

1948

Geneva Steel Company v. Utah Tax Commission of Utah : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

7236 P1

TABLE OF CONTENTS

	<i>Page</i>
I. STATEMENT OF FACTS	1-7
a. The Sale of Geneva	1-4
b. The Deficiency Assessment by Defendant	4-6
c. The Federal Policy	6-7
II. STATUTES INVOLVED	7-13
a. The Sales Tax Statutes	8-10
b. The Use Tax Statutes	10-13
c. The Uniform Sales Act	13
III. STATEMENT OF POINTS	14
IV. ARGUMENT	15-42
a. The Conveyance of the "Geneva Steel Plant" Was Not a "Sale" of "Tangible Personal Property."	15-21
b. The Transactions by the United States with respect to the "Geneva Steel Plant" and the "Inventories" were not "Retail Sales" Made by a "Retailer." ..	22-24
c. The Specific Exemption Excluding from Taxation "Isolated" and "Occasional Sales" Here Applies	24-31
2. The State of Utah Does Not Have The Power to Interfere with the Disposal by the United States Government of its Property; and the Utah Statutes Accordingly Exempt from Sales-Use Taxation Sales by the Federal Government	31-38
3. The Deficiency Use Tax Assessment Is Void, Because If Any Tax Was Here Applicable It Would Be the Sales Tax ..	38-39
4. The Tax Commission's Attempt to Tax Alone this Transaction Is Discriminatory and Therefore Void as in Violation of the Federal and Utah Constitutions. ..	39-42
V. CONCLUSION	42-47

INDEX OF AUTHORITIES

	<i>Page</i>
Laws of Utah 1933:	
Chapter 63	8, 17
Laws of Utah 1937:	
Chapter 110	25
Utah Code Annotated 1943:	
80-5-46 (20)	47
80-15-2 (b)	9, 22, 32
80-15-2 (b)	13, 19
80-15-2 (e)	8, 11, 22
80-15-3	9, 32
80-15-4	8, 18
80-15-5	9, 32
80-15-6	10, 32
80-15-9	9, 32
80-15-10	9, 32
80-15-11	9, 32
80-15-19	9, 32
80-16-2	11, 12, 34
80-16-2 (a)	22, 34
80-16-2 (b)	22
80-16-2 (e)	32
80-16-2 (f)	22
80-16-3	10, 18
80-16-4 (a)	39
80-16-4 (b)	32
80-16-5	11, 32
80-16-6	11, 32
80-16-8	13
80-16-9	13
80-16-10	13
80-16-12	7
80-16-13	7
80-16-15	13
80-16-16	11, 32
80-16-18	13
81-1-1	13
88-2-11	13
U. S. C. A. Title 4, Sec. 104 et seq.	38
Federal Constitution:	
Art. 6, Clause 2	38

	<i>Page</i>
Constitution of Utah:	
Art. II, Sec. 24	40
Art. II, Sec. 27	40
50 Am. Jur. 309, ¶ 319	44
50 Am. Jur. ¶¶ 280, 383	45

INDEX OF CASES

Acorn Iron Works v. Auditor General, 294 N. W. 126, Cited and quoted	23
Battle Creek Wrapping Mach. Co. v. Paramount Baking Co., 88 Utah 67, 89 P. 2d 323, Cited	18
Falls City Breeding Co. v. Reeves, 40 F. Supp. 35, Cited	37
Local Realty Co. v. Steele, 62 P. 2d 558, 90 Utah 458, Cited	45
McCulloch v. Maryland, 17 U. S. 159, 4 Wheat. 318, 4 L. ed. 579, Cited	36
New Park Mining Co. et al v. State Tax Comm'n., ... Utah ..., 196 P. 2d 485, Cited	45
Norville v. State Tax Commission, 98 Utah 170, 97 P. 2d 937, Cited and quoted	43
Olson Co. v. State Tax Commission, 109 Utah 553, 168 P. 2d 324, Cited and quoted	44
Southern California Telephone Co. v. State Board of Equalization, 82 P. 2d 422, Cited	21

	<i>Page</i>
Union Portland Cement Co. v. State Tax Comm'n., 170 P. 2d 164, Cited	31, 39
Union Portland Cement Co. v. State Tax Comm'n., (on rehearing) 176 P. 2d 879, Cited	7
Utah Concrete Products Corp. v. State Tax Comm'n., 101 Utah 513, 125 P. 2d 408, Cited	19, 33
Van Cott v. State Tax Commission, 98 Utah 264, 96 P. 2d 740, Cited	35
Washington County v. State Tax Commission, 133 P. 2d 564, 103 Utah 73, Cited and quouted	43
Whitmore Oxygen Co. v. Utah State Tax Comm'n., 196 P. 2d 976, Cited	39

IN THE
Supreme Court
OF THE
STATE OF UTAH

GENEVA STEEL COMPANY,
a corporation,

Plaintiff,

v.

THE STATE TAX COMMISSION
OF UTAH,

Defendant.

Case No.
7236

BRIEF OF PLAINTIFF

I.

STATEMENT OF FACTS

The basic facts are largely stipulated (R. 10-17) and not in dispute (R. 187).

a. The Sale of Geneva.

By the original of Exhibit B herein (R. 21-32) dated June 19, 1946, the Government of the United States sold to plaintiff, Geneva Steel Company, a wholly owned subsidiary of United States Steel Corporation, the "Geneva Steel Plant." The Government had constructed and op-

erated this integrated steel plant in Utah in connection with World War II. (Stip, par. 7 to 12, R. 11-12.) As the purchase price plaintiff paid the Treasurer of the United States \$40,000,000.00, the lump sum consideration for the conveyance to it of the "Geneva Steel Plant." (Ex. B, R. 21-32, and Stip. Par. 5, 12 and 14, R. 11-12.)

In addition, plaintiff bought from the Government certain "Inventories" for an additional and separate purchase price. This price was based upon unit prices applied to the inventories actually on hand as of the effective date of sale, midnight June 18, 1946; was finally computed to be \$7,175,345.00; and was likewise paid to the Treasurer of the United States. (Ex. B, R. 21-32 and Stip. par. 6, 12 and 14, R. 11-12.)

In constructing, operating and so disposing of both the "Geneva Steel Plant" and the "Inventories", the Federal Government functioned through the Reconstruction Finance Corporation, a wholly owned government instrumentality. (Stip. par. 3, 7, 8, 9 and 10, R. 10-12.) However, in connection with the over-all disposal of its entire War Plant Congress required Reconstruction Finance Corporation (as it did all other government agencies disposing of war surplus property) to utilize the over-all selling and policy-making services of the War Assets Administrator, who was a federal attorney-in-fact for that purpose. (Stip. par. 4, 23 and 24, R. 10-15.)

The basic contract of sale for "Geneva" and the "Inventories," Exhibit B, states that "Reconstruction

Finance Corporation” was “Seller” acting “by and through” the “War Assets Administrator.” (Stip., R. 21-32.) Likewise read the subsequent instruments of conveyance executed and delivered after the fact of the sale and in performance of this contract. (Stip. par. 18 and 20, and Ex. C, D, E, F and G ; R. 33-109.) Geneva Steel Company was in possession of the plant both before and after the sale, first as operator for the Government and after June 18, 1946 as the owner. (Stip. par. 8, 9 and 12, R. 12.)

In effecting the sale, both R.F.C. and the War Assets Administrator operated through their Washington main offices. (Stip. par. 25b, R. 16, 32.) Geneva Steel Company is a Delaware corporation, with its principal place of operations in Utah. It executed the contract of sale in Utah (R. 32), while United States Steel Corporation guaranteed plaintiff’s performance of the contract. (Stip. Ex. B, R. 32.)

Neither the Federal Government nor R.F.C. and W.A.A., its two instrumentalities here concerned, is licensed or registered as a retailer under the Utah sales and use tax system. (Stip. par. 24b and 26b, R. 15-16.) Nor did they mention or pretend to collect any additional sum from plaintiff denominated or in the nature of a sales or use tax. This was so both as to the “Inventories”—admittedly tangible personal property—as well as with respect to such components of the “Geneva Steel Plant” which might be classified as “tangible personal property,” as distinguished from the land, water rights,

good will and other tangible or intangible assets together constituting the integrated steel plant. (Stip, par. 21, R. 14.)

The lump sum price for "Geneva" as an "integrated steel plant" was at no time prior to the sale broken down into component items, either as between real or personal property, tangibles and intangibles, or as between its four principal physical locations in Utah at Geneva, and near Columbia, Payson and Cedar City. (Stip. par. 15, R. 12 and Ex. B, R. 21-34.) As appears from Exhibit A herein (R. 19-20) (amplified in the Congressional Report on the sale of Geneva) the price for "Geneva" had no relationship to either cost or inventory value; the price was based upon the productive capacity of this integrated steel plant related to such factors as potential post-war demands for its product, potential markets and their location, freight rates, operating costs and competitive prices.

b. The Deficiency Assessment by Defendant.

In its administration of the Use and Sales Tax Acts since 1933, the defendant State Tax Commission of Utah has consistently and until now without exception construed as exempt such items of tangible personal property as might be included in a bona fide sale of an integrated property unit, as distinguished from inventories. A list of examples of such sales constitutes Exhibit H (R. 111). The sale of personal property constituting a part of an operating unit similar to Geneva except for

size has not been considered taxable whether the seller transferring ownership of such an integrated property unit was selling one or several units; or to one or several purchasers; or incidentally invoked the services of a sales agent to assist in the disposal. (Ex. H, R. 111.)

No exceptions have been made in this policy except for this instance and the assertion at the hearing before the Commission (R. 197) and in P. 6 of its decision (R. 213) that it was now intending to proceed against other buyers of integrated businesses from W.A.A. or R.F.C.

Twenty months after the date of sale, on February 25, 1948, the defendant Commission first levied a deficiency Use Tax against plaintiff. This deficiency assessment is two-fold: it consists of a tax based upon the purchase price of that portion of the "Inventories" which are not presently agreed by the Commission to be exempt for reasons not here involved; and a tax based upon that portion of the "Geneva Steel Plant," as distinguished from the "Inventories," which the Commission has determined to be tangible personal property. Also included is an interest item for \$37,976.69 to March 6, 1948. (Stip. par. 22, R. 14, and R. 1-6.)

Since the lump sum purchase price for the "Geneva Steel Plant" has not been broken down to "tangible personal property," the Commission used an allocation which plaintiff had made on December 12, 1946 when it determined how much of the \$40,000,000.00 was to be considered real property for the sole purpose of affix-

ing the revenue stamps required by the terms of federal statutes. (Stip. par. 15 and 19, R. 12, 13.)

c. The Federal Policy.

It has not been the policy of the Federal Government in the case of bulk sales or the sales of integrated businesses to collect from purchasers any additional item in lieu of or denominated a sales or use tax. (Stip. par. 25, R. 15, 16.) But where it has sold sleeping bags, electric motors, jeeps or similar items, the Federal Government generally has collected from purchasers an additional percentage of the purchase price which it has denominated a "sales tax"; and this additional sum the Government has remitted to various state and local taxing authorities. (Stip. par. 24a and 26a, R. 15, 16.)

Thus both R.F.C. and W.A.A. have collected such "sales tax" in Utah. But neither has been licensed as a "retailer" under the Utah law, and both refuse to use sales tax tokens or to use the periodic report forms required by the Commission to be submitted by licensed retailers. (Stip. par. 24b and 26b, R. 15, 16.) The Federal Government has made it clear that it has collected such additional items—not because of any mandate of state statutes, for it denies such state power—but as a matter of policy. (Ex. J. R. 114.) The Federal Government has, however, disclosed to such state and local taxing agencies, including the Utah Commission in this case, information with respect to the sales of integrated businesses where

no such "sales tax" was collected from the purchasers as a condition of the sale. (Stip. par. 25a, R. 16.)

On the basis of the foregoing facts which are either stipulated or beyond dispute, the Commission rejected plaintiff's petition for a redetermination August 19, 1948 (R. 214). Plaintiff under Sec. 80-16-12, U.C.A. 1943, now seeks from this tribunal relief from the Use Tax deficiency assessment which it claims is improper, having filed the bond required by Sec. 80-16-13.

II.

STATUTES INVOLVED

In 1933 Utah, together with many other states, enacted an "Emergency Sales Tax Act." This law was complemented in 1937 by the Use Tax to fill in the interstate commerce loopholes of the basic sales tax, particularly with respect to prior adverse discrimination against Utah merchants. (Tax Commission Third Biennial Report 1935-36, p. 54.)

The two taxing statutes are "correlative and complementary" and the "legislature-created specific exemptions from the sales tax are also to be treated as exemptions from the use tax." *Union Portland Cement Co. v. State Tax Commission of Utah* (on rehearing), 176 P. 2d 879.

Since the scope of coverage of these acts is here involved, all sections deemed directly concerned are set forth in full, together with references to other pertinent sections having generally to do with the taxing scheme which are too lengthy to be quoted. All italics are ours.

a. The Sales Tax Statutes.

The title to the Sales Tax Act, Chapter 63, Laws of Utah 1933 and now Chapter 15, Title 80, of the Utah Code, states that the act was to impose "a tax upon the retail purchases of certain *commodities*, admissions and services." The tax is imposed by Section 80-15-4 upon "every retail sale of tangible personal property *made within the State of Utah.*"

Section 80-15-2(e) defines the terms "retailer" and "retail sale" as follows:

(e) The term "retailer" means a *person* doing a regularly organized retail business in tangible personal property, *known to the public as such* and selling to the user or consumer and not for resale, and includes commission merchants and all persons regularly engaged in the business of selling to users or consumers within the state of Utah; but the term "retailer" does not include farmers, gardeners, stockmen, poultrymen, or other growers or agricultural producers, except those who are regularly engaged in the business of buying or selling for a profit. The term "retail sale" means every sale *within the state of Utah* by a retailer or wholesaler to a user or consumer, except such sales as are defined as wholesale sales or otherwise exempted by the terms of this act; but *the term "retail sale" is not intended to include isolated nor oc-*

casional sales by persons not regularly engaged in business, nor seasonal sales of crops, seedling plants, garden or farm or other agricultural produce by the producer thereof, nor the return to the producer thereof of processed agricultural products.

Section 80-15-2(a) in defining the term "person", excludes by implication the United States and its agencies, as follows:

(a) The term "person" includes any individual, firm, co-partnership, joint adventure, corporation, estate or trust, or any group or combination acting as a unit and the plural as well as the singular number unless the intention to give a more limited meaning is disclosed by the context.

Section 80-15-5 provides for the collection of the tax. The vendor is to collect the tax from the vendee and is to file returns bimonthly on forms prescribed by the Commission. This section also provides for the use of tax tokens; for plenary regulatory power of the Commission over vendors, including vendor-liability for the tax; and for interest and penalties thereon if not remitted.

Section 80-15-3 covers licensing of vendors; Section 80-15-9 requires licensees to keep certain records; Section 80-15-10 makes the tax a lien against property of vendor; Section 80-15-11 provides that unpaid taxes constitute "*a debt due the state from the vendor*" and further provides methods for collection of the debt; while Section 80-15-19 imposes criminal sanctions upon non-complying vendors.

In addition to the specific exemption in Section 80-15-2(e) quoted above of “isolated” and “occasional sales by *persons not regularly engaged in business*” is the exemption by Section 80-15-6 of “all sales which the state of Utah is prohibited from taxing under the Constitution or laws of the United States, or of the state of Utah.”

b. The Use Tax Statutes.

Section 80-16-3 of the Use Tax Act, enacted as Chapter 114, Laws of Utah 1937, imposes an excise tax on the storage, use or other consumption in Utah *based upon the “sales price”* of “tangible personal property purchased” *unless* the Sales Tax has been paid in connection with the sale or sales are otherwise exempt by the specific provisions of the act or the implied provisions carried over from the Sales Tax Act. (Union Portland Cement Co. v. State Tax Commission, *supra*.) The section reads as follows:

80-16-3. Use Tax.

There is levied and imposed an excise tax on the storage, use or other consumption in this state of tangible personal property *purchased* on or after July 1, 1937, for storage, use or other consumption in this state at the rate of two per cent of the sales price of such property.

Every person storing, using or otherwise consuming in this state tangible personal property *purchased* shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this state.

Under the Use Tax, too, “retailers” must register as required by Section 80-16-5; and the retailers *are personally liable for the tax which they are required to collect at the time of sale*, the tax constituting “a debt owed by the retailer to this state.” (Sec. 80-16-6.)

Section 80-16-16 provides that the Use Tax “shall be a lien upon the property of any retailer”; and the following definitions contained in Section 80-16-2 excluding again by implication the United States as a “retailer”, “person”, etc. are set forth in full:

(a) “Storage” means and includes any keeping or retention in this state for any purpose except sale in the regular course of business of tangible personal property *purchased from a retailer*.

(c) “Purchase” means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. A transaction whereby the possession of property, is transferred but the seller retains the title as security for the payment of the price shall be deemed a purchase.

(e) “*Person*” means and includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any county, city, municipality, district, or other political subdivision thereof, or any other group or combination acting as a unit, and the plural as well as the singular number.

(f) “Retailer” means and includes every *person* engaged in the *business* of making sales of tangible personal property for storage, use or

other consumption; *provided*, when in the opinion of the commission it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales, on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the commission may so regard them and may regard the dealers, distributors, supervisors or employers, as retailers for purposes of this act.

(h) "Business" includes any activity engaged in by any *person* or caused to be engaged in by him *with the object of gain*, benefit or advantage either direct or indirect.

(i) "Tax" means the tax payable by the person storing, using or consuming tangible personal property, the storage, use or consumption of which is subject to tax or the aggregate amount of taxes *due from any retailer* making sales of tangible personal property for storage, use or other consumption in this state during the period for which he is required to report his collections, as the context may require.

(j) "Taxpayer" shall include *every retailer*, as herein defined, and every person storing, using or consuming tangible personal property, the storage, use or consumption of which is subject to the tax imposed by this act *when such tax was not paid to a retailer*.

Consistent with the definition of "Taxpayer", the civil and criminal sanctions of the Use Tax Statutes (in contrast to the Sales Tax Section) extend beyond the "retailer" to include the *purchaser*, who is also with the retailer directly liable to the state of Utah for the pay-

ment of the tax where due. (See sections 80-16-8, 9, 10, 15 and 18.)

c. **The Uniform Sales Act.**

Neither the Sales Tax Act nor the Use Tax Act purports to define a "sale", leaving this to Section 88-2-11 of the Uniform Sales Act (Title 81 of the Utah Code). Section 80-15-2(b) of the Sales Tax Act does, however, broaden the term "sale" to include the following *in addition* to "sales" as defined by Utah's statutes which otherwise codify the common law definitions:

The term "sale" or "sales" includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale, and also includes the sale of electrical energy, gas, services or entertainment taxable under the terms of this act. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale.

Attention is particularly invited to the following definitions codifying common law meanings in the Uniform Sales Act:

81-1-1. **Contracts to Sell and Sales.**

(1) A contract to sell goods is a contract whereby the seller agrees to transfer the property *in goods* to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property *in goods* to the buyer for a consideration called the price.

* * * *

III.

STATEMENT OF POINTS

1. The Scope of the Sales-Use Tax Act Does Not Extend to the Transaction Here Involved Because:

- a. The Conveyance of the "Geneva Steel Plant" Was Not a "Sale" of "Tangible Personal Property."
- b. The Transactions by the United States with respect to the "Geneva Steel Plant" and the "Inventories" were not "Retail Sales" Made by a "Retailer."
- c. The Specific Exemption Excluding from Taxation "Isolated" and "Occasional Sales" Here Applies.

2. The State of Utah Does Not Have the Power to Interfere with the Disposal by the United States Government of Its Property; and the Utah Statutes Accordingly Exempt from Sales-Use Taxation Sales by the Federal Government.

3. The Deficiency Use Tax Assessment Is Void, Because If Any Tax Was Here Applicable It would Be the Sales Tax.

4. The Tax Commission's Attempt to Tax Alone this Transaction Is Discriminatory and Therefore Void as in Violation of the Federal and Utah Constitutions.

IV.

ARGUMENT

1. The Scope of the Sales-Use Tax Acts Does Not Extend to the Transaction Here Involved Because:

- a. The Conveyance of the "Geneva Steel Plant" Was Not a "Sale" of "Tangible Personal Property."
- b. The Transactions by the United States with respect to the "Geneva Steel Plant" and the "Inventories" were not "Retail Sales" made by a "Retailer."
- c. The Specific Exemption Excluding from Taxation "Isolated" and "Occasional Sales" Here Applies.

To come within the scope of the Sales-Use Tax coverage Utah has required three basic conditions before the statutes are applicable:

- (1) There must be a "Sale" of "Tangible Personal Property" within the intended sense.
- (2) That sale of tangible personal property must both have been made by a "Retailer" and be a "Retail Sale."
- (3) The sale must be neither "Isolated" nor "Occasional."

a. The "Geneva Steel Plant" Was Not "Tangible Personal Property".

Here we are excluding the "Inventories", to which this point is inapplicable. We are using the term "Geneva" in the sense not only used by the contracting

parties under Exhibit B which was the taxable sale, but as per paragraph 5 of the Stipulation (R. 11). There it was recognized that what was sold was an "integrated steel plant," including all real and personal property, and rights and interests appurtenant thereto, contracts, water rights, mining rights, and permits, leases, licenses, easements and all other interests or rights of every character in, or pertaining to, or incident to the use or operation of the Geneva Steel Plant at Geneva, Utah, the Geneva Coal Mine near Columbia, Utah, the Iron Mountain Ore Mine Facilities at Cedar City, Utah, the Quarry Facilities at Payson, Utah, and the Interchange Yard near Columbia, Utah.

True, so defined Geneva necessarily includes items which if taken separately would be tangible personal property, just as the light globes, carpets, blinds and other parts of a house or building might be if treated and sold separately. But just as every day such items (in part fixtures and in part personalty) are sold as a part of the realty, so here with the integrated Geneva Steel Plant which likewise was sold as a unit.

The legislative intent *not* to tax the incidental transfer of title to such personal property when it constitutes but a part of the transfer of an integrated business or property unit in the nature of a capital asset to a new owner, appears from the following:

(1) The Title of the Sales Tax expresses the intention of the Legislature to tax the sale of "*commodi-*

ties, admissions and services.” (Chapter 63, Laws 1933.) The sale of Geneva was no more the sale of a “commodity” than it constituted an “admission” or a “service”.

Webster’s Encyclopedic Dictionary defines “Commodity” as follows: “specifically, an article of merchandise; anything movable that is bought and sold, as goods, wares, produce of land and manufacturers.”

This transaction constituted the single sale of an “integrated steel plant,” comprising in one unit the necessary components of land, buildings, cranes, water rights, contracts, locomotives, mining rights, conduits, good will, and all the other requisite items which were an integral part thereof. True, the plant might have been, or now *ex post facto* may be broken down into its various parts. But to transmute the single actual transfer of *the integrated plant* into a series of sales of its countless parts, some of which may be tangible personal property, seems to us to do violence not only to a nonseverable contract, but to the obvious meaning of the Utah statutes.

The law speaks of the “sale” and a tax based upon the “purchase price” of “tangible personal property” sold at “retail” by a “retailer.” The Legislature did not speak of a tax based upon the “transfer” of “all tangible personal property”, sold by “any person including the United States,” and whether “incidental to the sale of an integrated business, or sold alone as

tangible personal property.” (§§80-15-4 and 80-16-3.)

This contract was not divisible, except as between “Geneva” and the “Inventories”. Battle Creek Wrapping Mach. co. v. Paramount Baking Co., 88 Utah 67, 39 P. 2d 323.

(2) Since 1933 and until this single isolated occasion, defendant Tax Commission has *without exception* construed Utah’s statutes administratively to exempt such transactions as beyond the intended scope of tax coverage. Never has it attempted to tax the transfer of the cash register of the corner grocery store which changes hands; the chairs, tables and silverware of the restaurant sold to a new operator; the electric range included in the sale of John Doe’s home; or the countless other transactions *identical with the incidental transfer of tangible personal property in connection with the sale of Geneva*, except perhaps for size. (Ex. H, R. 111.)

For example, when the old Traction Company sold its system to the Salt Lake City Lines during the war, no tax was imposed on the transfer of its several hundred busses—obviously tangible personal property. When the Standard Oil Company of California after the war sold most of its Utah service stations to various independent “Chevron” owner-operators, the Commission did not tax the incidental transfer to the new owners of the pumps, gauges and other articles of tangible personal property comprising the bulk of the transaction. The examples of Exhibit H could be multiplied endlessly to

the one end: that until Geneva attracted public attention no one considered for a moment that the Sales-Use Tax Acts applied to the transfer to new owners of capital assets to the extent any tangible personal property was involved.

(3) The Legislature has not changed the statutes to correct the Commission's construction as contrary to legislative intent. On the contrary, in 1937 it added the consistent "isolated" or "occasional sale" exclusion in defining the scope of tax coverage.

(4) Nothing in the cases decided by this court discussing the purpose of the Sales-Use Tax Acts or the construction of the statutes here involved lends support to the Commission's novel contention now made with respect to Geneva alone.

The nearest applicable case seems *Utah Concrete Products Corp. v. State Tax Commission*, 101 Utah 514, 125 P. 2d 408, where the Commission assessed a Use Tax against a manufacturer using his own products. There this court set the assessment aside because no sale at all had occurred as the necessary taxable incident. Here we ask for the same result, because while a "sale" occurred, it did not involve the "retail sale" by a "retailer" of "tangible personal property", nonisolated and nonoccasional, which is the prerequisite of either sales or use tax liability.

(5) Here at no time has there been a "purchase price" for the tangible personal property included in

the sale of Geneva upon which the tax could be based. This was not by design or a fraud; it is inherent in the nature of this and similar transactions. (Ex. B and Stip. par. 12, 14, 15, 17 and 19; R. 12-13.)

We do not contend that a tax otherwise applicable can be defeated by the device of lumping the price for the personal property with the price paid for other property items. We do submit that the inherent difficulty in making such a segregation *where sales of integrated businesses are concerned*, here illustrated by the extensive assumptions that the Commission has made in this case, argues again that the legislature did not intend to include transfers of the tangible personal property portions of integrated business within the Sales-Use Tax coverage.

The nature of this integration is apparent from examination of ex port facto Exhibit 9 (R. 175). Included in the transfer to plaintiff of Geneva were, for example, "Water Claims and Applications" together with "muniments of title". While in one sense (Restatement of the Law-Property, Sec. 8(c)) such may be "personal property", tangible *and intangible*, since 1933 such items have never been segregated from the realty for sales-and-use tax purposes in the countless every-day sales of real property with accompanying transfers of abstracts of title, water right certificates, and similar items.

And so with "all other items of portable and stationary machine, tools, machinery and equipment," etc.

listed in ex post facto Exhibit 9 of November, 1946. In *Southern California Telephone Company v. State Board of Equalization*, 82 P. 2nd 422, the Supreme Court of California held a central telephone exchange to be *a single unit of real property for tax purposes*, although it was composed in part of countless articles readily portable and not attached to the building in the usual sense of fixtures becoming a part of the realty.

(6) Although most states have adopted the Sales-Use Tax system, and neither government sales of war plants nor every-day transfers of property units are confined to Utah alone, no other state appears to have attempted such action as was here initiated by the defendant Commission. However as noted hereinafter, three states have amended their statutes to cover War Surplus retail sales.

(7) A further indication of the legislative intent to exclude transactions of this nature is that generally the personal property concerned in such cases has already been subjected, as here, to the coverage of the Sales-Use Tax Acts at the time each component item was purchased at retail prior to becoming a part of the integrated business. Of course this contention is not controlling in itself. It does lend practical support, however, to the claim that incidental transfers of the items of movable, tangible personal property comprising an integrated business are not again subject to the tax when the entire business is sold as a unit.

b. The Transactions by the United States with respect to the "Geneva Steel Plant" and the "Inventories" Were Not "Retail Sales" Made by a "Retailer".

The Government is not a "retailer", "doing a regularly organized retail business," and "known to the public as such." (§§ 80-15-2(a) and 80-16-2(b).) Those words apply to the Z.C.M.I., the corner drug store, the markets, and the myriad others in the categories which we all know to be engaged in the business of selling to consumers the vast supply of available "commodities".

The Government was not making these sales "with the object of gain"; it was disposing of its Surplus War Plant constructed and acquired in the tragic "business" of the United States to wage war.

The Government is by implication excluded as a "person"; "retailers" are limited to "persons", by the wording of the statutes. (§§80-15-2(e) and 80-16-2(f).)

Expressly by § 80-16-2(a) "storage" (and by implication, too, both "consumption" and "use") is to be combined with a "purchase from a retailer" before there is use tax liability. Hence, while in a broad sense therefore the Government through War Assets Administration or even R.F.C. might have been making sales of jeeps, sleeping bags and radios to ultimate consumers, still the United States was not a "retailer" *as defined by the statutes here applicable.*

Further, the difference between a retail sale of a jeep, and the sale of the Geneva Steel Plant, would seem

for tax purposs to be at least as readily distinguishable as the sale of his cash register by the corner grocer from sales of his groceries. The Tax Commission has had no trouble in fifteen years in saying that the grocer's "business" is confined to the sale of groceries; and thus when he happened to sell his cash register he was not a "retailer".

Just because a licensed retailer is such for some purposes does not subject to taxation every sale he makes. As was said by the Michigan Supreme Court in *Acorn Iron Works v. Auditor General*, 294 N.W. 126:

To some extent defendants stress the fact that "The plaintiff at bar engages in the retail sales business, and has applied for and accepted a license under the general sales tax act; it maintains on hand in its shop a stock-in-trade, consisting of from 100 to 200 tons of structural steel material." But it does not follow from the circumstances just above noted that merely because some of plaintiff's transactions are subject to the sales tax therefore all of its business is likewise subject to the tax. One may be both a retailer and a wholesaler of merchandise, but clearly by the very terms of the statute (section 2) the sales tax law applies only to his "sales at retail." And likewise one may be both a retailer of merchandise and a dealer in real estate, but even so the sales tax would not be applicable to his real estate dealings.

The state board of tax administration from time to time has changed its construction and method of enforcing the sales tax law as it affects building trade transactions; but in this connection it is sufficient to note that liability for payment of the sales tax is controlled by statute.

It cannot be imposed by rulings or regulations of the board.

“Tax exactions, property or excise, must rest upon legislative enactment and collectors can act only within express authority conferred thereby, the scope of such laws cannot be extended by implication or forced construction and language, if dubious, is not resolved against the taxpayer.” (Syllabus) *J. B. Simpson, Inc. vs. O’Hara*, 277 Mich. 55, 268 N.W. 809.

So here not only was neither the United States nor its agencies the R.F.C. and W.A.A. a “retailer” as defined and required by Utah’s statutes; but to the extent the United States *did* make sales at retail in the sense that the buyers were the ultimate consumers, these sales were limited to the thousands of jeeps and sleeping bags and electric motors. They did not extend to sale of the single, isolated Geneva Steel Plant which was a transaction of *an entirely different character; namely, the conveyance of an “integrated steel plant” to a new operator.*

Such transactions are not retail sales of commodities; they are sales of capital assets and as such constitute an entirely different category from normal retail sale transactions. That this difference is well recognized can be proved by reference to income tax decisions, both state and federal.

c. The Specific Exemption of “Isolated and Occasional Sales” Here Applies.

Utah’s statutes specifically exempt from Sales-Use

Tax Coverage sales which are either "isolated" or in the alternative, "occasional". Plaintiff contends that the transfer to it of Geneva comes within that category.

Plaintiff has been restricted by the Government from selling Geneva for at least another three years by the terms of the first sale in its history. (Ex. B, R. 30.) Common knowledge informs us that the sale of Geneva was not only "isolated" in the sense that it was segregated and separated from the usual run of sales of tangible personal property at retail; but also that the transaction was "occasional" in that it was casual, incidental, infrequent, and pertaining to an occasion—the tests found in Webster or any elementary dictionary.

For example, Webster's Encyclopedic Dictionary defines "occasional" as: "Incidental; occurring at times, but not regular or systematic; made or happening as opportunity requires or admits."

Publicity attendant the transfer to private industry of Geneva makes known to every Utahn at least, the unusual event which has taken place—far beyond the occasional sale every day of other businesses or integrated properties, including incidental thereto component items of tangible personal property which the Commission recognizes are exempt.

The title to Chapter 110, Laws of Utah 1937, which created this express exemption to the Sales-Use Tax system, reads: "An Act * * * Exempting from Taxation * * * Isolated Transactions and Occasional Transactions In-

volving Transfer of Property Rights *from Persons not Engaged in a Regularly Constituted Business* or Enterprise Subjected to Taxation by the Terms of the " " " Act."

It appears to us obvious beyond argument that the Federal Government was not so engaged in a "regularly constituted business or enterprise" subjected to taxation by the State of Utah.

For convenience we reprint at this time Section 39 from the Commission's Sales and Use Tax regulations with respect to isolated and occasional sales (Ex. 1, R. 113):

Isolated or occasional sales made by persons not regularly engaged in business are not subject to the tax. Under this rule no sale is taxable if it is not made in the regular course of a business of a person selling tangible personal property. The word "business" as thus used refers to *an enterprise*, engaged in selling tangible personal property notwithstanding the fact that the sales may be few or infrequent.

All sales made by officers of a court, pursuant to court orders are occasional sales, with the exception of sales made by trustees, receivers, assignees and the like in connection with the liquidation or conduct of a regular established place of business. Examples of such casual sales are those made by sheriffs in foreclosure proceedings and sales of confiscated property.

Under both the wording of the statutory exemption and the Commission's amplification thereof the exclusion here applies.

The present attempt to subject this transaction to tax coverage appears to be the original idea of the defendant Tax Commission, in this case, aided and abetted by the Attorney General. (Ex. 3, R. 158-163.) That attempt, we submit, is contrary to both legislative intent and the Commission's own past practice. As shown by Exhibit "H," the Commission has never before taxed this type of transaction.

At this point it might be well to refer to the Attorney General's first opinion of September 25, 1947 (Exhibit 3) wherein he states:

"An argument advanced by the Geneva Steel Company which gives me considerably more concern is their contention that the sale of Geneva Steel property did not constitute the sale of tangible personal property itself, that the sale was a sale of an entire going concern and that no distinction was made between real property and personal property, and that the entire property, because of the manner in which it was handled, took on the characteristics of real property. Support is given to this argument by dicta found in a concurring opinion in the Utah case of *Telonis v. Staley*, 104 Utah 505. *If, in fact, this sale had been regarded and treated by the parties thereto as a single sale of a going old concern, we would be inclined to follow the language of the court in the above mentioned case.* It does not appear, however, that the parties so considered the sale."

When the record in the formal hearing established beyond argument that the transaction *was* the single sale of "an integrated steel plant", for this and other

reasons, the Tax Commission gave the Attorney General a chance to correct and change his opinion. Instead he in effect said by his letter of June 25, 1948: "I will not change my first opinion even though it was bot-tomed upon false premises."

It was the Attorney General, too, who insisted that in spite of the Commission's regulations the deficiency assessment to be levied against Geneva in this case should be under the Use Tax law and not under the Sales Tax Act. (Exhibit 3) The Attorney General's letter of December 13, 1947 is also interesting in that from his information he then felt that the sale was not being made by the Reconstruction Finance Corporation. (Exhibit 3) The record now clearly shows, however, that the sale was made in Utah by the United States, which used as its operating agencies the Reconstruction Finance Corporation for holding title and operating Geneva, the War Assets Administration merely as the sales agent, and the Treasurer for payment. (Stipulation pars. 4, 13 and 14.) But as noted, the Attorney General directed the Commission nevertheless to make the assessment. (Exhibit 4.)

Recourse to the laws and interpretations of our sister states indicates a few instances where the isolated and occasional sale exclusion has been interpreted.

In Iowa, under Rule 30, receipts from "casual or isolated sales" are not subject to the sales tax law. Examples are where a person sells his household furniture

or a farmer his farm implements. (CCH 60-233.)

In Alabama there is a similar exemption, and an Attorney General's opinion May 12, 1937 (CCH 65-057.07) held—"Property may be sold by a retailer free from the tax as an occasional sale if the sale of such property is entirely disassociated from his retail business and if the property was originally purchased for his own personal use.

In Arkansas, Section 14093.4(m) contains an exemption which reads: "Gross receipts or gross proceeds derived from isolated sales not made by an established business."

There is a similar exemption in the Illinois law for "isolated or occasional sales of tangible personal property at retail by a person who does not hold himself out as engaging in the business of selling such tangible personal property." Under the Regulations, Article I, an example is given of a retailer selling tangible personal property such as machinery or other capital assets which he has used in his business and no longer needs and which he does not otherwise engage in selling as a part of his regular business.

In Michigan, Section 3619.1 states that the term "sale at retail" shall not include an isolated transaction in which any tangible personal property is sold, transferred, offered for sale, etc., not in the ordinary course of repeated and successive transactions of a like character. An example cited by Regulation B interpreting this

statute is a sale by a merchant of his cash register. (CCH 60-021.)

In South Dakota the law provides: "the isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as engaged in the business of selling such tangible personal property at retail, does not constitute such a person a retailer." The Regulations then state that "This means a merchant may sell his store fixtures or a farmer may sell a horse or cow. Disposal of property for purposes of liquidation * * * are deemed to be tangible sales."

In Washington, by Rule 106, sales are deemed to be "occasional or isolated" when made by a person who is not engaged in the business of selling the type of property that may be incidentally sold by him. Examples given are the sales of capital assets. (CCH 64-003.) The use tax is there called the "compensating tax", and it contains no exemption for casual sales. However, in a ruling under the same Rule 106, interpreting Section 8370-32 of Washington's Code, it was held:

Under the said ruling the retail sales tax would not apply upon such transactions (casual sales). Furthermore, the use of property so acquired would not be subject to the compensating tax. The same reasoning for granting immunity on the retail sales tax would apply to the compensating tax, and this Commission has uniformly applied such interpretation in such cases.

This ruling is similar to that of this court in Union

Portland Cement Company v. State Tax Commission,
supra.

From the undisputed facts plaintiff submits that with respect to the Geneva Steel Plant, no "retail sale" of "tangible personal property" occurred within the intent of Utah's Legislature expressed in the statutes as enacted. And with respect to both "Geneva" and the "Inventories", plaintiff submits that there occurred no sale by a "retailer" as was also required by the Legislature as a prerequisite to Sales-Use Tax liability.

And further, in the light of the exclusion of isolated and occasional sales from tax coverage, Utah's Legislature never intended to subject such transactions to taxation.

2. The State of Utah Does Not Have the Power to Interfere With The Disposal By the United States Government of Its Property; and the Utah Statutes Accordingly Exempt From Sales-Use Taxation Sales by the Federal Government.

The next basis for plaintiff's claim that the tax assessed by the defendant is improper is that these sales *by the federal government* are exempt *by reason of that very fact*. This contention is two-fold; not only is it beyond the power of the State of Utah to interfere with the sovereign United States in the performance of the latter's governmental functions; but also in recognition of that principle both the Utah Sales and Use Tax statutes have exempted such sales from tax coverage.

a. Utah has exempted sales by the Federal Government.

In full recognition of the principle that one sovereign cannot interfere with the functions of another sovereign, Utah in enacting its Sales-Use Tax plan carefully avoided interfering with the Federal Government by exempting sales made by it.

Thus Utah *under both the Sales and Use Tax Acts* has excluded the Federal Government from its definition of a "person", who as a "retailer" makes retail sales. (§§80-15-2(a) and 80-16-2(e).) Accordingly the United States is not required *by the terms of Utah statutes* to either collect the tax or report with respect thereto (§ 80-15-5); to be licensed (80-15-3); or registered (§ 80-16-5); to keep the required records (§ 80-15-9); its property is not subject to a lien (§§ 80-15-10 and 80-16-16); no debt is owed by the United States to Utah (§§ 80-15-11 and 80-16-6); nor is the United States criminally liable for failure to collect the tax (§ 80-15-19).

Also, §§ 80-15-6 and 80-16-4(b) expressly exempt transactions which the State of Utah "is prohibited from taxing under the Constitution or Laws of the United States."

From these provisions it seems clear that Utah's Legislature explicitly directed the Commission to keep "hands off" of sales of tangible personal property made by the Federal Government, to the same effect and extent as if the statutes expressly exempted "sales by the Federal Government." To construe Utah's statutes other-

wise would not only be inconsistent with the specific directions indicating intention to exempt, but would risk the very constitutional pitfalls hereafter discussed which it seems plain the Legislature expressly sought to avoid.

No doubt the defendant will say: Utah is not interfering with any function of the United States. We are only exacting a tax after the property has been transferred to plaintiff by the Federal Government, and we seek to tax not this disposal, but plaintiff's storage, use and consumption of the property here involved.

In the first place, such contention ignores the direct effect of such a tax on the *disposal* thereof by the Government which is hampered in its efforts pro tanto to the extent of the ex post facto tax.

Also, contrary to the Commission's contention, not all "uses" are subject to Utah's Use Tax unless expressly or impliedly exempt. As previously noted, it is a general condition precedent to any tax that the "use" follow a *purchase from a "retailer"*. While under the Sales Tax Act this sale by a retailer is the express incident taxed, still in the case of the Use Tax it is likewise essential but as a condition precedent to the named taxing incident of "storage, use or other consumption."

In the Utah Concrete Products Case, *supra*, the Commission, attempting to use the Use Tax as the convenient catchall for *any* storage or use, was told by this court that "the Legislature contemplated transfer of right, title or property from one *person* to another" as

the necessary condition precedent. This case now goes one step further: while a transfer *did* take place, it was not the kind of transfer contemplated by the Legislature since inter alia made by the Federal Government. And since sales by the Federal Government are excluded, the Government being neither a "person" nor a "retailer" under § 80-16-2, the necessary condition precedent is here missing. Just as where storages or uses occur where no sale has taken place, there is here no liability imposed.

The clearest spelling-out of this Legislative intent is perhaps § 80-16-2(a) which in these words so restricts Use Tax liability to instances where tangible personal property is "purchased from a retailer." But the pattern to exclude federal sales is consistent throughout all the other provisions of both the Sales and Use Tax Acts.

No doubt, too, the defendant will argue that the trend away from inter-governmental immunity here applies, and the point next argued by plaintiff is no longer the law.

But should it be that under today's concepts Utah now *has* the power to tax such transfers by the Federal Government, still the Utah statutes have not at least to date been amended to extend tax liability to such transactions. The Legislature still must act, as did that of the State of Iowa which recently amended its Section 6943.-076 to read:

Section 6943.076. Exemptions.

1. The gross receipts from sales of tangible

personal property which this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this state. (This is the same exemption found in the Utah sales and use tax.) Purchases of tangible personal property from the Government of the United States or any of its agencies by ultimate consumers are hereby declared to be subject to the state use tax.

The last sentence was added by amendment, it having previously been held that sales by the Government were not taxable. (CCH 60-211.)

This court has held that an amendment would still be required in such a case. *Van Cott v. State Tax Commission*, 98 Utah 264, 95 P. 2d 740, involving the disappearance of the inter-governmental income tax immunity.

By substantially the same language as in the case of Iowa, California (Sec. 6402) and Connecticut (Sec. 1351.58) have likewise recently amended their Sales-Use Tax laws to now include "property reported to the Surplus Property Board of the United States".

b. Utah Lacks Power to Interfere with Functions of the Federal Government.

The sovereign Government of the United States *with respect to the very transactions now sought to be taxed* by the Commission has said:

"It is generally recognized that the War Assets Administration and other disposal agencies of the Federal Government *cannot be subjected to any state or local taxes with respect to sales made by them.* * * * The principle * * * must be recog-

nized as remaining unimpaired by anything we do with respect to this tax problem.” (Ex. J, R. 114.)

Mindful of this current reiteration of a fundamental principle of constitutional law, declared by the United States Supreme Court in *McCulloch vs. Maryland*, 17 U.S. 159, 4 Wheat. 316, 4 L. Ed. 579, we see from paragraph 25 of the Stipulation (R. 15) and Exhibit J that the Government—

- (1) has neither been licensed nor registered as a “retailer”;
- (2) has neither collected the tax, nor reported as required by Utah statutes if applicable;
- (3) has instructed its Utah office *not* to collect such taxes in such cases as this.

Thus despite “new look” concepts, here the Federal Government still asserts that for Utah to attempt to tax federal sales is unconstitutional. True, in fairness the United States has agreed *in the case of retail sales only* to collect the substantial equivalent of the Utah tax imposed on similar retail sales of jeeps, sleeping bags, electric motors and the like, *but on its own terms and as a condition of sale*. This is an entirely different situation from submitting to a *power to tax*, regardless of inter-governmental courtesy or fairness.

Here, too, the Federal Government did not and *refused* to impose payment to Utah of such equivalent as a condition of the sale of Geneva or other integrated war plants. Failing this “cooperation” on the part of the

Government, the defendant Commission now *ex post facto* asserts an alleged *power to tax* which it never had, the Federal Government refuses to recognize, and which the Legislature to date has never been so bold as to seek to invoke.

Ignoring the fact that the United States is not a "retailer" as defined by statutes which in further respects also exclude the Government; failing to distinguish between the retail sale of a jeep as personal property and the isolated and occasional sale of personalty incident to the unit conveyance of Geneva as realty; confusing the power to tax with the right of the seller to impose contractual conditions in making sales; the defendant on thrice-reiterated advice from the Attorney General has finally made this attempt to collect additional revenue.

If made by the Legislature such an attempt by the State of Utah to interfere with the Federal Government's disposal of its property would be void. A fortiori where made by the Commission in violation of Utah statutes which are designed and are to be construed to avoid such unconstitutional results.

That the doctrine of immunity between sovereigns as here applied is a living, controlling principle despite other changes in constitutional law concepts is clear from similar attempts of the states to tax federal sales at Post Exchanges during the recent war. When these attempts were held void under either the sales *or* use tax laws, (e.g., *Falls City Brewing Co. v. Reeves*, 40

F. Supp. 35) Congress corrected what it considered an unfairness in 1940 by what is now the Act of July 30, 1947, Ch. 389. (U.S.C.A., Title 4, §§ 104 et seq.)

But while permitting under that Act state taxing of military sales of motor fuels, etc., subsequent to 1940, under sales and use tax acts, in certain specified cases, Congress maintained the principle of immunity, in part saying:

(a) The provisions of sections 105 and 106 of this title *shall not be deemed to authorize* the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

With respect to such sales as those here involved, the United States has not waived the immunity of such transactions from either sales or use taxation, but has expressly asserted that immunity. The tax here assessed is therefore void under the Federal Constitution, Article 6, Clause 2 as an attempt to interfere with sovereignty without consent of the United States.

3. The Deficiency Use Tax Assessment Is Void, Because If Any Tax Was Applicable It Would Be The Sales Tax.

Here the property involved at all times was located in Utah, where plaintiff took possession. (Stip. par. 13, R. 12.) In such cases the Commission itself has consistently ruled that it is the Sales Tax and not the Use Tax that applies. (Ex. 1, Reg. 4, R. 113.)

When taxable personal property is located within the state of Utah at the time of sale and is delivered within the state of Utah, such sale is taxable (under the Sales Tax Act) *irrespective of where the parties to the contract of sale are located and where the contract was made or accepted or the funds paid.*

This construction has received the support of this court in such cases as *Union Portland Cement Co. v. State Tax Commission*, 170 P. 2d 164, and *Whitmore Oxygen Co. v. Utah State Tax Commission*, recently decided by this court, 196 P. 2d 976.

Thus plaintiff submits that the Use Tax applied here is void, for if any tax is applicable, it is the Sales Tax; and the Use Tax expressly exempts the transaction under §80-16-4(a) when the Sales Tax is applicable.

Why the defendant Commission chose to levy the Use Tax is a matter of speculation. It may be that it felt the Sales Tax Act too clearly exempted sales by the Federal Government. Perhaps the Commission hoped that the decision of this court in the Portland Cement case on rehearing applying the occasional sale exemption to the Use Tax might be overlooked or overruled. Still the *facts* bring this transaction under the Sales Tax if indeed any tax is due at all, for *it was a Utah sale*. *Whitmore Oxygen Company*, *supra*. The only act that took place outside of this state was the execution of the contract by the Government in Washington. (R. 32.)

4. The Defendant's Attempt to Tax Alone this Transaction is Discriminatory and Therefore Void as in Violation

of the Utah and Federal Constitutions.

We have heretofore discussed fully and the record is explicit with respect to the facts showing that the Commission is here acting against Geneva alone. (Ex. H, R. 111.) When the Commission so acted it was **not** by inadvertence; nor was it a change of policy. Such transactions have always been and continue to be treated by the Commission as exempt since 1933. (Stip. par. 27, R. 17.) The reason for the tax in this case was the thrice-repeated instruction to the Commission by the Attorney General, dealing only with the Geneva transaction. (Ex. 3, R. 158-163, 202.)

Utah's Constitution says:

All laws of a general nature shall have uniform operation. (Art II, § 24.)

No person shall be deprived of * * * property, without due process of law. (Art. II, § 27.)

The Federal Constitution by the Fourteenth Amendment likewise prohibits Utah from denying plaintiff the equal protection of its laws, or depriving it of its property without due process of law.

Now, twenty months after the fact, and acting against Geneva alone, the Commission seeks to extract the use tax. From the instances suggested in Exhibit H it is evident that the Commission is acting against Geneva alone, for since 1933 it has exempted such incidental transfers of personal property whether the seller sells one or several units; or divides and sells to more

than one purchaser; or uses the services of a sales agent to assist in the disposal. In none of these cases, including Geneva, was the owner who sold in the "business" as such of making sales of the tangible personal property incidentally involved.

This attempt to so discriminate is void.

While the Commission now suggests that it may proceed against other war plant purchasers from R.F.C., the record is still plain that the Commission is discriminating against plaintiff and may be as to such other buyers. Under such circumstances the action by the Commission is still, we admit, improper and void.

That there may be no doubt as to this discrimination against Geneva, we quote from the reluctant testimony of Supervisor Paul M. Holt, of the Commission, at the hearing of May 28, 1948. When asked by Commission's counsel, who referred to the list of twenty to thirty business sales contained in Exhibit H, what the present instructions from the Commission were with respect to these transactions, Holt said that a month or so before this hearing Commissioner Twitchell, with the approval of Commissioner Brown, said that "in the ordinary course of our work down there, that we were to audit all businesses that were acquired from War Assets Corporation or from Reconstruction Finance Corporation." (p. 12) On cross examination he then said that in addition to Geneva the Utah Oil Refining Company was now being extended the new tax treatment. (p. 15) But it is

clear that the administrative construction of the Commission still considers such transactions exempt unless perchance the seller happens to be either the War Assets Administration or the Reconstruction Finance Corporation.

V.

CONCLUSION

In conclusion, it seems apparent to counsel that in his zeal of advocacy and desire to sustain a tax on any possible grounds, the Attorney General has advised the Commission to overlook or ignore certain basic and elementary rules of statutory construction which, if followed, lead clearly to the true intention of Utah's legislature and support plaintiff's contentions.

(This is apart from factual errors used in argument in Exhibit 3 no longer possible under the record in this case.)

a. Revenue laws are to be construed strictly against the Government and in favor of the taxpayer.

The Attorney General has verbally denied that this is the rule, but we would have thought that it was an *elementary* rule of construction. This for the reason that tax laws are intended to be plain to the average man so that he can both know and anticipate his tax obligations. Neither plaintiff nor any other citizen should be required to face such *ex post facto* and *de novo* attempts to extort extra revenue, with liability uncertain or unexpected until decision by this court.

Thus this court has said:

The doctrine that taxing statutes are, in case of doubt as to the intention of the legislature, to be construed strictly against the taxing authority and in favor of those on whom the tax is levied, has been well set out in the case of *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 55 S. Ct. 50, 79 L. Ed. 211. See, also, *Los Angeles & S.L.R. Co. v. Richards*, 52 Utah 1, 172 P. 474; *W. F. Jensen Candy Co. v. State Tax Commission*, 90 Utah 359, 61 P. 2d 629, 107 A.L.R. 261; 25 R.C.L. Sec. 307 at p. 1092; *Cooley on Taxation*, Vol. 11, 4th Ed. Sec. 503 at p. 1113. * * * (*Norville v. State Tax Commission*, 98 Utah 170, 97 P. 2d 937.)

b. The construction given these statutes by the Tax Commission charged with carrying out the administration of the tax acts should be given consideration as a guide to determining what the legislature intended.

This rule was recently expressed in *Washington County v. State Tax Commission*, 133 P. 2d 564, 103 Utah 73, where at page 568 the following quotations were cited with approval:

“ ‘It is a general rule that contemporaneous construction by the department of government specially delegated to carry out a provision of the Constitution raises a strong presumption that such construction, if uniform and long acquiesced in, rightly interprets the provision. * * * While such construction is not conclusive upon the courts, it is entitled to the most respectful consideration.’ *Wells Fargo & Co. v. Harrington*, 54 Mont. 235, 169 P. 463, 466.

“ ‘The construction placed on * * * constitutional provisions by officers * * * at or near the

time of the enactment, which has been long acquiesced in, is a just medium for their judicial interpretation.' Foote v. Town of Watonga, 37 Okl. 43, 130 P. 597, 598."

And generally, see 50 Am. Jur. 309, "Statutes", Sec. 319.

Again, in 1946 this court said in Olsen Co. v. State Tax Commission, 168 P. (2d) 324, 109 Utah 553:

Where there is an ambiguity in the statute as to whether the latter does or does not cover a particular matter, a practical construction of the statute shown to have been the accepted construction of the agency charged with administering the matters in question under the statute will be one factor which the court may take into consideration as persuasive as to the meaning of the statute. Especially is this true where the agency, as in this case, is one on whom the Legislature must rely to advise it as to the practical working out of the statute and where practical application of the statute presents the agency with unique opportunities and experiences for discovering deficiencies, inaccuracies or improvements in the statute.

In this case, *until the sale of Geneva took place*, for more than fifteen years the Tax Commission had treated such sales of integrated businesses as exempt. Now the Attorney General would ignore all this.

c. In construing a statute the court should consider the consequences involving oddities or unfairness which might follow from one construction and can be avoided by another construction.

This rule, quoted from *Local Realty Co. v. Steele*, 62 P. 2d 558, 90 Utah 468, assumes that the statutory language is susceptible of construction. If the legislative intent is otherwise clear the wisdom or unwisdom, convenience or inconvenience, or confusion or uncertainty resulting is of course not the concern of the court. 50 Am. Jur. §§ 380, 383. There is no place for either judicial or administrative construction. *New Park Mining Co. et al v. State Tax Commission*, ——— Utah———, 196 P. 2d 485.

Here, if indeed doubt exists, should the construction urged by the Commission be adopted:

1. Plaintiff, together with other purchasers of businesses from R.F.C. and others, will face an unforeseen and ex post facto tax liability now being or to be imposed for the first time after fifteen years' administration of the Utah Sales-Use Tax Acts.

2. The Commission will face the administrative task of ferreting out each such purchase, in contrast to the practicable administrative procedure heretofore followed whereby it can check sales from licensed or registered retailers, and purchasers can anticipate tax liability when dealing with such vendors.

3. The present state policy of encouraging new industries will be set at naught. The state of Utah will be in the anomalous position of taking official action through its Governor and others on the one hand to encourage

business in this state, welcoming Kaiser-Frazier, Simplot and others; and with the other hand ex post facto sending "greetings" through its State Tax Commission.

4. The court must determine the further problems of discrimination, interference with federal governmental functions, and whether the Sales or Use Tax applies.

So plaintiff submits that for the foregoing reasons the action of the Commission should be held to be void and its deficiency Use Tax assessment should be set aside. There has been here no "sale" of "tangible personal property" at all within the meaning of the tax statutes; no "retail sale" by a "retailer" was involved, but only an isolated occasional transaction; government sales are exempt both by Utah statutes and by principles of constitutional law; the application of the tax here is void as discriminatory and not due process; and if any tax is due at all, it should have been the Sales Tax.

There being substantial question with respect to these contentions, these doubts should be resolved in favor of plaintiff and against the tax collectors; and the Commission should be advised that in cases where after due consideration such doubts exist, hereafter it should resolve such doubts in favor of the taxpayer until the legislature clarifies the taxing statutes. The Commission

should continue to make its reports to the Governor and Legislature as required by §80-5-46 (20), and not take the law into its own hands.

Respectfully submitted,

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