REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

FCF MINERALS CORPORATION, *Petitioner,*	**CTA CASE NO. 8789**
	Members:
-*versus*-	**UY,** *Chairperson,* **RINGPIS-LIBAN,** *and* **MODESTO-SAN PEDRO,** *JJ.*
COMMISSIONER OF CUSTOMS, *Respondent.*	Promulgated: MAR 15 2021 3:34 p.m.

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AMENDED DECISION

MODESTO-SAN PEDRO, J.:

The Case

This case is pursuant to the Decision rendered by the Court of Tax Appeals ("CTA") *En Banc*, dated 14 August 2018, remanding the Petition for Review filed by petitioner FCF Minerals Corporation on 28 March 2014 to the CTA Third Division.

The said Petition for Review prays for the refund of value-added tax ("VAT") and customs fees alleged to be erroneously imposed on petitioner's importations of capital equipment by respondent Commissioner of Customs ("COC") in the amount of ₱57,896,506.00.[1]

The Parties

Petitioner FCF Minerals Corporation is a domestic corporation engaged "in the continuing exploration, development and commercial operation of mineral claims with full power and authority to do any and all acts, things, business and activities which are related, incidental or conducive directly or indirectly to the attainment of the foregoing objectives." It is also a VAT-registered entity with Bureau of Internal Revenue ("BIR") Certificate of Registration No. 8RC0000050092.

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[1] Petition for Review; Records, Vol. 1, pp. 14-575, with annexes.

Respondent COC is the head of the Bureau of Customs ("BOC"), which is a government instrumentality under the Department of Finance ("DOF"), tasked with the assessment and collection of the lawful revenues from imported articles and all other dues, taxes, fees and charges, fines, and penalties accruing under the Tariff and Customs Code.

The Facts

On 19 September 2009, petitioner and the Republic of the Philippines entered into a Financial or Technical Assistance Agreement ("FTAA") where petitioner, acting as an FTAA Contractor, was to provide large-scale exploration, development, and commercial utilization of minerals in Quezon, Nueva Vizcaya, in exchange for the exclusive right to conduct mining operations in the said area.[2] The project was called the "Runruno Gold Molybdenum Project."[3]

On 15 February 2013, the BIR issued ***Revenue Memorandum Circular ("RMC") No. 17-2013***,[4] declaring that FTAA contractors are liable to pay taxes due under the ***National Internal Revenue Code of 1997, as amended (hereinafter referred to as the "Tax Code")*** and existing rules and regulations during and after their "Recovery Period."[5]

Meanwhile, on different dates, petitioner imported several capital equipment, as follows:

Date of Entry	Import Entry No.	Description
18 April 2013[6]	C48170[7]	78 pkgs. Dump Trucks[8]
18 April 2013[9]	C44534[10]	10 pkgs. Hydraulic Excavator [11]
18 April 2013[12]	C44535[13]	50 pkgs. Hydraulic Excavator, Motor Grader, Bulldozer[14]
18 October 2013[15]	C122537[16]	1 Bundle Steel Rails
12 December 2013[17]	C146371[18]	12 pkgs. 3T Forklift and spare parts[19]

[2] Exhibit "P-12"; *id.*, Vol. 3, pp. 1332-1448.
[3] Judicial Affidavit of Mr. Tommy E. Alfonso; *id.*, Vol. 4, pp. 1839-1852.
[4] Clarifying the Taxes Due from Financial or Technical Assistance Agreement (FTAA) Contractors During "Recovery Periods", 15 February 2013.
[5] Exhibit "P-18"; Records, Vol. 3, pp. 1501-1503.
[6] Exhibit "P-2D"; *id.*, p. 1247.
[7] Exhibit "P-2E"; *id.*, pp. 1248-1249.
[8] *Ibid.*
[9] Exhibit "P-3D"; *id.*, p. 1262.
[10] Exhibit "P-3E"; *id.*, pp. 1263-1264.
[11] *Ibid.*
[12] Exhibit "P-4E"; *id.*, pp. 1278-1280.
[13] *Ibid.*
[14] *Ibid.*
[15] Exhibit "P-5"; *id.*, pp. 1290-1294.
[16] *Ibid.*
[17] Exhibit "P-6D"; *id.*, p. 1299.
[18] Exhibit "P-6E"; *id.*, pp. 1300-1302.
[19] *Ibid.*

In connection with the foregoing importations, respondent collected VAT and customs fees from petitioner in the total amount of ₱57,896,506.00. This prompted petitioner to file Letter Protests to the District Collector of the BOC, Port of Manila,[20] bearing the following docket numbers on the following dates:

Docket Number	Date Filed	Import Entry No.	Amount (VAT and Fees)
2013-224	29 October 2013	C48170	₱ 26,687,444.00[21]
2013-225	29 October 2013	C44534	5,296,716.00[22]
2013-226	29 October 2013	C44535	25,572,871.00[23]
2013-227	4 November 2013	C122537	23,345.00[24]
2013-253	18 December 2013	C146371	316,130.00[25]
TOTAL			**₱ 57,896,506.00**

Subsequently, the District Collector of the BOC issued a Decision (hereinafter referred to as "DC Decision"), dated 3 January 2014, denying petitioner's Letter Protests on the basis of ***RMC No. 17-2013***.[26] The DC Decision was received by petitioner on 7 January 2014.[27]

Aggrieved, petitioner, on 21 January 2014, filed a Notice of Appeal with the District Collector of the BOC expressing its intent to appeal the DC Decision. It also requested the transmittal of its case records to the Office of respondent.[28]

In light of the Notice of Appeal, the District Collector of the BOC issued the 1st Indorsement on 28 January 2014, endorsing the case records of the above-stated Letter Protests to respondent.[29]

Thereafter, petitioner filed its Position Paper on 4 February 2014.[30]

Considering that petitioner was not able to receive a decision from respondent within thirty (30) days from his receipt of the case records or until 27 February 2014, it filed the instant Petition for Review on 28 March 2014.[31]

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20 JSFI; *id.*, pp. 1111-1115.
21 Exhibit "P-2"; *id.*, pp. 1243-1257.
22 Exhibit "P-3"; *id.*, pp. 1258-1272.
23 Exhibit "P-4"; *id.*, pp. 1273-1289.
24 Exhibit "P-5"; *id.*, pp. 1290-1294.
25 Exhibit "P-6"; *id.*, pp. 1295-1305.
26 JSFI; *id.*, p. 1112; Exhibit "P-1"; *id.*, pp. 1237-1242.
27 Exhibit "P-7" to "P-8"; *id.*, pp. 1306-1307.
28 JSFI; *id.*, p. 1112; *id.*
29 *Id.*; Exhibit "P-9"; *id.*, p. 1308.
30 *Id.*; Exhibit "P-10"; *id.*, p. 1309-1324.
31 Petition for Review; *id.*, pp. 14-575, with annexes.

Meanwhile, on 1 April 2014, respondent issued a Decision (hereinafter referred to as the "COC Decision"), affirming the DC Decision, which was received by petitioner on 7 April 2014.[32]

This caused petitioner to file a Supplemental Petition for Review before this Court on 15 April 2014.[33]

Respondent filed his Answer on 5 June 2014, which was within the extended period granted by the Court.[34] He also submitted the BOC records pertaining to the instant case on 16 June 2014.[35] On 9 July 2014, petitioner filed its Reply to respondent's Answer reiterating that the Commissioner of Internal Revenue ("CIR") has no authority to interpret the provisions of the ***Philippine Mining Act***[36] and that the COC erred in relying on the interpretations of the CIR.[37]

Petitioner and respondent filed their respective Pre-Trial Briefs on 22 July 2014[38] and 17 July 2014.[39] Pre-trial ensued on 24 July 2014,[40] followed by the parties' filing of their Joint Stipulation of Facts and Issues ("JSFI") on 4 August 2014.[41] On 3 September 2014, the Court issued the Pre-Trial Order, marking the commencement of Trial.[42] Subsequently, the same was amended by the Court in its Resolution dated 10 November 2014.[43]

During trial, petitioner presented the following witnesses:

1. Ms. Chevy F. Albo - petitioner's Director and Corporate Secretary

   She testified on the fact that petitioner entered into an FTAA with the Philippine Government. She also identified various documents, including the Certifications issued by the Mines and Geosciences Bureau ("MGB") confirming petitioner's exemption from VAT, customs duties, and fees on its importation of capital equipment. Finally, she shed light on the processes petitioner undertook to protest the collection efforts of respondent.[44]

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[32] JSFI; *id.*, p. 1112; Exhibit "P-11"; *id.*, pp. 1325-1331.
[33] Supplemental Petition for Review; *id.*, pp. 580-584.
[34] Answer; *id.*, pp. 609-630; Resolution; *id.*, p. 608.
[35] Manifestation and Motion; *id.*, Vol. 2, pp. 632-734.
[36] Republic Act No. 7942, 3 March 1995.
[37] Reply; Records, Vol. 2, pp. 739-748.
[38] Pre-Trial Brief (for Petitioner); *id.*, pp. 1023-1032.
[39] Pre-Trial Brief (for Respondent); *id.*, pp. 1033-1040.
[40] Minutes; *id.*, p. 1054.
[41] JSFI; *id.*, Vol. 3, pp. 1111-1120.
[42] Pre-Trial Order; *id.*, pp. 1131-1137.
[43] Resolution; *id.*, pp. 1147-1148.
[44] Judicial Affidavit of Ms. Chevy F. Albo; *id.*, Vol. 2, pp. 751-764; Minutes; *id.*, p. 1138.

2. Mr. Roger R. Bisoña - petitioner's customs broker

He testified on the facts and identified documents surrounding the release of petitioner's shipments or importations covered by the aforementioned Letter Protests.[45]

Subsequently, petitioner filed its Offer of Exhibits on 23 January 2015.[46] The Court admitted all pieces of evidence offered by petitioner through its Resolution dated 1 April 2015.[47]

On 4 June 2015, respondent filed his Manifestation and Motion (In Lieu of Comment), stating that he will no longer present any witness since the case only involves questions of law.[48]

Considering the same, the Court ordered the parties to file their respective Memoranda,[49] which petitioner and respondent accordingly followed on 24 July 2015[50] and 20 July 2015, respectively.[51]

On 21 June 2016, the Court issued a Decision (hereinafter referred to as the "Court in Division Decision") denying the instant Petition for Review for lack of merit.[52] In it, the Court agreed with the argument of petitioner that an FTAA contractor is exempt from payment of VAT and customs fees on importation of capital equipment during the Recovery Period. However, it also found that petitioner was not able to present sufficient evidence to prove that the contended charges in this case were imposed and paid by petitioner during the Recovery Period.[53]

This prompted petitioner to file its Motion for Partial Reconsideration on 20 July 2016,[54] which was denied by the Court through its Resolution, dated 20 February 2017 (hereinafter referred to as "Court in Division Resolution).[55]

Undeterred, petitioner appealed the Court in Division Decision and Court in Division Resolution with the CTA *En Banc*.[56]

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[45] Judicial Affidavit of Mr. Roger R. Bisoña; *id.*, pp. 1056-1062; Minutes; *id.*, p. 1145.
[46] Offer of Exhibits; *id.*, pp. 1231-1537.
[47] Resolution; *id.*, pp. 1565-1566.
[48] Manifestation and Motion (In Lieu of Comment); *id.*, pp. 1580-1584.
[49] Resolution; *id.*, p. 1586.
[50] Memorandum of Petitioner; *id.*, Vol. 4, pp. 1610-1642.
[51] Memorandum of Respondent; *id.*, Vols. 3-4, pp. 1587-1609.
[52] Decision; *id.*, Vol. 4, pp. 1646-1668.
[53] *Ibid.*
[54] Motion for Partial Reconsideration; *id.*, pp. 1669-1679.
[55] Resolution; *id.*, pp. 1715-1721.
[56] Decision; *id.*, pp. 1769-1830.

In its appeal, petitioner presented its ***Declaration of Commencement of Commercial Operations***, duly filed with the MGB and Department of Environment and Natural Resources ("DENR") on 16 September 2016, or after the promulgation of the Court in Division Decision.[57]

Giving weight to the ***Declaration of Commencement of Commercial Operations***, and considering it as newly discovered evidence, the CTA *En Banc*, on 14 August 2018, rendered its Decision, granting petitioner's appeal and remanding the case to this Court for further proceedings.[58]

The CTA *En Banc* ruled that, during the time of the importations of the subject capital equipment, the "commencement of commercial production" period had not even begun. This is proven by the fact that the subject importations were made three (3) years before the ***Declaration of Commencement of Commercial Operations*** was submitted to the MGB and DENR. The relevant portion of the Decision is quoted, to wit:

> "In the case of FCF, its Declaration of Mining Project Feasibility (DMPF) was approved on October 18, 2011. The shipments that were erroneously subjected to VAT were made in 2013. It was only on September 9, 2016 or five (5) years after the DMPF and three (3) years after the shipments, that the DCCO was filed by FCF. **To emphasize, the taxability of the imported goods will only be after the recovery period of FCF, i.e., five (5) years or at a date when the aggregate of the net cash flows from the mining operations is equal to the aggregate of its pre-operating expenses, <u>reckoned from the date of commencement of commercial production</u>, whichever comes first.**
>
> In fact, September 9, 2016 does not even start the recovery period for FCF as this was only the filing of the DCCO and not yet approved by the Regional Office, which starts the counting of the recovery period. Thus, Section 2.1 (m) of FCF's FTAA defines the "date of commencement of commercial production" as follows:
>
>> (m). "Date of Commencement of Commercial Production" or "Commencement of Commercial Production" refers to the date of written declaration by the Contractor to start commercial operations after the conduct of Test Run including Debugging, and its approval by the Regional Office concerned."
>
> **<u>Obviously, the period for the Government Share, i.e., taxes, to be correctly collected has not yet begun.</u>**
>
> The **<u>capital equipment being a pre-operating expense is also of no moment</u> as the rule on the aggregate of the net cash flows from the mining operations being equal to the aggregate of the pre-operating expenses <u>must still reckon from the date of commencement of commercial production, which has not yet begun</u>.** The Third Division found the necessity of determining the amount of pre-operating expenses in

[57] *Ibid.*
[58] *Ibid.*

order to ascertain the date when the recovery period would end to start the collection of government shares. **Such determination is already futile as it is already proven by FCF that its date of Commencement of Commercial Production would only start upon approval of its DCCO which was only filed on September 9, 2016. Thus, the computation of net cash flow and pre-operating expenses as being insisted by the COC is actually immaterial. It is only upon presentation of the filing of the DCCO that this Court was able to reckon, at the very earliest, the said recovery period. Logic then dictates that the collection of VAT and fees before the recovery period should not occur.**[59]

On account of the CTA *En Banc* Decision, this Court reopened trial for the presentation of petitioner's additional pieces of evidence.[60]

Accordingly, petitioner presented the following additional witnesses:

1. Mr. Tommy E. Alfonso - petitioner's Financial Comptroller

He testified that petitioner is exempt from VAT on imported goods and services and custom duties and fees on importations of capital equipment from the date of approval of its ***Declaration of Mining Project Feasibility*** on 18 October 2011 up to the end of its Recovery Period; that petitioner was still in its pre-operating phase when it made the subject importations; and that its ***Declaration of Commencement of Commercial Operations*** was submitted to MGB and DENR and subsequently approved by MGB on 17 July 2017. He also identified documents relevant to his testimony.[61]

2. Mr. Roel D. Bahiwag - petitioner's Accounting Manager

He testified that the imported capital equipment are still currently being used in the Runruno Gold Molybdenum Project. He also identified pieces of evidence relevant to his testimony.[62]

Thereafter, petitioner filed its Offer of Exhibits on 18 November 2019.[63] The exhibits were all admitted by the Court through its Resolution, dated 22 January 2020.[64]

[59] Emphasis and underscoring supplied, original emphasis and underscoring omitted.
[60] Resolution, Records, Vol. 4, pp. 1832-1833.
[61] Judicial Affidavit of Tommy E. Alfonso, *id.*, pp. 1839-1852. Minutes; *id.*, p. 2109; Vol. 5, p. 2235; Order; *id.*, Vol. 5, pp. 2236-2237.
[62] Judicial Affidavit of Roel D. Bahiwag, *id.*, pp. 2122-2131; *id.*; *id.*
[63] Offer of Exhibits; *id.*, pp. 2238-2245.
[64] Resolution; *id.*, pp. 2622-2623.

The parties filed their respective Memoranda on 21 February 2020 for respondent[65] and 9 March 2020 for petitioner.[66]

On 16 March 2020, the Court issued a Resolution submitting the case for decision.[67] Hence, this Decision.

The Issues[68]

WHETHER THE COC ERRED IN RELYING ON RMC NO. 17-2013 WHEN HE DENIED THE CLAIM FOR REFUND OF PETITIONER REPRESENTING VAT AND OTHER FEES PAID ON ITS IMPORTATION OF CAPITAL EQUIPMENT AMOUNTING TO ₱57,896,506.00.

WHETHER PETITIONER IS ENTITLED TO REFUND OF VAT AND OTHER FESS AMOUNTING TO ₱57,896,506.

Arguments of the Parties

Petitioner's Arguments[69]

Petitioner alleges that the subject importations took place during its pre-operating period. Therefore, it argues that it is not liable for VAT and customs fees on its importations of capital equipment. It opines that it was able to produce overwhelming proof to support its contention. Hence, it stresses that it is entitled to the refund being claimed.

Respondent's Arguments[70]

Respondent counters that it is not enough for petitioner to prove that the subject importations were made during the pre-operating period. He insists that it should also establish that it had complied with the provisions of the ***FTAA***, the ***Philippine Mining Act***, and ***DENR Administrative Order ("DAO") No. 2007-12*** during the period the subject importations took place. In this case, respondent alleges that petitioner failed to adduce sufficient proof to show that it was able to comply with the requirements under each issuance.

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[65] Memorandum for Respondent, *id.*, Vol. 6, pp. 2624-2647.
[66] Memorandum for Petitioner, *id.*, pp. 2653-2687.
[67] Resolution; *id.*, pp. 2689-2690.
[68] Pre-Trial Order; *id.*, Vol. 3, pp. 1131-1136.
[69] Memorandum for Petitioner, *id.*, Vol. 6, pp. 2653-2687.
[70] Memorandum for Respondent, *id.*, pp. 2624-2647.

Respondent explains that, under ***Clauses 9.6(b) and 9.7(a), Section IX of the FTAA***, the FTAA Contractor is bound to follow the prevailing procedures under pertinent laws, rules, and regulations in order to avail of the privilege of non-payment of taxes and fees during the Recovery Period. This includes the need of petitioner to prove that the subject importations fall within the category of actual expense and capital expenditures enumerated in ***Section 7(b) of DAO No. 2007-12*** and that these pre-operating expenses were verified by the Government and approved by the DENR Secretary upon recommendation of the MGB Director. Here, respondent avers that petitioner failed to prove its compliance with the said requisites.

Furthermore, he opines that petitioner was not able to satisfy the conditions set forth under the FTAA which include: (1) that the imported capital equipment are required in carrying out its operations in the Runruno Gold Molybdenum Project; (2) that the capital equipment were not available domestically in comparable price and quality; (3) that the capital equipment are covered by shipping documents under the name of petitioner to whom the shipment will be delivered; and (3) that the capital equipment were not sold, transferred or disposed from the date of approval of the ***Declaration of Mining Project Feasibility*** until the end of the Recovery Period and/or within five (5) years from their acquisition, without prior approval of the MGB Director and payment of any taxes due thereon which it was previously exempted on paying.

Respondent also questions the admissibility of the Certification issued by Maxima Machineries Incorporated, stating that it had not been properly identified and authenticated by the affiant, and the probative value of the Certifications issued by MGB, since they do not categorically state that petitioner is exempt from payment of VAT and customs fees on the subject importations.

The Ruling of the Court

Respondent erred in relying on RMC No. 17-2013.

In resolving the first issue in the Court in Division Decision, the Court discussed that an FTAA contractor is exempt from paying VAT and customs fees on the importation of capital equipment before and during the "Recovery Period." In arriving at the said conclusion, the Court scrutinized the relevant provisions of the ***Philippine Mining Act*** and its implementing ***DAO No. 2007-12*** and found that the "Government Share" in FTAA arrangements corresponds to the different types taxes imposable to the FTAA Contractor including but not limited to the VAT and custom fees on imported capital equipment.

However, as mentioned, the VAT and customs fees will only be collected from the FTTA Contractor after the "Recovery Period." The relevant portions of both legal authorities are hereby quoted, to wit:

> "Section 81. Government Share in Other Mineral Agreements-The share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the:
>
> a. capital investment of the project;
>
> b. risks involved;
>
> c. contribution of the project to the economy; and
>
> d. other factors that will provide for a fair and equitable sharing between the Government and the contractor.
>
> The Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's 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 stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.
>
> **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**.
>
> SUBJECT : REVISED GUIDELINES ESTABLISHING THE FISCAL REGIME OF FINANCIAL OR TECHNICAL ASSISTANCE AGREEMENTS (FTAA)
>
> In line with the continuing policy of the Government to provide for a responsive regulatory framework in the management of mineral resources development in the Philippines and pursuant to Section 81 of Republic Act No. 7942, the Philippine Mining Act of 1995, DENR Administrative Order (DAO) No. 99-56 is hereby revised for the guidance and compliance of all concerned.
>
> xxx xxx xxx
>
> **Section 4. Fiscal Regime of a Financial or Technical Assistance Agreement**

The fiscal regime of FTAA entered into by and between the Government of the Republic of the Philippines and FTAA Contractors shall be guided by the following provisions:

a. <u>General Principles</u>

1. The Total Government Share shall consist of a Basic Government Share and an Additional Government Share.

2. The Basic Government Share shall consist of direct taxes, royalties, fees and other related payments as defined in this Order.

3. The Additional Government Share is the amount to be paid by the Contractor when the Basic Government Share is less than fifty percent (50%) of the Net Mining Revenue.

4. The Net Mining Revenue is Gross Output less Deductible Expenses.

b. <u>Basic Government Share</u>

The Basic Government Share shall consist of all direct taxes, royalties, fees and related payments required by existing laws, rules and regulations to be paid by the Contractor. It shall be the minimum share that Government shall receive during any Calendar Year. The following national and local taxes, royalties and fees paid by the Contractor to the Government during a Calendar Year constitute the Basic Government Share:

(a) Contractor's income tax;
(b) Customs duties and fees on imported capital equipment;
(c) Value-added tax on imported goods and services;
(d) Withholding tax on interest payments on foreign loans;
(e) Withholding tax on dividends to foreign stockholders;
(f) Documentary stamps taxes;
(g) Capital gains tax;
(h) Excise tax on minerals;
(i) Royalties for Mineral Reservations and to Indigenous Peoples, if applicable;
(j) Local business tax;
(k) Real property tax;
(l) Community tax;
(m) Occupation fees;
(n) Registration and permit fees; and
(o) All other national and local Government taxes, royalties and fees as of the effective date of the FTAA.

Related payments made by the Contractor for Special Allowance and Royalty to Indigenous Peoples or Indigenous Cultural Communities, if applicable, and which are subject of agreements entered into by and between the Contractor and concerned individuals or private parties, and were duly approved by the Government, shall be considered as part of the Basic Government Share.

Starting from the effective date of the FTAA, the Contractor shall pay all applicable taxes, royalties, fees and other related payments subject to the following:

> i. **From the date of approval of the Declaration of Mining Project Feasibility up to the end of the Recovery Period as defined in this Order, the Contractor shall pay the above Items (h) to (o) which includes the Excise Tax on Minerals, Royalty on Mineral Reservations and to Indigenous Peoples, if applicable, and local taxes, fees and related imposts due to Local Government Units.**
>
> ii. **After the Recovery Period, Contractor shall then pay all applicable taxes, fees, royalties and other related payments to the national and local Governments [Items (a) to (o) above].**
>
> iii. Any value-added tax on exported products refunded by or credited to the Contractor shall not form part of the Basic Government Share."[71]

Concomitantly, the term "Recovery Period" was defined under ***Section 7 of DAO No. 2007-12*** as:

> Section 7. Recovery of Pre-Operating Expenses
>
> a. Recovery Period. Considering the high risk, high cost and long term nature of an FTAA Mining Operation, the Contractor shall be given an opportunity to recover the expenses incurred during its pre-operating period. After this period, the Government shall receive its rightful share from the national patrimony. **Recovery Period, as used in this Order, shall be a <u>maximum of five (5) years</u> or at a <u>date when the aggregate of the Net Cash Flows 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</u>**.

The Court also found that the government official who has the authority to promulgate rules and regulations implementing the intent and provisions of the ***Philippine Mining Act***, including those governing the tax exemption awarded to FTAA Contractors, is the DENR Secretary and not the CIR.

In view of the foregoing, the Court, in the Court in Division Decision ruled that it was erroneous for respondent to rely on ***RMC No. 17-2013***. The Court pronounced that respondent should have applied the implementing rules promulgated by the DENR Secretary in resolving petitioner's refund claim.

We adopt these findings in this Decision.

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[71] Emphasis supplied.

<u>Petitioner failed to prove its entitlement to the VAT and customs fees prayed for.</u>

Having established that an FTAA contractor will only be held liable for VAT and custom fees on its importation of capital equipment **after the Recovery Period**, the Court will now determine at what period were the said charges incurred and whether it is indeed exempt from said impositions.

In this case, the FTAA is divided into five (5) stages, namely:

(a) Exploration Period-period given to the FTAA contractor to search for Mineral Resources.[72]

(b) Pre-Feasibility Study Period- period to conduct preliminary studies to evaluate and assess the potential economic value of identified Mineral Resources.[73]

(c) Feasibility Study Period- period when the FTAA contractor finds that the Contract Area contains minerals which may be commercially utilized in accordance with internationally accepted sound mining methods.[74]

(d) Development and Construction Period- period when the FTAA Contractor is expected to complete the mine development in the mining areas identified in the Mining Project Feasibility Study.[75]

The said period commences from the **date of approval of the Declaration of Mining Project Feasibility** and **ends on the day before the Date of Commencement of Commercial Production.**[76]

The **Declaration of Mining Project Feasibility** is a written notice submitted by the FTAA Contractor to the MGB proclaiming the feasibility of commercial utilization of the minerals identified in the Contract Area by internationally accepted sound mining practices and supported by a Mining Project Feasibility Study and other requirements prescribed in Section 30 of the IRR. This document is filed by the FTAA Contractor during the Feasibility Period and is approved by the

[72] *See* Section II.2.1.u, Exhibit "P-12", Records, Vol. 3, p. 1336.
[73] *See* Section II.2.1.ax, *id.*, p. 1339.
[74] *See* Section VI.6.5, *id.*, pp. 1346-1347.
[75] *See* Section VII7.2, *id.*, p. 1348.
[76] *See* Section IV4.2.e, *id.*, p. 1343.

DENR Secretary, through the Regional Director and Director of the MGB.[77]

Meanwhile, the **Date of Commencement of Commercial Production** refers to the *date of written declaration* by the FTAA Contractor to start commercial operations after the conduct of Test Run, including Debugging, **<u>and</u>** its *approval by the MGB Regional Office.*[78]

(e) Operating Period-refers to the period where mining operations are conducted.[79] The said period commences from the **Date of Commencement of Commercial Production** in the mining area until the **expiration of the FTAA.**[80]

To recapitulate, in order for the subject importations to be exempted from VAT and customs fees on its importations of capital equipment, ***DAO No. 2007-12***, as reiterated in the ***FTAA***, provides that the importation should have taken place before or during the "Recovery Period," which is:

1. The maximum of five (5) years; or

2. At a date when the aggregate of the Net Cash Flows from the Mining Operations is equal to the aggregate of its Pre-Operating Expenses

Both are reckoned from the ***Date of Commencement of Commercial Production***, whichever comes first.

Aside from the aforementioned, the ***FTAA*** also provides for additional conditions to the FTAA Contractor before it may avail of the VAT and customs duties exemption on its importations of capital equipment. The pertinent portion of the ***FTAA*** is hereby quoted,[81] to wit:

"SECTION XIII
RIGHTS AND OBLIGATIONS OF THE PARTIES

13.2 Rights of the Contractor. The Contractor shall have the following rights

j. Subject to existing laws, rules and regulations, the Contractor shall have the right to import into the Philippines **<u>all equipment, machinery and spare parts required by Contractor for Mining</u>**

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[77] *See* Section II.2.1.o, *id.*, pp. 1335-1336.
[78] *See* Section II.2.1.m, *id.*, p. 1335.
[79] *See* Section VIII.8.3, *id.*, p. 1349.
[80] *See* Section II.2.1.as, *id.*, p. 1339.
[81] *See* Section XIII.2.j, *id.*, p. 1368.

> **Operations**, and to export the same when no longer needed for Mining Operations: **Provided, That machinery, equipment and spare parts of comparable price and quality are not manufactured domestically, are actually needed and will be used exclusively by the Contractor in its Mining Operations, and are covered by shipping documents in the name of the Contractor to whom the shipment will be delivered direct by the customs authorities.**
>
> **From the date of approval of the Declaration of Mining Project Feasibility until the end of Recovery Period and/or within a period of five (5) years from the date of acquisition of such machinery, equipment and spare parts, the Contractor may not sell, transfer, or dispose of such machinery, equipment and spare parts within the Philippines without the prior approval of the Director and payment of any taxes due the Government that were previously exempted**: Provided, That should the Contractor sell, transfer or dispose of such machinery, equipment and spare parts within the Philippines without the prior consent of the Director within the prescribed period, it shall pay twice the amount of the tax exemption granted: Provided further, That the Director may allow the sale, transfer, or disposition of the said items within the Philippines within the prescribed period without payment of previously granted tax and duty exemptions under terms and conditions to be formulated by the Bureau: Provided finally, That any sale, transfer or disposition made after the prescribed period shall not require prior approval of the Director but notice thereof shall be made within ten (10) days from the sale, transfer or disposition thereof."[82]

Hence, based on the foregoing, the Court finds that the following requisites must first be satisfied in order for petitioner to be entitled to the VAT and customs fees exemption on its importations of capital equipment, to wit:

1. The importation of the capital equipment should have taken place during or before the Recovery Period;

2. The capital equipment is not available domestically in comparable price and quality;

3. The capital equipment is actually needed and will be used exclusively by the FTAA Contractor in its Mining Operations;

4. The importation of capital equipment should be covered by shipping documents in the name of the FTAA Contractor to whom the shipment will be delivered directly by the customs authorities; and

[82] Emphasis and underscoring supplied.

5. The capital equipment was not sold, transferred or disposed from the date of approval of the Declaration of Mining Project Feasibility until the end of Recovery Period and/or within a period of five (5) years from the date of acquisition of such capital equipment, subject to exceptions under the ***FTAA***.

In order to prove the *First Requisite*, petitioner presented its ***Declaration of Commencement of Commercial Operations***, duly received by the MGB Regional Office on 9 September 2016, declaring the commencement of commercial operations for the Runruno Molybdenum Gold Project on **9 September 2016.**[83] It also offered in evidence the ***Letter from Mr. Mario A. Ancheta-OIC Regional Director of the MGB approving the Declaration of Commencement Operations***, dated **17 July 2017.**[84]

Considering that the subject importations took place between 18 April 2013 and 12 December 2013, which is nearly three years before the filing of the ***Declaration of Commencement of Commercial Operations*** with the MGB and three years and seven months before the approval of said Declaration, clearly, petitioner was able to establish with sufficient proof that the importations were made even before the Recovery Period. These findings are in line with the Court *En Banc* Decision, as discussed above.

Meanwhile, in satisfaction of the *Second Requisite*, petitioner simply presented a Certification issued by Mr. Tsuyoshi Isogami, the Executive Vice President of its supplier, Maxima Machineries Incorporated, stating that the imported capital equipment were not available domestically.[85]

Even a most cursory scrutiny of the Certification, however, will show that the same does not constitute sufficient evidence to show compliance with the requisite that the imported "**machinery, equipment and spare parts of comparable price and quality are not manufactured domestically**."

To begin with, the affiant of the Certification, Mr. Tsuyoshi Isogami, was not shown to be knowledgeable as to the fact of domestic availability of the equipment sought to be imported by petitioner. At most, he can only certify as to the fact that the Komatsu brand of the specific equipment stated in the Certificate, of which his company was the exclusive distributor, was not locally manufactured or produced. Indeed, this is simply what the Certificate reflects, to wit:

> "2. The following capital equipment which were imported by FCF Minerals Corporation were not locally manufactured nor produced and as such were unavailable in the Philippines:

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[83] Exhibit "P-23"; *id.*, Vol. 5, p. 2247.
[84] Exhibit "P-29"; *id.*, pp. 2375-2376.
[85] Exhibit "P-45" *id.*, p. 2419.

Description	Import Entry No.	Date of Entry	Purchase Order (PO) No.	PO Date
6 Units Komatsu HD785-7 Dump Trucks	C48170	April 18, 2013	1226	July 31, 2012
1 Unit Komatsu PC2000-8 Hydraulic Excavator	C44534	April 18, 2013	1226	July 31, 2012
1 Unit Komatsu PC1250-8 Hydraulic Excavator	C44535	April 18, 2013	1330	September 3, 2012
1 Unit Komatsu GD825A-2 Motor Grader	C44535	April 18, 2013	1330	September 3, 2012
2 Units Komatsu D475A-A Bulldozer	C44535	April 18, 2013	1330	September 3, 2012

> 3. POs for the above equipment with nos. 1226 and 1330 were received by Maxima, **being the exclusive distributor of Komatsu equipment in the Philippines**, but were referred to Marubeni Corporation, a Japanese trading firm, conducting import and export of Komatsu equipment in Japan, where the above equipment were imported from as the capital equipment covered by the POs were not being locally manufactured nor produced and as such were unavailable in the Philippines."

Stated differently, what the Certification only represents is that the Komatsu brand of the specific equipment stated in the Certification was not domestically available.

Certainly, the requisite that the "**<u>machinery, equipment and spare parts of comparable price and quality are not manufactured domestically</u>**" does not only pertain to the Komatsu brand as other brands of these pieces of equipment do exist. Other popular brands include Hyundai, Isuzu, Hino, Hitachi, Caterpillar, Sany and Mitsubishi. Granting for the sake of argument that these brands are also not manufactured domestically, there is no evidence to that effect presented by petitioner.

What is on record is that petitioner did not even exhaust efforts in determining whether the imported capital equipment was domestically available in comparable price and quality. In fact, it is evident in the testimony of petitioner's witness that it only approached Maxima Machineries Incorporated for the purchase of the said equipment.[86] The relevant testimony is quoted to wit:

[86] TSN dated 1 August 2019, p. 15.

"Justice Liban:

> Are you saying that there are no domestic corporation manufacturing these equipment?

Mr. Alfonso:

> None, your Honors, particularly with the mining equipment, the dump trucks, excavators and bulldozers, **we actually approached one of the suppliers here, namely: Komatsu, Maxima**. They are the licensed distributors in the Philippines and they are the ones who asked us, who approached the Japanese counterpart because its not available here."[87]

Again, petitioner's evidence on this score is limited to one particular brand supplier and does not reflect the absence of domestic manufacturers, as required.

Furthermore, as observed by respondent, the Certification being presented was not properly notarized, considering that the Notarial Certificate on the document is incomplete. ***Section 2, Rule VIII of the 2004 Rules on Notarial Practice***[88] requires that the Notarial Certificate should include the following information, as follows:

> "SEC. 2. Contents of the Concluding Part of the Notarial Certificate. – The notarial certificate shall include the following:
>
> (a) the name of the notary public as exactly indicated in the commission;
>
> (b) the serial number of the commission of the notary public;
>
> (c) the words "Notary Public" and the province or city where the notary public is commissioned, the expiration date of the commission, the office address of the notary public; and
>
> (d) the roll of attorney's number, the professional tax receipt number and the place and date of issuance thereof, and the IBP membership number."

In this case, only a signature appears on the Notary Public portion of the subject Certification and does not include the foregoing required information. Hence, the Certification cannot be considered a Notarized Document under the ***2004 Rules on Notarial Practice*** making it a private document.

Given the same, ***Section 20, Rule 132 of the Rules of Court*** provides for the specific requirements on when a private document may be received in evidence, to wit:

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[87] Emphasis supplied.
[88] A.M. No. 02-8-13-SC, 6 July 2004.

> "Section 20. *Proof of private document.* — Before any private document offered as authentic is received in evidence, **its due execution and authenticity must be proved either**:
>
> (a) By anyone who saw the document executed or written; or
>
> (b) By evidence of the genuineness of the signature or handwriting of the maker.
>
> Any other private document need only be identified as that which it is claimed to be."[89]

As can be gleaned above, the Court may only give weight to the Certification if the same had been duly attested to by a witness who can guaranty its authenticity and due execution.

Here, a perusal of the Judicial Affidavit of petitioner's witness proves that the Certification had not been properly authenticated.[90] The relevant testimony of the witness is produced below, as follows:

> "Q23: You mentioned that the equipment which you photographed are imported equipment, what proof do you have to show that these were indeed imported equipment?
>
> A23: xxx our supplier, Maxima Machineries Incorporated ("Maxima") issued a Certification dated October 2, 2019 stating that the following capital equipment were imported by FCF because they were not locally manufactured nor produced and as such are unavailable in the Philippines xxx.
>
> Q24: If this Certificate is shown to you, will you be able to identify it?
>
> A24: Yes, ma'am.
>
> Q25: I am showing you a Certification issued by Tsuyoshi Isogami (Executive Vice President of Maxima) dated October 2, 2019, what is the relation of this Certification which you mentioned earlier?
>
> A25: That is the same Certification.

Clearly, petitioner's witness only identified the Certification but did not authenticate the same, rendering the said document inadmissible. The same is in line with the ruling of the Supreme Court in ***Otero v. Tan***,[91] to wit:

> "Anent the admissibility of the statements of account presented by Tan, this Court rules that the same **<u>should not have been admitted in evidence by the lower tribunals.</u>**

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[89] Emphasis supplied.
[90] Judicial Affidavit of Roel D. Bahiwag, *id.*, pp. 2122-2131; *id.*; *id.*
[91] G.R. No. 200134, 15 August 2012.

Section 20, Rule 132 of the Rules of Court provides that the authenticity and due execution of a private document, before it is received in evidence by the court, must be established. Thus:

> Sec. 20. Proof of private document. — Before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either:
>
> a) By anyone who saw the document executed or written; or
>
> b) By evidence of the genuineness of the signature or handwriting of the maker.
>
> Any other private document need only be identified as that which it is claimed to be.

A private document is any other writing, deed, or instrument executed by a private person without the intervention of a notary or other person legally authorized by which some disposition or agreement is proved or set forth. Lacking the official or sovereign character of a public document, or the solemnities prescribed by law, a private document requires authentication in the manner allowed by law or the Rules of Court before its acceptance as evidence in court. The requirement of authentication of a private document is excused only in four instances, specifically: (a) when the document is an ancient one within the context of Section 21, Rule 132 of the Rules of Court; (b) when the genuineness and authenticity of an actionable document have not been specifically denied under oath by the adverse party; (c) when the genuineness and authenticity of the document have been admitted; or (d) when the document is not being offered as genuine.

The statements of account which Tan adduced in evidence before the MTCC indubitably are private documents. **Considering that these documents do not fall among the aforementioned exceptions, the MTCC could not admit the same as evidence against Otero without the required authentication thereof pursuant to Section 20, Rule 132 of the Rules of Court. During authentication in court, a witness positively testifies that a document presented as evidence is genuine and has been duly executed, or that the document is neither spurious nor counterfeit nor executed by mistake or under duress.**

Here, Tan, during the ex parte presentation of his evidence, did not present anyone who testified that the said statements of account were genuine and were duly executed or that the same were neither spurious or counterfeit or executed by mistake or under duress. Betache, the one who prepared the said statements of account, was not presented by Tan as a witness during the ex parte presentation of his evidence with the MTCC.

Considering that Tan failed to authenticate the aforesaid statements of account, the said documents should not have been admitted in evidence against Otero. It was thus error for the lower tribunals to have considered the same in assessing the merits of Tan's Complaint.[92]

[92] Emphasis supplied.

None of the exceptions enumerated in ***Otero v. Tan*** exist in this case. In fact, respondent vehemently objected to the admissibility of the said Certification in its Comment to petitioner's Offer of Evidence and Memorandum.

The Court has scanned the transcript of stenographic notes and the documentary evidence submitted by petitioner and has found no other evidence to prove that the subject importations constituted "**machinery, equipment and spare parts of comparable price and quality (that) are not manufactured domestically**".

Considering that petitioner failed to satisfy the second requisite, the Court finds that petitioner is not entitled to the VAT and Customs fees refund prayed for. Given the same, the Court will no longer discuss petitioner's compliance with the other remaining requisites.

This Court reiterates its consistent ruling that actions for tax refund or credit, as in the instant case, are in the nature of a claim for exemption. The law is not only construed in *strictissimi juris* against the taxpayer—the pieces of evidence presented entitling a taxpayer to an exemption is also *strictissimi* scrutinized and must be duly proven. The burden is on the taxpayer to show that he has strictly complied with the conditions for the grant of the tax refund or credit. Since taxes are the lifeblood of the government, tax laws must be faithfully and strictly implemented, as they are not intended to be liberally construed.[93]

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED.

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

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[93] Coco-Cola Bottlers Philippines, Inc. v. Commissioner of Internal Revenue, G.R. No. 222428, 19 February 2018

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

ATTESTATION

I attest 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's Division

ERLINDA P. UY
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution and the Division Chairperson's Attestation, 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.

JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice