OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CALIFORNIA STATE BOARD OF EQUALIZATION, Petitioner V. SIERRA SUMMIT, INC.

CASE NO: 88-681

PLACE: WASHINGTON, D.C.

DATE: April 19, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA STATE BOARD OF EQUALIZATION, Petitioner, v. SIERRA SUMMIT, INC. : No. 88-681

Washington, D.C.

Wednesday, April 19, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 o'clock a.m.

APPEARANCES:

ROBERT F. TYLER, JR., ESQ., Sacramento, California; on behalf of the Petitioner.

DAVID RAY JENKINS, ESQ., Fresno, California; on behalf of the Respondent.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll have argument next in No. 88-681, Tyler v. David Ray Jenkins. No, I'm sorry. California Board of Education v. Sierra Summit. You may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT F. TYLER, JR.

ON BEHALF OF THE PETITIONER

MR. TYLER: Thank you, Mr. Chief Justice and may it please the Court:

At issue in this case is a proper interface between Federal bankruptcy power and the fundamental sovereign rights of the states to tax commerce and property within their borders.

The case concerns the Ninth Circuit's holding that a state may not tax a private party's subsequent commercial rentals of property purchased at a bankruptcy liquidation sale by reason of the purported preemptive effect of 28 U.S.C. Section 960 and the purported unconstitutional interference such taxation is seen as imposing upon the bankruptcy processes.

The state contends that this ruling is in error for three reasons. First, whatever it is, Section 960 is obviously not a clear expression of preemptive intent stated to be necessary to preempt state taxation

under this Court's ruling in Swarts v. Hammer.

Second, whatever the limits of intergovernmental immunity, the imposition of a nondiscriminatory tax on a liquidation sale or the purchaser therefrom certainly does not cross them.

Third, whatever the limits of bankruptcy jurisdiction, a bankruptcy court clearly has no jurisdiction to adjudicate a controversy between a state and a nonbankruptcy party concerning the taxability of transactions occurring long after the bankruptcy is closed.

QUESTION: Mr. Tyler, there is kind of a procedural wrinkle in this case, isn't there, in that -- it comes up because your client in effect was held in contempt for disobeying an injunction?

MR. TYLER: That's correct.

QUESTION: Do you think the Ninth Circuit in this case, or the bankruptcy courts, did more than just interpret the terms of the injunction?

MR. TYLER: Yes, I do, for the simple reason that the injunction is circumscribed by the judgment underlying it and that judgment in turn is circumscribed by the pleadings brought by the parties underlying the adversary complaint. That pleading, in turn, was brought by the debtor -- if one will -- or the trustee,

state receiver's, under Bankruptcy Code Section 505.

In turn, Bankruptcy Code Section 505 only allows adjudication of the debtor and the estate's rights -- tax rights and obligations -- on property in the bankruptcy estate. That's all that the trustee --

QUESTION: I don't understand that answer. Your answer is that the judgment could not possibly go beyond the jurisdiction permitted? Surely, it could.

MR. TYLER: No. The jurisdiction permitted is circumscribed in the Bankruptcy Code.

QUESTION: You mean no court has ever issued a judgment which went beyond what the court could do, legally?

MR. TYLER: That was not the case presented in this situation. The Bankruptcy Court clearly did not mean to exceed the jurisdictional grant in 505.

QUESTION: Well, nobody ever means to do that, but the question is whether it did so. Whether the text of the judgment was clear enough that it meant to cover even subsequent -- subsequent taxation such as was involved here. Isn't that simply a question of construing the judgment?

MR. TYLER: Yes. The Bankruptcy Court construed the judgment to the contrary. It found that this was not a contemptuous action because its prior

order was not meant to have the ambit urged upon it by Respondent herein.

QUESTION: But then the bankruptcy appellate panel reversed that, didn't it?

MR. TYLER: Yes, but the Bankruptcy Court itself obviously knew what it had in mind in framing its original order and I think that that construction is one which should be paid deference on appeal.

QUESTION: Well, we ought to get out of the business of interpreting statutes, then. Just let Congress interpret them. I thought -- you know, once you utter a judgment, it exists out there and it's not up to you to say in the future what it is. It's up to the appellate courts to say.

MR. TYLER: But the Bankruptcy Court -- what you have here is a nebulous phrase. It's included by some draftsmen in the judgment ultimately entered by the court, the "or other persons."

QUESTION: Could you have stipulated to an injunction which would forbid you from collecting tax from an ultimate user?

MR. TYLER: I'm sorry, I don't understand what you mean by the ultimate user.

QUESTION: Well, suppose -- suppose the judge said I'm going to enter an injunction and you can't tax

this transaction, and you can't tax ultimate use based on the exempt nature of this transaction. Could you say, we stipulate to that, Your Honor?

MR. TYLER: I believe so. I think you can assent to that.

QUESTION: All right. Well, hasn't that in effect happened, because the judge -- at least arguably -- issued a very broad injunction and you didn't appeal it. If -- if you can stipulate to it, you can't come up here and say well, it's beyond their jurisdiction.

MR. TYLER: No. The judge had no intent to affect the relationship between Respondent and its --

QUESTION: Well, that's the second question. Let's assume that the injunction can be prohibited -- can be interpreted to prohibit the tax in this transaction. Let's assume that for the moment. If that's the case and you didn't appeal the injunction, aren't you barred by res judicata?

MR. TYLER: If in fact that was the intent of the court, the Bankruptcy Court, to enter such a judgment, yes. Well --

QUESTION: All right. And if not -- if not, then we don't have the issue before us anyway, because the injunction doesn't even apply. So I don't see how in either case we reach the constitutional issue.

Either you're bound by the injunction and the injunction covers you, or the injunction doesn't cover you, but in either event I don't see how we ever reached the Goggin case.

MR. TYLER: It was clear that the intent of the parties and the understanding of the parties and the Bankruptcy Court in 1983, when the original adversary judgment was entered, was simply that it only related -- that judgment only related to the taxability of the debtor and the estate through the trustee and that -- it begs reason --

QUESTION: Well, if that's true then that's the end of the case and we never reach the Goggin principle.

MR. TYLER: No. That's not -- I would beg to differ. Under res judicata principles what the Court essentially would be holding us to there is to adjudicate hypothetical controversies with the trustee concerning taxability of transactions of third parties and clearly the trustee has no desire to do that and clearly the Board has no desire to do that, considering that in 1983 all of this exists as a mere hypothetical.

QUESTION: Is this all part of one proceeding? Was -- isthe proceeding we have here before us now basically just a continuation of the proceeding

in which the injunction was entered?

MR. TYLER: I -- it's hard to answer that question. What happened was that the bankruptcy was opened, dismissed, reopened again for the purpose of the original adversary proceeding by the trustee, dismissed again, two and a half years later it's reopened again by Sierra Summit for the purpose of ostensibly bringing the instant contempt citation. In one sense it is a continuation, but in another sense it is very attenuated.

QUESTION: Okay. I know you intend to argue the merits of the case and please feel free to do so.

MR. TYLER: Thank you, Your Honor.

The main fault with the Ninth Circuit's ruling in this case exists and the cases upon which it rests -- Goggins I and Goggins II -- rests upon their interpretation that 28 U.S.C. Section 960 bars the taxation of a liquidation sale or property rights that a purchaser acquires therein.

Whatever it is, Section 960 is not the clear expression of Congressional preemptive intent to preclude state taxation in this area. If anything, Section 960 is an affirmation of tax liability, establishing the liability of the bankruptcy estate for all state and local taxes otherwise applicable to its operations.

Congress meant, by enactment of this statute, to advance two specific purposes. First, to create a level playing field by equalizing tax burdens between bankruptcy estates and commercial competitors outside the bankruptcy protection.

Second, it meant to ensure the continued flow of tax revenues to the states to fund the services and protections that those states afford.

QUESTION: Suppose there was no Section 960.

MR. TYLER: Excuse me?

QUESTION: Suppose there was no 960? Or to put it another way, why did Congress think it was necessary to pass 960?

MR. TYLER: Because the courts, previous to the enactment of 960, had been engaging in essentially Socratic dialogue, splitting hairs over whether or not a bankruptcy trustee was doing business or not doing business.

QUESTION: Well, what if he was?

MR. TYLER: They were finding states' tax statutes inapplicable on the —

QUESTION: Is the problem that the bankruptcy trustee is a Federal instrumentality and there's some argument that you can't tax a Federal instrumentality?

MR. TYLER: Conceivably that would be the

situation.

QUESTION: Well, did any court ever hold that?

MR. TYLER: Goggin II did.

QUESTION: Uh-huh. So we really needed 960 to really make sure that the states could tax, if the business was being operated?

MR. TYLER: No. Because this court had previously held in Swarts v. Hammer that the general rule, the presumption is taxability of bankruptcy estates, and absent a clear expression by Congress —

QUESTION: So they didn't need 960?

MR. TYLER: No, they did not need it, but the courts had been mired in a construction -- essentially, a fruitless construction -- splitting hairs over what was the conduct of business, what wasn't the conduct of business. The focus, prior to 960, as always, has been a focus on whether or not the transaction or property in question is taxable under state law.

QUESTION: So absent 960, your submission is that the sales tax could surely have been imposed on the sale of this estate.

MR. TYLER: The only question remaining then would be one of intergovernmental tax immunity and that is the only question that actually is in this case, according to our view and we believe that that's a

well-founded view.

QUESTION: I thought you said that we had already decided that there wasn't any such thing.

MR. TYLER: As intergovernmental tax immunity?

QUESTION: No, in this bankruptcy situation. That you could tax trustees and transactions just normally, even absent 960.

MR. TYLER: Yes, that's true. But one still ends up with the question of whether or not there is a conflict between the fundamental purposes of the Bankruptcy Code and the efforts of the state to tax. It's essentially a Tenth Amendment analysis at that point.

Going back, the immediate reason for enactment of 960 by Congress was simple: to clarify previously confused law in an area by providing a rule of construction whereby the taxability of an activity conducted under the jurisdiction of the Bankruptcy Court would be determined by reference to state law rather than by distinguishing whether or not it was conducted by a trustee or receiver.

My opponents assert that 960 was meant to have preemptive intent with regard to state taxation of liquidating activities by Congress' inclusion of language, "conduct of business" within the terminology

of that statute. They argue that that terminology was meant to resurrect and maintain a pre-act distinction in the act between liquidating and nonliquidating activities and by innuendo to retain a purported bar to state and Federal taxation on liquidation activities.

The argument's invalid for three reasons. First, it's factually incorrect, for even assuming that such a distinction was made under the act, there was no bar on taxation of liquidation activities. The Hendersonville case cited in my brief amply demonstrates that a taxation on property held in the liquidating state was taxable.

Similarly, the Mason/Tire case, although ultimately holding that no tax was due, found that there was no immunity to such taxation but found that as a matter of construction of Ohio law that a personal property tax on the monetary proceeds from a liquidation sale was not due and owing under Ohio law, as a matter of Ohio construction.

The argument ultimately rests on a totally improper preemption analysis posited by negative innuendo from what is otherwise an affirmative statement of tax liability. As before, Swarts demands a clear expression of Congressional preemptive intent. Swarts is in line with the recent cases by this Court, most

recently exemplified by the Puerto Rico decision cited in my brief, holding essentially that the states' exercise of their sovereign rights may be abridged only by the clear and direct statement of congressional intent to do so.

Here we are talking, of course, the most fundamental of those rights -- essentially, the state's very existence -- the right to tax to create the lifeblood by which the services and protections demanded by bankruptcy estates are provided.

The clear expression here is asserted to lie in hidden subtlety of meaning, a purported term of arts, but if Congress meant a preemptive effect to take place here, it should have said so in direct language, such as doing business, except that the estate shall not be liable for any state, local or Federal tax on liquidation activities.

Congress intended to create a level playing field, and at worst it left one ambiguity as to the extent of that field. That the ambiguity exists is demonstrated by the fact that I stand in front of the Court today, for the conflict of the circuits essentially created the jurisdiction of this Court and the fact that you have a myriad of cases cited on both sides, by both myself and my opponents, as to whether or

not Section 960 includes liquidating activities.

In practical terms, the Ninth Circuit's construction differentiating liquidating activities from the definition of business leads to absurd results and creates a rule which is both impossible to consistently and rationally apply.

The inconsistent application of this rule is most amply demonstrated within the Ninth Circuit itself, for in United States v. Sampsell, considering Federal taxation of liquidating activities, the Ninth Circuit held that liquidating activities are included within the ambit of 960.

Now, there's no rational differentiation one can make between Federal and state taxation for the purposes of the instant analysis. The Code at least, and the act since 1850, certainly made no distinction between Federal and state taxation. And the fact that one is undertaken under a supremacy clause analysis, whereas the other one is under statutory construction, is really of no regard, for the analysis is the same: harmonization to avoid conflict.

If in fact -- I would note that the contrary construction to the Ninth Circuit's analysis is one of common commercial usage and is one given terms in other statutes such as the Internal Revenue Code. This Court

noted in Magruder, cited in my brief, that the term "doing business" is one of broad import, fairly limitless, and specifically stated that liquidation activities were included within that phrase. Obviously Sampsell stands for the same proposition.

But perhaps the greatest fault of the Goggins rules is the fact that there's no rational test for differentiate -- by which one can differentiate liquidating from nonliquidating activities. In this case, China Peak is a debtor in possession operated by a state receiver. It filed a bankruptcy proceeding to essentially gain protection from the state receivership and then dismissed it shortly after the liquidation sale -- or what was termed a liquidation sale -- took place.

It was filed under Chapter 11, but no plan was ever filed. No trustee was ever appointed. It was never adjudicated. It was not brought under Chapter 7. It was not even what would now be termed as a liquidating 11. The sale was not for the benefit of the creditors of the estate but, by order of the Bankruptcy Court, was passed directly through to the state receivership to be distributed by the state receivership to whatever creditors or persons were deemed worthy of receipt therein.

The sale here, because it was done in

bankruptcy, was felt to be a liquidation sale and because of that was exempt from the same taxation given for the benefit of the state receivership, which would have borne it in the first place, had it been conducted by it directly.

The Goggin cases are also good examples of the problem with the Goggin rules, for there, Mr. Goggin as trustee took a debtor's inventory, consisting of partly finished goods, utilized the debtor's work force and plant to continue finishing those goods and then sold them. Obviously, that is the normal course of business operations for the debtor, or under any common construction of the term and phrase, yet it was held to be a liquidation and thus immune from state taxation.

The Oklahoma trustee amicus here, by analogy, argues that, as long as he is not operating under an order under Section 721, that he should be regarded as a liquidator. But consider the amicus banks, who argue that receivership should be taken as liquidating entities also.

This Court has previously refused to draw such a distinction in Michigan v. Michigan Trust, where a liquidating receivership, if one will, was still held to be a receivership and properly subject to state taxation on receivers.

But perhaps the most pernicious hypothetical that one can draw is in fact a Chapter 11 "liquidating 11" by a retail grocery chain or hotel chain consisting of a -- of a multiple series of outlets. The hypothetical in particular is one of 16, possibly 17, of say 18 or 19 outlets where they are sold at sales deemed to be a liquidation sale, because they are virtually all of the assets, not within the ordinary course of business, but providing the debtor with a sufficient amount of cash to successfully reorganize and come out of Chapter 11.

You've now come full circle, for the debtor obviously falls directly within the language of Section 960 but yet has been held to be immune from taxation because it's liquidating, as opposed to operating a business.

Two cited cases, cited by both of us for contrary rules, also demonstrate the perniciousness of the rule. In Glick v. Missouri you have a bankruptcy trustee who is held liable for unemployment taxes by reason of Section 960, or actually who was allowed to -- who was stated to be subject, 960 notwithstanding.

Under Goggin this is arguably an incorrect statement of the law, but it's an -- an absurd application, because there is absolutely no reason

advanced why a -- a liquidation trustee should be exempt from paying unemployment taxes on the debtor's employees. There is absolutely no reason to deny those employees unemployment insurance benefits because they were operating under a liquidating trustee rather than an operating trustee.

Similarly, in Cusado the Eleventh Circuit's wholesaler liquor case, liquor taxes were imposed at the wholesale level on the debtor and because of this, under the Goggin analysis, were held to be improperly applied and barred, yet there's no practical purpose inuring to the benefit of the bankruptcy estate from this.

Under Goggin, the only -- under this analysis, only the estate is benefited by receiving more dollars by avoiding taxes that a regular business would otherwise have to pay. This is done so that a retailer receives a better price from the estate and arguably makes a better profit at the retail level. But they are not going to provide the services and protection, that the state has to provide those.

The ultimate effect -- the ultimate effect of the entire analysis is that, essentially, an unevil -- an uneven playing field, the uneven playing field decried by Congress has been created and you have liquor entering the commercial transactions of the State of

Florida, which suffers absolutely no tax burden whatsoever.

All of these results are produced by, in essence, resurrecting -- quibbling over much the same terms of art that Section 960 was designed to obviate by essentially reading them back into the statute.

All of this creates a rule whereby tax-advantaged goods are created where to do so directly violates the concept of a level playing field, the concept underlying the promulgation of Section 960 in the first place and all without advancing any discernible Federal purpose.

The last point underscores the next. If in fact there is no preemption under 960, the only bar is intergovernmental immunity. Yet whatever these concepts mean, they are clearly not reached here.

At issue in this case is a nondiscriminatory tax, broadly based, applicable to all retail sales in the State of California. It neither falls on a Federal instrumentality nor imposes a cognizable burden on the processes of the Federal court.

One need only look at who is paying the tax. There are no Federal dollars involved in this. The taxes come out of the estate. The trustee doesn't even pay the taxes, he passes them through to the estate.

Who is complaining in this case? Not the Federal Government. We have private parties before us. Private parties who, simply put, want a better deal than they can get in the normal course of commercial discourse.

Simply put, they want a bar to the efforts of the state to equalize the tax burdens on the property they own. They don't stand in the shoes of the government, to use the terms of this Court, and there's simply no Federal interest in barring the state's efforts to equalize that tax burden.

This Court has recently declared its solicitousness of the efforts of states to raise revenues in this manner in the United States v. Washington case. Conversely, there is absolutely no tax on a government instrumentality, in that a government instrumentality is not involved in a liquidation sale.

Goggin II speaks of the trustee. Under United States v. New Mexico, the test is whether or not a trustee is incorporated into the government structure. The trustee is paid by the estate, not by the government. The trustee is a private individual, operating his own business interests rather than being an employee of the Federal Government and he's acting to advance the private purposes of the creditors of the estate, rather than those of the Federal Government.

Goggin II speaks of the liquidation sale as the process. Yet, since the promulgation of the Code, Section 363 in specific, the sale is -- the sale is by the trustee, not the court and obviously one can speak of Levy and those -- those cases as holding that there is a Federal instrumentality involved, but since the promulgation of the Code that analysis is no longer correct.

There are two purposes of bankruptcy, only one of which is arguably affected by the instant taxation efforts and that is the efficient administration and distribution of the bankrupt property. Yet the efficiency of the administration and distribution is not what's impaired.

The impairment raised by Respondents rises solely from the equalization of the tax burden to support the services and protection that that property receives. That equalization effort is felt to be a permissible abridgment on the exercise of enumerated powers as held -- as stated, generally, in Massachusetts v. United States and Swarts v. Hammer.

QUESTION: Mr. Tyler, can I interrupt you to go back to the problem that some of us -- some of my colleagues raised at the outset? Exactly what -- supposing we agree with you that Goggin is incorrectly

decided and all of the legal points you're making. Precisely what relief do we grant in the -- in this case? What is the order you're seeking here?

MR. TYLER: The order I'm seeking is a dissolution of the contempt citation.

QUESTION: Would that require a vacation of the injunction, too? I mean, it is the law of the case that you violated the injunction, according to the Court of Appeals. And -- and -- I -- I'm still not quite clear on what happens if we agree with all of your legal analysis, but nevertheless feel that as the court of appeals held, you did not comply with the terms of an injunction which may have been erroneously entered. How -- how -- I'm just not quite clear on what happens.

MR. TYLER: Well, obviously our contention is that the injunction entered had nothing to do with the taxation activities at issue in this case. The injunction entered --

QUESTION: But if that's true, we don't reach all the Goggin issues, if that's true.

MR. TYLER: Well, under the Goggin analysis you do have to reach them, because Goggin provides this -- Goggin utilizes this elaborate hypothetical, or elaborate rather arcane structure of in lieu of taxes and creates these bootstraps, consecutive bootstraps.

Now, one can -- I argued to the Ninth Circuit that those consecutive bootstraps were nonavailing in this particular circumstance, but they have held that those are the logical end result of the Goggin analysis and that the but for test, if one will, rising from one tax to the other, to the other, is one which they feel compelled to indicate in these cases.

QUESTION: I must confess, I'm still puzzled about how reversing Goggin helps you in this case. Maybe I'm dense, but I just don't --

MR. TYLER: Well, on the first line, we felt that we should have won in the Ninth Circuit under the debtor's reorganizer's rationale.

QUESTION: And of course you might have won if you'd objected to the entry of the injunction, or appealed from that.

MR. TYLER: But there was no reason to appeal from that injunction. Simply put --

QUESTION: Did -- did that injunction bar you from collecting a use tax on the purchaser at the time of the sale?

MR. TYLER: No. No, that injunction -- if you read the injunction, the injunction said you may not take from the debtor, from the trustee or a person who is liable to reimburse them, for a sales tax --

QUESTION: No. It says you may not enforce a sales or other tax against the receiver or its principals or other parties by reason of the sale.

MR. TYLER: But the other parties -- in turn it has to be limited by the pleadings underlying the judgment itself and that is all that the trustee asked for. If one reads the conclusions of law and the findings of fact entered by the Court at that time, that is the conclusion that the Court came to.

It was seeking to reach only the tax obligations of the debtor and the trustee and that is totally consistent with Bankruptcy Section 505, because that is -- those are the only tax obligations raised under 505 and the only tax obligations that are litigable under Section 505. And the Court obviously meant to adjudicate that which was brought before it and nothing else.

QUESTION: Well, you litigated that and lost it and didn't appeal, though didn't you?

MR. TYLER: That's correct.

QUESTION: So it's too late.

MR. TYLER: No.

QUESTION: No, you want to raise it again?

MR. TYLER: Why -- why -- why -- and, I'm sorry, I don't mean to argue with you. But why does an

adjudication of rights between two parties -- how does that affect -- or, why should a party have to adjudicate with a disinterested party, essentially, the rights of subsequent persons, persons who subsequently come in possession of that property for subsequent retail transactions?

There is simply no rational purpose and no rational reason why those parties should litigate that question at that time, and that's why res judicata should not be applied in this case. And simply put, none of the parties to that prior proceeding foresaw the application of this particular rule to these transactions on behalf of Respondent herein.

QUESTION: That goes to the question whether the use tax can be imposed by the leases by the purchaser of the equipment.

MR. TYLER: Yes.

QUESTION: But if you're right on Goggin, your fundamental position, you really could have objected to the injunction against the collection of the sales tax, couldn't you?

MR. TYLER: That is correct. That is correct. We've always felt that Goggin -- I mean, we have -- this Court knows we have attempted to bring the Goggin issue before this Court by certiorari in numerous

instances.

QUESTION: But we don't have to reach that question here and indeed, probably can't. All we can decide in view of your failure to appeal on the Goggin question below in the first litigation, all we have before us is whether you can be held in contempt for the present application of the tax to the subsequent purchaser. Isn't that all we can do?

MR. TYLER: No, this Court can also state that the previous injunction was improperly entered. I have the ability to be here because of the fact that I can collaterally attack that order by reason of the jurisdictional differences and the fact that res judicata will not apply to our case.

I think that the Court brought up -- and I deign to say why the Court brought the issue up before it at this time -- but the reason and the patent conflict between the circuits is there.

The question is one of law and there are no facts to be adjudicated further than what's in the record before you now. You will never have a record that says anything different from this record, because the only things in issue are the legal rights, obligations and constructions of Section 960 intergovernmental tax immunity and the ability of the

states to exercise such a tax, and I would like to reserve the rest of my time.

QUESTION: Very well, Mr. Tyler. Mr. Jenkins?

ORAL ARGUMENT OF DAVID RAY JENKINS

ON BEHALF OF THE RESPONDENT

MR. JENKINS: Mr. Chief Justice, may it please the Court:

I agree with Ms. Justice O'Connor. I don't think you can reach the substantive Goggin issues in this case, and I don't think you can allow a collateral attack of this judgment without doing great violence to your own precedent.

QUESTION: The court of appeals seemed to me in its opinion to have reached the merits. Do you disagree with that?

MR. JENKINS: I think the Court of Appeals discussed the merits.

QUESTION: At great length -- not much else.

MR. JENKINS: Basically, what was admitted before the court of appeal was that the injunction was intended to enjoin whatever Goggin II proscribed and that's why they discussed the merits of what Goggin II proscribes compared to what was going on in this case.

Let's look at the record very briefly, because some, in my view, misrepresentations have been made to

you about the status of the record. In the joint appendix at page 3 is the prayer of the complaint by which this injunction was sought.

Paragraph 2 of the prayer requests a judgment determining that the debtor, the plaintiff -- who was the estate -- and any and all other parties which may have any obligation in connection therewith, have no liability or obligation to the defendant. If you then look at the --

QUESTION: But you didn't read the whole sentence -- have liability in connection with the particular transaction before the Court.

MR. JENKINS: That's correct.

QUESTION: And this transaction that the tax was imposed on occurred quite a while later, didn't it?

MR. JENKINS: No, Your Honor. This tax is in effect a tax on the sale, because --

QUESTION: Well, I understand that, but they didn't actually try to collect it until sometime later.

MR. JENKINS: They came back and tried to collect it later.

QUESTION: After there had been leases of the equipment.

MR. JENKINS: That's correct, Your Honor, but the tax that they're trying to collect is only due

because no sales tax —

QUESTION: Well, I understand that legal argument and the party from whom they're trying to collect it was not a party to the case that you read from the pleading.

MR. JENKINS: No, Your Honor. My client was not a party to that proceeding, but my client was intended to be a beneficiary of the injunction even at the time the complaint was filed.

QUESTION: Well, the district -- the judge who entered the injunction didn't think so, but apparently the Court of Appeals did.

MR. JENKINS: I would agree with counsel for the Petitioner that as an ordinary rule of construction, if you're looking at an order or a judgment that's entered by a court, that you ought to give some deference to what that judge thinks it means.

This case is different for two reasons, in my opinion. One reason is that I think this judge took a view of his own order that simply isn't supported by the literal language of the order. The second reason is that if you look at the findings and the opinion that the Judge issued in that case, the order was clearly intended to proscribe whatever Goggin II proscribed.

So it basically incorporated by reference a

Ninth Circuit Court of Appeals case, and the Petitioner has admitted that. They have admitted that this injunction was intended to cover whatever Goggin II covered and I think that in that regard, deference should be given to the court which authored the Goggin II case and that's the Ninth Circuit Court of Appeals.

QUESTION: But then is it not correct that either the meaning or the accuracy of the Goggin doctrine is before us because that's what illuminates the meaning of the underlying order. And is it also not true that in your brief in opposition to the petition for certiorari, you did not suggest that we would not be able to reach the Goggin issue? You suggested it wouldn't affect the outcome, but you did seem to agree at that time that the Goggin rule was before the Court under the questions presented.

MR. JENKINS: I think that what the Court needs to determine is what the Goggin case means. I think that the Goggin case defines the parameters of this injunction, and I don't think this Court can reverse the Goggin cases. I think all it can do is construe what they mean for the purpose of determining what the injunction meant.

QUESTION: Well certainly, we aren't going to ordinarily take a case in order to construe something

that the Ninth Circuit said 40 years ago.

MR. JENKINS: I would think not.

QUESTION: But as Justice Stevens pointed out, under our Tuttle case it's your obligation, if it's a nonjurisdictional point you want to raise, in your response to the petition for certiorari to point out that we can't reach the issue that the Petitioner seeks to reach.

MR. JENKINS: I did not do that. In any event, they are bound by the doctrines of res judicata and collateral estoppel.

QUESTION: (Inaudible).

MR. JENKINS: No, Your Honor. But they cannot collaterally attack this injunction. This court has a long line of precedent that says that they can't, including a specific precedent that says --

QUESTION: Well, that's sort of like a defense and if you don't ever raise it, you can't just raise it any time you want to.

MR. JENKINS: Your Honor, I did raise that in my brief.

QUESTION: No, you didn't. Well, you didn't raise it when -- before we granted certiorari.

MR. JENKINS: No, Your Honor, I did not. I raised it in my brief that the doctrine -- the doctrines

of collateral estoppel and res judicata prevent a collateral attack on an injunction in contempt proceedings and the state had every opportunity in this case for a complete trial.

As it happens in this case, the facts were all not subject to dispute and there was a stipulated statement of facts, but they had the opportunity to present each and every fact that they wanted to present in connection with their case and they had the opportunity to file a brief.

And they did file a brief in connection with the injunction, in which they had the opportunity to raise all of the arguments that they're raising here and further, they in fact raised almost all of those arguments in their brief on the injunction action.

QUESTION: Let me just make one other -- ask you one other question about the Court of Appeals opinion. The Court of Appeals, as I read Judge Noonan's opinion, seemed to think that the question whether Goggin was wrongly decided was open, but they -- but as I read him he says, but we're not going to -- we, as a panel, unlike a court sitting en banc, we don't have the power to reexamine and we're not inclined to change a rule that's been in force for over 30 years anyway.

But as I read that opinion, I thought that the

Court of Appeals considered the issue of whether Goggin correctly stated the rule was something that, had it been sitting en banc, they could have passed upon.

MR. JENKINS: That was not my impression when I argued before them and it's not the way I read that opinion.

QUESTION: It is not?

MR. JENKINS: Because they specifically say that they're bound by Goggin I and Goggin II.

QUESTION: Right, they're bound by it in a precedential sense and as a panel they don't have the power to overrule a Ninth Circuit precedent that's been on the books for 30 years. But if they didn't feel bound by stare decisis, it would seem to me they would have said that was an issue they could have confronted. At least, that's the way I had thought the opinion read.

MR. JENKINS: Again, my understanding from having been there was that they felt that Goggin II not only bound them but absolutely and very clearly controlled this issue.

Are there any other questions about this particular issue? Because if there aren't I'll get into the substantive issues.

QUESTION: Let me just refer you to one part of the Ninth Circuit's opinion, at page A4 of the

petition where Judge Noonan says the Board suggests that Goggin II was wrongly decided. The Second and Fifth Circuits are in the Board's corner, but this circuit was aware of the Second Circuit's reasoning and refused to follow it and the Supreme Court, denying certiorari, accepted a certain regionalism in the administration of Federal bankruptcy law. Then it goes on to say, it's not within the power of this panel and not within its heart to change a rule of this circuit that has been in force for over 30 years.

It seems to me if they were saying that the merits of this question of whether the state can tax, levy a use tax or a sales tax, were simply not before it at all they wouldn't have used that language.

MR. JENKINS: I must be reading that differently from you, Your Honor. When they talk about what this circuit was aware of, I believe they're talking about at the time the Goggin cases were decided. And when they're talking about it not within their heart to change the rule, I think they're telling you that they wouldn't if they could.

QUESTION: Yes, I believe that, but it seems to me the reason they say they're not going to change it is because the panel can't overrule an earlier decision and doesn't want to overrule it, not that the parties

before them have no -- have no right to have a decision on the merits.

MR. JENKINS: In another part of the decision, the court also makes reference to the fact that they could have litigated this issue on an appeal from the injunction and that it's now too late. I think in that particular portion of the opinion, what they're doing is they're dealing with the petitioner's argument that the other circuits are right and Goggin is wrong.

QUESTION: Well, I didn't mean to prevent you from going on to your argument on the merits.

MR. JENKINS: Thank you, Mr. Chief Justice.

We have never taken the position, as far as I can recall, that 28 U.S.C. Section 960 in and of itself directly limits states from imposing this tax. Our position is that it impliedly creates such a limitation, and we are well aware that as a rule of construction this Court disfavors implied preemption. But the argument that we're making in this case is not substantially different from the line of reasoning that this Court used in the First Agricultural National Bank case in construing 12 U.S.C. Section 548.

In that case, looking at the legislative history, the Court determined that Congress must have intended that this Section pro -- prescribe those areas

In which taxation was permitted to the exclusion of taxation in other areas, and the Court so held.

I do want to point out, Swarts v. Hammer was decided 30 years before Section 960 was enacted. Presumably Congress was aware of Swarts v. Hammer at the time it enacted 960. The Swarts v. Hammer case doesn't deal with taxes of this type.

What Swarts v. Hammer says is that there's no magic that occurs to property of the estate when a bankruptcy is filed such, that that property changes its nature so that the property shouldn't any longer be subject to property taxation, and we don't deny that property in bankruptcy estates is subject to ad valorem taxes. We have no issue with that.

Section 960 when it was enacted was enacted at a time when intergovernmental immunity was at its high water mark and basically there were decisions which tended to limit the ability of state governments to tax almost anything having to do with the Federal instrumentality. And the courts on some occasions had found bankruptcy estates, or Federal receivers, to be instrumentalities of the Federal Government.

If the Supreme Court -- I'm sorry. If Congress hadn't felt that taxation was generally proscribed, it wouldn't have enacted 960 because it's

superfluous otherwise, and I can see a reasonable and logical argument that 960 is over 50 years old and it's basically now a historic anomaly.

The problem with that argument is that Congress undertook an exhaustive review of bankruptcy law in 1978 and at that time it reviewed, among other things, the provisions of the chapter in which Section 960 is and Congress in fact made some conforming changes to Section 959.

If Congress had felt that Section 960 were no longer necessary or that it required some change to conform with the present status of the law, Congress could easily have made those changes.

QUESTION: Was 960 enacted as part of the Chandler Act?

MR. JENKINS: No, Your Honor, I believe it was a separate statute.

QUESTION: When -- when was it enacted?

MR. JENKINS: 1934. I believe it was specifically designed to deal with a discrete problem and the problem that was presented -- bearing in mind that that was a time of great economic hardship in the country -- the basic problem that was presented was, you have two businesses, substantially identical to one another, one of which happens to be in a Federal

receivership, the other of which happens not to be.

The receivership business at that time was allowed to operate at a great advantage over the one who wasn't and I think the feeling was that everybody in the world was going to wind up in receivership if we didn't solve that problem.

The second reason we think that the tax is not permitted on a bankruptcy estate has to do with McCulloch v. Maryland. Basically, this tax is an assertion by the state -- or a tax on the liquidation process itself is an assertion by the state of control in some form over the liquidation process, and the liquidation process is what bankruptcy is all about. It's the absolute essence of bankruptcy. Even in those cases where liquidation is not ordinarily contemplated, such as Chapters 11, 12 and 13 --

QUESTION: Well, at this stage the liquidation is over. The assets have been sold and someone else has acquired them and is in business. It's just very hard for me to see why, under any interpretation of the statute, it shouldn't be taxable.

MR. JENKINS: Because, in essence, this is still a tax on the liquidation sale itself. It doesn't make any difference whether the state collects the tax at my cash register, out of my customer's pocket, or

mugs him on the street, they're still doing the same thing.

QUESTION: The sale is over.

MR. JENKINS: The sale is over, but --

QUESTION: Your client acquired the assets and now wants to rent the skis.

MR. JENKINS: Yes, Your Honor and we -- if they impose a tax generally that said, if you rent skis you have to pay a tax, we'd pay it. The only reason we owe this tax is because no sales tax was paid, so it's still a tax on the liquidation sale itself and in operation the way this tax works, it's basically designed to terrorize you into paying the sales tax.

Because if you don't pay the sales tax you pay a tax measured by the same percentage of your rental income and as a general proposition, if you don't think you're going to generate at least as much rental income as you paid for the property, you wouldn't buy it. So as a general proposition you would ordinarily expect to, you know, wind up paying a higher use tax than the sales tax would have been.

So basically what this is, Your Honor, is it's an effort on the part of the state to go far enough down the stream that they think they can safely do it, but still tax a transaction that is a Federal transaction

and is not taxable. It's an effort on their part --

QUESTION: I guess other courts have held that the liquidation sale itself is doing business and can be taxed under 960.

MR. JENKINS: I'm aware of those holdings and I disagree with them. It's not unusual for there to be different constructions of different words in different parts of the Code.

For example, the term willful, as used in the Internal Revenue Code dealing with the 100 percent penalty for failure to withhold and turn over, at least as construed in the Ninth Circuit, it means that you were alive at the time. Willful in the context of the Bankruptcy Code means something much more limited than that.

I think that you don't have to apply doing business from the IRC to the bankruptcy context and I think in the bankruptcy context you have a long line of established case authority dealing with what is doing business and what isn't; and you're certainly going to have factual questions, but I don't think that the fact that a court is going to have to determine some factual issues justifies coming up with a rule that goes too far.

The concept that I would like to discuss with you for why this tax isn't allowable is one that I think

the Court -- and now I'm talking about the specific tax on my client -- is a concept that the court has alluded to in the United States v. New Mexico case and also in the Red Cross case dealing with employment taxes, and the concept is this:

There are some transactions -- irrespective of who the incidence of the tax falls on, there are some transactions which are Federal transactions and the states are not entitled to exercise control or authority over them, and they can't do that by simply choosing to place the incidence of the tax on somebody other than the Federal entity itself, and that's exactly what you have here.

No matter how far downstream you go, as long as they're still collecting a tax that's only due because no sales tax was paid, it's still basically a tax on the sale itself and that transaction is a Federal transaction conducted by a Federal bankruptcy estate, conducted with the requirement that it be approved by the Federal Bankruptcy Court and it's subject to a whole system of Federal regulation. The states have no business asserting control over that transaction and to allow them to is to basically concede to them control over the bankruptcy process.

QUESTION: Your argument would make a lot more

sense if McCulloch against Maryland still stood as law in all its language, rather than having been toned down much later. You know, the idea that the power to tax is the power to destroy is no longer accepted by the Court. It's treated on a more pragmatic basis, don't you think?

MR. JENKINS: I agree with that, but I think even under the more pragmatic basis that the Court now uses, that this transaction should not be taxable and it's part of the bankruptcy process. The states have no more business asserting control over the bankruptcy liquidation process than they do asserting control over national banks, and that's exactly what they're trying to do.

Now, I do want to discuss with you the case of Washington v. The United States, because it appears to be contrary to me. In that case, there was a sales tax system where ordinarily in a contractor setting if I'm a contractor and I'm building a house for you and I go down to the hardware store, the incidence of the sales tax -- the liability for the sales tax in the State of Washington is placed on you as the owner of the property that I'm going to improve.

But the statute provides for a specific exception which says, if the owner of the property is a

Federal entity then the tax falls on the contractor and in response to the argument that that was just an evasion of intergovernmental immunity, this Court said, look, the transaction is taxable.

The fact that by an accident of state law the incidence of that tax would ordinarily fall on an exempt entity does not prevent the state from shifting the incidence of the tax to somebody else. But the key in that case is that the transaction was itself taxable, and the transaction was me, a contractor, not a Federal entity, going down to the hardware store, which is also not a Federal entity and buying stuff to use to improve your home. That's a taxable transaction.

The difference in the bankruptcy case is that it's a Federal transaction governed by Federal law and the state has no right to attempt to control it.

You also need to look at the impact that your ruling is going to have on the Bankruptcy Code as a whole.

For example, if you hold that states can tax the liquidation process because what happens in the reorganization chapters is measured by what would happen in a liquidation, if I were to have to pay a 6.5 percent sales tax if I liquidated, that's 6.5 percent of the estate that I get to pocket as the debtor, because it's

something that wouldn't have to go to the creditors and in Chapter 11, the floor on what you have to pay the creditors is what they would get in a reorganization and there are similar provisions in both Chapters 12 and 13.

That -- the net result of that would be that if you find that states can tax bankruptcy liquidation sales you're going to be allowing debtors to achieve a great windfall and I don't think that Congress had that in mind at all.

Unless there are further questions, I will remit the rest of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jenkins. The case is submitted.

(Whereupon, at 11:54 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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No. 88-681 - CALIFORNIA STATE BOARD OF EQUALIZATION, Petitioner V.

SIERRA SUMMIT, INC.

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BY alan friedman

(REPORTER)