

1992

Brown Plumbing and Heating Co. v. Utah State Tax Commission : Response to Petition for Rehearing

Utah Court of Appeals

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BRIEF

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920402

IN THE UTAH STATE COURT OF APPEALS

BROWN PLUMBING & HEATING CO., :

Petitioner, :

vs. :

UTAH STATE TAX COMMISSION, :

Respondent. :

Case No. 920402

Priority No. 15

PETITIONER'S OPPOSITION TO PETITION FOR REHEARING

ON PETITION FOR REVIEW OF FINAL ORDER OF
THE UTAH STATE TAX COMMISSION

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FILED
Utah Court of Appeals

MAR 24 1993

Mary T. Noonan
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Clerk of the Court

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BACKGROUND

On 19 February, 1993 this Court entered a decision which overturned the Utah State Tax Commission's determination that Petitioner is responsible to pay sales taxes on materials which the Alpine School District purchased and Petitioner installed into a junior high school in Alpine School District. On 2 March 1993, the Respondent filed a Petition for Rehearing and requested this Court to reverse itself with respect to its decision. By letter dated 18 March 1993, this Court has requested Petitioner to file a response to the Petition for Rehearing.

ISSUE ON REHEARING

Is the Court of Appeals Decision Wrong With Respect to Standard of Review, the Facts Upon Which it Relied for its Decision and the Appropriate Law Applicable to Determine This Matter?

SUMMARY OF ARGUMENT

The Tax Commission has petitioned for rehearing on the grounds that the Court applied the wrong standard of review, misunderstands the law, and improperly overturned factual findings of the Commission. Like its original decision, however, the Tax Commission's Petition for Rehearing stems from a basic misunderstanding of the sales and use tax law. Moreover, the argument that the Court based its decision upon the wrong facts is clearly without merit because the Court relied upon facts stipulated to by both parties. Finally, the Court of Appeals correctly applied the "correction of error" standard of review.

ARGUMENT

I.

REHEARING SHOULD NOT BE GRANTED BECAUSE THE COURT APPROPRIATELY APPLIED THE "CORRECTION OF ERROR" STANDARD OF REVIEW

The Court of Appeals correctly applied the "correction of error" standard of review because all of the Tax Commission's assessment of error arise from erroneous legal conclusions. First, the Tax Commission's assessments of error arise from misinterpretation of the tax statute. The Commission is in no better position than the Court of Appeals to construe the statute. As Respondent admits in its own brief, the Court must determine if the Commission's findings are appropriate "in light of the statutory setting in which it operates." (Petition for Rehearing at 3). In reviewing such findings, the Court appropriately applied the correction of error standard which accords no deference to the Commission's reading of relevant statutes. Therefore, the Court applied the appropriate standard of review under *Morton International Inc. v. Auditing Division*, 814 P.2d 581 (Ut. 1992).

The Commission's statement of the law set forth in *Utah Department of Administrative Services, v. Public Service Commission*, 658 P.2d 601 (Ut. 1983) is misleading. The Respondent maintains that the "mixed questions of law or fact or the application of findings of basic fact to the legal rules governing the cases" always must be reviewed under the "reasonableness"

standard.¹ However, the reasonableness standard is employed to review mixed questions of law and fact only when the application of fact to law involves a matter as to which the legislature expressly has given the Tax Commission discretion to interpret the statutory language. *Chevron v. Utah State Tax Commission*, 207 Utah Adv.Rep. 23, 24 (Utah Sup.Ct., January 29, 1993). As the Court stated in *Morton International, Inc. v. Auditing Division*, 814 at 585:

The correction of error standard was also used to review an agency's construction of, or application of findings of fact to, the statute to which the agency is empowered to administer - when the agency's experience or expertise is not helpful in resolving the issue. One example of such a situation is when a question of statutory interpretation turns on basic legislative intent. Other examples include situations where the agency is construing ordinary statutory terms within the statute which they administer, such as, application of limitation, under the Workman's Compensation Act, the proper construction of the term 'deficiency of service.' In fact, in any situation involving the application of the legal rules to the findings of fact, a correction of error standard is used if the Court is as well suited to determine the issue as the agency. (emphasis added)

The legislature has not given the Tax Commission any special charge to interpret the statutes in question. Further, the particular issue raised by the Tax Commission is not one which it is better suited to determine than the Court of Appeals -- in fact

¹This Memorandum addresses issues under current law because the Tax Commission's Petition has ignored the Court's proper finding that the law in effect on December 1985 governs this case. However, the conclusion is unchanged under the 1985 law.

the Tax Commission is decidedly less competent than this Court. The precise issue involves the legal effect of deductive change orders which remove all obligations to furnish materials from a furnish and install contract. The Tax Commission reached an erroneous legal conclusion that the Petitioner remained responsible for purchased materials notwithstanding the amendment to the contract by the deductive change order process. However, the Petitioner demonstrated in its Memoranda previously submitted to this Court that the Tax Commission's conclusion is legally erroneous. The Tax Commission is in no better position than the Court of Appeals to construe the statutes at issue or the effect of deductive change orders.

II.

REHEARING SHOULD NOT BE GRANTED BECAUSE THE COURT APPROPRIATELY STATED THE LAW

- A. In the Context of the Present Case, a "Transfer" Is Not a Taxable Event.

The Court properly found that the mere "transfer" without a purchase is not a taxable event under the circumstances of the present case. The Respondent is correct that U.C.A. §59-12-102(10)(e) refers to taxing "possession, operation or use" granted under a "lease or contract," which indicates that in general "transfers" could be subject to sales tax under some circumstances. However, when read in context it is clear that the phrase "lease or contract" must be read *in para materia* with "leases and rentals" referred to in §59-12-103(1)(k). The present case does not involve

any "lease and rentals" and therefore the language regarding a "lease or contract" in §59-12-102(10)(e) is irrelevant under the facts of the present case. Thus, in the context of the present case, the Court of Appeals is correct to hold that only events of purchase and not subsequent transfers are material to determination of responsibility for sales or use taxes.

B. The Court of Appeals Findings Regarding the Use Tax are Correct

The Tax Commission's second two arguments regarding a "critical area of law and the application of the use tax" and the "Commission's stated basis for imposing the tax" amount to nothing more than a complaint that the Court did not give adequate "time" to the Tax Commission's logic and argument. (Petition for Rehearing, pp. 4 - 7). However, the Court correctly noted that a use tax is totally inapplicable because the use tax can be assessed only against the purchaser and the Petitioner was not a purchaser. It was adequate for the Court to have found one dispositive flaw in the Tax Commission's argument -- it need not find numerous flaws. It was not incumbent upon the Court to elaborate upon the Tax Commission's argument or to discuss alternative grounds which would have reached the same result, such as the inapplicability of use tax to extra-territorial sales as set forth in *Geneva Steel Company v. State Tax Commission*, 116 Utah 170, 209 P.2d 208 (1949), and *Union Pacific Railroad Company v. Utah State Tax Commission*, 99 UAR 13, (Utah Nov. 6, 1992) or the requirement of ownership contained in the definition of "use" in §59-12-102(13)(a), U.C.A.

III.

REHEARING SHOULD NOT BE GRANTED BECAUSE THE COURT'S FINDINGS OF FACT WERE APPROPRIATE

The Respondent's final assignment of error is a claim that the Court of Appeals improperly overturned factual findings of the Commission. There are at least three (3) errors in the Tax Commission's position which justify the Court of Appeals finding. First, the specific finding cited in the Tax Commission's Petition constitutes a legal conclusion as to the ultimate significance of the other findings and stipulations quoted in the Court of Appeals' opinion. Second, by citing the facts stipulated to by the parties, the Court of Appeals showed that adequate facts had indeed been marshalled to overturn the Tax Commission's ultimate findings. The facts stipulated to by the parties were clearly inconsistent with the ultimate findings by the Tax Commission. The Court of Appeals did not need to look further than the facts stipulated to by the parties as a basis for its decision.

Finally, the actual legal issue on which this case turned was "who purchased the materials" not "who does the Tax Commission deem to be responsible to become the purchaser of the materials." Thus, the Tax Commission's erroneous findings about who had the duty to purchase the materials were not relevant to the critical question or final outcome of the case. The Court of Appeals was free to decide the case based upon the stipulated facts which had been properly marshalled without any obligation to specifically overrule contrary ultimate facts which were not directly relevant to the

decision on the correct question of law. Finally, since the Tax Commission reviewed the case based upon an erroneous understanding of the legal issues involved, its findings simply were not helpful or relevant to the Court of Appeals to make the correct determination.

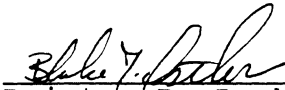
CONCLUSION

Because the Court of Appeals did not make an error in selecting the standard of review, its analysis of the law or in the facts, there is no reason to grant a rehearing.

DATED this 24th day of March, 1993.

Respectfully Submitted

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MAILING CERTIFICATE

I hereby certify that on the 24th day of March, 1993 I caused to be mailed a true and correct copy of PETITIONER'S OPPOSITION TO PETITION FOR REHEARING to the following by mailing said copy through the United States mail, postage prepaid, first class mail:

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