

1949

Kennecott Copper Corporation v. State Tax Commission : Response to Petition for Rehearing

Utah Supreme Court

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Unknown.

Recommended Citation

Legal Brief, *Kennecott Copper Corporation v. State Tax Commission*, No. 19497298.00 (Utah Supreme Court, 1949).
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UTAH SUPREME COURT

BRIEF

7298 P1

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IN THE SUPREME COURT
of the
STATE OF UTAH

KENNECOTT COPPER CORPO-
RATION, and

BINGHAM AND GARFIELD
RAILWAY COMPANY,

Plaintiffs,

— vs. —

THE STATE TAX COMMISSION,

Defendant.

Case No.
7298

PLAINTIFFS' PETITION FOR REHEARING

Plaintiffs respectfully request a rehearing of the above cause on the following grounds:

1. This Court's conclusion that depletion may be computed only on that part of Kennecott's net income from the property allocated to Utah can find support in neither fact nor law and contravenes the express mandate of the legislature to the contrary by Chapter 13, Title 80, Utah Code Annotated 1943, especially its Sections 80-13-8 (9) (b) and 80-13-21.

2. This Court has violated basic and elementary principles of statutory construction by concluding that depletion may be computed only on that part of Kennecott's net income from the property assigned to Utah.

3. The Court erred in its decision relative to the depletion deduction wherein it held that Kennecott's request to change the method of computation was "unduly delayed," a holding contrary to fact and not raised by the Commission.

4. The Court erred in holding that Kennecott's request for permission to change the method of depletion computation was for no "substantial" reason, but merely to "escape tax liability."

5. The court erred in holding that the record in this case supported the Tax Commission's decision, rejecting Kennecott's corporate tax return and instead requiring continued use of its Utah Copper Division operations as the basis for tax computation.

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BRIEF

I.

Point

This Court's conclusion that depletion may be computed only on that part of Kennecott's net income from the property allocated to Utah can find support in neither fact nor law and contravenes the express mandate of the Legislature to the contrary by Chapter 13, Title 80, Utah Code Annotated 1943, especially its Sections 80-13-8 (9) (b) and 80-13-21.

No income at all is derived ~~from~~ this property until the marketable product is sold. Smelting and refining and transportation from smelter to refineries are activities, not of Kennecott, but of others hired by Kennecott for that purpose. Like all other activities in this single continuous and closely integrated mining operation their cost was paid by Kennecott, and with the Commission's approval was deducted from the gross income of Kennecott's Utah Copper Division whereby to arrive at that Division's taxable net income. The cost of those services included profit earned by and taxes levied upon the independent custom smelters and refineries and the transcontinental carriers. Of course those services added to the value of the ultimate product (without them there would have been no ultimate product, no operation, and nothing for Utah to tax). Wherein these and all others essential to this operation contributed to the creation of a commercially marketable product, Utah benefited by the increased net income from the property which Utah was able to subject to its State franchise tax.

This operation began with the removal of the crude ores from the ground in Bingham Canyon, Utah, and was not concluded until the production of the first commercially marketable product in the metals refined and sold on the Atlantic coast; hence the allocation fraction. Section 80-13-21. None of these activities in and of itself yielded a profit. The only profit to taxpayer was that realized when the refined metals were sold. The metals sold were from the property (certainly they were from nowhere else) and their cash equivalent for which they were sold was income from the same source. In the nature of things there neither was nor could there have been any other source than the mining property in Utah.

Neither fabrication of the refined metals nor their uses for any purpose are here involved. The mining operation ceased with the production of the refined metals and their sale. We are not here concerned with income derived from fabrication or from any other operation subsequent to that of mining, with which and only with which we are here concerned. This Court correctly defined the term "mining" as follows:

"Generally speaking, the phrase 'income from the property' means the income from mining. The latter term is usually understood to mean not merely the extraction of ores or minerals from the ground, but also the ordinary treatment processes normally applied by operators in order to obtain the commercially marketable mineral product."

The several processes described in this Court's opinion were but incidents of this single, uninterrupted, closely integrated mining operation. Without each and all of

them in their integrated aggregate, there would be no income to tax. Of those operations some were within the State of Utah, others outside, and the statutory allocation formula is for the purpose of assigning to the State of Utah an equitable part of the total net income from this mining property by this mining operation in its entirety, on the basis of business done within the State of Utah as compared with that transacted outside.

Depletion must be computed on the net income from the property, but when the Court states that Kennecott's mining operation invades "fields not usually associated with extraction and sale of ores," it indicates a lack of understanding of the facts, which apparently precludes correct decision. Kennecott's operation is not only that "usually associated with extraction and sale of ores;" its field is that of all the great copper producers, from the operations of which more than ninety percent of the world's copper is obtained. The world is dependent upon the low grade copper ores for its supply of copper and of practical necessity, if mined at all, these low grade ores must be removed from the ground on magnificent scale and handled in enormous quantity to produce copper as the ultimate marketable product; otherwise the operation would not be profitable.* The product at any point prior to the refined metals of necessity must be on

*

Anaconda Copper Company

Anaconda Copper Company mills, smelts and refines all of its production in Montana. Sales are by Anaconda Sales Company, located in New York.

Kennecott Copper Corporation

Kennecott Copper Corporation mills all of its production

a scale beyond the financial ability of any smelter to purchase and carry over the ninety day period required for the smelting, transportation and refinement before a commercially marketable product could be obtained.

It may be that this Court is laboring under the delusion that the franchise tax statute was enacted with the basic thought that all "normal" mining operators sold their crude ores or concentrates to the various custom smelters within the State of Utah, at which point their mining operations ceased and that therefore Kennecott's operation was not contemplated by the Legislature.

The franchise tax statute was enacted in 1931, at

and does its own smelting at the Nevada and Chino Divisions, where the mines of those Divisions, respectively, are situated. At the Ray Division the smelting is done in Arizona by the American Smelting and Refining Company under contract. At the Utah Division smelting is done in Utah by the American Smelting and Refining Company under contract. A small part of Chino production is fire-refined in New Mexico, but all the rest of Kennecott's production from all its Western properties has been electrically refined under contract by the American Smelting and Refining Company in states other than those wherein the ores are extracted. All sales are by Kennecott Sales Corporation in New York.

Phelps-Dodge Corporation

Phelps-Dodge Corporation mills, smelts and sells all its copper production, the smelting generally being done in Arizona, New Mexico and Mexico, the states where the mines are located; but the refining is done on contract by Phelps-Dodge Refining Corporation at El Paso, Texas and Laurel Hill, New York. Sales are by Phelps-Dodge Corporation with offices in New York.

which time the Utah Copper mine had been in operation a full quarter of a century. The nature of that operation in and out of the State of Utah over the whole of that quarter century was accurately and fully comprehended by the taxing authorities and the successive Legislatures of this State. The Legislature of 1931 enacted the franchise tax statute with its mine depletion deduction provisions knowing full well the operation of Utah Copper Company in and out of the State of Utah, the profitable character of that operation and the revenue to be derived by the State of Utah by applying thereto this franchise tax statute with its allocation formula devised to meet this Company's mining activities, initiated in the State

Inspiration Consolidated Copper Company

In the past the production from Inspiration Consolidated Copper Company has been in part from leaching operations, and that part is refined at the mine. The other portion of the production comes from concentrating ores. These are smelted on contract by the International Smelting & Refining Company at Miami, Arizona, where the mine is located, and on this part the refining is done by International Smelting & Refining Company's refining works in New Jersey. All of the sales are by Anaconda Sales Company, located in New York.

Castle Dome

This company is a subsidiary of Miami Copper Company. The ores are milled at the mine near Miami, Arizona, smelted on contract at International Smelting & Refining Company's smelter at Miami in part and part on contract by Phelps-Dodge at Douglas, Arizona. That part which is smelted by International is refined by the International Smelting Company in the State of New Jersey, and that part which is smelted by Phelps-Dodge is refined by Phelps-Dodge Refining Corporation at El Paso, Texas. Sales are by Adolph Lewisohn & Sons, located at New York.

of Utah, but concluded only on the Atlantic coast. In its calculation of anticipated State revenue the Legislature did not overlook this, the greatest open pit copper mine in the world and the State's largest taxpayer.

Kennecott and its predecessor Utah Copper Company, with the other mining interests affected, were consulted and participated in the framing, amendment or interpretation not only of the State franchise tax act, but of the occupation tax, net proceeds act, and other statutes from time to time introduced for the purpose of taxing the mining industry. Also Kennecott and its predecessor Utah Copper Company had been on the defensive before the taxing authorities of the State of Utah and the courts on review of the conduct of those authorities too frequently to permit the conclusion that the character of their operation tax-wise had escaped the Legislature's notice. A mining operation is entered upon to obtain a commercially marketable mineral prod-

Miami Copper Company

The ores are milled at the mine at Miami, Arizona, smelted on contract at International Smelting & Refining Company's smelter, also at Miami, in part, and part by the Phelps-Dodge at Douglas, Arizona. That part which is smelted by International is refined by the International Smelting Company at its refinery in New Jersey, and that part which is smelted by Phelps-Dodge is refined by Phelps-Dodge Refining Corporation at El Paso, Texas. Sales are by Adolph Lewisohn & Sons, located at New York.

Consolidated Copper Mines

Ore is milled and smelted on contract in Nevada in which state the mine is located, refined by American Metal Company at New Jersey, and sold by Consolidated Copper Mines Company in New York.

uct. In this instance, for reasons well understood, such a product could not have been obtained within the State of Utah; of practical necessity it was obtainable and obtained only at the conclusion of the operation on the Atlantic coast, where and only where the entire net income from the property was or could have been realized.

Moreover we have shown that there is nothing unique or unusual in this mining operation of Kennecott and its predecessor Utah Copper Company, having in mind both its in-and-out-of-the-State-of-Utah aspect and the copper product which it mines.

The Court proceeds:

“* * * We believe that if the taxpayer claims that all net income is not earned in this state, that

Magma Copper Company—Arizona

Ore is milled and smelted by Magma Copper Company in Arizona, refined on contract by Phelps-Dodge Refining Corporation either at El Paso, Texas, or Long Island, New York, and sold by the Magma Copper Sales Corporation located in New York.

Calumet & Hecla Consolidated Copper Company

The production from this company is smelted and refined by this company in Michigan and is sold by the same company in New York.

In 1941 the above accounted for 89% of the copper produced in the United States. The same procedures have been followed since that time, but the relative production from these properties has increased. All of the above information is from American Bureau of Metal Statistics, a bureau which up until the time of the war furnished the authoritative data on copper produced in the United States, and from the Minerals Year Book, which is published by the Bureau of Mines, a department of the United States Department of the Interior.

the portion allocated to business done outside this state must, of necessity, not be income from the property within the meaning of our statute. * * * if any net income is attributable to business done elsewhere, it must come from operations which would not be considered ordinary treatment processes normally applied by operators. The taxpayer in this instance is in a rather inconsistent position to assert that net income pertaining to business performed outside this state can be considered as net income from the property. * * * All we need do in this case is to point out that there are two possible paths for the taxpayer to take. * * * Either the net income is from the property and should be allocated to this state, or the net income is from both the property and the postmining activities and they are not so related that the net income cannot be roughly allocated to both sources. * * *"

In the light of the facts to which the Court's attention has now been directed, we think it will be understood that the foregoing excerpt from the Court's opinion is utterly unintelligible to us. It appears to us as a complete *non sequitur*.

The statute provides that:

"The portion of net income assignable to business done within this state, and which shall be the basis and a measure of the tax imposed by this chapter, may be determined by an allocation upon the basis of the following rules: * * *"
§ 80-13-21.

How could it be that "if the taxpayer claims that all net income is not earned in this State, that the portion allocated to business done outside this State must, of

necessity, not be income from the property within the meaning of our statute"? Upon what premise are we expected to arrive at that astonishing conclusion? The Court had already correctly defined the operation in and out of the State of Utah as a single, uninterrupted mining operation. Indeed it is here so stipulated. Surely it must be presumed to remain such until some interruption shall have occurred more potent than the mere intervention of a State line.

Why are we to conclude that the refined metals are not "from the property" merely because State lines intervene in the processes necessary to the realization of that first and the ultimate commercially marketable mineral product sought? Of course, this Court would not deny that the refined metals were from the property. Those refined metals were income's equivalent; wherefore, would it not be reasonable to conclude that their money equivalent was income likewise from the property? By what inexplicable magic does the intervention of a State line break the continuity of this single, uninterrupted, closely integrated mining operation and render no longer "from the property" the refined metals mined from that source; or render their money equivalent, income no longer likewise from that property? What the intervention of State lines could have to do with what was or was not income from the property we cannot comprehend. Were this mining operation in its integrated entirety to and including its first commercially marketable mineral product wholly within the State of Utah, would this Court deduct from its total net income, an estimated net income from transportation,

refining and sales, and compute depletion only upon what was left? Of course it would not! Then why here emasculate that deduction for no other or better reason than that transportation, some smelting, and all refining and sales were accomplished beyond the Utah State line?

The Court continues:

“If any net income is attributable to business done elsewhere, it must come from operations which would not be considered ordinary treatment processes normally applied by operators.”

To that statement the Court as seen has already applied its own denial. That statement is a denial of the very fact the Court itself correctly has declared, since the operations here involved, and all of them, were in fact the “ordinary treatment processes normally applied by operators in order to obtain the commercially marketable mineral product.” Wherein were they not such? Do they cease to be such when State lines intervene, and if so, why?

Why should the taxpayer be in this instance “in a rather inconsistent position to assert that net income pertaining to business performed outside this state can be considered as net income from the property”? The taxpayer has followed the plain and unequivocal wording of the statute, which sets up the ratio of business done in the State to that transacted outside, as a basis for allocation in and out of the State of the total net income, including rentals, dividends and other income as well as that derived from the property by the min-

ing operation the Court has defined. None of these operations are post-mining. They are, as the Court properly defined them, a part of mining itself. Fabrication of the refined metals would be a post-mining activity, but fabrication is not here involved. Mining ceased with the production and sale of the first and ultimate commercially marketable mineral product, i.e., the refined metals. Such is the Court's own definition.

Then the Court further proceeded:

“All we need do in this case is to point out that there are two possible paths for the taxpayer to take * * * Either the net income is from the property and should be allocated to this state, or the net income is from both the property and the postmining activities and they are not so related that the net income cannot be roughly allocated to both sources.”

Why may these plaintiffs not adhere to the position which always has been theirs, that here they must comply with the statute which provides that:

“The portion of net income *assignable to business done within this state*, and which shall be the basis and measure of the tax imposed by this chapter, may be determined by an allocation upon the basis of the following rules:” (§80-13-21).

We suggest that the Court also remember that it is here called upon to construe that same statute in the light of the stipulated facts.

There being no market for Kennecott's ores, for its concentrates or for its blister copper with milling,

smelting, refining and transportation being nothing more than certain of the many necessary steps contributing to the first and ultimate commercially marketable product at the conclusion of the mining operation, the Commission in its computations always started, as of course it must, with that first and ultimate commercial product, whether for mine depletion, net proceeds or the occupation tax. Any attempted allocation of income to any of these preliminary activities, each and all of which are necessary to a commercial product and net income, is certainly not within the contemplation of the statute, no more than does the statute contemplate a further breakdown of net income as for labor, supplies or payment of Social Security taxes. To what fantastic result is this Court's legislative effort to bring us. The Court is not construing the statute—there is none such.

There is nothing in this statute which seeks first to break down a single, continuous, integrated mining operation into its several processes up to and including the production and sale of the ultimate commercially marketable product; then to locate the intervening state lines; and finally on the basis of their occurrence to eliminate from the total "net income from the property" for purposes of depletion calculation, such excluded parts as in the sovereign discretion of this defendant may accord with its conception of what is equitable to Utah.

Section 80-13-8 (9) (b) provides:

"The allowance for depletion shall be thirty-three and one-third per cent of the net income from the property."

While the entire net income from Kennecott's Utah Copper Division (except of course for minor rentals and dividends always excluded) is from its property in Utah, that net income is in large part the result of business transacted outside the State of Utah. Therefore, Section 80-13-21, the statutory allocation formula, contemplates the very situation here involved and makes provision for just that allocation returned by the plaintiffs.

This Court concludes that since the only property subject to depletion is located in Utah, the depletion allowance should be computed on the net income allocated to Utah. The defendant wants the money; but why the Court so concludes is not disclosed. It is respectfully submitted that the defendant and this Court attempt to rewrite the statute.

Depletion is defined as a reduction in values by destroying or consuming resources or values. Depreciation comprehends something which may be replaced, but that which is lost through depletion is gone forever. If assets are held for the purpose of earning revenue, it is clear that any shrinkage in their value is a loss, which should be charged against income before true profit or net income can be ascertained. It is the unvarying practice, in the valuation of mining property, to find the value of the minerals in the ground on the basis of their sales price, the quantity of such minerals and the deductions comprehending the total cost of operation, including of course the mining of the crude ores, milling, smelting, refining, transportation, marketing and all

other activities and processes essential to the ultimate objective of a commercially marketable production. This has always been and can be the only basis upon which the value of mining property may be determined. As the mining property is the thing depleted, the basis for depletion must be the value of the property, determined as stated. Such being the only accepted concept of depletion, it is fallacious and unprecedented to assign any profit or net income to any intermediate process or activity, and no such attempt would be made by any qualified appraiser. Were the Utah Copper mine to be evaluated for purpose of sale, such would be the only basis which could be used in arriving at the profit or loss sustained under the franchise tax statute. What is here actually going on is that the ore body of the Utah Copper mine is being sold from year to year, and the value of the part sold is the profit or net income resulting from the year's operation to and including the first commercially marketable product and its sale. The resulting shrinkage in the value of the ore body is depletion, which must be computed on the basis of total value and must first be deducted before net income can be realized.

In the light of the foregoing facts how can this Court, without any precedent or authority whatever, in the teeth of a statute which does not so provide, solemnly declare its opinion that for purposes of the depletion calculation, those activities or processes performed beyond the State line, although without question all necessary to the first marketable product resulting from the total integrated operation, necessary to the very income taxed, must have allocated to them either by some in-

explicable incantation, or by an arbitrary state-line division, a part of that total net income in computing the allowance for depletion! It is respectfully submitted that it is the plain intent of the law that the taxpayer shall have the value of his mining property as of the basic date, income tax free. Actually no mining operator realizes a profit or any net income until the operation shall have discharged its burden of returning to the participants in the venture the capital invested. The Utah State Franchise Tax Act did not become effective until January 1, 1931, and any appreciation in the value of the mineral deposit before that date cannot be subject to tax as income. The plain intent of legislative enactments, whether Federal or State, is that there shall be allowed compensations for loss through exhaustion of the mineral property, and the amount of depletion allowable will obviously be proportionate to the exhaustion suffered. Depletion suffered in any year is the money value in the ground of that part of the ore body removed by production; and its money value in the ground is its sales price, less all costs up to the first commercially marketable product, such marking the termination of the mining operation.

The Legislature recognized the fact that the mine at Bingham is a wasting asset and decreed that the depletion allowance should be computed on the "net income from the property." Thus using Kennecott's first marketable product as the base, was this statute construed and applied by the defendant from its passage until March 10, 1945, the date of defendant's proposed adjustments. The allowance for depletion is not part

of the allocation formula—it is a deduction just as are the costs of the mining operation, a deduction which by Section 80-13-21 is to be made *before* an allocation fraction can be applied. It is not intended to make, and the statute cannot be rightly construed as making, the depletion allowance dependent on or subject to an allocation of net income to the State of Utah. The propriety of a depletion allowance is not to be ruled by the fortuitous occurrence of state boundaries. The one bears no relation to the other. By the statute itself the depletion deduction must be made upon total net income before depletion, not upon a part of it, and the depletion deduction must of necessity precede allocation of net income to Utah.

In the absence of other authority, the intent of the Legislature expressed in the Utah Net Proceeds Tax Statute, Section 80-5-56, Utah Code Annotated 1943, as amended, Session Laws 1947, c. 106, Section 1, page 398, and the Utah Mine Occupation Tax Statute, Section 80-5-66, as amended, should be especially significant.

By Sections 80-5-56, 57, of the Net Proceeds Tax Statute, as amended, it is provided that:

“80-5-56. Assessment of Mines.

“All metalliferous mines and mining claims, both placer and rock in place, shall be assessed * * * at a value equal to two times the average net annual proceeds thereof for the three calendar years next preceding or for as many years or fractions thereof next preceding as the mine has been operating, whichever is less. * * *

“80-5-57. Id. Net Annual Proceeds-Definition of-Basis for Tax-Deductions.

“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 * * * The following, and no other, deductions may be taken:

“(5) The actual cost not exceeding a reasonable cost of the transportation of the ore from the mine to the market or reduction works.

“(6) The charge made for sampling, assaying, reducing (sic) and smelting the ore and extracting the metals and minerals therefrom;
* * *”

By Section 80-5-66, as amended, of the Mine Occupation Tax Statute, it is provided that:

“* * * every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metal in this state shall pay to the state of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold * * *

“(c) If a mill or other reduction works is operated exclusively in connection with a mine, such mill or reduction works shall be treated as a part of the mine and the cost of operating such mill or reduction works shall, for the purpose of fixing the occupation tax imposed by this act, be regarded as part of the cost of mining and cost of assaying, sampling, smelting, refining, and transportation, only, shall be deducted.”

The net proceeds tax is an ad valorem property tax levied upon mines and mining claims evaluated by applying a multiple to the average net proceeds from the property over a period of years preceding the tax. Under that statute the miner must report his total net proceeds from the property after deductions for "milling, smelting, refining, marketing, transporting," etc. No court or commission has yet attempted to break down such net proceeds at points where state boundaries may intercept the path of "the ordinary treatment processes normally applied by operators in order to obtain the commercially marketable mineral product," in order to assess the mine on the basis of that part of the total net proceeds from the property allocated to Utah. But depletion is a reduction in values by destroying or consuming resources or values. Just as this ad valorem property tax deals with total value, so, of necessity, must depletion be computed on total value. For purposes of depletion the taxpayer must have the value of his property as of the basic date, tax free. And, of course, it can make not the slightest difference in fact or principle where state lines shall cross the mining processes. No more did the Legislature when enacting the State Franchise Tax Statute intend by the term "net income from the property" only that part of the net income from the property which the Commission "in its discretion" shall have allocated to Utah.

Section 80-5-66 of the Mine Occupation Tax Statute provides that the miner shall pay an occupation tax equal to one per cent of the gross amount received for metalliferous ores sold. And it is further provided that

if a mill or other reduction works shall be operated exclusively in connection with a mine, such mill or reduction works shall be treated as a part of the mine and the cost of operating such mill or reduction works shall be regarded as part of the cost of mining, and in addition the cost of assaying, sampling, smelting, refining, and transportation shall be deducted. Again it makes not a particle of difference where state lines cross the mining processes.

Does the Court appreciate the fact that a “refinery”—fire or electrolytic—is to copper the same type of a “reduction works” that for example a cyanide plant is to gold? Each is equally necessary to create or effect the first normally commercial marketable product.

True, by allocating income from the sales of gold to the mint on some ratio of costs, or by the injection of a basically unrelated “state line” theory, one could declare by fiat that X Dollars was the value of the ore before the cyanide or any other intermediate process in the mining production chain short of the ultimate product. But that declaration *ipsa dixit* cannot create something that in fact does not exist; nor could the Legislature have had such in mind when it enacted these statutes. The income from each mine expressed in dollars is still the value or sales price received for the mine’s first normally commercial marketable product in fact, not in theory.

It is submitted, with all respect due this Court, that the portion of its opinion here discussed is inconsistent

with itself and unintelligible; that it is constructed upon assumptions contrary to fact and in the teeth of the stipulated record herein; that the Court has ignored, or by implication has rewritten the statute, not construed it; and in so doing has tendered into an already complicated problem an incoherent discussion which bears no logical relation to the conclusion announced.

II.

Point

This Court has violated basic and elementary principles of statutory construction by concluding that depletion may be computed only on that part of Kennecott's net income from the property assigned to Utah.

a. A cardinal rule of statutory construction is that where legislation is adopted from another jurisdiction, the interpretations and meaning which have been given that wording by the sister jurisdiction are likewise adopted as a part of the statute.

This rule has been generally followed in this state: *In re Cowan*, 98 U. 393, 99 P. 2d 605; *Norville v. State Tax Commission*, 98 U. 170, 97 P. 2d 937, 126 A.L.R. 1318; *Fuller-Toponce Truck Co. v. Public Service Commission*, 99 U. 28, 96 P. 2d 722; and *In re Raleigh*, 48 U. 128, 158 P. 705 wherein the rule is stated thus:

“In view that the decisions of Iowa were in effect before that section was adopted by the code commission of this state in 1898, we must assume that the construction placed upon it by the Supreme Court of Iowa was likewise adopted.”

By the record herein it was stipulated (R. 106) that the Federal law was the model for the Utah income tax law; and that with respect to the base for the percentage depletion deduction, the language is identical. In each case that base is "income from the property." This has been construed to mean in the case of this same and similar mining operations, the income obtained through the normal milling and reduction processes necessary in addition to extraction to obtain the commercially marketable product of refined copper. (R. 67)

Since this does not appear to have been made too clear to the Court, we quote from the undisputed testimony of expert witness GEORGE C. EARL (R. 67-9):

“Q Has the Federal Government ever attempted in its administration of its law to make such an allocation as the Commission’s Staff now proposes?

“A Insofar as the operations of Kennecott in Utah, or the Utah Copper before it became Kennecott’s property was concerned, *no such allocation has ever been attempted*. They have, however, in recent years attempted to allocate profits from certain operations of some of the other units of Kennecott, where these further processes were carried on by Kennecott. It has never attempted to allocate any profits to any of the properties of Kennecott where the processes or transportation has been by others. It has announced no intention of ever doing such a thing. We have had some controversy with them as to the allocation of profits to smelting at Nevada and in New Mexico where the Internal Reve-

nue Department has attempted to allocate a part of,—a very small part I may say—of the profit to the smelting of the concentrates in Kennecott's smelters. The basis for this attempt by the Government as announced by them is because Kennecott, at those particular smelters, smelts other people's ores, that is they engaged in a custom smelting business, and do, of course, make a profit on that smelting, or attempt to make a profit at least on the smelting of the custom ores, and because of that the Federal Government has attempted to allocate a very small portion of the profit to the smelting in those two instances.

“Q But as I gather, not in the cases of the Utah operations because it is the company's contention that whatever profit there results from this postmilling operations is paid to the parties who do that work?

“A Of course, that is the basis underlying it, but the Federal Government had never attempted to allocate anything. They say on their determinations, ‘These services performed by others at cost to Kennecott’ and they have made no attempt whatever to allocate any profit. I might state in connection with this that things that have developed in that connection, that much of this need of allocating profits so far as the Federal Government is concerned, has arisen from the fact that in many instances, in fact several cases in Utah, it is done where a Mining Company charged itself a cost of smelting, or made a cost for smelting which wasn't the cost, for instance, if one of the smelting companies in Utah would smelt a certain grade of ore for an-

other mining company for \$7.00 a ton without charging themselves \$7.00 a ton, and as a result the smelting operation was making the profit at the expense of the mining operation. And it was announced in many instances, and it appears in the Congressional Record in statements made by the under-Secretaries of the Treasury, particularly Mr. Paul, that the purpose of allocating any costs whatsoever to processes was to make the company owning a smelter, or other processing plant,—put them on the same basis as any other taxpayer who didn't own those things, and that the Department didn't ever intend to allocate profits on any other conditions.

“Q Then, Mr. Earl, it is your opinion that by the same reason there is no occasion whatsoever for this attempt by the Commission's Staff to make an allocation in this instance?

“A That is correct.”

So it would hardly seem reasonable that Utah's legislature had any different concept in mind when it provided that depletion might be a percentage of the same net income from the same mine. That is, the same refined copper less the same expenses; as likewise was the base under the occupation and net proceeds taxes, *supra*.

We submit that to hold to the contrary would be in violation of this fundamental and elementary rule of statutory construction.

b. The second basic rule of statutory construction which the present opinion violates is that of administra-

tive or contemporaneous construction. It was here stipulated that from 1931 when the law was first enacted until 1942, the Tax Commission in applying the statute to this and all other taxpayers construed the intent of Utah's legislature to be that adopted by the Federal Government (which the Commission likewise invoked for both the occupation and net proceeds mining tax laws). That is, taxpayer's refined copper as the first commercially marketable product was taken as the tax base, from which was then deducted the expenses of the necessary and normal extraction, treatment and reduction processes and the deduction for depletion. The proceeds from the sales of the copper before any fabrication constituted the "income from the property." (R. 106-8).

Each of the elements appropriate to place this rule of administrative construction into operation is in this instance present. We quote from 2 Sutherland on Statutory Construction (3rd Ed.) Sec. 5104:

"The conclusiveness of a contemporaneous and practical construction will depend upon a number of additional elements that give efficacy to the rule. In general, these elements are: (1) that the interpretation originated from a reliable source; (2) that the interpretation has continued for a long period of time and received wide acceptance; and (3) that the interpretation was made at or near the time of the enactment of the statute."

In this respect the situation is far different from the deduction-of-income-taxes interpretation originally a part of this case, and determined by this Court in the New Park Mining Company decision, 196 P. 2d 485.

Thus the opinion as it now stands is in the teeth of this basic rule, to a degree that amounts to a violation of the elementary principle that it is not the province of the Court to legislate.

III. Point

The Court erred in its decision relative to the depletion deduction wherein it held that Kennecott's request to change the method of computation was "unduly delayed," a holding contrary to fact and not raised by the Commission.

True, Kennecott once had "its option to select the method it desired to use" (Opinion p. 6). The Court then admits that "a change in the administrative regulations might be good grounds for requesting a change in accounting practice." There is no dispute that important administrative changes here were made.

a. But how, in this case, was Kennecott's request "unduly delayed"? It was made before and during the only formal hearing before the Commission, which made the record for this Court.

The Commission did not object that the request was not timely. It stipulated in this Court by the time of oral argument that Kennecott would be permitted to switch to the cost-or-value method. Then it joined in our request for an interpretation of the question of whether or not it might invoke the federal percentage or some other alternative method instead of the two specifically described in the law.

This Court was the first to suggest any "undue" delay. What standard is now to guide Kennebec, or any other taxpayer? Does the Court really mean that we can't request a change of method, because we didn't anticipate that the Commission would make at least three changes in administrative regulations; and so anticipating file our request in this case two years before that fact occurred? Of course no taxpayer can sustain that burden of prophecy if that be the test of a timely request.

We can add but little to the dissent: "The rejection by the Commission of its previous stand in the matter should throw the door open to the company making a selection as contemplated by the section of the code involved."

We have thought it fundamental that one who changes the rules of any game in the course of its conduct *without allowing the others to adjust their positions accordingly*, might be characterized by an unpleasant word. The Commission realizing this *by the time of the hearing before this Court and when the record in this Court had been augmented to show its repudiation of former principles*, cooperated fully by asking for an interpretation by this Court of the methods or courses of action open, including a switch to cost depletion *which it professed to this Court would be allowed*.

Yet the majority opinion seems to hold Kennebec to the position taken by it in reliance on the Commission's previous actions; and uses as an excuse something never raised by the Commission—that Kennebec's requests in both instances were "unduly delayed."

IV.

Point.

The Court erred in holding that Kennecott's request for permission to change the method of depletion computation was for no "substantial" reason, but merely to "escape tax liability".

Kennecott's reasons for requesting the change in method for computing depletion are in no way associated with "repeated requests to change systems merely for the purpose of escaping tax liability". (Opinion p. 7.) It was the only such request since the law was first enacted in 1931.

Kennecott felt and still feels that it is being denied the "reasonable allowance for depletion" which Utah's statute grants to all taxpayers alike. We quote from Section 80-13-8(8) which establishes as a deduction:

"* * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case."

We submit that the denial of such allowance by commission or court is indeed a "substantial" cause of complaint, even though the incidental result is a lower tax and to that extent an "escape of tax liability".

Since the Court has either overlooked, or by ignoring has not found persuasive the basis for Kennecott's claim that it has been denied that "reasonable allowance", these reasons are reiterated briefly as follows:

a. Utah's corporation franchise tax is a tax on net *income*. It is not a tax on returns of capital.

b. Therefore not only are applicable expenses first deducted to obtain the taxable net income base, but also depreciation and *mine depletion*. Depletion is peculiar to wasting assets involving returns of capital.

c. To determine mine depletion, a choice between two general methods is originally available to the taxpayer:

(1) Straight-line depletion of the cost-or-value of the property at the time the tax law became effective—just as in the case of depreciation.

(2) A percentage of either the “gross” under federal law, or “net” under the Utah law, “income from the property”.

d. The taxpayer is afforded an initial election between these methods. Thereafter a switch may not be made without the consent of the Tax Commission. This is not an arbitrary power vested in the Commission, but a control to be used according to the circumstances of each particular case to prevent unfair results to either the State or the taxpayer.

e. Since 1916 the Federal Government, and from 1931 until this case, the Tax Commission alike, construed “income from the property” to be the value of the first commercially marketable product obtained from the mine. In the case of porphyry copper mines such as the Utah Copper Mine with its extremely low ore con-

tent, this first commercially marketable product is refined *copper*. Some of the smelting, and the equally essential refining processes have taken place outside of the State of Utah. No fabrication is here involved, we again repeat.

f. Utah's Tax Commission from 1931 through 1941 also construed the net income from Kennecott's property on which depletion was computed to be net income *before* deduction of federal taxes.

g. Relying upon interpretations *e* and *f* above, the owner of the Utah Copper Mine in 1931 originally elected the percentage depletion method. In 1936, when the property was acquired by Kennecott, the taxpayer by agreement with the Commission filed its tax returns invoking a method of separate accounting for the Utah Copper Mine, likewise in reliance upon the administrative interpretations outlined above.

h. In 1945 (although for the 1942 tax return) the Tax Commission made several changes in its rulings including two changes specifically with respect to points *e* and *f*:

(1) It determined that "income from the property" now was meant by the legislature to mean either the value of the ore at the mine, or at most the value of the concentrates at the mill. Since there was no commercial market for either, it invented a self-proving formula applied to Kennecott alone to establish or create such a value mathematically.

(2) Also it said that mines using the percentage depletion method now must first deduct the federal taxes. These taxes often reached the 90% bracket since the United States was financing World War II.

i. Kennecott pointed out (Exhibit 4) that the mathematical result was to cut down to less than one-half, the depletion allowance which would be available under either of the two federal methods; or under the Utah cost-or-value of 1931 method; or under the Utah percentage method until the injection of the distorted federal taxes and the changes in administrative rulings. It should again be recalled that the taxpayer under its 1931 choice had elected to use the percentage rather than the cost-or-value method in reliance upon the Tax Commission's interpretations which now were to be changed.

j. By timely request—before and at the hearing which was sought to be reviewed in this Court—Kennecott accordingly asked:

(1) To be allowed to “re-elect” the method for determining depletion; i.e., to use either the Utah cost-or-value method, or the federal percentage-of-gross method.

(2) To file a return on the basis of its over-all operations. (We need not set forth here the treatment afforded this second request, since it is hereinafter covered as the final reason urged for granting a rehearing of this cause.)

k. As to changing the method of computing the

depletion deduction, the Tax Commission by its brief and stipulation herein finally conceded the point. It said that the taxpayer would be granted permission to switch to the cost-or-value method. It also cooperated by joining Kennecott in asking the Court to determine whether or not the federal percentage-of-gross method was available under the wording and intent of Utah's statutes.

l. As to the latter, this Court said in effect "Perhaps—we need not decide". And as to the former, after fifteen months it branded Kennecott's request—*finally conceded by the Commission*—as untimely!

m. Next the Court proceeded to reject the federal interpretation as to what was "income from the property" because "arising under different statutory provisions". But the wording is identical; it is stipulated that it was the model for Utah's law; and therefore by a basic rule of statutory construction *the federal interpretations* at the time Utah's legislature adopted the wording were to be followed.

n. No mention was made by the Court of the Tax Commission's own similar administrative interpretations of this wording for eleven years until this case.

o. And finally, the Court rewrote the statute to say in effect that percentage depletion under Section 80-13-8 should be based not only upon net income "from the property", but should be further limited to net income "from the property assignable to Utah under Section 80-13-21".

Thus apparently the majority concluded that here the depletion allowance *was* reasonable. Therefore of course it would follow that the Commission could not be arbitrary in denying use of any other method of computation.

But in order so to hold the allowance reasonable, the Court had first to lay down a new set of rules to determine depletion for a mine with multiple state processes necessary before the first commercially marketable mineral product is obtained. The fallacy of this discriminatory ruling has heretofore been made apparent. This Court erred in not requiring the allowance of the reasonable deduction in accordance with the mandate of Utah's legislature.

V.

Point.

The Court erred in holding that the record in this case supported the Tax Commission's decision, rejecting Kenecott's corporate tax return and instead requiring continued use of its Utah Copper Division operations as the basis for tax computation.

The majority opinion assumes facts and possibilities for which no basis exists in the record before the court.

For example is the next-to-last sentence of the opinion on page 3—"Had the request been granted at that late date it would have resulted in a substantial change in accounting procedure and would have com-

plicated and not simplified what was already a difficult tax question". Again, in the next-to-last paragraph on page 4: "We * * * see many practical difficulties had a different method been permitted. * * * To use the method set out in the first subparagraphs of the section *might* introduce variable facts, some impossible of ascertainment, such as the relative value of mines or mining property. The determination of this factor alone *might* lead to endless and unsatisfactory litigation. In addition it *might* unjustly discriminate against this state or the taxpayer in that the tax assessed *might* bear no reasonable relationship to the value of the ore extracted or the amount of business done in this state." (Italics ours.)

We thought this was a judicial proceeding in the nature of a *review of the record below*—not an occasion for the expression of what "may" or "might" or *might not be*. And we thought Utah statutes as interpreted by the California Packing Company (97 u. 367, 93 P. 2d 463) case were clear and unambiguous, the decision to depend *upon the record in the particular case*.

Here the record is silent, except that in January, 1948 (long before the hearing before the Commission and its decision in 1949 on which this review is based) Kennecott prepared and filed an amended return on the corporate basis *as required by statute*. It stated that the reason for the change was the Commission's repudiation of principles which originally caused the taxpayer to use the separate accounting method of return with the consent of the Commission. (R. 228-234.) The Com-

mission itself didn't find anything wrong with this amended return—even as to the “difficulties” which the majority opinion thinks “might” be there. It simply ignored the amended return to the extent that it was omitted from the record certified by it to this Court, until Kennecott filed a motion to augment. Then at last it sent the amended return to this Court.

What guide is now to be followed in such cases by Kennecott or any other taxpayer? Is the Commission's *ex parte* fiat that the formula does not work in a particular case absolute, a hearing and record being unnecessary? It is possible that given a hearing, and if it were incumbent upon it so to do, Kennecott could demonstrate that the corporate method the better effected an allocation of earnings; and the Commission might so hold. We had thought it clear under the California Packing case (97 U. 367, 93 P. 2d 463) that there must be a hearing with the burden of proof on the Commission.

As a matter of fact, the suggestion for an amended return filed on the corporate basis originally came in mid-1947 from the Commission's own staff. (R. 55-6.) At that time the Staff took the position that under Utah's statutes, an interstate taxpayer *had* to file on the corporate basis, unless by agreement or by assuming its burden of proof under subsection 8, the Commission otherwise determined. We agree that this still **plainly** states the law. But presumably when it was discovered that the resulting tax computations were in Kennecott's favor, the Staff forthwith abandoned all such talk and proceeded simply to ignore Kennecott's amended return

prepared on that basis. One wonders, had the Staff persisted because the tax results were in the State's favor, if such action on review would be held by this court to be "untimely"; and void because of a major change in accounting; and in the absence of any record, fraught with possible "difficulties".

And as to these "difficulties" which the Court anticipates here, we cannot forget Mr. Christopherson's statement in the Staff conferences to the effect that "there would be no great administrative difficulties" should filing on the corporate basis be required. Any taxpayer with corporate property within and without the state, or with employees within or without the state, must sustain its returns, and difficulties "may" be encountered by it or the State Tax Commission.

Thus Kennecott with no great difficulty prepared and filed its amended return January 19, 1948. The formal hearing was held in December of that year. It is this amended return filed more than a year before the Commission's decision January 22, 1949 which, if the majority opinion stands, was now "untimely".

To conclude on this point, frankly we are shocked that members of this Court, with no definitive determination by the Commission, without a record on which its decision should be based, and without an opportunity to the taxpayer to be heard, should deny the opportunity to proceed in accordance with what is the plain mandate of the legislature. The taxpayer *must* file, invoking the formula of Section 80-13-21, until the Commission should

determine following a hearing that a return on the corporate basis "does not" make a proper assignment of income to the State of Utah. And the Commission's determination must find appropriate support in the record upon review.

Conclusion.

Following oral argument herein where substantially the same time was given this "difficult" case as in actions involving a simple appeal, the then Chairman of the Tax Commission shared the opinion of plaintiffs' counsel—that this court simply didn't understand the ramifications herein involved. Recognizing fully our own shortcomings responsible for this situation, we tried in vain to suggest re-argument when a year elapsed without action by the Court. Now the opinion finally produced confirms our worst fears.

We would think that the Commission itself would ask for further clarification. This, since the mixing together of the depletion allowance with assignment of income to state lines not only is contrary to the Commission's interpretations through 1941, including its settlement of Case No. 6324 herein, but is about to plunge us into further confusion and conflict. For if by mathematical say-so something not a fact is held to be so for depletion purposes, namely, a commercial market value for Kennecott's mill concentrates, it becomes such for occupation and net proceeds tax purposes; and the arbitrary state line cut-off rather than

the first commercially marketable product in fact—copper at the refineries—will be the tax base with Kennecott entitled to substantial refunds due to these changes in rulings. That is, unless this court will also rewrite the occupation and net proceeds tax laws.

Kennecott respectfully requests that to prevent injustice and further conflict and confusion, this Court should grant a rehearing. It should take the time necessary to become truly informed on the issues herein so that it may remand the case with the following instructions:

a. That the Utah legislature, using the words “income from the property” concerning the mine depletion deduction, intended to require use of the market price or value of the mine operator’s first normally commercial marketable products. (Just as Congress intended, the Utah legislature intended with respect to the mine occupation and net proceeds taxes, and as the Tax Commission interpreted the law for eleven years.)

b. That in view of the Tax Commission’s change of administrative rulings, this taxpayer should be afforded the opportunity to re-file, selecting anew from the alternatives originally available. That this amended return be subject to determination by the Tax Commission to the extent necessary to invoke the legislative mandates that the depletion allowance be “fair and reasonable” under the circumstances of this case, and that the assignment of income fairly reflects to Utah

“the portion of net income reasonably attributable to business done in this state”; both such determinations to be subject to the usual procedures for redetermination and review.

Respectfully submitted,

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