

1949

Kennecott Copper Corporation v. State Tax Commission : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Kennecott Copper Corp. v. State Tax Comm.*, No. 7297 (Utah Supreme Court, 1949).
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In the Supreme Court of the State of Utah

CHIEF CONSOLIDATE MINING COMPANY,	<i>Appellant,</i>	Case No. 7323
vs.		
STATE TAX COMMISSION,	<i>Respondent.</i>	
PARK UTAH CONSOLIDATED MINING COMPANY,	<i>Appellant,</i>	Case No. 7334
vs.		
SUMMIT COUNTY, et al,	<i>Respondent.</i>	
SILVER KING COALITION MINING	<i>Appellant,</i>	Case No. 7332
vs.		
STATE TAX COMMISSION,	<i>Respondent.</i>	
UNITED STATES SMELTING REFINING AND MINING COMPANY,	<i>Appellant,</i>	Case No. 7324
vs.		
SALT LAKE COUNTY, et al,	<i>Respondent.</i>	
KENNECOTT COPPER CORPORATION,	<i>Appellant,</i>	Case No. 7297
vs.		
STATE TAX COMMISSION,	<i>Respondent.</i>	

RESPONDENTS' BRIEF

FILED

15-1910

CLERK, SUPREME COURT, UTAH

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RESPONDENTS' BRIEF

STATEMENT OF FACTS

The statement of facts in the Appellant's Brief is substantially correct in stating the contentions and allegations

of the various appellants as set forth in their complaints and amended complaints. Such statement of facts is therefore accepted except as it may be augmented to some extent throughout the argument in this brief by reference to the pleadings in the cases and by referring more fully to matters in the pleadings not covered in the statement of facts of the appellants.

ARGUMENT

The Appellants have set forth their arguments under four subdivisions numbered one to four, the latter having sub-headings (a), (b), and (c). We believe that all of these arguments can conveniently and effectively be met under the following headings:

1. The Subsidy Payments Under the Premium Price Plan were Properly Included in the Basis for Determining the Mine Occupation Tax.

2. The Subsidy Payments Under the Premium Price Plan were Properly Included in Determining Gross Proceeds and Thereby Fixing the Assessed Value of the Mines.

(a) The inclusion of payments under the premium price plan in the Net Proceeds Tax Base would not be unconstitutional.

ARGUMENT I

THE SUBSIDY PAYMENTS UNDER THE PREMIUM PRICE PLAN WERE PROPERLY INCLUDED IN THE

BASIS FOR DETERMINING THE MINE OCCUPATION TAX.

One of the arguments set forth by the appellants is that the premium price plan was "an outright subsidy arrangement." We do not believe it makes any difference by what name the payments are designated which were made under the premium price plan. If, however, by this argument appellants mean to indicate that such payments were outright gifts to the mining company and had no relationship whatsoever to the price paid for the ore or metals or to the value thereof and could therefore not be considered in any manner in arriving at a proper tax base in connection with the taxes to be assessed against the mining companies then such argument is absurd.

In Appellants' Brief they set forth under Argument 1, in great detail excerpts from a report made by the Metals Reserve Company to a committee of Congress. In view of the fact that these cases are before this court on judgments of dismissals entered after the court had sustained demurrers to the complaints and amended complaints and after appellants had declined to amend further their complaints, it seems to us improper to endeavor to bring into the record such extraneous matters as reports of the Metals Reserve Company to a Congressional committee. It is our understanding that under such circumstances the cases will be decided by this court upon the pleadings as filed in the court below and the rulings of the court thereon. If the report to the Congressional committee had been introduced or an attempt made to intro-

duce the same at a trial it would have been inadmissible as hearsay and surely in a case brought to this court on an appeal from an order sustaining a demurrer and a subsequent order dismissing the complaint there is no place for such a report.

Nevertheless, let us examine here just briefly what the situation is with regard to the nature of these payments. The very title of the plan is significant in showing that the amounts paid thereunder were to be and were a part of the price of the ore or metals produced. It was called the "premium price plan." The pleadings in these cases, and particularly the amended complaint in the Kennecott case, bring the cases right in line with the statement of Mr. Justice Wolfe in his concurring opinion in Combined Metals Reduction Co. et al. vs. State Tax Commission et al., 176 P.(2d) 614, wherein he states:

"That the so-called subsidy was in fact considered as an additional price for the metal in the ore is borne out by the fact that at first it was announced that the Metals Reserve Company would pay as an overall price, the ceiling plus the premium prices for domestic ores where production exceeded quotas which were to be fixed. But under the Emergency Price Control Act the Metals Reserve Company could not sell for any more than the maximum price established. Hence, if the Metals Reserve Company had paid respectively 17c for copper, 11c for lead and $9\frac{1}{4}$ c for zinc, it would have been required to have them smelted on a toll basis and then sold to the fabricator for 12c, $6\frac{1}{2}$ c and $8\frac{1}{4}$ c per pound respectively for copper, lead and zinc. While the ultimate outlay to the Government would have been substantially the same, it was simpler to have the mills or smelters pay only ceiling prices for the metals, the Metals Reserve Company paying the

producer the premium price if applicable. But even this method required a change in the regulation of the Office of Price Administration in May, 1942. This was immediately after setting up the 'premium price plan.' The change in the regulation required sales of copper, lead and zinc or ores containing such metals to smelters at ceiling prices, but permitted Metals Reserve Company 'pursuant to the premium price plan announced by the Federal Loan Agency, the War Production Board and the Office of Price Administration,' to pay the premium price or subsidy and provided it 'should exempt from the maximum regulations'. There should be little doubt then that the extra amount paid for metal in over-quota ores is part of a price."

These so-called subsidy payments were certainly not outright gifts. The Appellants themselves state that the payments were made for over-quota production and if they failed to meet their quota no payments were made by Metals Reserve Company. A real, tangible and valuable consideration existed for the subsidy payments. As was stated in the case of *Helvering vs. Clairborne-Annapolis Ferry Co.* (CCA 4th) 93 Fed. 2d 875:

"Bounties granted by a government are never pure donations but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or moral obligations to be recognized."

See also *Allen vs. Smith*, 173 U.S. 389, 402; 19 Sup. Ct. 446, 451; 43 L. Ed. 741; also *Baboquivari Cattle Co. vs. Commissioner of Internal Revenue* (CCA 9th) 135 Fed. (2d) 114.

It is our contention that the reasoning and rules laid down by this court in *Combined Metals Reduction Co. vs.*

State Tax Commission, *supra*, apply and are controlling in connection with the cases here involving the occupation tax. The contention of the Appellants is, however, that such case is not controlling and has no bearing on this matter now before the court. Appellants' contention is based upon the fact that the court stated therein:

"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, 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 . . . ' It is self-evident that metals are not paid for under settlement contracts unless such metals are sold. (*Italics added*).

"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."

Appellants' contention is that the statement referred to by the court in the above quotation was that contained in original Rule 13, which rule was subsequently amended. The

contention is further made that inasmuch as the Appellants allege in their complaints in the said cases that the amended Rule 13 provided that subsidy payments would be based on certain stated percentages for 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, and that they further alleged that such amended Rule 13 did not require as a condition of payment of subsidies that the ores be sold on account of the production of which such bonuses were payable, that we must conclude that the payment of the subsidies had no relationship to the sale of the ore or metals produced.

Such a conclusion cannot be properly drawn. The allegation in the complaint as amended to the effect that the amounts received as subsidies from Metals Reserve Company were not amounts received by plaintiff from the sale of such ores nor the gross value thereof are certainly nothing but conclusions of law. This is the very question at issue — the very legal conclusion to be determined. Where the complaint sets forth various facts in regard to methods of procedure, this court will determine from such facts the ultimate legal conclusion as to whether or not amounts received by the plaintiff from Metals Reserve Company were or were not received from the sale of such ores *or the gross value thereof*. Hence, the allegations in the complaint with regard thereto, being conclusions of law, are not binding upon the defendants and respondents herein and were not admitted by their demurrers, since the demurrers admit only facts well pleaded and not conclusions of law.

The original Rule 13, to which this court referred in its decision in the occupation tax cases, recognized that the ores and metals mined by the various companies were in ordinary course delivered to smelters or mills in connection with the sale thereof of the ores or metals and further recognized that in connection with most such transactions there were involved and in existence settlement contracts. That original Rule 13, however, further recognized that in some cases no settlement contracts exist and provided for a method of computing premium payments in such instances. In connection with the amended Rule 13, there is nothing to indicate that the premium payments were thenceforth to be made for any different purpose than had been made under the original Rule 13. In fact, the amended rules explicitly state that the purpose of changing Rule 13 was to place premium payments on a uniform basis and to simplify the administration of the program. Such change in procedure, however, did not alter the basic facts that such premium payments were still, as they had been before, a definite and integral part of the price paid for such metals or ores in connection with the sale thereof. Throughout the entire program, both before Rule 13 was amended and afterward, the premium payments were made as a part of the actual total price authorized and pursuant to the premium price plan inaugurated jointly by the Federal Loan Agency, the War Production Board and the Office of Price Administration. In other words, under O. P. A. regulations made in conjunction with the War Production Board the prices permitted to be paid for the metals were the ceiling prices plus the premium price. And the two of them together constituted the selling price of the ores and metals. The one was never divorced from the

other. We submit that the ruling of this court in the case of Combined Metals Reduction Co. vs. State Tax Commission, supra, is binding and controlling in the occupation tax cases here before this court, namely, Chief Consolidated Mining Co. vs. State Tax Commission, Silver King Coalition Mining Co. vs. State Tax Commission and Kennecott Copper Corporation vs. State Tax Commission, and that the order of the court below sustaining the demurrers of the defendants in each such case and the judgment dismissing the complaints as amended in each of such cases should be sustained.

KENNECOTT COPPER CORPORATION CASE

The Kennecott Copper Corporation has submitted a separate brief with regard to its particular case and has pointed out one additional factor which it contends differentiates the situation in Kennecott from the other cases and upon which it contends there is proper basis for reversal of the ruling of the court below. The allegations in the Kennecott amended complaint are in part,

“ * * * but said subsidies are nevertheless paid by said Metals Reserve Company without regard to date or fact of sale, are not computed on the refined metal produced or the sales prices thereof, and the refined metal is plaintiffs' ultimate product and plaintiffs' only product that is sold or that is commercial in character.” (Kennecott Record 23).

With regard to such allegations we submit again that they are conclusions of law—a legal conclusion as to the very question to be determined by these actions.

Furthermore, the pleadings of the Appellant, Kennecott Copper Corporation, must be taken as a whole and considered

as one unit. When so taken, such pleadings do not bear out the theory and contentions of Appellant as to the nature, purpose, and method of payment of the premium price monies. The amended complaint refers to a copy of the agreement under which said subsidies were paid the plaintiff and the form of the affidavit periodically submitted by plaintiff in connection with which said subsidy payments were made, said agreement and affidavit being marked exhibit "A" and made a part of the amended complaint. Although the complaint alleges that the payments were made without regard to the date or fact of sale (Kennecott Record 23), it is significant to note from the affidavit referred to as part of exhibit "A" attached to said amended complaint that the portion thereof entitled "Receipt from Producer" reads as follows:

"This is to certify to the Metals Reserve Company that the undersigned has received from the American Smelting and Refining Company, as agent for Metals Reserve Company, \$623,700,091.30 as a premium on 12,475,826 pounds of copper * * * delivered and sold in excess of (his) (its) monthly production quota as stated in the above affidavit." (Kennecott Record 30).

Inasmuch as the Kennecott Copper Company in its complaint alleges that such affidavit and the receipt attached thereto were the ones customarily used by it, and inasmuch as the producer, the Kennecott Copper Corporation, signed such receipt and by such receipt stated that it had received certain payments on account of copper delivered and sold, we certainly must conclude that the premium payments made to Kennecott Copper Corporation did have some relationship to the sale of the ore or metals.

ARGUMENT II

THE SUBSIDY PAYMENTS UNDER THE PREMIUM PRICE PLAN WERE PROPERLY INCLUDED IN DETERMINING GROSS PROCEEDS AND THEREBY FIXING THE ASSESSED VALUE OF THE MINES.

It seems very clear that the two net proceeds tax cases here involved, namely, Park Utah Consolidated Mining Company vs. Summit County and United States Smelting, Refining and Mining Company vs. Salt Lake County, fall squarely within the ruling and reasoning of this court in the case of United States Smelting, Refining and Mining Company vs. Haynes, 176 P.(2d) 622, which we will refer to hereinafter as the Haynes case. The Appellants seek to distinguish the present cases from the Haynes case, claiming that in these cases it is shown that there was not either a sale of ores or metals or a conversion of ores or metals into money or the equivalent of money.

What has been said with regard to the occupation tax cases on the matter of a sale of the ores applies with equal force to the net proceeds cases. It is not necessary, however, to rely upon the matter of a sale of the ores or the metals in connection with these net proceeds cases. In the Haynes case, *supra*, the court recognized that under the provisions of Section 80-5-57, Utah Code Annotated 1943, proceeds realized in addition to those from a sale of the ores or the metals, from "a conversion of ores or metals into money or the equivalent of money" should properly be considered in arriving at the tax base. Under the Utah Statutes the base for determining the taxes from mines includes what is annually realized from

the product of the mine, over and above the cost of expenses of obtaining such proceeds and includes the value of the ore, etc., produced but not sold during the year. Mercur Mining & Milling Co. v. Spry, 16 Utah 222, 52 P. 382; Tintic Standard Min. Co. v. Utah County, 80 Utah 491, 497, 15 P. (2d) 633; Salt Lake County v. Utah Copper Co., 294 Fed. 199, 264 U.S. 590, 68 L. Ed. 864, 44 Sup. Ct. 403; 267 U.S. 610, 69 L. Ed. 813, 45 Sup. Ct. 461. The Appellants contend that by reason of the allegations contained in the second amendment to Amended Complaint and numbered paragraph 10a (Record 31, Case 7334), that the present cases do not come within the rule laid down by this court in the Haynes case heretofore decided and above cited. That allegation was as follows:

“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.” (Italics added).

Appellants argue that for the purpose of the present proceeding the allegation of the complaint must be accepted as correct and hence we must accept as true the statement that the payment of premium prices was not conditioned upon a sale of the ores nor upon their conversion into money or the equivalent of money.

We respectfully submit that the allegation that such total

metal contents were determined "before any conversion of the ores" is a conclusion of law. The very question to be determined would be as to whether or not there was a conversion of the ores into money or the equivalent of money. Being a conclusion of law, such allegation would not be admitted by the demurrer because it would not be a fact well pleaded.

We particularly call the attention of the court to the language used by this court in the Haynes case, wherein the court stated:

"Are the 'premium payments' money received from a sale or conversion into money or its equivalent of ores extracted from the mine or mining claim? That the 'premium payments' are tied tight to ores extracted from a mining claim is not disputed, nor could it well be. These payments are made only on metals produced from a mine or mining claim over the assigned quota. But the statute confines the tax base to proceeds realized from: (a) a sale of ores or metals; (b) a conversion of ores or metals into money or the equivalent of money. We consider them in the reverse order.

"(2,3) 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.*, 10 Cir., 93 F.(2d) 127 (certiorari denied 303 U.S. 652, 58 S. Ct. 750, 82 L. Ed. 1112). See also Sec. 80-5-59, U.C.A. 1943; *Mercur Gold Mining & Mill 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) of 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 payments must be included in computing the gross proceeds realized."

Even if we accept the theory and argument of the Appellants that in connection with these net proceeds cases the payment of the premium payments had no relationship whatsoever to any sale (which, of course, we do not admit), nevertheless even under that theory amended Rule 13 to which the Appellants refer and which is made a part of their complaint in these cases, provided that the premium payments should be made on the basis of ore sent to the mills or smelter, or reduction plants. The mining companies did not have to wait for a determination of the exact metal content but the amount of the premium payment was fixed by a formula. So that at the very instant such ores were sent to the smelter they had a very definite fixed value, namely, the ceiling price plus (in

the case of over-quota ores) the premium payment which immediately became due thereon, based upon the formula.

The premium in connection with the net proceeds cases here, falls squarely within the rule laid down in the Haynes case, without regard to the question of whether or not such funds were realized from a sale of the ores or metals. When the ores were taken out of the mine and were sent to the smelter or to the mill, such ores immediately had a value in addition to their ceiling price, namely the amount which was payable for such ores as premium payments. What difference could it possibly make that for purposes of uniformity the premium price was based on a formula rather than an actual assay of the metal content? The premium payments were received on account of and for said ore. How could any fair minded person state that such payments were not received in connection with a conversion of the ores or metals into money or the equivalent of money? Such payments represented a definite part of the value,—yes, a part of the price paid for—the ores. Certainly, as stated by the court in the Haynes case, such proceeds received as premium payments were “proceeds realized” from ores extracted from the mines.

It will be observed that in Appellant's brief they refer particularly to the situation of Park Utah Consolidated Mines Co., and endeavor from that to show that because of the nature of the payments made to Park Utah they could not have any relationship to the ores and could not have been proceeds realized from the sale or conversion into money or its equivalent of the ores. We believe that the argument presented by them proves just the contrary. It will be observed that even

though the quotas of this company were changed from time to time because of alleged representations by the company that the quotas were not sufficient to permit operation due to excessive costs in connection with unwatering of the mine and other projects, nevertheless it still appears affirmatively that where there was no production, that is, when there was no ore taken from the mine that there were no premium payments due or payable, but when ores were taken from the mine under the zero quota, premium payments became immediately due upon the ore so produced and when the other quotas were established and ore in excess of such quotas was taken from the mine and produced then there became due upon the ore so produced premium payments. Such premium payments certainly were proceeds realized from the sale or conversion into money or its equivalent of the ores. They certainly had a very definite fixed relationship to the ores and were a part of the value and price paid for the ores. In this connection it is interesting to note that under the pleadings and theory of the Park Utah Consolidated Mines Co., it seeks to exclude from "gross proceeds" the premium payments but insists on deducting from the gross proceeds, without premium payments included, all the costs involved in mining, extracting and smelting the metallic ores on which the premium payments were made. Referring to the figures in its complaint, it received from International Smelting and Refining Co. and American Smelting and Refining Company cash under bona fide contracts of sale of its ores in the amount of \$820,295.32. (Park Utah Record 10). It likewise, however, received as premium payments in connection with the production of said ores a sum of \$536,991.38. But the mining company sought

to deduct the cost of producing said ore as permitted by section 80-5-57 U.C.A. 1943, only from the amount received from the smelting and refining companies (without including premium payments) and in doing so stated that such costs exceeded the amount so received. The companies contended that the amount received as premium payments should not have been included and considered. On this basis they contended that there were no net proceeds. In other words, they choose to charge off the cost of production against the taxable value of such ore produced but do not wish to include as a part of that taxable value an amount actually received for the production of the ore and which certainly amounted to and was a part of the value of the ore. It is interesting to note that such a situation was commented upon by this court in the Haynes case, *supra*, the court therein indicating that the inclusion of the premium payments would tend to equalize and render uniform the tax base and the assessment.

ARGUMENT IIa

THE INCLUSION OF PAYMENTS UNDER THE PREMIUM PRICE PLAN IN THE NET PROCEEDS TAX BASE WOULD NOT BE UNCONSTITUTIONAL.

It is the contention of Appellants that the inclusion of subsidies in the net proceeds tax base would be unconstitutional as in contravention of sections 2 and 3 of article XIII of the Constitution of the State of Utah and also section 2 of Article I and section 24 of Article I of the Constitution of the State of Utah. All of said sections relate to uniformity

in connection with the assessment and taxation of tangible personal property and to the rights of the people to equal protection of the laws and uniformity in operation of the laws. These same contentions were made in the Haynes case, supra. The contentions were clearly and ably disposed of in the opinion of the court in that case, the court holding that there was no valid constitutional objection, either state or federal to the computation of the tax base as used by the Tax Commission and that the inclusion of subsidies in the net proceeds tax base was entirely constitutional. In that case this court, after argument of the case, requested that counsel submit a supplemental brief on the constitutional questions. A rather lengthy brief was prepared and filed by counsel for the defendant, Haynes, County Treasurer of Tooele County, bearing upon this question. In view of the fact that the matter was thoroughly presented and considered in the Haynes case and since the court adopted the theory of the defendants in that case and held that there was no constitutional objection to the inclusion of such subsidies in the net proceeds tax base; and since we feel that the holding of the court in the Haynes case is in point and binding with regard to that matter, we have not thought it either necessary or proper to burden the court with other arguments or citations with regard to such point in connection with the present cases.

CONCLUSION

In conclusion we respectfully submit that the premium price payments were definitely tied into and were a part of the sale price of the ores received by the mining companies for

the ores or metals sold under bona fide contracts of sale, and were properly included in fixing the occupation taxes; that such premium price payments were without question a part of the gross proceeds realized from the sale or conversion into money or its equivalent of ores from the mines and therefore properly to be considered in connection with fixing the net proceeds tax; and that there is no constitutional objection to the inclusion of said premium payments in computing either the occupation tax or the net proceeds tax.

By stipulation these five cases have been consolidated for the purpose of briefing and argument but separate decisions should be rendered in connection with each case in view of the different statutes involved in the occupation tax cases and the net proceeds tax cases.

We respectfully submit that the ruling and judgment of the court below in each case should be affirmed.

Respectfully submitted,

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