1951

Budget Homes, Inc. v. State Tax Commission : Brief of Plaintiff on Defendant's Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BUDGET HOMES, INC., a corporation,
Plaintiff,
— vs. —
STATE TAX COMMISSION,
Defendant.

Case No. 7605

Brief of Plaintiff

On Defendant's Petition For Rehearing

On Review from the State Tax Commission

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"Consistency, thou art a jewel!"

The origin of this proverb is unknown. (Stevenson's Home Book of Quotations.)

The jewel itself, consistency, is also unknown to the Tax Commission. Look:

> "The issue involved in this case is whether or not the sale of certain real properties was a *corporate* sale." Commission's Brief, P. 29.

But, look now:

> "The issue in this case, however, is *not* who made or participated in the sales, the corporation or

the stockholders . . .'' Commission's Brief For Rehearing, P. 2.

The origin of our proverb and consistency, too, may both be obscure to the Commission but the duty to be constant with this Court should be understood by all litigants — even powerful ones such as arms of the State; even this State Tax Commission.

For one litigant to *affirm* and for another to *deny* that the issue on appeal is whether or not sales were corporate ones might possibly occur, we grant. (Although, how two litigants could be so far apart on the actual issue by the time they have arrived in this Honorable Court is hard to understand.) But, for the same litigant to *assert* positively in one brief and *deny* no less positively in another that that is the issue, defies understanding.

The Tax Commission is cast in a new role. Loser. It is not accustomed to that role in income tax trials. It is a bitter one. In tax trials, the Commission has been at once prosecutor, judge and jury before itself as its own forum. It has not been difficult for it to win like that. But, now before this Honorable Court, the Tax Commission has lost. And so, consistency aside, it now repudiates its self-pronounced issue — the corporate sale — and offers to exchange it for another which it hopes can win. Was the Commission stolid before or is it cunning now? Its same counsel signed both briefs. Strenuously they argued therein for the rule of *Court*

Holding Company, Kaufmann, Wichita Terminal Elevator Company, Meuerer Steel Barrel Company, and *Embrey Realty Company,* which were all decided solely on the issue then claimed by the Commission — the corporate sale issue. (Commission's Original Brief, P. 9). And, strenuously, no less, the Commission's First Brief concluded:

> "This case falls directly within the scope of those cases following the Commissioner vs. Court Holding Company case." (Commission's Original Brief, P. 30.)

But, the issue is not changed. It is still the same: Who made these sales?

STATEMENT OF PLAINTIFF'S POINTS

1. Sudden Death A Fallacious Test — Now As Before.
2. The Liquidation Was Lawful In This Case.

ARGUMENT

1. Sudden Death A Fallacious Test — Now As Before.

The Commission *re*-argues that the corporation continued on; was not immediately dissolved. The fallacy of this position was exposed in our Reply Brief of Plaintiff, P. 16, 20. We pointed out that the corporation resolved to liquidate. This was the first step in this case. And, pursuant thereto, the property was finally distributed. And now this Court properly says in its Opinion (Par. 2, P. 2):

> "Lapse of time between initiation of dissolution proceedings and final liquidation 14 months later does not, viewed in the light of the factual situation in this case, reflect any disorderly or unlawful proceedings, in our opinion."

And what about partial liquidations? They are indeed common. Our Statutes recognize the right of corporations to amend and reduce their capital (which leaves surplus for *partial* distribution to stockholders) so long as the assets remain at 150% over debts. §18-2-44. Moreover, a *partial* liquidation implies that the corporation will continue. The Federal Regulations on Income Tax recognize that no gain or loss results to a corporation from mere distribution of its assets in *partial* or complete liquidation. (See Reply Brief of Plaintiff, P. 16.)

2. The Liquidation Was Lawful In This Case.

The Commission having lost, now wants to jettison the issue which it previously so stoutly claimed — whether the sales were *corporate* ones. Now it says that for want of certain *formalisms* the liquidation must not stand. One such formalism claimed, for example, was the failure to make affidavit that the liquidating resolution was mailed to all non-participating stockholders (whereas, as shown by the Commission's own findings, there were only 4 stockholders — two men and their wives — and all participated in the resolution. Tr. 63).

Invalidity of the liquidation is claimed for other reasons. Section 18-2-17 is said to be athwart such validity. The Section says no corporation shall ". . . divide, withdraw, or in any manner except as provided by law, pay to the stockholders, or any of them, any part of the capital of the corporation . . .". But, what is the purpose of the Section. It can only be to protect (1) other stockholders, and, (2) creditors.

True, if a group of stockholders withdraws or divides the capital, or part of the capital, the non-participating or objecting stockholders — even one minority stockholder — can make them put it back. That is too plain for argument. Prejudice has thus resulted.

And, if all of the stockholders withdraw or divide the capital, or part of the capital, to the prejudice of creditors, the non-consenting creditors — even one

creditor — can make them put it back. Prejudice has again resulted.

But here 4 stockholders — 2 men and their wives — owned all of the stock and they all voted to liquidate their corporation. None dissented. No prejudice resulted to any stockholder. And Prudential Insurance Company, the second largest in the world, is not a creditor any more. Once it was. But it released the corporation and accepted the purchasers in lieu, consenting to the liquidation in every case. If Prudential could have objected once, it cannot now. It is no longer a creditor. The Commission expresses grave concern over "the large debts of the corporation to Prudential Insurance Company (which) were never paid by the corporation". Commission's Brief for Rehearing, P. 14. But the Commission cannot litigate for others; especially not for creditors who are no longer creditors, certainly not for creditors who have consented.

And the Commission itself is not a creditor. By the decision here, it is adjudged this corporation's taxes are paid in *full.* **Just whom then is the Commission looking after?** *Not* the four stockholders who owned all of the stock and voted it all to liquidate. *Not* Prudential who accepted the purchasers as obligors in lieu of the corporation. All of the stockholders and Prudential have participated and consented. And the Commission itself was not prejudiced by the dissolution. It now piously disavows any concern over corporate dissolu-

tions as such "even were the sole and only motive . . . is to avoid tax". Commission's Brief For Rehearing, P. 6. And by the decision here, it is not a *creditor* for it is now adjudged no tax is owing by the corporation.

Upon this record then, there were no non-consenting stockholders or creditors. If there had been any such, it would be time enough to decide upon the points raised by the Commission if and when those persons attacked the liquidation. Clearly, the Statute was designed to protect persons who might be prejudiced. None have been. But if they had, *they,* not the Tax Commission, are the ones to sue and assert the alleged wrong to themselves and demand the property be put back.

All other complaints against the liquidation now asserted are similarly of no force, for example, non-filing with the Tax Commission and Secretary of State of the affidavit of no debts, and of the resolution, and of the notice of publication of the proposed liquidation, and the mailing of same to the non-consenting stockholders. These provisions are all designed for the protection of those who might be prejudiced — stockholders, creditors, or even tax authorities where a tax is actually owing.

But no such prejudice occurred. No stockholder is objecting; the creditor consented and is gone. No tax or debt is owing to the Commission. The latter is asserting pure *formalism,* asking the Court to substitute that for *realism.*

As to the corporation's filing in the District Court its application for dissolution, Jensen explained good cause ("sufficient reason" §18-2-17.11) for its not being done earlier than 90 days after the resolution. The City compelled the Company to install meter boxes around the street hydrants, which it hired done by a contractor. It had to hold the money (approximately $900.00) to abide that installation. (Tr. 48). There was also road work to be done as required by the City. But the City would not permit it to be done until consent of the owner on the opposite side of the street was obtained, and this was had only shortly before the petition for dissolution was filed. (Tr. 60). And the Commission so found. (Tr. 66. See Reply Brief of Plaintiff, P. 20-21). It found that the work was finally finished and paid for January 16, 1950.

The Act directs filing of court proceedings to dissolve 90 days after the resolution to liquidate. But it is not limited. It also permits the filing afterward where there is "sufficient reason". We suspect this was meant to be addressed to the dissolving District Court, not the Tax Commission. It is not a revenue measure. It is not even contained in the chapter relating to taxation. It is part of the chapter on corporations, Title 18. §18-2-17.11. If, for example, in the court dissolution proceedings it were shown that a corporation had resolved to dissolve but had afterward started up again and gone about its ordinary corporate business, the court should rule with-

out any statute, we take it, that the liquidation was abandoned; and the resolution, too.

So the purpose of this Act, we think, was simply to provide against unreasonable lag between resolving and filing. But, to insure also against unreasonable application of the 90 day rule, the liberal saving provision was added authorizing filing afterward for "sufficient reason". This added provision must be given liberal application. And, while we pointed out that this Company and the Commission's Findings, too, showed "sufficient reason" (the delay in finally finishing up the meter boxes and road work), we submit this is a problem for the District Court in the dissolution proceedings, not the Tax Commission as a tax court in this tax trial.

The Commission's argument also assumes that the bare failure to formalize the liquidation of this private company by filing the affidavit and proof of publication, etc., and mailing to non-participating stockholders (there were none) without more makes the whole liquidation void. The argument assumes too much. The statute must be applied in the light of some reasonable purpose. That purpose can only be, we submit, to protect those having a direct pecuniary interest in the corporation, i.e., non-participating stockholders and creditors, even taxing authorities where a tax is actually due. But in this private liquidation, Prudential Insurance Company consented and released the Company, too. And no tax, by the decision now, is owing to the Commission. No

prejudice has occurred. *The Commission does not even claim it has.*

But, the Commission pointed out the non-filing of the affidavit, etc., in its First Brief here (P. 5) and it also acknowledged therein the court dissolution filing was delayed ("held up" it said) "because the corporation had yet to see that the meter boxes or road work were done". Commission's First Brief, P. 5. These points were actually raised. But their argument was "omitted", it is said now. (Commission's Brief For Rehearing, P. 13.) Why? If to provide argument for rehearing in case the Commission lost, it should not commend itself to this Court. But regardless of that, the points were actually made. They must have been considered. The Commission has lost. It and its same counsel now expressly deny the very issue which they so forcefully asserted throughout the trial and appeal.

CONCLUSION

"These already over-burdened taxpayers" (Opn. P. 2) have already paid the taxes on these sales. The four stockholders honestly reported and paid them with their income tax returns. But, the Commission wants more. It wants them taxed again. It wants this corporation to pay the taxes, too. It goes on holding the taxes already paid with *one* hand but reaches out to collect them over again with the *other*. It does not even offer to refund the taxes already paid by the four individuals on the sales although, it insists the corporation owes the taxes; not the individuals. Where individuals over-pay income taxes, the Statute says "they shall be refunded immediately to the taxpayer". §18-14-37. The Commission is not acquainted with the proverb "Consistency, thou art a jewel". It offers no refund, as the law demands, to the four individuals who, it asserts, did not owe the tax; yet it claims it over against the Company. And, throughout the trial and appeal, the Commission asserted and wrote that the issue was one thing; now, on rehearing, it asserts and writes on the contrary that it is another. The jewel, consistency, is missing from the crown this sovereign wears.

Plaintiff respectfully submits that the liquidation of this private company by its four sole stockholders, with the consent of all concerned and to the prejudice of no one whatsoever, stands. The income tax on the sales was properly paid by the four individuals who actually made the sales, as the Opinion here decided. "The presump-

tion that taxpayers generally pay a full and honest tax'' has thus been vindicated. (Opn. P. 2). The corporation did not make the sales and does not owe the tax, as has been decided.

The Decision and Opinion are correct. The petition for rehearing must be denied.

Respectfully submitted,

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