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

DEFENDANT'S BRIEF

Review of a Decision of the Utah State Tax Commission

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JUN 10 1968

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DEFENDANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a proceeding to review a determination of the Utah State Tax Commission made against the plaintiff. Following an audit and examination report dated June 15, 1966 (R.113-117), the Utah State Tax Commission through its auditing division determined that during the period May, 1964, through March, 1966, the plaintiff was subject to the applicable state and local sales taxes.

DISPOSITION BEFORE THE UTAH STATE TAX COMMISSION

Both an informal and formal hearing were held before the Utah State Tax Commission, and in November, 1967, the commission issued its decision No. 260 determining that the plaintiff was subject to the taxes as alleged. This decision was subsequently amended on December 28, 1967; however, no change was made in the ultimate determination of liability by the commission.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have the determination of the Utah State Tax Commission that it was subject to the state and local sales taxes for the period involved reversed. The defendant seeks to have the decision upheld.

STATEMENT OF FACTS

The defendant accepts generally the plaintiff's statement of facts; however, a few additional matters might be mentioned. The plaintiff makes reference to a general statement of the plaintiff's which was read into the record (R. 60-62) and rather intimates that the defendant accepts these facts more or less as a stipulation since no objection was raised to its being read into the record. This statement was presented only in the interest of saving time and as a condensed representation of plaintiff's interpretation of the matters contained there-

in. At no time did the defendant stipulate that it would accept all of the matters contained in the statement as binding on it.

Contrary to the contention of the plaintiff, it is believed that all regulations and rulings in the possession of the defendant were continuously made available to it and, if they were not furnished, would have been furnished had they been requested. With respect to the advertisement seeking boys to operate the ice cream vehicles, there is some confusion and question that he advertised for independent contractors since he indicated that his ad was placed under a column of either salesmen or help wanted. (R.77) While it appears that the plaintiff did not advertise by conventional media such as newspaper ads, billboards or radio, the use of motor vehicles having musical devices and bearing signs prominently displaying the name of plaintiff constituted a form of advertisement. And, this advertisement brought attention only to the plaintiff. (R.75) There was nothing to indicate a separateness between the plaintiff and the operator of the vehicle, and it was the distinct intention to have identity of the vehicle and operator related solely to the plaintiff.

Finally, while the plaintiff did not solicit retail sales through the conventional means mentioned above, it did solicit retail sales by having its trucks traverse the streets of the county playing music and offering sale of its confections to county residents.

ARGUMENT

POINT I

PLAINTIFF'S APPEAL SHOULD BE DISMISSED SINCE IT FAILED TO COMPLY WITH THE REQUIREMENTS OF THE STATUTE ESTABLISHING THE RIGHT TO APPEAL.

The defendant would greatly like to bring this matter back to the attention of the court, at least briefly, realizing that memoranda have been filed previously and that oral arguments have been held. Since, however, the court did not enter a written decision setting forth the basis on which the writ of certiorari was allowed, although the statutory requirements had not been complied with, the defendant feels that it and the taxpaying public should be advised of the basis of the court's determination. This is necessary to insure uniform enforcement of the law as to all taxpayers and to enable the administrative body to seek such legislative relief as it deems necessary if it is the opinion of the court that the statute is for some reason unconstitutional.

The applicable statutory provision is Repl. Vol. Utah Code Ann. §59-15-16 1963:

Before making application to the Supreme Court for a writ, the full amount of the taxes, interest and other charges audited and stated in the determination or decision of the tax commission must be deposited with the tax commission and an undertaking filed with the tax commission in such amount and with such surety as the tax

commission shall prove [sic] to the effect that if such writ is dismissed or the decision of the tax commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of said case; or at the option of the applicant, such undertaking may be in a sum sufficient to cover the taxes, interest and other charges audited and stated in such decision, plus the costs and charges which may accrue against him in the prosecution of such case, in which event, the applicant shall not be required to pay such taxes, interest and other charges as a condition precedent to his application for the writ. (Emphasis added.)

There is no contention by either party that the plaintiff has complied with this provision.

Within the past few years this court in two cases has considered matters brought before it involving the Utah State Tax Commission wherein appeal was sought to be taken without the party availing itself of the exclusive means of review provided by the sales tax statute. In *Pacific Intermountain Express Co. v. State Tax Comm'n*, 7 Utah 2d 15, 316 P.2d 549 (1957) the taxpayer sought to appeal from the district court to the Utah Supreme Court. Sales tax had been assessed against the taxpayer which taxpayer felt was unlawful and sought to have it declared so in the lower court. In a unanimous decision, after considering several cases and the statutory provision involved, this court held:

It is our conclusion that the trial court correctly dismissed the action for the reason that the procedure set forth in the Sales Tax Act itself is

the exclusive method of seeking redress from the sales tax assessment. This obviates our consideration of the validity of the tax. 7 Utah 2d 15, 20, 316, P.2d 549, 552.

Then, in 1964, the court issued its decision in *Lambert v. State Tax Comm'n*, 16 Utah 2d 159, 397 P.2d 294. There, the taxpayer sought to compel in the district court action by a representative of the Utah State Tax Commission. The district court granted the taxpayer the relief sought. On appeal by the Utah State Tax Commission this court again unanimously held that the decision must be reversed since the taxpayer did not comply with the exclusive requirements of the use tax act. The court stated:

Whether Mr. Lambert's remedy under Chapter 16, U.C.A.1953, known as the Use Tax Act was exclusively to exhaust his administrative remedies and seek review of the Commission's decision in this court or whether the remedies provided under the provisions of Sec. 59-16-23 of that Act are available to him need not be determined in the instant case. Under all the provisions of the Use Tax Act before recourse can be had to either this court or the district court for relief from a use tax assessment there must either be deposited with the Commission the amount assessed or payment made under protest. Here it is clear this action was brought to avoid these conditions precedent to recourse to the courts. The court therefore erred in ordering the issuance of license plates and registration of the vehicle involved.

This court has held, therefore, that where the Legislature has established exclusive means of review of the

determinations and decisions made by the Utah State Tax Commission such means of review must be followed. The defendant would agree that arbitrary or capricious action by it may obviate the necessity of following these statutorily established means of review, but there has been no showing here of such arbitrariness or capriciousness. (R. 131-146)

It would appear, then, that under the statute and the decisions of this court, plaintiff is not entitled to prosecute this appeal until it has complied with the conditions precedent set forth in the statute. Because of the statute and past court decisions, the defendant feels compelled to ask the court to reconsider its determination in which it permitted this appeal or, at least, to advise it and the public generally in a written decision the basis on which it determined that a taxpayer can appeal a determination of the Utah State Tax Commission without complying with the conditions precedent of the statute.

POINT II

THE PLAINTIFF IS A RETAILER REQUIRED TO COLLECT AND PAY OVER TO THE STATE ALL STATE AND LOCAL TAXES IMPOSED BY LAW UPON RETAIL SALES.

Repl. Vol. Utah Code Ann. § 59-15-5 (1963) requires the collection of a sales tax by the vendor on every retail sale, and Repl. Vol. Utah Code Ann. § 59-15-4 (1963) establishes the rate of the tax imposed. Contrary to the

contention of the plaintiff that the operators of the ice cream vehicles were independent contractors, the defendant determined that said individuals were either agents or employees of the plaintiff; that the retail sales were made by the plaintiff; and, that the plaintiff was required to collect and pay over the applicable tax.

This court in several cases has been required to determine the nature of the relationship between individuals; i.e., principal-agent, employer-employee, master-servant, or independent contractor. Though none of these cases seem to have been concerned with an individual's liability for sales tax, these cases, nevertheless, seem to be so similar as to be controlling in this issue.

In *Christean v. Industrial Commission*, 113 Utah 451, 196 P. 2d 502 (1948), the court reviewed the case authorities and considered, particularly, the tests which have been set forth in the *Restatement, Agency*, sec. 220, which provides:

(1) A servant is a person employed to perform service for another in his affairs and who, with respect to the physical conduct in the performance of the service, is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

a. The extent of control which, by the agreement, the master may exercise over the details of the work;

b. whether or not the employee is engaged in a distinct occupation or business;

c. the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

d. the skill required in the particular occupation;

e. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

f. the length of time for which the person is employed;

g. the method of payment, whether by the time or by the job;

h. whether or not the work is a part of the regular business of the employer;

i. whether or not the parties believe they are creating the relationship of master and servant; and

j. whether the principal is or is not engaged in business.

Under the *Restatement* and the Utah case law, the important criterion for determining whether there is a relationship of master and servant is whether there is a right to control the manner in which the work is accomplished, whether or not such control is exercised. *Thiokol Chemical Corp. v. Peterson*, 15 Utah 2d 355, 393 P. 2d 391 (1964); *Nicholson v. Industrial Commission*, 14 Utah 2d 3, 376 P. 2d 386 (1962); *Stover Bedding Co. v.*

Industrial Commission, 99 Utah 423, 107 P. 2d 1027 (1940).

In the instant case it would appear that the taxpayer had the right to control the activities of the drivers and that he did exercise such rights. The plaintiff was responsible for the care and maintenance of the motor vehicles; the plaintiff established areas in which the drivers were to operate; the plaintiff regulated the hours during which they were to work and could determine which of the drivers would work on any particular occasion; the plaintiff furnished the goods to be sold and restricted the drivers to the sale of his products only, set the price of these products and determined the commission to be paid each of the drivers. The employment was terminable at will by the plaintiff and the plaintiff, in reality, did not sell merchandise to the drivers each day but provided them with the merchandise and paid them a portion of the gross receipts on the Tuesday following the end of the weekly period.

These factors strongly indicate that the drivers were not independent contractors but were employees of the plaintiff.

It is noted that the agreement is entitled as one for the lease of the motor vehicle and it is specifically provided that the drivers are independent contractors. While effect is normally given to the designation of the contracting parties, a legal relationship of independent contractor does not arise simply by calling it such and if

the factors indicate that another relationship exists, the agreement will be treated as such.

Where parties in good faith contract as to a status and the understanding arrived at is not contrary to the law as it is then announced, the intent of the parties as set forth in such a contract can be considered as an element in determining the relationship of the parties and can be given weight by the Commission and this court. Such a provision in a contract has the effect of negating an intent on the part of the master to retain control and an intent on the part of the agent to yield control. *However, the weight to be given this factor may be inconsequential if the other terms of the contract are such that by peering through the mask of contract phraseology it can be reasonably determined the contract was merely a guise to conceal the true relationship. Christean v. Industrial Commission, supra.*

We must look to the substance rather than the form of a transaction, and the categorization given to a relationship by the interested parties is not conclusive of the nature of the relationship. There, an agreement between the taxicab company and the drivers specifically provided that no employer-employee relationship existed between the parties. In holding that the cab company was liable for contributions under the Unemployment Compensation Act, we stated that despite the negation of an employer-employee relationship in the agreement there was sufficient exercise of control over the drivers to justify a finding of employment status under the Employment Compensation Act. True, "employment" was specifically defined in that act, but the ultimate determination came from the totality of the cir-

cumstances surrounding the transactions. *Abt v. Dept. of Revenue*, 34 Ill. 2d 324, 215 N. E. 2d 243 (1966).

See also *Cassidy v. Peters*, 50 Wash. 2d 115, 309 P. 2d 767 (1957). There have been several recent cases similar to the instant case in which ice cream was vended by means of motorized drivers. In *Abt v. Dept. of Revenue*, *supra*, the court pointed particularly to the facts that the taxpayer owned the vehicles used, that he supplied the gas and obtained the licenses and registration for the vehicles, that the vehicles were stored at his place of business, that the drivers were paid a commission on the amount sold and that he assigned the drivers to designated territories. The court held that this constituted a relationship of employer-employee and that the taxpayer rather than the drivers was subject to the Illinois sales tax.

In *Ogozalek v. Administrator, Unemployment Compensation Act*, 28 Conn. Sup. 100, 163 Atl. 2d 114 (1960), the court again held that the drivers of ice cream vending trucks were employees. There the employer owned five trucks with his name printed on each, and the price of the ice cream was listed on each of the trucks. The employer repaired, serviced and maintained the trucks, obtained insurance and licenses for them, and paid for all gas and oil used. The drivers were furnished with a uniform and furnished with cash each day for the purpose of making change. The employer assigned each of the drivers to a specific territory and paid them their portion of the proceeds at the end of each week. These factors

were held to evidence sufficient control to create a relationship of employer-employee.

Also, in *Cassidy v. Peters*, supra, the ice cream vendors were considered to be employees. The operative facts were similar to those in the above cited cases and in the instant case.

POINT III

NEITHER THE UTAH STATE SALES TAX ACT NOR THE REGULATORY PROVISIONS PROMULGATED THEREUNDER PROHIBIT COLLECTION BY THE PLAINTIFF ON THE APPLICABLE STATE AND LOCAL SALES TAX.

In order to facilitate the collection of state and local sales tax by vendors, the Utah State Tax Commission enacted regulation S6 which established a bracket system of collection. In other words, sales between certain amounts were deemed to require a tax of a certain amount, and the scale was graduated as to the amount of sales. This bracket system imposed no tax on sales which were between the amounts of zero to fourteen cents. Apparently, the taxpayer is contending that since its sales were less than fifteen cents in each instance it was not required to collect the sales tax because of this bracket system. The defendant feels that this contention has been adequately resolved in a decision of this court, *Hinckley, Inc. v. State Tax Comm'n*, 17 Utah 2d 70, 404 P. 2d 622 (1965). This court there considered several aspects of

the sales tax provisions, its imposition, and duty of collection. With respect to the duty of the vendor to collect the tax, the court stated:

. . . The legislature by eliminating the provision that the vendor had the option of collecting from the vendee or absorbing the tax himself, if he saw fit, did not change the nature of the tax, which is still one imposed on the transaction. It is still mandatory for the vendor to assume the responsibility for the collection, accounting and remitting of the amounts due the State on the transactions.

As to the nature of the tax, the court made relation to its decision in *W. F. Jensen Candy Co. v. State Tax Comm'n*, 90 Utah 359, 61 P. 2d 629, 107 A.L.R. 261 (1936):

. . . this court pointed out that the tax imposed is a tax on a transaction, and unless there is an exemption there is still due the State the rate imposed on such transaction whether it be a cent or one-fifth of a cent. The fact that in sales of less than 50 cents the collection of the tax may be difficult does not change the responsibility of the vendor for the collection and accounting to the State for the tax imposed.

Then, the court further stated:

The tax imposed is upon the transaction, and its payment to the State is not dependent upon how it is collected. The rate is constant and applies alike to every seller. The seller is required to remit the amount due on total sales. If he chooses to sell items which are priced at a point on the schedule where less than the full tax can be collected, he

cannot complain that the schedule is discriminatory as to him because no provision has been made by the Tax Commission whereby the correct amount due from the purchaser under his method of doing business can be collected. The schedule applies alike to every seller and aids those whose method of doing business makes its application practical by facilitating the collection of the correct amount required by the seller to be remitted to the State on its local sales.

As to the fact that the sales made by Hinckley were generally less than the minimum amount set forth in the bracket system, the court made this observation:

That Hinckley has chosen a method of doing business through vending machines which makes it impossible for it to collect the tax under the "bracket system" does not deprive it of equal protection of the laws nor is it deprived of its property without due process. The tax imposed is upon the transaction, and its payment to the State is not dependent upon whether it is collected or whether the consumer pays it. The rate remains constant and applies alike to every vendor. Because a vendor chooses to sell only articles at a price on which no tax can be collected under the "bracket system" does not make the system discriminatory nor arbitrary. It may be that the "bracket system" should not apply to such a vendor if he can devise a means of collecting the correct amount of the tax, but that does not mean that if he cannot devise such a means that as to him the tax is unlawful.

And, then:

Our attention has not been called to any provision of our Sales Tax Act which forbids the

collection of the correct amount due from a purchaser regardless of the fact that the consideration is so small that there is no coin of the realm that can be used. Nor has our attention been called to any provision of our Sales Tax Act which makes it unlawful or prohibits a vendor from absorbing or paying the tax himself, if he so chooses. It does not necessarily follow from the fact that the 1937 amendment deleted the provision that the vendor had the option of collecting from the vendee or absorbing the tax himself that the legislature intended to prohibit or make it unlawful for a vendor to absorb or pay the tax himself. The Act still provides that the tax shall be collected and that the vendor is responsible for its collection and must remit the correct amount due from its total sales for the remitting period. We cannot ascribe to the legislature an intent to make it impossible for a vendor to conform with its requirements.

Finally, this court took specific note of the fact that the bracket system of collection was not the only method of collection of the tax imposed by the statute and could not be used exclusively by the administrative agency.

It follows from what we have said that as to businesses where all sales are for less than the amount in which the "bracket system" provides for collection of the tax from the vendee, the "bracket system" provided by the Tax Commission does not conform to the Act which imposes the tax on the transaction and requires the vendor to collect the tax from the vendee. As to such businesses, the "bracket system," promulgated by the Tax Commission, of collecting the taxes by the vendor need not be the only device which can

be used by a vendor. . . . Such a regulation obviously is not in harmony with the Act which requires the collection of the tax, yet makes it impossible for a vendor to charge fractional parts of a cent for items sold; for instance 9 and 7/10 cents as consideration for the sale and 3/10 cent for sales tax, thereby making it possible, if he desires to use that device, to collect the tax from the vendee. After all, the "bracket system" is only a device which would make it possible for vendors to collect approximately the correct amount of the tax which they are required to remit on their transactions. *Where the "bracket system" device is impractical because it cannot serve such a purpose, a vendor should not be precluded from using some other means, since the clear intent of the law is the collection of approximately the correct amount from vendees and the remittance by vendors of the tax due on total value of transactions.*

The defendant contends that under this case and its underlying reasoning that the state and local sales tax must be imposed and that a regulatory bracket system is only directive and is set forth only for the assistance of the vendor. It does not relieve the retailer of his responsibility to collect the tax on each retail sale. The plaintiff, therefore, as a retailer was required to collect the state and local sales taxes although he may have considered himself exempt under the bracket system.

CONCLUSION

The defendant contends first that this court should not entertain this appeal since the plaintiff failed to

comply with the conditions precedent clearly set forth in the sales tax statute, which provisions this court has heretofore upheld. Additionally, the arrangement between the plaintiff and the operators of the motor vehicles was clearly not one of an independent contractor, but more closely resembling that of either a principal-agent or employer-employee. It seems inconceivable that these young boys could be treated as independent contractors where the plaintiff exercised such a degree of control and supervision and where their concept of the relationship was only that of selling ice cream.

As the cases all indicate, the characterization accorded to an agreement by the parties is not controlling and this would be particularly so where the contract itself was drafted by an individual dealing primarily with young men who have not even yet reached the age of majority. Finally, the contention that the plaintiff could not collect the sales tax because he is prohibited by statute is wholly untenable. This court in its own decision has demonstrated that it could collect the tax and there is no provision in either the statute or the regulation which would have prohibited the collection of the tax. Therefore, it is submitted that the decision of the Utah State Tax Commission should be upheld.

Respectfully submitted,

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