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

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 RESPONDENTS

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RESPONDENT'S BRIEF

The Utah State Tax Commission, plaintiff in this action, appeals from a judgment of the District Court of Utah County sustaining defendants' demurrer to its complaint. Plaintiff will hereinafter be referred to as appellant and the defendants as respondents.

We agree that appellant's brief substantially sets forth appellant's complaint, the form of bond or undertaking signed by respondents, respondents' demurrer to the complaint and that the trial court sustained respondents' demurrer upon the theory that the State Tax Commission

had no authority to require or accept the type of written contract upon which this suit is predicated.

QUESTIONS PRESENTED

Appellant in its brief states that it believes that this case can be settled by answering the following questions:

1. Does the complaint, as stated, 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?

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

We believe that this matter can be further simplified and that the issue can be determined by answering question 2. We feel that if question 2 is resolved against appellant, there is no need to consider question 1.

Appellant in its brief urges two reasons why the district courts ruling should be reversed: First because the undertaking sued upon is a common law obligation and respondents are liable upon the undertaking or bond signed by them independent of statute. Secondly that the appellant has complied with the provisions of the laws of Utah which authorize it to accept security.

The first proposition was not raised or discussed before the trial court, and as we believe the second point raised by appellant is the crux of this whole matter, we prefer to direct our remarks to what appellant has designated in its brief as point 2.

ARGUMENT

Point 1

We submit that a proper conclusion can be reached in this case by answering the following question: Is the undertaking accepted by appellant, and upon which the complaint is founded, the kind of security the legislature intended that the Tax Commission should require when it determines that a retail vendor may fail to remit to the State Tax Commission money collected by the vendor for the State. To answer this question requires an interpretation of a part of Section 80-15-5, Utah Code Annotated, 1943. We quote the pertinent part:

“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.”

The undertaking or bond, whatever it may be termed, upon which the complaint is founded is clearly not security that can be sold. If appellant asserts to the contrary, why has it not complied with the statute and proceed to do so?

The section's provisions for notice to persons depositing said collateral, sale thereof, and disposition of any surplus, would indicate a pledge of collateral with conditional power of sale to insure performance, and not a suretyship or indemnity contract.

This court in the case of **E. C. Olsen Company vs. State Tax Commission**, 109 Utah 563, 168 Pacific Second 324, says:

"The Tax Commission is created by statute and has only such powers as the statute confers upon it. Such powers must be exercised in accordance with the statute."

In that case Mr. Justice Wolfe said:

"Where there is an ambiguity in the statute as to whether the latter does or does not cover a particular matter, a practical construction of the statute shown to have been the accepted construction of the agency charged with administering the matters in question under the statute will be one factor which the court may take into consideration as persuasive as to the meaning of the statute. Especially is this true where the agency, as in this case, is one on whom the Legislature must rely to advise it as to the practical working out of the statute and where practical application of the statute presents the agency with unique opportunities and experiences for discovering deficiencies, inaccuracies or improvements in the statute. But such factor is only one among others persuasive on the court when it is engaged in the interpretation of the statute and may be given much or little weight in the total consideration of the question depending on circumstances but never against the plain meaning of the statute."

To like effect is **Utah Concrete Products Corporation vs. State Tax Commission** in 101 Utah 513, 125 Pacific Second 408, in which the Court said:

“Defendant maintains that long compliance with an administrative ruling lends strength to the presumption of the regulation’s validity, city State Board of Land Commissioners v. Ririe, 56 Utah 213, 190 P. 59; In the Matter of the Estate of John Cowan, 98 Utah 393, 99 P. 2d 605; United States v. Missouri P. R. Co., 278 U. S. 269, 49 S. Ct. 133, 73 L. Ed. 322, 323. This is true. However, the interpretation placed on the language of the statute by the Tax Commission must not do violence to its apparent meaning. The construction placed here by the defendant Tax Commission on the Act misinterprets the meaning and intent of the Legislature. It cannot be termed a “practical” construction. Governmental agencies cannot deprive the courts of their judicial functions nor can the agencies extend the operation of the statute by administrative regulations. *Western Leather & Finding Co. v. State Tax Commission*, supra; *P. H. Mallen Co. v. Department of Finance*, 372 Ill. 598, 25 N. E. 2d 43; *Dun & Bradstreet v. City of New York*, 276 N. Y. 198, 11 N. E. 2d 728; *Northern Pacific Ry. Co. v. Henneford*, D. C., 15 F. Supp. 302.

And in **Utah Hotel Company v. Industrial Commission**, 107 Utah 24, 151 Pacific Second 467, in interpreting a ruling of the Commission the Court said:

“An administrative interpretation out of harmony and contrary to the express provisions of a statute cannot be given weight. To do so would in effect amend the statute. Construction may not be substituted for legislation. *United States v. Missouri Pac. R. Co.*, 278 U. S. 269, 49 S. Ct. 133, 73 L. Ed. 322.

"In *Manhattan General Equipment Co. v. Commissioner of Internal Rev.* 297 U. S. 129, 56 S. Ct. 397, 400, 80 L. Ed. 528, the court held that an administrative regulation which was contrary to the statutory provision was a nullity. In so holding, the court said:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law * * * * but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity (Citing cases) And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. (citing cases) The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable."

The latest case decided by this Court that we have been able to find is that of the **New Park Mining Company, et al., v. State Tax Commission**, 196 Pacific Second, 485, not yet reported in Utah Reports, follows the rule stated in the cases cited above.

We have no quarrel with appellant's argument that the Tax Commission has the power to sue and be sued in its own name, and that that power was given to enable it to enforce payment of taxes. The Commission is still a creature of the Legislature, with powers limited to those granted it by act of that Legislature. The grant of power to sue and be sued would not appear to be a grant of power generally to legislate, or to exceed those substantive powers granted by the Legislature to the Commission.

The Commission in its brief cites numerous cases defining the term "security," and with these we take no issue. However, it will be noted that the facts out of which the question arises in these cases as to what is "security" caused the courts to give the definition in each particular case. In no case cited by appellant can be found a definition holding that the type of undertaking herein sued upon is defined as a "security."

We believe that Section 80-15-5 was enacted in the interest of the State of Utah and its people and to insure remittance of the tax to the State by the vendors of merchandise. Appellant seems to adopt a contrary point of view and argues that the law was enacted for the benefit of vendors who are in precarious financial circumstances and that appellant in the interest of such vendors may determine the type of bond that is acceptable, as well as who shall sign the undertaking. We confidently assert that to permit such practice would result in serious losses to the State.

Section 80-15-5 is definite and certain as to the duties of appellant, and to permit appellant to place the interpretation upon it that they seek to do would be to authorize them to legislate. No reference in the section is made to a bond or an undertaking. Had the Legislature intended that the appellant should have authority to accept a bond or undertaking, they would have said so; there is precedent for so doing. In Section 80-10-4, Utah Code Annotated, 1943, the Legislature specifically authorizes county assessors to accept bonds. Section 80-25-49, Utah Code Annotated, 1943, authorizes the county to accept a bond in lieu of the payment of the taxes at the time they are assessed. Section 80-14-26 specifically grants the tax com-

mission the right to require a taxpayer to furnish a bond where undue hardship would be imposed upon the taxpayer who is delinquent in his payment of taxes.

Counsel places reliance upon a regulation which counsel says appellant published effective January 1, 1944, and which has been in continuous effect since that time, and then quotes the section. As we view the issues, it makes little or no difference as to whether the appellant did or did not promulgate such an order. Surely the passage of the regulation which is in direct contravention of the plain mandate of the law cannot be given effect. To give effect to it would be to permit the appellant to legislate, and that, this Court has said they may not do.

In view of the statute quoted above and of the authorities cited, we take the position that the appellant has deliberately violated the plain mandate of the law and that the complaint is defective and fails to state a cause of action.

Point 2

Appellant's next contention, denominated by it as point 1, that the undertaking herein sued upon is good in any event as a common law obligation, is next considered.

This argument may appear plausible at first glance. However, examination of authorities cited by appellant to sustain the theory that the instant undertaking is good in any event as a common law obligation will show that, in all cases wherein a bond, invalid because not complying with statutory provisions, has been upheld, there has in the first instance been either a statutory provision for a suretyship or indemnity bond, or power to require such has been inherent, and the bond in question has simply not

complied with the statutory provisions. Annotation, LRA 1917B, p. 990ff.

The Kansas City case of **State ex. rel. Hendrick, Co. Atty. vs. Hartford Accident & Indemnity Co.**, 114 Pacific Second 812, cited in appellant's brief, p. 9, is not in point for the reason that the bond therein involved was required by a court. It is axiomatic that courts have wide discretion in imposing conditions upon those before it, and the Kansas court so recognized in the cited case (p. 816 of report, headnote 7-9). The Utah State Tax Commission is not a court, and its discretionary power is closely hedged by statutory restrictions and grants of power. **E. C. Olsen Co. vs. State Tax Commission**, supra. To hold the bond in question in this case valid as a common law obligation would be to give the Tax Commission by indirection powers which, we submit, they do not have by legislative grant, and would circumvent the rule against unauthorized legislative power in an administrative agency.

The case of **Central Banking & Security Co. vs U. S. F. G. et al**, 80 South Eastern 121, cited by appellant (Appellant's brief, p. 7) to sustain its argument for the validity of the undertaking herein sued upon, is also distinguishable. That case involves the enforceability of an administrator's bond taken by the clerk of the court without statutory authority. That is, that case also involves the powers of a court in the first instance to require bonds, and the defect there cited was that the statutory procedure was not followed.

As cited earlier in this brief, in the **E. C. Olsen Co.** case, "The Tax Commission is created by statute and has only such powers as the statute confers upon it. Such powers must be exercised in accordance with the statute."

(boldface added). It is respondents' position that, the commission being merely a creature of limited powers, those powers cannot be expanded by the commission "pulling itself up by its own bootstraps." It cannot achieve by indirection what it is not permitted to do directly. It has no "inherent" powers and must exercise the powers it has "in accordance with the statute." A defectively executed bond may be upheld as a common law obligation; a bond accepted when no statutory authority at all exists therefore, supposedly running to an agency of limited powers, of which accepting such an obligation is not one, should be declared void.

In the case of **Territory ex. rel. Thacker, Co. Atty. vs. Woodring**, 82 Pacific 572, 574, the Oklahoma court has this to say:

"But it is contended that, if the bond is invalid as a statutory bond, it is good as a common law bond. This contention is clearly untenable. A statutory bond, which is void for want of authority to execute it, cannot be enforced as a common law obligation. (cases cited)."

That case involved the taking of a bail bond by the clerk of the court, when there was no authority to do so. The court held that there was no inherent power in the clerk of the court to take such a bond, and absent a statute, he had no such power. Appellant earnestly urges that the undertaking is valid under the statute. If it is, as respondent contends, void for want of authority in the Commission to accept it, then it cannot be held valid as a common law obligation.

It is respectfully submitted that the acceptance of such an undertaking as herein sued upon is against public policy.

As urged elsewhere in this brief, regardless of the recommendations of appellant to the Legislature, that body saw fit, when acting upon said recommendations, to enact a law specifically providing that when appellant determined that a retail vendor was in a precarious financial condition, then the vendor be required to deposit with appellant readily saleable collateral sufficient to cover the amount of the sales tax collected. The Legislature contemplated a summary and effective means of getting tax money collected into the State treasury. It did NOT contemplate tying up large sums of public money in the form of collected sales taxes in suretyship bonds, many of which might require protracted litigation before payment can be realized, and many of which, even after litigation, might prove worthless. If this be so, how then, can the appellant urge the validity of such an undertaking as a common law obligation, even if we were to admit that appellant's authorities therefor were in point?

In the case of **Territory ex. rel. Thacker, Co. Atty., vs. Woodring et al**, supra, at page 574, the Oklahoma court, after holding that a statutory bond, which was void for want of authority to execute it, could not be enforced as a common-law obligation, had this to say:

"It follows that the bond taken in this case by the deputy clerk of the district court is void, and therefore the court properly sustained the demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action."

It is respondents' position that the undertaking herein sued upon cannot stand as a common law obligation; that it must derive its force and effect from a statutory provi-

sion; that there is no statutory provision therefor; and that because of this absence of statutory authority, the complaint is demurrable on the ground of insufficient facts to constitute a cause of action.

CONCLUSIONS

We submit that Section 80-15-5, Utah Code Annotated, 1943, is not ambiguous or uncertain; and that it was enacted to protect the interests of the State and not the interest of vendors who might be in precarious financial circumstances. We further submit that the interpretation placed upon the above section by appellant is out of harmony and does violence to the plain wording of the statute.

Appellant urges the Court to approve the procedure followed by it because of hardship to vendors. The adoption of such a theory by the Court, we believe, would be tantamount to a grant of power to appellant to legislate and a declaration that appellant, having fallen into error, could perpetuate its error as law.

There was and is a total lack of authority by appellant to accept the undertaking which was the foundation for the complaint sued upon. There being no authority to accept the undertaking, the instrument is void under statutory provisions, as well as upon the theory of a common law obligation. There being no authority to accept the undertaking, the trial Court was required to sustain the respondents' demurrer.

We respectfully submit that the judgment of the District Court was correct and should be affirmed.

Respectfully submitted,

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