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STATE REGISTER

STATE OF MINNESOTA

VOLUME 6, NUMBER 24

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STATE REGISTER

Printing Schedule for Agencies

Issue Number	*Submission deadline for Executive Orders, Adopted Rules and **Proposed Rules	*Submission deadline for State Contract Notices and other **Official Notices	Issue Date
	SCHEDULE FOR VOLUME 6		
25	Monday Dec 7	Monday Dec 14	Monday Dec 21
26	Monday Dec 14	Friday Dec 18	Monday Dec 28
27	Monday Dec 21	Monday Dec 28	Monday Jan 4
28	Monday Dec 28	Monday Jan 4	Monday Jan 11

*Deadline extensions may be possible at the editor's discretion; however, none will be made beyond the second Wednesday (12 calendar days) preceding the issue date for rules, proposed rules and executive orders, or beyond the Wednesday (5 calendar days) preceding the issue date for official notices. Requests for deadline extensions should be made only in valid emergency situations.

**Notices of public hearings on proposed rules and notices of intent to adopt rules without a public hearing are published in the Proposed Rules section and must be submitted two weeks prior to the issue date.

Instructions for submission of documents may be obtained from the Office of the State Register, 506 Rice Street, St. Paul, Minnesota 55103, (612) 296-0930.

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The *State Register* is the official publication of the State of Minnesota, containing executive orders of the governor, proposed and adopted rules of state agencies, and official notices to the public. Judicial notice shall be taken of material published in the *State Register*.

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NOTICE

How to Follow State Agency Rulemaking Action in the *State Register*

State agencies must publish notice of their rulemaking action in the *State Register*. If an agency seeks outside opinion before promulgating new rules or rule amendments, it must publish a NOTICE OF INTENT TO SOLICIT OUTSIDE OPINION. Such notices are published in the OFFICIAL NOTICES section. Proposed rules and adopted rules are published in separate sections of the magazine.

The PROPOSED RULES section contains:

- Calendar of Public Hearings on Proposed Rules.
- Proposed new rules (including Notice of Hearing and/or Notice of Intent to Adopt Rules without A Hearing).
- Proposed amendments to rules already in existence in the Minnesota Code of Agency Rules (MCAR).
- Proposed temporary rules.

The ADOPTED RULES section contains:

- Notice of adoption of new rules and rule amendments (those which were adopted without change from the proposed version previously published).
- Adopted amendments to new rules or rule amendments (changes made since the proposed version was published).
- Notice of adoption of temporary rules.
- Adopted amendments to temporary rules (changes made since the proposed version was published).

All ADOPTED RULES and ADOPTED AMENDMENTS TO EXISTING RULES published in the *State Register* will be published in the Minnesota Code of Agency Rules (MCAR). Proposed and adopted TEMPORARY RULES appear in the *State Register* but are not published in the MCAR due to the short-term nature of their legal effectiveness.

The *State Register* publishes partial and cumulative listings of rule action in the MCAR AMENDMENTS AND ADDITIONS list on the following schedule:

Issues 1-13, inclusive
Issues 14-25, inclusive
Issue 26, cumulative for 1-26
Issue 27-38, inclusive
Issue 39, cumulative for 1-39
Issues 40-51, inclusive
Issue 52, cumulative for 1-52

The listings are arranged in the same order as the table of contents of the MCAR.

MCAR AMENDMENTS AND ADDITIONS

PROPOSED RULES

Pursuant to Minn. Laws of 1980, § 15.0412, subd. 4h, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless seven or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules;

and

4. that the rule may be modified if modifications are supported by the data and views submitted.

If, during the 30-day comment period, seven or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of § 15.0412, subds. 4 through 4g, which state that if an agency decides to hold a public hearing, it must publish in the *State Register* a notice of its intent to do so. This notice must appear at least 30 days prior to the date set for the hearing, along with the full text of the proposed rules. (If the agency has followed the provisions of subd. 4h and has already published the proposed rules, a citation to the prior publication may be substituted for republication.)

Pursuant to Minn. Stat. § 15.0412, subd. 5, when a statute, federal law or court order to adopt, suspend or repeal a rule does not allow time for the usual rulemaking process, temporary rules may be proposed. Proposed temporary rules are published in the *State Register*, and for at least 20 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Department of Agriculture
Shade Tree Program

Proposed Amendments to Rules Governing the Shade Tree Program

Notice of Intent to Amend Rules without a Public Hearing

Notice is hereby given that the Minnesota Department of Agriculture proposes to adopt amendments to the above-entitled rules without a public hearing. The Commissioner of Agriculture has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minn. Stat. § 15.0412, subd. 4h (1980).

Persons interested in these rules shall have 30 days to submit comment on the proposed rules. The proposed rules may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language.

Unless seven or more persons submit written requests for a public hearing on the proposed rules within the 30-day comment period, a public hearing will not be held. In the event a public hearing is required, the agency will proceed according to the provisions of Minn. Stat. § 15.0412, subds. 4-4f.

Persons who wish to submit comments or a written request for a public hearing should submit such comments or request to: Gerald Heil, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, MN 55107, (612) 296-1486. If a public hearing is requested, identification of the particular objection, the suggested modifications to proposed language, and the reasons or data relied on to support the suggested modification is desired.

Authority to adopt these rules is contained in Minn. Stat. § 18.023. Additionally, a statement of need and reasonableness that describes the need for and reasonableness of each provision of the proposed rules and identifies the data and information relied upon to support the proposed rules has been prepared and is available upon request from: Gerald Heil, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, MN 55107, (612) 296-1486.

Upon adoption of the final rules without a public hearing, the proposed rules, this notice, the statement of need and reasonableness, all written comments received, and the final rules as adopted will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as proposed for adoption, should submit a written statement of such request to Gerald Heil, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, MN 55107, (612) 296-1486.

Please be advised that Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five (5) days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (Supp. 1979) as any individual:

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250.00, not including *his own* travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250.00, not including *his own* traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 40 State Office Building, St. Paul, MN 55155, (612) 296-5615.

Copies of this notice and proposed rules are available and may be obtained by contacting Gerald Heil, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, Minnesota 55107, (612) 296-1486.

November 23, 1981

Mark Seetin
Commissioner of Agriculture

Rules as Proposed

3 MCAR § 1.0109 General.

A. Purpose and authority. ~~The~~ Rules ~~contained herein~~ 3 MCAR §§ 1.0109-1.0113 are prescribed by the commissioner pursuant to Minn. Stat. § 18.023~~, as amended,~~ to implement a program to control Dutch elm disease and oak wilt by local units of government and to include procedures and criteria for three grant-in-aid programs. ~~The provisions of these rules are in addition to those set forth in the act itself.~~

B. Definitions. For purposes of ~~these rules~~ 3 MCAR §§ 1.0109-1.0113, the following definitions, in addition to those in ~~the act~~ Minn. Stat. § 18.023, shall apply:

1.-9. [Unchanged.]

10. "Population" means the population of a municipality as published ~~in~~ by the ~~U.S.~~ United States Bureau of Census~~, 1970 Census~~ in the most recent federal census.

3 MCAR § 1.0111 Shade tree disease control program. The shade tree disease control program of ~~all municipalities~~ a municipality affected by ~~these rules shall~~ 3 MCAR §§ 1.0109-1.0113 must include ~~as a minimum~~ at least the following elements. However, the ordinances or resolutions adopted by the municipality regarding the local shade tree disease control program may be more stringent than ~~these rules~~ the provisions of 3 MCAR §§ 1.0109-1.0113.

A.-E. [Unchanged.]

F. Program review.

1. By ~~November 15~~ December 31 of each year, ~~municipalities shall~~ a municipality must submit to the commissioner ~~their~~ its shade tree disease control and replanting programs for the following calendar year. The commissioner shall review these programs to determine if the requirements of the law and the applicable rules have been met.

2. [Unchanged.]

3. [Unchanged.]

G. [Unchanged.]

3 MCAR § 1.0112 Grants-in-aid to municipalities for sanitation and reforestation program. The commissioner may, in the name of the state and within the limits of appropriations provided, make grants-in-aid to a municipality with an approved disease control program for the partial funding of municipal sanitation and reforestation programs. One grant shall be made for all eligible sanitation and reforestation costs.

A. [Unchanged.]

B. Program eligibility. ~~Any~~ A municipality is eligible to receive sanitation and reforestation grants upon submitting to the commissioner by ~~November 15~~ December 31 a completed program application form provided by the commissioner, and upon receiving notice of an approved disease control program designation. Extensions shall be granted for good cause shown.

1.-5. [Unchanged.]

C. Program application. To receive a sanitation and reforestation grant, a municipality ~~shall~~ must submit to the commissioner by ~~November 15~~ December 31 a completed program application form provided by the commissioner.

1.-3. [Unchanged.]

Energy Agency
Conservation Division

Proposed Temporary Rules Governing the Home Energy Disclosure Program

Request for Public Comment

Notice is hereby given that pursuant to Minn. Stat. §§ 116H.129, as well as 116H.08, clause (a) and 116H.07, clause (i), the Energy Agency proposes to adopt temporary rules governing the Home Energy Disclosure Program.

The proposed temporary rules which are the subject of this notice are exactly the same as the Minnesota Energy Agency's Proposed Rules Governing the Home Energy Disclosure Program, 6 MCAR §§ 2.2501-2.2510. These proposed rules were published at *State Register*, Volume 6, Number 20, pp. 922-937, on November 16, 1981 (6 S.R. 922).

Persons interested in these rules have 20 days from this publication to submit data and views on the proposed temporary rules in writing. Comments should be submitted to:

Greg Hubinger
Minnesota Energy Agency
980 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101
Telephone (612) 297-2117

The proposed temporary rules may be modified if the modifications are supported by the data and views submitted to the agency.

These proposed temporary rules, with modifications, if any, shall be submitted to the Attorney General for final approval as to form and legality. The temporary rules shall take effect immediately upon the Attorney General's approval.

These temporary rules shall be effective for 180 days or until they are replaced by permanent rules, whichever occurs first.

Michael J. Murphy
Acting Director

Minnesota Pollution Control Agency

Proposed Revision to APC 1 (6 MCAR § 4.0001) Relating to Ambient Air Quality Standards

Notice of Continuation of Hearing

Please take notice that the hearing regarding the proposed amendments to the state ambient air quality standards for ozone and sulfur dioxide will continue on December 11 and December 17, 1981, and January 14, 1982, and such other days as are necessary. The December 11 hearing will commence at 9:30 a.m. in the Board Room of the Minnesota Pollution Control Agency (MPCA) at 1935 W. County Road B-2, Roseville, Minnesota 55113. The December 17 hearing will be in the Basement Conference Room at the MPCA offices in Roseville at 9:30 a.m. The January 14 hearing will be held in the MPCA Board Room commencing at 9:30 a.m. Hearing Examiner Howard Kaibel, Jr. will preside.

The agency originally gave notice of its intention to amend rule APC 1 by publishing in the *State Register* a range of recommended standards for ozone and sulfur dioxide. See 5 S.R. 1063 (January 5, 1981). On June 8, 1981, the agency gave notice of specific recommendations regarding the proposed standards. See 5 S.R. 1943. Recently the MPCA staff recommended

the adoption of the federal ozone standard and the adoption of regional secondary three-hour sulfur dioxide standards, which represent changes from the June 8 proposals. Copies of the January and June notices and proposals and the recent staff recommendations are available by contacting the MPCA at (612) 296-7280.

During the hearings on December 11 and 17, 1981, and January 14, 1982, testimony can be submitted regarding any of the proposed standards. The agency, however, is primarily interested in receiving testimony on a short-term primary sulfur dioxide standard.

During the hearings that have been conducted thus far several primary short term air quality standards for sulfur dioxide have been recommended for adoption, including a 0.5 parts per million one-hour standard, a 0.5 parts per million 3-hour standard, a 0.35 parts per million 3-hour standard, and no primary short term standard. Since all of these possibilities are under consideration by the agency, any person who has any testimony to present on a short term primary sulfur dioxide standard is encouraged to make his or her views known to the hearing examiner.

The tentative schedule is for the hearing record to close around February 1, 1982. Anyone interested in submitting written comments into the record should consult the hearing examiner to determine the last day to submit written comments.

Any questions about the hearing schedule or about procedures should be directed to Hearing Examiner Kaibel at (612) 296-8107.

December 1, 1981

Louis J. Breimhurst
Executive Director

ADOPTED RULES

The adoption of a rule becomes effective after the requirements of Minn. Stat. § 15.0412, subd. 4, have been met and five working days after the rule is published in the *State Register*, unless a later date is required by statutes or specified in the rule.

If an adopted rule is identical to its proposed form as previously published, a notice of adoption and a citation to its previous *State Register* publication will be printed.

If an adopted rule differs from its proposed form, language which has been deleted will be printed with strike outs and new language will be underlined, and the rule's previous *State Register* publication will be cited.

A temporary rule becomes effective upon the approval of the Attorney General as specified in Minn. Stat. § 15.0412, subd. 5. Notice of his decision will be published as soon as practicable, and the adopted temporary rule will be published in the manner provided for adopted rules under subd. 4.

Department of Corrections

Adopted Rules Governing Programs and Services for Battered Women

The rules proposed and published at *State Register*, Volume 6, Number 13, pp. 508-511, September 28, 1981 (6 S.R. 508) are now adopted without amendments.

November 24, 1981.

Minnesota Energy Agency
Alternative Energy Development Division

Adopted Rules Relating to District Heating Preliminary Planning Grants

The rules proposed and published at *State Register*, Volume 6, Number 13, pages 533-537, September 28, 1981 (6 S.R. 533) are now adopted as proposed.

Department of Health

Adopted Rules Governing Vital Statistics; Fees

The Department of Health adopts the following fee increases in accordance with the provisions of Minnesota Statutes, §§ 15.0412, subd. 4, as amended by Laws of 1981, ch. 357, § 25; and 16A.128, as amended by Laws of 1981, ch. 357, § 26. All fee increases in the rule have been approved by the Commissioner of Finance.

Rules as Adopted

7 MCAR § 1.007 General provisions.

N. Fees.

1. Effective ~~July 1, 1979~~ January 1, 1982, the fee for the issuance of either a certified copy of a birth, death, or marriage record or a certification that the record cannot be found shall be ~~$3.00~~ $5. No fee shall be charged for a certified copy needed in connection with service in the armed forces or the Merchant Marine of the United States or in the presentation of claims to the United States Veterans Administration or the official veterans administration of any state or territory of the United States or for any copy needed by the Commissioner of Public Welfare in connection with the needs of state wards. No fee shall be charged for verification of information requested by official agencies of this state, local governments in this state, or the federal government.

2. The fee for the replacement of a birth certificate shall be ~~$3.00~~ $5.

3. The fee for the filing of a delayed registration of birth or death shall be ~~$4.00~~ $5.

4. The fee for the alteration, correction, or completion of a birth or death certificate when requested more than one year after the filing of the certificate shall be ~~$2.00~~ $5.

5. The fee for the verification of information from or noncertified copies of a birth, death, or marriage record shall be ~~$.50~~ $5 when the applicant furnishes specific information to locate the record. When the applicant does not furnish specific information the fee shall be ~~$5.00~~ $8 per hour for staff time expended. Specific information shall include the correct date of the event and the correct name of the registrant.

Minnesota Housing Finance Agency

Adopted Rules Governing the Home Improvement Grant Program and Rehabilitation Loan Program

The rules proposed and published at *State Register*, Volume 5, Number 51, pages 2052-2057, June 22, 1981 (5 S.R. 2052) are now adopted with the following modifications:

Rules as Adopted

12 MCAR § 3.061 Scope. Rules in this chapter ~~(12 MCAR §§ 3.061 to 3.072)~~ govern the Home Improvement Grant Program authorized by Minnesota Statutes § 462A.05, subd. 15 and the Rehabilitation Loan Program authorized by ~~Laws of 1981, ch. 306, § 5~~ Minn. Stat. § 462A.05, subd. 14a. The agency is authorized to make rehabilitation loans with or without interest or periodic payments. In this chapter loans made with interest and periodic payments shall be referred to as "flexible loans" and loans made without interest or periodic payments shall be referred to as "deferred loans."

In addition to the requirements of this chapter, a flexible loan must meet the requirements of Chapter Six of these rules, except that the applicant for a flexible loan need not be a reasonable credit risk as required in 12 MCAR §§ 3.051 C. and the structure to be improved need not be at least 15 years old as required by 12 MCAR § 3.051 D.

12 MCAR § 3.062 Reservation of funds.

C. The agency shall allocate the funds available at any time among the several regions, based upon data assembled by the agency and accurately reflecting housing needs and related factors. The agency shall submit its proposed allocation of funds to

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the applicable Regional Development Commission (including the Metropolitan Council) and shall consider the comments and recommendations of the commissions with respect to the extent to which the proposed allocation assists in satisfying the housing needs for the region.

12 MCAR § 3.067 Eligible improvements. Improvements made with Home Improvement Grant or Loan funds shall satisfy the following requirements:

G. Improvements which affect the accessibility of a dwelling for a handicapped person are eligible improvements provided that they are performed in compliance with the following conditions:

2. The beneficiary of the improvements must occupy or ~~intent~~ intend to occupy the dwelling unit to be improved as his or her ~~principle~~ principal residence.

12 MCAR § 3.068 Repayment.

A. The recipient of a grant and all individuals who signed the application for such grant shall enter into an agreement with the agency for repayment, which shall provide that in the event the property ~~(~~upon which the improvement is located~~)~~ is sold, transferred, or otherwise conveyed, or ceases to be the recipient's principal place of residence within six years from the date upon which the grant application was approved, then the recipient shall repay, and the agency shall have a lien as security for repayment of, all or a portion of such grant funds in accordance with the following schedule:

Period of Time Within Which Sale, Transfer, Conveyance, or Cessation of Residency Occurs	Percent Repayment
Prior to end of 36th full month	100%
After end of 36th full month until end of 48th full month	75%
After end of 48th full month until end of 60th full month	50%
After end of 60th full month until end of 72nd full month	25%
After end of 72nd full month	No Repayment

If any grant funds are used for purposes other than an eligible improvement upon eligible property or if the recipient's application is found to contain a material misstatement of fact the recipient shall be liable for repayment of the grant.

~~12 MCAR § 3.0701 Accessibility improvement fund. The agency may establish an Accessibility Improvement Fund from which Home Improvement Grants and Loans may be made to eligible applicants for the purpose of making Accessible improvements to dwelling units occupied by handicapped persons of low or moderate income, as defined in 12 MCAR § 3.002 O.3. Grants and loans from the accessibility improvement fund shall be made pursuant to the procedures set forth in Chapter 7 of these rules, provided, however, that the accessibility improvement fund shall not be subject to the reservation and allocation requirements of 12 MCAR § 3.062.~~

12 MCAR § 3.071

A. With respect to rehabilitation grants and loans pursuant to Chapter Seven of these rules and accessibility improvement assistance pursuant to Chapter Seven-A of these rules, "handicapped person" means a person who has a permanent physical condition which is not correctable and which substantially reduces such person's ability to function in a residential setting. A person with a physical condition which does not require the use of a device to increase mobility ~~may~~ shall be deemed a handicapped person upon the written certification of a licensed physician that the physical condition substantially limits such person's ability to function in a residential setting.

Pollution Control Agency
Air Quality Division

Adopted Rule 6 MCAR § 4.0041 Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

The rule proposed and published at *State Register*, Volume 6, Number 8, pp. 218-224, August 24, 1981 (6 S.R. 218) is adopted with the amendments set out below.

Please note that, in addition to the amendments noted below, the rule as adopted contains several corrections to typographical errors contained in the version of the rule published in the August 24, 1981, *State Register* (6 S.R. 218). These corrections are as follows: The word "Environment" in part C.6.f.(2) of the proposed rule should read "Environmental" and the word "new" in part D.2.b. of the rule should read "net." In addition, the Errata section of the September 14, 1981 *State*

Register, Volume 6, Number 11, p. 470 (6 S.R. 470), contains other corrections to the typographical errors made in the August 24, 1981, publication of the rule.

Please also note that section C.4. of the rule has been deleted in its entirety and that sections C.5. through C.19. have, therefore, been renumbered consecutively as C.4. through C.18. All other amendments to the rule as proposed are as follows:

Rule as Adopted

6 MCAR § 4.0041

B.1. Except as provided in 2., this rule applies to persons who propose to construct or modify a subject emission facility, as defined in ~~C.18.~~ C.17.

~~C.4. "Gross increase in emissions" means the gross number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the gross increase in emissions, the director shall include all nonattainment criteria pollutant discharges that the subject emission facility could emit but shall give a credit for all legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction in nonattainment criteria pollutant discharges that would result from installing required pollution control equipment). No credit shall be allowed for any other reductions of or restrictions on nonattainment criteria pollutant discharges.~~

C.~~6.~~ 5. "Modification" or "modified" means any physical change in, change in the method of operation of, or addition to an emission facility which would result in ~~an~~ a net increase in emissions. As used in this rule, the term modification or modified does not include: [The rest of this section remains unchanged.]

C.~~18.~~ 17.a.(2) The construction or modification of which will result in a ~~gross~~ net increase in emissions of at least 100 tons per year of a nonattainment criteria pollutant; or

C.~~18.~~ 17.c.(2)(a) X = the ~~gross~~ net increase in nonattainment criteria pollutant discharges resulting from any construction or modification of the plant which was permitted by the agency during the following time period: [The rest of this section remains unchanged.]

D.2. Requirement to demonstrate a net air quality benefit. Prior to constructing or modifying a subject emission facility, the permit applicant shall demonstrate that the offsets to be provided are sufficient to result in a net air quality benefit, as defined in ~~C.8.~~ C.7.

D.2.b. For subject emission facilities located or proposed to be located in sulfur dioxide or particulate matter or lead nonattainment areas, a permit applicant shall perform a modeling analysis to determine whether the offsets to be provided are sufficient to result in a net air quality benefit, . . . [The rest of this section remains unchanged.]

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TAX COURT

Pursuant to Minn. Stat. § 271.06, subd. 1, an appeal to the tax court may be taken from any official order of the Commissioner of Revenue regarding any tax, fee or assessment, or any matter concerning the tax laws listed in § 271.01, subd. 5, by an interested or affected person, by any political subdivision of the state, by the Attorney General in behalf of the state, or by any resident taxpayer of the state in behalf of the state in case the Attorney General, upon request, shall refuse to appeal. Decisions of the tax court are printed in the *State Register*, except in the case of appeals dealing with property valuation, assessment, or taxation for property tax purposes.

STATE OF MINNESOTA — **TAX COURT**

Pickands Mather & Co., as Managing Agent for Erie Mining Company — **Appellant**

v.

The Commissioner of Revenue — **Appellee**

and

Range Municipalities and Civic Association — **Intervenor**

Docket Nos. 2193, 2228, 2430
Order dated November 25, 1981

These consolidated appeals are from Orders of the Commissioner of Revenue determining occupation tax liability of Erie Mining Company under Minnesota Statutes, Chapter 298 for the calendar year ended December 31, 1974 (Docket No. 2193) and from redeterminations of the Commissioner under Minnesota Statutes, Sec. 298.09, subd. 4, of Erie's occupation tax liability for the calendar years ended December 31, 1971-1973 (Docket Nos. 2228 and 2430).

Subsequent to several pre-trial conferences, trial of these consolidated appeals commenced November 13, 1978 at the St. Louis County Court House in Hibbing, Minnesota and concluded November 16, 1978. During trial, the Court heard testimony from eight witnesses and received 116 exhibits including the parties' detailed Stipulation of Facts dated November 16, 1978. On November 29, 1978, Appellee moved to reopen to conduct additional discovery, which motion was granted following hearing on December 7, 1978. This discovery was concluded by submission of the parties' second detailed Stipulation of Facts dated September 5, 1979. Subsequently, Appellant moved to reopen to conduct additional discovery, which motion, after hearing, was granted by Order of November 14, 1979. Pursuant to the Order, the results of this discovery were submitted to the Court by December 20, 1979. Pre and post trial legal memorandums were submitted. On September 12, 1980, Appellant moved the Court to take judicial notice of certain legislative history of Sections 10 and 12 of Laws of Minnesota 1980, Chapter 607, Article VII enacted April 23, 1980, which motion was granted.

Edward T. Fride and Paul J. Lokken of Hanft, Fride, O'Brien & Harries appeared for Appellant.

C. Hamilton Luther, Deputy Attorney General, and Thomas K. Overton, Special Assistant Attorney General, appeared for Appellee.

Fred Cina appeared for Intervenor.

Syllabus

The production tax assessed under Minnesota Statutes Section 298.241 is a tax deductible in computing the occupation tax.

The 1974 combined occupation, royalty and excise tax exceeds the hypothetical income tax limitation established by Section 298.40, subd. 1(b) and Minnesota Constitution 1976, Article X, Section 6 (The Taconite Amendment).

Decision

The Orders of the Commissioner are reversed as specified in the Conclusions of Law.

John Knapp, Chief Judge

Findings of Fact

1. The Stipulations of Fact submitted by the parties of November 16, 1978 and September 5, 1979 are incorporated by reference.

2. Erie Mining Company is a Minnesota corporation with facilities at Hoyt Lakes and Taconite Harbor, Minnesota, whose sole business is mining taconite ore in Minnesota and processing or beneficiating the same into taconite pellets which are sold and shipped or delivered exclusively to non-Minnesota purchasers who consume the pellets in non-Minnesota steel making facilities.

3. The capital stock of Erie is owned in varying percentages by its shareholders, Bethlehem Steel Corporation (45%), Youngstown Sheet and Tube Company (35%), Interlake, Inc. (10%), and Stelco Coal Company (10%). Each shareholder is located outside of Minnesota and purchases Erie's pellets in proportion to its stock ownership, which pellets are delivered to and consumed in blast furnaces located outside of Minnesota.

4. Appellee is the duly appointed and acting Commissioner of the State of Minnesota Department of Revenue. Said office is now held by Commissioner Clyde Allen and in 1974 and 1975 was occupied by Commissioner Arthur C. Roemer who now serves as Deputy Commissioner.

5. Intervenor is an unincorporated association of cities, independent school districts and towns located in northeastern Minnesota.

6. In earlier years, Minnesota held almost a monopoly but by 1940, it was recognized that the heavy demand for raw materials by the nation's steel industry from the Minnesota Iron Range would result in the exhaustion of Minnesota natural ores. Severe unemployment and erosion of the tax base were seen as a corollary. The Minnesota legislature looked upon the development of the vast taconite resources on the Mesabi Range as the only viable substitute for the natural ores. Recognizing the deficiencies in the ad valorem method of taxation which had been applied to the natural ores, the Minnesota legislature at the 1941 session enacted Chapter 375 which imposed a production tax on taconite in lieu of ad valorem taxes. Enactment of the taconite production tax law had the desired effect of encouraging development of that industry.

7. After passage of the taconite production tax in 1941, Erie began acquiring taconite reserve lands for possible future development. In 1942, it set up a laboratory in Hibbing, Minnesota to develop a flow sheet for implementation of the process being developed and to conduct further experimentation on the pilot plan basis. In 1946, Erie's shareholders authorized the construction of a preliminary plant at Aurora, Minnesota to test the flow sheet on commercial size equipment. This plan began operating in 1948 and soon annually produced 200,000 tons of taconite pellets which proved successful for use as blast furnace feed. Until mid-1952, it was the only taconite plant in the world to produce substantial quantities of taconite pellets from taconite rock. In the early 1950's, Erie began planning for the construction and operation of a commercial plant having a productive capacity of approximately 5.25 million tons of pellets annually. The undertaking presented difficulties in technological problems and economic uncertainties. Erie's shareholders intended to undertake the project essentially as a joint venture but were ultimately required to conduct the operation through Erie as a separate mining company since Erie was the lessee of non-assignable mineral interests, the permittee of federal and state permits and because of certain financing considerations. The shareholders determined that the project could be feasibly undertaken only if Erie was disregarded as a corporate tax-paying entity for federal income tax purposes, and the shareholders taxed for those purposes as if they were conducting the operation on a joint venture basis. In an effort to obtain this treatment Erie and its shareholders filed an application for a Closing Agreement with the Internal Revenue Service providing for treatment as a "cost company" for federal corporate income tax purposes. The Internal Revenue Service granted this request of Erie and its shareholders by its ruling letter dated March 11, 1953 and Closing Agreement. (Exhibit No. 11). The Defense Production Administration granted Erie a Certificate of Necessity. (Exhibit No. 2). Construction of the contemplated facilities began in 1954, and operations were commenced in September 1957.

8. From the beginning of its operations and including 1974, the tax year here litigated, Erie was a "cost company" within the meaning of Rev. Ruling 56-542 of the Internal Revenue Service. The "cost company" concept dates back to 1909 and originated because it best filled the business necessities and government desires for iron ore production. In general, the only significance of Erie's cost company status is as it relates to the treatment of Erie and its shareholders for *federal* income tax purposes. Under the agreement with the Internal Revenue Service, it was recognized that the development of taconite projects such as contemplated by Erie were essential to the national interest and, to promote its feasibility, Erie was designated as a corporate non-taxpaying entity for federal tax purposes and its shareholders were taxed for those purposes as if they were conducting the operation on a joint venture basis. The "cost company" concept for mining was widely used in Minnesota and elsewhere. In 1963 when the Minnesota legislature enacted Minnesota Statute Sec. 298.40 and in 1964, at the time of the adoption of the Taconite Amendment, there were then only two taconite companies operating in Minnesota, Erie Mining Company and Reserve Mining Company, and they were both cost companies.

9. Erie Mining Company is subject to the taxes imposed by Minnesota upon members of the taconite industry: For 1974: Erie paid occupation taxes of $2,827,017.98 (this amount is the subject of dispute in this litigation); Erie paid royalty taxes imposed under Minnesota Statutes, Chapter 299, of $437,750; Erie paid taconite production taxes of $1,798,743 imposed under Minnesota Statutes, Sec. 298.24, and $1,383,964 imposed under Minnesota Statutes, Section 298.241; Erie paid the "taconite railroad tax" imposed by Minnesota Statutes, Sec. 294.22, of $1,367,998.10; Erie paid the special school taxes imposed under Laws 1965, Chapter 735, of $61,980. Erie's "non-project property" is subject to taxation under the normal ad valorem system. Its taconite reserve lands are subject to the tax imposed by Minnesota Statutes, Sec. 298.26. Any income it may receive not related to mining is subject to the state income tax. Erie was subject to the sales tax imposed under Minnesota Statutes, Chapter 297A, and the employer's excise tax imposed under Minnesota Statutes, Chapter 290.

10. The occupation tax was originally enacted at the 1921 session of the legislature as Chapter 223, Laws of Minnesota 1921. Because of concern that the occupation tax might be held unconstitutional, the 1921 legislature submitted a constitutional amendment specifically requiring the payment of "an occupation tax on the valuation of all ores mined and produced," such valuation to be "ascertained in the manner and method prescribed by law". The amendment was approved at the 1922 general election and became Article IX, Section 1A, of the Constitution (now codified as Article X, Section 3, under the amendment and restructuring of the Constitution as adopted by the people of the state on November 5, 1974). The imposition of the occupation tax preceded by twelve years the imposition of a state income tax. When the state income tax law was enacted in 1933, those subject to the occupation tax were expressly exempted from the income tax with respect to income from mining. Many items of expense allowed as deductions for state corporate income tax purposes are now allowed as deductions for occupation tax purposes.

11. The occupation tax is computed as follows: Minnesota Statutes, Sec. 298.01, subd. 2, imposes the occupation tax against "the valuation of all taconite, semi-taconite and iron sulphides mined or produced . . ." Minnesota Statutes, Sec. 298.03, specifies that this "valuation" is to be measured "at the place where . . . the ore is brought to the surface of the earth" (often referred to as "the value at the mouth-of-the-mine"), less the so-called "statutory deductions" set forth in paragraphs (1)-(6) of said Minnesota Statutes, Sec. 298.03. These statutory deductions relate primarily to expenses incurred in the actual process of mining the ore and bringing it to the surface of the earth, and include some or all of such items as cost of supplies used and labor performed in separating the ore and elevating it to the surface, cost of removing overburden, royalty paid or incurred for the right to remove the ore, certain ad valorem taxes, production taxes and certain other special taxes. Minnesota Statutes, Chapter 298, is silent as to the method by which the value of the ore at the mouth-of-the-mine is to be determined, except to say in Minnesota Statutes, Sec. 298.03, that "such value [is] to be determined by the Commissioner of Revenue." The Commission and his predecessors, under their interpretation and administration of the occupation tax laws since their inception, have made this determination of value in the following manner: They have adopted the published Lake Erie price as the actual market value of the ore delivered at lower Lake Erie ports, and from that value they have worked backward to arrive at a value at the mouth-of-the-mine by subtracting certain expenses which would necessarily have to be incurred beyond the mouth-of-the-mine and which necessarily are reflected in the Lake Erie price. This method adopted by the Commissioner has been judicially approved in a number of cases. The expenses subtracted by the Commissioner from the Lake Erie price to arrive at the value of the ore at the mouth-of-the-mine have traditionally been referred to as the "non-statutory" deductions. They have been so denominated because from the inception of the occupation tax until 1974, the granting of these deductions has not been pursuant to any statutory provision, but necessitated rather by the circumstances described above, whereby the Commissioner was required to adopt a method of determining the mouth-of-the-mine value. Principal among the non-statutory deductions have been, and continue to be, an allowance for stockpiling and loading costs, beneficiation costs, transportation and marketing costs, and certain miscellaneous expenses. After the non-statutory deductions are taken against the Lake Erie price to arrive at the value of the ore at the mouth-of-the-mine, and after the statutory deductions are taken against the mouth-of-the-mine value, the remainder represents the taxable value of the ore. Against the taxable value is applied the rate of tax provided in Minnesota Statutes, Sec. 298.01, which for 1974 was in the amount of fifteen percent (15%), to arrive at what the Department of Revenue denominates as the total gross tax. Against the gross tax are applied certain credits, the principal one being the labor credit as provided under Minnesota Statutes, Sec. 298.02. The amount remaining after application of these credits is the net amount of tax due.

12. Findings of the 1956 report of the Governor's Minnesota Tax Study Committee received as Exhibit No. 4 included:

" . . . the [occupation] tax rate is almost twice as high as the corporate income tax rate and the tax base is probably as much as or more than twice as broad.

Iron ore production in Minnesota is subject to much heavier taxation than is business in general and Minnesota's taxes appear to be considerably higher than those imposed in the Canadian provinces or in other states in which petroleum, natural gas and other mineral products are of comparable importance."

These findings were not contradicted by other evidence, find additional support in the record and are adopted by the Court.

13. The Minnesota Legislative Commission on Taxation of Iron Ore was originally created by Laws of Minnesota 1951, Section 2, Chapter 714, and its activities were continued by successive legislative appropriations. The purposes for which this Commission was created include:

"Such Commission shall make a comprehensive, detailed and complete investigation and study of all the factors contributing to a sound iron ore tax policy for this state, including information regarding the quality and extent of Minnesota's iron ore reserves and those in other parts of the world; the cost of developing Minnesota iron ores and those in other parts of the world; the advisability of using the Lake Erie price as a tax base; the impact of national defense considerations; and the possible construction of the St. Lawrence Waterway by either Canada or the United States or both, upon the Minnesota iron ore

industry, and other related factors, for the purpose of formulating a stable and fair policy for the taxation of iron ore and in order that the state shall receive the maximum possible benefit from this natural resource."

In its Report submitted to the Minnesota Legislature of 1961 the Commission stated in part:

"It would appear that the most significant competition faced by the Minnesota iron ore industry is the competition for capital investments. Once a large capital investment is made in an iron ore production facility by a steel company, that production assumes a preferred position with the company because of the need to amortize the investment.

* * *

"Canadian iron ore reserves are very important in evaluating the competitive position of Minnesota's iron ores, not only because of the fact that geographically their proximity to already established markets is significant, but also because of the variety of types and quality of ores available in Canada. It is important too, to note that a flow of capital from the United States into Canada has taken place in developing the Canadian iron ore resources. Many factors, including taxation of iron ore, will affect the extent of development of the iron ore in Canada, but it is very evident that Canada is taking a front seat in its production and that from any vantage point today that country has the potentialities to achieve the position of being one of the great iron ore producing areas of the world.

* * *

"Because of the decline in reserves of Minnesota's high grade natural ore, and decrease in demand for much of the remaining natural ores, the construction of new taconite and semi-taconite plants is imperative if Minnesota is to retain its share of the iron ore market and if employment is to be stabilized on the Iron Range. If this goal is to be reached there must be an influx of hundreds of millions of dollars of new capital. Minnesota must compete for this capital with areas in Canada and South America which have huge reserves both of high quality direct-shipping ores, and also enormous reserves of material which can produce high grade concentrates by methods which have been proved to be both economically and technologically feasible.

"The need for Minnesota to compete for new capital is both immediate and urgent. When taconite-like plants are built elsewhere, the products produced assume competitive priority, not only because of the high quality of the products but because of the need to amortize the large investments.

* * *

"The comparative low cost per ton-mile of ocean shipping helps to bring South American reserves into competition with traditional markets for Minnesota ores. The fact that the ocean carriers are much larger than those of the Great Lakes, and usually are manned by low-paid foreign crews, reduces the cost of ocean shipping. The South American ores being shipped are, of course, of a much higher grade than Minnesota's natural ores. The South American reserves are great enough to maintain a much greater production than now is current.***"

In its Conclusions and Recommendations the Commission in its 1961 Report stated:

"In its 1957 report, this Commission concluded that 'the history of taxation in Minnesota shows very clearly that iron ore has been taxed on a more onerous basis than any other class of property. The reason for the higher rate of tax can be traced to the premise that iron ore is a natural resource and a diminishing asset and therefore should stand a heavier burden of taxation.

'When Minnesota had a monopoly on low cost open pit iron ore this premise may have been justified but conditions have changed. High grade ore is rapidly diminishing—high cost concentrates made from low grade ore are increasing—plants to manufacture iron ore from taconite are under construction to supplement the dwindling supply of natural ore—competition from the large deposits of high grade ores in Canada and Venezuela is now a reality.

'Higher taxes on iron ore would have the following effects:

1. 'Cause foreign ores to become more competitive;
2. 'Hasten depletion of remaining high grade ore reserves;
3. 'Be detrimental to many small high cost mine producers;
4. 'Tend to discourage further investments in Minnesota's taconite industries.'

"Developments since that time has emphasized the correctness of this conclusion.***

"The need for Minnesota to compete for new capital is both immediate and urgent. When taconite-like plants are built elsewhere, the products produced assume competitive priority, not only because of the high quality of the products but because of the need to amortize the large investments made.***"

These uncontradicted findings of the Commission were received by the Court as Exhibit No. 5 and are adopted by the Court.

14. The Governor's Minnesota Tax Study Commission 1962 report received as Exhibit No. 6 included findings that:

"It is generally conceded that the position of natural high grade Minnesota ores has changed markedly in the years since the middle 1950's. What was once thought of as a near monopoly situation is fast deteriorating into a highly competitive situation where the natural high grade ores of Minnesota appear daily to be in a worsening position. . . .

The reason for our worsening position seems to stem from three factors which are for the most part beyond the control of the State of Minnesota or any of its political subdivisions. They are not completely beyond control because there are some actions which might be taken to help the situation, but nothing which might restore the old monopoly position.

The first factor is that of changes in the situation of iron ore in the world. The expansion of iron ore mining in Canada, Venezuela, Brazil, with additional possibilities in Africa and other places around the world has considerably increased the total world supply of iron ore. In the short-run this has created a so-called 'glut' on the world iron ore market. This is similar to the situation which was created in the oil market during the 1950's. Other countries are going to do everything possible to develop their resources in this important field, and the development and availability of more shipping facilities make it possible to supply customers around the world, including customers within the United States. The best Minnesota can hope for is a vigorous and aggressive iron ore industry to keep Minnesota ores as competitive as possible in the face of these widespread pressures from around the world.

A second factor stems from improvements in steel making technology which are changing the nature of the entire iron ore industry. This new technology is requiring a higher grade of iron ore as a basic raw material, with the result that those ores formerly thought to be "high grade" are rapidly becoming obsolete. In other words, improvements in the steel making process are placing more stringent demands on this very first stage in the steel making process. As a result, all natural ores in Minnesota will need some beneficiation in the years to come, but even then they will probably not meet all the requirements. Instead, a newcomer has entered the field, namely, taconite, which seems to have a decided edge over the best grade natural ore which has been beneficiated. While this is a difficult pill for Minnesota to swallow, it will have to admit that its so-called high grade ore, which was once its pride and joy, is the victim of technological obsolescence.

A third factor which must be taken into account is the apparent growth in the competition for many of the markets which have been traditional markets for steel. Substantial inroads are being made by various substitute products. The use of aluminum, for example, has been growing at a far greater rate than steel. This is also true for plastic, glass, paper, and other materials, which have invaded the market for specific products formerly made only of steel. . . . These three factors, therefore, are combining to place Minnesota iron ore in an unfavorable position.

A still further point which must be made, because it also has a direct bearing upon the entire iron ore industry, is that high grade ores are being rapidly depleted. In light of what has been said earlier, it is probably just as well that this is the case. Otherwise we might have a very large supply of ore which has become technologically obsolete. It should be pointed out that necessity is the mother of invention and one of the reasons why the remaining high grade ore is losing its position is due to the fact that those directly concerned with the technology could foresee this day coming and have made important strides in preparing for it. In any event, the facts seem to indicate that, given the present rate of production, high grade ores will be substantially depleted in Minnesota within the next 5 to 7 years."

These finding are not contradicted in the evidence and are adopted by the Court.

15. Uncontradicted testimony presented to the Court by the author of a 1963 study, "Iron Mining and Taxes in Minnesota" received as Exhibit No. 8 found:

"***Taxes paid by mining companies under the occupation tax are much higher than if these companies were taxed under the Minnesota corporation income tax. ***If the mining companies were taxed as other corporations in the state, the following expenses would also be allowed as deductions:

1. Federal income taxes paid.
2. Sales Discounts.
3. All ad valorem taxes paid during the year.
4. Royalty taxes.
5. Depletion—this would allow amortization of the purchase price of the mine.
6. Losses incurred by individual mines could be carried forward to future years.***"

16. By 1963, Minnesota's earlier position as a supplier of iron ore to the nation's steel making facilities had been adversely affected to a substantial degree. Among factors cited as influencing the decline was the depletion of high grade ore, the decrease in demand for much of the remaining natural ores, increasing world and national competition, changing blast furnace practice and technology, the construction of the St. Lawrence Seaway permitting delivery of foreign ore to lower lake ports of the United States and state taxing policies.

17. Among the results of the decline specified in paragraph 16 was significant unemployment, instability of the Minnesota iron mining industry and loss of Minnesota tax revenues. With the decline of Minnesota natural ores and changing competitive factors there was increasing interest in developing the vast reserves of low grade ore such as taconite and semi-taconite found in Minnesota. Taconite and semi-taconite are also found outside of Minnesota with resulting competitive pressures. Large capital investments are required for construction or expansion of taconite-producing facilities. State tax policies are among factors cited by potential investors which influence the decision of the investors whether to expand or invest in the development of taconite in Minnesota.

18. In recognition of the described findings, the Minnesota legislature enacted on March 18, 1963, HF 1149 as Chapter 81, Laws of Minnesota 1963, codified as Minnesota Statutes Sec. 298.40. This bill provided that it was,

"An act declaring the policy of the state with respect to the taxation of taconite and semi-taconite, and the facilities for the mining production, and beneficiation thereof."

In relevant part the Act provided:

"Subdivision 1. The combined occupation, royalty and excise taxes imposed upon ore required to be paid with respect to the mining, production or beneficiation of taconite or semi-taconite by any person or corporation engaged in such mining, production or beneficiation, shall not be increased so as to exceed the greater of (a) the amount which would be payable if such taxes were computed under the laws in existence as of July 1, 1963, or (b) the amount which would be payable if such person or corporation were taxed with respect to such mining, production or beneficiation under the income, franchise, and excise tax laws generally applicable to manufacturing corporations transacting business within the state, as such laws may be enacted or amended from time to time***."

Subdivision 2. Taxes imposed upon the mining or quarrying of taconite or semi-taconite and upon the production of iron ore concentrates therefrom, which are in lieu of a tax on real or personal property shall not be considered to be occupation, royalty, or excise taxes within the meaning of this section."

19. The enactment of Chapter 81, Laws of Minnesota 1963 was accompanied by the enactment of Chapter 99, Section 1, Laws of Minnesota 1963, hereafter referred to as the "Taconite Amendment."

Its preface stated:

"An act proposing an amendment to the constitution of the State of Minnesota by adding thereto a new article prohibiting the amendment, modification, or repeal for a period of 25 years of Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite and semi-taconite, and facilities for the mining, production and beneficiation thereof; and to taxes imposed upon or required to be paid with respect to the mining, production or beneficiation of copper, copper-nickel, and nickel in this state."

The Taconite Amendment was submitted to and approved by the voters of Minnesota at the November, 1964 general election. It was incorporated into the Minnesota Constitution as Article XXI and is now codified and hereafter referred to as Article X, Section 6, as a result of the amendment and restructuring of the Minnesota Constitution as adopted by the people of the State November 5, 1974. Prior to submission to the public, the form and content of the Taconite Amendment was the subject of extensive consideration, debate and ultimate agreement among leaders of political parties, industry, labor, public and others. Some 540 Minnesota organizations endorsed the amendment.

The Taconite Amendment provides in relevant part that:

"Notwithstanding any other provision of this Constitution, Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite and semi-taconite, and the facilities of the mining, production and beneficiation thereof shall not be repealed, modified or amended, nor shall any laws in conflict therewith be valid for a period of twenty-five (25) years after the adoption of this Amendment;***"

20. The purpose of said legislation and Taconite Amendment was to provide incentives, assurances, and legal commitments to encourage investors to build and operate new taconite production facilities and to continue and expand existing taconite facilities in Minnesota.

21. Following the passage of the Taconite Amendment, Appellant and others invested millions of dollars in new or expanded taconite production facilities in Minnesota in reliance on said Amendment.

22. Appellant is among those taconite producers who are beneficiaries of the Taconite Amendment and intended to be protected by Chapter 81, Laws of Minnesota 1963 and the Taconite Amendment.

23. In its Report subsequent to the adoption of the Taconite Amendment submitted to the Minnesota legislature in 1965, the Minnesota Legislative Commission on Taxation and Production of Iron Ore submitted findings that:

"The Legislative Commission on Taxation and Production of Iron Ore has followed closely the problems of Minnesota's

iron mining industry. Over the years, the Commission's recommendations have always been aimed toward strengthening the state's mining industry, while at the same time keeping in mind the best interests of the State of Minnesota and its people.

"Members of this Commission have made inspection trips during the past 15 years, to mining and steelmaking centers in Minnesota, the United States, Canada and South America to study the mining industry's problems and competition in greater perspective.

"Further, this Commission was extremely gratified to witness the voters of Minnesota ratify the Taconite Amendment by an 86 percent majority of those voting on the issue.

"As rapid as this growth may seem, in the early 1960's it became apparent to many that Minnesota was not attracting its fair share of new taconite plant investment. To alleviate this problem, the 1963 Legislature passed the proposed Taconite Amendment which was subsequently ratified by the voters of Minnesota on November 3, 1964. Passage of this amendment and the announcements of plants that followed certainly make 1964 one of the most important years in Minnesota's mining history.

"New taconite plants that are now under construction or that have been announced for Minnesota are contained in Table 13. In addition to these plants, Jones & Laughlin Steel Corp. is planning a 1.6 million ton plant near Biwabik. When completed, these plants will boost Minnesota's taconite production almost ninety percent to a total of 32 million tons per year.

"Since the Commission was first established, its members have observed a vast change in iron ore mining, marketing and use. A parallel change has characterized the entire steel industry as new technology has brought about increased efficiencies. The new technologies which have been brought into use in the steel industry have had a profound impact upon Minnesota's position as a major iron ore producer.

"The modern iron ore industry must respond to new demands brought about by changing technology—demands which require increased production of beneficiated iron ores, including iron ore pellets produced from taconite, jasper and similar materials as well as prepared, sized iron ores which can meet quality and structural standards.

"Minnesota's ability to respond to the changes in the iron ore market have been advanced by research efforts carried out at the University of Minnesota and by various mining companies, particularly as they have related to the mining and concentration of taconite. The development of Minnesota's taconite industry has offset the decline of our natural iron ore industry, and this offset has reduced the effects of the economic downturn that has accompanied the loss of markets for Minnesota's natural iron ore.

"Passage of the Taconite Amendment in 1964 has served to strengthen Minnesota's taconite industry as evidenced by the renewed flow of investment money into Minnesota for the construction of new and additional taconite facilities. Certainly, Minnesota's taconite resources are large and abundant, sufficient for the support of a much larger taconite industry. Efforts to develop economically feasible methods for the concentration of semi-taconite and non-magnetic taconites should be continued.

"Chapter 81 . . . [codified as Minnesota Statutes, Sec. 298.40] provides that taxes for taconite and semi-taconite will not be increased unless the amount that the mining companies would pay under the corporate income tax were to go up. That is, if the tax on other manufacturing industries is raised up to, and above, the level of taxes now paid by the taconite mining industry, the taxes on taconite mining could be raised apace."

These uncontradicted findings of the Commission were received by the Court as Exhibit No. 12, find additional support in this record and are adopted by the Court.

24. Chapter 81, Laws of Minnesota 1963 and the Taconite Amendment thereafter enacted constitute a contract between the State of Minnesota and those investing in new, expanded or continuing taconite production facilities in reliance thereon.

25. Ignoring the limitations contained in Minnesota Statutes Sec. 298.40 and the 1964 Taconite Amendment, significant statutory changes increasing the amount of occupation and royalty taxes payable by the taconite industry were made in 1971 and thereafter significant changes in the interpretation of the laws by the Commissioner resulting in increased occupation and royalty taxes were made. In 1971, the legislature through enactment of Ex. Sess., c. 31, art. IV, Laws of Minnesota 1971, increased the rate of both the occupation tax and the royalty tax on taconite from twelve percent to fifteen percent, and limited the applicability of the labor credit.

26. The labor credit was specifically limited by Ex. Sess., c. 31, art. IV, Laws of Minnesota 1971, in the following manner: Prior to the enactment of said Article IV, the maximum labor credit available with respect to the occupation tax was expressed by Minnesota Statutes, Sec. 298.02, in the following terms:

". . . That in no event shall the credit allowed hereunder be in excess of 75 percent, as applied to underground and taconite or semi-taconite operations, and 60 percent as applied to all other operations, of the total tax computed under the provisions of section 298.01, subdivision 1 . . ."

Since prior to the enactment of said Article IV the occupation tax rate against which labor credits were applied was 11 percent,

the maximum labor credit available to taconite producers was 75 percent of 11 percent of the valuation of the ore. Subsequent to the enactment of Article IV, however, and notwithstanding the increase in the occupation tax rate to 15%, the maximum labor credit available with respect to the occupation tax under Minnesota Statutes, Sec. 298.02, was limited to,

". . . Three-fourths of eleven percent . . . of the valuation of the ore used in computing the tax under the provisions of section 298.0. . . ."

Thus, while Article IV increased the occupation tax rate to 15 percent, it reduced the proportion of the occupation tax to which the labor credit was to be applied. Article IV limited in precisely the same manner the maximum labor credit available with respect to the royalty tax under Minnesota Statutes, Sec. 299.012.

27. The Commissioner in determining Erie's 1974 occupation tax applied to the taxable value of taconite as determined by the Commissioner the rate of fifteen percent as compared with the rate of twelve percent which was applicable in 1963, and limited the effect of the labor credit as required under Ex. Sess., c. 31, art. IV, Laws of Minnesota 1971. Additionally, the rate of fifteen percent was applied to royalties paid by Erie in determining Erie's royalty tax liability as compared with the rate of twelve percent which was previously applicable in 1963. Occupation taxes on taconite were further increased by the enactment of Chapter 556, paragraph (7) of Minnesota Statutes, Sec. 298.03, was amended to limit the deduction for interest on plant investment and shrinkage in computing the taxable value of taconite for occupation tax purposes. The language added to said paragraph (7) by said Chapter 556 was:

Deductions for interest on plant investment shall not exceed the greater of (a) four percent of book value, or (b) the amount actually paid but not exceeding six percent of book value. No subtraction shall be allowed for shrinkage of iron ore except that which can be measured in a manner determined by the Commissioner of Revenue. In no case shall the shrinkage subtraction exceed one-quarter of one percent of the value of the ore.

In accordance with the foregoing provisions, the Commissioner, in determining the 1974 occupation tax of Erie, reduced its deduction for interest on beneficiation plant investment for the second half of 1974 from the rate of six percent allowed in 1963 and subsequent years to the rate of four percent of book value, or the amount actually paid not exceeding six percent of book value. Additionally, the Commissioner reduced Erie's deduction for shrinkage for the second half of 1974 in shipments to lower lake ports from the .5% allowed for the taxable years from 1963 to 1967, and 1.0% allowed for the taxable years from 1967 to 1973, to such amount as could be measured by the Commissioner, not exceeding, however, .25%.

28. For the calendar year 1974, Erie was subject to the production tax as imposed by Minnesota Statutes, Sec. 298.24 and sec. 298.241. The production tax, as imposed under each of the provisions, is levied on the basis of a specific amount per ton of merchantable iron ore concentrate produced. The production tax is in addition to the occupation tax, the royalty tax and the taconite railroad tax. It is in lieu of ad valorem taxes on real and personal property.

29. The production tax, as imposed under Minnesota Statutes, Sec. 298.24, was originally adopted by the legislature in 1941 as Chapter 375, Laws of Minnesota 1941. The tax imposed under that provision was at a base rate of five cents per gross ton of concentrate. In 1969, the Minnesota Legislature amended Minnesota Statutes, Sec. 298.24, to increase the base rate from 5 to 11.5 cents per ton. The 1971 Legislature again increased the production tax through the adoption of Ex. Sess., c. 31, art. XXX, section 1, which was incorporated into the Minnesota Statutes as Section 298.241. This statute provided for a graduated increase in the production tax over a period of years from four cents per ton during the year 1971 to fourteen cents per ton during the year 1979 and each year thereafter.

30. Contemporaneous with its 1971 enactment, the Commissioner determined that the production tax as payable under Minnesota Statutes, Sec. 298.241, was deductible in determining the value of ore for occupation tax purposes under Minnesota Statutes, Sec. 298.03, subd. 6. The Commissioner recognized this deduction in computing the occupation taxes of Erie and the other taconite producers for the years 1971 through 1973. In calculating the occupation taxes payable by Erie in 1974, the Commissioner initially made the same determination but then reversed this previously existing practice and determination, and denied this deduction. In addition to denying this deduction in calculating the 1974 occupation tax of Erie, the Commissioner also redetermined the 1971-1973 occupation taxes of Erie on this basis.

31. The taxes imposed by Minnesota Statutes 298.24 and 298.241 are identical in substance. Section 298.24, subdivision 1 states:

"There is hereby imposed upon taconite and iron sulphides, and upon the mining and quarrying thereof, and upon the production of iron ore concentrate therefrom, and upon the concentrate so produced, a tax of 11.5 cents per gross ton of merchantable iron ore concentrate as produced therefrom.**"

Section 298.241, subdivision 1 states:

"In addition to the tax imposed under section 298.24, subdivision 1, there is hereby imposed upon taconite and iron sulphides, and upon the mining and quarrying thereof, and upon the iron ore concentrate produced therefrom, and upon the concentrate so produced, (i) a tax of 4 cents per gross ton of merchantable iron ore concentrate produced thereform.***"

32. Similar legislative intent, policy and purpose underlies both Minnesota Statutes 298.24 and 298.241.

33. The Commissioner's determination contemporaneous with the 1971 enactment of Minnesota Statute 298.241 consistently applied for the years 1972 and 1973 and initially for 1974 to allow the tax paid thereunder as a deduction under Minnesota Statute 298.03, subd. 6, is entitled to weight.

34. The production tax imposed under Minnesota Statute 298.241 is a specific tax for governmental purposes within the meaning of Minnesota Statutes 298.03(6).

35. When the 1971 legislature increased the production tax through the enactment of Minnesota Statutes, Sec. 298.241, it adopted a "Declaration of Policy" through the enactment of Minnesota Statutes 1971, Sec. 298.242, which Declaration assured taconite producers that no further increases in the production tax would be effected at least through 1979. Minnesota Statutes 1971, Sec. 298.242, stated:

"In order to promote the health and welfare of the residents of the iron range communities, the economic well-being of that area and the state and further in order to encourage continued operation of existing taconite facilities and the construction of expanded or new taconite facilities in Minnesota, the Minnesota legislature hereby declares as the policy of the state that those who have invested in taconite facilities, those who are expanding such facilities or those who may wish to invest in new taconite facilities may be assured of continued fair and equitable treatment by the Minnesota legislature and may rely upon the state to maintain the production taxes on taconite set under existing law and section 298.241 at a level no higher than that prevailing as of the effective date of this act through the year [1979] prescribed in said section 298.241 for the last incremental increase."

In 1975, the legislature repealed this Declaration by enacting Chapter 437, Art. 11, Sec. 7 and increased the production tax through the adoption of what became Minnesota Statutes 1975, Sec. 298.243. This provision imposed a tax of 39 cents per gross ton on concentrate in addition to the tax imposed under Minnesota Statutes, Sec. 298.24 and 298.241.

36. In its January 1973 Report, received as Exhibit 74D, the State of Minnesota Tax Study Commission made recommendations to the Governor and the 1973 Legislature which included a proposed change in the statutory basis under which sales are allocated for income tax purposes:

"This commission recommends that the present basis for determining a sale attributable to Minnesota for allocation purposes be changed. Under present Minnesota law a sale is counted at the place where it originates. Most states use the destination of a sale as the basis for determining whether it is attributable to them for allocating purposes. The origin basis tends to make it harder on Minnesota businesses selling out of state from Minnesota offices. On the other hand, the destination sales basis would act as an incentive to Minnesota firms selling their products out of state."

37. In 1973, the Minnesota Legislature adopted Chapter 650, Article VII, Sec. 1, amending Minnesota Statute 290.17 in part, relating to trade or business carried on partly within and partly without this state by providing:

"For the purposes of this clause, trade or business located in Minnesota is carried on partly within and partly without this state if tangible personal property is sold by such trade or business and delivered or shipped to a purchaser located outside the State of Minnesota***"

Said Chapter 650 also amended Minnesota Statute 290.19 by adding a provision relating to determining of sales made within this state as follows:

"Sales of tangible personal property are made within this state if the property is delivered or shipped to a purchaser within this state, and the taxpayer is taxable in this state, regardless of the f.o.b. point or other conditions of the sale ***".

The intent of such legislation was to encourage the continuance, location or expansion of Minnesota business by changing the test to determine Minnesota sales from an origin basis to an ultimate destination basis of the products sold by Minnesota business. In the application of the destination test, the legislative intent was to focus upon the ultimate destination of the product as determined by the location of the market or consumer state rather than technical matters such as f.o.b. points or conditions of sale.

38. Under the Erie Operating Agreement (Exhibit No. 3), entered into among Erie and its shareholders, the shareholders have the right and obligation to purchase Erie's entire production of taconite pellets. Within specific limits, each shareholder orders from Erie the quantity of taconite pellets it desires to have delivered to it. As consideration for such pellets, each shareholder pays Erie, proportionate to its receipt of pellets, for all Erie's expenses of mining and producing such pellets.

39. A minor portion of Erie's 1974 production was transported out of state to Bethlehem by railroad cars of a common carrier directly from Erie's beneficiation plant at Hoyt Lakes while the remainder was transported from Erie's plant over the company railroad to the loading facilities of the company situated at Taconite Harbor, Minnesota and there directly transported by vessel without further processing, outside the State of Minnesota. This vessel transport was another link in the transportation system of ore to the blast furnace, the ultimate destination. The value, for tax purposes, of such pellets is that established by Lake Erie ports. No steel making facilities exist in Minnesota which can make beneficial use of the taconite pellets produced by Erie.

40. The first and only beneficial use of the taconite pellets is as a raw material used in the production of steel and pig iron in blast furnaces which are all located outside of Minnesota. Mechanisms used to transport and deliver the taconite pellets to the blast furnaces include shovels, conveyors, trucks, trains and ships.

41. Initially, in 1979, the Commissioner's Advisory Committee and the Commissioner issued "guidelines" with respect to the 1973 amendments to Minnesota Statute 290.19 including:

"Under Minnesota Statute 290.19, subd. 1(a) sales are to be assigned within and without this state upon the basis of the *ultimate destination* of the tangible personal property and not upon the particular form of transportation or terms of delivery." (emphasis added) (G.T. Caulfield deposition, Exhibit Nos. 5 and 20, submitted December 20, 1979).

42. Erie is incorporated as a separate legal entity under the laws of the State of Minnesota. As a separate legal entity, it either owns or has taken a leasehold interest in the properties from which it mines crude ore. It has legal title to the crude ore it mines once it has been separated from the earth. Erie holds title to the plants and equipment used in beneficiating the crude ore into pellets, and it retains ownership of the pellets until title to the same is transferred by Erie to its shareholders for a valuable consideration. Such transfer constitutes a sale under Minnesota Statutes 290.17, subd. 4 and 290.19, subd. 1(a).

43. Erie Mining Company's trade or business is carried on partly within Minnesota and partly without Minnesota within the meaning of Minnesota Statutes, Sec. 290.17, subd. 4. The pellets produced by Erie constitute tangible personal property which are sold by Erie and delivered or shipped to purchasers located outside of Minnesota. All of such sales should be assigned outside Minnesota within the meaning of Minnesota Statutes, Sec. 290.19, subd. 1(a).

44. Within the meaning of Minnesota Statute 290.19, 100% of Erie's total tangible property used in connection with its trade or business is located within Minnesota, 100% of Erie's total payroll in connection with its trade or business is in Minnesota, and 100% of Erie's sales are made outside Minnesota.

45. Exhibit No. 100 was received without objection and graphically illustrates the differences between the occupation and royalty tax laws and the Commissioner's interpretation and administration of those laws as of July 1, 1963, and those laws and interpretations for the calendar year ended December 31, 1974:

Item of Difference	As of July 1, 1963	1974
A. Occupation Tax Laws		
1. Deduction for interest on plant investment.	Allowed uniformly at 6% of book value, whether more or less than the amount actually paid.	Allowed in an amount not to exceed the greater of (a) four percent (4%) of book value, or (b) the amount actually paid but not to exceed six percent (6%) of book value (this change became effective July 1, 1974).
2. Deduction for shrinkage.	Allowed uniformly at .5% of the value of the ore, regardless of the actual amount, whether more or less than .5%.	Allowed in an amount not to exceed that which can be measured, but in no event more than .25% (this change became effective July 1, 1974).
3. Rate of tax.	12% of the taxable value of the ore, subject to credits against tax.	15% of the taxable value of the ore, subject to credits against tax.
4. Effective rate of tax after taking into account the labor credit.	3.75% of the taxable value of the ore.	6.75% of the taxable value of the ore.
5. Deduction for production tax.	All production taxes then imposed allowed as a deduction under Minnesota Statute, Sec. 289.03(6).	Commissioner in 1974 reversed previous practice and allowed as a deduction only a portion of the production taxes then imposed, disallowing the production tax payable under Minn. Stat., Sec. 298.241.
B. Royalty Tax Laws		
1. Rate of tax	12% of royalties paid	15% of royalties paid
2. Effective rate after taking into account the labor credit.	3.75% of royalties paid.	6.75% of royalties paid.

46. Issues addressed to the Court include whether the Commissioner assessed an occupation tax against Erie for 1974 in excess of the amount permitted under Minnesota Statutes, Sec. 298.40, and Article X, Section 6, of the Minnesota Constitution. Minnesota Statutes, Sec. 298.40, provides that the combined total of Erie's occupation, royalty and excise taxes for 1974 cannot exceed the greater of (a) the combined total of Erie's occupation, royalty and excise taxes for 1974 if computed under the laws in existence as of July 1, 1963, or (b) the amount of taxes which would be paid by Erie with respect to its mining operations if in 1974 it would have been subject with respect to those operations to the then existing income, franchise and excise tax laws generally applicable to manufacturing corporations transacting business within this state. The application of this limitation involves the proper computation and comparison of a number of different types of taxes for a number of different years. First, Erie's occupation, royalty and excise tax liabilities under the laws in existence in 1974 must be separately computed and totaled. Second, Erie's occupation, royalty and excise tax liabilities under the laws in existence on July 1, 1963, must be separately computed and totaled. Third, Erie's liability under the income, franchise and excise tax laws in existence in 1974 must be separately computed and totaled under the assumption that Erie operated in that year as an ordinary Minnesota manufacturing corporation. After these various computations have been made, Erie's occupation tax liability under the laws in existence on July 1, 1963, must be compared with hypothetical liability under the income, franchise and excise tax laws in existence in 1974 generally applicable to manufacturing corporations. A determination must then be made whether the greater of these two amounts is less than the computation of Erie's occupation, royalty and excise tax liability under the laws in existence in 1974. If so, Erie's 1974 occupation, royalty and excise tax liability must be limited to that amount.

47. This process has been simplified because of the many matters which have been resolved by the Stipulation of Facts (Exhibit No. 106). There is no dispute either as to Erie's royalty tax liability under the laws in existence as of July 1, 1963, or its royalty tax liability under the laws in existence in 1974. As a result, this Court is not required to make any determination as to the actual computation of Erie's royalty tax liability for any year in connection with this appeal. There is no dispute as to the amount of excise taxes incurred by Erie in any year relevant to this appeal. Therefore, no determination is required as to the computation of Erie's excise taxes for any year. This Court is concerned with the computation of three basic taxes: (1) the amount of Erie's occupation tax liability under the laws in existence in 1974, (2) the amount of Erie's occupation tax liability under the laws in existence as of July 1, 1963, and (3) the amount of income and franchise taxes Erie would be hypothetically required to pay as computed under the income and franchise laws in existence in 1974 generally applicable to manufacturing corporations transacting business within the state.

48. Chap. 81, Laws 1963, now codified as Minnesota Statute 298.40, subsequently approved by the people through their adoption of Art. X, Sec. 6 of the Minnesota Constitution, includes the phrases, "as such laws may be enacted or amended from time to time" and "income shall be apportioned to Minnesota in the manner which may be otherwise specified by law" to ensure that in computing the hypothetical income, franchise and excise taxes which a taconite company would pay if taxed as a manufacturing corporation transacting business within the state, the computation would reflect the current rates, allowable deductions and income apportionment of such manufacturing corporations as may be enacted during the 25-year period of the Taconite Amendment.

49. In computing the limitation amount applicable to Appellant in 1974 under Minnesota Statute 298.40, subd. 1(a), the objective is to arrive at the amount of occupation tax which would have been hypothetically payable by Appellant for 1974 if its 1974 operations were subject to the occupation, royalty and excise tax laws as they existed in 1963.

A. In 1963, the Commissioner authorized a deduction for interest on plant investment at the rate of 6% book value. In computing the 1974 occupation tax under Minnesota Statute 298.40, subd. 1(a), for the purpose of determining what tax would be payable in 1974 under the occupation tax laws in existence in 1963, interest at the rate of 6% of book value is a proper deduction. Similarly, shrinkage equal to .5% of the value of the ore as authorized in 1963 is properly deductible in making the computation for 1974 under the 1963 laws.

B. Special taxes were imposed upon Appellant for 1974 under Laws 1965, Chap. 735, to provide a means of payment of principal and interest on bonds issued by Independent School District No. 91 to finance the rehabilitation and construction of school facilities in Hoyt Lakes, Minnesota. Such special taxes are included as "a specific tax for school and other governmental purposes" within Minnesota Statute 298.03(6) and are thus deductible in computing the 1974 occupation tax which would be paid by Appellant as computed under the laws existing in 1963, which 1963 laws included Minnesota Statute 298.03(6).

C. Appellant is entitled to a deduction for production taxes paid under Minnesota Statute 298.24 at the rate of 11.5 cents per ton escalated for the described purpose applicable in 1974 under Minnesota Statute 298.03(6).

D. Consistent with earlier Findings, the production tax payable in 1974 under Minnesota Statute 298.241 is deductible under Minnesota Statute 298.03(6) which existed in essentially the same form in 1963 and 1974.

50. The Court finds Section 10 and 12 of Article VII, Chap. 607, Laws of Minnesota for 1980, have no probative value. Legislative history reveals that they were erroneously represented to the legislature as reflecting only a "technical change". The legislative history also reflects that they were introduced and adopted for the specific purpose of influencing this Court's

determination of issues raised by appeals filed in 1975. The intent of the 1963 Legislature and the People in 1964 is not properly perceived by the 1980 Legislature. The record does not contain any facts supporting the reasonableness of the classification utilized.

51. The attached Memorandum is made a part of these Findings.

Conclusions of Law

1. In computing Erie's occupation tax liability for the calendar year ended December 1, 1974, under the laws applicable in that year, the Commissioner's disallowance of a deduction for taconite production taxes imposed and paid by Erie under Minnesota Statutes, Section 298.241, was in error. The production tax imposed under that section is deductible under Minnesota Statutes, Section 298.03(6). Erie incurred, for the calendar year ending December 31, 1974, production tax liability under Minnesota Statutes, Section 298.241, in the amount of $1,383.964. Accordingly, the Amended Findings and Order dated April 19, 1977, under which Erie's occupation tax liability for the calendar year ending December 31, 1974, had been redetermined, shall be adjusted by decreasing the taxable value of the ore produced by Erie as previously determined by the Commissioner ($41,866,933) by the amount of $1,383,964, and by decreasing the total amount of tax after credits as previously determined by the Commissioner ($2,826,018) by the amount of $93,418. Erie's total occupation tax liability for the calendar year ended December 31, 1974, under the laws applicable in that year, but before application of the limitation, amounts specified in Minnesota Statutes, Section 298.40, Subd. 1, is $2,732,600.

2. The production tax imposed upon and paid by Erie for the calendar years ending December 31, 1971 through 1973, under Minnesota Statutes, Section 298.241, is also deductible under Minnesota Statutes, Section 298.03(6) in determining Erie's occupation tax liability for those years. Accordingly, the Commissioner shall adjust the taxable value of the ore produced by Erie in those years and its total occupation tax liability for those years in a manner similar to that set forth in the immediately preceding paragraph.

3. The issues placed before this Court for determination under paragraph 16(d) of the Stipulation of Facts (Exhibit 106) relative to the computation of the limitation amount under Clause (a) of Minnesota Statutes, Section 298.40, Subd. 1, are hereby resolved as follows:

A) In computing the limitation amount under Clause (a), Erie is to be allowed a deduction for interest on plant investment at the rate of six per cent per annum, the amount uniformly allowed by the Commissioner as of July 1, 1963. Accordingly, the deduction for the total cost of beneficiation, after the adjustment made in the Amended Findings and Order dated April 19, 1977, shall be increased from the $91,362,458 set forth in Item 18 of paragraph 16(c) of the said Stipulation of Facts, to $92,771,326.

B) In computing the limitation amount under Clause (a), Erie is to be allowed a deduction under Minnesota Statutes, Section 298.03(b), computing the taxable value of the ore produced, a deduction for taconite production taxes in the amount actually imposed upon and paid by Erie with respect to its 1974 operations, i.e., at the base rate of 11.5 cents per ton adjusted for grade as escalated. Accordingly, Item 12 of paragraph 16(c) of the said Stipulation of Facts shall be increased in the amount of $1.147,626.

C) In computing the limitation amount under Clause (a), Erie is entitled to a deduction under Minnesota Statutes, Section 298.03(6) for special taxes actually imposed upon and paid by Erie for 1974 under Minnesota Laws 1965, Chapter 735, but not for taxes imposed upon and paid by Erie for 1963 under Minnesota Laws 1955, Chapters 429 and 540, Minnesota Laws 1959, Chapters 21 and 664. Accordingly, the amount deducted under Item 12 of paragraph 16(c) of the said Stipulation of Facts shall be increased by $61,980, and decreased by $896,618.

D) In computing the limitation amount under Clause (a), Erie is to be allowed a deduction under Minnesota Statutes, Section 298.03(6) in computing the taxable value of the ore a deduction for taxes imposed upon and paid by Erie for 1974, under Minnesota Statutes, Section 298.241. Accordingly, the amount deducted under Item 12 of paragraph 16(c) of the Stipulation shall be increased in the amount of $1,383,964, the amount of taxes paid by Erie for 1974 under Minnesota Statutes, Section 298.241.

4. The proper computation of the taxable value of the ore for the purpose of Clause (a), based upon the agreement among the parties as reflected in paragraph 16(a), (b) and (c) of the Stipulation and adjusted to reflect this Court's resolution of the issues specified in paragraph 16(d) of the said Stipulation, is shown below in a format corresponding with that of the occupation tax report filed by Appellant and the Final Determination. The figures reflect the adjustments made by the Amended Findings and Order dated April 19, 1977.

Tax Report Item:

7.	Net merchantable ore produced during the year	10,897,352 Tons

4.	Lake Erie value of Item 7	Total Value $243,593,210	
	NON-STATUTORY DEDUCTIONS: COSTS BEYOND MOUTH-OF-MINE.		
		Total Cost	
18.	Cost of beneficiation	$92,771,326	
	The $91,377,476 amount shown on the Final Determination is decreased by the $15,018 disallowed after audit by the Amended Findings and Order.		
15.	Transportation cost	$63,311,920	
16A.	Marketing expense	$ 542,143	
16B,C,D.	Misc.	$ 21,795	
	Total Non-Statutory Deductions		$156,647,184
	Value of Ore at Mouth-of-Mine		$ 86,946,026
	STATUTORY DEDUCTIONS:		
8.	Cost of Development	$10,982,720	
	Cost of Mining		
9A,B.	Labor	$11,588,682	
9A,B.	Supplies	$11,264,239	
13.	Depreciation of mine plant and equipment	$ 3,368,543	
11.	Royalty	$ 7,423,054	
12.	Taxes under Minn. Stat. Sec. 298.24, Sec. 298.241, and Minnesota Laws 1965, Chapter 375	$ 2,994,687	
	Total Statutory Deductions		$ 47,871,925
	Taxable value of ore		$ 39,074,101

5. In accord with paragraph 16(e), the effective occupation tax rate for 1963 of 3.75 per cent is to be applied against the taxable value of the ore ($39,074,101) to arrive at a total occupation tax liability under Clause (a) of $1,465,279.

6. The parties have agreed in paragraph 17 of the Stipulation that the amount of royalty tax on royalties paid by Erie if such taxes were computed under the royalty tax laws in existence as of July 1, 1963, is $209,520.

7. Erie would have incurred, with respect to its 1974 operations, no sales and use tax liability, no employment excise tax liability, or no liability for any other excise tax under the laws in existence as of July 1, 1963.

8. Therefore, Erie's combined occupation, royalty and excise tax liabilities with respect to its 1974 operations if computed under the laws in existence as of July 1, 1963, for the purpose of Clause (a) is $1,674,799.

9. For the purpose of computing the hypothetical income and franchise tax which would be applicable to Erie for 1974 under Clause (b) of Minnesota Statutes, Section 298.40, Subd. 1, Erie's production of pellets is sold within the meaning of Minnesota Statutes, Section 290.17, Subd. 2(4), and it carries on its trade or business partly within and partly without the State within the meaning of that same provision.

10. For that same purpose, none of Erie's sales are made in this State within the meaning of Minnesota Statutes, Section 290.19, Subd. 1(1)(a), and Subd. 1a.

11. Accordingly, no more than 30 per cent of Erie's net income is apportionable to Minnesota and subject to tax under the relevant provisions of Minnesota Statutes, Chapter 290 in computing the hypothetical income and franchise tax which would be applicable to Erie for the purpose of Clause (b).

12. The hypothetical income and franchise tax applicable to Erie under Clause (b) shall be computed in accordance with this paragraph.

A) In accordance with Clause (3) of Minnesota Statutes, Section 298.40, Subd. 1, the market value of the taconite produced by Erie at the point where the beneficiation processes are completed shall be treated as Erie's gross receipts for the purpose of determining its gross income. Such market value shall be computed as follows:

1) Lake Erie value of ore (Item 4, Final Determination)	$243,593,210
2) Transportation expenses (Item 15, Final Determination)	(63,311,920)
3) Marketing expenses (Item 16A, Final Determination)	(542,143)
4) Miscellaneous expenses (Item 16B, C, and D, Final Determination)	(21,795)
5) Additional marketing and administrative expenses not allowable for occupation tax purposes as shown in Exhibit G	(551,376)
6) Market Value at point where beneficiation processes within this State are completed (gross receipts)	$179,165,976

B) Erie's net income shall be calculated as follows:

1) Gross receipts (from subparagraph (a))	$179,165,976
2) Labor for beneficiation (Item 18B, Revised Tentative Determination decreased by the $15,018 disallowed after audit by the Amended Findings and Order)	(27,025,935)
3) Supplies for beneficiation (Item 18C, Revised Tentative Determination)	(45,711,010)
4) Depreciation of beneficiation equipment (Item 18F9, Revised Tentative Determination)	(11,581,174)
5) Interest expense on beneficiation facilities (the balance of the $7,044,339 shown in Item 18G of the Revised Tentative Determination shall be disallowed)	(5,061,128)
6) Cost of development (Item 8, Final Determination)	(10,982,720)
7) Cost of mining supplies (Item 9B, Final Determination)	(11,588,682)
8) Cost of mining supplies (Item 9B, Final Determination)	(11,264,239)
9) Depreciation of mining equipment (Item 13, Final Determination)	(3,368,543)
10) Royalties paid (Item 11, Final Determination)	(7,423,054)
11) Taxes under Minn. Stat. Sec. 298.24 and Laws 165, c. 735	(1,860,723)
12) Taxes under Minn. Stat. Sec. 298.241	(1,383,964)
13) Net additional administrative expenses as shown in Exhibit H	(518,051)
14) Ad valorem taxes as shown in Exhibit I	(204,031)
15) Royalty taxes as shown in Exhibit J	(437,750)
Net Income	$40,754,972

C) In accord with the Conclusions of Law set forth in paragraph 11 above, 30 per cent of this total net income of $40,754,972, or $12,226,492 shall be apportioned to Minnesota for the purpose of this calculation.

D) Pursuant to paragraph 17(c) of the Stipulation, there shall be deducted from this amount the sum of the $500.00 deduction available to all corporations and Minnesota charitable contributions in the amount of $3,140.00, or $3,640.00. The remainder after this subtraction is $12,222,852.

E) Against this amount is to be applied the corporate income tax rate of 12 per cent. The product of this computation is $1,466,742. This amount is Erie's hypothetical income and franchise tax liability under Clause (b).

13. To arrive at the total limitation amount applicable to Erie for 1974 under Clause (b), there must be added Erie's sales and use tax liability for 1974 of $696,511, and Erie's employment excise tax liability for 1974 in the amount of $70,627. The sum of this computation is $2,233,880. This is the total limitation amount applicable to Erie under Clause (b).

14. The limitation amount under Clause (b), $2,233,880, exceeds the applicable limitation amount under Clause (a), $1,674,799 (see paragraph 8 of these Conclusions, supra), therefore, it is the limitation amount under Clause (b) which must be compared with Erie's liability under the occupation, royalty and excise tax laws applicable with respect to its 1974 operations.

15. Erie's combined liability under the occupation, royalty and excise laws applicable for 1974 is $3,876,874, consisting of an occupation tax liability of $2,732,600 (see paragraph 1 of these Conclusions, infra), a royalty tax liability of $377,136, a sales and use tax liability of $696,511, and an employment excise tax liability of $70,627.

16. Therefore, the combined occupation, royalty and excise tax liabilities paid by Erie for 1974 exceeds the limitation amount under Clause (b) by the sum of $1,642,994.

17. Sections 10 and 12, Article VII, Chapter 607, Laws of Minnesota for 1980, codified as Minnesota Statutes, Section 298.401 is an attempt by the legislature to interfere with the judicial process. If this Court were to give effect to that act, it would effectively destroy the opportunity to realistically compare taxes imposed on a taconite cost company with taxes imposed on a non-mining Minnesota corporation as contemplated by Minnesota Statutes Section 298.40, subd. 1(b), and the Taconite Amendment. The effect of that law would be to deny apportionment to taconite costs companies and to permit apportionment to other corporations.

18. Erie is entitled to a refund with interest, or at Erie's election, a credit with interest against future taxes, of the following amounts: (1) the sum of $1,642,994, the amount by which the combined occupation, royalty and excise tax liabilities paid by Erie for 1974 exceeds the limitation amount under Clause (b), (2) the sum of $93,418, which represents the additional amount of occupation tax paid by Erie for 1974 because of the failure of the Commissioner to allow a deduction for the taxes imposed for that year under Minnesota Statutes, Sec. 298.241, and (3) whatever sums which result from the adjustment of Erie's occupation tax liabilities for 1971-1973 as required in paragraph 2 of these Conclusions because of the Commissioner's failure to allow this same deduction in those years.

LET JUDGMENT BE ENTERED ACCORDINGLY. A STAY OF 30 DAYS IS HEREBY ORDERED.

Minnesota Tax Court
John Knapp, Chief Judge

MEMORANDUM

This matter is before the Tax Court by virtue of the appeal of Erie Mining Company (hereinafter referred to as "Erie") from the final determination of the Commissioner of Revenue (hereinafter referred to as the "Commissioner") of the occupation tax liability of Erie under Minnesota Statutes, Chapter 298, for the calendar year ended December 31, 1974, with respect to its Minnesota taconite mining operations (Docket No. 2193). Erie objects to the final determination of the Commissioner as to its 1974 occupation tax liability essentially on two general bases: First, Erie contends that the Commissioner in computing the taxable value of the ore produced by Erie in 1974 erred in not permitting Erie a deduction for the amount of production tax paid by it with respect to its operations for 1974 under Minnesota Statutes, Sec. 298.241. Erie claims it is entitled to this deduction under Minnesota Statutes, Sec. 298.03, subd. 6. Second, Erie contends that the magnitude of the occupation tax for 1974 as finally determined by the Commissioner exceeds the amount permitted under Minnesota Statutes, Sec. 298.40, subd. 1, and Article X, Sec. 6, of the Minnesota Constitution, the so-called "Taconite Amendment."

In addition, Erie is appealing from the redeterminations of the Commissioner made pursuant to Minnesota Statutes, Sec. 298.09, subd. 4, of its occupation tax liability for the calendar years ended December 31, 1971-1973 (Docket Nos. 2228 and 2430). Erie objects to these redeterminations on the sole ground that they improperly deprive Erie of a deduction under Minnesota Statutes, Sec. 298.03(6) for the production taxes paid under Minnesota Statutes, Sec. 298.241, which deduction had been previously granted for those years.

The combined occupation, royalty and excise taxes required to be paid with respect to mining, producing or beneficiating taconite are subject to a maximum limitation set out in Section 298.40. It reads as follows:

Minn. Stat. 298.40 TACONITE AND SEMI-TACONITE, LIMITATIONS ON TAXATION. Subdivision 1. The combined occupation, royalty, and excise taxes imposed upon or required to be paid with respect to the mining, production, or beneficiation of taconite or semi-taconite by any person or corporation engaged in such mining, production, or beneficiation, shall not be increased so as to exceed the greater of (a) the amount which would be payable if such taxes were computed under the laws in existence as of July 1, 1963, or (b) the amount which would be payable if such person or corporation were taxed with respect to such mining, production, or beneficiation under the income, franchise, and excise tax laws generally applicable to manufacturing corporations transacting business within the state, as such laws may be enacted or amended from time to time, except that for the purpose of the computation under this clause (b), (1) income shall be apportioned to Minnesota in the manner which may be otherwise specified by law; (2) operating losses shall be carried forward from one taxable year to another only to the extent which may be otherwise permitted by law; and (3) the market value of the taconite or semi-taconite, or the beneficiated product thereof, at the point where the beneficiation processes within this state are completed may be treated by law as gross receipts for the purpose of determining gross income from the business of mining, producing, or beneficiating taconite or semi-taconite, provided that if such market value is so used, to the extent that federal income taxes are deductible in computing taxes of manufacturing corporations generally, deductions shall be computed and allowed as if such taxes had been

computed, assessed, and paid under the federal income tax laws with the market value of the taconite or semi-taconite or the beneficiated product thereof constituting the gross receipts for the purpose of determining gross income from the business of mining, producing, or beneficiating taconite or semi-taconite.

Subd. 2. Taxes imposed upon the mining or quarrying of taconite or semi-taconite and upon the production of iron ore concentrates therefrom, which are in lieu of a tax on real or personal property, shall not be considered to be occupation, royalty, or excise taxes within the meaning of this section.

Subd. 3. For the purpose of this section "taconite" and "semi-taconite" shall have the meaning given to them by laws in existence at the time of the adoption of this section.

Article X, Section 6 of the Minnesota Constitution (commonly called the Taconite Amendment) prohibits the repeal or amendment of Section 298.40 and invalidates any conflicting laws until 1989. It reads as follows:

Sec. 6. Taconite taxation. Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite and semi-taconite, and facilities for the mining, production and beneficiation thereof shall not be repealed, modified or amended, nor shall any laws in conflict therewith be valid until November 4, 1989. Laws may be enacted fixing or limiting for a period not extending beyond the year 1990, the tax to be imposed on persons engaged in (1) the mining, production or beneficiation of copper, (2) the mining, production or beneficiation of copper-nickel, or (3) the mining, production or beneficiation of nickel. Taxes imposed on the mining or quarrying of taconite or semi-taconite and on the production of iron ore concentrates therefrom, which are in lieu of a tax on real or personal property, shall not be considered to be occupation, royalty, or excise taxes within the meaning of this amendment.

Essentially Section 298.40 provides that the occupation, royalty and excise tax imposed on Erie shall not exceed the greater of the following:

a) the amount Erie would pay if its taxes were computed under the laws as they existed July 1, 1963.

b) the amount Erie would pay if Erie were taxed under the income, franchise and excise tax laws generally applicable to manufacturing corporations transacting business within Minnesota, with specified differences.

Erie contends that the amount of occupation, royalty and excise tax paid by it in 1974 exceeds the permissible limit set out in Section 298.40. The Commissioner submits that the taxes do not exceed the "hypothetical income tax" limitation set out in that section. Because all of the other issues and questions regarding the limitation arise only if the Commissioner is reversed on this point, this question is of primary significance.

It is clear that a state can enter into a binding, valid and enforceable contract which grants tax exemptions or places express limitations on its power to tax. *Stearns v. State of Minnesota*, 179 U.S. 223; *Winona and St. Peter R Company v. City of Marshall*, 151 Minn. 331, 186 N.W. 791. The statute or a constitutional provision creates a contract between the state and the taxpayer where the language and circumstances show an intent to create private rights of a contractual nature which are enforceable against the state. See, *Sylvestre v. State*, 298 Minn. 142, 214 N.W. 2d 658.

It is clear from the evidence that all of the elements of a valid enforceable contract exist between Erie and the people of this state according to the terms of Article V, Section 6 of the Minnesota Constitution and Minnesota Statutes, Section 298.40. It is clear that the state intended to enter into a contract. Not only was the purpose of the Taconite Amendment to induce the development of the taconite industry in Minnesota and to encourage additional investment in that industry, but in addition, the word "contract" was repeatedly used by the persons who framed, supported and expressed the purpose and effect of the Taconite Amendment. Thus, the state not only attempted to induce additional development of the taconite industry for the economic welfare of northern Minnesota, but also intended that the taconite producers rely on its expressed policy of limiting the level of occupation taxes payable to that which would be payable if the producers were taxed as a manufacturing corporation.

It is very obvious that the intent and purpose of the Taconite Amendment was to make it more attractive for the iron mining industry to invest in plant and equipment in the State of Minnesota by giving the industry an assurance more binding than a mere statute. In laymen's language the Taconite Amendment provides that for a period of 25 years the taconite industry would receive the tax treatment then in existence, or at least not more severe than that treatment accorded other corporations within the state. Given the history of the state's treatment of the iron mining industry in the past, such an assurance by the state was a legitimate concern. Now that the industry has invested in plant and equipment in Minnesota the state has a contractual obligation to abide by the agreement. That part is conceded by the Appellee.

In *Reserve Mining Company v. State of Minnesota*, 210 N.W. 2d 487, the Minnesota Supreme Court held that the Taconite Amendment to the State Constitution constituted a contract between taconite mining companies and the state. In that case the Court said:

". . . In a basic contract analysis, the Amendment meets the criteria necessary to create a viable contract. The passage

of the bill and approval by the citizens of Minnesota constituted the offer. The acceptance was the action of Reserve to build facilities, create jobs and continue the production of taconite. Consideration existed on both sides: the state received revenues, a stronger economy and jobs for its citizens, while Reserve received a favorable tax status. Both sides have performed to date. When the people of this state make a bargain, mining companies as well as the least of us have a right to expect that the bargain will be kept. We affirm the trial court's finding that the Taconite Amendment is a contract between Reserve and the State of Minnesota."

The 1980 Minnesota Legislature enacted a law which purports to be a "restatement of the intent of Minnesota Statutes, Section 298.40, as originally enacted." The Commissioner contends that this legislation merely "construes and clarifies Section 298.40" and is entitled to "great weight in statutory construction" and should be recognized and given effect by this Court. The timing and circumstances under which this law was enacted, its legislative history, and the substance of the statute itself, preclude the Court from giving any probitive value in determining the issues presented in this appeal. It is practically, logically and legally impermissible for the 1980 Legislature to state the intent of the 1963 Legislature and the intent of the people of Minnesota in adopting the Taconite Amendment in 1964. The Act violates the doctrine of separation of powers provided by Article III of the Minnesota Constitution in two respects. It seeks to strip the Court of the judicial function of construing the 1963 legislation and the 1964 Constitutional Amendment and also seeks to compel the Court to decide in a specific way a contested matter properly within the Court's jurisdiction.

Long ago the Minnesota Supreme Court stated:

"It is only the intent of the legislature which enacts a statute that is to govern courts in the construction thereof. The opinion of a subsequent legislature on a meaning of a statute is entitled to no more weight than that of the same men in their private capacity."

Bingham v. Board of Supervisors of Winona County, 8 Minn. 441, 448.

In *Mayer v. Berlandi*, 39 Minn. 438, 446, the Minnesota Supreme Court said:

"This is a clear invasion of the functions of the judiciary. The legislature enacts the laws, but it belongs to the courts alone to construe them."

It is now incumbent on this Court to determine what the agreement was when the Taconite Amendment was adopted by the people of the State of Minnesota. This Court cannot look to any statutes enacted by the legislature since the adoption of the Taconite Amendment, for help in determining its intent and purpose, but must make that decision from the statutes then in existence. It is conceded than an agreement was entered into between the State of Minnesota and the iron mining industry, but there is disagreement about the terms of that agreement.

This Court will not concern itself with whether or not the Taconite Amendment was favorable to the iron mining industry or favorable to the State of Minnesota. That is a concern which must be addressed by the legislature at the end of the 25 year period of the agreement.

The issues to be resolved by the Court relative to the proper determination of the limitation amount specified in Clause (a) of Minnesota Statutes, Section 298.40, subd. 1 (i.e., the amount of occupation, royalty and excise taxes which would be payable by Erie with respect to its 1974 operations if computed under the laws in existence as of July 1, 1963), are as follows:

1. Whether for the purpose of this Clause (a) there should be allowed for occupation tax purposes, as Erie contends, a non-statutory deduction for interest on beneficiating plant computed at the rate of 6% per annum, the amount allowed informally to all taconite producers at the time of the original enactment of Minnesota Statutes, Section 298.40, subd. 1 and the adoption of the Taconite Amendment or whether this deduction should be computed, as the Commissioner contends, in accordance with the provisions of Minnesota Laws 1974, Chapter 556, Section 27, i.e., at the rate of 4%.

2. Whether for the purpose of computing the limitation amount under said Clause (a) there should be allowed for occupation tax purposes, as Erie contends, a statutory deduction under Minnesota Statutes, Sec. 298.03(6), for the tax actually paid by it in 1974 under Minnesota Laws 1965, Chapter 735, or whether, as the Commissioner contends, such tax is not deductible, but deductible instead are the taxes which were actually paid by Erie in 1963 under Minnesota Laws 1955, Chapters 429 and 540, Minnesota Laws 1957, Chapters 628, 776 and 858, and Minnesota Laws 1959, Chapters 21 and 664.

3. Whether for this purpose of computing the limitation amount under said Clause (a) there should be allowed for occupation tax purposes, as Erie contends, a statutory deduction under Minnesota Statutes, Sec. 298.03(6), for taconite production taxes imposed under Minnesota Statutes, Sec. 298.24, at the base rate of 11.5 cents per ton adjusted for grade as escalated, the rate applicable and actually paid by Erie with respect to its 1974 operations, or whether such deduction should be allowed, as the Commissioner contends, at the base rate of 5 cents per ton adjusted for grade as escalated, the rate in existence as of July 1, 1963.

4. Whether for the purpose of computing the limitation amount under said Clause (a) there should be allowed for

occupation tax purposes, as Erie contends, a statutory deduction under Minnesota Statutes, Sec. 298.03(6), for the tax paid by it for 1974 under Minnesota Statutes, Sec. 298.241, or whether, as the Commissioner contends, such tax is not deductible.

Clause (a) of Minnesota Statutes, Section 298.40, subd. 1 provides that the combined occupation, royalty and excise taxes imposed in any given year upon a person or corporation engaged in the production of taconite cannot exceed "the amount which would be payable if such taxes were computed under the laws in existence as of July 1, 1963." This limitation becomes applicable only if it is greater than the amount which would be payable under Clause (b) of said section, that is, the amount which would be payable by such a taconite producer if taxed under the income, franchise and excise tax laws applicable to manufacturing corporations generally transacting business within the state.

The Commissioner is in error in his contention that the production taxes paid by Erie with respect to its operations for the years 1971 through 1974 under Minnesota Statutes, Section 298.241, are not properly deductible in arriving at the taxable value of ore for the purpose of determining Erie's occupation tax liability in those years. The additional amount of tax imposed by Minnesota Statutes Section 298.241 is in nature no different from the amount of tax imposed under Minnesota Statutes, Section 298.24. The additional amount of production tax imposed under Section 298.241, like the amount of production tax imposed under Section 298.24, is levied on the basis of a specific amount per ton of merchantable iron ore concentrate produced. The subject of the taxes imposed under both sections is defined in an identical manner, the taxes in each case being "imposed upon taconite and iron sulphides, and upon the mining and quarrying thereof, and upon the iron ore concentrates produced therefrom, and upon the concentrate so produced. . . ." The escalation formula is the same in each. The production taxes imposed under both sections are in addition to the occupation tax, the royalty tax and the taconite railroad tax. The taxes under both sections are in lieu of all other taxes upon taconite lands currently being used for production, and upon the machinery, etc., used in mining or concentration. The Court finds that the taxes imposed under both statutes are of precisely the same substance and must be deducted in determining the occupation tax liability for those years.

In *Reserve Mining Co. v. State of Minnesota,* supra, the Minnesota Supreme Court held that a tailings tax was an excise tax subject to the tax limitations of the Taconite Amendment because the tailings tax functions as an excise tax. In that case the Court said:

"Though the legislature characterized the taconite tailings tax as an 'in lieu' tax, we must look beyond the form of the tax to its substance. To be exempt from the limitations on taxation imposed by Minn. Stat. Section 298.40, subd. 1, the Taconite Amendment, the tailings tax must be a valid substitute for a tax on real or personal property . . . "

In the instant case, the Respondents contend that the tax imposed by Minn. Stat. Section 298.241 is not a production tax because the legislature chose not to call it by that name. We find, however, that the tax is imposed in exactly the same manner as the production tax under Minn. Stat. Section 298.24. This Court will, therefore, also look beyond the form of the tax to its substance and determine that it is a production tax.

Immediately after the legislature's enactment of Minnesota Statutes Section 298.241, and immediately after the Commissioner and other members of his staff had participated directly in the legislative process which produced this enactment, the Department of Revenue adopted a practice of allowing a deduction for taxes paid under Section 298.241, as a deduction in computing the taxable value of ore for occupation tax purposes under the authority of Section 298.03(6). This practice was continued for three years, 1971, 1972 and 1973. Later the Commissioner reversed this practice and denied the deduction not only for 1974, but also retroactively for the prior three years. This interpretation of the statute by the Department of Revenue made contemporaneously with the adoption of Section 298.241 is persuasive evidence of the legislature's intent that the taxes payable under that section were to be deductible. This is particularly true because occupation tax is not a self-assessed tax. It is computed by the Department of Revenue after the taxpayer files an occupation tax report. The Commissioner's argument to the effect that it was a mistake is not very valid because the Commissioner himself signed the final certifications of occupation tax due with respect to Erie and the other taconite producers for the years herein issue.

The Commissioner contends that the re-enactment rule of statutory construction should not be applied in the instant case for several reasons. The Commissioner's argument to the effect that the re-enactment rule cannot apply to the instant case because of the shortness of duration between the adoption of the departmental policy and the time of the re-enactment is not persuasive. Neither is the argument to the effect that the legislature was not aware of the department's policy relative to the deductibility of the tax imposed prior to its re-enactment of the statute, because in 1974 the legislature did amend Paragraph (7) of that section.

The Commissioner is in error in his contention that in computing the limitation amount under Clause (a) of Minnesota Statutes Section 298.40, subd. 1, Erie is not entitled to a deduction for interest on plant investment at the rate of 6%. It is not contested that for at least a decade prior to the enactment of Section 298.40, subd. 1, and the adoption of the Taconite Amendment, and continuing thereafter until July 1, 1974, the effective date of Chapter 556, Laws of Minnesota 1974, the Commissioner allowed uniformly to every taconite producer a non-statutory deduction for interest on plant investment at the flat rate of 6% in computing the mouth-of-the-mine value for ore for occupation tax purposes. As of July 1, 1963, undeniably it was the Commissioner's unvarying practice to allow this deduction at that rate. Now the Commissioner contends that this

deduction should be computed under the standard established by the legislature for this deduction the full eleven years after July 1, 1963. The Commissioner's view violates not only the expressed language of Clause (a), but also the very spirit and intent of the Taconite Amendment.

While the deduction is denominated as interest, it appears to the Court that the historic reason for the 6% interest allowance on capital investment was not really for the purpose of making an allowance of the actual interest expense, but was a recognition that some return on capital investment must be allowed in order to arrive at the mouth-of-the-mine value of the iron ore. This theory seems to be recognized even by the amended statute which sets the minimum amount at 4%. It is common knowledge that the expected return on investment did not decline between July 1, 1963, and July 1, 1974, so the Commissioner's argument to the effect that the new rate is more accurate than the old rate has no validity.

The Commissioner does not contend that the standards established under the relevant statutory provisions as they existed as of July 1, 1963, for the purpose of deducting certain costs from the mouth-of-the-mine value of ore to arrive at the taxable value of ore may in any way be modified for the purpose of computing the limitation amount under said Clause (a). By the same token, it logically follows that the standards established by the Commissioner as they existed as of July 1, 1963, for the purpose of deducting certain costs from the Lake Erie value to arrive at the mouth-of-the-mine value may similarly not be altered for the purpose of computing this same limitation amount.

Erie does not contend and this Court does not find that such deductions, statutory or non-statutory, must be in the specific amounts which would have been available to Erie in 1963 if it would have mined the same number of tons of ore in that year.

As we see it, Clause (a) does not mean that the deductions in 1974 and subsequent years would be the same as they were in 1963, but the standards must be the same. The standards in existence as of July 1, 1963, for computing the relevant deductions, statutory as well as non-statutory, must be applied if said Clause (a) is to be applied and accord not only with its spirit and intent, but also with its express language. As of July 1, 1963, certain non-statutory deductions, such as those pertaining to labor and supplies, were allowed in the amount of the actual expense incurred. This standard still applies in 1974 and subsequent years.

All of the regulations and interpretations in effect on the date of the adoption of the Taconite Amendment are to be given full effect. If additional production taxes were paid pursuant to Minnesota Statutes Section 298.241, proper credit must be given in computing the limitation amount under Clause (a) for the tax actually paid by it in 1974 under Minnesota Laws 1965, Chapter 735.

For the purpose of computing the limitation amount under Clause (a), there must be allowed for occupation tax purposes a statutory deduction under Minnesota Statutes Section 298.03(6) for taconite production taxes imposed under Minnesota Statutes Section 298.24, at the base rate of 11.5 cents per ton adjusted for grade as escalated, the rate applicable and actually paid by Erie with respect to its 1974 operations.

With respect to the computation of the limitation amount under Clause (b) of Minnesota Statutes, Section 298.40, subd. 1, the single issue is to be determined by this Court. That issue relates to the proper application of the apportionment formula as contained in Minnesota Statutes, Section 290.19, subd. 1(1), in determining Erie's tax liability if computed under the 1974 income and franchise tax laws applicable to ordinary manufacturing corporations. Erie contends that for such purpose only 30% of its net income is apportionable to Minnesota. The Commissioner, on the other hand, contends that 100% of such net income is apportionable to Minnesota, or in other words that Erie is not entitled to any apportionment whatsoever.

The Commissioner is in error in his contention that 100% of Erie's net income is properly apportionable to Minnesota in computing the hypothetical income and franchise tax to which Erie would be subject for 1974 under Clause (b) of Minnesota Statutes Section 298.40, subd. 1.

Erie contends that it carries on its business within and without the State of Minnesota within the meaning of Section 290.17, subd. 2(4). It contends that all of its sales are made outside of the state within the meaning of Clause (a) of Section 290.19, subd. 1(1), if properly construed in conjunction with the tests set forth in Section 290.19, subd. 1a.

The Commissioner contends that Erie's trade or business for the purpose of the hypothetical computation is by definition conducted "wholly within this state" within the meaning of Section 290.17, subd. 2(3), and that Erie, as a result, is entitled to no apportionment. In coming to his conclusion, the Commissioner ignores the specific statutory tests set forth in Minnesota Statutes Section 290.17, subd. 2(4), and Section 290.19, subd. 1a which tests were devised and inserted into the statutes expressly for the purpose of determining questions of the type herein issue, i.e. whether a business under the circumstances of any given case is to be deemed to be carried on partly within and partly without the state so as to be entitled to apportionment.

The Commissioner contends that because all of Erie's mining, production and beneficiation takes place within Minnesota, Erie conducts its activities wholly within Minnesota. This Court, however, sees no basis for that conclusion particularly in view of the fact that Clause (b) of Section 298.40 reads in pertinent part as follows:

"Income shall be apportioned to Minnesota in the manner which may be otherwise specified by law. . . ."

The use of the word "shall" in connection with the language "income shall be apportioned" indicates unequivocally that the principles of apportionment are to apply for the purpose of computing the limitation amount under Clause (b), irrespective of the other language of Minnesota Statutes Section 298.40, siezed upon by the Commissioner as indicating to the contrary.

Minnesota Statutes Section 298.17, subd. 2(4) provides that "a trade of business located in Minnesota is carried on partly within and partly without this state if tangible personal property is sold by such trade or business and delivered or shipped to a purchaser located outside the State of Minnesota."

The legislative history of the 1973 amendment established clearly the intent of the legislature that even companies which carry on their business activities totally within the State of Minnesota may be entitled to apportionment under the current apportionment of income provisions contained in Chapter 290.

The explicit language of Clause (b) to the effect that "income shall be apportioned" specifies unequivocally that the principles of apportionment are to be applied for the purpose of determining that limitation amount.

The legislative history surrounding the original enactment of Minnesota Statutes Section 298.40, and the adoption of the Taconite Amendment, establishes that Clause (b) was inserted as one of the limitation amounts to insure that the liability of a taconite producer under the occupation, royalty and excise taxes normally applicable to such producers would not result in a burden comparatively any greater than that borne by manufacturing corporations generally under the income, franchise and excise tax laws applicable to such corporations. It was recognized that if this intent were to be realized, some special provision would have to be made to facilitate the computation of this limitation amount in the case of taconite producers organized as cost companies. At the time of the enactment of Section 298.40 and the adoption of the Taconite Amendment, the only taconite producers in existence in the state were Erie and Reserve Mining Company, both of which were cost companies.

It is evident that the legislature in constructing the language of Section 298.40, as above quoted, had nothing in mind relating to apportionment, but rather had as its sole purpose the fashioning of a solution to the problem arising solely by virtue of the unique nature of the cost company. The legislature recognized that if the normal method of determining gross receipts were followed in the case of Erie and the other cost companies for the purpose of determining the hypothetical income tax which would be applicable to them under Clause (b), the result would be that ordinarily such cost companies would have only a nominal limitation amount applicable under Clause (b). Therefore, the only limitation which would be applicable to such companies would be the hypothetical amount under Clause (a) of Section 298.40, subd. 1. This at the outset would run contrary to the fundamental concept thought to be achieved by Section 298.40, subd. 1 and the Taconite Amendment. That concept was that the occupation, royalty and excise taxes of a given taconite producer was not in any sense to be considered frozen, but only that the combined amount of those taxes could not be raised so as to exceed the income, franchise and excise taxes applicable to ordinary manufacturing corporations, as those taxes were increased from time to time. The Appellant does not contend and this Court does not hold that Clause (a) or Clause (b) froze the amount of taxes to be paid by taconite producers.

If the mouth-of-the-mine value were used to calculate the hypothetical income tax for the purpose of calculating the limitation under Clause (b), the income would be completely distorted because taconite ore is not a marketable product until after beneficiation has taken place.

To remove this obvious distortion which could result in an unwarranted benefit to such cost companies to the disadvantage of taconite producers not organized as cost companies, the legislature provided that such gross receipts would be determined rather by reference to "the market value of the taconite or semi-taconite, or the beneficiated product thereof, at the point where the beneficiation process within this state are completed. . . ." It seems clear that the legislature chose this particular measure to be used in imputing gross receipts to the cost companies rather than, for example, the "mouth-of-the-mine" value which is used in connection with the imposition of the occupation tax on high grade ores because it is only after beneficiation has taken place that the manufacturing process with respect to taconite ore is completed and a saleable product in the form of pellets has resulted. The gross receipts of a manufacturing corporation received from the sale of its product, whether this product be taconite pellets in the case of taconite producers not organized as cost companies or any other tangible product in the case of other manufacturers, will not under ordinary circumstances differ substantially from the market value of its product at the point where the manufacturing process with respect to that product is completed and the product is available for sale in its final form. By employing this measure, therefore, the legislature insured that the starting point of the computation of the hypothetical income and franchise taxes of a cost company under Clause (b) of Section 298.40, subd. 1 would be comparable with the starting point of the computation of the same hypothetical taxes under said Clause (b) for taconite producers not organized as cost companies, and comparable to the starting point of the computation of the actual income and franchise taxes of manufacturing corporations generally.

The Commissioner contends that the language in Clause (b) indicates that the hypothetical income tax is to relate to activities undertaken geographically only within the State of Minnesota, and that therefore taconite producers generally are not entitled to apportionment in computing the limitation amount under Clause (b). That argument is not sound because many other companies conduct their business wholly within the State of Minnesota and yet are entitled to an apportionment because all of

their sales take place outside the State of Minnesota. It appears to this Court that when Clause (b) is read in its entirety apportionment is mandated.

The Commissioner argues further that the language of Minnesota Statutes Section 298.40, subd. 1(b) (3), which imputes to cost companies gross receipts measured by "the market value of the taconite . . . at the point where the beneficiation process within this state are completed . . ," indicates that such gross receipts are established without regard to sales. The Commissioner is in error in presuming that gross receipts can be imputed without sales. Where gross receipts are imputed to a cost company, a sale must be assumed or imputed because without a sale no income can be imputed or realized since it is clear that no manufacturer of tangible personal property can have gross receipts in excess of its costs of production without sales. Gross receipts must be deemed to have resulted from sales. In the instant case the only sale that could be assumed or imputed is a sale with a destination outside of the State of Minnesota because there are no smelting facilities within the state.

Taconite producers not operating as cost companies will ordinarily have their gross receipts determined in the normal fashion by specific reference to sales. If the question whether apportionment is to be permitted or not to be permitted is to be resolved by reference to the question of whether gross receipts are determined in any given case specifically by reference to sales, the obvious result would be that some taconite producers for the purpose of computing the limitation amount under Clause (b) would be entitled to apportionment while others would not. The discrimination which would result among the taconite producers themselves for the purpose of computing the said limitation amount could not have been intended by the legislature.

The legislative history relating to the adoption of the 1973 Amendments to the apportionment statutes makes it clear that the legislature intended by them to encourage local manufacturers exporting their product outside the State of Minnesota by affording to them the benefit of apportionment.

The essential concept sought to be achieved by the Taconite Amendment is that the occupation and royalty tax liabilities of a taconite producer in any given year are not to result in a burden comparatively greater than that borne by manufacturing corporations generally under the income, franchise and excise tax laws applicable to such corporations, as amended from time to time. If this limitation amount is to be in accord with the intent with which it was obviously adopted, the "hypothetical" income tax of a taconite producer under Clause (b) must be made on the same basis that the actual income taxes of manufacturing corporations generally are computed. This intent will not only be not realized, but will in effect be totally subverted, if at the outset an assumption is made that apportionment is not available by definition to taconite producers for the purpose of the computation under Clause (b), despite the fact that apportionment is available in computing the income taxes of manufacturing corporations generally. The express language of the statute is otherwise.

The Commissioner is in error in his contention that Erie's sales cannot be considered as having been made outside this state for apportionment purposes in computing Erie's hypothetical income and franchise tax under Clause (b).

Under the 1973 Amendment, sales are to be assigned on a destination basis to the "consumer state" or the state in which the purchaser is located. The legislature expressly directed in Section 290.19, subd. 1a, that f.o.b. points and other conditions of sale, the very factors upon which the Commissioner is relying in making his argument, are to be expressly disregarded. F.o.b. points and other conditions of sale were not considered determinative even under the "origin" test which applied before the adoption of the 1973 Amendments.

Having given this matter grave consideration, the Court feels duty bound to find for the Appellant on all counts. Here we have an agreement that must be honored.

John Knapp

STATE OF MINNESOTA
COUNTY OF RAMSEY

TAX COURT
REGULAR DIVISION

West Publishing Company,

Appellant,

v.

The Commissioner of Revenue,

In the Matter of the Appeal from the Commissioner's Order dated October 27, 1978 relating to sales and use tax of West Publishing Company for the taxable period July 1, 1974 thru July 31, 1974.

Appellee.

Docket No. 2822

Order dated Dec. 1, 1981

The above matter came on for trial in the Tax Court Hearing Room in the City of St. Paul, Minnesota before the Honorable Jack Fena, who was then one of the Judges of the court on April 16, 1980. Subsequent to that, briefs were filed by the parties and

Judge Fena's term of office ended February 2, 1981, before he had rendered his decision in the matter. The parties through their attorneys agreed to have the case submitted to another Tax Court Judge upon the transcript, briefs and other materials in the file but with a request for additional oral argument. The case was submitted to the Honorable Carl A. Jensen, Judge of the Minnesota Tax Court. The additional oral arguments were heard by all three judges, the Honorable Carl A. Jensen, the Honorable John Knapp and the Honorable Earl B. Gustafson.

Vance K. Opperman and Richard G. Braman of McGovern, Opperman & Paquin, represented the Appellant.

Paul R. Kempainen, Special Assistant Attorney General, represented the Appellee.

Syllabus

The entire cost of a huge machine or manufacturing equipment installed in a building is subject to sales or use tax regardless of whether or not it becomes a "fixture" unless it becomes part of the realty so as to subject it to future real estate taxes. The actual cost of installation is not subject to sales or use tax if this is clearly separated out in the contract.

If machines or equipment become part of the realty so as to subject it to real estate taxes in the future, only the cost of the materials paid by a contractor-constructor is subject to sales or use taxes under M.S. 297A.01(4).

In the instant case the machine did not become part of the realty so as to subject it to future real estate taxes.

From all the files, records and proceedings herein, including transcripts of depositions and trials and a Stipulation of Facts entered into by and between the parties hereto, the Court finds as follows:

Findings of Fact

1. The Appellant, West Publishing Company, is a Minnesota corporation with its main offices and plant located in the City of St. Paul, Minnesota.

2. In 1973 Appellant ordered from Sheridan Company, a certain binding machine to be delivered in 1974.

3. The components of the machine arrived in separate shipments commencing in February of 1974.

4. The contract, Exhibit B, provided as follows:

"Purchaser is responsible for installation of the equipment including the preparation of a proper foundation. However, if this contract covers new or reconditioned equipment the installation of which calls for special technical knowledge, seller will provide the service of a qualified man to supervise the installation for the number of days required therefore, at seller's regular service charge."

5. The contract provided for a purchase price of $340,000 less a trade-in of apparently similar used machinery in the amount of $40,000 leaving a net purchase price of $300,000.

6. The various components of the machine were put together in Appellant's St. Paul Plant under the supervision of a Sheridan employee with the rough labor being done by Appellant's employees. It would appear that Sheridan's employee principally supervised the installation although he may have done some work in connecting the various components but this is not clear from the record.

7. The principal part of the machine was put together at one location although it appears that some parts were located in some other parts of the plant. The machine weighs approximately 30 tons.

8. Appellant's contract with Sheridan provided that Appellant would pay any sales or use tax due in connection with the transaction.

9. Appellant filed a Minnesota Sales & Use Tax Return on August 25, 1974 for the period ending July 31, 1974 and reported the entire purchase price of $300,000 as one of its purchases subject to the Minnesota Use Tax and paid a total of $12,000 in use taxes thereon.

10. On or about August 16, 1977, Appellant filed a claim for refund of excess sales and use taxes. This claim requested a refund of the $12,000 in use taxes which had previously been paid by West with respect to the purchase of the machine.

11. It was agreed by stipulation of the parties that Sheridan's cost of materials in constructing the machine was $150,000.

12. Appellant has amended its original claim for refund of $12,000 to a claim for refund in the amount of $6,000 based on Sheridan's cost of materials.

13. On October 27, 1978, the Commissioner issued his Order denying Appellant's claim for refund.

14. Item 4 of the Stipulation of Facts reads as follows:

"No. 4. The machine, which is of substantial size and weight, was delivered to West's manufacturing plant in early February, 1974 and was permanently affixed to the floor of West's plant (becoming a fixture therein). West owns the underlying realty."

15. The purchase of this machine by Appellant was a purchase of personal property subject to Minnesota Sales & Use Taxes. This was not a sale by a contractor to an owner such that a sales tax was due only on the cost of materials paid by Sheridan to its suppliers, since the purchaser took title f.o.b. Sheridan's point of manufacture and Appellant assumed all risk of loss after the machine was delivered to the carrier.

16. Minn. Stat. § 297A.01, subd. 4 states in part as follows:

"Sales of building materials, supplies and equipment to owners, contractors, subcontractors or builders for the erection of buildings or the alteration, repair or improvement of real property are "retail sales" or "sales at retail" in whatever quantity sold and whether or not for purpose of resale in the form of real property or otherwise."

This section does not apply to the sale and installation of any machinery or equipment which is thereafter considered personal property and exempt from real estate taxes. This provision applies only to such materials, supplies and equipment which become a part of the building and are subsequently subject to real estate taxes.

17. Appellant has taken a timely appeal from the Commissioner's Order to this Court.

Conclusions of Law

1. Appellant purchased a machine for the sum of $300,000 and this amount is subject to Minnesota Sales and Use Taxes.

2. Even if this could be considered an installation by a contractor, it is personal property that never becomes part of the realty and is not included in the provisions of Minn. Stat. 297.01, subd. 4 and the total price paid less only the cost of installation, is subject to the sales and use taxes.

3. The Order of the Commissioner of Revenue dated October 27, 1978 is hereby affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY. A STAY OF 15 DAYS IS HEREBY ORDERED.

Minnesota Tax Court
Carl A. Jensen, Judge
John Knapp, Judge
Earl B. Gustafson, Judge

Memorandum

This case involves the purchase of a machine by Appellant from Sheridan for the sum of $300,000. Appellant claims that this was a situation involving Minn. Stat. 297A.01, subd. 4 in which Sheridan is a contractor installing equipment and that only the cost of materials paid by Sheridan to its suppliers is subject to sales and use taxes. Appellant claims that this is a huge and ponderous machine which becomes a fixture and therefore included in the above Minnesota Statutes. Incidentally, it should be noted that the machine was not even bolted down but apparently some steel angle irons may have been bolted to the floor after the installation to prevent the machine from being moved by bumping.

The Commissioner takes the position that this was simply the purchase of a machine and that Appellant became the title owner either when the various components of the machine were placed on board a carrier or when the components of the machine were received by Appellant at its place of business in St. Paul.

One of the Stipulations provides that the machine was permanently affixed to the floor and became a fixture. Unfortunately, the word fixture does not have a precise meaning.

As between a mortgagor and mortgagee if nothing is specifically stated, ordinarily fixtures are considered part of the realty and included in the mortgagee's security.

As between a landlord and tenant any fixtures that are provided by the tenant and removable without serious damage to the property continue to be considered personal property belonging to the tenant.

Black's Law Dictionary, Revised Fourth Edition, indicates that there are three views. One is that fixture means something which has been affixed to the realty so as to become a part of it and irremovable. An opposite view is that fixture means something which appears to be a part of the realty but is only a chattel and removable. An intermediate view is that fixture means a chattel that is affixed to the realty but implies nothing as to whether or not it is removable and that is to be determined by considering the circumstances and the relation of the parties.

The Minnesota Supreme Court and the Minnesota Tax Court have wrestled with this matter for some time but there have been no definitive cases by either of the courts since the last amendments of the Minnesota Statutes relating to the taxation of real estate and the imposition of sales and use taxes.

It now appears that Minnesota Statutes define what is real property and what is personal property for the purposes of real estate taxation and sales and use taxation and this Court is bound by these legislative determinations.

Minn. Stat. 272.03, subd. 1(a) states the following:

"For the purposes of taxation," real property" includes the land itself and all buildings, structures, and improvements or other fixtures on it, and all rights and privileges belonging or appertaining to it, and all mines, minerals, quarries, fossils, and trees on or under it."

Minn. Stat. 272.03, subd. 1(c)(i) reads as follows:

"The term real property shall not include tools, implements, machinery, and equipment attached to or installed in real property for use in the business or production activity conducted thereon, regardless of size, weight or method of attachment."

All property must either be real or personal property by definition. It is obvious by the last section cited above that the machine involved in this matter is not real property and is therefore personal property.

Minn. Stat. 272.02, subd. 1(11) states in part as follows:

"The taxpayer shall be exempted with respect to, ...tools and machinery which by law are considered as personal property, and the property described in section 272.03, subdivision 1, clause (c), . . ."

It would appear that the legislature could have added the items in Minn. Stat. 272.03, subd. 1(c)(i) to subdivision 2 which lists other personal property. In any event by stating that for tax purposes those items are not real property the legislature thereby defined them as personal property. Part of this difficulty undoubtedly occurred because of the apparently conflicting statements contained in some of the Minnesota Supreme Court cases and the Minnesota Tax Court cases involving these matters.

Minn. Stat. § 297A.01, subd. 3 provides as follows:

"A "sale" and "purchase" includes, but is not limited to, each of the following transactions:

(a) Any transfer of title or possession, or both, of tangible personal property, whether absolutely or conditionally, . . . for a consideration in money or by exchange or barter;"

Minn. Stat. 297A.01, subd. 4 provides in part as follows:

"A "retail sale" or "sale at retail" means a sale for any purpose other than resale in the regular course of business . . . Sales of building materials, supplies and equipment to owners, contractors, subcontractors or builders for the erection of buildings or the alteration, repair or improvement of real property are "retail sales" or "sales at retail" in whatever quantities sold and whether or not the purpose of resale in the form of real property or otherwise."

Appellant's claim is based on the premise that this transaction involves Minn. Stat. 297A.01, subd. 4. This provision specifically relates only to building materials, supplies and equipment for the erection or alteration, repair or improvement of real property. This section does not speak of materials, supplies and equipment in connection with trade fixtures. The implication is clear that it relates only to materials that are going to be subsequently taxed as part of the real property. This would include normally such items as heating, plumbing, airconditioning, wiring and elevators and other similar items.

Even if Minn. Stat. 297A.01, subd. 4 could be construed to apply to personal property of the nature involved in this matter, we would find that this particular transaction still would not fall within the terms of this subdivision. The contract provided that the cost of the machine was $300,000. It further provided that the purchaser was obligated to provide the installation but that Sheridan would provide supervision, if requested, which would be billed to the purchaser. This is somewhat similar to *Duluth Steel Fabricators, Inc. v. Commissioner of Taxation,* 237 N.W. 2d 625 (1975). Duluth Steel fabricated steel for the building. Duluth Steel provided the erection drawings and before delivery and during its erection, Duluth Steel conferred with the general contractor as to the manner in which the steel was to be erected. Duluth Steel did not have an employee on the job at all times but it did send someone whenever requested by the contractor. Whenever there was a problem Duluth Steel made the necessary corrections. It was held in that case that Duluth Steel was a retailer and sales tax was due on the entire sales price and not just a use tax on the cost of materials Duluth Steel purchased.

Although it may not be considered precedent it is interesting to note that in *Abex Corporation v. Commissioner of Taxation,* 207 N.W. 2d 37 (1973), in the dissent a Hennepin County District Court case was referred to. This case was *Minneapolis Star and Tribune Company v. County of Hennepin,* No. 667349 (Dist. Ct. Hennepin County (December 3, 1971. It appears that this involved similar printing presses and related machinery weighing 25 tons each which is about twice as much as the machinery involved in the instant case. It appears from the above *Minneapolis Star & Tribune* decision that the District Court Trial Judge reasoned that the machinery was easily disassembled and moved to different locations and that a used machinery market was available for such ponderous machinery just as with other types of machinery or equipment. Those facts seem quite similar to those in the instant case. It should also be noted that in the instant case the Appellant did in fact trade in apparently a similar type of machine.

Minn. Stat. § 297A.02 imposes an excise tax of 4 percent of the gross receipts from sales at retail. Minn. Stat. 297A.14 imposes a use tax of 4 percent on any property sold at retail on which the sales tax was not paid.

Minn. Stat. 297A.01, subd. 4, states that a retail sale means a sale for any purpose other than for resale in the regular course of

business. This subdivision specifically provides that sales of building materials, supplies and equipment to owners or contractors for the erection of buildings or the "alteration, repair or improvement" of real property are retail sales.

Minn. Stat. § 272.01, subdivision 1(a) reads as follows:

"For the purposes of taxation, "real property" includes the land itself and all buildings, structures, and improvements or other fixtures on it, . . ."

Minn. Stat. § 272.03, subdivision 1(c)(i) reads as follows:

"The term real property shall not include tools, implements, machinery and equipment attached to or installed in real property for use in the business or production activity conducted thereon, regardless of size, weight or method of attachment."

Minn. Stat. § 272.02, subd. 11, states as follows:

"The taxpayer shall be exempted with respect to . . . tools and machinery which by law are considered as personal property, and the property described in section 272.03, subdivision 1, clause (c), . . ."

Minn. Stat. § 272.03, subd. 2, provides as follows:

"For the purposes of taxation, "personal property" includes:

(1) all goods, chattels, money and effects;"

By definition, property consists of either real property or personal property. There may be different kinds of personal property such as tangible or intangible personal property and there are different kinds of real property such as fee holdings, leaseholds, reversionary interests, etc. All of the statutes quoted above appear to be an attempt to define real property and personal property for the purpose of taxation.

The property described in Minn. Stat. § 272.03, subdivision 1(c) (i) must be considered personal property since the legislature says that this is not real property. It is true that Minn. Stat. § 272.02, subd. 11 speaks of "*personal property and the property described in section 272.03, subdivision 1(c),*" which might seem to indicate that personal property does not include the items listed in Minn. Stat. § 272.03, subdivision 1(c) (i) but we hold that the legislature is simply saying that this is personal property and exempt from real property taxes and that the purpose for specifically listing this property in this way is that there had been some decisions of the Minnesota Tax Court and the Minnesota Supreme Court which had left some doubt as to the status of the property listed in Minn. Stat. 272.03, subdivision 1(c) (i) and these statutes were changed in this manner to make it perfectly clear that these items were personal property as far as taxation is concerned regardless of how they might be considered as between a mortgage and mortgagee, a seller and purchaser, and in other situations.

Minnesota Department of Revenue, Tax S&U 112(a) reads as follows:

"(a) In general. Under Section 297A.01, Subd. 4, sales of building materials, supplies and equipment to owners, contractors, subcontractors or builders constitute retail sales and are thus taxable.

The term "building materials, supplies and equipment," as used in these regulations, refers to property intended to become part of a new building, structure, road or an addition, repair, improvement or alteration to roads or real estate. A partial list of such materials includes gravel, blacktop, bricks, cement, steel beams and rods, electrical supplies, glass, woodwork, paint and paint supplies, pipes and valves, aluminum sheathing, wood and composition sheathing, lumber, plastics, roofing and wallboards. Other property usually incorporated into a building or other types of real property includes lighting fixtures, plumbing and bathroom fixtures, furnaces, boilers and heating units for space heating, pre-fabricated cabinets and central air conditioning units (for space cooling).

Other types of equipment may be incorporated into a new structure or added to an existing structure undergoing repairs, alterations or improvements in order to enhance the attractiveness of the structure or to increase its rental or sales value. Examples of such equipment are built-in dishwashers, stoves and ranges, garbage disposal units and air-conditioners installed in openings in outer walls."

This Court concludes that Minn Stat. 297A.01, subd. 4 and Minn. Dept. of Rev. Tax S&U 112(a) relate only to materials, supplies and equipment that are incorporated into the building or real estate in such a permanent way that they become part of the real estate and are subject to real estate taxes. We hold that this statute and this regulation do not apply to the personal property listed in Minn. Stat. 272.03, subdivision 1(c) (i) and that the sale of such property is subject to sales or use taxes on the total sale price. If the property is sold for a total installed price, the entire installed price would be subject to sales or use taxes. If the property is sold for a stated price plus the cost of installation, only the sale price would be subject to sales or use taxes.

Opinion written by Judge Jensen.

Gustafson, Judge, concurring,

I agree that in sales tax cases we should apply the definitions of real and personal property found in Minn. Stat. 272.03 (b)

and (c) whenever they become issues. The adoption of these statutory definitions "for the purposes of taxation" follows the legislature's most recent expressions in this area and should lead to greater uniformity and certainty for both taxpayers and the Commissioner. To return to the often conflicting common law definitions of "fixtures" and "attachments" would, in my opinion, spawn greater uncertainty and litigation.

Therefore, when the issue is whether "building materials or equipment" will become real property through attachment, the "removability" standard found in Minn. Stat. 272.03(b) should apply to Minn. Stat. 297A.01, subd. 4 (sales to contractors). See *Hauenstein and Burmeister, Inc., et al v. Commissioner,* Tax Ct. Docket No. 3080, March 18, 1981 (appeal to Supreme Court pending). When heavy machinery moves through commerce, it remains personal property, regardless of size, weight or method of attachment, under Minn. Stat. 272.03(c)(i) and therefore should be subject to the sales tax when purchased by the ultimate consumer who uses the machinery in his business or production activity.

Under Appellant's theory, this book binding machine purportedly became real property (a fixture, according to the stipulation) and, therefore, subject to the provisions relating to contractors who make improvements to real property and pay sales tax only on their costs of materials. This ignores the fact that it is *not* considered real property under Minn. Stat. 272.03(c)(i).

I prefer and concur in the analysis and opinion of Judge Jensen that machinery and equipment exempt from real estate taxes under Minn. Stat. 272.03(c)(i) remain personal property subject to the sales tax when purchased by the ultimate consumer—in this case West Publishing.

SUPREME COURT

Decisions Filed Friday, December 4, 1981

Compiled by John McCarthy, Clerk

51773/Sp. In the Matter of the Involuntary Dissolution of Villa Maria, Inc., James Sheehan, *et al.*, petitioners, v. John J. Mondati, Appellant. Hennepin County.

The trial court did not err in ordering the dissolution of a corporation where the facts showed a consistent abuse of authority by the 50% shareholder who was also president of the corporation.

Where grounds existed under the statute to justify involuntry dissolution of a corporation it was not error for the trial court to grant buy-out provisions on terms other than those in the pre-incorporation agreement.

Affirmed. Otis, J.

50634/391, 50693 State of Minnesota, by Warren Spannaus, its Attorney General, petitioner, Appellant (50634), v. Delmar Dangers and Alyce Marie Dangers, his wife, Appellants (50693). Nicollet County.

In assessing the value of an historic site taken by the state in eminent domain proceedings it was prejudicial error to permit expert witnesses to use as comparable sales the purchase price paid by the state for adjacent property some eighty years previously.

Reversed and remanded. Otis, J. Concurring in part, dissenting in part, Yetka, J.

81-281/Sp. State of Minnesota v. Mark A. Jenson, Appellant. Cass County.

Defendant, in entering guilty plea, not only explicitly waived his right to later raise issue of sufficiency of admissible evidence to indict but his guilty plea, by itself, removed the issue of factual guilt from the case and barred the claim.

Trial court, pursuant to *State v. Goulette*, 258 N.W.2d 758 (Minn. 1977), properly accepted defendant's guilty plea, even though defendant denied his guilt, because the record supports the trial court's conclusion that there was a strong factual basis for the plea and that the plea was intelligently (that is knowingly and understandingly) and voluntarily entered.

Affirmed. Todd, J.

51931/Sp., 51976 Ronald K. Lockwood, Sr., Relator (51976), v. Independent School District No. 877, *et al.*, Relators (51931), Blue Cross and Blue Shield of Minnesota, intervenor, Horace Mann Life Insurance Co., intervenor. Workers' Compensation Court of Appeals.

In the absence of a clearly expressed legislative intent that a mental disability caused by work-related mental stress without physical trauma is within the purview of the Workers' Compensation Act, such disability is not compensable as a personal injury arising out of and in the course of employment.

Reversed. Scott, J. Dissenting, Yetka, J.

81-102 Gerald Marker, Appellant, v. Robert Greenberg. Hennepin County.

The general rule in a legal malpractice action is that an attorney is liable for professional negligence only to a person with whom the attorney has an attorney-client relationship and not, in the absence of special circumstances, to anyone else.

Affirmed. Scott, J.

50475/Sp. In the Matter of the Application for the Disbarment of Warren Henry Johnson, an Attorney at Law of the State of Minnesota. Supreme Court.

Indefinite suspension. Per Curiam.

Decision Filed Tuesday, December 1, 1981

81-1020/Sp. State of Minnesota, Appellant, v. Herman John Barutt. Swift County.

It is not a defense to a charge of violating Minn. Stat. § 169.129 (1980)—driving under the influence before one's license has been reinstated following its revocation for driving while under the influence—that the revocation for driving while under the influence was based on driving while under the influence in another state.

Reversed and remanded. Sheran, C. J.

STATE CONTRACTS

Pursuant to the provisions of Minn. Stat. § 16.098, subd. 3, an agency must make reasonable effort to publicize the availability of any consultant services contract or professional and technical services contract which has an estimated cost of over $2,000.

Department of Administration procedures require that notice of any consultant services contract or professional and technical services contract which has an estimated cost of over $10,000 be printed in the *State Register*. These procedures also require that the following information be included in the notice: name of contact person, agency name and address, description of project and tasks, cost estimate, and final submission date of completed contract proposal.

Department of Commerce Insurance Division

Notice of Request for Proposal for Computer-Related Services

Notice is given that the Department of Commerce, Insurance Division is soliciting proposals from qualified firms or consultants to implement the computerization of the record keeping and information system of the Department of Labor and Industry. The primary purpose of the system will be to monitor and process workers' compensation claims. The firm/consultant is expected to perform the following tasks:

1. Devise and propose an integrated system of hardware, software and application software to satisfy the requirements of the information system procedures as set forth in the system specification.

2. Define the costs of implementation and ongoing operation of the proposed system.

3. Submit a detail plan and schedule for the implementation of the proposed system.

4. Specify those tasks related to the implementation of the system which will be the responsibility of the vendor and those tasks which the vendor regards as the responsibility of the procuring agency.

5. Specify the expected performance of the system in terms of the processes defined in the specification and the additional load which could be absorbed by the system proposed with no degradation in performance.

The estimated cost is $300,000, which includes the price for the leasing or purchasing of the necessary hardware for the system. The due date for proposals is 3:00 p.m., January 4, 1982. Expected date of completion of evaluation of proposals is January 15, 1982. Expected completion date of the project is June 30, 1982. This RFP does not obligate the Department of Commerce, Insurance Division to complete the project. The Department of Commerce reserves the right to cancel the solicitation of this request.

System specifications are to be obtained by calling or writing:

Gothriel "Fred" La Fleur
Department of Commerce, Insurance Division
500 Metro Square Building
7th and Robert Streets
St. Paul, Minnesota 55101
(612) 297-3977

Department of Transportation Technical Services Division Research and Development Office

Notice of Availability of a Contract for Implementation of Research Findings

The Department of Transportation acting as the agent for the Local Road Research Board requires the services of a consultant for implementation of research findings applicable to county highway and municipal streets in Minnesota. This contract involves the review of selected research, recommendation of implementation procedures and performance of effective implementation activities. Concurrent activity on several implementation projects may be anticipated.

A seasoned professional, with engineering and educational experience who is familiar with design, construction and maintenance practices and problems on Minnesota streets and highways, as well as national research trends, is desired.

The Local Road Research Board has budgeted a maximum of $30,000 per year for this two year contract. Interested bidders should note that the board may extend this project for an additional two years if they should decide to continue the project beyond the initial two year period.

Those interested may obtain a request for proposal form:

Gabriel S. Bodoczy
Research Services Engineer
Minnesota Department of Transportation
Research and Development Office
Room B-9, Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-4925

Request for Proposals will be available through January 15, 1982. All proposals will be due no later than January 26, 1982.

OFFICIAL NOTICES

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 6, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

Minnesota Energy Agency
Data and Analysis Division

Recertification of the Sherburne County Generating Unit No. 3 as Proposed by Northern States Power Company, Southern Minnesota Municipal Power Agency, and United Minnesota Municipal Power Agency, Joint Applicants

Supplemental Order Revising Hearing Schedule

On November 20, 1981, Minnesota Public Interest Research Group (MPIRG), a party in the above-entitled matter, filed its Motion for Change of Hearing Location. MPIRG asserted cost savings to the state and the parties as reasons for eliminating out-state evidentiary hearings. After polling the parties, the hearing examiner partially granted the motion on December 4, 1981.

Now, therefore, it is ordered and notice is given that the dates, times and places for the hearings in the above-entitled matter shall be held as indicated in the

Revised Schedule

Date (1982)	Time	Place
Feb. 8	1:00 and 7:00 p.m.	City Council Chambers, City Hall, Becker
Feb. 9-11	9:00 a.m. & 1:00 p.m.	City Council Chambers, City Hall, Becker
Feb. 16	1:00 and 7:00 p.m.	Public Library, Mora
Feb. 17 & Feb. 18-19	1:00 p.m. 9:00 a.m. & 1:00 p.m.	Room 584, Federal Building 316 North Robert Street Saint Paul
Feb. 22	1:00 and 7:00 p.m.	City Council Chambers, Municipal Building, Austin
Feb. 25	1:00 and 7:00 p.m.	City Council Chambers, City Hall, Rochester
March 1	1:00 and 7:00 p.m.	City Council Chambers, City Hall, Owatonna
March 8	1:00 and 7:00 p.m.	Highland Senior High School, 1015 S. Snelling, St. Paul

Additional hearing sessions which are needed will be scheduled by the hearing examiner. The hearing examiner may cancel any session except those dedicated to receiving public input and scheduled for February 8—Becker, February 16—Mora, February 22—Austin, February 25—Rochester, March 1—Owatonna, and March 8—Saint Paul. Information on additional hearings scheduled may be obtained from the energy information center at 296-5175 or (800) 652-9747 (toll free).

Michael J. Murphy, Director

Department of Energy, Planning and Development
Office of the Commissioner

Extension of Notice of Intent to Solicit Outside Opinion Regarding Rules for Administration of Small Cities Community Development Block Grant

Notice is hereby given that the Minnesota Department of Energy, Planning and Development has extended the time period

during which information or opinions from sources outside the agency will be accepted regarding rules for the administration of the Small Cities Community Development Block Grant under Omnibus Reconciliation Bill P.L. 97.35.

The Department of Energy, Planning and Development originally published a notice of intent to solicit such outside opinion on September 17, 1981 in the *State Register*, Volume 6, Number 11, Page 465.

The promulgation of these rules is authorized by Minnesota Statutes § 4.13, which permits the commissioner to apply for, receive, and expend money made available from federal sources for the purpose of carrying out the duties and responsibilities of the commissioner relating to local and urban affairs, and by Minnesota Statutes 4.17, which requires the commissioner to promulgate rules describing the criteria, standards, and procedures to govern the expenditure of such money.

The Department of Energy, Planning and Development requests information and comments concerning the subject matter on these rules. Interested or affected persons may submit statements of information in writing. Written statements should be addressed to:

Wes Cochrane
Assistant Commissioner
Office of Business and Community Development
Department of Energy, Planning and Development
480 Cedar Street
St. Paul, Minnesota 55101

All statements of information and comment received between September 14th and November 1, 1981, as well as information and comment received from November 1, 1981 until January 20, 1982 by the Department of Energy, Planning and Development shall become part of the record in the event that the Rules are promulgated.

December 4, 1981

W. Wesley Cochrane
Assistant Commissioner

State Board of Investment

Notice of Regular Meeting

The State Board of Investment will meet Tuesday, December 15, 1981, at 9:45 a.m. in the State Capitol, Room 130, Saint Paul.

Investment Advisory Council

Notice of Regular Meeting

The Investment Advisory Council will meet Tuesday, December 15, 1981, at the MEA Conference Room 41 Sherburne Avenue, St. Paul, at 7:30 a.m.

Department of Public Welfare Bureau of Support Services

Notice of Intent to Solicit Input Concerning Issues Related to the Reimbursement of Intermediate Care Facilities for the Mentally Retarded

Notice is hereby given that the Minnesota Department of Public Welfare is considering the appointment of a Task Force to examine several issues in connection with DPW Rule 52 (12 MCAR § 2.052).

This rule governs reimbursement to intermediate care facilities for the mentally retarded (ICF/MR) by the Medical Assistance program. The charge to the Task Force is to examine the different issues surrounding DPW Rule 52 and to submit recommendations to the commissioner on how to modify the rule so that cost containment, administrative simplification, equitable distribution of resources and program objectives are attained.

All interested or affected persons or groups are requested to participate by providing information or comments on the Task Force charge or any of the issues surrounding this rule.

Statements of informtion and comment may be made orally or in writing. Written statements of information and comment may be addressed to:

Maria Gomez
Long-Term Care Rates Division
Department of Public Welfare
4th Floor, Centennial Building
St. Paul, MN 55155

Oral statements of information and comment will be received during regular business hours over the telephone at (612) 296-5724.

All statements of information and comment must be received by January 4, 1982.

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State Register and Public Documents Division
117 University Avenue
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Weekly Wrap-Up—House committees, committee assignments of individual representatives, news on committee meetings and action, House action and bill introductions. Contact House Information Office, Room 8 State Capitol, St. Paul, MN, (612) 296-2146.

This Week—weekly interim bulletin of the House. Contact House Information Office.