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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

TAGANITO MINING CORPORATION,
Petitioner,

- versus -

C.T.A. CASE No. 4702

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PROMULGATED:
APR 28 1995

x - x.

D E C I S I O N

This case presents to us a claim for refund of excise taxes on mineral products allegedly overpaid by Taganito Mining Corporation.

Taganito Mining Corporation is a domestic corporation organized and existing under and by virtue of the laws of the Republic of the Philippines.

Petitioner corporation has been expressly granted a permit by the government via an operating contract to explore, develop and utilize mineral deposits found in a specified portion of a mineral reservation area located in Surigao del Norte and owned by the government. In exchange for the privilege given, Taganito Mining Corporation is obliged to pay royalty to the government over and above other taxes.

During the period covering the months of July to December, 1989, petitioner removed, shipped and sold substantial quantities of Beneficiated Nickel Silicate ore and chromite ore and as a consequence paid excise taxes in the amount of six million two hundred seventy seven thousand nine hundred ninety three and 65/100 pesos (P6,277,993.65) in compliance with section 151 (3) of the Tax Code. The 5% excise tax was based on the amount and weight shown in the provisional invoice issued by Taganito Mining Corporation. These metallic minerals are then shipped abroad to Japanese buyers where these minerals are analyzed allegedly by independent surveyors upon unloading at its port of destination. The procedure seems simple enough, except for the fact that analysis abroad would oftentimes reveal a different value for the metallic minerals from that indicated in the temporary or provisional invoice submitted by seller Taganito Mining Corporation. There is almost always a variance in "market values" between that shown in the provisional invoice and that indicated in the final calculation sheet presented by the buyers.

A comparison between the values found in the two invoices is illustrated hereunder.

A. FIRST SHIPMENT - JULY 30, 1989

PROVISIONAL INVOICE
Quantity - 18,073,300 DMT
Nickel content = 2.4%
= 18,073,300 x 2.4
= 433,759 Kg.
Unit Price = US$ 3.42/Kg.
Total Price
= US$ 1,483,455.78

FINAL INVOICE
Quantity - 17,898,873 DMT
Nickel content = 2.53%
= 17,898,873 x 2.53%
= 447,781 Kg.
Unit Price = US$ 3.4 Kg.
Total Price
= US$ 1,559,173.44

B. SECOND SHIPMENT - OCTOBER 6, 1989

PROVISIONAL INVOICE
Quantity - 18,163,600 DMT
Nickel content - 2.45
= 18,163,600 x 2.45
= 445,006 Kg.
Unit Price = US$ 3.44/Kg.
Total Price
= US$ 1,533,052.56

FINAL INVOICE
Quantity - 18,183,866 DMT
Nickel content - 2.48
= 18,183,866 x 2.48
= 451,869 Kg.
Unit Price = US$ 2.96/Kg.
Total Price
= US$ 1,337,532.24

C. THIRD SHIPMENT - NOVEMBER 20, 1989

PROVISIONAL INVOICE
Quantity - 15,494,500 DMT
Nickel content - 2.45
= 15,494,500 x 2.45
= 379,615 Kg.
Unit Price = US$ 2.94/ kg.
Total Price
= US$ 1,117,017.14

FINAL INVOICE
Quantity - 14,638.977 DMT
Nickel content - 2.46
= 14,638.977 x 2.46
= 360,119 Kgs.
Unit Price = US$ 2.94/Kg.
Total Price
= US$ 1,061,450.75

D. FOURTH SHIPMENT - DECEMBER 27, 1989

PROVISIONAL INVOICE
Quantity - 18,200,000 DMT
Nickel content - 2.45 Kg.
= 18,200,000 x 2.45
= 445,900 Kgs
Unit Price = US$ 2.94/Kg.
Total Price
= US$ 1,312,060.75

FINAL INVOICE
Quantity - 17,971.870 DMT
Nickel content - 2.49 Kg.
= 17,921,870 x 2.45
= 441,209 Kgs.
Unit Price = US$ 2.48/Kg.
Total Price
= US$ 1,096,095.52

E. FIFTH SHIPMENT - (Chromite) NOVEMBER 21, 1989

PROVISIONAL INVOICE	FINAL INVOICE
Quantity - 3,800 DMT	Quantity - 4,380.317 DMT
Ore content - 38%	Ore content - 38%
Unit Price = US$ 70.00/Kg.	Unit Price = US$ 70.00/kg.
Total Price = US$ 266,000.00	Total Price = US$ 306,622.19

The differences as shown reveal that variances occur in the weight of the shipment or the price of the metallic minerals per kilogram and sometimes in their metallic content resulting in discrepancies in the total selling price. Be that as it may, it is always the price indicated in the final invoice that is determinative of the amount that the buyers will eventually pay Taganito Mining Corporation. Petitioner on its part has no quarrel with the price that they will receive from the clients for the metallic minerals sold, it however claims that there has been overpayment of excise taxes already paid to the government declaring that the 5% excise taxes were based on the amount indicated in the provisional invoice and final computation show that if it based its excise taxes on the amount shown in the final invoice, which they assert is the actual market value, they would have been required to pay a lesser amount, computed as follows:

SHIPMENT NO.	COMMODITY	FINAL VALUE (in pesos)	CORRECT EXCISE TAX (5%)
1	Nickel	₱34,078,880.07	₱1,703,944.00
2	Nickel	₱29,187,720.03	₱1,459,386.00
3	Nickel	₱23,668,157.51	₱1,183,407.88
4	Nickel	₱24,537,340.73	₱1,226,867.04
1	Chromite	₱ 6,835,198.39	₱ 341,759.91
Total		₱118,307,296.73	₱5,915,364.83
Less: Excise Tax Paid			₱6,277,993.65
Overpaid Excise Tax			**₱ 362,628.82**

Petitioner opted to pay the excise taxes on a quarterly basis and made payments on the following dates:

DATE PAID	AMOUNT
July 20,1989	₱ 250,000.00
September 21,1989	₱ 120,000.00
October 20,1989	₱1,376,206.40
November 6,1989	₱ 120,000.00
November 7,1989	₱ 50,000.00
December 18,1989	₱ 120,000.00
January 19,1990	₱4,241,787.25
Total	₱6,277,993.65

(see Exhibits "I", "I-A", "I-1", "I-2", "I-3", "I-3a", "I-4", "I-4a", "I-5", "I-5a", "I-6")

Petitioner would like to impress upon us that it is entitled to claim for a refund of excise taxes in the amount of ₱362,628.82 because the actual market value that should be made the basis of these taxes is that amount specified by the independent surveyor abroad after analysis of the products and indicated in the final calculation sheet. To strengthen this assertion, petitioner mentioned the fact that even the government in receiving the royalties due it from the mining corporation based the 5% for nickel and 8% for chromite royalty fees in the amount indicated in the final invoice, which is the rate determined after its analysis abroad.

Respondent in her answer presented as special and affirmative defenses the following:

6. Petitioner's claim for refund is pending administrative investigation;

7. The tax in question was collected in accordance with law;

8. In an action for refund, the burden of proof is upon the taxpayer to establish its right to refund. Failure to sustain the burden is fatal to the action;

9. Mere allegations regarding refundability do not ipso facto merit the refund claimed;

10. Claims for refund of taxes are construed strictly against claimant, the same being in the nature of an exemption.

Respondent in her memorandum raised the issue of prescription claiming that the petitioner's right to claim for a refund is already barred having been filed beyond the 2 year prescriptive period. She based this argument on her theory that the prescriptive period of 2 years should be counted from the time specified by the law for payment and not on the date of actual payment.

In the case of excise taxes on mineral products, the law requires that these should be paid upon removal of the minerals. Section 151 (c) of the Tax Code provides:

> "(C) Time, manner and place of payment of excise Tax or mineral and mineral products - unless otherwise provided, the excise tax on minerals or mineral products shall be due and payable upon removal of the minerals or mineral products or quarry resources from the locality where mined or upon removal from customs custody in the case of importations."

Records show that petitioner did not pay the excise taxes upon removal but availed of the quarterly scheme of payment, the last payment of which was made on January 19, 1990. Petitioner however maintains in its memorandum, that prescription not having been raised by respondent in her answer can no longer raise it in issue.

Respondent also attacked petitioner's failure to post a bond when it subscribed to quarterly payments of the said excise taxes citing as his basis, Section 151(c) of the Tax Code which provides in part:

> Any person liable to pay the excise tax on locally produced or extracted mineral, mineral products or quarry resources shall, before removal of such products file, in duplicate, a return setting forth the quantity and the actual market value of the mineral or mineral products to be removed and pay the excise taxes

> due thereon to the collection agent, or the treasurer of the city or municipality of the place where the mine is located except as therein below provided.
>
> However the output of the mine may be removed from such locality without the prepayment of such excise taxes if the lessee owner, or operator of the mining claim shall file a bond in the form and amount and with such sureties as the Commissioner may require, conditioned upon the payment of such excise taxes.

It is the contention of the respondent that failure to post a bond is enough reason to deny petitioner's claim for a refund.

Arguments presented to us by both parties show that this is not just a simple case of refund where the only issue to be resolved is whether or not the taxpayer is entitled to a refund, more than this, it raises a question of interpretation of the provision of the Tax Code, particularly Section 151(3) as applied to mineral products extracted in the Philippines but sold abroad. What then should be the basis of the excise taxes? What is the meaning of the actual market value as mentioned in the Tax Code?

This case also raises the issue of prescription - whether the two-year prescriptive period for claiming a refund should be reckoned from the actual date of payment of the tax or from the due date of payment provided by the law.

We shall first tackle the issue of prescription.

Petitioner in its reply memorandum contends that respondent can no longer raise the issue of prescription because nowhere in her answer or during the entire proceeding did she aver that defense, besides it is the opinion of the petitioner that the claim for refund was filed on time.

This Court finds that the petition for review was filed within the period provided by law. Petitioner paid the excise taxes on a quarterly basis, the last and final payment being on January 19, 1990. The claim for refund was filed on September 11, 1990 and the petition for review was received by this Court on January 17, 1992. The Supreme Court has ruled that if a tax is paid on installments or only in part, the period is counted from the date of the last or final payment until the whole or entire tax liability is fully paid (Comm. vs. Prieto, 2 SCRA 1007; Comm. vs. Palanca, 18 SCRA 496). It is but logical to infer that the period should be counted from full payment because it is only then that one can determine if there was overpayment.

We do not agree with the contention of respondent that the two-year period should be reckoned from the due date of payment and not on the actual date of payment.

Section 230 of the Tax Code clearly provides that the two (2) year prescriptive period for the recovery of the tax erroneously or illegally collected shall be reckoned from the "date of payment of the tax or penalty regardless of any supervening cause that may arise after payment", thus:

> **SEC. 230.** ***Recovery of tax erroneously or illegally collected.*** — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, <u>no such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment:</u> **Provided, however,** That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

We cannot entertain petitioner's plea that prescription can no longer be raised for the first time if it was not made an issue in the answer of respondent because the issue of prescription determines whether or not this Court has jurisdiction to consider this petition and it is a well-settled rule that the question of lack of jurisdiction can be raised anytime even on appeal.

As to the matter of actual market value as basis for the 5% excise taxes, we cite the specific provision of Section 151(3) of the Tax Code:

> On all metallic minerals, a tax of five percent (5%) based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced: or the value used by the Bureau of Customs in determining tariff and customs duties, net of excise tax and value-added tax, in the case of importation.

This Court takes notice of the phrase "at the time of removal". The law refers to the actual market value of the minerals at the time these minerals were moved away from the position it occupied, obviously referring to Philippine valuation and analysis because it is in this country where these minerals were extracted, removed and eventually shipped abroad. To reckon the actual market value at the time of removal is also consistent with the essence of an excise tax. It is a charge upon the privilege of severing or extracting minerals from the earth, and is due and payable upon removal of the mineral products from its bed or mines (see Republic Cement vs. Comm, 23 SCRA 967). The law is clear. It does not speak of actual market value at the time the mineral products are unloaded at the country of destination neither does it speak of the selling price as the basis of the excise tax. The law even requires payment of excise taxes upon the removal of the mineral or mineral product or quarry resources from the locality where mined or upon removal from customs custody in the case of importations (Sec. 151(c) of the Tax Code). It would then necessitate an analysis of these metallic minerals upon its removal to be able to accomplish the payment of excise taxes as required by law. Furthermore, it would be impossible for one to comply with the date prescribed by law for the payment of excise taxes if one has to wait for the final analysis to be done in the country where it is to be shipped and certainly impractical as what the petitioner has done, to base the excise tax on the valuation done here in the Philippines and then later on claim for a refund if it appears that the final analysis accomplished abroad reveal a much lower price.

This set-up established by the petitioner is contrary to the principle of administrative feasibility which is one of the basic principles of a sound tax system. Tax laws should be capable of convenient, just and effective administration which is why it fixes a standard or a uniform tax base upon which taxes should be paid. In the case of excise taxes on minerals and mineral products, the basis provided by law is the actual market value of these minerals at the time of removal. Petitioner argues that excise taxes should be based on the amount indicated in the final invoice because the government in receiving its royalties acknowledges this amount as its basis. We disagree with the reasoning of petitioner because excise tax is different from royalties. Excise tax as earlier mentioned is a tax on the privilege of extracting minerals from the earth while royalty as the term is used and understood in mining and oil operations means a share in the product or profit paid to the owner of the property (Words and Phrases, Vol. 37A, p. 605). Therefore royalty paid to the government is rightfully based on the amount indicated in the final invoice because it is this amount which will be received by the seller from the buyer as consideration for the sale of mineral products.

It is well settled in our jurisdiction that tax refund cases partake of the nature of an exemption, and as such, tax exemption cannot be allowed unless granted in the most explicit and categorical language. (Resin Inc. vs. Auditor General of the Phil., et.al., G.R. No. 17888, Oct. 29, 1980; Union Carbide Phil. vs. Comm. of Internal Revenue, CTA Case No. 2876, Aug. 15, 1983).

Lastly, taxes are what we pay for civilized society. Without taxes, the government would be paralyzed for lack of the motive power to activate and operate it. (Commissioner of Internal Revenue vs. Algue, Inc., 158 SCRA 9).

IN VIEW OF ALL THE FOREGOING, petitioner's claim for refund in the amount of P362,628.02 is hereby denied with costs against petitioner.

SO ORDERED.

MANUEL K. GRUBA
Associate Judge

WE CONCUR:

(On Leave)
ERNESTO D. ACOSTA
Presiding Judge

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

MANUEL K. GRUBA
Associate Judge
Court of Tax Appeals