

1961

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

Utah Supreme Court

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Walter L. Budge; F. Burton Howard; Attorneys for Respondent;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH  
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JAN 3 - 1961

NICKERSON PUMP AND  
MACHINERY CO., INC.,

*Petitioner,*

— vs. —

THE STATE TAX COMMISSION  
OF UTAH,

*Respondent.*

Clerk, Supreme Court, Utah

Case  
No. 9353

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BRIEF OF RESPONDENT

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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NICKERSON PUMP AND  
MACHINERY CO., INC.,

*Petitioner,*

— vs. —

THE STATE TAX COMMISSION  
OF UTAH,

*Respondent.*

Case  
No. 9353

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE CASE

The parties herein will be designated as follows: Petitioner, Nickerson Pump and Machinery Co., Inc., as “Nickerson” and Respondent, State Tax Commission of Utah, as the “Tax Commission.” Emphasis has been supplied.

This is a proceeding to review an order and decision of the Tax Commission imposing a sales tax liability and deficiency upon Nickerson. The assessment was based

upon a series of transactions wherein the petitioner sold and emplaced water pumps to governmental units under lump-sum contracts, the governmental units being exempt from sales tax liability. The issue presented, as suggested by the petitioner, is whether plaintiff is the consumer of water pump assemblies sold and emplaced by it under lump-sum contracts, it apparently being conceded that if Nickerson is found to be the consumer of the pump assemblies in question it is subject to sales or use tax as assessed by the State Tax Commission.

It is submitted that to find Nickerson a consumer does not require modification of previous decisions as intimated by petitioner, but rather that previous decisions relied upon by the petitioner have already been severely questioned by this Court. It is stipulated and conceded that the penalties mentioned in petitioner's Point II were improperly assessed and that its Point III is valid.

## STATEMENT OF FACTS

Respondent agrees substantially with the statement of facts as set forth by the petitioner. In addition thereto, the following facts are submitted:

The pumps in question are specifically engineered for the particular need involved. An engineering firm is often consulted to determine the requirement of the water and the size of the pump which is needed in a particular case, and a complete set of specifications are furnished to the petitioner, which then supplies a pump and related equipment for the given need. (T. R. pg. 79)

The following items are included in the lump-sum contract, and petitioner is required to furnish:

1. a motor and pump head
2. a discharge column assembly
3. a suction pipe and strainer
4. a water level indicator
5. labor

(Commission's Exhibit 16 and 17.) These exhibits are typical of what is bid upon by petitioner, in that they list the specifications, the type of equipment and the basis for payment which go into a lump-sum bid of the nature involved herein. (T. R. p. 73)

In addition, the Tax Commission found the installation of deep well pumps under lump-sum contracts made by the taxpayer with tax-exempt organizations on property of said organizations to be an installation by an ultimate consumer of materials and supplies for the purpose of erecting, building on or otherwise improving, altering or repairing the real property of others.

## ARGUMENT

### POINT I.

PETITIONER, NICKERSON PUMP AND MACHINERY CO., IS A CONSUMER.

The question is fundamentally as stated by the petitioner on page 13 of its brief. If the petitioner in the

sale and emplacement of pumps and pumping equipment under a lump-sum contract is the consumer, it should pay the tax on materials being consumed. In other words, the question is whether or not petitioner consumes the pump, motor and related equipment necessary to fill its lump-sum contract and to deliver an operating unit installed in the ground. In this regard there can be no question but that Nickerson is a consumer.

The petitioner contends that assembling pumps from component parts is "manufacturing" or "compounding for sale," and, further contends that manufacturing is not taxable as consumption. Error is committed here. Section 59-16-4 (h), Utah Code Annotated, 1953, does not exempt property consumed by a manufacturer as the last user. See *Union Portland Cement Co. v. State Tax Commission*, 110 Utah 135, 170 P. 2d 164 (1946). Therefore, even if Nickerson were a manufacturer, only the property which entered into and became an ingredient or component part of the property manufactured which was thus passed on to an *ultimate user* would be thereby exempt. The test is, "Are the articles involved consumed by the processor as the last user? If they are so consumed the tax must be paid thereon by the processor." *E. C. Olsen Co. v. State Tax Commission*, 109 Utah 563, 168 P. 2d 324 (1946).

Petitioner claims it is exempt from the tax in question because it manufactures or compounds for sale, but the test for the manufacturing exemption is whether or not the articles involved are consumed. Hence, petitioner



begs the question by claiming the manufacturing exemption.

Petitioner further contends that under the terms of Tax Commission Regulation 58, where the contractor enters into both lump-sum contracts and agreements to furnish materials and supplies at a fixed price and to render service for an additional price that he is deemed to be a retailer of tangible personal property and that the Commission should be bound by this determination. The Regulation provides that:

“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 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.*” (Emphasis supplied)

Petitioner suggests that this has been done and, therefore, that it is a retailer of tangible personal property. It is significant that Regulation 58 further provides:

*“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.”*

The plain import of Regulation 58 is to require contractors entering into both of the above kinds of contracts to obtain a sales tax license in order to properly collect tax and report their liability and pay sales tax on *retail sales*. The quoted parts of Regulation 58 are in no way designed to abrogate the lump-sum provisions of the

Regulation concerning contracts by contractors wherein the sale of materials and supplies is taxable to the contractor where he becomes the consumer or the final buyer.

Taxpayer, in the present case, contends that it does not consume pumps; that the buyers from it do consume them, and that the pump assemblies retain their identity after being installed under a lump-sum contract. The Tax Commission respectfully takes issue with these contentions. In particular Nickerson Pump and Machinery Co. did act as a consumer of purchases specified in Schedules 2 and 4 of the original deficiency assessment. Petitioner claims not to be a consumer, user or storer of the purchases involved and bases this claim upon a strict definition of the word "consumed." However, this as defined in the case of *Utah Concrete Products Corp. v. State Tax Commission*, 101 Ut. 513, 125 P. 2d 408 (1942), has been given a liberal construction. The court in that case said:

"From the context of our statute 'used' and 'consumed' may be said to express the same meaning — to make use of, to employ and does not necessarily mean the immediate destruction or extermination or change in form of the article or commodity."

It is not disputed that the transactions which resulted in an assessment by the State Tax Commission were those upon which the taxpayer bid and sold pumps, motors and related equipment under lump-sum contracts.

"Sales to contractors are sales to consumers \* \* \*."  
*State v. J. Watts Kearney & Sons*, 181 La. 554, 160 So. 78

(1934). See also *Volk v. Evatt*, 142 Ohio 335, 52 N.E. 2d 338 (1943).

“A contractor when fabricating personalty into realty neither sells, resells, sells at retail, nor can he be considered a retailer.” *Duhamel v. State Tax Commission*, 65 Ariz. 268, 179 P. 2d 252, 171 ALR 684 (1947).

According to the Utah Supreme Court the words “used” and “consumed” are synonymous. To construe either word to mean that the state may only tax the sale of property which is consumed or destroyed in use is to virtually annihilate the Act and give it a strained and unthought of meaning. Such a construction would immediately exclude diamond rings, luxuries and other things not destroyed or consumed immediately in use, from the realm of liability for sales and use taxes. It is suggested that this intention cannot be attributed to the legislature. However, even under the narrow definition as contended by taxpayer, the personal property used by the contractor was consumed and used under lump-sum contracts.

In addition to defining “consume” to mean “to destroy,” “to use up” and “to expend,” Webster’s New International Dictionary gives the following definitions:

“Consumer n. 1. One that consumes. 2. Economics. One who uses (economic) goods and so diminishes or destroys their utility; opposed to producer.”

“Consumption \* \* \* 2. Economics. The use of (economic) goods resulting in the diminution or destruction of their utility; — opposed to production. Consumption may consist in the active use of goods in such a manner as to accomplish their

direct and immediate destruction, as in eating food, wearing clothes, or burning fuel; or it may consist in the mere keeping, and enjoying the presence or prospect of, a thing, which is destroyed only by the gradual processes of natural decay, as in the maintenance of a picture gallery."

"Generally, it may be said that consumption means using things, and production means adapting them for use." See *J. W. Meadors & Co. v. State*, 89 Ga. App. 583, 80 S.E. 2d 86 (1954).

The problem of what is meant by "consume" was presented to the Colorado Supreme Court under a statute providing that a "retail sale" includes all sales made within the state except wholesale sales, and that "wholesale sale" means a sale by wholesalers to retail merchants, jobbers, dealers, or other wholesalers for resale and does not include a sale to "users or consumers, not for resale." It was held, in *Craftsmen Painters & Decorators v. Carpenter*, 111 Colo. 1, 137 P. 2d 414 (1942), that an administrative regulation in effect declaring that building contractors were users or consumers of materials and supplies used by them in performing building contracts was valid. And it was held that painting contractors were the users of paints, oils, finishes, and other incidental materials used by them in the business of painting contractors, and that electrical contractors were the users and consumers of wire, lighting fixtures, and incidental materials used in the business of electrical contracting. The court said:

"The problem presented to the director of revenue, briefly stated, was, Were plaintiffs the ulti-

mate users and consumers of the materials built into their jobs and furnished the owner as an entirety, or were they retailers to those owners of each particular item of personal property so built in? Stated otherwise, Were they selling to the owner the completed job, or were they selling him separately each pint of paint and each piece of wire used in the job? We think his conclusion that when they purchased the several items of personal property and built them into the structure as an integral part of their entire contract, and then disposed of the completed work to the owner, they were users and consumers and not retailers to the owner of each item, was not only a ruling within his discretion, but is absolutely irrefutable on any basis of logical reasoning, and that authority to support it is no more essential than is authority to support the conclusion that black is not white, or that two plus two equals four." See Note 163 A.L.R. p. 282.

It is urged that Nickerson can be nothing but a consumer under applicable statutes and judicial interpretations.

Petitioner further contends that the pumps, motors and related equipment which are the subject matter of this deficiency assessment are no less pumps and related equipment after emplacement than before, and contends that because of this fact petitioner is not a consumer. It becomes necessary to determine what is meant by a product losing its identity or being incorporated into a separate entity. In the *Utah Concrete Products* case, *Supra*, the Utah Supreme Court cites approvingly the case of *City of St. Louis v. Smith*, 342 Mo. 317, 114 S.W. 2d 1017 (1938), where under Retail Sales Statutes the

contractors in question were held liable for the tax as “consumers” and it was found to be the dealer’s duty to collect the tax at the time of sale. The court there said:

“It is clear from these statutory provisions that where one buys tangible personal property for his own use or consumption he is liable for the tax. On the other hand, it is equally clear that where one buys tangible personal property for the purpose of resale he is not liable for the tax. In this case, the contractors agreed with the city to furnish all the labor and material necessary to construct, and to construct the improvement in question for a fixed sum of money. It was necessary for the contractor to purchase and use all material necessary to complete said work in order to be in a position to deliver to the city a *completed structure as provided in the contract*. Our judgment is that it cannot be said by the contractor that he resold the materials to the city for its use, and then not use or consume them in the performance of his contract. We are not without authority on this question. In the case of *State v. Christhlf*, 170 Md. 586, 185 Atl. 456, 458 (1936), that court said: ‘It is the contractor or builder who is the ultimate user or consumer of the materials which in one of these cases are converted and fabricated into a building and in the other into a road.’

“Another authority, *State v. J. Watts Kearney & Sons*, 181 La. 554, 160 So. 77 (1954), is to the same effect. Speaking of sales of materials to contractors, that court said: ‘His undertaking is to deliver to his obligee some work or edifice or structure, the construction of which requires the application of skill and labor to these materials so that, when he finishes his task, the materials purchased are no longer to be distinguished but something has been wrought from their use and

union. The contractor has not resold, but has consumed the materials. Sales to contractors are sales to consumers.'

"Again, the case of *York Heating & Ventilating Co. v. Flannary*, 87 Pa. Suer. 19 (1936), that court said of the installation of a blower and heating system by contract: 'The contract in suit in no sense was a contract of sale. It was a construction contract. \* \* \* It would be just as proper to call a contract for the construction of a building, a sale of the stone, brick, cement, wood, etc., which entered into the erection of the building'

*"In our judgment the contractors in this case did not buy the materials in question for the purpose of reselling such materials to the city. They were under contract to deliver to the city the finished product. It was the inseparable comingling of labor and material that produced the finished product. Our conclusion is that the contractors used and consumed the material in order to produce the finished product in compliance with their contract."* (Emphasis supplied)

In the case of *Atlas Supply Co. v. Maxwell*, 212 N.C. 624, 194 S.E. 117 (1957), the court on holding plumbing and heating contractors subject to sales tax law stated that:

"They purchase the materials and supplies, not for resale as tangible personal property, but for use in producing the turnkey job. There is no resale of the materials and supplies as such, either actual or intended, within the meaning of the act."

See views expressed to the same effect in *Lone Star Cement Co. v. State Tax Commission*, 234 Ala. 465, 175 So. 399 (1937); *Albuquerque Lumber Co. v. Bureau of Rev-*

enue, 42 N.M. 58, 75 P. 2d 334 (1938); *State v. J. Watts Kearny & Sons*, 181 La. 554, 160 So. 77 (1934); *Herlihy Mid-Continent Co. v. Nudelman*, 367 Ill. 60, 12 N.E. 2d 638, 115 A.L.R. 491 (1938). All of which cases were cited in the *Utah Concrete Products* case at page 519.

It is submitted that an article of tangible personal property sold under a lump-sum construction contract to install the same thereby loses its identity in that what is finally sold is not personal property but is rather that article plus any other articles combined with the labor necessary to meet specifications under the lump-sum contract. This was considered in the case of *Harding v. Oklahoma Tax Commission*, 275 P. 2d 264 (1954), where it was held that the taxpayer did not sell a specific amount of cement, tile, lumber, etc., but rather he contracted to and did construct an airplane hangar, and if there was any contract of sale at all it was for the sale of a completed hangar and not for the various component parts thereof.

It is apparent that petitioner in this case is a consumer because it was the last person to deal with the products which it sold before they lost their identity as such and became incorporated into a separate entity.

## CONCLUSION

The petitioner did act as a consumer of articles in filling its lump-sum contracts with various governmental units.



The decision of the Tax Commission should be affirmed.

Respectfully submitted,

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