

1956

Nevada Trailer Finance Company, Inc. and Idaho Trailer Finance Company, Inc. v. State Tax Commission of The State of Utah : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

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NEVADA TRAILER FINANCE
COMPANY, INC.

and

IDAHO TRAILER FINANCE
COMPANY, INC.,

Appellants,

Case No. 8436

vs.

STATE TAX COMMISSION OF
THE STATE OF UTAH,

Respondent.

Clark, Supreme Court, Utah

BRIEF OF APPELLANTS

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POINT 5.

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STATEMENT OF FACTS

The corporations, Nevada Trailer Finance Company and Idaho Trailer Finance Company, the first incorporated in the State of Nevada and the other in the State of Idaho, were engaged in the business of purchasing conditional sales contract and notes

from dealers in the respective states in which they are incorporated. The obligors on the conditional sales contracts and notes in each case are residents respectively of the states of Nevada and Idaho. In no case are the obligors on the notes residents of Utah. The dealers who sold the trailers which are given as security for the conditional sales notes and contracts are dealers respectively in the states of Nevada and Idaho. The notes and contracts are assigned to these two foreign corporations in Nevada and Idaho and are accepted by the foreign corporations through their agents in those states. Neither of these corporations are qualified to do business in the State of Utah; neither corporation has used the Courts of the State of Utah to enforce collection of the contracts and notes; none of the property which stands as security for the payment of the contracts or notes is located in the State of Utah.

When the Nevada corporation was originally organized, a bank account was maintained in Las Vegas for the Nevada corporation, but because of inadequate accounting by the bank and because the bank did not extend a full line of credit, a bank account was opened in Salt Lake City, Utah and thereafter banking for both corporations was handled through Salt Lake City banks. The stock in the foreign corporations was owned principally by a Utah corporation and minority holdings in the cor-

poration were held by Utah residents. The directors of these two foreign corporations are Utah residents and some meetings of the Board of Directors were held in Nevada.

The Trailer Dealers who took these notes, representing the purchase price of the trailers sold by them in the foreign states, obtained all of the credit information on the purchasers of the trailers and cleared the contracts without any assistance from any representative of either of these corporations living in Utah. These dealers had the full power to accept the contract and to complete all transactions, which they did in every case. When the contracts were completed the agents of each of these corporations out of the State of Utah completed the purchase of these contracts from the Trailer Dealers. These agents of the foreign corporation, both in Nevada and Idaho were paid by each of the corporations, but not in money; they were paid by services that each of the corporations rendered to each of these respective dealers.

After the purchase of these contracts was completed by the foreign corporations in each of the foreign states and the foreign corporations acquired title to the contracts and were entitled to receive the payments, in many instances payments were received and collections were made by agents of each of these foreign corporations in Nevada and Idaho.

It is true, that some payments on contracts and notes were sent by mail to Salt Lake City by these out-of-state obligors. In no case do the obligors come into the State of Utah and make payments in the State of Utah.

As a matter of convenience, after the purchase was completed, the contracts were sent by mail to Utah where the collection of payments due under the contracts and the keeping of records was supervised. The record keeping itself, was handled by an independent agency. This record keeping is handled by an entity assisting in making the collection on the accounts. (R.90). That entity was paid for rendering these services as follows: (R. Page 2)

	1951	1952
Idaho Trailer		
Finance Company	\$1200.00	\$1200.00
Nevada Trailer		
Finance Company	\$3600.00	\$3930.00

The entity which received that income in the State of Utah, paid taxes on that income in the State of Utah.

The company has no paid employees at all (R. 104) though it is true, that the President of the company, who resides in Utah, received a salary, but he states that a great part of his duties on behalf of these corporations required his attendance in the States of Nevada and Idaho. Aside from the

collection effort made by the independent agency, which was paid the administrative expenses, as just related, payments on the contracts are made at the Office of the Las Vegas Trailer Sales Company in Las Vegas, Nevada and at a bank in Las Vegas, Nevada, which accepts payments and deposits them to the account of the Nevada Trailer Finance Company and charges 50¢ a payment for doing so. (R 106)

When the contracts are purchased, the company selling the contracts is paid, in every instance, either by a check from the Nevada Trailer Finance Company, sent from Utah by mail or if the contract is delivered to the bank in Nevada, by a transfer of funds between the bank accounts of the Nevada Trailer Finance Company and the party from whom the contract was purchased. (R 107)

Neither of these corporations has any tangible property in the State of Utah. These corporations hold title to the trailers which are physically located either in the State of Nevada or in the State of Idaho. The documents evidencing the title to these trailers located outside the State of Utah are kept in the State of Utah.

The income of the corporation in each case comes from the business of purchasing trailer contracts. "The business of the Nevada Trailer Finance Company is that of purchasing trailer con-

tracts, house trailer contracts—is what we make our money from. It is buying these contracts. They are all bought in Nevada. They are not all bought from Las Vegas Trailer Sales. A few have been bought from other places.

“And on these few that were bought from other places, Mr. Baldwin (the man who collects payments on the contracts in Nevada) made all arrangements and made the acceptance of those contracts, as well as the ones that he did for himself.” (R 111)

The consideration paid to this agent in the State of Nevada, is the agreement on the part of the Nevada Corporation to purchase the time contracts which the trailer sales company receives in payment of the trailer which it sells. That is a valuable consideration and explains why the foreign corporation is not obliged to pay salaries or wages. “Without a source of financing they probably couldn’t do two per cent of the business that they are now doing, and a source of financing has been very hard to get in Las Vegas. Up until recently the banks have refused to handle any kind of trailer financing, and there have been no trailer finance companies or no finance company that would accept them.

“That is the reason that Mr. Baldwin, working on his arrangements with me, is very willing to do all this work that he is doing without any charge. That is, he is willing to accept all the contracts, he

pays all the expenses himself and does all the checking of the contracts. He checks the people's credit, he checks the trailers and he does the entire acceptance of the contracts and he is willing to do that without charge with the understanding that I will accept the contracts that he wants. It makes it good for his business to be able to have a finance arrangement. If he didn't have a finance arrangement he couldn't have a business down there." (R 111-112)

In the event there are repossessions of trailers to be made in the State of Nevada or in the State of Idaho, that work is done by the respective dealers in each of those states. When asked who made the repossessions, the witness stated: "Mr. Baldwin has made most of them. It could be that Anthis Recovery may or may not—one of the two. But substantially, in effect, Mr. Baldwin has made practically all of them." Mr. Baldwin also keeps a record of all the contracts in the State of Nevada and he enters the payments and watches to see whether the payments are made on certain of the contracts. (R 113) A duplicate set of records was also kept in Utah. (R 123) An employee of the company which performed the administrative duties for these foreign corporations in Utah gave her testimony that, "the majority of the customers who bought trailers remaining in Nevada made their payments to Mr. Baldwin at the trailer sales lot. We did not get pay-

ments directly from the customers. Usually that was when they had left Nevada". (R 123)

Even though delinquency notices to the contract holders was sent out from the Salt Lake Office, the particular dealer who sold the trailer was notified in each case that there was a delinquency. (R 127) And in the event that the trailer purchaser did not make his payment after two letters were sent, then the procedure was as follows, according to this witness: (R 127) "usually we would ask the dealer to make a collection to take care of it. If it was impossible for him to handle it, then we would go through the credit bureau and through the collection agencies to make a collection" but in no instance was that work done through the Salt Lake Credit Bureau. The clerk who did this work was asked, "what proportion of your work, your working hours, was spent on posting these accounts and doing the work you have related in connection with the Nevada Trailer Finance and Idaho Trailer Finance in comparison to the work you did otherwise? Can you estimate that?" and the witness replied, "It was very small. I had an 8 hour day and I would say if I spent—20 minutes a day would be more than enough to handle those companies." (R 129)

ARGUMENT

POINT 1.

THESE FOREIGN CORPORATIONS PAID NO CORPORATION FRANCHISE TAXES TO THE STATE

BECAUSE ALL OF THEIR TRANSACTIONS CONSISTED OF BUSINESS DONE OUTSIDE THE STATE OF UTAH AND APPELLANTS CONTEND THAT THEY DID NOT DO ANY BUSINESS IN UTAH WITHIN THE MEANING OF THE CORPORATION FRANCHISE TAX ACT.

FROM THE FOREGOING FACTS, IT IS APPARENT THAT ALL OF THE BUSINESS OF THESE TWO CORPORATIONS WAS DONE OUTSIDE OF THE STATE OF UTAH.

Neither of these two companies has qualified under the laws of the State of Utah to do business in Utah. The Appellants contend that all of its business is done outside of the State of Utah. Their business is buying conditional sales contracts and incidental thereto the collection of the payments due thereon. As the facts show, it is the business of buying the contracts that produces the income, because the contracts are purchased at a discount. The Nevada Corporation purchases the contracts in Nevada and the Idaho Corporation purchases the contracts in Idaho. Clearly, if the entire business of these two corporations consisted of the purchasing of the contracts, then neither is doing business in Utah.

If after purchasing these contracts the appellant had sent them into Utah to be placed with a bank to collect the installments, these corporations would not have been subject to the burden of the Utah Franchise Tax Act. The fact is, that when the

contracts are sent into Utah, they are sent to the President of these foreign corporations, who takes custody of them, but the work of the collection of the contracts is done by the independent entity who receives a lump sum payment annually for that administrative service. That entity is one of the firms which occupy the storeroom at 76 East 2nd South, Salt Lake City, Utah, where the President of the company happens to have his office. He maintained that Office for 25 years prior to the organization of either of these corporations.

It is clear that the Nevada Corporation is doing business in Nevada and the Idaho Corporation is doing business in Idaho. The Idaho corporation pays a franchise tax in Idaho and reports 100% of its income subject to an 8% Idaho tax, so this is not a case of where a corporation is pretending to be doing business in another state so as to avoid the payment of any income tax. Appellants sole business of buying contracts was carried on in other states and that which the appellants do in Utah is nominal and is incidental to and a part of the business which each does outside the State of Utah.

If we applied the test of prior decisions of this Court to these facts, the Appellants were correct in not filing Utah Franchise Tax Returns and the assessments by the Tax Commission are in error.

The case of American Investment Corporation

v. State Tax Commission, 120 Pacific 2d, 331, is important because of its approval and citation of cases in other jurisdiction similar to our instant case. In this case a Nevada Corporation was qualified and authorized to do business in Utah:

“Most of its stock was owned, and it was dominated and controlled by men residing at Ogden, Utah. During 1937 the books of the plaintiff company were kept in Ogden; directors meetings were held there, its bank account was kept there, and such disbursements as it had were made at Ogden, Utah.”

The holding of our Court is that Utah had no right to tax the income from the foreign corporations investments. In reaching this conclusion the Court held:

“Where foreign corporation had no property in the state other than bonds and note deposited with trust company as trustee and balance on bank account, and confined its operations in the state to collection and distribution to its stockholders of income from stock and obligations of other foreign corporations, it was not required to pay license fee under Tax Law, 181, or franchise tax under section 182, since its activities in the state were confined to management of internal affairs as distinguished from maintenance of organization for profit and gain, and could as effectively been done in other state, for which reason it did not do 'business in this state', or 'employ capital in this state' within the Tax Law. People ex rel. Manila Electric

R. & Lighting Corporation 1. Knapp, 229 N. Y. 502, 128 N. E. 892, 894. "5 Words and Phrases, Perm., Page 1035."

Of more importance is the Court's following quotation from the case of United States Glue Company v. Town of Oak Creek, *supra* 161 Wisconsin 211, 153 N.W. 244:

"The income derived from goods which were produced and purchased outside of the state and shipped, either directly or by way of plaintiff's factory at Carrollville, to plaintiff's branch houses, and thence sold and delivered to customers without the state, is clearly a separable class of plaintiff's business. *Such business is transacted and located without the state, excepting incidental management from and accounting for the result thereof to plaintiff's principal office at Carrollville.* The carrying on of this part of the trade according to the findings of fact produced an income, which issued out of the business and property located without the state. Under the facts and circumstances showing the manner of conducting this part of the plaintiff's business, it must be held that the income derived therefrom is attributable to the business conducted without the state, and hence not taxable under the law. (*Italics added by Court.*)

The analogy between the fact of the case cited with approval by our Supreme Court and the instant case is readily apparent. The contracts and notes involved business done outside the State of Utah. The approval and purchase thereof was consum-

mated outside of the State of Utah. The only activities in the State of Utah were "incidental management from and accounting for the result" of the out of state business.

Mr. Justice Wolfe in the case of J. M. and M. S. Browning Company v. State Tax Commission of Utah, 154 Pacific 2d 993, 107 Utah 382, established a new rule for determining whether business is done in Utah or in a foreign state. This rule is as follows:

"Further the rule while being one of exclusion and inclusion according to the particular facts involved, must be uniform in its application. The same conduct should be held to constitute the doing of business whether that conduct were done in Utah or done in another state. If upon certain conduct it would be held that a corporation was doing business in Utah so as to subject it to the corporate franchise tax, the same conduct in another state would constitute doing business in said other state and income derived therefrom would not be allocated to Utah. The test as to whether a corporation is doing business in states other than Utah under particular fact situations would therefore be: Would such conduct if carried on in Utah be held to constitute doing business so as to subject the corporation to the Utah Corporate Franchise Tax."

Let us apply this rule to facts of instant case in reverse. A Utah corporation purchases contracts and notes from dealers in Utah. The obligors are Utah

residents and the security is Utah property, the entire transaction is approved and accepted in Utah. Thereafter the notes and contracts are sent to Las Vegas, Nevada where the obligors are instructed to make payment and where the accounting is done. The Utah corporation pays an administrative fee for the work done for it in Nevada. If such a Utah corporation were to file a corporation franchise tax return and pay the minimum tax claiming that all of its business was done in Nevada, we are certain that the State Tax Commission would assess a deficiency on all income derived from the contracts and notes accepted in Utah and that the franchise tax thereupon assessed would be upheld by the Supreme Court of Utah.

In the Emerald Oil Company v. State Tax Commission, 1 Utah (2d) 379, 267 P. (2) 272 this Court held that no income could be attributed to the business done in Colorado because the only business done there was "activities to protect the petitioners reversion or to determine whether the lessee was abiding by the terms of the lease". To paraphrase this statement, all that these corporations were doing in Utah was, "protecting the corporations' investment and determining whether the contract holders were abiding by the terms of their contracts." In the Emerald Oil case, such activities were held not to constitute the doing of busi-

ness and therefor, the same type of activity in Utah, should not be considered the doing of business in Utah.

POINT 2.

A FOREIGN CORPORATION MUST BE QUALIFIED TO DO BUSINESS IN THE STATE OF UTAH (OR BE DOING AN INTRASTATE BUSINESS IN UTAH) TO BE SUBJECT TO THE CORPORATION FRANCHISE TAX ACT.

The issue is whether the two foreign corporations are subject to the terms of Chapter 13, Title 59, Utah Code Annotated, 1953. The particular paragraph of the chapter which is to be construed is paragraph (5) of 59-13-1, which reads as follows:

“The term ‘doing business’ includes any transaction or transactions in the course of its business by a bank or corporation created under the laws of this State or by a foreign corporation qualified to do or doing intra-state business in this State, and shall include the right to do business through such incorporation or qualification.”

It is the position of the corporations that the State Tax Commission has no authority to demand that tax returns be filed by these two foreign corporations or to levy the tax against them unless the corporations qualify to do business in the state as foreign corporations. Chapter 13 is a franchise and privilege tax levied against corporations which have incorporated in the state or have qualified to

do business in the state and have thereby been granted a franchise or right to operate in the state.

The Supreme Court of the State of Utah in the case of First Security Corporation v. State Tax Commission, 91 Utah 101, (63) Pacific (2d) 1062, established this principle without equivocation in the following language:

“The statute requires only Utah corporation, or corporations qualified to do business in Utah to make returns. The State of Utah has no power or authority to require a Wyoming corporation which has not accepted the constitutional provisions of Utah nor qualified to do business in the State, to make returns under the income tax law.”

The two foreign corporations, on advice of counsel, have not qualified to do business in the State of Utah, because they have no reason to exercise such a franchise or to avail themselves of the privilege of doing business in the State of Utah.

But if the two foreign corporations are unlawfully doing business in the State of Utah, are they subject to the corporation franchise act of the State of Utah? Again, our Supreme Court, in the case of American Investment Corporation v. State Tax Commission, 101 Utah 189; 120 Pacific 2d 331, was held that no tax should be collected:

“This is a franchise tax, a tax on the right or privilege of doing business in the

state. What business? Why, lawful business; business it may do without violating the law; the business it may do under the franchise for which it pays the tax. The state cannot collect a franchise tax unless it gives a franchise therefore. And it cannot be said that the state intended to collect franchise taxes for the right to do business unlawfully."

There are penalties against a foreign corporation not qualifying in the State of Utah. It is not the province or the duty of the State Tax Commission to determine which foreign corporations should qualify to do business in the State of Utah. This is a matter for the courts and other state agencies to pass upon. The State Tax Commission only has power or authority over a foreign corporation once it has qualified to do business in the State of Utah and has accepted the constitutional provisions of the State of Utah, and is availing itself of the franchise and privileges granted by qualification.

POINT 3.

IF THE BUSINESS OF THE CORPORATION IS NOT A BUSINESS CONDUCTED WHOLLY OUT OF THE STATE OF UTAH, THEN AT MOST, IT'S UTAH ACTIVITIES ARE INTERSTATE IN CHARACTER AND A FRANCHISE TAX MAY NOT BE EXACTED FOR THE PRIVILEGE OF CARRYING ON INTER-STATE COMMERCE.

All of the business of these corporations is carried on with the residents of the State of Nevada in one case and the State of Idaho in the other. No

business is carried on with residents of Utah. It is true that there is some minimum activity in the State of Utah incidental to this interstate commerce. Instead of the transactions being the purchasing and selling of some tangible property, it is the purchasing of intangible property, namely conditional sales contracts. Following the purchase some incidental services in collecting the installment payments are required. The business of dealing in installment contracts consists of the purchasing of the contracts which gives the purchaser the right to receive the payments and, of course, then follows the actual receipt of the payments. The collection activity is a part of and necessary to the enjoyment of the fruits of the purchase. It is an integrated operation. Here again we may paraphrase the words of this court, this time in the case of *Riley Stoker Company v. State Tax Commission*, 3 Utah (2d) 164, 280 Pac. (2d) 967 at 968, "It is recognized that not only contracts for the purchase of conditional sales agreements from out of the State of Utah are interstate commerce, but further that incidental services in the collection of the payments provided for does not deprive it of its interstate character."

In the *Riley* case, the Court at Page 9692 of 280 Pac. (2d) adopted a test to determine whether the work done in the state is "over and above its

inherent and intrinsic relationship to the subject matter of the interstate commerce". The test is whether the work in this State involved "the performance of duties over which the State had a right to exercise control because of their inherent INTRA-STATE character (The italics are in the Court's opinion) These corporations performed no acts of an intrastate character in Utah. The only acts consisted of carrying on correspondence with residents of another State and receiving payments in the mail from outside the State. There are in addition, the minor activities of keeping books of accounts and depositing money in a national bank. Keeping the records and depositing the money are incident to the commerce of buying the contracts. At most these activities in Utah change an intra-state business, done wholly outside of Utah, into a business which is inclusively interstate, so far as Utah is concerned.

The right to engage in interstate commerce is granted by the Federal Constitution. No tax may be imposed for the enjoyment of a right granted by the Federal Constitution. The United States Supreme Court cases in support of this proposition are listed in the case of *West Publishing Company v. McColgan* (California) 166 Pac (2d) 861 at 863. The burden of the tax is upon interstate activity because there are no intrastate commerce activities in Utah. The imposing of such a burden violates the

COMMERCE CLAUSE, ARTICLE 1, Paragraph 8, Clause 3, United States Constitution. The tax in this case is an excise tax, that is, one for the privilege of doing business in the State. It is constitutional to impose an excise tax for the privilege of doing business in the state, if the corporation does business both without and within the state. It is our contention that the corporation is doing business only without the State of Utah. There is some minimum activity in the State of Utah, but as we contend, it is not local in nature but rather incidental to the interstate activity.

In the case to which we shall now refer, an excise tax was sought to be imposed. The Spector Motor Company was an interstate carrier and in that case the activities of the corporation which the Tax Commission contended were local are set out in the dissenting opinion of Mr. JUSTICE CLARK, in these words, "It leases and utilizes terminals in Connecticut. It employs 27 full time workers in Connecticut. Its payroll at New Britain amounts to \$1200.00 per week. It owns pick-up trucks which are registered in its name by the State Motor Vehicle Department and which ply the streets of Connecticut Cities and uses heavy trucks which grind over Connecticut highways. As pointed out by the Connecticut Supreme Court of errors, it's leaseholds were the means adopted by it for the successful oper-

ation of its business in this State and no doubt they were of material service in producing the large portion of the plaintiff's business which is attributable to Connecticut." *Spector Motor Co. v. Walsh* 340 U. S. 602, 71 S. Ct. 508 at 514². The United States Supreme Court held that these local aspects of its business did not take away the interstate character of its business. The majority opinion held that in this business there are no intrastate activities. In that case as in this, there was an excise tax involved, see, *Spector* case at Page 510 of 71 S. Ct. The tax is then a tax or excise upon the franchise of a corporation for the privilege of carrying on or doing business in the State, whether it be domestic or foreign. *Stanley Works v. Hackett* 122 Conn 547, 551, 190 A 743." Net earnings are used merely for the purpose of determining the amount to be paid by each corporation which by the application of the rate charged was intended to impose upon each corporation a share of the general tax burden as near as possible, equivalent to that borne by other wealth in the State. As regards a corporation doing business both within and without the State, the intention was, by the use of a rather complicated formula to measure the tax by determining as fairly as possible the proportionate amount of its business done in this state. The incidence of the tax is upon no intrastate commerce activities because there are none." Further at

Page 511, "It is a 'tax or excise' placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the state. It serves no purpose for the State Tax Commissioner to suggest if there were some intrastate commerce involved the same sum of money as is at issue here might be collected lawfully from petitioner even though the financial burden of interstate commerce might be the same. The question whether a state may validly make interstate commerce pay its way, depends first of all upon the constitutional channel through which it attempts to do so. *Freeman v. Hewit*, 329 U. S. 429, 67 S. Ct. 274, 91 L.Ed. 265; *McLeod v. J. E. Dilworth Company*, 322 U. S. 327, 64 S. Ct. 1023, 88 L. Ed 304". Further at Page 512, the majority opinion states, "Our conclusion is not in conflict with the principle that where a taxpayer is engaged both in intrastate and interstate commerce, a State may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayers business done within the state, including both interstate and intrastate. *Interstate Oil Pipe Line Company v. Stone*, *Supra*, *International Harvester Company v. Evatt*, 329 U. S. 416, 67 S. Ct. 444, 91 L.Ed 390; *Atlantic Lumber v. Commissioner* 289 U. S. 553, 56 S. Ct.

887, 80 L. Ed 1328. The same is true where the taxpayers business activities is local in nature such as the transportation of passengers between points within the same state although including interstate travel.”

It is the position of these corporations that what little incidental activity there was in the State of Utah, was a part of interstate commerce so as to preclude the assessment of the Corporate Franchise Tax.

POINT 4.

NOT EVERY LOCAL INCIDENT OR COMBINATION OF LOCAL INCIDENTS NECESSARY TO CARRY ON THE INTERSTATE BUSINESS, CAN PROVIDE THE BASIS FOR THE IMPOSITION OF A FRANCHISE TAX.

The case of *Memphis Natural Gas v. Stone*, 335 U. S. 80, 68 Supreme Court 1478 states:

“The cases just cited in the note show that, from the viewpoint of the Commerce Clause, where the corporations carry on a local activity sufficiently separate from the interstate commerce state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself. But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. *Nippert v. City of Richmond*, supra, 327 U. S.

at 423, 66 S. Ct. 589, 90 L. Ed. 760. The incident selected should be one that does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce."

What could the local incidents be in this case? First, sending letters to a resident of another state which is in itself affected by interstate commerce. Second, keeping a bank account in which the proceeds of monies collected from another state are deposited. Third, keeping a set of books in order to reflect whether monies received from the other states are properly received. Fourth, holding one or two stockholders' meetings although most of the meetings were held in the states of incorporation. Each of these are necessary to the conduct of the companies' business and by these transactions between two states the business becomes interstate. Even the majority opinion in the above cited case which found the necessary local incidents to subject the corporation to a tax, acknowledged that if the local activities are essential to that business that they are not taxable activities. The local activities are essential to completing the interstate business of these corporations which is buying the contracts outside the state and collecting the payments. There are really no separate local incidents which are not essential to the consummation of this interstate business. There is no act performed for any

purpose other than this one central business of the corporations.

The U. S. Supreme Court in *Ozark Pipe Line v. Monier*, 266 U. S. at 565 45 S. Ct. 186, 69 L.Ed 439 said:

“The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. See also *Heyman v. Hays*, 236 U. S. 178, 185, 35 S. Ct. 403, 404, 59 L.Ed. 527.”

This case is referred to in *Memphis Gas Company v. Stone*, *supra* at page 1482²:

“In *Ozark Pipe Line v. Monier*, *supra*, this Court, 266 U. S. at page 565, 45 S. Ct. 186, 69 L.Ed. 439, spoke of such activities as set out below. If it was intended to say that such in-the-state activities as there described could not be taxed, we disagree with that conclusion. We are inclined to the view that the fact that the tax there under consideration was considered a tax “upon the privilege or right to do business,” led the Court to point out that as the local activities were essential

to that business, they were not taxable activities.”

The Supreme Court, while recognizing that such local incidents as there described could be taxed, that where the nature of the tax is one which is “upon the privilege or right to do business” and thus the activities performed in the state were essential to that business, that those activities are not taxable. In the instant case the matter of record keeping and the banking of funds are part and parcel of the interstate business of buying the contracts and receiving the payments.

In *Railway Express Agency v. Commonwealth*, 347 U. S. 359, 74 S. Ct. 558 at 5642, in the dissenting opinion reference was made to the holding of the *Spector* case in these words:

“*Spector* held that a state tax imposed on a foreign corporation engaged solely in interstate commerce for “the privilege of carrying on or doing business in the state” (340 U. S. 602, 71 S. Ct. 510) violates the Commerce Clause of the United States Constitution. The “operating incidence of the tax—” “the privilege of carrying on or doing business in the state” “—was determined by the state court and not questioned by this Court. The label formed the nub of the Court’s rationale in striking down the tax. That decision did not purport to cover a tax bearing a different name. In fact, the Court there specifically noted that the tax was not “collected in lieu

of an ad valorem property tax"; presumably had such been the case the tax would have been upheld."

Appellants conclude that where the attempt is to impose a franchise tax on the right to do business and the business transacted is primarily interstate, that even though there be some minor local incidents, the tax is struck down:

POINT 5.

THE LOCAL INCIDENTS OF INTERNAL MANAGEMENT ARE UNRELATED TO ANY BUSINESS DONE WITHIN THE STATE AND LIKEWISE, DO NOT PROVIDE THE BASIS FOR THE IMPOSITION OF A FRANCHISE TAX.

It is acknowledged that there is some record keeping and making of bank deposits that have to do with the management of the company's internal affairs. Such activity does not, however, provide a basis upon which to impose an excise tax.

The accounting work furnished in Utah produced no income; it was an expense of operation which could be minimized by having it done in the office of the principal stockholder in Utah. The investors who had advanced the funds to the corporations to make loans in other states, (the making of which produced the income) wanted the records and security from the loans to be available to them, without traveling to other states. If accountants and office help had been employed to do the work in Nevada and Idaho, the income earned as a result

of the out of state agents' activity would have remained the same, but the expenses would have been greatly increased.

Much emphasis has been placed on the fact that the accounting work of the foreign corporations was done in Utah and that an administrative fee was paid for this. Certainly if the corporation had retained independent certified public accountants whose offices were in Salt Lake City, Utah to do the accounting and clerical work this would not constitute doing business in the State of Utah. In effect the administrative costs paid by the corporation was to reimburse other corporations which furnished such clerical and accounting services to the foreign corporations in Utah. Moreover, maintaining an accounting department in the State does not constitute doing business within the State. Thus the Supreme Court of Iowa in the case of Iowa Limestone Company v. Cook, 233 N. W. 682, held that the corporation was taxable where its plant was located and its business transacted and not where its books were kept, "the keeping of books and bank account outside principal place of business held not doing business in such district".

The case of Haskins and Sells v. Kelly, (Kansas) 93 Pacific 605, involved the following facts; A corporation was employed to investigate and audit

the books of various departments of State of Kansas. The state brought an action against it to pay the corporate license fee as a foreign corporation doing business within the state. The Supreme Court of Kansas held that doing such accounting work and checking records did not constitute the doing of business in Kansas and that a license fee was not due and owing.

This Court in the case of Miller Brewing Company v. Capitol Distributing Company, 72 Pacific (2d) 1056 held that the making and delivery of a contract of guaranty in Utah for the payment of future and past indebtedness for the goods sold in interstate commerce is not doing business in Utah.

To uphold a tax predicated on such incidental business in this state would be to extend the tax jurisdiction of Utah beyond all reasonable limits and would be contrary to prior decisions and would violate constitutional rights.

CONCLUSION

We respectfully submit that the Order of the State Tax Commission should be set aside and an Order entered that these corporations are not subject to the Utah State Franchise Tax Act.

Respectfully submitted,
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