2000

Husky Oil Company of Delaware v. State Tax Commission of Utah : Reply Brief

Utah Supreme Court

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SUPREME COURT OF THE STATE OF UTAH

HUSKY OIL COMPANY OF DELAWARE,

Petitioner and Appellant,

vs.

Case No.

14466

STATE TAX COMMISSION OF UTAH,

Respondent.

REPLY BRIEF OF APPELLANT

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AUTHORITIES CITED

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NATURE OF THE CASE

Both parties agree that the only issue is whether the exemption for "isolated and occasional sales" under Utah Sales and Use Tax Acts (Utah Code Annotated, §59-15-2(e) [1953, Repl. Vol. 1974] applies to sale by a person which is not made in pursuit of the regular course of his business of selling tangible personal property.

REPLY ARGUMENTS

The following important points appear in the Commission's brief:

1. The State Tax Commission admits that its own longstanding regulations (until recent amendment) applied the isolated and occasional sale exemption to both wholesalers and retailers to any sale not made in the regular course of such retailer's or wholesaler's business.

2. The Commission's brief fails to cite a *single* case, from Utah or other jurisdiction, in support of its new interpretation.

3. The Commission brief admits that the Commission's new interpretation renders the isolated and occasional sale language in the statute mere surplusage (and hence negates the existence of any exemption).

The Respondent makes the following admissions concerning the prior regulations of the Commission on page 13 of its Brief:

> An administrative regulation does lose its presumption of correctness simply because it is more restrictive than an earlier regulation of the same subject matter. *Prior to the promulgation of Rule S-38, the State Tax Commission had applied the isolated and occasional sale exemption to any sale not made in the regular course of a retailer's or wholesaler's business.*

Brief of Respondent, page 13. The brief admits that the State Tax Commission "had applied" the exemption to sales not made in the regular course of retailer's business. Actually, such prior "application" by the Commission was by published regulations, initially promulgated in 1937 and sustained on two occasions by the Utah Supreme Court.

The Commission's brief cites no case from Utah or other jurisdictions in support of its current position. The passing reference in the Commission's brief to case authorities in other states is unconvincing. It states that all case and other authorities from other jurisdictions have no relevance to this proceeding, because all statutes are distinguishable from the Utah Statute. The unsupported statement ignores the numerous cases cited by the taxpayer in its brief. *See* Brief of Appellant Point III and cases cited in footnote 3 on page 12. The Commission fails to make even a passing reference to the Tennessee case, discussed at length by the taxpayer, which did involve a statute substantially identical in the pertinent part to the Utah statute. The Tennessee statute provided:

> The term *"business" shall not be construed* in this *act to include occasional and isolated sales* or transactions *by a person who is not holding himself out as engaged in business.*

See Tennessee statute quoted in *Liberty Cash Grocers, Inc. v. Z. D. Atkins,* 304 S.W.2d 633, 634, 202 Tenn. 448 (1957). (Emphasis added). It is also unreasonable to assume, as the Commission contends, that the Utah legislature intended that the Utah exemptions have a meaning in conflict with similar statutory exemptions found in a majority of state jurisdictions that indeed do have similar statutory language.

Finally, the Commission brief admits that their new construction of the Utah statute renders the critical language in the statute mere surplusage. On page 5 of the brief, Respondent states as follows:

> The statute simply says the same thing two different ways, obviously for emphasis or clarity.

Brief of Respondent, page 5. Thus, under the interpretation of the State Tax Commission, the critical language, on which the exemption was based for thirty years in the administration of Utah tax laws, is now in the statute without any particular meaning but "obviously for emphasis". This position is anathema to the holding of this Court in *L. A. Young Sons Construction Co. v. State Tax Commission,* 23 Utah 2d 84, 457 P.2d 978 (1969).

By attempting to render the isolated and occasional sales exemption mere surplusage, the Commission in its brief and current regulation develops quite a mixed bag in light of previous Utah Supreme Court decisions. The pertinent statutory language is very concise:

> [B]ut the term "retail sale" is not intended to include isolated or occasional sales by persons not regularly engaged in business . . . .

U.C.A. §59-15-2(e). The plain meaning of this phrase is that the term "retail sale" is not intended to include isolated or occasional sales *by persons not regularly engaged in the business of selling such property.* The State Tax Commission, contemporaneously with the enactment of the exemption, believed this interpretation to be correct, and the Utah Supreme Court adopted this interpretation as early as 1949. The Commission now contends that the above quoted language means *not regularly engaged in a business requiring a license "to collect sales tax".* The statute, however, makes no reference to the distinction between license holders and non-license holders. But what does the Commission do with the holding of the Utah Supreme Court in the case of *Geneva Steel v. State Tax Commission,* 116 Utah 170, 209 P.2d 208 (1949), that the sale of the assets of a business is not made in the regular course of business of a person selling tangible personal property. The current regulation takes an inconsistent position by recognizing *only one* situation in which a license holder may make an isolated and occasional sale. The Commission's current regulation provides in substance that the exemption applies where a person sells his "entire business" to a "single buyer". Where does the statute talk about a "single buyer"? What happens to the taxpayer who sells a division of his business, rather than the "entire business", or a single store among a chain of stores? Why should the closing of an entire refinery installation be treated differently? Why should the sale of a used adding machine by a grocer (a license holder) be

The answer is that the State Tax Commission ignores the substantial authorities that have interpreted exemptions for "isolated or occasional" sales within the meaning of sales and use tax statutes. The scope of sales and use tax acts has generally been limited to sales made in the regular course of a business of a person selling tangible personal property. The exemption for isolated and occasional sales applies, as prior regulations of the Commission indicate, if the sale is "not made in the regular course of a business of a person selling tangible personal property", or in other words, if the sale is by a person not regularly engaged in the business of selling such property. The classic example of such sales is a sale by a retailer or wholesaler of its capital assets used by such person in the conduct of its business. As noted in our main brief on page 9, prior Utah regulations contained the factual "example" that the sale of fixtures by a merchant is not subject to tax, when the merchant sells them in the course of his modernization program.

The action of the State Tax Commission to abrogate the exemption in Utah is arbitrary and capricious. Such action is not based on any amendment to the Utah statute. It is inconsistent with decisions of the Utah Supreme Court. The action is further not supported by case authority interpreting similar statutory language from any jurisdiction. It is respectfully urged that the promulgation of regulation S-38 is beyond the power and authority of the State Tax Commission, because it is directly contrary to Utah statutory law.

WHEREFORE, the taxpayer prays that the determination of the State Tax Commission that the taxpayer is liable for a use tax deficiency in the amount of $30,375.00, plus interest, be reversed, and for costs and such further relief as the Court deems appropriate.

DATED this 8th day of October, 1976.

Respectfully submitted,

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