1966

Union Pacific Railroad Company, A Corporation v. State Tax Commission of Utah : Plaintiffs Brief

In the

Supreme Court of the State of U

UNION PACIFIC RAILROAD COMPANY, a corporation,

Plaintiff,

—vs.—

STATE TAX COMMISSION OF UTAH,

Defendant

PLAINTIFF'S BR

Upon Proceedings for Rev
Decision of the Utah State Tax C
Case No. 246

BRYAN P. L
A. U. MINER
HOWARD F.
SCOTT M. MA
NORMAN W.
600 Union
Salt Lake
Attorneys

HENRY L. ADAMS
Assistant Attorney General
State Office Building
Salt Lake City, Utah
Attorney for Defendant

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In the
Supreme Court of the State of Utah

UNION PACIFIC RAILROAD COMPANY, a corporation,
Plaintiff,
—vs.—
STATE TAX COMMISSION OF UTAH,
Defendant

No. 10710

PLAINTIFF'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This proceeding involves the review of a majority decision of the State Tax Commission upholding a deficiency use tax assessment against plaintiff in the sum of $888.42, and is concerned with the question of whether or not the railroad industry in Utah is "commercial" in nature within the scope of Section 59-15-4, UCA, 1953, as amended, which imposes the tax on "gas, electricity, heat, coal, fuel oil or other fuels sold or furnished for domestic or commercial consumption."

DISPOSITION BEFORE UTAH STATE TAX COMMISSION

Following formal hearing, the State Tax Commission issued a Decision, one Commissioner dissenting, upholding the deficiency assessment.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the majority ruling of the defendant and judgment in its favor as a matter of law.

STATEMENT OF FACTS

There is no dispute between the parties as to the material facts of this case. They were the subject of a written stipulation introduced at the formal hearing, and show the following:

Section 59-15-4 (a) UCA, 1953, as amended, imposes a sales tax upon retail sales of tangible personal property, but specifically exempts all sales of "coal, fuel oil and other fuels" except as provided in subsection (b). That subsection imposes a sales tax on "gas, electricity, heat, coal, fuel oil or other fuels sold or furnished for domestic or commercial consumption." (R. 22, 23)

The foregoing provisions of the sales tax act mean that all noncommercial sales and consumption of energy or fuel in the State of Utah are exempt from the sales tax, and pursuant to the holding of this court in *Union Portland Cement Company v. State Tax Commission*, 110 Utah 152, 176 P. 2d 879 (1947), from the use tax as well. (R. 22)

During all times mentioned herein Union Pacific Railroad Company has been and is a Utah corporation engaged as a common carrier by railroad of freight and passengers for hire in intrastate commerce within Utah as well as in interstate commerce in Utah and surround-

ing states. (R. 7) The predominant character and nature of its business is the ownership, operation and maintenance of a public service transportation system by rail in which all or substantially all of its operating property is devoted to the transportation of property and persons over lines and terminals having fixed locations. Almost all of Union Pacific's functions are incidental to and in the performance of said transportation business. (R. 10)

In said transportation business Union Pacific purchases, stores, uses and/or consumes large amounts and quantities of energy and fuel. Of these, the most important for railroad purposes is locomotive fuel oil which is used for the propulsion of Union Pacific's locomotives.

In this regard neither Union Pacific nor the railroad industry generally operating in Utah has ever paid sales and use taxes on purchases of locomotive fuel oil used for the propulsion of locomotive engines since the legislature exempted from the sales tax all sales of coal, fuel oil and other fuels furnished for other than domestic or commercial consumption on March 18, 1943. Such consumption by the railroad industry has always been considered by it to be noncommercial and therefore exempt. The State Tax Commission has been in complete agreement with that position since it issued a formal ruling to that effect on November 7, 1945, and has continued to exempt such consumption until July 1, 1965. (R. 10, 21, 23)

The change and reversal of position by defendant was due to an Opinion of the Utah Attorney General, No. 65-038, which provides as follows:

"OFFICE OF THE ATTORNEY GENERAL

"STATE OF UTAH

"OPINION OF LAW

No. 65-038

"Requested by Donald T. Adams, Chairman, Utah State Tax Commission. Opinion by Attorney General Phil L. Hansen and staff.

"QUESTION

"Are sales within the State of Utah of gas, electricity, heat, coal, fuel oil, or other fuels to railroads subject to the Utah sales tax?

"CONCLUSION

"Yes.

OPINION

"Section 59-15-4, Utah Code Annotated, 1953, provides in part:

"'From and after the effective date of this act there is levied and there shall be collected and paid:

"'* * *

"'(b) A tax equivalent to two and one-half per cent of the amount paid.

"'* * *

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

"This section has been interpreted as taxing 'coal . . . furnished for domestic or commercial consumption' but not coal furnished for 'industrial consumption.' (*Union Portland Cement Co. v. State Tax Commission,* 110 Utah 135, 170 P.2d 164, modified on rehearing 110 Utah 152, 176 P.2d 879, (1947).)

"This opinion was requested as to whether sale of coal, etc., to railroads is subject to the sales tax.

"In view of the foregoing statute and interpretation, the narrower questien seems to be whether or not the sale of coal, etc., to railroads is in the nature of a sale for commercial consumption or in the nature of a sale for industrial consumption? If commercial, it is apparently taxable; if industrial, it is apparently not.

"The cases which are concerned with defining 'commercial' and 'industrial' are not easily synthesized, since they arise under widely varying fact situations and statutory schemes. (*Reiser v. Meyer,* 323 S.W. 2d 514, Mo., 1959.) However, a meaningful distinction has been made in some cases which say that fuel would be used commercially when used merely to assist in the exchange of goods and services. (*United States v. Public Service Co. of Colorado,* 143 F.2d 79, 10th Cir., 1944; *Reiser v. Meyer,* supra; *Jordan v. Tashiro,* 278 U.S. 123, 1928) and industrially when used to manufacture or fabricate materials. (*North Whittier Heights C. Ass'n v. National Labor Relations Board,* 109 F.2d 76, 1940; *Murdock v. City of Northwood,* 67 N.E. 2d 867, 870, Ohio, 1946.)

"The law in Utah pertaining to this question should be explained by looking at both of these definitions and at what appears to be the justification for making any distinction at all between industrial and commercial uses.

"The rationale in not taxing sales of coal, etc., for industrial purposes seems to be that the cost of such materials is included in the price of the article manufactured or fabricated, which article is eventually taxed.

"Sales of coal for commercial consumption are taxed because the cost of the coal is not as closely connected with the product upon which there is an ultimate tax, or the use to which the coal is put results in a product or service upon which there is no tax. Therefore, if a tax on such sales is to be collected at all, it must be collected at the time the coal is sold to the commercial user.

"This interpretation is in accord with the holding in the *Union Portland Cement* case, supra. That case dealt with purchase of coal in Wyoming to be used for heating kilns used in the manufacture of cement in Utah. The case indicated that the production of cement was an industrial activity. The Court stated that while the coal did not enter into and become an ingredient or component part of the manufactured product so as to become exempt as a wholesale sale under Section 59-15-2 (f), Utah Code Annotated, 1953, nevertheless since it was employed in an industrial use, it was not subject to either the Utah sales or use tax, since the Utah Sales Tax Act exempts sales of coal for industrial uses.

"Thus, the exemption of coal for industrial use seems to have a similar basis as the exemption of wholesale sales; that is, the tax will be collected later on the finished product. However, actual incorporation of the coal into the manufactured product is not a requirement to qualify for the industrial exemption.

"This rationale also provides a reasonable basis for the holding in the recent case of *Ogden Union R.R. Depot Co. v. State Tax Commission*,

16 Utah 2d 23, 395 P.2d 57, modified on rehearing ..... Utah 2d ....., 399 P.2d 145 (1964). There, coal was purchased in Wyoming and used in Utah in the plaintiff's business of repairing railroad equipment. The coal was not used to manufacture a product which subsequently was going to be subject to the Utah sales tax. The Court held that such a use was commercial and, therefore, taxable.

"A further guide is provided in the case of *Wisconsin Electric Power Co. v. United States*, 336 U.S. 176 (1948). There, the Court said that in determining whether a business is industrial or commercial, one must look at the "predominant character" of the business.

"It appears that the question of this opinion must be answered by applying the definitions and guide suggested above, together with the purpose for the commercial-industrial distinction as discussed. In so doing, it is believed that the predominant character of the railroad business is commercial in nature; that is, it does not involve manufacturing or fabrication. The fact that the business of the railroad does not consist in that type of activity upon which a Utah sales tax is eventually levied would, in view of the intention of the exemption, also classify the sale of coal, etc., to railroads as commercial. Since the application of the factors discussed herein leads to the conclusion that the sale of coal is for a commercial use, such a sale is subject to the Utah sales tax.

Respectfully submitted,

(s) PHIL L. HANSEN
Attorney General Phil L. Hansen"

PLH/jbr./bv
6/23/65
(R. 7, 8, 23, 24-26)

In accordance with and based on said Opinion, defendant issued a sales and use tax bulletin containing a notification that effective July 1, 1965, all sales of gas, electricity, heat, coal, fuel oil and other fuels sold to railroads would be considered subject to the sales tax, and all storage, use or other consumption of such items in Utah by railroads in connection with out-of-state purchases, would be subject to the use tax. (R. 8, 27)

Upon receipt of said notice plaintiff advised defendant that in its view the Attorney General's Opinion and the position of the State Tax Commission pursuant thereto was in error, and that said sales and use in Utah were exempt from the sales and use tax laws. Plaintiff also indicated that the validity of the Opinion would be contested. To do so plaintiff presented to defendant the factual data on three out-of-state purhases of locomotive fuel oil which occurred in July of 1965. Two of the purchases came from Sinclair, Wyoming, and one came from Denver, Colorado. All three were delivered to Union Pacific's storage facilities at Ogden, Utah, and thereafter used by it for propulsion of locomotives in the operation of its railroad, including switch engines and road engines, both in passenger and in freight service. (R. 8, 9)

Following receipt of the information concerning said out-of-state purchases totaling $25,383.23 defendant issued and served a deficiency use tax assessment upon plaintiff for the period July, 1965, and assessed a use tax against plaintiff in the sum of $888.42 on said out-of-state purchases. The "remarks" section of the deficiency assessment states:

> "This audit assesses Utah use tax on purchases of locomotive fuel oil listed on Exhibit A-1, and is assessed in accordance with Attorney General's Opinion 65-038 that sales of energy and fuel oil to railroads are subject to tax." (R. 9)

The factual details of said purchases by plaintiff and the subsequent use thereof in its railroad business are representative of a general practice by plaintiff which has been in existence for over 20 years. Plaintiff has also made similar purchases of fuel oil within the State of Utah for the same type use over the same period. Said purchases as outlined represent only a small percentage of the overall purchases, use and consumption of fuel by plaintiff in Utah for the propoulsion of locomotives transporting persons and property in the operation of its railroad business. All other railroads in business in Utah have similar operations with respect to the purchase, storage, use and consumption of locomotive fuel oil, and have paid no sales or use taxes to the State of Utah on the same. (R. 10)

ARGUMENT

POINT I

THE LEGISLATURE INTENDED TO EXEMPT THE RAILROAD INDUSTRY FROM SALES AND USE TAX ON THE PURCHASE AND CONSUMPTION OF FUEL OIL FOR THE PROPULSION OF LOCOMOTIVES, AND THE TAX COMMISSION'S LONG-STANDING ADMINISTRATIVE RECOGNITION THEREOF HAS BEEN ENTIRELY PROPER.

Taxability in this case is dependent upon the construction to be placed upon the provisions of Section 59-

15-4(a), UCA, 1953, as amended, which specifically exempts the sale of coal, fuel oil and other fuels from the tax, except as provided in subsection (b) where a sales tax is imposed upon "gas, electricity, heat,, coal, fuel oil or other fuels sold or furnished for domestic or commercial consumption."

The basic judicial approach for proper statutory construction is to carry out what the legislature had in mind at the time of the enactment. That principle was recently applied in *Johnson vs. State Tax Commission*, 17 Utah 2d 337, 411 P.2d 831 (Utah, 1966), where this court observed:

> "The fundamental consideration which transcends all others in regard to the interpretation and application of a statute is: What was the intent of the legislature? All of the rules of statutory construction are subordinate to it and are helpful only insofar as they assist in attaining that objective. In determining that intent the statute should be considered in the light of the purpose it was designed to serve and so applied as to carry out that purpose if that can be done consistent with its language."

In the application of that fundamental principle to the present case we are fortunate in having a legislative history which is explicitly clear in establishing legislative intent without the need for the court to rely upon peripheral rules of statutory construction. That legislative history graphically illustrates, as we will hereinafter point out, that the lawmakers intended to exempt railroads from the sales and use tax on locomotive fuel oil.

The exemption for noncommercial consumption of coal, fuel oil and other fuels was first added to the Utah sales tax act by chapter 93, Laws of Utah, 1943, effective March 18, 1943. However, the basic statutory exemption from the sales tax for noncommercical consumption was a part of the original Emergency Revenue Act of 1933. (R. 14) Accordingly, to acquire the complete legislative history as well as the administration of said exemption by the State Tax Commission, it is necessary to review certain material events which go back to the early 1930's.

The origin of the present statutory provision concerning domestic and commercial consumption in the Sales Tax Act is found in Section 4(b) of Chapter 63, Laws of Utah, 1933, commonly known as the Emergency Revenue Act of 1933. That section provided that "all services rendered or commodities furnished for domestic or commercial consumption by any utility of the State of Utah," which was under the jurisdiction of the Public Utilities Commission, were subject to the sales tax. (R. 14)

Effective August 3, 1933, the Second Special Session of the legislature amended Section 4(b) to provide that the sales tax would apply only "to gas, electric and heat corporations * * * for gas, electricity, or heat, furnished for domestic or commercial consumption." (R. 15, 16)

The 1933 legislature obtained the basic language for Section 4(b) from a similar provision which was then contained in Section 616(a) of the Federal Revenue Act of 1932. In addition, and of material significance in the present case, the Utah legislature adopted the federal legislative history of said provision as well as the federal

regulations promulgated with respect thereto. In fact, said history and regulations, along with Section 616(a), provided both the source and the background for Section 4(b) of Chapter 63, Laws of Utah, 1933, as well as the regulations of the Tax Commission pertaining thereto. (R. 13, 14)

Section 616(a) as originally enacted on June 6, 1932, by the 72nd Congress, imposed a tax "for electrical energy for domestic or commercial consumption * * *." On June 16, 1933, the 73rd Congress amended the section to shift the tax from the consumer to the vendor. (R. 10, 11)

The original provision was first proposed as a Senate amendment to the Revenue Act of 1932 in the following language:

> "There is hereby imposed upon energy sold by privately owned operating electrical power companies a tax equivalent to 3 per cent of the price for which so sold." 72 Congressional Record, page 12054. (R. 11)

The amendment was referred to a Conference Committee, which reported:

> ". . . This amendment imposes a tax of 3 per cent of the sale price of electrical energy sold by privately owned, operating electrical power companies. The House recedes with an amendment substituting a tax of 3 per cent of the price paid for electrical energy for domestic or commercial use (as distinguished from industrial use), to be paid by the purchaser and collected by the vendor . . ." H. R. (Conf. Report) No. 1492, 72nd Congress, 1st Session, page 22. (R. 11)

The Conference Report was accepted. 72 Congressional Record, page 12071. (R. 12)

On May 11, 1933, the Senate debated and discussed the proposed amendment to Section 616(a) to shift the tax from the consumer to the vendor. The material comments are set out in Volume 77, Congressional Record, between pages 3212 and 3217:

Senator Harrison, a member of the Senate Finance Committee, which favorably reported the Revenue Act, in discusssing the proposed revision in 1933, said:

> ". . . I am tellling the Senators nothing new when I remind them that we had a fight here in 1932 over the imposition of this tax. The Senate imposed a 3 per cent electric-energy tax, and it was finally adopted, to be collected from the consumer of electrical energy. We applied that only on domestic and commercial energy; that is, electric energy used in stores and dwellings that are classified as commercial and domestic. There was no tax in the 1932 Act imposed upon energy employed in industry."

Mr. Robinson of Indiana: "I am asking the Senator (Mr. Harrison) for information because I know he is very familiar with the subject. I have had a number of inquiries with reference to a 1 per cent tax assessed against electric railways. Does the Senator call that industrial energy?"

Mr. Harrison: "Yes, I think that is industrial energy." (R. 11, 12)

This excerpt clearly indicates that Congress intended the railroad industry to qualify as an exempted industrial user.

Further evidence showing that the Senate intended the railroad industry to be exempt from the tax imposed on commercial consumption under Section 616 (a), is shown by the proposal at page 3216 (which was not adopted) to include a proviso "that this tax shall not apply to the sale of electric energy sold for manufacturing purposes."

In arguing against the amendment, at page 3217, Senator Reed said:

> "Furthermore, the Senator's amendment would exempt manufacturing concerns if they buy industrial current but does not exempt the trolley lines which are now in receivership or on the verge of it. The Senator from Nebraska does not exempt railroad companies which are having a bad time now. Many manufacturing concerns are far better able to pay the 3 per cent tax than are the railroad companies and the trolley lines which will find themselves taxed under it. It is a wholly unjust discrimination." (R. 12)

The federal regulation applicable to 616(a), which was promulgated by the Commissioner of Internal Revenue in 1932, and again in 1933 following the amendment to Section 616(a), is even more explicit. It provided in part:

> "Scope of tax. The tax is imposed upon electrical energy sold for domestic or commercial consumption and not for resale, except as provided hereinafter.

"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, processing, mining, refining, shipbuilding, building construction, irrigation. etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by public utilities, waterworks, telegraph, telephone and radio communication companies, *railroads,* other common carriers, educational institutions not operated for profit, churches, and charitable institutions. However, electrical energy is subject to tax if sold for use in commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc." Emphasis added. (R. 13)

Recognizing the intent of the Utah legislature in its enactment of Section 4(b) of the Emergency Revenue Act of 1933, and following the basic language of the foregoing federal regulation, the State Tax Commission issued its regulation on the effective date of the Emergency Revenue Act with respect to the scope of domestic and commercial consumption. Said regulation provided in part, as follows:

"All services rendered or commodities furnished the consumer by a utility are taxable, except:

"(1) Services rendered or commodities furnished for industrial consumption, e.g., those used in manufacturing, processing, mining, refining, building construction, etc., and

"(2) Those rendered or furnished for other uses which likewise cannot be classed as domestic

> or commercial, such as public utilities, waterworks, irrigation companies, telegraph, telephone, and radio communication companies, *railroads*, other common carriers, educational institutions not operated for profit, churches and charitable institutions." Emphasis added. (R. 15)

No change of any significance occurred in said regulation until July 1, 1944, and no change was made in the statute until March 18, 1943. Of course, during that entire period the railroad industry was exempted from the sales tax on amounts paid for gas, electricity and heat.

The effect of the exemption afforded users of gas, electricity and heat furnished for other than domestic or commercial consumption placed producers of, dealers in, and consumers of coal, fuel oil and other fuels at a competitive disadvantage. (R. 17) Accordingly, the 1943 legislature enacted Chapter 93, effective March 18, 1943, again amending Section 4 of the Emergency Revenue Act of 1933. The amendment expanded the exemption for noncommercial consumption to include "coal, fuel oil and other fuels." (R. 18).

Chapter 93 was introduced as Senate Bill 172 and was prepared by the State Tax Commission. It was sponsored by legislators who were residents of coal-producing areas for the purpose of removing the discrimination which had resulted to Utah coal producers, fuel oil producers and other fuel producers from an imposition of a tax on sales of such products for other than domestic or commercial consumption. In its consideration and enactment of Chapter 93 the legislature had before it and relied upon the prior construction of the phrase "domes-

tic and commercial consumption" from the original Emergency Revenue Act, together with the Tax Commission's regulations applicable thereto. (R. 19). This had the practical effect of exempting the railroad industry from the tax on coal, fuel oil and other fuels to the same extent and in the same manner as had been the case with gas, electricity and heat from the effective date of the Emergency Revenue Act of 1933.

In fact, immediately following the enactment of Chapter 93, the Commission advised vendors and purchasers of coal, fuel oil and other fuels that the purchase and use thereof for the propulsion of locomotives in the operation of a railroad was not a use for domestic or commercial consumption and that said use was exempt from the tax. (R. 19)

Since the enactment of Chapter 93, there has been no material change in the statutory language of Section 4(b) of the Emergency Revenue Act of 1933, as amended, with respect to the legislative exemption for gas, electricity, heat, coal, fuel oil or other fuels furnished for other than domestic or commercial consumption. The present provision is Section 59-15-4, Utah Code Annotated, 1953, as amended. (R. 22)

Nevertheless, there was a brief reversal in the administrative handling of the exemption with respect to the railroad industry by the Tax Commission shortly after Chapter 93 became effective. It began on January 1, 1944, with a revision of the regulation relating to the definition of commercial use. The revised regulation provided in part:

> "Commercial use means the use connected with trade or commerce, or a use used in the commercial phases of industrial or other businesses. For example, the use of electricity to light a retail store is a commercial use and the use of electricity to light the administrative offices of an industrial concern is in the nature of a commercial use. The tax upon gas, electricity, heat, coal, fuel oil, or other fuels applies only to the sale or furnishing of such services for domestic or commercial consumption. Where the consumer has all gas, electricity or heat used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of the consumption of such product for the purposes of the Act." (R. 57)

On January 10, 1944, the Commission issued an order advising vendors and vendees of gas, electricity, heat, coal, fuel oil or other fuels of its opinion that the use of such materials or energy for the purpose of hauling freight or passengers by railroad was a commercial consumption and therefore taxable under Chapter 93. The Commission further advised that the sale of such energy and fuel from and after January 15, 1944, would be subject to the imposition of the tax. (R. 20)

Between January 15, 1944, and February 29, 1944, The Denver and Rio Grande Western Railroad Company (hereinafter called Rio Grande) purchased from Utah Fuel Company a quantity of coal which was used and consumed primarily for the propulsion of locomotives used by the Rio Grande in the operation of its railroad. The Commission denied the Rio Grande's claimed exemption from the sales tax for such use and consumption based upon its order of January 10, 1944, and Rio Grande

filed a petition before the Commission alleging that such sales of coal were fully exempt on the grounds that said coal was not sold or furnished for domestic or commercial consumption. (R. 21)

Following a hearing on said petition, the Tax Commission by a formal decision dismissed the case on November 7, 1945, expressly recognizing therein that the use and consumption of coal for the propulsion of Rio Grande's locomotives was not a commercial consumption within the proper scope and meaning of Chapter 93. (R. 21)

In addition, the Tax Commission issued a Bulletin on October 19, 1945, revoking its order of January 10, 1944, and readopting the construction and practice the Commission had followed from the enactment of the Emergency Revenue Act in 1933 to 1943, to the effect that such use and consumption by railroads did not constitute commercial use and the sale or furnishing of such items to railroads was not taxable. (R. 21)

The regulation defining commercial use issued on January 1, 1944, has never been altered by the Tax Commission to the present date even though at least eight additional revisions of the sales and use tax regulations have occurred since that time. And, since the formal ruling of the Commission in the Rio Grande case and the issuance of the Tax Commission's Bulletin on October 19, 1945, there has been no effort or attempt on the part of the Commission to impose a sales or use tax on the consumption of coal, fuel oil or other fuels in loco-

motives, and the Tax Commission has recognized the exemption of such use and consumption during that entire period of time and until July 1, 1965. The change and reversal of position by the Commission was due to Opinion No. 65-038 of the Attorney General. (R. 23)

We believe the foregoing outline of the legislative history of Section 4(b) persuasively establishes the intention of the legislature and that further argument with respect thereto would be superfluous. It is abundantly clear that the lawmakers intended to exclude and exempt the railroad industry from the sales and use tax on the purchase, storage and consumption of locomotive fuel oil. We now ask this court to enforce that intent.

In addition, we have presented the contemporaneous and administrative construction given the statutory language by the Tax Commission which has been in complete harmony with the legislative history, with one brief interlude, for a long period of time. Such construction and practice by the Tax Commission is entitled to receive great weight before the court. See *State vs. Hatch*, 9 Utah 2d 288, 342 P.2d 1103 (1959), and *Undercofler v. Eastern Airlines, Inc.*, 147 SE 2d 436 (Ga., 1966).

POINT II

ATTORNEY GENERAL'S OPINION NO. 65-038 IS ERRONEOUS AND SHOULD BE DISCARDED.

Although this appeal is for the purpose of reviewing the majority decision of the Tax Commission upholding the deficiency use tax assessment, since the decision and

the assessment are both predicated upon Attorney General's Opinion No. 65-038, we will proceed to an examination of its validity.

In the light of the established legislative intent with respect to the statute imposing a tax for energy and fuel "sold or furnished for domestic or commercial consumption," the misconceptions in and fallacious conclusion of Opinion No. 65-038 become readily apparent. In fact only a cursory examination reveals its vulnerability.

According to that Opinion, the law in Utah on the question of whether or not sales of energy and fuel to railroads is taxable under Section 59-15-4 is dependent upon the application of three factors or guides:

The first factor is to apply the definitions of "commercial" and "industrial." However, in establishing their meaning, the Opinion indiscriminately looks to all cases on any subject matter where one or both of these terms have been involved. While conceding that the cases are not easily synthesized, the Opinion does arrive at what it calls "a meaningful distinction" which "has been made in some cases which say that fuel would be used commercially when used merely to assist in the exchange of goods and services * * * and industrially when used to manufacture or fabricate materials." In making this distinction the Opinion ignores the only case where both terms are considered in connection with railway transportation. In *State vs. Smith,* 342 Mo. 75, 111 S.W. 2d 513 (1938), a Missouri statute taxed all sales of electricity to "domestic, commercial and industrial consumers" of electric

current. An effort was made to impose the tax on the current used by a street railway in propelling street rail cars. The court held that transportation of passengers on street railway cars was neither commercial nor industrial and points out that several Public Service Commissions as well as the Federal Power Commission have classified the various users of electricity into six categories: domestic, commercial, industrial, sale of electricity to railroads, municipalities, and to other utilities for resale.

We agree that the definitions selected by the Attorney General can be found in some cases. But at the same time, it is apparent that by their nature both terms can be construed in innumerable ways, and differences of opinion as to their meaning can and often do occur. In other words we are dealing with language which is susceptible to ambiguity and uncertainty. Therein, we think, lies the fallacy of the abstract technique employed in the Attorney General's Opinion. The scatter-gun approach in defining an ambiguous word in a statute runs the substantial risk of employing the wrong definition, as exemplified by this Opinion.

Rather than guess at the legislative intent, reference should have been made to the language of the statute, the subject matter of the Act, its legislative history, and any other acceptable aid to statutory construction. See C.J.S., Statutes, Sec. 351, *Norville vs. State Tax Commission,* 98 Utah 170, 97 P.2d 937 (1940).

In this regard, and in contrast to said Opinion, we believe a proper approach in arriving at the correct

definitions of commercial and industrial in this case was taken by Commissioner Gunther in his dissenting opinion to the Tax Commission's Decision. He cogently points out that the tax imposed by subsection (b) of 59-15-4 on fuels is not a tax of general imposition, but actually is one of limited imposition because of the general undefined tax exemption for such fuels in subsection (a). (R. 72) In other words the legislature intended to exempt every transaction relating to fuels unless specifically qualifying within the limited area to be taxed. This requires a strict construction of the word "commercial," since it is in the area to be taxed, and a broad construction must be applied to the word "industrial," which would include the railroad industry, since it is in the generally undefined exempted area.

In addition, in the present case the complete legislative history of the Utah statute was and is available and expressly excluded the railroad industry from the scope of "commercial" consumption. It is apparent from examining the Attorney General's Opinion that no attempt was made to define the material terms involved by looking to the context of their use in the statute or in the legislative history.

This is graphically illustrated on page 3 of the Opinion (R. 26) where the application of the abstract definition of "industrial" produces a final result in direct violation of the manifest legislative intent. It states: "* * * it is believed that the predominant character of the railroad business is commercial in nature; that is, it does not involve manufacturing or fabrication." However, as

we have heretofore pointed out in Point I, for the express purpose of preventing industrial consumption to be restricted and limited to manufacturing, the Senate in 1937 defeated a proposed proviso to 616 (a) that the tax would "not apply to the sale of electric energy sold for manufacturing purposes." (R. 12)

The second factor applied by the Opinion is based upon the unfounded presumption that the basic distinction between commercial and industrial consumption is dependent upon whether or not the consumption of the energy or fuel constitutes the last opportunity to impose the tax. If it is, the use is commercial; if it is not, using the analogy of a wholesale sale, the use is industrial because the tax will be collected later on the cost of the finished product.

Such a distinction, if in fact it is a distinction, does not appear at any place in the legislative history of the Sales Tax Act, and until this Opinion, has never been the basis for the administration and construction of the statute by the State Tax Commission. The proper test of what is commercial and what is industrial has always been tied to the nature of the business making the use, rather than whether or not a tax can ultimately be imposed on an article associated with the consumption. This was made clear by the opinion of the Supreme Court of the United States in *Wisconsin Power Company vs. United States,* 336 U.S. 176 (1945). In construing the scope of the term "commercial" under Section 616 (a) which was the forerunner and source of the present Utah statute, the Court states:

"The legislative history indicates that the term 'commercial' was meant to apply to the nature of the business in which the energy is consumed. . . ."

In his dissenting opinion, Commissioner Gunther further exposes the error of the alleged wholesale sales analogy as the basis for determining what constitutes industrial use by pointing out some inconsistent results through its application.

At pages 74 and 75 of the Record, he states:

"An adoption of the tests suggested in the Attorney General's opinion, while it might in many situations produce equitable results, can in some lead to questionable conclusions and, more significantly, tends to make indistinct and meaningless the difference between 'industrial' consumption and 'commercial' consumption of these fuels. For example, application of these tests to sales of fuel to a commercial repair garage and to the United States Steel plant at Geneva points out some of these problems. United States Steel, manufacturing tangible products for resale, is clearly an industrial consumer under the opinion and would be exempt from tax on its fuel purchases. This is true even though its sales are out of the state as a general rule and promise no later tax receipts in exchange for the exemption.

"At the same time, Opinion No. 65-038 would impose a tax on the purchase of fuel by a commercial repair garage because no tangible product results from such production. But the end product of the garage, i.e., service, is taxable under the Utah Sales Tax Act. Therefore, even though the fuel were put to the same use in both cases, such as the propulsion of vehicles belonging to the re-

> spective establishments or to the production o heat, nevertheless, the commercial establishmen would pay a dual tax in this state and the indus trial establishment would likely pay no tax at all. It is submitted, therefore, that the fundamental premise of the opinion is in error."

Opinion No. 65-038 states that the third or final factor to be applied in determining whether a business is industrial or commercial is to look at its "predominant character," citing the Wisconsin Power Co. case, supra. We have no quarrel with the application of that principle to the present case, because it has always been an accepted doctrine under both the federal and state tax provisions involving commercial consumption, and has been expressly recognized in all regulations promulgated thereunder, including Regulation No. 35, presently in effect. However, we do object to the misapplication of that principle in this case. The Opinion concludes that the predominant character of the railroad business is commercial because it does not involve manufacturing or fabrication. This is simply a negative application of the Opinion's incorrect and limited definition of "industrial" in an attempt to place railroads in the "commercial" category, while ignoring the factor of "predominant character" altogether.

It was admitted by the stipulation of facts, and seems obvious, that the predominant character of plaintiff's business is the transportation of persons and property by rail. In the present case, since the consumption of fuel oil for the propulsion of locomotives is the very essence of railroading, there is no question that such consumption is associated with the "predominant character" of plaintiff's

business. And, as we have already pointed out in Point I, such business was intended by the legislature to be exempt from the tax on its consumption of energy and fuel because of its predominantly noncommercial character.

Nevertheless, there are some minor phases of activity in the railroad industry, as in other industrial enterprises, which may properly qualify as commercial in nature and be subject to the sales tax. That situation has been recognized in both federal and state regulations since the original tax enactments in 1932 and 1933. For example the first federal regulation provided in part:

> ". . . However, electrical energy is subject to tax if sold for use in commercial phases of industrial or other businesses, such as office buildings, sales and display rooms, retail stores, etc." (R. 13)

Both the initial state regulations concerning commercial consumption and the present regulation contain similar language.

From our analysis, it appears that the ruling of this court in *The Ogden Union Railway and Depot Company vs. State Tax Commission,* 16 Utah 2d 255, 399 P.2d 145 (1965), on rehearing, could properly qualify as an example of the application of the tax to a minor commercial phase of an industrial enterprise. However, we also recognize that the facts of that case are at material variance with the present one. There is a wide difference between consumption of fuel in the propulsion of locomotives in the operation of a railroad, including switch engines

and road engines in moving passengers and freight, and consumption of coal by a separate and distinct terminal company in a stationary power plant for the purpose of applying heat for various terminal activities.

CONCLUSION

We believe the legislative intention to exempt the railroad industry in Utah from the sales and use tax on its consumption of fuel oil for the propulsion of locomotives is clearly established. We therefore urge the court to enforce that intent by reversing the majority decision of the Tax Commission.

Respectfully submitted,

BRYAN P. LEVERICH
A. U. MINER
HOWARD F. CORAY
SCOTT M. MATHESON
NORMAN W. KETTNER
600 Union Pacific Building
Salt Lake City, Utah
Attorneys for Plaintiff