

1948

State Tax Commission of the State of Utah v. F. P. Linford, Voyle B. Barber and Raymond Peterson : Brief of Appellants

Utah Supreme Court

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In the
Supreme Court of the State of Utah

STATE TAX COMMISSION OF THE
STATE OF UTAH,

Appellant,

vs.

F. P. LINFORD, VOYLE B. BARBER
and RAYMOND PETERSON,

Respondents.

Case No.
7245

BRIEF OF APPELLANTS

FILED

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CLERK, SUPREME COURT, UTAH

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STATEMENT OF FACTS

This is an appeal from an order of the 4th Judicial District Court sustaining the demurrer to plaintiff's complaint and dismissing the action without leave to amend. The facts which appellant believes give rise to a cause of action, and as set forth in its complaint, are as follows:

The appellant, State Tax Commission, is a body politic charged with the duty of collecting sales tax, *Title 80, Chapter 15, Utah Code Annotated, 1943*. On the 7th day of April, 1947, the respondents entered into an undertaking with appellant whereby they would jointly and severally be liable to the people of the state of Utah in the sum of \$1,000 lawful money of the United States.

That said obligation was upon the expressed condition thereunder written, that as the bounden principal, the Orem Motor Company, Inc., should well and truly comply with all the provisions of the Sales Tax Act and any amendments thereto, and in particular pay all taxes, interest and penalties promptly when due, in which case this obligation was to be null and void; otherwise to remain in full force and effect.

That said obligation was upon the further condition thereunder written, that upon failure of the principal, the Orem Motor Company, Inc., to comply with any or all of the provisions of the Sales Tax Act and any amendments thereto, that after demand by the State Tax Commission upon the principal to comply with the provisions of said act and to cease the violation and said principal should not perform or cause to be performed all acts necessary to conform completely to the requirements of said act, then the State Tax Commission should within 60 days from the date when notice and demand for payment of all taxes, interest and penalties was made, give written notice to the sureties, postage prepaid to the last known address, of such violation by said principal and should make demand upon the sureties for the payment of the amount of the default by said principal, up to

but not to exceed the amount of the liability as defined by this bond.

That pursuant to the provisions of *Title 80, Chapter 15, Utah Code Annotated, 1943*, said principal, the Orem Motor Company, Inc., should have filed a sales tax return for the period November-December, 1947, and remitted the sales tax shown to be due thereon; that said principal, the Orem Motor Company, Inc., filed a sales tax return for the period November-December, 1947, but failed to remit the tax shown to be due thereon in the sum of \$808.24; therefore, penalty in the amount of \$80.32 and interest in the amount of \$4.08 were assessed by the Tax Commission of the State of Utah pursuant to the provisions of *Title 80, Chapter 15, Utah Code Annotated, 1943*, the total sum being \$893.14.

That on the 26th day of January, 1948, notice and demand for payment within 10 days of the delinquent sales tax due for the period above mentioned with penalty and interest, the amount due being in the sum of \$893.14, was made upon the principal, the Orem Motor Company, Inc.

That the Orem Motor Company, Inc., the principal on the bond above mentioned, did not pay such delinquent sales tax nor respond in any manner whatsoever to the notice and demand for payment of the same within 10 days or at any time up to the filing of the complaint.

That on the 25th day of March, 1948, payment not having been made in any amount on the sales tax owing by the Orem Motor Company, Inc., notice and demand for payment was made upon the defendants, F. P. Linford, Voyle B. Barber and Raymond Peterson.

That at the time of the filing of this complaint no part of the sales tax delinquency has been paid by either the Orem Motor Company, Inc., or the sureties on the bond which said corporation filed as security for payment of the same (R. 1 and 2).

The respondents demurred on the grounds:

1. That said complaint does not state a cause of action against the defendants or either of them.
2. That there is a defect or misjoinder of parties defendant.
3. That said complaint fails to allege that there was any consideration for defendants' signing as surety for the Orem Motor Company.
4. That said complaint fails to allege by what authority plaintiff accepted the written undertaking upon which this suit is predicated (R. 4).

After argument the trial court sustained the demurrer as to grounds 1, 3 and 4, and overruled the demurrer as to ground 2.

ASSIGNMENT OF ERRORS

Appellant contends that the trial court in making its decision erred in the following particulars:

- (a) In sustaining the demurrer to appellant's complaint as to grounds 1, 3 and 4 and ordering the cause dismissed.
- (b) In ordering the cause dismissed without leave to amend.

QUESTIONS PRESENTED

As appellant views this case, grounds 3 and 4, as set forth in the demurrer, are not actually grounds for demurrer but are reasons why the respondents consider that the complaint, as filed, does not set forth a cause of action. The primary question, therefore, to be decided by this Honorable Court is: Does the complaint as filed set forth a cause of action against the respondents?

The trial court in considering the demurrer in this case considered only the question as to whether the appellant, State Tax Commission, had authority to accept the written undertaking upon which this suit is predicated. (See memorandum decisions R. 13-15 and R. 23-26.) Inasmuch as there is nothing in the complaint which shows no consideration was given, such defense, if valid at all, must be taken by answer and not demurrer. It is felt that the question of consideration may be overcome by amending the complaint in the court below. Therefore, this question need not be determined by this court.

It is believed, then, that this case may be settled by answering the following questions:

1. Does the complaint, as filed, fail to state a cause of action inasmuch as it fails to allege by what authority appellant accepted the written undertaking upon which this suit is predicated?

If the court should decide that such complaint is faulty for this reason, it will then be necessary to answer a second question.

2. Does the appellant, State Tax Commission, have authority to require the type of written undertaking upon which this suit is predicated?

ARGUMENT

Point 1.

Does the complaint as filed fail to state a cause of action inasmuch as it fails to allege by what authority appellant accepted the written undertaking upon which this suit is predicated?

At the threshold of this argument, it should be observed that the appellant takes the view it does have the authority to require security to be given whenever it deems it necessary in order to insure compliance with the provisions of the Emergency Revenue Act of 1933, as amended, and that the bond involved herein is such security. However, we take the view that, even though the State Tax Commission does not have such authority, the complaint as filed sets forth a cause of action against the respondents. It is the law in this jurisdiction that a complaint is not vulnerable to a general demurrer if, under its allegations, plaintiff may prove such a state of facts and inferences as would withstand a motion for nonsuit. *Eddington v. Union Portland Cement Co.*, 42 Utah 274, 281, 130 Pac. 243.

While the question as to the effect to be given to a written undertaking taken by a public officer in the absence of specific statutory authority has not been decided by the Supreme Court of the state of Utah, the almost uniform authority holds that such an undertaking is not invalidated

and the bond is valid as a common law obligation or as a contractual obligation voluntarily undertaken.

In the early case of *Central Banking and Security Co. v. United States Fidelity and Guaranty Co. et al.*, 80 S. E. 121, the Supreme Court of West Virginia considered a situation wherein a clerk of the county court had, without statutory authority, taken a new bond from the administrator of an estate. The validity of the bond was denied on account of the lack of authority in the clerk of the county court to take such bond. The Supreme Court of Appeals of West Virginia in summarizing the law in this situation said:

“As the statute nowhere confers upon the clerk authority to take a new bond from a personal representative or other fiduciary, and makes it his duty to report to the court the necessity thereof, it may well be conceded he had no authority to take either of the two substitute bonds, but their absolute invalidity and worthlessness does not necessarily follow. Every bond taken without authority in the officer who took it is not void. Such bonds are often held good as common-law obligations. Numerous authorities holding them void are cited in support of the cross-assignments of error, but the bonds in those cases were, for the most part, held void because the taking thereof contravened a principle of public policy. Most of them were recognizances under which officers had discharged prisoners. One of them involved in *Benedict v. Bray*, 2 Cal. 251, 56 Am. Dec. 332, was a void attachment bond, but the opinion is unsatisfactory. It assumes, contrary to almost uniform authority, that all bonds, taken by officers not authorized to take them, are void. The law on this subject was summarized by Judge Green in *Porter's Ex'r v. Daniels*, 11 W. Va. 250, in the following terms: ‘The mere fact that a bond not authorized by law has been

taken by an officer does not render such bond invalid at common law. Such bonds have been frequently held void at common law, but wherever so held, it has been not simply because taken by an officer without authority, but for other and sufficient reasons appearing in each particular case—such as that they were not voluntarily executed; that they were given to the officer, to induce him to violate his duty as such officer; or to induce him to perform a duty he was bound to perform without the giving of such bond; that the taking of the bond was oppressive, and it was given without consideration; that the obligee in the bond had no interest in the subject-matter; that the taking of the bond was a violation of public policy, or was executed under circumstances, or contained provisions, which would have rendered a private bond void at law.’ These bonds were voluntarily given for consideration paid to the sureties, and neither the acceptance nor the giving of the same contravenes any principle of public policy. Hence, they are clearly good as common-law obligations.”

The reasons why a bond taken without authority might be held invalid as summarized in the opinion of Judge Green are not present in the case at Bar. Or, if present at all, do not appear on the face of the complaint and, therefore, cannot be reached by a general demurrer. So far as appears from the facts now before the court, the bond was voluntarily executed. We take the view that if defendants claim such bond not to have been voluntarily executed, such defense must be taken by answer and not by demurrer. Further, there is nothing to show that it was given to an officer of the Tax Commission to induce him to violate his duty, or to induce him to perform a duty he was bound to

perform without the giving of such bond, the bond in this case being exacted pursuant to 80-15-5, *Utah Code Annotated, 1943*, which authorizes the commission "to require any person subject to the tax imposed hereunder to deposit with it such security as the Tax Commission may determine." Nor can it be said that the taking of the bond was oppressive; that it was given without consideration; that the obligee in the bond had no interest in the subject-matter; that the taking of the bond was a violation of public policy or executed under circumstances or contained provisions which would have rendered a private bond void at law.

The Supreme Court of Kansas in considering a similar situation arrived at the same conclusion, i. e. that a bond taken without statutory authority gives rise to a common-law obligation or a contractual obligation voluntarily undertaken. *State ex rel Hendrick Co. Atty. v. Hartford Accident & Indemnity Co., Hartford, Conn., 114 Pac. 2d 812*. In that case, the Supreme Court of Kansas was considering a situation wherein a juvenile court had required a person to whom custody of a child was being given to deposit a bond with the court, the bond being to insure the delivery of the child upon order of the court. No statutory authority was given to the juvenile court to require such bond. The Supreme Court in speaking with reference to the validity of a bond, held:

"While the bonds not provided for by statute and extorted by public officers, under color of their office, are not enforceable, the general rule is that the mere absence of specific statutory authority for the giving of a bond does not invalidate a bond which is given voluntarily and which is not in contraven-

tion of public policy. It is valid as a common-law obligation, or as a contractual obligation voluntarily undertaken. *9 C. J. p. 29, sec. 45 and cases there cited; 11 C. J. S., Bonds sec. 27; 8 Am. Jur. p. 721, sec. 35; Constable v. National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903, 916."*

In view of these authorities, we take the view that the complaint is not defective inasmuch as it fails to allege by what authority the appellant accepted the written undertaking.

Point 2.

Does the appellant, State Tax Commission, have authority to require the type of written undertaking upon which this suit is predicated?

The learned trial judge took the view that 80-15-5, Utah Code Annotated, 1943, above quoted, does not vest authority in the State Tax Commission to require the type of security as is herein involved (R. 13-15 and R. 23-26). Such view necessitated the sustaining of the demurrer without leave to amend.

Notwithstanding the fact that, as we view the law, no allegation of authority is necessary in a suit of this type, appellant takes the view and submits to the court that the State Tax Commission of the state of Utah does in fact have authority to require the type of undertaking upon which this suit is predicated.

The State Tax Commission of the state of Utah is vested with the responsibility of administering and enforcing the provisions of the Emergency Revenue Act of 1933.

In the early administration of the Act, the Tax Commission experienced considerable difficulty in collecting the sales tax from certain retailers. Therefore, in its fourth biennial report for the years 1937-1938, the Tax Commission recommended, among other things, that the collection procedure be changed so as to allow the Commission to require the posting of a bond. This recommendation, as found on page 38 of the fourth biennial report of the State Tax Commission of Utah, for the years 1937-1938, reads as follows:

“There are certain changes which we consider should be made in the present law in order to improve the administration of the Act and to facilitate the collection of the tax. These changes cover such items * * * (2) collection procedure, *including posting of bond*; * * * (Italics supplied.)

“These proposed changes will be drafted into proper bills and submitted to the legislature together with complete explanations giving our reasons for such changes.”

A bill incorporating the proposed change to allow the posting of a bond to insure collection procedure was prepared by the members of the Tax Commission and was submitted to the Legislature. In response to this recommendation, the Emergency Revenue Act was amended by the next session of the Legislature. (*Laws of Utah, 1939, Chapter 103*,); (80-15-5, *Utah Code Annotated, 1943*), so as to include the following provisions:

“The state tax commission, whenever it deems it necessary to insure compliance with the provisions of this act, may require any person subject to the tax imposed hereunder to deposit with it such security as the state tax commission may determine. The

same may be sold by the state tax commission at public sale if it becomes necessary so to do in order to recover any tax, interest or penalty due. Notice of such sale may be served upon the person who deposited such securities personally or by mail; if by mail, notice sent to the last known address as the same appears in the records of the state tax commission shall be sufficient for the purposes of this requirement. Upon any such sale the surplus, if any, above the amounts due under this act, shall be returned to the person who deposited the security."

After the Act was so amended, the Commission, pursuant to authority vested in it by 80-15-20, *Utah Code Annotated*, 1943, passed a regulation which reads as follows:

"8. Bonds.

(Applies to sales tax only)

"In all cases where the state tax commission deems it necessary to insure compliance with the provisions of the act, vendors are required to post a bond or other security as a condition to their obtaining a license under the Act. Such bonds shall be in the form and for such amounts as the state tax commission deems appropriate under the particular circumstances."

While this regulation was promulgated earlier, it was first published effective January 1, 1944, and has been in continuous effect since that time. Since the passing of the amendment, the Commission has uniformly required the posting of a bond with either personal or corporate sureties. The form of the bond as required by the Commission and as executed and signed by the respondents, is as follows:

BOND OF UTAH RETAILER

KNOW ALL MEN BY THESE PRESENTS:

That we, _____ of _____
(name) (address)

as principal, and _____ of _____,
and _____ of _____,
and _____ of _____,
as sureties, are jointly and severally held and firmly bound
unto the people of the State of Utah in the sum of _____

_____ (\$_____) lawful money of the United States of America, for the payment whereof well and truly to be made we bind ourselves, our heirs, executors, successors and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that,

WHEREAS, the above bounden principal has made application for a license to engage in business in Utah, pursuant to the provisions of the Emergency Revenue Act of 1933, as amended, and that pursuant to the application a license has been or is about to be issued; and

WHEREAS, a demand has been made upon the principal by the State Tax Commission for security for the payment of the tax.

NOW, THEREFORE, if the above bounden principal shall well and truly comply with all the provisions of said Act and any amendments thereto, and in particular pay all taxes, interest and penalties promptly when due, including both taxes, interest and penalties now due and those which may become due, then this obligation shall be null and void; otherwise to remain in full force and effect.

Upon the failure of the principal herein to comply with any or all of the provisions of said Act and any amendments thereto, and in particular on the principal's failure to pay all taxes, interest and penalties promptly when due and

when demanded by the State Tax Commission, the State Tax Commission shall within 60 days from the date when notice and demand for payment of all taxes, interest and penalties was made give written notice to the sureties, postage prepaid to their last known address of such principal's failure to comply with the provisions of said Act or of failure to make payment of all taxes, interest and penalties due and shall make demand upon the sureties for the payment of the amount of the default by said principal, up to but not to exceed the amount of their liability as defined by this bond, and in addition any costs or attorneys fees incurred in collecting the same from said sureties.

The surety or sureties herein reserve the right to withdraw as such sureties, except as to any liability already incurred or accrued hereunder, and may do so upon the giving of written notice of such withdrawal to the State Tax Commission; provided, however, that no withdrawal shall be effective for any purpose until thirty days shall have elapsed from and after the receipt of such notice by said Commission, and further provided that no withdrawal shall in anywise affect the liability of said surety arising out of any sales made by the principal herein prior to the expiration of such period of thirty days, regardless of whether or not an assessment for tax due on the receipts from such sales has been levied before the lapse of such thirty days.

Signed and sealed this _____ day of _____, 194____.

Principal

Surety

Surety

Surety

ATTEST

BY _____

**CORPORATE ACKNOWLEDGMENT OF PRINCIPAL
(TO BE EXECUTED BY CORPORATIONS WITHOUT
CORPORATE SEAL)**

STATE OF _____ }
COUNTY OF _____ } SS.

On the _____ day of _____ in the year _____
before me personally appeared _____,
to be known, who, being by me duly sworn, did depose and
say: That he reside in _____ : that
he is the _____ of the _____,
the corporation which executed the above instrument and
which is described therein; that he signed the above men-
tioned instrument on behalf of the said corporation; that
he was authorized to do so by Article _____ of the Articles
of Incorporation of the said corporation, and by order of the
Board of Directors of said Corporation; and that his signa-
ture as it thus appears in the above instrument is binding
upon the corporation.

Notary Public

AFFIDAVIT BY SURETY

STATE OF UTAH _____ }
COUNTY OF _____ } SS.

I, _____, being duly sworn upon
oath, do depose and say that I am one of the sureties named
in the bond to which this Affidavit is attached, and that I
am a resident householder in _____ County,
State of Utah, and that I am possessed in my own name of
real and personal property, other than my homestead, at
reasonable value in excess of \$_____, free and
clear of all encumbrances.

Subscribed and sworn to before me this _____ day of
_____, 19____.
My Commission Expires:

(SEAL)

(Notary Public)

Turning now to an analysis of the wording of 80-15-5, *Utah Code Annotated, 1943*, we must first consider just what is meant by the term "security." No comprehensive and exact legal definition of the term "security" is possible. It is possible to find most any definition desired and such may be found in a relatively few pages by consulting volume 38, *Words and Phrases*, pages 469 to 487. One definition which would support the definition of the Tax Commission that a surety bond is a "security" is found in the case of *Storm v. Waddell, N. Y., 2 Sandf. Ch. 494, 507*, citing 2 Bouv. Law Dict. 493, as set forth in 38 *Words and Phrases*, 471:

"The term 'security' signifies that which makes secure or certain. In its proper use it relates to pecuniary matters, and often consists of a promise or right unattended with possession of the thing upon which it reposes. It implies in its common acceptance that which prevents loss or makes safe. Dr. Johnson defines it as anything given as a pledge or caution. Dean Swift uses it as synonymous with 'safety' or 'certainty.' Webster defines it as anything given or deposited to secure the payment of a debt or the performance of a contract, *as a bond with surety*, a mortgage, the indorsement of a responsible man, or a pledge. It is that which renders a matter sure; and instrument which renders certain the performance of a contract." (Italics supplied.)

Also significant are the following:

"The addition of the word 'security' to the signature of a bond shows prima facie that the person signing is a surety. *Boulware v. Hartsook's Adm'r*, 3 S. E. 289, 291, 83 Va. 679, citing *Harper's Adm'r v. McVeigh's Adm'r*, 1 S. E. 193, 82 Va. 751.

“In Code section authorizing court, upon ‘security’ being first given, to open judgment entered for want of affidavit of defense, word ‘security’ is used in sense of ‘surety’; that is, bond with surety or sureties. Rev. Code 1915, 4169. *Penn. Central Light & Power Co. v. Central Eastern Power Co.*, 171 A. 332, 6 W. W. Harr. 74.

“The word ‘security’ is often used in the Code in the sense of ‘surety.’ Thus the applicant for an attachment must give bond with good security, and one filing a claim to property levied on, in order to replevy the property, must give bond with good and sufficient security, so that the word ‘security’ as used in the phrase ‘and to give security for the eventual condemnation money,’ appearing in section 4819 of the Civil Code, which provides for entering a defense to the levy of a distress warrant, means that the defendant in such warrant must give a bond with a surety or sureties thereon, and the levying officer is not authorized to take in lieu of such bond a deposit of money. *Goggins v. Jones*, 41 S. E. 995, 996, 115 Ga. 596.”

We submit that the appellant, State Tax Commission, has made a practical interpretation of the statute involved and that its view of the term “security” being a bond is proper in view of the definition of “security” as herein set forth and particularly in view of the fact that the change made in 80-15-5, *Utah Code Annotated, 1943*, was made upon the recommendation and advice of the Tax Commission. The Tax Commission, by long administrative interpretation, has always considered the word “security” to mean a bond with either personal or corporate sureties. It is admittedly true that a misinterpretation of the statute gives no regularity to such interpretation; however, the Supreme

Court of Utah, in the case of *Board of State Land Commissioners v. Ririe* (1920), 56 Utah 213, 190 Pac. 59, said:

“While it is true that the construction of a statute by the executive department is not binding upon the courts, it is, nevertheless, also true, and is so determined by the overwhelming weight of authority, that unless such construction does violence to the apparent intent of the language used it is entitled to serious consideration by the courts, and especially so if the statute has been in force for any great length of time and has been so construed.”

This statement of the law was acquiesced in by this court in *In re Cowan's Estate*, (1940) 98 U. 393, 99 Pac. 2d 605, and was reaffirmed in the case of *Utah Concrete Products Co. v. State Tax Commission* (1942), 101 U. 513, 125 Pac. 2d 408, and *E. C. Olsen Co. v. State Tax Commission*, 168 Pac. 2d 332.

The interpretation placed by the State Tax Commission upon the word “security” has been in effect since 1939 when the Emergency Revenue Act of 1933 was amended to allow the Commission to require security. And it is submitted such interpretation does no violence to the apparent intent of the language, the intent being to make sure or certain that provisions of the Emergency Revenue Act of 1933 will be complied with by the principal. The Commission has made the determination pursuant to authority vested in it by 80-15-5, Utah Code Annotated, 1943, that such bond shall be deemed sufficient security.

It should be noted that in the nine years this provision has been in effect many hundreds of taxpayers have been required to post this type of bond with the Tax Commission,

and, further, that there are at the present time many such bonds posted with the Tax Commission to assure compliance with the provisions of the Act. We think that it is a reasonable inference from *Regulation #8, 80-15-5, Utah Code Annotated, 1943*, and from the form of the bond as written, that the primary reason for requiring a vendor to post a bond is to insure that the tax collected will be paid and that the only cases in which a bond would be required are cases wherein the principal is in a precarious financial circumstance, or the nature of his business is such that he will incur a large tax liability, in which case, a sudden financial reverse would cause a loss of tax collected.

The Tax Commission in dealing with taxpayers has found it necessary to require this type of security. We believe that in view of the type of taxpayer from whom security is required—that is taxpayers in precarious financial circumstances, or taxpayers incurring large tax liabilities—in the great majority of cases, the taxpayer who is required to post security is financially not in a position to deposit any other type of security with the Tax Commission. Certainly a taxpayer who is in sufficiently difficult financial circumstances that the Commission deems it necessary to require him to post security to insure compliance with the Act, is not in a position to deposit negotiable instruments, stocks, bonds, etc., which might be sold in strict compliance with the wording of the Act. To place such an interpretation on the language contained in *80-15-5, Utah Code Annotated, 1943*, we submit, is not a practical interpretation of the statute. Furthermore, there are a limited number of cases in which the vendor when required to post a bond desires

for one reason or another to post cash in lieu thereof. While the issues in this case are not concerned with the posting of a cash bond, we call the court's attention to the fact that such bonds are posted and certainly it would be an impractical interpretation of the statute to require a taxpayer desiring to post a cash bond to purchase negotiable securities which might decline in value. Such risk should not be imposed upon a taxpayer.

The court below in making an analysis of the wording of 80-15-5, *Utah Code Annotated, 1943*, took the view that the remedy therein provided, that is, selling the security at public sale in order to secure any tax, was the only remedy (R. 14). With such interpretation we most respectfully disagree. The words of the statute "The same may be sold by the Tax Commission at public sale if it became necessary so to do in order to recover any tax, interest or penalty * * *" as we view them, are permissive or directory and not mandatory or exclusive.

80-5-46, *Utah Code Annotated, 1943*, which outlines the powers and duties of the Utah State Tax Commission, among other things, authorizes the Commission "to sue and be sued in its own name." This court in the case of the *State Tax Commission v. City of Logan (1936)*, 88 *Utah* 406, 54 *Pac.* 2d 1197, in construing the general powers of the Tax Commission to sue and be sued, said:

"* * * Article 13, Sec. 11, of our State Constitution grants to the State Tax Commission supervision of the tax laws of the state. R. S. Utah 1933, 80-5-46, contains an enumeration of the general powers and duties of the Commission. Power is there

conferred upon the Commission 'to sue and be sued in its own name,' and generally to supervise and direct the levy and collection of taxes. In the light of the fact that broad powers are conferred upon the Commission to levy and collect taxes, it would seem idle for the legislature to vest authority in the Commission to sue in its own name unless it intended thereby that the Commission might sue for the collection of taxes. *Apparently one of the chief purposes of the legislature in granting to the Commission authority to sue was to enable it to enforce payment of taxes.* The city's contention that the Commission is without authority to prosecute this action in its own name must fail." (Italics supplied.)

This reasoning was set forth by the court in spite of the fact that section 11 of the Emergency Revenue Act of 1933, as it was in effect when the case arose, provided specifically that the sales tax could be collected by appropriate judicial proceedings.

Therefore, we contend that the State Tax Commission having the power to sue in its own name may sue the respondents in this case for the collection of the sales tax which the respondents have incurred a liability to pay by reason of the default of the principal.

There is one further principle which appellant feels should be considered by the court in making a determination as to the question of the authority of the Commission requiring posting of a bond. The section of the statute relied upon by the Commission, 80-15-5, Utah Code Annotated, 1943, was amended by the Laws of Utah, chapter 103 to include the provision hereinbefore quoted. No further amendment was made until the 1947 session of the legisla-

ture (H. B. #48, approved February 24). The amendment passed made no change in that portion of 80-15-5, Utah Code Annotated, 1943, upon which the Commission relies as having authority to require the posting of a bond. Inasmuch as the practice of the Commission in requiring bonds was adopted shortly after the 1939 amendment and such construction was adopted by regulation and promulgated to the public and, further, since the public has come to rely on such regulation, we submit that the legislature knew of such construction and adopted it in re-enacting the statute. This court recognizing this doctrine in the case of *Utah Power & Light Company v. Public Service Commission* (1944), 107 Utah 55, 152 Pac. 2d 542 cited considerable authority and held:

“Closely allied to this argument (administrative construction) is the third argument in which the Company seeks to invoke the principle of law that when the legislature re-adopts a statute or act without change after uniform and notorious construction by officers required to administer it the presumption is that the legislature knew of such construction and adopted it in re-enacting the statute. This doctrine has been criticized (see 54 Harvard Law Review p. 1311, Article by A. H. Feller) but it nevertheless is supported by considerable authority. *State Board of Land Commissioners v. Ririe*, supra, 56 Utah 213, 190 P. 59; *Van Veen v. Graham County*, 13 Ariz. 167, 108 P. 252; *City of Louisville v. Louisville School Board*, 119 Ky. 574, 84 S. W. 729; *State v. Sheldon*, 79 Neb. 455, 113 N. W. 208.”

We submit that in the event this court should determine that an allegation of authority be necessary in order to state a cause of action, that the appellant, State Tax Commission,

should be allowed to amend its complaint and allege that the bond was taken pursuant to the provisions of 80-15-5, Utah Code Annotated, 1943.

CONCLUSION

In conclusion, therefore, it is submitted that the complaint of appellant, as filed in the court below, sets forth a cause of action against the respondents or may be amended so as to state a cause of action.

We submit that the Tax Commission has placed a most practical interpretation upon 80-15-5, *Utah Code Annotated, 1943*, and that to place any other interpretation thereon would work a hardship upon the vendors who have come to rely upon the Commission's regulation and who would be required to deposit negotiable securities. Furthermore, we submit that a holding that the Commission has authority to require the type of security upon which this suit is predicated is a *sine qua non* to the successful administration of the Emergency Revenue Act of 1933.

We urge that the posting of a surety bond with sufficient personal sureties, or a corporate surety, furnishes adequate security to insure that the tax will be paid; that the only purpose of requiring such security is to insure that the tax will be paid, and, therefore, the Commission by requiring the posting of a surety bond of the nature upon which this suit is predicated evidences a sufficient compliance with the terms of the Act.

The appellant respectfully submits that the decision of the lower court should be set aside and the case remanded for further proceedings pursuant to law.

Respectfully submitted,

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