

1993

Knowledge Data Systems v. Auditing Division of the Utah State Tax Commission : Brief of Respondent

Utah Court of Appeals

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KNOWLEDGE DATA SYSTEMS,
Petitioner/Appellant
vs.
AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,
Respondent.

Priority 15

Appeal from a Decision of the Utah State Tax Commission

UTAH COURT OF APPEALS
BRIEF

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Mary Hoover

IN THE UTAH COURT OF APPEALS

KNOWLEDGE DATA SYSTEMS,

Petitioner/Appellant

vs.

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,

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Case No. 930323

Priority 15

BRIEF OF RESPONDENT

Appeal from a Decision of the Utah State Tax Commission

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JURISDICTION

The Court lacks jurisdiction over this case because the appeal was not timely filed.¹ The Commission issued its Findings of Fact, Conclusions of Law and Final Decision on October 28, 1992. (R. 23-27). On November 16, 1992 Knowledge Data Systems ("Petitioner") filed a Request for Reconsideration. (R. 20-22). Pursuant to Utah Code Ann. § 63-46b-14(3)(a), a party is required to file a petition for judicial review "within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued." See Utah Code Ann. § 63-46b 14(3)(a). The order is issued when signed by the Commission. See Dusty's Inc. v. Utah State Tax Comm'n, 199 Utah Adv. Rep. 7 (1992).

Section 63-46b-13 allows a party to file a request for reconsideration with the agency "within 20 days after the date that an order is issued. . . if the order would otherwise constitute a final agency action. . . ." However, under 63-46b-13(3)(b)(1992) an order denying a request for reconsideration is deemed to be issued 20 days after the filing of the request if no action is taken by the agency.

On November 16, 1992, Petitioner filed its Request for Reconsideration on the Tax Commission's October 28, 1992 Final

¹. Failure to file a timely appeal is jurisdictional in nature and can be raised at any time during the appellate proceedings. See Leonczynski v. Indus. Comm'n, 713 P.2d 706 (Utah 1985).

Decision. (R. 20-22). No action was taken by the Tax Commission within 20 days from the date the Petition for Reconsideration was filed. Therefore, pursuant to the express language of § 63-46b-13(3)(b), an order denying Petitioner's Request for Reconsideration was deemed to have been issued on December 7, 1992. However, Petitioner can still ". . . file a Petition for judicial review within 30 days after the order . . . is considered to have been issued under Subsection 63-46b-13(3)(b)." As such, Petitioner should have filed an appeal of that order by January 6, 1993. Petitioner did not file for judicial review until February 12, 1993, which is beyond the 30 day statutory limit. (R. 6). Accordingly, the appeal is untimely and the Court lacks jurisdiction.

It should be noted that Petitioner's attorney, Gary Kuelczo, noted some concern regarding the deemed denial period as evidenced in his letter to the Tax Commission on December 10, 1992.² (R. 13). This letter indicates that Petitioner's attorney was familiar with the Utah Tax Code and understood the effect of Utah Code Ann. § 63-46b-13(3)(b). However, Petitioner cannot rely on the fact that its attorney's letter, which raises the 20 day deemed denial issue, serves to extend the time for judicial review.

² The original copy of Gary Kuelczo's December 10, 1992, letter shows handwriting presumably from Alan Hennebold, Utah State Tax Commission Hearing Officer, stating the following: "Called 12-14-92. 2 p.m. Left answer w/K's sec."

First, Utah Code Ann. § 63-46b-1(9) specifically states that an agency does not have the authority to extend the time requirements allowed for judicial review. Utah Code Ann. § 63-46b-1(9) states:

"Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review." (Emphasis added).

Additionally, the Utah Supreme Court recently held that the Tax Commission cannot expand the time period established for judicial review. See Dusty's Inc. v. State Tax Comm'n, 199 Utah Adv. Rep. 7 (Utah 1992). Therefore, because both the statute and case authority forbid state agencies from extending the time for judicial review, Petitioner cannot claim that an extension had been granted by the Tax Commission merely because its attorney mentioned the deemed denial period in a letter.

Furthermore, although the Tax Commission eventually issued its January 15, 1993 Order confirming the denial of the Petitioner's Request for Reconsideration, this Order does not have the effect of extending Petitioner's rights to obtain judicial review since the request for reconsideration was deemed to have been denied by operation of law on December 7, 1992. The language of § 63-46b-1(9) expressly prohibits such action.

This Court reached a similar conclusion in Hase v. Hase, 775 P.2d 943 (Utah Ct. App. 1989). Hase involved an appeal from a district court decision, but its reasoning is applicable to the

facts of the case at bar. In Hase the court issued a final divorce decree on December 31, 1987, which disposed of all the Petitioner's claims. On January 15, 1989, the Petitioner filed a tardy "Objection to Order" pursuant to Utah R. Civ. P. 52(b). On February 5, 1988, the district court issued a "consolidated findings of fact, conclusions of law, decree of divorce, and order." Petitioner then filed an appeal on March 4, 1988.

The Petitioner in Hase argued that its appeal was timely since it was filed within 30 days of the district court's February 5, 1988 decision. This Court rejected this argument by stating:

The Consolidated Decree of Divorce and Orders merely reiterated what the court had previously ordered in several different orders, referred to those orders specifically by date in most instances, and joined them in one document, as appellants request. We find that such an order cannot be used to extend the time for appeal because it does not resolve any issues extant, but merely refers to prior orders of the court.

Id. at 945. (Emphasis added).

The Petitioner in Hase also argued that its tardy "Objection to Order" should stay the 30 day filing requirement for an appeal. This Court rejected that argument as well, stating that because the objection was not filed within 10 days as required, the objection did not qualify as a post-judgment order, which would have suspended the time for appealing the December 31, 1987 final order. Id.; see also Burgers v. Maiben, 652 P.2d 1320

(Utah 1982) (a tardy request for a new trial cannot stay the time limits imposed upon appeals); Vanjonora v. Draper, 30 Utah 2d 364, 517 P.2d 1320 (1974) (failure to file a motion for a new trial does not stay the time constraints governing appeals).³

Both the relevant statutes and the cited case law support the proposition that the agency has no authority to extend the time for judicial review. As cited earlier, it is jurisdictional in nature, not procedural. As such, Petitioner is unable to argue that filing within 30 days of the Tax Commission's January 15, 1993 Order was timely. Utah courts have strictly enforced the time requirements for the filing of an appeal. In Isaacson v. Dorius, 669 P.2d 849 (Utah 1983), the Utah Supreme Court refused to extend the 30 day time limit for filing an appeal that was filed two days beyond the time limit. Moreover, in Dusty's Inc., the Utah Supreme Court also held that the 30 day time limit runs from the date of the issuance of the final decision, not the date of notice to the parties.

The Legislature has established the time frame for seeking judicial review of agency action. By specifically tying the time to file for review to the date a motion for reconsideration is deemed denied, the legislature has set a time certain within

³ Federal courts have long recognized that tardy motions for reconsideration cannot toll the statute of limitations governing appeals even if the trial court hears the motion for reconsideration. See Denley v. Shearson/American Exp. Inc., 733 F.2d 39 (6th Cir. 1984); Smith v. Evans, 853 F.2d 155 (3rd Cir. 1988); Martinez v. Trainer, 556 F.2d 818 (7th Cir. 1977).

which an appeal must be filed. It has specifically prohibited the Commission from extending that time. Therefore, the issuance of a written order confirming that a motion for reconsideration has been denied, by operation of law, cannot have the effect of extending the time to seek judicial review. The provisions of § 63-46b-14(3)(a) are tied to the provisions of § 63-46b-13(3)(b), to ensure that a petition for reconsideration does not indefinitely delay the time for filing for an appeal.

ISSUES PRESENTED FOR REVIEW

I. The Tax Commission properly concluded that Petitioner's subsequent use of the computer equipment taken in trade was subject to Utah use taxes.

A. The proper standards of review for all issues raised in this case under UAPA is the "abuse of discretion" standard for statutory interpretation and "not supported by substantial evidence" standard for findings of fact.

Standard of Review: The Court should review this factual determination under the "substantial evidence" standard pursuant to Utah Code Ann. § 63-46b-16(4)(g), or under § 59-1-610 (1992 Supp. 1993).

II. Petitioner cannot rely upon the "isolated or occasional sale exemption" because Petitioner acquired the used computer equipment in trade, not from a sale.

Standard of Review: The Court should review the Tax Commission's application of the facts to the law under the "abuse

of discretion standard" pursuant to Utah Code Ann. § 63-46b-16(4)(h)(i) or under § 59-1-610.⁴

III. Petitioner is not entitled to attorneys' fees pursuant to 42 U.S.C. § 1988.

A. Issues not raised in the proceedings below cannot be raised for the first time on appeal.

B. Petitioner's § 1988 claim is improper because Utah law provides an adequate remedy to address erroneous tax assessments.

C. The Tax Assessed Against Petitioner Does Not Violate the Commerce Clause Nor 42 U.S.C. § 1983.

Standard of Review: The Court should review this question of law by applying the "correction of error" standard pursuant to Utah Code Ann. § 59-1-610.

DETERMINATIVE LAW

Set forth verbatim in Appendix 1.

1. Utah Code Ann. § 59-12-102(14) (1992).
2. Utah Code Ann. § 59-12-103(1)(a) (1992).
3. Utah Code Ann. § 59-12-104(14) (1992).
4. Utah Code Ann. § 59-12-104(19) (1992).
5. Utah Code Ann. § 63-46b-1(9) (1989 & Supp. 1992)

⁴. If this appeal is governed by Utah Code Ann. § 59-1-610, which became effective on May 3, 1993, the applicable standard of review to be applied to conclusions of law. Mixed questions of law and fact should be determined based on implied or implicit grants of discretion pursuant to Utah Dep't of Admin. Servs. v. Public Serv. Comm'n 658 P.2d 601, 610 (Utah 1983).

6. Utah Code Ann. § 63-46b-13 (1989 & Supp. 1992).
7. Utah Code Ann. § 63-46b-14(3)(a) (1989 & Supp. 1992).
8. Utah Admin. R. 86-19-72S (1992).

STATEMENT OF THE CASE

This case involves a sales and use tax assessment against Knowledge Data Systems, Inc. ("Petitioner") for its failure to remit sales and use taxes for its subsequent use of computer equipment taken in trade. An audit conducted by the Auditing Division of the Utah State Tax Commission revealed that Petitioner was liable for \$15,396.99 plus interest for its use of the computer equipment. The case was submitted to the Tax Commission upon stipulated facts and oral arguments on April 13, 1992. The Tax Commission held that Petitioner was the ultimate consumer of the computer equipment and upheld the tax assessment against Petitioner. Petitioner subsequently filed a Request for Reconsideration, which was deemed denied on December 7, 1992, and subsequently confirmed on January 15, 1993. Petitioner appealed the Tax Commission's October 28, 1992, Final Decision and the January 15, 1993 Order denying Petitioner's Request for Reconsideration to the Utah Supreme Court. The case was transferred to the Utah Court of Appeals on May 17, 1993.

STATEMENT OF THE FACTS

Stipulated Facts

This case was submitted to the Tax Commission on the stipulated facts and the arguments of the parties at the formal

hearing. Both parties agree and stipulate to the following facts:

1. That Knowledge Data Systems, Inc. ("Petitioner") is in the business of selling computer systems (hardware and software) at retail both inside and outside Utah. (R. 47).

2. That Petitioner sold a computer system to the University of Minnesota Hospital and Clinic (hereinafter "U. Minn.") and took in trade used computer hardware which Petitioners had previously sold to them. (R. 47).

3. That U. Minn. is not in the business of selling new or used computer hardware, but rather is a patient care facility. (R. 48).

4. That the equipment Petitioner took in trade was used by Petitioner in its business in Utah and was booked to a fixed asset account and was not held for subsequent sale in an inventory account. (R. 48).

5. That I.C.I. America's (hereinafter "ICI") is in the business of selling wholesale pharmaceutical supplies and is not in the business of selling new or used computer hardware. (R. 48).

6. That Petitioner purchased used computer hardware from ICI in conjunction with providing a new computer system to ICI. (R. 48).

7. That Petitioner used a portion of the computer hardware in its trade or business and held a portion of the hardware for resale in its inventory account. (R. 48).

8. That neither U. Minn. or ICI is registered with the Utah Department of Revenue to sell tangible personal property at retail in Utah. (R. 48).

Other Relevant Facts

Petitioner sold new equipment to U. Minn. and as partial consideration for the sale, Petitioner took used computer equipment in trade from U. Minn. (R 24, 47-48). Furthermore, Petitioner sold new equipment to ICI and as partial consideration for the sale, Petitioner took used computer equipment in trade from ICI. (R. 24, 48).

Additionally, U. Minn. did not actually sell its used computer equipment to Petitioner, rather, U Minn. traded in its used equipment as partial consideration in order to acquire new computer equipment from Petitioner. (R. 24, 47-48). Furthermore, ICI did not actually sell its used computer equipment to Petitioner, rather ICI traded in the used equipment as partial consideration in order to acquire new computer equipment. (R. 24, 25, 48).

Procedural History

The Auditing Division conducted an audit of Petitioner for the audit period of July 1987 through June 1990. The results of the audit indicated that Petitioner was liable for \$15,396.99 tax

assessment. (R. 70-71). On April 15, 1991, Petitioner filed for redetermination with the Tax Commission in connection with the tax assessment. (R. 67-69).

On April 13, 1992, the Tax Commission conducted a hearing for oral arguments. (Transcript). Subsequently, on October 28, 1992 the Tax Commission issued its Findings of Fact, Conclusions of Law, and Final Decision. (R. 23-28).

On November 16, 1992, Petitioner filed a Request for Reconsideration of the Tax Commission's October 28, 1992 Final Decision. (R. 20-22). However, pursuant to Utah Code Ann. § 63-46b-14(3)(a) (1992), an order denying Petitioner's Request for Reconsideration was deemed to have been issued on December 7, 1992. Petitioner failed to timely file for judicial review of final agency action within 30 days after Petitioner's Request for Reconsideration was deemed denied pursuant to Utah Code Ann. § 63-46b-14(3)(a) (1992).

On January 15, 1993, the Tax Commission issued an Order confirming the denial of Petitioner's Request for Reconsideration. Subsequently, on February 12, 1993, Petitioner filed its Petition for Review of Final Decision, wherein Petitioner seeks review of the Tax Commission's October 28, 1992 Final Decision and the January 15, 1993 Order. The Utah Supreme Court transferred this case to the Utah Court of Appeal.

SUMMARY OF THE ARGUMENT

The Court should review the Tax Commission's Final Decision under the "abuse of discretion" and "not supported by substantial evidence" standards of review pursuant to Utah Code Ann. § 63-46b-16(4)(g), and (h)(i) (1992). This Court must sustain the Tax Commission's finding that Petitioner did not qualify for the "isolated or occasional sales" exemption from sales and use taxes unless this finding is not supported by substantial evidence. The record indicates that Petitioner acquired the used computer equipment in trade and became the ultimate consumer of the equipment when Petitioner used the equipment for its own business purposes. Therefore, because the Tax Commission's factual finding is supported by substantial evidence in the record, this Court should uphold the Tax Commission's Final Decision.

Furthermore, given the broad and general terms of the relevant statutes and the authority of the Tax Commission to administer the tax laws, the Tax Commission has been given an implicit grant of authority from the legislature. As such, the Tax Commission's finding cannot be overturned unless it has abused its discretion. Therefore, under the applicable standards of review, this Court should affirm the Tax Commission's Final Decision and subsequent Order. However, even if § 59-1-610 supersedes the Utah Administrative Procedures Act ("UAPA") in this case, the court must defer to findings of the Tax Commission

since it has only made factual findings. There are no interpretations of law at issue.

In the present case, the Tax Commission properly concluded that Petitioner's subsequent use of the computer equipment that it acquired in trade constituted a taxable transaction. Use or consumption of tangible personal property constitutes a separate taxable event. This conclusion is supported by statute and case authority. The stipulated facts indicate that Petitioner acquired used computer equipment in trade and subsequently used the equipment for its own business purposes. Pursuant to Utah Code Ann. § 59-12-104(19) (1992), the initial acquisition of the traded-in equipment is exempt from sales and use taxes. However, pursuant to Utah Admin. R. R865-19-72S (1992), the subsequent sale or use of the tangible personal property that has been acquired in trade constitutes a taxable transaction. Utah case law and other authority support the proposition that a tax is levied upon the ultimate consumer. In the case at bar, Petitioner is the ultimate consumer because it used the traded-in equipment for its own business purposes and did not hold the equipment for resale.

Given the nature of the trade-in situation, Petitioner is unable to qualify for the "isolated or occasional sale" exemption from sales or use taxes. The facts indicate that the out-of-state purchasers bought new computer equipment from Petitioner in the Petitioner's normal course of business. As partial

consideration for the new computer equipment, the out-of-state purchasers traded-in their old equipment. Because Petitioner acquired its used computer equipment under the typical trade in situation, Petitioner cannot claim the "isolated or occasional sale" exemption pursuant to Utah Code Ann. § 59-12-104(14) (1992). Therefore, this Court should affirm the sales and use taxes assessed against Petitioner as found by the Tax Commission in its Final Decision.

Finally, Petitioner cannot claim relief pursuant to 42 U.S.C. § 1983 and § 1988 for three important reasons. First, the issue of attorneys' fees was never raised in the proceedings below. Second, because Utah provides an adequate remedy by which taxpayers can become whole after an erroneous assessment, this court should not extend a § 1988 remedy that has not been provided for by the legislature. Finally, pursuant to Utah law all tangible personal property taken in trade that is subsequently used or sold constitutes a taxable transaction. This rule is true regardless of the origin of the property. As such, this tax does not violate the Commerce Clause and therefore, Petitioner's request for attorneys' fees pursuant to 42 U.S.C. § 1988 must be denied.

ARGUMENT

I. THE TAX COMMISSION PROPERLY CONCLUDED THAT PETITIONER'S SUBSEQUENT USE OF THE COMPUTER EQUIPMENT TAKEN IN TRADE WAS SUBJECT TO UTAH USE TAXES.

A. THE PROPER STANDARDS OF REVIEW FOR ALL ISSUES RAISED IN THIS CASE UNDER UAPA IS THE "ABUSE OF DISCRETION" STANDARD FOR STATUTORY INTERPRETATION AND "NOT SUPPORTED BY SUBSTANTIAL EVIDENCE" STANDARD FOR FINDINGS OF FACT.

The Utah Administrative Procedures Act ("UAPA") outlines the various situations in which a court may grant relief and the associated standards of review to be applied in granting such relief. See Utah Code Ann. § 63-46b-16 (1992). The two standards of review applicable in this case are the "abuse of discretion" standard for statutory interpretation and "not supported by substantial evidence" standard for findings of fact. See Utah Code Ann. § 63-46b-16(4)(g), and (h)(i) (1992).

This Court must sustain the Tax Commission's finding that Petitioner did not qualify for the "occasional or isolated sale" exemption to Utah sales and use taxes because Petitioner acquired used equipment in trade from U. Minn. and ICI in trade as partial consideration for underlying sales of new equipment. Later, Petitioner used the trade-in equipment for its own use. Unless this finding is not supported by substantial evidence, the Commission's decision should be upheld. Utah Code Ann. 63-46b-16(4)(g) (1992) and Zissi v. Tax Comm'n, 842 P.2d 848, 852 (Utah 1992).

In applying this standard the Court must consider both the evidence that supports the challenged finding and the evidence that cuts against such finding. Stewart v. Board of Review, 831 P.2d 134, 137 (Utah Ct. App. 1992). This standard does not permit the reviewing court to weigh of the evidence itself, but only requires the court to determine whether the fact finder's weighing was reasonable. Semeco v. Tax Comm'n, 209 Utah Adv. Rep. 73, 77 (Utah 1993) (Durham, J., dissenting).

The case at bar was submitted to the Tax Commission on the stipulated facts and arguments of the parties at the formal hearing. The Tax Commission found that Petitioner sold new computer equipment to U. Minn. and ICI and received used equipment from each entity in trade as partial consideration for the sale of the new equipment. (R. 24). The Tax Commission also found that the used equipment that Petitioner took in trade was used in Petitioner's business operations. (R. 25). Furthermore, the Tax Commission also found that Petitioner's subsequent use of the equipment taken in trade was the taxable event. (R. 26). As such, the Tax Commission correctly determined that Petitioner did not qualify for an "isolated or occasional sale" exemption, given the fact that Petitioner acquired the used equipment in trade. (R. 27).

The Utah Supreme Court has previously applied the substantial evidence standard in O'Rourke v. Tax Comm'n, 830 P.2d 230 (Utah 1992) and affirmed a Tax Commission finding that a

taxpayer was domiciled in Utah and thereby subject to Utah income taxes. Therefore, this Court should remain consistent and sustain the Tax Commission's finding since it is supported by substantial evidence in the record.

With respect to the Tax Commission's application of the facts to Utah Code Ann. § 59-12-103 and § 59-12-104(14), the proper standard of review is "abuse of discretion." In discussing this standard of review under the UAPA, the Utah Supreme Court stated:

Under UAPA, this court reviews an agency decision which interprets statutory law using the correction of error standard found in section 63-46b-16(4)(d), unless the legislature has granted the agency discretion in interpreting and administering the statute. Agency discretion may be either express or implied and, if granted, results in review of the agency action for an abuse of discretion under section 63-46b-16(4)(h)(i).

Nucor Corp. v. Tax Comm'n, 832 P.2d 1294, 1296 (Utah 1992) (footnotes omitted).⁵ Thus, if either express or implied discretion is found, the proper standard of review is Utah Code Ann. § 63-46b-16(4)(h)(i), which provides:

(4) The appellate court shall grant relief only if, on the basis of the agency record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

* * *

(h) the agency action is:

⁵. The Supreme Court has also stated, "[i]n many cases where we would summarily grant an agency deference on the basis of its expertise, it is also appropriate to grant the agency deference on the basis of an explicit or implicit grant of discretion contained in the governing statute." Morton Int'l, Inc. v. Auditing Division, 814 P.2d 581, 588 (Utah 1991).

(i) an abuse of discretion delegated to the agency by statute;. . .

This Court in King v. Industrial Comm'n, 209 Utah Adv. Rep. 33, 37 (Utah Ct. App. 1993) also articulated an analytical model derived from the Supreme Court cases dealing with this standard of review. The threshold step is to determine whether there has been an explicit grant from the legislature to the agency of deference to interpret the specific statutory language. Id. If there is no explicit grant of authority, the next step is to determine whether implicit authority is granted. Implicit authority can be inferred if the "statutory language is broad and expansive or subject to numerous interpretations. . ." Id. Courts have also recognized implicit authority when there is an absence of discernible legislative history and the agency determination is the type of determination the agency routinely performs. Putvin v. Tax Comm'n 837 P.2d 589 (Utah Ct. App. 1992), citing Morton Int'l, Inc., 814 P.2d at 592.

In the case at bar, the legislature has granted the Tax Commission general discretion to administer and supervise the tax laws of the state. See Utah Code Ann. § 59-1-210(3), (5) (1992). Similarly , there is implicit discretion granted to the Tax Commission from the fact that sections 59-12-102(8)(a), which defines retail sale, and 59-12-104(14), which states the exemption for isolated and occasional sales, are broad and subject to a variety of different interpretations. Therefore,

this Court should apply the "abuse of discretion" standard when reviewing the reasonableness of the Tax Commission's determinations.⁶

Even if this Court were to find the proper standard were an intermediate "correction of error," "corrections," or "reasonableness" standard, the Tax Commission's Final Decision should be affirmed. The record shows that the Tax Commission relied upon the parties' stipulated facts and the parties' arguments to determine whether Petitioner's equipment taken in trade was exempt from sales and use taxes. Thus, this Court must uphold the decision below on that basis. The Tax Commission has not exceeded their authority in statutory interpretation, but has carefully weighed and applied the stipulated facts to the statutory standard.

Having framed the standard of review, the following facts show that the Tax Commission properly found Petitioner's subsequent use of the computer equipment constituted a taxable event. Petitioner is engaged in the business of selling computer systems at retail both inside and outside of Utah. (Record at 24, 47; Transcript at 14). Petitioner sold a new computer system

⁶. If this appeal is governed by Utah Code Ann. § 59-1-610, which became effective on May 3, 1993, the applicable standard of review to be applied to "mixed questions of law and fact," like the Tax Commission's finding that Petitioner did not qualify for the "isolated or occasional sales" exemption, is "abuse of discretion." See Utah Dep't of Admin. Servs. v. Public Serv. Comm'n 658 P.2d 601, 610 (Utah 1983).

to U. Minn. and took in trade used computer hardware. (R. 24, 25, 47; T. 14, 15). Additionally, Petitioner acquired a used computer system from ICI in conjunction with providing ICI with a new computer system. (R. 24, 25, 48). The equipment that Petitioner acquired from U. Minn. was used in its business in Utah, booked to a fixed asset account, and not held for resale. (R. 24, 48). Similarly, the equipment that Petitioner acquired from ICI was partially used by Petitioner in its business, although some of the equipment was also held for resale. (R. 24, 48; Transcript at 11). The Tax Commission properly concluded that the material taken in trade and then subsequently used by Petitioner in its business constituted a taxable event. (R. 26). This conclusion is supported both by statute and case authority.

In the case at bar, the tax has been assessed on Petitioner's subsequent use of the computer equipment that it took in trade, not the manner in which Petitioner acquired the equipment. In fact, the initial transaction by which Petitioner acquired the used computer equipment is exempt from sales taxes pursuant to Utah Code Ann. § 59-12-104(19) (1992). However, Petitioner's subsequent use of the used computer equipment for its own business purposes is not exempt from sales and use taxes. In essence, this case is analogous to the typical trade-in scenario when a car dealer takes in trade a used automobile as partial consideration for the sale of a new car, but instead of placing the used car on the lot for resale, the dealer uses the

used car for other business purposes.⁷ In this example, the trade-in transaction is not the taxable event, rather, it is the subsequent use or consumption of the traded-in vehicle by the ultimate user that constitutes the taxable event. To this issue, the Utah legislature created a statutory exemption for the initial trade-in transaction. Utah Code Ann. § 59-12-104(19) (1992) states:

The following sales and uses are exempt from the taxes imposed by this chapter:

(19) tangible personal property, other than money, traded in as full or part payment of the purchase price, except that for purpose of calculating sales or use tax upon vehicles not sold by a vehicle dealer, trade-ins are limited to other vehicles only, and the tax is based upon the then existing fair market value of the vehicle being sold and the vehicle traded in, as determined by the commission;

For purposes of clarifying this statute, the Tax Commission promulgated the following rules:

Trade-ins and Exchanges Pursuant to Utah Code Ann. § 59-12-102

A. An even exchange of tangible personal property for tangible personal property is exempt from tax. When a person takes tangible personal property as part payment on

⁷. Utah Code Ann. 59-12-102(14)(a), (b) (1992) defines "use" in the following manner: (a) "Use" means the exercise of any right or power over tangible personal property under Subsection 59-12-103(1), incident to the ownership or leasing of that property, item, or service. (b) "Use" does not include the sale, display, demonstration, or trial of that property in the regular course of business and held for resale. See e.g., Merrill Bean Chevrolet, Inc. v. State Tax Comm'n, 549 P.2d 443 (Utah 1976) (automobiles used for display to stimulate sales does not constitute "use" by the auto dealer).

a sale of tangible personal property, sales or use tax applies only to any consideration valued in money which changes hands.

B. For example, if a car is sold for \$8,500 and a credit of \$6,500 is allowed for a used car taken in trade, the sales or use tax applies to the difference, or \$2,000 in this example.⁸ Subsequently, when the used car is sold, tax applies to the selling price less any trade-in at that time.

C. An actual exchange of tangible personal property between two persons must be made before this exemption applies. . .

Utah Admin. R. R865-19-72S (1992) (emphasis added).

This rule broadens the scope of the trade-in exemption to transactions involving all forms of tangible personal property, not merely automobiles. As such, both the statute and the rules cited above are applicable to the case at bar. Petitioner acquired the used computer equipment as a trade-in for the underlying sale of new computer equipment to the out of state purchasers. After Petitioner acquired the traded-in equipment, Petitioner then used the equipment in its own business. Pursuant to Utah Code Ann. § 59-12-104(19) (1992), the used equipment that Petitioner received in trade is exempt from sales and use taxes. However, pursuant to the rule that accompanies § 59-12-104(19), when the traded-in equipment is subsequently sold or used, a tax

⁸. Note that because Petitioner's underlying sale of its new equipment to the out-of-state purchasers is a "sale made in interstate commerce" pursuant to Utah Admin. R. R865-19-44S (1992) (not subject to sales tax), a tax is not levied upon the difference between the value of the new equipment and the equipment taken in trade. The Tax Commission similarly found that because the sales took place outside of Utah, no sales tax could have been levied on the underlying sale of the new computer equipment. (R. 26).

is levied upon that transaction. See Utah Admin. R. R865-19-72S (1992).

Utah case law supports the proposition that sales tax applies to all sales of tangible personal property made to the ultimate consumer. Merrill Bean Chevrolet, Inc. v. State Tax Comm'n, 549 P.2d 443, 445 (Utah 1976); Olson Construction Co. v. State Tax Comm'n, 12 Utah 2d 42, 361 P.2d 1112 (1961). In Merrill Bean the Tax Commission assessed a tax on "demonstrator automobiles" that were being used by the automobile dealer's wife for her own personal use. Because the dealer's wife's use of the demonstrator vehicles was short-lived and because she helped stimulate sales of those vehicles, the Utah Supreme Court held that the dealer was not the ultimate consumer despite his wife's personal use of the demonstrator. Merrill Bean, 549 P.2d at 446.

However, in a case similar to the facts of Merrill Bean, the Georgia Supreme Court held that a taxable transaction occurred when a dealer's wife used a demonstrator automobile for her personal use for longer than a six month period. See Law Lincoln Mercury, Inc. v. Strickland, 271 S.E.2d 152 (Ga. 1980). In discussing the concept of ultimate use by the car dealer, the Georgia court held that since the demonstrator vehicles were used for personal use as well as for display over an extended period of time, the dealer was liable for sales taxes as the ultimate consumer of the display vehicles. Id. at 154. The court also

stated:

[w]hen the [car dealer] 'makes any use of the property other than retention, demonstration, or display while holding [the automobiles] for sale in the regular course of business, the use shall be deemed a retail sale by the purchaser. . . .' The [car dealer] will be taxed as though he had purchased the property. If he thereafter sells the property to a consuming purchaser a tax will again be applicable to that sale. These, however, are two distinct sales transactions and are independent taxable events. (Emphasis added).

Id. at 155. Therefore, the Tax Commission's conclusion that Petitioner's subsequent use of the traded-in computer equipment is consistent with the rules imposing a tax upon the ultimate consumer.

Although no Utah case has directly interpreted section 59-12-104(19), the Pennsylvania Superior Court discussed the taxable effect of an automobile that was originally taken in trade and subsequently sold to a consumer. In City of Philadelphia v. Heinel Motors, 16 A.2d 716 (Pa. Super. Ct. 1940), the court states:

When the defendant corporation [Heinel Motors] proceeds to sell the car accepted by it in trade to a new purchaser, the latter enters into a totally distinct and separate transaction and is chargeable under the ordinance with the tax on the purchase made by him [the purchaser]. (Emphasis added).

Id. at 764. Therefore, the court indicates that a separate taxable event occurs on the subsequent sale of the used vehicles, and the tax burden is placed upon the purchaser.

Although this case does not involve the resale of used automobiles taken in trade, the case does involve equipment taken

in trade and ultimately used by Petitioner in its business. As such, the reasoning behind the rules cited above apply to this case as well. The court in Philadelphia had to determine who the ultimate purchaser of the automobiles was in order to assess the sales tax liability. The court stated that because the sale of the used car was a separate and distinct transaction, the sales tax liability fell on the purchaser. Id. at 764. Similarly, the Tax Commission concluded that Petitioner was the ultimate user of the used computer equipment, which it took in trade. The equipment was booked as a fixed asset, evidencing the fact that Petitioner was the ultimate user of the used equipment. As such, the Tax Commission properly concluded that a taxable event occurred when Petitioner began to use the equipment for its own business purposes. (R. 26).

The Tax Commission's finding that Petitioner's subsequent use was a taxable transaction is consistent with the general rule that sales tax is levied upon the ultimate consumer. Tummurru Trades, Inc. v. Utah State Tax Comm'n, 802 P.2d 715, 718 (Utah 1990); see also Ralph Child Constr. Co. v. State Tax Comm'n, 12 Utah 2d 53, 362 P.2d 422 (1961). The Utah Supreme Court has defined "used" and "consumed" in the following manner:

From the context of our statute "used" and "consumed" may be said to express the same meaning--to make use of, to employ and does not necessarily mean the immediate destruction or extermination or change in form of the article or commodity.

Utah Concrete Products v. State Tax Comm'n, 101 Utah 513, 125 P.2d 408, 410 (1942). Thus, under this broad definition it seems clear that Petitioner's subsequent use of the equipment that it took in trade, even though it was used for its own business purposes, would fit within this definition. Furthermore, because the used computer equipment was not held for resale, Petitioner becomes the last person in the chain to have used such equipment and the ultimate consumer liable for the tax. See Utah Concrete Products, 101 Utah 513, 125 P.2d at 411; see also Merrill Bean Chevrolet, Inc. v. State Tax Comm'n, 549 P.2d 443, 445 (Utah 1976).

Petitioner's subsequent use of the used computer equipment can also be compared to the situation when a construction contractor takes materials out of inventory for use in a construction contract. In Tummurru Trades, Inc. v. Utah State Tax Comm'n, 802 P.2d 715 (Utah 1990), Tummurru was in the business of constructing modular buildings as well as selling building materials. Tummurru argued that the building materials that its contracting entity acquired from inventory, to be used in out-of-state construction projects, did not constitute a taxable transaction. However, the court rejected Tummurru's argument by stating the following:

The act of taking the items out of inventory for use in a construction contract is a retail sale for the purpose of sales tax because the contractor is the ultimate consumer . . . Tummurru is therefore liable for the sales tax due on those items sold to its

contracting entity for use in the out-of-state construction projects.

Id. at 719.

The reasoning behind Tummurru is applicable to the case at bar. First, the Tummurru court determined that Tummurru was the ultimate consumer. Similarly, this Court should find that the Petitioner was the ultimate consumer.. Second, the Tummurru court also determined that taking the building materials out of inventory and subsequently using them in the construction projects constituted a taxable transaction. In this case, although Petitioner may not have booked the receipt of the used equipment into an inventory account, the fact remains that Petitioner is commonly engaged in the business of selling used computers that it receives in trade. Thus, each used computer that Petitioner receives in trade automatically goes into inventory whether or not this inventory account step is shown on the books. Further proof that traded-in equipment enters inventory is evidenced by the fact that a portion of the equipment acquired from ICI was actually placed in an inventory account for resale. Therefore, when Petitioner used the equipment that it received from U. Minn. and ICI for its business purposes, Petitioner essentially took the equipment from its inventory and became the ultimate consumer of the equipment. As such, the act of taking items out of inventory for subsequent use

by Petitioner as the ultimate consumer constitutes a taxable transaction. See Tummurru Trades Inc., 802 P.2d at 719.

In sum, Petitioner would not hesitate to admit that a taxable event occurs when it sells used computer equipment taken in trade to a third party purchaser. In the common trade-in and subsequent sale situation, the purchaser is the ultimate consumer and is liable for the sales tax. In a similar manner, Petitioner cannot argue that it is exempt from sales tax liability merely because it chose to use the equipment for its own business instead of choosing to place the used equipment for resale. In the case at bar, Petitioner constitutes the ultimate consumer of the used computer equipment and is therefore logically and legally liable for the tax.

II. PETITIONER CANNOT RELY UPON THE "ISOLATED OR OCCASIONAL SALE EXEMPTION" BECAUSE PETITIONER ACQUIRED THE USED COMPUTER EQUIPMENT IN TRADE, NOT FROM A SALE.

Petitioner's reliance on the "isolated or occasional sales by persons not regularly engaged in business" exemption from sales and use tax is misplaced. See Utah Code Ann. § 59-12-104(14) (1992). As the Tax Commission noted in its Final Decision, statutes that provide for exemptions to general taxation provisions are strictly construed against the taxpayer and the taxpayer has the burden of showing entitlement to the exemption. (R. 25); see also Parsons Asphalt Products v. Utah State Tax Comm'n, 617 P.2d 397, 398 (Utah 1990). Given the nature of the trade-in situation in the case at bar, the Tax

Commission properly concluded that Petitioner was not entitled to this exemption. (R. 26). The facts show that Petitioner subsequently used the equipment that it took in trade for its own business purposes. Both the Utah Code and the Utah Administrative Rules specifically explain that the original trade-in is exempt from sales tax, yet the subsequent sale or consumption of the used equipment constitutes a taxable event. See Utah Code Ann. § 59-12-104(19) (1992); Utah Admin. R. R865-19-72S (1992). As such, the Tax Commission's finding that although the Petitioner's acquisition of the used equipment that it received in trade was not taxable, Petitioner's subsequent use of the equipment in its business constituted the taxable event consistent with Utah law. (R. 26). Therefore, Petitioner's reliance upon the "isolated and occasional sales" exemption and the cases that interpret that exemption are misplaced because Petitioner acquired the used computer equipment under a trade-in situation. See e.g., L.A. Young Sons Construction Co. v. State Tax Comm'n, 23 Utah 2d 84, 457 P.2d 973 (1969) (a Utah construction company that purchased used construction equipment not of the type regularly sold in the course of the seller's business, and subsequently used the equipment for its own business qualified for the "isolated or occasional sale" exemption from Utah sales and use taxes); Husky Oil v. State Tax Comm'n, 556 P.2d 1268 (Utah 1976) (a Utah oil refinery company that purchased used refinery equipment not of the type regularly

sold in the course of the seller's business, and subsequently used the equipment for its own qualified for the "isolated or occasional sale" exemption from Utah sales and use taxes); Geneva Steel Co. v. State Tax Comm'n, 116 Utah 170, 209 P.2d 208 (1949) (a Utah steel company that purchased a steel plant and its inventories located in Utah qualified for the "isolated or occasional sales" exemption from Utah sales and use tax). (Emphasis added).

Even if this Court were to determine that transactions in question constitute isolated or occasional sales, KDS would still not qualify under the terms of that exemption. In the present case it is imperative to note that KDS buys and sells computer equipment in its regular cause of business. These facts make the Geneva case distinguishable.

In Geneva, however, neither party was engaged in buying or selling of tangible personal property in the regular cause of its business. As such, Geneva, is factually inconsistent with the case at bar.

Furthermore, at the time the Geneva case was decided the sales tax statute and the use tax statute were separate. The Utah State Tax Commission made a policy decision to apply all sales tax exemptions to the Use Tax Act. The Court in Geneva, noting the legislature's inaction, simply ratified this procedure. Thus, the underlying rationale of Geneva is no longer applicable since the legislature has recently acted by combining

the two Acts into its present form. But even before the statutory union of the Sale and Use Tax Acts, the Geneva court recognized the existence of two separate taxable transactions when it stated:

In the Union Portland Cement case, we narrowed further the scope of the use tax. But this narrowing did not make the Use Tax Act useless or a "nullity." Remaining for the use tax to operate upon is the storage use or other consumption of property purchased outside of this state and brought into this state for storage, use, or other consumption. 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. (emphasis added) Id. at 211.

The general public policy of sales tax statutes includes the concept that a state is entitled to tax property coming to rest and being consumed within its borders. In order for taxpayers to avoid double taxation of tangible personal property, interstate agreements have been reached whereby one state will credit sales or use tax paid by a taxpayer for the same item of property in another state. Had Minnesota taxed the used computer equipment allegedly purchased by KDS in Minnesota, the state of Utah would recognize that payment and credit KDS for any amount of use tax owed to Utah. Therefore, KDS bears no undue risk. However, there is no evidence that this happened. The used

computer equipment which KDS has and continues to consume, conceivably would escape legitimate state taxation if the arguments of the Petitioner are accepted by this court. The validity of the use tax concept should not be so jeopardized.

III. PETITIONER IS NOT ENTITLED TO ATTORNEYS' FEES PURSUANT TO 42 U.S.C. § 1988.

A. Issues Not Raised in the Proceedings Below Cannot Be Raised for the First Time on Appeal.

Petitioner's request for attorney's fees pursuant to 42 U.S.C. § 1988 should be summarily denied in this action. Utah law clearly establishes that issues not presented in the proceedings below cannot be raised for the first time on appeal. See Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356 (Utah Ct. App. 1991), James v. Preston, 746 P.2d 799 (Utah Ct. App. 1987). In its brief before this court, Petitioner raises for the first time the issues of a violation of 42 U.S.C § 1983 and a request for attorneys' fees in connection with that violation pursuant to 42 U.S.C. § 1988. (Brief of Appellant at 15). However, the record indicates that a violation of § 1983 and attorneys' fees pursuant to § 1988 have not been plead or put to issue in the proceedings below. Therefore, this Court should reject Petitioner's request for attorneys' fees pursuant to § 1983.

Petitioner may try to argue that this issue has been plead below in its Request for Reconsideration. (R. 22). However, neither that document nor the cases to which it cites mentions a

violation of 42 U.S.C. § 1983 or attorneys' fees pursuant to 42 U.S.C. § 1988.⁹ Furthermore, Petitioner cannot claim that the § 1983 and § 1988 issues were implicitly raised in its Request for Reconsideration. This Court has already determined the effect of issues that allegedly have been "implicitly raised" in the proceedings below. In Olson v. Park-Craig-Olson, an appellant urged this court to consider the issue of standing on appeal, stating that this issue was "broadly speaking . . . raised below," suggesting that the trial court "implicitly considered" the standing issue raised on appeal. However, this Court rejected the appellant's claim and denied him the opportunity to raise the standing issue. Id. at 1359. Likewise in this case, this Court should find that the § 1983 and § 1988 have neither expressly or implicitly been raised in the proceedings below. Therefore, this Court should deny Petitioner's request for attorneys' fees in connection with this case.

B. Petitioner's § 1988 Claim Is Improper Because Utah Law Provides An Adequate Remedy To Address Erroneous Tax Assessments.

The objective of 42 U.S.C. § 1983 is to interpose federal courts between the states and the people, as guardians of the peoples' federal rights. Patsy v. Fla. Bd. of Regents, 457 U.S.

⁹. Note that the case to which Petitioner cites, Kraft General Foods, Inc. v. Iowa Dep't of Revenue, 505 U.S.____, 120 L. Ed. 2d 59 (1992), does not involve a sales tax issue nor does it address the issue of a 42 U.S.C. § 1983 violation or § 1988 attorneys' fees claim.

496, 503 (1982) (quoting Mitchum v. Foster, 407 U.S. 225, 242 (1972)) (emphasis added). Accordingly, § 1983 does not create new rights; rather, it merely facilitates enforcing certain federal rights by providing a federal forum. Chapman v. Houston Welfare Rts. Org., 441 U.S. 600, 617 (1979).

Although § 1983 challenges may have an extensive reach in other contexts, there are special limiting concerns when the dispute involves the collection and assessment of state taxes. The Tax Injunction Act, 28 U.S.C. § 1341, specifically provides that federal "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The policies embodied within the Act create an impenetrable barrier to contesting state taxes in federal court. Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) (federal courts cannot entertain actions for damages under § 1983 for alleged denial of federal constitutional rights in the administration of state tax laws). This barrier is derived from our system of federalism and comity. The United States Supreme Court noted the following:

The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere . . . with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it (emphasis added).

McNary, 454 U.S. at 108. Thus, as long as the state provides an adequate remedy, any challenge--including one based upon § 1983--cannot be brought to a federal court. McNary, 454 U.S. at 113.

Accordingly, the issue in the present case is whether a state is required by federal law to provide a forum for federal claims that would not otherwise be heard in a federal court. However, the cases cited above bolster the proposition that a state should have no obligation to create additional remedies concerning the payment of taxes beyond those provided in the state statutes.¹⁰

In the instant case, the Utah legislature has already created an adequate and efficient remedy for taxpayers who contest their assessments. Utah Code Ann. § 59-1-301 allows taxpayers to pay the disputed amounts under protest and then bring an action in the tax division of the appropriate district court to determine the validity of the tax. If the decision goes in favor of the taxpayer, the taxpayer is entitled to a refund of the amount paid under protest. See Utah Code Ann. § 59-1-301

¹⁰. Note that this issue has engendered much confusion throughout the various states. Nutbrown v. Munn, 811 P.2d 131 (Or. 1991)(a § 1983 challenge against state taxes was improper because state provided an adequate remedy); Hogan v. Muslof, 471 N.W. 2d 216 (Wis. 1992)(a § 1983 challenge against state taxes was improper because the state provided a plain, adequate, and complete remedy); but see Bunc's Bar v. Township Council, 502 A.2d 1198 (N.J. Super 1985)(state court has jurisdiction over § 1983 tax claims); Bloomington's By Mail Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1992) (a state granted attorney's fees under § 1983 in a state tax case).

(1992). Thus far, the Utah legislature has not incorporated the § 1988 action as a remedy available for Utah taxpayers.

Furthermore, it is a sovereign function of the legislature, and not the judiciary, to determine what remedies are available to Utah taxpayers. Thus, because there is no federal requirement that a state provide a remedy for contesting state taxes beyond the pay and sue-for-refund remedy provided in Utah Code Ann. § 59-1-301, and because the legislature has not incorporated the remedy under § 1988 for Utah taxpayers, Petitioner is not entitled to attorney's fees under his § 1988 claim.

C. The Tax Assessed Against Petitioner
Does Not Violate the Commerce Clause
Nor 42 U.S.C. § 1983.

Because this Court has discretionary power to deny attorneys' fees in a § 1983 claim, this Court should carefully consider the Tax Commission's reasoning in upholding the taxes assessed against Petitioner. By doing so, the Court should find that Petitioner's § 1983 and § 1988 claims are not warranted in this case. See 42 U.S.C. § 1983 (1989 & Supp. 1992).

As indicated in the analysis above, the imposition of the tax against Petitioner does not discriminate against out-of-state purchases of tangible personal property. It is imperative to note that the underlying transaction in this case involves a trade-in situation, not an isolated or occasional purchase of tangible personal property. As such, all tangible personal property acquired in trade is tax exempt pursuant to Utah Code

Ann. § 59-12-104(19) even if the property comes from within or outside of this state. However, the subsequent sale or consumption of all traded-in property, constitutes a legitimate taxable transaction. Finding two separate transactions does not discriminate against interstate commerce. Therefore, because the tax imposed upon Petitioner's subsequent use is in no way connected with the manner in which Petitioner acquired the equipment, there can be no violation of the federal Civil Rights Act.

In support of its 42 U.S.C. § 1983 claim, Petitioner relates an example stating that if "Knowledge Data (Petitioner) had purchased used computer equipment in Salt Lake City from the University of Utah Hospital, no sales tax would have been collected from the University of Utah Hospital and no use tax would have been due from Knowledge Data." (Brief of Appellant at 13). This argument is correct so long as the transaction from the University of Utah Hospital to Petitioner is an actual sale, and not a trade-in situation. However, because the facts of this case indicate that Petitioner acquired the used equipment as part of a trade-in, Petitioner's example cannot be considered as an appropriate analogy. In fact, if Petitioner in its example actually received equipment in trade from the University of Utah Hospital, and subsequently used the equipment for its own business purposes, the Auditing Division would assess a tax on that transaction. Therefore, Petitioner cannot claim that the

tax violates the Commerce Clause unfairly discriminating against non-Utah entities because all tangible personal property taken in trade is received tax exempt. The Commission is consistent in this case. Subsequent sale or consumption of the equipment constitutes a separate taxable transaction.

Finally, this Court has already held that attorneys' fees pursuant to 42 U.S.C. § 1988 are not allowed if a trial court makes an erroneous factual determination when applying the determination to a statutory provision. See Kelsey v. Hanson, 818 P.2d 590, 592 (Utah Ct. App. 1991). In Kelsey a trial court judge improperly determined that a plaintiff was able to bear the costs of filing a divorce as set out in Utah Code Ann. § 21-7-3 and § 21-7-4. On appeal the plaintiff argued that her right of access to the courts had been violated given the erroneous determination of her ability to pay, and sued to recover her attorney's fees pursuant to 42 U.S.C § 1988. This Court held that the trial court's erroneous factual determination of her financial status, a determination that the court was required to make in applying § 21-7-4, did not constitute a civil rights violation. Id. at 592. As such, the Court denied attorney's fees. Id. This Court reasoned that to hold otherwise would subject all erroneous state court decisions to be construed as civil rights violations. Id.

In the present case, the Tax Commission made the factual determination that Petitioner did not qualify for the "isolated

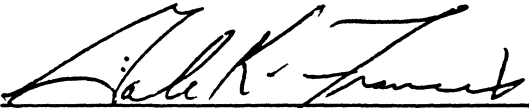
or occasional" sales tax exemption given the nature of the trade-in situation. However, if this Court finds that this factual determination was improper, then this Court still should not find that Petitioner's civil rights have been violated. Just as in the Kelsey case, this Court should hold that an erroneous factual determination applied to a statutory provision does not give rise to a civil rights violation or attorneys' fees pursuant to 42 U.S.C. § 1988. Therefore, this Court should conclude that Petitioner's request for attorneys' fees are not warranted in this case.

CONCLUSION

The Tax Commission properly concluded that Petitioner's subsequent use of the used computer equipment that it acquired in trade did not qualify for an "isolated or occasional sales" exemption given the underlying nature of the transaction. The stipulated facts clearly show that Petitioner acquired the used equipment from the out-of-state purchasers as partial consideration for the sale of new computer equipment. Although the initial trade-in transaction is tax exempt pursuant to Utah Code Ann. § 59-12-104(19), the subsequent sale or use of the equipment constitutes a taxable event. Because Petitioner used the equipment for its own business purposes instead of holding the equipment for resale, Petitioner became the ultimate consumer of the equipment and is liable for the sales tax. The tax assessed against Petitioner does not discriminate against

interstate commerce, and as a result, Petitioner's request for attorney's fees must be denied. Therefore, this Court should affirm the sales tax, interest, and penalties assessed against Petitioner.

DATED this 15th day of June, 1993.

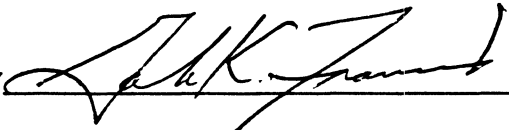


GALE K. FRANCIS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above
Brief of Respondent was mailed, postage pre-paid on this 15th
day of June 1993 to the following:

R. Bruce Johnson
David J. Crapo
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111

by 

APPENDIX 1

1. Utah Code Ann. § 59-12-102(14) (1992):

(a) "Use" means the exercise of any right or power over tangible personal property under Subsection 59-12-103(1), incident to the ownership or the leasing of that property, item, or service.

(b) "Use" does not include the sale, display, demonstration, or trial of that property in the regular course of business and held for resale.

2. Utah Code Ann. § 59-12-103 (1992):

(1) There is levied a tax on the purchaser for the amount paid or charged for the following:

(a) retail sales of tangible personal property made within the state;

3. Utah Code Ann. § 59-12-104(14) (1992):

(14) isolated or occasional sales by persons not regularly engaged in business, except the sale of vehicles or vessels required to be titled or registered under the laws of this state;

4. Utah Code Ann. § 59-12-104(19) (1992):

(19) tangible personal property, other than money, traded in as full or part payment of the purchase price, except that for purposes of calculating sales or use tax upon vehicles not sold by a vehicle dealer, trade-ins are limited to other vehicles only, and the tax is based upon the then existing fair market value of the vehicle being sold and the vehicle being traded in, as determined by the commission;

5. Utah Code Ann. 63-46b-1(9) (1989 & Supp. 1992):

(9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review.

6. Utah Code Ann. § 63-46b-13 (1989 & Supp 1992):

(1)(a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.

(3)(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

7. Utah Code Ann. § 63-46b-14 (1989 & Supp. 1992):

(3)(a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

8. Utah Admin. R. R865-19-72S (1992):

A. An even exchange of tangible personal property for tangible personal property is exempt from tax. When a person takes tangible personal property as part payment on a sale of tangible personal property, sales or use tax applies only to any consideration valued in money which changes hands.

B. For example, if a car is sold for \$8,500 and a credit of \$6,500 is allowed for a used car taken in trade, the sales or use tax applies to the difference, or \$2,000 in this example. Subsequently, when the used car is sold, tax applies to the selling price less any trade-in at that time.

C. An actual exchange of tangible personal property between two persons must be made before this exemption applies. . .

APPENDIX 2

BEFORE THE UTAH STATE TAX COMMISSION

KNOWLEDGE DATA SYSTEMS,)	
	:	
Petitioner,)	FINDINGS OF FACT
	:	CONCLUSIONS OF LAW,
v.)	AND FINAL DECISION
	:	
AUDITING DIVISION OF THE)	Appeal No. 91-0934
UTAH STATE TAX COMMISSION,	:	
)	Account No. D51752
	:	
Respondent.)	

STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a formal hearing on April 13, 1992. Alan Hennebold, Presiding Officer, heard the matter for and on behalf of the Commission. Gary S. Kuelczo, manager of state and local taxes, participated by telephone for Petitioner. Rick Carlton, Assistant Utah Attorney General represented Respondent.

Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is use tax.
2. The period in question is July 1987 through June 1990.
3. Respondent performed a sales and use tax compliance audit of Petitioner for the period in question. As a result of that audit, Respondent assessed additional use tax in the amount of \$15,396.99 plus interest at the statutory rate of 12% per annum.

4. Petitioner filed a timely appeal of the foregoing assessment with the Commission.

5. Petitioner is in the business of selling computer hardware and software at retail both inside and outside Utah.

6. Petitioner sold a computer system to the University of Minnesota Hospital and Clinic and took in trade used computer hardware which Petitioner had previously sold to them.

7. The University of Minnesota is not in the business of selling new or used computer hardware, but rather is a ~~patient~~ care facility.

8. The equipment Petitioner took in trade was used ~~by~~ Petitioner in its business in Utah and was booked to a fixed asset account and was not held for subsequent sale in an inventory account.

9. ICI America is in the business of selling wholesale pharmaceutical supplies and is not in the business of selling new or used computer hardware.

10. Petitioner purchased used computer hardware from ICI in conjunction with providing a new computer system to ICI.

11. Petitioner used a portion of the computer hardware in its trade or business and held a portion of the hardware for resale in its inventory account.

12. Neither the University of Minnesota nor ICI is registered with the Utah Department of Revenue to sell tangible personal property at retail in Utah.

CONCLUSIONS OF LAW

Sales tax is levied on the purchaser for the amount paid or charged for retail sales of tangible personal property made within the state. (Utah Code Ann. §59-12-103(1)(a)).

Sales tax is not imposed on isolated or occasional sales by persons not regularly engaged in business. (Utah Code Ann. §59-12-104(14)).

Use tax is levied on the purchaser for the amount paid or charged for tangible personal property stored, used or consumed in Utah. (Utah Code Ann. §59-12-103(1)(1)).

Generally, taxing statutes are to be construed strictly, and in favor of the taxpayer where doubtful. (Pacific Intermountain v. State Tax Commission, 8 Utah 144, 146; 329 P.2d 650 (1958)). However, statutes which provide for exemptions to general taxation provisions are also strictly construed, and the taxpayer has the burden of showing its entitlement to the exemption. (Parsons Asphalt Products v. Utah State Tax Commission, 617 P.2d 397, 398 (Utah 1980)).

DECISION AND ORDER

The facts underlying this dispute are not at issue. In summary, Petitioner took used equipment back in trade from the University of Minnesota and ICI America, for use in Petitioner's own business operations. Petitioner argues that the transactions are exempt from sales and use tax as isolated or occasional sales. Respondent argues that Petitioner s

initial purchase of the equipment was exempt from sales tax, but that its subsequent use of the equipment is subject to use tax.

Utah Code Ann. §59-12-103(1)(a) levies sales tax on the purchaser of tangible personal property sold within Utah. In this case, the parties agree that no sales tax may be levied on the transactions in question because the sales took place outside Utah. However, Utah Code Ann. §59-12-103(1)(1) levies an alternative "use" tax on the purchaser of tangible personal property stored, used, or consumed in Utah.

The equipment at issue in this case was used in Utah, and is therefore subject to use tax unless it falls within one of the specific exemptions set forth by statute. Petitioner relies upon the exemption found in Utah Code Ann. §59-12-104(14), which exempts isolated or occasional sales by persons not regularly engaged in business from sales and use tax. However, it is not the sale of the equipment which is taxable, but only Petitioner's subsequent use of that equipment.

Appeal No. 91-0934

Based on the foregoing, the Commission finds that Petitioner's use of used computer hardware taken in trade from the University of Minnesota and ICI America is subject to use tax under Utah's Sales and Use Tax Act. Respondent's audit assessment is therefore affirmed. It is so ordered.

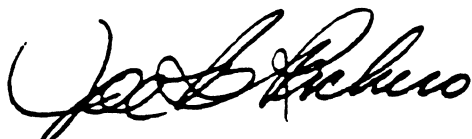
DATED this 28th day of October, 1992.


BY ORDER OF THE UTAH STATE TAX COMMISSION.


R.H. Hansen
Chairman

ABSENT

Roger O. Tew
Commissioner


Joe B. Pacheco
Commissioner


S. Blaine Willes
Commissioner

NOTICE: You have twenty (20) days after the date of the final order to file a request for reconsideration or thirty (30) days after the date of final order to file in Supreme Court a petition for judicial review. Utah Code Ann. §§63-46b-13(1), 63-46b-14(2)(a).

AH/sj/3507w



MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing
Decision to the following:

Knowledge Data Systems
c/o Richard Wolfley
102 West 500 South, Suite 600
Salt Lake City, UT 84101

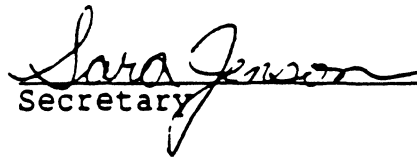
Gary S. Kuelczo, Esq.
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Assistant Director, Auditing
Heber M. Wells Building
Salt Lake City, UT 84134

James H. Rogers
Director, Auditing Div.
Heber M. Wells Bldg.
Salt Lake City, UT 84134

Rick Carlton
Assistant Attorney General
36 South State, 11th Floor
Salt Lake City, UT 84111

DATED this 28th day of October, 1992.


Secretary

APPENDIX 3

BEFORE THE UTAH STATE TAX COMMISSION

KNOWLEDGE DATA SYSTEMS,)	
	:	
Petitioner,)	
	:	ORDER
v.)	
	:	
AUDITING DIVISION OF THE)	Appeal No. 91-0934
UTAH STATE TAX COMMISSION,	:	
)	Account No. D51752
	:	
Respondent.)	

STATEMENT OF CASE

This matter came before the Utah State Tax Commission upon a Petition for Reconsideration, dated November 16, 1992, filed by the Petitioner as a result of the Commission's final decision, dated October 28, 1992.

FINDINGS

1. Utah Administrative Rule R861-1-3A(P) provides that a Petition for Reconsideration "will allege as grounds for reconsideration either a mistake in law or fact, or the discovery of new evidence." Under this rule, the Tax Commission may exercise its discretion in granting or denying a Petition for Reconsideration.

2. In its Petition For Reconsideration, Petitioner raises what it considers to be errors of fact in the Commission's prior decision. However, as generally acknowledged by Petitioner, such alleged errors were not material to the Commission's prior decision in this matter.

3. The primary point raised by Petitioner's Request For Reconsideration is as follows: Petitioner's acquisition of the used computer equipment in question was the result of isolated or occasional sales by the University of Minnesota and ICI. Utah Code Ann. §59-12-104(14) exempts isolated or occasional sales from sales tax. According to Petitioner the same exemption must be applied to Petitioner's subsequent use of the equipment, so as to preclude imposition of use tax.

The Commission carefully considered the foregoing argument in reaching its initial decision in this matter. The Commission has again considered Petitioner's argument in connection with Petitioner's Request for Reconsideration. The Commission continues to believe that although Petitioner's initial purchase of the subject property is not subject to sales tax, Petitioner's subsequent use of the equipment in Utah is subject to Utah's use tax.

DECISION AND ORDER

Based upon the foregoing, it is the decision and order of the Utah State Tax Commission that the Petition for Reconsideration is denied. It is so ordered.


DATED this 15th day of January, 1992.

BY ORDER OF THE UTAH STATE TAX COMMISSION.


R.H. Hansen
Chairman

Roger O. Tew
Commissioner


Joe B. Pacheco
Commissioner


S. Blaine Willes
Commissioner

NOTICE: You have thirty (30) days after the date of the final order to file with the Supreme Court a petition for judicial review. Utah Code Ann. §§63-46b-13(1), 63-46b-14(2)(a).

AH/sj/3703w



MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing
Decision to the following:

Knowledge Data Systems
c/o ~~Richard Wolfley~~ *DALLIN HENSELEY*
102 West 500 South, Suite 600
Salt Lake City, UT 84101

Craig Sandberg
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Salt Lake City, UT 84134

Mark Wainwright
Assistant Attorney General
36 South State, #1100
Salt Lake City, UT 84111

DATED this 15th day of January, 199⁹³2.

Sara Jensen
Secretary