

The definitions of "mining" and the lists of allowable and non-allowable treatment processes in Section 613(c) of the present Code were created by an amendment to the Code in the summer of 1960 (the so-called "Gore amendment"). Prior to that time the statute had provided that "mining" included the "ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable or industrial product"; ordinary treatment processes were defined to include a lengthy list of allowable treatment processes for various minerals. But the list of allowable treatment processes for particular minerals was subsidiary to the "commercially marketable" product test.

Under the law as it existed prior to 1960, it is reasonably clear that the retorting of oil shale would have been a treatment process considered as mining, and depletion would have been calculated on the oil. It is clear, in other words, that mined, crushed oil shale rock is not a "commercially marketable or industrial product," and that the first obtainable "commercially marketable" product is shale crude oil, after retorting. Any contrary position which might then have been taken by the Internal Revenue Service would have failed, against a demonstration that the crushed oil shale rock is not "suitable for industrial use or consumption"¹ and that consequently oil shale rock would not have been a "commercially marketable" product.

Shale rock is not such a product because the amount of oil-bearing kerogen which is found in any given weight or volume of rock is too minute to permit economical transportation of rock. (Rock coming from mine is approximately 90% waste matter, even in high grade oil shale.) It is therefore not possible to obtain the oil-bearing kerogen from the rock economically except by on-site retorting, which requires integrated mining and retorting operations.

As amended in 1960, subsection 613 (c) provides that the treatment processes considered as mining shall be those "described in paragraph (4) and the treatment processes necessary or incidental thereto." Paragraph (4) of subsection 613 (c) contains a specific list of the allowable treatment processes in substantially the form of prior law, and paragraph (5) contains a less detailed list of treatment processes which shall not be allowable "unless they are otherwise provided for in paragraph (4)" or are necessary or incidental to processes so provided for.

Because the Gore amendment, which enacted the pertinent provisions of Section 613 (c), was a floor amendment added to the Tax-Rate Extension Bill, it was hastily enacted with that Bill, which was designed to avoid an impending lapse of certain tax rates. Senator Gore had introduced his amendment prior to the Supreme Court's decision in the *Cannelton* case, and had explained the purpose of his amendment in terms of the brick and tile depletion problem (the very dispute which was before the Supreme Court). He said specifically that the amendment was intended to prevent the computation of depletion allowances on finished industrial products. There was no report on the amendment by the Senate Finance Committee, and no hearings were held by the Senate Finance Committee on the text. Congressman Mills noted, in his discussion of the Conference Report on the floor of the House (Cong. Rec. p. 14546), that the Gore amendment contained some complicated new language which might produce unintended results, and that the language used in the Conference bill followed the language of the prior law in order to avoid such effects.

Since hearings had not been held on the amended text by the House or Senate Committee there is not an extensive legislative history on this provision. There is little question, however, that oil shale falls within the provisions of subparagraph (D).² In commenting on subparagraph (D) in his explanation of the Conference Report (Cong. Rec. p. 14514), Senator Byrd stated that,

"In the case of subparagraph (D) which deals with certain named minerals, as well as those not customarily sold in the form of crude mineral products, the named processes are substantially the same as under the Gore amendment and under present law."

¹ The "commercially marketable" language produced considerable litigation, particularly in the brick and tile, refractory and cement industries. In *U.S. v. Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960) the Supreme Court decided that the cutoff point should be "where the mineral first became suitable for industrial use or consumption." See *Riddell v. Monolith Portland Cement Co.* 371 U.S. 537 (1963).

² Since it is an ore or a mineral which is "not customarily sold in the form of the crude mineral product."