1948

# Chief Consolidated Mining Company v. State Tax Commission : Petition for Rehearing

Utah Supreme Court



A. M. Cheney; G. A. Marr; C. W. Wilkins; Paul B. Cannon; Attorneys for Chief Consolidated Mining Company..

C.C. Parsons; WM. M. McCrea; A. D. Moffat; Calvin A. Behle; R. J. Hogan; W. W. Ray; Athol Rawlins; Joseph Jones; c. E. Henderson.

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## APPELLANT'S PETITION FOR REHEARING

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## PETITION FOR REHEARING

Come now the appellants respectively named in the above entitled causes and petition the Court for a rehearing in said cases and each of them.

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

1. In failing to consider on the facts in these cases the issue as to the constitutionality of Section 80-5-57, Utah Code Annotated 1943, if such statute is construed as permitting the inclusion of premium payments in computing net annual proceeds.

2. In holding that there was "no substantial difference between the present cases and those earlier decided by us," and in effect holding the decisions in such cases to be controlling here.

3. In failing to consider Section 81-1-1, Utah Code Annotated 1943, in view of the admitted facts in these cases that premiums were paid after a sale of ores upon quotas established subsequent thereto.

4. In failing to give effect to the fact presented in these cases that premium payments were continued after ceiling prices on metals were removed and that petitioners at such times reported to the Tax Commission the amount received upon the open market and not, as the Court states, the ceiling price.

5. In failing to follow the elementary rule of statutory construction that where ambiguity as to tax

liability exists, the doubt should be resolved in favor of the taxpayer.

WHEREFORE appellants pray that this petition be granted and that upon rehearing the decision of this Court heretofore made and entered be vacated and the judgments of the Lower Courts be reversed.

## BRIEF IN SUPPORT OF PETITION FOR REHEARING

In the face of a unanimous decision, to petition any court for a rehearing is doubtless comparable to

> "tapping the deck of a troop ship with your cane to stop the engines when you are seasick."

Nevertheless, for the reasons above enumerated and hereinafter considered, we feel under a duty, not only to our clients but to the Court, to so petition:

Not only is it true (and never more so than in this day of changing ideas and when established institutions are under question) that as Judge Wolfe has written

> "The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the Courts."

It is equally true that confidence in the thoroughness and impartiality of the Courts must be preserved to insure respect for their decisions.

## I.

THE COURT ERRED IN FAILING TO CONSIDER ON THE FACTS IN THESE CASES THE ISSUE AS TO THE CONSTITUTIONALITY OF SECTION 80-5-57 U. C. A. 1943, IF SUCH STATUTE IS CONSTRUED AS PERMITTING THE INCLUSION OF PREMIUM PAYMENTS IN COMPUTING NET ANNUAL PROCEEDS.

This Honorable Court in its opinion makes no reference to the most basic issue in the net proceeds cases, namely, the constitutionality of the statute if that statute is to be construed as permitting the inclusion of premium payments.

As we pointed out in our original brief (pages 42 to 46), and as is clear beyond question *upon the record presented in the present cases,* subsidies are the exact opposite of net proceeds. They represent not what a mine is capable of earning, but what in addition to earnings is necessary to be expended for the continued operation of a mine.

Our statute defines value as the amount at which property would be taken in payment of a just debt from a solvent debtor.

The Constitution requires equality of taxation.

To say that a mine would be taken in payment of a just debt from a solvent debtor at a value arrived at

by including premium payments as net proceeds is to say what every man with any familiarity with the facts knows to be erroneous.

Surely this Honorable Court does not by its silence wish to be understood as regarding the constitutional right of the hundreds of stockholders in Utah mines to equality of tax treatment with other taxpayers as undeserving of its consideration.

Surely also this Honorable Court does not assume that such stockholders are ignorant of the fact that as costs increase, values diminish.

As the record here shows, repeated and detailed applications to the Quota Committee were made by the various appellants and quotas were fixed and revised on the basis of costs, and the higher the costs the more the premiums received to compensate.

While the constitutional provision is applicable only to the net proceeds cases and not to the occupation tax cases, we respectfully submit that this Court should not fail to consider it or fail to give its reasons for such decision as it may make upon it. The Haynes case involved a record showing wholly different facts and therefore is not applicable here.

## II.

**THE COURT ERRED IN HOLDING THAT THERE WAS "NO SUBSTANTIAL DIIFFERENCE BETWEEN THE PRES-**

ENT CASES AND THOSE EARLIER DECIDED BY US", AND IN EFFECT HOLDING THE DECISIONS IN SUCH CASES TO BE CONTROLLING HERE.

In its opinion, this Honorable Court states that:

> "We are unable to determine any new points or questions now being advanced which were not presented to us for consideration in the earlier actions, with the possible exception of the fact that the subsidies continued for some period after the ceiling price on the metals was removed. This one additional factor is not of controlling importance."

And the Court states that:

> "We have no desire to foreclose appellants from presenting matters which were not litigated in the previous cases. The only burden we place on them is to establish that the matters presented in these suits are essentially and substantially different from those passed on in the previous litigation."

Far from there being only one "additional factor" as the Court states, the present cases differ materially from what are referred to as the "earlier actions."

The only matter in common between the present cases and the earlier cases is that they both involve the inclusion of subsidy payments in computing the occupation tax and the net proceeds valuation of mines for purposes of the general property tax.

In the cases previously considered by this Court, quotas were based upon mine production in 1941; "premiums" were paid on account of excess production over production in 1941. Quotas were not tied to current costs of production; were not adjusted to take account of retroactive costs; subsidies were not paid on the basis of a quota revised and established after sale of ores.

In the occupation tax cases, this Court speaking through Mr. Justice Wade based its decision *specifically* on original Rule 13 which was subsequently rescinded, and upon specific facts in the records of the cases then before it as distinguished from what might have been in other cases then not before the Court. The Court itself adopted this line of reasoning.

In the net proceeds cases, this Court based its decision on the *specific* facts which it found from the record in those cases that premiums were *only* paid on a sale of ores or when the ores had been converted into the equivalent of money. But in the present cases the records do not permit of holding that *any* ores have been converted into the equivalent of money, the allegations being specifically to the contrary. Therefore if in the present net proceeds cases it is to be held that the premiums are includible in computing net proceeds, it must be found as a fact that they were paid *only* on a sale of the ores, since there was no conversion of the ores into the equivalent of money. But likewise the subsidies here were not based upon *sales* either!

We do not understand the court's comment to the effect that *amended* Rule 13 "was the foundation for many of the arguments of appellants in the previous cases"; those cases were submitted upon a stipulation of facts *which did not contain amended Rule 13.* (We may add that the stipulation did not contain such amended rule because counsel were not aware at the time the stipulation was entered into that original Rule 13 had been rescinded.)

In contrast with the earlier cases, here in summary are the factors presently before this Honorable Court for consideration:

1. No question of the conversion of ores into the equivalent of money is involved. Consequently with relevance it cannot be said, as the Court nevertheless now does, that the language in the Haynes case "broadened the scope of the former as the later decision holds that for 'net proceeds tax' purposes there need not be a sale of the metals to include the subsidy payment in the tax base."

It is specifically alleged in the present net proceeds cases that there was no conversion of the ores into the equivalent of money.

2. Quotas are tied neither to a prior year's production nor to ceiling prices. On the contrary, they are tied to costs of production and are revised upwards or downwards as experience demonstrated to be requisite to insure continued production. They were revised retroactively and premiums were paid on the basis of quotas

established *after* a sale of ores and pursuant to a discretionary act of the Quota Committee; such payments obviously were nothing which the company was even legally entitled to receive at the time the ores were sold but depended upon the subsequent action of the Quota Committee.

3. Premiums were paid after all controls and ceiling prices were removed and in such instances the amounts received on the open market for ores sold were reported to the State Tax Commission as the amounts received on sales.

4. Neither in the act of Congress authorizing the payment of premiums, nor in any regulation applicable to the present cases is there a single word indicating an intention that the payment of premiums shall be *conditioned upon or deemed to be a part of the moneys received on, a sale of ores,* the basis of the earlier occupation tax case decision of this Court. On the contrary, the relevant regulations expressly provide for payment of premiums when excess production has been determined.

## III.

THE COURT ERRED IN FAILING TO CONSIDER SECTION 81-1-1 U. C. A. 1943 IN VIEW OF THE ADMITTED FACTS IN THESE CASES THAT PREMIUMS WERE PAID AFTER A SALE OF ORES UPON QUOTAS ESTABLISHED SUBSEQUENT THERETO.

Unless Section 81-1-1 of our Code, setting forth the common definition of a sale, is to be utterly disregarded

(and this Honorable Court in its opinion makes no reference to it), then in order to hold that premiums were received on a "sale of ores", and therefore were properly includible under the Legislature's language in computing the occupation tax and net proceeds valuation, it must be found that they were received "on account of a transfer of the property in the goods to the buyer." This is the Legislature's language.

Under the allegations in some of the complaints now before this Court, and which for present purposes must be accepted as true, certain premiums were paid on the basis of quotas fixed *after* a sale of the ores.

The Quota Committee had discretion in revising quotas; it did revise quotas to take account of retroactive labor costs, and to compensate for increased costs over those on which quotas had originally been fixed.

We respectfully submit that it is a logical impossibility to assert that something to which a person had no right at the time of a sale of ores still was received by him on account of a transfer of the property in the goods to the buyer.

All premiums were paid pursuant to the same Federal authority. When it appears that some premiums were paid under these facts, it must be difficult to believe that premiums were part of what was received on

a "sale of ores." This is the Legislature's wording, not ours.

## IV.

THE COURT ERRED IN FAILING TO GIVE EFFECT TO THE FACT PRESENTED IN THESE CASES THAT PREMIUM PAYMENTS WERE CONTINUED AFTER CEILING PRICES ENDED.

In its opinion this Honorable Court says that the one fact presented in the present cases, additional to those presented in the earlier cases, is that subsidies continued for some period after the ceiling price on the metals was removed. And the Court states "this one additional factor is not of controlling importance."

As we have endeavored to point out, this one factor is far from being the only additional factor. Certainly it is of much less importance than the further additional fact that subsidies in some cases were paid on quotas established *after* a sale of ores. Also the fact that subsidies continued independent of prices *was* called to the Court's attention on rehearing, but the Court stood by the original decision on the basis of the *records in those cases.*

Neverthless, we submit that it is not a fact which should be disregarded without explanation:

As this Honorable Court states in the earlier cases, subsidies were tied to ceiling prices, and in those cases

relying upon *original* Rule 13 the Court held that the "premiums" plus the ceiling price represented the purchase price of the ores.

We now have a sale of ores on the open market, and the payment of subsidies based upon quotas tied to determined costs of production. These subsidies are *not* tied in to either ceiling prices or to a previous year's production.

To hold that the subsidies under such facts are received "on a sale of the ores", we submit, requires that we disregard Section 81-1-1 as well as the obvious realities. If such an argument is "tenuous", after all it arises and is based upon the very distinction made by the majority opinion in the Combined Metals Case. If, as is now suggested, that difference is not of substance, since the Court's original argument was tenuous, then it would seem indeed that the earlier decisions are injudicious and should be frankly overruled.

These differences and distinctions are not ours.

## V.

THE COURT ERRED IN FAILING TO FOLLOW THE ELEMENTARY RULE OF STATUTORY CONSTRUCTION THAT WHERE AMBIGUITY AS TO TAX LIABILITY EXISTS, THE DOUBT SHOULD BE RESOLVED IN FAVOR OF THE TAXPAYER.

In an attempt to view this whole matter from our position as officers of the Court and not mere advocates

of our clients' cause, we can follow the predicament of the present court up to the point where on page 5 of its opinion the basis of the majority in the Combined Metals Case is really abandoned and the views of Mr. Justice Wolfe are before the Court. The problem then indeed becomes that of either overruling the former decisions, or sustaining sweeping tax liability upon Justice Wolfe's theory.

Your Honors then unanimously state, as did only Mr. Justice Wolfe in his Combined Metals Case opinion:

> "a good case could be made for including a premium payment in the tax base and conversely () a good case could be made for excluding the payments."

What, then, is the guide to show the Court which of these two possibilities it should follow? The beacon that, as a rule of law, should be known to Bench and Bar alike in lighting our paths. The facts are not in dispute. It is a question of statutory construction to determine the intent—the "legislative mind"—of Utah's legislature when in 1937 and before it enacted the laws now facing Utah's citizens and the Bench and Bar.

The rule applicable, it would seem, is one of long standing and based upon sound reasons of policy. It might be termed elementary, having been expounded

long ago by this Court in common with the judiciary and text-writers for generations without dissent.

We need turn only to Mr. Justice Wolfe's masterly opinion in *Norville v. State Tax Commission,* 98 Utah 170, 97 P. 2d 937, where it is stated:

> "The doctrine that taxing statutes are, in case of doubt as to the intention of the legislature, to be construed strictly against the taxing authority and in favor of those on whom the tax is levied, has been well set out in the case of Helvering v. Stockholms Enskilda Bank, 293 U. S. 84, 55 S. Ct. 50, 79 L. Ed. 211. See, also Los Angeles & S. L. R. Co. v. Richards, 52 Utah 1, 172 P. 474; W. F. Jensen Candy Co. v. State Tax Commission, 90 Utah 359, 61 P. 2d 629, 107 A.L.R. 261; 25 R. C. L. Sec. 307 at p. 1092; Cooley on Taxation, Vol. 11, 4th Ed. Sec. 503 at p. 1113."

Section 27 of Article 1 of our State Constitution states:

> "Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

There has been no more fundamental principle in our system of jurisprudence and public law than that tax statutes should be construed strictly in favor of the taxpayers. In Utah, starting with the case of *Kerr v. Woolley,* 3 Utah 456, 24 P. 831, decided in 1866, there has

been no rule better recognized by an unbroken line of decisions through and including the Norville case, supra.

> "Now, it is an established rule that all statutory modes of executing any laws, or any power under a law, must be strictly pursued: A. D. M. Turnpike Company v. Guild, 6 Mass. 44; Franklin Glass Co. v. White, 14 Id. 286; 3 U. S. Dig. 43, sec. 30.
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> "The supreme court of the United States has decided, Jefferson Branch Bank v. Skelly, 1 Black 436, upon this question of taxation and kindred ones, that the rule of construction is against the corporation and in favor of the public, and neither the right of taxation nor any other power of sovereignty will be held to have been surrendered unless such surrender has been expressed in terms too plain to be mistaken.
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> "To the same effect are Billings v. The Providence Railroad Bank, 4 Vet. 561; Charles River Bridge v. Warren Bridge, 11 Id. 420; Girden v. The Appeal Tax Court, 3 How. 133; The Richmond Railroad Company v. The Louisiana Railroad Co., 13 Vet. 71; and many other cases of the highest authority, all of which enjoin a strict construction and execution of all such powers.
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> "It is wholly unnecessary to multiply citations as to the strict construction of the power in question and the class to which it belongs. But for this rule of strictness, the remedies in all such cases might at last come to depend upon the mere caprice of parties, in the unbridled discretion of the courts." Kerr vs. Woolley, supra.

For other recent statements of this basic rule, we cite:

*Howard Gould, Plff. in Err., v. Katharine C. Gould,* 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. * * * "

*Edison California Stores v. McColgan,* (Calif.) Jan. 17, 1947, 176 P. 2d 697:

> " * * * courts, in interpreting statutes levying taxes, may not extend their provisions, by implication, beyond the clear import of the language used, nor enlarge upon their operation so as to embrace matters not specifically included. In case of doubt, construction is to favor the taxpayer rather than the government. * * * "

And see 51 Am. Jur. "Taxation" Sec. 316.

It is respectfully submitted that right here is the underlying and inherent error of this entire subsidy series of decisions to date. If such is the case, it would still seem to be the duty of this Court—despite any embarrassment from overruling prior decisions which Federal Courts have had to follow—to choose that "possi-

bility'' which the law of statutory construction points out as proper.

True, the decisions as they now stand create liability for more taxes to be paid the State of Utah by a well-nigh prostrate industry. But to allude to the old Greek legend—if the State of Utah is to win this race—after the Tax Commission itself conceded it in the early years by following this basic rule of construction—will the torch of justice under the law in the hands of the winner still be alight?

Respectfully submitted,

**A. M. CHENEY,**
**G. A. MARR,**
**C. W. WILKINS,**
**PAUL B. CANNON,**

**Attorneys for Chief Consolidated Mining Company and United States Smelting Refining and Mining Company.**

**W. W. RAY,**
**ATHOL RAWLINS,**
**JOSEPH JONES,**
**C. E. HENDERSON,**

**Attorneys for Park Utah Consolidated Mines Company.**

**R. J. HOGAN,**

**Attorney for Silver King Coalition Mines Company.**

**C. C. PARSONS,**
**WM. M. McCREA,**
**A. D. MOFFAT,**
**CALVIN A. BEHLE,**

**Attorneys for Kennecott Copper Corporation.**