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H. J. Cornell & Ambrose Black dba Country Club Foods v. State Tax Commission of the State of Utah : Brief of Petitioners and Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

H. J. CORNELL & AMBROSE BLACK
d/b/a COUNTRY CLUB FOODS, a
Partnership,

Petitioners and Appellants,

—vs.—

STATE TAX COMMISSION OF THE
STATE OF UTAH,

Respondent.

FILED

JUL 8 - 1960

Clerk, Supreme Court, Utah

Case
No. 9272

BRIEF OF PETITIONERS AND APPELLANTS

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In the Supreme Court of the State of Utah

H. J. CORNELL & AMBROSE BLACK
d/b/a COUNTRY CLUB FOODS, a
Partnership,

Petitioners and Appellants,

- vs -

STATE COMMISSION OF THE
STATE OF UTAH,

Respondent.

Case
No. 9272

STATEMENT OF FACTS

Petitioners, Country Club Foods, were at all times pertinent hereto, a partnership engaged in the business of selling and distributing food products in and outside the State of Utah, among which were oleomargarine products.

That during the month of November 1959 the State of Utah Tax Commission audited the books of petitioner and determined therefrom that a \$7,980.00 oleomargarine tax deficiency was due the State of Utah because certain quantities of oleomargarine was sent to and received by petitioner upon which no tax stamps were affixed from

the 8 day of July, 1958, to the 30 day of August, 1959. The tax so assessed was not assessed upon the presence of any oleomargarine package or container in petitioners' possession or place of business but was assessed against any and all quantities of oleomargarine that was sent to and received by them as disclosed by examination of the sales records of a third party. Petitioners maintain that the oleomargarine upon which no tax stamps were affixed by them, had been stolen or embezzled from them and had never been sold by them. (R. 20)

Section 59-18-4, Utah Code Annotated, 1953, imposed a tax upon the sale of oleomargarine in the State of Utah at the rate of 5¢ per pound if not artificially colored and 10¢ per pound if artificially colored.

STATEMENT OF POINTS

POINT I.

THE OLEOMARGARINE LICENSE ACT AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, IS A VIOLATION OF ARTICLE VI, SECTION 23, OF THE CONSTITUTION OF UTAH.

POINT II.

THE OLEOMARGARINE LICENSE ACT AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953 IS A VIOLATION OF ARTICLE I, SECTION 24, OF THE CONSTITUTION OF UTAH.

POINT III.

THE OLEOMARGARINE TAX ASSESSED IN THIS CASE IS A VIOLATION OF ARTICLE I, SECTION 7, OF THE CONSTITUTION OF UTAH AND ALSO A VIOLATION

OF AMENDMENT V AND AMENDMENT XIV, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES.

POINT IV.

THAT THE UTAH STATE TAX COMMISSION ERRORED IN ASSESSING PETITIONERS FOR ANY AND ALL OLEOMARGARINE SENT TO OR RECEIVED BY PETITIONERS.

POINT V.

THE UTAH STATE TAX COMMISSION DID NOT HAVE AUTHORITY TO SELL STAMPS TO OLEOMARGARINE DEALERS AND PETITIONERS COULD NOT LAWFULLY BUY STAMPS.

POINT VI.

THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION 179 BEFORE THE STATE TAX COMMISSION OF UTAH ARE CONTRARY TO THE LAW AND THE FACTS.

ARGUMENT

History of Chapter 18, Title 59, Utah Code Annotated, 1953. Oleomargarine:

The first legislation dealing with oleomargarine was passed in 1929 (Chapter 91). Section 1 of the 1929 Act defined oleomargarine. Section 2 required purchase of a license permit for \$5.00 before any person could sell margarine. It also imposed a tax at the same rates as presently imposed upon the sale of all oleomargarine to consumers, to be paid at the time of sale and delivery to the consumer by affixing stamps to the packages and cancelling them. The Act also provided that the State

Auditor should prepare and have suitable stamps for use on each kind of package described in the Act. The Auditor was required to deliver the stamps to the Treasurer and charge him for the stamps delivered and the Treasurer was required to sell the stamps only to dealers holding permits.

This Act was amended by Chapter 6 of the Laws of Utah, 1930, to provide that the license permit should be furnished by the State Treasurer instead of by city or county commissions. There were one or two other minor changes made.

The *Best Foods, Inc., v. Christensen*, 285 P. 1001 75 Ut. 392, Chapter 91 of the Laws of 1929 was held to be a *revenue Act* and not a regulatory Act. The Court, by dicta, noted the discrimination against oleomargarine, which governed butter. (See 75 Ut. at page 400 and 403)

Tobacco:

The tobacco statutes first appeared in Chapter 145, Laws of 1921 as amended by Chapter 52, Laws of 1923. Section 2 was amended by the Laws of 1929, Chapter 92 and this portion of the tobacco law dealt with advertising of cigarettes and tobacco. Section 1 of Chapter 145, Laws of 1921 as amended by Chapter 52, Laws of 1923 as amended by Chapter 68, Laws of 1925 was further amended by the Laws of 1930, Chapter 5, to provide for licensing and tax provisions substantially similar to the same provisions dealing with oleomargarine as passed in 1929 and amended in 1930. The title to the 1930 Act describes the law as regulating the sale of cigarettes and

cigarette paper. Subsections (k) and (1) of Section 1 prohibiting the furnishing of tobacco to minors and provides that a person maintaining a place where tobacco is sold or kept with the intent to sell it, in violation of the Act, shall be a nuisance. These later two provisions, of course, have nothing to do with revenue or taxation and are admittedly regulatory.

In *State v Packer Corp.*, 297 P. 1013, 77 Ut. 500, 505 P. 2d 114, 78 Ut. 177, the constitutionality of Chapter 92, was attacked on unrelated rounds and the court upheld the act as a valid exercise of the police power. The court, stated that the law was "to regulate and restrict the sale and use of cigarettes and tobacco."

The revised statutes of 1933 under Title 93, Tobacco, contain the provisions in Chapter 1 dealing with license and stamp taxes and the two regulatory provisions prohibiting the sale of tobacco to minors and providing that a place of unlawful sale is a nuisance. Chapter 2 of this title contains the provision of law regulating the advertising of tobacco, and Chapter 3 dealt with the unlawful use of tobacco and prohibited proprietors from letting minors use tobacco in their place of business and prohibited smoking in enclosed places.

Combination of oleomargarine and tobacco laws:

The Legislature in 1933 in the Second Special Session, combined the oleomargarine statute (Chapter 6, Laws of 1930, Title 66 revised statutes of 1933) and the tobacco statute (Chapter 5, Laws of 1930, Chapter 1, Title 93 Revised statutes of 1933) into one chapter,

Chapter 17. The first section provided for identical licensing for the sale of oleomargarine and tobacco. The fourth section imposed an excise tax upon tobacco and oleomargarine. The fifth section provided that taxes would be paid by affixing stamps in the manner set forth, and provided for the time when the stamps were to be affixed, stated certain exceptions and provided penalties for violations. This act of 1933 is substantially the same act as the one we are presently concerned with except for two minor changes made in 1941 and one important modification that was made in 1947.

It is highly probable that the combination of the tobacco and oleomargarine features in this act were violative of the Utah constitution which provides that a title should adequately describe the subject of a bill and that a bill should only contain one subject. At first blush, the title would appear to be complete enough, but it should be noted that the *provision of the act prohibiting the furnishing of cigarettes to minors is regulatory* and is not described in the title. The nuisance provision of earlier acts was deleted in this 1933 act, however.

It would also seem that this act does in effect combine two subjects. Oleomargarine and tobacco admittedly are not cognate, but the taxing of their sale probably is. The prohibition of furnishing tobacco to minors, however, is not cognate to taxation.

The Laws of 1941, Chapter 95, added the provision that if a person maintains a tobacco vending machine

accessible to minors, he is guilty of a misdemeanor and this same Chapter 95 provided that any person violating any provisions of the statute shall be deemed guilty of maintaining and keeping a nuisance.

Title 93 of Utah Code Annotated, 1943, was entitled by the codifiers as Tobacco And Oleomargarine. Chapter 1 of the Code contains the combination features of the Laws of 1933, Chapter 17, with two additions earlier noted as being made in 1941. Chapter 2 of the Code dealt with advertising of tobacco and Chapter 3 dealt with unlawful use of tobacco. In 1947, (Chapter 138) 93-1-1 was amended by deleting the provisions requiring dealers licenses for the sale of oleomargarine.

The codifiers of the 1953 code placed the provisions of Chapter 1 of Title 93 of the 1943 code, as amended in 1947, into Chapter 18 of Title 59, which is the revenue and taxation title. It should be noted that *under the heading of revenue and taxation, it is still unlawful to furnish cigarettes to minors*, to have tobacco vending machines accessible to minors and it is provided that any person who does have vending machines available to minors shall be deemed guilty of maintaining a nuisance. It seems clearer that *two subjects have been combined in one bill, when it is realized that regulatory provisions dealing with the sale of tobacco are to be found under present law in a revenue and taxation title of the code.*

Significance of the deletion of oleomargarine license provisions in 1947.

The codifiers, peculiarly enough, entitled Chapter 18, Title 59 of the 1953 code as Tobacco and Oleomargarine Licenses, and yet *there is absolutely no provision for licensing oleomargarine dealers*. Section 5 of Chapter 18 states:

“It is the intent and purpose of this chapter to require all manufacturers, jobbers, distributors and retail dealers securely to affix the stamps provided for in this section to the packages or containers of products referred to in Section 59-18-1, but when the stamps have been affixed as required herein, no further or other stamp shall be required under the provisions of this chapter, regardless of how often such articles may be sold or resold in this state. Any person failing properly to affix and cancel stamps to the products enumerated in section 59-18-1, as provided herein or by regulations promulgated by the state tax commission as provided in this chapter, shall be required to pay as a part of the tax imposed hereunder, a penalty of not less than ten dollars (\$10) nor more than two hundred ninety-nine dollars (\$299) for each offense, to be assessed and collected by the state tax commission as provided in section 59-18-15.”

Of course, oleomargarine is not a product enumerated in 59-18-1 and so the provisions of this paragraph would have no applicability to oleomargarine. It should further be noted that this particular penalty provision was held to be unconstitutional in *Tite v. State Tax Commission*, 57 P. 2d 734, 89 Ut. 404. The court there held that the Legislature could not lawfully delegate to the tax commission the judicial power to determine the amount of fines and penalties.

Section 6 of Chapter 18 states that any of the products referred to in 59-18-1 found in this state after a period of 72 hours without having stamps affixed are contraband. This section cannot apply to oleomargarine since oleomargarine is not referred to in 59-18-1.

Section 13 requires persons dealing in the products referred to in 59-18-1, within ten days after receipt of the same, to mail or deliver a duplicate invoice to the State Tax Commission. Again this section cannot cover oleomargarine.

The most significant effect of the deletion of "oleomargarine" from 59-18-1 can be found in Section 10 of this act, which authorizes the state auditor to prepare stamps for use on packages and containers of the products enumerated in 59-18-1. Since oleomargarine is not so enumerated, it would appear that the Auditor does not have the authority to prepare oleomargarine stamps, and that the Auditor does not have the authority to furnish these stamps upon requisition to the tax commission. Even more important, however, the statute states:

"The state tax commission shall sell the stamps herein provided for only to persons holding licenses issued as provided in this chapter, and the moneys received from the sale of such stamps shall be turned into the General Fund of the state."

There are other provisions in this section relating to the distribution of stamps, their redemption, refunding in certain instances, stating certain dealers who are ex-

empt, and providing for a discount upon large sales. All of these provisions apparently have no application to oleomargarine and, of the utmost importance, it would appear that the tax commission does not have the authority to sell stamps to oleomargarine dealers and oleomargarine dealers could not lawfully buy such stamps.

POINT I.

THE OLEOMARGARINE LICENSE ACT AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, IS A VIOLATION OF ARTICLE VI, SECTION 23, OF THE CONSTITUTION OF UTAH.

Article VI, Section 23 of the Constitution of Utah provides:

“Except general appropriation bills, and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title.”

“The purpose of this section is to prevent the legislature from intermingling in one act, two or more separate and distinct propositions — things which, in a legal sense, have no connection with, or proper relation to, each other. *Martineau v. Crabbe*, 46 Ut. 327, 150 P301.”

The general rules governing attacks upon the ground they violate this provision of the Utah Constitution are stated at length in *State v. Barlow*, 107 Ut. 292, 153 P. 2d 647, 655.

The rule is that the legislature may not include matters which are neither related nor germane to one subject. *State v. Barlow*, 107 Ut. 292, 153 P. 2d 647, 655.

It is the policy of this state to discourage the use of cigarettes and tobacco. This act is an exercise of the state's policy power, and is not a revenue measure. *State v. Packer Corp.*, 77 Ut. 500, 505, 297 P. 1013, followed in 78 Ut. 177, 2 P 2d 114, aff'd 285 U.S. 105, 76 L. Ed. 643, 52 S. Ct. 273.

Petitioners do not believe it is the policy of the State of Utah to discourage the use of oleomargarine for its harmful effects upon minors; that it should be unlawful to furnish to minors; or that a person maintaining a place where oleomargarine is sold or kept accessible to minors in violation of the act shall be deemed guilty of keeping and maintaining a nuisance.

Petitioners do believe that it might be the policy of the State of Utah to favor the Dairy Industry and to discourage the use of oleomargarine for the Dairy Industry's protection but to advocate such a policy would be admittedly discriminatory and in as much as we are here concerned with provisions under the revenue and taxation title and in view of *Best Foods, Inc., v. Christensen*, 75 Ut. 392, 285 P. 1001, it is submitted that oleomargarine and tobacco are not cognate, the taxing of their sale and the revenue derived therefrom probably is. The prohibition of furnishing tobacco to minors, with related criminal penalties provided, however, is not cognate to taxation.

In the case of *Carter v. State Tax Commission*, 98 Ut. 96, 96 P 2d 727, 126 ALR 1402, this court held in dealing with an admittedly regulatory statute that an

added provision distinguishing between gasoline and diesel power vehicles (here we have colored and not colored oleomargarine), which was revenue producing in its nature, was invalid as not germane to the general title and the one subject therein.

It is submitted that the Oleomargarine License Act is not a licensing act at all and is solely a tax and as such is a revenue measure and the act concerning tobacco is an exercise of the state's police power and a regulatory law, as such the act contains more than one subject, and includes matters which are neither related nor germane to one subject.

POINT II.

THE OLEOMARGARINE LICENSE ACT AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953 IS A VIOLATION OF ARTICLE I, SECTION 24, OF THE CONSTITUTION OF UTAH.

Article I, Section 24 of the Constitution of Utah provides:

“All laws of a general nature shall have uniform operation.”

“In determining whether classification made by legislature is unconstitutional, discrimination is the very essence of classification and is not objectionable unless founded upon reasonable distinctions. *Gronlund v. Salt Lake City*, 113 Ut. 284, 194 P 2d 464.”

Section 59-18-4, Utah Code Annotated, 1953, imposes a tax upon the sale of oleomargarine in the State

of Utah at the rate of 5¢ per pound if not artificially colored and 10¢ per pound if artificially colored. (R. 85)

This is a tax imposed and collected upon *the sale of* not artificially colored oleomargarine (5¢) and artificially colored oleomargarine (10¢) and makes about as much sense as taxing the sale of brown eggs more than white eggs or taxing the sale of colored gasoline more than white gasoline. The Leghorn poultry man could always change to raising Plymouth Rocks or Rhode Island Reds, or could purchase dye to color his Leghorn produced eggs a dazzzling color so to keep within the law, if such a law was enacted.

The tax is further designated as a tax "*upon the sale of*" and as such is nothing more than a "Sales Tax" which is additional to and in excess of the 2½¢ sales taxes imposed on food stuff presently taxed upon the sale thereof. There is no license to sell colored as distinguished from not colored oleomargarine involved or necessary under the law and the inclusion or exclusion feature of artificial coloring as being a basis for differentiation between charging a 5¢ per pound or 10¢ per pound tax bears no reasonable relation to the purposes of revenue by taxation of the sale of oleomargarine and as such is discriminatory in the sense of being arbitrary and unconstitutional for the reason that no reasonable basis to differentiate the tax can be found.

There is no fair reason for the law that would not require equally its extension to those which it leaves untouched, *State v. J. B. & R. E. Walker, Inc.*, 100 Ut. 523, 116 P 2d 766.

It is submitted that there is no fair reason why colored oleomargarine should be taxed 100% more than not colored oleomargarine; which in turn is taxed considerably more than butter, jam, peanut butter, honey and other food stuff.

POINT III.

THE OLEOMARGARINE TAX ASSESSED IN THIS CASE IS A VIOLATION OF ARTICLE I, SECTION 7, OF THE CONSTITUTION OF UTAH AND ALSO A VIOLATION OF AMENDMENT V AND AMENDMENT XIV, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES.

“No person shall be deprived of life, liberty or property, without due process of law.”

An examination of the Stipulation of Facts, (R. 82, 83) Decision 179 rendered before the State Tax Commission of Utah (R. 84, 85) and the Conclusion of Law supporting said decision 179 (R. 85, 86) will disclose that the tax assessed is not based upon a finding that petitioners did sell the oleomargarine assessed as per 59-18-4, Utah Code Annotated, 1953, nor a finding that the assessed oleomargarine was possessed by the petitioners for longer than seventy-two hours as per 59-18-5(2) but is based solely upon sales records of a third party, Ray and Whitney Brokerage Company, Salt Lake City, Utah, which disclosed that they had sold and delivered to petitioners the assessed oleomargarine (R. 84). Petitioners have denied and maintained that said assessed oleomargarine was sold by them or in their presence for longer than seventy two hours. (R. 20, 86, also Petition for Hearing Before Tax Commission not included in Transcript of Record)

It is submitted that the judgment rendered under authority vested by Section 59-18, Utah Code Annotated, 1953, and upon the record thus made in this case, if and when enforced will in effect be depriving petitioners of their property without due process of law. There being no evidence of a sale made or possession for more than 72 hours had.

POINT IV.

THAT THE UTAH STATE TAX COMMISSION ERROR-ED IN ASSESSING PETITIONERS FOR ANY AND ALL OLEOMARGARINE SENT TO OR RECEIVED BY PETITIONERS.

The same argument set out and argued under Point III is applicable here.

POINT V.

THE UTAH STATE TAX COMMISSION DID NOT HAVE AUTHORITY TO SELL STAMPS TO OLEOMARGARINE DEALERS AND PETITIONERS COULD NOT LAWFULLY BUY STAMPS. (The argument rendered under this point is basically repititious)

Title 59, Chapter 18, Utah Code Annotated, 1953, although entitled Tobacco and Oleomargarine Licenses makes no provision whatsoever for licensing oleomargarine dealers. Section 59-18-5 provides.

“It is the intent and purpose of this chapter to require all manufacturers, jobbers, distributors and retail dealers securely to affix the stamps provided for in this section to the packages or containers of products referred to in section 59-18-1, but when the stamps have been affixed as required herein, no further or other stamp shall

be required under the provisions of this chapter, regardless of how often such articles may be sold or resold in this state. Any person failing properly to affix and cancel stamps to the products enumerated in section 59-18-1, as provided herein or by regulations promulgated by the state tax commission as provided in this chapter, shall be required to pay as a part of the tax imposed hereunder, a penalty of not less than ten dollars (\$10) nor more than two hundred ninety-nine dollars (\$299) for each offense, to be assessed and collected by the state tax commission as provided in section 59-18-15."

Oleomargarine is not a product enumerated in 59-18-1 and so the provisions of this section would have no applicability to oleomargarine.

Section 59-18-6 states that any of the products referred to in 59-18-1 found in the State of Utah after a period of 72 hours without having stamps affixed are contraband. This section cannot apply to oleomargarine since oleomargarine is not referred to in 59-18-1.

Section 59-18-13 requires persons dealing in the products referred to in 59-18-1 within 10 days after receipt of the same to mail or deliver a duplicate invoice to the State Tax Commission. Again this section cannot cover oleomargarine.

The most significant effect of the deletion of oleomargarine from 59-18-1 is found in Section 59-18-10, which authorizes the State Auditor to prepare stamps for use on packages and containers of the products enumerated in 59-18-1. Since oleomargarine is not so enumer-

ated it would appear that the State Auditor does not have the authority to prepare oleomargarine stamps, and that the State Auditor does not have the authority to furnish oleomargarine stamps upon requisition to the tax commission. Even more important, however, in view that *there is absolutely no provision for licensing oleomargarine dealers or sellers*, the statute states:

“The State Tax Commission shall sell the stamps herein provided for only to persons holding licenses issued as provided in this chapter, and the moneys received from the sale of such stamps shall be turned into the general fund of the state.”

There are other provisions in this section relating to the distribution of stamps, refunding, exempting dealers and providing discounts upon large sales. All of these provisions apparently have no application to oleomargarine and, of the utmost importance, it would appear that the Utah Tax Commission does not have the authority to sell stamps to oleomargarine dealers and oleomargarine dealers could not lawfully buy such stamps at all.

POINT VI.

THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION 179 BEFORE THE STATE TAX COMMISSION OF UTAH ARE CONTRARY TO THE LAW AND THE FACTS.

The law in this case has been hereto before argued.

The assessments made were imposed prior to, and not upon the sale of oleomargarine in the State of Utah,

for the reason that the oleomargarine assessed was, and had been stolen from petitioners or otherwise disposed of other than by sale by petitioners. (R. 20, 86, also petition for hearing before Tax Commission not included in Transcript of Record)

There is no proof whatsoever or finding that the oleomargarine assessed was within the custody or presence of petitioners for 72 hours and therefore, the taxation thereof, if applicable, would be the responsibility of whoever sold the same within the State of Utah.

CONCLUSION

Only two states, Idaho and Utah, have an oleomargarine tax, the same is arbitrary and discriminatory in application. To tax a woman who should not dye her hair a color a certain amount and tax a woman who should dye her hair blond a double amount makes about as much sense as taxing 5¢ per pound for not colored oleomargarine and 10¢ per pound for colored oleomargarine.

Such laws if not deemed unconstitutional should be strictly construed and it is submitted that respondents decision 179 should be set aside and the matter remanded with directions to annul, vacate and set aside the same under one or all of the points herein presented and argued.

Respectfully submitted,

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