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Utah Parks Co. v. Iron County and Cedar City Corp. : Brief of Respondent Iron County

Utah Supreme Court

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JAN 17 1963

In the Supreme Court of the State of Utah

UTAH PARKS COMPANY, a Corporation,

Plaintiff-Appellant

vs.

IRON COUNTY, a Body Corporate and
Politic, and CEDAR CITY CORPORATION,
a Municipal Corporation,

Defendants-Respondents.

JAN 26 1962

Supreme Court, Utah
No. 9540
and
No. 9753

Brief of Respondent Iron County

Appeals from the Judgments of the 5th District Court
for Iron County

Hon. Will L. Hoyt, Judge, in Case No. 9540

Hon. C. Nelson Day, Judge, in case No. 9753

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No. 9540

and

No. 9753

Brief of Respondent Iron County

BRIEF OF RESPONDENT IRON COUNTY

The Statement of Facts as given by the plaintiff-appellant is substantially correct. This is a suit brought under Section 59-10-14, Utah Code Ann. 1953 for a refund of real property taxes assessed by Iron County upon property at Cedar City, Utah and known as El Escalante Hotel, for the year 1958. On January 1, 1958 this property was owned by the appellant but on January 31, 1958 the appellant conveyed this property to the other defendant-respondent, Cedar City Corporation, a Municipal Corporation, which accepted the property under a covenant or condition in the deed that it would pay any and all taxes legally assessed. The lower court sustained the motion of the respondent Iron County to dismiss the complaint on the grounds that the complaint did not state facts upon which relief could be granted. This respondent also joins in the Preliminary Statement given by the appellant in its brief.

ARGUMENT

Point I.

THE TAX ASSESSED AND PAID BY THE APPELLANT WAS A LEGAL ASSESSMENT AND CANNOT NOW BE RECOVERED.

The claim of the plaintiff-appellant is that although the real property in question was owned by it on January 1, 1958, before the taxes for that year were subsequently levied and assessed, the property was conveyed to the other defendant, Cedar City Corporation, an exempt governmental body. Therefore, the lien that attached on January 1, 1958 never ripened into a valid assessment and therefore, the taxes for that year were illegal and void. This claim is clearly untenable and is based upon a legal fiction and unsound reasoning.

Most states by statute provide for a time certain when real property will bear taxes for that particular year. The Utah Statute is Section 59-10-3, U. C. A. which provides as follows:

“Every tax upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to other than the owner of the real estate is a lien upon the land and improvements; which several liens attach as of the 1st day of January of each year.”

Also, Section 59-5-4, U. C. A. 1953 provides as follows:

“The county assessor must, before the 15th day of April of each year, ascertain the names of all taxable inhabitants and all property in the county subject to taxation except such as is required to be assessed by the State Tax Commission and must assess such property to the person by whom it was owned or claimed, or in whose possession or control it was, at 12 o'clock m. of the first day of January next preceding, and at its value on that date”

It is necessary that there be some date certain as to what property and when it shall bear taxes as the county officers must be guided by some specific date. The above quoted sections setting a definite date must have had in mind that property could and would be transferred during the calendar year and it is submitted that is the main reason why a definite date is fixed. Subsequent sections to

those above quoted set forth the manner and procedure for assessing and collecting taxes for the various county officers. When these statutes provide that a county assessor shall assess property to the owner as of January 1 and that the lien attaches as of this date, the statutes can only mean what they say in clear, precise terms. But the plaintiff-appellant claims that something more should be read into the statutes which is that the Legislature meant that the lien of taxes attaches as of January 1 only if a valid assessment and levy is thereafter made and that if the owner conveys the property away before the assessment then the owner of January 1 cannot be required to pay. But it should make no difference whether the property is conveyed away or not as the property must bear the taxes and some one will have to pay. It so happens in this case that the new owner of the property after January 31 was a public body, Cedar City Corporation, normally exempt from taxation and without question would have been for all subsequent years. But the appellant's argument is sufficiently broad that it would make no difference whether the new owner was a public body or not because under its theory, the same rule would apply as between two private owners. The rationale of appellant's argument is that if the property is transferred **after** the lien date but **before** the assessment date, the old owner cannot be required to pay and this would seem to be appellant's argument whether the new owner was a public body or not. If appellant's contention is the law, then every time there is a transfer of property after January 1 but before the county levy is made between the last Monday in July and the second Monday in August, the old owner could claim that he could not be assessed as he did not own the property when it was assessed and the new owner could claim that since he did not own the property on January 1 he would not have to pay and in every case both the old and new owner could question the validity of the tax. This would be so whether the new owner was a public body or not. It should be obvious to anyone that such a situation was never intended by our legislature.

If the property was in private ownership as of January 1 the mere fact that it was transferred to a public body prior to assessment should in no way interrupt the taxing process. All of the authorities relied upon by appellant merely held that as to whether a valid lien attaches as of January 1 of each year depends upon there subsequently being a valid levy and assessment. This respondent sub-

mits that this condition was complied with and that there was a subsequent assessment and the fact that the property was then in public ownership has nothing to do with the case. This is particularly so when the new owner accepted the property under a condition that it assume and pay all taxes legally assessed.

To more clearly show the fallacy in the argument of the plaintiff, suppose that in this case the property in question had been transferred by the plaintiff to the defendant Cedar City Corporation on July 31, 1958 instead of January 31. This would have been before the County made its levy. The plaintiff would have had the use and occupancy of the property for seven months of the year and would have had all the benefits of the property, including making any profit therefrom but would have been able to escape the payment of any taxes for that year simply by the process of conveying it to an exempt public body after seven months of the year had elapsed. For the County to get any taxes for the year it would be compelled to apportion the taxes based upon ownership, assuming it had the power to do so.

Another vital point should be here considered. The payment of taxes, although admittedly an onerous burden, goes right to the foundation of all government. In fact no government could survive without them, particularly a County which usually has no other means of raising revenue. If property owners are permitted to dodge property taxes by the method claimed by appellant, it strikes right at the foundation of government itself and this cannot be permitted.

Furthermore, if transferring of property during the year was intended to be taken into consideration in determining who would pay taxes, there would be statutory authority and machinery for apportioning taxes but instead of any such statutory authority in our code, a definite date is set, January 1, as to when the property shall bear taxes and the only concern of the county officers is to determine the owner as of that date and assess accordingly.

As to whether a transfer of property after the lien date but before the assessment date, and even to a public body makes any difference has been ruled upon in a number of cases and contrary to the theory of the appellant. The case of *Logan vs. Luukinen*, 231 Pac. 184 (Ore.) held as follows:

"The rule supported by the authorities is that when the statute declares a lien from a certain date, the lien is an encumbrance although the amount of the lien may not yet be determined or collectible. When determined, the lien dates by relation by the date fixed by statute."

Also in *Broadway-Madison Corporation vs. Fisher*, 102 Pac. 2d 194, (Ore.) it was held:

"The accrual of the tax occurs on the date when there arises a liability to pay such taxes and not when the mechanics of computing the amount of taxes have been completed or when the tax is due and payable."

The case of *City of Santa Monica vs. Los Angeles County*, 115 Pac. 945 also held that it made no difference as to a transfer of property after the lien had attached and that the owner on the lien date must pay the taxes. Likewise, the U. S. Supreme Court in the case of *United States vs. Alabama*, 313 U. S. 274 which was a case in which the United States acquired land subsequent to the tax date but prior to the date of levy. The state of Alabama claimed the tax lien effective even though the land passed into government ownership afterward and the Supreme Court so held and the tax was held to be legal and collectible.

The Utah case of *Gillmor vs. Dale*, 75 Pac. 932 is relied upon strongly by the appellant to support its contentions. There certain property which had been within the corporate limits of Sale Lake City was segregated from the City by a segregation suit. The decree in the segregation suit was entered by the District Court in May of the year in question, which would be after the tax date, which was then the first Monday in February but before the levy. The decree in the segregation suit expressly provided that the property disconnected from the city would bear no taxes. In other words, there is a valid court judgment expressly exempting the property from taxes from the date of the judgment. This could have, and, from the court's language, did have considerable weight in holding as the court did. Furthermore, there is another vital distinguishing feature which is that the taxes in question were paid under protest and this will be discussed under respondent's Point No. III.

Point No. II.

IF THE APPELLANT HAS ANY RIGHT OF RECOVERY, IT IS ONLY AS AGAINST THE DEFENDANT CEDAR CITY CORPORATION.

The respondent Iron County contends and believes the authorities above cited so show that the tax in question was legally levied and assessed and that some one will have to pay the taxes for the year 1958. If not the appellant, then it will have to be the new owner, Cedar City Corporation. On this particular point, this respondent joins in the brief of the appellant and specifically to Point II of the Appellant's brief. It would serve no purpose in this brief to reiterate the argument of the appellant as to this point. This respondent has no additional or more convincing authority than that in the brief of the appellant and will therefore, rely upon the brief of the appellant. This respondent feels that the cases therein cited of *United States vs. Alabama*, 313 U. S. 274, *State vs. Salt Lake County*, 85 Pac. 2d 851 and *State vs. Duchesne County*, 85 Pac. 2d 860 definitely hold that when Cedar City Corporation took title to the property in question, that the property was already encumbered by 1958 taxes and when it accepted title with a provision in the deed that it would pay all taxes assessed, it could only have meant these 1958 taxes. Therefore, it is Cedar City Corporation which should refund the taxes if any are to be refunded.

Point III.

BEFORE THE PLAINTIFF UTAH PARKS COMPANY CAN RECOVER THE TAXES PAID, IT IS NECESSARY THAT THE TAXES WERE PAID UNDER PROTEST AS PROVIDED BY STATUTE.

It is the third contention of the defendant Iron County that these taxes, in order to be refunded, would have had to have been paid under protest, but the plaintiff admits that they were not. It is true that the plaintiff undoubtedly pays a great amount of taxes and undoubtedly pays them upon submission of the tax notice and in some instances, taxes are paid which probably would not have to be paid. However by the same token, the plaintiff undoubtedly has a great array of accountants and auditors who handle all tax problems and it would not have been any great burden on the plaintiff to have discovered what it is now claiming and paid these taxes under protest. The

recovery of taxes by the plaintiff will have to be upon one of two different statutes, one being Section 59-10-14, herein designated as the voluntary but absolutely void tax and the other being Section 59-11-11, U. C. A. or the payment under protest statute. Section 59-10-14 provides as follows:

“The board of county commissioners, upon sufficient evidence being produced that property has been erroneously or illegally assessed, may order the county treasurer to allow the taxes on that part of the property erroneously or illegally assessed to be deducted before payment of taxes. Any taxes, interest and costs paid more than once, or erroneously or illegally collected, may, by order of the board of county commissioners, be refunded by the county treasurer, and the portion of such taxes, interests and costs, paid to the state or any taxing unit, must be refunded to the county, and the proper officer must draw his warrant therefor in favor of the county.”

Section 59-11-11, Utah Code provides as follows:

“In all cases of levy taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest.”

These two sections have been discussed in several cases by the Supreme Court of Utah and in these cases, this court makes a distinction as to the nature of the claim. In the case of *Nielsen vs. Sanpete County*, 123 Pac. 334, the taxes had been assessed against some mortgages, for the years 1907, 1908 and 1909. Prior to 1906 mortgages could be taxed but in that year our Constitution was amended so as to eliminate mortgages from taxation and therefore, on January 1, 1907 and for all the subsequent years, such mortgages could not be taxed. Sanpete County, however, had assessed taxes for the years in question and they were not paid under protest. The assessment and

collection of these taxes were clearly void as they were in direct contravention of our Constitution. In that case the taxpayer presented a claim for a refund under Section 59-10-14 and when it was refused, filed the action. The Court, however, made a distinction when it said that it was obvious to anyone that the taxes were illegal from the first instance and that section 59-10-14 could be relied upon as a basis for a refund. This court stated, however, that in any instance where a refund was in doubt and would have to be ruled upon by a court, then it would be necessary that the taxes be paid under protest. It appears that such a situation prevails in this case in view of Sections 59-5-4 and 59-10-3, U. C. A. which impose upon the county assessor the duty of assessing and collection the taxes, irrespective of a transfer of the property, based upon the ownership as of January 1, particularly in view of the fact that the new owner, Cedar City Corporation, accepted the property under a covenant to pay the taxes. It is clear from the Nielsen case that Section 59-10-14 only applies when the tax assessed has always been void as this Court held, in using the language of the Nielsen case, this statute applies in situations where "it is clear the County has no authority to collect and where the County Commissioners may readily adjust the matter" and where the "illegality of the tax is absolutely assumed." But the case at bar is not such a case. The law provides that the county officers are to assess property as of the ownership on January 1 and it would be incumbent upon them to follow the law. This is not a situation where the tax had no semblance of legality or "warrant of law" to use Justice Wolfe's language in the Wilson case, *infra*, but instead presented a legal question upon which the County Commissioners could not rule as they would not understand the niceties of the law. Instead it would present a situation of whether or not the tax was lawful or unlawful, to use the language of Section 59-11-11 and in such cases the tax would be paid under protest so as to permit a court of competent jurisdiction to decide the issue. It is obvious that when Section 59-10-14 states that when "sufficient evidence" is presented to the County Commissioners more than merely a formal claim would have to be presented but instead "evidence" which would indicate beyond any doubt that the tax was illegal and void, and the County Commissioners could summarily adjust the matter.

The Utah case of *Wilson vs. Weber County*, 111 Pac. 2d 147 was another case which discusses the difference in

these two statutes. This was a case for a refund of excess probate fees collected by the County Clerk and not paid under protest. This Court had ruled in the case of *Smith vs. Carbon County*, 63 Pac. 2d 259 that the taxes in question were illegal and void and although this decision had not been handed down so as to guide the officers of Weber County, the Court in the Carbon County case held that the tax had always been void and therefore was in fact void at the time of the payment of the excess fees to Weber County. Therefore, the taxes were void from the beginning and at the time Weber County collected them. In other words this court followed the ruling of the Nielsen case and held that since the probate fees paid had **always** been void and illegal, it was not necessary to have paid them under protest. It is true that Justice Wolfe dissented in the Wilson case which dissent was joined in by Justice McDonough, but it is clear that Justice Wolfe objected to the finding that it made no difference whether the Carbon County case had been handed down so as to be a guide to the Weber County Officers and he felt that until the officers of Weber County had something to guide them, they would not know that the tax was illegal and void. Justice Wolfe in his dissenting opinion in the Wilson case felt that the taxes would have had to be paid under protest before they could be refunded. However, the majority opinion followed the Nielsen case by holding that the taxes in question were always illegal and void and it was not necessary to pay them under protest..

It should be noted that we have two statutes governing the refund of taxes paid. If there are two statutes then there must be some reason yet under the argument of the appellant, either or both apply to the same situation. But when the Legislature adopted two different statutes, which admittedly are a change in the common law rule, the Legislature must have intended that the two statutes apply to two different situations as pointed out in both the Nielsen and Wilson cases.

Although we do not know why the Utah Parks Company or its parent company, Union Pacific Railroad Company, paid these taxes voluntarily and not under protest it is reasonably safe to assume that the officials of appellant or Union Pacific Railroad did not discover for several months after the taxes had been paid that perhaps they had paid some taxes to Iron County unnecessarily and since they were not paid under protest it was necessary for the appellant to rely upon the other statute, Section

59-10-14 as that is the only way it could get into court. But it is the very earnest contention of this respondent that the appellant would have had to come in under the other statute, being Section 59-11-11, or the payment under protest statute.

The wisdom in the statute requiring that before a refund of taxes can be claimed, the taxes must have been paid under protest is obvious. Both cities and counties by law, adopt their budget in the latter end of the year when taxes are being paid. The county for instance makes up a tentative budget by November 1 and the final budget is adopted by the end of the year. Cities likewise adopt a budget in December of each year. Therefore if any taxes are claimed to be invalid or illegally assessed and are paid under protest, the county or city would have an opportunity to make a notation of the possibility of refund of taxes when they adopt their budget and could provide accordingly. In this case, however, the 1958 taxes were levied and assessed and paid by the taxpayer in November of 1958; all revenues were budgeted by the county and the county was never put on notice until the latter end of July, 1959 when a claim was filed by the plaintiff. By this time, all of the money had been budgeted and over one-half of it spent and for the county to now refund \$7,082.88 and interest will be a burdensome obligation and places the county in a precarious position not of its own making

In the case of *Gillmor vs. Dale*, 75 Pac. 932 (Utah), one of the main cases relied upon by the appellant was a case where the taxes were paid under protest and does not support the appellant in its claim that it can recover the taxes under Section 59-10-14.

Point IV

THE TAXES WERE VOLUNTARILY PAID, NOT UNDER PROTEST AND CANNOT NOW BE RECOVERED.

It was the common law rule that taxes paid voluntarily could not be recovered and the following cases so hold:

Corwin Inc. Co. vs. White 6 Pac. 2nd 607 (Wash.)
Pacific Finance Corp. vs. Spokane County, 15 Pac. 2nd 652 (Wash.)

Glendale Union High School District vs. Peoria School District, 99 Pac. 2nd 482, (Ariz.)

Flynn vs. City and County of San Francisco, 115 Pac. 2nd 3 (Cal.)

Jaymes vs. Herom, 130 Pac. 2nd 29 (N. M.)
 Board of Commissioners of Morgan County vs. Doherty,
 168 Pac. 2nd 556 (Colo.)
 Moses vs. Board of County Commissioners, 242 Pac.
 2nd 743 (Kan.)

In many cases, however, this common law rule worked a hardship upon the taxpayer and many states, the same as Utah, have adopted statutes changing the common law rule. The statutes adopted in Utah are Section 59-10-14 where taxes that were illegal, erroneous or void and levied without a semblance of authority or warrant of law could be recovered by the simple process of submitting evidence to the County Commission of the illegality and which would be clear to any one and other being Section 59-11-11, where taxes, claimed to be unlawful, could be paid under protest and then having the illegality adjudicated. But unless one of these statutes apply, we would still have the common law rule. The appellant admits that the taxes were not paid under protest so we are not concerned with this statute and as shown above the taxes in this case are not so illegal, erroneous or void as to come within the provisions of Sec. 59-10-14, and are not the kind of taxes intended by this statute and therefore, the appellant cannot recover under Sec. 59-10-14. Therefore, we are right back to the common law rule of voluntary payment and which is that the taxes cannot be recovered.

CONCLUSION

The authorities hold that the tax with which we are herein concerned was legally levied and assessed. The tax could only be questioned as to its lawfulness or unlawfulness and to do this, it was necessary that the tax be paid under protest, which it was not. Since it was not paid under protest and was not a tax wholly illegal and void and without a semblance of authority, then neither of the remedial statutes regarding the refunding of taxes can be relied upon by the appellant and therefore, this is a situation of a voluntary payment of taxes which cannot be recovered. Furthermore, if the tax is legal, the appellant's only redress is against Cedar City Corporation and not Iron County.

Respectfully submitted,

ORVILLE ISOM, County
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 Iron County.