REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL SECOND DIVISION

OCEANAGOLD (PHILIPPINES), INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NOS. **10021** and **10061**

Members:

BACORRO-VILLENA, *Acting Chairperson,*
CUI-DAVID, *JJ.*

Promulgated: JUL 11 2022 8:40 am

x - x

RESOLUTION

BACORRO-VILLENA, J.:

For the Court's resolution is petitioner Oceanagold (Philippines), Inc.'s (**petitioner**'s/**OGPI**'s) "Motion for Reconsideration (of the Decision dated November 10, 2021)"[1] (**MR**) filed on 26 November 2021, without respondent Commissioner of Internal Revenue's (**respondent**'s/**CIR**'s) comment *per* Records Verification dated 08 March 2022. The motion seeks the reversal of this Court's Decision dated 10 November 2021[2] (**assailed Decision**). The dispositive portion of the assailed Decision reads, thusly:

> ...
>
> **WHEREFORE**, the foregoing considered, the Petition for Review filed by petitioner Oceanagold (Philippines), Inc. in CTA Case Nos. 10021 and 10061 are hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**
>
> ...

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1 Division Docket, (CTA Case No. 10021), Volume IV, pp. 1423-1434.
2 Id., pp. 1402-1422.

In its MR, petitioner states that the Honorable Court erred in holding that petitioner failed to prove that the excise tax payments between 06 February 2017 and 16 June 2017 were erroneous or illegal.

Petitioner anchors its arguments on the following grounds:

First, petitioner argues that the commencement of the five (5)-year recovery period should be reckoned from 01 April 2013 or allegedly the "Date of Commencement of Commercial Production" according to Section 2.14 of the Financial or Technical Assistance Agreement[3] (**FTAA**) which states:

> ...
>
> SECTION II
> DEFINITIONS
>
> ...
>
> 2.14 '<u>Date of Commencement of Commercial Production</u>' shall mean the first day of the calendar quarter following the quarter in which production equals **fifteen percent (15%) of the project's initial annual design capacity as outlined in the Declaration of Mining Feasibility** as hereinafter defined.
>
> ...

Petitioner claims to have reached 15% of the project's initial project design within the first quarter of 2013 as evinced in a letter to the Department of Environment and Natural Resources (**DENR**) on 27 March 2013. If reckoned from 01 April 2013, petitioner contends that its excise tax payments from 06 February 2017 to 16 June 2017 would still be within the 5-year recovery period and thus, should be the proper subject of a tax refund.

Petitioner further argues that in CTA Case No. 9289 entitled *Oceanagold (Philippines), Inc. v. Commissioner of Internal Revenue*, a case that similarly involved the herein parties, the Third Division deemed therein the commencement period to begin on 01 April 2013.

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3 Exhibit "P-2", id., Volume III, pp. 962-1015.

Second, in relation to the above argument, petitioner states that it is not required to strictly adhere with the timetable in the FTAA to be granted the refund claimed provided that its claim was still within the 5-year recovery period.

Third, petitioner contends that assuming there was delay in its compliance with the timetable in the FTAA, the same does not disqualify it from claiming its pre-operating expenses.

We resolve.

At the onset, it must be pointed out that petitioner's arguments are a mere rehash of its previous arguments in its consolidated Petitions for Review.[4] A review of the first and second arguments will show that they rest solely on the determination of when the 5-year recovery period should be deemed to have commenced. The commencement date has already been discussed exhaustively in the assailed Decision in the following wise:

> ...
>
> DAO No. 40-96 defines the term "Commercial Production" as follows:
>
>> ...
>> i. "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 the Contractor or as stated in the feasibility study, whichever comes first**.
>> ...
>
> It must be noted that, on 18 March 2005, petitioner submitted a PDMF stating that it found "sufficient ore reserves and diluted resource of 23.7 million tonnes of 1.8g/t Au and 0.64% Cu ... and such ore reserves have been delineated to sustain the mining operation of the Corporation for some 14 years," and that "mining operation ... will process gold and copper at 2 million tonnes per annum..."
>
> Subsequently, on 11 October 2005, the DENR issued an Order approving the Partial Declaration of Mining Feasibility subject to the following condition, among others:

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4 Division Docket (CTA Case No. 10021), Volume I, pp. 10-60; Division Docket (CTA Case No. 10061), pp. 10-60.

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

A scrutiny of the FTAA reveals the following:

> ...
>
> 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.
>
> ...

Anent thereto, Sections IX, X, and XX of the FTAA provide:

> ...
>
> 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**.
>
> 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.

...

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.

...

SECTION XX
OTHER PROVISIONS

...

20.4 Suspension of Obligations.

(a) Any failure or delay on the part of any party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to Force Majeure.
(b) If Mineral Exploration and/or Mining Operations are delayed, curtailed or prevented by such Force Majeure causes, then the time for enjoying the rights and carrying out the obligations thereby affected, the term of this Agreement and all rights and obligations hereunder shall be extended for a period equal to the period thus involved.
(c) The party whose ability to perform its obligations is affected (i) **shall promptly give Notice to the other in writing of any such delay or failure in performance, the expected duration thereof, and its anticipated effect on the party expected to perform**, and (ii) shall use its best efforts to remedy such delay, except that neither party shall be under any obligation to settle a labor dispute.
(d) This Agreement and the performance of all the obligations of the CONTRACTOR under the same shall be deemed suspended if the prosecution of the CONTRACTOR'S obligations under this Agreement is

> prevented by delays in obtaining approvals of the GOVERNMENT, both national and local, including statutory authorities, to any matter or aspect of this Agreement in which such approvals are necessary, provided that the delays are not due to the fault of the CONTRACTOR.
>
> ...

Based on the foregoing provisions of the FTAA, petitioner had three (3) years from the approval of its PDMF 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. Moreover, it bears stressing that in its Memorandum, petitioner avers:

> ...
>
> 16. In 2008, petitioner was constrained to halt further mine development in the Didipio Project due to escalating costs and uncertainty in the financial markets. Petitioner, thus, put the Didipio Project on "care and maintenance."
>
> 17. In 2010, however, after completing a strategic review and securing further financing, petitioner resumed development work in the Didipio Project.
>
> 18. In late 2012, petitioner successfully commenced the commissioning of the Didipio Project, and mined and stockpiled approximately 800,000 metric tonnes ("MT") of ore for further processing. As part of the commissioning process, petitioner commenced ore milling operations to produce copper concentrates. Petitioner expected to make its very first sale and delivery of copper concentrates in the first quarter of 2013.[5]

...

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5 Citations omitted and emphasis and underscoring in the original text.

To summarize the foregoing disquisitions, DENR Administrative Order (**DAO**) No. 40-96[6] provides that commercial production commences from the date declared by the Contractor or as stated in the feasibility study, whichever comes first. On 11 October 2005, the DENR issued an Order[7] approving the "Partial Declaration of Mining Feasibility" (**PDMF**). Thereafter, petitioner would have had three (3) years from the approval of its PDMF on 11 October 2005, or until 11 October 2008, to develop and construct its facilities. After the end of said period, it had to submit within thirty (30) days another Work Program for the period of 3 years within which actual production activities and commercial production would take place. Therefore, petitioner should have commenced commercial production within the fourth (4^{th}) quarter of 2008 up to 4^{th} quarter of 2011.

Petitioner's claim that it commenced commercial production in the first quarter of 2013 cannot be taken into account given that it was already way past the three (3)-year period within which it should have actually begun. Counting from the 4^{th} quarter of 2011, the 5-year recovery period would have ended on the 4^{th} quarter of 2016 making petitioner's excise tax payments in 2017 clearly made beyond such recovery period.

Furthermore, while it may be gainsaid that another division of this Court expresses a contrary view, it is elementary that this Court's decisions do not constitute biding precedent. Article 8 of the Civil Code provides that "judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines". Such judicial decisions only contemplate those decided by the Supreme Court.

As regards petitioner's last argument, the Court fully agrees that despite the lapse of the 5-year period, petitioner may still claim its pre-operating expenses. However, as explained, any such claim shall be deducted from the Government's share pursuant to the FTAA[8], *viz:*

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6 Revised Implementing Rules and Regulations of Republic Act No. 7942, Otherwise known as the Philippine Mining Act of 1995.

7 Exhibit "P-8", Division Docket (CTA Case No. 10021), Volume III, pp. 1048-1049.

8 Exhibit "P-2", id., pp. 962-1015.

...

SECTION XI
FISCAL REGIME

...

11.2 Recovery of Pre[-]operating 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) Pre[-]operating Expenses; and (b) Property expenses incurred during the period in which Pre[-] operating 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 Pre[-] operating Expenses and Property expense incurred during the Period in which Pre-operating Expenses were incurred, it shall be allowed to recover the same as a depreciation allowance deductible against the distributable Net Revenues over the period of the succeeding three Contract Years.

...

All taxes, duties, fees, costs, levies and imposts paid by the CONTRACTOR and which are detrimental to the CONTRACTOR's recovery of Pre[-]operating Expenses and Property Expenses during the five (5) Contract Years contemplated in this Section shall be recoverable by the CONTRACTOR, whenever possible during the year(s) such expenditures were actually incurred. Any **amount not recovered shall be deducted from the GOVERNMENT's Share** as more specifically provided in Section 11.5 of this Agreement, unless legislation is required to allow the necessary deductions, in which case the deductions shall be made only after the appropriate legislation has been passed.

All the items recoverable by the CONTRACTOR under this Section 11.2, including the on-going Mineral Exploration costs incurred by the CONTRACTOR during the five-year recovery period, shall be recovered from Net Revenue, as the term 'Net Revenue' is defined under Section 11.4 of this Agreement.[9]

...

[9] Emphasis and underscoring in the original text.

Clearly from the above provisions of the FTAA, a claim for refund of taxes incurred beyond the 5-year period was never contemplated. Rather, any pre-operational expenses suffered by petitioner would only constitute a deduction from the government's share in the venture established under the FTAA.

All told, the Court finds no cogent reason to reverse or modify the assailed Decision.

WHEREFORE, premises considered, petitioner Oceanagold (Philippines), Inc.'s "Motion for Reconsideration (of the Decision dated November 10, 2021)" filed on 26 November 2021 is hereby **DENIED**.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

I CONCUR:

LANEE S. CUI-DAVID
Associate Justice