

1987

Kennecott Copper Corporation, a New York Corporation v. Salt Lake County, a body corporate and politic; Arthur Monson, Treasurer of Salt Lake County; Milton Yorgason, Assessor of Salt Lake County; The State Tax Commission of Utah : Brief of Respondent

Utah Supreme Court

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James B. Lee; Kent W. Winterholler; Parsons, Behle & Latimer; Attorneys for Respondent.
David W. Wilkinson; Attorney General of Utah; Maxwell A. Miller; Assistant Attorney General;
David E. Yocom; Salt Lake County Attorney; John G. Avery; Special Assistant/Legal Counsel; Bill Thomas Peters; Special Deputy County Attonrey; Attorneys for Appellants.

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UTAH SUPREME COURT
BRIEF

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DOCKET NO. 870047

IN THE SUPREME COURT

OF THE STATE OF UTAH

KENNECOTT COPPER CORPORATION,
a New York corporation,

Respondent,

vs.

Case No. 870047

SALT LAKE COUNTY, a body corpor-
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Treasurer of Salt Lake County;
MILTON YORGASON, Assessor of
Salt Lake County; THE STATE
TAX COMMISSION OF UTAH,

Appellants.

BRIEF OF RESPONDENT KENNECOTT CORPORATION

APPEAL FROM THE TAX DIVISION OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE TIMOTHY R. HANSON, JUDGE

JAMES B. LEE
KENT W. WINTERHOLLER
Parsons, Behle & Latimer
185 So. State Street
Suite 700
Attorneys for Respondent
Kennecott Corporation
Salt Lake City, UT 84147-0898

DAVID W. WILKINSON
Attorney General of Utah
MAXWELL A. MILLER
Assistant Attorney General
Attorneys for Respondent
State Tax Commission of Utah
130 State Capitol Building
Salt Lake City, UT 84114

DAVID E. YOCOM
Salt Lake County Attorney
JOHN G. AVERY
Special Assistant/Legal Counsel
BILL THOMAS PETERS
Special Deputy County Attorney
#9 Exchange Place, Suite 1000
Salt Lake City, UT 84111
Attorneys for Appellants

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Clerk, Supreme Court, Utah

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OF THE STATE OF UTAH

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TAX COMMISSION OF UTAH,)	
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* * * * *

BRIEF OF RESPONDENT KENNECOTT CORPORATION

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JAMES B. LEE
KENT W. WINTERHOLLER
Parsons, Behle & Latimer
185 So. State Street
Suite 700
Attorneys for Respondent
Kennecott Corporation
Salt Lake City, UT 84147-0898

DAVID W. WILKINSON
Attorney General of Utah
MAXWELL A. MILLER
Assistant Attorney General
Attorneys for Respondent
State Tax Commission of Utah
130 State Capitol Building
Salt Lake City, UT 84114

DAVID E. YOCOM
Salt Lake County Attorney
JOHN G. AVERY
Special Assistant/Legal Counsel
BILL THOMAS PETERS
Special Deputy County Attorney
#9 Exchange Place, Suite 1000
Salt Lake City, UT 84111
Attorneys for Appellants

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JURISDICTION AND NATURE OF PROCEEDINGS BELOW

Utah Supreme Court jurisdiction of this appeal arises under the provisions of Utah Code Ann. § 59-1-608 (Supp. 1987). This appeal was brought by defendants Salt Lake County, Arthur L. Monson, and Milton Yorgason, (hereinafter collectively referred to as "the County"), from an order of the Tax Division of the Third Judicial District Court, Judge Timothy R. Hanson, which granted plaintiff, Kennecott Corporation ("Kennecott"), summary judgment of no cause of action on the County's counterclaim against Kennecott, dismissing that counterclaim with prejudice. The County is also appealing Judge Hanson's order which granted summary judgment to the Utah State Tax Commission, (the "Commission"), on the County's crossclaim against the Commission, dismissing that crossclaim with prejudice.

This case was originally brought by Kennecott against the County under Utah Code Ann. § 59-2-1411 (Supp. 1987), formerly Utah Code Ann. § 59-11-11, 1953 as amended, for the recovery of taxes paid under protest by Kennecott in 1981. Kennecott's original case in chief was resolved by Rio Algom Corp. v. San Juan County, 681 P.2d 184 (Utah 1984). Following that resolution, there remained the County's counterclaim against Kennecott and the County's crossclaim against the Commission.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. May the County obtain additional taxes from Kennecott because of an alleged underassessment of Kennecott's

centrally assessed property when that property has neither escaped assessment, nor been omitted from assessment, for the years in question?

2. Does Utah Code Ann. § 59-5-17, 1953 as amended, now codified at § 59-2-309 (Supp. 1987), permit the County to force an assessment of Kennecott's centrally assessed property by the Commission due to an alleged underassessment?

STATEMENT OF THE CASE

In May of 1982 Kennecott brought an action against the County in the Tax Division of the Third Judicial District Court of Salt Lake County under the provisions of Utah Code Ann. § 59-11-11, 1953 as amended, now codified at Utah Code Ann. § 59-2-1411 (Supp. 1987). (Rec. 2-8). In that action, Kennecott alleged it had been required to pay illegal, excessive and unconstitutional taxes as a result of the enactment and implementation of Utah Code Ann. § 59-5-4.5, 1953 as amended.

The County counterclaimed against Kennecott alleging that Kennecott's property was underassessed in 1981 and for four years prior thereto. (Rec. 53-57). The County alleged that because of Utah Code Ann. § 59-5-17, supra, it should be permitted to have Kennecott's property reassessed for these five years and to collect taxes based upon the reassessed value. (Rec. 56-57).

The County also crossclaimed against the Commission, asking that the Commission be required to value Kennecott's

property in a fashion which was not pled or specified, and to disregard the net annual proceeds assessment procedure mandated by the Utah Legislature in Utah Code Ann. § 59-5-57, 1953 as amended. (Rec. 57-64).

Kennecott's case in chief against the county was resolved by the Utah Supreme Court in Rio Algom Corp. v. San Juan County, 681 P.2d 184 (Utah 1984). In Rio Algom this court specifically held that Utah Code Ann. § 59-5-4.5, 1953 as amended, was valid and in compliance with the Utah and United States Constitutions. Thus, there remained only the County's Counterclaim and Crossclaim for resolution.

Kennecott and the Commission thereafter brought Motions for Judgment on the Pleadings with respect to the County's Counterclaim and Crossclaim. (Rec. 725-727, 742-744). The County responded with a Motion for Summary Judgment, along with supporting affidavits and submissions. (Rec. 771-867). On November 26, 1986, the District Court heard arguments on Kennecott's and the Commission's Motions for Judgment on the Pleadings, on the County's Motion for Summary Judgment and on Kennecott's and the Commission's Motions to Strike the County's affidavits and other documents submitted in support of the County's Motion for Summary Judgment. (Rec. 1004).

After hearing argument for over two and one-half hours, the District Court denied the County's Motion for Judgment on the pleadings, granted Kennecott's and the Commission's Motions to

Strike the County's Affidavits and other submissions, and granted Kennecott Summary Judgment, no cause of action, on the County's counterclaim, dismissing that counterclaim with prejudice. (Rec. 1005-1013). The District Court also granted Summary Judgment to the Commission on the County's crossclaim, dismissing that crossclaim with prejudice. (Rec. 1004, 1013).

In his decision and ruling, Judge Hanson specifically held:

. . . that the net proceeds method of assessing metalliferous mines and mining claims, including Kennecott's mines and mining claims, as set out in Utah Code Ann. § 59-5-57 et. seq., 1953, as amended, is constitutional. (Rec. 1009-1010).

. . . that Salt Lake County's counterclaim against Kennecott is an attempt to apply the provisions of Utah's escaped assessment statute found at Utah Code Ann. § 59-5-17 (1974), to property which Salt Lake County alleges was underassessed by the Utah State Tax Commission for 1981 and years prior thereto. The Court rules that this attempt is improper in that underassessment is not, and does not constitute grounds for, escaped assessment. (Rec. 1011)

The County has appealed the District Court's order granting Kennecott and the Commission Summary Judgment on the County's counterclaim and crossclaim, respectively.

STATEMENT OF FACTS

The County asserts in its counterclaim that Kennecott's property which is assessed by the Commission was undervalued and underassessed in 1981 and for four years prior thereto. (Rec. 53-57). There is no allegation that any of Kennecott's property

was not listed for assessment, i.e. was omitted from assessment by the Commission, or that part or all of Kennecott's property somehow escaped assessment. (Rec. 53-64). The allegations are that the method of assessment which was applied by the Commission resulted in underassessment and undervaluation. (Rec. 54-55, 58-60).

The County presented no admissible evidence of any escaped or omitted Kennecott property in response to Kennecott's motion for Judgment on the Pleadings, or in support of the County's Motion for Summary Judgment. (Rec. 785-867, 1007-1009). The only response by the County to Kennecott's Motion for Judgment on the Pleadings was an assertion that the methods employed by the Commission to assess Kennecott's property resulted in undervaluation. (Rec. 774-783).

Part of this undervaluation argument was that use of the constitutionally and statutorily mandated net proceeds method of valuing metalliferous mines and mining claims resulted in undervaluation of Kennecott's mine. (Rec. 778-779). The County has never alleged or presented any evidence to demonstrate that the Commission or Kennecott did not properly value Kennecott's mine and mining claims under the net proceeds valuation formula set out in Article XIII, Section 4 of the Utah Constitution and in Utah Code Ann. § 59-5-57 et seq, 1953 as amended. (Rec. 54-67, 773-784). Furthermore, the record contains no allegation

of, or evidence of, improper, fraudulent, or collusive assessment of Kennecott's property by the Commission. (Rec. 54-67).

The County's only complaint is that the assessment by the Commission of Kennecott's property did not produce the tax revenue the County believes it needs or should receive, and, as a consequence, Kennecott's property must have been undervalued. (Rec. 56-57, 60-61, 64).

The record contains no allegations, or evidence, that the County sought to have Kennecott's property revalued by the Commission when the County received notice of Kennecott's assessment from the Commission in 1977, 1978, 1979, 1980 or 1981. Only after Kennecott filed its tax protest action to recover a portion of the taxes it paid the County did the County allege that it should receive more taxes from Kennecott, because Kennecott's property was undervalued and underassessed in 1981 and for the preceding four years. (Rec. 53-67).

In pressing this appeal and in arguing its position, the County has relied heavily in its brief upon material which was stricken by the lower court and which also was stricken from the Addendums to the County's brief by this court. None of this material is in evidence. The state of the record presents only two issues for decision by this court. Those issues are whether or not the County has stated a cause of action when it alleges in its counterclaim that Kennecott's property which is purportedly undervalued is property which has "escaped assessment" to the

extent of the alleged undervaluation, and whether or not the County has authority to have Kennecott's property reassessed when that assessment is committed to the Commission by the Constitution of the State of Utah and Utah statute.

SUMMARY OF ARGUMENTS

The County has no authority to recover additional taxes from Kennecott for 1981 and four years prior thereto under Utah Code Ann. § 59-5-17, supra, because of an alleged undervaluation or underassessment of Kennecott's property by the Commission.

The County may not, under the procedure and guise of a Counterclaim or a Crossclaim in a Utah Code Ann. § 59-2-1411 (Supp. 1987) tax protest action, obtain a reassessment or revaluation of Kennecott's property by the Commission.

ARGUMENT

POINT I.

THE COUNTY MAY NOT RECOVER TAXES FROM KENNECOTT IN THIS ACTION BY VIRTUE OF UTAH'S ESCAPED ASSESSMENT STATUTE

- A. Utah's Escaped Assessment Statute Does Not Apply to Property Which is Allegedly Undervalued.

As is pointed out above, the County relies upon Utah Code Ann. § 59-5-17 (1974), now found at Utah Code Ann. § 59-2-309 (Supp. 1987), in asserting its counterclaim. That statute, in pertinent part, reads as follows:

Any property discovered by the assessor to have escaped assessment may be assessed at any time as far back as five years prior to the time of discovery, and the assessor shall enter such assessments on the tax rolls in

the hands of the county treasurer or elsewhere . . .

Id. This statute does not define "escaped assessment" or specify what property is deemed to have escaped assessment. This court has on two occasions examined this escaped assessment statute, first in Union Portland Cement Co. v. Morgan County, 65 Utah 335, 230 P. 1020 (Utah 1924), and again in Builders Component Supply Co. v. Cockayne, 22 Utah 2d 172, 450 P.2d 97 (1969). In 1985, the Commission applied the statute in Nupetco Associates v. County Board of Equalization of Salt Lake County, Appeal No. 84-18-1600. A copy of the Commission's decision in Nupetco Associates is attached as Addendum A to this brief. (Rec. 737-740).

In Union Portland Cement Co. v. Morgan County, supra, this court applied Laws of Utah 1917 § 5908, the predecessor statute to Utah Code Ann. § 59-5-17, supra. The plaintiff in Union Portland failed to report all of its property in its annual statement to the State Board of Equalization. Id. at 1020. The omitted property was later assessed in a tax levy. Id. This court held as follows:

Our statute which clearly indicates that, if for any reason, property is omitted from the assessment roll, or has not been assessed in the regular order or at the time contemplated by law, it shall nevertheless be assessed. Comp. Laws of Utah 1917 § 5908. . . .

Id. at 1022. It is "the duty of the local assessor to assess property not listed for taxation . . ." Id. This language by the Utah Supreme Court shows that only property omitted from the

tax rolls, or which has not been "listed for taxation," has escaped assessment.

The court in Builders Component Supply Co. v. Cockayne, 22 Utah 2d 172, 450 P.2d 97 (1969), construed the current Utah escaped assessment statute. All tax statutes, according to the court, should be "construed favorably to the taxpayer and strictly against the taxing authority." 450 P.2d at 99. The court determined that where "there has never been a previous assessment [of plaintiff's property] and [plaintiff] had paid no taxes thereon" the statute imposed a duty upon the assessor to tax the property. Id. In reaching this conclusion the court states: "that where a valid assessment has been made by an assessor cognizant of the facts, undervaluation is ordinarily not a ground for another assessment; and that property should not be subject to double taxation." Id., 450 P.2d at 98. Only under extraordinary circumstances is undervaluation grounds for reassessment. The court in Builders Component Supply followed the decision in Union Portland Cement, stating that only property which was not assessed for taxes at all has escaped assessment and become subject to the escaped assessment statute.

The Commission cites Builders Component Supply and Union Portland Cement in its decision in the Nupetco Associates v. County Board of Equalization of Salt Lake County, Addendum A to this brief. In Nupetco, three acres of petitioner's property were not taxed due to a clerical error. Id. The Commission

states in its conclusions of law that "property which has been undervalued due to a clerical mistake in the quantity of the property to be assessed or in the assessed valuation does not result in property which has escaped valuation." Id. (citations omitted). "The subject property did not escape assessment . . . but was undervalued," so the Salt Lake County Assessor was said to have acted improperly in reassessing the property. Id. at page 6.

The County does not claim that any of Kennecott's property was deleted or omitted from assessment. The County's counterclaim in this action states that Kennecott's property escaped assessment because it was "underassessed by the State Tax Commission of Utah." Kennecott Corp. v. Salt Lake County, 702 P.2d 451, 453 (Utah 1985). Salt Lake County's Counterclaim at ¶ 4. (Rec. 54). This assertion by the County is denied by Kennecott. However, assuming only for purposes of this appeal that underassessment in fact occurred, this does not present a claim for relief by the County. The decisions in Builders Component Supply and Nupetco specifically state that undervaluation is not sufficient grounds for reassessment. Under Union Portland Cement and Builders Component Supply the assessor's duty to assess escaped property arises only when that property is omitted or has never been assessed.

**B. The Majority Rule in Other Jurisdictions
Would Not Permit Recovery in this Action by
the County Under the County's Counterclaim.**

Utah's escaped assessment statute is similar to that found in many states. The majority rule in construing those statutes is that property is not open to reassessment as escaped property simply because it was undervalued. See State v. Realty Loan Company, 96 So. 613 (Ala. 1923); Thomas Executrix v. Commonwealth, 215 S.W. 2d 546 (Ky. 1948); Davidson v. Franklin Avenue Investment Company, 151 N.W. 537 (Minn. 1915); Stafford v. Riverside County, 155 Cal.2d 474, 318 P.2d 172 (Ca. 1957); E.K. Wood Lumber Co. v. Whatcom County, 5 Wsh.2d 63, 104 P.2d 752 (1940). The Minnesota and Washington escaped assessment statutes use "omitted" to describe property subject to further assessment. Davidson, supra at 538; Tacoma Goodwill Industries Rehabilitation Center, Inc. v. County of Pearce, 518 P.2d 196, 197 (Wa. App. 1973). Utah Code Ann. § 59-5-17, supra, does not contain this "omitted" language, and thus more closely resembles the California statute. Stafford, 318 P.2d at 174.

In Stafford, the court relied on the precedent set in Davidson and E.K. Wood Lumber Co., as well as cases from North Dakota, Alabama, Louisiana, Oklahoma and Illinois, when it ruled "it is only where there has been no assessment at all that the provisions for escape assessment apply." Id. at 174. Stafford was qualified by the California Supreme Court in Bauer-Schweitzer

Malting Company v. City and County of San Francisco, 106 Cal. 643, 506 P.2d 1019 (1973).

In Bauer-Schweitzer the city and county assessor was charged with criminal misconduct while in office. Id. at 1020. The court upheld an order which allowed properties underassessed due to the assessor's criminal conduct to be reassessed by experts. Id. at 1021. The holding expanded the definition of property which has escaped assessment to include property "assessed at an assessment ratio lower than the ratio properly established by the assessor for a particular year" Id. at 1022. An assessor's criminal conduct is an extraordinary circumstance, which was contemplated by the Utah Supreme Court in Builders Component Supply, supra, when the court indicated that an extraordinary circumstance constitutes sufficient grounds for a second assessment of the property. Builders Component Supply, supra, at 98.

Because Utah follows the rule that property which is underassessed is not the same as property which has escaped assessment, Kennecott's property may not be reassessed, and the County cannot recover on its Counterclaim.

C. The County is Not the Assessor of Kennecott's Property and Cannot have Kennecott's Property Reassessed as Property Which has Escaped Assessment.

Utah Code Annotated § 59-5-46(22), (1974), clearly commits to the Commission the power and authority to correct any

assessment made by it when that assessment is improper. It states as follows:

To correct any error in any assessment made by it at any time before the tax is paid thereon and report such correction to the county auditor, who shall thereupon enter the same upon the assessment roll.

Nowhere in Utah statute is the county assessor given any authority whatsoever to correct any assessment made by the Commission upon property which, by statute and the constitution, the Commission is required to assess. Kennecott's property is mining property and as such it is assessed under the Utah Constitution and Utah Statute by the Commission. The County Assessor has no authority to assess Kennecott's property. As a result, any erroneous assessment can only be corrected by the original assessor, i.e. the Commission, and may not be corrected by the county assessor. Thus, Utah Code Annotated § 59-5-17, supra, granting authority to the County Assessor to assess property which has escaped assessment as far back as five years prior to the time of discovery, does not apply so as to permit the County, or the County Assessor, to have Kennecott's property reassessed.

The only body which may correct an assessment, or which may require property which has escaped assessment to be assessed, is the Commission. The County simply does not have the authority to have Kennecott's property reassessed in this case, as the County is not the assessor. Furthermore, Utah statutory law clearly states that any assessment made by the Commission may not

be changed by the County. In Utah Code Annotated § 59-2-802 (Supp. 1987), it states as follows:

The commission shall, before June 1, transmit to the county auditor of each county in which an apportionment has been made a statement showing the property assessed and the assessed value of the property, as fixed and apportioned to the county, cities, towns, schools, and other taxing districts. The county auditor shall enter the statement on the assessment roll or book of the county, and enter the amount of the assessment apportioned to the county in the column of the assessment book or roll which shows the total value of all property for taxation of the county. No county governing body, acting as a county board of equalization, may change any assessment fixed by the commission.

Thus, the County's attempt to use Utah's escaped assessment statute to reassess Kennecott's property, which property has been assessed by the Commission, is improper and cannot be allowed.

D. Sound Public Policy Dictates That, Absent Extraordinary Circumstances, Utah's Escaped Assessment Statute Should Be Held Inapplicable To Underassessed Property.

There are sound policy reasons for holding that Utah's escaped assessment statute should not apply to property which is only allegedly undervalued, but upon which the taxpayer has paid his taxes, and closed his books. The taxpayer in this proceeding, Kennecott, received its assessment from the Commission in 1977, 1978, 1979, 1980 and 1981, and did not protest or seek to have that assessment changed under the Commission equalization procedures found at Utah Code Ann. § 59-7-12 et seq., 1953 as

amended, now codified at § 59-2-1013 (Supp. 1987). Kennecott paid its taxes to the County based upon the assessment, and the County accepted that payment based upon that same assessment. Kennecott is entitled to an assurance that its acceptance of the Commission's assessment, and its payment of taxes based upon that acceptance, will end any obligation for taxes in those years it did not protest its assessment before the Commission under Utah Code Ann. § 59-7-12, supra. Both Kennecott and the Commission are also entitled to the assurance that the Commission's assessment is final unless the County protests that assessment under Utah Code Ann. § 59-7-12, supra.

A policy of finality in taxation matters, and the administrative and financial nightmare which ensues without such a policy, is what led this court to give prospective effect to its holding that Utah Code Ann. § 59-5-109, 1953 as amended, was unconstitutional in Rio Algom v. San Juan County, 681 P.2d 184, 196 (Utah 1984). That same policy of finality, coupled with reliance upon the taxpayer's part, was the reason this court's holding in Loyal Order of Moose No. 259 v. County Bd., 659 P.2d 257 (Utah 1982), was given only prospective effect. In Moose the court states:

Also, if the rule were to be given retroactive effect, the assessment of back taxes on properties affected by this rule might well result in an unreasonable burden upon all those organizations and governmental bodies associated with it. By staying the effective date of our ruling in this case, not only are court and agency resources saved, but time

also is allowed for organizations affected to make needed adjustments.

This correction of a misinterpreted line of law should not and shall not work harshly against the appellant here.

657 P.2d at 265.

For the same policy and hardship reasons enunciated in both Rio Algom and Moose, this court should hold that, absent extraordinary or unusual circumstances, Utah's escaped assessment statute, Utah Code Ann. § 59-2-309 (Supp. 1987), does not apply to underassessed, as opposed to omitted, property. In this case to hold otherwise will reopen the assessment of Kennecott's property for as far back as 1977, ten years ago. Under these circumstances no taxpayer can ever be assured his responsibility for payment of taxes has ended when his taxes are paid. This will create uncertainty upon the part of governments, the Commission and taxpayers and may well work a hardship upon, and work harshly against, Kennecott and other taxpayers.

Other courts in determining that their escaped assessment statutes do not apply to underassessed property, have stated a policy opposing "double taxation". This is considered to be the effect of extending an escaped assessment statute to allow reassessment, and consequently new taxation, of undervalued property. In Tradewell Stores, Inc. v. Snohomish County, 69 Wsh.2d 352, 418 P.2d 466, 467-68 (Wa. 1966) the Washington Supreme Court states as follows:

In Hammond Lumber Co. v. Cowlitz County, 84 Wash. 462, 147 P. 19 (1985), the assessor had

levied taxes based on the value of the land but had neglected to include a railroad built on the property. When he attempted to levy an "omitted property assessment" to cure this oversight, this court ruled that it was not a case of assessing omitted property but, rather, was double taxation and therefore improper.

The Utah Supreme Court has also characterized an attempt to apply Utah's escaped assessment statute to underassessed property as being double taxation. See Builders Component Supply v. Cockayne, 22 Utah 2d 172, 450 P.2d 97, 98 (1969). Indeed, even the County recognizes the application of Utah's escaped assessment statute to property which is only underassessed to be "double taxation". See Addendum B to this Brief, letter from Bill Thomas Peters to Salt Lake County Board of Commissioners dated July 20, 1981, at pp. 2 and 3, (Rec. 729-736).

Fairness and equity also require that Utah's escaped assessment statute be held inapplicable to undervalued property, as opposed to escaped or omitted property. It is not fair to require Kennecott to challenge its assessment within ten days after it is received, see Utah Code Ann. §§ 59-5-52 and 59-7-12, 1953 as amended, and to require the Commission to correct any errors it makes in an assessment within eight months of the date it assesses the property, see Utah Code Ann. §§ 59-5-46(22), 59-5-52 and 59-10-36(1), 1953 as amended, and yet allow the County five years, under the guise that undervaluation

constitutes escaped assessment, to complain about, or challenge an assessment.

For the foregoing reasons, sound public policy requires that underassessed property not be subject to an escaped assessment merely because it is undervalued.

POINT II

THE COUNTY'S COUNTERCLAIM IS FORECLOSED
BECAUSE THE RELIEF SOUGHT IS UNTIMELY UNDER
UTAH'S ASSESSMENT SCHEME.

Utah Code Ann. § 59-5-3 (1974) requires the Commission to assess all mines and mining claims, all machinery used in mining and all improvements to the surface of mines. This is to be accomplished by the Tax Commission before the first day of April of each year. See Utah Code Ann. § 59-5-52, 1953 as amended. Immediately after this assessment, the owner of the property is to be notified of that assessment. Id.

Thereafter, if an owner of property which is assessed by the Commission is dissatisfied with the assessment, he may apply to the Commission to have that assessment corrected, so long as the application is submitted before the tenth day of April. See Utah Code Ann. § 59-7-12, 1953, supra. If no assessment protest is filed with the Commission within this time frame, the assessment becomes final and a later assertion in a lawsuit that the assessment was improper is foreclosed. See Crystal Car Line v. State Tax Commission, 110 Utah 426, 174 P.2d 984, 991 (1946).

The basis and thrust of the County's Counterclaim is that it is entitled to additional taxes from Kennecott because Kennecott's property was allegedly underassessed in 1981 and for four years prior thereto. Yet the County did not protest Kennecott's assessment before the Commission under Utah Code Ann. § 59-7-12, supra, as Kennecott was required to do had Kennecott desired to protest that assessment. Certainly, if Kennecott is required to protest its assessment to the Commission in order to have Kennecott's property reassessed, then the County should also be required to proceed in the same manner if it desires to have Kennecott's property assessed at a higher level so as to collect additional taxes.

POINT III

THE COUNTY MAY NOT HAVE KENNECOTT'S PROPERTY WHICH IS ASSESSED UNDER A NET PROCEEDS METHOD REASSESSED BECAUSE THE ASSESSED VALUE IS NOT TO ITS LIKING.

The County alleges that Kennecott's mining claims were undervalued for 1981 and four years prior thereto as a result of the net proceeds assessment of Kennecott's mining property by the Commission under Utah Code Ann. § 59-5-57, 1953 as amended. The County then asserts it should be allowed to have these mining claims reassessed according to a mysterious formula the County has devised which does not comply with the requirements for assessment of mines specified in Utah Code Ann. § 59-5-57, 1953, as amended.

There is no allegation by the County that the assessment of Kennecott's mining claims and mining property was accomplished in any fashion other than that specified in those statutes relating to the assessment of mines under the net annual proceeds formula. See Utah Code Ann. § 59-5-57 et. seq., supra. The County's counterclaim is that the assessment of Kennecott's mining claims under the net annual proceeds formula results in what the County considers to be an underassessment because this net annual proceeds assessment produces an inappropriate value. The County ignores Article XIII, Section 4 of the Utah Constitution in raising this point, which specifies as follows:

All metalliferous mines or mining claims, both placer and rock in place, shall be assessed as the Legislature shall provide; but the basis and multiple now used in determining the value of metalliferous mines for taxation purposes and the additional assessed value of \$5.00 per acre thereof shall not be changed before January 1, 1935, nor thereafter until otherwise provided by law.

This provision requires that Kennecott's mine be assessed according to the net proceeds formula. The Utah Supreme Court, in construing this constitutional provision, and the statute implementing that provision which was the predecessor to the current net proceeds formula found in Utah Code Ann. § 59-5-57, et. seq., supra, stated in Tintic Standard Mining Co. v. Utah County, 80 Utah 491, 15 P.2d 633 (1932), as follows:

The constitution indicated general principles specifying what the general assessments should be, but did not lay down rules by means of which those principles became effective. This was left to the legislature.

There is a limitation in the constitution to the effect that all metalliferous mines or mining claims can be assessed only on the basis of a value, in addition to \$5.00 an acre, to be determined by multiplying the amount of the net annual proceeds by some multiple to be fixed by the Legislature. This necessarily limits the legislative power to an assessment of mines and mining claims as provided in the constitution. There is no express limitation to prevent the Legislature from making the constitution effective by providing a method by which the assessment may be made as applied to the basis specified in the constitution.

Id. 15 P.2d 636 [emphasis added].

Thus, all metalliferous mines and mining claims may only be assessed as specified in the constitution and as provided by the legislature. In other words, neither this court, nor the County may change the method of assessment specified in Article XIII, Section 4 of the Utah Constitution and in Utah Code Ann. § 59-5-57, et. seq., supra.

The thrust of the County's complaint in its counter-claim relating to the assessment of Kennecott's ore in the ground is that application of the net annual proceeds formula found at Utah Code Ann. § 59-5-57, et seq., supra, by the Commission to Kennecott resulted in Kennecott's ore having no value for some of the years in question. Again, this is not an argument that Kennecott's property escaped assessment, rather the allegation is that the value resulting from application of the net proceeds formula constitutes underassessment. This allegation fails to recognize that under certain circumstances, which the Utah

Legislature acknowledged in enacting Utah Code Ann. 59-5-57, supra, Kennecott's and other mining companies' unextracted minerals will not have positive value.

Additionally, this assertion is misleading. The County would like this court to believe that Kennecott paid no taxes on its property during some of the years in question. Kennecott paid substantial taxes in each of the years from 1979 through 1981. In fact, Kennecott paid more taxes than any other taxpayer in the County during each of those years.

In Rio Algom the court recognized, when it upheld the constitutionality of Utah Code Ann. § 59-5-4.5, 1953 as amended, that different types of properties require different valuation and assessment methodologies. See Rio Algom, 681 P.2d 188-89, where the court states:

Because of the many different kinds of property and the various factors that affect their values, the determination of what constitutes equal "in proportion to the value of his, her or its tangible property," under Article XIII, § 3, cannot be made by application of any single formula.

Of primary importance is the determination of what valuation methods should be utilized, and that depends on the nature of the properties to be taxed. Residential, commercial, transportation, mining, and public utilities, etc., must be treated differently because of the economic conditions that give value to such properties. Some properties are income-producing; some are not. Some types of property sell frequently in an open market and have a market value that may be reasonably estimated on the basis of comparable market sales; some types of property are rarely sold and have no ascertainable market value based on comparable sales. The value

of some properties may be strongly influenced by general economic or market conditions, while others are not. Some may be "wasting asset" type properties (such as mines and oil and gas properties), while most are not. Indeed, some properties may have a value that is peculiar to the owner and to no one else. See Kennecott Copper Corp. v. Salt Lake County, 122 Utah 431, 250 P.2d 938 (1952) (where the issue was the valuation of a mine dump).

The court has also clearly acknowledged that the net proceeds method of assessing mining claims is permissible and constitutional under Utah's constitution. In United States S.R. & M. Co. v. Haynes, 111 Utah 172, 181, 176 P.2d 622 (1947), the court stated:

It is conceded that the statutory method of valuing metalliferous mines for taxation purposes at \$5 per acre plus a multiple or sub-multiple of the net proceeds is a proper and constitutional formula for determining the value of the mines for assessment purposes.

The County believes the assessed value of Kennecott's mine and mining claims is insufficient even though that assessed value was arrived at by proper application of a constitutional assessment method mandated by the legislature in Utah Code Ann. § 59-5-57 et seq., supra. Simply speaking, this does not constitute sufficient grounds to have Kennecott's property revalued and reassessed as having "escaped assessment."

The County argues that in the years prior to 1983 the Commission rolled back the value of Kennecott's real property to its 1978 level in contradiction to the statute specifying a 1978

roll back which was, at the time, found at Utah Code Ann. § 59-5-109, 1953 as amended. That statute mandated that all real property that was revalued after January 1, 1978, was to be appraised at its current fair market value and the value of that property rolled back to the January 1, 1978 level. In interpreting the application of this section to property assessed by the Commission, the Commission took the position that it revalued all property assessed by it each year and that therefore, the value of the property assessed by the Commission was to have its value rolled back to the January 1, 1978 level. See Memorandum to Mark K. Buchi, Chairman, State Tax Commission of Utah, from Gary R. Thorup, Assistant Utah Attorney General, dated October 18, 1983. Rec. 833-41. Under this interpretation of the roll back statute the Commission rolled back the value of Kennecott's property to its January 1, 1978 level. At issue in this lawsuit is the assessment of Kennecott's property through January 1, 1981. No years after January 1, 1981 are at issue. The Commission acted properly in the method by which it assessed Kennecott's property for the years in question.

As is amply pointed out in this Brief, the allegation by the County is not that Kennecott's property was not assessed at all, but that Kennecott's property was undervalued and underassessed as a result of the application of the roll back in 1981 and the years prior thereto. Clearly, under Point I above, the escaped assessment statute relied upon by the County does not

apply and may not properly be used to have Kennecott's property revalued for the years in question. Under those cases submitted by Kennecott as well as the County's Opinion as set out in Addendum "B" attached to this Brief, Utah's escaped assessment statute does not permit reassessment of Kennecott's property.

Kennecott's property is entitled to be assessed under Article XIII, Sections 2, 3, and 4 of the Utah Constitution upon the same basis and in the same fashion as is all other property in Utah. In assessing Kennecott's property, the Commission did nothing more than apply its understanding of the uniform and equal clauses of Article XIII, Sections 2 and 3 of the Utah Constitution so as to roll back the value of Kennecott's property to its 1978 level as was done for all other real property in Utah during the same period of time. Under Moon Lake Electrical Assn. v. Utah State Tax Commission, 9 Utah 2d 384, 345 P.2d 612 (1959), this is a correct and proper interpretation of the Commission's role in enforcing the tax laws of the State of Utah.

It is ironic that the County is asserting that Kennecott's mining claims were undervalued and that Article XIII, Sections 2 and 3 of the Utah Constitution require that the court ignore Article XIII, Section 4 of the Utah Constitution and increase the value of Kennecott's mining property under some mystical formula. On the other hand, the County asserts that Article XIII, Sections 2 and 3 of the Utah Constitution simply do not apply to the Commission's assessment of Kennecott's other

property so as to compel a roll back to that property's 1978 level. This is inconsistent and an improper reading of the Utah Constitution. The County is asking the court to increase the value of Kennecott's property in one instance as a result of Article XIII, Sections 2 and 3 of the Utah Constitution, and yet, not to allow a reduction in value of Kennecott's property by operation of those same constitutional provisions.


CONCLUSION

As is demonstrated above, underassessment does not constitute escaped, or omitted, assessment giving rise to a right by the County to reassess Kennecott's property in 1977, 1978, 1979, 1980 and 1981 under Utah Code Ann. § 59-5-17 (1974). Furthermore, because the County, and the County assessor, are not the assessor of Kennecott's property, neither the County or the County assessor may invoke Utah's escaped assessment statute so as to compel a reassessment of Kennecott's property. Only the Commission, as the assessor of Kennecott's property, has that authority. Additionally, because the County did not challenge Kennecott's assessment by the Commission under Utah Code Ann. § 59-7-12, 1953 as amended, in any of the years in question, the County is now foreclosed from such a challenge as a counterclaim in a Utah Code Ann. § 59-11-11, 1953 as amended, tax protest lawsuit.

For the foregoing reasons, as well as others stated in the body of this brief, the decision of Judge Hanson granting

Kennecott and the Commission Summary Judgment should be sustained.

RESPECTFULLY SUBMITTED this 18th day of September,
1987.


JAMES B. LEE



KENT W. WINTERHOLLER

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, four (4) true and correct copies of the foregoing BRIEF OF RESPONDENT KENNECOTT CORPORATION to the following on this 18th day of September, 1987:

Bill Thomas Peters
Special Deputy S.L. County Attorney
#9 Exchange Place
Salt Lake City, Utah 84111

Maxwell A. Miller
Assistant Attorney General
130 State Capitol Bldg.
Salt Lake City, Utah 84114



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ADDENDUM A

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J T WELER

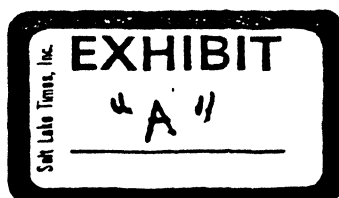
BEFORE THE UTAH STATE TAX COMMISSION

NUPETCO ASSOCIATES,)	
	:	
Petitioner,)	
	:	
v.)	FINDINGS OF FACT,
	:	CONCLUSIONS OF LAW
	:	AND FINAL DECISION
COUNTY BOARD OF EQUALIZATION OF)	
SALT LAKE COUNTY,	:	Appeal No. 84-18-1600
STATE OF UTAH,)	Serial No. 22-27-306-002
	:	
Respondent.)	425

A Formal Hearing was held on this matter on October 23, 1985. James E. Harward conducted the matter with Commissioner Roger O. Tew of the Utah State Tax Commission presiding. Bill Thomas Peters appeared representing the Respondent. Wayne Petty appeared representing the Petitioner.

At the outset the Petitioner requested that the Request for Admissions numbers 1 through 7 and Answers to Interrogatories 1 through 5, 11, 12 and 13 be admitted into evidence. The Petitioner then presented testimony of Helen Watson, Deputy Salt Lake County Assessor of the following:

1. A portion of the subject property was sold necessitating a change in the legal description on the county records.



Appeal No. 84-18-166

2. During the change of the legal description a typographical error occurred whereby 9.6070 was transposed into 6.607 acres. This occurred approximately April 26, 1983.

3. The Petitioner subsequently told the county appraiser that the tax assessment notice was incorrect.

4. The evidence was presented that a note was made and the correction process began to take place on the appropriate county record.

5. Another witness testified that the value for ad valorem purposes is computed by multiplying the acreage listed on the building card times the value per acre which value is then used for computing the assessed value and ultimately the tax. The number of acres used to compute the property tax for the 1984 tax year was 6.607 rather than the actual 9.6070.

6. Evidence was further presented that there is no dispute as to the value, per acre, of the ground.

FINDINGS OF FACTS

1. The tax year in question is 1984.

2. The lien date for determination of value for the tax year is January 1, 1984.

3. The lien date of the subject property on the building cards from which value is established for assessment purposes showed 6.6070 acres of ground. The 6.6070 acres of ground was then multiplied by the value per acre of \$30,500 arriving at a market value.

4. In reality, the ground was 9.607 acres which resulted in a total of 3 acres which were not multiplied by \$30,500 to arrive at the fair market value for January 1, 1984 of the property.

5. Such a clerical error resulted in property which was undervalued.

CONCLUSIONS OF LAW

1. The County has the authority to assess escaped property at anytime within 5 years ending on the date of discovery of the property which has escaped assessment. (Utah Code Ann. § 59-5-17; Union Portland Cement Co. v. Morgan County, 230 P. 1020 (Utah 1924)).

2. The Assessor with the consent of the County Commissioners has the authority to correct omissions, errors or defects in form in the assessment book when it can be ascertained what was intended at any time prior to the sale for delinquent taxes and after the original assessment was made. (Utah Code Ann. §59-11-3 (1953)). Procedures to correct errors, omissions or defects are contained in the Utah Code Ann. § 59-7-1 et seq.

3. Property which has been undervalued due to a clerical mistake in the quantity of the property to be assessed or in the assessed valuation does not result in the property which has escaped valuation. (See, Builders Components Supply Company v. Cockayne, 450 P.2d 97 (Utah 1969); Tradewell Stores

Inc. v. Snowhomish County, 418 P.2d 466 (Wash. 1968); Leyh v. Glass, 508 P.2d 259 (Okla. 1973); People ex. rel. Schuler v. Chapman, 19 N.E.2d 351 (Ill 1939); and Chicago Gravel Company v. Rosewell, 455 N.E.2d 120, aff'd, 469 N.E.2d 1098 (Ill. 1983)).

4. Because this is not escaped property, there has been a failure of the Respondent to comply with the reassessment provisions of the Utah Code.

5. Because the error in the number of acres which resulted in undervaluing the property was discovered subsequent to the time the tax was levied and paid by the Petitioner, the Board of Equalization cannot now go back and assess 3 acres as if they were escaped property.

FINAL DECISION

Based upon the foregoing, it is the Decision of the Utah State Tax Commission that:

1. Three acres of the subject property did not escape assessment for the tax year January 1, 1984, but were undervalued.

2. The action of the Salt Lake County Assessor was improper in assessing the property and giving notice thereon.

3. The action of the County Board of Equalization denied Petitioner of due process and equal protection of the law.

Therefore, the Decision of the Salt Lake County Board of Equalization is reversed

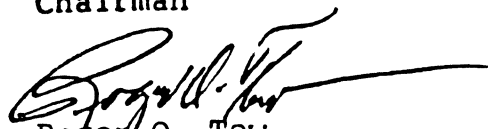
Appeal No. 84-18-166

DATED this 2 day of April, 1988.

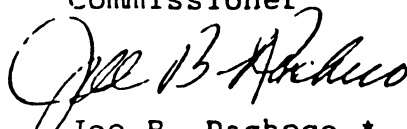
BY ORDER OF THE UTAH STATE TAX COMMISSION.

ABSENT

Mark K. Buchi
Chairman


Roger O. Tew
Commissioner


R. H. Hansen
Commissioner


Joe B. Pacheco *
Commissioner

* Since the hearing on this case, Commissioner Gary C. Cornia has been replaced by Commissioner Joe B. Pacheco. Commissioner Pacheco has been duly advised of the facts and circumstances regarding this case and is qualified to sign this decision.

JEH/lgh/1926w

Appeal No. 84-18-160.

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing
Decision to the following:

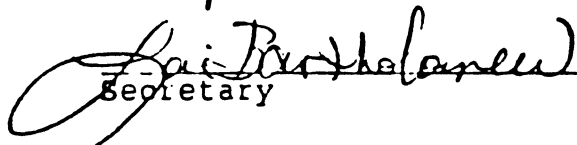
Wayne G. Petty, of
Moyle & Draper, P.C.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111-1901

Robert L. Yates
Salt Lake County Deputy Assessor
Salt Lake City and County Bldg.
Salt Lake City, Utah 84111

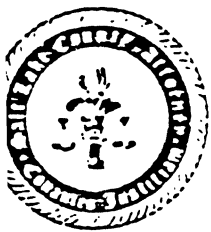
Mike Reed
Salt Lake County Deputy Auditor
72 East 400 South, Suite 400
Salt Lake City, Utah 84111

Bill Thomas Peters
Special Deputy County Attorney
10 Exchange Place, No. 1000
Salt Lake City, Utah 84111

DATED this 3rd day of April, 1985.


Secretary

ADDENDUM B



Office of the Salt Lake County Attorney

Administration
Metropolitan Hall of Justice
Suite C-220
Salt Lake City, Utah 84111
(801) 363-7900



TED CANNON
County Attorney

July 20, 1981

ROGER LIVINGSTON
Chief Deputy County Attorney

Honorable Board of County Commissioners
Room 407, City and County Building
Salt Lake City, Utah 84111

ATTN: William E. Dunn, Chairman

RE: Reassessment of Properties for Prior Years -
Brown Subdivision, et al.

Dear Commissioners:

This opinion is written in response to numerous inquiries concerning the actions of the Salt Lake County Assessor's Office in assessing back taxes to properties that had been previously assessed and the taxes have been paid, but in a subsequent year they were determined to be inaccurate.

In reassessing these properties previously assessed, the Salt Lake County Assessor was moving under the provisions of Utah Code Annotated, Section 59-5-17, which sets forth in specificity the duties of the Assessor when he discovers a piece of property which has "escaped assessment." At the present time, the writer is unaware of any Utah cases directly answering the question. However, there are Utah cases which do reflect the attitudes of the Court in similar situations and based upon those decisions it is the conclusion of this Office that once an assessment has been made, the taxes levied and the monies paid, the Assessor is without the authority to reassess the property as having been "escaped."

In the Utah Supreme Court Case of Builders Components Supply Co. v. Cockayne, 450 P2d 97 (Utah-1969) the Utah Supreme Court said that "Statutes imposing taxes and prescribing tax procedures should generally be construed favorably to the taxpayer and strictly against the taxing authority" recognizing that this is a long understood policy. That Court went on to state that "...where a valid assessment has been made, by an assessor, cognizant of the

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July 20, 1981

facts, undervaluation is ordinarily not a ground for another assessment; and that property should not be subject to double taxation." It has been early held that property is not open to back assessment if it was merely assessed at too low a value or in the wrong county. See Anniston City Land Co. v. State, 64 So 110 (Ala-1913); State v. Reality Loan Co., 96 So 613 (Ala-1923) and Thomas Executrix v. Commonwealth, 215 SW2d 546 (Ky-1948). On the other hand, clerical errors such as omitting the final zero in calculating the tax or misplacing a decimal point that results in a substantial portion of the property escaping taxation can, under certain circumstances trigger a back assessment. See Heuck v. Cincinnati Model Homes, 199 NE 698 (Ohio-1936).

Since the state of Utah has not decided the question directly, it is necessary to review the interpretative decisions of some of the other States that have statutes similar to the Utah Statute. In the case of Davidson v. Franklin Avenue Investment, Co., 151 NW 538 (Minn-1915), the Supreme Court of the State of Minnesota was required to interpret a statute that is quite similar to the one found in Utah Code Annotated, 59-5-17. That case involved a fact situation similar to the one in the instant case. In that case, the Supreme Court of Minnesota stated that "...this statute gives no power to reassess, except where real property is omitted in the assessment of any year or years and thereby escapes taxation." This is not a case of omitting property in an assessment, but simply of undervaluing it. Without mention of the word "reassessment" this Court said that it authorizes a reassessment only when the property has been omitted, when it has escaped taxation. The words "escaped taxation" or "escaping assessment" appear both in the Utah Statute and the Minnesota Statute. The Minnesota Court, in that decision, went on to say that to hold otherwise "...when property has been undervalued by the assessing officers, but has paid the taxes assessed and levied, would often work a hardship upon innocent purchasers of the property." This position was also restated by the California Supreme Court in the case of Stafford v. Riverside County, 318 P2d 172 (Cal-1957). In that case, the assessor attempted to reassess property previously assessed for the tax year of 1949, 50, 51, 52, 53 and 54. The property had been improved for the years 1947, 48 and 49 and

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the improvements were "well-known to the county assessor" and were open and apparent to anyone. However, in 1954, the assessor attempted to go back and collect additional taxes. The county assessor was moving under a provision similar to the one found in the Utah Statute which gave him the authority to assess property that had escaped assessment. The California Supreme Court reviewed the authorities from the various states including the Minnesota case of Davidson v. Franklin, supra, and made the following observations "From the authorities cited, it would appear that it is only where there has been no assessment at all that the provisions for escaped assessment apply." The Court then went on to conclude that since the property had been previously assessed, although undervalued, it could not be reassessed as property having escaped assessment.

Thus, we see that the California Supreme Court, in the case of Stafford, like the Minnesota Court in the case of Davidson, has concluded that the word "escaped" or "omitted" does not mean the same thing as "undervalued."

It should be pointed out, however, that the assessor's action in the instant case is not without supporting authority. In fact, in a more recent California decision, the Supreme Court of California appeared to overturn the previous position taken by it in Stafford. Thus, in the case of Bauer-Schweitzer Malt, Inc. v. City and County of San Francisco, 506 P.2d 1019 (Cal-1973) the Supreme Court of the State of California allowed the assessor to reassess property undervalued in previous years. However, that case arose out of a situation in San Francisco County wherein a grand jury had determined that the Assessor's Office had deliberately assessed certain properties below the applicable assessment ratio for the area and had done so intentionally and was charged with criminal misconduct in office.

In that case, the California Supreme Court restricted its previous holding in the Stafford Case and said that, to the extent the property has been assessed at an assessment ratio lower than the ratio properly established by the assessor for a particular year, such property had escaped assessment. The court went on to conclude

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that there was authority to make an escape assessment in the amount of the deficiency for any year for which recovery of back taxes was permitted by law. This latest pronouncement by California Supreme Court would certainly appear to support the actions of the Salt Lake County Assessor in the instant case. As was pointed out by the California Supreme Court "The Assessor is under a duty not to allow anyone to escape a just and equal assessment." And was further observed by the Court, the Assessor is obligated "Not to allow anyone to escape a just and equal assessment through favor, reward or otherwise."

As can be seen from the above and foregoing authorities, there is no consensus of opinion concerning what constitutes escaped or omitted property and what constitutes reassessment. And, while it is admitted that the Minnesota statute referred to by the Court in the Davidson case is not exactly like the Utah statute, the thrust of the statute seems to be substantially the same. While the Utah statute does not use the word "omitted" and simply refers to "escaped assessment," it is my opinion that the intent of both statutes is substantially the same. It is further my opinion that the decisions of the Supreme Court of the State of Utah, while not directly in point, would indicate that the Utah Supreme Court would probably follow the Minnesota court's approach.

Reference is made to the decision of the Utah Supreme Court in the Case of Union Portland Cement Co. v. Morgan County, 230 P.1020, in that case our Supreme Court declared that "it is the duty of the Assessor ...to assess property omitted from assessment when discovered." (Emphasis supplied). The fact that this word has been used in construing Utah Code Annotated 59-5-17 is further persuasion of the fact that the Utah Supreme Court would probably construe the language of 59-5-17 to mean the same as the Supreme Court of Minnesota construed the Davidson case. See also Muscatine Lighting Co. v. Ditchforth, 243 NW.292, wherein the Iowa Supreme Court held that property erroneously assessed with respect to the amount was not "omitted" or "withheld, overlooked or for any other cause not listed and assessed;" hence the County Treasurer could not make the correction. Again, the statute in question in

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that case contained the words "omitted property." This position is further supported by the Supreme Court of the State of Arizona and the Supreme Court of the State of Washington.

In Leyh v. Glass, 508 P.2d 259, the Supreme Court of Oklahoma made the following observation: "Statutory procedures for listing and assessing omitted property is not appropriate for reassessing or revaluing property which has already been assessed." And in Tradewell Stores, Inc. v. Snohomish County, 418 P.2d 466, the Washington Supreme Court held that under a statute relating to omitted assessments, inappropriate valuations may not be increased and the property must have been omitted entirely as evidenced by the assessment rolls before taxes for the past years may be assessed. (Emphasis supplied). The Washington Court went on to characterize such an approach as a double taxation question as has Utah, in the Builder Components case, supra; and said that the fact "...that this interpretation allows a tax payer to escape payment of taxes as a result of error or oversight of the assessor, or even because of his inability to keep constantly informed of new construction in his county is unfortunate, but is immaterial."

Based upon the foregoing authorities and a literal reading of the provisions of Utah Code Annotated, Section 59-5-17, and based upon the previous opinion issued by this office, it is still the opinion of this office that once an assessment has been made upon property, and the taxes have been paid, it would be inappropriate and unlawful for the Assessor to attempt to change the assessment by treating said previously assessed property as escaped property and move under Utah Code Annotated, Section 59-5-17, 1953, as amended. On the other hand, if the error is discovered prior to the time that the taxes are delinquent or have been paid, the Assessor has the authority to correct such errors. This authority is found in Utah Code Annotated, Section 59-11-3, 1953, as amended, which statutory provision allows the Assessor to make certain corrections in the assessment book for errors or omissions. The pertinent language of that statute reads as follows:

"Omissions, errors or defects in form in the assessment book, when it can be ascertained

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therefrom what was intended, may, with the consent of the County Commission, be supplied or corrected by the Assessor at any time prior to the sale for delinquent taxes and after the original assessment was made." (Emphasis supplied).

As previously indicated, this statute would appear to allow a correction or a reassessment of property that was erroneously assessed if the discovery of the error occurred prior to the time that the property became subject to sale for delinquent taxes. This would, therefore, mean that if an erroneous assessment is made and the taxes have, in fact, not been paid and the error is discovered prior to the sale for delinquent taxes to the County, a correction could be made. However, in those cases where the underassessment was not discovered until after the time that the taxes were paid or that the sale to the County had taken place, the authorities from a majority of the states having statutes similar to the Utah Statute would not allow a subsequent assessment.

I should also like to mention in passing that in the instant case, and in particular with the Brown Subdivision, the Salt Lake County Assessor was acting pursuant to preliminary advice given by the undersigned as Special Deputy County Attorney. That advice was based primarily upon the fact that the Supreme Court of the State of California, in approaching a similar problem, had drastically changed from its previous position and had allowed the assessor to make reassessment for previously undervalued property in subsequent years. This is the position set forth in the Schweitzer-Malt case. However, upon more detailed review and upon further review of the authorities and a re-examination of the two Utah cases that would appear to have a bearing on the question, it is the opinion of the undersigned that the Utah Court would not allow a subsequent reappraisal of property previously assessed upon which the taxes had been paid. While the actions of the Salt Lake County Assessor were certainly in the best interests and welfare of all taxpayers in Salt Lake County and were geared towards assuring that each and every taxpayer in the County pays their just and fair share of the tax burden, it is also apparent that, under the facts and circumstances of this case, the action would probably not be supportable.

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Therefore, the opinion of this Office is that those reassessments made by the Assessor's Office for the year 1981 of properties previously assessed but undervalued where the taxes had been paid or where a preliminary sale to Salt Lake County had taken place, should be cancelled, at least to the extent that they relate to prior years. Of course, any corrective action taken for the year 1981 is supportable and can be taken until such times as the taxes are in fact paid or the property is preliminarily sold to Salt Lake County for non-payment of taxes.

If there are any additional questions with regard to this matter, please do not hesitate to contact the undersigned.

Best personal regards,

Ted Cannon,
Salt Lake County Attorney

By: 

Bill Thomas Peters
Special Deputy Salt Lake
County Attorney

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cc: Donald S. Sawaya

ADDENDUM C

59-5-17. Property escaping assessment—Five-year limitation period on assessment—Duties of assessor.—Any property discovered by the assessor to have escaped assessment may be assessed at any time as far back as five years prior to the time of discovery, and the assessor shall enter such assessments on the tax rolls in the hands of the county treasurer or elsewhere, and when so assessed shall be reported by the assessor to the county auditor, if made after the assessment book has been delivered to the county treasurer, and the auditor shall charge the county assessor with the taxes on such property, and the assessor shall give notice to the person assessed therewith and the assessor shall forthwith proceed to secure or collect the taxes as provided in chapter 10 of this title.

EQUALIZATION

59-7-12

59-7-12. Time for application to correct assessment.—If the owner of any property assessed by the state tax commission is dissatisfied with the assessment made by it, such owner may, between the third Monday in May and the second Monday in June, apply to the commission to have the same corrected in any particular, and it shall set a time for hearing such objections and may correct and increase or lower any assessment made by it, so as to equalize the same with the assessment of other property in the state.

59-2-803. Statement transmitted by county auditors to governing bodies.

The county auditor shall transmit to the governing bodies of cities, towns, schools, and other taxing districts in which the property is situated, or to which any of the value is apportioned, a statement of the valuation of all property as fixed and apportioned by the commission and reported under § 59-2-802. The statement shall be transmitted at the same time and in the same manner as the statement is transmitted under § 59-2-924. All the property is taxable upon assessment at the same rate, by the same officers, and for the same purposes, as the property of individuals within the city, town, school, road, or other taxing districts, respectively, and the taxes, except the taxes on car companies and on automobiles, motor stages, and motor transports, shall be collected in the same manner and by the same officers as the other taxes are collected.

ADDENDUM D

Sec. 2. [Tangible property to be taxed—Value ascertained—Properties exempt—Legislature to provide annual tax for state.]

All tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The property of the state, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Tangible personal property present in Utah on January 1, m., which is held for sale or processing and which is shipped to final destination outside this state within twelve months may be deemed by law to have acquired no situs in Utah for purposes of ad valorem property taxation and may be exempted by law from such taxation, whether manufactured, processed or produced or otherwise originating within or without the state. Tangible personal property present in Utah on January 1, m., held for sale in the ordinary course of business and which constitutes the inventory of any retailer, or wholesaler or manufacturer or farmer, or livestock raiser may be deemed for purposes of ad valorem property taxation to be exempted. Water rights, ditches, canals, reservoirs, power plants, pumping plants, transmission lines, pipes and flumes owned and used by individuals or corporations for irrigating land within the state owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes. Power plants, power transmission lines and other property used for generating and delivering electrical power, a portion of which is used for furnishing power for pumping water for irrigation purposes on lands in the state of Utah, may be exempted from taxation to the extent that such property is used for such purposes. These exemptions

shall accrue to the benefit of the users of water so pumped under such regulations as the Legislature may prescribe. The taxes of the indigent poor may be remitted or abated at such times and in such manner as may be provided by law. The Legislature may provide for the exemption from taxation of homes, homesteads, and personal property, not to exceed \$2,000 in value for homes, homesteads, and all household furnishings, furniture, and equipment used exclusively by the owner thereof at his place of abode in maintaining a home for himself and family. Property not to exceed \$3,000 in value, owned by disabled persons who served in any war in the military service of the United States or of the state of Utah and by the unmarried widows and minor orphans of such disabled persons or of persons who while serving in the military service of the United States or the state of Utah were killed in action or died as a result of such service may be exempted as the Legislature may provide.

The Legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. For the purpose of paying the state debt, if any there be, the Legislature shall provide for levying a tax annually, sufficient to pay the annual interest and to pay the principal of such debt, within twenty years from the final passage of the law creating the debt. (As amended November 4, 1930; November 5, 1946; November 4, 1958, effective January 1, 1959; November 6, 1962, effective January 1, 1963; November 3, 1964, effective January 1, 1965; November 5, 1968, effective January 1, 1969.)

**Sec. 3. [Assessment and taxation of tangible property—Exemptions—
Personal income tax—Disposition of revenues.]**

The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all tangible property in the state[,] according to its value in money, and shall prescribe by law such regulations as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value

of his, her, or its tangible property, provided that the Legislature may determine the manner and extent of taxing transient livestock and livestock being fed for slaughter to be used for human consumption. Land used for agricultural purposes may, as the Legislature prescribes, be assessed according to its value for agricultural use without regard to the value it may have for other purposes. Intangible property may be exempted from taxation as property or it may be taxed in such manner and to such extent as the Legislature may provide. Provided that if intangible property be taxed as property the rate thereof shall not exceed five mills on each dollar of valuation. When exempted from taxation as property, the taxable income therefrom shall be taxed under any tax based on incomes, but when taxed by the state of Utah as property, the income therefrom shall not also be taxed. The Legislature may provide for deductions, exemptions, and/or offsets on any tax based upon income. The personal income tax rates shall be graduated but the maximum rate shall not exceed six per cent of net income. No excise tax rate based upon income shall exceed four per cent of net income. The rate limitations herein contained for taxes based on income and for taxes on intangible property shall be effective until January 1, 1937, and thereafter until changed by law by a vote of the majority of the members elected to each house of the Legislature. All revenue received from taxes on income or from taxes on intangible property shall be allocated to the support of the public school system as defined in Article X, Section 2 of this Constitution. (As amended November 6, 1900; November 6, 1906; November 4, 1930; November 5, 1946; November 5, 1968, effective January 1, 1969.)