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The Ogden Union Railway and Depot Company v. State Tax Commission of Utah : Brief of Defendant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE OGDEN UNION RAILWAY
AND DEPOT COMPANY,
a corporation,

FEB 20 1964

Plaintiff

— vs. —

STATE TAX COMMISSION
OF UTAH,

Defendant.

Case
No. 10025

BRIEF OF DEFENDANT

Upon Writ of Certiorari to Review an Order and
Decision of the State Tax Commission of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE OGDEN UNION RAILWAY
AND DEPOT COMPANY,
a corporation,

Plaintiff,

— vs. —

STATE TAX COMMISSION
OF UTAH,

Defendant.

Case
No. 10025

BRIEF OF DEFENDANT

STATEMENT OF THE NATURE OF THE CASE

This case involves a sales and use tax deficiency assessment proposed against the Ogden Union Railway & Depot Company by the defendant for the period October 1, 1957 to September 30, 1961, in the total amount of \$34,068.04.

DISPOSITION BEFORE THE STATE TAX COMMISSION

A formal hearing was held before a lawfully constituted quorum of the State Tax Commission of Utah on

Friday, August 23, 1963, upon petition and notice as required by law. As a result of this hearing, the State Tax Commission sustained the deficiency assessment imposing the tax upon the plaintiff.

RELIEF SOUGHT ON REVIEW

Plaintiff seeks reversal of the sales and use tax deficiency assessment, or, failing that, a reversal of that portion of the Tax Commission's decision imposing a sales tax upon certain services identified under Point III herein, and in addition plaintiff contests the imposition of interest on the deficiency, if upheld by this Court, from the date due until paid.

Plaintiff also seeks a reversal of the use tax portion of the deficiency assessment upheld by the Tax Commission relating to the consumption of coal by plaintiff in the direct operation of railroad revenue equipment belonging to the Union Pacific and Southern Pacific Railroads.

STATEMENT OF FACTS

The facts herein are not in dispute. The Tax Commission agrees with the plaintiff's statement, but in the interests of clarity and amplification submits the following summary and additional facts.

The plaintiff, the Ogden Union Railway & Depot Company, is a wholly owned subsidiary of Union Pacific and Southern Pacific, each of which owns one-half of its capital stock except for qualifying shares. Each of these railroad companies uses the plaintiff's terminal facilities

for their principal passenger and freight terminals at Ogden, Utah. The principal duty of the plaintiff is to inspect, repair and clean all cars arriving at or leaving the terminal facilities in Union Pacific or Southern Pacific trains.

These cars may belong to many foreign lines but are usually always in the possession of the Union Pacific or the Southern Pacific. The plaintiff provides cleaning and other services for all such cars, but no billing is made to a foreign railroad not having possession of the cars. The line in possession thereafter bills the foreign line owner for the services rendered to the particular car. (R. 42, 44-45)

In the performance of these duties, plaintiff operates the Ogden Terminal; inspects railroad cars in possession of its parent companies; performs light repairs thereon; sells hay, straw and sand to its parents in connection with the cleaning and bedding of stock cars; and furnishes labor for washing, loading and unloading of grain doors, stenciling and other mechanical and cleaning services. (R. 207-210)

The vehicles, tools and other facilities used to provide such services are either owned or leased by the Depot Company. (R. 36)

The plaintiff was organized specifically to assist its parent companies, in duties required of them under federal law and Interstate Commerce Commission regulations.

In addition to sales and services rendered to its parent companies, the plaintiff leases certain parts of its

facilities to independent third parties and receives revenue therefrom. In this regard plaintiff receives a percentage of the gross receipts of a snack bar, open to the public, located in the depot passenger building. (R. 36-37)

Plaintiff also leases space to the U. S. Government for a railroad mail terminal and receives additional revenue from locker rentals, telephones, and storage, switching and detention or demurrage of railroad cars.

The total amount of income from these sources is used, pursuant to agreement with its parent companies, to reduce expenses charged to the parents for the operation and maintenance of the terminal. (R. 37)

Only two railroads provide passenger and freight service to Ogden City. (R. 41) However, on occasion, another line may receive the benefit of the services and activities of the Depot Company. When this happens, a stipulated fee received for these services is used to reduce the net expense to the Union Pacific and Southern Pacific. (R. 30) Certain small amounts of income received as rental payments are also used to reduce expenses to the parent companies. (R. 30)

The Tax Commission seeks to impose a tax upon all amounts paid or charged by plaintiff for:

1. Sand, straw, hay and any other items of tangible personal property furnished to the Union Pacific and Southern Pacific Railroads.
2. Certain services involving repairs, renovations or installations of tangible personal property as provided in Section 59-15-4(e), U.C.A. 1953, as fully set forth hereafter.

3. Coal, purchased in Wyoming and used or consumed by plaintiff in the production of heat at its heating plant in Ogden for the direct operation of revenue equipment belonging to the parent companies.

In addition the Commission has contested the plaintiff's claim that interest cannot run from the time the taxes, in the form of an undertaking on appeal, were deposited with it; and has ordered, in the event its decision is upheld by this Court, that interest shall be due on the amount of such deficiency as may be upheld, from the date due until paid.

ARGUMENT

POINT I.

PLAINTIFF, OGDEN UNION RAILWAY & DEPOT COMPANY, IS A RETAILER WITHIN THE PROVISIONS OF SECTION 59-15-2(e), U.C.A. 1953.

That plaintiff is a retailer required to collect and pay sales taxes has never heretofore been subject to serious doubt. For at least 10 to 15 years prior to the audit, plaintiff has filed sales tax returns and collected and paid sales taxes on sales of sand and straw used for bedding, and hay used for feeding livestock, sold to the Union Pacific Company and the Southern Pacific Company. (R. 35) (R. 213)

During the period of the audit deficiency, the plaintiff continuously had the sales tax license required by

Section 59-15-3, U.C.A. 1953, of all persons engaging in business in the State of Utah.

The plaintiff contends that it is not a retailer for the following reasons:

1. That it repairs and makes installations in behalf of its parent companies and performs all services at cost and no profit whatsoever is involved. (Pl. Br. p. 16)

2. That it is not engaged in a regularly organized retail business. Plaintiff contends that an examination of its organization as set forth in the stipulation of facts reveals a most irregular and unique type of business organization, hardly the type which one would consider in relation to the definition of a "regularly organized" retail business. (Pl. Br. p. 17)

3. Plaintiff claims that it performs its entire services for its parent companies and neither attempts to nor solicits such services for any third parties. It does no advertising and makes no solicitation of any kind to the public and that, therefore, it is not "known to the public" as being engaged in a retail business of servicing railroad equipment, or in fact any service business at all. (Pl. Br. p. 17)

4. That the engaging in business in the customary sense means to voluntarily select an occupation or endeavor and to have control over the manner in which the activities or work of the business are to be carried out. Plaintiff claims that these elements are not present

in its current activities because it is required, pursuant to agreement, to meet the requirements of its parent companies, and the parent companies in turn impose those requirements on plaintiff in order to comply with federal law and regulations. (Pl. Br. p. 18)

Regarding plaintiff's contention that profit is necessary before a tax can be imposed upon it, the Illinois case of *Continental Can Co. v. Nudelman*, 376 Ill. 446, 34 N.E. 2d 397 is significant. There, the plaintiffs were manufacturing and business enterprises operating lunchrooms at which food was sold at cost to their employees. The Court held that the sales of food to employees measured a tax, although apparently none of the plaintiffs made any sale at retail other than those sales to employees in the lunchroom. In that case, the primary activity of the taxpayers was not selling at retail, but the Court held that although the particular activity that measures the tax is incidental, and not conducted at a profit, that this does not bar the tax.

A similar claim that profit was necessary in order to justify the imposition of a sales tax liability was made in the case of *Trico Electric Cooperative v. State Tax Commission*, 79 Ariz. 293, 288 P. 2d 782. The State Commission of Arizona there had levied an assessment against Trico Electric Cooperative for selling tangible personal property at retail. The tax was paid under protest and suit brought to recover the same. The plaintiff was an electrical cooperative, selling electricity to its members only, constructing most of, and maintaining all of, its distribution lines, and to that end making pur-

chases of large quantities of material. In making these purchases, often plaintiff estimated in excess of its needs. All purchases were made with the intention of using the same, but with the knowledge that a surplus might and probably would occur, and that in all probability it would be necessary in good business practice to dispose of such surplus. During the period involved, a surplus of various materials did occur and was sold to various companies and individuals for their respective consumption and not for resale. The Arizona Supreme Court held that such sales constitute a separate business of selling at retail, which was taxable. The following language is pertinent:

“While the aggregate of these materials were purchased for consumption to the extent there would be a need therefor, the excesses were bought with the knowledge that they might not and probably would not be consumed and with the expectation of selling at retail or cost whatever materials were not needed for consumption. This was a continuing practice and resulted in advantages accruing to the plaintiff. By purchasing in carload lots, better prices were enjoyed. The sales were made with the object in view of securing these advantages. To place one in the classification of doing business as a retailer, it is not essential that the activity of selling at retail be done with the object of realizing a profit directly from the sales. It is sufficient if the object be any gain, benefit or advantage, direct or indirect.”

The Commission contends that the Depot Company is adequately compensated for the services or sales it makes on behalf of its parent companies. This compen-

sation, which is received from direct charges to the parents, is apparently adequate to maintain payrolls, pay depreciation, buy new equipment and in every way carry out the plaintiff's business purpose. The presence or absence of additional monetary profit to plaintiff can hardly be determinative of whether or not it is a retailer.

Plaintiff next contends that it is not a retailer because of its irregular organization wherein it is controlled by its parent companies. A similar claim was made on behalf of a Maine manufacturer and its wholly owned subsidiary. The Supreme Court of Maine in the case of *Bonnar-Vawter, Inc., v. Johnson*, 157 Me. 380, 173 A.2d 141 (1961), spoke directly to both points — both this point and the issue of profit heretofore raised by plaintiff. In that case the taxpayer appealed from an assessment by the state tax assessor against Bonnar-Vawter, Inc. for a use tax and penalty arising out of the use within the State of Maine of certain printing plates. The court set forth the facts substantially as follows: The plates are manufactured in New Hampshire by a wholly owned subsidiary of the plaintiff. The president, board of directors, and other officers are the same in the two companies. The two corporations maintain separate books of account and separate corporate balance statements, and also file separate federal income tax returns. The employees engaged in the manufacture of the plates are employed by the subsidiary. When the plaintiff receives a printing order, it orders the plates from the subsidiary, which then orders from various supply houses the raw materials to make them. The raw materials are shipped by the suppliers to the subsidiary. No agency

agreement existed between plaintiff and subsidiary in respect to the order for raw materials, and they are not purchased by the subsidiary as the disclosed agent of the plaintiff. When received, the materials are carried as items of inventory on the books of the subsidiary. The invoice when received is approved and is forwarded by the subsidiary to the plaintiff, who enters an account payable-trade on its books and then makes payment to the vendor and then enters an account receivable-Photo Plate on its books. Photo Plate, the subsidiary, enters an account payable-Bonnar-Vawter on its books. The raw materials are then converted into printing plates. Similar transactions are carried on the books of the various parties for accounts payable, accounts receivable, labor costs and other matters fully set forth in the option.

The Court upheld the tax and stated, in referring to a claim that the subsidiary was not engaged in an activity with an object of gain, benefit or advantage, either direct or indirect:

“It will be noted that the statute does not use the word ‘profit.’ The statute used the words ‘gain, benefit or advantage, either direct or indirect.’ These words have a broader meaning than that of the word profit. One may engage in a business activity with an object of gain, benefit or advantage and not necessarily for profit [citing cases].

“The gain, benefit or advantage may be large or small, direct or indirect. Although no profit was made by Photo Plate from its transaction with the appellant, it is not difficult to discover a direct or indirect gain, benefit, or advantage therefrom. The charges made by Photo Plate were

made to cover, in addition to the cost of labor and materials, 'overhead, depreciation, taxes, etc.' We must assume from the nature of the plates that Photo Plate was the owner of equipment necessary in their production. This equipment was subject to depreciation. There was necessarily some overhead in the maintenance of the corporation. Apparently, there was a tax liability of some sort. The charges made to the appellant and paid for by it, provided revenue to Photo Plate sufficient to cover its overhead, taxes, and depreciation, and thereby to that extent at least, Photo Plate benefited from its transactions with the appellant. We must conclude that Photo Plate was engaged in an activity with the object of gain, benefit, or advantage within the meaning of the word 'business' as defined in the statute.

"Generally, courts have been reluctant to disregard the legal entity of a corporation, and have done so with caution and only when necessary in the interest of justice. The corporate entity will be disregarded when used to cover fraud or illegality or to justify a wrong. It will not be disregarded when to do so would promote an injustice, give an unfair advantage, or contravene public policy. . . .

"In the field of retail sales tax legislation and similar tax legislation, courts have generally refused for various reasons to separate the corporate entities of the parent company and the wholly owned subsidiary in order to grant relief from such taxes at the expense of the state. See *Superior Coal Co. v. Department of Finance*, 377, Ill. 282, 36 N.E. 2d 354; *Superior Coal Co. v. Department of Revenue*, 4 Ill. 2d 459, 123 N.E. 2d 713; *Northwestern Pacific R. Co. v. State Board of Equalization*, 21 Cal. 2d 524, 133 P. 2d 400; In

Re Bush Terminal Co., 2 Cir., 93 F. 2d 661; Simmons Hardware Co. v. City of St. Louis, 192 S.W. 394; 64 A.L.R. 2d 769.

“In the instant case, the appellant did not cause the plates to be manufactured by its own company. It elected to organize a subsidiary company to manufacture the plates. The reason for so doing was not disclosed by the stipulation. We must assume, however, that some economic advantage resulted therefrom. A corporation ought not to be able to take whatever advantages are gained by maintaining a subsidiary as a separate entity, and at the same time cast aside that entity whenever it becomes a burden. We see no reason under the circumstances of this case, for applying the rule that allows the corporate entity to be disregarded.”

Plaintiff's argument that it is not a retailer appears to be based in large measure upon that part of the Utah statutory definition providing that “The term ‘retailer’ means a person doing a regularly organized retail business in tangible personal property, *known to the public as such . . .*” (emphasis supplied). See Section 59-15-2(e) U.C.A. 1953.

The term “doing a regularly organized retail business in tangible personal property” apparently does not contemplate the service activity carried on by the plaintiff. Rather, it contemplates a continuous and systematic course of sales activity involving the passage of title to personal property as contrasted with the isolated and occasional sales transactions which are exempt from tax.

Because only a small portion of the tax liability proposed by the Tax Commission is based upon sales of

tangible personal property, the question of whether or not plaintiff is doing a regularly organized retail business in *tangible personal property*, known to the public as such, loses much of its applicability in the present controversy.

Many retail businesses have a small or limited public. The Tax Commission believes that no retail business establishment in the State of Utah is known to the entire general public. A retail department store is known by a larger segment of the public than is a home barbershop or repair shop. Nevertheless, there is no doubt that both consider themselves a retailers and are treated as such by city and state taxing authorities. The size of the public segment served by a retailer cannot control the nature of the business operation unless so minimal as to constitute a sale, by a person who would otherwise be a retailer, an isolated and occasional sale. See Section 59-15-2(e), U.C.A. 1953.

The Tax Commission submits that where there is a regular and continuous course of rendering taxable sales or services that the requirement of being known to the public is satisfied when the retailers' activities are known to the particular element of the public which normally receives the benefit or end product of the general sales activity of the retailer.

¹Regarding the claim that plaintiff did not voluntarily select nor control the activities sought to be taxed by the Commission and derives no profit therefrom, plain-

¹ Much of the Tax Commission's response in this regard is derived from the unpublished decision of *Wabash Railroad Co. v. Dept. of Revenue*, decided by the Supreme Court of Illinois, February 1, 1963.

tiff cites the case of *Valier Coal Co. v. Department of Revenue*, 11 Ill. 2d 402, 143 N.E. 2d 35 (1957). This case is the subject of an extensive annotation in 64 A.L.R. 2d 769.

As it involves the Illinois Retailers' occupation tax upon "persons engaged in the business of selling tangible personal property at retail . . ." It should not control the disposition of this case where the tax is on every retail sale of tangible personal property and upon amounts paid and charged for certain services.²

As far as the matter of duty is concerned, the Tax Commission thinks that the Depot Company unduly exaggerates both the element of compulsion and its legal significance. Whether the duty to repair the cars of other railroads results from an agreement among the railroads themselves, or is imposed by federal law or regulation apart from any contractual basis, is not controlling. In neither case is the plaintiff compelled to provide the services sought to be taxed, the obligation to make the repairs and provide the services in question is only a consequence of its decision to do so. The incidence of the tax depends upon the conduct involved, and not upon the influence that impels that conduct. The conduct here involved is the making of repairs, renovations and installations to tangible personal property and sales of such property, and that conduct falls within the statute.

² The Illinois tax is on the occupation and not on the sale. The act does not demand a tax unless the occupation to be taxed is selling personal property at retail.

American Brake Shoe Co. v. Department of Revenue, 25 Ill. 2d 354, 185 N. E. 2d 192.

Plaintiff argues that if it is not a “retailer” then sales by it to others which would otherwise be taxable are rendered exempt. By making this contention plaintiff overlooks the fact that the sales tax in Utah is imposed not upon “retailers” but upon “retail sales.”

Section 59-15-2(e) defines the term retail sale as “every sale within the State of Utah by a *retailer or wholesaler* to a user or consumer, except such sales as are defined as wholesale sales or otherwise exempted by the terms of this act . . .” (Emphasis supplied).

The Utah statute provides exemption for isolated and occasional sales and sales by certain agricultural producers. See 59-15-2(e). No sales of automobiles between private parties are exempt by reason of the isolated and occasional sale exemption. It is apparent, however, that the private parties to a sale of an automobile are not “retailers” and under the interpretation of the act urged by plaintiff would owe no tax on such a sale.

A similar argument was urged upon this Court in the case of *Pacific Intermountain Express Co. v. State Tax Commission*, 8 Utah 2d 144, 329 P. 2d 650 (1958). The Court there said:

“As to the contention that the Sales Tax Act is applicable only to sales made by licensed retailers, we disagree. . . . We believe the plain wording of the amendments clearly displays a legislative intent to tax all motor vehicle sales not exempted, irrespective of the vendor’s personality or status, and did not mean to tax only sales of motor vehicles by licensed retailers . . .”

Similarly, the Tax Commission submits that as the tax is upon every "retail sale" and as "retail sale" is *every* sale by a retailer or wholesaler except those sales otherwise exempted by the act, plaintiff's contention in effect reopens questions settled by the P.I.E. case, *supra*, and would eliminate the tax on the sale of an automobile by private parties.

The Commission submits that the better rule is to tax all sales within the state except those otherwise exempt. In the case of sales the Utah statute provides taxation as the rule and exemption as the exception.

POINT II.

THE PLAINTIFF, OGDEN UNION RAILWAY & DEPOT COMPANY, IS REQUIRED TO COLLECT AND FORWARD SALES TAX ON TAXABLE SERVICES RENDERED FOR OTHERS.

Plaintiff, in its brief, argues that it is not a retailer doing a regularly organized retail business, known to the public as such. It then reasons that because it is not such a retailer it is not required to collect and forward sales tax on sales of taxable services to its parent companies.

It agrees that some of the services it performs "constitute repairs, renovations or installations within the customary and ordinary meaning of those terms" (Pl. Br. p. 6), but contends that if it is not a "retailer under the Sales Tax Act definition, it is outside the scope of

both the sales tax on tangible personal property and the sales tax on services as well.” (Pl. Br. p. 12)

By this plea, plaintiff would negate the tax on all services. By definition a “retailer” is “a person doing a regularly organized retail business in *tangible personal property* . . .” (emphasis supplied). If a sale of tangible personal property by a service-oriented retail establishment is necessary before the service tax can be imposed, Section 59-15-4(e), U.C.A. 1953, is rendered meaningless, and hundreds of thousands of dollars previously paid to the state³ have been collected erroneously.

During the period of the controversy, as here before stated, the plaintiff at all times was licensed as required by Section 59-15-3, U.C.A. 1953. The present language of the license statute dates from prior to 1939, when the Emergency Revenue Act of 1933, Section 3, required a license of “any wholesaler, *retailer* or proprietor . . .” (emphasis supplied). In 1939 this language was changed by Chapter 103, Laws of 1939, to delete the words “retailer or proprietor” and exact the license only of “persons required by the provisions of this act to collect the tax.” The 1939 amendment thus evidenced a legislative intention that persons other than retailers or proprietors could be required to collect the tax.

The definition of “retailer” as provided by Section 59-15-2(e) has been in existence since the adoption of

³ The collection of which, at least by implication, was approved by this Court in the following cases: *Francom v. Utah State Tax Commission*, 11 Utah 2d 301, 356 P. 2d 285; *Howe v. State Tax Commission*, 10 Utah 2d 362, 353 P. 2d 468; *Denver & Rio Grande Western R. R. Co. v. State Tax Commission*, 11 Utah 2d 301, 358 P. 2d 352.

the Sales Tax Act. On the other hand, the services tax was adopted by Chapter 113 of the Laws of Utah 1959. Pertinent provisions of the current act provide:

“59-15-4. EXCISE TAX — RATE — From and after the effective date of this act, there is levied and there shall be collected and paid:

(a) A tax upon every retail sale of tangible personal property made within the State of Utah . . .

(e) A tax equivalent to $2\frac{1}{2}$ per cent of the amount paid or charged for all services for repairs or renovations of tangible personal property, or for installation of tangible personal property rendered in connection with other tangible personal property.”

Thus, the present statute requires a sales tax to be levied and paid upon retail sales of tangible personal property, and also an independently levied tax to be paid upon transactions involving services for repairs or renovations of tangible personal property.

Section 59-15-5, U.C.A. 1953, provides in part:

“Every person receiving any payment or consideration upon a sale of property or service subject to the tax under the provisions of this act, or to whom such payment or consideration is payable (hereinafter called the vendor) shall be responsible for the collection of the amount of the tax imposed on said sales . . .”

Section 59-15-2(e) defines “person” as:

“any individual, firm, co-partnership, joint adventure, corporation, estate or trust, or any

group or combination acting as a unit and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.”

It would appear, therefore, that the plaintiff is a statutory “person” and that, therefore, it is subject to the collection provision of Section 59-15-5, on a transaction taxable by virtue of Section 59-15-4(e), and that whether or not it is a “retailer” is immaterial to its liability for the tax upon services.

In the analogous case of *Ford J. Twaits Co. v. Utah State Tax Commission*, 106 Utah 343, the Tax Commission imposed a use tax liability upon contractors who purchased materials on their own account for construction of federal ordnance plants in Utah. The contractor contended in that case that the Utah Use Tax Act, Section 80-16-2(j), provided that the retailer, as that term is used in the Act, was responsible for the collection of the tax, and when collected that it was a debt due from the retailer to the State. It further argued that it was not such a retailer. The contractors, however, could be included under the term “taxpayers,” which was defined by Section 80-16-2 as:

“every person storing, using or consuming tangible personal property, the storage, use or consumption of which is subject to the tax imposed by this act when such tax is not paid to a retailer.”

The Utah Supreme Court said:

“Since it is not claimed that the contractors paid the tax to the people from whom they made

these purchases, whether they were 'retailers' or not, they are included in the term 'taxpayer' as used here. 80-16-7 provides for making of returns and payments by 'every taxpayer.' As shown above, in this case the contractors are taxpayers." 106 Utah 343, 347.

So here, whether or not the plaintiff is a retailer is immaterial in view of the fact that it is a "person" required to collect tax on a series of transactions which are determined to be taxable by the Utah Code.

Because of the fact that the majority of transactions subjected to tax by the defendant involve services rendered and not sales of tangible personal property, the question of whether or not it is known to the public as operating such a retail business loses much of its applicability to the present controversy.

The Tax Commission submits that the Utah Sales Tax Act is intended to impose a sales tax on all taxable sales, exchanges of property, and services, and that unless the plaintiff falls within the provisions of some particular exemption statute that the sale of tangible personal property or rendering of services is subject to the tax.

POINT III.

SERVICES PERFORMED BY PLAINTIFF
FOR ITS PARENT COMPANIES ARE TAX-
ABLE UNDER SECTION 59-15-4(e), U.C.A. 1953,
AS REPAIRS, RENOVATIONS OR INSTAL-
LATIONS OF TANGIBLE PERSONAL PROP-
ERTY RENDERED IN CONNECTION WITH
OTHER TANGIBLE PERSONAL PROPERTY.

The Commission concedes that Section 59-15-4(e) does not impose a tax upon all services as contended by plaintiff in its brief.

It is submitted, however, that if a certain service is taxable under this section it is not made less so by its inclusion by plaintiff in a nonrepair account. The Tax Commission will not concede to the plaintiff or to the Interstate Commerce Commission the power to determine the applicability of the Utah tax on services.

The Commission does claim that the following services are taxable:

1. The cleaning of passenger cars and cabooses.
2. The washing of exteriors of diesel cab windows, which consists of washing and wiping of walls and equipment, mopping floors, vacuuming rugs, and removal of refuse and garbage.
3. Checking heating, lighting and cooling systems in passenger cars.
4. Maintaining the charge on battery systems in passenger cars.
5. Lubricating of cars in transportation train service, which service consists of inspection, maintaining waste levels and oiling car journal boxes.
6. Stenciling baggage trucks and benches.
7. Coopering and reclaiming grain doors.
8. Cleaning, disinfecting and bedding stock cars.

Charges for the above mentioned services are sought to be taxed by the Commission as "amounts paid or charged for all services for repairs or renovations of tangible personal property, or for installation of tangible personal property rendered in connection with other tangible personal property" as provided in Section 59-15-4(e), U.C.A. 1953.

In order to determine whether or not the above enumerated services are taxable under Section 59-15-4(e), it becomes necessary to define what is meant by repairs, renovations or installations.

Webster's International Dictionary, 2nd Ed. (1938), defines these terms as follows:

1. Repairs. n.

5. pl. Accounting, the sum total of renewals and replacements during a given period.

1. Repair. n.

1. Act or process of repairing; restoration to a sound or good state, after decay, dilapidation, injury, loss, waste, etc.

The same dictionary does not define "renovations." It does define the verb "renovate" in the manner indicated by plaintiff. In addition it states:

Renovation. n.

Act or process of renovating, or state of being renovated, renewed or revived.

The verb “renovate” is defined :

3. To renew, make over, or repair; to restore to freshness, purity, a sound state, newness of appearance, etc., as to *renovate draperies*, or a house . . . (Emphasis supplied).

In addition plaintiff cites several additional definitions of these words as both verbs and nouns from the same dictionary. The Tax Commission does not dispute any of the definitions of actual terms in question.

It is submitted, however, that these particular words have acquired new connotations in the ever-changing complexity of the English language since the 1938 date of that edition of the dictionary. In this regard, Webster’s Third New International Dictionary, 1961 edition, defines “renovate”:

1. To restore to life, vigor activity; 2. To restore to a former state (as of freshness, soundness, purity, or newness of appearance); make over.

Repair:

1(a). The act or process of repairing; restoration to a state of soundness, efficiency, or health; (b) An instance or result of repairing; 3. Repairs (pl.) The portion of maintenance charges expended to keep fixed assets in adequate and efficient operating condition and recorded on the books as expense — contrasted with renewal and replacement.”

Under modern definitions, it would appear that:

1. Services in cleaning passenger cars and cabooses would constitute a renovation under the definition as a

restoration to a former state of freshness, soundness or newness of appearance. Similarly, services of washing the exterior windows in the cabs of diesel units, cleaning interiors of dining cars, cleaning and washing train markers, and services in cleaning, sanding and disinfecting livestock cars would constitute a similar renovation under Utah statutes.

Under the definition defining repairs as the act or process of repairing or restoration to a state of soundness or efficiency, services rendered in testing and checking heating, lighting and cooling systems and maintaining the charge on battery systems, as well as services in lubricating cars in transportation service, would be repairs taxable under the Utah statute.

Services in stenciling identification, loading grain doors, reclaiming or removing grain doors, adjusting shippers' ladings, stripping, or disconnecting cables and removing batteries from the dining car, would constitute installation services taxable under the Utah statutes. In addition, as the accounts included within the proposed sales tax deficiency assessment on services performed by the plaintiff on behalf of the Union Pacific and Southern Pacific Railroads during the period involved are charged on the books of the plaintiff as expenses and represent charges expended to keep fixed assets of the Union Pacific and Southern Pacific in adequate and efficient operating condition, such charges are properly deemed "repairs" under the provisions of the Utah statutes, as defined by Webster's Third International Dictionary, 1961 edition.

The following court decisions furnish further support for the Tax Commission's construction of these terms.

"Repair" commonly embraces not only restoration, but also renovation or renewal by any process of making good, strengthening, supplying or mending. "Repair" of interstate railway, constituting work in "interstate commerce," includes whatever may be necessary to keep subsisting railway, its structures, and equipment in safe state for interstate traffic, or to maintain and improve that state. *Boyer v. Pennsylvania R. Co.*, 162 Md. 328, 159 A. 909, 911.

"Repair" is work done on an existing structure or thing which has become imperfect by reason of action of elements or otherwise. *Board of Ed. of City of Asbury Park v. Hock*, 66 N. J. Super. 231, 168 A. 2d 829, 936.

"Repair" consists of correction of condition which has become defective because of injury or deterioration over a period of time and restores the original condition. *Masterson v. Atherton*, 149 Conn. 302, 179 A. 2d 592, 598.

In absence of any showing that the word "repairs" has a restricted meaning, in trade and commerce, it includes "maintenance painting of a ship, since the words "maintain" and "maintenance" are frequently used in the sense of keeping a thing in good condition by means of repairs. *E. E. Kelly & Co., v. United States*, 17 C.C.P.A. 30, 32 (Customs).

The words “maintain” and “repair” practically mean one and the same thing. *Verdin v. City of St. Louis, Mo.*, 27 S.W. 447, 451, 33 S.W. 480, 494.

Under the same definitions cited by plaintiff, the Court in *Tesche v. Best Concrete Products, Inc.*, 160 C.A. 2d 256, 325 P. 2d 150, found “repair” to encompass certain cleaning operations, including the removal of cement which had adhered to a cement mixer. A California State Safety Order there required certain controls when the mixer was in use during repair work.

POINT IV.

COAL PURCHASED BY PLAINTIFF OUT OF THE STATE FOR USE AND CONSUMPTION IS SUBJECT TO USE TAX WHEN USED IN PROVIDING HEAT FOR OPERATING REVENUE EQUIPMENT OF PLAINTIFF'S PARENT CORPORATIONS.

Plaintiff purchased coal outside the State of Utah for use within the state in connection with the production of heat for the direct operation of Union Pacific and Southern Pacific Revenue equipment.

As the coal was purchased and consumed by the plaintiff, it is subject to use tax under the provisions of Section 59-16-3, U.C.A. 1953, unless otherwise exempt.

This section provides:

“There is levied and imposed an excise tax on the storage, use or other consumption in this state of tangible personal property purchased for storage, use or other consumption in this state at the rate of 2½% of the sales price of such property.

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

Plaintiff correctly states the applicability of sales tax exemptions to the use tax. Because of the rule of *Genera Steel Co. v. State Tax Commission*, 116 Utah 170, 209 P. 2d 208 (1949), the only sales of coal properly subject to use taxation are those provided by Section 59-15-4(b), U.C.A. 1953, which states that a tax equivalent to 2½ per cent of the amount paid:

“(2) To any person as defined in this act including municipal corporations for gas, electricity, heat, coal, fuel oil or other fuels sold or furnished for domestic or commercial consumption. . . .”

shall be collected and paid.

The Tax Commission submits that consumption of coal so purchased by plaintiff herein clearly constitutes “commercial consumption” within the meaning of the Utah statute.

Coal sold for industrial consumption has been exempt from Utah sales and use taxation since 1943. See *Union Portland Cement Co. v. State Tax Commission*, 110 Utah 152, 176 P. 2d 879.

The imposition of a tax on “commercial consumption” does not manifest an intention to tax energy sold for industrial consumption, and the word “commercial” is not intended to include all business activities. The

Commission agrees that the term "commercial" may have a broad or a narrow scope. The broad meaning encompasses all business, while the narrow sense includes only those enterprises buying or selling goods or services. See *United States v. Public Service Co. of Colorado*, (C.C.A. Colo.), 143 F. 2d 79.

The plaintiff cites the case of *State ex rel. Kansas City Power & Light Co. v. Smith*, 342 Mo. 75, 111 S.W. 2d 513. There, electricity sold to a company to propel *its* cars over *its* streetcar system was determined not to be used for commercial purposes.

Here, however, the sale of coal to plaintiff is for the production of heat for the Union Pacific and Southern Pacific Railroads, not for plaintiff's own use and benefit.

Plaintiff receives benefits from the production of such heat. As it receives these benefits from services it provides to others, its consumption is hardly the same as that in *State v. Smith, supra*.

Plaintiff's corporate survival depends upon its business of providing service for others. It receives tangible benefits in return for such services. It is actively engaged in the commercial furnishing of services to its parent companies, and coal purchased and used for this purpose is sold or furnished to plaintiff for commercial consumption.

POINT V.

THE DEPOSITING OF AN UNDERTAKING PURSUANT TO SECTION 59-15-16, U.C.A.

1953, AS A CONDITION PRECEDENT TO
APPEAL, DOES NOT CONSTITUTE PAY-
MENT OF THE TAX HEREIN.

Plaintiff asserts that by paying all taxes and interest assessed by the Tax Commission it is relieved of further interest charges accruing after such undertaking is filed.

The Tax Commission contends that the filing of such an undertaking does not constitute a payment of taxes. The Commission does not have full use and control of amounts so paid because of the fact that should the taxpayer prevail the deposit must be refunded.

Revenue collected from sales taxes is required by Section 59-15-21, U.C.A., to be deposited daily with the State Treasurer and credited to the state general fund. To construe an undertaking as payment of tax is to require the depositing of funds so paid in the general fund of the State of Utah. Such money is thereafter subject to distribution or appropriation to state purposes.

Should the decision in this case require the return to the taxpayer of amounts deposited as an undertaking, the Tax Commission would then be powerless to effect a refund of monies so paid. And it is further possible that the funds could have been appropriated to some state purpose as to be unavailable for refund through other than legislative action.

Payment implies the existence of a debt, of a party to whom it is owed, and of satisfaction of the debt to the party. *Tuttle v. Armstead*, 53 Conn. 175, 22 A. 677, 678.

As plaintiff's appeal herein constitutes a denial of tax liability and as the Tax Commission's participation in this appeal constitutes a denial of satisfaction, it is obvious that "payment" of the tax cannot be made until after this Court renders a decision on this matter.

CONCLUSION

The plaintiff sells tangible personal property within the State of Utah. It also performs taxable services. The fact that the market for these sales and services is relatively limited cannot be determinative of whether or not they are taxable. Both sales and service are continuous and for the corporate benefit of the Depot Company. The only market for plaintiff's commercial activities is fully and adequately served thereby.

For these reasons the Tax Commission urges that its decision be upheld.

Respectfully submitted,

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