

1957

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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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G & G MINING COMPANY,

Petitioner

Clerk, Supreme Court, Utah

— vs. —

TAX COMMISSION OF THE
STATE OF UTAH,

Respondent.

Case

No. 8595

Respondent's Brief

JOHN MARSHALL and
BEN RAWLINGS,

Attorneys for Respondent.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

G & G MINING COMPANY,	}	Case No. 8595
<i>Petitioner</i>		
— vs. —		
TAX COMMISSION OF THE STATE OF UTAH,		
<i>Respondent.</i>		

Respondent’s Brief

STATEMENT OF FACTS

The Tax Commission can agree generally with the Statement of Facts contained in Petitioners’ brief. However, it should be pointed out regarding the statements therein relating to the computation of the tax due that the accountant for Petitioners, Mr. Moffat, stated that during 1954 the Petitioners delivered to the buying station ore valuing \$1,352,080.95. (Tr. 62) He also testified that the Petitioners received \$105,640.27 as hauling allowance on the ore delivered during 1954 (Tr. 62), while it actually cost the Petitioners \$144,913.27 to ship this ore.

After allowing a specific exemption of \$50,000, there remains a net amount of \$1,262,807.95. This net amount, representing the ore sold during 1954, will produce a tax of \$12,628.08.

The above figures concern only the sales of ore by Petitioners during 1954. The Petitioners also sold some ore during 1953. On July 21, 1955, the Petitioners submitted a return based on their sales during 1953 (Tr. 106), and they paid \$9,697.14 as the tax thereon. (Tr. 21) Inasmuch as this tax was paid on sales for a prior year, it has no bearing upon the amount to be determined as the tax due on sales during 1954.

STATEMENT OF POINTS

POINT I

PETITIONERS WERE PERSONS ENGAGED
IN THE BUSINESS OF MINING AND
PRODUCING ORE IN THE STATE OF
UTAH.

POINT II

THE TAX IS NOT ILLEGAL:

- (A) THE ASSESSMENT WAS MADE AS
PROVIDED BY LAW.
- (B) IT IS NOT MANDATORY THAT THE
TAX BE FIXED ON OR BEFORE
THE DATE SPECIFIED IN THE
MINE OCCUPATION TAX.

POINT III

THE ASSESSMENT WAS NOT CONTRARY
TO THE DECISIONS OF THIS COURT.

POINT IV

THE TAX WAS PROPERLY COMPUTED.

ARGUMENT

POINT I.

PETITIONERS WERE PERSONS ENGAGED
IN THE BUSINESS OF MINING AND
PRODUCING ORE IN THE STATE OF
UTAH.

The Tax Commission will readily concede that it has no authority to assess or collect any tax except in accordance with the authority granted by the State Legislature. The tax liability here involved concerns the Mine Occupation Tax imposed by Sections 59-5-66 to 82, inclusive, Utah Code Annotated 1953. Section 59-5-67, Utah Code Annotated 1953, provides in part as follows:

“... Every person engaged in the business of mining or producing ore . . . in this state shall pay to the State of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold . . .”

Thus, it will be seen that this is a tax imposed upon persons who are engaged in the business of mining and that the tax is measured by the amount of ore sold. In order to

be liable for a tax it is only necessary that a person (1) be engaged in the business of mining or producing ore, and (2) that he sell ore so produced. The petitioners in this case have argued that no tax is due from one who is not in the business of mining ore. This the Tax Commission will concede. However, in its decision No. 166 the Tax Commission expressly found “that the petitioners were engaged in the business of mining or producing ore on February 11, 1953, and continuously thereafter until November 19, 1954.” (Tr. 70)

The evidence shows that the Petitioner submitted a tax return and paid the amount of \$9,697.14 as a tax on their sales during 1953. (Tr. 22) No return was submitted to the State Tax Commission on 1954 sales. (Tr. 17) And no tax has ever been paid for such sales. The essence of the Petitioners’ position is that they were not required to pay any tax on their sales during 1954 because they were not engaged in business during 1955.

In their brief Petitioners distinguish the Mine Occupation Tax from a property tax, and they also argue that it is not a severance tax. From this they infer that the Mine Occupation Tax is a franchise tax, and that the tax should be prepaid and, therefore, that they owed no tax in 1955 based upon their sales during 1954, because they were not engaged in business during 1955.

The Tax Commission agrees that the Mine Occupation Tax is not a property tax and asserts that the requirements of the law regarding the advalorem property

tax have no relevance in this case. Therefore, such cases as *Box Elder County vs. Conley*, 79 Utah 199, 284 Pac. 105; *Winton Lumber Co. vs. Shoshone County*, 294 Pac. 529 (Idaho 1931); *Fairlamb vs. Bowle*, 71 P. 2d 417 (Colorado 1937) cited in Petitioners' brief on pages 9, 14 and 15 and the extract from 51 Am. Jur., Taxation, Section 29, cited on page 7 of Petitioners' brief are not relevant to the determination of this case since they all involve provisions of law relating solely to ad valorem taxes.

The Tax Commission also contends that the Mine Occupation Tax is not a franchise tax. It would appear from the cases that a franchise tax or license tax is often confused with an occupation tax. This was specifically recognized by the Utah Supreme Court in the case of *Provo City vs. Provo Meat and Packing Co.*, 49 Utah 528, 165 Pac. 477, 479 Ann. Cas. 1918 D. 530. This case states that a license or franchise tax is primarily intended to regulate or prohibit a particular business, while an occupation tax is primarily intended to raise revenue. The same distinction was made in the case of *Hurt vs. Cooper*, 110 S.W. 2d 896, 899, 900. According to Black's Law Dictionary, an occupation tax is "to be distinguished from 'a license tax' which is a fee or exaction for the privilege of engaging in the business, not for its prosecution." See Black's Law Dictionary, *Occupation Tax*, page 1,230 (4th Ed.). Corpus Juris Secundum also distinguishes an occupation tax from a privilege tax as follows:

“*Occupation tax* — The term ‘occupation tax,’ used as descriptive of a tax levied on the privilege of carrying on a business or occupation, is sometimes also applied to a license fee or license tax. It is in the nature of an excise tax.

“*Privilege tax* — A privilege tax is a tax passed to raise revenue which is imposed on the right to exercise a privilege; its payment is invariably a condition precedent to the exercise of the privilege involved. Such a tax is in the nature of an excise tax.” (53 C.J.S., Licenses, Sec. 1 (C), page 447.)

Adler vs. Whitbeck, 44 Ohio St. 539, 9 N.E. 672, 675, distinguishes the two taxes as follows:

“The distinction between a tax upon a business [or an occupation tax], and what might be termed a license, is that the former is exacted by reason of the fact that the business *is carried on*, and the latter is exacted as a condition precedent to *the right* to carry it on. In the one case the individual may rightfully engage in and carry on the business without paying a tax; in the other he cannot.”

From the foregoing principles it will be seen that a franchise tax is primarily intended to regulate or prohibit particular businesses and that in keeping with this purpose the tax must be paid in advance. Pre-payment is the means adopted to regulate, for if the tax is not paid there is no privilege extended to do business and any business done is illegal. On the other hand, an occupation tax is primarily intended to raise revenue. The taxable incident is the *doing* of business and the tax is measured by the amount of business done. Since it is impossible to determine the amount of the tax until after the business

has been done, payment of tax is usually deferred until after the close of the year in which the business is done.

This conclusion is consistent with the language of the Utah Supreme Court interpreting the Mine Occupation Tax in the recent case of *Consolidated Uranium Mines Inc. vs. State Tax Commission*, 4 Utah 2d 236, 240, 291 P. 2d 895, 898:

“Although, it is true that a license fee or tax may be, and usually is, required to be paid before the business which is licensed may be carried on, the legislature in our Mining Occupation Tax specifically provided that: ‘Said tax shall be delinquent on the first day of June next succeeding the calendar year when the ore or metal is *sold*.’ (Emphasis ours) This clearly indicates that the legislature intended that the tax base should be on the ‘gross amount received for or the gross value of metalliferous ore sold’ and of course that cannot be ascertained until after the occurrence of one of those events. 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 . . .”

Thus in this case it would appear that in 1955 the Petitioners should have paid a tax based upon their sales of ore during 1954. The record is clear that no tax was ever paid the State of Utah for Petitioners’ sales during 1954.

Therefore, the State Tax Commission properly found in its decision No. 166 that the Petitioners were engaged

in the business of mining or selling ore during 1954 and that they were persons who should have paid to the state a Mine Occupation Tax in the year 1955.

POINT II

THE TAX IS NOT ILLEGAL:

- (A) THE ASSESSMENT WAS MADE AS PROVIDED BY LAW
- (B) IT IS NOT MANDATORY THAT THE TAX BE FIXED ON OR BEFORE THE DATE SPECIFIED IN THE MINE OCCUPATION TAX.

Under point 2 of their argument Petitioners cite the case of *Moss, County Attorney, Ex Rel. State Tax Commission, vs. Board of Commissioners of Salt Lake City, et al*, 1 Utah 2d 60, 261 P. 2d 961, for the proposition that the taxing authority must act within the scope of the constitutional and legislative authority. This the Tax Commission is willing to concede. Next, the Petitioners cite the Jensen Candy Case and the Norville Case for the proposition that any ambiguities as to the intention of the legislature in enacting taxing statutes must be resolved strictly against the power to tax. The Tax Commission will also concede that this is a proper rule of construction. However, the Tax Commission contends that in the present case there is no ambiguity or uncertainty as to the intention of the legislature to impose the Mine Occupation Tax upon persons engaged in the business of mining or producing ore. Section 59-5-67, Utah Code Annotated 1953, imposes a Mine Occupation Tax

upon every person engaged in the business of mining or producing ore. The record clearly indicates that the Petitioners during 1954 were engaged as lessees in the business of mining and producing and selling ore. (Tr. 16) They have not claimed otherwise. There can be no dispute but what they were persons whom the legislature intended to tax. The lease (Tr. 84) shows that the property leased was a portion of a mining claim and that the remainder of the claim was being worked by the lessor. As lessees the Petitioners were independent of the control of the lessors, and thus were persons engaged on their own account in the business of mining during 1954. The evidence also shows that Petitioners filed no statement with the Tax Commission (Tr. 16) as required by Section 59-5-68, Utah Code Annotated 1953. Under this same section, "the statement or report required by this section may be made by the owner of the mine or mining claim from which the ore is extracted, irrespective of whether such property be operated directly by the owner or be operated by one or more lessees, or otherwise" The record shows that the Commission assumed that the statement of ores sold during 1954 which was filed by the owner, in this case, Utex Exploration Company, included sales of ore by the Petitioners. (Tr. 9) When it was shown that the ore sold by Petitioners was not included in the return furnished to the State Tax Commission by Utex Exploration Company, the Tax Commission notified the Petitioners of the amounts due. (Tr. 39 and 40)

It would appear that the Petitioners' attack on the validity of the tax amount claimed to be due resolves

itself to two arguments: (1) That the tax was not assessed as of the date which is provided by statute, and (2) that the Tax Commission itself did not assess the amount claimed to be due.

As to the first point, Sec. 59-5-73, Utah Code Annotated 1953, says:

“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.”

Petitioners in their brief comment on page 13: “It is generally held that where a statute fixes a time for assessment such provisions are mandatory.” Cooley in his work on taxation has one chapter which is devoted to the subject of mandatory and directory provisions of tax statutes. In 2 Cooley on Taxation, Sec. 510, (4th Ed. 1924) he states as follows:

“Many eminent judges have endeavored to lay down a general rule on this subject, by which the difficulties in tax cases may in general be solved. In one of the cases in which this has been attempted, the general doctrine is stated as follows: ‘There are undoubtedly many statutory requisites intended for the guide of officers in the conduct of business evolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designated to secure order, system, and dispatch in proceedings, and by a disregard of

which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words, importing that the act required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed, or the acts done will be invalid. The power of the officer in all such cases is limited by the measure and conditions prescribed for its exercise.' '' (Citing *French vs. Edwards*, 13 Wall. [80 U. S.], 506, 511, 20 L. Ed. 702, 703.)

In the case cited, French owned a considerable amount of land which was sold to Edwards' predecessor in interest under a tax deed. The law in the State of California in which the sale took place required the sheriff to sell "only the smallest quantity that any purchaser will take and pay the judgment and all costs." Instead, the sheriff sold the whole tract, consisting of some 1300 acres, to the highest bidder. The court in its decision argued that because of the relatively great value of the property and the small amount of taxes due "it is hardly credible that a less portion of the whole of this large tract would not have been readily accepted and the judgment and costs, amounting to only \$155.40, been paid, had any opportunity to take less than the entire tract been afforded to purchasers." (*French vs. Edwards*, 13 Wall. [80 U. S.] 506, 513, 20 L. Ed. 702, 704.) Therefore,

the court found that a disregard of these provisions amounted to a sacrifice of French's rights.

The case of *State vs. Lean*, 9 Wis. 279, 292, involved the validity of a statute which was not published within the time required by law to be published. In that case the court said:

“We understand the doctrine concerning directory statutes to be this: That where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before—no presumption that by allowing it to be so done it may work an injury or wrong—nothing in the act itself, or in other acts relating to the same subject matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not to be done at all; there the courts assume that the intent was, that if not done within the time prescribed, it might be done afterwards.”

The instant case is substantially different on its facts from the case of *French vs. Edwards*, supra. In that case it was clear that French's property interests were directly affected by the sheriff's failure to offer less than the entire tract for sale for such a relatively small amount. In the present case it is difficult to see wherein the Petitioners' *property interests* are injured because of the fact that this tax was assessed later than the date prescribed by law. Petitioners in their brief on page 13 state as follows:

“The provisions of Sec. 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 taxed 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.”

The facts of this case, however, disclose that the Petitioners are not injured in any of these particulars which they set forth. They claim that this is the only section setting forth the manner in which they will be advised of the assessment, yet the evidence discloses that they received a letter from the State Tax Commission stating the amount claimed to be due. They claim that this is the procedure by which they know the property and activity being taxed and the amount thereof. The law requires only the amount of the tax to be communicated to the taxpayer in this notice. Normally, the taxpayer furnishes a return to the State Tax Commission whereby he discloses the property and amount of his sales. Based on this information the Tax Commission computes his tax and notifies him thereof. In the instant case, the taxpayers failed to furnish a return, but certainly they cannot claim that they did not know which activity was being taxed. The Petitioners further argue that this assessment is the only opportunity which a taxpayer has to avoid penalty and interest charges. Yet Sec. 59-5-70, Utah Code Annotated 1953, imposes a penalty of 25% of the tax for *failure to make or file a return*, and no penalty is provided for failing to pay the tax on time. However, interest at the rate of 6% is required to be charged by Sec.

59-5-71, Utah Code Annotated 1953, from the date the tax is delinquent. An examination of Tax Commission Decision No. 166 will disclose that in the instant case the Petitioners are not being charged with either penalty or interest on the amount due. They have only been assessed the amount actually due as taxes to the State of Utah and no added charge is put on for penalty or interest.

Therefore, it would appear that taxpayers' property interests were not damaged because of the failure of the Tax Commission to assess this amount and notify them thereof on or before May 1, 1955. Rather it would appear from the facts of this case that there is no substantial reason why the act required to be done could not be done as well after the date set by statute as before the date set by statute, for where no injury is suffered by the petitioning taxpayers, it would appear that the legislature intended that it would rather have the act done late than not to be done at all.

The taxpayers further argue that no assessment at all was made. This argument was not raised by the taxpayers' petition to the State Tax Commission, and no decision was made thereon in Tax Commission Decision No. 166. Therefore, it would appear improper to now raise the argument for the first time on appeal. Apart from this, it would appear that according to the law a formal assessment is not necessary. In the case of *State ex rel, Rice-Stix Dry Goods Co. vs. Alt*, 224 Mo. 493, 507, 123 S. W. 882, 885, the court stated as follows:

“The distinction between an ad valorem property tax and a strictly occupation or license tax

must be kept in view, to reach a proper settlement of the controversy in these cases.

“When the state or a municipality by authority of the state, imposes a license tax, it fixes the amount, and there is no assessment or any need of one; neither is there any necessity for notice or a hearing.”

It should be noted that all the cases cited by Petitioner as to the necessity of an assessment are cases relating to ad valorem property tax wherein a formal assessment may be a condition precedent to the right to collect the tax. As pointed out in Point No. 1 these cases have no bearing on a case involving the Mine Occupation Tax. Further, an examination of the statutes relating to the Mine Occupation Tax discloses that the word “assessment” is never mentioned. Therefore, it would appear that no assessment is necessary.

To the same effect also is 4 Cooley on Taxation, Sec. 1676, (4th Ed. 1924), which distinguishes an occupation tax from a property tax.

“Whether a particular tax is on the one or the other cannot be determined by the application of any fixed rule. Ordinarily a tax imposed on the carrying on of any business, trade, profession or calling is not a tax on property as distinguished from an occupation tax. Generally an assessment of the tax is necessary in case of a property tax but not in the case of an occupation tax.”

The only requirement of the Mine Occupation Tax Statutes is contained in Sec. 59-5-73, Utah Code Annotated 1953, wherein it says that the Tax Commission

shall *fix the amount* of occupation tax which each person shall pay.

There can be no substantial question in this case but what the amount was fixed by the Tax Commission. A letter notifying the Petitioner of the amount claimed to be due was sent on Tax Commission stationery. It was signed by the Executive Secretary of the Tax Commission. It set a definite amount and recited the statutes of the State of Utah in connection with the collection of the Mine Occupation Tax. There can be no question in this case of the Tax Commission attempting to collect from Petitioners a tax obligation owed by third parties, inasmuch as the evidence clearly shows that Petitioners were persons independently engaged in the business of mining and, therefore, were properly subject themselves to the Mine Occupation Tax.

POINT III

THE ASSESSMENT WAS NOT CONTRARY TO THE DECISIONS OF THIS COURT.

The Utah State Supreme Court in the case of *Consolidated Uranium Mines, Inc. vs. State Tax Commission*, 4 Utah 2d, 236, 291 P. 2d 895, indicated the way in which the year of payment of the Mine Occupation Tax relates to the year of the taxable incident. The court stated:

“Although, it is true that a license fee or tax may be, and usually is, required to be paid before the business which is licensed may be carried on, the legislature in our Mining Occupation Tax specifically provided that: ‘Said tax shall be delin-

quent on the first day of June next succeeding the calendar year when the ore or metal is *sold*.' (Emphasis ours) This clearly indicates that the legislature intended that the tax base should be on the 'gross amount received for or the gross value of metalliferous ore sold' and of course that cannot be ascertained until after the occurrence of one of those events. 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*' (Latter emphasis added)

It is also true that the court in continuing stated as follows:

"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 in the year 1953."

From this last quoted portion the taxpayers argue that in the instant case the Tax Commission assessed the tax "for 1955," and that unless this is a tax upon metals mined and sold during 1955, the assessment is on its face invalid. The petitioners later contend that the statement by the Tax Commission that this was based upon sales of ore during 1954 is an afterthought. However, considering all the circumstances, it would appear that in reality the Petitioners' argument in this instance is the afterthought. The letter notifying Petitioners of the amount claimed to be due was sent to them before the taxes would be due on any ore which they may have sold during 1955.

This would tend to prove that from the beginning the only amount claimed by the Tax Commission was the tax on the sales of ore made during 1954. It would seem that the Petitioners have thought of this argument since the decision in the Consolidated Case, published on Dec. 21, 1955, which was subsequent to the time when the notice was given to Petitioners.

The Tax Commission contends that the statement of the Supreme Court of the State of Utah last quoted above from the Consolidated Case was really dicta, particularly if it be applied to the facts of this case. In that case the taxpayer never argued that the tax was based upon the wrong year. In the Consolidated Case, *supra*, 4 Utah 2d at 239, the court stated as follows:

“Plaintiff also contends that the Commission unlawfully used the production figures for the entire year of 1953 as a basis for the tax imposed because until October, 1953, under section 1809 (b) of the Atomic Energy Act, 42 U.S.C.A. Sec. 1809 “* * * The Commission, and the property, activities, and income of the Commission, are expressly exempted from taxation in any manner or form by any state, * * *.’ We agree.”

It therefore appears from the opinion in the Consolidated Case that the only thing which the taxpayer in that case contended was that it was exempt from taxation until October, 1953. The taxpayer never contended that the Tax Commission improperly assessed that tax as being “for the year 1954 based upon sales of ore during 1953.”

The Sections of the Utah Code relating to the Mine Occupation Tax do not mention the necessity of tying the

tax to any particular year. Therefore, to denominate the Mine Occupation Tax as a tax due for a particular year is merely a matter of convenience. It is not a matter so substantial as to determine the validity of any amount sought to be collected as Mine Occupation Tax for that year. If a person engages in the business of mining during 1954 and sells ore during that same year, a taxable incident has resulted, and it was the intention of the legislature to exact a tax from the prosecution of the business of mining during that year. Whether that tax be denominated a tax for 1954 (the year of the sale) or a tax for 1955 (the year of the payment) is of no substantial difference, so long as the party being taxed understands that he is being taxed on his sales during the preceding year. In the instant case, although the notice to the Petitioners stated that the tax was for the year 1955, there is no allegation anywhere in the petitions or in the evidence presented at the hearing before the Tax Commission that the Petitioners were in any way misled. The evidence is to the contrary. The taxpayers in their Amended Petition supplied the basis for the computation of the tax which was ultimately adopted by the Tax Commission. This was based upon their sales of ore during 1954. In Taxpayers' Exhibit D (Tr. 105) we find the production figures for 1954 and the notation "this amount is now at issue." In addition it is clear that the tax which should be paid on sales of ore during 1955 would not become delinquent until June of 1956. Since the letter notifying Petitioners of the amount claimed to be due was sent to them on Nov. 4, 1955, it is obvious on the face of the letter that this could not relate to sales

of ore during 1955. Therefore, Petitioners were not misled into thinking that they were being taxed for sales of ore during a year in which they had no operations in the state of Utah as they now claim. Furthermore, the holding in the Consolidated Case would seem to indicate that it is proper to collect a Mine Occupation Tax in 1955 based upon sales of ore during 1954.

POINT IV

THE TAX WAS PROPERLY COMPUTED.

It would appear from the Petitioners' argument that they are in reality advancing two arguments. The first is that Petitioners owe no tax because the primary tax liability is on the part of Utex, the lessor of the mining property involved here, and not on the part of the lessee. The second argument would appear to be that the State Tax Commission improperly refused to allow Petitioners a credit against the amount claimed to be due for an overpayment of tax applicable against sales of ore during 1953. As to the first argument, the position of the Tax Commission is set out in Point II of this brief.

Concerning the actual computation of the amount found to be due, Mr. Moffat, the accountant for the G. & G. Mining Company, testified that during 1954 the Petitioners shipped ore to the buying station in the amount of \$1,352,080.95 (Tr. 62); that during the same year they received as hauling allowance \$105,640.27 (Tr. 62); and that during 1954 Petitioners incurred hauling expense in the amount of \$144,913.27 (Tr. 62). Adding together the

amounts received for the ore and hauling allowance and subtracting therefrom the amount of hauling expense actually incurred and after deducting the specific allowance of \$50,000, computing the tax at 1% of the net amount so derived will produce a tax in the amount of \$12,628.08 which the Tax Commission found to be due. The Petitioners cannot complain of this finding since the amount was computed by using the figures which are shown in Taxpayers' Exhibit D (Tr. 105). These amounts are the only figures which are relevant to a computation of the tax owed for sales of ore during 1954.

Petitioners in their brief now argue that the Tax Commission erred in not allowing them a credit for overpayment of the amount paid as tax based on sales of ore during 1953. Yet at the hearing before the Tax Commission while Mr. Moffat, the accountant for G & G Mining Company, was on the stand being cross-examined, he was asked the following question:

“Q. And according to the books of the company, what was the value of the ore shipped by the taxpayer between Oct. 1, 1953, and Dec. 31, 1953, inclusive?

Mr. Evans: I would object that there is no issue as to that period of time, and on the grounds that it is immaterial.” (Tr. 55)

Later Mr. Moffat was asked as to the value of ore delivered to the purchaser during this same period of time and the following colloquy resulted:

“Q. So the values would be the same, the values shipped and delivered?

A. I would consider them the same, yes.

Q. That is all I want to know. And the answer would be the same for the value of the ore delivered to the purchaser from October 1, 1953 to Dec. 31, 1953?

Mr. Evans: I have the same objection as to that question.” (Tr. 56)

Subsequently Mr. Moffat was asked:

“Q. And how much was received for hauling allowance between Oct. 1, 1953 and Dec. 31, 1953 regardless of when received?

Mr. Evans: I object to that as being immaterial; there is no issue as to that.” (Tr. 60)

Finally Mr. Moffat was asked:

“Q. Now how much did it cost the taxpayer to ship the ore which he shipped between Oct. 1, 1953, and Dec. 31, 1953, regardless of when he paid it?

Mr. Evans: I object to the question as immaterial. There is no issue as to that period of time.” (Tr. 61)

In view of the holding of the Utah Supreme Court in the Consolidated Case, *supra*, it would appear that the Petitioners may have paid too much as Mine Occupation Tax for their sales of ore during 1953 since the amount paid as tax was based upon their sales during the entire year. However, inasmuch as the tax was not paid under protest, it would appear that there is no way the Tax Commission could refund the overpayment. The Tax Commission would not object to allowing Petitioners a credit for overpayment of this tax to be applied against their tax in subsequent years. However, nowhere in the

Taxpayers' Petition or Amended Petition does there appear a request that such a credit be allowed, and as outlined above, at the hearing, counsel for Petitioners objected four times to the introduction of testimony which would have enabled the Commission to determine the amount properly due the state, in the event the Petitioners should later apply for a credit.

Should this court decide that it is proper to allow the Petitioners a credit for overpayment of taxes based on sales of ore during 1953 regardless of the foregoing objections, the Tax Commission would like to bring one matter to the attention of the court. In Taxpayers' Exhibit D (Tr. 105), the taxpayers assert that the amount of the overpayment is \$6,418.50. In Petitioners' brief, on page 20, Petitioners allege that the overpayment is in the amount of \$7,904.01. The reason for the discrepancy between these two figures is not clear, and the testimony given by Mr. Moffat at the hearing will not substantiate either figure. At the hearing Mr. Moffat testified that the value of the ore shipped by the taxpayers prior to October 1, 1953, was \$641,850.45. (Tr. 54) He later testified that the hauling allowance received by the Petitioners on ore delivered prior to Oct. 1, 1953, was in the amount of \$28,601.57. (Tr. 60) These two amounts when added together produce a gross receipt in the amount of \$670,452.02. Mr. Moffat then testified that the actual hauling expense incurred by the taxpayers prior to October 1, 1953, was in the amount of \$38,135.43. (Tr. 61) Deducting this figure from the gross receipt produces a net receipt of \$632,316.59. Even allowing the Petitioners to apply the

full \$50,000 statutory exemption against the taxable portion of the year, rather than making them allocate the \$50,000 exemption over the entire year would produce a taxable amount for the portion of 1953 prior to Oct. 1st in the amount of \$6,323.17. This is the maximum amount which the testimony indicates the taxpayers overpaid on their sales of ore during 1953. The amount which Mr. Moffat arrived at in computing the overpayment on Taxpayers' Exhibit D is greater than the amount found through the evidence at the hearing because Mr. Moffat, through the process which he used, applied the net hauling expense for the entire year to the taxable portion of the year, rather than to allocate the expense between the taxable and non-taxable portion of the year. Should this court find that a credit should be allowed, the expense at least should be allocated between the taxable and non-taxable portion of the year as it was actually incurred, rather than allowing the petitioning taxpayers to charge their expenses for the non-taxable portion of the year against income for the taxable portion of the year. The net tax then due the state for the two years would be the amount of \$6,405.72 instead of the \$1,604.48 alleged by Petitioners on Page 20 of their brief. Should the Court find that the exemption also should be pro-rated, the net tax due the state for the two years would be \$6,680.72.

CONCLUSION

The respondent respectfully submits that the Tax Commission properly found that the Petitioners were subject to Mine Occupation Tax in the amount of \$12,628.08, and moves that this Honorable Court affirm Tax Commission Decision No. 166.

Respectfully Submitted,

JOHN MARSHALL and
BEN RAWLINGS,
Attorneys for Respondent.