1965

Allan E. Mecham, Frank v. Nelson and Lorin N. Pace v. State Tax Commission of Utah and Treasurer of the State of Utah : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

ALLAN E. MECHAM,
FRANK V. NELSON
and LORIN N. PACE,
Plaintiffs and Appellants,

— vs. —

STATE TAX COMMISSION OF
UTAH and TREASURER OF
THE STATE OF UTAH,
Defendants and Respondents.

APPELLANTS'

Appeal From the Judgment
Third Judicial District Court for
Honorable A. H. Ellett,

ALLAN E.
FRANK V.
LORIN N.
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Plaintiff*

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALLAN E. MECHAM,
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and LORIN N. PACE,
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— vs. —

STATE TAX COMMISSION OF
UTAH and TREASURER OF
THE STATE OF UTAH,
Defendants and Respondents.

Case
No. 10410

APPELLANTS' BRIEF

NATURE OF THE CASE

This is an appeal from a judgment dismissing appellants' (plaintiffs') Second Amended Complaint and holding that Article VI, Section 25 of the Constitution of Utah cannot be invoked to prevent the retroactive application of Substitute House Bill No. 81 (income tax) passed by the 36th Legislature March 11, 1965, by a simple majority vote. See House Journal, 60th day (yeas 40, nays 24, absent 5). See Senate Journal, 59th day (yeas 15, nays 12).

DISPOSITION BY THE TRIAL COURT

The case was submitted to the trial court on defendants' Motion for a Summary Judgment. The Court granted the motion and judgment was entered, as amended, on June 4, 1965. In substance, the Court's ruling held that Article VI, Section 25 of the Constitution of Utah was not violated by the retroactive enforcement of Substitute House Bill No. 81.

RELIEF SOUGHT

Appellants seek to reverse the judgment of the Court below.

STATEMENT OF FACTS

The facts of the case are not in dispute. The 36th Legislature of the State of Utah, on or about March 11, 1965, passed by a simple majority vote, an individual income tax law known as "Substitute House Bill No. 81." Said Substitute House Bill No. 81 provided in Section 3:

> "The tax rates provided for herein shall apply to all returns filed on or after January 1, 1966 for taxable years *commencing on or after January 1*, 1965." (Emphasis added)

Article VI, Section 25 of the Constitution of Utah states:

> "All acts shall be officially published and no act shall take effect until so published nor until 60 days after the adjournment of the session at which it passed *unless the Legislature by a vote of two-*

thirds of all members elected to each house shall otherwise direct." (Emphasis added)

The 36th State Legislature did not by a vote of two-thirds of all members elected to each house, pass this said Substitute House Bill No. 81. As a matter of fact, the House of Representatives, on the 60th day, voted 40 yeas, 24 nays, and 5 absent; and, the Senate, on the 59th day, voted 15 yeas and 12 nays. The act became law 60 days thereafter on May 11, 1965. Prior to the effective date, the State Tax Commission by its bulletin of March 23, 1965, demanded withholding of income tax under this said statute, commencing April 1, 1965, from all State income taxpayers.

The action was brought in the Court below under the Declaratory Judgment Act of the State of Utah, and more particularly, Title 78-33-2, wherein it is stated:

> "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the instrument, statute, . . . and obtain a declaration of rights, status, or other legal relation thereunder."

ARGUMENT

POINT I.

THE COURT ERRED IN NOT DECLARING SUBSTITUTE HOUSE BILL NO. 81 EITHER (a) UNCONSTITUTIONAL; OR (b) INAPPLICABLE TO INCOME EARNED BY INDIVIDUALS FROM JANUARY 1, 1965 TO MAY 11, 1965.

The State Tax Commission will collect individual income tax at the new rates established in Substitute House Bill No. 81 commencing January 1, 1965. See Utah State Tax Commission Bulletin, dated March 22, 1965 (R. 14). Said the Commission on March 22, 1965 prior to May 11, 1965, the date upon which appellees claim the act was effective:

> "The 1965 Legislature amended the State Income Tax Law to increase the tax rates from existing scale of 1 per cent through 5 per cent to a new scale of 2 per cent through 6½ per cent *effective* for taxable years *on and after January* 1, 1965." (Emphasis added)

The effective date of H. B. No. 81, according to Section 5 of the Act (R. 12) and by implementation of the Tax Commission bulletin aforesaid (R. 14) is January 1, 1965.

Article VI, Section 25 of the Utah Constitution expressly requires:

> "All Acts shall be officially published, and no Act shall take effect until so published, nor until 60 days after the adjournment of the session at which it passed, *unless the Legislature by a vote of two-thirds of all members elected to each house shall otherwise direct.*" (Emphasis added)

There is no dispute that H. B. No. 81 failed to receive the required two-thirds vote (R. 16).

Respondents rest their case upon the retroactive operation as distinguished from the retroactive effective

date of H. B. No. 81. The Court below summarily ruled the Act did not take effect until May 11, 1965, but on that date the new tax rates went into operation, retroactively from January 1, 1965, and thus Article VI, Section 25, was not involved and there was no violation of the Utah Constitution.

Appellants reason that to distinguish the date of operation from the effective date of the Act avoids the clear meaning of Article VI, Section 25, of our Constitution. Why must the reasoned judgment of judicious minds struggle to hold the effective date was May 11, 1965, when the Legislature and the public knew on March 11, 1965, on the date of its passage, the new tax rates were effective January 1, 1965? Was it actually necessary to wait out the 60-day period after passage merely to say officially on May 11, 1965, the law "is now effective, but it now dates back to January 1, 1965, for its enforcement"? This is like saying you are obligated as of yesterday but I will wait until tomorrow to tell you what you already know about your obligation of yesterday.

Even the Tax Commission bulletin of March 22, 1965, long before the May 11, 1965 date, used the term "effective" and not "operation" in advising the public of liability under the Act. Moreover, the appellee Tax Commission commenced its collection procedures prior to the effective date of May 11, 1965, by requiring payments at the new rates on withholding taxes as of April 1, 1965. Call it what you may, effective January 1, 1965, the new rates apply and it will be the dollars earned on that date

and thereafter to which the new tax rates apply. Had the law backed up the taxing period one, two or ten years, the effective date would still have been the date the dollars were earned as set forth in the law, and not the period commencing 60 days from the close of the Legislative session.

A retrospective or retroactive law is one which takes away or impairs vested or accrued rights acquired under existing law. *In Re: Ross*, (Oklahoma) 207 Pac. 2d 274. 50 Am. Jur. 492, Section 476.

A statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions already passed, is retrospective and void. *Murphy* v. *Limpp*, (Missouri) 147 S.W. 2d 420. See also *Graham Paper* v. *Gehner et al.*, 59 S.W. 2nd 49 and 11 A.L.R. 510.

Many states have adopted constitutional provisions against retroactive laws. See Colorado Constitution, Article II, Section 11; Idaho Constitution, Article XI, Section 12; Montana Constitution, Article XV, Section 15; Ohio Constitution, Article II, Section 28. Other states, including Utah, have made retroactive or retrospective legislation conditioned upon a two-thirds vote of both Houses of the Legislature.

Retroactive or retrospective legislation has never been judicially construed in reference to Article VI, Section 25 of the Utah Constitution. Cases in this jurisdic-

tion and other jurisdictions referring to this constitutional provision, as well as similar provisions in other state constitutions, have all treated the two-third vote requirement a constitutional condition to make the enactment effective at the time of passage, or at a date in the future and for emergency, health, safety or other reasons. See for example, the case of *State* v. *Reynolds*, 24 Utah 29, wherein this Court held that the part of Article VI, Section 25, of our Constitution, empowering the Legislature to otherwise determine the effective date of a legislative enactment, meant:

> "That no act shall take effect until officially published, unless the Legislature by a two-thirds vote shall otherwise direct, nor shall any act take effect until 60 days after the adjournment of the session at which it passed, unless the Legislature likewise shall direct."

The word "effective" means in actual operation. *Krause* v. *Henry* (Ohio), 35 N.E. 2d 169; and, *Woods* v. *Riley*, (Texas) 211 S.W. 2d 591. See Webster's New International Dictionary—"in actual operation."

Appellants do not quarrel with the fact that retroactive tax laws, onerous as they are, have been upheld by our courts. For example, see (R. 17) *Garrett Freightlines* v. *State Tax Commission*, 103 Utah 390, 135 Pac. 2d 523.

Appellees argue (R. 17):

> "If no specific constitional prohibition to retrospective laws exist, the Legislature may enact prospective laws which have retroactive application."

The *Garrett case* involved the Diesel Fuel Tax Law, passed by the Utah Legislature in 1941, which imposed an excise tax "at the rate of 4 cents per gallon on the use of fuel by any user thereof on and after January 1, 1941". Article VI, Section 25, of the Utah Constitution was not raised as a defense to the retroactive application of the 1941 Diesel Fuel Law in that case. The 1941 Diesel Fuel Tax Law, known as Senate Bill No. 18, passed the Senate in 1941 by a vote of 21 yeas, 1 nay and 1 absent; and, passed the House of Representatives by a vote of 50 yeas, 0 nays and 10 absent. Accordingly, this 1941 Senate Bill No. 18 clearly received the required two-thirds vote and met the Legislative requirement of Article VI, Section 25 of our Constitution to collect the tax effective January 1, 1941. (See Senate Journal 1941 — 26th day, page 254; and, House Journal 1941 — 32nd day, page 278.)

The 1941 State Legislature also imposed a tax on Federal salaries retroactive 1½ years to January 1, 1940, but here again the two-thirds vote required by Article VI, Section 25 of the State Constitution was secured. This Act, Senate Bill 285, passed the Senate by a vote of 21 yeas, 0 nays and 2 absent; (1941 Senate Journal, page 443) and, passed the House of Representatives by a vote of 55 ayes, 0 nays and 5 absent (1941 House Journal, page 555).

In the only case before this Court involving the retroactive application of a tax law (*Garrett case*, supra), the question here involved simply could not have been raised

because the required two-thirds vote of both Houses of our State Legislature had been received. This Court may have ruled differently had the Legislature failed to enact the retroactive Diesel Fuel Tax law in 1941 by less than the two-thirds vote of both Houses.

POINT II.

THE COURT ERRED IN NOT DECLARING TAX LIABILITY TO COMMENCE MAY 11, 1965, SINCE THE CLEAR MEANING OF *ON OF AFTER* JANUARY 1, 1965 IN H. B. 81, COULD ONLY MEAN "AFTER" IN THE ABSENCE OF A TWO-THIRDS VOTE OF BOTH HOUSES OF THE STATE LEGISLATURE.

The State Legislature, in Section 5 of H. B. 81, declared:

> "The tax rates provided for herein shall apply to all returns filed on or after January 1, 1966 for taxable years commencing *on or after* January 1, 1965."

QUERY: Is tax to be collected on individual income received on January 1, 1965, and thereafter, or is tax to be collected on income received sometime after January 1, 1965? If after January 1, 1965, is May 11, 1965, the date taxes are collectable under H. B. 81 in the absence of the required two-thirds vote of both Houses of the State Legislature?

The word "or" used in a statute is disjunctive and ordinarily means one or the other of two but not both.

See *Brewer* v. *Brewer,* 129 S.E. 2nd 738 and *Kornbrodt* v. *Equitable Trust,* 2 Pac. 2d 236.

Speaking of the construction of a statute, where the respondent sought to construe "or" to mean "and" in a statute, this Court stated:

> "To construe the statute as do the respondents, the word 'or' in the statute must read 'and.' That sometimes is done in deference to evident meaning of context, or when necessary to harmonize two provisions of statute, or give effect to all of its provisions, or to save the statute from the vice of containing two subjects and to make it constitutional. But the word 'and' can never be substituted for 'or' in a statute when the meaning of the language used in the statute is clear and there is nothing in it to call for the substitution." Weir v. Bauer, et al, 75 Utah 498 (at page 520).

In respondents' bulletin to all employers, dated March 22, 1965, (R. 14) the Tax Commission uses the words "*on and after* January 1, 1965," and not the words used in the H. B. 81 "*on or after* January 1, 1965."

It is not necessary to change "or" to "and" to preserve the constitutionality of Section 5 of H. B. 81, and Respondents have no right to thusly change the meaning by substituting "and" for "or."

Courts generally will not declare an Act unconstitutional or invalid for uncertainty where reason demands and the intention can be taken or presumed according to what is consonant with reason and good discretion. Taxing statutes, are in case of doubt, to be con-

strued strictly against the taxing authority and in favor of those on whom the tax is levied. *Norville* v. *State Tax Commission,* 126 A.L.R. 1318, 97 Pac. 2d 937, 98 Utah 170. See also *Morrison-Merrill & Company* v. *Industrial Commission* (1933), 81 Utah 363, 18 Pac. 2d 295; *Chez, ex rel Weber College* v. *Utah State Building Commission* (1937), 93 Utah 538, 74 Pac. 2d 687.

A Court will *not* insert words in a statute or ordinance which is plain and unambiguous and does not need the insertion of words to carry out its terms, since to do so would be an act of legislation and not an act of construction is found in the following cases: *Newhall* v. *Sanger* (1876), 92 U.S. 761, 23 L. ed. 769; *Standard Oil Co.* v. *Birmingham,* (1918) Ala. 97, 79 So. 489; *Maricopa County* v. *Pratt,* (1936) 7 Cal. (2d) 60, 59 P. (2d) 962; *Litchfield* v. *Bridgeport,* (1926), 103 Conn. 565, 131 A. 560; *Metropolitan L. Ins. Co.* v. *Jacobs,* (1938) 1 A (2nd) 603; *Re Hitchens* (1920), 12 Del. Ch. 417, 109 A. 574; *Haworth* v. *Chapman,* (1933) 113 Fla. 591, 152 So. 663; *Boise Street Car Co.* v. *Ada County,* (1931) 50 Idaho 304, 296 P. 1019; *Com.* v. *Lipginski,* (1926) 212 Ky. 366, 279 S.W. 339; *State ex rel. Cobb* v. *Thompson,* (1928) 319 Mo. 492, 5 S.W. (2d) 57; *Moruzzi* v. *Federal Life & Casualty Co.,* (1938) 42 N.M. 35, 75 P.(2d) 320, 115 ALR 407; *Re Davies,* (1926) 242 N.Y. 196, 151 N.E. 205; *Abernethy* v. *Pitt County,* (1915) 169 N.C. 631, 86 S.E. 577; *Catlin* v. *Pickett,* (1918) 262 Pa. 351, 105 A. 503; *Re Nicholson,* (1930) 300 Pa. 299, 150 A. 466; *Re Hereford Twp. Road,* (1913) 22 Pa. Dist. R. 781; *State ex rel United States*

Fidelity & G. C. v. *Smith,* (1924) 184 Wis. 309, 199 N.W. 954.

One of the prime requisites of any statute, and particularly of a taxing statute, is certainty. *Williams* v. *Richmond,* 134 A.L.R. 833, 177 Virginia 477, 14 S.E. 2d 287. The subject of a tax must be determined from the statute or ordinance imposing it, and must rest upon the judgment of the legislative body and not upon the whims of an administerial officer. See *Williams* v. *Richmond,* supra.

CONCLUSION

In conclusion, it would appear that H. B. 81 is clear and unambiguous provided the Court gives meaning to the words "*and or after* January 1, 1965" to mean the effective date of the statute which is May 11, 1965. House Bill 81 did not receive the required two-thirds vote of the State Senate and the State House of Representatives and under Article VI, Section 25, of the Utah Constitution, the effective as well as the date of operation of the statute must be May 11, 1965.

Respectfully submitted,

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