REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

LEPANTO CONSOLIDATED MINING COMPANY,
Petitioner,

- versus -

HON. MAURICIO B. AMBANLOC, in his capacity as the Provincial Treasurer of Benguet
Respondent.

C.T.A. EB No. 201
(AC No. 13)

Present:
Acosta, *P.J.,*
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez, *JJ.*:

Promulgated:
MAY 1 7 2007

x- -x

DECISION

CASTAÑEDA, Jr., *J.*:

For review before this Court *En Banc* are the Decision and the Resolution dated February 27, 2006 and July 14, 2006, respectively, promulgated by the Second Division of this Court in C.T.A. AC No. 13 (RTC Civil Case No. 01-CV-1652) entitled "*Lepanto Consolidated*

Mining Company vs. Hon. Mauricio B. Ambaloc, in his capacity as the Provincial Treasurer of Benguet."

The dispositive portion of the judgment, dated November 25, 2004 rendered by Branch 62 of the RTC of La Trinidad, Benguet in Civil Case No. 01-CV-1652, reads as follows:

> WHEREFORE, viewed from the foregoing, the Court finds that Lepanto Consolidated Mining Company should pay Benguet Province through its Provincial Treasurer the sum of ONE MILLION NINE HUNDRED ONE THOUSAND EIGHT HUNDRED NINETY THREE & 22/100 PESOS (P1,901,893.22) as payment for sand and gravel tax from the total aggregate of such materials extracted by Lepanto for the period 1997 to June 2000 from areas covered by its mining lease contract situated at Barangays Nayak and Sapid, in the municipality of Mankayan. Such tax shall bear interest at the rate of two percent (2%) per month in accordance with Sections 165 to 169 of R.A. No. 7160 from the time the corresponding payments should have been made.
>
> However, the Court finds no cogent basis for the imposition of a surcharge as imposable under Section 167 of R.A. No. 7160 as the taxability of petitioner regarding the activities can be considered a novel question of law and the Court finds neither negligence nor fraud in such deficiency.
>
> SO ORDERED.

The Court in Division affirmed the judgment rendered by the trial court insofar as petitioner's liability for the sand and gravel tax to the province of Benguet is concerned. The dispositive portion of the assailed Decision of the Court in Division reads as follows:

> **WHEREFORE**, the foregoing considered, the present petition is hereby **DISMISSED**. The decision dated November 25, 2004 of the RTC of La Trinidad, Benguet, Branch 62, in Civil Case No. 01-CV-1652 is hereby **AFFIRMED** with the **MODIFICATION** that the total interest of 2% per month on the unpaid taxes shall not exceed thirty six (36) months. No costs.

SO ORDERED.

On November 14, 2006, this case was raffled for study and report to Associate Justice Juanito C. Castañeda, Jr.

In the deliberations of this case, Justice Castañeda expressed his opinion that the assailed Decision and the Resolution should be affirmed on the following grounds:

- Section 138 of the Local Government Code of 1991 expressly allows provinces to impose an excise tax on the extraction of sand and gravel and that incidental extraction of sand and gravel is subject to tax because the law does not distinguish

- Only holders of gratuitous permit are excluded in the imposition of the sand and gravel tax under Section 3 ARTICLE D of "The Revised Benguet Revenue Code."

- Petitioner is not an agent of the government as evident in SECTION II (par.2.10) of the Mineral Production Sharing Agreement(MPSA).

Associate Justice Erlinda P. Uy, and Associate Justice Olga Palanca-Enriquez concurred with Associate Justice Juanito C. Castañeda, Jr. voted to affirm the assailed Decision and Resolution.

However, Presiding Justice Ernesto D. Acosta expressed his view that the assailed Decision and Resolution of the Second Division of this Court should be reversed on the following grounds:

- The amount of tax imposed is based on the quantity of the quarry resources applied for and expected to be

Jc

extracted or removed from public lands or public waters within the territorial jurisdiction of the province under Sections 3 and 5 of Article D of "The Revised Benguet Revenue Code."

- The Supreme Court had long settled that incidental activities of a business should not be taxed separately.

- Statutes levying the taxes or duties are to be construed strongly against the Government and in favor of the subject or citizens, because burdens are not to be imposed or presumed to be imposed beyond what statutes expressly and clearly declare.

Associate Justice Lovell R. Bautista and Associate Justice Caesar A. Casanova concurred with the opinion of Presiding Justice Acosta.

Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9282, requires the affirmative votes of four (4) members of the Court *en banc* for the rendition of a decision or resolution. Considering that the required number of votes was not obtained in this case, the appealed Decision and the Resolution shall stand AFFIRMED, pursuant to Section 3 of Rule 2 of the Revised Rules of the Court of Tax Appeals (RRCTA), which provides as follows:

> SEC. 3. *Court en banc; quorum and voting.*- The presiding justice or, in his absence, the most senior justice in attendance shall preside over the sessions of the Court *en banc*. The attendance of four justices of the Court shall constitute a quorum for its session *en banc*. The presence at the deliberation and affirmative vote of four justices of the Court *en banc* shall be necessary for the rendition of a decision or resolution on any case or matter submitted for its consideration. **Where the necessary majority vote cannot be had**, the petition shall be dismissed; **in appealed cases, the judgment or order appealed from shall stand affirmed;** and on all incidental matters, the petition or motion shall be denied.

gr

No decision of a Division of the Court may be reversed or modified except by the affirmative vote of four justices of the Court *en banc* acting on the case.

In view of the foregoing considerations, Presiding Justice Ernesto D. Acosta was tasked to write the Dissenting Opinion and Justice Castañeda became the ponente of the Affirming decision.

STATEMENT OF THE FACTS

The facts of this case, as found by the Court in Division, are as follows:

Lepanto Consolidated Mining Company (hereafter petitioner) is a domestic corporation organized and existing under Philippine laws with principal office at the 21st Floor, BA-Lepanto Building, Paseo de Roxas, Makati City. It conducts its mining operations and related works and activities in Nayok, Municipality of Mankayan, Province of Benguet and maintains its field offices in said municipality.

On September 9, 1983, petitioner was granted and issued Mining Lease Contract No. MRD-372 by the Philippine Government, covering, among others, "Tikem" mining claim, located at Sitio Nayok, Barrio Palasou (Suyoc), Municipality of Mankayan. The lease contract has a term of twenty five (25) years which will expire on September 8, 2008.

In accordance with the mining lease contract, related communications between petitioner and the Director of the Bureau of Mines, and policy guidelines, petitioner extracted and removed sand and gravel materials from its "Tikem" leased mining claim and exclusively utilized the same for its mining operations.

Petitioner and its subsidiary, South East Gold Resources, Inc., entered into a Mineral Production Sharing Agreement No. 001-90 (MPSA) dated March 3, 1990 with the Republic of the Philippines to undertake mining exploration, development and utilization of minerals, for and in behalf of the State. This mineral production sharing agreement is in full force and effect.

In the inspection report of the inspectors team of the Province of Benguet and the report submitted to the Department of

Environment and Natural Resources (DENR), petitioner extracted sand and gravel within its mine site from the year 1997 to June 2000, and the total aggregate sand and gravel extracted was about 262,330.1 cubic meters.

Invoking *Section 138 of the Local Government Code of 1991*, the Provincial Treasurer of Benguet (hereafter respondent), in his letter dated February 14, 2001 to the petitioner, assessed and demanded the amount of P1,901,893.22 as payment for sand and gravel tax for the total aggregate of such material extracted covering the period from 1997 to June 2000 from areas covered by its mining lease contract.

In a letter-protest dated June 25, 2000, petitioner categorically protested the imposition of the sand and gravel tax on the ground that the extraction and removal of sand and gravel materials from the areas covered by its Mining Lease Contract No. MRD-372 and MPSA No. 001-90 were used exclusively for its mining operations , hence, exempted for any kind of taxes.

On July 31, 2001, respondent denied petitioner's letter-protest, a copy of which was received by petitioner on August 7, 2001.

On September 5, 2001, petitioner filed an appeal under Section 195 of the Local Government Code of 1991, docketed as Civil Case No. 01-CV-1652 before the RTC of La Trinidad, Benguet, Branch 62, questioning the above assessment and demand for sand and gravel tax.

On November 5, 2001, respondent filed his Answer and/or Opposition.

At the pre-trial held on November 15, 2002, the parties stipulated that the only legal issue to be resolved is: "Whether or not petitioner is liable for sand and gravel tax assessed by the respondent Provincial Treasurer, on said sand and gravel extracted by petitioner in areas covered by its mining lease contracts or agreements and used exclusively on its mining operations".

After the termination of the pre-trial of the case, the parties submitted documentary evidence (without any testimonial evidence) in support of their respective positions, after which, the parties simultaneously submitted their respective memoranda.

On November 25, 2004, the court a quo rendered the assailed decision in favor of the respondent in terms earlier set forth.

Jc

On December 6, 2004, petitioner received a copy of the trial court's judgment. Thereafter, a motion for reconsideration was filed by petitioner on December 20, 2004. The trial court denied the said motion and a copy of such order was received by petitioner on April 25, 2005.

Not satisfied with the trial court's adverse judgment and order, petitioner filed an appeal with the Court in Division on May 25, 2005 which was docketed as C.T.A. AC No. 13 and raffled to the Court in Division. As stated above, the Court in Division affirmed the judgment of the trial court in a Decision dated February 27, 2006. Petitioner was notified of the aforementioned Decision on March 14, 2006. On April 5, 2006, a motion for reconsideration was filed by petitioner.

In a resolution dated April 18, 2006, the Court in Division directed respondent to file a comment within ten (10) days from receipt of the said resolution. Petitioner's Motion for Reconsideration was deemed submitted for resolution in view of respondent's failure to file a Comment within the period prescribed by the Court. In a Resolution dated July 14, 2006, the Court in Division denied petitioner's Motion for Reconsideration for lack of merit. Hence, this appeal filed with the Court *en banc* on August 11, 2006.

In a Resolution dated October 5, 2006, the court *en banc* ordered respondent to file his comment, not a Motion to Dismiss, within fifteen (15) days from receipt thereof. In said Resolution, the Court ordered that upon submission of the requisite Comment or the expiration of the period for filing the same, the petition shall be deemed submitted for resolution, unless the court *en banc* decides to require the parties to submit simultaneous memorandum

No comment was filed by respondent. Hence, this case was deemed submitted for decision.

SOLE ISSUE

WHETHER OR NOT PETITIONER MINING COMPANY IS LIABLE FOR THE SAND AND GRAVEL TAX ASSESSED BY RESPONDENT PROVINCIAL TREASURER OF BENGUET PURSUANT TO SECTION 138 OF THE LOCAL GOVERNMENT CODE OF 1991 ON ITS (PETITIONER'S) SAND ANG GRAVEL EXTRACTION IN AREAS COVERED BY ITS MINING LEASE CONTRACTS OR AGREEMENTS, WHICH EXTRACTION IS MERELY INCIDENTAL TO ITS OPERATION AS A MINING COMPANY AND WHICH EXTRACTED MATERIALS WERE USED EXCLUSIVELY FOR ITS MINING OPERATIONS.

PETITIONER'S ARGUMENTS

Petitioner avers that the Court's reliance on the Supreme Court's decision in ***Province of Bulacan vs. Court of Appeals***, 299 SCRA 454 is misplaced. According to the petitioner, said case does not contemplate a situation where the extraction is merely incidental or

Jc

auxiliary to the mining operations of a mining company within its leased mining area and that the extracted materials are for its exclusive use in its mining operations and/or utilized in the performance, carrying on or consummation of its mining activities.

Petitioner contends that "The Revised Benguet Revenue Code", which is the enabling law, was not considered in resolving the legal issue at hand. If considered, said law obviously excludes from its operation, regulation, and coverage the incidental extraction of earth materials by petitioner mining company. Petitioner contends that a careful scrutiny of Sections 3 and 4 thereof will show that said code was actually intended to tax the extraction and removal of sand and gravel by permittees and not to those who are excepted from the operation of said law like the petitioner mining company which undertook incidental extraction activity within its mining leased area in the pursuit of its mining operations. It further avers that the aforementioned code appears to contemplate a situation whereby only establishments engaged in sand and gravel business are liable for sand and gravel tax, citing Sections 4 and 8, Article D, Chapter I of said code. As its incidental extraction activity is not covered by the provisions of the code, petitioner concludes that it should not be held accountable for the contested tax.

Furthermore, petitioner argues that the 2nd Division of this Court patently erred in failing to consider that it is virtually an agent of the government, thus, not subject to the questioned tax; and that the disputed tax partakes of the nature of an excise tax collectible only by the national government.

THIS COURT'S RULING

We deny the petition.

Local Government Code of 1991 Expressly Allows Provinces to Impose an Excise Tax on the Extraction of Sand and Gravel

The Court in Division did not err in sustaining petitioner's liability for the sand and gravel tax imposed by the province of Benguet. The imposition by the respondent of the sand and gravel tax on petitioner's extraction is expressly authorized by the Local Government Code of 1991 (LGC). The relevant provisions of the LGC are as follows:

> Sec. 134. **Scope of Taxing Powers.** — Except as otherwise provided in this Code, the province may levy only the taxes, fees, and charges as provided in this Article.
>
> Sec. 138. **Tax on Sand, Gravel and Other Quarry Resources.** — The province may levy and collect not more than ten percent (10%) of fair market value in the locality per cubic meter of ordinary stones, sand, gravel, earth, and other quarry resources, as defined under the National Internal Revenue Code, as amended, **extracted from public lands** or from the beds of seas, lakes, rivers, streams, creeks, and other public waters **within its territorial jurisdiction**. *(Emphasis supplied)*

gr

Based on the foregoing, it is clear that the requisites for the imposition of sand and gravel tax under Section 138 of the LGC are the following: (1) the stones, sand, gravel, earth and other quarry resources were extracted from public lands; and (2) the public land is within the territorial jurisdiction of the province imposing the said tax.

Petitioner extracted sand and gravel within its mining site in Nayok, Municipality of Mankayan, Province of Benguet . The mining site being a mineral land is undoubtedly a part of the inalienable public land which is situated within the territorial limits of the Province of Benguet. Consequently, since both requirements prescribed by Section 138 of the LGC of 1991 were satisfied, the assessment for sand and gravel tax made by the respondent against the petitioner is proper.

As stated in the assailed Decision, the issue in this case is not novel as the Supreme Court had already made a pronouncement that provinces have the authority to impose taxes on stones, sand, gravel, earth and other quarry resources extracted from public lands[1]. The Supreme Court had ruled as follows:

> It is clearly apparent from the above provision that the National Internal Revenue Code levies a tax on all quarry resources, regardless of origin, whether extracted from public or private land. Thus, a province may not ordinarily impose taxes on stones, sand, gravel, earth and other quarry resources, as the same are already

---

1 *The Province of Bulacan, et al., vs. The Honorable Court of Appeals, et al.,* G.R. No. 126232, November 27, 1998 (299 SCRA 442).

Je

> taxed under the National Internal Revenue Code. **The province can, however, impose a tax on stones, sand, gravel, earth and other quarry resources extracted from public land because it is expressly empowered to do so under the Local Government Code.** As to stones, sand, gravel, earth and other quarry resources extracted from private land, however, it may not do so, because of the limitation provided by Section 133 of the Code in relation to Section 151 of the National Internal Revenue Code. *(Emphasis supplied)*

Petitioner's assertion that the disputed tax partakes of the nature of an excise tax collectible only by the national government cannot be sustained. The above-quoted excerpt of the Supreme Court ruling categorically states that a province can impose a tax on stones, sand, gravel, earth and other quarry resources extracted from public land because it is expressly empowered to do so under the LGC. Therefore, the proscription under letter (o) of Section 133 of the LGC in relation to Section 151 (2) of the National Internal Revenue Code of 1997 refers only to the imposition of sand and gravel tax extracted from private lands.

Incidental Extraction Of Sand and Gravel is Subject to Tax

Je

It is a well recognized rule that where the law does not distinguish, courts should not distinguish. *Ubi lex non distinguit nec nos distinguere debemos.*[2]

The LGC authorizes all provinces to impose an excise tax on the **extraction** of sand and gravel from public lands. The law did not prescribe that the excise tax may only be imposed on commercial extraction. Hence, the word extraction should be understood to include all forms thereof whether for personal or for commercial purposes, in a continuous or intermittent manner, and whether or not it is the main business or merely incidental to a main business.

There is also no requirement that the person taxed be a holder of a permit, neither is it required that the sand and gravel extracted be commercially disposed of, as averred by petitioner. To exclude from the ambit of the law, **incidental** extraction of sand and gravel in a mining site, is tantamount to giving petitioner exemption from taxation. He who claims an exemption from his share of the common burden of taxation must justify his claim by showing that the

---

2 *Philippine British Assurance Co., Inc. vs. Intermediate Appellate Court* No.L-72005 May 29, 1987 (150 SCRA 521) citing *Colgate-Palmolive Phil., Inc. vs. Gimenez*, G.R. No. 14787, January 28, 1961, 1 SCRA 267 ; *Libudan vs. Gil*, G.R. No. 21163, May 17, 1972, 45 SCRA 17 ; *Dominador vs. Derahunan,* 49 Phil. 452 (1926); *Guevarra vs. Inocentes,* G.R. No. 25577, March 15, 1966, 16 SCRA 379 ; *Director of Lands vs. Gonzales,* G.R. No. 32522, January 28, 1963; *Alfato vs. Commission on Elections,* G.R. No. 52749, March 31, 1981, 103 SCRA 741 ; *Statutory Construction* by Ruben E. Agpalo,1986, pp. 143-144

Legislature intended to exempt him by words too plain to be mistaken.[3]

In this case, petitioner failed to present any legal basis that indeed its incidental extraction is exempt from the sand and gravel tax imposed by the respondent. Thus, the Court in Division is correct in saying that:

> The law does not provide that to be subject to tax, the extracted sand, gravel and other quarry resources should be commercial or for business purpose. Whether the extraction activities are for commercial purpose or merely incidental to the primary purpose of a mining company or any other purpose, the extracted stones, sand, gravel, earth and other quarry resources extracted from public lands are taxable.

Even the "The Revised Benguet Revenue Code" (Benguet Revenue Code) relied upon by the petitioner does not support its contention that only establishments engaged in sand and gravel business are liable for sand and gravel tax. Section 3, ARTICLE D thereof providing for the imposition of a *Tax on Sand, Gravel and Other Quarry Resources* reads as follows:

> **SECTION 3. *Imposition of Tax.*** There shall be levied a tax of ten (10) percent of fair market value in the locality per cubic meter of **ordinary stones, sand, gravel, earth, and other quarry resources,** such as but not limited to marl, marble, granite, volcanic cinders, basalt, tuff and rock phosphate, applied for and expected to be **extracted or removed from public lands** or from beds of seas, lakes, rivers, streams, creeks and other public waters within the territorial jurisdiction of Benguet Province.

---

3 *Surigao Consolidated Mining Co., Inc. vs. Collector of Internal Revenue*, G.R. No. L-14878, December 26, 1963 (9 SCRA 1963)

Jc

> **This provision may not apply in case of gratuitous permits for government projects within Benguet Province.** *(Emphasis supplied)*

Nowhere in the aforequoted provision is it stated that a permit to extract quarry resources is required before the sand and gravel tax can be imposed by the province. As defined under letter (f) Section 1, Article D of the Benguet Revenue Code, a permit is "a privilege granted by proper authority to any qualified applicant in accordance with this Article for the purpose of taking, removing and/or disposing of ordinary earth, gravel, sand, pebbles, boulders and other quarry resources used for building and construction purposes." The said definition does not state that it is a prerequisite for taxability. An absurd situation will arise if the imposition of the sand and gravel tax would be limited only to those entities that were granted permits to extract the quarry resources of a province and those who are illegally extracting quarry resources will not be subject to the sand and gravel tax simply because they do not have any permit to engage in such activity. Thus, petitioner's argument that the Benguet Revenue Code imposes the sand and gravel tax only on establishments engaged in sand and gravel business must perforce fail.

Moreover, as provided in the aforecited Section 3 of Article D of the Benguet Revenue Code, the only exception from the sand and gravel tax is in case of gratuitous permits for government projects within Benguet Province. A "gratuitous permit" shall be granted to any government entity or agency in need of materials for government infrastructure projects within the Province of Benguet over an area of not more than two (2) hectares for a period of co-terminous with the duration of the government project, but not more than one (1) year, renewable for the same period.

Parenthetically, Section 48 of Republic Act No. 7942[4] provides that holders of existing mining leases can extract sand and gravel within the area covered by the mining agreement for its exclusive use without even securing a permit, thus:

> SECTION 48. *Exclusive Sand and Gravel Permit.*- Any qualified person may be granted an exclusive sand and gravel permit by the provincial governor to quarry and utilize sand and gravel or other loose or unconsolidated materials from public lands for his own use, provided that there will be no commercial disposition thereof.
>
> **A mineral agreement or a financial technical assistance agreement contractor** shall, however, have the right to extract and remove sand and gravel and other loose unconsolidated materials **without need of a permit** within the area covered by the mining agreement for the exclusive use in the mining operations: *Provided,* That monthly reports of the quantity of materials extracted therefrom shall be submitted to the mines regional office concerned: *Provided, further,* That said right shall be coterminous with the expiration of the agreement.
>
> **Holders of existing mining leases shall likewise have the same rights as that of a contractor**; *Provided,* That said right shall be coterminous with the expiry days xxx *(Emphasis supplied)*

---

4 An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization and Conservation, March 3, 1995.

Significantly, the above provision however did not exempt such holders of mining leases from the coverage of the sand and gravel extracted from their mining leases forming part of the inalienable public land. It only removed the requirement of a permit before undertaking the extraction of sand and gravel.

Petitioner is Not An Agent of the Government

The contention that petitioner is exempt from the sand and gravel tax because it is an agent of the National Government is likewise bereft of merit. This is evident in Section II (par. 2.10) of the *Mineral Production Sharing Agreement* (MPSA) which refers to petitioner and Far South East Gold Resources as contractors. Clearly, petitioner is a contractor and not an agent of the State as correctly found by the Court in Division. Not being an agent of the government, petitioner cannot claim for tax exemption under Section 133(o) of the LGC which provides, in part, as follows:

> SEC. 133. *Common Limitations on the Taxing Powers of Local Government Units.*- Unless otherwise provided herein, the exercise of the taxing powers of provinces, cities, municipalities, and barangays shall not extend to the levy of the following:
>
> xxx xxx xxx
>
> (o) Taxes, fees or charges of any kind on the National Government, its agencies and instrumentalities, and local government units.

Jr

As stated at the outset, considering that the required number of votes was not obtained in this case, the appealed Decision and the Resolution shall stand AFFIRMED, pursuant to Section 3 of Rule 2 of the Revised Rules of the Court of Tax Appeals (RRCTA).

WHEREFORE, the present petition is hereby **DENIED.** Accordingly, assailed Decision and the Resolution dated February 27, 2006 and July 14, 2006, respectively, are hereby **DEEMED AFFIRMED**.

SO ORDERED.

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

We concur:

(with Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

(concurs with Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

(concurs with Dissenting Opinion)
CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice