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Olson Construction Co. et al v. State Tax Commission of Utah : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

OLSON CONSTRUCTION COM-
PANY, THIOKOL CHEMICAL
CORPORATION, Utah Divi-
sion; EMPIRE STEEL COM-
PANY and FIFE ROCK PROD-
UCTS COMPANY,

Petitioners,

— vs. —

THE STATE TAX COMMISSION
OF UTAH,

Respondent.

FILED

JAN 3 - 1961

Clerk, Supreme Court, Utah

Case
No. 9362

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

As indicated in petitioners' Brief, the facts in this case are undisputed and were submitted to the Tax Commission upon a written stipulation (R-6).

Thiokol Chemical Corporation holds a prime contract with the United States Government for the construction of certain facilities near Brigham City, Utah. Thiokol awarded two sub-contracts to Olson Construction Company for the construction of various buildings and other

facilities, known and described as Minuteman Facilities Package No. 1 and Minuteman Facilities Package No. 2. These facilities were constructed by Olson in accordance with two lump sum construction contracts. Olson contracted and agreed with Thiokol to construct Minuteman Facilities Package No. 1 for \$1,124,965.00 (Exhibits B and C); the lump sum price to construct Minuteman Facilities Package No. 2 was \$734,559.00 (Exhibits D and E).

In the course of fulfilling its sub-contracts, Olson Construction Company used and consumed building materials which it purchased from various suppliers. Empire Steel Company and Fife Rock Products Company were two of these suppliers. A sales tax was imposed upon and paid by Olson on the purchase of the building materials. A claim for refund of these taxes was made to the Tax Commission (R-1); the petition was denied (R-32); and the sole question to be decided on appeal is whether the sales tax was properly imposed.

No tax has been imposed upon any of the other parties to this litigation; Empire and Fife were merely collectors of the tax; and Thiokol has joined in the petition because under the terms of its sub-contract it has reimbursed Olson for the taxes paid.

STATEMENT OF POINTS

POINT I

OLSON CONSTRUCTION COMPANY WAS
THE USER AND CONSUMER OF THE VAR-

IOUS BUILDING MATERIALS AND THE
SALES TAX WAS PROPERLY IMPOSED
AND PAID.

POINT II

THE TAX COMMISSION IS NOT BOUND TO
FOLLOW AN ADMINISTRATIVE REGULA-
TION IF SAID REGULATION IS CONTRARY
TO THE LAW.

ARGUMENT

POINT I

OLSON CONSTRUCTION COMPANY WAS
THE USER AND CONSUMER OF THE VAR-
IOUS BUILDING MATERIALS AND THE
SALES TAX WAS PROPERLY IMPOSED
AND PAID.

Appellants in this case do not claim to be exempt from sales tax under Section 59-15-6, Utah Code Annotated, 1953, which exempts from taxation all sales to the U. S. Government. None of the parties involved in this lawsuit are agents of the U. S. Government and under the leading Supreme Court cases of *Alabama v. King & Boozer*, 314 U.S. 1 and *Curry v. United States*, 314 U.S. 14, the government exemption cannot be invoked. Rather, the contention seems to be that the sale of building materials to Olson Construction Company were sales for resale; that a sale for resale is not a retail sale; and that the sales tax only applies to retail sales.

It is the position of the Tax Commission that the sales tax applies to all sales of tangible personal prop-

erty made to the ultimate consumer of the property purchased, and that Olson Construction Company was the user and consumer of the materials in question.

Section 59-15-4, Utah Code Annotated, 1953, as amended, imposes a sales tax upon every "retail sale of tangible personal property made within the state of Utah." The term "retail sale" is defined in Section 59-15-2 (e) as "every sale within the state of Utah by a retailer or wholesaler *to a user or consumer*, except such sales as are defined as wholesale sales or otherwise exempted by the terms of this act"; and the term "retailer" is defined in the same section as "a person doing a regularly organized retail business in tangible personal property, known to the public as such and *selling to the user or consumer* and not for resale." Section 59-15-2 (d) defines the term "wholesale" to mean "the sale of tangible personal property by wholesalers to retail merchants, jobbers, dealers, or other wholesalers for resale, *and does not include a sale by wholesalers or retailers to users or consumers* not for resale, except as otherwise hereinafter specified.

The question as to whether a contractor is a user or consumer and thus liable for sales tax on the purchase of building materials has already been clearly decided by the Utah Supreme Court in the case of *Utah Concrete Products Corporation v. State Tax Commission*, 101 Utah 513, 125 P. 2d 408. As in the case presently before the Court, that case involved the sale of products made by a manufacturer of building materials to contractors for

use upon a public construction contract. Because this case is directly in point, we quote at length from the language of the Court:

“It is the plaintiff’s position that a sale by them as manufacturers to contractors for use in private and public construction is not a ‘retail sale’ within the contemplation of the act. The defendant Tax Commission contends that by the provisions of the act it is ‘apparent that the sales tax applies to the sale to the ultimate “user or consumer.”’

Under paragraph (e), Section 2, Chapter 20, Laws of Utah, Second Special Session, 1933, as amended by Laws 1939 c. 103, amending the original act of 1933, it states the term ‘retailer’ to mean

‘a person doing a regularly organized retail business in tangible personal property, known to the public as such and selling to the *user* or *consumer* and not for resale, and includes commission merchants and all persons regularly engaged in the business of selling to *users* or *consumers* within the state of Utah * * * The term “retail sale” means every sale within the state of Utah by a retailer or wholesaler to a *user* or *consumer*, except such sales as are defined as wholesale sales or otherwise exempted by the terms of this act * * *.’ (Emphasis by the Court)

* * *

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

The paramount question then turns upon the proposition of whether the contractors to whom the plaintiffs sold their products were ‘users’ or ‘consumers’ within the meaning of the act or whether

they were mere dealers in the products reselling to the third parties.

* * *

. . . in the instant case, contractors purchase the pipes, culverts and cinder blocks for the purpose of using and consuming them by incorporating them as one of many units which go to make up buildings, structures, or roads, as the case might be, and not for reselling them as such in their original form, but for the purpose of changing their very nature from personal to real property. In short, labor and many other materials enter along with the plaintiffs' products to make up the particular structure, and they are all used or consumed in the process of producing a new entity. . .

In the case of the *City of St. Louis v. Smith*, 342 Mo. 317, 114 S.W. 2d 1017, 1019, under a retail sales statute similar in intent and wording to ours, building, paving and sewer contractors were held liable for the tax as 'consumers,' and it was the dealer's duty to collect the tax at time of sale. The court stated that in its 'judgment the contractors in this case did not buy the materials in question for the purpose of reselling such materials to the city. They were under contract to deliver to the city a finished product. It was the inseparable comingling of labor and material that produced the finished product.'

Again in the case of *Atlas Supply Co. v. Maxwell*, 212 N. C. 624, 194 S.E. 117, 118, the court on holding plumbing and heating contractors subject to sales tax law, stated that

'they purchase the materials and supplies, not for resale as tangible personal property, but for use in producing the turnkey job. There is no resale of the materials and supplies, as such, either actual or intended, within the meaning of the act.' See views expressed to the same effect in *Lone Star*

Cement Co. v. State Tax Commission, 234 Ala. 465, 175 So. 399; *Albuquerque Lumber Co. v. Bureau of Revenue*, 42 N.M. 58, 75 P. 2d 334; *State v. J. Watts Kearney & Sons*, 181 La. 554, 160 So. 77; *Herlihy Mid-Continent Co. v. Nudelman*, 367 Ill. 600, 12 N.E. 2d 638, 115 A.L.R. 491.”

Thus, it was held that contractors are consumers within the meaning of the Sales Tax Act.

The only difference between the *Utah Concrete Products case* and the instant case is the fact that here there exists a provision in the contract reciting that title to all property purchased by the contractor shall pass to and vest in the government immediately upon delivery to the site. The government was not even a party to this contract. It would seem unreasonable to believe that the Sales Tax Act could be completely circumvented by the simple insertion of this clause in the construction contract between Thiokol Chemical Corporation and Olson Construction Company.

The above is especially true when the nature of the contract is carefully examined. Thiokol did not contract with Olson for the purchase of a load of lumber, a pile of bricks, or a keg of nails; on the contrary, they were only interested in contracting for the construction of a complete facility. This is clearly evident by the Statement of Work as provided at page 1 of the basic contracts (Exhibits B and D):

“*Contractor agrees to furnish all plant, labor and materials, equipment and supplies and to perform all operations in connection with the construction*

of a complete facility as indicated in the Cost Schedule of Bid Items, in strict accordance with the specifications, schedules, drawings and conditions.” (emphasis supplied)

That Thiokol or the United States Government did not in reality repurchase from Olson the building materials as such is further evidenced by the fact that acceptance of the completed facility was subject to inspection (Clause 9 of General Conditions of Contract, Exhibits C and E) ; and also that Olson had the sole responsibility for all materials upon which payments had been received and the responsibility for restoration of all damaged work (Clause 7(c) of General Conditions of Contract, Exhibits C and E).

From a realistic standpoint, Olson Construction Company performed and completed its construction contract in the same customary manner as any other contractor. Because of such facts, Olson cannot be considered as a wholesaler of building supplies which it used and consumed in the performance of its contract and which were never at any time used or consumed by either Thiokol Chemical Corporation or the United States Government.

Appellants have cited two Connecticut cases in support of their position. These cases, however, involve the interpretation of Connecticut statutes, which are entirely different from the Utah Sales Tax Act. The Connecticut Act does not necessarily impose the tax upon the user or consumer as does the Utah Tax Law. It seems

clear from the definitions in the statute and from the *Utah Concrete Products case*, previously referred to, that under the Utah Law the legislative intent was to impose a sales tax upon all sales of tangible personal property made to the consumer or user of said property.

POINT II

THE TAX COMMISSION IS NOT BOUND TO FOLLOW AN ADMINISTRATIVE REGULATION IF SAID REGULATION IS CONTRARY TO THE LAW.

As the Petitioners have pointed out in their brief, it is true that under Sales Tax Regulation 58, as it was originally promulgated, Olson Construction Company would be considered a purchaser for resale and thus not subject to the Sales Tax Act. However, it is apparent from the provisions of the Act and the *Utah Concrete Products case* previously cited, that such regulation had no legal basis and was completely contrary to the law.

It is no doubt embarrassing to the State Tax Commission to have to admit an error and amend a published regulation. It further cannot be argued that such policy makes for good public relations. The error was certainly unfortunate for all concerned. However, when the matter was brought to the attention of the Commission there was no other alternative but to recognize the mistake and take immediate steps to correct it. The regulation was, therefore, amended July 1, 1959, to conform to the law. The Commission not only had the power but it had the duty to rectify its error.

Section 59-15-20, Utah Code Annotated, 1953, gives the State Tax Commission power to prescribe rules and regulations only so long as they are "in conformity with this Act." This point was stressed in the case of *Western Leather & Finding Co. v. State Tax Commission*, 87 Utah 227, 48 P. 2d 526, where it was stated by the Utah Supreme Court that the legislative power to determine who is or is not to be taxed is vested in the Legislature and the people of the State of Utah, and not in the Tax Commission. To put it in the language of the court, "The Commission is empowered merely to make rules and regulations, etc., in conformity with the Act." If the authorization to make rules and regulations were to go beyond this, such would constitute an unconstitutional delegation of legislative power. In other words, the Tax Commission has no power to change the legislative intention. It was further stated in the case of *Utah Concrete Products Corporation v. State Tax Commission*, 101 Utah 513, 125 P. 2d 408, that "Governmental agencies cannot deprive the Courts of their judicial functions, nor can the agencies extend the operation of the statute by administrative regulations."

The case of *Howard Pore Inc. v. Nims, State Commissioner of Revenue*, 33 N.W. 2d 657, decided by the Michigan Supreme Court involved changes made in an administrative regulation. There, the court held as follows:

"the liability for the payment of taxes, and the determination of the amount thereof, depend on the statute. Such liability may not be imposed by rules or regulations of the department. (citation)

By the same process of reasoning, liability for a tax imposed by statute may not be obviated by administrative action on the part of those charged with enforcing the law. . . . Administrative interpretation is not binding on the court and must be rejected if not in accord with the intent of the legislature.”

In *Peoples Gas & Electric Co. v. State Tax Commission*, 28 N.W. 2d 799 (Iowa), it was stated that “although stability in such rules and regulations is desirable it does not follow that they may not be changed or corrected by the Commission.”

In *Merchants National Bank v. Commissioner of Internal Revenue*, 199 F. 2d 657 it was held that “the Commissioner has the power to overrule or modify a subordinate ruling, or even his own if he considers it unsound.”

And in *National Labor Relations Board v. National Container Corp.*, 211 F. 2d 525, it was stated that reliance upon a Board rule will not estop the Board from applying a new rule in an appropriate case where the application of the new rule will effectuate the purpose of the Act.

Petitioners have cited cases holding that a regulation cannot be applied retroactively. None of these cases, however, involve a regulation which was void or inoperative from the beginning because of being contrary to the law. The cases are not in point.

Petitioners’ brief further gives the impression that they relied upon the early regulation to their detriment. The facts, however, do not bear this out. Petitioners Fife Rock Products Company and Empire Steel Com-

pany were not hurt because they collected the tax from Olson and paid it to the State Tax Commission. Olson Construction Company is not hurt because Thiokol reimbursed them for all taxes paid pursuant to their contract. And Thiokol is not hurt because under their prime contract with the United States Government, they are entitled to be reimbursed for all direct and indirect costs in connection with the construction of the facility.

Further, under the old regulation, a contractor claiming to be exempt was required to obtain a Sales Tax License and secure a clearance with the State Tax Commission prior to making any purchases. Olson did not obtain the necessary clearance as contemplated by the regulation and later when they attempted to do so the same was denied (R. 7 and 8). It would seem unreasonable to permit Olson to claim benefit of a regulation to which they themselves did not comply.

None of the Petitioners suffered any damage as a result of the Tax Commission's amendment to Sales Tax Regulation 58.

CONCLUSION

It is respectfully submitted that the decision of the Tax Commission should be affirmed and that petitioners' claim for refund should be denied.

Respectfully submitted,
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