

1993

Knowledge Data Systems v. Utah State Tax Commission, Auditing Division of the Utah State Tax Commission : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 930323

IN THE UTAH COURT OF APPEALS

KNOWLEDGE DATA SYSTEMS,)	
)	
Petitioner/Appellant,)	
)	
vs.)	
)	
UTAH STATE TAX COMMISSION,)	
AND AUDITING DIVISION OF THE	)	Case No. 930323
UTAH STATE TAX COMMISSION,)	
)	
Respondents/Appellees.	)	Priority 15
)	

REPLY BRIEF OF APPELLANT

PETITION FOR REVIEW OF FINAL DECISION OF
THE UTAH STATE TAX COMMISSION

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FILED
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AUG 02 1993

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
REPLY ARGUMENT.....	1
I. JURISDICTION IS PROPERLY PLACED IN THE COURT OF APPEALS.....	1
A. The Request For Reconsideration Was Never Deemed Denied Because The Presiding Officer Extended The Period In Which The Commission Would Consider The Request.....	1
B. Even If The Request For Reconsideration Had Been Deemed Denied Prior To The Commission's Order, The Plain Reading Of Utah Code Ann. § 63-46b-14(3)(a) Allows The Filing Of An Appeal Within 30 Days of The Commission's Order.....	6
C. The Attorney General's Interpretation of Utah Code Ann. § 63-46b-14(3)(a) Violates Principles of Judicial Economy and Yields Absurd Results.....	10
II. BOTH THE ISOLATED AND OCCASIONAL SALES AND THE TRADED PROPERTY EXEMPTIONS EXEMPT THE SUBJECT HARDWARE ACQUISITIONS FROM SALES AND USE TAX; AND IT DOES NOT MATTER WHETHER THE HARDWARE WAS ACQUIRED IN EXCHANGE FOR PROPERTY, CASH, CREDIT OR OTHER CONSIDERATION.....	11
III. KNOWLEDGE DATA HAS A VALID CAUSE OF ACTION UNDER 42 U.S.C. § 1983 AND IS ENTITLED TO ATTORNEYS' FEES UNDER 42 U.S.C. § 1988.....	17
A. Utah Recognizes § 1983 and § 1988 Claims..	17
B. The Issues Underlying the § 1983 and § 1988 Claims Were Raised At The Commission.....	19

C.	The Commission's Imposition Of The Use Tax Discriminates Against Interstate Commerce and Violates The Commerce Clause.....	21
D.	Knowledge Data Is Entitled To Attorneys' Fees Under § 1988 Even If The Court Resolves The Issues Under A Non-civil Rights Claim.....	22
CONCLUSION	.....	24
APPENDICES		
A.	Affidavit of Administrative Law Judge Alan L. Hennebold	
B.	Stipulation of Parties to Supplement The Record With The Affidavit of Judge Hennebold	

TABLE OF AUTHORITIES

Cases:

	<u>Page No.</u>
<u>Americans United for Separation of Church and State v. School Dist. of the City of Grand Rapids</u> , 835 F.2d 627 (6th Cir. 1987).....	20
<u>Barrett Investment Co. v. State Tax Comm'n</u> , 15 Utah 2d 97, 387 P.2d 998 (1964).....	20
<u>Bevans v. Industrial Comm'n</u> , 790 P.2d 573 (Utah Ct. App. 1990).....	7
<u>Bloomington's By Mail Ltd. v. Huddleston</u> , 848 S.W.2d 52, (Tenn. 1992), <u>cert. denied</u> , ___ U.S. ___, 125 L.Ed.2d 694 (U.S. 1993).....	20, 23
<u>Burgers v. Maiben</u> , 652 P.2d 1320 (Utah 1982).....	9
<u>Butterfield Lumber, Inc. v. Peterson Mortg. Corp.</u> , 815 P.2d 1330 (Utah Ct. App. 1991).....	6
<u>City of Philadelphia v. Heinel Motors</u> , 142 Pa. Super. 493, 16 A.2d 761 (1940).....	14
<u>Daou v. Harris</u> , 139 Ariz. 353, 678 P.2d 934 (Ariz. 1984)	6
<u>Dennis v. Higgins</u> , 498 U.S. 439 (1991).....	22
<u>Denley v. Shearson/American Exp., Inc.</u> , 733 F.2d 39 (6th Cir. 1984).....	9
<u>Dusty's, Inc. v. Auditing Div.</u> , 842, P.2d 868 (Utah 1992).....	4
<u>Felder v. Casey</u> , 487 U.S. 131 (1988).....	17
<u>Gallardo v. Bolinder</u> , 800 P.2d 816 (Utah 1990)....	9
<u>Hase v. Hase</u> , 775 P.2d 943 (Utah Ct. App. 1989)...	9
<u>Hogan v. Muslof</u> , 471 N.W. 2d 216 (Wis. 1992), <u>cert. denied</u> , ___ U.S. ___, 112 S. Ct. 867 (1992)	17-19
<u>Husky Oil Co. v. State Tax Comm'n</u> , 556 P.2d 1268 (Utah 1976).....	12

<u>Kerans v. Industrial Comm'n</u> , 713 P.2d 49 (Utah 1985)	7
<u>Kraft General Foods, Inc. V. Iowa Dep't of Rev.</u> , ___ U.S. ___, 112 S. Ct. 2365 (1992).....	20
<u>L.A. Young Sons Construction Co. v. State Tax Comm'n</u> , 23 Utah 2d 84, 457 P.2d 973 (1969).....	12
<u>Law Lincoln Mercury, Inc. v. Strickland</u> , 246 Ga. 237, 271 S.E.2d 152 (1980).....	14
<u>Lorenc v. Call</u> , 789 P.2d 46 (Utah Ct. App. 1990), <u>cert. denied</u> , 795 P.2d 1138 (Utah 1990).....	17, 22-24
<u>Martinez v. Trainor</u> , 556 F.2d 818 (7th Cir. 1977)	9
<u>Mayer v. Unemployment Compensation Board of Review</u> , 27 Pa. Commw. 244, 366 A.2d 605 (1976)....	8
<u>Merrill Bean Chevrolet, Inc., v State Tax Comm'n</u> , 549 P.2d 443 (Utah 1976).....	14
<u>Nutbrown v. Munn</u> , 311 Or. 328, 811 P.2d 131 (1991), <u>cert. denied</u> , ___ U.S. ___, 112 S. Ct. 867 (1992)	17-19
<u>Pacific Intermountain Express Co. v. State Tax Comm'n</u> , 7 Utah 2d 15, 316 P.2d 549 (1957).....	19
<u>Prince v. Tooele County Housing Authority</u> , 834 P.2d 602 (Utah Ct. App. 1992).....	17, 23, 24
<u>Smith v. Evans</u> , 853 F.2d 155 (3rd Cir. 1988).....	9
<u>Smith v. Robinson</u> , 468 U.S. 992 (1984).....	23
<u>Tummurru Trades, Inc. v. Utah State Tax Comm'n</u> , 802 P.2d 715 (Utah 1990).....	15
<u>Utah State Tax Comm'n v. Katsis</u> , 90 Utah 406, 62 P.2d 120 (1936).....	5
<u>Vanjonora v. Draper</u> , 30 Utah 2d 364, 517 P.2d 1320 (1974)	9
<u>Vorm v. David Douglas School District</u> , 45 Or. App. 225, 608 P.2d 193 (1980).....	8

<u>Vrontikis Bro. Inc. v. Utah State Tax Comm'n.</u> , 9 Utah 2d 60, 337 P.2d 434 (1959).....	15
<u>Waldron v. Wilson</u> , 505 N.E. 2d 858 (Ind. Ct. App. 1987)	8
<u>West Jordan v. Morrison</u> , 656 P.2d 445 (Utah 1982)	7

Statutes:

Ore. Rev. Stat. § 183.482(1).....	8
28 U.S.C. § 1341 (1988).....	18
42 U.S.C. § 1983 (1986).....	17-20, 22-24
42 U.S.C. § 1988 (1986).....	17-20, 22-24
Utah Code Ann. § 59-12-102(10) (1992 & Supp. 1993)	13
Utah Code Ann. § 59-12-104(14) (1992 & Supp. 1993)	12, 14
Utah Code Ann. § 59-12b-104(19) (1992 & Supp. 1993)	14
Utah Code Ann. § 63-46b-1(9) (1989 & Supp. 1993)...	1, 2
Utah Code Ann. § 63-46b-13 (1989).....	1
Utah Code Ann. § 63-46b-14(3) (a) (1989).....	2, 6, 7, 9
Utah Code Ann. § 63-46b-14(3) (b) (1989).....	5
Utah Code Ann § 78-2-2(3) (1992 & Supp. 1993).....	18

Administrative Rules:

Utah Admin. R. R865-19-72S (1992-1993).....	14, 15
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REPLY ARGUMENT

I. JURISDICTION IS PROPERLY PLACED IN THE COURT OF APPEALS.

This Court has jurisdiction because Knowledge Data timely filed its appeal within 30 days of the date the final agency order was issued. The jurisdictional challenge made by the Attorney General fails to properly read the Utah Administrative Procedures Act ("UAPA"). Acceptance of the Attorney General's strained interpretation of the UAPA would offend the rules of statutory construction, defeat one of the main objectives of UAPA, waste judicial resources and lead to absurd results.

A. The Request For Reconsideration Was Never Deemed Denied Because The Presiding Officer Extended The Period In Which The Commission Would Consider The Request.

Utah Code Ann. § 63-46b-13 (1989)¹ provides that an aggrieved party may file a request for reconsideration within 20 days of the Utah State Tax Commission's (the "Commission's") order and if the Commission does not issue an order on reconsideration within 20 days after the filing of the request, the request will be considered denied.

Pursuant to Utah Code Ann. § 63-46b-1(9) the presiding officer may extend the time period in which the

1. Unless otherwise indicated, all subsequent citations to the Utah Code Annotated are to the most recent codification as amended.

Commission will receive the request for reconsideration and the time period in which the Commission will reconsider its decisions:

Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review.²

Thus, a request for reconsideration will be considered denied within 20 days unless the presiding officer extends the time in which the request should be considered. In the present matter, the presiding officer, Administrative Law Judge Alan L. Hennebold, under Utah Code Ann. § 63-46b-1(9), lengthened the time in which Knowledge Data's Request for Reconsideration was to be considered. A review of the record and the facts contained therein is appropriate.

On Wednesday, October 28, 1992, the Commission entered its Finding of Facts, Conclusions of Law and Final Decision. (R. 23). On Monday, November 16, 1992, Knowledge Data timely filed its Request for Reconsideration. (R. 20). On Wednesday, November 25, 1992 counsel for the Auditing Division asked the Commission to extend the time period in which it could respond to the Request for Reconsideration.

2. The language, "except those time periods established for judicial review," refers to the 30-day time period set forth in Utah Code Ann. § 63-46b-14(3)(a): "A party shall file a petition for judicial review within 30 days after the date that the order constituting the final agency action is issued or considered to have been issued."

(R. 18). The Commission granted a continuance. (R. 18).³

On Tuesday, December 1, 1992, the Division filed its response and asked the Commission to leave the review period open until at least Friday, December 4, 1992 so it could supplement its response. (R. 15). Had the Commission not continued the time for considering the Request for Reconsideration, the 20-day deemed denied period would have expired on the next working day, Monday, December 7, 1993.

By letter dated Thursday, December 10, 1992, Gary Kuelczo, in-house counsel for Knowledge Data, asked Judge Hennebold to confirm that the Commission had lengthened the deemed denied period pursuant to Utah Code Ann. § 63-46b-1(9). (R. 13). On Monday, December 14, Judge Hennebold informed Mr. Kuelczo by phone that he had lengthened the time period for considering the Request for Reconsideration and that he should not consider the Request denied. See Affidavit of Judge Hennebold in Appendix A (hereinafter referred to as "Affidavit"). Judge Hennebold further stated that the Commission's decision on reconsideration would be forthcoming and that Knowledge Data could file an appeal with the Supreme Court within 30 days of that decision if it was dissatisfied.

3. It is highly disingenuous, at best, for the Attorney General to now claim that the Commission could not grant the continuance to extend the time in which it would receive and consider the issues on reconsideration that the Division and the Attorney General's office requested.

Affidavit at 2, Appendix A. On Friday, January 15, 1993, the Commission issued its order on reconsideration and on Friday, February 12, 1993, Knowledge Data timely filed an appeal of that order with the Utah Supreme Court. (R.9, 6).

As evidenced by the above facts, the Administrative Law Judge lengthened the time period in which the Commission would consider the Request for Reconsideration. Accordingly, the Request was never deemed denied and the judicial review period of 30 days did not commence until January 15, 1993.

The lengthening of the 20-day reconsideration period is not novel to this case, but is frequently used by the Commission, in appropriate circumstances, to allow it sufficient time to fully review, correct and clarify its decisions.⁴ See Affidavit at 2-3, Appendix A. If the Commission were not allowed to lengthen the time period in which it considers requests for reconsideration, almost every

4. The case of Dusty's, Inc. v. Auditing Div., 842, P.2d 868 (Utah 1992) cited by the Attorney General is an example of a case in which the Commission lengthened the reconsideration time period beyond 20 days. In Dusty's, the Commission originally issued its order on January 10, 1992. Requests for reconsideration were filed by the taxpayer and the Auditing Division on January 23, 1992 and January 29, 1992, respectively. Had the Commission not desired to fully review the parties' requests, they would have ordinarily been deemed denied on February 12, 1992 and February 18, 1992, respectively. The Commission, however, desired to fully consider the requests and thus lengthened the 20-day consideration period until it could issue its decision on reconsideration on March 25, 1992. The March 25th order corrected and clarified several points in the original January 10, 1992 order. On appeal, the Supreme Court ruled that Dusty's appeal had not been timely filed because it was filed more than 30 days after the March 25, 1992 order had been issued.

decision of the Commission would have to be appealed to the Utah Supreme Court without the benefit of the correction and clarification that occurs on reconsideration. Clerical errors and omissions that could be easily corrected by the agency on reconsideration would have to be corrected on appeal. The Supreme Court and the Court of Appeals would consequently be required to hear many additional and unnecessary appeals.

The Attorney General's argument, ostensibly made on behalf of the Commission, is not only contrary to the plain language of the statute and its purpose, but it is also contrary to the Commission's own long standing practice, and should be rejected by this Court.⁵

-
5. Pursuant to Utah Code Ann. § 63-46b-14(3)(b) the "agency and all other appropriate parties" are to be named as respondents in appeals from agency actions. Accordingly, the Commission was named as a respondent in this appeal. As a protective measure, the Auditing Division of the Commission was also named as a respondent so as to identify the originating division in which the Commission's action commenced. It should be noted that the Auditing Division is merely a division within the Commission and as such is not a legal entity that has any statutory authority to act on its own accord. See Utah State Tax Comm'n v. Katsis, 90 Utah 406, 62 P.2d 120 (1936)(Commission auditor unauthorized to act independently, the Commission is the only entity authorized to act quasi-judicially).

When the Appellees' Brief was filed by the Attorney General's Office on June 15, 1993, it only identified the Brief as being filed in the name of the Auditing Division. It is assumed that the Appellees' Brief and the arguments therein are filed on behalf of the Commission, although, as noted, they reject the Commission's well established practice. If the Attorney General does not represent the Commission in this appeal, however, the Brief should be stricken as being submitted by an entity that does not have standing before the Court.

B. Even If The Request For Reconsideration Had Been Deemed Denied Prior To The Commission's Order, The Plain Reading Of Utah Code Ann. § 63-46b-14(3)(a) Allows The Filing Of An Appeal Within 30 Days Of The Commission's Order.

UAPA provides that an appeal from a final agency action may be initiated "within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued." Utah Code Ann.

§ 63-46b-14(3)(a). Accordingly, an aggrieved party may file its appeal either within 30 days of the date of the order or within 30 days of the date that the request is deemed to be denied. The language of this statute is clear and unambiguous and should be interpreted according to its plain meaning.⁶

The Commission's order on reconsideration was issued on January 15, 1993 and Knowledge Data filed its appeal with the Supreme Court on February 12, 1993. Inasmuch as Knowledge Data complied with the plain language of the statute and filed its appeal within 30 days of the date the order was issued, this Court clearly has jurisdiction.⁷

6. Butterfield Lumber, Inc. v. Peterson Mortg. Corp., 815 P.2d 1330, 1332 (Utah Ct. App. 1991)(where the language of the statute is unambiguous "we construe the statute according to its plain meaning").

7. Even if Utah Code Ann. § 63-46b-14(3)(a) were ambiguous, the generally applied rule is that the statute should be interpreted with a "presumption" "in favor of retention rather than divestiture of jurisdiction." Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984).

The Attorney General refuses to read Utah Code Ann. § 63-46b-14(3)(a) as it is written, as an "either-or" option. Rather, the Attorney General asks the Court to add to the language of the statute by requiring an appeal to be filed within 30 days of the date that the order is issued or considered to have been issued, "whichever date is earlier." Had the legislature intended this result they would have added the language to the statute when they enacted it.⁸ To request this Court to act legislatively to add this language violates the rules of statutory construction previously identified and the separation of powers between the Court and the Legislature.⁹

Other jurisdictions, in reviewing similar administrative appeal provisions, have refused to legislatively add the "whichever date is earlier" language and have allowed appeals filed within the prescribed time period

8. See West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982) ("We must assume that each term in the statute was used advisedly by the Legislature and that each should be interpreted and applied according to its usually accepted meaning. Where the ordinary meaning of the terms results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction to the express purpose of the statute, it is not the duty of this Court to assess the wisdom of the statutory scheme.").

9. See Bevans v. Industrial Comm'n, 790 P.2d 573, 574 (Utah Ct. App. 1990) (the Court will not legislate by reading a provision into a statute); see also Kerans v. Industrial Comm'n, 713 P.2d 49, 55 (Utah 1986) ("Following well-recognized rules of statutory construction, we . . . decline to read into the statute a provision not apparently intended by its enactment.")

from the date of the order on reconsideration, even though the order was issued after the request for reconsideration could have been deemed denied. See Vorm v. David Douglas School District, 45 Or. App. 225, 608 P.2d 193 (1980). In Vorm, an administrative agency affirmed the school district's termination of an employee and the employee timely filed a petition for reconsideration. Pursuant to Ore. Rev. Stat. § 183.482(1),¹⁰ the petition was deemed denied 60 days after it was filed. Subsequent to the deemed denied date, the agency issued its order on reconsideration and the employee timely filed its appeal within 60 days from the date of the actual order. The Court of Appeals rejected the school district's claim that the appeal was not timely because it was not filed within 60 days of the deemed denied date. See also Mayer v. Unemployment Compensation Board of Review, 366 A.2d 605 (Penn. 1976) (claimant had 30 days from the date of the board's actual order on reconsideration to file an appeal even though the motion for reconsideration may have been deemed denied much earlier); and Waldron v. Wilson, 505 N.E. 2d 858

10. Ore. Rev. Stat. § 183.482(1) provides in pertinent part: "Proceeding for review shall be instituted by filing a petition in the Court of Appeals. The petition shall be filed within 60 days only following the date the order upon which the petition is based is served unless otherwise provided by statute. If the agency does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such cases, petition for judicial review shall be filed within 60 days only following such date."

(Ind. Ct. App. 1987) (although Waldron's motion for reconsideration was deemed denied five days after filing, the trial court was authorized to rule on the motion 130 days later and this later date started the time for appeal because it was the certified final order).

In effect, a petition for reconsideration is similar to a post-judgment motion that tolls the time in which an appeal must be filed with the court. See Gallardo v. Bolinder, 800 P.2d 816, 817 (Utah 1990) (filing of post-judgment motion tolls the time for appeal).¹¹ This tolling allows the trial court or agency to correct or clarify items in their decisions before the aggrieved party must file an appeal, thus preserving judicial resources. The Commission has long recognized the benefit of being able to reconsider its decisions before the taxpayer is required to file an appeal. Accordingly, the Commission has interpreted Utah Code

11. The Attorney General's citations to Hase v. Hase, 775 P.2d 943 (Utah Ct. App. 1989); Burgers v. Maiben, 652 P.2d 1320 (Utah 1982); Vanjonora v. Draper, 30 Utah 2d 364, 517 P.2d 1320 (1974); Denley v. Shearson/American Exp., Inc., 733 F.2d 39 (6th Cir. 1984); Smith v. Evans, 853 F.2d 155 (3rd Cir. 1988); and Martinez v. Trainer, 556 F.2d 818 (7th Cir. 1977) are completely inapposite to this appeal. Each of these cases held that the late filing of a post-judgment motion did not toll the time period for filing an appeal. In this appeal, it is uncontested that the Request for Reconsideration was timely filed within 20 days of the October 28, 1992 Order. Moreover, the Attorney General concedes that a request for reconsideration tolls the time in which the appeal needs to be filed. The only contested issue is how long does the toll period last -- until the Commission enters its order or until the deemed denied period runs? As previously answered in the above discussion, the toll period runs until the Commission enters its order.

Ann. § 63-46b-14(3)(a) as allowing the aggrieved party 30 days from the date of the order on reconsideration to file an appeal with the Utah Supreme Court. See January 15, 1993 Order on Reconsideration, (R. 11) (final page of the Commission's order gave notice to the Knowledge Data that it had 30 days from the date of the order to file an appeal with the Supreme Court); see also, Affidavit at 3, Appendix A (when taxpayers ask, they are told they can file an appeal within 30 days of the date of the order on reconsideration).

C. The Attorney General's Interpretation of Utah Code Ann. § 63-46b-14(3)(a) Violates Principles of Judicial Economy and Yields Absurd Results.

The Attorney General's Office suggests that the deemed denied period for reconsideration cannot be lengthened because it fears that its client, the Commission, could indefinitely delay ruling on requests for reconsideration. This fear is speculative, misperceived¹² and greatly overshadowed by the benefit of allowing agencies, on reconsideration, to clarify issues for appeal and reduce the cases that appellate courts must review. If the Attorney General's suggestion is accepted, this appeal and many other pending appeals before this Court and the Utah Supreme Court will be dismissed due to lack of jurisdiction. If, on the

12. It should be noted that the reconsideration period is not lengthened in every case, but only in those that the Commission believes should be more fully reviewed for good cause. In the cases cited in this Reply Brief the average time extension was 37 days.

other hand, the Attorney General's suggestion is rejected, the Commission and the other administrative agencies in this state will continue to be able to review and correct their decisions and obviate the filing of unnecessary appeals with this and the Supreme Court.

Nevertheless, should an agency delay its decision unduly, or refuse to rule at all, the deemed denial date could be relied on by an aggrieved petitioner. In other words, the deemed denied date is an ameliorative provision that enables a petitioner to exhaust its administrative remedies and obtain judicial review in situations where an agency prefers to take no action on a request for reconsideration. Where the agency chooses to act, however, and so notifies the petitioner, it should be allowed to do so.

II. BOTH THE ISOLATED AND OCCASIONAL SALES AND THE TRADED PROPERTY EXEMPTIONS EXEMPT THE SUBJECT HARDWARE ACQUISITIONS FROM SALES AND USE TAX; AND IT DOES NOT MATTER WHETHER THE HARDWARE WAS ACQUIRED IN EXCHANGE FOR PROPERTY, CASH, CREDIT OR OTHER CONSIDERATION.

The Attorney General spends extensive time in its brief arguing that Knowledge Data is the ultimate consumer of the used computer hardware it acquired from the University of Minnesota (the "University") and ICI Americas ("ICI").

Appellees' Brief at 20-28. Knowledge Data agrees that it is the ultimate consumer of the hardware,¹³ just as L.A. Young

13. The fact that Knowledge Data is the ultimate consumer of the hardware was stipulated to in the Parties' Stipulation of facts. (R. 41).

Sons Construction Company was the ultimate consumer of the construction equipment it acquired from Amis Construction Co. in Wyoming and just as Husky Oil Company was the ultimate consumer of the refinery reformer it acquired in Canada from Gulf Oil Canada, Ltd.

As the ultimate consumers, Knowledge Data, L.A. Young Sons Construction Company and Husky Oil Company would have been required to pay sales or use tax on the hardware but for the intervention of the isolated and occasional sales tax exemption. See Utah Code Ann. § 59-12-104(14); L.A. Young Sons Const. Co. v. State Tax Comm'n, 457 P.2d 973 (Utah 1969); and Husky Oil Co. v. State Tax Comm'n, 556 P.2d 1268 (Utah 1976). As fully discussed in Appellant's Brief at pages 8 through 13 the isolated and occasional sales exemption exempts the subject transactions and the Commission was in error to try to impose use tax on the transactions. If the use tax can be imposed, this sales tax exemption would be rendered totally meaningless, inasmuch as the user is responsible ultimately for both the sales and use tax.

The Attorney General's sole rebuttal to the application of the isolated and occasional sales exemption is the unsupported argument that the exemption does not apply to the two subject transactions because the used hardware was acquired by trade-in. Not only is this argument incorrect legally, it is incorrect factually with regard to the ICI

transaction. The ICI hardware was not acquired in a trade-in. As set forth in the Stipulation of facts, Knowledge Date "purchased used computer hardware from ICI." (R. 41 emphasis added). The cash purchase price for the hardware was "\$50,000" at a "distress sale." (R. 69).

The used hardware acquired from the University was obtained in exchange for other property. The form of consideration exchanged in a transaction, however, does not affect whether the transaction is a "sale" subject to tax or a "sale" entitled to protection by the isolated and occasional sales exemption. Utah Code Ann. § 59-12-102(10) defines sale to mean "any transfer of title, exchange, or barter, conditional or otherwise, in any manner of tangible personal property . . . for a consideration."¹⁴ Accordingly, the acquisition of the used computer hardware would be subject to tax unless an exemption acts to preclude the imposition of the tax.

14. Apparently, even the Commission disagrees with the Attorney General's argument that the form of consideration is dispositive. In its October 28, 1992 order, the Commission incorrectly assumed that the ICI hardware was acquired by trade. (R. 25). In its Request for Reconsideration, Knowledge Data pointed out this factual error and cited the Commission to the Parties' Stipulation that clearly identified that Knowledge Data had purchased the ICI hardware. (R. 21). In its order on reconsideration, the Commission stated that this factual error was not "material" to its decision and did not affect whether the isolated and occasional sales exemption applied. (R. 10).

There are two exemptions that preclude the imposition of tax in the the University acquisition: the isolated and occasional sales exemption (Utah Code Ann. § 59-12-104(14)) and the traded property exemption (Utah Code Ann. § 59-12-104(19)). As fully discussed in Appellant's Brief at pages 8-13 the University and ICI transactions qualify for the isolated and occasional sales exemption because Knowledge Data acquired hardware from entities that are not regularly engaged in the business of selling hardware.¹⁵

Even if the isolated and occasional sales exemption were not applicable to the subject transactions, the traded property exemption ("Exemption 19") would exempt the University transaction from tax. Exemption 19 proscribes the imposition of tax on property that is acquired by exchange. "An even exchange of tangible personal property for tangible personal property is exempt from tax." Utah Admin. R. R865-19-72S (1992-1993). Tax only applies to the "consideration in money which change[s] hands" when there is an uneven exchange

15. The Attorney General's citation to cases such as Merrill Bean Chevrolet, Inc. v. State Tax Comm'n, 549 P.2d 443 (Utah 1976); Law Lincoln Mercury, Inc. v. Strickland, 271 S.E.2d 152 (Ga. 1980); and City of Philadelphia v. Heinel Motors, 142 Pa. Super. 493, 16 A.2d 761 (1940) are completely inapposite because these cases concern registered motor vehicles. Utah has expressly excluded registered motor vehicles from receiving the benefits of the isolated and occasional sales exemption.

of property. Id.¹⁶ The Attorney General severely misreads Exemption 19 and Rule 72S in its Brief when it assumes that tax can be imposed on the subsequent use of property that is acquired by trade-in. Nowhere does Exemption 19 or Rule 72S apply a tax on the use of property acquired by trade. The entity acquiring the exchanged property will either consume the property acquired or resell it to another. If the party consumes the property, no tax is applied because no money changes hands.¹⁷ If, however, the entity resells the property, tax can be imposed on the money collected at that time because a separate transaction has occurred and a monetary value has been placed on the property by the market. Utah Admin. R. R865-19-72S (1992-1993) ("Subsequently, when the used car is sold, tax applies to the selling price less any trade-in at that time.").

The Attorney General's citation of Tummurru Trades, Inc. v. Utah State Tax Comm'n, 802 P.2d 715 (Utah 1990) for

16. Prior to the enactment of Exemption 19, Utah's Tax Code required that the Commission determine the value of property exchanged and assess tax on the difference of the values of the property exchanged. Vrontikis Bro. Inc. v. Utah State Tax Comm'n., 9 Utah 2d 60, 337 P.2d 434 (1959). Because it was extremely time consuming and imprecise to set fair market values on exchanged property, Exemption 19 was enacted to exempt the tax on the exchange of property and to only impose the tax on the "consideration in money which changed hands." The exemption and the policy apply equally to both the sales and use taxes.

17. If the Attorney General were correct in its assumption that the subsequent use of property acquired by trade could be taxed, Exemption 19 would be rendered completely meaningless.

the proposition that the use of property acquired by trade is subject to tax is misplaced. In Tummurru, the contractor did not pay sales tax on the purchase of building materials because he claimed that he was acquiring the materials for resale to his customers who were the ultimate consumers. Tummurru did not acquire the building materials by trade and Exemption 19 was not applicable. When Tummurru did not sell the materials at retail, but rather consumed the materials himself, Tummurru had to pay the tax because the wholesale exemption had been improperly claimed. The tax applied when Tummurru took the materials out of inventory because that was when it became apparent that Tummurru was the ultimate consumer and the wholesale exemption would not be applicable as originally claimed. Tummurru is not applicable to the case at bar because it did not deal with the isolated and occasional sales exemption or traded property exemption both of which are clearly applicable to this transaction. Unlike Tummurru, the facts on which the exemptions were originally justified in this case have not changed and Knowledge Data's use of the hardware has remained fully consistent with the use contemplated under each exemption.¹⁸

18. Whether the used computer hardware was placed in a fixed asset account or an inventory account is not dispositive in an Exemption 19 situation. What is dispositive is whether the used hardware is ultimately resold. If the hardware is never resold, no tax applies. Even though the booking of the hardware into the fixed asset account is not dispositive in this case, Knowledge Data is amazed that the Attorney General can stipulate that Knowledge Data acquired the used

Footnote continued on next page.

III. KNOWLEDGE DATA HAS A VALID CAUSE OF ACTION UNDER 42 U.S.C. § 1983 AND IS ENTITLED TO ATTORNEYS' FEES UNDER 42 U.S.C. § 1988.

A. Utah Recognizes § 1983 and § 1988 Claims.

This Court has already recognized that § 1983 claims are cognizable in Utah's state courts and has awarded attorney's fees under § 1988. See Prince v. Tooele County Housing Authority, 834 P.2d 602 (Utah Ct. App. 1992) and Lorenc v. Call, 789 P.2d 46 (Utah Ct. App. 1990) (both awarding attorneys' fees awarded under § 1988).

Contrary to the Attorney General's allegation, the cases of Nutbrown v. Munn, 311 Or. 328, 811 P.2d 131 (1991), cert. denied, ___ U.S. ___, 112 S. Ct. 867 (1992) and Hogan v. Muslof, 471 N.W. 2d 216 (Wis. 1992), cert. denied, ___ U.S. ___, 112 S. Ct. 867 (1992) do not stand for the proposition that § 1983 and § 1988 claims relating to state tax matters cannot be brought in state court. Rather, these cases clearly hold that such claims can be brought in state court, but only after administrative remedies have been exhausted. Generally, a party need not exhaust its administrative remedies prior to bringing § 1983 and § 1988 claims. See Felder v. Casey, 487

Footnote continued from previous page.

hardware by trade and that such property "was booked to a fixed asset account and was not held for subsequent sale in an inventory account," and then, when these stipulated facts are not conducive to its argument, allege that the booking of the hardware to the asset account is a fiction because all traded property must "automatically" go into an inventory account. See (R. 48) and Appellees' Brief at 27.

U.S. 131 (1988). Nevertheless, because of the Tax Injunction Act (28 U.S.C. § 1341), when the claims relate to state tax matters, the taxpayer must pursue administrative relief prior to filing the § 1983 and § 1988 claims.

Nutbrown and Hogan dealt with the issue of whether a state must refund state income taxes that were alleged to have been improperly collected from federal retirees. In both Nutbrown and Hogan, the taxpayers filed § 1983 and § 1988 claims in the state trial courts without first seeking administrative relief by filing refund claims with the state Departments of Revenue. In both cases, the courts held that the § 1983 and § 1988 claims could be brought in state court, but only after the administrative remedies were pursued:

[W]e conclude that plaintiffs who challenge the administration of state's taxing statutes must exhaust their administrative remedies before commencing their sec. 1983 claims in the courts of this state.

Hogan, 471 N.W. 2d at 225 and 226.

In the present case, Knowledge Data complied with the holdings in Nutbrown and Hogan and first sought administrative relief at the Commission. Because Knowledge Data was denied relief administratively it sought judicial relief with this Court pursuant to Utah Code Ann. § 78-2-2(3) and properly commenced its § 1983 and § 1988 claims.¹⁹

19. The pay and sue-for-refund remedy urged by the Attorney General on pages 35 and 36 of its Brief is the very remedy Nutbrown and Hogan determined cannot be pursued without first exhausting administrative Footnote continued on next page.

B. The Issues Underlying the § 1983 and § 1988 Claims Were Raised At The Commission.

As evidenced in the Nutbrown and Hogan decisions, § 1983 and § 1988 attorneys fees cannot be demanded before the administrative agency because the agency may grant relief on the underlying claims and thus prevent the attorney's fee claims from ever maturing. Such claims do not become ripe unless and until the administrative agencies fail to provide the taxpayer the requested relief. When judicial relief is required, however, the § 1983 and § 1988 claims may be alleged.

Although it is premature to allege violations of § 1983 and § 1988 before the Commission, the constitutional issue which gives rise to these claims may be, and was, alleged at the Commission. Knowledge Data originally believed that the Auditing Division had erred in its deficiency assessment merely by failing to consider the isolated and occasional sales exemption. When the Commission issued its October 26, 1992 Order, however, it became apparent that the Commission denied the exemption because the sales took place outside of Utah. (R.26). Such a ruling clearly discriminates

Footnote continued from previous page.

remedies. See also Pacific Intermountain Express Co. v. State Tax Comm'n, 7 Utah 2d 15, 316 P.2d 549 (1957)(here the taxpayer pursued the course urged by the Attorney General and had his action dismissed when the court ruled that he had not exhausted his administrative remedies).

against interstate commerce and violates the Commerce Clause of the United States Constitution. In its Request for Reconsideration, Knowledge Data clearly and expressly raised this issue of discrimination. See (R. 22) and the cases cited by Knowledge Data in its Request for Reconsideration: Barrett Investment Com. v. State Tax Comm'n, 15 Utah 2d 97, 387 P.2d 998 (1964) (disparate tax treatment of goods purchased inside and outside Utah would violate interstate commerce); and Kraft General Foods, Inc. V. Iowa Dep't of Rev., ___ U.S. ___, 112 S. Ct. 2365 (1992) (disparate tax treatment of domestic and foreign companies violates the Commerce Clause).

When the Commission issued its January 15, 1993 Order on reconsideration, it rejected Knowledge Data's argument that the Commission's conduct unconstitutionally burdened interstate commerce. Upon the rejection of the interstate commerce argument at the administrative level, the Civil Rights' actions became ripe and could properly be alleged, with the Commerce Clause violation, in this Court.²⁰

20. Note, that even if § 1983 and § 1988 are not specifically cited, an underlying violation of the Commerce Clause entitles Knowledge Data to relief and attorneys' fees under § 1983 and § 1988. Bloomington's By Mail LTD v. Huddleston, 848 S.W.2d 52 (Tenn. 1992), cert. denied, ___ U.S. ___, 125 L.Ed.2d 694 (1993) (quoting Americans United for Separation of Church and State v. School Dist. of the City of Grand Rapids, 835 F.2d 627, 631 (6th Cir. 1987) ("The mere failure to plead or argue reliance on § 1983 is not fatal to a claim for attorneys' fees if the pleading and evidence do present a . . . claim for which § 1983 provides a remedy.")).

**C. The Commission's Imposition Of The Use Tax
Discriminates Against Interstate Commerce And
Violates The Commerce Clause.**

The Attorney General concedes that the Commerce Clause would be violated, if the property were acquired by purchase instead of by trade. Appellees' Brief at 37. (Thus, the Attorney General must also concede that the tax was improperly imposed on the ICI transaction. See pp. 12 to 13, above). As previously discussed above, pp. 11 to 14, however, the fact that the hardware was acquired by trade does not obviate the application of the isolated and occasional sales exemption. Consequently, Knowledge Data's argument that the Commission violated the Commerce Clause by not applying the isolated and occasional sales exemption, Appellant's Brief at 13 to 16, remains unrebutted.

On appeal, the Attorney General claims that the Commission did not impose tax on the initial sale because it was exempt under Exemption 19 as traded property. The Attorney General further argues that the Commission could tax the subsequent use of any property acquired by trade, whether the property was acquired inside or outside Utah without violating the Commerce Clause. This characterization of the Commission's Decisions is inaccurate. The Commission did not consider Exemption 19 as the reason why the acquisition of the hardware was exempt from sales tax. The Commission expressly determined that the acquisition was exempt "because the sales

took place outside Utah." (R. 26). Having made this conclusion, the Commission then reviewed whether the isolated and occasional sales exemption applied. The Commission refused to apply the exemption solely because the property was acquired outside Utah and was subsequently used "in Utah." (R. 10). As discussed in Appellant's Brief at 13-16, this conclusion violates the Commerce Clause and is contrary to Utah's well established precedent applying the isolated and occasional sales exemption. Even if the Commission had relied on the traded property exemption, the transaction must still be exempt. Like the occasional sales exemption, the traded property exemption would be a nullity if it did not apply to both the sales and use tax. (See pp. 14-15, above).

D. Knowledge Data Is Entitled To Attorneys' Fees Under § 1988 Even If The Court Resolves The Issues Under A Non-civil Rights Claim.

To obtain relief under § 1983 a party "need allege only (1) that some person deprived complainant of a right, privilege or immunity secured by the federal constitution; and (2) that such person acted under color of state law." Lorenc v. Call, 789 P.2d at 50 (citations omitted). Knowledge Data has satisfied these requirements: (1) it has alleged that the Commission has deprived it of its constitutional right to engage in interstate commerce without state interference (Dennis v. Higgins, 498 U.S. 439 (1991) (Nebraska's imposition of certain motor vehicle taxes violated the Commerce Clause

and was thus actionable under § 1983)), and (2) it has alleged that the Commission acted under color of the sales and use tax act and its administrative rules to deprive these rights by imposing use tax on its out-of-state property acquisitions (Bloomingtondale's By Mail, Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1992), cert. denied, ___ U.S. ___, 125 L.Ed.2d 694 (1993) (state action of imposing use tax under color of its tax statute violated the Commerce Clause and was actionable under § 1983)).

Even if the Court determines that Knowledge Data is entitled to relief under one of its statutory or non-civil rights claims, it is still entitled to attorneys' fees under § 1988:

[A] plaintiff is generally entitled to an award of attorney fees under section 1988 if the plaintiff prevails on a statutory, non-civil-rights claim which is pendent to a substantial constitutional claim and which arises from a 'common nucleus of operative fact.'

Lorenc v. Call, 789 P.2d at 50 (quoting, Smith v. Robinson, 468 U.S. 992 (1984); see Prince v. Tooele County Housing Authority, 834 P.2d at 604.

In Prince, this court never reached the § 1983 claim because it determined that the Housing Authority had violated state statutes in improperly terminated the claimants housing eligibility. Because Prince's § 1983 claims arose from the same common nucleus of fact, however, this Court concluded

that attorneys' fees should be awarded to Prince under § 1988. Granting such fees "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." Prince, 834 P.2d at 604 (citations omitted).

Knowledge Data's statutory claims, Commerce Clause claim and § 1983 claim all arise out of the same common nucleus of fact surrounding the out-of-state acquisition of the used computer hardware from the University and ICI. If this Court determines that tax was improperly imposed for any of these reasons, Knowledge Data should still be awarded attorneys' fees under § 1988 in accordance with rationale announced in Prince and Lorenc.

CONCLUSION

Based on the above argument, Knowledge Data respectfully requests that the Court reverse the Commission's Orders of October 28, 1992 and January 15, 1993, and declare that Knowledge Data's use of computer hardware it purchased in isolated or occasional sales from the University and ICI is exempt from sales and use tax. Knowledge Data further requests that the Court rule that the Commission's imposition of use tax on property purchased in an out-of-state isolated or occasional sale violates the Commerce Clause and the Federal Civil Rights Act, and award Knowledge Data its

reasonable attorneys' fees associated with this appeal.

Respectfully submitted this 2nd day of August, 1993.

HOLME ROBERTS & OWEN LLC

By: 

R. Bruce Johnson

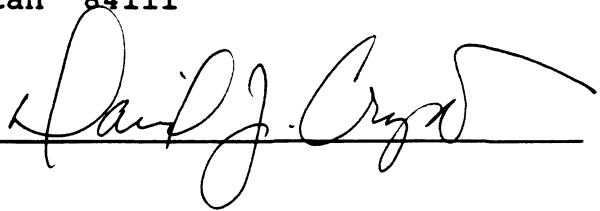
David J. Crapo

Attorneys for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that pursuant to Rule 26(b) (Supp. 1992) of the Utah Rules of Appellate Procedure I caused to be mailed in the U.S. mail, postage prepaid, two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT this 2nd day of August, 1993, to the following:

Gale K. Francis
Assistant Attorney General
36 South State, #1100
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "David J. Cryer", is written over a horizontal line.

APPENDIX A

IN THE UTAH COURT APPEALS

KNOWLEDGE DATA SYSTEMS,)	
)	
Petitioner/Appellant,	)	AFFIDAVIT OF
	)	ALAN L. HENNEBOLD
vs.)	
)	
UTAH STATE TAX COMMISSION,)	
AND AUDITING DIVISION OF THE	)	Case No. 930323
UTAH STATE TAX COMMISSION,)	
)	
Respondents/Appellees.)	)	Priority 15
)	

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

ALAN L. HENNEBOLD, having been duly sworn upon oath,
deposes and states as follows:

1. I am an Administrative Law Judge with the Utah
State Tax Commission.

2. I was the Administrative Law Judge who was
assigned to hear the above captioned matter when it was
pending before the Utah State Tax Commission (the "Knowledge
Data Appeal").

3. On October 28, 1992, the Tax Commission issued
its Finding of Facts, Conclusions of Law and Final Decision
("Final Decision") in the Knowledge Data Appeal.

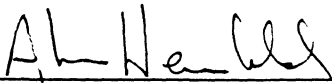
4. On November 16, 1992, Knowledge Data filed a Request for Reconsideration of the Final Decision with the Tax Commission.

5. By letter dated December 10, 1992, Knowledge Data's in-house counsel, Gary Kueltzo, asked the Tax Commission if it intended to respond to the Request for Reconsideration of the Final Decision or if he should file an appeal within thirty days after the deemed denied period of twenty days. A copy of Mr. Kueltzo's December 10, 1992 letter is attached hereto.

6. On or about December 14, 1992, Mr. Kueltzo called me to discuss his December 10, 1992 letter. I informed Mr. Kueltzo that the Tax Commission intended to rule on his Request for Reconsideration of the Final Decision. I further informed Mr. Kueltzo that because many requests and petitions are filed with the Tax Commission, it is rare that the Tax Commission can schedule a meeting of the Commissioners to rule on all the requests for reconsideration within the twenty-day period. I informed Mr. Kueltzo to wait for the Tax Commission to issue its decision on his Request for Reconsideration and that if he was displeased with the decision on reconsideration, he could appeal to the Utah Supreme Court within thirty days of the date the decision on reconsideration was issued.

7. Due to the large volume of cases and requests for reconsideration, the majority of the requests for reconsideration filed with the Tax Commission are not acted upon within twenty days. The information communicated to Mr. Kuelczo to wait for the decision on reconsideration to be issued is routinely given to those individuals who contact the Tax Commission concerning the status of their requests for reconsideration.

DATED this 14th day of July, 1993.

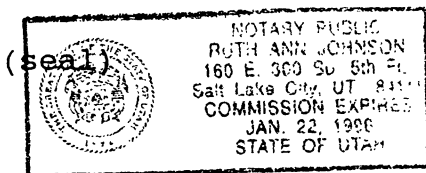


Alan L. Hennebold

SUBSCRIBED AND SWORN to before me this 14th day of July, 1993.



Notary Public



DJCP/BV8

GARY S. KUELTZO, ESQ.
Manager-State and Local Taxes

30 South Wacker Drive, Suite 3600
Chicago, Illinois 60606
312/750-5320

December 10, 1992

Allan Hennebold
Utah State Tax Commission
160 East Third South
Salt Lake City, Utah 84134

Re: KDS
Appeal Number 91-0934

RECEIVED
DEC 14 1992
APPEALS SECTION
STATE TAX COMMISSION

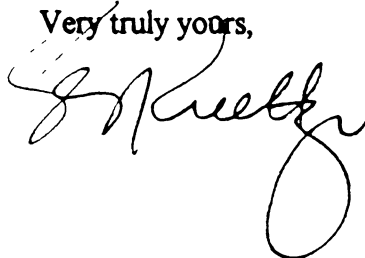
Dear Mr. Hennebold:

I received a call from the Attorney General's office asking for additional time to respond to petitioners request for redetermination and I received a copy of their response to my petition.

I don't know if you've granted them any additional time but my question is whether the 20 day deemed denial period will be moved back as a result of your granting additional response time. Since our time to file for administrative review is tied into any potential deemed denial I would ask for an expeditious answer.

Please call if possible and follow up with a written communication. Thank you.

Very truly yours,



cc: A. Au

Called 12-14-92
2 pm left answer
w/ K's sec

APPENDIX B

FILED
Utah Court of Appeals

JUL 16 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

KNOWLEDGE DATA SYSTEMS,)	
)	
Petitioner/Appellant,	)	JOINT MOTION AND STIPULATION
	)	TO SUPPLEMENT THE RECORD
vs.)	
)	
UTAH STATE TAX COMMISSION,)	
AND AUDITING DIVISION OF THE	)	Case No. 930323
UTAH STATE TAX COMMISSION,)	
)	
Respondents/Appellees.)	)	Priority 15
)	

On June 15, 1993, the Appellees filed their Brief in the above captioned appeal and argued therein that the Court of Appeals lacked jurisdiction to hear this appeal. Because the issue of jurisdiction had not previously been contested, several factual items relevant to this issue had not previously been certified as part of the appellate record.

Pursuant to Rule 11(h) of the Utah Rules of Appellate Procedure both the Appellant and the Appellees jointly stipulate and move that the Court supplement the appellate record in this appeal by certifying and transmitting the Affidavit of Alan L. Hennebold, attached hereto as Exhibit A, as part of the record.

DATED this 16th day of July, 1993.

OFFICE OF THE
UTAH STATE ATTORNEY GENERAL
Jan Graham #1231
Gale K. Francis #4213


Attorneys for Appellees

HOLME ROBERTS & OWEN LLC
R. Bruce Johnson #1726
David J. Crapo #5055


Attorneys for Appellant