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

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs-Appellants,

vs.

STATE TAX COMMISSION OF
UTAH and TREASURER OF
THE STATE OF UTAH,

Defendants-Respondents.

Case No.
10410

BRIEF OF RESPONDENT

Appeal from the Judgment and Order of the
3rd District Court for Salt Lake County
Honorable A. H. Ellett, Judge

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Clark, Supreme Court, Utah

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Case No.
10410

STATE TAX COMMISSION OF
UTAH and TREASURER OF
THE STATE OF UTAH,

Defendants-Respondents.

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellants, members of the 36th Utah State Legislature and citizens of Salt Lake County, State of Utah, appeal from a judgment of the District Court of the Third Judicial District, Honorable A. H. Ellett, Judge, ruling that House Bill No. 81, enacted by the 36th Utah State Legislature, providing for an increase in the income tax effective for the taxable year beginning January 1, 1965, is constitutional.

DISPOSITION IN LOWER COURT

The appellants filed a complaint, challenging the constitutionality of House Bill No. 81, enacted by the Utah State Legislature. Thereafter, an amended and second amended complaints were filed and the respondents filed an answer. On June 4, 1965, the trial court entered its amended judgment of dismissal, finding that House Bill No. 81, enacted by the 36th Utah State Legislature, became effective May 11, 1965, and was not unconstitutional.

RELIEF SOUGHT ON APPEAL

The respondents submit that the decision of the trial court should be affirmed.

STATEMENT OF FACTS

The 36th Utah State Legislature enacted House Bill No. 81 (R. 10). This bill amended Sections 59-14-2, 59-14-47, 59-14-67 and 59-14-70, Utah Code Annotated, 1953. The appellants challenge the constitutionality of the act insofar as it purports to raise the individual income tax and impose the increased rates effective during the taxable year beginning January 1, 1965. Section 5 of House Bill No. 81 (Laws of Utah, 1965, Chapter 125, Section 5) provides:

“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.”

Although the pleadings of the parties do not disclose by what margin of votes House Bill No. 81 was enacted, the House Journal of the 36th Legislature discloses that the bill passed by a vote of 40 yeas to 24 nays, with five members of the House of Representatives being absent. In the Senate, the bill passed by 15 yeas and 12 nays. The act had no special provision providing that it become effective at any other time than May 11, 1965, although it did provide, as noted above, for an increase in income taxes to be applied for the taxable year beginning January 1, 1965.

The appellants seek a determination that since Article VI, Section 25, of the Constitution of the State of Utah provides that “[a]ll acts shall be officially published, and no act shall take effect until so published, nor until sixty days after the adjournment of the session at which it passed, unless the Legislature by a vote of two-thirds of all the members elected to each house, shall otherwise direct”, the tax rate could not constitutionally apply for the taxable year beginning January 1, 1965, or, at least, should not apply prior to May 11, 1965, the effective date of the act, because of the failure of the bill to be passed by a vote of two-thirds of the members of each house.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DETERMINING THAT HOUSE BILL NO. 81,

AS ENACTED BY THE 36TH UTAH STATE LEGISLATURE, WAS CONSTITUTIONAL OR, AS RESPECTS ITS APPLICATION TO THE INCOME TAX PAYABLE UNDER THE ACT, THAT IT APPLIES TO THE TAXABLE YEARS BEGINNING JANUARY 1, 1965.

The appellants contend that House Bill No. 81, enacted by the 36th Utah State Legislature, on March 11, 1965, does not conform to the requirements of Article VI, Section 25, of the Constitution of the State of Utah, which requires:

“All acts shall be officially published, and no act shall take effect until so published, nor until sixty days after the adjournment of the session at which it passed, unless the Legislature by a vote of two-thirds of all the members elected to each house, shall otherwise direct.”

House Bill No. 81 provides that the increased rates provided for therein “shall apply to all returns on or after January 1, 1966 for taxable years commencing on or after January 1, 1965.” The act does not provide for any special effective date.

The tax increase resulting from the act applies to income earned during the taxable year commencing January 1, 1965 before, up to and subsequent to the passage of the act. It is because of this retroactive inclusion of income under the increased tax rates that appellants claim that the bill, which did not become effective until sixty days after the adjournment of the

Legislature, is unconstitutional. Further, the appellants contend that House Bill No. 81 was not intended to apply to income earned prior to the effective date of the bill, or May 11, 1965.

It should be noted that the bill does not require returns filed in 1965 to be subject to the increased rates but only returns filed on or after January 1, 1966, which is after the effective date of the bill. Thus, the effective date of the act is not changed beyond the sixty-day period provided in the Constitution, but the operative effect of the act provides for retrospective application. It is important to note that the tax on income earned in 1965 is not due and payable until the due date of the 1965 tax return on April 25, 1966. (Section 59-14-19, Utah Code Annotated, 1953.)

It is not in dispute that House Bill No. 81 failed to obtain the two-thirds necessary to impose an effective date other than that of sixty days after the adjournment of the 1965 Legislature. However, it is the respondents' position that the act does not provide for any other effective date and that appellants confuse the question of the effective date of the act with the scope or operation of the act. Respondents submit that House Bill No. 81 did in fact become effective of May 11, 1965. To rule otherwise would render the statute unconstitutional and the appellants' contention that the bill became effective at some other period is neither legally nor factually sound. In *Blackrock Copper Mining and Milling Co. v. Tingey*, 34 Utah 369, 98 Pac. 180 (1908), this Court stated:

“ * * * [W]e again repeat, what this court has so often declared, that, when an act or statute is attacked upon the ground that it violates some provision of the Constitution or in some way is repugnant to the instrument, it must clearly appear to be so, or the act or statute must be held valid. This doctrine applies with especial force to a law which sets in motion a sovereign power such as the power of taxation when it is alleged that the Constitution prohibits the exercise of the power. In such a case, unless it is made to appear beyond a reasonable doubt that the sovereign power to impose taxes in a particular way is withheld from the Legislature, the law imposing a particular tax must be upheld.”

In accord with this view are the cases of *Pleasant Grove City v. Holman*, 59 Utah 242, 202 Pac. 1096; *Jackson v. Bonneville Irr. District*, 66 Utah 404, 243 Pac. 107; *Howe v. Tax Commission*, 10 U.2d 362, 353 P.2d 568. Such a ruling is only in keeping with the established proposition that every presumption must be indulged in favor of constitutionality. *Thomas v. Daughters of Utah Pioneers*, 114 Utah 108, 197 P.2d 477.

In view of the well established principle of statutory and constitutional construction indicated above, it is apparent that House Bill No. 81 had an effective date of May 11, 1965. It is, of course, reasonable for House Bill No. 81 to have an effective date of May 11, 1965, and still cause all persons covered by the act to include in their 1966 income tax returns, at the increased rates, the taxable income earned during the year 1965. This is merely another way of noting the dis-

inction between retroactive operation of a statute and retroactive effective date.

Although many states have adopted express constitutional provisions against retroactive laws¹, Utah has no such constitutional provision. In the absence of such a constitutional provision, the general rule is that retroactive laws are not prohibited. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541. The clear meaning of Article VI, Section 25, of the Constitution of the State of Utah, makes it apparent that it was adopted only to govern the effective date of acts of the Legislature and not to prohibit retroactive laws. Thus, in *Garrett Freight Lines v. Tax Commission*, 103 Utah 390, 135 P.2d 523 (1943), this court observed:

“Neither the Federal Constitution nor the Utah Constitution has any provision in terms prohibiting retroactive legislation—excepting that which forbids the enactment of ex post facto laws.”

It is apparent from the *Garrett Freight Lines* case that the appellants' argument, relating to the provisions of Article VI, Section 25, is not applicable. It may be argued that the *Garrett Freight Lines* case did not involve a situation where the Legislature had passed a law for retrospective operation without two-thirds vote, but it is apparent that the court felt that Article VI, Section 25, did not inhibit an act being passed, effective sixty days after the adjournment of the Legislature,

¹ Colorado Constitution, Article II, Section 11; Idaho Constitution, Article IX, Section 12; Montana Constitution, Article XV, Section 15.

which had retrospective application, even though two-thirds of the Legislature did not concur therein. There can be no doubt as to the right of the Legislature to pass statutes which reach back, change, or modify the effect of prior transactions, providing there is no constitutional provision against retrospective law. Cooley, *Constitutional Limitations*, 8th Ed. (1937), page 772. If no specific constitutional prohibition to retrospective laws exist, the Legislature may enact prospective laws which have retroactive application. No constitutional objection exists in Utah, and, hence, no prohibition exists preventing House Bill No. 81 from having retrospective application. *Garrett Freight Lines v. Tax Commission*, supra.

It is well established that a statute may have both an effective date and an operative date. Generally, the operative date is prospective but may, on occasion, be retrospective. *County of Los Angeles v. Lamb*, 61 Cal. 196; *Williams v. City of Vallejo*, 36 Cal. App. 133, 171 Pac. 834; *Callahan v. City and County of San Francisco*, 68 Cal.App.2d 286, 156 P.2d 479; *Washington Oil Co. v. State*, 159 S.W.2d 57 (Texas). Generally, the effective date of legislation is that date fixed by the Constitution, and, in the absence of a legislative intention to establish some other date, no other date beyond the constitutional provision is effective. *Portland-Pendleton Transportation Co. v. Devin*, 26 Wash. 2d 333, 173 P.2d 994. In the instant case, it is apparent that the Legislature intended no other effective date than that provided by the Utah Constitution.

It is well established that a tax or revenue bill can

take effect prospectively but thereafter cause retroactive tax liability to those effected by the passage of the act. This was the situation before this Court in *Garrett Freight Lines v. Tax Commission*, supra. In that case, in 1941, the Utah Legislature enacted an excise tax of four cents per gallon on the use of diesel in the State of Utah. The act was passed by the Legislature on February 13, 1941, and, without question, became effective May 13, 1941. It purported to impose the tax on the use of the fuel in the State on or after January 1, 1941. The taxpayer asserted that the part of the act which purported to impose a tax upon the use of fuel prior to the effective of the act was invalid. Although the argument was based upon one of due process, it appears that the Court carefully considered all the constitutional objections raised by the taxpayer and, in discussing retrospective legislation, stated:

“ ‘If the Constitution does not expressly forbid retrospective legislation, the Legislature may impose a business tax upon business done prior to the time the statute was adopted.’ 2 Cooley, Taxation, 4th Ed., Sec. 522.

“ ‘In apportioning the tax between the individuals, there is no valid objection to making it on consideration of a state of things that may now have come to an end; as where a tax is imposed on the extent of one’s business for the preceding year instead of upon an estimate of the business for the year to come.’ Ib. Sec. 523, citing *People v. Gold Co.*, 92 N.Y. 383; *Drexel v. Commonwealth*, 46 Pa. 31.

* * *

“Appellant concedes that income taxes may be based upon income earned within a reasonable period prior to the enactment of the taxing act. This is well established by decisions of the United States Supreme Court and many state courts.”

While the specific question raised by the appellants was not directly passed upon by this Court, the fact remains that a revenue bill, passed by the Utah State Legislature with an effective date of May 13, 1964, was held to legally impose a tax retroactively from its effective date to January 1, 1941. Further, the Court expressly noted no constitutional objection, either State or Federal, prohibited such action. The legislation in the instant case is no different from the statute in the *Garrett* case insofar as its effective and operative date features are concerned.

In the case of *Welch v. Henry*, 305 U.S. 134, the United States Supreme Court was presented with an analogous situation. A 1933 Wisconsin statute imposed a tax upon net income in graduated rates. The taxpayer's 1933 income tax return and the tax for that year were due and filed March 15, 1934. In 1935, the Wisconsin Legislature increased tax liabilities for the years 1933 and 1934 by means of an act effective March 27, 1935. The United States Supreme Court rejected a challenge to the constitutionality of the statute, stating:

“ * * * For more than seventy-five years it has been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is

enacted, and in some instances during the year of the preceding session.”

Admittedly, this case did not deal with the same constitutional provision invoked by the appellants. However, it is apparent from this decision that the question of operation of a statute may be entirely different from the question of the effective date of the enactment.

In *United States v. Hudson*, 299 U.S. 498, the United States Supreme Court observed that it was a uniform practice “to make” tax statutes “retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in the process of enactment, or within so much of the calendar year as preceded the enactment.” In almost every instance where this has been done by the state or Federal legislatures, courts interpreting such statutes have stated them to be effective at a date certain but held them to include income earned prior to their enactment. Clearly, this demonstrates the simple proposition, apparently not grasped by the appellants, that a statute may have an effective date at one time but be sufficiently broad in scope and operation to relate to previous periods. No case has been cited by the appellants, nor have the respondents been able to find a case, holding that a statute, which is retroactive in application or retrospective in its definition of taxable income, was unconstitutional for the reasons which appellants attack the instant statute. The terms “retroactive” and “retrospective” are synonymous, and when applied to a statute denote a law which operates on matters which occurred

before it came into effect or which looks or acts backward from its effective date. *Graham Paper Co. v. Gehnen*, 232 Mo. 155, 59 S.W.2d 49; *Los Angeles Bond and Securities Co. v. Heath*, 120 Cal. App. 128, 7 P.2d 1089.

A case very similar to the proposition presented in the instant case is *Leon v. Torruella*, 99 F.2d 85 (1st Cir. Puerto Rico). This case involved the Organic Act of Puerto Rico which provided that no act of the Legislature should take effect until ninety days after its passing unless otherwise directed by a two-thirds vote of the Legislature. A statute, making separation of spouses for seven years a grounds for divorce, was approved by the Puerto Rico Legislature May 9, 1933, to take effect ninety days after its approval. In 1936, plaintiff sued for divorce under the statute and his wife contested the action, alleging noncompliance with the statute and that the statute was contrary to the Organic Act of Puerto Rico. She claimed that the retroactive application of the divorce statute, sought by plaintiff, would render it unconstitutional in violation of the Organic Act provision. The First Circuit, in rejecting the argument, stated:

“We fail to see wherein Act No. 46 in its enactment fails in any respect to comply with provisions of * * * the Organic Act. It was approved May 9th, 1933, and expressly provided that it should not take effect until ninety days after its approval, and fully complied with the [Organic Act provisions]. This provision of the Organic Act has only to do with of a law not its application.”

Applying this case to the facts in the instant case, it is apparent that House Bill No. 81 became effective on May 11, 1965, pursuant to Article VI, Section 25, of the Utah Constitution. The appellants ask the Court to disregard this date. It is obvious that this cannot be done. In doing so, appellants confuse and seek to obliterate the difference between an effective date of the bill and the prospective or retroactive application thereof.

The appellants' contention that the bill by its terms would not apply to income earned prior to May 11, 1965, simply does not follow. The bill expressly states that it is applicable to tax returns filed after January 1, 1966, for taxable years commencing on or after January 1, 1965. By the clear meaning of the statute, if the taxpayers' taxable year begins anytime after January 1, 1965, and prior to May 11, 1965, his return on personal income must include any income earned during that period of time, which income is subject to taxation at the higher rates. Any other construction would be clearly contrary to the legislative intent and the clear meaning of the statute. The appellants' arguments to the contrary are at best specious.

It is submitted that there is no basis for relief on the theories claimed by the appellants .

CONCLUSION

It is apparent that the appellants seek to strain the meaning of Article VI, Section 25, of the Constitution

of the State of Utah. Their argument fails to comprehend the difference between an effective date of an act, because of its substance, may have retrospective operation.

It is submitted that the determination of the trial court, upholding the constitutionality of House Bill No. 81 and determining that it applies to all income earned subsequent to January 1, 1965, was correct. This Court should affirm.

Respectfully submitted,

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Attorney General

Attorney for Respondents