

1964

Jerry Sine and Dora Sine v. State Tax Commission of Utah : Defendant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY SINE and DORA SINE,
Plaintiffs,

— vs. —

STATE TAX COMMISSION
OF UTAH,

Defendant.

Clerk.

1964

Case

No. 10012

DEFENDANT'S BRIEF

WRIT OF CERTIORARI TO REVIEW AN ORDER
OF THE STATE TAX COMMISSION OF UTAH

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— vs. —

STATE TAX COMMISSION
OF UTAH,

Defendant.

} Case
No. 10012

DEFENDANT'S BRIEF

STATEMENT OF THE CASE

This is a proceeding to review an order and deficiency assessment of the Tax Commission imposing sales and use taxes upon petitioners, Jerry Sine and Dora Sine, d/b/a/ Jerry Sine Investments, as a result of plaintiffs' failure to acknowledge and pay sales and use taxes.

DISPOSITION BEFORE THE TAX COMMISSION

After consideration of the facts and the law, the Tax Commission concluded that the deficiency assessment was in order, and by decision dated September 24, 1963, sustained the same.

RELIEF SOUGHT ON APPEAL

Plaintiffs Jerry Sine and Dora Sine, d/b/a/ Jerry Sine Investments, seek an order reversing the order of the State Tax Commission with reference to the use tax deficiency assessment.

STATEMENT OF FACTS

The sales tax deficiency herein was assessed as a result of the failure of the plaintiffs to report and remit sales tax on taxable sales of postcards and soda water from January 1, 1959 to June 30, 1959, during which period the plaintiffs did not file sales tax returns. Subsequent to this period, taxable sales have been reported correctly.

The sales tax deficiency is in the amount of \$12.85, together with penalties in the amount of \$2.50 and interest in the amount of \$5.52, all of which plaintiffs have not contested nor objected to and to which they have raised no objection in this appeal (R. 18).

The use tax deficiencies for the period January 1, 1958 to December 31, 1961, in the amount of \$281.18, with penalties in the amount of \$28.11 and interest in the amount of \$86.54, for a total sales and use tax deficiency of \$416.70, including interest to January 3, 1963. These figures are based on an amended audit report dated January 3, 1963 (R. 18).

At all times pertinent hereto, plaintiffs were engaged in the business of conducting Jerry Sine Investment, Se Rancho Motel and Scotty's Motor Lodge, all

of Salt Lake City, Utah, and carrying on these businesses for profit (R. 13).

The use tax deficiency, which is in controversy, falls into three categories of purchases by the plaintiffs which resulted in the deficiency assessment:

(1) The first consists of purchases from outside the State of Utah of certain items used and consumed by plaintiffs in their business of renting motel rooms. These items consist of small packages of soap (Exhibit 14); plastic mattress covers (Exhibit 15); postcards, including stationery (Exhibit 16); linen, towels, blankets, and washrags, having an average life in plaintiffs' business of one year, one year, three years and three months respectively; sanitary glassine bags used for covering drinking glasses which have been washed and sterilized to protect them from contamination prior to use by each new guest (Exhibit 17); and sanitary toilet bands (Exhibit 18).

The Tax Commission found as a matter of fact that in the regular course of plaintiffs' motel business they charged their guests for the use of rooms. These charges are made on a day-to-day basis, and the guests agree to pay the rate specified by the plaintiffs, which entitles them to use of the rooms and all the furnishings and the items mentioned herein for the term of the guests' occupancy (R. 15) (R. 40). The Tax Commission further found that each of the items were purchased by the plaintiffs exclusively for their use in conducting the motel business, and further that there is no stated charge made on the guests' bills, furnished by the plaintiffs, for

the use of any of these furnishings or items (R. 15, 40). The Commission also found that each of the above items of property assessed on the use tax deficiency was stored, used and consumed by the plaintiffs (R. 40).

(2) The second category consists of the purchase outside the State of Utah of the following magazines and pamphlets:

Institution Magazine (Exhibit 1); Tourist Court Journal (Exhibit 2); World Review of Hotels (Exhibit 3); Baxter Research (Exhibit 4); Kiplinger Washington Letter (Exhibit 5); Consumer Research (Exhibit 6); American Hotel Journal (Exhibit 7); Guideposts (Exhibit 8); Journal of Accounting (Exhibit 9); Sunset Magazine (Exhibit 10); Hospitality (Exhibit 11); Wall Street Journal (Exhibit 12); Hotel Monthly (Exhibit 13).

The Tax Commission found, with regard to the above, that the purchase of the Wall Street Journal was exempt by its being a newspaper, and, therefore, the deficiency for the Wall Street Journal was deleted from the amended audit report and is not contested by the Tax Commission. The Commission found the remaining magazines to be subject to the use tax (R. 40).

(3) The original audit report contained a use tax liability on sales by the Admiral Sales Corporation to petitioners. Upon review, the use tax liability on these items was deleted from the amended audit report and is no longer contested by the Tax Commission.

From the decision of the Tax Commission the plaintiffs appeal.

ARGUMENT

POINT I.

LINENS, TOWELS, MATTRESS COVERS, BLANKETS, WASHRAGS, SOAP, SANITARY TOILET BANDS AND STATIONERY PURCHASED BY HOTEL OR MOTEL OPERATORS ARE USED AND CONSUMED BY THEM AND ARE SUBJECT TO THE USE TAX UNDER SECTION 59-16-3, U.C.A. 1953.

Points I and II of plaintiffs' brief will be argued in defendant's Point I.

Section 59-16-3, U.C.A. 1953, levies and imposes an excise tax on the storage, use or other consumption in the State of Utah of tangible personal property, and further provides that every person storing, using or otherwise consuming in Utah tangible personal property so purchased shall be liable for the tax imposed by the act, which is not extinguished until the tax has been paid. Plaintiffs argue at page 5 of their brief that certain items such as linens, towels, mattress covers, blankets and washrags are purchased "in a sense for resale" and are thus exempt under Section 59-16-4, U.C.A. 1953.

It is an undisputed principle of law that an exemption statute must be construed strictly against the exemption, and those claiming such bear the burden of proof of showing that the exemption applies to them. See *Norville v. State Tax Commission*, 98 Utah 170, 97 P.2d 939 (1940).

The issue now before the Court has been faced directly by the United States Court of Appeals for the

District of Columbia Circuit, in the case of *Statler Co., Inc. v. District of Columbia*, 199 F.2d 172 (1952). There, the court held that china, silver, table linen, etc., were not part of meals sold to the hotel's guests but were accessory utensils used by the hotel in making sales of its meals; and, likewise, that bed linen, towels, tumblers, light bulbs, draperies and carpets were not parts of the rooms but were property used by the hotel in furtherance of sales of its rooms, and therefore transactions whereby the hotel acquired such articles were not exempt from sales or use tax. The Court found the following facts:

“The statute exempts from the tax sales ‘in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be, received by him, or to use or incorporate the property so transferred as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining. (Emphasis ours.)

“The sales tax applies to sales within the District of Columbia. The statute also imposes a ‘Compensating-Use Tax’ upon the use of tangible personal property and services sold or purchased at retail sale, excepting sales subject to or exempt from the sales tax. These sections contain the definitions and the same exceptions as do the sections relating to the sales tax. The scheme of the statute is thus the familiar one of a retail sales tax upon sales within the jurisdiction and a corresponding use tax upon property purchased outside but used within the jurisdiction. The general object of the limitations in the statute is that only the ‘end’ transaction and not the ‘intermediate’ transactions shall be taxed; i.e., that taxes on transactions involving a given arti-

ele, without change in form, or service shall not be pyramided."

The Court then proceeds to set forth the problem involved, being that the petitioner purchases the goods within or without the District of Columbia and uses them in connection with its sales of meals and rooms within the District of Columbia. It also pays a sales tax on the latter sales; that is, the sale of the room or meal, the same as is now the law in Utah under Section 59-15-4(f), U.C.A. 1953. *The Court states that the question is whether the use of the listed property in these taxable transactions is such as to make the transactions, whereby the hotel acquired these goods, exempt from tax.* The Court goes on to make an example as follows:

"... Perhaps an illustration will clarify the question. Suppose the hotel buys sheets, towels, soap, etc., in Baltimore. It puts these goods in rooms and charges transient guests for the rooms thus furnished. Must it pay a use tax upon the prices it paid for these goods?

"Petitioner says that its purpose in purchasing these listed goods is to resell them — that is to transfer possession of them — in the same form in which they are received, or that these goods are incorporated as a part of other property, to wit, a room or a meal, produced for sale by assembling. Concretely, its contention is that it sells an assembled package consisting of room, linen, towels, soap, etc., or of food, china, glass, toothpicks, etc. It says that the listed goods were acquired by it for this assembly and resale. Hence it says, under the exemption quoted above from Section 114(a) of the statute, its purchases are not subject to either sales or use taxes."

“ . . . Upon the foregoing premise, that the listed goods become part of a meal or a room which is furnished transients, petitioner contends that the ‘sales’ of the listed goods come within both of the clauses of the exemption quoted above. *It says (1) that they are resold, as part of a room or meal, in the form in which they are received by the hotel, and (2) that they are incorporated as part of other property, a room or a meal, produced for sale by assembling.* (Emphasis ours.)

“The District of Columbia says that these goods are merely used by the hotel in the conduct of its business, in the same manner as it uses tables and beds; or in the same manner as a shoe salesman uses chairs, footstools and mirrors in the business of selling shoes. It says that the sale, under the statutory provision, is of the room or the meal, and that the listed goods are not ‘sold’ as part of that transaction. The position of the District is supported in part by the reasoning of the Supreme Court of Illinois in *Theo. B. Robertson Products Co. v. Nudelman.*”

The Court then makes its decision as follows:

“Upon the issues thus presented to us, we agree with the District of Columbia and thus with the conclusions and decisions of the Board of Tax Appeals. Clearly the china, glass, silver, table linen, etc., are not parts of the meal sold the guest but are accessory utensils used by the hotel in making the sales of its meals. Less clearly, perhaps, but nevertheless correctly we think, bed linen, towels, tumblers, light bulbs, draperies and carpets do not become parts of the room but are properties used by the hotel in furthering the sales of its rooms. No separate contentions are made as to soap, toothpicks, sta-

tionery and similar articles actually consumed by guests. We assume that they are *de minimis*."

In that case, as in ours, the defendant admitted that no separate charge is made for the separate items (R. 15, par. 16 & 17). In that case, as in ours, there was no sale for resale, and these items are not incorporated into another product for sale.

Similar issues arose in the Pennsylvania case of *Commonwealth v. Benjamin Franklin Hotel Co.*, Court of Common Pleas, Dauphin County, Docket No. 207 (1960), March 13, 1961, Pennsylvania Tax Reporter, Transfer Binder, New Matters 200-139. There, the defendant was engaged in the operation of a hotel and was assessed for understatement of its sales and use taxes for the period from March 1956 to February 1958. It was determined that in the regular course of the hotel business the defendant charged its guests for the use of rooms. The charges were made on a day-to-day basis, and the guests agreed to pay the rate specified by the hotel, which entitled the guests to the use of the room and all the furnishings contained therein for the term of the guests' occupancy. Also included with the furnishings were a television set and in each room a heating or cooling unit providing heat or air conditioning for the room. The taxpayer contended that these television sets and air conditioners were purchased from the suppliers for the purpose of resale and are therefore not subject to the sales or use tax. They argued that the daily room charges to the guests amounted to a resale of these items. The Court then looked to the

definition of a resale under their code, which is very similar to ours. The Court held as follows:

“What we have said as to consideration in the *McHugh* case [*Commonwealth of Pennsylvania v. McHugh, et al.*, 75 Dauph. 68 (1960)] is equally applicable here. When the rooms were rented to guests, there was no payment for the television sets or air conditioners as such. The charges and payments were for the rooms as a whole including all the other furnishings that went with them. We think that no more was consideration paid — the equivalent of a purchase price — for these individual items than there was for the materials in the *McHugh* case. And since there was no consideration, there was not a resale of these items. Hence, in our judgment, the television sets and air conditioners were not acquired for the purpose of resale. On the contrary, they were purchased at retail and the sales and use tax was properly assessed.”

Section 59-16-2(d), U.C.A. 1953, contains the definition of a sales price as used in the use tax section as follows:

“‘Sales price’ means the total amount for which tangible personal property is sold, including services that are part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses or any other expenses whatsoever; provided, cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount

charged for labor or services rendered in installing, applying, remodeling or repairing property sold.”

Under Section 60-1-1, U.C.A. 1953, the sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the “price.” And further, under Section 59-15-2(b), U.C.A. 1953:

“The term ‘sale’ or ‘sales’ includes installment and credit sales, every closed transaction constituting a sale, and also includes the sale of electrical energy, gas, services or entertainment taxable under the terms of this act. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale. An exchange of tangible personal properties for other than money shall not be deemed a sale for purposes of this act, except that in any transaction wherein both tangible personal property and money are exchanged for other tangible personal property that part of the exchange which is in money shall be deemed a sale.”

Unless there is a transfer of property for a consideration called a price, there is no sale. And, as above stated, the plaintiffs have admitted that there is no transfer of the personal property, nor is there a consideration paid for the separate items, but rather, the consideration is paid for the room in which these items are situated but only ancillary and as an inducement for the sale of their product, that is, an accommodation.

The Utah Supreme Court developed this point in another sales and use tax case, *Union Portland Cement*

Co. v. State Tax Commission, 110 Utah 135, 170 P.2d 164 (1946), where the Court held, "The essence of a sale is the transfer of title to the goods from the seller to the buyer."

In question in the *Union Portland Cement* case was the imposition of a use tax on steel or iron grinding balls which are purchased outside of the state and which are used in plaintiff's grinding mills. It was argued that these grinding mills were used to grind up cement raw materials and that in so doing particles of iron were worn away from the iron balls and became part of the cement, and as a result, no use tax could be imposed. The Court rejected this argument, holding that the iron ball did not become an ingredient or component part of the property manufactured but is, in fact, used and consumed by the manufacturer.

The same reasoning is applicable here. These items are not sold and do not become an ingredient part of the accommodation sold to the transients using plaintiffs' motels, but are in fact consumed by the motel owners themselves in the same sense as the iron balls were used by the manufacturer in the production of cement.

The Utah Supreme Court's recent decision in *Barrett Investment Co. v. State Tax Commission of Utah* (Case No. 9872, January 6, 1964) is also applicable. The Court states, "Taxes assessed on paid admissions for the use of an object cannot reasonably be said to be taxes paid for the sale of tangible personal property."

In the Illinois case of *Theo. B. Robertson Prod. Co. v. Nudelman*, 389 Ill. 281, 59 N.E. 2d 655 (1945), the appellants were engaged in the business of selling paper napkins, towels, toilet tissue, drinking straws, paper cups and plates, liquid and bar soap, and the like to hotels and office buildings which furnished the same as part of the service rendered to their patrons and tenants, either without compensation or as a part of the service paid for by the user as a guest or tenant. The appellants argued that such sales were not subject to the Retailer Occupation Tax Act for the reason that the tax referred to in the act was upon the final use and consumption of the products, and therefore the appellants' customers, that is, the motels, hotels and office buildings, did not use or consume the articles but that the use and consumption was enjoyed by either their guests, in the case of hotels, or their tenants, in the case of office buildings. They urged further that the cost of these items must be considered in fixing the charges made for the use of the rooms and that such amounts to a sale or sales to a tenant. The Court held:

"The sole question in this case is whether appellants, in making sales of paper napkins, towels, drinking cups and plates, drinking straws, toilet tissue and bar soap, to hotels, office buildings and others, who furnish these articles as part of the service to patrons, tenants or guests, who actually use them, are engaged in selling tangible personal property at retail for use and consumption, as contemplated by the act. This court has determined that the theory of the title as shown by its language and explained by the act, is to cover retail sales only, that is, sales not for resale in any form for a valuable con-

sideration. *Stolze Lumber Co. v. Stratton*, 386 Ill. 334, 54 N.E. 2d 544 . . .”

“ . . . We have held that in order to render the tax act applicable it is necessary that the purchaser be the ultimate user and consumer. If he is, of course, there is no further resale. If he is not, then necessarily that fact forces the conclusion that there must be at least some further transfer. Nor do we believe it is necessary to enter into refinements to determine the legislative intent in this matter. That no direct charge for these commodities is made by hotels or office buildings, in the generally accepted sense of making a sale, is admitted. In general contemplation, a given hotel will use so many hundred pounds of tissue, soaps and the like. They are the persons who use them in the conduct of their business just as they use the furniture or the pictures on the wall, or rugs on the floor. While no agent or employee of the hotel actually uses or consumes such paper articles and soaps, the use is no less the use by the hotel, for it is generally recognized that such articles are to be furnished by the hotel as a standard method of doing its business just as the carpets on the floor and the pictures on the wall are furnished. This is likewise generally true of office buildings. While these items must be counted a part of the operating cost of the business and such cost may be said, therefore, to enter into the matter of fixing charges, the same is true in the case of furniture and other like equipment, linen, towels and metal or glass cups. No thought of transfer or resale is indulged. *Hotels and office buildings are not in the business of selling paper napkins, tissue, cups, plates, and the like, but they are in the business of running a hotel or an office building or the like. We are of the opinion it is in this sense that they may be said to consume these articles.*

Nor is this to be confused with the materials used by contractors which go to make up a given object sold to a customer. The items here considered are simply a part of the equipment of hotels and office buildings just as the contractor's tools are a part of his equipment. We believe this to be true intent of the General Assembly as indicated by the act itself and by the practice which is a matter of common knowledge, as to which courts are not presumed to be more ignorant than other people." (Emphasis ours.)

"We conclude that appellants in this case, in selling these supplies to hotels, office buildings and other buildings, sold them for the use and consumption of those buildings as defined in the act, and that they are used by such hotels and buildings as an incident to the business of operating a hotel or office building. It follows that the decree of the circuit court is right and it is affirmed."

It is clearly evident in the case now before the Court that the plaintiffs are not in the business of selling linens, towels, washrags, plastic mattress covers, sanitary glassine bags for glasses, soap, sanitary toilet band, and postcards and stationery, but are rather in the business of selling hotel and motel accommodations and as such are consumers of those items above named, and are subject to the sales and use tax.

POINT II.

THE PUBLICATIONS IN CONTROVERSY ARE
MAGAZINES AND TRADE JOURNALS AND ARE
NOT EXEMPT FROM THE USE TAX AS NEWS-
PAPERS UNDER SECTION 59-15-4(b)(1).

The issue as to what constitutes a newspaper under excise tax statutes which exempt newspapers from such taxes was faced by the Supreme Court of Florida in *Gasson v. Gay*, 49 So. 2d 525, 526 (Fla. 1950). The plaintiff had for several years owned and operated a newsstand situated in the city of Miami, Florida, where he sold periodicals and magazines. Under a Florida statute passed in 1949 a sales tax was levied upon enumerated articles, but listed among the exemptions were "newspapers."

The plaintiff filed an action praying for a declaratory decree that such magazines as sold by his newsstand, such as *Life*, *Time*, *Newsweek*, *United States News*, *Saturday Evening Post* and similar periodicals be decreed exempt from the Sales Tax Act as qualifying under the exemption as newspapers. The Court held *en Banc* as follows:

"The provision in section 8, chapter 26319, laws of Florida, acts of 1949, exempting 'newspapers' from the operation of said chapter, had reference to the natural, plain and ordinary significance of the word newspaper — the understanding of the word newspaper in general and common usage — and did not refer to or comprehend magazines or periodicals . . . (See other authorities therein cited.) Words of common usage, when used in a statute, should be construed in their plain and ordinary signification and not in a technical sense (State [State ex rel. Hanbury] v. Tunnicliffe, 98 Fla. 731, 124 So. 279)."

The Court then held that the publications were not newspapers under ordinary signification and upheld the tax.

Under Section 59-15-4(b), U.C.A. 1953, the only items exempt from the tax are "newspapers" and not magazines or pamphlets. Further, the publications here involved are not newspapers, either by common usage or by their own definition. Of the twelve publications in controversy, seven refer to themselves, either on their covers or in their publication information, as "magazines" (Exhibits 1, 2, 6, 7, 8, 10 and 11); one refers to itself as "*monthly* management ideas for key executives" (Exhibit 13) and another as "the *journal* of accountancy" (Exhibit 9) (Emphasis ours). Exhibits 4 and 5 refer to themselves as "confidential" and privately circulated bulletins or letters. Exhibit 3 is a 46-page trade journal. It is also interesting to note that nine of the twelve publications are published monthly (Exhibits 1, 2, 6, 7, 8, 9, 10, 11 and 13). Exhibit 3 is published every other week. The record does not indicate at what intervals Exhibits 4 and 5 are published, but Exhibit 4 appears to be published at irregular intervals. As plaintiffs point out in their brief, page 10:

"The American College Dictionary, Random House, New York, defines a newspaper as 'printed publication issued at regular intervals, usually daily or weekly, and commonly containing news, comments, features and advertisements.'"

The plaintiffs also quote Sections 39, Am. Jur., Sec. 2, as stating that a newspaper is "usually in sheet form." The publications in question are either bound magazines or pamphlets and are not, in the normal context of the term, in "sheet form."

In Opinion No. 58-044 by E. R. Callister, Attorney General, dated May 28, 1958, a newspaper, for purposes of Section 59-15-4, U.C.A. 1953, is described as follows:

“In order to constitute a newspaper the publication must meet the following test:

(1) It must be published at short intervals (usually daily or weekly).

(2) It must not, when its successive issues are put together, constitute a book.

(3) It must be intended for circulation among the general public.

(4) It must contain matters of general interest and reports on current events.”

None of the publications in question fit these definitions in every respect. As pointed out previously, most are not published daily or weekly, and are not intended for circulation among the general public but rather as specialized magazines and pamphlets pertaining to the plaintiffs' business.

If any of these publications were purchased over a newsstand within the State of Utah, they would be subject to the sales tax, and it is therefore entirely right and proper that the use tax should be applied to these publications for the purpose of protecting retailers of similar items within the State of Utah. This tax is, of course, a self-imposed and assessed tax, as are many other taxes in the State of Utah, such as the income tax, and it is the responsibility of every citizen of the State to declare such taxes as are lawfully imposed under the statutes of the State of Utah.

CONCLUSION

The plaintiffs, Jerry Sine and Dora Sine, were the consumers of those items of tangible personal property referred to in Point I hereof upon which the Tax Commission properly assessed use tax; and further, the plaintiffs were and are the consumers and users of those magazines and pamphlet referred to in Point II hereof and upon which the Tax Commission properly assessed a use tax; also, the sales tax upon the sale of soda water and postcards, to which the plaintiffs have not objected, was properly assessed by the Tax Commission. There is evidence in the record justifying the Tax Commission's findings and imposition of penalties.

The decision of the Tax Commission should be affirmed.

Respectfully submitted,

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