

1950

Illinois Powder Manufacturing Co. v. State Tax
Commission of the State of Utah and R. E.
Hammond, J. Welton Ward and Elisha Warner :
Brief of Defendant

Utah Supreme Court

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**In the Supreme Court
of the State of Utah**

ILLINOIS POWDER MANUFACTURING COMPANY, a corporation,

Plaintiff,

— vs. —

STATE TAX COMMISSION OF
THE STATE OF UTAH and R.
E. HAMMOND, J. WELTON
WARD and ELISHA WARNER,
as the duly appointed and acting
commissioners thereof,

Defendant.

Case No.
7415

BRIEF OF DEFENDANT

FILED

JAN 26 1950

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Attorney for Defendant

Clerk, Supreme Court, Utah

Argument:

Point 1. Does the taxpayer's procedure in filing Tax Commission form No. 71 constitute the filing of a use tax return?

Point 2. Is the method used by the commission in making this assessment so unconscionable as to be a nullity?

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G. HAL TAYLOR
Attorney for Defendant

BRIEF OF DEFENDANT

FACTS

The defendant's statement of the case contains the essential facts upon which a determination may be had. Except for the allegations made as to the arbitrariness of the Commission's assessment, which is now being raised for the first time on appeal, the defendant ac-

quiesces in such statement of facts for the purpose of this brief.

One further fact which it is felt should be noted at this time is the fact that the instant controversy was presented to the Commission on a claim for refund which set forth the reason for the claim as follows:

“The amount claimed for refund was assessed by the commission against the taxpayer for the years 1940, 1941, 1942 and 1943, and such assessment for the years enumerated was barred by applicable statutes of limitation.” (Tr. 22)

QUESTIONS INVOLVED

Plaintiff's Assignments of Error raise two questions for determination. The first question presented is, we submit, the only question to be decided on this appeal. That question stated by plaintiff is as follows:

“(1) Does the taxpayer's procedure in filing the Tax Commission's Form 71 constitute the filing of a use tax return?”

The second question raised by taxpayer's Assignment of Error, No. 4, i.e., that the Tax Commission erred in failing to find that the assessment was arbitrary and capricious and without basis in law and fact, or, as stated in plaintiff's brief as point No. 2, “Is the method used by the commission in making this assessment so unconscionable as to be a nullity?” will not be discussed by the defendant, except to point out to the

court that this question is being presented for the first time on appeal and was not considered by the commission.

ARGUMENT

Point 1.

Does the taxpayer's procedure in filing Tax Commission Form No. 71 constitute the filing of a use tax return?

Plaintiff's argument with regard to the question of the statute of limitations sets forth no authority in support of the argument that the claim asserted by the Tax Commission is barred by the statute of limitations. A perusal of plaintiff's argument indicates that nothing more is done than to point out to the court the apparent unfairness of the assessment, and makes an attempt to distinguish the case of *Whitmore Oxygen Company vs. State Tax Commission*, 196 Pac. 2d 976.

We have no argument with plaintiff's dissertation with regard to the purpose of a statute of limitations. Such a statute is a statute of repose and is for the purpose of compelling the exercise of the right of action within a reasonable time, but it appears that to argue the purpose of the statute of limitations in this case merely begs the question properly presented as to when, under the circumstances of this case, the statute of limitations began to run.

We will submit that the taxpayer in this case failed

to furnish any information with respect to required items as set forth in the instructions furnished the taxpayer and, therefore, a return has not been filed within the meaning and intent of our Use Tax Act.

Item No. 7, relating to purchases of tangible personal property purchased by the taxpayer for storage, use or consumption in this state, on all of the returns available, both duplicate and original during the period of the audit, is totally blank. (Tr. 64-105, Tr. 118-141) True, in several instances, as pointed out by the plaintiff in its brief, there are spaces which contain certain markings and also in some instances the word "none." We would submit that an examination of all the returns available during the period of the audit indicates that the taxpayer made no genuine endeavor to satisfy the requirements of the Tax Commission's instructions. Instructions issued with regard to Item No. 7 read as follows:

"Item 7. Enter as this item, valued at the sales price, all purchases made by you outside of Utah or in interstate commerce for storage, use or consumption by you in this State upon which the seller has not collected the use tax. For the most part, this item will include equipment, supplies, merchandise, etc., purchased from out-of-state sellers. It should not include (a) merchandise purchased for resale; or (b) materials which become an ingredient or component part of tangible personal property to be sold."

Nor is there any attempt made to comply with the

instructions set forth on Form TC 71 under Item 7 which reads as follows:

“Purchases—Total purchase price of tangible personal property purchased for storage, use, or other consumption in this state on which the seller has not collected sales or use tax (See ‘Instructions’).”

In *Florsheim Bros. Dry Goods Company v. United States* (1930) 280 U. S. 453, 460, Mr. Justice Brandeis speaking for a unanimous court stated:

“The burden of supplying by the return the information on which assessments were to be based was thus imposed on the taxpayers. And, in providing that the period of limitation should begin on the date the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner.”

We submit that, in view of the fact that Item 7 is blank on all returns available, taxpayer did not supply information in the prescribed manner.

In *Corona Coal & Coke Company vs. Commissioner* (1928) 11 B.T.A. 240, taxpayer filed a form 1120, which was duly signed by the proper officers of the company. This form was blank with the exception of one line which required information as to the “net income for taxable year.” At the blank space provided for the amount of net income there appeared the word “none.”

No other blank spaces were filled in and no other information was contained in the return except the name and address of the taxpayer. The Board of Tax Appeals in that case held in substance that the word "none" written on the document was not sufficient to start the running of the statute of limitations where other information is required. See also *The Jockey Club* (1934) 30 B.T.A. 670, aff'd. without discussion of this point. (C.C.A. 2d 1935). 76 F. 2d 597 (blank return accompanied by letter claiming exempt status).

We submit that the burden of furnishing the information upon which an assessment may be made is cast by law upon the taxpayer. By measuring the period of limitation from the filing of the return, the statute manifests a clear legislative intent that:

"* * * the period should begin only when the taxpayer had furnished such information in the manner prescribed. *Florsheim Bros. Co. v. United States*, 380 U. S. 453 * * *. Meticulous accuracy, perfect completeness, or absence of any omission is not exacted. But a return which fails to comply in a substantial degree with the requirements of the statute in respect to disclosing the requisite information essential to the making of assessments does not suffice to start the period of limitation." *Alkire Inv. Co. v. Nicholas* (C.C.A., 10th Cir.), 114 Fed. (2d) 607, 710.

In denying the taxpayer's claim that collection of the tax was barred by the statute of limitations, the Cir-

cuit Court in the last cited case stated in addition to above quoted matter as follows:

“* * * While there was no intentional fraud, willful negligence or purposed attempt at evasion of tax on the part of the taxpayer, the returns not only failed to disclose requisite information but were misleading and calculated to prevent discovery of material facts. Returns of that kind are not effective to start the period of limitation running. Compare *Florsheim Bros. Co. v. United States*, supra; *Lucas v. Pilliod Lumber Co.*, 281 U. S. 245 * * *; *Germantown Trust Co. v. Commissioner*, 309 U. S. 304 * * *; *United States v. National Tank & Export Co.*, 5 Cir. 45 F. 2d 1005, certiorari denied 283 U. S. 839, * * * *Myles Salt Co. v. Commissioner*, 5 Cir., 49 F. 2d 232; *National Contracting Co. v. Commissioner*, 8 Cir., 105 F. 2d 488.”

So, too, in the instant case, there is no question of fraud or willful negligence or any purpose to evade the tax, but we submit that the returns are not of the kind effective to start the period of the statute of limitations.

The contention is made by the plaintiff, as was done in the *Whitmore Oxygen Case*, that the fact that Form TC 71 was filed regularly and has been sworn to by the taxpayer as a true and complete return for sales and use tax should have some effect. This court in the *Whitmore Oxygen Company case* held with regard to this point that, “If no marks, words or figures were placed on the form at all, that the taxpayer merely signed the

printed certification, the form so filed would not constitute a return for either sales tax or use tax."

As heretofore stated, the plaintiff attempts to distinguish the Whitmore Oxygen Case, *supra*. The differences noted, we submit, do not go to the fundamental question involved herein; i.e., whether the forms as filed with the Tax Commission, conceding that the duplicates represent the actual form of the original, constitute a use tax return sufficient to start the statute of limitations running. The audit report reveals that the additional use tax liability results from the failure of taxpayer to report and remit use tax on purchases subject to use tax (Tr. 26), and that portion of the returns herein available relating to purchases made by the taxpayer is blank in every instance.

The case of *Zellerbach Paper Co. v. Helvering* (1934) 293 U. S. 173, establishes the rule that perfect accuracy or completeness is not necessary to rescue a return from nullity. It is to be noted, however, that in that case and similar cases, while the return filed may not have been accurate or complete, it did contain entries of the kind required to be included in the returns by federal law. Plaintiff herein filed returns upon which the entries, in most cases, were addressed to but one of the two tax liabilities and in no instance did it comply with the requirement of the Commission's instructions on Form TC 71 that required plaintiff to set forth its purchases made for use in Utah or at least claim that

none had been so made. Speculation as to how or why the returns were filed as they were would be useless, but it is submitted that an examination of the returns which plaintiff claims started the statute of limitations to running will reveal that they are not complete, and surely do not furnish the required information.

The defendant relies on the Whitmore Oxygen Case, *supra*, as being directly in point and submits that the finding of the Commission, that no use tax return was filed during the period of the audit, is correct and should be sustained and that no error was committed by the Tax Commission in failing to find that the deficiency use tax assessment was barred by any statute of limitation.

It is felt that some discussion should be had with regard to the tax liability asserted by the Commission with regard to the year 1940. It is admitted that the originals and duplicates of the returns for the year 1940 have been destroyed in due course of business by the taxpayer and the Commission and cannot now be produced. Plaintiff's counsel objected to the introduction of certain original and duplicate returns of the taxpayer for the years 1944 to 1949, inclusive, and cites in support of its contention that presumptions are never retroactive, the general rule cited in Vol. 20, *American Juris.* 208. Such, we admit, is the general rule. However, this court in the case of *Gibson vs. Equitable Life Assurance Society* (1934), 84 Utah 452, 36 Pac. 2d 105 at p. 111, had the following to say concerning this principle:

“While it may be conceded that there is ‘no presumption from the fact that a condition exists at a particular time that it existed in the past,’ it is also true that ‘proof of present condition of a thing may sometimes be admissible and material as circumstantial evidence, persuasive as to prior condition or status.’ Jones Comm. on Evid., Vol. 1, pp. 440, 441; Encyl. of Evid., pp. 916, 917; 32 L.R.A. (N.S.) at page 1117, note.”

See also 31 C.J.S., Sec. 140 at page 789, where the following appears:

“As a general rule mere proof of the existence of a present condition or state of facts or proof of the existence of a condition or state of facts at a given time, does not raise any presumption that the same condition or facts existed at a prior date, since inferences or presumptions of fact ordinarily do not run backward.

“However, the general rule is not of universal application. Whether the past existence of a condition or state of facts may be inferred or presumed from proof of the existence of a present condition or state of facts, or proof of the existence of a condition or state of facts at a given time, depends largely on the facts and circumstances of the individual case, and on the likelihood of intervening circumstances as the true origin of the present existence or the existence at a given time. Accordingly, in some circumstances, an inference as to the past existence of a condition or state of facts may be proper, as, for example, where the present condition or state of facts is one that would not ordinarily exist unless it had also existed at the time as

to which the presumption is invoked. An inference that a state of affairs existed at a certain time may be reinforced by evidence that it continued to exist at a subsequent time."

We submit, therefore, that in view of this exception to the general rule, that the Commission could and this court can now consider the course of action taken by the taxpayer in this case in filing Tax Commission Form 71 with the Tax Commission over this period of years, including the years after the audit.

It will be noted that not until after the period of the audit did the taxpayer make any conscientious, genuine endeavor to compute and pay any use tax to the state of Utah. All during the years of the period of the audit for which we have either duplicates or originals of Form TC 71, the taxpayer exercised no conscious endeavor to compute or pay use tax on purchases of tangible personal property made for use in Utah. In one instance, the March-April return of 1942, the taxpayer computed an amount of \$7.44 which purported to be use tax on a purchase made in California. (Tr. 92) This is the only case during the period of the audit for which returns are available in which the plaintiff computed or paid any use tax on a regular return. The only other instance where plaintiff paid any use tax was on a single return filed on the 8th day of January, 1944, paying the use tax on an International-6 truck. This return was made out locally and not by the plaintiff's general offices at St. Louis, Missouri, as were all of the other returns. (Tr. 140)

Surely it is a fair presumption that the plaintiff never had any intention to pay any use tax to the state of Utah, at least during the period of the audit. The schedules set forth in the audit report (Tr. 28-51) indicate the number of items purchased and credited to the Utah account. The Commission, after discussions with the taxpayer's representative, concluded that under the facts of this case there was no negligence and the negligence penalty was never assessed against the taxpayer. It is submitted that the only conclusion that can be reached from the facts as presented to this court is that the taxpayer had no knowledge of the requirement of the Tax Commission with regard to the filing of use tax returns and, consequently, the conclusion is inescapable that no use tax returns were filed during the period of the audit.

While, as heretofore pointed out, there are no returns, either duplicates or originals, available for the year 1940, it will be noted that it was not until the September-October return of 1941 that the duplicates indicate any mark of any kind with regard to the use tax and it is submitted that inasmuch as four returns were filed during the first eight months of the year 1941 (Tr. 99-106) without a mark of any kind with regard to use tax, the fact may be considered by the court as material with regard to the filing of returns during the year 1940, and we submit that it is fair to assume that the returns filed during 1940 were filed in the same manner as were the returns immediately subsequent to that year.

Point 2.

Is the method used by the commission in making this assessment so unconscionable as to be a nullity?

As heretofore indicated it is the position of the defendant herein that the plaintiff is presenting this question for the first time on appeal and consequently it is fundamental that such argument will not be considered by the court.

Under date of December 17, 1947 the plaintiff herein submitted a letter to the Tax Commission (Tr. 54) and attached thereto a petition for review of audit division's findings and for hearing. (Tr. 55) In this petition the plaintiff set forth as grounds for a review and hearing the following:

“1. The findings indicate a tax liability which is excessive.

“2. The findings would purport to authorize a tax for transactions arising prior to December 11, 1944, and would thus purport to authorize an assessment or levy barred by the Statute of Limitations, State of Utah (Laws 1937, Chapter 138, Section 1) which provides that every action for a liability created by the Statutes of the State of Utah shall be commenced within three years. The liability by reason of the findings herein mentioned could not, under the law, therefore, exceed the sum of \$912.78, being the total tax computed for 1944 to 1947, inclusive.

“3. There was no negligence or intentional

disregard of authorized rules, and the findings are therefore erroneous in assessing a penalty of 10% and interest at 12% per annum.

“4. The findings are in other respects, erroneous.”

Unfortunately all of the correspondence had in this matter does not appear in the record. Under date of April 26, 1948 the plaintiff communicated with the Commission and stated as follows:

“The Statute of Limitations being the main exception we are taking to your audit deficiency report, and it is my desire if possible to avoid a trip to Utah for the hearing and the time-consuming operation of checking back through old records to ascertain whether or not the items contained in your audit report were taxable, we will be willing to settle this deficiency without a hearing, if you will waive the penalty of 10% and interest at 12% per annum which is claimed by you for negligence or intentional disregard for authorized rules.

“I will welcome your comments should your Commission be willing to settle on the above basis with the understanding that we could expect a refund if the decision in the case of Whitmore Oxygen Company is in favor of the taxpayer.”

Upon receipt of this letter the Commission considered the matter and the taxpayer was advised that the penalty and a portion of the interest had been cancelled. (Tr. 52) The Commission had determined that there

was no negligence and thus the penalty originally assessed could be deleted. (Tr. 9)

The plaintiff was further advised that the total amount then due was \$5,249.97. (Tr. 52) This amount was paid to the Commission with the understanding that the matter would be heard on a claim for refund and was held up pending the outcome of the Whitmore Oxygen Company case, in which a similar question was being determined by the Supreme Court (Tr. 9).

It should be noted that the settlement thus made was made with the understanding that the taxpayer could expect a refund if the decision in the Whitmore Oxygen Company case was in favor of the taxpayer, and there was no other proviso.

The attention of the court is also called to the preliminary statements and the stipulations of counsel. (Tr. 8-12) It is submitted that nowhere in these statements or stipulations as to the basis of the hearing did the taxpayer, by and through its counsel, assert that the Tax Commission was being arbitrary or unconscionable. It being a fundamental principle of law that matters cannot be raised for the first time on appeal, it is submitted that the asserted arbitrary action by the Commission should not be considered by the court. Even assuming that the court can consider the question of arbitrariness on the part of the Commission, and consider point two, it is submitted that the record does not sustain

plaintiff's position that the Commission acted arbitrarily. The payment in this case, as heretofore pointed out, was made because the taxpayer had no desire to "check back through old records," (Tr. 53) and thus comply with the reasonable request of the examining officer set forth in the summary of the audit report (Tr. 26) as follows:

"The examining officer would appreciate it if the invoices and contracts of his listed in the report would be forwarded to taxpayer's Salt Lake Office, where he could examine them."

Can the plaintiff now seriously contend, having agreed to the settlement of the tax provided the tax would be refunded in the event of a favorable decision in the Whitmore Oxygen Company case, that the Commission's assessment was so arbitrary as to be a nullity? We think not.

It is respectfully submitted, in view of the fact that the question as to the unconscionableness of the assessment is being raised for the first time on appeal, and particularly in view of the fact that there is no substantial evidence in the record that the Commission did act arbitrarily, that the court should not consider point No. 2.

CONCLUSIONS

In conclusion the defendant, State Tax Commission, respectfully submits that, in view of the arguments here-

in presented and the authorities cited, this court should deny petitioner's claims.

WHEREFORE, defendants pray that the decision heretofore rendered by the Tax Commission in this matter be affirmed and judgment rendered accordingly.

Respectfully submitted,

G. Hal Taylor,
Attorney for Defendants