

Decision S9 11 028 NOV 3 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
CALIFORNIA WATER SERVICE COMPANY)
(U 60 W), a corporation, for an)
order authorizing it to acquire)
all the outstanding shares of stock)
of Water West Corporation in)
exchange for the issuance to such)
shareholders of shares of common)
stock of California Water Service)
Company.)

Application 87-12-014
(Filed December 7, 1987)

O P I N I O N

By this application, California Water Service Company (Cal Water), joined by Water West Corporation (Water West), and all of the shareholders of Water West, sought authorization for Cal Water to acquire all outstanding shares of Water West stock in exchange for the issuance to such shareholders by Cal Water of 70,000 shares of Cal Water common stock.

Decision (D.) 88-05-010 in this proceeding was issued after hearing¹; it authorized Cal Water to issue its no par common stock to the shareholders of Water West in exchange for all 376,863 outstanding shares of Water West. The first sentence of

1 Cal Water requested a hearing on the fairness of the transaction under Public Utilities (PU) Code § 822. Although there was no dispute between any of the parties or the staff as to the fairness of the proposal, a hearing was necessary to take advantage of the provisions of § 3(a)(10) of the Securities Act of 1933 (Title 15 USCA § 77c(a)(10)). § 3(a)(10) provides that certain transactions, including an exchange of stock, are exempt from registration requirements, if a state tribunal finds that they are fair. There must be a hearing on the issue and the affected shareholders must have the right to appear. Such a hearing was held before Administrative Law Judge Gilman on February 22, 1988.

Ordering Paragraph 5 of that decision provides that the authorization should become effective only when Cal Water paid a statutory fee (PU Code §1904.1) of \$3,254.

Cal Water paid the fee in full under protest on May 16, 1988 and the transaction was consummated on May 20, 1988. Cal Water thereupon filed this Petition for Modification, seeking to recover the fee paid.

The first paragraph of PU Code § 1904.1 provides as follows:

"The commission shall also charge and collect a fee for a certificate authorizing an issue of stock, which fee shall be computed at the rates set forth in subdivision (b) of Section 1904 and determined by the commission upon the basis of the proposed maximum proceeds. No fee shall be paid on such portion of any such issue as may be used to guarantee, take over, refund, discharge, or retire any stock, bond, note, or other evidence of indebtedness on which a fee has theretofore been paid to the commission."
(Emphasis added.)

Cal Water contends that it issued stock as authorized herein to "take over" securities on which a fee had previously been paid to the Commission. There is no question that Water West paid a fee to issue the stock to be acquired (cf. D.79185 in Application 52382). Cal Water argues that, therefore, the only condition for relief from the fee requirements of § 1904.1 has been met.

Cal Water's petition therefore requests that the Commission modify its D.88-05-010 in this matter by revising the first sentence of Ordering Paragraph 5 therein to read as follows:

"This order shall become effective upon the date hereof; under the provisions of PU Code § 1904.1 no fee is payable."

and that the Commission refund the \$3,254 fee paid by it under protest on May 16, 1988.

Discussion

When applying a statute, a tribunal's function is to determine the legislative intent. If the meaning of the words can be discerned from the face of the statute, the tribunal does not need to interpret; it simply applies the provisions as written. (Barret v Lipscomb (1987) 194 Cal. App. 3d 1524.) When interpretation is necessary, the tribunal can consider legislative history, and the context in which the disputed provision appears; it can also apply certain rules ("canons") of statutory construction. (§§ 1858, 1859, Code of Civil Procedure (CCP); Committee of Seven Thousand v Sup. Ct. (City of Irvine) (1988) 45 C. 3d 491.)

CCP § 1858 states that the function of a court when interpreting a statute is "not to insert what has been omitted or to omit what has been inserted." CCP § 1859 declares that the intention of the Legislature "is to be pursued, if possible" and that a "particular intent controls a general one that is inconsistent with it."

Is the Exemption Clause Ambiguous?

We conclude that the phrase "take over...any stock, bond, note, or other evidence of indebtedness" is ambiguous. While there is no doubt that the phrase "take over" has a conventional meaning, i.e., corporate takeover, the addition of "... any stock, bond, note, (etc.)" indicates that another meaning was intended. If the Legislature had meant corporate take over, it would be expected to use "another utility" or "another corporation," rather than "any stock (etc.)." Moreover, "take over" is found in context with the words "guarantee, refund, discharge or retire." "Take over" in its dictionary sense has a meaning which is not parallel to all the rest of the list. For example, the last three words would not be used to refer to a utility's dealings in another corporation's securities. Even the word "guarantee" would rarely applied to intercorporate transactions.

Petitioner Cal Water has not cited any other instance where the phrase "take over...stock" has been used in any sense which would support the result it seeks. We have been unable to find either a legal or layperson's dictionary which would support such a usage. The phrase "take over...stock" is not a common usage in the financial world.

We conclude that the phrase "take over... any stock" has no established meaning. Therefore, we must use the normal techniques of statutory interpretation to determine if the Legislature intended this type of transaction to be exempt from fees.

What Rules of Interpretation Are Applicable?

Exemptions from tax statutes are construed narrowly. (Great Western etc. v Franchise Tax Board (1971) 4 Cal 3d 1.) There appears to be no parallel California authority to guide us in construing fee statutes; however, there is no obvious reason to adopt a different rule. We therefore conclude that "take over...any stock" must be interpreted narrowly.

One of the applicable canons codified in CCP § 1858 provides that a tribunal may not add add words to the statute to find a meaning. Another holds that the tribunal cannot disregard words which the Legislature included. There is also case authority which warns that a disputed word or phrase should not be interpreted in isolation; instead, the adopted definition must be consistent with the clause in which the disputed term appears. (Skivers v State of California (1970) 13 Cal. App. 3d 652.)

Finally, the interpreting tribunal should not adopt an interpretation which is inconsistent with the statute's syntax and grammar. (CSEA v State Personnel Board (1986) 178 Cal. App. 3d 382.)²

History

The language in § 1904.1 was copied from a previously adopted statute, PU Code § 1904; there the clause provides an exemption from the normal fee for authorizing the issuance of debt securities.

The § 1904 clause can in turn be traced back to § 57 of the original Public Utilities Act, as adopted in 1911. In the Act, the exemption applied only to the issuance of bonds or other debt securities "for the purpose of guaranteeing, taking over, refunding discharging or retiring" other debt securities.

The fact that the original phrase dealt only with transactions in which debt securities were exchanged for other debt securities strengthens our belief that "take over" was not used in its normal sense. It is difficult to envision a corporate takeover which would be effectuated by exchanging one corporation's debt for another. Even if such a transaction were necessary to complete a takeover, we would expect the objective to be accomplished by retiring the acquired company's debt, rather than by a voluntary exchange of debt for debt.

2 In CSEA, the statute permitted contracting out "if the contractor's wages...do not significantly undercut state pay rates." The Board argued that the undercutting provision was operative only if the contractor intentionally reduced his pay rates to obtain a state contract. The court stated "... the operative noun is 'wages' which do not significantly undercut state pay rates." Unlike contractors, 'wages' have no 'intention.' They are simply higher or lower than some other number. [Board's] construction of the statute is thus at odds with its syntax." (178 Cal. App. 3d at 378.)

Cal Water has not explained how the conventional definition of "take over" would be meaningful in a statute applicable only to debt for debt exchanges. Nor has Cal Water suggested any reason to believe that the Legislature intended to expand the meaning of "take over" when the same words were applied by § 1904.1 to exchanges of stock. Finally, Cal Water has not suggested any other meaning which would be useful in a debt-for-debt situation.

Did the Legislature Intend "Take Over"
To Mean A Corporate Takeover?

We have considered whether "take over" was used in the sense of "corporate takeover" or "take over a business." We cannot conclude that the Legislature said "to take over...any stock..." when it meant "to take over another utility corporation." Nor can we conclude that it said "used to...take over...any stock..." when it meant "used for a takeover." Such an interpretation would interpret "take over" out of context, in violation of the principle used in Skivers, supra; it would also be inconsistent with CSEA, supra, since this meaning cannot be made to conform to the existing context.

In short, a court is not to infer that the draftsman made a mistake when devising the syntax of a statute; nor can it assume that the draftsman mistakenly omitted words or added them.

As we see it, the conventional meaning will not fit into the context provided by the Legislature, without either substituting the words "any corporation" (or perhaps "another utility" or a similar phrase) for "any stock" as an object of the

phrase "take over."³ Such an interpretation is inconsistent with the quoted canons, *supra*, and with the holding of CSEA.

Did the Legislature Intend to Prohibit All Second Fees?

We have also considered whether the Legislature meant that the Commission should never collect a second fee for approving any exchange of new securities for older fee paid securities, regardless of the type of transaction proposed. This is not a permissible interpretation, since it would also require us to overlook the words "issued to guarantee, take over, refund, discharge, or retire any stock (etc.)" or to hold that they are the equivalent of "issued in exchange for any other stock (etc.)."

In our analysis, the Legislature could easily have found a simple, clear means of expressing a rule which distinguishes between capital raising and capital reshuffling transactions. It did not follow that course. Instead it adopted a list of specific activities which are exempt. It is difficult to escape the conclusion that it did not intend a broader, categorical exemption. We will therefore not adopt a meaning for one word in the list of words which create a categorical exemption for every transaction in fee paid stock which does not increase a utility's capital stock.

What is the Underlying Legislative Policy?

Even though Cal Water has not specifically raised the issue, we have considered whether the underlying intent was to distinguish between security issues which increase capital and those which do not. A policy that the latter should not generate a fee would be rational and easy to defend. However, it is difficult

3 The statute would then be read as if it said "...any such issue as may be used to take over any other corporation by a purchase of stock (etc.) on which a fee has heretofore been paid or to guarantee, refund, discharge or retire any such stock." Adopting such a reading would, in our opinion, cross the line between rewriting and merely interpreting a statute.

to conclude that the Legislature would have used the words "guarantee, take over, refund, discharge or retire" to express such a distinction between capital increasing and non-capital increasing transactions.

In any event, adopting such an interpretation would not aid Cal Water's case. This was a transaction which increased Cal Water's capital.

We cannot therefore conclude that the Legislature intended "taking over" or "to take over" to have a much broader reach than the other words in the series.

Summary

We conclude that neither legislative history or context supports Cal Water's claim that this type of exchange was intended to be exempted from fees. We have not attempted to precisely determine what "take over" meant to the 1911 Legislature. We have, however, satisfied ourselves that it was not used in any sense which would exempt this transaction from the statutory fee.

Conclusions of Law

1. A reading of § 1904.1 which uses "take over" in the dictionary sense (to assume control or management) would require us to add and to overlook other words in the statute, or to ignore the context.
2. A reading of § 1904.1 to exempt all second transactions in securities on which a prior fee had been paid is too broad; it would require us to overlook words, and ignore context.
3. The exemption in § 1904.1 was not intended to distinguish between capital raising and capital reshuffling projects.
4. This transaction increased Cal Water's capitalization.
5. The Commission must collect a second fee if stock is issued for a purpose other than to "guarantee, take over, refund, discharge or retire" another security on which a fee has been paid. Cal Water has not carried its burden of establishing that this is a transaction to "take over" Water West's stock.

6. We should reject applicant's claim that PU Code § 1904.1 exempts corporations which issue stock in order to acquire the stock of another corporation.

7. D.87-05-010 did not err in requiring a fee.

8. D.87-05-010 should not be modified, and the fee paid should not be refunded.

ORDER

IT IS ORDERED that the Petition for Modification is denied.

This order becomes effective 30 days from today.

Dated NOV 3 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUOA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.

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Wesley Franklin
WESLEY FRANKLIN, Acting Executive Director