

1997

Greater Park City Company, a Utah corporation v. Customer Service Division Division of the Utah State Tax Commission : Reply Brief

Utah Court of Appeals

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Gordon Strachan; M. Alex Natt; Strachan & Strachan; Attorney for Appellant.

Clark L. Snelson; Assistant Attorney General; Jan Graham; Attorney General; Attorney for Appellee.

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Appellant Greater Park City Company, a Utah corporation, ("appellant GPCC"), by and through its counsel Gordon Strachan, Esq., and M. Alex Natt, Esq., of the law firm of Strachan & Strachan, L.L.C., appeals from the decision of the Utah State Tax Commission ("The Commission") denying appellant GPCC's Petition for Redetermination of Sales Tax collected erroneously from appellant GPCC during the periods June 1991 through June 1994 and May 1992 through June 1994, prior to the Legislature's July 1, 1994 amendment of the statute following the Court of Appeals' decision in 49th Street Galleria v. Utah State Tax Commission, 860 P.2d 996 (Utah Ct. App. 1993), *cert. denied* 878 P.2d 454 (Utah 1994).

SUMMARY OF THE ARGUMENT

The Tax Commission's Findings of Fact are published at R9-R11. These Findings are entitled to deference if supported by substantial evidence. Hales Sand & Gravel, Inc. v. Audit Division of the State Tax Commission of Utah, 842 P.2d 887 (Utah 1992). Appellant GPCC does not challenge the Commission's Findings of Fact. This Court should accept the Findings of the Commission as true and proceed to a review of the Commission's Conclusion of Law. Saunders v. Sharp, 806 P.2d 198 (Utah 1991).

The Commission's application of the Findings of Fact to the law is contained in its "Analysis" section. (R13-R19). These legal conclusions by the Commission are accorded no deference. Utah Code Ann. §59-1-610(1)(a)(b). The appellee incorrectly states

the standard of review. This Court may not grant "optional discretion" to decisions of the Tax Commission. Id. Appellant GPCC challenges the Commission's Conclusion of Law as they are set forth in the Commission's Analysis section. (R13-R18).

The Commission's conclusion that appellant GPCC does not have standing to bring this appeal is not supported by the Findings of Fact. The Commission's application of the law in the Analysis section to the Findings of Fact in R9-R11 is therefore incorrect.

The Commission correctly found in Finding #7 that appellant GPCC does not print the amount of sales tax on its lift and summer activity tickets, but includes the sales tax in the price. This Finding supports appellant GPCC's right to bring this appeal.

Finding #8 similarly supports appellant GPCC's position. The Commission determined that "[appellant GPCC] has regularly filed sales tax returns and paid the amount of tax shown due thereon." (R10). Appellant GPCC is therefore the taxpayer who paid the tax to the state of Utah. Finding #8 further states that appellant GPCC claimed and retained 1.5% of its sales tax burden as permitted by Utah Code Ann. §59-12-108(3). This fact does not establish that appellant GPCC was not the taxpayer.

Finding #9 supports appellant GPCC's position. Any ski area operator could claim its share of the investment incentive to ski resorts provided by Utah Code Ann. §59-12-120, regardless of

whether the ski resort chose to absorb and pay, or collect and remit sales tax.

Finding #10 supports appellant GPCC's ability to claim the refund sought in the instant proceeding. Appellant GPCC's accounting method can be employed to determine its sales tax burden regardless of whether appellant GPCC absorbed and paid, or collected and remitted its sales tax.

The Tax Commission's uncontested Findings of Fact contained at R9-R11 do not support the Tax Commission's legal conclusion that appellant GPCC lacks standing to bring this appeal. This legal conclusion is therefore erroneous and must be reversed.

Similarly erroneous is the appellee's argument that estoppel should bar appellant GPCC's appeal. Estoppel does not apply to the case at bar. Appellant GPCC has not represented to the state of Utah that it is not the taxpayer. GPCC is the taxpayer in this case. There has been no detrimental reliance by the state of Utah, and estoppel does not apply in cases of erroneously withheld taxes.

ARGUMENT

I. APPELLEE MISSTATES THE STANDARD OF REVIEW. THIS COURT OWES NO DEFERENCE TO THE LEGAL CONCLUSIONS OF THE TAX COMMISSION.

Appellee, the Customer Service Division of the Utah State Tax Commission, erroneously asserts that the following is the appropriate standard of review.

In cases involving the application of law to the facts, the court may grant some "optional discretion" to the agency's application of the law to the facts based on the expertise of the agency in that particular area. Drake v. Industrial Commission, 939 P.2d 177 (Utah 1997). . . . Thus, because the second and third questions presented involve an area of special expertise of the Tax Commission, the court should apply the deferential standard set forth in Drake when reviewing the Commission's application of the law to the facts.

Brief of Appellee at p. 2-3.

This is not the correct standard of review to be applied in this case. Unlike decisions of the Industrial Commission, Drake, *supra* or the Department of Employment Security, Boyd v. Dep't v. Employment Sec., 773 P.2d 398 (Utah Ct. App. 1989), which are governed by Utah's Administrative Procedures Act, the Utah Legislature in 1996 established a different, specific standard of review to be applied to decisions of the Tax Commission. Utah Code Ann. §59-1-610(1)(a)(b) (1996 as amended). The Tax Commission's Conclusions of Law are granted no deference, and this Court should not grant "optional discretion" as the appellee Customer Service Division suggests. B.L. Key, Inc. v. Utah State Tax Comm'n., 934 P.2d 1164 (Utah Ct. App. 1997).

In addition, "optional discretion" is granted only to those administrative agencies which have demonstrated a particular expertise. Drake. The Tax Commission's "expertise", prior to this Court's holding in 49th Street Galleria, consisted of taxing

companies if their particular activities began with the letter "s".

According to Roger Tew of the Utah Tax Commission:

The area of admissions has been an extremely thorny area for the tax commission for a number of years. What is or what is not a place of amusement, what is or what is not an admission has been frankly handled on a very random basis for a long time.

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Having said that, what we currently have is a complete hodge-podge of items that are taxable and those that are not. . . [The items that are taxed have been] euphemistically referred to as the S-Test over the years. If it started with "S" it was taxed, and if it didn't it was not. (R34).

This Court would err in this case if it were to grant the Tax Commission any deference based on an assertive "expertise" for the period before the Legislature's July 1, 1994 amendment.

II. THIS COURT WOULD ERR IF IT SUMMARILY AFFIRMED THE DECISION OF THE TAX COMMISSION.

The appellee asks this Court to affirm summarily the decision of the Commission. The appellee erroneously asserts that appellant GPCC has not "marshaled" the evidence in order to contest the Findings of Fact. Brief of Appellee at p. 7. However, appellant GPCC does not challenge the Commission's Findings of Fact. (R9-R11). Appellant GPCC instead challenges the application of these facts to the law, contained in the Commission's "Analysis" (R13-19). Appellee's argument, that appellant GPCC did not marshal the evidence misses the point and ignores the Utah Supreme Court's controlling authority:

[i]f the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's Conclusions of Law and the application of that law in the case.

Saunders v. Sharp, 806 P.2d 198 (Utah 1991).

Appellant GPCC challenges the application of the law to the facts in the "Analysis" section of the Tax Commission's decision; that is not a question of marshaling the facts. It would be error for this Court to affirm summarily the decision of the Commission without examining the Commission's application of the law to the facts. This Court's review of the Tax Commission's application of the law is done without deference. B.L. Key, Inc. v. Utah State Tax Comm'n., 934 P.2d 1164 (Utah Ct. App. 1997).

III. THE COMMISSION'S CONCLUSION OF LAW, IN ITS "ANALYSIS" SECTION, THAT APPELLANT GPCC DOES NOT HAVE STANDING TO BRING THIS APPEAL, IS ERROR.

The Commission, in its "Analysis" section, concludes that:

[T]he issue of whether the charges of Petitioner [GPCC] are for an admission is a moot issue because the refund cannot be paid to Petitioner regardless of whether or not the charges were for an admission. The Commission therefore, finds that Petitioner lacks the standing to request the refunds. (R19).

The Commission, in reaching this conclusion, applied the facts found in R9-R11 to the law of standing. The Commission's decision is accorded no deference by this Court. B.L. Key, Inc. v. Utah State Tax Comm'n., 934 P.2d 1164 (Utah Ct. App. 1997).

The Commission's conclusion that appellant GPCC lacks standing is mistaken as a factual and legal matter. The Commission's own Findings of Fact (R9-R11) do not support its Conclusion of Law and its ultimate decision to deny appellant GPCC standing to bring this appeal. (R19)

According to the Utah Supreme Court:

[s]tanding is a flexible legal concept designed to preserve the integrity of judicial adjudication by requiring that legal issues be adequately defined and crystallized so that judicial procedures focus on specific, well-defined legal and factual issues. To that end, the parties must have both a sufficient interest in the subject matter of the dispute and a sufficient adverseness so that the issues can be properly explored.

National Parks & Conservation Ass'n v. Board of State Lands, 869 P.2d 909, 913 (Utah 1993). Standing requires suffering of a distinct and palpable injury which gives rise to a personal stake in the outcome of the dispute. Id.

Appellant GPCC's distinct and palpable injury is the Tax Commission's collection of \$3,054,895.36 in sales taxes on lift tickets and \$185,624.79 in sales taxes on tickets for its summer activities. Appellant GPCC is the taxpayer because it paid the taxes. Utah law permits a business either to absorb and pay sales taxes itself, or to collect the taxes from customers and remit those funds to the state. Utah Code Ann. §59-12-107(1). Appellant GPCC elected to absorb and pay the sales taxes; it did not collect and remit the taxes. (See Appellant's Brief at pp. 15-21).

The Commission, in its Analysis/Conclusion of Law section, relies on the Findings of Fact in R9-R11 to try to justify its conclusion that appellant GPCC does not have standing. An examination of these undisputed Findings of Fact demonstrates that the Tax Commission's Conclusions of Law in its Analysis should be overturned by this Court.

The Commission's Finding of Fact #7 confirms appellant GPCC's standing to bring this appeal. The Commission states:

7. The tickets which are sold by Petitioner do not have printed upon them the amount of sales tax, which is included in the price charged for the ticket.

(R10)(emphasis added). Appellant GPCC does not include the price of sales tax on the face of its activity tickets because it has chosen to pay sales tax out of its gross sales and not collect and remit taxes as the appellee argues. The Commission cannot rely on this Finding to support its decision that appellant GPCC is not the taxpayer.

At Finding of Fact #8, the Commission states:

8. Petitioner has regularly filed sales tax returns and paid the amount of tax shown due thereon. On those sales tax returns, Petitioner has claimed and retained 1.5% of the tax amount as the vendor discount as permitted by Utah Code Ann. §59-12-108(3). That statute permits vendors, who meet certain requirements, to "retain an amount not to exceed 1.5% of the total monthly sales tax collected . . ."

Appellant GPCC did claim and retain the 1.5% vendor discount as permitted by Utah Code Ann. §59-12-108(3). However, this does not require the conclusion that appellant GPCC is not the taxpayer. Rather, Finding #8 states that "Petitioner has regularly filed sales tax returns and paid the amount of tax shown due thereon." (R10). As is explained in appellant GPCC's initial Brief at pp. 19-21, this Finding supports appellant GPCC's contention that it is indeed the taxpayer in this case:

The "taxpayer" is the business which actually filed the tax return. The Sales & Use Tax Act never uses the term "taxpayer" to refer to customers purchasing good and services, but only to refer to the entity who actually signs the tax return and pays the sales tax to the state.

For the Tax Commission to make the Finding that appellant GPCC paid the tax, and then, in the Analysis/Conclusion of Law section to conclude that appellant GPCC is not the taxpayer is clear error.

Finding of Fact #9 states:

Petitioner has also claimed its share of the investment incentive to ski resorts provided by §59-12-120, which based the investment incentive upon the proportional amount of "sales tax collected from the sale of ski lift tickets."

The Ski Resort Investment Incentive Act assisted Utah's ski resorts in their efforts to compete with out of state ski resorts who are not required to pay sales tax on ski lift tickets. This Act entitled Utah's ski resorts to claim, from the state of Utah's General Fund (not from a segregated, sales tax source only fund), a cash incentive. The plain language of the Act states:

The investment incentive is available to **any person** operating a ski resort in the state of Utah . . .

Utah Code Ann. §59-12-120(3) (emphasis added). Appellant GPCC claimed its share of the investment incentive provided by §59-12-120. The Act does not, as the appellee Customer Service Division argues, restrict this incentive to those ski areas which elect to collect and remit sales tax. Ski resorts which absorb and pay may claim the incentive.

To determine how much money each ski resort was to be allocated from the state of Utah's General Fund, the Legislature determined that:

The investment incentive paid out of the account shall be allocated among ski resorts based on the relation between the total sales tax collected from the sale of ski lift tickets in Utah to the total sales tax collected from the sale of ski lift tickets in Utah by each ski resort.

Utah Code Ann. §59-12-120(2). The appellee Customer Service Division argues that the term "collect" as used in the Act, would preclude those ski resorts who choose to absorb and pay, rather than collect and remit, sales taxes from claiming their portion of the incentive. However, that over-simplistic reading of the Act, suggested by the appellee, conflicts with Utah law. Utah law authorizes any business to choose whether it will absorb and pay sales tax out of its general revenues, or collect and remit sales tax. Utah Code Ann. §58-12-107(1)(a), see also Robert H. Hinckley, Inc. v. State Tax Comm'n, 404 P.2d 662 (Utah 1965) (Utah Supreme

Court rejected the argument that a vendor cannot absorb or pay the sales tax himself). The interpretation urged by the appellee Customer Service Division cannot stand. Finding of Fact #10 states:

When Petitioner filed its sales tax returns, it calculated the net amount of sales by dividing its gross receipts by 1.0725, which was to discount the gross amount by 6.25% for the sales and use tax, and one (1.00%) percent for the resort area tax. Petitioner then calculated the tax on the net amount after deduction of the 6.25% for sales tax and the one (1.00%) percent for resort area tax.

(R11). The accounting method chosen by appellant GPCC can be used to determine the amount of sales tax apparently due, regardless of whether that tax was to be paid out of appellant GPCC's general funds received from its customers, or collected individually and remitted from appellant GPCC's customers. Appellant GPCC's use of the authorized, alternative accounting method does not indicate, as the Tax Commission erroneously concludes, that appellant GPCC was not the taxpayer who paid the tax.

The Findings of Fact relied upon by the Tax Commission in its Analysis/Conclusion of Law section, to deny appellant GPCC standing, do not support that decision. Rather, the Tax Commission's Findings of Fact at R9-R11 support appellant GPCC's position that as the taxpayer it is the only entity with standing to seek a refund of the erroneously-assessed sales tax. The

Commission's Conclusion of Law that appellant GPCC lacks standing to bring this appeal, is erroneous.

IV. THE DOCTRINE OF ESTOPPEL DOES NOT BAR GPCC'S CLAIMS BECAUSE REQUIRING THE CUSTOMER SERVICE DIVISION TO REFUND ILLEGALLY COLLECTED TAXES WOULD NOT CONSTITUTE LEGAL DETRIMENT.

The appellee Customer Service Division's argument that the doctrine of estoppel bars appellant GPCC's claims for this refund also fails. None of three of the essential elements of estoppel exist in this case. Those three essential elements are:

(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689, 694 (Utah 1979). The appellee Customer Service Division has failed to establish the existence of any of these elements.

The appellee Customer Service Division argues that the first element of estoppel is satisfied because "Park City filed tax returns and claimed that it collected tax from its customers." Brief of Appellee at p. 13. Appellant GPCC filed tax returns and paid the tax shown due. GPCC is the taxpayer. Appellant GPCC did not include sales tax on the face of its lift and activity tickets but chose instead to absorb and pay its sales tax out of its own general fund.

Appellee argues that appellant GPCC claimed that it had collected tax from its customers. Appellant GPCC did collect its \$263,541 share of the appropriated General Fund amount under Utah Code Ann. §59-12-120, but as discussed above, this investment incentive was available to any ski area operator regardless of how they choose to pay their sales tax. The only representations made by appellant GPCC support its claim that it is the taxpayer in this case.

The appellee next claims that the second element of estoppel is satisfied because money it received from appellant GPCC has allegedly been budgeted and spent in reliance on appellant GPCC's supposed representations. This claim suffers from two fatal flaws. First, the appellee has failed to produce any evidence that the Tax Commission changed its position in reliance on any alleged representations by appellant GPCC. The appellee has not shown that, but for appellant GPCC's filing of its sales tax returns, the Tax Commission would not have budgeted and spent the erroneously collected tax. In addition, appellant GPCC was due the ski resort investment appropriation regardless of whether it absorbed and paid, or collected and remitted its sales tax. Utah Code Ann. §59-12-120.

The appellee fails to cite a single case in support of its plea to apply estoppel. Neither a case or theory of government budgeting would apply the doctrine to facts such as these because

if estoppel applied on these facts, it would have to apply in every tax refund case. Other states have uniformly held that spending wrongfully collected taxes does not constitute a change in position for purposes of estoppel. Pennsylvania Co. for Banking & Trusts v. Philadelphia, 76 A.2d 443, 445, 167 Pa.Super. 637, 641 (1950) ("The city did not shift its position; it merely kept and spent the taxes it had unlawfully taken from the Company."). Even if the appellee Customer Service Division had produced any evidence of reliance, that reliance would be unreasonable because Utah Code Ann. §59-12-110(2) places the Tax Commission on notice that a refund may be requested at any time within three years of the tax payment.

Finally, the appellee claims that it would suffer legal injury by being forced to refund the money it illegally collected from appellant GPCC. However, being required to return illegally collected taxes cannot constitute legal detriment because the state was not entitled to receive that money in the first place. Pennsylvania Co. for Banking & Trusts, 76 A.2d at 445 ("Estoppel is an equitable defense, and it is not available to avoid the obligation arising from 'the unmoral practice under which [governments], in general, kept and used for [government] purposes, funds however erroneously paid and unlawfully received by them.'").

Estoppel does not apply in cases such as this. E.g. Pennsylvania Co. for Banking & Trust, 76 A.2d at 445; Longacre Park Heating Co. v. Delaware County, 50 A.2d 706 (Pa. Super. 1948). If

the mere filing of a tax return constitutes a binding representation for purposes of estoppel, then every refund would be denied. Necessarily, each petitioner will always have made such a representation because he will have already paid the taxes at issue in the claimed refund.

Second, if merely budgeting and spending revenues constituted reasonable reliance, then that element will always be satisfied because every state budgets and spends its revenues. Third, if being forced to return illegally collected revenues constitutes legal detriment, then that element will always be satisfied because a refund necessarily requires a return of funds.


In short, if estoppel bars appellant GPCC's refund in this case, then it bars all refunds in all cases. Such a result is not permissible because it conflicts with the Legislature's clear directive that any overpayment or wrongfully collected taxes "shall be refunded." Utah Code Ann. § 59-12-110(2).

CONCLUSION

Appellant GPCC does not contest the Findings of Fact of the Commission at R9-R11. Appellant GPCC does challenge the application of the law to these facts as contained in the Commission's "Analysis" section. (R13-19). The Commission's decision, that appellant GPCC does not have standing to bring this appeal, is not supported by the Findings of Fact. The decision is erroneous and should be reversed.

DATED this 29th day of September, 1997.

STRACHAN & STRACHAN

BY 

M. Alex Natt
Attorneys for Appellant

CERTIFICATE OF MAILING

I certify, that on the 29th day of September, 1997, I mailed, postage prepaid a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the following:

Clark L. Snelson, Esq.
Assistant Attorney General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84144

J. L. Snelson