

1964

The Ogden Union Railway and Depot Company v. State Tax Commission of Utah : Additional Authorities

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED
APR 13 1964

THE OGDEN UNION RAILWAY
AND DEPOT COMPANY,
a corporation,

Clark, Supreme Court, Utah

Plaintiff,

ADDITIONAL AUTHORITY

- vs. -

Case No. 10025

STATE TAX COMMISSION
OF UTAH,

Defendant.

Pursuant to Rule 75(p)(2), the defendant, State Tax Commission of Utah, hereby submits for insertion as an addition to its brief heretofore filed in the above entitled matter, and to be included on page 28 after line 11 of said brief, the newly uncovered case of Wisconsin Electric Power Co. v. United States of America, 336 U.S. 176, 93 L.Ed. 591 (1948). This case stands for the proposition that electric energy supplied through a single meter to a dairy plant is energy sold for commercial consumption where the electricity was used to prepare products for sale.

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

AN 3 1 1901

Court, Utah

No.
10025

PLAINTIFF'S BRIEF

Upon Proceedings for Review of the Amended
Decision of the Utah State Tax Commission,
Case No. 216-A

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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

No.
10025

PLAINTIFF'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a proceeding involving a deficiency sales and use tax assessment imposed against plaintiff by defendant for the period, October 1, 1957, to September 30, 1961. The sum presently in dispute is \$33,471.78, together with interest, of which \$33,219.96 is sales tax on materials and services and \$251.82 is use tax.

DISPOSITION BEFORE UTAH STATE TAX COMMISSION

Formal hearing, after a written petition had been filed by plaintiff, was held before defendant. From a

Decision and a later Amended Decision of defendant, substantially adverse to plaintiff, it commenced proceedings for review by this court.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the entire sales tax deficiency assessment sustained by defendant in its Amended Decision, or that failing, a reversal of the portion of said sales tax deficiency where defendant has imposed a sales tax upon certain services, identified under Point II, and, in addition, plaintiff requests an order requiring defendant to give favorable consideration to plaintiff's claim for refund or credit.

Plaintiff also seeks a reversal of that portion of the use tax deficiency assessment sustained by defendant in its Amended Decision which relates to the consumption of coal by plaintiff in the direct operation of railroad revenue equipment.

STATEMENT OF FACTS

Plaintiff is a Utah corporation having its principal place of business at Ogden, Weber County, Utah. (R. 205) It owns, maintains and operates a railroad terminal facility at Ogden for the joint and equal benefit of Union Pacific Railroad Company and Southern Pacific Company, each of which owns 50 per cent of plaintiff's capital stock, except for qualifying shares of individuals. Both Union Pacific and Southern Pacific (as they will

hereinafter be identified) are railroad corporations operating in both passenger and freight service in interstate commerce, and both operate lines of railroad into plaintiff's terminal at Ogden, Utah, and use said terminal facilities as their principal passenger and freight terminals. (R. 206)

For many years plaintiff has operated the terminal facilities pursuant to an agreement with its parent companies, commonly known as the Ogden Yard Agreement of 1920. This agreement outlines the basic and overall design of the operation of the terminal by plaintiff as well as the duties and responsibilities of plaintiff as directed by its parent companies. (R. 22, 204-229)

One of the principal responsibilities of plaintiff in the operation of said terminal, pursuant to said agreement, is to perform all inspections and running or light repair services on behalf of Union Pacific and Southern Pacific at Ogden for all cars, both foreign and domestic, passenger and freight, arriving at or leaving plaintiff's terminal facilities in Union Pacific and Southern Pacific trains, and to provide whatever materials are necessary to make said light repairs. (R. 207)

In addition, plaintiff operates the passenger and freight stations and furnishes all necessary labor for switching cars. It also supplies the labor and material to its parent companies for the following services: (1) cleaning of passenger cars, diners and cabooses, which consists of washing and wiping walls and equipment, mopping floors, vacuuming rugs and removal of refuse and garbage therefrom; (2) washing the exteriors of

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windows in diesel cabs; (3) inspecting and checking the heating, lighting and cooling systems in passenger cars and in maintaining the battery charges therein by temporarily connecting the same to a power source; (4) lubricating cars in transportation service, which consists of inspecting and maintaining the waste and oil levels in journal boxes; (5) icing and watering passenger cars and cabooses; (6) stenciling baggage trucks and benches; (7) loading, cooping and reclaiming (removing) portable grain doors from freight cars; (8) cleaning, bedding, sanding and disinfecting livestock cars; (9) cleaning train markers, lamps and lights; (10) adjusting ladings in cars; and (11) stripping or disconnecting cables and removing batteries from diners. Plaintiff also cleans, maintains and repairs the terminal and all facilities connected therewith, including its own equipment. (R. 207-208, 211, 214-229)

All of the foregoing services and any other activities performed by plaintiff are directed primarily to the efficient operation of the railroad business of its parent companies at Ogden and elsewhere, and to assist Union Pacific and Southern Pacific in carrying out the responsibility imposed on them by federal law (Interstate Commerce Act, 49 U.S.C., Chapter 1, Secs. 10, 11, 13 and 21) to inspect, repair and maintain all railroad cars, both domestic and foreign, for the purpose of maintaining safety, to keep traffic moving and to provide an adequate supply of cars in interstate commerce. (R. 206-207)

The entire net expense of operating and maintaining the terminal companies, as set forth in the Ogden Yard

Agreement, both for services as well as materials, is apportioned to Union Pacific and Southern Pacific by plaintiff at cost on an agreed formula basis without monetary profit of any kind to plaintiff. (R. 27, 207-8) In fact, said agreement prohibits plaintiff from making a monetary profit. (R. 29)

In the operation of the terminal facilities, plaintiff leases certain limited areas to independent third parties. In this respect there is a snack bar in the depot passenger building open to the public and plaintiff receives a percentage of the gross receipts from the operation thereof. It leases space to the United States for a railroad mail terminal and it also receives minor sums for locker rentals, telephones for cabs, and for storage, demurrage and switching. The total average of all sums paid to plaintiff from the foregoing sources, or otherwise, is less than 3 per cent of the cost of operating the terminal facilities, and pursuant to the Ogden Yard Agreement must be used exclusively to reduce expenses charged to Union Pacific and Southern Pacific for the operation and maintenance of the terminal. (R. 30, 31, 36-38, 224-225)

Plaintiff acts primarily and almost exclusively for the joint and equal benefit of Union Pacific and Southern Pacific, at their specific instance and instruction, and for no other persons or corporations. It neither solicits nor undertakes to perform services for other railroad companies or for the general public in the normal commercial trade and does no advertising of the type of business in which it is engaged. No third parties seek out

and request its services. Its business nature is neither generally known to non-railroad interests nor, with the exception of its parent companies, to railroad interests as well. (R. 32, 41, 42, 208)

During the period of the audit, plaintiff had a sales tax license issued pursuant to Section 59-15-3, U.C.A., 1953, and collected and forwarded to defendant taxes on materials used as services and repairs on behalf of Union Pacific and Southern Pacific, as well as for sand and straw used for bedding and for hay used in feeding livestock sold to Union Pacific and Southern Pacific. (R. 33, 34, 213) However, plaintiff has filed a claim for a credit or refund of the entire amount of said taxes on the ground said taxes were erroneously paid and collected because plaintiff alleges it is not a retailer within the scope and application of the Sales Tax Act. (R. 33) Defendant denied said claim for refund or credit in its Amended Decision. (R. 258)

Although plaintiff disputes the authority of defendant to assess a sales tax on any of the services performed for Union Pacific and Southern Pacific on the theory plaintiff is not a retailer within the scope of the Sales Tax Act, it does agree with defendant that some of the services performed at Ogden constitute repairs, renovations or installations within the customary and ordinary meanings of those terms. As to others, however, there is complete disagreement. In this regard plaintiff's mandatory accounting system provides some assistance in establishing a line of demarcation. The system followed is the one prescribed by the Interstate Commerce

Commission, in accordance with Section 20 of the Interstate Commerce Act, in the "Uniform System of Accounts for Railroad Companies." (Ex. 6, R. 230) Under said system all of the charges made by plaintiff to its parent companies for services in repairing cars must be charged to Accounts 314 and 317, which are entitled "Freight Train Cars; Repairs," and "Passenger Train Cars; Repairs," respectively. There is no dispute as to the nature of these services. On the other hand, virtually all other services performed by plaintiff, as heretofore identified, must be charged to Account 402, an operating account entitled "Train Supply and Expense," and includes all miscellaneous expenses of transportation train service, such as cleaning, heating, lighting, lubrication, icing and watering cars.

Defendant claims that the following services charged to Account 402 are subject to the sales tax:

1. Cleaning passenger cars, diners and cabooses — Defendant claims that such services constitute a renovation of tangible personal property. (R. 257)

2. Testing and checking the heating, lighting and cooling systems in passenger cars and in maintaining the charge in the battery systems in said cars (R. 209) — Defendant claims that such services constitute a repair to tangible personal property. (R. 258)

3. Lubricating cars in transportation train service — Defendant claims that such services constitute a repair to tangible personal property. (The oil level is reduced through sustained car use.) (R. 258)

4. Stenciling identification on baggage trucks and benches — Defendant claims that such services constitute an installation. (R. 258)

5. Reclaiming or removing portable grain doors from cars after a shipment has been completed — (Reclaiming is the opposite of cooping which involves the placing of inner doors into freight cars prior to grain shipments). (R. 211) Defendant claims that such services constitute an installation. (R. 258)

6. Cleaning and washing the exterior windows on cabs of diesel units — Defendant claims that such services constitute a renovation of tangible personal property. (R. 257)

7. Cleaning and washing train markers, lamps and lights — Defendant claims that such services constitute a renovation of tangible personal property.

8. Cleaning, sanding and disinfecting livestock cars — Defendant claims that such services constitute a renovation of tangible personal property. (R. 258)

It is plaintiff's contention that the foregoing services carried in Account 402 are not subject to the sales tax because they are not taxable services within the proper scope and application of the Service Tax Amendment.

Defendant has also sustained a use tax on the consumption of coal purchased by plaintiff in Wyoming and used in the production of heat at Ogden for the direct operation of Union Pacific and Southern Pacific revenue

equipment. In the past, defendant has never assessed a sales or use tax against plaintiff for electricity purchased and used by it for the same purpose. (R. 212)

On November 7, 1945, defendant issued a formal Decision in which it ruled that there was no sales tax imposed by law upon purchases of coal in Utah used in the generation of steam for the propulsion of railroad locomotives for movement of freight and passenger equipment, thus recognizing that such use was non-commercial within the scope and application of the sales tax laws. (R. 251-253) There is nothing in the record indicating the Decision has ever been modified or annulled.

On November 14, 1963, plaintiff paid defendant the full amount of the sales and use taxes, interest and other charges, sustained, audited and stated in defendant's Amended Decision in the total sum of \$40,371.13. In its receipt for said payment, defendant ordered that in the event proceedings are taken for review of said Amended Decision, and said Decision, or any part thereof, is ultimately sustained, it shall then compute, assess and take whatever legal steps are necessary to collect additional interest from and after November 14, 1963, to the ultimate date of payment upon any principal amount so sustained. (R. 260)

ARGUMENT

POINT I

PLAINTIFF IS NOT A RETAILER DOING A REGULARLY ORGANIZED RETAIL

BUSINESS, KNOWN TO THE PUBLIC AS
SUCH, WITHIN THE SCOPE AND MEAN-
ING OF THE UTAH SALES TAX ACT.

Under modern day sales tax concepts, if a tax on a transaction does not offend some constitutional principle, a legislature may include such transaction within the statutory definition of a sale and impose the liability for the tax upon the seller or consumer. And, with such broad leeway, such a transaction may be a sale for tax purposes and not a sale for other purposes. The meaning of words or phrases in sales tax statutes must therefore be considered within their proper context to determine what are and what are not taxable transactions. Thus, there are transactions which are not in the form of a sale but which, nevertheless, fall within the taxing statute. On the other hand, there are transactions which may qualify as sales, but which are not taxable because they do not qualify under the definition of a taxable retail sale or service under the applicable sales tax laws.

It is our purpose to demonstrate in the present case that the entire sales tax deficiency assessed by the defendant against plaintiff should be set aside because the transactions between plaintiff and its parent companies involving both transfers of materials as well as services, fall into the latter category. It is our contention that the special type of business activity and the unique circumstances under which plaintiff operates, as set forth in the statement of facts, removes it from the scope and application of the "Emergency Revenue Act of 1933," as amended, hereinafter called the Sales Tax Act.

The terms "retailer" and "retail sale" are defined in Section 59-15-2, Utah Code Annotated, 1953, as amended, in subsection (e) as follows:

*"The term 'retailer' means a person doing a regularly organized retail business in tangible personal property, known to the public as such and selling to the user or consumer and not for resale, and includes commission merchants and all persons regularly engaged in the business of selling to users or consumers within the state of Utah; but the term 'retailer' does not include farmers, gardeners, stockmen, poultrymen or other growers or agricultural producers, except those who are regularly engaged in the business of buying or selling for a profit. The term 'retail sale' means 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 Added)

Under Section 59-15-4, Utah Code Annotated, 1953, as amended, in subsection (a), a tax is imposed upon "every retail sale of tangible personal property made within the State of Utah." Subsection (e) of that section, which was added by amendment in 1959 (Chapter 113, Laws of Utah, 1959) imposes a service tax on "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." Since the Service Tax Amendment has been included in and made a part of the Sales Tax Act, it properly follows that the tax on services is subject to any and all limita-

tions imposed on the authority of defendant to impose a tax on retail sales of tangible personal property as set forth in the Act, and that the definition of "retailer," above quoted, is applicable to each type of transaction. Such a position is consistent with the general rule of construction of statutory amendments set forth in 82 C. J. S., Statutes, Section 384:

"Amendments are to be construed together with the original act to which they relate as constituting one law, and also with other statutes on the same subject, as part of a coherent system of legislation."

Thus, if plaintiff 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. It also means that the basic limitations governing the application of the sales tax on sales of tangible personal property should be the same as those applied to the application of the sales tax on services.

The Utah Sales Tax Act does not set forth a definition of the phrase "a regularly organized retail business" or the phrase "known to the public as such," and no Utah case, to our knowledge, has specifically construed that language with respect to the scope of the application of the Sales Tax Act. It appears that the nearest the point has been reached was in *Pacific Inter-mountain Express Co. v. State Tax Commission*, 8 Utah (2d) 144, 329 P. (2d) 650 (1958), containing an inference in favor of the type of limitation advocated by plaintiff in this case with respect to the scope of the Sales

Tax Act. In that case PIE had acquired all assets, including trucks, trailers and semi-trailers, of several concerns that directly or indirectly had been operating highway transportation rolling stock, and claimed that no sales tax was due on the transfer of said equipment because it was not a "licensed retailer" of motor vehicles.

In considering the point, the court states:

"As to the contention that the sales tax act is applicable only to sales made by licensed retailers, we disagree, notwithstanding the able argument of counsel pointing out that the taxing section (59-15-4) is concerned with *retail* sales, that the definition section (59-15-2) says a *retail* sale is made by a *retailer* doing a regular organized *retail* business *known to the public to be such*. Before 1949 the contention that the act applied only to retail sales by a licensed dealer would have been conceded, but since the 1949 amendments such concession could not be made. 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, the legislation announcing that *no sale of a motor vehicle should be deemed occasional* (i. e., made by a non-retailer and hence not taxable), and that on *all* sales of motor vehicles *the tax shall be paid by the purchaser* (not a licensed dealer). * * *

It seems clear that the sole reason for ruling against PIE on this point was the 1949 amendment, which was added to the definition section (59-15-2) of the Sales Tax Act and provided "that no sale of a motor vehicle shall

be deemed isolated or occasional for the purposes of this act.” That amendment, of course, is limited to motor vehicle transfers and is not involved in any way in the present case. Therefore, without the injection of that amendment into the court’s consideration of the limitation of the scope of the Sales Tax Act as advocated by PIE, the concession that the language in Section 59-15-2 would have excluded PIE’S acquisition from the sales tax, is indicative of the court’s recognition of a definite limitation on the scope and application of the Sales Tax Act. In this regard the court suggests that there are certain limitations in the scope of the Sales Tax Act based upon the “personality or status” of the vendor. The court also alludes to the fact that in purchasing the equipment involved, PIE, whose business is that of a motor carrier transporting goods in interstate commerce, was not in a “retailer” status in acquiring the rolling stock involved from concerns in the same business and also was not “known to the public to be such.”

Other states have considered the scope and application of their respective sales and use tax acts. In most instances where the matter has been in issue the legislature has provided a specific definition of the term “business” as applied to the transactions involved, and the decisions have been based upon the special legislative mandate. In those cases “business” has been customarily defined as any activity engaged in by a person with the hope of gain, profit or advantage, either direct or indirect. Where such a definition is present, the courts have uniformly held that the term is not used in the nor-

mal commercial sense and no profit on the sale is required to be subject to the tax. For example, see *Market Street Ry. Co. v. California State Board of Equalization*, 137 Cal. App. (2d) 87, 290 P. (2d) 20 (1955); *Trico Electric Cooperative v. State Tax Commission*, 79 Ariz. 293, 288 P. (2) 782 (1955); *Bonnar-Vawter, Inc. v. Johnson*, 157 Me. 380, 173 A. (2d) 141 (1961); and *Sumner Rhubarb Growers' Association v. State*, 55 Wash. (2d) 781, 350 P. (2d) 478 (1960).

Utah has no such specialized definition of "business" in the Sales Tax Act. However, it is a part of the Utah Use Tax Act, (Section 59-16-2(h)).

Of course, under Point I, all of the taxes in question are sales taxes and not use taxes. Therefore, the scope of the application of the Use Tax Act and the definitions set forth therein are neither material nor helpful. Neither are the decisions of other states having similar specialized definitions of business. The proper limitation on the application of the Utah sales tax laws is to be found in the Sales Tax Act itself. The issue is basically: What vendors of sales and service did the legislature intend to include within the scope and application of the Utah Sales Tax Act? The answer lies in the proper construction of the language in Section 59-15-2 where the title to that section includes the word "scope." In construing that language, certain legal guide lines must be followed. The language must be considered according to its context and generally approved and normal usage, unless there is evidence of a contrary legislative intent through a statutory definition specifically prescribed. There is no spe-

cial statutory definition involved here. Therefore, the words used in the statute should be given their popular and ordinary meaning and interpretation. However, since the statute is a tax law, it must be strictly construed against the defendant, and if the right to tax is not plainly conferred by the statute, it is not to be extended by implication. *Ingersoll Milling Machine Co. v. Department of Revenue*, 405 Ill. 367, 90 NE (2d) 747 (1950); *PIE v. State Tax Commission*, *supra*; and *National Dairy Products Corporation v. Carpenter*, 326 SW (2d) 87 (Mo., 1959). The Utah State Tax Commission is not entitled by an attempted all-inclusive interpretation of taxing statutes, or by administrative fiat, to extend the same beyond their legislative limits. *Ruby Chevrolet, Inc. v. Department of Revenue*, 6 Ill. (2d) 147, 126 NE (2d) 617 (1955).

Based upon the factual circumstances present here and what we believe to be the proper scope of the Sales Tax Act, plaintiff is not a "retailer" and clearly falls outside its application for at least four reasons:

FIRST: Plaintiff repairs and makes installations in behalf of its parent companies and performs all services at cost and no profit whatsoever is involved. In the normal commercial sense a "business" contemplates buying and/or selling for a profit. *Valier Coal Co. v. Department of Revenue*, 11 Ill. (2d) 402; 143 NE (2d) 35 (1957); *Kopp v. Baird*, 79 Idaho 152, 313 P. (2d) 319, 323 (1957); *WSAZ, Inc. v. Lyons*, 254 F. (2d) 242 (CCA-6, 1958); *Cherot v. U. S. Fidelity & Guaranty Co.*, 264 F. (2d) 767, 769, (CCA-10, 1959); and *Weatherford*

v. *Arter*, 135 W. Va. 391, 63 SE (2d) 572, 574 (1951). Having no reason or basis to apply a special meaning to the term “business,” it should follow the generally accepted and customary meaning, restricting the same to activities engaged in solely for profit. Since plaintiff earns no profit and, in fact, is not permitted to do so under the Ogden Yard Agreement, it does not qualify as a retailer doing a regularly organized retail business in the present case.

The necessity for a profit element, under the Utah Sales Tax Act, is also bolstered by the specific language in the definition of a retailer which expressly excludes from such status those persons engaged in agricultural or livestock pursuits unless they are “regularly engaged in the business of buying or selling for a *profit*.” The necessity of the element of profit in those situations, should, by following a construction in favor of the taxpayer, extend to all retail businesses in the state.

SECOND: To qualify as a retailer, the vendor must be engaged in a “regularly organized” retail business. An examination of the organization of plaintiff as set forth in the Statement 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 subject to the Utah Sales Tax laws.

THIRD: Plaintiff performs its entire services for its parent companies and neither solicits nor undertakes to perform such services for any third party or for the

general public in the normal commercial trade. It does no advertising and makes no solicitation of any kind. Its business is neither generally known to nonrailroad interests nor, with the exception of its parent companies, to railroad interests. It is therefore not “known to the public” as being engaged in the retail business of servicing railroad equipment, or in fact, any retail sales or service business at all. It is of note that the phrase “known to the public as such” was deleted from Section 59-15-2(e) by the 1963 Legislature (Chapter 140, Laws of Utah, 1963).

FOURTH: To engage in a “business” in the customary sense means to *voluntarily* select that occupation or endeavor and to have control over the type and manner in which the activities or work of the business are to be carried out and to fix the charges for the work done or the material sold. Those elements are not present in plaintiff’s business. It is entirely subservient to its parent companies, and may operate solely under their direction and control. They require plaintiff, pursuant to agreement, to assist them in complying with federal laws and regulations relating to car service, and to perform all services without any profit.

A case in point is *Valier Coal Co. v. Department of Revenue*, 11 Ill. (2d) 402, 143 NE (2d) 35 (1957), where the court held that Valier was not subject to the Illinois Retailers Occupation Tax upon its sales of coal to its parent corporation because it was not engaged in the business of selling tangible personal property at retail as contemplated by the Illinois Retailers Occupation Act.

Valier, pursuant to an order of the Illinois Public Utilities Commission, was not only required to sell coal to its parent at actual cost, but also was prohibited from selling coal to the general commercial trade. However, Valier was required to sell small amounts of coal to its employees, on which it paid a tax. It supplied its parent with coal at a price determined by the actual cost of production without taking into consideration any element of profit. Moreover, it deducted all income from other sources from the cost of operation, in computing net cost, and therefore did not recover the full cost of operation from its parent company.

The court held that these requirements were tantamount to prohibiting the coal company from engaging in business since the right to sell to the general trade and to make a profit or realize a gain are ordinarily incidents of being engaged in retail business, even though the imposition of the tax did not, and could not, depend upon whether a profit was actually realized.

There is no difference whatever to Valier's situation and plaintiff's in the present case. Here, plaintiff's parent companies are required by federal law to furnish a safe, suitable and adequate car service. Said parent companies, owning virtually all of the stock in plaintiff, can and do require plaintiff to assist in fulfilling that federal obligation. Plaintiff is obligated, pursuant to the Ogden Yard Agreement to perform those services. There is no element of profit involved. Since those services are compulsory and rigidly controlled, they cannot qualify plaintiff as being engaged in a voluntary retail

business as contemplated by the Utah Sales Tax Act. Therefore whether rigidly limited and forbidden to make a profit by a state administrative ruling, as was the taxpayer in the *Valier* case, or whether required by agreement to assist its parent corporations to satisfy mandatory and compelling requirements of federal law on a cost basis, as is plaintiff in this case, the principal elements of a voluntary and “regularly organized retail business” involving retail sales are completely absent.

Since plaintiff does not qualify as a “retailer” under the Utah Sales Tax Act, and therefore makes no retail sales, then it consistently follows that any sales taxes heretofore paid on materials should now be refunded or credited pursuant to plaintiff’s application therefor.

POINT II

THE SERVICE TAX AMENDMENT DID NOT INTEND TO IMPOSE A SALES TAX ON ALL SERVICES, BUT ONLY THOSE SERVICES WHICH CONSTITUTE ACTUAL REPAIRS OR RENOVATIONS TO TANGIBLE PERSONAL PROPERTY, OR THE INSTALLATION OF TANGIBLE PERSONAL PROPERTY RENDERED IN CONNECTION WITH OTHER TANGIBLE PERSONAL PROPERTY.

A number of the services performed by plaintiff for its parent companies at Ogden are not charged to its regular and customary repair accounts. Defendant claims that many of said services are subject to the sales tax, and plaintiff claims they are outside the scope of the sales

tax. The list of items in dispute is set out in the statement of facts.

This Court has never construed the language in the Service Tax Amendment, and we have found no sales tax case from another jurisdiction dispositive of the matter. As a consequence we again have a problem of statutory construction with no case in point and with no special definition of terms provided by the legislature. Accordingly, the language involved should be given its ordinary popular meaning and interpretation. However, the amendment must be strictly construed, in favor of the taxpayer, and its language not extended or enlarged beyond clear implication. In other words, the defendant is not entitled to expand the interpretation of the amendment to an all-inclusive service tax but must give due consideration to each word in the statutory language and respect all limitations which said words, in their normal meaning, reasonably impose on the taxing authority.

It is apparent that the legislature did not intend an all inclusive service tax when reference is made to the title to said amendment, in Chapter 113, Laws of Utah, 1959, which provides as follows:

* * *

“An Act Amending Section 59-15-4, Utah Code Annotated, 1953, Relating to the Rate of Taxation Under the Emergency Revenue Act of 1933; and Providing a Tax on *Certain Services*.” (Emphasis Added)

The Service Tax Amendment, 59-15-4 (e), provides as follows:

“A tax equivalent to 2½% of the amount paid or charged for all services for repairs or renova-

tions of tangible personal property, or for installation of tangible personal property rendered in connection with other tangible personal property.”

It seems clear from an examination of the wording of the Service Tax Amendment that the legislature did not intend to impose a tax on all services relating to tangible personal property. If that had been the legislature’s purpose, it would have been a simple matter to have said so in concise terms. The addition of language confining the tax to certain types of service transactions, indicates a clear intention on the part of the legislature to limit the scope of the application of the amendment to those transactions, and to no others. Therefore, before a service is properly taxable it must constitute either a “repair,” a “renovation” or an “installation.” The critical problem of construction is, first, to review each of those terms on the basis of their popular and ordinary meanings, and, second, to consider said terms in the context of the Service Tax Amendment.

As to repairs:

Webster’s New International Dictionary, 2nd Edition, the edition in standard use when the Service Tax Amendment was enacted in 1959, defines repair as follows: “To restore to a good or sound state after decay, injury, dilapidation or partial destruction.” Cases construing the meaning of “repair” or “repairs,” consistently quote and adopt this definition. See Vol. 36 A, Words and Phrases, Permanent Edition, page 744, et seq., especially pages 772 to 776.

According to numerous cases analyzed in 76 C.J.S.,
page 1169:

“REPAIR. The word is plain, unambiguous and not technical, and is to be taken as used in its ordinary sense, and should not be given a technical or strained interpretation. While it has been said that the term is incapable of exact definition, and there are some varying shades of difference in the general definitions, the courts have generally adopted the commonly accepted meaning of the word as defined by the lexicographers. It is often used in the plural.

“The word ‘repair’ involves the idea of something preexisting, and presupposes something in existence to be repaired or the existence of the thing to be repaired. The term contemplates an existing structure or thing which has become imperfect by reason of the action of the elements or otherwise; that is, something the condition of which has been affected by decay, waste, injury or partial destruction.

“The word ‘repair’ relates to the preservation of property in its original condition, and commonly embraces rebuilding and restoration, and, in addition, renovation or renewal by any process of making good, strengthening, supplying, or mending; and it implies the doing of work again, or redoing some work found defective, or which has become defective from use and is in need of doing over again. The term does not carry the connotation that a new thing should be made, and in no sense does it mean to create a distinct entity, but ordinarily it contemplates only a restoration to the originally existing condition, as near as may be. Thus, under authority to repair there can be no enlargement and improvement except in so far

as the work of repairing necessarily enlarges and improves; but in practical conduct a repair very often results in a betterment or improvement as compared with the original condition.”

A typical statement considering the meaning of repair is found in *Mozingo v. Wellsburg Electric Light, Heat & Power Company*, 101 W. Va. 79, 131 SE 717 (1926), as follows:

“What is meant by ‘repair’? The numerous texts and courts whose decisions we have examined have adopted the commonly accepted meaning of the verb ‘repair’ as defined by the lexicographers. Webster says: ‘To restore to a sound or good state after decay, injury, dilapidation, or partial destruction.’ The Standard and Century dictionaries define the term in the same language, except that the words ‘mend’ and ‘renovate’ are added as synonyms. (Citing authority.) ‘Repair means to restore to its former condition, not to alter either the form or the material.’ (Citing authority.) And it is generally held that repair does not mean to alter or change condition, or replace with new or different material.”

From the foregoing consideration, it seems clear that to constitute a “repair” to tangible personal property, in the normal and popular meaning of the term, there must be a restoration of existing tangible personal property to its original state, following decay, injury, dilapidation or partial destruction. It contemplates neither a change in form nor a change in material and does not encompass improvements, additions or alterations. By its nature the basic purpose of repair is to

return tangible personal property to a functional state of operation. Since the lubrication of cars by plaintiff is a service directed solely to continuing and maintaining, not returning, the functional state of journal boxes, and is not concerned with a restoration thereof following decay, injury, dilapidation or partial destruction, such lubrication services do not constitute repairs within the scope of the Service Tax Amendment.

As to renovations:

Webster's defines renovate as follows: "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 . . ."

The definition in 76 C.J.S., page 1166, is similar: "To make as good as new; restore after deterioration; put in good condition; renew; refresh; reinvigorate; to make thoroughly clean; purify. It has been held synonymous with repair."

In *Bryant v. Board of Examiners*, 130 Mont. 512, 305 P. (2d) 340 (1956), the court defines renovate as meaning "to renew, make over or repair."

In *William A. Doe Co. v. City of Boston*, 262 Mass. 458, 160 NE 262, (1928), the City of Boston leased a portion of a building to the plaintiff for a term of ten years and reserved the right to make "renovations, repairs and changes" in and about the leased premises. The city arranged for the substitution of a concrete for a wooden floor in the building, for deepening the cellar,

for placing girders to support the concrete floor, for putting in a new drainage system, for new plumbing and new electric wiring, and for other structural changes in the premises. Plaintiff claimed an unlawful eviction. However, the court held for the lessor, by construing the language "repairs, renovations and changes" in part as follows:

"It is to be observed that the right which the lessor reserved was not limited to the making of repairs, but authorized the city to make 'renovations . . . and changes' in and about the leased premises. *The word 'renovations,' as applied to a building, means the making new after decay, destruction or impairment; the renewing materially; the restoring by replacing worn-out, unsafe or damaged parts; the creating anew.* To make 'changes' means to make different, to alter to put one thing in place of another . . ." (Emphasis supplied.)

In *Finney v. Bennett*, 97 N.Y.S. 291, 292, the court held that where plaintiff knew that magnesium stains are a frequent, inherent and ineradicable defect in bricks, and defendant did not know that fact, and plaintiff contracted to "renovate the entire brickwork on a house, guaranteeing to make it look like new," without making any exception of magnesium stains, he could not urge the impossibility of eradicating magnesium stains which appeared on the house, and which he was unable to remove, as an excuse for not complying with the terms of his contract by removing all the stains.

To illustrate the difference between "renovation" of bricks, as required in the *Finney* case, and "cleaning"

of bricks, 14 C.J.S., page 1197, defining “clean” as a verb, provides: “In a particular context, the word has been held to imply an undertaking to do no more than clean the *superficial* areas as distinguished from an undertaking to remove stains in stonework several inches in depth.” (Emphasis supplied.)

Another example of the scope of “renovate” is found in *U. S. v. Nine Barrels of Butter*, 241 F. 499, 500. (S. D. NY, 1917). In that case the court held that melting down of butter to a fluid, so that all solid matters fall to the bottom, and then straining and blowing it into a spray, in which condition hot water is allowed to percolate through the oil, after which the water is drawn off and an emulsion made with milk, cooled into crystals and packed, constituted the renovation of butter. The same type of renovation is involved where used motor and diesel oil is re-converted or renovated into reusable oil through a chemical process.

A case illustrating a practical limitation on the meaning of “renovate,” is *Harvey v. Switzerland General Insurance Co.*, 260 SW (2d) 342 (Mo. App., 1953). That case involved an action to recover under an insurance policy for a loss sustained when the insureds employed a third person to spray their carpet with a liquid solution to prevent moth infestation, and the solution stained and discolored the carpet, causing damage. The policy involved, insured plaintiff’s personal property from all risks, except damage to the property occasioned either by moth infestation or by any work thereon in the course of a “refinish, renovating or repairing process.”

The defendant relied upon the exclusionary provision. The court, however, held for plaintiff, on the ground the spraying was a preventive measure against moth infestation, not actual moth infestation, and that it did not constitute work in the course of "refurnishing, renovating or repairing."

In determining the plain and unambiguous meaning of "renovating," the court states:

"To 'renovate' according to Webster's International Dictionary, Second Edition, among other things, means 'To renew, make over or repair; restore to freshness, purity, a sound state, newness, of appearance, etc. . . .' *Renovation or restoration involves a return from an abnormal or damaged state to a normal, sound state. It does not contemplate a preventive measure whereby an effort is made to insure the continuation of a normal, sound state.*" (Emphasis supplied.)

The foregoing analysis illustrates the scope and application of the term "renovation" and supplies us with a clear conception of the popular and ordinary meaning thereof. The authorities conclude that a renovation to property is similar in many respects to a repair, as indicated by Webster and the *Bryant* case, *supra*. However, it is also readily apparent that those terms in their ordinary application, are not identical. In practical operation they overlap in many areas, but there are some unique characteristics in each, especially with respect to renovations.

The cases and authorities indicate that the basic purpose of a renovation, with the exception of the restora-

tion of certain products to a pure state, such as rancid butter, illustrated by the *Nine Barrels of Butter* case, supra, and used oil products, is to cause an improvement in the overall appearance of the article. In many, if not a majority of instances, there is also an improvement in the function or utility of the article, but this is not the prime motive for a renovation; and, in fact, such improvement in functions need not be involved at all. A basic illustration of renovation, where no functional element is necessarily involved, would be periodic painting, which is concerned with bringing the article involved back to a newness of appearance following damage or prolonged exposure to the elements. However, to qualify as a renovation, in that illustration, and in all other cases heretofore considered, it is clear that there must be a major or substantial restoration of the article to a newness of appearance and not simply a superficial cleaning. The distinction is found in the authorities cited earlier with respect to cleaning and renovating brick and stonework; cleaning was limited to a superficial washing, and renovation included the removal of deep stains from the brick.

It is also clear that before a renovation of an article can occur, the article must be in an abnormal, unsound or damaged state as a condition precedent. This point is brought out in the *Harvey* case, supra, where the court held that renovation, "does not contemplate a preventive measure whereby an effort is made to insure the continuation of a normal, sound state." It contemplates "a return from an abnormal or damaged state to a nor-

mal, sound state.” By clear implication, every day cleaning services as performed by plaintiff for its parent companies cannot qualify as renovations. Such services are directed primarily to the continuation in appearance of property in a normal and undamaged condition and also constitute, in many instances, preventive measures to continue a normal, sound state.

In addition to the fact that cleaning services are not within the normal concept of a “renovation,” based upon an independent consideration of the term, there is also a clear expression of legislative intention to that effect in the present case. In the same bill (SB No. 175) containing the enactment of service tax on repairs and renovations, the legislature included a provision imposing a service tax on “the amount paid or charged for laundry and dry cleaning services.” (59-15-4(g)). If the legislature had intended to include cleaning services within the concept of “renovation,” as defendant contends, why did the lawmakers feel that it was necessary to add a provision to the bill specifically covering certain cleaning services? The answer, and the only one which gives reasonable and practical effect to both provisions of the enactment, is that the legislature did not intend to include cleaning services within “renovations.” Otherwise, the laundry and dry cleaning provision would be superfluous, a result which would violate the basic rule of statutory construction, that the legislature is never presumed to do a useless act, and all language in legislative enactments must be given practical effect, if that can be done on a reasonable basis. In applying the proper construction of

excluding cleaning services from “renovations,” it also follows that the only cleaning services which are taxable are those specifically covered in 59-15-4(g).

There is an additional area in which the term “renovation” may have some application. This area is illustrated by the *Doe* case, *supra*, extending renovations to include major repairs and renewals, and perhaps into the area of additions and betterments as well. However, there appears to be no practical need to inquire into whether or not a “renovation” includes such services in this case, since there is a third category of taxable services under the Service Tax Amendment involving installation of tangible personal property on other tangible personal property, clearly taking cognizance of that situation.

As to installation:

Webster defines installation as follows: “Setting up or placing in position for service or use.” Install is “to set up or fix, as a lighting system, for use or service.” The cases where the term has been considered follow the Webster definition rather closely. See *State v. Jones*, 242 NC 563, 89 SE (2d) 129, 131, (1955); *Smith v. Kappas*, 218 NC 758, 12 SE (2d) 693, 697 (1941); and *King v. Elliott*, 197 NC 43, 147 SE 701, 704 (1929).

Install is defined in 44 C.J.S., page 408, as follows:

“In builder’s terminology, to set in place, to connect up, and fix ready for use; and specifically applied to machinery, the word has a technical meaning, which is to set up or fix in position for

use or service; to place machinery in that position where it will reasonably accomplish the purposes for which it is set up; to set up or fix for use or service, as to install a lighting system.”

In *DeMerritt v. Forbes Milling Co.*, 114 Kan. 62, 216 P. 1086 (1923), the court held that where a contract for the sale of a cleaning attachment to a steam boiler allowed the buyer sixty days after it was installed in which to make a trial or its effectiveness, installation was complete when the cleaning attachment was *affixed* to the boiler. (Emphasis supplied.) See also *Carver v. Denn*, 117 Utah 180, 214 P. (2d) 118, 121 (1950).

From our examination of the cases and authorities, considering the term “installation,” it appears that the popular concept of the term, in its customary and ordinary meaning, includes the following elements:

(1) A physical attachment of personal property in a manner similar to annexation of an article of personal property to real property, thereby converting the same into a fixture. This usually involves some mechanical fitting so that under ordinary circumstances the article becomes a part of the structure itself, and is used as a part of the article to which it is appropriated; and (2) when the personal property is in place, there must be some reasonable degree of permanency in the attachment as well as the usage thereof. Of course, in the present case, taxable installations are limited by the statutory language to attachments to tangible personal property.

In the practical application of the Service Tax Amendment, many acts of installation will also qualify

as a repair or a renovation. However, in a case where personal property is restored beyond its original state and therefore not a repair, or is improved beyond the act of restoration to a new appearance and therefore not a renovation, or where there is no repair or renovation involved at all, through the process of additions to or improvements upon tangible personal property, in the nature of a betterment, such services can only be taxable under the Service Tax Amendment on the theory of an "installation."

The foregoing consideration of the three terms in the Service Tax Amendment, demonstrating the customary and ordinary concepts they convey to the average person, is also indicative of their proper context in the amendment. All three have similarities, but they are not identical. Each includes within its scope and ordinary conceptual limits, some areas of application not found in the other two. In applying those recognized conceptual limits to the three words in the amendment, each is given an independent scope and effect outside the area where it overlaps with the others, and as a result, the legislative purposes indicated by wording the statute in the disjunctive, is properly and reasonably satisfied. On the other hand, the right of the taxpayer to have the statutory language strictly construed is served, because the language is not extended beyond clear implication to an all-inclusive service tax.

There is no question that many services performed by plaintiff at Ogden constitute repairs, renovations or installations. In this regard it is readily conceded that

all services charged to plaintiff's regular repair accounts 314 and 317 properly qualify as repairs, renovations or installations. However, those services are not being contested under this Point. Only services outlined in the Statement of Facts and carried in account 402 are involved. We submit that each of the services outlined is clearly outside the service tax under the foregoing analysis of the scope and application thereof, and, accordingly, all of the sales taxes based on said services should be annulled and cancelled.

One final comment seems necessary. Defendant has prescribed Sales Tax Regulation No. 78 to implement the Service Tax Amendment. An examination of that Regulation illustrates that the defendant considers the tax on services to be virtually all-inclusive where tangible personal property is involved. Illustrative of this attitude is the amendment to the regulation in 1963 which included under the service tax all "persons engaged in the business of . . . *removing* . . . tangible personal property . . ." (Emphasis added.) This would appear to be the exact opposite of an installation and a clear violation of the defendant's authority. Of course, the liability for a tax on services cannot be first imposed by regulation of defendant. It does not have the power to create taxable transactions not covered by legislative edict. Therefore, to the extent said regulation attempts to extend the service tax beyond the legislative purpose, as heretofore considered, it is invalid.

POINT III

COAL PURCHASED BY PLAINTIFF IN WYOMING AND CONSUMED IN UTAH TO PROVIDE HEAT FOR THE DIRECT OPERATION OF RAILROAD REVENUE EQUIPMENT IS NEITHER DOMESTIC NOR COMMERCIAL USE WITHIN THE SALES TAX ACT AND IS THEREFORE EXEMPT FROM BOTH THE SALES AND THE USE TAX.

During part of the period of the audit in this case, plaintiff purchased coal in Wyoming and used a portion thereof at Ogden for the production of heat for direct operation of Union Pacific and Southern Pacific revenue equipment. Defendant has assessed a tax upon that consumption under the Use Tax Act.

It is plaintiff's view that such use of coal is exempt under a proper construction of Section 59-15-4, U.C.A., 1953, as amended, of the Sales Tax Act, which provides, in part, as follows:

“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 . . . provided, however, that the sale of coal, fuel oil and other fuels shall not be subject to the tax except as hereinafter provided.

“(b) a tax equivalent to 2½ per cent of the amount paid:

* * * * *

“(2) to any person as defined in the act, including municipal corporations for gas, electricity,

heat, coal, fuel oil or other fuels sold or furnished for domestic or commercial consumption . . .”

Although the assessment in this instance is based upon the use tax rather than the sales tax, this court held in *Union Portland Cement Co. v. State Tax Commission*, 110 Utah 152, 176 P. (2d) 879 (1947), and in *Geneva Steel Co. v. State Tax Commission*, 116 Utah 170, 209 P. (2d) 208 (1949), that legislative created exemptions from the sales tax are also to be treated as exemptions from the use tax. Therefore, the sales tax exemption for coal furnished for purposes other than “domestic or commercial,” is also applicable to coal purchased in Wyoming and used in Utah for purposes other than “domestic or commercial.”

The issue under this Point is to determine whether or not the phrase “domestic or commercial consumption,” as set out in the Sales Tax Act, properly includes within the legislative mandate the consumption of coal for the production of heat for direct operation of railroad revenue equipment. We submit that under the applicable rules of construction, hereinafter considered, such use and consumption is clearly exempt from the sales tax, and in this instance, the use tax as well.

Of course, in this case the rule of construction to which all others are subordinate is to give effect to the legislative intent as expressed in the statute, by using all legal aids available. This requires that the phrase “domestic and commercial” be assigned the meaning that the words commonly convey, and when that meaning is

doubtful, the true intent must then be determined from the context and the purpose of the statute. *Norville v. State Tax Commission*, 98 Utah 170, 97 P. (2d) 937 (1940); 82 C.J.S., Statutes, Sections 321 and 322. The task is somewhat simplified because it is unnecessary to define the activities which lie outside the field of commercial consumption. It is only necessary to inquire whether the use of the coal in the present case is a commercial consumption. If it is not, then no tax is due. And, this is true whether the use is industrial or some other noncommercial use which would not fall within the usual definition of industrial consumption.

We would agree that standing alone the phrase "commercial consumption," (the material portion of the language in this case) leads to sharp differences of opinion as to its meaning. The term "commercial" may have a broad or a narrow scope. In a broad sense it encompasses all business or everything pertaining to commerce, and in a narrow sense it includes only those enterprises engaged in buying and selling goods or services. *United States v. Public Service Co. of Colorado*, 143 F. (2d) 79 (CCA-10, 1944) and *State ex rel. Kansas City Power & Light Co. v. Smith*, 342 Mo. 75, 111 SW (2d) 513 (1938). Therefore, a reference to the context of the statute is necessary to find the true legislative intent in this case. It is clear from an examination of the provisions of the statute above set forth that the legislature did not intend the broad application of the term "commercial" or to embrace the whole field of business activity. Otherwise, the term would have been mere surplusage and a

useless legislative act. It is also clear that it intended certain exemptions from its application. This is apparent from a reading of the Title to the Act including coal within the exemption, (Chapter 93, Laws of Utah, 1943) which provides in part:

“An Act . . . Relating to the Imposition of a Tax Upon Certain Sales and Services, and Providing Certain Exemptions Therefrom.”

The intention to place a narrow construction on the term “commercial” was also recognized by this court in *Union Portland Cement Co. v. State Tax Commission*, supra, where it is pointed out at page 881 of the Pacific 2nd Reporter, that the amendment establishing the present language in Section 59-15-4(a) (b) (2), which became effective March 18, 1943, “. . . in effect, exempted sales of industrial coal from the sales tax . . . From our interpretation of the effect of the exemption from the sales tax it follows that industrial coal has been exempted from both the sales and use taxes since March 18, 1943.”

The court also recognized in that case that the uses to which coal can be put are not limited to the three categories of domestic, commercial and industrial consumption, by expressly indicating that for the purpose of that opinion that it used the “term ‘industrial coal’ and ‘coal for industrial use’ as meaning ‘coal other than sold or furnished for domestic or commercial consumption.’ ”

In accord, is the court’s prior opinion in that case, *Union Portland Cement Co. v. State Tax Commission*, 110 Utah 135, 170 P. (2d) 164 (1946).

A helpful and well reasoned case on the point involved here is *State v. Smith*, supra. There an unsuccessful effort was made to impose a sales tax on electric current used in propelling street cars where the statute taxed all sales of electricity to "domestic, commercial and industrial consumers." The state claimed that electricity used in the propulsion of street cars was a "commercial" use. The court, however, pointed out that using "commercial" in the broad sense would include all business activity, including industrial pursuits, and thus the term "industrial" in the statute would have been a useless act by the legislature. It therefore ruled that the ordinary and restricted sense of commercial and industrial applied and that transportation of passengers failed to qualify under either term.

A case involving the identical language set forth in the Utah statute is *Wis. Power Co. v. United States*, 336 U. S. 176, 93 L. Ed. 591, 69 S. Ct. 492 (1949). At the time that case was decided the United States imposed a tax on electrical energy for "domestic or commercial consumption" under Section 3411 of the Internal Revenue Code of 1939, as amended. (The section was repealed October 20, 1951.) It was originally enacted in 1932, one year before the same language appeared in the Emergency Revenue Act of 1933. The federal regulation, defining the scope of the section, provided in part:

"The term 'electrical energy sold for domestic or commercial consumption' does not include (1) electrical energy sold for industrial consumption, e. g., for use in manufacturing . . . or (2) that sold

for other uses which likewise can not be classed as domestic or commercial such as . . . railroads . . .”

Our research has not disclosed a case where under a statute such as ours a court has held the term “commercial consumption” to embrace the use of coal or other energy used in the direct operation of railroad revenue equipment. We submit that under the proper limited construction of our statute, as above considered, it would violate the legislative intent to do so.

We do not understand that defendant now contends for an all-inclusive application of “domestic or commercial consumption.” But it does seek in this case, to broaden the scope of “commercial” to include the use of coal as set forth herein, which it ruled to be exempt under formal decision, contemporaneously with the 1943 amendment, and which it has consistently exempted in actual administrative practice for at least twenty years. Under such circumstances, as an extrinsic aid to the determination of the legislative intent, the doctrine of contemporaneous construction would appear to be applicable. The doctrine provides that a constant administrative construction of a statute by those charged with the duty of applying the same for a long period of time, raises a presumption that such a construction correctly interprets the statute and, although not binding on the court, is entitled to great weight. *State v. Hatch*, 9 Utah (2d) 288, 342 P. (2d) 1103 (1959); *Alexander v. Bennett*, 5 Utah (2d) 163, 298 P. (2d) 823 (1956); and *Utah Power & Light Co. v. Public Service Commission*, 107 Utah 155, 152 P. (2d) 542, 557 (1944).

POINT IV

FOLLOWING PAYMENT BY PLAINTIFF OF THE TAXES AND INTEREST STATED IN DEFENDANT'S AMENDED DECISION, PURSUANT TO SECTIONS 59-15-16 AND 59-16-13, U.C.A., 1953, DEFENDANT HAS NO RIGHT TO COLLECT FURTHER INTEREST ON SAID TAXES IN THE EVENT SAID AMENDED DECISION, OR ANY PART THEREOF, IS AFFIRMED. .

This Point is based upon an "executory" order of defendant (R. 260) and therefore the question may be premature at this time. However, to remove any possibility of waiver, plaintiff has assigned the defendant's ruling in this respect as error on this appeal. In doing so plaintiff specifically hereby disclaims any concession or even implication of a lack of confidence in the validity and soundness of its arguments in prior Points.

By paying all taxes and interest assessed by defendant, which Commission has no limitation imposed by law upon its use of the money so paid, plaintiff cut off defendant's authority to exact additional interest.

CONCLUSION

Initially, we submit that plaintiff's unusual status and business operation removes it from the scope and application of the Sales Tax Act, not only with respect to sales of tangible personal property to its parent companies, but also with respect to sales of services for repairs, renovations, or installations in connection with tangible personal property. Therefore, the entire sales tax deficiency sustained by defendant should be reversed, and defendant should be directed to give favorable consideration to plaintiff's claim for refund or credit of all sales taxes paid on materials sold to its parent companies during the period involved.

Our second argument, entirely unrelated to the first, and of consequence in this case only if plaintiff is unsuccessful in convincing the court it is not subject to the Sales Tax Act, or to that portion involving the service tax, is an effort to place what we believe to be a reasonable limitation on the scope of the sales tax on services. We have attempted to confine the sales tax to those services which constitute repairs, renovations or installations within the ordinary and customary meanings of those terms. We think that the services in dispute in the present case should not be subjected to the sales tax and that defendant's efforts to do so constitute an unwarranted attempt to extend its authority beyond the scope of the legislative intent.

Finally, we urge that the court order defendant to recognize the exemption from tax of the consumption of

coal by plaintiff in the manner herein set forth, not only to meet the legislative requirement with respect to "domestic or commercial consumption," but also to be consistent with its own formal ruling of long standing and prior administrative practice.

Respectfully submitted,

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