

1980

Kennecott Copper and Bingham and Garfield Railway v. State Tax Commission : Brief of Appellee

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

8091 P1

IN THE SUPREME COURT
of the
STATE OF UTAH

KENNECOTT COPPER CORPORA-
TION, a corporation, and

BINGHAM AND GARFIELD RAIL-
WAY COMPANY, a corporation,
Plaintiffs,

VS.

THE STATE TAX COMMISSION,
Defendant.

PLAINTIFFS' BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH

Case. No.
8091

KENNECOTT COPPER CORPORA-
TION, a corporation, and

BINGHAM AND GARFIELD RAIL-
WAY COMPANY, a corporation,

Plaintiffs,

vs.

THE STATE TAX COMMISSION,

Defendant.

PLAINTIFFS' BRIEF

JURISDICTION.

The decision of the defendant, which is here the subject of review, was rendered on the 23rd day of July, 1953. On the 18th day of August, 1953, plaintiffs filed in this Court their Petition for Writ of Certiorari to review and annul that decision. Writ of certiorari issued out of this Court on the

18th day of August, 1953, and was served upon the defendant on that day. Pursuant to that writ, defendant certified and filed with this Court the proceedings and evidence taken in the case. The jurisdiction of this Court is invoked under Section 59-13-46, Utah Code 1953.

QUESTIONS PRESENTED.

The questions presented are:

1. Whether in determining plaintiffs' State Franchise Tax under Section 80-13-21(6)(c), Utah Code 1943 (Sec. 59-13-20(6)(c), Utah Code 1953) defendant may attribute to Utah, as the amount of plaintiffs' gross receipts from business assignable to Utah, the gross receipts from sales of copper, molybdenum, platinum and palladium produced by its Utah Copper Division and sold outside of Utah.

2. Whether said State franchise taxes as imposed by the defendant, tax income from activities beyond the jurisdiction of this State and thus deprive plaintiffs of due process of law within the meaning of Section 7 of Article I of the Constitution of Utah and Section 1 of the Fourteenth Amendment to the Constitution of the United States and

unduly burdens interstate commerce in violation of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States; and whether the defendant's attempt to impose and to exact payment thereof as a condition to the continued conduct of plaintiffs' interstate business within the State of Utah pursuant to the prohibition of Sections 59-13-61 and 59-13-62, Utah Code 1953, would burden interstate commerce.

3. Whether under Section 80-13-8(9)(a)(b), Utah Code 1943, (Sec. 59-13-7(9)(a)(b), Utah Code 1953), for the purpose of the depletion deduction, the term "net income from the property" means the net income derived from the sale of the mineral production obtained from the property less all costs and expenses incurred in the production and sale of such products.

4. Whether, for the calendar year 1942, the defendant has either jurisdiction or authority but to obey the mandate of this Court in its Case No. 7298 and whether the defendant's attempt to change the allocation of Kennecott's net income within and without the State of Utah for purpose of the State franchise tax for that year, or otherwise to exceed or elaborate upon that mandate, is beyond its power and void.

5. Whether in the light of the facts disclosed by this record the defendant is empowered to assess interest on deficiencies, should any such be found.

STATEMENT

This suit is one to review the decision of the defendant and its assessments thereunder of the corporation franchise tax against these plaintiffs for the years 1942 to 1950, both inclusive. The plaintiff Bingham and Garfield Railway Company was a wholly-owned subsidiary of the plaintiff Kennecott Copper Corporation (hereinafter sometimes called "Kennecott"), and plaintiffs' return was a joint return for each of the years 1942 to 1948, inclusive; in each of 1949 and 1950 the return was that of Kennecott Copper Corporation alone. Bingham and Garfield Railway Company ceased operation April 30, 1948, and was dissolved June 30, 1951, Kennecott Copper Corporation succeeding to all the Railway Company's assets and agreeing to fulfill and discharge all contractual obligations of the Railway Company. Whatever obligation, if any, there be by reason of the corporate franchise tax assessments here the subject of review will be Kennecott Copper Corporation's obligation solely. Furthermore the matter here in issue pertains exclusively to the operation of Kennecott Copper corporation; therefore, the plaintiffs hereafter will be referred to in the singular as Kennecott.

The issue is one of power or authority in the defendant to proceed as by its decision below, under the statutes and Constitution of the State of Utah and the stated provisions of the Constitution of the United States. The defendant State Tax Commission (hereafter sometimes called the "Commission") is created by statute and has only such powers as the statute confers upon it. Such powers must be exercised in accordance with the statute. *E. C. Olsen Co. vs. State Tax Commission*, 109 Utah 563 at 570, 168 P. 2d 324.

The defendant had before it some 700 pages of oral testimony and a multitude of voluminous exhibits. Numerous witnesses appeared for the plaintiff. In not a single instance was their testimony contradicted. The facts as presented by the plaintiff's witnesses are established without contradiction. The defendant was required to make and should have made its finding of fact and have rendered its decision upon the evidence before it. No new or additional evidence may now be introduced, but the cause is to be heard on the record before the Commission as certified to by it. The decision of the Commission may be reviewed by this Court both upon the law and the facts. Section 59-13-46, Utah Code 1953.

Because of the voluminous nature of the record, we do not desire to burden this Court by pointing out the many instances where the findings of fact by the

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defendant are not supported by the testimony and evidence presented before it. Consequently, this brief is based upon facts that are not in dispute between the Commission and Kennecott because, on the basis of such facts alone, Kennecott believes its contentions are amply sustained.

F. 4, Ex. Kennecott is a New York State corporation
49 (2), which, since its incorporation in 1915, has always
Tr. 164 had its principal office and place of business in New
Ex. York City. During all years here under considera-
24(2) - tion this office was located at 120 Broadway, New
42(2) York City. These were the principal executive,
Tr. 571 administrative and financial offices of the Corpora-
et seq., tion, where the Corporation's president and other
574 principal officers had their offices, where the Board
45, 46, of Directors regularly held its meetings and where
48, 341 there was located a large force of executives, admin-
istrative, accounting and clerical personnel. It was
from these offices in New York that Kennecott con-
ducted and administered its extensive operations,
including its several directly-owned mining proper-
146 ties located in the State of Utah and in other parts
et seq., of the United States, and the affairs of its various
149 subsidiaries located in the United States and in
et seq. foreign countries. It was from these offices that
Kennecott conducted and controlled the sales of its
mineral products, including sales made by Kenne-
cott Sales Corporation (a wholly-owned subsidiary
of Kennecott organized under the laws of New

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155, 169 York), as agent for Kennecott. It was in a part of
Ex. the space rented by Kennecott for its offices at 120
41(2), Broadway that the Kennecott Sales Corporation
42(2) (hereinafter sometimes called the "Sales Corpora-
575 tion") had its office and place of business.

342 Kennecott followed a divisional method of ac-
counting for its various operations and affairs. One
of these divisions was the so-called Utah Copper
Division which covered the operations of Kennecott
with respect to its Utah properties and the further
processing and ultimate sale of the products of such
properties. The Utah Copper Division thus covered
the activities conducted by or in connection with
Kennecott's properties, offices and business within
the State of Utah, and those in relation thereto con-
ducted by or in connection with its head office in
New York. The Commission has held, and Kennecott
in this case does not dispute, that the tax returns
of Kennecott for the Utah corporation franchise tax
and the tax determinations to be made for purposes
of that tax relate only to such part of the activities
and income of Kennecott as is represented by its
Utah Copper Division, excluding from such tax
returns and such determinations the income or
affairs of other divisions of Kennecott. Accordingly,
in this case, it is understood that unless *clearly*
indicated to the contrary, reference to Kennecott
and its operations and affairs relate solely to those

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included under the broad designation set out in this paragraph as the Utah Copper Division.

In Utah, Kennecott is the owner of and operates the Utah Copper Mine and a precipitating plant in Bingham Canyon, in Salt Lake County, Utah, and is the owner of and operates two ore concentrators at Magna and Arthur, respectively, both being in the vicinity of the settlement of Magna, also in Salt Lake County. Kennecott is also the owner of and F. 10, 12 operates certain transportation facilities between its Tr. 43, mine and concentrators and between the concen- 131-2 trators and the smelter of the American Smelting and Refining Company at Garfield, in Salt Lake County, Utah.

Ex. To recover the metals, most precipitates and all iii (2), copper concentrates must be smelted, the metals 18(2), being thus converted into what is known as blister 19(2) copper. Kennecott delivered its precipitates and Tr. 44, concentrates to various smelters at various locations, 165, 267 some within the State of Utah and some in states other than the State of Utah, and for a negotiated fee those smelters performed their operation as a bailee for Kennecott's account. Almost all of the copper concentrate during the taxable years involved was shipped to and smelted at the nearby Garfield, Utah smelter of American Smelting and Refining Company (hereinafter sometimes called "A. S. & R.").

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166, 208 The blister copper resulting from the smelting operation contains the copper and other metals, which, to produce a commercially marketable product, must be refined so that the refined metals will be separated one from the other. There being no

Ex. refinery within the State of Utah,* refining was iii(2), performed in states other than Utah, for the most Tr. 43, part by A. S. & R. at its eastern refineries located 138, 166, at Baltimore, Maryland and Perth Amboy, New 216, 268 Jersey, always for a negotiated fee and as a bailee for Kennecott's account. Transportation from the smelters to the refineries was by Kennecott as the shipper and over the trans-continental railroads at published tariff rates. After refining, the refined metals were delivered to Kennecott in states other than Utah.

F. 11, There was no market in the State of Utah for Tr. 44-5, any part of Kennecott's production, either unrefined 53, 146, or refined; Kennecott in fact produced no commercial product in Utah other than molybdenite concentrates and a relatively small quantity of precipitates, all of which, however, were sold by the Sales 336, 339, Corporation, as agent for Kennecott, in states other 620 than Utah for delivery to buyers located outside Utah. Net income being the end and necessary result

45, 180 * Kennecott's refinery in Utah began operations in October 1950, but since its production was insignificant in the period here involved the parties have mutually disregarded it.

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of its operation, Kennecott was required to find and develop in states other than Utah the required market for its production, and Kennecott did find and develop such market in states other than Utah and in those states sold and distributed its production on the open market and completed its operation by converting its production into money or income in those states other than Utah.

51
et seq. Kennecott's operation in and out of the State of Utah was one continuous, indivisible, closely integrated operating unit, the single ultimate purpose of which was the production and sale of mineral products. Only the mining of the crude ores, concentration and smelting, if smelted in Utah, were accomplished within the State of Utah; but the necessary processes of smelting, where smelted outside Utah, and refining and the sale, distribution and delivery of all refined metals wherever refined, were accomplished wholly outside Utah. The operation was indivisible, continuous and uninterrupted from the mining of the crude ores within the State of Utah, to and including the realization of the first commercially marketable product and the sale, distribution and delivery thereof outside of and beyond
339 Utah.

Kennecott's operation within and outside Utah was an unitary business for which the "Massachusetts" formula as embodied in Section 80-13-21(6),
256, 259 Utah Code 1943, (Sec. 59-13-20 (6), Utah Code 1953),

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was devised and, as in many others of the states, was adopted by Utah. The parties are here in agreement that this statutory formula is to be applied in this case. They are also in agreement upon the manner of calculating and applying the first and second factors of that formula — (6) (a) and (b) — with respect to property and payroll. The only question between the parties relating to the application of this statutory formula is regarding the manner of determining the third factor — (6) (c) and (6) (e) (1st) — with respect to gross receipts and the manner in which sales made without the State of Utah are to be assigned in computing that factor; which is Question 1 here presented. Question 3 here presented with respect to depletion affects determination of the total net income subject to allocation but does not affect determination of the third factor (6) (c) assigning gross receipts to business transacted.

Ex. Kennecott Sales Corporation was and is a corporation of the State of New York, a wholly-owned subsidiary of Kennecott, created by Kennecott to perform the function of selling Kennecott's production. The only business office of the Sales Corporation was located at, was embraced within and was actually included in and was a part of the premises rented by Kennecott, constituting Kennecott's principal place of business, being that in the Equitable Building at No. 120 Broadway in New York City. The Sales Corporation at all the times herein involved acted as Kennecott's agent in negotiating

51(2),
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and effecting sales of the copper and molybdenite produced by Kennecott from its Copper Mine in Utah and performed that function in accord with policies determined by Kennecott and obedient to the direction and instructions given to it by Kennecott from its principal office in New York. No title to these products ever passed to the Sales Corporation; on the contrary title remained at all times in Kennecott until delivery of the product to purchasers. The product was never consigned to the Sales Corporation, nor was the Sales Corporation ever in possession of the product it sold. The Sales Corporation was not engaged in any manner of business within the State of Utah.

Until delivery of the refined copper to buyers outside of Utah, the refined metal was held for Kennecott by the refineries located outside of this State, Kennecott's shipment being made of specified tonnages in specific shapes to particular points as directed by the Sales Corporation upon the authority of Kennecott and on Kennecott's behalf. Molybdenite was produced in Utah and delivered therefrom to buyers in states other than Utah on instruction from the Sales Corporation, again for and on behalf of Kennecott and by Kennecott's authority.

Ex.

Platinum and palladium were sold by A. S. & R. for Kennecott's account and as Kennecott's agent.

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Gold and silver were sold from Kennecott's principal place of business in New York City directly 546-565 by Kennecott to and were purchased by the refineries.

The relative importance of the sales of the mineral products is indicated by the following summary of the percentages of the total dollar sales during the years 1942 to 1950, inclusive:

(a) Sales by Kennecott Sales Corporation as agent for Kennecott:

Copper	79.79%
Molybdenite	8.00
Total for copper and molybdenite	87.79%

(b) Sales directly by Kennecott to A.S. & R.:

Gold	10.18%
Silver	2.02
Total for gold and silver	12.20

(c) Sales by A.S. & R. as agent for Kennecott:

Platinum and palladium....	.01
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Total sales	100%
-------------------	------

The Commission's decision attributed to business assigned outside Utah, receipts from sales of gold and silver, and these sales are not in issue in

this case. Since sales of platinum and palladium constituted only a small fraction of 1% of total sales (approximately \$96,000 in the aggregate) during the taxable years involved, our discussion of the third or gross receipts factor, will primarily relate to the sales of copper and molybdenite.

Varying Positions Taken by the Commission

For an understanding of this case and its record as it now comes before this Court, it seems necessary to note the various and inconsistent positions which the Commission has taken with Kennecott over a period of years with respect to

- (a) the allocation of net income within and without the State for the purpose of this tax, and
- (b) the determination of depletion allowable.

1. For 1941 and prior years (before the years 1942 to 1950, inclusive, which are involved in the present controversy), the Commission had consistently applied the statutory formula for allocation and in determining the sales factor of such statutory formula had recognized that all sales of the mineral products were without the State of Utah and were not to be brought into the numerator in determining the allocation fraction. Depletion, as a deduction from total net income before allocation within and

without the State, had also been consistently determined by the Commission at $33\frac{1}{3}\%$ of the entire net income from the sales of the mineral products without use of any algebraic formula or otherwise excluding any part of the income from such mineral products as not subject to percentage depletion.

The returns filed by Kennecott for 1942 and subsequent years followed in these particulars the same standards as before for allocation of income in accordance with the statutory formula and for computing depletion on the entire net income from the mineral product.

2. The Commission in its March 10, 1945 proposed adjustments with respect to the 1942 tax first applied an *algebraic formula* for determination of the net income from the property as the basis for the depletion computation. (This formula will be discussed in Point II of this brief.) However, the allocation of net income to the State of Utah was made on the basis of the *statutory formula* attributing all sales of mineral products outside the State of Utah.

This was the basis for the determination of the 1942 tax as that case was then brought before this Court. *Kennecott Copper Corporation v. State Tax Commission*, 221 P. 2d 857 (1950).

A particular issue in that case was whether Federal income and excess profits taxes should be deducted in computing net income for purposes of depletion. This Court decided that they should be ~~so~~ deducted and that issue was definitely determined and so is not an issue now pending before this Court. Such taxes have been so deducted in the determinations for the years 1942 to 1950 which are now before this Court and Kennecott raises no contrary contention in this respect.

This Court did not in that case pass on the question of the use of the algebraic formula and method for determining depletion but remanded the case to the Commission for further determination. No question was there raised by Kennecott, the Commission or the Court as to the use of the statutory formula for allocation of income within and without the State, nor as to the computation thereof.

3. The Commission in 1951 presented in a series of amended reports its revised determinations for 1942 and for all subsequent years to 1950 inclusive. In such determinations, it continued to apply the algebraic formula for the depletion computation. However, for the first time instead of applying the statutory formula, it substituted its algebraic formula to determine that portion of the Utah Copper Division's net income from mineral production to be allocated within the State of Utah for taxation.

It was in respect to these reports for the years 1942 to 1950, inclusive, and the computations thus made as to depletion allowable and income allocable to the State of Utah, that Kennecott filed its several petitions for redetermination of deficiencies and thus instituted the Commission's hearings below.

4. The hearings with respect to such determinations were opened December 4, 1951 and proceeded on this basis until April 2, 1952. At that time, the Commission again changed its position and presented its new determinations in its Exhibit PPP(2) (Tr. 432). In these revised determinations, the Commission acknowledged that the statutory allocation formula was to be applied in the allocation of income in place of a determination based on its algebraic formula which it had applied in its 1951 determinations and which had theretofore been the subject of the hearings. It, however, still adhered to the use of the algebraic formula in determining depletion. This explains the reason for considerable testimony and argument in the record of the hearings directed to the use of the algebraic formula for determining income allocation which is now no longer pertinent to the issues, under the changed position of the Commission.

The Commission, however, in applying the statutory formula for allocating income to the State of Utah adopted a new theory, never before applied or suggested by it since enactment of the franchise

tax, under which it ascribed gross receipts from all sales of metallic products, even though made by or in connection with the principal office of the corporation in the State of New York, as being gross receipts attributable to business carried on within the State of Utah. It was this point which was particularly dealt with in the hearings as they thereafter continued before the Commission.

5. The Commission in its decision below somewhat modified the position taken in its revised demand presented during the course of the hearings and attributed gross receipts from sales of gold and silver to business carried on without the State of Utah. However, it continued to hold that gross receipts from sales of the other mineral products were to be attributed to business carried on within Utah, even though there was no question but that such sales were made entirely without the State of Utah and that none of such sales were to customers located in the State of Utah. The major question relative to such other products involved the sales of copper and molybdenite. These sales were made on behalf of Kennecott by the Sales Corporation, its wholly-owned subsidiary, as sales agent of Kennecott from or in connection with the principal office of Kennecott in the State of New York. A minor question involved was as to sales of platinum and

palladium sold by A. S. & R. as agent for Kennecott pursuant to agreement made in and supervised from New York and connected with the principal office of Kennecott in the State of New York.

After this long extended history and frequent and material changes by the Commission of its position, the questions which now come before this Court as to these matters are with respect to the propriety of:

1. The Commission's determination of the sales factor to be applied in allocation of the total net income in accordance with the statutory formula; and,
2. The Commission's method of determining depletion deductible in computing such total net income, including its use of the algebraic formula for that purpose.

ARGUMENT

I

Point

Receipts from sales of products produced by Kennecott's Utah Copper Division were not gross receipts from business done in Utah and cannot be attributed to business carried on within Utah nor included in the numerator of the gross receipts factor as from business assignable to Utah; and, if the franchise tax statute were to be interpreted and applied as determined by the Commission, it would be unconstitutional.

The question discussed in this portion of the brief involves the proper construction, as applied to the facts in this case, of Section 80-13-21 of the Utah Code of 1943, (Sec. 59-13-20, Utah Code 1953) (originally enacted in 1931 and in effect during all of the years in question) and the constitutionality of that section if construed as the Commission has construed it.

The Franchise Tax Act imposes an annual franchise tax for the privilege of doing business in this State in any year in an amount equal to 3% of the net income of the corporation for the preceding year "computed and allocated to this State in the manner hereinafter provided." Laws of Utah 1931, Ch. 39, Section 4, as amended by Laws of Utah 1935, Ch. 89, Section 80-13-3 (Sec. 59-13-3, Utah Code 1953).

Section 80-13-21, Utah Code 1943, (Sec. 59-13-20, Utah Code 1953) sets forth the rules for determining the portion of net income assignable to business done within Utah, upon which the tax is based. The statute first specifies rules relating to allocation within or without the State of certain items such as rents, interest, dividends, and gains and losses from sale of capital assets. Then subsection 6 specifies the statutory "three-factor" allocation formula applicable to the remainder of its net income if the corporation carries on any business outside of Utah. In the formula equal weight is given

to three separate factors, (a) tangible property within the State, (b) payroll assignable to the State, and (c) gross receipts from business assignable to the State. The specific language of the gross receipts factor is as follows:

(e) The amount of the corporation's gross receipts from business assignable to this State shall be the amount of its gross receipts for the taxable year from

(1st) Sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside this state, and sales otherwise determined by the tax commission to be attributable to the business conducted on such premises.

In determining that portion of the net income of Kennecott's Utah Copper Division assignable to business done within this State, the Commission by its decision below attributed to business carried on within Utah, in purported compliance with the above "gross receipts" factor of the allocation formula, *all* of the gross receipts from *all* of the sales of copper, molybdenite, platinum and palladium of the Utah Copper Division, although all of such sales were made outside of Utah to buyers located outside of this State by agents operating from offices outside of this State. As a result, the Commission arrived at an allocation to Utah of such gross receipts

ranging from approximately 83% to 89% for such years. When combined with the other allocation factors prescribed by the statute, this resulted in an allocation to Utah of from approximately 90% to 94% of the total net income of the Utah Copper Division.

Kennecott contends that none of such gross receipts from sales outside of this State should be attributed to business carried on within Utah in applying the gross receipts factor; such gross receipts are the result of business carried on in a state other than Utah. As a result the numerator of the gross receipts factor should be substantially zero and the resulting percentages of net income allocated to Utah would range from approximately 63% to 65%.

The Commission attributed all of the gross receipts from sales of gold and silver to business done outside of Utah, and with this Kennecott is in agreement. As indicated above, the sales of platinum and palladium are but an infinitesimal part of the total gross receipts here involved. Accordingly, the statements made hereafter in this Brief will relate only to the sales of copper and molybdenite, except where otherwise indicated, and the argument will be addressed primarily to those sales.

As we believe the argument which follows clearly demonstrates, the Commission in so applying the formula prescribed by the statute dis-

regarded both the purpose and the letter of the statute and, if the statute is to be applied in the manner in which the Commission has applied it, the resulting tax on Kennecott would be in violation of the Federal and State constitutions as a denial of due process of law and an undue burden on interstate commerce.

- A. In the case of a corporation doing business both within and outside the State of Utah, the franchise tax statute is designed to tax only the portion of the corporation's net income fairly and reasonably attributable to the business done by it within the State of Utah. The decision of the Commission produces a result obviously at variance with this cardinal purpose of the law.**

The Utah franchise tax statute, like that in a number of other states, is one embodying the so-called Massachusetts formula — a three-factor formula — for the purpose of determining the portion of the net income of a corporation engaged in business both within and without Utah to be taxed under the statute. Before discussing the specific wording of the statutory formula and showing how the Commission's decision is contrary thereto, it is appropriate at the outset to consider the purpose of the statute and to show how the decision of the Commission is at variance with this purpose.

The purpose of the Utah statute, as with all such apportionment laws, is to impose the State Franchise Tax on only so much of the net income of

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a corporation as is fairly and reasonably attributable to business done within the state. Such a standard is necessary to meet constitutional considerations. It is also desirable in the enlightened self-interest of this State so as not to discourage domestic corporations from extending their activities beyond the boundaries of the state, nor to discourage foreign corporations from prosecuting their activities within the state. To accord with that purpose, orderly administration and fairness to taxpayers require the establishment of reasonable rules or methods of allocating income from activities within and activities without the state.

The State of Massachusetts had faced this problem earlier than did Utah and in order to meet such purpose in 1920 adopted a three-factor formula for allocation of total net income on the basis of property, of payroll and of sales or other gross receipts within and without the state. This was done in recognition of the fact that no single factor could be generally applied to give a fair allocation of business incomes which arose under many varied circumstances and conditions; and in the belief that those three factors would give a reasonable standard of measurement generally applicable to meet the purpose and intent of the statute. The experience of Massachusetts with this formula and the further consideration of the problem in other states had led many states to adopt this so-called "Massa-

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chusetts formula" as the basis for their taxation, —with some differences in its specifications in one state or another, and with some states writing their specifications directly into the law and some few other states leaving the specifications to be prescribed by administrative authority. The Utah statute, adopted in 1931, included the specific provisions which we shall later discuss, but not intending these as arbitrary rules which, contrary to the purpose and intent of the statute, would allocate to the state income which was not fairly and reasonably attributable to business carried on within the state.

109 It is clear from the statute itself, from its legis-
et seq. lative history, and also from the opinions of this Court construing it that the purpose of the Utah Legislature in adopting the franchise statute was to tax only such income as is reasonably attributable to business done in Utah. Thus, Section 80-13-3 Utah Code 1943 (Sec. 59-13-3, Utah Code 1953) imposes a franchise tax upon net income "computed and allocated to this state," and Section 80-13-21 Utah Code 1943 (Sec. 59-13-20 Utah Code 1953) which prescribes the specific statutory apportionment formula, begins as follows:

"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: . . .” (Italics supplied.)

The Utah statute provides in Paragraph (6) for an allocation based on the three factors of property, payroll and gross receipts, each of which is given equal weight in the final result. In addition, it provides in Paragraph (8) for a different method of allocation when, in a particular case, even this broad formula does not give a fair and proper result in that it allocates to Utah more or less than “the proportion of net income fairly and equitably attributable to this State” or when necessary to avoid “double taxation”.

The Report of the Tax Revision Commission of the State of Utah in the year 1929 with respect to the State franchise tax then in the process of formulation, contains the following statement at pages 67 and 68 under the heading, “The Allocation of Net Income:”

“Since the basis of this tax is to be the net income from the business done within the State, it becomes necessary to provide for a distribution or allocation of the net income of any business concern among the several states in which it does business. *No state has the right to tax the capital employed or the business done beyond its borders.*” (Italics supplied.) (Tr. 109)

The legislative intent to tax only income *reasonably attributable* to business done in Utah has been specifically recognized by this Court. In California

Packing Corp. v. State Tax Commission, 97 Utah 367, 93 P. 2d 463 (1939), this Court stated (93 P. 2d at 465 and 467-68) :

“... In providing for the determination of the amount of the net income to be used as the basis for computation of the franchise tax, the Legislature carefully distinguished between business done within the state and business done outside the state, *so as to confine the operation of the tax to business done within the State.*”

“... The language of the statute throughout evidences an intent only to determine the franchise tax from income from business done under the franchise from the state, that is business done within the state. The various methods of allocation are designed to restrict the tax to business done within the state and to assign to the state for taxation that portion of the business reasonably attributable to the state. There is also apparent a purpose to avoid double taxation.”

A fair and reasonable apportionment of the net income was thus intended by the statute and is required by it.

However, as we feel is indicated by the Commission's repeated change in position during the course of these proceedings (see pp. 14-19, *supra*) and by the more detailed discussion of its present position which follows, the Commission has apparently not been concerned with arriving at a fair and reasonable apportionment to Utah of Kenne-cott's net income from the product of its Utah mines.

On the contrary, the Commission has seemingly attempted, in derogation of the fundamental purpose of the statute and by recourse to a tortured and, we believe, entirely unjustified construction of its language, to allocate to Utah the largest possible amount of net income.

The Commission made no attempt to determine whether the result it reached was a fair one. In Finding No. 69, page 163, it said: "It is not the function or prerogative of the Commission to attempt to evaluate, by its own judgment, the relative significance to the production of income of the Utah Division of mining and other operations in Utah as against the executive operations in New York. It is the Commission's function only to determine the facts; the statute then determines the portion of net income assignable to business done within the State."

The apportionment formula contained in the Utah statute is premised on the principle that where a single or unitary business is conducted across state lines, a fair and reasonable apportionment of the net income of the entire operation can be obtained only by giving weight to three factors carefully selected to reflect the property ownership and the activities which produce such income—namely property, payroll and gross receipts. Three factors are used since each factor operates as a check and balance to the others to prevent an extreme or unfair

result which might occur if only one or two factors were used. Accordingly, unless all such factors are fairly applied and given full effect the whole basis of the three-factor formula is negated.

In this case, the Commission attributed to Utah substantially all of the property (approximately 94% over the years in question) and payroll (approximately 97%), as to which no objection is made by Kennecott. It also attributed to business carried on within Utah all of the gross receipts from the sales of the products of the Utah Copper Division (other than gold and silver) although admittedly none of such sales were negotiated or made within this State, none of the persons concerned with sales worked out of offices within this State, none of such products were delivered to customers within this State, and, in fact, no sales activities of any character were carried on within this State. The effect of such allocation is an overall apportionment of net income to Utah ranging from 90% to 94% during the taxable years involved. Such a result patently violates the intent of the apportionment statute when viewed in relation to the very substantial activities occurring outside of Utah in connection with the production of the net income from the Utah Copper Division.

As evidence of such out-of-Utah activities, we need cite only a few of the Commission's own findings as follows:

- F. 23 (a) Kennecott directs its industrial enterprise, including the operation of the Utah Copper Division, from its permanent executive headquarters in New York.
- F. 24 (b) Such executive offices in New York keep constantly in touch with and coordinate all operational matters relating to mining, smelting, refining and selling to the end that Kennecott's far-flung industrial enterprises throughout the United States and the world will move forward as one united cohesive venture, the ultimate goal of which is to mine and treat the ore and sell the products at a profit.
- F. 24 (c) The duties and function of Kennecott's headquarters in New York are many and varied both in respect to relations with operators in the field, relations within itself and general relations with the public and the outside world.
- F. 24 (d) The activities of Kennecott's headquarters in New York relate generally to operational, development, purchasing and selling matters.
- F. 16 (e) All of the refining of copper, resulting in the production of marketable copper, gold, silver, platinum and palladium, occurred outside of Utah.
- F. 11, Tr. 28, 51, 52 (f) All sales and deliveries to purchasers of copper and molybdenite by the Sales Corporation on behalf of Kennecott were made outside of Utah.
- F. 53 (g) All sales and deliveries to purchasers of platinum and palladium by A. S. & R. in behalf of Kennecott were made outside of Utah.

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F. 54 (h) All sales and deliveries to A. S. & R. of gold and silver by Kennecott were made outside of Utah.

Tr. 45 It is perfectly apparent from the foregoing and
et seq., from the undisputed testimony in the proceeding,
146 that the activities of Kennecott outside of the State
et seq. of Utah were both necessary and substantial and but
for them the operation of the Utah Copper Division
would not have been carried on successfully over
the years involved. Although more detailed facts
could readily be adduced from the record, the above
findings of the Commission suffice to reveal, we
believe, how unreasonable and unrealistic is the deci-
sion of the Commission in attributing to Utah ap-
proximately 93% of net income from the sales of
mineral products.

The error of the Commission lies in the fact
that, in disregard of the legislative intent, it has
inequitably attributed to Utah sales in no way
related thereto. Consequently, the primary purpose
and intent of the statutory formula is defeated. In
the present case all of the products are sold outside
of Utah, whereas the property and payroll were for
almost all of the years 94% and 97%, respectively,
attributed to Utah. The factual circumstances thus
present a typical example of the necessity of a fair
application of all factors of the three-factor formula,
in order that thereby the gross receipts or sales
factor may operate to alleviate an otherwise unrea-
sonable attribution of net income to one jurisdiction.

As if they were talking about the present case, Altman and Keesling, *Allocation of Income in State Taxation* (2d ed. 1950), explain the purpose of the sales factor in the Massachusetts formula as follows (p. 129):

“ . . . it is believed that a fairly satisfactory apportionment can be made if the purpose of the use of the sales factor is kept in mind, namely, to balance the property and payroll factors by giving weight to the elements not reflected by those factors and thereby to assist in making a reasonable apportionment of the entire income among the states in which the business is conducted.”

The Commission in its decision, contrary to the above quoted principles, has achieved an inequitable and unsupportable result by attributing the gross receipts from the sales to business carried on in Utah in which, admittedly, none of the sales were made and none of the selling activities in relation thereto took place.

An example of the inequity resulting from the failure to obtain a fair balance by the use of different factors is the case of *Hans Rees' Sons, Inc. v. North Carolina*, 283 U. S. 123, 51 S. Ct. 385, 75 L. ed. 879 (1931). In that case the Supreme Court held unconstitutional a state tax based upon net income because the apportionment formula, as applied to the particular facts, operated to tax profits not attributable to transactions within the jurisdiction. This case will be discussed subse-

quently from its constitutional aspect. The important point here is that the North Carolina statute utilized only a property factor which resulted for most of the years involved in an allocation of over 80% of net income to that state. The sales office was located in New York and sales were made throughout the United States (including North Carolina) and abroad. The Supreme Court held it unnecessary to review the evidence in detail, holding that, in any aspect of the evidence, the statutory method unreasonably and arbitrarily attributed to North Carolina a percentage of income out of all appropriate proportion to the business transacted there.

In general, in the case of a manufacturing or mining corporation, such as Kennecott, the payroll factor tends to follow the property factor with respect to allocation to the state of income from manufacture or mining. Hence, if any substantial portion of such a corporation's income is to be attributed to another state or states in which the vital and important selling, executive and management activities are carried on, it is necessary to employ and give weight to a sales factor. The use of such factor was, obviously, the lacking element in the Hans Rees' case, which caused the statute to reach an unconscionable result.

The misuse of the sales factor by the Commission in the present case has achieved substantially the same result as if it had applied only a two-factor

formula of property and payroll. Altman and Keesling, *supra*, after summarizing the necessity of utilizing a sales factor, state the proper basis for its application as follows (pp. 126-27) :

“The reasons for the use of the sales factor afford a clue to the solution of the problem of how sales should be apportioned. If the reason for the use of the factor is to balance the other two factors, then obviously the sales should be apportioned in such a manner as to offset rather than aggravate the effects of the property and the payroll factors. This consideration rules out the use of a number of the possible methods of apportioning sales.

“Thus, apportionment of sales to the state where the goods are manufactured or produced obviously tends in many situations to emphasize further the activities in the state of manufacture, which are already overemphasized by the property factor and possibly also by the payroll factor.”

This reasoning applies directly to the present case. Here the obviously unreasonable result obtained by the Commission by attributing all of the sales of copper, molybdenite, platinum and palladium to Utah clearly demonstrates the soundness of Kennecott's position and the propriety of an allocation which assigns to business outside of Utah sales admittedly negotiated and made outside of the State.

The foregoing demonstrates the unreasonableness of the result reached by the Commission's decision. We shall now show that its decision cannot be sustained under a proper interpretation and application of the specific language of Subsection 6 of Sec. 59-13-20, Utah Code 1953, prescribing the formula for assigning gross receipts.

B. The Commission erroneously construed and applied the specific provisions of the statute with respect to the gross receipts factor by assigning to Utah business which in its entirety was carried on in other states.

- 1. The gross receipts factor is designed to allocate to Utah only gross receipts from business assignable to this State. The decision of the Commission contravenes this basic legislative intent.**

As is admitted by the Commission in its Findings, all of the gross receipts from the sale of copper, molybendite, platinum and palladium derived by Kennecott from the Utah Copper Division resulted from sales made entirely outside the State of Utah to buyers located outside the State and through persons operating at or from offices permanently located outside the State. No selling activities of any character took place in Utah or were carried on by persons within or operating from or under the supervision or direction of Kennecott's office within this State.

In spite of these facts, the Commission has attributed to Utah all of the gross receipts from such sales solely on the ground that, in its view, such sales were not made in Kennecott's name by Kennecott's own employees at Kennecott's own offices outside the State but were made through corporations, which it characterized as "factors" or "commission merchants," operating in their own behalf from their own premises located outside the State. Accordingly, under the Commission's interpretation of the statute, the amount of the numerator of the gross receipts factor does not depend upon whether the sales were, in fact, made out of the State, or by Kennecott's employees or agents connected with a permanent place of business of Kennecott outside the State, or whether the sales were in fact attributable to Kennecott's offices outside the State.

The statute may not properly be construed as the Commission has applied it. This we believe evident from the opinions of this Court in the California Packing case, cited *supra*. In that case this Court was called upon to construe the provisions of the statute dealing with the gross receipts factor. While the Court was divided as to the manner in which the provisions relating to the gross receipts factor were to be read, it is clear from both opinions (i) that none of the Judges considered the provisions as authorizing the use in the numerator of sales not made within the State or by personnel not operating from offices within the State or otherwise

not related to sales activities within the State, and
(ii) that if the statute be otherwise construed serious questions as to its constitutionality would be raised.

Moreover, the Commission's construction of the gross receipts factor violates the clear intent of the statutory language. The basic intent of the statute to allocate to Utah only net income reasonably and fairly assignable to business done within Utah is reflected not only in its general provisions but also in the gross receipts factor itself. Thus, Paragraph 6(e) (quoted on p. 21) seeks to ascertain "the amount of the corporation's gross receipts from *business assignable to this state . . .*" (Italics added). The paragraph then assigns to Utah the gross receipts from sales:

" . . . except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside this state . . ."

The Commission's decision is predicated, as will be discussed subsequently, upon an erroneous and narrow interpretation of the above "except" clause. And it completely disregards the next clause in the statute which also excepts from assignment to Utah:

" . . . sales otherwise determined by the tax commission to be attributable to the business conducted on such premises."

It is submitted that however technical an interpretation be given to the initial language of the "except" clause in Paragraph 6(e), the concluding language was clearly designed to attribute to business carried on outside Utah sales not fairly attributable to Utah but which were not encompassed by the preceding language of the "except" clause. And we believe it evident that, under any interpretation of the facts, the sales of the products of the Utah Copper Division in this case were *attributable* to permanent premises rented by Kennecott outside of Utah.

Furthermore, the "attributable" clause emphasizes the primary statutory intent to attribute to Utah only gross receipts fairly assignable to business there carried on and establishes the perspective for construing the other provisions of Paragraph 6(e). It thus becomes apparent that the real and substantive question under the statute is, in each case, whether the sales in question resulted from sales activity within or otherwise related to Utah or whether, on the contrary, they are in fact attributable to sales activity permanently carried on outside of this State. It is entirely inconsistent with the purpose of the statute to attribute to Utah gross receipts from sales which had no relation to any sales activity conducted in that state. We believe that on no reasonable basis can the gross receipts provision of the statute be deemed to intend such a result.

2. **The sales were negotiated or effected in behalf of Kennecott by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business rented by Kennecott outside of Utah.**

The decision of the Commission, moreover, cannot be sustained on any proper interpretation of the initial provisions of the "except" clause of the gross receipts factor, even if the last clause be disregarded.

The Commission held that sales of copper and molybdenite sold without the State, through the Sales Corporation, do not fall within the statutory exception language and so are to be attributed to Utah. This is because, in the view of the Commission, such sales were not made in behalf of Kennecott by "agents or agencies" of Kennecott within the meaning of the statute and, even if so made, such "agents or agencies" were not "chiefly situated at, connected with or sent out from premises . . . owned or rented" by Kennecott.

The sales were made in behalf of Kennecott by agents or agencies of Kennecott.

There can be no real contention that the Sales Corporation was not an "agent or agency" of Kennecott. The Restatement of the Law, Agency lists the following as the three essential characteristics of an agency relationship:

§12. Agent as Holder of a Power.

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An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself.

§13. Agent as a Fiduciary.

An agent is a fiduciary with respect to matters within the scope of his agency.

§14. Control by Principal.

A principal has the right to control the conduct of the agent with respect to matters entrusted to him.

Unquestionably these characteristics are found in the arrangements between Kennecott and the Sales Corporation. Under its agreement with Kennecott, the Sales Corporation had power to effect a transfer of title in minerals from Kennecott to third parties—to divest its principal of its interest in its goods. The Sales Corporation had the power to bind Kennecott by contracts and create liability to third persons thereunder. It had the power to acquire commissions by effecting sales.

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The fiduciary nature of the relationship includes the duty to account for profits arising out of the employment, the duty not to act adversely to the principal's interest, and the duty not to compete with the principal on the agent's own account or for another in agency matters. All these duties were explicit or implicit in the relationship between Ken-

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171, 187, necott and the Sales Corporation. It was explicitly
650, 651, required to collect and remit to Kennecott net pro-
653, 662 ceeds (after expenses and commissions) and to
account therefor. It was required to sell at the high-
est price obtainable.

The Sales Corporation was subject to the direc-
tion, supervision and control of the officials of
Kennecott and was under standing orders to get
616 instructions in the event of unusual conditions.

168 Finally, the parties clearly contemplated an
agency relationship. The Sales Corporation was
designated as Kennecott's agent and it was agreed
that all sales should be made by the Sales Corpo-
ration "solely as sales agent" for Kennecott.

It is clear from the foregoing that the Sales
Corporation was an "agent" of Kennecott within
any recognized or normal definition of that term.
The fact is that the Commission itself recognized
that, in making sales for Kennecott, the Sales Corpo-
ration acted as Kennecott's agent. The position of
the Commission, however, is that such corporation
was a special type of agent which it characterized as
a "commission merchant" or "factor" and by reason
of this fact cannot be regarded as an "agent" or
"agency" within the meaning of the apportionment
statute. This position is asserted by the Commis-
sion despite the fact that the words "agents" and

"agencies" are used without qualification in the statute and there nowhere appears therein any intent to exclude any particular types of agents.

That "commission merchants" and "factors" are "agents" is perfectly clear in the law. 22 Am. Jur., Factors §§ 1, 2. A factor is both an agent and a bailee since one of the distinguishing characteristics of this type of agency relationship is that the factor is entrusted with the possession of the property. 22 Am. Jur., Factors §§ 2, 3. The factor, like any other *agent*, has the power to alter the legal relations between the principal and third persons and between the principal and himself, is in a fiduciary relationship to his principal, and must obey instructions from his principal. 22 Am. Jur., Factors §§ 3, 14, 20, 22, 50. The Restatement of the Law, Agency summarizes the meaning of the word as follows (§ 1(d)):

"'Agent' is a word used to describe a person authorized by another to act on his account and under his control. Included within its meaning are both those who, whether or not servants as described in § 2, act in business dealings and those who, being servants, perform manual labor. An agent may be one who, to distinguish him from a servant in determining the liability of the principal, is called an independent contractor. Thus, the attorney at law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions are agents, although, as to their physical activities, they are independent contractors."

Finally, the use in the apportionment section of the Utah statute of the word "agencies" in addition to the word "agent" clearly evidences a statutory intent to broaden the coverage rather than to restrict it to only certain types of agents. "Agency" is defined in Webster's New International Dictionary (2d ed. 1951) as an "instrumentality" and as an "office or function of an agent, or factor." The word is not limited to an individual, but clearly includes a corporation or other organization or entity acting in such capacity. In no place in the statute is the intention evidenced that the language be confined to the relationship of an employee or servant.

Moreover, even if such a narrow interpretation of the statute were warranted, the decision was incorrect on the facts. The relationship between Kennecott and the Sales Corporation, contrary to the finding of the Commission, was not one which would justify a holding that there existed such independence from control of or lack of control by Kennecott as to support a finding that it was a "factor or commission merchant" as those terms are customarily used. The Sales Corporation never obtained possession of the products sold, possession remaining either in Kennecott or A. S. & R. on Kennecott's behalf. It sold as "agent" for Kennecott's account, not as principal. Kennecott constantly supervised the activities of the Sales Corporation and there was a standing instruction that if anything unusual should occur the Kennecott officials were to be con-

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sulted before any action was taken with regard to sales matters. The Sales Corporation did not sell for any producer other than Kennecott or its subsidiaries and did not hold itself out generally to other persons or companies as engaging in such business activities. The Sales Corporation did not

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guarantee the credit of customers.

In considering this question it should also not be overlooked that the Sales Corporation is a wholly owned subsidiary of Kennecott, organized by Kennecott solely for the purpose of selling Kennecott's own products, that its employees were hired by Kennecott and assigned to duties (either full or

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part-time) with the Sales Corporation, and that the majority of the directors and officers of the Sales Corporation were officers or employees of Kennecott. For the purpose of the Utah Franchise Tax as applied to a unitary business such as this, the mere fact that the Sales Corporation exists as a separate legal entity is not significant, rather its activities as they affect the Utah Copper Division should be taken into account to the same extent as though it were simply a division of Kennecott. For that purpose, the separate corporate entity of the Sales Corporation may in effect properly be disregarded. Cf. Centmont Corporation v. Marsch, 68 F. 2d 460; Bishop v. U. S., 16 F. 2d 410; Chicago M & St. P. Ry. Co. v. Minneapolis, etc., Assn., 247 U. S. 490, 38 S. Ct. 553, 62 L. ed. 1229; In re Kentucky Wagon Mfg. Co., 3 F. Supp. 958, (Aff. 71 F. 2d 802, Cert.

den. 293 U. S. 612); *Darling Stores Corporation v. Young Realty Co.*, 121 F. 2d 112 (CCA 8); *Detroit Motor Appliance Co. v. General Motors Corporation*, 5 F. Supp. 27; *Pacific Can Co. v. Hewes*, 95 F. 2d 42 (CCA 9); *Western Securities Co. v. Spiro*, 62 Utah 623, 221 P. 856.

The evidence in the record clearly shows that the operations of Kennecott and the Sales Corporation in the production and sale of copper and molybdenite, from the removal of the ore from the ground, through its milling, smelting and refining processes and to and including the sale of the ultimate product to consumers, constitute a single unitary enterprise, the purpose of which is the realization of profit from the combined operations. In such case, for franchise tax purposes to treat the activities of the Sales Corporation as those of an independent factor acting on its own behalf is to disregard the essential economic facts of the case as well as the actual relations between the parties. This thought is well expressed in the statement of the California Supreme Court in *Edison California Stores v. McColgan*, 176 P. 2d 697 (aff. on rehearing, 183 P. 2d 16 (1947)), where the Court stated, at p. 701:

“In the present case all of the elements of a unitary business are present—unity of ownership, unity of operation by centralized purchasing, management, advertising and accounting, and unity of use in the centralized executive force

and general system of operation. The business of the parent and all of its subsidiaries is owned and managed under one centralized system, to the same extent as in the Butler Brothers case and other cases considered therein. Thus the business is unitary regardless of the fact that in the Butler Brothers case there was but one corporation involved, owning as parts of the unitary system seven different branches in as many states, and that in the present case there is a parent corporation owning and controlling as units of one system fifteen different branches organized as corporations in as many states. No difference in principle is discernible. If the crux of the matter is to ascertain that portion of the business which is done within this state, then the same considerations justify the use of the formula allocation method in the one case as in the other."

In assigning the sales to Utah because it found the Sales Corporation to be a "commission merchant or factor," the Commission relied upon cases which clearly do not support its position and, in fact, actually support Kennecott's contention.

The first case cited by the Commission, *Commonwealth v. Bayuk Cigars, Inc.*, 345 Pa. 348, 28 A. 2d 134 (1942), *aff'd per curiam*, 318 U. S. 746, 87 L. ed. 1123 (1943), involved sales negotiated outside of Pennsylvania by salesmen whose selling activities were performed in other jurisdictions, but the services of these men were supervised, directed and controlled by the home office in Pennsylvania. The corporation had no offices owned or rented outside

of Pennsylvania from which these men were assigned or from which they could receive their compensation. Under a Pennsylvania statute similar to that involved in the present case, the court attributed the gross receipts from such sales to Pennsylvania because the salesmen were working out of the Pennsylvania office and not out of any offices outside Pennsylvania. Kennecott has no quarrel with this decision. Indeed, although the facts are distinct from the present case, the obvious rationale of the case supports Kennecott's position. The sales were to be assigned to the head office of the corporation from which the selling activities were directed and controlled and to which those making the sales were responsible.

The Commission states in its opinion that it is well settled that companies marketing their products outside of the state of production through the medium of independent factors or commission merchants are not doing business for tax purposes outside the state of production so as to be entitled to an apportionment of income within and without the state on account of such out-of-state sales. In its support, the Commission cites a comment by the Supreme Court of California in *Irvine Co. v. McCogan*, 26 Cal. 2d 160, 157 P. 2d 847 (1945) to the effect that the reason is that factors or commission merchants are independent contractors engaged in their own business rather than the business of their principals. The decision of the Court in the *Irvine*

Co. case was predicated upon the fact that the corporation had its only office and place of business in California and marketed the greater portion of its products out of California through what were held to be commission merchants or factors. The Court did not even reach the question of the allocation formula because it decided that the entire business of the taxpayer was done within California and, in such event, the statute provided that the tax should be measured by its entire net income.

Actually, all the comment relied upon by the Commission says is that, if a factor markets a corporation's products in a state, the corporation is not thereby doing business in such state. It does not say, and manifestly does not intend to say, that there may not be other circumstances and conditions which would constitute doing business by the corporation in that or in other states. Where the corporation's only office and place of business is in the state where its products are produced and the factor has its authority from and responsibility to that office the sales will be attributable to such office in the state of production. But it follows from this reasoning that if the corporation has an office and place of business without the state of production, the sales made by a factor having its authority from and responsibility to such office are to be assigned to that out-of-state office. The question is as to the office or place of business with which the

factor, commission merchant or other agent or agency is connected. It is that which determines where the sales should be assigned.

The vital distinction between the Irvine Co. case and the present case is that there the *taxpayer's* entire activities were confined to the taxing (producing) state while, in this case, even though the Sales Corporation be considered a commission merchant or factor, Kennecott admittedly was permanently and substantially engaged in business outside of Utah, its principal offices being in New York City, and conducted its own sales activities and directed and supervised those of its agents from such out-of-state office. All sales were connected with and attributable to those offices and in no sense to any office in Utah.

Where the corporation is engaged in business outside of the producing state, allocation of income is necessary; and, even assuming the commission merchant's or factor's activities are to be ignored (which we do not concede), the gross receipts from sales are to be attributed to the state in which is located the taxpayer's office with which such selling activities are connected. In other words, the officers and employees of the taxpayer who entered into the contract or arrangements with the commission merchant or factor, and who exercise supervision over such contract and the activities of such agent (as in this case), actually negotiate or effect the

sales in behalf of the taxpayer insofar as the sales factor is concerned. It is the income from the taxpayer's activities that is being allocated. Consequently, in such a case the taxpayer's activities, sales-wise, should be given effect in the assignment of sales if those of the agent are disregarded.

Similarly, in all of the other cases cited by the Commission the sales activities of the taxpayer—namely, the conduct and supervision of the sales arrangements and the continuing relationship with the commission merchant or factor there involved—took place in the taxing state.

To illustrate, *Commonwealth v. Minds Coal Mining Corporation*, 360 Pa. 7, 60 A. 2d 14 (1948), involved a West Virginia corporation which owned and operated a coal mine in West Virginia and maintained its only executive and administrative office in Pennsylvania. The taxpayer had a contract with Bulah Coal Mining Corporation whereby Bulah acted as sales agent for the taxpayer. Bulah maintained its own offices in New York and had its own salesmen. It agreed to observe certain price limitations and Federal regulations, make contracts with purchasers, invoice all shipments of coal direct to the customer, collect for sales and assume the credit risk. Orders for coal were forwarded by Bulah to the West Virginia mines where the coal was loaded to fill the orders. The Supreme Court of Pennsylvania held that Bulah, as a result of a con-

tract, became the sales agent and authorized representative of the taxpayer for the sale of its coal; and that the sales negotiated and effected by Bulah were not by agents or agencies chiefly situate at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth of Pennsylvania. They held, in consequence, that the gross receipts from the sales of coal sold by Bulah were to be assigned to Pennsylvania.

In this case, as in the others cited by the Commission, the taxpayer itself maintained no executive or sales office outside the state asserting the tax, its principal office was within the taxing state, and all of its own activities with respect to sales occurred within the taxing state. Accordingly, these cases offer no support for the Commission's assignment of the sales in this case to Utah. In fact, upon analysis, they constitute direct support for Kenne-cott's position.

Moreover, the Pennsylvania Supreme Court in the Minds case specifically held in its conclusions of law that the sales involved were not effected in and should not be assigned to West Virginia, the state of production, the taxpayer having argued to that effect. Thus we have in that case the situation where the taxpayer mines its product in one state, maintains its executive and administrative headquarters in the second state, and sells its product through a

commission merchant or factor in a third state which is not the state of production. Under the Court's decision in that case the gross receipts from sales were assigned *not* to the state of production but to the state where the executive and administrative offices were maintained. We have in substance the same situation in the present case: Kennecott mines in one state, maintains its executive and administrative offices in a second state, and (assuming *arguendo* that the Sales Corporation is a "factor") sells its products through a factor in the second state, but not in the state of production. It is strikingly clear that, under the Minds decision, the gross receipts from sales should be assigned to the state where the executive offices are maintained, and not to the state of production.

The Minds case also demonstrates the inequitable and incorrect nature of the Commission's decision in this proceeding. If the Commission's theory in this case were followed, in every case in which a "commission merchant" or "factor" is used for selling activity, every state in which the taxpayer did any business related to the product sold might claim that all of the gross receipts from sales are attributable to it. Thus, if the case stood for the proposition advanced by the Commission, in that same case West Virginia could have assigned all of the sales to itself, as the state of production, on the basis of the same argument. And, if the taxpayer had also fabricated the product in another state, that state

could on similar reasoning assign all of the gross receipts to itself. In other words, sales effected through a factor could under such a theory be assigned in full to every state in which a corporation is taxed because (according to the interpretation advanced by the Commission) such sales will not have been "negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by the corporation" in *any* jurisdiction.

It is clear that the Legislature of Utah did not intend that its statute operate in any such inequitable and unreasonable manner. In the California Packing case this Court stated (93 P. 2d at 468, 97 Utah 377): "There is also apparent a purpose to avoid double taxation."

Finally, the Commission in its decision seems to have adopted just as unrealistic an interpretation and application of the words "in behalf of the corporation" in the "except" clause in the gross receipts factor, stating that sales were effected by the Sales Corporation acting in its own behalf. And this, despite the statement in the same sentence that such sales were for the account of Kennecott. Of course, every agent acts in his own behalf in the sense that he performs the activity or function and does so to obtain compensation. But to state that, within the meaning of the "except" clause, sales of Kennecott's

property by the Sales Corporation, as to which it had to account to Kennecott for the proceeds less expenses and commissions and was subject to the direction and control of Kennecott, were made on behalf of the Sales Corporation and not on behalf of Kennecott would render the "except" clause meaningless and inapplicable in any situation.

The sales were negotiated or effected by agents or agencies "chiefly situated at, connected with or sent out from premises" rented by Kennecott outside of Utah.

The Commission has also erroneously interpreted and applied the "premises" provision of the "except" clause of the gross receipts factor by holding, in effect, that the statutory provision was not met since the sales were negotiated and effected by employees of the Sales Corporation out of offices owned or rented by it and not out of offices owned or rented by Kennecott. In so doing the Commission not only failed to give effect to the language of that clause, but also acted upon an erroneous interpretation of the facts.

The "except" clause excludes from sales to be attributed to Utah those made by agents or agencies "chiefly situated at, *connected with* or sent out from premises for the transaction of business owned or rented by the corporation outside the state."

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As is perfectly clear, the language of the statute is in the alternative—the agents can be either chiefly situated at, or sent out from premises rented by Kennecott, or they can be “connected with” such premises. The vital consideration, and that which the statute attempts to cover, is obviously whether in fact the taxpayer regularly maintains offices and conducts a portion of its business outside of the State of Utah and whether the sales activities of the taxpayer are related to such office rather than to its operations in Utah.

It is undisputed that in this case all sales activities were performed outside of Utah and had no connection with any offices or places of business maintained by Kennecott or its agents within the State of Utah.

68-9, 178 As clearly appears from the testimony, it is essential in the business in which Kennecott is engaged that its sales activities be centralized in and conducted from offices on the eastern seaboard. This is equally true of its competitors. Ready access to buyers, market data, markets and the like on the part of its executive officers and sales representatives have required and continue to require their location in New York City. The location of all sales activities outside of Utah results from hard economic facts. No contention can be made, nor is one made as we understand the position of the Com-

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mission, that the New York office of Kennecott was not a bona fide and permanent office outside the State of Utah and that all of Kennecott's sales activities were not effected and directed from that office.

145, 616, The record is replete with evidence of the direct
618, 623, and continuing supervision of the sales activities of
629, the Sales Corporation by Kennecott's own officers
674-5 and employees. Constant contact was maintained
by Kennecott's officers with respect to the sales
activities of its agent and major sales policies were
determined by Kennecott's officers and transmitted
to the agent. The scheduling of production as re-
lated to sales, the supervision of accounting with
respect to proceeds of sales, and other important
matters required the constant consideration and
attention of Kennecott's officers and employees. All
of this supervision, direction and other sales activi-
ties on the part of Kennecott took place or emanated
from its New York office,—none occurred in Utah.

With these facts admitted, it is unrealistic to attribute the entire gross receipts from the sales so consummated to Utah on technical considerations of occupancy of identical office space. Under no reasonable interpretation of the statute can it be said that the activities of Kennecott's agent—the Sales Corporation—were not "connected with" a

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permanent place of business owned or rented by Kennecott outside of the State of Utah or that the sales were not "attributable" to such premises.

Moreover, the offices occupied by the Sales Corporation's employees were located on the same

Ex. floors of the same building in New York City as
41(2), those occupied by Kennecott's officers and employ-
42(2) ees, which premises were rented by Kennecott from
575 the building owner. Most of the officers and em-
et seq. ployees of the Sales Corporation were also officers

and employees of Kennecott. The office space made
available by Kennecott to the Sales Corporation
was only a part, and in general not a segregated
part, of the space rented by Kennecott from the
F. 63, owner of the building. The Commission itself found

Ex. that the premises of Kennecott and the Sales Corpo-
52(2) ration were "joint offices and premises". Account-
r. 576, ing, shipping billing, collecting, purchasing, legal,
581-2, telephone and cable and similar services were furn-
1, 613, ished to the Sales Corporation by Kennecott's
.6, 631 employees, the Sales Corporation being charged by
it seq. Kennecott for its appropriate portion of the cost of
such services. Admitting all this, the Commission
insists that the Sales Corporation was not "situated
at, connected with or sent out from" premises of
Kennecott merely because, among many other salary
and expense items originally paid by Kennecott and

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Ex. then allocated among the departments involved,
48(2) including the Sales Corporation, was an amount
582 with respect to "rent". Even this item admittedly
et seq., was not a fixed charge for any definite space but
590 an indirect allocated charge.

The foregoing we believe suffices to indicate the nature of the Commission's action on this point and we will not seek to extend this brief unduly to discuss in greater detail the evidence on this point. We do not believe that the incidence of the tax can be deemed to be dependent on such a theoretical and minor point as that advanced by the Commission. As illustrative of the lack of substance or reasonable basis for the Commission's decision on this point, it is interesting to speculate as to what its decision would have been had the building in which Kennecott and the Sales Corporation maintained their joint offices been *owned* by Kennecott rather than space therein leased from an outside owner. In such case, the space occupied by the employees of the Sales Corporation would have been in premises "owned" by Kennecott.

As the foregoing discussion of the Commission's contentions with respect to the "agency" and "premises" sections of the gross receipt factor demonstrates, the Commission does not give effect to the actual wording of the statute but rather applies it as if it read as follows (additions in italics and omissions in brackets) :

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“(1st) Sales, except those negotiated or effected in behalf of the corporation *in its name* by agents or agencies *other than factors or commission* agents chiefly situated at, [connected with] or sent out from premises for the transaction of business owned or rented by the corporation outside this state *and for the use or occupancy of which the selling agent or agency pays to the corporation no rent or rental charge*”

3. **Until 1951 the Commission had concurred in assigning to business carried on outside Utah the gross receipts from sales of the Utah Copper Division's mineral products. This long-standing administrative construction and application of the apportionment statute should be controlling.**

Even if there had initially been a question as to the interpretation of the gross receipts factor of the apportionment statute, the Commission's own long-standing interpretation and application thereof so as to exclude gross receipts from sales of the Utah Copper Division's products should now be followed.

From the passage of the Franchise Tax Act in 1931 until 1951, the Commission, in applying the statutory apportionment formula, consistently assigned to business carried on outside of Utah 100% of the gross receipts from sales of mineral products of the Utah Copper Division.

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The nature and purpose of the Sales Corporation since its organization in 1933 as the sales agent of Kennecott had been well known by the Commission. In full knowledge of the facts, for 1941 and prior years the Commission had consistently applied the statutory formula and assigned all sales of mineral products outside the State. For 1942 and subsequent years, Kennecott filed its returns on the basis here contended for by Kennecott. When the Commission on March 10, 1945 applied an algebraic formula as to the computation of the depletion deduction with respect to 1942, it again conceded the propriety of Kennecott's assigning 100% of sales to business carried on outside of Utah. When the depletion issue for that year came to this Court, *Kennecott Copper Corporation v. State Tax Commission*, supra, the Commission likewise conceded the propriety of such assignment of sales by Kennecott and this Court concurred accordingly.

It was not until 1951 that the Commission in any way departed or indicated any intent to depart from its former practice and it was not until 1952, during the course of the hearings in this case, that the Commission applied the allocation formula so as to assign to Utah gross receipts from sales of mineral products.

Even if there were doubt as to the proper interpretation and application of the statute (and Kennecott submits that there is no reasonable doubt as

to the correctness of its contentions), such a long and consistent administrative construction of the statutory provision by the public agency charged with its administration should control.

- C. The apportionment statute, as construed and applied by the State Tax Commission, would unconstitutionally tax income from activities beyond the jurisdiction of Utah and would unduly burden interstate commerce.**

Since, under what we regard as the proper construction of the statute, the result in this case is to eliminate from the numerator of the gross receipts factor of the apportionment statute, the gross receipts from sales made outside of Utah, there is no necessity for this Court to pass upon the constitutional questions involved under either the Federal or the Utah Constitution.

Under established principles of judicial construction, the statute should be construed so as to avoid serious doubts as to its constitutionality. If the statute were to be applied in the manner determined by the Commission, it would result in taxing income not attributable to business activities carried on within the jurisdiction of Utah and would thus deprive Kennecott of due process of law within the meaning of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 7 of Article I of the Constitution of Utah

and would likewise unduly burden interstate commerce in violation of Section 8 of Article I of the Federal Constitution.

It has long been settled by the Supreme Court of the United States that a state cannot tax income from activities done or income earned without its jurisdiction and that an apportionment formula, however valid on its face, is invalid if, as applied to the facts, it results in the allocation of an unreasonable or arbitrary amount of income to the taxing jurisdiction.

Underwood Typewriter Co. v. Chamberlain,
254 U. S. 113, 65 L. ed. 165, (1920);

Bass, Ratcliff & Gretton, Ltd. v. State Tax
Commission, 266 U. S. 271, 69 L. ed. 283,
(1924);

Hans Rees' Sons, Inc. v. North Carolina, 283
U. S. 123, 51 S. Ct. 385, 75 L. ed. 879, (1931);

Butler Brothers v. McColgan, 315 U. S. 501,
62 S. Ct. 701, 86 L. ed. 991, (1942).

In the Hans Rees' case, discussed above, the Supreme Court held invalid a North Carolina tax based upon net income because the apportionment formula as applied to the particular facts operated to tax profits not attributable to transactions within its jurisdiction. Net income was assigned to North Carolina in the ratio that the value of real and per-

sonal property in that state bore to the value of all such property. The taxpayer, a New York corporation, was engaged in the business of tanning, manufacturing and selling belting and other heavy leathers. Its manufacturing plant was located in North Carolina and it conducted its business upon both wholesale and retail levels. Its wholesale business consisted of selling hides to shoe manufacturers in carload lots and the retail business consisted of cutting the hides into innumerable pieces, finishing it in various ways, and selling it in less than carload lots. A warehouse was located in New York from which shipments were made from stock on hand to various customers. When the merchandise required by a customer was not on hand in the New York warehouse, it was shipped from North Carolina either to the New York warehouse or direct to the customer. The sales office was located in New York and the salesmen reported to that office, sales being made throughout the United States, including North Carolina, and abroad. Certain finishing work was done in New York. Between 40% and 50% of the output of the North Carolina plant was shipped to New York, the remainder being shipped directly to the customers on orders from New York.

The income allocated to North Carolina pursuant to its statutory method for the years involved was in excess of 83%, 84%, 66% and 85%, respectively. The Supreme Court of North Carolina had upheld the statute as being not invalid on its face.

But the Supreme Court of the United States held the statute as applied invalid, stating (283 U. S. at pp. 134-136) :

“When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method, which, albeit fair on its face, operated so as to reach profits which are in no just sense attributable to transactions within its jurisdiction.

* * *

“For the present purpose, in determining the validity of the statutory method as applied to the appellant, it is not necessary to review the evidence in detail, or to determine as a matter of fact the precise part of the income which should be regarded as attributable to the business conducted in North Carolina. It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the facts shown, the statutory method, as applied to the appellant’s business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that State. In this view, the taxes as laid were beyond the State’s authority.”

The Hans Rees’ case has been discussed in detail because it is strikingly analogous to the present case, each being a situation where a review of the

facts and the results of the application of the apportionment statute by the tax authorities immediately disclose an unreasonable and arbitrary allocation of net income to the taxing jurisdiction. As pointed out previously, the Hans Rees' case involved only a single factor apportionment formula. However, in the instant case, the interpretation accorded the gross receipts factor by the Commission, in effect, substantially reads it out of the statute and thus attributes to Utah income in fact earned in other states.

The following, among other cases, evidence the restrictions upon state taxation of income or property without its borders and upon burdening interstate commerce.

Alpha Portland Cement Co. v. Massachusetts,
268 U. S. 203, 69 L. ed. 916 (1925);

J. D. Adams Manufacturing Co. v. Storen, 304
U. S. 307, 82 L. ed. 1365 (1938);

Gwinn, White & Prince v. Henneford, 305 U. S.
434, 83 L. ed. 272 (1939);

McLeod v. Dilworth Co., 322 U. S. 327, 88 L.
ed. 1304 (1944);

Freeman v. Hewit, 329 U. S. 249, 91 L. ed. 265
(1946);

Joseph v. Carter and Weekes Stevedoring Co.,
330 U. S. 422, 91 L. ed. 993 (1946);

Central Greyhound Lines, Inc. v. State Tax
Commission, 334 U. S. 653, 92 L. ed. 1633
(1948).

Moreover, it is clear that the invalidity of the Utah tax, if applied as has been done by the Commission so as to tax Kennecott's activities beyond its jurisdiction, is not dependent upon taxation in fact in any other state or the basis or amount thereof. Such factors are entirely irrelevant. As stated in *Freeman v. Hewit*, supra, (pp. 256-57) :

"It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment."

And in *Central Greyhound Lines, Inc. v. Tax Commission*, supra, the Supreme Court said (p. 663) :

"* * * Even if neither Pennsylvania nor New Jersey sought to tax their proportionate share of the revenue from this transportation, such abstention would not justify the tax by New York of the entire revenue."

The Supreme Court of the United States has but recently reaffirmed that state taxation is not unrestricted. *Spector Motor Service, Inc. v. O'Con-*

ner, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573 (1951). Consequently, if the obvious intent of the Utah apportionment statute and the plain meaning of its specific provisions are ignored and contravened, as in the decision of the Commission attributing to Utah sales having no relation thereto, constitutional invalidity will result.

II. Point

In computing percentage depletion with respect to the Utah Copper Division, the statutory term "net income from the property" means the gross receipts from the sale of products less only costs and expenses.

The second basic issue in this case concerns the amount of the deduction from gross income to be made for depletion in computing the net income of the Utah Copper Division for franchise tax purposes.

Under the Utah Franchise Tax statute, the net income, to be apportioned within and without Utah in accordance with the apportionment formula discussed in Point I of this Brief, is to be determined by deducting from its gross income the several deductions specified in Section 80-13-8 (Sec. 59-13-7 Utah Code 1953) of the statute. The gross income from which such deductions are to be made is the total gross income resulting from operations both within and without the State; similarly, the deduc-

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tions specified are those applicable to the business done both within and without the State. Such deductions, to be made before apportionment of net income, include "in the case of mines . . . a reasonable allowance for depletion." The section then provides:

"Percentage allowance for depletion.

(b) The allowance for depletion shall be thirty-three and one-third percent of the net income from the property during the taxable year, computed without allowance for depletion or on the basis provided in Sub-section (9)(a) as the taxpayer may elect."

Since Kennecott elected to use the percentage method of computing the allowance for depletion, the only question here involved is as to the proper construction and application, under the facts of this case, of the foregoing provision for percentage depletion, and in particular the words "net income from the property."

As more fully set forth above in this Brief (pp. 4 to 14), the operations of Kennecott's Utah Copper Division within and without the State of Utah constitute a continuous, indivisible and integrated operation, the single purpose of which is the production and sale at a profit of mineral products. F. 12, During the years here in question, ore extraction and concentration were effected by Kennecott itself

at its mines and Arthur and Magna mills, located
14, 179 in Utah. At this point, the molybdenite concentrates
and certain precipitates, aggregating but a small
percentage of the total, were sold to customers out-
side of the State.

In the case of all other metals, the remaining
processes necessary to produce the marketable re-
fined metals, and all transportation related to such
43 processes, were performed for Kennecott by others.
Thus, practically all such concentrates coming from
267-8 Kennecott's mills were smelted for Kennecott by
A. S. & R., at its Garfield smelter in Utah, and
practically all the blister copper resulting from the
smelting was transported by common carriers to
the refineries of A. S. & R. located in Maryland and
216 New Jersey, where it was electrolytically refined and
the copper, gold, silver, platinum and palladium, for
Ex. the first time in marketable form, were obtained.
ii(2), Such smelting and refining were performed for
F. 20 Kennecott by A. S. & R., an independent company,
, 226, for a negotiated fee on what may be termed a "cost
400 plus" basis; that is, under a contract which provided
for the reimbursement by Kennecott to A. S. & R.
of specified costs incurred by it in processing Ken-
necott's products plus fixed amounts per ton to
cover A. S. & R.'s overhead, profit, taxes and other
items not compensated for through the direct reim-
bursement of costs. The transportation of the blister
copper from the Garfield Smelter of A. S. & R. to
the refineries in the East was performed for Ken-

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necott by common carriers, entirely independent of Kennecott, at regular published tariff rates. Until sale after completion of the refining, all such products remained the property of Kennecott.

171, 609

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F. 70

43-4,

268, 308

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With the minor exception mentioned above, it is admitted by both parties, and the Commission so found, that none of the production of Kennecott's mines or mills resulted in a commercially marketable product, and that there was no representative market or field price, in Utah or elsewhere, for the minerals in the crude form in which they came from Kennecott's mills. The copper, gold, silver, platinum and palladium were not in marketable form until after they had been smelted and electrolytically refined at refineries located outside of Utah. In the case of these products, it was only at this final point in the production process that any market for such metals existed.

Kennecott contends that the term "net income from the property" in the percentage depletion provision means the gross receipts from the sale of the products of the Utah Copper Division, less all related expenses of mining, concentrating, smelting, refining, transportation and sale and also less Federal income taxes.

The Commission takes the position that "net income from the property" means the gross receipts from the sale of such products, less such expenses

and income taxes, and also less a substantial portion of such net income which it deems to be attributable to what it terms the "post-mining" processes, namely, smelting, refining, transportation and sale. Under the Commission's decision, the amount of net income attributable respectively to the mining and post-mining processes as by it defined is deemed to be the portion thereof which the costs and expenses of each such class of processes bear to the total of such costs and expenses (including depletion). This position is taken by the Commission although it admits that processes beyond ore extraction and milling are required in order to obtain a marketable product, and that such additional processes were not conducted by Kennecott itself but were performed for it by independent parties.

Under Kennecott's construction of the statute, the statutory allowance for depletion is obtained very simply by applying the factor of $33\frac{1}{3}\%$ to the net income obtained by deducting from gross receipts all expenses (including income taxes) other than the depletion allowance itself.

The Commission's position, however, requires the use of an algebraic formula, involving quadratics. This is because (a) the allocation of net income ratably to costs (including depletion) required to determine the amount of depletion cannot be determined until the depletion deduction itself is determined, and (b) the amount of depletion, in

turn, depends on the allocation of net income. The use of this formula by the Commission resulted, for the period involved, in a depletion deduction which was not $33\frac{1}{3}\%$ of total net income from mineral production before depletion (as provided by the statute), but was $33\frac{1}{3}\%$ of approximately 78% of such total net income. This 78% of total net income was the amount of such total net income which the application of the formula attributed to mining and concentrating processes.

In support of its contention, Kennecott submits that (a) the language of the statute is clear and that the Commission's interpretation, requiring the use of an algebraic formula, is not only illogical and insupportable but cannot reasonably be deemed to have been intended by the Utah Legislature, (b) that the legislative history of the Utah percentage depletion provision, as set forth in the testimony, is so specific and clear as to admit of no dispute as to its proper interpretation in the manner asserted by Kennecott, and (c) that the Commission's present construction of the statute is contrary to the administrative interpretation accorded it for many years following its enactment and also is contrary to the construction given by the Commission to other provisions of the tax laws of Utah.

- A. The language of the statutory depletion provision is clear and supports Kennecott's contention. The Commission's use of an algebraic formula is unnecessary, contrary to the language of the statute and was not intended by the Legislature.**

61-2 The language of the depletion provision sup-
66-8 ports Kennecott's position completely. The plain
78-9 and natural meaning of the words is that "net in-
88 come from the property" means the actual receipts
from sales of the products less all related costs,
expenses and taxes. This is the ordinary and normal
way of determining "net income", and permits of
a ready and simple calculation of the depletion
deduction. Nowhere does the statute even imply
that this ordinary method of determining net income
is to be departed from nor does it imply that, in a
unitary operation such as Kennecott's, the term "net
income" means only that portion of the ordinary net
income deemed attributable to a part of the single
business which has produced the income. As pointed
out by the Court in *New Park Mining Company v.*
State Tax Commission, 113 Utah 410, 196 P. 2d 485,
the addition of the words "from the property" do
not envisage some different method of computing
net income than that ordinarily employed; on the
contrary, they are intended only to relate the net
income in question to that derived from the sale of
the wasting asset, as distinct from income from
other sources. There this Court said:

"We note, also, the contention of plaintiffs
that the phrase 'net income from the property
during the taxable year' means something dif-
ferent from 'net income.' The theory upon which
wasting assets corporations, such as mining com-
panies, are allowed a deduction for depletion, is
that the corporation franchise tax, is a tax on
income or upon the increment produced by capi-

tal, and not upon the capital itself. Hence, wasting assets corporations are allowed a deduction for depletion on the theory that the taxpayer thus recoups its capital investment. But a wasting assets corporation may have income other than that *derived from the sale of its capital*. On such other income it is not entitled to a deduction for depletion. Hence in Section 80-13-8(9)(b) which provides for deduction for depletion, the words 'net income' were qualified with the words 'from the property' so that wasting assets corporations would not be entitled to make a deduction for depletion from all income, from whatever source derived. The words are not ambiguous and do not create a *separate concept or a separate kind of net income* for tax purposes. They merely serve to indicate that deductions for depletion can be made only from that portion of the taxpayer's net income which is derived from sales of its capital assets." (Italics supplied.)

The Commission, however, would construe the statute so as to require, in lieu of the simple and ordinary computation seemingly prescribed, an unrealistic allocation of net income to what are but component parts of a continuous and unified process all of which are necessary to the production of marketable products. As a result, it would require the use of an elaborate algebraic formula in order to determine the amount of the depletion allowance provided by the statute.

Where a statute permits of a ready and simple method of calculation in accordance with ordinary accounting methods, it is obviously unreasonable to attribute to the Legislature which enacted it an intent to require an algebraic formula involving quadratics for the purpose of determining the deduction.*

294 * The complicated nature of the formula is evident from the mere statement thereof made by Mr. C. W. Allison of the Commission's auditing division, in his letter to Kennecott:

"Herewith is the formula which was used in arriving at the \$6,455,813.78 allowable depletion shown in Schedule No. 8 of our report dated March 10, 1945, in connection with your 1942 Utah corporation franchise tax return.

$$D^2 + D \frac{(2TC + MC - TNI)}{3} - \frac{TNI \cdot MC}{3} = 0$$

D = allowable percentage depletion.

TC = total costs of mining, milling, concentrating, smelting, refining, transporting, and selling the ore and ore products, before depletion.
(\$62,619,791.58 per Schedule No. 8)

MC = mining costs, including milling and concentrating costs, transportation of ore to mill, etc. before depletion.
(\$40,991,515.78 per Schedule No. 8)

TNI = total net income derived from ore products, before depletion, but after federal taxes.
(\$25,253,046.43 per Schedule No. 8)

By making the appropriate substitutions and solving for 'D' the \$6,455,813.78 figure is arrived at. If any further information is desired, we shall be glad to furnish it."

In connection with a similar attempt to attribute to Congress the requirement of an analogous (although not nearly so complicated) algebraic computation, in *Edwards v. Slocum*, 287 F. 651 (2d Cir. 1923) the Court said (pp. 653-55):

“... the taxpayer perceives that the ‘net estate,’ which is practically synonymous with taxable estate, is to receive augmentation by an unknown amount, which renders its own figure unknown; but this baffles arithmetic, so he has recourse to an algebraic formula, which has played an unduly important part in the arguments at bar.

“We have treated this formula in a footnote; it is only legally important in that it has produced the argument that any method of taxation, or of working out taxes, that requires so much algebra, ‘must be wrong.’ We need not go so far, but do hold that the presumption is that Congress intended a simpler method — one that a plain man could understand. Algebraic formulae are not lightly to be imputed to legislators.

* * * *

“... History, so far as we can discover, shows no other instance of attempting to measure a tax pro tanto by itself.”

298 In this connection Mr. Henry B. Fernald* in his testimony in this case aptly pointed out this error in the position of the Commission, as follows:

“The statute of the State of Utah seems to me not to contemplate nor warrant the use of any such algebraic formula. I know of no taxing statute of any state which contemplates any such algebraic formula. It seems to violate all accepted standards of simplicity and comprehensibility in a taxing statute or in good tax practice.”

Furthermore, the Commission's position violates the specific statutory requirement that the allowance for depletion is to be $33\frac{1}{3}\%$ of the net income from the property “computed without allowance for depletion.” In other words, the statute

* Mr. Fernald is a nationally recognized authority in the fields of accounting and taxation, particularly with respect to mining. He has been for many years a member of the Tax Committee of the United States Chamber of Commerce and has been a member of and is now Vice-Chairman of the Tax Committee of the International Chamber of Commerce. For many years he has been a member of and the Chairman of the Tax Committee of the American Mining Congress. Since 1921 he has frequently appeared before legislative and administrative bodies in connection with tax legislation and has assisted in the drafting of proposed Federal tax legislation and regulations applicable to mining and other natural resource businesses. He has also had a broad experience for over 30 years in state and municipal tax matters in both an advisory and administrative capacity.

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t seq.,
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specifically excludes depletion as a factor in computing the net income upon which depletion is based. As previously stated, far from excluding such depletion as such a factor, the Commission's method of computation by use of an algebraic formula necessarily involves the use of the depletion deduction itself in determining the net income with respect to which depletion is computed.

Moreover, the Commission has utilized illogical and insupportable reasoning in its theory that the net income of the Utah Copper Division can be attributed to each of the processes and activities carried on by the Utah Copper Division in direct proportion to the costs and expenses of each such process or activity. The simple answer to this part of the Commission's theory is that an allocation of income ratably to costs just does not make good sense. As Mr. Fernald testified:

"The basic error in the method is its assumption that income will arise ratably to costs. This would be true only in the case of 'cost-plus' contracts where the amount to be received as income will be determined as a percentage of costs. It is not true when income receipts are determined by sales at competitive or fixed prices without regard to the costs involved in any particular case. In such case, the net income is what remains of the receipts after deduction of the costs, and the amount of the costs determines how much of the receipts will not constitute income. The general principle in such a case is that the higher the costs the less the net income, and the lower the costs the greater the net income.

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"The assumption of the Commission's method is directly contrary to this principle in that the method is based on an assumption that the greater the costs the greater the share of income allocable thereto, and the less the costs the less the share of income.

"The mere statement of this fundamental error in the basis of this method should be sufficient to show it is not a fair and reasonable method to be applied. The examples given merely serve to illustrate the unreasonable results such as come from the use of the essentially defective method."

236-9

Mr. Seymour Wells* likewise testified:

"In my opinion, this (the Commission's) method for computing depletion is wrong for several reasons.

"The principal reason is that the formula is not based on any sound accounting principle. It is entirely a fiction to suppose that the total

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et seq,

* Mr. Seymour Wells is a former president of the Utah Association of Certified Public Accountants with long experience in accounting and mining matters. From 1917 to 1924 he was a Federal internal revenue agent. In 1931 he was employed by the State of Utah to assist in drafting the corporation franchise tax law. He also assisted in planning the accounting system and procedure for the newly organized State Tax Commission, in drafting forms for the returns, and the instructions with respect thereto.

profits of the single business are divisible among the various stages of production according to their relative costs. The results obtained have no real meaning. Moreover, there is no reason for ascribing any profit at all to freight or to the other purchased services of smelting and refining. In my opinion, the entire profit is net income from the property as that term is generally understood. * * *

“Finally, I believe the method of apportionment of profits to various stages of production on the basis of relative costs is wrong because it gives a relatively greater profit to a high cost and less to a low cost. Under this method, if freight rates should go up and mine costs down, more profit would be assigned to freight and less to mining. This is unreasonable. * * *

“As the product goes along the stages of production, it accumulates costs, and the cost value increases, and finally it gets to the stage where it is sold, and there are many factors entering into what they get for it. It is based on supply and demand, and not cost of production solely; and there is no way of telling what the profit will be until that sale is arrived at.

“Now this formula attempts, or according to the formula, it accumulates not only the costs but a proportion of the profit for the whole year. To do that it would have to know what the profit is, and second, what proportion each dollar of expenditure should have of the total. Of course, there is no such determination possible as that. It is nothing real. It is simply a fictitious arithmetical calculation without any meaning.”

It should be noted that the foregoing testimony of Mr. Fernald and Mr. Wells is in no way contested by any testimony presented on behalf of the Commission. The Commission at no point in these hearings presented any testimony in support of the formula used by it in its method of allocating profits ratably to costs or of its construction of the statute.

B. The Legislative history of the percentage depletion provision of the Utah Statute clearly demonstrates that the Legislature intended the computation to be made as Kennecott asserts.

As shown above, the language of the percentage depletion provision provides no support for the devious and complicated calculation of depletion attempted by the Commission in this case; nor is it to be presumed that the Legislature in enacting the provision intended that it be applied in such a fashion.

That the Legislature had no such intent—that, on the contrary, it intended the words to mean exactly what Kennecott contends they do mean—is evident from an examination of the legislative history of the provision and the construction given it by the Commission itself for many years following its enactment.

For an understanding of the legislative background of the depletion provision, which was first adopted by the Utah Legislature in 1931, a brief

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review of the treatment accorded depletion for mines under the Federal income tax laws is apposite.

57 The purpose of a deduction for depletion in
et seq. computing any tax levied on income is, of course, to
avoid the taxing as income of that part of the gross
return of a "wasting-assets" enterprise which repre-
sents the exhaustion of capital.

472 The income tax laws of the Federal Govern-
et seq. ment have for many years included provisions for
an allowance for depletion to taxpayers engaged in
a wasting-assets business. In the earlier years of
the Federal income tax, the basis of the depletion
allowance for mines was the cost of the property or
its fair market value as of March 1, 1913 or its dis-
covery date. The determination of such fair market
value generally necessitated estimating the future
60 output of the mine, the period of production, the
et seq., prices for the product which could be obtained over
66 such future period, the cost of production, the plant
et seq. and equipment required, and other factors requiring
an estimate for the future. When the results had
been so estimated, it was necessary to discount them
back to obtain a present value. That value was then
divided by the estimated mineral units to be pro-
duced in order to determine the depletion per unit
allowable as a tax deduction.

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There was much complaint as to these difficulties, of the uncertainty inherent in their application, and of the fact that they seemed to work unfair discrimination between various taxpayers. Provision had been made in the Federal statute for "percentage depletion" for oil and gas in 1926. The question then arose of providing for percentage depletion for mines. This matter was given extended study by the Joint Committee of Internal Revenue of the United States Congress, which requested the preparation of a report with respect thereto by its staff. As a result, the so-called Parker Report, which included the Shepherd Report as an appendix, was submitted to the Joint Committee in 1929. These reports recommended the adoption of percentage depletion for metal mines, the Parker report recommending that it be based upon net income (one alternative suggested being 33⅓% of net income) and the Shepherd Report that it be 15% of gross income with a limitation of 50% of net income.

Percentage depletion represents an effort to get away from the difficulties of estimating future receipts and costs, inherent in the former "analytic appraisal method," by utilizing actual receipts and costs each year instead of such future estimates. It was recognized that over a period of time a percentage of current net income (gross receipts, less costs) would be substantially equivalent to the deduction computed in the former manner if the future esti-

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68. mates there made had been correct. This purpose is recognized in the Parker Report. As appears therefrom, percentage depletion was not intended generally to arrive at a substantially different allowance from that sought under the former method, but rather to simplify the procedure by which the allowance was to be determined. Thus, the Parker Report states:

“The methods of percentage depletion proposed for consideration are not such a departure from the present system as would appear from a preliminary inspection. The analytic method of valuation now used in most important cases arrives at a value through the estimation of future expected profits. Depletion based on a percentage of the net income from the property merely uses actual figures instead of estimated figures.”

* * * * *

“It has already been pointed out that the most important valuations for depletion purposes are computed by the analytic appraisal method. This method requires an estimate to be made of the future profits of the mine. If it were possible to determine these future profits correctly, they would equal the net income from the property. The question at once arises: What is the use of estimating such profits if the actual profits can be used? In fact, it can be proven mathematically that depletion by a percentage of net income and depletion by the analytic appraisal method will be the same if the expected profit is correctly estimated in using the latter method.”

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As above indicated, when the Utah franchise tax was passed in 1931 (Laws of 1931, Chapter 39), the Federal income tax law had not yet provided for percentage depletion for mines. It did, however, use a percentage of "net income . . . from the property" as a limitation on the discovery depletion of mines otherwise allowable.

Under the practice of the Treasury in applying this limitation, net income represented the actual selling price of the products less all the costs of production. The only exception to this practice was one, not applicable to Kennecott's case, where a representative market or field price existed for the product at a stage in its processing prior to that in
487 which it was actually sold.

At the time the Utah franchise tax statute was under consideration, the Parker Report, and related
5, 81-2 Shepherd Report, were considered by the Utah Tax Revision Commission. Both of these reports, in recommending the adoption by Congress of percentage depletion for mines, assumed a determination of
78 gross income and net income, based on actual receipts less expenses, which was in accordance with the construction given the then existing statute and regulations by the Treasury, as outlined above. Thus, the Parker Report points out, in the quotations given above, that the purpose of adopting percentage depletion is to avoid the necessity of making

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the estimates and assumptions necessary under the former practice of determining the fair market value of the property. The purpose was to simplify, and not to complicate, the procedure. Nowhere in the Parker Report is the suggestion made that the percentage depletion there recommended should be based upon a determination of net income which would differ from that then being followed by the Treasury with respect to the limitation of the allowance for discovery depletion.

79 On this point the Shepherd Report expressly stated:

“For the purpose of this subdivision ‘the gross income from the property’ shall be the competitive market receipts, or its equivalent, received from the sale of the crude, partially beneficiated or refined gold, silver, or copper, the product actually disposed of by the taxpayers to govern the method of computation of receipts in all cases, and in the case of all other metals, coal and oil and gas, the competitive market receipts, or its equivalent, received from the sale of the crude products, or concentrates on an f. o. b. mine, mill, or well basis.”

“The ‘net income of the taxpayer (computed without allowance for depletion) from the property’ shall be determined by deducting allowable expenses except depletion from ‘the gross income from the property’ as defined above.”

The Parker Report, and accompanying Shepherd Report, were carefully considered by the Tax Revision Commission in its consideration of the proposed Utah franchise tax legislation enacted in 1931. Mr. G. C. Earl* testified as to the hearings with respect to such legislation. Mr. Earl testified as follows:

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"I attended as a representative of the Copper Company most of the hearings which were held at the time this law was being considered, and in addition some conferences which were held on the side. The two important men who took part in those conferences were Dr. Lutz, who had been brought here by the Tax Commission, and Mr. Graton. There were others, Mr. Brownrigg, who had been employed under Mr. Vandegriff, who had been employed by the producers. And there were a great number of conferences held, discussions took place, as to the method of arriving at depletion. That was the primary discussion that took place at most of these conferences.

"The quotations were read from the Parker Report and there was considerable discussion among the representatives of various units as to whether they should use 15 per cent of the gross

* Mr. Earl has been employed as a mining engineer by Kennecott or its predecessor since 1909. Since 1938 he has been Chief Engineer of the Utah Copper Division. He has had close contact with Federal and State tax questions and participated actively in conferences and hearings relating to the 1931 Utah franchise tax legislation.

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or $33\frac{1}{3}$ per cent of the net. It finally came out, of course, when the law was passed with $33\frac{1}{3}$ per cent of the net. Both of these plans had been included and had been discussed in the Parker Report."

In his testimony Mr. Earl read from a report of the Tax Revision Commission which specifically stated that net income should be determined under the Utah law substantially as it was determined under the Federal law, since that arrangement would have the great advantage of being familiar to all of the larger business concerns and would permit the taxpayer to comply with the provisions of the state law by using the data on the basis of which 100, 104 the Federal return was prepared. Mr. Earl testified:

"... as there was no difference between the Federal and State statutes as to apparently what constitutes gross income from the property, we made a particular study as to what would be the amount allowable under the 'net income from the property' phrase.

"At that time the hearings had all been held, the law had been passed, but the Federal percentage depletion basis had not been adopted (by Congress). It was not adopted (by the Federal Government) until 1932. It was understood by everyone which we came in contact with that the net income from the property was to be interpreted exactly as it had been interpreted in arriving at the income on the analytic or cost basis, and this had all been reported in the Parker Report.

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"This matter was discussed with the representatives of the Tax Commission, and in the first return which was filed for the Utah Copper Company, there was no determination of depletion because there was no net income, and the amount of the tax assessable was determined on the basis of the values of the property.

"When the time came to take a deduction for depletion, the Federal law had been passed, and it confirmed the understandings which had resulted from the studies which the Federal Bureau had undertaken. It was exactly on that premise that the Utah Copper Company then elected to calculate the depletion allowance under the State franchise tax act on the percentage basis."

It is clear from the foregoing that, in enacting the franchise tax in 1931 providing for percentage depletion, the Utah Legislature intended that the then Federal practice should apply in a case such as Kennecott's — namely, where there is no representative market or field price for the mineral products in a stage prior to that in which they are sold, the net income from the property is the gross receipts from the actual sale of the products less all production expenses.

In 1932 the Federal statute was amended to 104,300, provide for percentage depletion for metal mines 478,480 at 15% of the gross income from the property but not in excess of 50% of the net income from the property. The Federal regulations were then rewrit-

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ten and amplified. They applied the prior practice of determining net income in specifically prescribing that the gross income from the property was represented by the receipts from the sale of the mineral products less the costs of any processes or transportation (other than those considered part of ore extraction and concentration), except only in the case where there was a representative market or field price for the mineral products in a stage prior to that in which they were actually sold. Thus, Reg.

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77, Art. 221 (g), after providing the conditions under which a representative market or field price was to be applied, continued:

“Where there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes minus the cost (including transportation costs) of the processes not listed below [costs of ore extraction and concentration not deducted].”
(Material in brackets added.)

Mr. Fernald, who, as chairman of the Tax Committee of the American Mining Congress, attended a number of meetings with the Treasury Department officials in connection with the formulation of these new regulations with respect to percentage depletion, testified as follows:

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“ . . . In the discussion . . . the question had been raised as to whether, if the mining company itself conducted the further processes, such as smelting, transportation, etc., the deduction should be made for the actual cost to it for conducting such processes or transportation, or whether there should be addition of an amount for the profit of conducting such an operation so as to bring the deduction to be made up to the amount which would have been charged if it had been conducted by an independent concern. Secretary Douglas stated that this would be a refinement which he did not believe was intended and that the deduction should be only for actual cost. This would avoid getting into a speculative field which he did not believe was intended and he did not believe was worth while. The regulations were written accordingly.”

The regulation quoted above was in effect at the time the Utah statute was re-enacted in the Utah Code of 1933.

Ex. Since Kennecott's products had no representative market or field price prior to the stage in which 15(2), they were actually sold, the application of the Tr. 452, they were actually sold, the application of the 481 amended Federal regulations would result in the same determination as that prescribed by the Utah statute and then applied by the Commission — namely, deduction of all costs and expenses, except depletion, from gross receipts to arrive at the net income from the property.

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None of the foregoing Treasury regulations on depletion for mines provided that profits should be attributed to any processes or to transportation.

It was not until the 1940 amendment to the Federal regulations respecting percentage depletion was adopted that mention was made in the regulations of any deduction of profits attributable to processes beyond the mining stage. Such amended regulations provided as follows (Reg. 77, Art. 221 (g), as amended in 1940) :

“If there is no such representative market or field price (as of the date of sale) then there shall be used in lieu thereof, the representative market or field price of the first marketable product resulting from any process or processes (or, if the product in its crude state is merely transported, the price for which sold) minus the costs and proportionate profits attributable to the transportation and the processes not listed below.”

483-4 However Mr. Fernald's uncontradicted testimony makes it clear that even these 1940 Treasury regulations, providing for attribution of profits, related only to cases where the further processes or transportation were performed *by the taxpayer* itself :

“The regulations continued in this form [that of 1932] until 1940, when the Bureau felt that the regulations should be so changed as to require

deduction not merely for the cost of the processes or the transportation, but also for any profit attributable to the conduct of such operations. The Treasury Regulations were then amended to this effect. The amended provisions were clear that as to transportation it was only 'if transported by the taxpayer' that 'the proportionate profits attributable to transportation' should be subtracted from the sale price of the product to determine 'gross income from the property'. Similar specification was not written into the regulations with respect to any profits attributable to further processes but this has always been understood, and the regulations have always been so applied.

"In discussions of this question by representatives of the mining industry with the Bureau and Treasury officials, it was definitely stated that the requirement for deducting 'the costs and proportionate profits attributable to the transportation and the processes not listed below' meant and could only mean the 'proportionate profits, if any, attributable'. *It was definitely stated by the Treasury officials that if the transportation and the further processes were conducted by independent concerns whose charges included any profits attributable to the conduct of such operations, there would be no occasion for increasing any such charge of an independent by any profits of the taxpayer's attributable thereto, and that this was clearly the meaning and intent of the wording used in the regulation. This has been the consistent interpretation and procedure followed by the Bureau.*" (Italics supplied.)

Thus, the 1940 change in the Federal regulations (even if it constituted a proper basis for a change in the application of the Utah statute enacted nine

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years earlier, which we deny) resulted in no change in the computation of gross income from the property of the Utah Copper Division, since the smelting and refining processes and transportation following the mining operations were not performed by Kennecott but were performed by independent contractors at charges to Kennecott which took fully into

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3(2), account any income or profits applicable to the con-
Tr. 89, duct of and investment in such further operations.
236, 304, It should be noted that the Federal law and regula-
309, 460, tions have never required attribution of profit to
483-4, sales activities conducted by a taxpayer; such at-
489 tribution relates only to production processes and
transportation necessary to put the mineral product
into a marketable form.

Finally, the Federal rule as previously in effect or as subsequently amended, does not constitute a basis or precedent for use by the Commission of its algebraic formula in computing percentage depletion. No such formula or procedure is in any way authorized or applied under Federal regulations or law.

The unfairness of the Commission's construction of the depletion provision, as applied to Kennecott, is clearly evidenced by a comparison of its decision in this case with the rule applied by it in the case of other mining companies.

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75 In the case of a majority of the metal mines,
et seq., the mining company sells its concentrates to an
487 independent smelter and receives therefor what is
et seq. termed the "net smelter return". Such net smelter
return represents the market value of the estimated
recoverable saleable metal products at the appro-
priate price quotations, less deduction for the
amount to be paid by the purchasing smelter to
others for the transportation, refining and other
services to be performed by others and for the
agreed amounts for the services of the smelter for
its own smelting of the products or for any other
services performed by the smelting corporation
itself.

Thus, for example, if only the smelting is per-
formed by the smelting corporation which purchases
the concentrates, and all other services for trans-
portation, refining and selling are performed by
others, the smelting corporation will deduct a fair
charge for its smelting (which will include allow-
ance for its expected profit for performing the
smelting) and will deduct the amounts it will pay or
will expect to pay to others for their transportation,
refining or other services. If, however, the smelting
corporation will itself perform both the smelting
and the refining, but transportation or other serv-
ices will be performed by independent concerns,
the smelting corporation will deduct a fair charge
for its smelting and its refining (which will include

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allowance for expected profit for performing such services) and will deduct the amounts it will pay to others for the services rendered by them.

Under the Utah statute, as consistently applied by the Commission, in the case of a company so selling its concentrates to an independent smelter, the "net income from the property" to which the percentage depletion factor is to be applied is determined by treating the net smelter return as the gross income from the property and deducting therefrom, to arrive at net income, the mining company's own costs of mining, concentrating, overhead, etc. In its Findings in this case, the Commission states:

"If Kennecott's operations were limited to mining (including milling of the ores) and it *sold* all of its concentrates to A. S. & R., for example, our problem would be a relatively simple one. The cash receipts derived from the sale of concentrates would constitute the gross income from the property from which we could subtract the costs and expenses of mining and milling, together with federal income and excess profits taxes attributable to the operation (see *New Park Mining Co. et al v. State Tax Commission*, 113 Utah 410, 196 P. 2d 485), and the resulting figure would be the net income from the property. Thirty-three and one-third per cent of such net income would be the proper amount of the deduction allowed by the statute for depletion of the mining property."

F. 70

So far as the allowance for depletion is concerned, there is no substantive difference between Kennecott's operations and those of a mining company which sells its product to an independent smelter for a net smelter return, or from the case assumed by the Commission in the above quotation. Kennecott, while not selling its product to an independent smelter, did not itself own or operate the smelters or refineries, or the transportation facilities, utilized to obtain the marketable products which it sold. For these further processes and transportation Kennecott paid a charge which embodied all of the costs of the services so rendered and all profits to be attributed to the rendition of those services, just as the mining company selling its product to the independent smelter paid for such costs and profits through their deduction in computing the net smelter return. Since Kennecott did not itself conduct the activities of smelting and refining, and related transportation, it did not have any profits attributable thereto for the purpose of computing percentage depletion.

There is no logical or economic justification for treating the two situations in a different manner as respects the application of the percentage depletion provision.

- C. The long administrative construction accorded the percentage depletion provision and other statutory provisions by the Commission is in accord with that for which Kennecott contends and should be followed.**

As shown above, the Utah Legislature, in adopting the percentage depletion provision in 1931, clearly intended that the term "net income from the property" meant (in line with the then Federal law and regulations) total gross receipts less costs and expenses incurred in producing a marketable product.

For over fourteen years, after the enactment of the statute, namely, until 1945, the Commission itself consistently so construed the statute and during that period accepted and approved tax returns filed by Kennecott and other taxpayers based on the method of computing percentage depletion here contended for by Kennecott. Neither at the time that the franchise Tax statute was enacted in 1931 nor subsequent thereto, until the present controversy began in 1945, did anyone, so far as known to Kennecott, least of all the Commission, contend that under that statutory provision income should be separately allocated to the several parts of a unified operation all of which were necessary to produce the marketable product, or that an algebraic formula was necessary in order to arrive at the proper allowance for depletion under the statute. During this period the franchise tax was reenacted without change by the Legislature in the Revised Statutes of Utah, 1933, c. 13, Title 80, and it was thereafter amended in several respects, but without changing the particular provisions with which we are here concerned, first, by the Laws of Utah 1935,

c. 89, and, secondly, by the Laws of Utah 1937, c. 109, the latter to define gross income. By neither amendment was Section 80-13-21, (Sec. 59-13-20, Utah Code 1953) with which we are here concerned, as theretofore consistently construed and applied by the public body charged with its administration, changed in any respect. The State Franchise Tax Act, without further change, was embodied in the compilations of the Utah Code of 1943 and 1953.

This long period of administrative interpretation not only evidences a clear understanding on the part of everyone (Legislature, Commission and taxpayers) as to what the statute meant when it was enacted, but, also, the acceptance by the Legislature of that application by the Commission. There can be no basis now for departing from what was clearly not only original legislative intent, but, also, the practical application so given the statute by the Commission.

Furthermore, the present decision of the Commission on this point cannot be reconciled with its construction of the analogous language of the Utah ad valorem tax called the "Net Proceeds Tax", Sec. 80-5-56, (Sec. 59-5-57, Utah Code 1953) which provides:

"All metalliferous mines and mining claims, both placer and rock in place, shall be assessed at \$5.00 per acre, and in addition thereto, at a value

equal to two times the *net annual proceeds thereof* (italics supplied) for the calendar year next preceeding."

The Commission has consistently taken, and still takes, the position that the language means the entire proceeds from the ultimate sales less related costs and expenses, and not something less than that figure.

The Mining Occupation tax (§ 59-5-67, Utah Code 1953) was first enacted in 1937 and was a substitute for a part of the Net Proceeds Tax. The Net Proceeds Tax had been upon the value of the mine calculated by statute at three times the annual net proceeds; the multiple was reduced to two and the occupation tax of "1% of gross amount received for or the gross value of metalliferous ore sold" was imposed to replace the lost value resulting from the change in the net proceeds. Again no deduction is allowed as for profit or income attributable to any process, no receipts, income or profit is attributed to any process.

"*** the Utah law for computing net proceeds of a mine and the mine occupation tax law do not allow any more than the cost of transportation and smelting and refining to be deducted. It does not seem fair or reasonable for the state to take one position or the other according to which makes the larger tax, and that is what it would be doing by applying this formula." Testimony of Seymour Wells, Tr. 236-237).

Trans.

Ex. Speaking of the net proceeds tax, the Commission itself has said in its Third Biennial Report for 116-118 the years 1935-36:

"The Tax Commission insisted that it was concerned only with the gross proceeds realized from an actual sale of the ore, or at least the value of the metals extracted from the ores after they had passed through the smelting process. *** The company keeps separate records for each of the different divisions of its operation, and the profits which are made by the milling and smelting divisions are not allocated back as a profit from the mining operation. The result is that the milling and smelting profits are not considered by the company to be any part of the gross proceeds of the mine. Accordingly a lesser tax upon the mine results.

"The Commission was of the opinion that the sum realized from an actual sale should be considered as gross proceeds and also directed that the company was entitled to deductions for only its 'actual costs of milling and smelting.'

"We do not recommend any legislation that would seek to prohibit or limit the right of these companies to pursue this method of operation.

*** If one mining operator has developed a more economical operation than another operator and receives greater net proceeds, we believe that the ultimate consideration is the amount of the net proceeds by whatsoever method of operation

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derived. One business man may have a more economical method of operation and may have made a greater net profit for income tax purposes; his tax is then based on that greater net profit. No deduction is allowed to him because he has a more economical method of conducting his business."

That is exactly the way, up until March 10, 1945 for the year 1942, that Kennecott's franchise tax liability for its Utah Copper Division has been
118 determined by the defendant.

Similar statutes should be similarly construed. In *United States Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, 52 S. Ct. 247, 76 L. ed. 408, interpretation of the Shipping Act was involved, and the similarity in the applications there and here will be apparent from the following quotation from the opinion:

"*** When the Shipping Act was passed, the Interstate Commerce Act had been in force in its original form or in amended forms for more than a generation. Its provisions had been applied to a great variety of situations, and had been judicially construed in a large number and variety of cases. *** In this situation the Shipping Act was passed. In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that the settled construction in respect of the earlier

act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion."

D. The method of computing percentage depletion contended for by Kennecott is in accord with the objective of this Court in Kennecott Copper Corporation v. State Tax Commission, 221 P. 2d 857.

In its opinion the Commission states that "with respect to the issue of depletion, we are bound by the ruling of the Supreme Court" in the case of Kennecott Copper Corporation v. State Tax Commission cited *supra*.

However, as will be shown that decision does not support the computation of percentage depletion here contended for by the Commission. Kennecott also submits that whatever be its interpretation that decision relates to the tax for the year 1942 solely and for subsequent taxable years the percentage depletion deduction prescribed by the statute is to be computed as Kennecott asserts, that is $33\frac{1}{3}\%$ of the net income from the property shall be determined by deducting only costs and expenses from the gross receipts from sales of the mineral products.

The previous discussion under this Point II has demonstrated, we believe, that the position taken by Kennecott is the proper interpretation of the

statutory provision. Kennecott's construction represents a normal and logical interpretation of the words "net income from the property" and one consistent with other uses of the term "net income" in the statute and other analogous statutes whereas the Commission's use of an algebraic formula involving quadratics is not a computation reasonably to be deemed to have been intended by the Legislature. Moreover, the theory of the Commission that allocation of profits among various production processes can properly be made in proportion to their costs is insupportable.

Kennecott has also clearly demonstrated from the legislative history that the Utah Legislature, when it enacted the franchise tax in 1931 intended the term "net income from the property" as respects depletion to have the meaning given under the then Federal Treasury practice and in the Parker and Shepherd Reports. As stated by Mr. Earl who took part in the conferences, it was this Treasury practice and these reports that the Utah Tax Revision Commission and Legislature considered when they decided upon the percentage depletion provision to be incorporated in the Utah statute.

It has been shown that, even if the 1940 amendments to the Treasury regulations respecting percentage depletion for mines were relevant in the construction of the Utah statute (which Kennecott

denies), nevertheless even under these 1940 amendments and Treasury practice up to this very date, the computation of depletion would be made in this case as Kennecott contends. It has also been shown that where, as here, smelting, refining and transportation are conducted by persons independent of the taxpayer, the deduction of the cost thereof to the taxpayer already includes the profit reasonably attributable to such operations, since the charge made by the processor or carrier includes both his costs and profit.

Finally, Kennecott has shown that the Commission in applying the statute followed the interpretation of the percentage depletion provision for which Kennecott here contends, from the date of enactment of the statute in 1931 until 1945, when the Commission in this case and for the first time introduced its algebraic computation. Such long continued administrative interpretation clearly evidences the Commission's understanding that the statute was intended by the Legislature to be so applied, and that interpretation must be deemed to have been accepted by the Legislature when it reenacted the legislation in 1933 and thereafter changed the franchise tax law in several respects without changing the percentage depletion provision.

We believe that the evidence hereinbefore summarized definitely establishes the proper construction of the percentage depletion provision in the Utah franchise tax statute. The question at issue not only can, but should be, now considered by the Court on its merits. This Court remanded the case for that purpose.

In the 1942 case a number of issues were brought before this Court, some of which were decided by the Court and one of which was referred back to the Commission.

The Court there decided two points not directly involving depletion. It held that Federal subsidies (premiums or bonus payments for emergency mineral production) were includable in income for franchise tax purposes. It also held that the Utah franchise tax was properly computed upon the net income of the Utah Copper Division alone, instead of on the entire net income of Kennecott from all of its divisions. There is no dispute in the present case as to either of these points.

As to depletion for the year 1942, the Court decided two additional points. One was that Kennecott should compute depletion under the statutory provision of $33\frac{1}{3}\%$ of net income, and not on some different basis, since in filing its tax returns Kennecott had elected to follow percentage depletion

and had not made a timely request or shown a substantial reason for a change in method. This point is not involved in the present case.

The other point relative to depletion decided by the Court was the question as to whether net income subject to depletion should be computed before deducting Federal taxes, as had been the accepted procedure in earlier years, or after deducting such Federal taxes. The Court sustained the latter position. This point is no longer in dispute, and Kennecott's present contentions give full effect in the computation of the depletion allowance, to the deduction of Federal taxes.

The major part of the Court's opinion was devoted to the foregoing questions. The Court then proceeded to consider the calculation of the $33\frac{1}{3}\%$ depletion allowance. The opinion of the Court on this point concludes as follows:

"We need not place our approval on the formula used by the Commission or arbitrarily determine the break-through point between mining operations and post-mining activities. All we need do in this case is to point out that there are two possible paths for the taxpayer to take. The Commission might agree that it take either but it cannot traverse both. 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 post-mining activities and they are not so related that the net income cannot be roughly allocated to both sources. The lengths to

which the taxpayer might go under its theory is aptly illustrated by the figures used in its first return. From an approximate net income, before depletion, in this state of \$18,000,000, Kennecott seeks to establish a depletion allowance of \$13,000,000. This is far in excess of the 33 $\frac{1}{3}$ % provided for by statute.

"In disposing of this last contention, we hold that if Kennecott files its return on an allotted basis that it must allocate some of its net income to post-mining operations before computing depletion.

"The case is remanded with instructions to determine and enter a deficiency judgment in accordance with the views herein expressed."

As will be noted, while the case was remanded with instructions to enter a deficiency judgment, the Court expressly stated that it was not placing its approval upon the formula employed by the Commission. Accordingly, the computation of the depletion provision for 1942 remained to be made by the Commission, and the formula and its application continued subject to judicial review.

Moreover, from a full reading of the opinion of the Court it would seem that in stating "if Kennecott files its return on an allotted basis . . . it must allocate some of its net income to post-mining operations before computing depletion", the Court acted under the belief that Kennecott was taking an inconsistent position and that (even after allowance for Federal taxes) if its contention were sustained,

Kennecott would receive *in the calculation of the Utah tax* the benefit of a depletion allowance very substantially in excess of $33\frac{1}{3}\%$ of its net income, before depletion, allocated to Utah.

Nowhere in its opinion does the Court mention the evidence and arguments outlined above bearing on the interpretation of the depletion provision. Rather, it apparently assumed that, *in computing depletion*, some attribution of profits to post-mining activities was essential to prevent Kennecott from "eating its cake and having it too" through allocating to Utah only a portion of its net income arising out of the sale of its mineral products, while at the same time claiming as a deduction from such portion of net income a depletion allowance equal to $33\frac{1}{3}\%$ of its entire net income allocable both within and without the State of Utah.

Thus, the Court stated in the above portion of its opinion: "from an approximate net income, before depletion, *in this State* of \$18,000,000, Kennecott seeks to establish a depletion allowance of \$13,000,000. This is far in excess of the $33\frac{1}{3}\%$ provided for by the statute." Again, on page 865, the Court states:

"If the total net income were allocated to this state then we might be faced with the difficult question as to whether we were not on the one

hand permitting the post-mining operations to increase the franchise tax due the state and on the other hand denying the taxpayer the right to the increased income for depletion calculations. However, when the taxpayer allocates the net income received from the appreciation to out of state net income, another question presents itself."

The Court thus recognized that if the income from post-mining (as well as mining) operations were allocated to Utah and thus served to increase the net income before depletion used in computing the Utah tax, it would be unfair to deny to the taxpayer a deduction of $33\frac{1}{3}\%$ of all such income assigned to Utah. The Court felt it unnecessary finally to decide this question. It evidently regarded the case before it as one where, unless corrected in the depletion allowance itself, any income from out-of-state post-mining operations would serve to increase the depletion deductible against Utah net income, while at the same time such post-mining income would remain free of the Utah tax because allocated outside of the State.

This view of the Court is also evidenced by the other statement from the Court's opinion quoted above and by computations made by it earlier in its opinion. In that quotation the Court assumes that against an approximate net income before depletion, allocated to Utah, of \$18,000,000, Kennecott sought

to establish a depletion allowance of \$13,000,000.* This the Court pointed out was far in excess of 33 $\frac{1}{3}$ % of the former figure. The sum of \$18,000,000, given by the Court as Utah net income before depletion, is evidently the Court's approximation of the sum of \$5,803,351 appearing earlier in the opinion (which it deemed to represent net income after depletion allocated by Kennecott to Utah) and

* It should also be recognized that this \$13,000,000 figure for depletion, claimed on the original tax return and used by the Court, did not give effect to the deduction of Federal taxes required by the Court's decision or certain other necessary adjustments, all of which are corrected in the computation of depletion now claimed by Kennecott. Kennecott now claims depletion in the amount of \$7,938,367 upon \$23,815,102, which latter amount both the Commission and Kennecott agree is the correct total net income from mineral products before depletion. This results in \$15,876,735 total net income from mineral products after depletion. Adding to this amount the small amount of income from sources other than mineral production, makes \$16,061,627 net income after depletion which is subject to allocation to Utah according to the three-factor formula. Applying the allocation factor of 66.926% used in the 1942 case, the net income from mineral products after depletion allocated to Utah would be \$10,625,664. (This is before taking into account any sundry income.)

The foregoing should be taken into account in any consideration of the figures given in the Court's decision.

\$13,568,213 (representing the total amount claimed by Kennecott as depletion). Evidently the Court regarded Kennecott as contending that the entire amount of depletion was deductible against the portion of net income before depletion allocable to Utah, otherwise there could be no occasion for adding the two figures. This is not and never was Kennecott's contention.

On the contrary, Kennecott's contention on this point conforms with what we regard as the view of this Court, when it is recognized that, under the statutory method for calculating the tax, the depletion allowance itself is subject to the same allocation under the three-factor formula as is the net income before depletion. The statute provides for the determination of total income before depletion and then for the deduction therefrom of $33\frac{1}{3}\%$ of this amount (as Kennecott contends), thus arriving at total net income after depletion. This amount is then allocated within and without the State of Utah in accordance with the prescribed three-factor formula. Mathematically, the resulting net income, taxed in Utah, is the same as if the allocation had been made by applying the three-factor formula separately to total net income before depletion and to the depletion allowance itself, and then deducting the depletion so allocated to Utah from the net income before depletion so allocated to this State.* Accordingly,

* This is readily demonstrated by the use of rounded-out figures approximating those claimed by Kennecott for the year 1942 — namely total

Kennecott's method of determining depletion, when combined with the allocation prescribed by the three-factor formula, results in charging for depletion against Utah income, in determining the Utah tax, only $33\frac{1}{3}\%$ of the net income before depletion which is allocated to Utah. This we believe is in accord with the rationale of the Court's decision.

net income (before depletion) from mineral production of \$24,000,000, (in lieu of \$23,815,102) and an allocation factor of 67% (in lieu of 66.926%) of net income after depletion under the three-factor formula. In such case, under Kennecott's contention, the net income subject to the franchise tax in Utah would be computed under the statute as follows:

Table I

Total net income before depletion.....	\$24,000,000
Depletion allowance ($33\frac{1}{3}\%$ of total net income before depletion).....	8,000,000
Total net income after depletion	\$16,000,000
Net income after depletion allocated to Utah (67% of total net income after depletion)	\$10,720,000

As will be noted, the net income after depletion allocated to Utah in Table I is the same as that obtained in Table II by allocating separately net income before depletion and the depletion allowance.

On the other hand, the method advocated by the Commission would result in a depletion deduction applicable against Utah income substantially less than $33\frac{1}{3}\%$ of the net income before depletion allocated to Utah. This is because application of the three-factor formula results in allocating to Utah only a portion of the Commission's reduced allowance for depletion. The Court seems to have overlooked the fact that the Commission's method of computing depletion results in a double reduction of the depletion allowance — first, limitation of the

Table II

Total net income before depletion.....	\$24,000,000
Net income before depletion, allocated to Utah (67% of total net income before depletion)	16,080,000
Total depletion allowance ($33\frac{1}{3}\%$ of total net income before depletion)	\$8,000,000
Depletion allowance allocated to Utah (67% of total depletion allowance)	5,360,000
Net income after depletion, allocated to Utah (net income before depletion allocated to Utah less depletion allowance to Utah)	10,720,000

As will be noted the depletion allowance allocated to Utah is $33\frac{1}{3}\%$ of net income before depletion allocated to Utah.

depletion allowance to a percentage of only the net income attributable to ore extraction and concentration and second, the allocation outside of Utah of a portion of this reduced allowance by the application of the three-factor formula.

The only substantial business done by Kennecott itself within Utah was that of ore extraction and concentration. It is the net income fairly attributable to this portion of the business which the statutory formula seeks to ascertain as the basis for the imposition of the franchise tax, and it was such income fairly attributable to the State at which the Court was seeking to arrive. As is evident from what has preceded, the method of computing depletion contended for by the Commission, in computing the Utah tax, deprives Kennecott of depletion equal to $33\frac{1}{3}\%$ of the net income before depletion from its aggregate mining operation and thus deprives Kennecott of its property without due process of law. It thus *pro tanto* serves to impose the tax on a return of capital rather than upon income. We do not regard the decision of the Court in the 1942 case as intending, much less requiring, any such result.

Kennecott accordingly maintains that the decision in the 1942 case does not sustain the Commission's decision as to the depletion allowance in this case, and that the history of the adoption, interpretation and application of the Utah statute does not admit such a decision as would support the allow-

ance now determined by the Commission. On the contrary, the depletion claimed by Kennecott is in accord with the historical purpose and intent of the statute and its application and, we believe, accords with the rationale of the Court's decision in the 1942 case.

III.

Point.

For the calendar year 1942 the Commission must obey the mandate of this Court in Case No. 7298, entitled Kennecott Copper Corporation et al, v. State Tax Commission, 221 P. 2d 857. The Commission's attempt here to change the allocation of Kennecott's net income within and without the State of Utah for the purpose of the State Franchise Tax for that year, and otherwise to exceed, modify and elaborate upon that mandate, is beyond it's power.

This Court's decision in Kennecott Copper Corporation et al v. State Tax Commission, supra, related to Kennecott's tax for the calendar year 1942 only, and thereby it was finally adjudicated that:

1. Subsidy payments made by the Federal government for Kennecott's over-quota production must be included in Kennecott's gross income.

2. Federal taxes must be deducted in determining Kennecott's net income, 33 $\frac{1}{3}$ % of which, under the statute, represents the depletion allowance.

3. The Commission had not acted arbitrarily or capriciously in denying Kennecott's request to amend its 1942 franchise tax return by changing its method of reporting from the Utah Copper Divisional basis to that encompassing the operations of Kennecott's several divisions.

4. The Commission did not act arbitrarily in refusing to allow Kennecott to amend its 1942 return by changing from percentage depletion to a cost or other basis.

5. In its return for the calendar year 1942 Kennecott applied and followed the statutory allocation formula, which the Commission had applied and followed in the settlement of 1942 for the years 1935 to 1941, inclusive, and to which the Commission had adhered ever since the passage of the franchise tax statute March 12, 1931, and the Commission represented in this Court in its Case No. 7298 and Kennecott there conceded that if confined to the Utah Copper Divisional basis, the allocation so arrived at was correct; and this Court adopted the Commission's findings accordingly.

6. This Court remanded the case to the Commission only to find depletion and therein "to determine and render a deficiency judgment in accordance with the "views" expressed by the Court in its opinion. Therein the Court refrained from placing its approval on the formula used by the Commission in its computation of depletion.

The judgment of this Court in Case No. 7298 wherein final is res adjudicata for the year 1942, and all issues raised herein pertaining to the succeeding years await disposition as new and separate causes, consolidated here only for purpose of hearing and review.

The *factor* found by the Commission as well as by Kennecott to apply to total net income in order to obtain the portion thereof attributable to business done in the State of Utah was 66.926 per cent. Both parties having agreed upon and used that allocation factor for assignment of net income derived from business done in Utah, that factor was accepted by this Court and that question was accordingly settled and disposed of by this Court. In that allocation factor of 66.926 per cent the full 100 per cent of sales was assigned outside Utah, this by both Kennecott and the Commission, and that factor was accordingly accepted by this Court for the purpose of its decision. The determination of that factor by this Court is binding for the year 1942 and the Commission's attempt to assign 100 per

cent of sales to Utah and thus to increase the allocation factor to Utah to 97.749 per cent is an endeavor to raise again an already determined issue.

5 C. J. S.:

§ 1964, pages 1499, 1501:

“a. In General.

“The decision of a reviewing court becomes the law of the case as to all matters properly within the scope thereof and controls in all subsequent trials or proceedings.

“*** The rule is especially applicable where the appellate court has remanded the cause with specific directions as to the steps to be taken by the lower court *** and such rule holds good regardless of whether the decision of the appellate court is right or wrong. ***

“*** matters once determined by the appellate court cannot, after remand, be again raised and relitigated in the lower court.”

§ 1969, page 1526:

“After determination on appeal and remand to the lower court, a party will not be allowed so to plead as to open up matters already adjudicated by the appellate court, nor will he be allowed, without showing a sufficient reason

therefor, even under statute, to plead matters which existed and were known by him at the time of the first trial and might then have been pleaded by him."

§ 1971, page 1528:

"The findings cannot be corrected after remand with directions.

"Where a cause is remanded with directions, the lower court cannot correct alleged errors in the findings of fact or amend by making additional findings."

§1993, page 1557:

§ 1993. Effect.

"Failure of the trial court to follow the decision or comply with the mandate of the appellate court constitutes reversible error."

That such is the law of Utah is plainly evident from the following decisions of this Court:

Helper State Bank v. Crus, 95 Utah 320, 81 P. 2nd 359.

"It is a well-established rule in this jurisdiction, as well as in a majority of other jurisdictions, that where the questions of law and fact are the same the decision of the first appeal, whether right or wrong, becomes the law of the case on

second appeal and is binding as well on the parties to the action, the trial court, and the appellate court. To this effect was *Venard v. Green*, 4 Utah 456, 11 P. 337; *Societe des Mines v. Mackintosh*, 7 Utah 35, 24 P. 669; *Krantz v. Rio Grande Ry. Co.*, 13 Utah 1, 43 P. 623, 32 L.R.A. 828; *Brim v. Jones*, 13 Utah 440, 45 P. 46, 352; *Silva v. Pickard*, 14 Utah 245, 47 P. 144; *People's B. & L. Ass'n v. Fowble*, 18 Utah 206, 55 P. 57; *Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999; *Herriman Irrigation Co. v. Keel*, 25 Utah 96, 69 P. 719; *State v. Mortensen*, 27 Utah 16, 74 P. 120, 350; *Corporation of Members of L.D.S. v. Watson*, 30 Utah 126, 83 P. 731; *Teakle v. San Pedro Railroad Co.*, 36 Utah 29, 102 P. 623, 639; *Grand Central Mining Co. v. Mammoth M. Co.*, 36 Utah 364, 104 P. 573, Ann. Cas. 1912A, 254; *Grow v. Oregon S.L.Ry.Co.*, 47 Utah 26, 150 P. 970; *Chadwick v. Beneficial Life Ins. Co.*, 56 Utah 480, 191 P. 240; *Thompson v. Reynolds*, 59 Utah 416, 204 P. 516; *Huntsman v. Huntsman*, 61 Utah 376, 213 P. 179; *Forbes v. Butler*, 73 Utah 522, 275 P. 772; *Utah State Nat. Bank v. Livingston*, 74 Utah 456, 280 P. 327; *Sessions v. Dee Memorial Hospital Ass'n*, 94 Utah 460, 78 P. 2d 645.

“*** where an appellate court disposes of the entire case by directing just what judgment shall be entered, then the case is finally disposed of, and no new issues can be raised, and the only thing that can be determined on another appeal is whether the trial court has followed those directions. And under those conditions, if any party has failed to take an appeal or failed to raise any issue which it might have raised, it is too late, because the appellate court has finally disposed of the case.”

To the cases there cited may be added the following:

Bolognese v. Anderson et al, 97 Utah 136, 90 P. 2d 275:

"On the former appeal this court unanimously determined the tax deed to be invalid on the record before it but reversed the action and granted a new trial for other reasons. So far as the tax proceedings are concerned we are convinced that the facts now disclosed by the record remain essentially the same as they appeared when the case was here before. Such being the case we are precluded from again passing on a question which was presented, considered and passed upon before by this court, by force of the doctrine of the law of the case. 5 C.J.S., Appeal and Error, page 1499, 1508, § 1964, and cases there cited. See also Forbes v. Butler, 73 Utah 522, 275 P. 772; Utah State National Bank v. Livingston, 74 Utah 456, 280 P. 327; Clark v. Los Angeles & S.L.R. Co., 73 Utah 486, 275 P. 582; Grow v. Oregon Short Line R. Co., 47 Utah 26, 150 P. 970."

Powerine Co. v. Zion's Savings Bank & Trust Co. et al, 106 Utah 384, 148 P. 2d 807:

"On retrial the District Court, evidently misapplying the decision of this court on the former appeal, made new findings of fact and conclusions of law on matters settled by the opinion of this court. It then made further findings covering the question of rentals for which the cause had been remanded. Since the findings, conclusions and judgment on the retrial, except as to rentals, were at variance and contrary to the decision of this

court on the former appeal, and against the plaintiff who prevailed as to those matters on that appeal, it brings this appeal.

"We shall not review our pronouncements heretofore made in this case, nor shall we discuss the errors assigned, as they deal with matters discussed in the previous opinion, and upon which no new determination should have been made by the trial court, except by way of entering findings to conform to the previous opinion. *Forbes v. Butler*, 73 Utah 522, 275 P. 772.***

Our pronouncements are the law of the case, binding no less upon us than upon the lower court."

Phebus et al v. Dunford, Judge, et al, 198 P. 2d 973.

Street et al v. Fourth Judicial District Court, Utah County et al, 113 Utah 60, 191 P. 2d 153:

"As a general rule, where a judgment or decree is affirmed or reversed and remanded with directions to enter a particular judgment, the trial court may not permit amended or supplemental pleadings to be framed to try rights already settled. 9 Bancroft, op. cit. Sec. 7430. This rule is not only reasonable, but necessary, if litigation is ever to come to an end. After an appellate court has once ruled upon issues presented to it, such ruling becomes the law of the case, and the trial court is bound to follow it, even though it considers the ruling erroneous."

The matter of assigning 100 per cent of sales outside Utah for the calendar year 1942 was settled in favor of such assignment by agreement of the parties and its adoption accordingly by this Court. When the Commission was reinvested with jurisdiction of that cause by the decision and mandate of this Court, a limited power was restored to the Commission to find the correct amount of depletion for that year and to do only that. The Commission certainly was not reinvested with jurisdiction to repudiate its agreement upon which the Court had settled and disposed of that issue, and in direct contradiction of the Commission's position then taken and acted upon, to assign to Utah 100 per cent of Kennecott's sales. For the year 1942 the authority of this Commission must be confined to the computation of depletion as then directed by this Court.

As to depletion, by its decision and mandate this Court reinvested the Commission with power and authority to compute depletion under the statutory provisions and to make that computation only. This Court withheld its approval of the algebraic formula devised by the Commission for that purpose, and said:

"If Kennecott files its return on an allotted basis ** it must allocate some of its net income to post-mining operations before computing depletion."

As discussed in Subsection D of Point II of this brief, Kennecott submits that its method of computing the depletion deduction is in accordance with this Court's objective, and that the Commission's method is contrary thereto.

IV. Point.

Under the facts and circumstances here disclosed the Commission is not empowered to assess interest on deficiencies, if any, adjudged against Kennecott, and its attempt to do so here is an abuse of the discretion vested in it by the statute.

Over and above the Commission's demand for additional payments by way of its claimed tax deficiencies for the years 1942 to 1950 both inclusive, the Commission claims interest, which, as of June 15, 1953 it asserts amounted to the sum of \$1,283,647.81.

Kennecott had no word of this approaching controversy until March 10, 1945 when the Commission proposed adjustments for the calendar year 1942. Kennecott had made its return for each the years 1942 to 1944 both inclusive, upon the statutory allocation formula and depletion calculation in accord with the settlement of May 27, 1942 for the years 1935 to 1941 inclusive. The Commission computed this interest on the claimed deficiencies for each of the years 1942-1950 both inclusive, from the 15th day of March of each year. It makes no dif-

ference to the Commission that the statute, Section 59-13-25, Utah Code 1953, prescribes quarterly payments on March 15, June 15, September 15, December 15, and that interest shall be computed upon such quarterly amounts from those dates, respectively. Section 59-13-28, Utah Code 1953. It is stated by the Commission that the final amount of interest to be payable will ultimately depend upon the amount of tax finally found to be owing.

This controversy began March 10, 1945, with the Commission's proposed adjustments for the calendar year 1942. The issue revolved mainly about the depletion calculation. On January 22, 1948, the Commission rendered its decision for the year 1942, again as to the depletion calculation, whereupon Kennecott carried the case to this Court for review, the controversy still revolving about depletion. This is Case No. 7298, already discussed, wherein a decision was rendered August 24, 1950, and the case was remanded to the Commission to find depletion and render a deficiency judgment in accord with the views expressed by this Court.

From March 10, 1945 to this day, within the period allowed by the statute, the Commission has proposed adjustments with relation to the depletion calculation, by consistent recourse to its algebraic formula, and Kennecott has duly filed with the Commission its several petitions for redetermination directed to the Commission's proposed deficiencies.

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On March 10, 1951, applicable to the year 1948 only, the Commission in its then proposed adjustments for the first time and without explanation repudiated the statutory three-factor formula and substituted therefor its algebraic formula by which to compute the portion of Kennecott's net income allocable to Utah by which to measure the Utah State franchise tax.

On June 29, 1951, Commission filed amended proposed adjustments for each the years 1942 to 1950, both inclusive, using for each year, in lieu of the three-factor statutory formula, the Commission's algebraic formula by which to compute the portion of Kennecott's net income allocable to Utah by which to measure the franchise tax. The aggregate tax deficiency as computed by the Commission was then stated by it to amount to the sum of \$2,712,015.04, upon which it computed interest from August 1st of the year in which the returns were respectively due to August 1, 1951 in the sum of \$596,081.10.

Ex. On December 4, 1951, the opening day of the A (2), hearing below, the Commission recomputed interest Tr. 4-5 from the due date of the return for each of the years 1942 to 1950 both inclusive, to December 15, 1951, then stating the tax deficiency to be the sum of \$2,712,915.47, and interest to be the sum of \$707,481.37. While still using its algebraic formula for

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the depletion calculation and as well for the allocation to Utah for purpose of the tax, the Commission reserved "the right to this Commission and to the Supreme Court if this case again reaches the Supreme Court, to amend the deficiencies by asserting tax based on 100 percent of the Utah Division's net income."

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On April 2, 1952, in the middle of the hearing below, the Commission concluded that its "primary obligation in this case is to follow the Utah statute ***. We have no reason nor can we fail to follow the express and explicit terms of our statute." Therefore, the Commission concluded it must abandon its algebraic formula for the computation of that part of Kennecott's net income allocable to Utah by which the Utah tax would be measured, although retaining that algebraic formula for the depletion calculation. However, in lieu of the algebraic formula for allocation of net income to Utah, the Commission proceeded to assign to Utah 100 per cent of Kennecott's sales, every one of which had been negotiated, effected and concluded in states other than Utah. The tax deficiency was then stated by the Commission to be \$3,848,439.68, and interest computed to December 15, 1951, to be \$1,033,275.71.

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The decision of the Commission under date of July 23, 1953 assigned all sales to Utah, except only those of gold and silver, and stated the tax deficiency to be \$3,568,041.92, and interest computed to June 15, 1953 to be \$1,283,647.81. Sales of gold and silver were assigned out of Utah because made by Kennecott itself instead of by Kennecott Sales Corporation acting on Kennecott's behalf.

Kennecott duly returned its net income for the State franchise tax as calculated under the statutory three-factor formula required both by the statute and as the statute had been interpreted by the Commission over the years 1935 to 1941 inclusive, and prior thereto from the enactment of the statute, March 12, 1931. Kennecott paid the franchise tax for each of the years 1942 to 1950 inclusive, here involved, as so returned, and made those several payments at the times required by the statute. Kennecott has paid to the State of Utah as much of the claimed tax as it could, with due regard to the lawfulness of the Commission's demand.

With this over-all picture, the Commission insists on a judgment against Kennecott for the item of interest on whatever deficiency may be ultimately adjudged against Kennecott, should there be any, computed from March 15th of the year wherein the return was due, quite regardless of its subsequent proposed adjustments and the subsequent amendments of such proposals.

The Utah statute provides as follows:

59-13-28. "Deficiency - Interest. — Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the tax commission, and shall be collected as a part of the tax at the rate of six per cent per annum from the date prescribed for the payment of the tax to the date the deficiency is assessed."

59-13-57. "Power to waive or reduce penalty or interest. Upon making a record of its reasons therefor, the tax commission shall have the power, in its discretion, to waive or reduce any of the penalties or interest provided in this chapter or to compromise the same."

It is stated in 51 American Jurisprudence, page 849, Section 970:

"Penalties for nonpayment of taxes often take the form of the imposition of interest charges on the delinquent amounts unpaid, but neither interest nor any other form of pecuniary penalty may be exacted for delay in payment of taxes unless authority therefor is given by legislative enactment."

page 851, Section 974, as follows:

"A taxpayer should not be charged with penalties or with interest for nonpayment of taxes until he has had opportunity to pay them. In case of real property, for example, he should not be charged with penalties until there has been an

identification of the property subject to taxation and a determination of the amount of taxes due upon it."

page 853, Section 975, as follows:

"*** Moreover where there is necessity for resort to litigation to determine the validity of the tax, and particularly where the taxing authorities are the moving parties in the litigation, or agree to submit the question to the decision of the court, the courts have refused to hold the taxpayer liable for penalties and interest upon so much of the tax as is finally determined to be valid against him. This is upon the theory that payment of taxes to which the state may not be rightfully entitled should not be coerced under threat of penalty. ***

"The cases which recognize that a taxpayer may escape liability for penalties or interest where his failure to pay a tax when due is because of his contention in good faith that he is not liable for the tax,*** do not require as an element of good faith that the taxpayer be upheld in his contention; but if his insistence is frivolous, malicious and unreasonable so as to be arbitrary and clearly show conduct not prompted by good faith, it will be ineffective and of no avail."

page 855, Section 978, as follows:

"Statutes providing for the remission or reduction of penalties, interest charges, and costs imposed upon delinquent taxpayers are liberally construed in favor of the taxpayer. The grant to tax officers of power to remit penalties for tax delinquencies includes power to remit interest

charges imposed by statute in respect of delinquent taxes, such charges being in the nature of penalties."

61 Corpus Juris, page 1518, Section 2227, as follows:

"The circumstances attending the nonpayment of taxes may be such as to warrant the courts in refusing to enforce payment of interest imposed by statutes on delinquent taxpayers."

and Section 2229, as follows:

"Construction of such statutes. Statutes for remission of interest, being remedial in character, should be liberally construed, and extended to all cases fairly coming within the reason or rule thereof; and although permissive in form should be given a mandatory effect."

It cannot have been and, as shown by the statutory provisions quoted above, was not the intention of the Legislature to coerce, by threat of a heavy penalty should a taxpayer resort to this Court, the payment of taxes to which the State may not be rightly entitled. It is Kennecott's right to submit this litigation to this Court for review on both facts and law.

Under all the circumstances it is the Commission's duty in this case to waive interest, as it is empowered by the statute.

The following authorities demonstrate that such a power to waive interest to avoid injustice cannot be arbitrarily withheld, but that under such circumstances the power must be exercised.

It was held in *Commonwealth v. Southern Pac. Co.*, 169 Ky. 296, 183 S.W. 925, that:

“Two questions are presented for decision: First, may the interest and penalties provided by the statute for failure to pay taxes on or before the 1st of December be exacted from the taxpayer where he exercises his statutory right to appeal from the action of the board of supervisors in assessing his property if his appeal so taken is not acted upon by the quarterly court until after the 1st of December following, the time which the statute fixes for the interest and penalty to attach? Second, is it incumbent upon a taxpayer taking such an appeal to tender any taxes, the amount of which has not been ascertained?

“The first proposition resolves itself into the question whether the taxpayer is delinquent until he has had an opportunity to voluntarily pay his taxes, and which have previously been definitely fixed or the amount of which could have been by him, approximately ascertained before the penalty attaches. In this case, *** as long as the appeals were pending in the quarterly court it was impossible for the company to know what the final amount of the assessment might be, and

it would have been nothing short of a reckless guess for it to have undertaken to approximately fix the amount of its taxes for any one of the years involved, so as to have tendered the same before the interest and penalty attached.

“*** Here the taxpayer did not know what he had to pay until the final assessment was made by the quarterly court. *** If under these conditions the agency selected by the state to finally assess the property fails to assess it before the time fixed for the interest and penalties to attach, will this failure be allowed to operate so as to penalize the taxpayer? So far as this record shows, the appellee is not responsible for this delay; it only exercised a right expressly granted by the statute. The commonwealth was the moving party, and it would seem to be its duty to urge such proceedings to a speedy determination, and if it fails to do so before the interest and penalties attach, it would be inequitable and unjust to enforce their collection.

“At any rate, the state agency charged with the duty of finally assessing this property on the appeal failed to discharge that duty, for some reason not entirely apparent from this record, before the time fixed for the interest and penalties to attach, and that failure should not be permitted to operate so as to penalize a taxpayer for **not paying his taxes** before his property has been finally assessed, and before he could possibly know their amount. To do so would be to penalize a taxpayer for exercising the right of appeal which the statute expressly gives him. Clearly it could not have been the legislative purpose to

exact from a taxpayer a penalty for failure to pay his taxes when the agency selected by the state for that purpose has not assessed his property in time for him to have voluntarily paid the tax in time to escape the penalty. To so interpret the statute would be to convict the General Assembly of a deliberate purpose to do a palpable wrong to the taxpayers, and this we do not believe and are not authorized to infer. It follows from what we have said that the statute could not have intended that the interest and penalties should be exacted when the taxpayer has had no opportunity to voluntarily pay his taxes before they ordinarily attach under its terms.

“Before the board of supervisors the company filed each year a statement giving what it conceived to be the assessable value of the floating equipment to the company, but contending all along that the taxable situs was not in Jefferson county, and it is now strenuously insisted that, after taking the various appeals to the quarterly court, it was obligatory upon the part of the company to at least tender the taxes pending the appeals to the quarterly court on the conceded valuation of the property.

“*** Undoubtedly it is not only within the power of a chancellor, but it is his duty, when being so applied to, to put the applicant upon such terms as will not delay the prompt collection of taxes which he concedes to be due; but the quarterly court occupied a very different attitude. It was only a state agency, acting in a ministerial capacity in the assessment of property under our assessment and taxation statute. It had no power to enter any judgment for taxes. It had no authority to put the company upon any sort

of terms before it would hear its appeal. Its sole power is, under the statute, to determine whether the property is or not assessable, and, if so, what is its assessable value.

“The statute requires no tender, and puts no condition whatever upon the right of appeal; and, while it is apparent that it was contemplated by the statute that an appeal would, under ordinary circumstances, be disposed of in time for the taxpayer to pay his taxes without incurring the interest and penalties, yet there is no provision fixing the time within which the quarterly court shall dispose of such an appeal; and, if that agency so selected by the state fails to dispose of such an appeal and make the final assessment so that the taxpayer would have an opportunity to escape such penalty and interest, manifestly the taxpayer should not be penalized because of such failure, and should not be expected to make a tender of an amount which has not been ascertained, and which necessarily is indefinite and uncertain.

“The suggestion that the taxes on the conceded valuation might have been tendered to the sheriff is untenable. The assessment was not final. ***

“It is apparent from the whole record that the delay in the quarterly court was either because of the failure of the commonwealth to push to a speedy determination a proceeding which it had instituted to assess this property, or because of the mutual acquiescence in such delay by all parties.

"Judgment affirmed."

State v. Coos County, 115 Ore. 300, 237 P. 678,
the court held:

"We are of the opinion that the words used, to wit, 'The county courts of the several counties of the state may and are hereby authorized to remit,' etc., when used in the connection in which they appear in the act, should be construed as mandatory. While in form permissible, they are peremptory when used to clothe a public officer with the power to do an act which ought to be done for the sake of justice, or which concerns the public interest or the rights of third persons. Ex parte Banks, 28 Ala. 28; Rex v. Barlow, 2 Salk. 609; Johnston v. Pate, 95 N.C. 68; Lynn v. County Com'rs, 148 Mass. 148, 19 N.E. 171; Bowen v. Minneapolis, 47 Minn. 115, 49 N.W. 683, 28 Am. St. Rep. 333; and various other authorities to that effect, which will be found in a note to section 636, vol. 2 (2d Ed.) Lewis' Sutherland Statutory Construction."

Commenting upon the case of Commonwealth v. Southern Pacific Company, *supra*, the court said in Bingham's Administrator v. Commonwealth, 196 Ky. 257, 244 S.W. 781, at 791:

"The tax due in that case (Commonwealth v. Southern Pacific Company, *supra*), a franchise tax, before it became due by or collectible from the owner, had to be assessed against it in some one of the several ways in which property is

assessed for taxation, and the owner was not delinquent in any duty imposed upon him by law until such assessment was ascertained according to law. The property of the owner having been assessed against it by the board of equalization at an exorbitant figure, the owner, as the law gave it the right to do before the assessment became final, appealed to the quarterly court for review of the board's assessment. The quarterly court materially reduced the assessment, and the owner promptly paid the taxes thus found to be due. We held that the owner should not be required to pay penalties when it was not delinquent in its duty to pay the taxes it owed; that it was not delinquent during the pendency of the appeal to the quarterly court, as the law gave it that right; and, that to charge it interest and other penalties the law imposed for delinquency would be unfair and was not intended, although another and general law provided that all taxes, unless otherwise specially provided, should be due on the 1st day of March after assessment, and become delinquent if not paid on the 1st day of December thereafter."

And it was held in *Commonwealth v. Bingham's Administrator*, 187 Ky. 749, 220 S. W. 727, at 730, as follows:

"*** The law neither demands nor expects the impossible, nor will a court by its decree penalize a person for the nonpayment of a tax, the amount of which is not only uncertain, but at

the present time is still undetermined, and this through no fault of the party sought to be charged. ***

"We are told that a wide expanse of time and territory were covered in the proof taking, after which the appraiser filed a voluminous report. This being true, should we charge a dereliction of duty to appellee because the overworked court, to whom the matter was submitted, has not had time to render a decision? We think not. Appellee is without fault in the premises, and we are unable to find wherein it has failed or neglected to perform any duty required of it.

"As said in *State v. Certain Lands in Redwood County*, 40 Minn. 512, 42 N. W. 473:

" 'A penalty for the nonpayment of a tax cannot be imposed until the person has an opportunity to pay it, and fails to do so.' "

And in *Bingham's Administrator v. Commonwealth*, 199 Ky. 402, 251 S. W. 936, it was said:

"Upon the question of interest upon the amount of the tax as finally determined, the circuit judge, in his written opinion upon which the judgment is based, has so accurately analyzed the cases from this court upon the question and so admirably stated the rules deducible therefrom

under varying circumstances that we have decided to adopt it, as we do the conclusion that, under the facts of this case, interest runs only from the date of the judgment herein. It reads:

'(7) Where the commonwealth delays the assessment, the taxpayer should be charged with interest only from the time of the assessment.

'The allowance of interest is, in the last analysis, by way of penalty upon the property owner, for having done that which he ought not to have done. The history of this case has been very unusual. When it is considered that the tax supervisors, with the advice of the state revenue authorities, were responsible for the failure of a timely assessment early in 1918, and thereby forced the administrator into prolonged litigation, which included a justifiable defense against a totally unwarranted charge of delinquency and claim to enormous penalties, it would seem inequitable to charge the administrator with offensive delay, and to impose upon it the payment of interest from a date earlier than this, the first assessment of the properties. These conclusions seem to accord with the philosophy of the four opinions hereinbefore digested. ***'

It was said in *Re Clark*, 105 Mont. 401, 74 P. 2d 401, 114 A.L.R. 496, that:

“*** We think this contention has been most effectively disposed of in the case of *In re Estate of Irwin*, 196 Cal. 366, 237 P. 1074, 1078 wherein the court said: ‘If the proviso be construed to mean “any or all litigation,” it would necessarily follow that even a litigant who had successfully proved in court his contentions as to the invalidity of a tax imposed would be liable for the imposition of the interest of 10 per cent. as a penalty for submitting his objections to a court for adjudication, for even successful litigation would be “litigation to defeat the payment of a tax.” Such a result would obviously be an absurdity.’”

“The Arkansas Supreme Court has reached the same conclusion in the construction of a similar statute in the case of *State v. Lane, Executor*, 134 Ark. 71, 203 S.W. 17. See, also, *In re Duncan’s Estate*, 119 Wash. 426, 206 P. 1.”

In State v. Certain Lands in Redwood County, 40 Minn. 512, 42 N.W. 473, at 476-7-8; affirmed in 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247:

“*** To render a person chargeable with interest there must be a promise, express or implied, to pay it, or some default of duty on his part in not sooner paying the money. *Sibley v. Pine Co.*, 31 Minn. 201, 17 N.W.Rep. 337. *** If, under such circumstances, in the absence of any default on his part, the legislature can impose interest retrospectively, there is no reason why it might not also impose certain penalties for the

nonpayment of the tax, for both stand, in this respect, on the same footing. Both are in the nature of damages for a default of legal duty. ***

**** One thing is very certain: that a penalty in any form cannot be imposed until a party is in default in some legal duty. A penalty for the nonpayment of a tax cannot be imposed until the person has an opportunity to pay it, and fails to do so. What we have heretofore said regarding 'interest' is equally applicable to penalties. Now, as the whole tax extended against a tract of land is an entirety, the owner cannot pay a part of it without paying the whole, and if a part of it is illegal, and he pays the whole, ordinarily it would be a voluntary payment, and he could not recover back the illegal part. Hence in such case his only remedy is to wait until proceedings are commenced to enforce judgment against his land, and then defend against the illegal part of the tax, and until it is deducted by the judgment of the court he has had no opportunity to pay the valid part of the tax, and consequently has been guilty of no default."

State v. Hughes Brothers Timber Company, 163 Minn. 4, 203 N.W. 436 at 438; reversed in 272 U. S. 469, 47 S. Ct. 170, 71 L. ed. 359, on the ground that the property taxed was in interstate commerce:

"The original assessment was on 10,000 cords, but in fact there were only 8,367 cords. The tax was reduced accordingly by the decision below,

but, notwithstanding, the statutory interest and penalties were sustained as to the reduced amount. In that we think there was error. Under the principle of *County of Redwood v. Winona & St. Peter Land Co.*, 40 Minn. 512, 41 N. W. 465, 42 N. W. 473, neither interest nor penalties can be imposed upon the taxpayer until he defaults in payment. Defendants had no opportunity to pay the correct amount of the tax until it was determined. Until then they were not in default, so all they can be held for is interest on the tax from the time it was so determined. ***

“*** We are now concerned with default in payment, and there was no such default until the correct amount was ascertained, and that was not until the filing of the order for judgment.”

State v. Great Northern Railway Company, 160 Minn. 515, 200 N. W. 834, at 839:

“The right of the state to assess omitted earnings is not questioned.

“The statute provides for a direct penalty of 5 per cent. and an interest penalty of 1 per cent. a month. The assessment was against the Great Northern for all of the years from 1901 to 1912 inclusive. The draft was drawn for that amount including penalty and interest from April 23, 1913, the date of the enactment of the statute. It was largely in excess of the amount actually due. The defense was justifiable and in part

successful. There was no opportunity to pay the amount due without paying the excessive amount claimed. Interest and a penalty should not be imposed. *County of Redwood v. Winona, etc.*, 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; *U. S. Trust Co. v. New Mexico*, 183 U.S. 535, 22 S. Ct. 172, 46 L. ed. 315; *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443; *Lake Shore, etc., v. People*, 46 Mich. 193, 9 N. W. 249.

"It was provided by Laws 1917, c. 398 (Gen. St. Supp. 1917, §§ 90-1 to 90-3) among other things, that uncollected drafts then in the hands of the Attorney General should be delivered to the treasurer. The treasurer was authorized to receive part payment. The state insists that after this statute the interest penalty should commence. We do not take this view."

United States Trust Co. v. New Mexico, 183 U. S. 535, 22 S. Ct. 172, 46 L. ed. 315:

"Until the amount of legal taxes was definitely ascertained, the owners of this property had no opportunity of paying such taxes, and were therefore not in default in not paying; hence the claim for back interest is not a valid one. ***

**** The owners of the road were therefore justified in contesting their liability to such assessment and taxation in gross, and until there was an identification of the property subject to taxation and a determination of the amount of taxes due, it would be inequitable to charge penalties for nonpayment. ***

"Viewing the proceedings from an equitable standpoint, we see no error in refusing interest prior to the decree."

CONCLUSION

The decision of the Commission is contrary to the provisions of the statute imposing the Utah State Franchise Tax; if given effect, it would deprive Kennecott of its property without due process of law and would impose an undue burden on interstate commerce in violation of the Utah and Federal constitutions. Accordingly, the decision of the Commission should be reversed by this Court.

Respectfully submitted,

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