REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

FCF MINERALS CORPORATION,
Petitioner,

CTA EB No. 1620
(CTA CASE No. 8789)

-versus-

Present:
DEL ROSARIO, P.J.,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, *JJ.*

COMMISSIONER OF CUSTOMS,
Respondent.

Promulgated:
AUG 14 2018
2:10 p.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under *Section 4(b), Rule 8*[1] *of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA), as*

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[1] **SEC. 4.** *Where to appeal; mode of appeal. –*

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(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court *en banc* shall act on the appeal.

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amended, of the Decision dated June 21, 2016[2] and the Resolution dated February 20, 2017[3] rendered by the Third Division of this Court, the dispositive portions of which, respectively, read as follows:

Decision dated June 21, 2016:

> **WHEREFORE**, the instant Petition for Review is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**

Resolution dated February 20, 2017:

> **WHEREFORE**, finding no cogent reason to reverse the ruling in the assailed Decision, petitioner's Motion for Partial Reconsideration is **DENIED** for lack of merit.
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> **SO ORDERED.**

The facts of the case, as recited by the Third Division in its Decision, read as follows:

> "This resolves the Petition for Review filed on March 28, 2014 and the Supplemental Petition for Review filed on April 15, 2014 by FCF Minerals Corporation, praying for the reversal and setting aside of the Decision of the Commissioner of Customs dated April 1, 2014 and for the refund of the amount of P57,896,506.00, allegedly representing the amount paid as value added tax (VAT) and fees on its importations of capital equipment.
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[2] Penned by Associate Justice Ma. Belen M. Ringpis-Liban, concurred in by Associate Justice Lovell R. Bautista and Associate Justice Esperanza R. Fabon-Victorino, *En Banc* Docket, pp. 57-79.
[3] Penned by Associate Justice Ma. Belen M. Ringpis-Liban, concurred in by Associate Justice Lovell R. Bautista and Associate Justice Esperanza R. Fabon-Victorino, *En Banc* Docket, pp. 37-43.

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Petitioner FCF Minerals Corporation (FCF) is a corporation duly organized and existing under Philippine laws and is engaged in the exploration, development, and commercial operation of mineral claims.

On the other hand, respondent Commissioner of Customs (COC) is the head of the Bureau of Customs (BOC), which is a government instrumentality under the Department of Finance tasked with "the assessment and collection of the lawful revenues from imported articles and all other dues, taxes, fees and charges, fines and penalties accruing under the tariff and customs laws".

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Petitioner submitted five (5) Letters of Protests to the District Collector of Customs of the Port of Manila xxx The said protest letters seek the refund of the VAT and fees assessed and paid on importation of various equipment for petitioner's Runruno Gold Molybdenum Project under the Financial or Technical Assistance Agreement (FTAA) xxx

On February 15, 2013, the Commissioner of Internal Revenue (CIR) issued Revenue Memorandum Circular (RMC) No. 17-2013, stating that FTAA contractors are liable to pay the taxes due under the National Internal Revenue Code (NIRC) and existing rules and regulations during and after their "recovery period".

On the basis of the said RMC, the District Collector of Customs of the Port of Manila issued a Decision on January 3, 2014, denying petitioner's protests.

On January 20, 2014, petitioner filed a Notice of Appeal with the District Collector of Customs of the Port of Manila.

In the 1st Indorsement dated January 28, 2014, the District Collector of Customs of the Port of Manila

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endorsed the case folder in light of the Notice of Appeal filed by petitioner.

On February 4, 2014, petitioner filed its Position Paper.

Considering the lapse of thirty (30) days from February 27, 2014 without petitioner receiving the Decision of the Commissioner of Customs, petitioner filed its Petition for Review before this Court on March 28, 2014.

Thereafter, on April 1, 2014, respondent rendered a Decision affirming the January 3, 2014 Decision of the District Collector of Customs of the Port of Manila.

As a result, petitioner filed a Supplemental Petition for Review before this Court on April 15, 2014.

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The instant case arose from the Financial or Technical Assistance Agreement No. 04-2009-11 entered into by petitioner and the Government on September 19, 2009 for a gold-molybdenum project located in Barangay Runruno, Quezon, Nueva Vizcaya.

The FTAA is defined under the Philippine Mining Act of 1995 or Republic Act No. 7942 as a contract involving financial or technical assistance for large-scale exploration, development, and utilization of mineral resources.

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Petitioner claims that it is not liable to pay VAT and customs duties and fees on imported capital equipment, invoking Section 81 of the Philippine Mining Act of 1995 or Republic Act (RA) No. 7942, which allegedly provides that the "*Government share*" in the FTAAs of mining companies, which includes VAT and customs duties on importation of capital goods, shall be collected only after the FTAA Contractor has

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fully recovered its pre-operating expenses and exploration and development expenditures.

In this regard, petitioner likewise claims that RMC No. 17-2013, which categorically states that FTAA contractors are liable to pay the taxes under the NIRC during and after their "recovery period", runs contrary to the law it seeks to interpret, which is RA No. 7942.

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Respondent counter-argues that he did not err when he relied on RMC No. 17-2013 in denying petitioner's claim for refund of VAT and other fees paid on its importation of capital equipment." (citations omitted.)

The Third Division cited the DENR Administrative Order (DAO) No. 2007-12 that implements Section 81[4] of R.A. No. 7942, which states that:

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[4] **Section 81**
Government Share in Other Mineral Agreements

The share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the:

a. capital investment of the project;
b. risks involved;
c. contribution of the project to the economy; and
d. other factors that will provide for a fair and equitable sharing between the Government and the contractor.

The Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.

The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.

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"Section 4. Fiscal Regime of a Financial or Technical Assistance Agreement

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b. Basic Government Share

The Basic Government Share shall consist of all direct taxes, royalties, fees and related payments required by existing laws, rules and regulations to be paid by the Contractor. It shall be the minimum share that Government shall receive during any Calendar Year. The following national and local taxes, royalties and fees paid by the Contractor to the Government during a Calendar Year constitute the Basic Government Share:

(a)Contractor's income tax;
(b)Customs duties and fees on imported capital equipment;
(c)Value-added tax on imported goods and services;
(d)Withholding tax on interest payments on foreign loans;
(e)Withholding tax on dividends to foreign stockholders;
(f)Documentary stamps taxes;
(g)Capital gains tax;
(h)Excise tax on minerals;
(i)Royalties for Mineral Reservations and to Indigenous Peoples, if applicable;
(j)Local business tax;
(k)Real property tax;
(l)Community tax;
(m)Occupation fees;
(n)Registration and permit fees; and
(o)All other national and local Government taxes, royalties and fees as of the effective date of the FTAA.

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Starting from the effective date of the FTAA, the Contractor shall pay all applicable taxes,

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royalties, fees and other related payments subject to the following:

i. From the date of approval of the Declaration of Mining Project Feasibility up to the end of the Recovery Period as defined in this Order, the Contractor shall pay the above Items (h) to (o) which includes the Excise Tax on Minerals, Royalty on Mineral Reservations and to Indigenous Peoples, if applicable, and local taxes, fees and related imposts due to Local Government Units.

ii. After the Recovery Period, Contractor shall then pay all applicable taxes, fees, royalties and other related payments to the national and local Governments [Items (a) to (o) above].

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DAO No. 2007-12 explicitly states that VAT on imported goods and services as well as customs duties and fees on imported products must be paid only after the recovery period.

As to when is the recovery period, Section 7a of the same DAO was cited by the Third Division, which states that:

"Section 7. Recovery of Pre-Operating Expenses

a. Recovery Period. Considering the high risk, high cost and long term nature of an FTAA Mining Operation, the Contractor shall be given an opportunity to recover the expenses incurred during its pre-operating period. After this period, the Government shall receive its rightful share from the national patrimony. **Recovery Period, as used in this Order, shall be a maximum of five (5) years or at a date when the aggregate of the Net Cash Flows from the Mining Operations is equal to the aggregate of its Pre-Operating Expenses, reckoned from the Date of**

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Commencement of Commercial Production, whichever comes first.

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b. Recoverable Pre-Operating Expenses. **All Pre-Operating Expenses allowed for recovery under this Order shall be approved by the Secretary upon recommendation of the Director**. It shall be limited to actual expenses and capital expenditures relating to the following:

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All Pre-Operating Expenses reported for recovery shall be subject to verification by Government or its designated representative or auditor. All expenses to be incurred in the verification of Pre-Operating Expenses shall be chargeable against the Contractor." (Underlining in the original; emphasis in the assailed Decision.)

However, the Third Division ruled that FCF Minerals Corporation (FCF) failed to establish that the VAT and customs duties and fees on importation of capital equipment were imposed and paid during the recovery period or that it has not yet recovered its pre-operating expenses at the time of imposition and payment of VAT and customs duties, thus, the assailed Decision.

In its Motion for Reconsideration,[5] FCF alleges that there is no need to show proof that it is yet to recover its pre-operating expenses because such is premature; and it cannot yet present any reports of its aggregate pre-operating expenses as it is still in the process of continually incurring these expenses at the time when the importations were made.

FCF's Motion for Reconsideration was denied for lack of merit, thus, the instant Petition for Review.

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[5] *Division Dockets,* Vol. IV, pp. 1669-1680.

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In its Petition, FCF attached and declared therein its Declaration of Commencement of Commercial Operations (DCCO),[6] which was made to the Mines and Geosciences Bureau (MGB), Regional Office No. 2, on September 9, 2016, and subsequently to the MGB Central Office[7] and to the DENR,[8] both on September 16, 2016, after the Third Division had rendered the assailed Decision. An original copy of the September 9, 2016 DCCO to the MGB Regional Office No. 2 and the MGB Central Office and DENR Secretary with acknowledgment receipt[9] of the DENR's Undersecretary for Legal Services are attached to the said petition. Considering that it is only on September 9, 2016 that FCF filed its DCCO, it must be assumed that the importations subjected to tax by the Commissioner of Customs (COC) happened before the recovery period. In addition, Its Declaration of Commercial Production must still be approved by the MGB Regional Office as required under the FTAA and the Mining Act. Considering the foregoing, it was impossible for the FCF at the time of the assailed Decision to produce the said required documents before the Division.

In his Comment,[10] the COC claims that FCF failed to prove that the imposition of VAT and fees on the importation of capital equipment was made during the recovery period. He insists that FCF's pre-operating expenses failed to comply with the requirements of Section 7b of DAO No. 2007-12, which states that such expenses must be approved by the Secretary upon recommendation of the Director. Also, for pre-operating expenses to be reported as recovery to determine the recovery period, such must be subject to verification by government or its designated representative or auditor. Since the pre-operating expenses of FCF, such as the importations of capital equipment in this case, did not comply with the above-mentioned requirements, the date of recovery period could not be determined. Accordingly, FCF failed to prove that the collection of government shares for such importation was made during the recovery period.

While the rule that government shares are collected only after recovery period is already settled, the issue being

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[6] *En Banc Dockets,* Vol. II, p. 80.
[7] *Ibid.,* p. 82.
[8] *Ibid.,* p. 86.
[9] *Ibid.,* p. 90.
[10] *En Banc Dockets,* Vol. II, pp. 561-585.

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raised herein is whether the VAT and fees constituting government shares were collected before FCF's recovery period.

We rule in favor of FCF.

In the case of FCF, its Declaration of Mining Project Feasibility (DMPF) was approved on October 18, 2011. The shipments that were erroneously subjected to VAT were made in 2013. It was only on September 9, 2016 or five (5) years after the DMPF and three (3) years after the shipments, that the DCCO was filed by FCF. To emphasize, the taxability of the imported goods will only be after the recovery period of FCF, *i.e.,* five (5) years or at a date when the aggregate of the net cash flows from the mining operations is equal to the aggregate of its pre-operating expenses, reckoned from the date of commencement of commercial production, whichever comes first.

In fact, September 9, 2016 does not even start the recovery period for FCF as this was only the filing of the DCCO and not yet approved by the Regional Office, which starts the counting of the recovery period. Thus, Section 2.1(m) of FCF's FTAA defines the "date of commencement of commercial production" as follows:

> (m). "Date of Commencement of Commercial Production" or "Commencement of Commercial Production" refers to the date of written declaration by the Contractor to start commercial operations after the conduct of Test Run including Debugging, <u>and its approval by the Regional Office concerned</u>." (Underlining supplied.)

Obviously, the period for the Government Share*, i.e.* taxes, to be correctly collected has not yet begun.

The capital equipment being a pre-operating expense is also of no moment as the rule on the aggregate of the net cash flows from the mining operations being equal to the aggregate of the pre-operating expenses must still reckon from the date of commencement of commercial production, which has not yet begun. The Third Division found the

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necessity of determining the amount of pre-operating expenses in order to ascertain the date when the recovery period would end to start the collection of government shares. Such determination is already futile as it is already proven by FCF that its date of Commencement of Commercial Production would only start upon approval of its DCCO which was only filed on September 9, 2016. Thus, the computation of net cash flow and pre-operating expenses as being insisted by the COC is actually immaterial. It is only upon presentation of the filing of the DCCO that this Court was able to reckon, at the very earliest, the said recovery period. Logic then dictates that the collection of VAT and fees before the recovery period should not occur.

The documents presented by FCF at this level constitute newly discovered evidence and these are the precise documents asked for by the Third Division. FCF was able to satisfy all the requisites for newly discovered evidence, *i.e.*: (1) it discovered the evidence after the Third Division rendered its judgment; (2) it could not have discovered and produced the evidence during the trial with reasonable diligence; and (3) the evidence was material, not merely cumulative, corroborative, or impeaching, and was of such weight that, if admitted, would probably change the judgment.

More importantly, this Court is not governed strictly by technical rules of evidence,[11] as rules of procedure are not ends in themselves and are primarily intended as tools in the administration of justice. No other than the Supreme Court allowed presentation of evidence despite failure to file a Motion for New Trial/Reconsideration in the case of *Philippine Phosphate Fertilizer Corporation vs. Commissioner of Internal Revenue*,[12] to wit:

> "We reiterate the fundamental principle that technical rules of procedure are not ends in themselves but are primarily designed to aid in the administration of justice. And in cases before tax courts, Rules of Court applies only by analogy or in a suppletory character and whenever practicable and

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[11] *Calamba Steel Center, Inc. (formerly JS Steel Corporation) vs. Commissioner of Internal Revenue*, G.R. No. 151857, April 28, 2005, 457 SCRA 482, 494.
[12] G.R. No. 141973. June 28, 2005.

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> convenient shall be liberally construed in order to promote its objective of securing a just, speedy and inexpensive disposition of every action and proceeding. The quest for orderly presentation of issues is not an absolute. It should not bar the courts from considering undisputed facts to arrive at a just determination of a controversy. This is because, after all, the paramount consideration remains the ascertainment of truth. Section 8 of R.A. No. 1125 creating the CTA also expressly provides that it shall not be governed strictly by technical rules of evidence.
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> Since it is not disputed that petitioner is entitled to tax exemption, it should not be precluded from presenting evidence to substantiate the amount of refund it is claiming on mere technicality especially in this case, where the failure to present invoices at the first instance was adequately explained by petitioner.
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> As we pronounced in *BPI-Family Savings Bank, Inc. vs. Court of Appeals:*
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>> ...Technicalities and legalisms, however exalted, should not be misused by the government to keep money not belonging to it and thereby enrich itself at the expense of its law-abiding citizens. If the State expects its taxpayers to observe fairness and honesty in paying their taxes, so must it apply the same standard against itself in refunding excess payments of such taxes. Indeed, the State must lead by its own example of honor, dignity and uprightness" (Citations omitted; Italics in the original; Underlining supplied.)

The COC insists that FCF can only import into the Philippines equipment, machinery, and spare parts required for mining operations, provided that such machinery, equipment, and spare parts of comparable price and quality are not manufactured domestically, are actually needed and will be used exclusively by FCF in its mining operations, and are covered by shipping documents in the name of FCF to whom the shipment will be delivered directly by the customs authority. Section 13.2.j of the FTAA pertinently provides:

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> "j. Subject to existing laws, rules and regulations, the Contractor shall have the right to import into the Philippines all equipment, machinery and spare parts required by Contractor for Mining Operations: Provided, That machinery, equipment and spare parts of comparable price and quality are not manufactured domestically, are actually needed and will be used exclusively by the Contractor in its Mining Operations, and are covered by shipping documents in the name of the Contractor to whom the shipment will be delivered direct by the customs authority."

However, an issue not raised before the lower court could not be raised first time on appeal.[13] A question that was never raised in the courts below cannot be allowed to be raised for the first time on appeal without offending basic rules of fair play, justice and due process.[14]

SO ORDERED.

WHEREFORE, the Petition for Review is **GRANTED**. Accordingly, the Decision promulgated on June 21, 2016 and the Resolution dated February 20, 2017 by the Third Division in CTA Case No. 8789 are **REVERSED** and **SET ASIDE**.

Let the case be **REMANDED** to the Court in Division for further proceedings in order to determine and rule on the merits of FCF Minerals Corporation seeking the refund of the amount of fifty seven million eight hundred ninety six thousand five hundred six pesos (₱57,896,506.00), Philippine currency, allegedly representing the amount paid as value added tax (VAT) and fees on its importation of capital equipment.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

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[13] *Commissioner of Internal Revenue vs. Obayashi Philippines Corporation,* CTA EB No. 42 (CTA Case No. 6222), June 10, 2005, citing *Victorias Milling Co., Inc., vs. Court of Appeals*, 333 SCRA 663; *Jimenez vs. Patricia*, Inc., 340 SCRA 525
[14] Bank of Commerce vs. Serrano, 451 SCRA 484.

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

(with Concurring Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation among the members of the Court En Banc before the case was assigned to the writer of the opinion of the Court En Banc.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

En Banc

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Petitioner,

- versus -

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Respondent.

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Present:

DEL ROSARIO, *PJ,*
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FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN , *and*
MANAHAN, *JJ.*

Promulgated:

AUG 14 2018 2:10 p.m.

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CONCURRING OPINION

RINGPIS-LIBAN, *J.*:

I concur with the Ponencia of J. Mindaro-Grulla which remanded and the case to the Court in Division for further proceedings in the light of the newly discovered evidence.

The Court in Division denied the petition for lack of merit and held that FCF failed to establish that the VAT and customs duties and fees on importation of capital equipment were imposed and paid during the recovery period or that it has not yet recovered its pre-operating expenses at the time of imposition and payment of VAT and customs duties.

Without any evidence to prove that petitioner has complied with the requirements provided under the FTAA and the implementing rules of RA No. 7942, the Court could not determine whether or not petitioner had already recovered its pre-operating expense at the time when the importation of its capital equipment was subjected to VAT and customs duties. A necessary consequence of this was that the Court could not likewise determine whether petitioner was exempt from the VAT and customs duties it paid on the importation of capital equipment.

As I subscribe to the holding in the *ponencia* that the period for the Government Share to be correctly collected has not yet begun, the Declaration of Commencement of Commercial Operations (DCCO) which petitioner made to the Mines and Geosciences Bureau (MGB), and subsequently, to the MGB Central Office and to the DENR **after the Third Division had rendered the assailed Decision**, would be invaluable in determining the propriety of petitioner's claim and ought to be considered by the Court in Division for a more comprehensive appreciation the of the claims of both parties.

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice