1967

Union Pacific Railroad Company, A Corporation v. State Tax Commission of Utah : Plaintiff's Petition For Rehearing and Brief In Support Thereof

In the
Supreme Court of the State of Utah

UNION PACIFIC RAILROAD COMPANY, a Corporation,
Plaintiff

— vs. —

STATE TAX COMMISSION,
Defendant

Case No. 10710

Plaintiff's Petition for Rehearing and Brief in Support Thereof

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In the
Supreme Court of the State of Utah

UNION PACIFIC RAILROAD COMPANY, a Corporation,
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— vs. —

STATE TAX COMMISSION,
Defendant

Case No. 10710

Plaintiff's Petition for Rehearing

STATEMENT OF THE NATURE OF THE PETITION

This is a Petition for Rehearing of the Court's decision on the ground the Court not only committed error in concluding that the word "commercial" in Section 59-15-4 (b) (2), U.C.A., 1953, (the statute involved) is unambiguous and clear, but also in failing or refusing to recognize the legislative meaning as established by the undisputed and stipulated facts in the record.

DISPOSITION BEFORE THE UTAH SUPREME COURT

In its decision filed March 13, 1967, the Court held that "the legislature intended to exclude from tax the fuel oil which industrial concerns use in the business of fabricating merchandise which, when completed, would be subject to a sales tax and that a sales tax is intended to be imposed on railroads which are primarily engaged in commerce, that is, in trade rather than industry, or in the fabrication of merchandise."

On the basis of that holding the Court ordered that the determination of the State Tax Commission be affirmed.

RELIEF SOUGHT BY PETITION FOR REHEARING

Plaintiff seeks (1) a reversal of the erroneous construction placed by this Court on the statute involved, to-wit, that "commercial" includes all "trade" (railroads are considered to be in trade rather than industry) and that the "industrial" exemption is limited to the fabrication of merchandise; and (2) a ruling, in accordance with the intent of the legislature, that the railroad industry in Utah is exempt from the sales and use tax on its purchase and storage of fuel oil for the propulsion of locomotives.

STATEMENT OF FACTS

The material facts of this case are the subject of a stipulation set out in the record at pages 7 through 11.

and are digested in plaintiff's brief at pages 2 through 9. Accordingly they are not again recited herein.

ARGUMENT AND BRIEF IN SUPPORT OF PETITION FOR REHEARING

PRELIMINARY STATEMENT

Because of the substantial effect of the Court's decision in this case on all railroads doing business in this state, The Denver and Rio Grande Western Railroad Company, Southern Pacific Company and Western Pacific Railroad Company, which, along with plaintiff, constitute all of the Class I railroad companies doing business in Utah, petitioned the Court for leave to file an *amici curiae* brief in support of plaintiff's Petition for Rehearing. By court order dated March 30, 1967, said petitioners were granted such leave. Accordingly, they hereby join with Union Pacific Railroad Company in the following argument and brief in support of plaintiff's Petition for Rehearing.

POINT I

THE COURT ERRED IN HOLDING THAT THE STATUTE INVOLVED IN THIS CASE IS CLEAR AND UNAMBIGUOUS.

On page 2 of its green sheet decision, the Court states: "We do not think there is any ambiguity in the statute involved herein."

Again, on page 3: "It is not any ambiguity in the law which gives the occasion for this lawsuit, but it is

the application of the facts to the law which brings this matter to the court's attention."

We respectfully disagree with these statements. In fact, and entirely contrary to the court's conclusion, plaintiff has proceeded under the conviction that the main reason for this lawsuit *was* the ambiguity in the meaning of the word "commercial," and therefore to apply the proper definition to that term as it appears in and is a part of Section 59-15-4 (b) (2), UCA, 1953, it is necessary to look to all available and proper sources to determine and carry out what the legislature had in mind. By its nature the term "commercial" can denote as broad or as narrow a meaning of business as one wishes to ascribe to it. The fact that it inherently produces more than one interpretation is aptly pointed out by reference to the Tax Commission's "flip flop" administrative constructions over the past twenty-two years. (R. 20, 21, 23)

The wide gamut of meanings and senses which the term is capable of producing, and has produced (and the creation of an ambiguity or uncertainty of meaning requires only two variable interpretations) is graphically illustrated by the definitions of "commercial" in 15A *Corpus Juris Secundum,* pages 1 and 2:

> "The word 'comercial' is defined as meaning mercantile; occupied with commerce; relating to or dealing with commerce; of the nature of commerce; of or pertaining to commerce; pertaining or relating to commerce or trade; derived by commerce or trade; engaged in trade; having financial profit as the primary aid.

> "The term 'commercial,' in its broad sense comprehends all business and industrial enterprises, and in a comprehensive sense it includes occupations and recognized forms of business enterprise which do not necessarily involve trading in merchandise as well as buying, selling, and exchange in the general sales or traffic of (American) markets, although, when limited to the purchase and sale or exchange of goods and commodities, it is said to be used in a narrow and restricted sense. Thus it has been said that in its narrow sense it includes only those enterprises which are engaged in the buying and selling of goods. It has also been said that there is nothing erroneous or irrational in interpreting the word 'commercial' as including farming activities.
>
> "Used in a broad sense, it includes 'industrial,' and is sometimes synonymous with 'business.' "

Apart from general definitions, the cases have uniformly recognized the indistinct and questionable meaning of the term "commercial" as it appears in innumerable statutes and ordinances throughout the country. And, upon such recognition the courts involved have carefully reviewed the legislative background involved and available in order to arrive at the proper legislative intent. For example, the court prefaced its consideration of the meaning of "commercial" in *Reiser v. Meyer,* 323 SW 2d 514, 521 (Mo., 1959), as follows:

> "A reading of the cases shows that the term 'commercial' or the phrase 'commercial purposes' are not susceptible of exact definition. They are given different meanings under varying circumstances and depend on the circumstances under which they are used."

Similarly, in *United States* v. *Public Service Co. of Colorado,* 143 F. 2d 79 (10th Cir., 1944), at page 81, the court said:

> "The term 'commercial' may have a broad or a narrow meaning. In its broad meaning it encompasses industrial enterprises or all business. In the narrow meaning of the term 'commercial' is included only those enterprises engaged in the buying and selling of goods. The legislative history . . . would indicate that Congress was using the word 'commercial' in the restricted sense rather than the broad sense."

In *Jordan* v. *Toshiro,* 278 U.S. 123, 49 S.Ct. 47, 73 L.Ed 214 (1928), at page 127 the court says:

> "While in a narrow and restricted sense the terms 'commerce,' or 'commercial,' and 'trade' may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise."

And, in *Colorado Contractors Ass'n* v. *Public Utilities Commission,* 262 P.2d 266 (Colo., 1953), the court's analysis is as follows:

> " 'Commercial' pertains to commerce. . . . The term 'commerce,' it is said, is not susceptible of exact or comprehensive definition, and the question of what is commerce is to be approached both affirmatively and negatively. 11 Am. Jur. 7, 15 C.J.S. Commerce, Section 1, page 256. It is given different meanings under varying circumstances in the interpretation of certain statutes and doctrines. It has been stretched out of all proportion in some instances and contracted in others

> In the main, it should be declared to mean that which the legislature had in mind by its use in the particular statute under consideration."

See also *City of Sioux Falls* v. *Cleveland,* 75 S.D. 548, 70 N.W. 2d 62, 64 (S.D., 1955); *State ex rel. Kansas City Power & Light Company* v. *Smith,* 342 Mo. 75, 111 S.W. (2d) 513 (Mo. 1938); and *Mechanical Farm Equipment Distributors* v. *Porter,* 156 F. 2d 296 (9th Cir. 1946).

Based upon the foregoing consideration of the critical term involved, it is difficult to see how the court arrived at its view that the statute in this case is clear and certain. Apparently it follows from the comments on page 2 of the green sheet, which state:

> "Fuel oil and coal are taxed only if sold or furnished for domestic or commercial consumption. We would not expect the legislature to predetermine whether or not any given concern was engaged in domestic or commercial activity. That is a factual question to be initially determined by the Tax Commission and ultimately by this court."

While that statement may be true with respect to the proper application of the legislative intent on a case-by-case basis, it completely slides over and leaves unanswered the critical issue in this case: What did the Utah legislature mean by the phrase "furnished for . . . commercial consumption"?

While conceding that the legislature is not expected to decide in advance whether or not any or every concern is commercial in nature, where that body has set

down a meaningful legislative definition of that otherwise questionable term, which is clearly delineated in the legislative history and has thereby established a standard under which the Tax Commission and the Court can apply the legislative intent to a given situation, we believe it is error for this Court to conclude that the statute is clear and then substitute its own views for those of the legislature.

And, in substituting its own views as to what the legislature intended, we believe the court has committed further error for the following reasons: First, the scope and meaning of the exclusion from the statute involved was determined solely by resorting to the dictionary. Second, the Court held that the legislature intended to exclude from the broadest definition of "commercial," which includes all business activity, only that aspect falling within the term "industrial." (Green Sheet, page 4) Thus, instead of interpreting "commercial" the Court turns to the construction of the word "industrial" to decide this case.

This approach makes the sole basis of statutory construction in Utah a literal reading of the dictionary and places an impossible burden on the legislative draftsman. If he does not include his own definition of terms in the statute, he is bound by Webster despite whatever extrinsic evidence is available as to what the legislature was trying to do.

Such an approach has also produced in this case an overly restricted and unduly limited area of exemption

by applying a strict construction to the term "industrial," i.e., fabrication of merchandise, and a very broad definition to "commercial," i.e., all business activity except fabrication. This is the very antithesis of the application of normal and customary rules of statutory construction to tax statutes. And, the upshot is the erroneous placement of the railroad industry into the "commercial" category.

In cases of this kind the Court is to construe the language imposing the tax strictly against the taxing authority and, should "resolve doubts in favor of the taxpayer." *The Ogden Union Railway and Depot Company* v. *State Tax Commission,* 16 Utah 2d 23, 395 P.2d 57 (Utah, 1964).

In his dissenting opinion to the Commission's decision, Commissioner Gunther succinctly and clearly analyzes this point at page 72 of the Record where he states:

> "It appears to me that sales tax upon coal, fuel oil and other fuel is not a tax of general imposition with specific and defined exemption, but rather, because of the peculiar wording of the sections of the Sales Tax Act relating to these substances, a tax of limited imposition. The Legislature in Section 59-15-4, Utah Code Annotated, 1953, did not define the areas of exemption but rather defined in the following language the area of taxation:
>
> "(a) The sale of coal, fuel oil and other fuels shall not be subject to the tax except as hereinafter provided.

"(b) (2) To any person as defined in this act including municipal corporations for gas, electricity, heat, coal, fuel oil or other fuels sold or furnished for *domestic or commercial consumption.*

"If the Legislature had intended to broaden the tax to include such activities as those performed by the railroad in this case, it could easily have done so by imposing a tax and defining areas of exemption. This it did not do. Therefore, under general rules of tax statute construction, the tax imposition, being specific, must be strictly construed.

"Because this tax is of limited and carefully defined imposition, it necessarily follows that any uncertainty or ambiguity as to whether or not imposition is appropriate in a given fact situation must needs be resolved in favor of the taxpayer and against the taxing authority."

It would appear to us that in applying the customary rule of statutory construction, the Court should properly consider "commercial" in its strict sense and "industrial" in its broad sense, or in a reverse order to the method which was followed by this Court.

POINT II

THE COURT ERRED IN REFUSING TO CONSIDER OR IN IGNORING THE STIPULATED FACTS IN THE RECORD WHICH ESTABLISH THAT THE LEGISLATURE INTENDED TO EXCLUDE THE BUSINESS OF RAILROADING FROM THE SCOPE AND MEANING OF THE WORD "COMMERCIAL" IN THE STATUTE.

The opening remarks on the first page of *The United States Law Week*, for the week of March 21, 1967, 34 L.W. 3325, state:

> "Mr. Justice Holmes once wryly commented that in a moment of indiscretion he had told counsel arguing the intention of the legislature that 'I don't care what their intention was. I only want to know what the words mean.'"

Without intending any disrespect, it would appear that the Court's Opinion in this case is a very apt illustration of Mr. Justice Holmes' comment. After reaching the erroneous conclusion that the statute is clear and certain, the Court has no difficulty in brushing aside the facts in the record which establish, insofar as the present case is concerned, exactly what the legislature had in mind in its enactment of Chapter 93, Laws of Utah 1948. Instead, the Court looks to the dictionary for the meaning of the words.

While refusing to recognize the facts in the record, the Court rather incongruously expresses interest in knowing what was said by the sponsors of and the committees which urged passage of the bill. It is, of course, well known that statements of sponsors of bills and committees of Utah legislatures have never been permanently recorded until recent times, and therefore such information is not available in the present case. It is difficult to understand how that type of legislative history would be acceptable to the Court, while the facts in the record, which are just as meaningful, would not be acceptable.

In a case where a statute is, in fact, clear on its face, we would agree that the meaning should be derived from looking to the ordinary and every-day meanings of the statutory language. On the other hand, however, where the language in a statute is not clear, as in the present case, as has been demonstrated under Point I, it would appear that the Court should properly consider all of the available legislative background material. *Peay* v. *Board of Education of Provo City School District*, 14 Utah 2d 63, 377 P. 2d 490 (Utah, 1962); and *City of Mesa* v. *Killingsworth*, 394 P. 2d 410 (Ariz., 1964). See also *Johnson* v. *State Tax Commission*, 17 Utah 2d 337, 410 P. 2d 831, (Utah, 1966), which recites the basic overriding rule in the interpretation of every statute: "What was the intent of the legislature? All of the rules of statutory construction are subordinate to it and are helpful only insofar as they assist in attaining that objective."

The statute with which we are concerned in this case was enacted in its present form as Chapter 93, Laws of Utah, 1943, effective March 18, 1943. (R. 18) That was the first time that the exemption for non-commercial consumption was afforded to solid fuels. The amendment was for the purpose of removing the discrimination which has resulted to Utah coal producers, fuel oil producers, and other fuels producers, from the tax on the sales of such coal, fuel oil and other fuels made for reasons other than domestic or commercial. (R. 19) At that time the initial statute, which was borrowed from the Federal Revenue Act of 1932, had been on the statute books of this state for over

ten years, and during that period there was a clearcut and uniform construction of the language of the statute, which clearly excluded railroads from the scope of "commercial consumption."

Page 19 of the Record includes the following stipulation of fact:

> "*In its consideration and enactment of Chapter 93, Laws of Utah, 1943, the legislature had before it and relied upon the prior construction of the language, 'domestic and commercial consumption' as passed by it in the original enactment of the Emergency Revenue Act of 1933,* and as amended, *together with the Commission's regulations* heretofore set forth which were *issued in definition and construction thereof* by the Commission." (Emphasis Added)

And what was the construction of the original amendment in 1933?

The tax imposed upon energy sold for commercial consumption did not include energy sold to railroads. (R. 13)

And what was the Commission's regulation?

> "All gas, electricity or heat furnished the consumer is taxable except: . . .
>
> "That furnished for other uses which likewise cannot be classed as domestic or commercial, such as . . . railroads. . . ." (R. 17)

We submit that a reference to and the application of the foregoing facts from the legislative history of Chapter 93 is indispensable in establishing the proper legislative intent in this case, and that the Court was in error in failing to do so.

CONCLUSION

All counsel involved in this case are fully aware that this Court does not favor unwarranted use of rehearing procedures. Nevertheless, for the reasons discussed in this brief, we believe this important and far reaching case deserves a rehearing. We therefore respectfully invoke further thought and reconsideration by the Court on the points raised herein.

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STATEMENT OF AMICI CURIAE

The undersigned companies and counsel have joined in this brief not simply because of the effect the result of this case will have upon their respective operations, but primarily because of the rules of law applied by the Court. We have not found persuasive authority which holds that a dictionary definition is entitled to greater weight in statutory construction than established legislative intent coupled with consistent administrative construction over a long period of time. The Court's decision in this case appears to be contrary to the main stream decisions and concepts of long standing applied in Anglo-Saxon jurisprudence.

Accordingly, we respectfully join in the conclusion and urge this Court to grant the foregoing Petition.

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