

1992

# Valgardson Housing Systems, Inc. v. Utah State Tax Commission : Reply Brief

Utah Court of Appeals

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Clark Snelson; Assistant Utah Attorney General; Attorneys for Respondent.

W. Andrew McCullough; McCullough, Jones, and Ivins; Attorneys for Petitioner.

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DOCKET NO.

920644

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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VALGARDSON HOUSING SYSTEMS,  
INC.

Petitioner,

vs.

UTAH STATE TAX COMMISSION,

Respondent.

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REPLY BRIEF

Case No. 920644-CA

Priority No. 15

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Petition for Writ of Review of Judgment  
of the Utah State Tax Commission

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**FILE**

NOV 9 1992

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IN THE UTAH COURT OF APPEALS

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VALGARDSON HOUSING SYSTEMS,  
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Case No. 920644-CA

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REPLY BRIEF

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CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES  
AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE

Statutes and rules which are determinative were set forth in  
Petitioner's original brief and in the brief of Respondent.

SUMMARY OF ARGUMENTS

The correct standard of review is correction of error as the  
Utah State Tax Commission has not been granted discretion to  
interpret the applicable law to its own liking.

If the transactions in dispute here are wholesale sales of  
personal property, or building materials, to a dealer, who is the  
actual contractor, no tax is due at all from Petitioner, as it is  
a tax exempt transaction. In that case, the State Tax Commission  
should be seeking its tax from the dealer, not from Petitioner.

Public policy, the weight of authority, and the Commission's own rules, are in favor of Respondent's position that a sales tax in the disputed transactions is due only on the value of the materials used in construction of the housing unit.

POINT I

PETITIONER SET FORTH THE CORRECT STANDARD OF REVIEW IN THIS MATTER IN ITS ORIGINAL BRIEF.

Petitioner in this action, in its original brief on appeal, referred to the Standard of Review set forth by the Utah Administrative Procedures Act. Section 63-46b-16 U.C.A. states as follows:

(4) The Appellate Court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(d) The agency has erroneously interpreted or applied the law; . . . .

Respondent attempts to tilt the playing field in its direction by suggesting an alternative standard of review that would allow this Court to grant relief to the Petitioner only in the case of an abuse of discretion delegated to the agency by statute. In support of that alternative theory, Respondent cites the case of Morton International, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581 (Utah 1991). Respondent, in doing so, has asked this Court to misread and misapply that Utah Supreme Court case. The Utah Supreme Court, in reviewing the Administrative

Procedure Act and the Standard of Review under the Act, stated:

Therefore, in cases dealing with statutory construction, the Utah Administrative Procedure Act does not change the Standard of Review when the court is in as good a position as the agency to determine the issue or when the agency has been granted discretion in interpreting the statute. However, nothing in the language of section 63-46b-16 or its legislative history suggests that an agency's decision is entitled to deference solely on the basis of agency expertise or experience. Indeed, there is no reference to agency expertise or experience in the statute or the statute's legislative history. Rather, in granting judicial relief when an "agency has erroneously interpreted or applied the law," the language of section 63-46b-16(4) clearly indicates that absent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation or application of a statutory term. 814 P.2d at 588

The Utah Supreme Court, in further referring to the Standard of Review in cases such as the present one, stated as follows:

However, it is clear from the wording of section 63-46b-16 that an agency's statutory construction should only be given deference when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language.

The question presented is one of statutory construction or application, and absent a grant of discretion, the Commission's decision will be reviewed under a correction-of-error standard. The statutory terms in question are of a specific nature and do not connote a general grant of discretion.

It is apparent that the Commission has not been granted any discretion in regard to the present issue. Therefore, its interpretation will not be granted deference. 814 P.2d at 589.

As in the Morton case, the Utah State Tax Commission is granted no discretion in interpreting the statutes at issue here.

Those statutes, § 59-12-102 and 103 set forth the basis of levying a sales tax on certain transactions, and then define in detail the terms used in the statute. No grant of discretion is made, either explicit or implied, to interpret the statute on its own without assistance from the courts of this state. Regarding the legal issues involved in this action, the "correction-of-error" standard should be applied. The Utah State Tax Commission has erroneously interpreted the statutes at issue here, and its decision should be reversed.

The Supreme Court, in its analysis of the Administrative Procedure Act and the standard of review, referred to cases decided before the adoption of the Act. In doing so, the Court referred to instances where some deference had been granted to the decision of the agency:

. . . when the agency's experience or expertise puts the agency in a better position to resolve issues concerning the application of findings of fact to the legal rules governing the case and the interpretations of the operative positions of the statutes the agency is empowered to administer. 814 P.2d at 586.

As referred to above, there is no language in the new Act which suggests such a continued deference. Additionally, public policy militates against giving such deference (or looking for a reason to find an implied grant of discretion) in a case such as this one. Most government agencies subject to review in this Court regulate certain specified activities. Most such agencies have no



particular reason to favor one point of view over the other, and to "skew" a statute in favor of one party. The Utah State Tax Commission, of course, is in a unique position. The reason for establishing the Utah State Tax Commission is to collect revenue. The bias of the Commission is inherent. Any ruling made in behalf of a taxpayer cuts down on the ability of the Commission to raise revenue. Any decision by an administrative law judge, which is subject to approval by the Utah State Tax Commission, pits the Commission itself against the taxpayer. The function of the court in such an instance is to level the playing field and make sure that the State Tax Commission does not confuse its revenue-raising function with its regulatory function. One function requires the State Tax Commission to be fair, while the very reason of the Commission's existence militates against such fairness. Granting deference to the Commission, as it has suggested, is an extremely poor public policy decision. A revenue-raising agency can only be kept on a balanced and fair course by a vigorous review of its decisions by the courts.

Respondent has also cited a recent case from this court, Putvin v. Utah State Tax Commission, No. 920329CA, slip op. (Utah App. September 1, 1992) for the proposition that Respondent has considerable discretion in interpreting certain parts of the Tax Code. That case can be readily distinguished from the present one.

The court there found that certain terms had not been defined by the legislature, and that there was an absence of discernable legislative history regarding those terms. The court also found that the Commission had previously defined the terms itself in detailed rules which it was following in the Putvin action. In this action, the terms at issue have been carefully defined by the legislature. Additionally, there have been no additional definitions in the rules promulgated by the Tax Commission, which assist the Commission in making the determination it has made. In fact, the Commission has violated its own rules and attempted to stretch and distort the normal reading of statutes to fit its own special interests. This is not what the Utah Supreme Court had in mind in its decision in the Morton case, and it is not what this Court had in mind in applying that case in Putvin.

#### POINT II

THE TYPE OF SALE RESPONDENT ARGUES IN ITS BRIEF IS NOT A RETAIL SALE AS DEFINED BY THE CODE, AND IS NOT SUBJECT TO SALES TAX AT ALL.

Discussion in front of the Utah State Tax Commission focused on whether or not a sale of property by Petitioner was the sale of personal property or of real property. Petitioner claimed that it was the sale of real property, because the items which were sold, while still on the crane, were finished housing units which were converted into real property immediately upon the crane depositing

those housing units on prepared foundation. Testimony was that the housing units were attached to the crane with steel bands, which bands were snipped off immediately upon depositing the home. Without the bands, the house could not be moved. Within an hour or two thereafter, the house was nailed to the foundation, and became totally permanent.

The discussion did not deal with, in any depth, the question of the nature of the sale from Valgardson to the dealer, and from the dealer to the ultimate consumer, the owner of the property.

The ruling of the Utah State Tax Commission did refer to a "sale" of the personal property by Valgardson to the dealer. It is only, however, in the brief of the Respondent, that the "sale and resale" transaction takes on significance. Respondent now makes it clear that the tax commission considers there to be two separate sales. On page 13 of Respondent's brief, it states:

Valgardson sells its modular units to dealers who are responsible for linking the units together and affixing the units to a foundation. The dealers then sell the completed home to purchasers.

By emphasizing that there are, in fact, two sales in a very short period of time, Respondent has changed the whole complexion of this case. The argument in front of the Utah State Tax Commission primarily concerned whether the sale was of tangible personal property as defined by § 59-12-102(13)(a) U.C.A. or whether it is a sale of an interest in real estate, which is not

taxable, pursuant to § 59-12-102(13)(b)(i) U.C.A. The argument now shifts to whether or not this was a retail sale as defined by § 59-12-102(8) and (9) U.C.A. A retail sale is defined by those sections as a sale which is "not for resale."

Petitioner acknowledges Rule R865-19-58S of the Administrative Rules of the Utah State Tax Commission which states, in part:

A. Sale of tangible personal property to real property contractors and repairmen of real property is generally subject to tax.

That rule, however, goes on to state:

1. The person who converts the personal property into real property is the consumer of the personal property since he is the last one to own it as personal property.

Ordinarily, that would mean that the sale from Petitioner to the dealer of tangible personal property would be a taxable transaction, and, that Valgardson would be responsible for collection and payment of a full sales tax if the transaction is deemed to have been a sale of tangible personal property. In actual practice, however, a real estate contractor purchases building materials in a tax exempt transaction, in bulk. It is only when he sells the finished product, as part of real estate, that he determines the amount of materials actually used in that housing unit and is responsible for remitting the tax on the building materials used in that unit. (See Stipulated Facts Nos. 23, 24 and 25, and Additional Stipulated Facts Nos. 1 and 2, both

of which are attached Petitioner's original brief). In other words, if the disputed transactions are a sale of improvements on real property, it is Respondent's duty to collect and pay the tax on the building supplies consumed in that housing unit, upon sale of the unit. If the sale is of tangible personal property (building materials) to a dealer who is a real estate contractor, it is a tax exempt transaction, and the determination and payment of the tax owed is up to the dealer. In that case, Petitioner has vastly overpaid taxes to the State Tax Commission and this Petition for redetermination should not only be upheld, but a substantial refund should be ordered. The State Tax Commission, in its mad rush to collect as much tax as possible, has changed the nature of the transaction and "shot itself in the foot". The Tax Commission simply cannot have it both ways. If Petitioner is a real estate contractor, as he claims, he pays taxes on 50% of the sale (the value of materials in the completed housing unit as set forth in stipulated facts No. 23 - 25). If Petitioner is determined to be a wholesaler of housing materials, the State Tax Commission is simply talking to the wrong person. This is an exempt transaction and the sales tax should be collected from the dealer.

### POINT III

RESPONDENT HAS FAILED TO REASONABLY APPLY WHAT DISCRETION IT HAS, AND HAS VIOLATED ITS OWN RULES.

Respondent has, in its brief, cited some dubious authority for its position in this action. Several of the so-called citations of authority are "private letters". Those letters are exactly what they say: private. They are in the form of letters to a particular person giving an informal opinion as to what tax ramifications certain transactions might have in other states. The letters are complete with blank spaces or asterisks where the names of private individuals seeking legal advice were once inserted. Respondent does not doubt that, given a particular situation, a staff attorney for a tax commission in Illinois or Massachusetts might offer some valid advice. If counsel for the State Tax Commission in this action were asked for his private opinion, he would obviously state that the transactions at issue here are taxable at 100% of the value of the sale. He would be entitled to his private opinion; but he would be wrong. His opinion would have absolutely no authority in a court of law in this state, and obviously would have none in an appellate tribunal of another state. If the legislature had determined that a staff attorney working for the Utah State Tax Commission could determine on his own what taxes should be paid, it would not have granted Petitioner the right to bring this case to the court system.

Additionally, some of the authorities cited by Respondent are in Petitioner's favor. A case in point is the ruling of the Virginia Department of Taxation included in Respondent's materials. In fact, a careful reading of the Virginia ruling is that the modular builder in that action is deemed to be a real estate contractor and is required to pay sales tax on the value of the materials used to construct the building. That is exactly what Petitioner has offered to do, and is the correct position to take.

Respondent has cited the Iowa Supreme Court case of Sturtz v. Iowa Department of Revenue, 373 N.W.2d at 134 (Iowa 1985). Once again, this case substantiates the position of Petitioner. The actual dispute was over whether a sales tax or a use tax should be levied on a sale of a modular home built in Wisconsin and sold in Iowa. Harold Sturtz was not the manufacturer of the housing, but was the equivalent of the "dealer" in the transactions at issue here. It is obviously interesting to note that Pittsville Homes, Inc., the manufacturer of the homes, was not a party to the action. The Iowa Supreme Court first reviewed the reason for setting up the sales tax law as it had been enacted:

A special rule, however, applies to sales of building materials to 'contractors' -- which the director, on substantial evidence, found that Sturtz was. . . . The reason for this rule is that contractors turn building materials into real estate, and problems may arise as to whether the ultimate customer would be liable for sales tax. . . . Indeed the Department does not argue that the Sturtz - customer sales are subject to sales tax. 373

N.W.2d at 134.

As set forth by the Iowa Supreme Court, the reason for taxing transactions in the way they are taxed is simple. Building materials are to be taxed on their value before being put into the finished home. Because the actual sale of a finished home is not subject to sales tax, the value of the materials used in producing that home are taxed. While it is theoretically the sale of the building materials to the contractor that is taxed, it is actually the contractor who determines the amount of, and pays, that tax. Once again, that has been the Petitioner's position all along.

Respondent has cited the Georgia Supreme Court case of Adrian Housing Corporations v. Collins, 319 S.E.2d 852 (Ga. 1984). While that case does appear to support Respondent's position herein, it can certainly be distinguished. The Georgia Supreme Court, over the dissent of two justices, found a taxable transaction between two separate corporations owned by the same principals, when a manufacturer of modular homes sold the homes to the second company for delivery. The Georgia Supreme Court found that at the time of sale, "the modules are half units on Gillis' flatbed trailers waiting to be moved to a purchaser's lot by Gillis, and are properly considered tangible personal property." 319 S.E.2d at 855. In the instant case, Petitioner delivers the units to the lot, puts them on the crane, and actually begins the process of



affixing the homes to the property. Thus, Petitioner in this instance is much closer to the actual real estate construction than was Adrian. The opinion of the Georgia Supreme Court is poor public policy, and it should not be followed.

Respondent, in its very weak survey of other state decisions, has failed to cite the case of Wisconsin Department of Revenue v. Sterling Custom Homes Corporation, 283 N.W.2d 573 (Wis. 1979). In that case, the Wisconsin Supreme Court did see the nature of the transaction. In a well-reasoned opinion, the court stated:

In reaching our conclusion that Sterling Homes was a contractor and a consumer of the goods, we look to the general scope of its activities in its home-construction enterprise. 283 N.W.2d at 574.

The facts of the Wisconsin case were almost identical to the present facts:

When the foundation was completed and the builder was ready to erect the house, the taxpayer loaded the components in the sequence that conformed to the order that the components would be used at the job site. The components were delivered to the job site by the taxpayer's trucks and drivers. At the job site, the larger components were unloaded by crane. The crane operators were hired by the builder, but were usually selected by one of the taxpayer's sales men. . . . Although the drivers' only defined on-site responsibility was to keep a report and respect to the erection, they often helped or supervised, because they were very familiar with the process. 283 N.W.2d at 574-5.

The court went on to say:

The taxability of the transaction transferring the components to the builder is dependent on whether Sterling Homes was engaged in "real property construction activities." If Sterling Homes was engaged in such an activity, then it is a contractor or a subcontractor and is a consumer of the tangible personal property used in real property construction activities and the sales tax applies to transfers to Sterling Homes and not by it.

The facts demonstrate that, in all respects but one, the taxpayer was engaged in 'real property construction activities. The lone exception is that Sterling Homes conducted its construction activities at a factory, rather than at the building site. The tax payer used the materials it purchased for only a single purpose -- to construct custom-designed homes to be assembled at predetermined locations on foundations which were specifically designed for the prefabricated components. The components thus assembled were consumed by the very process of fabrication, for which they would be useless in their fabricated form except for the very building for which designed.

The distinction between on-site and off-site construction of the components is not a criterion upon which the legislature has hinged the question of taxability. Rather, taxability is to be determined by whether or not the tax payer is engaged in 'real property construction activities.' The record leaves no doubt that Sterling Homes was so engaged. 283 N.W.2d at 575.

It appears that the Utah Supreme Court has adopted similar reasoning to that of the Wisconsin Court, in the very recent case of Chicago Bridge v. State Tax Commission, 196 Ut. Adv. Rep. 18 (Utah 1992). The court stated:

In effect, a real property contractor is treated as a consumer for sales tax purposes.

The reason for this rule is that materials which are purchased and then converted into real property would escape the sales tax because a sales tax is not imposed on the sale of real property. Real property contractors

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December 7, 1992

Mrs. Mary T. Noonan  
230 South 500 East, Suite 400  
Salt Lake City, Utah 84102

RE: Valgardson Housing Systems, Inc. v. Utah State Tax  
Commission, Case No. 920644-CA

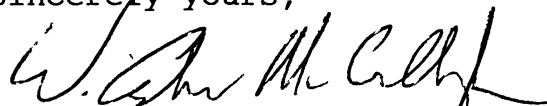
Dear Mrs. Noonan:

This letter is being written pursuant to Rule 24(i) of the Utah Rules of Appellate Procedure. On page 17 of Respondent's Brief is a citation to an unpublished opinion of the State of New York Tax Appeals Tribunal, purportedly in support of Respondent's position. The entire opinion of the Tax Appeals Tribunal is included in an addendum to Respondent's Brief.

Please be advised that this decision was annulled by the New York Supreme Court -- Appellate Division on November 25, 1992. This will be a published opinion, but since it is not yet published, I am enclosing a copy of the opinion of the Appellate Division with this letter.

Thank you for your consideration.

Sincerely yours,



W. Andrew McCullough  
(Also admitted in New York)

WAM/dao  
utctappeals.wam

cc: Valgardson Housing Systems  
Clark L. Snelson

**Supreme Court—Appellate Division  
Third Judicial Department**

Decided and Entered: November 25, 1992

65446

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In the Matter of LAKE CITY  
MANUFACTURED HOUSING INC.  
et al.,

Petitioners,

v

OPINION AND JUDGMENT

STATE OF NEW YORK TAX  
APPEALS TRIBUNAL et al.,  
Respondents.

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Calendar Date: October 13, 1992

Before: Mikoll, J.P., Crew III, Mahoney, Casey and Harvey, JJ.

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Blinkoff, Viksjo, Robinson & Saeli (Joseph F. Saeli Jr. of counsel), Buffalo, for petitioners.

Robert Abrams, Attorney-General (Daniel Smirlock of counsel), Albany, for Commissioner of Taxation and Finance of the State of New York, respondent.

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Casey, J.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal which sustained a sales and use tax assessment imposed under Tax Law articles 28 and 29.

Petitioner Lake City Manufactured Housing Inc. (hereinafter petitioner) is a Pennsylvania corporation engaged in the business of manufacturing modular homes. During the relevant audit period, 85 modular homes manufactured by petitioner were sold in New York. Based upon an audit of petitioner's invoices for the 85 sales, the State Department of Taxation and Finance concluded that 23 sales for which a "roll-on" or installation charge was included on the invoice were exempt from sales tax under Tax Law § 1115 (a) (17), but were subject to use tax under Tax Law § 1110. The remaining 62 sales for which no "roll-on" charge was shown on the invoice were determined to be subject to sales tax. Notices of deficiency were issued and petitioner initiated the administrative appeal process.

At the hearing before an Administrative Law Judge (hereinafter ALJ), the Department conceded that, pursuant to Matter of Morton Bldgs. v Chu (126 AD2d 828, affd on mem below 70 NY2d 725), petitioner owed no use tax. After hearing the testimony of the sales tax auditor who conducted the field audit and petitioner's president, the ALJ sustained the determination that 62 of the 85 sales were subject to sales tax. Respondent Tax Appeals Tribunal (hereinafter respondent) sustained the ALJ's determination, resulting in this proceeding to review respondent's determination.

Tax Law § 1115 (a) (17) provides an exemption from sales tax for "[t]angible personal property sold by a contractor, subcontractor or repairman to a person \* \* \* for whom he is adding to, or improving real property, property or land by capital improvement, or for whom he is about to do the foregoing, if such personal property is to become an integral part of such structure, building or real property". It is undisputed that in each of the sales, the modular home manufactured by petitioner was permanently installed on the customer's land and constituted a capital improvement (see, Tax Law former § 1101 [b] [9]). The critical issue in dispute at the administrative proceeding was whether petitioner not only sold the tangible personal property, but also installed it on the customer's land. According to respondent's interpretation of Tax Law § 1115 (a) (17), petitioner's sales are exempt if petitioner installed the modular homes, but the sales are taxable if petitioner did not install the modular homes. We see nothing irrational in this interpretation, which accords plain meaning to the statutory language.

On the issue of whether petitioner was the installer as well as the seller of the modular homes, respondent made the following relevant findings. Petitioner sold its modular homes through dealers or realtors who would accompany the customer to the customer's site to determine whether a modular home could be installed on the site. Petitioner would then custom build a modular home using the customer's design. The sections of the home were shipped to the customer's site, with petitioner making all of the arrangements for shipping. Upon arrival at the site, the sections were unloaded from the truck, assembled and permanently installed on a foundation. The "roll-on" crew which performed the installation work was W.D. Construction, and in every instance petitioner contacted W.D. Construction to arrange and schedule installation.

A "roll-on" charge was listed on the customer invoice in instances where the installer had inspected the site and advised petitioner what the charge would be. When the installer had not inspected the site or there were conditions at the site which might require extra work, no "roll-on" charge was listed on the invoice. Because the invoice accompanied the home to the site, W. D.

Construction sent its bill for installation services to the dealer when no "roll-on" charge was listed on the invoice. Petitioner maintained insurance on each home until it was permanently installed on its foundation, at which point title passed from petitioner to the customer.

Respondent concluded that in the absence of a contractor-subcontractor relationship between petitioner and the installer (W. D. Construction), petitioner did not both sell and install the modular home and, therefore, was not entitled to the exemption. In so doing, respondent rejected the testimony of petitioner's president that W. D. Construction was its subcontractor because of the absence of supporting documentation. The determination must be annulled as irrational and lacking in evidentiary support in the record.

Respondent's determination that no contractor-subcontractor relationship existed between petitioner and W. D. Construction is in direct conflict with the Department's conclusion that 23 of petitioner's sales were exempt under Tax Law § 1115 (a) (17). Inasmuch as W. D. Construction was the installer in each of those sales, it is clear that there was in fact a contractor-subcontractor relationship between petitioner and W. D. Construction for at least 23 sales and, therefore, we are of the view that respondent's finding of no contractor-subcontractor relationship in the 61 disputed sales cannot stand in the absence of evidentiary support in the record establishing a rational basis for the disparate treatment of the sales.

The Department relied exclusively upon the presence or absence of a "roll-on" charge on the invoice to determine whether a sale was exempt or taxable. Respondent agreed and also noted that for the 61 disputed sales petitioner was not billed for the installations and did not pay for them. These facts do not justify the disparate treatment accorded to petitioner's sales. The relationship between and among petitioner, W. D. Construction, the dealer and the customer was the same for all the sales: the dealer acted as petitioner's agent in effecting the sale to the customer and W. D. Construction installed the modular homes at petitioner's request. Regardless of whether a "roll-on" charge was listed on the invoice, installation of the modular home was an integral part of each sale, which was not completed by the passing of title to the customer until the home was installed. Neither the customer nor the dealer played any role in the installation of the modular homes. Petitioner arranged and scheduled the installation with W. D. Construction, and petitioner controlled the manner in which W. D. Construction installed the homes. When asked about petitioner's control over W. D. Construction's work, petitioner's president explained:

Well, there are certain things that are unique to every different manufacturer's home. And we have instructed him on how we want the house set and erected, how the roof goes. He's aware of all these things that are unique to our house. \* \* \*

The undisputed evidence in the record establishes that the relationship among the relevant parties, including petitioner and W. D. Construction, was the same, regardless of whether a "roll-on" charge was listed on the invoice. The mere fact that W. D. Construction sent its bill to the dealer instead of petitioner does not alter the relationship. The invoices in the record are addressed to the dealer. Thus, regardless of whether the installation fee is included in the invoice or billed directly by W. D. Construction, the dealer receives the bill for installation. It is apparent that in most cases both the shipping fee and installation fee, along with various options and extras selected by the customer, are separately stated items included in the total price paid by the customer, regardless of whether the installation fee is included as a "roll-on" charge on the invoice addressed to the dealer or is billed directly to the dealer by W. D. Construction.

The irrationality of determining petitioner's eligibility for an exemption based upon the presence or absence of a "roll-on" charge on the invoice for a particular sale is confirmed by the record. During the hearing, petitioner conceded that three of its sales of modular homes in New York during the audit period were sales of tangible personal property. All three sales were to a dealer in the Town of Cairo, Greene County, where the modular homes apparently were temporarily assembled as displays. Two of those sales, however, were included in the 23 sales which the Department had ruled exempt from sales tax (and later conceded were not subject to use tax) because a "roll-on" charge was listed on the invoices. As a result of the taxing authority's reliance upon the presence or absence of a "roll-on" charge to determine whether a sale was exempt, clearly a matter of form over substance, two sales which concededly should not have been exempt were exempted.

In conclusion, we note that this is not a case where respondent's determination rests on an assessment of the credibility of the testimony of petitioner's president that W. D. Construction was petitioner's subcontractor for the installation of modular homes in New York. Rather, the issue is whether the evidence in the record provides a rational basis for respondent's determination that although some of petitioner's sales in New York were exempt from sales tax, others were not exempt. In the absence of any evidence in the record that petitioner's relationship with W. D. Construction differed from sale to sale, there is no basis

for according different tax treatment to those sales. The determination must, therefore, be annulled.

Mikoll, J.P., Crew III, Mahoney and Harvey, JJ., concur.

ADJUDGED that the determination is annulled, with costs, and petition granted.

ENTER:

Michael J. Novack  
Clerk



are therefore considered the consumers because their purchases of materials that are incorporated into real property are the last transactions in which those materials can be subjected to the sales tax.

The test for determining whether a person is a real property contractor is based not only on who converts tangible personal property into real property, but also on the nature of the transaction. 196 Adv. Rep. at 20.

The Supreme Court went on to cite the earlier case of Nickerson Pump and Machinery Co. v. State Tax Commission, 361 P.2d 520 (Utah 1961) in which a manufacturer and installer of pumps on real property was determined not to be a real property contractor because the pumps were removable and were to be used at different locations. The court there found that the primary agreement was for the assembling of the pumps, and that installation in a specific place, which was temporary, was incidental to the contract. Obviously, none of those items are present in the instant case. This transaction is for the installation of a permanent housing unit, and, to reiterate the position of the Utah Supreme Court:

The test for determining whether a person is a real property contractor is based not only on who converts tangible personal property into real property but also on the nature of the transaction. id.

The Chicago Bridge case went on to determine that the large tanks manufactured by the Chicago Bridge and Iron Company in Utah were for permanent installation, and therefore made the Chicago Bridge and Iron Company a real property contractor even though the

\*materials were not installed in the State of Utah. It is interesting to note that the Utah State Tax Commission took exactly the opposite position in that case that it takes here. Once again, the State Tax Commission cannot have things both ways. Petitioner is a real property contractor and should be taxed as one.

Rather than looking at technicalities, the Wisconsin Supreme Court looked at the totality of the transaction. It saw the transaction for what it was, the construction of an improvement to real property. This appears to be the position of the Utah Supreme Court, as well. This is the only reasonable interpretation of the transaction as a whole, and it is the reasoning of the Wisconsin Supreme Court that should be upheld. It is just that reasoning that is apparent in Rule R 865-19-58S.A.3 which was cited in Petitioner's original brief, and which specifically states that "the sale of a completed home or building is not subject to the tax, . . . ." The Utah State Tax Commission should be required to live up to the spirit and the clear meaning of its own rule.

Petitioner once again directs the attention of the court to the Administrative Rules of Colorado and California (made part of the Addendum in Petitioner's main brief) which specifically tax sales of modular homes on the value of the materials in those modular homes, and set forth formulae very similar to the 50% formula set forth in the stipulated facts of these parties.


Respondent's contention that their view in this matter is the majority view is simply not supported by the facts. In fact, Respondent has changed its view several times since this action was commenced. Counsel for the tax commission has attempted to hold the transaction up to several different lights to find one that will support his position. He certainly has succeeded in confusing the issues. He has not succeeded in showing any authority or support for the peculiar meaning which his auditors have read into a statute which appears to speak for itself. The position of the Utah State Tax Commission in this matter not only flies in the face of the weight of authority in other jurisdictions, it is not a reasonable position. It is not a reasonable application of what discretion has been granted to the State Tax Commission. Thus, Petitioner should be granted the redetermination that it seeks, on the basis of whichever standard of review the Court determines should be applied.

#### CONCLUSION

Petitioner should be granted the relief requested in its original brief.

DATED this 6<sup>th</sup> day of November, 1992.

MCCULLOUGH, JONES & IVINS

  
W. Andrew McCullough (2170)  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of November, 1992,  
I did mail a true and correct copy of the above and foregoing Reply  
Brief, postage prepaid to Clark Snelson, Attorney for Respondent,  
36 South State Street, 11th Floor, Salt Lake City, Utah 84111.

W. Asher McCallister

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