

1963

# Thiokol Chemical Corporation v. United States of America : Brief of Appellant

Utah Supreme Court

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IN THE UNIVERSITY OF UTAH  
SUPREME COURT  
OF THE  
STATE OF UTAH

29 1963

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THIOKOL CHEMICAL CORPORATION, a corporation,

*Plaintiff-Respondent  
and Cross-Appellant,*

vs.

UNITED STATES OF AMERICA,

*Plaintiff-Intervenor  
and Cross-Appellant,*

vs.

LE GRANDE PETERSON,

*Defendant-Appellant.*

FILED

AUG 7 - 1963

Clerk, Supreme Court, Utah  
Case No.

9912

BRIEF OF APPELLANT

Appeal from the Judgment of the  
1st District Court for Box Elder County  
Honorable Lewis Jones, Judge

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O.K. for length  
S. J. S.  
8/7/63

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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THIOKOL CHEMICAL CORPORATION, a corporation,

*Plaintiff-Respondent  
and Cross-Appellant,*

vs.

UNITED STATES OF AMERICA,

*Plaintiff-Intervenor  
and Cross-Appellant,*

vs.

LE GRANDE PETERSON,

*Defendant-Appellant.*

Case No.

9912

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BRIEF OF APPELLANT

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STATEMENT OF NATURE OF CASE

The instant action was brought in the First Judicial District Court, Box Elder County, by cross-appellant, Thiokol Chemical Corporation, attacking a privilege tax assessment made against it, by Box Elder County, on the basis that (1) the incidence of the tax was upon the United States; (2) that Thiokol was not subject to the tax; (3) the statute imposing the tax, 59-13-73, U. C. A. 1953, was unconstitu-

tional as being discriminatory, and (4) that the tax was discriminatorily applied. The United States intervened and the Utah State Attorney General was served pursuant to 78-33-11, U. C. A. 1953. The appellant appeals from a decision adverse to it on point (4) mentioned and cross-appellants, Thiokol Chemical Corporation and the United States, appeal essentially from an adverse decision on points (1), (2) and (3) above mentioned.

### DISPOSITION IN LOWER COURT

The cross-appellant, Thiokol Chemical Corporation, paid the sum of \$125,802.29 assessed taxes under protest to Box Elder County, and then sued to recover the return of the monies paid under protest challenging the assessment on several grounds. The United States intervened and the Attorney General of Utah appeared in the action, pursuant to 78-33-11, U. C. A. 1953. Trial was had, without jury, in the First Judicial District Court, Box Elder County, State of Utah, on February 6-7 and March 12, 1963. On April 12, 1963, the Honorable Lewis Jones entered his Findings of Fact, Conclusions of Law (R. 245) and Judgment (R. 252). The court entered judgment against the appellant for the return of all the tax money paid under protest and interest thereon. The appellant appeals from so much of the judgment as orders return to respondents and cross-appellants of the protest payment, and respondents and cross-appellants have appealed from the court's decision to the extent it holds Thiokol Chemical Corporation to be subject to the Utah privilege tax, 59-13-73, U. C. A. 1953, and that the statute is constitutional.

## RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the trial court's decision awarding the respondent return of all tax monies paid under protest, or, in the alternative, reversal with instructions to the trial court to equalize the taxes paid by respondent with other persons taxed.

## STATEMENT OF FACTS

The plaintiff below and respondent-cross-appellant herein, Thiokol Chemical Corporation, is a Delaware corporation, authorized to do business in Utah, and was at the pertinent times herein doing business in Box Elder County (R. 204). Box Elder County officials, operating pursuant to 59-13-73, U. C. A. 1953, issued tax assessment No. D975 against the Thiokol Chemical Corporation assessing certain personal property and fixtures at the Thiokol plant in Brigham City. (R. 204-206 and Exhibit A to plaintiff's complaint.) The assessment of tax due was in the sum of \$125,801.29, and was for the taxable year 1961. On November 29, 1961, the Thiokol Chemical Corporation paid the tax assessment under protest (R. 205), and on May 21, 1962, commenced this action for return of the money paid (R. 195). Subsequently, the United States intervened alleging ownership of the assessed property, challenging the constitutionality of the tax, and claiming a specific pecuniary interest in the litigation (R. 214-18). The Utah Attorney General entered under 78-33-11, U. C. A. 1953.

The title to the property assessed is in the United States, but the Thiokol Chemical Corporation has possession of the property under the terms of a contract with

the United States, and used the property for the purposes of performing its contract with the United States (Pl. Ex. 1). The contract between Thiokol and the United States is a cost-plus-a fixed-fee contract (Pl. Ex. 6), and provides that the United States can supply certain special tooling and other equipment to Thiokol to be used "primarily" for the work Thiokol is to perform under its contract for the United States (Pl. Ex. 6, R. 246). Nothing in the contract indicates that Thiokol must use the property "exclusively" for the work being done for the United States (R. 79). The court found that pursuant to the contract, Thiokol would receive a profit of 3.76% of the cost of performing the contract during 1961, and that the fee paid Thiokol by the United States for the year 1961 was in excess of \$4,000,000.00. The court also found that the "cost" figure included overhead and some indirect overhead costs of Thiokol (R. 246).<sup>1</sup> The percentage figure for profit is a percentage of the overall cost of performing the contract (R. 153).

Thiokol's contract is a research and development contract for the production of the first stage of the Minuteman missile (R. 151). Stages two and three of the missile production phase are produced by other private contractors who dovetail their work to fit with that of Thiokol (R. 151). The final assembly of the missile occurs at Boeing Plant 77 at Hill Air Force Base, from where it is transported to firing silos (R. 152).

The contract between the Air Force and Thiokol is

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<sup>1</sup>The actual fee as testified to was \$5,304,018.00 for 1961, and \$4,891,740.00 for 1960 (R. 153).

generally written in broad terms. The Air Force Contract Administrator testified, (R. 69) :

“Q. And did the contract specify exactly how that research and development would be conducted?

“A. No, sir, these contracts are in very broad terms.

“Q. Specifying the end that was desired rather than the means by which the end would be achieved?

“A. That is correct, sir.”

The Air Force only exercised general overall control, but left the technical performance of the contract up to Thiokol. In this regard, the trial judge expressly found, (R. 246) :

“That in accordance with the provisions of said contract, the United States Air Force maintained general supervisory control over the activities of plaintiff in carrying out said contracts. However, plaintiff was expected to use initiative, diligence and managerial discretion so long as the best interests of the United States were served in the performance of the specific terms of the contracts of the United States under which it received and used the assessed property.”

Thiokol was to be reimbursed by the United States for the cost of taxes it had to pay to Box Elder County; this was by virtue of a provision in the contract between Thiokol and the United States (Pl. Ex. 1).

Thiokol is a profit corporation (R. 90, 246); it has been in existence since the late 1920's and conducts substantial operations in other fields besides government contracting (R. 92). Although salaries of personnel work-

ing on the subject contract are "approved costs" under the contract, management salaries are not dictated by the United States (R. 94).

The court received into evidence several special use leases (Exhibits 1-c, 1-h, 1-i, 1-j, 1-o, 1-q, 1-r, 1-u and 1-v) by which the State of Utah leased state lands to private persons or corporations for various purposes. Of those leases, Exhibits 1-c, 1-q, 1-r, 1-u and 1-v were taxed in accordance with Section 59-13-73, U. C. A. 1953; however, the other leases received in evidence were not taxed (R. 248). All the leases covered lands owned by the State and located in various counties of the State. On the following leases not taxed under 59-13-73, U. C. A. 1953, evidence was presented that some commercial use was being made of the leased lands: Exhibit 1-H (a one acre experimental well being used in conjunction with turkey growing operations); 1-I (Sunset Beach resort); 1-J (a resort area); 1-O, (Sunset Beach resort). Leases 1-I, 1-J and 1-O were not granted with exclusive possession and 1-J was open to the public at large (Def. Ex. 10). The court did not find that this possible disparity of state leases was sufficient to constitute discrimination. It noted, (R. 200) :

“\* \* \* The court can't bring itself to the point of making a finding of fact in this case that because the tax people of Utah have only assessed the Southern Pacific Railroad on an easement and the Texas Company on three or four oil leases, and Thiokol, that this practice has been so acquiesced in by the tax people as to constitute discrimination in the legal sense. \* \* \*”

The evidence further disclosed that for the year in



question, and as a standard practice, the State Land Board would make a list of state lands to which the State still held legal title, but which had been sold to private persons under contract (Plaintiff's Ex. 3 & 3A). This list would show the sale certificate number, the name and address of the purchaser, the legal description of the property, the purchase price and the equity of the purchaser. These lists are then eventually forwarded to the local county assessors for use in making assessments on state lands. This procedure was followed prior to the enactment of 59-13-73, U. C. A. 1953, and is based upon 59-2-2, U. C. A. 1953. It was stipulated that none of the lands listed on Exhibit 3A for the year 1961 were taxed under 59-13-73, U. C. A. 1953. Plaintiffs' Exhibits 12 and 13 describe 190 parcels of state land sold under contract to private persons and stipulate to the testimony of Lee E. Young and Mark H. Crystal, employees of the State Land Board, as to use of the lands by the contract vendees. It was stipulated that none of these parcels were taxed under 59-13-73, U. C. A. 1953, but were taxed under 59-2-2, U. C. A. 1953, but only to the extent of the owners' equity rather than their full value, which is applicable to properties taxed under 59-13-73, U. C. A. 1953. No evidence was introduced to show that comparable federal land leases or sales were being taxed any differently. It was upon this evidence of state lands under contract not being taxed that the trial court found that the tax under 59-13-73, U. C. A. 1953, was being discriminatorily applied (R. 249, para. 20).

The evidence showed that the Box Elder County Assessor had not personally inspected the parcels of state land

under contract of sale in Box Elder County (R. 249, para. 18), but assessed these lands upon purchaser's equity alone.

The State Tax Commission conducted an Assessor's School on December 10th and 11th, 1959. (Exhibit 7, p. 24, etc.) At that school the local assessors were instructed to assess for tax purposes leases and possessory interests held by third persons of otherwise exempt entities. No instructions were given that assessors were to exclude lands sold by the State under contract; rather, "government owned" lands and facilities were expressly mentioned as being subject to the new privilege tax. (Exhibit 7, p. 24, etc.).

The policy of the State Tax Commission was to direct taxation of all property encompassed by 59-13-73, U. C. A. 1953 (R. 98). Mr. Max H. Kerr, Director of the Property Tax Division of the State Tax Commission, expressly noted, (R. 98) :

"Q. Is that policy any different as to any other tax exempt entity that may own the property? Say like state property, for example.

"A. There's no difference between whether it is owned by the federal government or any other so-called exempt owner.

"Q. Otherwise then there is a general across-the-board exercise of this tax rather than attempting to pinpoint it into any particular tax exempt entity; is that correct?

"A. That is true."

Mining companies (R. 98) and utilities (R. 101, Def. Ex. 10), were taxed where they possessed state leased prop-

erty. A specific direction was made by the Tax Commission to the Box Elder County Assessor advising him that a gravel pit was owned by Brigham City and leased, and that it was to be taxed (Pl. Ex. 9).

The State specifically undertook a program of re-evaluation to determine property escaping taxation, including but not limited to that taxable under 59-13-73, U. C. A. 1953 (R. 114, 118, 119).

Some properties owned by tax exempt entities in Box Elder County, being specifically Brigham City and Box Elder County School District, that were leased to commercial enterprises were not taxed (R. 247). However, the Box Elder Assessor testified that this was an oversight (R. 179, 180), and this evidence was not contradicted. His testimony disclosed, (R. 179) :

“A. Oversight, I think, yes, sir. Since we did not receive any records from the Recorder’s office of any property listed in their name, we don’t have a record of it in our office, and it’s been an oversight there.

“Q. But you did have this letter which you read earlier dated January 6, 1960, from the State Tax Commission, did you not, Mr. Peterson?

“A. That’s right.”

The same witness further commented that he had failed to put a piece of property on the assessment rolls, that he had inquired of the Tax Commission as to its taxability, apparently due to oversight (R. 179), nor was he aware of any other assessable property not assessed (R. 181).

Although the court apparently found one piece of property in Box Elder County to be taxable under 59-13-73, U. C. A. 1953, being the property leased by S. L. Jeppson, Mr. Jeppson expressly testified this was "primarily" his home (R. 192).

Finally, the evidence disclosed that the reason that state lands under contract of sale were not taxed under 59-13-73, U. C. A. 1953, was because their use was not known nor was the Box Elder County Assessor aware of their taxable status, but at least one employee of the State Tax Commission felt them covered, and no policy of exemption had been adopted by the State Tax Commission.

## ARGUMENT

### POINT I.

THE THIOKOL CHEMICAL CORPORATION  
WAS TAXABLE UNDER SECTION 59-13-73,  
U. C. A. 1953, FOR THE PROPERTY POS-  
SESSED IN CONNECTION WITH A GOVERN-  
MENT CONTRACT AND DID NOT ACT UN-  
DER THE CONTRACT AS THE ALTER EGO  
OF THE UNITED STATES.

The Thiokol Chemical Corporation is an independent, private, profit seeking corporation, incorporated under the laws of Delaware, and authorized to do business in the State of Utah. The property assessed in the instant case, although federally owned, was in the possession of the Thiokol Chemical Corporation to be used "primarily" by

them in carrying out a profitable government contract. The Thiokol Corporation was free to use whatever engineering and production techniques it desired so long as the end product met the requirements of the Air Force and specifically the Minuteman missile program. The contract between Thiokol and the United States (Pl. Ex. 6), provides, at page 1, that the government will provide:

“Item 1 — Such Government-owned severable facilities as have been or may hereafter be furnished to the Contractor by the Government from the Government Reserve.”

The machines and equipment are supplied to plaintiff and plaintiff has complete use of the equipment to carry out its functions. Part 9 of Contract, at page 13, reads:

“The facilities furnished the Contractor under Supplemental Agreement Nr 10 are furnished *primarily* for the performance of Contract Nr AF 33 (600)-36514 and supplemental agreements hereto.”  
Etc.

The contractor has the right to inspect and reject all unsuitable facilities (Contract No. 15 Facilities Clause 2). The contractor has responsibility for maintenance, and has no liability for “loss of or damage to the” property (Facilities p. 3). The right of possession to the property is complete in Thiokol for the carrying out of its functions under the contract. Under such circumstances, the Thiokol Chemical Corporation clearly had the beneficial control and possession of the property assessed and taxed. The trial court expressly found such as a matter of fact and ruled that as a matter of law Thiokol exercised sufficient control

and possession to be taxable under the Utah Privilege Tax Statute.

59-13-73, U. C. A. 1953, provides :

“From and after the effective date of this act there is imposed and there shall be collected a tax upon the *possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation*, when such property is used in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, fairground, or similar property which is available as a matter of right to the use of the general public, or where the possessor or user is a religious, educational or charitable organization or the proceeds of such use or possession inure to the benefit of such religious, educational or charitable organization and not to the benefit of any other individual association or corporation. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral or grazing leases or permits issued by the United States or the state of Utah or upon any easement unless the lease, permit or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit or easement relates.”

It should be noted that the tax under this statute is imposed, not upon the tax exempt entity, but upon the non tax-exempt individual, association, or corporation having the possession or beneficial use of the property. Clearly, therefore, the tax was properly assessed and collected from Thiokol, unless some aspect of its relationship with the

United States under its contract otherwise prevented the imposition of the tax.

The Utah statute was patterned after and is very similar to, a Michigan statute (Public Act of Mich., 189, 1953). The Michigan Statute was challenged in three cases going before the United States Supreme Court in 1958. The constitutionality of the Michigan statute was upheld in these three cases. In *United States v. Township of Muskegon*, 355 U. S. 484 (1958), one of the cases above referred to, the property possessed by the contractor, who was taxed, was held by the contractor pursuant to a government contract, and its possession was for the purpose of satisfying such contract. The contractor and the United States argued that this was property not properly taxable under the U. S. Constitution<sup>2</sup> since it would in effect lay the tax at the doorstep of the United States. In rejecting the contention, the Supreme Court commented, noting that the possession of the contractor was no different merely because the property was possessed by virtue of a government contract than other property it might use in conducting its business. It stated:

“If under certain conditions the State can tax Continental for use of government property in connection with its business conducted for profit—and as set forth in No. 26 we are of the opinion that it can—the fact that Continental was carrying out a contract with the Government does not materially alter the case. Continental was still acting as a private enterprise selling goods to the United States.

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<sup>2</sup>The Michigan courts had previously ruled that the statute applied to such possessions.

In a certain loose way it might be called an 'instrumentality' of the United States, but no more so than any other private party supplying goods for his own gain to the Government. \* \* \*

The use of the property in the instant case enables Thiokol to make a profit of between four and five million dollars a year. Although the performance of the contract is for the United States, the benefit is a mutual one between obligee and obligor. The Thiokol Chemical Company in no way acts as the alter ego of the United States. The independent profit motive is clearly the motive of Thiokol's activities rather than the governmental interest that would be present were this an alter ego situation. In the *Muskegon* case, *supra*, the court stated the facts of that case which are extremely similar to those of the instant case:

"\* \* \* In 1952 it [United States] granted Continental Motors Corporation the right to use this plant in the course of performing several supply contracts Continental had with the Government. No rent was charged as such but Continental agreed not to include any part of the cost of the facilities furnished by the Government in the price of the goods supplied under the contracts."

The court further noted that it makes no difference that the property is held under a permit or contract rather than a formal lease. Certainly, the possession and beneficial use of the property in the instant case being of such a nature as to allow the plaintiff to carry out its contract and receive a fixed fee is a beneficial use or possession. In *American Motors Corp. v. Kenosha*, 356 U. S. 21 (1958), the United States Supreme Court affirmed a tax of a general



property nature by the City of Kenosha. The tax, however, was imposed irrespective of title, upon the beneficial use. The Wisconsin Supreme Court in the same case at 274 Wisc. 315, 80 N. W. 2d 363 (1957) found that a sufficient beneficial use from the following use of the property, and stated :

“Under the terms of this contract the Company, in its private capacity, acquires materials needed for performance of the contract. In procuring such materials it does not act as purchasing agent for the Government and the Government incurs no responsibility to the vendor for payment of the purchase price. If a partial payment is made, or has previously been made under the contract, title to all such property vests in the Government upon its acquisition by the Company.”

Utah cases have seemed to find a similar benefit to government contractors sufficient to impose a sales or use tax as the “ultimate consumer” of property to be used in government contract. *Olson Construction Co. v. Tax Commission*, 12 U. 2d 42, 361 P. 2d 1112 (1961). There can be no claim that Thiokol does not have sufficient interest or use of the property to satisfy the statute.

In the trial court the United States and Thiokol attempted to bring themselves within the doctrine of *United States v. Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959) affirmed without opinion 364 U. S. 281 (1960). An analysis of that case shows its inapplicability to the instant factual situation. The case involved the imposition of the South Carolina sales and use tax. The court had before it a contract between the Atomic Energy Commission and the Du-

Pont Company. The contract concerned the construction of an atomic energy plant. All materials used in construction were purchased with appropriate funds, title passed to the United States on purchase and only \$1.00 profit was to be given DuPont, and, finally, DuPont had authority to draw directly from government bank balances. In commenting on the contract in question, the lower federal court said:

“These provisions of the contract are sufficient to show that the lengthy document is unusual. *It was entered into by a contractor without hope of gain*, except the nominal one dollar, payable upon final completion of the contract, but upon whom was imposed no risk of loss. DuPont was not even required to lend its credit or its funds. That it was contemplated that DuPont would act as the alter ego of the Commission is further suggested by the contract requirement that DuPont include in sub-contracts a number of provisions applicable to public contracts. \* \* \*

In the instant case there is a profit motive by an independent business organization whose internal controls and actions on the project are left to itself and are not intimately supervised by the United States so long as the end product meets the consumptive needs of the United States. Thiokol has complete freedom. Finally, no sales tax is involved, but rather one obviously on beneficial use and possession. In *United States v. Boyd*, 363 S. W. 193 (Tenn. 1962), the Tennessee Supreme Court reviewed a suit to recover taxes paid under protest. In rejecting the alter ego theory advocated by the United States and, hence, the *Livingston* case, *supra*, the court commented on the inap-

plicability of that case to the usual government service contract. The court noted :

“The main contention of the appellants is that we are bound by the decision of the U. S. District Court in *United States v. Livingston*, 179 F. Supp. 9, affirmed without opinion, 364 U. S. 281, 80 S. Ct. 1611, 4 L. Ed. 2d 1719 (1959). That case involved a South Carolina sales and use tax upon DuPont Corp. in its operations under a similar contract with the A. E. C. We are not persuaded that the holding of that case should be followed here, because both in the facts and the South Carolina and Tennessee taxing statutes substantial differences appear. There DuPont undertook to design, construct, and operate a plant for the A. E. C. for a fee of only \$1.00. The Court in that case found that DuPont entered the contract from motives of public responsibility, and that it was the intention of the parties that DuPont would act as agent or ‘alter ego’ of the A. E. C. in that project. The Court concluded that DuPont itself lacked a separate taxable interest.

“We do not wish to ignore any patriotic motives that may exist, but we find in this record no indication that the appellant Carbide continues its contract or that appellant Ferguson entered its contract with any primary motive other than that of the normal business transaction. Carbide’s yearly fee, above allowable costs, is \$2,751,000.00 and Ferguson’s fee, negotiated from time to time, is equally substantial as it appears in the supplemental agreements to the Ferguson contract. In addition, we feel that Carbide, contrary to DuPont in the *Livingston* case is deriving substantial indirect benefit that will enable it to maintain a position of indus-

trial leadership as atomic energy finds more uses in non-defense fields.”

Similarly, in the present case, a large fee is paid, and Thiokol is in competition with other companies in the missile industry, and has opportunity to gain a substantial position in the missile defense industry. The contract (p. 2-2) provides for reimbursement of both direct costs and indirect costs (except where the latter are purely without direct relevance to the contract to be performed, or the benefits so received are additional to the contract). A cost-plus-a-fixed-fee contract is provided for by Congress under 10 U. S. C. 2306(d). Under such contracts for military procurement, or other contracts under Title 10 U. S. C., Chapter 137, the contractor receives a fee based on the percentage of estimated cost. Department of the Army Pamphlet 27-153, Procurement Law, notes at page 170:

“The cost-plus-a-fixed-fee, or ‘CPFF’, contract is a cost contract which provides a profit, called a ‘fee’, to the contractor in addition to the reimbursement of his allowable costs. The fee is ‘fixed’, i.e., it is a set sum, based on the estimated cost of performance of the contract. The fixed fee does not vary with actual cost of performance, but may be adjusted as a result of subsequent changes in the work or services to be performed under the contract. The fixed fee must be approved by the Head of a Procuring Activity or his designee and may not be greater than 7 per cent of the estimated cost of performance (exclusive of the fee) in contracts generally, or 10 per cent of the estimated cost of performance (exclusive of fee) in the case of experimental, developmental or research work, except that fees up to 10 per cent and 15 per cent respec-

tively may be authorized by the Secretary of the Military Department or his designees. The term, 'fee', regarding architect-engineer type contracts is used to designate the architect or engineer's costs of performance and profit. This fee may not exceed 6 per cent (exclusive of the architect-engineer fees) of the estimated cost of the part of the public works or utility project to which the architect or engineering services pertain. Since the contractor's fee in all CPFF contracts is based on estimated costs and may not change with actual costs, accurate cost estimates are important."

Additionally, the Armed Services Procurement Regulations allow coverage for indirect costs. A.S.P.R. 15-203, and the Comptroller General of the United States has ruled that indirect costs, based on actual overhead, although renegotiated after performance, are allowable. 35 Comp. Gen. 434 (1956). Further, the Armed Services Procurement Regulations recognize the "fee" as "profit". A.S.P.R. 3-404.3(c). A cost-plus-fixed-fee contract guarantees a "profit" to the contractor at a specified percentage. Because the profit is not wide open (nor the possibility of a loss immediate), the plaintiff cannot contend the use of the property taxed in the instant case was not for a business conducted "for a profit", and that they are somehow the alter ego of the United States. To adopt the respondent's position would free every government contractor from state taxation merely because public work was involved.

## POINT II.

## THE SUBJECT ASSESSMENTS DO NOT INFRINGE UPON FEDERAL IMMUNITY FROM STATE TAXATION.

The respondents and cross-appellants alleged in their complaints that the Utah privilege tax violates the immunity of the Federal Government from state taxation. The trial court ruled contrary to their contention. A simple examination of the pertinent provisions of the Utah statute, 59-13-73, U. C. A. 1953, demonstrates that the statute itself places no direct tax upon the United States. The statute imposes the tax "upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation, when such property is used in connection with a business conducted for profit." Consequently, the tax is imposed against the "individual association or corporation", not the United States or other tax exempt agency. It is submitted that the instant statute in no way places the incidence of the tax upon the United States and, hence, does not fall within the category of taxes outlawed by *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316 (1819); *Weston v. City of Charleston*, 27 U. S. (2 Pet.) 448 (1829). The Supreme Court of the United States in *Alabama v. King & Boozer*, 314 U. S. 1 (1941), approved a sales tax imposed by Alabama on federal contractors who purchased supplies to be used in the construction of government facilities, and which were purchased for the purpose of satisfying government contracts. Under the

contracts in question, as is the instant case, the tax burden was passed on to the United States. In holding that such taxation did not violate the prohibition against taxing the United States, the Supreme Court stated:

“\* \* \* The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity.”

The court further noted:

“We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax. The added circumstance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor’s gross receipts from the Government in *James v. Dravo Contracting Co.*, 302 U. S. 134, \* \* \*, supra. See *Metcalf & Eddy v. Mitchell*, supra (260 U. S. 523, 524, \* \* \*); *Trinityfarm Constr. Co. v. Grosjean*, supra (291 U. S. 472, \* \* \*); *Helvering v. Gerhardt*, supra (304 U. S. 416, \* \* \*); *Graves v. New York*, supra (306 U. S. 483, \* \* \*).”

Consequently, the plaintiff cannot argue that because, under its contract with the United States, the latter picks up the tab, this somehow changes the tax to one against the United States. The tax is clearly on the user-possessor, and under Section 59-13-75, U. C. A. 1953, does not become

a lien on the property itself. In *U. S. v. Allegheny*, 322 U. S. 174 (1944), the Supreme Court again noted:

“\* \* \* Nor is the validity of the tax dependent upon the ultimate resting place of the economic burden of the tax.”

In the latter case, the court reserved for decision the question of whether a tax levied on the possession or beneficial use of government property could be upheld. However, in several recent cases, the United States Supreme Court has expressly held that statutes almost identical with Section 59-13-73, U. C. A. 1953, did not violate the privilege of the United States from taxation by states. The act involved in some of the cases was Michigan Public Act 189, which provided:

“When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for a profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public [sic], shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property.”

The similarity of the instant statute to the present Utah statute is obvious. In *United States v. City of Detroit*, 355 U. S. 466 (1958), the United States Supreme Court upheld the statute as against a claim, the same as that made below by respondents, that the statute invades the province of



federal immunity from local taxation. In the case, realty was leased by Borg Warner Co. from the United States. The court noted:

“\* \* \* In general terms this statute, Public Act 189 of 1953, provides that when tax-exempt real property is used by a private party in a business conducted for profit the private party is subject to taxation to the same extent as though he owned the property.

“\* \* \*

“The Michigan statute challenged here imposes a tax on private lessees and users of tax-exempt property who use such property in a business conducted for profit. Any taxes due under the statute are the personal obligation of the private lessee or user. The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid. So far as the United States is concerned as the owner of the exempt property used in this case it seems clear that there was no attempt to levy against its property or treasury. \* \* \*

“It is undoubtedly true, as the Government points out, that it will not be able to secure as high rentals if lessees are taxed for using its property. But as this Court has ruled in *James v. Dravo Contracting Co.*, 302 U. S. 13, \* \* \*, *Alabama v. King & Boozer*, 314 U. S. 1, \* \* \*, and numerous other cases, the imposition of an increased financial burden on the Government does not by itself, vitiate a state tax.

“\* \* \*

“Today the United States does business with a vast number of private parties. In this Court the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a

matter of constitutional law. Cf. *Penn-Dairies v. Milk Control Commission*, 318 U. S. 261, 270, \* \* \*. Of course this is not to say that Congress, acting within the proper scope of its power, cannot confer immunity by statute where it does not exist constitutionally. Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve. As the Government points out Congress has already extensively legislated in this area by permitting states to tax what would have otherwise been immune. To hold that the tax imposed here on a private business violates the Government's constitutional tax immunity would improperly impair the taxing power of the State."

A similar case to the instant one was *United States v. Township of Muskegon*, 355 U. S. 484 (1958), where the court noted, as respects the same Michigan tax statute:

"In this case the United States owns a manufacturing plant at Muskegon, Michigan. In 1952 it granted Continental Motors Corporation the right to use this plant in the course of performing several supply contracts Continental had with the Government. \* \* \*

"On January 1, 1954, Continental was assessed a tax under Public Act 189. As in No. 26, this tax was levied because of Continental's use of tax-exempt property in its private business and was measured by the value of the exempt property which it was then using. Continental refused to pay the tax and this suit was brought by state authorities in a state court to recover the amount assessed. The United States intervened, contending that the tax

was invalid because it imposed a levy on government property. But the lower court rejected this contention and entered judgment for the plaintiffs. The Michigan Supreme Court affirmed, 346 Mich. 218, 77 N. W. 2d 799. We noted probable jurisdiction of an appeal from this decision by both Continental and the United States, 352 U. S. 963, \* \* \*, and now affirm the judgment below on the basis of our decision in No. 26.

“There are only two factual differences between this case and No. 26. First, Continental is not using the property under a formal lease but under a ‘permit’; second, Continental is using the property in the performance of its contracts with the Government. We do not believe that either fact compels a different result.

“Constitutional immunity from state taxation does not rest on such insubstantial formalities as whether the party using government property is formally designated a ‘lessee.’ Otherwise immunity could be conferred by a simple stroke of the draftsman’s pen. \* \* \*

“If under certain conditions the State can tax Continental for use of government property in connection with its business conducted for profit — and as set forth in No. 26 we are of the opinion that it can — the fact that Continental was carrying out a contract with the Government does not materially alter the case. Continental was still acting as a private enterprise selling goods to the United States. In a certain loose way it might be called an ‘instrumentality’ of the United States, but no more so than any other private party supplying goods for his own gain to the Government. In a number of cases this Court has upheld state taxes on the activities of contractors performing services

for the United States even though they were closely supervised in performing these functions by the Government."

In *City of Detroit v. Murray Corp.*, 355 U. S. 489 (1958), a third and companion case to the other two discussed, the court again had the same Michigan statute before it. The court noted:

"In 1952 Murray Corporation was acting as a sub-contractor under a prime contract for the manufacture of airplane parts between two other private companies and the United States. From time to time Murray received partial payments from the two prime contractors as it performed its obligations under the subcontract. By agreement, title to all parts, materials and work in process acquired by Murray in performance of the subcontract vested in the United States upon any such partial payment, even though Murray retained possession.

"On January 1, 1952, the City of Detroit and the County of Wayne, Michigan, each assessed a tax against Murray which in part was based on the value of materials and work in process in its possession to which the United States held legal title under the title-vesting provisions of the subcontract. Murray paid this part of each tax under protest and then sued in a Federal District Court for a refund from the city and county. It contended that full title to the property was in the United States and that the taxes infringed the Federal Government's immunity from state taxation to the extent they were based on such property. The Government intervened on Murray's behalf. \* \* \*

"We believe that this case is also controlled by the principles expressed in our opinion in Nos. 26

and 37, ante, pp. 424 and 436, and that the taxes challenged here do not violate the Constitution. These taxes were not levied directly against the United States or its property. To the contrary they were imposed on Murray, a private corporation, and there was no effect to hold the United States or its property accountable. \* \* \*

.. \* \* \*

“\* \* \* Of course the Government will eventually feel the financial burden of at least some of the tax but the one principle in this area which has heretofore been clearly settled is that the imposition of an increased financial burden on the Government does not by itself invalidate a state tax.”

In *American Motors Corp. v. Kenosha*, 356 U. S. 21 (1958), the United States Supreme Court affirmed the imposition of a personal property tax on a government contractor on property he used carrying out a government contract where legal title to the property was in the United States, but the contractor had possession to enable him to manufacture airplane parts.

The substance of all these cases was aptly summed up in *General Dynamics Corp. v. County of L. A.*, 330 P. 2d 794 (Cal. 1958), where the California Supreme Court stated:

“It is now settled that a private contractor’s right to use government property may be made the subject of a nondiscriminatory tax measured by the value of the property used even though the economic burden of the tax falls on the United States.”

Since the Utah statute, Section 59-13-73, does no more than what the United States Supreme Court has allowed, no claim that the immunity of the Federal Government has been encroached upon can be sustained.

The annotation in 2 L. Ed. 2d 1789, notes that the present trend of decisions of the United States Supreme Court has "been to reject immunizing private parties doing business with the United States from nondiscriminatory state taxes as a matter of constitutional law."

In *Esso Standard Oil Co. v. Evans*, 345 U. S. 495 (1953), the appellant, a private corporation, entered into a contract, with the United States for a definite fee, to store government owned gasoline. The Federal Government assumed liability under the contract for all state taxes. Tennessee levied a special gasoline privilege tax on the gasoline stored. The United States and the contractor claimed the tax on the government gasoline was barred by sovereign immunity. The Supreme Court rejected the contention, citing *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937), for the proposition that merely because the "economic burden" of the tax is transferred to the United States, because of some contractual provision, the "incidence of the tax" is not thereby imposed on the United States. The court cogently commented:

"\* \* \* There is no claim of a stated immunity. And we find none implied. The United States, today, is engaged in vast and complicated operations in business fields, and important purchasing, financial, and contract transactions with private enterprise. The Constitution does not ex-

tend sovereign exemption from state taxation to corporations or individuals, contracting with the United States, merely because their activities are useful to the Government. We hold, therefore, that sovereign immunity does not prohibit this tax."

See also *Offutt Housing Co. v. Sarpy County*, 351 U. S. 253 (1956). It should also be noted that if the tax becomes delinquent it does not become a burden on the exempt property, 59-13-75, 76, U. C. A. 1953.

Since the Michigan tax cases have decisively laid to rest any claim of unconstitutionality in this area, cross-appellant's position is without merit.

### POINT III.

SECTION 59-13-73, U. C. A. 1953, IS NOT UNCONSTITUTIONAL, AS BEING IN VIOLATION OF EITHER THE FEDERAL OR STATE CONSTITUTIONS.

The respondents and cross-appellants contend that Section 59-13-73, U. C. A. 1953, imposes a discriminatory tax and improperly exempts various classes from the tax, thus violating Article I, Section 24 of the Utah Constitution and the Fourteenth Amendment to the Federal Constitution. The trial court decided the issue contrary to their assertions.

Every construction of a statute favors the presumption of constitutionality. Sutherland, *Statutory Construction*, 3rd Ed., Sec. 4509. This is true whether the statute is being weighed against the Federal Constitution, *Butt-*

*field v. Stranahan*, 192 U. S. 470 (1904); *Davies Warehouse Co. v. Bowles*, 321 U. S. 144 (1944); *Ex Parte Endo*, 323 U. S. 283 (1944), or the Constitution of this state. *Salt Lake City v. Tax Commission*, 11 U. 2d 359, 359 P. 2d 397 (1961). Consequently, every presumption favors the position that the instant legislation was drawn with a reasonable view towards constitutionality.

In *Untermeyer v. Tax Commission*, 102 Utah 214, 129 P. 2d 881, (1942), the Utah Supreme Court stated, as to the requirement of uniformity in taxation under Article I, Section 24, of the State Constitution:

“We also hold the tax does not violate the ‘uniformity clause’ Section 24, Article I, of the state constitution. The significance of this clause is well expressed on pp. 818, 819 of Vol. 5, Calif. Jurisprudence where it states:

“‘The word “uniform” in the section of the constitution under consideration does not mean universal. The provision intends simply that the effect of general laws shall be the same upon all persons who stand in the same relation to the law. It has been repeatedly held that a law is general which applies to all of a class — the classification being a proper one — and that the requirements of uniformity is satisfied if it applies to all of the class alike.’

“As applied to taxation statutes such constitutional provision requires only that the tax shall fall equally upon all **similarly situated.**”

If a proper reason for legislative differentiation or classification exists, the uniformity provision is not vio-



lated. *State v. Mason*, 94 Utah 501, 78 P. 2d 920; *State v. J. B. & R. E. Walker, Inc.*, 100 Utah 523, 116 P. 2d 766. The burden of proof of showing a discriminatory classification rests on the plaintiff and intervenor. *State v. J. B. & R. E. Walker, Inc.*, supra. A similar standard is imposed by the equal protection clause of the Federal Constitution. Thus, in *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, 37 (1928), the United States Supreme Court stated that a state's power to classify for purposes of taxation is  
 “\* \* \* of wide range and flexibility.”

In *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, (1890), the court said that the Constitution does not prevent a state:

“\* \* \* from adjusting its system of taxation in all proper and reasonable ways. *It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions.* It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, \* \* \*.”

The claim made below was that the Utah statute denied equal protection of the laws and was not uniform because of an arbitrary classification of exemptions. In order

for the position of respondents-cross-appellants to be valid, the provisions for exemption under the Utah statute, 59-13-73, U. C. A. 1953, would have to be arbitrary. In the trial court, respondents did not contend that all the exemptions were arbitrary, rather only those exemptions were attacked that relate to religious, educational or charitable organizations, to the degree they excluded the United States. It was claimed, relying on the dissenting opinion of Robson, D. J. in *United States and Olin Mathieson Chemical Co. v. Department of Revenue*, 202 F. Supp. 757, 761 (Ill. 1962), that the United States was a monumental charity and, therefore, should be treated in a class with other eleemosynary institutions. The overwhelming weight of authority is to the contrary.

The general rule in this area is noted in 51 Am. Jur., Taxation, Sec. 522:

“It seems generally to be assumed that constitutional requirements of equality and uniformity in taxation do not preclude the legislature from providing general tax exemptions for the property of charitable, educational, and religious institutions and corporations devoted to public uses and purposes, since through such institutions and corporations the state is relieved of a burden which it would otherwise be obliged to bear. \* \* \*”

The United States Supreme Court in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237 (1890), expressly so recognized, and several federal cases have at least implicitly upheld these exemptions. *St. Anna's Asylum v. New Orleans*, 105 U. S. 362 (1882); *Northwestern University*

*v. Illinois*, 99 U. S. 309 (1878); *Home of the Friendless v. Rouse*, 8 (Wall) 430 (1869). There is also no impediment to such an exemption under Utah law, *Parker v. Quinn*, 23 Utah 332, 64 Pac. 961 (1901); *Odd Fellows Bldg. Assn. v. Naylor*, 53 Utah 111, 177 Pac. 214 (1918); *Salt Lake Lodge v. Groesbeck*, 40 Utah 1, 120 Pac. 192 (1911); *Wey v. Salt Lake City*, 35 Utah 504, 101 Pac. 381 (1909); Art. XIII, Sec. 2, Utah Constitution, 59-2-1, U. C. A. 1953.

In a recent case, exemptions of a similar nature to those of the Utah statute in question were upheld, being included in the Illinois Retailers Occupation Tax, in *United States and Olin Mathieson v. Department of Revenue*, (1962, N. D. Ill.). A three judge federal court noted:

“We iterate briefly the principles applied in our first opinion. Tax exemptions are founded on public policy and are granted for the accomplishment of public purposes which will benefit the public generally. Tax exemptions are subject to the limitation that they and the classification upon which they are based be reasonable, not arbitrary, and apply to all persons similarly situated.

“The exemption accorded to non-governmental institutions operated for charitable, religious and educational purposes is not of recent origin, but is the continuance of an old and well-established public policy. \* \* \*

“The exemption of these institutions encourages their existence and relieves the State of the heavy burden of maintaining and performing these essential services. Article VIII, Sec. 3 of the Constitution of the State of Illinois forbids the use of public funds in the ‘aid of any church or sectarian

purposes' nor may 'any grant or donation of land, money or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose.' Obviously, a distinct dissimilarity exists between religious institutions and governmental bodies. While charitable and educational objectives can, and are, performed through governmental units, the revenue to support them is derived from the power and authority of the government to tax its citizens for the public welfare. But no compulsory process exists to exact contributions to non-governmental organizations dedicated to the moral, spiritual and physical well-being of mankind. The financial resources to accomplish their objectives are derived from the concept of giving voluntarily — without legal obligation or compulsion. This difference forms a reasonable basis for a separate classification and the exemption, therefore, does not discriminate against governmental bodies.

"We are in accord with the holding of the Supreme Court of Illinois that the classification of governmental units and these non-governmental units is indeed separate and distinct, and that there is a reasonable classification based on differences between them; that Sec. 441 of the Illinois Retailers' Occupation Tax Act which did not exempt retailers who sold to the federal government but did exempt retailers who sold to charities, schools and churches is not unconstitutional for that reason."

This decision was affirmed by the United States Supreme Court, 371 U. S. 21. The Supreme Court apparently rejected in toto Judge Robson's dissent. Consequently, it is clear that such exemptions as are provided under the Utah statute result in no constitutional infirmity. See also,

*People ex rel. Holland Coal Co. v. Isaacs*, 22 Ill. 2d 477, 176 N. E. 2d 889 (1961).<sup>3</sup>

It is obvious that no merit exists to respondents and cross-appellants' position on this point, and the trial court's favorable determination should be upheld.

#### POINT IV.

THERE IS NO DISCRIMINATION IN APPLICATION OF 59-13-73, U. C. A. 1953 ON ITS FACE BECAUSE THE UNITED STATES IS TREATED EQUALLY WITH OTHER GOVERNMENTAL ENTITIES AND 59-13-73, U. C. A. 1953, REPEALS 59-2-2, U. C. A. 1953, TO THE DEGREE IT IS INCONSISTENT WITH THE FORMER.

The trial court ruled that 59-13-73, U. C. A. 1953, was on its face non-discriminatory. This is clearly a correct result since, as has been noted during the discussion in this brief on various other points, 59-13-73, U. C. A. 1953, in no way singles out the United States for any different treatment than that accorded any other tax exempt entity, and especially is this so where the State of Utah and the United States are treated the same under the statute. In *Phillips Chemical Co. v. Dumas School Dist.*, 361 U. S. 376

<sup>3</sup>Although no attack was raised on other portions of the statute, it is clear such recognized legislative distinctions do not constitute unconstitutional discrimination. *McGowan v. Maryland*, 366 U. S. 420 (1960). The general exemptions found in the statute have been upheld as valid in various similar instances. *Martin v. Collingswood*, 36 N. S. 447, 177 A. 2d 759 (1962) (concession in public park); *Rockwell Spring & Axle Co. v. Romulus Township*, 365 Mich. 632, 114 N. W. 2d 166 (1962) (airport hangar on state university); *Sproul v. Gilbert*, 359 P. 2d 543 (Ore. 1961) (grazing on state and federal lands); *Rummel v. Musgrave*, 350 P. 2d 825 (Colo. 1960) (mining enterprises).

(1960), the United States Supreme Court had before it a claim that a Texas statute, imposing a "use" type tax was discriminatory. However, the statute was entirely different than the statute now before the court. First, a different tax rate was imposed on lessees of state land as distinct from those of the Federal Government. The court noted as to the provisions of Texas law involved:

"As construed by a majority of the Texas court, this provision is an affirmative grant of authority to the State and its political subdivisions to tax private users of government realty. While the subject of the tax is the right to the use of the property, i.e., the leasehold, its measure is apparently the value of the fee. The constitutionality of the provision, thus construed, depended upon the court's interpretation of our decisions in the Michigan cases two terms ago, where we held that a State might levy a tax on the private use of government property, measured by the full value of the property. *United States v. Detroit*, 355 U. C. 466, \* \* \*; *United States v. Township of Muskegon*, 355 U. S. 484, \* \* \*; cf. *Detroit v. Murray Corp.*, 355 U. S. 489, \* \* \*.

"However, three members of the Texas court, joined by a fourth on petition for rehearing, were of the opinion that under the majority's construction the statute discriminates unconstitutionally against the United States and its lessees. Their conclusion rested on the fact that Article 7173 of the Revised Civil Statutes of Texas imposes a distinctly lesser burden on similarly situated lessees of exempted property owned by the State and its political subdivisions. We agree with the dissenters' conclusion.

“Article 7173 is the only Texas statute other than Article 5248 which authorizes a tax on lessees. It provides in part that:

“‘Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this state, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law.’

“As construed by the Texas courts, Article 7173 is less burdensome than Article 5248 in three respects. First, the measure of a tax under Article 7173 is not the full value of leased tax-exempt premises, as it apparently is under Article 5248, but only the price the taxable leasehold would bring at a fair voluntary sale for cash — the value of the leasehold itself. Second, by its very terms, Article 7173 imposes no tax on a lessee whose lease is for a term of less than three years. Finally, and crucial here, a lease for three years or longer but subject — like Phillips’ — to termination at the lessor’s option in the event of a sale is not ‘a lease for a term of three years or more’ for purposes of Article 7173. *Trammel v. Faught*, 74 Tex. 557, 12 S. W. 317. Therefore, because of the termination provisions in its lease, Phillips could not be taxed under Article 7173.”

None of the factors noted in the cited case are present in the instant case. State leases are taxed at the same value as federal leases and 59-13-73, U. C. A. 1953 makes no distinction between state and federal governmental leases. 59-13-74, U. C. A. 1953, provides:

“The tax imposed upon such possession or other beneficial use of tax-exempt property shall be in the same amount and to the same extent as the ad valorem property tax would be if the possessor or user were the owner thereof; provided that there shall be credited against the tax so imposed upon the beneficial use of property owned by the federal government the amount of any payments which are made in lieu of taxes.”

The tax imposed in the uniform ad valorem rate, and is equally applied to all property.

At trial, the respondents-cross-appellants argued that 59-2-2, U. C. A. 1953, carved out an exception for state lessees and purchasers of state lands under contract. 59-2-2 provides:

“No tax shall be levied upon lands, the title to which remains in the state, held or occupied by any person under a contract of sale or lease from the state, but this provision shall not be construed to prevent the taxation of improvements on such lands and an interest therein to the extent of money paid, or due, in part payment of the purchase price thereof, whether an extension of payment has been granted or not prior to the levying of such tax. Where final payment has been made upon such lands, the contract of sale shall, for the purpose of taxation, be regarded as passing title to the purchaser or assignee, and the state land board shall immediately certify the receipt of such final payment to the state tax commission.”

As can be seen, the tax under this statute on state lands sold under contract or leased is only to the extent of the equity and/or improvements of the holder.



The trial judge found that 59-2-2, U. C. A. 1953, had been impliedly repealed by 59-13-73, U. C. A. 1953 to the degree that the latter statute was inconsistent with the former. Thus, the trial court would properly have 59-2-2, U. C. A. 1953 apply to the sale or lease of state lands where the possessor was not using or possessing the lands in conjunction with the business conducted for profit. If the lands were being used by the contract vendee for such commercial enterprises, as would invoke 59-13-73, U. C. A. 1953, then they would be subject to the privilege tax valuation, and not just the value of the purchaser's equity. Indeed, were any different construction given the statute a difference in the tax assessment valuation would exist between lessees and beneficial possessors of federal lands and those of state lands. This would obviously render the Privilege Tax discriminatory and hence unconstitutional. In *Phillips Chemical Co. v. Dumas School Dist.*, 361 U. S. 376 (1960), the United States Supreme Court ruled that if such a divergence in tax burden existed by state statute, the assessment on consequent tax would be unconstitutional. It noted:

"However, all lessees of exempt public lands would appear to belong to the class defined by Article 7173. In view of the fact that lessees in this class are taxed because they use exempt property for a nonexempt purpose, they appear to be similarly situated and presumably should be taxed alike. Yet by the amendment of Article 5248, the Texas Legislature segregated federal lessees and imposed on them a heavier tax burden than is imposed on the other members of the class by Article 7173. In this case the resulting difference in tax, attendant

upon the identity of Phillips' lessor, is extreme; the State and the School District concede that Phillips would not be taxed at all if its lessor were the State or one of its political subdivisions instead of the Federal Government. The discrimination against the United States and its lessee seems apparent."

The court noted that the Texas tax was not a tax, the incidence of which fell upon the United States, and held it not subject to attack on that basis. However, the court met the discrimination issue head on, saying:

"It is true that perfection is by no means required under the equal protection test of permissible classification. But we have made it clear, in the equal protection cases, that our decisions in that field are not necessarily controlling where problems of intergovernmental tax immunity are involved. In *Allied Stores of Ohio, Inc. v. Bowers*, (U. S.) supra, for example, we noted that the State was 'dealing with [its] proper domestic concerns, and not trenching upon the prerogatives of the National Government.' 358 U. S. at 526. When such is the case, the State's power to classify is, indeed, extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary. Id. 358 U. S. at 526-528. But where taxation of the private use of the Government's property is concerned, the Government's interests must be weighed in the balance. Accordingly, it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals in itself."

In *Moses Lake Homes v. Grant County*, 365 U. S. 744 (1961), the United States Supreme Court held a Washing-

ton tax illegal because the assessment against *leaseholds* of federal leases is not the same as *leaseholds* of state leases. The court noted:

“In addition to the weight properly to be accorded to the conclusions of the two courts below that Washington imposes a higher tax on Wherry Act leaseholds than on other similar leaseholds, it is eminently clear that this is so.”

Thus, the decision of Judge Jones that 59-13-73, U. C. A. 1953, repealed 59-2-2, U. C. A. 1953, to the degree of any inconsistent discrimination avoided any disparity between the two statutes, and consequently avoided the decisions of the *Moses Lake & Phillips Chemical* cases, *supra*.

The respondents contended this construction was erroneous, but it is submitted the construction was in perfect accord with recognized canons of statutory construction, and the legislative intent and purpose.

If the trial court's construction and findings are erroneous, the burden of proving such impropriety and consequently the burden of proving the general unconstitutionality of the Utah Privilege Tax, 59-13-73, 74, 75, etc., U. C. A. 1953, rests upon the respondents and cross-appellants. *Thomas v. Daughters of Utah Pioneers*, 114 Utah 108, 197 P. 2d 477 (1948). It is also a general canon of statutory construction that if there are two possible constructions of a statute, one of which will render the statute constitutional, and the other unconstitutional or render the constitutionality doubtful, the interpretation will be adopted which will save the statute. *Howe v. State Tax Commis-*

sion, 10 U. 2d 362, 353 P. 2d 468 (1960); *State Water Pollution Control Bd. v. Salt Lake City*, 6 U. 2d 247, 311 P. 2d 370 (1957); *Donahue v. Warner Brothers Pictures*, 2 U. 2d 256, 272 P. 2d 177 (1954). Most recently in *Rothfels v. Southworth*, 11 U. 2d 169, 356 P. 2d 612 (1960), this court noted:

“Closely related to the doctrine just stated is the well recognized rule of statutory construction that if statutes can be given different reasonable interpretations, under one of which they would be constitutional and under the other their constitutionality would be doubtful, the former will be adopted. \* \* \*”

Unless the opposite construction is clear and unmistakable, no statute will be struck as being unconstitutional. *Gubler v. Utah State Teachers Retirement Board*, 113 Utah 188, 192 P. 2d 580 (1948). All doubts should be resolved in favor of constitutionality, *State v. Guerts*, 11 U. 2d 421, 360 P. 2d 1018 (1961); *Salt Lake City v. Tax Commission*, 11 U. 2d 359, 359 P. 2d 397 (1961). The Supreme Court must give a statute a construction that will uphold the statute's constitutionality if reasonably possible. *Munsee v. Munsee*, 12 U. 2d 83, 363 P. 2d 71; *Denver & Rio Grande Western Railway Company v. Central Weber Sewer Improvement District*, 4 U. 2d 105, 287 P. 2d 884; *Tygesen v. Magna Water Company*, 119 Utah 274, 226 P. 2d 127; *Newcomb v. Ogden City Public School Teachers Retirement Commission*, 117 Utah 557, 218 P. 2d 287; *Allen v. Merrell*, 6 U. 2d 32, 305 P. 2d 490. Indeed authority in this jurisdiction requires the courts to be convinced beyond a reasonable doubt before striking the constitutionality of a stat-

ute. In *State Board of Education v. Commission of Finance*, 122 Utah 164, 247 P. 2d 435 (1952), this court noted:

“\* \* \* It should be borne in mind that we have a duty to uphold legislative acts unless we are convinced beyond a reasonable doubt that they are unconstitutional.”

It may be generally conceded that repeal by implication is not favored. Sutherland, *Statutory Construction*, 3rd Ed., Sec. 2014. However, in the instant case there is evidence of a real intent on the part of the Legislature to anticipate implied repeal, especially where necessary to sustain the overall contemplated statutory purpose. Sutherland, *op. cit.*, Sec. 2014 (1962 Supp.) notes:

“The presumption against implied repeals is overcome, however, by a showing that the two acts are irreconcilable, clearly repugnant as to vital matters to which they relate, and so inconsistent that the two cannot have concurrent operation.”

See *Golconda Lead Mines v. Null*, 82 Idaho 96, 350 P. 2d 221 (1960); *Rydalch v. Glauner*, 357 P. 2d 1094 (Idaho 1961). Sutherland, *supra*, Sec. 2012, p. 463, also notes:

“When a subsequent enactment covering a field of operation coterminous with a prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict.”

Utah has apparently adopted the above rule. In *Union Pac. R. Co. v. Public Service Commission*, 103 Utah 186, 134 P. 2d 469 (1943), the court commented:

“It is elementary that statutes may be repealed by implication, and where the provisions of a later statute are clearly and manifestly repugnant to the provisions of existing statutes the latter are deemed repealed to the extent of such repugnancy. \* \* \*”

In the instant case we have just such a repugnancy as would render 59-13-73, U. C. A. 1953 unconstitutional in the absence of implied repeal. The construction for implied repeal (if there has not been an express one) should, therefore, be favored. 59-2-2, U. C. A. 1953, was originally enacted as statehood. R. S. 1898, Sec. 2502, and with minor modification (L. 1919, Ch. 113, Sec. 1: 1921, Ch. 132, Sec. 1), has remained the same since that time. On the other hand, 59-13-73, U. C. A. 1953, was passed after the decisions of the United States Supreme Court in the Michigan cases, referred to heretofore. It was part of a general effort on the part of states all over the country to avail themselves of this new available source of revenue to meet their increased tax demands. *The Aftermath Of The Michigan Tax Decisions: State Taxation of Federal Property and Activities*, 13 Military L. Rev. 167, 169 (1961). The Utah statute was closely patterned on the Michigan statute and was aimed at covering all sources of tax revenue which had otherwise escaped assessment because the title, as distinct from the beneficial use, rested in a tax exempt entity. The act was passed by the 1959 Legislature in Special Session, Chapter 5, Sec. 4 (SS). The act became effective December 31, 1959 (L. 1959 (SS), Ch. 5, Sec. 6). It was specific legislation and subsequent in time to the previous statute re-

lating to state lands. Since 59-13-73, U. C. A. 1953 was later in time, more extensive in scope and specific in purpose, it would govern in the face of an irreconcilable conflict. In *State v. Betensen*, 14 U. 2d 121, 378 P. 2d 669 (1963), this court commented on a later statute requiring county attorneys to be licensed, qualified attorneys where a prior statute, still on the books, apparently exempted them:

“\* \* \* This provision, incidentally, was not expressly repealed by the statute here in question. Although if the latter were a valid enactment, it would undoubtedly supersede the former as being in conflict and later in time. \* \* \*”

Consequently, the factual pattern of the statutes here in question being of the same nature, leads to the conclusion that 59-13-73, U. C. A. 1953, impliedly repeals 59-2-2, U. C. A. 1953, to the extent of any inconsistency. The trial court's obviously correct construction should stand.

However, an additional reason offers much impetus for reaching such a conclusion. 59-13-77, U. C. A. 1953, the last provision in the Privilege Tax Act, provides:

“Nothing contained herein shall be construed as limiting or repealing the exemptions granted in sections 59-2-4, 59-2-5, 59-2-6, 59-2-7, 59-2-8, 59-2-9, 59-2-12 and 59-2-13 Utah Code Annotated 1953.”

This section expressly limits the applicability of 59-13-73, U. C. A. 1953, etc. in the face of the exemptions in Title 59, Chapter 2. However, 59-2-2, U. C. A. 1953, is not mentioned, obviously demonstrating a legislative intention that the provisions of the Privilege Tax Act *would* limit or repeal the exemptions of 59-2-2, U. C. A. 1953 to the degree

of any inconsistency. By not mentioning 59-2-2, but mentioning and exempting other companion provisions, the Legislature obviously intended a repeal of any inconsistency between 59-13-73 and those statutes not mentioned. *Expressio unius est exclusio alterius*. This is as much as an express repeal. A fortiori, the trial court's construction was in full accord with constitutional law, canons of statutory construction, and the legislative purpose and intent.<sup>4</sup>

### POINT V.

THE TRIAL COURT ERRED IN FINDING THAT THERE HAD BEEN SUCH A DISCRIMINATORY APPLICATION OF 59-13-73, U. C. A. 1953, AS TO VOID THE ASSESSMENT AND TAX, AND EVEN ASSUMING SUCH FINDING WAS PROPER, THE COURT ERRED IN THE RELIEF GRANTED.

The trial court made a finding that the application of the privilege tax under 59-13-73, U. C. A. 1953, was discriminatory and that, as a consequence, the levy was "illegal and void" (R. 250). The court in its oral findings stated the basis of the alleged discrimination (R. 200):

"\* \* \* These state land contracts, gentlemen, under the stipulation of the parties there are about 200 or some such number of these contracts

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<sup>4</sup>Respondents' assertion of an administrative interpretation to the contrary is not well founded since: (1) There was no evidence of a contrary interpretation. (2) Even if local assessors had so construed the statutes this is hardly binding or persuasive construction. (3) No long history of legislative acquiescence exists. In addition, at least one assessor had construed the statutes the same as Judge Jones, this was the Kane County Assessor. This fact was not known till after trial, but is a proper subject of judicial notice.



that the court has examined, which if the court recalls correctly there's about that number where the purchaser of these state lands in 1961 placed those lands to commercial use. The court finds from the stipulation that this was a commercial use, but nothing was done collectively by those tax people. I'll just treat them collectively as tax people, because the Tax Commission has supervisory duties under the Constitution and the assessor has, I guess, primary responsibility. But collectively in all the counties of the state there apparently has been a studied indifference over these state land contracts, and notwithstanding the fact that the Land Board is across the hall or on another floor, somehow or other, though these lands are being used for grazing of animals and used in commercial practice, in not one instance, if the court recalls the record correctly, has any assessment been made under this privilege tax.

"Now the court is just simply impelled into the conclusion that so long as the state is going to continue to practice such discrimination, the least this court can do is to raise its voice in protest and decide in favor of the plaintiff and find that the tax has been discriminatorily applied and with reluctance direct that the money be returned with the interest provided by statute. \* \* \*"

It ruled that because of such action, the assessment against Thiokol was nullified (R. 201) and void (R. 250), and that Thiokol was entitled to the return of all monies paid under protest. It is submitted that this determination was error in two respects. First, it is submitted that the trial court erred in finding that there was sufficient evidence of discrimination as to warrant the court in

granting relief; and, second, it is submitted that the relief granted was improper.

As respects the first point, the evidence disclosed that none of the lands which the State of Utah had sold, under certificate of sale but retaining title in the State, had been taxed under 59-13-73, Utah Code Annotated 1953, at their full value rather than the purchaser's equity.<sup>5</sup> No evidence was introduced to show that any federal contracts of sale of public lands had been taxed differently in a similar situation nor, additionally, was there any evidence that lands under contract of sale from other tax exempt entities had been taxed. No evidence was introduced to show the proportion the state lands bore to all the property taxable under 59-13-73, U. C. A. 1953. Thiokol was taxed on personal property not realty and holds such property by permit of contract not a contract of sale. Consequently, there could be no direct injury to Thiokol or the United States by the failure to tax state contract lands, since there was no evidence that either respondent had any similar property in that category that was taxed. *Esso Standard Oil Co. v. Evans*, supra. 84 C. J. S., *Taxation*, Sec. 36. If any injury can be claimed, it could only be claimed because of the fact that such state lands come generally within the category of taxable properties under the statute, which is insufficient to show discrimination injurious to respondents. Moreover, it is submitted that the evidence of discrimination, if the above be such, was not of a nature as

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<sup>5</sup>Outside of Kane County, which appellant understands did tax contract lands 59-13-73, U. C. A. 1953, no dispute is made by appellant with this finding.

would constitute legal discrimination entitling the respondents to relief. There was not one scintilla of evidence to show an intentional discrimination against the respondents. The only evidence with respect to the intent or attitude of any county assessor was the testimony of Fred L. Peterson, the Box Elder County Assessor (R. 139, et seq.). He testified that upon receipt of the list of state lands, he computed the equity of the purchaser and assessed for the year (R. 141). He made no visual inspection of the lands, but did make reference to a map that had been prepared a few years earlier to aid in his assessment (R. 143, 154). He had no specific knowledge of what use was being made of lands by any contract vendee (R. 156). He further testified (R. 157) :

“Q. Mr. Peterson, was it your understanding that users of property owned by the State of Utah as well as users of property owned by the United States of America were subject to the tax provided for by section 59-13-73 of the Utah Code when you made your assessments for the year 1961?

“A. Would that apply to what the land is used for and the assessed—

“Q. Assuming that the land was being used in connection with a business for profit.

“A. All livestock ranging on this exempt land are all assessed. That together with the equipment, camps, and otherwise used on this land is assessed.

“Q. Assessed under what section of the Code?

“A. I don't know the Code, but then that — just the same as other properties are assessed.

"Q. They're assessed as personal property?

"A. As personal property, yes, sir.

"Q. And they were assessed in the same manner after December 31, 1959, as they were prior to that?

"A. That's right, yes, sir.

"Q. So the manner and extent to which you assess such property was not changed by the advent of section 59-13-73 of the Utah Code, to which reference was made at the assessors' school held in December of 1959, and in this exhibit seven which you looked at earlier?

"A. Well, that's a long time to remember, but I've interpreted that to mean that it would apply to, as I say, livestock and equipment or otherwise used on this particular property, would be assessed at its value as other property.

"Q. But not assessed because it was government property that was being used; the livestock was not government property, was it?

"A. No, sir.

"Q. It was being assessed as property of the livestock operator?

"A. That's right.

"Q. And the land which the State of Utah owned and which the livestock operator has purchased under contract was not assessed to him?

"A. Just the equity."

He had made inquiry as to one piece of property under lease by Brigham City, a gravel pit, and was informed that it was taxable (R. 177), but had failed to tax it due to "oversight" (R. 179). Therefore, his testimony directly shows that any failure to tax other properties than state contract lands was oversight, and as to state lands under contract, he did not know the law made them taxable under 59-13-73, U. C. A. 1953.

The director of the property tax division of the State Tax Commission, Mr. Max H. Kerr, testified that state policy was to tax all lands that the Tax Commission was made aware of that would be properly taxed (R. 98). He testified (R. 98) :

"A. There's no difference between whether it is owned by the federal government or any other so-called exempt owner.

"Q. Otherwise then there is a general across-the-board exercise of this tax rather than attempting to pinpoint it into any particular tax exempt entity; is that correct?

"A. That is true."

He further testified that when the act was passed, the state set up an assessor's school and expressly advised assessors that private possessory interest of persons holding from government and other non-taxable entities were to be taxed (R. 99). No policy of exclusion of state lands was directed or intended by the State (R. 100). He testified that he had never considered the question of whether installment con-

tract purchases of state lands would or would not be subject to taxation (R. 106) :

“A. I don’t think that I have specifically considered that hypothetical case before.”

Clearly, the evidence allows for only two assumptions. First, as to any specific property leased by a municipality or other tax exempt entity, any failure to assess and tax the holder in accordance with 59-13-73, U. C. A. 1953, where the holder could be validly assessed, was due to mere oversight. Second, as to contract vendees of state lands, using or possessing the lands in conjunction with a business conducted for profit, any failure to tax was due to a mistake or oversight in the coverage of the law. The general rule of law in this area is summarized in 84 C. J. S., *Taxation*, Sec. 30, p. 103 :

“\* \* \* Since equality of assessment is an ideal which is impossible of realization, as discussed supra subdivision a of this section, it has been held that, in the assessment of property, mere omissions, mistakes, oversights, or errors of judgment of the taxing officials in the exercise of an honest judgment will not invalidate the assessment; but there must be something more, something which in effect amounts to an intentional violation of the principle of practical uniformity, which may be made out by showing that other property was uniformly and systematically assessed at a percentage of its fair cash value lower than that of the complaining party. In other words, unlawful discrimination by tax officials consists, not merely of mistake or lack of diligence in seeking out those who are subject to tax, but of an intentional discrimination adopted as a practice.”

In this state the rule was expressed in *Continental National Bank of Salt Lake City v. Naylor*, 54 Utah 49, 179 P. 67:

“We find no substantial evidence whatever of intention or design on the part of the assessor or board of equalization to discriminate against appellant and other banks, or their stockholders, by the adoption of wrong principles, standards, or methods, or in any other respect. Even if we could find that there was some apparent discrimination in point of fact by which appellant and other banks and their stockholders were required to pay something more than was required of taxpayers on some other classes of property, still, as we understand the authorities, appellant would have no standing in a court of equity to restrain the collection of the tax unless the discrimination resulted from wrong principles, methods, or standards, willfully and intentionally adopted. *Discriminations resulting from mistake, inadvertence, and miscalculations or error of judgment must be remedied in some other form of proceeding than the one adopted by appellant in the case at bar.*” (Emphasis added.)

In *Alfred J. Sweet, Inc. v. City of Auburn*, 180 Atl. 803 (Me., 1935), the Supreme Court of Maine stated:

“(In cases involving attacks on assessment) (t)he burden is on the petitioner to show that the valuation is unjust, not on the assessors to establish that their figures are correct. The presumption is that the assessment is valid. *Penobscot Chemical Fibre Co. v. Inhabitants of the Town of Bradley*, 99 Me. 263, 59 A. 83; *Spear v. City of Bath*, supra; *City of Roanoke v. Williams*, supra; *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154.

“It is furthermore generally recognized that it is not sufficient to show merely that the taxing board has made an error, even though such mistake may result in a lack of uniformity. *Penobscot Chemical Fibre Co. v. Inhabitants of the Town of Bradley*, supra; *Maish v. Territory of Arizona*, 164 U. S. 599, 17 S. Ct. 193, 41 L. Ed. 567; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979. The reason for such a doctrine is obvious. Mathematical precision is impossible in dealing with taxable values. Uniformity can only be approximated. The court is not a board of review to correct errors. It is solely where there is evident a systematic purpose on the part of a taxing board to cast a disproportionate share of the public burden on one taxpayer, or one class of taxpayers, that the court will intervene. In *Shawmut Manufacturing Co. v. Town of Benton*, 123 Me. 121, 130, 122 A. 49, 53, this principle has been definitely enunciated in the following language, quoting with approval the words of Chief Justice Taft in *Sioux City Bridge Co. v. Dakota County*, supra: “The proving of a mere error of human judgment, as has been indicated, will not support a claim of overrating; “there must be something more—something which in effect amount to an intentional violation of the essential principle of practical uniformity.” ’ ’ ”

The federal rule is no different, the evidence must manifest a clear and intentional discrimination before the assessment is held to violate the Equal Protection Clause. In *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 447 (1923), the United States Supreme Court commented that:



“\* \* \* mere errors of judgment do not support a claim of discrimination, but that there must be something more,—something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity. *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U. S. 350, 353, 62 L. Ed. 1154, 1156, 38 Sup. Ct. Rep. 495.”

In *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352 (1918), the court noted:

“The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.”

Consequently, unless the conduct of state officials is an intentional and systematic discrimination against one taxpayer in the same tax class, no violation of the Equal Protection Clause or uniformity provisions is made out. See *Inequality in Property Tax Assessments: New Cures for an Old Ill.*, 75 Harvard L. Rev. 1374 (1962).

Applying the above rules to the instant case, it is clear that no evidence was before the trial court of any deliberate, intentional, systematic exclusion. What in fact there was, was an oversight as to some property, and a mistake as to the extent of the application of a new law. Certainly,

this is not sufficient evidence of discrimination to sustain an attack against an assessment, especially where there was no showing that similar property of the same class of the plaintiff or intervenor had been taxed.

Finally, it is submitted that even if the evidence were sufficient to sustain a claim of discrimination, the remedy the trial court granted the respondents, to wit: return of *all* monies paid, was improper. It was urged by the respondents at trial that if such discrimination were shown, it would render the assessment void. Reliance for that position was placed on *Moses Lake Homes v. Grant County*, 365 U. S. 744 (1961); and *Phillips Chemical Co. v. Dumas*, 361 U. S. 376 (1960).

In *Moses Lake Homes*, the court noted:

“In addition to the weight properly to be accorded to the conclusions of the two courts below that Washington imposes a higher tax on Wherry Act leaseholds than on other similar leaseholds, it is eminently clear that this is so.”

In the *Phillips Chemical Co.* case, the Supreme Court stated:

“As construed by the Texas courts, Article 7173 is less burdensome than Article 5248 in three respects.”

Where there is statutory discrimination, this would obviously be unconstitutional, and hence void. But, the situation in the instant case does not involve a decision of the court of *prima facie* disharmony. Rather, the court ruled all properties were covered under 59-13-73, Utah

Code Annotated 1953, and should be taxed at full value. Therefore, in the instant case, the discrimination, if any, is one of administrative misapplication. In such cases, it is clear that the remedy of the taxpayer is not to have returned all his money, since this would put him in a better position than others and all he is entitled to is to be placed in a generally equal position. Therefore, the courts allow a reduction to the level of other properties assessed. In *Sioux City Bridge Co. v. Dakota County*, supra, the Supreme Court ruled:

“\* \* \* This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.”

See also *Township of Hillsborough v. Cromwell*, 326 U. S. 620 (1945). In *Des Moines Bank v. Bennett*, 284 U. S. 239 (1931), the Supreme Court did not declare the assessment void where discrimination was found, but allowed petitioners to obtain “the excess of taxes exacted from them.” In *Cumberland Coal Co. v. Board*, 284 U. S. 23, 30 (1931), the Supreme Court, after finding discrimination, ruled:

“The petitioners are entitled to a readjustment of the assessments of their coal so as to put these assessments upon a basis of equality, with due regard to differences in actual value, with other as-

sessments of the coal of the same class within the tax district."

Several state courts have assumed a similar rule. *In re Brooks Building*, 391 Pa. 94, 137 A. 2d 273 (1958); *In the Matter of Kents*, 34 N. J. 21, 166 A. 2d 763 (1961). It is noted in 75 Harvard L. Rev. 1374, 1376, *supra*:

"\* \* \* As a result of these Supreme Court decisions, the state courts generally have recognized—albeit with startling exceptions—that the Fourteenth Amendment forbids intentionally unequal assessment as between properties of the same class and entitles a taxpayer who has proved such discrimination to a reduction to the level at which comparable parcels have been assessed." (*McCluskey v. Sparks*, 80 Ariz. 15, 291 P. 2d 791 (1955); *Anderson v. Dunn*, 180 Kan. 811, 308 P. 2d 154 (1957); *Baldwin Const. Co. v. Essex County Bd. of Taxation*, 16 N. J. 329, 108 A. 2d 598 (1954).)

Consequently, if there was in fact discrimination, the court should have determined the percentage value that the assessment to Thiokol bore to the average percentage assessment to the non-assessed property and granted a reduction, if any, in the excess amount and judgment only for that amount. This court could direct such action if it deemed it proper.

## CONCLUSION

The trial court obviously was correct in upholding the constitutionality of 59-13-73, Utah Code Annotated 1953, and ruling that it impliedly repealed 59-2-2, Utah Code Annotated 1953, to the extent of conflict. However, the trial court erred in finding sufficient intentional discrimination, or, in the alternative, in the relief awarded.

It is submitted this court should affirm.

Respectfully submitted,

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