2000

Combined Metals Reduction Company v. State Tax Commission : Brief of Appellant

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

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REFERENCES AND AUTHORITIES

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

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vs.

STATE TAX COMMISSION and J. LAMBERT GIBSON, ROSCOE E. HAMMOND, MILTON TWITCHELL and HEBER BENNION, JR., constituting said Tax Commission,
Defendants and Appellant.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

These cases involve appeals from judgments entered in favor of the Eureka Lilly Consolidated Mining Company, Tintic Standard Mining Company, Montana Bingham Consolidated Mining Company, Chief Consolidated Mining Company, Colorado Consolidated Mines Company, Eureka Bullion Mining Company, U. S. Smelting, Refining and Mining Company, International Smelting and Refining Company, National Tunnel and Mines Company, Ohio Copper Company of Utah and the Combined Metals Reduction Company, in actions brought by the respective companies against the appellants herein in the District Court of Utah. The issues in all cases being the same, the causes were consolidated for trial (Rec. 89-90). The trial court without a jury heard the cases. The parties submitted written stipulations in lieu of testimony (Rec. 89-90). The court gave judgment for the plaintiff in each case (Rec. 91). On appeal the points raised with respect to each case being the same, the causes have been consolidated for purpose of printing the record, submitting the brief and argument before the court.

Appellant in its brief will refer to the record in the case of the Combined Metals Reduction Company vs. State Tax Commission, No. 6869, exclusively, except as otherwise indicated.

The cases arise out of the payment under protest, of certain occupation taxes to the State of Utah by the respondents, hereinafter referred to as the Mining Companies. Section 80-5-66, Utah Code Annotated, 1943, provides in part 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 1 per cent of the gross amount received for or the gross value of the metalliferous ore sold which tax shall be in addition to all other taxes provided by law * * *."

During the calender year 1943 the Mining Companies, in addition to the amounts received from private enterprise for the sale or other disposal of their ores, also received certain sums of money from the Federal Government through Metals Reserve Company, pursuant to a "premium payment program" (Rec. 73). In assessing said occupation tax, the State Tax Commission of Utah included in the "gross amount received for or the gross value of metalliferous ore sold," the "premium payments" received by each of the Mining Companies. The Companies, with respect to that portion of the tax attributable to the respective amounts received from Metals Reserve Company, paid the same under protest, and brought suit in the District Court of Utah in and for Salt Lake County to recover the amount so paid. The Companies alleged, in substance and effect, that the amounts received by them from Metals Reserve Company were in no manner related to the sale or other disposition of the various ores, without regard to the same, and were in no wise a part of the value of such ores; that the assessments were an immediate and direct and substantial interference with, and burden upon, the National Government and the exercise by the National Government of its legislative function of prosecuting war; that said assess-

ments were wholly in excess of the power of appellants and were an arbitrary usurpation of power and the taking of property of the respective companies without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States, and Section 7 of Article I of the Constitution of the State of Utah.

In answer to the complaints, it was alleged in substance and effect that the amounts received by the Mining Companies from the Federal Government through Metals Reserve Company were paid pursuant to a "premium price plan" sponsored by the said Metals Reserve Company; that in accordance with such plan Metals Reserve Company paid "premium prices" for production of copper, lead and zinc, in excess of certain quotas established by the War Production Board and the Office of Price Administration, said premium prices being based on 17c per pound for copper, 11c per pound for zinc, 9¼c per pound for lead. Said program was fully set forth in the Affirmative Defense filed by appellants in each case (Rec. 16-21). From the facts set forth in appellants' answer in each case, appellants further alleged that the amounts received by each of the Companies from the Metals Reserve Company, presented a part of the "gross amount received for or the gross value of" the various metalliferous ores sold by the respective Mining Companies during the calender year 1943 (Rec. 21), and denied that the inclusion of such amounts as a part of the "gross amount" was an interference with or burden upon the National Government in its function of prosecuting

the war or that the same was without authority of law or a taking of property without due process of law as alleged in plaintiff's complaint (Rec. 3).

Upon the pleadings, the issues of law to be determined are: (1.) whether the taxation of the premium payments was authorized by Utah law, and (2.) whether the taxation of such payments was a taxation of the means used by the Federal Government in the prosecution of the war and consequently beyond the powers of the state to make a direct levy upon government activities or facilities.

In the trial of the causes, counsel for the respective parties introduced a statement of facts and a compilation of what was deemed to be the pertinent statutes and orders and announcements of the various Federal Agencies. The court in rendering its decisions held:

"I am of the opinion that the premiums or bonus paid by Metals Reserve Company cannot, under the statutes of the State of Utah involved, be considered a part of the 'gross proceeds' of bona fide sales of the metal products of plaintiff mining companies, but that such payments constitute an inducement to increase production, adding nothing to the intrinsic value of the metal that would in any way affect its sale price on a free and open market to any independent and unhampered purchaser. The State Tax Commission of Utah, in the opinion of this court, had no authority to levy or collect an occupational tax from the plaintiff mining, including in the base used for such purposes, the subsidy payments

paid to the plaintiff corporations by the United States Government."

From the judgment in each case, these appeals were taken (Rec. 95).

SPECIFICATION OF POINTS RELIED UPON

For the purpose of argument, appellants have grouped their statement of points under two general headings:

(1) The amounts received by the respective Mining Companies from Metals Reserve Company were properly included as a part of the "gross amount received for or the gross value of metalliferous ore sold" within the meaning and contemplation of the Utah statutes. (2) The inclusion thereof was not prohibited by the State or Federal Constitututions.

ARGUMENT I

The occupation tax imposed by Section 80-5-66, Utah Code Annotated, 1943, is one per cent of the "gross amount received for or the gross value of metalliferous ore sold." The problem, therefore, is whether the amounts received by the respective Mining Companies from Metals Reserve Company, in connection with the production and sale of the ores produced by the respective Mining Companies in the calender year 1943, forms a part of such "gross amount received for or gross value of" such metalliferous ores. In considering this point, we call the court's attention to the following pertinent facts relative to the "premium payment plan" (Rec. 73).

1. The Office of Price Administration, on or about

August 2, 1941, issued its price schedule No. 15 whereby it was provided that on and after February 1, 1942, no person should sell, offer to sell, deliver or transfer and no person should buy, offer to buy, or accept delivery of copper at a price higher than 12c per pound (Rec. 39). At or about the same time price schedules No. 69 and No. 81 were issued with respect to lead and zinc whereby it was provided that on and after the effective date (January 15, 1942, for lead, and January 28, 1942, for zinc) no person should sell, offer to sell, deliver or transfer and no person should buy, offer to buy, or accept delivery of primary lead or primary slab zinc in excess of the ceiling prices set forth in the schedules, to-wit: 6½c per pound for lead and 8¼c per pound for zinc (Rec. 42-44).

2. It was immediately apparent, however, that at the ceiling prices fixed by the Office of Price Administration, very little of these highly critical ores would be produced and put at the disposal of the Federal Government in connection with its war program. It was, therefore, announced on January 12, 1942, by the Federal Loan Administrator, the Honorable Jesse Jones, that at the request of the OPM and OPA, Metals Reserve Company would "for a period of two and one-half years from February 1, 1942, pay 11 cents per pound East St. Louis for zinc, 9¼ cents per pound New York for lead, and 17 cents per pound Connecticut Valley for copper, for increases above 1941 production governed by quotas to be fixed."

3. This "premium price plan," as more fully outlined by a joint statement issued on February 9, 1942, by the War Production Board and the Office of Price Ad-

ministration, provides that the plan is "one of the steps taken to increase production;" that premium prices based on 17c per pound for copper, 11c per pound for zinc, and 9¼c per pound for lead, would be paid in excess of quotas to be established jointly by the War Production Board and the Office of Price Administration; that in general, quotas would be established at the normal production rate for 1941, but that in special cases different quotas would be fixed, depending upon individual circumstances (Rec. 15). The premium payments were made to respondent herein upon the basis of a fixed percentage of total metal content of the ores or concentrates produced, based upon the normal metal recovery for such ores or concentrates. (Rec. 47-48.)

4. The amount actually to be paid by Metals Reserve Company is set forth in the "*Program for Premium Payments by Metals Reserve Company on Production of Copper, Lead and Zinc in Excess of Monthly Production Quotas*" issued March 7, 1942. It is therein stated that Metals Reserve Company would pay the "difference between the respective ceiling prices for the materials involved and the equivalent of 17c per pound Connecticut Valley for copper, 9¼c per pound New York for lead and 11c per pound East St. Louis for zinc." The program also provides that various smelting companies throughout the United States would be designated as agents for Metals Reserve Company in connection with the making of the premium payments. (Rec. 48) Thus the producer would receive the ceiling prices for his ores from the smelter to which they were shipped and at the same time

would receive from Metals Reserve Company through the very same smelter the premium payments for his ores produced in excess of quota.

5. The producer in each case was guaranteed by Metals Reserve Company the sum of 17c per pound for copper, 9¼c per pound for lead, and 11c per pound for zinc until July 31, 1945, for all of such ores produced in excess of quota unless the National Emergency should terminate prior thereto, in which case notice of termination of the program was required to be given thirty days in advance. Thereupon adjustments would be made with each producer as in said program set forth (Rec. 49). However, as stated above, Metals Reserve Company paid only the amount in excess of the ceiling price, allowing the smelter or processor to pay such ceiling price to the producer.

6. In order to obtain payment of the premiums quoted, each producer, representing himself as eligible for such premium payment must "(1.) cause the smelting company to which he ships to be furnished, as agent for Metals Reserve Company, with a sworn producer's affidavit * * * showing, among other things, the amount of material in excess of quota delivered during the month covered by such affidavit for which he has been paid or will be paid and on which he is eligible for a premium, and (2.) cause the smelting company to be furnished with all necessary information so as to enable it to supply Metals Reserve Company with a statement setting out all data required for the making of the premium payments" (Rec. 49).

7. The producer, in the affidavit filed with the smelting company, sets out that he "produced, and delivered for sale during the month" mentioned to the particular smelting or refining company the amount of material listed (Rec. 52).

8. Following the receipt of the foregoing affidavit, together with the statement of its agent, Metals Reserve Company agreed to make payment of the premiums promptly to the producer (Rec. 49).

9. In order to relieve the Mining Companies from the provisions of price schedules Nos. 15, 69 and 81 hereinbefore referred to, prohibiting *sales or deliveries* of copper, lead or zinc at prices higher than maxium prices fixed, the Office of Price Administration issued its supplementary regulation No. 4 exempting from the general maximum price regulation "*sales or deliveries*" of metallic copper, lead, or zinc, or of ores or concentrates containing copper, lead or zinc, *to the Metals Reserve Company,* or its duly authorized agent or agents, *pursuant to the premium price plan* announced by the Federal Loan Agency, the War Production Board, and the Office of Price Administration."

10. Metals Reserve Company was originally incorporated pursuant to Section 5 (d) of the Reconstruction Finance Corporation Act to "produce, acquire, carry, sell, or otherwise deal in strategic and critical materials." Section 5 (d) of the Reconstruction Finance Corporation, when requested by the Federal Loan Administrator, with the approval of the President, to create corporations with power "to produce, acquire, carry, sell or otherwise deal

11. Net Proceeds Valuation Reported by Protesting Companies and Valuations Assessed by Tax Commission, Tax Assessment for 1944, Operations for 1943

	Reported Basis for Computation of Tax	Metal Premium Payments	Assessment Basis for Computation of Tax	Occupation Tax Reported	Occupation Tax Assessed
Chief Consolidated Mining Co.	$ 105,227.92	$492,238.84	$ 597,466.76	$ 1,052.28	$ 5,974.67
Colorado Consolidated Mines Co.	1,538.25	13,758.12	15,296.37	15.38	152.96
Combined Metals Reduction Co.— Butterfield Mine	168,971.12	238,209.81	407,180.93	1,689.71	4,071.81
Combined Metals Reduction Co.— Calumet Mine	370,679.96	272,150.86	642,830.82	3,706.80	6,428.31
Eagle & Blue Bell Mining Co.	31,293.06	1,439.39	32,732.45	312.93	327.32
Eureka Bullion Mining Co.	71,332.77	7,144.87	78,477.64	713.33	784.78
Eureka Lilly Cons. Mining Co.	24,565.19	10,792.25	35,357.44	245.65	353.57
International Smelting Co.— Tintic Bullion Mine	294,910.16	25,892.69	320,802.85	2,949.10	3,208.03
Montana Bingham Cons. Mining Co.	64,171.43	32,958.59	97,130.02	641.71	971.30
National Tunnel & Mines Co.	322,949.32	886,975.64	1,209,924.96	3,229.49	12,099.25
Niagara Mining Co.	30,358.95	1,227.85	31,586.80	303.59	315.87
Ohio Copper Co. of Utah	234,027.18	142,889.45	376,916.63	2,300.46	3,729.36
Park Utah Cons. Mines Co.	740,805.95	905,506.66	1,646,312.61	7,408.06	16,463.13
Tintic Standard Mining Co.	640,760.99	440,494.16	1,081,255.15	6,407.61	10,812.55
U. S. Smelting Co.— Hidden Treasure Mine	124,693.74	24,489.40	149,183.14	1,246.94	1,491.83
U. S. Smelting Co.— U. S. & Lark Mine	3,575,831.45	99,078.56	3,674,910.01	35,758.31	36,749.10

in strategic and critical materials." The Act further authorizes any corporation so created "to make payments against the purchase price to be paid for strategic and critical materials in advance of the delivery of such materials." Thereafter the premium price program hereinabove outlined was sponsored and carried on by Metals Reserve Company.

In our opinion, the mere statement that respondents herein received the respective amounts set forth from private industry for their ores and the additional amount for such ores from Metals Reserve Company should, when considered in connection with the language of Section 80-5-66, Utah Code Annotated, 1943, hereinbefore set out, be sufficient ground to justify the Tax Commission in combining both of such sums so received by the respective Mining Companies for the purpose of fixing the occupation tax. However, because of Respondents' contentions to the effect that the amounts received from Metals Reserve Company were and are not part of the "gross amount received" for their ores, and that such amounts have no relation to the sale or disposition of the ores or to their value, but are mere gifts from the Federal Government to the producer, we have deemed it expedient to make the foregoing statement of facts indicating the picture under which these premium payments are made. Such statement, together with other additional facts as may be necessary, will be referred to in the course of the appellants' argument in meeting the contentions of

Respondents as have been urged throughout the instant proceedings.

It is contended first, that because the premium payments do not form a part of the amount received by the producer from the immediate purchaser in private industry of such ores at the time such ores are sold, such premium payments are not to be included within the language "gross amount received for". However, as we view the matter, the actual amount of money received at the time of sale is not the criterion for determining the amount of the tax. The requirement in the statute that the tax be levied upon the "gross amount" received for the ores that have been sold fixes the time of sale as the instant or point of time at which the occupation tax is to accrue or become fixed. It is not merely what the producer may receive at the time title passes but what the "gross amount" is which the producer has received or has become entitled to receive on account of the ores up to the time of such sale. It could hardly be contended that if the smelter paid to the producers a fixed amount at the time the ores are produced and another additional amount at the time the ores are delivered to the smelters under the contract of sale (at which time title to the same would pass from the producer to the smelter) that the total amount of money thus paid and received would not be the "gross amount" received for such ore.

The case of Vause & Striegel, Inc., vs. McKibbin, 379 Ill. 169; 39 NE (2d) 1006 illustrates this principle very well. The Retailers Occupation Tax Act of Illinois im-

posed an occupation tax upon retailers upon the "gross receipts" from the sales of tangible personal property. As defined in the statute, "gross receipts" meant the total selling price or the amount of the sales of such tangible personal property. Selling price was also defined as "the consideration for a sale valued in money, whether received in money or otherwise, including cash, credit, services and property of every kind or nature and shall be determined, without any deduction on account of the cost of the property sold, cost of the materials used, labor or service cost, or any other expense whatsoever." Plaintiffs in that case were engaged in the business of selling tangible personal property at retail. Their items were priced in advance and advertised in newspapers, circulars and by price tags. When a customer appeared and made a purchase of an article at the price quoted or indicated, he was advised that in addition he would be charged at the rate of 3c for every dollar of purchase to cover the occupation tax which the retailer had to pay. In some instances, if the customer refused to pay the additional amount, the sale was consummated without such payment being made. The narrow issue involved in the case was whether the retailer must pay his occupation tax "upon $1.03 or $1 where he prices the same article at $1 but receives in payment therefor $1.03, the additional three cents being designated, as between the retailer and consumer, a payment of tax." In determining this question the Supreme Court of Illinois held:

> "Plaintiff insists that the additional charge to cover the occupation tax received by them is a

separate item and not a part of the true selling price. It is pointed out that they have transacted their sales and received the additional three cents from the consumer subsequent to the sale—not as a part of the selling price. The plain purpose of the Retailer's Occupation Tax Act to exact the tax upon all those engaged in the business of selling at retail in this State cannot be so readily circumvented and payment of the tax so easily evaded. Conceding that retailers and their customers, in some transactions, as disclosed by the stipulated facts, make a distinction between (1) the money paid for the property transferred and (2) the added charge on account of the retailer's occupation tax, the concession cannot aid them until and unless the legislature makes the same distinction. The mere fact that the retailer and the consumer may, by a particular form of billing, denominate the three cents additional charge in one instance a tax and in another a part of the selling price is not decisive. Manifestly, the State cannot be deprived of the tax upon the actual selling price irrespective of the form of invoice agreed upon by a retailer and the purchaser from him. Again, so far as the consumer is concerned, the selling price is $1.03, irrespective of the manner of bookkeeping. If a retailer elects to add the three cents exacted of him by the law to the original selling price of $1 he is not in a position to complain when the State demands that he pay a tax on the amount actually received by him from the consumer, namely $1.03. In short, where a retailer adds the tax which he is required to pay, to the purchase price of the merchandise sold by him, he must pay the tax on the total amount received by him from the consumer. The tenuous distinction urged by plaintiffs cannot be sustained. It follows, necessarily, that rule No. 20 of the De-

partment of Finance, to the extent challenged, is valid."

Likewise, in the instant matters, so far as Respondents are concerned, the "gross amount" received for their ores is the combined amount received from the smelter or processor and the Metals Reserve Company.

Conversely, in the case of the State vs. Armson,—— Minn. ....., 207 N. W. 732, involving the occupation tax statute of the State of Minnesota, the contracts for the sale of ore provided for payments to be made for ore monthly as the ore was shipped. Since no deliveries could be made during the winter months, the purchaser often paid for ore before it was delivered . In such cases the contract for purchase provided that the purchaser should have a discount from the purchase price normally received. Holding that the discount did not affect the value of the ore, the Supreme Court of Minnesota stated:

> "* * * in no event do these discounts affect either the value or the market price of the ore. They represent interest on money paid before it is due, or rather an allowance on the purchase price for the advantage the seller gains by receiving his money in advance."

As a matter of fact, under the provisions of our occupation tax statute (Section 80-5-66, Utah Code Annotated, 1943) a sale is not necessary, in all cases, in order to fix the time or moment at which the occupation tax attaches. Subdivision (b) of Section 80-5-66 provides that in those instances where the ores are treated at a mill, smelter or reduction works owned by the producer of the ores and which said mill, smelter or reduction

works also receives ores from independent sources "such disposal (meaning the disposal of the ores to the mill, smelter or reduction works) shall be treated as a sale within the meaning of this section for the purpose of determining gross proceeds or otherwise." We also observe in the language just quoted that the term "gross proceeds" is used synonymously with "gross amount received for." The tax being determined as of the time said ores are disposed of to the mill, smelter or reduction works, the amount which the producer has received or will be entitled to receive on account of said ores in the crude state they are in would be the determining factor in fixing the "gross amount" or "gross proceeds" received from such ores. Too, the terms "gross proceeds" and "net proceeds" as used elsewhere in the taxing statutes of the State of Utah (Section 80-5-57, U. C. A. 1943) have been defined by our state Supreme Court. In the case of Mercur Gold Mining & Milling Company v. Spry, 16 Utah 222, 52 P. 382, the Court held:

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

This definition of "proceeds" was subsequently quoted with approval by U. S. District Court in the case of Salt Lake County v. Utah Copper Company, 294 Fed. 199.

Applying the foregoing principles it would appear that the gross amount upon which a producer in the

foregoing situation would be required to pay an occupation tax, would be the amount of premium payment received from Metals Reserve Company at the time such ores are disposed of to the mill, smelter or other reduction works, plus the ceiling prices for the respective ores (which prices the producer would be entitled to receive from the purchaser in private industry of the ores produced).

The term "gross" as used in statutes taxing "gross income," "gross premiums," etc., has been defined by numerous courts under varying conditions and circumstances. For instance, in the case of State v. Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814, where the statute imposed a tax of 7 per cent on the "gross receipts" of the corporation, the court held that the word "gross" meant the "entire amount, the total sum, without any deduction of any kind" and included receipts derived by the company for transporting interstate commerce as well as receipts derived from intrastate commerce. In Metropolitan Life Insurance Co. v. Rouillard, ... N. H....., 24 Atl. 2d 264, a statute imposing a tax of 2 per cent upon the "gross premiums received" was construed by the court in the following language:

> "There is nothing in the statute to indicate that the word 'gross' is not to be given its usual meaning of 'whole; entire; total; without deduction'."

Again in Hartford Electric Light Company v. McLaughlin, 131 Conn. 1, 37 Atl. 2d 361, the court construed the meaning of a statute imposing a tax upon "gross earnings from operations" as follows:

> "When we speak of the 'gross earnings' of a person or corporation, we mean the entire earnings of such person or corporation from the business or operations to which we refer."

In the case of Hawaii Consolidated Ry. Ltd. v. William Borthwick, 34 Hawaii 269, the court was concerned with the meaning of the term "gross" as used in connection with the income tax statute. The court there stated:

> "As an adjective qualifying the term 'income' the word 'gross' implies income *from any and all sources.*" (Italics added.)

It has also been pointed out by the Mining Companies throughout these tax proceedings that the "premium payments" were made by Metals Reserve Company although the title to the ores involved was transferred elsewhere—to the smelter or other processor in accordance with the smelter contracts or other contracts under which such ores were, in fact, sold. Such a fact, in view of the conditions existing under which these ores are disposed of by the producers cannot alter or affect the proposition that all monies received both from the Federal Government and from private industry form a part of the "gross amount" or "gross proceeds" derived from the production and disposition of the ores.

The Federal Government, through its various agencies, is so intimately and intricately connected with the producing, refining, processing, fabricating, and distributing such ores, and becomes 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 pro-

duced cannot be distinguished or separated from any amounts otherwise received in connection with such ores. The producer is called upon by the Government to produce more and more ores for the war effort. As to such production, however, the Office of Price Administration fixes a ceiling price at which such ores are to be sold. The Government then steps in and agrees to pay the producers an additional amount which plan the Office of Price Administration approves by supplementary regulation. The smelters are made the agents of the Federal Government for the purpose of receiving the ores and paying the premium prices. The producers are required to dispose of their ores at the designated smelters before such premium prices will be paid. The smelters or other processing plants are prohibited from disposing of the refined ores or metals except upon allocation by the War Production Board as successor to the Supply Priorities and Allocations Board. No dealer or refiner is permitted to deliver copper to any person requesting such delivery without the presentation of an allocation certificate. Similar requirements are imposed with respect to lead and zinc, and finally the Federal Government becomes the ultimate consumer of most, if not practically all, of the ores in the form of finished products such as bullets, machine guns, tanks, trucks, ships and other products used in the prosecution of the war.

It is admitted that the Federal Government pays the premium prices to the producers in order to obtain increased production of the ores involved, which increased production the Government must have to prose-

cute the war. The Government, through the premium prices, pays only for what it gets. As a matter of fact it gets a good deal more of the ore production than that on which the premium prices are actually paid. It has been estimated how much the Government has saved in actual dollars and cents by the program hereinbefore outlined, it being recognized that the Government is the ultimate purchaser and consumer of most of the ores produced. Recently the question of continuing the premium payment program for another year was before Congress. In a speech before the House of Representatives, Congressman Patman from Texas produced two tables or charts showing the production of the respective ores, the cost at ceiling prices, the premiums paid, the total thus paid for such ores, the amount that would have otherwise been required to be paid for such ores without the premium payment program, and the savings thus effected. For the year 1943, the year here in question, savings of $84,356,000.00 were made on the production of copper, $14,702,200.00 on the production of lead, and $48,605,700.00 on the production of zinc, or a total of $147,663,900.00 on the production of all three such metals. See Congressional Record Volume 91, No. 18, page A381 (January 31, 1945). We further quote from his speech as follows:

> "At my request, the Office of Price Administration has prepared some charts on this subject. One of these tabulations shows the actual amount of premiums disbursed by the Government in connection with the production of each one of these three metals; the other tabulation

shows the provable, computable savings to the Nation—on a conservative basis—in reference to the metals themselves before use for fabrication purposes. 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. If we had used the 1917 average figures the estimated savings of today would run into many, many billions of dollars.

"I endeavored also to have prepared tabulations which would show the savings to the Nation in the cost of finished products which are made from these three metals, but found that the preparation of that additional data would involve untold research, much time of valuable employees, and would impose too great a burden on industry at this time. However, from responsible sources in both industry and Government, I get information which convinces me that the savings to both governmental and civilian purchasers of these finished products is at least $1,500,000,000. Beyond this, there is the additional saving in scrap metal costs which follow the lower costs of the basic metals themselves."

To the same effect is a speech, delivered by Senator Murdock of Utah before the Senate, contained in the Congressional Record, Volume 91, No. 49, pages 2301, 2309 (March 15, 1945). We quote from his speech as follows:

"From the viewpoint of price control, the plan has avoided the necessity for general price

increases for the commodities with a consequent over-all savings to the Government, which, being the purchaser in one form or another of a large part of the production of the metals under war conditions, would have had to absorb such price increases."

The term "gross amount received for" as set forth in Section 80-5-66, and hereinbefore discussed is used in connection with the term "or gross value of." That is to say, the language of the statute reads "the gross amount received for or the gross value of" the ores. Respondents therefore argue that the "gross amount" cannot be considered to be more than the "gross value"; that the "gross value" of the ores in question is no more than the "market value"; that the "market value" is fixed by the ceiling prices for the respective ores, so that the premium payments made are not reflected in the "gross amount received for or gross value of" the ores in question. The term value is defined by our statute (Section 80-3-1, Utah Code Annotated, 1943) to mean "the amount to which the property would be taken in payment of a just debt due from a solvent debtor." Again, in the case of State vs. Thomas, 16 Utah 86, 50 P. 615, our Supreme Court in construing the word "value" as used in the statute requiring that all property shall be assessed "according to its value in money" held:

> "It is evident that the term 'according to its value in money' means that all property shall be valued, for the purpose of assessment, as near as is reasonably practicable, at its full cash value; in other words, that the valuation for assess-

ment and taxation shall be, as near as reasonably practicable, equal to the cash price for which the property valued would sell in open market, for this is doubtless the correct test of the value of property."

With reference to the situation presented in the instant matters, however, we do not feel that the foregoing tests of value can properly be applied. There can be no test of determining a "fair market value" when there is no "open" or "fair" market. At the present time the market is closed with respect to competitive bidding in buying and selling. Each producer of copper, lead and zinc is guaranteed a specific amount by the Federal Government, part of which is to be paid by the smelting company or other immediate purchaser and the balance by the Federal Government through the Metals Reserve Company, but in order to receive the same the producer must ship its ores to the smelter designated by Metals Reserve Company. It cannot go to an "open market" and seek a competitive price.

Nor, can the amount for which the ores would be taken in payment of a just debt from a solvent debtor, be used as a criterion for the reason that a solvent debtor would not permit his ores to be taken by a creditor in payment of a debt for less than the ceiling price plus the amount of premium payments to which such debtor-producer would be entitled. At the same time, it is doubtful whether a creditor would care to take such ores at that price (being the total amount received for such ores as herein indicated) for the reason that such creditor may not be eligible to receive the premium pay-

ments to which the debtor-producer would be entitled. Thus to deprive the debtor-producer of the ores might deprive both him and the creditor of the premium payments. It is also questionable whether, under the allocation program as hereinbefore set forth such ores could, in fact, be taken in payment of any debt. If, in fact, they were so taken, they would be subject to the same restrictions as to use or sale as all other ores and, therefore, would be of no practical value to a creditor. For this reason we cannot see how, under any reasonable hypothesis, it might be argued that the value of the ores here in question must be determined by the ceiling price. The value of the ores to the producer is the amount he can receive for them—from Metals Reserve Company and from the smelter or other private purchaser. He would not part with them for less, nor would he have in the original instance mined them except for the guarantee given by Metals Reserve Company as to the total amount which he would receive therefor.

Definitions of value which more nearly apply to the situation here involved are as follows:

> "A fair return in money, goods, services, etc., for something exchanged; that which is considered an equivalent in worth."—Webster's New International Dictionary.
>
> " 'Value' is what the thing will bring today in exploitation or exchange under some presently possible conditions."—Babbit vs. Read, C. C. A. (2nd) 236 F. 42, 47.

In his Book, "The Valuation of Property," Professor James C. Bonbright says: "The value of prop-

erty is nothing but the value of an opportunity to derive future profits or other services." We submit that the value of the ore here in question is the total amount to which, under the artificial conditions existing as imposed by the Federal Government, the producer is in all events entitled to receive for such ore, irrespective of the source from which such money is derived.

This value is linked with the entire production of the mine and not with any particular pound of ore or the over-quota portion of the ores produced. The producer must furnish his quota before he is entitled to receive the premiums on the extra production. Therefore, the ores up to the amount of the quota are imbued with a value other than the actual ceiling price, because, without them, premium prices could not be received for over-production ores. A similar situation exists with respect to the amount received by a laborer for his services. In most instances, workmen are paid at an hourly rate for so many hours a week (similar to the quota prescribed for the Respondents herein). However, for his services in excess of the stipulated number of hours, the workman receives once and a half or twice the amount which he received for the regular or normal hours of service. As a matter of common knowledge, respondents herein pay their workmen upon such a basis. Certainly, the extra amount received by the workman for overtime is as much a part of the "gross amount" or "gross value" of his services as the money received for regular time. Nor is he entitled to any overtime pay until he has worked in a given week the full normal

time prescribed. Respondents, undoubtedly, pay a considerable amount of overtime to workmen in order to produce the ores in excess of quota on which they receive the premium payments. Just as the total amount received by the workmen, including overtime, forms a part of his gross receipts for income tax purposes and just as the gross amount received by the respective Mining Companies, including premium payments, forms a part of the gross receipts of such Mining Companies for income or corporate franchise tax purposes under both State and Federal statutes, so we believe must such gross amount, including premium payments, be reported for the purpose of making the occupation tax assessment herein—which was done in each case by the State Tax Commission.

As hereinbefore indicated, such premium payments are definitely recognized as a part of the "gross amount received for or gross value of" the respective ores by the Federal Government when it was deemed necessary by the Office of Price Administration to authorize the sale or delivery of the metals pursuant to the premium price plan as an exception to the ceiling prices imposed. Insofar as "gross value" goes, were it not for the restrictions placed by the Federal Government upon the sale or delivery of copper, lead, and zinc ores, the amount which might well be received on an "open market" would be far in excess of the total amount now received. See remarks of Representative Patman hereinbefore referred to.

It was upon such considerations as those expressed by Representative Patman and Senator Murdock, calling attention to the savings which had resulted to the Federal Government by reason of the premium payment plan, which caused Congress to pass an act extending the program until June 30, 1946 "on the same terms as heretofore, except that all classes of premiums shall be non-cancellable unless necessary in order to make individual adjustments of income to specific mines" (Senate Bill 502).

It has also been urged that the premium payments received by Respondents herein are mere gifts and hence not a part of the "gross amount received for or gross value of" the various ores. The District Court in its oral decision, characterized the payments as constituting an inducement to increase production adding nothing to the intrinsic value of the metal. The court said in the case of Helvering v. Clairborne-Annapolis Ferry Co. (C. C. A. 4th) 93 Fed. (2nd) 875:

> "The amount received by taxpayer from the state was in no sense a gift, which is a transfer without consideration. Noel v. Parrott, 4 Cir., 15 F. (2nd) 669; Bogardus v. Commission, 58 S. Ct. 61, 82 L. Ed.—It was made in consideration of the maintenance of the ferry service; it was paid monthly; and its payment would not have been continued from month to month if the service had not been maintained. 'Bounties granted by a government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or moral obligations to be recognized.'

Allen v. Smith, 173 U. S. 389, 402, 19 S. Ct. 446, 451, 43 L. Ed. 741."

The problem is whether these "subsidies" or "premium prices" are a part of the "gross amount" received for Respondents' ores. There can be no question but that such payments are not gifts by the Federal Government to the producers. The *quid pro quo* for which such premium payments were made, was the actual production of the various metals for the Federal Government in the prosecution of the war. This is well recognized by Respondents in the allegations of their respective complaints wherein it is stated that these payments were made by the National Government "to insure the maximum necessary production of essential metal for use by the National Government in the waging of war, to induce this plaintiff and other like industries to enter upon an operation on behalf of the National Government and its legitimate function of prosecuting war". (The italics added.) The premium payments were made for production of ore, to be used by the Federal Government in its prosecution of the war, and are based upon the recoverable metals normally recovered from such ores. The amount paid by the Federal Government at the time the ores are smelted or refined is made in lieu of increasing the purchase price to the smelting or refining companies, which, in turn, would correspondingly increase the purchase price upon the refined metals and ultimately upon the finished products purchased by the Federal Government. Just as in the case of Helvering v. Clairborne-Annapolis Ferry Company, supra, "the

amount received from the state for the maintenance of the ferry was gain to the taxpayer; and it was gain derived from the capital invested in the ferry and the labor involved in its operation'' so in the instant cases the amounts received by Respondents from Metals Reserve Company was gain to Respondents arising out of the production and disposal of their ores and formed a part of the ''gross amount received for or the gross value of'' such ores.

The Supreme Court of the United States has had occasion to pass upon a rather similar situation to the one here involved in the case of Texas and Pacific Railway Company v. United States, 286 U. S. 285, 52 S. Ct. 528, 76 L. Ed. 1108. Pursuant to the provisions of Section 209 of the Transportation Act of 1920, the Federal Government guaranteed to the Texas and Pacific Railway Company, ''a minimum operating revenue.'' Since the actual operating revenue received from fares and charges did not reach the amount guaranteed, the balance was made up by a payment from the Federal Government. Such amounts were included by the Commissioner of Internal Revenue as part of the company's gross income. The additional tax thus resulting was protested on the ground that the ''guaranteed payment was not income from operation of the railroads but was a subsidy''; that being a subsidy ''the guaranteed payment is not income within the meaning of the 16th Amendment.'' Chapter 18, 40 Stat. at L., 1057, 1065, provided that the term ''gross income'' did not include ''the value of property acquired by gift.'' In speaking of the

plan whereby the Government guaranteed the railroad company a minimum operating revenue, the Supreme Court stated:

> "While the Government had either paid or was obligated to pay just compensation for their requisition, the amount if it was known to be insufficient for rehabilitation of the roads as privately owned and operated organizations. Until rates could be adjusted to meet increased expenses, loans be negotiated, and operating forces realigned and reintegrated, the credit of the carriers must by some means be re-established. Thus the Government had a real obligation, not readily susceptible of accurate measurement, to assist in the restoration of normal conditions. The purpose of the guaranty provision was to stabilize the credit position of the roads by assuring them a minimum operating income. They were bound to operate their properties in order to avail themselves of the Government's proffer. Under the terms of the statute no sum could be received save as a result of operation. If the fruits of the employment of a road's capital and labor should fall below a fixed minimum then the Government agreed to make up the deficiency, and if the income were to exceed that minimum the carrier bound itself to pay the excess into the federal treasury. In the latter event the carrier unquestionably would have been obligated to pay income tax measured by actual earnings; in the former, it ought not to be in a better position than if it had earned the specified minimum."

Concluding then that the amount received from the Federal Government was just as much a part of the income of the railroad company *from its operations* as its fares and charges, the Supreme Court stated:

> "Clearly, then *the amount paid* to bring the yield from operation up to the required minimum *was as much income from operation as were the railroad's receipts from fares and charges.* The sums received under the act were not subsidies or gifts—that is, contributions to the capital of the railroads,—and this fact distinguishes cases such as Edwards v. Cuba R. Co., 268 U. S. 628, 69 L. Ed. 1124, 45 S. Ct. 614, where the payments were conditioned upon construction work performed. Here they were to be measured by a deficiency in operating income, and might be used for the payment of dividends, of operating expenses, of capital charges, or for any other purpose within the corporate authority, just as any other operating revenue might be applied. The Government's payments were not in their nature bounties, but an addition to a depleted operating revenue consequent upon a federal activity."

See also Boston Elevated Ry. Co. v. Commissioner (C. C. A. 1st), 131 Fed. (2d) 161.

In the case of Baboquivari Cattle Co. v. Commissioner of Internal Revenue (C. C. A. 9th), 135 F. (2d) 114, the court was concerned with the problem of determining whether monies received by the taxpayer from the Federal Government pursuant to the Soil Conservation and Domestic Allotment Act constituted income for the purpose of taxation. The court characterized the payments as follows:

> "It is plain that the moneys received were not exempt as gifts under Sec. 22 (b) (3) of the Revenue Act of 1936, 26 U. S. C. A. Int. Rev. Acts, page 825; they were earned payments made upon a consideration. On oral argument petitioner did not seriously contend that they were

gifts. Its contention, in summary, is that the payments were not income at all, but capital subsidies. The taxpayer attempts to distinguish between types of payments made under the Act, those for inaction—as for refraining from production or for producing a limited amount only of a given crop—being said by petitioner to be classifiable as "income subsidies" because designed to supplement income; whereas subsidies for positive outlays such as those made here are said, on the authority of Edwards v. Cuba Railroad Co., 268 U. S. 628, 45 S. Ct. 614, 69 L. Ed., 1124, to be classifiable as 'capital subsidies.'

"We are not able to discover in the Act or in the administrative practices of the Department of Agriculture any justification for these nice distinctions. We think the pertinent regulations of the Secretary afford no basis for them. Under these regulations a farmer is not entitled to receive or retain a payment if he has pursued practices tending to defeat the conservation program. *Thus a beneficiary does not earn a payment merely by making an improvement; he earns it in part by compliance with conditions in respect of the proper use of his land.* For example, if the utility of a range has been improved by the building of a reservoir, the right to have or retain the subsidy for the improvement would be defeated if the grower overgrazed his land or indulges in similar injurious practices.

"It is of little importance, we think, what name be applied to the payments, whether they be called 'subsidies' as insisted upon by the taxpayer, or 'benefits' as they were termed by the Board. In either event they are within the broad concept of income as that term is defined in Sec. 22(a) of the 1936 act. Consult Eisner v. Macom-

> ber, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570. No part of the sums paid to the petitioner were required to be placed by him in a particular account or fund. The payments were not earmarked, nor was there any restriction on their use. Petitioner was free to use the money for any purpose it might see fit, as to defray operating expenses or to pay dividends or to purchase an automobile."

The foregoing analysis of the court with respect to the nature of the payments received by the taxpayer from the Federal Government applies with equal vigor to the premium payments involved in the instant matters. Nor does the fact that an income tax statute was involved in the Baboquivari case, whereas in the instant matters we are concerned with an occupation tax, affect the reasoning of the court. If the monies received by Respondents herein from the Federal Government constitute income to them and not mere "gifts" as they were characterized by the District Court, such income must have been derived from a specific activity on the part of the Mining Companies. This activity, of course, was the production of ores—and more ores. The payments received were for the additional ores produced for the benefit of the Federal Government. As such, the premium payments constitute a part of the "gross amount received for or gross value of" such metalliferous ores.

While none of the foregoing cases cited in support of Appellants' position are directly in point as to both the facts and issues involved, nevertheless the reasoning and analysis of the question of law by the several courts

illustrate the soundness of Appellants' position herein. However, there has been one case decided involving metal premium payments such as those received by the Respondents herein. Klies vs. Linnane (Montana 1945) 156 P. (2nd) 183. That case determines that under the provisions of the net proceeds statute of Montana, premium payments are not a part of the "gross yield or value in dollars and cents" of the minerals. Apparently the Montana court adopts the theory advanced by the District Court in the instant matters in determining the premium payments to be "gifts" from the Federal Government. Notwithstanding that Metals Reserve Company, in its announcement stated that the price of overproduction metals would be 17 cents per pound for copper, 11 cents per pound for zinc and 9¼ cents per pound for lead, the Montana Supreme Court states that "Metals Reserve Company does not * * * increase the price of the metal." We opine that the Montana court did not have before it all the orders and pronouncements of the Federal agencies, nor all of the facts and circumstances hereinbefore set forth in Appellants' brief.

The court goes on to hold that the premium payments increase the "value of the enterprise by making it more profitable" but do not increase the value of the metals involved. We do not see how such a distinction in law or in fact can be made. The premium payments are paid upon the production of copper, lead and zinc, based upon a total purchase price of 17 cents per pound for copper, 9¼ cents per pound for lead and 11 cents per pound for zinc. The amount received from the Federal

Government is just as much a part of the amount received for such ores as the amount paid by the smelter or other refining company. Both are paid for the production of such ore based upon the actual recoverable metal content thereof, and are paid upon ores actually received—by the smelting company in the crude state and by the Federal Government in the refined or finished product.

We do not feel that the reasoning of the Montana court can be upheld. Nor does the opinion refer to any cases as supporting the analysis or reasoning therein contained.

There is also a definite differentiation between the mining tax statutes of the State of Utah and the mining tax statutes of the State of Montana. Whereas, in Montana "the annual net proceeds of all mines and mining claims, *shall be taxed as other personal property*" (italics added), in our state the Occupation Tax is assessed upon the right of the respective mining companies to do business, such tax being based on the "gross amount" received by every mining company from its ores. The title to Chapter 101, Laws of Utah, 1937, imposing a mining occupation tax, states that a tax is to be imposed "on all engaged in the business of mining or producing metalliferous ores."

Montana, too, has an occupation tax similar to ours, but again the basis for determining the value of the "gross yield" is entirely different. Section 2344-3, Revised Codes of Montana, 1935, Annotated, defines the "total gross value" of the product to be:

> "* * * the market value of all merchantable metals or mineral products extracted or recovered thereby, as shown by the gross smelter returns of such metals or mineral product in dollars and cents, without any deductions for costs of smelting, reduction or treatment, or otherwise, *based upon the average quotations of the price of such metals, or mineral products, in the city of New York,* as evidenced by some established authority or market report such as the Engineering and Mining Journal of New York City, or other standard publications, giving the market reports during the calendar year immediately preceding." (Italics added.)

In the case of State ex rel Snidow et al v. State Board of Equalization et al, 93 Mont. 19, 25, 17 P (2d) 68, 77, the Supreme Court held:

> "In fixing the market value of zinc in Montana, based upon the price of the metal in St. Louis, the board clearly violated the law, for the statute requires the New York price to be taken as a basis, and that price shows a differential of 35 cents per pound between St. Louis and New York."

We find no such statutes or decisions in our state with respect to our mining occupation tax.

ARGUMENT II

Respondents' final position, which was apparently adopted by the District Court also, is that the inclusion of the premium payments here involved in the "gross amount" received for the ores of the respective Mining Companies constitutes a seizure of monies paid by the National Government in the interest of national defense

and is a direct and substantial interference with and burden upon the National Government; that said tax is in violation of Section 1 of the 14th Amendment of the Constitution of the United States and Section 7 of Article I of the Constitution of Utah. In the case of Helvering v. Clairborne-Annapolis Ferry Co., supra, involving the taxation of monies paid to the Ferry Company by the State of Maryland, it was contended that such payments were exempt from taxation because "a contribution by the state toward the maintenance of the public ferry." The court rejected such contention in the following language:

> "On the second question, there can be no question but that the operation of a public ferry as a link in the state highway system is a proper function of the state and that the proceeds of such operation by the state itself would not be subject to the Federal income tax (Jamestown & Newport Ferry Co. v. Commissioner, 1 Cir., 41 F. (2d) 920); but it by no means follows that the income of a private corporation engaged in operating such a ferry would not be subject to such tax. Cf. Susquehanna Power Co. v. State Tax Commission of Maryland, 283 U. S. 291, 293, 51 S. Ct. 434, 435, 75 L. Ed. 1042; Broad River Power Co. v. Query, 288 U. S. 178, 181, 53 S. Ct. 326, 327, 77 L. Ed. 685; South Carolina Power Co. v. South Carolina Tax Commission D. C., 52 F. (2d) 515, 526. Nor is the payment made by the state to a private corporation necessarily exempt from such tax because made as compensation or part compensation for a service which the state itself might have performed. Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46

S. Ct. 172, 174, 70 L. Ed. 384; Underwood v. Commissioner, 4 Cir., 56 F. (2d) 67.

> "The taxpayer here was a private corporation engaged in the operation of a public ferry. The greater part of its income was derived from tolls collected from vehicles and passengers transported. The subsidy paid by the state increased its annual income in the same manner as its income would have been increased by a contract entered into with the state for the performance of any other public service; and the tax was imposed without discrimination as to whether its income was derived from charges made to private individuals or from the state subsidy. Such tax cannot be said, in the light of the facts to which we have adverted, to impair in any substantial manner taxpayer's ability to discharge its obligations to the state or the state's ability to procure the services of private individuals to aid in the undertaking."

The leading case on this subject is James vs. Dravo Contracting Company, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 114 A. L. R. 318. There the State of West Virginia, under an *occupation* tax statute imposing a tax of 2 per cent upon the "gross income of the business" of any person engaged in the state in the business of contracting, included in taxpayer's "gross income" the amounts received by him from the Federal Government for the construction of locks and dams upon Federal property in the State of West Virginia. The Supreme Court of the United States in holding such tax valid stated:

> "The tax is not laid upon the Government, its property or officers. Dobbins v. Commission-

ers, 16 Pet. 435, 449, 450.

"The tax is not laid upon an instrumentality of the Government. McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of the United States, 9 Wheat. 738; Gillespie v. Oklahoma, 257 U. S. 501; Federal Land Bank v. Crosland, 261 U. S. 374; Clallam County v. United States, 263 U. S. 341; New York ex rel Rogers v. Graves, 299 U. S. 401. Respondent is an independent contractor. The tax is non-discriminatory."

Answering the contention of the taxpayer that the tax increased the cost to the government of the services rendered, the court said:

> "But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid."

See also Alabama vs. King & Boozer, 314 U. S. 1, ... S. Ct. ....., 86 L. Ed. 3, (involving state sales tax); Fidelity & Deposit Company vs. Pennsylvania, 240 U. S. 319 (involving a tax upon the gross premiums received by a company where there were receipts derived from the Federal Government).

CONCLUSION

In conclusion we submit:

The amounts received by Respondents from Metals Reserve Company were properly included as a part of the "gross amount received for or gross value of" the

ores produced and sold under the statutes of Utah and the inclusion of such premium payments did not violate the provisions of either the Federal or State Constitution.

Respectfully submitted,

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