1967

Union Pacific Railroad Company, A Corporation v. State Tax Commission of Utah : Plintiff's Response To Defendant's "Newly Uncovered Authority"

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

UNION PACIFIC RAILROAD COMPANY, a corporation,	PLAINTIFF'S RESPONSE TO DEFENDANT'S
Plaintiff,	"NEWLY UNCOVERED AUTHORITY"
-vs-	
STATE TAX COMMISSION OF UTAH,	Case No. 10710
Defendant.	

In response to Defendant's "Newly Uncovered Authority" Plaintiff desires to submit the following comments:

(a) Directing the Court's attention to St. Louis Refrigerating & Cold Storage Co. v. United States, 43 F. Supp. 476 (Ct. Cl. 1942), adds nothing new or fresh to this controversy because that case is quoted extensively at pages 6 through 8 of Defendant's brief, was argued by Defendant's counsel at the oral argument on February 17, 1967, and

Plaintiff cited in its Brief in Reply to Petition for Rehearing. Thus, in partial repetition of our own comments at oral argument, Plaintiff now asserts that the decision in the St. Louis Refrigerating case is not really pertinent to the present case, even in the light of Justice Callister's dissent. That case stands only for the proposition that there is arguably no twilight zone between the meaning of the words "commercial" and "industrial" sufficient to encompass the activity of manufacturing refrigeration for distribution through pipelines to customers and manufacturing refrigeration for taxpayers' refrigerated warehouses. But it does not stand for or assert that railroading is not "industrial" and for that very reason must be considered "commercial." In fact, at page 481 of the Court of Claim's opinion, a special finding is made that "electrical energy used by cold storage warehouses is consumed in a commercial activity, except where the warehouses are part of a railroad system ..." (emphasis added)

Accordingly, that case affords no support whatsoever for Defendant's basic position in this case, because Defendant asserts herein, plainly and simply, that railroading is not "industrial" and must therefore be "commercial." Nor does the St. Louis Refrigerating case conflict with Justice Callister's dissenting opinion in the case at bar, such claimed conflict obviously being the sole reason for Defendant's referring to it again at this late date.

Justice Callister's dissent said:

"This dissent is premised on the basis that if the consumption of fuel by the taxpayer is neither commercial nor domestic, the taxpayer is within the exempt status provided in Sec. 59-15-4(a), U.C.A. 1953, and whether the use is industrial becomes irrelevant."

The St. Louis Refrigerating case does not contradict that premise.

(b) In Point I of its opinion, the Court of Claims carefully noted that the use of electric power for manufacturing refrigeration did not fall specifically within one of the categories of activities recognized in the applicable federal regulation. In

our case, to the contrary, "railroads" are recognized and listed in that vital regulation as constituting an activity which is neither domestic nor commercial. Moreover, the decision in the St. Louis Refrigerating case, as shown by the fifth full paragraph at page 483, and again in Point 6 thereof, is partially based upon the fact that the taxpayer could not separate and had not segregated its use of power for ice manufacturing purposes from its use of power for storage purposes, its predominant business activity. As a consequence the court gave some significance to the "predominantly commercial" nature of that taxpayer's business. In the present case, not even the Defendant has argued that Plaintiff's business is predominantly one other than railroading.

(c) Finally, in the category of what is really "newly uncovered authority," Plaintiff requests this Court to consider the case of Bennett Association v. Utah State Tax Commission, ___ Utah 2d ____, 426 P. 2d

ch, decided April 21, 1967, (after the oral argument in the present case) and first printed in the advance sheets of the Pacific Reporter on June 2, 1967, (after the Petition for Rehearing in this case had been granted). That decision demonstrates more clearly than any words we can write the basic principle for which we have always contended. In that case, this Court in a unanimous opinion, went directly to the federal cases construing a federal tax statute and federal regulations to determine the meaning of a Utah tax statute and Utah regulation "taken almost verbatim" from the federal sources mentioned. The same identical process in the case at bar, and reference to the Wisconsin Electric Power Co. decision of the U.S. Supreme Court, 336 U.S. 176, 69 Sup. Ct. 492, 93 L. Ed. 591, cited in our principal brief herein and in Justice Callister's dissent herein, will result in a correct decision of our case now.

Respectfully submitted,

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