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Taxes on Merchants' Inventories

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TAXES ON MERCHANTS' INVENTORIES

In 1963, Ohio Revised Code section 5711.22(B) was amended to provide a new method for the listing and assessment of personal property of merchants, which is sold or held for the use or consumption by the purchaser.\(^1\) The amended section provided that the first 100,000 dollars of merchant's inventory would be assessed at 66 percent of true value in 1964; 62 percent in 1965; 58 percent in 1966; 54 percent in 1967; and 50 percent in 1968 and thereafter.\(^2\) It further provided all merchant's inventory in excess of the first 100,000 dollars would be assessed at 70 percent of value.

In *Kroger Co. v. Schneider*,\(^3\) the Kroger company claimed that section 5711.22(B), as amended, resulted in an unequal burden of taxation upon taxpayers and was a denial of equal protection under both the Ohio Constitution\(^4\) and the fourteenth amendment to the Constitution of the United States. It asked for a declaratory judgment declaring section 5711.22(B) unconstitutional. The Franklin County Court of Common Pleas found the Ohio equal protection clauses forbid a state from levying any taxes directly on property at graduated rates, except as expressly allowed by other provisions of the constitution.\(^5\) The common pleas court interpreted section 5711.22(B), as amended, to be such a graduated tax, and declared it violative of the Ohio and Federal Constitutions.\(^6\)

On appeal, the Franklin County Court of Appeals found the provisions of section 5711.22(B) were not unreasonable, capricious or discriminatory, and did not impose an unjust burden of the cost of government upon merchants with inventories in excess

\(^1\) [OHIO REV. CODE ANN. § 5711.22(B) (Page Supp. 1967)].

\(^2\) For ease of reference in this article the first 100,000 dollars of inventory shall be referred to as being assessed (or returned) at all times at 50 percent of true value.

\(^3\) 9 Ohio St. 2d 80, 223 N.E.2d 606 (1967).

\(^4\) OHIO CONST. art. I, § 2.

\(^5\) 1 Ohio Misc. 9, 13, 205 N.E.2d 603, 605 (Ohio C.P. 1964). OHIO CONST. art. XII, § 7 allows a graduated inheritance tax. OHIO CONST. art. XII, § 8 allows a graduated income tax. U.S. CONST. Amend. XVI allows a graduated income tax.

\(^6\) 1 Ohio Misc. 9, 16, 205 N.E.2d 603, 607 (Ohio C.P. 1964).

The common pleas court held the statute (a) imposes an unequal burden of taxation on like personal property, used for the same purpose, owned by taxpayers similarly situated, and engaged in the same types of enterprise; (b) it is a purported classification of taxpayers, not property; and (c) it is based upon an unreasonable and arbitrary classification not having any fair or substantial relation to the object of the legislation. . . .

*Id.*
of 100,000 dollars. Therefore, it held section 5711.22(B) did not violate the equal protection of the law guarantee of either the state or federal constitutions. The Ohio Supreme Court reversed, holding section 5711.22(B) violated the equal protection clause of the Ohio Constitution, and was therefore, null and void, because it placed an unequal burden upon personal property within the same classification. The second paragraph of the syllabus clearly states the holding of the case:

Where personal property has been properly classified for purposes of taxation, all such property within the same class that has not been lawfully exempted from taxation must be assessed and taxed in the same manner; and the equality of burden required by the Constitution of Ohio cannot exist unless the rate of assessment and the rate of taxation borne by all such personal property within the same class are uniform. (citations omitted)

In Ohio only lands and improvements thereon must be taxed by uniform rule according to value. The General Assembly has the power to classify personal property for purposes of taxation and to assess or tax individual classes at varying rates or to exempt particular classes from all taxation. This power came about as a result of a 1929 amendment to the Ohio Constitution. The amendment, which became effective January 1, 1931, substituted for the directive, that all property must be taxed by uniform rule, the provision that only “[]and and improvements thereon shall be taxed by a uniform rule....” The amendment continued, “without limiting the general power, subject to the provisions of Article I of this Constitution, to determine the subjects and methods of taxation or exemptions therefrom. . . .” Article I of the Ohio Constitution (the equal protection clause) was to be a limit upon the power to classify. Ohio cases have held the Ohio equal protection clause

7 Kroger Co. v. Schneider, 4 Ohio App.2d 226, 212 N.E.2d 76 (1965).
8 Kroger Co. v. Schneider, 9 Ohio St.2d 80, 88, 223 N.E.2d 606, 612 (1967). The statute was declared unconstitutional only to the extent that it provides personal property held by a merchant for sale and not for resale shall be listed and assessed for taxation at less than 70 percent of its value.
9 Kroger Co. v. Schneider, 9 Ohio St.2d 80, 80-81, 223 N.E.2d 606, 608 (1967). In Ohio, the syllabus states the law of the case. OHIO SUPREME CT.R. OF PRAC. VI.
10 OHIO CONST. art. XII, § 2.
11 Id.
12 Id.
13 State ex. rel. Struble v. Davis, 132 Ohio St. 555, 560, 9 N.E.2d 684, 687 (1997); Zangerle v. Republic Steel Corp., 144 Ohio St. 529, 560, 60 N.E.2d 170, 171 (1945); State ex. rel. Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947); Reed v. County Bd. of Revision, 152 Ohio St. 207, 88 N.E.2d 701, (1949).
requires that any classification of personal property must be reason-
able and not arbitrary. The Kroger case now holds that not only must a classification be proper (reasonable and not arbitrary), but "[w]here personal property has been properly classified . . . , all such property within the same class that has not been lawfully exempted from taxation must be assessed and taxed in the same manner . . . ." This holding represents a rather clear rejection of the concept of graduation in personal property taxation other than income and inheritance taxes.

In reaching their decision the Kroger court made an analysis of the legislative history of the constitutional provisions concerning the taxing power in Ohio. The court concluded, "[A] graduated taxation of personal property was not contemplated or intended by the 1929 amendment . . . ." This conclusion is questionable. The foundation of the 1929 amendment was the 1926 Report of the Joint Legislative Committee on Economy and Taxation (hereinafter referred to as the 1926 Report). The 1926 Report recommended the uniform rule of taxation be repealed. The Kroger court found, "[n]othing therein implies the power to create a graduated taxation of personal property within any such classification." However, the 1926 Report cited the tax system of New York which authorized a graduated personal income tax. Thus, it is arguable the 1926 Report implied the same power was possible in Ohio. Most states, whose constitutions at the time of the 1926 Report, required all property within the same class to be taxed in the same manner, stated this requirement affirmatively in their constitutional provisions. Pennsylvania, whose

15 Kroger Co. v. Schneider, 9 Ohio St.2d 80, 84, 223 N.E.2d 606, 609 (1967).
16 Id. at 85, 223 N.E.2d at 610. The position of the Ohio Supreme Court seems to be that since the 1929 amendment does not grant in so many words the power of graduation, such a power was not contemplated or intended. This view is supported by the fact that explicit constitutional amendments were deemed necessary in order to authorize a graduated inheritance tax and a graduated income tax. However, this view, which would allow change only through constitutional amendment and not through the process of judicial interpretation, is overly strict.
17 EIGHTY-SIXTH OHIO GENERAL ASSEMBLY, REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON ECONOMY AND TAXATION (1926).
18 Id. at 133.
19 Kroger Co. v. Schneider, 9 Ohio St.2d 80, 84, 223 N.E.2d 606, 609 (1967).
20 EIGHTY-SIXTH OHIO GENERAL ASSEMBLY, REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON ECONOMY AND TAXATION, at 140-41 (1926).
21 See, OHIO CHAMBER OF COMMERCE REPORT, CLASSIFICATION PROVISIONS OF STATE CONSTITUTIONS, at 2-10 (2d ed. 1929).
taxing system also served as a model in the 1926 Report, stated this requirement affirmatively.\textsuperscript{22} A careful reading of the 1929 amendment will reveal no such limitation.\textsuperscript{23} If the same limitation was contemplated or intended, it would be stated affirmatively.

In 1931, after the 1929 amendment was adopted, a second taxation report was made.\textsuperscript{24} The 1931 Report concluded, "[t]he taxation of tangible property will be on a uniform basis, and many existing inequalities will be eliminated."\textsuperscript{25} The Kroger court found these words to be strong support for their holding.\textsuperscript{26} However, the 1929 amendment itself would seem to be the best evidence of what was contemplated or intended. The following words in the 1929 amendment, "[w]ithout limiting the general power, subject to the provisions of Article I of this Constitution, to determine the subjects and methods of taxation . . . ",\textsuperscript{27} arguably grant the power to create graduated taxes on personal property.

In further support of their conclusion that a graduated taxation of personal property was not contemplated or intended by the 1929 amendment, the Kroger court cited the case of Stewart Dry Goods Co. v. Lewis.\textsuperscript{28} In Stewart, a Kentucky statute established a retail sales tax with a base rate of 1/20 of 1 percent on the first 400,000 dollars of annual gross sales, the rate increasing with each 100,000 dollars of additional sales to a maximum of 1 percent on all sales over 1,000,000 dollars. The United States Supreme Court held the statute was denial of equal protection of the laws, contrary to the fourteenth amendment, since it imposed taxes at varying rates upon identical sales, solely upon the basis of the volume of the sales annually.\textsuperscript{29} The majority concluded it was an unjust and unreasonable classification because the gradations were not adjusted with reasonable approximation to profits.\textsuperscript{30} In the course of the opinion the majority stated:

\begin{quote}
\textsuperscript{22} Eighty-Sixth Ohio General Assembly, Report of the Joint Legislative Committee on Economy and Taxation, at 141 (1926).
\textsuperscript{23} The Kroger court admitted that the 1929 amendment was at least silent on the question of graduation. Kroger Co. v. Schneider, 9 Ohio St.2d 80, 87, 223 N.E.2d 606, 611 (1967).
\textsuperscript{24} Eighty-Ninth Ohio General Assembly, Report of the Special Joint Taxation Committee on the Revision of the Ohio Taxation System (1931).
\textsuperscript{25} Id. at 4.
\textsuperscript{26} Kroger Co. v. Schneider, 9 Ohio St.2d 80, 85, 223 N.E.2d 606, 610 (1967).
\textsuperscript{27} Ohio Const. art. XII, § 2.
\textsuperscript{28} 294 U.S. 550 (1935).
\textsuperscript{29} Id. at 559.
\textsuperscript{30} Id. at 559.
\end{quote}
We think the graduated rates imposed were not intended to bear any relation to net profits. The argument based upon the asserted analogy to a tax upon net income graduated in accordance with the size of the income is unconvincing, for the execution here demanded is not of that kind.\textsuperscript{31}

The majority continued:

In several recent cases we sustained the classification of chain stores for taxation at rates higher than those applicable to single stores . . . because of advantages incident to the conduct of multiple stores and obvious differences in chain methods of merchandizing as contrasted with those practiced in the operation of one store.\textsuperscript{32} (citations omitted)

The \textit{Kroger} court apparently believed the statute in \textit{Stewart} was declared unconstitutional because it imposed graduated rates. However, the above language of the \textit{Stewart} Court indicates the statute was declared unconstitutional because it worked in such a way as to bear no relation to profits. The rationale of \textit{Stewart} indicates that where a clear showing of a relation between a tax measure (graduation) and ability to pay cannot be made to the satisfaction of the Court, then the state is given no choice but to employ the proportional principle.

The question in \textit{Stewart} was whether a state tax statute violated the Federal Constitution. Such a case can be little support for the proposition that an amendment to a state constitution did not contemplate or intend a graduated taxation of personal property. The \textit{Stewart} case can be relevant only as to whether the statute in \textit{Kroger} violates the equal protection clause of the Federal Constitution.\textsuperscript{33} But even as to this question the principles announced in \textit{Stewart} seem to be outmoded.\textsuperscript{34}

Certain language in \textit{State ex. rel. Struble v. Davis},\textsuperscript{35} an early case interpreting the power of classification given to the General Assembly by the 1929 amendment, makes no reference to a requirement that all property within the same class be taxed in the same manner. In speaking of the effect of the 1929 amendment the Ohio Supreme Court in \textit{Struble} stated:

\begin{quote}
Thus, while the uniform rule was retained as to real estate, full
\end{quote}

\textsuperscript{31} \textit{Id}.
\textsuperscript{32} \textit{Id}. at 565.
\textsuperscript{33} The \textit{Kroger} court avoided the federal question.
\textsuperscript{34} The principles announced in \textit{Stewart} seem to have been eclipsed by those announced in \textit{Allied Stores, Inc. v. Bowers}, 358 U.S. 522 (1959).
\textsuperscript{35} 132 Ohio St. 555, 9 N.E.2d 684 (1937).
and complete plenary power to otherwise classify property for taxation. . . apparently was restored substantially as it had existed under the provisions of the Constitution of 1802.

In reference to the 1802 constitution the court in Zanesville v. Richards stated:

[The whole matter of taxation was committed to the discretion of the general assembly. It might be levied upon such property and in such proportion as that body saw fit. The right to make exceptions and exemptions was unquestionable.]

The Kroger court believed a classification based upon value is not authorized by the Constitution of Ohio. Apartment Operators Ass'n v. Minneapolis, lays down a rule contrary to the Kroger court's thinking. The statute involved in the Apartment Ass'n case is directly analogous to the statute in Kroger. It separately classified homesteads and provided that the first 4,000 dollars in value of a homestead was to be assessed for taxation at a fixed percentage of true value while the value of such homestead in excess of 4,000 dollars was to be assessed at a higher percentage. This Minnesota statute was upheld even in the face of a uniformity provision of the state constitution requiring that "taxes shall be uniform upon the same class of subjects." In rendering its decision the Minnesota Supreme Court gave full support to the proposition that classification may be based upon value. That court stated: "Protection and benefits received by the taxpayer, and ability to pay, may properly be taken into consideration by the Legislature in classifying property for the purpose of taxation."

In holding section 5711.22(B) unconstitutional the Kroger court found that section was not an exemption statute. This conclusion is also subject to attack. In Schumacher Stone Co. v. Tax Comm., the Supreme Court of Ohio stated:

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38 Id. at 560, 9 N.E.2d at 666-87.
39 5 Ohio St. 590 (1855).
39 Id. at 592-93.
39 Kroger, Co. v. Schneider, 9 Ohio St. 2d 80, 87, 223 N.E.2d 606, 611 (1967).
40 191 Minn. 365, 254 N.W. 443 (1934).
41 MINN. CONST. art. 9, § 1. The Kroger court, on the other hand, has invalidated a similar statute even though there is no explicit uniformity provision in the Ohio Constitution with regard to personal property.
42 Apartment Operators Ass'n v. Minneapolis, 191 Minn. 365, 369, 254 N.W. 443, 445 (1934).
43 Id. at 370, 254 N.W. at 445.
44 Kroger Co. v. Schneider, 9 Ohio St. 2d 80, 85, 223 N.E.2d 606, 610 (1967).
45 124 Ohio St. 529, 18 N.E.2d 405 (1938).
The provision that personal property used in manufacturing should be assessed at only fifty per cent of the true value thereof instead of seventy per cent is in the nature of an exemption... (emphasis supplied)

In Cleveland-Cliffs Iron Co. v. Glander,\textsuperscript{47} paragraph three of the syllabus states:

The provision of any statute which purports to except certain property from general provisions governing taxation is a measure of exemption... (emphasis supplied)

There is authority for the position that a graduated tax necessarily involves the comparison of more than two classes.\textsuperscript{49} The statute in Kroger created only two classes; merchants with inventories below 100,000 dollars, and merchants with inventories in excess of 100,000 dollars. The statute in Kroger did not create a “graduated” tax, but a “degressive” tax, defined as a flat tax with an exemption.\textsuperscript{50} The court of appeals in the Kroger case was correct when it concluded, “... the exclusion of a fixed percentage of true value from the amount required to be listed and assessed is in the nature of an exemption.”\textsuperscript{51}

Taking into consideration the court’s questionable analysis of legislative history and constitutional provisions, and its doubtful conclusion that section 5711.22(B) was not an exemption statute, the holding in Kroger is somewhat unwarranted. In Cincinnati, W.\&Z.R.R. v. Comm.,\textsuperscript{52} it was stated:

The legislature is, of necessity, in the first instance, to be the judge of its own constitutional powers. Its members act under an oath to support the constitution, and in every way, under responsibilities as great as judicial officers. Their manifest duty is, never to exercise a power of doubtful constitutionality. Doubt, in their case, as in that of the courts, should be conclusive against all affirmative action. This being their duty, we are bound, in all cases, to presume they have regarded it; and that they are clearly convinced of their power to pass a law before they put it in the statute book.\textsuperscript{53}

\textsuperscript{46} Id. at 531, 18 N.E.2d at 406.
\textsuperscript{47} 145 Ohio St. 423, 62 N.E.2d 94 (1945).
\textsuperscript{48} Id. at 424, 62 N.E.2d at 94.
\textsuperscript{49} W. Blum \& H. Kalven, The Uneasy Case for Progressive Taxation, at 97 (1953).
\textsuperscript{50} Id. at 94.
\textsuperscript{51} Kroger Co. v. Schneider, 4 Ohio App. 2d 226, 230, 212 N.E.2d 76, 78 (1965).
\textsuperscript{52} 1 Ohio St. 77.
\textsuperscript{53} Id. at 83.
Beyond the legal merits of the case, its practical impact must be determined. The Kroger case has held that all property within the same class must be assessed and taxed in the same manner, except that property which has been lawfully exempted. The question now arises, what are the requirements for a lawful exemption?

In State ex. rel. Struble v. Davis, the court held the 1929 amendment removed all restrictions, other than those specified in article I (Bill of Rights), on the power of the General Assembly to pass laws exempting personal property from taxation. A subsequent case, Cleveland v. Board of Tax Appeals, declared, contrary to Struble, that the constitution does not grant the General Assembly unlimited power to exempt any and all property from taxation. This case held a constitutional enumeration of exemptions authorized to be granted by the General Assembly precludes the granting of any further exemptions. However, a recent case, Denison University v. Board of Tax Appeals, has overruled the Cleveland case and reverted back to the rationale of Struble. A lawful exemption only requires compliance with article I of the Ohio Constitution. Recognizing the limitation on exemptions imposed by article I, the Struble court nonetheless gave support to the following proposition:

Where not prohibited or restricted in its exercise by constitutional provisions, the Legislature of a state has full power to exempt any persons or corporation or classes of property from taxation, and to limit the exemption, according to its views of public policy or expediency, subject only to the limitation that the exemption shall serve a public purpose, and that the exemption not be arbitrary, such power being included in the legislative power to tax, and to classify for purposes of taxation. (emphasis supplied)

If the General Assembly had enacted a statute which expressly exempted the first 20,000 dollars in merchant's inventory from taxation, but provided that all inventory in excess of 20,000 dollars would be assessed at 70 percent, such a statute would appear to be

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54 132 Ohio St. 555, 9 N.E.2d 684 (1937).
55 Id. at 560, 9 N.E.2d at 687.
56 153 Ohio St. 97, 91 N.E.2d 480 (1950).
57 Id. at 114, 91 N.E.2d at 489.
58 Id.
59 2 Ohio St. 2d 17, 205 N.E.2d 896 (1965).
60 Id. at 18, 205 N.E.2d at 897.
constitutional under the above tests. This conclusion is buttressed by the court in Kroger when it said, "(i)f this were in fact an exemption, a different result might follow." As the following chart illustrates, the hypothetical statute which expressly exempts the first 20,000 dollars in merchant’s inventory from taxation, and assesses all inventory in excess of 20,000 dollars at 70 percent, would achieve a monetary result and progressive effect very similar to the statute declared unconstitutional in Kroger. Thus, two statutes, one an exemption statute, the other interpreted to be a graduated tax statute, achieve very similar monetary results and progressive effect. The hypothetical statute would seem to be constitutional; the statute in Kroger was declared not to be. The Ohio Supreme Court has overlooked the fact that any exemption in an otherwise proportionate tax introduces an element of progression in the effective rates, the same progression which is the infirmity in a graduated tax. Both an exemption statute and a graduated tax create a situation where property in the same class will bear an unequal burden of taxation. The Kroger court’s ruling to a certain extent is meaningless in that it may not prevent progressive taxation of property within the same class.

In Kroger the federal question was never reached, the case being decided on state constitutional grounds. However, had the only question been whether the Kroger statute violated the fourteenth amendment to the Federal Constitution, the statute might have been upheld. In speaking of the equal protection clause of the Constitution of the United States, the Kroger court cited a United States 62 Ohio cases have upheld tax devices where they result in some discrimination if they are actually exemptions. See Middletown Iron & Steel Co. v. Evatt, 20 Ohio Ops. 394 (reversed on other grounds 139 Ohio St. 115, 38 N.E.2d 585) (1941); Cleveland-Cliffs Iron Co. v. Glander, 145 Ohio St. 423, 62 N.E.2d 94 (1945). The hypothetical statute, infra pp. 183-84, has been purposely structured to exempt the first 20,000 dollars so as to avoid not only the argument that the statute in Kroger was not expressly labelled an exemption statute, but also the argument that the practice in Ohio to assess property only for a percentage of the actual value does not create an exemption. Kroger Co. v. Schneider, 9 Ohio St.2d 80, 85, 223 N.E.2d 606, 611 (1967). The practice of providing for partial exemptions as in the hypothetical statute, infra pp. 183-84, is no new innovation in Ohio. Ohio Constitution article XII, sec. 2, as it read before the 1929 amendment, provided that the legislature may exempt from taxation personal property to the value of 500 dollars for each individual. The 1926 Report observed that this 500 dollar exemption should be repealed by the 1929 amendment, but only because it would be an undesirable limitation making it impossible for the legislature to make liberal exemptions of personal property as a part of a model tax plan. 1926 Report, at 153.
20,000 DOLLAR EXEMPTION; ALL ABOVE ASSESSED AT 70%

<table>
<thead>
<tr>
<th>Hypothetical taxpayer; merchants residing in taxing district</th>
<th>True value of all merchant's inventory owned by each taxpayer; year 1968 (a)</th>
<th>Assessed value of inventory of each taxpayer listed in column (a) (b)</th>
<th>Effective % of assessed value of inventory listed in column (a) as assessed in column (b) (c)</th>
<th>Total tax paid on inventory in column (a) assuming levy of $30 per $1,000 of assessed value listed in column (b) (d)</th>
<th>% of total tax paid in column (d) to true value of inventory listed in column (a) (e)</th>
<th>Tax paid on inventory item with true value of $1.00 assuming levy of $30 per thousand (f)</th>
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</thead>
<tbody>
<tr>
<td>A $100,000</td>
<td>$80,000 @ 70%</td>
<td>56 %</td>
<td>1,680</td>
<td>1.68 %</td>
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<tr>
<td>B $200,000</td>
<td>$180,000 @ 70%</td>
<td>63 %</td>
<td>3,780</td>
<td>1.89 %</td>
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<td>C $300,000</td>
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<td>69.72 %</td>
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<td>Hypothetical taxpayer; merchants residing in taxing district</td>
<td>True value of all merchant's inventory owned by each taxpayer; year 1968</td>
<td>Assessed value of inventory of each taxpayer listed in column (a)</td>
<td>Effective % of assessed value of inventory listed in column (a) as assessed in column (b)</td>
<td>Total tax paid on inventory in column (a) assuming levy of $30 per $1,000 of assessed value listed in column (b)</td>
<td>% of total tax paid in column (d) to true value of inventory listed in column (a)</td>
<td>Tax paid on inventory item with true value of $1.00 assuming levy of $30 per thousand</td>
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</tr>
<tr>
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<td>$100,000</td>
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Supreme Court case, *Stewart Dry Goods Co. v. Lewis*. In that case a graduated sales tax was held to violate the equal protection clause of the Federal Constitution. However, the facts in *Stewart* can be distinguished from the facts in *Kroger*. The statute in *Stewart* was very extreme. As an example, one store, after paying taxes, would end the year with a 9,000 dollar deficit. The statute in *Stewart* also resulted in an extremely steep progressive rate. This was only another factor in the *Stewart* court's conclusion that the tax was capricious, arbitrary and whimsical. Moreover, the principles in *Stewart* have been eclipsed by the principles announced in a recent United States Supreme Court case, *Allied Stores, Inc. v. Bowers*. The *Allied* Court stated:

Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation.

The Court in *Allied* pointed out that a classification is not discriminatory, under the equal protection clause of the fourteenth amendment, if any state of facts can be conceived that would sustain it. The statute in *Kroger* would be constitutional under the above test. Many differences between small merchants with inventories below 100,000 dollars and merchants with inventories in excess of 100,000 dollars can reasonably be conceived. One important difference may be the special advantages due to large-scale merchandising. The big stores having ample capital can get the best locations. They can make their purchases in bulk and hence at cheaper prices. The big stores acquire a prestige that makes customers eager to buy

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64 294 U.S. 550 (1935).
65 Id. at 561. This result would be unlikely under the *Kroger* statute since under its provisions all merchants would be receiving a tax reduction.
66 Under the statute in *Stewart* there were six different tax rates applied to gross sales from 400,000 dollars to 1,000,000 dollars. Under the *Kroger* statute, only two different rates were established.
67 358 U.S. 522 (1959). The strength of the *Stewart* case was weak from the very beginning. First, there was a strong dissent by Justices Cardozo, Stone and Brandeis. Secondly, the majority opinion appears to rest in part upon the fact that a flat sales tax or a net income tax were available as alternative means of lessening the disproportionate burden cast by former taxes upon small merchants. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 563 (1935).
69 Id. at 528.
from them. Their management tends to be more efficient.\textsuperscript{70} The Court in \textit{Allied} also stated that a classification is not discriminatory if it rests upon some reasonable policy.\textsuperscript{71} A policy of preventing large retail organizations from wiping out the independent retailer and disturbing the economic balance within a state seems reasonable. Taking into consideration the factual differences between \textit{Stewart} and \textit{Kroger}, and the principles of the \textit{Allied} case, a strong argument can be made that the United States Supreme Court would have upheld the statute in \textit{Kroger}.

Notwithstanding the merits of the \textit{Kroger} case, the fact remains that Ohio had to adjust to its rulings. In 1967 the General Assembly passed a new bill which would amend section 5711.22 and enact a new section, section 5711.222.\textsuperscript{72} The bill provides for gradual elimination of the tax on personal property used in agriculture by reducing the rate of assessment to 43 percent in 1968, 37 percent in 1969, 32 percent in 1970, 20 percent in 1971, 10 percent in 1972, and thereafter no tax. The bill also provides for a gradual reduction of the rate of assessment on a merchant’s inventory by reducing the rate of assessment to 63 percent in 1968, 57 percent in 1969, 52 percent in 1970, and 50 percent in 1971 and thereafter. Since personal property inventories will eventually be assessed at 50 percent, and tangible personal property used in agriculture will be entirely exempt from the personal property tax, the question arises, is Ohio departing from the taxation of tangible personal property used in business?\textsuperscript{73} The answer seems to be yes. The Select Committee on Tax Revision of the Ohio House of Representatives currently has under consideration possible changes in the structure of Ohio local government taxation. The changes being considered by the committee would shift business taxation in part from a property base to an income base, and utilize income as a tax base for all units of local government. To implement these changes the committee has considered the following proposals:\textsuperscript{74}

\begin{itemize}
\item \textsuperscript{70} The president of the Kroger Company, while giving testimony in the \textit{Stewart} case stated: “Kroger trains its men, having regular training schools and diplomas.” Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 575-76 (1935).
\item \textsuperscript{71} Allied Stores, Inc. v. Bowers, 358 U.S. 522-527 (1959).
\item \textsuperscript{72} Amended Substitute House Bill 480. This act became effective December 2, 1967.
\item \textsuperscript{73} Except for domestic animals, which are required to be listed for taxation whether or not used in business (\textit{Ohio Rev. Code Ann.}, § 5711.09 (Page 1953)), only taxable personal property used in business is required to be listed for taxation (\textit{Ohio Rev. Code Ann.}, § 5711.07 (Page 1953)).
\item \textsuperscript{74} See Battelle Memorial Institute, \textit{Report on Local Government Tax Revision in Ohio}, p. ii (January 4, 1968).
\end{itemize}
repeal of the tangible personal property tax
repeal of the intangible personal property tax as applied to stocks, bonds, and other similar intangibles ("local situs intangibles")
elimination of municipal taxation of business income
a credit against real property taxes for homeowners
a county "mandatory" tax (imposed by the legislature with no local levy) of 1 percent on adjusted gross personal income with optional credit for payments of municipal income taxes in effect on the date of enactment (a proportional waiver of real estate credit would be required by taxpayers taking this credit)
a 7 percent county tax on business net income with deductions, for unincorporated businesses, of wage and salary payments to owners and partners
a 1 mill increase in the tax on deposits and shares in financial institutions ("state situs intangibles")
distribution of funds within each county among political subdivisions by a formula to reflect differing needs, but with a guarantee that no jurisdiction (with exceptions for cities with extremely high per capita tax valuations) would receive less from the formula than from old taxes in the last year they were in effect
replacement of the local government fund distribution through county budget committees by the new formula for revenues returned by the state to local governments (part of the sales tax and state situs intangible revenues)
a state equalization fund to ensure that no county received less under the proposal than under existing legislation and to cover the expenses of administration.

The committee commissioned the Battelle Memorial Institute to make a study of the above proposals. The Battelle report concluded the proposed tax revision is feasible, pointing out the revenue raised in each of Ohio's 88 counties from new taxes is likely to equal or exceed that from old taxes in all but three counties, and a relatively small equalization fund can make up the difference.  

Of all the business taxes, the tax on merchant's inventories is one of the most undesirable. Inventories are movable and subject to control for tax-minimization purposes. Inventory turnover rates vary greatly not only from industry to industry, but also between

76 Id.
firms in any one industry. Moreover, various accounting measurements make inventory valuation for assessment purposes a substantial problem. In conclusion, taxes on inventories are hard to administer in a just manner. Therefore, the elimination of this tax, as part of a general plan to shift business taxation from a property base to an income base, is worthwhile if Ohio is able and willing to make the change.\textsuperscript{76}

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\textsuperscript{76} Some state (e.g. New York, Pennsylvania and Delaware) have eliminated this tax. These states have also eliminated the ad valorem taxation of tangible personal property.