1948

Whitmore Oxygen Company v. State Tax Commission of Utah and Grant A. Brown, Elisha Warner, Milton Twitchell and Roscoe E. Hammond : Brief of Defendant State Tax Commission in Opposition to the Granting of a Petition for Rehearing

Utah Supreme Court

G. Hal Taylor; Wayne Christoffersen; Attorneys for Defendant;

7154

In the
SUPREME COURT
of the
STATE OF UTAH

WHITMORE OXYGEN COMPANY,
Plaintiff,

vs.

UTAH STATE TAX COMMISSION,
Defendant.

Case No. 7154

BRIEF OF DEFENDANT STATE TAX COMMISSION IN OPPOSITION TO THE GRANTING OF A PETITION FOR REHEARING

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STATEMENT OF FACTS

Plaintiff herein filed a petition for rehearing in the above entitled case and based its petition upon the following grounds:

I

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 sub-

ject to the Indiana Gross Income Tax Act of 1933 as the same was in effect in the year 1941.

II

By the inclusion of supplemental comments, counsel for plaintiff infers that the court erred in holding that Tax Commission Form TC 71, as filed by the Tax Commission by taxpayers, did not constitute a use tax return.

ARGUMENT

Point I

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.

Plaintiff's argument that the court erred in holding that the sale herein involved was not subject to the Indiana Gross Income Tax Act of 1933, is apparently based upon plaintiff's supposition that the writer's citation of the case of *J. D. Adams Manufacturing Company v. Storen* (1938), 304 U.S. 307, 82 L. ed. 1365, was loosely cited and that the original presentation of the problem by counsel for the Tax Commission was not adequate. With such contention we most heartily disagree. It is the position of defendant that the J. D. Adams case is controlling in this matter and that the argument presented by counsel for rehearing is entirely without merit, and, further, that the authorities cited are just plainly not in point.

The plaintiff makes the assertion that the Indiana Gross Income Tax Act of 1933 was amended "to meet

the Adams case." (Plaintiff's Brief, page 5.) Plaintiff does not explain how this amendment was made or what such amendment is and we are unable to determine just which portion of the Indiana Act that counsel feels was amended to meet this case.

Subsection (a) of 64-2606, Gross Income Tax Act of 1933, (Burns, Indiana Statute Annotated, 1933, 1943 replacement) which excepts interstate commerce as originally passed by the Indiana Legislature, reads as follows:

> "There shall be excepted from the gross income taxable under this act:
>
> "(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America." *Laws of the State of Indiana,* 1933, 78th *Session, page* 392.

This section was amended in 1937 (approved March 9, 1937) to read as follows:

> "That section 6 of the first above entitled act be amended to read as follows: Sec. 6. There shall be excepted from the gross income taxable under this act:
>
> "(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States

of America. * * *'' *Laws of Indiana,* 1937 80th *Session, page* 615.

The sub-section, as so amended, has remained in effect since March 8, 1937 to the present date. It will be noted that the only changes made by the 1937 amendment is to insert the words ''but only'' preceding the words ''to the extent'', and ''such gross income'' following the words ''prohibited from taxing'' in subsection (a) of section 6.

The Adams case was decided by the Supreme Court of Indiana, April 30, 1937, some 61 days after the Act was amended. *In Storen v. J. D. Adams Manufacturing Company* (1937), 212 Ind. 343, 7 N.E. 2d 941, the Supreme Court of Indiana sustained the constitutionality of the Indiana Gross Income Tax Act of 1933. The case was then appealed to the Supreme Court of the United States and was subsequently decided on the 18th day of May, 1938.

Section 1, of the Indiana Gross Income Tax Act of 1933, as pointed out by the Supreme Court of the United States in the J. D. Adams case, ''declares that the phrase 'gross income' as used in the act, means, inter alia, gross receipts derived from the trades, businesses, or commerce, and receipts from investment of capital, including interest.'' Section I, as it defines ''gross income,'' was amended in 1937, which entirely reworded the section. However, since no material change was made after 1937, it may be concluded that no amendment was made to section I, as it defines ''gross income,'' by reason of the J. D. Adams Company case. The only other section of the

Indiana Gross Income Tax Act of 1933, which was considered by the Supreme Court of the United States, was section II, which, as pointed out by such court, "imposes a tax ascertained by the application of specified rates to the gross income of every resident of the state and the gross income of every non-resident derived from sources within the state." The same argument applies with regard to section II; that is, no amendment was made except in 1937 which could not have been influenced by the J. D. Adams case.

In view of the foregoing analysis, it is the opinion of the writer that no amendment was made to the Indiana Gross Income Tax Act of 1933 because of the J. D. Adams Company case. As we view it, the Adams case merely placed an interpretation upon the foregoing sections which precludes the State of Indiana from including the receipts from interstate sales in the measure of the tax. The amendment made to chapter 2601 in 1941, referred to by plaintiff in his brief on page 5, would have no affect upon the decision in this case even if it be viewed as having some material change in the definition of "gross income" for the reason that chapter 140, Laws of Indiana, 1941, page 418, which amended section 1, did not take effect until the 1st day of January, 1942, which was after the contract was accepted by the Whitmore Oxygen Company. The contract being accepted April 18, 1941.

As indicated by this court, the Adams case holds with regard to the case at Bar, that a state may not tax receipts from interstate sales for the reason that inter-

state commerce would be subjected to the risk of a double tax burden. Defendant elects to stand and rely on the J. D. Adams Manufacturing Company case as originally argued.

Now, curiously enough, the plaintiff cites as authority for the proposition that the sale was subject to the Indiana tax, the case of the *Department of Treasury of Indiana, et al, v. International Harvester Company* (1943), 221 Indiana 416, 47 N.E. 2d 150. Although this case was decided by the Supreme Court of Indiana in the year 1943, the case arose by reason of the fact that appellees sued to recover gross income taxes paid to the State of Indiana during the years 1935 and 1936 and thus of necessity the case was decided under the identical law as existed when the J. D. Adams case arose.

The Supreme Court of the United States in deciding the International Harvester Company case cited the J. D. Adams case and said:

> "In that case an Indiana corporation which manufactured products and maintained its home office, principal place of business and factory in Indiana sold those products to customers in other states and foreign countries upon orders taken subject to approval at the home office. It was held that the commerce clause (Art. I, sec. 8 of the Constitution) was a barrier to the imposition of the tax on the gross receipts from such sales. But as we held in the Wood Preserving Corporation case, neither the commerce clause nor the 14th amendment prevent the imposition of tax from receipts from an *intrastate* transaction even though the total activities from which the local

> transaction derives may have incidental interstate attributes." *International Harvester Company v. Department of Treasury of Indiana* (1943), 322 *U.S.* 340, 88 *L. Ed.* 1313. (Italics supplied)

Plaintiff has apparently set forth "Class D" sales as being the type of transaction which most nearly parallels the Whitmore Oxygen-Linde Air Products transaction herein involved. The Supreme Court of the United States in the International Harvester Company case in considering Class D sales said:

> "The Class D sales are sales by an Indiana seller of Indiana goods to an out of state buyer *who comes to Indiana,* takes delivery there and transports the goods to another state. The Wood Preserving Corporation case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana." (Italics supplied.)

The Wood Preserving Corporation case referred to above by the Supreme Court was a case in which the respondent, Wood Preserving Corporation, entered into certain contracts with the Baltimore and Ohio Railroad Company to sell railroad ties. The ties were purchased by the respondent from local companies in the state of Indiana and the Indiana vendors delivered the ties at loading points on the railroad in Indiana. An inspector for the railroad and an agent of the respondent accepted the ties and supervised the loading. Inspection

and loading were simultaneous. The Supreme Court in speaking of this liability said: "The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment." *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62, 85 L. ed. 1188.

We submit that the type of transaction involved in the International Harvester Company case and the Wood Preserving Corporation case in no way parallels the transaction herein involved. In those cases the purchaser of the goods went to the State of Indiana and himself took physical possession or delivery of the goods within that state, and thereafter transported such goods outside of the state on his own account.

We believe that the distinction is clear and that the principle of law which may be deduced from the J. D. Adams case and the International Harvester Company case is, *that where a transaction is completed within the borders of the state and nothing further remains to be done such as, shipment out of the state, that such state may constitutionally impose a gross receipts tax or similar tax upon such transaction. However, where the transaction is so inseparably connected with interstate commerce by the terms of the contract, that the goods must be shipped out of the state before said transaction is completed, then no tax may constitutionally be imposed.*

In the case at Bar, we have a situation wherein

the vendor, Linde Air Products Company, agreed to sell the cylinders to the Whitmore Oxygen Company f.o.b. Speedway, Indiana. Delivery of said cylinders was made to a common carrier, and thus we take the view that while the sale was consummated in Indiana, that something more was contemplated by the terms of the contract than was contemplated in the situation as outlined by Class D sales in the International Harvester Company case. In that case the buyer went to the state of Indiana and *personally* took delivery and then later himself transported the goods to another state.

We submit, therefore, that this court was correct in holding that "The sale is, then, one which the Supreme Court has said may not be taxed by the state of Indiana, under the Indiana Gross Income Tax Act of 1933."

Point II

By the inclusion of supplemental comments, counsel for plaintiff infers that the court erred in holding that Tax Commission Form TC 71, as filed with the Tax Commission by taxpayers, did not constitute a use tax return.

In plaintiff's supplemental comments, the contention is again set forth that the filing of Form TC 71, entitled "Sales and Use Tax Return", consisting of two parts in which entries relating to sales tax have been made in the sales tax portion of the form, but in which entries have not been made in the use tax portion of the form, constitutes a use tax return for the purpose of starting the period of the statute of limitations for collecting a use tax deficiency determination.

It is submitted that this contention has been argued

and decided, and the supplemental comments made by the plaintiff are merely an attempt on the part of plaintiff to have the court adopt his original theory that the filing of TC 71, with the use tax portion blank, starts the period of the statute of limitations.

We believe the fact that the question involved is one of first impression nationally and that several members of the Bar of sister states are concerned with the ruling of this court is of no importance and certainly not sufficient reason to grant a rehearing. It is fundamental in this jurisdiction that, "New points first brought to the Supreme Court's attention on application for rehearing, though they were just as available on original hearing, cannot be considered." *Dahlquist v. Denver & Rio Grand Railway,* 52 Utah 438, 174 Pac. 833; *Swanson v. Sims,* 51 Utah 485, 170 Pac. 774.

We take the view that the argument of plaintiff set forth in the supplemental comments, while, as we view it are without merit, are also improperly presented inasmuch as such argument was just as available on the original hearing. Should the court feel that the argument as presented with regard to the filing of Form TC 71 should be considered, we would like to point out that such argument is faulty inasmuch as Regulation No. 12, cited by plaintiff, which requires that a return must be made even though no tax is due, applies only to the sales tax.

Sales tax regulation No. 12, quoted by plaintiff, has a heading which appears as follows:

12—Filing of Returns.

(Applies to sales tax only.)

The portion of this regulation italicized by plaintiff in his brief on page 9, which reads as follows: "*The return must be made even though no tax is due,*" refers only to sales tax liability imposed under the Sales Tax Act. No such requirement is imposed upon taxpayers whose sole liability is that of a consumer or user for use tax liability. Such a person shall make the return on Form TC 326 "Consumer Use Tax Return."

Inasmuch as the case at Bar involves a use tax deficiency and not a sales tax deficiency, plaintiff's conclusion that the Tax Commission would require a taxpayer who had no use tax liability "to file a sales and use tax form 71, *regardless of whether there is any tax due or not,*" is, we believe, totally without merit.

It is the law in this jurisdiction that no hearing will be granted "unless the court has misconstrued or overlooked some material fact or facts, or has overlooked some statute or decision which may affect the result, or has based the decision on some wrong principle of law or has either misapplied or overlooked something which materially affects the result." *Cummings v. Nielson,* 42 Utah 157, 129 Pac. 619.

It is submitted that no material fact is presented in plaintiff's argument, nor is any fact presented which could not have been presented in the original argument. There is no indication that the court has misconstrued or overlooked anything that would materially affect this

case and no rehearing should be granted where nothing new or important is offered for consideration. *Ducheneau v. House,* 4 Utah 483, 11 Pac. 618; *Jones v. House,* 4 Utah 484, 11 Pac. 619. Plaintiff's only reason for a rehearing which might be considered by the court is his assertion that the J. D. Adams case is not in point. Such, we submit, is not the case and as heretofore stated, defendant relies upon the rule announced in the Adams case.

CONCLUSION

In conclusion we submit that the plaintiff has not presented sufficient reason for granting a rehearing. Plaintiff indicates that the court has based its decision on a wrong principle of law as to the taxability of sales made by an Indiana vendor to customers in other states. However, we submit that this court did not base its decision on a wrong principle of law but reaffirmed and set forth a proper interpretation of the law with regard to interstate sales.

In the case of *Brown v. Pickard,* 4 Utah 292, and *In Re McKnight,* 4 Utah 237, this court recognized the doctrine that "to justify a rehearing a strong case must be made. The Supreme Court must be convinced either that it failed to consider some material point in the case; that it erred in its conclusion or that some matter has been discovered which was unknown at the time of the original hearing."

This court in its well reasoned opinion has thoroughly examined the issues in this case and the plaintiff has

not made out a case or presented sufficient reason for this court to grant a rehearing.

THEREFORE, it is requested that a rehearing be denied.

Respectfully submitted,

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