

1955

Young Electric Sign Company v. State Tax Commission : Plaintiffs' Reply Brief

Utah Supreme Court

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CLERK

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs,

vs.

STATE TAX COMMISSION,

Defendant.

Case
No. 8383

FILED

NOV 10 1956

Supreme Court, Utah

REPLY
PLAINTIFFS' / BRIEF

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Attorney for Plaintiffs

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~~REPLY~~ PLAINTIFFS' BRIEF

PRELIMINARY STATEMENT

The defendant, in its brief, agreed with the statement of facts set forth in plaintiffs' brief and did not modify plaintiffs' statement of facts or enlarge it. The facts involved are not, then, in dispute.

Plaintiffs have moved to strike portions of defendant's brief which plaintiffs claim is outside the evidence. This brief will discuss defendant's brief as if the portions complained of were stricken.

STATEMENT OF POINTS

POINT I

THE SALES TAX ACT RENDERS TAXABLE THE SALE OF SERVICES ONLY WHEN THOSE SERVICES ARE RENDERED BY CERTAIN PUBLIC UTILITIES NAMED IN THE ACT. NO SUCH SERVICES ARE INVOLVED IN THIS CASE.

POINT II

IN ITS BRIEF DEFENDANT CITES AS AUTHORITY FOR THE TAXATION OF THE SALE OF SERVICES, CERTAIN REGULATIONS WHICH DO, ^{BY} THEIR TERMS, LEVY A TAX UPON THE SALE OF SERVICES. THESE ARE THE VERY REGULATIONS WHOSE VALIDITY IS CALLED INTO QUESTION BY THE PLAINTIFFS.

POINT III

IN ITS BRIEF DEFENDANT ASSERTS THAT IT HAS NOT LEVIED A TAX UPON SERVICES IN THE INSTANT CASE, WHEREAS, IT HAS IN FACT DONE SO.

POINT IV

IN RELATION TO THE TAXATION OF CHARGES MADE UNDER "RE-WRITES," DEFENDANT SEEKS TO AVOID THE CLEAR MEANING AND INTENT OF ITS STIPULATION.

POINT V

PLAINTIFFS AGREE WITH THE PROPOSITION SET FORTH AS THE DEFENDANT'S POINT III.

ARGUMENT

POINT I

THE SALES TAX ACT RENDERS TAXABLE THE SALE OF SERVICES ONLY WHEN THOSE SERVICES ARE RENDERED BY CERTAIN PUBLIC UTILITIES NAMED IN THE ACT. NO SUCH SERVICES ARE INVOLVED IN THIS CASE.

Under Point I of its brief (page 3) defendant states that the excise tax on retail sales is not limited to a tax on the sale of tangible personal property. This is true. Only the portion of the Sales Tax Act concerned in this case, Sec. 59-15-4 (a), U.C.A., 1953, is so limited. Portions of the Sales Tax Act which have no bearing whatever on this case do tax things other than the retail sale of tangible personal property. For example, Sec. 59-15-4 (b) levies a tax on the sale of services by certain public utilities, Sec. 59-15-4 (c) levies a tax on the full price of meals furnished, and Sec. 59-15-4 (d) levies a tax on the sale of admission to places of amusement, entertainment or recreation. Since none of the above cited sections of the Sales Tax Act have any bearing whatever on the case at bar, plaintiffs did not feel it necessary to refer to them in its argument, or to modify its arguments or statements in consideration of those sections.

Defendant takes issue with plaintiff's statement that the proposition is elementary that the Sales Tax Act does not tax the sale of services, and cites in sup-

port of its position certain references in the act to the taxation of services. Again, it did not seem necessary to plaintiffs to modify their statement that the sale of services is not taxable by saying "except for the sale of services by public utilities having no connection with this case." This is particularly so in view of the statement of the defendant in its Fourth Biennial Report quoted at page 19 of plaintiffs' brief as follows:

"The Emergency Revenue Act, better known as the 'Sales Tax Act' has been in effect in this state since June 1, 1933. This Act imposes a two per cent tax on retail sales of tangible personal property, *certain service rendered by public utilities*, sales of meals, and the amount paid for admission to a place of amusement or recreation. * * *" ((Italics added.)

It is no answer to the proposition that the sale of services of the type rendered by these plaintiffs, viz., repair and maintenance services, is not taxable, to say that the sale of services is taxable when rendered by certain public utilities. Yet this is one of the arguments to which the Defendant's Brief is devoted under point I.

POINT II

IN ITS BRIEF DEFENDANT CITES AS AUTHORITY FOR THE TAXATION OF THE SALE OF SERVICES, CERTAIN REGULATIONS WHICH DO, ^{BY} THEIR TERMS, LEVY A TAX UPON THE SALE OF SERVICES. THESE ARE THE

VERY REGULATIONS WHOSE VALIDITY IS CALLED INTO QUESTION BY THE PLAINTIFFS.

Under Point I of its brief, defendant seeks to answer the plaintiffs' contention that the portion of the Sales Tax Act with which this case is concerned is limited to a tax on the sale of tangible personal property (a contention stated and re-stated by the defendant in its Biennial Reports as quoted in plaintiffs' brief on pages 18 to 20 inclusive) by making the following statement:

“The tax also applies to the sale of services where they cannot be 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 prepares meals and collects tax on the total price for the meal.”

The example of the restaurant comes under subsection 4(c) of the Sales Tax Act and has no application to transactions taxable under subsection 4(a). The example of the delivery of furniture specifically refers to an instance where no additional charge is made for the service of delivery. No tax is imposed on free service, and no one contends that the cost of furnishing service for which a merchant does not charge, for example air conditioning, the packaging, free delivery, etc., can be *deducted* from the *sales tax return*.

In the case at bar, a customer may buy the sign at the *cash sale price* and make his own arrangement for maintenance and repair service on the sign, either with the plaintiffs or one of their competitors, or the customer may enter into a agreement with the company where the sum of the monthly payments he pays over the life of the contract consists of (1) the cash sale price (48.74% of the total contract price) and (2) the *charge for maintaining and servicing* the sign for the period of the contract (51.26% of the total contract price). (See stipulation 16, page 8 of plaintiffs' brief.) To claim that the transactions in the instant case, carefully delineated by stipulation, are in any way analagous to the free delivery example given by defendant, is a misleading distortion.

Reference is made by defendant to the provision of the rental agreement providing for liquidated damages in the amount of three-fourths of the unpaid rental at the time of the breach of contract by the customer. Defendant then says: "The company tries to argue that only one-half the rentals paid constitute the fair selling price * * *. This would seem to be inconsistent."

In considering this contention of the defendant it should be noted:

1. The plaintiffs don't try to *argue* that only one-half the rentals paid constitute the fair selling

price,” the defendant *stipulated* that to be the fact. Stipulations 15 and 16 state:

“15. The purpose of the amount in excess of the cash sale price charged the customer over the rental period is to compensate the company for servicing and maintaining the sign during the period, which servicing and maintaining includes the furnishing of parts and materials which are not separately taxed. *In the case of a 36 months contract, approximately 39% of the total rental charged is for service and maintenance, including parts and materials, and in the case of a 60 months contract, approximately 55% of the total rental charged is for service and maintenance, including parts and materials.*

“16. *An analysis of the rentals contracted for during the entire period of this audit shows that the cash sales price was equal to 48.74% of the total amounts receivable for the signs to which said cash sales price applies. Or, stated conversely, the receipts for servicing and maintaining said signs, including parts and materials, during the period of the audit was 51.26% of the total amounts received from them during the original lease period.*” (Italics added)

2. There is no inconsistency between the fact stipulated to and the liquidated damages provision. The provision setting liquidated damages at three-fourths of the unpaid rentals is designed to approximate the damages the company will suffer by way of loss of profit, unrecovered costs expended, etc., the

ordinary components of damages for breach of contract. Many Utah cases discuss liquidated damages and the proper components of them. By its terms, quoted by defendant, this provision encompasses those components. There is no relation between that figure and the breakdown in the charges between compensation for the sign itself (cash sale price) and compensation for repair and maintenance of the sign (the other 51.26% of the total rental charged), nor is any relation intended.

In many places throughout its brief, defendant confuses facts stipulated to by it with positions taken by the plaintiffs by way of argument. For example, on page 8 defendant makes the following statement:

“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.” (Italics added.)

It is true that plaintiffs maintain that none of the rentals from re-writes should be taxable *because it all represents maintenance*. We maintain it because it is the fact, a fact stipulated to by the defendant as follows:

“17.* * *The rental during that re-write period is for the purpose of compensating the company for maintaining and repairing the

sign, which includes the parts and materials, together with a reasonable profit.”

On pages 9 and 10 of defendant’s brief is cited a number of examples from Sales Tax Regulation 58 wherein the Tax Commission has levied and assessed sales tax on *services* rendered by certain contractors and installers in connection with the sale of their goods, unless the charge for the installation of the goods sold is separately stated on the invoice to the customer. That regulation is cited to *prove* that the *Sales Tax Act* taxes services unless the charge for them is separated on the invoice. This regulation proves nothing except that it has been promulgated. This regulation is one of the acts of the Commission which is by necessary implication *under attack* in this case and the issue is whether the Commission can, by regulation, tax the sale of services simply because of the manner of billing.

The plaintiffs complain that the Commission seeks to tax charges for services (charges it expressly says are not subject to sales tax if made separately) on the basis that if they are included in a lump sum charge along with the sales price of the tangible personal property involved they become taxable. Where in the Sales Tax Act has the Legislature abdicated its power to designate what may be taxed and what may not be? That the Commission has exercised that power cannot be taken as *proof* that the

Sales Tax Act gave it the power, or that it exercised the power lawfully.

In the instant case the Commission has repeatedly told the plaintiffs, "if you'll separate the 51.26% of your rental charges which are for maintenance and repair from the 48.74% of your rental charges which are for the sales price of the sign, the maintenance and repair charges will not be taxed," presumably because they are not subject to sales tax under the Sales Tax Act (stipulation 25). Plaintiffs have answered that if those charges are not taxable under the Sales Tax Act when *separated*, they are not taxable under the Sales Tax Act when *combined* with the cash sales price charged for the sign. From the plaintiffs' books, as this audit and the stipulation clearly shows, it can be readily ascertained exactly what charges are for maintenance and repair service and what charges are for the cash sale price of the sign. There is no administrative inconvenience or uncertainty whatsoever involved in this case.

After arguing that "services" are subject to sales tax, the defendant states that the Tax Commission has never attempted to tax them as such (page 11 of defendant's brief). Surely the Tax Commission would levy a sales tax on "services" if the Sales Tax Act made them taxable. It would be the duty of the Commission to do so and it cannot be assumed that the Commission would wilfully fail to comply with its duty.

POINT III

IN ITS BRIEF DEFENDANT ASSERTS THAT IT HAS NOT LEVIED A TAX UPON SERVICES IN THE INSTANT CASE, WHEREAS, IT HAS IN FACT DONE SO.

The defendant argues that, insofar as the proceeds from original rental agreements, re-writes and options are concerned, they do not seek to tax charges for "services" because, by definition, "services" are acts performed for "another" and in the instant case the maintenance and repair labor is expended upon the plaintiffs' own signs. This argument is fallacious for two reasons; first, the defendant has stipulated that the charges it seeks to tax are charges for "service," said, second, the charges made for keeping the signs in good working order are charges for labor performed for the benefit of "another," i.e., the customer.

1. *The defendant has stipulated that the charges it seeks to tax are charges for "service."* This is shown by the following stipulation of fact:

"15. The purpose of the amount in excess of the cash sale price charged the customer over the rental period is to compensate the company for servicing and maintaining the sign during the period, which servicing and maintaining includes the furnishing of parts and materials which are not separately taxed. *In the case of a 36 months contract, approximately 39% of the total rental charged is for*

service and maintenance, including parts and materials, and in the case of a 60 months contract, approximately 55% of the total rental charged is for service and maintenance, including parts and materials.

In the face of the above stipulation by the defendant it is hard for the plaintiffs to see how defendant can seriously urge that the charge which is involved in this case is not a charge for maintenance and repair "*service.*" Again defendant seeks to confuse the issue by stating that *a fact stipulated to by it* is merely a *proposition urged by the plaintiffs.*

2. *The charges made for keeping the sign in good working order are charges for labor performed for the benefit of "another," i.e., the customer.*

As is shown by stipulation 21, the sign manufactured for the customer is of use only to the customer for whom it is manufactured. He is the person to whom it is important that the sign operate properly and be maintained. As set forth in stipulation 22 the sign has no salvage value to the company once it is installed. It has the same value to the company, that is, none, whether maintained and repaired or unmaintained and unrepaired. Lack of maintenance could not reduce its salvage value below the value stipulated, that is, below nothing.

For whom then, is the labor and effort to keep the signs in good running order and appearance ex-

pended? For the customer upon whose place of business the sign is placed. The labor of maintaining and repairing the sign is performed by the plaintiffs for the benefit of another, the customer. Plaintiffs are then, performing and selling “services” under rental agreements, re-writes and options, as well as under maintenance contracts.

As the stipulation of facts shows, a customer of these plaintiffs has several choices before him. He may buy the sign outright for its full cash sales price and thereafter have it maintained and repaired under a “maintenance contract,” or he may enter into a rental contract for 36 to 60 months. As is the case if he purchases the sign, the customer has full use of the sign, but instead of having a substantial initial investment the customer has his payment of the cash sale price spread over the 36 to 60 month period in combination with his payments for maintenance. *Under either system his cost is the same.* (Stipulation 24.)

True, at the expiration of the 36 to 60 month period involved in the rental agreement, the company owns the sign, not the customer. This would be a disadvantage were it not for the fact that the customer may continue ad infinitum to use the sign by simply paying for its maintenance under a “re-write” the same amount he would pay under a “maintenance contract.” (Stipulations 17 and 18.) Since the sign

has no salvage value to the company, once installed; and the company gets paid the same amount for the sign over the years whether the customer buys it and makes a maintenance contract or enters into a rental agreement with re-writes, the only material difference between the two methods is that so long as the company owns the sign it is assured of getting the maintenance work on it. Since the bulk of the company's work is maintenance work, this is important to the company and it encourages the "rental agreement" method of acquiring the use of a sign by allowing the "cash sales price" to be spread over the whole original rental period without extra charge (stipulation 24) instead of requiring the cash sale price to be paid in full at the time the sign is manufactured as is the case with the "outright sale plus maintenance agreement" system.

The company claims that the difference in form ought not to effect a different sales tax result between the two systems, and further claims that the sales tax act does not authorize a difference in treatment.

The Commission has levied a sales tax on "services" in the instant case and has done so purely on the basis of form instead of substance.

All the plaintiffs ask is to receive the same consideration that is afforded funeral directors in eliminating from sales tax the charge made for

“services.” The plaintiffs believe it is entitled to that consideration as a matter of law.

POINT IV

IN RELATION TO THE TAXATION OF CHARGES MADE UNDER “RE-WRITES,” DEFENDANT SEEKS TO AVOID THE CLEAR MEANING AND INTENT OF ITS STIPULATION.

On pages 16 and 17 of its brief the Commission makes the following statement relative to stipulation 12:

“Paragraph 12 of the Stipulation of Facts states that ‘a maintenance agreement is executed for a new term.’ This is in fact a misstatement 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.’ ”

The Commission has stipulated that “re-writes” are in substance and essence, though not in form, “maintenance agreements.” When the following stipulations are read together, as they must be if the

proper meaning of the whole of the stipulation is to be understood, the fact that a “re-write” is merely a “maintenance agreement” by another name—as the Commission stipulated—is made clear:

“12. If the customer, at the end of the original rental period, desires to continue to use the sign, a maintenance agreement is executed for a new term, on the basis of 50% of the original monthly charge. The agreements are on the same form as the original rentals and are termed ‘re-writes’ on the books of the company.

“17. During the re-write period, because of the increased age of the sign, the cost of maintaining the same is greater than the maintenance expense during the original rental period. The rental during that re-write period is for the purpose of compensating the company for maintaining and repairing the sign, which includes the parts and materials, together with a reasonable profit.

“18. The entire cost of any signs placed with the customer under a rental agreement is amortized over the period of the original term of that agreement so that, at the expiration of the original lease period the sign is completely written off as an asset of the company. At that time the company eliminates from the contract price for the rental of the sign that portion of the rental which it attributed to recovering the cash sale price and re-writes the contract at a price approximately equal to what would be charged for the service and

maintenance of the sign, were it the property of the customer.”

Had it not been the intent and meaning of stipulation 12 that a “re-write” is a “maintenance agreement” in its essential nature, there would have been no reason for putting in the second sentence of stipulation 12. That sentence points out that, although the re-write” is a “maintenance agreement,” it is on a different form from the “maintenance agreement” used when the title to the sign is in the customer.

On page 24 of its brief, defendant refers to the “de minimus” rule and states that it cannot apply when a sum as large as \$39,107.55 is concerned. The amount concerned is, at the most, 2% of \$39,107.55, but the principle of the “de minimus” rule is that where the amount under discussion is small *in relation to* the whole, it may be disregarded. It is a rule of *relative* values or importances. In the instant case, the *cost* of materials used in repair sales was 6% of the whole amount charged for repair sales. This is fixed by the defendant’s own audit and the statement of facts agreed to by defendant.

POINT V

PLAINTIFFS AGREE WITH THE PROPOSITION SET FORTH AS THE DEFENDANT’S POINT III.

Point III of the defendant’s brief reads as follows:

“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.”

This proposition must be read in connection with the portion of stipulation 7 which states:

“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.”

If the proper measure of the sales tax on materials used under maintenance agreements is two per cent of the *cost* of those materials to the company, and it is stipulated that the tax to be charged for materials used in “repair sales” is to be the same, it would follow that the proper measure for the sales tax to be charged on materials used in “repair sales” is two per cent of the cost thereof. This agrees with plaintiffs arguments in Point IV of their brief, and is correct.

CONCLUSION

For the reasons set forth in plaintiffs’ brief and in this reply brief, it is respectfully urged that the decision of the court in this case be as prayed in plaintiffs’ brief heretofore filed.

Respectfully submitted,

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