1967

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

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

DEFENDANT'S BRIEF

Review of a Decision of the Utah State Tax Commission

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STATEMENT OF THE NATURE OF THE CASE

This is a proceeding to review a determination of the Utah State Tax Commission which held that a deficiency use tax in the amount of $888.42 was properly assessed against the taxpayer on the use of fuel oil furnished for commercial consumption within the meaning of Section 59-15-4, Utah Code Annotated, 1953, as amended.

DISPOSITION BEFORE THE UTAH STATE TAX COMMISSION

A formal hearing on this matter was held before all members of the Utah State Tax Commission on April 27, 1966 and on July 14, 1966 the Commission entered its Decision No. 426, one commissioner dissenting, upholding the deficiency assessment.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have the majority decision of the Commission reversed and a judgment entered holding that fuel oil used in the propulsion of its locomotives is not used in commercial consumption.

STATEMENT OF FACTS

The parties to this action have entered into a Stipulation of Facts (R. 7-23) and these facts are incorporated in and restated in the decision of the Commission (R. 66-76) and in plaintiff's brief.

ARGUMENT

POINT I

FUEL OIL USED BY THE PLAINTIFF IN THE PROPULSION OF LOCOMOTIVES IN THE OPERATION OF ITS RAILROAD IS FUEL OIL SOLD OR FURNISHED FOR COMMERCIAL CONSUMPTION AND THE

SALE OR USE OF SUCH FUEL OIL IS SUBJECT TO THE UTAH SALES AND USE TAX.

The applicable statutory provision in this case, since our sales and use tax are complementary in operation, *Barrett Investment Co. v. State Tax Commission,* 15 Utah 2d 97, 387 P. 2d 998 (1964); *Geneva Steel Co. v. State Tax Commission,* 116 Utah 170, 209 P. 2d 208 (1949); *Union Portland Cement Co. v. State Tax Commission,* 110 Utah 152, 176 P. 2d 879 (1947), is Section 59-15-4, Utah Code Annotated, 1953, as amended, which provides that:

> From and after the effective date of this act there is levied and there shall be collected and paid:
>
> (a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to three percent of the purchase price paid or charged, except that where a person takes, as a trade-in for part payment of the merchandise sold, tangible personal property other than money, the tax shall be computed and paid only upon the net difference between the selling price of the merchandise sold and the amount of the trade-in allowance. 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 three 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. None of the provisions of this subsection shall apply to electric power plant systems owned and operated by co-operative or nonprofit corporations engaged in rural electrification. (Emphasis added.)

We agree with the plaintiff that it is liable for the tax imposed by the sales and use tax acts only if the fuel oil is used for commercial consumption. The terms "commerce" and "commercial" are broad enough to include all business activity. 11 Am. Jur., Commerce sec. 3:

> The term "commerce," although employed in the Constitution, is nowhere defined therein. In fact, it has ben said that the term is not susceptible of exact and comprehensive definition and that no all-embracing definition has ever been formulated. The term is one of extensive import and the question as to what constitutes commerce should be approached both affirmatively and negatively—that is, from the points of view as to what it includes and what it excludes. Although the term includes traffic, it is much broader. As used in the Constitution, the word is equivalent of the phrase "intercourse for the purpose of trade" and comprises every species of commercial intercourse. It includes the purchase, sale, and exchange of commodities, the transportation of persons and property by land and water, and all the instrumentalities by which such intercourse is carried on. Stated in another way, it has been said that the term, as used in the Constitution, includes the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and

> traffic embraces all the means, instruments, and places by which intercourse and traffic are carried on,and comprehends the act of carrying them on at these places by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons.

However, it is our view that the legislature adopted the term in a narrower sense. The legislature used the term "commercial" consumption as opposed to "industrial" consumption and intended to exempt from taxation only items which were truly used in industrial consumption.

The plaintiff has contended that it need only show that the fuel oil was used for some purpose which is not defined as commercial, whatever that purpose may be and which it has not defined. We contend, however, that the taxpayer must show not only that its use was not commercial, but that it must show that the use was one of industrial consumption.

In the Joint Committee Report pertaining to Sec. 616 of the Federal Revenue Act of 1932 (an act closely related to ours), it was stated:

> The House recedes with an amendment substituting a tax of three per cent of the *price paid for electrical energy and for domestic or commercial use (as distinguished from industrial use)* to be paid by the purchaser and collected by the vendor with administrative provisions and an exemption in the case of electrical energy

> sold to the United States or any state or territory or political subdivision thereof, or the District of Columbia. (Emphasis added.)

This statement does not permit an interpretation which says that a taxpayer must only show that his use was not commercial. It was intended that two broad categories of use be established within the business community and that a taxpayer must fit within one of them. A taxpayer's use must be either commercial or industrial and if his activity is essentially commercial he is subject to the tax imposed by the statute.

The plaintiff in its brief has set forth several statements made by members of the United States House of Representatives at the time the statute was being considered. One of the questions asked and the response given would seem to indicate that electric railways were not to be held subject to the tax imposed by the statute. It is submitted, however, that this exchange between members of the House in the course of debate is not conclusive of the final effect of the bill, particularly where it is in conflict with the official documents pertaining to the consideration of the bill and contrary to the statute.

In *St. Louis Refrigeration and Cold Storage Co. v. United States,* 43 F. Supp. 476, (Ct. Cl. 1942), the taxpayer used electrical energy in the operation of its refrigerated warehouses in the St. Louis area. The taxpayer there sought to avoid imposition of the tax on the electrical energy used in the operation of its busi-

ness. It, too, refered to statements which had been made during the course of debate on Sec. 616. The Court of Claims rejected the taxpayer's contention, stating:

> The discussions in the Congress covered a wide range. Many individual statements were made. These are quoted in extenso by both parties with conflicting interpretations. However, the Conference Report which was made by the Joint Conference Committee representing both the Senate and House, and *which was the last committee explanation before final vote was taken,* contained the following explanation of the taxing provision which was made here:
>
> (See Joint Committee statement quoted above.)
>
> * * *
>
> If any ambiguity existed and any explanations were needed apart from the language of the statute, this final Joint Conference Committee Report makes it clear that it was the intention that the term "commercial" should have a meaning broader than the restricted sense plaintiff would have us apply. It explains *that the tax applies to commercial as distinguished from industrial use.* It then exempts only electrical energy sold to the government, national or state, or a political subdivision thereof.
>
> The use of the two terms by way of contrast . . . would seem to preclude the intermediate classification which plaintiff attempts to read into the statute.
>
> It hardly seems necessary to go behind the clear wording of the statute. Certainly it is unnecessary to go behind the Joint Conference Report into the maze of discussion and interpre-

> tation by individual members of the Congress when the statute itself, which is the final product of their labors, is couched in simple language clearly expressed.

The court then held that the taxpayer's use of electrical energy constituted commercial consumption and that it was subject to the tax imposed by the statute.

In *Wisconsin Electric Power Co. v. United States*, 336 U.S. 176, 69 Sup. Ct. 492, 93 L. Ed. 591 (1949), the taxpayer supplied electrical energy to a number of dairy plants and sought to avoid the burden and responsibility of collecting the electrical energy tax on the ground that the busines activity of the dairy plants was not commercial. There, also, the court refused to recognize any twilight zone between industrial and commercial, stating:

> Although the language of the section does not include the word "industrial" it is clear from the legislative history that "commercial" was used in contradistinction to "industrial." While electricity sold for commercial consumption is taxed, that sold for industrial consumption is not.

The court then went on to state:

> The legislative history indicates that the term "commercial" was meant to apply to the nature of the business in which the energy is consumed and not to the specific purpose to which each measurable unit of electricity is devoted.

This court, too, has considered these classifications and it has not recognized an area which is neither com-

mercial nor industrial. In *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), the court in considering the use of coal by the taxpayer found that it was called upon to determine whether the use was one of commercial consumption or industrial consumption. These terms, for the purpose of the statute, are used in contra-distinction and there is no in-between area which may or may not be subject to taxation.

In view of these decisions and the Joint Conference Committee Report, it is contended that the Utah statute should also be interpreted as allowing only two classifications — commercial and industrial — and that the plaintiff must show that its business activity is industrial in nature in order to be relieved of the sales and use tax imposed upon the consumption of fuel oil.

There is no simple or general definition of what business activity is commercial and what is industrial; and, in the *Wisconsin Electric Power Co.* case, supra, the United States Supreme Court refused to set forth such a definition, stating:

> We shall not undertake the difficult and here needless task of general definition which differentiates for this statutory clause between industrial and commercial in other lines of business activity. That is a problem primarily for the administrators of the section with knowledge of the specific and varying facts.

Nor has this court set forth a general definition of

industrial consumption as opposed to commercial consumption.

For the purpose of this case and the statute, it would appear that industrial consumption contemplates the use of coal, fuel oil or other fuels to process, manufacture, fabricate or operate on a product which is then sold or disposed of.

In the instant case the fuel oil is not so used. The taxpayer is the final consumer and the oil is used to achieve the taxpayer's primary function, propelling its locomotives over its rail network in the transportation of persons and things. The fuel oil, then, was not used in nor closely related to the process, manufacture or fabrication of a product which is then sold or disposed of.

This consumption is commercial and there is no industrial consumption exempt from the tax as contemplated by the statute.

In *Chicago B. & Q. R. Co. v. Iowa State Tax Commission,* .... Iowa ...., 142 N.W. 2d 407 (1966), the taxpayer sought a refund of the use tax imposed upon fuel oil it had purchased outside of the state. The Iowa statute provided an exemption from the use tax for " . . . fuel which is consumed in creating power heat or steam for processing or for generating electric current." This exemption as so delineated seems clearly to pertain to industrial consumption such as we have discussed above and would provide no exemption for commerical consumption, the term used in our statute

The taxpayer in the *Chicago, B. & Q. R. Co.* case sought to come within the exemption by arguing that the fuel oil was used in generating electricity which was then used to operate its diesel electric engines. The court rejected this contention stating:

> What plaintiff does is not generate electric current, but run locomotives. The fuel oil used is consumed in operating locomotives. To come within the definition of property used in processing, in subsection (b), plaintiff is taking an intermediate step in the use of the fuel to run the locomotive, not the end result.

And then at page 411, the court further observed:

> Our interpretation is simply, when the statute is considered as a whole, *generating electric current is used in a sense contemplating a complete action or end result and does not include one who consumes fuel to run a locomotive,* even though as an intermediate step he generates electric current. (Emphasis added.)

The court then went on to hold that the taxpayer was subject to the Iowa sales and use tax.

That case is not too unlike the case we have under consideration here and the difference in the wording of the statutes does not compel a different result. The Iowa statute clearly contemplates an exemption for industrial use while contemplating taxation of commercial use, even though the statute does not use the term "commercial." Our statute, approaching the question from the other way, declares that all commercial consumption is taxable and by implication indicates

that industrial consumption is not taxable, even though the statute does not use the term "industrial." See in this regard the first *Union Portland Cement Co.* case, supra:

> It appears, therefore, from all the provisions of Sec. 80-15-4 taken together that, first, sales of coal, etc., were exempt from the sales tax except as thereinafter provided. Second, *it was thereinafter provided that coal, etc., used for domestic and commercial consumption were made subject to the sales tax, hence this left industrial coals, etc., not subject to the sales tax.* (Emphasis added).

In both cases the fuel oil is used to provide the energy necessary to propel the companies' locomotives—the end result or end product which the taxpayer is seeking—and this is commercial consumption rather than industrial consumption.

Finally, some consideration should be given to the opinion of this court in *Ogden Union Railway and Depot Co. v. State Tax Commission,* 16 Utah 2d 25, 399 P. 2d 145 (1965), (on rehearing). Although this court was not there concerned with the use of coal or fuel oil to propel locomotives as in the instant case, the court made an observation which we consider to be quite pertinent here:

> A careful consideration of the entire sales tax statute, Section 59-15-4, U.C.A. 1953, tends to support the Commission's conclusion. The same statute which provides for the tax on coal sold or furnished for "commercial" consumption

(Section 59-15-4(b)(2), by its other subdivisoins (b), (d), (e), (f) and (g)) *also expressly taxes a wide gamut of other services such as transportation,* amusements, hotels, motels, cafes and laundries, *all of which are properly classified as "commercial" and includes with them "common carrier" operations.* (Emphasis added.)

The plaintiff is unquestionably a common carrier and is unquestionably engaged in the business of transporting people and goods. It is the final consumer of the fuel oil. As this court observed in the *Ogden Unoin* case just quoted, these are commercial type activities and being commercial the fuel oil used by the plaintiff is subject to the sales and use tax.

POINT II

PRIOR FAILURE TO TAX FUEL OIL USED IN THE PROPULSION OF LOCOMOTIVES, BASED ON ADMINISTRATIVE PRACTICE AND INTERPRETATION, IS NO BAR TO VALID SUBSEQUENT TAXATION WHICH IS PROSPECTIVE IN OPERATION.

The plaintiff in its brief has argued that the Commission has never taxed fuel oil used by railroad companies except for one abortive attempt to do so in 1944, and that it should not be permitted to do so now. While considerable weight generally is and should be given to an administrative interpretation, if that interpretation is wrong and contrary to the statute then it should

not be allowed to stand. Nor should an administrative agency be prohibited from adopting a correct interpretation of a statute, prospective in operation, even if it means rejection of a prior interpretation, where its experience and the development of the law indicate that the prior interpretation was erroneous. As is stated in Davis, *Administrative Law Treatise,* p. 327, an administrative agency's " . . . activities ought not to be frozen, but the agency should have freedom to try to achieve general legislative objectives by taking into account later developments and experience."

And, in *E. C. Olson Co. v. State Tax Commission,* 109 Utah 563, 168 P. 2d 324 (1946), this court held that the failure of the Tax Commission to collect a tax properly collectible for over 12 years was no bar to its present collection of the tax. It was there stated:

> The facts of this case merely show that for over 12 years the Tax Commission has failed to discover that taxes as required by the sales tax law were not being paid by plaintiff on the questioned sales. The Tax Commission because of said failure to discover the mistake is now precluded by statute . . . from collecting the deficiency except for the past three years, which collection the Commission is att empting to make in this case. *It will not be seriously contended that because the Tax Commission has for so many years omitted to assess and collect the tax on the questioned sales it is now precluded from performing that duty* and from salvaging from its past omissions what it can for the state. (Emphasis added.)

Likewise, the failure of the Commission—because of uncertainty and doubt or some other reason—to collect the sales and use tax on fuel oil consumed by this plaintiff and others similarly situated should not operate as a bar to collection now where it has been properly determined that the fuel oil was furnished for commercial consumption.

The plaintiff devotes a considerable portion of its brief to the task of taking issue with Attorney General's Opinion No. 65-038. It is sufficient to state here that the plaintiff's liability for the Utah sales and use tax is determined by the statute not the Attorney General's opinion. If the plaintiff is using fuel oil for commercial consumption, it is subject to the tax. Further, it should be noted that this case is here on review not from the determination made in Attorney General's Opinion No. 65-038 but from a determination made by the Utah State Tax Commission in its Decision No. 246 which, in detail, sets forth the basis for that determination.

This court need only determine whether the Findings of Fact and Conclusions of Law made by the Commission ,the trier of the facts, are supported by the evidence and whether the Commission correctly interpreted the statute. This court is not called upon to determine whether the Attorney General's opinion is "erroneous and should be discarded" since this is not the matter here on review.

CONCLUSION

It is contended, then, particularly in view of the case law as it has developed throughout the country as discussed above, that the plaintiff's business is commercial in nature within the meaning of the Utah sales and use tax statutes providing for taxation of fuel sold or furnished for domestic or commercial consumption. It is urged, then, that the determination of the Utah State Tax Commission be affirmed.

Respectfully submitted,

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