1972

Atlantic Richfield Company, A Corporation v. State Tax Commission of Utah : Brief of Plaintiff

Utah Supreme Court

IN THE

SUPREME COU

OF THE

STATE OF UTA

ATLANTIC RICHFIELD CO
PANY, a Corporation,

Pl

vs.

STATE TAX COMMISSION
UTAH,

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BRIEF OF PL

Upon Writ of Review to
of the State Tax Co

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ATLANTIC RICHFIELD COMPANY, a Corporation,

Plaintiff,

vs.

STATE TAX COMMISSION OF UTAH,

Defendant.

Case No. 12823

BRIEF OF PLAINTIFF

STATEMENT OF THE CASE

This proceeding is upon Writ of Review to review a decision of the State Tax Commission of Utah, dated the 7th day of January, 1972, by which it assessed a motor fuel tax against plaintiff for motor fuel exported from the State of Utah during the period of January 1, 1968, through December 21, 1969.

DISPOSITION BEFORE THE TAX COMMISSION

On January 7, 1972, the Utah State Tax Commission made its order assessing a motor fuel excise tax against taxpayer and ordered the same to be paid totaling in all the sum of $75,376.59, together with interest in the amount of $5,252.91 (R. 5, 8, 9).

RELIEF SOUGHT ON REVIEW

Plaintiff seeks a review of the proceedings and for an order vacating the judgment assessed against it by the State Tax Commission of Utah.

STATEMENT OF FACTS

The parties stipulated to the relevant facts necessary to determine the above entitled action before the State Tax Commission, and the Findings of Fact adopted by the Tax Commission fairly represent the facts of the instant matter. A summary of the material facts are as follows:

Taxpayer now is and at all times hereinafter mentioned, has been a licensed distributor of motor fuel (gasoline) in the State of Utah (R. 1, 2).

During the period of January 1, 1968, through December 21, 1969, taxpayer failed to report gallonage of motor fuel exported from Utah on line 8 of monthly reports filed with the State of Utah on Form TC-109 Rev., and to report an equal amount of tax exempt purchases on line 4 of said reports (R. 2, 6). Through an accounting inadvertance taxpayer treated such unreported receipts from Continental Oil Company as Nevada exchange receipts. This same error was made for twenty-four consecutive months (R. 2, 3). The gallonage received on exchange from Continental Oil Company at Pioneer Pipeline Terminal, North Salt Lake, and transported to various bulk plants owned by taxpayer in eastern Nevada

was reported to the Nevada Tax Commission and tax paid thereon (R. 2, 3). On July 20, 1970, taxpayer filed a supplemental motor fuel tax return reflecting the gallonage thus received and exported (R. 5).

The Utah State Tax Commission concluded that Section 41-11-20, Utah Code Annotated 1953, requires taxpayer to report motor fuel (gasoline) exported from Utah within 180 days from the date of exportation or become liable for the excise tax to the full extent as if said motor fuel had been sold in the State of Utah (R. 8).

Taxpayer claims said exports to be exempt under Section 41-11-20, Utah Code Annotated 1953, which reads as follows, to-wit:

> "Sec. 41-11-20. Export Sales Exempt. — Said excise tax shall not apply to sales of motor fuel actually exported from this state, and on proof of actual exportation upon blanks furnished by the state tax commission and in accordance with the rules and regulations promulgated by it, the state tax commission shall, as the case may be, either collect no tax or refund the amount of tax paid to the person who paid it on his application made within 180 days after exportation."

ARGUMENT

POINT I.

THE STATUTE, SECTION 41-11-20, UTAH CODE ANNOTATED 1953, IS CLEAR AND UNAMBIGUOUS.

Plaintiff submits that Section 41-11-20, Utah Code Annotated 1953, set forth above, is clear and unambiguous and provides two alternatives to the Tax Commission in the case of tax exempt exports — 1., collect no tax, or 2., refund tax previously paid upon application for refund filed within 180 days from date of export. The 180 day limitation patently applies only to claims for refund and Defendant is in error in its interpretation of the statute that failure to file evidence of export within 180 days makes the exemption unavailable.

With respect to the use of the word "or", we quote from 50 *American Jurisprudence* 267, paragraph 281:

> "In its elementary sense, however, the word 'or' as used in a statute, is a disjunctive particle indicating an alternative. It often connects a series of words or propositions, presenting a choice of either. If the disjunctive conjunction 'or' is used, the various members of the sentence are to be taken separately."

And quoting from the Utah Supreme Court in *Ringwood* v. *State*, 8 U. 2d 287, 289, 333 P. 2d 943 (1959):

> ". . . Focusing attention upon the words purporting to give the right of revocation, it is to be noted that the driver is deemed to give his consent to a chemical test of '* * * his breath, blood, urine or saliva * * *'. The words being used in series, the only connective being the disjunctive 'or' it applies to the whole series. Therefore the ordinary and usual meaning of the language would be that the subject is deemed to give his consent to a test of some one of the designated substances,

> or of another, but not all of them. That is, of his breath, or of his blood, *or* of his urine, *or* of his saliva."

Quoting from *Mountain States Telephone & Telegraph Co.* v. *Public Service Commission, et al.*, 107 Utah 502, 155 P. 2d 184, 185 (1945):

> "We therefore address ourselves to its meaning, keeping in mind one of the cardinal rules of statutory construction, viz., that the interpretation must be based on the language used, and that the court has no power to rewrite a statute to make it conform to an intention not expressed. 'The legislative intent being plainly expressed, so that the act read by itself, or in connection with other statutes pertaining to the same subject, is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. * * * If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage.' 2 Lewis' Sutherland Statutory Construction (2nd Ed.) p. 701."

Here plaintiff has paid no tax on the exports in question in Utah but reported the same to the Nevada Tax Commission and paid a tax thereon. Plaintiff has, albeit belatedly, filed with the Defendant Commission proof of export upon blanks furnished by the state tax commission and the State of Utah has suffered no damage thereby. The State of Utah, under the circumstances of the instant matter, should not be allowed to unjustly enrich itself.

POINT II.

THE DEFENDANT'S TAX REGULATION NO. 3 DOES NOT SUPPORT DEFENDANT'S BASIS FOR THE ASSESSMENT.

Section 41-11-16 of the Utah Code Annotated 1953, provides that the Tax Commission shall administer the motor fuels (gasoline) tax law and gives the Commission the power to make and promulgate such reasonable rules and regulations pertaining to the administration and enforcement of the law as the Commission deems necessary. Under the powers so granted, the Defendant Tax Commission has adopted various rules pertaining to the administration of the motor fuels tax law. Rule No. 3 pertains to exports. Such rule is quoted in Findings of Fact (R. 6, 7, 8) and, for the convenience of the Court, is quoted here:

> "Sales of motor fuel, as defined in the motor fuels (gasoline) tax law (chapter 11, title 41, Utah Code Annotated 1953, as amended), made by a licensed distributor in the State of Utah, and actually exported from the state, will be allowed as exempt sales provided the sale and delivery of the motor fuel meets with one of the following requirements:
>
> 1. *Delivery is made to a point outside the State of Utah by a common or contract carrier for a licensed distributor in the State of Utah;*
>
> 2. Delivery is made to a point outside the State of Utah in a vehicle owned and operated by a licensed distributor in the State of Utah;

3. Delivery is made at a point in the State of Utah to a licensed distributor or importer of another state for use or sale in that state;

4. Delivery is made, in a drum or similar container, at a point in the State of Utah to a person for use in another state.

Each export sale must be supported by records that will show the following information:

In the case of a licensed distributor, records shall show date of exportation, consignee or purchaser and destination of motor fuel. In cases wherein the exporter is not a licensed distributor, credit must be claimed through a licensed distributor and the following requirements must be met:

A. Exporter must furnish Form TC-112 'Proof of Exportation — Motor Fuel' showing date of exportation, purchaser or consignee and destination of motor fuel.

B. Licensed distributor shall then make note of the date this information is furnished and shall make claim for credit due on the motor fuel return for the same period in which the TC-112 'Proof of Exportation-Motor Fuel' was received.

In all cases, claims for credit or refund must be made within 180 *days from date of export,* whether claim is made through a licensed distributor or directly to the State Tax Commission. All persons authorized to do so must file claim directly to the State Tax Commission.

Motor fuel delivered into the fuel tank or auxiliary fuel tanks of any vehicle owned and/or operated by a resident of this state or any other state is held to be taxable." (Emphasis is supplied.)

That Plaintiff is, and at all times mentioned herein has been, a licensed distributor of motor fuel in the State of Utah is admitted. In the case of distributors licensed in Utah, exports from Utah are reported on Form TC-110 D-1. Form TC-110 D-1 is not even mentioned in the Regulation No. 3 quoted above and creates an ambiguity and uncertainty with respect to a licensed exporter exporting gas for his own account. The deliveries of motor fuel which are the subject of Defendant's assessment were made by common carrier truck transport from the Pioneer Pipeline Terminal in North Salt Lake to Plaintiff's bulk plants located in Eastern Nevada and fall squarely within the requirements outlined in sub-paragraph 1. of Regulation No. 3.

Plaintiff's records showed the date of exportation, the consignee or purchaser and the destination of the motor fuel exported. Again, falling squarely within the requirements of Regulation No. 3.

And in the penultimate paragraph of Regulation No. 3 the requirement, ". . . claims for credit or refund must be made within 180 days from date of export, . . ."

In our argument under Point I we outline our reasoning tending to support our contention that the Statute provides for a 180 day limitation only in cases where there is a claim for refund.

Plaintiff submits that the Regulation even more clearly establishes that the 180 day limitation applies only to claims for refund and does not support the Tax

Commission's theory that the exemption is lost unless exports of motor fuel are reported within 180 days from exportation.

POINT III.

THE TAX COMMISSION BY ITS INTERPRETATION AND APPLICATION OF REGULATION NO. 3 DELETES THE SUBSTANTIVE PROVISIONS OF SECTION 41-11-20, UTAH CODE ANNOTATED, 1953.

Those charged with administering the law should not be allowed to avoid a statutory exemption by an unreasonable interpretation thereof, but should be required to administer the law in a reasonable manner with a view to effectuating the Legislative intent.

The Tax Commission by its Regulation No. 3 substitutes the words of the statute, "collect no tax" for "claims for credit", thus disregarding the substantive portion of Section 41-11-20 which provides that there will be no excise tax collected on motor fuel exported from the State and arbitrarily imposes a limitation on the exemption by making it unavailable if motor fuel exported from the state is not reported to the Tax Commission within 180 days from exportation.

In *Crystal Car Line, et al.* v. *State Tax Commission, et al.*, 110 Utah 426, 174 P. 2d 984, 987 (1946), the Utah Supreme Court stated:

> "The power to tax is purely a legislative function and unless the legislature has provided for the taxation of the property any attempt to levy and assess a tax on property is void."

Plaintiff contends that the 180 day limitation sought to be imposed by the Tax Commission is completely outside the boundaries established by the Statute and the Rule is arbitrary and capricious.

POINT IV.

THE ASSESSMENT AS CONSTITUTING A PENALTY.

Chapter 11, Title 41, of the Utah Code Annotated 1953, wherein the motor fuels (gasoline) tax law is found, provides various penalties for various offenses, but there is no penalty provided, as such,, for the late reporting of export sales.

Section 41-11-21 provides that any violation of the law not otherwise specifically provided for is a misdemeanor and punishable by a fine of not less than $25 nor more than $1,000 or imprisonment in the county jail for not more than 90 days or both.

By the attempted extinguishment of the exemption allowed, the Tax Commission seeks to levy a penalty of 100% of the tax involved. This is without legislative authority and is clearly arbitrary.

As a general proposition it is recognized that penal statutes should be strictly construed. *General Petroleum*

Corporation of California v. *Smith*, 157 P. 2 356 (Ariz. 1945).

We find no decisions of the Utah Courts on the precise question but in conjunction with various cases involving forfeitures under property tax laws, the Utah Supreme Court has indicated that statutes providing for forfeiture of property for non-payment of taxes must be construed in favor of the taxpayer and against the taxing authority. See *Fivas* v. *Petersen*, 5 U. 2d 280, 300 P. 2d 635 (1956),, and *Mecham* v. *Mel-O-Tone Enterprises, Inc.*, 23 U. 2d 403, 464 P. 2d 392 (1970), and various cases cited.

Plaintiff submits that in the matter at hand, the Tax Commission, by denying the exemption provided by Sec. 41-11-20 Utah Code Annotated 1953, for a late filing of a report is imposing a penalty against plaintiff of 100% of the tax involved without authority of law and, in so doing, is acting arbitrarily and capriciously.

CONCLUSION

There is no statute or other basis for the Tax Commission's judgment against taxpayer in the amount of $75,376.59 together with interest in the amount of $5,252.91. On the contrary, Section 41-11-20, Utah Code Annotated 1953 and Tax Regulation No. 3 support plain-

tiff's position that sales of motor fuel made by a licensed distributor and actually exported from the state are exempt sales and not subject to tax.

The relief prayed for by plaintiff should be granted.

Respectfully submitted,

GUSTIN & GUSTIN

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