1967

Union Pacific Railroad Company, A Corporation v. State Tax Commission of Utah : Defendant's Brief In Rehearing To Petition For Rehearing

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 IN REPLY TO PETITION FOR REHEARING

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STATEMENT OF THE NATURE OF THE CASE

This is a petition for rehearing of the court's determination that fuel oil used in the propulsion of plaintiff's locomotives was a commercial use subject to the Utah sales tax under provisions of Utah Code Ann. § 59-15-4 (1963).

DISPOSITION BEFORE THE UTAH SUPREME COURT

On March 13, 1967, this court rendered its opinion written by A. H. Ellett, Justice, and concurred in by ~~three~~ two members of the court, sustaining the Utah State Tax Commission, and held that the railroads were subject to the Utah sales tax on fuel oil used to propel its engines upon its railways.

RELIEF SOUGHT ON PETITION FOR REHEARING

It is the defendant's position that the decision entered by this court on March 13, 1967, properly applied the law and fully considered all of the matters raised by the plaintiff in its petition, and that the petition for rehearing should be denied.

STATEMENT OF FACTS

The relevant facts have been set forth previously and need not be recited herein.

ARGUMENT AND BRIEF IN REPLY TO PETITION FOR REHEARING

THE PETITION SETS FORTH NO GROUNDS WHICH WOULD JUSTIFY

GRANTING THE PETITION FOR REHEARING UNDER UTAH LAW.

It is the rule of this court that a strong case must be made to justify petition for rehearing. *Brown v. Pickard*, 4 Utah 292, 11 Pac. 512 (1886). A petition for rehearing should be denied unless the court has failed to consider a material point, has erred as a matter of law in its conclusion, or has been unable to consider some material matter which has been newly discovered. *In re James McKnight*, 4 Utah 237, 9 Pac. 299 (1886); *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 619 (1913).

Where the court has fully considered all of the material matters of the case in its original opinion; where it has considered all of the matters asked to be reviewed; where the petition for rehearing sets forth no matters not previously considered; and, where the law has been properly applied, a petition for rehearing should be denied. *Venard v. Green*, 4 Utah 67, 6 Pac. 415 (1885); *Panagopulous v. Manning*, 93 Utah 215, 72 P. 2d 456 (1937); *Edwards v. Clark*, 96 Utah 140, 85 P.2d 768 (1938). See also: 5 C.J.S. *Appeal and Error* § 1411, et seq.; Louisell and Degnan, *Rehearing in American Appellate Courts*, 25 F.R.D. 143 (1960).

The plaintiff devotes a considerable portion of its brief to an analysis of the term "commercial" and its contention that the term is uncertain and ambiguous. This court was fully cognizant of the argument that the term "commercial" was broad enough to include

all phases of business activity, and that the Legislatu in enacting the statute must have intended a somewh narrower construction. It was the opinion of this cour that the Legislature intended to carve out of this broa category of business activity an area which could b properly defined as industrial. This court has heret fore recognized this construction. *Union Portland Cement Co. v. State Tax Comm'n.,* 110 Utah 152, 17 P.2d 879 (1947).

Being aware of this, this court then concluded tha as so used in the statute, the term was not ambiguou or uncertain, and that it need only determine whethe the use of fuel oil in the propulsion of railroad loco motives was a commercial consumption.

It then held, not as plaintiff contends in its brief that an industrial use is only that of fabricating mer chandise subject to sales tax when completed; but, tha if fuel oil is used to fabricate such merchandise, i would be an industrial use and that if fuel oil is used in the propulsion of locomotives, such as in the plain tiff's case, it would be a commercial use.

Prior to the hearing of this case on oral argument the plaintiff had contended that there was a twilight area between commercial use and industrial use, an that it fit within that category—whatever it may b This position was abandoned on oral argument, bu now it seems that the plaintiff is attempting to return to it. It seems to argue that it is not a commercial enter prise within the meaning of the statute without con

sidering whether it fits within the category of industrial as the area not intended to be taxed as heretofore construed by this court.

In reply to the defendant's presentation on oral argument, the plaintiff's opening remarks were (referring to counsel for defendant):

> Much of his argument seems to be involved in attempting to limit the nature of the areas that are involved to industrial and commercial. In other words, there are two categories. We think that is right. There doesn't need to be any dispute about that. We've got to qualify on the industrial side of the ledger or we are in the commercial. Then we are through with our case and we are taxable. So there is no need to dispute that point.

This court was fully aware of the argument plaintiff is now making; heard it abandoned by him; and, presumably, gave that argument due consideration in arriving at its decision. This court and other courts have long considered that commercial use must be considered as opposed to industrial use in determining taxability. *Union Portland Cement Co. v. State Tax Comm'n,* supra; *Ogden Union Railway & Depot Co. v. State Tax Comm'n,* 16 Utah 2d 255, 399 P.2d 145 (1965) (on rehearing); *St. Louis Refrigeration & Cold Storage Co. v. United States,* 43 F. Supp. 476, (Ct. Cl. 1942); *Chicago B. & Q. R. Co. v. Iowa State Tax* Comm'n, ... Iowa ...., 142 N.W. 2d 407 (1966); and, finally, *Wisconsin Electric Power Co. v. United States,*

336 U.S. 176, 69 Sup. Ct. 492, 93 L.Ed. 597 (1949) in which the court said:

> 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. Thus our task resolves itself to a determination of the category in which the consumption of electricity by these dairy plants should be classified. 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. . . . (Emphasis added).

The only case to the contrary seems to be *State v. Smith,* 342 Mo. 75, 111 S.W. 2d 513 (1938), and it is of questionable applicability here since it was decided prior to the enactment of the Utah statute; prior to the Supreme Court decision in *Wisconsin;* and, prior to the subsequent *Utah, Court of Claims* and *Iowa* cases cited above.

It would appear that this court properly considered only the terms of the statute itself since the terms were thought to be unambiguous and refused to consider statements made by individual members of various bodies. After analyzing the terms of the statute, it was then only necessary to determine whether the use of the fuel oil by the plaintiff was industrial or commercial.

and we feel it was quite properly concluded that the sales were subject to the tax imposed by the statute.

The plaintiff devotes too many pages in this petition for rehearing in trying to show the nuances of the terms "commerce" and "commercial" and then concludes that this court should use the term "commercial in its strict sense and 'industrial' in its broad sense." (Pet. for Reh., p. 10).

There is nothing in the statute or in the rules of statutory construction which would require this, nor is there anything in this opinion or previous opinions of this court to indicate that it has used either the term "commercial" or "industrial" in too narrow or too broad a sense. The court has simply concluded here that for the purpose of the statute certain activities should be considered commercial and certain activities should be considered industrial, and that the operation of a railroad upon its system of railways, transporting persons and freight and goods for hire and using fuel oil to perform these functions, is a commercial use just as would be the moving of people and freight across a metropolitan area by taxi, bus or trolley.

Again, that services such as transportation are considered to be commercial for the purpose of the applicable statute involved was determined in *Ogden Union Railway & Depot Co. v. State Tax Comm'n,* 16 Utah 2d 255, 399 P.2d 145 (1965) (on rehearing), which case this court quoted favorably on pages 3 and 4 of the Green Sheet opinion.

Finally, while this is not conclusive as to the nature of the plaintiff's business for the purpose of this statute, it is worth noting that most of the plaintiff's activities are regulated by the federal government through the Interstate Commerce Commission. The very nomenclature suggests that the plaintiff's activities should be considered commercial rather than industrial.

Since the legislature has created the classification which causes this plaintiff to be taxed on its use of fuel oil, it is to the legislature that the plaintiff must seek its relief.

CONCLUSION

It is contended, therefore, that the plaintiff has presented nothing which would cause the court to grant a rehearing, and it is urged that the petition for rehearing be denied.

Respectfully submitted,

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