REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

<u>SECOND DIVISION</u>

OCEANAGOLD (PHILIPPINES), INC., Petitioner,	**CTA CASE NOS. 9517 & 9559** Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson, and* **BACORRO-VILLENA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: SEP 01 2020 8:12 Am

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RESOLUTION

CASTAÑEDA, JR., J.:

Submitted before this Court is petitioner's **Motion for Reconsideration [of Decision dated February 3, 2020]**, filed on February 20, 2020, without respondent's comment as per Records Verification dated June 15, 2019.

On February 3, 2020, a Decision was promulgated by this Court for the present consolidated cases, denying petitioner's claims for refund of excise taxes for to its failure to adduce sufficient evidence to warrant the said refund, the dispositive portion of the Decision reads as follows:

> **WHEREFORE**, in light of the foregoing considerations, the Petitions for Review filed by OceanaGold (Philippines), Inc. in CTA Case Nos. 9517 and 9559, claiming for the refund or for the issuance of a tax credit certificate in the amounts of ₱80,140,751.85 and ₱44,899,335.57, representing alleged erroneously paid and illegally and wrongfully collected excise taxes for the

period from January to March 2015, and April to June 2015, respectively, are hereby **DENIED** for lack of merit.

SO ORDERED.

In its Motion, petitioner urges this Court to reconsider the above Decision based on the following grounds:

I. The Honorable Court erred in not holding that the reckoning date of the recovery period is on April 1, 2013, which is the date of petitioner's commencement of commercial production pursuant to the Financial or Technical Assistance Agreement (FTAA).

II. The Honorable Court erred in requiring prior approval by the DENR Secretary of petitioner's pre-operating expenses as a condition to the entitlement of the incentives under the FTAA and Republic Act (RA) No. 7942.

As to the first ground, petitioner claims that under the FTAA, it has a period of up to five years from the *Date of Commencement of Commercial Production* within which to recover its pre-operating expenses. Petitioner continues that it notified the Department of Environment and Natural Resources (DENR), through a letter dated March 27, 2013, that it has already milled 301,903 million tonnes (MT) of mineral ores on February 26, 2013, thereby, achieving the fifteen percent (15%) production capacity. Citing Section 2.14 of the FTAA, which defined the *Date of Commencement of Commercial Production* as the "first day of the calendar quarter following the quarter in which production equals 15% of the project's initial annual design capacity", petitioner claims the five years should be counted from April 1, 2013, which is the first day of the second calendar quarter. Petitioner also asserts that this Court need not look for the definition of the terms "commercial operation" and "commercial production" in various DENR Administrative Orders (DAOs) as the FTAA has already provided a specific and technical definition on the said matter.

Lastly, petitioner further claims that the submission of the Work Program is not a condition precedent to petitioner's recovery of its pre-operating expenses during the so-called Recovery Period.

With regard to the second ground, petitioner claims neither the FTAA nor RA No. 7942, otherwise known as the "Mining Act of 1995", requires the DENR Secretary's approval to enjoy the tax incentives provided by law. In fact, it was only in DENR Administrative Order (DAO) No. 99-56[1] which provides for such condition for the recovery of pre-operating expenses. However, DAO No. 99-56 is not applicable in the present case since the subject FTTA was entered into by the government prior to its issuance. Nonetheless, petitioner insists that the its tax exemption privilege under the FTAA is a contractual tax exemption granted by the government in exchange for a valid and material consideration and, therefore, is protected by the non-impairment clause of the 1987 Constitution.

After due consideration, this Court finds no merit in the present Motion. Notably, the arguments proffered by petitioner in support of its Motion are mere rehash of its previous arguments which have already been considered, thoroughly discussed, and passed upon in the Decision assailed.

Again, petitioner's failure to submit the pertinent supporting documents and Work Program, which could have served as a guide, precluded this Court in ascertaining the exact date as to when the recovery period should be reckoned from.

It bears to stress at this juncture that Sections 1[2] and 2[3], Chapter 1, Title XIV of Executive Order No. 292, s. 1987, or the "Administrative Code of 1987" expressly provides that the DENR is, subject to law and higher authority, in charge of carrying out the State's constitutional mandate to control and supervise the exploration, development, utilization and conservation of the

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[1] "SUBJECT: Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements", dated December 27, 1999.

[2] "SEC. 1. Declaration of Policy. — (1) The State shall ensure, for the benefit of the Filipino people, the full exploration and development as well as the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources, consistent with the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment and the objective of making the exploration, development and utilization of such natural resources equitably accessible to the different segments of the present as well as future generations.

x x x."

[3] "SEC. 2. Mandate. — (1) The Department of Environment and Natural Resources shall be primarily responsible for the implementation of the foregoing policy.

(2) It shall, subject to law and higher authority, be in charge of carrying out the State's constitutional mandate to control and supervise the exploration, development, utilization and conservation of the country's natural resources."

country's natural resources.[4] As such, it is empowered to promulgate rules and regulations in the form of DAOs to implement the intent of the Mining Act, and to fill in the gaps of the said statute for its proper and effective implementation. This is exactly what it did when it defined in DAO No. 96-40[5] the concept of *commercial production* as one that pertains to "the production of sufficient quantity of minerals of sustained economic viability of mining operations reckoned from the date of commercial operation as declared by the Contractor or as stated in the feasibility study, whichever comes first".[6]

Accordingly, for purposes of ascertaining petitioner's entitlement to the refund of its alleged erroneous payment of excise taxes, this Court cannot be faulted in referring to various DAOs issued by the DENR which are already in effect at the time petitioner submitted its Partial Declaration of Mining Feasibility (PDMF) on March 15, 2005. After all, Administrative issuances partake of the nature of a statute and have in their favor a presumption of legality. As such, courts cannot ignore administrative issuances especially when, as in this case, its validity was not put in issue. Unless an administrative order is declared invalid, courts have no option but to apply the same.[7]

Also, petitioner was very much aware that the approval of its PDMF on October 11, 2005, by the Mines and Geosciences Bureau, was subject to certain conditions, among which were: (a) full compliance with the contractual obligations stated under the FTAA, including the reporting requirement in accordance with the pertinent provisions of DAO No. 96-40, as amended; and (b) that the conduct of the mining operation in the contract area shall be undertaken in accordance with the existing applicable law, their implementing rules and regulations, and the pertinent provisions of the FTAA.

Moreover, Sections VII, IX and X of subject FTAA categorically requires the contractor to submit a Declaration of Mining Feasibility with a Work Program for the next succeeding three (3) years. After which, petitioner is expected to commence its commercial production in accordance with the periods specified in the approved Work Program, *viz:*

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[4] Section 2, Article XII, 1987 Philippine Constitution.
[5] "SUBJECT: Revised Implementing Rules and Regulations of Republic Act No. 7492, Otherwise known as the 'Philippine Mining Act of 1995'", dated December 19, 1996.
[6] Section 5(i), Chapter 1.
[7] *Landbank of the Philippines v. Leonila P. Celada,* G.R. NO. 164876, January 23, 2006.

"SECTION VII
FEASIBILITY STUDY AND RELINQUISHMENT

7.1 Mining Feasibility. During the Exploration Period, the CONTRACTOR shall conduct feasibility studies for any part of the Exploration Contract Area as may be warranted. At anytime prior to six (6) months from the expiration of the Exploration Period, **the CONTRACTOR, if it elects to transform the Exploration Contract Area into a Mining Area as provided in Section VIII of this Agreement, shall submit a Declaration of Mining Feasibility with a Work Program and Budget for development for the next succeeding three (3) years indicating therein the Mining Area.** Areas not delineated as part of the Mining Area shall be relinquished pursuant to the following section.

Failure of the CONTRACTOR to submit a Declaration of Mining Feasibility within the prescribed period shall be considered a waiver of the CONTRACTOR's right to transform the Exploration Contract Area into a Mining Area as provided in Section VIII of this Agreement.

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SECTION IX
DEVELOPMENT AND CONSTRUCTION PERIOD

9.1 Timetable. **The CONTRACTOR shall complete the development of the mine including the construction of production facilities within thirty-six (36) months from the date of the approval of the Declaration of Mining Feasibility**, subject to such extension based on justifiable reasons as the Secretary may approve.

9.2 Work Program and Budget. **The CONTRACTOR shall develop and construct the production facilities in the Mining Area in accordance with the Work Program included in the Declaration of Mining Feasibility** referred to in Section 7.1 of this Agreement, spending at least

US$50,000,000 less any amount of Exploration expenditures it has already spent.

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SECTION X
PRODUCTION PERIOD

10.1 Timetable. The CONTRACTOR shall submit to the Government, through the Secretary, copy furnished the Director of the Mines and Geosciences Bureau, within thirty (30) days from the completion of the construction facilities a Work Program for a period of three (3) years. **The CONTRACTOR shall commence Commercial Production according to the period(s) specified in the approved Work Program and the CONTRACTOR shall advise the Government within fifteen (15) days therefrom that Commercial Production has commenced. Failure of the CONTRACTOR to commence Commercial Production within the period**, except as may be excused by Force Majeure as stated in Section 20.4 hereof or other justifiable causes, **shall be considered a substantial breach of this Agreement**." *(Emphases supplied)*

Taking all the foregoing provisions of the DAOs and FTAA, petitioner had 3 years from the approval of its PDMF on October 11, 2005, or until October 11, 2008, to develop and construct mining production facilities. Thereafter, petitioner had to submit within 30 days from the completion of the said construction facilities its Work Program for the period of 3 years. After which, petitioner is expected to commence its commercial production in accordance with the periods specified in the approved Work Program and shall advise the government within 15 days therefrom that its commercial production has commenced. Failure to do the same shall be considered a substantial breach of the FTAA.

Apparently, there is no basis for petitioner to claim that the submission of the Work Program is not a condition precedent for the recovery of its pre-operating expenses during the so-called Recovery Period. *Je*

The same rationale holds true with the requirement of submitting a duly approved pre-operating expenses (approved by the DENR Secretary as recommended by the Director of the Mines and Geosciences Bureau) as mandated in Section 3 (f) of DAO No. 99-56, as the same was already in effect when petitioner submitted the above-stated PDMF.

Lastly, the transitory provision of the RA No. 7942, fortifies this Court's stance that DAO Nos. 96-40 and 99-56 are applicable to the instant case as the said law categorically states that financial or technical assistance agreements must comply with the applicable provisions of this Act and its implementing rules and regulations, to wit:

> "CHAPTER XX
> TRANSITORY AND MISCELLANEOUS PROVISIONS
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> Section 112. **Non-impairment of Existing Mining/Quarrying Rights. — All valid and existing mining lease contracts, permits/licenses, leases pending renewal, mineral production-sharing agreements granted under Executive Order No. 279**, at the date of effectivity of this Act, **shall remain valid, shall not be impaired, and shall be recognized by the Government**: Provided, That the provisions of Chapter XIV on government share in mineral production-sharing agreement and of Chapter XVI on incentives of this Act shall immediately govern and apply to a mining lessee or contractor unless the mining lessee or contractor indicates his intention to the secretary, in writing, not to avail of said provisions: Provided, further, That no renewal of mining lease contracts shall be made after the expiration of its term: **Provided, finally, That such leases, production-sharing agreements, financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations**." *(Emphases supplied)*

In view of the foregoing, this Court reiterates that due to petitioner's failure to prove that it submitted a Work Program for the period of 3 years and duly approved pre-operating expenses, this Court has no reason to reverse or modify the findings in the assailed Decision. *ge*

WHEREFORE, in view of the foregoing, petitioner's Motion for Reconsideration [of Decision dated February 3, 2020] is **DENIED** for lack of merit.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

I Concur:

JEAN MARIE A. BACORRO-VILLENA
Associate Justice