

1998

Yeargin Inc v. Auditing Division of the Utah State Tax Commission : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 9801342-CA

IN THE UTAH COURT OF APPEALS

YEARGIN, INC.,)	
)	Case No. 9801342-CA
Petitioner/Appellant,)	
)	Tax Comm'n Appeal No. 93-0002
vs.)	
)	
AUDITING DIVISION OF)	Priority No. 14
THE UTAH STATE TAX COMMISSION,)	
)	
Respondent/Appellee.)	

RESPONDENT'S/APPELLEE'S BRIEF

APPEAL FROM THE UTAH STATE TAX COMMISSION

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over appeals of final agency orders pursuant to Utah Code Ann. § 63-46b-16 and § 78-2a-3(2)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: Was the Utah State Tax Commission correct in affirming and sustaining the audit assessment for sales and use tax of tangible personal property Petitioner used or consumed in constructing a real property facility as prime contractor?

Standard of Review: This is a mixed question of fact and law. The standard of review is governed by Utah Code Ann. § 59-1-610(1)(Supp. 1994). The Court must grant the Tax Commission "deference concerning its written findings of fact, applying a substantial evidence standard on review." The Court grants no deference concerning its conclusions of law, applying a correction of error standard.

ISSUE NO. 2: Was the Tax Commission correct in disregarding a paragraph in the Joint Stipulation of Facts, when the weight of the evidence contradicted it?

Standard of Review: This is a mixed question of fact and law. The standard of review is governed by Utah Code Ann. § 59-1-610(1)(Supp. 1994). The Court must grant the Tax Commission "deference concerning its written findings of fact, applying a substantial evidence standard on review." The Court grants no

deference concerning its conclusions of law, applying a correction of error standard.

DETERMINATIVE STATUTES

Utah Code Ann. § 59-1-601 (Supp. 1996).

Utah Code Ann. § 59-1-610 (Supp. 1996).

Utah Code Ann. § 59-12-103 (1989).

Utah Code Ann. § 59-12-107 (Supp. 1996).

Utah Code Ann. § 63-46b-16 (Supp. 1996).

Utah Code Ann. § 78-2-2(e)(ii) (Supp. 1996).

Utah Code Admin. P. R865-19S-58 (Supp. 1996)

Utah Code Admin. P. R865-19S-2 (Supp. 1996)

Utah Code Admin. P. R865-19S-23.E. (Supp. 1996).

STATEMENT OF THE CASE

Yeargin filed an appeal in the Tax Commission for reconsideration of an audit for sales and use tax. A formal hearing was held on March 13, 1997. The Commission issued its Final Division in affirming and sustaining the audit on April 14, 1997.

On May 7, 1997, Yeargin filed a Complaint and Petition for Review by Trial De Novo of Final Decision of State Tax Commission in the Third District Court pursuant to Utah Code Ann. § 59-1-601(1996).

On October 30, 1997, Yeargin filed a Motion to Remand to Tax Commission in the Third District Court in an effort to transfer

the Third District Court case back to the Tax Commission.

On November 6, 1997, Yeargin filed a Petition for Review in the Utah Supreme Court which was followed, on November 17, 1997, by a Motion to Stay Proceedings. That Stay was lifted on April 22, 1998, by Order of the Utah Supreme Court and this case was poured over to the Utah Court of Appeals on June 25, 1998. The Court of Appeals raised a Sua Sponte Motion for Summary Disposition for Lack of Jurisdiction, denied that Motion on August 31, 1998, and, by Order dated September 29, 1998, denied Respondent's Motion for Reconsideration of the Court's August 31, 1998 Order.

STATEMENT OF FACTS

1. The Petitioner, Yeargin, Inc. ("Yeargin") was the contractor with principle responsibility to construct a new manufacturing facility for ammonium perchlorate (R. at 6). This facility was being constructed near Cedar City, Iron County, Utah (R. at 8). Ammonium perchlorate is used to make fuels for solid fuel rockets, important to space exploration (R. at 6).
2. Following an explosion of a prior ammonium perchlorate production facility in Henderson, Nevada, on May 4, 1988, a new facility needed to be constructed (Tr. at 66-68).
3. The previous production facility was owned by a corporation named Pacific Engineering and Production Co. of Nevada

("PEPCON") (R. at 88). Western Electrochemical Company ("WECCO") is a wholly owned subsidiary of PEPCON which owns the ammonium perchlorate facility in Iron County (Tr. at 66-67). The Agreement establishing the responsibilities of Yeargin identifies the work to be done by the contractor as:

Contractor shall perform, as necessary for completion of the Project, the detailed design and engineering (including preparation of plans, specifications, construction drawings and estimates); shall, procure, deliver and install permanent materials and, equipment; shall procure and deliver construction equipment, supplies, tools; shall provide supervisory services and labor; and shall perform changes, if any, pursuant to GC-3; all in accordance with the terms of this Agreement (the Work).

(R. at 21, 163).

4. In approximately May 1991, the Auditing Division of the Utah State Tax Commission conducted an audit of Yeargin (Tr. at 81, 83). Documents reviewed by an auditor included purchase orders, purchase order status reports, checks, ledgers, and sales tax returns (Tr. at 82, 85-85, 89-90, 91, 101-103).
5. After reviewing and analyzing these documents, the Auditing Division issued a Statutory Notice with an accompanying Utah Sales and Use Tax Audit Summary dated September 17, 1992 (R. 100-133). The Audit Summary listed itemized transactions which the Auditing Division determined as taxable. The total tax due was \$67,827.86 (R. at 102). Ron Jacobsen, Senior Auditor with the Auditing Division, reviewed each document itemized on the schedules accompanying the Audit

Summary (Tr. at 86-87). For each item entered, a Yeargin invoice, a purchase order, a Yeargin check, and/or a ledger entry documented the transaction (Tr. at 85-86, 98-99, 101-103). Items purchased by Yeargin and converted into real property were summarized in Schedule 1 of the Audit Summary, and were considered taxable to Yeargin (Tr. at 91, 100-101, 109).

6. None of the items listed on the Audit Summary were duplicated on another entity's purchase orders, invoices or checks (Tr. at 90-91, 98-99, 111). No items included in the schedules accompanying the Audit Summary were duplicated in any other audit of any other related entity (Tr. at 87-88).
7. Credits were given to Yeargin if taxes had been paid or if items originally scheduled qualified for the manufacturer's exemption in consultation with Yeargin representatives during the field audit (Tr. at 83-84, 86-87, 89). At no time did Yeargin supply information that items included in the audit were cost-accounted on any other entity's books or records (Tr. at 90-91).
8. The Audit Summary also included tangible **personal property** purchased by Yeargin but not converted to real property. These were considered consumables purchased by Yeargin and listed on schedule 2 of the Audit Summary (Tr. at 92, 100-104).

9. Yeargin acknowledged it had taxable purchases by filing Utah State Quarterly Sales and Use Tax returns from October 1988 through December 1989 (R. at 135-142), (Tr. at 93-94). All of the purchases scheduled in the Audit Summary traced the accrual records of Yeargin to invoices or other supporting documentation and were scheduled only for the Cedar City facility (Tr. at 95, 97). All purchase orders and checks reviewed as supporting documents to the scheduled items in the Audit Summary belonged to Yeargin (Tr. at 98, 111, R. at 143, 204-211, 213-217, 219-221).
10. Following the formal hearing, the Tax Commission issued its Findings of Fact, Conclusions of Law and Final Decision, attached as Addendum A. The Findings of Fact included:
 - a. The tax in question is sales and use tax.
 - b. The period in question is October 1988 through December 1989.
 - c. During the course of construction of the facility, PPI and WECCO entered into an agreement with United Engineers and Constructors, Inc., and its affiliate, Yeargin, for purpose of providing assistance in the engineering, design and procurement for the construction of the AP manufacturing facility. United Engineers assisted WECCO in purchasing materials for use in the construction of the facility and located

suppliers, obtained price quotations and arranged for WECCO to make purchases of materials. In addition to assisting WECCO, United Engineers and Yeargin actually purchased some of the materials which were invoiced and billed to Yeargin and were paid for by checks from Yeargin. Yeargin ultimately installed those materials into the real property at the WECCO facility or consumed to the materials in the construction process. The contract provides that title to all materials purchased for use at the WECCO facility would pass directly from suppliers to WECCO, but the invoices and checks indicate that some of the materials came to rest in the hands of Yeargin.

- d. United Engineers placed one of its employees with Yeargin to perform the purchasing function for the products for WECCO. That employee performed those purchasing functions. Paragraph GC-17 of the Agreement between PPI and United Engineers and Constructors Inc., provided that "title to all material and equipment procured by contractor to be incorporated into the project, shall pass to owner upon delivery to common carrier or at the project site, whichever is provided for in the purchase order." However, Petitioner was not a party to that contract. Even if Petitioner had

been a party to the contract, the actions of Petitioner determine the taxability of purchases, and not the written agreement, especially if the provisions of the agreement were not followed.

- e. Notwithstanding paragraph GC-17 of the Agreement, paragraph A-1 of the Agreement provides the contractor (United or Yeargin) is to "procure, deliver and install permanent materials and equipment." The evidence submitted in this proceeding is clear that Petitioner did procure many of the materials and install them into the project.
- f. Yeargin also issued an exemption certificate to the vendors of some of the materials. Exemption certificates were not appropriately issued for any materials which were not resold or which Petitioner installed into real property.
- g. There is no evidence, or even an allegation, that WECCO or any other company paid the sales tax on the materials at issue in this proceeding.
- h. The only items on which sales tax has been imposed upon Petitioner by Respondent are those materials which were invoiced to Petitioner and/or were paid for by checks of Petitioner.
- i. In performing the audit, Respondent looked only at who

bought and paid for the materials. The source of those funds was not, and should not have been, material in determining whether or not Petitioner should have paid sales tax on the materials.

- j. Petitioner converted the materials to real property, or personally consumed the materials in the construction of the project.

(R. at 6, 9-11).

- 11. Though the Joint Stipulation of Facts was entered into by the respective parties on April 24, 1994, auditors did not receive, nor had they reviewed, the Agreement until November 16, 1994 (Tr. at 106).

SUMMARY OF THE ARGUMENT

Yeargin was liable for the tax assessment under any of three legal theories. By contract and in fact, Yeargin was a real property contractor converting tangible personal property into real property. For all transactions in the audit, Yeargin either purchased them for installation into real property, or used and consumed the goods itself. But for Yeargin providing invalid exemption certificates for each purchase in the audit, the vendor would have collected tax and the parties would not be here. Even if Yeargin was not liable under the theory of a real property contractor, it was liable for remitting sales tax, as a vendor, or as a retail consumer under use tax.

Substantial evidence exists in the record to justify the factual findings of the Commission that Yeargin consumed and was liable for those purchases. Contractual provisions, and the weight of the evidence defends the Commission's decision, and even if the parties are bound to a joint stipulation of facts, the Commission had the power to set that aside in the face of justifiable cause and contrary evidence.

ARGUMENT

I. THE COURT MUST GIVE DEFERENCE TO THE TAX COMMISSION'S FINDINGS OF FACT CONCLUDING THAT YEARGIN, INC., AS A REAL PROPERTY CONTRACTOR, VENDOR, OR USER, WAS RESPONSIBLE FOR COLLECTING AND REMITTING SALES OR USE TAX ON ALL TRANSACTIONS IN THE AUDIT.

Petitioner was a real property contractor for the construction of the WECCO facility (the "Work" or "the Project" as Referenced in the Transcript and Pleadings). Items of tangible personal property purchased by the Petitioner, which were included on Schedule 1 of the Audit Summary, were converted to real property by the Petitioner (R. at 9, 21, 105-108, 163), (T. at 31, 85-89, 91-92).

The Tax Commission found that "[i]n addition to assisting WECCO, United Engineers and Yeargin actually purchased some of the materials which were invoiced and billed to Yeargin and were paid for by checks from Yeargin. Yeargin ultimately installed those materials into the real property of the WECCO facility or consumed the materials in the construction process." (R. at 9).

The sale of tangible personal property to real property contractors is governed by Utah Code Ann. § 59-12-103 and Utah Code Admin. P. R865-19S-58 (Supp. 1996). Utah law imposes a tax against the purchaser for the amount paid or charged for tangible personal property stored, used, or consumed in this state. Utah Code Ann. § 59-12-103 (1989). The administrative rules of the Tax Commission generally provide that the person who converts the personal property into real property is the consumer of the personal property, since that person is the last one to own it as personal property. Utah Code Admin. P. R865-19S-58 (Supp. 1996). As the installation contractor, Petitioner by law became the ultimate consumer of the tangible personal property and is therefore subject to the sales and use tax on the materials in those transactions.

In Tummurru Trades v. Utah State Tax Comm'n, 802 P.2d 715 (Utah 1990), the Utah Supreme Court addressed a similar claim by a taxpayer who sought an exemption from sales tax on items that were sold to out-of-state customers. Tummurru was in the business of constructing and selling modular buildings. The company made a number of sales to out-of-state customers, transported the modular units to the site, and then Tummurru's construction arm installed the buildings on-site. In holding the taxpayer liable for the sales taxes on the transactions, the Utah Supreme Court applied a principal first discussed in Utah

Concrete Products Corp. v. Utah State Tax Comm'n, 125 P.2d 402 (Utah 1942), and supported by later decisions, that contractors are the ultimate consumers of the items they purchase for incorporation into real property. E.C. Olsen Co. v. Utah State Tax Comm'n, 168 P.2d 324 (Utah 1946), BJ-Titan Services v. Utah State Tax Comm'n, 842 P.2d 822 (Utah 1992), Chicago Bridge & Iron Co. v. State Tax Comm'n, 839 P.2d 303 (Utah 1992).

Paragraph A-1 of the Agreement between WECCO and Petitioner defines the work to be done by Petitioner:

Contractor shall perform, as necessary for completion of the project, the detailed design and engineering (including preparation of plans, specifications, construction drawings, and estimates); shall procure, deliver and install permanent materials and equipment; shall procure and deliver construction equipment, supplies, tools; shall provide supervisory services and labor; and shall perform changes, if any, pursuant to GC-3; all in accordance with the terms of this Agreement (the Work). (Emphasis added.)

Petitioner was a real property contractor, and as such made purchases of all items included in the Audit Summary. The Record supports, and the Tax Commission found that Petitioner was the purchaser or user of those materials in Schedule 1 of the Audit Summary as an ultimate consumer, by installing those materials into real property at the WECCO facility, or, having consumed items of tangible personal property (Schedule 2 of the Audit Summary). Sub-argument "A" below explains this reasoning, which should be adopted. But even if the Court rejects it, Sub-arguments "B" and "C" demonstrate how Petitioner will still be

liable for sales or use tax on all transactions in the audit.

A. The Tax Commission's Findings of Fact were Based on Substantial Evidence and the Failure of the Petitioner to Marshal Evidence to the Contrary Requires this Court to Sustain the Tax Commission's Final Decision.

The Tax Commission in its Findings of Fact, Conclusions of Law, and Final Decision, attached hereto as Addendum A, found:

- a. The evidence submitted in this proceeding is clear that the Petitioner did procure many of the materials and install them into the project. (R. at 10-11).
- b. "Yeargin... issued an exemption certificate to the vendors of some of the materials. Exemption certificates were not appropriately issued for any materials which were not resold or which Petitioner installed into real property." (R. at 11).
- c. "There is no evidence, or even an allegation, that WECCO or any other company paid the sales tax on the materials at issue in this proceeding." (R. at 11).
- d. "The only items on which sales tax has been imposed upon Petitioner by Respondent are those materials which were invoiced to Petitioner and/or were paid for by checks of Petitioner." (R. at 11).
- e. "Petitioner converted the materials to real property, or personally consumed the materials in the construction of the project." (R. at 11).

Utah Code Ann. § 59-1-610 (Supp. 1996) establishes the standard of review of an appellate court:

(1) When reviewing formal adjudicative proceedings commenced before the commission, the Court of Appeals or Supreme Court shall:

(a) grant the Commission deference concerning its written findings of fact, applying a substantial evidence stands on review; and

(b) grant the commission no deference concerning its conclusions of law, applying a correction of error standard, unless there is an explicit grant of discretion contained in a statute at issue before the appellate court.

(2) This section supercedes Section 63-46b-16 pertaining to judicial review of formal adjudicative proceedings.

Under the "substantial evidence" test, the reviewing court shall "grant the commission deference concerning its written findings of fact, applying a substantial evidence standard." "Substantial evidence" is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. First National Bank of Boston v. County Bd. of Equalization of Salt Lake County, 799 P. 2d 1163 (Utah 1992). Substantial evidence is "more than a mere 'scintilla' of evidence . . . though 'something less than the weight of the evidence.'" (Citations omitted). Grace Drilling v. Board of Review, 776 P.2d 63 (Utah App. 1989).

The "substantial evidence" test requires review of the whole record, including evidence that both supports the agency's factual findings and evidence that fairly detracts from the

weight of the evidence. Id. at 68. This does not mean that the Commission need grant equal weight to all the evidence. Questar Pipeline Company v. Utah State Tax Comm'n, 850 P.2d 1174 (Utah 1993). In the past, the Utah Supreme Court noted that the "substantial evidence" test "requires us to uphold an agency's factual findings if such findings are supported by substantial evidence." Zissi v. State Tax Commission of Utah, 842 P.2d 848 (Utah 1992).

The burden of proof lies with the party appealing the administrative order. Id. at 852. The challenging party must "marshal all of the evidence supporting findings and show that despite the supporting facts and in light of the conflicting contradictory evidence, the findings are not supported by substantial evidence." Grace Drilling, 776 P.2d at 68. This Court has held that:

Successful challenges to findings of fact thus must demonstrate to appellate courts first how the trial court found the facts from the evidence and second why such findings contradict the weight of the evidence.

Oneida/SLC v. Oneida Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1053 (Utah App. 1994). In describing the responsibility of the challenger this Court noted:

In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw

in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous. (Emphasis added.)

West Valley City v. Majestic Investment Co., 818 P.2d 1311, 1315 (Utah App. 1991). The Petitioner has failed to marshal the evidence in accordance with these decisions. The Findings of Fact by the Tax Commission in its Final Decision, even if not sufficiently marshaled by the Petitioner in its brief, easily meets the substantial evidence standard (See Addendum A). Thus, the Tax Commission correctly concludes, "Therefore, it appears clear to the Commission that Yeargin purchased the materials and installed those materials into the real property at the Cedar City facility or otherwise consumed those materials or supplies in the construction of that project. Under either event, sales and use tax would be due and owing from the Petitioner." (R. at 15.)

B. Irrespective of Petitioner's Contract or Agency Arguments, Petitioner was Responsible to Collect and Pay Sales or Use Tax on the Audited Non-Exempt Transactions as a Vendor or Consumer.

Utah Code Ann. § 59-12-103(1)(a) provides:

There is levied a tax on the purchaser for the amount paid or charged for the following:

(a) retail sales of tangible personal property made within the state... (emphasis added).

As established previously, the Petitioner purchased all items reflected on the schedules accompanying the Audit Summary (Tr. at 88, 101-104, 109-112), (R. at 143-144, 211-221). Sales tax is a

transactional tax. Utah Code Admin. P. R865-19S-2 (Supp. 1996) states:

A. The sales and use taxes are transactional taxes imposed on certain retail sales and leases of tangible personal property.... B. The tax is not upon the articles sold or furnished, but upon the transaction, and the purchaser is the actual taxpayer. The vendor is charged with the duty of collecting the tax from the purchaser and of paying the tax to the state.

This is the foundation of sales tax law in Utah. All analysis begins with examining a specific transaction to first determine if it falls within the tax imposition language of § 59-12-103 and then, if taxable under that section, whether it is specifically exempted from taxation under § 59-12-104. It is uncontested that all items listed in the Audit Summary are taxable and that the amounts calculated are correct (Tr. at 11-12, 85-86, 88, 101-104, 109-112). Additionally, no information was provided to contest that all audit items were not accounted for, nor tax paid, by any other entity (Tr. at 90-91).

The transactions for which Petitioner sought refund were purchases of either goods consumed by the Petitioner, or for tangible personal property which was converted by Petitioner into real property (R. at 6-11), (Tr. at 78-79, 91, 97, 100-101). Tax was properly imposed on those transactions, and the Petitioner's request for refund was properly denied.

Invalid exemption certificates were supplied by the Petitioner for purchases it made on tangible personal property

later converted to real property by Petitioner (R. at 211-221), (Tr. at 101, 103).

The Utah Supreme Court has established the purpose of proper tax collection administration in administering the Sales Tax Act as follows:

For the purpose of the proper administration of this chapter and to prevent evasion of the tax and the duty to collect the tax, it shall be presumed that tangible personal property or any other taxable item or service under subsection 59-12-103(1), sold by any person for delivery in this state is sold for storage, use, or other consumption in this state unless the person selling such property, item, or service has taken from the purchaser an exemption certificate signed by and bearing the name and address of the purchaser to the effect that the property, item, or service, was exempted under § 59-12-104. The exemption certificates shall contain information as prescribed by the commission. (Emphasis added.)

Tummurru Trades, Inc. v. Utah State Tax Comm'n, 802 P.2d 715, 717 (Utah 1990). The transactions identified in the Audit Summary were taxable but for Yeargin's supplying exemption certificates for the purchases it made. (Tr. at 100, 103), (R. at 211, 216).

Regardless of Petitioner's arguments that it consummated the purchases in the audit as agent for WECCO as the principal, or for itself, tax liability still attaches to the Petitioner. Tax was due at the time of the purchase of each item in the audit. The Petitioner, if not a real property contractor, was a vendor required to collect and remit the tax at the time of each transaction.

"The burden of providing that a sale is for resale or

otherwise exempt is upon the person who makes the sale. If any agent of the Tax Division requests the vendor to produce a valid exemption certificate or other similar acceptable evidence to support the vendor's claim that a sale is for resale or otherwise exempt, and the vendor is unable to comply, the sale will be considered taxable and the tax shall be payable by the vendor.

Utah Code Admin. P. R865-19S-23.E. (Supp. 1996).

Referencing that rule, the Utah Supreme Court stated, "The purpose for the statutory requirement that merchants keep records of their sales and exemptions is to prevent tax evasion and tax fraud. In the instant case, the Tax Commission properly determined that where Tummurru could not uphold its burden of proving that the sales were made in interstate commerce or for resale by providing records of exemption certificates, the sales tax would be levied. Tummurru's failure to keep records necessarily requires this result because oral testimony is not an adequate substitute for accurate record keeping." (Emphasis added.) Tummurru Trades, 802 P.2d at 718.

Here, the Petitioner was the presenter of exemption certificates. Therefore, in light of the invalidity of the exemption certificates, Petitioner is absolutely liable for the sales tax that was due and owing. But for the presentation of improper exemption certificates, no audit, hearing, or appeal would have occurred. The vendor would have collected the tax at the time of the transaction in the absence of an exemption certificate.

If, indeed, the Petitioner made these purchases as an agent for an undisclosed principal, it still cannot escape tax liability. It may have a cause of action to be indemnified for that cost by the principal. It is a fact that Yeargin was the purchaser, regardless of whether title passed thereafter to the another (R. at 10-11). The entire argument about the capacity of the Petitioner as an agent is a red herring. Even if accepted, which is not admitted here, such argument does not relieve the Petitioner of its tax liability because it became a vendor of tangible personal property in the string of transactions.

If, as Petitioner argues, it received title to the tangible personal property from these transactions, and then transferred title to WECCO as the ultimate consumer, it would now be liable to collect and remit the tax as a vendor pursuant to Utah Code Ann. § 59-12-107:

(2)(a) Each vendor shall collect the sales or use tax from the purchaser.

None of the transactions referenced in the audit were allocated to any other entity (Tr. at 90-91, 98-99, 111). Additionally, purchases subject to a valid exemption were already credited and excluded from the audit prior to the statutory notice (Tr. at 86-87, 89). The unmistakable conclusion from this line of reasoning is that even if Petitioner's arguments as to its agency capacity were adopted by this Court, the Petitioner was still the purchaser of the items (as found by the Tax Commission and

substantially proven by the evidence in the Record). Regardless of whether Petitioner is a real property contractor or an agent for the owner, it cannot escape sales tax liability.

C. In the Last Alternative, Petitioner is Liable for Use Taxes Assessed to a User or Consumer Under Utah Code Ann. § 59-12-107(3).

Utah Code Ann. § 59-12-107(3) states:

Each person storing, using, or consuming tangible personal property under subsection 59-12-103(1) is liable for the use tax imposed under this chapter.

The Petitioner received tangible personal property purchased in transactions identified in the audit (R. at 10-11, T at 88-89, 101-104, 109-112). Petitioner then either installed or consumed the property so purchased (R. at 10-11). Thus, the last person to store, use or consume the tangible personal property before it was converted to real property was the Petitioner. For all items included in Schedule 1 accompanying the Audit Summary, Petitioner is liable for use tax since it used those goods. This Court has held, "If a vendor doing business in Utah meets any of the above conditions, it must collect and remit sales and use taxes. Id. If the vendor does not meet any of the conditions, the 'person storing, using, or consuming tangible personal property is responsible for remitting the use tax.' Id. 59-12-107(1)(b)."

B.L. Key, Inc. v. Utah State Tax Comm'n, 934 P.2d 1164 (Utah App. 1997), referencing Beaver County v. Utah State Tax Comm'n, 916 P.2d 344 (Utah 1996). By delivering exemption certificates to

(1975); Johnson v. Peoples Finance & Thrift Co., 2 Utah 2d 246, 272 P. id 171 (1954); Guard v. County of Maricopa, 14 Ariz. App. 187, 481 P.2d 873 (1971); Higby v. Higby, Colo. App., 538 P.2d 493 (1975); Thompson v. Turner, 98 Idaho 110, 55, P.2d 1071 (1977)[sic]." First of Denver Mtg. Investors v. C.N. Zundel & AS, 600 P.2d 521, 528 (Utah 1979).

Petitioner in its Brief, pages 25-26, implies that a court is required to render judgment consistent with the terms of a stipulation. Higley v. McDonald, 685 P.2d 496, 499 (Utah 1984). The quotation cited is simply a summary of that plaintiff's position indicating that the rule precludes the adoption of findings in conflict with the stipulated facts. In the next paragraph, the court states:

While Plaintiff accurately cites the rules in this regard, we do not adopt his characterization of the stipulation. According to the record, the extent to which the parties stipulated respecting the deed survey was that it could be admitted into evidence and that it depicts the 'approximate' location of defendant's mobile home. We cannot agree that the effect of this stipulation was to bind or obligate the trial court to apply the measurements and calculations on the deed the survey in determining the location of the disputed boundary. (Emphasis added.)

The general provision of the principal espoused in First of Denver continues to be the legal precedent.

Notwithstanding the legal arguments, the Tax Commission, being well aware of the provisions of the Joint Stipulation of Facts, acknowledged the same in its Final Decision, and clearly

articulated the greater weight of evidence produced which contradicted Petitioner's interpretation, and found it necessary to sustain and affirm the audit. This Court should not find justifiable cause to reverse that decision regarding the stipulation.

Petitioner, in its Brief at page 35, appears to mischaracterize another Utah Supreme Court decision. Petitioner states, "A party may withdraw from a stipulation only on a motion to the court. Dove v. Cude, 710 P.2d at 171." (Emphasis added.) However, the Dove decision appears to the Respondent to reinforce the First of Denver decision and does not hold that in the absence of a motion to the court the court must follow the stipulation. Justice Durham stated in the Dove decision:

We have previously stated that "[p]arties are bound by their stipulations unless relieved therefrom by the court, which has the power to set aside a stipulation entered into inadvertently or for justifiable cause." First of Denver Mortgage Investors v. C.N. Zundel and Associates, Utah, 600 P.2d 521 (1979) (citations omitted) (emphasis added). It is unlikely that a stipulation signed by the counsel and filed with the court was entered into inadvertently. Further, although the trial court has certain discretion in providing relief from a stipulation, if timely requested, See Klein v. Klein, Utah, 544 P.2d 472, 476 (1975), "[ordinarily, courts are bound by stipulations between parties." Zundel, 600 P.3d at 527 (citations omitted). In this case, there is no indication that the trial court found as a matter of fact that plaintiff did not understand or agree to the stipulation; nor did the trial court ground its decision to permit withdrawal of the stipulation on any legal or equitable basis. Klein, 544 P.2d at 476. In the absence of any articulated "justifiable cause," Zundel, 600 P.2d at 527, we must reverse the withdrawal

of the stipulation. (Footnotes omitted.) (Emphasis added.)

This Court should find that there was justifiable cause, and that it was within the discretion of the Tax Commission in light of its evidentiary findings, to not rely on a contradictory statement within the Joint Stipulation of Facts.

B. The Evidentiary Burden of Proof Was the Petitioner's, and it Failed to Meet That Burden or to Shift it to Respondent.

Utah Code Admin. P. R861-1A-7.G. (Supp. 1996) states, "Burden of Proof. The Petitioning party shall have the burden of proof to establish that his petition should be granted." The Utah Supreme Court also held in Zissi v. State Tax Comm'n, 842 P.2d 848, 852 (Utah 1992), "Because a party appealing from an order of an administrative agency must demonstrate that the agency's factual determinations are not supported by substantial evidence, (citation omitted) we state the facts and all legitimate inferences drawn therefrom in the light most favorable to the agency's findings."

Petitioner attempts in its brief, specifically pages 11, 15 and 24, to shift the evidentiary burden to the Respondent. In light of the Petitioner's burden of proving that it's Petition should be granted, it was obligated to prove by sufficient evidence that the audit findings in the statutory notice were incorrect. At best, it's reliance on one paragraph of the Joint Stipulation of Facts is the only hook upon which its argument can

hang.

On the contrary, the testimony of Ron Jacobsen, witness for the Auditing Division, is uncontested in the Record. For each item listed on the schedules, Mr. Jacobsen had a purchase order from Yeargin, a check from Yeargin, and never a WECCO check (Tr. at 111). Also, Mr. Jacobsen testified that he did a 100% review of every purchase order and that none of the invoices that were part of the assessment against Yeargin were in fact issued by PEPCON (or WECCO) (Tr. at 112).¹

Other than raising doubt of that testimony in its Brief before this Court, that testimony is uncontroverted. Additionally, the testimony of Petitioner's witnesses failed to substantiate the same kind of review on and/or repudiate the individual entries in the schedules to the Audit Summary.

The Record reflects that even if the burden of proof had successfully shifted from the Petitioner to the Respondent, substantial evidence was presented by Respondent, and insufficiently contradicted by Petitioner.

CONCLUSION

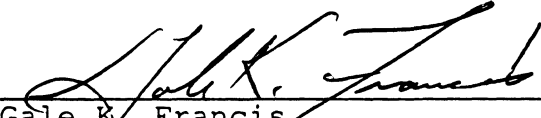
The Tax Commission correctly found that the actions of the

¹ Mr. Jacobsen testified that files pertaining to purchase orders covered a range in numeration, "purchase orders stated with 1000 and went through 13000-something,..." (Tr. at 88.) He did not allege he previewed 12,000 documents. It was clear taking his testimony as a whole that he reviewed each applicable documents. At a minimum, all entries on the schedules had all supporting documents. (See Statement of Facts).

Petitioner determined the taxability of purchases, not a written agreement. How Yeargin was reimbursed for its taxable purchases is immaterial as well. Yeargin, Inc., in the capacity as real property contractor, vendor, or consumer, was responsible for tax liability as established in the assessment. Sufficient cause existed both in legal and factual bases to practically disregard a deficient section of the Stipulation of Facts.

Since the Petitioner has not met either its trial or appellate burden of proof justifying a reversal, the Findings of Fact, Conclusions of Law, and Final Decision of the Tax Commission should be sustained in its entirety.

Dated this 16th day of November, 1998.

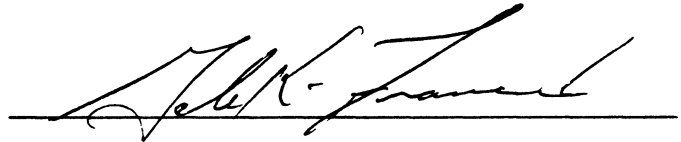


Gale K. Francis
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Gale K. Francis, certify that on the 16th day of November, 1998, I served the parties listed below with 2 copies each of the Brief of Respondent, Utah State Tax Commission by mailing them by first-class mail with sufficient postage pre-paid to the following:

ROBERT A. PETERSON, ESQ.
GIAUQUE, CROCKETT, BENDIGER & PETERSON
170 SOUTH MAIN STREET, SUITE 400
SALT LAKE CITY, UTAH 84101

A handwritten signature in black ink, appearing to read "Gale K. Francis", is written over a horizontal line.

ADDENDUM A

BEFORE THE UTAH STATE TAX COMMISSION

YEARGIN INC & WESTERN
ELECTROCHEMICAL,

Petitioner,

v.

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

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**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL DECISION**

Appeal No. 93-0002

Account No. H02516

Tax Type: Sales & Use Tax

STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on March 13, 1997. G. Blaine Davis, Administrative Law Judge, heard the matter for and on behalf of the Commission. Present and representing Petitioner were Mr. Robert Peterson from the law firm of Giauque Crockett Bendinger and Peterson, together with Mr. Bill Burke and Mr. C. Keith Rooker. Present and representing Respondent were Mr. Gale Francis, Assistant Attorney General, together with Mr. Brad Simpson, Mr. Bert Ashcroft, Mr. Ron Jacobson, and Ms. Marie Humphreys from the Auditing Division.

Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

0006005

FINDINGS OF FACT

1. The tax in question is sales and use tax.
2. The period in question is October 1988 through December 1989.
3. Petitioner, Yeargin Inc., is a corporation organized, existing, and in good standing under the laws of the State of Delaware, and was duly qualified to transact business and was in good standing as a foreign corporation under the laws of the State of Utah.
4. Western Electrochemical Company (WECCO) was also a Delaware Corporation and was authorized to transact business in the State of Utah.
5. WECCO is a wholly owned subsidiary of Pacific Engineering and Production Company of Nevada (PEPCON) which, prior to May 4, 1988, operated an ammonium perchlorate (AP) manufacturing facility in Clark County, Nevada. Prior to May 4, 1988, PEPCON was one of two domestic producers of AP. AP is a chemical that is essential to a variety of national defense and space exploration programs.

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6. On May 4, 1988, a series of fires and explosions at the PEPCON-AP manufacturing facility resulted in the total destruction of PEPCON's facility and the loss of approximately one-half of the United States' domestic AP production capacity.

7. After the May 4, 1988 fires and explosions, the United States Department of Defense (DOD) and the National Aeronautic's and Space Administration (NASA) determined that it was essential to national security and space exploration that the nation's AP production capacity be replaced as soon as possible.

8. After the fires and explosion of May 4, 1988, PEPCON lacked sufficient funds with which to rebuild or replace its AP manufacturing facility, and was unable to obtain conventional financing for this purpose. In order to expedite the replenishment of the nation's AP production capacity, contractors of NASA and DOD made certain financing available to PEPCON Production Inc. (PPI), an affiliate of PEPCON. The terms of the financing prohibited the expenditure of the loan funds to purchase "non-severable" property, or real property.

9. The financing made available by contractors of NASA

and the DOD was the sole source of construction funds for the AP facility until permanent financing was obtained in March, 1989.

10. It was not possible to rebuild the AP manufacturing facility on the site that had been occupied by the PEPCON manufacturing facility. After a brief but intensive search, a suitable site was located in Iron County, Utah, approximately 15 miles west of Cedar City. PPI purchased the site with its own funds because real property was not a permissible use of the construction funds. Construction began at the Iron County site in July, 1988 and proceeded under the terms of a DOD priority rating, pursuant to the provisions of the Defense Priority and Allocation System Regulation 15 C.F.R. 350 .

11. During the construction period, a search for permanent financing continued. When construction was nearly complete, permanent financing was obtained from Security Pacific Bank, Washington, N.A. The permanent financing was closed on March 3, 1989. On that date, the lender required that PEPCON form WECCO for the purpose of completing the construction of the facility and thereafter operating the facility. WECCO then succeeded PPI as the

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owner of the AP facility under construction. Initial manufacture of AP at the new WECCO-AP manufacturing facility occurred in August, 1989.

12. During the course of construction of the facility, PPI and WECCO entered into an agreement with United Engineers and Constructors, Inc., and its affiliate, Yeargin, for purpose of providing assistance in the engineering, design and procurement for the construction of the AP manufacturing facility. United Engineers assisted WECCO in purchasing materials for use in the construction of the facility and located suppliers, obtained price quotations and arranged for WECCO to make purchases of materials. In addition to assisting WECCO, United Engineers and Yeargin actually purchased some of the materials which were invoiced and billed to Yeargin and were paid for by checks from Yeargin. Yeargin ultimately installed those materials into the real property at the WECCO facility or consumed the materials in the construction process. The contract provides that title to all materials purchased for use at the WECCO facility would pass directly from suppliers to WECCO, but the invoices and checks indicate that some

of the materials came to rest in the hands of Yeargin.

13. United Engineers placed one of its employees with Yeargin to perform the purchasing function for the products for WECCO. That employee performed those purchasing functions. Paragraph GC-17 of the Agreement between PPI and United Engineers and Constructors Inc., provided that "title to all material and equipment procured by contractor to be incorporated into the project, shall pass to owner upon delivery to common carrier or at the project site, whichever is provided for in the purchase order." However, Petitioner was not a party to that contract. Even if Petitioner had been a party to the contract, the actions of Petitioner determine the taxability of purchases, and not the written agreement, especially if the provisions of the agreement were not followed.

14. Notwithstanding paragraph GC-17 of the agreement, paragraph A-1 of the agreement provides the contractor United or Yeargin is to "procure, deliver and install permanent materials and equipment;". The evidence submitted in this proceeding is clear that Petitioner did procure many of the materials and install

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them into the project.

15. Yeargin also issued an exemption certificate to the vendors of some of the materials. Exemption certificates were not appropriately issued for any materials which were not resold or which Petitioner installed into real property.

16. There is no evidence, or even an allegation, that WECCO or any other company paid the sales tax on the materials at issue in this proceeding.

17. The only items on which sales tax has been imposed upon Petitioner by Respondent are those materials which were invoiced to Petitioner and/or were paid for by checks of Petitioner.

18. In performing the audit, Respondent looked only at who bought and paid for the materials. The source of those funds was not, and should not have been, material in determining whether or not Petitioner should have paid sales tax on the materials.

19. Petitioner converted the materials to real property, or personally consumed the materials in the construction of the project.

APPLICABLE LAW

There is a sales tax imposed upon the purchaser for amounts paid or charged for retail sales of tangible personal property made within the State of Utah (U.C.A. 59-12-103).

Property purchased for resale in this state in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product is exempt from sales tax. U.C.A. 59-12-104(27).

Sales of construction materials and other items of tangible personal property to real property contractors and repairmen of real property are subject to tax if the contractor or repairman converts the materials or items to real property. Rule R865-19S-58, Utah Administrative Code).

The contractor or repairman who converts the personal property to real property is the consumer of tangible personal property regardless of the type of contract entered into between the parties. (Rule R865-19S-58B.1, Utah Administrative Code).

ANALYSIS

In this case, Respondent made an audit assessment against

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Petitioner for additional sales and use taxes. Petitioner has paid the full amount of sales and use taxes, together with the interest thereon, and Petitioner is now seeking a refund of approximately \$87,000 for the taxes and interest which it paid pursuant to the audit. If the audit assessment is correct, then Petitioner was not entitled to such a refund. If the audit assessment was not correct, then Petitioner is entitled to a refund.

The position of Petitioner is that it never made any purchases of products upon which it should have paid tax, because the title to those products passed directly to WECCO as provided by the contract between WECCO, PEPCON Production Inc., and United Engineers and Constructors, Inc.

Petitioner further relies upon paragraph 12 of the stipulation of facts entered into between the parties in which it was agreed that United Engineers assisted WECCO in purchasing materials for use in the construction of the facility and located suppliers, obtained price quotations and arranged for WECCO to make purchases of materials. Therefore, Petitioner claims that its only function was to assist in obtaining materials and that it did not

actually obtain any such materials. However, the interpretation of the Commission of that stipulation is that although one of the functions of United Engineering was to assist WECCO, that does not foreclose the possibility that United Engineers (Yeargin) may have itself purchased materials for the construction of the facility. The Petitioner's interpretation of paragraph 12 is one possible interpretation of the paragraph, but it is not the only possible interpretation. Further, Respondent has submitted evidence which would indicate that Petitioner's interpretation of paragraph 12 does not accurately portray the facts as they were carried out by the parties.

Petitioner also takes the position that everything was purchased for the account of the owner, but there may have been some mistakes in documentation because of the fast-track requirements to try to get the plant built in a hurry to restore the nation's AP production capacity. Again, that does not comport with the invoices billing items directly to Yeargin, and Yeargin then paying those invoices from its funds. That argument may be persuasive if it were determined that the owner, either WECCO or

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PEPCON paid the tax on the materials, but there is no evidence to indicate that any other entity has also paid the tax on the materials purchased by Yeargin.

Therefore, it appears clear to the Commission that Yeargin purchased the materials and installed those materials into the real property at the Cedar City facility or otherwise consumed those materials or supplies in the construction of that project. Under either event, sales and use tax would be due and owing from Petitioner.

DECISION AND ORDER


Based upon the foregoing, the Tax Commission finds that the audit assessment made by Respondent was appropriate, that Petitioner was responsible for the payment of such sales and use taxes. Petitioner is therefore not entitled to the requested refund. The request for refund is denied, and the audit assessment

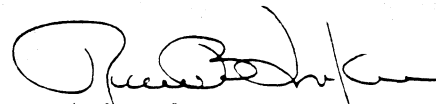
Appeal No. 93-0002

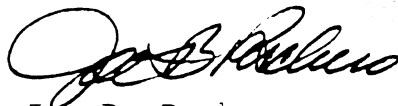
is affirmed and sustained. It is so ordered.

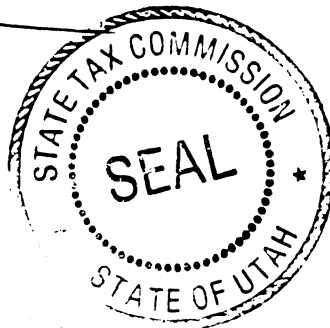
DATED this 4 day of April, 1997.

BY ORDER OF THE UTAH STATE TAX COMMISSION.


W. Val Oveson
Chairman


Richard B. McKeown
Commissioner


Joe B. Pacheco
Commissioner




Alice Shearer
Commissioner

NOTICE: You have twenty (20) days after the date of a final order to file a Request for Reconsideration with the Commission. If you do not file a Request for Reconsideration with the Commission, you have thirty (30) days after the date of a final order to file a.) a Petition for Judicial Review in the Supreme Court, or b.) a Petition for Judicial Review by trial de novo in district court. (Utah Administrative Rule R861-1A-5(P) and Utah Code Ann. §§59-1-601(1), 63-46b-13 et. seq.)

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C E R T I F I C A T E O F M A I L I N G

Utah State Tax Commission
Appeal

Yeargin Inc & Western Electrochemical VS. Auditing Division	93-0002
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Yeargin Inc. & Western Electrochemical
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Salt Lake City UT 84134

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Salt Lake City UT 84144

I hereby certify that I mailed a copy of the foregoing document
addressed to each of the above named parties.

4-14-77
Date

W. R. F. [Signature]
Appeals Staff

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