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Robert H. Hinckley, Inc. v. State Tax Commission of Utah : Brief of Defendant

IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT H. HINCKLEY, INC.
a corporation,
Plaintiff,

vs.

STATE TAX COMMISSION
OF UTAH,
Defendant.

Case No.
10260

BRIEF OF DEFENDANT

UPON WRIT OF REVIEW TO REVIEW AN O
DER AND DECISION OF THE STATE TA
COMMISSION OF UTAH.

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STATEMENT OF THE CASE

This case involves the validity of a deficiency assessment for sales tax and the imposition of penalty and interest upon both such sales tax deficiency and a use tax deficiency which has been paid.

DISPOSITION BEFORE THE TAX COMMISSION

After formal hearing, the Tax Commission upheld the assessment of sales tax deficiency and the penalty and interest involved herein.

RELIEF SOUGHT ON REVIEW

Defendant seeks a judgment upholding the action of the Tax Commission in sustaining the deficiency assessment for sales tax and the penalty and interest on both the sales tax and use tax.

STATEMENT OF FACTS

Defendant agrees in substance with the facts as set forth in Plaintiff's brief. However, because of some irrelevant material in the stipulation of facts entered into by the parties and the statement of facts in Plaintiff's brief, the Defendant offers the following brief statement of the facts in this case.

Plaintiff is a Utah corporation, which has as its principal business the sale of motor vehicles and accessories. (R. 108.) Within the same corporate structure Plaintiff also operates a business which retails items to the public through automatic vending machines. (R. 86, 108.)

During the period herein, 1954 to 1962, there was in effect Tax Commission Regulation S-74, (Exhibit 2) which had been promulgated in 1937 (R. 181) and which reads in part as follows:

> Persons operating punch boards or vending machines are deemed to be retailers and selling articles of tangible personal property which are disposed of in connection with the operation of such punch boards or vending machines.

> The total receipts from the operations of the above will be considered as the total selling price of the tangible personal property distributed in connection with their operations and must be reported as the amount of sales subject to tax.

Since 1936 the law has also included the decision of this Court in the *Jensen Candy Company* case, more fully discussed in Point I of this brief.

The collection of sales tax was regulated during this time by a bracket system which has been in effect since 1950 (Exhibit 9, R. 168.)

During the time involved herein plaintiff made certain purchases which were subject to use tax but upon which no tax was paid. Plaintiff also made sales through its vending machines without remitting to the Tax Commission any sales tax based on such sales.

Subsequently, an audit was conducted by the Tax Commission, which resulted in deficiency assessments for both use tax and sales tax. (R. 117-164.) A 10 per cent penalty and interest at 12 per cent per annum were also assessed on both the sales and use tax deficiencies.

Plaintiff paid the full amount of use tax deficiency and the interest at 6 per cent which had accrued thereon up to the time of payment. (R. 110.) Plaintiff refuses to pay the 10 per cent penalty and the additional 6 per cent interest. (R. 180.) This leaves an amount in controversy related to

use tax of penalty of $278.25 and interest of $862.92, or a total amount of $1,141.17(12). (R. 116.)

Plaintiff also paid that portion of the sales tax deficiency which represented tax on sales made from vending machines where the cost was in excess of 10 cents per item, together with interest at 6 per cent on such amount. (R. 110.) Plaintiff refuses to pay the balance of the sales tax deficiency which arose from sales made at 10 cents or less per item, as well as the 10 per cent penalty on the total sales tax deficiency. Plaintiff also refuses to pay the additional 6 per cent interest on that portion of the sales tax deficiency which was paid and the 12 per cent interest on that portion of the sales tax deficiency which remains unpaid. (R. 181.) This leaves an amount in controversy related to sales tax of principal of $7,086.05, penalty of $1,012.98, and interest of $3,117.57, or a total amount of $11,216.60. (R. 115.)

Thus, this Court is called upon in this case to decide two questions:

1. Whether sales at 10 cents or less per item are subject to sales tax.

2. Whether the disregard by the plaintiff of the Commission's regulations and long established case law justifies the imposition of the penalty and interest.

ARGUMENT

Point I.

THE PROPOSED ASSESSMENT OF SALES TAX ON SALES UNDER FOURTEEN CENTS IS LAWFUL AND SHOULD BE UPHELD.

Great stress was placed by the petitioner on the fact that certain practical problems of collecting the tax on sales of ten cents or less only serves to indicate that the legislature could not have intended to extend the sales tax to these or similar sales. Evidence was introduced to the effect that it would be very costly to alter the petitioner's machinery so as to provide for automatic tax collection, and further, that it is unlikely that an equitable tax could ever be assessed based upon the fact that there are no tokens presently existing in Utah.

Assuming that these or other similar practical difficulties exist, this issue has nevertheless been before the Utah courts on at least three occasions. *W. F. Jensen Candy Co. v. State Tax Commission*, 90 Utah 359, 61 P.2d 629 (1936); *State Tax Commission v. City Commission of Logan*, 88 Utah 406, 54 P.2d 1197 (1936); *Francom v. Utah State Tax Commission*, 11 Utah2d 164, 356 P.2d 285 (1960). The Court has held that the solution to the problem raised was a practical and not a legal one and that the legislature and the Court would leave the problems of collection of such a tax to the vendor. The Court in the *Jensen Candy* case found a legislative intention to tax sales of less than 50 cents even

though the practical problems involved therein were greater than allegedly exist in the present case. The Court in that case said:

> The vendor has the option to collect the tax from the vendee; that is, he may "if he sees fit" to do so . . . or he may if he sees fit elect to pay or absorb the tax himself. 90 Utah 364, 61 P.2d 632.

In that case the plaintiff operated a confectionary at Logan City, Utah, and a stipulated set of facts indicated that most of the sales made were in amounts of less than 50 cents; that a large proportion of those were below 25 cents, with many of them being 5, 10 or 15 cent sales. The plaintiff therein classified its sales according to amounts and calculated that 30 per cent of its sales were represented by 5 cent sales, 10 per cent by 15 cent sales, etc. The Court found that a large percentage of the plaintiff's business was represented by these small sales of less than 50 cents. The plaintiff there paid the sales tax on all sales made in amounts of 50 cents and over, and the Tax Commission then, as now assessed a tax on the basis of the total or aggregate of the sales made and demanded a deficiency with penalty and interest. The question presented to the Court there was whether a vendor could collect a tax on sales made by him when the sale was in an amount of less than 50 cents. The sales tax rate at that time was 2 per cent of the purchase price paid or charged, and the petitioner argued that the practical effect of this requirement was that no sale of

less than 50 cents could be taxed because of the fact that there were no coins small enough to provide for such a tax. This Court said:

> The Sales Tax Act imposes the tax on the transaction. The amount of consideration involved in the sale or transaction (a sale always involves a purchase) is the measure to which the rate is applied. . . . The vendor or the person receiving the payment or consideration upon a sale is charged under the law with the responsibility of collecting or accounting to the state for the tax imposed. . . . 90 Utah 362, 61 P.2d 630.

The Court then cited Section 5 of the statute, which reads as follows:

> The vendor may, if he sees fit, collect the tax from the vendee, but in no case shall he collect as tax an amount (without regard to fractional parts of one cent) in excess of the tax computed at the rates prescribed by this act. 90 Utah 362, 61 P.2d 631.

The Court then said that this sentence, particularly the parenthetical part, was the basis of the difference between the parties. Apparently, the plaintiff argued that this phrase, in effect, eliminated the tax on sales involving fractional parts of 50 cents, whereas the defendant, Tax Commission, argued that the vendor was required to pay all taxes actually collected, and whether or not taxes were collected, to pay the rate of the tax imposed upon the aggregate amount of the sales involved.

The Court made reference to the *Logan City* case, wherein it was said:

> It is argued that the city cannot collect a sales tax from the consumer who purchases electricity for a fractional part of fifty cents; that is to say, if the bill of any consumer is, say, forty-nine cents, no tax can be collected thereon, and likewise, if electrical energy in any given month is sold to a consumer in the amount of $1.25, a sales tax of only two cents is collectible thereon, and therefore if the city is required to pay 2 per cent of its total sale [*sic*] it will be required to pay a substantial part of the tax out of its own funds. 90 Utah 363, 61 P.2d 631.

The Court then said that except for the subject matter of the sale the foregoing question in the Logan City case was before it in the *Jensen Candy* case, and continued:

> The law declares that there is levied and collected and paid, as to sales involved in this case, a tax of 2 per cent of the consideration upon every retail sale of tangible personal property. Section 4(a), id. The language of the statute is clear and unambiguous and must be given effect. No exemption is provided for sales where the gross amounts is less than 50 cents or where the sale involving more than 50 cents fails to express its consideration in even units of 50 cents or dollars. There being no exemptions, the rate of 2 per cent of the consideration paid or charged attaches to every sale. If the sale is a 10 cent sale, there is due to the state a tax of 1/5 of

> a cent. That no coins or currency of that particular denomination, or other fractional medium of exchange, are immediately available is not a matter the court may consider in determining the validity of the law. It may present a practical difficulty, but not an insurmountable one, . . . but certain it is that a tax levied upon every sale within the terms of the statute and the vendor is responsible for the collection of it. The vendor may, "if he sees fit," collect the tax from the vendee . . . or he may, if he sees fit, elect to pay or absorb the tax himself. He may not within the terms of the law require the payment of more than the rate imposed by the statute. 90 Utah 364, 61 P.2d 631.

The identical argument presented by plaintiff was again before this court in the *Francom* case which involved sales made through automatic coin operated machines. Although argued in the briefs, no mention was made of that argument in the decision. Apparently the Court deemed it to be without merit. We submit that the argument is again without merit in the present case.

Several other jurisdictions have decided this question and upheld the tax. While some differences exist in the statutes involved, the basic premises and much of the reasoning are applicable in this case. See, for example, *Calvert v. Canteen Co.*, 371 S.W.2d 556 (Texas, 1963); *Piedmont Canteen Service v. Johnson*, 123 S.E. 2d 582 (N.C., 1962).

Point II.

THE PLAINTIFF, AS VENDOR, IS LIABLE FOR THE PAYMENT OF THE TAX.

Plaintiff argues that "since 1937 the Utah Sales Tax Act has placed the legal and economic burden of the sales tax on the vendee and not on the vendor." (Plaintiff's brief, p. 11.) The idea apparently is that to require Plaintiff, a vendor, to pay the tax herein is unlawful. Admittedly, the changes since the enactment of the Sales Tax Act in 1933 emphasize the duty of the vendee to pay the tax. However, numerous cases, including a number decided since 1937 when the seemingly most significant changes in emphasis occurred, have set forth with clarity the vendor's liability with regard to sales tax. *W. F. Jensen Candy Co. v. State Tax Commission*, 90 Utah 359, 61 P.2d 629 (1936); *State Tax Commission v. City Commission of Logan*, 88 Utah 406, 54 P.2d 1197; *State Tax Commission v. Spanish Fork*, 99 Utah 177, 100 P.2d 575 (1940); *Dupler's Art Furs, Inc. v. State Tax Commission*, 108 Utah 513, 161 P.2d 788, (1945); *E. C. Olsen Co. v. State Tax Commission*, 109 Utah 563, 168 P.2d 324, (1946).

The recent case of *Ralph Child Construction Co. v. State Tax Commission*, 12 Utah2d 53, 362 P.2d 422 (1961), clearly sets forth the law in this state on this subject:

> Under our statute the seller or "vendor" is required to collect tax from the purchaser-ultimate consumer and pay it to the state. The

primary obligation to pay the tax is on the ultimate consumer, but we have *repeatedly* held that a retailer who makes a taxable sale must pay the state even though he has failed to collect the tax from the consumer. (Citations.) (Emphasis supplied.)

Point III.

THE PROPOSED ASSESSMENT IS CONSTITUTIONAL.

We would like to emphasize at the outset that in the present case the Court is not confronted with an unusual taxing situation. The sales from the vending machines, which are herein questioned, are a relatively minor part of a large automobile business conducted by Plaintiff. (R. 86, 108.) This case can thus be viewed as the normal situation of any business concern which may devote some portion of its activity to the sale of goods at a price of less than 14 cents per item. While the use of vending machines involves some regulations which may not be involved in the case of manual sales, we submit that the basic problems concerned herein are not different from those faced by the majority of retailers.

We also note that the constitutionality of the sales tax under the same facts as presented herein was upheld in the *Jensen Candy* case. 90 Utah 361, 61 P.2d 630.

The first argument of the Plaintiff seems to be that the constitutional doctrine of equal protec-

tion is violated because sales from vending machines are treated differently and discriminatorily when compared to sales of similarly priced items not made through such machines, that is, manually. We suggest that the statutes and regulations make no distinction between manual and automatic sales as far as the imposition of the tax is concerned.

U.C.A. 59-15-5, which deals with the collection of sales tax, provides that "the tax as computed in the return shall in all cases be based upon the total sales made during the period, including both cash and charge sales." This statute applies to all sales and indicates that the total sales provide the basis for the amount of taxes to be paid.

Sales Tax Regulation 74 applies the statutory requirement to vending machines when it says in part:

> The total receipts from the operations of the above [vending machines] will be considered as the total selling price of the tangible personal property distributed in connection with their operations and must be reported as the amount of sales subject to tax.

Thus, rather than making a distinction between manual sales and those made by vending machines, the regulation merely specifies the application of the statute to one particular type of sale where there might otherwise be misunderstanding. We submit that there is no distinction made in either the statutes or regulations or in practice in the application of the sales tax to manual and vending machine sales

or to plaintiff and any other retailer in Utah. This being so, there is no denial of equal protection of the laws to the Plaintiff.

As a second argument Plaintiff says that it is being deprived of its property without due process of law because Plaintiff, as vendor, is being required to pay a tax imposed on the vendee. We refer the reader to Point II of our brief for authorities in support of the proposition that Plaintiff is only being required to perform a duty imposed by statute upon all vendors.

We are uncertain as to plaintiff's position with regard to the bracket system. Plaintiff appears to rely on the system in an attempt to escape the tax (Plaintiff's brief, pp. 20, 21, 25), while at the same time seemingly questioning it (Plaintiff's brief, p. 20). We would suggest that in relying upon the bracket system to exempt from taxation sales under 14 cents the Plaintiff is in no position to question its validity. If Plaintiff's position is that tokens or some other device must be used by the Commission to facilitate collection, we suggest that the following portion of U.C.A. 59-15-5 gives the Tax Commission discretion in the device employed and that the bracket system is reasonable and lawful:

> For the purpose of more efficiently securing the payment, collection and accounting for the taxes provided for under this act, the tax commission in its discretion, by proper rules and regulations, shall provide for the issuance of tokens or other appropriate devices to facilitate collections; . . .

The bracket system is devised so that sales made in the lower portion of a given bracket are slightly overtaxed, while those sales which fall in the upper portion of a given bracket are slightly undertaxed. It appears to be the premise of the system that in averaging the total sales approximately the correct amount of tax will be collected, so as to equal the amount required to be remitted when computed on the total sales. See *Calvert v. Canteen*, 371 S.W.2d 556, 558 (Texas, 1963).

The bracket system is not the law which sets the incidence and amount of tax. It is merely an administrative device employed to facilitate collection as suggested in the *Jensen Candy* case and authorized by the foregoing statute. (R. 168.)

In the *Jensen Candy* case this Court suggested a standard by which the constitutionality of the bracket system must be sustained:

> It is also recognized that no method or form of taxation has yet been devised that is absolutely equal and uniform (citation). The levy or imposition of taxes may, and is intended, to approach uniformity and equality. The actual collection falls short of that uniformity and equality. 90 Utah 365, 61 P.2d 632.

We submit that the proposed assessment is neither discriminatory, arbitrary or unreasonable. Rather, the Plaintiff is being asked to pay a tax levied in like manner on all vendors, the collection

of which is regulated in some degree by the lawful administrative device of a bracket system.

Point IV.

THE IMPOSITION OF THE PENALTY AND INTEREST IS PROPER.

The statutory basis for the imposition of the penalty herein is found in U.C.A. 59-15-5, which provides in part as follows:

> Any person failing to pay any tax to the state or any amount of tax herein required to be paid to the state within the time required by this act, or file any return as required by this act, shall pay, in addition to the tax, penalties and interest as provided in Section 59-15-8 hereof.

Section 59-15-8, U.C.A. 1953, provides in part:

> If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added the amount of $2.50 or 10 per cent of the total amount of the deficiency whichever amount is greater and interest in such a case shall be collected at the rate of 1 per cent per month of the amount of such deficiency from the time the return was due, from the person required to file the return, which interest and additions shall become due and payable 10 days after notice and demand to him by the commission.

For similar use tax provisions, see U.C.A. 59-16-8, 58-16-9.

The imposition of such penalty and interest has been sustained by this Court on several occasions. *Ford J. Twaits Co. v. State Tax Commission*, 106 Utah 343, 148 P.2d 343 (1944); *Dupler's Art Furs, Inc. v. State Tax Commission*, 108 Utah 513, 161 P.2d 788 (1945); *Ralph Child Construction Co. v. State Tax Commission*, 12 Utah2d 53, 362 P.2d 422 (1961).

As was noted in the Commission's findings of fact (R. 181), there were in effect during the period covered by the assessment, Tax Commission Regulation S-74 and a series of cases, including the *Jensen Candy* case, which unambiguously imposed a duty upon plaintiff to pay the taxes in question. The Plaintiff also admitted that it was guilty of inadvertence in failing to pay the use tax (R. 69). We suggest that failure to pay the tax, in view of the statutes, regulations, and judicial decisions then in force, "is due to negligence or intentional disregard of authorized rules or regulations with knowledge thereof" as required by U.C.A. 59-15-8.

Plaintiff further contends that it was denied equal protection and due process of law in being prevented from inquiring into the policies and practices of the Commission with regard to the assessment of penalties.

A careful reading of the record indicates that Plaintiff was not denied an opportunity to investigate the policies of the Commission (R. 27-42). Plaintiff stated at the hearing that it desired to make such an investigation and was given an oppor-

tunity to explain to the Commission what it intended to prove thereby. The Chairman at the hearing indicated that the Plaintiff was free to offer any evidence relevant to the points at issue.

We believe that the record shows that Plaintiff was attempting to enter unsupported testimony on issues not before the Commission — issues extraneous to Plaintiff's negligence or disregard of rules or regulations. Such irrelevant matters were properly excluded, but without prejudice to the Plaintiff to enter any other competent evidence it had. But Plaintiff presented no further evidence. We submit that such procedure did not unlawfully prejudice Plaintiff and really has no bearing on the matter of penalty and interest.

CONCLUSION

The deficiency assessment for sales tax and the penalty and interest on both sales and use tax are lawful and should be upheld.

Respectfully submitted,

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