REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

OCEANAGOLD (PHILIPPINES), INC.,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA *EB* NO. 2663
(CTA Case Nos. 10021 & 10061)

Present:

DEL ROSARIO, *P.J.,*
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO,
CUI-DAVID,
FERRER-FLORES, *and*
ANGELES, *JJ.*

Promulgated:
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RESOLUTION

MANAHAN, *J.*:

This resolves petitioner's *Motion for Reconsideration (of the Decision dated October 18, 2023)*[1] filed on November 7, 2023, with respondent's *Comment/Opposition (Re: Petitioner's Motion for Reconsideration)*[2] filed on November 20, 2023.

The relevant antecedent facts follow.

On August 12, 2022, Oceanagold (Philippines), Inc. ("Oceanagold") filed a *Petition for Review*[3] seeking to set aside the *Decision* dated November 10, 2021[4] and *Resolution* dated July 11, 2022[5] rendered by the Second Division of the Court.

[1] Docket – Vol. II, pp. 597-610.
[2] Docket – Vol. II, pp. 613-621.
[3] Docket – Vol. I, pp. 38-55.
[4] Annex "A", *Petition for Review*, Docket – Vol. I, pp. 66 to 86.
[5] Annex "C", *Petition for Review*, Docket – Vol. I, pp. 100 to 108.

Said *Decision* and *Resolution* denied its claim for refund of the aggregate amount of ₱155,525,759.86, allegedly representing excise taxes illegally collected by the Commissioner of Internal Revenue ("CIR") for the first and second quarters of taxable year 2017. The Court in Division held that while Oceanagold is exempt from the payment of excise taxes during the five-year recovery period,[6] the amounts claimed in this case were no longer covered by the same.

It its *Petition for Review*, Oceanagold reiterated before the Court *En Banc* that the five-year recovery period should be reckoned from the actual date of commencement of commercial production, not from the time it should have begun as found by the Court in Division. Oceanagold argued that strict compliance with the timetable is irrelevant for the purpose of determining its exemption from excise taxes, and that there can be no "recovery" without commencing actual commercial production.

The Court *En Banc* denied the *Petition for Review* in its *Decision* dated October 18, 2023.[7] Citing the related case of *Oceanagold (Philippines), Inc. v. Commissioner of Internal Revenue*,[8] the Court *En Banc* ruled that to be entitled to the refund, Oceanagold must establish that the collection of excise taxes during the recovery period was detrimental to the recovery of its pre-operating and property expenses. Oceanagold failed to present evidence that its payment of excise tax adversely affected its financial position. Therefore, even assuming that its claim for refund was within the recovery period, the Court in Division still correctly denied the same.

Hence, the instant *Motion for Reconsideration*.

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[6] DENR Administrative Order No. 56-99, Sec. 3:

...

e. *Recovery of Pre-Operating Expenses*. ... The Recovery Period, which refers to the period allowed to the Contractor to recover its Pre-Operating Expenses as provided in the Mining Act And the IRR, 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. ...

[7] Docket – Vol. II, pp. 570-591.

[8] CTA EB No. 2492, May 31, 2022.

Petitioner Oceanagold assigns the following error:

> **"THE HONORABLE COURT ERRED IN HOLDING THAT PETITIONER FAILED TO PROVE THAT THE PAYMENTS OF THE EXCISE TAX SUBJECT OF THE INSTANT CASE WERE DETRIMENTAL TO ITS RECOVERY OF PRE-OPERATING AND PROPERTY EXPENSES.**
>
> **A. Republic Act No. ("R.A.") 7942 effectively amended or modified the provisions of petitioner's Financial or Technical Assistance Agreement ("FTAA") pertaining to government's share thereto.**
>
> **B. Jurisprudence provide that an FTAA contractor is exempt from excise tax during the recovery period.**
>
> **C. Assuming for the sake of argument that payment of excise tax during the recovery period should be detrimental to petitioner as a requirement before petitioner may invoke its tax exemption, petitioner has sufficiently established that such tax payment was in fact detrimental to petitioner."**

Petitioner cites Section 81 of Republict Act ("RA") No. 7942, which provides that the government share in the Financial or Technical Assistance Agreement ("FTAA") consists of excise tax, among others, and shall be collected only after the contractor has fully recovered its pre-operating expenses. It emphasizes that the law makes no qualifications or conditions. Thus, while the FTAA uses the term "detrimental" with respect to recoverable taxes, said qualification should be deemed effectively superseded upon the enactment of RA No. 7942.

Petitioner likewise submits that jurisprudence affirms the waiver of national taxes during the recovery period in order to support an FTAA contractor's cash flow during this critical phase. There is no requirement that such taxes be detrimental before the FTAA contractor can invoke this tax exemption. In any case, petitioner argues that the mere fact that it used the amounts claimed to pay the excise tax is sufficient to establish that such payment had been detrimental to its recovery of pre-operating expenses as it delayed the same.

On the other hand, respondent maintains that the Court in Division correctly ruled that petitioner's recovery period had already ended in 2016. Consequently, petitioner's payment of the subject excise taxes cannot be considered erroneous or illegal such that it would be entitled to a refund.

We now resolve.

After due consideration of the parties' arguments, the Court finds no merit in the present *Motion*.

Petitioner anchors its *Motion* on the premise that the Court *En Banc* "essentially accepted petitioner's arguments ... when it held that '*[a]ssuming* that the recovery period starts from April 1, 2013 ... petitioner's payments of excise taxes ... were made during the recovery period."[9] A proper look at the assailed *Decision*, however, visibly shows that the Court *En Banc* did not reverse nor modify the findings of the Court in Division in denying petitioner's claim for refund.[10]

RA No. 7942 or the "Philippine Mining Act of 1995" ("Mining Act") indeed allows full recovery by FTAA contractors of their pre-operating expenses, but it does not provide the period within which such recovery may be made. Department of Environment and Natural Resources ("DENR") Administrative Order (DAO) No. 95-23,[11] as amended by DAO No. 96-40[12] and DAO No. 2010-21,[13] supplies that "[t]he period of recovery *which is reckoned from the date of commercial operation* shall be for a period not exceeding five (5) years or until the date of actual recovery, whichever comes earlier."[14] The "date of commercial operation" is not exactly defined in the implementing rules, but Section 5(j) describes "commercial

[9] Docket – Vol. II, p. 597, par. 2. (Emphasis supplied)
[10] *See* Docket – Vol. II, p. 589, par. 4.
[11] Implementing Rules and Regulations (IRR) of Republic Act No. 7942, Otherwise Known as the "Philippine Mining Act of 1995" (1995).
[12] Revised Implementing Rules and Regulations of Republic Act No. 7942, Otherwise Known as the "Philippine Mining Act of 1995" (1996).
[13] 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" (2010).
[14] *Emphasis supplied.*

production" as the "production of sufficient quantity of minerals to sustain 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.***"[15]

We thus reiterate with approval the findings of the Court in Division:[16]

> "[P]etitioner had three (3) years from the approval of its [Partial Declaration of Mining Feasibility] on 11 October 2005, or until 11 October 2008, to develop and construct mining production facilities. Thereafter, it had to submit within 30 days another Work Program for the period of three (3) years for the actual production activities, including the commencement of commercial production.
>
> It is thus clear from the foregoing that petitioner should have commenced commercial operation and production within the fourth quarter of 2008 up to fourth quarter of 2011. Consequently, **the recovery period would have ended in the fourth quarter of 2016**, regardless of petitioner's declaration of the commencement of commercial production on 27 March 2013
>
> Accordingly, the subject payments of excise taxes that were made between **06 February 2017** and **16 June 2017** (which are beyond the recovery period) are not rendered erroneous nor illegal." (*Emphasis in the original*)

In any case, petitioner failed to establish that it would have been entitled to the refund of the subject excise taxes. As held by this Court, the FTAA is explicit that all taxes collected during the recovery period are recoverable provided that they are detrimental to the contractor's recovery of pre-operating and property expenses. In other words, to be entitled to refund, petitioner had the burden to prove two things: 1.) that the taxes were paid during the recovery period; and 2.) that the taxes were detrimental to the recovery of pre-operating and property expenses. As found by this Court, petitioner did not present evidence to establish the latter. Instead, it solely relied on its theory that it is no longer required to do so, the plenary tax

[15] *Emphasis supplied.*
[16] Docket – Vol. I, Decision promulgated November 10, 2021, p. 84.

exemption under Section 81 of the Mining Act having already eliminated such requirement under the FTAA.

Contrary to petitioner's postulation, however, the Court finds that there is no conflict between the FTAA requirement and the Mining Act, such that the provisions of the latter would impliedly modify the former. The FTAA requirement merely governs the manner of recovering all taxes, duties, fees, costs, levies, and imposts paid during the recovery period, but it does not diminish the incentive granted under Section 81 of the Mining Act. As pointed out in the assailed *Decision*:[17]

> "Notwithstanding petitioner's failure to establish its entitlement to its refund claim of the excise taxes paid during the alleged recovery period, it is not without any recourse. As provided for under Section 11.2 of the FTAA, "Any amount not recovered shall be deducted from the GOVERNMENT'S Share [.]" Even Section 11.5 of the FTAA recognizes that "excise tax, including excise tax paid during the recovery of Pre-Operating Expenses" may be deducted from the Government Share in Net Revenue." (*Citation omitted*)

It should be stressed that DAO No. 56-99,[18] which implements Section 81 of the Mining Act, mandates that the contractor comply with the prevailing procedures under pertinent laws, rules, and regulations for the availment of the tax incentive. Particularly, Section 3 thereof requires that the FTAA entered into by the government and the contractor embody a provision to that effect. It states:

> "SECTION 3. *Fiscal Regime of a Financial or Technical Assistance Agreement.*
>
> The Financial or Technical Assistance Agreement which the Government and the FTAA Contractor shall enter into shall have a Fiscal Regime embodying the following provisions:
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> ...
>
> d. *Payment of Government Taxes and Fees.* The Contractor shall promptly pay all the taxes and fees

[17] Docket – Vol. 2, Decision promulgated October 18, 2023, p. 588.
[18] Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements Pursuant to Section 81 and Other Pertinent Provisions of Republic Act No. 7942, Otherwise Known as the "Philippine Mining Act of 1995" (1999). am

> required by the Government in carrying out the activities covered in the FTAA and in such amount, venue, procedure and time as stipulated by the particular law and implementing rules and regulations governing such taxes and fees subject to all rights of objection or review as provided for in relevant laws, rules and regulations. *In case of non-collection as covered by Clause 3-g-1 of this Section, the Contractor shall follow the prevailing procedures for availment of such non-collection in accordance with pertinent laws, rules and regulations.*"[19] (Emphasis supplied)

Clearly, from the foregoing provision, the mere fact of payment of excise taxes does not automatically entitle an FTAA contractor to a refund under Section 81 of the Mining Act.

In actions for tax refund such as the present case, not only is the law construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence are *strictissimi* scrutinized and must be duly proven.[20] Petitioner failed to convince that its case is supported by law and evidence. Thus, the Court finds no reason to reverse or modify the assailed *Decision*.

ACCORDINGLY, petitioner's *Motion for Reconsideration (of the Decision dated October 18, 2023)* is **DENIED** for lack of merit.

SO ORDERED.

CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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[19] DAO No. 56-99, Sec. 3.
[20] *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(On Leave)
JEAN MARIE A. BACORRO-VILLENA
Associate Justice

(ON OFFICIAL BUSINESS)
MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
Associate Justice

CORAZON G. FERRER-FLORES
Associate Justice

HENRY S. ANGELES
Associate Justice