

1961

Pacific States Cast Iron Pipe Co. v. State Tax Commission of Utah

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

C. M. Gilmour;

Recommended Citation

Reply Brief, *Pacific States Cast Iron Pipe Co. v. State Tax Comm. Of Utah*, No. 9493 (Utah Supreme Court, 1961).
https://digitalcommons.law.byu.edu/uofu_sc1/3884

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Water *Case 8*

**IN THE SUPREME COURT
of the
STATE OF UTAH**

PACIFIC STATES CAST IRON
PIPE COMPANY, a corporation

Plaintiff

—vs.—

STATE TAX COMMISSION OF
UTAH,

Defendant

Case No. 9493

REPLY BRIEF OF PLAINTIFF

C. M. GILMOUR
Kearns Building
Salt Lake City, Utah

IN THE SUPREME COURT
of the
STATE OF UTAH

PACIFIC STATES CAST IRON
PIPE COMPANY, a corporation

Plaintiff

—vs.—

STATE TAX COMMISSION OF
UTAH,

Defendant

Case No. 9493

REPLY BRIEF OF PLAINTIFF

A.

Defendant continued to insinuate during the hearing and now continues in its brief to assert that the interstate transactions here involved should be taxable in some way because none of the customers in hauling the pipe to the out-of-state job site had a certificate of public convenience and necessity from the Utah State Public Service Commission. Of such straw is the defendant's case made.

In the first place, defendant is concerned with enforcing the state tax laws and those pertaining to the regulation of public motor carriers are outside its purview.

In the second place, cases cited by plaintiff clearly establish that interstate commerce is "a practical conception not drawn from the 'witty diversities' (Yelv., 33) of the law of Sales", and the place where title passes has nothing to do with whether a sale is interstate commerce.

In the third place, even if the interstate hauls here involved were subject to motor carrier regulation, the Federal Interstate Commerce Commission would be primarily involved, not the Utah State Public Service Commission.

In the fourth place, it is apparent that defendant's loose insinuations are made without inquiry into the law because it is quite clear that the interstate transportation here involved being incidental to and in furtherance of the primary construction business of the contractor-customers of plaintiff, constitutes private carriage under the law and whether or not the contractor happens to make a profit from the transportation activity and whether or not title passes to the contractor f.o.b. point of delivery or point of destination.

For example, *Williams Bros. Corp. Cont. Car. App.*, 44 Motor Carrier Cases (ICC 557 (Div. 5) (1945), held that a general contractor whose business was the construction of pipe lines was not a common or contract carrier but a private carrier when in connection with its business of laying pipe lines, it hauled pipe from railhead, boat point, storage yard or elsewhere at a profit to the job site and strung the pipe along trench site for welding and laying in the ground.

The above case involved the definition of the term "private carrier of property by motor vehicle" in Sec. 203

(a) (17) of the Interstate Commerce Act. A private carrier was there defined as a person, other than a contract or common carrier, "which transports in interstate or foreign commerce by motor vehicle property of which such person is the *owner, lessee, or bailee*, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

See also: *Brooks Transp. Co., Inc. v. United States*, 93 Fed. Sup. 517 (1950) (E. D. Va.), affirmed 340 U.S. 925, (also affirming *Lenoir Chair Co. Cont. Car. App.*, 51 MCC 65).

The opinion (per Dobie, J.) States:

"The Commission, in deciding that Lenoir and Schenley were private carriers, as opposed to contract carriers or common carriers, applied what is known as *the primary business test*. In other words, if it is established that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that business and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added thereto as a separate item."

* * * * *

"The history of the Act, we think, completely demolishes the validity of plaintiff's *compensation* criterion and supports the Commission's criterion of *Primary business purpose*."

The fact that none of plaintiff's customers "had a license from the Public Service Commission of Utah" is completely irrelevant to the present case.

B.

All of the sworn testimony and all of the contractual documents, show conclusively that all pipe was purchased at prices delivered to the out-of-state job site and for use on the specific out-of-state job in accordance with the engineer's plans and specifications. All of the documents, including the bills of lading, show beyond any possibility of doubt that an interstate shipment of goods was required in the performance of the contracts of sale.

In the face of this clear and undisputable evidence, what is defendant's contention?

"It is contended that these documents were a sham, not legally binding on the parties, and intended to convert wholly intrastate sales into sales purporting to be in interstate commerce." (Page 5 of Brief)

Again, of such straw is defendant's case made.

There is, of course, in the record not even the slightest scintilla of evidence to warrant the above accusation that plaintiff is using false, fraudulent or counterfeit documents for the purpose of converting intrastate taxable sales into non-taxable sales in interstate commerce. The accusation is pure nonsense.

The documents are apparently not sham when the pipe goes under the contract and bill of lading by common carrier to the out-of-state job site. They are only sham when the pipe goes under the same contract and bill of lading by customer truck to the out-of-state job site. Indeed, how can this nonsensical accusation itself be reconciled with the following statement on page 3 of defendant's brief?

“All of the sales herein were solicited by means of quotations issued by petitioner to contractors bidding on various out-of-state jobs, and the materials so sold were purchased for use on specific out-of-state jobs and were of specified sizes and lengths to conform to the specifications covering the particular out-of-state job.”

C.

Defendant state in its brief (pages 3 and 4) that the Tax Commission has “found” (1) that there existed no contractual obligation to deliver the material sold across state lines, (2) that notwithstanding the bills of lading signed by the purchaser upon receiving the materials, delivery was made at plaintiff’s plant at Ironton, and (3) that plaintiff’s responsibility to effect delivery of the materials to the out-of-state job site ceased when the purchaser took possession of the materials at Ironton.

We respectfully suggest defendant must be talking about some other case. These are certainly not the facts of this case. The findings have no support whatsoever in the record.

The unequivocal sworn testimony of every witness, the clear and undisputable import of every contractual document, show beyond doubt that the sales were interstate sales of cast iron pipe into out-of-state sewage or waterworks engineering projects. The sales were negotiated by plaintiff’s out-of-state sales agents at delivered prices, including freight, to a specific out-of-state job site for the specific sizes, lengths and types of material specified in the job plans and specifications. Plaintiff maintained complete control and responsibility at all times over the selection of the means of transport to the out-of-state job site whether by its own trucks or by com-

mon carrier or by customer truck. For credit and collection purposes, plaintiff in every instance 'followed the pipe right into the ground' at the out-of-state job site. In every customer truck shipment here involved possession at the foundry at Iron-ton was taken by the purchaser under bill of lading for the sole and paid purpose of hauling the material to the specific out-of-state destination shown on the bill of lading. In every instance the purchaser was paid the established interstate tariff rate for the haul by means of credits against the delivered invoice prices. In no instance was there a breach of contract and the material diverted to local intrastate use by the purchaser.

Cases cited by plaintiff make it abundantly clear that interstate commerce is a practical conception in nowise concerned with the problem of who bears the risk of loss of the goods in transit, i.e. where title passes. If title passes to the customer f.o.b. foundry, it does so in all cases, including common carrier shipments which defendant does not here seek to tax. The so-called 'evasive' testimony referred to by defendant relating to risk of loss (page 4), is merely to the effect that plaintiff in practically all cases actually handles or processes the damage claims with the carrier or insurance company through its traffic department.

On whom lies the risk of loss of the goods in transit is something which simply has nothing to do with the case at bar.

D.

Defendant argues the sales tax herein is valid, because imposed on a 'local activity.' The argument is without any merit.

Utah, the state of the seller, cannot tax the gross receipts of interstate sales. This is settled and recognized law under the *Adams, Gwin-White and Freeman* decisions. This is so, a fortiori, where as here most of the sales transactions have already been taxed in the states of the buyer making the burdensome consequences to interstate trade, in the words of the *Freeman* decision, "undeniable."

After hopefully suggesting some undisclosed distinction between a gross receipts tax on sales and a sales tax on gross receipts, defendant then concedes plaintiff's argument (page 12) by stating:

"Generally, when a sale involves the delivery of merchandise to a destination outside the state where sold, the validity of a sales tax levied by such state on such transaction is denied." (Citing the *Crew Levick* and *Adams* cases).

Why, it may be asked, if this is the law 'generally', is it now not applicable here?

Defendant's argument, on analysis, reduces down to this: There can be no such thing as interstate commerce unless delivery is made "to an interstate carrier for transportation beyond the state." (p. 12). No matter what the facts, no matter how clear the certainty of foreign destination and use, "sales tax may be applied" if physical possession by the out-of-state purchaser is taken within the state of the seller. This, of course, is clearly not the law. The cases cited by plaintiff amply demonstrate the interstate transport may be performed by the purchaser. Each case turns on its own facts and if the proof is, as here, that possession by the purchaser is taken under the contract

and bill of lading for the sole and paid purpose of transport across the state line, there is interstate and not intrastate commerce.

The several cases cited by defendant, including particularly the *Wood Preserving*, *International Harvester*, *Trotwood Trailers*, *Blind Bull Coal* and *Superior Oil* cases, merely hold that a sale is taxable where an out-of-state purchaser comes within the state and purchases merchandise under a sales transaction which is completely closed and completed by the transfer of title and unrestricted delivery of possession within the seller's state. This is, of course, settled law and it makes no difference that the purchaser in his mind may then or thereafter intend to transport the merchandise to some other state. The point is that the contract of sale does not require for its consummation delivery across the state line. The circumstances show no manifest certainty of foreign or out-of-state destination. The buyer may change his mind. He may decide to use the property locally. He is under no obligation to transport the property across the state line for use at an out-of-state job site.

A simple example illustrates this line of authority. A visitor from Chicago staying at the Hotel Utah may cross the street and purchase a hat from the Z.C.M.I. store. He pays for the hat, takes title and full and unrestricted delivery of possession of the hat in Utah. This is obviously a local sale. The purchaser has the right to use, resell, abandon or give away the hat in Utah. Whether or not he has an intention to ultimately wear, carry or ship the hat back to Chicago is completely immaterial. It is, of course, obvious that this type of case bears no resemblance whatsoever to the case at bar.

We cannot distinguish the cases cited by defendant as well as did the Supreme Court in its opinion in the *Richfield Oil* case (329 U.S. at p. 82) :

“The fact that delivery to a common carrier for export gave the sale immunity in *Spalding & Bros. v. Edwards*, supra, is seized upon as stating a rule that the process of exportation has not started until such delivery has been made. And cases like *Superior Oil Co. v. Mississippi*, 280 U.S. 390, are relied upon as indicating that delivery to the purchaser is not sufficient. That case arose under the Commerce Clause. Mississippi was upheld in its effort to tax a distributor or wholesaler who purchased gasoline and later took it to Louisiana for sale. The Court said, p. 395, that although the course of business indicated the likely destination of the oil, it was “in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes.” The Court held, therefore, that the tax was not on goods moving in interstate commerce. But it added, p. 396, “Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing *the manifest certainty of the destination* and exhibiting grounds of policy that are absent here.”

Thus did the Court again reaffirm its historic test of interstate commerce as being the manifest certainty of the destination and not shipment by common carrier as urged here by defendant in the case at bar.

If a consigned sale under bill of lading to a Pueblo, Colorado, sewage project at a delivered price with freight payable by plaintiff, as seller, does not constitute a manifest certainty of out-of-state destination, what possible evidence could make it more certain?

E.

The various cases cited by defendant involving the purchase of supplies or equipment for use in conducting interstate commerce obviously have no pertinence to the case at bar. The pipe is not purchased for use in an interstate pipe line. It is purchased for transport and use outside the state in out-of-state sewage and waterworks projects.

F.

Defendant's argument about double taxation under the due process heading is in the wrong place and misconceives the point of the case at bar. Regardless whether double taxation infringes the due process clause, the *Western Livestock*, *Adams*, *Gwin-White* and *Freeman* cases, all hold that the risk of multiple taxation on the same sales transaction is what constitutes the test of invalidity of the tax under the commerce clause. Cases cited by plaintiff show the Supreme Court has sanctioned the imposition of a sales or use tax in the state of the buyer.

We may concede, as suggested by defendant (p. 29), that plaintiff "is supposed to know the law." It could be asked, however, whether defendant considers itself immune from the same requirement.

Plaintiff's argument under the due process heading is simply that a tax on the full proceeds of sale, *without apportionment*, is invalid.

G.

Defendant's discussion of credit provisions in certain use tax laws of sales taxes paid in other jurisdictions has

no pertinence to the constitutional prohibition of a tax by the state of the seller on the proceeds of an interstate sale. Whether the law of the state of the buyer has such a credit provision is immaterial. This is, for example, precisely the point decided by this Court in the *Whitmore Oxygen* case denying a credit under the Utah use tax law to the buyer in Utah because Indiana, the state of the seller, was regarded as constitutionally precluded from levying a tax on the same sales transaction under the *Adams* case.

H.

Again, defendant misconcieves plaintiff's argument under the equal protection heading. It may be conceded that the legislature might tax sales of certain tangible personal property but exempt sales of motor vehicles from tax. The discrimination here, however, is not in the taxing of certain kinds of personal property but where all are taxed basing the exemption of interstate commerce simply on the means of transport across the state line. The exemption of the sale from tax cannot under the cases be made to depend on the type or form of interstate transport.

I.

The article in the University of Detroit Law Journal by Norman L. Zemke (1) and Thomas W. Watkins, (2) republished in defendant's brief appears to be a very interesting discussion of some of the cases which relate to the taxation of interstate commerce. Surely, no one can disagree with the following statement in their summation (p. 55):

(1) LL.B. University of Detroit. Admitted to bar 1957.

(2) LL.B. University of Detroit. Admitted to bar 1956.

“After much discussion about “local activity”, “cumulative burdens”, “direct-indirect burdens”, etc., it is time to look to the basic principles.”

A reading of this article would show that the authors would probably not disagree with the following conclusion of another eminent scholar in this field, Thomas Reed Powell, who states in *New Light On Gross Receipts Taxes*, 53 H.L.R. at p. 928:

“So far as the actual decisions go, the law of the moment says that the state of entrance may tax but the state of exit may not.”

Utah, in the case at bar, happens to be the state of exit and the *Adams*, *Gwin-White* and *Freeman* cases still happen to be the ‘law of the moment’. No party to a law suit can ask for more than the law of the moment.

Plaintiff is also indebted to Messrs. Zemke and Watkins for the reference to *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) for another case again reaffirming the principle that Texas, as a state of exit, cannot under the commerce clause tax the taking and purchase of gas *transported by the purchaser* through its own pipe line for use and sale outside Texas.

Respectfully submitted,

C. M. Gilmour
Kearns Building
Salt Lake City, Utah