REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

OCEANAGOLD (PHILIPPINES), INC.,
Petitioner,

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.*

- versus –

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

JAN 2 3 2020
4:06 p.m.

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RESOLUTION

CASTAÑEDA, JR., *J.:*

For resolution of the Court *En Banc* is petitioner Oceanagold (Philippines), Inc.'s *Motion for Reconsideration [of Decision dated August 16, 2019]*[1] filed on September 6, 2019. Petitioner's *Motion for Reconsideration* seeks reconsideration of the Decision of the Court *En Banc* promulgated on August 16, 2019,[2] (the "Assailed Decision") denying its Petition for Review for lack of merit. The Assailed Decision effectively affirmed the Decision dated March 22, 2018 as well as Resolution dated July

[1] Court *En Banc*'s Docket, pp. 271-289.
[2] *Id.*, pp. 233-262.

20, 2018 both rendered by the Third Division of this Court (Court in Division) in CTA Case Nos. 8995 & 9034.

In a Resolution[3] dated October 25, 2019, the Court *En Banc* required the respondent to file his Comment or Opposition to petitioner's *Motion for Reconsideration* within a period of ten (10) days from receipt thereof. On November 5, 2019, respondent filed his *Opposition (Re: Motion for Reconsideration).*[4]

Petitioner moves for reconsideration of the Assailed Decision on the basis of the following grounds:[5]

GROUNDS AND SUMMARY OF ARGUMENTS

I. THE HONORABLE COURT ERRED IN HOLDING THAT THE RECKONING DATE OF THE FIVE-YEAR RECOVERY PERIOD WAS NOT ESTABLISHED.

A. Pursuant to petitioner's Financial or Technical Assistance Agreement ("FTAA"), the reckoning date of the five-year recovery period is the "Date of Commencement of Commercial Production".

B. Petitioner was able to establish the "Date of Commencement of Commercial Production", which is the reckoning date of the five-year recovery period.

C. Petitioner's compliance with the FTAA and DENR's timetable is irrelevant for the purpose of determining reckoning date of the five-year recovery period.

D. Granting without conceding that the reckoning date of the five-year recovery period cannot be determined, Republic Act No. ("RA") 7942 or the Philippine Mining Act does not provide for such limit.

II. THE HONORABLE COURT ERRED IN HOLDING THAT PETITIONER HAS NO RECOVERABLE PRE-OPERATING EXPENSES. 9e

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[3] *Id.*, pp. 328-330.
[4] *Id.*, pp. 331-336.
[5] *Id.*, pp. 272-273.

A. Petitioner was able to establish as fact its Pre-Operating Expenses.

B. Petitioner's FTAA, which was entered into prior to DENR Administrative Order No. ("DAO") 99-56, does not require approval by the Secretary of the DENR of the Pre-Operating Expenses.

C. The CTA Third Division held that petitioner incurred valid pre-operating expenses, an undisputed finding of fact which respondent did not question on appeal.

After thorough evaluation of petitioner's arguments, the existing case records as well as the applicable laws and jurisprudence, the Court *En Banc* finds that petitioner's *Motion for Reconsideration* lacks merit.

To review, petitioner is seeking for refund of the excise taxes paid to respondent's bureau for the period covering February to June 2013 on the theory that it is still under the recovery period when the taxes were paid as provided in its FTAA, DENR AO No. 1995-23, as reiterated in DENR AO No. 2010-21, DENR AO No. 1999-56 and BIR Ruling No. 10-2007.

The Court in Division found that 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. "Accordingly, for failure of OGPI to prove that it has valid pre-operating expenses to recover, and that it has yet to recover the same, and thus, it is still under the period of recovery, the Court cannot grant the instant Petition for Review."[6]

In its Motion for Partial Reconsideration, petitioner asserts that its pre-operating expenses do not require approval by the DENR because its FTAA was entered into prior to the issuance of DENR AO No. 99-56.[7]

In a Resolution dated July 20, 2018,[8] the Court in Division found that OGPI has not fully recovered its pre-operating expenses during the period of assessment[9] and that it cannot be determined if the five (5)-year period to recover pre-operating expenses has already lapsed.[10] Thus, the Court in Division ruled:[11]

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[6] *Id.*, p. 36.
[7] Paragraphs 49 to 56, Motion for Partial Reconsideration [of Decision dated March 22, 2018], Division Docket, Vol. IV, pp 1771-1773.
[8] Court *En Banc*'s Docket, pp. 40-54.
[9] *Id.*, pp. 46-48.
[10] *Id.*, pp. 48-53.
[11] *Id.*, p. 54.

> "**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."

In its Petition for Review filed before the Court *En Banc*, petitioner further claims that the five-year limit on the recovery period provided by DENR AO No. 1996-40 is not valid being contrary to RA 7492.[12] The same argument is repeated in this *Motion for Reconsideration*.[13]

In the Assailed Decision, the Court *En Banc* upheld the Court in Division's finding 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 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."[14] The Court *En Banc* likewise pointed out that petitioner failed to comply with the timetable set in its FTAA.

The reckoning date of the five-year recovery period was not established.

It should be noted that the arguments raised in petitioner's *Motion* are mere rehash of the issues already discussed in the Assailed Decision. Nevertheless, the Court *En Banc* shall endeavor to discuss them again for emphasis.

Petitioner's FTAA provides for the definition of the "Date of Commencement of Commercial Production", thus:[15]

> "2.14 '<u>Date of Commencement of Commercial Production</u>' shall mean the first day of the calendar quarter following the quarter in which

[12] Paragraph 69, Petition for Review, Rollo, p. 74.
[13] Paragraph 36, Motion for Reconsideration [of Decision dated August 16, 2019], Court *En Banc*'s Docket p. 280.
[14] Court *En Banc*'s Docket, pp. 257-258.
[15] Exhibit "P-2", Division Docket, Vol. III, p. 918.

> 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 the other hand, DENR AO No. 96-40 defines "commercial production" thus:

> "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"

It should be noted that both definitions refer to the contractor's feasibility study. Petitioner submitted a Partial Declaration of Mining Feasibility on March 15, 2005.[16] However, petitioner did not submit the accompanying Work Program as required by the FTAA.

As discussed in the Assailed Decision, 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.[17] The same representation was made by petitioner when it applied for a BIR Ruling, which was issued in favor of petitioner on May 4, 2007.[18]

Petitioner's explanation for its failure to comply with the timetable set in the FTAA consists only of the testimony of its Senior Vice President for Legal and Human Resources, Atty. Joan D. Adaci-Cattiling, who stated that OGPI halted mine development in the Didipio Project in 2008 due to escalating costs and uncertainty in the financial markets.[19] However, petitioner failed to show to the Court how these market conditions affected petitioner that prompted it to halt mine development. Neither did petitioner submit evidence that the appropriate government agencies (the DENR and the BIR) were informed that petitioner halted mine development.

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[16] Exhibit "P-7", Division Docket, Vol. III, pp. 996-997.
[17] Decision, p. 24, Court *En Banc*'s Docket, p. 256.
[18] Exhibit "P-25".
[19] Q&A-19 to 30, Exhibit "P-51", Division Docket, Vol. 3, pp. 1175-1177.

About eight (8) years after the approval of its Partial Declaration of Mining Feasibility, petitioner notified the DENR in a letter dated March 27, 2013 that the Date of Commencement of Commercial Production in accordance with Section 2.14 of the FTAA is April 1, 2013.[20] Considering that it was made way past the timetable set in the FTAA, the Court *En Banc* is not convinced of the said notification without any explanation.

After arguing that strict compliance with the FTAA's timetable is <u>irrelevant</u> for the purpose of determining its exemption from excise tax,[21] petitioner then questions the validity of the five-year limit of DENR AO No. 1996-40. Citing Section 81 of R.A. 7942, petitioner avers that the Philippine Mining Act does not provide for a time limit to recover its pre-operating expenses. Thus, the five-year limit of DENR AO No. 1996-40 is not valid being contrary to the law it seeks to implement.

The Court *En Banc* strongly disagrees.

It should be reiterated that under the FTAA and the implementing rules and regulations of the Philippine Mining Act, petitioner is allowed to recover its pre-operating expenses before the government collects its share but subject to certain conditions. Among others, these conditions include:[22]

a) Maximum of five years recovery period, or at a date when the aggregate of the Net Cash Flow from the Mining Operations is equal to the aggregate of its Pre-operating expenses, reckoned from the Date of Commencement of Commercial Production, whichever comes first;

b) Approval of pre-operating expenses by the Secretary of the DENR, upon recommendation of the Director of the Mines and Geosciences Bureau; and

c) Verification of actual expenditure by an independent audit recognized by the Government and chargeable against the Contractor.

During the recovery period, petitioner is given temporary exemption from paying excise taxes and other fees to the government. On this wise, respondent correctly stated that the "exemption was not extended indefinitely upon petitioner. [Quite] the contrary, the exemption was only temporary; it existed only for the duration of the recovery period."[23]

[20] Exhibit "P-27".
[21] Paragraph 21, Motion for Reconsideration [of Decision dated August 16, 2019], Court *En Banc*'s Docket, p. 276.
[22] Section 3(e) and (f) of DENR AO No. 99-56.
[23] Opposition (Re: Motion for Reconsideration), Court *En Banc*'s Docket, pp. 331-332.

The Supreme Court ruled in *Paseo Realty & Development Corporation v. Court of Appeals, et al.*:[24]

> Taxation is a destructive power which interferes with the personal and property rights of the people and takes from them a portion of their property for the support of the government. And since taxes are what we pay for civilized society, or are the lifeblood of the nation, **the law frowns against exemptions from taxation and statutes granting tax exemptions are thus construed *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority**. A claim of refund or exemption from tax payments must be clearly shown and be based on language in the law too plain to be mistaken. Elsewise stated, **taxation is the rule, exemption therefrom is the exception**. *(Citations omitted; emphasis supplied)*

Thus, it is only reasonable that the exemption or the recovery period be limited to 5 years.

Based on the evidence submitted, the Court *En Banc* found that petitioner failed to prove that it complied with the conditions set forth in the implementing rules and regulations of the Philippine Mining Act.

Petitioner failed to comply with the conditions set forth in Section 3(f) of DENR AO No. 99-56.

Determination of the correctness of petitioner's expenses is important because the implementing rules and regulations of the Philippine Mining Act sets the recovery period up to five years or until the net cash flows from mining operations equal the total pre-operating expenses (date of actual recovery), <u>whichever comes earlier</u>.[25]

Petitioner submitted a list of expenses it allegedly incurred before it started mining operations[26] together with the supporting documents[27] which was examined by a Court-commissioned independent CPA.[28] From the foregoing documents, it appears that petitioner has pre-operating expenses

[24] G.R. No. 119286. October 13, 2004.
[25] Section 214 of DENR AO No. 1996-40 and Section 3(e) of DENR AO No. 1999-56.
[26] Exhibit "P-26".
[27] Exhibits "P-71" to "P-53540", including sub-exhibits.
[28] Exhibit "P-70".

which it has not fully recovered when it paid excise taxes in 2013.[29] To state that the Court *En Banc* holds that petitioner has no recoverable pre-operating expenses is incorrect.

The Court *En Banc* found, however, that petitioner failed to prove that the said expenses were approved by the DENR Secretary upon recommendation by the Director of the Mines and Geosciences Bureau, pursuant to Section 3(f) of DENR AO No. 99-56.

To reiterate, DENR AO No. 99-56 is applicable to petitioner. The transitory provision of the Philippine Mining Act (R.A. No. 7942) clearly provides:

> "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 Chapter XVI on incentives of this Act shall immediately govern and apply to a 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)*

In sum, the Court *En Banc* cannot grant petitioner's claim because 1) the reckoning of the 5-year recovery period cannot be clearly established, considering that the date of commencement of commercial production as determined by petitioner is way past the specific timetable as provided in the FTAA, and 2) petitioner failed to comply with the conditions set forth in Section 3(f) of DENR AO No. 99-56.

The Court *En Banc* is not convinced that petitioner is entitled to a refund of excise taxes paid for the period covering February to June 2013 and finds no reason to disturb the Assailed Decision.

WHEREFORE, the present *Motion for Reconsideration* is **DENIED** for lack of merit.

[29] Court *En Banc*'s Docket, pp. 46-48.

SO ORDERED.

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

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ON LEAVE
ERLINDA P. UY
Associate Justice

Took No Part
ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice