

1948

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

Utah Supreme Court

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In the
SUPREME COURT
of the
STATE OF UTAH

WHITMORE OXYGEN COMPANY,

Plaintiff,

vs.

STATE TAX COMMISSION, GRANT
A. BROWN, ELISHA WARNER,
MILTON TWITCHELL and ROSCOE
E. HAMMOND,

Defendants.

Case No.
7154

FILED Defendants Brief

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WHITMORE OXYGEN COMPANY,

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vs.

STATE TAX COMMISSION, GRANT
A. BROWN, ELISHA WARNER,
MILTON TWITCHELL and ROSCOE
E. HAMMOND,

Defendants.

Case No.
7154

Defendant's Brief

FACTS

The facts in this case are not in dispute and plaintiff's statement as outlined in its brief is substantially correct and is adopted by defendants for the purpose of

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this brief. This case was submitted to the Commission on an agreed statement of facts (Tr. 32-34), which outlines the pertinent facts in greater detail.

QUESTIONS INVOLVED

It is believed that the questions as outlined in plaintiff's brief do not set forth the problems herein with sufficient exactness and, therefore, it is submitted that the specific questions for determination are as follows:

1. Does the filing of form TC 71 entitled "Sales and Use Tax Return," consisting of two parts in which entries relating to sales tax have been made in the sales tax portion of the form but in which entries have not been made in the use tax portion of the form, constitute a use tax return for the purpose of starting the period of the statute of limitations for collecting a use tax deficiency determination?
2. Was the sale of personal property evidenced by the Whitmore-Linde contract an interstate sale, an Indiana sale, or a sale made in Utah?
3. If such sale is determined to be an Indiana sale is the use made by the Whitmore Oxygen Company of these cylinders exempt pursuant to the provisions of Title 80-16-4 (d), Utah Code Annotated, 1943, because subject to the Gross Income Tax Act of Indiana?

REPLY TO PLAINTIFF'S ARGUMENT

1. Plaintiff predicates its argument as to the first question on the fact that it filed form TC 71 with the

Tax Commission every two months and that each return was certified to by the company (Tr. 35), and further contends that the form as filed by it constituted a use tax return within the meaning of the Use Tax Act.

If the forms as filed by plaintiff can be considered to be a return for the purpose of the Use Tax Act, its contention that the statute of limitations is a good defense, must be conceded. It is the position of defendants that the 4 year statute of limitation applies for the assessment of use tax deficiencies in cases where a use tax return has been filed. Title 80-16-18, Utah Code Annotated, 1943, allows the Commission to bring an action at any time within 4 years after any person is delinquent in payment of use tax. While there is no specific statute of repose with regard to the making or the finding of a deficiency assessment by the Commission, it is believed that the only reasonable interpretation of the Act as a whole would be that the general 4 year statute of limitations (104-2-30, Utah Code Annotated, 1943) applies inasmuch as an action could be brought within this time.

The required contents for use tax purposes is set forth in Title 80-16-7, Utah Code Annotated, 1943, which requires the taxpayer to “* * * file with the Commission a return for the preceding bimonthly period in such form and containing such information as may be prescribed by the Commission. * * *” With regard to the use tax, the Commission has issued its form TC 71-B entitled “Instructions,” and lists the purpose of the combined return to be as follows:

“Since a considerable number of retailers will be required to return to the State the use tax with respect to certain of their sales, as well as being subject to the use tax on certain of their purchases, in addition to being liable for returning sales tax, a combined return has been prepared so that both the sales tax and the use tax may be reported on one return.”

Items 6 and 7 on form TC 71 filed by the plaintiff herein (Tr. 35) are completely blank. Instructions with regard to Items 6 and 7 reads as follows:

“Item 6. Enter as this item the total sales price as tangible personal property the storage, use or other consumption of which, in Utah, is subject to the use tax. For the most part, this will include the sales price of property on which delivery is made from an out-of-state point to purchasers in Utah which ordinarily would be the same as Item 13 in the schedule of sales tax deductions. This will also include the sales price of property, the sale or delivery of which is made at a place outside of this State if the property is purchased for storage, use or other consumption in this State. The use tax does not apply to the sales price of property the sale of which is subject to a sale or excise tax of this State or any other state.

“Item 7. Enter as this item, valued at the sales price, all purchases made by you outside of Utah or in interstate commerce for storage, use or consumption by you in this State upon which the seller has not collected the use tax. For the most part, this item will include equipment, supplies, merchandise, etc., purchased from out-of-

state sellers. It should not include (a) merchandise purchased for resale; or (b) materials which become an ingredient or component part of tangible personal property to be sold.”

While it may be true that the filing of a return containing incorrect information in the absence of fraud will be sufficient to start the running of the limitation period, if a taxpayer fails to furnish any information with respect to required items as set forth in the instructions, and leaves the form blank as did the plaintiff herein, it is submitted that a return has not been filed within the meaning and intent of the Use Tax Act.

No direct judicial authority has been found on this subject and it is believed that there is no reported case in which this specific question has been determined. However, Federal cases interpreting sections 51 (a), 52, 142 (a), and 187 of the Internal Revenue Code and their earlier counterparts relating to Federal income tax returns are somewhat analogous. These sections require, as in prior Revenue Acts, a return “stating specifically the items of gross income and the deductions and credits allowed under this title,” and also “such other information for the purpose of this title as the Commission with the approval of the Secretary may by regulations prescribe.”

In *Florsheim Bros. Dry Goods Company v. United States* (1930) 280 U.S. 453, 460, Mr. Justice Brandeis speaking for a unanimous court stated:

“The burden of supplying by the return the information on which assessments were to be

based was thus imposed on the taxpayers. And, in providing that the period of limitation should begin on the date the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner."

In *Corona Coal and Coke Co.*, (1928) 11 B.T.A. 240, where no information was given except the name and address of the taxpayer, and only the word "none" was written at the blank space provided for net income, a similar holding was reached. See also *The Jockey Club* (1934) 30 B.T.A. 670, aff'd. without discussion of this point. (C.C.A. 2d 1935). 76 F. 2d 597 (blank return accompanied by letter claiming exempt status); *National Contracting Co.* (1938) 37 B.T.A. 689, aff'd. (C.C.A. 8th 1939) 105 F. 2d 488 (two return forms filed neither of which was held sufficient); *The John D. Alkire Investment Co. v. Nicholas* (C.C.A. 10th 1940) 114 F. 2d 607 (corporation return showing no income or deductions, and not disclosing that assets of the corporation had been conveyed in trust was held not sufficient).

Such cases as *Zellerbach Paper Co. v. Helvering* (1934) 293 U.S. 173 cited by the plaintiff and *Myles Salt Co. v. Commissioner* (C.C.A. 5th 1931) 49 F. 2d 232, do establish the rule that perfect accuracy or completeness is not necessary to rescue a return from nullity. It is to be noted, however, that in each of these and similar cases, while the return filed may not have been accurate or complete it did contain entries of the kind required to be included in the returns by Federal law.

Plaintiff herein filed forms upon which the entries were addressed to but one of two separate tax liabilities, and it did not comply with the requirements of the Commission's instructions on Form TC 71-B. The plaintiff's circumstances are thus closely akin to those in the recent case of *Commissioner v. Lane Wells Co.* (1944) 321 U.S. 219, 88 L. Ed. 684, wherein it was held that the filing of an income tax return upon which a corporation erroneously but in good faith denied it was a personal holding company would not operate to start the limitation period against an assessment of the surtax imposed upon personal holding companies, if a separate personal holding company return was not filed. See also *McDonnell v. United States* (Ct. Cl. 1932) 59 F. 2d 295 (partnership filed income tax return, but no excess profits tax return); *Rockland and Rockport Lime Corp. v. Ham* (D.C. Maine 1930) 38 F. 2d 239 (corporation filed income tax return but no excess profits tax return).

It is submitted that the forms filed with the deficiency were insufficient to start the running of a limitation period for use tax deficiency determinations. We submit that the application of the instructions given in TC 71-B and the Lane Wells Company case to the instant case, calls for a negative answer to question No. 1. Plaintiff argues that form TC 71 purports to be on its face a single return of sales and use tax and points to the designation and certification on the form to substantiate its position. Such argument, we submit, is beside the point for clearly the form was addressed to two separate

tax liabilities. This was made evident by the fact that the form itself provides spaces for separate computation of the sales tax and of the use tax and by specific instructions for Items 1 and 2 for the sales tax, and Items 6 and 7 for the use tax (Tr. 35).

Items 6 and 7 on form TC 71 refers specifically to instructions (Tr. 35). Of great significance are these express instructions given to taxpayer wherein the required contents of a return for use tax purposes are set forth. As to the certification, could the plaintiff seriously contend that a completely blank form except for signatures is a return for sales tax? It follows that a form containing no information for use tax purposes as required by law and the instructions of the Commission would be a nullity with regard to the use tax despite the language of the certification. This construction is supported by the various Federal tax cases heretofore cited since the Federal law required verification of the forms filed and presumably the requirement was followed.

It is submitted that the Federal statutes requiring a return "stating specifically the items of gross income and the deductions and credits allowed" are comparable to the instructions given by the Commission which require that a return for use tax purposes shall include " * * * all purchases made by you outside of Utah or in interstate commerce for storage, use or consumption by you in this state upon which the seller has not collected the use tax. * * *" and " * * * total purchase price of tangible personal property purchased for storage, use, or

other consumption in this state on which the seller has not collected Sales or Use Tax.” (Item 7-Tr. 35.) The Federal taxes and the use tax are both based upon self assessment and in both instances the purpose is not to obtain information in some form but to obtain it with uniformity and completeness to facilitate handling and certification. See *Commissioner v. Lane Wells Co.*, supra.

The use tax is complimentary to the sales tax, but it is also true that the excess profits tax was complimentary and supplementary to the usual tax on corporation income as was the surtax imposed on personal holding companies involved in the *Lane Wells Co.* case.

We submit that the Federal authorities are appropriate here and that the language such as found in the *John D. Alkire Investment Co. v. Nicholas* (C.C.A. 10th 1940) 114 F. 2d 607 at 610, is significant. It is stated therein:

“The taxpayer no longer contends that the rentals did not represent gains for which it was subject to be taxed. Its sole contention now is that the deficiency assessments were barred by the statutes of limitations—the three year period from the filing of the return provided in the Revenue Act of 1926, and the two year period provided in the subsequent acts. That contention turns upon whether the returns currently made for the years in question were returns within the meaning of the statutes of limitation.

“Sections 239 and 52, supra, respectively, required every corporation to make a return ‘stat-

ing specifically the items of its gross income and the deductions and credits allowed * * *.' The burden was thus cast upon the taxpayer to furnish by return the information on which assessments were to be made. And by providing that the period of limitation should begin to run from the filing of the return, the statute manifested a clear legislative intent that the period should begin only when the taxpayer had furnished such information in the manner prescribed. *Florsheim Bros. Co. v. United States*, 280 U.S. 453, 50 S. Ct. 215, 74 L. Ed. 542.

“Meticulous accuracy, perfect completeness, or absence of any omission is not exacted. But a return which fails to comply in a substantial degree with the requirements of the statute in respect to disclosing the requisite information essential to the making of assessments does not suffice to start the period of limitation.”

Plaintiff indicates in its argument that a different rule should apply to it because it apparently acted in good faith. This is the precise contention which was made and rejected in *Commission v. Lane Wells Co.*, *supra*, which we have heretofore mentioned. There, as here, the taxpayer acted in good faith and contended that a return addressed to but one of its two tax liabilities was sufficient to answer the purpose of both, but to no avail.

Plaintiff further argues that this case demonstrates the harshness of a rule which would allow the Commission to make this deficiency assessment. Plaintiff presumably argues that the policy consideration should ab-

solve it from tax. Such an argument, it is submitted, is totally without merit, or if it has merit, should be addressed to the Legislature and not to the Court. There is in sustaining the defendants position here the sound principal of preventing unjust discrimination in the application of tax statutes. If taxes may be evaded by the simple expedient of non payment or failure to make a return, then the entire revenue system of the state would be completely disrupted. Especially is this true of the self assessed taxes of which the use tax is only one. In all of these taxes the state relies upon the taxpayers to comply voluntarily with its laws and instructions. If he does not, the state cannot with any degree of efficiency and economy maintain a staff of auditors sufficiently large to ascertain each default. And further, when we speak of the public we must remember that each member of the public is to some extent a taxpayer. That which reduces the tax burden of one merely increases the tax on others and the benefits received by one individual taxpayer is to the detriment of the remaining taxpayers. In other words, the basic policy of the state is to secure the payment of tax and by sound collection policy to prevent evasion.

Of the thousands of taxpayers who are required to file form TC 71, the vast majority complete only that portion of the return which applies to the sales tax. It is only because some taxpayers are required to file both sales and use tax that the Commission adopted a combined sales and use tax return. The Commission has con-

sistently, since the adoption of form TC 71, taken the view that where the use tax portion of the return is left blank that such return does not constitute a return for use tax purposes. As pointed out by Mr. Justice Cordoza, and by plaintiff in its brief on page 7, perfect accuracy is not required. This rule we have applied to the sales tax portion of plaintiff's return (Tr. 35), wherein certain questions were not answered by taxpayer. However, it is our position and we believe such position to be substantiated by both Federal cases and long administrative interpretation, that some indication must be made on form TC 71 to apprise the Commission and its auditors of the fact that the taxpayer claims no use tax to be due or an amount certain to be due.

Plaintiff suggests that "The law does not require a person to do a useless thing." (Plaintiff's brief, page 6.) With this general principal of law, we, of course, agree. However, we have pointed out that such principal has no application here. To indicate to the Commission taxpayer's status with regard to the use tax is not a useless act. Some affirmative representation of non-liability must be made because of the inherent ambiguity existing if no entry of any kind is made.

Plaintiff points out to the court that the sales tax and use tax are closely related and the taxpayer cannot be called upon to distinguish carefully between each tax separately. This, as a general rule, is also true, and where it is admitted that one of the two taxes is of necessity applicable to a transaction, little is to be gained

by making such distinction. This principal, however, has absolutely no application in the case now before the court. It might be applicable if in an audit of the Linde Air Products Company the question arose as to whether Linde should return the tax collected, if collected, as a sales or use tax. In such case it would not be necessary to distinguish between the taxes. Here, however, it is admitted that "No sales or use tax has been paid by the Whitmore Oxygen Company to the state of Utah or any other state upon said purchase." (Tr. 33.) We take the position that in view of instructions to Item 7 hereinbefore set forth that taxpayer would have had no difficulty in determining that a use tax was due on the purchase of the cylinders.

We submit, therefore, that in view of the foregoing authorities and arguments that the only reasonable interpretation of the law with regard to the question herein presented is that some affirmative indication must be made on the combined sales and use tax return and that where the use tax portion of the form is left completely blank, that such is not sufficient to start the running of the period of the statute of limitation.

2. Proceeding now to the second question, we must determine whether the sale of the cylinders herein involved is an interstate sale, an Indiana sale, or a sale made in Utah. The discussion of plaintiff as to where title to these cylinders passed is of no consequence. The passage of title is in no event the taxable incident in this contract whether it be sales or use tax. The sole reason

that title passed within the state of Utah, as evidenced by paragraph 4 of the contract (Tr. 38), was to reserve title in the vendor until the purchase price was paid in full.

There is no reported case which has come to counsel's attention holding that the passage of title is the taxable incident for sales or use tax purposes in a contract wherein title is reserved to insure the payment of the price. Title 80-16-2 (c), Utah Code Annotated, 1943, defines "purchase" as follows:

“ ‘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.”

The plaintiff has cited Title 80-15-2 (b), Utah Code Annotated, 1943, which is a substantially similar provision in the Sales Tax Act. (Plaintiff's brief, page 11.) Plaintiff concludes with regard to these provisions that they “* * * 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.”

80-16-3, Utah Code Annotated, 1943, levies the use tax “* * * on the storage, use or other consumption in this state of tangible personal property purchased * * *

for storage, use or other consumption in this state * * *.” This section further provides that “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.” Clearly, then, the tax in the instant case is imposed on the use in Utah and the transfer of possession is a purchase made by the plaintiff of these cylinders for use in Utah. It is believed that the controversy with regard to where the sale herein took place may be settled simply by pointing out that the use of property purchased here or elsewhere is liable to the use tax unless specifically exempted.

This court in the case of *Southern Pacific Company v. Utah State Tax Commission* (1944) 150 Pac. 2d 110, 106 Utah 451, at page 455, pointed out that “Unless exempted under the provisions of 80-16-4, of the act or prohibited by constitutional provisions, the use, storage, or other consumption of tangible personal property in Utah, *purchased here or elsewhere* is liable to the use tax.” (italics supplied.)

The sales tax and the use tax, as pointed out, are complimentary and are designed to provide a complete and comprehensive system of taxation on the purchase or use of tangible personal property. The tax of 2% must be paid to the state of Utah upon all tangible personal property used in this state unless specifically exempted. It is submitted that even though the sale is to be consid-

ered a Utah sale, and inasmuch as it is stipulated by counsel that no sales or use tax has been paid to the state of Utah or any other state upon said purchase (Tr. 33), that the sale becomes subject to the use tax. True, Title 80-16-4 (a), Utah Code Annotated, 1943, contains words which in typical legislative ambiguity presumably are intended to exempt from the use tax property which is subject to the sales tax. As to this, we submit that unless the sales tax is paid either to the state or to the vendor, the purchase of property made in Utah becomes subject to the use tax.

Be all this as it may, the sale herein involved was not a sale in Utah but a sale in interstate commerce. The contract which is an executory contract to sell the cylinders was drafted and signed by the vendor, The Linde Air Products Company, at its New York office. This is clearly evidenced by the letterhead on which the contract is written. (Tr. 36)

The Linde Air products Company in submitting the contract to the Whitmore Oxygen Company indicated the terms and conditions of sale and required that Whitmore Oxygen Company “* * * confirm your acceptance of the foregoing terms and conditions by signing a copy of this letter and returning to us, whereupon it shall constitute a contract between us.” (Tr. 39) This contract was accepted by plaintiff and returned as instructed, whereupon it became a binding contract to sell.

No comprehensive definition of interstate commerce is possible. The essential characteristic of interstate com-

merce is the crossing of state lines. Interstate commerce includes negotiations for the sale of goods located in another state. The Supreme Court of the United States in recognizing the uncertainty as to what constitutes an interstate sale, held that "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiations are made, is interstate commerce," which "cannot be taxed at all" to outside sellers or their agents. *Robbins v. Shelby County Tax Dist.*, 120 U.S. 489, 7 S. Ct. 592.

The contract is silent as to where delivery of the cylinders took place. An interpretation of such a contract requires an examination of all of the terms of the contract provisions, the conduct of the parties, usages of trade and the circumstances of the case. (81-2-2 (2), Utah Code Annotated, 1943.) The contract herein quotes the purchase price of said cylinders "f.o.b. our manufacturing plant at Speedway, Indiana." (Tr. 36) The essence of an f.o.b. transaction is that title to and possession of goods are turned over from the seller to the buyer at the time and place that the goods are turned over from the seller to the carrier. When this event occurs the carrier becomes the agent of the buyer and the latter must pay the freight to point of destination. The fact that the record is silent as to where and when possession of the goods was taken and as to payment of freight charges is believed not material herein. The contract was available and required the same interpretation immediately after the transaction was completed as it now requires.

While the intention of the parties with regard to passage of title is not governed by a provision to deliver f.o.b. point of shipment, such provision can and does affect delivery and transfer of possession although title is retained as security for payment of the purchase price. An analogous situation, we believe, is where the express retention of title by the seller, in a contract of sale in order to secure payment of the purchase price, does not prevent its passing under an f.o.b. provision at the point of shipment for the purpose of a suit by the seller to recover the purchase price. *Kilmer vs. Moneyweight Scale Co.*, 36 Ind. App. 568, 76 NE 271. Likewise we believe that the only interpretation which can be placed upon the f.o.b. provision involved herein is that possession to the goods passed and delivery occurred at Speedway, Indiana.

Plaintiff makes reference to certain of the contract provisions as being helpful in determining the intent of the parties as to whether the transaction was an Indiana or Utah sale. Special reference is made to paragraph 8 of the contract (Tr. 39. Plaintiff's brief, page 11). This paragraph has to do with the contract being interpreted and governed by the laws of Utah. While careful drafting of the contract might require the inclusion of such a provision, it is submitted that sufficient doubt existed as to whether this contract was a Utah contract, one in interstate commerce, or an Indiana contract that the draftsman considered it necessary to clarify the law by which such contract should be governed. As pointed out

heretofore, the contract was sent from New York, accepted in Utah by plaintiff herein, and returned to New York whereupon it became binding as a contract to sell.

Plaintiff cites *Lawson v. Tripp*, 34 Utah 28, 95 P. 520, as establishing the rule that "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." (Plaintiff's brief, page 12.) Conceding this to be the law, we submit that such has no application here. By the express terms of the contract the vendor, Linde Air Products Company, had the responsibility only of delivering the cylinders free on board at its manufacturing plant, Speedway, Indiana. There is nothing in the contract which imposes any further duty of performance upon Linde Air Products Company. We find no provision in the contract which, as plaintiff points out, "*** provides expressly that designated portions shall be performed at the place of contracting." Conditions imposed upon the vendee, i.e., keeping cylinders in good order, not to sell, mortgage or dispose of or permit any lien or charge to attach against said cylinders, (paragraph 5 of contract, Tr. 39); assumption of risk of loss of cylinders (paragraph 6 of contract, Tr. 39); assumption of personal injury claims (paragraph 7 of contract, Tr. 39), cannot be interpreted as performance in Utah on the part of the vendor. True, the vendor reserves the right to repossess the cylinders and sell them at private or public sale upon default, and they further agree to deliver a bill of sale when the cylinders have been fully paid for under the

provisions of the contract (Tr. 38). However, such provisions we submit cannot be considered as portions of the contract to be performed at the place of contracting.

Plaintiff further makes reference to the provision of the contract (paragraph 2, Tr. 38—Plaintiff's brief, page 12), wherein Whitmore agrees to pay “* * * on demand the amount of any sales, use or other excise tax, which we may be required to pay in connection with the cylinders delivered hereunder.” And concludes that, “If, however, the sale was intended to be an Indiana sale * * *, and one in interstate commerce, Linde could have no liability and the contract provision is meaningless.” Such conclusion, we submit, is erroneous. The Linde Air Products Company having an agent in Utah and being authorized to do business within this state as a foreign corporation (paragraph 2, Stipulation of Facts, Tr. 32) would be required to collect and remit use tax to the state of Utah on sales made by it in interstate commerce. See *Montgomery Ward & Co., v. State Tax Commission*, (1941) 100 Utah 222, 112 Pac. 2d 152.

Plaintiff cites the case of *Commonwealth of Penn v. Wiloil Corporation*, 316 Pa. 33, 173 Atl. 404, 101 A.L.R. 287, as being clearly in point and nearly identical in fact. This case is distinguishable upon three grounds:

(a) The vendor and vendee were both located in the state of Pennsylvania. Wiloil Corporation was a Pennsylvania corporation with its principal office and place of business in the state of Pennsylvania. The vendee to whom the gasoline was sold (Ace Oil Cor-

poration and the High Power Gasoline Co.) were both from Philadelphia, Pennsylvania. All of the gasoline was sold by Wiloil Corporation's agent in Philadelphia to the two companies named. Whereas, in this case, while the vendor, The Linde Air Products Company, is qualified to do business in Utah, the contract here involved was not drafted in Utah, but was drafted in the New York office of the Linde Air Products Company and mailed to Whitmore Oxygen Company in this state.

(b) A second and more definite distinction is that the court in the Wiloil Corporation case assumed the fact that the sale was actually made in Pennsylvania and the determination which the court was called upon to make was where title to the gasoline passed. It was contended that by the f.o.b. provision alone, the title passed at Wilmington, Delaware, and the court held that the f.o.b. provision was merely a price fixing provision. That this was a price fixing provision was shown by the fact that plaintiff's invoice, which was offered in evidence, contained a specific reference to tax as follows: "Price 5½c gal. f.o.b. Wilmington, Del. plus 3c tax." Furthermore, in this case there was testimony by the secretary and treasurer of the Wiloil Corporation that it was the practice to sell gasoline f.o.b. certain places in order to fix the price. The transaction was compared to the custom of the automobile trade, wherein the price was quoted f.o.b. place of manufacture. We submit that there is nothing in the

record nor any assertion made to show that it is the custom in selling acetylene cylinders to quote prices f.o.b. place of manufacture.

(c) A third distinction is that the tax involved in the Wiloil Corporation case is a gasoline tax which is a tax upon the first sale of gasoline within the state and is imposed upon the vendor. Whereas, the tax in this case is a use tax which may or may not be imposed upon the vendor which fact gives rise to extreme difference in the contract provisions in the two cases. The court stated with regard to this proposition:

“If the parties contemplated that the title passed at Wilmington, Del., outside of 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. * * * The sale and delivery of the gasoline occurred in Philadelphia. The fact that appellant secured the gasoline in Wilmington for the purpose of performing its contract was incidental. It was not contemplated by the agreement of sale that the gasoline be procured in Wilmington or any other particular place. The contract could have been as well performed had it been procured by appellant in Pennsylvania. Taxation of the sale or delivery of the gasoline by appellant to its purchasers only remotely and indirectly affects interstate commerce.”

It becomes readily apparent that there are clearly distinguishable differences between the contract of sale

involved in the Wiloil Corporation case and in the case now before the court, and said case cannot be relied upon to sustain plaintiff's position.

Now, therefore, in view of the definition of "purchase," Title 80-16-2 (c), Utah Code Annotated, 1943, and in view of the f.o.b. provision, it is submitted that this contract must be interpreted to be one to sell property in interstate commerce or a sale made in Indiana, and that inasmuch as Whitmore purchased these cylinders for use in Utah, that the use tax and not the sales tax applies to said purchases.

3. In the event the sale is determined to be an Indiana sale, the third contention of plaintiff that the purchase is specifically exempt pursuant to provision 80-16-4 (d), Utah Code Annotated, 1943, may be summarily dealt with. Plaintiff's indication, set forth in its brief on page 15, that there is ample authority that a transaction such as the Whitmore-Linde sale is not taxable in Indiana, is correct. An examination of the Indiana Gross Income Tax Act (Acts of Indiana, 1933, ch. 50), (Burns Ind. Statutes Annotated, 1933, sec. 64, 2601-64-2630), as amended, as such tax act was in effect during the years in question, and the cases decided thereunder indicates clearly that such transaction was not subject to the Indiana tax. See *J. D. Adams Mfg. Co. v. William Storen* (1937) 304 U.S. 307, 82 L. Ed. 1365, which held, as set forth in the syllabus, that:

"A state gross income tax (Indiana Gross Income Tax Act of 1933) imposes an unconstitu-

tional burden on interstate and foreign commerce when applied to the gross receipts of a corporation which, although its factory and principal place of business is within the state, sells most of its products to customers in other states and foreign countries, where the tax is imposed on the total gross receipts of the corporation, whether from business within or without the state, indiscriminately and without apportionment."

It is believed, however, that such is not the solution to the problem presented. As indicated by plaintiff, the Tax Commission has long interpreted the words "subject to" as found in Title 80-16-4 (d), Utah Code Annotated, 1943, as meaning "subject to and actually paid." This, we submit, is a practical and in fact the only effective interpretation which can be placed upon this section. Insisting that sales tax actually be paid to a sister state is the only method by which the Tax Commission can determine with certainty and definiteness that the sale was subject to the tax in another state.

The Tax Commission cannot be called upon to interpret all of the laws of the various states which impose a sales tax upon sales of tangible personal property. The exemption exempting property upon which a tax already has been paid to another state is indeed a wise and equitable exemption. Such provision eliminates the possibility of interstate commerce being subjected to an unfair burden. If, however, a tax is not paid to a sister state, the transaction is not in fact subjected to such discrimination but is put upon the same basis as sales made in intrastate commerce. It is admittedly true that a mis-

interpretation of the statute gives no regularity to such interpretation. However, this court in the case of *Board of State Land Commissioners v. Ririe*, (1920) 56 Utah 213, 190 P. 59, said:

“While it is true that the construction of a statute by the executive department is not binding upon the courts, it is, nevertheless, also true, and is so determined by the overwhelming weight of authority, that unless such construction does violence to the apparent intent of the language used it is entitled to serious consideration by the courts, and especially so if the statute has been in force for any great length of time and has been so construed.”

This statement of the law was acquiesced in by this court in *In re Cowan's Estate*, (1940) 98 U. 393, 99 Pac. 2d 605, and was reaffirmed in the case of *Utah Concrete Products Co. v. State Tax Commission*, (1942) 101 U. 513, 125 P. 2d 408.

The interpretation placed by the State Tax Commission upon the words “subject to” has been in effect since 1937 when the Use Tax Act was first passed. And it is submitted such interpretation does no violence to the apparent intent of the language, the intent being to eliminate the possibility that both a sales and use tax would be paid on the same transaction.

In view of the impossibility of the Commission determining whether another state law subjects a sales transaction to tax and the fact that the Commission has long held that the tax must be paid to a sister state in or-

der for the transaction to be exempt here, it is submitted that the contention of plaintiff as to question three be held for naught and the position of the Tax Commission sustained.

CONCLUSION

In conclusion the defendant, State Tax Commission, respectfully submits that in view of the authorities cited and the arguments presented herein that this court should deny petitioner's claim that the filing of form TC 71 entitled "Sales and Use Tax Return" in which the use tax portion of the return was left blank is a return sufficient to start the running of the period of the statute of limitation, and this court should likewise deny the petitioner's claim that the Whitmore-Linde contract evidences a sale made in Utah, and the defendant further submits that in view of the long standing interpretation of Title 80-16-4 (a), Utah Code Annotated, 1943, that this court should deny petitioner's claim that if a sale is subject to a tax, that such sale is exempt irrespective of the fact that no tax is paid to the other state.

WHEREFORE, defendants pray that the decision heretofore rendered by the Tax Commission in this matter be affirmed and judgment rendered accordingly.

Respectfully submitted,

G. HAL TAYLOR,

Attorney for Defendants.