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NOTES

The Compensating Use Tax and Its Effect on Multistate Business

A n increasing problem which confronts a substantial segment of our economy concerns the taxation of business enterprises whose activities are not confined to a single state. The problem is best described in terms of the conflicting and competing federal and state interests involving fiscal and commercial transactions. On a national scale, it is of vital importance that the commerce and trade of the country not be fettered by state taxes which operate to deter an expanding and prosperous economy. On the other hand, recent years have witnessed an exponential rise in the cost of governmental services placing severe fiscal pressures on the states. In an effort to keep revenues in line with expenditures, the states have sought to implement new taxing schemes, and to preserve and extend the revenue-generating power of traditional tax devices.¹

The sales tax continues to account for a substantial share of state revenues. However, this tax is limited to sales which are actually consummated in the taxing state and cannot extend to extraterritorial sales even where the goods involved are destined for ultimate use in the taxing state.² In order to compensate for the loss of sales tax revenues occasioned by out-of-state purchases, many states have enacted use taxes.³ Unlike the sales tax which is a tax on the sales

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² See note 24 infra.

³ The term "use tax" is general in nature and is applied in various situations. For example, the use tax has been imposed on articles used in interstate commerce. Eastern Air Transp., Inc. v. South Carolina Tax Comm'n, 285 U.S. 147, 153 (1932). Here, South Carolina had imposed a license tax on all dealers in gasoline — the tax being measured by the number of gallons sold within the state. In order to compensate for this tax, the dealer merely added the amount it was required to pay the state on to the purchase price of all gasoline which it sold. The complainant taxpayer, who operated airplanes only in interstate commerce, purchased gasoline for the operation of his planes at a price which had been inflated by the amount of the state license tax. The Court sustained the tax, holding that a state tax on goods sold within the taxing state did not constitute an unconstitutional burden on commerce even though the goods sold were intended for use in interstate commerce. The use tax also has been applied to articles transported in interstate commerce. See P. HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 134-47 (1953). This Note will deal with the use tax as it is levied in a third instance — incident to interstate sales. For a discussion of the rationale
transaction, the compensating use tax is a tax on the privilege of owning or using property within the taxing state. The following fact pattern will aid in examining the nature and purpose of such a tax: State $T$ has a sales tax, but neighboring State $F$ has none. Residents of $T$ generally confine the majority of their purchases to local sources. However, when confronted with a major purchase it is likely that the prospective buyers will go "bargain-hunting" into $F$ and other states. When this out-of-state shopping results in an actual purchase, the effect on State $T$ will be twofold: (1) it loses sales tax revenues which would have resulted from in-state purchases; (2) $T$'s merchants, subject to the liability of a sales tax on a transaction in State $T$, are placed at a competitive disadvantage with a seller of the same goods in State $F$, because the latter's sales are not subject to any sales tax. Moreover, the legislature of $T$ would be unable to curb the revenue loss directly, for its taxing power cannot constitutionally reach purely extraterritorial sales transactions. Thus, by making the purchase beyond the borders of $T$, or by "rigging" the transaction so as to make it appear to be an interstate sales transaction, residents of $T$ could make purchases free of state $T$'s sales tax. It is precisely this type of bargain-hunting against which the compensatory use tax is directed.

As previously noted, compensating use tax statutes impose a levy on the privilege of ownership or possession in the use of tax-

which permits states to levy a tax upon interstate commerce, see note 14 infra & accompanying text.

4 The sales tax, unlike the use tax, is imposed upon the transfer of ownership or possession of personal property within the taxing state. See 1 P-H STATE & LOCAL TAX SERV. § 92,505 (1962). See generally P. HARTMAN, supra note 3, at 147-61, n.47. The use tax, on the other hand, is imposed upon the privilege of ownership or possession in the use of personal property brought into the taxing state. See note 14 infra & accompanying text.

5 Notwithstanding the fact that most states today have enacted sales taxes, discrepancies in the rate of taxation may be sufficient to induce out-of-state purchases. For example, a resident of Rhode Island, which has a 6 percent sales tax, would save 4 cents on a dollar by purchasing a particular good in a state which has a 2 percent sales tax, assuming constant transportation costs. See 1 P-H STATE & LOCAL TAX SERV. § 92,952, at 92,905 (1962).

6 A purely extraterritorial sale does not have sufficient "minimum contacts" with the taxing state to meet the due process requirements of the 14th amendment. See Henneford v. Silas Mason Co., 300 U.S. 577 (1937); P. HARTMAN, supra note 3, at 161. See also notes 33-37 infra & accompanying text.

7 For example, buyer and seller, both residents of State $T$, could make an agreement whereby the seller would ship the article to an agent in State $F$. Then, by consummating the sale in $F$, buyer would escape $T$'s sales tax. Of course, the transaction would be subject to sales tax by State $F$, but where $F$ has no sales tax or a relatively low one, the evasive scheme would be profitable.

8 See P. HARTMAN, supra note 3, at 161.
gible personal property brought into the taxing jurisdiction — property which would have been subject to a sales tax if purchased within that state. The use tax serves to protect the state from loss of sales tax revenues and to preserve the competitive position of local vendors. The rate of the compensating use tax is identical to that of the local sales tax, and it is generally provided that any article upon which a sales tax has already been paid in another state shall not be subject again to the use tax. Although the burden of the use tax ultimately falls on the purchaser, use tax statutes impose the burden of collection on out-of-state sellers. To insure that the tax will be collected, the out-of-state seller is made directly liable for payment of the tax whether collected or not.

As of 1964 there were 120,000 manufacturing and mercantile companies engaged in interstate commerce. It is likely that every


10 The use tax is intended to complement the local sales tax and, in effect, to reach those transactions which, in actuality, are not extraterritorial. See note 6 supra. Of course, a blanket exemption from use tax in State T where a sales tax has already been paid in State F will not resolve the problem created by differential rates of taxation. See note 5 supra. If a seller in State F can completely avoid a 6 percent use tax in State T merely by paying a 2 percent sales tax in State F, State T will continue to lose revenues. The problem has been solved by an interstate credit system whereby the seller would receive only a 2 percent use tax credit in State T. See note 93 infra. Today, there are 45 states which have enacted a use tax. 1968 CCH STATE TAX HANDBOOK 651-53. See, e.g., CAL. REV. & TAX. CODE §§ 6201-02 (West Supp. 1968); ILL. ANN. STAT. ch. 120, § 439.1 (Smith-Hurd 1968); MD. ANN. CODE art. 81, §§ 372-73 (1965); PA. STAT. ANN. tit. 72, §§ 3403-1 to -3 (1964).

The rate, basis, and subject matter of the compensating use tax varies from state to state. The tax is as high as 6 percent in one jurisdiction and as low as 2 percent in others. The basis of the tax is generally the purchase price of the article subject to the transaction. In many instances it is provided that certain transactions are exempt from use taxation, but in the absence of such provisions, the tax is levied on all transactions involving tangible personal property. In addition to these special transactions, state statutes exempt certain individuals and businesses from liability of the use tax. Given that there are 45 states imposing use taxes, each with varying exemptions, bases, and rates, one can easily appreciate the magnitude of the compliance problems which face the multistate businesses. For a general survey of the various state sales and complementary use taxes, see 1 P-H STATE & LOCAL TAX SERV. § 92,950, at 92,901-30 (1964).

11 See, e.g., ALA. CODE tit. 51, § 788 (Supp. 1967); ILL. ANN. STAT. ch. 120, § 439.8 (Smith-Hurd 1965); PA. STAT. ANN. tit. 72, § 3403-201(a) (1964); R.I. GEN. LAWS ANN. § 44-18 to -22 (Supp. 1967). It is often the case that marginal sellers, particularly small vendors, are unable to collect the tax from purchasers by raising their prices to reflect the tax. Even where the seller does have the ability to exact the tax, the administrative costs incident to collection are often prohibitive. Although most use tax statutes attempt to reimburse the seller for expenses incurred in collecting the tax, reimbursement is based on a percentage discount system which has a tendency to discriminate against small vendors who have insufficient gross revenues to absorb administrative costs. See note 78 infra.

one of these firms conducting sales operations in foreign states has been confronted with the imposition of a compensating use tax. This Note will examine the commercial impact of state use taxes in the perspective of the constitutional limitations on imposition of such taxes and the recent attempts by Congress and state legislatures to reduce the burden of compliance through unification of the variegated state use tax statutes.

I. JUDICIAL DEVELOPMENT OF THE COMPENSATING USE TAX

A. Early Cases Upholding the Constitutionality of the Use Tax

The constitutionality of the compensating use tax was first upheld in Henneford v. Silas Mason Co.13 Plaintiff, a contractor in the construction business, brought machinery and other materials which it had purchased from an out-of-state seller into the State of Washington. The state tax commission imposed a tax upon the use of the property transported into the taxing state. The court held that the tax imposed was "not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end,"14 and therefore did not constitute an unconstitutional restraint on interstate commerce.

Henneford involved a taxpayer who was a purchaser of goods and a resident of the taxing state. In subsequent years, however, the states began to levy the compensating use tax upon out-of-state sellers. The following fact patterns will illustrate those cases in which the compensating use tax was upheld by the Supreme Court:15

(1) Seller owned no property within State T, but it did maintain

13 300 U.S. 577 (1937).
14 Id. at 582 (emphasis added). If the Court would have considered the tax as a levy upon the operation of interstate commerce, the tax would have been held invalid as an unconstitutional burden on commerce. U.S. CONST. art. I, § 8, cl. 3. For example, O who operates a ferry boat between State T and State F, has its place of business in F. T seeks to impose a tax upon the gasoline which O consumes in its interstate operation. Seventy-five percent of the route is in T although the gasoline was purchased in F. Such tax is considered unconstitutional as a levy upon the operation of interstate commerce. However, if the gasoline were purchased in T and T imposed a tax measured by the gallons of gasoline purchased within T's borders, the tax would not be upon the operation of interstate commerce because it occurred at a stage which was too remote from the interstate transit. Compare Helson & Randolph v. Kentucky, 279 U.S. 295 (1929), with Eastern Air Trans., Inc. v. South Carolina Tax Comm'n, 285 U.S. 245 (1932). See P. Hartman, supra note 3, at 135.
15 For the sake of clarity, T will represent the taxing state and F will represent the state of the seller. As intimated in note 3 supra, the compensating use tax is levied upon and collected by the seller. Thus, an out-of-state seller will be placed on a par with local vendors within State T who are necessarily subject to the state sales tax.
two employees in the taxing state to solicit orders from residents of T.\textsuperscript{10} (2) Seller owned no property within State T, but it sent traveling salesman into T to solicit local orders.\textsuperscript{17} In holding that fact patterns (1) and (2) were "indistinguishable,"\textsuperscript{18} the Court appeared to be emphasizing the importance of the organized nature of the local solicitation in State T — not the form which it assumed.\textsuperscript{19} (3) Seller owned no property in T and had no full-time employees located there. However, it actively conducted continuous solicitations in State T through "brokers" supplying catalogues, samples, and other advertising devices to prospective purchasers. A written agreement between Seller and each broker provided that the parties intended to create an independent contractor relationship. The Court held that the distinction between part-time brokers and full-time employees was insignificant and in so doing upheld the tax imposed upon the use of the goods purchased by the residents of the taxing state.\textsuperscript{20} (4) Seller maintained a retail store in State T in which it displayed advertisements relating both to local merchandise and to goods which could be ordered by mail from Seller's home office in State F. The goods which were obtainable by mail order were not directly sold in T. In upholding the tax, the Court found that the mail-order goods were related to the Seller's local activities\textsuperscript{21} and went on to note that in this context it was immaterial that "solicitation [of mail orders] was done through local advertisement rather than directly by local agents . . . ."\textsuperscript{22}

The cases arising after Henneford v. Silas Mason Co.\textsuperscript{23} indicate that before a state can constitutionally impose a use tax on an extraterritorial seller, there must be "some definite link, some minimum connection between . . . [the] state and the person, property or trans-

\textsuperscript{17} See General Trading Co. v. Iowa Tax Comm'n, 322 U.S. 335 (1944). In addition to upholding a use tax levied by the state of the purchaser, the Court noted that the requirement that an out-of-state seller collect the use tax from the local purchaser "is a familiar and sanctioned device." \textit{Id.} at 338.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} The fact that the seller sends traveling salesmen into the taxing state (rather than maintaining agents there) will not relieve it from liability for the collection and payment of the use tax. In both instances the seller's business activities constituted the transaction of local business, sufficient to justify imposition of the use tax.
\textsuperscript{22} \textit{Id.} at 376; cf. Felt & Tarrant Co. v. Gallagher, 306 U.S. 62 (1939). Again the Court looked to the \textit{nature and extent} of the local solicitation as opposed to the form such solicitation takes. \textit{See} note 19 \textit{supra}. \textit{See also} Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941), a companion case to \textit{Montgomery-Ward}.
\textsuperscript{23} 300 U.S. 577 (1937).
action it seeks to tax." In deciding whether the compensating use tax was validly applied, the Court looked to the out-of-state vendor's business conduct within the taxing jurisdiction. If a definite connection or relationship between the taxing state and the individual, property, or transaction it sought to tax were not found to exist, then the tax was unconstitutional as applied to that transaction, because of its failure to satisfy the requirements of due process of law. Thus, it was clear that if an out-of-state seller maintained a place of business, or salesmen in the taxing state, or employed independent contractors to solicit business, it would be subject to use taxation, but if the seller's only contact with the taxing state were advertising solicitation originating from a foreign state, no tax could be imposed. Nonetheless, the cases arising subsequent to Henneford amply illustrate the need for a final determination of definite guidelines. The existing guidelines had been created in a case-by-case manner over a time-span of nearly 30 years. Certain important questions were left open: Was there a meaningful distinction between maintaining full-time employees in the taxing state or merely sending traveling salesmen there? What if the traveling salesmen were independent contractors? Could the seller make household deliveries or must he confine his deliveries to the United States mail or common carriers? Would the seller be able to advertise through local media? Could he advertise in any medium which might reach the residents of the taxing state? The answers to these questions were never unified in any one decision and consequently, interstate sellers were compelled to draw their own conclusions from the handful of relevant Supreme Court cases. This lack of clarity posed a serious threat to the expansion of interstate commercial transactions, for the uncertainties had an inherent inhibiting effect on multistate sellers. In 1967, the Court attempted to ameliorate this threat and to restore meaning and certainty to the situation.

B. National Bellas Hess, Inc. v. Department of Revenue

The Latest Judicial Interpretation

National Bellas Hess is a large retail establishment incorporated

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25 In Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954), the seller, a Delaware corporation, neither owned property nor maintained employees in Maryland, the taxing state. The seller did advertise on radio and television and in the newspapers; however, all such advertising was done on Delaware stations and in the Delaware newspapers. Finding that advertising in a foreign state did not constitute "exploitation of the consumer market" within the taxing state, the Court held that the seller could not be subjected to Maryland's use tax. Id. at 347 (emphasis added).
26 386 U.S. 753 (1967).
in Delaware. For years it has operated a national, retail mail order business with headquarters in North Kansas City, Missouri. Twice each year Bellas Hess mailed catalogues from its Missouri location to over 5 million customers residing throughout the United States. It also mailed out and enclosed sales books and flyers in merchandise. All orders were received in Missouri. Bellas Hess had no other contacts with Illinois.\(^{27}\)

The Illinois Supreme Court upheld the assessment of a use tax on Bellas Hess\(^{28}\) pursuant to the Illinois Use Tax Act.\(^{29}\) On appeal, the United States Supreme Court was confronted with two closely related, yet legally distinct questions: (1) Whether the Illinois statute, as applied to the specific transactions in the case at bar, constituted a violation of the 14th amendment due process clause.\(^{30}\) (2) Whether the Illinois statute constituted an unconstitutional burden on interstate commerce.\(^{31}\) In reversing the Illinois Supreme Court, the Court held against the tax on both issues.

(i) The Due Process Issue. — In essence, the majority opinion in *Bellas Hess* reaffirmed the Court's previous position with respect to the jurisdictional nexus required before a state can validly impose a use tax on an out-of-state seller. In applying the nexus principle, the Court's earlier decisions seemed to distinguish out-of-state corporations which had salesmen or representatives,\(^{32}\) and outlets or property\(^{33}\) within the taxing state from those firms which were exclusive-

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\(^{27}\) The Illinois Supreme Court adopted the findings of the trial court to the effect that Bellas Hess does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells; [it owns] no tangible property, real or personal, in Illinois [and] it has no telephone listing in Illinois; [nor has it] advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois. Department of Revenue v. National Bellas Hess, Inc., 34 Ill. 2d 164, 166-67, 214 N.E.2d 755, 757 (1966), rev'd, 386 U.S. 753 (1967).

Thus, the fact pattern of *Bellas Hess* does not fit into any of the previous categories considered by the Court. *See* notes 16-25 *supra* & accompanying text.


\(^{29}\) ILL. ANN. STAT. ch. 120, §§ 439.1-.51 (Smith-Hurd 1965), provides that the use tax shall be collected from the purchaser by any retailer "maintaining a place of business in this State," and makes the obligation a debt of the retailer regardless of whether the tax is actually collected. *Id.* § 439.3. The statute defines "maintaining a place of business" as "[e]ngaging in soliciting of orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." *Id.* § 439.2.

\(^{30}\) U.S. CONST. amend. XIV, § 1.

\(^{31}\) *Id.* art. I, § 8, cl. 3.

\(^{32}\) *See* notes 16-23 *supra* & accompanying text.

\(^{33}\) *See* notes 21 & 22 *supra* & accompanying text.
ly out-of-state and whose only contact with the taxing jurisdiction was by mail, common carrier, local newspaper, radio, television, or magazine advertisements. The corporations in the former category were susceptible to local use taxation; the corporations in the latter class were not. The only contacts which Bellas Hess had with its customers in Illinois were by common carrier and United States mail, and the Court found this nexus insufficient to satisfy the requirements of due process.

As previously disclosed, in each case coming to the Court prior to Bellas Hess where the tax was upheld, there was a continuous and complex exploitation of the taxing jurisdiction's market that coincided with the physical contacts established by the seller. This exploitation could be found only by an examination of the substance, as well as the form, of the out-of-state vendor's business activity in the purchaser's state. Query: Did the majority in Bellas Hess look to the scope and complexity of the seller's business activity (that is, the substance of the conduct), or did it merely look to the physical contacts which Bellas Hess established (or failed to establish) with the taxing state (that is, the form of such conduct)?

The dissent in Bellas Hess attacked the artificial and mechanical approach which the majority had taken in deriving a definition of a sufficient jurisdictional nexus. Mr. Justice Fortas viewed the seller's "systematic, continuous solicitation and exploitation of the Illinois consumer market," as the controlling factor in determining whether jurisdictional contact had been established. The dissent would expand the standard to include a scrutinizing analysis of the vendor's business activities, taking in such considerations as the sell-

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34 See Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954), which held that it was unconstitutional for Maryland to impose a use tax upon a Delaware seller who had no retail outlets or sales solicitors in Maryland. The seller in Miller Bros. advertised its wares in newspapers and on television and radio, and made occasional home deliveries in the tax paying state, whereas Bellas Hess confined its advertising activities to catalogues and occasional flyers sent by United States mail. To the extent that the solicitation activities of the seller in Miller Bros. exceed those employed by Bellas Hess, the Court's refusal to find the required jurisdictional nexus in Miller Bros. represents a position more favorable to out-of-state sellers than the Court's decision in Bellas Hess.

35 386 U.S. at 759-60.

36 See notes 16-22 supra.

37 The form of the business activity is evidenced by the actual physical contacts with the taxing states: for example, ownership of real property in the taxing state (retail stores, warehouses), or maintenance of employees and other agents who are sent to the taxing state. The substance of the business activity is evidenced by the overall effect of the out-of-state seller's conduct on the taxing state (advertising campaigns, use of taxing state's credit facilities).

38 386 U.S. at 761 (dissenting opinion).
er's net sales, mailing list, and credit operation in the taxing state. After such examination the dissent concluded that, despite Bellas Hess' conformity to the pre-existing constitutional guidelines prescribed by the Court, its activities in Illinois satisfied the minimum contact requirements of the due process clause, and that, therefore, the tax was constitutional.

Of the two approaches to the due process issue and the nexus criterion, the position advocated by Justice Fortas in his dissenting opinion appears more formidable and realistic. Certainly the mechanical and artificial guidelines which the majority reaffirmed are likely to be modified in future cases. Regardless of where the distinctions are made and how sharply they are drawn, no doubt future cases will arise demanding a further "splitting of hairs," until the original distinctions become meaningless.

The approach to the jurisdictional issue advocated by Mr. Justice Fortas considers the effect of a vendor's course of business on the taxing state rather than the form such business activity takes.

39 Id.

40 Mr. Justice Fortas emphasized the fact that Bellas Hess enjoyed the benefits of, and the profits from, facilities established and "nurtured by the State of Illinois." Id. at 762. In exchange for these "benefits," Illinois was entitled to ask for compensation—via an assessment of a local use tax. Id. at 765. Query whether the benefits to which Justice Fortas alluded — the right to engage in the business of systematically offering merchandise for sale in a state in competition with local retailers, and the right to solicit deferred-payment credit accounts from the taxing state's residents — were indirect and not of such magnitude to allow Illinois to levy a tax in exchange for these benefits. See Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940), where the Court said that one of the questions to be asked in determining whether an out-of-state business must comply with a state tax is "whether the state has given anything for which it can ask return." Id. at 444.

41 For example, the Court might modify the present rule which extends constitutional protection from taxation to corporations whose only contact with the taxing state is through advertisements which appear only in the mass media of the seller's state. A feasible modification would be one that disregards the origin of the advertisements and permits a tax to be imposed when such advertising reasonably would be expected to reach the consumer in the taxing state. But see Miller Bros. v. Maryland, 347 U.S. 340 (1954).

42 Sometimes referred to as the "economic exploitation" standard, this test has been applied in the area of in personam jurisdiction. In Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956), the court said: "While the due process test applied to state jurisdiction over nonresidents for taxing purposes is not identical with the due process test for the exercise over them of state judicial power, the two present a close parallel." Id. at 506. Compare Restatement (Second) of Conflict of Laws § 43 (Tent. Draft No. 3, 1956), with id. §§ 74-77. In deciding whether a nondomiciliary corporation is subject to personal jurisdiction in a foreign state, the Supreme Court has looked to the "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The Court also intimated that service of process jurisdiction was very similar to taxation jurisdiction: "The activities which establish its [the corporation's] presence subject it alike to taxation by the state and to suit to recover the tax." Id. at 321. The standard for in personam jurisdiction was further expanded in McGee v. International Life Ins. Co., 355 U.S. 220
Is it constitutionally material whether the seller continuously solicits orders in the taxing state through the mails as opposed to soliciting through salesman or property physically present there? A realistic business fact of life which the majority in \textit{Bellas Hess} refused to accept is that a continuous and direct mail order campaign may be much more efficient economically than the solicitation of sales through employees or retail outlets in the taxing jurisdiction. Although the Court's insistence on physical contacts to establish jurisdictional nexus may add some certainty to the law, it ignores economic reality.

\textbf{(ii) The Commerce Clause Issue.} \textsuperscript{43} — The Supreme Court has long recognized the difficulty in distinguishing the concepts of "due process" and "commerce" as they relate to the states' power to tax. In 1941, Mr. Justice Rulege admitted that the two concepts do overlap to some extent:

If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the States becomes "undue." But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing State to sustain the tax as against due process objections. Yet the tax may fail because of its burdening effect upon the commerce. \textsuperscript{44}

There is little doubt that the majority in \textit{Bellas Hess} was sensitive to the imminent threat to mail-order businesses and to interstate commerce as a whole, presented by the broad Illinois Use Tax Act. The greatest burden on interstate commerce which generally threatens every corporation whose livelihood depends upon interstate sales is the burden created by the compliance requirements of state use


\textsuperscript{43} For a basic understanding of the interpretation of the commerce clause as it pertains to the state's ability to affect interstate commerce, see Norton, \textit{Scope of the Commerce Clause As Evidenced in the Decisions of the United States Supreme Court}, 31 ICC PRAC. J. 374 (1964); Light, \textit{The Federal Commerce Power}, 49 VA. L. REV. 717 (1963).

\textsuperscript{44} \textit{International Harvester Co. v. Department of Treasury}, 322 U.S. 340, 353 (1941) (concurring opinion).
tax statutes. This burden manifests itself through the various collection duties cast upon the out-of-state seller, who is often situated a great distance from the taxing jurisdiction. For example, the out-of-state seller must comply with various accounting procedures, keep detailed records of sales made in the different jurisdictions, and determine, charge, and collect whatever tax is imposed. Furthermore, each state has its own procedural requirements and the out-of-state seller who makes sales in many states must be acquainted with these variegated, and many times, inconsistent procedures. When the compliance duties demanded by a particular state become so onerous that the out-of-state vendor is discriminated against in his interstate business activity, there is an undue burden upon interstate commerce. Such an undue burden was found to exist in *Bellas*

45 Another burden arises from the possibility that an out-of-state vendor could be taxed twice for the same transaction. Commonly referred to as the "multiple burdens doctrine," this theory was first articulated by Mr. Justice Stone in *Western Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938). Under this doctrine a corporation in State F which sells to a customer in State T could conceivably be taxed for the sale in State F and also be liable for collection of a use tax in State T. In effect, this would discriminate against interstate commerce because a local retailer whose sole business is in State T would be assessed only one tax, the state sales tax, thus giving it a competitive advantage over the out-of-state seller who is incorporated in State F but does business in State T. *See Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952); *State Taxation of Interstate Commerce — "Direct Burdens," "Multiple Burdens," or What Have You?*, 4 VAND. L. REV. 496, 506-55 (1951).

The possibility of multiple burdens has been virtually eliminated, since most states have adopted a more or less uniform regulation or administrative practice recommended by the National Association of Tax Administrators. *See NATIONAL ASS'N OF TAX ADMINISTRATORS REP. NO. 10, PROPOSED UNIFORM REGULATION FOR TAXATION OF INTERSTATE TRANSACTIONS UNDER STATE SALES TAX LAWS* (1940). This practice exempts an out-of-state seller from a sales tax imposed by *its own state* on a transaction pursuant to a contract requiring shipment from seller's state to buyer's state. Such a transaction is left subject to a use tax by the *customer's state* and duplication is avoided. However, these taxing procedures are administrative, not statutory, and thus readily subject to change. Of greater consequence is the fact that the Supreme Court has never specifically stated that a multiple burden is prohibited, and presently only 28 states have joined the compact avoids the possibility of double taxation. Since only 28 states have joined the compact, the potential for a multiple burden affecting non-member states cannot be dismissed until Congress passes legislation which clearly sets forth which state — seller's or buyer's — may impose what tax and under what circumstances. *See Kust & Sale, State Taxation of Interstate Sales*, 46 VA. L. REV. 1290, 1302 (1960). Until Congress does act, the out-of-state vendor will face a possibility that his business activity may be subjected to a double tax. For discussion of recent congressional activity in this area see part II of this Note.


47 *See National Bellas Hess, Inc. v. Illinois Dep't of Revenue*, 386 U.S. 753, 760 (1967) where the Court noted that:

>The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate... business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."
Hess: "[I]f the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote." That the burden of complying with numerous and often inconsistent state use tax statutes is indeed not imaginary or remote is documented by recent congressional studies and legislative hearings which are discussed in greater detail in Part II of this Note.

II. THE DEVELOPMENT OF A CONGRESSIONAL PROGRAM DEALING WITH STATE TAXATION OF INTERSTATE COMMERCE

A. Developments Leading to Public Law 86-272

Prior to 1959, the responsibility for resolving conflicts between state taxing policies and the paramount federal interest in the unhampered flow of commerce was shouldered completely by the judiciary. During this period there existed no federal legislation to guide the courts. Consequently, each state extended its jurisdictional reach further and further beyond its borders to levy taxes upon more and more interstate firms. It became increasingly evident that the case-by-case process of judicial determination was inadequate to police the growing complex of state taxes. The need for

48 386 U.S. at 760.
50 Congress had exercised its powers under the commerce clause in other fields of state taxation. The few steps it did take resulted in an enlargement rather than a curtailment of state taxing powers. This policy of liberalizing the state taxing authority was manifested in three federal statutes: (1) Federal Unemployment Tax Act, INT. REV. CODE OF 1954, §§ 3301-08 (employment tax imposed on employers); (2) Jenkins Act, 15 U.S.C. §§ 375-78 (1964) (permitting states to regulate interstate commerce by requiring vendors of cigarettes to give tax collecting aid to other states). This statute was upheld in Consumer Mail Order Ass'n v. McGrath, 340 U.S. 925 (1951), rehearing denied, 341 U.S. 906 (1952); (3) McCarran Act, 15 U.S.C. §§ 1011-15 (1958) (state regulation of insurance). In these three statutes, Congress exercised its power over interstate commerce to augment state taxation, and in essence was doing for the states what they were constitutionally unable to do for themselves. What Congress failed to achieve was a clear definition of the limits of state taxing power.

51 There have been six Supreme Court Justices who have subscribed to the view that Congress should act to achieve the necessary balance between state revenue requirements and the national need for an open market: (1) Mr. Justice Black in McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 188-89 (1940) (dissenting opinion); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 448-55 (1939) (dissenting opinion); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 327 (1938) (dissenting opinion); (2) Mr. Justice Clark in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457-58 (1959); (3) Mr. Justice Douglas dissenting in McCarroll; (4) Mr. Justice Frankfurter in Northwest Airlines Inc. v. Minnesota, 322 U.S. 292, 300 (1944); dissenting in Northwestern States and McCarroll; (5) Mr. Justice Jackson concurring in Northwest Airlines; (6) Mr. Justice Rutledge in International Harvester Co. v. Depart-
congressional action had arisen.\textsuperscript{52}

The impetus for congressional action came in 1958 when the Supreme Court held that in the absence of a federal statute, a company could be compelled to pay a state income tax, even where engaged solely in interstate commerce in the taxing state.\textsuperscript{53} A harsh reaction to this decision emanated from the business community,\textsuperscript{54} and within weeks after the decision, Congress responded to the multistate business reaction. Hearings were conducted by the Senate Select Committee on Small Business.\textsuperscript{55} Simultaneously, both the Senate Finance Committee\textsuperscript{56} and the House Judiciary Committee\textsuperscript{57} reported out bills to afford immediate relief while Congress could develop a more comprehensive program supported by detailed testimony and data. The result of the congressional investigations was Public Law 86-272,\textsuperscript{58} providing that no state may impose an income

\footnotesize{\textsuperscript{52}On the eve of congressional action, Mr. Justice Frankfurter made the following observation regarding the respective roles of Congress and the judiciary in policing state taxes affecting commerce: At best, the Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State. The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits of such state taxing power. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476-77 (1959) (dissenting opinion). \textsuperscript{53}Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). Until this decision there had been a widely accepted view in the business community that a company could not be taxed by a state unless it engaged to some extent in intrastate commerce within the taxing state. See H.R. REP. No. 1480, 88th Cong., 2d Sess. 7 (1964). \textsuperscript{54}The small and moderate-sized interstate corporations were pierced with a double-edged sword. Not only were they faced with the prospect of complying with the complex and diverse income tax laws with which they were unable to cope, but these corporations also were confronted with the grave prospect of deficiency assessments for back years. In Northwestern, for example, the taxpayer was held liable for back taxes covering a period of 16 years. \textsuperscript{55}Hearings on State Taxation of Interstate Commerce Before the Senate Select Comm. on Small Business, 86th Cong., 1st Sess. (1959). \textsuperscript{56}S. REP. NO. 658, 86th Cong., 1st Sess. (1959), reporting S. 2524. \textsuperscript{57}H.R.J. RES. NO. 936, 86th Cong., 1st Sess. (1959), reporting H.J. RES. 450. \textsuperscript{58}15 U.S.C. §§ 381-84 (1964).}
tax on a foreign corporation whose only business activity in the taxing state consists of the solicitation of orders for sales of personal property to be accepted outside the state and to be filled by shipments from a point outside the state. The statute further provides that for purposes of state income taxation, a company is not to be deemed "engaged in business" within the taxing state merely by reason of the fact that it employs independent contractors owning property within the state to solicit orders for out-of-state sales.60

Several months after the enactment of Public Law 86-272, the Court came down with *Scripto, Inc. v. Carson*,60 holding that Florida could constitutionally impose upon a Georgia seller the duty of collecting a state use tax upon the sale of goods shipped to customers in Florida where the seller employed 10 salesmen in Florida to solicit orders which were forwarded to the company's Georgia office for acceptance. *Scripto* met with a response from the business community similar to the response that precipitated Public Law 86-272. Again demonstrating sensitivity to these reactions, Congress enacted legislation which broadened the congressional study of state taxing practices to include sales and use taxes and other taxes relating to interstate commerce.61

B. Congressional Studies Arising out of Public Law 86-272

Early in 1961 the Special Subcommittee of the House Judiciary Committee convened for the purpose of developing "a body of factual information . . . as to the number and characteristics of interstate companies, the pattern of their activities across state lines, the cost of complying with State and local tax laws, the degree to which they were able to comply, and the effect on businesses and State revenues of various possible remedial proposals."62 The study, reputed to be one of the most comprehensive ever undertaken by the Congress,63 was published in four volumes over 4½ years.64 It

59 Id.
60 362 U.S. 207 (1960). For a more detailed analysis of the facts and holding of *Scripto*, see text accompanying note 20 supra.
showed that the present state system governing the taxation of corporations dealing in interstate commercial transactions was defective in several major respects: (1) The system was plagued with a preponderance of noncompliance and nonenforcement.\(^65\) (2) There was a tendency to result in overtaxation in some instances and undertaxation in others.\(^66\) (3) Many states discriminated in favor of local sellers by affording them benefits which were unavailable to out-of-state competitors.\(^67\) (4) The system promoted a widespread feeling of disrespect for the state and local laws, especially among small and moderate-sized firms.\(^68\) The results of the study were so alarming that extensive congressional hearings were ordered to probe more deeply into the restraints on interstate commerce inherent in state taxing policies and practices.

C. Congressional Hearings on Taxation of Interstate Commerce

During 1966, extensive hearings were conducted before the Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee.\(^69\) Few witnesses, even those representing different interest groups, actually contributed "hard" facts. The testimony was subjective and manifested personal points of view. Nevertheless, certain themes recurred throughout the hearings.\(^70\) It was the general consensus among state tax administrators that the federal government had no jurisdiction to interfere in the area of state taxation. This proposition disregarded the fact that in recent years many Supreme Court Justices had subscribed to the view that the judicial system was inadequate to deal with the problems of multistate taxation.\(^71\) Another recurring theme reflected the belief

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\(^{65}\) Celler, supra note 63, at 389. The study revealed that in the sales and use tax area there was no return filed in 93.5 percent of the cases in which tax liability existed. REPORT supra note 64, vol. 3, at 729. Many of the corporations which did file returns were found to be in derogation of the compliance requirements. Id.

\(^{66}\) See Celler, supra note 63, at 390.

\(^{67}\) Id. See also REPORT, supra note 64, at 1127-28. In the sales and use tax area it was found that some states were taxing products made outside the taxing state, while granting exemptions to in-state manufacturers of the same product. Id., vol. 3, at 820.

\(^{68}\) See Celler, supra note 63, at 390. See also REPORT, supra note 64, vol. 4, at 1128.

\(^{69}\) Hearings Before the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. of the Judiciary, 89th Cong., 2d Sess. (1966) [hereinafter cited as 1966 Hearings].

\(^{70}\) See Dane, A Solution to the Problem of State Taxation of Interstate Commerce, 12 VILL. L. REV. 507, 509-15 (1967). One theme was that the states, in a matter of time, would unite and enact a uniform statute for the allocation of income among the states for taxing purposes. Id. at 510.

\(^{71}\) See note 51 supra.
that the imposition of all-encompassing use taxes on multistate business operations, without uniformity and under diverse recording procedures, placed a grave burden on the nation's free economy.\(^\text{72}\)

To illustrate the complexity of the compliance problems faced by multistate businesses, the following example was cited in the hearings. If a California postcard manufacturer sells cards in another state to a distributor for resale, it need not collect the California sales tax; but if the same cards are sold to a hotel that distributes them for no charge, the card manufacturer must collect a sales tax for this portion of his business.\(^\text{73}\) On many occasions the out-of-state vendor is not able to determine whether a specific item he sells was purchased for resale or for use in the buyer's trade or business.\(^\text{74}\) Indeed, the ultimate disposition of the goods is often unknown even to the buyer. Thus, it is apparent that in many instances the out-of-state vendor does not know the facts necessary to determine whether or not the tax applies.\(^\text{75}\) The sale may be for resale, or it may be of an exempt item, or to an exempt purchaser. Although the in-state buyer is likely to be aware of these facts, the out-of-state seller usually is not. The burden of ascertaining relevant sales information is particularly acute for mail-order businesses. Small mail-order houses do not keep records of sales by states, and to require them to do so would impose an unjustified hardship upon them.\(^\text{76}\) The added expense due to more detailed record keeping would constitute a heavy burden.\(^\text{77}\)

\(^\text{72}\) One businessman testified that 35 states and the District of Columbia required compensating use taxes, and that among these 35 states, five separate standards for use tax application are employed: "Five states required [the tax if seller] . . . 'maintain[ed] a place of business' in the [taxing] State; 5 used 'agent operating' in the State as the test, and 12 added 'agent operating temporarily.'" Three more used "solicitation" by "agent" as a standard. The fifth and most drastic test required collection of the use tax by out-of-state sellers who advertise by means of distribution of catalogues into the taxing state. 1966 Hearings, supra note 69, at 219. The last test would clearly fall within the constitutional proscription of *Bellas Hess*. See note 35 supra & accompanying text.

\(^\text{73}\) 1966 Hearings, supra note 69, at 465.

\(^\text{74}\) Id. at 61.

\(^\text{75}\) See Comment, *Use Tax Collection: National Bellas Hess and the Congressional Reports*, 63 NW. U.L. REV. 373, 385-86 (1968), where it is noted that: "The ability to determine whether a particular sale is subject to a use tax requires constant checking of state court decisions and announcements by state tax administrators."

\(^\text{76}\) 1966 Hearings, supra note 69, at 224.

\(^\text{77}\) Another aspect of the compliance problem was presented by a representative of the American Book Publisher's Council, Inc. who pointed out that state taxing laws requiring companies to collect state taxes on small purchases would subject the book publishing industry to severe hardships. The seller would be required to analyze its sales by states. This particular witness' company issued approximately 5 million invoices per year to over 1 million different customers throughout the 50 states. Each invoice would require a tax determination and computation, and the millions of remit-
Conceding that in some instances an out-of-state seller may have a competitive advantage over the in-state merchant, the strict enforcement of the burdens of use tax collection requirements would probably drive marginal firms out of the market.\textsuperscript{78} The possibility of a competitive advantage accruing to an out-of-state seller may very well be the price that must be paid in order to insure the free flow of interstate commerce. Furthermore, the out-of-state seller many times is not in competition with in-state corporations.\textsuperscript{79} Indeed, testimony at the hearings indicated that mail order firms do a substantial amount of business in goods which are not available in local markets.\textsuperscript{80} In general, the results of the 1966 congressional

\textsuperscript{78}The testimony gathered at the congressional hearings indicated that only some of the large mail-order houses — and they comprise a small minority — would be able to cope with variegated state taxes imposed on interstate transactions. The remaining interstate corporations would find it almost impossible to comply with the burdens imposed by the taxing authorities of the states. The expense alone involved in familiarizing themselves with the technicalities of divergent tax laws would discourage these firms from entering many states. Such firms would be compelled to hire lawyers and accountants to prepare and file various tax returns and to negotiate with tax administrators. \textit{See Studenski, The Need for Federal Curbs on State Taxes on Interstate Commerce — An Economist's View-Point}, 46 VA. L. REV. 1121, 1138-39 (1960).

The magnitude of the burden of use tax collection was well articulated in the statement of Mr. James M. Alter. \textit{1966 Hearings, supra note 69}, at 1438-46. Mr. Alter estimated that the cost of complying with the various use tax provisions imposed by the many states in which he sells amounted to one-half of 1 percent of his gross sales, and 50 percent of the net profits of the company after taxes. To meet this burden of compliance, many states grant the seller-collector some compensation in the form of allowing the seller to retain a part of the tax collected. For example, the Illinois statute provides for a “discount of 2\% or $5 per calendar year, whichever is greater . . . to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data . . . .” ILL. ANN. STAT. ch. 120, § 439.9 (Smith-Hurd 1965). Although the average allowance is 3 percent of the total tax collected by the seller, it is not sufficient to completely offset compliance costs. \textit{REPORT, supra note 64, vol. 3, at 701-02. See also dissenting opinion of Mr. Justice Frankfurter in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 474 (1959), noting that for small interstate sellers, the cost of compliance may often exceed the amount of tax revenue derived.}

\textsuperscript{79}Testimony of an officer of a Detroit mail order firm. \textit{1966 Hearings, supra note 69}, at 510-11.

\textsuperscript{80}Mr. James A. Alter of Chicago testified:
The local wholesaler has the advantage of proximity, speed and friendship — and many other factors — that give him a competitive advantage. We are able to do business in these other States only because we carry a very large inventory of many esoteric items, and when a customer in a distant State needs something he can't order locally, he orders it from us. He certainly doesn't order from us something he can get locally. \textit{Id. at 1445.}
hearings reaffirmed the findings of the previous study to the effect that the complex of diverse, inconsistent, and discriminatory compensating use taxes imposed by the states on multistate business did indeed result in a serious obstruction to the free flow of interstate commerce.

D. The Interstate Taxation Bill

(i) Congressional History.— Soon after the completion of the congressional hearings by the Special Subcommittee in the 89th Congress, the House Judiciary Committee reported out a proposed Interstate Taxation Act.81 Immediately thereafter Congress adjourned and the bill was introduced in the 90th Congress as H.R. 2158.82 On March 7, 1967, the House Judiciary Committee favorably reported the bill and it was sent to the Rules Committee for debate 4 months later.83 The bill passed the House of Representatives on May 22, 1968, by a roll call vote, and was presented to the Senate Finance Committee for debate. In this committee the bill "died" when the 90th Congress adjourned for the year on October 14, 1968.84 The failure of H.R. 2158 to become law was an unfortunate event for those desiring a unification of the many state statutes regarding the state taxation of interstate commerce. This year the bill will begin anew and will be subjected to the vigorous and painful legislative processes of the 91st Congress. However, the outlook for the bill's success is not totally forlorn. Since it did pass the House last term, there is a good chance it will do so again and possibly in less time than was required in the 90th Congress. Because of the certainty that H.R. 2158 (or a similar bill) will be reintroduced in the current session of Congress, an examination of its provisions is essential to a comprehensive understanding of the congressional attitude toward state taxation of multistate businesses.

(ii) Jurisdiction to Tax — Business Location Standard.—

Reaffirming this position, a representative of the New England Mail Order Association testified that practically every mail-order business aside from the giants is based on the unusual products that have not reached the local stores. Id. at 1321-22.

81 H.R. 16491, 89th Cong., 2d Sess. (1966). The predecessor of this bill, H.R. 11798, merely restated the findings of the hearings, and did not contain the comprehensive plan for federal regulation of state taxation proposed by H.R. 16491.


83 CCH CONGRESSIONAL INDEX 5561 (1968). There were several amendments reported with the bill which were later incorporated therein. See H.R. REP. NO. 69, 90th Cong., 1st Sess. 5 (1967).

84 P-H FED. TAXES REP. BULL. NO. 45, ¶ 5102, at 5100 (Nov. 7, 1968) [hereinafter cited as REP. BULL.].
Section 101 of the bill establishes a uniform jurisdictional standard\textsuperscript{85} for the four taxes covered in the bill: corporate income taxes, capital stock taxes, sales and use taxes, and gross receipts taxes. Pursuant to section 101, a state or political subdivision may not impose a sales or use tax with respect to a sale of tangible personal property unless the seller has a business location in the state or regularly makes household deliveries in the state.\textsuperscript{88} The concept of maintaining a business location is defined as owning or leasing real property within the taxing jurisdiction, having one or more employees located in the state, or regularly maintaining a stock of tangible personal property in the state for sale in the ordinary course of business.\textsuperscript{87} The method of determining whether an employee is located in a particular state was set out in section 513 providing that an employee is located "in" the taxing state only where the employee's services are performed exclusively within the state or the employee has his base of operations within the state and performs some services there. Under section 513, an employee would not be located within the taxing state where he does not have his base of operations in the state and merely solicits orders for acceptance outside the state.\textsuperscript{88}

(iii) \textit{Title III — Sales and Use Taxes.}— This portion of H.R. 2158 contains several provisions designed to reduce multiple sales

\textsuperscript{85}H.R. 2158, § 101 describes what business conduct would subject the out-of-state vendor to the taxing state's jurisdiction. With one major exception, the bill codifies the due process jurisdictional nexes criteria enunciated by the Supreme Court in cases up to and including \textit{Bellas Hess}. \textit{See note 88 infra.}

\textsuperscript{86}H.R. 2158, § 101. Household delivery is further defined as the delivering of goods by the seller, other than by mail or common carrier, to the dwelling of his purchasers. \textit{Id.} § 514. The household deliveries portion of section 101 only applies to sales and use taxes.

\textsuperscript{87}\textit{Id.} § 511. This definition of "business location" is the result of an amendment to the original proposal. The amended bill also expands the states' taxing jurisdiction to include the "regular maintenance of a stock of tangible personal property held for sale in the ordinary course of business." H.R. REP. NO. 69, 90th Cong., 1st Sess. 1 (1967).

\textsuperscript{88}H.R. 2158 § 513. \textit{But see} Scripto, Inc. v. Carson, 362 U.S. 207 (1960), which held that there was no constitutional distinction between full-time employees soliciting orders in the taxing jurisdiction and part-time independent brokers doing the same. Section 513 would seem to overrule \textit{Scripto}. The exemption from use tax collection for sellers who maintain salesmen permanently located out-of-state has been criticized on the grounds that it would permit a company with an organized sales force to minimize use tax burdens without losing any sales effectiveness. \textit{See Comment, supra note 75, at 394.}

In other respects, H.R. 2158 codifies the existing case law regarding the jurisdictional standards. \textit{See notes 16-25 supra & accompanying text.} The bill adopts the guidelines articulated by the majority opinion in \textit{Bellas Hess}; nowhere in the bill does it appear that the "economic exploitation standard," stressed by the dissent in \textit{Bellas Hess}, was considered. \textit{See text accompanying note 42 supra.}
taxation and aid the seller in complying with the duty of collection. Section 301 stipulates that an interstate sale must have its destination in the taxing state before an out-of-state seller may be required to collect a use tax with respect to the sale. A second provision aiding the out-of-state seller provides that a use tax may not be imposed on a seller who has no business location in the state or on an individual without a dwelling place in the state. A third protection extended to the interstate seller takes the form of a credit which must be given by a taxing state to an out-of-state seller for prior taxes it has paid with respect to the same transaction. The credit system is intended to avoid the double taxation that would result should a sale be subject to sales tax in one state and subject to use tax in the state of destination.

Title III also strives to reduce the burdens of tax collection on interstate sellers. For example, section 304 provides that certificates or other written evidence from the buyer indicating that a particular transaction is nontaxable would conclusively exempt the seller from both paying and collecting the tax. Further, if a seller receives notice from the buyer that the latter is registered with the state for sales tax purposes, the seller would be relieved of his collection responsibilities. Finally, H.R. 2158 eliminates the seller's bookkeeping burden of collecting or reporting sales or use taxes on sales according to geographic location within the taxing state.

89 Section 301 further provides, however, that a state other than the state of destination may require the seller to collect a sales or use tax in behalf of the state of destination even though no household deliveries have been made to, and no business location has been maintained in, the taxing state.

90 See notes 85-89 supra & accompanying text.

91 "'Dwelling place' is intended [to denote] less than State residence, but more than mere transient status with a State." H.R. REP. NO. 69, 90th Cong., 1st Sess. (1967). The bill was not intended to affect existing case law concerning the question of when a given use of property could be considered to be within a state for tax purposes. Id.

92 H.R. 2158, § 301. This credit provision also requires refunds in the event a sales tax is paid to the seller after a use tax has been paid in another state.

93 See note 45 supra. Although the credit system would not remove the "cumulative impact on multistate sellers of variations in taxing bases, filing and reporting requirements and statutory interpretation," it has been suggested that solutions to these problems should best be left to cooperative agreements among the states. See Comment, supra note 75, at 395.

94 H.R. 2158, § 304. This provision reflects the consensus among interstate sellers that the burden of ascertaining whether or not a particular sale is taxable in the buyer's state can be rigorous, especially when the seller is miles away from the taxing jurisdiction. See note 72 supra & accompanying text.

95 H.R. 2158, § 304. In this instance, the taxing state would pursue the buyer for the tax.

96 Id. § 305. This exemption does not apply to situations where the seller has a business location or makes household deliveries in a political subdivision. Here the out-
(iv) Constitutionality of Federal Legislation in the Area of State Taxation of Interstate Commerce.— If a bill such as H.R. 2158 ever does become an enacted law, its constitutionality may be questioned. There have been numerous asides by past and present Supreme Court Justices to the effect that the problem of regulating state taxation of interstate commerce is legislative rather than judicial.\(^7\) There is little doubt that Congress, in the exercise of its commerce powers, would be able to supercede otherwise valid state regulation.\(^8\) In the interests of a uniform national policy, Congress has invoked the commerce power to preempt state regulation in many areas of local concern where commerce is affected,\(^9\) including local taxation.\(^9\) The authorities concur that under its plenary powers over interstate commerce, Congress can either authorize interstate taxation by the states as it sees fit, or it can prevent "facets of state taxation, otherwise valid," when it uses its power as the "foundation for the establishment of national policy over interstate commerce."\(^10\) In light of the foregoing authorities, it would appear that the constitutionality of H.R. 2158 would not be open to serious question.

Whether H.R. 2158 will be enacted in the 91st Congress in its present form is unclear. By establishing a uniform jurisdictional standard for the imposition of state use taxes, and by eliminating much of the reporting complexities and the potential for double taxation inherent in the present system of unregulated state taxes, the bill goes a long way toward easing the burdens on the multistate seller and promoting a freer flow of commerce. Whatever the fate of H.R. 2158, there exists today a pressing need for some national guidelines which will permit interstate businesses to pay their share of-state seller would have to account specifically for interstate sales with destinations in that subdivision. H.R. REP. NO. 69, 90th Cong., 1st Sess. 9-10 (1967).

\(^7\) See note 51 supra.

\(^8\) "[Congress] may either permit the States to regulate the [interstate] commerce in a manner which would otherwise not be permissible . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce." Southern Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945). See also P. Hartman, State Taxation of Interstate Commerce 247-57 (1953).


of state and local taxes, and, at the same time, afford them a long-awaited liberation from the burdens of multiple, unwarranted taxation.

III. THE MULTISTATE COMPACT

Realizing both the imminent need for some form of unity in the field of multistate taxation and the relatively slow progress of federal legislation, 14 states\textsuperscript{102} decided to formulate a Multistate Tax Compact which would govern their activities with respect to the taxation of interstate commerce among member states. The compact, in the form of a model statute, is managed by the Multistate Compact Commission, which is comprised of one member from each member state. The Commission is empowered to conduct research studies and to recommend proposals for the furtherance of uniformity in state and local tax laws. The Commission exercises no authority over the member states except in the arbitration of disputes which arise between a taxpayer and a member state.\textsuperscript{103} The compact is directed to state income, capital stock, sales, and use taxes, but is authorized to expand coverage into other areas of multistate fiscal concern.\textsuperscript{104}

The Multistate Compact defines the use tax as a nonrecurring levy which is "imposed on . . . the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property . . . ."\textsuperscript{105} Other than this definitional provision,\textsuperscript{106} there are only two other sections of the model statute pertaining to the sales and use taxes to which the member states are bound: (1) a section providing for a tax credit accruing to any purchaser of tangible personal property who has previously paid a sales or use tax with respect to the same property in another

\textsuperscript{102}The member states of the compact are Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Kansas, Missouri, Nebraska, Nevada, New Mexico, Oregon, Texas, and Washington. Alabama has adopted the compact subject to legislative consent. There are 13 "associate members" who have all the rights of the other parties except the right to vote or to hold an office in the Multistate Tax Commission. REP. BULL., supra note 84, § 5150, at 5201.

\textsuperscript{103}The Commission is authorized to adopt uniform regulations including regulations defining jurisdiction to tax. All party states take part in this process through officially-designated representatives (one per state). Party states are not obligated to accept the regulations adopted by the Commission, but prompt acceptance is strongly encouraged. Id. § 5105, at 5104.

\textsuperscript{104}Id. at 5102.

\textsuperscript{105}Id. § 6311, at 6301.

\textsuperscript{106}Each party state and associate state has adopted and accepted the model statute and has recognized it as binding upon the others. However, the jurisdictional regulation referred to in note 109 infra is merely a proposal.
state or subdivision;\textsuperscript{107} (2) a section providing for relief from liability for a sales or use tax to a vendor who receives a certificate or other written evidence of an exemption from the appropriate taxing authority.\textsuperscript{108} With respect to the jurisdictional standard regarding the imposition of a sales or use tax, there is a \textit{proposed} regulation presently being considered for adoption, the substance of which bears a strong resemblance to the jurisdictional standard of H.R. 2158.\textsuperscript{109}

One immediate benefit of the Multistate Tax Compact is that it is taking effect presently whereas any relevant federal legislation will have to survive the long and arduous legislative process. In addition, the compact possesses a certain flexibility which will allow for modification and improvement when such a need arises; modification of any federal law will again be subjected to the processes of Congress. Despite the fact that the compact achieves a unity only to the extent of the number of participating states, there has been a recent trend toward a growing membership, and until Congress comes forth with a federal statute, the Compact will serve a useful purpose.

\textbf{IV. CONCLUSION}

From the developing case law, the congressional studies and hearings, and the existing and proposed state and federal legislation, it has become apparent that the need for uniform legislation in the area of state taxation of interstate commerce is imminently

\textsuperscript{107} \textit{Id.} § 6333, at 6306.

\textsuperscript{108} \textit{Id.} § 6334, at 6306. This provision is strikingly similar to the one included in Title III of H.R. 2158. \textit{See text accompanying note 92 \textit{supra}.}

\textsuperscript{109} A vendor is required to pay or collect and remit the tax imposed by this Act [includes the use tax] if within this state he directly or by a subsidiary or by an agent:

1. Has or utilizes an office, distribution house, sales house, warehouse, service enterprise or other place of business; or
2. Maintains a stock of goods; or
3. Regularly solicits orders whether or not such orders are accepted in this state, unless the activity in this state consists solely of solicitation by direct mail or advertising via newspapers, radio or television; or
4. Regularly engages in the delivery of property in this state other than by common carrier or U. S. mail; or

Under this proposed jurisdictional test, solicitation by out-of-state salesmen would subject the foreign seller to use tax collection. \textit{Compare} H. R. 2158, § 513, which expressly exempts out-of-state sellers who solicit orders within the taxing state through nonresident salesmen. \textit{See note 88 \textit{supra} \& accompanying text.}
pressing. Thus far, due to concerted pressure by state tax administrators and others who believe that congressional legislation in this field would constitute federal encroachment, attempts by Congress to pass a compromise measure have failed. Until federal legislation becomes a reality, the needed unity will have to be provided by state compacts — compacts which must be far-reaching both substantively and geographically.

Any legislation — federal or multistate — must, in addition to providing mechanical jurisdictional guidelines, consider the "exploitation standard" espoused by the dissenting opinion in *Bellas Hess*. Notwithstanding that a test of this kind is difficult to apply, it is a prerequisite to the achievement of a meaningful balance between the state interests and those of the interstate businesses. New legislation in this field must also pay careful attention to the interests of many small and medium-sized interstate companies which have been prejudiced by heavy compliance burdens which, in effect, operate as undue restraints on the free flow of commerce. Implementation of uniform standards in the area of use tax collection will reduce the burdens of compliance, and the present trend toward a balkanized domestic economy can be curbed. Whether these pressing demands are met by state legislation in the form of multistate tax compacts, or whether they are dealt with by means of federal legislation, it remains evident that the problem of state taxation of interstate commerce has sweeping ramifications and that a nationally-oriented program must evolve to resolve the inherent problems of the unworkable system which exists today.

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110 See note 84 *supra* & accompanying text.
111 See note 42 *supra* & accompanying text.