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Consumer Sales Tax--What Service Taxable

J. L. G. Jr.

West Virginia University College of Law

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RECENT CASE COMMENTS

CONSUMERS SALES TAX—WHAT SERVICES TAXABLE.—A contract was entered into by the *B* company and the *T* company by which *B* was to equip all of its vehicles with *T* company tires. *T* assumed the risk of transportation and further agreed to repair at *B*'s expense all damage caused by accident after receipt by *B*. *B* was to keep accurate mileage records and make payments for mileage run by each tire during the preceding month. All tires worn out or removed from service for any reason were to be returned to *T*. *B* agreed that upon termination of the contract it would buy all tires then in use. The issue was whether the contract contemplated such a transaction as was taxable under the statute imposing a consumers sales and service tax.¹ *Held*, two judges dissenting, that the contract was not a sale or a rental, but the furnishing of services taxable under section 8 of this act.² *Charleston Transit Co. v. James*.³

In construing a statute conferring authority to impose taxes it is a cardinal rule that it must be construed strictly against the taxing power.⁴ The text writers and the cases always state this rule of construction to be applicable between the taxpayer and the taxing power.⁵ This would by implication seem to mean that they do not use such strict construction in construing a written contract for the purpose of determining whether the transaction is taxable or not. The West Virginia court in the principal case has merely stated positively what other courts seem to have said by implication.⁶

In distinguishing a sale from other transactions the important element is whether the transfer applies to the general property interest. If this element is lacking the transaction is not a sale.⁷ In the principal case *B* clearly did not get a general property in-

¹ W. VA. CODE (Michie, 1937) c. 11, art. 15.

² "The provisions of this article shall apply not only to selling tangible personal property, but also to the furnishing of all services, except professional and personal services, and except those services furnished by corporations subject to the control of the public service commission and the state road commission." *Id.* § 8.

³ 4 S. E. (2d) 297 (W. Va. 1939). The court expressed no opinion on the interstate commerce aspect of the transaction.

⁴ *Lee v. Gaddy*, 133 Fla. 749, 183 So. 4 (1938).

⁵ 2 COOLEY, TAXATION (4th ed. 1924) § 503.

⁶ Syl. 1: "The rule that ambiguity in statute imposing tax is to be resolved in favor of person on whom tax is sought to be imposed does not apply to construction of written contract for purpose of determining whether transaction represented constitutes sale or service taxable under statute."

⁷ VOLD, SALES (1931) § 4.

terest, because it could not do what it wanted to with the tires—could not sell them, had to have any repairs that were necessary made by *T*, and when the tires for any reason became unfit for service they were to be returned to *T*. Therefore the court was right in holding that the contract was not a sale.

The problem whether a transaction such as this is a conditional sale or a bailment has come up many times where the purpose of the purchaser was to circumvent the recording act. In order to determine whether this contract is a conditional sale or a bailment it is necessary to understand the essentials of each. These essentials may be stated as follows: (1) In a bailment, the article is given to the bailee to be used by him for a certain time and then to be returned to the bailor, who retains title throughout, payments being made for the use of the article. (2) In a conditional sale, the article is given to the conditional vendee with the intention that the article is to belong to the vendee and payment be made for the article itself.⁸ The motive for a conditional sales contract is security, the vendor retaining title for the purpose of insuring payment of the purchase price. At first glance the contract in the principal case would appear to be a conditional sale, but upon close inspection it will be seen that this is not so. That *B* was not to get the tires with the intention that they belong to it is shown by the provisions in the contract that *T* was to make all repairs, and that tires when worn out were to be returned to *T*. The provision that *B* was to keep a mileage record and make payments for mileage run by each tire during the preceding month, does not appear to be a security arrangement for the payment of a purchase price, which is the prime motive for a conditional sale, but more of a payment for use of the tires. The provision as to retention of title by *T*, the returning of the tires to *T*, and the means of payment would seem to fit in better with the idea of a bailment than that of a conditional sale. For these reasons it would appear that the court should have said that the contract was a contract of bailment rather than a mere service contract without more.

The essential problem is whether the word "service" in the statute⁹ can fairly be said to include this type of bailment. In order to ascertain the meaning of the word "service" it is necessary

⁸ Vermont Acceptance Corp. v. Wiltshire, 103 Vt. 219, 153 Atl. 199, 73 A. L. R. 792 (1931); Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971, L. B. A. 1917B 615 (1915). Notes (1926) 43 A. L. R. 1257; (1934) 92 A. L. R. 321.

⁹ W. VA. CODE (Michie, 1937) c. 11, art. 15, § 8.

to consult the dictionary.¹⁰ The dictionary defines "service" as the performance of labor for the benefit of another. In every transaction listed as a service in the rules and regulations of the tax commission the element of labor is the important factor.¹¹ A simple bailment for a term in connection with which no labor is exerted ought not to be taxed. The principal case falls in between these two extremes and it is a fair question whether the labor involved in servicing the tires brings the case under the statute.¹² On the facts of the case a decision either way would hardly be subject to criticism.

J. L. G., JR.

CRIMINAL LAW — INDICTMENT — ALLEGATION OF KNOWLEDGE.

— An indictment was returned against the Chesapeake & Potomac Telephone Company, charging that, while engaged in the telephone business, it unlawfully transmitted information concerning the result of a horse race, to a pool room where it was used for gambling purposes. One of the certified questions was: "Is the indictment demurrable because of the fact that it does not allege that the offense charged was 'knowingly' committed?" *Held*, that since the statute¹ does not require that the act prohibited, an offense *malum prohibitum*, should be knowingly done, the absence of an allegation of knowledge is no ground for sustaining a demurrer to the indictment. *State v. Chesapeake & Potomac Telephone Co. of W. Va.*²

Operating a gaming house is a public nuisance at common law, a crime *malum in se*,³ but furnishing information thereto was

¹⁰ *Eisner v. Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521 (1919).

¹¹ Some of the services listed are: advertising, auto repairing, baggage transfer companies, broadcasting stations, collection agencies, credit bureaus, dress-makers, dyers and cleaners, electric repair service, garages, hotels, laundries, loan companies, machine shops, parking lots, plumbers, painters, printing, repair shops, shoe repairing, storage, tire repairing, towel supply, and general cleaning. It can be seen that all these services denote labor and are not like the service in the principal case which does not take any labor on part of *T*.

¹² *T* agreed to maintain and repair all tires for which service *B* agreed to pay, in addition to the mileage fee provided for their use, the sum of fifty dollars per month.

¹ W. VA. CODE (Michie, 1937) c. 61, art. 10, § 10: " . . . any person engaged in the telephone, . . . business, . . . who shall transmit or furnish, or permit to be transferred or furnished, over or upon, or by means of the wires, . . . to any pool room, . . . any message, token or information of or concerning the result of any such event as herein mentioned, they . . . shall be guilty of a misdemeanor, . . ."

² 4 S. E. (2d) 257 (W. Va. 1939).

³ *State v. Baker*, 69 W. Va. 263, 71 S. E. 186 (1911).