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IN THE SUPREME COURT

OF THE STATE OF UTAH

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[illegible]RRILL BEAN CHEVROLET, INC.
[illegible] corporation,

Plaintiff,

vs.

[illegible]ATE TAX COMMISSION OF UTAH,

Defendant.

Case No. 14263

BRIEF OF PLAINTIFF

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IN THE SUPREME COURT

OF THE STATE OF UTAH

- - - - - - - -

MERRILL BEAN CHEVROLET, INC., a corporation,

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BRIEF OF PLAINTIFF

- - - - - - - -

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STATEMENT OF FACTS

Evidence presented to the Tax Commission shows that all automobiles are purchased by Merrill Bean Chevrolet, Inc., for resale, and that from the stock of automobiles thus purchased, the taxpayer arbitrarily picks colors, models, and automobiles with certain option equipment for demonstration purposes, and that at all times and under all circumstances the automobiles are at the dealership for sale to an ultimate consumer unless they are then being demonstrated (T. P.52, L. 19-25). These unassigned demonstrators are designated "loaners" to distinguish them from demonstrators assigned to salesmen. However, they are classified by General Motors Corporation as demonstrators (T. P.72, L.2-24) and are used primarily for demonstrator purposes (T. P.71, L.1-13). On occasion they are "loaned" to another salesman who has sold his demonstrator (T. P.64, L. 19-25), and on occasion they are "loaned" to a customer whose older model car is in for repair, in an effort to get the customer to drive a new automobile and make a comparison with his old one on which he is facing a repair bill, a legitimate sales technique (T. P.65, L.21-24).

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Merrill Bean Chevrolet, Inc., does not generally enjoy the luxury of having a sales force sufficient in size to allow a salesman to be assigned to every model of car that should be in demonstration; consequently, there are models in demonstration that are not assigned to salesmen (T. P.64, L. 11,12). Furthermore, the salesmen will generally choose to demonstrate automobiles in the medium price range which have the fastest turnover because they are paid on commission and can more readily sell such a demonstrator. Most salesmen cannot afford to operate the higher priced automobiles, such as a Caprice station wagon, and yet such automobiles must be available for demonstration purposes (T. P.80, L.9-25).

The ownership of these "loaners" or unassigned demonstrators is represented by a manufacturer's Certificate of Origin that is held by the financing institution until the car is taken at random out of new car inventory and specially titled by the State of Utah for demonstration purposes (T. P.86, L. 7-24). Interest on the loan increases one-half percent for cars in demonstration (T. P.51, L.4-18).

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The vehicle is retired from service as a demonstrator (T. P.83, L.19-25) under rules and regulations of General Motors Corporation before 6,000 miles to preserve the new car warranty and the demonstrator status of the automobile (T. P.67, L.2-25). Under federal tax rules the automobiles may not be depreciated because of demonstrator use (T. P.83, L.19-25), and when the demonstrators are sold to the ultimate consumer they are shown on the contract to be new cars that have been in demonstration (T. P.76, L.1-6, P.83, L.11-16), and the State of Utah titles them as new cars and at that time receives a sales tax on the retail sale (T. P.84, L.2-6). It is evident that these vehicles may be sold to the ultimate consumer immediately after being placed in demonstration, or they may be sold as much as six months later (T. P.66, L.22-25).

POINT I

ALL NEW CARS PURCHASED BY MERRILL BEAN CHEVROLET, INC., FROM GENERAL MOTORS ARE FOR RESALE.

Merrill Bean Chevrolet is a "retailer" as defined in §59-15-2, U.C.A. 1953, as amended. The business of the corporation is to sell new and used automobiles

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to an ultimate consumer, and all of their cars are for resale.

The term "sale" is defined at 59-15-2, U.C.A. 1953, as amended, and among other things,

> ...includes installment and credit sales, every closed transaction constituting a sale...
>
> ...an even exchange of tangible personal property shall not be deemed a sale for purposes of this act, but in any transaction wherein tangible personal property is taken as part of the sales price of other tangible personal property, the balance valued in money or other consideration shall be deemed a sale.

The words "use" and "purchase" are defined at 59-16-2, U.C.A. 1953, as amended.

> (b) The word "use" means the exercise of any right or power over tangible personal property incident to the ownership of that property, <u>except that it shall not include the sale, display, demonstration, or trial of that property in the regular course of business and held for resale</u>. (emphasis added)
>
> (c) The word "purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property <u>for a cash consideration</u>, whether paid with order, on open account, or by installments. 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. (emphasis added)

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The Commission takes the position that these vehicles are being consumed or used and that a use tax is therefore assessable the very minute they are placed in demonstration. However, they completely ignore the definition of the word "use" as set forth in §59-16-2, U.C.A. 1953, as amended, and the fact that use tax cannot apply to the "sale, display, demonstration, or trial of that property (demonstrators) in the regular course of business and held for resale". The record clearly shows that these automobiles are principally used for demonstration purposes and are at the dealership daily for that purpose, and in paragraph 7 of the Findings of Fact the Commission states that they are <u>only occasionally</u> loaned to salesmen who have sold their demonstrator automobiles pending receipt of a new car demonstrator for said salesmen. Also, these automobiles are occasionally loaned to a potential customer who is having his car serviced, and some of these loaner-demonstrators are sold to potential customers on this basis. The evidence is therefore unequivocal that these unassigned demonstrators are excepted from taxation under Chapter

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16, Title 59, U.C.A., and the testimony of Mr. Bosch at page 24 beginning at line 15 confirms this approach:

> Q. Now are they being taxed because they're used for loan purposes, or are they being taxed because they're unassigned demonstrators?
>
> A. Basically because they are used for loan purposes. We have no objection to demonstrators being unassigned necessarily as such.

Then at Page 28 of the transcript, Mr. Bosch makes the following admission beginning at line 16:

> Q. You indicated to us previously that on unassigned demonstrators, if they are used primarily for demonstration purposes and only occasionally as loaners, there would be no tax due.
>
> A. Right, we concede that.

POINT II

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE ASSESSMENT OF THE SALES TAX ON THE AUTOMOBILE DRIVEN BY MRS. BEAN.

The Commission found as a fact under paragraph 16 that a sales tax deficiency was assessed against the automobile used by Mrs. Bean and classified by the dealership as a demonstrator. If a sales tax was assessed, it must be based on a sale, and inasmuch as Merrill Bean Chevrolet cannot make a sale

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to itself (T. P.17, L.14-19) the sales tax has to be on the theory that Merrill Bean Chevrolet, Inc., as a corporation, sold a vehicle to Merrill Bean or to his wife, Janet Bean. If such a sale took place, then paragraph 15 of the Findings of Fact has no application because the seller is not General Motors Corporation, but rather, Merrill Bean Chevrolet, Inc., and the trade we are concerned about is not between Merrill Bean Chevrolet and General Motors but rather between Merrill Bean as an individual and Merrill Bean Chevrolet, Inc., and paragraph 12 of the Findings of Fact further supports this view because the Commission found that the Internal Revenue Service requires that the corporation charge Merrill Bean for the use of Mrs. Bean's automobile as compensation from the corporation to Merrill Bean (T. P.91, L.8, 9). In other words, he pays for the car.

The record shows that Mrs. Bean drives as many as five different vehicles in one year (T. P.84, L.24,25), and these vehicles are traded back to the dealership by Mr. Bean without any cash consideration. The record is entirely devoid of any suggestion that the dealership

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receives a cash consideration when the trade is made, and the entire transaction falls squarely within the provisions of 59-15-2(b), wherein it is stated:

> ...An even exchange of tangible personal property shall not be deemed a sale for purposes of this act, but in any transaction wherein tangible personal property is taken as part of the sales price of other tangible personal property, the balance valued in money or other consideration shall be deemed a sale.

In a letter addressed to the Utah State Tax Commission dated October 24, 1974, the taxpayer's attorney stated unequivocally that the reason for the refusal to pay tax on Mrs. Bean's car is that the vehicle is traded back to Merrill Bean Chevrolet, Inc., straight across for another vehicle without cash exchange. This is the theory that was pursued by the taxpayer throughout the hearing, and the record is completely devoid of any evidence to the contrary. The fact that Merrill Bean Chevrolet, in compliance with the auditing procedures of General Motors, chooses to treat this car as a demonstrator, and in fact does demonstrate the vehicle (T. P.72-73), does not thereby take it out of the category of a trade of tangible personal property which in fact is exactly what happens.

The Tax Commission has chosen to interpret Rule

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S-82 in such a manner as to fail completely to give any validity to the sections of the Utah Code cited as applying directly to the two issues before the court. The Auditing Division of the Tax Commission frankly concedes that a literal interpretation of S-82 would have extremely harsh results in the case of an automobile dealer whose wife may drive four or more different automobiles in one year with the prospect that any automobile she drives may be sold out from under her by the dealership without notice (T. P.13, L.5-15). At Page 31 of the transcript, beginning at line 6, the testimony illustrates the problems of Rule S-82 as presently being applied by the Tax Commission:

> Q. And then when the car is resold by Merrill Bean, when the demonstrator is resold by Merrill Bean, a full sales tax is assessed on the price paid by the ultimate consumer, is that correct?
>
> A. Merrill Bean's customer is required to pay the sales tax, yes sir, if it results in a taxable sale.
>
> Q. And the difference between those periods of time, that could be as short as 12 hours and as much as four months.
>
> A. That's correct, that's principally where we just assessed the tax on one car a year.

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Q. Well, if your theory holds true, though, you are really not following the law, are you, Mr. Bosch?

A. No, as far as our theory holds true, we should have assessed more tax on more vehicles.

Q. That is what I mean, don't you have to assess it on all the cars that Mrs. Bean drives?

A. Well, I don't know that we have to. I guess following the law, we would probably substitute our judgment for the law.

Q. And when you say following the law, you really mean following the Regulation S.82, don't you?

A. Which in our opinion is in conformity with the law, or it couldn't have been adopted and promulgated.

As a taxpayer, plaintiff has a deep distrust of having the Auditing Division substitute its judgment for the law, because no one knows if the same judgment in substitution of the law being exercised in this taxpayer's case is also being exercised in the audit of other automobile dealers in like circumstances, and the taxpayer was summarily prevented from making inquiry. The witness testified at page 41 of the record, beginning at line 1:

Q. Did you review an audit involving Duaine Brown Chevrolet's last audit?

A. If there was an audit, I would have reviewed it.

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MR. DEAMER: Mr. Chairman, again I wish to object on the basis of relevancy. I don't see the relevance of an audit conducted on Duaine Brown Chevrolet in the matter of Merrill Bean Chevrolet sales tax deficiency.

CHAIRMAN HOLMAN: The objection is sustained.

MR. BEAN: I think I can show the relevancy if I may be allowed to proceed just briefly, and then if I don't the chairman can make an order to strike it from the record.

CHAIRMAN HOLMAN: No, I think we will just sustain the objection.

Q. (by Mr. Bean) Well, let me ask the question this way, Mr. Bosch, are you representing to us that the same audit procedures and charges were made against Duaine Brown Chevrolet that are now being assessed against Merrill Bean Chevrolet?

MR. DEAMER: Again I wish to object, Mr. Chairman. I don't see the relevance of how tax audits are conducted among many dealers as to the application of the sales tax deficiency against one dealer.

CHAIRMAN HOLMAN: Sustained.

We further have difficulty with the gratuitous statement by the witness for the Tax Commission to the effect that Rule S-82 is in conformity with the law or it couldn't have been adopted and promulgated. As was said in Olsen Construction Co., et al., v. State Tax Commission of Utah, 12 Utah 2d 42, 361 P.2d 1112 (1961),

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at page 1113:

> Nor does the quoted provision of sales tax regulation No. 58 aid the plaintiffs. The commission has since deleted this provision from its regulations, and now contends, with some embarrassment, that it had no legal basis and was contrary to law. We agree with this contention. The regulation went beyond permissible limits of administrative interpretation, since it would, on the facts of this case, nullify the applicable statutory definitions of the terms "retail sale" and "retailer" and would grant an exemption where the statutes grant none. This court, while recognizing the possibility that one might be penalized by reliance upon an invalid administrative regulation, has held that an administrative interpretation out of harmony and contrary to the express provisions of a statute cannot be given weight and, to do so, would in effect amend that statute.

The strained interpretation the Tax Commission puts on their Rule S-82 cannot be used to emasculate the definition of "sale" of 59-16-2(b) and (c), and of course when the Tax Commission begins to substitute its judgment under its own regulation, the results are horrendous. For example, Mr. Bosch states that they tax only one car per year to Mrs. Bean, with the implication that they do this to soften the harsh effects of their own rule, but where the record shows without contradiction that Mrs. Bean's car is traded by Mr. Bean for another new car under the provisions of the statute, their tax

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can only apply to the cash difference, and the Tax Commission must first ascertain what that cash difference is before they can assess any tax. In substituting their judgment for the law, the Tax Commission simply says, in effect--It is difficult for us to determine what the cash difference was because there is no record of a cash difference, and therefore we will simply tax one car per year as a fair compromise. But there is no statutory or legal justification for any tax at all on the vehicles traded by Mr. Bean when he has once paid a full tax on the purchase price of one vehicle in 1971 immediately after S-82 became effective. The record, at Page 35, beginning at line 3, shows some uncertainty on the part of the Tax Commission on this issue.

> Q. Now what prevents Merrill Bean Chevrolet from trading that car back to General Motors as vendor and having Merrill Bean take another vehicle as vendee?
>
> A. Nothing would prevent it if General Motors is willing to do it.
>
> Q. And if they did that it would be a non-taxable transaction if no money changed hands. Is that correct?
>
> A. Well, we had some discussion on that. I am not really sure if it would be non-taxable or not, to tell you the truth.

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It is readily admitted by the Tax Commission that they have no authority to determine the sales price of vehicles sold by Merrill Bean Chevrolet (T. P.46, L.17-21). Furthermore, it is a well known fact that in the retail sales of new automobiles the suggested retail sales price or window sticker price is seldom if ever the actual price to the consumer, and that the price of automobiles will vary because of a number of factors, including supply and demand, season of the year, engineering improvements, U.S. Government regulations on seat belts, pollution devices, and other safety equipment, and the proposed increase in price in next year's models. Therefore, the amount of sales tax collected by the State of Utah on each new unit is affected far more by the factors mentioned, than the fact that the vehicle may have been used as a demonstrator or loaned occasionally. The fact of the matter is, that a Tax Commission auditor has strong personal feelings about automobile dealers whose wives drive an automobile where no sales tax is paid when his wife has to pay a sales tax on the car she drives, and it was this same auditor who helped design,

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implement, and interpret Rule S-82 (T. P.14-15).

It is a fact that all businesses and all professions have built-in benefits: The medical doctor seldom sends a bill to his colleague for medical services rendered to members of his family. The lawyer seldom bills his partner for services rendered to him or members of his family. The tax auditor seldom bills his daughter or her husband for federal and state income tax returns. And the corporate automobile dealer is able to trade cars used by members of his family back into the corporation without paying a cash difference that is taxable.

POINT III

THE USE TAX ASSESSED ON UNASSIGNED DEMONSTRATORS, AND THE SALES TAX ASSESSED ON VEHICLES DRIVEN BY MRS. BEAN, CONSTITUTES DOUBLE TAXATION AND IS CONTRARY TO PUBLIC POLICY, AND THE EXPRESSED INTENT OF THE LEGISLATURE IN PROVIDING FOR SALES AND USE TAXES.

In providing for special titles for demonstrator automobiles, the Motor Vehicle Division of the State Tax Commission has already taken the position that a demonstrator automobile is in the category of tangible personal property used for "display, demonstration, or trial ...in the regular course of business and held for

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resale". The Commission found as a fact that the federal government will not permit said automobiles to be depreciated by the dealer, and the manufacturer of said automobiles, General Motors Corporation, permits the use of said automobiles in the way that they are being used by the taxpayer without concern for depreciation of value and has designed accounting procedures for its dealerships to allow such use without sale and with full new car warranty at the time of sale to the ultimate consumer. All who deal with these automobiles understand and accept the demonstrator category except the Tax Commission, who now, contrary to the expressed intent of their only witness, insist that tax applies if the vehicle is occasionally loaned to a salesman. The transfer of cars used in demonstration from the new car account to a demonstrator account consistent with the auditing practices of General Motors Corporation does not thereby constitute a purchase of said automobiles for the use and benefit of the taxpayer. At that point in time the cars have already been financed by GMAC. General Motors has already been paid, and GMAC holds the manufacturer's Certificate of Origin, which is the only title then in existence for said auto-

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mobile, as security for payment by Merrill Bean Chevrolet. In construing the meaning of 59-16-3, U.C.A. 1953 as amended, the court in Utah Concrete Products Corp. v. State Tax Commission, 101 Utah 513, 125 P.2d 408 (1942), at page 412 said:

> The definition of "purchase" thus includes a "transfer, exchange or barter" for a consideration. The mere bookkeeping and physical transfer of the use of one's own products not only does not come within the clear meaning contemplated by the legislature of "transfer, exchange or barter", but is also lacking in consideration. The mere charge on the books of the plaintiff for the materials they used for themselves is for purposes of keeping inventory correct and cannot be termed a "transfer" in the sense as used by the legislature,...

In Union Portland Cement Co. v. State Tax Commission, 101 Utah 135, 170 P.2d 164 (1946), the court was called upon to consider the purposes for which the use tax was levied, and in expressing the public policy of this state the court said, at page 168:

> Plaintiff would have subsection (a) of the use tax act next above quoted exempt from the use tax any class or type of property the sale of which was subject to the sales tax of this state at the time the use tax law was passed regardless of whether or not the sales tax law was later amended to exempt that property from the sales tax. We do not inter-

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> pret the subsection that way. Subsection (a) was enacted to prevent the sales tax and the use tax from being chargeable on the same articles of personal property; that is, to prevent the use tax from being applied to the use, storage or consumption of specific articles of personal property, the gross receipts from the sale of which were subject to the sales tax. (emphasis added)

In further expounding on the public policy and the intent of the legislature the court said, at page 169:

> The clear intent of the legislature in passing subsection (d) was to prevent duplication of taxes and discrimination against property which was already subject to a tax comparable to the use tax. The subsection in effect says: If a sales or excise tax is charged by any state of the Union against the gross receipts from the sale, distribution or use of tangible personal property, the storage, use, or other consumption of that specific property in Utah is exempted from the Utah state use tax.

In further expounding on sales tax theory, the court said, at page 171:

> ...Under the original act all of the purchases of the manufacturer, if for the use of his business, were exempt from payment of the sales tax. Purchases of articles which were used or consumed and which did not go into the articles manufactured were not taxable. This was not in harmony with the sales tax theory that while the tax should not be exacted more than once, it should be paid at least once; hence the amendment, which exempted from payment of the tax any article, substance or commodity which enters into and becomes an ingredient or component part of the product manufactured or compounded.

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It thus becomes apparent that use tax is complementary to and in lieu of sales tax and was not designed or contemplated to be a tax in addition to sales tax on the same article. In Chicago Bridge and Iron Co. vs. Johnson, 19 C.2d 162, 119 P.2d 945 (1939) the California Supreme Court stated at page 947:

> ...The use tax act is complemental to the California Retail Sales Act of 1933. The latter levies a tax on the gross receipts of California retailers from sales of tangible personal property; the former imposes an excise on the consumer at the same rate for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government.

In L. A. Young Sons Construction Co. v. State Tax Commission of Utah, 23 Utah 2d 84, 457 P.2d 973 (1969), the court stated that if a purchase of tangible personal property was exempt under the sales tax act, it is also exempt under the use tax act, regardless of the fact that the property was purchased outside the state. Here the automobiles purchased from General Motors are exempt from sales tax because the automobiles are destined for resale to an ultimate consumer. The fact that those automobiles are demonstrated in the course of business does not change

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the character of the original acquisition by Merrill Bean Chevrolet from General Motors Corporation. The fact that said automobiles are designated as "loaners" because they are not assigned to a salesman and are therefore occasionally loaned does not change the fact that they are used primarily for demonstration and trial. Other states have attempted to impose a use tax on airplane dealers (*Montgomery Aviation Corp. v. State*, 275 Ala. 266, 154 So.2d 24, heavy equipment dealers, *Herman M. Brown Co. v. Johnson, et al.*, 82 N.W.2d 134, Iowa (1957) and have been refused by the courts, and we now ask this honorable court to reject the double taxation attempted by the State Tax Commission and declare Rule S-82 adopted by said Commission to be contrary to the statutes of this state.

Respectfully submitted this 15th day of November, 1975.

DAVID E. BEAN
Attorney for Plaintiff,
Merrill Bean Chevrolet, Inc.

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A P P E N D I X

S82. Demonstration, display and trial (Applies to sales and use taxes).--Tangible personal property purchased by a wholesaler or a retailer and held for display, demonstration or trial in the regular course of his business is not subject to tax. An example of this is a desk bought by an office supply firm and placed in a window display. Another example of this is an automobile purchased by an auto dealer and assigned to a salesman as a demonstrator. Sales tax applies to any rental charges that might be made to the salesman for use of a demonstrator. Sales tax applies to these charges even though all or part of the charge may be waived if such waiver is dependent upon the salesman performing certain services or reaching a certain sales quota or some similar contingency. Also, tax applies to items purchased primarily for company or personal use and only casually used for demonstration purposes. For example, wreckers, or service trucks used by a parts department, would be subject to tax even though they are demonstrated occasionally. Also, automobiles assigned

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to non sales personnel such as a service manager, an office manager, an accountant, an officer's wife or a lawyer would be subject to tax even though they may be demonstrated on occasion.

Normally, vehicles will not be allowed as demonstrators if they are used well beyond the new model year by a new car dealer or if used for more than six months or so by a used car dealer. Tax will apply if these conditions are not met unless it is shown that these guidelines are inapplicable in a given instance, in which case consideration will be given to the circumstances surrounding the need for a demonstrator for a longer period of time.

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