REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

Third Division

OCEANAGOLD (PHILIPPINES), INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9289

Members:
UY, *Chairperson,*
RINGPIS-LIBAN, *and*
MODESTO-SAN PEDRO, *JJ.*

Promulgated:
OCT 07 2020
12:40 p.m.

X---X

DECISION

RINGPIS-LIBAN, *J*.:

This Petition for Review prays for the refund of, or issuance of a tax credit certificate for, the amount of ₱136,407,793.17, representing excise taxes erroneously paid by Petitioner, and illegally and wrongfully collected by Respondent for the period June to December 2014.[1]

THE PARTIES

Petitioner Oceanagold (Philippines), Inc. is a corporation organized and existing under the laws of the Philippines, with principal place of business at the 2nd Floor, CJV Building, 108 Aguirre St., Legaspi Village, Makati City.[2]

Respondent is the duly appointed Commissioner who is tasked to assess and collect all national internal revenue taxes, fees, and charges, and enforce all forfeitures, penalties, and fines connected therewith. He holds office at the

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[1] Summary of the Case, Pre-Trial Order dated September 1, 2016, Docket – Vol. 2, p. 702.
[2] Par. 1, Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), Docket – Vol. 2, p. 688.

Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Diliman, Quezon City.[3]

THE FACTS

On December 7, 2012, to prevent Petitioner from making removals of copper concentrates without prepayment of excise tax, Respondent detained mineral ores in Petitioner's stockpile.[4]

Thereafter, Respondent issued, on February 15, 2013, Revenue Memorandum Circular (RMC) No. 17-2013,[5] which revoked BIR Ruling No. 10-2007 and with it, Petitioner's exemption from excise tax during the recovery period.[6]

Petitioner then filed on February 20, 2015, a formal claim for refund or tax credit with the Excise LT Audit Division I of the BIR, seeking the recovery of excise taxes paid on Petitioner's removals of copper concentrates in the aggregate amount of ₱136,407,793.17, covering the period from, among others, June to December 2014.[7]

On February 12, 2016, Petitioner received an undated letter-decision from the Large Taxpayers Service of the BIR, denying Petitioner's claim for refund of excise taxes in the aggregate amount of ₱136,407,793.17, covering the period from June to December 2014.[8]

On March 11, 2016, Petitioner filed the instant Petition for Review before this Court.[9]

Respondent filed his Answer on April 21, 2016,[10] interposing the following special and affirmative defenses, to wit:

"SPECIAL AND AFFIRMATIVE DEFENSES

4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau.

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[3] Par. 2, Stipulation of Facts, JSFI, Docket – Vol. 2, p. 688.
[4] Par. 3, Stipulation of Facts, JSFI, Docket – Vol. 2, p. 689.
[5] SUBJECT: Clarifying the taxes due from Financial or Technical Assistance Agreement (FTAA) Contractors During "Recovery Periods".
[6] Par. 4, Stipulation of Facts, JSFI, Docket – Vol. 2, p. 689.
[7] Par. 5, Stipulation of Facts, JSFI, Docket – Vol. 2, p. 689.
[8] Par. 6, Stipulation of Facts, JSFI, Docket – Vol. 2, p. 689.
[9] Docket – Vol. 1, pp. 10 to 43.
[10] Docket – Vol. 1, pp. 218 to 224.

5. The amount of P136,407,793.17 representing excise taxes allegedly paid by [P]etitioner for the period June to December 2014 was not properly documented.

6. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit.

7. Petitioner must show that it has complied with the provisions of Section 229 of the NIRC of 1997 on the prescriptive period for claiming tax refund/credit.

8. Revenue Memorandum Circular No. 17-2013 is valid and constitutional. Petitioner misconstrues the nature of RMC 17-2013 and the purpose for its issuance. Respondent respectfully submits that RMC 17-2013 is an interpretative ruling, intended for the benefit and instruction of [R]espondent's employees.

9. The Honorable Supreme Court made a thorough discussion on the subject of interpretative rulings in the case of Victorias Milling Company, Inc. vs. Commissioner of Internal Revenue, where it held that:

> 'xxx xxx xxx
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> There can be no doubt that there is a distinction between an administrative rule or regulation and an administrative interpretation of a law whose enforcement is entrusted to an administrative body. When an administrative agency promulgates rules and regulations, it 'makes' a new law with the force and effect of a valid law, while when it renders an opinion or gives a statement of policy, it merely interprets a pre-existing law (Parker, Administrative Law, p. 197; Davis, Administrative Law, p. 194). Rules and regulations when promulgated in pursuance of the procedure or authority conferred upon the administrative agency by law, partake of the nature of a statute, and compliance therewith may be enforced by a penal sanction provided in the law. This is so because statutes are usually couched in general terms, after expressing the policy, purposes, objectives, remedies and sanctions intended by the legislature. The details and the manner of carrying out the law are often times left to the administrative agency entrusted with its enforcement. In this case, it has been said that rules and regulations are the product of a delegated power

> to create new or additional legal provisions that the effect of law. (Davis, op. cit., p. 194).
>
> A rule is binding on the courts so longs as the procedure fixed for its promulgation is followed and its scope is within the statutory authority granted by the legislature, even if the courts are not in agreement with the policy stated therein or its innate wisdom, (Davis, op. cit., 195-197)
>
> On the other hand, administrative interpretation of the law is at best merely advisory, for it is the courts that finally determine what the law means.
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> xxx xxx xxx'

10. RMC 17-2013 was meant as a guideline for [R]espondent's corps of revenue officials. It does not add anything other than what Republic Act No. 7942 (The Philippine Mining Act of 1995) and the National Internal Revenue Code of 1997 (NIRC of 19978) already prescribe. An examination of RMC 17-2013 reveals that [R]espondent noticeably interpreted Section 81 of RA 7942 vis-à-vis the context of Sections 83 and 84, as well as Section 51 of the NIRC. Evident from its content is the fact that [R]espondent merely cited the law and interpreted the same.

11. The nature of interpretative rulings is such that they do not need to be published. Nor is it necessary for copies thereof to be furnished any party in particular. Thus, [R]espondent respectfully submits that since RMC 17-2013 is an interpretative ruling, she was not amiss in not publishing it and in not furnishing [P]etitioner with a copy thereof.

12. Even granting that [P]etitioner enjoyed a tax-exempt status during its recovery period, it is nevertheless no longer exempt from excise tax since the recovery period had already lapsed.

13. Even if [R]espondent assumes for a moment but not concedes that [P]etitioner enjoyed a tax-exempt status during its recovery period, this exemption was not extended indefinitely upon [P]etitioner. Quite the contrary, the exemption was only temporary; it existed only for the duration of the recovery period. Respondent respectfully submits that such period had already lapsed and that [P]etitioner no longer enjoys a tax exemption.

14. The supposed tax-exempt status may be traced from [P]etitioner's Financial or Technical Assistance Agreement, particularly in Section 11.2 thereof, which reads as follows:

> '11.2 Recovery of Preoperating Expenses, Property Expenses and Taxes Paid During the Recovery Period. The CONTRACTOR shall have paid a period of up to five (5) Contract Years, counted from the Date of Commencement of Commercial Production within which to recover his: (a) Preoperating Expenses; and (b) Property expenses during the period in which Preoperating Expenses are recovered, after which period only shall the right of the GOVERNMENT to share in the Net Revenue, as hereunder defined, accrue.
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> xxx xxx'

15. This arrangement is supported by Section 81 of RA 7942 which sets forth that:

> 'SECTION 81. Government Share in Other Mineral Agreements.
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> xxx xxx xxx
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> 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 agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its preoperating expenses, exploration, and development expenditures, inclusive.'

16. Although this tax holiday scheme allowed [P]etitioner to recover up to the full extent of its pre-operating expenses, [P]etitioner did not have an indefinite period within which to do so. Petitioner could have recovered its expenses only within a five (5)-year recovery period. Petitioner and [R]espondent disagree on the point upon which to reckon the 5-

year recovery period. Petitioner argues that the period should be reckoned from its actual commencement of commercial operations. Petitioner additionally contends that it has not begun commercial operations yet. Upon the other hand, [R]espondent respectfully submits that the recovery period does not necessarily have to be reckoned from [P]etitioner's actual commencement of commercial operations. Respondent maintains that the reckoning point for the 5-year recovery period may be either the actual commencement of commercial operations, as argued by [P]etitioner, or the date indicated or declared by [P]etitioner in the feasibility study submitted to and approved by the Department of Environment and Natural Resources (DENR).

17. Respondent draws this argument from Section 4(g) of the DENR Department Administrative Order No. 95-23 (DAO 95-23 and Section 5(i) of DENR Department Administrative Order 96-40 (DAO 96-40), both of which define commercial operations as:

> 'xxx xxx xxx
>
> 'Commercial Production' refers to the production of sufficient quantity of minerals to sustain economic viability of mining operations reckoned from the date of commercial operations as declared by the Contractor or as stated in the feasibility study whichever comes first.
>
> xxx xxx xxx'

18. Since commercial production is to be reckoned either from the actual date declared by [P]etitioner or by the date stated in the feasibility study, whichever comes first, and since the commercial production is considered to be the reckoning point for the 5-year recovery period, then it follows that the recovery period itself should be reckoned from either of the two.

19. The feasibility study was filed with the Mines and Geosciences Bureau (MGB) of the DENR on 18 March 2005. It was approved on 11 October 2005 through an Order issued by the Secretary of the DENR. The Order confirmed that the contractor of the FTAA, [P]etitioner's predecessor, had submitted the feasibility study, and that the same had been preliminarily approved by the Director by the Director of the MGB. Since the feasibility study was submitted nearly eight (8) years ago, then it is also likely that the reckoning date for the determination of the recovery period is much earlier than when [P]etitioner claims it to be. Such being the case, [R]espondent respectfully submits that

the recovery period, the 5-eyar period within which [P]etitioner may recover its pre-operating expenses, had already prescribed.

Partaking of the nature of exemptions, claims for refund are strictly construed against the claimant and cannot be allowed unless granted in the most explicit and categorical language **(Sps. Aguilar vs. Commissioner of Internal Revenue, et al., CA G.R.SP No. 16432, March 30, 1999)**. Being in the nature of tax exemptions, these claims are regarded as in derogation of sovereign authority and to be construed strictissimi juris against the claimant and liberally in favor of the taxing authority **(Commissioner of Internal Revenue vs. Procter and Gamble Philippines Manufacturing Corporation, 204 SCRA 377)**

Claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation *(Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)* and such, they are looked upon with disfavour *(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211)*."

The Pre-Trial Conference was set and held on August 2, 2016.[11] In the meantime, the Respondent's Pre-Trial Brief was filed on May 17, 2016,[12] while the Pre-Trial Brief for Petitioner was submitted on July 29, 2016.[13]

The parties submitted their Joint Stipulation of Facts and Issues (JSFI) on August 12, 2016.[14] The Court then issued the Pre-Trial Order dated September 1, 2016,[15] deeming the termination of the Pre-Trial Conference.

Subsequently, Respondent transmitted to this Court the BIR Records for the instant case on November 18, 2016.[16]

The trial of the case proceeded.

During trial, Petitioner presented its documentary and testimonial evidence. It offered the testimonies of the following individuals, namely: (1) Atty. Joan D. Adaci-Cattiling,[17] Petitioner's Senior Vice President for Legal and

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[11] *Notice of Pre-Trial Conference* dated April 28, 2016, Docket – Vol. 1, pp. 227 to 228; Minutes of the hearing held on, and Order dated, August 2, 2016, Docket – Vol. 2, pp. 684, and 686 to 687, respectively.
[12] Docket – Vol. 1, pp. 243 to 246.
[13] Docket – Vol. 1, pp. 472 to 490.
[14] Docket – Vol. 1, pp. 688 to 700.
[15] Docket – Vol. 1, pp. 702 to 708.
[16] Respondent's *Compliance* dated November 18, 2016, Docket – Vol. 2, pp. 794 to 796.
[17] Exhibit "P-80", Docket – Vol. 3, pp. 1428 to 1445; Minutes of the hearing held on December 5, 2016, Docket – Vol. 2, p. 806.

Human Resources; (2) Ms. Josefina Mallari,[18] Petitioner's Finance Manager; and (3) Mr. Richard R. Lapres,[19] the Court-commissioned Independent Certified Public Accountant (ICPA).[20]

On October 2, 2017, Petitioner filed its Formal Offer of Evidence with Motion to Admit Secondary Evidence,[21] wherein Petitioner prayed that: (1) the offer of Petitioner's documentary evidence be admitted for the purposes for which they are offered; and (2) Exhibits "P-26" and "P-26-a" be admitted as secondary evidence together with the other exhibits offered therein. Respondent then filed on October 6, 2017 his Comment (Re: Petitioner's Formal Offer of Evidence).[22] Thereafter, Petitioner filed its Supplemental Omnibus Motion [(A) To Admit Supplemental Affidavit of Atty. Joan D. Adaci-Cattiling and Judicial Affidavit of Roberto A. Cortez; (B) To Set the Case for Hearing on the Introduction of Secondary Evidence; and (C) For Re-Marking of Secondary Evidence],[23] praying that (1) the Supplemental Judicial Affidavit of Atty. Adaci-Cattiling and Judicial Affidavit of Mr. Cortez attached to the supplemental omnibus motion, with attached exhibits be admitted; (2) the instant case be set for hearing on November 28, 2017 or at any later date and time as may be available in the Court's calendar, and that Petitioner's witness, Atty. Adaci-Cattiling, be recalled to testify on the basis of her Supplemental Judicial Affidavit dated November 10, 2017, and Mr. Cortez, be allowed to testify on the basis his Judicial Affidavit dated November 10, 2017; (3) a Commissioner's Hearing be set in this case for the permanent marking of Petitioner's Exhibits "P-26" and "P-26-a" and the marking of exhibits attached to the Supplemental Judicial Affidavit of Atty. Adaci-Cattiling and Judicial Affidavit of Mr. Cortez, at any date and time most convenient to the Court; and (4) Exhibits "P-26" and "P-26-a" be admitted as secondary evidence.

Respondent failed to file his comment on Petitioner's Supplemental Omnibus Motion.[24] Thus, in the Resolution dated December 29, 2017,[25] the Court granted Petitioner's Motion to Admit Secondary Evidence and Supplemental Omnibus Motion; admitted the Supplemental Judicial Affidavit of Atty. Adaci-Cattiling and Judicial Affidavit of Mr. Cortez as part of the records of the case; set a Commissioner's Hearing for the marking and re-marking of Petitioner's exhibits on January 16, 2018, and the hearing for Petitioner's Supplemental Omnibus Motion, on January 22, 2018, for the

[18] Exhibit "P-81", Docket – Vol. 3, pp. 1446 to 1457; Minutes of the hearing held on, and Order dated, January 30, 2017, Docket – Vol. 2, pp. 823 to 825.

[19] Exhibit "P-82-b", Docket – Vol. 2, pp. 892 to 897; Minutes of the hearing held on, and Order dated, August 29, 2017, Docket – Vol. 2, pp. 902 to 904.

[20] *Oath of Commission* dated June 6, 2017, Docket – Vol. 2, p. 880; *Judicial Affidavit [for Commissioning of Mr. Richard R. Lapres as Independent Certified Public Accountant]*, Docket – Vol. 2, pp. 874 to 876; Minutes of the hearing held on, and Order dated, June 6, 2017, Docket – Vol. 2, pp. 879 and 881, respectively.

[21] Docket – Vol. 2, pp. 912 to 943.

[22] Docket – Vol. 3, pp. 1458 to 1462.

[23] Docket – Vol. 3, pp. 1464 to 1471.

[24] Records Verification dated December 11, 2017 issued by the Judicial Records Division of this Court, Docket – Vol. 4, p. 1525.

[25] Docket – Vol. 4, pp. 1527 to 1528.

presentation of Petitioner's witnesses; and held in abeyance the initial presentation of evidence for Respondent until Petitioner finishes the presentation and formal offer of its additional evidence in support of its Supplemental Omnibus Motion.

To establish as secondary evidence the photocopy of the Memorandum dated October 7, 2005 issued by the Department of Environment and Natural Resources-Mines and Geosciences Bureau (DENR-MGB), Petitioner presented Atty. Adaci-Cattiling who testified by way of her Supplemental Judicial Affidavit.[26] Thereafter, the parties stipulated on the following: Petitioner's other witness Mr. Cortez sent letter-requests to the DENR-MGB for the issuance of certified true copies of the Memorandum dated October 7, 2005, and the letter requests were denied. Thus, the testimony of Mr. Cortez was dispensed with.

On January 29, 2018, Petitioner filed its Supplemental Formal Offer of Evidence,[27] praying that (1) the supplemental offer of Petitioner's documentary evidence, attached exhibits, including those which are in the custody of the Court and those appended to its records, be admitted as Petitioner's evidence for the purposes for which they are being offered; and (2) Exhibits "P-26" and 'P-26-a" be admitted as secondary evidence. Subsequently, Respondent filed on January 30, 2018 his Comment (Re: Petitioner's Supplemental Formal Offer of Evidence).[28]

In the Resolution dated December 10, 2018,[29] the Court, acting on both Petitioners' Formal Offer of Evidence with Motion to Admit Secondary Evidence and Supplemental Formal Offer of Evidence, denied the Motion to Admit Secondary Evidence, but admitted certain Exhibits of Petitioner, *except* for the following:

1. Exhibits "P-333-A", "P-336-A", "P-336-A", "P-394", "P-1022", "P-3015-A", "P-3080-A", "P-5210", "P-5582 to P-5582-A", "P-5672-A", "P-7216", "P-7571", "P-8617", "P-15853", "P-16067", "P-16068", "P-19302-N", "P-19365 to P-19367", "P-19657 to P-19659", "P-20569", "P-22360", "P-22686", "P-23014", "P-23249 to P-23251", "P-26606-1", "P-27308 to P-27311", "P-28054-A", "P-29900-A", "P-30816 to P-30817", "P-33887", "P-35073", "P-35391", "P-36322 to P-36324", "P-36804 to P-36805", "P-37404", "P-37772", "P-38035 to P-38038", "P-42696", "P-45940", "P-48107 to P-

[26] Exhibit "P-26-d", Docket – Vol. 3, Minutes of the hearing held on, and Order dated, January 22, 2018, Docket – Vol. 4, pp. 1532 and 1533 to 1534, respectively.
[27] Docket – Vol. 4, pp. 1535 to 1539.
[28] Docket – Vol. 4, pp. 1567 to 1571.
[29] Docket – Vol. 4, pp. 1577 to 1586.

48109", "P-49058", and "P-52791", for not being found in the records;
2. Exhibits "P-25" and "P-26", for failure to present the originals for comparison; and
3. The "Judicial Affidavit of Mr. Roberto A. Cortez dated November 10, 2017," and "Signature of Roberto A. Cortez on page 4 of his Judicial Affidavit dated November 10, 2017," for failure to identify the same.

As a consequence, Petitioner filed a Motion for Partial Reconsideration on January 3, 2019,[30] praying for the admission in evidence of Exhibits "P-25", "P-26", "P-26-a", "P-5582", "P-5582-A", and "P-37772". Respondent failed to file his comment on Petitioner's Motion for Partial Reconsideration.[31] In the Resolution dated April 22, 2019,[32] the Court partially granted Petitioner's Motion for Partial Reconsideration, admitting Exhibits "P-5582", "P-5582-A" and "P-37772", and *still* denied the admission of Exhibits "P-25" and "P-26", for failure to present the originals for comparison.

For his part, Respondent likewise presented his documentary and testimonial evidence. His lone witness is Mr. Saidamen T. Marohombsar,[33] a Revenue Officer II of the BIR.

Respondent filed his Formal Offer of Evidence on July 25, 2019.[34] On August 5, 2019, Petitioner filed its Comment to Respondent's Formal Offer of Evidence.[35] Thus, in the Resolution dated September 11, 2019,[36] the Court admitted Respondent's Exhibits, *except* for the following:

1. Exhibit "R-6", for failure of the exhibit formally offered to correspond with the document actually marked; and

2. Exhibit "R-7", for failure to identify the exhibit.

Subsequently, the Memorandum for Petitioner was filed on October 18, 2019;[37] while Respondent failed to file his Memorandum.[38]

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[30] Docket – Vol. 4, pp. 1587 to 1593.
[31] Records Verification dated February 8, 2019 issued by the Judicial Records Division of this Court, Docket – Vol. 4, p. 1607.
[32] Docket – Vol. 4, pp. 1616 to 1618.
[33] Exhibit "R-8", Docket – Vol. 2, pp. 848 to 851; Minutes of the hearing held on, and Order dated, July 25, 2019, Docket – Vol. 4, pp. 1619 to 1621.
[34] Docket – Vol. 4, pp. 1622 to 1626.
[35] Docket – Vol. 4, pp. 1629 to 1631.
[36] Docket – Vol. 4, pp. 1634 to 1635.
[37] Docket – Vol. 4, pp. 1636 to 1683.
[38] Records Verification dated October 28, 2019 issued by the Judicial Records Division of this Court, Docket – Vol. 4, p. 1686.

The case was deemed submitted for decision on November 12, 2019.[39]

Thereafter, Respondent filed on November 19, 2019 a Motion to Admit Attached Memorandum,[40] praying that the Court admit the Memorandum attached thereto.

In the Resolution dated December 17, 2019,[41] the Court granted Respondent's Motion to Admit, and admitted Respondent's Memorandum. The Court, however, specified that the case is still submitted for decision on November 12, 2019.

THE ISSUES

The parties submitted the following issues[42] for this Court's resolution, to wit:

> "A. Did Petitioner comply with the requirements under Section 229 of the 1997 NIRC for the recovery of internal revenue taxes that have been erroneously, wrongfully, illegally or excessively assessed or collected?
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> B. Is Petitioner exempt from excise tax during the so-called recovery period? If so, were the excise taxes paid by Petitioner on June 20, 2014, July 23, 2014, August 5, 2014, August 11, 2014, August 27, 2014, September 1, 2014, September 18, 2014, September 23, 2014, October 1, 2014, and October 15, 2014, covering removals of copper concentrates, and doré bars erroneously paid or illegally or wrongfully collected?
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> C. Whether or not Petitioner is entitled to refund in the amount of ₱136,407,793.17 allegedly representing excise taxes paid for the period June to December 2014?
>
> D. Did Respondent observe the proper procedural requirements before issuing the Assailed RMC?
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> E. May Respondent apply retroactively the revocation of the Ruling?
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> F. Did the revocation of the Ruling through the Assailed RMC violate the Non-Impairment Clause of the 1987 [C]onstitution?"

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[39] Resolution dated November 12, 2019, Docket – Vol. 4, p. 1688.
[40] Docket – Vol. 4,
[41] Docket – Vol. 4,
[42] Proposed Stipulation of Issues, JSFI, Docket – Vol. 2, pp. 689 to 690.

THE ARGUMENTS OF THE PARTIES

Petitioner argues that it complied with the requirements under Section 229 of the 1997 National Internal Revenue Code (NIRC), and Section 11 of Republic Act (RA) No. 1125, for the recovery of internal revenue taxes that have been erroneously, wrongfully, illegally or excessively assessed or collected; that it is exempt from excise tax until the end of the recovery period pursuant to the Financial and Technical Assistance Agreement (FTAA) dated June 20, 1994, Section 81 of the Philippine Mining Act, and Section 236 of DENR Administrative Order (DAO) 95-23; and the Court has jurisdiction to rule on the validity or constitutionality of Revenue Memorandum Circular (RMC) No. 17-2013; that the assailed RMC is null and void for failure to observe the proper procedural requirements before its issuance; that assuming arguendo that the revocation of the Ruling is valid, the retroactive application of the assailed RMC violates Section 246 of the 1997 NIRC; and that the tax exemption privilege of Petitioner under the FTAA is a contractual tax exemption granted by the government in exchange for a valid and material consideration, and thus, protected by the Non-Impairment Clause of the 1987 Constitution.

On the other hand, Respondent counter-argues that RMC No. 17-2013 is valid and constitutional; that even granting that Petitioner enjoyed a tax-exempt status during its recovery period, it is nevertheless no longer exempt from excise tax since the recovery period had already lapsed; and that claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation and as such, they are looked upon with disfavor.

THE RULING OF THE COURT

The Petition for Review lacks merit.

Petitioner Timely Filed Administrative and Judicial claims under Sections 204(C) and 229 of the NIRC of 1997

Sections 204(C) and 229 of the NIRC of 1997 read:

> "SEC. 204. *Authority of the Commissioner to Compromise/Abate and Refund or Credit Taxes.* — The Commissioner may —
>
> xxx xxx xxx

(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty**: *Provided, however,* that a return filed showing an overpayment shall be considered as a written claim for credit or refund." *(Emphasis added)*

"SEC. 229. ***Recovery of Tax Erroneously or Illegally Collected.*** — No suit or proceeding shall be maintained in any court for the recovery of any national **internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected,** until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." *(Emphases added)*

The aforequoted provisions are clear: within two (2) years from the date of payment of tax, the claimant must first file an administrative claim with Respondent before filing its judicial claim with the courts of law. **Both claims must be filed within a two (2)-year reglementary period. Timeliness of the filing of the claim is mandatory and jurisdictional,** and thus the Court cannot take cognizance of a judicial claim for refund filed either prematurely or out of time. It is worthy to stress that as for the judicial claim, tax law even explicitly provides that it be filed within two (2) years from payment of the tax "regardless of any supervening cause that may arise after payment."[43]

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[43] *Commissioner of Internal Revenue vs. San Miguel Corporation, etseq.*, G.R. Nos. 180740 and 180910, November 11, 2019.

In this case, Petitioner paid excise taxes on the subject copper concentrates and doré bars on June 20, 2014,[44] at the earliest. Counting two (2) years therefrom, Petitioner had until **June 20, 2016** within which to file claims for refund thereof.

Considering that Petitioner filed its administrative and judicial claims for refund on February 20, 2015[45] and on March 11, 2016,[46] respectively, Petitioner was able to timely file both its administrative and judicial claims within the two-year prescriptive period under the law.

Furthermore, the foregoing provisions allow the recovery of taxes erroneously or illegally collected. An "erroneous or illegal tax" is defined as one levied without statutory authority, or upon property not subject to taxation, or by some officer having no authority to levy the tax, or one which is some other similar aspect is illegal.[47]

Thus, Petitioner must not only establish that it has timely filed its refund claim. Perforce, it must likewise prove that the subject thereof is an "erroneous or illegal tax". At this juncture, it must be stated that the amount being refunded is not an erroneous or illegal tax.

Petitioner Not Exempt from Excise Tax; Collection Merely Deferred

Sections 81, 84, and 97 of RA No. 7942,[48] otherwise known as the "Philippine Mining Act of 1995", provide:

> "SEC. 81. *Government Share in Other Mineral Agreements.* — xxx
>
> **The Government share** <u>**in financial or technical assistance agreement**</u> **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.

[44] Exhibits "P-36" and "P-37", Docket – Vol. 3, pp. 1171 and 1172, respectively.

[45] Par. 5, Stipulation of Facts, JSFI, Docket – Vol. 2, p. 689.

[46] Docket – Vol. 1, pp. 10 to 43.

[47] *Commissioner of Internal Revenue vs. Pilipinas Shell Petroleum Corporation*, G.R. No. 188497, April 25, 2012, citing the definition provided in BLACK'S LAW DICTIONARY, Fifth Edition, p. 486.

[48] AN ACT INSTITUTING A NEW SYSTEM OF MINERAL RESOURCES EXPLORATION, DEVELOPMENT, UTILIZATION AND CONSERVATION.

> **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.**" *(Emphases and underscoring added)*

> "SEC. 84. *Excise Tax on Mineral Products.* — **The contractor shall be liable to pay the excise tax on mineral products as provided for under Section 151 of the National Internal Revenue Code**: *Provided, however*, That with respect to a mineral production sharing agreement, the excise tax on mineral products shall be the government share under said agreement." *(Emphasis and underscoring added)*

> "SEC. 97. *Non-payment of Taxes and Fees.* — **Failure to pay taxes and fees due the Government for two (2) consecutive years shall cause the cancellation of the** exploration permit, mineral agreement, **financial or technical assistance agreement** and other agreements and the re-opening of the area subject thereof to new applicants." *(Emphasis and underscoring added)*

A cursory reading of the foregoing provisions reveals that the intention of the legislature is to impose excise tax on mineral products as provided under Section 151 of the NIRC of 1997 on the concerned contractor[49] in a financial or technical assistance agreement[50]. As clearly worded, the foregoing provisions do not contemplate any excise tax exemption. In fact, it is even clear that failure to pay the said tax, *inter alia*, for two (2) consecutive years shall cause the cancellation of the said agreement. Thus, it was error for Petitioner to conclude that it enjoys excise tax exemption under RA No. 7942.

Nonetheless, on the basis of the last paragraph of Section 81 of RA No. 7942, it is clear that the said excise tax imposition shall form part, among others, of the share of the Government according to the pertinent financial or technical assistance agreement, and provides when the same may be collected. Thus, the last paragraph of Section 81 of RA No. 7942 created an exception to Section 130(A) of the NIRC of 1997, as to when the excise tax on mineral products should be paid. Said Section 130 reads:

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[49] Under Section 3(g) of Republic Act (RA) No. 7942, a "[c]ontractor" means "a qualified person acting alone or in consortium who is a party to a mineral agreement or to a financial or technical assistance agreement."

[50] Under Section 3(r) of RA No. 7942, a "[f]inancial or technical assistance" means "a contract involving financial or technical assistance for large-scale exploration, development, and utilization of mineral resources."

"SEC. 130. *Filing of Return and Payment of Excise Tax on Domestic Products.* –

(A) *Persons Liable to File a Return, Filing of Return on Removal and Payment of Tax.* –

(1) *Persons Liable to File a Return.* – Every person liable to pay excise tax imposed under this Title shall file a separate return for each place of production setting forth, among others, the description and quantity or volume of products to be removed, the applicable tax based and the amount of tax due thereon: xxx

xxx xxx xxx

(2) *Time for Filing of Return and Payment of Tax.* – Unless otherwise specifically allowed, the return shall be filed and the excise tax paid by the manufacturer or producer before removal of domestic products from place of production: xxx *Provided, further*, **That the excise tax on nonmetallic mineral or mineral products, or quarry resources <u>shall be due and payable upon removal of such products from the locality where mined or extracted</u>, but with respect to the excise tax on locally produced or extracted metallic mineral or mineral products, the person liable <u>shall file a return and pay the tax within fifteen (15) days after the end of the calendar quarter when such products were removed</u> subject to such conditions as may be prescribed by rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner.** xxx.

xxx xxx xxx." *Emphasis added)*

Specifically, unlike in the case of regular excise taxpayers under Section 151 of the NIRC of 1997 who are required to comply with the foregoing Section 130(B)(2), the collection of the excise tax on mineral products from a financial or technical assistance agreement contractor is merely deferred, or until it *"has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive"*, pursuant to the last paragraph of Section 81 of RA No. 7942.

Thus, for the instant claim for refund to prosper or for the subject excise tax paid to be refundable, it must be proven by Petitioner that the Government, through Respondent, has illegally or without authority collected the said excise tax. Succinctly put, the burden is on the taxpayer to show strict compliance with the conditions for the grant of the tax refund or credit.[51] Unfortunately, however, Petitioner failed to discharge this burden.

Section XI, paragraph 11.2 of the FTAA dated June 20, 1994,[52] to which Petitioner is an assignee of the original contractor (*i.e.*, Arimco Mining Corporation),[53] states the *"recovery period"* or the period within which Petitioner, as assignee to the said Agreement, may recover its Preoperating Expenses and Property expenses. It reads as follows:

> "11.2 Recovery of Preoperating Expenses, Property Expenses and Tax Paid During the Recovery Period. **The CONTRACTOR shall have a period of up to five (5) Contract Years, counted from the Date of Commencement of Commercial Production within which to recover its: (a) Preoperating Expenses; and (b) Property expenses incurred during the period in which Preoperating Expenses are recovered, after which period only shall the right of the GOVERNMENT to share in the Net Revenue, as hereinafter defined, accrue.**
>
> However, if after the lapse of the period mentioned in the preceding paragraph, the CONTRACTOR has not yet fully recovered its Preoperating Expenses and Property expense incurred during the period in which Pre-Operating Expenses were incurred, it shall be allowed to recover the same as a depreciation allowance deductible against the distributable Net Revenues over the period of the succeeding three Contract Years.
>
> Property expenses incurred during the period in which Preoperating Expenses are recovered shall not for the purpose of this Section include Major Capital Expenditure as defined in Section 11.7.
>
> **All taxes, duties, fees, costs, levies and imposts paid by the CONTRACTOR and which are detrimental to the CONTRACTOR's recovery of Preoperating Expenses and Property Expenses during the five (5) Contract Years contemplated in this Section shall be recoverable by the CONTRACTOR, whenever possible during the year(s) such expenditures were actually incurred. Any amount not recovered shall be deducted from the GOVERNMENT's Share as more specifically provided in Section 11.5 of this Agreement**, unless legislation is required to allow the necessary

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[51] CBK Power Company Limited vs. Commissioner of Internal Revenue, G.R. Nos. 198729-30, January 15, 2014.

[52] Exhibit "P-2", Docket – Vol. 2, pp. 956 to 1000 to Vol. 3, pp. 1001 to 1009.

[53] Exhibits "P-4", "P-4-a", and "P-5", Docket – Vol. 3, pp. 1020 to 1031.

> deductions, in which case the deductions shall be made only after the appropriate legislation has been passed.
>
> All the items recoverable by the CONTRACTOR under Section 11.2, including the on-going Mineral Exploration costs incurred by the CONTRACTOR during the five-year recovery period, shall be recovered from Net Revenue, as the term 'Net Revenue' is defined under Section 11.4 of this Agreement." [54] *(Emphases added)*

Parenthetically, certain phrases, as used in the foregoing stipulations, mean as follows:

> "2.10 **'Commercial Production'** means the production of sufficient quantity of minerals to sustain economic viability of Mining Operations as specified in the approved Work Program. Production of copper, gold and silver ore required to test and/or develop a processing system or supply a pilot plant used for such testing shall not be considered in the determination of Commercial Production."[55] *(Emphasis added)*
>
> "2.12 **'Contract Year'** means a period of twelve (12) consecutive months counted from the Effective Date of this Agreement or from the anniversary of such Effective Date.
>
> 2.13 **'CONTRACTOR'** means Arimco Mining Corporation and its assignee or assignees of any interest under this Agreement provided such assignment of any such interest is accomplished pursuant to the provisions hereof.
>
> 2.14 **'Date of Commencement of Commercial Production'** shall mean the first day of the calendar quarter following the quarter in which production equals fifteen percent (15%) of the project's initial annual design capacity as outlined in the Declaration of Mining Feasibility as hereinafter defined." [56]

Indeed, in accordance with the foregoing provisions, Petitioner, as assignee, and now, the contractor to the said FTAA dated June 20, 1994, is entitled to recover its Pre-operating and Property Expenses, for a period of five (5) years, which begins from the date of commencement of commercial production, before the right of the Government to share in the Net Revenue (which includes, *inter alia*, the collection excise taxes) accrues.

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[54] Exhibit "P-2", Docket – Vol. 2, pp. 979 to 980.
[55] *Id.*, Docket – Vol. 2, pp. 960 to 961.
[56] *Id.*, Docket – Vol. 2, p. 961.

Moreover, the FTAA dated June 20, 1994 contemplates and addresses the situation where, during the said five (5)-year period, taxes, among others, were paid by Petitioner. In such situation, the taxes paid may be recovered by Petitioner. However, the payment of the said taxes must be shown to be *"detrimental to the CONTRACTOR's recovery of Preoperating Expenses and Property Expenses"*; and to be recovered, whenever possible, *"during the year(s) such expenditures were actually incurred."* In any event, in case the same taxes are *not* recovered, the amount thereof should be deducted from the Government's share. In this latter case, Petitioner, in effect, acceded, as assignee to, and the present contractor of, the said FTAA, that the excise taxes paid during the said five (5)-year period that are not recovered, for any or whatever reason, would eventually be attributed to share of the Government.

In the letter dated March 27, 2013,[57] Petitioner advised the Secretary of the Department of Environment and Natural Resources as follows:

> "We are pleased to advise that on February 26, 2013, the Didipio Project was able to mill 301,903 tonnes and achieve the 15% production capacity. With this development, we wish to inform you that the Date of Commencement of Commercial Production in accordance with Section 2.14 of the FTAA is April 1, 2013, which is the first date of the second calendar quarter."

Thus, the "recovery period", in this case, started on April 1, 2013, and ended on March 31, 2018. Correspondingly, Petitioner was entitled to recover its Pre-operating and Property Expenses, within such period.

Petitioner, however, failed to prove that the payments of the subject excise taxes, during the said five (5)-year period, were detrimental to its recovery of the said Pre-operating and Property Expenses. There is no specific evidence to show such fact. But even granting that said fact was established, the same is still of no moment. This is so because, as already intimated, the payments of the excise taxes, during the said period, were not rendered illegal or unauthorized, pursuant to the above-quoted stipulation in the FTAA dated June 20, 1994, which states that should the tax payment not be recovered, the same would merely form part of the Government's share.

RMC No. 17-2003 Invalid for BIR's Failure to Observe Provisions of RMC No. 20-86; BIR Ruling No. 010-07, Likewise Void

[57] Exhibit "P-28", Docket – Vol. 3, p. 1096.

Petitioner contends that since RMC No. 17-2013 was never published and nor was it ever notified of its existence until it was able to secure its own copy, it is clear that the said RMC did not have the legal effect of validly revoking or reversing the Ruling issued to Petitioner on May 4, 2007.

On this score, *We* agree with Petitioner.

In *Commissioner of Internal Revenue vs. Court of Appeals, et al.*,[58] the Supreme Court held as follows:

> "Petitioner stresses on the wide and ample authority of the BIR in the issuance of rulings for the effective implementation of the provisions of the National Internal Revenue Code. Let it be made clear that such authority of the Commissioner is not here doubted. Like any other government agency, however, the CIR may not disregard legal requirements or applicable principles in the exercise of its quasi-legislative powers.
>
> **Let us first distinguish between two kinds of administrative issuances – a <u>legislative rule</u> and an <u>interpretative rule</u>.**
>
> In *Misamis Oriental Association of Coco Traders, Inc. vs. Department of Finance Secretary*,[59] the Court expressed:
>
>> 'x x x **a legislative rule is in the nature of subordinate legislation, designed to implement a primary legislation by providing the details thereof.** In the same way that laws must have the benefit of public hearing, it is generally required that before a legislative rule is adopted there must be hearing. In this connection, the Administrative Code of 1987 provides:
>>
>> 'Public Participation – If not otherwise required by law, an agency shall, as far as practicable, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule.
>>
>> '(2) In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon.

[58] *Cawad, et al., vs Abad, et al.*, G.R. No. 207145, July 28, 2015.
[59] *Id.*

'(3) In case of opposition, the rules on contested cases shall be observed.

'In addition such rule must be published. On the other hand, **<u>interpretative rules are designed to provide guidelines to the law which the administrative agency is in charge of enforcing.</u>**'

It should be understandable that when an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance for it gives no real consequence more than what the law itself has already prescribed. When, upon the other hand, the administrative rule goes beyond merely providing for the means that can facilitate or render least cumbersome the implementation of the law but substantially adds to or increases the burden of those governed, it behooves the agency to accord at least to those directly affected a chance to be heard, and thereafter to be duly informed, before the new issuance is given the force and effect of law.

xxx xxx xxx

Indeed, the BIR itself, in its RMC 10-86,[60] has observed and provided:

'RMC NO. 10-86

Effectivity of Internal Revenue Rules and Regulations

'It has been observed that one of the problem areas bearing on compliance with Internal Revenue Tax rules and regulations is lack or insufficiency of due notice to the tax paying public. Unless there is due notice, due compliance therewith may not be reasonably expected. And most importantly, their strict enforcement could possibly suffer from legal infirmity in the light of the constitutional provision on 'due process of law' and the essence of the Civil Code provision concerning effectivity laws, whereby due notice is a basic requirement (Sec. 1, Art. IV, Constitution; Art. 2, New Civil Code).

[60] SUBJECT: Notice, Publication and Effectivity of Internal Revenue Tax Rules and Regulations.

'In order that there shall be a just enforcement of rules and regulations, in conformity with the basic element of due process, the following procedures are hereby prescribed for the drafting, issuance and implementation of the said Revenue Tax Issues:

'(1). This Circular shall apply only to (a) Revenue Regulations; (b) Revenue Audit Memorandum Orders; and (c) Revenue Memorandum Circulars and Revenue Memorandum Orders bearing on internal revenue tax rules and regulations.

'(2). Except when the law otherwise expressly provides, the aforesaid internal revenue tax issuances shall not begin to be operative until after due notice thereof may be fairly presumed.

'Due notice of the said issuances may be fairly presumed only after the following procedures have been taken:

'xxx xxx xxx

'(5). Strict compliance with the foregoing procedure is enjoined.'

Nothing on record could tell us that it was either impossible or impracticable for the BIR to observe and comply with the above requirements before giving effect to its questioned circular.

xxx xxx xxx

All taken, the Court is convinced that the hastily promulgated RMC 37-93 has fallen short of a valid and effective administrative issuance." *(Emphases added)*

Based on the foregoing jurisprudential pronouncements, it is clear that there two (2) kinds of administrative issuances: (1) legislative rule, and (2) interpretative rule. Basically, a legislative rule is in the nature of subordinate legislation, designed to implement a primary legislation by providing the details thereof; while an interpretative rule is designed to provide guidelines to the law which the administrative agency is in charge of enforcing.[61]

[61] *Commissioner of Internal Revenue, et al. vs. Hypermix Feeds Corporation*, G.R. No. 179579, February 1, 2012.

On the basis of the foregoing distinction, *We* rule that **RMC No. 17-2013 is an interpretative rule**. This is so because the said issuance merely provided for the guidelines to the tax provisions of RA No. 7942, to wit:

> "Accordingly, FTAA contractors are liable to pay the taxes due under the NIRC and existing rules and regulations during and after their *'recovery period.'* This payment is in the nature of compliance with tax obligations and not in the nature of settling the *'government share'* under the FTAA."

This Court cannot consider RMC No. 17-2013 as a legislative rule for the reason that it is not in the nature of subordinate legislation, and it is not designed to implement RA No. 7942 by providing the details thereof. As can be gleaned from the above-quoted portion of RMC No. 17-2013, no details of RA No. 7942 was provided. The said BIR issuance gives no real consequence more than what RA No. 7942 itself has already prescribed, particularly, insofar as the imposition of taxes are concerned, even during the "recovery period". To reiterate, when an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance.

Nevertheless, **RMC No. 17-2013 is void**, for the failure of the BIR to observe its own rules as embodied in RMC No. 10-86. Similar to the above-quoted case, there is nothing on record showing that it was either impossible or impracticable for the BIR to observe and comply with the requirements prescribed under RMC No. 10-86 before giving effect to RMC No. 17-2013.

To be clear, however, it must be emphasized that **BIR Ruling No. 010-07 dated May 4, 2007**, which was revoked by RMC No. 17-2013, cannot still be relied upon by Petitioner for its excise tax exemption, simply because the same **is likewise void**. To recall, the said BIR Ruling held as follows:

> "WHEREFORE, in view of the foregoing, this Office confirms your opinion that APMI[62] is exempt from the payment of excise tax. Excise tax shall not be collected from APMI upon the date of approval of the Mining Project Feasibility Study up to the end of the recovery period. The recovery period shall be reckoned from the date of commercial operation and shall be for a maximum of five (5) years or until the date of actual recovery of its pre-operating, exploration and development expenses, whichever comes earlier, as provided under Section 81 of the Philippine Mining Act, its implementing rules and regulations particularly DAO 96-40; and the FTAA between the Philippine Government and APMI. It is understood that after the expiration of the said recovery period or until the date of aforesaid actual

[62] Petitioner's former name. Refer to Exhibit "P-6', Docket – Vol. 3, pp. 1032 to 1040.

> recovery, whichever comes earlier, APMI shall become subject to excise tax."

Notwithstanding the foregoing ruling, the same BIR Ruling No. 010-07 is explicit that the same *"is being issued* ***on the basis of the foregoing facts as represented. However, upon investigation, it will be disclosed that the facts are different, then this ruling shall be considered null and void."*** In other words, in the event it is shown that the representations made when such BIR Ruling was obtained no longer hold true or are already substantially different when the excise tax exemption is sought to be applied, such BIR Ruling is rendered void.

In the said BIR Ruling No. 010-07, the representations, *inter alia*, made by Petitioner when it requested a confirmation of its opinion, to which the BIR rendered the ruling of excise tax exemption, read:

> "It is represented that...under APMI's original BOI certificate of registration, APMI was expected to start commercial operations in June 2007, which was, however, extended to December 2007; **that APMI's initial commercial production is now expected to commence on the 4th quarter 2008...**" *(Emphasis added)*

In this case, however, unlike the representation made in the said BIR Ruling, it is clear that Petitioner's commencement of its commercial production only started on the 2nd quarter of 2013,[63] and not the *"on the 4th quarter 2008"*. Correspondingly, the said BIR Ruling contemplated a recovery period which started on October 1, 2008; while the recovery period in the instant case started only on April 1, 2013. Simply stated, the facts obtaining in this case are different from the representations made when it obtained BIR Ruling No. 010-07, thereby rendering it void. Correspondingly, Petitioner cannot validly invoke the excise tax exemption given under the said BIR Ruling.

In sum, Petitioner's claim for refund remains unsubstantiated, and its arguments, unpersuasive.

Our consistent ruling is that actions for tax refund, as in the instant case, are in the nature of a claim for exemption and the law is not only construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence presented entitling a taxpayer to an exemption is *strictissimi* scrutinized and must be duly proven.[64]

[63] Exhibit "P-28", Docket – Vol. 3, p. 1096.

[64] *Atlos Consolidated Mining ond Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.

WHEREFORE, in light of the foregoing considerations, the instant Petition for Review is **DENIED** for lack of merit.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

(With Concurring and Dissenting Opinion)
MARIA ROWENA MODESTO- SAN PEDRO
Associate Justice

ATTESTATION

I attest 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's Division.

ERLINDA P. UY
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, and the Division Chairperson's Attestation, 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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

OCEANAGOLD (PHILIPPINES), INC.,	**CTA CASE NO. 9289**
Petitioner,	Members: **UY,** *Chairperson,* **RINGPIS-LIBAN,** *and* **MODESTO-SAN PEDRO,** *JJ.*
-versus-	
COMMISSIONER OF INTERNAL REVENUE,	Promulgated:
Respondent.	OCT 07 2020 12:40 p.m.

x -- x

CONCURRING AND DISSENTING OPINION

MODESTO-SAN PEDRO, J.:

I concur with the *ponencia* in denying the Petition for Review.

However, I disagree on the conclusion reached in the *ponencia* that BIR Ruling No. 010-07 is null and void on the basis that the facts obtaining in the case are different from the representations made when petitioner obtained the ruling.

BIR Ruling No. 010-07 provides that the ruling shall be null and void if, upon investigation, it will be disclosed that the facts are different, to wit:

> "This ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be disclosed that the facts are different, then this ruling shall be considered null and void."

In said BIR Ruling No. 010-07, petitioner represented the expected commencement of its initial commercial production as follows:

> "It is represented that APMI is a corporation organized and existing under Philippine laws and is engaged in the mining industry; that it is a wholly-owned subsidiary of Oceana Gold Limited ("Oceana"), a company listed in the Australian and New Zealand Stock Exchanges; that recently, Oceana merged with the previous parent company of APMI, Climax Mining Ltd; that APMI is registered with the Philippine Board of Investments ("BOI") as a "new export producer of gold and copper concentrates" on a pioneer status; that under APMI's original BOI certificate of registration,

> **APMI was <u>expected</u> to start commercial operations in June 2007, which was, however, extended to December 2007; that APMI's initial commercial production is <u>now expected</u> to commence on the 4th quarter 2008; . . .**"[1]

In the *ponencia*, the Court ruled that the aforementioned statement rendered the BIR Ruling void because petitioner's commencement of its commercial production actually started on the 2nd quarter of 2013 and not on the 4th quarter of 2008.

However, a close reading of BIR Ruling No. 010-07 proves that there is no such misrepresentation of facts that will render the ruling null and void. In BIR Ruling No. 010-07, petitioner merely represented its **<u>expected</u>** commencement of commercial production. There was no representation as to the **<u>actual</u>** commencement date.

Moreover, the commencement of commercial production, whether actual or expected, will not substantially change respondent's interpretation of the relevant provisions Republic Act No. 7942 or the Philippine Mining Act of 1995 and DENR Administrative Order ("DAO") No. 96-40 and respondent's position that excise taxes shall not be collected up to the end of recovery period.

Finally, in BIR Ruling No. 010-07, respondent did not specifically identify the commencement of commercial production thereby recognizing that petitioner's representation as to commencement of commercial production is merely an approximation. The pertinent portion of the ruling reads:

> WHEREFORE, in view of the foregoing, this Office confirms your opinion that APMI is exempt from the payment of excise tax. Excise tax shall not be collected from APMI upon the date of approval of the Mining Project Feasibility Study up to the end of the recovery period. The recovery period shall be reckoned from the date of commercial operation and shall be for a maximum of five (5) years or until the date of actual recovery of its pre-operating, exploration and development expenses, whichever comes earlier, as provided under Section 81 of the Philippine Mining Act, its implementing rules and regulations particularly DAO 96-40; and the FTAA between the Philippine Government and APMI. It is understood that after the expiration of the said recovery period or until the date of aforesaid actual recovery, whichever comes earlier, APMI shall become subject to excise tax.

Given the foregoing, it is my opinion that the there is no misrepresentation as to the commencement of commercial production that will render BIR Ruling No. 010-07 null and void.

[1] Emphasis supplied.

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice