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Pacific Intermountain Express Co. v. State Tax Commission and the State of Utah : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

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PACIFIC INTERMOUNTAIN EXPRESS
COMPANY, a Corporation,

Plaintiff and Appellant,

vs.

STATE TAX COMMISSION and THE
STATE OF UTAH,

Defendants and Respondents.

Clerk, Supreme Court, Utah

Case

No. 8659

APPELLANT'S BRIEF

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Case
No. 8659

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This appeal is taken from the order of the District Court for Salt Lake County, sustaining the Motion to Dismiss filed by the State Tax Commission, on the ground that the complaint does not contain sufficient facts to constitute a basis for relief as prayed. There was no formal appearance by the State of Utah, but the matter is presented to this court as though the State of Utah had also filed the Motion to dismiss, and the State of Utah is designated as Respondent herein. No

question of parties has been raised and it will not be considered material unless raised by this court.

The complaint alleges, in effect, that a Trustee held title to certain motor vehicle equipment in the State of Utah for the purpose of leasing it to two corporations, Orange Transportation Company, an Idaho corporation, and Collett Tank Lines, a Utah corporation. These two corporations went out of business by selling all of their capital stock to the plaintiff and as part of the transaction the Trustee sold the motor vehicle equipment to the plaintiff. This equipment consisted of trucks and tractors, and included also semi-trailers. The State Tax Commission refused to register any of this equipment until the sales tax was paid by the plaintiff, which was the purchaser. The plaintiff, therefore, paid under protest on the 15th day of January, 1957, assessed tax in the amount of \$8,174.83 which was the combined tax on the sale price of the motor vehicle tractors, the motor vehicle trucks and the semi-trailers which are used in connection with tractors. The item of \$8,174.83 is not broken down as to the various classes of equipment sold.

The complaint alleges that the sellers of the equipment were not engaged in the business of selling property to users or consumers and that it was not an isolated or occasional sale by a retailer as defined in Section 59-15-2 (E) U.C.A. 1953, and alleges that none of the sellers was engaged in a regularly organized retail business within the meaning of that section.

STATEMENT OF POINTS

1. The Utah Sales Tax Act is not applicable to sales by persons other than retailers, as defined in the Statute.

2. Semi-trailers, as used by a motor carrier of property are not taxable under the Sales Tax Act when sold in occasional or isolated transactions.

3. Amendment of the definition and collection sections of the Sales Tax Act does not alter the scope of the tax.

4. An interpretation of the Statute singling out motor vehicles for taxation when sold in isolated or occasional transactions would be unconstitutional.

ARGUMENT

1. *The Utah Sales Tax Act is not applicable to sales by persons other than retailers, as defined in the Statute.*

Section 59-14-4 U.C.A. is the section of the Utah Code which levies what is referred to as the Sales Tax. This section reads:

“there is levied . . . (a) A tax upon every retail sale of tangible personal property made within the State of Utah . . .”

The definition section of Chapter 15 (59-15-2) defines “retail sale” as “every sale within the State of Utah by a retailer . . . to a user or consumer.” A “retailer” is defined as “a person doing regularly organized retail business in tangible personal property, known to the public as such and selling to the user or consumer and not for resale.” Under no stretch of the imagination does the term “retailer” include one engaging in a transaction of the nature here involved, that is, the sale of rolling stock by one carrier to another as part of the sale of the business. The definitional section referred to says,

"that no sale of a motor vehicle shall be deemed isolated or occasional for the purposes of this act." The effect of this language is to treat the sales of motor vehicles as "usual" or "regular" instead of "isolated" or "occasional." Then, assuming that the sales of motor vehicles are usual, or regular, does that make the seller in this case a "retailer"? ("Retail sale' means every sale . . . by a retailer.") By no means does this follow. The seller in this case was not "doing a regularly organized retail business" of selling trucks, or of selling any other commodity. The seller was not "known to the public as such." It follows that no "retail sale" was involved in the purchase of trucks by the appellant in this case, and Section 59-15-4 U.C.A. levies a tax "upon every retail sale." Therefore, the act of the respondent was unauthorized in compelling payment of a tax by the appellant. Even if the legislative intent could be clearly shown, and it cannot, it shouldn't be used to go against plain terms of the statute to reach transactions upon which no tax is levied.

To be sure, there is some question or doubt as to the purpose of the words in the definitional Section of 59-15-2 referring to isolated or occasional sales of motor vehicles, but the clear import of the language in the section levying a tax (59-15-4) and the correlative definitional Section (59-15-2) is not to include taxes such as that to the appellant. The United States Supreme Court in the Gould case stated a rule which has become almost axiomatic:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace

matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen."

(Gould v. Gould, 245 U. S. 151, 62 L. Ed. 211, 38 S. Ct. 53; see generally, 3 Sutherland Statutory Construction 293 and cases there cited.)

Even if it be said that the clear intention of the legislature is to raise revenue by taxing the sale of motor vehicles, effect of the language used, as we have seen, is to tax only retail sales and the courts should not adopt a strained construction in order to put into effect what may be said, by the collectors of the tax, to be the intention of the legislature. Crawford in his text, *Statutory Construction*, points up this rule of Construction as it applies to sales taxes in these words:

"Naturally, those laws which impose a tax on sales, being tax laws, are subject to a strict construction in accord with tax statutes generally. In other words, a sales tax statute must be strictly construed in considering its coverage, and no strained construction may be indulged in against the taxpayer simply because of the apparent purpose to raise needed revenue . . . " (p. 738).

In Tennessee a case arose which is analgous in many ways to the case at bar. Both cases involve statutory construction of a statute which though containing certain terms which might include the taxpayer, has controlling language which clearly does not include the taxpayer. In the Tennessee case (*State v. McLemore*, 290 S.W. 386), the State sought to hold that certain compulsory insurance was applicable to the automobile of the taxpayer who operated the automobile for hire, using a fixed stand, charging fares proportional to the haul

and the number of passengers in each case, but not operating between fixed termini or over a regular route. The court said:

"The caption is broad, covering all 'motor vehicles . . . for hire, 'and the word 'taxicab' is given a definition practically as broad, and it may be plausibly contended that the protection sought to be provided might fairly be so extended, but the language of section 2 is definitely limited. 'It shall be unlawful for any person . . . to operate any motor vehicle . . . for hire, between fixed termini, without executing bond or providing insurance,' etc. This is the controlling language of the act. The broad terms of the caption and the references to taxicabs, contained in the body of the act, fairly suggest a possible original purpose to enact legislation which would apply to all motor vehicles driven for hire, whether strictly taxicabs or not (except when coming under a municipal ordinance having similar requirements); but the manifest ambiguity and confusion in the frame and language of the act as it now appears indicates restrictive changes in-artificially made before final passage.

"However this may be, we find the language of the act heretofore quoted declaring 'what shall be unlawful' reasonably clear (emphasis added.) While in arriving at the intent, which is always important, the apparent general purpose of legislation may be considered, 'it is also a settled rule of interpretation in this state,' as said by Mr. Justice Lansden in *Plow Co. v. Hays*, 125 Tenn. 155, 140 S.W. 1069, 'that statutes levying taxes or duties upon citizens will not be extended by implication beyond the clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically pointed out, although standing upon close analogy . . . Burdens are not to be imposed beyond what the statute expressly imports.' "

In the case just cited, words were used by the legislature

which indicated a certain intent, but which the court found negated by express and controlling language. In the case at bar, too, there is an indication of a possible legislative intent regarding motor vehicles, which we have seen, however, is negated by the express and controlling language taxing retail sales by retailers, which language does not include the appellants.

An analysis of the definition section from a grammatical point of view may be helpful. Section 59-15-4 imposes an excise tax "upon every retail sale of tangible personal property." Then Section 59-15-2(e) defines the term "retailer" as a person conducting "a regularly organized retail business in tangible personal property." Then the latter half of that subsection defines the term "retail sale." This definition is analyzed as follows:

RETAIL SALE:

I. Sale by retailer or wholesaler to user or consumer.

- (a) Wholesale sales excluded
- (b) Exempted sales excluded
- (c) Isolated or occasional sales (by persons not regularly engaged in business) excluded
- (d) Seasonal sales and agricultural sales excluded
 - (1) Provided no sale of motor vehicle is isolated or occasional.

The last clause of subsection 59-15-2(2) states: "but the term 'retail sale' is not intended to include isolated nor occasional sales by persons not regularly engaged in business . . .

provided, however, that no sale of a motor vehicle shall be deemed isolated or occasional for the purposes of this act.” This clause is separated from the clause defining retail sale by a semicolon.

It is submitted that this clause excluding “isolated or occasional sales *by persons not regularly engaged in business*” from the definition of “retail sale” is merely a reiteration (in the negative) of the first clause of this subsection which states, “the term ‘retailer’ means a person *doing a regularly organized retail business . . .*” The sellers here were not in the business of selling to the user or consumer and their isolated or occasional sales were therefore excluded both generally and specifically.

The proviso part of the last clause of subsection 59-15-2(e), “sale of a motor vehicle shall not be deemed isolated or occasional,” was obviously meant to limit only the sales excluded from the term “retail sale.” This is obvious from a grammatical standpoint in that this part is separated from the last clause by a comma, while the exclusionary clause is separated from the definition of a retail sale by a semicolon. This interpretation is obvious from a sense, or meaning standpoint, in that the clause speaks of isolated or occasional sales, and the proviso shows what shall not be deemed isolated or occasional.

Thus, while upon first reading it might appear that any sale of a motor vehicle is a retail sale subject to a sales tax, it can be seen upon analyzing the subsection, both from a grammatical and a meaning standpoint, that there must be a sale

by a person doing a regularly organized business of selling to the user or consumer in order to constitute a "retail sale."

It is clear that the sale of a motor vehicle cannot be deemed isolated or occasional. But the fact that a sale is not isolated or occasional does not make it subject to the sales tax imposed by Section 59-15-4. There still must be a sale by a retailer to a user or consumer.

The meaning of the phrase "isolated or occasional sales" when applied to persons who are regularly engaged in business must be that sales by such persons are covered even though they involve commodities not regularly dealt in. For example, if a regular retailer of dry goods gets a special deal on electrical appliances and sells that one shipment out, it would be in the nature of isolated or occasional sales, but would still be covered. Or, if a sporting goods house orders a large inboard motor boat on special purchase, that would be an isolated or occasional sale, but would still be covered, because it is within the volume of business done by a regularly organized retailer. If such a retailer sold his fixtures and bought new fixtures for his store, it would appear to be an occasional sale, but would still be covered. And, likewise, if a grocery store which makes deliveries sells its delivery truck, that would appear to be an isolated or occasional sale and would be subject to the act. And the definition states, specifically, that no sale of a motor vehicle shall be considered an isolated or occasional sale, without looking any further into the comparison of that transaction with other regular transactions of the person making the sale. But there still is no modification of the application of the act to retailers only, and to retail sales only, and the sale here involved was not by a retailer and was not a retail sale.

For courts consciously or unconsciously to ignore the wording of a statute in order to put into effect what they conceive to be the legislative intent, at times might prove a service to the legislature and the community from a nearsighted point of view. But in the long run a grave disservice would be perpetrated on the judicial and the legislative systems, and thus to the community. Legislative enactments could easily become a mockery were courts to infer anything they might conceive of as the intention of the legislature, irrespective of the wording of the enactment.

“Where there is reasonable doubt as to the meaning of a revenue statute it should be resolved in favor of those taxed.” 3 Sutherland Statutory Construction 293. Cases: *Gould v. Gould*, 245 U. S. 151, 62 L. Ed. 211, 38 S. Ct. 53 (1915); *Stephens v. Glander*, 151 Ohio St. 62, 84 N. E. 2d 279 (1949); *Compana Corp. v. Cmr.* 210 F 2d 897 (1954); *Allen v. Atlanta Metallic Casket Co.*, 197 F 2d 460 (1952); *Masonite Corp. v. Fly*, 194 F 2d 257 (1952); *Peck v. State*, 216 P 2d 132 (1950); *Walgreen Co. v. Gross Inc. Tax Div.*, 75 N. E. 2d 784 (1947); *Langford v. Aten*, 39 N. W. 2d 82 (1949); *Salomon v. Jersey City*, 97 A 2d 405 (1953); *School Dist. of Philadelphia v. Frankford Grocery Co.*, 103 A 2d 738 (1954); *Bott v. Commonwealth*, 48 S. E. 2d 235 (1948).

Revzan v. Nudelman, 18 N. E. 2d. 219 (Illinois): This case involved a sales tax law and was decided in favor of the taxpayer by subjecting the words “use” and “consumption” to their restrictive meaning of “use up” or “exhaust.” The court said:

“In the first place, it must be remembered that the act imposes a tax only upon persons engaged in the business of selling at retail. No other class is included

in its provisions, either expressly or by necessary implications. Defendants insist that the sole leather and rubber heels sold by plaintiffs to repairmen are retail sales, on the theory that such materials are used or consumed by the repairman. This brings us to a consideration of the meaning of the terms: 'for use or consumption.' In construing a statute, 'it is fundamental that taxing laws must be strictly construed. They are not to be extended by implication beyond the clear import of the language used. In case of doubt, they are construed most strongly against the government and in favor of the taxpayer. Strict construction does not require that the words be given the narrowest meaning of which they are susceptible, and words of the act are to be given their full meaning.'"

Bedford v. Johnson, 78 P. 2d, 373 (Colo.):

"This court has repeatedly held that statutes levying taxes or duties upon citizens will not be extended by implication beyond the clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically pointed out, although standing upon a close analogy, and all questions of doubt will be resolved against the government and in favor of the citizen, and because burdens are not to be imposed beyond what the statute expressly imports."

This case was one where the court refused to regard automobile parking lots as falling within the scope of a statute which imposed a tax on general warehouse storage establishments.

Doran v. Crenshaw (Tenn.) 61 S. W. 2d, 469: Held that the tax under the heading of "Florists," imposing a tax upon each person dealing in cut flowers or potted plants, conducting the business of a florist from a regular place of business, and

each person selling cut flowers, shrubs, or potted plants on the streets or at other places outside a regular store, did not include a horticulturist engaged in the operation of a nursery and greenhouse on his land at 1732 Felix Avenue where he grows from the soil various kinds of flowering and perennial plants and shrubs, which he sells to dealers and the public generally: "This language so limited cannot be extended by implication to embrace a producer of plants and flowers. To do so would be to reach beyond the clear import of the language used . . . "

It is to be concluded from the foregoing that the respondent unlawfully imposed a tax on the appellants with respect to the purchaser of the motor vehicles and trailers here involved. The sellers were not retailers and this was not a retail sale.

2. Semi-trailers, as used by a motor carrier, are not taxable under the Sales Tax Act when sold in occasional or isolated transactions.

Should the court find isolated or occasional sales of motor vehicles taxable under the Sales Tax Act, such a finding should not include semi-trailers.

Motor vehicles as referred to under the Sales Tax Act in Sections 59-15-2 and 59-15-5, U.C.A., are nowhere defined under the Act. He who would interpret the meaning of "motor vehicle" is left to interpret by analogy or common understanding. Interpretation by analogy has strong support from the wording of the statute. Section 59-15-5 refers to "every sale of a motor vehicle subject to registration and licensing under the laws of this state." Reference to registration and licensing

would logically refer one to the Motor Vehicle Act for a definition of the term "motor vehicle." Section 41-1-1, U.C.A. defines "motor vehicle" as:

"Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

A semi-trailer is certainly not included within this definition of "motor vehicle." A semi-trailer is not self-propelled. Moreover, "semi-trailer" is defined in the same section as:

"Every vehicle without active power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests or is carried by another vehicle."

It is evident that the terms "motor vehicle" and semi-trailer" are mutually exclusive, as defined in Section 41-1-1. The term which the legislature, had it so desired, could have used to include both a motor vehicle and a semi-trailer would have been "vehicle," which is defined as:

"Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks."

However, the legislature did not choose to use the term "vehicle." It would seem clear from this analysis that the legislature did not intend to include semi-trailers in "motor vehicles."

If the above analysis is not sufficient, recourse must be had to the common understanding of the meaning of motor vehicle, for the words employed in a tax statute "are to be

given their ordinary meaning.” (51 Am. Jur. 362 and cases cited.)

Unquestionably, the ordinary meaning of motor vehicle would be a vehicle with a motor. A semi-trailer certainly does not come under such a category. It neither has a motor to propel it nor is it part of a vehicle with a motor.

Webster's New International Dictionary does not have a definition of “motor vehicle.” Words and Phrases, Vol. 27, at page 707, and the 1957 Cumulative Supplement at page 181 contain about a dozen cases passing on the question whether a trailer or a semi-trailer is a motor vehicle. All of them hold that a trailer is not a motor vehicle because it is not propelled by a motor, and only one case is contra. This is Department of Motor Transport vs. Motor Convoys (Ky.), 279 S. W. 2d, 815 and 816. In that case the Court was applying a tax statute on new “motor vehicles” but had another statute which defined “motor vehicle” as “any motor propelled vehicle . . . including any such vehicle operated as a unit in combination with other vehicles . . . ”

Under either the Utah statutes or the ordinary meanings of the words “motor vehicles” the sales tax act of Utah is not applicable to occasional sales of trailers or semi-trailers by persons not regularly engaged in the retail business.

3. Amendment of the definition and collection sections of the Sales Tax Act does not alter the scope of the tax.

It is elementary that there is no imposition of a tax unless the rate is fixed and the subject matter definitely established. 51 Am. Jur. 621; 46 A.L.R. 609, 639; South Covington Street-

car Company vs. Bellevue, 105 (Ky.) 283, 49 S.W. 23, 57 L.R.A. 50; People Ex Rel Seeley vs. Hall, 8 (Colo.) 485, 9 P. 34; Albion vs. Boone County, 94 (Neb.) 494, 143 N.W. 749. A grant of authority to collect a tax, where the tax had never been imposed, would make collection of the tax unlawful. 84 C.J.S. 679; Bridgeport Hydraulic Co. vs. City of Bridgeport, 130 Atlantic 164, 103 (Conn.) 249.

In the Sales Tax Act the tax is levied or imposed by Section 59-15-4. The collection section is 59-15-5, which provides as follows:

“The tax shall be paid by the purchaser directly to the State Tax Commission upon every sale of a motor vehicle subject to registration and licensing under the laws of this state, and shall be collected by the State Tax Commission at the time of such registration and licensing.”

But it must be remembered that this section does not impose the tax. And the antecedent of “the tax” is the tax established by Section 4 of the Act.

Section 59-15-4, which is the section imposing the tax, was not amended when the language pertaining to motor vehicles was included by the legislature. This section still reads in part: “From and after the effective date of this Act, there is levied and there shall be collected and paid: (a) a tax upon every retail sale of tangible, personal property made within the State of Utah . . . ” That is the tax which the Act imposes; and when Section 5 refers to: “The tax under the provisions of this act,” it is limited to imposition of tax on retail sales and it thus becomes plain that although Section 5 suggests that all sales of motor vehicles are subject to the tax, this

careful analysis indicates that this section simply provides that the Tax Commission and the purchaser are responsible for collection and payment of "the tax" and no motor vehicle subject to "the tax" is to have registration changed until that tax has been paid.

4. An interpretation singling out motor vehicles for taxation, when sold in isolated or occasional transactions would be unconstitutional.

It is axiomatic that a state has the power to make reasonable and natural classifications for purposes of taxation. *Chalker v. Birmingham & N. W. R. Co.*, 249 U. S. 522, 63 L. Ed. 748. However, this power of a state to make classifications with respect to taxation is not unlimited. An early United States Supreme Court decision pointed out that a state legislature has no power to select particular persons or companies to bear the exclusive burdens of taxation. *Provident Inst. v. Massachusetts*, 6 Wall. 611, 18 L. Ed 907.

Taxes should be levied with equality and uniformity and in accordance with some reasonable system of apportionment, calculated to distribute the public burden. Section 3 of Article XIII of the Constitution of the State of Utah requires a "Uniform and equal" taxation on all tangible property in the State. While this section refers to property, and not sales taxes, it exemplifies the requirement for equality and uniformity in taxation. The policy of equally distributing the public burden applies to a sales tax as well as a property tax. The Supreme Court of the State of Alabama has stated:

"Whilst there is no provision of the Constitution commanding in terms and uniformity, the principle

should underlie and regulate the provisions of every law imposing public burdens and charges." *Western Union Tel. Co. v. State Board of Assessment*, 80 (Ala.) 273, 60 Am. Rep. 99. (Reversed on other grounds in 132 U. S. 472).

Numerous cases can be cited for the general principle that classifications in tax statutes must be reasonable, natural, and founded upon some just and rational basis or distinction. Classifications may not be arbitrary, oppressive, hostile, capricious, illusory or fanciful. No definite rules have been laid down in this area. Whether a classification for tax purposes is reasonable or arbitrary must be decided upon the facts and circumstances appearing in each particular case.

In *Winter v. Barrett*, 352 (Ill.) 441, 186 N.E. 113, 89 A.L.R. 1398, the Illinois Supreme Court had before it a statute imposing a tax upon persons engaged in the business of selling intangible personal property at retail, which exempted from the tax farmers selling their own produce and sellers of motor fuel. It was argued that the seller of motor fuel could be excepted from the tax because an excise tax was presently being collected for each gallon of gasoline sold. The Illinois court held that this tax on gasoline was on the consumer as a toll for use of the state highways, and was no basis for excepting the seller from the questioned tax. Because there was no valid basis for a discrimination in favor of farmers and sellers of gasoline, the court held that the statute violated the section of the State Constitution requiring that a tax shall be uniform as to the class upon which it operates, and offended against the equal protection clauses of the state and federal constitutions (89 A.L.R. at 1412-1416). The court held that

the tax on persons engaged in the business of selling tangible personal property at retail was an occupation tax, as distinguished from a tax on property, or on purchasers of property. Rather than having sales or the receipts therefrom as the subject of the tax, the subject matter taxed was the privilege of performing some business, while the amount of the tax was measured in sales. This is one type of sales tax. 47 Am. Jur. 195.

Four years later this same court had before it a statute which imposed a tax measured by the gross receipts upon water, gas, or electricity supplied to persons for domestic or commercial consumption, but did not impose the tax when the same was supplied for industrial use. *Chicago v. Ames*, 365 (Ill.) 529, 7 N.E. (2d) 294, 109 A.L.R. 1509 (1937). The discrimination was held to be unreasonable, and the statute was contrary to the uniformity clause of the State Constitution.

The discrimination involved in the administrative interpretation of the Utah sales tax is more readily apparent than in either of the Illinois cases. Their reading of the Utah tax does not merely except one or two groups from the class upon which it operates. Their interpretation singles out one particular event, the sale of a motor vehicle, and subjects it to a sales tax. Excepted from the tax are sales of semi-trailers, railroad cars, refrigerators, engines, farm tractors and many similar items which are within the same class of isolated or occasional sales. There is no reasonable basis for the taxing of isolated sales of motor vehicles and not occasional sales of other similar property. A state does not have this power to select particular persons or companies to bear the exclusive burdens of taxation. *Provident Inst. v. Massachusetts*, *supra*.

The equal protection clause of the Fourteenth Amendment is applicable to state tax legislation. *Ohio Oil Co. v. Conway*, 281 U.S. 146, 75 L. ed 775, 50 S. Ct. 310; *Louisville Gas & E. Co. v. Coleman*, 277 U.S. 32, 72 L. ed 770, 48 S. Ct. 423. In *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, the Supreme Court of the United States had under consideration a statute of the State of Louisiana imposing a tax on the business of refining sugar and molasses. The amount of the tax was based on gross annual receipts. The statute provided it should not apply to planters and farmers grinding and refining their own sugar and molasses. This exemption was held valid, in that it did not deny equal protection of the laws to persons and corporations engaged in a general refining business. The Supreme Court stated:

“The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes.”

The court found there was a reasonable distinction between the refiners who were taxed and the producers who were not taxed.

In *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 77 L. ed. 929, 53 S. Ct. 481, 85 A.L.R. 699 (1933), the court held a

tax statute violates the equal protection clause of the Fourteenth Amendment where the classification was found to be without reasonable basis. The statute required a license to be obtained for the operation of a store, and imposed a greater tax per store where stores are located in more than one county than where they are all in the same county. The court was unable to discover any reasonable basis for this classification, in that an increase in the tax not only on a new store but on all the old stores, consequent upon the mere physical fact that the new one lies a few feet over a county line, finds no foundation in reason or in any fact of business experience.

Ohio Oil Co. v. Wright, 53 N.E. 2d 966, says in headnote 14, "The designation of persons composing a class subject to tax may not be arbitrary or capricious and uniformity may be violated by including those in fact not within the class, as well as by excluding those properly within it." This statement seems to apply to the case here, and excluding from the tax all sales of an isolated or occasional nature by persons not regularly engaged in retail selling, and then making a general exception for motor vehicles only seems arbitrary and capricious.

In Transport Manufacturing Equipment Co. v. Bates, 224 S.W. 2d, 996, it is held that a statute imposing a use tax on motor vehicles, but exempting motor vehicles having a seating capacity of ten passengers or more, is void as violating constitutional provision that a tax shall be uniform on the same class of subjects.

Likewise, an increased rate of tax on department stores, which would not be applicable to stores carrying the same merchandise but not segregating it into departments, was held

invalid for lack of a reasonable basis for distinction. *Barker Bros. v. City of Los Angeles*, 76 P. 2d 97.

A statute requiring sanitation of buildings occupied by bread, biscuit and cake bakeries, but exempting from its operation buildings of pie, pastry and cracker bakeries is unconstitutional as being discriminatory between members of virtually the same class. *State v. Miksicels*, 125 S.W. 507.

It is important that the State raise revenues; but it must be done with equality and non-discrimination as the standard. For the legislature to have singled out occasional sales of motor vehicles as subject to the tax, and have it apply otherwise only to sales made by persons regularly engaged in an organized retail selling business is discriminatory and therefore invalid. The imposition of the tax must be limited to persons engaged in such regular retail business.

SUMMARY AND CONCLUSION

The amendment of the Sales Tax Act by the 1949 legislature was awkward and ambiguous and involved poor draftsmanship. It shifted the collection burden from retailers (except registered automobile dealers) to the State Tax Commission and used the need for registration as the means of collecting the tax. This tended to expand the incidence of the tax since it placed upon the purchaser the burden of convincing the State Tax Commission that the vehicle involved had not been purchased through a retailer or a regularly licensed automobile dealer. The practical effect of this has apparently become insistence on payment of the tax by all purchasers whether

arising from an isolated or occasional sale or not. But since the legislature did not expand the definition of retailer or change the incidence of the tax from one upon retail sale or sale by a retailer, it is plain under the statute that the only isolated or occasional sales of motor vehicles subject to the sales tax are those sold by regular retailers.

The reference in the amendment to the motor vehicle registration laws compel this court, in the construction of the statute, to go to the motor vehicle laws for a definition of motor vehicle. These definitions plainly exclude trailers and semi-trailers from the Sales Tax Act.

The appellant is entitled to the benefit of strict construction in the application of this revenue measure which includes the construction that since the section levying the tax was not amended the legislature must be held not to have intended to change the tax levy or the imposition of the tax and simply to clarify the handling of motor vehicle sales when made by retailers.

The foregoing constructions are all confirmed by the doubtful constitutionality of a tax law which would single out of many similar transactions and sales of many comparable commodities the sales only of motor vehicles. The singling out of sales of one commodity for taxation is a clear denial of the equal protection of the laws.

This court should hold that the Sales Tax Act applies to sales of motor vehicles when made by persons regularly engaged in the selling of motor vehicles or other commodities but has no application to those isolated and occasional trans-

actions which occur when a person not engaged in business or one engaged in a business other than regular selling of commodities chooses to transfer title to a motor vehicle.

Respectfully submitted,

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