1942

American Investment Corporation v. The State Tax Commission of Utah and Irwin Arnovitz, R. E. Hammond, H. P. Leatham and B. H. Robinson : Reply to Defendants' petition for Rehearing and Brief

Utah Supreme Court

Devine, Howell & Stine; Neil R. Olmstead; Attorneys for Plaintiff;

6312

IN THE

SUPREME COURT

OF THE STATE OF UTAH

No. 6312

AMERICAN INVESTMENT CORPORATION,
a corporation,

Plaintiff,

vs.

STATE TAX COMMISSION OF UTAH, and
IRWIN ARNOVITZ, R. E. HAMMOND,
H. P. LEATHAM and B. H. ROBINSON, the
members of said Commission,

Defendants

REPLY TO DEFENDANTS' PETITION FOR REHEARING AND BRIEF

DEVINE, HOWELL & STINE
NEIL R. OLMSTEAD
Attorneys for Plaintiff

IN THE

SUPREME COURT

OF THE STATE OF UTAH

No. 6312

AMERICAN INVESTMENT CORPORATION, a corporation,

Plaintiff,

vs.

STATE TAX COMMISSION OF UTAH, and IRWIN ARNOVITZ, R. E. HAMMOND, H. P. LEATHAM and B. H. ROBINSON, the members of said Commission,

Defendants

REPLY TO DEFENDANTS' PETITION FOR REHEARING AND BRIEF

In reply to the defendants' petition for rehearing in the above matter, and the brief in support thereof, plaintiff must point out that the same is predicated upon an erroneous premise.

At page 3 of such petition, defendants state the "basic fact" upon which their entire petition rests as follows:

> "At the outset it is to be remembered that the plaintiff corporation during the year in question had

its sole and only place of business at Ogden, Utah (See pages 2 and 3 of the main brief of defendants.) With that fact established the conclusion is irresistible that plaintiff, during the year in question, exercised its franchise to do business as a corporation nowhere other than the State of Utah.

"We submit that, starting with this basic fact, the conclusions of the majority opinion under subsections 2 and 3 of the opinion are not sound."

From the facts found by the Commission, and the conclusion drawn therefrom, namely finding No. II and Conclusion No. II, as follows:

Finding No. II

"During the year 1937 the books of the company were located at Ogden, Utah; directors' meetings were held at Ogden, Utah; income was received and dividends disbursed from Ogden, Utah; and stock certificates were held there."

Conclusion No. II.

Petitioner's principal place of business during 1937 was at Ogden, Utah, and it had no place of business in any other state."

the defendants now assume, as a fact, that the plaintiff did business nowhere but in the State of Utah. On the contrary, however, no such finding was made by the Commission, nor could any such conclusion be drawn from the facts it did find, or from the evidence before it. What the Commission did conclude from the facts found is that plaintiff's principal place of business in 1937 was in Ogden, and that it had no

place of business in any other state. This is a far cry from a finding as a fact that plaintiff actually did no business outside the State of Utah. It does not follow from the fact that plaintiff had no *place* of business other than in Utah that it in fact *did* no business other than in Utah, because it is wholly conceivable for one to do business in a state in which it has no place of business. The acts constituting the doing of such business may not be such as to come within the meaning of "doing business" as that phrase is used in connection with franchise tax laws, but nevertheless constitute an act of business done. A perfect example of this is found in this case. The plaintiff sold in New York its Ohio Oil and Socony-Vacuum stock. This may or may not constitute "doing business" in New York, as that phrase is used in the New York franchise tax laws, depending upon how that phrase is defined by the laws and interpreted by the New York courts, but irrespective of that, this sale by plaintiff in New York constitutes a business transaction by plaintiff in New York. If profit results to plaintiff thereby, it is the result of business done in New York, namely, the sale, and under the Utah law that profit is not allocable to Utah. It may be that New York has some cause to complain, if plaintiff is transacting business there, and its laws require plaintiff to qualify there before doing such business, but certainly Utah has no cause to complain about it.

So, while it may be said that we have the "basic fact" that plaintiff had no "place of business" outside the State of Utah, the same is of no importance as it is determinative of nothing, and we do not have any basic fact that plaintiff did no business outside the State of Utah. The evidence before the Commission conclusively demonstrates that plaintiff did

transact business outside the State, as is shown by the sale of stock in New York. This eliminates Subsection (5) of 80-13-21, which is applicable only when the corporation "carries on no business outside this state", and leaves the matter of allocation to be determined upon the principal of whether the particular income was the result of business done within or without the state.

Insofar as the gains resulting from the sale of the various stocks are concerned, we believe we have demonstrated the same to have arisen from business done without the state. The gains resulted from the sales, and the sales were made in New York. Accordingly, the gains were the result of business done in New York.

The same is true with respect to the dividends received. The plaintiff owned stocks in foreign corporations who did no business in Utah. Plaintiff was a non-resident owner (being a resident of Nevada) of stock in non-resident corporations doing no business in Utah. Nothing whatever that plaintiff did in Utah was in any wise responsible for its receipt of those dividends. The dividends were earned by the paying corporations from business done without this state. Plaintiff received the same by virtue of its ownership thereof, and this was in no wise connected with anything done by it in Utah. They would have been received by plaintiff even though it had never had a place of business in Utah, or never qualified herein. The receipt of the same was in no wise dependent upon any right or privilege conferred by the State of Utah upon plaintiff, nor could the State of Utah "with ordinary interstate comity interdict or prevent" the receipt of such dividends by plaintiff.

This Court has held in the instant case, and rightly so, that if the business that produces the dividend is done outside the state, it is not allocable as income received from business, or the right to do business, in this state. In this regard this Court but adhered to its previous holding in the case of California Packing Corporation v. State Tax Commission. The only factual difference between this case and that is that in the California Packing Corporation case the muniments of title were held outside the state, while in this case they were held within the state. To make any distinction between the two on that ground, however, would but lead to a circumvention of the distinction by a physical removal of the stock to a safety deposit box outside the state. This Court accordingly, has now held that fundamentally there is no difference whether the stock is physically held within or without the state.

Thus considered the so called "administrative difficulties" the defendants claim the Court has erected by its decision herein, evaporate. The Commission has no more to do now than it had before - simply determine whether the particular income was the result of business done within or without the State of Utah. In the case of capital gains the same is to be determined by whether anything done by the tax payer which resulted in such gains was done within the State of Utah. If the asset involved was neither bought or sold in Utah the resulting gain was not from business done in Utah. All this Court has held in this case, insofar as capital gains are concerned, is that if all that be shown is that the asset was neither bought or sold in Utah, any gain resulting from the sale thereof is not allocable as income from business done

within the State of Utah. No administrative difficulty is to be encountered in that determination.

So far as interest or dividends are concerned, this Court has decided that under the statute the same are not to be allocated as income received from business done in this state if the business which produces the same does no business herein. Defendants complain,however, that if the above be true the reverse must likewise be true, and if the business which produces the income does business in Utah, the interest or dividends received therefrom by the tax payer is in part allocable to business done in Utah, and that if the business producing the dividends or interest also does business in other states a difficult problem arises as to the portion to be allocated to Utah. The effect of this argument is to suggest to this Court that even though it is of the opinion the legislature has enacted a law fixing certain rights and privileges nevertheless this Court should ignore its honest interpretation of the law and construe it to mean something else in order that the body charged with the administration of the same might have an easier time of it. That a law must be interpreted, irrespective of its intent and meaning, so as to make it easy for those charged with the responsibility of administering it, is a novel rule of statutory construction.

So far we have considered the defendants' petition and brief from the standpoint of the palpably false premise upon which it is predicated, namely, that plaintiff as a matter of fact, did no business outside the State of Utah, and have sought to demonstrate that if any such calamitous results to tax collections follow this decision as defendants suggest it is the responsibility of the legislature which enacted the

law and not of the Court. However, we respectfully submit that such will not be the case. The legislature has heretofore provided the Tax Commission with the right to adopt alternative rules for determining net income assignable to business done within the State when in its opinion the ordinary rules laid down by the legislature do not allocate to the state the portion of such income fairly and equitably attributable to this state. Sub-section 8 of 80-13-21, Revised Statutes of Utah, 1933, provides as follows:

> "If in the judgment of the tax commission the application of the foregoing rules does not allocate to this state the proportion of net income fairly and equitably attributable to this state, it may with such information as it may be able to obtain make such allocation as is fairly calculated to assign to this state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation."

In other words, if under the peculiar circumstances of a particular case (for example, the hypothetical cases discussed by defendants in their petition) the application of Subsections (1), (2), (3) and (4) of Section 80-13-21, Revised Statutes of Utah, 1933, does not result in Utah receiving what the Commission feels it to be justly and equitably entitled, the Commission may, within the limits of the decision of California Packing Corporation v. State Tax Commission, 97 Utah 367, 93 P. 2d. 463, adopt some other formula for allocation.

The Commission has never endeavored to do that in the instant case, being content with the allocations fixed by Sub-

sections (1), (2), (3) and (4), but certainly there is nothing to prevent the Commission from endeavoring to solve its "administrative difficulties" under Subsection (8) in the examples it has cited, or others should the same become necessary.

Finally, it is submitted that none of the so called "administrative difficulties" are encountered under the facts involved in this case, and under the interpretation of the law by the majority decision, nor will they be in other cases involving similar facts. However, the defendants want to assume in this case that other cases may arise involving entirely different facts, and that they will be confronted with the question as to what to do in those cases, and, in view of that possibility, this Court should decide in this case, and in advance of those cases arising, what should be done with respect thereto. But the Court is not and should not be called upon to pre-judge those cases. Let it be assumed that there may be cases arising in the future in which part of the interest or dividends does come at least indirectly from business done in Utah. In that event, and under the majority decision herein, the Commission may be entitled to allocate it in part to Utah. Under what conditions the same may be allocable, and the amount thereof, will have to be determined when, if ever, those cases are properly brought before this Court, and not until then is the Court required to pass thereon. If this were not true, then in every case the Court would be required to speculate as to different factual situations, and then assuming those facts were present, determine what the result would be in the light of the principales announced in the immediate case. Such a burden is not now and never has been

and should never be cast upon the Court. When different facts are involved there will, in all probability be different parties likewise involved, and those new parties have a right to be heard with respect to their individual cases.

WHEREFORE, it is respectfully submitted that the defendants' petition for a rehearing herein should be denied.

Respectfully submitted,

DEVINE, HOWELL & STINE
and
NEIL R. OLMSTEAD
Attorneys for Plaintiff