1966

Bennett Association v. Utah State Tax Commission : Plaintiff's Reply Brief

IN THE SUPREME
OF THE STATE OF

BENNETT ASSOCIATION,

Pl

— vs. —

UTAH STATE TAX
COMMISSION,

Def

PLAINTIFF'S

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IN THE SUPREME COURT OF THE STATE OF UTAH

BENNETT ASSOCIATION,
Plaintiff,

— vs. —

UTAH STATE TAX COMMISSION,
Defendant.

Case No. 10682

PLAINTIFF'S REPLY BRIEF

ARGUMENT

POINT I

THERE IS NO AUTHORITY IN THE STATUTE OR THE REGULATIONS FOR DEFENDANT'S POSITION THAT AN AFFILIATED CORPORATION SHOULD HAVE A "TAXABLE YEAR" OF ITS OWN BEFORE IT IS ENTITLED TO JOIN IN A CONSOLIDATED RETURN FOR SUCH YEAR.

Point I of defendant's argument completely overlooks the fundamental proposition that a consolidated "group" is the taxpaying entity — not its constituent members. This was the intent of the statute and regulations when a new approach for taxing a group of corporations was adopted by defendant over thirty-five years

ago. The only "taxable year" involved with a group is the group's taxable year. Defendant's brief cites absolutely no authority for a conclusion to the contrary.

Section 59-13-23, UCA 1953, refers to "corporations which have been members of the affiliated group *at any time during the taxable year.*" The words "the taxable year" clearly refer to the group's taxable year and not to the taxable years of constituent members. (Emphasis added)

POINT II

IN THE WORDS OF THE STATUTE ITSELF, UPON THE MAKING OF A CONSOLIDATED RETURN INCLUSION OF A MEMBER'S INCOME IN THE GROUP'S RETURN IS MANDATORY, NOT PERMISSIVE.

Defendant states at page 7 of its brief that "at the time of the filing of the parent's return in this case, the election was not made to have Bennett's income included in the return. . ." Plaintiff sees no permissive language in either the statute or the regulations, and defendant cites none that gives such an election. To the contrary, the inclusion of Bennett's income for the period during which it was a member of the consolidated group is by statute and regulation mandatory. The proffered amended return was an attempt to fully and fairly report all income of the consolidated group.

Defendant has held in its Decision opinion at paragraph 2 that Bennett's was a "member" of the affiliated group at the time the liquidating distribution was made.

The statute, 59-13-23 UCA 1953, states that the making of a consolidated return *shall be considered as consent* to the regulations. The regulations, Article 32 of Reg. 4, state that if a corporation ceases to be a member of an affiliated group which makes a consolidated return, ". . . the income of such corporation *to be included* in the consolidated return *shall be computed* on the basis of its income . . . for the period during which it is a member of the group." (Emphasis added) It is submitted that the terms "shall be considered," "to be included," and "shall be computed," are mandatory rather than permissive and no choice existed once the parent filed a consolidated return.

Defendant argues that a consolidated return was not made. This is clearly in error since by Article 15 of Reg. 4 the parent corporation is the agent of each corporation which during any part of the taxable year was a member of the affiliated group for all purposes in respect of the tax for such year. The Article goes on to say that "the provisions of the paragraph shall apply whether or not one or more members have become or have ceased to be members of the group at any time." Thus, in making the consolidated return, plaintiff was duly authorized, indeed required, to act for Bennett's.

POINT III

SINCE BENNETT'S WAS A MEMBER OF THE AFFILIATED GROUP, ITS INCOME PRIOR TO DISSOLUTION MUST BE INCLUDED IN THE GROUP'S CONSOLIDATED RETURN.

Defendant, on page 8 in Point II, asserts that "affiliated group" is defined by the regulation as not including corporations not subject to the tax under the Act, and that Bennett's was not subject to tax under the Act for the year 1964 because it owed no tax on the activities in the year it dissolved. Curiously, defendant is arguing, and so states, that Bennett's was not a member of an affiliated group, and it has previosly conceded otherwise in its decision. Defendant simply overlooks the fact that since the group, and not the constituent members, is the taxpaying entity, the activities of Bennett's during the period January 1st to March 31st, 1964, were activities of the group, and are fully subject to franchise tax to the group in the year 1965 for the group's preceding taxable year 1964.

It is submitted that the phrase "not subject to tax" refers to charitable corporations and the like. If this is not true, Article 2(b) of Regulation 4 renders Article 34 of Regulation 4 meaningless.

POINT IV

THE STATUTES AND REGULATIONS ARE MEANINGFUL, CONSISTENT AND EQUITABLE.

If defendant is correct that a corporaiton liquidating into its parent is, in the year of its dissolution, not eligible to join in a consolidated return, then when can Article 34 ever have any meaning?

Defendant seems to imply, by the manner in which it italicizes a part of Sec. 59-13-23(2), UCA 1953, on page 9,

that what plaintiff did involved an avoidance of tax liability. Defendant overlooks the fact that Article 34 also prevents a parent from deducting losses if they occur upon a liquidating distribution from a ninety-five percent owned subsidiary in an intercompany transaction.

As plaintiff pointed out in its opening brief (page 14), the United States Supreme Court in *Ilfeld* v. *Hernandez* upheld the validity of Article 37(a) of Regulation 75, which our Article 34(a) of Regulation 4 adopted. The United States Supreme Court held that the parent could not deduct the losses of subsidiaries which were dissolved and liquidated into the parent, and thus the Court reached precisely the same conclusion which plaintiff urges this Court to reach.

The regulatory plan as authorized by statute recognizes a difference between a single corporation and a group of corporations when the requisite ninety-five percent control over subsidiaries exists. Not only are the income and expenses of all members aggregated under the group-as-an-entity approach, but upon the liquidation of one of the subsidiaries this same approach recognizes that the assets are not distributed to the parent's shareholders, but remain in the group. These assets are still locked in a continuing business corporation and a tax, measured by the operating income produced by these assets, is properly assessed and paid. This makes good sense when it is realized that the position of the shareholders owning stock in the parent is not changed either in substance or form. The parent's shareholders still have a corporate entity intervening between them and

the business assets. Ultimately, when the parent (plaintiff in this case) dissolves and liquidates, the correct gain or loss to the parent's shareholders can be detremined, and it will be recognized.

CONCLUSION

It is submitted that the decision of the defendant should be reversed.

Respectfully submitted,

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