REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

OCEANAGOLD (PHILIPPINES), INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 9517
For: Tax Refund

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OCEANAGOLD (PHILIPPINES), INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9559
For: Tax Refund

Members:

CASTAÑEDA, JR., *Chairperson,*
MINDARO-GRULLA, and
BACORRO-VILLENA, *JJ.*

Promulgated:
FEB 03 2020
4:05 p.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision on April 22, 2019 are two (2) consolidated Petitions for Review[1], filed by OceanaGold (Philippines), Inc., seeking the refund or issuance of a tax credit certificate (TCC) of its alleged erroneous payment of excise taxes for the period of January to March 2015 in the amount of ₱80,140,751.85, and for the period of April to

[1] Petition for Review, CTA Case No. 9517, Docket, vol. I, pp. 10-43; Petition for Review, CTA Case No. 9559, Docket, vol. I, pp. 10-42.

June 2015 in the amount of ₱44,899,335.57, or in the aggregate amount of ₱125,040,087.42.[2]

Petitioner OceanaGold (Philippines), Inc. [formerly Australasian Philippines Mining Inc. (APMI)] 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.[3] It may be served with legal processes, orders and resolutions of this Court through its counsel, Baniqued & Baniqued, with office address at Suite 803, 8th Floor, Jollibee Centre, San Miguel Avenue, Ortigas Center, 1605 Pasig City.

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue (CIR) 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 Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Diliman, Quezon City.[4]

The material facts and events leading to this controversy are as follows:

On June 20, 1994, the Republic of the Philippines and Arimco Mining Corporation (AMC) entered into a Financial or Technical Assistance Agreement (FTTA), which involves the large–scale exploration, and subsequent development and commercial utilization of mineral deposits over a contract area spanning the Provinces of Nueva Viscaya and Quirino. A portion of the contract area under the FTAA covers that Didipio Gold-Copper Project (Didipio Project).[5]

On October 19, 1995, the Securities and Exchange Commission (SEC) approved the change of AMC's corporate name to Climax-Arimco Mining Corporation (CAMC).[6]

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[2] I. Summary of the Case, Pre-Trial Order, CTA Case No. 9517, Docket, vol. IV, p. 1601.
[3] Par.1, I. The Parties, Petition for Review, CTA Case No. 9517, Docket, vol. I, p. 10.
[4] Par. 1, I. Stipulation of Facts, Joint Stipulation of Facts and Issues, CTA Case No. 9517, Docket, vol. IV, p. 1588.
[5] Exhibit "P-2", CTA Case No. 9517, Docket, vol. IV, pp. 1754-1808; A-9 and A-13, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, pp. 898-899.
[6] Exhibit "P-3", CTA Case No. 9517, Docket, vol. IV, pp. 1809-1817; A-10, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 898.

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Then, on December 23, 1996, CAMC entered into an Assignment, Accession and Assumption Agreement with Australasian Philippines Mining Inc. (APMI), whereby CAMC transferred to APMI all its rights and obligation under FTTA.[7] The same was amended and restated in the Assignment, Accession and Assumption Agreement (Amended and Restated) on September 15, 2004.[8]

On December 9, 2004, the Department of Environment and Natural Resources (DENR) approved the Transfer of the Financial or Technical Assistance Agreement Denominated as FTAA No. 001.[9]

Thereafter, on March 3, 1995, the Congress enacted Republic Act No. 7942, otherwise known as the "Philippine Mining Act of 1995".

After identifying a portion of the Exploration Contract Area that would be suitable for Didipio Project, petitioner filed a Partial Declaration of Mining Feasibility (PDMF) with the DENR on March 15, 2005.[10]

On August 15, 1995, the implementing rules and regulations of RA No. 7942 in the form of Department of Environment and Natural Resources (DENR) Administrative Order (DAO) No. 95-23, became effective. In December 1999, the DENR promulgated DAO No. 99-56 providing the guidelines establishing the fiscal regime of FTTAs.[11]

On October 11, 2005, the DENR issued an Order approving the aforesaid PDMF which, includes, among others the Mining Project Feasibility Study (MPFS). [12]

On February 13, 2007, petitioner requested respondent to make a ruling regarding petitioner's exemption from the payment of excise tax on minerals during the recovery period. In response to the said request, the BIR issued BIR Ruling No. 10-2007 on May 4, 2007,

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[7] Exhibit "P-4", CTA Case No. 9517, Docket, vol. IV, pp. 1818-1821; A-11, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 898.

[8] Exhibit "P-4-a", CTA Case No. 9517, Docket, vol. III, pp. 973-976; A-11, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 898.

[9] Exhibit "P-5", CTA Case No. 9517, Docket, vol. IV, pp. 1827-1829; A11, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 898.

[10] A-19, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, pp. 900-901; Exhibit "P-7", CTA Case No. 9517, Docket, vol. IV, pp. 1838-1840.

[11] Par. 7, III. The Material Facts and Antecedent Proceedings, CTA Case No. 9517, Docket, vol. I, p. 12.

[12] A-21 to A-23, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 901; Exhibit "P-8", CTA Case No. 9517, Docket, vol. IV, pp. 1841-1842.

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confirming APMI's exemption from the payment of excise tax from the date of approval of the MPFS up to the end of the recovery period, which 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.[13]

On June 1, 2007, the SEC approved the change of APMI's corporate name to OceanaGold (Philippines), Inc.

In 2008, petitioner alleged that it was constrained to halt further mine development in the Didipio Project due to escalating costs and uncertainty in the financial market. This, accordingly, placed the Didipio Project under "care and maintenance" from December 2008 until December 2010.[14]

In December 2010, petitioner claimed that it resumed its development work in Didipio Project after completing a strategic review and securing additional funding.[15]

In late 2012, petitioner claimed that it successfully commenced the commissioning of the Didipio Project, and mined and stockpiled approximately 800,000 metric tons (MT) of ore for further processing. Thereafter, it allegedly commenced its ore milling operations to produce copper concentrates.[16]

On September 3, 2012, the BIR issued Mission Order No. 00030182, authorizing its revenue officers to search petitioner's premises for articles subject to excise tax and to detain packages containing excisable articles.[17] The same was served to petitioner on December 7, 2012, which resulted to the seizure/detention of 800,000 MT of mineral ores, covered by Apprehension Slip No. 00013424.[18]

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[13] Exhibit "P-25, Docket, vol. IV, pp. 1882-1887; A49, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 906

[14] A-24 to A-25, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 901.

[15] A-26 to A-27, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, pp. 901-902.

[16] A-28, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 902.

[17] Exhibit "P-10", CTA Case No. 9517, Vol. IV, p. 1846; A-32 to A-33, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 903;

[18] A-34 and A-36, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 903; Exhibit P-11, CTA Case No. 9517, Docket, vol. IV, p. 1847.

On December 11, 2012, petitioner sent a letter dated December 10, 2012 to the BIR protesting the detention of 800,000 MT based on the following grounds: (i) the mineral ores had not yet been removed, therefore, excise tax, if any, is not yet due; and (ii) petitioner is exempt from excise tax pursuant to BIR Ruling No. 10-2007.[19]

On January 14, 2013, petitioner obtained an Ore Transport Permit (OTP) from the Mines and Geosciences Bureau (MGB), authorizing the sale and delivery of the 5,500 MT of copper concentrates from the Didipio mine site up to the shipping point in Poro Point, La Union. The MGB issued another OTP on February 13, 2013, extending the original OTP up to March 13, 2013.[20]

Meanwhile, on February 11 and 12, 2013, respondent seized and detained a total of 100 MT copper concentrates, with estimated value of US$320,000.00, covered by Apprehension Slip Nos. APS 2003 00013426 and 2003 00013427, while the same were allegedly being transported to petitioner's buyer.[21]

On February 13, 2013, petitioner received a letter from CIR dated December 12, 2012, impliedly denying petitioner's letter-protest dated December 10, 2012.[22]

Thereafter, on February 15, 2013, the CIR issued the assailed Revenue Memorandum Circular (RMC) No. 17-2013, revoking and invalidating BIR Ruling No. 10-2007. In the said RMC, the BIR ruled, among others, that FTAA contractors, including petitioner, are subject to excise tax during and after period of recovery. [23]

On February 20, 2013, respondent seized and detained a total of 160 MT copper concentrates (with estimated value of US$512,000.00).[24]

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[19] A-37 to A-38, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, pp. 903-904; Exhibit P-12, CTA Case No. 9517, Docket, vol. IV, pp. 1848-1849.

[20] A-29 to A-30, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 902; Exhibits "P-9" and "P-9-a", CTA Case No. 9517, Docket, vol. III, pp. 996-998.

[21] Exhibit "P-13", CTA Case No. 9517, Docket, vol. III, p. 1023; Exhibit "P-14", CTA Case No. 9517, Docket, vol. III, p. 1024; A-40 to A-41, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 904.

[22] Exhibit "P-29", CTA Case No. 9517, Docket, vol. IV, p. 1895; A58, Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 908.

[23] A-62, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 909; Exhibit "P-30", CTA Case No. 9517, Docket, vol. III, pp. 1048-1050.

[24] Covered by Eight (8) Apprehension Slips, Exhibits "P-15" to "P-22", CTA Case No. 9517, Docket, vol. III, pp. 1025-1032; A67, Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 910.

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On February 25 and 26, 2013, petitioner paid under protest the excise taxes in the amounts of ₱13,942,179.39 and ₱417,743.20, respectively.[25]

On March 1, 2013, respondent seized and detained 40 MT of tax-paid copper concentrates. Said copper concentrates were, accordingly, part of the 5,500 MT MGB-approved OTP, which petitioner already paid.[26]

Subsequently, on March 27, 2013, petitioner advised Ramon J. P. Paje, the Secretary of DENR that, "on February 26, 2013, the Didipio Project was able to mill 301,903 tonnes and achieve the 15% production capacity." Thus, "the Date of Commencement of Commercial Production in accordance with Section 2.14 of the FTAA is on April 1, 2013, which is the first day of the second calendar quarter."[27]

On January 9, 2017, petitioner filed its administrative claim for refund or issuance of TCC, with the Excise LT Audit Division I of the BIR, seeking recovery of the alleged erroneous payment of excise taxes on petitioner's removals of mineral ores and copper concentrates.[28] The details[29] of petitioner's payments of excise taxes under protest covered by the instant Petitions are as follows:

Quarter	Date of Payment	Amount of Excise Tax Paid	Total by Quarter
Q1 2015	01.12.2015	23,931,567.93[30]	
	01.14.2015	1,553,779.83[31]	
	02.04.2015	4,058,434.84[32]	
	02.05.2015	11,810,601.99[33]	
	02.16.2015	11,708,150.39[34]	

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25 Par. 28, Memorandum for Petitioner, CTA Case No. 9517, Docket, vol. V, p. 2287.

26 Covered by Two (2) Apprehension Slips, Exhibits "P-23" to "P-24", CTA Case No. 9517, Docket, vol. III, pp. 1033-1034; Par. 29, Memorandum for the Petitioner, CTA Case No. 9517, Docket, vol. V, p. 2288.

27 Exhibit "P-28", CTA Case No. 9517, Docket, vol. IV, pp. 1893-1894.

28 Exhibit "P-32", CTA Case No. 9517, Docket, vol. IV, pp. 1896-1906; A-69, Affidavit of Atty. Joan D. Adaci-Cattiling, CTA Case No. 9517, Docket, vol. III, p. 911.

29 Par. 31, Memorandum for Petitioner, CTA Case No. 9517, Docket, vol. V, p. 2288.

30 Exhibits "P-35" to "P-37", CTA Case No. 9517, Docket, vol. IV, pp.1957-1972.

31 Exhibits "P-38" to "P-39", CTA Case No. 9517, Docket, vol. IV, pp. 1973-1974.

32 Exhibits "P-40" to "P-42", CTA Case No. 9517, Docket, vol. IV, pp. 1975-1985.

33 Exhibits "P-43" to "P-45", CTA Case No. 9517, Docket, vol. IV, pp. 1986-1999.

34 Exhibits "P-46" to "P-48", CTA Case No. 9517, Docket, vol. IV, pp. 1999-2011.

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	02.18.2015	11,226,106.85[35]	
	02.23.2015	10,630.30[36]	
	03.10.2015	10,868,632.74[37]	
	03.16.2015	4,972,846.98[38]	₱80,140,751.85[39]
Q2 2015	04.04.2015	11,740,289.36[40]	
	04.21.2015	12,926,776.41[41]	
	04.29.2015	4,736,479.84[42]	
	06.11.2015	11,204,131.29[43]	
	06.24.2015	4,291,658.67[44]	₱44,899,335.57[45]
	Total		**₱125,040,087.42**

Alleging inaction of respondent on its claim for refund or issuance of TCC, petitioner filed the subject Petitions for Review on January 11, 2017 and March 31, 2017, respectively, seeking for the Court to:

a. CTA Case No. 9517 — render a judgment declaring petitioner entitled to a refund or issuance of TCC in the amount of ₱80,140,751.85, representing alleged erroneously paid and illegally and wrongfully collected excise taxes for the period from January to March 2015; and order respondent to refund or to issue a TCC in favor of petitioner the said amount.

b. CTA Case No. 9559 — render a judgment declaring petitioner entitled to a refund or issuance of TCC in the amount of ₱44,899,335.57, representing alleged erroneously paid and illegally and wrongfully collected excise taxes for the period from April to June 2015; and order respondent to refund or to issue a TCC in favor of petitioner the said amount.

On March 28, 2017, respondent filed his Answer (To the Petition for Review dated 11 January 2017) for CTA Case No. 9517, interposing the following special and affirmative defenses[46]:

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35 Exhibits "P-49" to "P-51", CTA Case No. 9517, Docket, vol. IV, pp. 2012-2024.
36 Exhibits "P-52" to "P-53", CTA Case No. 9517, Docket, vol. IV, pp. 2025-2026.
37 Exhibits "P-54" to "P-56", CTA Case No. 9517, Docket, vol. IV, pp. 2027-2039.
38 Exhibits "P-57" to "P-59", CTA Case No. 9517, Docket, vol. IV, pp. 2040-2052.
39 A-9, Judicial Affidavit of Richard R. Lapres, CTA Case No. 9517, Docket, vol. IV, p. 1633.
40 Exhibits "P-60" to "P-62", CTA Case No. 9517, Docket, vol. IV, pp. 2053-2065.
41 Exhibits "P-63" to "P-65", CTA Case No. 9517, Docket, vol. IV, pp. 2066-2078.
42 Exhibits "P-66" to "P-68", CTA Case No. 9517, Docket, vol. IV, pp. 2079-2091.
43 Exhibits "P-69" to "P-71", CTA Case No. 9517, Docket, vol. IV, pp. 2094-2104.
44 Exhibits "P-72" to "P-74", CTA Case No. 9517, Docket, vol. IV, pp. 2105-2115.
45 A-9, Judicial Affidavit of Richard R. Lapres, CTA Case No. 9517, Docket, vol. IV, p. 1633.
46 CTA Case No. 9517, Docket, vol. I, pp. 214-220.

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"4. Respondent hereby reiterates and repleads the preceding paragraphs of this Answer as part of his Special and Affirmative Defenses:

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

6. Petitioner must prove that the amount of ₱80,140,751.85 representing excise taxes allegedly paid by petitioner for the period January to March 2015 was properly substantiated by supporting documents.

7. 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.

8. 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.

9. 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 respondent's employees.

10. 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:

> 'x x x x x x x x x
>
> 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 have the effect of law. (Davis, op. cit., p. 194).

A rule is binding on the courts so long 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.

xxx xxx xxx'

11. RMC 17-2013 was meant as a guide for respondent'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 1997) already prescribe. An examination of RMC 17-2013 reveals that respondent 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 respondent merely cited the law and interpreted the same.

12. 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, respondent respectfully submits that since RMC 17-2013 is an interpretative ruling, he was not amiss in not publishing it and in not furnishing petitioner with a copy thereof.

13. 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.

14. Even if respondent assumes for a moment but not concedes that petitioner enjoyed a tax-exempt status during its

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recovery period, this exemption was not extended indefinitely upon petitioner. 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 petitioner no longer enjoys a tax exemption.

15. The supposed tax-exempt status may be traced from petitioner'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 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, accrues.
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> xxx xxx'

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

> 'SECTION 81. Government in Other Mineral Agreements.
>
> xxx xxx xxx
>
> The Government share in financial or technical assistance agreement, shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.
>
> The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its preoperating expenses, exploration, and development expenditures, inclusive.'

17. Although this tax holiday scheme allowed petitioner to recover up to the full extent of its pre-operating expenses,

petitioner 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 respondent 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, respondent respectfully submits that the recovery period does not necessarily have to be reckoned from petitioner's actual commencement of commercial operations. Respondent maintains that the reckoning point for the 5-year recovery period may either be the actual commencement of commercial operations, as argued by petitioner, or the date indicated or declared by petitioner in the feasibility study submitted to and approved by the Department of Environment and Natural Resources (DENR).

18. 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 x x x 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 operation as declared by Contractor or as stated in the feasibility study whichever comes first.
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> xxx x x x xxx

19. Since commercial production is to be reckoned either from the actual date declared by petitioner 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.

20. 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 FTTA, petitioner'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 petitioner claims it to be. Such being the case, respondent respectfully submits that the recovery period, the 5-year period within which petitioner may recover its pre-operating expenses, had already expired.

21. 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)**.

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

Meanwhile, for CTA Case No. 9559, respondent raised the following affirmative defenses in his Answer filed on June 22, 2017, *viz:*

"I. THE HONORABLE COURT HAS NO JURISDICTION OVER THE INSTANT PETITION

8. It is settled that what determines the nature of the action and which court has jurisdiction over it are the allegations in the complaint and the character of the relief sought.

8.1 A perusal of the instant petition would readily show that it is not a mere claim for refund or issuance of a tax credit for alleged erroneously paid taxes, for it is in fact primarily questioning the validity of RMC 17-2013.

8.2 This is confirmed by the fact that petitioner exhaustively discussed in paragraphs 55 to 66 of the petition why RMC 17-2013 is null and void. Petitioner likewise referred to RMC 17-2013 as the 'Assailed RMC'. Undeniably, the core issue of the instant Petition is the validity of RMC 17-2013.

8.3 RMC 17-2013 is an interpretation of Sections 83 to 89 of RA 7942. As such, it is presumed to be valid interpretation of the tax code until revoked by the Secretary of Finance himself.

8.4 Clearly, RMC 17-2013 was issued in the exercise of CIR's power to interpret tax laws as provided for in Section 4 of the NIRC of 1997, as amended; *viz*:

> **'Sec. 4. Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.**— The power to interpret the provision of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.
>
> The power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals.'

8.5 When an administrative agency, such as the BIR, renders an opinion by means of a circular or memorandum, it merely interprets a pre-existing law. Thus, RMC 17-2013 falls under the quasi-legislative power of the CIR as provided for in the first paragraph of Section 4.

8.6 In *Petron Corporation vs. CIR,* this Court ruled that:

> 'Under the second paragraph of Section 4, respondent CIR has the power to decide on administrative cases which includes, 'other matters.' These 'other matters' pertain to disputes such as the determination if the warrant of distraint and levy issued by the BIR is valid; if the Waiver of Statute of Limitations was validly effected and determination if the BIR's right to collect taxes has prescribed. **With the nature of 'other matters' as previously enumerated, there is no way an action of the CIR through issuance of a BIR Ruling can be classified as 'other matters'. The BIR Ruling is simply an interpretation of a provision of tax code in the exercise of its quasi-legislative power. To classify the BIR Ruling as 'other matters' will**

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render inoperative the first paragraph. *(Emphasis supplied)*

II. PETITIONER FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

9. Time and again, the Supreme Court consistently declared that the doctrine of exhaustion of administrative remedies is a cornerstone of our judicial system. The thrust of the rule is that courts must allow administrative agencies to carry out their functions and discharge their responsibilities within the specialized areas of their respective competence.

9.1 As provided for in Section 4 of the NIRC of 1997, as amended, the power to review CIR rulings issued in relation to the CIR's power to interpret tax laws belong to the Secretary of Finance.

9.2 Moreover, in the recent case of *Commissioner of Internal Revenue vs. Court of Appeals and Petron Corporation*, the Court expressly held that,

' x x x that CIR correctly argues that the CTA had no jurisdiction to take cognizance of the Petition as its resolution would necessarily involve a declaration of the validity of the constitutionality of the CIR's interpretation of Section 148 (e) of the NIRC, which is subject to the exclusive review by the Secretary of Finance and ultimately by the regular court.'

9.3 In the instant petition, petitioner did not appeal before the Secretary of Finance. Prior to elevating the case to this Court, petitioner should have questioned RMC 17-2013 before the Secretary of Finance. Only after the Secretary of Finance adversely ruled on its appeal can petitioner come to Court.

9.4 While it is true that the rule admits of exceptions, there is no showing in the instant petition that it falls in one of the exceptions.

9.5 Thus, when the law provides for a remedy against a certain action of an administrative board, body, or officer, relief to the courts can be made only after exhausting all remedies provided therein.

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> 9.6 It is settled that the non-observance of the doctrine of exhaustion of administrative remedies results in lack of cause of action, which is one of the grounds in the Rules of Court justifying the dismissal of the complaint.
>
> 9.7 In view of petitioner's failure to exhaust administrative remedies when it directly elevated to the CTA the CIR Ruling before appealing it first to the Secretary of Finance, respondent respectfully submits that the instant Petition should be dismissed."

Thereafter, on March 31, 2017, a Notice of Pre-Trial Conference[47] was issued by the Court for CTA Case No. 9517, setting the case for pre-trial conference on April 27, 2017, while the Notice of Pre-Trial Conference for CTA Case No. 9559 was issued by the Court on June 28, 2017, setting the case for pre-trial conference on July 20, 2017.

Within the extension of time granted[48] by the Court, both parties filed their Joint Stipulation of Facts and Issues[49] on May 29, 2017.

On May 31, 2017, petitioner filed an Omnibus Motion A. To Consolidate CTA Case Nos. 9517 and 9559; B. To Postpone Hearing on June 5, 2017; and C. To Defer Commissioning of Independent Certified Public Accountant.[50]

Subsequently, the Court issued the Pre-Trial Order[51] on June 1, 2017.

On July 6, 2017, the Court issued a Resolution[52] granting petitioner's Motion to Consolidate filed by petitioner; ordering both parties to file their respective consolidated pre-trial briefs; and, cancelling the initial presentation of evidence for the petitioner and the hearing of petitioner's Motion to Commission an ICPA in CTA Case No. 9517.

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[47] CTA Case No. 9517, Docket, vol. I, pp. 222-223.
[48] Until May 27, 2017, as per Order dated May 18, 2017, CTA Case No. 9517, Docket, vol. II, p. 669.
[49] CTA Case No. 9517, Docket, vol. II, pp. 670-680.
[50] CTA Case No. 9517, Docket, vol. II, pp. 681-685.
[51] CTA Case No. 9517, Docket, vol. II, pp. 690-697.
[52] CTA Case No. 9517, Docket, vol. II, pp. 701-702.

In compliance, the Consolidated Pre-Trial Brief for Petitioner[53] and the Respondent's Consolidated Pre-Trial Brief[54] were both filed on July 17, 2017.

The pre-trial conference ensued.[55] The Parties submitted their Joint Stipulation of Facts and Issues[56] on August 4, 2017, which was approved and adopted in the Pre-Trial Order[57] dated August 16, 2017.

During trial, petitioner presented the following witnesses: (i) Atty. Joan Adaci-Cattiling[58], petitioner's Senior Vice President for Legal and Human Resources; (ii) Richard R. Lapres[59], the Court-commissioned Independent Certified Public Accountant (ICPA); (iii) Josefina Mallari[60], petitioner's Finance Manager; and, Roberto A. Cortez[61], petitioner's Tenements Supervisor.

After completing their respective testimonies, petitioner filed its Formal Offer of Evidence[62] on January 22, 2018, and its Supplemental Formal Offer of Evidence[63] on March 1, 2018.

Petitioner offered the following exhibits, to wit:

Exhibit:	**Description:**
P-1	Certificate of Filing of Amended Articles of Incorporation issued by the Securities and Exchange Commission (SEC) on January 7, 2015
P-2	Financial or Technical Assistance Agreement (FTAA) dated June 20, 1994 executed by the Government of the Republic of the Philippines and Arimco Mining Corporation (AMC)
P-3	Amended Articles of Incorporation of AMC issued by the SEC dated October 19, 1995
P-4	Assignment, Accession and Assumption Agreement executed on December 23, 1996 between CAMC and Autralasian Philippines Mining Inc. (APMI)

53 CTA Case No. 9517, Docket, vol. III, pp. 1535-1555.
54 CTA Case No. 9517, Docket, vol. III, pp. 1556-1560.
55 As per Minutes of the Hearing dated July 20, 2017, CTA Case No. 9517, Docket, vol. IV, p. 1561.
56 CTA Case No. 9517, Docket, vol. IV, pp. 1588-1599.
57 CTA Case No. 9517, Docket, vol. IV, pp. 1601-1611.
58 Minutes of the Hearing dated August 30, 2017, Docket, vol. IV, p. 1620; Minutes of the Hearing dated February 21, 2018, Docket, vol. V, p. 2128.
59 Minutes of the Hearing dated August 30, 2017, Docket, vol. IV, p. 1620; Minutes of the Hearing dated October 9, 2017, CTA Case No. 9517, Docket, vol. IV, p. 1640.
60 Minutes of the Hearing dated December 6, 2017, CTA Case No. 9517, Docket, vol. IV, p. 1651.
61 Minutes of the Hearing dated February 21, 2018, Docket, vol. V, p. 2128.
62 CTA Case No. 9517, Docket, vol. IV, pp. 1657-1691.
63 CTA Case No. 9517, Docket, vol. V, pp. 2130-2136.

P-4-a	Amended and Restated Assignment, Accession and Assumption Agreement executed on September 15, 2004 between CAMC and APMI
P-5	Order dated December 9, 2004 of the Secretary of the DENR
P-6	Certificate of Filing of Amended Articles of Incorporation issued by the SEC on June 1, 2007
P-7	Partial Declaration of Mining Feasibility (PDMF) dated March 15, 2005
P-8	Order dated October 11, 2005 issued by the DENR approving the PDMF
P-9	Ore Transport Permit OTP dated February 13, 2013
P-9-a	OTP dated January 14, 2013
P-10	Mission Order No. 0030182 dated September 3, 2012
P-11	Apprehension Slip No. 00013424
P-12	Letter dated December 10, 2012 stamped received by the BIR on December 11, 2012 addressed to OIC-Regional Director Thelma S. Milbao and OIC Asst. Revenue District Officer (ARDO) Ma. Isabel D. Utit by petitioner
P-13	Apprehension Slip No. 00013426
P-14	Apprehension Slip No. 00013427
P-15	Apprehension Slip No. 00013051
P-16	Apprehension Slip No. 00013054
P-17	Apprehension Slip No. 00013060
P-18	Apprehension Slip No. 00013052
P-19	Apprehension Slip No. 00013053
P-20	Apprehension Slip No. 00013055
P-21	Apprehension Slip No. 00013059
P-22	Apprehension Slip No. 00006245
P-23	Apprehension Slip No. 00013451
P-24	Apprehension Slip No. 00013452
P-25	BIR Ruling No. 10-2007 dated May 4, 2007 (i.e., the Ruling)
P-26	Department of Environment and Natural Resources – Mines Geosciences Bureau (DENR- MGB) Memorandum dated October 7, 2005, on the Partial Declaration of Mining Project Feasibility (PDMF) for the Didipio Gold/Copper Project of Australasian Philippines Mining, Inc. (APMI) under FTAA No. 001
P-26-a	Paragraph 5 of DENR MGB Memorandum dated October 7, 2005
P-26-b	Petitioner's letter to DENR-MGB dated January 8, 2014 requesting certified true copies, among others, of Memorandum dated October 7, 2005, on the PDMF, with attached photocopies of the requested documents
P-26-c	Letter to DENR-MGB dated July 25, 2017 requesting certified true copies, among others, of Memorandum dated October 7, 2005, on the PDMF, with attached photocopies of the requested documents

P-26-d	Supplemental Judicial Affidavit of Atty. Joan D. Adaci-Cattiling dated January 19, 2018
P-26-e	Signature of Atty. Joan D. Adaci-Cattiling on page 3 of her Supplemental Judicial Affidavit dated January 19, 2018
P-26-f	Judicial Affidavit of Mr. Roberto A. Cortez dated January 19, 2018
P-26-g	Signature of Roberto A. Cortez on page 4 of his Judicial Affidavit dated January 19, 2018
P-27	Summary of the pre-operating expenses
P-28	Petitioner's letter dated March 27, 2013 to the DENR
P-29	Letter dated December 12, 2012 of RDO 14
P-32	Petitioner's letter claim for refund or tax credit filed by petitioner on January 9, 2017 with the Excise LT Audit Division I
P-34	Certificate of Registration dated January 1, 1997 issued by the BIR
P-35	Petitioner's letter dated January 8, 2015 re: payment under protest of excise tax in the amount of P23,931,567.93
P-36	BIR eFPS Confirmation Page confirming the payment of excise tax in the amount of P23,931,567.93
P-37	Excise Tax Return confirming the payment of excise tax in the amount of P23,931,567.93
P-38	BIR eFPS Confirmation Page confirming the payment of excise tax in the amount of P1,553,779.83
P-39	Excise Tax Return confirming the payment of excise tax in the amount of P1,553,779.83
P-40	Petitioner's letter dated February 2, 2015 re: payment under protest of excise tax in the amount of P4,058,434.84
P-41	BIR eFPS Confirmation Page confirming the payment of excise tax in the amount of P4,058,434.84
P-42	Excise Tax Return confirming the payment of excise tax in the amount of P4,058,434.84
P-43	Petitioner's letter dated February 5, 2015 re: payment under protest of excise tax in the amount of P11,810,601.99
P-44	BIR eFPS Confirmation Page confirming the payment of excise tax in the amount of P11,810,601.99
P-45	Excise Tax Return confirming the payment of excise tax in the amount of P11,810,601.99
P-46	Petitioner's letter dated February 13, 2015 re: payment under protest of excise tax in the amount of P11,708,150.39
P-47	BIR Efps Confirmation Page confirming the payment of excise tax in the amount of P11,708,150.39
P-48	Excise Tax Return confirming the payment of excise tax in the amount of P11,708,150.39

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P-49	Petitioner's letter dated February 17, 2015 re: payment under protest of excise tax in the amount of P11,226,106.85
P-50	BIR eFPS Confirmation Page confirming the payment of excise tax in the amount of P11,226,106.85
P-51	Excise Tax Return confirming the payment of excise tax in the amount of P11,226,106.85
P-52	BIR eFPS Confirmation Page confirming the payment of excise tax in the amount of P10,630.30
P-53	Excise Tax Return confirming the payment of excise tax in the amount of P10,630.30
P-54	Petitioner's letter dated March 10, 2015 re: payment under protest of excise tax in the amount of P10,868,632.74
P-55	BIR eFPS Confirmation Page confirming the payment of excise tax in the amount of P10,868,632.74
P-56	Excise Tax Return confirming the payment of excise tax in the amount of P10,868.632.74
P-57	Petitioner's letter dated March 12, 2015 re: payment under protest of excise tax in the amount of P4,972,846.98
P-58	BIR eFPS Confirmation Page Confirming the payment of excise tax in the amount of P4,972,846.98
P-59	Excise Tax Return confirming the payment of excise tax in the amount of P4,72,846.98
P-60	Petitioner's letter dated March 30, 2015 re: payment under protest of excise tax in the amount of P11,740,289.36
P-61	BIR eFPS Confirmation Page Confirming the payment of excise tax in the amount of 11,740,289.36
P-62	Excise Tax Return confirming the payment of excise tax in the amount of P11,740,289.36
P-63	Petitioner's letter dated April 21, 2015 re: payment under protest of excise tax in the amount of P12,926,776.41
P-64	BIR eFPS Confirmation Page Confirming the payment of excise tax in the amount of P12,926,776.41
P-65	Excise Tax Return confirming the payment of excise tax in the amount of P12,926,776.41
P-66	Petitioner's letter dated April 28, 2015 re: payment under protest of excise tax in the amount of P4,736,479.84
P-67	BIR eFPS Confirmation Page Confirming the payment of excise tax in the amount of P4,736,479.84
P-68	Excise Tax Return confirming the payment of excise tax in the amount of P4,736,479.84
P-69	Petitioner's letter dated June 9, 2015 re: payment under protest of excise tax in the amount of P11,204,131.29
P-70	BIR eFPS Confirmation Page Confirming the payment of excise tax in the amount of P11,204,131.29

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P-71	Excise Tax Return confirming the payment of excise tax in the amount of P11,204,131.29
P-72	Petitioner's letter dated June 23, 2015 re: payment under protest of excise tax in the amount of P4,291,658.67
P-73	BIR eFPS Confirmation Page Confirming the payment of excise tax in the amount of P4,291,658.67
P-74	Excise Tax Return confirming the payment of excise tax in the amount of P4,291,658.67
P-75	Letter dated February 28, 2013 of RDO 14
P-76	Letter dated February 28, 2013 of RDO 16
P-77	Official Receipt No. OR1000000478 dated October 1, 2012 from EEI Corporation
P-78	Judicial Affidavit of Atty. Joan D. Adaci-Cattiling
P-78-a	Signature of Atty. Joan D. Adaci-Cattiling in the Judicial Affidavit
P-79	Judicial Affidavit of Josefina Mallari
P-79-a	Signature of Josefina Mallari in the Judicial Affidavit
P-70-A	Independent Certified Public Accountant Report dated September 29, 2017 with attached Annexes "A" to "BY"
P-70-B	Signature of Richard R. Lapres in the Independent Certified Public Accountant Report
P-71-A, P-72-A, P-73-A, P-74-A, P-75-A, P-76-A, P-77-A, P-78-A, P-79-A, P-79-B, P-80-B, P-81-B, P-82 to P-573, including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-574 to P-917, including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-946 to P-1309, P-1312 to P-1650, including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-1651 to P-2568, P-2577 to P-2932	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-2934 to P-3262, P-3265 to P-3318, including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-3319 to P-4271, P-4273 to	

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P-4868, P-4873 to P-5108, P-5125 to P-5153, P-5155 to P-5266, P-5268 to P-6021, including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-6022 to P-6303, P-6366 to P-6581, P-6674 to P-7324, including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-7325 to P-7499, P-7506 to P-7765, including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-7766 to P-13714, P-13716 to P-13717, P-13719 to P-13726, P-13728 to P-13924, P-13963 to P-15301, P-15308 to P-19532, P-19534 to P-19580, P-19582 to P-19872, P-19888 to P-20685, P-20687 to P-20688, P-20690 to P-22768, P-22770 to P-22899, P-22901 to P-23694, P-23696 to P-25912, P-25914 to P-26148, P-26150 to P-26173, including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-26176 to P-26787, P-26816 to P-27421, P-27439 to P-28354, P-28359 to P-31480, P-31496 to P-	

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31498, P-31502 to P-33016, P-33018, P-33020 to P-33684, P-33686 to P-35083, P-35100 to P-35251, P-35254 to P-35857, P-35859 to P-36318, P-36320 to P-36910, P-36912 to P-37201, P-37203 to P-40672, P-40677 to P-40678, P-40683 to P-40686, P-40691 to P-40692, P-40697 to P-41361, P-41363 to P-41864, P-41869 to P-41883, P-41888 to P-43384, P-43386 to P-43546, P-43551 to P-43817, P-43819 to P-43901, P-43904 to P-45327, P-45330 to P-45700, P-45703 to P-45712, P-45723 to P-46045, P-46047 to P-46455, P-46459 to P-47400, P-47407 to P-47409, P-47413 to P-47415, P-47428 to P-48364 including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-48365 to P-50276, P-50278 to P-50303, P-50306 to P-50345, P-50347 to P-50358, P-50360 to P-	

50361, P-50363 to P-50439, P-50441 to P-50442, P-50444 to P-50445, P-50447 to P-50448, P-50450 to P-50451, P-50454 to P-50455, P-50457 to P-50464, P-50466 to P-50471, P-50473 to P-50474, P-50476 to P-50483, P-50485 to P-50488, P-50490 to P-50491, P-50493 to P-50494, P-50496 to P-50499, P-50501 to P-50506, P-50508 to P-50509, P-50511 to P-50516, P-50519 to P-50544, P-50546 to P-50547, P-50550 to P-50558, P-50560 to P-50566, P-50568 to P-50613, P-50615 to P-50616, P-50618 to P-50619, P-50621 to P-50631, P-50633 to P-51786, P-51791 to P-52235, P-52238 to P-52774, P-52776 to P-52781, P-52783 to P-52893, P-52895 to P-53540, P-53542 to P-53597, P-53599 to P-53845 including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts

P-53865, including sub-exhibits	General Ledger for Capital Pre-operating expenses – with Account Code Nos. 1700015, 1700020, 1700030, 1711000, 1712000, 0109509505, 01019509510, 01019509515
P-53866	Certified Copy of Net Cash Flow Computation
P-53867, including sub-exhbiits	Sales Invoices / Provisional Invoices from April 2013 to December 2014
P-53868	General Ledger of Deductible expenses and On-going Capital Expenditures

In the Resolution[64] promulgated on November 23, 2018, the Court, save for Exhibits "P-80-B", "P-4796", "P-4844", "P-4848", "P-4856", "P-4860", "P-6366", "P-7716", "P-13196", "P-13216", "P-13218", "P-13230", "P-13246", "P-13250", "P-13268", "P-13270", "P-15503", "P-15967", "P-15971", "P-16126", "P-16255", "P-16257", "P-16261", "P-16263", "P-16703", "P-18022", "P-18058", "P-18228", "P-18409", "P-18411", "P-18419", "P-18482", "P-18485", "P-18489", "P-18493", "P-19265", "P-19714", "P-20557", "P-20596", "P-20682", "P-20683", "P-20768", "P-20769", "P-20771", "P-20779", "P-20781", "P-20799", "P-20801", "P-20924", "P-21252", "P-21443", "P-21535", "P-21541", "P-22443", "P-22461", "P-22464", "P-22578", "P-22624", "P-22859", "P-23115", "P-23124", "P-23151", "P-23154", "P-23169", "P-23172", "P-23262", "P-23301", "P-23319", "P-23352", "P-23364", "P-23397", "P-23403", "P-23049", "P-23433", "P-23436", "P-23442", "P-23445", "P-23448", "P-23451", "P-23457", "P-23475", "P-23481", "P-23484", "P-23514", "P-23557", "P-23575", "P-23596", "P-23599", "P-23636", "P-23642", "P-23657", "P-23678", "P-23684", "P-23703", "P-23718", "P-23721", "P-23736", "P-23742", "P-23754", "P-23760", "P-23784", "P-35113", "P-35121", "P-35133", "P-35192", "P-35200", "P-35224", "P-35228", "P-39552", "P-39555", "P-39558", "P-39651", "P-44201", "P-44425", "P-48519", "P-48677", and "P-48704, "P-1022", "P-3321 to P-3322", "P-4186", "P-4259", "P-5210", "P-7557 to P-7558", "P-8617", "P-15853", "P-16067 to P-16068", "P-19365 to P-19367", "P-19657 to P-19659", "P-20569", "P-22360", "P-23014", "P-23249 to P-23251", and "P-48107 to P-48109, admitted the following exhibits, namely: Exhibits "P-1", "P-2", "P-3","P-4", "P-4-a", "P-5", "P-6", "P-7", "P-8", "P-9", "P-9-a", "P-10", "P-11", "P-12", "P-13", "P-14", "P-15", "P-16", "P-17", "P-18", "P-19", "P-20", "P-21", "P-22", "P-23", "P-24", "P-25", "P-26", "P-26-a", "P-26-b", "P-26-c", "P-26-d", "P-26-e", "P-26-f", "P-26-g", "P-27", "P-28", "P-29", "P-32", "P-34", "P-35", "P-36", "P-37", "P-38", "P-39", "P-40", "P-41", "P-42", "P-43", "P-44", "P-45", "P-46", "P-47", "P-48", "P-49", "P-50", "P-51", "P-52", "P-53", "P-54", "P-55", "P-56", "P-

[64] CTA Case No. 9517, Docket, vol. V, pp. 2166-2177.

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57", "P-58", "P-59", "P-60", "P-61", "P-62", "P-63", "P-64", "P-65", "P-66", "P-67", "P-68", "P-69", "P-70", "P-71", "P-72", "P-73", "P-74", "P-75", "P-76", "P-77", "P-78", "P-78-a", "P-79", "P-79-a", "P-70-A", "P-70-B", "P-71-A", "P-72-A", "P-73-A", "P-74-A", "P-75-A", "P-76-A", "P-77-A", "P-78-A", "P-79-B", "P-80-B", "P-81-B", "P-82 to P-573 including sub-exhibits", "P-574 to P-917 including sub-exhibits", "P-918 to P-927", "P-930 to P-941", "P-946 to P-1309", "P-1312 to P-1650 including sub-exhibits", "P-1651 to P-2568", "P-2577 to P-2932", "P-2934 to P-3262", "P-3265 to P-3318 including sub-exhibits", "P-3319 to P-4271", "P-4273 to P-4868", "P-4873 to P-5108", "P-5125 to P-5153", "P-5155 to P-5266", "P-5268 to P-6021 including sub-exhibits", "P-6022 to P-6303", "P-6366 to P-6581", "P-6674 to P-7324 including sub-exhibits", "P-7325 to P-7499", "P-7506 to P-7765 including sub-exhibits", "P-7766 to P-13714", "P-13716 to P-13717", "P-13719 to P-13726", "P-13728 to P-13924", "P-13963 to P-15301", "P-15308 to P-19532", "P-19534 to P-19580", "P-19582 to P-19872", "P-19888 to P-20685", "P-20687 to P-20688", "P-20690 to P-22768", "P-22770 to P-22899", "P-22901 to P-23694", "P-23696 to P-25912", "P-25914 to P-26148", "P-26150 to P-26173 including sub-exhibits", "P-26176 to P-26787", "P-26816 to P-27421", "P-27439 to P-28354", "P-28359 to P-31480", "P-31496 to P-31498", "P-31502 to P-33016", "P-33018", "P-33020 to P-33684", "P-33686 to P-35083", "P-35100 to P-35251", "P-35254 to P-35857", "P-35859 to P-36318", "P-36320 to P-36910", "P-36912 to 37201", "P-37203 to P-40672", "P-40677 to P-40678", "P-40683 to P-40686", "P-40691 to P-40692", "P-40697 to P-41361", "P-41363 to P-41864", "P-41869 to P-41883", "P-41888 to P-43384", "P-43386 to P-43546", "P-43551 to P-43817", "P-43819 to P-43901", "P-43904 to P-45327", "P-45330 to P-45700", "P-45703 to P-45712", "P-45723 to P-46045", "P-46047 to P-46455", "P-46459 to P-47400", "P-47407 to P-47409", "P-47413 to P-47415", "P-47428 to P-48364 including sub-exhibits", "P-48365 to P-50276", "P-50278 to P-50303", "P-50306 to P-50345", "P-50347 to P-50358", "P-50360 to P-50361", "P-50363 to P-50439", "P-50441 to P-50442", "P-50444 to P-50445", "P-50447 to P-50448", "P-50450 to P-50451", "P-50454 to P-50455", "P-50457 to P-50464", "P-50466 to P-50471", "P-50473 to P-50474", "P-50476 to P-50483", "P-50485 to P-50488", "P-50490 to P-50491", "P-50493 to P-50494", "P-50496 to P-50499", "P-50501 to P-50506", "P-50508 to P-50509", "P-50511 to P-50516", "P-50519 to P-50544", "P-50546 to P-50547", "P-50550 to P-50558", "P-50560 to P-50566", "P-50568 to P-50613", "P-50615 to P-50616", "P-50618 to P-50619", "P-50621 to P-50631", "P-50633 to P-51786", "P-51791 to P-52235", "P-52238 to P-52774", "P-52776 to P-52781", "P-52783 to P-52893", "P-52895 to P-53540", "P-53542 to P-53597", "P-53599 to P-53845 including sub-exhibits", "P-53865 including sub-exhibits", "P-53866", "P-53867 including sub-exhibits", and "P-53868".

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As such, petitioner filed a Motion for Partial Reconsideration[65] on December 13, 2013, which resulted in the admission of the following exhibits: "P-1022", "P-3321", "P-3322", "P-4186", "P-4259", "P-4796", "P-4844", "P-4848", "P-4856", "P-4860", "P-5210", "P-6366", "P-7557", "P-7558", "P-7716", "P-15503", "P-16068", "P-19714", "P-20569", "P-20596", "P-20682", "P-20683", "P-21443", "P-21535", "P-21541", "P-22578", "P-23014", "P-23049", "P-23352", "P-23364", "P-23721", "P-23742", "P-35113", "P-35121", "P-35133", "P-35192", "P-35200", "P-35224", "P-35228", "P-39552", "P-39555", "P-39558", "P-39651", "P-44425", "P-48519", "P-48677", and "P-48704", as per Resolution[66] dated February 4, 2019.

In the hearing[67] held on February 20, 2019, respondent's counsels manifested that they will no longer present any evidence in this case as there was no report of investigation submitted by the Revenue Officer handling the administrative claim for refund.

Thus, on April 22, 2019, the Court submitted[68] the instant cases for decision, taking into consideration the Memorandum for Petitioner[69] and respondent's Memorandum[70] filed on March 22, 2019 and April 8, 2019, respectively.

ISSUES

Petitioner submits[71] the following issues for resolution of the Court:

A. Did petitioner comply with the requirements under Sections 204 and 229 of the 1997 NIRC, and Section 11 of Republic Act No. 1125, for the recovery of internal revenue taxes that have been erroneously, wrongfully, illegally or excessively assessed or collected?

B. Is petitioner exempt from excise tax during the so-called recovery period? If so, were the excise taxes paid by

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[65] CTA Case No. 9517, Docket, vol. V, pp. 2172-2176.
[66] CTA Case No. 9517, Docket, vol. V, pp. 2274-2276.
[67] As per Resolution dated February 4, 2019, CTA Case No. 9517, Docket, vol. V, p. 2277.
[68] CTA Case No. 9517, Docket, vol. V, p. 2339.
[69] CTA Case No. 9517, Docket, vol. V, pp. 2279-2325.
[70] CTA Case No. 9517, Docket, vol. V, pp. 2331-2338.
[71] II. Proposed Stipulation of Issues, Joint Stipulation of Facts and Issues, CTA Case No. 9517, Docket, vol. IV, p. 1589.

petitioner on January 12, 2015, January 14, 2015, February 4, 2015, February 5, 2015, February 16, 2015, February 18, 2015, February 23, 2015, March 10, 2015, March 16, 2015, April 1, 2015, April 21, 2015, April 29, 2015, June 11, 2015 and June 24, 2015 covering removals of copper concentrates and dore' bars erroneously paid or illegally or wrongfully collected?

C. Did respondent observe the proper procedural requirements before issuing the Assailed RMC?

D. May respondent apply retroactively the revocation of the Ruling?

E. Did the revocation of the Ruling through the Assailed RMC violate the Non-Impairment Clause of the 1987 constitution?

On the other hand, respondent submits[72] the following issues for the Court's resolution:

A. Whether the Court has jurisdiction over the instant petition;

B. Whether petitioner is entitled to a refund or tax credit in the aggregate amount of Eighty Million One Hundred Forty Thousand Seven Hundred Fifty-One and 85/100 Pesos (₱80,140,751.85), representing alleged Excise Taxes paid by petitioner for the period January to March 2015; and

C. Whether petitioner is entitled to a refund or tax credit in the aggregate amount of Forty-Four Million Eight Hundred Ninety-Nine Thousand Three Hundred Thirty-Five and 57/100 Pesos (₱44,899,335.57) representing alleged Excise Taxes paid by petitioner for the period April 1 to June 2015.

The foregoing issues may be summarized as follows:

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[72] II. Proposed Stipulation of Issues, Joint Stipulation of Facts and Issues, CTA Case No. 9517, Docket, vol. IV, pp. 1589-1590.

Whether petitioner is entitled to a refund of or issuance of a tax credit certificate in the aggregate amount of ₱125,040,087.42, representing excise taxes alleged to have been erroneously paid by petitioner and illegally and wrongfully collected by respondent for the period January to June 2015.

The Court has jurisdiction over the instant Petitions

Prefatorily, the Court shall first determine whether it has jurisdiction to entertain the instant cases.

Sections 204(C) and 229 of the NIRC of 1997, as amended, provides for the period when to file an administrative claim for refund with the BIR and judicial claim for refund with the CTA for recovery of tax erroneously or illegally collected, to wit:

> "SEC. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes. -The Commissioner may—
>
> x x x   x x x   x x x
>
> (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 purchases, 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 filed 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.
>
> x x x   x x x   x x x
>
> 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."

Corollary thereto, Section 3(a), Rule 8 of the Revised Rules of the Court of Tax Appeals provides for the following:

"SEC. 3. Who may appeal; period to file petition. - (a) A party adversely affected by a decision, ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claims for refund of internal revenue taxes, or by a decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction may appeal to the Court by petition for review filed within thirty days after receipt of a copy of such decision or ruling, or expiration of the period fixed by law for the Commissioner of Internal Revenue to act on the disputed assessments. In case of inaction of the Commissioner of Internal revenue on claims for refund of internal revenue taxes erroneously or illegally collected, the taxpayer must file petition for review within the two-year period prescribed by law from payment or collection of the taxes.

Pursuant to the afore-quoted provisions, a taxpayer has 2 years from the date of payment of tax alleged to have been erroneously or illegally collected, within which to file its administrative and judicial claims for refund or credit.

The details of petitioner's payments of excise taxes and the date of filing of petitioner's administrative and judicial claims for refund or issuance of TCC are herein provided for easy reference:

Date of Payment	Amount of Excise Tax Paid	Last Day of Filing of Administrative and Judicial	Date of Filing of Administrative Claim	Date of Filing of Judicial Claim

		Claims for Refund		
01.12.2015	23,931,567.93[73]	01.12.2017	January 9, 2017	For CTA Case No. 9517- January 11, 2017
01.14.2015	1,553,779.83[74]	01.14.2017		
02.04.2015	4,058,434.84[75]	02.04.2017		
02.05.2015	11,810,601.99[76]	02.05.2017		
02.16.2015	11,708,150.39[77]	02.16.2017		
02.18.2015	11,226,106.85[78]	02.18.2017		
02.23.2015	10,630.30[79]	02.23.2017		
03.10.2015	10,868,632.74[80]	03.10.2017		
03.16.2015	4,972,846.98[81]	03.16.2017		
04.04.2015	11,740,289.36[82]	04.04.2017		CTA Case No. 9559- March 31, 2017
04.21.2015	12,926,776.41[83]	04.21.2017		
04.29.2015	4,736,479.84[84]	04.29.2017		
06.11.2015	11,204,131.29[85]	06.11.2017		

It is clear from the foregoing that petitioner timely filed both its administrative and judicial claims for refund within 2 years from the date of payment of the subject excise taxes. As such, the Court has jurisdiction to entertain the instant Petitions.

That having been settled, this Court shall now proceed to determine the merit of petitioner's claims for TCC or refund.

RMC No. 17-2013 cannot be given retroactive application in the instant cases

Petitioner argues that the issuance of RMC No. 17-2013 violated petitioner's right to due process on the ground that the same was issued without furnishing petitioner or the professional organizations

[73] Exhibits "P-35" to "P-37", CTA Case No. 9517, Docket, vol. IV, pp. 1957-1972.
[74] Exhibits "P-38" to "P-39", CTA Case No. 9517, Docket, vol. IV, pp. 1973-1974.
[75] Exhibits "P-40" to "P-42", CTA Case No. 9517, Docket, vol. IV, pp. 1975-1985.
[76] Exhibits "P-43" to "P-45", CTA Case No. 9517, Docket, vol. IV, pp. 1986-1999.
[77] Exhibits "P-46" to "P-48", CTA Case No. 9517, Docket, vol. IV, pp. 1999-2011.
[78] Exhibits "P-49" to "P-51", CTA Case No. 9517, Docket, vol. IV, pp. 2012-2024.
[79] Exhibits "P-52" to "P-53", CTA Case No. 9517, Docket, vol. IV, pp. 2025-2026.
[80] Exhibits "P-54" to "P-56", CTA Case No. 9517, Docket, vol. IV, pp. 2027-2039.
[81] Exhibits "P-57" to "P-59", CTA Case No. 9517, Docket, vol. IV, pp. 2040-2052.
[82] Exhibits "P-60" to "P-62", CTA Case No. 9517, Docket, vol. IV, pp. 2053-2065.
[83] Exhibits "P-63" to "P-65", CTA Case No. 9517, Docket, vol. IV, pp. 2066-2078.
[84] Exhibits "P-66" to "P-68", CTA Case No. 9517, Docket, vol. IV, pp. 2079-2091.
[85] Exhibits "P-69" to "P-71", CTA Case No. 9517, Docket, vol. IV, pp. 2094-2104.

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enumerated in Section 2.1 of RMC No. 20-86 with copies of the same. It further argues that the assailed RMC was never published.[86]

Moreover, petitioner claims 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, thus, protected by the Non-Impairment Clause of the 1987 Constitution. As such, it is petitioner's position that RMC No. 17-2013 which revoked and invalidated BIR Ruling No. 10-2007, cannot be given retroactive application in the instant cases.[87]

The foregoing controversy is not novel. In the recent case of *OceanaGold (Philippines), Inc. vs. Commissioner of Internal Revenue*[88], the Court *En Banc* has already passed upon the very same issue raised by the same petitioner. The only differences are the taxable period involved and the amount of refundable tax. Pertinent portions of the said Decision are herein quoted for ready reference:

> "It was earlier mentioned that petitioner had questioned in its Petitions for Review before the Court in Division as well as its Petition for Review before this Court *En Banc* the retroactive application of RMC No. 17-2013, specifically its revocation of BIR Ruling No. 10-2007. Citing Section 246 of the 1997 NIRC, petitioner asserts that having taken the tax authorities at their word through the issuance of BIR Ruling No. 10-2007, it is the height of injustice for respondent to change the rules in the middle of the game through the retroactive application of RMC No. 17-2013.
>
> Section 246 of the 1997 NIRC states:
>
> > **'SEC. 246. *Non-Retroactivity of Rulings.* – Any revocation, modification or reversal** of any of the rules and regulations promulgated in accordance with the preceding Sections **or any of the rulings** or circulars **promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers,** except in the following cases:

[86] Par. 93, VI. Discussion, Memorandum for Petitioner, CTA Case No. 9517, Docket, vol. V, p. 2313.
[87] Par. 111, VI. Discussion, Memorandum for Petitioner, CTA Case No. 9517, Docket, vol. V, p. 2319.
[88] CTA EB No. 1904 (CTA Case No. 8995 and 9034), August 16, 2019.

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(a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;

(b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or

(c) Where the taxpayer acted in bad faith. (Emphasis supplied)

It is clear from the above-cited provision that rulings and circulars promulgated by the Commissioner of Internal Revenue have no retroactive application where to so apply them would be prejudicial to taxpayers.

Given the relevant factual circumstances of the present case vis-à-vis the above-cited provision, the Court *En Banc* holds that petitioner is entitled to the benefit of the principle on non-retroactivity of rulings and circular under Section 246 of the 1997 NIRC, in the absence of showing of bad faith on its part. Accordingly, what is applicable to petitioner's case should still be BIR Ruling No. 10-2007.

In the present case, the prejudicial effect of the retroactive application of RMC No. 17-2013 and the concomitant revocation of BIR Ruling No. 10- 2007 is beyond doubt. The issuance of RMC No. 17-2013 and the attendant revocation of BIR Ruling No. 10-2007 effectively served as legal basis for the assessment of deficiency excise taxes against petitioner. On the other hand, none of the exceptions stated under Section 246 of the 1997 NIRC that would prevent the application of the non-retroactivity rule was shown to exist."

In view thereof, the Court agrees with petitioner that RMC No. 17-2013 cannot be given retroactive effect for it will be prejudicial to petitioner's interest. Thus, BIR Ruling No. 10-2007 is still applicable to the instant cases.

Petitioner failed to present evidence to prove that the imposition of excise tax was

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made during the recovery period

To recall, petitioner argues that it is exempt from excise tax from the date of approval of its Mining Project Feasibility Study up to the end of the recovery period pursuant to the FTAA, Section 8 of the Philippine Mining Act and Section 236 of DAO 95-23.

Respondent, on the other hand, argues that, even granting that petitioner enjoyed a tax-exempt status during the recovery period, it is nevertheless no longer exempt from excise tax since the recovery period had already lapsed.

At the outset, it bears stressing that the burden of proof to establish entitlement to a refund is on the claimant. Thus, the petitioner is expected to show proof that it complied with the statutory requirements provided under the Mining Act and relevant BIR and DENR rules and regulations.

Upon close scrutiny of the provisions the Mining Act of 1995, the Court observes that the same is silent as to the exact period within which a contractor may recover its pre-operating expenses, exploration, and development expenditures, to wit:

> "CHAPTER XIV
> GOVERNMENT SHARE
>
> x x x x x x x x x
>
> Section 81. Government Share in Other Mineral Agreements.
>
> The share of the Government in coproduction and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the: (a) capital investment of the project, (b) risks involved, (c) contribution of the project to the economy, (d) other factors that will provide for a fair and equitable sharing between the Government and the contractor. The Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's income tax, excise tax, special allowance, withholding taxes due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign

stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

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

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

Notwithstanding the foregoing, the period to recover the pre-operating expenses had been stipulated by the government and petitioner in the subject FTAA in this wise:

"Section XI
FISCAL REGIME

XXX XXX XXX

11.2 **Recovery of Preoperating Expenses, Property Expenses and Taxes 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 Preoperating 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."

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xxx xxx xxx" *(Emphasis supplied)*

It is evident from the foregoing that the recovery period should be counted from the Date of Commencement of Commercial Production, which is defined in Section 2.14 of the FTTA as "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".

On the other hand, the DAO No. 95-23[89], which was amended by DAO No. 96-40[90], and DAO No. 2010-21[91] explicitly provides:

> "SEC. 214. Government Share in FTAA
>
> The Government share in an FTAA shall consist of, among others 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-owned corporation and all such other taxes, duties and fees as provided for in existing laws.
>
> The Government share in an FTAA shall be negotiated by the government and the Contractor taking into consideration:
>
> a. Capital investment of the project;
> b. Risks involved;
> c. Contribution of the project to the economy;
> d. Technical complexity of the project;
> e. Contribution to community and Local Government; and
> f. Other factors that will provide for a fair and equitable sharing between the parties.
>
> The collection of Government shall commence after the FTAA Contractor has fully recovered its pre-operating, exploration and development expenses, inclusive. **The period of recovery which is reckoned from the date of commencement of commercial operation shall be for a**

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[89] SUBJECT: Revised Implementing Rules and Regulations of Republic Act No. 7942, Otherwise known as the "Philippine Mining Act of 1995", August 15, 1995.
[90] SUBJECT: Revised Implementing Rules and Regulations of Republic Act No. 7942, Otherwise Known as the "Philippine Mining Act of 1995", December 19, 1996.
[91] SUBJECT: PROVIDING FOR A CONSOLIDATED DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES ADMINISTRATIVE ORDER FOR THE IMPLEMENTING RULES AND REGULATIONS OF REPUBLIC ACT NO. 7942, OTHERWISE KNOWN AS THE "PHILIPPINE MINING ACT OF 1995", June 28, 2010.

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> **period not exceeding five (5) years, or at a date when the aggregate of the net cash flows from the mining operations is equal to the aggregate of its pre-operating expenses, whichever comes earlier**. *Provided*, That in case of projects incurring very large investments with high production rate and extensive mine life, as determined by the Bureau, the recovery period may be extended upon negotiation with the FTAA Negotiating Panel and subject to approval by the Secretary.
>
> The Contractor shall also pay an additional Government share after the recovery period as provided for in the separate guidelines (Emphasis supplied)

It can, thus, be inferred that: "(1) government share' includes excise tax; (2) the collection of 'government share' shall not commence until the contractor has fully recovered pre-operating, exploration and development expenses; and (3) the period of recovery shall be from the date of commercial operation, which shall not exceed five (5) years, or at a date when the aggregate of the net cash flows from the mining operations is equal to the aggregate of its pre-operating expenses, whichever comes earlier."[92]

However, nowhere from the definition of terms of the aforementioned revised IRR can one find the exact definition of the so called "date of commercial operation". Instead, DAO No. 96-40 only describe the date of commercial operation as one "declared by the Contractor or as stated in the feasibility study, whichever comes first", to wit:

> "Section 5. Definition of Terms
>
> As used in and for purposes of these regulations, the following terms shall mean:
>
> xxx xxx xxx
>
> i. '**Commercial Production'** refers to the production of sufficient quantity of minerals of sustained economic viability of mining operations **reckoned from the date of commercial operation as declared by the Contractor or as stated in the feasibility study, whichever comes first.**
>
> xxx xxx xxx" (Emphasis supplied)

[92] OceanaGold (Philippines), Inc. vs. CIR, CTA Case No. 9594, October 21, 2019.

Records show that petitioner's Partial Declaration of Mining Feasibility was submitted to the Mines and Geosciences of the DENR on March 15, 2005. Its President, Robert P. Thomson, declared therein that petitioner "found sufficient ore reserves and diluted resource of 23.7 million tonnes of 1.8g/t Au and 0.64% Cu xxx and such ore reserves have been delineated to sustain the mining operation of the Corporation for some 14 years," and that "mining operation xxx will process gold and copper at 2 million tonnes per annum xxx."[93]

The said Partial Declaration of Mining Feasibility was approved[94] by the Mines and Geosciences of the DENR on October 11, 2005, subject to the following conditions, *viz*:

1. That the mining operations shall be confined within the project area as provided in Condition No. 1 of the Revised Environmental Compliance Certificate of August 6, 2004: *Provided*, that any increase in the production output and coverage area in the succeeding years of the mining operations under the FTAA shall be subject to amendment of the said Environmental Compliance Certificate pursuant to the Environmental Compliance Certificate pursuant to the Environmental Impact Statement System;

2. That in the implementation of the Project, Australasian Philippines Mining, Inc. shall **ensure that the contractual obligations under the FTAA are fully complied with, including the reporting requirement in accordance with the pertinent provisions of DENR Administrative Order No. 96-40, as amended**;

3. That the conduct of the mining operation in the Contract Area subject of the **Declaration of Mining Project Feasibility shall be undertaken in accordance with the existing applicable law, their implementing rules and regulations, and the pertinent provisions of the FTAA**; and

4. That mineral exploration activities outside of the 975-hectare portion of the Contract Area shall continue to be pursued in accordance with the conditions governing the first renewal of the Exploration Period of the FTAA." (Emphases supplied)

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93 Exhibit "P-7", CTA Case No. 9517, Docket, vol. IV, p. 1839.
94 Exhibit "P-8", CTA Case No. 9517, Docket, vol. IV, p. 1839

It is clearly indicated from the foregoing that petitioner should ensure that the contractual obligations under the FTAA are fully complied with, including the reporting requirement in accordance with the pertinent provisions of DENR Administrative Orders.

Some of the reporting requirements are set forth in Sections VII, IX and X of the subject FTTA, to wit:

"SECTION VII
FEASIBILITY STUDY AND RELINQUISHMENT

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

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

x x x x x x x x x

SECTION IX
DEVELOPMENT AND CONSTRUCTION PERIOD

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

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> 9.2 Work Program and Budget. **The CONTRACTOR shall develop and construct the production facilities in the Mining Area in accordance with the Work Program included in the Declaration of Mining Feasibility** referred to in Section 7.1 of this Agreement, spending at least US$50,000,000 less any amount of Exploration expenditures it has already spent.'
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> x x x x x x x x x
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> SECTION X
> PRODUCTION PERIOD
>
> 10.1 Timetable. **The CONTRACTOR shall submit to the Government, through the Secretary, copy furnished the Director of the Mines and Geosciences Bureau, within thirty (30) days from the completion of the construction facilities a Work Program for a period of three (3) years. The CONTRACTOR shall commence Commercial Production according to the period(s) specified in the approved Work Program and the CONTRACTOR shall advise the Government within fifteen (15) days therefrom that Commercial Production has commenced. Failure of the CONTRACTOR to commence Commercial Production within the period**, except as may be excused by Force Majeure as stated in Section 20.4 hereof or other justifiable causes, **shall be considered a substantial breach of this Agreement.**"[95] (Emphases supplied)

Applying the foregoing, petitioner had 3 years from the approval of its Partial Declaration of Mining Feasibility on October 11, 2005, or until October 11, 2008, to develop and construct mining production facilities. Thereafter, within 30 days from the completion of the said construction facilities, petitioner had to submit its Work Program for the period of 3 years. Afterwhich, petitioner is expected to commence its commercial production in accordance with the periods specified in the approved Work Program, and within 15 days therefrom, must advise the government of the commencement of its commercial production. Failure to do the same shall be considered a substantial breach of the FTAA.

As to the requirements in the payment of "government shares", Section 3(f) of DAO No. 99-56 is instructive:

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[95] Page 19 of Exhibit "P-2", CTA Case No. 9517, Docket, vol. IV, pp. 1773-1774.

"f. Recoverable Pre-Operating Expenses. **Pre-Operating Expenses for recovery which shall be approved by the Secretary upon recommendation of the Director** shall consist of actual expenses and capital expenditures relating to the following:

1. Acquisition, maintenance and administration of any mining or exploration tenements or agreements covered by the FTAA;

2. Exploration, evaluation, feasibility and environmental studies, production, mining, milling, processing and rehabilitation;

3. Stockpiling, handling, transport services, utilities and marketing of minerals and mineral products;

4. Development within the Contract Area relating to the Mining Operations;

5. All Government taxes and fees;

6. Payments made to local Governments and infrastructure Contributions;

7. Payments to landowners, surface rights holders, claim owners, including the Indigenous Cultural Communities, if any;

8. Expenses incurred in fulfilling the Contractor's obligations to contribute to national development and training of Philippine personnel;

9. Consulting fees incurred inside and outside the Philippines for Work related directly to the Mining Operations;

10. The establishment and administration of field and regional offices including administrative overheads incurred within the Philippines which are properly allocatable to the Mining Operations and directly related to the performance of the Contractor's obligations and exercise of its rights under the FTAA;

11. Costs incurred in financial development, including interest on loans payable within or outside the Philippines, subject to the financing requirements required in the FTAA and to a limit on debt-equity ratio of 5: I for investments equivalent to 200 Million US Dollars or less, or for the first 200 Million US Dollars of investments in excess of 200 Million US Dollars; or 8:1 for that part of the investment which exceeds 200 Million US Dollars: Provided, That the interests shall not be more than the prevailing

international rates charged for similar types of transaction at the time the financing was arranged;

12. All costs of constructing and developing the mine incurred before the Date of Commencement of Commercial Production, including capital and property as hereinafter defined irrespective as to their means of financing, subject to the limitations defined by Clause 3-f-11 hereof, and inclusive of the principal obligation and the interests arising from any Contractor's leasing, hiring, purchasing or similar financing arrangements including all payments made to Government, both National and Local; and

13. General and administrative expenses actually incurred by the Contractor for the benefit of the Contract Area."

The foregoing recoverable Pre-Operating Expenses shall be subject to verification of its actual expenditure by an independent audit recognized by the Government and chargeable against the Contractor. (Emphasis supplied)

Taking all these into consideration, petitioner, therefore, has a maximum period of five (5) years or at a date when the aggregate of the "Net Cash Flows from the Mining Operations" is equal to the aggregate of its pre-operating expenses, reckoned from the date of commencement of commercial production, whichever comes first, of exemption from excise tax. It must likewise submit the required Work Program for the period of 3 years and Pre-Operating Expenses, duly approved by the Secretary of DENR, upon recommendation of the Director.

An examination of the records disclose that in BIR Ruling No. 10-2007[96] dated May 4, 2007, petitioner specifically mentioned that it "was expected to start commercial operations in June 2007, which was, however, extended to December 2007; that [petitioner's] **initial commercial production is now expected to commence on the 4th quarter 2008**".

However, as per petitioner's letter dated March 27, 2013[97] addressed to the Secretary of DENR, Ramon J.P. Pajer, it was only on April 1, 2013, or about eight (8) years from the approval of the subject

[96] Exhibit "P-21", CTA Case No. 9517, Docket, vol. III, pp. 1267-1272.
[97] Exhibit "P-28", CTA Case No. 9517, Docket, vol. III, pp. 1277-1278.

Partial Declaration of Mining Feasibility that petitioner was able to commence its commercial production, to wit:

> "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 the development, we wish to inform you that the Date of Commencement of Commercial Production in accordance with Section 2.14 of the FTAA is <u>April 1, 2013</u>, which is the first day of the second calendar quarter."

Thus, it is petitioner's position that it is exempt from payment of excise tax until March 31, 2018, or until the date of actual recovery of its pre-operating, exploration, and development expenses, whichever comes earlier.

With regard to petitioner's pre-operating expenses, petitioner's Finance Manager, Josefina Mallari, testified that it amounted to US$429,153,922.00; and that the same were duly substantiated "by accounting records, official receipts, sales invoices, import documents, contracts and other adequate records."[98] Petitioner also mentioned in its Memorandum that, "[a]s of June 30, 2015, it has not fully recovered the said pre-operating expenses since the actual net cash flows from the mining operations has not exceeded the valid pre-operating expenses it incurred."[99]

However, nowhere in any of the documentary evidence presented by petitioner was it shown that it was able to submit the required Work Program for the period of 3 years, as well as the duly approved pre-operating expenses (approved by the DENR Secretary as recommended by the Director of the Mines and Geosciences Bureau), as mandated in the afore-quoted Section 3(f) of DENR Administrative Order No. 99-56.

In *La Bugal-B'laan Tribal Association Inc. vs. Ramos*[100], the Supreme Court had the occasion to explain the rationale in requiring government's approval of contractor's pre-operating expense, to wit:

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[98] A20 to 204, Judicial Affidavit of Ms. Josefina Mallari, CTA Case No. 9517, Docket, vol. III, pp. 715-716.
[99] Par. 13, Statement of Facts and the Case, Memorandum for Petitioner, Docket, vol. V, p. 2285.
[100] G.R. No. 127882, December 1, 2004.

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"Clearly, even at the stage of application for an exploration permit, the applicant is required to submit — for approval by the government — a proposed work program for exploration, containing a yearly budget of proposed expenditures. The State has the opportunity to pass upon (and approve or reject) such proposed expenditures, with the foreknowledge that — if approved — these will subsequently be recorded as pre-operating expenses that the contractor will have to recoup over the grace period. That is not all.

Under Section 24, an exploration permit holder who determines the commercial viability of a project covering a mining area may, within the term of the permit, file with the Mines and Geosciences Bureau a declaration of mining project feasibility. This declaration is to be accompanied by a work program for development for the Bureau's approval, the necessary prelude for entering into an FTAA, a mineral production sharing agreement (MPSA), or some other mineral agreement. At this stage, too, **the government obviously has the opportunity to approve or reject the proposed work program and budgeted expenditures for development works on the project. Such expenditures will ultimately become the pre-operating and development costs that will have to be recovered by the contractor.**

Naturally, with the submission of approved work programs and budgets for the exploration and the development/construction phases, the government will be able to scrutinize and approve or reject such expenditures. It will be well-informed as to the amounts of pre-operating and other expenses that the contractor may legitimately recover and the approximate period of time needed to effect such a recovery. There is therefore no way the contractor can just randomly post any amount of pre-operating expenses and expect to recover the same.

The afore-cited provisions on approved work programs and budgets have counterparts in Section 35, which deals with the terms and conditions exclusively applicable to FTAAs. The said provision requires certain terms and conditions to be incorporated into FTAAs; among them, 'a firm commitment x x x of an amount corresponding to the expenditure obligation that will be invested in the contract area" and "representations and warranties x x x to timely deploy these [financing, managerial

> and technical expertise and technological] resources under its supervision pursuant to the periodic work programs and related budgets x x x, 'as well as' work programs and minimum expenditures commitments.' (emphasis supplied)
>
> Unarguably, **given the provisions of Section 35, the State has every opportunity to pass upon the proposed expenditures under an FTAA and approve or reject them. It has access to all the information it may need in order to determine in advance the amounts of pre-operating and developmental expenses that will have to be recovered by the contractor and the amount of time needed for such recovery.**"[101] (Emphases supplied)

Accordingly, for failure of petitioner to substantially prove that it submitted a Work Program for the period of 3 years and duly approved pre-operating expenses, that it has yet to recover its pre-operating expenses, and thus, it is still under the period of recovery, petitioner failed to convince this Court that it is entitled to its claim for refund or issuance of TCC. As such, the denial of the instant Petitions for Review is in order.

WHEREFORE, in light of the foregoing considerations, the Petitions for Review filed by OceanaGold (Philippines), Inc. in CTA Case Nos. 9517 and 9559, claiming for the refund or for the issuance of a tax credit certificate in the amounts of ₱80,140,751.85 and ₱44,899,335.57, representing alleged erroneously paid and illegally and wrongfully collected excise taxes for the period from January to March 2015, and April to June 2015, respectively, are hereby **DENIED** for lack of merit.

SO ORDERED.

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

WE CONCUR:

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

[101] G.R. No. 127882, December 1, 2004.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the cases were assigned to the writer of the opinion of the Court's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
2nd Division Chairperson

CERTIFICATION

Pursuant to Section 13, 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 cases were assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice