

2000

# Merrill Bean Chevrolet, Inc. v. State Tax Commission of Utah : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

MERRILL BEAN CHEVROLET,  
INC., a corporation,

Appellant,

-v-

STATE TAX COMMISSION OF  
UTAH,

Respondent.

Case No. 14263

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BRIEF OF RESPONDENT, UTAH STATE TAX  
COMMISSION

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FILED

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Clk., Supreme Court, Utah

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

MERRILL BEAN CHEVROLET,     )  
INC., a corporation,         )  
          Appellant,         )  
          -v-                 )  
STATE TAX COMMISSION OF     )  
UTAH,                         )  
          Respondent.        )  
                               )

CASE NO. 14263

-----  
BRIEF OF RESPONDENT, UTAH STATE TAX  
COMMISSION

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STATEMENT OF FACTS

References to the Transcript of Proceedings before the Utah State Tax Commission are designated (T) with page number following. References to the Record on Appeal are designated (R) with page number following. References to Appellant's Brief are designated (AB) with page number following.

The Statement of Facts set forth in Appellant's Brief are substantially correct, except for some inferences that appellant would erroneously draw from the testimony. The following exceptions and additional relevant facts to appellant's Statement of Facts are hereinafter set forth.

This action involves the imposition of sales tax on the following:

1. New cars of appellant's used personally by Mrs. Merrill Bean; and
2. Demonstrators unassigned to salesmen, and occasionally used as loaners to customers having their cars repaired and to other salesmen.

Appellant sets forth in his Brief (AB-1) that:

"... at all times and under all circumstances the automobiles are at the dealership for sale to an ultimate consumer unless they are then being demonstrated."

In response to a question of whether demonstrators are used for family purposes, Merrill Bean, the owner and president of appellant, answered affirmatively. (T-42) The automobile utilized by Mrs. Merrill Bean is used in connection with family use, such as, transporting children to and from school and church, to drive to community meetings, school board meetings, community projects in which she is involved, and transporting other ladies with her. (T-81,82) Mrs. Merrill Bean is not an officer or employee of appellant's and is not licensed with appellant's dealership to transact business. (T-89) Mrs. Merrill Bean's automobile is not at the dealership at all times and under all circumstances as indicated in Appellant's Brief.

Merrill Bean Chevrolet has title by a flooring agreement with General Motors Acceptance Corporation to all automobiles, and regular salesmen sign a Demonstrators' Agreement

when a demo is personally assigned to them and are charged a fee and a sales tax on regular demonstrators directly assigned to them. (T-52) Mrs. Merrill Bean did not execute a Demonstrators' Agreement. (T-55) Merrill Bean has signed a Demonstrators' Agreement on behalf of his wife in order to get insurance protection but did not pay the demonstrators' fee or the sales tax. The Internal Revenue Service requires Merrill Bean to treat the use of Mrs. Bean's automobile as compensation to Merrill Bean. (T-91)

Many new cars are designated demonstrators for accounting and other purposes but are unassigned to any specific salesman. Unassigned demonstrators are loaned to salesmen for a few days, pending receipt of a new car demonstrator for said salesman. No agreement is signed by the salesman, and no sales tax is collected. (T-65) Unassigned demos are also loaned to customers for a few days who are having their regular cars serviced and repaired.

## ARGUMENT

### POINT I

THE STATE TAX COMMISSION'S SALES TAX REGULATIONS ARE VALID AND PROVIDE FOR ASSESSMENT OF SALES TAX ON DEMONSTRATORS PERSONALLY USED AND CONSUMED BY MRS. MERRILL BEAN.

All references to "sales tax" herein are intended to and do include "sales and use" taxes, since both taxes are correlative and complementary. (Union Portland Cement v. State Tax Commission, 110 U.152, 176 P.2d 879)

Utah Code Annotated, Section 59-15-20 (1953),  
provides:

"Administration vested in tax commission.--  
The administration of this act is vested in  
and shall be exercised by the state tax commis-  
sion which may prescribe forms and rules and  
regulations in conformity with this act for the  
making of returns and for the ascertainment, as-  
sessment and collection of the taxes imposed  
hereunder." (See also UCA, Section 59-16-2)

Pursuant to said statutory grant of authority to  
prescribe rules and regulations, the State Tax Commission  
has adopted Sales Tax Regulation S-82, effective July 1,  
1971, which provides, in part:

"Demonstration, display and trial (applies  
to sales & use taxes).--(a) Tangible personal  
property purchased by a wholesaler or a retailer  
and held for display, demonstration or trial in  
the regular course of his business is not subject  
to tax. An example of this is a desk bought by  
an office supply firm and placed in a window dis-  
play. Another example of this is an automobile  
purchased by an auto dealer and assigned to a  
salesman as a demonstrator. Sales tax applies to  
any rental charges that might be made to the sales-  
man for use of a demonstrator. Sales tax applies  
to these charges even though all or part of the  
charge may be waived if such waiver is dependent  
upon the salesman performing certain services or  
reaching a certain sales quota or some similar  
contingency. Also, tax applies to items purchased  
primarily for company or personal use and only  
casually used for demonstration purposes. For ex-  
ample, a wrecker, or a service truck used by a  
parts' department, would be subject to tax even  
though they are demonstrated occasionally. Also,  
automobiles assigned to non-sales personnel, such  
as a service manager, an office manager, an ac-  
countant, an officer's wife, or a lawyer would be  
subject to tax even though they may be demonstrated  
on occasion." (Emphasis added.)

Regarding the adoption of rules and regulations by



administrative body of the State of Utah, this Court, in Utah Hotel Company v. Industrial Commission, 107 Utah 24, 151 P.2d 467 (1944), stated, in dictum:

"We deem it essential to a clear understanding of the problems implicit in this matter to note at the outset that regulations of administrative tribunals are not all birds of a feather. Failure to note this fact will inevitably lead to hazy thinking and erroneous concepts. The weight which should be given to a prior administrative regulation will to a large extent be dependent upon the type of regulation involved. Regulations may be promulgated pursuant to a specific delegation of legislative power. In prescribing such regulations, the administrative tribunal within designated limits may actually be making the law or prescribing what the law shall be. In prescribing such a regulation, the tribunal in effect legislates within the boundaries marked out for its action by legislative enactment. On the other hand, the administrative tribunal may by adopting a given regulation only purport to interpret what the legislature meant by its statutory language. Such a regulation is nothing but an administrative opinion as to what the statute under construction means." (At page 31)

Sales Tax Regulation S-82 is lawfully adopted. It was intended to apply directly to situations like the case at hand on the use and consumption of vehicles by the wife of the owner of a car dealership.

Utah Concrete Products Corporation v. State Tax Commission, 101 Utah 513, 517, 125 P.2d 408 (1942), provides the applicable definition of "consumption" as:

"From the context of our statute 'used' and 'consumed' may be said to express the same meaning--to make use of, to employ and does not necessarily mean the immediate destruction or extermination or change in form of the article or commodity."

The imposition of the sales tax in the Merrill Bean Chevrolet situation upon the automobile utilized by Mrs. Bean results from a taxable incidence taking place. That is, there has been a final consumption of the tangible personal property. Mrs. Merrill Bean utilizes said vehicle for personal errand running, to attend church and transport herself and the family to civic and other functions and personal duties. Said automobiles are consumed within the meaning of the sales tax statute.

Also at issue in connection with the application of Sales Tax Regulation S-82 is whether a retail sale takes place sufficient to give rise to an incidence of sales tax liability. Utah Code Annotated, Section 59-15-2 (b), defines "sale" to include every transaction whereby the possession of property is transferred but the seller retains the title as security for payment of the price.

Sales Tax Regulation S-27 provides the definition of a "retail sale" to include every sale within the State of Utah by a retailer or wholesaler to a user or consumer, except such sales as are exempted.

"A retail sale has a broader meaning than the sale of tangible personal property. And includes any transfer, exchange or barter whether conditional or for a consideration by a person doing business in such commodity or service, either as a regularly organized principal endeavor or as an adjunct thereto. The price of the service or tangible personal property, the quantity sold or the extent of the clientele are not factors which determine a sale to be or not to be a retail sale."

However, S-27 provides that a particular retail sale or a portion of the selling price may not be subject to the sales or use tax. Sales Tax Regulation S-72 provides guidelines for trade-in's and exchanges. An even exchange of tangible personal property for tangible personal property is not a sale and no tax applies to any part of such an exchange. When a retailer takes tangible personal property as part payment on a sale of tangible personal property, sales or use tax applies to any consideration valued in money which changes hands but does not apply to the portion of the sale represented by the trade-in allowance. S-72 necessarily requires that there be an arms-length transaction, and that the parties be acting in good faith with one another. In the present situation, Mrs. Merrill Bean is dealing with a corporation wholly-owned by her husband and is not engaged in an arms-length transaction. Mrs. Bean appears to be subject to the control and management of her husband in retaining any given car for a period of time. The use tax is primarily imposed upon the transaction between General Motors and Merrill Bean Chevrolet, since Mrs. Bean uses the car. Merrill Bean Chevrolet does not exchange or trade cars back to General Motors. (T-62)

Appellant has stated in his Brief (AB-6-7) that Mrs. Bean drives as many as five different vehicles in a given year, and that these vehicles are traded back to the dealership without any cash consideration. Appellant sets forth in its Brief that the record is entirely void of any suggestion that the dealership receives a cash consideration when the trade is made. (AB-7) It is hereby submitted that

the burden is upon the taxpayer to demonstrate that an even exchange has been made without any cash consideration which taxpayer has failed to demonstrate. Merrill Bean testified that occasionally Mrs. Bean's car is sold to a customer, but it is unclear whether the sale takes place before or after Mrs. Bean exchanges her car for a new one. (T-89) Exemptions from the sales tax statutes are to be strictly construed against the taxpayer and in favor of the taxing authority. (68 Am.Jur. 2d, Sales and Use Tax, Section 177)

Appellant argues in its Brief that certain inherent benefits accrue to any retailer within the State of Utah from which the wife and family of said retailer may derive benefits free of any incidence of taxation. (AB-12-13) Appellant states that the medical doctor seldom sends a bill to his colleague for medical services, or the lawyer seldom bills his partners for services rendered to the ultimate consumer, or that a tax auditor would not be subject to sales tax for an income tax return prepared for his wife and family. (AB-12, 13) All such benefits bestowed upon the wife and family of the professional are distinguishable from the present situation, in that intangible services have been rendered rather than an actual delivery of tangible personal property. The services of a doctor, lawyer, or an accountant are not in the same category as the delivery of an automobile to the wife of the owner of a car dealership. If the wife of an owner of a grocery store were to take out her groceries each week, said groceries would be subject to sales tax. As a practical matter in most situations where the wife and family of a

business owner do, in fact, take and consume some of the inventory of the company, said items are shown as sales, and a sales tax is paid. In addition to the inherent benefits' argument set forth by appellant, certain benefits bestowed upon wives, friends and family are taxable as compensation, although as a practical matter, said taxes are not always assessed and collected. (See the 16th Amendment to the United States Constitution, Internal Revenue Code, Section 62, and Utah Code Annotated, Section 59-14-1, et seq., which impose an income tax upon "income from whatever source derived.")

There is no double taxation (AB-13), since the tax on the initial delivery to Mrs. Bean should be paid by Merrill Bean, but any tax paid on a subsequent sale of the used automobile is merely collected by Merrill Bean Chevrolet and is actually paid by the customer who has purchased the automobile.

Based upon Sales Tax Regulation S-82 and in the absence of any applicable exemption, appellant is liable for the sales tax on the vehicles consumed by Mrs. Merrill Bean, even though occasionally demonstrated.

## POINT II

UNASSIGNED DEMONSTRATORS WHEN UTILIZED FOR PURPOSES OTHER THAN SOLELY DEMONSTRATION, DISPLAY, OR TRIAL ARE SUBJECT TO SALES AND USE TAXES.

Appellant has properly cited Utah Code Annotated, Section 59-16-2 (b), which defines the word "use" to mean

the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale, display, demonstration or trial of that property in the regular course of business and held for resale.

However, appellant has not pinpointed the technical difficulty which forms the basis for the assessment by the State Tax Commission of additional sales and use taxes. That is, whenever any unassigned demonstrators are personally utilized, or utilized for purposes other than solely for demonstration, display, or trial and held for resale, then said demonstrators are subject to the sales and use tax.

Other states in the United States have attempted to deal with the same problem by adopting varying regulations pursuant to the same general provisions in the Uniform Sales and Use Tax Acts.

The State of Massachusetts in Sales Tax Information Letter, No. 3, dated March 1966, provides that:

"1. Vehicles used for demonstration to prospective customers only and for no other purpose are not taxable to the dealer.

"2. Vehicles sold to salesmen or other employees are taxable in the same manner as sales to other individuals.

"3. Vehicles owned by the dealer and used occasionally for business or personal purposes by the owner or any employee are used in a taxable

manner, and the dealer must report and pay a tax on such vehicles." (Emphasis added.) (CCH, Massachusetts State Tax Reporter, Para. 63-853.15)

The State of Kentucky has provided by regulation:

"Cars--... if used solely for demonstration or display (are not subject to tax). If used for any other purpose in addition to demonstration, then user pays tax on sales price to him."  
(Kentucky Regulation 103 KAR 31:100, cited at CCH, Kentucky State Tax Reporter, Vol 1, Para. 60-282)

The State of Nevada provides an exemption from use for demonstration, retention or display but requires that said use be the "sole use," and said exemption does not apply to rentals. (NRS 372.170, cited at CCH, Nevada State Tax Reporter, Para. 60-169)

The State of New York essentially uses a regulation similar to that of Massachusetts, which provides that vehicles which are occasionally demonstrated for business purposes and are used for other personal purposes by the owner or any employee are used in a taxable manner and are subject to sales and use tax. (Sales Tax Information Letter, No. 6 (1965), cited at CCH New York State Tax Reporter, Para. 64-072)

South Dakota provides by regulation that demonstrators are not subject to tax unless used for purposes other than demonstration; i.e., personal use, leasing or other commercial use. (South Dakota Regulation, No. 10-45-134.S, cited at CCH South Dakota State Tax Reporter, Para. 64-018)

Other states have attempted different approaches in levying and collecting sales and use taxes on demonstrators not used solely for demonstration purposes. The State of Tennessee provides that there is no tax on demonstrators if only used for less than 120 days and are sold for more than dealers' cost. There is a use tax on the difference between the dealers' cost and selling price. (Rule 3, cited at CCH Tennessee Tax Reporter, Para. 64-002)

The State of Washington provides a use tax on the number of demonstrators utilized after the initial number of demonstrators authorized in the first year of operation. (Excise Tax Bulletin, No. 37.12.132, dated July 8th, 1966, cited at CCH Washington State Tax Reporter, Para. 60-079.25)

The State of Michigan has provided a numerical formula for exemption of demonstrators from sales and use tax based upon the total number of cars sold each year by the dealership. If 0-to-25 cars are sold, two demonstrators are exempt; of 26-to-100 cars are sold, 7 demonstrators are exempt; if 101-to-500 cars are sold, 20 demonstrators are exempt, and if 501 or more cars are sold in any given year, 25 demonstrators may be exempt. (Michigan State statute, Section 205-51, cited at CCH Michigan State Tax Reporter, Para. 60-230)

The State of Utah has attempted to deal with the same problem by adopting Sales Tax Regulation S-82 hereinabove set forth, which provides, in part:



"... Also, tax applies to items purchased primarily for company or personal use and only casually used for demonstration purposes. For example, a wrecker, or a service truck used by a parts' department, would be subject to tax even though they are demonstrated occasionally."  
(Emphasis added.)

Merrill Bean has testified that unassigned demonstrators are loaned to customers having their cars serviced and repaired. The utilization of unassigned demonstrators is for the convenience and operation of appellant's Sales and Service Department. The unassigned demonstrators are also loaned to salesmen who have been unable to sign the agreement, pay the rental and acquire a new demonstrator directly assigned to them. The unassigned automobiles are driven home and utilized by salesmen for personal transportation and for the transportation of their families, although appellant does not recommend use of any demonstrators for personal purposes. (T-52)

The technical fine point is that certain unassigned demonstrators are being consumed within the meaning of the Sales and Use Tax statutes and are subject to said taxes. If sales and use taxes are not assessed and collected, appellant would be in a privileged position not enjoyed by other taxpayers who purchase cars, drive them for a short period of time, and then resell said vehicles, paying a sales tax on the purchase and collecting a sales tax on the subsequent resale. It is convenient that appellant claims that all of his vehicles, whether unassigned, assigned or loaned to Mrs. Merrill Bean,

are held for resale. In the context of our economic system and capitalism, probably every owner of a vehicle in the State of Utah would submit that his vehicle is held for resale, providing he can get the right price for it.

Should the exemption for demonstration be "solely demonstration" in the absence of express language in the statute? The rule of construction of exemptions in use tax statutes is that such provisions are to be strictly construed against the taxpayer and in favor of the taxing authority. In all cases of doubt as to legislative intent, presumption is in favor of the taxing power. To doubt is to deny the exemption. (68 Am.Jur. 2d Sales and Use Taxes, Section 177)

This Court, in determining exemptions from taxation in general, has provided guidelines in Parker v. Quinn, 23 Utah 332, 64 P.961 (1901):

"... The general rule is that all property of what kind soever, and by whomsoever owned, is subject to taxation; and, when any kind of property is exempt, it constitutes an exception to this rule. The reason of the rule is that it is just and equitable that every species of property within the state should bear its equal proportion of the burdens of the government. When, therefore, an owner claims that certain property is exempt from taxation, the burden is upon him to show that it falls within the exception. And an exemption will not be aided by judicial interpretation. It must be shown to exist by express terms of the enactment which it is claimed grants it. 'The presumption is that all exemptions intended to be granted were granted in express terms. In such cases the rule of strict construction applies, and, in order to relieve

any species of property from its due and just proportion of the burdens of the government, the language relied on as creating the exemption should be so clear as not to admit of reasonable controversy about its meaning; for all doubts must be resolved against the exemption. The power to tax rests upon necessity, and is essential to the existence of the state."

Appellant has further taken the position that the average demonstrator is sold for \$26 less than the average new car, thereby entitling the State of Utah to its full share of sales tax on said vehicle, when ultimately sold to a customer. Appellant's position is not tenable since the vehicle is actually being consumed, giving rise to incidence of taxation. Said demonstrator may have up to 6,000 miles and six months' use without any sales tax at all, notwithstanding the fact that the average sale of said demonstrator is \$26 less than the average new car sale. Said six months' use may span different years and may result in the decrease in the value of the vehicle when ultimately sold. The probability of the subsequent sale for \$26 less is not certain, and the subsequent sale for an average \$26 less is not relevant to the actual selling price of any given vehicle, whether specifically assigned, unassigned or loaned to Mrs. Merrill Bean. Inasmuch as there are not any arms-length transactions or exchanges, respondent cannot reasonably determine what cash consideration would be given for the vehicle utilized by Mrs. Merrill Bean or the unassigned vehicle. The taxation approach adopted recognizes the fact that if a 1974 model

were traded for a 1975 model, there would be a differing value, which would be represented by an additional cash payment to appellant. However, in every exchange between appellant's corporation and Mrs. Merrill Bean or other salesmen utilizing unassigned demonstrators, there is no cash consideration given for a transfer of property. Said cash consideration, if, in fact, given, would be subject to sales tax.

In conclusion then, appellant, when utilizing unassigned demonstrators for personal or other uses, is not entitled to exemption from sales and use taxes, although said vehicles may occasionally be for demonstration and display and held for resale.

#### CONCLUSION

Respondent sets forth that the basis for the taxation imposed upon unassigned demonstrators and the vehicles utilized by Mrs. Merrill Bean is that said tangible personal property is being consumed within the meaning of the Sales and Use Tax statutes. That upon any subsequent resale or exchange, any other sales and use taxes assessed are borne by different entities, not parties to this action, those being consumers who ultimately purchased the vehicle. Said consumption is sufficient to give rise to an imposition of sales and use taxes and cannot be denied simply by the fact that said vehicles are to be resold or that they are sometimes on display and occasionally being actually demonstrated. Sales

Tax Regulation S-82 has been lawfully and legally adopted by the State Tax Commission within the statutory realm of authority and is determinative of the issues raised herein. The sales and use tax audit deficiencies assessed against appellant should be sustained.

Respectfully submitted,

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