1948

Whitmore Oxygen Company v. State Tax Commission of Utah and Grant A. Brown, Elisha Warner, Milton Twitchell and Roscoe E. Hammond : Plaintiff's Petition for Rehearing

Utah Supreme Court

David T. Lewis; Attorney for Plaintiff and Appellant;

7154

In the Supreme Court

of the State of Utah

WHITMORE OXYGEN COMPANY,
Plaintiff,

vs. No. 7154

UTAH STATE TAX COMMISSION,
Defendant.

PLAINTIFF'S PETITION FOR REHEARING

DAVID T. LEWIS,
Attorney for Plaintiff.

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Comes now the Whitmore Oxygen Company, a corporation, and respectfully petitions this Honorable Court for a rehearing in the above entitled case, and requests the court to vacate and set aside the order and judgment of this court herein affirming the decision of the Utah State Tax Commission.

This petition is based upon the following grounds:

The court, having reached the conclusion that "for tax purposes the sale of the cylinders was consummated in Indiana", erred in holding that the sale was not subject to the Indiana Gross Income Tax Act of 1933 as the same was in effect in the year 1941.

Accompanying this petition and filed herewith is a brief of the point and authorities in support thereof.

WHEREFORE, your petitioner, having filed this petition for rehearing within the time allowed by the rules of this court for filing the same, prays that it be granted a rehearing of the cause, and that the matter be set down before the court for further argument, and that the matter set forth in this petition and in the brief following be given the full consideration of the court, and that upon such hearing the court set aside and vacate its judgment and decision filed herein, and that it enter a judgment reversing the decision of the State Tax Commission and holding the assessment of the commission to be invalid.

DAVID T. LEWIS,

Attorney for Plaintiff.

I hereby certify that I am one of the attorneys for the plaintiff, the petitioner herein, and that in my opinion there is good cause to believe the judgment objected to is erroneous and that the case should be re-examined as prayed for in said petition, and that said petition is well taken in point of law and in fact, and that the same is not imposed for the purpose of delay.

DAVID T. LEWIS

BRIEF IN SUPPORT OF PETITION FOR REHEARING

In originally presenting this matter to the court, by brief and argument, we strongly believed and urged that the assessment of the Tax Commission must be set aside regardless of what conclusion this court might reach on the more difficult law questions presented. Briefly summarized, the logic of our original argument was this:

1. If the sale in question was decided to be a Utah sale, the assessment was barred by each of several statutes of limitation applicable to the Utah Sales Tax Act.

2. If the sale in question was decided to be an Indiana sale, the assessment was barred by limitation under the Utah Use Tax Act, provided the Tax Commission Form 71, as filed by the Whitmore Company, constituted a Use Tax Return.

3. If the sale was decided to be an Indiana sale and Form 71, as filed, did not constitute an Use Tax Return, then the assessment was unlawful under the Use Tax Act, the sale being specifically exempt by virtue of Title 80-16-4 (d), which provides exemption upon "property, the gross receipts from the sale, disposition or use of which are now subject to a sale or excise tax under the laws of the state or of some other state of the United States."

This court, in its tentative opinion, has now concluded "that for tax purposes, the sale of the cylinders was consummated in Indiana," (Opinion, Page 4, Para-

graph 4), and that Form 71 as filed did not constitute Use Tax Return (Opinion, Page 6, Paragraph 2, Mr. Justice Pratt, dissenting). Disappointing as these conclusions are to us, we cannot enlarge our original argument and re-submit the questions without comment.

However, the court, having concluded the sale in question to have been consummated in Indiana, further decides that this Indiana sale was not subject to the Indiana Gross Income Tax Act, and consequently not exempt under the Utah Use Tax Act. We did not adequately present this point in our original brief, nor did defendant, and we believe this court may have been misled as to the Indiana law due to the loose citation by defendant of the case of *J. D. Adams Manufacturing Company vs. Storen,* 304 U.S. 307, 82 Lawyers' Edition 1365. This case is cited by the court in its tentative opinion as authority for the conclusion that the sale in question was not subject to taxation in Indiana, (Opinion, Page 5). An examination of the case and other later authorities construing the Indiana Gross Income Tax Act leads us firmly to the conclusion that the sale in question if consummated in Indiana was subject to taxation in that state.

The Indiana Act, as originally passed in 1933, attempted to tax the gross income of Indiana vendors from sales, regardless of type, nature, or place of sale or income. In the Adams case, the Supreme Court of the United States, in 1938, decided such a broad revenue act violated the Commerce clause of the Federal Constitution, and that as far as it attempted to tax income

from sales consummated *outside* the state of Indiana, it was unconstitutional. But the Adams case did not invalidate the act *in toto,* and the Indiana Gross Income Tax Act of 1933 as amended to meet the Adams case has remained in continuous effect in Indiana to date. (Burns, Indiana Statutes Annotated 1933, 1943 Replacement, Volume 11, Title 64, Chapter 26). (For Amendments following the Adams case, compare Chapter 2601 as contained in the 1933 and 1941 statutes).

This court has decided that the Whitmore-Linde sale was consummated in Indiana for tax purposes. This being so, there can be little question that the sale was subject to an Indiana tax, and the Indiana Supreme Court and the Supreme Court of the United States have so held. In *Department of Treasury of Indiana, et al, vs. International Harvester, et al,* 221 Ind. 416, 47 N.E. 2nd 150, (Indiana 1943) at page 151, The Supreme Court of Indiana held:

> "The evidence disclosed without conflict that the appellees were corporations organized under the laws of other states, but authorized to do business in Indiana. They were engaged in the manufacture of farm implements and in the sale of their products, both at wholesale and retail.
>
> "Manufacturing establishments were maintained at Richmond and Fort Wayne, and selling branches at Indianapolis, Terre Haute, Fort Wayne, and Evansville in this state. There are also numerous manufacturing plants and sales branches in adjoining states and elsewhere. Each branch served assigned territory and in several instances parts of Indiana were within the exclusive jurisdiction of the branch office located within the state.

"The trial court determined the tax liability of the appellees under four factoal situations designated as Classes A, C, D, and E. The nature of these transactions may be stated as follows:

"Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customer came to Indiana and accepted delivery to themselves in this state."

* * *

"Applying the above decisions to the case at bar, it seems clear that transactions C, *D,* and E are subject to our Gross Income Tax Act. Neither of these classes presents a possibility of double taxation *since no other state could impose such a burden in view of the conclusion reached in the J. D. Adams case.*" (Italics ours).

This case was affirmed by the Supreme Court of the United States, 88 Lawyers' Edition 1313. Annotations are found in 156 ALR 1384 and 167 ALR 955.

We submit, therefore, that both the Indiana Supreme Court, and the Supreme Court of the United States have spoken directly upon a question upon which this court now has reached a contrary conclusion, and that the decision of this court should be re-considered in that regard.

Having reached the conclusion that the sale must be construed as being subject to the Indiana Tax, this court must decide whether the words "subject to" as contained in the Use Tax Act mean "subject to and actually paid" as the Tax Commission contends. The tentative opinion of the court does not consider the matter as it would be moot if the Indiana Tax Act were not applicable.

On this matter we refer the court to the original briefs filed herein and the arguments of counsel at the oral presentation of the case. The court will recall the many instances when double taxation might result if the words "and actually paid" were read into the statute by judicial interpretation. The fact that the Tax Commission has by administration interpretation read the words "and actually paid" into the statutes is of no concern for as Mr. J. Wolfe states in the recent case of *New Park Mining Co. vs. State Tax Commission* .... Utah, 196 P. 2nd 485:

* * *

> "This is determinative of the case, for even if there were an administrative interpretation such as plaintiffs assert, this court could not permit such an interpretation to stand in flat contradiction to the clear terms of the statute."

We respectfully submit, therefore, that judgment of this court should be re-considered and that the court should make and enter its judgment holding the sale in question to be subject to the provisions of the Indiana Gross Income Tax Act and therefore specifically exempt from taxation under the Utah Use Tax Act.

DAVID T. LEWIS,
Attorney for Plaintiff.

SUPPLEMENTAL COMMENTS

Since our preparation and the printing of the foregoing Petition for Re-hearing, we have received several urgent requests from members of the Bar of sister states to urge this court to reconsider its ruling relative to the effect of filing Form 71 with the Use Tax portion left blank rather than filled in with the word "none" or otherwise. The question involved is one of first impression nationally and seems to be in litigation in a number of jurisdictions, a California trial court having reached the same conclusion as the majority of this court.

The arguments suggested to us by counsel interested are, with one exception, the same as presented to this court in the original briefs and upon which this court has decided adversely to our contention after full consideration. However, counsel have suggested one point which was not presented to this court and which we consider to be sound and persuasive. In order to give this court the benefit of every argument that will be presented to other appellant courts, we call the court's attention to the following: Under the Sales Tax Act, Title 80, Chapter 15, Section 5, Utah Code Annotated 1943, provides in part as follows:

> "Every vendor shall on or before the 15th day of the month next succeeding each calendar bimonthly period file with the commission a return for the preceding bimonthly period. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the vendor for the period covered by the return."

In interpreting this section of the statutes the Tax

Commission in its sales tax regulation Number 12 has provided as follows:

> "Every wholesaler and every other person responsible for the collection of the tax under the Act must make a return to the State Tax Commission on Form TC-71. Such return, including instructions, is made a part of this regulation. *The return must be made even though no tax is due.*" (Italics ours.)

The Use Tax Act, Title 80, Chapter 16, Section 7, Utah Code Annotated 1943 provides in part as follows:

> "Every taxpayer shall on or before the 15th day of the month next succeeding each calendar bimonthly period, said first bimonthly period ending on the 31st day of August, 1937, file with the commission a return for the preceding bimonthly period in such form and containing such information as may be prescribed by the commission. The return shall be accompanied by a remittance of the amount of tax herein required to be collected or paid by the taxpayer during the period covered by the return."

In interpreting this statutory provision the commission in its Use Tax Regulation Number 7, has provided as follows:

> "Persons responsible for the collection of the tax under the act must make a return to the State Tax Commission on Form TC-71. Taxpayers whose sole liability is that of a consumer or user, are subject to the same regulations with the exception of the fact that the return shall be made on Form TC-326 'Consumer's Use Tax Return.' Such persons, if filing on a regular bimonthly basis, are not required to itemize each taxable purchase made during the period. Taxpayers re-

porting on other than the bimonthly basis are required to submit as part of the return filed the detail concerning taxable purchases made."

We think it clear, therefore, that under the Tax Commission regulations a taxpayer is required to file the Sales and Use Tax Form 71 *regardless of whether there is any tax due or not.* This being so, the Tax Commission, having required and received Form 71 pertaining to both taxes every two months in compliance with its regulations cannot now say that the form did not constitute a return for both taxes. To adopt a contrary view the Tax Commission must admit that its regulation requiring the taxpayer to file a Use Tax Return *regardless of whether any tax is due or not has* been violated *with the knowledge of the Commission every two months* for ten consecutive years, and since the inception of the Use Tax in Utah. The Commission has either been grossly negligent in allowing the Whitmore Company to violate the Commission's regulations with full knowledge on the part of the Commission or the Commission has considered Form 71 as filed to constitute a compliance with its regulations and the law. We prefer the latter view.

Respectfully submitted,

DAVID T. LEWIS
Attorney for Plaintiff