REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

OCEANAGOLD (PHILIPPINES), INC.,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA *EB* NO. 2343
(CTA Case Nos. 9517 & 9559)

Present:

DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO, *and*
CUI-DAVID, *JJ.*

Promulgated:
FEB 10 2022 11:20 am

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DECISION

MANAHAN, J.:

Before the Court *En Banc* is a *Petition for Review* filed by petitioner Oceanagold (Philippines), Inc. seeking the reversal of the Decision and Resolution, dated February 3, 2020 and September 1, 2020, respectively, which denied petitioner's claim for refund/issuance of tax credit certificate (TCC) amounting to Php125,040,087.42 representing excise taxes allegedly erroneously paid by petitioner for the period January to June 2015.

FACTS

The CTA 2nd Division narrated the facts, as follows:

> Petitioner Oceanagold (Philippines), Inc., [formerly Australasian Philippines Mining Inc. (APMI)] is a corporation organized and existing under the laws of the Philippines,

with principal place of business at the 2nd Floor, CVJ Building, 108 Aguirre St., Legaspi Village, Makati City. It may be served with legal processes, orders and resolutions of this Court through its counsel, Baniqued & Baniqued, with office address at Suite 803, 8th Floor, Jollibee Centre, San Miguel Avenue, Ortigas Center, 1605 Pasig City.

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue (CIR) who is tasked to assess and collect all national internal revenue taxes, fees and charges, and enforce all forfeitures, penalties, and fines connected therewith. He holds office at the Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Diliman, Quezon City.

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On June 20, 1994, the Republic of the Philippines and Arimco Mining Corporation (AMC) entered into a Financial or Technical Assistance Agreement (FTAA), which involves the large-scale exploration, and subsequent development and commercial utilization of mineral deposits over a contract area spanning the Provinces of Nueva Viscaya and Quirino. A portion of the contract area under the FTAA covers that (*sic*) Didipio Gold-Copper Project (Didipio Project).

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

Then, on December 23, 1996, CAMC entered into an Assignment, Accession and Assumption Agreement with Australasian Philippines Mining Inc. (APMI), whereby CAMC transferred to APMI all its rights and obligations under FTTA (*sic*). The same was amended and restated in the Assignment, Accession and Assumption Agreement (Amended and Restated) on September 15, 2004.

On December 9, 2004, the Department of Environment and Natural Resources (DENR) approved the Transfer of the Financial or Technical Assistance Agreement Denominated as FTAA No. 001.

Thereafter, on March 3, 1995, the Congress enacted Republic Act No. 7942, otherwise known as the "Philippine Mining Act of 1995".

After identifying a portion of the Exploration Contract Area that would be suitable for Didipio Project, petitioner filed a Partial Declaration of Mining Feasibility (PDMF) with the DENR on March 15, 2005.

On August 15, 1995, the implementing rules and regulations of RA No. 7942 in the form of Department of Environment and Natural Resources (DENR) Administrative Order (DAO) No. 95-23, became effective. In December 1999, the DENR promulgated DAO No. 99-56 providing the guidelines establishing the fiscal regime of FTTAs (*sic*).

On October 11, 2005, the DENR issued an Order approving the aforesaid PDMF which, includes, among others the Mining Project Feasibility Study (MPFS).

On February 13, 2007, petitioner requested respondent to make a ruling regarding petitioner's exemption from the payment of excise tax on minerals during the recovery period. In response to the said request, the BIR issued BIR Ruling No. 10-2007 on May 4, 2007, confirming APMI's exemption from the payment of excise tax from the date of approval of the MPFS up to the end of the recovery period, which shall be reckoned from the date of commercial operation and shall be for a maximum of five (5) years or until the date of actual recovery of its pre-operating, exploration and development expenses, whichever comes earlier.

On June 1, 2007, the SEC approved the change of APMI's corporate name to OceanaGold (Philippines), Inc.

In 2008, petitioner alleged that it was constrained to halt further mine development in the Didipio Project due to escalating costs and uncertainty in the financial market. This, accordingly, placed the Didipio Project under "care and maintenance" from December 2008 until December 2010.

In December 2010, petitioner claimed that it resumed its development work in Didipio Project after completing a strategic review and securing additional funding.

In late 2012, petitioner claimed that it successfully commenced the commissioning of the Didipio Project, and mined and stockpiled approximately 800,000 metric tons (MT) of ore for further processing. Thereafter, it allegedly commenced its ore milling operations to produce copper concentrates.

On September 3, 2012, the BIR issued Mission Order No. 00030182, authorizing its revenue officers to search petitioner's premises for articles subject to excise tax and to detain packages containing exciseable articles. The same was served to petitioner on December 7, 2012, which resulted to the seizure/detention of 800,000 MT of mineral ores, covered by Apprehension Slip No. 00013424.

On December 11, 2012, petitioner sent a letter dated December 10, 2012 to the BIR protesting the detention of 800,000 MT based on the following grounds: (i) the mineral ores had not yet been removed, therefore, excise tax, if any, is not yet due; and (ii) petitioner is exempt from excise tax pursuant to BIR Ruling No. 10-2007.

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On January 14, 2013, petitioner obtained an Ore Transport Permit (OTP) from the Mines and Geosciences Bureau (MGB), authorizing the sale and delivery of the 5,500 MT of copper concentrates from the Didipio mine site up to the shipping point in Poro Point, La Union. The MGB issued another OTP on February 13, 2013, extending the original OTP up to March 13, 2013.

Meanwhile, on February 11 and 12, 2013, respondent seized and detained a total of 100 MT copper concentrates, with estimated value of US$320,000.00, covered by Apprehension Slip Nos. APS 2003 00013426 and 2003 00013427, while the same were allegedly being transported to petitioner's buyer.

On February 13, 2013, petitioner received a letter from CIR dated December 12, 2012, impliedly denying petitioner's letter-protest dated December 10, 2012.

Thereafter, on February 15, 2013, the CIR issued the assailed Revenue Memorandum Circular (RMC) No. 17-2013, revoking and invalidating BIR Ruling No. 10-2007. In the said RMC, the BIR ruled, among others, that FTAA contractors, including petitioner, are subject to excise tax during and after [the] period of recovery.

On February 20, 2013, respondent seized and detained a total of 160 MT copper concentrates (with estimated value of US$512,000.00).

On February 25 and 26, 2013, petitioner paid under protest the excise taxes in the amounts of P13,942,179.39 and P417,743.20, respectively.

On March 1, 2013, respondent seized and detained 40 MT of tax-paid copper concentrates. Said copper concentrates were, accordingly, part of the 5,500 MT MGB-approved OTP, which petitioner already paid.

Subsequently, on March 27, 2013, petitioner advised Ramon J.P. Paje, the Secretary of DENR that, "on February 26, 2013, the Didipio Project was able to mill 301,903 tonnes and achieve the 15% production capacity." Thus, "the Date of Commencement of Commercial Production in accordance with Section 2.14 of the FTAA is on <u>April 1, 2013</u>, which is the first day of the second calendar quarter.

On January 9, 2017, petitioner filed its administrative claim for refund or issuance of TCC, with the Excise LT Audit Division I of the BIR, seeking recovery of the alleged erroneous payment of excise taxes on petitioner's removals of mineral ores and copper concentrates. xxx[1]

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[1] *Rollo*, Decision dated February 3, 2020, pp. 2-6.

Alleging inaction on the part of respondent, petitioner filed its Petitions for Review before the CTA Division on January 11, 2017 and March 31, 2017, docketed as CTA Case No. 9517 and CTA Case No. 9559, respectively. These cases were consolidated in the Resolution dated July 6, 2017.[2]

After trial, the CTA 2nd Division rendered the assailed Decision which disposed of the claim for refund, as follows:

> **WHEREFORE**, in light of the foregoing considerations, the Petitions for Review filed by Oceanagold (Philippines), Inc. in CTA Case Nos. 9517 and 9559, claiming for the refund or for the issuance of a tax credit certificate in the amounts of P80,140,751.85 and P44,899,335.57, representing alleged erroneously paid and illegally and wrongfully collected excise taxes for the period from January to March 2015, and April to June 2015, respectively, are hereby **DENIED** for lack of merit.
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> **SO ORDERED.**[3]

Petitioner's Motion for Reconsideration [of Decision dated February 3, 2020] was likewise denied in the Resolution dated September 1, 2020.[4]

The CTA 2nd Division found that petitioner failed to prove that it submitted a Work Program for the period of 3 years and duly approved pre-operating expenses and that it has yet to recover its pre-operating expenses. Absent the foregoing, the CTA 2nd Division held that it could not ascertain the exact date as to when the recovery period should be reckoned from. Thus, petitioner's claim for refund/issuance of TCC was denied.

On October 23, 2020, petitioner filed the subject *Petition for Review* with the Court *En Banc*. Despite notice,[5] respondent failed to file his comment/opposition, per Records Verification[6] dated January 11, 2021.

On January 19, 2021, the case was submitted for decision.[7]

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[2] Docket, CTA Case No. 9517, Vol. II, pp. 701-702.
[3] *Rollo*, Decision dated February 3, 2020, pp. 98.
[4] *Rollo*, pp. 100-107.
[5] *Rollo*, Resolution dated November 20, 2020, pp. 110-111.
[6] *Rollo*, p. 112.
[7] *Rollo*, pp. 114-115.

ISSUES

Petitioner submits the following issues for consideration of the Court:

I. The CTA 2nd Division erred in holding that the reckoning date of the five-year Recovery Period was not established.

II. The CTA 2nd Division erred in holding that petitioner must prove that its pre-operating expenses have been approved by the DENR pursuant to Section 3(f) of DENR AO 99-56.

III. The CTA 2nd Division erred in not holding that petitioner is entitled to the refund or tax credit of excise taxes erroneously paid by petitioner and illegally and wrongfully collected by respondent for the period January to June 2015 in the aggregate amount of P125,040,087.42.

IV. Inasmuch as petitioner was exempt from excise tax until April 1, 2018, excise taxes paid by petitioner from January to June 2015, or before the lapse of the five-year recovery on April 1, 2018, were erroneously made and/or illegally and wrongfully collected by respondent.

RULING OF THE COURT

The instant Petition for Review was timely filed.

Petitioner received the assailed Resolution dated September 1, 2020 on September 24, 2020.

Petitioner had fifteen (15) days from the date of receipt of the resolution, or until October 9, 2020, within which to file the petition for review before the Court *En Banc*, pursuant to the Revised Rules of the Court of Tax Appeals (RRCTA), Rule 8, Section 3(b).[8]

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[8] Rule 8 Procedure in Civil Cases

On October 8, 2020, petitioner filed its Motion for Extension of Time to File Petition for Review,[9] praying for an additional period of fifteen (15) days from October 9, 2020, or until October 24, 2020, within which to file its Petition for Review. The same was granted in the Minute Resolution dated October 9, 2020.[10]

On October 23, 2020, petitioner timely filed its Petition for Review.

There is no compelling reason to reverse or modify the CTA 2nd Division's findings.

Petitioner argues that pursuant to the FTAA, the reckoning date of the five-year recovery period is the "Date of Commencement of Commercial Production"; that petitioner was able to establish the "Date of Commencement of Commercial Production" which is April 1, 2013; and, that presentation of petitioner's Work Program is not a condition before petitioner can recover its pre-operating expenses during the recovery period. Petitioner also alleges that its FTAA, which was entered into prior to DENR AO No. 99-56, does not require DENR approval of the pre-operating expenses; that it incurred valid pre-operating expenses amounting to USD 310,519,081 as of March 31, 2013, which petitioner has not fully recovered as of June 15, 2015; and, that petitioner was still within the five-year recovery period when it paid excise taxes during January to June 2015.

The issues raised herein are not novel. In *Oceanagold (Philippines), Inc. v. Commissioner of Internal Revenue*,[11] this Court had already stated the requirement for the submission of the work programs for the determination of the "date of commencement of commercial production", as well as proof

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Sec. 3. *Who may appeal; period to file petition.*
xxx xxx xxx
(b) A party adversely by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

[9] *Rollo*, pp. 1-6.

[10] *Rollo*, p.7.

[11] CTA EB No. 1904, August 16, 2019.

that the pre-operating expenses has been duly approved by the Secretary of the DENR, as recommended by the Director of the MGB, as mandated by DENR AO No. 99-56. The discussions are quoted hereunder:

> In the Assailed Decision, the Court in Division ruled that the collection of government share, which includes excise tax, shall commence after the Financial or Technical Assistance Agreement (FTAA) contractor has fully recovered its pre-operating expenses and that the period of recovery shall be five (5) years from the date of commercial operations, or until the date of actual recovery, whichever comes earlier. However, the Court in Division found that petitioner failed to present evidence to prove that the imposition of excise tax was made during the recovery period. Specifically, the Court in Division found that other than the testimony of the ICPA, petitioner failed to present pre-operating expenses duly approved by the Secretary of the DENR, as recommended by the Director of the MGB, and as mandated under DENR AO No. 1999-56.
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> To recapitulate, Section 81 of Republic Act (R.A.) No. 7942, otherwise known as the Philippine Mining Act of 1995, provides:
>
>> "SECTION 81. *Government Share in Other Mineral Agreements.* – xxx xxx xxx
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>> xxx xxx xxx
>>
>> **The Government share** in financial or technical assistance agreement **shall consist of, among other things,** the contractor's corporate income tax, **excise tax**, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.
>>
>> **The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.** (*Emphasis supplied*)
>
> Although the foregoing, provision does not specify a period to recover the pre-operating expenses, the FTAA between petitioner and the government, which was executed on June 20, 1994, stipulates the period within which to

recover its pre-operating expenses, exploration, and development expenditures, to wit:

> "Section XI
> FISCAL REGIME
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> xxx xxx xxx
>
> 11.2. Recovery of Preoperating Expenses, Property Expenses and Taxes Paid During the Recovery Period. **The CONTRACTOR shall have a period of up to five (5) Contract Years, counted from the Date of Commencement of Commercial Production within which to recover its: (a) Preoperating Expenses; and (b) Property Expenses incurred during the period in which Preoperating Expenses are recovered**, after which period only shall the right of the GOVERNMENT to share in the Net Revenue, as hereinafter defined, accrue.
>
> However, if after the lapse of the period mentioned in the preceding paragraph, the CONTRACTOR has not yet fully recovered its Preoperating Expenses and Property Expense incurred during the Period in which Pre-operating Expenses were incurred, it shall be allowed to recover the same as a depreciation allowance deductible against the distributable Net Revenues over the period of the succeeding three Contract Years.
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> xxx xxx xxx" (*Emphasis supplied*)

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

> "2.14 "Date of Commencement of Commercial Production" shall mean the first day of the calendar quarter following the quarter in which production equals fifteen percent (15%) of the project's initial annual design capacity as outlined in the Declaration of Mining Feasibility as hereinafter defined."

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

April 1, 2013, which is the first day of the second calendar quarter."

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

> "SEC. 214. Government Share in FTAA
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> 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 payment 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.
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> The Government share in an FTAA shall be negotiated by the government and the Contractor taking into consideration:
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> a. Capital investment of the project;
> b. Risks involved;
> c. Contribution of the project to the economy;
> d. Technical complexity of the project;
> e. Contribution to community and Local Government; and
> f. Other factors that will provide for a fair and equitable sharing between the parties.
>
> The collection of Government shall commence after the FTAA Contractor has fully recovered its pre-operating, exploration and development expenses, inclusive. **The period of recovery which is reckoned from the date of commercial operation shall be for a period not exceeding five (5) years or until the date of actual recovery, whichever comes earlier.**" (*Emphasis supplied*)

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

> "Section 5. Definition of Terms
>
> As used in and for purposes of these regulations, the following shall mean:

xxx xxx xxx

i. "**Commerical Production**" refers to the production of sufficient quantity of minerals of sustained economic viability of mining operations **reckoned from the date of commercial operation as declared by the Contractor or as stated in the feasibility study, whichever comes first**

xxx xxx xxx" (*Emphasis supplied*)

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

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

Scrutiny of the FTAA reveals the following:

"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

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transform the Exploration Contract Area into a Mining Area as provided in Section VIII of this Agreement." (*Emphasis supplied*)

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

"SECTION IX
DEVELOPMENT AND CONSTRUCTION PERIOD

9.1 Timetable. **The CONTRACTOR shall complete the development of the mine including the construction of production facilities within thirty-six (36) months from the date of the approval of the Declaration of Mining Feasibility**, subject to such extension based on justifiable reasons as the Secretary may approve.

9.2 Work Program and Budget. **The CONTRACTOR shall develop and construct the production facilities in the Mining Area in accordance with the Work Program included in the Declaration of Mining Feasibility** referred to in Section 7.1 of this Agreement, spending at least US$50,000,000 less any amount of Exploration expenditures it has already spent."

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SECTION X
PRODUCTION PERIOD

10.1 Timetable. The CONTRACTOR shall submit to the Government, through the Secretary, copy furnished the Director of Mines and Geosciences Bureau, within thirty (30) days from the completion of the construction facilities a Work Program for a period of three (3) years. **The CONTRACTOR shall commence Commercial Production according to the period(s) specified in the approved Work Program and the CONTRACTOR shall advise the Government within fifteen (15) days therefrom that Commercial Production has commenced. Failure of the CONTRACTOR to commence Commercial Production within the period**, except as may be excused by Force Majeure as stated in Section 20.4 hereof or other justifiable causes, **shall be considered a substantial**

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> **breach of this Agreement**." (*Emphasis supplied*)

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

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

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

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

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

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

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

Further, assuming that the claimed excise taxes were paid within the 5-year recovery period, the Court could not grant petitioner's claim for failure to comply with the requisites set forth in DAO No. 99-56, which provides for the Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements. Particularly, Section 3(f)

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lists the expenses and capital expenditures to be considered as recoverable pre-operating expenses:

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

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interests shall not be more than the prevailing international rates charged for similar types of transaction at the time the financing was arranged;

12. All costs of constructing and developing the mine incurred before the Date of Commencement of Commercial Production, including capital and property as hereinafter defined irrespective as to their means of financing, subject to the limitations defined by Clause 3-f-1 hereof, and inclusive of the principal obligation and the interests arising from any Contractor's leasing, hiring, purchasing or similar financing arrangements including all payments made to Government, both National and Local; and
13. General and administrative expenses actually incurred by the Contractor for the benefit of the Contract Area."

The foregoing recoverable Pre-Operating Expenses shall be subject to verification of its actual expenditure by an independent audit recognized by the Government and chargeable against the Contractor. (*Emphasis supplied*)

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

It should be emphasized that considering that the FTAA was executed in 1994 and the Philippine Mining Act was enacted in 1995, the transitory provision of the said law (R.A. 7942) applies:

"CHAPTER XX
TRANSITORY AND MISCELLANEOUS PROVISIONS

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

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> contractor unless the mining lessee or contractor indicates his intention to the secretary, in writing, not to avail of said provisions: *Provided, further,* That no renewal of mining lease contracts shall be made after the expiration of its term: ***Provided, finally,*** **That such leases, production-sharing agreements, financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations.**" (*Emphasis supplied*)
>
> Thus, DAO No. 99-56 is applicable to petitioner.

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

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

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

In the instant appealed case, the CTA 2nd Division also found that petitioner failed to submit proof, such as the Work Program, that would aid the Court in determining the exact date of commencement of commercial operation, thus, the Court cannot determine if the subject excise taxes were paid during the recovery period.

Petitioner likewise failed to submit the duly approved pre-operating expenses, and other evidence to show that it has yet to recover its pre-operating expenses, or that it is still under recovery at the time of payment of the subject excise taxes.

In sum, there is no reason to disturb the findings of the Court 2nd Division in the assailed Decision and Resolution.

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WHEREFORE, the Petition for Review is **DENIED** for lack of merit. The Decision and Resolution of the Court's Second Division, respectively dated February 3, 2020 and September 1, 2020, in CTA Case Nos. 9517 and 9559, are **AFFIRMED**.

SO ORDERED.

Catherine T. Manahan

CATHERINE T. MANAHAN
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

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

Marian Ivy F. Reyes-Fajardo

MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
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