1965

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

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CASES

Statutes and Regulations

In the Supreme Court of the State of Utah

ROBERT H. HINCKLEY, INC.,
a corporation,

Plaintiff,

vs.

STATE TAX COMMISSION OF UTAH,

Defendant.

STATEMENT OF KIND OF CASE

This case involves the validity of an assessment for sales tax and the imposition of penalties and interest upon such sales tax deficiency, and the interpretation of the Utah sales tax law as applied to sales of ten cents (10c) and less through vending machines. The deficiency assessment was upheld by the Tax Commission after a formal hearing, as was the penalty and interest.

RELIEF SOUGHT ON REVIEW AND STATEMENT OF FACTS

1. The review sought and the statement of facts are as set forth in the plaintiff's and defendant's briefs.

2. The amici curiae in this case, who filed this brief after leave of the Court having been first obtained, are persons and corporations in the business of retailing through vending machines. Each of said persons and corporations sells candy, gum, life savers, popcorn, and soft drinks through these machines, and one of those persons sells fresh apples

and pears by vending machines. A substantial portion of all of said businesses consists of retail sales of ten cents, or less, through vending machines in the State of Utah.

ARGUMENT

Point I.

THE UTAH SALES TAX IS A TAX ON THE VENDEE-CONSUMER. IT IS NOT NOW A "JOINT AND SEVERAL" TAX WHICH VENDOR AND VENDEE ARE PERMITTED TO ALLOCATE BY PRIVATE AGREEMENT, NOR IS IT A TAX ON THE VENDOR.

The legislative history of this act, as set forth in the plaintiff's brief at page 11, et seq., shows that the sales tax in effect now and during the time covered by the assessments in this case is a consumer tax. Cases such as *W. F. Jensen Candy Co. v. State Tax Commission,* 90 Utah 350, 61 P.2d 629, and *State Tax Commission v. City Commission of Logan,* 88 Utah 406, 54 P.2d 1197, are not in point because the tax has been changed to a consumer tax rather than a "permissive" vendee or vendor tax, as was the situation when the Jensen Candy case was decided.

In addition to the authorities in the plaintiff's brief, we ask the Court to take judicial notice of the Seventeenth Biennial Report of the State Tax Commission to the Utah Legislature, which is filed pursuant to law, and particularly paragraph 15 thereof which reads as follows:

> "15. *We respectfully recommend that the sales tax law be changed to a vendor or retailer type tax rather than a consumer tax.* (Emphasis supplied)

"There is some confusion as to whether the sales tax is a consumer tax, but it is generally regarded to be so. If the act were amended, it would eliminate this confusion and will make it possible to tax some sales of personal property which are not now being taxed."

The Tax Commission itself recognizes and administratively construes the present sales tax as a tax on the consumer.

Point II.

THE TAX COMMISSION, BY ITS REGULATIONS, MAY NOT LAWFULLY CONVERT THE TAX FROM ONE ON THE CONSUMER TO ONE ON THE SELLER.

It is submitted that this proposition is self-evident and needs only to be stated to be upheld. The Tax Commission must take the law from the Legislature and cannot, for administrative convenience or for any other reason, change the law as enacted by the legislative branch of the government.

The naked situation in this case is that the Tax Commission, by regulation, is trying to convert the sales tax from a tax on the consumer to a tax on the seller. This can be the only theory for the deficiency assessment and resulting penalties and interest imposed.

We submit that the Tax Commission has no such authority. It can make reasonable rules and regulations to carry out the legislative intent, but it has no authority to change the entire theory and purpose of the tax and defeat the purpose and intent of the Legislature. Section 59-15-20, U.C.A. (1953); *E. C. Olsen Co. v. State Tax Commission,* 109 Utah 563, 168 P. 2d 324 (1946); and authorities cited at page 28 of plaintiff's brief.

If the Tax Commission is allowed to convert this tax from a tax on the consumer (as the Legislature established it) to one on the seller, in ten cent and less sales, the legislative purpose is perverted — including its manifest desire to have the consumer know that he is paying the tax and how much that tax is, as recognized and required by Tax Commission rules.

The Tax Commission's Regulation 74 attempting to impose a "gross receipts" tax on vending machine vendors in lieu of the statutory sales tax on the vendee is outside the authority and jurisdiction of the Tax Commission, is unconstitutional, and void.

Point III.

UNDER THE LAW AND VALID REGULATIONS NO TAX IS COLLECTIBLE ON SALES OF TEN CENTS OR LESS, AND THE VENDOR AS COLLECTING AGENT IS NOT LIABLE TO REMIT TAXES NOT COLLECTIBLE OR COLLECTED FROM THE VENDEE-CONSUMER.

The seller is the collecting agent; and, in those cases where he can lawfully and practically collect the tax from the consumer, he has the duty to collect that tax and pay it to the State Tax Commission. If he does not perform that duty he is penalized by having to pay the tax himself *because of the dereliction of his duty to collect,* not because the tax is imposed upon the seller. This is the import of the following cases cited by the Tax Commission as authorities for the proposition that the tax is imposed on the seller:

Ralph Child Construction Co. v. State Tax Commission, 12 Utah 2d 53, 362 P. 2d 422 (1961)

E. C. Olsen Co. v. State Tax Commission, 109 Utah 563, 168 P. 2d 324 (1964)

Dupler's Art Furs, Inc. v. State Tax Commission, 108 Utah 513, 161 P. 2d 788 (1945)

State Tax Commission v. Spanish Fork, 99 Utah 177, 100 P. 2d 575 (1940)

The question in the case now before the Court is: Does the seller have to pay the tax himself in those instances where it is either unlawful or, as a practical matter, impossible for that seller to collect the tax from the consumer?

This question has not been before the Court before because all previous cases have either involved the law which imposed the tax on the transaction, with the seller having the option to collect or not from the consumer (such as the Jensen Candy case), or they involved cases where the seller *could* have collected the tax, ***but did not.***

On sales of ten cents or less, the seller cannot practically or lawfully collect a sales tax from the consumer. This is because there are no tokens or money less than one cent, and because of Tax Commission Regulations (Local Sales Tax Regulation No. 3, 1961) and State law (Section 59-15-5, U.C.A., 1953), which make it unlawful for a seller to collect any tax on a sale of less than fourteen cents (14c), where the tax at the authorized rate is less than one-half cent. So in this case it is both *illegal* and *impossible* for the seller to act as the collector of this tax.

Under this statute the vendor-collector is required only to remit "the amount of tax herein required to be collected by the vendor . . .". The statute does require that "the vendor shall 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." Applying the proper rule of strict statutory construction of a tax statute, the Tax Commission, by its Local Sales Tax Regulation No. 3, has properly and administratively construed this Statute as excluding the collection of tax where the amount of the tax at the proper rate is less than one-half cent. Any other construction leads to the absurdity of collecting a 100% tax of one cent on a penny sale of gum. Where the proper tax rate applied to the sale price results in a tax of less than one-half cent it is clear that the Legislature and the Tax Commission intended that the tax should be waived as uncollectible. This is the only common-sense conclusion.

Under this circumstance the seller is not breaching any duty, or any statutory obligation imposed upon him, in his failure to collect and remit the tax. Thus, the rule in the cases relied upon by the Tax Commission does not apply because there is no breach of a duty by the seller.

The Tax Commission in its brief implies that the plaintiff desires the Court to hold sales of ten cents or less are not "subject to sales tax". This is misleading. It appears to us that all retail sales, other than those expressly exempt (which sales are not here involved), are "subject to the sales tax". However, the Legislature and the Tax Commission by its regulations have made it so that the seller cannot lawfully, and as a practical matter it cannot, collect that tax from the consumer on sales of ten cents or less. If tokens were re-established, or if there were a coin smaller than one cent, it would be possible to collect the tax on such sales. But in the absence of tokens or some other practical device there is no way a consumer tax can be collected from the consumer on

a ten cent or less sale with the present tax rate. As no tax can be collected, the collector is not required to remit tax. This is just an application of the familiar maxim that the law does not require the impossible. Where performance of a duty is impossible, non-performance is excused, and ordinary penalties for non-performance are suspended. This is ordinary, basic justice. It is implicit in the statute and is the basis of the entire "bracket" system excusing the consumer-taxpayer from paying tax amounting to less than one-half cent.

CONCLUSION

The tax here involved is on the consumer. The vendor is merely the collector of that tax, with the obligation to pay the tax himself if he fails to perform his duty of collection in those situations where he can lawfully and practically make the collection. *He has no duty to do the impossible or unlawful.* In this case the seller has not failed to perform its duty to collect the tax because it could not lawfully and it could not as a practical matter collect the tax from the consumer. Since the seller has violated no duty and since the tax is not imposed upon a seller directly, the assessment here made and the penalties and interest thereon are invalid and should be set aside. The attempt by the State Tax Commission to convert this tax from one on the consumer to one on the seller is invalid, and the seller's obligation to pay the tax arises only in those cases where he has violated his duty to collect it.

Respectfully submitted,

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