REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

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LEPANTO CONSOLIDATED MINING COMPANY, Petitioner,	**C T A E B No. 1720** (CTA Case No. 8889)
	Present:
- **versus** -	**DEL ROSARIO,** P.J., **CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** and **MANAHAN,** JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** MAY 03 2019 3:50 p.m.

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DECISION

UY, J.:

The instant *Petition for Review*[1] filed by Lepanto Consolidated Mining Corporation against the Commissioner of Internal Revenue on October 19, 2017, seeks to reverse and set aside the Decision dated May 8, 2017 and Resolution dated September 11, 2017, promulgated by the Third Division of this Court (Court in Division) in CTA Case No. 8889, entitled *"Lepanto Consolidated Mining Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent,"* the dispositive portions of which respectively read as follows:

Decision dated May 8, 2017:

"**WHEREFORE,** the Petition for Review filed by

[1] EB Docket, pp. 30 to 51.

Lepanto Consolidated Mining Company is **DENIED,** for lack of merit.

SO ORDERED."

Resolution dated September 11, 2017:

"**WHEREFORE,** petitioner's *Motion for Reconsideration [Of Decision dated 8 May 20137 (sic)]* is **DENIED,** for lack of merit.

SO ORDERED."

THE FACTS

Petitioner Lepanto Consolidated Mining Company is a domestic corporation, incorporated primarily: (1) to purchase, lease, or otherwise acquire, and to sell, lease or otherwise dispose of mining claims, whether patented or unpatented, mining rights, timber rights, water rights, oil and gas rights, all to the extent permitted by law, as well as such buildings, machinery, tools and other properties as may be necessary or convenient for carrying on the business of the corporation, and to pay or to take payment for the same, either in cash, or in stock, bonds, debentures, or other securities or otherwise, as permitted by law; (2) to search for, prospect and explore for ores and minerals and to locate mining claims, grounds or lodes, and record the same pursuant to the laws of the Philippines, and to bore, drill, prospect and mine in such mining claims, grounds or lodes for metals and minerals of all kinds; and (3) to conduct and carry on the business of mining, milling, concentrating, converting smelting, treating, preparing for market, manufacturing, buying, selling, exchanging and otherwise producing and dealing in gold, silver, copper, lead, zinc, brass, iron, steel, antimony, tin, asbestos, marble, and all kinds of ores, metals, minerals, precious stones, oils, gas and coal, and all by-products of the foregoing. It is also registered with the Board of Investments (BOI) as a new export producer of gold bullion in accordance with the provisions of the Omnibus Investments Code of 1987.

Respondent, on the other hand, is the Commissioner of Internal Revenue (CIR), vested with the power to grant refunds, issue and abate tax assessments, and examine books of accounts and tax returns to determine the correctness of taxes paid under the Tax Code. He holds office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

Petitioner filed its Quarterly Excise Tax Returns for the 3rd and 4th quarters of taxable year (TY) 2008, the 3rd and 4th quarters of TY 2009, and the 1st quarter of TY 2010, but was unable to remit the taxes due thereon allegedly due to financial losses. In view thereof, petitioner requested that it be allowed to pay the corresponding excise taxes for the aforementioned periods through the proposed program of payment and it did.

On November 11, 2010, petitioner filed an application for abatement of surcharge and compromise penalties under Revenue Regulations (RR) No. 13-2001 in the total amount of ₱4,627,009.37, for the 3rd and 4th quarters of TY 2008 on the ground of "continuous heavy losses for the last 3 years."

Petitioner filed another application for abatement of surcharge and compromise penalties on March 17, 2011, in the total amount of ₱5,603,219.34 for the 3rd and 4th quarters of TY 2009 and 1st quarter of TY 2010, citing the same ground.

On August 8, 2014, petitioner received a letter from respondent dated August 4, 2014, denying its applications for abatement for lack of legal basis. In the same letter, respondent demanded payment of the aggregate amount of ₱10,230,248.71 through the Electronic Filing and Payment System (eFPS), within ten (10) days from notice. Thus, petitioner paid under protest the said amount of ₱10,230,248.71 on August 12, 2014.

In the letter dated August 19, 2014, petitioner informed respondent that its payment should not be deemed as an admission of liability, but only as a means to avoid interest and surcharges and in order to obtain a tax clearance from respondent which was necessary for issuance of its import permit.

On September 5, 2014, petitioner filed a *Petition for Review* before the Court in Division of the Court of Tax Appeals docketed as CTA Case No. 8889.

In his *Answer* to the said *Petition for Review*, respondent assails the jurisdiction of the Court in Division over the case on the ground that tax abatement is not subject to judicial determination.

According to respondent, he cannot be compelled by court action to exercise a power that is not ministerial but discretionary. Moreover, tax abatement is allegedly contractual, hence, consent of both parties is indispensable. To grant the relief prayed for by petitioner is to order him to give his consent to the abatement contract.

Furthermore, respondent raises the following contentions in his *Answer*, to wit:

1. To exercise of the power of abatement is to waive the government's right to receive the contribution from its inhabitants, therefore, the waiver must be voluntary. Respondent believes no person can "coerce" another to perform a "voluntary act" by judicial action; and

2. Anent petitioner's claim for refund, the same is allegedly beyond the Court in Division's competence, since petitioner failed to file an administrative claim for refund, a condition *sine qua non* for the Court to acquire jurisdiction over the present judicial action. Besides, the collection of the surcharges and compromise penalties accompanying petitioner's tax liabilities, is justified.

After the pre-trial conference, the parties filed their *Joint Stipulation of Facts and Issues* (JSFI) on the basis of which a Pre-Trial Order was issued on June 23, 2015.

During the trial, petitioner presented its lone witness, Teofilo Sacpa. After formal offer of its evidence, petitioner rested its case per the Resolutions of October 2, 2015 and March 9, 2016.

Respondent, on the other hand, did not present any evidence maintaining that the Court in Division has no jurisdiction over the case.

Taking into consideration the filing of the parties' respective Memoranda (respondent's on April 11, 2016 and petitioner's on May 4, 2016), CTA Case No. 8889 was deemed submitted for decision on May 10, 2016.

In the assailed Decision, the Court in Division denied the *Petition for Review* for lack of merit.[2]

Aggrieved, petitioner filed its *Motion for Reconsideration* on May 29, 2017, to which respondent filed his *Opposition (To Petitioner's Motion for Reconsideration dated 29 May 2017)* filed on July 3, 2017. In the assailed Resolution dated September 11, 2017,[3] the Court in Division denied petitioner's *Motion for Reconsideration* for lack of merit.

Undaunted, petitioner filed a *Motion for Extension to File Petition for Review* on October 5, 2017.[4] In the Minute Resolution dated October 9, 2017,[5] petitioner was granted a final and non-extendible period of fifteen (15) days from October 5, 2017, or until October 20, 2017, within which to file its *Petition for Review.*

On October 19, 2017,[6] petitioner filed the instant *Petition for Review.* In the Resolution dated November 16, 2017,[7] respondent was ordered by the Court *En Banc* to file his comment to the *Petition for Review* within ten (10) days from receipt. However, records show that respondent failed to file the said *Comment.*[8]

Subsequently, the parties were ordered to submit their respective memoranda, within a period of thirty (30) days in the Resolution dated January 29, 2018.[9]

Respondent filed a *Motion for Extension of Time to File Memorandum* on March 9, 2018,[10] which was granted on March 13, 2018;[11] while petitioner filed a *Motion for Time* on March 12, 2018,[12] which was granted on March 21, 2018.[13] Thus, respondent filed his

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[2] EB Docket, pp. 7 to 24.
[3] EB Docket, pp. 26 to 28.
[4] EB Docket, pp. 1 to 5.
[5] EB Docket, p. 29.
[6] EB Docket, pp. 30 to 51.
[7] EB Docket, pp. 175 to 176.
[8] Records Verification dated January 10, 2018 issued by the Judicial Records Division of this Court, EB Docket, p. 177.
[9] EB Docket, pp. 179 to 180.
[10] EB Docket, pp. 181 to 184.
[11] EB Docket, p. 185.
[12] EB Docket, pp. 186 to 188.
[13] EB Docket, p. 190.

Memorandum on March 26, 2018,[14] while petitioner filed its *Memorandum* on April 10, 2018.[15]

On May 8, 2018,[16] this case was submitted for decision.

Hence, this Decision.

THE ISSUES

In the instant *Petition for Review*, petitioner raises the following issues for the Court *En Banc*'s resolution, to wit:

I. Whether or not the Court in Division erred in setting aside and refusing to implement Section 2.3.6 of RR No. 13-2001;

II. Whether or not petitioner is entitled to the abatement of surcharges and compromise penalties in the aggregate amount of P10,230,248.71 due to continuous heavy losses from 2007 to 2011 in the total amount of P10,230,248.71;

III. Whether or not the Court in Division erred in not ruling that respondent committed grave abuse of discretion amounting to lack or excess of jurisdiction.

Petitioner's arguments:

Petitioner argues that the Court in Division erred when it struck down and refused to implement Section 2.3.6 of RR No. 13-2001 which clearly provided for the abatement of taxes on the ground of continuous heavy losses for the last 2 years. According to petitioner, the said provision was promulgated by the Secretary of Finance by virtue of his authority to promulgate rules and regulations under Section 244 of the National Internal Revenue Code (NIRC), as amended. As such, the same has the force and effect of law. It is clear and unambiguous, leaving no room for interpretation, but only application.

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[14] EB Docket, pp. 191 to 20
[15] EB Docket, pp. 205 to 223.
[16] EB Docket, pp. 225 to 226.

Moreover, petitioner avers that it is entitled to the abatement of surcharges and compromise penalties in the aggregate amount of ₱10,230,248.71, as it was able to prove that it suffered continuous heavy losses from 2007 to 2011 in the total amount of ₱10,230,248.71. Such continuous and heavy losses is a clear and recognized ground for abatement of surcharges and compromise penalties under RR No. 13-2001 of respondent.

Finally, petitioner argues that the Court in Division erred in not ruling that the respondent committed grave abuse of discretion amounting to lack or excess of jurisdiction, when the latter's decision to deny petitioner's application of abatement failed to state clearly the facts and the law on which it was based.

Respondent's counter-arguments:

Respondent counters that the Court in Division correctly ruled that petitioner is not entitled to the refund in the amount of ₱10,230,248.71.

In addition, respondent argues that the collection of the surcharge and penalties accompanying the tax liabilities were justified.

Lastly, respondent submits that petitioner is not entitled to the abatement of the corresponding surcharges and penalties in relation to its tax liabilities.

THE COURT *EN BANC*'S RULING

The instant *Petition for Review* lacks merit.

The power to abate a tax liability is discretionary on the part of respondent.

Section 204(B) of the NIRC of 1997 provides, in part, as follows:

> "SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – **The Commissioner <u>may</u>** –

nb

xxx xxx xxx

(B) **Abate or cancel a tax liability, <u>when</u>:**

(1) **The tax or any portion thereof appears to be <u>unjustly</u> or <u>excessively</u> assessed;** or

(2) The administration and collection costs involved do not justify the collection of the amount due." *(Emphases and underscoring supplied)*

Based on the foregoing provision, one of the powers granted to respondent under the NIRC of 1997 is that he *"may"* abate or cancel a tax liability.

It is a settled doctrine in statutory construction that the word *"may"* denotes discretion, and cannot be construed as having mandatory effect.[17] In fact, it has already been judicially recognized that the said power to abate a taxpayer's liability under the aforequoted provision is within the discretion of respondent.[18] Discretion, in turn, when applied to public functionaries, means a power or right conferred upon them by law of acting officially, under certain circumstances, according to the dictates of their own judgments and consciences, uncontrolled by the judgments or conscience of others.[19]

Considering therefore that it is discretionary on the part of respondent to decide whether or not to abate or cancel a tax liability, unless there is grave abuse of discretion committed by respondent, this Court shall not interfere with the exercise of such power as it finds no grave abuse of discretion was committed by respondent in the instant case.

The Court in Division correctly held that "continuous heavy losses" is not one of the instances under the NIRC of 1997 when respondent may exercise his power to abate a tax liability.

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[17] *Bayan Muna, et al. vs. Romulo, et al.*, G.R. No. 159618, February 1, 2011.
[18] *Ing Bank N.V. vs. Commissioner of Internal Revenue*, G.R. No. 167679, July 22, 2015.
[19] *Sanson vs. Barrios, et al.*, G.R. No. L-45086, July 20, 1936; *Laygo, et al. vs. Municipal Mayor of Solano, Nueva Vizcaya*, G.R. No. 188448, January 11, 2017.

Petitioner submits that the Court in Division erred in holding that Section 2.3.6 of RR No. 13-2001 does not conform to the standards provided by Section 204(B)(1) of the NIRC.

We disagree.

Indeed, the above-quoted Section 204(B) of the NIRC of 1997 empowers respondent to abate or cancel a tax liability;[20] but only in the following instances, to wit: (1) **the tax or any portion thereof appears to be <u>unjustly</u> or <u>excessively</u> assessed**; or (2) the administration and collection of costs involved do not justify the collection of the amount of due.

As regards the first instance when respondent may abate or cancel a tax liability, the word *"unjust"* (as the root word for *"unjustly"*) means "(d)*eficient in justice and fairness"*;[21] while the term *"excessive"* (the adjective form of *"excessively"*) means "(g)*reater than what is usual and proper; characterized by or exhibiting excess; greater than usual amount or degree"*.[22] Thus, a tax is said to be *"unjustly"* assessed, when compared to other taxpayers, the concerned taxpayer was not given the same treatment in the tax assessment as that of the former. On the other hand, a tax is considered as *"excessively"* assessed when the tax assessment is over and above the tax imposition made under the law. On either case, there must be a dispute as to the correctness of the assessment.[23]

Contrary to the assertion of petitioner and as correctly held by the Court in Division, *"continuous heavy losses incurred by the taxpayer for the last two (2) years"* cannot be treated as falling under the category of a tax being *"unjustly"* assessed. There is no showing that there is a rational connection between being *"unjustly"* assessed of a tax and sustaining *"continuous heavy losses"* regardless of the duration thereof. Furthermore, petitioner failed to prove that compared to other taxpayers, it was not accorded the same treatment as that of other taxpayers in the issuance of the tax assessment. Neither was it established that there is a dispute as to

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[20] *Asiatrust Development Bank, Inc. vs. Commissioner of Internal Revenue, etseq.*, G.R. Nos. 201530 and 201680-81, April 19, 2017.

[21] Philippine Law Dictionary by Federico B. Moreno, Third Edition, © 1972, 1982, and 1988, p. 979.

[22] The Attorney's Pocket Dictionary, © 1981, p. 178.

[23] *Koppel (Philippines) Inc. vs. The Collector of Internal Revenue*, G.R. No. L-1977, September 21, 1950.

the correctness of such assessment.

Thus, the ground relied upon by petitioner cannot be a valid basis for respondent to abate the surcharges and compromise penalties being applied for by petitioner.

Undoubtedly, Section 2.3.6 of Revenue Regulations (RR) No. 13-2001,[24] the implementing regulations for the aforequoted Section 204(B), and which was promulgated by the Secretary of Finance pursuant to Section 244 of the NIRC of 1997,[25] states:

> "SEC. 2. INSTANCES WHEN THE PENALTIES AND/OR INTEREST IMPOSED ON THE TAXPAYER MAY BE ABATED OR CANCELLED ON THE GROUND THAT THE IMPOSITION THEREOF IS UNJUST OR EXCESSIVE. —
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> xxx xxx xxx
>
> 2.3 When taxpayer fails to file the return and pay the tax on time due to substantial losses from prolonged labor dispute, *force majeure*, legitimate business reverses such as in the following instances, provided, however, that the abatement shall only cover the surcharge and the compromise penalty and not the interest imposed under Section 249 of the Code:
>
> xxx xxx xxx
>
> **2.3.6 Continuous heavy losses incurred by the taxpayer for the last two (2) years**;" *(Emphasis supplied.)*

However, as already intimated, the foregoing provision is not consistent with the above-stated Section 204(B) of the NIRC of 1997.

[24] SUBJECT: Implementing Section 204(B), in relation to Section 290 of the Tax Code of 1997, Regarding Abatement or Cancellation of Internal Revenue Tax Liabilities.

[25] "SEC. 244. *Authority of Secretary of Finance to Promulgate Rules and Regulations.* – The Secretary of Finance, upon recommendation of the Commissioner, shall promulgate all needful rules and regulations for the effective enforcement of the provisions of this Code."

To be valid, an administrative rule or regulation must conform, not contradict, the provisions of the enabling law. An implementing rule or regulation cannot modify, expand, or subtract from the law it is intended to implement. **Any rule that is not consistent with the statute itself is null and void.**[26]

Apparently, Section 2.3.6 of RR No. 13-2001 is inconsistent with the provisions of Section 204(B) of the NIRC of 1997. Such being the case, the Court in Division is correct when it ruled that the said Section 2.3.6 may not be relied upon by petitioner as a ground for abatement of its tax liabilities, and that there is no grave abuse of discretion on the part of respondent in denying petitioner's application for abatement of surcharges and compromise penalties.

Grave abuse of discretion has a well-defined meaning: "An act of a court or tribunal can only be considered as with grave abuse of discretion when such act is done in a 'capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction.' **The abuse of discretion must be so patent and gross as to amount to an 'evasion of a positive duty or to a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility.'"**[27]

In this case, there can never be a grave abuse of discretion on the part of respondent because, as already shown, the ground relied upon by petitioner does not fall under the purview of the instances under Section 204(B) of the NIRC of 1997 where respondent may exercise his power to abate or cancel tax liabilities of a taxpayer.

In other words, consistent with the said provision, respondent was correct in denying petitioner's application to abate the subject surcharges and compromise penalties *"for lack of legal basis"*[28].

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is **DENIED** for lack of merit. The Decision dated May 8, 2017 and the Resolution dated September 11, 2017 rendered by the Court in Division in CTA Case No. 8889, are hereby **AFFIRMED**.

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[26] *Fort Bonifacio Development Corporation vs. Commissioner of Internal Revenue, et al.*, G.R. Nos. 158885 and 170680, October 2, 2009.
[27] *Miranda vs. Sandiganbayan, et al., etseq.*, G.R. Nos. 144760-61, 167311-12, 167316-17, and 167625-26, August 2, 2017.
[28] Exhibit "P-6", Docket (CTA Case No. 8889) – Vol. 1, p. 287.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(On Leave)

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 before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice