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John R. Butler dba Davis & Butler Construction Co. v. State Tax Commission Of Utah : Brief of Appellant

Utah Supreme Court

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Clyde & Mecham; Attorneys for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

SEP 26 1961

JOHN R. BUTLER, d/b/a

DAVIS & BUTLER

CONSTRUCTION COMPANY,

Appellant,

— vs. —

THE STATE TAX COMMISSION
OF UTAH,

Respondent.

Supreme Court, Utah

Case
No. 9527

APPELLANT'S BRIEF

CLYDE & MECHAM

By ELLIOTT LEE PRATT

Attorneys for Appellant

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APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action involving the assessment of a sales and a use tax against Davis & Butler Construction Company for the period 1955 through 1959.

DISPOSITION OF THE CASE BELOW

The State Tax Commission, by its Decision of June 30, 1961, sustained a deficiency in the amount of \$1,008.07

for the period July 1, 1955, to December 31, 1956, for unpaid use taxes; sustained a deficiency for the period January 1, 1957, to September 30, 1959, in the amount of \$19,519.47 for unpaid use tax; and dismissed the sales tax deficiency in the amount of \$2,777.45 assessed in connection with the purchase of an airplane.

RELIEF SOUGHT BY THIS APPEAL

Appellant seeks to have the Decision of the Respondent reversed, dismissing the tax deficiencies assessed and sustained in the amounts of \$1,008.07 and \$19,549.14, and, if necessary, to have the case remanded to the State Tax Commission for admission of the evidence under the proffer of proof, in accordance with the decision of this Court, dismissing the tax deficiencies.

STATEMENT OF FACTS

Appellant is a construction company with its principal place of business in Salt Lake City, Utah. During the taxable periods in question, appellant was engaged in the construction of various projects as a general contractor, and in this capacity, purchased pursuant to purchase orders and to subcontracts, various items of personal property. Respondent prepared an audit upon the basis of which the tax was assessed. (R. 7-10) (Exs. 1, 2) The audit was the result of a rather cursory examination of some of appellant's records (R. 9), with no reference to whether tax was paid in other states. (R. 11) and without examination of any vendors' records.

The major item upon which the use tax deficiency was assessed, was a subcontract of \$674,775.00 with B. I. F. Company of Rhode Island for furnishing, installing, and servicing equipment on the Salt Lake City Water Treatment Plant. The use tax was assessed against this total contract amount without regard to the portion thereof attributable to labor and services, or to property and materials, (Exs. 1, 2) and without inquiry to B. I. F. or its agent, J. Henry Jones Company. (R. 14) At the hearing before the Tax Commission, all evidence relating to the nature of this contract was objected to by respondent, and was not admitted by the Commission on the theory that there had been no tax paid to the State of Utah thereon, and as a result, the tax was due and payable. (R. 18, 19) The proffer of proof made at the trial, however, indicated the nature of the relationship between appellant and B. I. F. as well as between the appellant and other vendors. This proffer of proof showed the facts to be the following:

The B. I. F. Company undertook, along with the J. Henry Jones Company of Salt Lake City as its local agent, the preparation of the contract, plans and specifications for the construction of the Water Treatment Plant. (R. 94, 96, 97) (Exs. 50, 51, 52) This work to be undertaken by B. I. F. as a subcontractor for Davis & Butler Construction Company, consisted of furnishing, installing, inspecting and servicing technical equipment used in the construction of the Water Treatment Plant. It further consisted of the instruction of operators of this equipment after its installation. (P. Ex. 52, Sections 34,

35 and 38) J. Henry Jones Company, for its participation as agent for B. I. F., received a commission out of the total contract of \$674,775.00. This was a very complicated type of installation, requiring the technical experience of B. I. F., and the employment of engineering personnel having at least 5 years engineering experience. It also involved the coordinated construction of complicated electrical and plumbing services, all according to the plans and specifications. (Ex. 52) (R. 102)

J. Henry Jones Company worked with and assisted B. I. F. in the preparation of the contract with appellants, in the checking of plans and specifications, (R. 100) and in advising the various subcontractors involved in the work, including appellant. The J. Henry Jones Company was in constant contact with the local engineers of B. I. F. Company in coordinating the work of the various subcontractors. (R. 65, 66) B. I. F., during all of this construction, maintained local representatives in addition to J. Henry Jones Company. (R. 71) In order to properly perform the work, B. I. F. employed Peters Plumbing & Heating Company (R. 31, 32, 61, 100) to do the plumbing work. In this capacity, Peters performed a substantial amount of the labor required of B. I. F. (R. 64) In performing this work for B. I. F., Peters backcharged B. I. F., and this backcharge credit was then offset in another subcontract between Peters and Davis & Butler. This offset was a credit against the \$674,000.00 subcontract price, payable from Davis & Butler to B. I. F. (R. 66, 67, 68)

B. I. F. also employed Industrial, Physics and Electronic Company as subcontractor to perform the installation and servicing of some of the more technical equipment of the B. I. F. - Davis & Butler contract. (R. 32) Throughout the course of the performance of the contract by B. I. F., its employees and engineers installed control hook-ups (R. 62), venturi tubes and other types of tubes and meters (Ex. 52, Section 34) furnished and installed the water pump controls (Ex. 52, Section 35), and furnished and installed, among other things, the filter flow controls. (Ex. 52, Section 383

B. I. F. was on the job until 1961, during which time it worked, together with J. Henry Jones Company, in servicing and fixing all of its installations previously made during the actual construction. This work went on for weeks at a time. (R. 31, 57, 61, 98-100)

J. Henry Jones Company was the local agent and representative for B. I. F. not only in the sale and distribution of B. I. F. products, but also in the many capacities listed above. J. Henry Jones Company all during the period in question, had a sales tax license with the State Tax Commission. (R. 90)

With reference to other portions of the assessed tax, and again under the proffer of proof, the evidence concerning the relationship of the various vendors show that many of them maintained local offices at which the appellant purchased the property assessed for the use tax. Fischer-Porter maintained a local office in Salt Lake City

from which appellant purchased the materials being assessed. (R. 20) (Exs. 6, 7, 38 and 39) The property was obtained under a subcontract wherein appellant paid the sales tax to Fischer-Porter. The materials included in the assessment on Ex. 9 constituted a sale not to appellant, but to Peters Plumbing & Heating Company. (R. 18) The materials purchased from A. C. Horning Company (Ex. 15) were purchased from Horning's local office in Salt Lake City. (R. 27) The equipment purchased from Mixing Equipment Company (Ex. 19) was purchased from that company's local representative here in Salt Lake City. (R. 37, 38) The material purchased from Chicago Pump Company (Ex. 31) was also purchased through the local office of said company at Nickerson Machinery Company of Salt Lake City. (R. 41, 42) Likewise, the property purchased from Jeffrey Manufacturing Company (Ex. 32) was purchased from that company's local representative here in Salt Lake City. (R. 42)

The respondent has assessed use taxes against all of the foregoing purchases without regard to the fact that the sale and purchase of said property was made in Salt Lake City through the local office of the said vendor.

STATEMENT OF POINTS

POINT I.

**THE RESPONDENT HAS FAILED TO SHOW
PROPER ASSESSMENT OF THE USE TAX.**

POINT II.

THE APPELLANT IS NOT LIABLE TO PAY THE USE TAX ASSESSED BY THE RESPONDENT.

A. RESPONDENT HAS FAILED TO PROVE BY ANY EVIDENCE THAT APPELLANT IS SUBJECT TO THE USE TAX.

B. THERE IS NO STATUTORY PROVISION AUTHORIZING COLLECTION OF THE TAX FROM APPELLANT.

POINT III.

THE COMMISSION ERRED IN REFUSING TO ADMIT EVIDENCE CONCERNING THE TYPE OF TRANSACTION BETWEEN APPELLANT AND ITS VENDORS AND SUB-CONTRACTORS.

ARGUMENT

POINT I.

THE RESPONDENT HAS FAILED TO SHOW PROPER ASSESSMENT OF THE USE TAX.

The Constitution of the State of Utah provides under Article XIII, Section 2, as follows:

“All tangible property in the state not exempt under the laws of the United States or under this Constitution shall be taxed in proportion to its value to be ascertained as provided by law . . .”

Upon this basic premise, the burden falls upon the respondent to show that the use tax is applied to personal

property used, consumed, or stored in the State of Utah. The respondent has the burden of showing that the tax applies to the tangible property, and not to labor or services rendered in connection therewith.

In the case at hand, the respondent put on evidence in the form of testimony of Henry Jones to the effect that the B. I. F. contract involved not only materials, but also labor and services. Having so shown, the respondent destroyed any presumption that may have been in its favor to the effect that the tax was properly assessed upon tangible personal property. Respondent attempted to show that the labor and services were relatively insignificant, or incidental to the contract for the materials. It offered no evidence, however, to make any breakdown as to values between materials and labor.

Respondent introduced Exhibits 45 through 49 as self-serving and hearsay evidence to attempt to show that the labor was insignificant. The Commission denied the offer of said exhibits, and no appeal has been taken therefrom. On the contrary, appellant's evidence in the form of the B. I. F. contract (Exs. 42, 50, 51) and testimony of John R. Butler, Ferris Daniels, Henry Jones, Gerald R. Clyde and Max Peters, indicated that substantial labor and services were rendered by the B. I. F. Company in the performance of its contract with petitioner for the furnishing of material and labor in the construction of the Water Treatment Plant. (R. 20, 27, 31, 32, 36-38, 61, 66, 67, 68, 96, 97-100)

The assessment of \$1,008.07 use tax (Ex. 1, 2) has no factual support whatsoever. There is no relationship to any of the invoices or contracts. It is simply an arithmetical computation without basis. This is indicative of the inadequate audit and proof of tax liability throughout respondent's tax determinations.

Unless respondent can show that its tax is applicable to property used and consumed in the State of Utah, respondent cannot show proper assessment of the use tax. The respondent has failed completely in assuming this burden in the hearing before the Tax Commission.

It is manifest that there must be a determination of the proportion of materials and of labor in any lump sum contract, so that the tax is only applied to the materials. *Young Electric Sign Company v. Tax Commission*, 4 Utah 2d 242. Respondent has ignored this principle in the instant case.

POINT II.

THE APPELLANT IS NOT LIABLE TO PAY
THE USE TAX ASSESSED BY THE RE-
SPONDENT.

A. RESPONDENT HAS FAILED TO
PROVE BY ANY EVIDENCE THAT
APPELLANT IS SUBJECT TO THE
USE TAX.

Title 59-16-4, Utah Code Annotated, 1953, exempts certain properties from the application of the use tax, including the following:

“(a) Property, the gross receipts from the sale of which are required to be included in the measure

of the tax imposed by Chapter 63, Laws of Utah, 1933, and any amendments made or which may be made thereto.

“(b)

“(c)

“(d) Property, the gross receipts from the sale, distribution or use of which are neither subject to a sale or excise tax under the laws of this state, or of some other state of the United States.”

Respondent has the burden of showing that petitioner does not come under these two exemptions (a) and (d). The sales tax law and the use tax law are inter-related and supplemental, and if a transaction is taxed or taxable under the sales tax law, it is not taxable under the use tax law. The burden of proof is clearly on the taxing body to show that use tax is applicable, particularly where, as in this case, the tax is a special excise tax. 84 C. J. S., Par. 225, and cases cited under Notes 50 and 51.

All of the evidence, whether offered by respondent or appellant, indicates that the B. I. F. Company was doing business in the State of Utah, and as such, was taxable by the respondent under the Sales Tax Act. The exemption above cited would, therefore, apply. The record indicates that J. Henry Jones Company supervised the construction and installation of the equipment purchased from the B. I. F. Company and placed on the job in the performance of the general contract. (R. 65, 66, 100) The evidence further shows that the B. I. F. Company employed Peters Plumbing & Heating Company as its subcontractor to perform its work in the installation and

servicing of the equipment purchased from it by appellant. (R. 31, 32, 61, 100) The evidence further shows that Henry Jones Company prepared the plans and specifications for the installation of this equipment for and on behalf of B. I. F. Company, prepared and negotiated the contract between appellant and B. I. F. Company, and continually furnished supervisory, as well as specialized engineers to assist in the operation of the equipment after it was installed. (R. 65, 66, 71)

In the case of *Nelson v. Sears Roebuck Company*, 312 U. S. 359, and *Nelson v. Montgomery Ward Company*, 312 U. S. 373, as cited in *Montgomery Ward v. Utah State Tax Commission*, 112 Pac. 2d 152, a mail order house doing business in the State of Utah was held taxable for goods sold to a consumer in Utah. The uncontroverted evidence in the case at bar clearly permits the same holding, and requires the taxing of a sale of property from B. I. F. to appellant as a sales tax.

B. I. F. was amendable to the enforcement of the tax liability, and this was, therefore, a sales tax transaction. There being a sales tax liability, there can be no use tax assessed and collected against the appellant. In *Utah Concrete Products Corporation v. Utah State Tax Commission*, 105 Utah 513, a contractor was held to be a consumer, and the sale of materials to him was held to be a taxable sale under the Sales Tax Act, and thus requiring the vendor to pay the tax. The failure of the respondent to enforce the sales tax against the proper retailer should not give rise to a use tax liability against appellant.

The evidence is clear and uncontroverted that not only was B. I. F. represented in Utah, and taxable under the Sales Tax Act, but also were the vendors, Fischer-Porter, (R. 20) A. C. Horning (R. 27) Mixing Equipment Company, (R. 37, 38) Chicago Pump Company (R. 41, 42) and Jeffrey Manufacturing Company. (R. 42)

The respondent has completely failed in its proof to show the liability of the petitioner under the Use Tax Act. Each of the transactions were taxable as sales tax transactions, and the tax could and should have been collected from the proper retailer designated by the Sales Tax Act.

B. THERE IS NO STATUTORY PROVISION AUTHORIZING COLLECTION OF THE TAX FROM APPELLANT. .

This Supreme Court has stated in the case of *Western Leather & Finding Company v. State Tax Commission*, 87 Utah 227, that the Tax Commission cannot delegate the payment of tax to someone who is not specifically designated in the statutes. The taxing power is a power limited by the statute. Our statute requires that the retailer register with the Tax Commission, and further provides that the use tax shall be collected by the retailer. Title 59-16-6, Utah Code Annotated, 1953, specifically provides :

“Every retailer making sales of tangible personal property for storage, use or other consumption in this state not exempt under the provisions of Section 59-16-4 hereof, shall be responsible for the collection of the tax imposed by this Act from the purchaser . . . The tax herein required to be col-

lected by the retailer should constitute a debt owed by the retailer to this state.”

It is, therefore, apparent that the use tax must be collected by the retailer, B. I. F., as well as the other vendors mentioned herein, if such a tax is properly assessable. The fact that the respondent finds it difficult, or even impossible to collect said tax from the retailer, does not enlarge the statutory authority to permit it to collect the tax from a consumer such as appellant.

The statute makes it mandatory for the retailer, not the consumer, to keep the necessary records and file the necessary returns, all for the purpose of effecting the proper tax collection. The appellant has no way of determining the correctness of the tax, since it is not required to, and has not established records to properly make these determinations. The B. I. F. contract is a lump sum contract for materials and labor. Appellant has no way of knowing how the vendor has segregated materials from labor in arriving at his lump sum figure. It, therefore, is in no position to make a return involving the tax on the consumption of the material bills of the subcontractor. The vendor, B. I. F. Company, on the other hand, being required to keep such records and being in the position of designating the proper breakdown between property and labor, is able to make a return, and should be liable for the payment of the tax.

POINT III.

THE COMMISSION ERRED IN REFUSING
TO ADMIT EVIDENCE CONCERNING THE

TYPE OF TRANSACTION BETWEEN APPELLANT AND ITS VENDORS AND SUB-CONTRACTORS.

At Page 17 of the Transcript of the Record, counsel for respondent objected to any testimony regarding any of the invoices which had been used by the Tax Commission in assessing the tax upon the ground that it was admitted that no tax had been paid by appellant to the state. The Chairman of the Commission sustained this objection, stating:

“That would be immaterial. I am sure this objection is correct because the use tax provides for the payment in this state, if materials are used in this state, and it wouldn’t matter whether they paid sales taxes elsewhere, so if that is the purpose of this, I will sustain the objection.”

All testimony and evidence from that point on relating to the maintenance of a local office in the State of Utah, to the fact that many of the prices covered labor instead of materials, and, to the fact that taxes could have been properly assessed and paid for under the Sales Tax Act, was all made by proffer of proof. This ruling of the Commission was clearly in error for the reason that appellant should have been permitted to put on evidence to show the application of any exemptions to the Use Tax Act to which appellant would be entitled.

Title 59-16-4, Utah Code Annotated, 1953, in effect provides that if an action was taxable under the Sales Tax Act, or was taxable under the taxing statutes of another state, that the use tax would not apply. The rea-

son for the inter-relation of the sales tax and use tax laws is apparent. If the sales tax is payable, then the use tax is not.

Appellant clearly should have the opportunity of showing that the use tax is not applicable in a particular transaction, either because the tax had not been properly assessed against tangible property only, or because the transaction was taxable under the Sales Tax Law of Utah, or because the transaction was taxable under the Sales Tax Law of another state. The Commissioner's ruling denying all evidence on these points was clearly in error.

Appellant, in its subcontract agreements with B. I. F. and with other subcontractors, has already, in paying the contract price, paid the sales tax. It is, therefore, inequitable to now assess appellant with the use tax on the theory merely that appellant has used the property in the State of Utah, and that any other factors are immaterial.

The tax on the B. I. F. contract, and on the other contracts for materials purchased in the State of Utah from local representatives could have been, and should have been taxed against the vendors or the subcontractors under the Sales Tax Act. Such vendors and subcontractors had in effect collected the tax from appellant, and should have been required to pay it to the State of Utah. The State admittedly made little or no effort to attempt to collect the said tax as a sales tax, even though the local

representative of B. I. F. Company was registered with the Tax Commission under a sales tax license.

The mere difficulty or inconvenience of collecting the tax from the vendor should not in the absence of a statutory provision, authorize the Tax Commission to collect the tax from the appellant. All of the evidence points to the ultimate conclusion that this tax could and should have been collected both as a practical and as a legal matter from the vendors and subcontractors. Any and all evidence which relates to sustaining this position should have been admitted and considered by the respondent. Had it been admitted, respondent could have come to no other conclusion than that the B. I. F. contract amount, to the extent applicable to property only, was collectible from B. I. F. through the J. Henry Jones Company, and that the other named subcontract amounts and purchase prices for property purchased in the State of Utah were likewise collectible on a sales tax basis from the vendors or subcontractors.

SUMMARY

The respondent has produced no evidence to show that the tax has been properly assessed against tangible property. The Tax Commission has no authority either under the Sales and Use Tax Law, or under the Utah Constitution to assess the use tax against appellant based upon the price of labor incident to the installation of various pieces of equipment. Respondent has likewise produced no evidence to show that the use tax and not the sales tax is applicable to appellant. Respondent relied

solely upon the testimony that no tax had been paid to the State of Utah by appellant on the various purchase prices or subcontract amounts. This evidence clearly establishes no justification for the assessment of a use tax.

There was no attempt by respondent either evidentially at the hearing, or as a practical matter in the collection of the tax, to reach, or to attempt to reach the vendors or subcontractors from whom appellant purchased the personal property and labor involved in the amounts in question. There is no evidence whatsoever of any attempt to place these amounts in the category of a sales tax, and to follow the sales tax collection procedures set forth in the statute. Neither is there any evidence to show that there is any authority under our taxing statute which permits respondent to collect this tax from the appellant. The whole tenor of the use tax, as well as the sales tax statutes, is to require the vendor to maintain the records, to take out the proper licenses, and to collect and pay the taxes to the State of Utah.

The inequity of requiring the consumer in this case to pay these taxes is demonstrated by the fact that appellant has already paid the taxes to the vendors, and by the further fact that appellant has no records to aid it in distinguishing between the value of the property and the value of labor. Had appellant been required by the statutes to maintain these records with the intent in mind of ultimately paying the tax, then we would not have the complete confusion which now exists in attempting to allocate values to the property as distinguished from the

labor. Neither would appellant have already paid the tax to the vendors, and rendered itself subject to a double payment.

Appellant respectfully claims that the use tax deficiency sustained by respondent be dismissed, and that the bond and sum of \$5,000.00 which has been heretofore deposited with respondent, be returned to appellant.

Respectfully submitted,

CLYDE & MECHAM

By ELLIOTT LEE PRATT

Attorneys for Appellant