

1960

Nickerson Pump & Machinery Co., Inc. v. State Tax Commission of Utah : Brief of Plaintiff

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

NICKERSON PUMP & MACHINERY
CO., INC.,

Plaintiff,

vs.

STATE TAX COMMISSION OF UTAH,

Defendant.

NOV 23 1960
Clerk, Supreme Court, Utah

Case No.
9353

BRIEF OF PLAINTIFF

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Defendant.

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9353

BRIEF OF PLAINTIFF

STATEMENT OF FACTS

1.

Nature of the Case

This is an original proceeding, initiated pursuant to 59-15-14, 15 and 16 and 59-16-11 - 13 UCA (1953), wherein plaintiff challenges the validity of a deficiency tax assessment imposed (R. 108, Ex. 1) and affirmed (R. 126-129) by

defendant.¹ The assessment is based upon fourteen transactions wherein plaintiff sold and emplaced water pumps for governmental units exempted from sales tax liability.

The primary issue is whether plaintiff is the *consumer* of water pump assemblies sold and emplaced by it under contracts specifying a single price for pump and emplacement. Defendant says it is, and—as to parts of such assemblies—that plaintiff should be charged with use or sales tax depending upon whether title passed within or without Utah.

If this Court adopts defendant's position (thereby overruling, or at least modifying, past Utah decisions), two subsidiary issues arise: whether various items within the assessment were correctly included; and whether defendant properly imposed penalties (including interest at 12% per annum). These subsidiary issues will require consideration of areas in which defendant's decision departs from stipulations at formal hearing.

By paragraph 3 of its petition for Writ of Certiorari and for Review, plaintiff also has complained of evidentiary rulings at formal hearing before defendant (note particularly R. 36-37, 74-76, 122, Ex. 15).

The amount of tax in question, while considerable, is not staggering. Despite this, a decision favorable to defendant would, as precedent, have important economic consequences. In the short view, it would subject all other Utah water pump

¹No objection is lodged against the imposition of the sales tax specified at Exhibit A, Schedule 1 of the deficiency notice, as amended, amounting to \$56.00 plus interest; as to such segment, however, plaintiff protests the imposition of penalties (including interest at 12% per annum). It will be noted that the credit to plaintiff for bad debts exceeds the tax deficiency hereby conceded. If bad debts are set-off only against tax deficiencies arising in the same year, the conceded deficiency is \$4.84 plus interest at 6% per annum.

dealers to deficiency assessments—complete with interest and penalties—of the type here challenged.² Patently, this would constitute, in arid Utah, a large sum. The gain to the State would be diminished somewhat by the cost of auditing the books of other dealers and by claims for refund of sales tax erroneously collected by such dealers from private lump-sum buyers on the assumption that the buyers were consumers. In the long term, the revenue of the State would be reduced. Governmental units would insist that separate contracts be entered into for, respectively, sale and emplacement. Otherwise, the cost to the unit would be increased by the cost of the sales and use tax paid by the dealer; that cost, of course, would be passed on to any lump-sum public buyer.³ But private persons would insist that water pump purchases be made under lump-sum contracts. In this manner, they would absorb only the tax paid by the dealer and passed on to them rather than the tax on the sales price to them. This would afford private buyers an advantage in that their actual cost would be reduced by the amount of the sales and use tax percentage (currently 2% or 2½%) times the dealer's mark-up over wholesale.

Plaintiff has assigned (Petition for Writ of Certiorari and for Review, par. 3) as error the incompleteness of defendant's findings (R. 126-128), and ~~to~~ the fact that they express bare ultimate conclusions of law. It is apparent from their reading

²Defendant excluded some evidence of trade practice (R. 36-37, 74-75, 122, Ex. 15). The testimony of witnesses Nickerson, Richards, Templeton and Hilbert, however, establishes that there has been uniform treatment by the industry (R. 66-67, 68-69, 72, 77-78, 95). If there be any doubt of this, it is negated by the firm assurances of public buyers that tax payments were not requisite (R. 44-46, 74, 109-110, Ex. 2-3; R. 118-119, Ex. 11-12), which assurances seemingly were buttressed by the then practical interpretation of defendants (R. 63, 97-98).

³Such procedure has been used subsequent to service of the instant assessment (R. 47).

and a comparison of them with plaintiff's pleading (R. 13-16) that such findings do not approach adequacy, see *Thomas v. Farrell*, 82 Utah 535, 26 P.2d 328, 330 (1936); 73 C.J.S., *Public Administrative Bodies and Procedure* §152 at page 486. Inasmuch as full appellate understanding of the questions presented may be had from a reading of the pleadings and record, plaintiff does not urge that remand to defendant for proper findings is requisite, 5 *Moore's Federal Practice* 2662-64.

The true significance of the inadequacy of defendant's findings is that they are reflective of the inadequacy of defendant's determination.

2.

Evidentiary Facts of Record

At formal hearing, defendant produced two witnesses, Paul M. Holt, its chief auditor, (R. 20-29) and A. C. Goates, its audit supervisor, (R. 97-98). Plaintiff called an adverse witness, William H. Buttolph, the commission auditor initially responsible for the instant deficiency assessment, (R. 30-41). Plaintiff's case-in-chief consisted of the testimony, largely stipulated, of R. H. Nickerson, its president, (R. 41-66; R. 75-97), A. Z. Richards, Sr. (R. 66-70) and Win Templeton (R. 70-73), both civil engineers specializing in the development of water wells and whose firms were responsible for the drawing of specifications for a substantial proportion of the sales here in question, and of Robert Hilbert, manager of the Salt Lake County Water Conservancy District, (R. 73-74). In addition, 17 exhibits were admitted, one rejected (R. 108-125).

The facts elicited were, in large measure, undisputed. In

those cases where dispute, real or imagined, existed, plaintiff will support its recitation by footnote.

Plaintiff and its predecessor sole proprietorship and partnership have been in the business for about thirty-six years. It is a dealer in pumping and allied equipment, specializing in water pumps. At all times here important, it held a Utah retail sales license (R. 42).

Three types of pumps are sold by it: submersible deep well pumps, deep well line shaft pumps, and booster pumps (R. 47). The former two types service wells which range in depth up to 1,000 feet; the wells in question are between 400 and 700 feet deep (R. 78). A pamphlet regarding submersible deep well pumps was introduced as Exhibit 7 (R. 114). Their distinguishing characteristic is that their motor is below water level, at the end of the pump shaft (R. 49). A pamphlet regarding deep well line shaft pumps was introduced as Exhibit 6 (R. 113). Their distinguishing characteristic is that their motor is on the top of the pump, at or about ground level (R. 49). Such pumps will produce from 200 to 4,500 gallons of culinary water per minute (R. 78, 92). Such pumps, including their extension pipes, range in weight from 700 pounds up to eighteen tons (R. 81). The deep well line shaft may be either water or oil cooled (R. 80-81). A pamphlet regarding booster pumps was introduced as Exhibit 9 (R. 116). While the purpose of deep well pumps is to bring water from a well to a water line, the purpose of a booster pump is to give pressure to the water as it goes thorough the line (R. 52). The booster pump is connected to the pipes at ground level (R. 52, 116, Ex. 9, p. 7). Plaintiff assembles booster pumps prior to emplacement (R. 51).

Because of the weight and bulk of the pumps, buyers are unable to emplace them in wells. As a "necessary evil" of the business of selling pumps, plaintiff emplaces them in the majority of instances. Plaintiff owns and operates a crane for the purpose of emplacing deep well pumps. Emplacement is not a profit item, being done at cost. Those of plaintiff's competitors who do not have the facilities for emplacement hire subcontractors to do so (R. 43, 73, 77-78).

Plaintiff and its competitors sell and emplace both for public and private buyers. Some 70% of plaintiff's sales are to private individuals. In none of its dealings, private or public, is there an express agreement as to whether the pump assembly, after emplacement, will be realty or personalty (R. 75-76). The security device used by plaintiff on private sales is the title retaining or conditional sales contract, under which it has effected repossessions. It has never filed a mechanic's lien (R. 44,75). Both plaintiff and its competitors charge sales tax to private persons. When a lump sum contract is used, sales tax on the entire amount, including installation, is charged private buyers, as required by defendant's regulations (R. 43-44, 46-47, 67-68, 102-105). Auditor Buttolph did not object to plaintiff's method of dealing with private contracts, although the collection of sales tax, rather than the payment of use tax, on plaintiff's lump sum contracts with private buyers would be improper under defendant's theory.⁴

⁴Defendant may dispute this statement. Although auditor Buttolph's testimony was, admittedly, evasive and contradictory, the following is clear: (a) according to both Buttolph and his superior, Holt, Buttolph covered all public and private sales files of plaintiff (R. 24, 30-31); (b) plaintiff has filed no use tax return (R. 31-32, 34); (c) according to Buttolph, plaintiff owed no tax upon its private transactions (R. 33, 35). Plaintiff concludes that auditor Buttolph's auditing endeavors were practical, not conceptualistic, that the test employed was one of increased revenue rather than increased consistency, and that auditor

Plaintiff's contracts with public buyers likewise are both separate and lump sum (R. 44, 90). In this connection it will be noted that defendant amended its assessment to delete certain non lump sum contracts (R. 108, Ex. 1, page 4), and that one of the sales here involved, Midvale City, No. 8833, was not under a lump sum contract (R. 60-61). Plaintiff, considering that the buyer—not it—*consumes* pumps, and in view of the fact that public buyers are exempt from sales tax, has not charged sales tax to such buyers nor has it paid use tax (R. 44).

The usual chronology of plaintiff's sales is as follows:

1. The engineer for the buyer, public or private, prepares an invitation to bid and specifications, outlining in detail the type or types of pumps needed, and whether or not a lump sum bid is sought (R. 46, 66, 70, 79). Examples of specifications appear as Exhibits 3, 16 and 17 (R. 110, 123-124).

2. Plaintiff bids according to the specifications. Prior to making its bid, plaintiff prepares a computation sheet which is retained in its files. This computation sheet shows clearly the cost of labor added to the bid. This cost, not a profit item, is computed on the basis of \$90.00 per day, for the emplacing equipment and a crew of two to three men. This cost is not a variable item—expected profit, not cost items such as emplace-ment, are reduced if competition demands (R. 43, 46-47, 90-91).

3. If the contract is awarded it, plaintiff then orders the specified pumps and ancillary equipment from its suppliers.

Buttolph's activities and testimony are an example of "the edacious minotaur, tax", referred to in a recent dissenting opinion, *Pender v. Alix*, Utah, 354 P.2d 1066, 1070 (1960).

Plaintiff normally does not store pumps. All such suppliers either are wholesalers or supply plaintiff at wholesale prices. Byron Jackson deep well and Aurora booster pumps are specialty goods, manufactured to specification. The goods are shipped either to plaintiff or the well site. Except for Cutler Hammer, shipping costs are prepaid by the seller. Byron Jackson specifies that title passes f.o.b. factory, California, but no other seller specifies where or when title passes. Resale certificates are given in-state sellers, but not out-of-state sellers (R. 55, 93-95).

4. Prior to emplacement of deep well pumps, the buyer, acting individually or through an independent contractor other than plaintiff, digs and lines the water well with casing (R. 47, 49, 78-79). The cost of the buyer's digging the wells, defendant's counsel elicited, is \$1.10 to \$1.20 per foot per inch of diameter (R. 78). The buyer, not plaintiff, also builds a concrete foundation around the mouth of the well, and builds a water line extending toward the pump (R. 47-48, 81, 82). Exhibits 4 and 5 show a water well prepared for emplacement (R. 48, 111-112).

5. In the emplacement of a deep well pump, plaintiff's crane lowers it and its pipe into the prepared well. As the pump base or platform reaches the prepared foundation, plaintiff is careful to align it, making it plumb. This is done by grouting the foundation with cement to even it. Plaintiff lubricates the pump base or platform so that it will not be cemented to the foundation, such cementing being "the last thing you would want." If a submersible pump is used, a specially prepared cable is also lowered into the well to furnish power to the motor. If a well is flowing, tending to seep,

the pump platform is bolted to a flange attached to the well casing, thereby "sealed." This is not done if the well does not flow. On occasion, plaintiff bolts an electric panel to a near-by wall and attaches the pump's cable to it; all pumps here involved use electric power. The outlet of the pump is attached, perhaps by a metal band, to the buyer's main (R. 48-51, 81-86, 93, 95). Exhibits 6-8 illustrate the emplacement of pumps (R. 113-115).

6. A booster pump is emplaced and bolted on a cement foundation and attached to pipes prepared for its connection by the buyer (R. 51-52). Exhibit 9, page 7 illustrates an emplaced booster pump (R. 51, 116).

7. The engineers in charge supervise the emplacement of all pumps (R. 67, 70). The pumps, after emplacement, retain their identity as pumps (R. 55-56).

8. Plaintiff does not ever use the pump to pump water. The buyer does this (R. 54).

Detailed descriptions of each transaction here involved are contained at R. 56-63. Each, except Midvale City, No. 8833, was performed under a lump sum contract; the exception concerns a pump sold without any agreement whatever for emplacement, and an agreement three months later that plaintiff would emplace such pump (R. 60-61, 120, Ex. 13). On the lump sum contracts, plaintiff's computation sheets show that the percentage of labor cost in the contract price ranged from 2.7% (Salt Lake County Water Conservancy District deep well line shaft 10703, R. 62) to 6.8% (Logan City Corporation, 9282, R. 62). The following transactions involved submersible deep well pumps in non-flowing wells which, therefore, were

not bolted to a flange: Midvale City, 8271; Tooele, 8603; Metropolitan Water District, 9237. The following transactions involved submersible pumps which were so bolted: University of Utah, 8541; Salt Lake County Water Conservancy District, 8921; City of Fillmore, 9164; Salt Lake County Water Conservancy District, 9067; South Salt Lake City, 10481. The following transactions involved deep well line shaft pumps, all so bolted: Town of North Salt Lake, 8596; Salt Lake County Water Conservancy District, 10703. The following transactions involved booster pumps: Salt Lake County Water Conservancy District, 8921; Logan City Corporation, 9282; Salt Lake County Water Conservancy District 10703.

Plaintiff's case was, thus, presented by the testimony or stipulated testimony of representatives of the parties to the usual transaction of sale, the dealer (Mr. Nickerson), the buyer (Mr. Hilbert) and the consulting engineer (Mr. Richards and Mr. Templeton). The testimony of each was demonstrative of the fact that the parties do not, and could not reasonably, intend that pump assemblies become permanent additions to the well, the pipes or to the realty upon which they are situate (R. 53-54, 67-68, 71-74, 79-80, 86-87). First, pumps are quite often removed for repair. Such repair is not at all unusual in this area, where wells tend to be sandy. It is impossible to repair any deep well or the motor of a submersible without removing the pump from the well. The surface motor of a line shaft pump may be repaired while the pump remains in the well. Repair is more likely for the pump than for the motor inasmuch as the pump's bearings, spaced every ten feet, are subjected to considerable wear. Assuming optimum conditions (no sandy or hard water), seldom extant in Utah,

the maximum life of a pump is 20 years. It is recommended that, even though no difficulty is apparent in its operation, a deep well pump be removed every 5-7 years for a preventive maintenance check (R. 53, 67, 71, 73, 79-80, 86-87). Secondly, deep well pumps are removed when repair to the well or well lining is required (R. 53, 673). Third, pumps are removed when the well's potential is exhausted (R. 71). Fourth, pumps are removed when it is desired to develop the facility in question to its full potential. It is usual for a well to be developed by the engineer in charge to a given potential and to emplace a pump with a lesser potential. This is because the area to be served may not, at the time of emplacement, have need for the well's full potential. As the need increases, the former pump is removed, and either used elsewhere or traded in. A given well can receive various sized pumps. An example of this procedure is Midvale City, No. 8276, one of the transactions here in question (R. 53-54, 56, 67, 71, 74, 95). Fifth, if the user has more than one facility, pumps are removed and interchanged to make use more fully of the potential of all facilities (R. 54, 71, 74). The need for removal is equivalent as between deep well and booster pumps (R. 72).

In view of the frequency of pump removal, water engineers such as Mr. Richards and Mr. Templeton design projects to facilitate pump removal (R. 67, 71). If a pumphouse is erected before or after the emplacement of the pump, it is invariably⁵ designed with a hatch to facilitate emplacement

⁵Auditor Buttolph, who professed knowledge of the pumping business, although he hadn't visited the sites in question, or interviewed the engineers or buyers involved in the subject transactions, would prefer the word "sometimes" (R. 35-38). It will be remembered, in evaluating his credibility, that it is Buttolph's assessment which is in question.

and removal (R. 52, 67, 71). No damage is caused to the real estate when the pump is removed, and it or a replacement pump may be emplaced in the same manner as were the well virgin. An example, once again, is Midvale City, No. 8276. Removal consists of unbolting and lifting the pump; the only thing broken is, perhaps, an inexpensive band on the connection between the pump and the water main (R. 54, 56, 67-68). Exhibit 10 illustrates the removal of a pump from a pump house (R. 53, 117).

In order to avoid duplication, the testimony of defendant's witnesses as to the propriety of penalties (including 12% per annum interest) will be deferred until the appropriate portion of plaintiff's argument, as will defendant's departure from two at-hearing stipulated amendments to the deficiency assessment.

STATEMENT OF POINTS

- I. Plaintiff does not consume pumps.
- II. Penalties were improperly assessed.
- III. Certain items of the assessment were incorrectly imposed.

ARGUMENT

I.

PLAINTIFF DOES NOT CONSUME PUMPS.

A.

BOTH SALES TAX AND USE TAX ARE TAXES ON THE CONSUMER.

Sales tax is a levy upon the consumer of personal property, *E. C. Olsen Co. v. State Tax Commission*, 109 Utah 563, 168 P 2d 324, 326 (1946). So is use tax, 59-16-3, UCA (1953). The two taxes are correlative and complementary, the latter having been passed for the purpose of removing "the theretofore existing discrimination in favor of out-of-state merchants," *Union Portland Cement Company v. State Tax Commission*, 110 Utah 135, 170 P. 2d 164 (1946), *modified on rehearing*, 110 Utah 152, 176 P. 2d 879, 881 (1947); *Geneva Steel Co. v. State Tax Commission*, 116 Utah 170, 209 P. 2d 208 (1949). If goods are purchased in-state by a consumer, the sales tax applies, see *Western Leather & Finding Co. v. Sales Tax Commission*, 87 Utah 227, 48 P. 2d 526 (1935). If goods are purchased out-of-state by an in-state consumer and no tax is owing or has been paid previously, the use tax applies, *Ford J. Twaits Co. v. State Tax Commission*, 106 Utah 343, 148 P. 2d 343 (1944).

The key term is "consumer."⁶ If plaintiff, in sale and emplacement, is a consumer, it should pay tax on materials to be consumed—sales tax if title to the materials passes to it in this state, use tax if title passes out of state. If a private buyer of a pump assembly is the consumer, he should pay sales tax. If a public buyer of a pump assembly is the consumer, no tax is paid because of the exemption provided by 59-15-6

⁶We are not here concerned with the sales tax on certain "services," 59-15-4 (b)(1)(2)(e)(f)(g), UCA (1959 Supp.), a fact of which defendant's counsel at hearing apparently was not fully aware (R. 77). Nor does plaintiff, in this case, despite the power of the legislature to impose a tax upon any "service" it may perform in the emplacement of pump assemblies, *Howe v. Tax Commission*, 10 Utah 2d 362, 353 P.2d 468 (1960); *Francom v. State Tax Commission*, No. 9271 (Utah, 1960). Plaintiff simply contends that it is not a consumer within the meaning of the tax laws currently applicable to its business.

UCA (1953) as implemented by Sales Tax Regulation 54 (R. 103-104).

Put another way: if, in the transactions here involved, plaintiff consumed the pump assemblies⁷ in question, it is subject to sales or use tax, whether the buyer is private or public. If, on the other hand, the buyer is the consumer, private buyers should pay sales tax (to be collected by the seller) and public buyers should pay no tax at all.

B.

UTAH DECISIONS PROVIDE DEFINITION OF THE TERM "CONSUMER."

On three occasions since legislative imposition of the sales tax, L. 1933, ch. 63, this Court has had occasion to define the meaning of the term "consumer," *Western Leather & Finding Co.*, supra; *Utah Concrete Products Corp. v. State Tax Commission*, 101 Utah 513, 125 P.2d 408 (1942); *Union Portland Cement Co. v. State Tax Commission*, 110 Utah 135, 170 P.2d 164 (1946), two of which were decided after enactment of the original use tax, L. 1937, ch. 114.

In *Western Leather & Finding Co.*, defendant had assessed plaintiff with sales tax liability for leather and shoe findings sold by it to Utah shoe repairers. After noting that plaintiff was liable only if the repairers were "consumers," this Court turned, at 48 P.2d 528, to Webster's New International Dictionary for the definition of "consume":

⁷The process of assembling the pumps from component parts is a "manufacturing" or "compounding for sale" within the meaning of 59-15-2 and 59-16-4, UCA (1953), hence not taxable as consumption.

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

It was then held:

"A person who places shoes, heels, and patches on old shoes does not consume material within the definitions above quoted or within the meaning of the statute. The consumer is the person who wears the shoes after they are repaired."

In *Utah Concrete Products Corp.*, sale tax was held to be applicable to purchases by road and building contractors from a supplier of concrete pipe, cinder blocks and related products. Such pipe, blocks and products were incorporated "as one of many units which go to make up buildings, structures, or roads," *id* at 125 P. 2d 410. This Court noted that the road and building contractors did not purchase the products

"for reselling them as such *in their original form*, but for the *purpose of changing their very nature from personal to real property*. In short, labor and many other materials enter along with the plaintiffs' (the suppliers') products *to make up the particular structure*, and they are all used or consumed in the *process of producing a new entity*." *id*. (Emphasis supplied).

This Court held, therefore, that road and building "(c)ontractors are consumers within the meaning of our act because they are the *last persons in the chain to deal with such products*

before incorporation into a separate entity and before such products lost their identity as such . . ." *id* at 125 P. 2d 411. (Emphasis supplied).

In *Union Portland Cement Co.*, a plaintiff-manufacturer was held to be liable for use tax on iron grinding balls, fire-brick and coal utilized in the manufacture of plaintiff's products. This Court, speaking through the same Justice as in *Utah Concrete Products Corp.* in answer to the problem of who was the consumer cited the definition from Webster's relied upon in *Western Leather & Finding*, *supra*. Also quoted, at 170 P.2d 171, was 9 *Words and Phrases, Permanent Edition* 10 delineating a "consumer" as: "one who uses economic goods and so diminishes or destroys their utilities; opposed to producer; and 'consume' means to use up, expend, waste, devour, with synonyms destroy, swallow up, engulf, absorb, waste, exhaust, spend, expend, squander, lavish, dissipate, burn up." Liability was imposed because the materials in question were worn away in the manufacturing process.

Although the Legislature has devoted regular attention to the sales and use tax acts, amending the definitions sections by L. 1933 (2nd SS), ch. 20; L. 1935, ch. 91; L. 1937, ch. 110; L. 1939 ch. 103; L. 1943, ch. 92; L. 1949, ch. 83; L. 1955, ch. 126; L. 1957, ch. 125, 128, it has not deemed it requisite to modify this Court's understanding of the meaning of the term "consumer."

C.

PLAINTIFF IS NOT A CONSUMER OF PUMPS—BUYERS FROM IT ARE.

A cursory reading of the statement of evidentiary facts demonstrates that plaintiff, in the transactions in question, was not a *consumer*.

By the test enunciated by Webster, and reflected by *Western Leather & Finding Co.* and *Union Portland Cement Co.*, plaintiff did not consume the pumps in question. *By definition, a water pump pumps water.* That is its purpose, its use, its reason for existence. Plaintiff does not pump water from the water pump it emplaces (R. 54). In consequence, plaintiff does not, in emplacing: (1) destroy the substance of a pump; (2) spend the pump; (3) use up the pump; (4) devour the pump; (5) waste the pump. It is the buyer (in these transactions, a public body) which, through its use of the water pump to pump water, causes the substance of the pump to be destroyed, spends the pump, uses up the pump, devours the pump and wastes the pump. A water pump of the type here involved has a maximum useful life of 20 years (R. 79). Its use, in the well in which emplaced or in other wells, starts after, does not end with, emplacement.

By the test enunciated by *Words and Phrases* and reflected by *Union Portland Cement Company*, plaintiff is, for like reason, not a consumer. Plaintiff, by emplacement, is not "one who uses economic goods and so diminishes or destroys their utilities." Quite the contrary. Plaintiff, in emplacing pumps, activates their utilities—a water pump out of water has no utility. The utility of a water pump is destroyed in 20 years at most, through use by the buyer. Equally, plaintiff, in emplacing the pump, does not use it up, expend it, waste it, devour it, destroy it, swallow it up, engulf it, absorb it, waste

it, exhaust it, spend it, expend it, squander it, lavish it, dissipate it, or burn it up. There is no evidence that plaintiff does so. There is every evidence that the buyer from plaintiff, through its utilization of it, does so. *Utah Portland Cement Company* is instructive, it should be added, for its analogy of the iron grinding balls, firebrick and coal there involved to manufacturing machinery, *id* at 170 P.2d 172. It is patent that this Court there considered that machinery was consumed in its use as machinery and not in its emplacement in the manufacturing plant.

By the test enunciated in *Utah Concrete Products Corp.*, plaintiff did not consume the pumps in question. Pumps are not, as are pipe, blocks and like products incorporated "as one of many units which go to make up buildings, structures or roads," changed in their very nature. They are sold as pumps. They remain pumps. They are not permanently incorporated into the well. As contrasted with products going into a roadway, wear on the pump does not directly affect the well. On this, the testimony is undisputed. (1) Pumps are quite often removed for repair to the pump. (2) Pumps are removed for repair of the well. (3) Pumps are removed when a well's potential is exhausted. (4) Pumps are removed when another pump is to be emplaced in order to develop the well's potential to its fullest. (5) Pumps are removed to exchange them with other pumps. At most, the life span of a pump is 20 years, and in Utah probably much less (by way of illustration, a common law adverse possessor taking possession of a well one week after the emplacement of a pump, would not own the well before the pump—if it were allowed to remain—was spent; lest one think of statutory adverse possession, let it be remem-

bered that it is recommended that pumps be removed at least every five to seven years for preventive maintenance). These are not mere possibilities of removal. Removal is sufficiently probable that consulting engineers plan wells and pumphouses to facilitate removal (R. 52, 67, 71). In emplacement, pumps do not lose their identity as such. They are not incorporated into a separate entity. Emplacement is certainly not for the purpose of changing the very nature of pumps from personal to real property in the process of producing a new entity. Once again the matter of planned removability arises. Engineers plan for it, plaintiff plans for it (taking care, for instance, to lubricate the pump platform so that it will not stick to the cement grouting on the foundation—R. 83), and the buyer plans for it (anticipating the trading in or exchange of pumps). It follows that pumps, through emplacement, are not “used or consumed in the process of producing a new entity,” *id* at 125 P.2d 410.⁸ Plaintiff is not a consumer.

Plaintiff is aware that the conclusions (labeled findings) of defendant’s decision purport to determine that it is a consumer. Such conclusions are at odds with the undisputed evidentiary facts. The language of *Fuller v. Mountain Sculpture*, 6 Utah 2d 385, 314 P.2d 842, 846 (1957), is appropriate: “Notwithstanding the fact that considerable tolerance must

⁸Auditor Buttolph hazarded that a pump was much like a window or a door. Although no evidence as to the reasons for removing windows was presented, Auditor Buttolph suggested that they would be removed more often than would pumps (R. 39). It is suggested that, in his testimony to this effect, Auditor Buttolph was, in the common experience of reasonable men, (1) mistaken; (2) experiencing a temporary mental lapse. His analogy of working machinery to doors and windows is for instance most peculiar when one considers the need for repairs alone. How many windows and doors are traded in? How many windows and doors are exchanged from one opening to another? Few, if any. But the uncontradicted testimony of experts is that these are common experiences with pumps.

be indulged in favor of the findings of the trial court because of its advantaged position in immediate contact with the trial and the parties, it nevertheless may not obdurately refuse to find facts which are established by credible and uncontradicted evidence." What was true in *Fuller* is doubly true here, where the evidence was largely a result of stipulated testimony and where the "finder" was, in reality, the adverse party.

D.

PLAINTIFF EMPLACES PUMPS AT COST.

The undisputed evidence is that plaintiff's emplacement of pumps is not a profit item, but rather is done at cost as a necessary evil of its business. The pumps are of considerable size and buyers (even one of the importance of Salt Lake County Water Conservancy District) do not have the truck and crane necessary for emplacement and removal.

It is well established that the primary nature of a concern's business, not incidental factors entering into the conduct of such business, will determine tax liability. Thus in *Washington Printing & Binding Co. v. State*, 192 Wash. 448, 73 P.2d 1326 (1937), the Washington Supreme Court held that the taxpayer, a printer, performed essentially a service although the state argued that it was "selling" the products of its presses. In *Young Electric Sign Co. v. State Tax Commission*, 4 Utah 2d 242, 291 P.2d 900 (1955), this Court ruled that, where an electric company's total charges for repairs to signs now owned by it included parts and material costing such company only 6% of the total bill, such furnishing of parts and materials was incidental and the service charges, including the cost of

parts and materials, were not subject to sales tax. In *McKendrick v. State Tax Commission*, 9 Utah 2d 418, 347 P.2d 177 (1959), this Court affirmed the determination of defendant that the services of an artificial limb manufacturer were incidental to the sale of such limbs.

In the instant case, it is obvious that the service performed by plaintiff is incidental to its business of selling pumps. No particular skill, just manual labor, is required in emplacement. Emplacement is performed at cost as a "necessary evil" of the business. A very small percentage of the total sales price (2.7% to 6.8%) is attributable to emplacement cost.

From computation sheets prepared by plaintiff prior to bid, the cost of the labor item can be readily ascertained. Defendant's apparent emphasis upon lump sum contracts is, therefore, highly unrealistic.

Plaintiff submits, therefore, that any service performed by it is at cost and is merely incidental to its primary business of selling pumps.⁹

E.

PLAINTIFF IS NOT A CONSUMER UNDER DEFENDANT'S REGULATIONS.

1.

Defendant Lacks Power to Impose Tax on a Non-Consumer.

It is dubious that, in view of exhaustive judicial treatment of the meaning of the term "consumer," defendant should or

⁹Even were it otherwise, it must be remembered that there is no excise tax on emplacement services.

could regulate thereon. Defendant has taken it upon itself so to do, however. Interestingly enough, its pride of authorship seemingly is such that its decision avoids citation of this Court's decisions, substituting therefor its own regulation.

By the seventh finding of its decision, citing present Sales Tax Regulation 58, defendant apparently indicates reliance upon its regulations to support imposition of sales and use tax liability upon a non-consumer. It is plaintiff's position that, even under the regulations promulgated by defendant, it is not liable.

It must be kept in mind however that the Legislature, not defendant, has the power to define the subjects of taxation. In *Western Leather & Finding Co.*, at 48 P.2d 528, it was stated:

"The Legislature is not permitted to abdicate or transfer to others the essential legislative function with which it is . . . vested. The imposition of a tax and the designation of those who must pay the same is such an essential legislative function as may not be transferred to others. . . . The commission is empowered merely to make rules and regulations, etc., in conformity with the act."

In *Utah Concrete Products Corp.*, at 125 P.2d 412, this Court stated:

"(T)he interpretation placed on the language of the statute by the Tax Commission must not do violence to its apparent meaning. . . . Government agencies cannot deprive the courts of their judicial functions nor can the agencies extend the operation of the statute by administrative findings."

In point is *Washington Printing & Binding Co. v. State*, supra. A printer, who printed tariffs for a railroad bureau, was held to perform a "service" and not to be engaged in retail selling. A Washington Tax Commission collection therefore was refunded. The state argued that its Tax Commission had a regulation which expressly specified that the transactions in question were subject to sales tax. The Washington Supreme Court replied at 73 P.2d 1328:

"The Tax Commission cannot, by such rule, impose a tax upon property or a transaction that is not mentioned as being taxable. The rule making power is given only for the purpose of empowering the commission to carry out the provisions of the statute."

Plaintiff may not, by regulation, make a "consumer" in law out of one who is not a consumer in fact. It may be that the imposition of a fictional standard would be wise. Be that as it may, defendant is not empowered to enact such a standard.

2.

The Commission's Regulations Do Not Apply Retroactively

Attention is directed to the rule set forth at 73 C.J.S. *Public Administrative Bodies and Procedure*, § 107, pp. 429-30. It is there noted that, aside from the issue of whether an agency may promulgate retroactive regulations:

"(A)n administrative rule or regulation will not be construed to operate retrospectively where the intention to that effect does not unequivocally appear Even though an administrative agency is not bound by the rule of *res judicata* . . . , it is bound to recognize the validity of a rule of conduct prescribed by it, and not to repeal its own enactment with retroactive effect."

As has been noted, the regulation cited at paragraph 7 of plaintiff's findings became effective on July 1, 1959 (R. 106-107). The last date of the instant deficiency assessment is June 30, 1959 (R. 108). Prior thereto the text of Regulation 58 (R. 104-106) was as follows:

MATERIALS AND SUPPLIES SOLD BY OWNERS, CONTRACTORS AND REPAIRMEN OF REAL PROPERTY (APPLIES TO SALES AND USE TAXES).—Such sales may be classified as follows:

I. To owners—sales are taxable—such sales are to final buyers and not for resale;

II. To contractors and subcontractors for use by them in fulfilling contracts for erecting, building on, or otherwise improving, altering or repairing the real property of others:

A. Where the contractor agrees for a lump sum to furnish the materials, supplies and necessary services, the sale to him of the materials and supplies is taxable as he becomes the consumer thereof or final buyer. Cost plus contracts are regarded as lump sum contracts for the purpose of this regulation. The above holding is true regardless of with whom the contract is drawn whether it be a governmental instrumentality or otherwise. In connection with government contracts the following exemptions exist:

1. Where the contract provides that title to the materials purchased shall vest in the government or instrumentality thereof prior to its use in the construction, the purchase by the contractor shall be deemed a purchase for resale and the contractor shall be required to obtain a sales tax license.

2. Sales to contractors who are authorized by the United States Government or an instrumentality thereof to make purchases in the name of the government or instrumentality thereof are deemed to be sales to an agent of the United States government or the instrumentality thereof and are, therefore, exempt from tax.

Governmental contractors claiming exemption from any purchases made pursuant to their contract must secure a clearance from the state tax commission prior to making such purchase. Supply houses should collect tax on all sales to contractors unless the contractor gives an exemption certificate and stipulates that proper clearance has been secured from the state tax commission.

B. Where the contractor agrees to furnish the material and supplies at a fixed price or at the regular retail price and to render the services either for an additional agreed price or on the basis of time consumed, the sale to him of materials and supplies is for resale and not subject to the tax. The contractor then becomes the retailer and the sale by him to the owner is a taxable sale. In this event the final buyer is the person whose property is improved, altered or repaired, and the sale is made at the time the contract or job is completed and accepted by the property owner.

In case a contractor enters into both of the above kinds of contracts, he shall be deemed to be a retailer or tangible personal property and shall register with the state tax commission, obtain a sales tax license, purchase all materials for resale and report his liability direct to the state tax commission.

Contractors and repairmen who enter into contracts or repair work of the type referred to herein include such persons as building, electrical, plumbing, paper hanging, sheet metal, bridge, road, landscape, excavating, roofing, or similar contractors or repairmen.

Contractors or repairmen in no case should give a resale certificate when they purchase materials, supplies, equipment or other articles for their own use and consumption. Such purchases, which would include fuel, cement mixers, trucks, tractors or other machinery and equipment, are taxable to the seller thereof.

This regulation is not applicable to contracts whereby the retailer merely agrees to sell and install a complete unit of

equipment under conditions whereby such unit does remain a chattel. In such instances the contract will not be regarded as one for improving, altering or repairing real property. For example, the maker of an awning or blinds agrees not only to sell them but to hang them; an electrical shop sells electrical fixtures and agrees to attach them; a dealer sells draperies and window shades and agrees to install them; a retailer sells an oil burner or heating equipment and contracts to install the same; a dealer sells linoleum and agrees to lay it; a cabinet maker sells show cases, counters and cabinets and agrees to install them; a retailer sells a sprinkling system and contracts to install it. A person performing such contracts is primarily a retailer of tangible personal property and should segregate the full retail selling price of such property from the charge for installation, as the tax applies only to the retail price of the property. If such retailer fails to make such segregation on the customer's invoice, the sales tax applies to the entire contract price including the installation charge. In no case will the retail price be deemed less than such person charges for similar materials and supplies to another installer.

Persons engaged in the foregoing types of business shall register with the state tax commission, obtain a sales tax license and report their liability directly to the state tax commission.

If defendant's erroneous recitation of an impertinent text was intentional, it may have been because it wished to avoid the effect of the last paragraphs of the pertinent text. This would not be accomplished, however, even were the present regulations applicable. The restriction of Regulation 58 led, effective the same date—July 1, 1959—to the expansion of Regulation 51. At all times here in question, Regulation 51 related to fabrication and machine work and had nothing to do with the issues at hand (R. 102). On July 1, 1959, it was expanded to cover not only fabrication, but also "Installation Labor in Connection with Retail Sales of Tangible Personal

Property" (R. 102-103). In substance,¹⁰ the concept of the last paragraph of former Regulation 58 was incorporated into present Regulation 51, to-wit:

"Dealers who sell tangible personal property and also agree to install the same on real property should segregate the full retail selling price of such property from the charge for installation as the tax applies only to the retail price of the property. If the retailer fails to make such segregation on the customer's invoice, the sales tax applies to the entire contract price, including installation charges.

"Retailers and dealers who enter into agreements of the type referred to above include such persons as dealers in awnings, draperies, window shades, heating equipment, carpeting, linoleum, show cases, electric fixtures and similar retailers."

If defendant intends to rely upon its own regulations, it properly should select the right one (the one in effect at the time in question). Even if defendant chooses to suggest that its current Regulation 58 is retroactive, it properly should cite Regulation 51.

3.

Plaintiff Sells Both Under Lump Sum and Non Lump Sum Contracts

Taken literally, Regulation 58, both in its pertinent and present form, identifies two types of contracts into which a seller who installs may enter: (A) lump sum contracts, wherein sales price and installation price are "lumped" into a single

¹⁰Chief auditor Holt preferred to state that the verbiage was "similar" (R. 27-28).

sum; (B) non lump sum contracts, wherein there are separate agreements as to, respectively, the amount of the sales price ~~and the amount of the sales price~~ and the amount of the installation price. It is undisputed that plaintiff enters into both types of contracts (R. 44).

Pertinent and present Regulation 58 says, as to this type of dealer: "In case a contractor enters into both of the above kinds of contracts, *he shall be deemed to be a retailer of tangible personal property . . .*" (Emphasis supplied). If plaintiff is a retailer, as the Regulations specify, he cannot be a consumer, for both the sales tax act and the use tax act define a retailer as a seller to the consumer, 59-15-2(e), 59-~~16~~-2(f), U.C.A., (1953).

Under the plain meaning of Regulation 58, therefore, defendant should have deemed plaintiff a retailer, not a consumer, and instructed its auditors to withdraw the instant assessment.¹¹ This Court should now do so.

4.

Defendant's Regulations Do Not Purport to Make Plaintiff a Consumer

Insofar as plaintiff has been able to discern any theory, other than *ipse dixit*, employed by defendant in asserting plaintiff's liability, it is this: (1) the pump assemblies, upon emplacement, become fixtures; (2) therefore, within the mean-

¹¹Chief auditor Holt would have objected to the instruction, for at hearing he indicated his belief that the language relative to both kinds of contracts related to a contract of sale followed by a contract to install (R. 26-27). This is, of course, neither kind of contract previously defined by the regulation. It is a separate contract of sale, followed by a hiatus, followed by a contract to install.

ing of applicable Regulation 58 and present Regulations 58 and 51, the pump assembly does not remain a chattel; (3) therefore, plaintiff is a "contractor" who has contracted, under lump sum contract, "for erection . . . on, or otherwise improving real property of others"; (4) therefore, plaintiff is a consumer. In the process of this theory, defendant is forced to disregard the "both lump sum and non lump sum" provisions of its regulations.

The theory is untenable on at least two counts.

The first fallacy of the theory is that, if it is applied, the regulations, either pertinent or present, are internally inconsistent. It is true enough that they speak in terms of chattels, but they then proceed to illustrate what is meant. According both to the pertinent regulation and its present counterparts, a seller, lump sum or not, is a retailer, not a consumer, when he "merely agrees to sell and install a complete unit of equipment under conditions whereby such unit does remain a chattel." As illustrations, however, the regulation specifies, among others, "an electrical shop sells electrical fixtures and agrees to attach them; . . . a retailer sells an oil burner or heating equipment and contracts to install the same; a dealer sells linoleum and agrees to lay it; a cabinet maker sells show cases, counters and cabinets and agrees to install them; a retailer sells a sprinkling system and agrees to install it." The pertinent regulation then adds, as if to emphasize, "(a) person performing such contracts is primarily a retailer of tangible personal property" The language in current Regulation 51 is somewhat more brief, but to substantially the same effect. After indicating that, in certain contracts, a retailer may "sell

tangible personal property and also agree to install the same on real property" and still remain retailers (that is, not be primarily liable for tax), the illustrations of "(r)etailers and dealers who enter into agreements of the type referred to above" include, among others, dealers in heating equipment, carpeting, linoleum, show cases, electric fixtures, and similar retailers.

The inconsistency of defendant's construction of the regulations is that the items mentioned therein (electric fixtures, heating equipment, linoleum, show cases, etc.) are ones which have been held, under the facts of the case, to be fixtures, or, put another way, to have lost their legal status as chattels upon installation, *Anno.*, 55 A.L.R. 2d 1044; 22 *Am Jur Fixtures* §§ 49, 55, 58. If, therefore, the regulations are taken at face value, they are self-defeating. They do not make sense, for they identify as illustrations of chattels items which may very well be, under the facts of a given case, fixtures. To construe the regulations as defendant apparently would have them construed, is to place them in a position in which this Court must disregard them because they are indefinite, uncertain, inconsistent, muddled and confused, hence inoperative, *Toronto v. Sheffield*, 118 Utah 460, 222 P.2d 594, 600, 604 (1950), and authorities there cited.

The second fallacy of the theory is that it apparently seeks to substitute a "fixture" test for the "consumer" test decreed by the legislature. In short, defendant's apparent theory is that it need only determine that goods installed on realty are "fixtures," that is that they lose their character as "chattels" and that it need not determine whether the person so installing

is, in fact a consumer or whether the items in question (here pump assemblies) have lost their identity as such. As noted previously, defendant has no power to impose tax liability upon a person who does not fall within the legislative imposition of liability, in this case upon a person who is not a consumer. Any attempt to do so by defendant is nugatory, for it is beyond defendant's power.

The fallacies inherent in defendant's theory, however, point to the proper construction of the pertinent regulation (and, for that matter, the present ones).

It is relatively clear that the pertinent Regulation 58 and its successors were drafted upon the basis of *Utah Concrete Products Corp.* They are best construed in the light of that decision. It will be recalled that, at 125 P.2d 410, this Court noted that the road and building contractors there in question were not reselling the products "in their original form," but for the "purpose of changing their very nature from personal to real property," that is to produce "a new entity"; again, at 125 P.2d 411, this Court spoke in terms of the products being incorporated into "a separate entity" and of losing "their identity as such." Regulation 58, unfortunately, appears in its emphasis upon "chattels" to pluck from context the language about the change of nature from personal to real property, dropping the key word "very" and the key term "new entity."

When read in context, *Utah Concrete Products Corp.* speaks in terms of consumption when personal property becomes real property *as a matter of law*, whatever the facts of the case. That is to say, when reasonable men could not disagree, despite the facts adduced, as to whether personalty had become realty

through incorporation in a new entity, the incorporator is the consumer.

If the verbiage in defendant's regulations relative to chattels is read in this light, it makes sense, for (with the possible exception of sprinkling systems, fortuitously deleted from present Regulation 51) the items mentioned in the illustration have each been held, if the facts in evidence permit, to be other than fixtures, *Anno.*, 55 A.L.R. 2d 1044; 22 *Am. Jur.*, *Fixtures* §§55, 68, 61.

Whether these illustrative items are fixtures is, in other words, under inconclusive facts, a mixed question of law and fact to be decided by a jury or other finder of fact, upon which a decision may be rendered either way, 22 *Am. Jur.*, *Fixtures* §77, pp. 798-99. On the other hand, there are certain instances when the item in question becomes realty as a matter of law, whatever the factual context of the case. As might be expected, this is where, as in *Utah Concrete Products Corp.*, "the chattel is so affixed to the realty *that its identity is lost*, or where it cannot be removed without material injury to the realty or to itself . . . " (emphasis supplied), *Bay State York Co. v. Marvix*, 331 Mass. 407, 119 N.E. 2d 727, 43 A.L.R. 2d 1373, 1377 (1954).

It is submitted that defendant's regulations are consistent, both in internal context and with the Legislative mandate and this Court's decisions, if—but only if—they are read to mean that the sale and installation of a chattel is, for sales and use tax purposes, a retail sale *unless* the chattel installed becomes a part of the real estate *as a matter of law, whatever the undisputed facts*.

Water pumps, when emplaced and whatever the facts, certainly are not a part of the real estate *as a matter of law*. To the contrary, they have been held to remain personalty after emplacement, *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 21 Pac. 809 (1889). It has been demonstrated previously that plaintiff, in the subject transactions, was not a consumer within the definitions afforded by Utah decisions, including *Utah Concrete Products Corp.* It should be added that the undisputed testimony is that no damage is caused to the real estate when a pump is removed (R. 54), that a given well can receive various sized pumps (R. 95), and that a given pump can be removed from a well and resold for use in another well (R. 56).

Under pertinent and present regulations, as properly construed, plaintiff is not a consumer. If such regulations are not interpreted as suggested they are void because inconsistent and because their promulgation is beyond the power of defendant.

5.

Defendant's Theory Does Not Make Plaintiff a Consumer

Even if defendant's regulations are read as defendant apparently would have them read (that is, by assuming the legal validity of the "fixture" test, and by deleting the "both lump sum and non lump sum" contract provision and the illustrations as to chattels), plaintiff was not a consumer. Even if the "fixture" test is adopted, the evidence of record establishes beyond any doubt which might be entertained by reasonable men that the pump assemblies in question remained chattels after emplacement.

The tests for determining whether an article becomes a "fixture" were set forth succinctly by this Court in *Workman v. Henrie*, 71 Utah 400, 266 Pac. 1033, 1035, 58 A.L.R. 1346 (1928):

"In considering whether a structure annexed to land is itself legally a part of the land, the chief determining factors are the mode of attachment or annexation, the character of the structure and the intention of the person making the annexation, which generally is regarded as the most important or controlling factor, and the mode of annexation and the character of the structure merely as evidence on the question of intention."

The evidence shows:

(1) *As to intention.* Neither the seller, the buyer nor the buyer's consulting engineer intend that the water pump shall constitute a permanent addition to the well. To the contrary, they all contemplate that its removal will be necessary for one or more of the five reasons set forth heretofore. Objectively, engineers plan water well construction to facilitate pump removal, buyers assume that pump houses have a hatch so removal can be effected and plaintiff, when emplacing pumps, lubricates the platform so that it will not be cemented by the grouting to the foundation. Additionally, plaintiff, in its private dealings, utilizes conditional sale contracts and has repossessed thereunder, but has never filed a mechanic's lien—once more an objective fact which demonstrates an intention that pumps remain personalty. Moreover, the very fact that plaintiff has not paid the excise taxes levied on consumers, but has charged sales tax to private buyers, coupled with assurances from public purchasers that no tax liability would accrue, is an objective indication of intent.

(2) *As to annexation*: Pumps are annexed so passingly to the realty that no damage thereto is done when they are removed. Although pumps are objects of considerable weight, all parties concerned are aware that plaintiff has (as do other dealers) facilities by which to remove them with relative ease. Constructive annexation, based upon unique suitability for the real estate, is not applicable. A pump can service any of a number of wells. A well can be served by any of a number of pumps.

(3) *Character of the object*: A pump, unlike auditor Buttolph's doors and windows (footnote 8), is a machine with moving parts which experiences considerable wear. Its life span in Utah is, at most 20 years, and probably less. It is recommended that pumps be removed every 5-7 years for a preventive maintenance check, and more frequent removal, for one of the reasons before recited, is likely.

The language of *Fuller v. Mountain Sculpture*, supra, is once again in point. It is clear that the pumps in question, after emplacement, remained chattels. This could not be doubted by reasonable men. It is significant that defendant's decision contains no finding relative to the issue of fixtures. Even under defendant's apparent theory, plaintiff was not a consumer.

6.

Defendant Erred in Not Allowing Cross-Examination and Not Admitting Exhibit 15 for Identification.

As just noted, plaintiff's non-payment of the tax required were it a consumer and its collection from private customers of sales tax is an objective indication of the intent that pumps,

after emplacement, remain personalty. Defendant's refusal to allow plaintiff to cross-examine regarding uniform trade practice in this regard (R. 36-37) and its refusal to admit a stipulation to the effect that other dealers, experts in the field, have uniformly considered sale and emplacement of pumps to be retail sales of personal property (R. 74-75, 122, Ex. 15) constituted error. As noted at 20 *Am. Jur., Evidence* §334, p. 311, custom or usage is properly admissible in order to ascertain the intention of parties to a contract. In this case, a pertinent issue, if defendant's own theory is adopted, was and is the intention of the parties to a contract as to the character of the goods thereafter. Uniform trade practice, custom and opinion is of importance to these issues. Defendant erred. Such evidence should be considered by this Court.

II.

PENALTIES WERE IMPROPERLY ASSESSED.

A.

PLAINTIFF WAS NEITHER NEGLIGENT NOR INTENTIONALLY DISREGARDFUL OF AUTHORIZED RULES AND REGULATIONS WITH KNOWLEDGE THEREOF.

Defendant has assessed plaintiff not only with a tax deficiency, but also with penalties (including 12% per annum interest) thereon. The statutory provisions in point are 59-15-8 and 59-16-9, U.C.A. (1953).

Ordinarily, if deficiency exists, interest at 6% per annum is charged from the time the return was due. If, however, the

deficiency, or any part thereof, is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, a flat 10% penalty, plus an additional 6% per annum interest, is charged. Although in its decision defendant made no finding that plaintiff's failure was due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, defendant affirmed the imposition of penalties.

The purported reason why the auditing department originally imposed the penalties is fairly apparent from the record. Chief auditor Holt was of the opinion that failure to report use tax liability on the transactions in question, inasmuch as the liability, according to him, was "clear cut," was sufficient indication of neglect or intentional disregard (R. 22-24). Mr. Holt, who did not go through plaintiff's books (R. 22), who did not visit the wells in question, who had not talked to persons and firms in the pump business, and who had not talked either to buyers or engineers (R. 29), had depended upon the report of auditor Buttolph (R. 24). Auditor Buttolph had never examined the pumps in question, but asserted familiarity with pumps in general; he claimed to have talked with engineers, but not the ones involved in the instant transactions; he had not talked to the buyers in question (R. 35-37).

Why defendant affirmed such assessment of penalty (including augmented interest) is less clear. As noted, there is no finding in support. Some indication would have been appreciated by plaintiff, particularly in view of the following statement of the hearing officer (and the only member of the bar on the Commission), which statement was made without

objection from any Commission member, all of whom were present:

COMMISSIONER SMART: I think that you have made your case, that the penalty in this case based upon willful neglect or negligence is an improper charge. I feel you have made your case in respect to that inasmuch as there is primarily in dispute here a question as to whether this sale to a tax exempt organization, as to whether or not a reasonable doubt in the mind of the Nickerson Pump Company as to whether it was actually taxable and as to the penalty. I think you have made your case and I am sure that the Commission will agree that in any event that would be waived regardless of the outcome with respect to the other . . . (R. 36).

It seems clear that there is not any rational basis upon which plaintiff may be found to have been negligent or intentionally disregarded of authorized rules and regulations of which it had notice. As to the specification of tax at Exhibit A, Schedule 1 of the deficiency notice, there is no evidence whatever. Surely negligence or intentional disregard cannot be presumed. From the sums involved, it would appear that bookkeeping errors were involved at the average of slightly over 5 a year, less than one a month. Defendant would be ill-advised to label this wrongdoing. If it is, what of auditor Buttolph who on the instant audit made four admitted errors (R. 4, 10-12, 108), two more errors stipulated to at hearing (R. 21, 22), and another error apparent on the face of the record (R. 60)? Insofar as the bulk of the deficiency is concerned, Commissioner Smart's summary, quoted heretofore, adequately expresses plaintiff's view. In view of the status of the law, of the status of the Commission's regulations, of the

assurances of tax exemption from public buyers and, apparently, of a prior contrary practical interpretation by defendant, plaintiff's failure to pay the asserted tax is precisely what one would expect of a reasonable man. If this is a proper case for imposition of penalties, one wonders what case is not.

A test exists for determination of negligence or intentional disregard. Mr. Nickerson's stipulated testimony was that he had regularly directed his bookkeeper to file sales and use tax returns as required (R. 43). If such bookkeeper had access to all files examined by auditor Buttolph, was the bookkeeper negligent or intentionally disregarding of authorized rules and regulations of which he had knowledge so that, if the decision of this Court is adverse, plaintiff herein may recover its loss from its bookkeeper? A similar test might be formulated. Assume that prior to July 1, 1955, Mr. Nickerson contacted an attorney, who advised him to treat the transactions, from the tax standpoint, as they were treated. Would such attorney, in the event of an adverse decision, be held liable to plaintiff because of negligence or intentional disregard? The answer to both questions is clearly no. The penalties (including augmented interest) are improper.

B.

DEFENDANT ERRED IN NOT ALLOWING CROSS-EXAMINATION
AND NOT ADMITTING EXHIBIT 15 FOR IDENTIFICATION.

This matter has been considered relative to the intention facet of the fixture issue. The matter of penalties raises a question of whether plaintiff was negligent. It is well estab-

lished that trade custom may be introduced or elicited in order to establish a standard of care, 1 *Jones on Evidence* (Fifth Edition) §192. The fact that all plaintiff's competitors treated like transactions in the same manner as did plaintiff was of importance. The cross-examination should have been allowed and the evidence admitted. The hearing officer apparently would have allowed the testimony and evidence, had he considered the matter of penalties open to dispute (R. 36, 37). Failure to do so was error, which this Court may purge by affording the evidence due consideration in its review of the facts herein.

III.

CERTAIN TERMS OF THE ASSESSMENT WERE INCORRECTLY IMPOSED.

The following list deals with errors in the deficiency notice prepared by defendant's auditors (R. 108, Ex. 1) and affirmed by defendant. Even if defendant's decision is otherwise affirmed, defendant should be ordered to correct them.

1. The amount upon which tax was based was amended and reduced, by stipulation at hearing by the amount of \$239.59 (R. 21-22). The decision did not reflect this stipulation and reduction.

2. Even if defendant's apparent theory is correct, all items attributable to Midvale City, No. 8833 (R. 60-61) should be eliminated. According to the undisputed evidence, neither a lump sum, nor a separately itemized contract was entered into in this transaction. Rather, two separate contracts, with a hiatus

in time between them, were entered into, one for sale and the other for installation.

3. Defendant erred in its computation of sales tax penalties at Exhibit A of Exhibit 1 (R. 108). It assessed the penalties year by year, resulting in two years wherein the statutory minimum of \$2.50 rather than 10% was applied. 59-15-8 U.C.A. (1953) makes the minimum applicable only to the entire deficiency, not on a year by year basis.

4. Assuming *arguendo* the correctness of defendant's apparent theory, plaintiff is responsible for sales tax on all goods title to which passed to it in Utah and is responsible for use tax on all goods title to which passed to it outside Utah. Regulation 31, both before and after its 1956 amendment, rules that: "If the contract of sale requires the seller to deliver the goods to the buyer at a particular place or to pay the freight or cost of transportation to the buyer at a particular place, title to the property does not pass until the goods have been so delivered to the buyer or have reached the place agreed upon" (R. 102). In this case all materials, save those from Cutler Hammer, are shipped postage prepaid by the seller. Byron Jackson, however, stipulates that title passes F.O.B. its factory, California, and both Byron Jackson and Aurora provide specialty goods (goods to order), thereby passing title outside Utah upon appropriation to the contract, 60-2-3 (4) (a), U.C.A. (1953). As to all materials save those purchased from Cutler-Hammer, Byron Jackson and Aurora and listed at Schedule 4, title passed to plaintiff within, not without Utah. The use tax as to those items is incorrectly assessed. They should be deleted from the assessment.

CONCLUSION

Plaintiff was not, under the largely stipulated and undisputed evidence, a consumer of the water pumps in question. Water pumps are consumed or exhausted through the wear entailed in pumping water, not through emplacement by plaintiff. Neither does plaintiff's emplacement of such pumps create a new entity. Neither is plaintiff a consumer under defendant's regulations nor under its apparent theory.

Judgment should be entered for plaintiff with, as in *Western Leather & Finding Co.*, costs awarded to it.

Respectfully submitted,

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