

1961

# Utah State Tax Commission v. Ralph Child Construction Company : Brief of Respondent

Utah Supreme Court

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

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# IN THE SUPREME COURT OF THE STATE OF UTAH

RALPH CHILD CONSTRUCTION  
COMPANY,

*Petitioner,*

vs.

STATE TAX COMMISSION OF  
UTAH,

*Respondent.*

FILED

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Case, Utah  
No. 9374

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## BRIEF OF RESPONDENT

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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RALPH CHILD CONSTRUCTION  
COMPANY,

*Petitioner,*

vs.

STATE TAX COMMISSION OF  
UTAH,

*Respondent.*

Case  
No. 9374

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE CASE

This is a proceeding to review an order and deficiency assessment of the Tax Commission imposing sales and use taxes upon petitioner, Ralph Child Construction Company, as a result of petitioner's failure to acknowledge and pay sales and use taxes.

The parties herein will be designated as follows, petitioner, Ralph Child Construction Company, as "Ralph Child" and respondent, State Tax Commission of Utah, as the "Tax Commission."

The assessments are based upon certain purchases by petitioner in the legitimate course of its business, which petitioner contends are not subject to taxation because either the tax should have been collected by someone else or the specified purchases were used out of the state of Utah.

The issues presented are:

(1) Whether or not the Tax Commission can assess and collect a sales tax directly from the consumer—in this case Ralph Child—or whether it is required to proceed directly against the original vendor;

(2) Whether or not it is proper to assess a use tax deficiency against petitioner as a result of its purchases of telephones and equipment from the Kellogg Switchboard and Supply Co., Chicago, Illinois, sold to the taxpayer F.O.B. Price, Utah;

(3) Whether the Tax Commission erred in assessing use tax on items purchased out of state and delivered to petitioner within the state where petitioner failed to show a use other than in the state of Utah;

(4) Whether or not penalties are properly assessed herein.

## STATEMENT OF FACTS

The tax deficiency herein was assessed as a result of a failure to report and remit sales tax on taxable

sales, and also a failure to report and remit use tax on out of state purchases. The sales tax deficiency includes the period from June 1952 to August 1958 in the amount of \$504.62, together with penalty and interest. The use tax deficiency includes the period from August 1952 to July 1958 in the amount of \$1,374.32, plus penalty and interest.

At all times pertinent hereto the petitioner was engaged in the construction business within the state of Utah. Prior to the hearing of April 6, 1959, petitioner never paid or acknowledged any tax as due or owing the state of Utah.

There are three categories of purchases by the petitioner which resulted in the above mentioned deficiency assessments:

(1) The first consists of purchases of telephone poles from Lee Southam and Sons of Spanish Fork, Utah, purchased by the petitioner and used by it in completion of its lump-sum contract to install the same, together with related equipment, with the Emery County Farmers Union Telephone Association. These purchases totaled \$25,231.03.

The Tax Commission found as a matter of fact that these poles were sold by Southam and Sons for "resale." Tax Commission Exhibit No. 1 and testimony relating thereto constitute the basis of this finding. (T.R. 110) The exhibit was introduced into evidence without any objection on the part of the taxpayer. (T.R. 58-59) This exhibit consists of an invoice from Southam and Sons,

Lodge Pole Pine Dealers, at Spanish Fork, Utah, detailing a sale of telephone poles to Ralph Child, F.O.B. Emery County, Utah. This invoice was obtained from the petitioner's office, given to one of respondent's auditors by an employee of petitioner, and came from a group of invoices. It is typical of all invoices in this category. (T.R. 59)

(2) Purchases of telephones and equipment from Kellogg Switchboard and Supply Co., Chicago, Illinois, and sold to the petitioner F.O.B. at Price, Utah, in the amount of \$49,945.33. The Tax Commission found that Kellogg Switchboard and Supply Co. maintained no "residence" within the state of Utah. However, the facts regarding these purchases are not in dispute.

(3) Items purchased out of state for use within the state and items purchased out of state and shipped to the petitioner within the state, it not being shown that the use thereof was other than in the state of Utah. In this connection the Tax Commission found that the following items were taxable in that they were used, stored or consumed within the state of Utah:

**RALPH CHILD**  
**OUT OF STATE PURCHASES USED, CONSUMED**  
**OR STORED WITHIN THE STATE OF UTAH**

PERIOD	INVOICE NO.	VENDOR	DESCRIPTION	AMOUNT
1953				
April 30	1421	Scheiber Sales Co., Detroit 23, Mich.	Material for in-wall, Closet tables on school	\$ 1,784.00
April 30	1422	"	"	1,784.00
May 26	5530	Tru Line Company Des Moines, Iowa	Coils	22.00



<b>1954</b>				
August 19	3005	Scheiber Sales Co., Detroit, Mich.	In-wall closet for tables	2,800.00
	3006	"	Tables and benches	2,800.00
May 3	1240	Hatch, Inc., 7639 S.E. Foster Rd. Portland, Ore.	Lumber	1,396.12
August 4	2824	Metpar Steel Prod. Corp. 911 - 40th Ave. Long Island City, N.Y.	Steel toilet partitions	900.00
September 30	6394	McIntosh & Truman, Inc. Seattle, Wash.	Lumber	2,270.74
<b>1955</b>				
April 11	4070	Scheiber Sales Co. Detroit, Mich.	Folding tables and benches	1,149.00
December 14	F2208	Loxit Systems, Inc. Chicago, Ill.	Floor channels	1,114.65
November 10	896	Water Seals, Inc. Chicago, Ill.	1,500 ft. water stock	1,725.00
December 20	2776	Gotham Chalkboard & Trim Co. 91 Weymand Ave. New Rochelle, N.Y.	Display cab- inets & Chalk- board	970.00
<b>1956</b>				
February 24	41163	Abbretton Eng. Co. Houston, Texas	Clear glass	85.51
Total				<hr/> \$18,771.02

The total of these purchases amounted to \$18,771.02, upon which the Tax Commission assessed a use tax deficiency.

A hearing was held on April 6, 1959, as a result of a petition for review filed by Ralph Child. This hearing was continued to March 22, 1960 for the further taking of testimony. During this hearing the petitioner furnished evidence justifying the elimination of certain items from the use tax deficiency, and the said deficiency was recomputed in the amount of \$1,374.32. The use tax deficiency, together with the sales tax deficiency afore-

mentioned, then totaled \$1,878.75, plus interest at 12 per cent per annum from the date due until paid and penalties for the taxable period as provided in Sections 59-15-5 and 59-16-9, Utah Code Annotated, 1953. From the decision of the Tax Commission the petitioner appeals.

In connection with this appeal, the petitioner filed four schedules as part of its brief. As these schedules were not offered or received by the Tax Commission into evidence at the hearing herein, as they contain items not included by the Tax Commission in its deficiency assessment, and as liability is admitted by petitioner for items in petitioner's "Schedule C" which were not included in the above deficiency assessment, the Tax Commission regretfully declines to accept any of the aforementioned schedules as factual or determinative of the issues herein.

## STATEMENT OF POINTS

I. THE TAX COMMISSION CAN LEVY AND COLLECT A SALES TAX, TOGETHER WITH PENALTY AND INTEREST, DIRECTLY FROM THE CONSUMER, RALPH CHILD CONSTRUCTION COMPANY, ON ITS PURCHASES OF TELEPHONE POLES FROM LEE SOUTHAM AND SONS CO.

II. THE TAX COMMISSION DID NOT ERR IN ASSESSING USE TAX, INTEREST AND PENALTIES AGAINST PETITIONER ON THE PURCHASE OF TELEPHONE SUPPLIES AND EQUIPMENT FROM THE KELLOGG SWITCHBOARD AND SUPPLY CO.

III. THE TAX COMMISSION DID NOT ERR IN ASSESSING USE TAX ON ITEMS PURCHASED OUT OF STATE AND DELIVERED TO PETITIONER WITHIN THE

STATE, IT NOT BEING SHOWN THAT THE USE THEREOF WAS OTHER THAN IN THE STATE OF UTAH.

IV. THE TAX COMMISSION DID NOT ERR IN ASSESSING PENALTY AND INTEREST.

## ARGUMENT

### POINT I

THE TAX COMMISSION CAN LEVY AND COLLECT A SALES TAX, TOGETHER WITH PENALTY AND INTEREST, DIRECTLY FROM THE CONSUMER, RALPH CHILD CONSTRUCTION COMPANY, ON ITS PURCHASES OF TELEPHONE POLES FROM LEE SOUTHAM AND SONS CO.

Section 59-15-5, Utah Code Annotated, 1953, provides in part:

“Every person receiving any payment or consideration upon the sale of property or service subject to the tax under the provisions of this act, or to whom such payment or consideration is payable (hereinafter called a vendor) shall be responsible for the collection of the amount of the tax imposed on said sale; provided, however, that where any sale of tangible personal property is made by a wholesaler to a retailer, upon the representation by the said retailer that the said personal property is purchased by the said retailer for resale, and the said personal property thereafter is not resold, the wholesaler shall not be responsible for the collection or payment of the tax imposed on the said sales, but the said retailer shall be solely liable for the said tax.”

Tax Commission Exhibit No. 1 was introduced into evidence without any objection of the part of the taxpayer (pages 55-56, Trial Record, April 6, 1959). It

consists of an invoice from Southam and Sons, Lodge Pole Pine Dealers at Spanish Fork, Utah, detailing a sale, to Ralph Child, F.O.B. Emery County, Utah, of telephone poles. This invoice was obtained from the taxpayer's office, given to an auditor of the State Tax Commission by one of the employees of Mr. Child and came from a group of invoices. It is typical of all of such invoices on Schedule 1 of Exhibit 2. Significantly, it is marked "for resale." Although the auditor could not testify that all of the invoices on Schedule 1 of Exhibit 2 were similarly marked, it is submitted that this Exhibit is important for two reasons—the first of which is, that it is indicative of the fact that Southam and Sons paid no sales tax on the transaction and did not collect any such sales tax; and, two, that it demonstrates the fact that a representation was made by Mr. Child to Southam and Sons that the personal property consisting of telephone poles was being purchased by Mr. Child, as a retailer, for resale. It is clear from the testimony that the poles in question were not resold but were consumed by the taxpayer under a lump sum contract for installation of telephone poles and equipment. Under the terms of 59-15-5, as amended, the wholesaler would not then be responsible for the collection or payment of the tax imposed on the sale, but the retailer, or the petitioner in this case, should be solely liable for the tax.

It is contended on the part of the taxpayer that the State has offered no evidence to the effect that the ultimate consumer, Mr. Child, represented to the retailer that the personal property purchased was for resale. It is submitted, however, that the above mentioned Ex-

hibit does constitute evidence that a representation was made to Southam and Sons and that Mr. Southam treated the whole series of transactions with Mr. Child as exempt sales as being sales to a retailer for resale.

On page 3 of petitioner's brief, it is argued that the taxpayer supplied the Tax Commission with purchase orders for all of the telephone poles herein and for the placing of the same in the holes. These were incorporated into taxpayer's Exhibit No. 11. (T.R. Attached Envelope) On page 3 it is contended that these are "the *seller's purchase orders.*" (Emphasis supplied) However, careful perusal of the exhibit under consideration will indicate that the purchase orders in question were not the "seller's" but were in fact issued by petitioner, Ralph Child, as a purchaser. The language upon said purchase orders does not specifically refer to sales or use taxes, and there is no indication of any kind that the parties entered into an agreement wherein Southam and Sons would assume sales taxes which normally would be collected from petitioner if in fact he were a consumer. Therefore, there is at least a conflict of evidence in the record, and the Tax Commission having an opportunity to evaluate the credibility of the witnesses thereupon made a finding that the above representations were made.

The Commission does not rest its position on the strength of Exhibit No. 1 alone. The aforementioned Section 59-15-5, Utah Code Annotated, 1953, further provides "the vendor shall collect the tax from the vendee..." This section has been construed to mean that the vendor is liable for sales tax, regardless of whether or not said vendor collects the said tax from the vendee.

See *E. C. Olsen v. State Tax Commission*, 109 Ut. 563, 168 P. 2d 324 (1946); *State Tax Commission v. Spanish Fork*, 99 Ut. 177, 100 P. 2d 375 (1941). But it has also been stated that the vendor's status, under the act, is that of a collector rather than that of a taxpayer. *Bird and Jex Co. v. Anderson Motor Co.*, 92 Ut. 493, 59 P. 2d 510 (1937). It should be noted that the sales tax in this state is a tax on the consumer. *Western Leather and Finding Co. v. State Tax Commission*, 87 Ut. 227, 48 P. 2d 526 (1935); *E. C. Olsen v. State Tax Commission*, 109 Ut. 563, 168 P. 2d 324 (1946).

In the case of *E. C. Olsen Co. v. State Tax Commission*, 109 Ut. 563, the plaintiff corporation engaged in the manufacture of packing boxes and other items related to the sale, packaging and processing of agricultural products. It paid no tax and collected no tax from sales of these products. The plaintiff corporation in that case sought relief from sales taxation on several grounds, among which was that all questioned sales were exempt as purchases, entering into and becoming part of manufactured goods. The court there made a significant statement:

“By no reasonable construction can we agree with plaintiff's contention that the legislature intended to exempt all purchases of material needed to prepare agricultural products for market. Rather, the processor of agricultural products is on the same footing as the processor of any other type product. The test is: Are the articles involved consumed by the processor as the last user? If they are so consumed, the tax must be paid thereon by the processor. On the other hand, if the articles enter into and become

an ingredient or component part of what he manufactures, and are thus passed on to the final users, or the articles are containers, labels, or shipping cases of what he manufactures, the processor does not pay the tax."

In other words, the court stated if the processor is an ultimate consumer, then the tax must be paid by that processor as ultimate consumer. The defendant taxpayer is, by its own admission in this case, an ultimate consumer.

It having been established that the consumer owes the tax, the important question herein to be decided is not who is responsible for the collection of the tax, but rather, in a case where no tax is paid or collected on a taxable transaction, can the State Tax Commission elect to hold either of the parties liable for the tax. Section 59-15-5, Utah Code Annotated, 1953, as amended, provides that it can, in certain circumstances. That is:

"Where any sale of tangible personal property is made by a wholesaler to a retailer, upon the representation by the said retailer that the said personal property is purchased by the said retailer for resale, and the said personal property thereafter is not resold, the wholesaler shall not be responsible for the collection of tax imposed on the said sale, but the said retailer shall be solely liable for the said tax."

Therefore, the Tax Commission is not bound to collect tax only from the vendor but, under certain circumstances, at least, may proceed directly against the vendee to collect the tax. It is the position of the Commission that, as there are two parties legally liable for the

tax, in all cases where the tax has not been paid it has the power to proceed against whichever party can be compelled to pay.

It has further been decided that the Commission can proceed to prosecute an action in its own name for collection of sales tax. See *State Tax Commission v. City of Logan*, 88 Ut. 406, 54 P. 2d 1197 (1938), where it was stated on pg. 418:

“Article XIII, Section 11, of our State Constitution granted to the State Tax Commission supervision of the tax laws of the state. Revised Statutes of Utah 1933, 80-5-46 [today 59-5-46] contains an enumeration of the general powers and duties of the Commission. Power is there conferred upon the Commission ‘to sue and be sued in its own name,’ and generally to supervise the levy and collection of taxes. In the light of the fact that broad powers are conferred upon the Commission to levy and collect taxes, it would seem idle for the legislature to vest authority in the Commission to sue its own name unless it intended thereby that the Commission might sue for the collection of taxes. Apparently, one of the chief purposes of the legislature in granting to the Commission authority to sue was to enable it to enforce the payment of taxes. The city’s contentions that the Commission is without authority to prosecute this action in its own name must fail.”

And the court in *State Tax Commission v. Linford*, 116 Utah 57, 207 P. 2d 1121 (1949), interpreted the powers of the Commission in broad terms when it said:

“Furthermore, the fact that the Commission is granted the power to sue and be sued in its



own name, 80-5-46(1), Utah Code Annotated, 1943 [59-5-46, 1953] and the further power to prescribe rules and regulations not in conflict with the Constitution and laws of this state for its own government and 'the transaction of its business,' Subsections 2 and 23, suggests that the Commission should be able to do everything reasonable, appropriate, and businesslike in the collection of taxes which it has the duty to collect."

It would follow from the above that the Commission could assess and collect the tax directly against the consumer because of the following reasons: (1) the tax is the consumer's debt; (2) the Tax Commission has the power to sue in its own name to enforce obligations owed to the state; (3) the Tax Commission has the duty to enforce such obligations; and (4) it is only reasonable to proceed against the consumer where this is practical and the amount is sufficient to justify such procedure.

A similar conclusion was reached in an opinion by Grover A. Giles, Attorney General, directed to J. Lambert Gibson, Chairman of the Commission, dated January 29, 1942. A question had arisen as to the method of procedure in collecting back taxes where the statute imposed a duty upon the vendor to collect the tax. The opinion is important because of its direct bearing on the present issue. It was therein stated:

"The fact that it is thus made a debt due from the vendor does not necessarily preclude the possibility of collecting the tax from the ultimate consumer. That is merely an effective means of compelling the vendor to perform his duty as the tax collector, and it is our opinion that the State itself could go against either the vendor

or the purchaser in the transaction. We think too that if the State compelled the vendor to pay the amount of these taxes which he should have collected at the time of the sale, the vendor would have the right to, in turn, go against the purchaser who should have paid the tax at the time of the sale. It was as much the duty of the purchaser as the vendor to know that the tax was due upon the transaction, and therefore, as far as the State is concerned, we think the State would have the right to go against either one. Nevertheless, we do not think that because the vendor has imposed upon him the burden of collecting the tax and failed to do so that the State would be deprived of its right to the tax where the vendor may be insolvent if the purchaser is still available. The vendor is merely a tax collector and the Tax Commission could use other means to collect the tax from the purchaser. The fact that both the vendor and the purchaser are involved in the transaction would not make the claim of the State for the tax a doubtful claim. It may present some problems in administering the law and collecting the tax, but it would not make the State's claim doubtful. The State has a valid claim for the tax and can assert that claim against the vendor by virtue of the Statutory duty imposed upon the vendor and can assert the claim against the purchaser by virtue of the fact that the tax is a consumer's tax, which by the very intention of the law is passed on to and must be paid by the ultimate consumer purchaser."

It is submitted that in the present case it is reasonable, appropriate and businesslike for the Commission to proceed to collect the tax against the party who is legally liable for it when said tax has not been collected or paid by the party to whom the responsibility for

collecting the same has been given. It is submitted that the Commission would be derelict in its duty if it failed to proceed against either or both until all possibilities for collecting the tax have been exhausted, and that the Commission may properly elect to proceed against the party which it feels would be most likely to meet the obligation of payment.

## POINT II

THE TAX COMMISSION DID NOT ERR IN ASSESSING USE TAX, INTEREST AND PENALTIES AGAINST PETITIONER ON THE PURCHASE OF TELEPHONE SUPPLIES AND EQUIPMENT FROM THE KELLOGG SWITCHBOARD AND SUPPLY CO.

The same general criteria applicable to the decision in Point I above are also applicable to the question herein. In addition thereto, petitioner contends that the Tax Commission is bound to collect the use tax from the seller and not from the petitioner. As authority for this proposition it cites, among other decisions, the 1960 U. S. Supreme Court Case of *Scripto, Inc. v. Carson*, .....U. S. ...., 80 S. Ct. 619, 4 L. Ed. 2d 660. In that case there was held to be sufficient minimum contact with the taxing forum to subject independent contractors soliciting business within the state of Florida on behalf of an interstate seller, to a use tax collectible from dealers as of the moment of purchase. However, the authority in that case was permissive not mandatory regarding powers granted a state agency.

This, and similar cases, are to be distinguished from the situation presently before this court. Here there is no question as to whether or not the sale took place in

interstate commerce, nor is there an independent broker or middleman, nor is there a question of whether or not the state may tax the seller. The terms of the agreement herein simply state that the materials in question were to be supplied and delivered to the petitioner F.O.B. at Price, Utah. Petitioner contends that, as such, the sale took place within the state of Utah, and, therefore, the use tax is not properly assessed against Ralph Child.

The Utah use tax is imposed upon the storage, use or other consumption of tangible personal property within this state. Every person so storing, using or consuming such property is liable for the tax. Section 59-16-5, Utah Code Annotated, 1953, provides that the retailer selling such property is liable for the collection of the tax. However, the retailer is not taxed in his own right nor is the tax a transaction tax as in the case of a sale. Rather, it is a tax on the storer, user or consumer of tangible personal property. Thus, it is a consumer's tax, collectible by the retailer as a convenience to the state, but failure of such a retailer to collect does not absolve the consumer of liability to the state. Indeed, the general criteria of Point I are applicable to such a situation and the state can proceed to collect the tax from either the retailer or the consumer.

In this regard, the Utah case of *Ford J. Twaits v. Utah State Tax Commission*, 106 Ut. 343, 148 P. 2d 343 (1944), is especially pertinent.

In that case the Tax Commission attempted to impose a use tax upon contractors who purchased materials for their own account for construction on a gov-

ernment project. The materials were purchased from out of state vendors and no tax was paid on the purchases. It was contended that the obligation to pay the tax was on the "retailer" and that the Tax Commission could not proceed against the particular defendants. The court in that case said:

"The Use Tax Act of 1937 is an excise tax imposed upon the privilege of storing or using property within this state, and liability for the tax is imposed upon the person so storing or using the property.... Such person is the one ultimately responsible for the tax. He may discharge this liability though by payment of the tax to the retailer from whom he purchases the goods.... It is provided that the retailer, as that term is used in the Act, is responsible for the collection of the tax, and when collected, it is a debt due from the retailer to the state."

The court further said:

"The word 'retailer' should be construed wherever it is found in the Act, to mean and include only such retailers as are subject to registration, or only such as have a place of business, or agents within the state. *Since contractors did not make the purchases here sought to be taxed from retailers registered or subject to registration under the provisions of the Act, the sections referring to the obligations of retailers in collecting and paying the tax to the state are not involved in this case.* [Emphasis supplied] Under the Act the term 'taxpayer' includes: 'every person storing, using or consuming tangible personal property, the storage, use or consumption of which is subject to the tax imposed by this Act when such tax is not paid to a retailer.' [59-16-2(j)] Since it is not claimed that the

contractors paid the tax to the people from whom they made these purchases, whether they [the vendors] were 'retailers' or not, they [the contractors] are included in the term 'taxpayer' as here used. [59-16-7] provides for making of returns and payments by 'every taxpayer.' As shown above, in this case the contractors are taxpayers."

The statement in Section 59-16-3 that the tax is imposed on "every person storing, using or otherwise consuming in this state tangible personal property" certainly includes a purchaser where the tax has not been paid to the retailer.

Under the provisions of Section 59-16-2(j) the purchaser becomes the taxpayer where the payment of the tax is not made to the retailer. There is no requirement in the statute that the purchase be made out of the state of Utah. It would be a peculiar anomaly if the purchaser were the taxpayer in such instances and there were no means of collection afforded the Tax Commission.

The very purpose of the use tax is to serve as a compensatory tax and thus remove the inequities which would otherwise be present in the application of the Sales Tax Act. It is submitted, therefore, that the assessment of use tax on the purchase of telephone supplies and equipment from the Kellogg Switchboard and Supply Co. was proper.

### POINT III

THE TAX COMMISSION DID NOT ERR IN ASSESSING  
USE TAX ON ITEMS PURCHASED OUT OF STATE AND

DELIVERED TO PETITIONER WITHIN THE STATE, IT NOT BEING SHOWN THAT THE USE THEREOF WAS OTHER THAN IN THE STATE OF UTAH.

Petitioner contends that the Tax Commission is in error in assessing these taxes of certain items which it contends were used out of the state of Utah and it claims an exemption for such items. In petitioner's brief it is stated that there has been no showing whatsoever that these items were stored in the state of Utah or used in the state of Utah or sold in the state of Utah. As such, we cannot accept this statement of the facts. Nor can we accept petitioner's statement that invoices showing delivery of material in Utah proved nothing regarding use within the state of Utah. Assuming, but not conceding, the validity of petitioner's argument it is submitted that the Tax Commission has sufficient evidence to warrant upholding the assessment, at least regarding the items included in category 3 on pages 4-5 of this brief.

Regarding these items, the taxpayer testified that Invoice No. 5530 was on the Ely High School job, together with Invoices Nos. 1240, 2776, F2208 and 41163, which were also used on said Ely High School project. (T.R. pgs. 20, 21, 24 and 25) In the hearing of March 22, 1960, an exhibit was entered into evidence on behalf of the Tax Commission indicating the contract for the Ely High School project was let on the 20th day of April 1954 and called for a completion date on or before July 1st, 1955. It would appear that in the absence of evidence to the contrary, of which there is none, that any invoices bearing purchase dates significantly before the

time of letting of this contract or bearing purchase dates after the completion of the contract should, therefore, be disallowed.

Examining the dates attached to petitioner's invoices, it is found that Invoice No. 5530 bears the date of May 26, 1953, and that Invoices Nos. 2776 and F2208 bear the date of December 1955 after the time said job was finished; that Invoice No. 41163 bears the date of February 24, 1956, again significantly subsequent to the time of the completion date of the high school. It is, therefore, obvious that the burden of proof regarding these items is shifted to the taxpayer, who has offered no evidence that the items purchased were actually used in such construction, and that the Tax Commission is justified in disallowing these claims. Regarding Invoice No. 876, it was claimed on behalf of the taxpayer that this item was used in a construction job at Gerlach, Nevada. This job was completed in 1954. (See R. 31) Yet the invoice shows that the material was purchased on November 10, 1955. Therefore, this item must not be allowed as an exempt item. Items Invoices Nos. 6394 and 2824 were claimed by the taxpayer to have been used as part of the Mesquite, Nevada school. The invoice dates show that these items were purchased in August and September of 1954 and a certified copy of the invitation to bid issued by the Clark County School District regarding the Mesquite, Nevada school, introduced into evidence at the hearing of March 22, 1960, indicates that bids for the Mesquite school were not let until the 12th day of May, 1955. It is submitted that it is highly unlikely that the taxpayer would have purchased items



for this school seven or eight months prior to the time of letting of bids for the said school. Therefore, these items should also be disallowed.

Invoices Nos. 1421 and 1422 are claimed by the taxpayer to be included in Invoices Nos. 3005 and 3006. (See R. 20, 22 and 23) However, Invoices Nos. 3005 and 3006 bear the date August 19, 1953. Invoices Nos. 1421 and 1422 as shown on Tax Commission's Exhibit 2, Schedule 3, bear dates of April 30, 1953. It is submitted that these items should be properly treated as separate invoices unless the taxpayer can offer evidence that they should be combined. This is supported by Tax Commission Exhibit No. 10 submitted at the hearing of March 22, 1960, consisting of a statement in account with Scheiber Sales Co. of Detroit 23, Michigan, stating that a November balance of \$3,568.00 was due on the account of Ralph Child, dated March 1, 1953. Other items included were admitted by the taxpayer to be unexempt. Therefore, regarding the cited items, it is submitted that the Tax Commission auditors did not err in assessing use tax upon property shown therein and that the tax assessment regarding these items should be upheld.

Petitioner on page 4 of its brief states that "Schedule B" is a summary of material purchased for ultimate consumption and, therefore, exempt from sales tax. On page 4 it is further stated:

"Schedule C consists of material purchased out of state for use within the state, which the taxpayer concedes tax liability."

“Schedule C consists of material purchased out of state for use within the state which the taxpayer concedes tax liability.”

The Tax Commission finds it difficult to reconcile these admissions with petitioner's Point III and Point IV. Petitioner's Point III questions the assessment of use tax on property purchased out of the state for use out of the state, claiming that the items in petitioner's "Schedule A" are exempt from taxation. Insofar as any of the items in said "Schedule A" are contained in the summary found in the schedule of pages 4-5 of respondent's brief, it is submitted that these items are taxable.

Petitioner's Point IV contends that the Tax Commission erred in assessing use tax on property purchased out of the state intended for use in the state, not used in the state but later sold out of the state in isolated and occasional sales. Petitioner contends that items in its "Schedule C" constitute the basis of this claimed exemption. However, petitioner on page 4 of its brief above cited admits tax liability for the items contained in "Schedule C." It is submitted that the only question regarding the items mentioned in the Tax Commission's category 3, which constitute the subject matter of the deficiency assessment herein, is whether or not such items were used in the state of Utah. The Tax Commission found that the enumerated items were so used, and the use tax is therefore properly imposed thereon.

#### POINT IV

THE TAX COMMISSION DID NOT ERR IN ASSESSING PENALTY AND INTEREST.

Petitioner herein contends that the Tax Commission erred in assessing penalty and interest because of the

claimed fact that there is no primary obligation on the part of petitioner to pay a use tax and that there is no showing of willfulness in not paying, or knowledge on the part of the petitioner that a tax was due.

It is submitted that petitioner's contentions in this regard are not valid and that if use tax liability is justified petitioner has rendered itself liable to penalty and interest by its failure to file returns. The court in the *Ford J. Twaits Co. v. Utah State Tax Commission*, 106 Ut. 343, 148 P. 2d 343 (1944) said: "Merely to set out the statute is sufficient answer to contractors' contention that penalty and interest for failure to file their returns are not authorized thereby." The court then cited what is now Section 59-16-10, Utah Code Annotated, 1953, which reads:

"If any person neglects or refuses to make a return required to be made by this Act, the Commission shall make an estimate for the period or periods in respect to which such person failed to make a return. . . . Such return shall be prima facie correct for the purposes of this Act and the amount of tax due thereon shall be subject to the penalties and interest as provided in Section [59-16-9] hereof. . . ."

Section 59-16-9 above referred to reads:

"If any part of the deficiency for which a determination of an additional amount due is made is due to neglect or intentional disregard of the Act or authorized rules and regulations, but without intent to defraud, a penalty of 10 per cent of such amount shall be added, plus interest at the rate of 1 per cent per month from the time the return was due. . . ."

The court continued: "These sections are self-explanatory, and clearly give the Commission the authority to assess the penalty and interest here imposed."

For the above reasons, it is submitted that the assessment of penalty and interest herein was proper.

### CONCLUSION

The petitioner, Ralph Child, did act as a consumer of various articles upon which the Tax Commission properly assessed sales and use tax. There is evidence in the record justifying the Tax Commission's findings and the imposition of penalties.

The decision of the Tax Commission should be affirmed.

Respectfully submitted,

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