REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

FCF MINERALS CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF CUSTOMS,
Respondent.

CTA CASE NO. 8789

Members:

BAUTISTA, *Chairperson,*
FABON-VICTORINO, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

FEB 20 2017
3:06 p.m.

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RESOLUTION

RINGPIS-LIBAN, *J.*:

For resolution is petitioner's **Motion for Partial Reconsideration**, filed on July 20, 2016, with respondent's **Comment (On Petitioner's Motion for Partial Reconsideration dated July 19, 2016)**, filed on August 30, 2016, and petitioner's **Reply**, filed on September 26, 2016, pursuant to the Resolution dated November 24, 2016.

Petitioner seeks reconsideration of the Court's Decision dated June 21, 2016, the dispositive portion of which reads as follows:

> "**WHEREFORE**, the instant Petition for Review is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

In assailing the said Decision, petitioner anchors its arguments on the ground that the Court erred in ruling that petitioner failed to establish that the VAT and customs duties on importation of capital equipment were imposed and paid during the recovery period.

According to petitioner, the Court may have misinterpreted petitioner's evidence and the provisions of the Financial or Technical Assistance Agreement (FTAA). Petitioner states that it is still in the pre-operating period, specifically on its construction and development phase. This phase allegedly precedes the recovery period which already pertains to the start of commercial operations. As such, petitioner posits that being before the recovery period, the importations are likewise exempt from VAT, customs duties and fees.

Allegedly, there is no need to show proof that petitioner is yet to recover its pre-operating expenses because such is premature; and petitioner cannot yet present any reports of its aggregate pre-operating expenses as it is still in the process of continually incurring these expenses at the time when the importations were made. Petitioner asserts that what determines the time period so that the importations can be considered exempt from VAT, customs duties, and fees are the testimony of Ms. Chevy C. Albo and the Order approving petitioner's Declaration of Mining Project Feasibility (DMPF).

Petitioner explains the different phases of the FTAA and the respective durations of the said phases. It is alleged by petitioner that under DENR Department Administrative Order (DAO) No. 2007-12, as amended by DAO 2010-21, recovery period reckons from the date of commencement of commercial production, which is not the case with respect to petitioner. Petitioner further insists that during the importation of its capital equipment, it was and continues to be within the construction and development stage which is the 3-year period from the date of approval of its DMPF on October 18, 2011, and not even in its recovery period yet.

Respondent opposes the foregoing arguments and alleges the following:

1. The Court correctly found that petitioner failed to present any proof that it has complied with the requirements provided under the FTAA and the

implementing rules of the Philippine Mining Act of 1995 (RA No. 7942) before it can claim exemption from payment of VAT and customs duties on importation of capital equipment;

2. Petitioner cannot automatically claim recovery of pre-operating expenses or expenditures because the same must be approved by the Secretary of Environment and Natural Resources upon recommendation of the Director of the Mines and Geosciences Bureau and must fall within the actual expenses and capital expenditures enumerated in Section 7(b) of DENR Administrative Order No. 2007-12 dated June 20, 2007; and

3. The Court correctly ruled that the evidence presented by petitioner failed to establish that the VAT and customs duties on importation of capital equipment were imposed and paid during the recovery period or that it has not yet recovered its pre-operating expense at the time of imposition and payment of VAT and customs duties.

In the Reply, petitioner argues that:

1. Compliance with Sections 14.1 and 13.2.j of the FTAA are not preconditions to the grant of tax exemption to petitioner that is expressly granted under Section 9.2;

2. No recovery of pre-operating expenses yet as petitioner is still in its pre-operating period. The submission of accounting of recoverable expenses to the DENR is still premature;

3. RA No. 7942 or the Mining Act clearly grants exemption from VAT and importation fees to petitioner. In granting the exemption, the law speaks of the time period as to when the importations were made without any further requirement; and

4. The Court indeed ruled that FTAA contractors who are in their pre-operating stage or within their recovery period are entitled to exemption from VAT and fees on importation.

The Court finds the Motion for Partial Reconsideration bereft of merit.

In the motion, petitioner insists that it is not subject to VAT and customs duties at the time of the subject importation because it is still in its Development and Construction phase which is a pre-operating phase and precedes the "recovery period". This phase allegedly precedes the start of the commercial operations as defined by petitioner's DMPF and FTAA. Because the "recovery period" pertains to the start of commercial operations where the mining contractor "recovers" its pre-operating expenses and where cash inflows are expected, the subject importation, which was allegedly made during the development and construction phase and before the recovery period, are claimed to be exempt from VAT, fees and customs duties.

Moreover, the fact that petitioner is still in its pre-operating stage at the time of the imposition of the taxes was allegedly supported by testimonial and documentary evidence which should have been given weight in deciding the merits of the case.

Petitioner further notes that in the Order approving the DMPF, the DENR allegedly affirmed the durations, specifically the 3-year development and construction period, as follows:

> "Whereas, FTAA 04-2009-II provides for a 2-Year Exploration Period, renewable for like period; 2-Year Pre-Feasibility Study Period; 2 Year-Feasibility Study Period; 3-Year Development Period and an Operating Period for the rest of the term of the FTAA."

Considering that the approval of the DMPF which triggers the start of the 3-year construction and development phase commenced on October 18, 2011 and extended until October 18, 2014, the said period effectively covered the time when the subject importations were made. Thus, petitioner concludes that the importations are covered by the exemption.

Lastly, petitioner avers that ascertaining whether it has fully recovered its pre-operating expenses is still premature as it is still on its pre-operating stage.

As already held by the Court, Section 81 of RA No. 7942 and its implementing rules clearly provide that the collection of "Government Share" in FTAA, including the VAT and customs duties on importation of goods, shall commence only after the recovery period or when the FTAA contractor has fully recovered its pre-operating expenses.

Relevantly, Section 7 of DAO No. 2007-12 provides:

> "**Section 7. Recovery of Pre-Operating Expenses**
>
> a. Recovery Period. Considering the high risk, high cost and long term nature of an FTAA Mining Operation, **the Contractor shall be given an opportunity to recover the expenses incurred during its pre-operating period**. After this period, the Government shall receive its rightful share from the national patrimony. **Recovery Period, as used in this Order, shall be a maximum of five (5) years or at a date when the aggregate of the Net Cash Flows from the Mining Operations is equal to the aggregate of its Pre-Operating Expenses, reckoned from the Date of Commencement of Commercial Production, whichever comes first.** For this purpose, the above Net Cash Flows and Pre-Operating Expenses refer to the actual Net Cash Flows from Mining Operations and the actual Pre-Operating Expenses incurred by the Contractor, respectively, converted into its United States dollar equivalent at the time the expenditure was incurred.
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> xxx xxx xxx. (*Emphasis supplied.*)

Clearly, the recovery period provided above shall be reckoned from the date of commencement of commercial production. However, petitioner claims that its commercial operation has not yet commenced because it is still in the development and construction period.

On this matter, it is true that the FTAA is divided into five (5) phases, which are the exploration period, pre-feasibility study period, feasibility study period, development and construction period, and operating period, and that the DENR's Order dated October 18, 2011 approving the DMPF[1] mentioned of the 3-Year Development Period, which allegedly covers the dates when the subject importations were made and VAT and custom duties and fees were paid.

Nevertheless, the foregoing is still insufficient to prove that at the time of the importation, the commercial operation has not yet commenced.

Contrary to petitioner's allegation, a perusal of the DENR's Order shows that it was only stating that the 3 years is the period agreed upon in FTAA 04-2009-II for the development phase[2] of the agreement.

The Court further noticed that there is no 3-Year Development Period mentioned in the FTAA[3]. Also, even if the said period was arrived at pursuant to the stipulations in the FTAA as mentioned in the DENR's Order dated October 18, 2011, a thorough scrutiny of the records, however, reveals that petitioner failed to present evidence to prove that the said period was observed in the actual implementation of the FTAA and DMPF.

Also, contrary to petitioner's allegation, the Court considered all of the evidence presented during trial. However, the Court found the same insufficient to prove that at the time of the importation of the subject capital equipment, petitioner has not yet commenced its commercial operation, or that petitioner has not yet fully recovered its pre-operating expenses.

As to petitioner's averment that ascertaining whether it has fully recovered its pre-operating expenses is still premature as it is still on its pre-operating stage, the same can only be true if it had presented sufficient evidence to convince the Court that it is indeed on its pre-operating phase at the time of the subject importation.

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[1] Exhibit "P-17", docket, vol. III, pp. 1497-1500.

[2] Under Section IV subsection 4.2(d) of the FTAA, the development and construction period is counted from the date of the approval of the DMPF and ending on the day before the date of commencement of commercial production.

[3] Exhibit "P12", docket, vol. III, pp. 1332-1386.

Without proof that petitioner has not yet commenced operation, or that it has not yet fully recovered its pre-operating expense, the Court has no basis to determine whether it is not liable to pay customs duties and VAT on its importations made in 2013.

At this juncture, it must be reiterated that a claimant has the burden of proof to establish the factual basis of his or her claim for tax credit or refund.[4] Tax refunds are in the nature of tax exemptions. As such, they are regarded as derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the refund.[5] Petitioner in this case failed to overcome such burden of proof.

WHEREFORE, finding no cogent reason to reverse the ruling in the assailed Decision, petitioner's **Motion for Partial Reconsideration** is **DENIED** for lack of merit.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

[4] *Citibank, N.A. vs. Court of Appeals and the Commissioner of Internal Revenue*, G.R. No. 107434, October 10, 1997.
[5] *Commissioner of Internal Revenue vs. S.C. Johnson & Son, Inc. and Court of Appeals*, G.R. No. 127105, June 25, 1999.