REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

OCEANAGOLD (PHILIPPINES), INC., *Petitioner*,	**CTA *EB* NO. 2216** *(CTA Case No. 9594)*
-*versus*-	Present: **DEL ROSARIO, P.J., CASTAÑEDA, JR., UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO,** *and* **REYES-FAJARDO,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: OCT 21 2021 2:3? pm

x -- x

<u>DECISION</u>

MODESTO-SAN PEDRO, J.:

<u>The Case</u>

Before the Court *En Banc* is a Petition for Review[1] filed by petitioner OceanaGold (Philippines), Inc. assailing the Decision, dated 21 October 2019,[2] and Resolution, dated 6 January 2020,[3] both rendered by the Court in Division[4] partially upholding respondent's assessment of deficiency excise tax for taxable year 2014.

[1] *EB* Records, pp. 1- 100, with annexes.
[2] Division Records Vol. 5, pp. 1928-1973.
[3] *Id.*, pp. 2006-2011.
[4] Court of Tax Appeals- Second Division.

The Parties

Petitioner OceanaGold (Philippines), Inc. (formerly Australasian Philippines Mining, Inc.) is a corporation organized and existing under the laws of the Philippines with principal place of business at the 2nd Floor, CJV Building, 108 Aguirre St., Legaspi Village, Makati City. Petitioner is primarily engaged in large-scale exploration, development, and utilization of mineral resources as well exploration and mineral processing activities pursuant to agreements or permits as may be allowed by law.

Respondent is the duly appointed Commissioner of Internal Revenue who is tasked to assess and collect all national internal revenue taxes, fees and charges, and enforce all forfeitures, penalties, and fines connected therewith.

The Facts

On 20 June 1994, a Financial or Technical Assistance Agreement ("FTAA") was entered into between the Republic of the Philippines and Arimco Mining Corporation, involving the mineral exploration and subsequent large-scale development and commercial utilization of mineral deposits that may be found within the Exploration Contract Area spanning the provinces of Nueva Vizcaya and Quirino.[5] This is known as the Didipio Gold-Copper Project ("Didipio Project"). Arimco Mining Corporation later on changed its corporate name to Climax-Arimco Mining Corporation.[6]

In the meantime, ***Republic Act No. 7942 - An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation***, otherwise known as the ***Philippine Mining Act of 1995*** ("Mining Act"), was enacted. It was meant to promote the rational exploration, development, utilization, and conservation of mineral resources through the combined efforts of government and the private sector to enhance national growth.[7]

On 23 December 1996, Climax-Arimco Mining Corporation entered into an Assignment, Accession and Assumption Agreement with petitioner to assign all its rights and obligations under the FTAA.[8] On 15 September 2004, the agreement was amended and restated in the Assignment, Accession and Assumption Agreement (Amended and Restated).[9] On 9 December 2004, the Department of Environment and Natural Resources ("DENR") approved the k

---

5 Exhibit "P-2", Division Records Vol. 3, pp. 1150-1203.
6 Exhibit "P-3", *id.*, pp. 1204-1213.
7 Section 2. Declaration of Policy, Mining Act.
8 Exhibit "P-4", Division Records Vol 3, pp. 1214-1218; Exhibit "P-4-a", *id.*, pp. 1219-1222.
9 Exhibit "P-4-a", *id.*, pp. 1219-1222.

assignment,[10] making petitioner a mining service contractor of the Philippines pursuant to the FTAA.

Shortly thereafter, on 15 March 2005, after finding that a portion of the Exploration Contract Area is feasible for the Didipio Project, petitioner filed with the DENR a Partial Declaration of Mining Feasibility ("PDMF"). In the PDMF, petitioner stated that it found gold and copper reserves sufficient to sustain mining operation in the delineated area for some fourteen (14) years.[11]

On 11 October 2005, the DENR approved the PDMF subject to several conditions including: (1) petitioner's full compliance with the contractual obligations under the FTAA including the reporting requirement in accordance with pertinent portions of the ***DENR Administrative Order ("DAO") No. 96-40***, as amended; and (2) conduct of mining operation in the area subject of the PDMF in accordance with existing applicable laws, their implementing rules and regulations, and the pertinent provisions of the FTAA.[12]

On 4 May 2007, pursuant to petitioner's request, respondent issued ***BIR Ruling No. 10-2007*** confirming petitioner's opinion that it is exempt from payment of excise tax upon 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 production and shall be for a maximum period of five (5) years or until the date of actual recovery of pre-operating, exploration, and development expenses, whichever comes earlier.[13]

However, sometime in 2008, petitioner halted further mining developments in the Didipio Project allegedly due to escalating costs and uncertainty in the financial markets. Petitioner then placed the Didipio Project under "care and maintenance" from December 2008 to December 2010.[14]

After completing strategic review and securing further financing, it resumed development work in the Didipio Project in 2010.[15] In late 2012, it successfully commenced the commissioning of the Didipio Project and mined and stockpiled approximately 800,000 metric tons of ore for further processing. As part of the commissioning process, petitioner commenced ore milling operations to produce copper concentrates.[16]

---

[10] Exhibit "P-5", *id.*, pp. 1223-1225.
[11] Exhibit "P-7", *id.*, pp. 1235-1236.
[12] Exhibit "P-8", *id.*, pp. 1237-1238.
[13] Exhibit "P-25", *id.*, pp. 1278-1283.
[14] *See* Answer Nos. 24-25, Exhibit "P-59", Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, Division Records Vol. 2, p. 525.
[15] *See* Answer No. 26, Exhibit "P-59", Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, *id.*
[16] *See* Answer Nos. 27-28, Exhibit "P-59", Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, *id.*

On 13 February 2013, respondent issued ***Revenue Memorandum Circular No. 17-2013*** clarifying the taxes due from FTAA contractors during the so called "recovery period" and revoking ***BIR Ruling No. 10-2007***.

Meanwhile, on 27 March 2013, petitioner filed a letter[17] to the Department of Environment and Natural Resources ("DENR") Secretary, copy furnished the Mines and Geosciences Bureau ("MGB") of the DENR, declaring that the Date of Commencement of Commercial Production pursuant to the FTAA is on 1 April 2013.

On 12 March 2015, petitioner received Letter of Authority No. 121-2015-00000019,[18] dated 10 March 2015, from the BIR-Large Taxpayers Service LT Excise Audit Division 1 authorizing the examination of petitioner's books of accounts and other accounting records for excise taxes for taxable period January 1, 2014 to December 31, 2014.

On 12 February 2016, petitioner received an undated Preliminary Assessment Notice ("PAN")[19] for deficiency excise tax and administrative penalty in the aggregate amount of ₱175,316,268.20, inclusive of surcharge and interest computed as follows:

I. Excise Tax		
Non-payment of excise tax- bond		₱ 118,931,018.44
Discrepancy of quantity removed/sold		587,314.85
Basic Excise Tax		₱ 119,518,333.29
Add: Surcharge (₱118,931,018.44 x 25%)	₱ 29,879,583.22	
Interest – 20% p.a. (up to Jan. 31, 2016)	25,868,351.59	55,747,934.91
Total Deficiency Excise Tax		₱ 175,266,268.20
II. Administrative Penalty		
Penalty- Excise Tax		₱ 50,000.00
Total Deficiency Taxes		**₱ 175,316,268.20**

On 29 February 2016, petitioner replied[20] to the PAN through a letter addressed to Mr. Nestor S. Valeroso, the Assistant Commissioner- Large Taxpayers Service ("LTS"). In the reply, petitioner asserted its exemption from excise tax pursuant to the FTAA, ***Mining Act***, and its implementing rules and regulations as confirmed in ***BIR Ruling No. 10-2007***. Petitioner argued that assuming it is liable for excise tax on its removals of copper concentrates

[17] Exhibit "P-28", Division Records Vol. 3, pp. 1285-1286.
[18] Exhibit "P-49", Division Records Vol. 4, p. 1556.
[19] Exhibit "P-50, *id.*, pp. 1557-1559.
[20] Exhibit "P-51", *id.*, pp. 1560-1565.

during the recovery period, respondent's remedy is to execute on the bond posted in CTA Case No. 8618. Petitioner also argued that the compromise penalty cannot be imposed without its conformity.

On 21 April 2014, petitioner received the Formal Letter of Demand with Final Assessment Notice (FLD/FAN)[21] reiterating the same assessment with adjusted interest. The attached Details of Discrepancies stated that records of the case disclose that petitioner had not introduced evidence to overthrow the validity of the findings. The adjusted deficiency tax liability in the FLD/FAN was ₱180,227,980.53.

On 20 May 2016, petitioner protested[22] the FLD/FAN to the Assistant Commissioner of LTS, reiterating its arguments in the reply to PAN. On 19 July 2016, petitioner submitted all relevant supporting documents in support of its Protest.[23]

On 2 August 2016, or merely 13 days from petitioner's submission of all relevant supporting documents, the LTS issued a Final Decision on Disputed Assessment ("FDDA"),[24] which petitioner received on 3 August 2016, denying petitioner's protest and affirming the alleged deficiency excise tax liability in the aggregate amount of ₱180,227,980.53, inclusive of surcharge and interest.

Thus, on 1 September 2016, petitioner elevated the Protest to respondent Commissioner through a Request for Reconsideration[25] pursuant to ***Section 3.1.4 of Revenue Regulations ("Rev. Regs.") No. 12-99***,[26] as amended by ***Rev. Regs. No. 18-2013***.[27]

On 19 April 2017, petitioner received respondent's Decision[28] dated 7 November 2016 denying the Request for Reconsideration for lack of factual and legal bases and reiterating petitioner's supposed liability in the aggregate amount of ₱195,159,586.00, inclusive of surcharge and adjusted interest computed as follows:

---

[21] Exhibit "P-52", *id.*, pp. 1566-1570.
[22] Exhibit "P-53", *id.*, pp. 1571-1576.
[23] Exhibit "P-54", *id.*, pp. 1577-1752.
[24] Exhibit "P-55", *id.*, pp. 1753-1754.
[25] Exhibit "P-56", *id.*, pp. 1755-1769.
[26] SUBJECT: Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty, 6 September 1999.
[27] SUBJECT: Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment, 28 November 2013.
[28] Exhibit "P-57", Division Records Vol. 4, pp. 1770-1773.

Basic deficiency Excise Tax		₱ 119,518,333.29
Add: Increments:		
Surcharge pursuant to Section 248 of the NIRC Surcharge	₱ 29,879,583.22	
Interest up to November 30, 2016 pursuant to Section 249 of the NIRC	45,711,669.39	75,591,252.71
Total		₱ 195,109,586.00
Add: Compromise penalty		50,000.00
Total inclusive of compromise penalty		₱195,159,586.00

On 19 May 2017, petitioner appealed respondent's denial through a Petition for Review.[29]

On 21 October 2019, the Court in Division rendered the assailed Decision[30] partially granting the Petition for Review. It upheld respondent's assessment against petitioner with respect to the deficiency excise tax, inclusive of increments, but cancelled the imposition of compromise penalty. The dispositive portion of the assailed Decision reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is **PARTLY GRANTED**. Accordingly, the assessment against petitioner for alleged deficiency excise tax for taxable year 2014 is **PARTLY UPHELD** and hereby computed as follows:

Basic Excise Tax	₱119,518,333.29
25% surcharge	29,879,583.32
20% Deficiency Interest up to November 30, 2016	45,711,669,39
Total Amount Due, November 30, 2016	195,109,586.00
20% Deficiency Interest from December 1, 2016 to December 31, 2017 (396 days) (basic tax x .20 x 1.0849 years)	25,933,087.96
20% Delinquency Interest from December 1, 2016 to December 31, 2017 (total amount due as of November 30, 2016 x .20 x 1.0849 years)	42,334,877.97
Total Amount Due as of December 31, 2017	₱263,377,551.93

> Petitioner is **ORDERED** to pay deficiency excise tax for the year 2014 in the amount of **₱263,377,551.93**, inclusive of the 25% surcharge and deficiency and delinquency interests imposed under Sections 248(A)(1)(3) and 249(B) and (C) of the NIRC of 1997, as amended, respectively computed until December 31, 2017.

> In addition, petitioner is liable to pay delinquency interest at the rate of 12% on the total unpaid basic deficiency tax, surcharge and deficiency interest as of November 30, 2016 amounting to ₱195,109,586.00, computed from January 1, 2018 until full payment thereof pursuant to Section 249(C)

[29] Petition for Review with annexes, Division Records Vol. 1, pp. 10-171.
[30] Division Records Vol. 5, pp. 1928-1973.

of the NIRC of 1997, as amended by Republic Act No. 10963, as known as the Tax Reform for Acceleration and Inclusion (TRAIN).

SO ORDERED."

Both parties received the assailed Decision on 23 October 2019.[31]

On 7 November 2019, petitioner filed a Motion for Reconsideration[32] of the assailed Decision. Subsequently, respondent filed its Comment[33] thereto within the extended period[34] granted by the Court in Division.

Thereafter, the Court in Division rendered the assailed Resolution,[35] dated 6 January 2020, denying petitioner's Motion for Reconsideration.

Petitioner and respondent received the assailed Resolution on 10 January 2020 and 14 January 2020, respectively.[36]

Petitioner filed the instant Petition for Review[37] before the Court *En Banc* on 27 January 2020. Respondent filed its Comment[38] thereto within the period prescribed by this Court.[39]

On 22 October 2020, the Court issued a Resolution[40] submitting the case for decision.

Hence, this Decision.

Issues[41]

Petitioner submits the following issues for resolution of the Court *En Banc*:

A. Whether the Court in Division erred in requiring prior approval by the DENR Secretary of petitioner's pre-operating expenses as a condition to the entitlement of the incentives under the FTAA and the Mining Act;

---

[31] *Id.*, pp. 1928-1929.
[32] Motion for Reconsideration [of the Decision dated October 21, 2019], *id.*, pp. 1974-1991.
[33] Comment/ Opposition Re: Petitioner's Motion for Reconsideration, *id.*, pp. 2000-2005.
[34] Resolution dated 15 November 2019, *id.*, pp. 1992-1993; Motion for Extension of Time to File Comment, *id.*, pp. 1994-1998; Order dated 4 December 2019, *id.*, p. 1999.
[35] *Id.*, pp. 2006-2011.
[36] *Id.*, p. 2006.
[37] Petition for Review with annexes, *EB* Records, pp. 1-97.
[38] Comment/Opposition Re: Petitioner's Petition for Review, *id.*, pp. 112-116.
[39] Resolution dated 18 February 2020, *id.*, pp. 98-100.
[40] *Id.*, pp. 124-126.
[41] *See* Statement of Issues, Petition for Review, *id.*, pp. 14-15.

B. Whether the Court in Division erred in not holding that petitioner was still within the recovery period during the subject taxable year 2014;

C. Whether the Court in Division erred in upholding respondent's assessment against petitioner for deficiency excise tax for taxable year 2014; and

D. Whether respondent's remedy is to execute on the bonds posted by petitioner.

Arguments of the Parties

Petitioner's Arguments[42]

Petitioner contends that approval of the DENR Secretary of the pre-operating expenses is not required to enjoy the incentives under the FTAA and the ***Mining Act***. It claims that neither the FTAA nor ***Mining Act*** require such approval. According to petitioner, ***DAO No. 99-56*** does not apply in the present case as it only applies to FTAAs entered by the Government after the issuance has taken effect. Petitioner also harps on the contractual nature of tax exemption privilege under the FTAA which is protected by the Non-Impairment Clause of the Constitution since it is granted by the government in exchange for a valid and material consideration.

Relying on the findings of the ICPA and evidence on record, petitioner insists that it has sufficiently established that it incurred valid pre-operating expenses in accordance with its FTAA and that such pre-operating expenses has not yet exceeded the aggregate net cash flows. Considering that it has unrecovered pre-operating expenses, it is still within the recovery period during the subject taxable year 2014, and thus exempt from excise tax. Petitioner also asserts that the subject taxable year is within the maximum five-year recovery period from 1 April 2013 which is the commencement of commercial production.

Petitioner thus concludes that because it is still within the recovery period during the subject taxable year 2014, it follows that respondent's assessment for deficiency excise tax is void for lack of factual and legal basis.

Finally, petitioner submits that even assuming it is held liable for deficiency excise tax, respondent's remedy is to execute on the bonds.

---

[42] *See* Summary of Arguments and Discussion, Petition for Review, *id.*, pp. 15-33.

Respondent's Arguments[43]

Respondent contends that the Petition for Review raised no points of contention that would warrant the reversal of the assailed Decision. It claims that petitioner's arguments are without merit and that the Petition should be denied for utter lack of basis.

Nonetheless, to address petitioner's arguments, respondent counter-argues that petitioner does not have tax-exempt status and is liable to pay excise tax. It posits that the ostensible tax holiday scheme in the FTAA only grants tax exemption to petitioner during the five-year recovery period. Further, according to respondent, petitioner could have recovered its expenses only within the five-year recovery period.

Respondent continues to argue that the reckoning point of the recovery period is commercial operation. Referring to the definition of commercial production as found in ***Section 4(g) of the DAO No. 95-23*** and ***Section 5(i) of DAO No. 96-40***, respondent states that the date of commercial operation is actual date declared by petitioner or the date stated in the feasibility study, whichever comes first. Respondent thus concludes that since the reckoning point of recovery period is the commencement of commercial operation, then the recovery period commences to run on the date so declared by petitioner or the date stated in the feasibility study, whichever comes first.

Applying the foregoing, respondent observes that the feasibility study was filed with the DENR- MGB on 18 March 2005 and was approved on 11 October 2005 through an Order issued by the Secretary of DENR. According to respondent, this confirms that petitioner, through its predecessor, obtained the preliminary approval of the feasibility study as early as 2005. Such feasibility study was submitted nearly 8 years from the subject taxable year and is the most likely reckoning date of the recovery period. Respondent believes that the 5-year recovery period had long expired.

Finally, respondent agrees with the findings of the Court in Division that petitioner failed to prove that it has valid pre-operating expenses to recover and that it has yet to recover the same.

The Ruling of the Court *En Banc*

After a careful and thorough evaluation and consideration of the records and arguments of both parties, the Court *En Banc* finds the Petition unmeritorious.

---

[43] *See* Comment/ Opposition, *id.*, pp. 112-114.

<u>Petitioner failed to comply with the conditions for recovery of its pre-operating expenses.</u>

In seeking to shield itself from the fatal effects of its non-availment of the required approval by the DENR Secretary of its pre-operating expenses, petitioner asserts that ***DAO No. 99-56*** is not applicable to the present case insofar as it requires such approval by the DENR Secretary of pre-operating expenses. It also argues that neither the FTAA nor the ***Mining Act*** require such approval.

The present controversy is not novel. In ***OceanaGold (Philippines), Inc. v. Commissioner of Internal Revenue***,[44] the Court *En Banc* passed upon the same issue between the same parties albeit involving a different taxable year where the Court found that ***DAO No. 99-56*** is applicable to petitioner. The Court further resolved that under the FTAA and the implementing rules and regulations of the ***Mining Act***, petitioner is allowed to recover its pre-operating expenses before the government collects its share but subject to certain conditions, among which include the following:[45]

i. Maximum recovery period of five years, 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;

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

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

What is more, contrary to petitioner's claim that ***DAO No. 99-56*** only applies to FTAAs entered after its effectivity, the transitory provision of the ***Mining Act*** expressly provide that that all existing FTAAs shall comply with its provisions and its implementing rules and regulations, to wit:

---

[44] CTA EB No. 1904 (CTA Case No. 8995 and 9034), 16 August 2019; *See also* Resolution dated 23 January 2020.

[45] DAO No. 99-56.

"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 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 <u>such</u> leases, production-sharing agreements, <u>financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations</u>**."[46]

Petitioner is fully aware that it must comply with the ***Mining Act*** and its implementing rules and regulations. In fact, in petitioner's PDMF filed with the MGB-DENR, petitioner stated:

> "That the Corporation is committed to complying with all the requirements of the FTAA and the rules and regulations of the Mining Act and other related laws."[47]

Upon approval of the PDMF, petitioner was again made aware that the approval was subject to certain conditions including: (a) petitioner's full compliance with the contractual obligations stated under the FTAA, including the reporting requirement in accordance with the pertinent provisions of ***DAO No. 96-40***, as amended; and (b) that the conduct of the mining operation in the contract area shall be undertaken in accordance with the existing applicable law, their implementing rules and regulations, and the pertinent provisions of the FTAA.[48]

A further examination of the papers filed with respondent and previous pleadings before the Court shows that petitioner did not question the applicability of ***DAO No. 99-56***. On the contrary, petitioner recognized ***DAO No. 99-56*** as establishing the fiscal regime of FTAAs and further invoked the issuance in support of its argument that it is exempt from excise tax, to wit:

---

[46] Emphasis and underscoring supplied.
[47] Exhibit "P-7", Division Records Vol. 3, pp. 1235-1236.
[48] Exhibit "P-8", *id.*, pp. 1237-1238.

"*OGPI is exempt from Excise Tax Pursuant to the Philippine Mining Act of 1995 and its Implementing Rules and Regulations*

...

Under DAO 99-56, the recoverable pre-operating expenses include "all Government taxes and fees" and "payments made to local Governments and infrastructure contributions." Moreover, DAO 99-56 provides specifically what the basic government share consists of, namely:

...

While DAO 99-56 states that the foregoing taxes, fees and other such charges constituting the basic government share shall be paid by the contractor from the effective date (which is the date of signing of the FTAA), it however expressly states in a *proviso* that items (a) to (g) shall not be collected from the contractor upon the date of approval of the mining project feasibility study up to the end of the recovery period. After the recovery period, a contractor shall be subject to all the normal taxes, duties and fees imposable on contractors under their FTAA. ..."[49]

"6. ... In December 1999, the DENR promulgated DAO 99-56 providing the guidelines establishing the fiscal regime of FTAAs.

...

b) Petitioner is exempt from excise tax pursuant to the Philippine Mining Act of 1995 and its IRR.

...

Under DAO 99-56, the recoverable pre-operating expenses include "all Government taxes and fees" and "payments made to local Governments and infrastructure contributions." Moreover, DAO 99-56 provides specifically what the basic government share consists of, namely:

...

While DAO 99-56 states that the foregoing taxes, fees and other such charges constituting the basic government share shall be paid by the contractor from the effective date (which is the date of signing of the FTAA), it however expressly states in a *proviso* that items (a) to (g) shall not be collected from the contractor upon the date of approval of the mining project feasibility study up to the end of the recovery period. After the

[49] Reply to PAN, Exhibit "P-51", Division Records Vol. 4, pp. 1560-1565; *See also* Protest to FAN, Exhibit "P-53", *id.*, pp. 1571-1576; *See also* Protest to FDDA, Exhibit "P-56", *id.*, pp. 1755-1769.

> recovery period, a contractor shall be subject to all the normal taxes, duties and fees imposable on contractors under their FTAA." [50]

Indeed, taking into consideration ***DAO No. 99-56*** during the ICPA examination, the ICPA Report states:

> "Pre-Operating expenses shall be approved by the Secretary of the DENR upon recommendation by the Director of the Mines and Geosciences Bureau ("MGB"). Under DAO No. 99-56, the recoverable pre-operating expenses should relate to the following:
>
> ...
>
> We performed our review to verify whether the Company is still under the recovery period as defined in DAO No. 99-56 in relation to the FTAA dated June 20, 1994 and to validate the pre-operating expenses during the recovery period. ..."[51]

The ICPA then concluded that petitioner has "valid pre-operating expenses as of 31 March 2013." However, the DENR Secretary's approval was markedly not among the documents verified and examined by the ICPA.

Given the foregoing, petitioner's claim that ***DAO No. 99-56*** is not applicable in the present case as it only applies to FTAAs entered by the Government after its effectivity must necessarily fail. There is no compelling reason not to apply ***DAO No. 99-56*** which was already in effect even before the subject taxable year. As such, the absence of the required approval by the DENR Secretary of its pre-operating expenses bars it from recovering the same.

Settled is the rule that the burden of proof rests upon the party claiming exemption to prove that it is in fact covered by the exemption so claimed.[52] It is thus incumbent upon petitioner to present sufficient evidence to convince the Court that it has complied with the conditions for recovery of its pre-operating expenses.

---

[50] *See* pars. 6, 6.5, 6.6, 61, and 62, Petition for Review, Division Records, Vol. 1, pp. 10-45; *See also* pars. 6, 6.5, 6.6, 72, and 73, Memorandum for Petitioner, Division Records Vol. 4, pp. 1886-1925.
[51] *See* ICPA Report, Exhibit "P-62".
[52] Republic v. Caguioa, G.R. No. 168584, 15 October 2007.

<u>The Court in Division did not err in its finding that petitioner failed to prove that it is still within the recovery period during subject taxable year.</u>

Even granting that ***DAO No. 99-56*** does not apply to the present case, the Court still cannot cancel the deficiency assessment for taxable year 2014 for failure of petitioner to establish that it is still within the recovery period during subject taxable year.

At this juncture, it is crucial for the Court to take a closer look at the relevant portions of the FTAA, ***Mining Act***, and its implementing rules and regulations for the proper determination of the reckoning point of petitioner's recovery period.

Section 81 of the Mining Act provides that Government Share, which includes excise tax, shall be collected only after the FTAA contractor has fully recovered its pre-operating expenses, 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:
>
> ...
>
> 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 **<u>collection of Government share</u> in financial or technical assistance agreement shall <u>commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses</u>**, exploration, and development expenditures, inclusive."[53]

Implementing the foregoing, ***DAO No. 96-23***, amended by ***DAO No. 96-40***, and further amended by ***DAO No. 2010-21 ("Revised IRR")*** provides that the recovery period commences from the date of commencement of commercial production and ends either at the lapse of five (5) years or when

[53] Emphasis supplied and underscoring supplied.

the aggregate net cash flows becomes equal to the aggregate of its pre-operating expenses, whichever comes earlier:

> "**Section 214. Government Share in FTAA.** The Government share in an FTAA **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-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:
>
> ...
>
> The **collection of Government share shall commence after the FTAA Contractor has fully recovered its pre-operating, exploration and development expenses, inclusive.** <u>**The period of recovery which is reckoned from the date of commencement of commercial operation shall be for a period not exceeding 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, whichever comes earlier**</u>: Provided, That in case of projects incurring very large investments with high production rate and extensive mine life, as determined by the Bureau, the recovery period may be extended upon negotiation with the FTAA Negotiating Panel and subject to approval by the Secretary.
>
> The Contractor shall also pay an additional Government share after the recovery period as provided for in separate guidelines."[54]

The ***Revised IRR*** defines 'commercial operation' as the date declared by the Contractor or stated in the feasibility study whichever comes first, to wit:

> "**Section 5. Definition of Terms.** As used in and for purposes of these rules and regulations, the following terms shall mean:
>
> ...
>
> j. "Commercial Production" refers to the **production of sufficient quantity** of minerals **to sustain economic viability** of mining operations **reckoned from the date of commercial operation as declared by the Contractor or as stated in the feasibility study, which ever comes first.**"[55]

---

[54] Emphasis and underscoring supplied.
[55] Emphasis supplied.

On the other hand, pursuant to the FTAA, Government Share can be collected after the pre-operating expenses of the contractor have been recovered and audited by an independent and certified public accountant. Such recovery period is reckoned from the 'Date of Commencement of Commercial Production' and runs for up to five (5) years. Pertinent portions of the Fiscal Regime Section of the FTAA are as follows:

"SECTION XI
FISCAL REGIME

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: (1) 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. ...

...

11.5 The GOVERNMENT's Share. **Provided that the Preoperating Expenses of the CONTRACTOR** and any of its Affiliates on the Contract Area, as defined in Section 2.42 in relation to Section 2.3 of this Agreement **and as passed on audit by an independent and certified public accountant** shall **have been recovered by the CONTRACTOR** pursuant to Section 11.2 of this Agreement, the GOVERNMENT's share of Net Revenue, as defined in the preceding section, shall be 60% while the CONTRACTOR's share shall be 40% of the same. ..."[56]

In turn, the FTAA defines 'Date of Commencement of Commercial Production' as the first day of the calendar quarter following the quarter when the 15% production threshold is met as outlined in the Declaration of Mining Feasibility with an approved Work Program, to wit:

"SECTION II
DEFINITIONS

2.10 "Commercial Production" means the **production of sufficient quantity** of minerals to sustain economic viability of Mining Operations **as specified in the approved Work Program**. Production of copper, gold and silver ore required to test and/or develop processing system or supply a pilot plant used for such testing shall not be considered in the determination of Commercial Production.

---

[56] Emphasis and underscoring supplied.

> 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**."[57]

The aforementioned Declaration of Mining Feasibility pertains to a document proclaiming the presence of recoverable minerals in a specific site with an approved Work Program:

> "SECTION II
> DEFINITIONS
>
> 2.15 "Declaration of Mining Feasibility" means a **document proclaiming the presence of minerals in a specific site** that are **recoverable** by socially acceptable, environmentally safe and economically sound methods, **as required to be submitted by the CONTRACTOR under Section VII of this Agreement.**
>
> 2.47 "Work Program" means a document which **presents the plan of major mining activities** and the **corresponding expenditures and Budget of the CONTRACTOR** in the Exploration Contract Area or in the Mining Area during a given period of time, including the plan and expenditures for environmental protection and rehabilitation, development of host and neighboring communities and of local geoscience and mineral technology, as submitted and approved pursuant to this Agreement."[58]
>
> "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."[59]

---

[57] Emphasis and underscoring supplied.
[58] Emphasis supplied.
[59] Emphasis and underscoring supplied.

In the present case, petitioner filed its PDMF with the MGB-DENR on 15 March 2005.[60] The PDMF pertinently provides:

> "That based on the extensive exploration activities and geologic study conducted on a portion of the FTAA area, the Corporation found sufficient ore reserves and diluted resource of 23.7 million tonnes of 1.8g/t Au and 0.64% Cu in accordance with the guidelines of the 1999 Australian Code for Reporting of Mineral Resources and Ore Reserves, the JORC Code and such other ore reserves have been delineated to sustain the mining operation of the Corporation for some 14 years;
>
> That the mining operation within this delineated area **will process gold and copper at 2 million tonnes per annum** to produce an **average annual production** of **95,000 ounces of gold** and **10,000 tonnes of copper concentrate**;
>
> That the Corporation is committed to complying with all the requirements of the FTAA and the rules and regulations of the Philippine Mining Act and other related laws;"[61]

On 11 October 2005, the DENR Secretary approved the PDMF subject to certain conditions.[62] A perusal of the approval shows that it refers to a Declaration of Mining Feasibility as well as a 3-Year Development and Utilization Work Program. However, these documents were not submitted in evidence.

On 27 March 2013 petitioner declared through a letter[63] to the DENR Secretary that it was able to achieve the 15% production capacity as stated in the supposed Declaration of Mining Feasibility and thus, pursuant to the FTAA, the Date of Commencement of Commercial Production is on 1 April 2013. The letter pertinently reads:

> "In this regard, the **Declaration of Mining Feasibility** (This was submitted as part of the approval of the PDMF dated October 11, 2005.) **provides that the design annual ore throughput is 2,000,000 tonnes.** Thus, the 15% threshold for the first calendar quarter of January to March 2013 is 300,000 tonnes.
>
> We are pleased to advise that on February 26, 2013, the Didipio Project was able to mill 301,903 tonnes and achieve the 15% production capacity. With this development, we wish to inform you that 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."[64]

---

[60] Exhibit "P-7", Division Records Vol. 3, pp. 1235-1236.
[61] Emphasis supplied.
[62] Exhibit "P-8", Division Records Vol. 3, pp. 1237-1238.
[63] Exhibit "P-28", *id.*, pp. 1285-1286.
[64] Emphasis supplied.

Following the ***Mining Act*** and ***its implementing rules and regulations***, the 'Date of Commencement of Commercial Operation' is the date declared by the contractor or as stated in the feasibility study, whichever is earlier. Petitioner presented in evidence the letter to the DENR Secretary, dated 27 March 2013, declaring that the Date of Commencement of Commercial Operation as 1 April 2013. However, no evidence was presented with respect to the date stated in the feasibility study. In fact, the feasibility study referred to in the DENR Secretary's approval[65] was not submitted in evidence. Without said document, the Court cannot ascertain the 'date stated in the feasibility study.' Consequently, the Court will have no basis to determine the reckoning point of the recovery period, which is the earlier date between the date declared by the contractor or the date stated in the feasibility study.

Meanwhile, following the ***FTAA*** alone, the 'Date of Commencement of Commercial Production' is the calendar quarter following the quarter in which production equals 15% of production capacity as stated in the Declaration of Mining Feasibility which supposedly includes a Work Program. To establish the 'Date of Commencement of Commercial Production,' petitioner presented the following:

1. PDMF dated 15 March 2005; [66] and
2. Letter to the DENR Secretary dated 27 March 2013[67] declaring that the 'Date of Commencement of Commercial Production' is on 1 April 2013, which is the calendar quarter after petitioner achieved the 15% production capacity.

Again, the Declaration of Mining Feasibility supposedly attached to the PDMF and the required Work Program were not submitted in evidence. These documents would have allowed the Court to ascertain if, indeed, the 15% production capacity was reached and that petitioner had commenced commercial production. There is also no proof that the DENR Secretary approved or acted on petitioner's declaration on 27 March 2013.

Petitioner also insists that it has valid pre-operating expenses based on the voluminous documents presented and examined by the court-commissioned Independent Certified Public Accountant who conducted a full audit of the items of its pre-operating expenses.

It is settled, however, that the Court is not bound by the findings of the ICPA pursuant to ***Section 3, Rule 13 of the Revised Rules of the Court of Tax Appeals ("RRCTA")***[68] to wit:

---

[65] Exhibit "P-8", *id.*, pp. 1237-1238.
[66] Exhibit "P-7", *id.*, pp. 1235-1236.
[67] Exhibit "P-28", *id.*, pp. 1285-1286.
[68] A.M. No. 05-11-07-CTA (Revised Rules of the Court of Tax Appeals, as amended).

"RULE 13
TRIAL BY COMMISSIONER

. . .

SEC. 3. Findings of independent CPA. – The submission by the independent CPA of pre-marked documentary exhibits shall be subject to verification and comparison with the original documents, the availability of which shall be the primary responsibility of the party possessing such documents and, secondarily, by the independent CPA. The findings and conclusions of the independent CPA may be challenged by the parties and shall not be conclusive upon the Court, which may, in whole or in part, adopt such findings and conclusions subject to verification."

Furthermore, the Court agrees with the finding of the Court in Division that the FTAA provides for a specific and strict timetable for the exploration, development, construction, and production in mining areas which was not followed in the present case. Relevant portion of the assailed Decision is hereby quoted:

"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.**

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, <u>petitioner should have commenced commercial operation and production in the fourth quarter of the year 2008</u>**.

In *BIR Ruling No. 10-2007* dated May 4, 2007, petitioner (formerly 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; x x x." Said ruling states that "the recovery period shall be reckoned from the date of commercial operation x x x."

In this case, **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.** Petitioner presented its letter dated March 27, 2013, advising the Secretary of DENR that "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," as proof of the commencement of its commercial production."[69]

Petitioner presented the testimony of Atty. Joan D. Adaci-Cattiling, its Senior Vice President for Legal and Human Resources, to explain the delay in mine development and commencement of commercial production. She testified that "[i]n 2008, petitioner was constrained to halt mine development in the Didipio Project due to escalating costs and uncertainty in the financial markets. Petitioner, thus, put the Didipio Project on "care and maintenance." This lasted December 2008 until December 2010. During this time, the construction and development of the Didipio Project was not completed and thus, there were no shipments made. Costs were being incurred for the maintenance of the mine site. After completing a strategic review and securing further financing, petitioner resumed development work in the Didipio Project."[70]

A thorough scrutiny of the records reveals that petitioner failed to present evidence to prove how such escalating costs and uncertainty in the financial markets affected its operations.

All told, the Court does not find error in the finding of the Court in Division that petitioner failed to present evidence to prove that the imposition of excise tax was made during the recovery period. Without proof that petitioner was in its recovery period during the subject taxable year, the Court cannot cancel the assessment on the basis that petitioner is exempt from excise tax.

<u>It is premature to require respondent to execute on surety bonds posted in a different case pending appeal before the Supreme Court.</u>

The Court also cannot give credence to petitioner's contention that respondent's remedy is to execute on bonds posted with this Court in CTA Case No. 8618 in the aggregate amount of ₱285,500,000.00.

From a perusal of the records, the surety bonds in CTA Case No. 8618 were posted pursuant to a Suspension Order ordering respondent to hold in abeyance: (a) the imposition and collection of excise taxes on petitioner's withdrawal of copper concentrates; and (b) seizure and detention of

---

[69] Emphasis and underscoring supplied.

[70] *See* Answer Nos. 24-27, Exhibit "P-59", Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, Division Records Vol. 2, p. 525.

petitioner's copper concentrates upon their removal[71] in 2012,[72] 2013[73] and April 2014.[74]

A suspension order is akin to an injunction. It is an ancillary remedy which cannot exist except only as an incident of an independent action or proceeding and exists only "until it is dissolved or until the termination of the action without the court issuing a final injunction."[75] Moreover, a suspension order intended to suspend collection of taxes for a specific tax assessment cannot be validly issued over future assessments based on an anticipation of a similar demand by the tax authority.[76]

Petitioner also states that CTA Case No. 8618, subsequently docketed as CTA *EB* No. 1222, is pending before the Supreme Court as SC-G.R. No. 234614.[77]

The ***Guidelines on Corporate Surety Bonds***[78] require that the lifetime of any bond issued in civil action shall be from its approval until the action is finally decided, resolved, or terminated:

> "VII. LIFETIME OF BONDS IN CRIMINAL AND CIVIL ACTIONS/SPECIAL PROCEEDINGS
>
> **Unless and until the Supreme Court directs otherwise**, the **lifetime or duration of the effectivity of any bond issued in criminal and civil actions/special proceedings, or in any proceeding or incident therein shall be from its approval by the court, until the action or proceeding is finally decided, resolved or terminated**. This condition must be incorporated in the terms and condition of the bonding contract and shall bind the parties notwithstanding their failure to expressly state the same in the said contract or agreement. ..."[79]

Given the foregoing, the Court cannot interfere with the surety bond supposedly posted pursuant to a suspension order in a different case, much less pending the outcome of such case.

WHEREFORE, in light of the foregoing considerations, the instant Petition for Review filed by OceanaGold (Philippines), Inc. is hereby **DENIED** for lack of merit. Accordingly, the assailed Decision, dated 21

---

71 Exhibit "P-33", Division Records Vol. 3, pp. 1322- 1326.
72 Exhibit "P-32", *id.*, pp 1288-1321.
73 *Ibid.*
74 Exhibit "P-36", *id.*, pp. 1353-1366.
75 G.R. Nos. 210501, 211294 & 212490, 15 March 2021.
76 *Ibid.*
77 *See* pars. 42-46, Petition for Review, *EB* Records, pp. 11-12; *See also* pars. 37-39, Petition for Review, Division Records Vol. 1, pp. 18-19.
78 A.M. No. 04-7-02-SC.
79 Emphasis and underscoring supplied.

October 2019 and Resolution dated 6 January 2020, both rendered by the Court in Division, are hereby **AFFIRMED.**

SO ORDERED.

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

ERLINDA P. UY
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

Marian Ivy F. Reyes-Fajardo
MARIAN IVY F. REYES-FAJARDO
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