

1961

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

— FILED

FEB 3 - 1961

THE CHEMICAL AND
INDUSTRIAL CORPORATION

Petitioner,

— vs. —

THE STATE TAX COMMISSION
OF UTAH,

Respondent.

Clerk, Supreme Court, Utah

Case
No. 9360

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE CHEMICAL AND
INDUSTRIAL CORPORATION,
Petitioner,

— vs. —

THE STATE TAX COMMISSION
OF UTAH,
Respondent.

Case
No. 9360

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The parties herein will be designated as follows : Petitioner, the Chemical and Industrial Corporation, as "Chemical and Industrial Corporation," 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 use tax liability and deficiency upon the Chemical and Industrial Corporation.

The deficiency assessment was based upon the purchase and furnishing of materials and supplies by the petitioner as the consumer of such supplies and materials delivered and stored in the state of Utah and used for the construction of an ammonium nitrate plant of the United States Steel Corporation, Columbia - Geneva Division (hereinafter denominated Geneva).

Three principal questions are presented by this appeal. They are: (1) whether or not the petitioner was the owner of the materials at the time they ended their transit in interstate commerce; (2) whether or not the petitioner 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) whether or not the assessment of this deficiency to the petitioner constitutes an undue burden upon interstate commerce or violates the provisions of the due process clause of the United States Constitution.

STATEMENT OF FACTS

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

The deficiency in the present case arose out of a prime contract between the Columbia-Geneva Steel Division of United States Steel Corporation and Blaw-Knox Company, in which agreement the Blaw-Knox Company agreed to furnish and pay for all labor and materials and services not furnished by Geneva and to do and to per-

form all things necessary for the completion and construction of an ammonium nitrate facility at Geneva, Utah. This agreement was made on the 6th day of July, 1956. Blaw-Knox, in turn, subcontracted the ammonium nitrate facility to the Chemical and Industrial Corporation in an agreement dated November 13, 1956, in which the present petitioner agreed to purchase the materials and perform the work necessary for the completion of the ammonium nitrate facility. By contract dated November 23, 1956, the petitioner contracted with its wholly owned subsidiary, the Chemical and Industrial Construction Company, under the terms of which contract the Chemical and Industrial Construction Company agreed to furnish labor, tools and equipment necessary to perform the work. The petitioner subsequently purchased all necessary materials and supplies required for the performance of the subcontract from vendors not residents of the state of Utah by contracts executed outside of the state of Utah. Such materials were then shipped by the petitioner in interstate commerce to the plant site in Utah where they were received by the Chemical and Industrial Construction Company.

Because of the nature of the issues, the time of passage of title to the materials and supplies purchased becomes extremely important. To determine the passage of title to these materials it becomes necessary to analyze the import of the three main contractual documents which govern the purchase of the supplies, their shipment, and later storage and use in the state of Utah. A summary of

the three contracts, together with references to the actual contract documents, is set forth as follows:

1. CONTRACT BETWEEN UNITED STATES STEEL CORPORATION, COLUMBIA-GENEVA DIVISION AND BLAW-KNOX COMPANY AS PRIMARY CONTRACTOR.

Under the terms of this agreement, Blaw-Knox agreed to furnish and pay for all labor and materials and services not furnished by U. S. Steel and to do and perform all things necessary for the construction and completion of the work (Paragraph 1). Blaw-Knox was denominated the contractor, and it was further agreed that prior to the completion of the work by the contractor and the acceptance thereof by the owner the work was to remain at the risk of the contractor, and the contractor was to be responsible for all loss and damage however caused, whether or not due to the fault of the contractor. (Paragraph 12) The work to be done was specified as furnishing and paying for all labor, materials, supplies, services, tools, equipment, utilities, transportation facilities and plant not furnished by Geneva, and to do and perform all things necessary for the construction and completion of facilities for the production of anhydrous ammonia and associated nitrogen compounds. (Paragraph 1) Blaw-Knox further agreed to pay all sales, use, excise, transportation, privilege, and other taxes. (Paragraph 15) The agreement was denominated by the parties as a turn-key contract. (Letter from E. W. Forker, Vice President and General Manager, of Blaw-Knox Company to H. W.

(Christensen, Director of Purchases, Columbia-Geneva Steel Division, United States Steel Corporation, dated June 18, 1955, paragraph 15.) The Tax Commission found a turnkey contract to be a contract in which the seller or contractor agrees to build a plant or facility and to furnish the complete facilities or plant installed and in operating condition to the extent of instructing employees of the purchaser in its operation, and that the final payment for the facility in such a contract is deferred until said facility is installed, operating and accepted by the purchaser. The contract further provided that Geneva could, under certain conditions, elect to complete the work itself, but that after so doing it should return any unexpended materials and supplies to Blaw-Knox. (Paragraph 4) Final payment was not to be made until acceptance, and partial payments were not considered as acceptance of work not in conformance with the terms of the contract. (Paragraph 24) It then agreed to assume the risk of loss or damage to that portion of facilities so occupied. (Paragraph 12)

Blaw-Knox did not purchase any materials or supplies, instead if elected to subcontract most of the work to the Chemical and Industrial Corporation. As a result, the following contract was signed dated November 13, 1956.

2. CONTRACT BETWEEN BLAW-KNOX COMPANY AND THE CHEMICAL AND INDUSTRIAL CORPORATION.

This contract provided that petitioner was obliged to furnish all materials, supplies, equipment, labor, services, etc., necessary for the construction of the ammonium nitrate plant. (Article 1) Petitioner agreed to be responsible for all materials delivered and work performed until completed and final acceptance. It further agreed to pay all federal, state and local taxes levied upon the subcontractor. (Article XXXI) The subcontract between Blaw-Knox Company and the Chemical and Industrial Corporation also contained the following significant provisions:

“Article I. DEFINITIONS

(c) The term ‘Work’ includes all labor and/or materials to be furnished by Subcontractor as provided in the Purchase Order, and, unless otherwise provided in the Subcontract Documents, Subcontractor shall furnish and pay for all materials, labor, supervision, tools and equipment, administration, transportation, handling, storage, services, supplies, temporary sheds for housing workmen, materials, tools and equipment, and other facilities necessary for the execution and completion of the Work.”

“Article XVIII. TITLE

The title to all Work completed and in the course of construction at the site and of all materials which are delivered and stored at the site and which will necessarily be incorporated into the Work as between Contractor, Owner and Subcontractor, shall be in the Owner.”

The original contract was not incorporated in the subcontract by reference. Petitioner subsequently contracted with its wholly owned subsidiary, Chemical and Industrial Construction Company.

3. CONTRACT BETWEEN CHEMICAL AND INDUSTRIAL CORPORATION AND THE CHEMICAL AND INDUSTRIAL CONSTRUCTION COMPANY DATED NOVEMBER 23, 1956.

This contract provided that the construction company was to furnish labor, tools and equipment to construct the ammonium nitrate facilities. The contract further provided that title to the materials *delivered and stored* at the site would necessarily be in Geneva Steel, which was denominated by the parties as the owner. (Tr. 142, 167-174) (Emphasis supplied)

Subsequently, petitioner purchased all the supplies and materials necessary for the fulfillment of the contract and shipped such materials and supplies in interstate commerce to the plantsite in Utah where they were received by the Chemical and Industrial Construction Company. All labor and services required in the construction work were then provided by the construction company as a wholly owned subsidiary of petitioner engaged in the actual construction of the facilities.

The outline of the Chemical and Industrial Corporation's contractual relationships, as set out on Pages 14-15 of this Brief may be helpful in reaching a determination of the issues.

STATEMENT OF POINTS

POINT I

PETITIONER WAS THE OWNER OF THE MATERIALS INVOLVED HEREIN DURING A TAXABLE MOMENT WITHIN THE STATE OF UTAH.

POINT II

PETITIONER WAS PRESENT IN THE STATE OF UTAH AND IN POSSESSION OF THE MATERIALS HEREIN INVOLVED SO AS TO BE SUBJECT TO THE TAXING POWER OF THE STATE OF UTAH.

POINT III

THE ASSESSMENT OF USE TAX AGAINST THE PETITIONER DOES NOT VIOLATE THE COMMERCE CLAUSE NOR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

POINT IV

THE CONTRACT BETWEEN UNITED STATES STEEL CORPORATION, COLUMBIA-GENEVA DIVISION, AND THE BLAW-KNOX COMPANY WAS PROPERLY ADMITTED INTO EVIDENCE.

ARGUMENT

POINT I

PETITIONER WAS THE OWNER OF THE MATERIALS INVOLVED HEREIN DURING A TAXABLE MOMENT WITHIN THE STATE OF UTAH.

It is clearly shown by the evidence that the petitioner was the original purchaser and that it did at one

time hold title to all of the materials so purchased and which are the subject matter of this assessment. The difference of opinion related to the time at which the petitioner lost ownership of such materials. The Tax Commission's position is based upon the interpretation of all pertinent contracts and may be set forth as follows: First, that it is impossible to impose upon the United States Steel Corporation terms to which it did not agree; and, that any attempt to determine the passage of title to the materials herein involved must necessarily include the agreement to which the United States Steel Corporation is a party. The only contract which meets these requirements is the contract dated July 6, 1956, of which the following paragraphs are pertinent:

Paragraph 1. Description of the work.

“Contractor shall furnish and pay for all labor, materials, supplies, services, tools, equipment, utilities, transportation facilities and plant, not furnished by owner, and do and perform all things necessary for the construction and completion of facilities for the production of anhydrous ammonia and associated nitrogen compounds, which said work is described in owner's specification No. GW-55-31 . . .”

Paragraph 12 is titled “Responsibility for Work” and provides in part:

“Prior to the completion of the work by Contractor and the acceptance thereof by Owner, the work shall remain at the risk of Contractor and Contractor shall be responsible for all loss and damage to the work and shall repair, renew and make good, at its own expense, all such loss and

damage however caused, whether or not due to the fault of the Contractor and including, but not limited to loss or damage caused by collision, riot, fire or force or violence of the elements. To the extent that such loss or damage is not covered by the insurance to be maintained by Contractor hereunder, Contractor shall not be liable in the event that such loss or damage is due to the sole negligence of Owner's employees (unless such loss or damage directly results from directions given such employees by Contractor). In the event that, pursuant to the provisions of Subsection 24(c), Owner accepts and occupies a portion of the facility prior to acceptance of the entire facilities, Owner shall assume all risk of loss or damage to such portion of the facilities."

It was clearly understood between the parties that the United States Steel should not bear any tax burden regarding the construction of the facility. Paragraph 15, entitled "Taxes," provides:

"Contractor shall pay all contributions, taxes and premiums payable under Federal, State and local laws measured upon payroll of employees engaged in the performance of work under this contract and all sales, use excise, transportation, privilege, occupational, and other taxes as they were in force as of April 29, 1955, and at rates then existing applicable to materials and supplies furnished for work performed hereunder and shall save Owner harmless from liability for any such contributions, premiums, and taxes. . . ."

Section 4, entitled "Conditions Under Which Owner May Complete Work," provides that the owner under certain conditions may finish the work by terminating his

contract, and that having properly elected to do so the owner :

“may enter upon the premises and take possession of all materials, tools, equipment, facilities and supplies thereon, and may finish the work with its own forces and may provide the necessary labor and additional materials, tools, equipment, facilities and supplies for finishing the work, or Owner may employ any other person or persons to finish the said work. . . . *Any unexpended materials, tools, equipment, facilities and supplies furnished by contractor for the work shall be returned to it following the completion thereof. . . .*” (Emphasis supplied)

Paragraph 24, entitled “Completion and Acceptance,” provides that after the contractor has finished its construction work that it is to carry on a test of mechanical functioning; that thereafter the owner may begin a two-week testing period; and further provides in Subsection (b) that:

“*Contractor shall make written request for acceptance of the work by Owner when in Contractor’s opinion the specifications as to performance expressly guaranteed by Contractor hereunder have been met and determined by the result of one of the 48-hour test-runs and all other work has been completed. Not later than thirty (30) days after Contractor has submitted to Owner such request for acceptance, Owner, if in agreement, shall in writing accept the work. . . .*” (Emphasis supplied)

Subsection (c) of Paragraph 24 further provides :

“In the event Owner wishes to occupy a portion of the work prior to acceptance of the entire work, such portion shall be tested and accepted under the

procedures of this Section 24 subject only to the results of the final test of the integrated plant and after occupancy Owner shall assume all risk of loss or damage to such portion of the work.”

That there is no basis in the agreement between the United States Steel Corporation and Blaw-Knox Company for the position that title to all materials prior to their incorporation in the work was in the United States Steel Corporation is evidenced by the above-cited provision 24 of the contract. Provision 24 in substance provides that the United States Steel Corporation shall accept the facilities upon completion and final test of the integrated plant by the contractor. United States Steel made no agreement, either with Blaw-Knox Company or with the Chemical and Industrial Corporation or the Chemical and Industrial Construction Company, to receive title to these materials as personal property prior to their incorporation in the plant. This, therefore, places the tax liability clearly upon the subcontractor, Chemical and Industrial Corporation, as coming within the Sales and Use Tax Regulation No. 58, which states:

“II. Where the contractor or subcontractor agrees for a lump sum to furnish materials, supplies and necessary services, the sale to him of the materials and supplies is taxable as he becomes the final consumer or user. . . . The sales or use tax on materials and supplies expended or used in performance of a lump-sum contract is the cost of the contractor or subcontractor, and is not to be billed separately to the owner of the real property.”

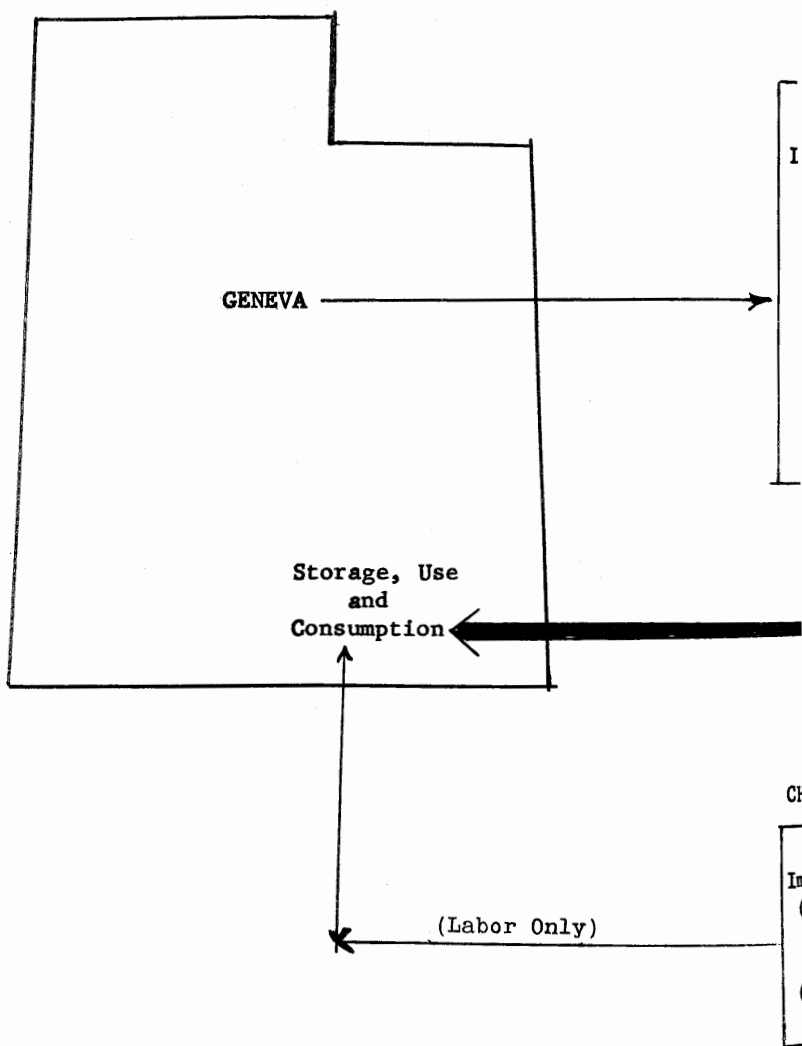
From the foregoing contractual provisions, it is apparent that title to the materials and supplies furnished by the petitioner, delivered within the state of Utah, and intended to be incorporated in the facility at Geneva, did not pass to Geneva until final acceptance of the same by the United States Steel Corporation.

It is further apparent that as the Chemical and Industrial Construction Company never took title or agreed to perform anything except necessary labor upon the materials and supplies furnished, that the ownership of these materials and supplies during the time they were stored and used in Utah was necessarily in the Chemical and Industrial Corporation.

Assuming, but not conceding, the interpretation of the contractual documents as contended by petitioner, it is submitted that the same result is forthcoming even though the prime contract between the United States Steel Corporation and Blaw-Knox Company is not used in making the determination.

The petitioner contends that Article XVIII of petitioner's subcontract with Blaw-Knox Company (hereinafter referred to as Blaw-Knox) is determinative of this issue. Article XVIII provides as follows:

“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], Owner [Geneva] and Subcontractor [petitioner] shall be in Owner.”



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Important Provisions
(1) Petitioner to perform
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materials
(2) Petitioner to pay
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(3) Title to materials
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Petitioner interprets this article to mean that at the moment that the interstate shipment of the materials in question ceased, the title to the materials passed instantly from petitioner to Geneva. Respondent, however, contends that such is not the meaning of Article XVIII and that even were we to concede that Article XVIII were to determine the point at which title to the materials passed to Geneva, that there would be a taxable moment when petitioner would be subject to a use tax thereon.

Article I of petitioner's contract with Blaw-Knox, although entitled "Definitions," provides as follows:

"(c) The term 'work' includes all labor and/or materials to be furnished by Subcontractor [petitioner] as provided in the Purchase Order, and, unless otherwise provided in the Subcontract Documents, Subcontractor shall furnish and pay for all materials, labor, supervision, tools and equipment, administration, transportation, handling, storage, services, supplies, temporary sheds for housing workmen, materials, tools and equipment, and other facilities necessary for the execution and completion of the work."

Thus, petitioner was required not only to purchase and store the materials for this project, but was required to provide the temporary sheds for storing the same.

It is admitted that even by the clear terms of Article XVIII, the title to the materials did not pass from petitioner to Geneva until the materials were "delivered and stored at the site." (Emphasis supplied)

Section 59-16-3, Utah Code Annotated, 1953, provides in part:

“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 sales price of such property.” (Emphasis supplied)

“Storage” is defined by Section 59-16-2, Utah Code Annotated, 1953, as follows:

“(a) ‘Storage’ means and includes *any keeping or retention* in this state for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.” (Emphasis supplied)

Even construing Article XVIII most favorably to petitioner it is respectfully submitted, since the material had to be delivered *and stored* by petitioner before title could conceivably pass to Geneva, that there was a taxable moment after the interstate shipment had ceased and before title rested in Geneva. See *Southern Pacific v. Gallagher*, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 563 (1939); *Pacific Telephone & Telegraph Co. v. Gallagher*, 306 U. S. 182, 59 S. Ct. 396, 83 L. Ed. 595 (1939).

This conclusion is further substantiated by Section 59-16-7, Utah Code Annotated, 1953, which provides in part:

“For the purpose of the proper administration of this act and to prevent evasion of the tax and the duty to collect the same herein imposed, it shall

be presumed that tangible personal property sold by any person for delivery in the state is sold for storage, use or other consumption in this state. . . .”

It is clear that the materials and supplies in question were sold and purchased for storage, use and consumption in the state of Utah; they were then shipped to the state of Utah where they were stored, used and consumed. The Tax Commission contends that the activities of the petitioner do constitute a keeping or retention or storing in this state of tangible personal property and that this keeping or retention is a proper basis upon which the Tax Commission may levy a use tax. To rule otherwise is to say that the parties to a construction contract, by intricate manipulation, may purchase materials outside the state for storage, use and consumption within the state, in such a way as to avoid paying a tax to the state altogether. To so find is to discriminate against intrastate contractors and place intrastate sellers in a position where they cannot compete with interstate sellers.

POINT II

PETITIONER WAS PRESENT IN THE STATE OF UTAH AND IN POSSESSION OF THE MATERIALS HEREIN INVOLVED SO AS TO BE SUBJECT TO THE TAXING POWER OF THE STATE OF UTAH.

Assuming for purposes of argument that petitioner was not the “owner” of the said materials, we submit that the petitioner was present in the state of Utah and in possession of the materials used in the construction of the

facility during a taxable moment. The Supreme Court of the United States had occasion to examine a factual situation very similar to this one in the case of *Kansas City Structural Steel Co. v. State of Arkansas*, 269 U. S. 148, 46 S. Ct. 59, 70 L. Ed. 204 (1925). In that case the state of Arkansas had levied a fine of \$1,000.00 against the Kansas City Structural Steel Co. (a Missouri Corporation) for doing business within the state of Arkansas prior to obtaining permission. On Mar. 3, 1921, the plaintiff company bid on a bridge job to be constructed in Arkansas. This bid was accepted, contingent upon the company's furnishing a bond. The bond was executed two days later in Missouri. On June 14, 1921, the plaintiff company sublet all the work except the erection of the steel superstructure to the Young Construction Co., a Kansas partnership. Subsequently, the plaintiff company shipped materials from its Kansas City plant addressed to itself, which were delivered to its subcontractor at Wilmot, Arkansas, and used by the latter in the work done by the subcontractor. On August 17, 1921, after the subcontractor had substantially completed his work, plaintiff company obtained permission to do business in the state of Arkansas. However, the state charged the plaintiff with doing business prior to the date upon which it obtained permission, and the statutory fine of \$1,000.00 was imposed, which was affirmed by the Supreme Court of Arkansas. The plaintiff company then took the matter to the United States Supreme Court on writ of certiorari.

The question on appeal was whether the acts done by the plaintiff company were in interstate commerce or

whether the company did business of a local, intrastate nature in Arkansas prior to obtaining permission. The United States Supreme Court affirmed that the company had done business of a local, intrastate nature in Arkansas before obtaining permission. In reasoning thusly, the Court stated:

“... In the case now before the court, the construction of the bridge necessarily involved some work and business in Arkansas, which were separate and distinct from any interstate commerce that might be involved in the performance of the contract. From the beginning, transactions local to Arkansas were contemplated. In fact, plaintiff in error obtained permission to do business in Arkansas in order to be authorized to erect the steel superstructure — the part of the work it had not sublet. But before obtaining such permission, it made the bid and signed the contract in Arkansas; it shipped from Kansas City to itself at Wilmothe the materials for the work it had sublet, and, after the interstate transit had ended, delivered them to the subcontractor who used them in the work. We need not consider whether, under the circumstances shown, the making of the bid, the signing of the contract and execution of the bond would be within the protection of the commerce clause, if these acts stood alone. But it is certain that, when all are taken together, the things done by plaintiff in error in Arkansas before obtaining the permission constitute or include intrastate business. *The delivery of the materials to the subcontractor was essential to the building of the bridge, and that was an intrastate and not an interstate transaction. The*

fact that the materials had moved from Missouri into Arkansas did not make the delivery of them to the subcontractor interstate commerce. So far as concerns the question here involved, the situation is the equivalent of what it would have been if the materials had been shipped into the State and held for sale in a warehouse, and had been furnished to the subcontractor by a dealer. We think it plain that the plaintiff in error did business of a local and intrastate character in Arkansas before it obtained permission.” (Citing cases.) (Emphasis supplied)

In view of the foregoing language it would appear that the fact that the construction company shipped materials addressed to itself for the completion of the contract in Arkansas convinced the Supreme Court that the construction company was present and doing business in the state, although the materials were actually received and used by the subcontractor of the construction company. Furthermore, the court indicated that the interstate shipment had ceased prior to the time when the materials were finally delivered to the subcontractor, and that the delivery was of an intrastate character, evidencing the presence of the construction company.

The storage and use in California of railroad supplies and equipment purchased outside the state by a Kentucky corporation which operated an interstate railroad, were held in *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, 59 S. Ct. 389, L. Ed. 583 (1939), to be intrastate events properly subjected to the California Use Tax, even as to articles ordered out of the state under specifications suitable only for utilization in interstate transportation facili-

ties and installed immediately on their arrival at the California destination. The Court said that there was a taxable moment when such goods had reached the end of their interstate transportation and had not begun to be consumed in interstate operation, and that at that moment the tax on storage and use — retention and exercise of a right of ownership, respectively — was effective. The further contention that the tax violated the due process clause because enacted for consumption of office and car supplies outside the state, upon their appropriation in California to the use of the whole system, was also rejected since the determination that the taxable event was the exercise of the property right in California justified the tax.

And in *Oklahoma Tax Commission v. Stanolind Pipe Line Co.* (CA 10th Oklahoma), 113 F. 2d 853, Cert. Den. 311 U. S. 693, S. Ct. 75, 85 L. Ed. 448 (1940), the Oklahoma use tax was held applicable to equipment and supplies purchased outside Oklahoma by a Maine corporation for immediate installation and repairs on its interstate pipe lines through Oklahoma. The Court, following the *Southern Pacific Co. v. Gallagher* case, *supra*, held that the retention and exercise of a right of installation of the property after the termination of its movement in interstate commerce and before the beginning of its use and consumption in the interstate business, was said to come well within the terms of the statute. See also *Chicago Bridge & Iron Co. v. Johnson*, 19 Cal. 2d 162, 119 P. 2d 945 (1941); *Sugarman v. State Board of Equalization*, 51 Cal. 2nd 361, 333 P. 2d 333 (1958); *Custom Built Homes*

Co. v. Kansas State Commission of Revenue and Taxation, 184 Kan. 31, 334 P. 2d 808 (1959); and *United Aircraft Corporation v. Connelly*, 145 Conn. 176, 140 Atl. 2d 486 (1958).

In the instant case, therefore, we submit that the Commission was justified in finding that the petitioner was present within the state of Utah after the interstate shipment of the materials in question had ceased, and that the petitioner thereupon delivered possession of the materials to its subcontractor for storage or further use in the construction project. This would constitute a "use" within the meaning of Section 59-16-2 (b), Utah Code Annotated, 1953, as amended. It would also be sufficient to justify the Commission in finding the petitioner to be present within the state during a taxable moment. See *Chicago Bridge & Iron Co. v. Johnson*, 19 Cal. 2d 162, 119 P. 2d 945 (1941).

POINT III

THE ASSESSMENT OF USE TAX AGAINST THE PETITIONER DOES NOT VIOLATE THE COMMERCE CLAUSE NOR THE FOUR- TEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

For the reasons stated in Point II hereof, we respectfully submit that the assessment of this deficiency to the petitioner would not unduly burden interstate commerce or violate the provisions of the Fourteenth Amendment to the United States Constitution. See *Kansas City Structural Steel Co. v. State of Arkansas*, 269 U. S. 148, 46 S.

Ct. 59, 70 L. Ed 204 (1925) which holds that shipments in all respects similar to those in question here had terminated their transit in interstate commerce prior to their delivery to the subcontractor.

POINT IV

THE CONTRACT BETWEEN UNITED STATES STEEL CORPORATION, COLUMBIA-GENEVA DIVISION, AND THE BLAW-KNOX COMPANY WAS PROPERLY ADMITTED INTO EVIDENCE.

The contract between Geneva and Blaw-Knox Company dated July 6, 1956, is clearly admissible. The propriety of this admission can be readily seen after careful scrutiny of the issues herein. The question of paramount importance is that of the passage of title to the materials and supplies used in the performance of the work and purchased by the petitioner. Clearly, an allegation or agreement by petitioner with some third party is not enough to vest title to the materials in Geneva without its consent. Especially is this true if the prime contract provided other prerequisites to the passage of title such as acceptance or completion of the work.

Petitioner's chief objection is that the contract lacks materiality and serves to confuse the issues. The Tax Commission submits that the materiality of this contract is clearly shown from the very nature of the contentions of the petitioner.

Even assuming the "remote relevancy" suggested by the petitioner, the contract should have been received.

Davis, Volume II, Administrative Law, Section 14.01, suggests that the direction of movement on the evidence problem throughout the legal system, in the judicial processes as well as the administrative processes, is toward (1) replacing rules with discretion, (2) admitting all evidence that seems to the presiding officer relevant and useful, and (3) relying upon the kind of evidence on which responsible persons are accustomed to rely in serious affairs. Admitting the fact that the Administrative Procedure Act has not been enacted in this state as yet, it is submitted that an administrative agency, sitting as a quasi-judicial body, should not be strictly bound by the exclusionary rules of evidence for jury cases. The provisions of Section 7 (c) of the Administrative Procedure Act appear eminently fair. This Section provides:

“Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or any such portion thereof as may be cited by any party and as supported by and in accordance with the reliable probative and substantial evidence.”
(Emphasis supplied)

Petitioner cites several cases in support of its contention that this contract was improperly received. The case of *General Foods Corporation v. Brannon* (7th Cir. 1948), 170 F. 2d 220, involving an attempt by the Secretary of Agriculture to impose certain sanctions upon General Foods Corporation and others because of an alleged attempt to manipulate the price of rye. The case

was tried before a referee and heard and decided by a Judicial Officer as though respondents were judged with and found to have been engaged in a conspiracy, this notwithstanding the Government's express disclaimer that any conspiracy or agreement existed. The totality of the respondents' activities was relied upon as an incriminating circumstance against each, a case hardly determinative of the propriety of admission in the present case.

The case of *Glen Alden Coal Co. v. Unemployment Compensation Board of Review*, 168 Pa. Super 534, 79 Atl. 2d 796 (1951), cited by petitioners, held only that the finding of an administrative board may not be based exclusively on incompetent evidence, and the case of *Phillips v. Unemployment Compensation Board of Review*, 152 Pa. Super 75, 30 Atl. 2d 718 (1943), held that the report of an investigator not himself a party to the hearing should be made a part of the record for the information of the Unemployment Compensation Board. The latter case is not inconsistent with the Tax Commission's position herein, and the totality of authority cited by petitioner does not justify any other course of action than that followed by the Tax Commission.

Petitioner further objects to a series of questions propounded of Mr. Maynard Gage, Assistant Director of Purchases for Geneva, who assisted in the negotiation and signing of the contract in question, regarding the passage of title of materials purchased by petitioner. Petitioner contends the oral testimony cannot be introduced to vary terms of a written contract.

As a general rule, petitioner is correct. However, this is not the case where the contract is ambiguous or incomplete. In a number of cases, the courts have said that oral evidence is admissible to *explain* the writing. Where the instrument is fairly susceptible to more than one construction, it is admissible to have the aid of pertinent facts and circumstances that will throw light on the intention of the parties to the contract in its execution. *Penn Co. v. Wallace*, 346 Pa. 532, 31 Atl. 2d 71, 156 ALR 1 (1943); 20 *Am. Jur., Evidence*, Sec. 1147. The contract in the instant case is apparently ambiguous as both petitioner and the Tax Commission cite its paragraphs in an attempt to ascertain the passage of title.

For the above reasons, the Tax Commission contends that it was proper to admit the contract in question into evidence, together with additional testimony relating thereto.

CONCLUSION

For the foregoing reasons, we respectfully urge that the use tax deficiency assessed against the petitioner should be affirmed.

Respectfully submitted,

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