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Geneva Steel Company v. The State Tax Commission of Utah : Reply Brief

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

7236 RB

IN THE
Supreme Court
OF THE
STATE OF UTAH

GENEVA STEEL COMPANY,
a corporation,

Plaintiff,

vs.

THE STATE TAX COMMISSION
OF UTAH,

Defendant.

REPLY BRIEF OF PLAINTIFF

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Case No.
7236

BRIEF OF PLAINTIFF

Defendant's brief raises certain implications and contentions which plaintiff feels must be met in reply lest silence lull the court into any inadvertent acceptance of that which we submit is erroneous and misleading.

1. The Utah Commission Has Acted.

On page 2 defendant contends that sales similar to that of Geneva have never "been considered" by the Commission. Such sales must have been made in the

thousands since the sales-use tax system became effective in this state; and so notorious that what the Commission actually *did*—to consider such sales not subject to the tax—speaks louder than if a score of opinions and regulations had been issued.

As was said by Washington's Supreme Court in the City of Spokane case cited by defendant: "What the Commission did rather than what it said establishes its administrative construction of the Act." 89 P. 2d 826, 829.

2. A Single Sale, Or Several.

Of course some tangible personal property was included in the sale of the "integrated steel plant". But the parties have *not* agreed that there was any retail sale of such tangible personal property as such. A reading of the contract of sale (Ex. B) will at once develop the fact of whether the transaction was the sale of an integrated steel plant, as plaintiff has stated; or the series of separate sales of various items of tangible personal property for agreed breakdown prices, as defendant contends on pages 8 and 9.

3. Sale of Geneva was a Casual Sale.

On page 8 defendant asserts that there are no cases where "the matter of sales tax or use tax was considered when applied to a purchase of tangible personal property in connection with real estate." Further search indi-

ates, however, that in addition to Utah's "consideration" by treating such isolated and occasional sales as excluded from the intended tax coverage, other states have treated the problem as follows:

(a) Some states have not been confronted with the situation because, as in the case of Nevada, Oregon and Idaho, there either was never a sales-use tax or it was repealed.

(b) Others, as Pennsylvania, specifically limit tax coverage to sales by merchants who are licensed.

(c) Some few, as Oklahoma, have complete coverage for all sales of tangible personal property. An anomalous situation exists in Washington where their Tax Commission, as did now defendant's counsel, claims the use tax to be separate and to cover *all sales*, even though the Sales Tax Act contains a specific exemption for casual sales. The Commission then waives in the interests of "administrative practicability" the tax on isolated sales where the tax liability is less than \$10.00.

(d) By far the great bulk of states with sales-use tax systems exempt isolated occasional or casual sales. Such are Alabama, Arizona, Arkansas, California, Mississippi, Rhode Island and Tennessee; with Connecticut, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan, Missouri, New Mexico, North Carolina, North Dakota, Ohio, South Dakota and West Virginia qualifying the exclusion of a casual sale to cases where the seller does not hold himself out as engaged in retail business. (Pren-tice-Hall All-State Tax Unit, par. 92, 572-5.)

In addition to the instances cited in plaintiff's brief pages 28 to 30, we find the following administrative interpretation expressly recognizing such sales as exempt:

(a) Connecticut—Sales and Use Tax Regulation 15 (P-H Connecticut Tax Service, par. 21,528):

“A ‘retail sale’ as defined by Section 2, Subsection 3½ of the Sales and Use Tax Act shall not include the following casual or isolated sales which are exempt from tax:

(a) Isolated sales of a non-recurring nature made by a person not engaged in the business of selling tangible personal property.

(b) Sales of articles of tangible personal property required for use or other consumption by a retailer or seller, which are not sold in the regular course of any business engaged in by such retailer or seller.

Examples of exempt sales: * * * (2) Sale of an entire business by the owner thereof * * *

(b) Maryland—Retail Sales and Use Tax Rules and Regulations, Rule 39 (P-H Maryland Tax Service, par. 21,686):

“Rule 39. Casual and isolated sales.—The tax does not apply to casual and isolated sales made by a vendor who is not engaged in the business of selling tangible personal property. However, this exemption does not apply to sales made by those persons who hold themselves out as engaged in a retail business, notwithstanding the fact that their sales may be few and infrequent.

* * * *

“Sales of fixtures and equipment in conjunction with a complete liquidation of a person's business are considered casual and isolated sales.”

The last paragraph above was added by revision of February 11, 1948.

(c) Ohio (P-H Ohio Tax Service, par. 21,332 and 21,605):

“Casual and Isolated Sales.

“The tax does not apply to casual and isolated sales. However, this exemption does not apply to sales made by persons engaged in the business of making sales at retail notwithstanding the fact that their sales may be few and infrequent.

“Where a person sells his household furniture; where a farmer sells his farm machinery, or other farm equipment; or where a grocer sells his cash register, counters, or other store fixtures at auction or otherwise, such persons are not ‘engaged in the business’ of selling tangible personal property at retail with respect to this property, but are making casual or isolated sales.”

“Generally it may be said that the use tax applies to the use of property in this state the sale of which would be subject to sales tax had there been a purchase within this state. Conversely the use tax does not apply upon the use of any property the sale of which has been subjected to

the sales tax *or the sale of which is exempt from sales tax*. The two taxes, sales and use, stand as complements to each other and taken together provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may have been purchased.

“Generally speaking, in determining exemptions under the use tax, reference may be made to the sales tax regulations, since the general rules applicable to the sales tax law are applicable to the use tax law unless otherwise herein specified.”

(d) Washington: Washington's May 1947 Regulations still are reported to read (P-H Washington Tax Service, par. 21,506, May 1, 1947):

Rule 165. *Casual or Isolated Sales*. Sales are deemed to be casual or isolated when made by a person who is not engaged in the business of selling the type of property involved. Examples of casual sales are the following:

(1) Sale of a capital asset by a manufacturer, wholesaler or retailer;

(2) Sale by an employee of any secondhand property which is of a type not sold by his employer; e.g., sale of an automobile or radio by a bank clerk;

(3) Sale of household furniture by a person who is registered but who is not engaged in the business of selling; e.g., sale of a dining set by a lawyer.

On the other hand, the sale at retail by a manufacturer or wholesaler of an article of merchandise manufactured or handled by him is not

a casual sale, even though he may make but one such sale.

Furthermore, persons who hold themselves out to the public as making sales at retail or wholesale are deemed to be engaged in the business of selling, and sales made by them of the type of property which they hold themselves out as selling, are not casual sales even though such sales are not made frequently.

Paragraph 23,003 of the same tax service still carries as current the following Commission opinion :

“Transfer of Assets in Continuing Business.

“We advise you that this Commission has uniformly held that the compensating tax (Title IV of said Act) does not apply upon the use of tangible personal property acquired through a casual transaction which is not subject to the retail sales tax and made under the conditions set forth above or set forth in Tax Commission’s Rule 106. * * *”

(Letter to Prentice-Hall, Inc. from State Tax Commission April 27, 1946.)

So we submit that the question *has* received ample consideration although short of the supreme court decisions in Utah and other states. Consistently the transfer of capital assets including tangible personal property such as in the case of Geneva has been recognized administratively as excluded under the casual sales definitions of the various tax acts.

4. Utah's Use Tax Act Does Not Stand Alone.

As we analyze defendant's present position it has reduced itself basically to an attack on the opinion of this court on the rehearing of the Portland Cement case. Commission's counsel on page 16 criticizes this opinion as "erroneous". Having once led this court into a position from which it unanimously retreated when the Commission's chairman presented on rehearing the true and complete facts and legislative history, the defendant would now reduce the opinions of this court by a further reversal to a category of "Good for this trip only." Counsel requests preferably a return to the original opinion, which treated the use tax as standing alone; or suggests as an alternative a distinction for isolated or occasional sales, which is right in the teeth of the defendant's stipulation in the records of this court in the Portland Cement case.

As was there disclosed, in 1939 the Utah State Tax Commission reported to the legislature as follows:

"The use tax should also be changed so as to correlate with the sales tax, and the same specific exemptions allowed in the sales tax, such as motor fuels, newspapers, *isolated and occasional sales* and sales by farmers and producers, should be written into the Use Tax Act. Again, *by regulation, we have provided that such exemptions also apply to the use tax*, but in order to support this regulation, the law should be changed." (Tax Commission Biennial Report, p. 41.)

Again, in the Seventh Biennial Report of the Commission to the 1945 Legislature, the Commission stated at page 59:

“The present administrative procedure and interpretations followed by the Commission operate uniformly under both the Sales and Use Tax Acts.”

In contrast, on page 22 of defendant's brief in this case, counsel for defendant now says:

“The Emergency Revenue Act of 1933, as amended, and the Use Tax Act of 1937, as amended, are separate acts and should not be combined by judicial interpretation.”

Counsel relies on *City of Spokane v. State of Washington*, *supra*, and quotes extensively from that case at pages 18 and 19 of his brief. But from the full opinion it is readily ascertained:

(a) An exemption not here involved because not present in Utah's Sales-Use Tax statutes was the limited basis of a qualified reversal of the *Henneford* case.

“It follows that the decision of this court in *Pacific Telephone & Telegraph Co. v. Henneford*, 195 Wash. 553, 81 P. 2d 786, must be, and it hereby is, overruled, in so far as it holds that the tax provided for by Title IV, chapter 180, Laws of 1935, as amended by chapter 191, Laws of 1937, is not leviable with respect to the use of articles of personal property that are not manufactured, or available for purchase, in this state.

(b) The basis for that reversal was that in the Henneford case there had occurred what happened also in the original Portland Cement case—An incomplete record.

“Upon a reexamination of that opinion in the light of evidence given in this case, it appears that the opinion attached a greater importance to the October, 1935 regulation of the tax commission than it deserved; for, the testimony of the members of the commission given in this case shows that the commission, in the actual administration of the act from the time it went into effect in 1935, levied the tax with respect to use of article, purchased without the state, though not available for purchase within. What the commission did, rather than what it said, establishes its administrative construction of the act, and, in the light of this testimony, the regulation itself becomes, at most, a mere opinion of no more materiality than the opinions expressed in the depositions of other state officers which we have refused to consider.

“Furthermore, the regulation quoted in the opinion in the telephone case does not attempt to state all the purposes of the act, but only the primary purpose, and at all events could not have been intended to have the effect which the court ascribed to it; for, we find that the very next paragraph of the regulation reads as follows: ‘In general, the Compensating Tax applies upon the use of any property, the sale of which would have been subject to our sales tax had it been purchased within the state. Conversely, it does not apply upon the use of any property, the sale of which has been subjected to our sales tax. Thus,

these two methods of taxation stand as complements to each other in our state revenue plan, and taken together, provide a uniform tax upon either the sale or use of *all* tangible personal property, *irrespective of where it may have been purchased.*" (Italics ours.)

Now here Commission's counsel cites as authority this Washington situation, when in contrast the Utah Commission has stipulated in this court (Case No. 6884) as follows:

C. The State Tax Commission has construed and applied the Sales Tax and Use Tax Acts as complementary and supplementary, and has never undertaken to collect a use tax as to the use of any property where the sale thereof within the State of Utah to the user or consumer was not subject to sales tax by reason of an exemption in the Sales Tax Act. However, the Tax Commission has assessed a use tax on property purchased outside the state and brought into Utah in situations where such property would have been exempt from the sales tax if purchased in Utah. (This discrimination has ceased.)

As authorized by the Use Tax Act, the State Tax Commission, after passage of the Use Tax Act, issued its regulations effective July 1, 1937, defining the scope and the meaning of the Act, the exemptions thereunder, and the relationship of such Act to the Sales Tax Act. Such regulations provided in part as follows:

2. Scope and Nature of Use Tax.

The Use Tax Act of 1937 was enacted to supplement the two per cent retail sales tax

(Emergency Revenue Act of 1933, as amended) by imposing a like tax of the storage, use, or other consumption in this state of tangible personal property purchased on or after July 1, 1937, the sale of which is not subject to a sales or excise tax of this state or of any other state.

The primary purpose of the Use Tax is to protect the merchants of Utah from discrimination arising by reason of the inability of the State of Utah, under the Constitution of the United States, to impose a sales tax upon sales made to residents of this state either in interstate commerce or by competitive merchants in other states.

In general, the Use Tax applies upon the storage, use, or other consumption of any tangible personal property, the sale of which would have been subject to the retail sales tax had it been purchased within this state. Thus, the use tax and the retail sales tax stand as complements to each other, and taken together, provide a uniform tax upon either the sale, use, storage, or consumption of all tangible personal property within this state irrespective of where it may have been purchased.

3. Application of Sales Tax Regulations.

(See also Paragraph 4.)

The sales tax regulations, revised November 1, 1937, issued by virtue of the authority vested in the State Tax Commission by Section 20 of the Sales Tax Act, in-

so far as the same are applicable, are adopted as Use Tax regulations.

The rules and interpretations contained in the following sales tax regulations are deemed to apply in the administration of the Use Tax Act:

14. *Isolated or Occasional Sales.*

* * * *

15. Seasonal Sales of Produce by the Producer.

* * * *

17. Religious, Charitable, and Eleemosynary Institutions.

* * * *

32 to 59, inclusive, known as Special Rules—Sales of Articles of Tangible Personal Property. (Rule 51 covers newspaper exemption.)

4. Exemptions.

The use tax complements the sales tax imposed by the Emergency Revenue Act of the State of Utah, and in construing the use tax, the provisions of the Emergency Revenue Act, relative to the tax imposed and the exemptions granted, should be taken into consideration.

The storage, use, or other consumption in this state of the following tangible personal property is considered to be within the exemptions:

(h) Newspapers and newspaper subscriptions.

(i) Property purchased from a person not regularly engaged in the business of selling such property *and where the sale is an isolated or occasional sale within the meaning of the sales tax regulation No. 14, Revised November 1, 1937.*

(k) Seasonal crops, seedling plants, garden or farm or other agricultural produce when purchased from the producer thereof.

(l) Property purchased from religious, charitable, and eleemosynary institutions, in the conduct of their regular religious, charitable, and/or eleemosynary functions and activities.

On April 1, 1938, and again on September 1, 1939, the State Tax Commission revised its sales and use tax regulations, but in such revisions employed language identical with that above quoted relating to the scope, nature, and purpose of the act and the exemptions thereunder, except that in the 1939 revision Rule 3 referred to Special Rules 31 to 60 (Rule 50 covering newspaper exemption) rather than 32 to 59, and Rule 4 (1) included property purchased 'by and from' religious, charitable, and eleemosynary institutions.

Effective January 1, 1944, the Commission again revised its Sales and Use Tax Regulations, such revision including the following statements as to the scope and application of the acts:

The sales tax is imposed upon sales of tangible personal property made within the

State of Utah regardless of where such property is intended to be used. The use tax is imposed upon the use, storage or other consumption of tangible personal property within the State of Utah in cases where the sale of such property is not made within the State of Utah. 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. However, in cases where the distinguishment must be made the determining factor is the place where the sale of the property is made. If the sale is made in Utah, the sales tax applies. If the sale is made elsewhere the use tax applies.

1. Nature of Tax.

This (the use tax) is an excise tax on the storage, use or other consumption of tangible personal property in Utah the sale of which is not subject to sales or excise tax in this or any other state. In general, the use tax applies upon the storage, use or other consumption of tangible personal property the sale of which would have been subject to retail sales tax had it been purchased within the State. Its primary purpose is to protect the merchants of Utah from discrimination arising by reason of the inability of the State of Utah under the Constitution of the United States to impose a sales tax upon sales made to residents of this state either in interstate commerce or by competitive merchants in other states.

So plaintiff submits that counsel's argument is here contrary to the Commission's own administrative construction and regulations — the very reverse of the Spokane case; and in urging an anomalous separate treatment for casual sales suggests a distinction, not a difference, both contrary to the enforcement of the Act by the Commission, to its official reports to the Legislature, and its official statements to this court.

It is for this reason, too, that the defendant so lightly dismisses on page 33 the argument that under the law as declared by this court, the Commission's own regulations and the facts *as finally determined in the record*, the sales tax, if any, is here applicable. Of course if it was the sales tax that should be applicable, the whole argument as to the casual sale exclusion would disappear.

5. A Few Non Sequiturs.

(a) On page 13 to 14 defendants asserts that both R.F.C. and W.A.A. collected and remitted taxes; but what the record to which reference is made shows, is that these agencies on occasion collected at their pleasure certain additional items *as a condition of sale*.

(b) On page 14 to 15 defendant asserts R.F.C. is a "corporation", and therefore is included under the Utah statutes as a "person". But it is elementary that government agencies—corporate or otherwise—are **not** so included with private corporations.

Taylor v. Genesee County (Mich.), (As to R.F.C.)
282 N.W. 863, 865;

Home Owners Loan Corp. v. Gordon,
97 P. 2d 845, 846;

United States v. Cooper Corp.,
31 F. Supp. 848, 551;

Feenster v. City of Tupelo (Miss.),
83 So. 804, 806;

City of Tyler v. Texas Employers' Ass'n.,
288 S.W. 409, 410;

9 Words & Phrases 712 et seq.

(c) Defendant speaks and defines “occasional *and* isolated sales”, page 20 to 21, but the statute is broader; it includes as taxable only retail sales by retailers which are neither “occasional *nor* isolated”.

(d) Again, on page 21 defendant argues that the Portland case applied only to “specific exemptions”. But a reading of the opinion and record in that case quickly indicates that no such limitation was made or intended. Ch. 103, Laws of Utah 1939, which created the casual sale exclusion, also brought into the statute the exclusion of sales by farmers, gardeners, stockmen, poultrymen, etc. (See point 4, *supra*.)

(e) On page 22, defendant asserts that the legislature had not passed in 1947 House Bill 153, and that therefore this court should not attempt by judicial interpretation what the legislature has refused to do. Such a speculation has no bearing in determining what was

the legislative intent, because any one of a myriad of reasons may have been the determining factor for failure to pass House Bill 153. 50 Am. Juris. § 326. However, counsel should know that the Legislative Tax Study Committee rejected House Bill 153 as unnecessary because at that time purposely this court handed down its opinion on rehearing in the Portland Cement case.

(f) On page 25 defendant quotes extensively from a California court of first impression. But it omits the factor, noted on page 35 of plaintiff's brief, that the California statute has been amended so that it is in no way comparable to that of Utah.

A case squarely in point involving the California sales tax, where at least in 1942 there was no casual sale exemption at all, is *State Board of Equalization v. Boteler*, 131 F. 2d 386, decided by the Ninth Circuit Court of Appeals. There the State Board had been enjoined from attempting to license and to collect the sales tax from a Trustee in Bankruptcy who was liquidating a bankrupt wholesale and retail bakery business. No federal question was involved as under the Bankruptcy Act trustees expressly are placed on the same footing as to state taxes as other persons.

The Trustee had first tried to sell the entire business, consisting of furniture, fixtures, equipment and other miscellaneous items of the business; failing this he had been granted court authority to sell the same at

private sale by the piece or in bulk. At this point the state tax authorities made their demand, and the Referee enjoined their attempt.

The Circuit Court without dissent sustained the District Court, which had affirmed the injunction, saying:

It thus appears that neither the case of *Bigsby v. Johnson*, supra, nor *Boteler v. Ingels*, supra, is determinative of the question with which we are here presented, unless, of course, as we have pointed out above, it could be said that the Trustee in liquidating the assets of the bankrupt estate was a "retailer" under the statutory definition of the term (*Bigsby v. Johnson*, supra) or was "operating a business" (*Boteler v. Ingels*, supra).

The cited cases do not compel, nor do they justify, such a holding. It is, of course, not a fact that the Referee in the circumstances of this case was engaged or was about to become "engaged in the business of making sales at retail * * * of tangible personal property." He did not continue the bankrupt's business in any sense, but instead chose to dispose of the physical equipment in accordance with his duty in such manner as to realize the highest return for the estate he was administering. Section 47, sub. a of the Bankruptcy Act, 11 U.S.C.A. § 75, sub. a. In our opinion the fact that these assets had previously been utilized by the bankrupt in the conduct of a business no longer in existence has no materiality in the case. His activities did not render him taxable under the terms of the California Retail

Sales Act, and, furthermore, did not subject him to the provisions of 28 U.S.C.A. § 124a, above quoted, to the effect that Trustees appointed by United States Courts to conduct any business shall be subject to state and local taxes applicable to such business.

The order is affirmed.

(g) On page 25 defendant also says that it sees no distinction between the sale by the United States of a sleeping bag and the sale of Geneva; nor do we as to the Government's *power* by paramount law to make sales of either or both free from state interference. The point plaintiff made was that the United States Government *did* make just such a distinction, as we claim exists by the nature of the two types of transaction. It asserted its general immunity, and then collected as a condition of sale the equivalent of the tax in one case, but refused so to do in the case of Geneva. (Ex. J. R. 114.)

(h) Defendant next says on page 25 that the Van Cott case is not in point as it involved income taxes. But the case was cited as authority for the proposition that if Utah's statutes *do* exclude federal sales, that policy cannot be changed except by legislative action (as was done in California, Iowa and Connecticut) even though the United States should waive its sovereign immunity or that immunity should otherwise no longer exist.

(i) On page 21 defendant admits that the casual sale is an exclusion from coverage. Then on page 36 it rejects plaintiff's authorities that *tax coverage* is to be construed against the tax collector as irrelevant, and quotes the familiar principle that *exemptions* from the basic plan or scope of tax coverage are to be strictly construed in favor of the tax.

(j) Defendant's claim that because W.A.A. made retail sales at Redwood Road or elsewhere of Webster's "commodities in small quantities or parcels" prompts us to note 50 U. S. C. A. App. § 1611 et seq. Obviously W.A.A. was not "in business", as defined by the Sales-Use Tax Acts or in common parlance. Further, the distinction between its "retail" activities and the sale of integrated war plants under entirely different conditions, § 1628 et seq., is apparent.

Counsel for defendant has heretofore amended his brief to eliminate one of the repeated charges that Geneva is seeking to evade taxes. All this taxpayer has ever desired is to be advised as to what its tax liabilities are, and it is well able to meet its obligations. There is here, we submit, no justification for defendant's statements on page 29 and 30 that it will be necessary to

“increase the tax on others” because of Geneva’s “evasion”.

The disturbing factor is that counsel is willing to repudiate the official position of the Commission as heretofore expressed in practice, in its regulations for the public, in its official reports to the legislature, and its official representations to this court, in order to sustain a decision in effect dictated by the Attorney General, who had expressed his own doubts as to liability and therefore welcomed a determination by the courts. (Ex. 3 and 4.)

Respectfully submitted,

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