1947

United States Smelting Refining and Mining Company v. Phares Haynes : Brief of Respondent

Utah Supreme Court

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Cheney, Jensen, Marr & Wilkins; Attorney for Respondent.
Unknown.

UTAH SUPREME COURT

BRIEF

DOCKET NO. 6931R

INDEX

In the Supreme Court
of the State of Utah

UNITED STATES SMELTING, REFINING AND MINING COMPANY, a corporation,

Plaintiff and Respondent,

vs.

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

Defendant and Appellant.

Case No. 6931

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Appellant's "Statement of Facts" (Brief pages 1-8) contains certain inaccurate statements and omits mention of material facts. We therefore make the following further statement:

At Page 5, Appellant states that with regard to excess production from "custom ores" various smelting companies were designated "as agents for Metals Reserve Company *to receive the ore* and transmit to it the necessary data required for the making of premium payments".

In fact, smelting companies were not designated as agents to receive the ore, but on the contrary continued to purchase ores in their customary manner and were designated as agents for Metals Reserve Company only to obtain and transmit to it the necessary data required for the making of premium payments. (R. pp. 39, 41, 43, 44)

On the same page Appellant states that "payments of 5 cents per pound of over-quota copper were made by Metals Reserve Company" and on page 6 states that appellant, in addition to the sum received from the purchaser of its ores also "received on account of said ores premium payments under the Metals Reserve Company premium payment plan * * *". In fact, payments from Metals Reserve Company were not made for ores, but "to aid in stimulating the domestic production of copper, lead and zinc". (R. pp. 34 and 43).

Among the facts stipulated, but omitted from "Appellant's Statement", are the following:

1. None of the ore or metals extracted by Respondent from its Hidden Treasure Mine (the property involved in this case) during the calendar year 1943, was sold by respondent to the United States Government or

to Metals Reserve Company or to any other agency of the United States Government. (R. p. 22).

2. Subsidies paid by Metals Reserve Company were not paid upon all ore produced by respondent or other mining companies, but only upon production in excess of established quotas. (R. pp. 37 & 39, 41-45).

3. Payments by Metals Reserve Company vary, certain mining companies receiving additional premiums where it appears that the initial premiums offered for production in excess of established quotas were not sufficient to permit of increased production of copper, lead or zinc, and that substantial expenditures were required for greatly increased development work and rehabilitation of underground workings or additional facilities. (R. p. 37).

4. Metals Reserve Company does not purchase the ores on account of the *production* of which it pays premiums to the producer; they are not taken into account in tariffs filed by railways and approved by the Interstate Commerce Commission or Public Service Commission fixing freight rates on ores or concentrates and predicated primarily on metal value contents; smelting companies may not participate in such premium payments even though their normal charges be based upon a sliding scale dependent upon the value of the metal contents of ores. (R. p. 50).

5. In certain instances subsidy payments were made by Metals Reserve Company to the producer in advance of the sale of ores or metals recovered from the ores,

while in other instances such payments were made after the sale of the ores. In no instance did it appear that subsidy payments were or could have been made at the time of the sale of ores by the producer to the smelters or other purchasers. (R. pp. 50, 51).

Premium payments are received by respondent on the basis of monthly affidavits, showing the production according to respondent's records from each mine owned by respondent and are received from 30 to 90 days before the recoverable metals are available for sale. (R. p. 51).

6. The smelting companies, as agents of Metals Reserve Company, were required to furnish monthly to the Traffic Manager of Metals Reserve Company "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 * * *". (R. p. 44)

7. Where a producer ships part of its ores to one smelter and part to another, the producer is required to designate through which smelter its premium payments are to be made and all premium payments covering ores of such producer are made through the smelter so designated, notwithstanding that part of the ores on account of the production of which premiums are paid, were shipped or sold to another smelter. (R. p. 51)

8. On February 9, 1942 War Production Board and Office of Price Administration issued a joint statement setting forth the rules and regulations governing payment of premium price for over-quota production of copper, lead and zinc. In said statement it was said that:

> "The premium Price Plan is one of the steps taken to increase production;"

that

> "premium payments will be made for all over-quota production;"

that

> "a joint committee from the War Production Board and the Office of Price Administration shall fix initial quotas;"

that

> "quotas shall be established for particular mines or groups of mines * * * and shall be expressed in terms of a property's monthly rate of production. A property's production shall be included in determining its quota and over-quota production regardless of whether that product is converted into metals, metal oxides or other products;"

that

> "there shall be five distinct classes of quotas,"

which are then set out and all of which were *based upon production during 1941:*

A property which either had no production or produced less than 200 tons of any metal was to be assigned a zero quota (with certain minor exception); a property which produced in 1941 between 200 and 600 tons of any metal was assigned an intermediate quota; a property which in 1941 produced more than 600 tons of any metal was assigned a quota for such metal equal to the property's 1941 rate of production of that metal and finally provision was made for the assignment of special quotas of less than 100% of a property's 1941 production and of quotas in excess of 100% of such production. (R. pp. 35-6)

9. The President of Metals Reserve Company, in a letter to F. S. Mulock, General Manager of respondent, and referring to a memorandum submitted to Metals Reserve Company by respondent and other mining companies, stated that:

> "The statements in the memorandum with respect to premium payments by Metals Reserve Company, beginning with the final paragraph on page 2 and continuing to the end of the memordandum *are in our opinion factually* true and correct."

The statements contained in the memorandum and so referred to as being factually true and correct are as follows:

> "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:
>
> "Such premium payments are not realized from a sale; they are not paid by a purchaser (Metals Reserve Company does not purchase the ores upon account of which it makes premium payments); they are not paid at the time of a sale, nor are they based upon recoverable metals or

actual recoveries at any particular concentrator or smelter, nor upon the terms of private settlement contracts; they are specifically exempted from the Excess Profits Tax; they are not taken into account in tariffs filed by railways and approved by the Interstate Commerce Commission or Public Service Commission fixing freight rates on ores or concentrates and predicated primarily on metal value content; smelters may not participate in such payments even though their normal charges be based upon a sliding scale dependent upon value of metal contents.

"The announced purpose of premium payments was 'to expand output of copper, lead and zinc because of their importance in the production or armaments', '* * * to compensate operators for extra costs involved for bringing out additional metal output,' '* * * to make it possible quickly to increase production by mining low grade sub-marginal ores and to develop additional ore reserves.' (See OPA Release, February 9, 1942.)

"Such purpose is emphasized by the order freezing royalties and prohibiting diversion of any part of 'B' and 'C' quotas,—it being said that diversion of such added premiums into increased royalties to landowners would be 'an unwarranted expenditure of public funds which can contribute nothing to further production.'

"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 and such funds be diverted from the use in the production of ores to a contribution to the support of state or local government." (R. pp. 55-56)

Appellant quotes the pertinent parts of Sections 80-5-3 and 80-5-56, Utah Code Annotated, 1943, but omits to quote the pertinent part of Section 80-5-57, which is the controlling statute in this case and which, so far as material here (there being no dispute as to the deductions taken and allowed by the Tax Commission), reads as follows:

> "Sec. 80-5-57: Assessment of Mines. Net Annual Proceeds Defined.
>
> "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 deductions:" * * *
>
> "(6) * * * provided, where a mill, smelter or reduction works receives ores from independent sources and also receives ores from a mine or mines owned or controlled by the same interests which own or control the mill, smelter or reduction works, such disposal for the purpose of this section shall be treated as a sale and the charge for sampling, assaying, milling and smelting the ores and extracting the metals and minerals therefrom shall not exceed an amount to be determined by applying the same rates as are applied by such mill, smelter or reduction works or competing works to ores of substantially like character and in like quantities furnished from independent sources. In the event of controversy the tax commission shall have power to determine such rates or charges."

ARGUMENT

The subsidies received by respondent from Metals Reserve Company for over-production of copper, lead and zinc during the calendar year 1943 were not a part of either gross or net proceeds realized by respondent during that year from the sale or conversion into money or its equivalent of ores extracted from the mine of respondent.

Appellant admits that the ores mined by respondent from the mine involved in this case were sold and that respondent received from the "immediate" purchaser thereof, the sum of $144,693.74 (Ap. Brief p. 6) and it is stipulated that said amount of $144,693.74 represented the smelter returns to respondent from the ores so produced, and that the only controversy here is with respect to the propriety of including premium payments made by Metals Reserve Company in computing the net proceeds valuation of respondent's mine. (R. pp. 57-57A)

In other words, it is not claimed that respondent either failed to apply,

> "the charge for sampling, assaying, milling and smelting the ores and extracting the metals and minerals therefrom,"

required by sub-section 6 of Section 80-5-57 to be applied, or that respondent claimed any other deductions not properly allowable to it under Section 80-5-57.

Consequently we should have here only to consider, in the light of the statute and the stipulated facts, what amount was received by respondent on the *sale* of the ores so produced by it, or on their "disposal" by treatment in respondent's own mill and smelter, which "disposal," for the purpose of computing net proceeds "shall be treated as a sale".

Appellant recognizes that under our constitutional and statutory provisions all tangible property is required to be taxed in proportion to its value, that provision must be made for a uniform and equal rate of assessment and taxation on all tangible property in the state and that the method adopted by the Legislature of valuing a mine on the basis of net proceeds furnishes "a reasonable guide to the value of the property". (Ap. Brief pages 9 and 10).

Certainly therefore appellant would not contend that there is any difference in the valuation arrived at by computing net proceeds on the basis of the amounts received from a sale of the ores (in the case of a custom mine) than by computing them on the basis prescribed by sub-section 6 of Section 80-5-57 (in the case of a smelter owned mine), and appellant would not contend that premium payments made by Metals Reserve Company could be part of net proceeds in one case and not in the other. Appellant makes no distinction, in contending for the inclusion of such premium payments in computing net proceeds, between an independent shipper selling his ores and a smelter owned mine treating its own ores and applying the rates and charges prescribed by law to produce the equivalent of what would have been paid for such ores had they been received from an independent shipper.

There can be no uncertainty as to what is meant by the phrase,

> "proceeds realized * * * from the sale or conversion into money or its equivalent of all ores * * *".

Our Statute, Section 81-1-1 defines a sale as follows:

> "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price",

and Section 81-1-9 provides that,

> "The price may be fixed by the contract or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties."

Clearly then under our statute the amount received on a sale of goods is the consideration called the price and the price is the amount fixed by the contract between the buyer and seller or is left to be fixed in such manner as they agree or else it is determined by the course of dealing between the buyer and seller.

Bouvier defines a sale as,

> "An agreement by which one of two contracting parties called the seller, gives a thing and passes the title to it in exchange for a certain price in current money to the other party who is called the buyer or purchaser, who on his part agrees to pay such price."

In view of the requirement of equality in assessment and taxation there can likewise be no uncertainty as to what is meant by "conversion into money or its equivalent,"—that must be equal to the amount receivable on a sale.

The word "equivalent" is defined in the Oxford Dictionary as,

> "Having equal or corresponding import, meaning or significance; what is virtually the same thing; identical in effect,"

and is defined in Webster as,

> "Equal in worth or value, force, power, effect, import and the like; alike in significance and value; of the same import and meaning."

What did respondent get when it treated at its own mill and smelter the ores produced from its mine? Obviously it got the metals resulting from such treatment and for purposes of computing net proceeds it is required to value such metals for such amount as they could be sold for. That is the result of applying the formula prescribed in sub-section 6 of Section 80-5-57 and that is the result arrived at by the court in the case of *Salt Lake County v. Utah Copper Company,* 93 F. (2d) 127, in which the court held that blister copper produced, but not sold, should be included in computing gross proceeds, saying:

> "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."

and

> "That the Legislature used the term 'money' in a comprehensive sense is indicated by the fact that it followed it with the phrase 'or its equivalent'. 'Equivalent' has been defined as follows: 'Equivalent' is defined by lexicographers as 'equal in value, force, measure, power and effect'."

The taxing authorities would have had anything but a simple problem to appraise the value of blister copper if, as appellant contends, its value was determined not by what it could be sold for, but by whether it had or had not been produced within or beyond the quota assigned to the mine from which it was produced. They would have had to identify the particular blister copper produced and remaining unsold from other blister copper produced and they would have had to ascertain the assigned quotas (which might be changed monthly) in effect at the time such blister copper was produced.

Appellant concedes that the amounts received by respondent from the "immediate purchasers" of the copper, lead and zinc produced by it did not include any part of the premium payments here in question. How, under the statute fixing the measure of net proceeds, or in fact the producer of ores could be concerned in what was received otherwise than from the "immediate purchaser" is not apparent. Certainly the producer could not sell the ores twice. On the contrary, after the producer had sold the ores to the "immediate purchaser" the next sale would have to be by that "immediate purchaser" to someone else.

But even were this not obviously true it could not be contended that Metals Reserve Company, which paid the premiums here in issue, was a purchaser "immediate" or otherwise. It is stipulated that none of the ores or metals produced by respondent from its mine during the calendar year 1943,

> "was sold by plaintiff (respondent) to the United States Government or to Metals Reserves Company or to any other agency of the United States Government." (R. p. 22)

It is further stipulated that,

> "Metals Reserve Company does not purchase the ores *on account of the production* of which it pays premiums to the producer" (R. p. 50)

and that such payments are made,

> "to aid in stimulating the domestic production of copper, lead and zinc." (R. p. 43)

To contend, as appellant does, that premium payments are any part of the amount received by respondent on the sale or conversion into money or its equivalent of the ores produced by respondent, requires us either to ignore the statutory definition and to legislate a new measure of net proceeds, or to ignore the stipulated facts.

It is not suggested by appellant that the receipt or payment of any subsidy was a term or condition of any contract of sale or that the passing of title in and to ores or metals under or pursuant to any contract of sale was in any manner dependent upon or affected by any subsidy payment.

It is stipulated that in the case of the independent producer title to the ores passed to the purchaser before application for the payment of any premiums could even be made and it is not claimed that it was ever the condition of any contract of sale that if premiums were not paid that the sale might be rescinded.

In the case of ores mined by companies like respondent which also processed them, it is stipulated that premiums were paid long before the metals recovered from the ores were *even available for sale* and it is not claimed that Metals Reserve Company had any right to demand the return of the premiums paid in the event such metals were not subsequently sold. (R. p. 51)

The Nature of the Subsidies or Premium Payments.

The fundamental distinction between proceeds realized from a sale of ore or its conversion into money or its equivalent and a subsidy paid by Government for over-quota production, becomes apparent (if it is not already so) by reviewing the history of current bonus payments and noting the reasons stated for the adoption of such program by Government. The distinction is not one of degree but one of character and purpose. It should be noted that such program was not limited to nonferrous metals, but extended to a vast number of products.

The relative place of metals in the program is indicated in the following statement, entitled "Where Subsidies Go" and showing *in millions of dollars* subsidy payments for the fiscal year 1946:

Rope Fiber	8
Petroleum	30
Coffee	54
Rubber	56
Fats and oils	61
Fruits and vegetables	75
Sugar	80
Metals	113
Flour	208
Dairy products	545
Meat	760

The above tabulation is taken from United States News, issue of April 26, 1946, page 15. Only today the radio carried a report of the passage of a bill providing $400,-000,000 bonuses to be paid to encourage production of homes for returned soldiers.

There were various immediate objectives in the payment of bonuses and in certain instances bonuses were paid by government to a *purchaser* on condition that the *purchaser* pay an agreed price higher than he could otherwise have been expected to pay for a designated product. In such instances the price received by the seller from the purchaser was made up of monies belonging to the purchaser and of monies contributed to the purchaser by government to induce him to pay a higher price for the product.

Had the government subsidized smelters in a similar way and had the smelters paid for over-quota production an amount in excess of the ceiling prices, the amount realized by the producer on a sale of ores would have been the amount so paid by the smelters and it would not have mattered in computing net proceeds that some of the money paid by the smelters was contributed to them by government to induce the payment of such higher prices. But this was not done and under the law could not have been done. (R. pp. 27-33)

It is stipulated that the Premium Price Plan under which Metals Reserve Company paid premiums was,

> "established to make it possible quickly to increase production by mining low grade submarginal ores and to develop additional ore reserves." (R. p. 34)

In a bulletin issued August 29, 1945 by the United States Department of Agriculture and Office of Price Administration relative to food subsidy programs for the fiscal year 1946, the reasons for the payment of certain subsidies were listed as follows:

Butter: "To roll retail price back to September, 1942 level."

Canned Grapefruit Juice: "To permit increased grower returns and to offset increases in canning cost."

Chedder Cheese: "To offset cost increases and to encourage greater production."

Dried Edible Beans: "To permit increased grower returns."

Peanut Oil: "To maintain adequate production at prices in line with other edible oils."

Sugar: "To permit increased grower returns, offset increased shipping, handling and processing

> costs and generally to encourage maximum production."

During the First World War subsidies were not paid but prices were permitted to increase with demand. During the Second World War government was determined to prevent such price increases with their resultant increase of cost to public and private purchasers alike and so the subsidy program was adopted.

Appellant, in his Brief (pp. 21-22) quotes from statements by Representative Patman and Senator Murdock respecting the bonus program and the statements quoted should in themselves be sufficient to demonstrate that bonus payments are no part of purchase price of metals. We call attention particularly to that portion of the quoted statement by Mr. Patman, reading as follows:

> "I feel that these charts are conservatively computed because, for example, 17 cents per pound is *used as a possible comparative price which copper might have sold for in the absence of this premium plan,* whereas during the last war copper actually sold as high as 37 cents a pound during 1917 and averaged, as stated, more than 29 cents a pound during that year."

In the report of the Sub-Committee on Mining and Minerals Industry to the Special Committee to Study and Survey Problems of American Small Business pursuant to Senate Resolution 28, issued February 1, 1946, the following illuminating statements appear which were prepared by the History Branch and Office of Metal Mining Analysis of the Office of Price Administration:

"The premium price plan had its origins in the efforts of the Government, early in the defense program, to maintain and expand production of copper, lead, and zinc, and to maintain price stability in these strategic metals. The problem faced by the Government was that of encouraging metal production without greatly increasing the general level of metal prices. This was especially difficult because in the mining industry increased production is associated with rapidly increasing costs, and a large increase in prices is therefore necessary to induce a small increase in production. In World War I the general level of metal prices was raised to cover the costs of all but the very highest cost mining operations. In this war, such price inflation was avoided by using differential pricing techniques that involved either Government purchase of the output of high-cost producers or subsidy payments for marginal metal production.

"The premium price plan was one of the most successful of these techniques and involved the payment by the Government of premiums for all production of copper, lead, and zinc above quotas established generally on the basis of 1941 output. The payment of a small subsidy as an alternative to raising the general level of metal prices saved the Government, as a large purchaser of metal war materials, many millions of dollars and aided in the stabilization of the prices of many metal products." (p. 73)

* * * * * *

"Such techniques and particularly differential pricing, that is, the concept that cost differences should be reflected in differing maximum prices for various segments of output, had been discussed and specifically rejected by the Price Fixing Committee in World War I. Futhermore, combining differential pricing with a subsidy to the higher-cost producers was anathema to the price controllers of World War I, who argued that the Government should not subsidize productive units which could not operate in peacetime.

"As a result of the failure to use such techniques, maximum prices of copper in World War I were established on bulk-line principles at the high level of 26 cents a pound, almost double the average price in 1914. Officials responsible for price controls in this war were determined that such an experience should not be repeated, and they soon moved to devise a plan in which differential pricing would be combined with subsidy arrangements to maintain and expand production without threatening price stability." (pp. 74-75)

How successful in minimizing costs that program has been is evidenced by a statement issued by the Office of Price Administration (Metal Mine Analysis Office) on April 15, 1945 (No. G-1186) showing the percentage of copper, lead and zinc which had been produced at ceiling prices during 1942 to 1944, inclusive, that is to say, the percentage of these metals on which premium payments were not made to producers. The percentages were:

Copper	80.29%
Lead	70.2%
Zinc	64.21%

In other words, bonuses on overproduction of copper were paid on less than 20% of the total copper produced.

Appellant speculates on what might have happened had ceiling prices been fixed at 1 cent a pound. Obviously in that event bonuses would have been paid on the entire copper output and the objective of Government have been defeated.

The Inclusion of Such Subsidies in the Base for Assessment and Taxation of the Property of Respondent Violates the Constitutional and Statutory Requirements as to Uniformity of Assessment and Taxation.

Appellant recognizes the requirements of our Constitution and statutes for uniformity in assessment and taxation of tangible property and at page 10 of his Brief quotes from Sections 2, 3, 4 and 11 of Article XIII of the Constitution of Utah. Likewise, respondent recognizes that the net proceeds basis of valuation affords a reasonable guide to the value of mining property.

Yet appellant insists that premium payments must be included in computing net proceeds.

It requires little consideration to realize that premium payments can not be included in computing net proceeds without violating such rules as to uniformity in assessment and taxation: The inclusion of such premium payments in computing net proceeds would lead to the following extraordinary results:

1. *A Mine Would Have a Greater Value in 1944 If It Produced No Ores in 1941 than It Would Have Had Had It Produced Ores in 1941.*

It is stipulated that on February 9, 1942 War Production Board and Office of Price Administration issued a joint statement setting forth the rules and regulations governing payment of premium price for over-quota production of copper, lead and zinc; that in such statement it was provided that there should be five distinct classes of quotas, all of which were based upon production during 1941; that a property which either had no production or produced less than 200 tons of any metal in 1941 was assigned a zero quota; a property which in 1941 produced between 200 and 600 tons of any metal was assigned an intermediate quota; and a property which in 1941 produced more than 600 tons of any metal was assigned a quota equal to the property's 1941 rate of production. (R. pp. 35-36)

It follows that if a mine produced no copper in 1941 it would receive premium payments on all copper produced by it in 1944 and its gross proceeds would be increased 7c per pound. Had that mine operated in 1941 and produced 600 tons or more of copper it would only have received premium payments on account of that part of its production in 1944 which exceeded its production in 1941. Consequently its gross proceeds would be reduced by 7c per pound times the pounds produced in 1941.

2. *Two Mines Producing Exactly the Same Quantity of Copper, Lead or Zinc in 1944 Would Have Different Values, Depending Upon the Quotas Assigned to Them, Which Quotas Were Based Upon Production in 1941.*

It must be observed that we are not dealing here with any question of relative richness of ore bodies, managerial ability, or other factors affecting cost of production: We are dealing only with the fact that because quotas applicable in 1944 were primarily based upon production in 1941, gross proceeds of one mine would necessarily exceed those of the other, and consequently whatever relative costs of production might be, there would result a difference in net proceeds attributable solely to the inclusion of premium payments in the base in one instance and excluding them in the other.

3. *The More It Costs to Produce Ore from a Mine the More Valuable the Mine Would Be.*

It is stipulated that,

> "In certain cases where operators of producing properties show that production of lead or zinc cannot be increased or maintained without *substantial expenditures for greatly increased development work, rehabilitation of underground workings or additional facilities,* provision has been made for the payment of additional premiums in excess of 'A' quotas announced on February 9, 1942. The additional premiums were announced by Metals Reserve Company on May 5, 1943 and in these cases the initial quotas are revised and an additional quota or quotas are assigned which are known as 'B' and 'C' quotas. From data supplied by the producer showing such expenditures and increased costs of production 'B' and 'C' quotas are established *which are intended to supply additional premiums to the extent necessary to provide an adequate operating margin.* After quotas are established premium payments are made solely upon the basis of production in excess of allotted quotas.
>
> "On June 18, 1943 Metals Reserve Company announced its plan for paying a special additional

> premium for copper in addition to the regular premium for those mines which produced less than 2,000 tons of copper during 1942 and which require increased revenue to obtain maximum production." (R. p. 37)

From the stipulated facts it is apparent that if costs of production at a mine are so great that it could not be expected to produce copper, lead and zinc at ceiling prices, even with the bonus to encourage production payable under the initial or "A" quota assigned it, that mine will be paid additional premiums. If these premiums are to be included in computing gross proceeds, then it follows that the more it costs to produce ore the more the gross proceeds will be and necessarily they will be reflected in computing net proceeds.

Appellant's argument leads to the inevitable conclusion that while no one could identify one pound of copper from another pound of copper, or one pound of lead or zinc from another pound of lead or zinc, certain pounds of such metals are more valuable than other pounds of such metals. This additional value (as appellant reasons) results from the fact that certain pounds of metal were produced by a mine in a month after it had already produced its quota for that month: Copper produced within the quota assigned the mine would be worth only 12c a pound. Copper produced after filling such quota (according to appellant) would be worth 17c per pound and indeed appellant goes to the extraordinary length in discussing the case of *Salt Lake County v. Utah Copper Co.*, supra, on page 13 of his Brief and again on page 17 of his Brief of saying:

> "So too for every pound of metal extracted by respondent for which premium payments were made to it by Metals Reserve Company, *such pound of metal* had a value not of the per pound O.P.A. ceiling price but of at least such price plus the amount per pound paid by Metals Reserve Company under the Premium Price Plan."

The Real Basis of Appellant's Contention.

It appears to us from a reading of appellant's Brief that the real basis of appellant's contention that premium payments should be included in computing net proceeds valuation of a mine is appellant's desire, laudable in a Tax Collecting Official, to see that no property escapes payment of any part of the tax for which it may on any theory be held liable. Yet appellant recognizes that it was urgently necessary to the nation in furtherance of the war effort to increase the production of copper, lead and zinc and that premium payments were made for such purpose; that the mining companies could not have been expected to produce the quantities of ores actually produced at the prices at which they were required to sell, unless they had received such aid from Government.

Appellant argues that unless premium payments be included in the valuation of mines ore bodies will be depleted without tax return to the state. Appellant does not stop to consider that the owners of such mines are likewise depleting their ore bodies, or that even with such assistance from Government many companies have been unable to continue operations.

In the report of the Sub-Committee on Mining and Minerals Industry above referred to, it is stated under the heading "Mortality of Mines Under Plan" that:

> "Up to May 31, 1945, 3,565 copper, lead, and zinc mines were assigned quotas under the premium price plan. Of this number, the RFC Office of Metals Reserve reports that 3,092 mines had received premium payments since the inception of the program. The balance of 473 mines for various reasons made no shipments after receiving quotas, some *presumably due to the receipt of inadequate premium assistance.*
>
> "Only 1,296 mines have made shipments and received premium payments since May 31, 1945. This indicates that 1,796 (58 percent of 3,092) small mines, opened and operated under the stimulus of premium price plan and other public announcements, *have been forced to close.*" (p. 32)

And appellant seems to forget what he has himself stated and what has been stipulated that,

> "Quotas were fixed in the amounts respectively deemed best calculated in the interest of each individual operator to obtain increased production of the metals named, *said increased production of said metals being critically essential to the successful prosecution of the war.* Said quotas were fixed at the several quantities of production beyond which it was thought that the operators could not or would not produce unless an additional amount were received." (Ap. Brief p. 4)

and again,

> "It is safe to say in each instance that had the only remuneration for its ores been the amount received from the smelter (represented by the ceiling price on the ores) each mining company

> would have curtailed its production to the extent that it *could have operated without loss, or at best, with very little loss.* The ores therefore would have remained intact to make the basis of a subsequent assessment when market prices would have justified their removal by *leaving the company a sufficient margin of profit.*'' (Ap. Brief p. 30)

Perhaps the statement made by appellant on page 23 of his Brief best explains what underlies appellant's contention. He there says:

> ''The statute states that net proceeds shall be determined by the '*amount received . . . from ores extracted,* while the premium payments were made for ores '*produced.*' However, we see no distinction in the meaning of these two words insofar as this case is concerned.''

In other words, appellant could see no difference between the bounty paid for killing a wolf and the price paid for the wolf's pelt.

Appellant obviously would not have the court do violence to the statute which fixes the measure of net proceeds since at pages 35-6 of his Brief he says:

> ''The exclusion of the premium payments from the computation of net proceeds would effectuate a great wrong and would do violence to the normal, natural meaning of the words of the statute.''

The statute is perfectly clear and requires no construction, but even if it did require construction, the assumed necessity of getting for the State the last possible penny of tax revenue, no matter what the injury to the National Government might be, would scarcely justify the inclusion of income from a source clearly different from that which under any reasonably conceivable construction the statute fixes as the measure of net proceeds.

At page 33 of his Brief, appellant says:

> "It seems so apparent to us that the Legislature, enacting Sections 80-5-3 and 80-5-56 intended to use and did use language sufficiently broad to result in an assessment of the metalliferous mines of the State of Utah based upon the amount of money which the producers actually received by extracting the ores from the mines."

What then did the Legislature mean by enacting Section 80-5-57? Appellant does not tell us, yet that is the section which says how net proceeds are to be computed.

It is not necessary to take the time of the court to review the cases cited by appellant dealing with income or gross income or value or gifts, since they obviously have no bearing on the present case. Admittedly premium payments received by respondent constitute income to respondent, reportable as such in its Corporate Franchise Tax Return along with other income not arising from the sale or conversion into money or its equivalent of ores produced,—and such income was in fact reported by respondent and the full tax paid.

At page 17 of his Brief, however, appellant calls attention to the early case of *Mercur Gold Mining and Milling Company v. Spry* and he quotes from the opinion in that case the following:

> "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."

Apart from the fact that the italicized portion of the above quotation merely emphasizes appellant's inability to distinguish between amounts realized from converting a product into money and amounts received from someone as an inducement to operate a property or expand production therefrom, it should be noted that the Mercur case was an action to annul and declare void a sale made of a mining claim for taxes levied and assessed upon the net annual proceeds of the mine for the year 1896. The appellant had included in the base for assessment of respondent's mine, income not authorized by law to be so included. The tax was declared void and removed from the record.

At page 19 of his Brief appellant, ignoring the fact that he has stipulated, that none of the ores or metals extracted from respondent's mine during the year 1943 was sold by respondent to the United States Government or to Metals Reserve Company or to any other agency of the United States Government, argues that:

> "The Federal Government, through its various agencies, was so intimately and intricately connected with the producing, refining, processing, fabricating, and distributing such ores, and became the ultimate purchaser and consumer of such a large part thereof, that any monies paid by it to the producer on account of the ores produced cannot be distinguished or separated from

any amounts otherwise received in connection with such ores."

This statement, we submit typifies appellant's whole attitude and clearly demonstrates that only by disregarding the stipulated facts and the language of the statute which lays down the measure of net proceeds, can even appellant assert that premium payments should be included in computing net proceeds.

Respectfully submitted,

CHENEY, JENSEN, MARR & WILKINS,
Attorneys for Respondent.