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Wally's Wagon, Inc. v. State Tax Commission of Utah : Plaintiff's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALLY'S WAGON, INC.,
a corporation,

Plaintiff,

vs.

STATE TAX COMMISSION OF
UTAH,

Defendant.

Case No.
11155

PLAINTIFF'S BRIEF

Original Proceedings to Review an Order and Deficiency Tax
Assessment of the State Tax Commission of Utah

FILED

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Utah Supreme Court, Utah

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**SUBJECT: MANDATORY COLLEC-
TION OF TAX**

IN THE SUPREME COURT OF THE STATE OF UTAH

WALLY'S WAGON, INC.,
a corporation,

Plaintiff,

vs.

STATE TAX COMMISSION OF
UTAH,

Defendant.

Case No.
11155

PLAINTIFF'S BRIEF

STATEMENT OF CASE

Wally's Wagon paid sales taxes on all sales made by the corporation. It denied that it was liable for any tax, penalty, or penalty interest on the unpaid balance of the assessment made on sales made by vendors claimed by Wally's Wagons to be independent contractors. The sales tax assessment was originally imposed by the auditing division for the period between

May 25, 1964, and March 31, 1966, upon every transaction of the corporation and on all sales by the contractors under their lease agreements with plaintiff and the assessed tax deficiency and applicable interest were sustained by the State Tax Commission. The imposition of the penalty tax and penalty interest upon the assessed deficiency were disallowed.

RELIEF SOUGHT ON APPEAL

Wally's Wagon seeks a judgment vacating the assessed deficiency for sales tax not collected or remitted by Wally's Wagon.

STATEMENT OF FACTS

To save time, a statement of facts was read into the record which would have been the testimony of Walter F. Pjerski, president of Wally's Wagon, had he testified. Defendant had no objection to the statement as made. (R 60-62)

Wally's Wagon Inc. is a Utah corporation with its place of business at 3565 South 2nd West, Salt Lake City, Utah. The company is not engaged in manufacturing ice cream but purchased same from Swift Company and Meadow Gold. (R 61)

Prior to commencing business, a discussion was had with counsel to determine how the business should

be handled. It was concluded not to go into the retail business but to sell ice cream to independent contractors, and to act as a broker. Wally's Wagon was to provide the facilities for the selling of the ice cream. (R 61) A lease agreement was prepared by counsel for the rental of the facilities (International Scout trucks with a refrigerating unit and a musical attachment.) (R 100) The lease agreement was taken to the United States Office of Employment Security to determine whether or not it would be necessary to pay unemployment compensation taxes on the contractors who sold the ice cream. (R 62) The lease was also taken to the Internal Revenue to determine whether or not the contractors would be considered employees and if it would be necessary to withhold taxes as required under the federal income tax law for employees. (R 62) The corporation does no advertising. The building has no sign on it that indicates that there is ice cream for sale. No retail trade is solicited by the corporation. Bulk sales or large sales are made at retail to accommodate persons who come to the office as a matter of good will. Sales tax was paid on said sales.

The lease is the sole agreement between the corporation and the contractors. If the signer of the lease happens to be a minor under 21 years of age, it is necessary that he obtain the signature of a parent or his legal guardian. No contracts are entered into unless one who has reached majority joins in the contract. (R 62 and 76) The defendant had no objection to the statement. (R 62)

Section 59-15-2, Utah Code Annotated, 1953, page 695, provided . . .

“(c) The term “wholesaler” means a person doing a regularly organized wholesale or jobbing business, and known to the trade as such and selling to retail merchants, jobbers, dealers or other wholesalers, for the purpose of resale.”

“(e) . . . The term “retail sale” means every sale within the State of Utah by a retailer or wholesaler to a user or consumer, except such sales as are defined as wholesale sales . . .”

Section 59-15-5, Utah Code Annotated, 1953, provided . . . (second sentence)

“ . . . The vendor *shall* collect the tax from the vendee, but in no case shall he collect as tax an amount (without regard to fractional parts of one cent) in excess of the tax computed at the rates prescribed by this act. . . ”

Local Sales Tax Regulation No. 3 (1961), in effect throughout this period to 1965, provided . . .

“When the *vendor is responsible for collecting from the purchaser* local sales or use tax of one-half of one percent in addition to state sales and use tax of two and one-half percent, the following combined 3% schedule is to be used to determine the amount to be collected:

Amount of Sale	Tax
\$0.01 to \$0.14	None
.15 to .42	\$0.01 . . . ”

Sales Tax Ruling No. 20, of the State Tax Commission, provided:

“ . . . Under the Act, as amended, the vendor is required to collect the tax from the vendee with respect to all transactions subject to tax. In all cases the tax must be added to the sales price and collected as a separate item. *It will be considered a violation of the Act for the vendor to absorb the tax or to consider that the tax is included and collected as part of the sales price.*”

After adoption of the Utah Sales Tax Regulations of 1965, the following were in effect:

“S4. It is unlawful for the vendor in any way to waive the collection or imposition of the tax or to consider that the tax is included and collected as part of the sales price. The vendor must add the tax to the sales price as a separate item and collect from the vendee. The vendor is required to remit to the tax commission all tax funds in his possession and is a guarantor of all amounts required to be collected under the tax act. (R 95 p. 40)

“S6. The vendor is responsible for collecting from the purchaser state sales or use tax at the rate of 3% of the sales price. See regulation No. S30 for definition of sales price. (R 95 p. 40)

“The following schedule may be used in determining the amount to be collected for 3% state tax:

Amount of Sale	Tax
\$0.01 to \$0.14	See below
.15 to .73	\$0.01

“For higher amounts, tax may be computed to the nearest cent. Tables covering sales up to \$50.00 are available upon request from the State Tax Commission.

“Vendors using the above schedule should not collect tax on sales under 15 cents. The bracket schedule is designed to over collect the tax in certain brackets and under collect the tax in others, in order that the vendor can be reimbursed for the approximate amount of tax that is required to be remitted to the tax commission. Eff. Sept. 1, 1965” (p. 41)

Copies of the foregoing Regulations and Rulings were sought of the Tax Commission. None were available until this hearing. They are no longer available. Prints from other briefs had to be used.

The lease agreement was the only agreement, written or oral between Wally's Wagon and the contractors, the sellers of the ice cream. (R 67) The lease was changed. During 1964, the lease agreement was Exhibit 7. During 1965 and 1966, the lease agreement was Exhibit 6. The only differences are:

a. In paragraph 1 the time when a truck was leased was changed to accommodate the contractors. It was generally changed to “from 10:00 A.M. to Sundown.”

b. In paragraph 4 the second paragraph was added to provide for credit sales. This was missing in the first lease. It was found necessary because the contractors did not have the money to pay cash for their ice cream.

c. Paragraph 8 was changed by reducing the bond from \$25.00 to \$15.00 and adding “the faithful performance of said contractor pursuant to the terms of this lease and to safely . . .”

d. Paragraph 11 was changed at the instance of the insurance carrier to prohibit riders.

e. Paragraph 16 was changed to require the lawful operation and proper operation of the motor vehicle and to set forth the responsibility of the Contractor.

f. Paragraph 22 was changed to meet the health regulations to require that the exterior of the food dispenser be clean as well as the interior.

g. Paragraph 30 was an addition to be sure that a legally responsible party executed the lease and the **CONSENT AND INDEMNITY AGREEMENT** was to the same effect.

None of these changes was to give Wally's Wagon control. The contractors wanted different hours. To meet the request of the contractors as to the hours, the lease was changed. To meet conditions in the operation which contractors desired, such as credit, to meet insurance carriers requests and to have a responsible party on the lease, the new lease was made. The outstanding leases were in force and effect during 1964. The new form of lease was used at the commencement of the next year, 1965 and thereafter.

All items handled have a recommended selling price of less than 15c. (R 70)

When the business was commenced, advertisements in the newspaper were made, for independent contractors. (R 71) Each seller of ice cream was asked to read the contract. (R 71) If the seller had not reached majority, the contract was gone over with the legal

guardian of the seller. (R 71) What the ice cream was sold for was unknown to Wally's Wagon. (R 72) There was no distinctive clothing. (R 76) When a truck was left with Wally's Wagon at night, the contractor would ask to have the truck checked with him. The contents and stock were checked and what was needed was determined. (R 78) The money change the contractors had was either their own, or they would purchase change or change might be loaned them. (R 79) The contractors were to turn in their cash receipts. This may not have been what the total recommended sale price was for the ice cream missing from the refrigerator. At the time of settlement for those working on a credit basis, twenty percent of the recommended sale price of all ice cream sold and delivered to the contractor was deducted from the total sum deposited. The balance of the deposit was turned over to the contractor. (R 80) Contractors chose a given area. (R 82) Wally's Wagon paid for the insurances on the vehicle and the vehicle tax (R 86) The contractors paid the city peddler's license. (R86) The state never required any unemployment compensation tax on this operation. (R 88) and (Exhibit 10) The deposit was whatever they had. (R 91)

STATEMENT OF POINTS UPON WHICH WALLY'S WAGON RELIES FOR REVERSAL

POINT ONE: WALLY'S WAGON SOLD THE ICE CREAM TO THE CONTRACTORS FOR RESALE.

POINT TWO: THE CONTRACTORS LEASED THE INTERNATIONAL SCOUTS FROM WALLY'S WAGON AS INDEPENDENT CONTRACTORS.

THE THIRD POINT IS NOT NECESSARY IF EITHER OF THE FIRST TWO POINTS ARE RESOLVED IN FAVOR OF WALLY'S WAGON.

POINT THREE. WALLY'S WAGON AND THE CONTRACTORS WERE PROHIBITED BY LAW FROM COLLECTING OR ABSORBING THE SALES TAX ON THE ICE CREAM SOLD.

ARGUMENT

The record contains a Legal Memorandum and the Reply Legal Memorandum of Wally's Wagon (Re: Sales Tax Assessment,) and a Memorandum in support of the Auditing Division which was filed by the Attorney General. Having been cautioned, even in the statute to make statements concise, without re-

dundancy or duplicity, an attempt is made to be brief even though interest and conviction would cause a different result.

POINT ONE: WALLY'S WAGON SOLD THE ICE CREAM TO THE CONTRACTORS FOR RESALE.

Black's Law Dictionary, Fourth Edition, defines "Sale" as:

"A contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer', (or purchaser), by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property . . .

"A contract whereby property is transferred from one person to another for a consideration of value, implying the passing of the general and absolute title, as distinguished from a special interest falling short of complete ownership . . ."

"An agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Three circumstances concur to the perfection of the contract, to-wit, the thing sold, the price, and the consent . . ."

Wally's Wagon entered into a written lease with the contractor. The contractor agreed:

(1) To sell exclusively the ice cream and frozen foods of Wally's Wagon, (R 100-2); (2) To pay cash for said ice cream purchased with the clear understanding that Wally's is in no way responsible to take back any of said ice cream and that the sole title and ownership is conveyed to the contractor at the time of delivery pursuant to 1964 lease, (R 100-4) or Wally's may accept cash or extend credit for the deliveries made during the week with the title passing upon delivery to the contractor, under the 1965-1966 lease. (R 100-4) The purchase price was twenty percent of the recommended resale price. (R 71) If it were not a sale what was it? Could Wally's deny that the contractor did not have title after the delivery to the contractor? Could Wally's deny that there was no fixed wholesale price? Could Wally's deny that the Scout was not leased to the contractor? There was a definite contract between two parties (lease); there was the payment of money or a credit granted; the price was fixed by practice—eighty percent of the recommended resale price—(That even indicates that it was a resale and not a direct sale to the consumer) and the title and possession of the goods transferred. (R 100-4) Would any court construe that Wally's owned the ice cream in the vehicle leased to the contractor? Wally's Wagon could not deny the provisions of the written lease. There was a definite sale for resale.

POINT TWO: THE CONTRACTORS LEASED THE INTERNATIONAL SCOUTS FROM WALLY'S WAGON AS INDEPENDENT CONTRACTORS.

In American Jurisprudence, Volume 35, under MASTER and SERVANT, Section 3, on page 445, one reads:

“While it is said that at common law there are four elements which are considered upon the question of whether the relationship of Master and Servant exist, namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, the power of the control of the servant’s conduct,—the real essential element of the relationship is the right of control—the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done. It is, moreover, essential that the master shall have control and direction not only of the employment to which the contract relates but also of all of its details, and if these elements of control and direction are lacking, no relationship of master and servant exists. The test of the employer-employee relation is the right of the employer to exercise control of the details and method of performing the work. It is the element of control of the work that distinguishes the relationship of master and servant from the independent contractor relationship, for the most important test in determining whether one employed to do a certain work is an independent contractor or a mere servant is the control over the work which is reserved to the employer.”

In this lease, what control is reserved to Wally's? What power is reserved to Wally's to terminate the lease? What power is reserved to supervise the work? What acts on the part of Wally's can end the relationship?

It would be nice if one could point out to a sentence that showed there was no control, that there was no right to terminate, that an act on the part of Wally's could terminate the relationship, but that cannot be done. One must read the entire contract and find out if any of these rights are reserved to Wally's Wagon in the contract. Then one must read the evidence to see if the acts or practices constituted a difference in relationship than the lease. Only then can it be determined if there were control. We challenge anyone to show where there was control.

In the case of *Christean vs. Industrial Commission*, 113 Utah 451, 196 P. 2d 502 (1948), your honorable court considered whether a salesman was an independent contractor and stated that the legal fact is the degree of control or the "Right to control."

Christean was under contract to do the following:

1. Shall put forth his best effort;
2. Shall promptly render services as the company may require;
3. Shall strictly comply with all written and printed instructions that may from time to time be communicated to him by the company;
4. Either party may terminate the contract;

5. Shall endeavor to promote the interests of the company;

6. Shall refrain from conduct which might adversely affect the business and good standing of the company;

7. Shall not engage in any business not covered by the contract between the parties;

8. Contract terminable on 30 days notice; and

9. All sales had to be approved by the company.

Christean was determined an independent contractor. In the Stover case, cited by the Tax Commission, 99 Utah 423, 107 P 2d 1027 (1940), the same conclusion was reached.

In Nicholson vs. Industrial Commission, 14 Utah 2d, 376 P 2d 386 (1962), the salesman was required to devote his entire time to this work; he was required to learn the company sales presentations; he must represent the company product in a direct manner; the company made deductions for social security from his compensation and withheld taxes for his income tax; he was required to make reports to the company on company forms and in accordance with company rules and regulations and had to account for his travel expenses; and he was required to comply with all company rules and regulations. These elements are all missing in this case.

Right to Terminate

In the lease before the court, there is no right for Wally's to terminate the lease. The illegal and negligent acts of the contractor may terminate the lease but Wally's has no control over the contractor committing such acts.

Right of Control

Section 6 of the Lease Reads:

That said undersigned contractor is an independent Contractor and is free to operate his business in accordance with good business practices as he shall, in his own individual judgment, find proper. (R 101)

What has Wally's to say about how the business is run? What control is reserved? Section 17 refers to the contractor in *his usual course of business.* (R 102)

The protect Wally's Section 5 provides . . .

"Said undersigned Contractor will protect and save said Wally's blameless from any liability for any damages whatsoever by said undersigned contractor infringing upon a sales area of any other Contractor who has entered into an agreement with said Wally's." (R 21-5 and 6)

Wally's knew it had no right to restrict a contractor to any area. Wally's showed contractors which areas had been chosen by other contractors. Because Wally's had no right to control or restrict the contractor, Wally's protected itself by inserting this clause

in the lease. Wally's was asked, "What if you had five boys in one area, what would you do then?" Wally's answered, "That was up to the boys." (R 83-8) As was testified, the areas were designated "solely for the purpose of letting other boys know where the trucks were operating and which areas had already been chosen. If they didn't want to go where another truck was, why, it was up to them." This was never contradicted. There is no testimony to the contrary. (R 83-21)

The price posted on the side of the truck was "the recommended price." (R 76-3) There was no distinctive clothing or required suits. (R 76-28) The contractors were not bound to take a full load. Sometimes they took a truck out three days in a row without putting any ice cream in. (R 79-3) There was nothing to control the prices. If the contractor ate ice cream, if he gave ice cream to a friend, if he did not keep it properly refrigerated, if some were "stolen" that was not the concern of Wally's. The charge made by Wally's was eighty percent of the listed price of the ice cream delivered. The contractor received the "difference between 80 percent of my charge and what he turned in" and this was because of "his own personal consumption." (R 80-16) Wally's had no way of controlling how much ice cream might have been given to a pretty maiden. The contractor *operated his business as he found fit* and it was *his sole judgment*. Under the written agreement, Wally could not enforce or control anything. There is no evidence that Wally's told a contractor of an area in which he could work. The

evidence is that the contractor chose the area in which he wanted to work. (R 83-21) The contractors paid Wally's on the basis of the ice cream purchased, not on the basis of the ice cream sold. (R 84-21 and 26)

In arguing Point Three, Wally's is doing so in behalf of the contractors as well as in its own behalf. What is said relative to Wally's is equally applicable to the contractors. The argument is simply made in the name of Wally's.

POINT THREE. WALLY' SWAGON AND THE CONTRACTORS WERE PROHIBITED BY LAW FROM COLLECTING OR ABSORBING THE SALES TAX ON THE ICE CREAM SOLD.

Wally's Wagon Inc. was incorporated on May 13, 1964, and commenced operation soon thereafter. All items offered for sale and all items sold were for less than 15c. Fourteen cents is the highest recommended price of any item. There is no evidence that any sale was made for an amount in excess thereof.

S6 of the 1963 Sales Tax Regulations provided:

“ . . . The following schedule is to be used in determining the amount to be collected for 3% state tax:

Amount of Sale	Tax
\$0.01 to \$0.14	None
.15 to .42	\$0.01 . . .

(R 94 p 34-35)

If you were a lawyer and your client asked you what would be the effect of charging 15c for ice cream sold, what would you advise? I advised, after consultation with Mr. F. Burton Howard, Assistant Attorney General, assigned to the State Tax Commission, that there would have to be a tax of 1c, which would mean that the resellers would have to collect 16c for the ice cream, priced at 15c. The next question is, if a charge of 14c is made is there need to collect any sales tax? After having head the regulation thoroughly, they were advised that no tax should be collected in that it would be contrary to the regulations.

S4 of the Sales Tax Regulations provided:

“It is unlawful for the vendor in any way to waive the collection or imposition of the tax or to consider that the tax is included and collected as part of the sales price. The vendor must add the tax to the sales price as a separate item and collect from the vendee. The vendor is required to remit to the tax commission all tax funds in his possession and is a guarantor of all amount required to be collected under the sales tax act.

The tax could not legally be included in their price, meaning the contractors. This eliminated untold problems for and with the contractors. The top recommended price of 14c on the truck was to eliminate problems. No tax was collected so no tax was to be remitted and there was no tax in the possession of anyone. There was none to be paid or remitted. If the contractors chose to sell for a higher price that was up

to the contractors. Wally's could not control or police the contractors.

The Utah Law Review, Volume 9, Number 4, Winter 1965, at page 1022, reviewed Robert H. Hinckley, Inc. vs. State Tax Commission, 17 U2d 70, 404 P2d 622. The article is entitled, "VENDOR REQUIRED TO REMIT SALES TAX NOTWITHSTANDING IMPOSSIBILITY OF COLLECTION FROM VENDEES UNDER UTAH LAW."

At the time, Sales Tax Ruling No. 20, SUBJECT: MANDATORY COLLECTION OF TAX, issued by the State Tax Commission, read:

"Chapter 111, Laws of Utah, 1937, amends Section 5 of the Emergency Revenue Act of 1933, reads in part as follows:

" . . . The vendor *shall* collect the tax from the vendee . . . "

"Under the Act, as amended the vendor is required to collect the tax from the vendee with respect to all transaction subject to tax. In all cases the tax must be added to the sales price and collected as a separate item.

"It will be considered a violation of the Act for the vendor to absorb the tax or to consider that the tax is included and collected as a part of the sales price."

The opinion does not state anything other than what the law stated. How is an attorney, counseling his client, to advise his client differently?

S6 of the Present Sales Tax Regulations, 1965, reads in part:

“The following schedule *may be used* in determining the amount to be collected for 3% state tax:

Amount of Sale	Tax
\$0.01 to \$0.14	See below
.15 to .42	\$0.01

. . .

“Vendors using the above schedule *should not* collect tax on sales under 15 cents. The bracket schedule is designed to over-collect the tax in certain brackets and under-collect the tax in others, in order that the vendor can be reimbursed for the approximate amount of tax that is required to be remitted to the tax commission. . . .” (Italics added R 95 p 41)

What is to be used if one does not use the schedule?

Note the weasel words. In 1963, it was “schedule is to be used” and tax “none”. In 1965, it is “schedule may be used” and “should not collect tax tax on sales under 15 cents.” If it please the court, what kind of law is that?

It does explain that the overall tax should be the same so as to balance out on the other business. Wally's has no other business. The contractors are mostly students and have no other business. All items are under 15c. How can it balance out? Perhaps what the explanation means is that the Tax Commission should not collect any tax where the sales are under 15c as in the overall the tax commission will balance out. All sales

taxes collected by the retailer, without reference to the item sales, and what all retailers collect will average out. The state has the best chance and only chance to balance out on total sales. The tax commission receives all sales tax collected. The tax commission wants all "balance out" plus that which is supposed to be balanced out.

The instant case varies from the Hinckley case as Robert H. Hinckley Inc. was involved in many other businesses. Wally's Wagon Inc. is engaged only in this one business. The contractors are in this business only. That is a clear distinction between the two cases. No item is sold for more than 14c. Each is prohibited by law from collecting any sales tax to remit, assuming "should not" means "shall not." Wally's paid a sales tax on everything that Wally's sold to the customer. They were bulk sales over 14c to consumers. No deficiency is claimed against Wally's on that ground. The dangers of permitting an absorption are set forth in the Law Review article. By law, it is prohibited. The tax is on the transaction but it is to be paid by the consumer.

CONCLUSION

The contractors all knew they were independent contractors. They responded to the independent contractors ad. The contractors knew there was a sale as they knew title passed. The tax is on the transaction but the payer is the consumer. What a travesty on

justice is would be to assess a consumer tax on a transaction to the purported retailer, when by statute and regulation the retailer is prohibited from collecting the tax, and during the majority of the time, from absorbing the tax. To give efficacy to a tax, couched in weasel words, because the Tax Commission dare not use direct words because it is contrary to the general scheme of the law is contrary to the American system of fair play. The law requires one to remit all sales tax collected. Where the law prohibits the collection and none is collected, what is to be remitted? The State Tax Commission should not be permitted to levy this assessment.

Respectfully submitted,

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