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The Snyder Mines Incorporated v. The Industrial Commission of Utah : Brief of Petitioner

Utah Supreme Court

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**IN THE SUPREME COURT
of the State of Utah**

THE SNYDER MINES INCORPORATED,
a corporation,

Plaintiff,

vs.

Case No.
7310

**THE INDUSTRIAL COMMISSION
OF UTAH,** Department of Employment Security,

Defendant.

BRIEF OF PETITIONER

FILED

HERBERT VAN DAM,
Attorney for Petitioner.

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In the Supreme Court of the State of Utah

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Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH, Department of Employment Security,

Defendant.

Case No.
7310

BRIEF OF PETITIONER

By its petition herein The Synder Mines, Incorporated, seeks to have set aside two demands made by the Industrial Commission for payment of contributions to the Unemployment Insurance Fund—Representative Letter of January 9, 1941, and Representative Letter of

February 23, 1943; the two were heard together by the Appeals Tribunal and the Industrial Commission.

The questions raised are as to the jurisdiction of the Industrial Commission and the constitutionality of the Act of 1941 purporting to confer jurisdiction upon that Commission to lay and collect the contribution or tax.

REFERENCE TO STATUTES

Chp. 38, S.L. 1935, see Sec. 32, Collections to be made by (Industrial) Commission in case of default. Chapter repealed in 1936 Special Session.

Ch. 1, Special Session 1936, see Sec. 14, which provides for collection by State Tax Commission.

Ch. 43, S.L. 1937, which amended a number of sections of the 1936 enactment, but Sec. 14 was not amended.

Ch. 52, S.L. 1939, which amended certain sections of the 1936 and 1937 enactments, and which did amend Sec. 14, but Sec 14 (c) provides for collection by civil action in the name of the State Tax Commission.

Ch. 40, S.L. 1941, in effect July 1, 1941, Employment Security Act, repeals all prior enactments, and Sec. 14 provides for collection by the "Commission".

Ch. 42-2a U.C.A. 1943, same as 1941 act. Sec. 14 was amended by S.L. 1945, Ch. 68, p. 149.

I

THE LETTER DEMAND OF JANUARY 9, 1941

By representative letter from the Industrial Com-

mission dated January 9, 1941, the Industrial Commission claimed a contribution liability against The Snyder Mines, Incorporated, the petitioner herein, in the amount of \$10,892.69 (R. 1). On the second page of the letter is the following—

“Therefore, unless within ten days from the date of this letter you ask for a review or present facts to us which will cause us to change this determination, reports will be submitted to the State Tax Commission for the purpose of assessing and collecting tax due.”

Appeal from this determination was taken by petitioner (R. 3-4) and the decision of the appeal tribunal was rendered August 19, 1943 (R. 127-132). The Appeals Referee held that contributions accruing for the years 1936 and 1937 were barred by the statute of limitations, which left a total claim of \$8332.44. Otherwise the representative letter was merely affirmed.

The Snyder Mines, Incorporated, was conducting mining and milling operations at Mercur, Utah, and from time to time leased portions of its mining property to various individuals. It was claimed by the Commission that these individuals were employees and by the company that they were independent contractors. Hearing by the appeals tribunal was delayed pursuant to stipulation between the parties (R. 6-7), dated January 27, 1941, the stipulation providing in general that there was pending in the Utah Supreme Court a case entitled Combined Metals Reduction Company v. The Industrial Commission of Utah, Clerk's File No. 6315, which in-

volved the question whether lessees were independent contractors or employees; that the leases in use by petitioner here were of the same character as the leases involved in the pending suit.

Decision by this court in *National Tunnel & Mines Company v. Industrial Commission*, on May 11, 1940, 102 P. 2d 508, held that lessees were employees under the Utah statute, and this ruling was followed in the case of *Combined Metals Reduction Company v. Industrial Commission*, decided September 15, 1941; rehearing denied February 25, 1942, 116 P. 2d 929. We do not now of course contend to the contrary of those decisions.

The question remains whether the Commission exceeded its jurisdiction, acted in excess of its jurisdiction, or proceeded improperly against petitioner.

Prior to the 1941 amendment no administrative procedure relating to laying and collecting the tax was provided for. There is in this case no claim for benefits, so the procedure discussed in *National Tunnel & Mines* case is not applicable here. There was no occasion for any since the *Industrial Commission* did not have jurisdiction of the **subject matter**.

If the representative letter of January 9, 1941, be construed as inclusive of an order laying a tax, it was void from the beginning (*National Tunnel & Mines* case cit. supra) and mere affirmation successively by the Appeals Referee and the Commission does not purport to have changed the character of the order, and it appar-

ently has not been changed, so that it would seem to be not pertinent to inquire whether the amendment of 1941 (Ch. 40, S.L. 1941 in effect July 1, 1941) had the effect of conferring jurisdiction upon the Industrial Commission to assess and collect the tax since the Commission has not seen fit to exercise such jurisdiction, and this is so even though it be given retroactive effect. And if so construed then we encounter the question of constitutionality to be discussed later.

In *State Tax Commission v. City of Logan* (February 10, 1936), 54 P. 2d 1197, see end Nos. 15-16, p. 1205, this court said—

“Such a levy is a nullity and can be questioned at any time.”

II

THE REPRESENTATIVE LETTER OF FEBRUARY 23, 1943

(a) Was Mr. Snyder an employee?

At the hearing of this matter on appeal before the Industrial Commission on November 29, 1948, Mr. Dre-
mann representing the Department of Employment Se-
curity, said with respect to the claim that E. H. Snyder
was an employee of The Snyder Mines, Incorporated—

“I might call the Commission’s attention to the fact that the law provides that if 50 percent or more of the services of an individual are performed within the employment within the meaning of the act, then all of the services of that individual are to be considered within the act and subject to contribution.”

The evidence on this subject will be found in six pages of the reporter's transcript of the hearing before the Appeals Referee (R. 69-74). Summarized, Neal Snyder testified—E. H. Snyder is my brother and is President of The Snyder Mines, Incorporated. During the past two years he spent most of his time out of the city. He has an office in Salt Lake and is Vice President and General Manager of Combined Metals Reduction Company. His office is across the hall from ours in the Felt Building. It is not the same suite of offices as The Snyder Mines. He does not maintain a personal office of his own separate from Combined Metals. After his interest in Combined Metals enlarged to the extent that he could no longer hold an executive position in the operation of The Snyder Mines, he requested that I come down from Idaho where I was running the Triumph mine, and take over the managership of The Snyder Mines. I believe it was in 1938. During the period 1940-41-42, E. H. Snyder had nothing to do with the administration or direction. He was President of the Company. His services were always professional and only concerned with the metallurgical and geological aspects of the operation and had absolutely nothing whatsoever to do with the executive branch or the administrative end of the operations. We had a very serious metallurgical problem out there. At odd times, whenever possible, there was no time set at all, but whenever possible when we got into trouble with our metallurgy or were interested in ore trends in the mine, whenever we could find some of his time available we would discuss with him

what he considered the best thing to do. He was put on a regular salary basis from month to month. I don't think he had the time to perform this kind of service for other companies. His services were confined to giving out this specialized advice to Snyder Mines and Combined Metals and we were lucky to get it.

It should be apparent that Mr. Snyder's time was devoted almost exclusively to the affairs of Combined Metals Reduction Company, and presumably contributions were paid for him as an employee by that company. If Mr. Dremann's definition of employment is correct it would seem that Mr. Snyder was not an employee of The Snyder Mines, Incorporated, within the meaning of the law.

(b) Were the truckers employees?

At the hearing before the Commission on November 29, 1948, the Commission expressed doubt in regard to this question and gave each party opportunity to supplement the evidence in the record by submitting memoranda "of a breakdown of the duties of these truckers". Petitioner furnished nothing further. After this proceeding was commenced in this court and counsel for petitioner withdrew the record from the Clerk for the purpose of preparing a brief herein, there was discovered in the record (R. 155-157) a letter from the Department of Employment Security to the Industrial Commission dated December 6, 1948, enclosing a memorandum, and in this memorandum are found quotations from "Confidential, special report" made by Department

Field Auditors Max Madsen and John Butts on January 31, 1943. This memorandum discusses matters that we think in all fairness should have been called to the attention of petitioner with an opportunity to meet such evidence because it is apparent that the contents of the confidential, special report may have caused the Commissioners to resolve any doubts they had about the truckers against the petitioner.

III

CONSTITUTIONALITY OF THE ACT PURPORTING TO CONFER JURISDICTION OF THE INDUSTRIAL COMMISSION TO ASSESS AND COLLECT TAXES

Perhaps enough has been said to justify this court in setting aside the orders here complained of, and if this is so, the question of constitutionality need not be decided. So far as we know, however, this question has not been decided. The opinion of Mr. Chief Justice Möffet in *National Tunnel & Mines Company*, included some discussion of the subject. Mr. Justice Wolfe, although concurring in the result, was in disagreement with the Chief Justice, particularly as to collection of contributions for tax. Mr. Justice Larsen and Mr. Justice McDonough were of the opinion the constitutional question was not involved, and since our present Chief Justice concurred in part and dissented in part and afterwards in *Combined Metals Reduction Company v. Industrial Commission*, dissented from the holding that a mining

lease was employment, I will not undertake to define his position.

The language of the constitution is plain. Article XIII, Section 11, provides—

“The State Tax Commission shall administer and supervise the tax laws of the state.”

The question will turn no doubt on whether exactions from employers are taxes as in the Carmichael case cited by Mr. Chief Justice Moffet, or whether they are to be placed in some other setting to avoid collision with the constitutional provision.

The question involved here is aptly put by Mr. Justice Wolfe in *National Tunnel & Mines Company v. Industrial Commission*, *cit.*, *supra*—

“It may well be that the type of contribution which is exacted for the Unemployment Insurance Fund is not a ‘tax’ in the sense that that term was used in the constitutional provision which gave the Tax Commission administration and supervision of tax laws.”

I think the answer is not to be found in that case and I know of no other case in which it has been answered.

See *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327;

26 U.S.C.A. Sec. 1410, note 4 at p. 65, citing *Glenn L. Martin Co. v. U. S.*, C.C.A. Md. 1939, 100 F. 2d 793; *Fromm Bros. v. U. S.*, D. C. Wis. 1940, 35 F. Supp. 145;

Christopher v. James, 1940, 12 S. E. 2d 813,
122 W. Va. 665.

We respectfully ^{fully}~~ively~~ solicit the views of the court on the
questions raised, which we think are pertinent and time-
ly and have not yet been answered.

Respectfully submitted,

HERBERT VAN DAM,
Attorney for Petitioner.