REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

OCEANAGOLD (PHILIPPINES), INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NOS. 10021 and 10061

Members:

CASTAÑEDA, JR., *Chairperson, and*
BACORRO-VILLENA, *JJ.*

Promulgated: NOV 10 2021 12:05 p.m.

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DECISION

BACORRO-VILLENA, J.:

At bar are consolidated Petitions for Review filed by petitioner Oceanagold (Philippines) Inc. (**petitioner/OGPI**) on 06 February 2019[1] and 08 April 2019[2], respectively.

In **CTA Case No. 10021**, the petition seeks a refund or issuance of a tax credit certificate (**TCC**) in the amount of ₱51,455,940.29, covering the first (1st) quarter of taxable year (**TY**) 2017. On the other hand, in **CTA Case No. 10061**, the petition seeks a refund or issuance of a TCC in the amount of ₱104,069,819.57, covering the second (2nd) quarter of TY 2017. Petitioner thus claims an aggregate amount of

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1 Division Docket (CTA Case No. 10021), Volume I, pp. 10-60.
2 Division Docket (CTA Case No. 10061), pp. 10-60.

₱155,525,759.86, allegedly representing excise taxes illegally assessed and collected by respondent Commissioner of Internal Revenue (**respondent/CIR**).

PARTIES OF THE CASE

Petitioner is a corporation existing by virtue of the laws of the Republic of the Philippines with principal office address at 2nd Floor, Carlos J. Valdes Building, 108 Aguirre St., Legaspi Village, 1229 Makati City.

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue (**BIR**), the government agency tasked with the enforcement of tax laws and the assessment and collection of internal revenue taxes.

FACTS OF THE CASE

Petitioner is a mining service contractor of the Republic of the Philippines pursuant to a Financial or Technical Assistance Agreement[3] (**FTAA**). Under the FTAA, petitioner is given a period of five (5) years from the commencement of its operations to recover its pre-operating expenses, part of which are excise taxes on minerals.[4]

In conducting its exploration activities under the FTAA, petitioner was able to identify a portion of the Exploration Contract Area suitable for the Didipio Gold-Copper Project (**Didipio Project**). As a result thereof, it filed a Partial Declaration of Mining Feasibility[5] (**PDMF**) with the Department of Environment and Natural Resources (**DENR**). The PDMF was finally approved by the DENR on 11 October 2005.

Seeking to confirm its exemption from payment of excise taxes, petitioner requested respondent to issue a ruling on the matter. On 04 May 2007, respondent issued BIR Ruling No. 10-2007, confirming

[3] Exhibit "P-2", Division Docket (CTA Case No. 10021), Volume III, pp. 962-1015.
[4] Id.
[5] Exhibit "P-7", Division Docket (CTA Case No. 10021), Volume III, pp. 1046-1049.

petitioner's tax exemption within the recovery period beginning from the PDMF's approval.

Subsequently or on 14 January 2013, petitioner was able to obtain an Ore Transport Permit (**OTP**) from the Mines and Geosciences Bureau (**MGB**), authorizing the sale and delivery of 5,500 metric tons (**MT**) of copper concentrates from the Didipio Mine to Poro Point, La Union. However, on 07 December 2012, despite the affirmation of its tax exemption and its procurement of an OTP, the BIR detained about 800,000 MT of mineral ores it stockpiled for processing. In February 2013, the BIR seized another 100 MT of copper concentrates.

On 15 February 2013, respondent issued Revenue Memorandum Circular (**RMC**) No. 17-2013[6], denying petitioner's exemption from payment of excise taxes and thereby, revoking BIR Ruling 10-2007.

On 20 February 2013, the BIR detained another delivery of 160 MT of copper concentrates on the premise that petitioner failed to pay the excise taxes on all of its previously seized ores and copper concentrates.

To secure the release of its ores and copper concentrates and fulfill its scheduled deliveries, petitioner paid under protest the excise taxes in the amount of ₱13,942,179.39 and ₱417,743.20 on 25th and 26th of February 2013, respectively, over the 5,500 MT of ores covered by an OTP. Notwithstanding its payment, the BIR again seized 40 MT of copper concentrates covered by an OTP and petitioner's proof of the excise tax payments made on 01 March 2013.

Distressed by the BIR's unrelenting seizures against it, petitioner continued to reluctantly pay excise taxes to ensure its unhampered operations.

On 04 February 2019, petitioner filed an administrative claim for refund or tax credit[7] with the Excise LT Audit Division I of the BIR. It sought a refund or credit of excise taxes in the aggregate amount of

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6 Clarifying the Taxes Due from Financial or Technical Assistance Agreement (FTAA) Contractors During "Recovery Periods", issued on 15 February 2013.

7 Exhibit "P-32" to "P-32-b", Division Docket (CTA Case. No. 10021), Volume III, pp. 1128-1144.

₱455,409,873.97 covering TY 2017 and the first quarter of TY 2018. However, respondent did not act on its claim. It then filed the present petitions.

PROCEEDINGS BEFORE THE COURT

Upon the filing of herein petitions, respondent initially filed his Answer[8] in CTA Case No. 10021 on 01 April 2019. Later, on 03 May 2019, petitioner filed an Omnibus Motion[9] seeking the consolidation of CTA Case Nos. 10021 and 10061, and in a Resolution dated 10 July 2019[10], the First Division resolved to consolidate the foregoing cases. Thereafter, he also filed another Answer[11] on 24 July 2019.

On 07 August 2019, the parties submitted their Consolidated Joint Stipulation of Facts and Issues[12] (**JSFI**). Thereafter, on 14 August 2019, the Court issued a Pre-Trial Order.[13]

When the trial ensued, petitioner presented its first witness, Elaine E. De Guzman (**De Guzman**), the Court-appointed Independent Certified Public Accountant (**ICPA**), who testified by way of her judicial affidavit.[14]

On the witness stand, ICPA De Guzman testified on the correctness of her findings as provided in her reports. She declared that petitioner paid a total of ₱155,525,759.86 in excise taxes for the first (1st) and second (2nd) quarters of TY 2017. She also affirmed that petitioner's payment was still within the five-year recovery period as of 30 June 2017 (counting from 01 April 2013 which allegedly was petitioner's commencement of commercial operations). She added that petitioner's cash flow has yet to exceed the valid pre-operating expenses it incurred.

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8 Id., Volume I, pp. 176-199.
9 Id., pp. 212-217.
10 Id., pp. 222-223.
11 Id., pp. 242-265.
12 Id., pp. 318-330.
13 Id., pp. 332-342.
14 Exhibit "P-69", id., Volume III, pp. 884-891.

Next, Atty. Joan D. Adaci-Cattiling (**Atty. Cattiling**) assumed the witness stand for petitioner. There, she testified by way of her judicial affidavit[15] that, under the FTAA, the commencement of commercial production is the 1st day of the 1st month of the calendar quarter after the mine site is already able to mine 15% of its initial annual production capacity. She pointed out that, in petitioner's case, it was on 01 April 2013.

Lastly, petitioner offered the testimony of Hesther Bahiwag (**Bahiwag**), who gave her direct testimony *via* her judicial affidavit.[16] Her testimony was also offered to prove petitioner's allegations; particularly, as to the amount of excise taxes that petitioner had paid and the illegality of the BIR's collection.

With no other witnesses to present, petitioner filed its Formal Offer of Evidence[17] (**FOE**) on 10 February 2020.

On 08 June 2020[18], the Court denied most of petitioner's offered exhibits for either being unmarked or not found in the case records. However, in a Motion for Reconsideration (of the Resolution dated June 8, 2020)[19] [**MR**] filed by petitioner on 06 July 2020, petitioner explained that the missing documents were just either mismarked or inadvertently excluded due to its voluminous records.

In a Resolution dated 28 September 2020[20], except for Exhibits "P-26746" and "P-33254"[21], the Court admitted all of petitioner's exhibits.

15 Exhibit "P-67", id., Volume II, pp. 351-374.
16 Exhibit "P-68", id., pp. 572-582.
17 Id., Volume III, pp. 905-950.
18 Id., Volume IV, pp. 1302-1308.
19 Id., pp. 1315-1319.
20 Id., pp. 1331-1335.
21

Exhibit	Description
P-26746 and P-33254	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts.

Upon respondent's previous Manifestation[22] filed on 17 June 2020, that he had no records to present, the Court ordered the parties to submit their respective memoranda. Respondent submitted his Memorandum[23] on 27 October 2020 while, petitioner filed its Memorandum[24] on 05 November 2020.

Finally, in a Resolution dated 10 November 2020[25], the Court submitted the consolidated cases for decision.

ARGUMENTS OF THE PARTIES

In sum, petitioner argues that during the time the excise taxes subject of these consolidated petitions were paid, it was still within the five-year recovery period provided under the FTAA and DENR Administrative Order (**DAO**) No. 96-40.[26] It contends that the FTAA reckons the recovery period from the commencement of "commercial operations". Although DAO No. 96-40 reckons the period from the commencement of "commercial production", the two (2) terms refer to the same thing. As for petitioner, it notified the Board of Investments (**BOI**) and the DENR in separate letters dated 06 May 2013 and 27 March 2013, respectively, of the actual start of its commercial production on 01 April 2013.

Petitioner further maintains the validity of BIR Ruling 10-2007, which confirmed its exemption from payment of excise taxes. On the other hand, it argues that RMC No. 17-2013[27] remains invalid for allegedly being issued without notice and hearing.

Respondent, however, counters that the Court is devoid of authority to rule on the present petitions as they constitute a direct attack on the validity of RMC No. 17-2013. He argues that petitioner should have first elevated the matter with the Secretary of Finance in

22 Id., pp. 1309-1312.
23 Id., pp. 1336-1350.
24 Id., pp. 1351-1397.
25 Id., p. 1398.
26 Revised Implementing Rules and Regulations of Republic Act No. 7942, Otherwise Known as the "Philippine Mining Act of 1995".
27 Supra at note 6.

line with Section 4[28] of the National Internal Revenue Code (**NIRC**) of 1997, as amended.

Assuming that this Court has jurisdiction over the present controversy, respondent claims that RMC No. 17-2013 is valid and a mere interpretation of portions of Republic Act (**RA**) No. 7942[29] or the Philippine Mining Act of 1995.

ISSUES

I.
WHETHER THE HONORABLE COURT HAS JURISDICTION TO ENTERTAIN THE INSTANT PETITION; AND,

II.
WHETHER PETITIONER OCEANAGOLD (PHILIPPINES), INC. IS ENTITLED TO THE REFUND OR TAX CREDIT OF EXCISE TAXES IT PAID UNDER PROTEST FROM JANUARY TO JUNE 2017, IN THE AGGREGATE AMOUNT OF ₱155,525,759.86.

RULING OF THE COURT

The Court responds below to the issues in this case, *in seriatim*.

THE COURT HAS JURISDICTION OVER THE CASE.

Respondent insists that the central issue of the instant petitions is the validity of RMC No. 17-2013. He further contends that petitioner failed to exhaust administrative remedies since it did not appeal first before the Secretary of Finance prior to elevating the case to this Court as provided under Section 4[30] of the NIRC of 1997, as amended.

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28 **SEC. 4.** *Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases* - The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.

The power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals.

29 AN ACT INSTITUTING A NEW SYSTEM OF MINERAL RESOURCES EXPLORATION, DEVELOPMENT, UTILIZATION, AND CONSERVATION.

30 Supra at note 28.

We disagree.

The instant case is not confined only to the validity of RMC No. 17-2013 but, more appropriately, it is an appeal from respondent's inaction on petitioner's administrative claim for refund or tax credit filed on 04 February 2019.[31] The claim for refund or tax credit was made pursuant to Section 204(c) of the NIRC of 1997, as amended, which provides:

> ...
>
> **SEC. 204.** *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –
>
> ...
>
> (c) Credit or refund taxes **erroneously or illegally** received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty**: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.[32]
>
> ...

In relation thereto, Section 229 provides:

> ...
>
> **SEC. 229.** *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 excessively 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.

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31 Exhibit "P-32", supra at note 7.
32 Emphasis supplied.

> **In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause** that may arise after payment: *Provided, however,* That the Commissioner may, even without 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.[33]
>
> ...

The Supreme Court in *CBK Power Company Limited v. Commissioner of Internal Revenue*[34] held:

> ...
>
> Sections 204 and 229 of the NIRC pertain to the refund of **erroneously** or illegally collected taxes. Section 204 applies to administrative claims for refund, while Section 229 to judicial claims for refund. In both instances, the taxpayer's claim must be filed within two (2) years from the date of payment of the tax or penalty. However, Section 229 of the NIRC further states the condition that a judicial claim for refund may not be maintained until a claim for refund or credit has been duly filed with the Commissioner.
>
> ...

The following are the pertinent dates relative to petitioner's claim for refund or tax credit:

Date of Payment	Amount	2-Year Prescriptive Period	Date of Admin. Claim	Date of Judicial Claim
02/06/2017[35]	₱6,383,671.01	02/6/2019	02/04/2019[36]	02/06/2019[37]
02/16/2017[38]	31,795,634.71	02/16/2019		
03/09/2017[39]	8,619,634.28	03/9/2019		
03/23/2017[40]	4,657,000.29	03/23/2019		
04/10/2017[41]	32,476,453.90	04/10/2019		4/8/2019[42]

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33 Emphasis supplied.
34 G.R. Nos. 193383-84, 14 January 2015; Emphasis in the original text.
35 Exhibit "P-35", Division Docket (CTA Case No. 10021), Volume III, p. 1158.
36 Exhibit "P-32", id., pp. 1128-1144.
37 Petition for Review, supra at note 1.
38 Exhibit "P-38", Division Docket (CTA Case No. 10021), Volume III, p. 1177.
39 Exhibit "P-41", id., p. 1183.
40 Exhibit "P-44", id., p. 1194.
41 Exhibit "P-50", id., p. 1216.

Date of Payment	Amount	2-Year Prescriptive Period	Date of Admin. Claim	Date of Judicial Claim
04/20/2017[43]	8,131,201.29	04/20/2019		
05/12/2017[44]	36,085,669.57	05/12/2019		
05/12/2017[45]	6,181,199.18	05/12/2019		
05/26/2017[46]	15,400,899.82	05/26/2019		
6/16/2017[47]	5,794,395.81	6/16/2019		
Total	**₱155,525,759.86**			

From the foregoing, it is clear that petitioner's administrative and judicial claims for refund were filed within the two-year period prescribed by law. Thus, it is unquestionable that the Court has jurisdiction over the instant petition.

With the issue of jurisdiction settled, We shall now proceed to determine whether petitioner is entitled to the relief sought.

PETITIONER FAILED TO PROVE THAT THE EXCISE PAYMENTS WERE ERRONEOUS OR ILLEGAL.

Section 81 of the Philippine Mining Act of 1995[48], provides:

> ...
> **SEC. 81.** ***Government Share in Other Mineral Agreements.*** —
> ...
>
> 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

42 Petition for Review, supra at note 2.
43 Exhibit "P-53", Division Docket (CTA Case No. 10021), Volume III, p. 1232.
44 Exhibit "P-56", id., p. 1238.
45 Exhibit "P-59", id., p. 1256.
46 Exhibit "P-62", id., p. 1275.
47 Exhibit "P-65", id., p. 1292.
48 Supra at note 29.

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.[49]

...

Moreover, the **FTAA**[50], which was executed on 20 June 1994 between petitioner and the government, provides the following:

...

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: (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.

...

All taxes, duties, fees, costs, levies and imposts paid by the CONTRACTOR and which are detrimental to the CONTRACTOR's recovery of Preoperating Expenses and Property Expenses during the five (5) Contract Years contemplated in this Section shall be recoverable by the CONTRACTOR, whenever possible during the year(s) such

[49] Emphasis supplied.
[50] Exhibit "P-2", supra at note 3.

expenditures were actually incurred. **Any amount not recovered shall be deducted from the GOVERNMENT's Share** as more specifically provided in Section 11.5 of this Agreement, unless legislation is required to allow the necessary deductions, in which case the deductions shall be made only after the appropriate legislation has been passed.

All the items recoverable by the CONTRACTOR under this Section 11.2, including the on-going Mineral Exploration costs incurred by the CONTRACTOR during the five-year recovery period, shall be recovered from Net Revenue, as the term 'Net Revenue' is defined under Section 11.4 of this Agreement.[51]

...

Relevantly, certain phrases, as used in the foregoing stipulations, *per* the FTAA, mean as follows:

...

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 a processing system or supply a pilot plant used for such testing shall not be considered in the determination of Commercial Production.

...

2.12 'Contract Year' means a period of twelve (12) consecutive months counted from the Effective Date of this Agreement or from the anniversary of such Effective Date.

2.13 'CONTRACTOR' means Arimco Mining Corporation and **its assignee or assignees of any interest under this Agreement** provided such assignment of any such interest is accomplished pursuant to the provisions hereof.

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.

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51 Emphasis supplied.

> 2.15 '<u>Declaration of Mining Feasibility</u>' 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.[52]
>
> ...

Moreover, the DENR issued DAO No. 99-56[53], which provides for the guidelines of the Fiscal Regime portion of the FTAAs executed pursuant to the Philippine Mining Act of 1995, to wit:

> ...
> SECTION 3. *Fiscal Regime of a Financial or Technical Assistance Agreement*
>
> The Financial or Technical Assistance Agreement which the Government and the FTAA Contractor **shall enter into shall have a Fiscal Regime embodying the following provisions**:
> ...
>
> d. *Payment of Government Taxes and Fees.* The Contractor shall promptly pay all the taxes and fees required by the Government in carrying out the activities covered in the FTAA and in such amount, venue, procedure and time as stipulated by the particular law and implementing rules and regulations governing such taxes and fees subject to all rights of objection or review as provided for in relevant laws, rules and regulations. **In case of non-collection as covered by Clause 3-g-1 of this Section, the Contractor <u>shall follow the prevailing procedures for availment of such non-collection in accordance with pertinent laws, rules and regulations</u>.** Where prevailing orders, rules and regulations do not fully recognize and implement the provisions covered by Clause 3-g-1 of this Section, the Government shall exert its best efforts to ensure that all such orders, rules and regulations are revised or modified accordingly.
>
> e. *Recovery of Pre-Operating Expenses.* Considering the high risk, high cost and long term nature of Mining Operations, the Contractor is given the opportunity to recover its Pre-Operating Expenses incurred during the pre-operating period, after which the Government shall receive its rightful share of the national patrimony. **The Recovery Period, which refers to the period allowed to the Contractor to recover its Pre-Operating Expenses as provided in the Mining Act and the IRR, shall be for a maximum of five (5) years or at a date when the aggregate of the Net Cash Flows**

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52 Emphasis supplied.
53 Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements.

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. The basis for determining the Recovery Period shall be the actual Net Cash Flows from Mining Operations and actual Pre-Operating Expenses converted into its US dollar equivalent at the time the expenditure was incurred.

"Net Cash Flow" means the Gross Output less Deductible Expenses, Pre-Operating Expenses, Ongoing Capital Expenditures and Working Capital charges.

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;

...

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.

g. *Government Share.*

1. *Basic Government Share.* The following taxes, fees and other such charges shall constitute the Basic Government Share:

a) **Excise tax on minerals;**
b) Contractor's income tax;
c) Customs duties and fees on imported capital equipment;
d) Value-added tax on the purchase of imported equipment, goods and services;
e) Withholding tax on interest payments on foreign loans;
f) Withholding tax on dividends to foreign stockholders;
g) Royalties due the Government on Mineral Reservations;
h) Documentary stamps taxes;
i) Capital gains tax;
j) Local business tax;

> k) Real property tax;
> l) Community tax;
> m) Occupation fees;
> n) All other local Government taxes, fees and imposts as of the effective date of the FTAA;
> o) Special Allowance, as defined in the Mining Act; and
> p) Royalty payments to any Indigenous People(s)/Indigenous Cultural Community(ies).
>
> From the Effective Date, the foregoing taxes, fees and other such charges constituting the Basic Government Share, if applicable, shall be paid by the Contractor: Provided, **That above items (a) to (g) shall <u>not be collected</u> from the Contractor <u>upon the date of approval of the Mining Project Feasibility Study up to the end of the Recovery Period</u>**. Any taxes, fees, royalties, allowances or other imposts, which should not be collected by the Government, **but nevertheless paid by the Contractor and are not refunded by the Government before the end of the next taxable year, shall be included in the Government Share in the next taxable year**. Any Value-Added Tax refunded or credited shall not form part of Government Share.[54]
>
> ...

Undeniably, in accordance with the foregoing provisions, petitioner, as assignee[55], and now, the contractor to the said FTAA, is entitled not to pay the excise taxes on minerals, among others, from the date of approval of the Mining Project Feasibility Study up to the end of the Recovery Period (**which must not exceed five (5) years from the date of commencement of commercial production**).

Petitioner avers further that, since it had already advised[56] the Secretary of DENR that "on February 2, 2013, the Didipio Project was able to mill 301,903 tons and achieve the 15% production capacity", the date of commencement of the commercial production is on **01 April 2013**; the first day of the second calendar quarter and the subject excise payments were made within the *Recovery Period* (*i.e.*, from **01 April 2013 to 31 March 2018**).

We disagree.

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[54] Emphasis and underscoring supplied.
[55] Exhibit "P-4" to "P-4-a", Division Docket (CTA Case No. 10021), Volume III, pp. 1026-1033.
[56] Exhibit "P-28", id., pp. 1117-1118.

DAO No. 40-96[57] defines the term "Commercial Production" as follows:

> ...
>
> i. "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, whichever comes first.**[58]
>
> ...

It must be noted that, on 18 March 2005, petitioner submitted a PDMF stating that it found "sufficient ore reserves and diluted resource of 23.7 million tonnes of 1.8g/t Au and 0.64% Cu ... and such ore reserves have been delineated to sustain the mining operation of the Corporation for some 14 years," and that "mining operation ... will process gold and copper at 2 million tonnes per annum..."[59]

Subsequently, on 11 October 2005, the DENR issued an Order[60] approving the Partial Declaration of Mining Feasibility subject to the following condition, among others:

> ...
>
> I. That **the conduct of mining operation in the Contract Area** subject of the Declaration of Mining Project Feasibility **shall be undertaken in accordance with** the existing applicable laws, their implementing rules and regulations, and **the pertinent provisions of the FTAA;** ...[61]
>
> ...

A scrutiny of the FTAA reveals the following:

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57 Revised Implementing Rules and Regulations of Republic Act No. 7942, Otherwise known as the Philippine Mining Act of 1995.

58 Emphasis supplied.

59 Exhibit "P-7", supra at note 5, pp. 1046-1047.

60 Exhibit "P-8", Division Docket (CTA Case No. 10021), Volume III, pp. 1048-1049.

61 Emphasis supplied.

...

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.[62]

...

Anent thereto, Sections IX, X, and XX of the FTAA provide:

...

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.

...

62 Emphasis supplied.

SECTION X
PRODUCTION PERIOD

10.1 Timetable. The CONTRACTOR shall submit to the Government, through the Secretary, copy furnished the Director of the 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 breach of this Agreement.

...

SECTION XX
OTHER PROVISIONS

...

20.4 Suspension of Obligations.

(a) Any failure or delay on the part of any party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to Force Majeure.

(b) If Mineral Exploration and/or Mining Operations are delayed, curtailed or prevented by such Force Majeure causes, then the time for enjoying the rights and carrying out the obligations thereby affected, the term of this Agreement and all rights and obligations hereunder shall be extended for a period equal to the period thus involved.

(c) The party whose ability to perform its obligations is affected (i) **shall promptly give Notice to the other in writing of any such delay or failure in performance, the expected duration thereof, and its anticipated effect on the party expected to perform**, and (ii) shall use its best efforts to remedy such delay, except that neither party shall be under any obligation to settle a labor dispute.

(d) This Agreement and the performance of all the obligations of the CONTRACTOR under the same shall be deemed suspended if the prosecution of the CONTRACTOR'S obligations under this Agreement is prevented by delays in obtaining approvals of the GOVERNMENT, both national and local, including statutory authorities, to any matter or aspect of this Agreement in which such approvals are necessary,

> provided that the delays are not due to the fault of the CONTRACTOR.[63]
>
> ...

Based on the foregoing provisions of the FTAA, petitioner had three (3) years from the approval of its PDMF on 11 October 2005, or until 11 October 2008, to develop and construct mining production facilities. Thereafter, it had to submit within 30 days another Work Program for the period of three (3) years for the actual production activities, including the commencement of commercial production.

It is thus clear from the foregoing that petitioner should have commenced commercial operation and production within the fourth quarter of 2008 up to fourth quarter of 2011. Consequently, **the recovery period would have ended in the fourth quarter of 2016,** regardless of petitioner's declaration of the commencement of commercial production on 27 March 2013.

Accordingly, the subject payments of excise taxes that were made between **06 February 2017** and **16 June 2017** (which are beyond the recovery period) are not rendered erroneous nor illegal. Moreover, it bears stressing that in its Memorandum[64], petitioner avers:

> ...
>
> 16. In 2008, petitioner was constrained to halt further 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."
>
> 17. In 2010, however, after completing a strategic review and securing further financing, petitioner resumed development work in the Didipio Project.
>
> 18. In late 2012, petitioner successfully commenced the commissioning of the Didipio Project, and mined and stockpiled approximately 800,000 metric tonnes ("MT") of ore for further processing. As part of the commissioning process, petitioner commenced ore milling operations to produce copper concentrates. Petitioner expected to make its very first sale and delivery of copper concentrates in the first quarter of 2013.
>
> ...

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63 Emphasis supplied.
64 Memorandum for Petitioner, Division Docket (CTA Case No. 10021), Volume IV, p. 1357.

However, petitioner did not submit to the Court pertinent supporting documents such as notice/s to the government stating the reason and duration of the delay and work programs in order to ascertain the date of the recovery period.

Even assuming *arguendo* that the subject payments of excise taxes were made within the recovery period, DAO No. 99-56[65] categorically states that, in case the excise taxes paid are not recovered, the same would merely form part of the Government's share.

With the above disquisitions, this Court finds no erroneous or illegal collection of excise taxes refundable in favor of petitioner.

On a final note, it is well established that actions for tax refund or credit, as in the instant cases, are in the nature of a claim for exemption and the law is not only construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence presented entitling a taxpayer to an exemption is *strictissimi* scrutinized and must be duly proven.[66] The burden is on the taxpayer to show that he has strictly complied with the conditions for the grant of the tax refund or credit.

WHEREFORE, the foregoing considered, the Petition for Review filed by petitioner Oceanagold (Philippines), Inc. in CTA Case Nos. 10021 and 10061 are hereby **DENIED** for lack of merit.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

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65 Supra note at note 53.

66 *Coca-Cola Bottlers Philippines, Inc. v. Commissioner of Internal Revenue*, G.R. No. 222428, 19 February 2018, citing *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue*, G.R. No. 159490, 18 February 2008.

I CONCUR:

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

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the cases were assigned to the writer of the opinion of the Court's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
2nd Division Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the cases were assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice