1947

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

Utah Supreme Court

Herbert Van Dam; Attorney for Respondent; Cheney, Jensen, Marr & Wilkins; Attorney for Respondent.
Grover A. Giles; Attorney General of Utah; Zar E. Hayes; Assistant Attorney General; Arthur H. Nielsen; Special Assistant Attorney General; Phares Johnson; Tooele County Attorney.

INDEX

CASES CITED:

STATUTES:

MISCELLANEOUS:

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

ANSWER TO PETITION FOR REHEARING

Respondents in the above cases having obtained an Order from the Court authorizing them to file a consolidated petition for rehearing, appellants have like-

wise consolidated the cases for the purpose of answering such a petition.

We have carefully read the several arguments relied on by counsel in seeking to obtain a rehearing of the instant cases, but find nothing therein which was not before the court and considered by it in rendering its decision herein. The four grounds set forth in Respondents' brief re-affirm the position taken in previous briefs filed herein in very similar language. However, the court has accepted Appellants' theory of the case as being the proper one. At the risk of duplicating many of our arguments heretofore submitted to the court, we shall proceed to answer Respondents' points in the order set forth in their brief.

However, we deem it necessary to comment on the "Re-statement of Facts" set forth in the petition for rehearing before discussing the main issues. On page 4 of petitioners' brief, appears the following statement: "The (premium payments) 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." This is a conclusion of the petitioners—not a stipulated fact. Nor did this court by its opinion rendered herein reach this conclusion from the stipulated facts.

On the contrary, appellants have at all times maintained that premium payments were related to the sale of the ores in question and were made as a part of, and

in consideration of, such sale. The premium payments were received by the various mining companies as partial consideration for the ores which they produced. We, of course, admit that the actual time of payment by Metals Reserve Company did not coincide with the time of the payment by the smelting companies on their smelting contracts, but we opine that petitioners would not contend that the time of payment was the factor which determined whether premium payments were or were not related to the sale or formed a part of the consideration for the sale or conversion of the ores into money. Such an argument would be ridiculous in the light of modern time financing where payments for the purchase of goods, wares and merchandise are often postponed and staggered over a long period of time.

As will hereafter appear the entire plan (including the fixing of ceiling prices and the payment of premiums) was one of "differential pricing for the purpose of increasing non-ferrous metals output." See Amici Curiae brief, Appendix p. 43.

ARGUMENT

I.

THE CONSTRUCTION BY THE COURT OF SECTION 80-5-57 SO AS TO INCLUDE "PREMIUM PAYMENTS" AS A PART OF THE "GROSS PROCEEDS" DOES NOT RENDER SUCH SECTION UNCONSTITUTIONAL AS BEING UNREASONABLE OR INEQUITABLE.

In this connection petitioners argue that "to include payments made . . . in gross proceeds is necessarily to hold that the greater the costs of production the more valuable a mine." This same position was taken by counsel in their brief heretofore filed, and was fully answered by the supplemental brief which appellants filed in this case. Petitioners apparently failed to differentiate between "gross proceeds" and "net proceeds." As always, the greater the cost of production, the smaller will be the *net* proceeds from the mining operation. The fact that one mining company receives greater *gross proceeds* does not in any wise indicate that its *net proceeds* will also be greater. And since the valuation of a mine is based upon its net proceeds in any one calender year, there can be no justification for the argument that the greater the costs of production the more valuable a mine.

We are apparently all agreed that when the Legislature enacted the "Net Proceeds" statute, it intended to lay down a practical formula for arriving at the value of a mine or mining claim. The formula is not only practical, it is also relatively simple. It requires to be included on the one hand all monies received by the mining company—the gross realized—"from the product of the mine," while permitting the mining company to deduct from such gross proceeds certain "costs and expenses of obtaining such proceeds and converting the same into money." Mercur Gold Mining & Milling Company v. Spry, 16 Utah 22, 52 P. 382.

We can think of numerous illustrations where the application of such a formula would in a given year impose a heavier tax upon a mining company which might otherwise have less ore reserves. However, the valuation of a mine is not determined by its ore reserves nor by the value and extent of its improvements, except as these factors may be reflected in the annual profit derived from the operation of the mine. Should a mining company (for the purpose of impressing its stockholders or for some other reason personal to itself) decide to drain its ore reserves as much as possible in a given year without at the same time carrying on necessary development work, and thereby show a large profit from its mining operation for such year, its valuation for taxation purposes may be considerably higher than a neighboring mine that may have carried out the policy of conserving its ore resources to the end that it produced little ore and showed only a small profit. As a matter of fact, a mining company which failed to operate its mine at all during a particular calendar year might have no *net proceeds* for valuation purposes. Under such circumstances its mine and mining claims would be assessed at $5.00 per acre although the value of such mining claims and mine would far exceed that.

We feel that what has been said by this court on this subject in its opinion heretofore rendered in these cases is well reasoned and is supported by ample authority. This court expressed itself as follows:

> "Because one mine, whether because of more efficient management, better mining equipment,

> stoping up for ores as distinguished from hoisting from low levels, shorter hauls, richer ores, or better smelter contract, has larger net proceeds per ton of ore mined than has another, mining the same kinds of metals, does not make the assessments discriminatory nor does it result in lack of uniformity. It does result in assessing one mine at a greater value than the other because it has a greater net return, a greater profit, more dividends, and that is an important item in the determination of value of mining property."

The argument is again made that because the Legislature could not have known when the statute defining "net proceeds" was passed that some day the Federal Government would regulate and control prices of metals, including the payment of "premiums," it must now be concluded that such premiums are not a part of the proceeds realized "from the product of the mine." As contended by counsel it is the duty of this court 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." The court in its opinion in the present cases determined that the interpretation given to the statute by the Tax Commission "tends to equalize and render uniform the tax base and assessment;" that the interpretation urged by the mining companies would lead to an impractical, unfair or unreasonable result. We desire again, at the risk of being repititious to quote

the definition of "net proceeds" which has been accepted in this State since 1898 when the case of Mercur Gold Mining and Milling Company v. Spry, supra, was decided:

> "By the term 'net annual proceeds of the mine' is meant what is annually realized from the product of the mine, over and above all the costs and expenses of obtaining such proceeds and converting the same into money."

While the statute has been amended from time to time since that date relative to the deductions permitted in arriving at "net proceeds" the above definition of "proceeds" as being "what is annually realized from the product of the mine" remains the true criterion. With such a definition having been made by the court, the Legislature in 1919 did not need to envisage any "premium payment" program. It did contemplate that the proceeds realized or derived from the ores produced by a mining company, as distinguished from any proceeds which it might receive from developing water, operating a store or boarding house, would be considered as part of the "gross proceeds" and thence into "net proceeds" from which the valuation of such mine or mining claim would be calculated. The legislature used ordinary, common words to indicate its intent to include all such proceeds as are received from the ore output. We do not know how more comprehensive, all-inclusive language could have been used. It was not necessary, as contended by the mining companies, to state specifi-

cally: "including the Federal Government in the nature of a subsidy or bonus for operations." (See Brief of Amici Curiae, page 34.)

II.

THE COURT DID NOT DISREGARD MATERIAL FACTS STIPULATED TO BETWEEN THE PARTIES.

It is true that the parties stipulated that in some instances premium payments "are made in advance of a sale of ores or the metals recovered from ores; in other instances such payments are made after sale of the ores." (Schedule "A," p. 23). However, it might just as well have been stipulated that the purchase price of the ores was received in two payments, since that actually was the way it was done. In no instance were premium payments made until the ores had been delivered to the smelter for smelting or refining, thereby, as stated in the court's opinion, placing the 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." As such the metals have been converted into the equivalent of money as defined in the case of Salt Lake County v. Utah Copper, 93 F. (2d) 127.

Take the situation of the United States Smelting Refining and Mining Company: A copy of an affidavit filed by that company appears on page 21 of Schedule "A." In that affidavit Mr. F. S. Mulock as Vice President and

General Manager of the company states that the company has "produced and delivered to itself and American Smelting and Refining Company at their Custom Milling-Lead & Copper plants known as Midvale Plant, Garfield Plant, respectively, . . . during the month of October, 1943, the quantities of copper, lead, and zinc hereinafter listed . . . That its monthly production quota, as hereinafter stated, has been filled and the amount of material specified therein has been produced *and delivered for sale* during the month above mentioned."

The instructions given by Metals Reserve Company to the smelting companies in connection with the latter acting as agent for the purpose of making premium payments are enlightening on this matter. As set forth at pages 17A and 17B of Schedule "A," these instructions read in part as follows:

> "During any given month you will settle with the producers in accordance with your contracts with them, and pursuant to your usual practice. Following the end of each month, each producer will furnish you a sworn affidavit (in the form of Exhibit "A" hereto attached) showing, among other things, the amount of each metal (in excess of his quota for that metal) contained in the material delivered by him to your works during the month in question for which (in accordance with your settlement sheets) he has been paid the market price and on which he is eligible for a premium from MRC.
>
> "MRC will make funds available promptly to enable you to make the premium payments to the respective producers, following receipt from

you monthly by the Traffic Manager of MRC of (1) a statement setting out the name of each producer *from whom excess production has been bought* during the month covered by the statement, the *total amount of metals contained in material received* during the month *for which payment has been made or will be made* to such producer, and the amount of such metals which, being excess production, is eligible for a premium, and (2) the producers' affidavits . . .

"Upon receipt of such funds you will pay to each producer, on behalf of MRC, as a premium on his metals in excess of quota, a sum equal to the difference between the market price (ceiling price) for the respective metals (which will have theretofore been paid to him by you under his contract) and the equivalent of seventeen cents (17c) per pound Connecticut Valley for copper, nine and one-fourth cents (9¼c) per pound New York for lead, and eleven cents (11c) per pound East St. Louis for zinc." (Italics added.)

As set forth in the table contained on page 31 of the same schedule, in the case of each mining company, the gross proceeds reported were based on *smelter returns* except in the case of Kennecott Copper Corporation, which reports its sales of metal in the open market. As indicated above, the premium payments were made on a basis of such smelter returns also. The court therefore properly concluded that such payments were a part of the gross proceeds received from the sale or conversion into money or its equivalent of the ores produced by the respective mining companies.

An additional factor, not heretofore presented to the court, which in our opinion sustains the decision rendered, is contained in the Senate Sub-Committee Preliminary Report, pursuant to Senate Resolution 66. "Rather full extracts are reprinted for the benefit of the court" in the appendix to the brief of Amici Curiae. In analyzing the "evolution of the plan" the report states that considerable price inflation resulted in World War I. "In this war, such price inflation was avoided by *differential pricing techniques.*" The report further states that the premium price plan was "one of the most successful of these techniques". The "differential pricing" was attained by fixing quotas so that one mining company would be required to produce more ore at a given price than another mining company. As one official stated " 'quota adjustments under the Premium Price Plan constitute a flexible instrument for adjustment of mine revenues so as to enable continuous maximum production in the face of changing circumstances which occasion changes in cost, unavoidable decline in grade of ore, wage increases, fluctuations in operations owing to changes in the manpower situation and the like'." (See Appendix, page 45).

As the plan developed, property was generally assigned a quota less than 100% of its 1941 rate of production "and the work of the Quota Committee became almost solely the revision of quotas to meet changing conditions". In other words, the nature of the problem involved became the "calculation of what might be produced with the given labor supply, what

that production would cost and what quotas would yield sufficient revenue to cover the cost and provide an adequate margin". As we have heretofore pointed out to the Court even the amount of royalties paid to leasers by the mining companies in certain instances included premium payments within the basis of settlement. (See, Maximum Price Regulation 356, Schedule "B", pp. 39-40.)

The foregoing statements taken from the Senate report indicate, as do the provisions of the pertinent statutes, regulations, and proclamations relative to the "premium price plan" that premium payments were an integral part of the price structure, and as such should be included as a part of the gross amount received for the ores produced by the several mining companies.

III. and IV.

THE PROVISIONS OF SECTION 81-1-1 AND 80-3-1, UTAH CODE ANNOTATED 1943 ARE NOT INCONSISTENT WITH THE COURT'S DECISION IN THIS MATTER.

Petitioners claim that this court disregarded the provisions of Section 81-1-1 with respect to the definition of a "sale of goods" as being "an agreement whereby the seller transfers the property in question to the buyer for a consideration called the price" in construing the net proceeds statute so as to include premium payments as a part of the gross amount received from the sale or conversion into money or its equivalent of the

ores produced. As a matter of fact, however, this Section has no application to the issues presented in the cases before us. There is no requirement in the statute that all of the money received for the goods be paid at one time or that it be paid entirely by one person.

Respondents here maintain the fact that because premium payments were made at a different time than the amounts otherwise received is conclusive that such premium payments were not a part of the gross proceeds. Such, of course, is not the law.

As defined in the case of Watson v. Odell, 58 Utah 276, 198 Pac. 772, a "sale is ordinarily understood to mean a transfer of property for money". But, again, nothing is indicated that the entire consideration for the transfer of the property must come from the transferee or that all of such consideration must be paid at the time of the transfer.

Section 80-3-1 defines "value" as being "the amount at which the property would be taken in payment of a just debt due from a solvent debtor". Mr. Justice Wolfe, in his concurring opinion in the Occupation Tax cases, adequately disposes of petitioners' argument herein as follows:

> "Value as meant by the legislature in Sec. 80-5-66 is no longer extant. The only remaining basis is the money received from the sale and certainly the money received from the sale is the total price which the sale yielded regardless

> of whether part of it would ultimately or immediately be paid by the Metals Reserve Company either directly or indirectly."

The definition of value as set forth in the statute was not ignored by the court, but because of its inapplicability to the circumstances in the present cases it was not discussed in the main opinion.

V.

THE COURT DID NOT ERR IN DISREGARDING THE STATEMENT OF THE PRESIDENT OF METALS RESERVE COMPANY.

As an indication of the weakness of their position, in seeking a re-hearing, respondents finally attempt to impose upon this court the opinion of Charles B. Henderson, chairman of Metals Reserve Company, to the effect 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." On page 25 of Schedule "A" appears the following stipulation:

> "The Mining Companies caused to be prepared and submitted to Metals Reserve Company a memorandum respecting the inclusion of premium payments in 'net proceeds' and in 'mine occupation tax'. After examining such memorandum a letter was written by the President of Metals Reserve Company to Mr. F. S. Mulock. Such memorandum and letter were, upon proper

> identification, received in evidence by the Commission *(but the Commission shall not be bound by the facts, inferences or conclusions therein stated)* . . . ." (Italics added.)

We wonder why counsel did not call the court's attention to the opinion of the Attorney General of Utah, also contained in Schedule "A" in which the conclusion is reached that the premium payments made by Metals Reserve Company are "payments made by that Company or received by the mining company for the sale or conversion into money or its equivalent of any order". Certainly the latter opinion is more persuasive of an interpretation of our own taxing statutes.

However, Mr. Henderson himself stated that Metals Reserve Company "has made no study of the provisions of the Utah laws relating to taxation of mines, and is not in a position to express any opinion concerning statements in the memorandum on that subject". He thereby appeared quite willing to let our Supreme Court pass on the interpretation and construction to be given to our own local taxing statutes. We wish that the same could be said for counsel for the various mining companies who have attempted to bind this court by the decisions of the trial courts, both State and Federal, all of which decisions have been reversed on appeal.

Having fully answered the arguments contained in Respondents' brief on petition for rehearing, we now turn to a discussion of the arguments of counsel in the brief of Amici Curiae filed in these cases as well as

the "occupation tax cases". As outlined in that brief, the issues presented for discussion are three-fold:

(a) Whether the premium payments were a part of the "gross proceeds" realized from the sale or conversion into money or its equivalent of the ores mined by the various mining companies.

(b) Whether the premium payments constitute a part of the "gross amount received for or the gross value of metalliferous ores sold".

(c) Whether the premium payments constitute "gross income" under the corporate franchise tax law.

Of course only the first two of these issues are presented in the cases on which a rehearing is being sought by the various mining companies. The question of whether the premium payments constitute income has never been raised insofar as we have been able to ascertain with respect to any of the parties involved in the cases pending before the Supreme Court.

In considering the nature of the premium payments, we concur with counsel that the Federal Government fixed prices generally and specifically with respect to copper, lead and zinc. We wish to add, however, that the Government also fixed the amount of "premium payments" which would be made for each pound of copper produced in excess of quota—quotas also being fixed by the Federal Government—so that we can say without equivocation that the entire sums received by

the mining companies from their ore were received by virtue and under specific regulation of the Federal Government.

On page 7 of their brief, Amici Curiae refer to the Senate Sub-Committee preliminary report which is printed in part in the appendix to the brief commencing page 41. Counsel term the "premium payment plan" as "one of the most mal-administered plans put forth by the Government". This, notwithstanding that the mining companies participated wholeheartedly in the program and were recipients of considerable sums of money from the Federal Government pursuant to such plan.

On page 31 of the Stipulation of Facts referred to as Schedule "A" will be found the various amounts received by the mining companies during the calendar year 1943 from Metals Reserve Company. The amount varies from $1,227.85 received by Niagara Mining Company to $3,781,421.55 received by Kennecott Copper Corporation. The total amount paid by Metals Reserve Company to the several Utah mining companies during that year is $8,212,355.94. There has been no contention made that any mining company was compelled to take part in the premium payment program or to participate in its benefits. The fact that every mining company did so is an indication that the plan was well founded and brought considerable benefits to the mining industry.

From further remarks contained on page 7 of their brief, counsel would have us believe that sales were

actually consummated without reference to premium payments. We again refer to Schedule "A" of the Stipulation, page 23, to the effect that "in certain instances premium payments are made in advance of a sale of ores or the metals recovered from ores; in other instances such payments are made after sale of the ores". This is not a stipulation that the premium payments have no relationship to the sale or the purchase price. As heretofore indicated and as shown by the *affidavit* of the producer filed for the purpose of qualifying for premium payments, such producer states that the quantities of ore listed "have been produced and delivered for sale during the month" mentioned in the affidavit (See Schedule "A," pages 20, 21 and 22).

As the Schedule recites on page 16:

> "17. Payment of premiums is made by Metals Reserve Company upon the basis of an affidavit of the producer and a statement by Metals Reserve Company's designated agent transmitting such affidavit and in support of the producer's request for premium payments. Such affidavit and statement are required to be made on forms prescribed by Metals Reserve Company and are as follows:"

It is further argued that the case of Park Utah Mining Company illustrates "that the subsidy payments constitute no part of the sum realized from the sale of ore or its conversion into money or its equivalent." The facts with respect to that mining company are not before this court. We are therefore in no position to

contradict counsel as to those matters. It however appears from the facts related that the Park Utah Mining Company received certain B and C premiums and in consideration of receiving such premiums agreed to a certain expansion program in its mine. But, the fact remains that all premiums were paid at a certain *amount per pound* for the metal content of the ores produced, and the additional expenses incurred in fulfilling its agreement with the Federal Government were deducted by the mining company before arriving at its net proceeds. Certainly, if the Metals Reserve Company was willing to increase the purchase price of the ore extracted by the Park Utah mine, such is no concern of the parties involved in this litigation. Nor do we see how the Park Utah, if it received a greater amount for its ores than some other mining company, can complain merely because such additional sum is included in the gross proceeds. The fact that it agreed to and did incur additional expenses for development work would reduce its "net proceeds" from which its valuation is determined, since cost and expenses of development work are deducted from gross proceeds from which a mine's valuation is determined.

Again, the case of the Kennecott Copper Corporation is not before this court for determination. However, Amici Curiae argue that as to such mining company subsidy payments "were made not only before a purchaser had appeared for the copper produced but even before there had been brought into existence a commercial product that was capable of sale".

We recognize that the premium payments were made before Kennecott Copper Corporation disposed of its metals, but before premium payments were made to Kennecott, its metals had reached the same stage of processing and refining as in the case of ores extracted by any other mining company and therefore came within the purview of the statute as interpreted in Salt Lake County v. Utah Copper Corporation, supra. The fact that premium payments were actually made before the metals were disposed of is not indicative that such payments were not related to the sale of such metals or their value. Opposing counsel are certainly aware of the fact in our present economic structure that there are numerous instances where "deposits," "pre-payments" or "advances" are made prior to the sale of a commodity or even its actual production. If the mining company is paid for the commodity and in consideration of its sale, as appears from the affidavits filed by the respective mining companies, no complaint can be injected into the picture that the money was actually received either before or after the sale was consummated.

It is finally concluded at page 10 of amici curiae's brief that the premium price plan was "closely tied in to price fixing during the early days of the plan, but later evolved to a condition when development and exploration work which might not result in any production was a basis for the amounts paid". We recognize that the forepart of this conclusion is correct, but insist that the record does not disclose any change or

evolution by which the theory of premium payments was withdrawn from the realm of price fixing. Notwithstanding the affidavits filed by the respective mining companies recited that the ore containing certain metal "had been produced and delivered for sale" counsel try to argue that such premium payments had no relationship to a sale or a disposal treated as a sale.

Nor did the court err in determining that the Federal Government had made no attempt to restrict the State of Utah from including the premium payments in the amounts received by the mining companies from their ores. Opposing counsel take the position that we are confronted here with an interpretation of Federal statutes and that therefore the decision of Judge Johnson on October 30th, 1944, would be binding upon this court. Those cases referred to on pages 13 and 14 of counsel's brief were finally appealed to the Supreme Court of the United States where they were dismissed for lack of jurisdiction on the part of the Federal court even to consider the merits of the controversy. And in discussing the nature of the problem involved in those cases, the Supreme Court made the following comment:

> "It is to be noted that the cases under consideration illustrate the disadvantage of deducing from equivocal language a state's consent to suit in the federal courts *on causes of action arising under state tax statutes. The disadvantage referred to is that, if the merits were to be passed upon, the initial interpretation of the*

> *meaning and application of a state statute would have to be made by a federal court without a previous authoritative interpretation of the statute by the highest court of the state.* See Spector Motor Co. v. McLaughlin, 323 U. S. 101, 103-105, 89 L. ed. 101-103, 65 S. Ct. 152." (Italics added.)

See, Kennecott Copper Corporation v. State Tax Commission, 327 U. S. 573, 66 S. Ct. 745, 90 L. ed. 862.

Again, reference is made by opposing counsel to the decision of Judge Johnson involving the application of the net proceeds tax as specifically applying to the Park Utah Consolidated Mining Company (hereinbefore referred to), the Kennecott Copper Corporation and others. So that counsel conclude "as a matter of law this court is bound by the Federal Government's construction of its own statutes and is not free to substitute its own opinion as to their construction." Those cases referred to have now been decided by the Circuit Court of Appeals which followed the decision of this court on the theory that the issue involved was one of construction of local statutes rather than of Federal statutes. We quote from the opinion of the Circuit Court of Appeals as follows:

> "One ground of the motions for directed verdicts for plaintiffs was that in the taxation of the mines and mining claims, the inclusion of subsidy payments in the gross proceeds and thence in the net proceeds, as a basis for such taxation, was not authorized by the law of Utah. That question consumes much space in the briefs and it was ably presented on oral argument.

> *The Supreme Court of Utah quite recently considered the question and held without qualification that in the taxation of mines and mining claims in that state, premium or subsidy payments of this kind should be added to twice the amount of the proceeds received from the sale of the ores for the preceding calendar year as the base for such taxation.* United States Smelting, Refining and Mining Co. v. Haynes, — Utah —, 176 Pac. (2d) 622. At the same time, the court reached a like conclusion in a case involving a closely similar question. Combined Metals Reduction Co. v. State Tax Commission, — Utah —, 176 Pac. (2d) 614. *The question before us is essentially one of local law and therefore these decisions of the supreme court of the state are controlling."* (Italics added.)

In the face of these decisions from the Circuit Court of Appeals and the Supreme Court of the United States, we marvel that anyone should suggest either that the question involved is primarily one of construction of Federal statutes and Regulations or that the decision of the Federal District court is in any wise persuasive that this court has erred in its construction of our local taxing statutes.

Construction of the Utah Statutes:

With the authorities and statements quoted from various cases by Amici Curiae contained in their brief at pages 16-25, we have no complaint. The law is well settled on the subject of statutory construction. However the argument referred to on page 27 to the effect

that Montana has determined the point here involved adversely to what our court has decided it, is not persuasive that our court was wrong but that the Montana court in the case of Klies v. Linnane, 156 Pac. (2d) 183 was ill advised and therefore determined the question improperly. Certainly a cursory reading of the opinion in that case would indicate that the record and files of the various Federal Agencies were not before the court; that it was not aware that the Office of Price Administration had passed a specific regulation excluding premium payments from the effect of the Price Control Act so that their payment would not constitute a violation of the regulation.

Nor does the fact that Nevada and Idaho are awaiting a determination of these cases before proceeding to enforce their local taxing statutes have any weight either for or against the contention taken by counsel in this case. It is true that both Judge Bronson and Judge Henderson of the District Court decided these cases adversely to the appellants, but in every case before the Supreme Court the appellant is the one who lost the case in the court below. The opinions of those two judges are in the record on appeal. There should be little comfort to opposing counsel in attempting to persuade the Supreme Court that it is in error because it did not follow the District Court in these cases.

Errors claimed in the Present Opinions:

Counsel take exception to the statement contained in the court's opinion that "metals are not paid for

under settlement contracts unless such metals are sold". We reaffirm that such a statement is correct in the light of the record in these cases; that all ores on which premium payments were applied for by the producer actually were "produced and delivered for sale"; and that no ore which remained on the dump or in the mine was considered as a basis for payment of premiums. It is, therefore, not true that in some cases the ores were never sold on which premium payments were made. The Stipulation contained in Schedule "A" illustrates this point when it states that in certain instances premium payments were made in advance of the sale and in other instances subsequent to the sale. Premium payments were a part of the price structure surrounding the production and sale of the ores in question.

Nor do we agree, as contended by counsel on page 34 of their brief that the effect of the present decision is to rewrite the occupation tax statute. The construction given to the taxing statutes by this court in its respective opinions gives the only logical and reasonable construction that can be made.

By way of conclusion, Amici Curiae desire this court to give an opportunity for "full re-argument" of the cases. Not only have we had the cases before this court, we have also had two sets of cases before the Federal courts. While some counsel have been involved in the cases before this court, other counsel have been involved in the cases before the Federal courts. The mining companies had a full opportunity to consolidate

all of the cases and appear in the State courts. Some of the companies refused to do this and commenced their actions in the Federal District court. They have had full opportunity to be heard both there and in the Circuit Court of Appeals (and in two cases in the Supreme Court of the United States). The balance of the mining companies have had full opportunity to be heard in the State District court and in the Supreme Court. We see no reason for granting any re-argument of these cases. There is nothing in the court's opinion which does not show a careful and full consideration of all of the issues involved and a determination in accordance with the more logical interpretation of the taxing statutes.

Apparently Amici Curiae feel "that the basic error into which the court's opinions have fallen is to fail to recognize that these cases turn fundamentally on the construction of a Federal statute, and not on the construction of a press release." We submit that the Federal Court has determined that the issue involved here is one of construction of a local taxing statute. That alone should be sufficient on which to deny the petitions for rehearing. The court's opinion is based upon the *stipulated facts*. True, some of those facts appear from press releases but opposing counsel stipulated that the press releases contained the facts and therefore should have no quarrel with this court in accepting such statements as the fact. The portions of the Stipulation of Facts marked Schedule "A" which are not admitted to be facts by the respective parties are:

1. The opinion of the Attorney General holding the premium payments to be properly included as a part of the proceeds from the various ores extracted (see pages 34-39);

2. The memorandum submitted by the mining companies to Charles B. Henderson, President of Metals Reserve Company and his reply in response thereto (see pages 25-30).

We have not attempted to persuade this court that its opinion was correct because it followed the theory of the Attorney General of the State of Utah who by law is required to interpret the statutes for the benefit of the Executive Branch of the Government; but certainly he should be in a much better position to interpret those statutes than Charles B. Henderson of Metals Reserve Company on whose opinion Amici Curiae heavily rely.

Too, in enumerating the various agencies and courts which had passed upon the question, opposing counsel also failed to mention that our State Tax Commission, after full hearing and argument of all counsel for the mining companies as well as counsel for the State of Utah, determined the issues adversely to the mining companies and assessed the taxes which are now upheld by this court's decisions.

CONCLUSION

From what has been stated herein, as well as in previous briefs filed by appellants, we respectfully sub-

mit that the decisions of this court should be sustained and a re-hearing of the several cases denied. The various causes have been argued thoroughly before each of the several tribunals in which they have been presented. Numerous briefs have been filed and lengthy oral arguments presented not only in this court but in other courts. There has been no matter presented in the petitions for re-hearing which was not thoroughly considered by the court and disposed of by the opinions rendered. No purpose could be served in granting a re-hearing in these cases, except to give the respondents another opportunity to argue the same points and matters heretofore presented.

We earnestly request the Supreme Court to deny the petitions for re-hearing.

Respectfully submitted,

GROVER A. GILES,
Attorney General of Utah

ZAR E. HAYES,
Assistant Attorney General

ARTHUR H. NIELSEN,
Special Assistant Attorney General

PHARES JOHNSON,
Tooele County Attorney
Attorneys for Appellants.