REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

APEX MINING CO., INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 4450

Promulgated:
OCT 06 1994

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DECISION

This is an appeal from the final decision of respondent, dated March 12, 1990 (C.T.A. records, p. 16), assessing petitioner the amount of P10,225,637.87 and P4,659,368.13 or a total of P14,885,006.00, including increments, representing deficiency excise tax on its purchased minerals and gold production for the period January to June 1988.

Petitioner is a domestic corporation organized and existing under and by virtue of the laws of the Philippines. The primary purpose for which the corporation is formed are: To carry on the business of mining, milling, concentrating, converting, smelting, manufacturing, buying, selling and otherwise producing and dealing in all kinds of ores, metals, and minerals, and the products and by-products thereof.

On October 26, 1989, petitioner received a notice from respondent requesting petitioner to appear in an informal conference regarding the findings submitted by the revenue enforcement officers who investigated its excise tax liabilities for the first semester of 1988 (Id., p. 8).

On November 13, 1989, a Pre-Assessment Notice signed by the Assistant Commissioner for Excise Tax was received by petitioner with the following deficiency assessment (Id., p. 9).

	Own Production	Purchased Minerals	Total
Gross Sales	P51,583,810.74	P113,252,643.90	P164,836,454.64
Less: Refining charges	166,547.15	410,238.64	576,785.79
Taxable Revenues	51,417,263.59	112,842,405.26	164,259,668.85
Ad Valorem Tax Rate	x .05	x .05	x .05
Ad Valorem Tax Due	2,570,863.17	5,642,120.33	8,212,983.50
Surcharge (25%)	642,715.79	1,410,530.11	2,053,245.90
Interest (16.66%)	535,382.25	1,174,971.55	1,710,353.80
TOTAL	P 3,748,961.21	P 8,227,621.99	P 11,976,583.20

On November 17, 1989, a protest letter to the Pre-Assessment Notice was filed by petitioner (Id., pages 10-11).

On December 11, 1989, petitioner received a letter reply from the Chief, Field Operations Division of the Bureau of Internal Revenue (BIR) advising petitioner to pay the sum of P3,748,961.21 representing the uncontested portion of the assessment pursuant allegedly to the requirements of Revenue Regulations No. 12-85 (Id., p. 12).

In a letter, dated January 25, 1990, petitioner informed the Chief, Field Operations Division of the BIR that it is not contesting the ad valorem tax due corresponding to its own production in the amount of P2,570,863.17 before surcharge and interest. However, due to its financial condition, it is requesting that its creditable input tax from January 1989 to October 1989 in the amount of P5,647,354.08 be applied against its 1988 ad valorem tax liability of P2,570,863.17. Further, it is requesting that the surcharge of 25% or P642,715.79 be waived (Id., p. 13).

On February 9, 1990, petitioner received respondent's letter denying its protest and the requests contained in its letter, dated January 25, 1990 (Id., p. 14).

In a letter, dated February 23, 1990, petitioner reiterated its protest on the assessment of ad valorem tax on its purchased minerals and offered to pay in twelve(12) equal installments starting June 1990 the ad valorem tax on its own production amounting to P2,570,863.17 (Id., p. 15).

On March 29, 1990, the final decision of respondent was received by petitioner denying the protest and the proposed payment scheme. Petitioner was requested to pay the entire assessment of P14,885,006.00 within ten(10) days from receipt of aforesaid letter (Id., p. 16).

On April 6, 1990, the petitioner through counsel, filed a notice of appeal to respondent informing the latter that it will file an appeal with the Court of Tax Appeals (Id., p. 17).

On April 27, 1990, the instant petition for review was filed by petitioner with this Court (Id., pages 1-7).

The issue is whether the deficiency excise tax assessment against petitioner on its own mineral production and the minerals purchased from small scale miners for the period of January to June 1988 is correct.

The liability of petitioner for the assessed deficiency excise tax on its own production of minerals has been settled with the petitioner's decision not to contest the said assessment (Annex "E" of the Petition) and its offer to pay the same (Annex "G" of the Petition). Surcharge and interest should likewise be imposed thereon pursuant to Section 248(a) and Section 249(a) of the Tax Code, respectively since respondent rejected petitioner's request for waiver of surcharge.

As to the assessment for deficiency excise tax on minerals purchased from small scale miners, petitioner contends that it is not liable for its payment.

The relevant provisions of the National Internal Revenue Code (NIRC) applicable to the issue are the following:

> SEC. 127. *Payment of excise taxes on domestic products.* - (a) Persons liable; time for payment. - Unless otherwise especially allowed, excise taxes on domestic products shall be paid by the <u>manufacturer or producer</u> before removal from the place of production: xxx Should domestic products be removed from the place of production without the payment of the tax, the <u>owner or person having possession</u> thereof shall be liable for the tax due thereon. (Underscoring supplied.)
>
> xxx
>
> SEC. 151. *Mineral Products.* - (a) Rates of tax. - There shall be levied, assessed and collected on mineral, mineral products and quarry resources, excise tax as follows:
>
> (1) xxx
>
> (2) xxx
>
> (3) On all metallic minerals, a tax of five percent (5%) based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced; xxx
>
> xxx xxx
>
> (b) For purposes of this section, the term -
>
> (2) "Minerals" shall mean all naturally occurring inorganic substances (found in nature) whether in solid, liquid, gaseous, or any intermediate state.

(3) "Mineral products" shall mean things produced and prepared in a marketable state by simple treatment processes such as washing or drying, but without undergoing any chemical change or process or manufacturing by the lessee, concessionaire or owner of mineral lands.

xxx xxx

(c) Time, manner and place of payment of excise tax on mineral and mineral products. - Unless otherwise provided, the excise tax on minerals and mineral products shall be due and payable upon removal of the minerals or mineral products or quarry resources from the locality where mined or upon removal from customs custody in the case of importations. (Underscoring supplied.)

xxx xxx

xxx It shall be the duty of every lessee, owner or operator to make true and complete return in duplicate setting forth the quantity and the actual market value of the minerals or mineral products or quarry resources removed during such calendar quarter, of the balance, if any, in cases where payments are made upon removal, and pay the excise taxes due thereon within 20 days after the end of such quarter to the Collection Agent, or the Treasurer of the city or municipality of the place where the mine is located. (Underscoring supplied.)

xxx xxx

It is clear from the foregoing provisions that the person principally liable to excise tax on domestic products is the manufacturer or producer, or in case said products are removed from the place of production without the payment of the tax, the owner or person having possession thereof is liable for the tax due thereon (Section 127(a), NIRC). The lessee, owner or operator of the mining claim is duty bound to pay the excise tax in the case of mineral products (Section 151(c), par. 3, NIRC).

The excise tax on domestic products shall be paid upon withdrawal from the place of production (Section 127(a), NIRC). The excise tax on minerals and mineral products shall be due and payable upon removal from the locality where mined (Section 151(c), par. 1, NIRC).

The undisputed facts of the case at hand is that the minerals on which respondent is assessing a 5% excise tax were merely purchased by petitioner from small scale miners. Petitioner, therefore, is not the manufacturer or producer of said minerals. Neither is petitioner a lessee, owner or operator of the mining claim in so far as the purchased minerals are concerned.

At the time the BIR revenue officers conducted the investigation of petitioner's excise tax liabilities for the period January to June 1988, pursuant to letter of authority dated August 10, 1988, and at the time the Pre-Assessment Notice dated November 7, 1989 was issued, petitioner is no longer the owner nor has possession of the minerals purchased from small scale miners since these were already sold to the Central Bank of the Philippines.

Quoted hereunder are the pertinent portions of the testimony of Revenue Enforcement Officer Wilma Gonzales in the hearing of this case on July 1, 1993:

> Q. Okay. I would like to refer your attention to the assessment specifically on the portion on purchased minerals. In your investigation were you able to determine also whether these purchased minerals made by petitioner from small scale miners, were they already sold to Central Bank at the time you conduct your examination?
>
> A. I think so.
>
> Q. Is it safe to conclude Miss Witness, at the time you conduct your investigation and at the time the pre-assessment notice was sent to the petitioner and this pre-assessment notice was dated November 7, 1989, that the products or mineral products were no longer in the possession of the petitioner?
>
> A. They are no longer in the possession of the petitioner.
>
> Q. Miss Witness, prior to the pre-assessment notice, you already determined that the mineral products especially those that were purchased from the small scale miners were no longer in the possession of the petitioner?
>
> A. Yes.
>
> (T.S.N., pages 8-10.)

As proof that the purchased minerals from small scale miners for the period January to June 1988 were already delivered and sold to the Central Bank, even before petitioner's receipt of notice of deficiency assessment, petitioner offered as evidence Exhibits "A" to "Z" and "AA" to "XX", inclusive of sub-markings. These were admitted by the Court ("Resolution", C.T.A. records, pages 188-189).

In the Memorandum filed in Court, respondent admitted that petitioner is no longer the owner or possessor of the mineral purchased from small scale miners during the first semester of 1988 since these were already sold to the Central Bank. Reproduced below is the pertinent portion of respondent's memorandum:

> "Accordingly, since petitioner became the owner of the mineral products it purchased from small scale miners and had taken possession thereof without the corresponding payment of the ad valorem tax due thereon upon their removal from the mines by the small scale miners, petitioner is also liable for the 5% ad valorem tax as assessed due on the mineral products it purchased from the small scale miners. Moreover, petitioner was the one who sold the gold and silver it purchased from the small scale miners to the Central Bank." (Underscoring supplied.) (C.T.A. records, pages 262-263).

It is axiomatic in statutory construction that when the language of the law is clear and unequivocal, the law must be taken to mean exactly what it says. Section 127 and 151 of the Tax Code speaks in clear and categorical language that there should be no doubt as to its application.

Having clearly established that petitioner is neither a producer or manufacturer nor lessor or operator of the subject minerals which it merely purchased from small scale miners, petitioner is not liable for the 5% excise tax (Phil. **Iron Mines, Inc. vs. CIR, CTA** Case No. 294, March 1, 1962). It cannot likewise be made to pay the excise tax as owner or possessor precisely because it is no longer the owner or person having possession of the subject minerals at the time of the assessment or even at time of investigation thereof since they have already been sold before hand to the Central Bank. To follow respondent's reasoning that petitioner is liable for the purchased minerals because it <u>became</u> the owner thereof and <u>had taken</u> possession thereof in the past would result in absurdity and precipitate havoc in the law. Accordingly, the 5% excise tax under Sections 127 & 151 of the Tax Code cannot be imposed on the minerals purchased by petitioner from small scale miners which it already delivered and sold to the Central Bank since it is beyond the ambit of its coverage.

WHEREFORE, petitioner is hereby ordered to immediately pay respondent Commissioner of Internal Revenue the excise tax on its own mineral production for the period January to June 1988 in the amount of P2,570,863.17 plus surcharge of 25% pursuant to Section

248(a) of the Tax Code and interest of 20% per annum computed from the date of removal of the minerals until paid as provided under Section 151(c) and Section 249(a) of the Tax Code.

The assessment for deficiency excise tax on minerals purchased from small scale miners and subsequently sold to the Central Bank is hereby cancelled for lack of legal basis.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

MANUEL K. GRUBA
Associate Judge

CERTIFICATION

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 VII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge