

1991

Wendell E. Brumley, et al. v. Utah State Tax Commission, et al. : Petition for Rehearing

Utah Supreme Court

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Priority No. 11

CLERK SUPREME COURT

IN THE UTAH SUPREME COURT

WENDELL E. BRUMLEY, et al.,)	
)	
Plaintiffs/Cross-Appellants,)	
)	
vs.)	Appeal No. 91-0242
)	
UTAH STATE TAX COMMISSION,)	
et al.,)	Priority No. 11
)	
Defendants/Appellants.)	

Interlocutory Appeal of Summary Judgment granted Plaintiffs in the Tax Commission of the Third Judicial District Court, the Honorable David Young presiding.

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I. PETITION FOR REHEARING

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, Defendants/Appellants, Utah State Tax Commission, et al. ("Commission"), respectfully petition the Utah Supreme Court for a rehearing on the Court's decision, dated September 2, 1993.

II. BACKGROUND

Defendants initiated a timely appeal, and Plaintiffs timely cross-appealed, seeking review of a decision of the Tax Court of the Third Judicial District granting Plaintiffs partial summary judgment. On November 7, 1991, this Court exercised its discretion in accepting the interlocutory appeal of the lower court's decision in view of the important issues raised.

The appealed Findings, Conclusions, and Partial Summary Judgment left open and undecided a number of issues relating to the class and to remedies. By its decision dated September 2, 1993, this Court affirmed the Tax Court's decision ordering declaratory relief and dismissal of Plaintiffs' claim under 42 U.S.C. §1983, remanded the case to amend the class, and reversed the award below of costs and attorneys fees.

Defendants petition this court for rehearing to consider Utah's pre-deprivation procedures, to further limit the size of Plaintiffs' class to those who complied with all state laws, and, if relief is ultimately ordered, to allow legislative latitude in fashioning appropriate relief.

III. SUMMARY OF ARGUMENT

The State petitions the Court for rehearing of its decision issued September 2, 1993. Federal retirees have already been fully remedied as required by the Federal Due Process Clause, and are entitled to no further relief under state law. If the Court decides that a remedy is required, it should grant the legislature wide latitude to craft it. The Court should amend the class to be consistent with its holding on the requirement that class members comply with all state laws necessary to obtain an individual income tax refund.

A. The Court must address the fundamental issue in this case -- that federal retirees are entitled to no further relief because the State has satisfied all Federal Due Process requirements. A decision that Section 59-10-529 (overpayment) applies, begs this fundamental federal question.

Once minimum federal due process requirements are met, the Court is free to determine if any relief is required under State law. Davis v. Michigan, standing alone, does not compel refunds. Federal Retirees had the opportunity to challenge the validity of the exemption for state retirees, without duress and prior to the assessment or collection of any tax, for each of the years they sought declaratory relief. Plaintiffs could have requested a declaratory judgment either through the courts or before the Tax Commission prior to paying any contested taxes. The State's declaratory relief provisions provided a remedy that satisfied

the requirements of Federal Due Process; no further relief is necessary.

B. This Court should consider granting the legislature wide latitude in crafting a remedy. These remedies could include, but are not limited to:

1. Retroactive taxation of state retirees;
2. An offsetting charge to state retirees;
3. A combination of tax refunds, offsetting charges, and retroactive taxation of previously favored taxpayers;
4. A full refund without interest; or
5. Credits against future taxes.

Finally, the district court should be ordered to abstain from ordering any relief pending the special legislative session set to commence on October 11, 1993.

C. The Court should require the district court to amend the class to be consistent with this Court's holding on exhaustion of administrative remedies. The district court's class definition is inconsistent with this Court's jurisdictional holding. The district court's class definition omits the requirement for filing individual claims or amended returns. This Court has validated a declaratory action on behalf of class members to determine the issues of retroactivity and payment under protest but has not validated a class refund of individual income tax. The Utah Tax Code contemplates individual action to perfect a claim for refund of individual income tax. The case should be

remanded to the district court to fine-tune and narrow the class consistent with this Court's ruling.

IV. ARGUMENT

A. CONSISTENT WITH THE REQUIREMENTS OF FEDERAL DUE PROCESS ARTICULATED IN MCKESSON AND HARPER, THE THRESHOLD ISSUE THIS COURT MUST CONSIDER IS THE AVAILABILITY AND ADEQUACY OF PRE-DEPRIVATION PROCEDURES UNDER UTAH LAW.

The Court must address the fundamental issue in this case -- that federal retirees are not entitled to further relief because the State has satisfied all Federal Due Process requirements. Brumley v. Tax Comm'n, No. 910242 at 7 (Utah, September 2, 1993); see also State's Opening Brief at 84-87; State's Reply Brief at 15-16. The Court's opinion is silent on this core issue. The Court's decision that retirees are entitled to relief under Section 59-10-529 (overpayment) begs this core issue. The Court need not address the overpayment issue because the State has satisfied, through its predeprivation procedures, all Federal Due Process requirements. Under McKesson v. Division of Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida, 496 U.S. 18, (1990), once minimum Federal Due Process requirements are met, further relief is not necessary.

The United States Supreme Court in McKesson, at 39 n.21 found:

[I]f a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary."

The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure. See Mississippi Tax Comm'n, supra, 412 U.S. at 368, n. 11, 93 S.Ct., at 2187, n. 11 "[W]here voluntary payment [of a tax] is knowingly made pursuant to an illegal demand, recovery of that payment may be denied".

Thus, if Utah provided, free of duress, a meaningful opportunity for the taxpayer to challenge the assessment prior to a financial sanction, the Due Process Clause is satisfied.¹ Once the minimum requirements of the Due Process Clause are satisfied, further relief is not mandated. McKesson, 496 U.S. at 52, n.36 ("The state is free, of course, to provide broader relief as a matter of state law"). It is clear that Davis v. Michigan, 489 U.S. 803 (1989) "did not mandate refunds, let alone decide whether refunds should be given for past years." Brumley at 6.

Federal Retirees had ample opportunity for forty years to challenge the validity of the exemption for state retirees, without duress and prior to the assessment or collection of any tax, for each of the years they sought declaratory relief. Plaintiffs could have requested a declaratory judgment either through the courts or before the Tax Commission. See Utah Code

¹ "[W]hen a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress'. . . ." McKesson, 496 U.S. at 39, n.21.

Ann. § 63-46b-21(1) (1989); Utah Admin. R861-1-5A(Q) (formerly R865-05A(P) (1987) & A12-01-1:5(6) (1983)).² Accordingly, for any of the years for which federal retirees seek declaratory relief, it could have been requested months before any tax return was due.

The State's declaratory relief provisions provided a remedy that satisfies all requirements of Federal Due Process, thus obviating the necessity of refunds to federal retirees. This is the fundamental issue of this case that this Court should reexamine and issue an explicit ruling.

B. IF RELIEF IS REQUIRED, THE COURT SHOULD ALLOW THE LEGISLATURE LATITUDE IN FASHIONING A REMEDY.

This Court has granted declaratory relief only on the legal questions raised below. Brumley at 4. It has not decided what specific remedies federal retirees may receive. This Court should consider granting the legislature wide latitude in crafting a remedy. The U.S. Supreme Court has given states great latitude to remedy the effect of an illegal tax. Harper v. Virginia Dep't of Taxation, 113 S.Ct. 2510, 2520 (1992). "[A] State found to have imposed an impermissible discriminatory tax retains flexibility in responding to this determination." Id. (Quoting McKesson, 496 U.S. at 39-40). In Harper, the Supreme

² Consistent with this Court's decision here, the Commission would have been required to sustain the state retiree exemption. However, a decision by the Commission could have been appealed directly to this Court.

Court again quoted McKesson, where it stated: "[A] State may either award full refunds to those burdened by an unlawful tax or issue some other order that create[s] in hindsight a nondiscriminatory scheme." Id. at 2520.

The Court should consider a variety of remedies or allow the legislature to adopt one. These could include, but are not limited to:

1. Retroactive taxation of state retirees;
2. An offsetting charge to state retirees;
3. A combination of tax refunds, offsetting charges, and retroactive taxation of previously favored taxpayers;
4. A full refund without interest³; or
5. Credits against future taxes.

Cf. McKesson, at 39-40. Hagge v. Iowa Dep't of Rev. and Finance, No 92-1377 Slip Op. (Iowa 1993).

Finally, the district court should be ordered to abstain from ordering any relief pending the special legislative session set to commence on October 11, 1993. This Court should plainly state that the issues it has not decided are left open for judicial and legislative action prior to entry of a final judgment. This would allow the legislature to perform its constitutional function of allocating funds. After the

³ Cf. Pendell v. Dep't of Rev., 847 P.2d 846 (Or. 1993), (Interest is a creation of statute, not a constitutional right).

legislature acts, the Court could then determine whether the legislative remedy is consistent with the Court's decision.

C. THE COURT SHOULD AMEND THE CLASS TO MAKE IT CONSISTENT WITH THE COURT'S HOLDING ON EXHAUSTION OF ADMINISTRATIVE REMEDIES.

The Court should require the district court to amend the class to be consistent with this Court's holding on exhaustion of administrative remedies. The district court certified the class as:

All persons and the estates of deceased persons who received federal retirement benefits or annuities and who have paid Utah state income tax on their federal retirement benefits for the 1984, 1985, 1986, 1987 and/or the 1988 tax years.

(R. 289.)

In delineating the jurisdiction of the district court and the Tax Commission, this Court held:

The district court, after deciding the legal issues and concluding that refunds should be paid to class members, properly left to the Commission the responsibility of making the factual determinations as to whether each class member has timely filed an amended return or a claim and whether each member has paid state income tax on federal retirement income for the years in question.

Brumley at 4-5. Accordingly, the district court's class definition is inconsistent with this Court's jurisdictional holding. The district court definition in effect expands the substantive rights of the class by ignoring the legal requirement for filing individual claims or amended returns. In addition,

this Court's decision may require further amendment of the class certification depending on the course of the factual determinations left to the Commission by this Court.

This Court has validated a declaratory action on behalf of class members to determine the issues of retroactivity and payment under protest. Brumley, at 4. However, it has not validated a class refund. This Court has stated that: "the Commission [has] the responsibility of making the factual determination as to whether each class member has timely filed an amended return or a claim and whether each member has paid state income tax on federal retirement income". Id. at 5

The class certification, in and of itself, cannot expand the rights the taxpayer enjoys under substantive and procedural Utah law. The Utah Tax Code contemplates individual action to perfect a claim for refund. Utah Code Ann. § 59-10-531(1) (refund of individual income tax). This is consistent with Plaintiffs' representations at the time of class certification that there is no class mechanism before the Commission. (R. 215.) It is also consistent with the Commission's representations in 1989 to class counsel that there is no mechanism for class claims before the Commission, but that individual claims must be filed. (See attached Exhibit 1, Currently on file with this Court as Exhibit E of Plaintiffs' Answer and Memorandum Opposing Defendants' Petition for Permission to Appeal from Interlocutory Order Assuming Jurisdiction, Case No. 900109.)

This Court should direct the district court to limit the class to those persons who filed individual claims or amended returns with the Commission. Those persons who took no individual action to perfect their claims should be deleted from the class definition.⁴ The case should be remanded to the district court to refine and narrow the class consistent with this Court's ruling in Brumley and for further proceedings as may be required.

V. RELIEF REQUESTED

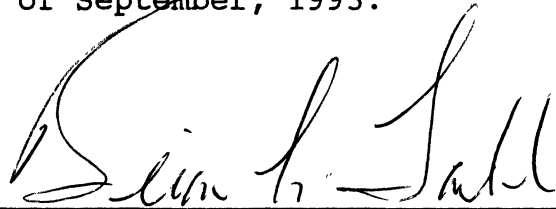
This Court should plainly state that the issues it has not decided are left open for judicial and legislative action prior to entry of a final judgment. This Court should rehear the case because Utah has already provided all legally necessary relief to Plaintiff class members. If the Court concludes that additional relief is necessary, it should allow the Legislature to propose a remedy that satisfies due process while allowing elected officials to allocate funds and balance programs. The district court should be ordered to amend the class definition to be consistent with this Court's decision.

⁴ Although a class claim was filed with the Tax Commission on behalf of plaintiffs, it was filed prior to certification of any class. Accordingly, all federal retirees should have filed individual claims or amended returns because there was no justifiable reason for relying on a class claim when a class had not yet been certified.

RULE 35 CERTIFICATION

As required by Appellate Rule 35, I certify that this petition is presented in good faith and not for delay.

DATED this 30TH day of September, 1993.

A handwritten signature in cursive script, appearing to read "Brian L. Tarbet", written over a horizontal line.

BRIAN L. TARBET
Assistant Attorney General
Attorney for Tax Commission

CERTIFICATE OF SERVICE

I hereby certify that on the 30TH day of September, 1993,
I caused two true and correct copies of the foregoing PETITION
FOR REHEARING to be mailed, first class, postage prepaid, to the
following:

JACK C. HELGESEN
RICHARD W. JONES
LYON, HELGESEN, WATERFALL, JONES
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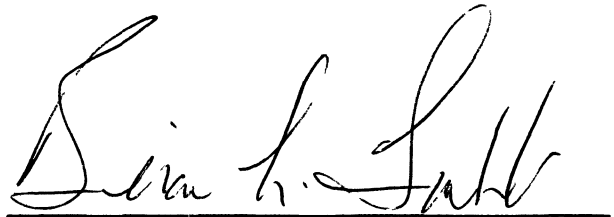
A handwritten signature in cursive script, appearing to read "David L. Ladd", is written over a horizontal line.

EXHIBIT 1



STATE OF UTAH

R. PAUL VAN DAM - ATTORNEY GENERAL

236 STATE CAPITOL • SALT LAKE CITY, UTAH 84114 • TELEPHONE 801-538-1015 • FAX NO. 801-538-1121

JOSEPH E. TESCH
CHIEF DEPUTY ATTORNEY GENERAL

September 11, 1989

Jack C. Helgesen
HELGESEN & WATERFALL
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4768 Harrison Blvd.
Ogden, Utah 84403

RE: Claim for Refund for 1985, dated April 17, 1989;
Class Claim For Refund, for 1986, 1987 and 1988,
dated June 5, 1989; Class Claim For Refund, for
1985, dated April 17, 1989.

Dear Mr. Helgesen:

The Commission is in receipt of the above-referenced documents. It is the Commission's position that the above-referenced documents do not constitute an adequate filing pursuant to Title 59, Chapter 10 of the Utah Code Ann., 1953, as amended. Should the taxpayers you purport to represent feel themselves entitled to a refund under the statute in question, it is his or her responsibility to file the appropriate amended return or extension in a timely manner. The documents which you have filed provide no basis for the Commission to issue refunds as insufficient information has been provided to calculate the amount of the refund, if any.

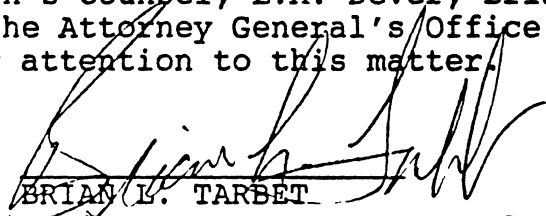
Additionally, Section 59-10-531 indicates that no claim may be filed for refund or credit on a tax for which the taxpayer has sought judicial review. As you are aware, your firm has filed a class action complaint against the State Tax Commission, the Commissioners and Executive Director in the Third Judicial District Court in and for Salt Lake County, Case No. 89-0903618.

The Commission also has reason to believe that many of

Mr. Helgesen
September 1, 1989
Page Two

the class claimants have also filed individual amended returns and/or extensions in order to preserve their rights. It is an administrative impossibility to recognize these class claims for refund.

Should you have any questions or comments, please feel free to contact the Commission's counsel, L.A. Dever, Brian L. Tarbet or Reed Stringham at the Attorney General's Office, at 538-1019. Thank you for your attention to this matter.



BRIAN L. TARBET
Assistant Attorney General

cc: R.H. Hansen, Chairman
Joe B. Pacheco, Commissioner
Roger O. Tew, Commissioner
G. Blaine Davis, Commissioner
Clyde R. Nichols, Jr.