

1993

Hercules Incorporated v. Utah State Tax Commission, Auditing Division : Petition for Writ of Certiorari

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH SUPREME COURT

HERCULES INCORPORATED)	
)	
Petitioner,)	Appeal No. 93-0051
)	
vs.)	Priority No. 16
)	
UTAH STATE TAX COMMISSION,)	
AUDITING DIVISION,)	
)	
Respondent.)	

ON PETITION FOR WRIT OF CERTIORARI TO THE
UTAH COURT OF APPEALS
JUDGES BILLINGS, JACKSON, AND RUSSON

BRIEF OF RESPONDENT

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UTAH

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STATEMENT OF JURISDICTION

The Court has jurisdiction to hear this matter pursuant to Utah Code Ann. § 78-2a-4 (1992) and Rule 49 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

Issue 1. Whether the Utah Court of Appeals was correct in finding several of the District Court's findings of fact clearly erroneous.

Standard of Review: Findings of fact will not be set aside on appeal unless clearly erroneous. See, Utah R. Civ. P. 52(a) (as amended, effective January 1, 1987); See also, Grayson Roper Limited Partnership v. Finlinson, 782 P.2d 467 (Utah 1989).

Issue 2. Whether the Utah Court of Appeals properly determined that sales of rocket motors manufactured and delivered

in Utah to a Utah purchaser were Utah sales pursuant to Utah Code Ann. § 59-7-318 (1987).

Standard of Review. Conclusions of law will be reviewed for correctness with no deference to the District Court's interpretations. Ward v. Richfield City, 798 P.2d 757 (Utah 1990). See also State ex rel Div. of Consumer Protection v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah 1990); Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

Issue 3. Whether the Tax Commission's including Hercules' Utah sales of rocket motors to an in-state purchaser in calculating Hercules' franchise tax liability violates the Commerce Clause of the United States Constitution.

Standard of Review. Conclusions of law will be reviewed for correctness with no deference to the District Court's interpretations. Id.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. U. S. CONST., Art. I, § 8, Cl. 3.
2. Utah Code Ann. § 59-7-311 (1987).
3. Utah Code Ann. § 59-7-317 (1987).
4. Utah Code Ann. § 59-7-318 (1987).
5. Utah Code Ann. § 59-7-301 (1987).
6. Utah Code Ann. § 59-7-102(3) (1987).
7. Utah Code Ann. § 70A-2-106(1) (1990).
8. Utah Tax Commission Rule R865-6-8F(I)(4)(b) and (c) (1989).

9. Utah R. Civ. P. 52(a).

STATEMENT OF CASE

1. NATURE OF THE CASE

This review on petition for certiorari is from a Utah Court of Appeals decision ("Opinion") (Attached as Appendix 1) overturning a decision rendered by the Third Judicial District Court. (R. 418.) The District Court had reversed the decision of the Utah State Tax Commission ("Tax Commission" or "Commission") and ruled that rocket motor sales made by Hercules to Lockheed were not Utah sales and therefore not properly included in the numerator of the Utah sales factor under Utah Code Ann. § 59-7-317 (1987) and § 59-7-318 (1987) [renumbering § 59-13-92 and § 59-13-93]. (R. 432.) These sections of the Utah Code refer to the Uniform Division of Income for Tax Purposes Act ("UDITPA") which sets forth the method for taxing income derived by a corporation both from within and without the state of Utah.

Under the UDITPA, income is apportioned among taxing states based on three factors: payroll, property, and sales. The sales factor is a fraction, "the numerator of which is the total sales of the taxpayer within this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period." Utah Code Ann. § 59-7-317 (1987). The business income to be apportioned to Utah is determined by "multiplying the income by a fraction, the

numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three." Utah Code Ann. § 59-7-311.

The issues in this case pertain only to the sales factor of the formula. The Tax Commission has determined that the Utah portion of the sales factor (the numerator of the sales ratio) should be increased to reflect Hercules Incorporated's ("Hercules") in-state sales of rocket motors to Lockheed Space and Missile Company ("Lockheed"). Hercules' property and payroll factors are not affected by the Commission's determination.

2. COURSE OF PROCEEDINGS

In 1982, the Auditing Division of the Utah State Tax Commission ("Auditing Division") issued a Notice of Deficiency to Hercules asserting that Hercules owed additional Utah corporate franchise taxes for the years 1977 to 1980. (R. 720.)

On October 28, 1982, Hercules filed a Petition for Redetermination with the Tax Commission. (R. 721.) On March 11, 1983, Hercules filed a Supplement to Petition for Redetermination with the Tax Commission. (R. 728.)

On July 15, 1986, the Tax Commission held an informal hearing on Hercules' Petition for Redetermination and on November 12, 1986 the Tax Commission issued its Informal Decision affirming the deficiency assessed by the Auditing Division. (R. 696, 701.)

On August 24, 1987, a formal hearing was held before the Tax Commission. (R. 1058.) The Tax Commission issued its Findings of Fact, Conclusions of Law and Final Decision on October 4, 1988. (R. 622.) In its decision, the Tax Commission affirmed the audit deficiency in favor of the Auditing Division. (R. 29, 629.)

On November 2, 1988, pursuant to Utah Code Ann. § 59-1-505 (1987), Hercules paid \$890,462.00, which amount included tax and interest, to the Tax Commission as a prerequisite to taking its appeal to the District Court. Of that amount, \$456,512.00 was contested and paid under protest. (R. 13.)

On January 31, 1989, Hercules filed with the District Court an Amended Appeal, Petition for Review and Complaint seeking review of the Tax Commission's ruling. (R. 63.) After oral argument, the District Court issued a Memorandum Decision, dated February 1, 1991, and final Judgment, dated March 11, 1991, reversing the Tax Commission's ruling and ordering the Commission to refund, with interest, the taxes that Hercules paid under protest. (R. 418, 438.) The District Court held that Hercules' sales to Lockheed were not Utah sales pursuant to Utah Code Ann. § 59-7-317 and § 59-7-318. (R. 432.) The District Court further held that the Auditing Division's taxation of Hercules constituted double taxation in violation of the Commerce Clause of the United States. (R. 432.)

The Commission timely appealed the District Court decision to this Court which transferred the case to the Court of Appeals. On December 31, 1992, the Court of Appeals' Opinion reversed the District Court in favor of the Auditing Division. On January 28, 1993, Hercules petitioned this Court for Writ of Certiorari to the Utah Court of Appeals. On June 18, 1993, this Court granted Hercules' Petition for Writ of Certiorari.

STATEMENT OF FACTS

During the years 1977 to 1980, Hercules was obligated under a subcontract with Lockheed to manufacture rocket motors for the Trident C-4 missile. Lockheed was obligated under a prime contract with the U.S. Government to manufacture the Trident C-4 missile. In 1982, the Auditing Division issued a "Notice of Deficiency" to Hercules for additional Utah corporate franchise tax for calendar years 1977 through 1980. The deficiency was based on the Auditing Division's interpretation and application of Utah Code Ann. §§ 59-7-317 and 59-7-318 (1987) to rocket motors manufactured by Hercules at its Bacchus, Utah facility. (R. 720.)

The entire manufacturing process which produced the rocket motors took place at Hercules' facility in Bacchus, Utah. (R. 1119-23, 1146-47.) Lockheed was the prime contractor which was to provide completed missiles to the U.S. Government. Hercules was a subcontractor, which was to provide motor components to Lockheed.

When the manufacturing of the rocket motors was completed under the subcontract, Lockheed inspected the motors and received title to the motors at Bacchus, Utah. (R. 661.) The U.S. Government in turn took title to the motors in Utah before shipping the motors to the out of state facilities. The rocket motors were then shipped via common carrier, under a U.S. Government bill of lading, to a military seaport assembly facility. (R. 662.) The point of final acceptance by Lockheed and the United States was at Hercules' Bacchus, Utah facility. (R. 661.)

Upon final acceptance and title transfer, the motors met all contract specifications required at that point. (R. 662.) The subcontract items consisted of the unconnected first, second and third stage motors of the C-4 missile body, each containing an explosive propellant, in an inert form, to facilitate interstate transportation to a seaport assembly facility. (R. 675, 1145.)

The Trident missile, the subject of the prime contract, was comprised of the motors and many other necessary component parts, some of which were supplied by Hercules and some of which were supplied by Lockheed, the United States, or third parties. (R. 659, 1088.) The missile assembly process was completed by the prime contractor, Lockheed, at the destination assembly facility. (R. 1120.) At the destination facility, Lockheed performed the hands-on manufacturing work, and Hercules provided

only advisory and technical assistance and inspection oversight to assure that specifications were met. (R. 1123, 1146, 1158.)

The final step in the manufacturing and assembly process was performed by Lockheed at the seaport facilities. (R. 1146.) At that point, the United States took possession of the assembled missile, attached the nuclear warhead or other cargo and placed the same in a canister for storage or loading into Navy submarines at the assembly site. (R. 1088, 1158.)

Hercules was compensated by a cost-plus, fixed fee contract calling for partial payment upon delivery in Utah as well as additional payments for services performed at the destination facilities and future component performance. The contract provided for incentives to reward good performance as well as penalties to deter bad performance. The compensation which Hercules received was based upon costs incurred together with a portion of the profits based upon acceptance at the plant, with some of the future profits withheld contingent upon component performance. (R. 659.)

SUMMARY OF ARGUMENTS

The Court of Appeals was correct in finding several of the District Court's findings of fact clearly erroneous and totally without support in the record. In finding several of these findings clearly erroneous, the Court of Appeals correctly applied Utah Code Ann. § 59-7-318 and found that Hercules' delivery of rocket motors to Lockheed at Bacchus, Utah

constituted Utah sales and were appropriately included in the Utah sales factor under the UDITPA.

The Court of Appeals' analysis and non-application of the destination rule was proper in this case. While the Tax Commission has accepted the validity of the destination rule, it is not applicable to the facts of this case. Whether the destination rule is a valid rule of law has never been contested by the Tax Commission. Neither the Tax Commission nor the Court of Appeals applied the destination rule in this case because the facts and clear language of § 59-7-318 simply do not warrant it.

The Court of Appeals properly found that no interstate sale occurred and therefore, no double taxation issue in violation of the Commerce Clause is raised. Regardless of whether an interstate sale occurred, Utah's inclusion of a sale which occurred in Utah in the numerator of the sales factor does not violate the principles of the UDITPA or Commerce Clause of the United States Constitution.

Under the controlling case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), a taxing authority must satisfy four prongs in order to sustain a tax on interstate commerce. The four prongs are as follows:

- (1) The tax must be applied to an activity with a substantial nexus with the taxing state;
- (2) The tax must be fairly apportioned;

(3) The tax must not discriminate against interstate commerce; and

(4) The tax must be fairly related to the services provided by the state.

Id. at 279.

Because the Tax Commission has satisfied these four prongs in taxing Hercules' sales to Lockheed in Utah, the tax is not violative of the Commerce Clause and should be upheld. The facts of this case show that the rocket motors sold by Hercules to Lockheed constitute Utah sales, not California or Washington sales.

There is no evidence in the record as to exactly what transpired between Hercules and the California and Washington taxing authorities. The fact that Hercules paid tax in some other jurisdiction is irrelevant regardless of whether it was paid mistakenly, voluntarily, or involuntarily. Utah cannot be bound by the decisions of other states. The sales at issue in this case were clearly Utah sales and are therefore properly included in the numerator of the Utah sales factor under the UDITPA.

ARGUMENT

I. THE FACTS SHOW, AND THE COURT OF APPEALS CORRECTLY FOUND, THAT THE SALES OF THE MISSILE MOTORS WERE UTAH SALES.

Utah Code Ann. § 59-7-318 (1987) dictates when a sale occurs in Utah for franchise tax purposes:

(1) Sales of tangible personal property are in this state if:

(a) the property is delivered or shipped to a purchaser, other than the United States Government, within this state, regardless of the f.o.b. point or other conditions of the sale.

The Utah Administrative Code further defines the meaning of the language in Utah Code Ann. § 59-7-318 (1987), "delivered or shipped to a purchaser . . . within this state."

(b) Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state even though the property is ordered from outside the state.

(c) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

Utah Code Admin. P. R865-6-8F(I)(4)(b), (c) (emphasis added).

The facts were stipulated that Lockheed was located within the State of Utah and had a business presence here at the time it purchased the rocket motors from Hercules. And, while the rocket motors were eventually shipped out of Utah by the U.S.

Government, they were nevertheless delivered to Lockheed, a Utah purchaser, in Bacchus, Utah. Therefore, under the clear language of Utah Code Ann. § 59-7-318 and Utah Code Admin. P. R865-6-8F, the sales were Utah sales under the UDITPA.

Utah Code Ann. § 70A-2-106(1) (1990) states that "[a] 'sale' consists of the passing of title from the seller to the

buyer for a price" The parties have stipulated that title to the rocket motors passes in Bacchus, Utah. (R. 19.) The contract between Hercules and Lockheed states that "acceptance shall constitute delivery for satisfying the delivery schedules set forth herein and provide substantiation for billing purposes, and acknowledges that title to the subcontractor end items vests in LMSC [Lockheed Missiles and Space Company]." (R. 661.) Clearly, if Lockheed is being billed by Hercules under the contract for the motors, Lockheed is paying a price for the rocket motors. Therefore, both requirements of § 70A-2-106(1) constituting a sale are met by the transaction between Hercules and Lockheed in Bacchus, Utah.

The Court of Appeals found that "[t]he [District] [C]ourt erred when it found the subject matter of the Hercules sale to Lockheed was a functional or usable motor that could be fired." Opinion at 4. The Court of Appeals found further that "[t]he manufacturing of the missile motor was complete at Hercules' Bacchus facility." Opinion at 4. These findings are fully supported by the record and the District Court's findings to the contrary are clearly erroneous and without support in the record.

Hercules argues that "when the motors left Utah, they were inert, dysfunctional and lacked critical interface and ignition components" and therefore the manufacture of the missile motors was not complete when Lockheed accepted delivery at

Hercules' Bacchus facility. Brief of Petitioner at 37-40. That argument is illogical and without merit given the simple facts of this case. The contract between Hercules and Lockheed calls for the sale of rocket motors - not the sale of completed missiles. It is irrelevant that the motors are "inert" and are inoperable until integrated into the missile.

The point is that Hercules was only responsible for the motor under the subcontract. The propulsion systems for Lockheed contracted which were complete when they were accepted by Lockheed in Bacchus, Utah. However, the systems would not fire until after Lockheed installed the additional initiation, ignition, and activation devices at Lockheed's seaport facility. (R. 1123, lines 3-12; R. 1146, lines 9-11.) Hercules was responsible only for the motors. The record is clear that the additional material needed to convert the completed motors into a total missile was installed entirely by Lockheed employees at its seaport facility. (R. 1119, line 23 - R. 1120, line 4.; R. 1146, lines 9-14.) Therefore, when Hercules delivers the completed motors and title to those motors is transferred to Lockheed at the Bacchus, Utah facility, a Utah delivery and sale occur for taxation purposes.

The Court of Appeals properly concluded that "[t]he tangible personal property contracted for by Hercules and Lockheed, and the subject matter of the sale generating the business income to be apportioned, was the missile motor as it

left Hercules' Bacchus facility." Opinion at 4-5. The Court of Appeals continued by concluding that "[a]pplying section 59-13-93 [renumbered in 1987 as § 59-7-318] to the motor as it left Hercules' Bacchus facility leads to only one reasonable conclusion: the sale of the missile motor was a Utah sale." Opinion at 5. The facts surrounding the sale of the rocket motors by Hercules to Lockheed at Bacchus, Utah fit squarely within the definitions of sale explicitly defined in Utah Code Ann. §§ 59-7-318 (1987) and 70A-2-106(1) (1990). As Utah sales, the sales of the rocket motors by Hercules are properly included in the Utah sales factor under the UDITPA.

A. Hercules' arguing in favor of application of the destination rule in this case is misleading.

Hercules claims that the Court of Appeals' analysis of the cases Hercules cites in support of application of the destination rule is "superficial and demonstrably incorrect." Brief of Petitioner at 21. In support of its erroneous claim, Hercules notes that "[n]one of the cited cases suggests the beer, carpet, banana and petroleum companies could not also have had presence in the origin or manufacturing state as well as the destination state." Brief of Petitioner at 21. Again, this argument is irrelevant and only serves to confuse the pivotal issue of this case; that is, "where did the sale of the rocket motors occur?"

First, as discussed above, the facts surrounding the sale of the rocket motors to Lockheed in Bacchus, Utah fall clearly within Utah's UDITPA statute and commercial code. The plain language of § 59-7-318 mandates the inclusion of Hercules' rocket motor sales which take place in Utah in the sales factor. That is precisely why neither the Tax Commission nor the Court of Appeals found the destination rule applicable in this case.

Second, the cases cited by Hercules which apply the destination rule are factually distinguishable from this case. Hercules attempts to revive its destination rule argument in the face of the Court of Appeals' flat refusal to apply it by arguing what "could have been" or "might have been" the facts of the cases Hercules cites. "The beer, carpet, banana and petroleum companies in the cases Hercules cited either had or could have had 'presence' in the state seeking to impose the tax just as Lockheed had 'presence in Utah.'" Brief of Petitioner at 24. However, each of the courts rendering the opinions on which Hercules relies make clear that the purchasers in those cases did not have presence in the taxing state. Hercules' speculation to the contrary is misleading and should be given absolutely no weight by this Court.

In Olympia Brewing Co. v. Commissioner of Revenue, 326 N.W.2d 642 (Minn. 1982) the Minnesota Supreme Court clearly adopts the destination rule. However, the facts of the case, as stated by the Minnesota Court were that only out-of-state

purchasers were involved. "In computing the sales-within-Minnesota factor, Olympia excluded all beer sold by its St. Paul brewery to out-of-state wholesale distributors and included all beer sold . . . to Minnesota wholesale distributors." Olympia Brewing Co., 326 N.W.2d at 644 (emphasis added). The facts are clear that the only issue involved whether or not to include the sales made to out-of-state distributors because the beer sold to Minnesota distributors had already been included by the taxpayer in computing its sales factor. The Minnesota Supreme Court continued and stated that "Olympia is not suggesting that the location of the final consumer, after resale upon resale, be determinative of the sales classification. The inquiry ends when it is determined where the initial purchaser is located; it is there that shipment and delivery terminate." Id. at 647 (emphasis added).

In this case, the parties stipulated that Lockheed was a purchaser located in Utah. (R. 19.) Under the reasoning of Olympia Brewing, the inquiry ends there because Lockheed was the initial purchaser of the rocket motors from Hercules. One need not apply the destination rule once it is determined that the purchaser (Lockheed) is located in Utah. The stipulation that Lockheed is an in-state purchaser should end the inquiry. The destination rule need not be applied because no out-of-state purchaser is involved in the Utah sale.

Likewise, in Strickland v. Patcraft Mills, Inc., 302 S.E.2d 544 (Ga. 1983), applying the destination rule, the Georgia Supreme Court stated that "[i]n all the transactions under review, Patcraft, a Georgia corporation, allowed out-of-state customers to pick up merchandise at its Dalton headquarters for transport and resale out of state." Strickland, 302 S.E.2d at 544 (emphasis added).

In Pabst Brewing Co. v. Wisconsin Department of Revenue, 387 N.W.2d 121 (Wis.Ct.App. 1986), the Wisconsin Court of Appeals also recognized the destination rule. However, it too concluded that the "purchaser's business location controls." Pabst Brewing, 387 N.W.2d at 123. "We conclude that because the location of the purchasing wholesaler rather than the pick up controls whether the sales are in this state Id. at 123. The Pabst Brewing Court explicitly states in the fact section of its opinion that "[t]he issue is whether Pabst's sales of beer to out-of-state wholesalers who pick up the beer at its Milwaukee plant for out-of-state distribution are sales 'in this state' under [the UDITPA]." Pabst Brewing, 387 N.W.2d at 122 (emphasis added). The facts in Pabst Brewing make clear that the Wisconsin Court was only considering tax on sales made to out-of-state purchasers. If these purchasers "had" or "could have had" presence in Wisconsin, it would be unusual that the court would explicitly state that they were out-of-state purchasers. Hercules' argument misstates the facts of the cases.

In Texaco v. Groppo, 574 A.2d 1293 (Conn. 1990), the Connecticut Supreme Court also noted that "the plaintiff supplied petroleum products to five distributors whose businesses and customers were located entirely outside the state." Texaco, 574 A.2d at 1294 (emphasis added). If the distributors' businesses and customers were located entirely outside the state, it seems irrational to assume that they "had" or "could have had" presence within Connecticut. Hercules' arguing that they "could have" ignores the clear language of the decision.

In Department of Revenue v. Parker Banana Co., 391 So.2d 762 (Fla.Ct.App. 1980), the Florida Court of Appeals also clearly adopts the destination rule. However, the Florida Court of Appeals stated that the issue in the case arose because "[i]n computing its Florida corporate income tax, Parker Banana treated all sales to purchasers from outside Florida as sales not in the state." Parker Banana, 391 So.2d at 762 (emphasis added). The Florida Department of Revenue "took the position that only those sales to out-of-state purchasers who used common carriers to pick up their bananas could properly be characterized as sales not in this state for purposes of the apportionment formula." Parker Banana, 391 So.2d at 763. The facts of Parker Banana as stated by the Florida Court of Appeals reveal that the only transactions at issue were those involving out-of-state purchasers. Therefore, contrary to Hercules' assertions, none of the purchasers had presence within the state.

In Howmet Corporation v. Revenue Division of the Michigan Dept. of Treasury, 1993 WL 45075 (Mich.Ct.Cl. 1993), the Michigan Court of Claims addressed the issue of whether a privilege tax levied on out-of-state sales against an in-state manufacturer violated the UDITPA or the Commerce Clause. The Michigan court concluded that the in-state manufacturer had sufficient nexus with the destination states to allow imposition of privilege tax by those destination states. Again, the facts of the instant case as found by the Court of Appeals are distinguishable. The sale of the rocket motors occurred in Utah, not in Washington or California. In Howmet, it is undisputed that the sales occurred in the destination states. Furthermore, the relevant statutory standard in Michigan is different than Utah's. In Michigan, the UDITPA statute states that "sales of tangible personal property to purchasers in other states are to be treated as 'in this state' where . . . [t]he property is shipped from a . . . place of storage in this state and the purchaser is the United States government, or the taxpayer is not taxable in the state of the purchaser." Howmet, 1993 WL 45075 at *2. Therefore, the Michigan court's inquiry focused on whether the taxpayer was properly "taxable in the state[s] of the purchaser[s]." The Michigan court found that the taxpayer was properly taxable in the states of the purchasers. However, it did not reach this conclusion through application of the destination rule as Hercules leads this Court to believe. The

Michigan court reached its conclusion by applying standards outlined by the U.S. Supreme Court to determine the nexus between the "destination states" and the taxpayer. It is significant to note that the Michigan court applied the four-pronged Complete Auto test to the Michigan tax to determine its constitutionality as discussed in section II of this brief.

The manufacture of the missile motors was completed and delivered to an in-state purchaser (Lockheed) in Utah, not in Washington or California. Other than Hercules occasionally "signing off" at certain points at the port facilities, the only transactions which took place in Washington and California were between Lockheed and the U.S. Government. (R. 1092-94, 1119-20, 1123, 1146-47.) Therefore, the Court of Appeals properly found that the sale of the rocket motors was a Utah sale under the UDITPA. None of Hercules' "authorities" supports application of the destination rule in this case because in all those cases, the facts are clear that none of the purchasers were in-state purchasers. All were out-of-state purchasers which came into the taxing state to take delivery from an in-state seller.

Hercules attempts to distinguish Bullock v. Ensearch Exploration, Inc., 614 S.W.2d 215 (Tex.Civ.App. 1981), by pointing out that the sales in Bullock involved natural gas which was commingled in a single tank prior to shipment out of state. "The gas seller could not foresee the ultimate destination of the fungible goods injected into a pipeline." Brief of Petitioner at

27, n. 4. This is an interesting distinction because in Texaco, which Hercules cites in support of its argument, title to petroleum products passed in Connecticut which were taken from Texaco's terminals by out-of-state purchasers. Texaco would likewise be unable to foresee the "ultimate destination" of the petroleum.

Nevertheless, the Bullock Court stated that "[i]t makes no difference that the gas eventually moves in interstate commerce. For the purposes of [the UDITPA], its status is simply determined by whether such property, when sold, is delivered or shipped to a purchaser within Texas." Bullock, 614 S.W.2d at 217. The Texas Court of Appeals noted that "[i]t is [the taxing authority's] position that, in spite of the fact that this natural gas is eventually delivered by third parties to destinations outside of Texas, the sale of the natural gas is completed within the state and is therefore taxable. We agree with this conclusion." Bullock, 614 S.W.2d at 217. The Bullock Court continued by noting that "[t]he statute in question is clear and unambiguous and means exactly what it says when it is applied to the facts of this case." Id.

Distinction of the Bullock case attempted by Hercules is meaningless. As cases cited by Hercules make clear, the inquiry ends when it is determined that the property is delivered to the in-state initial purchaser. The Court of Appeals found that the completed rocket motors were delivered to Lockheed (an

in-state purchaser) and were therefore Utah sales. The Court of Appeals did exactly what the UDITPA requires and therefore its decision was proper given the clear statutory language of § 59-7-318.

Hercules' reliance on the authority it cites to support its assertion that the Tax Commission has not accepted the destination rule is untenable. Whether or not the destination rule (however defined) is an accepted rule of law has never been argued or contested by the Tax Commission. Both the Court of Appeals and the Tax Commission found that this case is distinguished factually, not legally, from the cases cited by Hercules in support of its futile "destination rule" argument. (R. 627, Opinion at 5.) The distinguishing and controlling fact is that the completed rocket motors were sold by Hercules to Lockheed in Utah. Therefore, Utah Code Ann. § 59-7-318 controls regardless of the existence of the destination rule and requires that the rocket motor sales be apportioned to Utah, not Washington or California. (See chart attached as Appendix 2.)

**II. THE TAX COMMISSION'S INCLUDING A UTAH
SALE IN THE SALES FACTOR NUMERATOR DOES
NOT VIOLATE THE COMMERCE CLAUSE OF THE
UNITED STATES CONSTITUTION.**

As discussed above, the Court of Appeals properly found that no interstate sale occurred and therefore, no Commerce Clause double taxation issue is raised. However, even if the sale of the rocket motors can somehow be imputed to Washington or

California, Utah's inclusion of the rocket motor sales in the numerator of the sales factor is constitutional under the tests set forth by the United States Supreme Court.

A. Burden of proof.

A taxpayer must satisfy a substantial burden of proof in order to prevail in a Commerce Clause challenge. The United States Supreme Court stated that it will only strike the tax if:

[T]he taxpayer can prove by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportions to the business transacted . . . in that State or has led to a grossly distorted result.

Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 170 (1983).

The Court continued:

Appellant has the burden of proof; it must demonstrate that there is no rational relationship between the income attributed to the State and the intrastate values of the enterprise, by proving that the income apportioned to California under the statute is out of all proportion to the business transacted by the appellant in that state.

Id. at 180-181 (citations omitted). Hercules has failed to satisfy its burden. The sale of rocket motors, as determined by the contract between Hercules and Lockheed, and found by the Tax Commission and the Court of Appeals, occurred in Bacchus, Utah. The income from the sale must be attributed to the sales factor in Utah and, therefore, must be allocated to and taxed by the State of Utah. Hercules introduced no evidence that refutes the

sale in Bacchus, Utah. Essentially, Hercules only argues that because it may have paid tax in some other jurisdiction, it need not pay tax on sales it makes within Utah which are properly includable under the UDITPA.

The Tax Commission is concerned with the rocket motor sales simply for purposes of calculating the Utah sales factor. Because the rocket motor sales occurred in Utah, the Auditing Division properly imputed those sales as Utah sales for franchise tax purposes. Accordingly, Hercules has failed to prove that the business transacted between Hercules and Lockheed did not have a substantial relationship to the state of Utah for apportionment purposes.

B. The test for unconstitutional double taxation.

Hercules asserts that "'Double Taxation' in this case is a stipulated fact, not an unproven hypothetical." Brief of Petitioner at 28. Hercules claims that the mere fact that it paid some form of tax in California and Washington means Utah cannot constitutionally apply unambiguous Utah law to Hercules' in-state sales. However, the fact that a taxpayer pays tax in two jurisdictions (even if done "involuntarily") does not automatically make the tax unconstitutional.

The test for determining whether a state tax apportionment method survives constitutional scrutiny under the Commerce Clause is outlined in Complete Auto Transit, Inc. v.

Brady, 430 U.S. 274 (1977). Complete Auto sets forth a four pronged test that must be satisfied to sustain an apportioned tax on interstate commerce. The four tests are:

- (1) The tax must be applied to an activity with a substantial nexus with the taxing state;
- (2) The tax must be fairly apportioned;
- (3) The tax must not discriminate against interstate commerce; and
- (4) The tax must be fairly related to the services provided by the state

Id. at 279.

1. Substantial Nexus With Taxing State

The first prong of Complete Auto is plainly satisfied in this case. Hercules is a Utah taxpayer doing business in Salt Lake County, Utah. The contract between Hercules and Lockheed was for the sale and delivery of rocket motors at Hercules' place of business in Bacchus, Utah. The rocket motors were manufactured in Utah prior to their sale. Finally, plant inspection, acceptance and passage of title to Lockheed all occurred in Utah. Each of the facts provides more than sufficient nexus with the state of Utah for imposition of apportioned franchise tax.

2. Internal and External Consistency

The second requirement set out by Complete Auto is that the tax must be fairly apportioned. This requires the tax to be both internally and externally consistent. Container Corp., 463 U.S. 159 at 169. Utah's taxing method (Utah Code Ann. § 59-7-317 and § 59-7-318) satisfies both these requirements.

a) Internal Consistency

To be internally consistent, "a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result," Goldberg v. Sweet, 488 U.S. 252, 261 (1987). The intention of the UDITPA statute is to assure that no multiple taxation results. In fact, the purpose of the UDITPA is to organize a strict design whereby each state is only entitled to a calculated portion of a corporation's sales. Accordingly, the inherent result of employing the statute is avoidance of multiple taxation.

The fact that Hercules paid tax in other jurisdictions does not amount to multiple taxation. In Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978), an Illinois corporation contested Iowa's use of a single factor franchise tax formula to apportion an interstate business' income. The taxpayer in Moorman argued that both Iowa and Illinois taxed a portion of its income derived from business transactions which took place in Iowa. Thus, the taxpayer claimed that double taxation resulted

because Iowa used a single factor formula while Illinois used the more widely accepted three-factor formula. Id. at 276.

The Court stated:

The simple answer, however, is that whatever disparity may have existed is not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa and Illinois statutes, and Iowa is not responsible for the latter.

Thus, appellant's "discrimination" claim is simply a way of describing the potential consequences of the use of different formulas by the two States. These consequences, however, could be avoided by the adoption of any uniform rule; the "discrimination" does not inhere in either State's formula.

Id. at 277, n. 12.

Similarly, in the instant case, the overlap in taxation cannot be ascribed to Utah. As previously mentioned, Utah adheres to a uniform rule that carves out only that portion of tax that the State is entitled to. If the states involved were to properly apply the UDITPA, it is plain that Utah is statutorily entitled to include the Utah sale of rocket motors between Hercules and Lockheed, a Utah purchaser, in the numerator of the sales factor. Despite the fact that Hercules paid some form of franchise tax to alternate taxing authorities (Washington and California), it is critical to note that the state of Utah was the authority justified in including the rocket motor sales made within the state. Under the facts of this case, Hercules'

argument is with California and Washington, not Utah. While Hercules may have paid some tax in two separate taxing states, such does not represent double taxation in violation of the Commerce Clause, but only an error of Hercules in failing to recognize its statutory obligation for sales made within the state of Utah.

Hercules argues that "[t]he Tax Commission's reliance upon Moorman is misplaced because the facts there were strikingly dissimilar to the facts here." Brief of Petitioner at 31. This is untrue. In Moorman, the taxpayer was challenging the Iowa statute by claiming that both Iowa and Illinois were imposing tax on income derived from Iowa sales. Hercules likewise challenges Utah's assessment by alleging that payment of Utah, California, and Washington taxes would result in double taxation. In Moorman, the taxpayer had failed to prove which portion of its income had been earned from the Iowa sales, leaving the Court unable to determine "whether the Illinois and Iowa together imposed tax on more than 100% of the relevant income." Moorman, 437 U.S. at 276. The record in this case likewise "does not establish the essential factual predicate for a claim of duplicative taxes" (Id.) since there is not one scintilla of evidence showing the amount of tax Hercules paid in either Washington or California nor is there any evidence of the amount of income Hercules earned in Washington and California. Therefore, as in Moorman, Hercules' claim of duplicative taxation

is merely speculative and therefore the Commission's inclusion of the rocket motor sales in the numerator of the sales factor should be upheld.

b) External Consistency

To satisfy the external consistency test, the state must tax only that portion of the revenues from the interstate activity that reasonably reflect the instate component of the activity being taxed. Goldberg, 488 U.S. at 262 (1987). The rocket motors at issue are manufactured, delivered, and sold, including transfer of title, all within the state of Utah. Accordingly, in the present action, the Auditing Division is only seeking to include the initial sale of rocket motors as per contract between Hercules and Lockheed in Bacchus, Utah. Therefore, contrary to Hercules' assertion that Utah and the other states are "taxing Hercules like predators fighting over a kill" (Brief of Petitioner at 31), Utah is only adhering to the clear statutory mandate of the UDITPA. Incidentally, the states of Washington and California are also entitled to revenue generated from the payroll and property factors of the UDITPA formula which reflect Hercules activities in those states. However, because the sales of the rocket motors did not occur within those states, Utah, not California or Washington, is statutorily entitled to include the sales in the sales factor numerator franchise tax purposes.

3. No Discrimination Against Interstate Commerce

The third prong of Complete Auto provides that the tax must not discriminate against interstate commerce. This requirement attempts to avoid taxing companies engaged in interstate transactions more than firms engaged in in-state transactions. Utah Code Ann. § 59-7-317 and § 59-7-318 is intentionally designed to assure that Utah does not discriminate against interstate commerce. The purpose of the UDITPA is to organize a model statute whereby each state is only entitled to apportion a calculated share of an corporation's interstate sales. Hence, the ultimate result of the statute's application is a uniform taxation method and avoidance of impermissible discrimination.

Further, Utah Code Ann. § 59-7-102(3) (1987) imposes a five percent franchise tax on corporations conducting business within the state of Utah. This statute explicitly precludes any discriminatory effect by taxing all businesses at the same rate regardless of whether it is an interstate or intrastate corporation. Once the Tax Commission has determined that an interstate corporation's sale is "within the state" for taxing purposes pursuant to Utah Code Ann. § 59-7-318, that corporation's sale is properly included in the numerator of the sales factor and taxed at the same rate as any other corporation established within the state of Utah.

4. Fairly Related to Services Provided by the Taxing State

Finally, Complete Auto requires that the tax be fairly related to the services provided by the state. "The fourth prong of the Complete Auto test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue." Goldberg v. Sweet, 488 U.S. 252, 267 (1989). The crux of this requirement is that multistate corporations must pay their fair share of the benefits provided them by the state in which they are located. Hercules, as a significant business in the state of Utah, calls upon the state of Utah for countless services. To mention a few, Hercules is provided with fire and police services at their facilities. The state of Utah builds roads allowing access to and from Hercules facilities and operations. Utah also affords Hercules judicial forums to redress any grievances. While this list of services is not exhaustive, the point is that the services cannot be provided without fairly apportioning to multistate entities their share of the costs. By imposing the franchise tax upon Hercules, Utah is able to effectively provide a myriad of services to Hercules. As the Court said in Complete Auto "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing

business." 430 U.S. at 279 (quoting Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938)).

Hercules stresses the fact that "California and Washington are sovereign states with powers to enforce their tax law against taxpayers who may not view taxation to states other than Utah as 'voluntary,' as does the Utah State Tax Commission." Brief of Petitioner at 32. However, like California and Washington, Utah also has the power to enforce its tax law against taxpayers who do business and generate income from sales made to in-state purchasers. The important point is that Utah cannot be bound by the actions of other taxing jurisdictions. The Tax Commission must execute and administer the tax laws of the State of Utah, not those of California or Washington. This Court would be establishing dangerous precedent if it allowed other state's actions or the timing of those actions to determine the legality or constitutionality of the Tax Commission's administration of Utah's tax code.

CONCLUSION

The Utah Court of Appeals was proper in finding several of the District Court's factual findings clearly erroneous. The Court of Appeals properly found that the sales of the completed rocket motors which were the subject of the contract between Hercules and Lockheed were complete when Lockheed took delivery of the motors at Hercules' Bacchus facility.

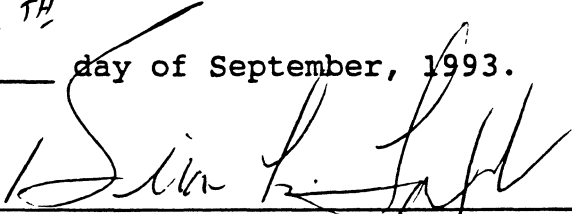
Utah Code Ann. § 59-7-318 (1987) provides that a sale is within this state if "the property is delivered or shipped to a purchaser . . . within the state." In the instant action, the rocket motors, per the contract between Hercules and Lockheed, were delivered to Lockheed at Hercules' place of business in Bacchus, Utah. Moreover, Lockheed is a Utah purchaser. Lockheed is a Utah taxpayer. It has property, payroll, and sales in the state of Utah and accordingly files Utah corporate tax returns. Because the sale of rocket motors between Hercules and Lockheed occurred in Utah between a Utah seller and a Utah purchaser, the Court of Appeals was correct in finding that a Utah sale occurred under Utah Code Ann. § 59-7-318 and is properly includable under the UDITPA.

The Court of Appeals was proper in holding that the Auditing Division's tax assessment did not constitute double taxation in violation of the Commerce Clause because no interstate sale occurred. Under the UDITPA statute, Utah was the proper taxing jurisdiction. The actions of Washington and California should not be allowed to determine the obligation of the Tax Commission to administer the tax laws of the State of Utah. The clear mandate of Utah Code Ann. § 59-7-318 requires that Utah sales be included in the numerator of the sales factor and the fact that Hercules paid some form of franchise tax to another jurisdiction does not make Utah guilty of double taxation. Further, Utah's UDITPA tax satisfies each of the four

tests set out in Complete Auto Transit Inc. v. Brady and should therefore be upheld.

For these reasons, this court should affirm the Court of Appeal's ruling.

DATED this 17TH day of September, 1993.

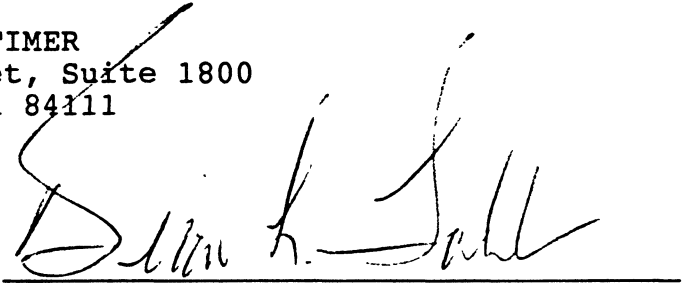


BRIAN L. TARBET
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of September, 1993, I caused four (4) copies of the foregoing BRIEF OF RESPONDENTS to be mailed, postage prepaid, to:

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A handwritten signature, appearing to read "Dean H. Hall", is written over a horizontal line.

- APPENDIX 1 -

FILED

This opinion is subject to revision before
publication in the Pacific Reporter.

DEC 31 1992

Gary T. Noonan

Gary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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Hercules Incorporated,)	OPINION
)	(For Publication)
Plaintiff, Appellee, and)	
Cross-Appellant,)	
)	Case No. 920548-CA
v.)	
)	
Utah State Tax Commission,)	F I L E D
)	(December 31, 1993)
Defendant, Appellant, and)	
Cross-Appellee.)	

Third District, Salt Lake County
The Honorable David S. Young

Attorneys: R. Paul Van Dam and Brian L. Tarbet, Salt Lake City,
for Appellant
Keith E. Taylor, Maxwell A. Miller, and Randy M.
Grimshaw, Salt Lake City, for Appellee

Before Judges Billings, Jackson, and Russon.

JACKSON, Judge:

Appellant (Tax Commission) appeals a decision of the Third
Judicial District Court Tax Division entitling appellee
(Hercules) to recover the tax in controversy plus interest. We
reverse.

FACTS

During the years 1977 through 1980, the United States
Government had a contract with Lockheed Missiles & Space Company
(Lockheed) to build Trident missiles. Lockheed subcontracted
with Hercules to build the missile motors.¹ Hercules

1. Much confusion exists over the definition of "missile motor."
Thus, it is important at the outset to distinguish between the
missile motor, the missile propulsion subsystem, and the
(continued...)

manufactured the motors at its Bacchus, Utah facility. Upon completion of the manufacturing process, Lockheed, who had a business presence in Utah, inspected the motors and received title to them at the Bacchus facility. At this point, the subcontract items consisted of the unconnected first, second, and third stage motors of the missile--three canisters containing an explosive propellant in an inert form. The units were then shipped from Utah via common carrier, on a government bill of lading, to a military assembly facility at a seaport in one of several destination states. It was Lockheed's contractual obligation at each of these facilities to assemble the components of the missile. Hercules, under its subcontract, provided many support services at these facilities. Hercules was compensated by a cost-plan, fixed fee contract calling for partial payment upon delivery to Lockheed at Bacchus, as well as additional payment for services performed at the destination facilities. Payment was also based on component performance.² The contract provided for incentives rewarding good performance and penalties discouraging bad performance.³

In 1982, the Auditing Division of the Tax Commission issued a "Notice of Deficiency" to Hercules claiming additional Utah Corporate Franchise taxes were due for the years 1977 through 1980. On October 4, 1988, the Tax Commission, after a formal hearing, affirmed the audit deficiency. On November 2, 1988,

1. (...continued)

completed missile. The record and the subcontract show that the motor is essentially three large canisters filled with "tooled" explosives. The motor is a component of the propulsion subsystem. In addition to the motor, the propulsion subsystem consists of firing units, actuators, adaptor sections, and various other components. The propulsion subsystem, together with the re-entry bodies, the nose fairing and the nose cap, make up the completed missile.

2. A missile motor is not like a car motor. The missile motor is capable of being fired one time only. Once the motor is ignited the "tooled" explosives burn at a steady pace until they burn out. The missile cannot be test-fired to check performance. Consequently, performance-based payments are not received until the missile is actually deployed.

3. Lockheed had supervisors at the Hercules facility and Hercules had supervisors at the destination facility. Each had to "sign off" on the work completed by the other. This arrangement is necessary considering both stood to benefit financially from work done by the other if the missile performed successfully.

Hercules paid \$890,462.00 as a prerequisite to appealing the decision to the Third Judicial District Court. See Utah Code Ann. § 59-1-505 (1987). Of that amount, \$456,512.00 was paid under protest. On February 1, 1991, the district court reversed the Tax Commission's Final Decision and held that Hercules was entitled to a refund with interest on the taxes paid under protest. The Tax Commission appealed the case to the Utah Supreme Court, which transferred the case to us.

ISSUE

This appeal involves the application of Utah Code Ann. § 59-13-93 (1967) to Hercules' sale of missile motors to Lockheed. The Uniform Division of Income for Tax Purposes Act (UDITPA), governs the amount of taxes payable to Utah when income is derived from both within and without the state. Utah Code Ann. § 59-13-79 (1967). The business income to be apportioned to this state is determined by "multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three." Utah Code Ann. § 59-13-86 (1967). The sales factor is a fraction, "the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period." Utah Code Ann. § 59-13-92 (1967). Sales of tangible personal property are "in this state" if the property is "delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of the sale." Utah Code Ann. § 59-13-93 (1967). The issue in this case is what tangible personal property was sold by Hercules to Lockheed.

ANALYSIS

The trial court made several findings of fact concerning the subject matter of the sale. The trial court found that the "property" to be sold by Hercules to Lockheed under the subcontract was "a functional rocket motor, which could be fired when the manufacturing process was completed." The trial court found that upon the completion of manufacturing in Utah, the subcontract items "were not a 'rocket motor' or functional unit that could be fired," and at that point "the total manufacturing process of the motors being purchased was approximately 60% complete." The trial court further found "the manufacturing process was completed at the destination assembly facility."

We review a trial court's findings of fact under a clearly erroneous standard, giving great deference to the trial court's findings. Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470

(Utah 1989); Utah R. Civ. P. 52(a). To successfully attack a trial court's findings of fact, an appellant must "demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings." Grayson, 782 P.2d at 470.

We find the evidence insufficient to support the trial court's findings. The record clearly demonstrates that the subject of the Hercules-Lockheed subcontract was a missile motor with accompanying services. The motor is not functional when it leaves Hercules' Bacchus facility. It is only functional when it is assembled into a missile. The court erred when it found the subject matter of the Hercules sale to Lockheed was a functional or usable motor that could be fired. In essence, the court found the subject matter of the sale to be a completed missile. This simply is not the case. Lockheed, as the prime contractor, sold completed missiles to the government. Hercules, as a subcontractor, sold a motor that was a component of the missile's propulsion subsystem.

The trial court found that the motor was not functional when it left Hercules' Bacchus facility, that the manufacturing process was only 60% complete, and that the manufacturing process would not be fully complete until further work was performed at the destination facility. It is clear from the record that the trial court has confused the missile motor with the missile propulsion subsystem.⁴ The motor was 100% complete in Utah and comprised approximately 60% of the propulsion subsystem. The director of contract policy implementation for Hercules testified at the formal hearing before the Tax Commission that "[w]hen we finish a motor, we complete it to a drawing. It's not a usable motor at that point, but we complete all the operations that Bacchus is responsible for. Then Lockheed will sign off and say, 'We accept this motor.'" No motor is functional without some way to "turn it on." Hercules sold Lockheed a completed missile motor. Lockheed combined it with other components necessary to "turn it on." The manufacturing of the missile motor was completed at Hercules' Bacchus facility. The manufacturing of the propulsion subsystem and ultimately the entire missile was completed at the destination facility. The tangible personal property contracted for by Hercules and Lockheed, and the subject matter of the sale generating the business income to be

4. We reemphasize the difference between the missile motor and the missile propulsion subsystem. The propulsion subsystem consists of the first, second, and third stage motors, firing units, and various other components. Without these additional components, the motor is just as unusable as a car motor before adding the starter, ignition switch, and other components.

apportioned, was the missile motor as it left Hercules' Bacchus facility.⁵ The trial court's findings with respect to the property are clearly erroneous.

Section 59-13-93 of UDITPA states that sales of tangible personal property are in this state if "the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of the sale." Utah Code Ann. § 59-13-93 (1967). Giving no regard to the f.o.b. point or other conditions of the sale, the sale in this case is a Utah sale if "the property is delivered or shipped to a purchaser within this state."

The trial court applied this statutory language to erroneous facts incorrectly concluding the sale at issue in this case was not a Utah sale. Applying section 59-13-93 to the motor as it left Hercules' Bacchus facility leads to only one reasonable conclusion: the sale of the missile motor was a Utah sale. Lockheed received the completed missile motors in Utah and is a Utah purchaser.⁶ Under § 59-13-93, Hercules' sale of missile

5. Hercules bases most of its arguments on the fact that its contractual obligations continued after the motor left the Bacchus facility. The subcontract between Hercules and Lockheed was for the sale of property and services. Hercules' post-sale contractual obligations were mainly for services and are listed in the subcontract under the heading "Technical Support Services." The only issue before us is the apportionment of business income generated by the sale of property. The issue of income generated by the sale of services is not properly before us and we do not decide that issue.

6. Hercules cites several cases for the proposition that for purposes of determining in which state a sale takes place, the destination or consumption rule should be applied. See Dep't of Revenue v. Parker Banana Co., 391 So.2d 762, 764 (Fla. Ct. App. 1980) (a purchaser from outside the state does not become a purchaser within the state merely by sending a representative to pick up the goods); Olympia Brewing Co. v. Comm'r of Revenue, 326 N.W.2d 642, 647 (Minn. 1982) (delivery terminates where initial purchaser is located); Strickland v. Patcraft Mills, Inc., 302 S.E.2d 544, 545 (Ga. 1983) (court applied destination test to determine where sale to out-of-state customer took place). Each of these cases, however, deals with an out-of-state purchaser coming in state to pick up the subject matter of the sale. In the case before us, it is undisputed that Lockheed is a corporation present and doing business within the state of Utah. Lockheed is a Utah purchaser. Accordingly, we do not reach

(continued...)

motors to Lockheed is a sale within this state. The trial court's conclusion to the contrary is incorrect.

CONCLUSION

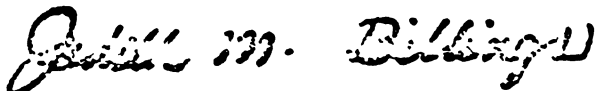
The Auditing Division of the Tax Commission properly assessed additional Utah Corporate Franchise taxes on Hercules for the years 1977 through 1980. During that period, Hercules sold missile motors to Lockheed. The motors contracted for were the motors as they left Hercules' Bacchus, Utah facility. The buyer, Lockheed, was doing business in Utah and was a Utah purchaser. The sale was hence a Utah sale under Utah Code Ann. § 59-13-93 (1967), and properly included in the sales factor used to apportion business income under Utah Code Ann. § 59-13-92 (1967). The Tax Commission's apportionment of Hercules' business income generated from the sale of the missile motor was proper under Utah Code Ann. § 59-13-86 (1967).

Accordingly, we reverse the trial court's decision to the contrary.

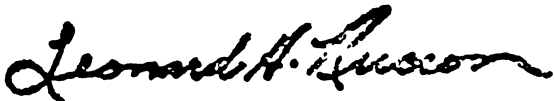


Norman H. Jackson, Judge

WE CONCUR:



Judith M. Billings, Judge



Leonard H. Russon, Judge

6. (...continued)
appellee's Commerce Clause argument because no interstate sale occurred.

- APPENDIX 2 -

	LOCATION OF INITIAL PURCHASER	MANUFACTURED OR PURCHASED FOR RETAIL SALE?	PRODUCT ACCEPTED, TITLE TRANSFERRED, POSSESSION TRANSFERRED, IN ORIGIN STATE?	INTENDED FOR USE AT DESTINATION STATE?	DESTINATION APPARENT AT TIME OF INITIAL PURCHASE?
HERCULES V. UTAH STATE TAX COMMISSION	IN-STATE	YES	YES	YES	YES
BULLOCK	IN-STATE	YES	YES	YES	NO
OLYMPIA	OUT-OF-STATE	YES	YES	YES	YES
STRICKLAND	OUT-OF-STATE	YES	YES	YES	YES
PABST	OUT-OF-STATE	YES	YES	YES	YES
TEXACO	OUT-OF-STATE	YES	YES	YES	NO
PARKER BANANA	OUT-OF-STATE	YES	YES	YES	YES
HOWMET	OUT-OF-STATE	YES	YES	YES	YES