REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

OCEANAGOLD (PHILIPPINES), INC.
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE
Respondent.

CTA CASE NO. 9594
For: Assessment

Members:
CASTAÑEDA, JR., *Chairperson,*
MINDARO-GRULLA, and
BACORRO-VILLENA, *JJ.*

Promulgated:

OCT 21 2019

1:30 p.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision on November 23, 2018 is a Petition for Review[1] filed on May 19, 2017 by petitioner Oceanagold (Philipines), Inc., against respondent Commissioner of Internal Revenue (CIR), pursuant to Section7(a)(1) of Republic Act (RA) No. 1125, An Act Creating the Court of Tax Appeals, as amended[2], as well as Rule 4,

[1] Docket vol. I, pp.10-40.

[2] Sec. 7. *Jurisdiction.* - The CTA shall exercise:

(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:

(1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;

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Section 3(a)(1)[3], in relation to Rule 8, Section 4(a)[4] of the Revised Rules of the Court of Tax Appeals (RRCTA), as amended.

Petitioner seeks the cancellation and withdrawal of the assessment issued by respondent against petitioner for its alleged deficiency excise tax for taxable year 2014 in the aggregate amount of ₱195,159,586.00, inclusive of surcharge, interest and penalties.

Petitioner Oceanagold (Philippines), Inc. (formerly Australasian Philippines Mining. Inc) is a corporation duly 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.[5]

On the other hand, 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. He holds office at the Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Diliman, Quezon City.[6]

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[3] Rule 4, Sec. 3. *Cases within the jurisdiction of the Court in Division.* – The Court in Division shall exercise:

(a) Exclusive original over or appellate jurisdiction to review by appeal the following:

> (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;

[4] Rule 8. Sec. 4. *Where to appeal; mode of appeal.-*

(a) An appeal from a decision or ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claim for refund of internal revenue taxes erroneously or illegally collected, the decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade & Industry, the Secretary of Agriculture, and the Regional Trial Court in the exercise of their original jurisdiction, shall be taken to the Court by filing before it a petition for review as provided in Rule 42 of the Rules of Court. The Court in Division shall act on the appeal.

[5] Par. 1., The Parties, Petition for Review, docket vol. I, p. 10; Exhibit "P-1", docket vol. III, pp. 1139-1149.

[6] Par. 1, Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), docket vol. III, p. 1014.

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On June 20, 1994, a Financial or Technical Assistance Agreement (FTAA)[7] was entered into by the Republic of the Philippines and Arimco Mining Corporation (AMC), involving the mineral exploration and subsequent large-scale development and commercial utilization of mineral deposits over a contract area spanning the Provinces of Nueva Vizcaya and Quirino. This is known as the Didipio Gold-Copper Project (Didipio Project), which is the first project to be built and commence operations in the Philippines under the FTAA structure.

On October 19, 1995, the Securities and Exchange Commission (SEC) approved the change of AMC's corporate name to Climax-Arimco Mining Corporation (CAMC).[8]

On December 23, 1996, CAMC entered into an Assignment, Accession and Assumption Agreement[9] with Australasian Philippines Mining, Inc. (APMI) and transferred to APMI all its rights and obligations in and under the FTAA. This was amended and restated in the Assignment, Accession and Assumption Agreement (Amended and Restated)[10] executed on September 15, 2004. The transfer was approved by the Department of Environment and Natural Resources (DENR) on December 9, 2004.[11]

On March 15, 2005, after finding a portion of the Exploration Contract Area as being suitable for the Didipio Project, APMI filed a Partial Declaration of Mining Feasibility[12] (PDMF) with the DENR. This was approved by the DENR in an Order[13] dated October 11, 2005, thereby constituting a portion of the Exploration Contract Area as the mining area.

Subsequently, on February 13, 2007, APMI submitted a request for ruling with the CIR confirming its exemption from

[7] Exhibit "P-2", docket vol. III, pp. 1150-1203.
[8] Exhibit "P-3", docket vol. III, pp. 1204-1213.
[9] Exhibit "P-4", docket vol. III, pp. 1214-1218.
[10] Exhibit "P-4-a", docket vol. III, pp. 1219-1222.
[11] Exhibit "P-5", docket vol. III, pp. 1223-1225.
[12] Exhibit "P-7", docket vol. III, pp. 1235-1236.
[13] Exhibit "P-8", docket vol. III, pp. 1237-1238.

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the payment of excise tax on minerals during the recovery period.

On May 4, 2007, the CIR issued BIR Ruling No. 10-2007[14] confirming APMI's exemption from the payment of excise tax upon the date of 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 operation and shall be for a maximum period of five (5) years or until the date of actual recovery of APMI's 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. (OGPI).[15]

Sometime in 2008, petitioner halted further mine development in the Didipio Project due to escalating costs and uncertainty in the financial markets. It thus placed the Didipio Project under "care and maintenance," which lasted from December 2008 until December 2010.

In December 2010, after completing a strategic review and securing further financing, petitioner resumed development work in the Didipio Project. Eventually, in late 2012, it successfully commenced the commissioning of the Didipio Project, and mined and stockpiled approximately 800,000 metric tons (MT) of ore for further processing. As part of the commissioning process, petitioner commenced ore milling operations to produce copper concentrates.

On February 15, 2013, the CIR issued Revenue Memorandum Circular (RMC) No. 17-2013[16] which, among others, revoked BIR Ruling No. 10-2007 and with it, OGPI's exemption from excise tax during the recovery period.

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[14] Exhibit "P-25", docket vol. III, pp. 1278-1283.
[15] Exhibit "P-6", docket vol. III, pp. 1226-1234.
[16] SUBJECT: Clarifying the Taxes Due From Financial or Technical Assistance Agreement (FTAA) Contractors During (Recovery Periods), February 15, 2013.

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On March 12, 2015, petitioner received Letter of Authority No. 121-2015-00000019[17], dated March 10, 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 February 12, 2016, petitioner received an undated Preliminary Assessment Notice (PAN)[18] assessing petitioner for alleged deficiency excise tax and administrative penalty in the aggregate amount of ₱175,316,268.20, inclusive of interest, to wit:

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 (₱118,931,018.44x25%)	29,879,583.32	
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**

Petitioner replied to the PAN, on February 29, 2016, through a letter[19] addressed to Mr. Nestor S. Valeroso, Assistant Commissioner, Large Taxpayers Service (LTS).

On April 21, 2016, petitioner received the Formal Letter of Demand with Formal Assessment Notice (FLD/FAN)[20] with Assessment No. XS-2014-00002 with Details of Discrepancies, assessing petitioner for alleged deficiency excise tax and administrative penalty in the total amount of ₱180,227,980.53, inclusive of interest, computed as follows:

[17] Exhibit "P-49", docket vol. IV, p. 1556; and Exhibit "R-1", BIR Records, p. 1.
[18] Exhibit "P-50", docket vol. IV, pp. 1557-1559; and Exhibit "R-4", BIR Records, pp. 458-460.
[19] Exhibit "P-51", docket vol. IV, pp. 1560-1565.
[20] Exhibit "P-52", docket vol. IV, pp. 1566-1570; and Exhibits "R-6" and "R-7", BIR Records, pp. 472-476.

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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: (₱118,931,018.44x25%)	Surcharge	29,879,583.32	
Interest - 20%p.a. (up to April 30, 2016)		30,780,063.92	60,659,647.24
Total Deficiency Excise Tax			180,177,980.53
II. Administrative Penalty			
Penalty - Excise Tax			50,000.00
Total Deficiency Taxes			**₱180,227,980.53**

On May 20, 2016, petitioner protested the FLD/FAN through a letter (Protest)[21] addressed to Mr. Nestor S. Valeroso of the LTS. Thereafter, on July 19, 2016, petitioner submitted all relevant documents in support of the Protest.[22]

On August 2, 2016, or merely 13 days from petitioner's submission of all relevant supporting documents, the LTS issued the Final Decision on Disputed Assessment (FDDA)[23], which denied petitioners Protest and affirmed the alleged deficiency excise tax in the amount of ₱180,227,980.53, inclusive of interest.

Thus, on September 1, 2016, petitioner elevated the Protest to respondent through a Request for Reconsideration[24] pursuant to Section 3.1.4 of Revenue Regulation (R.R.) No. 12-99[25], as amended by R.R. No. 18-2013[26].

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[21] Exhibit "P-53", docket vol. IV, pp. 1571-1576.
[22] Exhibit "P-54", docket vol. IV, pp. 1577-1752.
[23] Exhibit "P-55", docket vol. IV, pp. 1753-1754; and Exhibit "R-9", BIR Records, pp. 490-491.
[24] Exhibit "P-56", docket vol. IV, pp. 1755-1769.
[25] 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, September 6, 1999.
[26] SUBJECT : Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment, November 28, 2013.

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On April 19, 2017, petitioner received respondent's Decision[27] dated November 7, 2016 denying the Request for Reconsideration, reiterating petitioner's supposed liability in the aggregate amount of ₱195,159,586.00, inclusive of surcharge, interest, and compromise penalty.

Thus, petitioner filed the instant Petition for Review[28] on May 19, 2017.

Within the extended time granted by the Court[29], respondent filed his Answer (Re: Petition for Review dated 19 May 2017)[30] on August 11, 2017, interposing the following defenses:

> "3. He **DENIES** the allegations in Item A (inclusive of subparagraphs), under the caption "Summary of Arguments"; the allegations in paragraphs 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 64.1, 64.2, 65, 66, 67, 68, and 69, under the caption "Discussion" of the petition for being false, the truth being that petitioner is liable to pay deficiency Excise Tax for taxable year ended December 31, 2014 as will be discussed in the following paragraphs.
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> 3.1 Respondent submits that petitioner is liable to pay excise tax as it does not enjoy any tax-exempt status. Although there might appear a tax holiday scheme allowed petitioner under the Financial or Technical Assistance Agreement, respondent submits that such exemption is only for the period of recovery. Petitioner could have recovered its expenses only within a five (5)-year recovery period.
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> 3.2 Contrary to petitioner's allegations, respondent maintains that the recovery period does not necessarily have to be reckoned from petitioner's actual commencement of commercial operations. Respondent maintains that the reckoning point for the 5-year

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[27] Exhibit "P-57", docket vol. IV, pp. 1770-1773; and Exhibit "R-11", BIR Records, pp. 722-725.
[28] Docket vol. I, pp, 10-40.
[29] Orders dated June 27, 2017, July 21, 2017 and August 8, 2017, docket vol. I, pp. 173, 184 and 190.
[30] Docket vol. I, pp. 191-197.

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recovery period may either be the actual commencement of commercial operations, as argued by petitioner, or the date indicated or declared by petitioner in the feasibility study submitted to and approved by the Department of Environment and Natural Resources (DENR).

3.3 Section 4(g) of the DENR Department Administrative Order No. 95-23 (DAO 95-23 and Section 5(i) of DENR Department Administrative Order 96-40 (DAO 96-40), both of which define commercial operation as:

> "Commercial Production" refers to the production of sufficient quantity of minerals to sustain economic viability of mining operations reckoned from the date of commercial operations as declared by the Contractor or as stated in the feasibility study whichever comes first."

3.4 Since commercial production is to be reckoned either from the actual date declared by petitioner or by the date stated in the feasibility study, whichever comes first, and since the commercial production is considered to be the reckoning point for the 5-year recovery period, then it follows that the recovery period itself should be reckoned from either of the two.

3.5 The feasibility study was filed with the Mines and Geosciences Bureau (MGB) of the DENR on 18 March 2005. It was approved on 11 October 2005 through an Order issued by the Secretary of the DENR. The Order confirmed that the contractor of the FTAA, petitioner's predecessor, had submitted the feasibility study, and that the same had been preliminarily approved by the Director of the MGB. Since the feasibility study was submitted nearly eight (8) years ago, then it is also likely that the reckoning date for the determination of the recovery period is much earlier than when petitioner claims it to be. Such being the case, respondent submits that the recovery period, the 5-year period within which petitioner recover its pre-operating expenses, had already expired.

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3.6 Hence, petitioner was assessed deficiency Excise Tax with details as follows:

Basic Deficiency Excise Tax		P119,518,333.29
Add: Increments		
Surcharge pursuant to Section 248 of the NIRC	P29,879,583.32	
Interest up to November 30, 2016	45,711,669.39	P75,591,252.71
Total		P195,109,586.00
Add: Compromise Penalty		50,000.00
Total Inclusive of Compromise Penalty		P195,159,586.00

4. He **DENIES** the allegations in Item B (inclusive of subparagraphs), under the caption "Summary of Arguments"; the allegations in paragraphs 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, and 81, under the caption "Discussion" of the petition for being false, the truth being that Revenue Memorandum Circular (RMC) No. 17-2013 is a valid issuance as will be discussed in the following paragraphs.

4.1 The issuance of RMC No. 17-2013 providing for the revocation of BIR Ruling No. 10-2007 is a rightful exercise of the power of the Commissioner of Internal Revenue to interpret provisions of the NIRC of 1997. Section 4 of the NIRC of 1997 provides:

> "**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."

4.2 The issuance of the RMC did not violate any right of petitioner to due process as the same is merely interpretative in nature and it gives no real consequence more than what the law itself has already prescribed. It did not constitute promulgation of a revenue or regulation that may require participation or notices under the Administrative Code of 1987 or Revenue Memorandum Circular No. 20-86. In the case of *Republic, et.al. vs. Drugmaker's Laboratories, Inc., et.al.* the Honorable Supreme Court ruled:

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"In general, an administrative regulation needs to comply with the requirements laid down by Executive Order No. 292, s. 1987, otherwise known as the "Administrative Code of 1987," on prior notice, hearing, and publication in order to be valid and binding, except when the same is merely an interpretative rule. This is because "[w]hen an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance, for it gives no real consequence more than what the law itself has already prescribed.

4.3 The Honorable Supreme Court made a thorough discussion on the subject of interpretative rulings in the case of *Victorias Milling Company, Inc. vs. Commissioner of Internal Revenue*, where it held that:

"There can be no doubt that there is a distinction between an administrative rule or regulation and an administrative interpretation of a law whose enforcement is entrusted to an administrative body. When an administrative agency promulgates rules and regulations, it "makes" a new law with the force and effect of a valid law, while when it renders an opinion or gives a statement of policy, it merely interprets a pre-existing law (Parker, Administrative Law, p. 197; Davis, Administrative Law, p. 194). Rules and regulations when promulgated in pursuance of the procedure or authority conferred upon the administrative agency by law, partake of the nature of a statute, and compliance therewith may be enforced by a penal sanction provided in the law. This is so because statutes are usually couched in general terms, after expressing the policy, purposes, objectives, remedies and sanctions intended by the legislature. The details and the manner of carrying out the law are often times left to the administrative agency entrusted with its enforcement. In this case, it has been said that rules and

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> regulations are the product of a delegated power to create new or additional legal provisions that the effect of law. (Davis, op. cit., p. 194).
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> **A rule is binding on the courts so long as the procedure fixed for its promulgation is followed and its scope is within the statutory authority granted by the legislature, even if the courts are not in agreement with the policy stated therein or its innate wisdom (Davis, op. cit, 195-197)"** (Emphasis ours)

4.4 The nature of interpretative rulings is such that they do not need to be published. Nor is it necessary for copies thereof to be furnished any party in particular.

4.5 RMC 17-2013 was meant as a guideline for respondent's corps of revenue officials. It does not add anything other than what Republic Act No. 7942 (The Philippine Mining Act of 1995) and the National Internal Revenue Code of 1997 (NIRC of 1997) already prescribe.

4.6 In the case of *Abakada Guro, et. al. vs. Purisima et.al* the Honorable Supreme Court *En Banc* ruled:

> "Administrative regulations enacted by administrative agencies to implement and interpret the law which they are entrusted to enforce have the force of law and are entitled to respect. Such rules and regulations partake of the nature of a statute and are just as binding as if they have been written in the statute itself. As such, they have the force and effect of law and enjoy the presumption of constitutionality and legality until they are set aside with finality in an appropriate case by a competent court." (Citations omitted)

5. He DENIES the allegations in Item C, under the caption "Summary of Arguments"; the allegations in paragraphs 82, 83, 84, 84.1, 84.2, 85, 86, 87, 88, and 89, under the caption "Discussion" of the petition for being false, the truth being that Revenue Memorandum Circular No. 17-2013 does not violate the Section 246 of the NIRC of 1997.

5.1 The assessment for deficiency Excise tax pertains to taxable year 2014 and the related RMC was issued on February 15, 2013. Hence, there is no retroactivity of application of rulings to speak of.

6. He DENIES the allegations in Item D, under the caption "Summary of Arguments"; the allegations in paragraphs 90, 91, 92, 93, 94, 95, 96, 97, 99, under the caption "Discussion" of the petition for being false, the truth being that the grant of the tax exemption privilege to petitioner under the FTTA is already invalid for being contrary to or inconsistent with the provisions of the NIRC of 1997. Hence, the non-impairment clause does not apply to the instant case.

7. He DENIES the allegations in Item E, under the caption "Summary of Arguments"; the allegations in paragraphs 100, 101, 102, 103, under the caption "Discussion" of the petition for being false, the truth being that at the time of the issuance of the assessment against petitioner, the case of petitioner under CTA Case No. 8618 has not yet attained finality. Hence, respondent cannot pursue the execution of the bond petitioner posted in relation to the application for suspension of collection of taxes.

7.1 He DENIES the allegations in Item F, under the caption "Summary of Arguments"; the allegations in paragraphs 104, 105, 106, 107 and 108, under the caption "Discussion" of the petition for being false, the truth being that petitioner is liable for Compromise Penalties for petitioner's failure to file and/or pay the internal revenue tax at the time or times required by law or regulation pursuant to Section 255 of the NIRC, as amended and Revenue Memorandum Order (RMO) 7-2015.

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8. The decision of the Honorable Supreme Court in the case of *Commissioner of Internal Revenue vs. Bank of Philippine Islands* may be used well as a guide, thus:

> "Tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.""

The Pre-Trial Conference was set on August 31, 2017.[31] Accordingly, the Pre-Trial Brief for Petitioner[32] was filed on August 25, 2017, while the Respondent's Pre-Trial Brief[33] was filed on August 30, 2017.

Thereafter, the parties submitted their Joint Stipulation of Facts and Issues[34]. This was approved and adopted by the Court in the Pre-Trial Order[35] issued on September 29, 2017, which also terminated the Pre-Trial.

Upon motion[36] of petitioner, the Court commissioned Mr. Richard R. Lapres as the Independent Certified Public Accountant (ICPA).[37]

During trial, petitioner presented the following witnesses: Atty. Joan D. Adaci-Cattiling[38], its Senior Vice President for Legal and Human Resources; Ms. Josefina

[31] Docket vol. I, pp. 199-200.
[32] Docket vol. I, pp. 201-224.
[33] Docket vol. I, pp. 971-974.
[34] Docket vol. III, pp. 1014-1030.
[35] Docket vol. III, pp. 1059-1067.
[36] Docket vol. III, pp. 984-987.
[37] Docket vol. III, pp. 1068, and 1078-1080.
[38] Minutes of the Hearing dated October 2, 2017, docket vol. II, p. 1078; Exhibit "P-59", Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, docket vol. II, pp. 520-541.

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Mallari[39], its Finance Manager; and Mr. Richard R. Lapres[40], the Court commissioned ICPA.

On February 26, 2018, petitioner filed its Formal Offer of Evidence with Omnibus Motion[41]. In the Resolution dated July 2, 2018, the Court admitted most of petitioner's documentary exhibits. However, the Court denied the admission of Exhibits "P-394", "P-27240 to P-27241", "P-27308 to P-27311", and "P-38035 to P-38038", for not being found in the records of the case; and Exhibits "P-2569" to "P-2576", for not being found in the records of the case and for failure of petitioner's witness to identify.

Petitioner's documentary exhibits are as follows:

Exhibit:	Description:
P-1	Certificate of Filing of Amended Articles of Incorporation issued by the Securities and Exchange Commission (SEC) on January 7, 2015
P-2	Financial or Technical Assistance Agreement (FTAA) dated June 20, 1994 executed by the Government of the Republic of the Philippines and Arimco Mining Corporation (AMC)
P-3	Amended Articles of Incorporation of AMC issued by the SEC dated October 19, 1995
P-4	Assignment, Accession and Assumption Agreement executed on December 23, 1996 between Climas-Arimco Mining Corporation (CAMC) and Australasian Philippines Mining Inc. (APMI)
P-4-a	Amended and Restated Assignment, Accession and Assumption Agreement executed on September 15, 2004 between CAMC and APMI
P-5	Order dated December 9, 2004 of the Secretary of the DENR
P-6	Certificate of Filing of Amended Articles of Incorporation issued by the SEC on June 1, 2007

[39] Minutes of the Hearing dated January 22, docket vol. III, p. 1105; Exhibit "P-60", Judicial Affidavit of Ms. Josefina Mallari, docket vol. I, pp. 229-238.
[40] Minutes of the Hearing dated February 12, 2018, docket vol. III, p. 1106; Exhibit "P-61", Judicial Affidavit of Richard R. Lapres, docket vol. II, pp. 1091-1097.
[41] Docket vol. III, pp. 1107-1137.

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P-7	Partial Declaration of Mining Feasibility (PDMF) dated March 15, 2005
P-8	Order dated October 11, 2005 issued by the DENR approving the PDMF
P-9	Ore Transport Permit (ORP) dated February 13, 2013
P-9-a	OTP dated January 14, 2013
P-10	Mission Order No. 00030182 dated September 3, 2012
P-11	Apprehension Slip No. 00013424
P-12	Letter dated December 10, 2012 stamped received by the BIR on December 11, 2012 addressed to OIC-Regional Director Thelma S. Milbao and OIC Asst. Revenue District Officer (ARDO) Ma. Isabel D. Utit by petitioner
P-13	Apprehension Slip No. 00013426
P-14	Apprehension Slip No. 00013427
P-15	Apprehension Slip NO. 00013051
P-16	Apprehension Slip No. 00013054
P-17	Apprehension Slip No. 00013060
P-18	Apprehension Slip No. 00013052
P-19	Apprehension Slip No. 00013053
P-20	Apprehension Slip No. 00013055
P-21	Apprehension Slip No. 00013059
P-22	Apprehension Slip No. 00006245
P-23	Apprehension Slip No. 00013451
P-24	Apprehension Slip No. 00013452
P-25	BIR Ruling No. 10-2007 dated May 4, 2007 (*i.e.*, the Ruling)
P-27	Summary of the pre-operating expenses
P-28	Petitioner's letter dated March 27, 2013 to the DENR
P-29	Letter dated December 12, 2012 of RDO 14
P-32	Petition for Review (With Extremely Urgent Prayer for Issuance of a Suspension Order and Status Quo Ante Order) docketed as CTA Case No. 8618
P-33	CTA 2nd Division Resolution dated June 11, 2013 for CTA Case No. 8618
P-34	Submission and Motion to Approve bond dated June 24, 2013 for CTA Case No. 8618
P-35	CTA 2nd Division Resolution dated July 3, 2013 for CTA Case No. 8618
P-36	Manifestation with Urgent Motion dated April 16, 2014 for CTA Case No. 8618
P-37	CTA 2nd Division Resolution dated April 24, 2014 for CTA Case No. 8618

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P-38	Submission and Motion to Approve Surety Bond dated may 2, 2014 for CTA Case No. 8618
P-39	CTA 2nd Division Resolution dated May 7, 2014 for CTA Case No. 8618
P-40	Submission with Motion (to Approve Surety Bond and to Reduce Amount of Bond) dated June 11, 2014 for CTA Case No. 8618
P-41	CTA 2nd Division Resolution dated June 13, 2014 for CTA Case No. 8618
P-42	CTA 2nd Division Resolution dated June 17, 2014 for CTA Case No. 8618
P-43	Motion for Reconsideration [of Resolution dated June 13, 2014] dated July 1, 2014 and filed with the CTA on the same date for CTA Case No. 8618
P-44	CTA 2nd Division Resolution dated September 1, 2014 for CTA Case No. 8618
P-45	Petition for Review dated September 18, 2014 field with the CTA *En Banc* on September 22, 2014 and docketed as CTA EB 1222
P-46	CTA *En Banc* Decision dated June 16, 2016
P-47	Motion for Reconsideration [of the Decision dated June 16, 2016]
P-48	Certificate of Registration dated January 1, 1997
P-49	Letter of Authority No. 121-2015-00000019 dated March 10, 2015 addressed to petitioner
P-50	Undated Preliminary Assessment Notice (PAN) received by petitioner on February 12, 2016
P-51	Reply Letter to the PAN covering Taxable Year 2014 dated February 26, 2016 and received by the BIR Large Taxpayers Service (LTS) on February 29, 2016
P-52	Undated Formal Letter of Demand (FLD) with Assessment No. XS2014-00002 (FAN) received by petitioner on April 21, 2016
P-53	Protest Letter dated May 20, 2016 and filed with the BIR LTS on the same date
P-54	Transmittal Letter dated July 19, 2016 for the submission of relevant supporting documents to petitioner's Protest Letter and received the BIR on the same date
P-55	Final Decision on Disputed Assessment (FDDA) dated August 2, 2016 and received by petitioner on August 3, 2016
P-56	Request for Reconsideration dated September 1, 2016 and received the BIR

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	Office of the Commissioner on the same date
P-57	BIR's Decision on petitioner's Request for Reconsideration dated November 7, 2016 and received by petitioner through counsel on April 19, 2017
P-58	Official Receipt No. OR 1000000478 dated October 1, 2012 from EEI Corporation
P-59	Judicial Affidavit of Atty. Joan D. Adaci-Cattiling
P-59-A	Signature of Atty. Joan D. Adaci-Cattiling in the Judicial Affidavit
P-60	Judicial Affidavit of Josefina Mallari
P-60-A	Signature of Josefina Mallari in the Judicial Affidavit
P-61	Judicial Affidavit of Richard R. Lapres
P-61-A	Signature of Richard R. Lapres in the Judicial Affidavit
P-62	Independent Certified Public Accountant Report dated October 27, 2017 with attached Annexes" A" to "BY"
P-62-A	Signature of Richard R. Lapres in the Independent Certified Public Accountant Report
P-62-B	Compact Disk (CD) submitted with the Independent Certified Public Accountant Report
P-62-C	USB submitted with the Independent Certified Public Accountant Report
P-62-D	Transmittal Letter from Mr. Richard Lapres for the CD and USB dated October 30, 2017 and received the CTA 2nd Division on the same date
P-63 to P-70 including sub-exhibits	Certified true copy of filed excise tax returns and payment details for the period June to December 2014
P-71 to P-573, including sub-exhibits	Summary and photocopies of official receipts, sales invoices and other alternative documents such as billing statements, contracts
P-574 to P-917, including sub-exhibits	Summary and photocopies of official receipts sales invoices and other alternative documents such as billing statements, contracts
P-918 to P-927, P-930 to P-941	Summary and photocopies of official receipts sales invoices and other alternative documents such as billing statements, contracts
P-946 to P-1309, P-1312 to P-1650, including	Summary and photocopies of official receipts sales invoices and other

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sub-exhibits	alternative documents such as billing statements, contracts
P-1651 to P-2932	Summary and photocopies of official receipts sales invoices and other alternative documents such as billing statements, contracts
P-2934 to P-3262, P-3265 to P-3318, including sub-exhibits	Summary and photocopies of official receipts sales invoices and other alternative documents such as billing statements, contracts
P-3319 to P-4271, P-4273 to P-4868, P-4873 to P-5108, P-5125 to P-5153, P-5155 to P-5266, P-5268 to P-6021, including sub-exhibits	Summary and photocopies of official receipts sales invoices and other alternative documents such as billing statements, contracts
P-6022 to P-6303, P-6366 to P-6581, P-6674 to P-7324, including sub-exhibits	Summary and photocopies of official receipts sales invoices and other alternative documents such as billing statements, contracts
P-7325 to P-7499, P-7506 to P-7765, including sub-exhibits	Summary and photocopies of official receipts sales invoices and other alternative documents such as billing statements, contracts
P-7766 to P-13714, P-13716 to P-13717, P-13719 to P-17326, P-13728 to P-13924, P-13963 to P-15301, P-15308 to P-19532, P-19534 to P-19580, P-19582 to P-19872, P-19888 to P-20685, P-20687 to P-20688, P-20690 to P-22768, P-22770 to P-22899, P-22901 to	Summary and photocopies of official receipts sales invoices and other alternative documents such as billing statements, contracts

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P-23694 to P-23969 to P-25912, P-25914 to P-26148, P-26150 to P-26150 to P-26173, including sub-exhibits	
P-26176 to P-26787, P-26816 to P-27421, P-27439 to P-28354, P-28359 to P-31480, P-31496 to P-31498, P-31502 to P-33016, P-33018, P-33020 to P-33684, P-33686 to P-35083, P-35100 to P-35251, P-35857, P-35859 to P-36318, P-36320 to P-36910, P-36912 to P-37201, P-37203 to P-40672, P-40677 to P-40678, P-40683 to P-40686, P-40691 to P-40692, P-40697 to P-41361, P-41363 to P-41864, P-41869 to P-41883, P-41888 to	Summary and photocopies of official receipts sales invoices and other alternative documents such as billing statements, contracts

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P-43384, P-43386 to P-43546, P-43551 to P-43817, P-43819 to P-43901, P-43904 to P-45327, P-45330 to P-45700, P-45703 to P-45712, P-45723 to P-46045, P-46047 to P-46455, P-46459 to P-47400, P-47407 to P-47409, P-47413 to P-417415, P-47428 to P-48364 including sub-exhibits	
P-48365 to P-50276, P-50278 to P-50303, P-50306 to P-50345, P-50357 to P-50358, P-50360 to P-50361, P-50363 to P-50439, P-50441 to P-50442, P-50444 to P-50445, P-50447 to P-50448, P-50450 to P-50451, P-50454 to P-50455, P-50457 to P-50464, P-50466 to P-50471,	Summary and photocopies of official receipts sales invoices and other alternative documents such as billing statements, contracts

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P-50473 to P-50474, P-50476 to P-50483, P-50485 to P-50488, P-50490 to P-50491, P-50493 to P-50494, P-50496 to P-50499, P-50501 to P-50506, P-50508 to P-50509, P-50511 to P-50516, P-50519 to P-50544, P-50546 to P-50547, P-50550 to P-50566, P-50568 to P-50613, P-50615 to P-50616, PP-50618 to P-50619, P-50621 to P-50631, P-50633 to P-51786, P-51791 to P-52235, P-52238 to P-52774, P-52776 to P-52781, P-52783 to P-52893, P-52895 to P-53540, P-53542 to P-53597, P-53599 to P-53845, including sub-exhibits	
P-53865, including sub-exhibits	General ledger for Capital Pre-operating expenses – with Account Code Nos. 1700015, 1700020, 1700030, 1711000,

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	1712000, 0109509505, 01019509510, 01019509515
P-53866	Certified Copy of Net Cash Flow Computation
P-53867 including sub-exhibits	Sales Invoices /Provisional Invoices from July 2013 to December 2014
P-53868	General Ledger of Deductible Expenses and On-Going Capital Expenditures

On the other hand, respondent presented as his sole witness, Revenue Officer Saidamen T. Marohombsar[42]. Subsequently, respondent filed his Formal Offer of Evidence[43] on July 16, 2018. In the Resolution[44] dated October 2, 2018, the Court admitted all of respondent's documentary evidence, Exhibits "R-1" to "R-11".

Respondent offered the following exhibits, to wit:

Exhibit:	Description:
R-1	Letter of Authority (LOA) No. 121-2015-00000019/ SN: eLA201100087254 dated 20 March 2015
R-2	Letter dated 12 March 2015 requesting presentation of records
R-3	Memorandum with attached Revenue Officer's Report and Matrices of Computations dated 03 December 2015 recommending the issuance of the Preliminary Assessment Notice (PAN)
R-4	Preliminary Assessment Notice (PAN) with Details of Discrepancies
R-5	Memorandum with attached Revenue Officer's Report and Matrices of Computations dated 29 march 2016 recommending the issuance of the Formal Letter of Demand (FLD)
R-6	Formal Letter of Demand (FLD) with Details of Discrepancies
R-7	Final Assessment Notice (FAN) dated 15 April 2016
R-8	Memorandum dated 14 July 2016 recommending the issuance of the Final Decision on Disputed Assessment (FDDA)
R-9	Final Decision on Disputed Assessment (FDDA) dated 02 August 2016

[42] Minutes of the Hearing dated July 2, 2018, docket vol. IV, p. 1857; Exhibit "P-61", Judicial Affidavit of Revenue Officer Saidamen T. Marohombsar, docket vol. III, pp. 999-1008.
[43] Docket vol. IV, pp. 1862-1867.
[44] Docket vol. IV, pp. 1874-1875.

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R-10	Memorandum dated 07 November 2016 recommending the issuance of the denial of the request for reconsideration
R-11	Letter dated 07 November 2016 denying petitioner's request for reconsideration with attached computation

Respondent filed his Memorandum[45] on October 31, 2018, while the Memorandum for Petitioner[46] was filed on November 12, 2018. Accordingly, the case was submitted for decision in the Resolution[47] dated November 23, 2018.

ISSUES

Petitioner submits the following issues[48] for resolution of this Court:

A. Is petitioner exempt from excise tax during the so-called recovery period? If so, was petitioner exempt from excise tax for taxable year 2014? If petitioner is exempt from excise tax for taxable year 2014, is the assessment for deficiency excise tax for taxable year 2014 proper?

B. Did respondent observe the proper procedural requirements before issuing the Assailed RMC?

C. May respondent apply retroactively the revocation of the Ruling?

D. Did the revocation of the Ruling through the Assailed RMC violate the Non-Impairment Clause of the 1987 Constitution?

E. Is the respondents remedy the execution on the bonds?

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[45] Docket vol. IV, pp. 1876-1884.
[46] Docket vol. II, pp. 1886-1924.
[47] Docket vol. II, p. 1175.
[48] Proposed Stipulation of Facts, JSFI, docket vol. III, p. 1015.

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F. May compromise penalty be imposed without petitioner's conformity?

On the other hand, respondent submits the following issue for resolution of this Court:

A. Whether petitioner has factual and legal bases to refute the deficiency excise tax assessment for taxable year ended 31 December 2014, in the aggregate amount of One Hundred Ninety-Five Million One Hundred Fifty-Nine Thousand Five Hundred Eighty-Six Pesos (₱195,159,586.00).

The foregoing issues may be summarized as follows:

Whether petitioner is liable to pay the assessed deficiency excise taxes including interest and penalties for taxable year 2014.

PETITIONER'S ARGUMENTS

Petitioner argues that it is exempt from excise tax from the date of approval of its Mining Project Feasibility Study up to the end of the recovery period pursuant to the FTAA, Section 81 of the Philippine Mining Act and Section 236 of DAO 95-23. It contends that it is exempt from excise tax pursuant to the FTAA and the Philippine Mining Act of 1995 and its IRR. Petitioner avers that its excise tax exemption is confirmed in the BIR Ruling No. 10-2007. It contends that since petitioner is exempt from excise tax during the so-called recovery period, petitioner is exempt from payment thereof for taxable year 2014.

Moreover, petitioner alleges that RMC 17-2013 is null and void for failure to observe the proper procedural requirements before its issuance. It contends that the RMC failed to comply with the requisite notice and public hearing before its issuance and that it violated the Implementing Guidelines of the Memorandum of Agreement between the Bureau of Internal Revenue and the Mines and Geosciences Bureau. Assuming arguendo that the revocation of the Ruling is valid, the retroactive application of the assailed RMC violates Section 246 of the National Internal Revenue Code (NIRC) of 1997, as amended.

Petitioner further argues that the tax exemption privilege of petitioner under the FTAA is protected by the Non-Impairment Clause of the 1987 Constitution since it is a contractual tax exemption granted by the government in exchange for a valid and material consideration.

Lastly, petitioner contends that even assuming arguendo that petitioner is liable for excise tax on its removal of minerals during the recovery period, the respondent's remedy is to execute on the bonds.
It also submits that compromise penalty may not be imposed without petitioner's conformity.

RESPONDENT'S ARGUMENTS

On the other, respondent argues that petitioner is liable to pay deficiency Excise Tax for taxable year ended December 31, 2014 since it does not enjoy any tax-exempt status. While respondent submits that there might be a tax holiday scheme under the FTAA, he contends that the exemption is only for the five (5)-year period of recovery. He maintains that the reckoning point of the recovery period may either be the actual commencement of commercial operation or the date indicated or declared by petitioner in the feasibility study submitted to the DENR, whichever is earlier. In this case, respondent argues that the 5-year recovery period within which petitioner may recover its pre-operating expenses has already expired.

Moreover, respondent contends that RMC No. 17-2013 is a valid issuance since it is a rightful exercise of the power of the CIR to interpret provisions of the NIRC of 1997, as amended. He alleges that the issuance of the RMC did not violate any right of petitioner to due process as the same is merely interpretative in nature and gives no real consequence more than what the law has already prescribed.

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Furthermore, respondent submits that RMC No. 17-2013 does not violate Section 246 of the NIRC of 1997, as amended, since it is but an interpretation of an already existing law.

Respondent also argues that the grant of tax exemption privilege to petitioner under the FTAA is already invalid for being contrary to or inconsistent with the provisions of the NIRC of 1997, as amended. He avers that the non-impairment clause does not apply in this case.

Lastly, respondent contends that petitioner is liable for compromise penalty for its failure to file and/or pay the internal revenue tax at the time or times require by law or regulation.

The Court has jurisdiction over the instant Petition for Review.

Before proceeding to the main issue, the Court shall determine first the timeliness of the filing of this Petition for Review.

Pertinent in determining whether the Court has jurisdiction over the present petition is Section 228 of the NIRC of 1997, as amended, and Section 3.1.5 of RR No. 12-99[49], the relevant portions of which reads:

> "SEC. 228. *Protesting of Assessment.* — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however,* That a preassessment notice shall not be required in the following cases:

[49] 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, dated September 6, 1999.

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The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable."

"**3.1.5 Disputed Assessment**. — The taxpayer or his duly authorized representative may protest administratively against the aforesaid formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof. xxx xxx xxx

The taxpayer shall submit the required documents in support of his protest within sixty (60) days from date of filing of his letter of protest, otherwise, the assessment shall become final, executory and

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> demandable. The phrase "submit the required documents" includes submission or presentation of the pertinent documents for scrutiny and evaluation by the Revenue Officer conducting the audit. The said Revenue Officer shall state this fact in his report of investigation.
>
> If the taxpayer fails to file a valid protest against the formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof, the assessment shall become final, executory and demandable.
>
> If the protest is denied, in whole or in part, by the Commissioner, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision, otherwise, the assessment shall become final, executory and demandable.
>
> xxx xxx xxx"

Based on the foregoing provisions, petitioner has thirty (30) days from April 19, 2017, the date of receipt of the Decision dated November 7, 2016, or until May 19, 2017 within which to appeal the said decision before this Court. Thus, the Petition for Review filed on May 19, 2017[50] was timely filed.

Since the Petition for Review was filed on time, this Court has jurisdiction to take cognizance of the same pursuant to Section 7(a)(1) of Republic Act (RA) No. 1125, as amended by Section 7 of RA No. 9282.[51]

The Court shall now proceed to resolve the validity of the assessment against petitioner.

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[50] Docket vol. I, pp. 10-40.

[51] SEC. 7.Jurisdiction. — The CTA shall exercise:

(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:

(1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;

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Petitioner failed to present evidence to prove that the imposition of excise tax was made during the recovery period.

Petitioner argues that it is exempt from excise tax from the date of approval of its Mining Project Feasibility Study up to the end of the recovery period pursuant to the FTAA, Section 81 of the Philippine Mining Act and Section 236 of DAO 95-23. Thus, it contends that it exempt from payment thereof for taxable year 2014.

Respondent, on the other hand, submits although there might be a tax holiday scheme under the FTAA, such exemption is only for the period of recovery. He posits that the reckoning point for the five (5)-year recovery period has already expired.

Section 81 of Republic Act (RA) No. 7942, otherwise known as the Philippine Mining Act of 1995, provides:

> "CHAPTER XIV
> GOVERNMENT SHARE
>
> Section 81. Government Share in Other Mineral Agreements. - The share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the: (a) capital investment of the project, (b) risks involved, (c) contribution of the project to the economy, (d) other factors that will provide for a fair and equitable sharing between the Government and the contractor. The Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

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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*)

While the foregoing provision does not specify a period to recover the pre-operating expenses, the FTAA[52] between petitioner and the government, stipulates the period within which to recover its pre-operating expenses, exploration, and development expenditures, to wit:

"Section XI
FISCAL REGIME

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.

[52] Exhibit "P-2", docket vol. III, pp. 1150-1203.

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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.

xxx xxx xxx"[53](*Emphasis supplied*)

According to 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."[54]

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."[55]

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. 95-23[56], which was

[53] Exhibit "P-2", docket vol. III, p. 1173.
[54] Exhibit "P-2", docket vol. III, p. 1155.
[55] Exhibit "P-28", docket vol. III, pp. 1285-1286
[56] SUBJECT: Revised Implementing Rules and Regulations of Republic Act No. 7942, Otherwise Known as the "Philippine Mining Act of 1995", August 15, 1995.

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later revised in DAO No. 96-40[57], and DAO No. 2010-21[58] states:

"**SEC. 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:

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 share 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 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**: *Provided*, That in case of projects incurring very large investments with high

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[57] SUBJECT: Revised Implementing Rules and Regulations of Republic Act No. 7942, Otherwise Known as the "Philippine Mining Act of 1995", December 19, 1996.
[58] SUBJECT: PROVIDING FOR A CONSOLIDATED DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES ADMINISTRATIVE ORDER FOR THE IMPLEMENTING RULES AND REGULATIONS OF REPUBLIC ACT NO. 7942, OTHERWISE KNOWN AS THE "PHILIPPINE MINING ACT OF 1995", June 28, 2010.

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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. (*Emphasis supplied*)

From the foregoing, it is clear that: (1) "government share" includes excise tax; (2) the collection of "government share" shall not commence until the contractor has fully recovered pre-operating, exploration and development expenses; and (3) the period of recovery shall be from the date of commercial operation, which shall not exceed 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.

Based on 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 terms shall mean:

xxx xxx xxx

i. "Commercial 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*)

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Petitioner submitted a Partial Declaration of Mining Feasibility[59] 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.[60]

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

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[59] Exhibit "P-7", docket vol. III, pp. 1235-1236.
[60] Exhibit "P-8", docket vol. III, pp. 1237-1238.

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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."

xxx xxx xxx

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." (*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.

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. 10-2007[61] 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; xxx". Said ruling states that "the recovery period shall be reckoned from the date of commercial operation xxx".

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[62] 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 <u>April 1, 2013</u>, which is the first day of the second calendar quarter.", as proof of the commencement of its commercial production.

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[61] Exhibit "P-25", docket vol. III, pp. 1278-1283.
[62] Exhibit "P-28", docket vol. III, pp. 1285-1286

From the foregoing, petitioner has, from the date of commencement of commercial production, which was on April 1, 2013, a maximum period of 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 first, of exemption from excise tax.

Considering that the exemption is based on whichever comes first between the 5-year period and the full recovery of petitioner's pre-operating expenses, *i.e.,* when the aggregate of the "Net Cash Flows from the Mining Operations" is equal to the aggregate of its pre-operating expenses, and ultimately, to ascertain whether it is proper to impose excise taxes on the removals of mineral ores and copper concentrates, the amount of "Net Cash Flows" and "Pre-Operating Expenses" should first be determined.

The ICPA, Mr. Richard Lapres, testified that as of December 31, 2014, petitioner is still under the recovery period, to wit:

> "Q-9: After performing the procedures outlined in your Report, what were your overall findings, if any?
>
> A-9: It is my conclusion as provided therein that the petitioner paid excise taxes for the period June to December 2014 in the aggregate amount of **₱136,407,793.17**.
>
> The petitioner's excise taxes due for the period January to May 2014 in the aggregate amount **of ₱118,931,018** was covered by the Bond deposited.
>
> Petitioner has incurred **USD310,519,081** as valid pre-operating expenses as of March 31, 2013.

> As of December 31, 2014, petitioner is still under the recovery period as neither five (5) years have elapsed from the commencement of commercial operations on April 1, 2013, nor has the petitioner fully recovered its pre-operating expenses as well as property expenses. Petitioner's actual net cash flows from mining operations has not exceeded the valid pre-operating expenses it incurred."[63]

Petitioner alleged that its pre-operating expenses amounted to US$429,153.9221[64] as of March 31, 2013. However, other than the testimony of ICPA Richard R. Lapres that petitioner is yet to recover its pre-operating expenditures, it 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.

Accordingly, for failure of OGPI to prove that it has valid pre-operating expenses to recover, and that it has yet to recover the same, and thus, it is still under the period of recovery, the Court cannot grant the instant Petition for Review. As stated by the Court *En Banc* in a case involving the same parties:

> "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 operation, or until the date of actual recovery, whichever comes earlier. <u>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,</u>

[63] Exhibit "P-61", Judicial Affidavit of Richard R. Lapres, docket vol. III, p. 1094.
[64] Exhibit "P-27".

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as recommended by the Director of the MGB, and as mandated under DENR AO No. 1999-56."

Moreover, other than petitioner's argument that it is exempt from payment of excise tax, no other reason is raised to cancel respondent's assessment. Thus, this Court is constrained to uphold the assessment as to the deficiency excise taxes.

RMC No. 17-2013 cannot be given retroactive application in the instant case. BIR Ruling No. 10-2007 is still applicable.

The BIR Ruling No. 10-2007[65], issued by the CIR on May 4, 2007, confirmed petitioner's exemption from the payment of excise tax upon the date of 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 operation and shall be for a maximum period of five (5) years or until the date of actual recovery of APMI's pre-operating, exploration, and development expenses, whichever comes earlier, as provided by Section 81 of the Philippine Mining Act, its implementing rules and regulations particularly DAO 96-40; and the FTAA between the Philippine Government and APMI.

On February 15, 2013, the CIR issued Revenue Memorandum Circular (RMC) No. 17-2013[66] which, among others, revoked BIR Ruling No. 10-2007 and with it, petitioner's exemption from excise tax during the recovery period.

Petitioner argues that RMC No. 17-2013 is null and void for failure to observe the proper procedural requirements before its issuance. It also alleges that the retroactive application of the RMC violates Section 246 of the NIRC of 1997, as amended.

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[65] Exhibit "P-25", docket vol. III, pp. 1278-1283.
[66] SUBJECT: Clarifying the Taxes Due From Financial or Technical Assistance Agreement (FTAA) Contractors During (Recovery Periods),February 15, 2013.

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On the other hand, respondent argues that RMC No. 17-2013 is a valid issuance as is it a rightful exercise of the power of the CIR to interpret provisions of the NIRC of 1997, as amended. Moreover, he contends that RMC No, 17-2013 does not violate Section 246 of the NIRC of 1997, as amended.

This issue has already been settled by the Court *En Banc*, in the recent case of *Oceanagold (Philippines), Inc. vs. Commissioner of Internal Revenue*[67], which involves the same parties and the same relevant issue as to the retroactive application of RMC No. 17-2013 on the revocation of BIR Ruling No. 10-2007. The Court *En Banc*, held that RMC No. 2013 cannot be given retroactive application since it is prejudicial to petitioner, thus BIR Ruling No. 10-2007 is still applicable to petitioner's case, to wit:

> "It was earlier mentioned that petitioner had questioned in its Petitions for Review before the Court in Division as well as its Petition for Review before this Court *En Banc* the retroactive application of RMC No. 17-2013, specifically its revocation of BIR Ruling No. 10-2007. Citing Section 246 of the 1997 NIRC, petitioner asserts that having taken the tax authorities at their word through the issuance of BIR Ruling No. 10-2007, it is the height of injustice for respondent to change the rules in the middle of the game through the retroactive application of RMC No. 17-2013.
>
> Section 246 of the 1997 NIRC states:
>
>> "SEC. 246. *Non-Retroactivity of Rulings*. – **Any revocation, modification or reversal** of any of the rules and regulations promulgated in accordance with the preceding Sections **or any of the rulings** or circulars **promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers**, except in the following cases:

[67] CTA EB No. 1904 (8995 & 9034), August 16, 2019.

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(a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;

(b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or

(c) Where the taxpayer acted in bad faith." (*Emphasis supplied*)

It is clear from the above-cited provision that rulings and circulars promulgated by the Commissioner of Internal Revenue have no retroactive application where to so apply them would be prejudicial to taxpayers.

Given the relevant factual circumstances of the present case vis-a-vis the above-cited provision, the Court *En Banc* holds that petitioner is entitled to the benefit of the principle on non-retroactivity of rulings and circulars under Section 246 of the 1997 NIRC, in the absence of showing of bad faith on its part. Accordingly, what is applicable to petitioner's case should still be BIR Ruling No. 10-2007.

In the present case, the prejudicial effect of the retroactive application of RMC No. 17-2013 and the concomitant revocation of BIR Ruling No. 10-2007 is beyond doubt. The issuance of RMC No. 17-2013 and the attendant revocation of BIR Ruling No. 10-2007 effectively served as legal basis for the assessment of deficiency excise taxes against petitioner. On the other hand, none of the exceptions stated under Section 246 of the 1997 NIRC that would prevent the application of the non-retroactivity rule was shown to exist."

Based on the foregoing, it is clear that RMC No. 2013 cannot be given retroactive application since it is prejudicial to petitioner. Thus BIR Ruling No. 10-2007 which confirmed petitioner's exemption from the payment of excise tax upon the date of approval of the Mining Project Feasibility Study up

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to the end of the recovery period is still applicable in the instant case.

Compromise penalty may not be imposed in the present case.

Considering that petitioner is not liable for deficiency excise taxes for taxable year 2014, there is no factual or legal basis for its imposition in this case.

Moreover, absent a showing that herein petitioner consented to the compromise penalties, its imposition should be deleted. The imposition of the same without the conformity of the taxpayer is illegal and unauthorized.[68]

There is nothing in the records which would show that petitioner consented to the compromise penalties. Consequently, the compromise penalties should not be imposed and must be cancelled.

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 hereby **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 (396 days) (total amount due as	42,334,877.97

[68] *Commissioner of Internal Revenue vs. Lianga Bay Logging Co., Inc., et. al.*, G.R. No. L-35266, January 21, 1991.

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of November 30, 2016 x .20 x 1.0849 years)	
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.[69]

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

SO ORDERED.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

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

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

[69] Section 6 of Revenue Regulations No. 21-2018 dated September 14, 2018.

ATTESTATION

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

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 case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice