

1992

# Kennecott Corporation v. Salt Lake County and State Tax Commission of Utah : Reply Brief

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David E. Yocum; Salt Lake County Attorney; Karl Hendrickson; Deputy Salt Lake County Attorney; Bill Thomas Peters; Special Deputy County Attorney; Paul Van Dam; Utah State Attorney General; Rick L. Carlton; Assistant Attorney General.

James B. Lee; Kent W. Winterholler; Parsons, Behle & Latimer; Attorneys for Kennecott Corp..

---

## Recommended Citation

Reply Brief, *Kennecott Corporation v. Salt Lake County and The Utah State Tax Commission of Utah*, No. 920149.00 (Utah Supreme Court, 1992).

[https://digitalcommons.law.byu.edu/byu\\_sc1/4103](https://digitalcommons.law.byu.edu/byu_sc1/4103)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

45.9

BRIEF

.S9

DOCKET NO.

920149

IN THE SUPREME COURT

STATE OF UTAH

--oo0oo--

KENNECOTT CORPORATION,

Plaintiff/Appellee,

-vs-

SALT LAKE COUNTY and STATE  
TAX COMMISSION OF UTAH,

Defendants/Appellants.:

Case No. 92-0149

Priority 15

--oo0oo--

REPLY BRIEF OF APPELLANT

APPEAL FROM THE ORDER AND JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT, DATED FEBRUARY 28, 1992

JAMES B. LEE - 1919  
KENT W. WINTERHOLLER - 3525  
PARSONS BEHLE & LATIMER  
201 South Main St., #1800  
P. O. Box 11898  
Salt Lake City, Utah 84147-0898  
Attorneys for Kennecott Corp.

DAVID E. YOCOM - 3581  
Salt Lake County Attorney  
KARL HENDRICKSON - 1464  
Deputy Salt Lake County Attorney  
BILL THOMAS PETERS - 2574  
Special Deputy County Attorney  
310 South Main Street, Suite 1100  
Salt Lake City, Utah 84101  
Attorneys for Salt Lake County

PAUL VAN DAM - 3312  
Utah State Attorney General  
RICK L. CARLTON - 5575  
Assistant Attorney General  
36 South State Street, Suite 1100  
Salt Lake City, Utah 84114  
Attorneys for Tax Commission

FILED

NOV 23 1992

CLERK SUPREME COURT,  
UTAH

**IN THE SUPREME COURT**

**STATE OF UTAH**

KENNECOTT CORPORATION,  
 Plaintiff/Appellee,  
 -vs-  
 SALT LAKE COUNTY and STATE  
 TAX COMMISSION OF UTAH,  
 Defendants/Appellants.

Case No. 92-0149  
 Priority 15

## REPLY BRIEF OF APPELLANT

APPEAL FROM THE ORDER AND JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT, DATED FEBRUARY 28, 1992

JAMES B. LEE - 1919  
KENT W. WINTERHOLLER - 3525  
PARSONS BEHLE & LATIMER  
201 South Main St., #1800  
P. O. Box 11898  
Salt Lake City, Utah 84147-0898  
Attorneys for Kennecott Corp.

DAVID E. YOCOM - 3581  
Salt Lake County Attorney  
KARL HENDRICKSON - 1464  
Deputy Salt Lake County Attorney  
BILL THOMAS PETERS - 2574  
Special Deputy County Attorney  
310 South Main Street, Suite 1100  
Salt Lake City, Utah 84101  
Attorneys for Salt Lake County

PAUL VAN DAM - 3312  
Utah State Attorney General  
RICK L. CARLTON - 5575  
Assistant Attorney General  
36 South State Street, Suite 1100  
Salt Lake City, Utah 84114  
Attorneys for Tax Commission

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF FACTS.....	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT	
POINT I	
KENNECOTT IS NOT ENTITLED TO THE RELIEF GRANTED TO THE SIX PARTIES PLAINTIFF IN THE <u>RIO ALGOM</u> DECISION.....	5
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	12

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Bacchus Imports Ltd. v. Dias</u> , 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).....	5, 6, 7
<u>James B. Beam Distilling Co. v. Georgia</u> , 501 U. S. _____, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991).....	5, 6, 7, 8, 9
<u>McKesson Corp. v. Division of Alcoholic Beverages &amp; Tobacco</u> , 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed. 2d 17 (1990).....	5, 6, 9, 10
<u>Rio Algom Corp. v. San Juan County</u> , 681 P.2d 184 (Utah 1984).....	1, 2, 3, 4, 7, 10

## TABLE OF AUTHORITIES

<u>Statutes</u>	<u>Page</u>
Utah Code Annotated:	
§ 63-30-25 (Supp. 1989).....	9
§ 63-30-27 (Supp. 1989).....	9
 <u>Other Authority</u>	
Utah Constitution, Article XIII, § 2.....	2
Utah Constitution, Article XIII, § 3.....	2
Utah Constitution, Article XIII, § 4.....	2

## STATEMENT OF FACTS

1. On May 24, 1983, the State Assessed Property Division of the Commission sent a Notice of Assessment to Kennecott, informing Kennecott that its personal and real property had been assessed as of January 1, 1983. The assessed value of Kennecott's property for 1983 was \$136,685,576. R. 336.

2. On June 1, 1983, Kennecott filed a Petition of Protest relative to its 1983 assessment with the Commission. This Petition protested the Notice of Assessment as it applied to the assessed real property "on the grounds that the Notice of Assessment . . . failed to apply a rollback to 1978 values on that real property assessed by the Utah State Tax Commission." R. 2.

3. On June 29, 1983, the Commission held an informal hearing on Kennecott's protest. R. 20.

4. On January 26, 1984, the Commission issued a decision denying Kennecott the reduction it sought, and sustaining the original assessment. R. 20.

5. On March 13, 1984, the Utah Supreme Court issued its decision in Rio Algom Mining Corp. v. San Juan County, 681 P.2d 184 (Utah 1984). The named plaintiffs in the Rio Algom case were Rio Algom Corporation, Utah Power & Light, Energy Fuels Nuclear, Inc., Consolidated Oil and Gas, Inc., Atlas Corporation, and Northwest Pipeline Corporation.

6. On June 4, 1984, Kennecott petitioned the Commission for a formal hearing on its 1983 assessment. Kennecott specifically claimed that it was entitled to have the value of the property "rolled back" from its 1983 value to 1978 levels, pursuant to Article XIII, Section 4 of the Utah Constitution or, alternatively, pursuant to Article XIII, Sections 2 and 3.

7. On September 11, 1984, the Commission held a formal hearing on Kennecott's 1983 protest and, on June 27, 1985, issued its Findings of Fact, Conclusions of Law and Final Decision. R. 20. In its Final Decision, the Commission found that "the roll back in property values for locally assessed property was done pursuant to Utah Code Ann. § 59-5-109 (1953, as amended). That statute was held to be unconstitutional by the Supreme Court of Utah in the case of Rio Algom Corp. v. San Juan County, 681 P.2d 184 (Utah 1984). The Supreme Court stated in its decision that its determination was to be given only prospective relief and would be retroactive only in certain circumstances. Those circumstances only applied to the litigants in the Rio Algom case. Since appellant [Kennecott] was not one of the six taxpayers that were parties to that decision, then Rio Algom does not apply retroactively. (Rio Algom, supra)." R. 20-23.

8. On November 26, 1985, Kennecott filed a Complaint, Notice of Appeal and Petition for Review of a Decision of the Utah State

Tax Commission in the Tax Division of the Third Judicial District Court. This action appealed the Commission's June 27, 1985, decision and prayed for an order reducing the valuation of Kennecott's property by the Commission for 1983 by the sum of \$14,444,315, and for a refund of tax paid by Kennecott under protest, in the amount of \$898,475. R. 1-8.

9. On January 7, 1986, the Commission moved the District Court for an order dismissing Kennecott's complaint on the grounds that Kennecott was not entitled to relief by application of the ruling in Rio Algom, supra. In the alternative, and in the event that the District Court concluded Kennecott was entitled to relief under Rio Algom, the Commission moved that the case be remanded for further adjudication. R. 12-19.

10. On August 18, 1986, the District Court issued a Decision and Order on the Commission's motion to dismiss. The District Court denied the motion, stating that the Commission had erroneously decided that Kennecott "was entitled to no relief under either Rio Algom Corp. v. San Juan County, supra, or Article XIII, Sections 2 and 3, Utah Constitution." R. 220. The District Court did grant the Commission's motion to remand and instructed the Commission to give appropriate consideration to Rio Algom factors.

11. On June 27, 1987, the Commission entered an Order styled "Amended Final Decision and Order", which (1) reduced the assessed



value of Kennecott's property for 1983, and (2) further rolled back the reduced value to the 1978 level by applying a factor of 1.4. R. 247-250.

12. Salt Lake County (the "County") appealed the Commission's Amended Final Decision and Order and the District Court remanded for a second time, with directions indicating that the reduction of value was improper and directing the Commission to make express findings concerning whether the two-pronged test contained in Rio Algom, supra, had been met. R. 423-429.

13. On August 15, 1990, the Commission held a formal hearing pursuant to the Court's second remand order and, thereafter, entered an "order", dated September 5, 1991, determining that the requirements of Rio Algom had been met. R. 528-533.

14. Based upon the Commission's order of September 5, 1991, the District Court granted summary judgment in favor of Kennecott. R. 696-704, Appendix 1.

#### SUMMARY OF ARGUMENT

The sole issue in this appeal concerns the application and interpretation of this court's decision in the Rio Algom case, supra. It is the County's position that the District Court erred when it denied the motion of the County and the Commission to dismiss Kennecott's complaint. The District Court erroneously interpreted the Rio Algom decision as establishing a test for

pending litigants, when the Utah Supreme Court clearly intended the relief granted in Rio Algom to apply only to the six parties plaintiff in that case. In this case, Kennecott had an administrative appeal pending before the Commission.

In its responsive brief, Kennecott argues, based primarily upon recent United States Supreme Court cases, that this court's decision in the Rio Algom case to grant retroactive relief only to the parties plaintiff in the case is unconstitutionally discriminatory and deprives Kennecott of its constitutional rights under the Equal Protection and Due Process clauses of the state and federal constitutions.

## ARGUMENT

### POINT I

#### KENNECOTT IS NOT ENTITLED TO THE RELIEF GRANTED TO THE SIX PARTIES PLAINTIFF IN THE RIO ALGOM DECISION

As a preliminary matter, it is important to note that the United States Supreme Court decisions relied upon by Kennecott in its responsive brief are interpretations of challenges to federal, not state, law. James B. Beam Distilling Co. v. Georgia, 501 U. S. \_\_\_\_, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) [discriminatory impact of tax under federal Commerce Clause]; Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) [liquor tax discriminatory under Commerce Clause]; and McKesson Corp. v.

Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed. 2d 17 (1990) [discriminatory impact of excise tax in favor of local distributors violative of Commerce Clause].

It is also important to note that, for the first time in its responsive brief, Kennecott raises the specter of the United States Constitution's equal protection and due process clauses. In all prior proceedings, Kennecott has rested its claims for relief upon alleged discriminatory impact under state law. The equities of this case require that this Court give full effect to its decision in the Rio Algom case and deny retroactive application of that decision to Kennecott in this case.

Kennecott primarily relies on the United States Supreme Court's decision in the James B. Beam case, supra. Kennecott argues that the Beam case clearly establishes a new rule that "selective prospectivity" and "pure prospectivity" are beyond the jurisdiction of the courts and that any new rule of law must be retroactively applied. Brief of Respondent, p. 18. What Kennecott neglects to mention is the dearth of contradictory comments contained in the Beam decision.

The issue before the court in the Beam case was whether the Court's decision in Bacchus Imports, Ltd. v. Dias, supra, should be retroactively applied to the litigants in the Beam case. Justice Souter, writing the judgment of the court, in which Justice Stevens

joined, viewed the retroactive application rule as requiring a new rule of law which has been applied to the litigants in one case to be applied to all other litigants with cases pending at the time the new rule is announced. Justice White opined that, while Bacchus extended the benefit of that decision to the litigants in that case and to other litigants with pending cases at the time of the Bacchus decision, in proper cases, a new rule should not be applied retroactively, even to parties involved in the litigation and that automatic retroactive effect could not be justified under existing precedents. Justices Blackmun, Scalia, and Marshall expressed the views concerning "selective prospectivity" and "pure prospectivity" upon which Kennecott relies. And in a dissenting opinion, Justices O'Connor, Rehnquist, and Kennedy espoused the view that it was error for the rule established in the Bacchus decision to have been applied retroactively to the Bacchus litigants and that the Beam decision merely compounded the problem by imposing widespread liability on parties having no reason to expect it.

It is the concern expressed by Justices O'Connor, Rehnquist, and Kennedy that most clearly illustrates the problems that this Court would create should it reverse its earlier holding in the Rio Algom case and grant retroactive relief to Kennecott:

. . . In this case, Georgia reasonably relied not only on the Young's Market line of cases

from this Court, but a Georgia Supreme Court decision upholding the predecessor to the tax statute at issue. [Citations omitted.]

Nor is there much to weigh in the balance. Before Bacchus, the legitimate expectation of James Beam and other liquor manufacturers was that they had to pay the tax here at issue and that it was constitutional. They made their business decisions accordingly. There is little hardship to these companies from not receiving a tax refund they had no reason to anticipate.

The equitable analysis of Chevron Oil places limitations on the liability that may be imposed on unsuspecting parties after this Court changes the law. James Beam claims that if Bacchus is applied retroactively, and the Georgia excise tax is declared to have been collected unconstitutionally from 1982 to 1984, the State owes the company a \$2.4 million refund. [Citation omitted.] There are at least two identical refund actions pending in the Georgia Courts. These plaintiffs seek refunds of almost \$28 million. [Citations omitted.] The State estimates its total potential liability to all those taxes at \$30 million. [Citation omitted.] To impose on Georgia and the other States that reasonably relied on this Court's established precedent such extraordinary retroactive liability, at a time when most States are struggling to fund even the most basic services, is the height of unfairness.

We are not concerned here with a State that reaped an unconstitutional windfall from its taxpayers. Georgia collected in good faith what was at the time a constitutional tax. The Court now subjects the State to potentially devastating liability without fair warning. This burden will fall not on some corrupt state government, but ultimately on the blameless and unexpecting citizens of Georgia in the form of higher taxes and re-

duced benefits. Nothing in our jurisprudence compels that result; our traditional analysis of retroactivity dictates against it.

115 L.Ed.2d, at 503.

Kennecott argues that any fiscal concerns of the County are "largely nonexistent" because Utah Code Annotated, § 63-30-27 (Supp. 1989) permits the county to levy an annual property tax sufficient to pay the refund Kennecott seeks and § 63-30-25 (Supp. 1989) would permit payment of the refund in installments. Those provisions, however, do not alter the fact that the County made the initial assessment, based on the statute, in good faith and that it is the taxpayers of the County who would be required to ultimately answer any judgment in favor of Kennecott.

An important distinction between this case and the authority relied upon by Kennecott is illustrated in the McKesson decision. In its decision to impose potential liability on the State of Florida for tax refunds, the Court considered other remedies available to the State:

More specifically, the State may cure the invalidity of the Liquor Tax by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received. [Citation omitted.] Alternatively, to the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from petitioner's competitors who benefited from the rate reductions during the contested tax period, calibrating the retroac-

tive assessment to create in hindsight a nondiscriminatory scheme. [Citation omitted.] Finally, a combination of a partial refund to petitioner and a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce, would render petitioner's resultant deprivation lawful and therefore satisfy the Due Process Clause's requirement of a fully adequate postdeprivation procedure.

496 U.S., at 40-41.

The remedies available to redress the discriminatory impact of the invalid provisions in the decisions relied upon by Kennecott, including levying additional tax assessments on taxpayers who received favorable treatment under the unconstitutional statute, are simply not available to the County here.

#### CONCLUSION

Kennecott argues that it is entitled to be treated in the same manner as the other taxpayers similarly situated. In fact, with the exception of the six Rio Algom litigants, that is precisely the manner in which Kennecott is being treated. There is no way to determine at this late date the number of taxpayers whose claims were pending at the time this Court announced its decision in Rio Algom and who, then, abandoned their claims in reliance on this Court's holding.

This Court's decision to limit relief in the Rio Algom case to

the six parties plaintiff should be affirmed. The judgment granted by the Third Judicial District Court must be reversed and Kennecott's request for refund must be denied.

DATED this 23<sup>rd</sup> day of November, 1992.

DAVID E. YOCOM  
Salt Lake County Attorney  
KARL HENDRICKSON  
Deputy Salt Lake County Attorney

BY: 

BILL THOMAS PETERS  
Special Deputy Salt Lake County Attorney  
Attorneys for Salt Lake County



CERTIFICATE OF SERVICE

The undersigned hereby certifies that four true and correct copies of the foregoing Reply Brief of Appellant were mailed, postage prepaid, this 23<sup>rd</sup> day of November, 1992, to the following:

R. Paul Van Dam, Esq.  
Utah State Attorney General  
Rick L. Carlton, Esq.  
Assistant Attorney General  
Tax & Business Regulation Division  
136 South State Street, Suite 1100  
Salt Lake City, Utah 84111

James B. Lee, Esq.  
Kent W. Winterholler, Esq.  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
P. O. Box 11898  
Salt Lake City, Utah 84147



BILL THOMAS PETERS