REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

TAGANITO MINING CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 4866

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
APR 20 1995

x - x

DECISION

This case originally involves petitioner's claim for refund of alleged overpaid 5% excise tax in the amount of P135,495.18 on shipments of Beneficiated Nickel Silicate Ores and Chromite Ores to Japan from July to December 1990. However, with the Amended Petition for Review filed by petitioner on May 26, 1993, the claim for refund was increased from P135,495.18 to P298,021.69.

Petitioner is a corporation duly organized and existing under the laws of the Republic of the Philippines with office located at the 4th Floor, Solid Mills Bldg., Dela Rosa Street, Legaspi Village, Makati, Metro Manila. It is primarily engaged in business as a producer and exporter of Beneficiated Nickel Silicate Ores and Chromite Ores with BIR Permit No. 0057-MP-90 (Exh. B, as corrected per Our Resolution dated September 24, 1993) issued on June 22, 1990, by Deputy Commissioner Eufracio D. Santos.

For the period starting July to December 1990, petitioner shipped a total of 157,323 Wet Metric Tons (WMT) of Beneficiated Nickel Silicate Ores to Nissho Iwai Corporation and 12,131 WMT of Chromite Ores to Yonasho Corporation, itemized as follows:

Beneficiated Nickel Silicate Ores:

July 3, 1990	34,584 WMT
September 10, 1990	26,273 WMT
October 2, 1990	41,059 WMT
November 1, 1990	29,249 WMT
December 12, 1990	26,158 WMT
Total	157,323 WMT

Chromite Ores:

July 3, 1990	6,767 WMT
November 1, 1990	5,364 WMT
Total	12,131 WMT

Petitioner paid the corresponding 5% excise tax on the above shipments within twenty (20) days after the end of each calendar quarter pursuant to Section 151(c) of the National Internal Revenue Code, in the sum of P8,883,876.46, computed as follows: (Exhs. C, C-1, C-2, D, D-1 and D-2)

Date of Payment	BIR P.O.*	C.R.*	Amount Paid
October 22, 1990	C-8035012	B-22591998	P3,235,864.79
January 18, 1991	C-8036428	B-21184729	5,648,011.67
Total			P8,883,876.46

The excise tax was based on the foreign value appearing on the invoice and calculation sheets for each shipment converted at the exchange rate of a US Dollar to Philippine Pesos at the time of receipt of payment as shown in the Credit Advice/Memo from the local banks. Petitioner used as basis for the computation of the excise tax the exchange rate at the time of receipt of payment per Bank Credit Advice/Memo. Petitioner claims that the value at the time of payment was more than the actual market value of the gross output of minerals at the time of their removal or export.

On May 20, 1992, petitioner filed with the respondent a claim for refund of alleged overpaid 5% excise tax for the year 1990 in the amount of P135,495.18. The claim was anchored on the belief that the basis for the excise tax should be the value of the minerals at the time of their removal or export pursuant to Section 151(a)(3) of the National Internal Revenue Code. By and large, petitioner alleged that the exchange rate used at the time of remittance of the excise tax was higher than the exchange rate at the time of removal thus resulting to an overpayment. The basis for the excise tax payments were the amounts stated in the final invoice for each shipment. The conversion rate used was that prevailing at the time of receipt of payment from Japan as shown in the Credit Advice/Memo received from local banks.

On October 20, 1992, petitioner filed a petition for review with this Court seeking the refund of P135,495.18, computed as follows:

TAGANITO MINING CORPORATION
SALES SCHEDULE
FOR THE YEAR, 1990

SHIPMENT NO.	DATE	COMMODITY	VOLUME (WMT)	$ VALUE	EXCHANGE RATE (Exh.L)	PESO VALUE
5	7-3-90	Beneficiated Nickel Ore	34,584	$1,238,281.44	P23.35	P28,913,871.62
	7-3-90	Chromite Ore	6,767	394,415.86	23.35	9,209,610.33
6	9-10-90	Beneficiated Nickel Ore	26,273	1,021,389.83	25.00	25,534,745.75
7	10-2-90	Beneficiated Nickel Ore	41,059	1,652,191.52	25.75	42,543,931.64
8	11-1-90	Beneficiated Nickel Ore	29,249	1,149,657.77	28.00 *	32,190,417.56
9	11-1-90	Chromite Ore	5,364	295,022.36	28.00 *	8,260,626.08
	12-12-90	Beneficiated Nickel Ore	26,158	1,011,229.38	28.00	28,314,422.64
		TOTAL	169,454	6,762,188.16		174,967,625.62

TAGNITO MINING CORPORATION
EXCISE TAX
FOR THE YEAR, 1990

GROSS SALES	P 174,967,625.62
TAX RATE	5%
EXCISE TAX DUE	P 8,748,381.28

Less Payments:

October 22, 1990	CR No. 22591998	P3,235,864.79		
January 18, 1991	CR No. 21184729	5,648,011.67		8,883,876.46
EXCISE TAX OVERPAYMENT			P	135,495.18

* The conversion rate of a Philippine Peso to a US Dollar was erroneously stated at P28.00 instead of P25.75 on November 1, 1990 per letter of the Department of Economic Statistics of the Central Bank of the Philippines dated April 26, 1993 (Exh. L-1).

After the filing of the Formal Offer of Evidence by petitioner, petitioner filed on May 26, 1993 a Motion to Admit Amended Petition For Review. The Amended Petition sought for the refund of the amount of P298,021.69 instead of its original claim for refund of P135,495.18. The claim for refund was increased due to the overstatement of the conversion rate of a Philippine Peso to a US Dollar from P25.75 to P28.00 on November 1, 1990. The correct conversion rate should be P25.75 on November 1, 1990. Thus, petitioner stressed that the original claim for refund was understated by P162,526.51.

Respondent averred in her Amended Answer that the instant petition should be dismissed for failure on the part of petitioner to prove entitlement to the claim for refund. Claims for refund like tax exemptions are strictly construed against the taxpayer. The burden of proof lies with petitioner to prove entitlement to said claim. Petitioner failed to prove that the amount claimed for was actually withheld and remitted to the Bureau of Internal Revenue. Assuming arguendo that petitioner is entitled to the claim for refund only the amount of

P135,495.18 as claimed for in the administrative level should be granted instead of the amount of P298,021.69 as requested in the Amended Petition For Review. After filing her Amended Answer, respondent waived her right to present evidence instead she submits this case for decision based on the pleadings, the CTA records and the evidence presented by petitioner.

The issue presented for resolution is whether or not petitioner is entitled to the refund of P298,021.69, representing alleged overpaid excise tax from July to December 1990 on shipments of Beneficiated Nickel Silicate Ores and Chromite Ores to Japan.

Petitioner contended that the basis for computing the excise tax should be the actual market value of the shipments at the time of removal pursuant to Section 151(a)(3) of the National Internal Revenue Code, pertinent portion of which reads as follows:

> "SEC. 151. ***Mineral Products*** - **(a)** ***Rates of Tax*** - There shall be levied, assessed and collected on mineral, mineral products and quarry resources, excise tax as follows:
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> x x x x x x x x x.
>
> (3) On all metallic minerals, a tax of five percent (5%) based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced; x x x." (Emphasis Ours.)

Section 151(c) of the same Code likewise provides that the excise tax above-mentioned can be paid on a quarterly basis upon filing of a bond as surety for the payment of the excise taxes. Section 151(c) provides as follows:

> "(c) ***Time, manner and place of payment of excise tax on mineral and mineral products.*** - Unless otherwise provided, the excise tax on minerals and mineral products shall be due and payable upon removal of the minerals and mineral products or quarry resources from the locality where mined or upon removal from customs custody in the case of importations.
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> Any person liable to pay the excise tax on locally produced or extracted mineral, mineral products or quarry resources shall, before removal of such products file, in duplicate, a return setting forth the quantity and the actual market value of the mineral or mineral products to be removed and pay the excise taxes due thereon to the Collection Agent, or the Treasurer of the city or municipality of the place where the mine is located except as herein below provided.
>
> However, the output of the mine may be removed from such locality without the prepayment of such excise taxes if the lessee, owner, or operator of the mining claim shall file a bond in the form and amount and with such sureties as the Commissioner may require, conditioned upon the payment of such excise taxes. It shall be the duty of every lessee, owner or operator to make a true and complete return in duplicate setting forth the quantity and the actual market value of the minerals or mineral products or quarry resources removed during such calendar quarter, of the balance, if any, in cases where payments are made upon removal, and pay the excise taxes due thereon within 20 days after the end of such quarter to the Collection Agent, or the Treasurer of the city or municipality of the place where the mine is located.

> In the case of indigenous petroleum, the tax due thereon shall be paid by the buyer or purchaser within 15 days from the date of actual or constructive delivery to the said buyer or purchaser. *(As amended by E.O. No. 273)*" (Underscoring supplied.)

Petitioner was authorized by the respondent to pay the excise taxes on a quarterly basis (Exh. B-1, as corrected per Court's Resolution dated September 24, 1993) upon the approval of the bond filed covered by Provident Insurance Corporation Surety Bond No. PIC/G (25) 01285-4656 (Exh. B-2, as corrected), dated June 22, 1990, in the amount of P500,000.00.

In fine, Section 151(a)(3) of the Tax Code and all the evidence presented by petitioner bolster its claim for refund in the amount of P135,495.18.

The excise taxes are paid on goods manufactured or produced in the Philippines for domestic sale or consumption or for any other disposition and to things imported (Sec. 126, NIRC). The excise taxes can be classified into two: the specific tax and the ad valorem tax. The specific tax is an excise tax based on weight or volume capacity or any other physical unit of measurement. While an ad valorem tax is an excise tax based on selling price or other specified value of the goods.

The excise tax is basically a severance tax, that is, a tax on the privilege of severing or extracting minerals from the earth, and is due and payable upon removal of the mineral product from its bed or mines. **(Republic Cement Corporation v. Commissioner of Internal Revenue, 23 SCRA 967)** The mineral products extracted by petitioner falls under the ad valorem tax at the rate of 5% based on the actual market value of the gross output of the all metallic minerals locally extracted or produced at the time of removal [Sec. 151(3), NIRC]. In the cases of **CEPOC v. Commissioner of Internal Revenue, L-18649, February 27, 1965** and **Commissioner of Internal Revenue v. Court of Appeals and Atlas Consolidated Mining and Development Corporation, G.R. No. 86785, November 21, 1991, 204 SCRA 182**, the Supreme Court held that:

> "Ad valorem tax is a tax not on the minerals, but upon the privilege of severing or extracting the same from the earth, the government's right to exact the said impost springing from the Regalian theory of State ownership of its natural resources."

In the case of **Republic Cement Corporation vs. Commissioner of Internal Revenue, G.R. No. L-20660, June 13, 1968, 23 SCRA 967**, the Supreme Court had the occasion to rule that:

> "x x x, the *ad valorem tax* is computed on the '*actual market value* of the minerals or mineral products extracted or produced from all mineral lands'."

The law [Sec. 151(a)(3), NIRC] and the above-cited jurisprudence are clear. The excise tax is based on the actual market value of the gross output of minerals at the time of removal. This was reiterated in the latest ruling of the Supreme Court in the case of **Commissioner of Internal Revenue v.**

Court of Appeals and Atlas Consolidated Mining and Development Corportion, supra.,

> "Under the aforementioned provisions, although all minerals and mineral products extracted from the mineral lands are subject to *ad valorem* tax, however, the said tax becomes due and payable only upon removal of the same from the locality where mined. x x x. Moreover, it should be noted that said tax is imposed only on the actual market value of mineral products extracted or produced. This is confirmed by the second paragraph of said Section 243 which requires prior notification to the Commissioner of - Internal Revenue or his representative before the minerals or mineral products are removed from the mines. Such requirement is obviously intended to enable him to assess and collect the proper *ad valorem* taxes, which necessarily presupposes that such minerals or mineral products have an actual market value."

In this case, since the conversion rate of a US Dollar to a Philippine Peso is lower at the time of removal from the mines as compared to the conversion rate at the time of payment based on the Credit Advice/Memo from the local banks there was indeed an overpayment of excise tax. The correct basis therefore being the actual market value at the time of removal.

As a rule, any claim for exemption from tax statute is strictly construed against the taxpayer. However, where the law is clear and unambiguous, the law must be taken as it is devoid of judicial addition or subtraction. **(Acting Commissioner of Customs vs. Manila Electric Company, 77 SCRA 469.)** Hence, Section 151(a)(3) and (c) of the NIRC as plainly worded should be applied as it needs no further judicial interpretation from this Court.

Now, with respect to respondent's averment that only the amount of P135,495.18 should be granted instead of P298,021.69, We find the contention of respondent to be tenable.

The claim for refund should first be filed with the Commissioner of Internal Revenue, and the subsequent appeal to the Court of Tax Appeals must be instituted within the two-year period. If, however, the Commissioner takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Commissioner. **(Insular Lumber Company vs. Court of Tax Appeals, 104 SCRA 710)** Since the petition for review is on the appeal level, the Court can only take cognizance of the amount claimed for refund in the administrative level. In this case, petitioner filed a claim for refund with the respondent in the amount of P135,495.18. The claim for refund was not amended in the administrative level. It was only after petitioner had formally offered its evidence did it file a motion to admit its amended petition for review - this time increasing its claim from P135,495.18 to P298,021.69.

The rule is that, a written claim for refund filed by the taxpayer with the Commissioner is a condition precedent to the filing of a petition for review with the Court of Tax Appeals. Section 204(3) in relation to Section 230 of the National Internal Revenue Code is clear on this point, to wit:

"SEC. 204. ***Authority of the Commissioner to compromise, abate, and refund/credit taxes.*** - The Commissioner may -

x x x x x x x x x.

(3) Credit or refund taxes erroneously or illegally received, penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two years after the payment of the tax or penalty." (Underlining supplied.)

"SEC. 230. ***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 excessive 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 begun after the expiration of two 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.
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> *Forfeiture of refund* - A refund check or warrant issued in accordance with the pertinent provisions of this Code which shall remain unclaimed or uncashed within five (5) years from the date the said warrant or check was mailed or delivered shall be forefeited in favor of the government and the amount thereof shall revert to the General Fund." (Emphasis ours.)

As such only the amount claimed in the administrative level can be the subject matter of an appeal with this Court. Hence, the Court can only award the amount of P135,495.18, as claimed for with the BIR, after having been convinced by the evidence presented by petitioner.

WHEREFORE, in view of the foregoing, the petition for review is found to be meritorious and the same is hereby **GRANTED** only with respect to the amount of P135,495.18. Respondent is hereby ordered to refund in favor of petitioner the amount of P135,495.18, representing overpaid excise taxes for its shipments of Beneficiated Nickel Silicate Ores and Chromite Ores from July to December 1990.

No cost of suit.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

(On leave)
MANUEL K. GRUBA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation between the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Court of Tax Appeals
Presiding Judge