1967

Atlas Corporation v. Donald T. Adams, Orville Gunther, A. Pratt Kesler, and Ransom Quinn, Members of the State Tax Commission of Utah, and George W. Barben, Executive Secretary of the State Tax Commission of Utah, and the State Tax Commission of Utah : Plaintiff'S Brief

In the

Supreme Court of the St

ATLAS CORPORATION, a corpo

—vs.—

DONALD T. ADAMS, CHA
THER, A. PRATT KESLER
SOM QUINN, MEMBERS O
STATE TAX COMMISSION
and GEORGE W. BARR
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In the
Supreme Court of the State of Utah

ATLAS CORPORATION, a corporation,
Plaintiff,

—vs.—

DONALD T. ADAMS, ORVILLE GUNTHER, A. PRATT KESLER, and RANSOM QUINN, MEMBERS OF THE STATE TAX COMMISSION OF UTAH, and GEORGE W. BARBEN, EXECUTIVE SECRETARY OF THE STATE TAX COMMISSION OF UTAH, and THE STATE TAX COMMISSION OF UTAH,
Defendants.

Case No. 10522

PLAINTIFF'S BRIEF

STATEMENT OF THE CASE

This is an original action in the Supreme Court of Utah in which plaintiff seeks issuance of a Peremptory Writ of Prohibition prohibiting defendants from executing upon certain warrants issued by defendant, The State Tax Commission of Utah, against all of plaintiff's real and tangible personal property in three counties, for the purpose of imposing personal liability upon plaintiff for payment of real property taxes assessed against two worthless mining properties, and from requiring that plaintiff personally furnish security for the payment of

such taxes, and from in any other manner seeking to collect such taxes by means other than the sale of the property taxed. On January 4th, 1966, this Court issued an Alternative Writ of Prohibition and Order to Show Cause why the Peremptory Writ of Prohibition prayed for should not issue.

The jurisdiction of this Court to hear and determine this case and to grant the relief requested by plaintiff is expressly provided by Article VIII, Section 4 of the Utah Constitution, and by Section 78-2-2, Utah Code Annotated, 1953, and Rule 65B(b)(4), Utah Rules of Civil Procedure. The issues presented in this action are urgent public questions of general importance to the State of Utah and its citizens. Defendants have not been content to abide by the decision of this Court in *San Juan County and State Tax Commission of Utah v. Jen, Inc.*, 16 U.2d 394, 401 P.2d 952 (1965), and to seek a solution to their grievances through legislative action, but, with apparent disdain for that decision, have endeavored to circumvent it. Defendants' actions discredit the authority of this Court and that discredit must be rectified by this Court. Defendants' unconcerned resort in this isolated instance to summary warrant proceedings for the collection of these real property taxes threatens the integrity of the Utah tax system. An early determination of the issues is in the interest of the parties and the public and is necessary to prevent irreparable loss and damage to plaintiff.

Plaintiff's verified Complaint and Petition for Writ of Prohibition sets forth in detail the facts necessary to the decision of the issues here presented. Defendants

have stipulated to the truth of the factual statements contained in paragraphs 1 through 28 of the Complaint and Petition. Based upon these facts, plaintiff contends that the taxes in question do not constitute a personal obligation of plaintiff and that the actions of defendants are unconstitutional.

Defendants claim that the summary warrant procedure applied by them in this case for the collection of real property taxes from plaintiff entitles the Commission, forthwith upon docketing the warrants, to institute a Sheriff's sale of all of a taxpayer's real and tangible personal property in the State, the same to be accomplished without the necessity of notice to the property owner, without regard to any limitation as to time, and without any right of redemption of property sold through the sheriff's sale. Plaintiff contends that the drastic and harsh procedures advocated in this case and actually employed by defendants as against plaintiff are repugnant to the real property tax laws, customs and concepts of the State of Utah.

STATEMENT OF FACTS

Plaintiff is a Delaware corporation duly qualified to engage in business in the State of Utah. Defendants are the members and executive secretary of The State Tax Commission of Utah and The State Tax Commission of Utah. (For convenience, where The State Tax Commission of Utah is referred to hereafter separately from the remaining defendants, it is referred to as the "Commission.")

Plaintiff is engaged in the mining, extracting and processing of uranium and vanadium ores in Utah and owns or operates various mining properties from which it mines such ores. Plaintiff's mining properties were assessed by the Commission for the year 1965 for real property taxes pursuant to the provisions of Section 59-5-57, Utah Code Annotated, 1953, which provides for the assessment of metalliferous mining properties on the so-called "net proceeds" basis. Plaintiff has paid all 1965 real property taxes except such taxes assessed against the Mi Vida Mine and the South Almar Mine situated in San Juan County, Utah. Both of these mines were depleted prior to January 1, 1965, and on January 1, 1965, and throughout the year 1965 were valueless.

Defendants have assessed taxes against the Mi Vida Mine for 1965 in the sum of $248,312.59, based upon an assessed valuation as of January 1, 1965, of $5,988,342.00, and have assessed taxes against the South Almar Mine for 1965 in the sum of $268,022.41, based upon an assessed valuation as of January 1, 1965, of $6,463,667.00. These assessed valuations are equal to two times the average net annual proceeds realized from the operation of the Mi Vida and South Almar Mines respectively for the calendar years 1962, 1963 and 1964.

On July 9, 1965, the Commission served upon plaintiff a demand for security for payment of the 1965 and 1966 real property taxes assessed against all of plaintiff's mining properties, including the Mi Vida and South Almar Mines. In due course, plaintiff paid all taxes assessed against its mining properties except the

taxes assessed against the Mi Vida and South Almar Mines. Upon plaintiff's refusal to furnish the demanded security, defendants initiated jeopardy proceedings, and served upon plaintiff a Notice of Jeopardy Assessment, pursuant to which a hearing was held before the Commission, at which plaintiff filed a written protest to the jeopardy proceedings. Defendants, on November 10, 1965, by written decision, declared the 1965 real property taxes assessed against the Mi Vida and South Almar Mines to be in jeopardy.

Defendants then initiated in the name of the Commission and San Juan County an action in the San Juan County District Court seeking to restrain all plaintiff's operations, irrespective of the property upon which conducted, and to obtain appointment of a receiver to take possession of and hold all of plaintiff's properties. Defendants' application for preliminary injunction and appointment of a receiver was heard before the Honorable F. W. Keller, who, on December 3, 1965, rendered a Memorandum Decision denying the requested injunction and the request for appointment of a receiver. On December 8, 1965, the Commission and San Juan County voluntarily dismissed the pending action in the San Juan County District Court.

On December 1, 1965, defendants, presumably acting pursuant to Sections 59-5-79 and 59-5-80, and possibly Section 59-10-22, Utah Code Annotated, 1953, served upon plaintiff a Notice and Declaration of Taxes in Jeopardy, and pursuant thereto, on December 6, 1965, defendants docketed warrants in the sum of $516,335.00

in the offices of the County Clerks of Salt Lake, San Juan and Grand Counties. Defendants assert their right to effect collection of the 1965 real property taxes assessed against the Mi Vida Mine and the South Almar Mine by execution upon these warrants, which are a cloud upon plaintiff's title to all real and tangible personal property owned by plaintiff and situated in the three named counties.

On December 10, 1965, the Commission filed with the Salt Lake County District Court an Affidavit for Issuance of Execution and a Notice of Motion for Leave to Issue Execution seeking sanction from the Salt Lake County District Court for execution upon the warrant docketed with the Salt Lake County Clerk. On December 14, 1965, plaintiff initiated an action against the Commission by the filing of a Complaint in the Salt Lake County District Court, seeking to enjoin the Commission from executing upon the warrants theretofore docketed, from enforcing personal liability against plaintiff for payment of the subject taxes, and for a declaratory judgment concerning the rights and duties of the parties. At the same time, plaintiff also filed a Motion for Preliminary Injunction. The Commission's Answer to, and Motion to Dismiss, plaintiff's Complaint were filed on December 15, 1965. On December 20, 1965, plaintiff's Motion for Preliminary Injunction, the Commission's Motion for Leave to Issue Execution upon the warrant docketed in Salt Lake County and the Commission's Motion to Dismiss plaintiff's Complaint were heard before the Honorable A. H. Ellett,

who granted the Commission's Motion to Dismiss plaintiff's Complaint and entered judgment accordingly.

As noted above, the taxes in question were assessed against two mining properties known as the Mi Vida and the South Ahmar Mines, which were valueless on January 1, 1965, and throughout the year 1965. No operations were conducted upon these properties during 1965. No ores were mined from these properties in 1965. No proceeds whatever were realized from production of ores from these properties in 1965.

To the knowledge of the parties, neither defendants nor any of their predecessors in office have at any time, in the administration of the real property tax laws of this State, sought to collect taxes on real property by the summary procedure of docketing warrants enforceable personally against the owner of the properties. The use of warrants has been limited to cases where there is unquestioned personal liability, in an unquestioned amount, for payment of taxes other than real property taxes. No effort has ever been made by defendants or any of their predecessors in office to collect any taxes on real property by personal action against the owner or operator of the property except in the case of uranium and vanadium mining properties.

STATEMENT OF POINTS

Plaintiff relies upon the following points to support issuance of a Peremptory Writ of Prohibition herein:

POINT I.

THERE IS NO PERSONAL LIABILITY FOR REAL PROPERTY TAXES, INCLUDING SUCH TAXES BASED UPON AN ASSESSED VALUATION DERIVED FROM "NET PROCEEDS."

POINT II.

THE PROVISIONS OF THE REVENUE AND TAXATION CODE AUTHORIZING ISSUANCE OF AND EXECUTION UPON WARRANTS FOR THE COLLECTION OF UNPAID TAXES DO NOT RELATE OR APPLY TO THE COLLECTION OF THE UNPAID REAL PROPERTY TAXES SOUGHT TO BE COLLECTED BY DEFENDANTS FROM PLAINTIFF HEREIN.

POINT III.

THE PROVISIONS OF THE REVENUE AND TAXATION CODE AUTHORIZING THE COMMISSION TO REQUIRE DEPOSIT OF SECURITY FOR THE PAYMENT OF REAL PROPERTY TAXES ON URANIUM AND VANADIUM MINES DO NOT GIVE RISE TO PERSONAL LIABILITY FOR SUCH TAXES.

POINT IV.

UTAH CANNOT CONSTITUTIONALLY IMPOSE A TAX FOR THE YEAR 1965 ON THE PROPERTY INVOLVED IN THIS CASE BECAUSE SAID PROPERTY WAS WORTHLESS THROUGHOUT SAID YEAR AND THE TAX BEARS NO REASONABLE RELATION TO THE ACTUAL VALUE OF THE PROPERTY.

(A) THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES;

(B) ARTICLE XIII, SECTIONS 2 AND 3; ARTICLE VI, SECTION 26(8); AND ARTICLE I, SECTION 24, CONSTITUTION OF UTAH.

POINT V.

THE PROVISIONS OF THE REVENUE AND TAXATION CODE, IF DEEMED TO GIVE RISE TO PERSONAL LIABILITY, CONSTITUTE AN ARBITRARY AND UNREASONABLE CLASSIFICATION OF URANIUM AND VANADIUM MINES IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUION OF THE UNITED STATES AND ARTICLE VI, SECTION 26(8) AND ARTICLE 1, SECTION 24 OF THE CONSTITUTION OF UTAH.

ARGUMENT

POINT I.

THERE IS NO PERSONAL LIABILITY FOR REAL PROPERTY TAXES, INCLUDING SUCH TAXES BASED UPON AN ASSESSED VALUATION DERIVED FORM "NET PROCEEDS."

This question was squarely presented to this Court in 1965 in the case of *San Juan County and State Tax Commission of Utah v. Jen, Inc.*, 16 U.2d 394, 401 P.2d 952 (1965). This Court rendered its decision in that case on May 17, 1965. After full consideration of the entire

question, which was briefed thoroughly and argued ably for the Commission by counsel appearing in this action on behalf of defendants, this Court held "that the tax upon real property is a charge upon the property and not in the nature of an in personam obligation of the owner. . . ." This holding is clearly consonant with the prior decisions of this Court (*Crismon v. Reich,* 2 U. 111; *Citizens Coal Co. v. Capitol Cleaners & Dyers, Inc.*, 120 U. 285, 233 P.2d 377 (1951); *Crystal Car Line v. State Tax Commission,* 110 U. 426, 174 P.2d 984 (1946)), and with the decisions of other Courts interpreting and applying statutory provisions equivalent to the provisions of the Utah Code. (*Board of Commissioners of Ness County v. Hooper, et al.,* 204 Pac. 536 (Kan. 1922); *Calkins v. Smith,* 78 P.2d 74 (Mont. 1938); *State ex rel. Spokane and Eastern Trust Co. v. Nicholson, County Treasurer,* 240 Pac. 837 (Mont. 1925); *Santos v. Simon,* 138 P.2d 896 (Ariz. 1943); *Maricopa County v. Arizona Tractor & Equipment Co.,* 109 P.2d 618 (Ariz. 1941); *McDonald v. Duckworth,* 173 P.2d 436 (Okl. 1946); *Allen v. Henshaw,* 168 P.2d 625 (Okl. 1946); *City of Salem v. Marion County,* 137 P.2d 977 (Ore. 1943); *Puget Sound Power & Light Co. v. Cowlitz County,* 234 P.2d 506 (Wash. 1951).)

Moreover, such holding is consistent with the legislative history of the statutes. It is well established that, at the common law, there is no personal liability on the part of an owner for taxes levied upon his real property. (*Territory of Alaska v. American Can Company,* 269 F. 2d 471, 475 (9th Cir. 1959); 84 C.J.S., "Taxation," § 643, p. 1318.) A statutory provision is necessary to create such personal liability. Prior to 1933, Sections 6090, 6091 and

6092, Compiled Laws of Utah, 1917, expressly provided for a personal action against the owner of real property against which taxes had been assessed that were delinquent in an amount of $300.00 or more. These provisions were deleted from our statutes with the adoption of the Revised Statutes of Utah, 1933. There are at this time no provisions giving rise to personal liability for the payment of ad valorem real property taxes in the Utah statutes, and hence the common law rule that there is no personal liability for such taxes should and must be recognized, for the Legislature has expressly adopted the common law in cases not governed by the Constitution and laws of the State. (Section 68-3-1, Utah Code Annotated, 1953.)

It is significant that the Commission, in its Second Biennial Report rendered October 31, 1934, considered at length the difficulty of collecting real property taxes on mining properties arising from the exclusivity of the statutory remedy of sale of the property subject to the four-year redemption period. The problem was stated in terms of the possibility that the mining property preliminarily sold for the taxes might be depleted during the four-year redemption period, and, hence, lack sufficient value when the sale became final to satisfy the taxes. After stating this problem, the Commission recommended "the amendment of the law so as to authorize the collection of the tax, with penalty and interest, by suit or otherwise immediately after delinquency." (3 Utah Public Documents, 1932-1934, "Second Biennial Report of the State Tax Commission of Utah," page 23.) The Commission's

concern and recommendation in this regard was reiterated in its Third Biennial Report. (See 3 Utah Public Documents, 1934-1936, "Third Biennial Report of the State Tax Commission of Utah," page 24.) Notwithstanding this recommendation, the Legislature has never acted to provide a means whereby real property taxes may be collected through the assertion of a personal claim against the property owner.

Defendants have urged and are urging the Utah judiciary, including this Court, to give an effect to the Utah statutes which the legislative branch of government has considered and repudiated. This is obviously true in view of the efforts, of which this Court may take judicial notice, to have the 1966 Special Session of the Utah Legislature adopt a statute expressly providing for personal liability for payment of real property taxes and by the Legislature's refusal to enact such proposed legislation. (S.B. 8, First Special Session, Thirty-Sixth Legislature, 1966.)

Plaintiff respectfully submits that this Court did not ignore or overlook the questions and arguments raised by defendants and their able counsel in the *Jen* case which was decided only eight months ago. The *Jen* decision clearly, decisively and correctly determined that there is no personal liability for the payment of taxes on real property, including, in this case as in the *Jen* case, real property taxes assessed against metalliferous uranium and vanadium mining properties upon the basis of net proceeds realized in periods prior to the date of assessment.

It is disturbing that defendants — public officials charged with the duty of upholding the law — would attempt, by the issuance and docketing of warrants and threatened execution thereupon and by other action, to circumvent and avoid the holding of this Court in the *Jen* case. Defendants' activities are doubly disturbing because defendants' Petition for Rehearing of the *Jen* case was expressly based upon Sections 59-5-79 and 59-5-80, Utah Code Annotated, 1953, which sections provide for the issuance of warrants for the collection of certain taxes, and upon which sections defendants apparently rely as authorizing their conduct in this case. The decision of this Court denying defendants' Petition for Rehearing of the *Jen* case correctly disposed of the contention that the warrant procedure was applicable to real property taxes upon metalliferous mining claims assessed on the basis of net proceeds.

Defendants have suggested that this case can be distinguished from the *Jen* case on the ground that in the *Jen* case the real property that was taxed was sold preliminarily to the county for the taxes prior to the attempted imposition of personal liability therefor. However, it is submitted that the holding of this Court in the *Jen* case is not based upon any theory of election of remedies. Indeed, the Court expressly held that under the Utah statutes the sole remedy is to enforce the lien upon the taxed property provided for by the statutes. After quoting Section 59-10-1, Utah Code Annotated, 1953, the Court in the *Jen* decision held:

> "From the emphasized language it will be noted that the recourse is to the property, and

> that the statute contains no express indication that the tax obligation runs to the owner. This court has heretofore held that since the legislature has provided this means for the collection of property taxes, which is based upon a lien upon the property, and has omitted expressing any intent that there should be a personal judgment, *that no such personal obligation exists.*" (Emphasis added.) (16 U.2d 394, 396.)

For the foregoing reasons, plaintiff respectfully submits that this Court has clearly and correctly resolved the questions raised by defendants by holding in the *Jen* case that there is no such personal liability under our statutes.

POINT II.

THE PROVISIONS OF THE REVENUE AND TAXATION CODE AUTHORIZING ISSUANCE OF AND EXECUTION UPON WARRANTS FOR THE COLLECTION OF UNPAID TAXES DO NOT RELATE OR APPLY TO THE COLLECTION OF THE UNPAID REAL PROPERTY TAXES SOUGHT TO BE COLLECTED BY DEFENDANTS FROM PLAINTIFFS HEREIN.

Defendants rely upon Section 59-5-79 and 59-5-80, and upon Section 59-10-22, Utah Code Annotated, 1953, as authorizing issuance of and execution upon warrants as a proper procedure for the collection of the taxes in question. This argument is not new to this Court. Defendants, in their Petition for Rehearing in the *Jen* case, argued that the decision "fails to take into consideration Sections 59-5-79 and 59-5-80, U.C.A., 1953, wherein the tax commission is directly empowered to seize and sell all

real and personal property of a delinquent taxpayer for the payment of the tax debt." (*San Juan County and State Tax Commission v. Jen, Inc.*, supra, Appellants' Petition for Rehearing and Brief in Support Thereof, page 2.) By its denial of defendants' Petition for Rehearing in the *Jen* case, this Court properly rejected defendants' patent misinterpretation of these sections. By their terms, Sections 59-5-79 and 59-5-80 apply only to a "tax imposed by this chapter. . . ." (Section 59-5-79, Utah Code Annotated, 1953.) This section was adopted by the Utah Legislature in 1937 as Chapter 101, Laws of Utah, 1937. Chapter 101 imposed *only* the Mining Occupation Tax, now provided for in Sections 59-5-66 through 59-5-85, Utah Code Annotated, 1953. That chapter did not impose and does not impose any tax whatever on real property.

Chapter 101, Laws of Utah, 1937, in addition to imposing the Mining Occupation Tax, also amended Sections 80-5-56 and 80-5-57 (now Sections 59-5-57 and 59-5-58, Utah Code Annotated, 1953), which sections prescribe the mode of assessment of metalliferous mines and mining claims. However, said sections do not impose any tax. They are purely administrative and provide for the assessment of metalliferous mines and mining claims at $5.00 per acre plus an amount equal to two times the average net annual proceeds for a preceding period. The ad valorem tax on real property is imposed by Section 59-1-1, Utah Code Annotated, 1953. Section 59-1-1 is not, of course, a part of Chapter 101, Laws of Utah, 1937.

It is entirely understandable that the Commission be vested with authority to issue warrants for the collection of the Mining Occupation Tax because there is personal liability for payment of the Mining Occupation Tax. If the provisions of Sections 59-5-79 and 59-5-80 are limited to the collection of Mining Occupation Taxes, no problems arise in applying the provisions to carry out the statutory scheme. If, however, the said sections are construed to apply to all real property taxes, including the tax on metalliferous mines and mining claims, many statutory problems arise.

It is also clear that Section 59-10-22 was not intended to apply to the collection of real property taxes, for that section, by its terms, relates only to situations where "the tax commission shall find that a person liable for the payment of any tax which is collectible by the tax commission designs quickly to depart from the State of Utah. . . ." Hence, the condition for application of Section 59-10-22 is that there be a *person liable* for the payment of a tax. It is the express holding of this Court in the *Jen* case that no *person* is liable for the payment of ad valorem taxes on real property, the tax being "a charge upon the property, and not in the nature of an in personam obligation of the owner. . . ." (16 U.2d 394, 397.) Therefore, Section 59-10-22 is clearly not applicable.

Moreover, Section 59-10-22 relates only to taxes "collectible by the tax commission. . . ." Also, Sections 59-5-79 and 59-5-80 give authority *only* to the Commission to issue warrants. The ad valorem tax on real property, includ-

ing such taxes based on "net proceeds," are payable to and collectible by the counties of the State, not the Commission.

The use of warrants under Sections 59-5-79, 59-5-80 and 59-10-22 is a drastic remedy that subjects all the real and tangible personal property of a taxpayer to execution and sale. Under well established principles, these sections cannot be given the effect suggested by defendants in the absence of an unequivocally clear expression that such effect is intended. That intent cannot be found in any Utah statutes. The statutes evidence an intent to the contrary.

POINT III.

THE PROVISIONS OF THE REVENUE AND TAXATION CODE AUTHORIZING THE COMMISSION TO REQUIRE DEPOSIT OF SECURITY FOR THE PAYMENT OF REAL PROPERTY TAXES ON URANIUM AND VANADIUM MINES DO NOT GIVE RISE TO PERSONAL LIABILITY FOR SUCH TAXES.

Section 59-5-65, Utah Code Annotated, 1953 (1965 Supp.), provides, among other things, a method by which the Commission can require that an owner or operator of a uranium and vanadium mining property deposit security in advance of the due date of taxes assessed against such property to insure payment of such taxes. Without conceding the validity of that procedure either generally or as applied or sought to be applied in this case, plaintiff submits that this procedure was available to defendants and that defendants' present position results directly from their

failure to utilize or enforce in a timely manner the remedy provided by this section. This remedy has been available to the Commission since the amendment of Section 59-5-65 that became effective on May 14, 1963. However, the Commission did nothing to avail itself of that remedy until the decision of this Court in the *Jen* case in May, 1965. Defendants' failure to avail itself seasonably of express statutory remedies ought not to provide a basis for defendants' present efforts to create other remedies by way of personal liability that the statutes do not provide.

Indeed. in 1965, defendants finally invoked the provisions of Section 59-5-65 in this case by demanding that plaintiff deposit security for the payment of all real property taxes that had been assessed against plaintiff's mining properties. Plaintiff has paid and satisfied all of such taxes in respect of all properties other than the two properties involved in this case, the Mi Vida and South Almar Mines. With respect to these properties, plaintiff has refused the demanded security, and defendants have availed themselves of the remedy expressly provided therefor by Section 59-5-65. That remedy does not expressly or implicitly include a personal claim against the person from whom the security is demanded. Rather, the remedy is to obtain a decree restraining operations on the properties in question until the required security has been deposited. Defendants have abandoned the action that they initiated in the San Juan County District Court to obtain such relief. Again, defendants' unilateral decision not to seek the relief expressly provided by Section 59-5-65 for plaintiff's failure to deposit

the demanded security in no way gives rise to a personal claim against plaintiff for the taxes in question.

For the foregoing reasons, plaintiff respectfully submits that defendants have and at all times relevant to this proceeding have had available to them a wholly adequate remedy to protect their position, which remedy defendants have not exercised, and that neither Section 59-5-65 nor defendants' failure to exercise the remedy therein provided, provide a basis for defendants' present assertion that plaintiff is personally liable for the subject taxes.

POINT IV.

UTAH CANNOT CONSTITUTIONALLY IMPOSE A TAX FOR THE YEAR 1965 ON THE PROPERTY INVOLVED IN THIS CASE BECAUSE SAID PROPERTY WAS WORTHLESS THROUGHOUT SAID YEAR AND THE TAX BEARS NO REASONABLE RELAION TO THE ACTUAL VALUE OF THE PROPERTY.

(A) THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES;

The lower court found and defendants have stipulated in this proceeding that the Mi Vida and South Almar Mines were worthless on January 1, 1965, and throughout the year 1965. Notwithstanding this undisputed fact, defendants maintain the validity of assessed valuations of $5,988,342.00 on the Mi Vida Mine as of January 1, 1965, and $6,463,667.00 on the South Almar Mine as of January 1, 1965, and claim authority, based upon such claimed assessments, to collect real property taxes

in the amount of $248,312.59 in the case of the Mi Vida Mine and $268,022.41 in the case of the South Almar Mine for said tax year. The question is therefore squarely presented to this Court whether worthless property can validly and constitutionally be assessed for the year 1965 at an aggregate valuation in excess of $12,000,000.00.

In a case presenting a substantially identical problem under the Utah statutes involved in this case the United States Supreme Court has held that the State of Utah cannot constitutionally assess a mining property for a given tax year upon the basis of net proceeds at a valuation not reasonably related to the actual value of the mining property assessed at the beginning of that tax year. (*South Utah Mines & Smelters v. Beaver County,* 262 U.S. 325, 330-332, 43 S.Ct. 577, 578-580 (1923).) The *Beaver County* case involved an assessment of $361,641.00 with respect to a wholly depleted mine, the valuation being based upon three times the net proceeds realized from operations conducted during the preceding year in respect of the tailings dump remaining from the prior operations. Speaking for a unanimous Court, Mr. Justice Sutherland stated:

> "It follows that a given multiple of the net annual proceeds which may be a fair measure of value in the early part of a mine's development, will become excessive as the stage of exhaustion approaches. The constitutional provision, therefore, at best, will produce only approximate equality. Undoubtedly in fixing the multiple of the net annual proceeds upon which the value of metalliferous mines is to be calculated a good deal of latitude must be allowed the Legislature and the taxing authorities, but the power is not un-

> bo nded. *Without attempting to delimit the bou ndaries—a matter primarily for the state cou ts—it is sufficient for present purposes to say tha in our opinion they have been clearly exceeded in the instant case.* To treble the total of the proceeds for the purpose of basing thereon *an altogether fictitious value for a mine worked out and worthless* years before the adoption of the statutory provisions supposed to confer the authority to do so, results in such flagrant and palpable injustice as would cast the most serious doubt upon the constitutionality of such provisions if thus construed. . . .
>
> "It may well be that the taxable value of mines differing in extent of development or in degree of exhaustion and relatively of different actual values, must from the practical necessities of the case, be subjected to the same rule of measurement, although it may work inequality to some extent. *But the difference between a mine from which ore is still being or still may be extracted and net income derived, and one conceded to be an empty shell, with no present or prospective value whatsoever, is so obvious that the imposition of a tax upon the basis of their being, nevertheless, one and the same cannot be sustained with due regard for either law or logic.*" (Emphasis added.) (262 U.S. 326 at 330-332, 43 S. C. 577 at 579-580.)

The case now before this Court is squarely within both the rationale and the holding of the *Beaver County* case. Plaintiff submits that upon well accepted principles of federal constitutional law, the valuation of worthless property for ad valorem tax purposes at a value in excess of $12,000,000.00, and the levy of a tax based on such assessments in an amount exceeding $500,000.00, would, if sustained, constitute a taking of

property without due process of law, and a denial to plaintiff of the equal protection of the laws. (*In re Chicago Rys. Co.,* 79 F. Supp. 989 (N.D. Ill. 1948), affirmed 175 F.2d 282 (7th Cir. 1949), certiorari denied, 338 U.S. 850, 70 S. Ct. 94, 94 L. Ed. 520 (1949); *Stone v. City of Springfield,* 168 N.E. 2d 76 (Mass. 1960); *People ex rel. Ross v. Chicago, M., St. P. & P. R. Co.,* 44 N.E. 2d 566 (Ill. 1942); *Appeal of National Bank of Tulsa,* 312 P.2d 495 (Okl. 1957).)

(B) ARTICLE XIII, SECTIONS 2 AND 3; ARTICLE VI, SECTION 26(8); AND ARTICLE I, SECTION 24, CONSTITUTION OF UTAH.

Article XIII, Section 2 of the Constitution of Utah provides in relevant part as follows:

> "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. . . ."

Article XIII, Section 3 of the Constitution of Utah provides in relevant part as follows:

> "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 . . . ."

Article VI, Section 26(8) of the Constitution of Utah provides in relevant part as follows:

> "The Legislature is prohibited from enacting any private or special laws in the following cases: . . . (8) Assessing and collecting taxes."

Article I, Section 24 of the Constitution of Utah provides in relevant part as follows:

> "All laws of a general nature shall have uniform operation."

These several constitutional provisions express a clear and consistent policy requiring that the laws of this State, including particularly those laws relating to taxation of property, be applied even-handedly.

The actions of defendants in this case patently violate this public policy. Defendants seek payment from plaintiff of $500,000.00 in taxes for the year 1965 even though the property taxed, the value of which ought to be the measure of plaintiff's proportionate tax burden, was wholly without value throughout said tax year.

The cited provisions of the Constitution of Utah express limitations equivalent to those imposed by the federal Constitution, as stated by the United States Supreme Court in the *Beaver County* case, supra. Plaintiff respectfully submits that these federal and state limitations, both Federal and State, would be clearly exceeded by defendants' attempts in this case, as in the *Beaver County* case, if defendants attempts were successful in assessing as metalliferous mines, upon the basis of prior operational proceeds, properties that have

no value, either as metalliferous mines or otherwise — properties that, in fact, no longer constitute mines at all.

POINT V.

THE PROVISIONS OF THE REVENUE AND TAXATION CODE, IF DEEMED TO GIVE RISE TO PERSONAL LIABILITY, CONSTITUTE AN ARBITRARY AND UNREASONABLE CLASSIFICATION OF URANIUM AND VANADIUM MINES IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUION OF THE UNITED STATES AND ARTICLE VI, SECTION 26(8) AND ARTICLE I, SECTION 24 OF THE CONSTITUTION OF UTAH.

Defendants have stipulated that to their knowledge neither they nor their predecessors in office have at any time in the history of this State attempted to effect collection of real property taxes by issuing and executing upon warrants. Defendants have also stipulated that neither they nor their predecessors in office have at any time in the history of this State sought to impose personal liability for real property taxes except with respect to uranium and vanadium mining properties. Section 59-5-65, Utah Code Annotated, 1953, which defendants have invoked heretofore in this controversy in an effort to secure payment of the subject taxes from plaintiff, applies, by its terms, only to uranium and vanadium mining properties and operators.

Plaintiff respectfully submits that these facts, taken together with the deliberate, anomalous and dedicated campaign that defendants have undertaken against plain-

tiff, demonstrate that the actions of defendants are arbitrary, discriminatory and unreasonable, and hence in derogation of plaintiff's rights under the Constitution of the United States and the Constitution of Utah. It is settled that a state cannot satisfy the limitations of the Fourteen Amendment to the Constitution of the United States by the imposition of a tax that, as in this case, is applied differently as to taxpayers of the same class. (*Wheeling Steel Corp. v. Glander,* 337 U.S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544 (1949); *Blaustein v. Levin,* 4 A.2d 861 (Md. 1939); *Youngstown Sheet & Tube Co. v. City of Youngstown,* 108 N.E. 2d 571 (Ohio App. 1951); *New York State Trailer Coach Ass'n v. Steckel,* 144 N.Y.S. 2d 82 (1955).) The prohibited discrimination may arise not only from the statutory provisions themselves, but also from the mode in which the tax is administered. (*Dehydrating Process Co. of Gloucester v. City of Gloucester,* 135 N.E. 2d 20 (Mass. 1956); *Federal Land Bank of Houston v. State,* 314 S.W. 2d 621 (Tex. Civ. App. 1958).)

The cited provisions of the Constitution of Utah import the same standards of equality and due process in the application of taxing statutes as do the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and plaintiff submits that defendants' conduct violates both the federal and state constitutional standards. The cited provisions of the federal and state constitutions prohibit invidious and unreasonable discriminations in the administration of taxation laws.

The stipulated facts show that defendants seek to apply different treatment to plaintiff in the issuance of and execution upon the subject warrants than has ever in the history of this State been applied to any owner or operator of real property for collection of real property taxes. Plaintiff respectfully submits that the application of the taxing statutes of the State of Utah attempted by defendants in this case must fail because such application clearly violates the Constitution of the United States and the Constitution of Utah.

CONCLUSION

Plaintiff respectfully submits that the *Jen* decision correctly states the law applicable to this case. There is no personal liability in the State of Utah for real property taxes. The statutes of Utah do not give rise to personal liability for the payment of real property taxes, whether the attempt to impose personal liability is made under the guise of a direct action, the use of warrants or any other device which the imagination and methods of defendants may devise. Once the fundamental question has been decided, as it was in the *Jen* case, it cannot and should not be circumvented by flimsy distinctions and devious procedures. Further, plaintiff should not be subjected constantly to the inconvenience, expense and embarrassment of all the prosecutorial procedures defendants can invent in their attempt to create personal liability for real property taxes when the Supreme Court of this State has determined that personal liability for such taxes does not exist and the Legislature of this

State has refused to create personal liability for such taxes. To permit an administrative body to circumvent the decisions of this Court or to exercise legislative powers would weaken and discredit the stability, consistency and wisdom of our laws and the decisions of this Court.

Adherence to the *Jen* decision renders unnecessary a consideration of the additional Points upon which plaintiff relies in the foregoing brief. Only if the clear holding of the *Jen* decision should be overturned does it become necessary to consider the additional Points going to the questions of constitutionality under both the federal and the state constitutions. Should the deliberations of the Court take it to the constitutional questions, it is submitted that defendants' actions, both in the assessment of admittedly worthless mining property and in the isolated use of warrants as against this property owner, contrary to anything that has occurred in the prior history of this State, must be struck down as clearly in violation of both federal and state constitutional provisions.

There is more at stake in this case than the tax dollars that defendants seek to collect from this plaintiff. Defendants' methods to attain their end and vindicate their disdain for the *Jen* decision threaten fundamental concepts of law. The time-honored phrase "the power to tax is the power to destroy" rings a clear note of warning in this case. This case illustrates that there is a fine line between responsible and circumspect enforcement of law, and misrule. Plaintiff has been intimidated with

the threat of execution upon all of its real and tangible personal property in three counties despite the most recent decision of this Court that there is no personal liability for the payment of real property taxes, and in the face of a clear absence of any statutory authority for the use of warrants to collect real property taxes. But for the relief afforded through a review by this Court, plaintiff's real and tangible personal property might now be sold without the slightest concern on the part of defendants.

If defendants' conduct, and the procedures that they have followed in this case, are sustained by this Court, the time may well come when a warrant will be docketed against a home owner in January of a given tax year without the real property tax on his home having become due or delinquent until the succeeding November; an ex parte Sheriff's sale could be initiated and held without notice to the home owner, subjecting all of his real and tangible personal property in the State to sale; nor would a right of redemption from the sale exist, as has always been recognized in Utah concerning tax sales of real property. Defendants' theories are indeed both summary and violent.

Plaintiff respectfully urges this Court to issue its Peremptory Writ of Prohibition herein and thereby proscribe the actions of these State officers who have acted irresponsibly and without care and circumspection in the administration of the laws of this State and in the exercise of the powers entrusted to them.

Respectfully submitted,

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