2000

Husky Oil Company of Delaware v. State Tax Commission of Utah : Brief of Appellant

Utah Supreme Court

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SUPREME COURT
STATE OF UTAH

HUSKY OIL COMPANY OF DELAWARE,

Petitioner and Appellant,

vs.

STATE TAX COMMISSION OF UTAH,

Respondent.

Case No

14466

BRIEF OF APPELLANT

Writ of Review to Review an Order of
the State Tax Commission of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NATURE OF THE CASE

This case involves whether a sale of a certain used refinery reformer is entitled to exemption as an "isolated or occasional sale" under the Utah Sales and Use Tax Acts (Utah Code Annotated §59-15-2(e) (1953, Repl. Vol. 1974), where (1) the seller used the refinery reformer in its business prior to the sale, (2) the seller is not engaged in the business of selling refinery reformers and (3) the seller has never sold a refinery reformer as a completed unit prior to the subject sale.

DISPOSITION BEFORE STATE TAX COMMISSION

The State Tax Commission determined a use tax deficiency against petitioner, Husky Oil Company of Delaware, in the amount of $30,375.00, plus interest thereon, attributable solely to the purchase by petitioner of a used refinery reformer.

RELIEF SOUGHT ON APPEAL

Petitioner seeks reversal of the determination of the State Tax Commission of the use tax deficiency against petitioner in the amount of $30,375.00, plus interest thereon, on the

ground that undisputed facts show that the transaction is exempted from the tax as an isolated and occasional sale.

STATEMENT OF FACTS

The parties submitted a Stipulation of Facts and a Supplemental Stipulation of Facts, and the State Tax Commission based its written findings of fact solely on said written stipulations. References in this Statement of Facts will be to the paragraph numbers of the State Tax Commission's findings.

Gulf Oil Canada, Limited (hereinafter "Gulf") sold a used reformer to the petitioner, Husky Oil Company of Delaware (hereinafter "Husky"). A reformer is a piece of refinery equipment. Husky thereafter caused the used reformer to be located at its refinery in Salt Lake County, Utah. Fd. No. 10.

The subject refinery reformer had been used by Gulf in its refinery opertions at Moose Jaw, Saskatchewan, Canada. Gulf, at the time of its purchase of the refinery reformer, paid a Canadian use tax and was not subject to another sales or use tax on the sale of said reformer to Husky in that there is an exclusion from the Canadian tax where the tax has already been once paid. Fd. No. 4.

The sale of the subject used reformer to Husky was the *only* sale of completed unit that Gulf has made. Fd. No. 15. The sale was occasioned by the fact that Gulf made a decision in the late 1960's to consolidate the three refineries previously located at Calgary, Moose Jaw and Saskatoon at a new 80,000 barrel refinery at Edmonton, Alberta. Fd. Nos. 5 and 6. During 1971, Gulf disposed of certain surplus equipment located at Gulf's Calgary, Moose Jaw and Saskatoon refineries. Fd. No. 13. The equipment was made surplus when the refineries were shut down or converted to terminals supplied by Gulf's new enlarged Edmonton refinery. Fd. No. 13. The reformer was sold to Husky in 1971 for a purchase price of $675,000.00. Equipment sales by Gulf to firms other than Husky totaled some $95,000.00 and covered some 20 unit items of equipment sold at prices marginally over scrap value. In addition, some 39 storage tanks and miscellaneous equipment items were scrapped at a sales price of $36,000.00. Fd. No. 13.

Gulf does not sell refinery equipment or machinery (including refinery reformers) in the

pursuit of its regular course of business, but may sell refinery equipment upon economic obsolescence or upon closing a refinery installation in connection with a consolidation of plants where the equipment is surplus to Gulf's requirements. Fd. No. 3.

Gulf does not hold itself out as a seller of reformers. Fd. No. 4. Gulf's policy is to retain reformer units until economic obsolescence, except on the occasion of a relocation where the reformer becomes surplus to Gulf's requirements. Fd. No. 4.

POINT I

FOR THREE DECADES, THE FUNDAMENTAL PRINCIPALE THAT THE UTAH SALES AND USE TAX ACT EXEMPTS SALES NOT MADE IN THE REGULAR COURSE OF A BUSINESS OF A PERSON SELLING TANGIBLE PERSONAL PROPERTY WAS RECOGNIZED BY ADMINISTRATIVE REGULATIONS AND JUDICIAL DECISIONS, AND THE RECENT ACTION OF THE STATE TAX COMMISSION, WHICH ATTEMPTS WITHOUT LEGISLATIVE AMENDMENT TO ABROGATE THE EXEMPTION, IS ARBITRARY, ERRONEOUS AND CAPRICIOUS.

The established meaning of the Utah statutory exemption of isolated and occasional sales is that "no sale is taxable if it is not made in the regular course of a business of a person selling tangible personal property." The express statutory exemption shows legislative intent to limit the scope of the types of transactions that are intended to be subject to the Utah Sales and Use Tax Act. Contemporaneously with the enactment in 1937. of the statutory exemption for isolated and occasional sales, the State Tax Commission recognized in promulgated regulations the legislative intent to limit the scope of the tax to sales made in the regular course of a business of a person selling tangible personal property. 1/

The scope of the statutory exemption has been interpreted by this Court on two occasions (respectively in 1949 and 1969) to exclude from the tax sales not made in the regular course of business of a person selling tangible personal property.

In the case now before this Court, the State Tax Commission has made a *finding* that this sale was not made in the regular course of business of a person selling tangible personal

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1/ It appears that the sales and use tax regulations on isolated and occasional sales, quoted by the Supreme Court in *Geneva Steel Co. v. State Tax Commission,* 116 Utah 170, 178, 209 P.2d 208, 212 (1949), are the regulations which were issued by the State Tax Commission on November 1, 1937. The Reply Brief of plaintiff in the *Geneva Steel Co.* case, on page 12, refers to the fact that the use tax regulations then in effect adopted the sales tax regulations which were revised November 1, 1937.

property, but yet has nevertheless held that the transaction is subject to the tax. At this point, petitioner would note that the use tax is designed to only pick up tax on transactions that would have been subject to the Utah Sales Tax, if the transaction had taken place in Utah. Thus, an exemption from the sales tax also applies to the use tax. *L. A. Young Sons Construction Co. v. State Tax Commission,* 23 Utah 2d 84, 457 P.2d 978 (1969) and *Union Portland Cement Co. v. State Tax Commission,* 110 Utah 152, 176 P.2d 879. The question is, therefore, whether the subject transaction would be taxable if the seller were found in Utah and the transaction had taken place in Utah.

The basis of the Commission's decision is that if Gulf were found in Utah, it would be required to obtain a sales and use tax license. This basis is stated in the Commission's decision in Conclusions of Law Nos. 8 and 9. It is not disputed that Gulf does make retail sales and would be required to obtain a license, if found in Utah. The exemption, however, does not vanish simply due to the existence of license, as the Commission contends.

The pertinent regulation is Sales Tax Regulation S-38. It was amended in 1971 2/ to provide as follows:

> *No sale* of tangible personal property *made by a person licensed to collect sales tax is considered to be isolated or occasional* even though the tangible personal property was used by the seller in his regular business prior to the sale. However, any sale of an entire business is not deemed to be a taxable sale and no tax will apply to the sale of any assets made part of such a sale (with the exception of vehicles subject to registration) provided that the entire business is sold to a single buyer.

Sales Tax Regulation S-38 (1973) (emphasis added). The present regulation ties the availability of the isolated and occasional sale exemption to whether or not the seller has a license to collect the tax. Traditionally, a sale of capital assets, used by the seller in his business but no longer needed, has been exempt under the Utah isolated and occasional sale exemption. With the exception of the sale of an entire business, the current regulation,

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2/ The Commission's decision in Conclusion of Law No. 8 indicates the regulation was changed subsequent to the *L. A. Young Sons Construction Co.* case, and the historical note on the bottom of the Commissioners' published regulations (authored by the Commission) indicates the change was probably made on April 13, 1971 and effective July 1, 1971. Due to the unavailability of past Commission regulations, petitioner's attorney is uncertain of the precise date of the change, but is advised by representatives of the State Tax Commission that it occurred subsequent to the appeal of the *L. A. Young Sons Construction Co.* case.

above quoted, now states in substance that any sale by a license holder is not exempt "even though the tangible personal property was used by the seller in his regular business prior to the sale." Sales Tax Regulation S-38.

At all relevant times prior to the contested amendment to the regulations, however, the regulations of the State Tax Commission provided that "no sale is taxable if it is not made in the regular course of a business of a person selling tangible personal property." *See* Regulation S-38, quoted in *L. A. Young Sons Construction Co. v. State Tax Commission,* 23 Utah 2d 84, 85, 457 P.2d 973, 974 (1969) and *Geneva Steel Co. v. State Tax Commission,* 116 Utah 170, 177, 209 P.2d 208, 211 (1949). Under these regulations, a retail business was not deemed to be engaged in the business of selling its capital assets, and the sale of such tangible personal property was not deemed to be within the scope of transactions intended to be taxed under Utah Sales and Use Tax laws.

The change in the regulations is a complete reversal, leaving no exemption where one previously existed. It sidesteps issues previously resolved by this Court in favor of taxpayers, and directly conflicts with the Court's statutory interpretation.

The Utah statute definitely contemplates an isolated and occasional sale exemption. The statute provides as follows:

> The term "retail sale" means every sale within the state of Utah by a retailer or wholesaler to a user or consumer, except sales 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 occasional sales by persons not regularly engaged in business. . .*

Utah Code Annotated, §59-15-2(e) (1953, Repl. Vol. 1974) (emphasis added). The exemption should be applicable unless the seller is making the sale in the regular course of his business, and any other interpretation nullifies the exemption as hereinafter explained.

At the hearing below, the representative of the Office of the Attorney General explained the extremely restrictive interpretation of the exemption that is found in the current sales tax regulations as follows:

> *. . .I would submit that this* [exemption] *applies only to situations where people are not regularly engaged in retail sale of any kind. In other words, a garage sale where a housewife or someone who disposes of an old regrigerator they have. . . .*

Transcript, page 21, lines 17 through 21 (emphasis added). *See, also,* transcript, page 27, line 7.

Individuals, such as a housewife who has a garage sale, however, do not in the first instance make a "retail sale" as defined by statute. A housewife, therefore, need not rely on the isolated and occasional sale exemption. The statute defines the term "retail sale" as a sale *"by a retailer or a wholesaler* to a user or a consumer." Utah Code Annotated, §59-15-2(e). Thus, only sales by "retailers" or by "wholesalers" are taxable. A retailer or a wholesaler in turn are defined by statute to be persons doing a *"regularly organized"* wholesale or retail business. Utah Code Annotated, §§59-15-2(c) & (e). Since the housewife is not in a regularly organized retail or wholesale business, the housewife, who has a garage sale, is not making taxable sales within the meaning of the statute and the definition of a "retail sale."

Since the sales tax applies only to sales made by persons who are retailers or wholesalers, the exemption, if it does not apply to these individuals, has no practical meaning or effect. It becomes meaningless surplusage in the statute. By contending that the exemption only applies to persons who do not make taxable sales in the first instance, the Commission essentially takes the position that there is no exemption for isolated and occasional sales in Utah.

POINT II

REGULATION S-38 IS WHOLLY INCONSISTENT WITH AND A COMPLETE DISREGARD OF THE DECISIONS OF THE UTAH SUPREME COURT WHICH INTERPRET THE SCOPE OF THE ISOLATED AND OCCASIONAL SALE EXEMPTION.

A. *Geneva Steel Co. v. State Tax Commission,* 116 Utah 170, 209 P.2d 208 (1949).

The *Geneva Steel Co.* case held that in Utah a sale not made in the regular course of business of a retailer is exempt from the tax as an isolated and occasional sale. This case is the first occasion upon which the scope of the "isolated or ocasional sale" exemption was before this Court. The War Assets Administrator had sold the Geneva Steel plant at Geneva, Utah, for $40 million to the Geneva Steel Corporation. The State Tax Commission

contended, *inter alia,* that the War Assets Administration "was engaged in the business of selling surplus government property." Since the entire plant was in a sense government surplus, the Commission contended the selling of such integrated business by them was not an "isolated or occasional sale." 209 P.2d at 213. The Utah Supreme Court rejected this and other contentions of the State Tax Commission and held that the subject sale was an isolated and occasional sale within the meaning of the exemption in the statute.

In reaching its decision, the Utah Supreme Court commented on the nature of the exemption in Utah and on the State Tax Regulation No. 38, which was then in effect. The Court stated:

> The above [Utah] regulations, as well as those of other states which we have examined, definitely contemplate an isolated or occasional sale as one made by a person *while not in the pursuit of the regular course of his business of selling tangible personal property.* . . .

116 Utah at 178, 209 P.2d at 212 (emphasis added). Current Regulation S-38 is a complete rejection of the holding of this Court in the *Geneva Steel Co.* Case.

The Court in the *Geneva Steel Co.* case did not approve and interpret the then existing regulations without first analyzing their validity and the nature of the exemption. The Court cited and quoted with approval the interpretation in the regulations of several other states of the term "isolated and occasional" sales. This quote is exerpted only to the extent that a portion thereof bears directly on the point at issue here:

[1. Connecticut regulation was quoted by the Court]

> A "retail sale" as defined . . . shall not include the following casual or isolated sales which are exempt from tax:
>
> . . .
>
> (b) Sales of articles of tangible personal property required for use or other consumption by a retailer or seller which are not sold in the regular course of any business engaged in by such retailer or seller.

[2. Ohio's regulation was quoted by the Court, and the following example is an exerpt from this quote[

> [W]here a grocer sells his cash register, counters or other store fixtures at auction or otherwise, such persons are not "engaged in the business" of selling tangible personal property at retail with respect to this property, but are making casual or isolated sales.

[3. In regard to Illinois regulations, the Court stated]

> Under Article 1 of the Illinois regulations the selling of tangible personal property as machinery and other capital assets by a retailer 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 is an isolated and occasional sale.

116 Utah at 177, 209 P.2d at 212. All three examples quoted by the Court, which are regulations of taxing authorities in other states, exemplify the point which was made by this Court in its decision and which is directly applicable here. For example, the Ohio regulation states that when a grocer sells his cash register, counters or other store fixtures at an auction or otherwise, such persons are not "engaged in the business" of selling tangible personal property at retail with respect to *this* property. On the contrary, they are making casual or isolated sales as that term is used in virtually all jurisdictions having such as exemption. Similarly, the Illinois regulation, above quoted, states that the selling of capital assets by a retailer, where the retailer has used such assets in his business and no longer needs them, is an isolated and occasional sale.

The Commission in its current Regulation S-38 attempts to limit the holding of the Court to the facts of that particular case. There must be a sale of *all* the assets of a business. The sale must be to a *single* buyer. The current regulation provides:

> However, any sale of an entire business is not deemed to be a taxable sale and no tax will apply to the sale of any assets made part of such a sale (with the exception of vehicles subject to registration) provided that the entire business is sold to a single buyer.

Sales Tax Regulation S-38 (1973). If there are two buyers or if there is a sale of only part of the assets of a business, the exemption does not apply. If the precise facts do exist, however, the Commission in current Regulation S-38 concedes that a license holder has made an isolated and occasional sale.

Such a narrow reading of the Court's holding in the *Geneva Steel Co.* case is not consistent with the principle upon which the decision was based. The Commission's current regulation, further, is internally inconsistent in that a license holder *may* make an isolated and occasional sale when an entire business is sold to a single buyer, but, with this exception, no other sale by a license holder is an isolated or occasional sale.

In Conclusion of Law No. 7, the Commission distinguished the *Geneva Steel Co.* case

on the ground that the "seller [War Assets Administrator] *was not engaged in the business* of selling his entire business." We would submit that Gulf is equally not engaged in the business of selling its refinery equipment, and hence the cases are indistinguishable.

B. *L. A. Young Sons Construction Co. v. State Tax Commission* 23 Utah 2d 84, 457 P.2d 973 (1969).

In this case, the Utah Supreme Court held that the sale of equipment, used by a contractor in its business, was an isolated and occasional sale within the meaning of the Utah statute. It is petitioner's position that the holding of the Supreme Court of Utah in *L. A. Young Sons Construction Co.* is dispositive of the issues in the case at bar.

The decision of the Supreme Court notes the following facts. Amis Construction Company ("Amis"), an Oklahoma corporation, had used a large amount of construction equipment on a job in Wyoming. Rather than transport the construction equipment which it had used on the job back to Oklahoma, Amis decided to sell some of the equipment. To facilitate the sale, Amis engaged the services of an auctioneer.

The decision recites that the taxpayer (L. A. Young Sons Construction Co.) had purchased "a number of items at the auction which resulted in the Tax Commission levying a use tax deficiency thereon." The Court does not in its decision give further detail on the amount of the equipment which was involved, for the reason, it is submitted, the nature of the sale and of Amis' business was dispositive on the issues in the case. We would note that the State Tax Commission's brief to the Court argued that Amis had sold over 232 pieces of equipment for a total selling price of $789,737.50, of which six were purchased by the taxpayer at a price of $139,500.00. Brief of Defendant, at page 2.

The portion of Sales Tax Regulation S-38, which was quoted by the Court in this 1969 decision, is substantially unchanged from the portion of the same regulation which had been quoted by the Utah Supreme Court in its 1949 decision in the *Geneva Steel Co.* case. The regulation still contained the provision "no sale is taxable if it is not made in regular course of a business making retail sales . . . . " Another portion of the then existing regulation which was brought to the attention of the Court by the taxpayer in taxpayer's Brief read as follows:

On the other hand, the sale of fixtures and appliances used in a

> clothing store are not subject to tax when the merchant sells them in the course of his modernization program.

Regulation S-38, quoted in Brief of Plaintiff on page 13.

The Court noted that Amis was engaged in the business of constructing highways, roads, bridges and like projects, and had never been engaged in the business of selling construction equipment nor in making retail sales.

This Court held that "the sale of equipment here in question was an isolated or occasional sale and therefore clearly within the exemption [for isolated and occasional sales] of the statute referred to." The Court further stated that it saw "no valid distinction" between the case at hand and the *Geneva Steel Co.* case.

The holding of the Court in the *L. A. Young Sons Construction Co.* case cannot be reconciled with the position of the Commission in this proceeding. The Court's holding in the *L. A. Young Sons Construction Co.* case should be compared to the position of the representative of the Office of the Attorney General in his argument before the State Tax Commission. He stated:

> In other words, *a retailer operates an orange and apple stand selling apples and oranges.* He finally reaches a point where the table is too old to hold the oranges and apples and he runs and [sic] ad in the paper to sell his table. *The question then is, is there a sales tax on the sale of his table although he regularly sells apples and oranges?* The petitioner would say yes, he is entitled to an exception as an isolated sale. I would submit that he is not . . . .

Transcript, page 20, lines 2 through 9 (emphasis added). The position which the Commission seeks to establish in this proceeding cannot be reconsiled with this Court's prior decision on the subject.

In the *L. A. Young Sons Construction Co.* case, the State Tax Commission was essentially urging this Court that the number of sales or the gross amount of money involved in the sales by the contractor in that case were sufficient in number, scope and character that they could not be isolated and occasional sales. The Court in its decision expressly rejected this argument:

> The Tax Commission urges us to follow the decisions of the California Supreme Court which have construed sales such as the one involved here as not being within the exemption of the isolated or occasional sales provision. However, it should be noted that the California

> statute is not similar to the Utah statute. *The California statute provides that a series of sales sufficient in "number, scope and character"* to constitute an activity requiring the holding of a seller's permit is not an occasional sale. *The terms "sales sufficient in number, scope and character" are not a part of the Utah statute, and we do not believe that the court should construe the statute as including those terms.*

457 P.2d at 974 (emphasis added). The response of the State Tax Commission was not to acquiesce in the holding and decision of the *L. A. Young Sons Construction Co.* case. Instead, the State Tax Commission attempted to overrule the case by promulgating a regulation directly in conflict with the case. In Conclusion of Law No. 8, the State Tax Commission distinquishes the *L. A. Young Sons Construction Co.* case on the grounds that subsequent to that decision the Commission adopted the provision in the regulation that "there is no isolated or occasional sales exemption when there is a series of sales sufficient in number, scope and character to indicate that the seller is regularly engaged in the business of selling tangible personal property." The precise language of current Sales Tax Regulation S-38 on this point is as follows:

> The sale of used fixtures, machinery and equiment items by nonlicense holders is not an exempt occasional sale where such sale is one of the *series of sales sufficient in number, amount and character to indicate the seller deals in the sale of such items.*

Regulation S-38 (emphasis added). The Court in its decision in the *L. A. Young Sons Construction Co.* case did not state that the *regulations* of the Commission did not contain the terms "sales sufficient in number, scope and character," but rather the Court stated that the Utah *statute* did not contain these terms. The California statute is, as this Court has said, entirely distinguishable. If the Commission desires a result tailored after the California statute, the proper course is to request the legislature to modify the Utah statute. It is beyond the power of the Commission to modify the statute by amending its regulations.

The fulcrum of the Court's holding was that the contractor was not engaged in the business of selling its construction equipment. Similarly, Gulf used the subject reformer in its refinery operations and is not engaged in the business of selling refinery reformers or refinery equipment. Indeed, the subject sale is the only sale of a completed unit that Gulf has made. It is respectfully submitted that there is no valid distinction between the facts of the case at bar and the *L. A. Young Sons Construction Co.* case.

POINT III

COURTS IN OTHER STATE JURISDICTIONS HAVE CONSTRUED THEIR ISOLATED AND OCCASIONAL SALE EXEMPTION IN THE MANNER CONSISTENT WITH THE PRIOR DECISIONS OF THE UTAH SUPREME COURT.

As noted by the Supreme Court in the *Geneva Steel Co.* case, its interpretation of the Utah statute was in accord with interpretations of isolated and occasional sale exemptions in other state jurisdictions. Since the decisions of this Court are controlling on Utah law, we do not desire to burden this Brief with a lengthy discussion of the numerous cases that support petitioner's position and the construction found in prior decisions of this Court. Some of these cases, however, are cited in the footnote.[3/]

We will discuss very briefly only two cases from other state jurisdictions.

Tennessee had a statute that was substantially identical to the language in Utah's statute, and a Tennessee case reviewed an attempt by the local taxing authorities to abandon prior regulations that exempted sales not made in the regular course of business. The Tennessee court properly rejected the attempt of the local taxing authorities to amend the statute by promulgating regulations. *Liberty Cash Grocers, Inc. v. Z. D. Atkins,* 304 SW2d 633, 202 Tenn. 448 (1957). The Tennessee statute was substantially identical to the Utah statute in the pertinent part and provided as follows:

> The term "business" shall not be construed in this Act to include occasional and isolated sales or transactions *by a person who does not hold himself out as engaged in business.*

304 SW2d at 634 (emphasis added). The Tennessee Supreme Court Stated:

> *While the complainant was engaged in the business of selling tangible property, it was not engaged in the business of selling tangibles such as its fixtures and equipment.* In support of this conclusion, it must be presumed that when the merchandise and equipment in question was acquired for complainant's own use, the law was complied with, and said personal property had, therefore, already been burdened with a sales tax.

3/ *See, e.g., Maine Aviation Corporation v. Johnson,* 196 A.2d 748 (Maine, 1964) M. *L. Virden Lbr. Co., Inc. v. Stone,* 203 Miss. 251, 33 So. 2d 841 (Supreme Court of Mississippi, 1948); *Doolittle v. Johnson,* 250 A.2d 822 (Supreme Judicial Court of Maine, 1969); *State v. Bay Towing and Dredging Co.,* 265 Ala. 282, 90 So.2d 743 (Supreme Court of Alabama, 1956); *Green v. Pederson,* 99 So.2d 292 (Supreme Court of Florida, 1957); *Richard Bertram & Co. v. Green,* 132 So.2d 24 (District Court of Appeal of Florida, 1961); *Calvert v. Marathon Oil Company,* 389 SW2d 153 (Texas, 1965).

. . . . .

> Casual or isolated sales may be where a person sells his automobile or a merchant sells his store fixtures or a person sells a quantity of lumber and in such cases this person is not engaged in selling property within the meaning of the Tennessee Sales Tax Act.

304 SW2d at 635 (emphasis added). Similarly, the reformer was a fixture of Gulf. It is stipulated that Gulf is not engaged in the business of selling refinery reformers, and, indeed, the subject sale is the only sale of a completed unit that Gulf has ever made.

The Texas Supreme Court recently reviewed an issue similar in principle to the issue before this Court. The local taxing authorities (Texas Comptroller) argued that the exemption for isolated and occasional sales in the Texas statute did not apply to any person engaged in the business of making retail sales. The Texas Supreme Court rejected the Comptroller's position that a "retailer" could not make an occasional sale under the exemption for the simple reason that "retailers" were the only persons who made taxable sales under the terms of the Act in the first instance. *Big Three Industries, Inc. v. Keystone Industries, Inc.,* 472 SW2d 850 (Texas Civil Appeals, 1971). The Court stated:

> If the "occasional sale" provision applied to that definitition, then there could be no such thing as an occasional sale *because all occasional sales would be made by persons exempted from the sales tax in the first place.*

472 SW2d at 852 (emphasis added). For similar reasons, the current provisions of Utah provision S-38 would render the exemption under Utah law a nullity, since the only individuals or entities the Utah exemption would then apply to do not make taxable sales in the first instance.

Not only case laws of other jurisdictions, but also the regulations of the state tax authorities in other states have almost uniformly adopted such interpretations when similar statutory language is involved. On page 18 of the taxpayer's Brief to the State Tax Commission, the regulations of several taxing authorities in other states, interpreting language almost identical to the Utah statutory exemption, were cited and quoted. (Indeed, the Utah State Tax Commission would fall into the category of so interpreting the exemption, until the recent amendment in 1971.) In the Appendix of the petitioner's Brief to the State Tax Commission, the statutes and regulations of over half of other state jurisdictions were quoted, and these statutes and regulations show that it is the definite

policy of most state jurisdictions to exempt isolated and occasional sales under the circumstances of this case.

It is submitted that the decisions of the Utah Supreme Court control this case, and there is no need to look to the law of other state jurisdictions. This section is included in our Brief only to point out that the decisions of the Court on this subject are in accord with interpretations of other state jurisdictions.

CONCLUSION

The subject reformer was used by Gulf in its refinery operations prior to the sale to Husky. Gulf does not hold itself out as a seller of refinery reformers, and the subject sale of a reformer is the only sale of a completed unit that Gulf has made. While Gulf was engaged in the business of selling oil, gas and related products at retail, Gulf never engaged in the business of selling refinery reformers. If the sale had been made in Utah, it would have been exempt from the Utah Sales Tax as an isolated or occasional sale. It is therefore exempt from the Utah Use Tax.

The determination of the State Tax Commission that petitioner is liable for a use tax deficiency in the amount of $30,375.00, plus interest, is in error.

DATED this 26th day of April, 1976.

Respectfully submitted,

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