1966

Dona L. Johnson, on Behalf of Herself and all Other Taxpayers of the State of Utah v. State Tax Commission of Utah : Brief of Respondent and Cross-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

DONA L. JOHNSON, on Behalf of Herself and All Other Taxpayers of the State of Utah,
Plaintiff, Respondent and Cross-Appellant,

— VS. —

STATE TAX COMMISSION OF UTAH,
Defendant, Appellant and Cross-Respondent.

Case No. 10555

Brief of Respondent and Cross-Appellant

Appeal From the Judgment of the Third Judicial District Court for Salt Lake County
HONORABLE JOSEPH G. JEPPSON, *Judge*

ALLEN E. MECHAM
FRANK V. NELSON
LORIN N. PACE
Salt Lake City, Utah
Attorneys for Plaintiff, Respondents and Cross Appellants.

F. BURTON HOWARD
Special Assistant Attorney General
Attorney for Defendant, Appellant and Cross-Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

DONA L. JOHNSON, on Behalf of Herself and All Other Taxpayers of the State of Utah,
Plaintiff, Respondent and Cross-Appellant,

— vs. —

STATE TAX COMMISSION OF UTAH,
Defendant, Appellant and Cross-Respondent.

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STATEMENT OF THE CASE

This is an action under Title 78-33-2, Utah Code Annotated, in which the plaintiff, respondent and cross-appellant in the District Court of Salt Lake County prayed for relief as follows:

1. That the income tax return filed by the plaintiff, as well as all other citizens of the State of Utah, prior to January 1, 1966, or any extension thereof, covering income earned during 1965, are properly filed.

2. That the applicable income tax rate on said income tax returns filed prior to January 1, 1966, or any extension thereof, is the rate applicable prior to the enactment of H. B. -81, passed by the 36th Legislature.

3. That fiiscal year income taxpayers filing income tax returns for a period ending during 1965, non-resident income taxpayers filing for a period ending during 1965, and the estates of deceased persons filing income tax returns during the calendar year 1965 and based upon income tax rates applicable prior to the enactment of H. B. -81 (36th Legislature) are proper and valid income tax filings.

4. That H. B. -81 (36th Legislature) is unconstitutional and unenforceable under the Utah and Federal Constitutions because the application of the income tax rates set forth therein are not equally and unformly applicable to all Utah citizens of the same class.

DISPOSITION OF THE CASE BY LOWER COURT

The lower court granted plaintiff, respondent, and cross-appellant's Motion for Summary Judgment in the following terms:

1. There is no genuine issue as to any material fact alleged in the Complaint.

2. That the income tax rates provided in H. B. -81 (36th Legislature) do not apply to the plaintiff, Dona

L. Johnson, nor to other Utah income taxpayers who filed income tax returns on or before December 31, 1965.

3. Section 5 of H. B. -81 (36th Legislature) is not ambiguous and H. B. -81, as well as the statutes implementing said H. B. -81 do not violate provisions of the Utah or Federal Constitutions.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to confirm the lower court's judgment:

> "That the income tax rates provided in H. B. -81 (36th Legislature) do not apply to the plaintiff, Dona L. Johnson, nor to other Utah income taxpayers who filed an income tax return on or before December 31, 1965."

And:

> "That Section 5 of H. B. -81 (36th Legislature) is not ambiguous. . . ."

Plaintiff seeks to overrule the following portion of the Judgment of the lower court:

> " . . . H. B. -81, as well as the statutes implementing said H. B. -81 do not violate provisions of the Utah or Federal Constitutions."

STATEMENT OF FACTS

The plaintiff is a resident of the State of Utah and was domiciled in Utah during the entire year of 1965. She is a calendar year taxpayer who earned all of her

income in the State of Utah during the year 1965. Her income is, therefore, taxable by the State of Utah.

The 36th Utah Legislature, on the 11 day of March, 1965, passed an individual income tax law known as H. B. -81.

Section 5 of said H. B. -81 is quoted, as follows:

> "The tax rates provided for herein shall apply to all tax returns filed on or after January 1, 1966 for taxable years commencing on or after January 1, 1965."

Accordingly, plaintiff and approximately 6,000 other citizens of Utah filed 1965 calendar year income tax returns with the defendant Tax Commission, using the income tax rates in effect prior to the enactment of H. B. -81.

An undisclosed number of estates, non-residents and persons filing on the basis of a fiscal year, filed tax returns during the year 1965 at the tax rates in effect prior to the enactment of H. B. -81.

The defendant, Tax Commission, has declared that the income tax rates provided in H. B. -81, notwithstanding Section 5 thereof, are applicable only to citizens who report their 1965 earnings on a calendar year basis. Other Utah citizens who report their earnings on a fiscal year basis, or who move from the State of Utah, or who die during 1965 need not file under the rates provided in H. B. -81.

ARGUMENT

POINT I.

THE 1965 UTAH LEGISLATURE INTENDED THAT THE INCOME TAX RATE INCREASE IMPOSED BY H. B. -81 SHOULD NOT APPLY EQUALLY TO ALL TAXPAYERS, AND SECTION 5 OF H. B. -81 WAS INTENTIONALLY DRAFTED TO PERMIT LACK OF UNIFORMITY AND TO AUTHORIZE EARLY FILING OF INCOME TAX RETURNS TO AVOID PAYMENT OF THE NEW HIGHER INCOME TAX RATES IMPOSED BY H. B. 81.

Section 5 of H. B. -81 is quoted, as follows:

> "The tax rates provided for herein shall apply to all returns filed on or after January 1, 1966, for taxable years commencing on or after January 1, 1965."

H. B. -81, including Section 5, was drafted through the joint efforts of attorneys and administrative officers assigned to the Governor's Office and the defendant, Tax Commission. The Bill was presented to the Committee on Revenue and Taxation of the House of Representatives by Utah's Director of Finance, who is an attorney and who has a past record of service as a Commissioner with the defendant, Tax Commission. The Bill was *not* drawn by members of the Legislature.

Defendant Tax Commission quarrels with the decision of the lower court which permits taxpayers to file their income tax returns at the lower rates provided they file prior to January 1, 1966. Yet the intended wording

of Section 5 of H. B. -81 and for which the defendant Tax Commission had deep concern was purposely drawn to permit fiscal year taxpayers, dead taxpayers and non-resident taxpayers to file at the rates in effect prior to the passage of H. B. 81. The wording of this section was deliberate and intentional to avoid the administrative burden of accounting and auditing of prorated tax returns during the transitional period of going from the lower income tax rates to the higher income tax rates provided in H. B. -81. Administrative expediency and convenience offers little, if any, justification for the disparity and lack of uniformity imposed upon income taxpayers who are required to pay the increased tax assessed. Moreover, it would be virtually impossible to advance a more inconsistent position then to argue that one group of taxpayers in the same class should be permitted to pay income tax at a lower rate than other income taxpayers in the same class in order to justify the administrative expediency.

In support of the position that all 1965 calendar year taxpayers must file at the new tax rates, defendant Tax Commission cites the case of *Mecham, et al.* v. *State Tax Commission,* No. 10410, just decided by this court. At Page 15 of the Record on Appeal in that case, the defendant Commission clearly states:

> *"It should be noted that the Bill does not require returns filed in 1965 to be subject to the increased rates, but only returns filed on or after January 1, 1966."* (Emphasis added)

And again in its brief, at Page 5, the defendant Tax Commission urged this Court in rendering its decision:

> "It should be noted that the Bill does not require returns filed in 1965 to be subject to the increased rates, but only returns filed on or after January 1, 1966, which is after the effective date of the Bill."

The defendant Tax Commission not only reviewed H. B. -81 prior to submitting it to the Legislature, but the defendant Tax Commission also edited and approved the wording of Section 5 in order to preserve the tax inequity of the fiscal and short term taxpayer.

In a companion revenue bill increasing the corporate franchise tax by 50 per cent, the defendant Tax Commission approved a less complex effective date clause. Section 6 of that statute, which was also enacted by the 1965 Legislature (H. B. -68), reads:

> "This Act shall take effect for all taxable years beginning after December 31, 1964."

Obviously, the more complex effective date clause (Section 5 of H. B. -81) was for the clear purpose of allowing disproportionate and unequal income tax filings.

In its rationale to overrule the clear meaning of Section 5 of H. B. -81, defendant Tax Commission refers to 59-14-1, Utah Code Annotated, defining taxable year. This statute, read carefully, gives no comfort to defendant's position, since clearly there is no reference therein to income tax rates and the statute obviously was adopted merely to distinguish fiscal and fractional filings from calendar year filings.

Sutherland, in his work on statutory construction, discusses uniformity and equality in the imposition of the tax burden. He states:

> "While the power to tax and the exercise of that power is indispensable to the effective operation of government, the rule has been fiirmly established that tax laws are to be strictly construed against the State and in favor of the taxpayer. Therefore, where there is reasonable doubt as to the meaning of a revenue statute, it should be resolved in favor of those taxed. It was stated in Gould v. Gould, one of the leading cases upon the subject:
>
> > 'In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the government and in favor of the citizen.'
>
> "A number of theories have been put forth in sustaining the soundness of the doctrine. It has been suggested that since all taxation must originate through Legislation, precedent is lacking for extending its operation; that tax laws are not founded on a permanent public policy and, therefore, should not be extended by implication; that a rigid application of revenue measures is for the protection of the citizen who should be informed in unambiguous terms the amount and nature of his duty to pay taxes; and, that where tax statutes impose burdens upon long established trades and occupation, the balance of economic interest favors the taxpayer and not the State. *Probably the best*

explanation for the rule is to be found in the theory of securing equality and uniformity in the imposition of the tax burden." Sutherland, pp 293, 294 and 295. (Emphasis added)

"*Emphasis belongs upon the general objectives of such laws with a view to accomplishing uniformity and equality among the class of persons sought to be taxed.*" Sutherland, p. 297. (Emphasis added)

POINT II.

INCOME TAX RETURNS FILED PRIOR TO JANUARY 1, 1966 MAY BE FILED AT TAX RATES IN EFFECT PRIOR TO THE ENACTMENT OF H. B. -81.

The 36th Legislature of the State of Utah enacted House Bill No. 81 to increase income tax rates on individual income. Section 1 of House Bill No. 81 amended Section 59-14-2, Utah Code Annotated, 1953, by increasing the rate of tax imposed on net taxable income. Section 5 of the Act provides:

> "The tax rates provided for herein shall apply to all returns filed on or after January 1, 1966, for taxable years commencing on or after January 1, 1965."

This section is the operative section of the Act, specifying to what tax returns the rates provided for in Sections 59-14-2, Utah Code Annotated, 1953, will be applicable. The plain meaning of this provision makes it manifest that the increased tax rates only apply to returns filed on or after January 1, 1966.

The lower court, in this case, as well as the case of *Mecham, et al.* v. *State Tax Commission,* has ruled the above Section 5 of the statute to be not ambiguous:

> "Even when a court is convinced that the Legislature really meant and intended something not expressed by the the phaseology of the Act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." See Sutherland on Statutory Construction, page 314.

It is a well-established axiom of statutory construction, that a statute will be given the plain meaning that arises from its reading.

In *Ringwood* v. *State,* 8 U. 2d 287, 333 P. 2d 943, the Utah Supreme Court stated that a statute is normally to be interpreted according to the ordinary and usual meaning of the language used. The reason for the rule of construction is manifest. The easiest means by which a citizen has of determining what the law is is to read the statute. Subtle distinctions that the Legislature might have intended, cannot prevail over the plain meaning of the statute to the contrary.

In *People ex rel. Wood* v. *Sands,* 102 Cal. 12, 36 Pac. 404, it is stated:

> "When the intention of the legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction."

No other meaning can be drawn from the provisions of Section 5, Chapter 125, Laws of Utah 1965, except that

the substantive tax rates made applicable by the legislation were to be operative only to returns filed after January 1, 1966. Indeed, on page 5 of the Utah State Tax Commission's brief, it is acknowledged that one of the alternatives the Legislature might have had in passing the subject legislation would be ". . . that the rate increase shall only apply to returns filed after a certain time." This is exactly what the Legislature did. And again at page 15 of the Record on appeal in *Mecham et al,* v. *State Tax Commission* — the defendant, Tax Commission, states: "It should be noted that the bill does not require returns filed in 1965 to be subject to the increased rates but only returns filed on or after January 1, 1966."

It is a further well-stablished axiom of statutory construction that effect will be given to every word in a statute, since it will be presumed that the Legislature did not intend that a word be used in a statute without it having some significance. Sutherland, Statutory Construction, 3rd Ed., Sec. 4705. Sutherland, op. cit., observes:

> "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."

The Utah Supreme Court has recognized the validity of this axiom of statutory construction in *State* v. *Gates,* 118 Utah 182, 221 P. 2d 878. If the Legislature did

not intend a different rate to apply to reurns filed prior to January 1, 1966, why was legislation used to the effect that the rates would be applicable only to returns filed after January 1, 1966.

It may be that some members of the Legislature had in mind something other than that expressed in the statute they passed, but as the Utah Supreme Court has noted, this gives no basis to change the plain meaning of the statute.

A case where the Utah Supreme Court was faced with a very similar argument was *Park and Recreation Commission* v. *Department of Finance,* 15 U. 2d 110, 388 P. 2d 233. In that case, the 1961 Legislature appropriated a sum of money in excess of $1,000,000.00 to the Park and Recreation Commission for the purchase of lands for a state park. Subsequently, the Park and Recreation Commission felt an additional sum of money was necessary and was of the opinion that $150,000.00 more was required. An amendment in 1963 to the previous appropriation was made and the sum of $150,000.00 was all that was specified in the act. It was argued that the clear intention of the Legislature was to add the $150,000.00 to the previous sum appropriated. The Utah Supreme Court acknowledged that that might have been the intention of the Legislature, but that since the language used was clear, that would govern. The court observed:

> "As to the 1963 act it seems almost obvious that the legislature did not intend to emasculate the

authority of the 1961 act to purchase land for over a million dollar aggregate purchase price, and it seems also almost obvious that it indulged error, in failing to note that the 1963 amount was meant to be an addition. The legislature has the prerogative of making mistakes, and it is not the judiciary to correct them if the language of the legislation is clear and unambiguous. The 1963 act certainly is clear and unambiguous, and it is for the legislature, not us, to rectify the latter's mistake, if there be one here. . . ."

If however, the argument of the Utah State Tax Commission is correct, that the provision establishing the filing date for the tax returns demonstrates an intention to apply the increased rates to all calendar year returns for the year 1965, then it is obvious that Section 5 of Chapter 125, Laws of Utah, 1965, is ambiguous, since this section creates a different inference. This being so, the ambiguity must be resolved in favor of the taxpayer. *Moss* v. *Board of Commissioners of Salt Lake City*, 1 U. 2nd 60, 261 P. 2d 961; *Norville* v. *State Tax Commission*, 98 Utah 170, 97 P. 2d 937; *W. F. Jensen Candy Company* v. *State Tax Commission*, 90 Utah 395, 61 P. 2d 629.

The Utah State Tax Commission has acknowledged the above mentioned principle that ambiguity must be resolved in favor of the taxpayer.

POINT III

(PLAINTIFF'S CROSS-APPEAL)

H. B. -81 (36th Legislature) IS UNCONSTITUTIONAL BECAUSE IT PERMITS DISCRIMI-

NATORY AND UNEQUAL APPLICATION OF INCOME TAX RATES AMONG UTAH CITIZENS OF THE SAME CLASS.

Point three of the appellant's brief appears to concede that calendar year taxpayers are affected differently by the provisions of H. B. 81 than are fiscal year taxpayers, but argue that this does not make any difference to the validity of the act.

Although Utah does not have a specific constitutional provision relating to uniformity in the application of *income* tax legislation, it does have a general provision, ArticleI, Section 24, that, "all laws of a general nature shall have uniform application." The absence of a specific provision relating to income tax uniformity appears to make little difference. Federal courts, and state courts applying federal law, have long held that income tax legislation enacted by the states is subject to the provisions of the equal protection clause of Amendment XIV, Constitution of the United States.

States having "uniform" income tax provisions have usually held that the provisions are substantially coextensive with the uniformity requirement of the equal protection clause. See, for example, *Methodist Book Concern* v. *Galloway,* 186 Ore. 585, 208 P.2d 319.

By its terms H. B. 81 requires Utah taxpayers to pay income tax based upon a higher rate if their "taxable year" begins on or after January 1, 1965, and if they filed their returns on or after January 1, 1966. Tax-

payers who would not come within this provision would include fiscal year taxpayers whose year began before January 1, 1965; calendar year taxpayers who filed returns prior to January 1, 1965; and taxpayers who are not on an annual basis, such as the estates of taxpayers who died during the year 1965, or citizens of Utah who changed their residence and domicile to another state during 1965.

Although the classifications we are talking about arise out of the "effective date" provision of H. B. 81, they are real classifications and it is necessary to determine their legitimacy under Article I, Section 24, of the Constitution of Utah and the equal protection clause of Amendment XIV of the Constitution of the United States.

A number of decisions have held taxing statutes to be invalid because the classifications established had no reasonable relationship to the objects and purposes of the legislation. One of the earliest cases decided by the United States Supreme Court is *Pollock* v. *Farmers Loan & Trust Co.*, 157 U.S. 429, 599, 15 S. Ct. 673, 39 L. Ed. 759, in which an early income tax statute was held to be unconstitutional. Speaking of the statute the court said:

> "The inherent and fundamental nature and character of the tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.
>
> "This inherent limitation upon the taxing power forbids the imposition of taxes which are

> unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others when the corporations do not materially differ from one another in the character of their business or in protection required by the government. Trifling differences in their modes of business, but not in their results, are made on the ground and occasion of the greatest possible differences in the amount of taxes levied upon their income, showing that the action of the legislative power upon them has been arbitrary and capricious and sometimes merely fanciful."

A more recent recognition of the applicability of the equal protection clause to taxation by the states is found in *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480, wherein the court, although upholding a classification as reasonable, made the following statement:

> "* * *There is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' [Citing cases.]"

Decisions in courts of sister states have also recognized the need for a classification based upon some sub-

stantial ground. In *Blaustein* v. *Levin,* 178 Md. 423, 4 A 2d 861, an income tax statute was held invalid because of differences it made in certain trust income. The Court of Appeals of Maryland said:

> "Now, what the legislature has done by the Act of 1935, Ch. 302, is to single out the resident beneficiaries of non-resident trusts 'where the donor or testator creating such trust, is or was, at the time of creation of such trust, a resident of this state,' and impose upon such beneficiaries a tax of six per cent per annum on the income from such trusts, and it excuses, certainly does not include, other beneficiaries of trusts, such as resident beneficiaries of trusts foreign from their inception, and resident beneficiaries of wholly local trusts, though they are all exactly alike. The discrimination is in taxing one group of persons answering the description of the act of 1935, without including others who are similarly situated.
>
> * * *
>
> "In the opinion of this court, Section 141(a) of the Act of 1935, ch. 302, is invalid, because it sets up an arbitrary and unreasonable discrimination between persons of the same general clases. * * *"

In *Henry* v. *Shevinsky,* 239 Ala. 293, 195 So. 222, the Supreme Court of Alabama struck down a Revenue Act. While recognizing that taxing statutes are not required to provide for "perfect equality" there is a requirement that some individuals of a class fairly arranged are not selected to carry a burden not alike operative on all of the class, and that each local or sub-class must be reasonable and not capricious in order to be sustained.

In *Great Atlantic and Pacific Tea Co. v. Kentucky Tax Commission et al.*, 278 Ky. 367, 128 S.W. 2d 581, the Court of Appeals of Kentucky saw invalidity in a license and occupation tax. The court said:

> "While the provisions of Section 171 of our constitution, requiring taxes to be equal and uniform, apply in their fullness only to direct taxation of property, yet the principal of equality and uniformity must be observed in imposing license and occupation taxes. The uniformity provision does not prevent the classification of businesses, trades, professions or occupations, and the taxation of different classes at different rates, but the tax must be uniform on all subjects within the class to which it is applying, and the classification must be made according to natural and well recognized lines of distinction. The difference upon which the classification is based must be substantial. * * * The principle of equality and uniformity in taxation is one of the corner stones of our constitution, and has been zealously guarded by the decisions of this court in applying it, not only to statutes levying a direct tax on property, but to statutes and municipal ordinances imposing occupation taxes."

In *Opinion of the Justices* (N. H. 1965), 208 A. 458, the Supreme Court of New Hampshire recognized limits upon the classifying rights of the legislature with respect to revenue measures and expressed an opinion that a revenue measure because of improper classifications was invalid. The court said:

> "House Bill 292 would tax the incomes from personal services of all kinds, including professional services, except that it would not tax income from

personal services of an identical sort 'for which wages or salaries are received from an employer' §1 V. For example, a self-employed carpenter, painter, plumber or general repairman would pay a tax. But his assistants, receiving wages or salaries for an identical service, would pay nothing. * * * Such examples can be multiplied almost indefinitely, but it appears to us unnecessary to do so.

"We have said that a tax imposed on corporations, while allowing individuals engaged in like businesses or vocations to go free, is unconstitutional. [Citing cases] The converse of this is also true. [Citing cases] By incorporating his business and drawing a salary, any owner of a business could avoid personal liability for the tax. The small corporation by disbursing its receipts and the payments of salaries and other expenses, could likewise avoid liability for the tax. * * * It follows that this provision cannot be held constitutional."

In *City of Louisville et al.* v. *Koehler et al.*, (Ky. 1954) 264 S.W. 2d 80, the Court of Appeals of Kentucky held unconstitutional an ordinance imposing minimum annual license fees on businesses regardless of the amount of business done in the city. Noting a provision that none of the minimum fee would be returned, and that the law was a revenue measure designed in part to obtain revenue from itinerant merchants, the court said:

"Section 9(e) really does not apply to itinerant merchants as such, but only to those merchants who sell or do business from a fixed location for a period of less than a year. If such a merchant

were to operate a business for eleven months, for example, and made no profit, he would be subject to a license fee of $250.00, while another merchant in the same line of endeavor who managed to stay in business for a year without making a profit would owe no tax and not be out-of-pocket for the license to do business. * * * The fact alone that a merchant is in business for less than a year is not a sound reason for placing him in a different classification for tax purposes as that occupied by his competitor who stays in business for more than a year. The difference upon which the classification is based must be substantial and upon a natural and reasonable basis."

In *In re Vanderbilt's Estate*, 281 N. Y. 297, 22 N. E. 2d 379, the Court of Appeals of New York discussed the limits upon the power of a legislature to classify in estate tax legislation:

"The serious question in this case is whether the tax violates the constitution of the United States. The state has a broad power of taxation, but in the exercise of that power it may not provide a measure for tax which is entirely arbitrary and which produces inequality and injustice so great as to deprive a taxpayer of the equal protection of the law. * * * Always there must be some reason based on facts, not fiction, for imposing a particular tax upon a particular class, and absence of any basis for the classification may not be hidden by an arbitrary creation or a conclusive presumption. * * *

"Considering the validity of the tax three factors must be constantly kept in mind: the nature of the tax, the measure of the tax, and its incidence. * * *"

In *Barker Bros., Inc.* v. *City of Los Angeles,* 10 Cal. 2d 603, 76 P. 2d 97, the Supreme Court of California held invalid a general occupational license tax imposed by the City of Los Angeles, on the ground that the classifications in the statute were arbitrary. The classifications related to differences between stores "commonly known as department stores" and other stores. The Supreme Court of California said:

> "Wide discretion is given to legislative bodies in the imposition of taxes, and the right to classify for such purposes is of wide range and flexibility. * * * 'The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection "but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation." [Citing Power Co. v. Saunders, 274 U. S. 490, 493, 47 Sup. Ct. 678, 71 L. Ed. 17165, and other cases.]
>
> "While the state may classify broadly the subjects of taxation, it must do so on a rational basis so that all persons similarly circumstanced shall be treated alike."

For authorities holding generally that income tax statutes may not discriminate in favor of one as against another in the same position or class, see *Cook* v. *Walter Dry Goods Co.,* 212 Ark. 485, 206 S.W. 2d 742; *Hartman* v. *State Commission of Revenue and Taxation,* 164 Kan. 62, 187 P. 2d 939; *Martin* v. *Cage,* (Ky.) 134 S.W. 2d 966; *Christopher* v. *Jennings,* 122 W. Va. 665, 12 S.E. 2d 813;

Appeal of Van Dyke, 217 Wis. 528, 259 N.W. 700, 98 A.L.R. 1332; 1 *Cooley on Taxation* (4th Ed. 228.

In *State ex rel Haworth v. Berntsen*, 68 Ida. 539, 200 P. 2d 1007, the Supreme Court of Idaho struck down an income tax statute giving residents a credit of $1,500 against net income in case of a husband and wife, together with $200 for each dependent, but giving non-residents a credit of only $700, as violating the privileges and immunities clause of the Federal Constitution. It would also seem to be in violation of the equal protection clause.

In light of the tests set out above, the provisions of H. B. -81 are unconstitutional and void (under Utah and U. S. Constitutions) insofar as they discriminate between "slow" calendar year taxpayers on the one hand, and fiscal year taxpayers, non-annual taxpayers, and "fast" calendar year taxpayers on the other. In its brief the appellant Tax Commission argues that there is a legitimate reason for making a distinction between fiscal year taxpayers and calendar year taxpayers. It is difficult to see any basis for the distinction.

Payment upon a fiscal year, while authorized by statute, is not prescribed by it. Whether a taxpayer files upon a fiscal or calendar year basis is pretty much left up to the desires and accounting methods of the taxpayer and the approval or agreement of the Tax Commission. It is provided by 59-14-12 Utah Code Annotated 1953 that net income shall be computed upon the basis of

the taxpayer's annual accounting period. But 59-14-14 contemplates that a taxpayer may change his accounting period. Under the provisions of 59-14-15 Utah Code Annotated 1953, if a taxpayer with the approval of the Tax Commission changes the basis of computing net income from a calendar year to a fiscal year, a separate return is to be made for the period between the close of the last calendar year for which the return was made and the date designated as the close of the fiscal year. Conceivably, some taxpayers could still bring themselves under the old tax rate by obtaining approval from the Tax Commission to change from a calendar year basis to a fiscal year basis for the year 1965.

Inasmuch as income tax statutes are related primarily to the raising of revenue and standing the costs of government, there is no significant relationship between the classifications established by H. B. -81. Fiscal year taxpayers, the only difference between whom and calendar year taxpayers is that they have a different accounting period, ought to bear the same burden of tax increase as calendar year taxpayers; persons who remove from the state, or estates whose predecessor taxpayers died during the calendar year, should not be permitted to avoid the tax by such a happenstance. By its plain terms the statute permits some benefits to those taxpayers who are able to race to the Tax Commission with returns for the calendar year 1965.

It is submitted that the classifications are arbitrary, and cannot be justified by the argument that the legislature ought not to have to bother with such detail.

CONCLUSION

To achieve the results contended for by the State Tax Commission would require this court to go into the legislative business itself and either excise significant provisions from H. B. -81 or write other provisions into it. Time and again this court has held, consistent with views almost universally recognized, that it may not find that because of the "intention" of the legislature a statute should be held to have some meaning that it clearly doesn't have.

Section 5 of H. B. 81 which presently reads:

> "The tax rates provided for herein shall apply to all tax returns filed on or after January 1, 1966, for taxable years commencing on or after January 1, 1965."

Should, says the Tax Commission, be re-written to read as follows:

> "The tax rates provided for herein shall apply to all taxable years commencing on or after January 1, 1965."

Not only should this court refuse to enter the field of legislative draftsmanship, but it should declare invalid any act of the legislature which contravenes the constitutional provisions requiring uniformity of legislation.

Regardless of the interpretation given by the court to the rights of early filers, H. B. 81 is discriminatory with respect to a large group of taxpayers in that it has made the question of liability for the increased rates depend upon a circumstance which has nothing to do with the legitimate puroses of the revenue legislation. We submit that the portion of the trial court's judgment construing the meaning of H. B. 81 should be affirmed and that the entire act should be declared unconstitutional and void because of its lack of uniform application and its denial of equal protection of the laws.

Respectfully submitted,

ALLEN E. MECHAM
FRANK V. NELSON
LORIN N. PACE
Salt Lake City, Utah

Attorneys for Plaintiff, Respondents and Cross Appellants.