REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

FCF MINERALS CORPORATION,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 10003

Members:

DEL ROSARIO, *P.J., Chairperson,*
MANAHAN, *and*
REYES-FAJARDO, *JJ.*

Promulgated:

OCT 18 2021 2:00 p.m.

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DECISION

MANAHAN, *J.:*

This is a *Petition for Review* filed on January 3, 2019 by petitioner FCF Minerals Corporation against respondent Commissioner of Internal Revenue (CIR), praying for a refund or issuance of a tax credit certificate in the aggregate amount of ₱7,012,122.00, representing alleged erroneously paid documentary stamp tax (DST), for taxable year 2017.[1]

THE FACTS

Petitioner FCF Minerals Corporation is a corporation organized and existing under Philippine laws and engaged in the exploration, development and commercial operation of mineral claims.[2] It is registered with the Bureau of Internal Revenue (BIR) under Tax Identification No. 238-154-069-000.[3]

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[1] Summary of the Case, Pre-Trial Order dated October 1, 2019, Docket – Vol. III, p. 1485; Summary of the Case, Amended Pre-Trial Order dated July 7, 2020, Docket – Vol. III, p. 1976.

[2] Par. 1, Joint Stipulation of Facts, *Joint Stipulation of Facts and Issues* (JSFI), Docket – Vol. I, p. 517.

[3] Par. 2, Joint Stipulation of Facts, JSFI, Docket – Vol. I, p. 517.

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Respondent Commissioner of Internal Revenue is empowered to perform the duties of his office, including the duty to act upon and decide administrative claims for refund of erroneously and/or illegally paid internal revenue taxes as provided by law.[4]

Petitioner entered into a Financial or Technical Assistance Agreement (FTAA) No. 04-2009-II dated September 19, 2009, with the Republic of the Philippines, in accordance with Republic Act (RA) No. 7942.[5]

On December 15, 2016, petitioner, Metals Exploration Plc, and Metals Exploration Pte. Ltd., entered into an Amendment Deed with several financial institutions, covering a total loan commitment of US$28,160,000.00.[6] For the said transaction, petitioner paid DST[7] amounting to ₱7,012,122.00 on January 3, 2017.[8]

Subsequently, on March 14, 2018, petitioner filed an administrative claim for refund with the BIR relative to the said payment of DST,[9] invoking Section 81 of the Mining Act, Department of Environment and Natural Resources (DENR) Administrative Order No. 2007-12, and petitioner's FTAA with the government.

On January 3, 2019, petitioner filed the instant *Petition for Review.*[10]

Respondent filed his *Answer* on May 2, 2019.[11] On May 6, 2019, respondent transmitted the *BIR Records* for this case, consisting of one hundred sixty-seven (167) pages in one (1) folder.[12]

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[4] Par. 3, Joint Stipulation of Facts, JSFI, Docket – Vol. I, p. 517.
[5] Exhibit "P-6", Docket – Vol. III, pp. 1646, 1741 to 1766, 1720 to 1740, and 1702 to 1710.
[6] Exhibit "P-2", Docket – Vol. III, pp. 1575 to 1627
[7] Exhibits "P-1" to "P-1-b", Docket – Vol. III, pp. 1570 to 1574.
[8] Exhibit "P-2", Docket – Vol. III, p. 1599
[9] Exhibits "P-3" and "P-3-a", Docket – Vol. III, pp. 1628 to 1632.
[10] Docket – Vol. I, pp. 10 to 38.
[11] Docket – Vol. I, pp. 439 to 445.
[12] Respondent's *Compliance* dated May 6, 2019, Docket – Vol. I, pp. 448 to 450.

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The Pre-Trial Conference was set and held on July 4, 2019.[13] Prior thereto, respondent's *Pre-Trial Brief* was filed on June 26, 2019,[14] while petitioner's *Pre-Trial Brief* was posted on June 28, 2019.[15]

On August 13, 2019, the parties submitted their *Joint Stipulation of Facts and Issues.*[16] Subsequently, the Pre-Trial Order dated October 1, 2019 was issued,[17] deeming the termination of the Pre-Trial. Upon filing of petitioner's *Motion,*[18] however, the Pre-trial Order was amended on July 7, 2020.[19]

As trial ensued, petitioner presented its testimonial and documentary evidence. Petitioner offered the testimonies of the following individuals, namely: (1) Mr. Francis Caasi, petitioner's Document Controller;[20] and (2) Mr. Tommy E. Alfonso, petitioner's Financial Comptroller.[21]

On February 12, 2020, petitioner filed its *Offer of Exhibits.*[22] Respondent submitted his *Comment (On Petitioner's Formal Offer of Exhibits)* on February 17, 2020.[23]

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[13] *Notice of Pre-trial Conference* dated May 8, 2019, Docket – Vol. I, pp. 456 to 457; Minutes of the hearing held on, and Order dated, July 4, 2019, Docket – Vol. I, pp. 474 to 476, and 478 to 479, respectively.
[14] Docket – Vol. I, pp. 462 to 464.
[15] Docket – Vol. I, pp. 466 to 472.
[16] Docket – Vol. I, pp. 517 to 521.
[17] Docket – Vol. III, pp. 1485 to 1491.
[18] Docket – Vol. III, pp. 1505 to 1507.
[19] Docket – Vol. III, pp. 1976 to 1982.
[20] Exhibit "P-19", Docket – Vol. II, pp. 1087 to 1093; Minutes of the hearing held on, and Order dated, November 5, 2019, Docket – Vol. III, p. 1524 to 1525, and 1528 to 1529, respectively.
[21] Exhibit "P-20", Docket – Vol. II, pp. 528 to 547; Minutes of the hearing held on, and Order dated, December 10, 2019, Docket – Vol. III, p. 1535 to 1538, and 1542 to 1543, respectively.
[22] Docket – Vol. III, pp. 1561 to 1568.
[23] Docket – Vol. III, pp. 1963 to 1965.

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In the Resolution dated June 4, 2020,[24] the Court admitted petitioner's exhibits, *except* for Exhibit "P-15-m", for failure to present the original for comparison.

At the hearing held on September 1, 2020,[25] respondent's counsel manifested that he will no longer present any witness as no report was submitted, and thus, the parties were given thirty (30) days from notice to file their respective memorandum.

Petitioner's *Memorandum* was filed on September 15, 2020,[26] while respondent's *Memorandum* was posted on September 24, 2020.[27]

This case was submitted for decision on October 21, 2020.[28]

THE ISSUE

As stipulated by the parties, the sole issue for the Court's resolution is as follows:

> "Whether petitioner is entitled to the refund/issuance of tax credit certificate in the aggregate amount of ₱7,012,122.00 representing its allegedly erroneous documentary stamp tax payment for the taxable year 2017."[29]

Petitioner's arguments:

Petitioner argues that: (1) the subject transaction falls within the period of exemption from DST payment; (2) the Supreme Court pronounced that the grant of incentives to FTAA contractors from the date of approval of their

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[24] Docket – Vol. III, pp. 1972 to 1973.
[25] Minutes of the hearing held on, and Order dated, September 1, 2020, Docket – Vol. III, pp. 1983 to 1986.
[26] Docket – Vol. III, pp. 1988 to 2014.
[27] Docket – Vol. III, pp. 2019 to 2026.
[28] Docket – Vol. III, p. 2030.
[29] Joint Stipulation of Issue, JSFI, Docket – Vol. I, pp. 517 to 518.

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Declaration of Mining Project Feasibility[30] up to the end of their recovery period constitutes a waiver of national taxes of the Government; (3) this Court has recently affirmed petitioner's position that the collection of "Government share" in the FTAA, including DST, shall only commence after the FTAA contractor has fully recovered its pre-operating expenses; (4) respondent has no authority to interpret the provisions of the Mining Act; (5) the Tax Exemption Certificates issued by the Mines and Geosciences Bureau (MGB) are the final written attestations on petitioner's exemption from DST; (6) the FTAA creates a contractual obligation between the Government and petitioner which must be enforced and respected; and, (7) petitioner is entitled to refund of ₱7,012,122.00, representing the amount of DST which it erroneously paid to the BIR.

Respondent's counter-arguments:

Respondent counters that there is no clear legal basis that warrants the tax exemption claimed by petitioner; that respondent has the power to interpret tax laws and other related matters; that there is no tax exemption granted under the FTAA; and, that claims for refund are construed strictly against the taxpayer and in favor of the government.

THE COURT'S RULING

The instant *Petition for Review* lacks merit.

Governing provisions for refund claims

Sections 204(C) and 229 of the National Internal Revenue Code (NIRC) of 1997 read:

> "SEC. 204. *Authority of the Commissioner to Compromise/Abate and Refund or Credit Taxes.* — The Commissioner may —

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[30] Exhibit "P-7", Docket – Vo. III, pp. 1647 to 1649.

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(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." *(Emphasis added)*

"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.

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 a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." *(Emphases added)*

The aforequoted provisions are clear: within two (2) years from the date of payment of tax, the claimant must first file an administrative claim with respondent before filing its judicial claim with the courts of law. Both claims must be filed within a two (2)-year reglementary period. Timeliness of the filing of the claim is mandatory and jurisdictional, and the Court cannot take cognizance of a judicial claim for refund filed either prematurely or out of time. It is worthy to stress that as for the judicial claim, tax law even explicitly provides that it be

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filed within two (2) years from payment of the tax "regardless of any supervening cause that may arise after payment."[31]

Moreover, the foregoing provisions allow the recovery of taxes erroneously or illegally collected. An "erroneous or illegal tax" is defined as one levied without statutory authority, or upon property not subject to taxation, or by some officer having no authority to levy the tax, or one which in some other similar aspect is illegal.[32]

Thus, for the instant claim for refund to prosper, petitioner must not only establish that it has timely filed its refund claim, it must likewise prove that the subject DST was erroneously or illegally paid.

Petitioner timely filed its administrative and judicial claims.

The following dates are relevant and significant to the subject claim for refund, to wit:

Date of payment of DST	Last day of 2-year period to file claim for refund	Date of filing of administrative claim for refund	Date of filing of judicial claim for refund
January 3, 2017	January 3, 2019	March 14, 2018	January 3, 2019

Given the above dates, the last day to file the administrative and judicial claims is on January 3, 2019. Since the administrative claim for petitioner's DST payments was filed on March 14, 2018,[33] and the judicial claim was filed

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[31] *Commissioner of Internal Revenue vs. San Miguel Corporation, et seq.*, G.R. Nos. 180740 and 180910, November 11, 2019.
[32] *Commissioner of Internal Revenue vs. Pilipinas Shell Petroleum Corporation*, G.R. No. 188497, April 25, 2012, citing the definition provided in BLACK'S LAW DICTIONARY, Fifth Edition, p. 486.
[33] Exhibits "P-3" and "P-3-a", Docket – Vol. III, pp. 1628 to 1632.

on January 3, 2019,[34] the claim for refund was timely filed within the two-year prescriptive period.

Petitioner is subject to DST. However, under the law, the collection thereof, inter alia, is merely deferred until the lapse of the recovery period. Nevertheless, per the subject FTAA, the payment of DST during such period is allowed, and is not considered as erroneous or illegal.

Sections 81 and 97 of RA No. 7942,[35] otherwise known as the "Philippine Mining Act of 1995", provide:

> "SEC. 81. *Government Share in Other Mineral Agreements.* — xxx
>
> **The Government share <u>in financial or technical assistance agreement</u> 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 <u>all such other taxes</u>**, duties and fees **as provided for under existing laws.**
>
> **The <u>collection</u> of Government share in <u>financial or technical assistance agreement</u> shall commence <u>after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures</u>, inclusive.**" *(Emphases and underscoring added)*
>
> "SEC. 97. *Non-payment of Taxes and Fees.* — **<u>Failure to pay taxes</u> and fees due the Government for two (2) consecutive years shall cause the cancellation of the** exploration permit, mineral agreement, **financial or technical assistance agreement** and other agreements and

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[34] Docket – Vol. I, pp. 10 to 38.
[35] AN ACT INSTITUTING A NEW SYSTEM OF MINERAL RESOURCES EXPLORATION, DEVELOPMENT, UTILIZATION AND CONSERVATION.

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> the re-opening of the area subject thereof to new applicants." *(Emphasis and underscoring added)*

A cursory reading of the foregoing provisions reveals that the intention of the legislature is to impose and collect taxes on the concerned contractor[36] in an FTAA[37], albeit the said taxes are treated as part of the government's share therein. Contrary to petitioner's interpretation, Sections 81 and 97 of RA No. 7942 do not speak of any tax exemption. Neither is it stated that the concerned FTAA contractor is not liable for any tax at all at any given time. Specifically, as clearly worded, the foregoing provisions do not contemplate any exemption from the DST. In fact, it is even clear that failure to pay taxes, *inter alia*, for two (2) consecutive years shall cause the cancellation of the pertinent FTAA.

Nonetheless, on the basis of the last paragraph of Section 81 of RA No. 7942, it is clear as to when the taxes may be collected, *i.e.*, when the concerned contractor has fully recovered its pre-operating expenses. Thus, the last paragraph of Section 81 of RA No. 7942 created an exception to Section 200 of the NIRC of 1997, as to when the DST should be paid. Said Section 200 reads:

> "SEC. 200. *Payment of Documentary Stamp Tax.* –
>
> (A) *In General.* – The provisions of Presidential Decree No. 1045 notwithstanding, any person liable to pay documentary stamp tax upon any document subject to tax under Title VII of this Code shall file a tax return and pay the tax in accordance with the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner.
>
> (B) *Time for Filing and Payment of the Tax.* – Except as provided by rules and regulations promulgated by the Secretary of Finance, upon recommendation of the Commissioner, **the tax return prescribed in this Section shall be filed <u>within ten (10) days after the close of the</u>**

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[36] Under Section 3(g) of Republic Act (RA) No. 7942, a "[c]*ontractor*" means *"a qualified person acting alone or in consortium who is a party to a mineral agreement or to a financial or technical assistance agreement."*

[37] Under Section 3(r) of RA No. 7942, a "[f]*inancial or technical assistance agreement*" means *"a contract involving financial or technical assistance for large-scale exploration, development, and utilization of mineral resources."*

> **month when the taxable document was made, signed, issued, accepted, or transferred, and the tax thereon shall be paid at the same time the aforesaid return is filed.**
>
> xxx xxx xxx." *(Emphasis and underscoring added)*

Thus, unlike in the case of taxpayers who are required to pay DST within ten (10) days after the close of the month when taxable document was made, signed, issued, accepted, or transferred, the collection thereof from an FTAA contractor is merely deferred, or until it *"has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive"*, pursuant to the last paragraph of Section 81 of RA No. 7942.

What is clear, therefore, is that under RA No. 7942, there is no exemption from, *inter alia*, the DST, but merely a deferment on the collection thereof.

Apropos, exemptions from taxation are highly disfavored, so much so that they may almost be said to be odious to the law. He who claims an exemption must be able to point to some positive provision of law creating the right.[38] Put in another way, a tax exemption must be clearly expressed and cannot be established by implication. Exemption from a common burden cannot be permitted to exist upon vague implication.[39] Such being the case, the deferment of tax "collection" is *not* tantamount to a tax "exemption".

To be sure, during the recovery period, the law does not state that the concerned FTAA contractor shall be exempt from taxes. Rather, what is clear is that such contractor is liable therefor, but the collection of taxes will commence only after the said period. Thus, whatever taxes that became due during the recovery period, the FTAA contractor shall pay the same thereafter, as part of the government share in the pertinent FTAA.

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[38] *Commissioner of Internal Revenue vs. A.D. Guerrero*, G.R. No. L-20942, September 22, 1967.

[39] *Wonder Mechanical Engineering Corporation vs. Court of Tax Appeals, et al.*, G.R. Nos. L-22805 and L-27858, June 30, 1975.

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The foregoing conclusion is consistent with the statements made by the Supreme Court in *La Bugal-B'Laan Tribal Association, Inc., et al. vs. Victor O. Ramos, Secretary, Department of Environment and Natural Resources (DENR), et al.* (the "*La Bugal* case"),[40] *viz.*:

> "...DAO 99-56, entitled *'Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements'* aims to ensure an equitable sharing of the benefits derived from mineral resources. These benefits are to be equitably shared among the government (national and local), the FTAA contractor, and the affected communities. The purpose is to ensure sustainable mineral resources development; and a fair, equitable, competitive and stable investment regime for the large-scale exploration, development and commercial utilization of minerals. ***The general framework or concept followed in crafting the fiscal regime of the FTAA is based on the principle that the government expects real contributions to the economic growth and general welfare of the country, while the contractor expects a reasonable return on its investments in the project.***
>
> **Specifically, under the fiscal regime, the government's expectation is, *inter alia*, the receipt of its share from the taxes** and fees **normally paid by a mining enterprise.** On the other hand, the FTAA contractor is granted by the government certain fiscal and non-fiscal incentives to help support the former's cash flow during the most critical phase (cost recovery) and to make the Philippines competitive with other mineral-producing countries. **After the contractor has recovered its initial investment, it will pay all the normal taxes and fees comprising the basic share of the government**, plus an additional share for the government based on the options and formulae set forth in DAO 99-56.
>
> The said DAO spells out the financial benefits the government will receive from an FTAA, referred to as 'Government Share,' composed of a ***basic government share*** and an ***additional government share***.
>
> **The *basic government share* is comprised of all direct taxes**, fees and royalties, as well as other payments made by the contractor during the term of the FTAA. **These amounts are paid directly to (i) the national government**

[40] G.R. No. 127882, December 1, 2004.

(through the Bureau of Internal Revenue, Bureau of Customs, Mines & Geosciences Bureau and other national government agencies which imposes taxes or fees), (ii) the local government units where the mining activity is conducted, and (iii) persons and communities directly affected by the mining project. The major taxes and other payments constituting the *basic government share* are enumerated below:

Payments to the National Government:

xxx xxx xxx

- **Documentary stamp tax – the rate depends on the type of transaction**

xxx xxx xxx

The portion of revenues remaining after the deduction of the basic and additional government shares is what goes to the contractor.

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The third or last paragraph of Section 81 provides that the government share in FTAAs shall be collected when the contractor shall have recovered its pre-operating expenses and exploration and development expenditures. The objection has been advanced that, on account of the proviso, the collection of the State's share is not even certain, as there is no time limit in RA 7942 for this grace period or recovery period.

We believe that Congress did not set any time limit for the grace period, preferring to leave it to the concerned agencies, which are, on account of their technical expertise and training, in a better position to determine the appropriate durations for such recovery periods. **After all, these recovery periods are determined, to a great extent, by technical and technological factors peculiar to the mining industry.** Besides, with developments and advances in technology and in the geosciences, we cannot discount the possibility of shorter recovery periods. At any rate, the concerned agencies have not been remiss in this area. The 1995 and 1996 Implementing Rules and Regulations of RA 7942 specify that the period of recovery, reckoned from the date of commercial operation, shall be for *a period not exceeding five years, or until the date of* ***actual*** *recovery, whichever comes earlier.*

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> Granted that the contractors are allowed subsequently to recover their pre-operating expenses, still, that eventuality will happen only after they shall have *first put out the cash* and fueled the economy. Moreover, in the process of recouping their investments and costs, the foreign contractors *do not actually pull out the money from the economy.* Rather, **they recover or recoup their investments out of actual commercial production <u>by not paying a portion of the basic government share corresponding to national taxes</u>**, along with the additional government share, **<u>for a period of not more than five years counted from the commencement of commercial production</u>**.
>
> **It must be noted that *there can be no recovery without commencing actual commercial production.*** In the meantime that the contractors are recouping costs, they need to continue operating; in order to do so, they have to disburse money to meet their various needs. In short, money is continually infused into the economy.
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> xxx xxx xxx
>
> **The third or last paragraph of Section 81 of RA 7942 is slammed <u>for deferring the payment of the government share</u> in FTAAs until after the contractor shall have recovered its pre-operating expenses, exploration and development expenditures.** Allegedly, the collection of the State's share is rendered uncertain, as there is no time limit in RA 7942 for this grace period or recovery period. But although RA 7942 did not limit the grace period, the concerned agencies (DENR and MGB) in formulating the 1995 and 1996 Implementing Rules and Regulations provided that **the period of recovery, reckoned from the date of commercial operation, shall be for a period not exceeding five years, or until the date of actual recovery, whichever comes earlier.**
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> xxx xxx xxx." *(Emphases and underscoring added)*

Notably, the Supreme Court, in interpreting Section 81 of RA No. 7942, *inter alia,* did not declare any tax exemption to be enjoyed by the concerned FTAA thereunder. Moreover, the fiscal regime under the said provision entails that *"the government's expectation is, inter alia, the receipt of its share from taxes...normally paid by a mining enterprise"*, which taxes explicitly include DST, the collection or payment of which are

deferred until the contractor has recovered its pre-operating expenses and exploration and development expenditures. The period of recovery, which is reckoned from the date of commercial operation, shall be five (5) years or until the date of actual recovery, **whichever comes earlier**. Relative thereto, the Supreme Court emphasized that *"there can be no recovery without commencing actual commercial operation."*

FTAA No. 04-2009-II dated September 19, 2009 entered into by the Republic of the Philippines and petitioner (as Contractor)[41] is likewise consistent with, and more detailed than, Sections 81 and 97 of RA No. 7942 and the foregoing jurisprudential pronouncements. Pertinent provisions of the said FTAA read:

> "2.1 Definition. As used in this Agreement, the following words and terms shall have the following respective meanings:
>
> xxx xxx xxx
>
> m. **'Date of Commencement of Commercial Production'** or **'Commencement of Commercial Production'** refers to the date of written declaration by the Contractor to start commercial operations after the conduct of Test Run, including Debugging, and its approval by the Regional Office concerned.
>
> xxx xxx xxx
>
> ao. **'Net Cash Flow'** refers to the actual cash balance during a calendar year after deducting from the Gross Output the allowable deductible cash expenses, Loan Principal Amortization and Ongoing Capital Expenditures.
>
> xxx xxx xxx
>
> az. **'Pre-Operating Expenses'** refers to all expenditures incurred by the Contractor in and for the benefit of the Contract Area from the date of filing of the of the Financial or Technical Assistance Agreement application up to the Date of Commencement of Commercial Production.

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[41] Exhibit "P-6", Docket – Vol. III, pp. 1646, 1741 to 1766, 1720 to 1740, and 1702 to 1710.

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bb. **'Recovery Period'** refers to a time period allowing the Contractor to recover its Pre-Operating Expenses as provided in Clause 9.7 (a) hereof.

xxx xxx xxx."[42] *(Emphases added)*

"9.2 Basic Government Share

The Basic Government Share shall consist of all direct taxes, royalties, fees and related payments **required by existing laws, rules and regulations to be paid by the Contractor. It shall be the minimum share that Government shall receive during any calendar year. The following national** and local **taxes,** royalties and fees **paid by the Contractor to the Government during a calendar year constitute the Basic Government Share**:

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f. **Documentary stamp taxes**;

xxx xxx xxx

Starting from the effective date of this Agreement, the Contractor shall pay all applicable taxes, royalties, fees and other related payments subject to the following:

xxx xxx xxx

ii. **After the Recovery Period, the Contractor shall then pay all applicable taxes**, fees, and royalties and other related payments **to the national** and local **Governments** [Items (a) to (o) above].

xxx xxx xxx."[43] *(Emphases and underscoring added)*

"9.6 Payment of Government Share

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[42] Exhibits "P-6" and "P-6-c", Docket – Vol. III, pp. 1742 to 1743, 1747, and 1748.
[43] Exhibit "P-6-a", Docket – Vol. III, p. 1759.

b. Government Taxes, Royalties and Other Fees. **The Contractor shall promptly pay all the taxes, royalties and fees required by the Government in carrying out the activities covered in this Agreement and in such amount, venue, procedure and time as stipulated by the particular law and implementing rules and regulations governing such taxes** and fees, and subject to all rights of objection or review as provided for in relevant laws, rules and regulations. **In the case of non-payment of certain taxes and fees during the Recovery Period, the Contractor shall follow the prevailing procedures for availing non-payment in accordance with pertinent laws, rules and regulations.**

xxx xxx xxx."[44] *(Emphases and underscoring added)*

"9.7 Recovery of Pre-Operating Expenses

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a. Recovery Period. Considering the high risk, high cost and long-term nature of an FTAA mining operation, **the Contractor shall be given an opportunity to recover the expenses incurred during its pre-operating period.** After this period, the Government shall receive its rightful share from the national patrimony. **Recovery Period, as used in this Order, shall be a maximum 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, reckoned from the Date of Commencement of Commercial Production, whichever comes first.**

For this purpose, the above Net Cash Flows and Pre-Operating Expenses refer to the actual Net Cash Flows from mining operations and the actual Pre-Operating Expenses incurred by the Contractor, respectively, converted into its United States dollar equivalent at the time the expenditure was incurred.

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b. Recoverable Pre-Operating Expenses. **All Pre-Operating Expenses allowed for recovery under this Agreement shall be approved by the**

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[44] Exhibit "P-6", Docket – Vol. III, p. 1762.

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Secretary upon recommendation of the Director. It shall be limited to actual expenses and capital expenditures relating to the following:

1. Acquisition, maintenance and administration of any mining tenements or agreements covered by this Agreement;

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. Infrastructure contributions and payments made to local Governments except taxes, royalties and fees;

6. Payments to landowners, surface rights holders, Claim owners and to indigenous cultural people or indigenous cultural communities, if any;

7. Expenses incurred in fulfilling the Contractor's obligations to contribute to national development and training of Philippine personnel;

8. Consulting fees incurred inside and outside the Philippines for work related directly to the mining operations and consistent with the Contractor's approved Work Program;

9. The establishment and administration of field and regional offices including administrative overheads incurred within the Philippines which are properly allocable to the mining operations and directly related to the performance of the Contractor's obligations and exercise of its rights under this Agreement;

10. Costs incurred in financial development, including interest on loans payable within or outside the Philippines, subject to the financing requirements required in this Agreement and to a limit on debt-equity ratio of 5:1 for investments equivalent to US$200 Million or

less, or for the first US$200 Million of investments in excess of US$200 Million; or 8:1 for that part of the investment which exceeds US$200 Million: *Provided*, That the interests shall not be more than the prevailing international rates charged for similar types of transaction at the time the financing was arranged;

11. All costs of constructing and developing the mine incurred before the Date of Commencement of Commercial Production, including capital and property as hereinafter defined irrespective as to their means of financing, subject to the limitations defined by Clause 9.7.b(10) of this Section, and inclusive of the principal obligation and the interests arising from any Contractor's leasing, hiring, purchasing or similar financing arrangements including all payments made to Government, both national and local; and

12. General and administrative expenses actually incurred by the Contractor for the benefit of the Contract Area.

All Pre-Operating Expenses reported for recovery shall be subject to verification by Government or its designated representative or auditor. All expenses to be incurred in the verification will be chargeable against the Contractor." [45] *(Emphases added)*

The foregoing provisions flesh out what have been stated in Sections 81 and 97 of RA No. 7942 and enunciated in the *La Bugal* case.

As in the *La Bugal* case, Section 9.2 of the subject FTAA identified the basic government share as consisting of, *inter alia*, *"direct taxes"*, which expectedly included DST. Moreover, the same provision is explicit that such basic government share is the minimum share that the Government shall receive *"during **any** calendar year"*. This means that any tax, including DST, shall accrue, commencing from the execution of the said FTAA, *i.e.*, on September 19, 2009, until its eventual termination, notwithstanding the recovery period, but shall be paid only thereafter.

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[45] Exhibit "P-6-b", Docket – Vol. III, pp. 1763 to 1764.

As for the payment of direct taxes, including DST, among others, Section 9.6 of the subject FTAA is clear that "(t)*he Contractor shall* ***promptly pay*** *the same...****in such amount, venue, procedure and time as stipulated by the particular law and implementing rules and regulations governing such taxes****...*" Thus, notwithstanding the contemplated *"recovery period"*, petitioner is required to *promptly* pay all taxes in such amount, venue, procedure and time as stipulated by law and implementing rules and regulations governing such taxes. In any case, it is likewise clear in the said provision that there can be *non-payment* of certain taxes *during the recovery period*, but the Contractor must follow the prevailing procedures for availing non-payment in accordance with pertinent laws, rules and regulations.

Anent the recovery period, it is likewise clear that the same is not fixed for a full five (5) years, but is only set as the maximum, pursuant to the same Section 9.6 of the subject FTAA. Thus, this means that it could be less than five (5) years reckoned from the "*Date of Commencement of Commercial Production*" to a date when the aggregate of the "*Net Cash Flows*" from the mining operations is equal to the aggregate of petitioner's "*Pre-Operating Expenses*", as the said terms are defined under the same FTAA and as approved by the Secretary of the Department of Environment and Natural Resources (DENR).

In sum, Sections 81 and 97 of RA No. 7942, the *La Bugal* case, and even FTAA No. 04-2009-II dated September 19, 2009 entered into by the Republic of the Philippines and petitioner, granted no tax exemption in favor of petitioner. The collection of any tax, however, as part of the basic government share in, and that have accrued in the meantime in relation to, the FTAA, is merely deferred until the lapse of the recovery period, which in no case shall be more than five (5) years from the *Date of Commencement of Commercial Production* of petitioner, during which period the latter is able to recover its pre-operating expenses. The non-payment of taxes during the said recovery period is allowed, but petitioner must follow the prevailing procedures therefor in accordance with pertinent laws, rules and regulations. Otherwise, petitioner shall promptly pay all the taxes, *inter alia,* in such amount and time as stipulated by the particular law and implementing rules and regulations governing such taxes.

But even granting that this Court would accede to the notion that petitioner is exempt from the payment of DST during the subject recovery period, it is noteworthy that petitioner's *Date of Commencement of Commercial Production* was only on July 17, 2017,[46] pursuant to the aforequoted paragraph 2.1(m) of the FTAA No. 04-2009-II dated September 19, 2009. Thus, if at all, the supposed DST exemption should only commence from **July 17, 2017**, and not on any earlier date.

To recall, the date of the subject taxable document, *i.e.*, the Amendment Deed[47] entered into by petitioner, among other parties, is December 15, 2016. Such being the case, the contemplated recovery period has not yet begun. In other words, as of **December 15, 2016**, petitioner is not yet entitled to a DST exemption during the said period.

With the foregoing disquisitions, it becomes apparent that the DST being refunded in the amount of ₱7,012,122.00, cannot be treated as erroneously or illegally paid by petitioner. As such, the said amount may not be refunded or be the subject of an issuance of a tax credit certificate.

In any event, petitioner submits that respondent or the BIR has no authority to interpret the provisions of RA No. 7942 as such was vested by Congress solely to the DENR Secretary. According to petitioner, in not acting upon its request for refund of erroneously paid DST, respondent effectively confers upon himself the authority to interpret the provisions of the said law.

In addition, petitioner invokes previous decisions or rulings rendered by this Court in support of its claim of DST exemption.

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[46] Refer to Exhibits "P-10" to "P-14", Docket – Vol. III, pp. 1885 to 1890.
[47] Exhibit "P-2", Docket – Vol. III, pp. 1575 to 1627

Furthermore, petitioner contends that the Tax Exemption Certificates are the final written attestations on petitioner's exemption from DST.

Petitioner's arguments, however, are all untenable.

The power to interpret the tax provisions of RA No. 7942 is under the exclusive and original jurisdiction of respondent. Decisions of this Court are not binding precedents. The so-called "Tax Exemption Certificates" were issued without valid authority.

Section 4 of the NIRC of 1997 reads:

> "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**." *(Emphases and underscoring added)*

Based on the foregoing provision, it is plain that the power to interpret the provisions of the NIRC of 1997 and other tax laws, which necessarily includes the tax provisions of RA No. 7942, such as Sections 81 and 97 thereof, are under the exclusive and original jurisdiction of respondent, subject to review by the Secretary of Finance.

Admittedly, Section 8 of RA No. 7942 reads as follows:

> "SEC. 8. *Authority of the Department.* – The Department shall be the primary government agency responsible for the conservation, management, development, and proper use of the State's mineral resources, including those in reservations, watershed areas, and lands of the public domain. **The Secretary shall have the authority to enter into mineral agreements on behalf of the Government upon the recommendation of the Director, promulgate such rules and regulations as may be necessary to implement the intent and provisions of this Act.**" *(Emphasis and underscoring added)*

Based on the foregoing provision, upon recommendation of the Director of MGB, the DENR Secretary has authority to promulgate rules and regulations as may be necessary to implement the intention and provisions of RA No. 7942.

It is axiomatic in statutory construction that a statute must be interpreted, not only to be consistent with itself, but also to harmonize with other laws on the same subject matter, as to form a complete, coherent and intelligible system.[48]

Thus, to harmonize the seeming conflict between Section 4 (first paragraph) of the NIRC of 1997 and Section 8 of RA No. 7942, this Court decrees that respondent has the power to interpret the provisions of the latter law concerning, or relative to, the imposition and/or collection of taxes under RA No. 7942, subject to review by the Secretary of Finance; while for non-tax provisions thereof, the DENR Secretary has authority to promulgate rules and regulations to implement the same.

Correspondingly, there can be no merit in petitioner's stance that respondent has no power to interpret the pertinent provisions of RA No. 7942.

Indeed, administrative agencies possess two kinds of powers, the quasi-legislative or rule-making power, and the quasi-judicial or administrative adjudicatory power. The first is the power to make rules and regulations that results in

[48] *The Office of the Solicitor General (OSG) vs. The Honorable Court of Appeals, et al.*, G.R. No. 1999027, June 9, 2014.

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delegated legislation that is within the confines of the granting statute and the doctrine of non-delegability and separability of powers.[49] The second is the power to hear and determine questions of fact to which the legislative policy is to apply and to decide in accordance with the standards laid down by the law itself in enforcing and administering the same law. The administrative body exercises its quasi-judicial power when it performs in a judicial manner an act that is essentially of an executive or administrative nature, where the power to act in such manner is incidental to or reasonably necessary for the performance of the executive or administrative duty entrusted to it.[50]

Without doubt, the said authority of the DENR Secretary falls within the confines of quasi-legislative power, and as will be shown momentarily, respondent's power to interpret tax laws also falls under such category.

Nonetheless, petitioner is in error to argue that when it filed a refund claim with respondent, the latter is called upon to exercise his quasi-legislative power or power to interpret tax laws. This is not the case here. To be sure, regarding tax refund claims, respondent is called upon to exercise its quasi-judicial power instead, not its quasi-legislative power or power to interpret tax laws. Simply put, the power to decide matters concerning refunds of internal revenue taxes, among others, is vested in respondent.[51]

Section 4 of the NIRC of 1997 confers upon respondent both: (a) the power to interpret tax laws in the exercise of his quasi-legislative function; and (b) the power to decide tax cases in the exercise of his quasi-judicial functions.[52] The latter power involves the power to decide on tax refunds,[53] subject to the exclusive appellate jurisdiction of this Court.

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[49] *The Chairman and Executive Director, Palawan Council For Sustainable Development, et al. vs. Ejercito Lim*, G.R. No. 183173, August 24, 2016.
[50] *Id.*
[51] *Commissioner of Internal Revenue vs. Philippine National Bank*, G.R. No. 212699, March 13, 2019.
[52] Refer to *Commissioner of Internal Revenue vs. Court of Tax Appeals, et al.*, G.R. No. 207843, July 15, 2015.
[53] Refer to *Philippine Airlines, Inc. vs. Commissioner of Internal Revenue, et seq.*, G.R. Nos. 206079-80 and 206309, January 17, 2018.

This means that while respondent has the right to hear a refund claim first, if he or she fails to act on it, it will be treated as a denial of the refund, and this Court is the only entity that may review this ruling.[54]

Correspondingly, while this Court recognizes respondent's power to interpret tax provisions not only of the NIRC of 1997, but also of the pertinent tax provisions of RA No. 7942, the inaction of respondent on petitioner's claim is still within his power to decide on tax refunds, and has nothing to do with the rule-making authority of the DENR Secretary under Section 8 of RA No. 7942.

Anent petitioner's invocation of this Court previous rulings or decision, suffice it to state that this Court's decisions do not constitute as binding precedents.[55] More importantly, it must be stressed that the judicial decisions that form part of our legal system are only decisions of the Supreme Court.[56] In other words, only decisions of the latter Court constitute binding precedents, forming part of the Philippine legal system.[57]

Furthermore, petitioner's contention that the Tax Exemption Certificates issued by the MGB are the final written attestation of petitioner's exemption from DST is also unavailing.

The MGB has *not* been given the power to interpret tax laws. As already ruled, such power pertains to respondent, subject to review by the Secretary of Finance under Section 4 (first paragraph) of the NIRC of 1997. Thus, these so-called Tax Exemption Certificates[58] are not conclusive as to the tax liabilities of petitioner. In any event, of the said documents, only the Certification dated June 14, 2012[59] declared that

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[54] Refer to *Philippine Airlines, Inc. vs. Commissioner of Internal Revenue, et seq.*, G.R. Nos. 206079-80 and 206309, January 17, 2018.
[55] Refer to *Commissioner of Internal Revenue vs. San Roque Power Corporation, et seq.*, G.R. Nos. 187485, 196113, and 197156, February 12, 2013.
[56] *Agustin-Se, et al. vs. Office of the President, et al.*, G.R. No. 207355, February 3, 2016.
[57] *Commissioner of Internal Revenue vs. San Roque Power Corporation, et seq.*, supra.
[58] Exhibits "P-15" to "P-15-z", Docket – Vol. III, pp. 1891 to 1925.
[59] Exhibits "P-15-l", Docket – Vol. III, pp. 1907 to 1908.

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petitioner is not required to pay, *inter alia*, DST, "(f)*rom the date of the approval of the Declaration of Mining Project Feasibility, or on October 18, 2011, up to the end of the Recovery Period*". Such being the case, the said Certification is even erroneous. As We have already determined, the commencement of the Recovery Period is only on July 17, 2017—the *Date of Commencement of Commercial Production*,[60] since, as aptly emphasized by the Supreme Court, "*there can be no recovery without commencing actual commercial operation.*"[61] Thus, it is only from July 17, 2017 that there will be an instance that petitioner *may* not be required to pay, *inter alia*, DST. As a corollary, even if it could be further assumed that the commencement of the recovery period was indeed on October 18, 2011 as indicated in the said Certification, counting five (5) years therefrom would mean that such recovery period would end as early as October 18, 2016, and thus, the subject Amendment Deed executed on December 15, 2016[62] would no longer be covered by the said recovery period.

Clearly, petitioner failed to discharge the burden of proof to establish its entitlement to the subject refund claim.

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is **DENIED** for lack of merit.

SO ORDERED.

CATHERINE T. MANAHAN
Associate Justice

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[60] Refer to Exhibits "P-10" to "P-14", Docket – Vol. III, pp. 1885 to 1890.

[61] *La Bugal-B'Laan Tribal Association, Inc., et al. vs. Victor O. Ramos, Secretary, Department of Environment and Natural Resources (DENR), et al.*, G.R. No. 127882, December 1, 2004.

[62] Exhibit "P-2", Docket – Vol. III, pp. 1575 to 1627

WE CONCUR:

(See Separate Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

MARIAN IVY F. REYES-FAJARDO
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

FCF MINERALS CORPORATION,	**CTA CASE NO. 10003**
Petitioner,	Members:
-versus-	DEL ROSARIO, *P.J.*, Chairperson, MANAHAN, and, REYES-FAJARDO, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: OCT 18 2021 12:00 p.m.

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SEPARATE CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur in the *ponencia* denying petitioner's claim for refund amounting to ₱7,012,122.00 representing its alleged erroneously paid Documentary Stamp Tax (DST) paid on January 3, 2017 but **solely** on the ground that while petitioner is exempt from DST, it waived such exemption when it agreed to pay the DST due on the Amendment Deed dated December 15, 2016[1] (Amendment Deed) among petitioner, Metals Exploration Plc., Metals Exploration Pte. Ltd., as arranged by BNP Paribas, with the Original Lenders, Hong Kong Shanghai Banking Corporation Limited acting as Facility Agent, Offshore Security Trustee, Account Bank and Original Hedging Bank, BNP Paribas as Original Hedging Bank and Technical Bank, Philippine National Bank – Trust Banking Group as Onshore Security Agent, covering a loan commitment of US$28,160,000.00.

[1] Exhibit "P-2", Docket – Vol. III, pp. 1575-1627.

I take exception to the *ponencia's* conclusion that Sections 81 and 97 of Republic Act (RA) No. 7942, *La Bugal-B'laan Tribal Association, Inc., et al. vs. Victor O. Ramos, Secretary, Department of Environment and Natural Resources (DENR), et al.*[2] *("La Bugal-B'laan")* and Financial or Technical Assistance Agreement (FTAA) No. 04-2009-II dated September 19, 2009 ("*FCF FTAA*") entered into by the Republic of the Philippines and petitioner, do not grant tax exemption to petitioner as an FTAA contractor but merely deferred the payment of any tax that has accrued, as part of the Basic Government Share.[3]

Petitioner FCF Minerals Corporation is exempt from DST

Section 81 of RA No. 7942 provides:

> "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.
>
> **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 <u>after</u> the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive**." *(Boldfacing and underscoring supplied)*

Section 81 of RA No. 7942 is implemented by Department Administrative Order (DAO) No. 99-56 dated December 27, 1999, as

[2] G.R. No. 127882, December 1, 2004.
[3] Decision, p. 16.

amended by DAO No. 2007-12 dated June 20, 2007 and DAO No. 2010-21 dated June 28, 2010[4] issued by the DENR.

Section 4 (b) of DAO No. 2007-12[5] provides:

"Section 4. Fiscal Regime of a Financial or Technical Assistance Agreement

The fiscal regime of FTAA entered into by and between the Government of the Republic of the Philippines and FTAA Contractors shall be guided by the following provisions:

xxx xxx xxx

b. Basic Government Share

The Basic Government Share shall consist of all direct taxes, royalties, fees and related payments required by existing laws, rules and regulations to be paid by the Contractor. It shall be the minimum share that Government shall receive during any Calendar Year. The following national and local taxes, royalties and fees paid by the Contractor to the Government during a Calendar Year constitute the Basic Government Share:

(a) Contractor's income tax;
(b) Customs duties and fees on imported capital equipment;
(c) Value-added tax on imported goods and services;
(d) Withholding tax on interest payments on foreign loans;
(e) Withholding tax on dividends to foreign stockholders;
(f) Documentary stamps taxes;
(g) Capital gains tax;
(h) Excise tax on minerals;
(i) Royalties for Mineral Reservations and to Indigenous Peoples, if applicable;
(j) Local business tax;
(k) Real property tax;
(l) Community tax;
(m) Occupation fees;
(n) Registration and permit fees; and
(o) All other national and local Government taxes, royalties and fees as of the effective date of the FTAA.

Related payments made by the Contractor for Special Allowance and Royalty to Indigenous Peoples or Indigenous Cultural Communities, if applicable, and which are subject of agreements entered into by and between the Contractor and concerned individuals or private parties, and were duly approved by the Government, shall be considered as part of the Basic Government Share.

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[4] 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"

[5] The FCF FTAA was executed on September 19, 2009. The DAO in force at that time was DAO No. 2007-12.

Starting from the effective date of the FTAA, the Contractor shall pay all applicable taxes, royalties, fees and other related payments subject to the following:

i. **From the date of approval of the Declaration of Mining Project Feasibility up to the end of the Recovery Period** as defined in this Order, **the Contractor shall pay the above Items (h) to (o)** which includes the Excise Tax on Minerals, Royalty on Mineral Reservations and to Indigenous Peoples, if applicable, and local taxes, fees and related imposts due to Local Government Units.

ii. **After the Recovery Period, Contractor shall then pay all applicable taxes, fees, royalties and other related payments to the national and local Governments [Items (a) to (o) above].**

iii. Any value-added tax on exported products refunded by or credited to the Contractor shall not form part of the Basic Government Share. xxx" *(Boldfacing supplied)*

I submit that the intent of Section 81 of RA No. 7942 in allowing the collection of the government share in FTAAs to commence only after the FTAA contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive, is to grant the FTAA contractor an **exemption** from payment of such government share, which may include taxes like DST, among other things, **until it has fully recovered its expenses**. Such construction is consistent with the goal of allowing the FTAA contractor to fully recover its expenses before it is made to pay the Basic Government Share in the FTAA.

It must be emphasized that FTAAs are contracts between the FTAA contractors and the Republic within the purview of the Constitution.[6] Since the FCF FTAA is a valid contract, parties thereto are bound by its provisions[7] unless these are contrary to law, morals, good customs, public order, or public policy.[8]

Section 9.2 of the FCF FTAA reproduces the schedule of payment of the Basic Government Share provided in Section 4(b) of DAO No. 2007-12, *viz.*:

"9.2 Basic Government Share

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[6] *La Bugal-B'laan Tribal Association, Inc., et al. vs. Victor O. Ramos, Secretary, Department of Environment and Natural Resources (DENR), et al.,supra* note 1.
[7] Civil Code, Article 1308. The contract must bind both contracting parties; its validity or compliance cannot be left to the will of one of them.
[8] Civil Code, Article 1306. The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.

The Basic Government Share shall consist of all direct taxes, royalties, fees and related payments required by existing laws, rules and regulations to be paid by the Contractor. It shall be the minimum share that the Government shall receive during any calendar year. The following national and local taxes, royalties and fees paid by the Contractor to the Government during a calendar year constitute the Basic Government Share:

a. Contractor's income tax;
b. Customs duties and fees on imported capital equipment;
c. Value-added tax on imported goods and services;
d. Withholding tax on interest payments on foreign loans;
e. Withholding tax on dividends to foreign stockholders;
f. **Documentary Stamp Taxes;**
g. Capital gains tax;
h. Excise tax on minerals;
i. Royalties For Mineral Reservations and to Indigenous Peoples, if applicable;
j. Local business tax;
k. Real property tax;
l. Community tax;
m. Occupation fees;
n. Registration and permit fees; and
o. All other national or local Government taxes, royalties and fees as of the effective date of this Agreement;

xxx xxx xxx

Starting the effective date of this Agreement, the Contractor shall pay all applicable taxes, royalties, fees and other related payments subject to the following:

i. **From the date of the approval of the Declaration of Mining Project Feasibility up to the end of the Recovery Period** as defined in this Agreement, the Contractor shall pay above **Items (h) to (o)** which includes Excise Tax on Minerals, Royalty on Mineral Reservations and local taxes, fees and related imposts due to Local Government Units;

ii. **After the Recovery period**, the Contractor shall pay all applicable taxes, fees and other related payments to the national and local Governments [Items (a) to (o) above]. Xxx" (*Boldfacing supplied*)

Pursuant to Section 9.2 (i) and (ii) of the FCF FTAA, petitioner is obliged from the date of the approval of the Declaration of Mining Project Feasibility (October 18, 2011) up to the end of the Recovery Period to pay only items "h" to "o" of Section 9.2, **which do not include DST**,[9] and, after the Recovery period, to pay all applicable taxes, fees and other related payments to the national and local governments, **including DST**. In other words, petitioner shall only be liable to pay DST after the Recovery Period.

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[9] Item (f)

Section 7 (a) of DAO No. 2007-12, details the determination of the Recovery Period, *viz.*:

> "Section 7. Recovery of Pre-Operating Expenses
>
> a. Recovery Period. Considering the high risk, high cost and long term nature of an FTAA Mining Operation, the Contractor shall be given an opportunity to recover the expenses incurred during its pre-operating period. After this period, the Government shall receive its rightful share from the national patrimony. **Recovery Period**, as used in this Order, **shall be a maximum 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, reckoned from the Date of Commencement of Commercial Production, whichever comes first.**
>
> For this purpose, the above Net Cash Flows and Pre-Operating Expenses refer to the actual Net Cash Flows from Mining Operations and the actual Pre-Operating Expenses incurred by the Contractor, respectively, converted into its United States dollar equivalent at the time the expenditure was incurred.
>
> In case of projects incurring very large investments with high production rate and extensive mine life, as determined by the Mines and Geosciences Bureau, **the Recovery Period may be extended upon negotiation with the FTAA Negotiating Panel and subject to approval by the Secretary.**" *(Boldfacing supplied)*

Section 9.7 (a) of the FCF FTAA reproduces Section 7 of DAO No. 2007-12, *viz.*:

> "9.7 <u>Recovery of Pre-Operating Expenses</u>
>
> a. <u>Recovery Period</u>. Considering the high risk, high cost and long term nature of an FTAA mining operation, the Contractor shall be given an opportunity to recover the expenses incurred during its pre-operating period. After this period, the Government shall receive its rightful share from the national patrimony. **Recovery Period**, as used in this Order, **shall be a maximum 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, reckoned from the Date of Commencement of Commercial Production, whichever comes first.**
>
> For this purpose, the above Net Cash Flows and Pre-Operating Expenses refer to the actual Net Cash Flows from Mining Operations and the actual Pre-Operating Expenses incurred by the Contractor, respectively, converted into its United States dollar equivalent at the time the expenditure was incurred.

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> In case of projects incurring very large investments with high production rate and extensive mine life, as determined by the Mines and Geosciences Bureau, **the Recovery Period may be extended upon negotiation with the FTAA Negotiating Panel and subject to approval by the Secretary."** *(Boldfacing supplied)*

Under the afore-quoted Sections, generally the **Recovery Period** shall be a maximum 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, **reckoned from the Date of Commencement of Commercial Production, whichever comes first.** It may be extended upon negotiation with the FTAA Negotiating Panel and subject to approval by the DENR Secretary.

As mentioned, petitioner's Date of Commencement of Commercial Production is July 17, 2017. Pursuant to Section 9.7 (a) of the FCF FTAA and Section 7 of DAO No. 2007-12, it has a maximum of five (5) years reckoned from its Date of Commencement of Commercial Production or until July 17, 2022 to recover its pre-operating expenses. At the time of payment of the subject DST on January 3, 2017, the date when the aggregate of the Net Cash Flows from the Mining Operations is equal to the aggregate of its Pre-Operating Expenses cannot yet be determined as petitioner still has to commence commercial production. Thus, the applicable Recovery Period should be reckoned from its Date of Commencement of Commercial Production, July 17, 2017. Clearly, the payment of the subject DST on January 3, 2017 was before the expiration of the Recovery Period on July 17, 2022.

The Certification dated June 14, 2012,[10] proves the clear agreement between petitioner and the Republic **to exempt** petitioner from payment of DST from approval of its Declaration of Mining Project Feasibility (on October 11, 2011) until after the Recovery Period.

It is well to emphasize that Section 36[11] of RA No. 7942 reserved the power to negotiate the terms of the FTAA to the President through the DENR Secretary, subject to the execution and approval by the President. Section 36 reads:

> "Section 36. Negotiations. - A financial or technical assistance agreement shall be negotiated by the Department and executed and

[10] Exhibit "P-15-I", Docket – Vol. III, p. 1907 and 1908.

[11] Section 36. Negotiations. - A financial or technical assistance agreement shall be negotiated by the Department and executed and approved by the President. The President shall notify Congress of all financial or technical assistance agreements within thirty (30) days from execution and approval thereof.

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approved by the President. The President shall notify Congress of all financial or technical assistance agreements within thirty (30) days from execution and approval thereof."

In *La Bugal-B'laan,* the Supreme Court recognized the wide degree of discretion of the President in negotiating the terms of FTAAs, particularly the government share, *viz.*:

> *"The crux of the controversy is the amount of discretion to be accorded the Executive Department, particularly the President of the Republic, in respect of negotiations over the terms of FTAAs, particularly when it comes to the government share of financial benefits from FTAAs.* **The Court believes that it is not unconstitutional to allow a wide degree of discretion to the Chief Executive, given the nature and complexity of such agreements, the humongous amounts of capital and financing required for large-scale mining operations, the complicated technology needed, and the intricacies of international trade, coupled with the State's need to maintain flexibility in its dealings, in order to preserve and enhance our country's competitiveness in world markets.**
>
> We are all, in one way or another, sorely affected by the recently reported scandals involving corruption in high places, duplicity in the negotiation of multi-billion peso government contracts, huge payoffs to government officials, and other malfeasances; and perhaps, there is the desire to see some measures put in place to prevent further abuse. *However, dictating upon the President what minimum share to get from an FTAA is not the solution.* It sets a bad precedent since such a move *institutionalizes* the very reduction if not deprivation of the State's control. The remedy may be worse than the problem it was meant to address. In any event, provisions in such future agreements which may be suspected to be grossly disadvantageous or detrimental to government may be challenged in court, and the culprits haled before the bar of justice.
>
> Verily, under the doctrine of separation of powers and due respect for co-equal and coordinate branches of government, this Court must restrain itself from intruding into policy matters and must allow the President and Congress maximum discretion in using the resources of our country and in securing the assistance of foreign groups to eradicate the grinding poverty of our people and answer their cry for viable employment opportunities in the country. *(Boldfacing supplied)*

The issue brought before this Court is not even novel. In *FCF Minerals Corporation vs. Commissioner of Customs,*[12] involving petitioner herein and the same FTAA, the CTA Third Division concluded, among others, that: (1) pursuant to Section 81 of RA No. 7942 and DAO No. 2007-12, the collection from the FTAA contractor

[12] CTA Case No. 8789, June 21, 2016, penned by Associate Justice Ma. Belen M. Ringpis-Liban with Associate Justices Lovell R. Bautista and Esperanza R. Fabon-Victorino concurring.

of the *"government share"*, including VAT and customs duties on imported capital equipment, shall commence only after the recovery period; (2) petitioner is exempt from payment of VAT and customs duties on the importation of capital equipment during the recovery period albeit its claim for refund was denied for failure to show compliance with the requisites for refund; and (3) the DENR Secretary has the primary authority to promulgate such rules and regulations .

The Court *En Banc*[13] upheld the conclusion that the taxability of petitioner's imported goods will only be after the recovery period and remanded the case to the Court in Division to determine the merits of its refund claim which was, however, still denied in the Amended Decision.[14] Thus, reliance thereon by petitioner in good faith is not misplaced.

In fine, petitioner is exempt from payment of the subject DST, which forms part of the Basic Government Share, until it has fully recovered its pre-operating expenses, exploration, and development expenditures pursuant Section 9.2 of the FCF FTAA, in line with Section 81 of RA No. 7942 and Section 4(b) of DAO No. 2007-12.

Petitioner FCF Minerals Corporation NOT entitled to refund of DST

Notwithstanding petitioner's exemption from DST, petitioner's refund claim must still be denied. While petitioner is exempt from DST, the loan transaction itself is not.

Section 173 of the NIRC of 1997, as amended, imposes DST on such loan transaction payable by any of the parties thereto, and whenever one party to the taxable loan transaction enjoys exemption from DST, the other party who is not exempt shall be the one directly liable for the DST, *viz.*:

> "Section 173. *Stamp Taxes Upon Documents, Loan Agreements, Instruments and Papers.* - Upon documents, instruments, **loan agreements** and papers, and upon acceptances, assignments, sales and transfers of the obligation, right or property incident thereto, there shall be levied, collected and paid for, and in

[13] *FCF Minerals Corporation vs. Commissioner of Customs,* CTA EB No. 1620, August 14, 2018, penned by Associate Justice Cielito N. Mindaro-Grulla with Presiding Justice Roman G. Del Rosario and Associate Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Erlinda P. Uy, Caesar A. Casanova, Esperanza R. Fabon-Victorino, Ma. Belen M. Ringpis-Liban and Catherine T. Manahan, concurring.

[14] *FCF Minerals Corporation vs. Commissioner of Customs*, CTA Case No. 8789, March 15, 2021, penned by Associate Justice Maria Rowena Modesto-San Pedro with Associate Justices Erlinda P. Uy and Ma. Belen M. Ringpis-Liban, concurring.

> respect of the transaction so had or accomplished, the corresponding documentary stamp taxes prescribed in the following Sections of this Title, **by the person making, signing, issuing, accepting, or transferring the same** wherever the document is made, signed, issued, accepted or transferred when the obligation or right arises from Philippine sources or the property is situated in the Philippines, and the same time such act is done or transaction had: Provided, That **whenever one party to the taxable document enjoys exemption from the tax herein imposed, the other party who is not exempt shall be the one directly liable for the tax.**" *(Boldfacing and underscoring supplied)*

The DST exemption granted under Section 81 of RA No. 7942 to petitioner as an FTAA contractor **does not extend** to the other parties to the Amendment Deed. Thus, petitioner's recourse is to seek refund from the other parties to the Amendment Deed, not from respondent.

Considering, however, that the Amendment Deed entered into among the parties stipulated that "**[petitioner] must pay any DST** due in respect of the Omnibus Agreement promptly upon execution of this [Amendment Deed] but in any event on or before the date falling on the fifth day of the month following the month during which this Deed was signed in accordance with applicable laws and regulations in the Philippines,"[15] petitioner has effectively waived its exemption from DST. Hence, it cannot now seek refund of the DST it voluntarily agreed to pay.

All told, I **VOTE** to **DENY** the Petition for Review filed by FCF Minerals Corporation for lack of merit.

ROMAN G. DEL ROSARIO
Presiding Justice

[15] *Id.* at 1601.