

1961

# The Chemical and Industrial Corporation v. Utah State Tax Commission : Brief of Plaintiff

Utah Supreme Court

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Jerry L. Cowan; Frost & Jacobs; Attorneys for Plaintiff;

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IN THE  
**Supreme Court of the State of Utah**

No. 9360

FILED

THE CHEMICAL AND INDUSTRIAL CORPORATION, <sup>Utah</sup>  
Plaintiff,

v.

UTAH STATE TAX COMMISSION,

Defendant.

**BRIEF OF PLAINTIFF**

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IN THE  
**Supreme Court of the State of Utah**

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**No. 9360**

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THE CHEMICAL AND INDUSTRIAL CORPORATION,

*Plaintiff,*

v.

UTAH STATE TAX COMMISSION,

*Defendant.*

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**BRIEF OF PLAINTIFF**

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**STATEMENT OF FACTS**

This proceeding involves the question of whether or not the plaintiff is liable for the payment of a use tax upon certain items of tangible personal property used in the construction of an ammonium nitrate plant at or near Geneva, Utah in 1956.

Plaintiff, The Chemical and Industrial Corporation, is an Ohio corporation engaged in the business of designing and contracting for the erection of facilities for the production of chemical and allied products. Plaintiff is not now, and was not, during the period January 1, 1956 to December 31, 1956, authorized or qualified to do business in the State of Utah.

On or about November 9, 1956, plaintiff, as subcontractor, confirmed an agreement with the Chemical Plants Division,



Blaw-Knox Company, Pittsburgh, Pennsylvania, as primary contractor for Columbia Geneva Division, United States Steel Corporation, under the terms of which agreement plaintiff was obligated to furnish all materials, supplies, equipment, labor, services, etc., necessary for the construction of an ammonium nitrate plant at or near Geneva, Utah.

Article XVIII of this contract (Record pp. 140-174) provides as follows:

ARTICLE XVIII. The title to all work completed and in the course of construction at the site and all materials which are delivered and stored at the site and which shall necessarily be incorporated in the work, as between Contractor [Blaw-Knox Company], Owner [Columbia-Geneva Division, United States Steel Corporation] and Subcontractor [Plaintiff] shall be in Owner.

On or about November 23, 1956, the plaintiff confirmed a contract (Record pp. 138-139) with The Chemical and Industrial Construction Company, a corporation and a wholly-owned subsidiary of plaintiff, under the terms of which contract The Chemical and Industrial Construction Company agreed, among other things, to provide all labor and services required in the construction of the facilities.

The first paragraph of ARTICLE I of this contract provides:

#### ARTICLE I. STATEMENT OF THE WORK

Subcontractor [The Chemical and Industrial Construction Company] upon notice by Contractor [The Chemical and Industrial Corporation], shall as promptly and economically as practicable perform the necessary work and shall furnish all labor, supervision, tools and equipment to erect and install the equipment, compressors, machinery and building provided for in the Principal Contract. The Subcontractor shall also



furnish necessary field offices, shops, warehouses and sheds for the proper prosecution of the work and shall perform the necessary receiving, unloading, hauling from the railhead or other delivery point to the job site, warehousing and handling of the materials and equipment to be erected and installed under this sub-contract.

At all times material hereto, The Chemical and Industrial Construction Company was qualified and authorized to do business in the State of Utah.

Pursuant to plaintiff's contract with the Blaw-Knox Company, plaintiff purchased all necessary materials and supplies required in the performance of the work on the facilities from vendors not residents of the State of Utah pursuant to contracts executed outside of the State of Utah. No sales taxes were paid to such vendors upon the purchase of such materials and supplies. These materials were shipped from the vendors' plants or places of business in interstate commerce to the plant site at Geneva, Utah, where they were received by The Chemical and Industrial Construction Company.

Plaintiff maintained no office or other place of business in Utah prior to, during or subsequent to the period here involved, nor were any agents or employees of plaintiff located permanently at the plant site or elsewhere in the State of Utah.

On or about July 15, 1957, the defendant issued a proposed use tax tax deficiency assessment against the plaintiff for the period January 1, 1956 through December 31, 1956 in the amount of \$20,853.46, plus penalties and interest. Thereafter, plaintiff filed its petition for redetermination with the defendant in accordance with applicable provisions of the Use Tax Act. An informal hearing was held with representatives of the defendant before members of the Utah State Tax Commission. At this time a stipulation



of facts (Record pp. 149-174) was entered into by the parties and placed before the State Tax Commission. Thereafter, on December 10, 1957, pursuant to agreement between the parties to file seriatim briefs which, together with the stipulation of facts, would form the basis for the State Tax Commission to render its decision, plaintiff filed its brief with applicable authorities setting forth its position with respect to the imposition of liability upon it.

On September 15, 1958, the defendant transmitted a Request for Admission of the Genuineness of a Document (Record p. 67) to plaintiff, to which plaintiff answered (Record pp. 68-72) objecting to the Request on the grounds that such Request was not in compliance with Rule 36 of the Utah Rules of Civil Procedure and was otherwise improper. No ruling was made by the defendant on the Request or on plaintiff's answer thereto.

Subsequently, defendant's brief and plaintiff's reply brief were filed. No determination was made by the Utah State Tax Commission as a result of the first hearing, but instead on April 30, 1959, the defendant issued additional, identical deficiency assessments in the amount of \$20,853.46, plus penalties and interest against The Chemical and Industrial Construction Company, The Blaw-Knox Company and United States Steel Corporation. An informal hearing was held at the offices of the Commission on July 9, 1959, at which representatives of all four taxpayers were present. On July 14, 1959, the defendant sustained the use tax deficiencies against all four taxpayers.

On November 12, 1959, a formal hearing was held at the offices of the Commission, at which representatives of all four taxpayers were present (Record pp. 4-46). At this hearing, several important procedural and substantive questions were raised as to the validity and propriety of multiple assessments of the same tax and as to conducting a hearing involving all four taxpayers. This hearing was adjourned without such questions having been resolved.



On or about March 25, 1960, the defendant terminated the assessments against The Chemical and Industrial Construction Company, the Blaw-Knox Company, and the United States Steel Corporation, and the adjourned hearing of November 12, 1959 was reconvened on May 10, 1960 (Record pp. 47-55). The sole purpose of this hearing was the introduction into evidence of the prime contract between the Blaw-Knox Company and Columbia-Geneva Division, United States Steel Corporation dated July 6, 1956, and the receipt of testimony by the State Tax Commission of the interpretation of this contract by an employee of Columbia-Geneva Division, United States Steel Corporation. Pursuant to agreement between the parties, plaintiff was not personally represented at this hearing, but filed written objections to the introduction of evidence and testimony at such hearing (Record pp. 56-61).

On September 21, 1960, the defendant issued its decision numbered 186, entitled "In the Matter of the Sales and Use Tax Deficiency of Chemical and Industrial Corporation," wherein the defendant determined that the plaintiff was liable for the payment of a use tax deficiency in the amount of \$20,853.46, plus interest at the rate of 6% per annum.

In its decision, in addition to the above (excepting the matter of passage of title to the materials under Article XVIII of plaintiff's contract, on which defendant made no finding), the defendant made the following three additional findings of fact based upon the evidence produced at the hearing of May 10, 1960: (1) that pursuant to the aforementioned prime contract, the Blaw-Knox Company was required to provide all labor, materials, supplies, etc. not furnished by Columbia-Geneva Division, United States Steel Corporation, necessary for the construction of the facilities which were the subject of the contract and that the "risk of loss" until completion and acceptance by the Owner, United States Steel Corporation, was on the Con-



tractor, Blaw-Knox Company; (2) that pursuant to such contract, the Contractor was required to pay all sales, use, excise and other local taxes; and (3) that this contract was denominated a "turnkey" contract by the parties, i.e., one in which the seller or contractor agrees to furnish a completely installed operating plant or facility, and that final payment therefor is deferred until such plant or facility is accepted by the purchaser.

Based upon such facts, the defendant made three conclusions of law: (1) that the plaintiff was the owner of the materials at the time they ended their transit in interstate commerce; (2) that the plaintiff was present within the State of Utah and in possession of the materials used in the construction of the facility during a taxable moment; and (3) that the assessment of the deficiency does not unduly burden interstate commerce under the Commerce Clause or violate the provisions of the Fourteenth Amendment to the United States Constitution.

On October 20, 1960, plaintiff posted bond satisfactory to the defendant in compliance with Section 59-16-13 of the *Utah Code, Annotated*, and filed its petition for a writ of certiorari to this Court.

## STATEMENT OF POINTS

I. OWNERSHIP OF MATERIALS UPON WHICH A USE TAX IS ASSESSED IS ESSENTIAL TO A "USE" OR "STORAGE" OF SUCH MATERIALS UNDER THE UTAH USE TAX ACT OF 1937, AS AMENDED.

A. AT THE TIME THE MATERIALS ENDED THEIR TRANSIT IN INTERSTATE COMMERCE AND BECAME SUBJECT TO THE IMPOSITION OF THE USE TAX PLAINTIFF WAS NOT THE OWNER THEREOF, AND THEREFORE, THERE WAS NO "TAXABLE MOMENT" DURING



WHICH PLAINTIFF WAS SUBJECT TO THE IMPOSITION OF SUCH TAX.

II. PLAINTIFF WAS NOT PRESENT WITHIN THE STATE OF UTAH AT THE TIME THE MATERIALS WERE "USED" OR "STORED" IN THE CONSTRUCTION PROCESS, AND THEREFORE IS NOT SUBJECT TO THE TAXING POWER OF THE STATE OF UTAH.

III. THE UTAH STATE TAX COMMISSION IN ASSERTING THE LIABILITY FOR THE PAYMENT OF A USE TAX AGAINST PLAINTIFF, IS ACTING BEYOND THE SCOPE OF ITS AUTHORITY, SUCH ACTION BEING IN VIOLATION OF THE COMMERCE CLAUSE AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

IV. THE UTAH STATE TAX COMMISSION IMPROPERLY ADMITTED INTO EVIDENCE A CONTRACT AND CERTAIN TESTIMONY RELATING THERETO, BETWEEN THIRD PERSONS NOT PARTIES TO THIS PROCEEDING.

## ARGUMENT

### **I. Ownership of Materials upon Which a Use Tax Is Assessed Is Essential to a "Use" or "Storage" of Such Materials Under the Utah Use Tax Act of 1937, as Amended.**

From the inception of this proceeding plaintiff's position has been that a use tax could not be asserted against a person who was not the owner of tangible personal property at the time of the "storage, use or other consumption" under the express terms of the Utah Use Tax Act of 1937, as amended, and that since title to the materials which were the subject of the assessment passed from the plaintiff under the terms of its contract with the Blaw-Knox Company at the exact moment of the termination of their



transit in interstate commerce, plaintiff could not be subject to liability for the payment of the tax asserted.

Article XVIII of plaintiff's contract with the Blaw-Knox Company provides:

ARTICLE XVIII. The title to all work completed and in the course of construction at the site and all materials which are delivered and stored at the site and which shall necessarily be incorporated into the work, as between Contractor [Blaw-Knox Company], Owner [United States Steel Corporation] and Sub-contractor [The Chemical and Industrial Corporation] shall be in Owner.

Initially and throughout the early stages of this dispute, the defendant sought to impose liability for the payment of a use tax upon plaintiff pursuant to the terms of Sections 59-16-3 and 59-16-2(b), *Utah Code Ann.* (Supp. 1956), the first of which section provides:

There is levied and imposed an excise tax on the storage, use or other consumption in this state of tangible personal property purchased on or after July 1, 1937, for storage, use or other consumption in this state at the rate of two per cent of the sale price of such property.

Every person storing, using or consuming in this state tangible personal property purchased shall be liable for the tax imposed by this Act, and the liability therefore shall not be extinguished until the tax has been paid to this state.

The term "use" is defined in Section 59-16-2(b), *Utah Code Ann.* (Supp. 1956) as:

"Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale, display, demonstration, or trial of that property in the regular course of business and held for resale.



At the formal hearing held on November 12, however, the defendant receded from its original position that there was a taxable "use" by the plaintiff, and asserted at that time that the basis of the imposition of the use tax upon plaintiff was that title to the materials did not pass until they were stored at the site and since plaintiff had "stored" the materials in question it was liable for the use tax by reason of such storage.

Section 59-16-2(a) *Utah Code Ann.* (Supp. 1956) provides as follows:

"Storage" means and includes any keeping or retention in this state for any purpose except sale in the regular course of business all tangible personal property purchased from a retailer.

Plaintiff believes that the defendant's construction of Article XVIII is erroneous, that title to the materials passed upon delivery, and that the use of the phrase "and stored" is intended simply to distinguish between: (1) materials which are immediately incorporated "in the course of construction" of the work upon delivery; and (2) materials which would be stored temporarily before incorporation "in the course of construction" of the work, in order to insure that title to *all* items, regardless of the status of completion of the project, would be in the Owner.

Even assuming the correctness of defendant's construction of Article XVIII, plaintiff submits that the assertion of liability on the basis of distinction between a "use" and a "storage," as applied to the facts in this case, is a distinction without substance or legal effect and provides no basis for the imposition of the use tax upon plaintiff in this case.

Apparently the defendant is under the impression that ownership of tangible personal property is not an essential condition to the imposition of the use tax where the liability is asserted on the basis of "storage" rather than



“use.” Plaintiff submits that the defendant’s assumption is incorrect and not supported by the authorities.

In *Southern Pacific Co. v. Gallagher*, 306 U. S. 167 (1939), the Supreme Court upheld the application of the California Use Tax Act where the taxpayer, the Southern Pacific Company, purchased goods outside of the State of California for delivery at its various places of operation within the State of California. In rejecting the argument of the taxpayer that the particular items of tangible personal property involved were not subject to the imposition of a use tax by reason of the fact that these materials upon arrival at their destination at the company’s places of business in California were immediately placed into its business operations which were in interstate commerce, the court stated at 177:

We think there was a taxable moment when the former [materials] had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment the tax on storage and use—*retention and exercise of a right of ownership*, respectively—was effective. (Emphasis added.)

In a companion case, *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U. S. 182 (1939), the Supreme Court stated at 187:

The appellant exercised two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material distinction between the contentions of the appellant and those disposed of in *Southern Pacific Co. v. Gallagher*. . . .

It is noted that in both these decisions there was no question of passage of title or change of ownership of the materials involved. In addition, it is also important to note that the definitions of “use” and “storage” were identical to those contained in the Utah Act.



Clearly the tax imposed in these decisions was based upon the fact that the taxpayers had retained and exercised rights of ownership in the property and it was these acts which gave rise to the validity of the application of the tax in those cases.

Similarly, in *Avco Mfg. Corp. v. Connelly*, 145 Conn. 161, 140 A.2d 479 (1958), the Supreme Court of Errors of Connecticut, in construing the provisions of its Use Tax Act, which provisions are substantially the same as those utilized in the Utah Act, stated at 173, 140 A.2d at 485:

It seems clear that storage and consumption as well as use, must be incident to ownership for the use tax to apply. To construe the statute otherwise, so as to purport to tax the use of the facilities under the circumstances in this case would raise a constitutional question where, as here, the owner was the United States.

Thus the question of ownership of the materials at the time when they became subject to the taxing power of the state is critical in any determination of liability for the payment of a use tax. It is equally clear that in order to subject plaintiff to liability for the payment of the use tax in the present case, the "taxable moment" at which time the materials here involved became subject to the levy of a use tax by the State of Utah, must occur prior to the change in ownership of the materials.

**A. At the Time the Materials Ended Their Transit in Interstate Commerce and Became Subject to the Imposition of the Use Tax Plaintiff Was Not the Owner Thereof, and Therefore, There Was No "Taxable Moment" During Which Plaintiff Was Subject to the Imposition of Such Tax.**

The principle that a state excise tax upon the privilege of operating in, or carrying on interstate commerce is in-



valid, is so well established that citations of authority to support it are unnecessary. However, it is also well established that there is a point at which the interstate transit is completed but the interstate consumption has not begun. At this point materials may be subjected to a nondiscriminatory state tax levied upon the exercise of a right of ownership in the property. *Pacific Tel. & Tel. Co. v. Gallagher*, *supra*; *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937). Thus, in addition to the matter of the change of ownership, the determination of the point at which the interstate transit is completed is also of critical importance in the application of state use tax acts.

The landmark case in this area of the law is *Minnesota v. Blasius*, 290 U. S. 1 (1933). In this decision the Supreme Court set forth the standard for a determination of when interstate transportation is ended and property becomes subject to the taxing power of the states. The Court stated at 10:

Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. . . .

Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it within the State or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power.

This Court has expressed its agreement with the standard established in the *Blasius* case. In *Geneva Steel Co. v. State Tax Commission*, 116 Utah 170, 209 P.2d 208 (1949), this Court stated at 176, 269 P.2d at 211:



The sale of property made outside this state is not subject to our sales tax, it being a sale which this state cannot constitutionally tax. But when such property is brought into this state for storage, use or other consumption here, thus coming to rest as an integrated part of the total property in this state, then the use tax goes into operation and taxes, not the event of the sale of the property, but the event of storage, use or other consumption of that property within this state.

Although it would appear to be hypertechnical to require some further clarification of the above standard for determining when interstate transportation ends, probably no other area of the law has involved so many decisions in which the validity and applicability of various state laws have turned upon just such technical distinctions.

Fortunately, however, this Court has been called upon in the past to determine the precise question with which we are presently concerned—that point in time when interstate transportation of tangible personal property ends. In *Mud Control Laboratories v. Covey*, 2 Utah2d 85, 269 P.2d 854 (1954), the plaintiff was attempting to assert a cause of action for breach of contract in the courts of Utah. The lower court returned a judgment for the plaintiff for a portion of its claim, but held that it was not entitled to maintain an action in Utah for materials sold prior to the time it qualified to do business in Utah. Plaintiff, on appeal, contended that the sales made prior to qualification were in interstate commerce and therefore there was no requirement of qualification. This Court stated at 89, 269 P.2d at 856-7:

The principles in the foregoing cases are applicable to the fact situation we have here. Mud Control products were trucked into Vernal, Utah, where they were placed on the property of one L. N. Liscombe and there kept under tarpaulins pending sale. . . . When such products were deposited for warehousing subject



to distribution upon orders to be taken, their transit in *interstate* commerce had come to an end. Subsequent sales by Mud Control were *intrastate* commerce and subject to regulation by the laws of Utah.

The above authorities establish two essential elements to the imposition of liability for the payment of a use tax: (1) In order to be subject to a tax, the "use" or "storage" must be based upon the exercise of some right of ownership over the property upon which the tax is sought to be levied; (2) the taxable "event" or "moment" must occur *after* the property has come to rest in the state and *after* the interstate transportation of the materials has ended.

Returning now to Article XVIII of plaintiff's contract, it is apparent that title to the materials passed to Columbia-Geneva Division, United States Steel Corporation at the moment of delivery at the site or at the very latest no later than at the exact moment those materials were placed on the ground at the plant site near Geneva, Utah. There can be little doubt as to the meaning of this provision of the contract and it is axiomatic that clear, unequivocal language of a contract will be given effect. In those decisions where similar contract language was considered, the courts clearly indicated that title to materials utilized in construction contracts passed according to the terms of the contract. See *Alabama v. King & Boozer*, 314 U. S. 1 (1941); *Ford J. Twaits Co. v. Utah State Tax Commission*, 106 Utah 343, 148 P.2d 343 (1944); *General Motors Corp. v. State Tax Commission*, 182 Kan. 213, 320 P.2d 807 (1958), *cert. den.* 358 U. S. 875 (1958).

It is equally clear that the interstate transportation of the materials with which we are here concerned did not terminate until such materials were deposited on the ground at the plant site near Geneva, Utah.

The fallacy of the defendant's Conclusions of Law that plaintiff was the owner of the materials at the time they



ended their interstate transportation and was in possession thereof during a "taxable moment" thus becomes readily apparent. In order for the plaintiff to be subject to liability for the payment of this tax, the "taxable moment" *must occur* prior to the storage of materials and at some time during the course of delivery. This is, in effect, a tax upon the *sale* of the property rather than upon its *use* or *storage* and would be an unconstitutional attempt by the Utah State Tax Commission to exceed its powers and impose a tax where no right to assert such a tax exists. In this connection, the admonition of the Supreme Court in *Henneford v. Silas Mason Co.*, *supra*, and in *McLeod v. J. E. Dillworth Co.*, 322 U. S. 327, 331 (1943), is significant. In the *Silas Mason Co.* case the Court stated at 583:

A tax upon a use so closely connected with delivery as to be in substance a part thereof, might be subject to the same objections that would be applicable to tax upon the sale itself.

This statement was repeated and reaffirmed in the *J. E. Dillworth* case.

And in *Miller Bros. v. Maryland*, 347 U. S. 340 (1954), the Court stated at 344:

We do not understand the State to contend that it could lay a use tax upon mere possession of goods in transit by a carrier or vendor upon entering the State nor do we see how such tax could be consistent with the Commerce Clause.

Conversely, if it is the intent of the defendant that the "taxable moment" occurred at a point any time after the materials were placed upon the ground at the plant site, the plaintiff would still not be subject to the tax since plaintiff was then no longer the owner of the materials and the exercise of a right of ownership is an essential element of a valid levy of the use tax.



**II. Plaintiff Was Not Present within the State of Utah at the Time the Materials Were "Used" or "Stored" in the Construction Process, and Therefore Is Not Subject to the Taxing Power of the State of Utah.**

In addition to the above there is a third element essential to a valid levy of a state use tax: that the owner be present within the state at the time the taxable use occurs. The question of "presence" in the state of the forum of foreign corporations, not only for purposes of taxation, but also for purposes of service of process and qualification to do business, has been one of the most frequently litigated questions in the area of constitutional law.

Although the cases in this area are legion, it is almost impossible to ascertain any overriding principle which will be determinative in all sets of circumstances. It is generally agreed, however, that there are different degrees of "presence" or "doing business" for purposes of determining whether or not a foreign corporation is subject to the laws of the state of the forum for service of process, qualification and taxation. Most authorities are in accord that some sort of continuing business activity is necessary in order to require the qualification of a foreign corporation. Business activity amounting to something less than that of a continuing nature is required to subject a foreign corporation to the taxing power of the state in which such activity is conducted, and finally, still less activity is required in order to subject a foreign corporation to service of process in the state of the forum.

This Court has recently reviewed the significant cases in the area of jurisdiction for purposes of service of process and has most succinctly set forth the broad standard or guide in determining the question. In *Conn v. Whitmore*, 9 Utah2d 250, 342 P.2d 871 (1959) this Court stated at 254:

Even under the liberalized view the foregoing cases represent as to the prerequisites to holding one subject



to personal jurisdiction of courts of a foreign state, this requirement remains: there must be some substantial activity which correlates with a purpose to engage in a course of business or some continuity of activity in the state so that deeming the defendant to be present therein is founded upon a realistic basis and is not a mere fiction. That this is so and that a single act or transaction does not suffice unless it fits into the above pattern, is well established.

In the more limited area of decisions dealing with jurisdiction for purposes of service of process over foreign corporations engaged in the sale of goods and their delivery within the state of the forum, the Supreme Court of Utah in *Dykes v. Reliable Furniture & Carpet*, 3 Utah2d 34, 277 P.2d 969 (1954) held that the defendant seller with no office, files, facilities, equipment, books, bank accounts, telephone listing, advertising, samples, property, or employees in Utah, and whose orders were secured by an independent contractor who submitted them to the defendant for acceptance, was not doing business within the state for purposes of service of process. This Court stated at 36, 277 P.2d at 971:

We believe the principles heretofore announced by us are applicable to this case and support our conclusion, as are the decisions of many respectable authorities elsewhere. All authorities are not in complete harmony but most agree that certain activities do not constitute "doing business" in the jurisdictional sense, giving us a few guide posts to determine cases as they arise. That mere solicitation cannot confer jurisdiction, all will agree. In the *Western Gas Appliances* case, cited herein, Mr. Justice Crockett pointed out a number of other activities authoritatively determined as not "doing business" for process purposes; 1) mere presence of an officer in the forum, 2) a factory sale to a local distributor, 3) instruction to retailers in aid of distributors' aid promotion, 4) warranting and ship-



ping parts to an independent dealer, 5) isolated cases of equipment installation. Others might be added.

In the area of jurisdiction for purposes of qualification, in *Riley Stoker Corp. v. State Tax Commission*, 3 Utah2d 164, 280 P.2d 967 (1955) the appellant sold, delivered and constructed four large steam generating plants in the State of Utah. It contended this activity was interstate commerce and that it was not liable for the payment of corporate franchise taxes. This Court stated at 167, 280 P.2d at 968:

It is recognized that not only contracts for the sale and shipment of machinery or equipment from out of the state into Utah are interstate commerce, but further that incidental services in assembling, inspecting and testing of such equipment does not deprive it of its interstate character.

Here the court held that the appellant's activities in Utah were more than merely "incidental" to the sale and shipment of the goods.

If the defendant in the *Reliable Furniture & Carpet* case was not present for purposes of service of process and if shipment of goods and some incidental assembling services does not amount to presence for purposes of qualification under the *Riley Stoker Corp.* case, it is clear that plaintiff, who engaged in no activities within the State of Utah, is likewise not subject to the jurisdiction of the State of Utah for purposes of service of process, qualification or taxation.

Apparently the defendant is attempting to ascribe the presence of The Chemical and Industrial Construction Company in Utah to the plaintiff, regarding them as one for purposes of asserting the liability for the payment of the use tax in this case. Plaintiff submits that no legal basis or justification exists for such a determination.

At no time did plaintiff enter into the State of Utah to engage in, supervise or in any way or manner direct the



construction of the facilities at or near Geneva, Utah. All of the construction work, including the direction and supervision thereof, was performed by The Chemical and Industrial Construction Company to whom plaintiff subcontracted the work of erecting these facilities. In order to sustain a finding that plaintiff was present in the State of Utah for purposes of the application of the use tax, it will be necessary to disregard the separate corporate entities of the two firms, or to show that The Chemical and Industrial Construction Company was merely an agent or instrumentality of plaintiff. Neither of these determinations is supported by law.

The mere existence of a parent-subsidiary relationship, even though the parent exercises considerable control over the affairs of the subsidiary, is not sufficient basis for disregarding the separate corporate entities, nor does such a relationship of itself constitute the subsidiary an "agent" of the parent company. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U. S. 333 (1925).

Unless it appears that a true agency relationship exists between a parent corporation and its subsidiary, the separate identities of the corporations will not be disregarded for tax purposes. Thus, in *Board of Tax Supervisors v. Baldwin Piano Co.*, 296 Ky. 673, 178 S.W.2d 212 (1944) it appeared that The Baldwin Company was the sole owner of The Baldwin Piano Company, except for qualifying shares, the former being the manufacturing company and not authorized or qualified to do business in the State of Kentucky; the latter being a sales company and qualified to do business in Kentucky. The Baldwin Piano Company purchased musical instruments from The Baldwin Company, the latter crediting on its books the purchase price of the instruments sold. As the sales company sold the instruments in Kentucky, they assigned their accounts receivable to the parent company, these accounts being entered on the



books of The Baldwin Company offsetting the amounts due on the purchase price of the instruments. The State of Kentucky sought to impose an intangible tax on these accounts receivable, contending that the Piano Company was merely a cloak used to defraud the state out of its taxes and as such the two corporations should be regarded as one entity for tax purposes. The Supreme Court of Kentucky denied the contentions of the Board of Tax Supervisors, stating at 678, 178 S.W.2d at 214:

Here Piano was not formed to shield Baldwin from liability for fraud or unethical business transactions. . . . Piano was not the mere agent or instrumentality of Baldwin, nor were the business affairs between them fictional, nor was the method of doing business a plan to illegally evade taxes. *Ayer & Lord Tie Co. v. Comm.*, 208 Ky. 606, 271 S.W. 693.

Similarly, in *State ex rel. Porterie v. Gulf, Mobile & N. R.R.*, 191 La. 163, 184 So. 711 (1938) the court held that an almost wholly-owned subsidiary of the defendant was liable for the payment of an excise tax upon gasoline imported into Louisiana, rather than the parent company, as contended by the Louisiana taxing authorities. Here the two companies had practically the same managerial personnel, principal officers and boards of directors. They operated out of the same general offices. One man, acting as purchasing agent for the two corporations, ordered gasoline in the parent's name, the gasoline being consigned to the subsidiary in Louisiana, stored there and subsequently used by the subsidiary in the course of its business operations within the state.

Since the contract here involved was executed in Ohio and is governed by Ohio law, the decisions of the Ohio courts must be considered. In *Councill v. Douglas*, 163 Ohio St. 292, 126 N.E.2d 597 (1957) the Supreme Court of



Ohio elaborated on the test to be applied in determining whether the relationship between parties is that of "principal and agent" or "employer and independent contractor" when it quoted with approval the syllabus of an earlier Ohio decision, *Hughes v. Railway Co.*, 39 Ohio St. 461 (1883) at 296-297, 126 N.E.2d at 600:

"2. A corporation organized for the purpose of constructing and operating a railroad . . . may contract with another person for the construction of the whole or any part of the road, without retaining the right to control the mode or manner of doing the work. . . .

3. But if the corporation retain control over the mode and manner of doing the work, the relation of independent contractor does not exist. . . .

4. A right reserved in the contract, on the part of the railroad company, to direct as to the quantity of work to be done, or the condition of the work when completed is not a right to control the mode or manner of doing the work, within the rule above stated.

This basic principle has been approved in almost all American jurisdictions, including Utah. See *Dayton v. Free*, 46 Utah 277, 148 Pac. 408 (1914).

The terms of plaintiff's contract with The Chemical and Industrial Construction Company make it abundantly clear that plaintiff retained no right to control the mode or manner of the doing of the work. All supervision was to be provided by the subcontractor, subject only to plaintiff's right of final acceptance upon the completion of the work.

It is submitted, in the light of the above, that the relationship between plaintiff and The Chemical and Industrial Construction Company is that of employer and independent contractor; that there is no basis for attributing an agency relationship to such agreement or for disregarding the legal entity of these corporations, and, accordingly, plaintiff was not present within the State of Utah. Thus plaintiff could



not have "used" or "stored" in *Utah* the materials upon which tax liability is asserted.

**III. The State Tax Commission in Asserting Liability for the Payment of a Use Tax against Plaintiff Is Acting beyond the Scope of Its Authority, Such Action Being in Violation of the Commerce Clause and the Fourteenth Amendment to the United States Constitution.**

It is a well settled principle of constitutional law that the taxing power of a state is limited to subjects within its jurisdiction, and that the seizure of property by the state under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law. Thus, in the early case of *St. Louis v. Wiggins Ferry Co.*, 78 U. S. (11 Wall.) 423, 430 (1871) it was said:

"Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that citizens or property of another state or country should be taxed in the same manner as persons and property within its own limits and subject to its authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action. . . ."

Before there can be a valid exercise of the state's taxing power over persons not present within its borders, it must appear that there is a sufficient connection, certain minimum contracts sufficient to satisfy the demands of due process between the person upon whom the tax is sought to be imposed and the state seeking to exert such taxing power. *International Shoe Co. v. Washington*, 326 U. S. 310 (1945); *Miller Bros. v. Maryland*, 347 U. S. 340, 344-5 (1954).



The question in each case is whether the person upon whom the tax is sought to be imposed, by its acts or course of dealing, has subjected itself to the taxing power of the state. There can be little question as to the validity, in so far as constitutional questions of due process of law are concerned, of a state use tax applied to a corporation which enters into the taxing state, conducts part of its business operations there and actually uses items of tangible personal property in that state even though such items were purchased outside of the taxing state. *Pacific Tel. & Tel. Co. v. Gallagher*, *supra*; *Henneford v. Silas Mason Co.*, *supra*. Similarly, where a foreign corporation has localized its business within the taxing state by maintaining either its general offices, *Southern Pacific Co. v. Gallagher*, *supra*, or a branch office from which permanent general agents operate, *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 (1939), or storage and refining facilities, *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 (1934), the imposition of a use tax has been sustained. In each of the cases the person upon whom tax liability was imposed had, by its acts and manner of conducting business, engaged in business activities within the taxing state, and by so doing had subjected itself to the taxing power of that state.

However, plaintiff is aware of no decided case which imposed tax liability upon a foreign corporation under circumstances approximating those in the instant case. There was no solicitation of business within the state of Utah; no office or place of business was maintained there, and no employees of plaintiff conducted any of plaintiff's business from within the state; and none of the contracts involved herein were made in Utah. Plaintiff's only link with the state of Utah was the delivery, by common carrier, of goods purchased outside of the state of Utah pursuant to contracts made outside of Utah, to the job site at Geneva, Utah. Thus, there was no "nexus," no "minimum contacts" with



the state of Utah to support, consistent with constitutional "due process," the imposition of the tax in this case.

What has been stated previously with reference to the matter of the termination of the interstate transportation of these materials, makes it equally clear that the assertion of a use tax against plaintiff here is contrary to the principles announced in the *Blasius*, *Silas Mason Co.*, and *Covey* cases: that a tax upon the interstate transportation of goods, rather than a tax upon their use, storage or other consumption once they have come to rest and become a part of the mass of property within the state, places an undue burden upon interstate commerce within the meaning of the Commerce Clause of the U. S. Constitution.

It is submitted that the principles set forth in the above decisions are decisive of the question of the constitutional validity of the Utah use tax as applied to plaintiff. The Chemical and Industrial Corporation did not engage in any business activities in the state of Utah which would subject it to the taxing power of that state. Nor can plaintiff's presence in the state of Utah be attributed to the fact that the construction work was performed and supervised by The Chemical and Industrial Construction Company. The imposition of such tax by the State Tax Commission is an unconstitutional attempt to extend the taxing power of the state over subjects not within its jurisdiction in contravention of the Commerce Clause and the Fourteenth Amendment to the U. S. Constitution.

#### **IV. The Utah State Tax Commission Improperly Admitted into Evidence a Contract and Certain Testimony Relating Thereto, between Third Persons Not Parties to This Proceeding.**

The defendant has exerted considerable effort in the proceedings below to have the contract between the Chemical Plants Division, Blaw-Knox Company and Columbia



Geneva Division, U. S. Steel Corporation (Record pp. 80-131) admitted into evidence, apparently on the assumption that this contract is somehow determinative of the question of passage of title to the materials used in the construction of the facilities at Geneva, Utah. Plaintiff has maintained throughout these proceedings that this contract is not determinative of the matter of passage of title to the materials involved but also, being a contract between third persons not parties to this proceeding, is not relevant or material to the issues involved here, and is otherwise incompetent.

In *General Foods Corp. v. Brannan*, 170 F.2d 220 (7th Cir. 1948), wherein a decision of an administrative officer of the Commodity Credit Corporation was reversed, the court stated at 225:

The government cites no authority in support of its right to use proof as to the statements and activities of one party against another in the absence of a conspiracy, agreement or a relationship kindred thereto. . . . It is true, of course, as asserted by the government, that strict rules of procedure, including the admissibility of evidence, inherent in criminal and common law proceedings are not applicable to administrative proceedings. But no court, as far as we are aware, and we do not propose to be the first, has held in an administrative proceeding or any other kind that one person can be responsible for the actions of another in the absence of a conspiracy or agreement.

Cf. *Saxton v. W. S. Askew Co.*, 38 F.Supp. 323 (N. D. Ga. 1941).

Similarly, in *Glen Alden Coal Co. v. Unemployment Compensation Board of Review*, 168 Pa. Super, 534, 79 A.2d 796 (1951), the Superior Court reversed a proceeding of the Unemployment Compensation Board where the Board admitted into evidence a letter from a person not a



party to the proceeding over objection by one of the parties. The court stated that this document was incompetent and inadmissible. Although the Board was not required to conform to the common law or statutory rules of evidence, where a timely objection is made to incompetent evidence, it is nevertheless not admissible. See also *Phillips v. Unemployment Compensation Board of Review*, 152 Pa. Super. 75, 30 A.2d 718 (1943).

Although the contract in question has some remote relevancy to the question of the passage of title to the materials involved, this relevancy lacks sufficient materiality to this question to justify its admission into evidence by the State Tax Commission. Its admission, in addition to the fact that it is incompetent evidence in this proceeding, served merely to confuse the issues involved and to unduly prolong the proceedings. Once having been admitted, however, it is clear that the *entire* contract must be examined and considered in order to ascertain its effect.

Contrary to the construction placed upon this contract by the defendant, an examination of the entire contract supports plaintiff's position with respect to the matter of the passage of title to materials upon which the tax is asserted. Although there is no provision in this contract equivalent to Article XVIII of plaintiff's contract with the Blaw-Knox Company, Paragraph 5 does provide, in part:

... Owner shall pay Contractor progress payments on account of the contract price against estimates of percentage of completion made by Contractor and approved by Owner for ninety per cent (90%) of the proportionate price of services rendered, *materials and equipment delivered*, field work performed and other expenses incurred, said payments to be made by Owner within ten (10) days after submission of each invoice therefor. . . . (Emphasis added.)

Under Paragraph 5 the United States Steel Corporation is paying for work as it is performed and for materials as



they are delivered. There is nothing inconsistent in this provision of the contract with a determination that title to the materials passed upon delivery at the site. Where a person contracts to sell goods and delivers such goods to the buyer and the buyer has contracted to pay the seller for them, it is a completed sale. Nothing remains to be done to effect a transfer of title. See 46 Am. Jur. *Sales*, Sections 411 et seq. (1939); *Jones v. Commercial Investment Trust*, 64 Utah 151, 228 Pac. 896 (1924).

A reading of the transcript of the hearing of May 10, 1960 (Record pp. 47-55) indicates that counsel for the defendant was unwilling to rest his case to support his contention that the contract alone was determinative of the time of passage of title to the materials. After the contract was introduced, a series of leading questions (Record pp. 52-53) were directed to an employee of the United States Steel Corporation, a Mr. Maynard Gage, which elicited the desired testimony: to the effect that the interpretation placed upon this contract by Mr. Gage (or United States Steel) was that title to the materials did not pass until completion and final acceptance of the contract.

These questions and the answers they elicited were highly improper and clearly inadmissible on several grounds not the least of which is that the conclusions made by Mr. Gage are absolutely and unmistakably erroneous.

First, once the written contract was introduced in evidence, its terms could not be varied, altered, contradicted or added to by oral testimony. It is well established that oral evidence is not admissible to contradict, add to or vary a written instrument. *Farr v. Wasatch Chemical Co.*, 105 Utah 272, 143 P.2d 281 (1943); *Garrett v. Ellison*, 93 Utah 184, 72 P.2d 449 (1937). There is no provision in defendant's Exhibit No. 4 covering the passage of title to the materials used in the construction of the facilities at Geneva, Utah. Mr. Gage, by testifying as to his "inter-



pretation" of the contract is adding a provision thereto which is not contained in its express terms.

Second, since there is no express provision in the contract relating to the passage of title of the materials, it is clear that Mr. Gage is merely expressing his own opinion as to this question. There has been no showing that Mr. Gage is an "expert" on contract interpretation; that he is by training or profession qualified to express such an opinion. It is also well established that unless a witness is qualified as an expert, he cannot be permitted to express an opinion as to a matter to be determined by the trier of fact.

In *Upton v. Heiselt*, 118 Utah 573, 223 P.2d 428 (1950) the plaintiff, in an action to quiet title to real estate, sought to introduce a letter from a referee in bankruptcy in Colorado expressing an opinion as to the tax title of the plaintiff to the real estate. The Supreme Court of Utah held that such evidence was clearly inadmissible opinion evidence on issues that were to be decided by the court in which the suit was initiated.

This rule is equally applicable to administrative proceedings. In *Ryan v. New York State Liquor Authority*, 273 App. Div. 576, 79 N.Y.S.2d 827 (1948), the court stated that in administrative proceedings witnesses should not be permitted to testify as to their opinions, conclusions and inferences. Similarly, in *State Board v. Thomasson*, 65 Dauph. 110 (Pa.Com.Pl.s.) the court held that in a proceeding before an administrative agency, witnesses may not be permitted to express opinions of facts to which they are testifying. Testimony which thus amounts to a legal conclusion is incompetent and inadmissible. Such conclusions are to be drawn only by the administrative body on the basis of facts adduced before it.

Finally, and of particular importance, it is painfully obvious that Mr. Gage's "interpretation" of the contract is contrary to its terms and contrary to law. We take it



that there is no dispute that throughout the period of construction the title to the real estate upon which these facilities were constructed was in United States Steel Corporation. See in this connection, *Geneva Steel Co. v. State Tax Commission*, *supra*. There has never been anything, in evidence, the correspondence, or otherwise, which would indicate that this was not a fact. The only question relates to the time of passage of title to the personalty. Although it is far from clear as to which of the provisions of the contract Mr. Gage is relying upon to support his "interpretation" of the contract, we assume that it is, at least in part, based upon Paragraph 24 thereof. An examination of this section discloses, however, no mention or reference to any passage of title either to materials used or to the plant itself. It is obvious that "acceptance" as used in this section relates only to the guarantees of operating performance of the completed facility, a standard provision in contracts of this type.

The contention that "title" to anything passed pursuant to the operation of Section 24 is absurd. United States Steel Corporation already owned the real estate and in the absence of a provision to the contrary in the contract, local law must determine the passage of title to personalty.

It is a uniformly accepted proposition that once personalty is affixed or annexed to the land, it becomes a part of the land and title passes to the landowner. See 22 Am. Jur. *Fixtures*, § 2 (1939). This is the law of Utah. See *Heiselt Construction Co. v. Morrison-Knudsen Co.*, 176 F.2d 207 (10th Cir. 1949); *Heiselt Construction Co. v. Garff*, 119 Utah 164, 225 P.2d 720 (1950). Under Paragraph 23 of defendant's Exhibit No. 4, matters relating to the construction of the contract are expressly made subject to the laws of the State of Utah.

If Mr. Gage's interpretation of the contract were correct and if there were a breach of the contract by United States



Steel at any time prior to "final acceptance" under the contract, Blaw-Knox would have every right to dismantle the entire plant, piece by piece, and haul it away, since, according to Mr. Gage, they still had title to the plant. Plaintiff has no hesitation in saying that this is *not* United States Steel's understanding of the rights of the parties to this contract.

Throughout the course of the proceedings below the defendant has sought to nullify the effect of Article XVIII of plaintiff's contract with Blaw-Knox Company by stating that plaintiff cannot, by the terms of its contract with Blaw-Knox Company, impose liability for the payment of the use tax upon Columbia-Geneva Division, United States Steel Corporation. Plaintiff has never contended that United States Steel was the proper party upon which to impose liability for the payment of the tax. Plaintiff's position is simply that *it* is not liable for the payment of this tax. In view of the fact that plaintiff has not urged defendant to impose liability against any of the other parties to these transactions, defendant's argument would appear to have little merit.

Plaintiff would further direct the court's attention to three additional points: (1) It is noted that Article XVIII of the contract between plaintiff and Blaw-Knox Company is contained in the printed form of contract provided by Blaw-Knox Company and accordingly is a part of the contract at the direction of Blaw-Knox Company, not plaintiff. Provisions similar to Article XVIII of plaintiff's contract are frequently included in construction contracts at the request of owners because of the protection they afford as a defense to possible claims of subcontractors or materialmen, *i.e.*, in replevin actions or actions for the recovery of the materials delivered. Plaintiff submits that this provision was inserted in the contract by Blaw-Knox Company for a definite purpose and that such provision



cannot be effective for the purpose of protecting the owner against claims of subcontractors on the one hand, and ignored when its effect might work to the detriment of the owner; (2) In any event, United States Steel Corporation protected itself from any tax liability which might result from the contract and the construction of the facilities by providing in Paragraph 15 that the Contractor (Blaw-Knox Company) was required to indemnify and hold the Owner (United States Steel Corporation) harmless from any liability for any state or local taxes; (3) United States Steel was certainly aware of the fact that Blaw-Knox intended to subcontract a portion of the prime contract to plaintiff. The letter of June 1, 1955 from Mr. Lester of the Blaw-Knox Company to Mr. Purvance (Record pp. 94-95) refers to quotations of C. and I. (The Chemical and Industrial Corporation).

In summary it is plaintiff's position that this contract, and the testimony relating thereto, were not competent evidence in this proceeding and that the admission of such evidence was error. Even if the admission of such evidence is not deemed reversible error, however, the contract supports plaintiff's position with respect to the matter of the passage of title to the materials used in the construction of the facilities for the United States Steel Corporation at Geneva, Utah.

## V. Conclusion.

Plaintiff could not have "used" or "stored" the materials in question in view of the fact that by the express terms of its contract, the ownership of such materials passed to another upon their delivery and storage within the State of Utah, nor could plaintiff have "used" or "stored" materials within the State of Utah as required by the Utah Use Tax Act of 1937, as amended, since it did not engage in any activities within the State other than the delivery of



materials in interstate commerce to the job site. The activities of plaintiff's wholly-owned subsidiary are not attributable to it on an agency basis, because under their contract a relationship of employer-independent contractor, rather than principal and agent, was created.

Any attempt by the State Tax Commission to subject plaintiff to use tax liability under these circumstances constitutes an attempt to expand the scope of its taxing power over subjects beyond its lawful control, and as such is in contravention of the Commerce Clause of the United States Constitution, and, in addition, deprives plaintiff of its property without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The State Tax Commission committed error in admitting a contract between third persons not parties to the proceeding below, but even if no error was committed, such evidence does not support or provide any basis for the conclusions of law determined by the defendant.

Plaintiff prays that the decision of the defendant, Utah State Tax Commission, be reversed and that plaintiff be discharged from all liability for payment of any use tax in connection therewith.

Respectfully submitted,

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