

2001

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

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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13 JUN 1976

IN THE SUPREME COURT OF
THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

HUSKY OIL COMPANY OF DELAWARE,
Petitioner and Appellant, :

-v- :

Case No. 14466

STATE TAX COMMISSION OF UTAH,
Respondent. :

BRIEF OF RESPONDENT

WRIT OF REVIEW TO REVIEW AN ORDER OF
THE STATE TAX COMMISSION OF UTAH

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IN THE SUPREME COURT OF

THE STATE OF UTAH

HUSKY OIL COMPANY OF DELAWARE,)	
)	
Petitioner and Appellant,)	
)	
vs.)	Case No.
)	
STATE TAX COMMISSION OF UTAH,)	14466
)	
Respondent,)	
)	

BRIEF OF RESPONDENT

NATURE OF THE CASE

This case involves the validity of a use tax deficiency assessed against Husky Oil Company by the State Tax Commission. The Court is asked to resolve a question about the application of the isolated and occasional sales exemption to a transaction whereby a seller regularly engaged in retail sales transfers personal property of a type not sold in its regular business.

DISPOSITION BEFORE THE STATE TAX COMMISSION

The State Tax Commission determined a use tax deficiency against Husky Oil Company of Delaware in the amount of \$30,375.00, plus interest, for the purchase of a refinery from Gulf Oil Ltd. of Canada.

RELIEF SOUGHT ON APPEAL

Respondent, State Tax Commission seeks affirmance of the use tax deficiency against the Petitioner of \$30,375.00, plus interest thereon as provided by law.

STATEMENT OF FACTS

The parties submitted a Stipulation of Facts and a Supplemental Stipulation of Facts which the Tax Commission considered in making written findings. References are to the Tax Commission's Findings of Fact.

Husky Oil Company of Delaware, a foreign corporation doing business in Utah, purchased a reformer from Gulf Oil Ltd. of Canada through its parent corporation, Husky Oil Ltd. of Canada, (Fd. No. 2). A reformer is a refining device used for making gasoline, (Fd. No. 7).

Gulf Oil Company, the seller, sells oil and gas at wholesale and at retail in Canada (Fd. No. 3). Gulf Oil Company does not hold itself out as a seller of reformers but does sell its own reformers when they become economically obsolescent (Fd. No. 4). The reformer in question became available for sale as a result of Gulf's dismantling and moving the refinery to a new, modernized location.

After purchasing the reformer, Husky Oil Company caused it to be delivered and placed into operation at its Salt Lake County refinery. No sales or use tax has been collected by any

State as a result of the purchase (Fd. No. 10).

POINT I

UNDER THE PLAIN MEANING OF THE STATUTE, ONLY PERSONS NOT RETAILERS OR NOT ENGAGED IN BUSINESS QUALIFY FOR AN EXEMPTION FROM THE SALES AND USE TAXES.

The use tax is imposed on "the storage, use or other consumption in this State of tangible personal property purchased for storage, use or other consumption in this State." Section 59-16-3, Utah Code Annotated (1953). Appellant does not dispute that the property in question was purchased for use in this State, but rather claims that the transaction is exempt from use tax.

It has been established that in deciding whether a transaction comes within the scope of the use tax provisions or is exempt therefrom, reference may be made to the sales tax provisions. There is a liability for use tax if the transaction, had it taken place in Utah, would have been subject to sales tax. Further, there would be an exemption from use tax if, had it taken place in Utah, there would have been an appropriate sales tax exemption. The two statutes "are to be considered correlative and complimentary, and so far as exemptions are concerned, legislative created specific exemptions from the sales tax are also to be treated as exemptions from the use tax." Geneva Steel Co. v. State Tax Commission, 116 Utah 170, 209 P.2d 208 (1949) at 209 P.2d 208, p. 210, reaffirming Union Portland Cement Company v. State Tax Commission, 110 Utah 152, 176 P.2d 879 (1947).

The applicable sections of Utah Code Annotated (1953) are as follows:

Section 59-15-4. From and after the effective date of this act there is levied and there shall be collected and paid:

(a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to four per cent of the purchase price paid or charged, except that where a person takes, as a trade-in for part payment of the merchandise sold, tangible personal property other than money, that tax shall be computed and paid only upon the net difference between the selling price of the merchandise sold and the amount of the trade-in allowance. The sale of coal, fuel oil and other fuels shall not be subject to the tax except as hereinafter provided.

Section 59-15-2. Definitions

(e) * * * The term "retail sale" means every sale within the state of Utah by a retailer or wholesaler to a user or consumer, except sales defined as wholesale sales or otherwise exempted by the terms of this act; but the term "retail sale" is not intended to include isolated nor occasional sales by persons not regularly engaged in business,

This latter section of the Sales Tax Act states, very simply, that a sale made by one who does not regularly engage in business will not be taxed. Thus, sales made by one who is in the business of making retail sales is subject to the tax. No distinction is made in the statute about the type of business the taxpayer is in or the type of property he is selling. As counsel for the Respondent urged at the hearing below, the exemption should apply to situations such as a garage sale where a housewife disposes of an old refrigerator or some other situation where one who is not in business and does not regularly make retail sales, makes a sale of personal property.

Husky argues that, to the contrary, the exemption for isolated and occasional sales was intended to apply to retailers and wholesalers who make a sale which is not part of the regular

course of their business. In support of this reading of the statute they point to the definitions of retailer and wholesaler, which provide that only those doing a "regularly organized" wholesale or retail business are subject to the sales tax. Sections 59-15-2(c) and (e), Utah Code Annotated (1953). Thus, the argument goes, only retailers or wholesalers regularly organized can make taxable retail sales in the first place, and, therefore, a housewife or other non-business seller does not need the exemption for isolated or occasional sales because those transactions are not subject to the sales tax. Therefore, Appellant concludes, the exemption has no meaning and is surplusage if it applies only to non-business sellers who are not taxed anyway.

This interpretation of the statute clearly flies in the face of its plain language. The statute simply says the same thing two different ways, obviously for emphasis or clarity. The logic of the statutory provisions can be stated thus: (1) Only retail sales are taxed; (2) retail sales are those made by a retailer or wholesaler; (3) a retailer or wholesaler is a person doing a regularly organized retail or wholesale business; but, (4) an isolated or occasional sale by a person not engaged in business is not intended to be a retail sale.

These provisions are not inconsistent, and they are not ambiguous. Fundamentally, they present two obvious cases when a sales tax liability would not arise: (1) When the seller is not a retailer or a wholesaler, and (2) when a seller not engaged in business makes an isolated or occasional sale. Respondent believes

that all cases relied upon by Appellant clearly fall into one or the other of these two situations and that Appellant himself does not qualify for either.

It is for certain that the Legislature did not say that isolated and occasional sales of items which a retailer does not regularly or often sell will be exempted from taxation. If the Legislature had so intended, it would have been a simple matter to enact such an exemption.

Nevertheless, Appellant urges the Court to adopt such an interpretation. In response, Respondent would urge that as a matter of statutory construction, it is universally held that an exemption from taxation is to be construed very strictly and that all doubts should be resolved in favor of taxation and against exemption. This Court has been guided by that principle since it was announced in Parker v. Quinn, 23 Utah 332, 64 P. 961 (1961), wherein this Court states the following:

* * * When, therefore, an owner claims that certain property is exempt from taxation, the burden is upon him to show that it falls within the exception. And an exemption will not be aided by judicial interpretation. It must be shown to exist by express terms of the enactment which, it is claimed grants it.

The presumption is that all exemptions intended to be granted were granted in express terms. In such cases the rule of strict construction applies, and, in order to relieve any species of property from its due and just proportion of the burdens of the government, the language relied on, as creating the exemption, should be so clear as not to admit of reasonable controversy about its meaning, for all doubts must be resolved against the exemption.

It is not disputed that Gulf Oil of Canada is a regularly organized wholesaler and retailer and regularly makes such sales. Therefore, under the plain meaning of the statute it would not qualify for an isolated and occasional sale exemption from the sales tax in Utah, even though it does not sell refineries as its primary product. That exemption is therefore unavailable to Appellant, and the Commission's assessment of use tax was proper.

POINT II.

UTAH CASE LAW HAS NOT EXTENDED THE ISOLATED
AND OCCASIONAL SALES EXEMPTION TO A PURCHASE
SUCH AS WAS MADE BY HUSKY OIL.

Appellant cites Geneva Steel v. State Tax Commission, 116 Utah 170, 209 P.2d 208 (1949), to support its contention that the exemption in question is designed to free retailers and wholesalers who are selling something other than their regular product from a sales tax obligation. In Geneva Steel, the War Assets Administration sold their entire steel producing operations in Utah to Geneva Steel Company. The company maintained that they were exempt from the use tax since the sale was within the isolated and occasional sale exemption.

Although the Court observed that the sale of an entire business is an isolated and occasional sale under the tax regulations of most states, it did not hold that the exemption applies in Utah to any sale of something other than the tangible personal property usually sold by a retailer or wholesaler. The Tax Commission argued that, in any event, the War Assets Administration had sold six other integrated

businesses in Utah between the end of World War II and the hearing in 1949. The sale of an entire business seemed to be part of the sellers regular course of business.

In response to the argument that the exemption was inapplicable for that reason. The Court explained the basis for its conclusion that this sale was within the scope of the exemption.

Assuming, without deciding, that the War Assets Administration makes retail sales as defined by our sales tax act when it sells surplus items of government property . . . , it is not making a "retail sale" when it sells an integrated business to a new operator. The very nature and character of the two types of sales is radically different. The sale of a truck or a raft involves the simple exchange of an article of tangible personal property for a unit price. But the sale of an integrated business for a lump sum price is a complex transaction for it contemplates the exchange of real property as well as personal property, tangibles and intangibles, without regard as to what amount is being paid for real property, personal property, tangibles, or intangibles. * * * We do not mean to imply that a person can avoid paying the tax on the sale of an article of personal property justly due by combining it with the sale of real property for a lump sum price. We only hold the legislature did not intend to tax the sale of personal property transferred as a component part of the sale of an integrated business. 209 P.2d at 213 (Emphasis added.)

The Court pointed out in the above case that the sale of an integrated business involves the transfer of real as well as personal property, tangible as well as intangibles. It is not a retail sale of tangible property as contemplated by the Sales Tax Act. For this reason the Court classifies it as an isolated and occasional sale by a person not regularly engaged in business.

In L. A. Young Sons Construction Company v. State Tax Commission, 23 Utah 84, 457 P.2d 973 (1969), the other major Utah case upon which the Appellant relies, the Court held that the purchase of construction equipment in Wyoming by a Utah company fell within the isolated and occasional sale exemption applied to the use tax. Of primary significance is the Court's observation that the seller, a construction company, "has never been engaged in the business of selling construction equipment nor in making retail sales." 23 Utah at 85. Simply speaking, the seller was not a retailer and the sale was thus not subject to the sales tax.

A company which is not in the business of making retail sales is properly exempted from the sales tax when, on an isolated occasion, it does make such a sale. L. A. Construction holds nothing more. It is thus distinguishable from the case at hand where the seller, Gulf Oil, is a retailer, and for that reason the exemption is unavailable to the Appellant.

It can only be concluded that except in the special situation of the sale of an entire business to a single buyer, an occasional sale can only be made by a non-retailer, or a person not engaged in business. Appellant and the cases it relies upon are not in point.

POINT III

IT IS MISLEADING TO LOOK TO THE LAW OF OTHER JURISDICTIONS FOR THE MEANING OF THE UTAH ISOLATED AND OCCASIONAL SALES EXEMPTION.

The Appellant has quite properly submitted that "the decisions of the Utah Supreme Court control this case and there

is no need to look to the law of other state jurisdictions."

(Brief of Appellant, p. 14) Nevertheless, several cases from other jurisdictions are cited to aid the Court in construing the Utah law. A review of the law of other states reveals a variety of statutory provisions and judicial constructions of isolated or occasional sales tax exemptions having little relation to each other.¹

The Appellant's citation of Big Three Industries Inc. v. Keystone Industries, Inc., 472 S.W. 2d 850 (Tex. Civil Appeals 1971), illustrates the misunderstanding which easily arises when judicial interpretations of one state's law are offered to establish the meaning of another state's statute. The Texas Court of Civil Appeals held that their occasional sales exemption was designed to apply to sales by retailers of items not regularly sold in the course of business. The Texas Court noted that if the exemption were construed to apply to non-retailers, it would be surplusage as the tax by definition applies to retailers alone. The Appellant has made a similar argument about the Utah statute.

There are, however, crucial differences between the Texas statute and the Utah statute, which make a superficial

¹/Cases from many jurisdictions on isolated or occasional sales exemptions are compiled in an annotation at 42 A.L.R. 3d 292. The author concludes that "the exemption of isolated or occasional sales depends primarily upon the statutory language and the judicial construction of specific terms," and that "statutory language and judicial interpretation are not uniform." 42 A.L.R. 3d at 295-296.

comparison of the two misleading. The Utah statute provides for an isolated and occasional sale exemption in the section which defines "retailer" and "retail sale." As noted earlier, the intended construction of that section is singularly important to its understanding. The Texas statute includes an isolated and occasional sale exemption in a separate section with very different wording. Exempted sales are limited to:

"one (1) or two (2) sales of tangible personal property at retail during any twelve month period by a person who does not hold himself out as engaging (or who does not habitually engage) in the business of selling such personal property." Article 20.01(F), Title 122 A revised, Civil Statutes of Texas. (Emphasis added.)

The Texas Court stated quite explicitly that the phrase "such personal property," absent from our statute, indicated that the exemption applies when a retailer sells something other than the product he holds himself out as selling or habitually sells. Their decision and their rationale for reading Texas law as they did are inapposite to the interpretation of the Utah Sales Tax Act.

The purpose and scope of the isolated and occasional sales exemption are matters of Utah law. It is unhelpful and misleading to look to the tax law of other jurisdictions for the meaning of our own statutes.

POINT IV.

UTAH STATE TAX COMMISSION REGULATION S-38 IS
A VALID INTERPRETATION OF THE STATUTORY
ISOLATED AND OCCASIONAL SALES EXEMPTION AND
WAS PROPERLY APPLIED TO HUSKY OIL.

The State Tax Commission has been delegated authority

by the Legislature "to prescribe, adopt and enforce regulations" relating to the administration of "the Sales Tax Act and the Use Tax Act." Sections 59-15-20, 59-16-21, Utah Code Annotated (1953). Rule S-38(d) was promulgated to regulate the isolated and occasional sale exemptions. This rule is consistent with the plain meaning of the statute and Utah case law on the subject.

Rule S-38:

* * *

"(d) Isolated or occasional sales made by persons not regularly engaged in business are not subject to the tax. The word 'business' refers to an enterprise engaged in selling tangible personal property or taxable services notwithstanding the fact that the sales may be few or infrequent. No sale of tangible personal property made by a person licensed to collect sales tax is considered to be isolated or occasional even though the tangible personal property was used by the seller in his regular business prior to the sale. However, any sale of an entire business is not deemed to be a taxable sale and no tax will apply to the sale of any assets made part of such a sale (with the exception of vehicles subject to registration) provided that the entire business is sold to a single buyer."

Rule S-38(d) provides that only sales of tangible personal property made by a person not licensed to collect sales taxes will be exempted. Of course, all those who are engaging in a regularly organized retail business will be licensed to collect the tax. This rule is entirely consistent with the plain meaning of the statute, that only those not regularly engaged in business are exempted from the sales tax.

By expressly providing that the sale of an entire business to a single buyer is per se isolated and occasional, the Tax Commission has recognized the unique nature of such a sale, as did this Court in Geneva Steel.

This rule, like any regulation promulgated by a state agency with authority to enforce the law is entitled to a presumption of correctness. In McKnight v. State Land Board, 14 Utah 2d 238, 381 P.2d 726 (1963), the petitioner appealed the decision of the State Land Board denying his application for oil and gas leases. Their denial was based upon a regulation which he maintained was in conflict with the applicable statute.

The Court began its examination of the regulations stating:

"First let us consider whether the rules and regulations of the State Land Board were so repugnant to the statute as to be contradictory and irreconcilable therewith."
381 P.2d at 730.

Later they observed that, whenever possible, administrative regulations should be construed to harmonize with the statutes they interpret and enforce.

An administrative regulation does not lose its presumption of correctness simply because it is more restrictive than an earlier regulation of the same subject matter. Prior to the promulgation of Rule S-38, the State Tax Commission had applied the isolated and occasional sale exemption to any sale not made in the regular course of a retailer's or wholesaler's business.

It was noted in Reaveley v. Public Service Commission, 20 Utah 2d 137, 436 P.2d 797, 800 (1968), that administrative agencies are not bound by rules of stare decisis applied to courts and are free to depart from prior determinations of policy. That the State Tax Commission reconsidered its view of the scope of the exemption

in question does not alter its validity. This Court, of course, and not the agency, has the final duty to say what the law is regardless of the duration or the alteration of an interpretative administrative ruling.

Rule S-38 is a reasonable application of the isolated and occasional sales exemption in the Sales Tax Act and is consistent with judicial construction of the exemption. Its enforcement against Husky Oil by the State Tax Commission should be affirmed.

CONCLUSION

Under the plain meaning of the statute, only those not retailers or not regularly engaged in business are eligible for the isolated and occasional sales exemption from the sales and use taxes. Because Husky Oil purchased its reformer from a seller who regularly engages in retail and wholesale transactions, that purchase is not exempted from the use tax. The State Tax Commission's assessment of a \$30,375.00 use tax deficiency, together with interest thereon as provided by law, was proper and should be upheld by this Court.

Respectfully submitted,

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Dated this 30th day of June, 1976.