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Young Electric Sign Company v. State Tax Commission : Defendant's Brief

Utah Supreme Court

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DEC 8 1958

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**IN THE SUPREME COURT OF
THE STATE OF UTAH**

YOUNG ELECTRIC SIGN COM-
PANY and YOUNG ELECTRIC
SIGN COMPANY, INC.,

Plaintiffs,

Case No.

8383

— vs. —

STATE TAX COMMISSION,

Defendant.

DEFENDANT'S BRIEF

REX W. HARDY,
BEN E. RAWLINGS,
Attorneys for Defendant.

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DEFENDANT'S BRIEF

STATEMENT OF FACTS

The statement of facts set forth in plaintiff's brief is substantially correct. The question to be decided in this case is how the Sales Tax Act is to be applied to the various operations of the two plaintiffs who are engaged in the neon

sign business. For convenience both plaintiffs will subsequently be referred to as the company in the singular sense although there are two companies involved, and the Utah State Tax Commission will be referred to as the Commission.

The operation of the company is divided into different classes as set forth in the stipulation of facts, as follows:

1. Outright sale of signs and sign parts. There is no question in relation to these transactions because both parties agree that a tax of 2% must be collected and paid on the total selling price.

2. Rental of signs *which are owned by the company.*

3. Repairing of signs *owned by others.*

For the purposes of this appeal the company has divided the second group, rentals, into three parts, i. e.

- (a) Original rental period.

- (b) Option period which covers the rentals received between the expiration of the original rental period and the formal execution of the rewrite contract, and

- (c) The rewrite contract which is a re-execution of the original rental agreement, using the same form, but at a reduced rental.

We feel that the most important fact to be borne in mind when considering the taxability of the rentals received by the company on these three types of transactions is that at all times the title to the sign in question remains in the company. The only thing the company is agreeing to do is rent *their* sign to the customer. An entirely different light is thrown upon the argument presented in the plaintiff's brief when this fact is considered.

The third group, repairing of others signs, is also divided into two sub-groups, i. e.

(a) Ordinary repair sales where the company goes out and makes repairs on other peoples signs on order and sends the customer a bill. These are designated as "repair sales."

(b) Receipts from contracts where the company agrees for a fixed fee to keep a given sign which is owned by the customer in repair for a stated period. These are designated as "maintenance contracts."

How is the tax to be computed under the Sales Tax Act on these various transactions?

POINT I.

RENTALS RECEIVED UNDER ORIGINAL RENTAL AGREEMENTS, RE-WRITES AND OPTIONS ALL COME WITHIN THE SAME CLASS AND MUST BE TREATED THE SAME. THE TAX MUST BE COLLECTED AND PAID ON THE TOTAL RENTALS RECEIVED WITHOUT EXCEPTION.

Section 59-15-4, Utah Code Annotated 1953, provides for the placing of a 2% excise tax on certain retail sales. It is not limited to a tax on the sale of tangible personal property as inferred in the plaintiff's brief, in that it, for example, applies also to the sale of admission to any place of amusement in which case of course no transfer of tangible personal property takes place. The tax also applies to the sale of services where they cannot or are not separated from the sale of tangible personal property. For example, where a furniture store sells furniture and agrees to deliver it without additional charge, the store cannot deduct the cost of delivery from the selling price. A restaurant pre-

pares meals and collects tax on the total price for the meal. Other examples will be considered further on.

Section 59-15-2 (g), Utah Code Annotated 1953, provides as follows:

“When right to continuous possession or use of any article of tangible personal property is granted under a lease of contract and such transfer of possession would be taxable if an outright sale were made, such lease or contract shall be considered the sale of such article and the tax shall be computed and paid by the vendor or lessor upon the rentals paid.”

The Commission feels that this section of our code is clear and unambiguous. The language could not be more plain and the provision has been administered for over 20 years without difficulty. We feel that in order for the company to avoid the clear language of the act, they must prove that the rental transactions do not fall within this subsection. This they have neither done nor attempted to do, and in fact in the Stipulation of Facts which the company entered into, they stipulated as follows:

“21. With relatively few exceptions, each sign is custom designed for the particular needs of the particular customer and has no substantial value to anyone other than that customer or someone purchasing his business and name.

“22. The salvage value of any given sign at any time after its construction is approximately equal to the cost of removing and disassembling the sign and, the cost to the company of removing, disassembling, remodeling and reassembling a given sign is greater than would be the cost of fabricating the sign from new material.”

See how perfectly this fits into the second example of

Regulation 32, which provides in part as follows:

“Sales tax shall be computed by the lessor on rentals received pursuant to rental or lease agreements which are made in lieu of outright sales. In the following cases amounts received by way of rentals shall be subject to tax: (1) Where the type of personal property involved can not be purchased outright; and (2) where possession remains in one lessee for a period extensive enough to result in a substantial consumption of the property.”

There is, therefore, no question but that the transactions here involved come within Section 59-15-2 (g) and the tax cannot be avoided.

The same rule should apply to option rental income and re-write rental income. The signs in question are at all times the property of the company, and although they state that the signs are no longer held on the books of the company as an asset after the expiration of the original rental period, they are still their property and do have a *value* in that the customer is willing to continue paying for the use of the property. Would the company consider giving the sign to the customer? Obviously not. True an older sign has less value, but it still has a very sizable value to the customer and consequently to the company. Further evidence of value would be the fact that the customer would be willing to pay a substantial price for it if the company would sell, even after the lease period has ended.

We utterly fail to see the distinction between the situation presented here, and the situation which exists in connection with the rental of I. B. M. and National Shoe Company machines referred to on page 26 of plaintiff's brief. There the plaintiff states, “This provision was designed to pick up such things as I. B. M. machine rentals and National Shoe Company machine rentals, where one

cannot purchase the machines outright." Obviously in these cases part of the rental is paid to cover maintenance, and the percentage of the rental needed to keep it in repair would increase as the machine became older. Would the plaintiffs argue that the law applied only to that part of the rentals in the I. B. M. and National Shoe Company machines transactions which could be said to represent the payment of a fair selling price, although there is no price set and the machines are not being sold? This argument would have as much standing in the law as the one here presented, and yet they admit that this section of the code was "designed to pick up such things," and the tax is paid without question upon the total rentals received from I. B. M. and National Shoe Company machines.

When an I. B. M. machine is rented the purchase price is not disclosed. It would probably be safe to assume that in ascertaining how much rental they must charge in order to make a profit they use a method very similar to that used by the company in this case. In Paragraph 9 of the stipulation found at T-071 we find the following:

"When a customer approaches the company about a sign, or vice versa, the salesman and the artist discuss the requirements of the customer and the art department draws up a scale layout. Thereafter, the salesman fills out a "pitch sheet" (Exhibit "A") on which the sign is broken into its components. He prices the components from the price book, adds them up and ascertains the "cash sale price." This is the sum of the price of components and is generally equal to twice the estimated cost of the labor and materials in the sign. *Generally speaking the cash sales price is not disclosed to the customer unless requested, but the monthly rental is calculated as indicated below and given to the customer.*"

It cannot be stressed too strongly that this is not an installment sale with the payments merely termed rentals. It is the exact situation contemplated by law, i. e. where possession remains in one lessee for a period extensive enough to result in a substantial consumption of the property.

In the contracts executed by the company they expressly state in paragraphs (J) and (O) as follows:

“(J) It is agreed by the parties hereto that the SIGN is of special construction made for the uses and purposes of the Lessee and no other, and that except for use by the Lessee the SIGN has no value. Te Lessee agrees that in the event he shall be in default in the payment of rental when due, or shall fail to perform any other of his obligations hereunder, that he shall be indebted to, and hereby agrees to pay to the Lessor forthwith, as liquidated damages for his breach hereunder, an amount equal to three-fourths of the balance of the rental payable hereunder, whether the same may be due or not. The parties hereto agree that in such event, the said three-fourths of the balance of the rental payable hereunder, is and will be fair and reasonable compensation for the damage to the Lessor, arising from such breach by the Lessee. . . .”

“(O)) The SIGN shall at all times be demed personal property, and shall not by reason of attachment or connection to any realty, become or be deemed a fixture or appurtenant to such realty and shall at all times be severable therefrom, and shall be and remain at all times the property of the Lessor, free of any claim or right of the Lessee, except as set forth herein.”

Title is retained by the company at all times the same as in the case of I. B. M. and National Shoe Company

machines and the contract does not grant to the customer the option to purchase the sign upon the expiration of the original rental contract, in fact, so far as we have been able to find, there is nothing to indicate that the customer ever can purchase the sign after he once enters into the lease agreement.

The company tries to argue that only one-half of the rentals paid constitute the fair selling price, but still in Paragraph (J) above quoted they provide for damages of three-fourths of the balance owing. This would seem to be inconsistent. How would they propose to pay the tax on the funds received on breach of contract?

In connection with the rewrite contracts this same form rental contract is used. They maintain that none of the rentals from rewrites should be taxable because it all represents maintenance but still they have the same provision for damages. How would they propose we tax the receipts under this section in connection with what they claim to be untaxable rewrites?

Under Point I of plaintiff's brief we find the following:

"1. The Sales Tax Act does not purport to impose a tax on sale of services.

"This proposition may seem so elementary that it wouldn't even be controverted, but, in fact, it is the heart of this action. The Tax Commission has assessed a tax on 'services' where they are included with rentals and where they are included with repairs, and the plaintiff's just don't think services are subject to sales tax."

This is not true for two reasons. First, as indicated above, there is a tax placed upon services by the Sales Tax

Act under certain circumstances. This is clearly indicated at the start of Section 59-15-5, Utah Code Annotated (1953), which states:

“Every person receiving any payment or consideration upon a sale of property or *service* subject to the tax under the provisions of this act, . . .”

Also Section 59-15-2 (b) provides as follows:

“The term ‘sale’ or ‘sales’ includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale, and also includes the sale of electrical energy, gas, *services* or entertainment taxable under the terms of this act. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale.”
Emphasis added.

Other examples of where services are taxed are as follows:

1. Where the maker of awnings or blinds agrees not only to sell them but to hang them.
2. Where an electric shop sells electric fixtures and agrees to attach them.
3. Where a dealer sells draperies and agrees to install them.
4. Where a retailer sells an oil burner or heating equipment and contracts to install the same.
5. Where a retailer sells linoleum and agrees to lay it.
6. Where a cabinet maker sells show cases, counters and cabinets and agrees to install them.
7. Where a retailer sells a sprinkling system and contracts to install it.

In the last part of regulation 58 we find the following language pertaining to this type of operations:

“A person performing such contracts is primarily a retailer of tangible personal property and should segregate the full selling price of such property from the charge for installation, as the tax applies only to the retail price of the property. *If such retailer fails to make such segregation on the customer's invoice, the sales tax applies to the entire contract price including the installation charge.*” Emphasis added.

In the case of *Cusick vs. Commonwealth*, 260 Ky. 204, 84 S. W. (2nd) 14, where the contention was being made that the business of photography consisted of labor, and was one of personal service requiring special science, skill and talent, the court said:

“Coming to the argument that a photographer is engaged in selling service, and that service is not taxable, it must not be overlooked that the chief value of many articles consists in the cost of the service and skill by which they are produced rather than the cost of materials out of which they are made.”

The second reason that this statement is not true is that in this case *there are no services involved*. The Tax Commission has not assessed a tax on “services.”

Webster defines the term “service” in many different ways depending upon the manner in which it is used here, it is defined as follows:

“Performance of labor for the benefit of another;
“The deed of one who serves: *labor performed for another;*”

For whom are they performing these so-called “ser-

vices?" The sign belongs to them. They are contracting to rent the customer a sign in good working order which is at all times *owned by the company*, which is the same situation which exists in connection with I. B. M. and the National Shoe Company machines. They are not contracting to provide a "service" to anyone in any sense of the term.

In the case of *Erwin vs. Holliday, Tax Comm. App.*, 112 SW 2d 177, 180, they state that "service," when not otherwise defined means personal services to another. And in *Enders v. Clarke*, 183 N.E. 83, 84, 43 Ohio App. 253, they say that "service" is defined as the state of being a servant, the position of a servant, employment in the interest of a person or cause. and in *Boyd v. Gorman*, 52 N.E. 113, 157 N.Y. 365, they say that "services" means work done by one person at the request of another, the nature of the work, whether of a humble or high grade being unimportant.

Generally speaking, the Tax Commission has never attempted to place a tax upon "services" as such, and, in fact, it has consistently attempted not to do so. There are however situations, as pointed out above, where it is impossible to separate the service rendered from the sale of the property, in which case it necessarily follows that services must be taxed. The Tax Commission has the very difficult task of determining where to draw the line, but in the case at hand, so far as the rental contracts are concerned, there is no line to be drawn because there are no "services" rendered, and the act clearly states that where rentals are collected under conditions as exist in this case, the tax *must* be paid on the total rentals received.

The plaintiffs start out point one by saying: "The first question that arises under this point is whether or not

charges made for maintenance and repair service are, in fact, subject to sales tax." We submit that there are no maintenance or repair services in connection with a rental contract, and we do not place a tax upon the total receipts from maintenance and repair contracts. We would like to go further and show the history which has taken place between the company and the commission on the question of taxability of receipts from rental contracts.

Prior to the incorporation of the two companies in question, one on July 31, 1950 and the other on March 27, 1950, the companies were operated under a partnership composed primarily of the same persons who own the stock in the present corporations. In 1936 a deficiency was assessed against the partnership, Young Electric Sign Company, involving this same issue of how the receipts from rental contracts should be taxed under the Sales Tax Act. In the decision of the commission the problem was stated as follows, all as more fully appears from a copy of the decision in the Record at T-081:

"The taxpayer at the hearing objected to the proposed deficiency assessment on the ground that a portion of the receipts upon which the tax was based represents an amount paid for maintenance service of the electric sign sold and leased by the taxpayer . . .

"With respect to the first item we do not agree with the contention of the taxpayer and we hold that no part of the amount received as the proceeds from the sale of the sign or from the lease of the sign represents an amount paid for a maintenance service and as such exempt from tax. At the time the sign is sold or leased, there is no mention or segregation in the contract as to the payment of a certain fixed sum for a maintenance service."

There was no appeal taken by the taxpayer from this decision.

Again in 1938 a deficiency was assessed against the same company, Young Electric Sign Company, again involving the same issue. A copy of the decision on the hearing on this deficiency is included in the transcript at T-076, and we respectfully invite your attention to the same. The decision provides in part as follows:

“At the time of the hearing in this case, two legal questions were presented for consideration: (1) whether the vendor is liable for the sales tax if he has been unable to collect it from the vendee; and (2) Is the taxpayer entitled to deduct from the gross sales the amount expended by it in keeping signs rented to its customers in repair.”

Regarding the second point they referred to the previous decision in 1936, quoting from it in length, sustained the same, and then went on to say:

“It would seem that because in the rental contracts, a specified sum was not agreed upon or segregated for repairs and maintenance, the taxpayer cannot claim a deduction for the amounts actually expended for repairing and servicing such signs. Unless such a segregation or itemization is made at the time of contract, there can be no deduction.”

There was no appeal made from this decision.

“Long compliance with an administrative ruling of the State Tax Commission lends strength to the presumption of the validity of its regulation, but the interpretation placed on the language of a statute by the commission must not do violence to the statutes apparent meaning.” *Utah Concrete Products Corp. v. State Tax Com.* 125 P. 2nd 408, 101 Utah 513.

Because of the fact the companies are now incorporated, the commission does not contend that the above decisions are res judicata and the decisions would have been cited by the commission even had they involved other companies to show the past administrative policy on this question. The fact remains however that except for incorporation, it is the same taxpayer. In the formal hearing before the commission, the only witness called for the taxpayer was Harry Schutte, general manager of Young Electric Sign Company, which position he had held for eight years (T-018) and he had in fact worked for the company for 32 years. The company has not been collecting the tax in compliance with the above mentioned decisions, nor has it seen fit to change its method of doing business in order to avoid the tax as repeatedly recommended by the commission and counsel for the commission. As shown in the Stipulation of Fact in Paragraph 25 (T-074) we advised that if they would execute a bona fide sales contract for a stated price and a separate maintenance contract to keep the sign being purchased by the customer in repair, the total receipts on the maintenance contracts would not be taxable, but tax would only be payable on the parts used at their cost. This, "for business reasons" they refuse to do. We submit that it is for the same business reasons that a person cannot purchase an I. B. M. or National Shoe Company machine. As further evidence of this fact, as will be discussed more fully under Point III, the commission does not at the present time place a tax upon the total receipts from maintenance contracts.

On page 22 of plaintiff's brief, they make reference to our Sales Tax Regulation 64 to sustain their contention that "services" are not taxable. This has no bearing upon the issue at hand because the plaintiffs have apparently

lost sight of the fact they are *not selling* the signs, but only renting them and the title at all times, even after the expiration of the rental contract remains in the company. This argument should only be used in connection with maintenance agreements where they agree to maintain the signs of others and repair sales. They are not found there because the commission has applied a different rule in order to avoid the taxing of services, the very thing being complained of.

Income received by the company from "options" and "rewrites" cannot be treated differently than the income from the original rental. At the expiration of the original rental period the customer, so far as the commission has been able to ascertain, has only two options. (1) to return the sign which belongs to the company, or (2) to enter into a new rental agreement. What if the customer returned the sign and another customer wanted to rent it? Could it possibly be said that none of the rentals received from the second customer would be taxable under the act? Say an I. B. M. machine is used for 5 years by a customer and then at the expiration of the rental period it is returned to the company and they rent it to another customer. Even the plaintiffs admit the rentals from the second customer are subject to our sales tax act. How are these situations different? If they are, we fail to see the distinction.

To support the proposition that we do not tax services, the plaintiff has cited the cases of *Commonwealth vs. Dinnien*, 320 Pa. 257, 182A, 542, improperly cited as *Commission vs. Dinnien*, and the case of *Kirstner vs. Iowa State Board of Assessment and Review*, 225 Iowa 404, 280 N.W. 587. Both of these cases concern the taxability of the charge made by funeral directors. A careful reading of the cases indicates that they are in fact in support of the

position taken by the commission, but we feel that this problem is settled in Utah by Regulation 64 which provides as follows:

Morticians, undertakers and funeral directors sell tangible personal property for use or consumption. They also render services to their patrons for which they make a charge. Their sales of tangible personal property, such as caskets, vaults, clothing, flowers, etc., are subject to tax. They, in turn, use antiseptics, cosmetics, embalming fluids, and other chemicals, in rendering professional services and their purchase of the same is a sale to the user or consumer and is taxable.

If the books are kept in such a manner as to reflect the sales of tangible personal property as a separate item and the services rendered as a separate item, then the tax attaches only to the sale of tangible personal property. If no separation is made of the tangible personal property and the services rendered, the sales tax is collected upon one-half of the lump sum price quoted for a standard funeral service, which includes the furnishing of a casket, professional services, care of remains, funeral coach, floral car, use of funeral car, use of funeral chapel, and the securing of permits. Clothing, outside grave vault (a concrete or metal box into which the casket is placed), and other tangible personal property furnished in addition to the casket must be billed separately and the sales tax collected thereon.

The case of *Ahern vs. Nudelman*, 374 Ill. 237, 29 N.E. (2nd) 268, also cited by the plaintiffs was decided under a business occupation statute and is not therefore applicable to the issue at hand.

Paragraph 12 of the Stipulation of Facts states that "a maintenance agreement is executed for a new term." This is in fact a mis-statement because the parties have

agreed that a "maintenance agreement" is one executed for the maintenance of a sign *owned by the customer* and is executed on the form found on Page T-067 of the Transcript. The Stipulation, in the same paragraph 12, goes on to say, "the agreements are on the same form as the original rentals which is the form found at T-066, and are termed 're-writes' on the books of the company." This is correct. It has never been stipulated that the re-writes are "maintenance agreements."

POINT II.

THE PROPER MEASURE OF SALES TAX ON PARTS USED IN MAKING REPAIR SALES ON SIGNS OWNED BY THE CUSTOMER IS 2% OF THE FAIR SELLING PRICE OF THE PARTS AND MATERIALS USED IF SEPARATELY STATED ON THE BILL TO THE CUSTOMER OR 2% OF THE TOTAL BILLING IF NOT SEPARATELY STATED.

How the materials used by repairmen and servicemen are to be taxed has been governed for many years by Sales Tax Regulation 59. The Commission in this case has attempted to apply the same to the business conducted by the company. The regulation is as follows:

"All sales of materials and supplies to persons engaged in altering or repairing personal property of others, where the alteration or repair of such property is essentially a service and the furnishing of materials and supplies is merely incidental to the service rendered are taxable. For example, sales of materials are subject to tax when made to persons engaged in repairing shoes, tubes, clothing, furs, fishing rods.

"Sales of materials or supplies to repairmen where the furnishing of such materials is more than

merely incidental to the repairman's business are wholesale sales and exempt from tax. For example, sales of materials are not taxable when made to persons engaged in repairing automobiles, bicycles, radios, eye glasses, typewriters and other business machines, tires by recapping, and all other purposes when specific parts or materials are separately billed. Vendors making sales to such repairmen are required to obtain resale certificates as set forth in regulation 23 of the sales tax regulations."

By the decision in the case of *Western Leather & Find-ing Co. vs. Comm.* 489 P. (2nd) 526, 87U. 227, repairing shoes was eliminated from the first paragraph and placed under the examples in paragraph two.

The question then becomes, is the furnishing of materials and supplies merely incidental to the rendering of a service? The commission had this very question in mind at the time of the hearing and after considering the evidence made a finding of fact that "the selling price of the parts and materials so used are substantial and therefore more than incidental to the services rendered when compared to the total price charged by the company to the owner of the sign for the repair."

Note the two classes enumerated in Regulation 59. Which class does the activity of repairing electric signs more nearly come under? The cost of materials used by the company making repair sales represent approximately 6% of the total billings. This is based on the company's costs and the company admits that the fair selling price is cost plus 100% markup which would at least mean that the parts represent 12% of the total billings. This is subject to even further increase by reason of the fact that the 6% figure represents the actual cost of the materials used and does not include the labor which is utilized in making the

materials usable. For example, they purchase tubing and the 6% covers only its actual cost. Before it can be used, however, it must be heated and molded. If the item were to be sold outright, they would compute the actual cost to them, both labor and material, for example of making the "R" and then mark up that amount 100% to arrive at the selling price. The 6% figure is very misleading. The Commission feels that it is reasonable to assume that the fair selling price of the parts and materials used would represent considerably more than 12% of the total billing. This is far more than incidental to the rendering of a service.

In the repairing of bicycles, eye glasses and typewriters we submit that in many cases services represent the major part of the billing, and in many cases no parts will be used at all, and still the regulation requires that the parts used be separately billed and taxed on the fair selling price. If not separately billed then on the total price charged. This is very similar to the case at hand and the tax should apply to the parts, if separately billed, or, if not separately billed, the tax should be paid on the total billing.

The commission feels that the question under this point has been decided in Utah by the case of *Western Leather & Finding Co. vs. Comm.* supra, decided as early as 1935. In that case the commission was attempting to tax the sale of leather and shoe findings made by the plaintiff to shoe repair shops on the theory that the leather and the findings were consumed by the repairman and not sold to the customer and therefore the sale to him was a retail sale and the company should have collected the tax. In reversing the commission this court held that the sales to the shoe repair man were for resale by him and therefore the plaintiff did not need to collect the tax from the repair man. The court at page 232 makes the following state-

ment:

“The sales here involved are wholesale sales unless it may be said that shoe repairers are consumers of the materials which are used in the mending and repairing of shoes. If the charge made for repairing shoes constitutes a sale by the shoe repairer to the owner of the shoes of the materials used in the repair jobs, then and in such case under the express provisions of the act the plaintiff is not liable for the payment of the tax here sought to be imposed upon it. The word ‘consume’ is thus defined in Webster’s New International Dictionary Second Edition:

“1. To destroy the substance of, esp. by fire;—formerly and still figuratively used of any destructive or wasting process, as evaporation, decomposition, and disease. 2. To spend wastefully; hence, to use up; expend; waste. 3. To use up (time) whether wastefully or usefully; as, hours consumed in reading. 4. To eat or drink up (food); devour. 5. To waste or burn away; to perish. Syn.—Absord, spend, squander, dissipate.’

“A person who places soles, heels, and patches on old worn shoes does not consume material so used within the definition above quoted or within the meaning of the statute. The consumer is the person who wears the shoes after they are repaired. If there was any doubt about the intention as to whose duty it is to pay the sales tax, such doubt is removed by the provisions of subsection (f) of section 2 of the act above quoted. Under the provisions of such subsection it is clear that a sale of leather or other material to be used in the manufacture of new shoes is not subject to the tax. The mere fact that the leather and other material here in question was used to make only a part of a shoe does not change the nature of the transaction. A ‘sale of

goods' is defined as 'an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.' R. S. Utah 1933, 81-1-1. A sale is in effect so defined in the act here involved. *When a shoe repairer delivers the repaired shoes to the owner thereof and receives payment therefor, the title to the materials used in the repair job passes to the owner. The amount paid includes the price of the materials used.* Such a transaction possesses all of the elements of a sale of the materials used in the repair job."

This same language could be appropriately used in the decision in the case at hand.

This decision was made even in the face of a stipulation, like we have in the instant case, that the practice in the trade or business was not to separately bill the leather goods and other items of personal property used from the services rendered. On this point we find the following language:

"It is urged on behalf of the commission that shoe repairers should not be requested to pay a sales tax on the materials used to repair shoes because there is a custom among them not to make separate charges for services rendered and for materials furnished in repairing shoes. *The act does not make such fact, nor the fact, if it be a fact, that it is difficult for shoe repairers to make separate charges for labor performed and materials furnished in repairing shoes, the basis for shifting the duty of collecting and paying the sales tax on to others.*"

The shoe repair man is still selling personal property and must collect the tax. If he can segregate the parts and materials from the services, he needs only to collect the tax on the parts and materials. If, however, he cannot or does not, he still must collect the sales tax. On what basis? How

can he tell how much to charge the customer? The only way possible and the way it is done, is to charge 2% of the total bill. Could he possibly say that he thinks that the parts and materials are only going to be 30% of the total years sales and only charge the customer 2 cents on a \$3.00 sale?

Just what was meant by the provision "materials and supplies merely incidental to the service rendered" was very clearly pointed up by the Honorable Justice Wolfe in his special concurring opinion where he made the following statement:

The problem can be best approached by assuming extreme cases on both ends of the gamut. When a barber shaves a person, the lather and soap and soothing lotion which go upon the customer are mere incidentals as compared to the service performed. It is likewise true of shoe shiners. These illustrate cases on one end of the gamut. Where a merchant sells readymade clothing and in connection therewith does alterations and perhaps furnishes materials, such as a small piece of cloth or thread, we have a case in which the services are merely incidental to the sale. Other cases lie in between. The automobile repair shop furnishes parts as well as services. The parts may at times amount to more than the services and other times vice versa. Some trades have long customarily separated their charges for services and parts. The automobile repair trade is an example. There it is quite easy to make the separation because the parts are usually very definite. In the shoe repairing industry, on the other hand, the practice has been just the opposite. A gross charge is made without separation. Indeed, it might be difficult to make the separation in this trade because of the difficulty of determining just how much leather cut from a larger piece goes into each job."

The activities of the company do not even come in the middle of these examples, but in our opinion in the same class as automobile repair shops. There, as in this case, "the parts may at times amount to more than the services and other times vice versa."

The Plaintiffs have cited the case of *Mahon vs. Nudelman*, 377 Ill. 331, 36 N.E. 2nd 550. This case was decided under an occupation tax statute and not a sales tax statute and it is therefore not applicable to the case at hand. In that case, however, they use language which reflects their thinking along the same lines adopted by our state. For example, they say, "That question (whether the things sold were personal property or services) cannot be determined solely by the ratio which retail sales bear to the services rendered, or the quantity of personal property sold." In support of this they cite *Franklin County Coal Co. vs. Ames*, 359 Ill. 178, 194 N. E. 268.

It is not the prerogative of the Commission to demand of the company that they separate the parts used from the balance of the charge. The Commission's function is to determine how the tax is to be applied and advise the business men of this fact. This is all that the commission has done in the instant case. "Where to draw the line is questionable, but unless this court is convinced that the commission erred in drawing the line where it did, this court should not interfere with or upset its rulings." *Western Leather & Findings Co.*, supra.

It is stipulated that the company is engaged in the business of making repairs to electric signs owned by others. Justice Wolfe in the *Western Leather & Findings Co.* case, supra, goes on to say—

"If the repairing industry would come under

the category of the clothing repairer or others where the amount of goods used in repair was a mere trifle compared to the labor, under the maxim de minimis non curat lex, the commission would be justified in treating the shoe repairer as the end purchaser in the course of trade. Under the evidence it cannot do this."

The company's cost of the parts used in making the repairs during the period covered by the audit was \$19,553.77. If we mark this up only 100% and disregard the labor and materials used to make the parts usable, we still have \$39,107.55. Are we dealing with a "mere trifle" so as to invoke the use of the maxim de minimis non curat lex?

POINT III.

PARTS AND MATERIALS USED IN THE FULFILLING OF MAINTENANCE CONTRACTS ARE CONSUMED BY THE COMPANY AND TAX SHOULD BE PAID ON THEIR COST OF SAID PARTS AND MATERIALS.

It is true that the stipulation entered into between the parties as shown at line 3 of T-071 provides as follows:

"It is agreed that the proper measure of the tax to be charged for the materials used in maintaining and repairing signs under maintenance agreements should be the same as is charged for those materials used under 'repair sales'."

It is important to note that in effect *the company* agreed that the tax on materials used in maintenance contracts should be the same as those used in repair sales. The commission has for reasons hereinafter shown, assessed these parts for *less* than the company agreed to be taxed, and still under the plaintiff's Point III they *object* to this *reduction*.

Repair sales and maintenance contracts are patently different. Repair sales are where the company goes out on order and fixes a sign for the customer and sends him the bill. In a maintenance agreement the company *contracts* to maintain a sign owned by the customer over a given period usually 36 months, for a fixed monthly fee. In the latter case there are no sales involved. The contract could conceivably run for the full 36 months and nothing go wrong. On the other hand, there may be a defect which continually causes trouble and the actual cost of maintaining the sign to the company could be twice the amount they receive under the contract. As the parts are used by the company in fulfilling their contract, it cannot be said that a sale takes place as in repair sales. There being no sale, the company is the consumer of the parts used in fulfilling their contract and tax must be paid by the company at its cost at the time of purchase.

Regulation 58 deals with supplies sold to owners, contractors and repairmen of real property and is therefore not controlling on the issue at hand, but may be helpful in seeing the rationale used by the commission in arriving at its conclusion. It provides in part as follows:

“A. Where the contractor agrees for a lump sum to furnish the materials, supplies and necessary services, the sale to him of the materials and supplies is taxable *as he becomes the consumer thereof or final buyer . . .*

“B. Where the contractor agrees to furnish the material and supplies at a fixed price or at the regular retail price and to render the services either for an additional agreed price or on the basis of time consumed, the sale to him of materials and supplies is for resale and not subject to tax.”

The commission feels that the same type of distinction should be made where a company for a lump sum agrees to keep a sign owned by the customer in repair. The company is the consumer of the parts used in fulfilling their contracts and the contracts are not for the sale of parts and materials as in the case of repair sales.

CONCLUSION

Sales tax must be collected and paid to the Commission on all income from rental contracts, including original rental period, option periods and re-write periods under the provisions of the Sales Tax Act. The signs are owned by the company and placed out at rental under a situation where the possession remains in the lessee for a period amounting to substantial consumption. There is no service involved in these transactions because they are merely maintaining their own property.

The parts used in making repair sales on signs which are owned by the customer are in fact sold to the customer the same as parts used in making repairs on bicycles, automobiles and shoe repairing and therefore the tax must be collected and paid to the commission on the fair selling price of said parts if separately billed, and on the entire bill if not so separated.

The parts used by the company in fulfilling their contracts to maintain signs owned by the customer are in fact consumed by the customer because there is no sale involved at the time the parts are used but they are merely used by the company in compliance with their contract.

The decision of the commission should be sustained
in all parts.

Respectfully submitted,

REX W. HARDY

BEN E. RAWLINGS

Legal Counsel, State Tax Comm.