

Note:

Regulation of Municipal Solid Waste Through Taxation: the New York Recycling Incentive Tax

Solid waste is the stuff you leave on your curb at night.¹ Its disposal is a growing problem for municipalities around the country, and resolution of the problem is closely related to issues of energy, resource conservation, health and urban finance.

Legislative response to the problem has been limited. Unlike air and water pollution, solid waste has not yet attracted extensive or direct federal regulation. Under the Solid Waste Disposal Act² the government's role is essentially limited to research, coordination and funding of state efforts. Nonetheless, there have been numerous bills introduced in Congress dealing with various aspects of the problem.³ The states, too, have generally limited their role to coordination and funding of municipal and regional disposal efforts. Much of the emphasis has been on the hardware associated with solid waste disposal. Oregon's ban on "no deposit" bottles⁴ is an exceptional effort to deal with the basic problem by eliminating a major component of solid waste at the source. In New York City comprehensive and controversial legislation was created to deal with fundamental problems in the control of solid waste.

In 1971 the New York Recycling Incentive Tax (RIT) came and went. An offspring of the New York City Environmental Protection Administration (NYC EPA), the RIT was an attempt to use the city's taxing power to influence the quantity and composition of municipal solid waste. The RIT as originally conceived and authorized by the state legislature consisted of taxes on containers made of rigid or semi-rigid paperboard, fibre, glass, metal or plastic. The tax on each material was to correspond roughly to the degree

1. Agricultural and industrial wastes, although often solid waste, present far different problems and require a different solution than that discussed here.

2. 42 U.S.C. §§ 3251-3259 (1970).

3. See, e.g., *Hearings on S. 1377 and S. 3058 Before the Subcomm. on the Environment of the Comm. on Commerce*, 92nd Cong. 2nd Sess., ser. 92-60 (1971).

4. Ore. Rev. Stat. §§ 459.810-890 (1973).

of difficulty and expense of disposal. Thus paper containers were to be taxed at one cent each while metal containers were to be taxed at two cents. The tax was to allow credits where specified amounts of recycled materials were used in manufacturing the containers or if a sufficient number of the containers were reused. Each container was to be taxed separately, so that a tube within a box would have a double tax. To reduce economic hardship, purchases by industry and containers for pharmaceuticals and foodstuffs were exempt.

The tax had a brief and bizarre existence. The RIT as passed by the New York City Council taxed only plastic containers, despite the fact that its effectiveness and original design apply to all types of containers. Authorized by the state in June, 1971, it was declared unconstitutional by a lower New York court in November of the same year. The decision was never appealed.

The RIT is an extremely original and creative piece of legislation dealing with a wide variety of problems. This note will examine some of the problems that existed when the tax was conceived and how the tax sought to resolve them. It will then discuss the legal and economic appropriateness of a RIT.

THE PROBLEM

New York is full of solid waste. Although the statistics take a variety of forms, they all indicate that the problem is enormous.

- In 1970, NYC disposed of 22,000 tons of refuse per day.
- In 1980, NYC will dispose of 32,000 tons of refuse per day.⁵
- In 1961, each person produced 4.1 pounds of refuse per day.
- In 1971, each person produced 5.5 pounds of refuse per day.⁶
- The budget of the Dept. of Sanitation in 1971 was \$176.3 million.⁷
- The cost of solid waste management in the city in 1970/71 was \$268.5 million.⁸
- Solid waste management ranks seventh among state and local public expenditures nationally.⁹

5. *A Recycling Incentive Tax*. A study prepared by McKinsey & Co. for the Bureau of the Budget, New York City, at 1-1 (November, 1971) [hereinafter cited as *McKinsey*].

6. *Hearings on S. 1377 and S. 3058 Before the Subcomm. on the Environment of the Comm. on Commerce*, 92nd Cong. 2nd Sess., ser. 92-60, Report by Carolyn Brancato, Staff Economist, New York City EPA, at 133 (1971) [hereinafter cited as *Brancato*].

7. *Id.* at 138.

8. *McKinsey*, *supra* note 5, at 1-1.

9. *Id.*

The figures are important in that they indicate two things. First, the problem of solid waste management results in a significant municipal expense. Second, the trend of the problem is increasing. Although the population of the city remains constant, the amount of waste is increasing at about 5% per year.¹⁰ The increase in solid waste correlates closely with the increase in the Gross National Product,¹¹ and one can infer some causal relationship between greater wealth and greater waste.

Approximately 40% of the municipal solid waste load is composed of containers.¹² For a variety of reasons including its large percentage, amenability to recycling and ease of taxation the NYC EPA chose containers as the object of the tax. It is estimated that out of the \$15,865 million annual unit sales of containers in New York City in 1970, approximately 66% were of paperboard, 17% were of metal, 9% were of glass, 8% were of plastic and a small amount was of wood.¹³ But figures in this area may be confusing. While plastics may make up 8% of the total number of containers in New York City, they comprise about 6.1% of containers by weight and 12.6% by volume.¹⁴ In the total solid waste load plastics are about 1.5% by weight and 3% by volume.¹⁵

If nothing else is clear, it is apparent that change in the composition of waste is occurring. Plastics are increasing their share of the solid waste load relative to glass while aluminum is increasing relative to steel. The Department of Commerce, for the period 1970-80, estimates that in the container market paper will increase from 3-5% per year, glass and metal will increase from 6-7% per year and plastics will increase at 10% per year.¹⁶ Test marketing of plastic bottles by Pepsi and Coco-Cola threaten an enormous expansion of the amount and percentage of plastics with which the city will have to deal.

One final trend is important. Just as the total quantity of solid

10. *Kretchmer*, Statement in opposition to motion for preliminary injunction, *Society of the Plastics Industry, Inc. v. City of New York*, 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct. 1971) [hereinafter cited as *Kretchmer*].

11. *Brancato*, *supra* note 6, at 133.

12. *McKinsey*, *supra* note 5, at 3-2.

13. *Id.* at C-2.

14. *Kretchmer*, *supra* note 10.

15. *Id.*

16. *Brancato*, *supra* note 6, at 138.

waste is increasing, the per capita production of container waste is also increasing. In 1958 each person used 404 pounds of containers; in 1976 it is estimated that that figure will rise to 661 pounds.¹⁷ This is a truly alarming figure, and this gross expansion in our individual consumption of packaging is reflected in inflated costs of goods. 12.7% of the cost of cosmetics is for packaging, almost 13¢ out of every dollar spent. For cookies the figure is 10.2%, for detergents it is 8.9% while for televisions and other major appliances the figure is only 0.6%.¹⁸ While this, in part, reflects the fact that as the price of the item increases the percentage of cost attributable to packaging should decrease, there must be other forces at work. These forces range from consumer preferences, to cost benefits from sophisticated packaging, and they will be considered below when the economics of the RIT is discussed.

Currently, the overwhelming response to this mammoth solid waste problem is to burn it or bury it. Approximately 30.8% of New York garbage was incinerated in 1971; the rest was disposed of in sanitary landfills.¹⁹ With the rapid exhaustion of available landfill sites, a disposal gap of 63 million tons is threatened by 1985.²⁰ Difficulties in adequately coping with the problem arise not only as a result of the increasing quantities of waste but also because of technological difficulties associated with its composition.

THE RECYCLING INCENTIVE TAX*

The Recycling Incentive Tax was a comprehensive plan designed to deal with many of the preceding problems. As originally conceived the tax would have the following characteristics:

Tax per container	Paperboard	1¢
	Metal	2¢
	if one metal	1¢
	Glass	2¢
	Plastic	2¢
	Plastic bottles	3¢

17. *Id.*

18. *Id.* at 136-37.

19. *Kretchmer, supra* note 10.

20. *McKinsey, supra* note 5, at 1-1.

* See Appendices.

If made of a combination of materials a container would be taxed at the highest tax rate of its constituent materials with plastics to be taxed at 3¢. The RIT also provides a tax credit of 1¢ if

- paper containers are composed of 80% recycled materials
- metal containers are composed of 40% recycled materials
- glass containers are composed of 30% recycled materials
- plastic containers are composed of 30% recycled materials, or
- 60% of containers of a distinct type are reused.

Non-retail sales are exempt, thus removing the tax from industry. Pharmaceuticals and foodstuffs are also exempt, although beverages and candies would be taxed.

The tax would be administered by a local board with power to modify the existing tax rates and create new classifications in response to changes in the difficulty of disposal of materials. The tax would be levied on the supplier who sells to the retailer. If this supplier had no business situs within the city then the retailer would be responsible for the tax, although the foreign supplier would be allowed to pay instead of the retailer. The taxpayer would have the obligation of keeping adequate records and would have a prima facie obligation to pay the base rates associated with the containers. Tax credits would be obtained by application and appropriate documentation would be required.

Taken together the provisions of the RIT should produce a variety of results.

Reduction in volume of waste. This is perhaps the most critical objective of a solid waste management policy for any city with a population as large as New York's. With the growing shortage of landfill sites, a reduction in the amount of material is imperative. Furthermore, the vast majority of money spent on solid waste management goes for the collection of the refuse. It cost New York City \$27.50/ton for collection, \$6.50-\$10.00/ton for treatment and \$2-\$3/ton for disposal of incinerator refuse.²¹ A proposal which could reduce solid waste volume at its source reduces expenses at all levels.

The RIT promotes the reduction of volume in at least two ways. First, by taxing each container separately the trend towards multiple

21. *Kretchmer, supra* note 10.

and unnecessary packaging might be halted. Second, since each container regardless of size would be taxed the same amount, larger containers would be taxed proportionately less. Large containers are more efficient in that the ratio of goods to packaging is lower. Increased purchases of larger containers would result in a reduction in volume of waste.

Encourage recycling. An increase in recycling means a reduction in the final volume of waste to be disposed of by incineration or landfill, but it does not represent a decrease in the cost of collection. Recycling, of course, has the approved advantages of preservation of resources. It saves not only virgin materials but also energy. It takes much less energy to produce aluminum from recycled scraps than from ore. Furthermore, if there were a vital "secondary materials" market the city could recoup some of its expense in handling solid waste by selling the refuse.

There is no conspiracy against recycled materials except for the market place and, to be sure, a powerful virgin materials industry. A number of economic factors combine to price recycled materials out of the present market. These include inadequate sorting technology which makes recycled goods expensive to acquire, discriminatory tax and freight rates which favor virgin materials, and cheap energy. But the problem is "only money." Since the RIT provides credits for the use of recycled materials an "artificial" demand would be created. Given this increased demand the market for recycled goods should flourish. Forces are already at work which mandate an increased use of recycled materials. As energy costs increase, virgin materials become scarcer and recycling technology improves recycling must increase. The RIT would compliment and facilitate this shift.

Modify composition of solid waste. To the extent that some materials are taxed at a lower rate than others there is an incentive in the system to switch materials. This is extremely important.

Some materials present much more difficulty to a recycling program than others. Multi-material containers are much more difficult to recycle. The metal rings on glass bottles with twist off caps can ruin a shipment of glass to be recycled. The trend towards the use of more complex materials in packaging is growing. The RIT provides an incentive to use more easily recyclable materials.

Plastics present unique problems to the municipal incinerator. Burning at a far higher temperature than other materials they re-

quire greater amounts of oxygen. They produce hot spots and yield greater amounts of particulate matter. An increasing proportion of plastics contain polyvinyl chloride which when burned produces hydrochloric acid. This damages the walls of the incinerators and destroys air pollution devices. Per unit they are far more difficult to deal with than other components of solid waste and are posing problems to the design of more efficient new incinerators. The problem, while not acute now, looms large due to the trends in the use of plastic. The RIT by providing a disincentive to use plastic fights this trend.

Promote use of reusable bottles. Through a tax credit the RIT attempts to encourage the use of reusable, deposit bottles. Unlike a mandatory deposit law the RIT provides no direct incentive to the consumer to return bottles. Rather, this provision only hopes to stabilize the current use of returnable bottles in New York and through a more pronounced price advantage prevent the total phase out of these bottles.

Exploit environmental sentiment. While not a part of the RIT as conceived it would be easy to require conspicuous labelling of the recycled materials content in order to qualify for tax credits. In addition to price advantage, it is hoped that the public would respond to this information and that buying patterns would be altered. This would be an additional incentive to the supplier to use containers composed of recycled materials.

Production of revenue. Lost in the farsighted objectives of the RIT is the more mundane fact that the tax would also produce substantial revenue for a city. It was estimated that the initial tax yield for New York City would be \$30-\$50 million per year.²² If the objectives of the tax were fulfilled, however, this would not be maintained. As manufacturers responded to the incentives in the tax the revenue would be reduced and the composition of the solid waste stream would change. At some point equilibrium would be established and revenue would then grow with the market.

Apart from the direct production of revenue the tax would have two other effects on the city budget. If effective the tax would result in lowered expenditures for solid waste collection and disposal. Furthermore, as the tax created a market for recycled goods the city would be able to raise money by selling its wastes.

22. *Brancato, supra* note 6, at 162.

LEGAL ANALYSIS

In *Society of the Plastics Industry, Inc. v. City of New York*²³ a New York Supreme Court²⁴ found that the container tax as passed by the New York City Council violated the state enabling act and was unconstitutional both on equal protection and due process grounds. Although the court's conclusions as to the constitutionality of the tax were questionable at best, the decision was never appealed. Furthermore, the court's decision dealt primarily with problems associated with New York's limited application of the tax to plastic containers. The fundamental concept of the RIT was not impuned. If the RIT were passed in its complete form, it is likely that it would be able to withstand constitutional attack.

Those issues relevant to the RIT as a whole will be considered first. Then the issues raised only in connection with the New York City version will be discussed.

Recycling Incentive Tax

The fundamental challenge to the RIT comes from the Commerce Clause of the United States Constitution.²⁵ In granting Congress the power to regulate interstate commerce, the Commerce Clause was an attempt to insure that the United States would have a national economy. It sought to avoid those internal restraints which the states, under the Articles of Confederation, had imposed in order to protect their local economies. This tension between local regulation and federal power has never been resolved and has been a chief source of litigation rising from the Constitution.

It is obvious that there is conflict of state and federal powers over regulation of commerce. Unfortunately neither a resolution nor even an analysis of the problem is quite so obvious. Tests and catchwords which courts have evolved in attempts to simplify analysis have done the opposite. Direct-indirect,²⁶ unduly burdensome,²⁷ national uniformity is required,²⁸ and balance of interests²⁹ have not led to

23. 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct. 1971).

24. The New York Supreme Court is a court of original jurisdiction.

25. U.S. CONST. art. I, § 8.

26. *DiSanto v. Pennsylvania*, 273 U.S. 34 (1927).

27. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

28. *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

29. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

clarification of the enormous and complex problem. Justice Frankfurter, in reference to similar problems in state taxation, wrote that "to attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future."³⁰ Some particular approaches have, nonetheless, emerged.

Analysis of the Commerce Clause begins with the threshold question of whether Congress "preempted" the field. The concept is derived as much from the Supremacy Clause³¹ as the Commerce Clause. Under Commerce Clause preemption however, not only are states prohibited from passing laws inconsistent with federal laws but also from passing laws, consistent or not, in areas in which the federal government has assumed exclusive control.

Where Congress has passed regulations in a field, the courts will attempt to find a Congressional intention regarding preemption. In the absence of an explicit declaration, the courts may infer intention. In *Rice v. Santa Fe Elevator Corp.*³² the United States Supreme Court recognized circumstances when the inference was appropriate. Federal preemption would be found

- 1) if federal regulation was so pervasive in an area that it was possible to infer a Congressional intention to prohibit state regulation, or
- 2) if the federal regulation involved an area of dominant federal interest, or
- 3) if the state policy produced a result inconsistent with the objective of the federal regulation.

The attempt to ascribe intention where none may ever have existed has produced results which are not altogether consistent.³³

Even where there is extensive federal regulation, courts will validate concurrent state regulation where Congress has indicated that state action is proper. In *Huron Portland Cement Co. v. City of Detroit*³⁴ the Supreme Court upheld a municipal air pollution ordinance which created real difficulties for ships using the docks. Although there were comprehensive federal safety requirements which fixed certain standards for ships boilers, a local air pollution law which also affected the operation of the boilers was not held

30. *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

31. U.S. CONST. art VI.

32. 331 U.S. 218 (1947).

33. *Compare* *Campbell v. Hussey*, 368 U.S. 297 (1961) *with* *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

34. 362 U.S. 440 (1960).

to be preempted. The court found that Congress had specifically stated that air pollution control was primarily a responsibility of state and local government. While the dissent pointed out a previous court ruling which had invalidated local laws based on much the same facts, the majority advised that courts "enjoin seeking out conflicts between state and federal regulation where none clearly exists."³⁵

It was suggested in the *Society of the Plastics Industry* litigation that the Federal Solid Waste Disposal Act preempted the field of solid waste regulation, but the court, while interested, did not rule on the problem. The plaintiffs quoted a statement of Congressional policy that "the problems of waste disposal... have become a matter national in scope."³⁶ They did not, however, note that in the same sentence Congress recognized "collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies." The federal role is confined to financial and technical assistance. Not only is local regulation not preempted, the federal EPA is to "encourage the enactment of improved and, so far as practicable, uniform state and local laws governing solid waste disposal."³⁷ While it might be possible to draw a distinction between laws relating to production of solid waste and those regulating disposal, this has not been done. In the recent litigation over the Oregon mandatory deposit law,³⁸ the issue of preemption was not even raised.

Where Congress is silent in a field or where there is otherwise no determination of preemption, further analysis is necessary. First, the local regulation must be based on a legitimate state power.³⁹ In almost all cases in this area it is the police powers which form the basis of the regulation. Solid waste management is clearly within the area of health and safety with which the police powers deal.⁴⁰

State regulations which discriminate against non-resident business have been invalidated under the Commerce Clause.⁴¹ It is this

35. *Id.* at 446.

36. 42 U.S.C. § 3251(a)(6) (1970).

37. 42 U.S.C. § 3254 (1970).

38. *American Can Co. v. Oregon Liquor Control Commission*, 517 P.2d 691 (Ore. App. 1973).

39. *See, Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

40. *See, American Can Co. v. Oregon Liquor Control Commission*, 517 P.2d 691, 698 (Ore. App. 1973).

41. *See, Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

threat which was perhaps fundamental to the creation of the Commerce Clause. Courts have been particularly frightened by the lack of checks and balances on a state legislature which is regulating out of state concerns. There might be little pressure in opposition to restrictions. For this reason the concept of "inner political checks" seems important.⁴² Where there is opposition to the regulation from groups within the state the problem of discriminatory regulation is less keenly felt.⁴³

It was argued that the RIT was discriminatory and favored local suppliers. Since retailers were responsible for the tax if their suppliers were from out of the city, it was thought that this would encourage local retailers to deal with local suppliers. In fact the authors of the tax hoped that this would occur and provide an impetus to local industry. The court, however, ruled that this effect was not sufficient to declare the tax unconstitutional. It noted that this technique for administration of the tax was not unique and that other taxes, such as the gasoline tax, had successfully employed it.

There are further reasons for finding that the RIT is not discriminatory. First, the motivation of the tax is clearly nondiscriminatory. In the New York litigation, neither party disputed that the purpose of the tax was the control of solid waste and the encouragement of recycling, both valid state interests. Furthermore, there are pronounced political checks within the state. The tax imposes burdens on suppliers, retailers and consumers alike. Of course if an RIT were enacted from the federal level, these concerns would be moot.

State regulations which are otherwise appropriate will be stricken if they "unduly burden" interstate commerce. In *Southern Pacific Co. v. Arizona*⁴⁴ the Supreme Court voided a law which limited the length of trains that could pass through the state. Although the regulation was for safety purposes the Court found that the difficulty of stopping and reforming trains at the state border was too great to be allowed. They were helped in this conclusion by their finding that the law created more danger than it cured. The regulation was therefore "unduly burdensome."

The RIT is minimally burdensome on interstate commerce. The

42. See, Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 Harv. L. Rev. 1762 (1974).

43. *But see*, *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

44. 325 U.S. 761 (1945).

only burdens that the plaintiffs could point to were the problems of record keeping by the local merchants. This element of record keeping is not unique to the RIT, and a court should not hold that it is unduly burdensome. A greater problem is the possibility that manufacturers might have to design different containers for different markets. This could be the result of inconsistent legislation in varying jurisdictions. The Supreme Court has suggested that the mere possibility of inconsistent regulations is not sufficient⁴⁵ although they have acted where state laws have been in actual conflict.⁴⁶

Even in the earliest cases dealing with the interpretation of the Commerce Clause the courts have suggested that when the nature of the regulation requires national uniformity state actions will be prohibited.⁴⁷ It is hard to deny that the RIT would be more effective if it were enacted at a national or state level. The minimal leverage of the New York market is the tax's greatest weakness. Furthermore, a national tax would avoid any problems of inconsistent state laws. Several considerations, however, argue for the retention of a RIT at local levels. First, Congress has recognized that the problem of solid waste management is local. While it recognized the possibility of inconsistent state laws, Congress limited its role to that of coordination. Second, the goals which the RIT promote, a reduction in quantity of solid waste and the encouragement of recycling, will presumably be shared by all the states. Any inconsistencies would not be fundamental. Finally, to a limited extent it is proper for different states and localities to have different laws. Their needs are different. An urban area might wish to discourage organic wastes since they produce health problems. A rural area with great collection problems might want to discourage non-degradable containers. Glass and plastic, like diamonds, are forever. Paper and metal will naturally decompose. Different areas have differing capacities to absorb recycled materials. New York might have little use for tin cans whereas mining states might find a ready market for them to be used to leach ore.

In the final analysis the courts must consider the relevant factors and attempt to balance the interests involved. Where the state in-

45. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

46. *See, Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

47. *See, Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851), *accord, Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

terest is greater than the burden on interstate commerce the state regulation will be allowed. There should be little question that the RIT is a valid state regulation under the Commerce Clause.

An analysis of state *taxation* under the Commerce Clause involves some different considerations than that of state *regulations*. The courts have been concerned with problems of multiple tax burdens on companies, and they have required an adequate connection between the taxpayer and the state.⁴⁸ Although the RIT was explicitly ruled a regulation by the New York court the Recycling Incentive Tax *qua* tax is clearly valid. The taxing provisions are reflected in other taxes which have been sustained.⁴⁹

New York City RIT

The RIT when it emerged from the New York City Council consisted of a tax solely on plastic containers, and certain legal problems were litigated concerning this limited version of the tax. Although they are not directed at the basic concept of the RIT, two problems will be considered briefly.

The New York Supreme Court ruled that the city tax deviated from the state enabling legislation and was therefore invalid. Mao said that all power grows out of the barrel of a gun, but for New York City all power grows out of Albany. In a system of federal and state authority municipalities have no taxing power save that which is given them by states.⁵⁰ It is for this reason that the enabling act was a necessary prerequisite to the passage of the local container tax.

The enabling act authorized a tax on containers made of rigid or semi-rigid paperboard, fibre, glass, metal, plastic or any combination of such materials. In selecting only plastic as the basis for the tax the court held that New York City was improperly utilizing the authority. In *Glen Cove Theatres, Inc. v. City of Glen Cove*⁵¹ the New York Supreme Court invalidated a local tax on movie tickets. The enabling legislation had indicated that it was to be an amusement tax applicable to certain classes of establishments in-

48. See, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

49. See, *e.g.*, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

50. See, *Rhyme, Municipal Law*, 667, sec. 28-1 (1957).

51. 36 Misc. 2d 772, 233 N.Y.S.2d 972 (Sup. Ct. 1962).

cluding theatres, bowling alleys, cabarets, and roof gardens. The court said that the relevant consideration was whether the legislature had intended that the city be able to pick and choose. They found that the legislature had not so intended. Commenting on this decision a former New York State Tax Commissioner wrote that it was the policy of the state tax commission to advise municipalities that they were often in the position of having to take all or nothing of authorized taxes.⁵²

Arguments might be made about the intention of the legislature when they passed the enabling act for the RIT, but none are necessary. The obvious solution to this problem would be for the City Council to pass the RIT in its complete form.

A second problem with the New York City RIT on plastic containers lies in the Equal Protection Clauses of the Federal and State Constitutions.⁵³ It is clear that states are capable of creating classifications in order to effectuate a legitimate interest. Some items might be taxed while others are not; some objects might be regulated while others are not.

But there is a point beyond which the state cannot go without violating the Equal Protection Clause. The state must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'⁵⁴

While state laws are given a strong presumption of constitutionality that presumption is rebuttable.

The question of whether a tax on plastic containers alone was arbitrary or whether it actually furthered the purposes of the law comprised the bulk of the New York litigation. There were extensive and detailed submissions on the effect of plastics on the solid waste problem. The court concluded that there was no rational nexus between the objectives of the RIT and a tax solely on plastic containers. The tax was therefore arbitrary and invalid. This result is open to question. It is one thing to conclude that a law might not be wise; it is wholly another to state that it has no rational basis.

52. Murphy and Rock, *State and Local Taxation*, 15 *Syracuse L. Rev.* 223, 227 (1963).

53. U.S. CONST. amend. XIV, N.Y. CONST. art. I, sec. 11.

54. *Allied Stores v. Bowers*, 358 U.S. 522, 527 (1959).

While courts must at some time undertake to review the validity of a legislative action they are loath to involve themselves in legislative functions. Generally, courts will overturn a state law only when it involves a gross and obvious violation of rights. In *Quaker City Cab Co. v. Pennsylvania*⁵⁵ the Supreme Court overturned a tax on cab companies owned by non-residents. The Court concluded that the residency of the owners of the cab companies was not related to any valid aspect of the tax. It is this type of discrimination which the courts seek to prevent.

The United States Supreme Court, in *Williamson v. Lee Optical Co.*,⁵⁶ reviewed a law which prohibited opticians from placing lens in glasses without a prescription from an optometrist. This meant that opticians could not even fit an old lens into new glasses. Considering the equal protection argument the court wrote

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think (cite). Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind (cite). The legislature may select one phase of one field and apply a remedy there, rejecting the other (cite). The prohibition of the Equal Protection Clause goes not further than the invidious discrimination.⁵⁷

Although the law "may exact a needless, wasteful requirement in many cases"⁵⁸ the Court refused to invalidate it.

It is not clear that the New York court applied the proper standards in judging the tax on plastic containers. However this does not involve questions relating to the validity of the RIT in its complete form.

ECONOMIC ANALYSIS

Local economy

It is extremely difficult to estimate the impact of any tax on a local economy. The range of effects is, of course, enormous. There are, however, certain obvious concerns. When a tax with retail price

55. 277 U.S. 389 (1928).

56. 348 U.S. 483 (1955).

57. *Id.* at 489.

58. *Id.* at 487.

effect is instituted there will be a reduction in sales. This results not only from a transfer of sales to neighboring jurisdictions but also from a reduction in demand.

It is estimated that in New York City for every 1% increase in the local retail sales tax there is a 6% loss in sales.⁵⁹ While the RIT would have a similar effect due to the inevitable rise in retail price, the analogy is limited. The RIT with its numerous provisions for tax credits would not produce a uniform tax on goods. Some items would be affected more than others, and even within the same class of goods utilization of the credits would mitigate the impact. Certainly some sales would be lost. The effect would be less than that of a sales tax and more than no tax at all. Beyond that it is difficult to predict.

As a counter to lost sales there will be an incentive for retailers to deal with local suppliers. This support for local business comes from the administrative provisions of the tax dealing with responsibility for payment. Furthermore, the creation of a local demand for recyclable material should promote the creation of a local "secondary materials" industry which is capable of fulfilling that demand. In addition to container manufacturers, there are large numbers of industries in a city which are capable of utilizing recyclable materials.

Another effect of concern is the impact of the tax on jobs. It is expected that if the tax is effective jobs will be lost in the plastics industry and among primary materials suppliers. It is also expected that jobs will be gained in the recycling industry. Predicting whether the net effect will be a gain or loss of jobs is a dangerous business. A professor at the University of Illinois in estimating the impact of a mandatory deposit bottle law in the state predicted a loss of 5,903 jobs and a gain of 7,397 jobs, for a net gain of 1,494 jobs. A similar study by the Midwest Research Institute concluded that there would be a loss of 66,000 jobs, a gain of 56,000 jobs, for a net loss of 10,000 jobs.⁶⁰ Whether jobs are gained or lost there are other social considerations. If a thousand people were employed to destroy priceless paintings, a law which forced them out of work might still be considered appropriate.

There are provisions in the tax which attempt to mitigate potential adverse economic impact. All industrial sales are exempt. Thus

59. *McKinsey, supra* note 5, at 2-5.

60. *Brancato, supra* note 6, at 155.

there is no disincentive for industry to locate or remain in the city. This should have a minimal impact on the objectives of the tax since industrial containers are presumably minimal and functional. Furthermore, the tax exempts pharmaceuticals and foods, although not beverages or candies. While the tax is inevitably going to be regressive this minimizes the effect by exempting the most important basic items. The regressiveness of the tax may be less than feared since it is hoped that alternative packaging will appear at a lesser price and tax rate.

Impact on containers

Will it work? Whether the tax will actually alter container design depends on two considerations. First, how much leverage the particular market actually has, and second, what tax rate is sufficient to influence behavior.

Analysis of the effectiveness of the RIT is rife with inferences derived from a dearth of information. Nowhere was it possible to find an adequate analysis of the percent of the market for various containers that New York comprised. The McKinsey study was replete with conjecture. Noting that New York is 3.85% of the national market the study suggests that this leverage "would be hard for most area packagers and distributors to ignore."⁶¹ In its analysis of the impact of the tax on various materials, the study found that the paperboard industry is dominated by large firms and that therefore "one would not expect a vigorous response."⁶² The metal industry while largely national serves regional bottlers, and "a large proportion of metal container users are sensitive to local market conditions."⁶³ Glass manufacturers operate regionally, and "at least half of the glass entering New York City is made and used by manufacturers for whom New York City sales are so significant that they will probably find making the adjustments fostered by the tax's incentives worth while."⁶⁴ Because of high competition and low entry barriers the plastic industry's response "could be particularly quick."⁶⁵ All of these suggestions lack information on the actual shape of the market in containers. It is difficult to form an estimate

61. *McKinsey*, *supra* note 5, at 3-7.

62. *Id.* at 3-20.

63. *Id.* at 3-30.

64. *Id.* at 3-36.

65. *Id.* at 3-44.

of the potential effectiveness of the tax without such information.

The actual tax rate on each type of container was determined by considering the degree of difficulty of disposal. The tax rate reflects a rough ordering of materials based on their cost to the city. The important consideration is not, however, the cost of disposal but that amount which creates sufficient incentive to change the containers. It is suggested that there is extreme competition within the container industry and that slight changes in costs of packaging can produce shifts. Since the tax imposes costs generally greater than that of the container itself the industry should be quick to respond.

It is obvious that the basic rationale of the RIT assumes that capitalism works precisely and that consumers and manufacturers are actually responsive to changes in price. The figures do not necessarily suggest this. As noted previously, toiletries containers comprise 12% of the cost of the item while for cookies the figure is 10%. This is an enormous amount of money. It is hard to believe that these figures represent the minimum price for which it is possible to package these goods. Economics indicates that companies would begin to market their goods in cheaper containers and thereby increase their share of sales. That this does not happen suggests that there is strong consumer acceptance of expensive containers. The frightening inference is that we have been conditioned to respond to the packaging rather than the quality of the goods or the price. Assuming consumers are willing to spend a considerable extra amount for containers, is the one or two cent difference that the RIT would impose sufficient to change consumer purchasing?

To some extent the use of more expensive containers implies that they actually save money in other ways. Foam encased bottles reduce breakage and may therefore actually reduce costs. Plastic containers may reduce spoilage and thereby save money. To the extent that costs have reached a precise equilibrium, with costs of more expensive packaging balanced by money saved, then the gross figures used in the RIT will be sufficient to influence the market. To the extent that there is "slack" representing insufficient consumer attention or excess profits the market has the capacity to absorb slight price increases without changing.

These problems may be more abstract than real. The plastic industry certainly argued that the RIT would affect them. Those arguments, however, were in part due to the fact that it was not the complete RIT and in part due to litigation strategy.

CONCLUSION

There are numerous approaches to dealing with the problem of solid wastes, and advances are being made in the areas of collection, disposal and recycling. All solutions to these problems, however, are intimately dependent on the initial quantity and composition of the waste load, and a strategy of solid waste management which deals with the fundamental problem must involve provisions for influencing that total load.

The RIT is a particularly attractive component of any plan to deal with solid waste. First, it attempts to place the greatest burden where there is the greatest harm. This is done, of course, by taxing most heavily those materials which are the most expensive and difficult to eliminate. Second, it provides great flexibility and responsiveness by allowing rates to change in response to changes in new materials and new technology. Third, by promoting recycling and minimal packaging it helps lessen the final amount of waste with which we deal. Finally, it produces badly needed revenue for the collection and disposal of solid wastes.

The RIT alone will not solve all solid waste problems. But coupled with improved disposal technology it could bring the growing problem of solid wastes nearer to control.

Jeffrey M. Gaba

APPENDIX I New York State
Recycling Incentive Tax—Enabling Act

Cities of One Million or More—Solid Waste Disposal,
Containers—Tax

CHAPTER 399

An Act to amend the tax law, by adding thereto provisions enabling any city with a population of one million or more to impose taxes to promote the recycling of containers and reduce the cost of solid waste disposal to such city.

Approved June 9, 1971, effective as provided in section 2.

Passed on message of necessity. See Const. art. IX, § 2(b) (2), and McKinney's Legislative Law § 44.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twelve hundred one of the tax law is hereby amended by adding thereto a new subdivision, to be subdivision (f), to read as follows:

(f) (1) Taxes on the sale of containers made in whole or in part of rigid or semi-rigid paperboard, fibre, glass, metal, plastic or any combination of such materials, including, but not limited to, barrels, baskets, bottles, boxes, cans, cartons, carrying cases, crates, cups, cylinders, drums, glasses, jars, jugs, pails, pots, rigid foil containers, trays, tubs, tubes, tumblers, and vessels, intended for use in packing or packaging any product intended for sale. Such taxes shall be levied upon the seller or supplier of the container who or which makes sales thereof to the person who purchases them (whether filled or unfilled) for the purpose of using them in connection with and as part of sales at retail or who receives them as containers of products intended for sale at retail. Where no tax has been paid by such seller or supplier, the buyer or person who purchases the container to use it or its contents in making a sale at retail shall be liable for tax thereon upon purchasing such container. Notwithstanding the provisions of section twelve hundred twenty of this article, sellers and suppliers having no business situs in the city imposing the tax, who sell such containers to retailers within the city may pay the tax so as to prevent its levy upon such retailers. Such taxes shall be imposed at rates not to exceed (i) three cents for each plastic bottle, (ii) two cents for each other plastic container, (iii) two cents for each glass container, (iv) two cents for each metal container except one cent for metal containers shown to be made of one metal only. Where a container is made of a combination of two or more of the materials with which this subdivision deals, it shall be classified

and be taxable as if it were made of that of its component materials for which the following table provides the highest rate:

fibre and paperboard	metal	glass	plastic
1¢	2¢	2¢	3¢

(2) Any local law enacted pursuant to this subdivision may provide that: (i) metal containers and paperboard or fibre containers which have been impregnated, lined or coated with plastic or other materials shall be considered to be classified and taxable as metal containers and paperboard containers, respectively; (ii) paperboard or fibre containers with fastenings, tops and/or bottoms made of other materials dealt with by this subdivision shall be classified and taxed as paperboard or fibre containers; (iii) paperboard, metal, or plastic caps that are easily, readily, usually, and customarily separated from the container before disposal shall not be considered part of the container; and (iv) notwithstanding any exception made pursuant to subparagraphs (i), (ii) and (iii) of this paragraph, where a preponderantly glass container is made of a combination of taxable materials, the complete separation of which materials is not easily, readily, usually and customarily effected after use and before disposal, such container shall be taxed one cent in addition to the tax otherwise imposed upon it, but in no event shall the aggregate tax on such container exceed three cents.

(3) Any local law enacted pursuant to this subdivision may provide that containers sold or furnished containing products intended for use in manufacturing processes and not for final retail sale shall be exempt from such taxes.

(4) Local laws imposing taxes authorized by this subdivision shall provide for the allowance of credits against such taxes as follows:

(i) one cent for each taxable container if manufactured with the following minimum percentages of recycled material:

(A) Paperboard and fibre containers: eighty per cent, if made of boxboard; thirty per cent if made of foodboard, fibre or containerboard.

(B) Metal containers: thirty per cent if taxed during the period beginning July first, nineteen hundred seventy-one and ending June thirtieth, nineteen hundred seventy-two; and forty per cent, if taxed thereafter.

(C) Glass containers: twenty per cent if taxed during the period beginning July first, nineteen hundred seventy-one and ending June thirtieth, nineteen hundred seventy-two; and thirty per cent, if taxed thereafter.

(D) Plastic containers: thirty per cent.

(ii) one cent for each container of a clearly distinct type, class, pattern or form taxed during any taxable period provided that sixty per cent or more of all the containers of such distinct type, class, pattern or form subject to tax during such period were reused containers.

(iii) provided that the credits for each container during any taxable period shall not exceed the amount of taxes due on such container for such period.

(5) the fiscal officer of any such city in charge of the administration of any tax imposed pursuant to this subdivision, may be authorized by any local law enacted pursuant to this subdivision, to prescribe by

regulation, upon the joint recommendation of the chief officer in charge of the department or agency of such city dealing with the interests of consumers and the chief officer in charge of the department or agency of such city charged with the duty of waste collection and disposal:

(i) additional exemptions from and credits against the tax imposed by such local law; and

(ii) an additional surtax of no more than one cent per container, to be imposed upon containers made of any of the taxable components dealt with by this subdivision or any combination thereof.

In granting such exemption or credit or providing for such additional surtax, the above mentioned officers shall take into consideration the following qualities and characteristics of the container in question:

(A) the difficulty the container's material poses to the process of making recycled material.

(B) the difficulty of its manufacture from recycled materials.

(C) the difficulty and relative cost of its disposal.

(D) any obstacle it poses to consumer protection.

(E) the degree to which the container can or cannot be reused.

(F) the slowness, difficulty, and incompleteness with which the container degrades in the natural environment, either chemically or biologically.

Any such exemption, credit or surtax may be revoked by joint action of such officers, or by local law.

(6) There shall be exempted from any tax imposed pursuant to the authority of this subdivision, containers used as receptacles for food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionery, (ii) fruit drinks with contain less than seventy per cent of natural fruit juice, (iii) soft drinks, sodas and beverages such as are ordinarily dispensed at soda fountains or in connection therewith (other than coffee, tea and cocoa) and (iv) beer, wine or other alcoholic beverages.

(7) When used in this subdivision the words (i) "recycled material" mean component materials which have been derived from previously used material or from new or old scrap material, (ii) "retail sale" or "sale at retail" means a sale to any person for any purpose other than for resale as such or as a physical component part of tangible personal property, (iii) "taxable period" means each calendar month or such other periods as the official administering any tax enacted pursuant to this subdivision may provide for by regulation, (iv) "one metal only" means metal with such minimum amounts of alloys as the officer charged with the administration of any local law enacted pursuant to this subdivision shall provide by regulation, but shall not include metal which has been plated or lined with another metal. In formulating such regulations such officer shall consult with the chief officer in charge of the department or agency of such city dealing with the interests of consumers and the chief officer in charge of the department or agency of such city charged with the duty of waste collection and disposal and shall consider the difficulty of using the metal in the making of recycled material and the availability of or technical feasibility of manufacturing other metals for the same purpose and use as the metal in question but with a lower alloy content.

§ 2. This act shall take effect July first, nineteen hundred seventy-one, except that local laws may be adopted or amended pursuant to this act before such date to take effect on or after July first, nineteen hundred seventy-one.

APPENDIX II New York City
Version of Recycling Incentive Tax
LOCAL LAW No. 43

A local law to amend the administrative code of the city of New York, in relation to raising revenue by imposing taxes on plastic containers and to promote the recycling of such containers and reduce the cost of solid waste disposal to the city.

Became a law with the approval of the mayor, June 30, 1971. Passed by the local legislative body of the city of New York. Filed in the office of the secretary of state June 30, 1971.

Be it enacted by the council as follows:

Section I. Chapter forty-six of the administrative code of the city of New York is hereby amended by adding thereto a new title, to be title F, to follow title E, to read as follows:

TITLE F
TAX ON CONTAINERS

§ F46-1.0 **Definitions.** When used in this title, the following terms shall mean and include:

1. "Person." An individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise and any combination of individuals or of the foregoing.

2. "Container." Any article, thing or contrivance made in whole or in part of rigid or semi-rigid plastic, including, but not limited to, barrels, baskets, bottles, boxes, cartons, carrying cases, crates, cups, cylinders, drums, jars, jugs, pails, pots, trays, tubs, tubes, tumblers, and vessels, intended for use in packing or packaging any product intended for sale:

(a) Metal containers and paperboard or fiber containers which have been impregnated, lined or coated with plastic or other materials shall be considered to be classified as metal containers and paperboard containers, respectively;

(b) Paperboard or fiber containers with fastenings, tops and/or bottoms made of plastic shall be classified as paperboard or fibre containers;

(c) Plastic caps that are easily, readily, usually, and customarily separated from the container before disposal shall not be considered part of the container.

3. "Recycled material." Component materials which have been derived from previously used material or from new or old scrap material.

4. "Taxable period." Such calendar period prescribed for filing returns by this title or by the finance administrator.

5. "Retail sale" or "sale at retail." A sale to any person for any purpose other than for resale as such or as a physical component part of tangible personal property.

6. "Sale." The sale or furnishing of a container by a seller or supplier to a retailer.

7. "Seller or supplier." Any person who sells containers to a retailer.

8. "Retailer." Any person who purchases containers (whether filled or unfilled) for the purpose of using them in connection with and as part of sales at retail or who receives them as containers of products intended for sale at retail.

9. "City." The city of New York.

10. "Finance administrator." The finance administrator of the city.

11. "Comptroller." The comptroller of the city.

§ F46-2.0 **Imposition of tax.** On and after July first, nineteen hundred seventy-one, there is hereby imposed within the city of New York and there shall be paid a tax upon every sale of a plastic container at the rate of two cents for each container sold.

2. A credit shall be allowed against the taxes imposed by this title of one cent for each taxable container if manufactured with a minimum of thirty per cent of recycled material.

§ F46-3.0. **Presumptions and burden of proof.** For the purpose of proper administration of this title and to prevent evasion of the tax hereby imposed, it shall be presumed that all sales of plastic containers are taxable, and not entitled to any credit allowed against the taxes imposed hereby. Such presumptions shall prevail until the contrary is established and the burden of proving the contrary shall be upon the taxpayer.

§ F46-4.0. **Payment of the tax.** The tax imposed hereunder shall be paid by the seller or supplier. However, where the tax has not been paid on a sale by such seller or supplier, the retailer shall be liable for tax thereon upon purchasing the container. Should sellers and supplier having no business situs in the city, who sell containers to retailers within the city, pay the tax, the retailer purchasing the containers shall not be liable for the tax.

§ F46-5.0. **Records to be kept.** Every seller or supplier and every retailer shall keep records of all plastic containers taxed hereunder and of all purchases and sales thereof and of the taxes due and payable on the sale or on the purchase thereof, in such form as the finance administrator may by regulation require. Such records shall be available for inspection and examination at any time upon demand by the finance

administrator or his duly authorized agent or employee and shall be preserved for a period of three years, except that the finance administrator may consent to their destruction within that period or may require that they be kept longer.

§ F.46-6.0. **Exemptions.** 1. The following shall be exempt from the payment of the tax imposed by this title:

(a) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer;

(b) The United States of America, and any of its agencies and instrumentalities insofar as it is immune from taxation where it is the purchaser, user or consumer;

(c) The United Nations or other international organizations of which the United States of America is a member; and

(d) Any corporation, or association, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals, and no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; provided, however, that nothing in this paragraph shall include an organization operated for the primary purpose of carrying on a trade or business for profit, whether or not all of its profits are payable to one or more organizations described in this subdivision.

2. The following containers shall be exempt from the tax imposed by this title:

a. Containers sold or furnished containing products intended for use in manufacturing processes and not for final retail sale.

b. Containers used as receptacles for food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionery, (ii) fruit drinks which contain less than seventy percent of natural fruit juice, (iii) soft drinks, sodas and beverages such as are ordinarily dispensed at soda fountains or in connection therewith (other than coffee, tea and cocoa) and (iv) beer, wine or other alcoholic beverages.

§ F46-7.0. **Returns.** Every seller or supplier shall file with the finance administrator a return of containers sold and of the taxes due and payable thereon for the period from the day this tax takes effect until the last day of September, nineteen hundred seventy-one and thereafter for each of the four-monthly periods ending on the last day of January, May and September of each year.

2. Every retailer shall file with the finance administrator a return of containers purchased by him from sellers or suppliers having no situs within the city and of the taxes due thereon for the same periods provided in subdivision one of this section.

3. The returns shall be filed within twenty days after the end of the

periods covered thereby. The finance administrator may permit or require returns to be made for other periods and upon such dates as he may specify. If the finance administrator deems it necessary in order to insure the payment of the tax imposed by this title, he may require returns to be made for shorter periods than those prescribed pursuant to the foregoing provisions of this subdivision and upon such dates as he may specify.

4. The forms of returns shall be prescribed by the finance administrator and shall contain such information as he may deem necessary for the proper administration of this title. The finance administrator may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

5. If a return required by this title is not filed or if a return when filed is incorrect or insufficient on its face the finance administrator shall take the necessary steps to enforce the filing of such a return or a corrected return.

§ F46-8.0. **Determination of tax.** If a return required by this title is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the finance administrator from such information as may be obtainable and, if necessary, the tax may be estimated on the basis of external indices, such as volume of sales, inventories, purchases of containers, or of raw materials, production figures, and/or other factors. Notice of such determination shall be given to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within thirty days after giving notice of such determination, shall apply to the finance administrator for a hearing, or unless the finance administrator of his own motion shall re-determine the same. After such hearing the finance administrator shall give notice of his determination to the person against whom the tax is assessed. The determination of the finance administrator shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the Civil Practice Law and Rules if application therefor is made to the Supreme Court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the Civil Practice Law and Rules shall not be instituted unless (a) the amount of any tax sought to be reviewed, with penalties and interest thereon, if any, shall be first deposited with the finance administrator and there shall be filed with the finance administrator an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the Supreme Court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding; or (b) at the option of the applicant such undertaking filed with the finance administrator may be in a sum suf-

ficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

§ F46-9.0. **Refunds.** a. In the manner provided in this section the finance administrator shall refund or credit, without interest, any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application to the finance administrator for such refund shall be made within one year from the payment thereof. Whenever a refund is made by the finance administrator, he shall state his reasons therefor in writing. Such application may be made by the seller or supplier or the retailer or other person who has actually paid the tax. The finance administrator may, in lieu of any refund required to be made, allow credit therefor on payments due from the applicant.

b. An application for a refund or credit made as herein provided shall be deemed an application for revision of any tax, penalty or interest complained of. If the finance administrator, prior to any hearing held, initially denies the application for refund, he shall give notice of such determination of denial to the applicant. Such determination shall be final and irrevocable unless the applicant, within thirty days after the giving of notice of such determination, shall apply to the finance administrator for a hearing, or unless the finance administrator of his own motion shall redetermine the same. After such hearing the finance administrator shall give notice of his determination to the applicant, who shall be entitled to review such determination by a proceeding pursuant to article seventy-eight of the Civil Practice Law and Rules, provided such proceeding is instituted within four months after the giving of the notice of such determination, and provided that a final determination of tax was not previously made. Such a proceeding shall not be instituted unless an undertaking is filed with the finance administrator in such amount and with such sureties as a justice of the Supreme Court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner shall pay all costs and charges which may accrue in the prosecution of such proceeding.

c. A person shall not be entitled to a revision, refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section F46-8.0 of this title where he has had a hearing or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided. No refund or credit shall be made of a tax, interest or penalty paid after a determination by the finance administrator made pursuant to section F46-7.0 of this title unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by the finance administrator after a hearing or of his own motion, or in a proceeding under article seventy-eight of the Civil Practice Law and Rules, pursuant to the provisions of said section, in which event refund or

credit without interest shall be made of the tax, interest or penalty found to have been overpaid.

§ F46-10.0 **Reserves.** In cases where the seller or supplier or the retailer has applied for a fund and has instituted a proceeding under article seventy-eight of the Civil Practice Law and Rules to review a determination adverse to him on his application for refund, the controller shall set up appropriate reserves to meet any decision adverse to the city.

§ F46-11.0 **Remedies exclusive.** The remedies provided by sections F46-8.0 and F46-9.0 of this title shall be the exclusive remedies available to any person for the review of tax liability imposed by this title; and no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received or by any action or proceeding other than a proceeding in the nature of a certiorari proceeding under article seventy-eight of the Civil Practice Law and Rules; provided, however, that a taxpayer may proceed by declaratory judgment if he institutes suit within thirty days after a deficiency assessment is made and pays the amount of the deficiency assessment to the finance administrator prior to the institution of such suit and posts a bond for costs as provided in section F46-8.0 of this title.

§ F46-12.0. **Proceedings to recover tax.** a. Whenever any seller or supplier or retailer or other person shall fail to pay any tax, penalty or interest imposed by this title as therein provided, the corporation counsel shall, upon the request of the finance administrator bring or cause to be brought an action to enforce the payment of the same on behalf of the city of New York in any court of the state of New York or of any other state or of the United States. If, however, the finance administrator in his discretion believes that any such seller or supplier or retailer or other person is about to cease business, leave the state or remove or dissipate the assets out of which the tax, penalties or interest might be satisfied, and that any such tax, penalty or interest will not be paid when due, he may declare such tax, penalty or interest to be immediately due and payable and may issue a warrant immediately.

b. As an additional or alternate remedy, the finance administrator may issue a warrant, directed to the city sheriff commanding him to levy upon and sell the real and personal property of the seller or supplier or retailer or other person liable for the tax, which may be found within the city, for the payment of the amount thereof, with any penalties and interest, and the cost of executing the warrant, and to return such warrant to the finance administrator and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The city sheriff shall within five days after the receipt of the warrant file with the county clerk a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and in-

terest in real and personal property of the person against whom the warrant is issued. The city sheriff shall then proceed upon the warrant, in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the finance administrator a warrant of like terms, force and effect may be issued and directed to any officer or employee of the finance administration, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the finance administrator may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

c. Whenever a seller or supplier or the retailer shall make a sale, transfer, or assignment in bulk of any part of the whole of his fixtures, or of his stock of merchandise, or of stock or merchandise and of fixtures pertaining to the conduct or operation of business of the seller or supplier or the retailer, otherwise than in the ordinary course of trade and regular prosecution of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the finance administrator by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that it owes any tax pursuant to this title, and whether or not the purchaser, transferee or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

Whenever the purchaser, transferee or assignee shall fail to give notice to the finance administrator as required by the preceding paragraph, or whenever the finance administrator shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the city, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the city's claim. For failure to comply with the provisions of this subdivision, the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of article six of the Uniform Commercial Code, shall be personally liable for the payment to the city of any such taxes theretofore or thereafter determined to be due to the city from the seller, transferrer or assignor,

and such liability may be assessed and enforced in the same manner as the liability for tax under this title.

§ F46-13.0. **General powers of the finance administrator.** In addition to the powers granted to the finance administrator in this title, he is hereby authorized and empowered:

1. To make, adopt and amend rules and regulations appropriate to the carrying out of this title and the purposes thereof;

2. To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and for cause shown, to remit penalties but not interest computed at the rate of six percent per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

3. To request information from the tax commission of the state of New York or the treasury department of the United States relative to any person; and to afford information to such tax commission or such treasury department relative to any person, any other provision of this title to the contrary notwithstanding;

4. To delegate his functions hereunder to a deputy administrator, assistant administrator, commissioner or deputy commissioner in the finance administration or to any employee or employees of the finance administrator;

5. To prescribe methods for determining the containers sold or supplied or purchased and to determine which are taxable and nontaxable.

6. To require sellers and suppliers and retailers within the city to keep detailed records with respect to containers bought, sold, used, manufactured or produced, and stock and production records with respect to such containers whether or not subject to the tax imposed by this title, and to furnish any information with respect thereto upon request to the finance administrator;

7. To assess, determine, revise and readjust the taxes imposed under this title.

§ F46-14.0. **Administration of oaths and compelling testimony.** a. The finance administrator or his employees or agents duly designated and authorized by him shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of their powers and duties under this title. The finance administrator shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this title and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the Supreme Court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the finance administrator under this title.

c. Any person who shall refuse to testify or to produce books or records

or who shall testify falsely in any material matter pending before the finance administrator under this title shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the summons or subpoena of the finance administrator and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided. Such officers shall be the city sheriff and his duly appointed deputies or any officers or employees of the finance administration, designated to serve such process.

§ F46-15.0. **Penalties and interest.** a. Any person failing to file a return or to pay any tax to finance administrator within the time required by this title shall be subject to a penalty of five percent of the amount of tax due; plus interest at the rate of one percent of such tax for each month of delay excepting the first month after such return was required to be filed or such tax became due; but the finance administrator if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six percent per year. Such penalties and interest shall be paid and disposed of in the same manner as other revenues from this title. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this title.

b. Any seller or supplier or any retailer or any officer of a corporate seller or supplier or retailer, failing to file a return as required by this title, or filing or causing to be filed or making or causing to be made or given or causing to be given any return, certificate, affidavit, representation, information, testimony or statement required or authorized by this title which is willfully false, and any seller or supplier or any retailer or any officer of a corporate seller or supplier or retailer failing to keep the records required by subdivision six of section F46-13.0 of this title, shall, in addition to the penalties herein or elsewhere prescribed, be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment. It shall not be any defense to a prosecution under this subdivision that the failure to file a return or that the actions or failures to act mentioned in this subdivision was unintentional or not willful.

c. The certificate of the finance administrator to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this title, shall be presumptive evidence thereof.

§ F46-16.0. **Return to be secret.** a. Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the finance administrator, any officer or employee of the finance administration, any person engaged or retained on an independent contract basis or any person who, pursuant to this section is permitted to inspect

any return or to whom a copy, an abstract or a portion of any return is furnished, or to whom any information contained in any return is furnished, to divulge or make known in any manner any information contained in or relating to any return required under this title. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the finance administrator in an action or proceeding under the provisions of this title, or on behalf of any party to any action or proceeding under the provisions of this title, when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax; nor to prohibit the delivery of such a certified copy of such return or of any information contained in or relating thereto, the United States of America or any department thereof, to the state of New York or any department thereof, or to any agency or department of the city of New York, provided the same is requested for official business; nor to prohibit the inspection for official business of such returns by the corporation counsel or other legal representatives of the city or by the district attorney of any county within the city; nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof. Returns shall be preserved for three years and thereafter until the finance administrator permits them to be destroyed.

b. Any violation of subdivision a of this section shall be punishable by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, in the discretion of the court, and if the offender be an officer or employee of the city he shall be dismissed from office and be incapable of holding any public office for a period of five years thereafter.

§ F46-17.0. **Notices and limitations of time.** a. Any notice authorized or required under the provisions of this title may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this title or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this title by the giving of notice shall commence to run from the date of mailing of such notice.

b. The provisions of the Civil Practice Law and Rules or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise,

assess, determine or enforce the collection of any tax or penalty provided by this title. However, except in the case of a willfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law the tax may be assessed at any time.

c. Where, before the expiration of the period prescribed herein for assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

§ F46-18.0. **Construction and enforcement.** This title shall be construed and enforced in conformity with chapter three hundred ninety-nine of the laws of nineteen hundred seventy-one, pursuant to which it is enacted.

§ F46-19.0. **Separability.** In any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of this title, and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 2. This local law shall take effect July first, nineteen hundred seventy-one.