

1993

Miller Welding Supply, Inc. v. Auditing Division Utah State Tax Commission : Reply Brief

Utah Court of Appeals

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David O. Black, Richard W. Black; Black, Jensen, Stith & Argyle; attorneys for appellant.

Jan Graham, John C. McCarrey; attorneys for appellee.

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UTAH COURT OF APPEALS
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IN THE UTAH COURT OF APPEALS

MILLER WELDING SUPPLY, INC.

Petitioner-Appellant,

vs.

AUDITING DIVISION
UTAH STATE TAX COMMISSION,

Respondent-Appellee.

) APPELLANT'S REPLY BRIEF

) *Priority 15*

) (Utah State Tax Commission
) Appeal No. 90-1659)

) (Supreme Court
) Appeal No. 920432)

) UTAH COURT OF APPEALS
) APPEAL NO. 930119-CA

APPEAL FROM AN ORDER OF THE UTAH STATE TAX COMMISSION

Jan Graham
Attorney General
John C. McCarrey, #5755
Assistant Attorney General
Attorneys for Respondent
36 South State, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 533-3220

David O. Black #0346
Richard W. Black #6076
BLACK, STITH & ARGYLE
Attorneys for Petitioner/
Appellant
1245 Brickyard Rd. Suite 650
Salt Lake City, Utah 84106
Telephone: (801) 484-3017

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Mary T. Noonan
Mary T. Noonan
Clerk of the Court

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MILLER WELDING SUPPLY, INC.)	
)	APPELLANT'S REPLY BRIEF
Petitioner-Appellant,)	
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vs.)	(Utah State Tax Commission
)	Appeal No. 90-1659)
)	
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UTAH STATE TAX COMMISSION,)	Appeal No. 920432)
)	
Respondent-Appellee.)	UTAH COURT OF APPEALS
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Jan Graham
Attorney General
John C. McCarrey, #5755
Assistant Attorney General
Attorneys for Respondent
36 South State, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 533-3220

David O. Black #0346
Richard W. Black #6076
BLACK, STITH & ARGYLE
Attorneys for Petitioner/
Appellant
1245 Brickyard Rd. Suite 650
Salt Lake City, Utah 84106
Telephone: (801) 484-3017

Black, Stith & Argyle, attorneys for Appellant for Miller
elding Supply, Inc. respectfully submit Appellants' Reply Brief.

TABLE OF CONTENTS

I.	TABLE OF CASES AND AUTHORITIES.....	ii
II.	ARGUMENT.....	1
A.	THE STANDARD OF REVIEW IN THIS APPEAL IS THAT OF "CORRECTION OF ERROR" AND THERE IS NO DEFERENCE TO BE GIVEN TO AN ADMINISTRATIVE AGENCY'S INTERPRETATION OF THE STATUTE IN QUESTION	
B.	IN APPLYING RULES OF STATUTORY CONSTRUCTION, THE LEGISLATIVE INTENT AND PURPOSE OF THE TAX EXEMPTION IN QUESTION WAS TO EXEMPT ANY OXYGEN OR STOMA SUPPLIES PRESCRIBED BY A PHYSICIAN OR ADMINISTERED UNDER THE DIRECTION OF A PARAMEDIC, WHICH INCLUDES AN OXYGEN CONCENTRATOR	
III.	CONCLUSION.....	9

I.
TABLES OF CASES AND AUTHORITIES

CASES CITED:

<u>Chris & Dick's Lumber v. Tax Commission,</u> 791 P.2d 511 (Utah 1990).....	1, 2
<u>City of Liberal v. Seward County,</u> 802 P.2d 568 (Kan. 1990).....	2
<u>State v. Caprio,</u> 477 A.2d 67 (R.I. 1984).....	3, 4
<u>Parson Asphalt Products v. Utah State</u> <u>Tax Commission,</u> 617 P.2d 397 (Utah 1980).....	2
<u>Vytar Associates v. City Annapolis,</u> 483 A.2d 1263 (Md.Ct.App.1984).....	3
<u>Winslow v. Morgan County Commissioners,</u> 697 P.2d 1141 (Colo.Ct.App. 1985).....	3

AUTHORITIES CITED: None

STATUTES CITED:

Utah Code Ann. 59-12-102(4)(b)(i) & (2) (1953) as amended.....	4
Utah Code Ann. 59-12-102(4)(a)(iii) (1953) as amended.....	3
Utah Code Ann. 63-46b-16(4)(h)(i) (1953) as amended.....	1

RULES:

Utah Code Admin. P. R865-19-37S (1992).....	1
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DETERMINATIVE STATUTES

Utah Code Ann. 59-12-104(10) (1953) as amended

The following sales and uses are exempt from taxes imposed by this chapter:

* * *

(10) sales of medicine.

Utah Code Ann. 59-12-102(4)(a)(iii) (1953) as amended

(a) "Medicine means:

* * *

(iii) any oxygen or stoma supplies prescribed by a physician or administered under the direction of a physician or paramedic.

Utah Code Ann. 59-12-102(4)(B)(i) & (ii) (1953) as amended

(b) "Medicine" does not include:

(i) any auditory, prosthetic, ophthalmic, ocular device or appliance; or

(ii) any alcoholic beverage.

II.
ARGUMENT

A. THE STANDARD OF REVIEW IN THIS APPEAL IS THAT OF
"CORRECTION OF ERROR" AND THERE IS NO DEFERENCE TO BE
GIVEN TO AN ADMINISTRATIVE AGENCY'S INTERPRETATION OF THE
STATUTE IN QUESTION

The Appellee has argued that the standard of review for this appeal in the abuse of discretion standard pursuant to U.C.A. 63-46b-16(4)(h)(i). This abuse of discretion standard applies where a statute delegates discretion to an administrative agency. The Appellee has cited to no authority in this case that the statute in question has delegated such discretion to the tax commission. Furthermore, the Appellee has not attempted to dispute the Utah Supreme Court's standard for review relating to the statutory construction in tax exemption cases on which the Appellant relies. See Chris & Dick's Lumber v. Tax Commission, 791 P.2d 511, 513-14 (Utah 1990) ("In the usual case, questions of statutory construction are matters of law for the courts, and we rely on a 'correction of error' standard of review, according no deference to an administrative agency's interpretation"). Based upon the forgoing, the standard of review in the present appeal is that of correction of error.

Additionally, the Appellee has asserted that Utah Code Admin. P. R865-19-37S (1992) is somehow dispositive of the issue before this Court. This administrative rule does nothing more than rearrange the order of the operative words in the statute. To the extent that this administrative rule is attempting to interpret the statute, it is accorded no weight and is entitled to no deference.

See Chris & Dick's, supra. Since there is no evidence that the tax commission was given any discretion to interpret the statute at issue, an administrative rule that attempts to do so is ineffective for that purpose.

B. IN APPLYING RULES OF STATUTORY CONSTRUCTION, THE LEGISLATIVE INTENT AND PURPOSE OF THE TAX EXEMPTION IN QUESTION WAS TO EXEMPT ANY OXYGEN OR STOMA SUPPLIES PRESCRIBED BY A PHYSICIAN OR ADMINISTERED UNDER THE DIRECTION OF A PARAMEDIC, WHICH INCLUDES AN OXYGEN CONCENTRATOR

1. Legislative intent and the purpose sought to be accomplished.

The Appellee would have this Court abandon all rules of statutory construction because of the general rule that tax exemption statutes are to be construed against the taxpayer. This is not the law, and, of course, the Appellee has cited to no authority for this novel proposition. The Appellee's proposed construction is unreasonable; "[s]trict construction, however, does not warrant unreasonable construction." City of Liberal v. Seward County, 802 P.2d 568, 571 (Kan. 1990). If the Appellee's position in this regard were the law, the Utah Supreme Court could not have reached the decision it did in Parson Asphalt Products v. Utah State Tax Commission, 617 P.2d 397 (Utah 1980), which is outlined in the Appellant's Brief. Thus, an analysis of the issue before the Court requires the use of the tools of statutory construction to properly ascertain the legislative intent concerning what constitutes exempted medicine.

The primary issue before this Court is what the Utah State Legislature intended when it permitted a tax exemption for

medicine, which it defined as "any oxygen or stoma supplies prescribed by a physician or administered under the direction of a physician or paramedic." U.C.A. 59-12-102(4)(a)(iii) (emphasis supplied). If the legislature had defined "medicine" as "oxygen or stoma supplies. . ." then the Appellee's interpretation of the statute would be more credible; but, the legislature chose to use the adjective any to modify "oxygen." This usage greatly expands and broadens the scope of what was intended to be included within the term "oxygen." Any is "an 'uncompromising' word to be considered broadly," Vytar Associates v. City Annapolis, 483 A.2d 1263, 1266, n. 4 (Md.Ct.App.1984), and it has been interpreted to mean "all." Winslow v. Morgan County Commissioners, 697 P.2d 1141, 1142 (Colo.Ct.App. 1985). The Appellee's only response to these cases is to dismiss them because they do not involve tax exemptions, though no support is provided to justify the position that statutory construction cases are irrelevant to determine the legislative intent in a tax exemption case.

Of all the cases interpreting the word "any," the case of State v. Caprio, 477 A.2d 67, 70 (R.I. 1984) is particularly instructive. In that case, the court provided an expansive interpretation of the word "any" and stated that the "very breadth of the term 'any person' defies the exclusion of any class of persons. That term is so broad as to require exclusion, not specific inclusion." Id. When the word "any" is used as a defining adjective, the word it describes becomes all-encompassing and as broad as that word can possibly be. In the case before this

court, "any oxygen. . ." becomes any and all types and kinds of oxygen is any form whatsoever, whether in a green, metal bottle or an oxygen concentrator, as long as it is prescribed or administered by a physician. As is explained in State v. Caprio, supra, the term "any oxygen" "defies the exclusion of any class of [oxygen]." Id. In order for any type, kind or form of oxygen to be excluded pursuant to the exclusion, it must be separately and specifically excluded.

The Utah legislature has chosen to exclude from the definition of medicine the following items: "(i) any auditory, prosthetic, ophthalmic, or ocular device or appliance; or (ii) any alcoholic beverage." U.C.A. 59-12-102(4)(b)(i)&(2). However, the legislature did not attempt to limit the broad, all-encompassing definition of "any oxygen" in this limiting language. Using the tools of statutory construction to ascertain the legislative intent in this matter, it appears as though the legislature intended a broad, expansive interpretation of oxygen. The Appellee's flawed analysis of the issue before this Court becomes apparent when the Appellee attempts to explain why oxygen is excluded and why an oxygen concentrator would not be. In its brief, the Appellee argues that an oxygen concentrator is true to its name: It concentrates, but does not create oxygen. Appellee's Brief at 12-13. Implicit in this argument is the fallacy that in order to fall within the "oxygen" tax exemption, the person seeking the exemption would have to "create" the oxygen. Under this creative interpretation, no one would ever be able to claim this exemption

rendering it a nullity because no one can "create" oxygen.

The oxygen in the green cylindrical metal bottles, which the Appellee would agree is exempt, is nothing but concentrated oxygen stored until the patient needs some of the oxygen at which point a valve is turned on and the patient receives the concentrated oxygen. This is exempt. In a more efficient and less expensive process, a patient would have an oxygen concentrator instead of a green metal bottle next to him or her. When oxygen is needed, the patient would turn on the oxygen concentrator valve and the patient would receive concentrated oxygen, identical to that which would come out of the green metal bottle. Under both processes, the patient receives the same oxygen directly from a small device that might be sitting next to the patient, all of which is done and administered under the direction of a doctor or paramedic. These processes are almost identical and given the legislature's intent for a broad interpretation of "any oxygen," the Appellant's oxygen concentrator also falls within the medicine exemption.

III.

CONCLUSION

The Appellant has met its burden of establishing that an oxygen concentrator falls within the tax exemption of medicine within the tax exemption statute. An analysis of the medicine exemption under the Utah Sales Tax Act, applying accepted rules of statutory construction, compels the conclusion that the Legislature intended that such a device as the oxygen concentrator be covered under the "any oxygen and stoma supplies" exemption to the sales

tax act. Failure to permit such an exemption ignores reality and is nonsensical. The oxygen concentrator is a technological innovation that provides the same concentrated oxygen more efficiently and at less cost. Such a technological advance that provides oxygen to patients under the direction of a physician should be treated the same as traditional bottled oxygen, which is only a reflection of a reality that the two are virtually the same product.

DATED this 1 day of April, 1993.

RESPECTFULLY SUBMITTED.

A handwritten signature in dark ink, appearing to read 'David O. Black', written over a horizontal line.

David O. Black
BLACK, STITH & ARGYLE
Attorneys for Petitioner - Appellant

CERTIFICATE OF MAILING

I certify that two true and correct copies of the foregoing APPELLANT'S REPLY BRIEF was sent via first class mail, postage prepaid to the following:

Jan Graham Attorney General
John C. McCarrey, Assistant Attorney General
36 South State, Suite 1100
Salt Lake City, Utah 84111

DATED this 1 day of April, 1993.

Marci Stirling