

1983

Kennecott Corporation, A New York Corporation v. Salt Lake County, et al. : Brief of Defendant/Cross Claimants

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNECOTT CORPORATION, a :
New York Corporation, :
 :
Plaintiff, :
 :
-vs- :
 :
SALT LAKE COUNTY, et al., :
 :
Defendants. : Case No. 18972

SALT LAKE COUNTY, et al., :
 :
Cross-claimants, :
 :
-vs- :
 :
THE STATE TAX COMMISSION :
OF UTAH, et al., :
 :
Cross-defendants. :

BRIEF OF DEFENDANTS/CROSS-CLAIMANTS
SALT LAKE COUNTY

Appeal from the Decision of
The Third Judicial District Court
Honorable Philip R. Fishler, District Judge

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SALT LAKE COUNTY, et al.,
Cross-claimants,
-vs-
THE STATE TAX COMMISSION
OF UTAH, et al.,
Cross-defendants.

BRIEF OF DEFENDANTS/CROSS-APPELLANTS
SALT LAKE COUNTY

STATEMENT OF THE NATURE OF THE CASE

Plaintiff, Kennecott Copper Corporation sued Defendant Salt Lake County, the Utah State Tax Commission and others for partial refund of Plaintiff's 1981 property taxes previously paid under protest. Plaintiff's theory of recovery was that a recently enacted State Statute requiring County valuation to include recognition of certain expenses resulted in property valued by the County being assessed a proportionately lower tax than State valued properties. Plaintiff, believing such

differences in valuation to be unconstitutional, prayed that the court proportionately reduce Plaintiff's property assessment and refund the difference.

Defendant, Salt Lake County denied such allegation and filed a counterclaim asserting that the current State valuation techniques do not fulfill the constitutional mandate found at Article XIII, Section 3, which requires all property to be valued at an amount equal to its value in money. This Defendant alleged the valuation techniques used by the Tax Commission resulted in much of Plaintiff's property being underassessed and allowed significant property of Plaintiff to escape valuation all together.

Defendant, Salt Lake County filed a cross-claim against the Utah State Tax Commission asserting similar allegations as those stated above as well as demanding review of certain assessment records of the Tax Commission.

DISPOSITION OF THE CASE IN THE LOWER COURT

The Tax Division of the Third Judicial District Court, the Honorable Judge Philip A. Fishler, presiding, entered a memorandum decision after hearing cross motions for a Summary Judgment and Motion to Dismiss. Judge Fishler ruled against Plaintiff's claim that the State valued properties were unconstitutionally over-assessed. The Court granted the motions of both the Plaintiff and Defendant, Utah State Tax Commission.

dismiss the respective counterclaim and cross-claim filed by Defendant, Salt Lake County. The Court held the Defendant, Salt Lake County did not have the requisite standing to maintain the claims against the individual parties.

RELIEF SOUGHT ON APPEAL

Defendant Salt Lake County seeks reversal of the Trial Court's finding that the County was without standing to maintain its claims against the above mentioned parties. That the County be given the opportunity to prove by way of its counterclaim that plaintiff's property is underassessed and has escaped assessment. The appellant further prays that the Court find those valuation techniques used by the State Tax Commission to assess plaintiff's property be found not to fully measure the cash value of such property and that other methods be used to re-assess plaintiff's property for all years which Utah law allows such re-assessments to occur. And finally, appellant asks this honorable Court to find that the mining assessment book the defendant State Tax Commission is by law required to maintain be provided the appellant for its review.

STATEMENT OF FACTS

In 1981 the Utah State Legislature enacted a law which placed a percentage reduction on properties valued by county assessors. This law, Section 59-5-4.5, U.C.A. as amended 1953,

requires the local assessor to use 80 per cent of the property's cash value as its assessable cash value. The purpose of the law and the reduction is to achieve equity by reducing local assessed properties towards an assessment level that was previously being enjoyed only by State Assessed properties.

Plaintiff, Kennecott Corporation, is the owner of a vast mining operation situated within Salt Lake County (T.R. p4). The nature of plaintiff's business requires a majority of its property to be valued by the Utah State Tax Commission instead of the County Assessor, thereby exempting plaintiff's properties from the 80 per cent valuation ceiling. Utah Constitution Article XIII, Section 11. (T.R. p4).

Plaintiff Kennecott Corporation paid part of its 1981 property tax assessment under protest pursuant to Section 59-11-11, U.C.A. as amended 1953 (T.R. p5). Plaintiff then filed the action in the lower Court asking for a refund of the amount paid under protest (T.R. p7). In its complaint, plaintiff alleges that the newly enacted valuation limitation is unconstitutional (T.R. p6). Plaintiff thereby claims that its valuation must be proportionately reduced. (T.R. p7).

The defendant-appellant Salt Lake County filed an answer to plaintiff's complaint specifically denying plaintiff's allegations (T.R. p44-51). The appellant asserted a counterclaim in its answer wherein it alleged that as a result of certain underassessments made by the Utah State Tax

Commission, plaintiff had not paid its required share of property taxes. (T.R. p54-56) The appellant additionally alleged that certain properties of plaintiff's had escaped assessment entirely. Again resulting in plaintiff not paying its fair and equal share of taxes. (T.R. p54-56) The appellant stated further that Utah law provides that upon discovery of escaped properties, the same may be assessed as far back as five years prior. (T.R. p56)

The appellant also filed a crossclaim naming the Utah State Tax Commission as cross defendant. (T.R. p57-64) In said crossclaim, the appellant alleges the State Tax Commission to be responsible for the valuation and assessment of plaintiff's properties. (T.R. p58) It further alleges that the Utah State Tax Commission has failed to value plaintiff's properties at their full cash value. (T.R. p58-59) The appellant additionally states that the provisions found in Section 59-5-57, UCA as amended 1953, do not establish a value for plaintiff's properties equivalent to full cash value and the statutory methodology is therefore unconstitutional. (T.R. p59) The appellant thereby asks the lower Court to require the Utah State Tax Commission to rectify the inequities found in the past taxation of plaintiff's properties and to order the State Tax Commission to disregard Section 59-5-57, as the prescribed method for valuing plaintiff's properties in the future, insofar

as that method of valuation results in the underassessment and escape of plaintiff's property for purposes of taxation.

In a Second cause of action against the Utah State Tax Commission, the appellant alleges said Tax Commission has refused appellant the opportunity to review assessment information of mines and other state assessed properties including plaintiff's. (T.R. p61-62) Appellant believes that such information is required to be maintained by the Utah State Tax Commission under Section 59-5-56, U.C.A. as amended 1953. The appellant then asked the lower Court to require the State Tax Commission to maintain such assessment information and to require the cross-defendant to allow review of such information by the appellant. (T.R. p64) Appellant further contends that it needs to know the basis of plaintiff's assessment in order to properly defend against plaintiff's claims.

The plaintiff taxpayer filed a Motion for Judgment on the pleadings together with a supporting memoranda asking the Court to hold consistently with its allegations. (T.R. p95-96, p111-121) The defendant Utah State Tax Commission later filed a Motion for Summary Judgment as to plaintiff's complaint supported by a memorandum of points and authorities requesting the Court find the subject valuation ceiling constitutional (T.R. p128-129, p130-208)

Concurrently with plaintiff's Motion for Judgment consistent with its complaint, it filed a Motion to dismiss the

appellant's counterclaim. The Motion being filed under Rule 11(b) of the Utah Rules of Civil Procedure and was again supported by a memorandum. (T.R. p98-99, p101-110) The defendant Utah State Tax Commission filed a similar motion and memorandum concerning appellant's cross-claim. (T.R. p70-72, p73-94)

Plaintiff's supporting memorandum focuses on: a) the lack of wrongdoing on the taxpayer's part for the under-assessment, (T.R. p104); b) the lack of standing held by the appellant to challenge past assessments of plaintiff's properties, (T.R. p104); c) the assertion of a statute of limitations applying expressly to review by the Tax Commission instead of the Court as occurred here, (T.R. p105-106); and, d) lack of statutory authority on the part of the lower Court to hear matters dealing with the value of plaintiff's property. (T.R. p106-108)

The memorandum filed by defendant Utah State Tax Commission in support of its dismissal motion sets forth similar arguments as plaintiff's, including: a) the posture of appellants to the State Tax Commission being equivalent to a servant-master relationship and appellants thereby lack authority to maintain the action, (T.R. p76-81); b) lack of necessary standing on the part of the County to maintain the cross-claim, (T.R. p81-90); and, c) the mining assessment

information sought by the appellants is somehow confidential (T.R. p90-93)

The appellant responded to the above allegations in opposing memorandum answering both the plaintiff's and defendant Utah State Tax Commission arguments. (T.R. p300-318) The appellant cites a host of Utah decisions similar in facts to the present controversy which find the County as having the necessary standing. (T.R. p304-310) The appellant identifies the Utah statutory authority which invests the Utah Tax Court with the needed authority to properly adjudicate the counterclaims and cross-claims of appellant. The County also presented legislative and judicial authority which permits the Court to re-assess invalid valuations as far back as five tax years.

The appellant presented evidence which was taken from Kennecott's own records and which was not denied or qualified by plaintiff, Kennecott, which established that for the year 1981, Kennecott paid zero (0) dollars on minerals having a minimum value of \$436,355,560.00. In 1978, 1979 and 1980, Kennecott also paid zero (0) dollars in the face of similar substantial mineral production. (T.R. p232-286)

The affidavit of Robert Yates, chief appraiser for Salt Lake County, which was neither opposed nor refuted, indicated there was no acreage within Salt Lake County valued at

\$10.00 per acre in 1981. (T.R. p. 220-222) In 1980, 1979 and 1978 Kennecott owned 10,271.60 acres in Salt Lake County valued at \$5.00 per acre; and, in 1977, 12,092.60 acres valued at \$5.00 per acre. (T.R. p. 243)

The plaintiff filed a memorandum replying to the appellant's points and authorities. (T.R. p320-331) A response from the defendant Utah State Tax Commission was also filed. (T.R. p332-341) The appellant then duly filed a response to the opposing parties' memoranda. (T.R. p.650-657)

The Court filed a memorandum decision in this case on December 9, 1982. The Honorable Judge Fishler held Section 59-5-4.5, to be constitutionally valid thereby denying plaintiff's refund request. The Court additionally found the appellant to lack necessary standing to raise the earlier filed counterclaim and crossclaim and therefore dismissed the same.

The County duly filed a Notice of Appeal from that decision thereby bringing its claims before this Court.

POINT I

PLAINTIFF TAXPAYER HAS PLACED ITS VALUATION IN ISSUE BY FILING THE PRESENT ACTION IN THE LOWER COURT.

The taxpayer has tried to short-circuit the counterclaim of the appellant by positioning its claim for relief in a peculiar light.

The plaintiff insists a refund is owed it because of the claimed discrimination resulting from the application of

Section 59-5-4.5, U.C.A. as amended 1953, which details the procedure used in valuing locally assessed property, and Section 59-5-57, U.C.A. as amended 1953, which deals with assessment of mines. This claimed over assessment is due to the fact that locally assessed property is being given a 20% equalization factor in finding full cash value. The plaintiff asserts this same factor should be applied to mining valuation. At the same time, in order to dispense with the appellants counterclaim, the plaintiff asserts its case is not based on wrongful valuation. Plaintiff, by its action, has placed its valuation for the year 1981 into issue.

The appellant sees no merit to the plaintiff's contention outside of attempting to give a forum in which it has everything to gain and nothing to lose. By asking for a refund, the plaintiff must logically show it has been overassessed. The plaintiff is not asserting the tax assessment of its valued property was wrongful. It is claiming that compared to local valuations, its valuation was excessive. By making this claim it inherently puts its actual valuation into dispute.

The appellant respectfully submits that the plaintiff cannot be allowed to position its claim for relief through the bent lense which it seeks. Before the court can conclude that a refund is owed, the plaintiff must show that its valuation is excessive. Plaintiff's valuation for the year in question is in issue. And defendants, having been sued by plaintiff on the

question of the value of plaintiff's property, are entitled to
present and prove that plaintiff's property has been undervalued
and escaped assessment.

POINT II

THE UTAH TAX COURT ACT ALLOWS THE TRIAL COURT TO
DETERMINE THE TRUE CASH VALUE OF PLAINTIFF'S
PROPERTIES ONCE SUCH ISSUE IS BROUGHT BEFORE IT.

Plaintiff initiated the jurisdiction of the Tax
Division of the District Court by petitioning that tribunal to
determine the proper valuation of plaintiff's properties. Upon
the filing of such petition, the Court was obliged to decide the
actual assessment value of such property, whether such valuation
resulted in a greater or lesser amount than plaintiff's original
assessment.

In Consumer's Power Company v Big Prairie Township,
Newaygo County 265 NW2d 182, (Michigan 1978), the utility
petitioned the Michigan tax Court after the Township assessed
the subject's Dam at a higher value than earlier valuations
based on a new assessment technique. Once before the Court the
County received permission to intervene and requested even a
greater value be placed on the property for all the tax years in
question. When the lower Court held with the intervening
County's assessment, an appeal was taken. Early in the Court's
opinion, it found the tax Court had a duty, as the Legislature's
designated agent for that purpose, to determine the true cash

value of the appellant's property. At p188. As in the present case, the taxpayer charged that the Court could not increase its assessment beyond the initial level in a proceeding brought by the taxpayer to have the valuation reduced. As in this case, the County raised the issue of under-assessment by and through its responsive pleadings. In deciding this question, the Michigan Court summarizes the state's history pertaining to assessment appeals. It found the prior review process gave the taxpayer the option of appealing to an equalization board before tendering payment or filing a Court action after paying the taxes under protest. Only the equalization board had power to increase the initial tax. That system was found unworkable because both routes could be simultaneously taken by the taxpayer resulting in contradicting decisions. Although the jurisdictional language of the Michigan tax Court did not expressly specify whether the Court could increase the initial assessment, the appellate Court construed the law to include such power because the tax Court had assumed the functions of both the earlier review devices.

The powers vested in the tax division of the Utah District Courts under the Utah Tax Act, Section 59-24-1, et seq., U.C.A. as amended 1953, also provide the lower Court with plenary power to increase an initial assessment made by the State Tax Commission.

Section 59-7-12, U.C.A. as amended 1953, gives the Utah State Tax Commission the power to, "...correct and increase or lower any assessment made by it.." In reviewing the decisions of the State Tax Commission, the tax Court may,

"...affirm, reverse, modify or remand any order of the State Tax Commission, and shall grant other relief, invoke such other remedies, and issue such orders, in accordance with its decisions as shall be appropriate. Section 59-24-4 U.C.A. as amended 1953."

As the reviewing Court for the State Tax Commission, the Court has de novo review of Commission decisions. Section 59-24-3, U.C.A. as amended 1953. The Court then, inherently has those powers given the State Tax Commission. In addition to the powers of the Commission, the Court has those discretionary powers cited above.

As stated in the Consumers Power Case,

"...from a statutory and strictly legal point of view, the potential for a finding of under-assessment came into being, the instant consumers took its \$152 appeal to the Tax Tribunal. From that moment on, the Tax Tribunal had the jurisdiction and power to increase the contested assessments even if no one had appeared in opposition."

The extensive powers given the Utah Tax Court clearly include at least those powers invested in the Michigan Tribunal.

POINT III

ONCE APPELLANT PROVES THAT CERTAIN METHODS AND APPLICATIONS USED BY THE UTAH STATE TAX COMMISSION TO VALUE PLAINTIFF'S PROPERTIES FALL SHORT OF CONSTITUTIONAL MANDATES, SAID PROPERTIES MUST BE ORDERED BY THE COURT TO BE REASSESSED USING CONSTITUTIONALLY VALID METHODOLOGIES.

The ability to challenge tax valuation methods used by the Utah State Tax Commission in collecting taxes in behalf of the County has been shown above to be vested in the counties of Utah. Yet before this standing has any relevance it must be found that a remedy exists which the Court may invoke once the County proves the unconstitutionality of the methods used by the Utah State Tax Commission. The power to sue and the right to relief are inseparable. This is especially true in the constitutional context.

In Jensen v Byran 40 Cal Rptr 540, 541 (California Court of Appeals 1964) Los Angeles County, by oversight, failed to assess the improvements of plaintiff's real property apart from said property. When found, the County made the necessary deferred assessments. Plaintiff taxpayer unsuccessfully challenged this deferral. The Court found that California's Constitution requires all property within that state to be taxed unless an exemption is granted by State Constitution or by federal law. Additionally, it found the County had statutory authority to make such deferred assessments.

Utah has similar Constitutional language to that of California requiring assessment of all property not exempt by said Constitution or by federal law. Article XIII, Section Two. The appellant County has shown much of plaintiff's mineral

...ations have escaped assessment entirely. Such property is subject to the deferred assessments required in Jensen.

In Bauer-Schweitzer Malting Company v City and County of San Francisco 506 P2d 1019, 1020-1021 (California 1973), a Grand Jury investigation found the County Assessor had committed several improprieties in office. A later civil action resulted in new valid assessments being ordered on several properties. The plaintiff was one of many who was required to pay substantial taxes for property which had earlier escaped assessment. The higher Court affirmed this action even though no fraud or collusion involving the plaintiff was shown to have occurred. The Court quoting the lower appellate Court found

"uniform assessments are required and that where the applicable assessment ratio has not been uniformly applied, escaped assessments must be made for all years for which recovery is permitted by law,..

..the Constitution requires that all properties subject to taxation shall be assessed at its full cash value."

The public policy behind the Bauer-Schweitzer case is clear. In order to achieve constitutionally mandated uniformity, all assessable property must be appraised at its full cash value.

Under the present facts, the appellant County has shown that much of plaintiff's mineral extraction has escaped assessment entirely. This fact is un rebutted. No evidence to the contrary was presented. The defendant County has also shown

through affidavit that much of plaintiff's real property is grossly undervalued. Although it is true the defendant State Tax Commission has discretion in how it values the property of a tax payer, that valuation must reflect actual cash value. Utah Constitution Article XIII, Section three.

Once the appellant has shown that past valuations of plaintiff's property have failed to meet the above constitutional criteria, it is apparent that the State Tax Commission must then make valid assessments for those properties, at least as far back as Utah law allows, which is a maximum of 5 years.

In Hewlett-Packard Company v County of Santa Clara 123 Cal Rptr 195, 199 (California Court of Appeals 1975), the taxpayer had provided all information required by law to the assessor. For five years the assessor mistakenly valued much of the property on a manufacturer cost basis not realizing the property was made by the taxpayer and therefore subject to a higher assessment under the trade level method. When the mistake was found additional assessments were made for those years. The Court action followed. The taxpayer asserted such escaped assessments may be had only if caused by the wrongdoing of the assessor. The Court held otherwise quoting Excell-O Corporation v County of Alameda 107 Cal Rptr. 839 (1973),

Bauer-Schweitzer establishes that property must be assessed uniformly, that uniformity must be accomplished even though there has been an earlier assessment, where the assessment was too

low, and that an underassessment cannot be sustained although all parties acted in good faith. (emphasis added by Court)

The application of this Court's holding to the present facts is direct. Even though both the assessor and taxpayer believed each was acting in conformance with law, once it is shown constitutional requirements of uniformity and valuation at full cash value have not been attained such property must be re-assessed.

The appellant has already shown that significant portions of plaintiff's property escaped assessment or is seriously undervalued. All such properties must be re-assessed so as to achieve the required uniformity.

POINT IV

UTAH COUNTIES HAVE CONSISTENTLY ENJOYED JUDICIAL STANDING TO MAINTAIN ACTIONS AGAINST THE UTAH STATE TAX COMMISSION WHEN THE PROPRIETARY INTERESTS OF THE COUNTY ARE AT STAKE.

The Utah State Tax Commission is given a peculiar mix of responsibilities. Looking at those duties involving property tax assessment, the Commission has essentially two functions. The first involves hearing local taxpayer appeals taken from the individual County Equalization decisions. See Section 59-7-10, U.C.A. as amended 1953. This function also includes equalizing the value of properties between counties, aiding and supervising the county assessors in executing their local taxing duties, organizing conventions of county assessors for the discussion of

tax problems in the State, and to require County Attorneys to institute needed legal actions to enforce the tax laws in the areas. See Section 59-5-46(8) to (12).

The Utah State Tax Commission's other function is that of valuing, assessing and apportioning to the counties, that property which by law the Commission is charged with assessing. See Section 59-5-3 U.C.A. as amended 1953. Within this function, the taxes generated by the Commission's work belong to the counties. It is a county tax. The Commission merely determines the value. This duty of the Tax Commission is different from its management function in that it is working for the counties sole benefit. The Tax Commission is the fiduciary agent of the counties in executing this task.

The counties perform a similar role for their local taxing districts. This fiduciary obligation was recognized by this Court in the recent case of The Board of Education of the Granite School District v. Salt Lake County No. 17175, filed February 8, 1983. As in the present case, no specific statutory language exists which gives the taxing districts standing to challenge the counties actions in executing their collection duty. This Court found that a fiduciary obligation existed between the units due to the nature of the relationship. A result contrary to the public interest would occur here if the County was without power to question the Utah State Tax Commission's actions when operating in its fiduciary mode for

and in behalf of the county.. The ability to challenge the lawfulness of the Tax Commission's valuation methods becomes essential when noting that the property which the Commission taxes is one of the largest, single revenue sources the appellant has. An underassessment of the plaintiff substantially damages many essential County programs. The tax revenues collected from the plaintiff are for the sole use and benefit of the appellant and its various taxing entities. The appellant could not meet its public responsibility without these funds. Appellant must therefore have the power to question the results of the Tax Commission's fiduciary actions in behalf of the County.

The County appellant is not attempting by this action to obtain a valuation technique that simply produces more revenue. The County wants equity. The County wants equality. Nothing more--nothing less. Case law is rampant with authority that holds the Utah State Tax Commission to have discretion in which of many lawful valuation techniques it chooses. The County is asserting that defendant Tax Commission is not fully performing its function in that plaintiff's properties are not being valued at their full cash value. If the County is prevented from questioning these valuations, it will be left without a remedy and only the discretion of the Utah State Tax Commission will determine what revenue the County will receive. The undervalued taxpayer certainly will not challenge the

undervaluation and if the County is precluded from challenging the Commission, the public would likewise be precluded from using the courts as a remedy. Who then will be the watchdog? Not the Tax Commission, nor the underassessed property owner. Without the tools of enforcement, the Constitutional and statutory standards of equity and of valuing plaintiff's property at cash value is meaningless. Such a result would be inconsistent with the very purpose of setting such boundaries.

The lower Court refused the appellant standing on the basis of cases handed down in Washington and Colorado. The Trial Court stated the Utah authority cited and discussed by appellant dealt with procedural matters over which the County and State held concurrent jurisdiction.

A review of the cases relied on by the Trial Court in declining to judicially recognize the County right to question the assessment and the Tax Commission assessment practices illuminated the difference of functions given to the State Tax Commission and the resultant mistake made by the lower Court in not recognizing this difference.

In Board of County Commissioners of the County of Dolores v. Love 470 P2d 861, 862 (Colorado 1970), the plaintiff therein was attempting to challenge the State Tax Commission's review and reappraisal of properties earlier valued by the County Assessor. The County initially assessed the property and was represented in the administrative review. Relying solely on

the Dillon doctrine, the Court found the County was without the needed standing to judicially challenge the Board's supervisory decision. These facts fall squarely within the above mentioned review function of the Utah State Tax Commission versus its fiduciary function. The present facts involve the tax assessment functions of the Tax Commission, not its supervisory role. Further, as discussed below, this Court has previously expelled the Dillon Rule as a delegating source of County powers.

For the same reasons, the case of Adams County Board of Commissioners v. Union Pacific Railroad Company 525 P2d 1201, 1204 (Colorado 1974), cannot be used to prevent the appellant from challenging the actions of the State Tax Commission. The Adams County Court adopted the Love decision in toto as its basis for the affirmance.

In Pettit v. Board of Tax Appeals 538 P2d 501, 502 (Washington 1975), the facts again involved the local assessor's valuation being contested by the taxpayer. Again the County's interests were represented at the appeal before the State Board of Equalization. Only after a decision in favor of the taxpayer did the assessor attempt review in the Courts.

Here, the County has had no voice in the process which determined the amounts of revenue it alone is entitled to.

If standing is denied the County defendant here, its charges concerning the Tax Commission's valuations will never be

heard. The County will be relegated to a position in which it takes whatever revenue the Tax Commission decides to give it notwithstanding the fact that there exists a Constitutional mandate of a 20% assessment of the plaintiff's full cash value of its property.

The Court in King County v Washington State Board of Tax Appeals 622 P2d 898 (Washington 1981), was presented similar facts as those found in Pettit. Again the County Assessor appraised the property of taxpayer. The local assessment was appealed to the Board of Tax Appeals which lowered the assessment. The County then filed the action in the Superior Court for review.

Not one of the cases relied on by the lower Court in dismissing defendant County's claims dealt with the issue involved herein. The defendant County at no time valued the plaintiff's property and it has never had an opportunity to have its voice heard by any forum. At the same time, the valuation of plaintiff's property is a most important factor to the County's budget. The County is the interested party to the plaintiff's valuation in that the valuation is for the County's benefit.

The lower Court disregarded several Utah cases brought forth by the appellant to show that Utah counties continually have had standing to challenge the methods of the Utah State Tax Commission while operating as the County's tax collector.

The early case of Salt Lake County v State Board of Equalization 55 P 378, 378(Utah 1898) holds facts similar in principle to the present case. There the Tax Commission under its former name of the State Board of Equalization was challenged by the County concerning its methods of apportioning the earlier made assessment of railroad stock to the various counties. There the State Tax Commission was acting in its fiduciary capacity. Similar to the present facts, the County was challenging the method of apportionment. The Court, after examining the existing apportionment method ordered the defendant to re-apportion the assessments. It said

In any event, we have no doubt the Board can make a more correct assessment from information obtained from the officers of the respective roads.(emphasis added)

The Court focused on what method was fairer to the County. The present appellant has previously shown that present valuation techniques used by the defendant Tax Commission do not adequately measure full cash value. As done in the earlier case, this Court should require a more correct valuation of claimants properties.

The State Tax Commission's method of apportionment was again challenged in Juab County v Bailey et al., 140 P.764, 765 (Utah 1914). This time it dealt with how the proceeds of a mine situated in both Juab and Utah counties were respectively apportioned. The Court focused mostly on the timing of the County's complaint, not raising the standing issue sua sponte as

it did the timeliness one. Noting the attention it gave the issue of tardiness, it seems likely the Court would have disposed of the case on standing if it had felt such a holding would be accurate. See also Rich County v Bailey et al 154 P. 773 (Utah 1916); and Mammoth City v Snow et al 253 P. 680 (Utah 1926).

A similar fiduciary assessment process by the State Tax Commission to the present case was challenged in the more contemporary case of Washington County et al v State Tax Commission, et al 133 P 2d 564, 567-568 (Utah 1943). There the constitutionality and application of a statute exempting those portions of electrical utility companies used to pump irrigation water was disputed by the plaintiff County. Although the Court does not discuss the standing issue directly, it does allow the County to challenge the constitutionality of a State Statute, a legislative act having more credence than the presently challenged administrative acts which execute such authority.

The County in the present case is asking the Court to give it a forum in which it may attempt to show that the defendant Utah State Tax Commission is not living up to its duties. The only entity having a higher qualification for standing is the plaintiff taxpayer. How often will an advantaged taxpayer challenge the escape or underassessment of its own property? Realistically then, no enforcement tool exists if the County is denied standing. If no enforcement

exists, no boundaries exist to the discretion of the Utah State Tax Commission. Is it an entity unto itself or must it serve the needs of all citizens of the State of Utah?

The lower Court's dismissal of the defendant's claims was based on cases dealing with Court Appeals by the County from the review decisions of the various State Tax Commissions. Those courts subsequently held that the counties had no standing to appeal those review decisions. However, this Court has previously held that in this state, the counties have the right to even challenge these supervisory decisions. See County Board of Equalization of Kane County v State Tax Commission 50 P2d 418 (1935); Baker v Tax Commission 520 P2d 203 (1974); and Salt Lake County v Tax Commission 532 P2d 680 (1975).

Indicative of the legislative intent that Utah counties have the needed standing to challenge the methods of the State Tax Commission is S.B. 208 which was passed by both houses of the 1983 Utah Legislature and signed into law by the governor. During the review and debate involved in the creation of this law, an amendment was added which specifically exempted the bill's effect upon the present action. As a strong signal of the historic intent of the Utah State Legislature, this amendment was explicitly removed from the bill before the bill was successfully passed by both houses. It therefore specifically applies to this case. At the time of passage, the Legislature was much aware of the erroneous interpretation of

the Trial Court in this case. It remedied that error. Appellant believes the interpretation by this Court of the County's standing powers is still needed in order for the appellant to challenge the methodology of the Utah State Tax Commission.

POINT V

THE APPELLANT MAY RAISE THE ISSUE OF PLAINTIFF'S UNDERVALUATION THROUGH THE COUNTERCLAIM DEVICE.

In dismissing the appellant's claim against the named parties, the lower Court seems to have confused the issue of the appellant's standing, with the Court's statutory authority to increase the plaintiff's initially assigned assessment. Contrary to the lower Court's memorandum decision, the Consumer's Power Company opinion did not decide whether the intervening County had the ability to judicially challenge the taxpayers assessment. The Michigan opinion only discussed the valuation method which best determined the true cash value of the utility and whether a greater assessed valuation than that set by the assessing authority could be levied by the tax court. supra, p185. This misunderstanding of the Consumer's Power decision holding led the lower Court in the present action to misconstrue the statutory authority it has in reviewing orders of the State Tax Commission. The importance of this issue to the appellant and to the tax Court can not be overstated and requires reversal of the lower Court's decision.

Due to the absence of language in current Utah statutes authorizing the County to appeal a Utah State Tax Commission valuation, the County must be found to have the ability to challenge the taxpayer's assessment through a counterclaim once the property owner puts its valuation at issue. In Pima County v Cyprus-Pima Mining Company 579 P2d 1081, 1083 (Arizona 1978) the Court held that the County could not question the valuation of the taxpayer except in the manner provided by law. There, an open pit copper mine's assessment was appealed by the taxpayer to the State Board of Tax Appeals. Not satisfied with the result, the mine owner pursued its appeal through the Courts. In its responsive pleading, the County affirmatively asserted that the valuation should be increased. The Court found since the County had not pursued its statutory right to appeal the decision of the Administrative Board, it could not do so though an affirmative defense. Arizona law specifically provides that a County may appeal a decision of the Tax Board. See A.R.S. Section 42-123(B)(7), and 42-151(c). Conversely, Utah law specifically finds only the taxpayer may initiate a judicial challenge to an assessment of the State Tax Commission. See Section 59-11-11, U.C.A. as amended 1953. Once the judicial determination of valuation has been triggered by the taxpayer the County must be allowed to do more than defend a valuation which it had nothing to do with, has no records covering the basis for the assessment, and often cannot support.

The Pima County Court's explanation for its holding that the County did have the right to initiate an appellate review of the taxpayer's valuation but did not do so. Utah counties do not have the statutory authority to begin a judicial review of the State Tax Commission's valuation. To protect their revenue they must at least have the ability to prove to the Court a taxpayer's true assessment once the taxpayer has asked the Court to determine the true cash value of its property.

To find that the valuation initially assigned a State assessed taxpayer is the maximum valuation amount it will be forced to accept creates a tremendously litigious atmosphere for this class of taxpayer. Litigation is encouraged, even invited. The taxpayer is given a no lose forum in which to bring its assessment. Coordinately, the County is held to the devastating legal expense of defending every such action only to obtain an assessment amount which even if successful may be well below that which it can prove to be the actual valuation. Such a result could not have been the intent of the authors of Section 59-11-11, nor can it be tolerated realizing the contemporary financial burden of Utah's Counties.

As a prerequisite to the plaintiff's obtaining jurisdiction under the Tax Court Act, it must pay the originally assessed tax amount under protest and then ask the lower Court to find the actual assessment of the property. The purpose

behind the protest requirement is to alert all entities concerned that ownership of those funds is disputed and the court might order their refund to the taxpayer.

Here, the plaintiff taxpayer complied with the protest requirement. All entities were alerted to the contingency of those funds. The appellant County can now challenge the valuation by counterclaim using the taxpayer's earlier protest. If successful, the County will be entitled to a larger amount of revenue than it originally was apportioned. If unsuccessful the taxpayer's protest has prevented all concerned entities from unduly relying on these funds.

No procedural or substantive reason exists which prevents the County from enjoying the right to prove the taxpayer's actual valuation once the taxpayer has asked the Tax Court to decide this question. Equity and the Utah Constitution requires that this be allowed.

The taxpayer in the lower action named the appellant County as a defendant. The mining company must have believed the appellant to be an indispensable party to this action. Once the appellant was named a defendant, it had the duty, right and opportunity to act in a manner consistent with its general welfare. Both the taxpayer and the State Tax Commission alleged that the County is barred from raising a valuation counterclaim because no specific statutory authority exists which bestows this right upon it. In State v Hutchinson 624 P2d 1116, 1118

(Utah 1980), this Court discussed the ability of a County to establish an ordinance in furtherance of the community's health, safety, and welfare even though the State had not granted the locality the specific statutory authority to create such an ordinance. The well-known Dillon Rule is the invalidating source which had traditionally required specific delegation of rule making authority. This Court said,

"The rule requiring strict construction of the powers delegated by the Legislature to counties and municipalities is a rule which is archaic, unrealistic and unresponsive to the current needs of both State and Local governments and effectively nullifies the legislative grant of general police powers to the counties."

Later, this Court cited with approval from the earlier case of State v. Stanford 66 P.1061 (1901),

[T]he Constitution implies a right of local self-government to each county, and a right to establish a system of county government is expressly recognized and enjoined. The power is given to create the county government, not to administer to such a system when created. The right of the Legislature was to provide for and put in action, not to run and operate, the machinery of the local government to the disenfranchisement of the people. People v Hurlbut, 24 Michigan 44, 9 am. Rep. 103.

Granted the Hutchinson case dealt not with the power of a county to seek its legal level of tax revenue, but with the power to legislate a campaign funding ordinance. However, the principles set forth in that case are at least as applicable to a county securing its just revenue as they are to local legislation.

The State Tax Commission has absolutely no interest in the tax revenue derived from the properties it assesses for the County. In this function, it does not serve as a board of supervision to the County. While serving in this manner, it works in behalf of the County as a fiduciary. It is the County's trustee..

To find that the County appellant does not have the minimal power to raise by counterclaim alone the true valuation of a taxpayer assessed by the State Tax Commission is to hold that the Commission is utterly above the law. The taxpayer certainly will not bring the under-assessments to light. Relying on the reputations of the individual State Tax Commissioners to guide their assessment decisions has never been a resource which can replace the judicial forum. In sum, the County must have the ability to prove a larger assessment exists if the system is to function in balance.

Consideration should also be given to the absence of harm created by holding with the appellant's position. Since counties could only dispute the valuation after a taxpayer has brought its valuation into 'question', no inordinate amount of litigation would result. Since the taxpayer will not have a no loose situation by bringing its assessment to the Courts, the frivolous cases will be reduced.

The Utah Tax Court Act gives the lower Court the necessary authority to increase a taxpayer's assessment once the

initial assessment is proven legally inadequate. Although no statutory language exists providing the appellant with the power to bring an assessment challenge to the Court, no reason exists in logic or law which would disallow the appellant from attempting to prove a higher assessment value once the taxpayer asks the Court to determine its valuation. The lower court's decision must therefore be reversed.

POINT VI

THE APPELLANT MUST BE ALLOWED ACCESS TO THE MINING ASSESSMENT BOOKS REQUIRED BY LAW TO BE MAINTAINED BY THE UTAH STATE TAX COMMISSION.

The lower Court held against the appellant upon their cross-claim which sought to compel the Tax Commission to produce the mining assessment books required to be maintained by the State Tax Commission under Section 59-5-56, U.C.A. as amended 1953 and deliver the data upon which plaintiff's assessments were based.

Through the discovery process it was found that contrary to statute, the Utah State Tax Commission has not maintained the assessment book of mines. However, pertinent information which would be entered in the mandated record book is available to the State Tax Commission. This information has been withheld by the Commission from the appellant except for an insufficient summary earlier provided through discovery.

The 1983 Legislative General Session held in March of 1983, generated S.B. 184. This bill was passed by both houses and signed by the Governor soon thereafter. This law requires the State Tax Commission to allow County review of the information which normally would be found in the mining assessment book.

This newly enacted legislation obviously nullifies the need for this Court to interpret the appellant's rights in this regard. More importantly, this legislation should be interpreted to back up this Court's recent holdings which provides Utah counties with more autonomy in handling their ever-increasing complex problems. The counties must have, and are receiving more of the management powers needed to deal with these responsibilities and any decision of this Court should be consistent with that philosophy.

POINT VII

THE TAX COURT IS EMPOWERED TO ORDER A VALID ASSESSMENT OF ALL PROPERTIES OF TAXPAYERS WHICH HAVE ESCAPED LAWFUL ASSESSMENT WITHIN THE PAST FIVE TAXING YEARS.

The appellant has asked the lower Court to order the valid assessments of those properties of plaintiff which have escaped valid assessment within the past five tax years. The power to order such assessment is found at Section 59-5-17, U.C.A. as amended 1953. It states

"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,..."

This authority is specifically not limited to County assessors and this Court has previously ruled that this law is available to assessments made by the Utah State Tax Commission.

In Union Portland Cement Company v Morgan County 230 P.1020, (Utah 1924), the taxpayer's property was of the type assessed by the State Board of Equalization (The forerunner of the State Tax Commission). The plaintiff there had filed its affidavit of property ownership and duly paid the assessed tax. Later in the year the Board discovered the property affidavit to be insufficient in that additional property existed which had not been included in the taxpayer's statement. The Board valued and assessed the property and the taxpayer later paid the additional tax under protest and filed the Court action. In its complaint, the plaintiff asserted that once the Board had performed its duty, the Board could not raise the assessments on the basis of error. The Court found,

"...it is quite immaterial for what reason property was omitted from the assessment roll. The only question is: was it omitted? and, if it was, it is the duty of the assessor (in this case, the Board of Equalization) to assess it."

Clearly then, the State Tax Commission may assess all property of the taxpayer which has escaped assessment within the past five years. The Tax Court, with its reviewing powers over the State Tax Commission may require that administrative body to

perform its legally mandated job, including the assessment of escaped property.

The property of a taxpayer which has been underassessed in the same five year period may also be required to undergo a valid assessment. The question of whether re-assessment by valid means of previously under-assessed property may also fall within the five year statute of limitations was discussed in Mammoth City v Snow, et al., 253 P.680, 684 (Utah 1926). This case principally dealt with the proper assessment and apportionment of the mining properties of defendant. The owner of several mines had reported its net proceeds without designating from which mining property they came. This resulted in the plaintiff municipality believing that it had not been apportioned its fair share of the tax revenue. This Court found the defect not significant enough to call for a re-assessment. It said

"..[this defect] does not justify us in regarding such assessments as a nullity and directing the Board to now make an assessment as though none had been made. We have no allegations or proof that the assessment which was made was fraudulently, or based on a gross or any undervaluation, and no proof that such or any net proceeds of such mines or mining claims were omitted from assessment, or that they escaped assessment or taxation. (emphasis added)

This Court rightfully found that an undervaluation is as legally inadequate as no valuation at all. Therefore, those properties of the plaintiff which were undervalued are just as invalid as those properties escaping assessment altogether.

The facts of Bauer-Schweitzer Malting Company, Inc.,
City and County of San Francisco 506 P2d 1019, 1022 (California
1973), as set forth fully above, include the assessor being
charged with a variety of improprieties and much of the
previously assessed land being re-assessed in a valid manner and
at its correct value. The plaintiff alleged such re-assessments
did not fit within the statutory language of "escaping
assessment," and therefore past tax years could not be examined.
The Court overturned earlier case law by holding

"To the extent that property has been assessed
at an assessment ratio lower than the ratio
properly established by the assessor for a
particular year, such property has escaped
assessment."

By overturning earlier case law which prevented valid
re-assessments of land if the same had been earlier assessed in
any manner, the Court recognized that no difference existed
between property invalidly assessed and property not assessed at
all. Constitutionally mandated uniformity of assessment must be
achieved. Even where the taxpayer was not to blame for the
underassessment, collecting that revenue actually owed requires
the taxpayer to do no more than it is socially required to do,
contributing its fair share to the tax burden.

Here, much of plaintiff's properties have been shown
to be severely underassessed or to have escaped assessment
entirely. The taxes for 1981, are clearly open to re-valuation.
That property which has escaped assessment for the five years

prior to the 1981 tax year must also now be properly taxed. No reason exists for differentiating underassessed property from non-assessed property. Therefore, all plaintiff's property not previously having been fully valued must now be assessed as far back as Utah law allows.

CONCLUSION

The appellant has always had by law and necessity, the judicial standing to challenge the State Tax Commission's actions as tax collector. The lower Court under the powers given it by the Utah Tax Court Act has the capacity to hear issues dealing with the propriety of a taxpayer's valuation, determine the correct method of valuation, and require that such valuation methodology be applied to the property of taxpayer.

In the case of property assessed by the State Tax Commission, the appellant must have the ability to affirmatively prove the valuation of property once the taxpayer has brought the issue before the court. To find otherwise is to commit the County to an on-going no-win battle and would further bind the County to valuations which it had no part of making and often cannot support.

Once improper valuations are found by the Court the assessments for the five years preceding such finding may then be examined for impropriety. The appellant respectfully

requests this Court to reverse the decision of the lower court and to remand this case for a trial on the merits with instructions consistent with the points raised herein.

RESPECTFULLY SUBMITTED this 18th day of May, 1983.

THEODORE CANNON
Salt Lake County Attorney

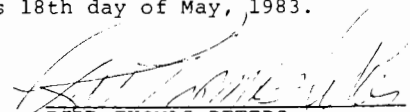
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CERTIFICATE OF SERVICE

I do hereby certify that I caused to be mailed or delivered two true and correct copies of the foregoing Brief of Defendants/Cross-claimants Salt Lake County to Reed L. Martineau and Rex Madsen of Snow, Christensen & Martineau, #10 Exchange Place, Salt Lake City, Utah 84111, and Keith E. Taylor and John F. Waldo of Parsons, Behle & Latimer, 185 South State Street, Salt lake City, Utah 84111, this 18th day of May, 1983.


BILL THOMAS PETERS