

2001

Youth Tennis Foundations of Utah v. Tax Commission of Utah : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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THE STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

YOUTH TENNIS FOUNDATION OF
UTAH,

PLAINTIFF,
Appellant,

-v-

TAX COMMISSION OF THE STATE
OF UTAH, ET AL.,

DEFENDANTS,
Respondent.

CASE NO. 14350

DEFENDANTS
BRIEF OF RESPONDENT, UTAH STATE

TAX COMMISSION

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FILED

MAR 5 1976

IN THE SUPREME COURT OF THE STATE OF UTAH

YOUTH TENNIS FOUNDATION
OF UTAH,

Appellant,

-v-

STATE TAX COMMISSION
OF THE STATE OF UTAH,

Respondent.

Sales Tax-1973

CASE NO. 14350

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
NATURE OF THE CASE -----	1
RELIEF SOUGHT ON APPEAL -----	1
STATEMENT OF FACTS -----	1
ARGUMENT -----	8
POINT I -----	8
A SALES TAX IS IMPOSED UPON ADMISSIONS TO PLACES OF AMUSEMENT, ENTERTAINMENT OR RECREATION WHICH TAX IS PAID BY THE PUBLIC PURCHASING SAID TICKETS.	
POINT II -----	11
APPELLANT IS NOT ENTITLED TO EXEMPTION FROM SALES TAXES AS A CHARITABLE INSTI- TUTION UNDER THE FACTS WHERE THE MOTIVES OF ITS PRINCIPALS ARE NOT FREE FROM THE TAINT OF EVERY CONSIDERATION THAT IS PERSONAL, PRIVATE OR SELFISH.	
POINT III -----	16
THE CONDUCT OF THE PROFESSIONAL TENNIS TOURNAMENT CHARGING ADMISSIONS TO THE CONSUMING PUBLIC IS NOT "REGULAR" WITHIN THE MEANING OF U.C.A., SECTION 59-15-6.	

CASES CITED

	PAGE
BARRETT INVESTMENT CO. V. STATE TAX COMMISSION, 15 Utah 2d 97, 99, 387 P.2d 998 (1964) -----	8
PALLE V. INDUSTRIAL COMMISSION, 79 Utah 47, 7 P.2d 284 -----	17
STAINES V. BURTON, 53 Pac. 1015 (1898) -----	12
UNITED STATES SMELTING, REFINING & MILLING CO. V. UTAH POWER & LIGHT CO., 58 U. 168, 197 P. 902 -----	9

STATUTES CITED

Utah Code Annotated, Section 59-2-30 -----	5
Utah Code Annotated, Section 59-2-31 -----	5
Utah Code Annotated, Section 59-15-4 -----	8
Utah Code Annotated, Section 59-15-6 -----	11, 12, 15, 16
Utah Code Annotated, Section 59-15-20 -----	9
Utah Code Annotated, Section 68-3-11 -----	9

OTHER AUTHORITIES

Black's Law Dictionary, Rev. Fourth Edition, p. 1450 -----	17
68 Am.Jur. 2d - Sales & Use Taxes, Section 11, pp. 25,26 -----	12

IN THE SUPREME COURT OF THE STATE OF UTAH

YOUTH TENNIS FOUNDATION
OF UTAH,

Appellant,

-v-

STATE TAX COMMISSION OF
THE STATE OF UTAH,

Respondent.

CASE NO. 14350

BRIEF OF RESPONDENT

NATURE OF THE CASE

A sales tax deficiency in the amount of \$1,364.84, together with interest accruing thereon until paid, was assessed against the Youth Tennis Foundation of Utah based upon its sale to the public of ticket admissions to a professional tennis tournament conducted in 1973 at the Special Event's Center, University of Utah.

RELIEF SOUGHT ON APPEAL

Respondent, Utah State Tax Commission, seeks affirmation of its decision upholding the audited sales tax deficiency for 1973.

STATEMENT OF FACTS

References to the Transcript of Proceedings before

the State Tax Commission are designated (TR) with page number following. References to the remaining record on appeal are designated (R) with page number following. References to exhibits are designated (E) with the exhibit number following. References to appellant's Brief are designated (AB) with page number following.

The background facts set forth in appellant's Brief are substantially correct. However, respondent, Tax Commission, takes issue with certain factual statements set forth in appellant's Brief as not being supported by the evidence before the State Tax Commission.

Appellant challenges paragraph eight of the Conclusions of Law which admits that the 1973 professional tennis tournament was similar to other tournaments conducted by the Foundation, but, significantly, the '73 tournament charged admissions, which none of the others had done, and, hence, it was not a "regular" activity of the Foundation. The references set forth in appellant's Brief (AB-3), referring to Exhibit No. 6 and pages 25, 26 and 43 of the Transcript of Proceedings, show no evidence that the Foundation regularly charged admissions to professional tennis tournaments. The language is in the terms of "net proceeds" from the conduct of the tournament. The only reference having any bearing on ticket admissions set forth in appellant's Brief (AB-3) is in the form of a question to the witness, Mr. Freed, which is

ambiguous on whether the net proceeds from tennis tournaments were from player entrance fees and ticket admissions.

(TR-20,21) The State Tax Commission, in rendering its decision, relied upon testimony that tournament income from paid admissions by the public was not regularly the way a tennis tournament was conducted by appellant. (TR-98)

Mr. Freed, a principal in appellant, Youth Tennis Foundation, testified in response to questions of whether the appellant would have still shown a profit had a sales tax been paid, as follows: (TR-98)

Q: In other words, if you were to pay the sales tax as presently assessed in the amount of \$1,400 odd-some dollars, you would still show a net income for 1973; is that correct?

A: Yes, but you see, we testified earlier that the pro tournament would have shown a loss of approximately \$100. The reason for that is we had other tournaments that were profitable that we ran.

Q: Did you pay sales tax on the other tournaments?

A: No. There were no admissions.

Q: What was the source of income from the other tournaments?

A: Entry fees and one of them we held in Las Vegas, the big one.

Q: Were you required to pay any kind of sales or use or transaction tax for conducting the tournament in Las Vegas, Nevada?

A: No. (TR-98)

Appellant's references to the nature and extent of the Foundation's income and outgo (AB-7) discloses the revenue for the past several years (1967 to 1974). The amount set forth of \$12,335.48 net as proceeds from tournaments was not specifically clarified in order to determine whether the greatest portion of those proceeds was from entry fees paid by players and advertising commissions, or ticket admissions purchased by the public.

Appellant correctly sets forth the facts regarding loans from the Youth Tennis Foundation to the Salt Lake Swim and Tennis Club and to the Freed Investment Company. It should be noted, however, that Mr. Freed testified that loans to Freed Investment Company were made to obtain secure, safe and favorable interest income and were not in any sense entered into for the benefit of the company. (Freed Investment Company). In fact, loans were fixed at a higher interest rate than the company would have had to pay at the bank and are in that sense donations to the foundation. (TR-75) Although not brought forth in the testimony, it was believed by the Tax Commission that said Freed Investment

Company deducted an amount for interest payments' expense from its corporate income tax to arrive at taxable income for Freed Investment Company. This money for corporate interest expense was not paid to any bank or savings institution but was paid to and accrued to the benefit of appellant, Youth Tennis Foundation, of which Mr. Freed was a principal.

References in appellant's Statement of Facts (AB-4,5) to Article XIII, Section 2, and U.C.A., Section 59-2-30 and Section 59-2-31, apply to ad valorem property taxes and have no relevancy to sales taxes which are statutory excise taxes imposed upon the transaction of buying and selling personal property.

Appellant sets forth in its Brief that regarding the conduct of the professional tennis tournament in 1973 in question herein, thousands of free admission tickets were provided to juniors daily. However, appellant does not know if any or all of said juniors attended said tournament. (TR-111) When questioned whether the benefit to the junior players to see world-class tennis players would outweigh the loss of receipts from the conduct of the 1973 tennis tournament, Mr. Freed answered "no". (TR-111) Mr. Freed previously testified that if the sales tax is paid as questioned herein, the loss to the appellant from the 1973 tennis tournament would be \$63.58. (TR-5)

Other factors were considered by respondent, Utah State Tax Commission, as having some bearing upon the charitable nature of the conduct of the 1973 professional tennis tournament at the University of Utah's Special Event Center. Appellant, Youth Tennis Foundation, had never applied for an exemption from sales and use taxes as is required by Utah law until challenged on the conduct of the 1973 tennis tournament. (TR-96) There was no separately stated price for sales tax on tickets sold to the general consuming public who bear the economic and financial burden of paying said sales tax. (TR-96) A professional manager was hired to promote the tournament and was paid a certain percentage of advance ticket sales and advertising commissions. (TR-69) Ticket income amounted to approximately \$30,801.65, upon which a tax of \$1,364.84 was imposed. (TR-5) Appellant also testified through Mr. Freed that the Youth Tennis Foundation bought and sold equipment for profit (net and balls). (TR-52-53) See also Exhibit No. 6 and Exhibit No. 7. Mr. Freed also testified that loans were made to Freed Investment Company in the following amounts:

1967	\$ 7,500.00	
1968	7,500.00	
1969	12,500.00	
1970	4,000.00	
1971	5,500.00	
1972	10,500.00	
1973	6,965.74	
1974	<u>6,765.74</u>	
Total	\$ 61,231.48	(TR-75)

Appellant testified that the rate of interest changed from time-to-time, but, at the present time, it was 8 percent. The total amount loaned to Freed Investment Company was approximately \$61,231.48, at an interest rate no higher than 8 percent at any time. (TR-75)

In 1964, appellant loaned to the Salt Lake Swim and Tennis Club the sum of \$42,500.00 for a term of 10 years with interest at 5 percent per annum. (TR-123,23) An additional loan of \$12,000.00 has been made in 1973, so that the total loan outstanding to the Salt Lake Swim and Tennis Club is \$54,500.00. (TR-72) No evidence was introduced by appellant to suggest that at the time the loan to the Salt Lake Swim and Tennis Club was first originated, it was so protected by an equity valued in excess of the club's obligation. (TR-23) In fact, appellant stated that at the time the loan was first made in 1964, there was still doubt and uncertainty expressed as to whether or not the then two-year-old Salt Lake Swim and Tennis Club would be profitable, which concern lead to the purchase of insurance by appellant for the benefit of the Salt Lake Swim and Tennis Club on the life of David L. Freed. (R-162) Mr. Freed indicated that he, from time-to-time, served on the Board of Directors of the Salt Lake Swim and Tennis Club. (R-162) It is questioned whether there was ever any arms-length transaction between appellant, Youth Tennis Foundation, and the Freed

Investment Company, in which some \$61,000.00 was transferred, and the Salt Lake Swim and Tennis Club in which some \$54,500.00 was loaned.

ARGUMENT

POINT I

A SALES TAX IS IMPOSED UPON ADMISSIONS TO PLACES OF AMUSEMENT, ENTERTAINMENT OR RECREATION WHICH TAX IS PAID BY THE PUBLIC PURCHASING SAID TICKETS.

The principal statute in this matter is set forth in Utah Code Annotated, Section 59-15-4, which provides:

"Excise tax--Rate.--From and after the effective date of this act there is levied and there shall be collected and paid:

* * *

(d) A tax equivalent to four percent of the amount paid for admission to any place of amusement, entertainment or recreation."

The above statute requires the collection and payment of sales tax on "admissions." This Court, in Barrett Investment Co. v. State Tax Commission, 15 Utah 2d 97, 99, 387 P.2d 998 (1964), has recognized the collection of sales tax on sales of certain services and admissions to places of amusement, entertainment or recreation.

In construing Utah statutes, the following rules should apply:

"Rules of construction as to words and phrases.--Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have

acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition."
(Utah Code Annotated, Section 68-3-11
(1953))

Where there is doubt respecting true meaning of certain words, then words should be read in light of conditions and necessities which they are intended to meet and objects sought to be attained thereby. (United States Smelting, Refining & Milling Co. v. Utah Power & Light Co., 58 U. 168, 197 P. 902.) Therefore, the above statute should be read as intending to impose a sales tax upon the admission price to any place of amusement, entertainment, or recreation.

The administration of the sales and use tax is vested in the State Tax Commission. Utah Code Annotated, Section 59-15-20, provides:

"The administration of this act is vested in and shall be exercised by the state tax commission which may prescribe forms and rules and regulations in conformity with this act for the making of returns and for the ascertainment, assessment and collection of the taxes imposed hereunder."

Pursuant to the above-cited authority, the Utah State Tax Commission has adopted regulations which apply and should have been applied by the Foundation regarding the collection and payment of sales and use tax. The following sales tax regulations are pertinent:

1. S-2 provides that the nature of the sales tax is a transaction tax imposed upon admissions to any place of amusement, entertainment, or recreation. The purchaser is the actual taxpayer and the vendor is charged only with the duty of collecting the tax from the purchaser and paying the tax to the State.

2. S-23 provides that taxpayers who sell tangible, personal property or related services for resale, or to exempt customers, are required to keep records verifying the nontaxable status of such sales. The burden of proving that a sale is for resale or otherwise exempt shall be upon the person who makes the sale. (Emphasis added.)

3. Sales Tax Regulation S-33 provides:

"Admission defined.--The term 'admission' means the right or privilege to enter into a place including seats and tables reserved or otherwise and other similar accommodations and charges made therefor. The amount paid for the right to use a reserved seat or any seat in an auditorium, theatre, circus, stadium, schoolhouse, meeting house or gymnasium to view any type of entertainment is taxable. The right to use a table at a night club, hotel, or roof garden is taxable, whether such charge is designated as a cover charge, minimum charge or any such similar charge, and the amount paid for such right is subject to the tax. This is true whether the charge made for the use of the seat, table, or similar accommodation is combined with an admission charge proper to form a single charge, or is separate and distinct from an admission charge, or is itself the sole charge.

"Where an original admission charge carries the right to remain in a place, or to use a

seat or table, or other similar accommodation for a limited time only, and an additional charge is made for an extension of such time, the extra charge is paid for 'admission' within the meaning of the law. Where a person or organization acquires the sole right to use any place or the right to dispose of all the admissions to any place for one or more occasions, the amount paid for such right is not subject to the tax on admissions. Such a transaction constitutes a rental of the entire place whether or not it is so designated. However, if the person or organization in turn sells admissions to the place, the tax will apply to amounts paid for such admissions."

4. S-34 provides:

"Place of amusement defined.--The phrase 'place of amusement, entertainment or recreation' is broad in meaning but conveys the basic idea of a definite location. The amount paid for admission to such a place is subject to the tax, even though such charge includes the right of the purchaser to participate in some activity within the place. For example, the sale of a ticket for a ride upon a mechanical or self-operated device is an admission to a place of amusement."

Based upon the above-cited statutes and regulations, an audited sales tax deficiency has been imposed against the admission price to the professional tennis tournament sponsored by the appellant.

POINT II

APPELLANT IS NOT ENTITLED TO EXEMPTION FROM SALES TAXES AS A CHARITABLE INSTITUTION UNDER THE FACTS WHERE THE MOTIVES OF ITS PRINCIPALS ARE NOT FREE FROM THE TAIN OF EVERY CONSIDERATION THAT IS PERSONAL, PRIVATE OR SELFISH.

Utah Code Annotated, Section 59-15-6, provides certain exemptions from sales tax and states:

"... and all sales made to or by religious or charitable institutions in the conduct of the regular religious or charitable functions and activities; ... shall be exempt from taxation under this act... ."

The general rule in the State of Utah is that the burden is on the taxpayer claiming exemption from taxation.

"... An exemption from taxation is never presumed but must be expressly and clearly conferred in plain terms and cannot be read into the statute. Provisions in a sales tax statute granting exemptions from the tax thereby imposed are to be strictly construed against the person who claims to be exempt under such provisions, and in favor of the taxing authority, in the absence of express legislative intent that the exemption is to be construed otherwise. All doubts, or all reasonable doubts, are resolved against the exemption... ."
(68 Am.Jur.2d Sales & Use Taxes, Section 11 pp. 25-26)

The initial question appears to be whether or not the Foundation is a "charity" within the meaning of the exemption set forth in Utah Code Annotated, Section 59-15-6. The definition of what constitutes a "charity" is difficult. One of the definitions suggested by the Court in Staines v. Burton, 53 Pac. 1015 (1898), provides that charity is:

"... whatever is given for the love of God, or for the love of your neighbor in the Catholic and universal sense,--given from these motives and to these ends,--free from the stain or taint of every consideration that is personal, private, or selfish."
(At page 1016) (Emphasis added.)

The facts presented at the formal hearing show that, although the Foundation is a nonprofit corporation, organized to promote "tennis", other indirect benefits accrued to its founders and organizers:

1. Revenue of the Foundation has been loaned for various personal purposes. Loans totalling some \$51,231.48 have been loaned to the Freed Investment Company at an interest rate not greater than 8 percent. Many times the interest rate was below 8 percent. Said loans were not really arms-length transactions, and it is doubtful that any demand for repayment could not be enforced when Mr. David Freed was a principal of appellant and also a principal owner of Freed Investment Company. If any loans to Freed Investment Company were, in fact, in excess of interest loans which could have been obtained from commercial banks, which is doubtful, then said interest payments represented an expense item deduction on corporate income tax returns of Freed Investment Company, although said interest expense accrued to the benefit of the Youth Tennis Foundation of Utah, appellant herein, in which Mr. Freed is a principal.

2. There were principal loans from appellant to the Salt Lake Swim and Tennis Club, of which Mr. Freed is also, or has been, a director, in the total amount of some \$54,000.00 at 5 percent per annum. Again, there is doubt as to whether this is legally enforceable as an arms-length transaction.

3. One of the actual expense items of appellant includes insurance premiums on the life of David L. Freed,

which expense ended in 1973. (TR-27, 101, 102) The reasons for the insurance are not clear, but it was stated that, if David L. Freed died, the loan of the appellant Foundation to the Salt Lake Swim and Tennis Club would be paid off in full, with all proceeds going to the Foundation, and none to the estate of David L. Freed. (TR-27) It was not clear why David L. Freed was liable for the debts of the Salt Lake Swim and Tennis Club.

4. The Foundation maintains that it purchases tennis equipment and balls at wholesale prices for sales to local schools at less than retail prices; however, a profit is made by the Foundation on said sales. (TR-53,57) Certain amounts of tennis equipment were purchased at wholesale and stored at the Salt Lake Swim and Tennis Club with Mr. David L. Freed and the club manager being the only ones having personal access to that equipment. (TR-108,109) But, significantly, Mr. Freed testified that he has never personally given any of the equipment to any individual, junior or otherwise, nor has Mr. Fairclough, the attorney. (TR-128) The manager of the Swim and Tennis Club has not ever personally given any equipment to any youngster. (TR-129) Apparently, the tennis professionals are the only ones who have made any distribution. (TR-128)

It should also be noted that appellant never sought an exemption from sales and use tax as a charitable organization

until at a point in time following the 1973 professional tennis tournament at the University of Utah's Special Event Center when questioned by sales tax auditors. The above-cited U.C.A., Section 59-15-6, granting an exemption from sales and use tax is not a self-executing statute, but requires that appellant file an application for exemption, which appellant has failed to do until this proceeding.

Respondent takes issue with the cases cited by appellant, dealing with ad valorem property tax laws as not being relevant to establish an exemption from sales taxes, which is a statutory excise tax imposed upon the transaction of buying and selling personal property. The ad valorem property tax statutes impose certain governmentally set mill levies upon property values determined at a fixed assessment levels. The two taxes are basically very different, and exemptions set forth in the Utah Constitution and general Utah statutes are fundamentally different. Hence, references to property tax statutes for determining exemption are immaterial and irrelevant.

Appellant also cites many cases from other jurisdictions dealing with exemptions for charitable organizations similar to appellant's organization. It should be noted at the outset that there are many varying and differing statutes throughout the United States, many of which are

greatly dissimilar to the Utah sales and use tax statutes. Many statutes impose gross proceeds taxes and other transaction taxes. References by appellant to cases outside of the jurisdiction of the State of Utah are irrelevant unless appellant can show similar sales and use tax statutes, exemptions and intent in setting forth exemptions for charitable organizations.

The above-cited facts seem to indicate that appellant utilizes its financial resources and revenue in a manner that is not free from the stain or taint of every consideration that is personal, private or selfish.

POINT III

THE CONDUCT OF THE PROFESSIONAL TENNIS TOURNAMENT CHARGING ADMISSIONS TO THE CONSUMING PUBLIC IS NOT "REGULAR" WITHIN THE MEANING OF U.C.A., SECTION 59-15-6.

The second aspect of the exemption set forth in U.C.A., Section 59-15-6, provides that the charitable activities and functions must be "regular." The conduct of the professional tennis tournament was similar to other tournaments conducted by the Foundation; however, significantly, the 1973 professional tournament charged admission prices which none of the other tournaments had charged.

(TR-98) Appellant has failed to submit any evidence or clarify on the record before the State Tax Commission whether other tournaments had charged admission prices to the consuming public, and, if so, how many of those tournaments

actually generated revenue from admissions. The amount of dollar income from admissions was never presented to the State Tax Commission. In fact, appellant, through Mr. Freed, testified (TR-98) that there was no previous sales tax on any of the tournaments, because there had been no admissions charged. Apparently, appellant has sponsored other professional tennis tournaments and has collected entry fees and advertising commissions. The conduct of the 1973 professional tennis tournament was not regular in terms of income and receipts. (See appellant's Exhibit No. 6, lines 5 and 6.)

In addition to the income irregularity, there were other irregularities. The conduct of the professional tennis tournament was not regular in terms of time expended by the principals of appellant in its promotion. Appellant hired a professional promotor who was entitled to a percentage of advanced ticket sales and advertising, which action appears to be profit-motivated in nature.

"Regular" is defined by Black's Law Dictionary, Rev. Fourth Edition, at page 1450, as:

"Steady or uniform in course practice or occurrence; not subject to unexplained or irrational variation. Regular is also the antonym of 'casual' or 'occasional'."
(Palle v. Industrial Commission, 79 Utah 47, 7 P.2d 284)

Sales Tax Regulation S-43 provides that all sales made to or by religious or charitable institutions in the conduct of their regular religious and charitable functions are not subject to sales tax, providing the property so sold or purchased is to be used, consumed or sold in carrying on the institution's regular religious or charitable purposes. The exemption granted by the statute under this rule does not apply to institutions merely operating upon a nonprofit basis. Every institution claiming exemption under this rule must obtain from the State Tax Commission an approval of its claim for such exemption. No such prior approval was obtained by appellant.

It is hereby submitted that the 1973 professional tennis tournament conducted by appellant was an activity not within the regular course of the charitable activities of the Youth Tennis Foundation as defined, such as to entitle it to exemption from sales tax under Utah statutes and regulations. Sales taxes should have been collected and paid on admissions to said pro-tennis tournament.

Respectfully submitted,

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