REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

Quezon City

RA No. 7942; DAO 99-56
BIR Ruling No. 008-07 BIR Ruling No. 010-07
0[illegible]11-2019
NOV 29 2019

GO & CERENO LAW OFFICES
Unit 3202-B Atlanta Centre, Annapolis St.
Greenhills, San Juan City

Attention: Atty. **Lito A. Go, Jr.**

Gentlemen:

This refers to your letter dated April 3, 2019 requesting on behalf of your client, Sagittarius Mines, Inc. (SMI), [formerly: Tampakan Mineral Resources Corporation (TMRC)] for confirmation of your opinion that SMI is exempt from the payment of excise tax on mineral products, income tax, value-added tax (VAT) on purchases of imported equipment, goods and services, withholding tax on dividends to foreign stockholders, withholding tax on interest payments on foreign loans, and royalties due the government on mineral reservations from the date of approval of the Mining Project Feasibility Study up to the end of the Recovery Period, pursuant to the provisions of Section 81 of Republic Act (RA) No. 7942, otherwise known as the Philippine Mining Act of 1995, Section 3 of DENR Administrative Order (DAO) No. 99-56, implementing RA No. 7942 and Financial or Technical Assistance Agreement ("FTAA") between SMI and the Philippine Government.

It is represented that SMI is a corporation organized and existing under Philippine laws and is engaged in the mining industry. SMI's Tax Identification No. (TIN) is with principal place of business at Liberty Core Farm, Brgy. Liberty, Tampakan, South Cotabato. SMI's sole project is the Tampakan Copper-Gold Project.

On March 22, 1995, Tampakan Mineral Resources Corporation [TMRC, formerly Western Mining Corporation (Philippines) Inc.] entered into a Financial & Technical Assistance Agreement (FTAA) with the Republic of the Philippines. On December 18, 2001, TMRC's FTAA was transferred to SMI. The FTAA has a term of 25 years, renewable for another term of not exceeding 25 years. On June 8, 2016, the Mines and Geosciences Bureau (MGB) approved the extension of the first term of the FTAA for another 12 years. SMI's FTAA covers Tampakan-Gold Project covering an area of 99,387 hectares. SMI's Declaration of Mining Project Feasibility (DMPF) was approved by the DENR in an Order dated May 20, 2016. Based on SMI's Three Year Development and Utilization Work Program submitted in 2018 and approved by the MGB in January 2019, SMI's production is expected to commence on the 4th quarter of 2022.

The FTAA allows the contractor to adopt a fiscal regime that will be governed by the principle according to which the Government expects a reasonable return in economic value for the utilization of non-renewable natural resources under its natural sovereignty while the contractor expects a reasonable return on its expenditure with special account to be taken of the high risks of exploration, the terms and conditions prevailing elsewhere in the mining industry. One of the provisions embodied in the fiscal regime is the payment of Government Share.

In March 1995, the Philippine Mining Act of 1995 was enacted (R.A. No. 7942), and that in December 1999, DENR Administrative Order No. 99-56 ("DAO 99-56") was promulgated establishing the fiscal regime of FTAAs and setting forth the guidelines for the implementation thereof; that among the features of R.A. No. 7942 is Section 81 which provides that:

"[t]he Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws;"

In addition, R.A. No. 7942 provides that:

"[t]he 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."

In reply, please be informed that Section 81 of Republic Act (RA) No. 7942, otherwise known as the Philippine Mining Act of 1995, which is a special law provides that:

"SEC. 81. *Government Share in Other Mineral Agreements*. — The share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the: (a) capital investment of the project, (b) risks involved, (c) contribution of the project to the economy, and (d) other factors that will provide for a fair and equitable sharing between the Government and the contractor. The Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

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

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

Based on the foregoing provisions, it is clear that pursuant to the Philippine Mining Act of 1995:

(1) the Government share in an FTAA shall consist of, among other things, the contractor's income tax, excise tax, 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; and

(2) the government shall be entitled to its share only when the FTAA Contractor has fully recovered its pre-operating, exploration and development expenditures.

Moreover, Section 3 (g) (1) (a) of DENR Administrative Order (DAO) No. 99-56 provides specifically what the Government Share consists of, namely:

(a) excise tax on minerals;
(b) contractor's income tax;
(c) customs duties and fees on imported capital equipment;
(d) value added tax on the purchase of imported equipment, goods and services;
(e) withholding tax on interest payments on foreign loans;
(f) withholding tax on dividends to foreign stockholders;
(g) royalties due the government on mineral reservations;
(h) documentary stamp taxes;
(i) capital gains tax;
(j) local business tax;
(k) real property tax;
(l) community tax;
(m) occupation fees;
(n) all other local government taxes, fees and imposts as of the effective date of the FTAA;
(o) special allowance as defined in the Mining Act;
(p) royalty payments to any indigenous people(s)/indigenous cultural community(ies).

DAO No. 99-56 further states that the foregoing taxes, fees and other such charges constituting the basic Government Share shall be paid by the contractor from the effective date (which is the date of signing of the FTAA), but it also expressly states in a *proviso* that items (a) to (g); shall not be collected from the contractor upon the date of approval of the Mining Project

Feasibility Study up to the end of the Recovery Period. After the Recovery Period, a contractor shall be subject to all the normal taxes, duties and fees imposable on contractors under their FTAA.

Under Section 3(e) of DAO No. 99-56, Recovery Period refers to the period allowed to the contractor to recover its pre-operating expenses as provided in the Mining Act and the IRR which shall be for a maximum of five (5) years or at a date when the aggregate of the net cash flows from the mining operations is equal to the aggregate of its pre-operating expenses, reckoned from the Date of Commencement of Commercial Production, whichever comes first. The basis for determining the Recovery Period shall be the actual net cash flows from mining operations and actual pre-operating expenses converted into its US dollar equivalent at the time the expenditure was incurred. Net cash flow means the gross output less deductible expenses, pre-operating expenses, ongoing capital expenditures and working capital charges.

The recoverable pre-operating expenses, however, shall be approved by the DENR Secretary upon recommendation of the Director of the Mines and Geosciences Bureau (MGB) and shall consist of actual expenses and capital expenditures enumerated under items 1 to 13 of Section 3(f) of DAO No. 99-56. Moreover, such recoverable pre-operating expenses shall be subject to verification of its actual expenditure by the independent audit recognized by the Government.

In the case of *La Bugal-B'Laan Tribal Association, Inc. v. Ramos, 445 SCRA 1, G.R. No. 127882 dated December 1, 2004*, the Supreme Court, in interpreting the provisions of the Philippine Mining Act of 1995, ruled that during the recovery period, the payment by the contractor of national taxes, is waived. Only local government taxes and fees would be paid during the period.

The Supreme Court explained:

> "Specifically, under the fiscal regime, the government's expectation is, *inter alia*, the receipt of its share from the taxes and fees normally paid by a mining enterprise. On the other hand, the FTAA contractor is granted by the government certain fiscal and non-fiscal incentives to help support the former's cash flow during the most critical phase (cost recovery) and to make the Philippines competitive with other mineral producing countries. After the contractor has recovered its initial investment, it will pay all the normal taxes and fees comprising the basic share of the government, plus an additional share for the government based on the options and formulae set forth in DAO 99-56."

Also, in the latest case of *FCF Minerals Corporation vs. Commissioner of Customs, CTA EB No. 1620*, promulgated on August 14, 2018, the Court of Tax Appeals (CTA), En Banc, has recognized and applied the rule that Government Shares are collected only after Recovery Period.

WHEREFORE, in view of the foregoing, it is the opinion of this Office, and thus, holds that excise tax on minerals, income tax, value added tax (VAT) on purchases of imported equipment, goods and services, withholding tax on dividends to foreign stockholders, withholding tax on interest payments on foreign loans, and royalties due the government on mineral reservations shall not be collected from SMI from the date of approval of the Mining Project Feasibility Study in June 8, 2016 up to the end of the Recovery Period. The Recovery Period, as defined under Section 3(e) of DAO No. 99-56, shall be for a maximum of five (5) years or at a date where 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 Operations (as represented, SMI's production is expected to commence on the 4th quarter of 2022), whichever comes first, as provided under Section 81 of the Philippine Mining Act, its implementing rules and regulations particularly DAO No. 99-56; and the FTAA between SMI and the Philippine Government. It is understood that the recoverable pre-operating expenses shall be approved by the DENR Secretary upon recommendation of the MGB Director and shall consist of actual expenses and capital expenditures enumerated under items 1 to 13 of Section 3(f) of DAO 99-56, and that such recoverable pre-operating expenses shall be subject to verification of its actual expenditure by an independent audit recognized by the Government. Finally, it is understood that after the expiration of the said Recovery Period, SMI shall become subject to all applicable taxes, fees, royalties, and other related payments required by the Government.

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

Very truly yours,

CAESAR R. DULAY
Commissioner of Internal Revenue
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gps(sagittarius mines-RA 7942)