BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
DANIEL PETER EAGAN	)	
	)	OAH No. 11-0091-TAX
Mining License Tax (Tax Year 2003)	)	

DECISION

I. Introduction

Daniel Peter Eagan owns property that was the site of a former gold mine. He sold some of the tailings that had been piled on the land to a construction contractor, who removed the tailings from the property using heavy equipment. The Department of Revenue assessed a mining license tax against Mr. Eagan. He protested, arguing that he was not engaged in the business of mining—that he merely sold personal property. Because the tailings were part of the real property, and because removing and selling gravel fit the definition of "mining" applicable at the time, the department properly imposed the tax, plus penalties and interest, and Mr. Eagan is not entitled to a refund.

II. Facts

In 1966, Mr. Eagan's father and mother purchased approximately 11 acres of land near Fairbanks from the United States Smelting Refining and Mining Company.[1] U.S. Smelting had mined for gold on the property in the 1950s using a bucket dredge.[2] As Mr. Eagan explained, "[g]ravel tailings (tailings), considered to be a waste product (refuse, dross) remained on the property following the mining."[3] Mr. Eagan later became the owner of the property.[4] In 2003, he sold some tailings to M & M Constructors for $63,840.[5] M & M entered Mr. Eagan's property and removed the tailings using heavy equipment.[6] Mr. Eagan did not apply for a mining license or submit a tax return for the mining license tax.[7]

On October 14, 2009, the department assessed Mr. Eagan a tax of $2,192.00, a late filing penalty of $548.00, and interest of $1,854.54.[8] The department levied Mr. Eagan's bank accounts for the $4,594.54 total, and he requested a refund and an informal conference, arguing

---

[1] Eagan Exhibit 2 at 2 (Deed).
[2] DOR0027
[3] *Id.*
[4] Testimony of Eagan.
[5] DOR0002; DOR0027.
[6] DOR0002.
[7] *Id.*
[8] *Id.*

that he did not owe the tax.[9] On February 9, 2011, the Department issued an informal conference decision upholding the tax, penalty, and interest.

On March 10, 2011, Mr. Eagan appealed the denial of his refund request to the Office of Administrative Hearings. A hearing was held on June 29, 2011, at which Mr. Eagan testified himself and presented one witness, and both parties presented arguments.

III. Discussion

Alaska law requires any person who engages or attempts to engage in the business of mining to obtain a mining license.[10] Unless an exemption applies, the person must pay a mining license tax, which is assessed on the net income from the mining operation.[11] In 2003, the law specifically applied to any business that extracts or removes sand and gravel from the earth or water.[12]

The Department of Revenue argues that Mr. Eagan was in the business of mining because his activity of selling tailings to M & M Constructors, and M & M's removal of the tailings, constituted mining. At the time in question, the department interpreted "mining" to include extracting marketable sand and gravel from a property. The department asserts that under 15 AAC 65.010(a)(2), Mr. Eagan is liable for the mining license tax because he owns a mining property and received payment based on production of minerals from the property. In the department's view, the fact that the tailings were removed from the ground and processed in the 1950s is not relevant because the tailings were not produced until M & M removed them from the property.

Mr. Eagan does not dispute that he owns the property or that he sold the tailings to M & M, and he does not argue that the amount of the tax, penalty or interest was incorrectly computed. Instead, he asserts that he was not in the business of mining. In his view, the mining took place in the 1950s when U.S. Smelting dredged the property and processed the tailings.[13] Mr. Eagan asserts that his parents then purchased an inventory of tailings, along with the land on which to store them, and that his subsequent sale to M & M was simply the sale of a commodity,

---

[9] DOR0006-8.

[10] AS 43.65.010(a).

[11] AS 43.65.010(c).

[12] AS 43.65.010(a) & AS 43.65.060(defining "mining"); *see also* 15 AAC 65.990(7) (defining "mining operation").

[13] Eagan prehearing brief at 1.

not "mining."[14] He concludes that the taxable event of mining took place more than 40 years prior to the transaction with M & M.[15]

To support his conclusions, Mr. Eagan argues that "processing" is a necessary element of mining and that a person not processing minerals before selling them is not mining. He argues that the tailings became personal property when they were originally produced and processed, and that they never lost their character as personal property. He reasons that because mining involves extracting value from real property, a person who sells personal property is not engaged in mining.

A. "Mining" does not require extracting and "processing."

Under Mr. Eagan's view, a person engaged in mining must both extract and process the minerals. Mr. Eagan makes this argument in two different ways. First, he makes a textual argument based on the definition of "mining operation" found in the mining license regulations and concludes that the definition requires both elements. He argues that the use of the conjunctive "and" in the regulation means that mining is defined by the presence of both extraction and processing.[16] He concludes that he did not engage in mining because neither he nor M & M processed the tailings.

Second, Mr. Eagan asserts that the common meaning of "mining" relates to the digging of ore. He made this point at the hearing by showing pictures of his property, and comparing the land that had been dredged with virgin land that had undisturbed topsoil remaining.[17] The result was a steep cliff with what he estimated was more than one million cubic yards of overburden remaining on eight acres of virgin land that would have to be removed to expose the rock for tailings.[18] Mr. Eagan asserts that a person who was actually mining for tailings would have to remove the overburden, and then process the rock into tailings, which would be a very demanding undertaking. In his view, U.S. Smelting did the mining and he merely scooped up the already extracted and processed tailings.

The department asserts that neither the statute nor the regulation make processing a necessary condition for mining.[19] The department cited to three cases in which courts held that

---

[14] DOR0015; Eagan prehearing brief at 1-4.
[15] DOR0016; Eagan prehearing brief at 1, 4.
[16] Eagan prehearing brief at 1.
[17] Eagan testimony.
[18] Eagan Exhibit 1, Photo 3.
[19] Department prehearing brief at 6.

mining occurs even when a business is merely reworking and moving material that had been originally extracted from the earth and then discarded during an earlier mining operation.[20]

The statute and the regulation do not support Mr. Eagan's textual argument. In 2003, the definition of "mining" in AS 43.65.060 read as follows:

> (2) "mining" means an operation by which valuable metals, ores, minerals, asbestos, gypsum, coal, marketable earth, or stone, or any of them are extracted, mined, or taken from the earth; "mining" includes the ordinary treatment processes normally applied by mine owners or operators to obtain the commercially marketable product, but does not include the extraction or production of oil and gas;[21]

The definition of "mining operation" in the regulations read:

> (7) "mining operation" means a business enterprise associated, directly or indirectly, with developing, removing, extracting, moving, or taking from the earth, water, or under water, metals, ores, minerals, asbestos, gypsum, coal, marketable earth, sand, gravel, and any other mineral deposit, including the treatment processes described in sec. 63(c)(4) of the Internal Revenue Code (26 U.S.C. 613), and such treatment processes normally applied by mine owners or operators to obtain a commercially marketable product, but not including the extraction or production of oil and natural gas, or the harvesting of trees or other natural living, organic resources;[22]

In each of these definitions, the word "processes" follows the word "includes" or "including," but is also modified by the word "treatment." The definitions do not use the word "processing" or any variation of it, except where the phrase "treatment processes" appears.

For purposes of the mining license tax laws, certain "treatment processes" are included in mining, but that does not mean a mining operation is obliged to use "treatment processes," or can escape taxation because no treatment is required to produce the target product. The definitions are not limited to establishing who must obtain a license and pay tax. They have other purposes as well, most notably in the tax calculation. Application of "treatment processes" in a mining operation can affect the tax calculation.[23] Use of the phrase "treatment processes" in the mining license tax context does not create "processing" requirement of any kind. Nothing in the

---

[20] DOR0003 n.2 (citing *Baker v. Waite,* 322 P.2d 512, 514-15 (Cal. 1958); *United States v. Tri-No Enterprise,* 819 F.2d 154, 157 (7th Cir. 1987); *United States v. Kennedy,* 806 F.2d 111, 113 (7th Cir. 1985)).

[21] AS 43.65.060(2) (2003). In 2012, this definition was amended to exclude extraction of "marketable earth, quarry rock, or sand and gravel." *See* Sess. Laws of Alaska, ch. 28, § 2.

[22] 15 AAC 65.990(7).

[23] *See* AS 43.65.060(d) (defining "net income" with reference to ordinary "treatment processes"); *also* 26 U.S.C. § 613(c)(4) (listing treatment processes considered "mining" for purposes of determining percent depletion).

definitions supports Mr. Eagan's argument that "processing" of some kind must take place for an activity or group of activities to be "mining" or a "mining operation." "Processing" is not a required element of "mining" under the mining license tax law.

Similarly, extraction is not a required element of "mining" under this tax law. The definitions contemplate that "mining" also can be accomplished by simple removal or moving of the minerals, or taking them from the earth, water or underwater in no particular manner. This is without regard to whether a previous mining business did the original excavation/extraction of the mineral. The cases cited by the department show that reworking of minerals extracted by a previous mining operation can be considered mining, depending on the applicable definition of mining.[24]

Based on Alaska's mining license tax statutes and regulations, Mr. Eagan's activity of producing tailings from his property could have been mining even though the original extraction occurred many years ago. Whether Mr. Eagan's activity was mining, rather than the sale of a product, depends on whether the tailings were personal property when M & M purchased and removed them.

B. The tailings were not personal property when Mr. Eagan sold them to M & M.

The sale of personal property from mining-related land is not "mining" under the mining license tax laws. Mr. Eagan takes the position that the tailings he sold M & M became personal property when his parents purchased the land containing the tailings in 1966. That could have happened under certain circumstances. For instance, if Mr. Eagan's parents had purchased tailings bundled in burlap sacks, stacked on pallets, those tailings likely would be personal property, having been separated from the real property. The Eagans purchased land containing piles of unconfined tailings resting directly on the land and mixing with the local soils. As a matter of fact, the tailings were physically part of the land—the real property. The question is whether as a matter of law they were converted to personal property through the 1966 sales transaction.

---

24 *Baker v. Waite,* 322 P.2d 512, 514-15 (Cal. 1958) (holding that reworking of tailings deposited and abandoned from earlier mining operations was mining for purposes of a miner's lien); *United States v. Tri-No Enterprise,* 819 F.2d 154, 157 (7th Cir. 1987) (holding that removing and selling stockpiled coal brought to surface by earlier occupant of property constituted surface coal mining operations for purposes of Surface Mining Control Reclamation Act); *United States v. Kennedy,* 806 F.2d 111, 113 (7th Cir. 1985) (holding that mere removal of coal from pile of material that had been brought to the surface in earlier operations constituted mining for purposes of Surface Mining Control Reclamation Act). Although Mr. Eagan attempts to distinguish these cases because they involve coal mining or a worker's lien, these cases establish that merely loading previously extracted minerals can be considered mining under the applicable definition of mining.

"Tailings are the waste material remaining after the removal of the valuable minerals in the processing of the product of the mine. If they are permitted to spread upon and to mingle with the earth, they become a part thereof and are real estate, but if they are kept separate and apart therefrom, … they are personal property."[25] Many courts in different jurisdictions have discussed whether mine tailings are personal property or real property.[26] In *Hayes v. Alaska Juneau Forest Industries, Inc.,* the Alaska Supreme Court recognized the general rule that tailings can be personal property of the miner at the time they are produced, and then can be converted to real property by means such as abandonment, or dumping on the land for disposal or as fill for a construction project.[27] The *Hayes* decision acknowledges that dumping of the tailings and using them as real property converts them into real property, while stockpiling the tailings for other uses preserves them as personal property.[28] The *Hayes* decision indicates that the intent of the owner who produced the tailings is controlling, and held "[w]here mine tailings are deposited for purpose of disposal, the tailings are considered realty."[29] The court cited a 1939 Montana case in which tailings impounded in a log crib were considered personal property but the tailings that washed out of the crib and spread upon the land became real property.[30]

Neither party presented evidence establishing U.S. Smelting's intent when it deposited the tailings on this property. Mr. Eagan testified that his father purchased the property with the specific intent of selling the tailings at a later date.[31] He also testified that Alaska Gold, the successor to U.S. Smelting, occasionally sold tailings off of its properties that were similar to this property.[32] He admitted, however, that there was little or no market for tailings at the time his parents purchased the property.[33] The lack of a market for tailings in the 1950s and 1960s would make it less likely that the tailings were stockpiled or impounded as personal property. The intent of the Eagans to later sell the tailings does not control the issue because, as *Hayes* notes, "[w]ith respect to the sale of the tailings, that use is consistent with the tailings being considered either personal or real property."[34]

---

25 *Foreman v. Beaverhead County*, 161 P.2d 524, 525 (Mont.1945).
26 *See* Eunice A. Eichelberger, *Mine Tailings as Real or Personal Property,* 75 A.L.R.4th 965 (1989).
27 748 P.2d 332, 334-37 (Alaska 1988).
28 *Id.*
29 *Hayes,* 748 P.2d at 336.
30 *Id.* at 335 (citing *Conway v. Fabian,* 89 P.2d 1022 (Mont. 1939)).
31 Eagan testimony.
32 *Id.*
33 *Id.*
34 *Hayes,* 748 P.2d at 336 n.10.

Mr. Eagan presented a witness, Rod V. Wakefield, who was qualified as an expert in real estate, and who testified that during the 1970s Alaska Gold would frequently sell properties, and would value the properties based on the value of the acreage plus the value of the tailings.[35] This testimony does not relate to whether the tailings on the land sold to Mr. Eagan's parents were deposited for disposal or stockpiled with the intent to treat them as a commodity. The fact that Alaska Gold charged more for property with exposed tailings is consistent with the tailings being either real or personal property.

The department asserted that the evidence does not support Mr. Eagan's argument that the tailings were a commodity because the tailings were not separately valued when the Eagans purchased the land.[36] Mr. Wakefield testified that a common practice in real estate transactions was that personal property is included in a real estate transaction without the personal property being referenced on the deed.[37] Again, Mr. Wakefield's testimony does not illuminate the intent of U.S. Smelting. At most, his testimony calls into question whether the deed's silence about conveyance of specific items that could be either real or personal property should be given any weight in discerning the grantor's intent. He provided credible testimony that it was common for grantors not to detail in the deed itself the particulars about personal property being conveyed. That U.S. Smelting may have followed this common practice says nothing about the company's intent regarding the status of the tailings.

The 1966 deed is the only land sale transaction document filed in this appeal about the transaction between U.S. Smelting and the Eagans. No contract of sale or purchase and sale agreement, or similar document, was offered into evidence. The deed recites the intent to convey and quitclaim a parcel described by metes and bounds, subject to two reservations and one exception. The reservations pertain to government interests—a state right of way and Patent Deed reservations, if any, to the United States. The exception pertains to the tailings. It imposes a condition under which "[n]o gravel or dredged tailings shall be removed from this property for sale or royalty purposes[]" for ten years.[38] The condition created a covenant running with the land in favor of U.S. Smelting's remaining land.[39] One can infer from this that U.S. Smelting intended to prevent competition from the Eagans and their successors for ten years. The

---

[35] Wakefield testimony.
[36] Department's prehearing brief at 6.
[37] Wakefield testimony.
[38] Eagan Exhibit 2 at 3.
[39] *Id.*

condition did not forbid use of the tailings on site or removal for a purpose other than sale or royalty.

In Mr. Eagan's view, this condition shows that the parties viewed the tailings as separate from the land. To the department, this condition indicates that the parties understood that the gravel tailings were part of the real property and that the tailings could be separated from the land at a later date.[40] The form of the transaction indicates that the sale was of real property that contained some tailings, not of tailings preserved as personal property. The deed's ten-year restriction against "removal" for value—i.e. mining—deemed a covenant running with the land is consistent with a real property transaction. Had the tailings been considered personal property, a different sort of transfer and restriction mechanism than a quitclaim deed would have been expected. The tailings were dumped on the ground rather than impounded or otherwise contained or treated like personal property. The photographs of the property submitted as exhibits by Mr. Eagan show tailings heaped on the ground and generally commingled with the land.[41] The tailings most likely were real property when removed by M & M.

IV. Conclusion

Mr. Eagan owns property that contains mine tailings left from gold mining that occurred in the 1950s. The tailing were dumped on the property for disposal and remained there when the property was sold to Mr. Eagan's parents in 1966 in a real estate transaction. Mr. Eagan came to own the land. In 2003, when Mr. Eagan sold tailings to M & M Constructors and M & M removed them with heavy equipment, Mr. Eagan was engaged in mining. His arguments that he was not engaged in mining because the tailings were not processed and were personal property failed for the reasons above.

Accordingly, Mr. Eagan was engaged in the business of mining in 2003 and, therefore, was required to pay mining license tax. The decision of the Department of Revenue denying Mr. Eagan his requested refund of $4,594.54 in mining license tax, interest, and penalty is affirmed.

DATED this 4th day of November, 2013.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

[40] Department's prehearing brief at 7.
[41] Eagan Exhibit 1 at photo 4, 5, 6, 9, 10, 13, 14.

This is the decision of the Administrative Law Judge under AS 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.[42]

A party may request reconsideration in accordance with AS 43.05.465(b) within 30 days of the date of service of this decision.

When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.[43] A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.[44]

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 43.05.480 within 30 days after the date on which this decision becomes final.[45]

[This document has been modified to conform to the technical standards for publication.]

---

42 AS 43.05.465(f)(1).

43 AS 43.05.470.

44 AS 43.05.470(b).

45 AS 43.05.465 sets out the timelines for the decision becoming final.