REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ATLAS CONSOLIDATED MINING
& DEVELOPMENT CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 4028

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.
x - - - - - - - - - - - - - x

D E C I S I O N

This is a petition to review the decision of respondent dated December 11, 1985 denying petitioner's protest against the deficiency income tax assessment in the aggregate amount of P49,603,025.15 including interest, for the tax years 1975 and 1976.

The pleadings of the parties and records of this case show that petitioner is a domestic corporation engaged in the business of mining and selling copper concentrates derived therefrom in the local and foreign markets. Petitioner is a BOI-registered enterprise under Republic Act 5186, otherwise known as the Investment Incentive Act.

For the years 1975 and 1976, petitioner filed on time its income tax returns as well as the quarterly income tax returns (Exhs. B, B-1 to B-6-a; C, C-1 to C-8; pp. 4-33, Folder II, BIR records). Upon verification of its income tax returns for those years, respondent's examiners reported the following discrepancies, among others, to wit:

<u>1975 Tax Year</u>

1. Additional Paid-in-Capital	-	P12,961,999.00
2. Double Deduction of Shipping Cost	-	14,416,678.00
3. Taxes, Licenses and Fees	-	12,135.00

<u>1976 Tax Year</u>

(1) <u>Cost Centers</u>		
1. Crushing Plant Cost	-	P 169,007.20
Mining Costs	-	1,054,825.10
Drilling Costs	-	<u>1,470,679.11</u>
Total Charges	-	<u>P 2,694,511.41</u>
(2) Taxes, Licenses and Fees	-	P 6,506.00
(3) Accelerated Depreciation	-	P61,282,871.00
(4) Unrecorded/Underrecorded Sale of Power	-	P 952,141.93
(5) Unrecorded other income (Commissions)	-	P 407,730.00
(6) Loss on Disposal of Assets	-	P 439,752.13

Also allegedly disclosed in the investigation are:

a) the failure to withhold the 15% tax-at-source on interest on loans from Mitsubishi Metal Corporation, a non-resident foreign corporation and

b) 15% deficiency interest on quarterly basis on the income tax due for the first 3 quarters of 1975.

(Exh. E, pp. 118-128, Folder II, BIR records).

On the basis thereof, a deficiency assessment letter with assessment notices for 1975 and 1976 dated December 19, 1980 was issued against petitioner as follows:

Year	Kind of Tax	Amount
1975	Deficiency Income Tax	P13,613,233.28
1976	Deficiency Income Tax	32,694,406.60
1975 & 1976	Deficiency Withholding Tax	2,169,252.68
1st, 2nd & 3rd quarter of 1975	Deficiency Corporate Quaterly Income Tax	1,126,132.59
	TOTAL DEFICIENCY	P49,603,025.15

(Exh. D, pp. 168-180, Folder II, BIR records)

On February 11, 1981, petitioner protested the assessment (Exh. H, pp. 203-214), Folder II, BIR records) but the same was denied by respondent in a letter dated December 11, 1985 (Exh. I-1, pp. 227-230, Folder II, BIR records).

Hence, this appeal.

The question raised is whether or not the deficiency tax liability in the amount of P49,603,025.15 assessed by respondent against petitioner is proper.

Set forth are the items in controversy and accordingly discussed.

Re: 1975 Deficiency Income Tax

(a) Additional Paid-in Capital - P12,961,999.00

Admittedly, petitioner was formed as a result of the merger of three original mining corporations, namely, IXL, Antamok and Masbate Gold Mines whose shareholders were required to exchange their old shares for equivalent shares in the nex corporation. It appears, however, that not all the stockholder surrendered their certificates. These unsurrendered or unconverted shares were then put up for sale by petitioner and as of 1975, the proceeds thereof as well as the cash dividends earned amounted to P12,961,999.00 which petitioner treated as non-taxable additional paid-in capital on the ground that said amount is nothing more than the participation or equity of numerous unknown stockholders, up to the year in question.

Respondent, on the other hand, determined that the amount is part of petitioner's gross income taxable under the law.

We agree with respondent.

While petitioner argued that said amount is merely the participation or equity of unknown stockholders, yet, it cannot be denied that cash flow from the disposition of those unconverted shares which benefited petitioner. It must be noted that the gross income which is required to be reported is income in the broad sense less income which is by statutory definition or otherwise exempt from tax imposed by law (See Sec. 36, Rev. Regs. No. 2). Moreover, "gross income" as defined in Section 29(a) of the National Internal Revenue Code includes gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interests, rents, dividends, securities, or transactions or any business carried on for gain or profits, and income derived from any source whatever.

The amount of P12,961,999.00 should therefore be taxable as part of petitioner's gross income.

(b) ***Double deductions of shipping costs - P14,416,678.00***

Petitioner claimed said costs as special deduction under Republic Act No. 5186 in relation to P.D. No. 667. Respondent, however, disallowed the amount allegedly for lack of sufficient justification.

On the basis of the unrefuted testimony of petitioner's witness during the hearing of September 17, 1986 (t.s.n., pp. 17-21) and the evidence presented (Exhs. O to O-4 & Q) which indicate that petitioner transported its products on board vessels of Philippine registry, we are convinced that it has adequately justified the deduction. As can be gleaned from the records, petitioner is a registered enterprise, and as such, it is allowed double deduction for shipping cost incurred in connection with exportation of its products, when shipments are made on board vessels of Philippine registry under Section 9(a), Republic Act No. 5186; Section 3, P.D. No. 667. The amount of P14,416,678.00 should therefore be allowed as special deduction.

(c) Taxes, Licenses and Fees - P12,135.00

Petitioner claimed this amount as deductible business expense under mineral claims but was disallowed by respondent treating the same as pre-operating expense which should be capitalized.

To our mind, the fact that said amount was charged under mineral claims is of no consequence, because as a general rule, all taxes are deductible except those with respect to which the law does not permit dedu:tion. Moreover, it has been established by evidence that during the year in question, petitioner was no longer at its exploratory or development stage but already existing (See t.s.n., p. 36, Sept. 17, 1986; Exhs. J to J-1 & H-2). The amount of P12,135.00 should be allowed as deductible expense.

Re: 1976 Deficiency Income Tax

(a) Various costs centers - P2,694,511.41

It appears that petitioner charged this amount to costs centers which consist of:

Crushing plant costs	-	P 169,007.20
Mining costs	-	1,054,825.10
Drilling costs	-	1,470,679.11
TOTAL	-	P2,694,511.41

Respondent disallowed the total amount claimed on the ground that petitioner's entries resulted in a double take-up of the item, i.e., first, a charge to particular cost centers, and second, a charge to freight and handling account.

In assailing said disallowance, petitioner presented a series of entries made in the following journal vouchers to show that there was no double deduction -

JV 12-294 (Exh. P)

Various cost centers -	P2,694,511.41	
Materials and supplies -		P2,694,511.41

To charge end-users for customs duties declined by the BOI.

JV 12-295

Cost of sale, copper -	P2,694,511.41	
Copper concentrates - cost		P2,694,511.41

To take up adjustment on cost of sales, copper Dec. '76

JV 12-313 (Exh. P-1)

Materials & Supplies Inventory	- P2,694,511.41	
Cost of sales - copper		P2,694,511.41

JV 12-314

Copper concentrate - cost	- P2,694,511.41	
Cost of sales-copper		P2,694,511.41

JV 12-934

Freight and handling	- P2,694,511.41	
Materials & Supplies Inventory		P2,694,511.41

To transfer to current account allocation of customs duties from inventory account when it should have been to freight and handling account.

and argued that respondent erred in failing to consider JV 12-313 as part of the investigation.

We disagree.

While petitioner has presented the foregoing series of entries made in the journal vouchers, a careful examination thereof, particularly Exh. P-1, however, disclosed some material alterations, apparently made in different handwriting, thus:

a) On the upper left-hand corner of Exh. P-1, the original entry - Freight & Handling" was cancelled and substituted with "Material & Supply Inventory" and

> b) the original notation - "To relocate account charges of JV 12-294 per instruction of Mr. P.T. Tacondong thru Mr. Cajoles" was cancelled and substituted with "To reverse JV 12-294."

Since no explanation was offered by petitioner on the material alterations, we find the evidence ineffective as a reversing entry. Hence, it should be disregarded and the disallowance of the amount of P2,694,511.41 sustained.

(b) Taxes, License and Fees - P6,506.00

Considering that this disallowance was premised on the same ground as that for similar item for 1975 which the Court is allowing, we likewise rule that the amount of P6,506.00 should be allowed as a deductible expense for 1976.

(c) Accelerated depreciation - P61,282,871.00

Respondent disallowed this item contending that petitioner failed to notify the Bureau of Internal Revenue and furnish it with the list of depreciable assets to be depreciated. This contention was, however, belied by petitioner's evidence which showed that in a letter date January 6, 1975, receipt of which was acknowledged by the Investment Incentive Group, Bureau of Internal

Revenue, petitioner informed the said office that beginning the calendar year 1975, it will avail of the accelerated depreciation incentive benefit under Section 7(b) of Republic Act No. 5186 by depreciating its fixed assets twice as much as the normal rate of depreciation (Exh. Q). In short, petitioner exercised its option for allowance of accelerated depreciation under Section 7(b) of Republic Act No. 5186 and complied with the requirement thereof.

The amount of P61,282,871.00 should therefore be allowed.

(d) Income from sale of Power - P952,141.93

In its 1976 income tax return, petitioner reported the amount of P43,458.00 from the sale of power (Exh. R-3, p. 5, Folder II, BIR records). In explaining how this was arrived at, petitioner presented the entries in the trial balance print out allegedly taken from its Cebu office to show that from the sale of power in the sum of P4,952,218.58, the cost of power in the amount of P4,548,760.93 is deducted and the difference, which is P43,457.65, is the amount it reflected in the return.

Respondent on the other hand, insists that from the transaction the total amount of P995,599.58 was realized, hence, the unreported income. He maintains that as ascertained by the examiners, the cost of power was P3,696,619.00, and since petitioner claims the sum of P4,548,760.93 a much bigger amount without presenting said costs report as evidence to show that the examiners were wrong, the presumption of correctness of the assessment applies.

We agree with respondent.

The rule is well settled that the Commissioner's assessment is presumptively correct and the burden of proof is on the part of the taxpayer to show the contrary. Thus, it has been repeatedly stated that the burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner is wrong but he (taxpayer) is right ***(Lino Gutierrez vs. Collector of Internal Revenue,*** *C.T.A. Case No. 504, January 28, 1962;* ***Tan Guan vs. Court of Tax Appeals,*** *L-23676, April 27, 1967, 19 SCRA 903).* In other words, the taxpayer is required to do more than come forward with the best evidence obtainable to overcome the presumption. Conformably to the doctrine therefore, the unreported income from the sale of power in the case at bar, in the amount of P952,141.93 as found by respondent should be upheld.

(e) <u>Other income</u> (unreported) - P407,730.00

As a result of the waiver by Hongkong Shanghai Banking Corporation of the commission in the sum of P407,730.00 due it from petitioner for the period 1971-1973 and on the theory that said commission was previously booked as expense respondent asserts that it should be credited back to income and returned for tax purposes in 1976.

However, a careful study of the evidence on record failed to show that such commission expense was deducted in 1976 as pointed out by petitioner (See t.s.n., pp. 43-44; Exhs. B & C). Since the imputation of this income would form part of the assessment which will determine the tax liability of the taxpayer, it must be based on actual facts and not on mere assertion, though logical it maybe.

shd'nt the presumption be that these expenses were deducted in prior years depending on acctg system?

The amount of P407,730.00 should not therefore be considered as unreported income.

(f) Loss on disposal - P439,752.13

Respono nt disallowed this deduction mainly for the reason that it arose from the demolition of the main office, bodega or building to give way for the erection of another structure, so that the expense should be capitalized.

As explained by petitioner's witness during the hearing of this case on September 17, 1986:

Q. The last item in 1976 is loss on disposal. Please explain to the Court what is this amount?

A. Yes.

This deduction in disposal of fixed assets was disallowed by the Examiner.

According to them when these old buildings were to be demolished to give way to new construction, that cost should be taken up as part of the new asset.

In this case, these old buildings and bodegas were demolished after the construction of new buildings which were not intended to give way to new structures.

Q. You did not construct a new office building and bodgega?

A. That is right, sir.

Q. What is the reason for the demolition of the old building and bodega?

A. Yes.

The old office building and bodega were demolished because of deafening noise from Dasscon Ball Mills situated nearby. They decided to vacate this and transfer to some other place.

Q. What is the activity conducted in this Dasscon?

A. They are crushing ores.

Q. Crushing ores?

A. Yes, sir.

Q. What machineries are they using?

A. Crushing balls ...

Q. What other items constitute this loss on disposal?

A. We also have aggregate plant of original value of P1,022,498.25. The iron recovered from this, we cut and valued at fair market value which were credited to the department which made use of this scrap iron.

Q. So this old plant was not replaced with a new plant?

A. No, sir.

Q. How about equipment, pick-up. This item 955. What is that?

A. Net book value of pick-up due to wear and tear.

Q. So this was no longer used?

A. Yes, sir.

Q. How did you treat it?

A. The net value was written off.

Q. Deducted?

A. Yes, sir.

Q. How about this machine shop and foundry equipment?

A. These were equipment no longer on operation or existent.

This was reported by the department which used these machineries.

(t.s.n., pp. 44-47, hearing of September 17, 1986).

Considering that the testimony was not contradicted by respondent, the amount of P439,752.13 should be allowed as losses.

Re: ***<u>15% Withholding Tax At Source, 1975 and 1976- P2,169,252.68</u>***

The question involved regarding this particular item, is whether or not interest income derived from laon extended to petitioner by Mitsubishi Metal Corporation is exempt from withholding tax pursuant to Section 29(b)(7)(a) of the National Internal Revenue Code.

As said question is the same as that resolved in ***Mitsubishi Metal Corporation and Atlas***

Consolidated Mining & Development Corporation vs. Commissioner of Internal Revenue, CTA Case No. 2801, April 18, 1980, where this Court held that interest payments made by Atlas Mining & Development Corporation on the loans obtained from Mitsubishi Metal Corporation are exempt from withholding tax at source since the actual and ultimate creditor is the Export-Import Bank of Japan, on the same vein, we rule that the interest income in the amount of P2,169,252.68 in the case at bar, should likewise be exempt from the withholding tax at source.

Re: ***<u>1975 Deficiency Corporate Quarterly Income Tax</u> - P1,126,132.59***

This deficiency for the first, second and third quarters of 1975 was assessed by respondent due to the change in the expansion reinvestment allowance granted to petitioner under Republic Act No. 5186 from a pioneer status which is allowed 75% deduction to a non-pioneer status which is allowed 37½% deduction. Since petitioner, according to respondent, availed of the full 75% rate instead of 37½%, it overshot the allowable deduction, hence, the deficiency.

We agree.

From its quarterly and final income tax returns for 1975 and the evidence presented, it appears that petitioner deducted the amount of ₱146,887,470.00 as expansion reinvestment allowance which is equivalent to 75% of its investment of ₱195,849,960.00 in the copper smelter project, otherwise known as PASAR, a pioneer project. Somehow, said project was discontinued, and petitioner shifted its investment to the Carmen project, a non-pioneer one. Thus, upon investigation, respondent's examiners disallowed the deduction of the full 75%.

While petitioner asserts that the recommendation was not approved by respondent and the Fiscal Incentive Review Board (FIRB), the records however, showed otherwise. It appears that the Board of Investment (BOI) reduced petitioner's reinvestment allowance for 1975 to ₱73,443,735.00, equivalent to 37½% of its investment which was shifted to the Carmen project (pp. 89 & 90, Folder II, BIR records). The reduction was also passed upon by the Fiscal Incentive Review Board (Exh. 2, p. 148, Folder II, BIR records).

In view thereof, we are of the persuasion that the recomputation of petitioner's quarterly income tax for the first, second and third quarters of 1975 is in order and the deficiency assessment of P1,126,132.59, proper.

Accordingly, petitioner's deficiency income tax for 1975 and 1976, as well as the deficiency corporate quarterly income tax for the first, second and third quarters of 1975 are computed as follows:

1975

Net income per return		P 7,720,023.00
Add: Additional income:		
Additional paid in capital		12,961,999.00
Net income per decision		P 20,682,022.00
Income tax due thereon		P 7,238,708.00
Less: Amount paid		2,692,008.00
Balance of tax due		P 4,546,700.00
Add: 14% int. fr. 4-15-76 to 4-15-79		1,909,614.00
TOTAL AMOUNT DUE & COLLECTIBLE		P 6,456,314.00

1976

Net income per return		P 99,321,516.00
Add: Disallowances/Additional Income		
Various costs	P2,694,511.41	
Income from sale of power	P 952,141.93	P 3,646,653.34
Net income per decision		P102,968,169.34
Income tax due thereon		P 36,038,859.27
Less: Amount paid		34,752,530.00
Balance of tax due		P 1,286,329.00

Add: 14% int. fr. 4-015-77 to 4-15-80	540,258.18
TOTAL AMOUNT DUE & COLLECTIBLE	P 1,826,587.18

1st Quarter - 1975

Taxable income per decision		P 30,219,430.00
Corporate quarterly income tax due thereon		10,574,300.00
Less: Amount paid	P3,849,612.00	
20% allowance for errors	2,114,860.00	5,964,472.00
B a l a n c e		P 4,609,828.00
Add: 15% int. fr. 5-30-75 to 4-15-76		606,223.95
T o t a l		P 5,216,051.95
Less: Amount already assessed		4,609,828.00
AMOUNT STILL DUE & COLLECTIBLE		P 606,223.95

2nd Quarter

Taxable income per decision		P 11,521,227.00
Corporate quarterly income tax due thereon		P 4,029,929.00
Less: Amount paid	P - 0 -	
20% allowance for errors	805,986.00	805,986.00
B a l a n c e		P 3,223,943.00
Add: 15% int. fr. 8-30-75 to 4-15-76		300,754.13
T o t a l		P 3,524,697.13
Less: Amount already assessed		3,223,943.00
AMOUNT STILL DUE & COLLECTIBLE		P 300,754.13

3rd Quarter

Taxable income per decision		P 14,011,239.00
Corporate quarterly income tax due thereon		4,901,434.00
Less: Amount paid	P - 0 -	
20% allowance for errors	980,287.00	980,287.00
B a l a n c e		P 3,921,147.00

Add: 15% int. fr. 11-30-75 to 1-15-76	219,154.51
T o t a l	P 4,140,301.51
Less: Amount already assessed	3,921,147.00
AMOUNT STILL DUE & COLLECTIBLE	P 219,154.51

WHEREFORE, petitioner Atlas Consolidated Mining & Development Corporation, is hereby ordered to pay to respondent Commissioner of Internal Revenue the aggregate amount of P9,409,033.77 as deficiency income tax for the years 1975 and 1976 deficiency corporate quarterly income tax for the first, second and third quarters of 1975, plus surcharges and interest incident to delinquency pursuant to the provisions of Section 51(e)(2)(3) of the National Internal Revenue Code, as amended.

SO ORDERED.

Quezon City, Metro Manila, April 28, 1989.

ALEX Z. REYES
Associate Judge

WE CONCUR:

AMANTE FILLER
Presiding Judge

(on leave)
CONSTANTE C. ROAQUIN
Associate Judge

C E R T I F I C A T I O N

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

AMANTE FILLER
Presiding Judge
Court of Tax Appeals