REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

OCEANAGOLD (PHILIPPINES), INC., *Petitioner,*	**CTA Case No. 9736**
	Members:
- versus -	**DEL ROSARIO,** *P.J., Chairperson,* **MANAHAN,** and **REYES-FAJARDO** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated:
	AUG 10 2023, 10:05AM

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DECISION

REYES-FAJARDO, *J*.:

This Petition for Review[1] filed on December 19, 2017, by petitioner Oceanagold (Philippines), Inc. prays for the cancellation of deficiency excise tax assessment issued by respondent Commissioner of Internal Revenue against Oceanagold (Philippines), Inc. for taxable year (TY) 2013, in the amount of ₱221,136,013.14, inclusive of interest and administrative penalties.[2]

PARTIES

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

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[1] Docket - Vol. I, pp. 10-44, with annexes.

[2] Statement of the Case, Pre-Trial Order dated October 24, 2019, Docket - Vol. III, p. 1254.

[3] Exhibit "P-1," Docket - Vol. IV, p. 1345 to 1355.

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

FACTS

Petitioner received a Letter of Authority (LOA) No. 121-2014-00000158 dated November 24, 2014, issued by Nestor S. Valeroso, OIC- Assistant Commissioner Large Taxpayers Service, authorizing Revenue Officers Thelma Pilar, Rona Marcellano, and Dalisay Umlas and Group Supervisor Hermania Cercado to examine its books of accounts and other accounting records for all internal revenue taxes including documentary stamp tax and other taxes, for the period from January 1, 2013 to December 31, 2013.[5]

On December 13, 2016, petitioner received respondent's undated Preliminary Assessment Notice (PAN), with Details of Discrepancies.[6]

On December 28, 2016, petitioner filed its protest to the PAN, refuting the findings of deficiency income tax (IT), value-added tax (VAT), expanded withholding tax (EWT), fringe benefit tax (FBT), withholding tax compensation (WTC), excise tax (ET), documentary stamp tax (DST), and administrative penalties.[7]

On February 1, 2017, petitioner received respondent's Formal Letter of Demand (FLD) with Details of Discrepancies, assessing it for deficiency IT, VAT, EWT, FBT, WTC, ET, DST, and administrative penalties in the amount of ₱816,484,285.75, inclusive of interest.[8]

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4 Par. 1, Stipulation of Facts, *Joint Stipulation of Facts and Issues* (JSFI), Docket - Vol. III, p. 1111.

5 Par. 2, Stipulation of Facts, JSFI, Docket - Vol. III, p. 1111; Exhibit "P-51," Docket - Vol. IV, p. 1877.

6 Exhibit "P-52," Docket - Vol. IV, pp. 1879 to 1888.

7 Exhibit "P-53," Docket - Vol. IV, pp. 1889 to 1902.

8 Par. 3, Stipulation of Facts, JSFI, Docket - Vol. III, p. 1112; Exhibit "P-54," Docket - Vol. IV, pp. 1903 to 1924.

On March 2, 2017, petitioner filed its Protest to the FLD.[9]

On November 20, 2017, petitioner received respondent's Final Decision on Disputed Assessment (FDDA) dated October 16, 2017, assessing it for deficiency taxes, surcharge, and interest in the reduced amount of ₱262,678,770.49, computed as follows:[10]

Tax Type	Basic	Surcharge	Interest	Total
Income tax	4,255,439.55		3,059,188.20	7,314,627.75
VAT	266,442.94		200,598.00	467,041.45
EWT	32,647.99		27,030.75	59,678.74
FBT	1,434,660.73		1,087,983.81	2,522,644.54
Excise tax	125,177,799.00		95,958,214.14	221,136,013.14
DST	15,482,279.00	3,870,569.75	11,825,916.12	31,178,764.87
Total	**₱146,649,269.21**	**₱3,870,569.75**	**₱112,158,931.53**	**₱262,678,770.49**

On November 29, 2017, petitioner paid the foregoing deficiency tax assessments, save for the ET assessment.[11]

On December 19, 2017, petitioner filed a Petition for Review,[12] docketed as CTA Case No. 9736, initially raffled to the Third Division of the Court.

On March 22, 2018, respondent filed his Answer,[13] within the extended period granted by the Court.[14]

On June 21, 2018, the Pre-Trial Brief for Petitioner was filed,[15] while on May 20, 2019, Respondent's Pre-Trial Brief was submitted.[16]

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9 Exhibit "P-55," Docket - Vol. IV, pp. 1925 to 1941.
10 Par. 4, Stipulation of Facts, JSFI, Docket - Vol. III, p. 1112. Exhibit "P-57," Docket - Vol. IV, pp. 1945 to 1948.
11 Exhibits "P-58" to "P-62," Docket - Vol. IV, pp. 1950 to 1964.
12 Docket - Vol. I, pp. 10 to 52.
13 Docket - Vol. I, pp. 248 to 257.
14 Docket - Vol. I, p. 240 and p. 246.
15 Docket - Vol. 2, pp. 820 to 845.
16 Docket - Vol. 2, pp. 987 to 991.

The Pre-Trial Conference was initially set on June 26, 2018.[17] Under Resolution dated July 4, 2018, the Court reset the Pre-Trial Conference to October 2, 2018.[18]

By Order dated September 25, 2018, this case was transferred to the First Division of the Court, and the Pre-Trial Conference was cancelled and reset until further notice.[19]

Through Resolution dated January 15, 2019, the Court referred the case to mediation in the Philippine Mediation Center - Court of Tax Appeals. [20] However, the parties failed to reach an agreement.[21] Thus, in the Resolution dated April 10, 2019, the Court set this case for Pre-Trial Conference on May 30, 2019.[22]

On May 29, 2019, petitioner filed an Omnibus Motion A. To Take Judicial Notice of CTA 3rd Division's Resolution in Oceanagold (Philippines), Inc. v. Commissioner of Internal Revenue Code, CTA Case Nos. 8995 & 9034 dated July 20, 2018; B. To Defer Pre-trial Conference, [23] to which respondent filed an Opposition (Re: Petitioner's Motion to Take Judicial Notice of CTA 3rd Division's Resolution in Oceanagold (Philippines), Inc. vs. Commissioner of Internal Revenue, CTA Case Nos. 8995 & 9034 dated July 20, 2018) on June 7, 2019.[24] In the Resolution dated July 24, 2019, the Court denied petitioner's Omnibus Motion. [25]

On July 25, 2019, the Pre-Trial Conference was held.[26]

On August 9, 2019, the parties filed their *Joint Stipulation of Facts and Issues*,[27] on the basis of which, the Court issued The Pre-Trial Order dated October 24, 2019.[28]

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17 *Notice of Pre-Trial Conference* dated March 27, 2018, Docket - Vol. I, pp. 261 to 263.
18 Docket - Vol. 2, p. 969.
19 Docket - Vol. 2, p. 970.
20 Docket - Vol. 2, pp. 973 to 974.
21 Mediator's Report, Docket - Vol. 2, pp. 975 to 982.
22 Docket - Vol. 2, p. 984.
23 Docket - Vol. III, pp. 1012 to 1020.
24 Docket - Vol. III, pp. 1079 to 1084.
25 Docket - Vol. III, pp. 1088 to 1093.
26 Minutes of the hearing held on, and Order dated, July 25, 2018, Docket - Vol. III, pp. 1094 to 1096, and 1098 to 1099, respectively.
27 Docket - Vol. III, pp. 1111 to 1126.
28 Docket - Vol. III, pp. 1254 to 1269.

Trial ensued. Petitioner presented: (1) Atty. Joan D. Adaci-Cattiling, [29] petitioner's Senior Legal Counsel and Corporate Secretary; (2) Ms. Hesther Bahiwag, [30] petitioner's Financial Accounting Superintendent; and (3) Ms. Elaine E. De Guzman,[31] the Court-commissioned Independent Certified Public Accountant (ICPA), as its witnesses.[32]

On November 25, 2019, the ICPA Report was submitted to the Court.

On December 27, 2019, petitioner filed its Formal Offer of Evidence,[33] to which respondent filed his Comment/Opposition (On Petitioner's Formal Offer of Evidence) on January 16, 2020.[34]

By Resolution dated June 10, 2020, [35] the Court admitted petitioner's offered exhibits, except for the following:

1. Exhibits "P-26," "P-26-A," "P-28," and "P-55," for failure to present their originals for comparison;

2. Exhibits "P-79-A," "P-394," "P-3015-A," "P-3080-A," "P-3321," "P-3321-A," "P-3321-B," "P-3322," "P-3322-A," "P-3322-B," "P-3322-C," "P-3322-D," "P-3322-E," "P-3349," "P-3349-A," "P-3350," "P-3350-A," "P-3350-B," "P-3351," "P-3351-A," "P-3351-B," "P-3352," "P-3552-B," "P-3352-C," "P-3352-D," "P-3353," "P-3353-A," "P-3354," "P-3354-A," "P-3354-B," "P-3355," "P-3355-A," "P-3354-B," "P-3355," "P-3355-A," "P-3355-B," "P-3355-C," "P-3356," "P-3356-A," "P-3356-B," "P-3356-C," "P-3556-D," "P-3356-E," "P-7557" to "P-7558," "P-8617," "P-15853," "P-19365" to "P-19367," "P-19657" to "P-19659," "P-22360," "P-27240" to "P-27241," "P-27308" to "P-27311," "P-29871" to "P-29881," "P-36322" to "P-36324," "P-36804" to "P-36805," "P-38035" to "P-38038," "P-48107" to "P-48109," "P-51601" to "P-51786," "P-51791" to "P-52235," "P-52238" to "P-52774," "P-52776" to "P-52781," "P-52783" to "P-52893," "P-52895" to "P-53349," and "P-

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29 Exhibit "65," Docket - Vol. I, pp. 274 to 297; Minutes of the hearing held on, and Order dated, October 1, 2019, Docket - Vol. III, pp. 1233 to 1236.

30 Exhibit "P-66," Docket - Vol. III, pp. 851 to 857; Minutes of the hearing held on, and Order dated, October 29, 2019, Docket - Vol. 2, pp. 1270 to 1273.

31 Exhibit "P-68," Docket - Vol. III, pp. 1282 to 1288; Minutes of the hearing held on, and Order dated, December 3, 2019, Docket - Vol. IV, pp. 1289 to 1293.

32 *Oath of Commission* dated October 15, 2019, Docket - Vol. III, pp. 1241 and 1245; Minutes of the hearing held on, and Order dated, October 15, 2019, Docket - Vol. III, pp. 1242 to 1244, and 1246 to 1247, respectively.

33 Docket - Vol. IV, pp. 1298 to 1344.

34 Docket - Vol. IV, pp. 1969 to 1972.

35 Docket - Vol. V, pp. 1979 to 1984.

53590" to "P-53592," for not being found in the records of the case; and

3. Exhibits "P-2569" to "P-2576," and "P-23695," for not being found in the records of the case and for failure to identify.

On July 13, 2020, petitioner filed a Motion for Reconsideration (of the Resolution dated June 10, 2020)[36] praying for the admission of Exhibits "P-26," "P-26-A," "P-28," "P-55," "P-3321," "P-3321-A," "P-3321-B," "P-3322," "P-3322-A," "P-3322-B," "P-3322-C," "P-3322-D," "P-3322-E," "P-3349," "P-3349-A," "P-3350," "P-3350-A," "P-3350-B," "P-3351," "P-3351-A," "P-3351-B," "P-3352," "P-3552-A," "P-3552-B," "P-3352-C," "P-3352-D," "P-3353," "P-3353-A," "P-3354," "P-3354-A," "P-3354-B," "P-3355," "P-3355-A," "P-3355-B," "P-3355-C," "P-3356," "P-3356-A," "P-3356-B," "P-3356-C," "P-3556-D," "P-3356-E," "P-29871" to "P-29881," and "P-53590" to "P-53592". Respondent failed to file his comment thereto.[37]

Through Resolution dated January 12, 2021,[38] the Court granted petitioner's Motion for Reconsideration, and admitted said Exhibits.

In the Hearing held on March 22, 2022, respondent presented his sole witness RO Rona B. Marcellano.[39]

On March 31, 2022, respondent filed his Formal Offer of Evidence,[40] to which petitioner filed its Comment [on Respondent's Formal Offer of Evidence dated March 31, 2022] on April 8, 2022.[41] Through Resolution dated June 6, 2022,[42] the Court admitted all of respondent's exhibits.

In the Resolution dated August 10, 2022, this case was submitted for decision,[43] considering respondent's Memorandum[44]

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36 Docket - Vol. V, pp. 1994 to 2005.

37 Records Verification dated November 9, 2020 issued by this Court's Judicial Records Division, Docket - Vol. V, p. 2012.

38 Docket - Vol. V, pp. 2015 to 2021.

39 Exhibit "R-12," Docket - Vol. 2, pp. 993 to 1007; Minutes of the hearing held on, and Order dated, March 22, 2022, Docket - Vol. V, pp. 2032 to 2036.

40 Docket - Vol. V, pp. 2041 to 2046.

41 Docket - Vol. V, pp. 2048 to 2051.

42 Docket - Vol. V, pp. 2054 to 2055.

43 Minute Resolution dated August 10, 2022, Docket - Vol. V, unpaged.

44 Docket - Vol. V, pp. 2056 to 2081.

and Memorandum for Petitioner,[45] respectively filed on July 11, 2022 and July 29, 2022.

ISSUES

The issues to be resolved are as follows:[46]

1. Whether the Honorable Court has jurisdiction over the instant petition.

2. Whether petitioner is liable for deficiency excise tax in the amount of ₱262,678,770.49, plus interest and surcharges thereon, for TY 2013.

3. Whether Revenue Memorandum Circular (RMC) No. 17-2013[47] which among others, revoked BIR Ruling No 10-2007, dated May 4, 2007 is valid.

ARGUMENTS

Petitioner argues that the Court has jurisdiction over its appeal of respondent's FDDA under Section 7(a)(1) of Republic Act No. (RA) 1125, as amended by RA 9282, and Section 3(a)(1), Rule 4 of the Revised Rules of the Court of Tax Appeals (RRCTA). Petitioner also cites *Banco De Oro, et al., v. Republic of the Philippines, et al. (BDO),*[48] in arguing that the Court of Tax Appeals has jurisdiction to pass upon the constitutionality or validity of RMC No. 17-2013, which it raised as a defense in disputing the deficiency ET assessment issued against it.

Petitioner maintains that it is exempt from excise tax from the date of approval of its Mining Project Feasibility Study up to the end of the recovery period pursuant to the Financial or Technical Assistance Agreement (FTAA), Section 81 of RA No. 7942, otherwise known as the "Philippine Mining Act of 1995,"and Section 236 of Department of Environment and Natural Resources Administrative

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[45] Docket - Vol. V, pp. 2083 to 2130.

[46] Stipulation of Issues, JSFI, Docket - Vol. III, pp. 1112 to 1113.

[47] SUBJECT: Clarifying the Taxes Due from Financial or Technical Assistance Agreement (FTAA) Contracts during "Recovery Periods"

[48] Resolution, G.R. No. 198756, August 16, 2016.

[initials]

Order (DAO) No. 95-23. It adds that BIR Ruling No. 10-2007[49] confirmed its excise tax exemption during the recovery period.

Petitioner further contends that respondent failed to observe due process of law in issuing RMC No. 17-2013, as there was no prior notice and hearing required by the Book VII, Chapter 2, Section 9 of the Administrative Code of 1987[50] and notice and publication required by RMC No. 20-86.[51]

For these reasons, petitioner concludes that it is exempt from payment of excise tax for TY 2013.

Respondent counters that the Court has no jurisdiction to rule on the validity or constitutionality of RMC No. 17-2013. Assuming that the Court has jurisdiction over the case, respondent points out that the deficiency excise tax in the amount of ₱221,136,013.14, issued against petitioner must be upheld.

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49 Exhibit P-25.

50 SECTION 9. Public Participation. – (1) If not otherwise required by law, an agency shall, as far as practicable, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule.

...

51 SUBJECT : Notice, Publication and Effectivity of Internal Revenue Tax Rules and Regulation

...

1. This circular shall apply only to (a) Revenue Regulations; (b) Revenue Audit Memorandum Orders; and (c) Revenue Memorandum Circulars and Revenue Memorandum Orders bearing on internal revenue tax rules and regulations.

2. Except when the law otherwise expressly provides, the aforesaid internal revenue tax issuances shall not begin to be operative until after due notice thereof may be fairly presumed.

Due notice of the said issuances may be fairly presumed only after the following procedures have been taken:

2.1 The Records Division of the National Office shall furnish, thru registered mail, all of the following business and professional organizations with the corresponding revenue tax issuance:

a. Philippine Institute of Certified Public Accountants;
b. Integrated Bar of the Philippines;
c. Philippine Chamber of Commerce and Industry;
d. American Chamber of Commerce;
e. Federation of Filipino-Chinese Chamber of Commerce and Industry; and
f. The Japanese Chamber of Commerce & Industry of the Philippines, Inc.

RULING

The Petition for Review is denied.

The Court has jurisdiction over the Petition for Review.

Section 7(a)(1), in relation to Section 11 of Republic Act (RA) No. 1125,[52] as amended by RA No. 9282[53] provides among others, that respondent's decisions in cases involving disputed assessments are appealable to the Court. In addition, an aggrieved party must appeal respondent's decision to the Court, within thirty (30) days from receipt thereof. These provisions respectively read:

> Sec. 7. Jurisdiction. - The CTA shall exercise:
>
> a. Exclusive appellate jurisdiction to review by appeal, as herein provided:
>
> 1. **Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments**, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue;
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> ...
>
> SEC. 11. Who May Appeal; Mode of Appeal; Effect of Appeal. - **Any party adversely affected by a decision**, ruling or inaction of the Commissioner of Internal Revenue, ... **may file an appeal with the CTA within thirty (30) days after the receipt of such decision or ruling** or after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein.
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> ...[54]

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52 An Act Creating the Court of Tax Appeals.

53 An Act Expanding the Jurisdiction of the Court of Tax Appeals (CTA), Elevating its Rank to the Level of A Collegiate Court with Special Jurisdiction and Enlarging its Membership, Amending for the Purpose Certain Sections of Republic Act No. 1125, As Amended, Otherwise Known as The Law Creating The Court of Tax Appeals, and For Other Purposes.

54 Boldfacing supplied.

On November 20, 2017, petitioner received respondent's FDDA dated October 16, 2017, ordering the payment of deficiency taxes amounting to ₱262,678,770.49, inclusive of interest and administrative penalties.[55] Counting thirty (30) days from November 20, 2017, petitioner had until December 20, 2017, to seek judicial redress. Therefore, the timely filing of the Petition for Review on December 19, 2017[56] clothed the Court with jurisdiction over this case.

The Court has jurisdiction over challenges to the validity of tax issuances.

This case is not confined to petitioner's appeal against respondent's decision. Petitioner also challenges the constitutionality or validity of RMC No. 17-2013 issued on February 15, 2013. RMC No. 17-2013 revoked BIR Ruling No. 10-2007 earlier issued to petitioner confirming its exemption from payment of excise tax on minerals from the date of approval of its Mining Project Feasibility Study (MPFS) up to the end of the recovery period in accordance with the FTAA and RA No. 7942, otherwise known as the "Philippine Mining Act of 1995." As a backgrounder:

> On June 20, 1994, Arimco Mining Corporation (AMC) entered into a FTAA[57] with the Republic of the Philippines, for the large-scale exploration, subsequent development, and commercial utilization of mineral deposits, over a contract area spanning the Provinces of Nueva Vizcaya and Quirino. AMC, later changed its corporate name to Climax-Arimco Mining Corporation (CAMC). Thereafter, CAMC transferred all its rights under the FTAA to petitioner, Australasian Philippines Mining, Inc. (Petitioner's former corporate name).[58] CAMC's assignment of all its rights and obligations to petitioner was approved by the Department of Environment and Natural Resources (DENR).[59]
>
> The FTAA allows petitioner to explore mining claims and areas in Nueva Vizcaya province on the condition that the commercial rewards for extracting minerals and mineral products shall be shared with the Philippine government in accordance with the sharing scheme provided in the FTAA.[60] After

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55 *Supra* at note 10.
56 *Supra* at note 1.
57 Exhibit "P-2," Docket - Vol. IV, pp. 1356 to 1409.
58 Exhibit "P-4," Docket - Vol. IV, pp. 1420 to 1427.
59 Exhibit "P-5," Docket - Vol. IV, pp. 1428 to 1430.
60 Item 4.3, Petition for Review, Docket- Volume 1, p. 3.

[initials]

> conducting mineral exploration activities, petitioner identified a portion of the Exploration Contract Area as suitable for the Didipio Gold-Copper Project (Didipio Project) and filed a Partial Declaration of Mining Feasibility (PDMF). On, October 11, 2005, the DENR approved the PDMF, which is petitioner's permit to operate the Didipio Project.[61]
>
> On the basis of the FTAA, Section 81 of RA 7942, and Section 236 of DAO 95-23, implementing RA 7942, petitioner requested a ruling to confirm that it is exempted from the payment of excise tax on minerals during the recovery period.
>
> On May 4, 2007, respondent issued BIR Ruling No. 10-2007[62] confirming that petitioner is exempt from the payment of excise tax. Said tax shall not be collected from APMI upon the date of approval of the Mining Project Feasibility Study up to the end of the recovery period which shall be reckoned from the date of commercial operation but not exceeding five (5) years or until the date of actual recovery of its pre-operating, exploration and development expenses, whichever comes earlier.
>
> On February 15, 2013, respondent issued Revenue Memorandum Circular (RMC) No. 17-2013 which, among others, revoked BIR Ruling No. 10-2007.[63]

Relevantly, in *BDO*,[64] the Supreme Court *En Banc* categorically declared that the CTA has undoubted jurisdiction to pass upon the constitutionality or validity of a tax law or regulation when raised by the taxpayer as a defense in disputing or contesting an assessment or claiming a refund. It is only in the lawful exercise of its power to pass upon all matters brought before it, as sanctioned by Section 7 of Republic Act No. 1125, as amended.

Consistent with *BDO*, the Court has jurisdiction to rule on the issue of constitutionality or validity of RMC No. 17-2013, upon which the deficiency excise tax assessment is based.

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61 Exhibit "P-8," Docket - Vol. IV, pp. 1442 to 1443.

62 Exhibit "P-25," Docket - Vol. IV, pp. 1483 to 1488.

63 *Supra* at Note 10.

64 G.R. No. 198756, August 16, 2016.

Petitioner is liable for the deficiency ET assessment covering TY 2013.

The BIR assessed petitioner for ET covering TY 2013 because of its sale of dore gold and metal concentrates are subject to 2% ET, pursuant to Section 151(A)(2) of the 1997 National Internal Revenue Code (NIRC), as amended, and RMC No. 17-2013.[65] According to petitioner, it is exempt from paying ET on minerals because it was being assessed during the recovery period.

The Court upholds the BIR assessment.

Sections 81, 84, and 97 of RA No. 7942,[66] otherwise known as the "Philippine Mining Act of 1995," provide:

> SEC. 81. *Government Share in Other Mineral Agreements.* — ...
>
> ...
>
> **The Government share in financial or technical assistance agreement shall consist of, among other things,** the contractor's corporate income tax, **excise tax,** special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.
>
> **The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.**
>
> ...
>
> SEC. 84. *Excise Tax on Mineral Products.* — **The contractor shall be liable to pay the excise tax on mineral products as provided for under Section 151 of the National Internal Revenue Code**: *Provided, however*, That with respect to a mineral production sharing agreement, the excise tax on mineral products shall be the government share under said agreement.

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65 Exhibit "P-29," Docket - Vol. IV, pp. 1518 to 1520.

66 An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization And Conservation.

...

> SEC. 97. *Non-payment of Taxes and Fees.* — **Failure to pay taxes 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 the re-opening of the area subject thereof to new applicants.

Indeed, the mineral products of a concerned contractor,[67] under an FTAA[68] with the government, is subject to ET under Section 151 of the NIRC,[69] as amended. By way of exception, Section 81 of RA No. 7942 provides that the government's share, including said ET, may not be collected by the latter from an FTAA contractor, if it has *not* fully recovered its pre-operating expenses, exploration, and development expenditures. The recovery period, or the period in

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67 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."*

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

69 **SEC. 151.** ***Mineral Products.*** **-(A)** ***Rates of Tax.*** - There shall be levied, assessed and collected on minerals, mineral products and quarry resources, excise tax as follows:
(1) On coal and coke, a tax of Ten Pesos (P10.00) per metric ton;
(2) On all nonmetallic minerals and quarry resources, a tax of two percent (2%) based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced; or the value used by the Bureau of Customs in determining tariff and customs duties, net of excise tax and value-added tax, in the case of importation.
Notwithstanding the provision of paragraph (4) of Subsection (A) of Section 151, locally extracted natural gas and liquefied natural gas shall be taxed at the rate of two percent (2%);
(3) On all metallic minerals, a tax based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced; or the value used by the Bureau of Customs in determining tariff and customs duties, net of excise tax and value-added tax, in the case of importation, in accordance with the following schedule:
(a) Copper and other metallic minerals;
(i) On the first three (3) years upon the effectivity of Republic Act No. 7729, one percent (1%) ;
(ii) On the fourth and the fifth years, one and a half percent (1 ½%); and
(iii) On the sixth year and thereafter, two percent (2%);
(b) Gold and chromite, two percent (2%) .
(4) On indigenous petroleum, a tax of three percent (3%) of the fair international market price thereof, on the first taxable sale, barter, exchange or such similar transaction, such tax to be paid by the buyer or purchaser before removal from the place of production. The phrase "*first taxable sale, barter, exchange or similar transaction*" means the transfer of indigenous petroleum in its original state to a first taxable transferee. The fair international market price shall be determined in consultation with an appropriate government agency.
For the purpose of this Subsection, "*indigenous petroleum*" shall include locally-extracted mineral oil, hydrocarbon gas, bitumen, crude asphalt, mineral gas and all other similar or naturally associated substances with the exception of coal, peat, bituminous shale and/or stratified mineral deposits. ...

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which petitioner may recover its pre-operating and property expenses is provided in Section XI, paragraph 11.2 of the FTAA dated June 20, 1994,[70] as follows:

> 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.**
>
> ...[71]

Meanwhile, Section 112[72] of RA No. 7942 recognizes valid and existing FTAAs. Yet, the same provision contained a proviso that said FTAAs shall comply with the applicable provisions of said law and its implementing rules and regulations. In the penultimate paragraph of its Partial Declaration of Mining Feasibility dated March 15, 2005, petitioner declared "[t]hat [it] is committed to complying with all the requirements of the FTAA and the rules and regulations of the Philippine Mining Act and other related laws;"[73] Among these rules and regulations is Section 7 of DAO No. 12-2007, which defines the term recovery period, as follows:[74]

> Section 7. Recovery of Pre-Operating Expenses

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70 Exhibit "P-2," Docket - Vol. IV, pp. 1356 to 1409.

71 Boldfacing supplied.

72 **Section 112**
Non-Impairment of Existing Mining/Quarrying Rights
All valid and existing mining lease contracts, permits/licenses, leases pending renewal, mineral production-sharing agreements granted under Executive Order No. 279, at the date of effectivity of this Act, shall remain valid, shall not be impaired, and shall be recognized by the Government: Provided, That the provisions of Chapter XIV on government share in mineral production-sharing agreement and of Chapter XVI on incentives of this Act shall immediately govern and apply to a mining lessee or contractor unless the mining lessee or contractor indicates his intention to the secretary, in writing, not to avail of said provisions: Provided, further, That no renewal of mining lease contracts shall be made after the expiration of its term: Provided, finally, That such leases, production-sharing agreements, financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations.

73 Exhibit "P-7," Docket - Vol. IV, pp. 1440 to 1443.

74 Subject: Revised Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements (FTAA).

ffr

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.

...

Section 7 of DAO No. 12-2007, provides that the recovery period, or the period within which the government may *not* collect its share, including the ET, is a maximum period of five (5) years, counted from the date of commencement of commercial production *(first circumstance)*, **or** the date when the aggregate of the Net Cash Flows from the Mining Operations is equal to the aggregate of its Pre-Operating Expenses *(second circumstance)*, **whichever comes first**.

In this regard, DAO No. 96-40 defined the term "commercial production," as follows:

Section 5. Definition of Terms. –

As used in and for purposes of these regulations, the following terms shall mean:

...

i. "**Commercial Production**" refers to the production of sufficient quantity of minerals of sustained economic viability of mining operations **reckoned from the date of commercial operation as declared by the Contractor or as stated in the feasibility study, whichever comes first.**[75]

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[75] Boldfacing supplied.

qff

On March 27, 2013, petitioner advised the Secretary of DENR that "on February 2, 2013, the Didipio Project was able to mill 301,903 tonnes and achieve the 15% production capacity."[76] Also, "the Date of Commencement of Commercial Production in accordance with Section 2.14 of the FTAA is April 1, 2013, which is the first day of the second calendar quarter." Thus, per petitioner's declaration, it allegedly commenced commercial production only on April 1, 2013.

On the other hand, petitioner submitted a Partial Declaration of Mining Feasibility on March 15, 2005, stating that it found "sufficient ore reserves and diluted resource of 23.7 million tonnes of 1.8g/t Au and 0.64% Cu ... and such ore reserves have been delineated to sustain the mining operation of the corporation for some 14 years," and that "mining operation ... will process gold and copper at 2 million tonnes per annum ... ."[77] Through Order dated October 11, 2005, Mines and Geosciences Bureau (MGB) approved petitioner's Partial Declaration of Mining Feasibility.[78]

Petitioner's Partial Declaration of Mining Feasibility was approved by the MGB on October 11, 2005, which is way earlier than its declaration that its alleged date of commencement of commercial production on April 1, 2013. Following Section 5(i) of DAO No. 96-40, the date of commencement of petitioner's commercial production is on October 11, 2005. Counting five (5) years from October 11, 2005, petitioner's recovery period ended on October 11, 2010. Thus, the deficiency ET assessment issued against it for TY 2013 is in order.

Assuming, the *second* circumstance, *i.e.,* date when the aggregate of petitioner's net cash flows from the mining operations is equal to the aggregate of its pre-operating expenses, occurred, *prior* to the happening of the *first* circumstance, the same result would ensue.

Section 7(b) of DAO No. 12-2007 commands that all recoverable pre-operating expenses must be approved by the Secretary of the DENR, upon recommendation of the Director of the MGB. Additionally, these expenses must be subjected to verification by the government or its representative or auditor:

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76 Exhibit "P-27," Docket - Vol. IV, pp. 1515 to 1516.

77 Exhibit "P-7," Docket - Vol. IV, pp. 1440 to 1441.

78 Exhibit "P-8," Docket - Vol. IV, pp. 1442 to 1443.

> a. Recoverable Pre-Operating Expenses. **All Pre-Operating Expenses allowed for recovery under this Order shall be approved by the Secretary upon recommendation of the Director**. It shall be limited to actual expenses and capital expenditures relating to the following:
>
> ...
>
> 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 of Pre-Operating Expenses shall be chargeable against the Contractor.

To shore up its stance, petitioner simply relied on the ICPA Elaine E. De Guzman's examination of its supporting documents, pertaining to its "Pre-Operating Expenses" and "Net Cash Flows," along with her findings, condensed below:

> A. The Company has incurred US$310,519,081 as valid pre-operating expenses as of March 31, 2013.
>
> B. As of December 31, 2013, the Company is still under the recovery period as neither five (5) years have elapsed from the commencement of commercial operations on April 1, 2013 nor has the Company's actual net cash flows from mining operations exceeded the valid pre-operating expenses it incurred.

Yet, there is dearth of proof that the recoverable pre-operating expenses was duly approved by the Secretary of the DENR, as recommended by the Director of the MGB; nor, is it shown that these expenses were validated by the government or its designated representative or auditor. *Sans* such approval and validation, we cannot compare said unapproved recoverable pre-operating expenses with petitioner's net cash flows. Therefore, the date when the *second circumstance* occurred may not be determined with certainty.

Further, petitioner invokes BIR Ruling No. 10-2007, [79] confirming its exemption from the payment of ET during the recovery period, stating as follows:

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[79] Exhibit "P-25," Docket - Vol. IV, pp. 1483 to 1488.

qfz

> "WHEREFORE, in view of the foregoing, this Office confirms your opinion that APMI[80] is exempt from the payment of excise tax. Excise tax shall not be collected from APMI upon the date of approval of the Mining Project Feasibility Study up to the end of the recovery period. **The recovery period shall be reckoned from the date of commercial operation and shall be for a maximum of five (5) years or until the date of actual recovery of its pre-operating, exploration and development expenses, whichever comes earlier,** as provided under Section 81 of the Philippine Mining Act, its implementing rules and regulations particularly DAO 96-40; and the FTAA between the Philippine Government and APMI. It is understood that after the expiration of the said recovery period or until the date of aforesaid actual recovery, whichever comes earlier, APMI shall become subject to excise tax.[81]

Again, the date of commencement of commercial operation started on October 11, 2005, or the date the MGB approved petitioner's partial feasibility study. Counting five (5) years therefrom, the recovery period ended on October 11, 2010. As such, there is no legal impediment for the BIR assess petitioner ET covering TY 2013.

Finally, the Court rejects petitioner's challenge on the constitutionality of RMC No. 17-2013. In *Lawyers against Monopoly and Poverty (LAMP), represented by its Chairman and counsel, Ceferino Padua vs. The Secretary of Budget and Management,*[82] the Supreme Court *En Banc* spelled out the conditions *sine qua non* for a court to exercise its power of judicial review in the following fashion:

> Like almost all powers conferred by the Constitution, the power of judicial review is subject to limitations, to wit: (1) there must be an actual case or controversy calling for the exercise of judicial power; (2) the person challenging the act must have the standing to question the validity of the subject act or issuance; otherwise stated, he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement; (3) the question of constitutionality must be raised at the earliest opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case.

Of the four (4) rudiments just mentioned, only *fourth* is to be considered here. Specifically, *lis mota* means that the court will not pass upon a question of unconstitutionality, although properly

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80 Petitioner's former name. Refer to Exhibit "P-6', Docket - Vol. 4, pp. 1431 to 1439.

81 Boldfacing supplied.

82 G.R. No. 164987, April 24, 2012.

presented, *if the case can be disposed of on some other ground, such as the application of the statute or the general law*. The petitioner must be able to show that the case cannot be legally resolved unless the constitutional question raised is determined.[83] If there is some other ground upon which the court may rest its judgment, that course will be adopted and the question of constitutionality should be avoided.[84]

Adverting to our earlier discussion, the five (5) year recovery period granted by law commenced on October 11, 2005 and ended on October 11, 2010. The merits of this case can be fully addressed without the need to touch on the issue of constitutionality of RMC No. 13-2007 raised by petitioner. For not being the *lis mota* in this case, the challenge on the constitutionality thereof must be rejected.

WHEREFORE, the Petition for Review dated December 18, 2017, filed by Oceanagold (Philippines), Inc. is **DENIED** for lack of merit.

Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **TWO HUNDRED SIXTY-TWO MILLION THREE HUNDRED EIGHTY-SIX THOUSAND FOUR HUNDRED SEVENTY-EIGHT PESOS AND SEVENTY-EIGHT CENTAVOS (₱262,386,478.78)**, inclusive of surcharge and deficiency and delinquency interests imposed under Sections 248(A) and 249(B) of the NIRC of 1997, as amended, computed as follows:

Basic Excise Tax Due	₱ 125,177,799.00
Add: 25% Surcharge	31,294,449.75
20% Deficiency Interest from January 1, 2014 to November 20, 2017 *[₱125,177,799.00 x 20% x 1,420/365 days]*	97,398,616.21
Total Amount Due as of November 20, 2017	**₱253,870,864.96**
Add: 20% Deficiency Interest from November 21, 2017 to December 31, 2017 *[₱125,177,799.00 x 20% x 41/365 days]*	2,812,213.57
20% Delinquency Interest from November 21, 2017 to December 31, 2017 *[₱253,870,864.96 x 20% x 41/365 days]*	5,703,400.25
Total Amount Due as of December 31, 2017	**₱262,386,478.78**

Congressman Enrique T. Garcia of the 2nd District of Bataan v. The Executive Secretary, G.R. No. 157584, April 2, 2009, italics in the original.

84 *Kalipunan ng Damayang Mahihirap, Inc.*, et al. *v. Robredo*, G.R. No. 200903, July 22, 2014; *General v. Uro*, G.R. No. 191560, March 29, 2011; and *Liban v. Gordon*, G.R. No. 175353, January 18, 2011.

In addition, petitioner should be **ORDERED TO PAY** respondent delinquency interest at the rate of twelve percent (12%) per annum on the ₱253,870,864.96 total amount due as of November 20, 2017, or an amount of ₱83,464.39[85] per day computed from January 1, 2018 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended by Republic Act (RA) No. 10963, also known as Tax Reform for Acceleration and Inclusion (TRAIN), as implemented by Revenue Regulations No. 21-2018.

Lastly, pursuant to Section 13 of RA No. 9282, this Court authorizes respondent to seize and distraint any goods, chattels, or effects, and the personal property, including stocks and other securities, debts, credits, bank accounts, and interests in and rights to personal property, and/or to levy the real property, of petitioner, in sufficient quantity to satisfy the taxes herein ordered to be paid, and the increments thereto incident to delinquency.

SO ORDERED.

Marian Ivy F. Reyes - Fajardo
MARIAN IVY F. REYES-FAJARDO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

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85 ₱253,870,864.96 x 12% / 365 days.

CERTIFICATION

Pursuant to Section 13 of Article VIII 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