

1949

Kennecott Cooper Corporation v. State Tax Commission : Brief of Appellants

Utah Supreme Court

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In The Supreme Court of the State of Utah

**CHIEF CONSOLIDATED MINING
COMPANY,**

vs.

Appellant,

Case No. 7328

STATE TAX COMMISSION,

Respondent.

**PARK UTAH CONSOLIDATED MINING
COMPANY,**

vs.

Appellant,

Case No. 7334

SUMMIT COUNTY, et al,

Respondent.

**SILVER KING COALITION MINING
COMPANY,**

vs.

Appellant,

Case No. 7332

STATE TAX COMMISSION,

Respondent.

**UNITED STATES SMELTING REFINING
AND MINING COMPANY,**

vs.

Appellant,

Case No. 7324

SALT LAKE COUNTY, et al,

Respondent.

KENNECOTT COPPER CORPORATION,

vs.

Appellant,

Case No. 7293

STATE TAX COMMISSION,

Respondent.

APPELLANTS' BRIEF

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In The Supreme Court of the State of Utah

CHIEF CONSOLIDATED MINING COMPANY,	vs.	Appellant,	}	Case No. 7323
STATE TAX COMMISSION,		Respondent.		
PARK UTAH CONSOLIDATED MINING COMPANY,	vs.	Appellant,	}	Case No. 7334
SUMMIT COUNTY, et al,		Respondent.		
SILVER KING COALITION MINING COMPANY,	vs.	Appellant,	}	Case No. 7332
STATE TAX COMMISSION,		Respondent.		
UNITED STATES SMELTING REFINING AND MINING COMPANY,	vs.	Appellant,	}	Case No. 7324
SALT LAKE COUNTY, et al,		Respondent.		
KENNECOTT COPPER CORPORATION,		Appellant,	}	Case No. 7293
STATE TAX COMMISSION,	vs.	Respondent.		

APPELLANTS' BRIEF

I.

STATEMENT OF FACTS

The cases here involved were brought into this court by separate appeals. Pursuant to stipulation the court has ordered the cases consolidated for the purpose of briefing and argument herein.

In each of the cases here involved, a general demurrer to the complaint or amended complaint was sustained by the lower court and the case dismissed. The sole ques-

tion here involved is whether each of such complaints does state a cause of action. This in turn will be found to determine upon whether under the allegations of such complaints, premiums received by appellants from Metals Reserve Company or Reconstruction Finance Corporation, Office of Metals Reserve, on account of over-quota production of certain ores in the years involved, were or were not properly includible in determining the mine occupation tax and/or the ad valorem property tax measured by net proceeds assessed against the respective appellants.

In each case that proportion of the total tax assessed against an appellant, which was based upon the inclusion of such premium payments, was paid under protest, and thereafter within the time allowed by law, suit for the recovery thereof was instituted in the proper district court.

Except with respect to the conditions under which quotas were established and revised, the time with respect to date of sale of the ores or metals and the basis upon which premiums were paid, and with respect to the constitutionality of the inclusion of premium payments in the base of the tax measured by net proceeds (not included in the occupation tax cases) the complaints so far as material here are identical. In addition to the formal allegations as to the identity and capacity to sue or be sued of the respective parties and the facts of the ownership and operation of mines by the several appellants, such complaints severally allege:

(a) *As to the authority for making subsidy payments.*

That the Emergency Price Control Act of 1942, as amended by the Stabilization Extension Act of 1944, the Act of June 23, 1945, and Public Law 548 (1946 U. S. Code Congressional Service, pages 632-639) empowered the Administrator in behalf of the United States, whenever he determines that the maximum necessary production of any commodity is not being obtained, to make subsidy payments to domestic producers of such commodity, in such amount and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof. Accordingly Metals Reserve Company and/or Reconstruction Finance Corporation, Office of Metals Reserve, was directed to make and did make to producers of copper, lead and zinc, certain subsidies for the production of such metals in excess of the amounts it was determined they could reasonably be expected to produce at the existing ceiling prices (or market prices during the periods when there were no ceiling prices in effect). The specific amounts were determined by joint action of the War Production Board (or the Civilian Production Administration which succeeded it in November, 1945), and the Office of Price Administration, which designated quotas. (R. 12)*

*Except where specifically noted to the contrary, all references are to the record in Case No. 7334, Park Utah Consolidated Mines Company vs. Summit County.

Such quotas were established with a view to ensuring to the mine operator an operating margin after taking into account operating costs, including new development, exploration, mill and smelter treatment charges, and were adjusted from time to time in the light of experience and revised to take account of changing costs and recoveries. (R. 12)

Subsidies payable on overquota production were computed on the basis of a stated percentage of the qualified metal contents of ore produced and delivered to a processing plant, regardless of the percentage of metals actually recovered or paid for under mill or smelter contracts. (R. 13)

On February 9, 1942, the Office of Price Administration and War Production Board issued a joint statement outlining the rules and regulations under which subsidies on overquota production of copper, lead and zinc would be paid. Such statement contained the following:

“Premium payments will be based upon metal paid for under the terms of settlement contracts. Quotas, of course, will be fixed on the same basis. *If no settlement contracts exist*, quotas and premium payments will be computed on the basis of 95%, 90% and 85% of the metal content in the case of copper, lead and zinc, respectively. Ores from mines from integrated companies will be treated in the same manner.”

The matter embodied in such joint statement was repeated in Rule No. 13 of the Rules and Regulations of the War Production Board — Office of Price Admins-

tration Quota Committee issued April 18, 1942, a copy of which is attached to the complaint and marked Exhibit "A". (R. 20)

On November 9, 1942, said Rule No. 13 was rescinded as of the close of business November 30, 1942, and a new Rule No. 13 effective with receipt at processing plant on and after December 1, 1942 was adopted by said Committee for the stated purpose of placing premium payments on a uniform basis and to simplify and accelerate the administration of the premium price program. A copy of said new Rule No. 13 is attached to the complaint and marked Exhibit "B". (R. 21)

Effective August 1, 1943, said Rule No. 13 was further revised and a copy thereof is attached to the complaint and marked Exhibit "C". (R. 22)

(b) *As to the receipt of payments.*

That during the year referred to in the several complaints, appellants and/or their lessees received either from Metals Reserve Company or Reconstruction Finance Corporation, Office of Metals Reserve, subsidies in an amount stated as bounties for producing lead, zinc and copper in excess of quotas determined as aforesaid. That no part of such subsidies was of concern to or paid or contributed by any purchaser of said ore or metals. That said Metals Reserve Company, Reconstruction Finance Corporation, Office of Metals Reserve, War Production Board, Civilian Production Administration and Office of Price Administration were then agencies of

the Federal Government, duly created, existing and acting pursuant to valid statutes enacted by the Congress of the United States. Said quotas were lawfully fixed and said subsidies were lawfully paid for the purpose of inducing producers of certain metals to increase their production of such metals which included lead, zinc and copper. That no part of such premiums were received from a sale of such ores or a part of the gross value thereof but were amounts received from the United States Government through its designated agency on account of excess production of ores over assigned quotas. (R. 16) and (R. 16, Case No. 7324.)

(c) *As to the action of the State Tax Commission respecting subsidies so received.*

That in determining the occupation tax payable, or assessing the value of the mining property in question as determined by net annual proceeds, the State Tax Commission unlawfully included premiums so received as part of the gross amount received from sales of production during the year in question, and as part of the net annual proceeds. That over the protest of appellants said State Tax Commission refused to disturb or modify the action so taken by it. (R. 11) (R. 10 in Case No. 7323).

(d) *As to payment of the proportion of the tax so unlawfully assessed.*

That the proportion of the occupation or property tax based upon the inclusion of such premium payments

was paid under protest either to the State Tax Commission or the County Treasurer as alleged. (R. 12)

(e) *The mechanics of the payment of subsidies.*

1. *As to independent producers:*

In order to determine the quantities of copper, lead and zinc produced by an independent producer selling its ores to a mill or smelter and eligible for the payment of premiums, Metals Reserve Company and/or Reconstruction Finance Corporation, Office of Metals Reserve, designated as its agents certain milling and smelting companies which companies were kept currently advised of the quotas assigned to each producer customarily delivering ores to it. Their agents were required to procure from each producer affidavits as to the eligible ores produced and available for the payment of subsidies, to verify the statements contained in such affidavits, and to certify the same to the paying agency. On the basis of the information so furnished the paying agency placed its agents in funds with which to pay for its account the applicable premiums, and such premiums were ordinarily paid from thirty to ninety days before the recoverable metals were converted or rendered into marketable condition but after a sale of the ores or concentrates. (R. 29)

In the case of a producer shipping part of its ores to one mill or smelter, and part to other mills or smelters, the producer was permitted to designate to which mill or smelter as agent for Metals Reserve Company, and/or

Reconstruction Finance Corporation, Office of Metals Reserve, it would furnish affidavits of production; and all subsidy payments to such producer were made through such designated mill or smelter irrespective of to what mill or smelter ores had in fact been shipped. (R. 30)

2. As to integrated companies milling or smelting their own ores:

In the case of companies designated as agents for Metals Reserve Company, and/or Reconstruction Finance Corporation, Office of Metals Reserve, premiums paid on account of overquota production from their own mines were paid pursuant to instructions issued by Metals Reserve Company under date of May 13, 1942 (See Exhibit "D" attached to complaint of United States Smelting Refining and Mining Company in R. 24, Case No. 7324); were computed on the basis of mine production records; and were paid on the basis of the percentage of the total metal contents of the qualified materials in the ores from time to time specified under Amended Rule No. 13 of the Quota Committee, such total metal contents being determined by sampling and assaying before any conversion of the ores and before any processing of the ores other than such crushing as is required to permit of sampling for assaying. (R. 34, in Case No. 7324)

Such payments were ordinarily received from thirty to ninety days before the recoverable metals were avail-

able for sale; they were paid unconditionally and without any right on the part of Metals Reserve Company, and/or Reconstruction Finance Corporation, Office of Metals Reserve, to receive back the same or any part thereof in the event the metals recovered from ores for the production of which such subsidies were paid, became lost, or were destroyed or retained by the producer or otherwise failed to enter the channels of commerce or to be sold. (R. 17, in Case No. 7324)

3. *As to Kennecott:*

The facts with regard to this particular operation are the subject of the separate brief in its case. (Case No. 7297)

(f) *As to the establishment and revision of quotas.*

1. *Chief Consolidated Mining Company.**

As of January 1, 1944, this company had been assigned a quota as follows:

	Lead	Zinc	Copper
"A" Quota	0	0	0
"B" Quota	0	0	
"C" Quota		95	

Such quota was assigned on the company's report to the Quota Committee on a development program which included the driving of a drift from one mine to another for water disposal purposes and which report included

*References are to record in Case No. 7323.

detailed estimates of the cost of the work proposed to be done and of the estimated production which would be obtained and applicable for computation and payment of premiums on overquota production. (R. 8)

On March 1, 1944, such quota was revised so as to reduce bonuses payable, on account of the completion of such drift and the increased grade and tonnage of ore produced. Thereupon the company protested such reduction showing that as so revised it was insufficient to permit of continued operations and might result in a complete cessation thereof. (R. 8-9)

Upon consideration of such report the Quota Committee, on March 11, 1944, revised the quota so as to increase the subsidies payable on overquota production; and subsequently when milling charges required to be paid by the company were increased by \$1.00 per ton and the percentage of recoverable metals upon which subsidies were paid was reduced from 77% of the zinc content to 54%, the Quota Committee further revised the quota to increase premiums payable. (R. 9)

*2. United States Smelting Refining and Mining Company.**

In 1943, such company was assigned quotas as stated which quotas remained in effect on January 1, 1946. (R. 13)

*References are to record in Case No. 7324.

Subsidies payable under such assigned quotas were insufficient to afford an adequate operating margin, and said appellant's production from its mines fell below the quotas so assigned. Substantial production deficits accumulated which said appellant would have been required to make up by additional production before it again became entitled to receive premium payments on account of current production in excess of such assigned quotas. (R. 14)

On April 3, 1946, said appellant applied to the Quota Committee of the War Production Board and Office of Price Administration for a revision of the quotas assigned it and for cancellation of accumulated deficits, accompanying such application with detailed operating cost data and production data. (R. 14)

Upon consideration of such application and accompanying data, the Quota Committee, on April 24, 1946, cancelled all deficits with respect to production from said appellant's U. S. Mine as of December 1, 1945, and revised the quota assigned said appellant for such mine so as to increase the subsidies payable to said appellant on account of production therefrom in the amounts set forth; such revised quota was made effective retroactively to December 1, 1945. (R. 14)

Thereafter, and on July 29, 1946, said appellant again applied to the Quota Committee for cancellation of accumulated deficits and revision of metal quotas on account of increased costs; and because of retroactive

increases in costs asked that such revision of quotas be made effective as of September 1, 1945, and that accumulated deficits be canceled as of August 31, 1945 and June 30, 1946. (R. 14)

Such application was likewise supported by detailed statements of increased retroactive costs and estimates of production and production costs for succeeding months. (R. 14-15)

Upon consideration thereof and on October 10, 1946, the quota assigned said appellant for its U. S. Mine was further revised to increase the Federal bonuses payable as stated. (R. 15)

On October 26, 1946, the quota assigned said appellant for its Lark Mine was likewise revised, and accumulated deficits were canceled as stated. (R. 15)

The quotas so assigned said appellant for its U. S. Mine remained in effect throughout the remainder of the year 1946; the quota so assigned said appellant for its Lark Mine remained in effect until December 1, 1946, when, in view of improved conditions, it was restored to the quota in effect January 1, 1946. At this time there were no longer any applicable price controls, which ceased November 9, 1946. (R. 10-15*)

*Metal price ceilings were effective from 1941 through June 30, 1946, and from July 26 through November 9, 1946. Subsidies were paid from 1942 to July 1, 1947; President Truman then vetoed the extension of authority.

3. *Silver King Coalition Mines Company.*

During the year 1945, the following quota assigned said company remained in effect:

	Copper	Lead	Zinc
"A" Quota	0	0	0
"B" Quota		0	0
"C" Quota			0

(R. 12 in case No. 7332.)

4. *Park Utah Consolidated Mines Company.*

Late in 1942, this company presented to the Quota Committee of the War Production Board and Office of Price Administration, a program designed to explore and develop the zinc-lead possibilities of its property; such program included the unwatering of the Ontario shaft and the development of ore production therefrom, the unwatering of the Park Utah shaft to the 1800 foot level, and the development of ore production therefrom, and the production at the highest possible rate from all ore bodies encountered in pursuance of such program. Such report was accompanied with detailed estimates of the cost of doing such work and of the estimated production which would be obtained and be applicable for computation and payment of subsidies on overquota production. Pursuant to such application, and on April 1, 1943,

the quota previously assigned such company was revised to the following:

	Zinc	Lead	Copper
"A" Quota	0	0	0
"B" Quota	0	0	0
"C" Quota	0	--	--

(R. 13)

Such approval was given upon the express condition that all premium payments made be devoted to the development of said company's mine, and said company was required to and did furnish to the Quota Committee monthly reports showing general progress, expenditures and footage development, segregated between the several items of the program. (R. 13)

The work so prosecuted resulted in greater production than estimated and the bonuses paid under such quota exceeded the estimated costs of such program, and on June 23, 1943, the quota assigned such company was revised so as to reduce the amounts payable, and subsequently was further revised to further reduce the premiums payable. (R. 14)

Said company then protested to the Quota Committee, contending that the quotas so assigned were inadequate to permit of the continued operation of the company's mine and the continuance of the necessary development program, and on September 8, 1944, the Quota Committee revised the quota so assigned retroactive to February 1, 1944 so as to increase the sums payable, and

as of September 1, 1944 canceled all accumulated production deficits. (R. 14)

Pending action on such protest, said company did not file monthly production affidavits but after the revision thereof, and on September 28, 1944, said company filed such affidavits covering the period from February 1 to August 31, 1944, and subsequently received the subsidies payable to it on such revised quotas. (R. 14)

On December 14, 1944, the Non-Ferrous Commission authorized retroactive vacation pay, which said company was required to and did pay and to compensate therefor said company applied to the Quota Committee for a further revision of the quota assigned it and upon such application and on June 6, 1945, the quota assigned for the month of September, 1944, was further revised to increase the subsidies payable, and on June 12, 1945, said company filed a supplemental affidavit of overquota production for the month of September, 1944, and pursuant thereto received the additional sums payable on account of such last revision. (R. 15)

All monthly production quotas were computed and subsidies were paid on the basis of the percentage of the total metal contents of the qualified materials in the ores from time to time specified under Amended Rule No. 13 of the Quota Committee, and for the purpose of determining the amounts payable, such total metal contents were determined by sampling and assaying before any conversion of the ores and before any processing of

the ores other than such crushing as is required to permit of sampling for assaying. (R. 31)

5. *Kennecott Copper Company.*

In the case of Kennecott, the quota was 46,000,000 pounds of "returnable" copper per month, computed on 97% of the concentrate assay samples after milling and without regard to subsequent smelting and refining, or sale if it occurred of the marketable product—refined copper. (R. 7, 23, 29 and 30, Case No. 7297)

(Kennecott joins herein in the argument that subsidies, regardless of how paid, were not intended by the legislature to be included in the occupation and net proceeds tax bases.)

(It has filed a separate brief on its further contention that the subsidies paid to it are excluded, even under the ruling of Combined Metals Reduction Co. et al v. State Tax Commission, 176 P. 2d 614.)

(g) *As to the marketing of ores or metals.*

The complaints of Park Utah Consolidated Mines Company, Silver King Coalition Mines Company and Chief Consolidated Mining Company, severally allege that all ores produced by them were sold under bona fide contracts of sale at the maximum price fixed by the Office of Price Administration; that the total amount received upon such sales was reported to the State Tax Commission, and that no other or further amount was received from the sale of such ores. (R. 11)

The complaint of the United States Smelting Refining and Mining Company alleges that most of the ore produced by that company and its lessees was shipped for treatment at its lead-zinc flotation mill and lead smelter at Midvale, Utah; that the zinc concentrates and lead bullion resulting from such treatment were shipped out of the state for further processing to refined metal,—such processing being done in part by a subsidiary company and in part by independent companies, principally on a toll basis which provides for the return of an agreed percentage of equivalent metals. That the refined metals so returned are ordinarily stored and in due course marketed by the company through its New York sales office. That the balance of the ores produced by the company and its lessees were sold under bona fide contracts of sale. All ores were sold at ceiling prices while such prices were in effect, and at other times were sold at market prices. That the total amount received from the sale or conversion into money or its equivalent was reported to the State Tax Commission. (R. 10 in Case No. 7324)

(h) *As to the constitutionality of the inclusion of subsidy payments in computing net proceeds.*

That the tax measured by net proceeds, exacted and paid as aforesaid was a tax on property and could be lawful and valid only insofar as based on the value in money of the gross proceeds from the mine during the applicable year, after making the deductions provided for by statute and multiplying the remainder by two.

That various and widely differing quotas were determined by joint action of the War Production Board and Office of Price Administration for many metalliferous mines of Utah during the applicable year, and in all cases where the production of any of said mines exceeded its quota fixed for lead, copper, or zinc, a subsidy was paid to the producer by Metals Reserve Company or Reconstruction Finance Corporation, Office of Metals Reserve. That the amount of any payment thus made had no relationship to the value in money of any ores or metals produced from or to the "net annual proceeds" of such mine, but was dependent only on the quantity of zinc, lead or copper produced, and was paid by way of bounty for production in excess of a fixed quota. That the value in money per ounce or per pound of any metal produced from any mine in Utah during such year, and the nature and character thereof, were identical, regardless of whether or not a part or all of such metal had been produced in excess of quota and regardless of whether or not any bounty or subsidy was paid. That the assessment and inclusion of such subsidy payments or any of them as a part of the "gross proceeds" or "net annual proceeds" of ores or metals from Utah mines resulted in the employment of a different yardstick for assessing the value of each mine; would and did create an utter lack of uniformity in levying the property tax thereon, and was an unwarranted and unlawful departure from the fundamental basis upon which any assessed value or property tax must rest, to-wit: the value in money of the assessed property. That such

assessment or inclusion of such subsidy payments or any of them as part of the gross proceeds or net annual proceeds of ores or metals from a mine and said tax levy to the extent complained of would and did violate the provisions of Section 2 of Article XIII of the Constitution of the State of Utah requiring that all tangible property not exempt be taxed in proportion to its value, to be ascertained as provided by law, and the provisions of Section 3 of said Article XIII that the Legislature should provide by law a uniform and equal rate of assessment and taxation of all tangible property in the State according to its value in money, and shall prescribe by law such regulations as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its tangible property, and would and did violate the provision of Section 2 of Article I of said Constitution, that the people shall have equal protection and benefit from their government, and would and did violate Section 24 of said Article I, which provides that all laws of a general nature shall have uniform operation. (R. 17-19)

II.

STATEMENT OF ERRORS

As stated above the sole question presented for determination is whether or not the court below erred in dismissing the several appellants' amended complaints which, alleging the foregoing basic facts in detail as

affecting each appellant, asserted that the subsidies received in the year in question in each case should have been excluded in determining the mine occupation tax or the property tax measured by net proceeds assessed against the respective appellants.

III.

ARGUMENT

1. *The premium price plan was an outright subsidy arrangement.*

Premiums were paid under the authority of the Emergency Price Control Act of 1942, as amended. This Act empowered the Administrator in behalf of the United States, whenever he determines that the maximum necessary production of any commodity is not being obtained, to make *subsidy payments* to domestic producers of such commodity in such amount and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof.

Such payments were, in the early years of the plan, made through Metals Reserve Company, a subsidiary of Reconstruction Finance Corporation, and later after the functions of such subsidiary had been transferred to the parent corporation, were made through Reconstruction Finance Corporation, Office of Metals Reserve.

Metals Reserve Company, in a report to a committee of Congress, stated with respect to the making of such payments by it that:

“GENERAL

“Premium payments to producers participating in the premium price plan are made and all fiscal details handled by Metals Reserve Company, an agency of the United States created pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, which secures the required funds from Reconstruction Finance Corporation, its parent corporation. The actual functioning and supervision of operations is conducted by a small staff in the Washington office and by means of agents located throughout the United States.

“MRC AGENTS

“Since the premium price plan is an outright subsidy arrangement, Metals Reserve Company does not acquire title to the metals on which the premiums are paid, such material being purchased through ordinary commercial channels by the smelting and milling companies which receive the miners’ production. Various smelting and milling companies have since February 1942, when the premium price plan was inaugurated, been appointed agents of Metals Reserve Company, and administration of the plan is carried out in the main by these agents, who act pursuant to instructions furnished them by Metals Reserve Company.” (Page 151)

Senate Subcommittee Print No. 8, issued February 1, 1946, pursuant to Senate Resolution 28, and entitled “Premium Price Plan for Copper, Lead, and Zinc.”

“PAYMENT PROCEDURES

“Premiums are paid on a monthly basis, the amount payable being determined by *the quantities of overquota production received in accordance with Metals Reserve Company’s procedure during a given month at the mill or smelter to which the producer delivers his production*. To establish his eligibility, the producer must file with the Metals Reserve Company agent a copy of the official quota assignment issued to him by the Quota Committee, Premium Price Plan for Copper, Lead, and Zinc. *As soon as the amount of production eligible for premiums is determined in accordance with premium price plan rules, the agent handling the production informs the producer thereof and thereafter receives from the producer two counterparts of a sworn affidavit * * * certifying to his overquota production and requesting premium payments thereon. Settlement weight and assays, as agreed upon between the receiving plant and the producer are used as a basis in determining the amount of metals eligible for premium payments. These producers’ affidavits receive their primary clearance by the agents in the field and are transmitted to Washington for review and final approval, accompanied by the agents’ statement of monthly production * * * summarizing items handled by the particular agent during the month in question. After such review and approval, the agents are authorized to effect actual disbursements to the producers.*” (Id. Page 153)

“PERIODIC AUDITS OF AGENTS’ RECORDS

“In the second quarter of 1943 arrangements were made for agents of Metals Reserve Com-

pany located in loan agencies of Reconstruction Finance Corporation to undertake examinations of the records of the various smelting and milling companies pertaining to the premium-price plan from February 1, 1942, to the close of the quarter preceding the date of the first examination and for quarterly or semi-annual examinations of such records to be made thereafter as promptly as possible after the close of each quarter year. * * *” (Id. Page 154)

“FIELD REPRESENTATIVES AND INVESTIGATORS

“In addition, Metals Reserve Company has arranged for representation when necessary at weighing and sampling operations and for independent assaying of production from mines owned or operated by smelting or milling companies acting as agents under the plan. * * *” (Id. Page 154)

Senate Subcommittee Print No. 8 contains also a statement prepared by the History Branch and Office of Metal Mining Analysis of the Office of Price Administration, explaining the evolution of the premium price plan in which it is stated that:

“EVOLUTION OF PLAN

“The premium price plan had its origins in the efforts of the Government, early in the defense program, to maintain and expand production of copper, lead, and zinc, and to maintain price stability in these strategic metals. The

problem faced by the Government was that of encouraging metal production without greatly increasing the general level of metal prices. This was especially difficult because in the mining industry increased production is associated with rapidly increasing costs, and a large increase in prices is therefore necessary to induce a small increase in production. In World War I the general level of metal prices was raised to cover the costs of all but the very highest cost mining operations. In this war, such price inflation was avoided by using differential pricing techniques that involved either Government purchase of the output of high-cost producers or subsidy payments for marginal metal production.

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

“*RULE 13 revision*

“The basis upon which premium payments were to be made, as set forth in rule 13 of the original announcement, was metal paid for at custom mills and smelters. *This had been found to be unworkable, because of the wide variations in the terms of such contracts.* For example, a number of mills and smelters paid for 100 percent of the metal content of ores, taking their discounts

in the form of high treatment charges and prices below prevailing markets, while others might pay for somewhat less metal than they actually recovered at prevailing prices and with lower treatment charges. The competitive advantage to the first group of premium payments against which there were no discounts is apparent. Further, the administrative burden created by calculating the premium payments in each quota revision on a different basis was more than the frail Committee organization could bear. After long consultation with the industry the Committee issued a revised rule 13 effective December 1, 1942. It prescribed standard factors to be applied to the metal content of ores and concentrates received at different types of treatment plants. * * * (Page 85)

“Wage increase policy

“By late summer of 1942 the annual negotiation of labor contracts in the Western States had raised the question whether quotas would be revised to compensate for the increased costs due to wage increases and whether this would be done in contemplation of such increases or retroactively after they were authorized by the War Labor Board. By the spring of 1943 the policy was well settled that quotas would be revised to compensate for the increased costs due to wage increases after they had been authorized by the War Labor Board (later the Director of Stabilization) insofar as operating margins were not adequate to absorb the increase, and that such quota revisions might be made retroactive to allow of accurate calculation of the amounts due on retroactive wage increases. Later a procedure was developed under which the Quota Committee acted as agent for OPA in receiving notice of contemplated requests for compensation if wage increases were

authorized and in turn supplied OPA with estimates of the cost to be used in advising the Director of Economic Stabilization with respect to the advisability of the proposed increase.”

“*Effective dates of quota revision*

“In connection with the decision of policy as to compensation for wage increases, important decisions were made as to the effective dates of quota actions. Where wage increases were authorized retroactively substantial back payments were involved. In such cases, where past operating margins for the period covered by the wage increase had been inadequate to absorb the increased wage costs, the Committee recommended retroactive quota revisions to compensate for such increases. A question was raised as to whether MRC funds might be expended to pay for past losses as distinguished from current production. It was, however, ultimately agreed that retroactive revision was permissible in the special case of a retroactive wage increase. * * *” (Page 87)

The report then continues with a description of the prescribed procedure for securing quota revisions. Specific illustrations are given of the basis employed from which it appears that *the greater the loss to a mine in producing ore which it sells at ceiling price or market price, the higher per pound were the subsidies paid by the Government for the production of such ore.* In each case the basis for the adjusted quota as recommended by the analyst of the Quota Committee is given.

For instance, at page 131, appears the following:

Basis for quota

	Per ton ore
Net smelter	\$13.08
Operating costs:	
Development	\$1.40
Mining	9.25
Milling	2.82
Other	.52
	<hr/>
	13.99
	<hr/>
Operating loss	.91
Amortization cost	.64
Margin	3.98
	<hr/>
Amount of premiums necessary	\$ 5.53

2. *The particular questions here presented have not heretofore been determined by this court.*

Presumably the lower court in sustaining the demurrers to the amended complaints of the respective appellants relied upon the cases of Combined Metals Reduction Co. vs. State Tax Commission, 176 Pac. 2d 614, and United States Smelting Refining and Mining Company vs. Phares Haynes as County Treasurer of Tooele County, 176 Pac. 2d 622.

Such cases were decided by this honorable court on January 6, 1947.

The first involved the question of whether or not subsidy payments made for overquota production of ores

were properly includible in determining the mine occupation tax payable by a mining company; the second involved the question of whether or not such payments were properly includible in determining the net annual proceeds of a mine and hence the assessed value of such mine for purposes of the general property tax.

In the occupation tax case, this honorable court based its opinion upon that part of original Rule 13 of the Quota Committee pertaining to metals sold under settlement contracts, and the records in the particular cases then before the court which the majority of the court held showed sales under settlement contracts. Original Rule 13, as hereinabove noted, was rescinded effective as of the close of business November 30, 1942. Consequently it is not applicable with respect to any of the cases presently before this court, where the records involved also differ.

In the occupation tax case this honorable court said:

“ * * * We base our conclusion that premium payments were made for ores sold and not for the mere production of such ores upon part of a joint statement issued in February of 1942, by the War Production Board and the Office of Price Administration, wherein it is stated: ‘Premium payments will be based upon metal *paid* for under the terms of settlement contracts. Quotas, of course, will be fixed on the same basis. If no settlement contracts exist, quotas and premium payments will be computed on the basis of 95, 90 and 85 per cent of the metal content in the case of copper, lead and zinc, respectively . . .’

(Italics ours) It is self-evident that metals are not paid for under settlement contracts unless such metals are sold.

“Since it appears that the ‘premium prices’ paid to the mining companies are for metals sold by them, and since our occupation tax statute provides that the basis for determining the amount of taxes due where there has been a sale of metals under a bona fide contract of sale is ‘the amount of money or its equivalent actually received . . . from the sale . . .’ it is our opinion that the lower court erred in holding that the ‘premium payments’ received from the Metals Reserve Company should not have been included by the Tax Commission in determining the amounts due.”

As noted in the statement of facts, and as appears from the allegations of the complaints, original Rule 13 was found to be inequitable, was rescinded, and a new Rule 13 was adopted. This provided that subsidy payments would be based on certain stated percentages for the respective metals, regardless of the percentages of the metals actually recovered or paid for under mine-smelter contracts or mill-smelter contracts or mine-mill contracts. Such amended rule was subsequently further amended to take account of the different types of processing plants to which the ores were shipped. One or the other of such amended rules is applicable in all cases here involved, *and neither such rule required as a condition of payment of the bounties that the ores be sold on account of the production of which such bonuses were payable.*

In the net proceeds case this honorable court held such payments properly includible because:

“(b) Premium payments apply only to ores shipped to the smelter or reduction works. They are made on the basis of the determined metal content of the precipitates and concentrates delivered to the smelting company. In other words, the premium payments are made only on and when the ores extracted from the mine are converted into concentrates or bullion where the quantity of the various metals is readily determinable and the value thereof easily computable. When the extracted ores have been converted or refined into metals in such form that they have a ready market at definite or readily determinable prices so that at any time the miner can dispose of them and receive the money therefor, they have been converted into the equivalent of money, and are to be included in the computation of gross proceeds for the purpose of fixing valuation or tax base. *Salt Lake County v. Utah Copper Co.*, 93 Fed. 2d 127 (certiorari denied 303 U.S. 652). See also Sec. 80-5-59, U.C.A. 1943; *Mercur Gold Mining Co. v. Spry*, 16 Utah 222, 52 P. 382. But in fixing the value or monetary equivalent of the refined metals bullion or concentrates for determination of the gross proceeds, are the premium payments to be included as part of the proceeds realized from ores extracted from the mine? There can be no question but that these premium payments accrue to the miner from the converting, or rendering, into a marketable condition (the equivalent of money) or ores extracted from the mine. They are therefore ‘proceeds realized’ from ores extracted from such mine. And since the tax base or valuation is fixed from the gross, total or whole proceeds so accruing, these pay-

ments must be included in computing the gross proceeds realized.

“Are they moneys received from a sale of ores or metals? These ores or metals belonged, and as far as the record shows, still belong to the miner. If such is correct, there never was a sale, and these moneys could not be received from a sale of the ores or metals. But if the fact be that these ores or metals extracted therefrom were or have been sold, then under our decision in *Combined Metals v. Tax Commission*, No. 6869, just decided, Utah, P. 2d, these payments would constitute part of the proceeds received from a sale, and properly be a part of the gross proceeds realized. The writer dissented from the opinion in that case and expressed his views therein. However, while that opinion stands it binds the writer, as well as the bar and laymen, and I accept it as the law of this jurisdiction. It follows that whether the metals have been sold or retained by the miner, the premium payments are part of the gross proceeds realized from ores extracted from the mine, and are to be included in computing the tax base or valuation of the mine for tax purposes.”

In other words, this honorable court held that if its opinion in the mine occupation tax case was correct, the subsidies would constitute part of the proceeds received from a sale, notwithstanding that (as the court stated) the record in the net proceeds case failed to disclose any sale. Also that, subsidies are paid only when the ores extracted from the mine are converted into concentrates or bullion where the quantity of the various metals is readily determinable and the value thereof easily com-

putable; and that when the extracted ores have been converted or refined into metals in such form that they have a ready market at definite or readily determinable prices so that at any time the miner can dispose of them and receive the money therefor they have been converted into the equivalent of money, and are to be included in the computation of gross proceeds for the purpose of fixing valuation or tax base.

We do not have the record before us and must assume that the record there showed that the premiums were only paid when the ores had been converted into the equivalent of money.

In the present cases, involving tax based upon net proceeds, it is on the contrary (and in accordance with the facts) alleged that:

“Monthly production quotas were computed and premiums were paid on the basis of the percentage of the total metal contents of the qualified materials in the ores from time to time specified under Amended Rule 13 of the Quota Committee, and for the purpose of determining the amount of premiums payable, such total metal contents were determined by sampling and assaying *before any conversion of the ores* and before any processing of the ores other than such crushing as is required to permit of sampling for assaying.”

For the purpose of the present proceeding, the material allegations of the complaints must be accepted as correct. Under such allegations it definitely and affirmatively appears that the payment of subsidies was

not conditioned upon a sale of the ores *nor upon their conversion into the equivalent of money*. On the contrary, the subsidies were paid when the quantities of the respective metals on account of the production of which they became payable were determined by the designated representatives of Metals Reserve Company or Reconstruction Finance Corporation, Office of Metals Reserve, after sampling and assaying.

Thus a new question is here presented, and the prior decisions are not here applicable.

3. *The subsidies received by appellants were not properly includible in determining the mine occupation tax.*

Section 80-5-66, Utah Code Annotated 1943, provides for the payment of an occupation tax equal to 1% of the gross amount received for or the gross value of metalliferous ores sold, and fixes the basis for computing such tax when the ore or metals is sold under a bona fide contract of sale as follows:

“(a) If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim from the sale of all ores or metals during the calendar year less a reasonable cost, if any, of transporting the ore from the place where mined to the place where, under the contract of sale, the ore is to be delivered.”

In the two cases here pending (other than the Kenne-cott case), involving mine occupation tax, it is alleged that all ore produced was sold under bona-fide contracts of sale for which the producer received a stated amount. That this amount did not include the subsidies, the inclusion of which in computing such tax is here in issue. Consequently these cases fall under subdivision (a) of such section.

Subdivision (2) of Section 81-1-1 of the Utah Code defines a sale of goods as follows:

“A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.”

As this court has heretofore pointed out, the consideration need not be received from the buyer; nevertheless under the clear wording of the statute, the “consideration” is limited to what is received *on account of a transfer of the property in the goods to the buyer*.

The subsidy payments received by the appellants in the mine occupation tax cases not only were not received from the buyers, but were not received on account of a transfer of the property in the goods to the buyer.

On the contrary, as the records show, these payments were received as a bonus from the Government on account of the overquota production of certain strategic materials.

The complaints specifically allege:

(a) That all ores were sold under bona fide contracts of sale.

(b) Were sold at the maximum price fixed and established by the Office of Price Administration as the highest price at which they might lawfully be sold.

(c) That under the authority of the Emergency Price Control Act of 1942, empowering the Administrator of the Office of Price Administration to make subsidy payments to domestic producers of certain commodities in order to obtain the necessary maximum production thereof, certain agencies of the United States were directed to make and did make subsidies for the production of copper, lead and zinc in excess of assigned quotas. These quotas were established with a view to ensuring to the mine operator an operating margin after taking into account operating costs including new development, exploration, mill and smelter treatment charges, and were adjusted from time to time in the light of experience and revised to take account of changing costs and recoveries.

(d) That such subsidies were computed on the basis of a stated percentage of qualified metal contents of ore produced and delivered to a processing plant regardless of the percentage of metals actually recovered or paid for.

(e) That in order to determine the quantities of such metals produced by an independent producer sell-

ing its ores and eligible for the payment of subsidies, Metals Reserve Company designated as its agents certain milling and smelting companies. These companies were kept currently advised of the quotas assigned to each producer customarily delivering ores to it and were required to procure from each producer affidavits as to the eligible ores produced and available for the payment of subsidies, to verify the statements contained in such affidavit, and to certify the same to Metals Reserve Company. That on the basis of the information so furnished, Metals Reserve Company placed its agents in funds with which to pay for its account the applicable bounties, which were ordinarily paid from thirty to ninety days before the recoverable metals were converted or rendered into marketable condition.

(f) That in the case of Chief Consolidated Mining Company, the quota assigned it as of January 1, 1944, was assigned on that company's report to the Quota Committee on a development program which included the driving of a drift from one mine to another for water disposal purposes and which report included detailed estimates of the cost of the work proposed to be done and of the estimated production which would be obtained and applicable for computation and payment of premiums on overquota production.

That such quota was revised on the completion of such work so as to reduce the sums payable; and upon a showing by the company that such revised quota was inadequate to permit of continued operations the same was again revised so as to increase the amounts payable

and subsequently was further revised to again increase the subsidies to compensate for increased milling charges.

(g) That original Rule 13 of the Office of Price Administration and War Production Board, which provided in part that premium payments would be based upon metal paid for under the term of settlement contracts, was rescinded effective as of the close of business November 30, 1942, and a new Rule 13 was adopted for the stated purpose of placing premium payments on a uniform basis and to simplify and accelerate the administration of the premium price program.

(h) That none of the ores produced by either such company was sold by it to Metals Reserve Company, and that the amounts received by such company from Metals Reserve Company were not amounts received from the sale of such ores or the gross value thereof, but on the contrary were amounts received from the United States Government through its agencies on account of excess production of ores beyond assigned quotas.

Under such allegations and in the light of the record here, it is submitted that by no stretch of the imagination can it be contended that subsidy payments were received on account of, or conditioned on, a sale of ores. This is further evident in the case of Kennecott.

4. *The subsidies received by appellants were not properly includible in determining gross proceeds or net*

proceeds and thereby fixing the assessed value of a mine for purposes of the general property tax.

Section 80-5-57, Utah Code Annotated 1943, defines the phrase "net annual proceeds" and provides in part:

"The words 'net annual proceeds' of a metaliferous mine or mining claim are defined to be the gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent of all ores from such mine or mining claim extracted by the owner or lessee, contractor or other person working upon or operating the property, including all dumps and tailings, during or previous to the year for which the assessment is made, less the following and no other, deductions: . . ."

- (a) *The subsidy payments were not "proceeds realized * * * from the sale or conversion into money or its equivalent" of ores.*

Insofar as a sale of ore is concerned, what we have just said with respect to the mine occupation tax cases is equally applicable to the net proceeds cases, except that in the case of United States Smelting Refining and Mining Company certain ores or metals were sold at a time when there were no ceiling prices. At such times the ores were sold at market prices.

Bearing in mind that all subsidies were paid pursuant to the same authority, it should further be noted as evidencing the impossibility that payment of premiums was made upon a sale of ores or conditioned on

a sale of ores, that in the case of Park Utah Consolidated Mines Company, the quota assigned it April 1, 1943, was assigned upon presentation of a program designed to explore and develop the lead-zinc possibilities of its property. This program included the unwatering of the Ontario shaft and the Park Utah shaft, and the production at the highest possible rate from all ore bodies encountered in pursuance thereof. Such report was accompanied with detailed estimates of the cost of doing such work and of the estimated production which would be obtained and be applicable for computation and payment of subsidies on overquota production. Such quota was assigned on the further express condition that all payments to be made were to be devoted to the development of the company's mine, and the company was required to furnish to the Quota Committee monthly detailed reports of progress.

Such quota was revised to reduce subsidies payable when it appeared that under the assigned quota, payments exceeded estimated cost of the program, and subsequently upon a showing that the revised quota was inadequate to permit of continued operation and development, it was again revised so as to increase the amounts payable and to cancel all accumulated production deficits.

Pending such revision the company did not file monthly production affidavits and consequently received no bonus; but when the revision was made authorizing increased payments, the company filed affidavits covering the period from February 1 to August 31, 1944, and

subsequently received the sums payable to it on such revised quotas.

Again and thereafter in December, 1944, to compensate for retroactive vacation pay, the quota for September, 1944, was revised on June 6, 1945 so as to increase the amounts payable, and on June 12, 1945, the company filed a supplemental affidavit of overquota production for the month of September 1944, and pursuant thereto received the additional subsidies payable on account of such last revision. Obviously these bounties were not something received on a sale of its ores, or even something to which the company was entitled at the time of the sale of its ores, but something to which it became subsequently entitled upon the successive revisions of its assigned quota.

With respect to United States Smelting Refining and Mining Company it should further be noted that the subsidies received could not have been received upon a sale of its ores, since under the allegations of the complaints the sums were paid on the basis of monthly affidavits showing the production according to such company's mine records, were usually received from thirty to ninety days before the recoverable metals were available for sale, and were paid unconditionally and without any right on the part of the agency of the Federal Government paying the same to receive back the premiums paid or any part thereof in the event the metals recovered from the ores for the production of which such subsidies were paid became lost, destroyed, were re-

tained by the company or otherwise failed to enter the channels of commerce or to be sold.

Such subsidies, it is further alleged in the United States Smelting Refining and Mining Company case, were paid pursuant to instructions issued by Metals Reserve Company under date of May 13, 1942, which provided that they should be computed on the basis of the amount of recovered metal involved, in all cases where no purchase contracts existed and where production was not treated on a toll basis.

The quotas assigned this company were likewise revised from time to time on the basis of detailed estimates of costs and production and to compensate for retro-active increased costs.

Nor were the subsidies received by these companies received from the conversion into money or its equivalent of any ores:

In each case it is expressly alleged in accordance with the facts that the monthly production quotas were computed and subsidies were paid on the basis of the percentage of the total metal contents of the qualified materials in the ores from time to time specified under Rule 13 of the Quota Committee, and that for the purpose of determining the amounts payable, such total metal contents were determined by sampling and assaying *before any conversion of the ores*, and before any

processing of the ores other than such crushing as is required to permit of sampling for assaying.

Obviously, therefore, payment of the Federal subsidies was not conditioned on the conversion into money or its equivalent of any ores; on the contrary such bonuses were paid before any conversion of the ores and even before any processing other than such crushing as is required to permit of sampling for assaying.

(b) *The inclusion of subsidies in the net proceeds tax base would be unconstitutional.*

Were Section 80-5-57 so construed as to permit of the inclusion of bounty payments in computing the gross annual proceeds or net annual proceeds of a mine, it would violate the provisions of Sections (2) and (3) of Article XIII of the Constitution of Utah.

As the record here shows, subsidies paid to the mining companies were increased as costs increased; the greater the costs of production the greater the amount of subsidies that were paid in order to enable the mine to continue production.

As stated in the report of the Subcommittee, printed in Senate Subcommittee Print No. 8, the premium price plan had for its objects:

“1. The expansion or maintenance of *production* by paying premiums for overquota production sufficient to compensate for the mining of lower-grade ores, thus increasing ore tonnage.

“2. Bringing idle and new mines into *production*.

“3. Paying for the more intensive development of mines, to expand or maintain *production*.

“4. Provision that price should be no impediment to *production*.” (Page 139)

Production was demanded, and subsidies were paid and increased when necessary to *insure continued production*.

Had net proceeds been sufficient to insure continued production, there would have been no necessity for the payment of any subsidy. In other words, *subsidies are the exact opposite of net proceeds*. They represent not what a mine is capable of earning, but what in addition to earnings is necessary to be expended for the continued operation of the mine.

It needs no citation of authority to realize that the value of a mine depends upon its production costs, and that the greater the costs of production the less valuable is the mine.

To say therefore that it is proper to include subsidies in net proceeds, would be the equivalent of saying that the more costly the operation of a mine, the more valuable the mine is.

Sections (2) and (3) of Article XIII of the Constitution of Utah require that all tangible property in the state not exempt shall be taxed in proportion to its value to be ascertained as provided by law, and that the Legis-

lature shall provide by law a uniform and equal rate of assessment and taxation of all such property according to its value in money.

The Legislature has defined what is meant by "value":

“ ‘Value’ and ‘full cash value’ mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor.”
(Section 80-3-1, Utah Code Annotated 1943)

Would anyone contend for a moment that a mine would be taken in payment of a just debt from a solvent debtor at an amount determined by including in the valuation, moneys required to be expended over and above the net proceeds in order to permit of operation?

It has been recognized by the courts that the special method of valuing mines, based upon net proceeds, does not work exact equality; but that in the long run and because the value of a mine like any other property determines upon what it can earn, such method results in substantial equality.

But to inject into the basis of valuation something entirely foreign thereto, to *add* where you should logically *subtract*, would in our opinion, violate the constitutional provisions as to equality of taxation.

The Supreme Court of the United States had occasion to consider such provisions of the Utah Constitution in a case in which it was sought to include as part of net proceeds amounts received as royalty from the lessee on

the treatment and reduction of certain old tailings. The court commented upon the effect of the constitutional provision providing a special method of assessing mines and, holding that such royalties might not properly be included, said:

“The state Constitution plainly contemplates that all property, irrespective of its character, shall be taxed ‘according to its value in money.’ The provision with reference to the taxation of metalliferous mines does not mean to depart from this rule, but recognizes that their value cannot be determined in the ordinary way, since the ores which constitute the wealth of such property are hidden in the earth, and, as a general thing, disclosure of their extent and character must await extraction. The Constitution, therefore, provides not for disregarding value in the assessment of taxes upon mines, but for arriving at it in a special manner,—that is, by a measurement proportioned to the net annual proceeds derived from the property. * * * Undoubtedly in fixing the multiple of the net annual proceeds upon which the value of metalliferous mines is to be calculated, a good deal of latitude must be allowed the legislature and the taxing authorities, but the power is not unbounded. Without attempting to delimit the boundaries,—a matter primarily for the state courts,—it is sufficient for present purposes to say that, in our opinion, they have been clearly exceeded in the instant case. The net proceeds here involved arose from a lot of refuse material, which long prior to the imposition of the tax, had been severed from the mining claims, removed to a distance, submitted to the process of reduction, and stored upon lands separate and apart from the claims. Moreover, but one tenth

of the amount of these net proceeds was realized by the owner of the mining claims. To treble the total of these proceeds for the purpose of basing thereon an altogether fictitious value for a mine worked out and worthless years before the adoption of the statutory provision supposed to confer the authority to do so results in such flagrant and palpable injustice as would cast the most serious doubt upon the constitutionality of such provisions if thus construed.

“While the taxing authorities cannot be held to an inflexible rule of equality, even in respect of properties in the same classification where their nature is such as to practically preclude the application of such rule, *it does not follow that all distinctions are to be ignored and indubitably dissimilar and readily distinguishable things treated as though they were the same.*”

South Utah Mines and Smelters vs. Beaver County, 262 U.S. 325, 67 L. Ed. 1004.

Undoubtedly the court was correct in holding that royalties so received might not properly be included in computing net proceeds. Yet such royalties did, remotely at least, come from the mine operation, and did represent part of what the mine *earned*.

It is submitted that it would do even greater violence to the constitutional requirements of equality of taxation, to include subsidy payments made by Government to meet the deficit over and above mine earnings required to permit of continued operation of the mine.

CONCLUSION

Consolidation of four cases (and of Kennecott's appeal on one phase), plus desire of counsel fully to inform the court of the background facts in each case, has resulted in an already lengthy brief. In conclusion we submit:

(a) The subsidies in question were paid by the United States, not for the sale of ores, but to stimulate production and defray part of the costs thereof. The records in these cases fully develop the true fact that the federal subsidy payments were in no way a part of the sales prices received by the mining companies for ore or metals sold under bona fide contracts of sale, nor conditioned upon the conversion of such ores into the equivalent of money.

(b) Utah's Legislature never intended to include such subsidies in the tax base when it used the words "the amount of money or its equivalent actually received * * * from the sale of all ores or metals * * *" in the occupation tax statute; and the words "the gross proceeds realized * * * from the sale or conversion into money or its equivalent of all ores * * *" in the net proceeds tax statute. Such subsidies were then unknown and the language used was inapt to embrace them.

(c) The inclusion of the subsidies in the net proceeds tax base is clearly in violation of the state constitution, and therefore is a further reason for holding that such was not the legislative intent.

(d) The fact that the majority of the court found that the records in some of the previous cases before this court showed that the payment of the subsidies was tied in with the payment of the purchase price for ores which were sold or when market value was readily ascertainable has no application in these cases. Here the records clearly show no such connection. This is emphasized particularly in the case of United States Smelting Refining and Mining Company (Case No. 7324) and the case of Kennecott (Case No. 7297).

We respectfully submit that the facts here pleaded are so free from doubt as not to call for reliance upon the familiar principle that tax statutes are to be construed in favor of the taxpayer where there is doubt, and that the judgments of the Lower Court should be reversed and the cases remanded for further proceedings.

Respectfully submitted,

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