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The Ogden Union Railway and Depot Company v. State Tax Commission of Utah : Plaintiff's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

Bryan P. Leverich; A. U. Miner; Howard F. Coray; Scott M. Matheson; Attorneys for Plaintiff;
F. Burton Howard; Attorney for Defendant;

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

Plaintiff's Petition for Rehearing and Brief in Support Thereof

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PETITION FOR REHEARING

PRELIMINARY STATEMENT

Plaintiff, The Ogden Union Railway and Depot Company, has prepared and now files this petition and brief in support thereof, in the bona fide belief this Honorable Court has decided one issue in this case erroneously, inadvertently, without really determining the point on its true legal merits, and especially without fully realizing the significance of said ruling with respect to past decisions of this court or with respect to its far-reaching future effects. That ruling of the Court denied to plaintiff a tax exemption created by the Sales Tax Act, but asserted in defense of a use tax assessment, by reference

to a use tax exemption statute which plaintiff has never relied upon in this litigation. In short, this Court, as to this problem, apparently gave its consideration to and cited the wrong statute. The parties to this suit have been concerned with Section 59-*15*-4. The Court decided the issue by reference to Section 59-*16*-4. The similarity in numbers in the respective sections may well have been the reason for the Court's error.

Unless a clarification of this particular matter is somehow achieved in the present lawsuit, there can be little doubt further litigation on the subject in the future will be inevitable. Aside from counsels' interest as representatives of a party to this proceeding, we also believe our responsibilities as officers of this Court justify this attempt to resolve this undesirable situation.

No effort is made hereby to seek rehearing with respect to the Court's decision on the retailer issue under the Sales Tax Act, as to which this Court has ruled against plaintiff. While, we hope understandably, plaintiff is not pleased with that holding, it nevertheless accepts the Court's decision in the knowledge that the Court did determine the issue on its merits.

STATEMENT OF THE NATURE OF THE PETITION

This is a petition for rehearing and reargument limited solely to that portion of the Court's decision involving the use tax issue (Point III in Plaintiff's Brief), on the ground the Court inadvertently, from all

appearances, failed to consider and dispose of this point on the real legal issue involved.

DISPOSITION BEFORE THE UTAH SUPREME COURT

In its decision filed September 4, 1964, the Court held that plaintiff is liable for the use tax assessed by the State Tax Commission on coal purchased in Wyoming and used within the state of Utah.

RELIEF SOUGHT BY PETITION FOR REHEARING

Plaintiff seeks a reversal of the use tax holding of the Court; or that failing, at least some clarification of the legal basis upon which the Court's holding is predicated, and a statement of the extent to which the holding is intended by the Court to constitute either a repudiation of its previous opinions or the creation of a new precedent concerning the availability of the statutory exemption created by the Sales Tax Act as a defense to assessments of a use tax for "gas, electricity, heat, coal, fuel oil or other fuels" sold or furnished for other than domestic or commercial consumption.

STATEMENT OF FACTS

The State Tax Commission assessed a use tax against plaintiff on the consumption of coal purchased by it in Wyoming and used in the production of heat at Ogden in its boiler plant for the direct operation of Union Pacific and Southern Pacific revenue equipment.

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

On November 7, 1945, the Tax Commission issued a formal decision in which it ruled 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 and is non-commercial within the scope and application of the Utah Sales Tax laws (R. 251-253). That decision has never been modified in any way by the State Tax Commission.

ARGUMENT AND BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THE COURT ERRONEOUSLY FAILED TO CONSIDER AND DETERMINE THE APPLICABILITY OF THE SALES TAX EXEMPTION ASSERTED BY PLAINTIFF AS A DEFENSE TO THE VALIDITY OF THE USE TAX ASSESSMENT UNDER THE FACTS OF THIS CASE

In its disposition of the use tax issue the Court states:

> "The exemptions allowed under the *use tax* are set forth under Sec. *59-16-4*, U.C.A. 1953, *and none of which fit plaintiff's situation.* We

> therefore hold that under the construction of the Barrett Investment Co. case, plaintiff is liable for the use tax assessed for coal purchased in Wyoming and used within the state of Utah." (Emphasis added)

Heretofore neither party has cited, discussed, argued or relied upon the statutory use tax exemptions with respect to the use tax issue in this case. Plaintiff's defense is grounded upon the statutory sales tax exemption set forth in Section 59-15-4(a) and (b) (2), U.C.A. 1953, as amended, of the Sales Tax Act. It is not in any way concerned with the statutory use tax exemptions set forth in Section 59-16-4, U.C.A., 1953, as amended, of the Use Tax Act, relied upon by the Court in deciding the use tax issue. Such error by the Court, even though inadvertent, effectively deprives plaintiff of the opportunity to have the issue decided on its true legal merits.

The section in the Sales Tax Act relied upon by plaintiff, provides that a sales tax is imposed upon "gas, electricity, heat, coal, fuel oil or other fuels sold or furnished for domestic or commercial consumption." Otherwise stated, all sales of the above named products for purposes other than domestic or commercial consumption are exempt from the sales tax. And, on rehearing, in *Union Portland Cement Company vs. State Tax Commission,* 110 Utah 152, 176 P. 2d 879 (1947), this Court specifically held that this exemption is also applicable to coal purchased in Wyoming and used in Utah for puposes other than domestic or commercial. This was the decision which established the principle that the Sales and Use Tax Acts were to be construed together in a correlative and complimentary manner, and that a

legislative created exemption in the Sales Tax Act is also to be treated as an exemption from the use tax. The principle was reaffirmed in *Geneva Steel Co. vs. State Tax Commission,* 116 Utah 170, 209 P. 2d 208 (1949), and in *Barrett Investment Co. vs. State Tax Commission,* 15 Utah 2d 97, 387 P. 2d 998 (1964), relied upon in this case by the Court to hold plaintiff liable for the use tax.

We have no quarrel with the principle that the Sales and Use Tax Acts are complimentary to each other. In fact, we rely upon that relationship in our defense on this point. The statutory sales tax exemption for non-commercial consumption of coal must be applicable to the corresponding use tax situation to provide plaintiff with the right to assert that defense under the facts of this case.

It is worthy of note that the Portland Cement case involved not only the same sales tax exemption presently involved but also the same product being consumed and under similar circumstances. There the Court held that coal used for industrial purposes was exempt from the use tax because it was not sold or furnished for domestic or commercial consumption. Nevertheless, that case is not even cited by this Court in the present decision. Instead, it relies upon the "construction of the Barrett Investment Co. case," to hold the plaintiff liable.

There is an explanation in Barrett concerning the nature of the Sales and Use Tax Acts, and in the present case the Court quotes a sentence from the Barrett opinion, at page 4 of the green sheet. Although con-

ceding the validity of that statement, we think it has no real pertinency to the present problem and stops short of the helpful language, contained in the next sentence of the Barrett opinion:

> "The Sales and Use Tax Acts being complimentary to each other the exemptions therein should be construed so as to effectuate the same purpose, that is, if a purchase of tangible personal property is exempt under one act, it should be exempt under the other and vice versa."

If the Court had applied that language to the present situation, the real issue in this case would have been reached. That is a determination of whether or not the consumption of coal in the heating plant at Ogden to produce heat and then used to operate railroad revenue equipment, is or is not a commercial use. If it is not, as we have contended in our brief, it is exempt from both the sales and use tax. But the Court did not consider in its decision the nature of the use of this coal, and that is the crux of the whole matter. Therefore, we are faced with an adverse decision, decided under the wrong statute, but without review and consideration in the opinion of the basic arguments of both parties upon which the merits should be reached. In this regard plaintiff's detailed argument is set forth in its brief at pages 35 to 40, inclusive. As we read the Tax Commission's brief (pages 26-28), there is no dispute between it and plaintiff that the above stated issue is the proper issue for the Court's determination.

Both parties to this suit have operated under the holdings in *Portland Cement and Geneva Steel,* supra,

since those cases were decided in 1947 and 1949, respectively. We believe the present decision of the Court casts doubt and confusion upon the holdings in those cases. We are not satisfied from reading the present opinion that this Court intended such a result, and, in fact, are persuaded that such a result was not necessarily contemplated by the decision. Nevertheless, we now have a holding from the Court on a similar fact situation involving consumption of coal which we believe repudiates the specific holding in the *Portland Cement* case. Apparently, the statutory exemption created by the Sales Tax Act is no longer a defense to assessments under the Use Tax Act for "gas, electricity, heat, coal, fuel oil and other fuels" sold or furnished for other than domestic or commercial consumption. The decision also lends confusion to the *Geneva Steel* case with respect to the relationship between the Sales and Use Tax Acts. Whatever precedent is thereby established will undoubtedly invoke additional litigation on the point. It will also open up an area to taxation which, until this decision, has been considered by innumerable taxpayers to be an exempt area from sales and use taxes. Such a result constitutes a decisive departure from precedent and will unquestionably involve the taxability of vast sums of money as a result thereof. If this Court actually intends to hold the use of coal involved in this case a commercial use, all taxpayers affected should have a clear-cut and considered opinion on the matter.

CONCLUSION

It is not the comparatively small sum of money involved in the use tax issue which prompted this petition. It is the potential effect on this taxpayer and all other taxpayers similarly situated, the inevitability of future litigation in this area, the confusion and uncertainty created by the Court's holding and the potential tax involved, all of which appears to have come about through inadvertence rather than design. We honestly believe this petition presents one of those rare instances in which it is necessary, in order to properly and fairly administer the tax laws of this state, for this Court to re-examine its decision. Otherwise, a patently erroneous reliance on a use tax exemption statute will be the foundation for all future handling of this important area of sales and use tax law. We therefore respectfully petition for a rehearing and favorable ruling on the use tax issue in this case.

Respectfully submitted,

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