REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

OCEANAGOLD (PHILIPPINES), INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 2492
(CTA Case No. 9289)

Present:

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

Promulgated:
MAY 3 1 2022 8:50a.m.

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DECISION

DEL ROSARIO, P.J.:

This resolves the Petition for Review filed on July 13, 2021 by petitioner Oceanagold (Philippines), Inc., assailing the Decision[1] dated October 7, 2020 and Resolution[2] dated March 12, 2021 rendered by the Court in Division in CTA Case No. 9289, which denied petitioner's claim for refund or issuance of a tax credit certificate in the amount of ₱136,407,793.17, representing excise taxes erroneously paid by petitioner and illegally collected by respondent for the period June to December 2014.

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[1] Penned by Associate Justice Ma. Belen M. Ringpis-Liban, concurred in by Associate Justice Erlinda P. Uy and with concurring and dissenting opinion by Associate Justice Maria Rowena Modesto-San Pedro; *En Banc* Docket, pp. 48-73.

[2] Penned by Associate Justice Ma. Belen M. Ringpis-Liban with Associate Justice Erlinda P. Uy and Associate Justice Maria Rowena Modesto-San Pedro, concurring; *En Banc* Docket, pp. 74-79.

The dispositive portions of the assailed Decision and Resolution are as follows:

Decision dated October 7, 2020

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

SO ORDERED."

Resolution dated March 12, 2021

"**WHEREFORE**, premises considered, Petitioner's Motion for Reconsideration (of Decision dated October 7, 2020) is **DENIED** for lack of merit.

SO ORDERED."

THE PARTIES

Petitioner is a corporation organized and existing under the laws of the Philippines with principal place of business at the 2nd Floor, CJV Building, 108 Aguirre St., Legaspi Village, Makati City.[3]

Respondent is the duly appointed Commissioner of Internal Revenue who is tasked to assess and collect all national internal revenue taxes, fees and charges, and enforce all forfeitures, penalties and fines connected therewith. Respondent holds office at the Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Diliman, Quezon City.[4]

THE FACTS

On December 7, 2012, to prevent petitioner from making removals of copper concentrates without prepayment of excise tax, respondent detained mineral ores in petitioner's stockpile.[5]

Thereafter, respondent issued Revenue Memorandum Circular (RMC) No. 17-2013 dated February 15, 2013, which revoked BIR Ruling No. 10-2007 and with it, petitioner's exemption from excise tax during the Recovery Period.[6]

[3] Pre-Trial Order, Division Docket, Vol. 2, p. 703.
[4] *Id.*
[5] *Id.*
[6] *Id.*

From June to December 2014, petitioner paid under protest the excise tax allegedly due on the seized concentrates in the total amount of ₱136,407,793.17, as follows:

Date of Payment	Excise Tax Paid	
June 20, 2014	₱	10,998,967.12[7]
June 20, 2014		1,606,555.74[8]
July 23, 2014		10,448,256.08[9]
August 5, 2014		10,577,208.57[10]
August 11, 2014		1,417,830.82[11]
August 27, 2014		12,674,348.17[12]
September 1, 2014		1,083,013.97[13]
September 18, 2014		2,169,435.94[14]
September 23, 2014		12,407,265.53[15]
October 1, 2014		11,446,206.34[16]
October 15, 2014		26,413,749.92[17]
November 5, 2014		3,287,671.51[18]
December 5, 2014		27,983,040.18[19]
December 11, 2014		3,894,243.28[20]
Total	₱	136,407,793.17

On February 20, 2015, petitioner filed a formal claim for refund or tax credit with the Excise LT Audit Division I of the BIR, seeking the recovery of excise taxes paid on petitioner's removals of copper concentrates in the aggregate amount of ₱136,407,793.17, covering the period from, among others, June to December 2014.[21]

On February 12, 2016, petitioner received an undated letter-decision from the Large Taxpayers Service of the BIR, denying Petitioner's claim for refund of excise taxes in the aggregate amount of ₱136,407,793.17, covering the period from June to December 2014.[22]

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7 Exhibits "P-36" to "P-37", Division Docket, Vol. 3, pp. 1171-1172.
8 Exhibits "P-39" to "P-40", Division Docket, Vol. 3, pp. 1181-1182.
9 Exhibits "P-42" to "P-43", Division Docket, Vol. 3, pp. 1205-1206.
10 Exhibits "P-45" to "P-46", Division Docket, Vol. 3, pp. 1232-1233.
11 Exhibits "P-48" to "P-49", Division Docket, Vol. 3, pp. 1243-1244.
12 Exhibits "P-51" to "P-52", Division Docket, Vol. 3, pp. 1261-1262.
13 Exhibits "P-54" to "P-55", Division Docket, Vol. 3, pp. 1277-1278.
14 Exhibits "P-57" to "P-58", Division Docket, Vol. 3, pp. 1295-1296.
15 Exhibits "P-60" to "P-61", Division Docket, Vol. 3, pp. 1317-1318.
16 Exhibits "P-63" to "P-64", Division Docket, Vol. 3, pp. 1336-1337.
17 Exhibits "P-66" to "P-67", Division Docket, Vol. 3, pp. 1355-1356.
18 Exhibits "P-69" to "P-70", Division Docket, Vol. 3, pp. 1380-1381.
19 Exhibits "P-72" to "P-73", Division Docket, Vol. 3, pp. 1400-1401.
20 Exhibits "P-75" to "P-76", Division Docket, Vol. 3, pp. 1423-1424.
21 Pre-Trial Order, Division Docket, Vol. 2, p. 703.
22 *Id.*

On March 11, 2016, petitioner filed a Petition for Review before the Court in Division.[23]

On April 7, 2016, summons was served upon respondent, who then filed an Answer on April 21, 2016.[24]

Petitioner and respondent filed their Pre-Trial Briefs on July 29, 2016,[25] and May 17, 2016,[26] respectively. Thereafter, the Pre-Trial Conference was held on August 2, 2016.[27]

The parties submitted their Joint Stipulation of Facts and Issues on August 12, 2016.[28] The Court then issued a Pre-Trial Order dated September 1, 2016.[29]

During trial, petitioner presented its documentary and testimonial evidence. It offered the testimonies of the following: (1) Atty. Joan D. Adaci-Cattiling,[30] petitioner's Senior Vice President for Legal and Human Resources; (2) Ms. Josefina Mallari,[31] petitioner's Finance Manager; and (3) Mr. Richard R. Lapres,[32] the Court-commissioned Independent Certified Public Accountant (ICPA).

Petitioner filed its Formal Offer of Evidence (FOE) with Motion to Admit Secondary Evidence[33] on October 2, 2017. Respondent then filed a Comment on petitioner's FOE on October 6, 2017.[34]

Thereafter, petitioner filed a Supplemental Omnibus Motion [(A) To Admit Supplemental Affidavit of Atty. Joan Adaci-Cattiling and Judicial Affidavit of Roberto A. Cortez; (B) To Set Case for Hearing on the Introduction of Secondary Evidence; and (C) For Remarking of Secondary Evidence][35] on November 20, 2017. Respondent failed to file its comment on the Supplemental Omnibus Motion, which the Court in Division granted in its Resolution dated December 29, 2017.[36]

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[23] Division Docket, Vol. 1, pp. 10-215.
[24] Division Docket, Vol. 1, pp. 218-224.
[25] Division Docket, Vol. 1, pp. 472-490.
[26] Division Docket, Vol. 1, pp. 243-246.
[27] Order dated August 2, 2016, Docket, Vol. 2, pp. 686-687.
[28] Division Docket, Vol. 1, pp. 688-700.
[29] Division Docket, Vol. 1, pp. 702-708.
[30] Exhibit "P-80", Division Docket, Vol. 3, pp. 1428-1445.
[31] Exhibit "P-81", Division Docket, Vol. 3, pp. 1446-1457.
[32] Exhibit "P-82-b", Division Docket, Vol. 2, pp. 892-897.
[33] Division Docket, Vol. 2, pp. 912-943.
[34] Division Docket, Vol. 3, pp. 1458-1462.
[35] Division Docket, Vol. 3, pp. 1464-1471.
[36] Division Docket, Vol. 4, pp. 1527-1528.

On January 29, 2018, petitioner filed its Supplemental FOE,[37] and on January 30, 2018 respondent filed its Comment (Re: Petitioner's Supplemental FOE).[38]

In the Resolution dated December 10, 2018,[39] the Court in Division resolved petitioner's FOE and Supplemental FOE, denying the admission of some of petitioner's exhibits. Thereafter, petitioner filed a Motion for Partial Reconsideration[40] thereof, which the Court in Division partially granted in its Resolution dated April 22, 2019,[41] thereby still denying the admission in evidence of its Exhibits "P-25" and "P-26", for failure to present the originals for comparison.

Respondent likewise presented documentary and testimonial evidence, and offered the testimony of its lone witness, Mr. Saidamen T. Marohombsar,[42] Revenue Officer II, BIR.

Respondent filed its FOE on July 25, 2019,[43] and petitioner filed its Comment to Respondent's FOE[44] on August 5, 2019. In the Resolution dated September 11, 2019,[45] the Court in Division admitted in evidence respondent's exhibits, except Exhibit "R-6" (for failure of the exhibit formally offered to correspond with the document actually marked), and Exhibit "R-7" (for failure of respondent's witness to identify it). The parties were also given thirty (30) days to file their respective memoranda.

Petitioner filed its Memorandum on October 18, 2019,[46] while respondent failed to file its own.[47]

The case was deemed submitted for decision by the Court in Division on November 12, 2019.[48]

The Court in Division promulgated on October 7, 2020 the assailed Decision[49] denying petitioner's refund claim for lack of merit.

Undaunted, petitioner filed a Motion for Reconsideration [of Decision dated October 7, 2020][50] on November 6, 2020, which was,

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[37] Division Docket, Vol. 4, pp. 1535-1539.
[38] Division Docket, Vol. 4, pp. 1567-1571.
[39] Division Docket, Vol. 4, pp. 1577-1586.
[40] Division Docket, Vol. 4, pp. 1587-1593.
[41] Division Docket, Vol. 4, pp. 1616-1618.
[42] Exhibit "R-8", Division Docket, Vol. 2, pp. 848-851.
[43] Division Docket, Vol. 4, pp. 1622-1626.
[44] Division Docket, Vol. 4, pp. 1629-1631.
[45] Division Docket, Vol. 4, pp. 1634-1635.
[46] Division Docket, Vol. 4, pp. 1636-1683.
[47] Division Docket, Vol. 4, p. 1686.
[48] Resolution dated November 12, 2019, Division Docket, Vol. 4, p. 1688.
[49] Division Docket, Vol. 4, pp. 1704-1731.
[50] Division Docket, Vol. 4, pp. 1737-1752.

however, denied by the Court in Division in the assailed Resolution dated March 12, 2021.[51]

On June 29, 2021, petitioner filed a Motion for Extension of Time to File Petition for Review,[52] praying for an additional period of fifteen (15) days, or until July 14, 2021, to file its Petition for Review, which the Court *En Banc* granted on July 2, 2021.[53]

On July 13, 2021, petitioner filed the present Petition for Review,[54] which was docketed as CTA EB No. 2492.

Respondent filed a Comment (Re: Petition for Review)[55] on November 24, 2021. In the Resolution dated March 10, 2022, the case was submitted for decision.[56]

THE ASSIGNED ERRORS

Petitioner assigned the following errors allegedly committed by the Court in Division:

I. The Court in Division erred in holding that payments of the excise taxes during the period were not illegal or unauthorized.

II. The Court in Division erred in ruling that petitioner's payments of excise taxes were not detrimental to the recovery of its Pre-operating Expenses.

III. The Court in Division erred in nullifying BIR Ruling No. 10-2007.[57]

THE PARTIES' ARGUMENTS

Arguments of Petitioner

Petitioner contends that under Section 11.2 of the Financial and Technical Assistance Agreement (FTAA) it signed with the Republic of the Philippines,[58] petitioner has a period of up to five (5) years from

[51] Division Docket, Vol. 4, pp. 1763-1767.
[52] EB Docket, pp. 1-5.
[53] EB Docket, p. 6.
[54] EB Docket, pp. 7-80.
[55] EB Docket, pp. 84-89.
[56] EB Docket, pp. 91-92.
[57] Petition for Review, EB Docket, pp. 19-20.
[58] Exhibit "P-2", Division Docket, Vols. 2 & 3, pp. 956-1009.

the Date of Commencement of Commercial Production within which to recover its Pre-operating Expenses as well as property expenses incurred during the period. Only after the Pre-operating Expenses incurred by petitioner are recovered is it liable to pay the Government's share of 60% of Net Revenue, which includes excise tax. Petitioner likewise invokes Section 81 of Republic Act (RA) No. 7942, or the Philippine Mining Act of 1995, as implemented by Department of Environment and Natural Resources Administrative Order (DAO) No. 95-23 issued on August 15, 1995, and reiterated in DAO No. 2010-21 issued on June 28, 2010, which all provide that the collection of the Government's share in an FTAA, including excise tax, shall only commence after the FTAA contractor has fully recovered its pre-operating, exploration and development expenses, inclusive.

Petitioner then insists that per the FTAA, its Recovery Period shall begin from the Date of Commencement of Commercial Production, or the first day of the calendar quarter following the quarter in which petitioner's production equals fifteen percent (15%) of the project's initial annual design capacity, which fell on April 1, 2013. Thus, petitioner asserts that when it paid the subject excise taxes during the period from June to December 2014, it was still in its five (5)-year Recovery Period.

Moreover, petitioner argues that the payment of excise taxes is detrimental to the recovery of its Pre-operating Expenses since the amount paid for excise taxes could have been part of pre-operating expense recovery, but instead of being recovered, it was made to pay such amount which is not due to the Government.

Finally, petitioner maintains that BIR Ruling No. 10-2007 is valid and should not have been annulled by the Court in Division since petitioner merely gave an estimate of the commencement of its commercial production, which at the time when the request for ruling was filed was not yet determined with certainty.

Arguments of Respondent

Respondent, in its Comment, reiterates the Court in Division's ruling that petitioner failed to prove that the payments of the subject excise tax during the Recovery Period were detrimental to its recovery of its Pre-operating Expenses, and that the payment of the excise tax during the Recovery Period would merely form part of the Government's share. Thus, it is respondent's position that petitioner failed to discharge its burden of establishing its claim for a tax refund or credit.

THE COURT *EN BANC*'S RULING

After a judicious review of the facts as established by the records of this case, and applying the governing law on the matter, the Court *En Banc* finds the Petition for Review bereft of merit.

The Petition for Review before the Court En Banc was filed within the prescribed time

The Revised Rules of the Court of Tax Appeals (RRCTA), as amended, provides:

> **"RULE 8**
> **PROCEDURE IN CIVIL CASES**
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> x x x x x x x x x
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> **SEC. 3.** *Who may appeal; period to file petition.* – x x x
>
> (b) **A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration** or new trial **may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees** and deposit for costs before the expiration of the reglementary period herein fixed, **the Court may grant an additional period not exceeding fifteen days from the expiration of the original period** within which to file the petition for review." (*Boldfacing supplied*)

Petitioner received a copy of the assailed Resolution of the Court in Division on June 14, 2021.[59] Thus, it had fifteen (15) days from said date, or until June 29, 2021, within which to file its petition for review before the Court *En Banc*.

Instead of filing a petition for review, petitioner filed a Motion for Extension of Time to File Petition for Review on June 29, 2021, and paid the full amount of the assessed docket fees on the same date. Thus, in a Minute Resolution dated July 2, 2021, the Court *En Banc* granted petitioner's Motion for Extension of Time to File Petition for Review, thereby giving petitioner a final and non-extendible period of fifteen (15) days from June 29, 2021, or until July 14, 2021, to file its Petition for Review.

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[59] Motion for Extension of Time to File Petition for Review, EB Docket, p. 1.

Considering that the present Petition for Review was filed on July 13, 2021, or within the extended period to file petition for review, the Court *En Banc* has jurisdiction to take cognizance of the same.

Under the FTAA and as supported by Section 81 of RA No. 7942, petitioner is exempt from payment of excise tax during the Recovery Period

The Court in Division ruled that Sections 81, 84 and 97 of RA No. 7942 do not provide for a tax exemption during the Recovery Period for FTAA contractors. It held that the collection of excise tax on mineral products from an FTAA contractor is merely deferred until such contractor has fully recovered its Pre-operating Expenses.

Petitioner insists, on the other hand, that it is exempt from payment of excise tax during the Recovery Period as provided for in the FTAA and RA No. 7942, as implemented by DAO Nos. 95-23 and 2010-21.

The Court *En Banc* rules for petitioner.

It must be noted that the basis for the tax exemption granted to petitioner is the FTAA it executed with the Republic of the Philippines on June 20, 1994, or prior to the effectivity of RA No. 7942.

Under Executive Order (EO) No. 279 issued on July 25, 1987 during which time the President exercised legislative powers,[60] the Secretary of Environment and Natural Resources was authorized to negotiate with foreign investors who wish to enter into FTAAs with the Government.

It is within the purview of EO No. 279 that the present FTAA was signed on June 20, 1994 by Executive Secretary Teofisto Guingona, Jr. and Bryce G. Roxburgh, President of Arimco Mining Corporation, with the recommendation of Angel C. Alcala, Secretary of Environment and Natural Resources. This FTAA with Arimco Mining Corporation was eventually assigned to petitioner with the approval of the Government.[61]

The FTAA, as a duly perfected contract between petitioner and the Republic of the Philippines, is the law between the parties, and

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[60] *La Bugal B'laan Tribal Association, Inc., et al. vs. Victor O. Ramos, et al.*, G.R. No. 127882, January 27, 2004.
[61] Exhibits "P-4", "P-4-a", and "P-5", Division Docket, Vol. 3, pp. 1020-1031.

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the stipulations, conditions, and obligations arising therefrom have the force of law between the contracting parties and should be complied with in good faith.[62]

Section 11.2 of the FTAA reads:

> "11.2 Recovery of Pre[-]operating Expenses, Property Expenses and Taxes Paid During the Recovery Period. The CONTRACTOR shall have a period of up to five (5) Contract Years, counted from the Date of Commencement of Commercial Production within which to recover its: (a) Pre[-]operating Expenses; and (b) Property expenses incurred during the period in which Pre[-]operating Expenses are recovered, **after which period only shall the right of the GOVERNMENT to share in the Net Revenue**, as hereinafter defined, **accrue**." [*Boldfacing supplied*]

The Government's share in the Net Revenue includes the collection of excise tax as provided for under Section 11.5 of the FTAA, which states:

> "11.5 The GOVERNMENT's Share. Provided that the Pre[-]operating Expenses of the CONTRACTOR and any of its Affiliates on the Contract Area, as defined in Section 2.42 in relation to Section 2.3 of this Agreement and as passed on audit by an independent and certified public accountant shall have been recovered by the CONTRACTOR pursuant to Section 11.2 of this Agreement, the GOVERNMENT's share of Net Revenue, as defined in the preceding section, shall be 60% while the CONTRACTOR's share shall be 40% of the same.
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> **The GOVERNMENT shall receive 60% of Net Revenue less the following** costs, **taxes**, duties, fees and other expenses by the CONTRACTOR or otherwise **accrued by the CONTRACTOR in its books as an expense for any given Contract Year**, provided that payments made in any Contract Year of an expense accrued the previous Contract Year and already charged to the GOVERNMENT for the previous CONTRACT YEAR shall no longer be chargeable:
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> (a) **excise tax, including excise tax paid during the recovery of Pre[-]operating Expenses** as provided for in par. 1 of Section 11.2 of this Agreement but which was not actually recovered by the CONTRACTOR from

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[62] *Rodolfo Morla vs. Corazon Nisperos Belmonte, et al.*, G.R. No. 171146, December 7, 2011.

the GOVERNMENT during the said period, for any amount paid by the CONTRACTOR which was not subject to deletion by the Board of Investments' incentives or other incentives laws, unless legislation is required to allow the deduction of the excise tax, in which case the deduction shall be made only after the appropriate legislation has been passed[.]" (*Boldfacing supplied*)

Thus, it is clear from the foregoing provisions that during the so-called "Recovery Period"—or the five (5) Contract Years beginning from the Date of Commencement of Commercial Production—the Government cannot collect from petitioner, as the FTAA Contractor, the Government's Share in the Net Revenue, which includes excise tax, because the Government's right to share shall **only accrue** after the Recovery Period.

The term "accrue" in legal parlance means "to come into existence as an enforceable claim."[63] Per the terms of the FTAA, it is unambiguous that the Government's Share, including excise tax, shall only become an "enforceable claim" after the Recovery Period. To construe that excise tax is collectible during the Recovery Period is a contravention of the terms of the FTAA.

Even if the FTAA does not make use of the phrase "tax exemption" during the Recovery Period, the construction of the words of Section 11.2, in relation to Section 11.5 of the FTAA, leads to no other conclusion than that the Government has no right to have a share in the taxpayer's Net Revenue and thus, precluded from collecting excise taxes from petitioner during the Recovery Period.

Verily, it was the intention of the parties when they entered into the FTAA to exempt petitioner from the payment not just of excise tax but all other applicable taxes and duties during the Recovery Period. As provided for in Section 11.1 thereof:

"Section 11.1 General Principles. x x x

Furthermore, the Department of Environment and Natural Resources, exerting its best efforts, shall assist the CONTRACTOR in negotiations with the Board of Investments and all other relevant agencies and instrumentalities of the GOVERNMENT for corporate tax and **other tax and duty holiday or other incentives, including the appropriate legislation, consistent with this Agreement, particularly**

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[63] *H. Villarica Pawnshop, Inc., et al. vs. Social Security Commission, et al.*, G.R. No. 228087, January 24, 2018.

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> **during the five-year period for recovery of Pre[-]operating Expenses** as provided for in Section 11.2 hereof. x x x" (*Boldfacing supplied*)

The contractual tax exemption granted to petitioner under the FTAA is protected by no less than Section 10, Article III of the Constitution, which prohibits the State from passing any law that impairs the obligations of contracts. As held by the Supreme Court in *Manila Electric Company vs. Province of Laguna and Benito R. Balazo*:[64]

> "x x x **Contractual tax exemptions, in the real sense of the term and where the non-impairment clause of the Constitution can rightly be invoked, are those agreed to by the taxing authority in contracts**, such as those contained in government bonds or debentures, lawfully entered into by them under enabling laws in which the government, acting in its private capacity, sheds its cloak of authority and waives its governmental immunity. Truly, **tax exemptions of this kind may not be revoked without impairing the obligations of contracts**. x x x" (*Boldfacing supplied*)

Thus, even with the enactment of RA No. 7942 after the execution of the FTAA, the former law cannot impair the contractual tax exemption already granted under the latter agreement.

In fact, the Supreme Court has ruled in *Lepanto Consolidated Mining Co. vs. WMC Resources Int'l. Pty. Ltd., WMC Philippines, Inc. and Sagittarius Mines, Inc.*,[65] that the provisions of RA No. 7942 do not retroactively apply to FTAAs executed prior to the effectivity of the said law, thus:

> "The pivotal issue to be resolved herein involves the propriety of the application to the Columbio FTAA of Republic Act No. 7942 or the Philippine Mining Act of 1995, particularly Section 40 thereof requiring the approval of the President of the assignment or transfer of financial or technical assistance agreements. Petitioner maintains that respondents failed to comprehend the express language of Section 40 of the Philippine Mining Act of 1995 requiring the approval of the President on the transfer or assignment of a financial or technical assistance agreement.
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> To resolve this matter, it is imperative at this point to stress the fact that the **Columbio FTAA was entered into by**

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[64] G.R. No. 131359, May 5, 1999.
[65] G.R. No. 162331, November 20, 2006.

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the Philippine Government and WMC Philippines on 22 March 1995, undoubtedly before the Philippine Mining Act of 1995 took effect on 14 April 1995. Furthermore, it is undisputed that said FTAA was granted in accordance with Executive Order No. 279 and Department Administrative Order No. 63, Series of 1991, which does not contain any similar condition on the transfer or assignment of financial or technical assistance agreements. Thus, it would seem that what petitioner would want this Court to espouse is the retroactive application of the Philippine Mining Act of 1995 to the Columbio FTAA, a valid agreement concluded prior to the naissance of said piece of legislation.

This posture of petitioner would clearly contradict the established legal doctrine that **statutes are to be construed as having only a prospective operation unless the contrary is expressly stated or necessarily implied from the language used in the law**. As reiterated in the case of *Segovia v. Noel*, a sound cannon of statutory construction is that a statute operates prospectively only and never retroactively, unless the legislative intent to the contrary is made manifest either by the express terms of the statute or by necessary implication.

Article 4 of the Civil Code provides that: "Laws shall not have a retroactive effect unless therein otherwise provided." According to this provision of law, **in order that a law may have retroactive effect it is necessary that an express provision to this effect be made in the law, otherwise nothing should be understood which is not embodied in the law**. Furthermore, it must be borne in mind that **a law is a rule established to guide our actions without no binding effect until it is enacted, wherefore, it has no application to past times but only to future time, and that is why it is said that the law looks to the future only** and has no retroactive effect unless the legislator may have formally given that effect to some legal provisions.

In the case at bar, **there is an absence of either an express declaration or an implication in the Philippine Mining Act of 1995 that the provisions of said law shall be made to apply retroactively, therefore, any section of said law must be made to apply only prospectively, in view of the rule that a statute ought not to receive a construction making it act retroactively, unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied**." (*Boldfacing supplied*)

In fine, the provisions of RA No. 7942 and its implementing rules cannot be used as bases to rule that petitioner does not enjoy any tax exemption during the Recovery Period, precisely because the said law cannot be retroactively applied to the FTAA.

Assuming *arguendo* that RA No. 7942 applies in this case, an examination of its provisions shows nonetheless that FTAA contractors are granted certain tax exemptions during the Recovery Period. Section 81 of RA No. 7942 reads:

> "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.
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> **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*)

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 includes excise taxes, among others, until it has fully recovered its expenses. Such construction is consistent with the goal

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of allowing the FTAA contractor to fully recover its expenses before it is made to pay the Government Share in the FTAA.

DAO No. 99-56 dated December 27, 1999 provided for the "Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements." Section 3(g)(1) of DAO No. 99-56 reads:

> "Section 3. **Fiscal Regime of a Financial or Technical Assistance Agreement**.
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> x x x x x x x x x
>
> g. Government Share.
>
> 1. Basic Government Share. The following taxes, fees and other such charges shall constitute the Basic Government Share:
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> a) **Excise tax on minerals**;
> b) Contractor's income tax;
> c) Customs duties and fees on imported capital equipment;
> d) Value added tax on the purchase of imported equipment, goods and services;
> e) Withholding tax on interest payments on foreign loans;
> f) Withholding tax on dividends to foreign stockholders;
> g) Royalties due the Government on Mineral Reservations;
> h) Documentary stamps taxes;
> i) Capital gains tax;
> j) Local business tax;
> k) Real property tax;
> l) Community tax;
> m) Occupation fees;
> n) All other local Government taxes, fees and imposts as of the effective date of the FTAA;
> o) Special Allowance, as defined in the Mining Act; and
> p) Royalty payments to any Indigenous People(s)/Indigenous Cultural Community(ies).
>
> From the Effective Date, the foregoing taxes, fees and other such charges constituting the Basic Government Share, if applicable, shall be paid by the Contractor: *Provided*, **That above items (a)**

> **to (g) shall not be collected from the Contractor upon the date of approval of the Mining Project Feasibility Study up to the end of the Recovery Period**. Any taxes, fees, royalties, allowances or other imposts, which should not be collected by the Government, but nevertheless paid by the Contractor and are not refunded by the Government before the end of the next taxable year, shall be included in the Government Share in the next taxable year. Any Value-Added Tax refunded or credited shall not form part of Government Share." (*Boldfacing supplied*)

Under Section 3(g)(1)(a) of DAO No. 99-56, excise taxes are not collected from the FTAA contractor from approval of the Mining Project Feasibility Study up to the end of the Recovery Period, which necessarily includes the whole five (5)-year Recovery Period.

DAO No. 99-56 was superseded by DAO No. 2007-12 dated June 20, 2007, which provided for a new fiscal regime for FTAAs. Section 4 thereof provides:

> "Section 4. **Fiscal Regime of a Financial or Technical Assistance Agreement**
>
> x x x x x x x x x
>
> b. <u>Basic Government Share</u>
>
> 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;

ση

(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.

x x x x x x x x x

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." (*Boldfacing supplied*)

Notwithstanding the amendment made in the fiscal regime of FTAAs as provided for under DAO No. 2007-12, Section 12 thereof provides:

"Section 12. **Status of Existing FTAAs**

All FTAAs approved prior to the effectivity of this Administrative Order shall remain valid and be recognized by the Government: *Provided*, That should a Contractor desires to amend its FTAA, it shall do so by filing a Letter of Intent (LOI) to the Secretary thru the Director: *Provided further*, **That if the Contractor desire to amend the fiscal regime of its FTAA, it may do so by seeking for the amendment of its FTAA's whole fiscal regime by adopting the fiscal regime provided herein**: *Provided finally*, That any amendment of an FTAA other than the provision on fiscal regime shall require negotiation with the FTAA Negotiating

> Panel and that every amendment of an FTAA shall require the recommendation of the Secretary for approval of the President of the Republic of the Philippines." (*Boldfacing supplied*)

DAO No. 2007-12 did not intend to amend the fiscal regime of existing FTAAs, including the subject FTAA. DAO No. 2007-12 is cognizant that the adoption of the fiscal regime provided therein requires the amendment of existing FTAAs. Thus, without such amendment, the fiscal regime in the subject FTAA remains the same.

Relevantly, the landmark case of *La Bugal B'laan Tribal Association, Inc., et al. vs. Victor O. Ramos, Secretary, Department of Environment and Natural Resources, et al.*,[66] decided by the Supreme Court, held that an FTAA contractor is exempt from certain national internal revenue taxes, including excise tax, during the Recovery Period, thus:

> "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." (*Boldfacing supplied*)

On what these fiscal and non-fiscal incentives are, the Supreme Court elucidated as follows:

> "**These incentives consist principally of the <u>waiver of national taxes</u> during the cost recovery period of the FTAA**. During such period, the contractor pays only part of the basic government's share in taxes consisting of local government taxes and fees. These are the local business tax, real property tax, community tax, occupation fees, regulatory fees, all other local taxes and fees in force, and royalty payments to indigenous cultural communities, if any.
>
> **These national taxes, however, are <u>not to be paid</u> by the contractor: (i) excise tax on minerals**; (ii) contractor's income tax; (iii) customs duties and fees on imported capital equipment; (iv) value added tax on purchases of imported equipment, goods and services; (v) withholding tax on interest

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

> payments on foreign loans; (vi) withholding tax on dividends to foreign stockholders; and (vii) royalties due the government on mineral reservations.
>
> Other incentives to the contractor include those under the Omnibus Investment Code of 1997; those for the use of pollution control devices and facilities; income tax carry-forward of losses (five-year net loss carry forward); and income tax accelerated depreciation."[67] (*Boldfacing and underscoring supplied*)

In sum, under the terms of the FTAA, respondent has no authority to collect excise taxes as the Government's right to have a share in the Net Revenue of petitioner during the Recovery Period has not accrued.

The Court in Division erred in invalidating BIR Ruling No. 10-2007

Petitioner maintains that BIR Ruling No. 10-2007, which was petitioner's basis in claiming its excise tax exemption during the Recovery Period, is valid and should not have been annulled by the Court in Division since petitioner merely gave an estimate of the commencement of its commercial production on the fourth quarter of 2008, even though the actual commercial production only commenced on April 1, 2013.

The Court *En Banc* finds petitioner's argument meritorious.

The Concurring and Dissenting Opinion of Associate Justice Maria Rowena Modesto-San Pedro to the assailed Decision aptly discussed the reasons why the Court in Division erred in invalidating BIR Ruling No. 10-2007, *viz.*:

> "However, a close reading of BIR Ruling No. [10-2007] proves that there is no such misrepresentation of facts that will render the ruling null and void. In BIR Ruling No. [10-2007], **petitioner merely represented its expected commencement of commercial production. There was no representation as to the actual commencement date**.
>
> Moreover, **the commencement of commercial production, whether actual or expected, will not substantially change respondent's interpretation of the**

[67] As explained in Footnote 64 of the Resolution in *La Bugal B'laan Tribal Association, Inc., et al. vs. Victor O. Ramos, Secretary, Department of Environment and Natural Resources, et al.*, G.R. No. 127882, December 1, 2004.

> **relevant provisions Republic Act No. 7942 or the Philippine Mining Act of 1995** and DENR Administrative Order ("DAO") No. 96-40 and respondent's position that excise taxes shall not be collected up to the end of recovery period.
>
> Finally, in BIR Ruling No. [10-2007], **respondent did not specifically identify the commencement of commercial production** thereby recognizing that petitioner's representation as to commencement of commercial production is merely an approximation." (*Boldfacing supplied*)

Thus, even if BIR Ruling No. 10-2007 stated that the "expected" commencement of commercial production would be on the fourth quarter of 2008, such is not material to the interpretation made by respondent that petitioner enjoys excise tax exemption during the Recovery Period, whenever it may actually start.

In *Commissioner of Internal Revenue vs. Lucio L. Co, et al.*,[68] the Supreme Court described the purpose of BIR Rulings, as follows:

> "**BIR rulings are the official position of the Bureau to queries raised by taxpayers and other stakeholders relative to clarification and interpretation of tax laws**. In this regard, the primary purpose of a BIR Ruling is simply to determine whether a certain transaction, under the law, is taxable or not based on the circumstances provided by the taxpayer. As admitted by the CIR, **rulings merely operate to "confirm" the existence of the conditions for exemption provided under the law**. If all the requirements for exemption set forth under the law are complied with, the transaction is considered exempt, whether or not a prior BIR ruling was secured by the taxpayer."

The value of a BIR ruling is merely to **confirm** any tax exemption granted by law or contract, which is the primary source of the exemption. Thus, even if a BIR Ruling is invalidated, as was done by the Court in Division, the same did not remove petitioner's excise tax exemption during the Recovery Period as provided for in the FTAA.

Notwithstanding its excise tax exemption during the Recovery Period, petitioner failed to prove that the amount may be recovered

[68] G.R. No. 241424, February 26, 2020.

The Court in Division ruled that petitioner failed to prove that the payments of the subject excise tax during the Recovery Period were detrimental to its recovery of its Pre-operating Expenses.

Petitioner contends that the payment of excise taxes is detrimental to the recovery of its Pre-operating Expenses since the amount paid for excise taxes could have been part of pre-operating expense recovery, but instead of being recovered, it was made to pay such amount which is not due to the Government.

Petitioner's argument is bereft of merit.

The fourth paragraph of Section 11.2 of the FTAA provides:

> "11.2 Recovery of Pre[-]operating Expenses, Property Expenses and Tax Paid During the Recovery Period.
>
> x x x x x x x x x
>
> **All taxes, duties, fees, costs, levies and imposts paid by the CONTRACTOR and which are detrimental to the CONTRACTOR's recovery of Pre[-]operating Expenses and Property Expenses during the five (5) Contract Years contemplated in this Section shall be recoverable by the CONTRACTOR, whenever possible during the year(s) such expenditures were actually incurred. Any amount not recovered shall be deducted from the GOVERNMENT's Share as more specifically provided in Section 11.5 of this Agreement**, unless legislation is required to allow the necessary deductions, in which case the deductions shall be made only after the appropriate legislation has been passed." (*Boldfacing and underscoring supplied*)

The FTAA is explicit that all taxes, including excise tax, collected during the Recovery Period is recoverable during the years they were incurred, provided that the amount collected is **detrimental to petitioner's recovery of Pre-operating and Property Expenses**. In the event that there is no recovery, or the recovered amount is less than the tax paid or incurred, then petitioner's recourse is to **deduct the amount not recovered from the Government's Share**.

It has been a jurisprudential rule that tax exemptions are construed against the one claiming it. As held in *Commissioner of Internal Revenue vs. Philippine Long Distance Telephone Company*:[69]

[69] G.R. No. 140230, December 15, 2005.

> "Time and again, the [Supreme] Court has stated that taxation is the rule, exemption is the exception. Accordingly, statutes granting tax exemptions must be construed in *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority. To [them], therefore, who [claim] a refund or exemption from tax payments [rest] the burden of justifying the exemption by words too plain to be mistaken and too categorical to be misinterpreted."

Thus, petitioner has the burden of proof to show that the collection of excise tax during the Recovery Period was **detrimental** to its recovery of Pre-operating and Property Expenses.

Section II of the FTAA provides for a definition of terms. The definition of the word "detrimental" is, however, not provided therein. With the absence of a technical definition, resort to the plain or literal meaning of the word is in order.[70]

The term "detriment" means "[a]ny loss or harm suffered in person or in property."[71] Thus, per the FTAA, petitioner must show that the collection of excise tax during the Recovery Period resulted in loss or harm in its person or property.

Review of the evidence formally offered by petitioner shows that the Court in Division correctly ruled that there is no specific evidence to show that its payment of excise tax during the Recovery Period resulted in loss or harm in the person or property of petitioner. Petitioner failed to present evidence that its payment of excise tax had an adverse effect on its financial performance and/or position.

In fact, petitioner did not offer in evidence its Audited Financial Statements during the subject period. Even the Report of the ICPA did not discuss the alleged detrimental effects of paying the excise tax during the Recovery Period. The overall findings of the ICPA as found in the Report only showed that "[a]s of December 31, 2014, petitioner is still under the so-called [R]ecovery [P]eriod as neither five (5) years have elapsed from the commencement of commercial operations on April 1, 2013, nor has petitioner fully recovered its [P]re-operating [E]xpenses as well as [P]roperty [E]xpenses."[72]

Thus, the contention of petitioner that payment of excise tax during the Recovery Period is detrimental to it because such payment "would have been part of recovered pre-operating expenses"[73]

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[70] *Norton Resources and Development Corporation vs. All Asia Bank Corporation*, G.R. No. 162523, November 25, 2009.
[71] BLACK'S LAW DICTIONARY (Rev. 4th Ed. 1968), p. 537.
[72] Exhibit "P-82-b", Judicial Affidavit of Richard R. Lapres, Division Docket, Vol. 2, p. 895.
[73] Petition for Review, EB Docket, p. 31.

remains to be a mere allegation. The basic rule is that mere allegation is not evidence and is not equivalent to proof.[74]

Notwithstanding petitioner's failure to establish its entitlement to its refund claim of the excise taxes paid during the Recovery Period as discussed herein, it is not without any recourse. As provided for under Section 11.2 of the FTAA, "Any amount not recovered shall be deducted from the GOVERNMENT's Share[.]" Even Section 11.5 of the FTAA recognizes that "excise tax, including excise tax paid during the recovery of Pre[-]operating Expenses" may be deducted from the Government Share in Net Revenue.

It bears stressing that a claimant for tax refund has the burden of proof to establish the factual basis of his or her claim for tax credit or refund.[75] Tax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the refund.[76] The pieces of evidence presented entitling a taxpayer to an exemption are also *strictissimi* scrutinized and must be duly proven.[77] Here, petitioner failed to discharge the burden of proof showing that the Court in Division erred in denying its refund claim.

WHEREFORE, the Petition for Review filed on July 13, 2021 is **DENIED**. The Decision dated October 7, 2020 and Resolution dated March 12, 2021 rendered by the Court in Division in CTA Case No. 9289 are **AFFIRMED**.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

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[74] *ECE Realty and Development Inc. vs. Rachel G. Mandap*, G.R. No. 196182, September 1, 2014.
[75] *Citibank, N.A. vs. Court of Appeals and Commissioner of Internal Revenue*, G.R. No. 107434, October 10, 1997.
[76] *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc.*, G.R. No. 127105, June 25, 1999.
[77] *Kepco Philippines Corp. vs. Commissioner of Internal Revenue*, G.R. No. 179961, January 31, 2011.

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

(With due respect, please see Concurring and Dissenting Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

OCEANAGOLD (PHILIPPINES), INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 2492
(CTA Case No. 9289)

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

Promulgated:
MAY 3 1 2022 8:50 a.m.

x- -x

CONCURRING & DISSENTING OPINION

RINGPIS-LIBAN, ***J.:***

I concur in the *ponencia* in denying the refund claim of Oceanagold (Philippines), Inc. ("Petitioner") and declaring that it failed to prove that the payments of the subject excise tax during the recovery period were detrimental to its recovery of its pre-operating expenses.

With all due respect however, I express my dissent on the view that there was contractual tax exemption granted under the Financial and Technical Assistance Agreement dated June 20, 1994 ("FTAA") executed between Arimco Mining Corporation, the original contractor and Petitioner's assignor, and the Republic of the Philippines. A complete reading of Section XI[1], paragraph 11.2 of the FTAA shows otherwise, *viz.*:

[1] Docket, Exhibit "P-2", pp. 979-980.

"11.2 Recovery of Preoperating Expenses, Property Expenses and Tax Paid During the Recovery Period. The CONTRACTOR shall have a period of up to five (5) Contract Years, counted from the Date of Commencement of Commercial Production within which to recover its: (a) Preoperating Expenses; and (b) Property expenses incurred during the period in which Preoperating Expenses are recovered, after which period only shall the right of the GOVERNMENT to share in the Net Revenue, as hereinafter defined, accrue.

However, if after the lapse of the period mentioned in the preceding paragraph, the CONTRACTOR has not yet fully recovered its Preoperating Expenses and Property expense incurred during the period in which Pre-Operating Expenses were incurred, it shall be allowed to recover the same as a depreciation allowance deductible against the distributable Net Revenues over the period of the succeeding three Contract Years.

Property expenses incurred during the period in which Preoperating Expenses are recovered shall not for the purpose of this Section include Major Capital Expenditure as defined in Section 11.7.

All taxes, duties, fees, costs, levies and imposts paid by the CONTRACTOR and which are detrimental to the CONTRACTOR's recovery of Preoperating Expenses and Property Expenses during the five (5) Contract Years contemplated in this Section shall be recoverable by the CONTRACTOR, whenever possible during the year(s) such expenditures were actually incurred. Any amount not recovered shall be deducted from the GOVERNMENT's Share as more specifically provided in Section 11.5 of this Agreement, unless legislation is required to allow the necessary deductions, in which case the deductions shall be made only after the appropriate legislation has been passed.

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

The salient provisions of the said section may be summarized as follows:

1) During the recovery period or five (5) years from the date of commencement of commercial production, Petitioner is not obligated to pay the share of the Republic of the Philippines

(*i.e.*, government) in the net revenues. The purpose for this is so that Petitioner can recover its preoperating and property expenses;

2) After the five-year recovery period, Petitioner is duty-bound to pay the share of the government in the net revenues. If Petitioner's preoperating and property expenses were not yet fully recovered at this juncture, it shall be allowed as a depreciation allowance deductible against the distributable net revenues over the period of the succeeding three years; and

3) In the event Petitioner had paid taxes, duties, fees, costs, levies and imposts during the five-year recovery period **and** said payments were detrimental to the Petitioner's preoperating and property expenses, then Petitioner can recover or refund the payments made. Any amount not recovered shall instead be deducted from the government's share.

It is important to note that the essence of a tax exemption is the immunity or freedom from a charge or burden to which others are subjected. It is a waiver of the government's right to collect the amounts that would have been collectible under our tax laws. Thus, when the law speaks of a tax exemption, it should be understood as freedom from the imposition and payment of a particular tax.[2]

Based on this principle, it is evident that the tax refund mechanism provided under the FTAA does not amount to a tax exemption. Indeed, the possibility of a subsequent refund exists, and yet Petitioner is not precluded from paying taxes, duties, fees, something it should be immune to in the first place. This completely contradicts the notion of a tax exemption.

From all the foregoing, I vote to **DENY** the instant Petition for Review for lack of merit.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

2 Secretary of Finance Cesar B. Purisima and Commissioner of Internal Revenue Kim S. Jacinto-Henares v. Representative Carmelo F. Lazatin and Ecozone Plastic Enterprises Corporation, G.R. No. 210588, November 29, 2016.