

1956

G & G Mining Company v. Tax Commission of the State of Utah : Petitioners' Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Gustin, Richards, Mattsson & Evans; Attorneys for Petitioners;

Recommended Citation

Brief of Appellant, *G & G Mining Co. v. Tax Commission of Utah*, No. 8595 (Utah Supreme Court, 1956).
https://digitalcommons.law.byu.edu/uofu_sc1/2715

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

JUN 13 1957

LAW LIBRARY

Case No. 8595

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

NOV 26 1956

G & G MINING COMPANY,

Petitioner

—VS.—

TAX COMMISSION OF THE STATE
OF UTAH,

Respondent

Clerk, Supreme Court, Utah

PETITIONERS' BRIEF

GUSTIN, RICHARDS, MATTSSON & EVANS

Attorneys for Petitioners

INDEX

	<i>Page</i>
STATEMENT OF THE FACTS	1
STATEMENT OF POINTS	4
ARGUMENT	5
1. A person who is not engaged in the business of mining or producing ore cannot be subject to the mine occupation tax.	5
2. The tax is illegal in that	
(A) An assessment made other than as pro- vided by statute is a nullity,	
(B) It is mandatory that the tax be fixed on or before a day certain.	11
3. The assessment is contrary to the decisions of this court.	17
4. The tax was not properly computed.....	18
CONCLUSION	21

TABLE OF CASES

Box Elder County et al. v. Conley, County Assessor, et al., 79 Utah 199, 284 P. 105.....	9, 14
Consolidated Uranium Mines, Inc. v. Tax Commission of the State of Utah (1955), 4 Utah 2d 236, 291 P. 2d 895	10, 17, 20
Fairlamb v. Bowle, County Treasurer (Colo. 1937), 71 P. 2d 417	15
W. F. Jensen Candy Co. v. State Tax Commission (1936), 90 Utah 359, 61 P. 2d 629.....	12
Moss, County Atty., ex rel. State Tax Commission v. Board of Com'rs of Salt Lake City et al. (1953), 1 Utah 2d 60, 261 P. 2d 961.....	11
Norville v. State Tax Commission (1940), 98 Utah 170, 97 P. 2d 937.....	12
Provo City v. Provo Meat & Packing Co., 49 Utah 528, 165 P. 477	7

INDEX—(Continued)

Page

Title Insurance and Trust Company v. Franchise Tax Board (Cal. 1956), 302 P. 2d 79.....	10
Winton Lumber Co. v. Shoshone County et al. (Idaho, 1931), 294 P. 529.....	14

STATUTES

Constitution of Utah, Section 12, Article 13.....	8
Utah Code Annotated 1953, Chapter 5, Title 59.....	1, 5
Utah Code Annotated 1953, Section 59-5-67.....	5
Utah Code Annotated 1953, Section 59-5-68.....	15
Utah Code Annotated 1953, Section 59-5-70.....	13
Utah Code Annotated 1953, Section 59-5-71.....	13
Utah Code Annotated 1953, Section 59-5-73.....	6, 12, 13, 16

TEXTS

51 Am. Jur., Taxation, Section 29, page 57.....	7
51 Am. Jur., Taxation, Section 652, page 618.....	13
53 C.J.S., Licenses, Section 49, page 671.....	13

IN THE SUPREME COURT
of the
STATE OF UTAH

G & G MINING COMPANY,

Petitioner

—vs.—

TAX COMMISSION OF THE STATE
OF UTAH,

Respondent

Case No.
8595

PETITIONERS' BRIEF

STATEMENT OF FACTS

The questions here involved relate to the assessment of the Mine Occupation Tax pursuant to Chapter 5, Title 59, *Utah Code Annotated 1953*, as amended. The Tax Commission in its decision No. 166 dated the 10th day of September, 1956, decreed that the petitioners be ordered to pay to the State Tax Commission a Mine Occupation Tax based upon sales of ore during 1954 in the sum of \$12,628.08 (R. 72).

The action arises out of mining operations conducted by the petitioners on a portion of the MiVida claim owned by Utex Exploration Company pursuant

to the terms of an instrument designated "Lease" made and entered into on the 11th day of February, 1953, between the Utex Exploration Company, a Utah corporation, designated therein as lessor, and Archie Garwood, R. C. Gerlach and W. E. Bozman, designated therein as lessees (R. 11, 84, Exhibit 1). The taxpayers are all residents of Cortez, Colorado (Exhibit 1). The lease was for a term of two years expiring on February 11, 1955. During the term of the lease the lessees, as a matter of convenience, were referred to by Utex as G & G Mining Company (R. 10-11). The lessees, which shall hereinafter be referred to as the petitioners, mined, removed and sold ore from the premises beginning February 11, 1953, until November 17, 1954 (R. 13). During the operations of the petitioners ore was shipped to an AEC purchaser and upon settlement Utex Exploration Company was paid directly the percentage of production provided by the lease, the petitioners only accounting to Utex for any under payment (R. 24).

On or about the 17th day of November, 1954, the petitioners received a letter from Utex Exploration Company terminating the lease and following November 19, 1954, the petitioners have never mined, removed or sold ore from the MiVida claim and have not conducted any mining operations on said property (R. 16, Exhibit B).

On July 21, 1955, the petitioners filed with the Tax Commission a statement of Occupation Tax of Mines and paid to the Tax Commission the sum of \$9,697.14

(R. 22-35, Exhibit 1). This return was filed by petitioners as the result of discussions between them, the Utex corporation and Mr. Higgs of the Tax Commission (R. 36). In November of 1955, as a result of their eviction from the premises by Utex, petitioners were engaged in litigation with the Utex corporation in the Federal Court in Salt Lake City (R. 14, 39, 40). At that time the attorneys for Utex voluntarily advised Mr. Higgs of the Tax Commission that the petitioners had not paid an occupation tax for the year 1955, and gave to Mr. Higgs the figures relating to the overall production of the petitioners for the period of their operation of the MiVida property (R. 39-40). As a result of these circumstances, Mr. Higgs, by the process of subtracting the figures in the return furnished in July from those furnished by Utex, determined that the petitioners owed a tax in the amount of \$12,675.40 (R. 40). Under date of November 4, 1955, the Executive Secretary of the Commission wrote a letter to petitioners stating that, *according to their information*, they owed a Mine Occupation Tax for 1955 in the amount of \$12,675.40 (R. 39-40). A statement of Mine Occupation Tax was enclosed with the letter but was never signed by petitioners (R. 17).

In the July return the sum of \$641,850.45 was included for the purpose of determining the tax. This amount of money represented production from February 11, 1953, until October 1, 1953 (R. 33). In computing the tax for 1953 based upon decisions of the Supreme Court that uranium ore during the period of January 1 to

October 1, 1953, was not taxable, petitioners arrived at the sum of \$3,289.44 as the tax due in 1953 (R. 32-33). In figuring the tax for 1954 Theron Moffett, a Certified Public Accountant called by petitioners, stated that he arrived at a 1954 tax in the amount of \$12,628.08. He then gave credit for the over payment in 1953, arriving at a net tax of \$6,209.58 (R. 34). These figures were based upon the actual amount of ore shipped regardless of when payment was received (R. 34). In computing the tax for the same years, based upon the amount of money actually received for ore sold during the tax period, Mr. Moffett testified that the petitioners owed for 1953 the sum of \$1,793.13, and the money paid in July of 1955 results in an over payment in the sum of \$7,904.01. Figuring the year 1954 on the same basis, and giving credit for the over payment, Moffett testified that the petitioners owed a tax in the amount of \$1,604.48 (R. 32-35, 53-66). The testimony of Mr. Moffett relating to the computation of tax is set forth in Exhibit D at page 105 of the record.

STATEMENT OF POINTS

POINT I

A PERSON WHO IS NOT ENGAGED IN THE BUSINESS OF MINING OR PRODUCING ORE CANNOT BE SUBJECT TO THE MINE OCCUPATION TAX.

POINT II

THE TAX IS ILLEGAL IN THAT

(A) AN ASSESSMENT MADE OTHER THAN AS PROVIDED BY STATUTE IS A NULLITY,

(B) IT IS MANDATORY THAT THE TAX BE FIXED ON OR BEFORE A DAY CERTAIN.

POINT III

THE ASSESSMENT IS CONTRARY TO THE DECISIONS OF THIS COURT.

POINT IV.

THE TAX WAS NOT PROPERLY COMPUTED.

ARGUMENT

POINT I

A PERSON WHO IS NOT ENGAGED IN THE BUSINESS OF MINING OR PRODUCING ORE CANNOT BE SUBJECT TO THE MINE OCCUPATION TAX.

The Tax Commission has no authority to assess a tax unless there is specific statutory authority. The Legislative Act under which the taxing authority is exercised determines the persons and properties to be taxed and the time at which the status is to be determined. The tax in question herein is the Mine Occupation Tax as set forth in Chapter 5, Title 59, *Utah Code Annotated 1953*. The authority to impose the tax is directed to persons engaged in the business of mining or producing ore. The particular statutory provision involved herein is:

“59-5-67. Occupation tax—Rate—Basis for computation—Annual exemption—When delinquent.—Except as herein otherwise specifically provided, every person engaged in the business

of mining or producing ore *** in this state shall pay to the state of Utah an occupation tax * * *."

The taxable status of the persons and property enumerated in the statutory provision above referred to is fixed by Section 59-5-73, *Utah Code Annotated 1953*. The two sections read together set forth the category of the persons taxed and the time when the taxable status is determined. Section 59-5-73 reads as follows:

59-5-73. Notice of amount of tax.—Not later than the first Monday in May of each year, the tax commission shall fix the amount of occupation tax that each person shall pay * * *."

The statutory provisions set forth the persons and the properties which may be subjected to the occupation tax and would appear to be clearly defined. The tax is directed to mining property which is producing ore and to the persons who are engaged in the business of producing and selling ores. This tax status is fixed in that it must be existing on or before the first day of May as provided by Section 59-5-73, *supra*.

In the instant case the petitioners were not engaged in the business of mining in 1955. It would be difficult to ignore the language of the statute relating to the occupation or activity which is taxed. In this respect the nature of the tax may have some importance. An occupation tax is a revenue tax imposed upon the privilege of doing business. It is distinguished from a license tax in that the latter is a measure used to regulate and prohibit certain business activities. This latter dis-

tion is set out in *Provo City v. Provo Meat & Packing Co.*, 49 Utah 528, 165 P. 477:

“As pointed out in the case of *Salt Lake City v. Christensen Co.*, *supra*, the merchant’s ordinance imposes a tax which is in the nature of an occupation tax rather than a license tax or license fee. The term ‘occupation tax’ is, however, sometimes also applied to a license fee or license tax, and thus some confusion has at times arisen concerning the meaning of the two terms. Properly speaking, a license fee or a license tax comes within and is based upon the police power of the state to regulate or to prohibit a particular business. Such a fee or tax is primarily intended to regulate a particular calling or business, and not to raise revenue, while an occupation tax is primarily intended to raise revenue by that method of taxation.”

The business of mining is not one of the trades or occupations which a State would regulate or prohibit by the exercise of its police power through a taxing statute. While the tax is based upon a specific valuation of property within a certain territory, assessed at a stated period and collected at an appointed time, it is not a property tax.

The difference between the tax involved herein and a property tax, in the ordinary sense of the word, is that it is a tax relating to the activity of mining or producing ore rather than the ownership of property. In 51 *Am. Jur.*, Taxation, Sec. 29, page 57, it states as follows:

“Section 29. Generally.—Taxes on property are taxes assessed on all property or on all prop-

erty of a certain class located within a certain territory on a specified date in proportion to its value, or in accordance with some other reasonable method of apportionment, the obligation to pay which is absolute and unavoidable and is not based upon any voluntary action of the person assessed. A property tax is ordinarily measured by the amount of property owned by the taxpayer on a given day, and not on the total amount owned by him during the year. It is ordinarily assessed at stated periods determined in advance, and collected at appointed times, and its payment is usually enforced by sale of the property taxed and, occasionally, by imprisonment of the person assessed. * * *."

As heretofore stated, the occupation tax is not a property tax and it is doubtful if it can be construed as a severance tax for the reasons that the language is not susceptible to such construction and there is a serious question as to whether or not there is a constitutional prohibition on severance tax. Section 12 of Article 13, *Constitution of Utah*, provides as follows:

"Nothing in this Constitution shall be construed to prevent the Legislature from providing a stamp tax, or a tax based on income, occupation, licenses or franchises. (As amended November 6, 1906)."

The constitutional provision itemizes the taxes which are not prevented by other constitutional provisions. A severance tax is not mentioned and in accord with the general rules of interpretation, where there is an itemization, the intention is that the itemization is controlling. We conclude that it is a tax on the privilege of carrying

on the activity of mining, which is consistent with the language of the statute. To be subject to the tax it would seem to require that there be mining property within the State and that the person be engaged in the mining business. If either of the factors are missing at the time fixed by the statute, there is no authority to assess the tax. *Box Elder County et al. v. Conley, County Assessor, et al.*, 79 Utah 199, 284 P. 105:

“Of course, it is necessary that there be a time as of which the taxable situs of property is to be fixed, whether the situs is dependent on the location of the property or of the person. Generally, a date is fixed by statute as of which the situs of property for purpose of taxation depends, at least so far as the place within the state where property is to be taxed is concerned. * * *”

In the instant case the tax was directed at the MiVida mining claim in San Juan County owned by Charles Steen. During the year 1955 petitioners were not living in Utah, but were residents of the State of Colorado. During said year they were not conducting any mining operations nor engaged in the business of mining or producing ore on the MiVida claim. This points up the time at which the taxable status is determined. The statute is clear that the assessment is to be made on or before the first Monday of May of each year. In view of the fact that it is directly tied to a calendar year, it cannot be construed to be a tax for any year except the year in which it is assessed. The fact that the statute provides that the prior year's production is the basis for the computation of the tax does not obliterate the

provision that it is a tax on the privilege of engaging in mining business in the year assessed. In the case of *Title Insurance and Trust Company v. Franchise Tax Board* (Cal. 1956) 302 P. 2d 79, the California Court stated as follows:

“The franchise tax here levied was for the privilege of doing business in 1943 regardless of the fact that a prior year’s earnings constituted the measuring rod of the amount of the tax. A tax for the privilege of doing business within the state is no less a tax upon this year’s privilege because measured by last year’s income. Is not success in the recent past the best criterion for measuring the value of doing business now? Since the formula prescribed by the legislature for deriving the taxes due by a trust company furnishes an approximation of the amount accrued and since there appears no abuse of power by the legislation, it will not be disturbed. See *Fulleton Oil Co. v. Johnson*, 2 Cal. 2d 162, 175, 39 P. 2d 796.”

This Court has previously stated that this tax is on ore mined in the year prior to the year in which the tax became delinquent. *Consolidated Uranium Mines, Inc. v. Tax Commission of the State of Utah* (1955), 4 Utah 2d 236, 291 P. 2d 895. However, persons must be engaged in the business in the year the tax is assessed. The tax here involved must be assessed on or before the first Monday in May of 1955. The petitioners were not engaged in the business of mining or producing ore on the MiVida claim at any time during the year 1955 and were not residents of the State of Utah or doing anything in Utah which would subject them to the taxing authority.

The Legislature did not intend by the language used to tax such persons.

POINT II

THE TAX IS ILLEGAL IN THAT

(A) AN ASSESSMENT MADE OTHER THAN AS PROVIDED BY STATUTE IS A NULLITY,

(B) IT IS MANDATORY THAT THE TAX BE FIXED ON OR BEFORE A DAY CERTAIN.

Notwithstanding the question as to whether or not a particular person or property is subject to a tax, the taxing authority must act within the scope of the Constitutional and Legislative authority. This is pointed out in *Moss, County Atty., ex rel. State Tax Commission v. Board of Com'rs of Salt Lake City, et al.*, (1953), 1 Utah 2d 60, 261 P. 2d 961:

“The City’s power to tax is derived solely from legislative enactment and it has only such authority as is expressly conferred or necessarily implied. This court has not favored the extension of the powers of the city by implication, and the only modification of such doctrine is where the power is one which is necessarily implied. Unless this requirement is met, the power cannot be deduced from any consideration of convenience or necessity, or desirability of such result, and no doubtful inference from other powers granted or from ambiguous or uncertain provisions of the law would be sufficient to sustain such authority. This is a fortiori true in the instant situation, because in case of any ambiguity or uncertainty as to authority to impose taxes, the doubt must be resolved in favor of the taxpayer.”

And where there is doubt as to the intention of the Legislature the statutes must be construed in favor of the taxpayer. *W. F. Jensen Candy Co. v. State Tax Commission* (1936), 90 Utah 359, 61 P. 2d 629:

“Having in mind the general rule that taxation statutes are strictly construed against the state and in favor of the taxpayer, the language of the statute permits the collection of the tax at the rate specified and no more.”

Norville v. State Tax Commission (1940), 98 Utah 170, 97 P. 2d 937:

“The doctrine that taxing statutes are, in case of doubt as to the intention of the legislature to be, construed strictly against the taxing authority and in favor of those on whom the tax is levied, has been well set out in the case of *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 55 S. Ct. 50, 79 L. Ed. 211.”

As heretofore mentioned the mine occupation tax is fixed as of a time certain, that being the first Monday in May of each year. The statute refers to assessment and notice and, for convenience, is again set forth:

“59-5-73. Notice of amount of tax. — Not later than the first Monday in May of each year, the tax commission shall fix the amount of occupation tax that each person shall pay. Immediately thereafter the person whose occupation tax is so fixed shall be notified by mail, postage prepaid, addressed to his last known place of residence, of the amount of the occupation tax so fixed.”
Utah Code Annotated 1953.

It is generally held that where a statute fixes a time for assessment such provisions are mandatory. 53 *C.J.S.*, Licenses, Section 49, page 671:

“Time for assessment. Generally the tax officials must make their assessment within the statutory time, or, where the statute does not fix a time, within a reasonable time.”

While it is recognized that certain statutory provisions relating to time have been interpreted as being merely directory, those provisions relate only to the orderly administration of public affairs. The provisions of Section 59-5-73, *supra*, are directly related to the taxpayer and is the only section setting forth the manner in which he will be advised of the assessment. It is the procedure by which he knows the property and activity being tax and the amount thereof. Further it is the only opportunity he has to avoid penalty and interest charges. The taxpayer is subject to penalty and interest unless he pays his tax on or before June 1st, ordinarily a period of less than thirty days. *Section 59-5-70 and Section 59-5-71, Utah Code Annotated 1953*. This proposition is set forth in 51 *Am. Jur.*, Taxation, page 618:

“Section 652.—Mandatory and Directory Requirements. — While the statutes of most states provide in considerable detail how the work of assessing the taxes shall be performed, compliance with all these provisions in exact conformity to the law is not necessarily a condition precedent to a valid tax. The test is whether the provision is for the benefit and protection of the individual taxpayer or is merely for the orderly administration of public affairs. All those provisions which

are intended for his security, for insuring an equality of taxation, and to enable one to know with reasonable certainty for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent which must be observed; otherwise, the assessment will be invalid. ***.”

It is manifest that the assessment and notice provisions of the statute are for the protection of the taxpayer. In the instant case the petitioners were first notified of the tax on November 4, 1955. At that time they were subject to severe penalty and interest charges and were not accorded any process by which they could prevent the possibility of these charges.

We believe this Court has passed upon the mandatory effect of the provisions relating to the time fixed by the statute. While the *Box Elder* case, *supra*, relates to a different tax statute, both statutes relate to the status of the person and property and is for the protection of the taxpayer. The Court therein stated as follows:

“The following cases support the general rule of law that, where the taxable status of property relates to a day certain in each year, no taxes can be legally assessed and levied for a particular year unless the conditions requisite to liability exist on the day fixed.” *Box Elder County v. Conley*, *supra*.

The Idaho Court has given the same effect to statutes relating to the status of property as of a certain date. *Winton Lumber Co. v. Shoshone County, et al.*, (Idaho, 1931), 294 P. 529:

“In this state property is assessable for taxes as of the second Monday of January. C. S. Section 3097, as amended by Sess. Laws 1927, c. 263, p. 562, Section 1; *Preston A. Blair Co. v. Jensen* (Idaho), 286 P. 366. That is, the status and value of property on that date controls the assessment for taxation. *Preston A. Blair Co. v. Jensen*, *supra*; *Clearwater Timber Co. v. Nez Perce County* (C.C.) 155 F. 633.”

The provisions of Section 59-5-68, *Utah Code Annotated* 1953, requiring the taxpayer to file a statement before February 10th of the year does not do away with the assessment and notice provisions. The Tax Commission is not bound by such statement and makes its assessment independent thereof. One not engaged in mining would not file the statement for the obvious reason that the statute only refers to those so engaged. The language in respect thereof is clear and in the present tense, not relating to any previous year. It has been generally held that the statement of the taxpayer in such cases is not an assessment. *Fairlamb v. Bowle, County Treasurer*, (Colo., 1937), 71 P. 2d 417:

“The mode of making assessments is a legislative function. *Stanley v. Little Pittsburg Mining Co.*, 6 Colo. 415. It is for the assessor ‘to make an official estimate of value for the purpose of taxation. *** *Making out a list of property by the owner, with its estimated value, is not its assessment.*’ *People ex rel. Hallett v. Board of Arapahoe County Commissioners*, 27 Colo. 86, 59 P. 733, 735.” (Emphasis added.)

If the tax involved herein is upheld, then a situation is presented where a tax liability is imposed where:

1. The taxpayers are not residing in the State of Utah
2. Were not engaged in the business of mining in the State of Utah
3. Were first notified four months after such a tax is delinquent
4. The tax was not assessed
5. Taxpayers had no notice of an assessment, and
6. They are subject to penalties and interest without notice of assessment.

The letter of November 4, 1955 (R. 104, Taxpayers' Exhibit C) is the basis of the claim by the Tax Commission. Section 59-5-73, *Utah Code Annotated* 1953, states without equivocation that the Tax Commission shall fix the amount of the occupation tax. The letter of November 4th is not in fact quite so unequivocal. As a matter of fact it shows on its face that someone other than the Tax Commission fixed the tax. The language of the Exhibit referred to is as follows:

“According to information recently received by this office your company owes mine occupation tax for 1955 in the amount of \$12,675.40.”

A reasonable construction to place upon that language is that the Tax Commission is collecting a third party's tax obligation, otherwise why did it not say the Commis-

sion has fixed your tax in the sum of \$12,675.40? If people are to be subjected to taxation in this manner, all that has been written by the Courts and all that has been enacted into law by the Legislature is for naught. The property here involved is probably the most famous Utah mining property of recent times. The petitioners had paid a sum of money to the Tax Commission on the 21st day of July, 1955, which has no more legality than that now claimed. Certainly under the circumstances the Tax Commission could not say that it was unaware of the mining operation and certainly no one should be required to pay taxes twice on the same thing in the same year.

POINT III

THE ASSESSMENT IS CONTRARY TO THE DECISIONS OF THIS COURT.

The letter of November 4th constitutes the only document notifying the taxpayer of the amount of occupation tax fixed by the Commission. As heretofore mentioned, it states that it is an occupation tax for 1955. If this be the assessment and the notice required by statute, then it is in direct conflict with the previous decisions of this Court. If it is a mine occupation tax for 1955, it must be based upon ore mined and sold during the year 1955. This Court in *Consolidated Uranium Mines, Inc. v. Tax Commission of the State of Utah*, supra, stated:

“Since the tax is not delinquent until the first day of June next succeeding the calendar year when the ore or metal is sold, this indicates *that*

the tax is on the metal mined in the year prior to the year in which the tax becomes delinquent, and, therefore, an imposition of such a tax based on sales other than those made in the calendar year sought to be taxed violates the provisions of the Act. The Tax Commission, therefore, erred when it purported to base its assessment for the year 1954 on sales made during the year 1953.” (Emphasis added.)

The Commission contends that the tax attempted to be collected is an assessment based upon sales of ores made during the year 1954. This is an afterthought, otherwise the tax and what it was for would have been set forth in the letter of November 4th. The manner in which the Tax Commission has acted is patently dilatory and contrary to the statutory provisions. The validity of its acts must be tested against the statutory provisions and the decisions of this Court. Clearly under both no valid assessment was made and the attempt to collect the tax must fail.

POINT IV.

THE TAX WAS NOT PROPERLY COMPUTED.

Since February 11, 1953, the petitioners have never been assessed a mine occupation tax in any manner whatsoever. In July of 1955 the petitioners signed a statement of mine occupation tax purporting to be a tax on 1953 ore sales and paid the sum of \$9,679.14. This payment was the result of conferences between the petitioners, Utex Exploration Company and the Tax Commission (R. 36). The failure to assess a tax in the

manner provided by law was not an oversight by the Commission or the careless exercise of a duty, nor was it because it was not aware of the petitioners' activity. The record shows that the property is the famous Steen claim, which is known to practically every man, woman and child in the State of Utah, and it would be ridiculous to assume that the Tax Commission did not know of the mining activity.

The reason is apparent why the Commission never attempted to assess a tax against the petitioners. It regarded the tax as payable by Utex. The payment made in July 1955, in view of the factual situation, can only be regarded as an adjustment of the tax obligation between the petitioners and Utex. The claim made by the letter of November 4th is of the same nature, the Tax Commission attempting to adjust the tax obligation between the parties to a contract. The payment in July 1955 was not paid under protest and was nothing more than a payment under mistake. It was not the result of any assessment, the Tax Commission never claiming it made an assessment (R. 36).

Whether or not the petitioners have the right to recover the money from the State of Utah is not involved. However, if the Court determines that the Commission assessed a tax in conformity with even a liberal interpretation of the statute, then the statement filed in July of 1955 should be considered together with the letter of November 4th and the two payments adjusted as if it

were one assessment. Certainly petitioners should not be subjected to two assessments and two payments for the same tax in the same year.

If the Commission is going to be permitted to tax in the manner that it did in this instance, then justice requires that the petitioners be given every benefit and have every doubt resolved in their favor. Upon this premise the taxpayers should only pay, in the event they are compelled to pay a tax, the sum of \$1,604.48.

In computing the sum paid in July 1955 the amount of \$640,850.45 was included in the computation which represented sales of ore from February 11, 1953, to October 1, 1953. By reason of this Court's determination in *Consolidated Uranium Mines, Inc. v. Tax Commission of the State of Utah*, supra, this amount should not have been figured in the computation of the payment. Giving credit for this, the petitioners made an overpayment in the sum of \$7,904.01. Taking the figure expressed in the letter of November 4th, the petitioners would be subject to a payment of \$9,508.49. Giving effect to the overpayment made in July 1955, the petitioners would owe the State of Utah \$1,604.48. These figures and the computations were testified to by Theron E. Moffett, a Certified Public Accountant, who had examined the books of the petitioners. The testimony is found beginning at page 31 to 39 and beginning at page 54 to 65. The testimony and the method of computation is set forth in taxpayers' Exhibit D found at page 105 of the record.

CONCLUSION

Upon the record in this case a tax is attempted to be collected by the State of Utah under circumstances that ignores every statutory requirement. If there is any due process relating to the imposition of a tax, then the decision of the Tax Commission in the instant case must be reversed.

Respectfully submitted,

GUSTIN, RICHARDS, MATTSSON & EVANS

Attorneys for Petitioners