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. 1904
(CTA Case Nos. 8995 & 9034)

Present:

Del Rosario, *P.J.*,
Castañeda, Jr.,
Uy,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban,
Manahan,
Bacorro-Villena, and
Modesto-San Pedro, *JJ.*

Promulgated:

AUG 16 2019
2:56 p.m.

x--x

DECISION

CASTAÑEDA, JR., *J.*:

Before the Court *En Banc* is a Petition for Review[1] which seeks the reversal of the Decision dated March 22, 2018,[2] (Assailed Decision) as well as the Resolution dated July 20, 2018[3] (Assailed Resolution) of the Third Division (Court in Division)[4] of this Court in CTA Case Nos. 8995 & 9034.

[1] Court *En Banc's* Docket, pp. 57-92.
[2] *Id.*, pp. 103-133.
[3] *Id.*, pp. 135-149.
[4] Composed of Associate Justice Lovell R. Bautista as Chairperson, Associate Justice Esperanza R. Fabon-Victorino and Associate Justice Ma. Belen M. Ringpis-Liban as members.

The respective dispositive portions of the Assailed Decision and Resolution are quoted hereunder:

Assailed Decision:

> "**WHEREFORE**, premises considered, the Petitions for Review filed by OceanaGold (Philippines), Inc. in CTA Nos. 8995 and 9034, claiming for the refund of or for the issuance of a tax credit certificate in the amounts of Php25,843,462.11 and Php42,785,549.13, representing alleged erroneously paid and illegally and wrongfully collected excise taxes for the period from February to March 2013, and April to June 2013, respectively, are hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

Assailed Resolution:

> "**WHEREFORE**, taking everything into consideration, the Court still finds the Petitions for Review filed by OGPI seeking for the refund of, or the issuance of a TCC in the amounts of Php25,843,462.11 and Php42,785,549.13, representing alleged erroneously paid and illegally and wrongfully collected excise taxes for the period from February to March 2013 and April to June 2013, respectively, lacking in merit. OceanaGold (Philippines), Inc.'s Motion for Partial Reconsideration [of Decision dated March 22, 2018] is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

THE FACTS

As found by the Court in Division in its Decision dated March 22, 2018, the facts of the present case are as follows:[5]

> "On June 20, 1994, the Republic of the Philippines and Arimco Mining Corporation ('AMC') entered into a Financial or Technical Assistance Agreement ('FTAA'), which involves the mineral exploration and subsequent large-scale development and commercial utilization of mineral deposits over a contract

[5] Court *En Banc's* Docket, pp. 105-116 (Citations omitted).

area spanning the Provinces of Nueva Vizcaya and Quirino. A portion of the contract area under the FTAA structure covers the Didipio Gold-Copper Project ('Didipio Project').

On October 19, 1995, the Securities and Exchange Commission ('SEC') approved the change of AMC's corporate name to Climax-Arimco Mining Corporation ('CAMC').

Thereafter, effective December 23, 1996, CAMC transferred to APMI all its rights and obligations in and under the FTAA, which was restated in the Assignment, Accession and Assumption Agreement (Amended and Restated) executed on September 15, 2004. The transfer was approved by the Department of Environment and Natural Resources ('DENR') on December 9, 2004.

On March 15, 2005, after finding a portion of the Exploration Contract Area as being suitable for the Didipio Project, APMI filed a Partial Declaration of Mining Feasibility ('PDMF') with the DENR. The PDMF was approved by the DENR in an Order dated October 11, 2005, thereby constituting a portion of the Exploration Contract Area as the mining area.

Subsequently, on February 13, 2007, APMI submitted a request for ruling with the CIR confirming its exemption from the payment of excise tax on minerals during the recovery period.

On May 4, 2007, the CIR issued *BIR Ruling No. 10-2007* confirming APMI's exemption from the payment of excise tax upon the date of approval of the Mining Project Feasibility Study up to the end of the recovery period, which recovery period shall be reckoned from the date of commercial operation and shall be for a maximum period of five (5) years or until the date of actual recovery of APMI's pre-operating, exploration, and development expenses, whichever comes earlier.

Eventually, the SEC approved the change of APMI's corporate name to OGPI on June 1, 2007.

Sometime in 2008, OGPI halted further mine development in the Didipio Project due to escalating costs and uncertainty in the financial markets. OGPI thus placed the

Didipio Project under 'care and maintenance,' which lasted from December 2008 until December 2010.

In December 2010, after completing a strategic review and securing further financing, OGPI resumed development work in the Didipio Project. Eventually, in late 2012, OGPI successfully commenced the commissioning of the Didipio Project, and mined and stockpiled approximately 800,000 metric tons ('MT') of ore for further processing. As part of the commissioning process, OGPI commenced ore milling operations to produce copper concentrates.

Mission Order No. 00030182 dated September 3, 2012 was issued by Revenue Region No. 3 ('RR No. 3') authorizing certain revenue officers ('ROs') to search OGPI's premises for articles subject to excise tax and to detain package/s containing taxable articles pursuant to *Sections 171 and 172 of the 1997 National Internal Revenue Code, as amended ('1997 NIRC').*

On December 7, 2012, pursuant to Mission Order No. 00030182, and to prevent OGPI from making removals of copper concentrates without prepayment of excise tax, ROs of Revenue District Office ('RDO') No. 14 seized and detained approximately 800,000 MT of mineral ores stockpiled in the mine site. The seizure was covered by Apprehension Slip No. 00013424.

On December 10, 2012, OGPI wrote a letter addressed to Ms. Thelma S. Milabao, Officer-in-Charge Regional Director ('OIC-RD') of Revenue Region No. 3, and Atty. Ma. Isabel D. Utit, OIC-Asst. Revenue District Officer of RDO No. 14, protesting the seizure and detention of 800,000 MT of mineral ores.

On January 14, 2013, in connection with OGPI's planned first sale and delivery of copper concentrates in April 2013, OGPI obtained an Ore Transport Permit ('OTP') from the Mines and Geosciences Bureau ('MGB') authorizing the transportation of 5,500 MT of copper concentrates from Brgy. Didipio, Municipality of Kasibu, Province of Nueva Vizcaya ('mine site') up to the shipping point in Poro Point, La Union. Another OTP was issued by the MGB on February 13, 2013, which extended the OTP issued on January 14, 2013 until March 13, 2013.

On February 11, 2013 and February 12, 2013, while OGPI was transporting copper concentrates for delivery to its buyer, a total of 100 MT with an estimated value of USD320,000.00 of copper concentrates were seized and detained. The seizures were covered by Apprehension Slip Nos. 00013426 and 00013427, respectively.

On February 15, 2013, the CIR issued *Revenue Memorandum Circular ('RMC') No. 17-2013* which, among others, revoked BIR Ruling No. 10-2007 and with it, OGPI's exemption from excise tax during the recovery period.

On February 20, 2013, while OGPI was again transporting copper concentrates for delivery to a buyer, the CIR seized, apprehended, and detained 160 MT of copper concentrates with an estimated value of USD512,000.00. The seizure was covered by Apprehension Slip Nos. 00013051, 00013054, 00013060, 00013052, 00013053, 00013055, 00013059, and 00006245.

On February 25 and 26, 2013, OGPI paid under protest excise taxes amounting to Php13,942,179.39 and Php417,743.20, respectively, allegedly due on the seized copper concentrates and the remaining concentrates awaiting removal from the mine site, or a total of 5,500 MT.

On March 1, 2013, the CIR again seized and detained 40 MT of OGPI's copper concentrates while in transit, this was covered by Apprehension Slip Nos. 00013451 and 00013452.

On March 26, 2013, OGPI prepaid the amount of Php11,483,539.82 representing its excise tax for its next scheduled removals of copper concentrates for transport and sale to its buyers.

Thereafter, on April 29, 2013, OGPI again prepaid excise tax in the amount of Php20,420,131.15 allegedly due on 11,000 wet metric tons ('WMT') of copper concentrates awaiting removal from the mine site pursuant to the OTP issued by MGB. Another payment was made on May 30, 2013 in the amount of Php20,783,962.43 allegedly to cover OGPI's next scheduled removals of 11,000 WMT of copper concentrates for transport and sale to its buyer. Je

Lastly, on June 25, 2013, OGPI prepaid the amount of Php1,581,455.55 representing alleged excise tax to cover its next scheduled removals of 1,685.57 ounces of doré bars for transport and sale to its buyer.

On February 20, 2015, OGPI filed a letter addressed to Ms. Sarah B. Mopia, Chief of Excise LT Audit Division I, seeking for the recovery of the: (1) excise taxes paid for the period from February to March 2013 on OGPI's removals of copper concentrates in the aggregate amount of Php25,843,462.41; and (2) excise taxes paid for the period from April to June 2013 on OGPI's removals of copper concentrates and doré bars in the aggregate amount of Php42,785,549.13.

Without the decision of the CIR on its claim for refund or the issuance of a TCC, on February 24, 2015 and April 28, 2015, OGPI filed two separate Petitions for Review before the Court of Tax Appeals ('CTA') docketed as *CTA Case Nos. 8995* and *9035*,[6] respectively, the first was raffled to the Third Division, and the second to the Second Division.

In *CTA Case No. 8995*, after being granted extension, the CIR filed his Answer on April 13, 2015, interposing the following Special and Affirmative Defenses: (1) that OGPI's claim is subject to administrative routinary investigation/examination by the BIR; (2) that the Php25,843,462.41 amount representing excise taxes allegedly paid by OGPI for the period from February to March 2013 was not properly documented; (3) that in an action for refund, the burden of proof is on the taxpayer to establish its right for a refund, and failure to sustain the burden is fatal to the claim; and (4) that OGPI must show that it has complied with the provisions of *Section 229 of the 1997 NIRC* on the prescriptive period for claiming tax refund or the issuance of a TCC.

The CIR continues to argue (5) that *RMC No. 17-2013* is valid and constitutional; (6) that said RMC was meant as a guideline for its revenue officials, and does not add anything other than what *Republic Act ('RA') No. 7942 ('Mining Act')* and the *1997 NIRC* already prescribe; and (7) that since *RMC No. 17-2013* is an interpretative ruling intended for the benefit and instruction of the CIR's employees, he was not amiss in not publishing it and in not furnishing OGPI with a copy thereof. The CIR adds (8) that even granting that OGPI enjoyed tax-

[6] It should be **9034**.

exempt status during the recovery period, the exemption was not extended indefinitely and has already lapsed; (9) that although OGPI was allowed to recover up to the full extent of its pre-operating expenses, it may only do so within a five (5)-year recovery period, which the CIR maintains may either be the actual commencement of commercial operations, as argued by OGPI, or the date indicated or declared by OGPI in the feasibility study it submitted to and approved by the DENR, following *Section 4(g) of DENR Administrative Order ('AO') No. 1995-23* and *Section 5(i) of DENR AO No. 1996-40*, which both define 'commercial operation;' (10) that since the feasibility study was submitted nearly eight (8) years ago, or on March 18, 2005, and was approved on October 11, 2005, then it is also likely that the reckoning date for the determination of the recovery period is much earlier than what OGPI claims to be; and (11) that in which case, the five (5)-year period within which OGPI may recover its pre-operating expenses has already lapsed. Finally, the CIR ended by stating that (12) claims for refund are strictly construed against the claimant and cannot be allowed unless granted in the most explicit and categorical language.

The CIR filed his Respondent's Pre-Trial Brief in CTA Case No. 8995 on May 5, 2015.

On July 14, 2015, OGPI filed before the Second Division a Motion for Consolidation, praying for *CTA Case No. 9034* to be consolidated with *CTA Case No. 8995*, the latter having been filed earlier and bearing the lower docket number. The same was granted by the Second Division in a Resolution dated August 4, 2015.

On even date, OGPI filed before the Third Division a Motion for Consolidation with Motion for Postponement of Pre-Trial and Deferment of Filing of Pre-Trial Brief and Judicial Affidavits, praying for *CTA Case No. 9034* pending before the Second Division to be consolidated with *CTA Case No. 8995*, and that the filing of OGPI's Pre-Trial Brief and judicial affidavits ('JA') be deferred until the said Motion is resolved. The Court granted the same in a Resolution dated September 4, 2015. Accordingly, *CTA Case No. 9034* was consolidated with *CTA Case No. 8995*, the latter bearing the lower docket number.

Meanwhile, in *CTA Case No. 9034*, after being granted two (2) extensions, the CIR filed a Motion for Leave to File and

Admit Attached Answer on July 22, 2015, praying that the attached Answer (Re: Petition for Review dated 28 April 2015) be admitted; which the Second Division granted and accordingly admitted the attached Answer.

In his Answer, the CIR interposed the following Special and Affirmative Defenses: (1) that *BIR Ruling No. 10-2007* is not applicable to OGPI's case because the ruling was issued to APMI; (2) that *BIR Ruling No. 10-2007* was expressly repealed by *RMC No. 17-2013*; (3) that *RMC No. 17-2013* is a valid circular, seeking to implement a valid legislation, specifically *Section 81 of the Mining Act*; (4) that *RMC No. 17-2013* is a mere interpretative ruling, as it adds nothing new aside from what was already stated in the *Mining Act*, thus, negating any need for notice and hearing for its implementation; and (5) that it is incumbent upon OGPI to prove its entitlement to the refund sought because a claim for refund is not *ipso facto* granted upon filing of the claim, which OGPI failed to do.

The CIR and OGPI filed their Consolidated Pre-Trial Briefs on September 22, 2015 and October 15, 2015, respectively for CTA Case Nos. 8995 and 9034.

On October 30, 2015, the parties filed their Joint Stipulation of Facts and Issues ('JSFI'); and, a Pre-Trial Order was issued on November 27, 2015.

Trial ensued. On March 3, 2016, OGPI filed a Motion to Commission Independent CPA to Conduct Special Audit (Pursuant to *Section 5, Rule 12, Revised Rules of the Court of Tax Appeals*), which was granted by the Court in a Resolution dated April 12, 2016. Thereafter, the Independent Certified Public Accountant ('ICPA') submitted his ICPA Report on May 19, 2016.

On June 29, 2016, OGPI filed a Motion to Admit Attached Amended Independent Certified Public Accountant Report ('Amended ICPA Report'), which was granted by the Court in a Resolution 103 dated August 4, 2016, thereby admitting the Amended ICPA Report.

Thereafter, on October 3, 2016, OGPI filed its Formal Offer of Evidence ('FOE'), offering *Exhibits* 'P-1,' 'P-2,' 'P-3,' 'P-4-1,' 'P-5,' 'P-6,' 'P-7,' 'P-8,' 'P-9,' 'P-9-1,' 'P-10,' 'P-11,' 'P-12,' 'P-13,' 'P-14,' 'P-15,' 'P-16,' 'P-17,' 'P-18,' 'P-19,' 'P- jc

20,' 'P-21,' 'P-22,' 'P-23,' 'P-24,' 'P-25,' 'P-26,' 'P-27,' 'P-29,' 'P-30,' 'P-31,' 'P-32,' 'P-33,' 'P-34,' 'P-35,' 'P-36,' 'P-37,' 'P-38,' 'P-39,' 'P-40,' 'P-41,' 'P-42,' 'P-43,' 'P-44,' 'P-45,' 'P-46,' 'P-47,' 'P-48,' 'P-49,' 'P-50,' 'P-51,' 'P-51-a,' 'P-53,' 'P-53-a,' 'P-54,' 'P-54-a,' 'P-70,' 'P-70-a,' 'P-71' to 'P-573,' including sub-exhibits, 'P-574' to 'P-917,' including sub-exhibits, 'P-918' to 'P-927,' 'P-930' to 'P-941,' 'P-946' to 'P-1309,' 'P-1312' to 'P-1650,' including sub-exhibits, 'P-1651' to 'P-2568,' 'P-2577' to 'P-2932,' 'P-2934' to 'P-3262,' 'P-3265' to 'P-3318,' including sub-exhibits, 'P-3319' to 'P-5108,' 'P-5125' to 'P-5266,' 'P-5268' to 'P-6021,' including sub-exhibits, 'P-6022' to 'P-6303,' 'P-6366' to 'P-6581,' 'P-6674' to 'P-7324,' including sub-exhibits, 'P-7325' to 'P-7499,' 'P-7506' to 'P-7765,' including sub-exhibits, 'P-7766' to 'P-13714,' 'P-13716' to 'P-13717,' 'P-13719' to 'P-13726,' 'P-13728' to 'P-13924,' 'P-13963' to 'P-15301,' 'P-15308' to 'P-17572,' 'P-19888' to 'P-20685,' 'P-20687' to 'P-20688,' 'P-20690' to 'P-22768,' 'P-20770' to 'P-23694,' 'P-23696' to 'P-26173,' including sub-exhibits, 'P-26176' to 'P-26787,' 'P-26816' to 'P-28354,' 'P-28359' to 'P-31480,' 'P-31496' to 'P-31498,' 'P-31502' to 'P-33015,' 'P-33017' to 'P-33018,' 'P-33020' to 'P-33684,' 'P-33686' to 'P-35083,' 'P-35100' to 'P-35247,' 'P-35250' to 'P-35251,' 'P-35254' to 'P-35857,' 'P-35859' to 'P-36318,' 'P-36320' to 'P-36910,' 'P-36912' to 'P-37101,' 'P-37104' to 'P-37201,' 'P-37203' to 'P-40672,' 'P-40677' to 'P-40678,' 'P-40683' to 'P-40686,' 'P-40691' to 'P-40692,' 'P-40697' to 'P-41361,' 'P-41363' to 'P-41864,' 'P-41869' to 'P-41883,' 'P-41888' to 'P-43384,' 'P-43386' to 'P-43546,' 'P-43551' to 'P-43817,' 'P-43819' to 'P-43901,' 'P-43904' to 'P-45700,' 'P-45703' to 'P-45712,' 'P-45723' to 'P-46045,' 'P-46047' to 'P-45327,' 'P-45330' to 'P-46455,' 'P-46459' to 'P-47400,' 'P-47407' to 'P-47409,' 'P-47413' to 'P-47415,' 'P-47428' to 'P-48364,' including sub-exhibits, 'P-48365' to 'P-50276,' 'P-50278' to 'P-50303,' 'P-50306' to 'P-50345,' 'P-50347' to 'P-50358,' 'P-50360' to 'P-50361,' 'P-50363' to 'P-50439,' 'P-50441' to 'P-50442,' 'P-50444' to 'P-50445,' 'P-50447' to 'P-50448,' 'P-50450' to 'P-50451,' 'P-50454' to 'P-50455,' 'P-50457' to 'P-50464,' 'P-50466' to 'P-50471,' 'P-50473' to 'P-50474,' 'P-50476' to 'P-50483,' 'P-50485' to 'P-50488,' 'P-50490' to 'P-50491,' 'P-50493' to 'P-50494,' 'P-50496' to 'P-50499,' 'P-50501' to 'P-50506,' 'P-50508' to 'P-50509,' 'P-50511' to 'P-50516,' 'P-50519' to 'P-50544,' 'P-50546' to 'P-50547,' 'P-50550' to 'P-50558,' 'P-50560' to 'P-50566,' 'P-50568' to 'P-50613,' 'P-50615' to 'P-50616,' 'P-50618' to 'P-50619,' 'P-50621' to 'P-50631,' 'P-50633' to 'P-51786,' 'P-51791' to 'P-52235,' 'P-52238' to 'P-52774,' 'P-52776' to 'P-52781,' 'P-52783' to 'P-52890,' 'P-52892' to 'P-52893,' 'P-52895' to 'P-53540,' including sub-exhibits, 'P- gr

53865,' including sub-exhibits, 'P-53866,' 'P-53867,' including sub-exhibits, and 'P-53868,' as evidence.

The FOE was resolved by the Court in a Resolution dated November 24, 2016, denying *Exhibits* 'P-900,' 'P-2737,' 'P-5154,' 'P-6793,' 'P-11011,' 'P-11012,' 'P-11013,' 'P-11014,' 'P-15853,' 'P-17302,' 'P-17303,' 'P-17304,' 'P-17509,' 'P-20524,' 'P-21052,' 'P-22360,' 'P-22769,' 'P-22900,' 'P-23249,' 'P-23250,' 'P-23251,' 'P-23665,' 'P-23666,' 'P-23667,' 'P-26149,' 'P-26553,' 'P-27308' to 'P-27311,' 'P-27381,' 'P-27442' to 'P-27438,' 'P-33017,' 'P-38030,' 'P-38554,' 'P-38841,' 'P-38975,' 'P-40170,' 'P-40171,' 'P-40624' to 'P-40642,' 'P-43515,' 'P-43516,' 'P-45328,' 'P-45329,' 'P-45701,' 'P-45702,' 'P-46046,' 'P-48107,' 'P-48108,' 'P-48109,' 'P-48308,' 'P-52791,' and 'P-53067' for not being found in the records of the case.

On December 13, 2016, OGPI filed a Motion for Reconsideration [of the Resolution dated November 24, 2016], to which the Court resolved in a Resolution dated February 21, 2017, eventually admitting *Exhibits* 'P-900,' 'P-2737,' 'P-6793,' 'P-11011,' 'P-11012,' 'P-11013,' 'P-11014,' 'P-17302,' 'P-17303,' 'P-17304,' 'P-17509,' 'P-20524,' 'P-21052,' 'P-23665,' 'P-23666,' 'P-23667,' 'P-26553,' 'P-27381,' 'P-38030,' 'P-38554,' 'P-38841,' 'P-38975,' 'P-40170,' 'P-40171,' 'P-40624' to 'P-40642,' 'P-43515,' 'P-43516,' 'P-48308,' and 'P-53067.'

There being no report of investigation, as manifested by the CIR's counsel, the parties were ordered to file their respective memoranda, doing away with the CIR's presentation of evidence.

OGPI filed its Memorandum for Petitioner on April 19, 2017; and after being granted extension, the CIR submitted his Memorandum on May 4, 2017.

On May 9, 2017, the Court promulgated a Resolution submitting the case for decision; hence, this Decision."

On March 22, 2018, the Court in Division rendered the Assailed Decision denying petitioner's Petition for Review.

Aggrieved, petitioner filed a Motion for Partial Reconsideration [of Decision dated March 22, 2018] on April 12, 2018 which the Court in Division denied in the Assailed Resolution.

Within the extended period granted by the Court *En Banc*, petitioner filed the present Petition for Review on August 24, 2018.

In a Resolution[7] dated October 4, 2018, the Court *En Banc* ordered the respondent to file its Comment to the Petition for Review within ten (10) days from notice. Respondent filed its Comment on October 17, 2018.[8]

In a Resolution[9] dated November 19, 2018, the Court *En Banc* gave due course to the present Petition for Review. Accordingly, the Court *En Banc* directed the parties to file their Memoranda within a period of thirty (30) days from notice.

On December 4, 2018, respondent filed a Manifestation[10] stating that he is adopting the arguments raised in his Comment as his Memorandum in compliance with the November 19, 2018 Resolution of this Court. Meanwhile, petitioner filed its Memorandum[11] on January 3, 2019.

Thus, through the Court *En Banc*'s Resolution[12] dated February 7, 2019, the present case was submitted for decision.

THE ISSUES

Petitioner filed the present Petition for Review on the basis of the following assigned errors: [13]

A. Whether the CTA 3rd Division erred in not holding that petitioner is still within the five (5)-year recovery period when it paid excise taxes during February to June 2013.

B. Whether the CTA 3rd Division erred in not holding that the Assailed RMC is invalid and unconstitutional. *Je*

---

[7] Court *En Banc*'s Docket, pp. 160-161.
[8] *Id.*, pp. 162-169.
[9] *Id.*, pp. 172-173.
[10] *Id.*, pp. 174-176.
[11] *Id.*, pp. 179-215.
[12] *Id.*, pp. 226-227.
[13] *Id.*, pp. 67-68.

THE PARTIES' ARGUMENTS

With respect to the first issue, petitioner argues that based on the FTAA, the 5-year recovery period should be counted from the "date of commencement of commercial production".[14] In this regard, petitioner posits that the 5-year recovery period should be counted from April 1, 2013, which is 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.[15] Accordingly, petitioner has 5 years from April 1, 2013 or until April 1, 2018 to recover its pre-operating and property expenses. Considering that the extraction of the minerals covered by CTA Case Nos. 8995 & 9034 was made before the lapse of such period, such extraction is within the recovery period and thus exempt from excise taxes.[16] Petitioner also claims that the terms "commercial operations" and "commercial production" are the same.[17] Petitioner avers that based on records, it only started earning from the Didipio Project in the 1st quarter of 2013 when it commenced "commercial production" or "commercial operations".[18] According also to petitioner, granting that the reckoning date of the 5-year recovery period cannot be determined, RA 7942 or the Mining Act of 1995 does not provide for such 5-year limit within [which] petitioner may recover its pre-operating expenses.[19] Thus, the 5-year recovery period provided by DENR DAO No. 1996-40 and various DENR issuances is not valid for being contrary to RA 7942.[20]

With respect to the second issue, petitioner maintains that the Court in Division erred in not considering the exceptions to the rule on exhaustion of administrative remedies as raised in petitioner's Motion for Partial Reconsideration.[21] In this regard, petitioner submits that direct resort to this Court is justified based on the following grounds: (1) respondent deprived petitioner of due process when she unilaterally revoked BIR Ruling No. 10-2007; (2) the issue involved is purely legal; and (3) the illegal acts of respondent in seizing and detaining petitioner's shipment of copper concentrates caused irreparable injury to petitioner and there were circumstances indicating the urgency of judicial intervention.[22] Petitioner likewise claims that respondent did not observe the procedural requirements before issuing Revenue Memorandum Circular (RMC) No. 17-2013.[23] Petitioner also contends that respondent may not apply retroactively RMC No. 17-2013.[24] Finally, petitioner postulates that the revocation of BIR

[14] *Id.*, pp. 70-71.
[15] *Id.*
[16] *Id.*
[17] *Id.*, pp. 71-72.
[18] *Id.*, pp. 72-73.
[19] *Id.*, pp. 74-75.
[20] *Id.*
[21] *Id.*, pp. 74-76.
[22] *Id.*, pp. 76-85.
[23] *Id.*, pp. 85-86.
[24] *Id.*, pp. 86-88.

Ruling No. 10-2007 through RMC No. 17-2013 violates the non-impairment clause of the 1987 Constitution.[25]

In his Comment, respondent CIR maintains that the Court in Division correctly refused to pass upon the validity or constitutionality of RMC No. 17-2013 for failure of petitioner to exhaust administrative remedies before appealing to this Court.[26] Respondent also claims that even granting that petitioner enjoyed tax-exempt status during its recovery period, it is no longer exempt from excise tax because the recovery period had already lapsed.[27] Respondent also submits that the Court in Division correctly ruled that petitioner failed to present evidence to prove that the imposition of excise tax was made during the recovery period.[28] Lastly, respondent avers that claims for refund are strictly construed against the claimant and cannot be allowed unless granted in the most explicit and categorical language.[29]

THE COURT *EN BANC*'S RULING

In a number of cases,[30] the Supreme Court already established that the CTA has exclusive jurisdiction to determine the validity or constitutionality of rules and regulations, and other administrative issuances of the Commissioner of Internal Revenue. The application of this rule was definitively stated by the Supreme Court in the *En Banc* case of *Banco De Oro, et. al. v. Republic,* as follows:[31]

> "We revert to the earlier rulings in *Rodriguez*, *Leal*, and *Asia International Auctioneers, Inc.* **The Court of Tax Appeals has exclusive jurisdiction to determine the constitutionality or validity of tax laws, rules and regulations, and other administrative issuances of the Commissioner of Internal Revenue**.
>
> x x x x x x x x x

---

[25] *Id.*, pp. 88-90.
[26] *Id.*, pp. 162-165.
[27] *Id.*, p. 165.
[28] *Id.*, pp. 165-167.
[29] *Id.*, p. 167.
[30] *Commissioner of Internal Revenue v. Court of Tax Appeals and Petron Corporation*, G.R. No. 207843 (Resolution), February 14, 2018; *Banco De Oro et. al. v. Republic*, G.R. No. 198756 (Resolution), August 16, 2016, 800 SCRA 392; *Bloomberry Resorts and Hotels, Inc. v. Bureau of Internal Revenue*, G.R. No. 212530, August 10, 2016, 800 SCRA 123; *The Philippine American Life and General Insurance Company v. The Secretary of Finance and the Commissioner of Internal Revenue*, G.R. No. 210987, November 24, 2014, 741 SCRA 578; *Asia International Auctioneers, Inc. v. Parayno, Jr.*, G.R. No. 163445, December 18, 2007, 565 Phil. 255; *Commissioner of Internal Revenue v. Leal*, G.R. No. 113459, November 18, 2002, 392 SCRA 9; *Rodriguez v. Blaquera*, G.R. No. L-13941, September 30, 1960, 109 Phil. 598.
[31] G.R. No. 198756, August 16, 2016, 800 SCRA 392 ("*Banco De Oro*").

Section 7, as amended, grants the Court of Tax Appeals the exclusive jurisdiction to resolve all tax-related issues:

Section 7. Jurisdiction. — The CTA shall exercise:

(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:

1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;

2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial;

3) Decisions, orders or resolutions of the Regional Trial Courts in local tax cases originally decided or resolved by them in the exercise of their original or appellate jurisdiction;

4) Decisions of the Commissioner of Customs in cases involving liability for customs duties, fees or other money charges, seizure, detention or release of property affected, fines, forfeitures or other penalties in relation thereto, or other matters arising under the Customs Law or other laws administered by the Bureau of Customs;

5) Decisions of the Central Board of Assessment Appeals in the exercise of its appellate jurisdiction over cases involving the assessment and taxation

of real property originally decided by the provincial or city board of assessment appeals;

6) Decisions of the Secretary of Finance on customs cases elevated to him automatically for review from decisions of the Commissioner of Customs which are adverse to the Government under Section 2315 of the Tariff and Customs Code;

7) Decisions of the Secretary of Trade and Industry, in the case of nonagricultural product, commodity or article, and the Secretary of Agriculture in the case of agricultural product, commodity or article, involving dumping and countervailing duties under Section 301 and 302, respectively, of the Tariff and Customs Code, and safeguard measures under Republic Act No. 8800, where either party may appeal the decision to impose or not to impose said duties.

<u>The Court of Tax Appeals has undoubted jurisdiction to pass upon the constitutionality or validity of a tax law or regulation when raised by the taxpayer</u> as a defense in disputing or contesting an assessment or <u>claiming a refund.</u> It is only in the lawful exercise of its power to pass upon all matters brought before it, as sanctioned by Section 7 of Republic Act No. 1125, as amended.

This Court, however, declares that the Court of Tax Appeals may likewise take cognizance of cases directly challenging the constitutionality or validity of a tax law or regulation or administrative issuance (revenue orders, revenue memorandum circulars, rulings).

Section 7 of Republic Act No. 1125, as amended, is explicit that, except for local taxes, appeals from the decisions of quasi-judicial agencies (Commissioner of Internal Revenue, Commissioner of Customs, Secretary of Finance, Central Board of Assessment Appeals, Secretary of Trade and Industry) on tax-related problems must be brought exclusively to the Court of Tax Appeals.

In other words, within the judicial system, the law intends the Court of Tax Appeals to have exclusive jurisdiction to resolve all tax problems. Petitions for writs of certiorari against the acts and omissions of the said quasi-judicial agencies should, thus, be filed before the Court of Tax Appeals.

Republic Act No. 9282, a special and later law than Batas Pambansa Blg. 129 provides an exception to the original jurisdiction of the Regional Trial Courts over actions questioning the constitutionality or validity of tax laws or regulations. **Except for local tax cases, actions directly challenging the constitutionality or validity of a tax law or regulation or administrative issuance may be filed directly before the Court of Tax Appeals.**

Furthermore, with respect to administrative issuances (revenue orders, revenue memorandum circulars, or rulings), these are issued by the Commissioner under its power to make rulings or opinions in connection with the implementation of the provisions of internal revenue laws. Tax rulings, on the other hand, are official positions of the Bureau on inquiries of taxpayers who request clarification on certain provisions of the National Internal Revenue Code, other tax laws, or their implementing regulations. Hence, the determination of the validity of these issuances clearly falls within the exclusive appellate jurisdiction of the Court of Tax Appeals under Section 7(1) of Republic Act No. 1125, as amended, subject to prior review by the Secretary of Finance, as required under Republic Act No. 8424." *(Emphasis and underscoring supplied; citations omitted)*

Notably, in the case of *Commissioner of Internal Revenue v. Court of Tax Appeals and Petron Corporation*,[32] the Supreme Court had confirmed that its ruling in *Banco De Oro* stands as the prevailing jurisprudence on the matter, *i.e.*, the CTA's jurisdiction to determine the validity or constitutionality of a particular tax regulation, ruling, or issuance.

The Court in Division likewise ruled that the CTA has jurisdiction to determine the validity or constitutionality of a particular administrative tax rule or regulation but then declined to pass upon the validity or constitutionality of RMC No. 17-2013 as it found that petitioner failed to exhaust administrative remedies. According to the Court in Division, petitioner should have filed an appeal with the Secretary of Finance to question the validity or constitutionality of RMC No. 17-2013 before going to this Court.

---

[32] G.R. No. 207843 (Resolution), February 14, 2018.

It bears emphasis, however, that in *Banco De Oro*, the Supreme Court had clarified that the CTA may pass upon the constitutionality or validity of a tax law or regulation when raised by the taxpayer for the purpose of claiming a tax refund, just like what petitioner did in this case. In such instances, according to the Supreme Court, the CTA is merely lawfully exercising its power to pass upon matters brought before it in accordance with its mandate provided under Section 7 of RA No. 1125, as amended.

Moreover, where the issue involved is characterized as pure question of law, the doctrine of exhaustion of administrative remedies does not apply.[33] The reason for this is because an appeal to an administrative officer involving pure questions of law would be an exercise in futility as issues of law cannot be resolved by administrative agencies with finality.[34] At best, the resolution of administrative authorities on these issues is merely tentative, subject to the final decision by the courts of justice.[35]

In the present case, the petitioner challenges the constitutionality of RMC No. 17-2013 on the basis of the non-impairment of contracts and due process clauses of the Constitution. Petitioner also assails the validity of the said revenue issuance for being violative of Section 246 of the National Internal Revenue Code of 1997, as amended (1997 NIRC). These are purely legal issues. Compliance with the doctrine of exhaustion of administrative remedies is, therefore, not necessary.

While the issue of constitutionality of RMC No. 17-2013 was properly raised herein, the Court *En Banc* deems it wise not to pass upon the same given that case records show the presence of some other legal grounds upon which the present case may be disposed of. Under the doctrine of constitutional avoidance, it was held that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter". [36] As categorically held by the Supreme Court *En Banc* in *Initia, Jr. v. The Commission on Audit*,[37] to wit:

> "It is a well-established rule that a court should not pass upon a constitutional question and decide a law to be unconstitutional or invalid, unless such question is raised by the parties and that when it is raised, if the record also presents some other ground upon which the court may raise its

---

[33] *Pascual v. Provincial Board of Nueva Ecija*, G.R. No. L-11959, October 31, 1959, 106 Phil. 466.

[34] *Cebu Oxygen & Acetylene Co., Inc. v. Secretary Drilon, et. al.*, G.R. No. 82849, August 2, 1989, 176 SCRA 29.

[35] *Republic v. Lacap*, G.R. No. 158253, March 2, 2007, 517 SCRA 266.

[36] *Ashwander v. Tennessee Valley Authority*, 297 US 288, 346-347, 56 S.Ct. 466, 483, February 17, 1936, per Brandeis, *J.*

[37] G.R. No. 131529, April 30, 1999, 306 SCRA 609-610 citing *Sotto v. Commission on Elections*, 76 Phil. 516 (1946). See also *Moldex Realty, Inc. v. Housing and Land Use Regulatory Board*, et. al., G.R. No. 149719, June 21, 2007, 525 SCRA 206-207; *Manila Electric Company v. Atilano et. al.*, G.R. No. 166758, June 27, 2012, 675 SCRA 126; *Laurel v. Garcia*, G.R. No. 92013, July 25, 1990, 187 SCRA 813.

> judgment, that course will be adopted and the constitutional question will be left for consideration until such question will be unavoidable."

It was earlier mentioned that petitioner had questioned in its Petitions for Review before the Court in Division as well as its Petition for Review before this Court *En Banc* the retroactive application of RMC No. 17-2013, specifically its revocation of BIR Ruling No. 10-2007. Citing Section 246 of the 1997 NIRC, petitioner asserts that having taken the tax authorities at their word through the issuance of BIR Ruling No. 10-2007, it is the height of injustice for respondent to change the rules in the middle of the game through the retroactive application of RMC No. 17-2013.

Section 246 of the 1997 NIRC states:

> "SEC. 246. *Non-Retroactivity of Rulings.* — **Any revocation, modification or reversal** of any of the rules and regulations promulgated in accordance with the preceding Sections **or any of the rulings** or circulars **promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers**, except in the following cases:
>
> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
>
> (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
>
> (c) Where the taxpayer acted in bad faith." *(Emphasis supplied)*

It is clear from the above-cited provision that rulings and circulars promulgated by the Commissioner of Internal Revenue have no retroactive application where to so apply them would be prejudicial to taxpayers.[38]

Given the relevant factual circumstances of the present case vis-à-vis the above-cited provision, the Court *En Banc* holds that petitioner is entitled to the benefit of the principle on non-retroactivity of rulings and circulars under Section 246 of the 1997 NIRC, in the absence of showing of bad faith on its part. Accordingly, what is applicable to petitioner's case should still be BIR Ruling No. 10-2007.

[38] *ABS-CBN Broadcasting Corporation v. Court of Tax Appeals*, G.R. No. L-52306, October 12, 1981, 108 SCRA 148.

In the present case, the prejudicial effect of the retroactive application of RMC No. 17-2013 and the concomitant revocation of BIR Ruling No. 10-2007 is beyond doubt. The issuance of RMC No. 17-2013 and the attendant revocation of BIR Ruling No. 10-2007 effectively served as legal basis for the assessment of deficiency excise taxes against petitioner. On the other hand, none of the exceptions stated under Section 246 of the 1997 NIRC that would prevent the application of the non-retroactivity rule was shown to exist.

At this stage, it must be recalled that the present Petition for Review involves a claim for refund of internal revenue taxes alleged to have been erroneously or illegally assessed or collected. Similar with any other claims for refund, it should be construed strictly against the taxpayer.[39] Any claim for refund takes the nature of tax exemptions that must be construed *strictissimi juris* against the claimants and liberally in favor of the taxing authority. This power of taxation being a high prerogative of sovereignty, its relinquishment is never presumed.[40]

In the Assailed Decision, the Court in Division ruled that the collection of government share, which includes excise tax, shall commence after the Financial or Technical Assistance Agreement (FTAA) contractor has fully recovered its pre-operating expenses and that the period of recovery shall be five (5) years from the date of commercial operation, or until the date of actual recovery, whichever comes earlier.[41] However, the Court in Division found that petitioner failed to present evidence to prove that the imposition of excise tax was made during the recovery period.[42] Specifically, the Court in Division found that other than the testimony of the ICPA, petitioner failed to present pre-operating expenses duly approved by the Secretary of the DENR, as recommended by the Director of the MGB, and as mandated under DENR AO No. 1999-56.[43]

To recapitulate, Section 81 of Republic Act (R.A.) No. 7942, otherwise known as the Philippine Mining Act of 1995, provides:

> "SECTION 81. *Government Share in Other Mineral Agreements.* – xxx xxx xxx
>
> xxx xxx xxx

[39] *Commissioner of Internal Revenue v. San Roque Power Corporation*, G.R. No. 187485, February 12, 2013, 690 SCRA 417.
[40] *Nestle Philippines, Inc. (formerly Filipro, Inc.) v. Honorable Court of Appeals, et al.*, G.R. No. 134114, July 6, 2001, 360 SCRA 583.
[41] Division Docket, Vol. IV, pp. 1743-1746.
[42] *Id.*, pp. 1747-1750.
[43] *Id.*, pp. 1748-1749.

> **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.**" *(Emphasis supplied)*

Although the foregoing provision does not specify a period to recover the pre-operating expenses, the FTAA between petitioner and the government, which was executed on June 20, 1994, stipulates the period within which to recover its pre-operating expenses, exploration, and development expenditures, to wit:[44]

> "Section XI
> FISCAL REGIME
>
> xxx xxx xxx
>
> 11.2 Recovery of Preoperating 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) 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.

[44] Exhibit "P-2", CTA Case No. 8995, Vol. III, p. 936.

xxx xxx xxx" *(Emphasis supplied)*

It should be noted that per the FTAA, the recovery period is counted from the Date of Commencement of Commercial Production. Section 2.14 of the FTAA provides the following definition:[45]

> "2.14 "Date of Commencement of Commercial Production" 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."

On March 27, 2013, petitioner advised the Secretary of DENR that "on February 2, 2013, the Didipio Project was able to mill 301,903 tonnes and achieve the 15% production capacity." Thus, "the Date of Commencement of Commercial Production in accordance with Section 2.14 of the FTAA is April 1, 2013, which is the first day of the second calendar quarter."[46]

On the other hand, the Philippine Mining Act Implementing Rules and Regulations (IRR) was issued by the Department of Environment and Natural Resources (DENR) in DENR Administrative Order (DAO) No. 23, which was later revised in DAO No. 96-40, states:

> "SEC. 214. Government Share in FTAA
>
> The Government share in an FTAA shall consist of, among others 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-owned corporation and all such other taxes, duties and fees as provided for in existing laws.
>
> The Government share in an FTAA shall be negotiated by the government and the Contractor taking into consideration:
>
> a. Capital investment of the project;
> b. Risks involved;
> c. Contribution of the project to the economy; ⅗

[45] Exhibit "P-2", Division Docket, Vol. III, p. 918.
[46] Exhibit "P-27", Division Docket, Vol. III, pp. 1047-1048.

> d. Technical complexity of the project;
> e. Contribution to community and Local Government; and
> f. Other factors that will provide for a fair and equitable sharing between the parties.
>
> The collection of Government shall commence after the FTAA Contractor has fully recovered its pre-operating, exploration and development expenses, inclusive. **The 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.**" *(Emphasis supplied)*

It is likewise noted that per the revised IRR, the recovery period is reckoned from the date of commercial operation. The definition of terms for the revised IRR (DAO No. 96-40) does not include a definition for "date of commercial operation" but includes the following:

> "Section 5. Definition of Terms
>
> As used in and for purposes of these regulations, the following terms shall mean:
>
> xxx xxx xxx
>
> i. "**Commercial Production**" refers to the production of sufficient quantity of minerals of sustained 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.**
>
> xxx xxx xxx" *(Emphasis supplied)*

Petitioner submitted a Partial Declaration of Mining Feasibility on March 15, 2005, stating that it found "sufficient ore reserves and diluted resource of 23.7 million tonnes of 1.8g/t Au and 0.64% Cu xxx and such ore reserves have been delineated to sustain the mining operation of the corporation for some 14 years," and that "mining operation xxx will process gold and copper at 2 million tonnes per annum xxx."[47]

[47] Exhibit "P-7", Division Docket, Vol. III, pp. 996-997.

On October 11, 2005, the Mines and Geosciences Bureau (MGB) of the DENR issued an order approving the Partial Declaration of Mining Feasibility subject to certain conditions.[48]

Scrutiny of the FTAA reveals the following:[49]

"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." *(Emphasis supplied)*

In relation thereto, Sections IX and X of the FTAA provides:[50]

"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. *gr*

[48] Exhibit "P-8", Division Docket, Vol. III, pp. 998-1000.
[49] Exhibit "P-2", Division Docket, Vol. III, p. 929.
[50] Exhibit "P-2", Division Docket, Vol. III, pp. 931-933.

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."

xxx xxx xxx

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.**" *(Emphasis supplied)*

Based on the foregoing, petitioner had 3 years from the approval of its Partial Declaration of Mining Feasibility on October 11, 2005, or until October 11, 2008, to develop and construct mining production facilities. Thereafter, petitioner had to submit within 30 days another Work Program for the period of 3 years for the actual production activities. Petitioner shall start commercial production accordingly and shall advise the government within 15 days therefrom that commercial production has commenced. Failure to commence production shall be considered a substantial breach of the FTAA.

Thus, the FTAA provides for a specific and strict timetable for the exploration, development, construction and production in mining areas.

Pursuant to the FTAA and based on the Partial Declaration of Mining Feasibility, petitioner should have commenced commercial operation and production in the fourth quarter of the year 2008.

In BIR Ruling No. 10-07 dated May 4, 2007, petitioner (formerly Australasian Philippines Mining, Inc. (APMI)) represented that it was "expected to start commercial operations in June 2007, which was, however, extended to December 2007; that APMI's initial commercial production is now expected to commence on the 4th quarter of 2008; xxx". Said ruling states that "the recovery period shall be reckoned from the date of commercial operation xxx".

However, it was only in the year 2013, about 8 years after the approval of its Partial Declaration of Mining Feasibility, that petitioner officially declared that it has started commercial production.

In its Petition for Review filed before the Court in Division, petitioner avers:[51]

> "11. In 2008, petitioner was constrained to halt further mine development in the Dipidio Project due to escalating costs and uncertainty in the financial markets. Petitioner, thus, put the Dipidio Project on "care and maintenance".
>
> 12. In 2010, however, after completing a strategic review and securing further financing, petitioner resumed development work in the Dipidio Project.
>
> 13. In late 2012, petitioner successfully commenced the commissioning of the Dipidio Project, and mined and stockpiled approximately 800,000 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."

Notably, petitioner did not submit to the Court the pertinent supporting documents and work programs to ascertain the date when the recovery period should be reckoned from.

Thus, the Court in Division is correct to find that petitioner failed to present evidence to prove that the imposition of excise tax was made during the recovery period.

Further, assuming that the claimed excise taxes were paid within the 5-year recovery period, the Court could not grant petitioner's claim for

---

[51] Petition for Review, Paragraphs 11 to 13, Division Docket, Vol. I, p. 11.

failure to comply with the requisites set forth in DAO No. 99-56, which provides for the Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements. Particularly, Section 3(f) lists the expenses and capital expenditures to be considered as recoverable pre-operating expenses:

> "f. Recoverable Pre-Operating Expenses. **Pre-Operating Expenses for recovery which shall be approved by the Secretary upon recommendation of the Director shall consist of actual expenses and capital expenditures** relating to the following:
>
> 1. Acquisition, maintenance and administration of any mining or exploration tenements or agreements covered by the FTAA;
> 2. Exploration, evaluation, feasibility and environmental studies, production, mining, milling, processing and rehabilitation;
> 3. Stockpiling, handling, transport services, utilities and marketing of minerals and mineral products;
> 4. Development within the Contract Area relating to the Mining Operations;
> 5. All Government taxes and fees;
> 6. Payments made to local Governments and infrastructure contributions;
> 7. Payments to landowners, surface rights holders, Claimowners, including the Indigenous Cultural Communities, if any;
> 8. Expenses incurred in fulfilling the Contractor's obligations to contribute to national development and training of Philippine personnel;
> 9. Consulting fees incurred inside and outside the Philippines for Work related directly to the Mining Operations;
> 10. The establishment and administration of field and regional offices including administrative overheads incurred within the Philippines which are properly allocatable to the Mining Operations and directly related to the performance of the Contractor's obligations and exercise of its rights under the FTAA;
> 11. Costs incurred in financial development, including interest on loans payable within or outside the Philippines, subject to the financing requirements required in the FTAA and to a limit on debt-equity ratio of 5:1 for investments equivalent to 200 Million US Dollars or less, or for the first 200 Million US Dollars of investments in excess of 200 Million US Dollars; or 8:1 Jz

> for that part of the investment which exceeds 200 Million US Dollars: *Provided,* That the interests shall not be more than the prevailing international rates charged for similar types of transaction at the time the financing was arranged;
>
> 12. All costs of constructing and developing the mine incurred before the Date of Commencement of Commercial Production, including capital and property as hereinafter defined irrespective as to their means of financing, subject to the limitations defined by Clause 3-f-11 hereof, and inclusive of the principal obligation and the interests arising from any Contractor's leasing, hiring, purchasing or similar financing arrangements including all payments made to Government, both National and Local; and
> 13. General and administrative expenses actually incurred by the Contractor for the benefit of the Contract Area."
>
> **The foregoing recoverable Pre-Operating Expenses shall be subject to verification of its actual expenditure by an independent audit recognized by the Government and chargeable against the Contractor.** *(Emphasis supplied)*

Petitioner argues that its FTAA, which was entered into prior to the issuance of DAO No. 99-56, does not explicitly require approval by the DENR of the pre-operating expenses.[52]

It should be emphasized that considering that the FTAA was executed in 1994 and the Philippine Mining Act was enacted in 1995, the transitory provision of the said law (R.A. No. 7942) applies:

> "CHAPTER XX
> TRANSITORY AND MISCELLANEOUS PROVISIONS
>
> Section 112. **Non-impairment of Existing Mining/Quarrying Rights.—All valid and existing mining lease contracts, permits/licenses, leases pending renewal, mineral production-sharing agreements granted under Executive Order No. 279**, at the date of effectivity of this Act, **shall remain valid, shall not be impaired, and shall be recognized by the Government**: *Provided,* That the provisions of Chapter XIV on government share in mineral production-sharing agreement and of Chapter XVI on incentives of this Act shall immediately govern and apply to a

[52] Motion for Partial Reconsideration, Paragraphs 49 to 56, Division Docket, Vol. IV, pp. 1771-1773.

> mining lessee or contractor unless the mining lessee or contractor indicates his intention to the secretary, in writing, not to avail of said provisions: *Provided, further*, That no renewal of mining lease contracts shall be made after the expiration of its term: ***Provided, finally*, That such leases, production-sharing agreements, financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations.**" *(Emphasis supplied)*

Thus, DAO No. 99-56 is applicable to petitioner.

Moreover, when petitioner partially declared mining feasibility on March 15, 2005, it stated:[53]

> "That **the Corporation is committed to complying with all the requirements of the FTAA and the rules and regulations of the Philippines** [sic] **Mining Act and other related laws**;" *(Emphasis supplied)*

Petitioner avers that its pre-operating expenses have been examined and validated by independent CPAs twice: 1) by its external auditors upon the yearly audit of petitioner's financial statements; and 2) by the Court-commissioned ICPA. Nevertheless, DAO No. 99-56 requires that petitioner's pre-operating expenses be approved by the Secretary of the DENR upon recommendation of the Director of the MGB. No amount of ICPA examination would matter without such recommendation and approval.

At this point, it is appropriate to bear in mind the dictum enunciated by the Supreme Court regarding the importance of submitting supporting documents in a claim for refund, as follows:[54]

> "x x x First, a judicial claim for refund or tax credit in the CTA is by no means an original action but rather an *appeal* by way of petition for review of a previous, unsuccessful administrative claim. Therefore, as in every appeal or petition for review, a **petitioner has to convince the appellate court that the quasi-judicial agency *a quo* did not have any reason to deny its claims. In this case, it was necessary for petitioner to show the CTA not only that it was entitled under substantive law** ℘

[53] Exhibit "P-7", Division Docket, Vol. III, p. 997.
[54] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 145526, March 16, 2007, 518 SCRA 430-431.

to the grant of its claims but also that it satisfied all the documentary and evidentiary requirements for an administrative claim for refund or tax credit. Second, cases filed in the CTA are litigated *de novo*. Thus, a **petitioner should prove every minute aspect of its case by presenting, formally offering and submitting its evidence to the CTA.** Since it is crucial for a petitioner in a judicial claim for refund or tax credit to show that its administrative claim should have been granted in the first place, part of the evidence to be submitted to the CTA must necessarily include whatever is required for the successful prosecution of an administrative claim." *(Emphasis supplied.)*

In sum, the Court *En Banc* finds no reason to disturb the findings of the Court in Division in the Assailed Decision dated March 22, 2018 and the Assailed Resolution dated July 20, 2018.

WHEREFORE, the present Petition for Review is **DENIED** for lack of merit.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

(On Leave)
ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice