

1948

Whitmore Oxygen Company v. State Tax Commission of Utah and Grant A. Brown, Elisha Warner, Milton Twitchell and Roscoe E. Hammond : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Whitmore Oxygen Co. v. Utah Tax Commission*, No. 7154 (Utah Supreme Court, 1948).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

WHITMORE OXYGEN COMPANY,
Plaintiff and Appellant,

— vs. —

STATE TAX COMMISSION OF
THE STATE OF UTAH and
GRANT A. BROWN, ELISHA
WARNER, MILTON TWIT-
CHELL and ROSCOE E. HAM-
MOND, as the duly appointed and
acting commissioners thereof,
Defendants and Respondents.

CASE
NO. 7154

BRIEF OF APPELLANT

FILED

APR 12 1948

DAVID T. LEWIS,
*Attorney for Plaintiff and
Appellant.*

CLERK, SUPREME COURT, UTAH

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WARNER, MILTON TWIT-
CHELL and ROSCOE E. HAM-
MOND, as the duly appointed and
acting commissioners thereof,
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CASE
NO. 7154

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This matter reaches this court by writ of certiorari from the State Tax Commission. The controversy involves a Use Tax assessment by the State Tax Commission, and the case was submitted to the commission upon an agreed statement of facts (Tr. 34-39) which, briefly summarized, are as follows:

The appellant, Whitmore Oxygen Company, is a local manufacturing company engaged in the manufacture and sale of oxygen, acetylene and other bottled gases (Tr. 32). The Linde Air Products Company is an Ohio corporation, doing business in Utah, and has its manufacturing plant at Speedway, Indiana (Tr. 32, 36). The two companies are competitors in the local market.

On *April 18, 1941*, the companies entered into a written contract (Tr. 36-39), under the terms of which the Linde Company agreed to sell and the Whitmore Company agreed to buy a quantity of acetylene cylinders at an agreed price of \$34,600.00. Payment was to be made by the Whitmore Company in monthly instalments, beginning thirty (30) days after delivery, and title to the cylinders was to remain in the Linde Company until the entire purchase price was paid (Tr. 38). The purchase price was set as being an amount certain per cylinder, f. o. b. Speedway, Indiana (Tr. 36), and the contract and record is silent as to the place of delivery and freight cost.

The contract was fully performed by the parties. Linde made delivery of the cylinders in the Fall of 1941, Whitmore made his first monthly payment on December 1, 1941 (Tr. 37) *and paid the balance in full on March 30, 1943, at which time title to the cylinders passed unequivocally to the Whitmore Company* (Tr. 33, 37). On November 21, 1947 (Tr. 1), *nearly six years after delivery of the cylinders, and more than four years after title to the cylinders passed to the Whitmore Company*, the Tax Commission made the deficiency Use Tax assess-

ment complained of in these proceedings.

During the entire period involved, that is, from January 1, 1941 to the date of the deficiency assessment in 1947, the Whitmore Company had filed with the Tax Commission every two months the commission's Form 71 (Tr. 34), which form is designated by the Tax Commission as a "Sales Tax and Use Tax Return" (Tr. 35). Each return was certified to by the company in the following language as required by the Tax Commission: (Tr. 35)

"I HEREBY CERTIFY, That I have examined this return and that the statements made and the figures shown herein and in any accompanying schedules are to the best of my knowledge and belief a true and complete return, made in good faith for the period stated, pursuant to the Emergency Revenue Act of 1933, as amended, and the Use Tax Act of 1937 and regulations issued under authority of both acts.

Whitmore Oxygen Co.

Name of business or taxpayer

C. A. Pingree

Agent, or officer if corporation,
trustee, etc.

Asst. Mgr.

"

Title

The Whitmore Oxygen Company has paid to the Tax Commission at two month intervals during all the period from 1941 to 1947, the total amount of Sales Tax and Use Tax shown to be due upon line eleven (11) of the various returns (Tr. 34). Notwithstanding these facts, stipulated to be true as they are, *the Tax Commission found that the Whitmore Oxygen Company had*

never filed a Use Tax Return at any time between January 1, 1941 and December 31, 1946 (Finding No. 2, Tr. 47).

ASSIGNMENTS OF ERROR

1. The Tax Commission erred in its finding "That the taxpayer filed no Use Tax Returns during the period January 1, 1941 to December 31, 1946." (Finding No. 2, Tr. 47).

2. The Tax Commission erred in failing to find that the deficiency Use Tax assessment was barred by the provisions of Title 104-2-24.10, Utah Code Annotated 1943.

3. The Tax Commission erred in failing to find that the deficiency Use Tax assessment was barred by the provisions of Title 104-2-30, Utah Code Annotated 1943.

4. The Tax Commission erred in failing to find that the proposed deficiency was barred by the provisions of Title 80-15-8.

5. The Tax Commission erred in failing to find that the sale in question was specifically exempt from taxation by virtue of the provisions of Title 80-16-4 (d).

6. The Tax Commission erred in finding that the sale was consummated in the State of Indiana.

7. The Tax Commission erred in its finding that the sale in question was one in interstate commerce.

8. The Tax Commission erred in concluding that the taxpayer is liable to the Tax Commission for Use Tax in the amount of \$1246.81, or in any other sum.

9. The Tax Commission erred in its conclusion No

1, in that the matters set forth therein are contradictory and incompatible.

QUESTIONS INVOLVED

Two general questions are presented upon this appeal:

1. Does the taxpayer's procedure in filing the Tax Commission's Form 71 constitute the filing of a Use Tax Return? If answered in the affirmative, it follows, we submit, that the assessment of the Commission is barred by each of several statutes of limitation, and no further question need be considered. If answered in the negative, additional problems are presented.

2. Is the sale of personal property evidenced by the Whitmore-Linde contract subject to a tax under the Use Tax Act?

STATEMENT OF ARGUMENT

In this brief, appellant will present the following points:

1. The taxpayer has filed with the Tax Commission every two months, the Commission's Form 71, and the purported deficiency Use Tax assessment is barred by the provisions of each of several statutes of limitation.

2. The sale evidenced by the Whitmore-Linde contract was either:

(a) Made in the State of Utah and, therefore, subject to Sales Tax rather than Use Tax, or (b) made in Indiana and specifically exempt under the provisions of the Use Tax Act because subject to the Gross Income Tax Act of Indiana.

ARGUMENT

1. Although the Whitmore Company has consistently filed with the Tax Commission its Form 71, designated by the Commission as a "Sales Tax and Use Tax Return," the Commission has ruled that the taxpayer's failure to completely fill out the form by omitting to write "O" on certain lines of the form, constitutes a failure of the taxpayer to file a Use Tax return at all. The filing of a return is the incident precedent to the starting point of the statute of limitations running in favor of the taxpayer and, consequently, the Commission has claimed the right to audit for Use Tax without limitation. The Sales Tax audit was only for the period 1944-47 (tr. 32), the three-year period allowed by the provisions of Title 80-15-8, and the Commission has conceded that Form 71 as filed constitutes a Sales Tax return regardless of the fact that many blanks relative to Sales Tax, including all of the questions contained on the back of the form (tr. 35) are not filled in. We believe the position of the Commission to be both inconsistent and erroneous.

What good would it do to have had the taxpayer write "O" upon each of the lines on the face of the return? The net result of the return would have been the same; the auditing result would have been the same; the administrative problems would have been the same; the taxpayer's liability would have been the same. To write "O" in the blanks would have been a useless gesture, and it is an ancient maxim that the *law does not require a person to do a useless thing*.

The intent of the taxpayer to have Form 71 constitute a Use Tax return would not be aided by the addition of zeros throughout the return. The intent of the taxpayer is clear by his designation on line 11 of the return where he states the total amount of Sales *and* Use Tax due, and is climaxed by his formal certification that the return is true and complete for both Sales *and* Use Tax.

In *Zellerbach Paper Company v. Helvering*, 293 U. S. at 180, 79 L. Ed. at 269, the Supreme Court of the United States, speaking through Mr. Justice Cardoza, in considering the Internal Revenue Act, states:

“Perfect accuracy or completeness is not necessary to rescue a return from a nullity if it purports to be a return, is sworn to as such, and evidences an honest and genuine endeavor to satisfy the law.”

Applying this rule to the instant case we have no hesitancy in maintaining that Form 71 as filed every two months by the Whitmore Company is not a nullity relative to Use Tax. The form is furnished by the Tax Commission, and that body is solely responsible for its form. It is labeled a “Sales and Use Tax Return,” is the standard one furnished taxpayers such as the Whitmore Company, and is consistently referred to as a “return” in the singular. Had the Tax Commission considered or desired the form to be otherwise than a return for both taxes, they could have easily changed the wording to so indicate. Had the Tax Commission thought it necessary to have the taxpayer fill the form with zeros where applicable, they could have so indicated. The words “if none, so indicate” are common instructions on many

forms. But the Commission chose Form 71 and the wording thereof, and the taxpayers have a right to rely on the form's appearance and apparent purpose, that is, that it is a "Sales and Use Tax Return." And when a taxpayer certifies that the form constitutes a true and complete return for both taxes, his duty is fulfilled. He has filed a return for both taxes.

The Sales Tax and Use Tax are complimentary taxes so related one with the other that to effectuate the general purpose of the taxes, this court has held that certain exemptions found in the Sales Tax Act, but not in the Use Act, apply nevertheless to the Use Tax Act.

Union Portland Cement Company v. Tax Commission, Utah, 176 P. 2d 879.

The two taxes, though written separately for necessity, are intended to provide a comprehensive taxing system upon the use, storage and consumption of personal property in this state. See *Douglas Aircraft Company v. Johnson*, 13 Cal. 2d 545, 90 P. 2d 572.

Now, because the two taxes are so closely related and are in fact just one comprehensive taxing system, the taxpayer cannot be called upon to distinguish carefully between each tax separately. This is particularly evident in the instant case as will subsequently appear in our discussion as to which tax is applicable, if any, to the sale involved in this case. The close and extremely technical distinction between the application of the two taxes is totally beyond the average taxpayer's knowledge and in many cases will be doubtful, even should the taxpayer seek the most expert of advice. This fact has

been recognized by the Tax Commission in choosing the form of Form 71, and is further recognized in its Regulation No. 1, wherein it is stated:

“... The two taxes are compensating taxes, one supplementing the other, but both cannot be applicable to the same transaction. The rate of each tax is the same and it is, therefore, usually unnecessary to determine which tax is technically applicable.”

Because of these matters, taxpayers cannot and are not required to distinguish between the taxes, and it is the wise and proper thing to have the taxpayers file one return for the two taxes. But having chosen the form and indicating that it is a return for both taxes, we submit the Tax Commission cannot now say that a taxpayer is not, as Mr. Justice Cardoza says, “making a genuine endeavor to satisfy the law,” when the taxpayer certifies that the return is for both taxes, but neglects to fill in some useless zeros in some lines of the form.

We believe that the Whitmore Company has clearly met every test as laid down by Mr. Justice Cardoza. Form 71 purports to be a Use Tax return. It is sworn to as such by the Whitmore Company and constitutes an honest and genuine endeavor to satisfy a most complicated and hard-to-distinguish system of taxation. The same method of filing has been used by the Whitmore Company since the effective date of the Use Tax in 1937, without prior complaint or criticism. A multitude of other taxpayers endeavoring to satisfy the law and the requirements of the Tax Commission have undoubtedly filed the same form in the same manner.

2. As we have pointed out, if the court concludes that the Whitmore Company has made "an honest and genuine endeavor to satisfy the law" in the filing of Form 71, no consideration need be given to other matters presented in this appeal; however, should the court reach a contrary conclusion, the question of which tax, sales or use, if either, is applicable to the Whitmore-Linde transaction must be considered. As the court pointed out at *Union Portland Cement Company v. State Tax Commission*, Utah, 170 P. 2d 164 (original opinion), ordinarily the situs of a sale is where the act is performed or the event occurs which operates to vest title in the buyer. Under the express terms of the Whitmore-Linde contract (tr. 38), title was retained in the Linde Company until the purchase price was paid. Consequently, the actual passing of title to the tanks passed while the goods were in Whitmore's possession in Utah and title passed in Utah. The designation in the contract (tr. 36) of a purchase price, f.o.b. Speedway, Indiana, did in no way change that fact. A sale contract expressly providing that title to property shall remain in the seller until the property is paid for is not affected by a provision to deliver f.o.b. point of shipment, and title remains in the seller regardless of delivery.

Colles v. Lake Cities Electric Company, 22 Indiana Appeals 86, 53 N. E. 256.

Petersburg Firebrick Company v. American Clay Company, 89 Ohio 365, 106 N. E. 33.

If the Sales Tax Act is applicable, the taxable incident was not the passage of title, but the transfer of possession due to the specific provisions of Title 80-15-2

(b), which provides in part:

“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.’”

The Use Tax Act has a comparable provision relating to the definition of “purchase” (Title 80-16-2 (c)), but the provision here can affect only the tax basis and not the tax incident as the tax incident, regardless of where or when title or possession passes, is the use, storage or consumption of property in Utah.

Where, then, did the possession of the goods pass? The record is silent as to where and when the Whitmore Company took possession of the goods and as to payment of freight charges from Indiana to Utah. The silence of the record in this regard is practical evidence of the harshness of an administrative effort to tax a seven-year-old transaction, and practical evidence of the fairness of statutes of limitation for the protection of taxpayers making conscientious efforts to comply with complicated tax requirements. At this late date neither Whitmore nor Linde has available records relating to the transfer of possession of the tanks nor to the payment of freight charges nor reimbursements for such charges, if any there be. However, some of the contract provisions are helpful in determining the intent of the parties as to whether the transaction was to be considered an Indiana or a Utah sale.

Paragraph eight of the contract (tr. 39) provides that the validity, interpretation and performance of the contract should be governed by the law of Utah. The

place of performance of a contract is the state where the promise is to be performed.

Beale Conflict of Laws, Vol. II, Page 1259.

This contract was made in Utah, as the acceptance was made by Whitmore in Salt Lake City (tr. 33), which act was the final act necessary to make the contract binding (tr. 39), by the express provisions of the contract. In the absence of contrary agreements or circumstances when no place of performance is fixed by a contract, it will be presumed that the contract is to be performed where made.

Lawson v. Tripp, 34 Utah 28, 95 P. 520.

This is especially true, and the presumption is stronger where the contract, as this one does, provides expressly that designated portions shall be performed at the place of contracting.

Burr v. Western States Life of California, 296 P. 273.

The contract also contains a provision (Paragraph 2, tr. 38) that Whitmore would pay on demand to Linde any Sales, Use or other excise tax for which Linde might be liable. If this transaction was intended by the parties to be a Utah sale, the contract provision has some significance for Linde would be liable for a sales tax. If, however, the sale was intended as an Indiana sale, as the Tax Commission contends, and one in interstate commerce, Linde could have no liability and the contract provision is meaningless. A case clearly in point and nearly identical in fact is found in *Commonwealth of Pennsylvania v. Wiloil Corporation*, 316 Pa. 33, 173 Atl.

404, 101 A. L. R. 287. In that case the Wiloil Corporation, a Pennsylvania company, sold to certain vendees located also in Pennsylvania, quantities of gasoline at a price f. o. b. Wilmington, Delaware, with the specific provision that the vendees would pay to the vendors the Pennsylvania gasoline tax in addition to the amount set as the purchase price. In a suit by the State of Pennsylvania to recover the gasoline tax, the Wiloil Company defended upon the assertion that title to the gasoline passed to the vendee at Wilmington and that as a consequence it wasn't a Pennsylvania sale. The court rejected that theory, stating:

“The first position assumed by appellant is that the title to the gasoline passed to the purchasers at Wilmington, Del., and that they were the importers under the terms of the act and alone liable for the tax. The second position taken is that, if the title did not pass at Wilmington, deliveries were made to the purchasers in Pennsylvania in tank cars, the original packages, that the shipments were at all times in interstate commerce and the charging of the tax to the seller is illegal, as it imposes a burden upon such commerce, and that, if that be the intent of the act, it is unconstitutional.

“Taking up the first position, we find that the Sales Act of May 19, 1915, P. L. 543, Para. 18, 69 PS Para-142, recognizes that the intention of the buyer and the seller determines the time of the passage of title. For the purpose of ascertaining their intention, the act says regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case.

“We start with the fact that the sale was

actually made in Pennsylvania. The contention of appellant arises out of the circumstance that the price was fixed f. o. b. Wilmington. This, however, does not necessarily mean that title passed there; particularly is this so in view of the intention of the parties evidenced by the provision in their contract that the vendees should pay the tax to the vendors. If the parties contemplated that the title passed at Wilmington, outside Pennsylvania, and the gasoline there belonged to the purchasers, it is difficult to understand how the seller could have regarded itself as in any way liable for a Pennsylvania tax. As we view it, the provision in the contract that the gasoline was to be f. o. b. Wilmington was not intended to designate the place of delivery, but to fix the full price to be paid. This is shown by plaintiff's invoice offered in evidence, which, after setting forth the sale, contains the following: 'Price $5\frac{1}{2}^c$ gal. f. o. b. Wilmington, Del. plus 3c tax'."

We submit, therefore, that the Whitmore-Linde transaction was a sale in Utah subject to the Sales Tax and improperly assessed by the Tax Commission as a Use Tax. As the Commission states in its Sales and Use Tax Regulation No. 1, "if the sale is made in Utah the Sales Tax applies. If the sale is made elsewhere, the Use Tax applies."

3. Even assuming, however, that the sale was an Indiana sale as found by the Commission in its Conclusion No. 1 (tr. 47), the purported Use Tax assessment was improper. Title 80-16-4 (d) provides an exemption upon "property the gross receipts from the sale, distribution or use of which are now subject to a sale or excise tax under the laws of the state or of some other state of

the United States.”

If, as stated by the Commission’s finding (tr. 47), “the sale was consummated in the state of Indiana,” it follows that the sale was subject to the Indiana Gross Income Tax Act of 1933, which act is in effect a general sales tax act. We understand that the Tax Commission has long interpreted the words “subject to” as found in Title 80-16-4 (d) as meaning “subject to and actually paid.” In other words, the Tax Commission insists that a foreign sales tax be actually paid to a sister state in addition to the transaction being subject to the sales tax of a sister state. With this interpretation we have no sympathy or patience. A misinterpretation of a statute, no matter how long continued by an administrative body, gives no regularity to the interpretation.

Utah Concrete Products v. State Tax Commission, 101 Utah 513, 125 P. 2d 408.

When the Utah Legislature used the words “subject to,” the intent of the law was and is clear, and an administrative body has no power to limit the exemption in such broad fashion by reading in additional limitations. Although we have made no search of the Indiana law, the probability is that there is ample authority that a transaction such as the Whitmore-Linde sale is not taxable in Indiana. This is true, we believe, because the Indiana authorities could not successfully claim that the sale was “consummated in Indiana.” However, any sale actually “consummated in Indiana” would be subject to their Gross Income Tax Act.

CONCLUSION

We submit that the assessment of the Tax Commission is erroneous and unlawful from any approach made to the problem. We think it clear that the Whitmore Company has filed a Use Tax Return every two months since the Use Tax Act became effective, and that any purported assessment upon a transaction occurring in 1941 is barred by each of the following statutory provisions:

“Title 104-2-24.10.

An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state, shall be commenced within three years.”

“Title 104-2-30.

An action for relief not otherwise provided for must be commenced within four years after the cause of action shall have accrued.”

We submit further that the assessment was made by the Tax Commission erroneously and unlawfully under the Use Tax Act when such act was not applicable, and upon a sale made in the state of Utah and subject to the Utah Sales Tax. In this regard it is admitted, we think, that had the Tax Commission made the assessment under the Sales Tax Act, the assessment would have been barred by the Statutes of Limitations above set forth, and specifically barred, in addition, by the provisions of Title 80-15-8.

In conclusion we submit that even if Whitmore had filed no returns and if the Tax Commission had been correct in their finding that the sale was "consummated in the state of Indiana," still the assessment would have been unlawful and erroneous because the transaction, if consummated in Indiana, would have been subject to the Indiana Sales Tax and specifically exempt from Utah taxation under the provisions of Title 80-16-4 (d).

The order of the Tax Commission making the deficiency assessment against the Whitmore Company should be reversed and the assessment held to be invalid.

Respectfully submitted,

DAVID T. LEWIS,
*Attorney for Plaintiff and
Appellant.*

Received a copy of the foregoing Brief of Appellant
this day of April, 1948.

*Attorney for Defendants and
Respondents*