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. **9627, 9697, 9760, 9830** and **9856**

Members:

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

Promulgated:
JAN 29 2024 3:00 pm

x - x

RESOLUTION

BACORRO-VILLENA, J.:

For the Court's resolution is petitioner Oceanagold (Philippines), Inc.'s (**petitioner**'s/**OPI**'s) "Motion for Reconsideration [of Decision dated September 8, 2023]"[1] (**MR**) filed on 29 September 2023, with respondent Commissioner of Internal Revenue's (**respondent**'s/**CIR**'s) "Comment (Re: Petitioner's Motion for Reconsideration)"[2] (**Comment**) filed on 06 November 2023.

The MR seeks a reversal of this Court's Decision dated 08 September 2023[3] (**assailed Decision**) in the above-captioned case. The dispositive portion of the assailed Decision reads:

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[1] Division Docket, Volume III, pp. 2367-2391.
[2] Id., pp. 2361-2364.
[3] Id., pp. 2394-2426.

> ...
>
> **WHEREFORE**, the foregoing premises considered, the Petitions for Review in CTA Case Nos. 9627, 9697, 9760, 9830 and 9856 filed by petitioner Oceanagold (Philippines), Inc. are hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**
>
> ...

As the records show, the petitioner's consolidated Petitions for Review are all actions for refund of allegedly erroneously paid excise taxes for the third (3rd) quarter of taxable year (**TY**) 2015 up to the fourth (4th) quarter of TY 2016. These petitions were previously separately filed and docketed as CTA Case Nos. 9627[4], 9697[5], 9760[6], 9830[7] and 9856[8], respectively.

In the present MR, petitioner mainly argues that: (1) strict compliance with the time allocations set in the Financial or Technical Assistance Agreement[9] (**FTAA**) does not result in FTAA's automatic termination; and, (2) the fact that the excise tax payments made should be detrimental need not also be proved as condition for the exercise of its right to refund of excise taxes.

Respondent, on the other hand, echoes the conclusions reached in the assailed Decision and eplores the Court to deny petitioner's MR.

We resolve.

At the onset, it must be stressed that as regards petitioner's first argument, this Court did not rule that petitioner's infractions of the FTAA resulted in its termination. In denying the petitions, the Court held that petitioner's failure to strictly comply with the timeframes set in the FTAA did not extend the recovery period for its excise taxes paid. Surely, although petitioner has now lost the right to avail one of its supposed benefits (which is the refund of excise taxes it paid during the

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4 Filed on 28 June 2017. Division Docket (CTA Case No. 9627). Volume I, pp. 10-43.
5 Filed on 06 October 2017, Division Docket (CTA Case No. 9697), pp. 10-48.
6 Filed on 31 January 2018. Division Docket (CTA Case No. 9760), Volume I, pp. 10-49.
7 Filed on 02 May 2018, id., Division Docket (CTA Case No. 9830), pp. 10-58.
8 Filed on 13 June 2018, id., Division Docket (CTA Case No. 9856), pp. 10-68.
9 Exhibit "P-2", Division Docket (CTA Case Nos. 9627, 9697, 9760, 9830 and 9856), Volume IV, pp. 1869-1922.

recovery period), the FTAA is still very much valid and binding on the parties. The relevant provisions of the FTAA are as follows:

> ...
>
> SECTION VII
> FEASIBILITY STUDY AND RELINQUISHMENT
>
> 7.1 <u>Mining Feasibility</u>. 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.
>
> ...
>
> SECTION IX
> DEVELOPMENT AND CONSTRUCTION PERIOD
>
> 9.1 <u>Timetable</u>. 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 <u>Work Program and Budget</u>. 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 <u>Timetable</u>. 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 **<u>shall</u> 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 XI
FISCAL REGIME

...

11.2 <u>Recovery of Preoperating Expenses, Property Expenses and Taxes Paid During the Recovery Period</u>. 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 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 Preoperating 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.

...

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.[10]

...

Thus, in the assailed Decision, the Court held:

...

Based on the foregoing provisions of the FTAA, petitioner had 36 months or three (3) years from the approval of its PDMF on 11 October 2005, or until 11 October 2008, to develop and construct

[10] Emphasis supplied and underscoring in the original text.

> mining production facilities. Thereafter, it had to submit, within 30 days, another Work Program for the period of 3 years for the actual production activities (including the commencement of commercial production).
>
> Clearly from the foregoing, petitioner should have commenced commercial operation and production *within the 4th quarter of 2008 up to 4th quarter of 2011*. Consequently, **the recovery period would have ended in the 3rd quarter of 2015 to fourth quarter of 2016** (subject periods of the instant refund), 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 **01 July 2015** and **19 December 2016** (which are beyond the recovery period) are not rendered erroneous nor illegal. Moreover, it bears stressing that, in its Petitions...
>
> ...
>
> However, petitioner did not submit pertinent supporting documents (or notices) to the Government stating the reason and duration of the delay and work programs in order to ascertain the date of the recovery period.
>
> Even assuming *arguendo* that the subject payments of excise taxes were made within the recovery period, DAO No. 99-56 and the FTAA state categorically that, in case the excise taxes paid are not recovered, the same would merely form part of the Government's share or the same shall be deducted from the latter's share.[11]
>
> ...

Clearly, petitioner's failure to timely execute on its Partial Declaration of Mining Feasibility (**PDMF**) led to the initial delay of its commencement of commercial production. Whereas the recovery period to file a claim for refund of excise taxes under the FTAA would have been 3rd quarter of 2015 to 4th quarter of 2016 (counting five [5] years from the supposed commencement of commercial operations which should have occurred within the 3rd quarter of 2010 up to 4th quarter of 2011), petitioner was only able to begin production on 27 March 2013.

Nevertheless, petitioner still had almost three (3) years within which to file its claim for refund under the FTAA. However, petitioner was only able to file its administrative claims for refund on 09 January

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11 Supra at note 3: Citations omitted and emphasis in the original text.

2017, 22 January 2018, and 15 May 2018. Undoubtedly, petitioner's right to claim for refund is already inapplicable under the FTAA, the recovery period having already ended.

As it is, nothing in the assailed Decision nor the FTAA grants the government a right to cancel unilaterally the FTAA for petitioner's failure to subscribe with the periods set therein. On the contrary, the FTAA even gives petitioner an alternative remedy in case it is unable to bring its claims within the recovery period which is to have the same deducted from the government's share.

Similarly, petitioner failed to prove that its excise tax payments were detrimental to its recovery of pre-operating expenses. Opposite to petitioner's stance, Section IX of the FTAA provides what can be recovered - "[**a**]**ll** taxes, duties, fees, costs, levies and imposts paid by the CONTRACTOR and which are **detrimental to the CONTRACTOR's recovery of Preoperating Expenses and Property Expenses during the five (5) Contract Years contemplated in this Section...**"[12]. Assuming that petitioner was able to timely enforce its right to be reimbursed of its payment of the excise taxes incurred during the subject period, it would still need to prove that such payments were detrimental to it. On this matter, the Court echoes its explanation in the assailed Decision thusly:

> ...
>
> Section II of the FTAA provides for a definition of terms. The definition of the word "detrimental" is, however, not provided therein. With the absence of a technical definition, resort to the plain or literal meaning of the word is in order. The term "detriment" means "[a]ny loss or harm suffered in person or in property". Thus, *per* the subject FTAA, petitioner must show that the collection of excise tax during the Recovery Period resulted in loss or harm in its person or property.
>
> Unfortunately, petitioner failed to prove that the payments of the subject excise taxes, during the said 5-year period, were detrimental to its recovery of the said pre-operating and property expenses. As it is, the records of these cases do not yield any evidence showing that such excise tax payments resulted in losses (to petitioner).

[12] Emphasis supplied.

> Moreover, petitioner failed to present evidence that its payments of excise taxes had an adverse effect on its financial position and/or performance as it did not also offer in evidence its Audited Financial Statements during the subject period. Even the ICPA Report is silent as to a supposed detrimental effect of the payments of the excise taxes during the Recovery Period.
>
> With the above disquisitions, this Court thus finds no erroneous or illegal collection of excise taxes that may be refunded to petitioner.[13]
>
> ...

Granting for the sake of argument that the detrimental effect of such payments need not be proven, petitioner's claim would nevertheless be denied on the ground that recovery period has already ended. Furthermore, petitioner has not shown that its delay was the result of any of the circumstances under Section XX of the FTAA which would have likely suspended the parties' obligations and perhaps extended the recovery period.

WHEREFORE, the foregoing premises considered, petitioner's "Motion for Reconsideration [of Decision dated September 8, 2023]" filed on 29 September 2023 is hereby **DENIED** for lack of merit.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

I CONCUR:

LANEE S. CUI-DAVID
Associate Justice

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[13] Supra at note 3; Citations omitted.