

1961

John R. Butler dba Davis & Butler Construction Co. 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

FILED

NOV 15 1961

DAVIS & BUTLER CONSTRUCTION COMPANY,

Appellant,

— vs. —

STATE TAX COMMISSION
OF UTAH,

Respondent.

Supreme Court, Utah

Case
No. 9527

BRIEF OF RESPONDENT

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the period July 1, 1955, to December 31, 1956; and \$19,517.47 for the period January 1, 1957, to September 30, 1959; together with interest on the principal sums at the rate of 6 per cent per annum from the date due until paid.

RELIEF SOUGHT BY THIS APPEAL

Appellant seeks to have the decision of the Tax Commission reversed and the deficiency assessments dismissed; or failing that, to have the case remanded for the admission of evidence in accordance with its proffer of proof.

STATEMENT OF FACTS

The respondent agrees that the statement of facts furnished by appellant is substantially true. However, because of its incompleteness the following brief statement is submitted in connection therewith.

Appellant is a construction company with its principal place of business in Salt Lake City, Utah. During the taxable periods appellant, as a general contractor, purchased various items of personal property from some 32 different suppliers. (R. 17-44) Some of these suppliers had local representatives in Utah although all were foreign companies. None of these companies forwarded sales or use tax to the Tax Commission for the purchases involved herein. (R. 10-11)

The Tax Commission assessed a use tax deficiency against appellant based upon appellant's invoices and

check registers, detailing purchases from these suppliers.
(R. 9)

Appellant contests the deficiency assessment in two areas. It claims that the Tax Commission improperly assessed use tax on the total amount of a \$674,775.00 contract between it and B. I. F. Industries, Inc., of Providence, Rhode Island. It is contended that this contract required B. I. F. to furnish, install and service equipment on the Salt Lake Metropolitan Water Treatment Plant. It urges that because the same subcontractor was required to provide installation services the Tax Commission erred in finding use tax due on the whole contract amount.

Additional error is claimed because certain of appellant's suppliers maintain Utah local offices and negotiations for purchase of materials and supplies were entered into in this state. Appellant's contention that such materials were "purchased" from local suppliers (App. Brief P. 5-6) is belied by the record in which appellant's own witnesses merely state that they "dealt with" these local offices in negotiating purchases. (R. 21, 37, 38, 42) Nevertheless, it is claimed that local vendors should have collected a sales tax on sales to appellant, and that, therefore, the Tax Commission is precluded from assessing a use tax against appellant on these purchases.

It is further contended that the \$1,008.07 assessment (Ex. 1) has no factual support in the record and is, for that reason, inadequate to prove tax liability.

The record shows the following:

B. I. F. Industries, Inc., is a manufacturing corporation. It actually consists of three companies: Builders Providence, Inc., Omega Machine Co. and Proportioneer, Inc. (R. 97) During the audit period B. I. F. was represented in Utah by the J. Henry Jones Co. which acted as its manufacturer's representative. (R. 84)

Personnel of the J. Henry Jones Co. solicited orders for B. I. F. and attempted to correlate and facilitate the Metropolitan Water District job. (R. 85, 94) The J. Henry Jones Co. was not authorized to handle the affairs of B. I. F. in Utah nor did it supervise the work of any of B. I. F.'s employees. However, its personnel were paid a commission by B. I. F. (R. 89) It did not supervise the installation nor perform any installation labor. (R. 92, 94)

Mr. Ken Jones, one of the J. Henry Jones' representatives, when asked if B. I. F. performed any installation or labor of any kind, replied:

"A. 'the only bit . . . they would, after the equipment was installed . . . put in maybe mercury into this transmitter, or place a part that was made especially for the transmitter, they would do this. Because in shipment they could not put this mercury into the transmitter itself . . .'" (R. 95)

B. I. F. provided service engineers to instruct the service personnel of the Metropolitan Water District in the operation of the equipment. (R. 95)

B. I. F. verbally employed Peters Plumbing & Heating Co. under another contract to make connections to the meters and perform certain plumbing work. (R. 99-100) (R. 64-68) Peters' compensation consisted of "back charges" of an indefinite amount. (R. 67)

The main contract between B. I. F. and appellant was one for materials and services. It did not include installation services. (R. 108)

The quotations from Builders-Providence, Inc., and Omega Machine Co. (R. 159-184) clearly indicate this to be true.

The materials in connection with this contract were purchased f.o.b. Providence, Rhode Island. (R. 160, 173, 176) The quotations further provide:

"Unless specifically set forth, time of a factory-trained service man is not included. Such service is available, at a per diem rate, . . . by special arrangement." (R. 160, 170)

"After the metering and chlorination equipment has been installed, a factory-trained serviceman will check the installation, place it in operation and instruct the operators in its use and maintenance." (Emphasis supplied) (R. 173) (See also R. 183)

"NOT INCLUDED

No installation labor or supervision, piping, wiring, hose, valves or fittings, to or from this equipment, unless specifically mentioned in the following outline to be furnished by Omega." (R. 184)

The quotations further provide:

"TAXES

“The amount of any applicable tax or other government charge upon the production, sale, shipment and/or use of the goods covered by this quotation shall be added to the price and paid by the purchaser.” (R. 160, 176)

The original prime contract between appellant and the Metropolitan Water District provided that payment for all work performed under contract for the construction of the water treatment plant should be on a lump sum basis and that no item of construction would be paid for on a unit price basis. (Ex. 52, p. P-1, P-5)

Based on this evidence the Tax Commission made the following findings of fact:

1. That the subject matter of the deficiencies consisted of items purchased out of state by the appellant and delivered to it within the State of Utah, whereupon petitioner used or consumed the materials as a general contractor in the completion of various contracts.

2. That no use tax had been paid to the State of Utah on any of the purchases which constitute the deficiency.

3. That no installation labor was furnished by out-of-state suppliers for any of the materials sold to or purchased by the appellant.

Regarding the alleged purchases from local suppliers (App. Br. P. 5-6) the record shows that all materials claimed to be purchased from local representatives

were in fact shipped from outside the State of Utah (Ex. 6, Ex. 7, Ex. 9, Ex. 15, Ex. 19, Ex. 31, Ex. 32) Most of such shipments were made f. o. b. Salt Lake City and only a few purchases were negotiated with local representatives of foreign suppliers.

One of these exhibits indicates that sales (use?) tax was charged on these purchases by out-of-state suppliers. Ex. 6, p. 2, 3 indicates that approximately \$75.00 was charged by the Fischer & Porter Co. on its sales to appellant. Significantly, later sales by the same company bear the notation "Utah State Tax EXEMPT." Ex. 7, p. 24, 25, 26, 27.

Ex. 14, p. 3, an invoice from Thompson Pipe & Steel, bears the notation "If no tax, why? interstate." Ex. 20 p. 5, an invoice from Paramount Mfg. Co., bears the notation "interstate." Ex. 35, p. 4, an invoice from Young Radiator Co., contains the notation "Purchaser must pay state or city sales or use tax, if taxable, to the proper taxing authority. Our prices do not include taxes."

Other invoices make no reference to sales or use tax. But the record clearly shows that the tax, if collected by any of the sellers in question, was never forwarded to the State of Utah. (R. 10-11)

Appellant contends that the use tax deficiency proposed and sustained against it for the period July 1, 1955, to December 31, 1956, in the sum of \$1,008.07 (Ex. 1) is without factual support and is therefore invalid.

This exhibit was admitted into evidence upon motion of appellant's counsel. (R. 8) The exhibit was based upon physical audit of appellant's purchase invoices and check registers. Several adjustments were made to it because appellant furnished evidence either of payment of the tax or of non-use within the State of Utah (R. 114)

It is submitted that appellant cannot contest the validity of a deficiency assessment on appeal where no objection was made to the basis of the said assessment below. It is well established that the burden of proving any assessment involved is upon the one attacking the assessment. 3 Cooley, Taxation § 1073 p. 2182-2183; *Eureka Hill Min. Co. v. City of Eureka City*, 22 Utah 447, 63 Pac. 654 (1900); *First National Bank v. Christensen*, 39 Utah 568, 118 P. 778 (1911).

STATEMENT OF POINTS

POINT I

THE USE TAX HEREIN WAS PROPERLY ASSESSED AGAINST APPELLANT.

POINT II

THE APPELLANT IS LIABLE FOR THE USE TAX AS ASSESSED BY THE STATE TAX COMMISSION.

- A. THE EVIDENCE CLEARLY INDICATES THAT NO TAX HAS BEEN PAID TO THE STATE OF UTAH ON THE TRANSACTIONS HEREIN.
- B. THE TAX MAY PROPERLY BE ASSESSED AGAINST APPELLANT

REGARDLES OF THE PLACE OF PASS-
AGE OF TITLE TO THE GOODS PUR-
CHASED.

POINT III

NO ERROR WAS COMMITTED BY THE
COMMISSION IN REFUSING TO ADMIT
EVIDENCE CONCERNING THE TYPE OF
TRANSACTIONS BETWEEN APPELLANT
AND ITS VENDORS OR SUBCONTRACTORS.

ARGUMENT

POINT I

THE USE TAX HEREIN WAS PROPERLY
ASSESSED AGAINST APPELLANT.

Section 59-16-3, U.C.A. 1953, provides:

“There is levied and imposed an excise tax on the storage, use or other consumption in this state of tangible personal property purchased on or after July 1, 1937, for storage, use or other consumption in this state at the rate of two per cent of the sales price of such property.

“Every person storing, using or otherwise consuming in this state tangible personal property purchased shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this state.”

Appellant contests the validity of a use tax levied against its purchase from B. I. F. Industries, Inc., of various materials necessary to perform its lump sum contract with the Salt Lake Metropolitan Water District. It is claimed that, as this purchase contract involved services, the Tax Commission has the burden of proof

of showing that the tax applies only to materials purchased and not to labor or services rendered in connection with such materials.

In this regard the following portion of a letter written by appellant's Marshall H. Bell and directed to B. I. F. as a vendor is significant:

"We wish to place our purchase order No. 449, *for all equipment as listed on the attached sheet for incorporation into the Salt Lake Metropolitan Water Treatment Plant in accordance with the plans and specification. . . . and for the lump sum amount of \$650,350.00.*" (R. 139) (Emphasis supplied)

Then follow two pages of specifications listing materials only.

The record clearly indicates that the only services to be performed by the seller of these materials consisted of instruction and training or specialized adjusting of the facility when completed. No installation labor was rendered by the vendor.

Section 59-16-2(d), U.C.A., 1953, provides in part:

" 'Sales Price' means the total amount for which tangible personal property is sold, *including any services that are a part of the sale*, valued in money, whether paid in money or otherwise . . . provided, cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold." (Emphasis supplied)

As it is not disputed that appellant stored, used or otherwise consumed the materials purchased, it must needs be that it is taxable on the full "sales price" of such materials unless that price includes amounts charged for labor or services rendered in installing, applying, remodeling or repairing property sold.

The record indicates that any service which may have been furnished by vendors of materials herein, did not fall into a category which would exempt them from the use tax.

In any event, incidental service rendered in connection with a lump sum sale of tangible property does not invalidate a tax on the purchase price paid. See *McKendrick v. State Tax Commission*, 9 Utah 2d 418, 347 P. 2d 177 (1959); *Western Leather & Finding Co. v. State Tax Commission*, 87 Utah 227, 48 P. 2d 526 (1935).

POINT II

THE APPELLANT IS LIABLE FOR THE USE TAX AS ASSESSED BY THE STATE TAX COMMISSION.

A. THE EVIDENCE CLEARLY INDICATES THAT NO TAX HAS BEEN PAID TO THE STATE OF UTAH ON THE TRANSACTIONS HEREIN.

Section 59-16-3, U.C.A. 1953, provides in part:

"Every person storing, using or otherwise consuming in this state tangible personal property purchased shall be liable for the tax imposed by this act, *and the liability shall not be extinguished*

until the tax has been paid to this state." (Emphasis supplied)

The record shows that the records of appellant indicate that no tax has been paid to the State of Utah on any of the transactions herein. More significantly, none of the vendors of materials in question have forwarded or paid tax to this state on any of the transactions upon which the deficiency assessment herein is based. (R. 10, 11)

The appellant, therefore, continues to be liable for the tax until it is paid to the State of Utah and the assessment cannot be contested on the ground that out-of-state vendors should have collected and paid the tax.

It is elementary that the burden of showing that any given transaction is exempt from taxation falls upon the party claiming the exemption. 2 Cooley Taxation, § 672, P. 1404; *Parker v. Quinn*, 23 Utah 332, 64 Pac. 961 (1901).

B. THE TAX MAY PROPERLY BE ASSESSED AGAINST APPELLANT REGARDLES OF THE PLACE OF PASSAGE OF TITLE TO THE GOODS PURCHASED.

Appellant also contends that the statute requires the retailer, not the consumer, to file and pay the tax and that the Tax Commission cannot delegate the payment of the tax to someone not specifically designated in the statute.

As the sales and use tax is a tax upon the consumer, and as appellant is a consumer (See *Utah Concrete Products Corp. v. State Tax Commission*, 101 Utah 513, 125 P.

2d 408), it would appear that the Tax Commission can proceed directly against the consumer to enforce tax liability. By so doing it is not delegating the payment of the tax to others not designated nor contemplated by the statute. Such procedure is consistent with that adopted by the Tax Commission and approved by this Court in the case of *Ralph Child Construction Co. v. State Tax Commission*, Utah, 362 P. 2d 422 (1961). It was there stated:

“The purpose of the use tax is to impose a tax in the same amount as the sales tax would have imposed were it applicable. Here, although the title to the property passed in this state and the sale was negotiated here, the seller shipped the goods from out of the state and there was no retailer within this state involved in this transaction. The sales tax emphasizes the fact that ordinarily a retailer will collect the tax whereas the use tax contemplates that the consumer will pay the tax directly to the Commission. Since there is no express provision in our statute that the sale involved in a use tax must be an out-of-state sale, we conclude that under the facts of this case the transaction is not covered by the sales tax and therefore is covered by the use tax. Such being the case, Child had a direct obligation to pay this tax to the Commission from which he cannot be discharged unless the tax is actually paid. On the other hand, even if the use tax is not applicable and the sales tax is, Child would be obligated to pay this tax to the state on the same theory adopted in the first point above decided, that where no retailer has either collected the tax from the consumer nor paid the tax to the state, the ultimate consumer is obligated to make such payment.”

POINT III

NO ERROR WAS COMMITTED BY THE COMMISSION IN REFUSING TO ADMIT EVIDENCE CONCERNING THE TYPE OF TRANSACTIONS BETWEEN APPELLANT AND ITS VENDORS OR SUBCONTRACTORS.

It is contended that error was committed by the Tax Commission in refusing to admit evidence concerning the type of transactions between appellant and its vendors. The Tax Commission excluded testimony relating to the nature and terms of purchases by appellant from the various vendors referred to in Exhibits 3 to 37. This testimony was, in the words of appellant's counsel, designed "to establish whether or not a tax was paid." (R. 18) It was contended that if appellant purchased materials under lump-sum contracts that it had contracted with its vendors to purchase materials, tax paid, whether paid to Utah or a foreign state being immaterial. (R. 18)

After receiving testimony to the effect that neither appellant nor any of the vendors had filed returns or paid on any of the transactions herein, the Tax Commission excluded such testimony. A proffer of proof was made for the record to the effect that appellant intended the sales or use tax to be included in all lump-sum purchases made by it from out-of-state vendors. (R. 19)

It is submitted that such exclusion was proper because of the terms of Section 59-16-3, U.C.A. 1953. This provides in part, ". . . the liability shall not be extinguished until the tax has been paid to this state." The Tax Commission properly excluded evidence of inten-

tion to pay and include use tax in lump-sum purchase contracts with out-of-state vendors.

Assuming, but not conceding, that error was committed, it is contended that this error was not prejudicial to appellant. The record indicates that the majority of the invoices were not lump-sum contracts but were simple purchases of materials. Many of these exhibits indicate that no sales or use tax was charged. (Ex. 7, Ex. 14, Ex. 20, Ex. 35) The majority contain no reference to sales or use tax. The appellant's own exhibits do not support its contention that sales or use tax was intended to be paid because the only case where such a claim is tenable is that of purchases under a lump-sum contract. Respondent is unable to find such a contract in the listed exhibits.

CONCLUSION

The appellant, John R. Butler d/b/a Davis & Butler Construction Company, is properly liable for the use tax assessed against him. This is true notwithstanding the fact that some purchases were negotiated with local representatives or the fact that appellant intended that foreign vendors should collect and pay use tax on the transactions herein.

The decision of the Tax Commission should be affirmed.

Respectfully submitted,

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