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Thiokol Chemical Corporation v. United States of America : Brief of Respondent and Cross-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THIOKOL CHEMICAL CORPO-
RATION, a corporation,

*Plaintiff-Respondent and
Cross-Appellant*

vs.

UNITED STATES OF AMERICA,
*Plaintiff-Intervenor and
Cross-Appellant*

vs.

LEGRANDE PETERSON,

Defendant-Appellant.

Clerk, Supreme Court, Utah

Case No.

9912

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BRIEF OF RESPONDENT AND CROSS-APPELLANT

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

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BRIEF OF RESPONDENT AND CROSS-APPELLANT

STATEMENT OF NATURE OF CASE

Respondent adopts the statement of the nature
of the case set out by appellant.

DISPOSITION IN LOWER COURT

Respondent adopts the statement of the appellant
set out as the disposition in the lower court.

RELIEF SOUGHT ON CROSS APPEAL

The respondent and cross-appellant seeks to sustain that part of the court's decision which was favorable to the relief sought and to have this court declare Section 59-13-73 U.C.A. 1953 invalid and unconstitutional, for the reason that it is not uniform in application; that it has not repealed, by implication or otherwise, Section 59-2-2 U.C.A. 1953, which section grants special tax rates to those who deal with the State of Utah under a contract of sale which tax rates, in certain cases, are as great as twenty times less than those applied to the respondent and cross-appellant herein.

STATEMENT OF FACTS

For the reason that respondent cannot go along with the statement set out by the appellant, it will now set out its version of the statement of facts.

Thiokol Chemical Corporation is a Delaware Corporation, authorized to do business in the State of Utah, and was conducting said business for the year 1961. It came to Box Elder County because of the combined efforts of many people who were seeking new industries. It was in the year 1956 when it decided to locate in Box Elder County. At that time Thiokol purchased some 11,000 acres of land and set up the plant facilities in the interest of furthering its private business. Sometime after it located here, it was able to obtain a contract for the production of the first stage of the Minute-

man and its operations immediately changed from a few hundred employees to the point where it now has approximately 6,000 employees. This situation has changed the very complexities of the economy of the northern part of Utah and has, at the same time brought a demand on the public for many increased facilities because of the increase in population by people moving in, with their families, to take part in this new industrial revolution in our end of the state.

The taxing authorities, who were very dormant at the time Thiokol moved into the State, immediately took on new energy and as a result, a special session of the Legislature in the year 1959 passed what is now known as Section 59-13-73 U.C.A., 1953, as amended, being a privilege tax upon the possession and use of exempt property. By the passing of the above section the Legislature aimed at picking up new revenue from new industries that had been attracted to Utah by economic-minded people. It based such legislation on the Michigan statute which had previously been passed by its legislature with the hope of obtaining revenue indirectly from the Government of the United States, by taxing people who used the tax exempt property of the United States to further their work on some particular contract that they might have with it. The Utah Legislature, while following the Michigan statute, further added to our statute, Section 59-13-73, U.C.A. 1953, as amended, certain exemptions which read:

“ . . . 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 . . . ”

They also added a further provision as follows:

“ . . . 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.”

These exemptions are in conflict with the exemptions of our Constitution, which are found in Article 13, Section 2 and part of Section 3 of the same article. There was, at the time this law was passed, another section on our statutes which section is still the law and has been the law since statehood, being Section 59-2-2 U.C.A. 1953, which now reads as follows:

“59-2-2. State Lands - Improvements taxable.
- 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 or 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 pass-

ing 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."

It is followed by Section 59-2-3 U.C.A. 1953, setting out a method of collecting the tax on this interest, which is as follows:

"59-2-3. Collection of tax on interest of purchaser - Certificate of sale - Effect of filed certificate. - Any tax levied on the interest of a purchaser of state lands before title passes to such purchaser or his assignee, shall be collected in the same manner as taxes on personal property and the said interest shall be subject to sale for taxes in the same manner as personal property.

"Upon the sale of any such interest, the officer making such sale shall issue a certificate of sale, and such certificate or a certified copy thereof, upon being filed with the state land board, shall operate as an assignment of the interest of the original purchaser or his assignee in said contract to the purchaser at the tax sale."

There is also a provision of the statute which has also been on our books since statehood and is Section 59-5-50 U.C.A. 1953. It was passed for the purpose of forwarding the equity of the purchaser in state lands sold under contract to the proper officials so they, in turn, could forward it to the respective county assessors. It reads as follows:

"59-5-50. State lands - Land board to furnish lists. - On or before the 15th day of January of

each year the executive secretary of the state land board must make out and transmit to the state tax commission certified lists of lands sold by the state for which certificates of purchase or patents have been issued during the year preceding, giving a description thereof by divisions or subdivisions or lots and blocks, together with the names of the purchasers or patentees thereof, and in the case of lands sold by the state upon contract the amount of the purchase price and the total amount paid or due on January 1, preceding."

The substance of the next section of our statute has been in existence since statehood and is still in existence as Section 59-5-51 U.C.A. 1953, and reads as follows:

"59-5-51. Tax commission to furnish list of patented lands to county assessors. - The state tax commission shall furnish the several county assessors, annually, by February 1, a list of all patents of lands, except patents for mining locations, and all lands for which receivers' final receipts have been issued for which patents have not been issued, not previously reported, and a certified list of all lands that have been sold by the state for which certificates of purchase or patents have been issued during the year preceding, giving a description thereof, together with the names of the purchasers or patentees. Such list shall also contain a description of the lands sold by the state during the preceding year upon contracts for purchase, together with the names and addresses of the purchasers where known, the amount of the purchase price and the total amount paid or due thereon on January 1, preceding."

In the year 1961, Thiokol then had a contract with the United States for the production of the first stage of the Minuteman. It had in its possession certain personal property belonging to the United States of America, which property was assessed to Thiokol, separately and apart from other property which was owned outright by Thiokol, under an assessment known as D975 and on said assessment was levied a tax equal to the sum of \$125,801.29 for said year. Said assessment was made pursuant to Section 59-13-73, Utah Code Annotated, 1953.

Thiokol, in dealing with the United States under its contract (Exhibit #6) was working on a cost-plus a fixed fee basis (Rec. 74). This contract is not a cost-plus a percentage of cost (Rec. 77). The fee is fixed during the stage of negotiations and before any contract is awarded and particularly before any use of the property is made (Rec. 88). Near the top of page 13 of Exhibit #6 it provides that the Government property to be furnished to Thiokol shall be used "primarily" to carry out the contract (Rec. 79) (see dictionary definition for the word "primarily"). Mr. Boyce thought the word "exclusively" should have been used (Rec. 79) but the testimony was to the effect (Rec. 73) that Thiokol could not use any of the Government property for non-government work. Also, that the Government, in order to determine the cost, must approve certain policies of the company (Rec. 74, 75), all salary policies, job classifications, accounting policies, procurement policies, organizational structures, etc. The Gov-

ernment had the right to remove any or part of the personal property that might be sent to Thiokol to be used on its project at any time, to any other project, if it felt it might save some costs (Rec. 72) and this was provided for in the contract.

Thiokol itself could not eliminate or reduce any costs which were reimbursable, by any use of the machinery, that is, whether the machinery was used for a part of the day or a full 24 hours of the day, or whether it was picked up and shipped elsewhere (Rec. 90) they were still entitled to those costs expended to produce the end result. The fee Thiokol was to receive for the work would remain the same when the end result was accomplished, the saving by the use of the Government machinery which was furnished to Thiokol, was for the benefit of the Government. If no machinery owned by the Government was available, and one had to be obtained, then, under the contract, the Government would authorize Thiokol to buy it and title would go to the United States immediately upon purchase and Thiokol would be reimbursed.

Thiokol itself is a corporation set up for the purpose of making a profit (Rec. 90, 246) but the use of this Government owned personal property by it, to carry out the contract, benefited the United States only, not Thiokol, in that it reduced the Government's costs. The United States was the only purchaser for the sale of the product being produced. Thiokol itself was not competing in any market, with any other firm

or corporation. It had one job to do and that was the first stage of the Minuteman. The Government and Thiokol had agreed on the fee to be paid for the work in the production to be performed and in said agreement it had provided it would pay the cost, on top of the agreed fee. It also provided that the Government might save itself some costs by furnishing to Thiokol certain personal properties which it might have on inventory. Thiokol was bound to use the same if humanly possible. If the United States of America found it might benefit itself economically by moving the machinery after it had been shipped to Thiokol, to other places, it so reserved the right to transfer the machinery immediately.

On November 29, 1961, Thiokol paid all of its taxes for which it was responsible, on its own privately owned lands, improvements and personal property. In addition thereto, Thiokol paid the sum of \$125,801.29 for the assessment made under Section 59-13-73 Utah Code Annatated, 1953, and paid this last portion of the tax under protest (Rec. 205) pursuant to directions from its contractor, United States of America. On May 21, 1962, and within the period of limitations, Thiokol commenced this action (Rec. 195) for a return of the money and the United States, who had directed the suit be filed, intervened and challenged the constitutionality of the tax claim and claimed an interest in the litigation (Rec. 214, 218). The Attorney General of the State of Utah entered under Section 78-33-11, U.C.A. 1953.

At the trial of the issues before the First Judicial

District Court sitting without a jury, certain witnesses were brought before the court, one of which was Max Gardner, Director of the Utah State Land Board. He was shown Exhibit #3 (Rec. 53), which is a list of the lands sold on contract by the State Land Board, to the individuals or corporations, showing the equities of the purchasers thereon. He was also shown a list of re-sold land (Ex. 5) and (Rec. 54) and explained the difference to be that those listed on Exhibit #3 were, at the time of sale, lands that were still part of the public domain, while those listed on Exhibit #5 were lands which had been acquired through mortgage foreclosure, or default, and were not part of the public domain at the time title was obtained. He explained (Rec. 57) what Exhibit 1A covered, being a special use lease to the Gilmer Lime Company, which had the following provision in it:

“Lessee shall use the premises solely for the installation of facilities necessary, convenient, and incidental to the conduct of mining operations of lessee, including but not limited to spur tracks, storage, crushing, cleaning and treatment facilities, and shall not commit waste upon the premises.”

This lease of Gilmer Lime Company (Rec. 57) had a grazing lease thereon, being #13214 issued to J. W. Jordon of Heber, Utah, on the S.E. $\frac{1}{4}$ of the section and on the S.W. $\frac{1}{4}$ was a grazing lease #L13215 issued to L. W. Fitzgerald and Sons of Draper, Utah. He told about a special use lease #11 (Rec. 64, 65) which contained this provision:

“Lessee shall use the leased premises only for the purpose of constructing and operating thereon an antique shop, a coffee shop,”

He told of leases, Exhibits 1G and 1H, (Rec. 65) and said they were not mineral or grazing leases and none of these leases referred to were assessed by any taxing authority on the State of Utah.

Mr. Max H. Kerr, a director for the Property Tax Division of the State Tax Commission, claimed he had general supervision over county assessors (Rec. 97) and was produced as a witness for the defendant, who claimed they have to conduct annual assessors schools for instructions, which were generally held in December of each year (Rec. 99). He claimed he instructed the assessors in December of 1959, that the new privilege tax law had been passed and they would have to apply it (Rec. 99), but, for the purpose of showing that this officer, who had such supervisory powers, did not consider it to apply to lands sold on contract by the State of Utah, we quote the following from cross-examination (Rec. 105):

“Q. Well, I understood you to say that. I’m getting more specific. What instructions did you give with respect to this particular factual situation: Mr. “X” buys some land from the state under an installment contract. He makes some installment payments, but he receives no title to the property. The title remains in the state, but Mr. “X” is engaged in farming and he farms this lands and he makes a handsome profit from the farming

of this land. Is he taxed with respect to his use of the land under section 59-13-73?

A. I do not recall such a hypothetical case ever coming to my attention to require an answer or a specific instruction.

Q. Have you been aware of this litigation prior to today?

A. This is my first day that I've been in court.

Q. No, I'm not asking you that. We haven't tried this case before today. Just started this morning. Have you been aware of the pendency of this litigation?

A. Yes.

Q. Have you had occasion to consider whether, in such circumstances as the hypothetical case which I give you a moment ago, whether the tax should or should not be assessed?

A. I don't think that I have specifically considered that hypothetical case before. This is something that's new. When we have a specific case presented to my division, we refer it to the legal division for specific advice."

Again on page 107 of the Record we have:

"Q. And do they in the course of complying with this requirement certify to you the equities in state lands that they are assessing?

A. No, the counties do not certify that to the Tax Commission. The Tax Commission is required under the law to transmit to the county, the County Assessors, the equities in state lands as furnished to the Tax Commission by the State Land Board.

Q. And has the State Tax Commission given thought to the need to assess these equities under section 59-13-73?

A. I don't remember any specific consideration that I was a party to by the Tax Commissioners, referring to them as a commission, no.

Q. Such instructions have never been issued?

A. So far as I know the only thing that has happened since the imposition of this law as regard to state land equities have been the same as before. We have been certifying them to the County Assessors in accordance with the law that requires us to. I don't know the citation.

Q. 59-2-2?

A. If that is the one. That's the one we have been following.

Q. In other words, there has been no change in the taxation of the interest which a contract vendee has in state lands since the advent of 59-13-73?

A. I can't answer that. I can only say that the equity information as to the purchase price, the purchaser, and the description of the land and the equity as of January first has been transmitted to the County Assessors in the same after that date as it was before . . . "

And on page 108, we have:

"Q. Does the State Tax Commission have the authority to direct County Assessors to assess property which they have overlooked when it comes to the attention of the State Tax

Commission that the properties have been omitted from the tax rolls?

A. It is my understanding that the Tax Commission has the authority, after the Board of Equalization has met, to review the work of the County Assessors and to assess in its own name this property.

Q. Any property that was omitted?

A. Yes.

Q. Has the State Tax Commission, in the exercise of that authority, ever made any assessments under section 59-13-73 for the year 1961?

A. Not to my knowledge."

He was asked if there were investigations being made by the Tax Commission to determine if any property was escaping taxation under Title 59-13-73 (Rec. 111) and he replied that there was a man in the field for 18 months with specific assignment to investigate property escaping taxation. He admitted that this man had been in Box Elder County (Rec. 111) but he could not recall anything being added to the rolls on account of this Section 59-13-73, and the court made a very interesting comment at the close of his testimony (Rec. 116):

"THE COURT: Are you going to be here tomorrow, Mr. Kerr? The court is rather interested in finding out what instructions were given the assessors in 1959.

MR. BOYCE: I think we have another witness which will also corroborate that and go into more detail.

THE COURT: In other words, we're getting an issue now as to whether the state just used this as a fifth wheel to get taxes where they weren't otherwise assessed or whether you gave a blanket order that the act was to be enforced against everybody."

Mr. John Rackman, another witness for the defendant, stated he was director of the evaluation division of the State Tax Commission (Rec. 118) and had the responsibility, under the provisions of 59-13-73, to make discovery and inform the county assessors of their duties (Rec. 120) and that he had a staff of 27 people. He was asked a hypothetical question (Rec. 127) to the effect that if a man were buying a piece of property from the State on contract for \$10,000.00 and had paid \$2,000.00 on an installment plan toward the purchase price, whether the land would be taxed on the basis of the \$2,000.00 paid for the value of the land and he said, if the assessor were assessing under 59-2-2 it would be on the \$2,000.00. He was asked if the Tax Commission had issued any instructions if this land were being used for business for profit whether the assessment would be under 59-2-2 or under 59-13-73. After a considerable amount of hedging, on page 128, and upon cross-examination, he was asked:

"Q. I'm sure you do. And yet in your capacity and with all of the dedication that you bring to bear upon your job and the performance of your duties, you've never heard of any direction by the State Tax Commission to assessors to value land held under contract from the state under 59-13-73 rather than

under 59-2-2 where the contract vendee is using that land in connection with a business operated for profit, have you?

A. I haven't heard of it?"

After further evasive answers on cross-examination, (Rec. 129) he was asked if he hadn't signed a letter dated December 26, 1962, with one Norman Johnson, one of the Assistant Attorney Generals, in regard to this very problem. He admitted he had done so and he was then asked (Rec. 129) bottom of the page:

"Q. So that this question of whether state lands under contract, where the lands are being used by the contract vendee in connection with a business operated for profit, has been before you at least since November 27, and isn't it reasonable to assume that in your consideration of this problem you would have uncovered and would have been made aware of and would have found any directive that might have at any time up until today been issued by the State Tax Commission to County Assessors as to what procedure to follow in such situations?

A. Well, I don't know whether I'm supposed to testify as to my abilities as a research man or to the degree of research that I put into the particular problem, but I don't know of any directive that has been issued by the Tax Commission."

He was asked (Rec. 132) where title to the property is in the name of the State and an individual has contracted to buy this property in connection with a busi-

ness operated for profit, is that land taxed to the user, the one who has contracted to buy it from the State, under Section 59-13-73, or under Section 59-2-2, and his answer was 59-2-2.

He was shown Exhibit #3 (Rec. 133) which was a list of the State owned lands being sold under contract. He appeared to be perfectly familiar with it and said it was to indicate to the assessor that there is a property interest in a particular property that should be assessed. He was asked if these equities were still being sent out to the assessors in the same way now as prior to the enactment of 59-13-73, and he answered: Yes. He was asked (Rec. 134) if there would be any other purpose for reporting the equities except to indicate to the assessor on what the tax is to be based and his answer was, that it was still being sent for the same reason it was sent in 1958. He came up with a new theory (Rec. 135) and he was asked if there were any reason for sending out the equity listing, if Section 59-13-73 is applicable and his answer was:

“A. I’ve thought about that. It’s possible, of course, that you would tax the equity under the basis or on the basis of 59-2-2 if that law were to remain upon the books, and possibly the balance could be taxed on the basis of the privilege tax.”

On re-direct examination by Mr. Boyce, Mr. Boyce readily fell in with this suggestion of Mr. Rackham. Then on page 136 he said:

“Q. Now could it not be possible, Mr. Rackham,

that some lands which the state sells to a particular individual may be taxable under 59-13-73 and that sum may be taxable under 59-2-2, depending on the use, the nature of their occupation, and things of that nature?

A. Well, I would assume so."

I have tried to set our very carefully the testimony of these two individuals who claim to be officers of the State of Utah and particularly the Tax Commission, charged with the responsibility of carrying out the enforcement of the new privilege tax law, to show that they did not consider in the least degree that 59-2-2 had been repealed by any enactment of 59-13-73, either in their own mind or by any deed that they had done to so show their desire to have State lands assessed under 59-13-73.

Fred L. Petersen, the County Assessor of Box Elder County, was placed on the stand. He was shown Exhibit #8 (Rec. 140) and he advised us that he knew what it was and that it was the equities in state lands paid on the purchase price that pertained to Box Elder County. He admitted he had received it from the Tax Commission and had received one also for the year 1963. He showed certain figures on Exhibit #8 (Rec. 141) which he had applied to the equity which had been paid in by the purchaser, not to the value of the land but for the purpose of making the assessment. Again on (Rec. 142) and on (Rec. 144) he gave an account of how it was applied and taxed. He admitted (Rec. 158) that all land owned by the State of Utah and which

was purchased under contract was only assessed in Box Elder County for just the equity and that (Rec. 159) it was assessed in 1961 just as the same as it had been done in the past. He admitted he had made no investigation of any property that might be owned by the county or the City or the Board of Education, which has been leased to individuals (Rec. 160). He admitted (Rec. 177) that there was a gravel pit some people by the name of Parson were buying from Brigham City and he even had correspondence with the State Tax Commission on it and yet it was not assessed for the year 1961 (Rec. 179).

Exhibit #1, which was read into the record (Rec. 2 to 6) was received and defendant's counsel (Rec. 6) said:

"We have no objections."

This exhibit shows there were more than 380 contracts entered into with certain individuals for the sale of lands by the State of Utah. Exhibits 3 and 5 are a list of these lands and from an examination of them it was readily discernable that some of the contracts involve many hundreds of acres.

It was the contention of the defendant that Section 59-13-73, being a privilege tax statute, had a provision in the fifth line thereof, which reads:

" . . . when such property is used in connection with a business conducted for profit . . . "

which should require the plaintiff to prove in his case, that in every instance of any piece of land that might

be owned by some entity such as the State, the Board of Education, Brigham City or Box Elder County, where the same was leased or being purchased, that the plaintiff would have to prove the use of the land was in connection with the business conducted for a profit. (See various refusals to so stipulate as to the use of the property for profit, Rec. 22, 23, 25, 27 and 31, and the court's statement, Rec. 32). As a consequence, the parties attempted to resolve these difficulties by entering into certain stipulations they made into the record (Rec. 183-189), the substance of which was, that Walter G. Mann would prepare an affidavit as to the use of certain lands sold under contract by the State of Utah in Box Elder County, which were within his knowledge, as and for the year 1961. That Mr. Mark Crystal, an employee in the State Land Office, would prepare a statement regarding Exhibits 1A through 1X. Also that Mr. Crystal and Lee Young, employees of the State Land Board, would prepare affidavits as to the use of land purchased on contract from the State of Utah, as applied to the 380 different contracts which were listed and sent to the assessors and those affidavits would be received as exhibits as to the use made of the particular lands they describe in their affidavits. As to the balance, where any affidavit failed to set out and cover any particular contract of sale and show its used made by the purchaser on the balance of the 380 contracts, that the court would say that the plaintiff has not sustained burden of proof in regard to those contracts not covered. In other words,

the matter was before the court but that the plaintiff hasn't offered sufficient proof as required by the court, as to any properties not covered by affidavits. These affidavits of the four parties were obtained. Affidavits on land sold under contract by the State of Utah covered approximately 200 contracts which set out that the purchaser was using the lands in a business conducted for profit.

In summary, the evidence before the court showed very plainly that the only party in Box Elder County, assessed under Section 59-13-73, was Thiokol Chemical Corporation, for the year 1961. Also, that no contract vendees from the State of Utah, in Box Elder County, or the entire State of Utah, were assessed under the provisions of Section 59-13-73, but were, in fact, still assessed under 59-2-2, Utah Code Annotated, 1953. That no properties belonging to the Board of Education of Box Elder County School District, of the City of Brigham, or any other public body, were assessed under Section 59-13-73, where there was a leasing or a sale. That the State Tax Commission, or any other public body, or official, did not consider by their actions or practice that Section 59-13-73 was applicable to any contract or lease by the State of Utah; that Section 59-2-2 was still in effect. That the Tax Commission, the County Assessors, and all other parties involved were still operating as fully under Section 59-2-2, U.C.A. 1953, for the year 1961, as they have been in any other year since statehood.

ARGUMENT

POINT I

THIOKOL CHEMICAL CORPORATION WAS NOT TAXABLE UNDER SECTION 59-13-73 UTAH CODE ANNOTATED 1953. THE SAME WAS IN CONFLICT WITH SECTION 59-2-2 UTAH CODE ANNOTATED 1953 AND WAS UNCONSTITUTIONAL, VOID AND OF NO EFFECT.

Under the stipulation Ex. #1, Thiokol Chemical Corporation was assessed on 40% of its fair cash value as of January 1, 1961, and the equity of those purchasing lands from the State of Utah was assessed on 40% on their equity of the purchase price paid in as of January 1, 1961. Let us give an illustration to show the difference between these two: Suppose that a piece of equipment which was owned by the United States had a fair cash value of \$2,000.00 on January 1st, 1961, and suppose by the same token a person was buying from the State of Utah a piece of land on contract for \$2,000.00 and had paid in the sum of \$100.00. The equity of \$100.00 as compared with the value of the other \$2,000.00 is as much as 20 times difference. The assessor applies his percentage as set out by statute, which is 40% to the value on the one hand and the equity on the other (59-5-1 Utah Code Annotated 1953), the ratio of assessment is still the same, 20 times difference. Consequently it is a fact that cannot be disputed, Section 59-13-73 has imposed upon Thiokol Chemical Cor-

poration and the Government of the United States a burden that is many times greater than it is putting on people dealing with the State of Utah under Section 59-2-2 of the U.C.A. 1953. If a lesser burden has been imposed on users or purchasers of State owned lands than on users of lands owned by the Federal Government, is the assessment resulting therefrom unconstitutional and void?

"Section 59-5-1. Rate of assessment of property: - All taxable property must be assessed at forty percent of its reasonable fair cash value. Land and the improvements thereon must be separately assessed."

"Art. XIII. Sec. 2. Tangible property to be taxed - Value ascertained - Properties exempt - Legislature to provide annual tax for state. All tangible property in the state, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The property of the state, counties, cities, towns, school districts, municipal corporations and public libraries, *lots with the buildings thereon used exclusively for either religious worship or charitable purposes*, and places of burial not held or used for private or corporate benefit, *shall be exempt for taxation . . .*" (Emphasis added).

"Section 3. Assessment and Taxation of tangible property - Exemptions - Personal income tax - disposition of revenues.

The Legislature shall provide by law a uniform and equal rate of assessment and taxation

on all tangible property in the State, according to its value in money, and shall prescribe by law such regulations as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its tangible property, . . . ”

The next question is: Has the State of Utah, through its Legislature, enacted by law a uniform and equal rate of assessment and taxation of all tangible property in the state? Section 59-13-73 authorized an assessment upon the value of the property while Section 59-2-2 covering those people who are dealing with the State of Utah, authorizes an assessment based on the equity of the purchaser which may be as much as 20 times lower.

CASES

Here are two interesting federal cases which I wish to analyze. The first is a case entitled Phillips Chemical vs. Dumas Independent School District, found in 361 U.S., page 376, which is an appeal from the Supreme Court of Texas, decision given February 23, 1960. Under the laws of the State of Texas, and particularly Article 5248, of the Revised Civil Statutes of Texas, as amended 1950, which had application to taxation of private users of property belonging to the United States, there was a certain assessment made against the

defendant. In addition to this particular article there was also Article 7173, which governs the taxation of private lessees of real property owned by the state and its political subdivisions. It did not authorize taxation of a lessee under a lease subject to termination at the lessor's option in the event of sale. This Article #7173 is set out in part on page 379, and reads as follows:

“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 specifically provided by law.”

The other section, being Article 5248 and set out in part on page 378, and provides as follows:

“Provided further, that any portion of said land and improvements, which is used and occupied by any person, firm, association of persons or corporation, in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this state and its political subdivisions.”

This last provision was added to the old law of Texas and was intended to levy a tax upon the use of Government land held and occupied by tenants for profit. There is another interesting sidelight in this case and that is, that Phillips Chemical Company engages in a commercial manufacture of ammonia on valuable in-

dustrial property leased from the Federal Government in Moore County, Texas. The lease, executed in 1948, pursuant to the Military Leasing Act of 1947, 61 Stat. 774, is for a primary term of 15 years and calls for an annual rental of over \$1,000,000.00. However, it reserves to the Government the right to terminate upon 30 days' notice in the event of a national emergency and up on 90 days' notice in the event of a sales of the property. Consequently in this case, the state of Texas could, if it had chosen, said this property was not subject to taxation as provided for under Article 7173 for the reason that the term was for a period of less than three years, inasmuch as it could be terminated on 30 days' notice under a national emergency, but rather than do this they chose to assess it under Article 5248, which provided that the entire lease was subject to an assessment. Stating it another way, they have two statutes which were in conflict. We have a notation found on page 380, which reads as follows:

“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 crucially 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 the purpose of Article 7173. *Trammell vs. Faught*, 74 Texas 557, 12 S.W. 317. Therefore because of the termination provisions in its lease, Phillips could not be taxed under Article 7173.

"Although Article 7173 is, in terms, applicable to all lessees who hold tax-exempt property under a lease for a term of three years or more, it appears that only lessees of public property fall within this class in Texas. Tax exemptions for real property owned by private organizations—charities, churches and similar entities—do not survive a lease to a business lessee. The full value of the leased property becomes taxable to the owner and the lessee's indirect burden consequently is as heavy as a burden imposed directly on federal lessees under Article 5248. Under these circumstances, there appears to be no discrimination between the Government's lessees and lessees of private property.

"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 non-exempt purpose, they appear to be similarly situate 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 upon the other members of the class under Article 7173. In this case the resulting difference in tax, attendant upon the identity of Phillip's 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 lessees seems apparent. The question, however, is whether it can be justified."

This case was decided on February 23, 1960, and is a very recent case on the subject matter and the case goes into all of the other opinions rendered on the subject matter and shows the difference in their application and then it says, on page 387:

"None of these arguments, urged in support of the Texas classification, seem adequate to justify what appears to be so substantial and transparent a discrimination against the Government and its lessees. Here, Phillips is taxed under Article 5248 on the full value of the real property which it leases from the Federal Government, while businesses with similar leases, using exempt property owned by the state and its political subdivisions, are not taxed on their leaseholds at all. The differences between the two classes, at least when the Government's interests are weighed in the balance, seems too impalpable to warrant such a gross differentiation. It follows that Article 5248, as applied in this case, discriminates unconstitutionally against the United States and its lessees. As we had occasion to state quite recently, it still remains true, as it has from the time of *McCullough vs. Maryland* ⁴³ *Wheat*, 316, that a state tax may not discriminate against the Government or those with whom it deals. ³ *US vs. City of Detroit*, *supra*, at ⁴⁷³. Therefore, this tax may not be exacted. Reversed.

Another case, *Moses Lake Homes vs. Grant County*, 365 U.S. 744, I believe is in point. It came about when the statutes of the State of Washington provided for methods of assessment on Government leased property at a much higher value and consequently at a much higher tax than other taxable property. The code provided for an assessment of 50% of its fair market value on other property, while it provided that "taxable leasehold estate shall be valued at such price as they would bring at a fair, voluntary sale for cash." (Page 749). The court, on page 751, said:

"If anything is settled in the law, it is that a state may not discriminate against the Federal Government, or its lessees. See e.g. *Phillips Co. vs. Dumas School District*, 361 U.S. 376; *United States vs. City of Detroit*, 355 U.S. 466, 473; *City of Detroit vs. Murray Corp.*, 355 U.S. 489. In *United States vs. City of Detroit*, supra, we said: 'It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government of those with whom it deals'. 355 U.S. at 473.

"The *Dumas Case*, supra, is closely in point and controlling. There the state of Texas taxed the leasehold estate of a government lessee at the 'full value of the leased premises' (361 U.S. at 378), while it imposed a 'distinctly lesser burden on similarly situated lessees of exempt property owned by the State and its political subdivisions.' 361 U.S. at 379. We there said, '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 itself.' 361 U.S. at 385, and we held the tax to be void because it 'discriminates unconstitutionally against the United States and its lessees.' 361 U.S. at 379. That case is indistinguishable from this one on the point here.

"The Court of appeals was also in error in holding that 'the fact that the taxes are higher does not invalidate the entire tax (but) only requires that the amount collectible be reduced to what it would have been if the tax had been levied on a non-Wherry Act leasehold basis' (276 F2d, at 847) and in remanding the case to the District Court to make the necessary adjustment. We held in the Dumas case, supra, that a discriminatory tax is void and 'may not be exacted', 361 U.S. at 387. The effect of court's remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one. When, as here, the tax is invalid, it 'may not be exacted.' Phillips Co. vs. Dumas School District, 361 U.S. at 387."

The court, in concluding its remarks on this case, said on page 752:

"Inasmuch as the taxes, presently assessed and levied, discriminate unconstitutionally against the United States and its lessees, they are void, and hence may not be exacted. REVERSED."

POINT IB

THIOKOL DID NOT HAVE THE BENEFICIAL USE REQUISITE FOR TAXATION UNDER SECTION 59-13-73.

Plaintiffs do not dispute that under certain circumstances the use of Government property may be taxed to the user, rather, they contend that such circumstances did not exist here, and, if construed to be applicable under the facts here present, Section 59-13-73 is unconstitutional.

In *United States and duPont vs. Livingston*, 179 F. Supp. 9, aff'd without opinion 364 U.S. 281, the South Carolina Tax Commission "contend(ed) that duPont had a separable beneficial and taxable use of (Government property) for their use was necessary to duPont's performance of its contractual obligations" with the Government. (179 F.Supp. 9, 22). In rejecting that contention, the Court said (179 F.Supp. 9, 23):

"For the possessor of government property to have a separable taxable use measured by the value of the Government property much more is required than would be provided by complete acceptance of the Tax Commission's hypothesis.

"The custodian of a federal post office building is paid for the performance of his duties, but his use of the materials he requires in the performance of his housekeeping duties is so completely that of the United States that no one would think of taxing him upon the value of the materials. In each of the *Detroit* cases, the Supreme Court was concerned with taxation of a

completely separate business enterprise which used government property for its purposes of profit and which derived as much advantage from the use as if it had legal title to the property. No such condition is to be found here. The use of the Savannah River Plant and of goods and materials purchased for its operation is so completely that of the United States, that while one may concede the possibility of advantage to others, those others do not become subject to taxation upon the value of the plant or its purchases when, by contract, and in good conscience without a contract, the United States must pay any tax enacted."

Like duPont, Thiokol did not pay any rent or other charge for the use of any of the property, nor did it use any of the property for any purpose other than the fulfillment of its contracts with the Government. Moreover, it held and used the property only at the will of the Government, which had the absolute right to remove any of the property at any time, if its interests would be served thereby. Thus, like duPont, Thiokol was nothing more than a bailee for the Government's benefit. Unlike the contractors in the Detroit cases referred to in *Livingston*, supra, Thiokol was not engaged in merely manufacturing required items according to Government specifications. Rather, like duPont, Thiokol was engaged in developing and testing.

Just as duPont, in *Livingston*, was the alter ego through which the Atomic Energy Commission discharged its duty of furthering, by research and development, the production of fissionable materials, so

here, Thiokol may be considered the alter ego through which the Air Force Department discharged its duty of furthering the Government's missile program.

In sustaining the taxes in the Detroit cases, the Supreme Court found that one contractor was "using tax-exempt property for its own 'beneficial personal use' and 'advantage' " (355 U.S. 466, 472); that another was "free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them" (355 U.S. 484, 486); and that the third was "using or processing (Government property) in the course of its own business" (355 U.S. 489, 493). Since no such findings are warranted here, Thiokol did not have the separable taxable use necessary to constitutionally sustain a tax under Section 59-13-73.

It is not only to avoid an unconstitutional construction of Section 59-13-73 that it must be held that Thiokol lacked the beneficial use requisite for taxation, thereunder. Here, as in Michigan, the Legislature apparently was trying to equate the tax burden imposed on private enterprise using exempt property with that carried by similar businesses using taxed property. In the absence of such equalization the lessees of tax-exempt property might well be given a distinct economic preference over their neighboring competitors. Such consideration, however, does not obtain here. Because of the very nature of the program in which it is engaged—development of missiles for the Govern-

ment—there cannot possibly be any neighboring competitors over whom Thiokol can gain any advantage by reason of its use of the property.

In sum, neither the purpose nor language of Section 59-13-73 require that Thiokol's use be held taxable hereunder; and to avoid any question of its constitutionality Section 59-13-73 should be construed to be inapplicable to Thiokol's use of the property here involved. Moreover, if construed to be applicable here, the tax provided for by Section 59-13-73 is unconstitutional not only because it is tantamount to a tax on the Government's property and activities (United States and duPont vs. Livingston, *supra*; see also United States v. Allegheny, 322 U.S. 174) but also because it discriminates against the Government and those with whom it deals.

POINT II

THE SUBJECT'S ASSESSMENTS DO INFRINGE UPON FEDERAL IMMUNITY FROM STATE TAXATION, and,

POINT III

SECTION 59-13-73 UTAH CODE ANNOTATED, 1953, IS UNCONSTITUTIONAL AS BEING IN VIOLATION OF BOTH THE FEDERAL AND STATE CONSTITUTION.

I feel that Points II and II are so closely related that they can be covered together in the following argument.

As pointed out in *Phillips Chemical vs. Dumas Independent School District*, 361 U.S. page 376, and particularly the last paragraph found on page 387:

“As we had occasion to state, quite recently, it still remains true, as it has from the time of *McCullough vs. Maryland*, 43 Wheat, 316, that a state tax may not discriminate against the Government or those with whom it deals. 3 U.S. vs. *City of Detroit*, supra, 473. Therefore, this tax may not be exacted. Reversed.”

Also, as pointed out in *Moses Lake Homes vs. Grant County*, 365 U.S. 744, where quoted from page 751:

“If anything is settled in the law, it is that a state may not discriminate against the Federal Government, or its lessees . . . It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government, or those with whom it deals 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 itself. . . . And we held the tax to be void because it discriminates unconstitutionally against the United States and its lessee.”

The U.S. Court having held that discrimination cannot take place, let us examine closely the wording of Section 59-13-73 as compared to the limitations placed

upon it by the State Constitution, to see if discrimination has taken place. Article 13, Section 2, begins as follows:

“Tangible property to be taxed - Value ascertained - Properties exempt - Legislature to provide annual tax for state: - All tangible property in the state, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The property of the state, counties, cities, towns, school districts, municipal corporations and public libraries, *lots with the buildings thereon used exclusively for either religious worship or charitable purposes*, and places of burial not held or used for private or corporate benefit, *shall be exempt from taxation . . .*” (Emphasis added).

In other words, the Constitution prescribes the exemption that shall be given to either religious or charitable organizations, and limited it to lots with buildings thereon. Let us compare that with our Section 59-13-73, which reads:

“Section 59-13-73: Privilege tax upon possession and use of tax-exempt property - Exceptions: - 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, fair-

ground, 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 . . .*" (Emphasis added).

Let us use several examples and see how this can be ridiculously applied. Any church, charity or school could lease from the State of Utah or from the Government, buildings, lands or personal property and enter into a competitive business at any place within the State of Utah and so long as they were the users, or the profits derived therefrom, were used for the benefit of either of these three organizations there would be no tax applied, or, if Thiokol were developing or testing x-ray machines or other equipment for a charitable hospital, and using property owned by the charity in performing its service contract, it would not be subject under Section 59-13-73, nor would it be subject thereto f, in executing a commission to design and fabricate religious objects for a church, it used as models for the incorporation into the new work, objects or precious metals loaned and furnished by the church. Nor would Thiokol be taxed under Section 59-13-73 for the use t would necessarily make of an educational institution's property in performing a contract or redesigning an existing laboratory computer or other facilities or equipment owned by the institution. Thus Section 59-

13-73 gives more favored treatment to religious, charitable and educational institutions than to the Government, and contrary to its State Constitution.

Or, if any of these three organizations would lease from the United States or the State of Utah, warehouses and then sublease them at a handsome profit to private individuals to use in a competitive business so long as they used the profit to benefit the charity, the church or the school, they would not be taxed. Yet, the Constitution has specifically limited the exemption to be given to charitable and religious organizations, to lots with buildings thereon, used for either religious or charitable purpose. This court has held, in *Parker et al vs. Quinn*, 64 P. 461, where Section 3 of Article 13 of the Constitution was discussed, that only that portion of the property of a benevolent society which is occupied and used exclusively for charitable purposes, is exempt from taxation, and the exemption does not extend to that portion not appropriated by the society to its own use, but held as a source of revenue. But Section 59-13-73 defies, and is in direct opposition to, such a holding and is an exemption greater than the Constitution which limits it. This court again, in 177 P.214, *Odd Fellows Building Association vs. Naylor*, where again it discussed our Constitution, Article 13, Section 3, held that where a building owned by a charitable association was, in part, rented out to stores, the income being used only to keep the building in repair and the remainder income for charitable and benevolent purposes, the part of the

building rented out to the stores was not exempt from taxation under Constitution Article 13, Section 3. Yet again, this new provision of the statute would defy it and allow that organization to do indirectly what it could not do directly by previous interpretations by this court. Let us take one more example. Suppose that either of the three organizations should buy from the State Land Board on a 20 year contract, some very valuable farm land that had been foreclosed by the State of Utah, and proceed to farm the land and use the proceeds for its benefit. Now, I have this question: Is the equity of the purchaser of this land taxable under 59-2-2? Is its value taxable under 59-13-73, or is it exempt under 59-13-73? At the end of the contractual period and when this land is paid for and title is transferred, is it taxable? In the latter case I believe we would have to say yes, so long as Parker et al vs. Quinn and Odd Fellows Building Association vs. Naylor, supra, were still the law. Then the further question, if there is any exemption at all, is the act discriminatory in that it does not treat the United States and the parties with whom it deals, on equal basis?

POINT IV

THERE IS A DISCRIMINATION IN APPLICATION OF 59-13-73 U.C.A. 1953, ON ITS FACE, BECAUSE THE UNITED STATES AND THOSE WITH WHOM IT DEALS IS NOT TREATED EQUALLY WITH OTHER

ENTITIES, AND 59-13-73 U.C.A. 1953, DOES NOT REPEAL 59-2-2 U.C.A. 1953, AND SAID SECTION IS INCONSISTENT WITH THE FORMER.

When the court rendered its opinion (Rec. 196) it said:

“ . . . the court has been deeply impressed with the fact that the so-called Detroit and the Muskegon cases from Michigan had with them in the record which went to Washington a privilege tax which had an exception in it. It's true that the people who apparently lifted that statute from Michigan and brought it out here and introduced it into our Legislature added some more wrinkles in it. They have put something about charitable use or where the proceeds of the use would be for charity, so that out here in Utah the Michigan statute, which was before the highest court in the land in those two cases, has an additional exception. That is the exception for charitable uses or where the proceeds are to be used for charitable purposes.”

The court further said (Rec. 198) as follows:

“ . . . Charities and religions were known to this country from the time of its inception. Charities and religions were in existence at the time of the Civil War and this court's understanding of the hornbook principles of law do not dictate that because an eleemosynary corporation such as operates these so-called church farms is not taxed, or because religious edifices are not taxed, or because other charitable organizations which operate as true charities are not taxed, that is not persuasive to this court —and I appreciate

this is merely the court of first instance—that the act is unconstitutional . . . ”

It appears to the writer that the judge missed the point, which is, that the Legislature cannot give or make greater exemptions than that allowed by the Constitution of the State of Utah. The Constitution as pointed out under Points II and III, limits the exemptions. It is not a question of someone's individual feeling that as a matter of principle they ought to be exempt (Malad Second Ward of the Church of Jesus Christ of Latter-day Saints vs. State Tax Commission, 269 P2d 1077), as expressed by that court, but is a question of what the limitations on exemption is. Our Legislature enacted into the statute exemptions which are in excess of the Constitution and contrary to cases that have been adjudicated by this court, more particularly set out in Points II and III. Mr. Boyce argues in his brief, page 36, that the Phillips Chemical Company vs. Dumas School District, 361 U.S. 376, provided a different tax rate on lessees of state land from those of the Federal Government. As I read the case, they did not provide a different tax rate, but provided a different method of arriving at the value of the property before the tax was applied. Article 7173 provided that the taxable leasehold would be the price it would bring at a fair voluntary sale for cash, while Article 5248 provided for the full value. Article 7173 imposed no tax where the lease is for a term of less than three years, applying this to our statutes. Section 59-13-74 provides that the values would be the same as if the pos-

essor or user was, the owner thereof as determined in the ad valorem assessment, while our Section 59-2-2 provides that the values would be only the equity of the purchaser. By analogy the same state of facts took place in Phillips Chemical Company vs. Dumas School District, 361 U.S. 376. They had two different values to apply the tax rate to, as we have in our instance, that is, that leases of individuals with the State of Utah were and are and have been taxed on just the equity, while leases of Government property, since the advent of 59-13-73 are taxed at the same ad valorem value as other property.

We feel that the trial judge erred when he found that 59-2-2 had been impliedly repealed by Section 59-13-73, to the degree that the latter statute was inconsistent with the former. In 3 Sutherland Statutory Construction, 3rd Edition, Section 6709, we find:

“One of the most significant aids of construction in determining the meaning of revenue laws is the administrative interpretation given such acts by the agency that is responsible for its administration and enforcement.”

The Utah Suopreme Court, E. C. Olsen Company vs. State Tax Commission, 109 Utah 563, 168 P2d 324, said on page 332, left-hand column:

“ . . . a practical construction of the statute shown to have been the accepted construction of the agency charged with administering the matters in question under the statute will be one factor which the court may take into consideration

as persuasive as to the meaning of the statute. Especially is this true where the agency, as in this case, is one on whom the Legislature must rely to advise it as to the practical working out of the statute and where practical application of the statute presents the agency with unique opportunities and experiences for discovering deficiencies, inaccuracies or improvements in the statute. . . . ”

Now, compare that with what is happening in this particular situation. The State Land Board certifies the list of all state contracts to the Tax Commission. The Tax Commission certifies them to the assessors so that the assessors can assess the property under Section 59-2-2. The assessors of every county, according to our stipulation throughout the State of Utah, assessed the property being sold on contract by the State Land Board in the same manner in 1961 as it had in all previous years. The individuals in the Tax Commission who I have quoted so freely in my statement of facts, Mr. Kerr and Mr. Rackham, who, with other employees, were searching for property that might be escaping taxation, never once considered that Section 59-2-2 had been repealed or had even been affected by the enactment of Section 59-13-73. The only time such a thought ever came up was in the course of the trial when someone suggested that maybe a person could be subject to two assessments, one under 59-2-2 and then for the balance under 59-13-73. From then on, we hear lots of arguments that Section 59-13-73 had appliedly repealed 59-2-2 to the degree that 59-2-2

was inconsistent with the former. The defendant, in his brief, contends that not all purchasers who might buy lands from the State of Utah would be subject to a tax under 59-13-73. That you have to find out first whether the possessor or purchaser was using or possessing the lands in conjunction with the business conducted for profit. He even argues that if a party should buy from the State of Utah on contract, a piece of land, and just let the land sit idle, that nothing but his equity should be assessed under 59-2-2, while if another person bought a piece of land of equal size and dimension from the state on contract and had any benefit regardless as to how great or how small, that the party should then be assessed under 59-13-73. All I can say is, what a confusing law, or interpretation of a set of laws this can turn out to be. I do not believe for one minute that any person would buy a piece of land unless he believes there is a profit in the venture. If he allows it to remain idle, he believes he will benefit by appreciation in value more than he would benefit from the interest he would make on the investment if he left it in a banking account or invested it in other properties. I do not believe for one minute that the Legislature ever considered such a wild interpretation. I do believe that when they passed Section 59-13-73 they never gave a second thought to Section 59-2-2. The Legislature was after revenue from people dealing with the Federal Government's property and were not concerned at all with the people dealing with the State of Utah on contract. This theory of Section 59-13-73

impliedly repealing any part of 59-2-2 which might be inconsistent with it, is now being widely proclaimed by people who were the advisors of the Tax Commission and the Tax Commission was also the advisor of the numerous County Assessors, who, until the law was questioned, went along and administered Section 59-2-2 in the same manner as it had always been administered since statehood.

The writer will agree with the statement of counsel for the defendant that it may be generally conceded that repeal by implication is not favored. Sutherland, Statutory Construction, 3rd Ed., Section 2014, where it is quoted:

"The presumption against implied repeal is overcome, however, by 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."

These two sections are irreconcilable. Section 59-13-73 provides that the tax under this section applies to:

" . . . real or personal property which, for any reason, is *exempt from taxation*, when such property is used in connection was a business conducted for profit. . . . " (Emphasis added).

and sold under contract by the State of Utah was not exempt from taxation because ever since statehood there have been provisions of the statutes, which have required the equity of the purchaser to be assessed and statutes were enacted, which are numerous, being Section 59-2-2, Section 59-2-3, Section 59-5-50 and

59-5-51, which provide ways and means to carry out the mandate of the legislative body. When Section 59-13-73 was passed in 1959, the Legislature, by the very wording of the statute, intended to cover land that was tax exempt, not land that was then being taxed.

As a consequence we had two statutes on the books, one which was very favorable to purchasers who were purchasing land from the State of Utah and one which was more burdensome by comparison to individuals who were leasing land from the Federal Government. These two sections are just like the two sections referred to in the Phillips Chemical Company vs. Dumas School District, 361 U.S. 376, both in existence and both being administered, but the burden is unequal. The defendant argues on page 45 of his brief that Section 59-13-77 U.C.A. 1953, which contains the following provision:

“Nothing contained herewith 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.”

would demonstrate a legislative intent that the provisions of the privilege tax act would limit or repeal the exemptions of Section 59-2-2 Utah Code Annotated, 1953, to the degree of any inconsistency. Let us just review what those exemptions in these sections cover: Section 59-2-4 covers property in interstate commerce; Section 59-2-5 covers property owned by disabled veterans or their unmarried widows or minor orphans; Section 59-2-6 is application, proof and percentage

disability, minimum allowed and has reference back 59-2-5; Section 59-2-7 covers pumping plant for irrigation; Section 59-2-8 is computation of power used for irrigation; Section 59-2-9 is exemption to be protected and paid to users and has reference back to 59-8; Section 59-2-12 has reference to exemption of property owned by blind persons or their unmarried widows or minor orphans, Amount; Section 59-2-13 procedure and conditions, filing of application and statement as to vision, maximum corrected vision allowed, and has reference back to Section 59-2-12. Each one of these sections is a specific exemption, that is protected and has nothing to do with a statement of levying a tax but is a statement of relieving a tax by form of exemption. Section 59-2-2 is the imposition of a tax and it is followed by 59-2-3 for a method of enforcing the collection of that tax levy. To this writer it would appear that the legislative intention was to protect the exemptions only, but the statute that imposed the tax, to-wit: 59-2-2 was intended to remain in existence and had they wanted it repealed, they could have added a section so declaring the repeal of Section 59-2-2, which has nothing to do with exemptions.

POINT V

THE TRIAL COURT DID NOT ERR IN FINDING THAT THERE HAD BEEN SUCH DISCRIMINATORY APPLICATION OF 59-2-13-73 UTAH CODE ANNOTATED, 1953, AS

TO AVOID THE ASSESSMENT AND TAX AND THE COURT DID NOT ERR IN THE RELIEF IT GRANTED.

The entire brief, in practically every point that has been raised, has gone into the problem of discriminatory application, so that the writer will not burden this court further by repeating, but alleges that the first part of this point has been fully covered. In regard to the second part, the defendant in his argument alleges that the State court, or even this court, if it found that discrimination in the application of the tax existed, and if he could convince you that it was not statutory discrimination, then it would be your duty to direct only part of the tax money be restored and not all of it. Let's just take this argument and tear it apart and see just what he is saying. If I understand him correctly, he is saying that the only discrimination that can exist is between the amount of tax that some people might be required to pay under 59-2-2 when their equity is assessed as compared with Thiokol's tax when the full value is assessed. The formula for each is as follows: Equity times 40% times tax rate for those under 59-2-2 and for Thiokol it is value times 40% times tax rate and he is, in fact, saying that you should apply this formula of 59-2-2 to Thiokol and refund only the difference between the amount so determined from the formula and the amount that we paid. Let us carry it a little further. Does Thiokol have any equity in the personal property belonging to the United States and used by it on this project? It does not. So the

quity of Thiokol would equal zero and zero times 1% times the tax rate would still be zero. It is absolutely absurd. I would also like to ask this question: Is this court, or the District Court, the power to levy and determine taxes or has that power by the State legislature been delegated to certain designated taxing officials? The Supreme Court of the United States has spoken on this subject and inasmuch as the defendant, through his counsel, has cited this case in his brief, I would assume he is fully familiar with its subject matter. The case is *Moses Lake Homes vs. Grant County*, 365 U.S. 744 (1961), which is the final word. Here the lower court attempted to do exactly what the defendant is urging this court to do, that is, not invalidate the entire tax but only reduce it to what would have been if plaintiff had been placed in the same position as people purchasing from the State, and the court said, page 751:

"... We held in the *Dumas* case, *supra*, that a discriminatory tax is void and 'may not be exacted.' 361 U.S. at 387. The effect of court's remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one. When, as here, the tax is invalid, it 'may not be exacted.' *Phillips Co. vs. Dumas School District*, 361 U.S. at 387."

The Supreme Court, having held that the theory advanced by the defendant in his final argument cannot be carried out, we will not treat the subject further

CONCLUSION

The trial court, we believe, was correct when it said:

“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.

“Three. The court finds and determines that this statute, this privilege tax, construed together with 59-2-2, has been applied and enforced by the tax people during 1961 in an unequal and discriminatory manner to such an extent as to nullify the assessment and the tax involved in this action.” (Rec. 200, 201).

We believe the court erred when it found that the privilege tax is amendatory to Section 59-2-2 and is constitutional, notwithstanding the exceptions for religious and charitable purposes. We believe that those exemptions and exceptions are contrary to our constitution and in and of themselves would make Section 59-13-73 unconstitutional. We further believe that Section 59-2-2 has not been amended; that Section 59-13-73 when compared with Section 59-2-2 creates statutory discrimination which makes Section 59-13-73 unconstitutional.

Consequently, we respectfully request this court to sustain that part of the judgment which declared that the tax had been discriminatorily applied and that the same was void and of no effect and to declare, by its opinion, that Section 59-13-73 is unconstitutional and is in conflict with Section 59-2-2, which has not been repealed by implication or otherwise.

Respectfully submitted

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Cross-Appellant