1947

United States Smelting, Refining, and Melting Company v. Phares Haynes : Petition for Rehearing

Utah Supreme Court

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Unknown.

UTAH SUPREME COURT

BRIEF

INDEX

CASES CITED:

STATUTES:

In the Supreme Court
of the State of Utah

UNITED STATES SMELTING REFINING AND MINING COMPANY,

Respondent,

vs.

PHARES HAYNES, as County Treasurer of Tooele County, a legal subdivision of the State of Utah,

Appellant

Case No. 6931

COMBINED METALS REDUCTION COMPANY, a corporation,

Respondent,

vs.

TOOELE COUNTY, a body corporate and politic of the State of Utah and PHARES HAYNES as County Treasurer of Tooele County

Case No. 6907

PETITION FOR REHEARING

Come now United States Smelting Refining and Mining Company and Combined Metals Reduction Com-

pany, the Plaintiffs and Respondents respectively named in the above-entitled cases and pursuant to Order of this Court authorizing Petitioners to file a consolidated Petition therein, petition the Court for a rehearing in the above entitled causes.

Your Petitioners respectfully represent that the Court in its Opinion, erred in the following particulars:

1. In so construing Section 80-5-57 as to render the net proceeds method of valuation unreasonable, inequitable and violative of the constitutional requirement of uniformity.

2. In disregarding material facts stipulated to between the parties.

3. In disregarding Section 81-1-1, Utah Code Annotated 1943, which defines a sale and thereby necessarily limits the meaning of the phrase "gross proceeds realized * * * from the sale * * * to the consideration for which the transfer of property is made, which consideration is called 'the price.'"

4. In ignoring Section 80-3-1 defining "value" as:

> "(5) 'Value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor."

and thereby reaching a conclusion necessarily implying that the *less valuable* a property, the *greater* the amount at which it would be taken in payment of a just debt from a solvent debtor.

WHEREFORE, Respondents pray that this petition be granted and that upon rehearing the decision of this Court heretofore made and entered be vacated and that the decision of the trial court be affirmed.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

RESTATEMENT OF FACTS

For convenience and particularly in view of the time that has elapsed since the original hearing, we shall make a brief restatement of the relevant facts.

These actions involve the construction to be placed upon Section 80-5-57, Utah Code Annotated 1943, relative to determining the base for valuation of metalliferous mines for ad valorem tax purposes. As far as pertinent here, Section 80-5-56, U.C.A. 1943, reads as follows:

> "All metalliferous mines and mining claims, both placer and rock in place, shall be assessed $5.00 per acre and in addition thereto at a value equal to two times the net annual proceeds thereof for the calendar year next preceding * * *."

Section 80-5-57 defines the phrase, "net annual proceeds," and provides in part:

> "The words 'net annual proceeds' of a metalliferous mine or mining claim are defined to be the gross proceeds realized during the preceding calendar year from the sale or conversion

> into money or its equivalent of all ores from such mine or mining claim extracted by the owner or lessee, contractor or other person working upon or operating the property, including all dumps and tailings, during or previous to the year for which the assessment is made, less the following and no other, deduction: * * *''

In fixing the valuation of the mines involved for general tax purposes for the year 1943, the defendants and appellants included in the tax base and as a part of the "gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent"—of the ores from such mines the subsidy payments received by the mining companies from the Federal Government for production of copper, lead and zinc in excess of quotas fixed by the War Production Board and the Office of Price Administration.

It is stipulated that these subsidies were paid to encourage additional production and to make possible the extraction of submarginal ores and to pay the increased costs incident to such extraction.

It is stipulated that the subsidies received by respondents were not received at the time of sale or disposal of the ores and metals nor were they received from the purchasers thereof. They were received sometimes before sale to the purchaser and sometimes subsequently thereto. They were not a part of or in any manner reflected in or related to any sale or any consideration for a sale or conversion into money of the ores or metals.

The appellants, purporting to act under the statutes above referred to, added to the sums received by respondents from the sale of their ores and metals during the year 1943, the amount of the subsidy payments received by respondents from the Federal Government and levied a tax thereon amounting in each case to the sum prayed for in the complaint. These amounts are in no manner disputed in the record.

The trial court found the issues in favor of the plaintiffs and respondents and rendered judgment accordingly. This court on appeal, by a divided opinion, reversed the trial court and held that the subsidy payments received by respondents from the Federal Government were properly includable in the tax base.

It is with respect to this decision and conclusion that petitioners pray for a rehearing and point out that the court erred with regard to material stipulated facts and the application of the controlling statutes thereto.

We shall discuss the points raised in the order in which they are set out in the petition for rehearing.

Reference herein will be made to the record in cause No. 6931, United States Smelting, Refining and Mining Company vs. Phares Haynes as County Treasurer of Tooele County, a legal subdivision of the State of Utah.

ARGUMENT

1. The Court erred in so construing Section 80-5-57 as to include "premium payments" in "net proceeds," thereby rendering such section as so construed unreason-

able, inequitable and violative of the Constitutional requirement of uniformity of taxation.

The Court correctly states in its Opinion in Case No. 6931 that:

> "The matter involved in this case is not the price received from copper, lead or zinc; it is not the quantity of ore mined nor the cost of mining same; it is not the quotas fixed by the government, nor the reasons for such quotas. *The only matter involved is the valuation for assessment purposes of the Mine on January* 4, 1944."

The Court states in its opinion that *Premium Payments* were,

> "*designed to encourage and make possible the mining, extraction and refining of sub-marginal ores which otherwise would not be 'pay dirt.'* "

To include payments made for such purpose in gross proceeds is necessarily to hold that the greater the costs of production the more valuable a mine. *No member of this Honorable Court, notwithstanding the Opinion of the Court in these cases, would pay as much for a mine which could only produce with the aid of a bonus as he would pay for a mine which could operate at a profit without such bonus.*

As the Court stated above,

> "*the only matter involved here is the valuation for assessment purposes of the mine on January* 4, 1944."

That is not primarily a legal problem but a practical problem which doubtless an investment banker, a mine engineer or anyone else familiar with the business of mining would be better qualified to determine than would the most expert lawyer unacquainted with mine investments and valuations.

The legal problem which this Court is called upon to determine is whether the statutes implementing the Constitutional requirements as to uniformity of assessment and taxation contemplate that premium payments should be included in net proceeds for the purpose of determining the value of a mine and whether, in such event, the statutes do or do not violate such Constitutional provisions.

The Constitution requires that all tangible property in the State not exempt,

> "shall be taxed in proportion to its value, to be ascertained as provided by law;"

and that

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

Section 80-5-57 must be read in the light of the fact so well expressed by this Court when it said:

> "*the only matter involved here is the valuation for assessment purposes of the mine on January* 4, 1944."

When the Legislature enacted that statute it must be assumed that it intended to lay down a practical formula for arriving at the value of mines.

The statute provides for the assessment of mines on the basis of a multiple of net proceeds. That basis has been recognized as a proper basis for the valuation of mines. The measure of value so specified had, as this Court stated in *Tintic Standard Mining Co. v. Utah County,* et al. 80 Utah 491, 15 P. (2d) 633, attained a definite and well understood meaning when the 1918 Constitutional Amendment was adopted.

What that "well understood meaning" was, is not in doubt.

As Mr. Justice Wolfe, in his concurring Opinion in the consolidated case of *Combined Metals Reduction Co. et al. v. State Tax Commission,* 176 P. (2d) 614, said:

> "Undoubtedly the Legislature, at the time of the passage of the Occupation Tax Law, did not envisage a war, consequent price ceilings and premium prices. It intended to impose a tax on the privilege of mining ore, and it made the measure of that tax a sum equal to 1% of the gross amount received for or 1% of the value of the metalliferous ore sold. *It may and probably did have in mind that the measure of the value of the ore would be what was received directly from the smelter in a bona fide sale be-*

cause it envisaged that as the usual situation in course of trade and did not think in terms of a consideration from another source.''

The Occupation Tax Act was enacted in 1937 so it cannot be questioned that the Legislature, when enacting the Net Proceeds Law long prior thereto, equally did not have in mind a situation such as that with which we are now confronted.

Under the meaning of ''net proceeds'' as understood until this Honorable Court spoke in this case and in the Occupation Tax cases, the measure of the value of a mine related to its economic production and the same factors applied to all mines. There was such uniformity as is reasonably possible.

Then there was taken into consideration what a mine produced, what it cost to produce it and what it realized from the production and on that basis the taxing authorities, just like a prospective investor or any one seeking with ordinary common sense to value a mine, arrived at an estimate of value.

Now for the first time and admittedly by doing something the Legislature did not contemplate, it is proposed to inject into the statutory formula for the valuation of a mine a factor which is not only not reasonably calculated to determine value, but which is directly opposed to the other factors therein.

To say that a mine may be valued by including a payment made to encourage the production of ore which

could not otherwise be economically produced is to say what is obviously opposed to common sense, to assert something on which no one would knowingly act in his own interest.

To take an illustration: Here are two mines. In the year 1943 they produced the same quantity of ore. One of them was able to produce that ore and to sell it at ceiling prices and make a profit. The other was unable to do so but on the contrary would not have been able to produce except that it was paid by Government a bonus to make possible the production of its sub-marginal ores. The total number of dollars received by the first mine from the sale of its ores just equalled the total number of dollars received by the second mine from the sale of its ores plus the premiums or bonus paid it by Government.

If Government was committed forever to continue such payments it is conceivable that someone might say that the two mines were of equal value because irrespective of source one returned to its owners as many dollars in a given year as did the other.

But as the record shows, no such situation existed. On the contrary, in a war emergency and for a limited period Government agreed to pay a bonus to encourage production of ores which could not otherwise be produced.

Would any man say that these two mines were of the same value?

We submit that no one would make such a statement and that this Court in holding that premium payments were a part of net proceeds was inadvertently led into the error of in effect holding that the two mines were of equal value.

If the statute was to be construed as including premium payments, then obviously it would violate the Constitutional requirement of uniformity since it would result in imposing *equal* taxes upon properties of *unequal* value.

We submit that no reason exists for so construing Section 80-5-57 and that in order so to construe such section this Court is obliged not only to ignore what it states has for many years been the well recognized meaning of the phrase, "net proceeds," but also to read into the statute something which obviously and as pointed out by Justice Wolfe, was not within the contemplation of the Legislature and something which destroys the very basis upon which net proceeds valuation has become accepted as a reasonable method of arriving at the value of a mine.

As the Supreme Court of the United States said in *United States v. Cooper Corporation, et al.* 312 U. S. 600, 85 L. ed 1071:

> "But it is not our function to engraft on a statute additions which we think the Legislature logically might or should have made."

Had the Legislature of Utah, when in 1919 it defined "net proceeds" contemplated that some day Government would pay a bonus to encourage or make possible the production of sub-marginal ores, it doubtless would have taken account of such fact, but had it done so it most certainly would have proided not that such premiums should be included in net proceeds, but that they should be excluded therefrom. We say this with confidence for the reason that the purpose of the Legislature was to provide a practical, rational method for valuing a mine and this it obviously could not do by including a factor evidencing a lack of value with factors going to make value.

This Honorable Court has said that it is its duty in construing and interpreting legislative acts to give effect to the intent of the Legislature and to avoid an interpretation which would lead to an impractical, unfair or unreasonable result. *Norville v. State Tax Commission,* 98 Utah 70, 97 P. (2d) 937.

This Court has likewise stated that it is required to give words used their ordinary and natural meaning and that unless the contrary appears, the terms of legislative enactments must be taken in their ordinary and usual significance, as they are generally understood among mankind. *Salt Lake Union Stock Yards v. State Tax Commission of Utah,* 93 Utah 166, 71 P. (2d) 538; *Emmertson v. State Tax Commission,* 93 Utah 219, 72 P. (2d) 467.

Appellants have pointed to nothing in the language of the statute or in the history of mine taxation in Utah which would warrant any departure from the rule so laid down by this Court.

The value of a mine, like any other property, is measured by its ability to earn a profit. The higher the costs of production, the less the ability to earn a profit. To include premium payments made to a mine to meet excess costs of production,—to make possible the mining of sub-marginal ores—which as this Court has said,

"otherwise would not be 'pay dirt'."

as though such payments represented profits derived from operation, is simply to ignore the obvious facts and to assert that the more it costs to produce ore the greater the value of the mine.

Even were it possible to ignore the fact that premiums were paid to make possible production and were no part of net proceeds as that term has been uniformly understood for many, many years, still premiums could not be included in measuring the value of a mine without violating the Constitutional requirement of uniformity, —this for the reason that, as the record shows, initial quotas were based upon production in 1941 and premiums paid under (A) quotas determined upon excess production in 1943 over production in 1941. Consequently two mines producing equal quantities of ore at identical costs in 1943 would, if premium payments were to be included, have different values depending not at all upon

what happened in 1943, but upon what had happened in 1941. It is no answer to say that uniformity requires merely that the same rule be applied to all. As this Honorable Court stated in its opinion,

> "But the different formulae which may be applied to different kinds of property must be such that they aim and tend to secure for assessment purposes a valuation fair and equitable in comparison with and commensurate with the valuation of other kinds of property."

If production in a given year, less certain statutory deductions, affords a fair measure for valuing a mine in comparison with other classes of property, then it must be because experience has demonstrated this to be a fact, but this contemplates that value be determined by what happens in a given year and not by what had happened in some other year. When it is attempted to include as a factor an event in past history, then equality is lost. We submit this is too obvious to excuse further comment.

2. The Court erred in disregarding material facts stipulated to between the parties.

The Court in its opinion said:

> "We conclude that 'the gross proceeds realized' as used in this section of the statute (Section 80-5-57) means the total or whole amount in money or other things of value that has been received or which the owner may receive or take possession of at his pleasure or to which he is entitled on demand and *which accrues to him from*

> *the sale or conversion into money or its equivalent* of ores extracted from the mine or mining claims."

We do not know why the Court referred in the alternative to sale or conversion into money or its equivalent, since the Court in its opinion, and speaking of the premium payments, says:

> "Are they moneys received from a sale of ores or metals? *These ores or metals belonged, and as far as the record shows still belong to the miner.*"

Certainly the Court does not propose to go beyond the record and as the Court says, the record does not show any sale. So far as the opinion contains any explanation of this, it appears to lie in the statement not supported by the record that,

> "But if the fact be that these ores or metals extracted therefrom were or have been sold, then under our decision in Combined Metals v. Tax Commission, No. 6869, just decided * * * these payments would constitute part of the proceeds received from a sale and properly be a part of the gross proceeds realized."

Following this the Court said:

> "It follows that whether the metals have been sold or retained by the miner, the premium payments are part of the gross proceeds realized from ores extracted from the mine and are to be included in computing the tax base or valuation of the mine for tax purposes."

The Court further says:

> "Premium payments apply only to ores shipped to the smelter or reduction works. They are made on the basis of the determined metal content of the precipitates and concentrates delivered to the smelting company."

and then in contradiction to this the Court says:

> "In other words, the premium payments are made only on and when the ores extracted from the mine are converted into concentrates or bullion where the quantity of the various metals is readily determinable and the value thereof easily computable. When the extracted ores have been converted or refined into metals in such form that they have a ready market at definite or readily determinable prices so that at any time the miner can dispose of them and receive the money therefor, they have been converted into the equivalent of money, and are to be included in the computation of gross proceeds for the purpose of fixing valuation or tax base."

and again:

> "There can be no question but that these premium payments accrue to the miner from the converting, or rendering, into a marketable condition (the equivalent of money) of ores extracted from the mine."

These statements contradict the following stipulated facts:

It was stipulated that the affidavit set out at R. p. 48, is a copy of that submitted by Petitioner, United States Smelting Refining and Mining Company, as a basis for payments to it. That statement shows that the quantity of copper, lead and zinc claimed as a basis for premium payments represented "*mine production for month stated as shown by our books and records.*"

It was stipulated that:

> "*Premium payments are received by United States Smelting Refining and Mining Company on the basis of monthly affidavits showing the production according to the company's records from 30 to 90 days before the recoverable metals are available for sale.*" (R. p. 51)

In order to hold that premium payments were received on a sale, it was necessary for the Court to find either (in disregard of the record as the court states it to be) that there had been a sale, or to find in disregard of the above stipulated facts, that the ores had been conerted or refined into metals in such form that they have a ready market at definite or readily determinable prices. *Salt Lake County v. Utah Copper Company,* 93 F. (2d) 127.

Obviously payments made 30 to 90 days before the recoverable metals are available for sale, payments based on mine production records, were neither payments made on a sale, nor payments made when the ores had been converted or refined into metals in such form that they have a ready market at definite or readily determinable

prices so that at any time the miner can dispose of them and receive the money therefor. They are not payments made when the ores have been "converted into the equivalent of money."

In the Salt Lake County v. Utah Copper Company case above referred to, it was not sought to include in net proceeds concentrates or untreated ores, but solely to include blister copper with respect to which the courts said:

> "Blister copper has an established and readily ascertainable market value and when the taxing authorities were apprised of the number of pounds produced it was a simple matter to appraise its value in money."

The record here shows that Utah Copper Company (now Kennecott Copper Corporation) is paid premiums not when its ores have been refined into blister copper but on the basis of the determined metal content of the precipitates and concentrates delivered to American Smelting and Refining Company and that the metals recovered from such precipitates and concentrates ordinarily become available for marketing approximately three months after their delivery to the smelter. R. p. 50.

United States Smelting Refining and Mining Company processes most of the ores produced at its own properties at its mill and smelter at Midvale, Utah and the resulting products are shipped out of the state for further processing to refined metal. R. p. 51.

Yet the premium payments are made to United States Smelting Refining and Mining Company on the basis of its mine production records for a stated month and from 30 to 90 days before the recoverable metals are available for sale.

In the face of these stipulated facts we submit it is beyond question that the Court erred in holding that the premium payments accrue to the miner from the converting into a marketable condition (the equivalent of money) of ores extracted from the mine.

The facts as stipulated and shown by the record were correctly stated by the Court when it said:

> "They (premium payments) were paid to the producer by the Metals Reserve Company monthly upon certificates from the smelter showing the quantity of the various metals over the assigned quota delivered to the smelter from the mine."

The Court likewise correctly stated the facts as stipulated in the record when it said:

> "Finding it necessary or advisable to increase the *production* of certain strategic metals *without disturbing the price structure* the Government set up the Metals Reserve Company to carry out a plan jointly arranged by the War Production Board and the Office of Price Administration *designed to increase the output of such metals.*"

We submit that the Court clearly erred in holding either that there was a sale by Petitioner, United States

Smelting Refining and Mining Company, or that premiums were paid to that Company when ores produced by it had been converted into the equivalent of money.

3. The Court erred in disregarding Section 81-1-1, Utah Code Annotated 1943, which defines a sale and thereby necessarily limits the meaning of the phrase,

> "the amount of money or its equivalent actually received by the owner * * * from the sale of all ores or metals during the calendar year * * *,"

as contained in Section 80-5-66, Utah Code Annotated, 1943.

With respect to companies such as Petitioner, Combined Metals Reduction Company, which sold its ores, the above section is, we submit, controlling. Moreover, as discussed in Petition for Rehearing filed by these Petitioners with others in the Occupation Tax cases, (Combined Metals Reduction Company and others v. State Tax Commission, No. 6869 to 6879 inclusive) the record shows that premium payments were received by some companies from 30 to 90 days before the recoverable metals were available for sale and in other cases 30 days or more after the ores had been sold, and consequently that not all premium payments could be related to ores produced in the year in which such premium payments were received. This in itself would negative the possibility of including such premium payments in computing net proceeds.

4. The Court erred in ignoring Section 80-3-1, defining "value."

This section defines "value" as:

> " 'Value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor."

Nowhere in its opinion does the Court refer to this statute, which is of first importance in a case in which, as this Honorable Court has said,

> "The only matter involved is the valuation for assessment purposes of the mine on January 4, 1944."

We respectfully submit that had the Court considered this statute it could not have held as it did that the value of a mine could be arrived at by including something paid to make possible the production of ores which would not otherwise have been "pay dirt."

It could not seriously be urged that property would be taken in payment of a just debt from a solvent debtor at a value arrived at by including moneys paid by government for a short time in a war emergency to secure the production of critically needed metals and which otherwise could not have been profitably produced.

5. The Court erred in disregarding the stipulated statement by Metals Reserve Company that,

> "Premium payments made by Metals Reserve Company *are not payments made by that company or received by the Mining Company for the sale or conversion into money or its equivalent of any ores* * * *."

> "To the extent that any portion of such premiums are taken by a state on account of a property tax the purpose of Metals Reserve Company in paying the same would be defeated * * *."

6. The Court erred in failing to construe the taxing statutes strictly against the defendant and appellant in each of the cases if doubt existed as to the intention of the Legislature.

This has been commented upon in Petition filed by Petitioners here with others in the Occupation Tax cases. We submit there can be no question as to the rule and further that even were the rule other than it is and were taxing statutes ordinarily as between the taxing body and the taxpayer to be construed in favor of the taxing body, they would never be so construed when there was a conflict in interest between the taxing body (Tooele County) and the United States of America.

In holding that premiums should be included in the tax base, the Court ignores the fact noted above from the statement approved by Metals Reserve Company, the agency speaking for the United States, that,

> "To the extent that any portion of such premiums are taken by a state on account of a property tax, the purpose of Metals Reserve Company in paying the same would be defeated."

IN CONCLUSION it is respectfully submitted that the Court in its Opinion clearly erred because:

1. Premium payments made by government to encourage and make possible the production of sub-marginal ores which otherwise would not be "pay dirt" could not properly be included as part of net proceeds for the purpose of valuing a mine.

2. The inclusion of such premiums would clearly violate the Constitutional requirement as to uniformity of assessment and taxation.

3. The inclusion of such premiums was not within the contemplation of the Legislature when it enacted the net proceeds method of mine valuation.

4. In Case No. 6931 the Court having determined as a fact that there was no sale shown by the record and the parties having stipulated that premiums were paid on the basis of mine production records and from 30 to 90 days before the recoverable metals are available for sale, the Court could not find either that premiums were paid upon a sale or were paid when the ores had been converted into the equivalent of money.

5. The Court may not disregard Section 81-1-1, Utah Code Annotated 1943.

6. The Court may not disregard Section 80-3-1, Utah Code Annotated 1943.

7. The Court erred in failing to construe the taxing statutes strictly against the defendant and appellant

in each of the present cases if doubt existed as to the intention of the Legislature.

Respectfully submitted,

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CERTIFICATE

We, Herbert Van Dam, A. M. Cheney, C. W. Wilkins and G. A. Marr, Attorneys for the Respondents in the above-entitled causes, do hereby certify that we have carefully considered the opinion of the Court therein and that in our opinion there is good reason to believe that the judgments herein objected to are erroneous and that the causes should be re-examined.