

06-0915
AUDIT

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER 1, Petitioner, v. AUDITING DIVISION OF UTAH STATE TAX COMMISSION, Respondent.</p>	<p>ORDER DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT</p> <p>Appeal No. 06-0915</p> <p>Tax Year: 1998 Tax Type: Severance Tax</p>
<p>PETITIONER 1, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>Appeal No. 06-1218</p> <p>Tax Year: 1999 Tax Type: Severance Tax</p>
<p>PETITIONER 2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>Appeal No. 07-1118</p> <p>Tax Year: 2000 Tax Type: Severance Tax</p>
<p>PETITIONER 1, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>Appeal No. 07-1124</p> <p>Tax Year: 2000-2003 Tax Year: Severance Tax</p> <p>Judge: Phan</p>

Presiding:

Pam Hendrickson, Commission Chair
Marc Johnson, Commissioner
D'Arcy Dixon Pignanelli, Commissioner

Appeal Nos. 06-0915, et al.

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP., Attorney at Law

For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Assistant Director, Auditing
RESPONDENT REP. 3, Manager, Oil & Gas Auditing

STATEMENT OF THE CASE

This matter is before the Commission on Petitioners' Motion for Summary Judgment, filed on February 26, 2008 ("Motion"). In the Motion, Petitioners request that the Commission grant summary judgment to PETITIONER 1 by ordering the Division to grant PETITIONER 1's and PETITIONER 2's refund requests. Respondent submitted a Response to Petitioners' Motion for Summary Judgment on April 4, 2008. Petitioner submitted a Reply Memorandum in Support of Motion for Summary Judgment on April 25, 2008. A Hearing on the Motion for Summary Judgment was held on June 17, 2008.

SCOPE OF REVIEW

Under Rule 56 of the Utah rules of Civil Procedure, summary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled a judgment as a matter of law. *Sorrenson v. Beers*, 585 P.2d 458, 460 (Utah 1978); *Utah Department of Environmental Quality v. Wind River Petroleum*, 881 P.2d 868 (Utah 1994). On Summary Judgment, all facts and all reasonable inferences drawn from those facts must be viewed in the light most favorable to the non-moving party. *Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, 116 P.3d 271. A summary judgment shall be rendered by the Tax Commission, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Utah R. Civ.P. 56; Utah Code Ann. Sec. 63-46b-1(4).)

STATEMENT OF MATERIAL UNDISPUTED FACTS

The following facts are material to the Commission's decision on Petitioners' Motion and are undisputed:

1. PETITIONER 1 ("PETITIONER 1") is the result of a merger, on DATE, between COMPANY A and a wholly-owned subsidiary of COMPANY B.

2. Prior to the merger PETITIONER 2 ("PETITIONER 2") was a wholly owned subsidiary of COMPANY A. As a result of the merger, PETITIONER 2 became a second-tier, wholly-owned subsidiary of PETITIONER 1.

3. PETITIONER 2 still exists today as a separate legal entity.

4. During the 1990's PETITIONER 2 owned and operated (WORDS REMOVED) within the AREA in UTAH REGION. Those (X) were located in the UNIT 1 and the UNIT 2. The records of the UTAH DIVISION ("UTAH DIVISION") identify PETITIONER 2 as the operator of the UNIT 1 from DATE through DATE, and of the UNIT 2 from DATE through DATE. After DATE, the UTAH DIVISION records identify the operator of both the UNIT 1 and UNIT 2 as PETITIONER 1.

5. Prior to the merger, PETITIONER 2 had owned 39.956% of the production from the UNIT 1. COMPANY B owned 24.787% and the remainder of the production was owned by COMPANY C and COMPANY E.

6. Prior to the merger, PETITIONER 2 had owned 64.367% of the production from the UNIT 2. COMPANY B did not own any production from that field. The remaining production was owned by COMPANY C, COMPANY D and COMPANY E.

7. From 1993 through 1998, PETITIONER 2 filed returns and paid severance taxes on its

Appeal Nos. 06-0915, et al.

production of (WORDS REMOVED) from the AREA by calculating the value of the (X) on the price that was paid at the point of sale.¹

8. After the merger, in 1999, PETITIONER 1 filed amended severance tax returns, amending the original returns filed by PETITIONER 2 for the 1993 through 1998 tax years. The amended severance tax returns were based on the value of the (X) produced using the net-back method, which resulted in lower tax amounts than PETITIONER 2 had claimed on the original severance tax returns for each of the years.

9. The Auditing Division of the Utah State Tax Commission denied PETITIONER 1's requests for refund regarding the returns originally filed by PETITIONER 2 for the 1993 through 1998 tax years.

10. PETITIONER 1 appealed the denial of the refund requests to the Utah State Tax Commission. The requests for redetermination of the refund claims for overpayment of taxes paid by PETITIONER 2 were combined for the periods from 1993 through 1998 into one appeal, which was identified as PETITIONER 1 v. Auditing Division of the Utah State Tax Commission, Appeal No. 00-0901 (the "Original Appeal"). After a Formal Hearing, the Commission upheld the Division's denial of the combined refund requests.

11. PETITIONER 1 appealed the Commission's decision in the Original Appeal to the Utah Supreme Court.

12. Because PETITIONER 2 was a wholly owned subsidiary of PETITIONER 1, all litigation surrounding the refund requests was managed and financed by PETITIONER 1.

13. The Utah Supreme Court issued its decision on November 25, 2003, in *PETITIONER 1 v. Utah State Tax Commission*, 2003 UT 53, 87 P.3d 706 (2003)mk, remanding the matter back to the Tax

¹ Whether these calculations by PETITIONER 2 were made using the first method required by Utah Code Ann. Sec. 59-5-103, arms-length contracts at the point the (X) was sold, is not material to the Commission's decision on Summary Judgment. The Respondent's contention that this is a disputed fact is not relevant to this proceeding.

Appeal Nos. 06-0915, et al.

Commission.²

14. On November 21, 2005, the Commission directed the Division to issue a severance tax refund to PETITIONER 1 in the amount of \$\$\$\$ plus statutory interest.

15. On January 6, 2006, the Commission issued a refund check for \$\$\$\$ (the \$\$\$\$ plus statutory interest) payable to PETITIONER 1.

16. COMPANY B had timely filed severance tax returns for the 1998 and 1999 tax years. COMPANY B became PETITIONER 1 as a result of the 1999 merger.

17. On or about May 24, 2005, PETITIONER 1 filed an amended 1998 severance tax return that indicated COMPANY B had made an overpayment of \$\$\$\$ with its original return. PETITIONER 1 alleged that the overpayment resulted from the fact the COMPANY B had not fully deducted transportation costs or correctly asserted applicable (X) stripper exemptions in the original severance tax returns. By Statutory Notice dated May 31, 2006, the Division denied most of the 1998 refund request relating to the tax paid by COMPANY B. PETITIONER 1 appealed the denial to the Utah State Tax Commission and the appeal was designated as Appeal No. 06-0915.

18. On or about May 24, 2005, PETITIONER 1 filed an amended 1999 severance tax return that indicated COMPANY B had made an overpayment of \$\$\$\$\$. By Statutory Notice dated August 30, 2006, the Division informed PETITIONER 1 that the severance tax would be reduced by only \$\$\$\$\$. PETITIONER 1 appealed the denial of the remainder of the refund to the Utah State Tax Commission and the appeal was designated as Appeal No. 06-1218.

19. For the tax year 1999, PETITIONER 2 had timely filed an annual return separately from the

² Although the parties each argue that various portions of the Utah Supreme Court's decision support their positions, the decision itself does not give rise to a dispute of fact. The decision provides legal guidance, appropriate for the Commission to consider in making its determination on whether the Petitioners are entitled to judgment as a matter

Appeal Nos. 06-0915, et al.

annual return filed by PETITIONER 1. PETITIONER 2's annual return reported PETITIONER 2's share of production from the UNIT 1 and the UNIT 2. PETITIONER 2's annual return did not report production owned by the former COMPANY B.

20. On or about May 22, 2006, PETITIONER 2 filed an amended 1999 severance tax return, which indicated an overpayment of \$\$\$\$\$. The overpayment resulted from the fact that PETITIONER 2 had not fully deducted transportation costs in its original severance tax return. On February 1, 2007, the Division granted PETITIONER 2's 1999 refund request in its entirety.

21. For the 2000 tax year, PETITIONER 2 had filed an annual return separately from the annual return filed by PETITIONER 1, reporting PETITIONER 2's share of production from the UNIT 1 and the UNIT 2. PETITIONER 2's annual return did not report production owned by the former COMPANY B.

22. On or about February 28, 2007, PETITIONER 2 filed an amended 2000 severance tax return, which indicated an overpayment of \$\$\$\$\$. By Statutory Notice dated August 24, 2007, the Division informed PETITIONER 2 that it denied the severance tax refund.³ PETITIONER 2 timely filed an appeal of the denial, and the appeal is identified as Appeal No. 07-1118.

23. PETITIONER 1 timely filed a severance tax return for the 2000 tax year, reporting its share of production from (X) in the UNIT 1 separately from the production owned by PETITIONER 2. The share of production reported by PETITIONER 1 was based on COMPANY B's interest in production from the UNIT 1 prior to the Merger.

24. On or about February 28, 2007, PETITIONER 1 filed an amended severance tax return for the 2000 tax year, which indicated an overpayment of \$\$\$\$\$. By Statutory Notice dated August 24, 2007, the

of law.

³ The parties argue there are facts in dispute regarding why this and the subsequent refunds were denied. However, the reason is not material to the Commission's decision in this matter.

Appeal Nos. 06-0915, et al.

Division informed PETITIONER 1 that it had denied its severance tax refund request for the 2000 tax year. PETITIONER 1 timely appealed the denial to the State Tax Commission and the appeal was identified as Appeal No. 07-1124.

25. PETITIONER 1 filed timely severance tax returns for the tax years 2001 through 2003. During the first quarter of 2001, PETITIONER 1's quarterly report did not include production owned by PETITIONER 2 from the UNIT 1 or any production from the UNIT 2. After the first quarter of 2001, PETITIONER 1 combined the data, which had, prior to that time, been separately reported by PETITIONER 2 and the former COMPANY B. Beginning the second quarter of 2001 and continuing through 2003 PETITIONER 1 filed annual returns reporting combined production from the UNIT 1 and the UNIT 2 in which PETITIONER 1 or its wholly-owned subsidiary, PETITIONER 2, had an interest.

26. On or about February 28, 2007, PETITIONER 1 filed amended severance tax returns for the 2001, 2002 and 2003 tax years, which indicated overpayments of \$\$\$\$\$, \$\$\$\$\$ and \$\$\$\$\$ respectively. PETITIONER 1 alleged that the overpayment resulted from the fact that PETITIONER 1 had not fully deducted transportation costs in its original severance tax returns.

27. By Statutory Notice dated August 24, 2007, the Division informed PETITIONER 1 that it had denied its severance tax refund request for the 2001 through 2003 tax years. PETITIONER 1 timely appealed the denial to the State Tax Commission and the appeal was identified as Appeal No. 07-1124.

ANALYSIS

In the Motion, Petitioners request that the Commission order Respondent to issue the refund requests, arguing that they are entitled to retroactive relief pursuant to the Utah Supreme Court's decision in *PETITIONER 1 v. Utah State Tax Commission*, 2003 UT 53, 87 P.3d 706 (2003). The facts material to whether the Petitioners in this matter are entitled to retroactive relief, as provided by the Supreme Court in

Appeal Nos. 06-0915, et al.

PETITIONER 1, are not in dispute. The Commission simply must interpret the Utah Supreme Court’s decision and the application of that decision to the subsequent refund requests filed by *PETITIONER 2* and *PETITIONER 1* that are the subject of this proceeding. That the parties have differences in opinion regarding the application of the decision to the undisputed facts, does not of itself constitute a dispute of fact.

From the undisputed facts, the Commission notes that although the Original Appeal involved refund requests filed by *PETITIONER 1* for taxes originally paid by *PETITIONER 2* for multiple years (1993-1998), the requests had been combined into one appeal, that being Appeal No. 00-0901. As it was *PETITIONER 1* that filed the refund requests subject to the Original Appeal, the Commission listed *PETITIONER 1* as the Petitioner on the appeal, rather than *PETITIONER 2*. In its decision in the Original Appeal, the Commission denied the combined refund request. It was this denial that *PETITIONER 1* had been appealed to the Utah Supreme Court and was the subject of the Court’s decision in *PETITIONER 1*. Further, all the subsequent refund requests that are now at issue in this proceeding, filed by either *PETITIONER 2* or *PETITIONER 1*, were filed at the Tax Commission years after November 25, 2003, when the Utah Supreme Court issued its decision in *PETITIONER 1*.

The Utah Supreme Court listed *PETITIONER 1* as the Petitioner in its proceeding. *Id.* at 706. The Court noted *PETITIONER 1* filed the petition and then defined it as “*PETITIONER 1*.” *Id.* at 707. In that decision the Court “reverse[d] the Tax Commission’s determination that severance taxes should be based on the value of (WORDS REMOVED) at the point of eventual sale” and found that “[v]aluation must occur in the immediate vicinity of the well . . .” *Id.* at 712. The Supreme Court remanded the matter back to the Tax Commission for “further adjudication of [*PETITIONER 1*’s] claim for a refund . . .” *Id.* After further adjudication, the Tax Commission ordered the Division to issue a refund to *PETITIONER 1* in the amount of \$\$\$\$\$ plus interest.

Appeal Nos. 06-0915, et al.

However, the Court had limited its decision to prospective application for other severance taxpayers, stating in its conclusion, “Although PETITIONER 1 is entitled to further adjudication of its claim for a refund, as to other parties who may have refund requests, deficiency proceedings, or similar matters pending before the Tax Commission, our holding is to apply prospectively only.” *Id.* at 712. PETITIONER 1 argues in the appeals currently before the Commission that it is entitled to the same retroactive application granted by the Supreme Court in the Original Appeal for all the subsequent refund requests.

It is clear from the Court’s decision in this matter that it was contemplating a specific refund request, the combined requests from the Original Appeal. The Court considered the combined refund requests to be a single request for refund. The Court indicated the matter under review was the “Tax Commission [] decision upholding the denial of PETITIONER 1’s request for a refund” *Id.* at 707. In the Factual Background, the Court stated that the case involved “a refund of severance taxes . . . from January 1, 1993 through December 31, 1998.” *Id.* at 707. The Court resolved the matter relating to the Tax Commission’s denial of “PETITIONER 1’s request for a refund.” *Id.* at 708. *See also Id.* at 709 (“the requested refund” and “PETITIONER 1’s refund request”). The Commission notes there is no mention, or acknowledgment in the Court’s decision that PETITIONER 1 might subsequently file additional refund requests for later periods or different subsidiaries than the “request for a refund” before the Court in that proceeding.

It is also clear from the express language of the Court that it intended to limit the refunds that would otherwise result from its decision because of the financial impact to governmental entities. The Court in *PETITIONER 1* explained, at *Id.* at 712, why it had applied its prospective effect doctrine to most refunds, stating:

The revenue concerns cited by the Tax Commission and amici convince us that application of our prospective effect doctrine is appropriate in this case. When invalidating the actions of a taxing authority, we have long recognized that our decisions may be given prospective effect to protect the solvency of governmental

entities and to avoid administrative and financial hardship caused by retroactive application of rules contrary to those relied on by the taxing authorities. *See, e.g., Rio Algom Corp. v. San Juan County*, 681 P.2d 184,196 (Utah 1984). We recognize, however, that preventing the retroactive application of the rule to PETITIONER 1, which has expended considerable time and resources to attack the actions of the Tax Commission, would both deprive PETITIONER 1 of the fruits of victory and “potential[ly] . . . discourag[e] other litigants from challenging [actions] of questionable validity.” *V-I (X) Co. v. Utah State Tax Comm’n*, 942 P.2d 906, 914 (Utah 1996). (citing *Rio Algom*, 681 P.2d at 196.) We give our holding this selectively prospective application because we are convinced that retroactive application could result in large refunds of taxes already collected and spent by government entities. Although the full breadth and depth of the impact is not immediately apparent from the record before us, no doubt it would be substantial and involve funds already budgeted, collected, and spent. Large refunds of money already collected and spent would pose a great burden on the amici revitalization funds and other relatively small governmental entities operation on correspondingly small budgets. Thus, whether in refund requests or deficiency proceedings, as to all but PETITIONER 1 the rule announced today is to have prospective application only.

The Court’s analysis was driven by policy considerations, best met by interpreting the Court’s retroactive application narrowly to only include the “refund request” before the court in *PETITIONER 1*. The proposed interpretation of the Petitioners is not well supported by the Court’s policy-driven analysis because that interpretation greatly extends the Court’s limited retroactive application to refund requests unknown to the Court at the time of the decision. Using the facts before it, the Court weighed the policy concerns of (1) protecting the revenue concerns of government entities, and (2) providing the litigant the fruits of victory and not discouraging prospective litigants. In light of the Court’s discussion, the Court likely intended to broadly protect the small government entities from other refund requests not before it. Based on the retroactive application of the Supreme Court’s decision on the “refund request” that was at issue before the Court, a refund check in the amount of \$\$\$\$\$ was issued to PETITIONER 1, providing PETITIONER 1 the fruits of victory.

Lastly, it is clear from the Court’s conclusion in *PETITIONER 1*, that although it granted

Appeal Nos. 06-0915, et al.

retroactive application of its decision to PETITIONER 1, and not any other party, the retroactive application granted was limited to the specific claim for refund before the Court during that proceeding. The Commission recognizes the Court's statement that "as to all but PETITIONER 1 the rule announced today is to have prospective application only" (*Id.* at 712) could, in isolation, be interpreted to allow other claims by PETITIONER 1. However, considering the entirety of the decision the retroactive relief was limited to the refund claim before the Court in that matter. The Court's conclusion, at *Id.* at 712, was not to grant PETITIONER 1 retroactive relief for any and all additional refund claims it may eventually file, but instead, specified that ". . . PETITIONER 1 is entitled to further adjudication of its claim for a refund, as to other parties who may have refund requests, deficiency proceedings, or similar matters pending before the Tax Commission, our holding is to apply prospectively only."⁴ The Court's reference to "its claim for a refund" indicates the retroactive relief was limited to the refund claim that was before it in that proceeding.

If the Court had intended a broader application of the selective retroactive relief it would have been specific on that point. One of the cases the Court in *PETITIONER 1* cited as precedent for the selective retroactive application was *Rio Algom Corp. v. San Juan County*, 681 P. 2d 184, 196 (Utah 1984). In *Rio Algom* the Court weighed the need to preserve the financial solvency of local governments against discouraging challenges to statutes of questionable validity and concluded that retroactive application would apply only to the stated plaintiffs in that case and only to the specific refund claim for which the suit was brought. The Court also applied a selective retroactive application of its decision in *V-1 Oil Co. v. Utah State Tax Comm'n*, 942 P.2d 906 (Utah 1996). In that case V-1 requested injunctive relief on behalf of itself and all similarly situated parties. The Court applied its decision prospectively as to all the other similarly situated

⁴ In its Memorandum in Support of Motion for Summary Judgment, the Petitioner, at page v, prg. 16, characterized the Supreme Court's decision to be one that, according to Petitioner, "granted PETITIONER 1's requests for severance tax refunds." (Emphasis added.) The Commission finds this misleading as the Court always referred only

Appeal Nos. 06-0915, et al.

parties, but for V-1 the decision was applied “retroactive to the year in which V-1 alleges it began to pay the surcharge, subject only to any applicable statutes of limitations and to the extent that V-1 can demonstrate that it paid the surcharge . . .” *Id.* at 915. In both of those cases the Court fashioned the selective retroactive relief in a manner it found appropriate based on the facts and circumstances before it. Therefore, there is no reason for the Commission to conclude that when the Court in *PETITIONER 1* stated that PETITIONER 1 was entitled to “further adjudication of its claim for a refund” it meant something other than the specific refund claim that was before it in the matter.

It is the conclusion of the Tax Commission that PETITIONER 1 is not entitled to the retroactive application of the Court’s decision in *PETITIONER 1* to the refund requests at issue in these appeals that are now before the Commission. Therefore, PETITIONER 1 is not entitled as a matter of law to the Summary Judgment requested.

ORDER

Based upon the forgoing, Petitioners' Motion for Summary Judgment is denied. It is so ordered.

DATED this _____ day of _____ 2008.

Jane Phan
Administrative Law Judge

to a single request or single claim for a refund from PETITIONER 1e.

Appeal Nos. 06-0915, et al.

BY ORDER OF THE COMMISSION.

The undersigned have reviewed this motion and concur in this decision.

DATED this _____ day of _____ 2008.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

DISSENT

I respectfully dissent from my colleagues. I interpret *PETITIONER 1 v. Utah State Tax Commission (Utah 2003)* differently and as such hold Petitioners are entitled to summary judgment for retroactive relief.

Retroactive relief does apply to Petitioners for all the years in question in this order. The Utah Supreme Court expected administrative remedy and the application of its ruling to the parties at issue -- PETITIONER 1 and its wholly owned subsidiary, PETITIONER 2 (PETITIONER 2) – the Petitioners. PETITIONER 1 and PETITIONER 2 are not the “other parties,” referred to in *PETITIONER 1*, but the claimants to whom “the fruits of victory” were awarded “whether in refund requests or deficiency proceedings” as the Utah Supreme Court wrote in *PETITIONER 1*.

The Majority has chosen a narrow reading of *PETITIONER 1*. The Majority supports its

Appeal Nos. 06-0915, et al.

narrow reading of *PETITIONER 1* citing what they hold to be the Court’s “policy considerations” and “policy-driven analysis.” They use this to say, “the Court likely intended to broadly protect the small government entities from other refund requests not before it.” To support this position, the Majority relies on *Rio Algom Corp. v. San Juan County (Utah 1984)* and *V-1 Oil Company. v. Utah State Tax Commission and the Utah State Department of Environmental Quality (Utah 1996)* claiming “the Court fashioned selective retroactive relief in a manner it found appropriate based on the facts and circumstances before it.”

The Majority attempts to use *Rio Algom* to support its narrow reading of *PETITIONER 1* and its interpretation that “its claim for a refund ” is the claim before the Court. The Majority wrote, “However, considering the entirety of the decision the retroactive relief was limited to the refund claim before the Court in that matter. . . . The Court’s reference to ‘its claim for a refund’ indicates the retroactive relief was limited to the refund claim that was before it in that proceeding.”

The Majority fails to provide an analysis as to why a strict reading of *Rio Algom* applies to this matter. The Majority’s narrow reading of the five words “its claim for a refund” actually does a disservice to the desire of the Court, which was to not deprive the claimants the fruits of victory whether in refund requests or deficiency proceedings. In addition, the Majority does not offer an analysis of what *PETITIONER 1* means in its entirety. The Court has not delineated in their decisions what the circumstances are for a claimant to be afforded a refund for a year, to a year or for all years forward.

The Court could have specifically limited *PETITIONER 1* to the years before it as it did in *Rio Algom*. The Court did not; thus, there is nothing in the *PETITIONER 1* decision to indicate relief for the Petitioner is limited to the years that were before the Court.

The Majority also cites *V-1* to support its position of selective and limited retrospective application. In that case the Court penned the following:

Prospective application of our decision to V-1, the only party to this appeal, would have the potential of discouraging other litigants from challenging statutes of questionable validity. *Rio Algom*, 681 P.2d at 196. Indeed, we have said in the past that it would be unconscionable to deprive the litigant who has sustained the burden of attacking an unconstitutional statute of the fruits of victory. *Salt Lake City v. Ohms*, 881 P.2d 884, 854-55 (Utah 1994); see also *Latrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 914 (Utah 1993). **Therefore as to V-1 our decision is retroactive to the year in which V-1 alleges it began to pay the surcharge, subject only to any applicable statutes of limitations and to the extent that V-1 can demonstrate that it paid the surcharge on motor fuels. See *Rio Algom* 681 P.2d at 196.** (Emphasis added)

In *V-1*, prospective application applied to other similarly situated parties, not the claimant, V-1. Furthermore V-1 was afforded retroactive treatment to the year it could prove it paid the surcharge and forward to the date of the issuance of the Court's decision.

There are two avenues for relief as outlined in the cases *Rio Algom* and *V-1*. In a reading of all the cases, there is a different approach to each. The Majority has not explained why a *Rio Algom* analysis is controlling in this matter. To use the Majority's words - "reading in its entirety" - the fact situation in *PETITIONER 1* is more similar to *V-1*.

In *Rio Algom*, the tax collected was a centrally assessed tax, distributed to local government entities. In *VI*, the tax was a surcharge collected by the State for a (WORDS REMOVED) fund or general pool in which large and small owners and operators participated. In *PETITIONER 1*, a portion of the severance tax collected was allocated to area specific revitalization funds, but the greater amount was credited to the general fund for statewide purposes.

Although some separate entities benefit from the taxes paid by *PETITIONER 1*, the overwhelming amount goes to the State as a whole, thus the impact on small funds is less in the matter before us than in *Rio Algom*. In *V-1*, the Court deemed the State could separately address the amount of funds needed in the pool and replacement of funds to the pool rather than deprive the litigant the fruits of victory. As such,

Appeal Nos. 06-0915, et al.

in *V-1* the Court made their ruling retroactive to the year claimant V-1 could show it began to pay the surcharge.

The factual scenarios in *V-1* and in *PETITIONER 1* share common elements: all or most of the monies collected were ultimately retained with the State; the State was better positioned (than smaller local entities) to address changes to the funds and provide solutions to protect the solvency of the funds. Therefore, the *V-1* analysis applies to *PETITIONER 1*. Using the *V-1* approach, claimant *PETITIONER 1* is entitled to the requested relief.

In *PETITIONER 1* the Court wrote:

Thus, whether in refund requests or deficiency proceedings, as to all but *PETITIONER 1*, the rule announced today is to have prospective application only. (Emphasis added)

Had it wanted, the Court could have specifically limited the retrospective relief as it did in *Rio Algom*; instead the Court more closely followed its actions in *V-1*. Until the Court chooses to clarify otherwise, I hold a commonsense reading of *PETITIONER 1* compels retroactive treatment to the year for which the suit for the refund was brought and up to the issuance of the Court's decision.

Petitioners, *PETITIONER 1* and *PETITIONER 2*, filed amended severance tax returns because it expected Respondent, the Auditing Division of the Sate Tax Commission to honor the 2003 Supreme Court *PETITIONER 1* ruling and address refund requests based on *PETITIONER 1*. Petitioners properly pursued the administrative remedy by filing amended returns believing correctly, *PETITIONER 1* was applicable to them and their amended returns. Unfortunately, Petitioners received mixed messages from Respondent.

PETITIONER 1 Corporation filed amended returns for tax years 1998 and 1999 on May 19 and May 24, 2005 respectively. For both years, partial refunds were granted to *PETITIONER 1*.

Appeal Nos. 06-0915, et al.

PETITIONER 2 filed an amended return for 1999 on May 22, 2006 -- nine days before Respondent issued a decision on PETITIONER 1's 1998 amended return (issued May 31, 2006) and more than 90 days before Respondent issued a decision on PETITIONER 1's 1999 amended return (issued August 30, 2006). PETITIONER 2's requested refund was granted in its entirety.

Respondent's actions would suggest that Petitioner's refund requests would be addressed administratively by Respondent based on *PETITIONER 1*. Accordingly, Petitioners filed amended returns for tax years 2000 – 2003 all on February 28, 2007, exactly 27 days after Respondent granted in whole the refund based on PETITIONER 2's 1999 amended returns. Except this time, five and half months later, Respondent denied all the amended returns filed for tax years 2000–2003.

Why Petitioner chose to file its first amended returns 18 months after the *PETITIONER 1* decision instead of sooner eludes me, however, based on the Supreme Court decision, it is reasonable for Petitioner to assume it could file amended returns for the years not part of its Supreme Court appeal, but up to the year *PETITIONER 1* was issued. All tax years cannot be presented at one time, as taxes must be filed each year. Neither the Petitioner nor the Respondent would have known to value (WORDS REMOVED) “in the immediate vicinity of the (X) with the (WORDS REMOVED) remaining in a relatively natural state” for the purposes of applying the severance tax until *PETITIONER 1* was issued in November 2003. Therefore, as there are no disputed issues of material fact, Petitioners are entitled to summary judgment for retroactive relief.

I understand granting a refund to an (X) company may be unpopular in the current environment; however, the facts and legal precedent cannot compel a different outcome. Had my position been the ruling of this body, the Governor and Legislature would have needed to be informed of the potential budget impact, and it would have been my hope that Petitioners would have used any refund to continue to invest in Utah's economy through infrastructure, jobs and a long-term presence in Utah. **In the end, I am most wary**

Appeal Nos. 06-0915, et al.

of the precedent the Majority opinion sets for subsequent taxpayers and entities seeking administrative remedy and relief based on a court decision.

It is an often-cited principle to be cautious when interpreting tax statutes against taxpayers. As the Supreme Court wrote in *County Board of Equalization of Wasatch County v. Utah State Tax Commission and Strawberry Water Users Association (Utah 1997)*:

It is an established rule in the construction of tax statutes that if any doubt exists as to the meaning of the statute, “our practice is construe taxation statutes liberally in favor of the taxpayer, leaving it to the legislature to clarify an intent to be more restrictive if such intent exists.” *Salt Lake County v. State Tax Commission* 779 P .2d 1131, 1132 (Utah 1989).

If there is any ambiguity in the reading and application of retroactivity and prospectivity as it relates to the Court’s cases, I have applied that principle in favor of the taxpayer.

D’Arcy Dixon Pignanelli
Commissioner

Notice: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Sec. 63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. & 63G-4-401 et seq.

JKP/06-0915.sjd2.