1969

L.A. Young Sons Construction Company v. State Tax Commission Of Utah : Brief of Defendants

In The Supreme Court of the State of Utah

L. A. YOUNG SONS CONSTRUCTION COMPANY,

Plaintiff,

vs.

STATE TAX COMMISSION OF UTAH,

Defendant.

Case No.

BRIEF OF DEFENDA

Writ of Review to Review an Order
State Tax Commission of Ut

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In The Supreme Court of the State of Utah

L. A. YOUNG SONS CONSTRUCTION COMPANY,

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vs.

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Case No. 11467

BRIEF OF DEFENDANT

STATEMENT OF THE KIND OF CASE

This is a proceding to review a determination of the Utah State Tax Commission, which held that a deficiency use tax in the amount of $5,540.24 was properly assesed against the taxpayer, L. A. Young Sons Construction Company, a partnership, for construction equipment purchased at an auction outside the State of Utah, brought into and used in the State of Utah.

DISPOSITION BEFORE THE UTAH STATE TAX COMMISSION

A formal hearing on this matter was held before all members of the Utah State Tax Commission (hereinafter referred

to as the Commission) on October 25, 1968, and on December 4, 1968, the Commission entered its unanimous decision, number 272, upholding the deficiency assessment.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have the decision of the Utah State Tax Commission reversed.

STATEMENT OF FACTS

The parties to this action have entered into a stipulation of facts (R. 39-50) and these facts are incorporated into, and restated in the decision of the Commission (R. 56-60), and in plaintiff's brief; however, it seems appropriate at this point to emphasize several additional facts which were not stressed in plaintiff's brief.

When plaintiff purchased the said equipment at the auction in Wyoming, it did not purchase the entire amount of property and equipment which was sold by Amis Construction Company. To the contrary, plaintiff purchased only six out of 232 separate pieces of equipment which were sold at the auction in Wyoming on August 25, 1961. The 232 separate pieces of equipment sold by Amis Construction Company, sold for a total selling price of $789,737.50, of which the six pieces of equipment purchased by plaintiff constituted $139,500 of said sum. The price for the smallest sale made was $2.50, and the price for the largest item, or group of items, sold was $139,500 for the sales to plaintiff. It should also be stressed that a similar sale was held by Amis Construction Company in Topeka, Kansas on the day preceding the sale to the plaintiff. It should further be stressed, that both sales were conducted and handled

by Forke Brothers, an auctioneering firm which frequently handles similar sales.

ARGUMENT

POINT I

THE SALE OF CONSTRUCTION EQUIPMENT BY ONE CONTRACTOR TO ANOTHER CONTRACTOR, AT AN AUCTION, IS NOT AN ISOLATED OR AN OCCASIONAL SALE WHEN NUMEROUS ITEMS OF EQUIPMENT ARE SOLD BY THE SELLER TO MANY DIFFERENT PURCHASERS AT SUCH AUCTION.

Plaintiff alleges that the sale of construction equipment in question was an isolated or occasional sale under Section 59-15-2 (e), Utah Code Annotated 1953, as amended, and that because of such isolated or occasional sale, said sale is exempt from Utah use tax.

The facts of this case clearly point out that such sale could not possibly be considered to be "isolated or occasional". At the sale of the equipment, 232 pieces of equipment were sold by the seller, through an auctioneer, to many different purchasers (R. 47-50). Plaintiff purchased only six of the 232 sold, and paid approximately 17.6% of the total amounts paid to the seller.

Although plaintiff may contend that this merely constituted one sale to plaintiff, and is therefore an isolated or occasional sale, it is clear from the stipulated facts, that when 232 separate items are sold at an auction, it requires 232 separate sales. The auctioneer is required to place 232 items up for sale, and is required to receive a top bid on each of those 232 items and hammer the gavel down 232times. In addition, the seller, through the same auctioneer, held a similar auction just the

day preceeding the sales in question. Although it does not appear from the record, it is likely to assume that a similar number of items were sold the preceding day through the same auctioneer for a total of over 400 separate sales in a time space of only two days.

The provision which excludes isolated and occisional sales from the term "retail sales", Section 59-15-2 (e), Utah Code Annotated 1953, as amended, is contained in the definitions portion of the sales tax act. The relevent portions of that statute read as follows:

> "The term 'retail sale' means every sale within the State of Utah by a retailer or wholesaler by a user or consumer, except such sales as are defined as wholesale sales or otherwise exempted by the terms of this act: but the term 'retail sale' is not intended to include isolated or occasional sales by persons *reguarly engaged in business*, . . . " (Emphasis added.)

Plaintiff urges that because of the above statute, and because of regulation S38 of the Utah State Tax Commission, this sale is an isolated or occasional sale. Regulation S38 of the State Tax Commission at the time of the transaction involved, was also quoted in plaintiff's brief and read as follows:

> "S38. Isolated and occasional sales (applies to sales and use taxes). Isolated or occasional sales made by persons not regularly engaged in business are not subject to the tax. Under this rule no sale is taxable if it is not made in the regular course of a business of a person making retail sales as defined in regulation no. S27. The word 'business' as thus used refers to an enterprize engaged in making retail sales *not withstanding the fact that the sales may be few or infrequent.*" (Emphasis added.)

In addition, the State Tax Commission, in 1967, amended regulation S38 to add the following provision:

> "Sales of items at public auctions do not qualify as exempt isolated or occasional sales."

This regulation regarding auctions was merely a declaration of the Commission's existing policy, and was not a new pronouncement on the subject.

The State Tax Commission's interpretation of what constitutes an isolated or occasional sale has previously been accepted by the Court in the case of *Geneva Steel Co. v. State Tax Commission*, 116 Utah 170, 209 P.2d 208 (1949), at page 177-79 of the Utah Reports.

Although the Utah Supreme Court, in the *Geneva Steel* case *supra*, held that the transfer of the entire Geneva Steel operation was an isolated or occasional sale, they have had very few other opportunities to determine what is an isolated or an occasional sale.

The State of California also excludes occasional sales, and defines occasional sales, in a statute similar to Utah's, as follows:

> "A sale of property not held or used by a seller in the course of an activity for which he is required to hold a sellers permit, *provided that such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a sellers permit;* . . ." (Emphasis added.) Section 6006.5, Californina Revenue and Taxation Code.

The Supreme Court of California has had numerious occasions to interpret this provision, and some of those decisions are similar to the present case.

The most factually similar California case is the case of *Pacific Pipeline Construction v. State Board of Equalization*, 321 P.2d 729, 429 C.2d 729. The facts of that case are stated by Justice Traynor, at page 731 of the Pacific 2d Reports, as follows:

> "Plaintiff's own evidence shows that in 19 separate sales, in addition to the sale in question, it sold at various times from 1947 through 1950, 65 items of equipment for a total of $41,879.22. Three sales took place within six months preceeding the sale in question and two in the month following. The items sold from 1947 to 1950 included trucks, automobiles, generators, a compressor, a steam cleaner, cranes, trailers, tar pots, and dynamometer. The items sold in the sale in question included trucks, an automobile, generators, steam cleaners, cranes and crane attachments, trailers and tar pots."

Justice Traynor's conclusion as to whether or not this was an occasional sale was summerized as follows:

> "The undisputed evidence shows that the sale was one of a series of sales sufficient in number, scope and character . . . and was therefore not an occasional sale . . . ."

Justice Traynor then went on to summerize the previous California Supreme Court's similar decisions, and the terms "number, scope, and character", as follows:

> "In fact, the words of the statute 'number, scope and character' were apparently taken from this court's opinion in *Northwestern Pacific R.R. Co. v. State Board of Equalization*, 21 Cal. 2d 524, 529, 133 P.2d 400. That case held that *five sales* of rolling stock over

a three year period for *about* $100,000 *could not be regarded as casual or isolated sales,* and that the seller was therefore a retailer and the tax applied. *Market Street Ry. Co. v. California State Board of Equalization,* 137 Cal. App. 2d 87, 95, 290, P.2d 20, 25, involved about 900 sales totalling about $100,000 during a 15 year period. Considering the 'number, scope, and character of the transfers,' the court held the seller to be a retailer. *Los Angeles City High School District v. State Board of Equalization,* 71 Cal. App. 2d 486, 488 489, 163 P.2d 45, held that sales of buildings, improvements, and equipment not needed by the school district, averaging two to three sales per quarter over a three year period were sufficient to make the sellers retailers and subject to the tax. Moreover, *Sutter Packing Co. v. State Board of Equalization,* 139 Cal. App. 2d 889, 895-896, 295 P.2d 1083, 1087 . . . held that a sale consummated on June 1, 1949, was one of a series and that the gross receipts therefrom must be included in the measure of the tax although they totaled $700,000 and the gross receipts from the largest sale since 1945 had totaled only $12,063.69." (Emphasis added.)

The poignant analysis by Justice Traynor is analagous to the case at hand. It is respectfully submitted that the purchase of equipment by plaintiff was not an "isolated or occasional sale" and plaintiff's petition for a reversal should be denied.

POINT II

THE ISOLATED OR OCCASIONAL SALE EXEMPTION CONTAINED IN SECTION 59-15-2, UTAH CODE ANNOTATED 1953, AS AMENDED, DOES NOT APPLY TO USE TAX ON OUT OF STATE PURCHASES.

Plaintiff goes to great length to convince the court that the sales and use tax are to be considered correlative and comp-

lementary, and that the legislative created specific exemptions from the sales tax act are to be treated as exemptions from the use tax act. The Commission, however, does not deny that general statement, but merely disagrees as to the application of that general statement to the case at hand.

In *Geneva Steel Co. v. State Tax Commission*, *supra*, former Chief Justice Lester A. Wade's dissent elequently points out that all sales exempt from the sales tax act cannot be exempt from the use tax, or there would be no purpose in having a use tax act. Therefore, there must be some line drawn between what is taxable under the sales tax act, and what is taxable under the use tax act. Justice Wade stated that in his opinion, the exemptions from use tax should be determined as follows:

> "The reasonable place to draw this line is, in my opinion, to hold that where a sale, though not expressly exempted therefrom, does not come within the scope of the sales tax act, but does come within the scope of the use tax act and is not expressly exempted therefrom and there is an appearent reason why such sale should be subject to the use tax though not subject to the sales tax, then such sale is subject to the use tax. However, every sale which comes within the general scope of the sales tax act but is expressly exempted from the tax where there is no appearent reason that such sale should be exempted from the sales tax and not from the use tax, should also be treated as exempted from the use tax."

The "appearent reason" for exemption from the use tax which Justice Wade would require is not evident in the case at hand. The obvious reason why the sales tax act exempts "isolated and occasional sales" from its purview, is because of the admin-

istrative difficulty in enforcing the sales tax on sales made between individuals where the State Tax Commission can have very little, if any, control over such sales. To attempt to impose a tax on all transactions between individuals, would be an administrative impossibility and that is the reason the statute, § 59-12-2 (e), Utah Code Annotated 1953, excludes only "isolated (or) occasional sales by persons *not regularly engaged in business* . . . ." **(Emphasis added.)**

On the other hand, the policy for making all legislative-created sales tax exemptions apply to the use tax, is to prevent discrimination *against out-of state purchases.* Instead, plaintiff here urges this court to discriminate *in favor of out-of-state purchases.* The legislature clearly enacted the use tax so that out-of-state purchases could be taxed for sales on which sales tax would have been levied if the sale had been made within the State of Utah.

Sales at auctions within the State of Utah would have been taxed at the time of this transaction, are now being taxed under the present State Tax Commission Regulation S38, and should be taxed for auction sales made outside the State of Utah under the use tax provisions.

These points are adequately stressed by the reasoning of Justice Wade in his dissent in the *Geneva Steel* case, *supra,* wherein he said:

> "Sales of tangible personal property only when made within the state are subject to the sales tax but such property sold outside this state for storage use or other consumption within this state is subject to the use tax . . . . Only sales made by a vendor regularly engaged in the business of selling to users or consum-

ers and not for resale, are required to pay that tax . . . . (A) ll such vendors, before making any sales, are required to obtain a license from the next state. Since the only means of collecting the tax is through the vendor who is regularly engaged in the business of making such sales it is apparent why only retail sales and not occasional or isolated sales were made subject to that tax. It was not because the legislature intended that occasional or isolated sales should not be subject to the tax, but was merely a matter of convenience in collecting the same.

"That reason does not apply to the use tax. Property sold whether outside of or within the state for storage, use or other consumption in this state is subject to that tax when it is brought within this state and the purchaser where he did not purchase from and pay the tax to a vendor regularly engaged in business in this state was made liable to the state for the payment of such tax whether the sale was made in this state or not and it was immaterial whether it was an occasional or regular sale (cites *Twaits Co. v. Utah State Tax Commission*, 106 Utah 343, 148 P.2d 343) since, where the sale was made outside of the state, tax had to be collected from the purchaser, it made no difference in such case whether the sale was an isolated or occasional tranaction or whether it was made to a person regularly engaged in business, because this state did not require a person doing business in another state to collect this tax for it. So the convenience in collecting this tax from a person regularly engaged in business which existed in the case of the sales tax, and was the reason for limiting that tax to a retail sales (sic) and for not covering occasional or isolated sales does not exist in the case of the use tax."

This definitive statement by Justice Wade, although contained in his dissenting opinion, is not contrary to any holding

of the majority opinion in the *Geneva Steel* case, *supra,* but is indicative of the manner in which the court would have applied the law to the facts of this case. In the majority opinion, written by Justice Wolfe, the sentiment of the court was clearly expressed as follows:

> "The sale of property made outside this state is not subject to our sales tax, it being a sale which this state cannot constitutionally tax. But when such property is brought into this state for storage, use or other consumption here, thus coming to rest as an integrated part of the total property in this state, then the use tax comes into operation and taxes, not the event of the sale of the property, but the event of storage, use or other consumption of that property within this state.
>
> "We hold therefore, that the storage, use or other consumption of property, the sale of which is made in this state and which is not made amendable to the sales tax, is likewise not subject to the use tax. Thus it follows that isolated or occasional sales made in this state are not subject to the operation of the use tax. *We express no opinion as to whether isolated or occasional sales made outside of this state are subject to our use tax.*" (Emphasis added) *Geneva Steel Co. v. State Tax Commission, supra.*

This same concept had been explained by the Utah Supreme Court in the decision, two years earlier, in the rehearing of *Union Portland Cement Co. v. State Tax Commission,* 110 Utah 152, 176 P.2d 879 (1947), wherein Justice Wolfe, at page 157 of the Utah Reports, stated as follows:

> "The use tax was not intended to create a discrimination against out-of-state merchants in favor o.

Utah merchants. Rather *it was passed . . . to remove the theretofore existing discrimination against local merchants in favor of out-of-state merchants . . .*" (Emphasis Added.)

At page 158 of the Utah Reports, the Court was even more explicit when it stated:

> "As before stated, *the obvious purpose of the Use Tax Act was to impose a tax on the use in this state of property the sale of which, because that sale took place outside the state, was beyond the reach of the Utah Sales Tax Act.*" (Emphasis added.)

In addition, the court approved a statement from page 39 of the *Fourth Biennial Report of the Utah State Tax Commission* which said:

> "The (use) tax applies *primarily* to goods shipped into the state in interstate commerce and to *purchases made outside of the state for use within the state,* and in this manner acts as a *protection and equalization to the Utah merchant against out-of-state merchants who may be selling to Utah purchasers.*" (Emphasis added.)

It should further be pointed out that the sales tax is a transaction tax and is not levied unless there is a transaction involving a "retail sale". On the other hand, the use tax does not require any specific transaction, but is levied upon the *use, storage or consumption* of property in the State of Utah.

In addition, this statute, § 59-15-2 (e) Utah Code Annotated 1953, only excludes from retail sales, "isolated (or) occasional *sales by persons not regularly engaged in business . . . .*" In the case at hand, plaintiff, L. A. Young Sons Construction Co., and the auctioneer selling the property, Forke Brothers, are both certainly *regularly engaged in business.* Therefore, that

exclusion should not apply to this case, even if the court should somehow decide that the above sale was an isolated or occasional sale, and should also somehow decide that that exclusion applies to use tax on out of state purchases.

CONCLUSION

It is respectfully submitted that because of the large number of sales (232) occuring at the auction, and because of a similar number of sales the previous day by the same seller and auctioneer, and because both the seller and the auctioneer are *regularly engaged in business*, the six sales to plaintiff did not constitute an "isolated (or) occasional sale."

It is further respectfully submitted that sales tax would have been added to the purchase price if the sale had occurred in Utah, and it is therefore within the intent of the Legislature to tax such transactions. It is also vital to the economic stability of the State of Utah to avoid discrimination against Utah merchants, especially in sales of this size where the difference in tax could well be sufficient inducement to purchase an item in another state rather than pay the Utah Sales or Use Tax.

It is theerfore respectfully urged that the decision of the Utah State Tax Commission be sustained.

Respectfully submitted

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