

2005

Utah State Tax Commission v. Eric Stevenson : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

UTAH STATE TAX COMMISSION,)
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 Appellant/Petitioner,)
) Case No. 20050521-SC
)
 vs.)
) Agency Decision No. 02-1472
)
ERIC STEVENSON,)
)
)
 Appellee/Respondent.)

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I. This Court Should Correct the Error of the Court of Appeals in Overlooking Utah Code Ann. § 59-1-302(7) (b) (2000) Finding Reckless Disregard by Stevenson.

The Utah Legislature obviously utilized the framework of federal case law in drafting Utah Code Ann. § 59-1-302(2000) in addressing and framing its definition of "willfulness." To characterize the Appellant's position as "discrediting federal law" is inaccurate. But the Utah statute should be correctly applied and interpreted.

This Court is capable of weighing the literal language of the State's statute and determining the legislative intent therein. Additionally, though the Appellee's Brief alleges there is uniformity in the federal court cases, modifications on the definition of "willfulness" and its varied application to particular cases illustrates that uniformity is an illusory term. (See Appellant's Brief, pp. 9-15.)

The knowledge Stevenson had of noncompliance in Tower's filing returns, in signing checks to pay withholding tax, and in awareness of the history of Kenneth Steckelberg's prior mismanagement, meet the threshold of statutory reckless disregard of obvious (or known) risks contained in Utah Code Ann. § 59-1-302(7) (b) (2000).

The crux of Appellant's argument regarding use of the Utah statute, is that the first level of review by this Court is the language of the statute. The Utah language does not mirror the

federal statute. That may be significant. The Court of Appeals did not think it was. The Commission focused on the state statute, but does not have the authority to create legal precedent. This Court does, and should direct the future interpretation and application in administrative actions and cases. Appellant thinks the record establishes the criteria for a *prima facie* case and encourages this Court to agree.

II. The Court of Appeals Incorrectly Applied the Principle of Preferring Other Creditors over the State Government, Due to Stevenson's Control of Funds.

Even if this Court adopts the application of federal cases in defining willfulness under the Utah statute, the facts here still favor Stevenson's liability. A crucial issue in Finley v. United States, 123 F.3d 1342, (10th Cir. 1997) and other cases cited by Appellee, is the extent of control demonstrated or exercised over funds by the responsible person.

A close examination of the principles reflected in In re: Premo, 116 B.R. 515, 535 (Bkrtcy. E.D. Mich., 1990) shows how the facts of that case differ from Stevenson. The facts in Premo note that "the Debtor testified that the funds used to pay employees came directly from [Michigan National Bank] MNB, and were forwarded to Tri-Cities for the specific purpose of paying payroll." (Id. at 536.) The court continued to clarify when funds can be considered encumbered for purposes of excusing an otherwise responsible person from the obligation of willfully

failing to withhold and remit to the government. The court stated "In determining whether funds are encumbered, the cases have focused on the extent to which the employer has unimpaired access to or control of the funds." (Id. at 536.) In that case, the Debtor, Michael J. Premo, had no prior training or experience in finance, and for a newly formed corporation, Tri-Cities Computer Mart, Inc., it hired an individual as CFO. The CFO was the person with the responsibility and control of the financial operation of the corporation. After four years passed, the Debtor only became aware of financial troubles through direct notice by MNB. In further defining the concept of "encumbrance," the Court continued, "As previously stated, the fact that funds are subject to a security interest does not itself warrant a finding that the funds are 'encumbered.' The IRS is therefore correct in stating '[t]he mere existence of a security interest in favor of one creditor cannot be held to give a responsible person the blanket license to prefer all types of other creditors over the United States.'" (Id. at 536.) Then that court excuses the Debtor since MNB only permitted the funds it supplied to be used for current payroll purposes and payment of minimal operating expenses such as rent and utilities. MNB did not permit any of the funds to be applied toward delinquent withholding taxes. The creditor in Premo had much greater control over the use of funds than the Bank of Utah did in this

case.

Stevenson had prior involvement as the sole check signer for Tower. Stevenson had also signed returns for the second and fourth quarter of 1999. In November of 2000, Stevenson became fully aware of the financial condition, but certainly historically had greater involvement than the Debtor did in Premo. (See Statement of Facts in Brief of Appellant, pp. 4-7.)

The actions of Stevenson demonstrated that he, not the Bank of Utah, was in control as to what creditors were paid. On November 15, 2001, Stevenson completed the orchestration of obtaining payment from XO Communications. (See Appellant's Brief, Addendum D.) After Stevenson paid personal funds to acquire the assignment from subcontractors (funds which were totally unencumbered), Stevenson acted as a signer for Tower and personally, in concert with Brett Cherry, in the contract to obtain the specific account receivable for XO Communications and then directed that the check from XO Communications be directly paid to the Bank of Utah. (See Appellant's Brief, Statement of Facts, pp. 7-8.)

A. Stevenson's Self-interest in Actions Taken after November 2000, Demonstrate Use of Personal Assets for Corporate Purpose.

Since Stevenson had competing responsibilities as an officer of the Bank of Utah, and an officer of Tower, the specter of self-serving interest in seeing to it that the Bank of Utah was

paid before or instead of other creditors, taints the characterization of his actions as a simple response to a secured creditor.

The trust fund nature of withholding tax was raised in the formal hearing before the Administrative Law Judge. (Tr. at 232, 234.) Further, until the decision of the Court of Appeals, the issue of encumbered priority among secured creditors was not in issue. Since it is arguable that the secured interest of the Tax Commission is at least on equivalent footing with the interest of the Bank of Utah, it further differentiates the Stevenson case from Premo, and like cases raised in Appellee's Brief.

Appellee argues that the Administrative Law Judge needed to make a specific finding in the Commission's order, that it must constitute a preference for those creditors over the Tax Commission. (Appellee's Brief at 18-19.) If that was an oversight, this Court can correct that oversight by making a determination on the record that the payment did constitute commitment of personal funds for corporate purposes, "priming the pump" to allow the collection of an outstanding account receivable from XO Communications. Without that priming, no collection of funds would have occurred, and Stevenson risked both the attempt to collect for Tower, and risked his standing with the Bank of Utah.

Appellee discounts the use of the lien statute, Utah Code

Ann. § 59-10-406(6) due to an unfiled warrant and a reference to Phillips Petroleum v. Wagstaff, 450 P.2d 100 (Utah 1969). The Phillips court was distinguishing cases on the notice to the secured creditor of the tax amount due and delinquent. A warrant filed would give that notice. Here, a warrant could not be filed because Stevenson's filing a Petition for Redetermination stayed further collection action by the Commission, including filing warrant. No warrant will be filed until final disposition, and only if that favors the Commission. But Tower and Stevenson had actual notice of the assessment and the amount, and the statute creates in them constructive of lien also.

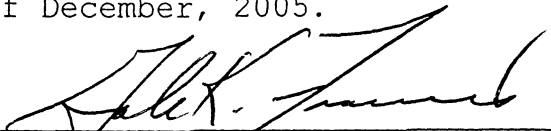
III. The Supreme Court Should Weigh Both the Facts and the Law in the Record to Determine if the Court of Appeals Applied the Standard of Review Correctly.

This Court has weighed issues of fact and law multiple times in prior decisions. The Appellant does not presume that mixed questions of fact and law are easy to determine. However, the specific statutory requirement of a *prima facie* case is established by Utah Code Ann. § 59-1-302(7)(b). The facts presented at the formal hearing are summarized in the record and the decision of the Tax Commission. The standard of review, as articulated in Utah Code Ann. § 59-1-610(2000), is also clear. The Appellant has confidence that this Court will determine those matters of fact and issues of law and allow the deference to the Commission to which it is entitled.

CONCLUSION

In light of the need to establish local precedent with regard to Utah Code Ann. § 59-1-302, and the particular facts and legal issues raised in relation to Stevenson, his position with both Tower and the Bank of Utah, Appellant requests that the Court affirms the decision of the Tax Commission and overrules and clarifies the decision of the Court of Appeals.

DATED this 15th day of December, 2005.

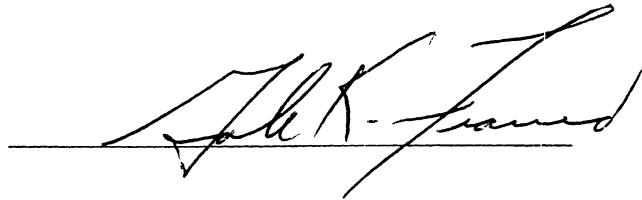


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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 2005, I caused two (2) copies of the foregoing BRIEF OF APPELLANT/PETITIONER to be mailed, postage prepaid, to:

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