2007

Columbia Iron Mining Company, a corporation v. Iron County, Utah State Tax Commission : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

COLUMBIA IRON MINING COMPANY, a corporation,
Plaintiff and Appellant,

vs.

IRON COUNTY,
Defendant and Respondent,

UTAH STATE TAX COMMISSION,
Intervenor and Respondent.

BRIEF OF APPELLANT

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Case No.
7503

BRIEF OF APPELLANT

Here is presented the legal question of the propriety of the judiciary reading into an otherwise silent and unambiguous tax statute a provision in substance as follows:

A bona fide and reasonable contract price for the sale of ores for a definite period, resulting in a substantial profit, and negotiated at arm's length between the mine owner and buyer, may be disregarded for tax purposes in the event the buyer subsequently assigns his interest in the contract to a corporation the stock of which, except for directors' qualifying shares, happens to be owned by a corporation which also owns the capital stock of the selling mine owner.

I.

STATEMENT OF FACTS

The facts are not in dispute and concisely stated are as follows:

1. The seller is plaintiff, Columbia Iron Mining Company; the buyer was the United States acting through its wholly owned subsidiary, the Defense Plant Corporation. The contract hereafter referred to as Exhibit 1 is dated August 17, 1943; in brief it provides that for an 18-year term Columbia will furnish described iron ore requirements to the buyer for the operation of the blast furnaces at Geneva, Utah, at cost plus a stated price per ton. (R. 71) The Court below found this to result in a profit of 25 cents per ton. (R. 95) For the year 1948 performance of this contract resulted in "net proceeds" to Columbia in the sum of $566,560.88. (R. 95)

2. Plaintiff was organized as an Utah corporation in 1930. (R. 75) It owns and leases certain mining properties and facilities within the limits of defendant Iron County, Utah, including what is generally known as the Columbia Iron Mine. (R. 87)

3. Since its organization and specifically since 1937, plaintiff has always reported each year to the intervenor, State Tax Commission, its "Net proceeds in dollars" as required by Section 80-5-55(4), Utah Code Annotated 1943, being its receipts from sales of iron ore under its various ore contracts, including Exhibit 1, less the specified deductions. For the years 1943 to 1947 the Tax Commission accepted such returns, but for the year 1948, after the buyer's end of the agreement (Ex-

hibit 1) was acquired from the Government by Geneva Steel Company, the Tax Commission substituted its own computation of gross value of the ore per ton. Geneva Steel Company is likewise a wholly owned subsidiary of the United States Steel Corporation. This substitution resulted in a tax increase from $37,664.42 to $74,-905.76. Plaintiff protested this substitution and on November 26, 1948 paid the excess of $37,241.34 under protest. (R. 96) This action to recover such protested excess was then brought in April of 1949. (R. 7)

4. Six certain additional contracts of plaintiff for the sale of iron ores during the time here involved are tabulated in Exhibit B. These sales were in small amounts, involving only 731.2 tons, and required special handling. (R. 89) In addition to these contracts and that of August 17, 1943 is a second "term requirement contract" for the supply of the Ironton No. 2 blast furnace. This contract likewise was entered into with the United States, is dated August 1, 1947, and was subsequently assigned by the United States Government to Kaiser & Frazer Parts Corporation, which is now the owner of that blast furnace. (R. 96)

5. Plaintiff, to expedite this case and eliminate disputed questions of fact, has admitted for the purposes of this case only that the substituted value figure of $1.45 per ton invoked by the Tax Commission (in lieu of 71c) may be treated as true, correct and proper if the Tax Commission has the legal right to substitute *any* figure for the proceeds *actually received* by plaintiff under its various ore contracts. (R. 95, 78, 69)

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6. The foregoing, being in substance the facts alleged in plaintiff's complaint, were admitted by defendant and intervenor. (R. 73) These facts were then supplemented by the following, stipulated likewise but subject to plaintiff's objections as to materiality and relevancy: (R. 34)

(a) Various other contracts were entered into between the United States and wholly-owned subsidiaries of the United States Steel Corporation prior to, at the time of, and subsequent to the date of execution of Exhibit 1, dated August 17, 1943. These include:

(1) An agreement under date of October 31, 1941 which provided for the construction of the Geneva steel works by Columbia Steel Company for Defense Plant Corporation. This agreement was subsequently supplemented by various letters of intent issued by Defense Plant Corporation covering various changes in the program, and was amended by Amendatory Agreement dated August 17, 1943 so as to eliminate therefrom provisions relating to the leasing of the facilities to Columbia Steel Company, with the result that this agreement then covered only the acquisition and construction of such facilities. (R. 90)

(2) An agreement hereafter denoted Exhibit E, executed under date of August 17, 1943 between Defense Plant Corporation and Geneva Steel Company for the management and operation of the iron and steel-producing facilities at Geneva, including facilities for mining coal in Emery County, for quarrying limestone and dolomite, for sale of the products thereof, and for the gen-

eral conduct of the business by Geneva Steel Company for the account of Defense Plant Corporation. (R. 90, 54)

(3) An agreement of purchase hereafter denoted Exhibit C, betwen the United States and Geneva Steel Company effective as of midnight June 18, 1946 for the sale of the Geneva works to the Geneva Steel Company. (R. 93, 44) This agreement was in accordance with the bid of the United States Steel Corporation dated May 1, 1946 for the purchase of the Geneva works including all rights, properties and interests acquired by the Federal Government agencies in connection with the matters mentioned in the three foregoing contracts and including the machinery and equipment owned by the Government at Columbia Iron Mine. The said bid recited that if accepted "title will be taken by Columbia Steel Company or another wholly owned subsidiary of United States Steel Company." (R. 93)

(b) The machinery and equipment at the Columbia Iron Mine referred to in Exhibit 1 as being leased to plaintiff was acquired by the Federal Government from the various manufacturers of such machinery and equipment pursuant to said contract between the Government and Columbia Steel Company of October 31, 1941 and the amendment thereto of August 17, 1943, and such machinery and equipment is also referred to in the recital of Exhibit 1, being the iron ore requirement contract between the Government and plaintiff of August 17, 1943, as then "being installed at the said mines by Columbia Steel Company". The cost paid by the Government for this machinery and equipment, so acquired

by it and placed at the iron ore mines and leased to plaintiff, was $1,350,000.00, of which $522,000.00 was expended for items classified as "machinery and equipment", and the balance was expended for a preliminary crusher, a secondary crusher, a screening and loading station, utilities and sundry other buildings. (R. 91)

(c) Commencing in 1942 and continuing since the contract of August 17, 1943 (Ex. 1) and the assignment of this contract to Geneva Steel Company, plaintiff, in addition to delivering the iron ore to the Geneva plant, has also continued deliveries of iron ore to the plant at Ironton, and has charged the same prices at which such ores were charged on deliveries to the Geneva plant pursuant to Exhibit 1. The Ironton plant was owned and operated by Columbia Steel Company up to about October 1, 1946, and by Geneva Steel Company since that time, and plaintiff has reported gross and net proceeds on deliveries to both plants on the same basis of charges and values as aforesaid. All iron ore treated at the Geneva plant and at the Ironton plant during the years 1945, 1946 and 1947 was supplied from the Columbia Iron Mine in Iron County, Utah here involved. (R. 89) The relative capacities of the two plants were found by the court to be 4 to 1, although the record is silent in this respect and the actual relative capacities are approximately 6 to 1. (R. 92, 83)

(d) Pursuant to the foregoing bid and contract (Ex. C and D), title to the Geneva Steel works, including the buyer's end of Exhibit 1 and the machinery and equipment acquired at the Columbia Iron Mine by the Government, was acquired by Geneva Steel Company

as purchaser, and thereafter the machinery and equipment acquired at the Columbia Iron Mine was transferred to the plaintiff. There was allocated to plaintiff as a charge therefor and as a portion of the general obligations to be paid by Geneva Steel Company and guaranteed by the United States Steel Corporation, the sum of $273,274.10. Thereupon, all obligations under said contract Exhibit 1 on behalf of the buyer, including but not limited to all obligations to furnish funds, equipment or machinery, were performed in accordance with the terms of the contract. That is, the contract (Exhibit 1) as then outstanding between Geneva Steel Company and Columbia Iron Mining Company was reduced by performance to the one contract provision for the supply of iron ore to Geneva Steel plant and for the purchase of and payment for that ore in accordance with said contract. All other provisions of this contract as to both parties were thus terminated as provided therein, but the contract terms as recited therein were not changed and the contract itself was not amended. (R.94)

(e) The contract of October 13, 1941 for the construction of Geneva, including the amendment of August 17, 1943, the contract of August 17, 1943 for its operation, as well as Exhibit 1, the contract of August 17, 1943 for the supply by plaintiff of Geneva's iron requirements, were all entered into for the purpose of furthering the war effort. The first two contracts, for construction by Columbia Steel Company and operation by Geneva Steel Company, were pursuant to a decision of the United States Steel Corporation and an under-

standing thereupon with Federal Government agencies that the construction and operation of the Geneva Steel plant, as covered by said contracts, would be at the expense of Defense Plant Corporation and without loss or profit to the United States Steel Corporation directly, or through its subsidiaries, during the war effort. (R. 91) Exhibit 1, the iron ore requirements contract with Columbia Iron Mining Company, in contrast is a "cost-plus-25 cents-per-ton" contract involving plaintiff's iron ore supply. (R. 95)

(f) For the years 1937 to 1942 the Tax Commission substituted for the plaintiff's contract prices a gross value per ton in excess of the contract price established in the agreement for the supply of iron ore for the blast furnace at Ironton, Utah, which during that period was owned and operated by Columbia Steel Company. The resulting excess tax over that reported, as shown by Exhibit A (R. 88) was paid by plaintiff under protest. (R. 87, 88)

7. From the foregoing and over plaintiff's objections the court further found and concluded:

(a) That the three contracts between the Government and the subsidiary corporations of the United States Steel Corporation were made in fact under the full control of United States Steel Corporation, and the operations thereunder were by it, operating through its respective subsidiairies, as named in each agreement. (R. 93) That the placing of titles to any acquired properties, and the allocation of charges, and the termination or continuance of contract covenants was by and

under the complete control of United States Steel Corporation, which alone could profit by any such, or by any operations of its said wholly-owned subsidiaries. (R. 94)

(b) That the statutes do not require under such circumstances acceptance of the contract receipts as the basis for tax computation, that the reported tax was unjust, unequal, discriminatory and in violation of Utah's Constitution, statutes and policy, and that the tax imposed was fair and just and should be sustained. (R. 97)

8. Judgment of no cause of action accordingly was duly made and entered February 20, 1950, (R. 99) from which plaintiff has appealed. (R. 100)

II.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) Section 4 of Article XIII of the Utah Constitution provides that the State Tax Commission shall assess mines "as the Legislature shall provide;". Section 80-5-3 of the Utah Code Annotated 1943 accordingly provides that the State Tax Commission must assess "all mines and mining claims, and the value of metalliferous mines" based on a multiple of the annual net proceeds as provided in subsequent sections.

(b) By Section 80-5-55 the State Tax Commission is required each year to prepare a mine assessment book in which is to be entered "the assessment of all mines

in the state subject to assessment by it and in which book must be specified in separate columns and under appropriate heads:

"* * *

"(4) Net proceeds in dollars, if a metalliferous mine.

"(5) Number of tons of ore mined, whether by the owner, lessee, contractor or otherwise.

"(6) *Amount received for ore and metal if sold;* if not sold the value thereof."

(c) Section 80-5-56 as amended then provides:

"All metalliferous mines and mining claims, both placer and rock in place, shall be assessed at $5.00 per acre and in addition thereto at a value equal to two times the net annual proceeds thereof for the calendar year next preceding."

(d) The following section, 80-5-57, then provides:

"The words, 'net annual proceeds,' of a metalliferous mine or mining claim are defined to be the gross proceeds realized during the preceding calendar year *from the sale or conversion into money or its equivalent of all ores from such* mine or mining claims 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 only certain deductions therein enumerated. (There is no question with respect to the deductions.)

III.

STATEMENT OF POINTS

1. The court erred in that the amounts actually received and realized by plaintiff from the sale of its ore under bona fide and reasonable contracts were disregarded.

2. The court erred in sustaining and basing the assessment of plaintiff's mine on the Commission's conception of the gross value of the ore produced and sold in 1947, rather than on the amount of money received and realized by plaintiff from the sale of its ores under bona fide and reasonable contracts.

3. The court erred in disregarding corporate entities in this instance where the original contract was bona fide and reasonable, the price fixed therein was reached after arm's length negotiations between non-affiliated interests, resulted in a 25 cents per ton profit, and was for a fixed term.

4. The court erred in concluding that for the Commission to act in accordance with the statutes and to compute the tax on the basis of actual contract receipts would result in an unjust, unequal and discriminatory tax, contrary to and in violation of the Constitution, statutes, and policy of the State of Utah, and the duty imposed upon the State Tax Commission by these.

5. The court erred in entering judgment against plaintiff of no cause of action.

IV.
ARGUMENT

Since all of the errors assigned on the part of plaintiff relate to the same fundamental issue, they are argued here under the following headings:

1. Exhibit 1, the contract of August 17, 1943, was bona fide and the price therein was arrived at after arm's length negotiations between unaffiliated interests.

Exhibit 1 is a "term requirement contract" for an 18-year period whereby plaintiff is obligated to supply the United States Government or its successor with the iron ore requirements for the operation of the Geneva Steel works for that definite period. It is submitted that the contract was fair and reasonable resulting in a profit of 25 cents per ton on a gross of 71 cents. Both parties were satisfied with the contract and abided by its terms. There is no suggestion in the record or any claim on the part of defendant or intervenor of any bad faith in the negotiations and transactions between the plaintiff and the United States, or that the cost-plus price fixed therein was in any sense unreasonable at the time of execution. A similar contract executed four years later is in effect although now assigned by the United States to the Kaiser interests, with which plaintiff has no inter-corporate relationships.

The contract was not only well within the uniform definitions in the sales act (Title 81 of the Utah Code); it was without question a bona fide and reasonable agreement at the time of the execution of the agreement between the plaintiff and the United States.

> " 'Bona fide' is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in acts of assembly in all the states, and signifies a thing done really, with a good faith, without fraud, or deceit, or collusion, or trust. * * *A debt must be bona fide at the time of its commencement, or it never can become so afterwards." Ware v. Hulton, 3 U.S. (3 Dall.) 199, 241, I L. Ed. 568.
>
> "Bona fide" means "in or with good faith; without fraud or deceit; genuine." Covert v. State Board of Equalization, 173 P. (2) 545, 550; 29 Cal. (2) 125.

This court recently said with respect to the companion occupation tax statute, Section 80-5-66:

> "Webster's new International Dictionary defines 'bona fide' as being 'in or with good faith; without fraud or deceit* * *'." Combined Metals Reduction Co. v. State Tax Commission, (Utah) 176 P (2) 614, 616.

2. A contract which was executed in good faith, was binding for a fixed term, and was bona fide at the time of its execution does not lose those characteristics by reason of subsequent events.

A contract that is bona fide when executed does not lose that character because of events occurring subsequent to its execution. *Dubuque & Sioux City R.R. Co. v. Richmond,* 86 U.S. 584, 22 L. Ed. 173.

To date it has never been argued or contended that a contract executed between *non-affiliates* would not be binding upon the Commission even though the consider-

ation to be paid for the ores might become more or less than their market value. This is specifically illustrated in this case in connection with the outstanding contract with Kaiser-Frazer, and with respect to Exhibit 1 while the Government was the contracting party. Particularly as judged by hindsight, a mine owner might make improvident contracts; or the same result, i.e., less net proceeds, may result from either improvident management or events beyond control. But in no such case would the Tax Commission presume to disobey the legislative mandate.

That mandate of the legislature is pursuant to a specific constitutional provision providing for the ad valorem taxation of a mine on the basis of a multiple of the net proceeds actually realized by that mine. In other words, the Constitutional provision delegates specific authority to the legislature to determine the details of mine assessment methods; and the legislature has established as Utah's policy *mine income* as the basis upon which to ascertain mine values.

The value of the Columbia Iron Mine is to a large extent determined by the proceeds derived from its products. Particularly is this true in an instance where approximately the entire production of the mine is subject to the terms of a single contract. Certainly any purchaser of the assets or stock of the Company would be bound by the terms of Exhibit 1 and of the Kaiser-Frazer contract, and the value of the mine would be determined accordingly. Likewise, Geneva Steel Company had a right to rely upon the terms of Exhibit 1 remaining in effect, just as any other purchaser of the

Geneva Steel Plant would have taken the existence of Exhibit 1 into effect in considering how much it would pay; and as Kaiser-Frazer did in purchasing Ironton No. 2.

In this case, insofar as the supply of iron ore to Geneva and to Ironton No. 2 were concerned, the gross price to be received was fixed after arm's length bargaining between unaffiliated interests at the time the contracts were negotiated. This satisfied the legislative intent, and plaintiff submits that the legislature could not have had in mind changing the situation in the unusual event that the subsequent assignment of any such term requirement contract, so negotiated at arm's length, resulted in the buying end of the contract being acquired by another affiliate of the mine owner.

Yet first this legislative prescience to anticipate such a situation, and then this specific intent for the particular solution here urged, would be plucked from the air by defendant to justify its contentions and inserted by implication into Utah's statutes. But unless such intent is clearly and convincingly evident from all circumstances which properly may be considered by the judiciary in determining the "legislative mind," to so read these principles into Utah's law would be judicial legislation.

It might just as well be contended that should *any* contract prove to bring less receipts to the mine owner than *might* have been obtained, the legislature would have intended disregard of the actual receipts and silent delegation to the Tax Commission of the power to determine values.

There is here no proper key or even clue to the legislative intent in such instances.

We quote from 50 Am. Jur. at page 212:

> § 228. *Avoidance of Judicial Legislation.*— As a result of constitutional provisions distributing the power of government among three departments, the legislative, executive and judicial, courts have no legislative authority, and should avoid judicial legislation, a usurpation of legislative powers, or an entry into the legislative field. It is not within the province of a court, in the course of construction of a statute, to make or supervise legislation. A statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms. The terms of the statute may not be disregarded. To depart from the meaning expressed by the words of a statute, is to alter it, and is not construction, but legislation. However, words or phrases may be altered where that is necessary to obviate repugnancy and inconsistency and to give effect to the manifest intention of the legislature. Especially will this be done where it is necessary to prevent a law from becoming a nullity.
>
> § 229. *Extension of Statute.*— The general rule is that nothing may be read into a statute which is not within the manfest intention of the legislature as gathered from the act itself, and that a statute should not be construed any more broadly or given any greater effect than its terms require. Where the language of the statute is clear in limiting its application to a particular class of cases and leaves no room for doubt as

> to the intention of the legislature, there is no authority to transcend or add to the statute which may not be enlarged, stretched, or expanded, or extended to cognate or related cases not falling within its provisions.

If we have a clue at all to the "legislative intent" when it enacted the net proceeds system of mine taxation, it is that the legislature until 1949 *refused to act* even as to contracts *initially* executed between corporate affiliate; and this though the possibility of purposeful discrepancy between contract price and possible market values was specifically brought to its attention in pages 21-22 of the Tax Commission's official Third Biennial Report to the Legislature for 1935-36:

> As the law now stands this company could organize a separate corporation for the purpose of operating the mining property. This subsidiary corporation could sell its ores to the parent milling or smelting corporation and then the state *would be required to accept* as gross proceeds the sum which the parent corporation paid the mining corporation for its ores. Where a mining company is a subsidiary of a milling and smelting company, it might sell its ores to the parent corporation at a price that would tend to greatly reduce the gross proceeds of the mine.
>
> Since this simple device of establishing a subsidiary corporation may be adopted, it would be advisable to provide that the Tax Commission could inquire into the reasonableness of the price paid for the ores. Even if such authority were granted to us we still would have difficulty in executing it, because that is the work of experts, and in almost every instance such experts are in the employ of the major milling and smelting companies.

There are many such mining corporations subsidiary to milling and smelting companies. One smelting company has as many as ten subsidiary mining corporations. We do not mean to charge that the subsidiaries were established to further tax avoidance, but we merely point out that tax avoidance is possible through the use of this device.

We believe that more authority should be granted the Tax Commission to permit it to make full inquiry into the price received for the ores of such subsidiary mining corporations when they sell their ores to a parent milling or smelting company. An amendment should be added in substance as follows:

"Where a sale is made by a mining corporation of its ores to an affiliated corporation or company, the burden of proving that the price received was a fair one shall rest upon the mining corporation. For this purpose the Tax Commission shall have authority to make such investigations as it deems necessary. In the absence of satisfactory proof that the price received is a fair one, the Tax Commission is authorized to determine from the best information available, what the gross proceeds should have been from the sale of the ores."

It was after the legislature rejected its views presented above, that between 1937 and 1942 the Tax Commission imposed its own values per Exhibit A. But the amounts were relatively inconsequential, so plaintiff contented itself with protests until the instant case, the Commission having accepted the contract proceeds without question for the years 1943-46 inclusive.

This situation is in direct contrast with that in *Union Portland Cement Co. v. State Tax Commission,* 176 P (2) 879, where on rehearing it was shown, clearly and convincingly to obtain reversal of the original decision, just what the legislature of Utah must have actually had in mind when it enacted the Use Tax Law in 1937. But here, until the details with respect to such a situation were carefully and specifically outlined by the 1949 amendment, we are in the realm of speculation.

3. The contract prices under the statute were binding upon the Commission as to value.

The statutes set out heretofore are plain and unequivocal. There is no ambiguity therein and therefore no place for judicial construction. 50 *Am. Jur.* 225; *New Park Mining Co. et al., v. State Tax Commission,* 196 P (2) 485, ... Utah .....; *Salt Lake Union Stock Yards v. State Tax Commission,* 71 P (2) 538; 93 Utah 166.

The statutory wording is that the mine value shall be based upon net annual proceeds of the mine, defined to be "*the gross proceeds realized* * * * from the sale or conversion into money or its equivalent, of all ores from such mine or mining claim extracted by the owner * * *", less specified deductions.

There is no authority for the Commission to vary this legislative mandate when for any reason it feels that the owner might have charged more or spent less in its operations, and so have realized more from the sale or conversion into money or its equivalent of the mine's ores.

Would it be contended that if the contract prices were *more* than the Commission's conception of gross market values, the lesser figure could be used?

The Tax Commission in collecting the occupation tax under Section 80-5-66 originally took the position asserted here, that is, that it could substitute its own estimate of what the mine owner should have received. The wording of Secion 80-5-66 is slightly different, reading as follows:

> The basis for computing the occupation tax imposed by this act for any year shall be 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 claims, from the sale of all ores or metals during the calendar year * * *.

This statute likewise is plain and unequivocal. Here, too, is no ambiguity and therefore there is no place for "construction" by the court. Since a direct review in this court was possible, plaintiff at once appealed, Case No. 7232. Whereupon the Tax Commission stipulated for dismissal and refunded the additional tax paid under protest, *since it had been assessed on a basis other than as provided by the legislature.*

Subsequently and consistent with abandonment of its first effort to obtain *judicial* legislation, the Commission submitted to the 1949 legislature and there was enacted as House Bill No. 179 the following:

AN ACT AMENDING SECTION 80-5-57, UTAH CODE ANNOTATED 1943, RELATING TO THE IMPOSITION OF A NET ANNUAL PROCEEDS TAX AND SETTING FORTH THE MANNER OF ARRIVING AT THE TAX LIABILITY.

Be it enacted by the Legislature of the State of Utah:

Section 1. Sec. 80-5-57, Utah Code Annotated 1943, is amended to read:

80-5-57. The words, "net annual proceeds," of a metalliferous mine or mining claim are defined to be the gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent of all ores from such mine or mining claim 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 ( ); *provided, that in cases where* * * * *the gross proceeds realized from the ore is disproportionate to its reasonable fair cash value, the tax commission shall place a value on the ore which is equal to its reasonable fair cash value, and said amount shall be taken as the basis for the tax. The following, and no other, deductions may be taken:* * * *

This action (no doubt at the instance of Iron County and the Tax Commission) could not of course effect the pending action. This statute did not become law until May 10th of 1949. Ch. 79, Session Laws of Utah 1949.

4. Authorities cited by defendant are not here applicable.

Anticipating reiteration of argument in this court along the lines submitted by defendant below, plaintiff wishes to point out that the circumstances surrounding this case are in sharp contrast to illustrations relied upon in the District Court.

For example, cases cited by defendant involving delegations of specific legislative authority to the taxing agency to substitute its estimate for contract prices, are not here in point. An illustration would be a case now arising under Section 80-5-57 as amended by the legislature in 1949, Chapter 79. Another such instance would be under the occupation tax law, Section 80-5-66, as likewise amended by the Utah legislature in 1949, Chapter 80. Still another instance would be a case arising under Section 80-5-66(b) where it is provided that in the event of controversy with respect to whether or not particular smelting charges are appropriate "the Tax Commission shall have power to determine such rates or charges."

Likewise, under income tax law, there is specific authority for the Tax Commission to disregard corporate entity. Section 80-12-18, for example, reads as follows:

> 80-13-18. *Allocation of Income and Deductions Between Several Corporations Controlled by Same Interests.*
>
> In any case of two or more corporations (whether or not organized or doing business in this state, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the tax commission is authorized to

> distribute, apportion or allocate gross income or deductions between or among such corporations, if it determines that such distribution, apportionment or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such corporations.

Section 45 of the Internal Revenue Code is the Congressional grant to the Collector of Internal Revenue of this same type of authority. But that this power even when granted is limited and to be strictly construed, see *Tennessee-Arkansas Gravel Co. v. Commissioner,* 112 F. (2d) 508 (CCA 6th, 1940), where it was held that the Commissioner could not *create* income even as between affiliates when none in fact existed. There the Commissioner had assessed additional rental income against the parent company on the theory that the subsidiary *should* have paid the additional amount as a reasonable rental for equiment.

Likewise, we are aware of the general rule and its multitude of specific illustrations in the cases to the effect that the corporate veil may be pierced by courts to prevent fraud or illegality. As is said in 13 *Am. Jur.* 160, *Corporations,* § 17:

> The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts. Thus, in an appropriate case and in furtherance

> of the ends of justice, a corporation and the individual or individuals owning all its stock and assets will be treated as identical, the corporate entity being disregarded where used as a cloak or cover for fraud or illegality.

In contrast, in the instant case there is not only no legislative grant of authority; there is further no suggestion of fraud or illegality in connection with the original execution of the contracts when negotiated at arm's length between plaintiff and the United States Government. The mere happenstance that some years later one of the outstanding contracts should be acquired by another company, which we have frankly stipulated is another wholly owned subsidiary of United States Steel Corporation, should not be made the excuse for judicial legislation in an effort to acquire further tax revenue.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be set aside, and the case remanded to the District Court with directions to grant relief in accordance with plaintiff's prayer and the mandate of Utah's legislature.

Respectfully submitted,

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