REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

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FCF MINERALS CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9725

Members:

UY, *Chairperson,*
RINGPIS-LIBAN, *and*
MODESTO-SAN PEDRO, *JJ.*

Promulgated:

JUN 04 2021
9:10 a.m.

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DECISION

UY, J.:

Before this Court is a *Petition for Review*[1] filed by FCF Minerals Corporation (FCF), petitioner, against the Commissioner of Internal Revenue (CIR), respondent, praying for the following reliefs:

(i) That the BIR's Final Decision on Disputed Assessment (FDDA) for FCF's Taxable year 2013 (which was received by FCF on October 17, 2017) be reversed and set aside;

(ii) That the Formal Letter of Demand (FLD) which was received by FCF on April 25, 2017 be declared null and void;

(iii) That the assessment for deficiency Documentary Stamp Tax (DST) [with penalties] amounting to ₱4,349,515.75 be cancelled.

[1] Docket – Vol. 1, pp. 12 to 45.

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THE FACTS

Petitioner FCF is a corporation organized and existing under Philippine laws and engaged in the exploration, development and commercial operation of mineral claims.[2]

Respondent CIR is the head of the Bureau of Internal Revenue, the government agency charged with implementing the NIRC and collecting all internal revenue taxes. He is empowered to perform the duties of his office, including the duty to issue, act upon and decide disputed assessments on internal revenue taxes such as DST.[3]

FCF received a Formal Letter of Demand ("FLD") with attached Details of Discrepancies and Audit Result/Assessment Notice with attached computation from the BIR [4] on April 25, 2017[5] assessing petitioner for deficiency DST amounting to P4,299.515.75, with penalties amounting to P50,000.00.

Subsequently, petitioner received the Final Decision on Disputed Assessment (FDDA) on October 27, 2017[6] denying FCF's Protest[7] contesting the BIR's Formal Letter of Demand,

On November 27, 2017, FCF filed the instant *Petition for Review*[8] praying for the reversal and setting aside of the BIR's FDDA for FCF's Taxable year 2013; that the FLD be declared null and void; and that the assessment for deficiency DST (with penalties) amounting to ₱4,349,515.75 be cancelled.

The CIR filed his *Answer* on March 2, 2018,[9] interposing the following special and affirmative defenses:

1) FCF is liable for the deficiency DST for taxable year 2013 pertaining to some advances and lease agreements which were transacted during said year but not subjected to the corresponding documentary stamp tax, thus assessed pursuant to Section 179 and

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[2] Joint Stipulation of Facts and Issues (JSFI), Docket – Vol. 1, par. 1, p. 465.
[3] JSFI, Docket – Vol. 1, par. 2, p. 465.
[4] JSFI, Docket – Vol. 1, par. 3, p. 465.
[5] Petition for Review, p. 2, Docket – Vol. 1, p. 13.
[6] Petition for Review, p. 3, Docket – Vol. 1, p. 14.
[7] JSFI, Docket – Vol. 1, par. 4, p. 465.
[8] Docket – Vol. 1, pp. 12 to 45.
[9] Docket – Vol. 1, pp. 420 to 430. MO

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Section 194 of the National Internal Revenue Code of 1997, as amended;

2) The assessment as stated in the FLD and FDDA is valid and lawful considering that the FLD and Details of Discrepancies clearly provide the factual and legal basis for the assessment, as well as the period within which to pay the deficiency tax involved or the due date thereof which is May 6, 2017;

3) Assessments are presumed correct and made in good faith and the taxpayer has the duty of proving otherwise; and in the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed.

As agreed upon during the Pre-Trial Conference held on May 22, 2018,[10] the parties submitted their *Joint Stipulation of Facts and Issues*[11] on June 13, 2018. Thereafter, the Court issued a *Pre-Trial Order*[12] on July 10, 2018 and Pre-Trial was deemed terminated.

During trial, FCF presented the following witnesses: 1) Tommy E. Alfonso,[13] its Financial Comptroller; and 2) Francisco Caasi,[14] its Document Controller. Their direct testimony was by way of Judicial Affidavits, summarized as follows:

1) ***Tommy E. Alfonso***:

Tommy E. Alfonso testified that he is the Financial Comptroller of FCF Mineral Corporation ("FCF") from January 4, 2010 until today and that he was the one who initiated this suit on behalf of FCF.

On September 19, 2009, FCF entered into a Financial or Technical Assistance Agreement with the Republic of the Philippines (the "FCF FTAA") for the exploration, development and commercial utilization of minerals in Runruno, Nueva Vizcaya, which is also known as the Runruno Gold Molybdenum Project (the "Runruno Gold Project"). He further said that the FCF FTAA provides for the exemption of FCF as an FTAA contractor, from

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[10] Docket – Vol. 1, pp. 463 to 464.
[11] JSFI, Docket – Vol. 1, pp. 465 to 469.
[12] Docket – Vol. 1, pp. 471 to 476.
[13] Exhibit "P-15," Docket – Vol. 1, pp. 494 to 500, Docket – Vol. 2, pp. 501 to 509.
[14] Exhibit "P-16", Docket – Vol. 4, pp. 1615 to 1623.

1215

payment of Documentary Stamp Tax ("DST"), among others, from the date of approval of its Declaration of Mining Project Feasibility ("DMPF") up to the end of its recovery period. Allegedly, FCF's DMPF was approved on October 18, 2011, the proof of which is the Order of the Department of Environment and Natural Resources ("DENR") dated October 18, 2011; "Recovery Period" as used in said 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.

According to him, FCF made a written declaration as to the start of its commercial operations on September 9, 2016 to MGB OIC Regional Director Engr. Mario A. Ancheta ("RD Ancheta") and sought his approval of FCF's Declaration of Commencement of Commercial Operations of the Runruno Gold Project. RD Ancheta approved said Declaration in his Letter dated July 17, 2017.

Subsequently on April 25, 2017, FCF was surprised to receive a Formal Letter of Demand ("FLD") from the BIR Large Taxpayers Service ("LTS") – Excise Large Taxpayers Division 1 assessing petitioner with deficiency DST with interest and penalties for taxable year 2013 in the total amount of P4,265,211.52 inclusive of interest (computed from January 6, 2014 until May 6, 2017) and administrative penalties. Thus, FCF filed its Protest Letter dated May 24, 2017 and Supplemental Protest Letter dated July 19, 2017. However, FCF received the BIR's Final Decision on Disputed Assessment ("FDDA") on October 27, 2017. The FDDA upheld the earlier assessment of deficiency DST against FCF for taxable year 2013, but this time the interest was adjusted by the BIR hence the total deficiency DST as of the issuance of the FDDA (inclusive of interest and administrative penalties) already amounted to P4,349,515.75.[15]

2) ***Francisco Caasi***:

Francisco Caasi said that he is the Document Controller of FCF Minerals Corporation from February 20,

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[15] Judicial Affidavit, Exhibit "P-15"

1714

> 2013 until today; that he has custody over corporate documents and records of FCF; and he identified pertinent documents in his custody marked and offered in evidence as Exhibit "P-1" to P-4"; "P-6 to P-14" and submarkings.[16]

On July 12, 2019, FCF filed its *Offer of Exhibits,*[17] to which the CIR filed his *Comment (Re: Formal Offer of Evidence dated 12 July 2019)*[18] on July 26, 2019. All of FCF's documentary evidence was admitted in the Resolution[19] dated August 29, 2019.

For his part, the CIR presented his lone witness, Revenue Officer Alfred B. Manodon.[20] His testimony is summarized as follows:

> ***Alfred B. Manodon*** testified that he had been employed with the BIR for more or less 33 years and his current position is Revenue Officer III, assigned at Excise Large Taxpayers Audit Division 1 (ELTAD 1), RDO No. 30 – Binondo, Manila. Allegedly, he was the one who conducted the audit/investigation of petitioner for taxable year 2013 pursuant to a Letter of Authority No. LOA-121-2014-00000224 SN: eLA201100087223 dated November 24, 2014; and after audit, petitioner was found liable to the findings discussed in the Memorandum dated February 1, 2016 recommending the issuance of a Preliminary Assessment Notice (PAN). Petitioner filed a reply to the PAN dated March 14, 2017, but the findings in the Memorandum dated April 7, 2017 was maintained recommending the issuance of a Formal Letter of Demand (FLD).
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> Petitioner allegedly protested the FLD but the assessment for deficiency DST and administrative penalty was maintained, and the issuance of a Final Decision on Disputed Assessment subsequently followed.
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> According to him, verification disclosed that for taxable year 2013, some advances and lease agreements transacted during the year were not subjected to the corresponding DST, thus assessed pursuant to Sections 179 and 194 of the NIRC of 1997, as amended. Moreover,

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[16] Judicial Affidavit, Exhibit "P-16".
[17] Docket – Vol. 3, pp. 1349 to 1354.
[18] Docket – Vol. 4, pp. 1626 to 1628.
[19] Docket – Vol. 4, pp. 1631 to 1632.
[20] Exhibit "R-12," Docket – Vol. 1, pp. 432 to 439.

1717

administrative penalty amounting to P50,000.00 was imposed for failure to pay internal revenue tax within the period required by law or regulations (Section 255, NIRC and Revenue Memorandum Order No. 7-2015).[21]

On December 16, 2019, the CIR filed his *Formal Offer of Evidence,*[22] to which FCF filed its *Comment with Motion*[23] on December 20, 2019. In the Resolution[24] dated January 28, 2020, the Court admitted all of respondent's evidence.

On June 30, 2020, FCF filed its *Memorandum,*[25] while the CIR filed his Manifestation[26] that he is adopting his Answer dated March 2, 2018 as his Memorandum in the instant case. Thereafter, this case was submitted for Decision on July 13, 2020.[27]

Hence, this Decision.

THE ISSUE

The parties stipulated a lone issue for this Court's resolution, to wit:

> "Whether petitioner is liable for deficiency Documentary Stamp Tax and Administrative Penalty for taxable year 2013 plus 20% deficiency interest pursuant to Section 249(B) of the NIRC of 1997."[28]

Petitioner's arguments:

Petitioner argues that the subject transactions fall within the period of exemption from DST payment of FCF. Allegedly, Section 81 of the Mining Act clearly provides that the "Government Share" in the Financial or Technical Assistance Agreement (FTAA), which includes DST shall be collected only after the FTAA contractor (FCF) has fully recovered its pre-operating expenses and exploration and

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[21] Judicial Affidavit, Exhibit "R-12"
[22] Docket – Vol. 4, pp. 1647 to 1653.
[23] Docket – Vol. 4, pp. 1655 to 1656.
[24] Docket – Vol. 4, pp. 1660 to 1661.
[25] Docket – Vol. 4, pp. 1668 to 1700.
[26] Docket – Vol. 4, pp. 1701 to 1704.
[27] Docket – Vol. 4, p. 1707.
[28] JSFI, Docket – Vol. 1, pp. 465 to 466; PTO, Docket – Vol. 1, p. 472.

development expenditures. Thus, FCF is not liable for the DST from the date of approval of its Declaration of Mining Project Feasibility (DMPF) by the Mines and Geosciences Bureau (MGB).

Allegedly, the Supreme Court has pronounced that the grant of incentives to FTAA contractors from the date of approval of their DMPF up to the end of their recovery period constitutes a waiver of national taxes of the government. To require otherwise will affect FCF's cash flow and necessarily take its statutory and contractual grant of exemption and downgrade its financial condition and would defeat the spirit and purpose of the FTTA.

Furthermore, petitioner avers that this Court has affirmed FCF's position that the collection of "Government Share" in FTAA, including DST shall only commence after the FTAA contractor has fully recovered its pre-operating expenses.

According to petitioner, the CIR has no authority to interpret the provisions of the Mining Act, as such was vested by Congress solely to the Department of Environment and Natural Resources (DENR) Secretary. In denying FCF's protest, the CIR effectively confers upon himself the authority to interpret the provisions of the Mining Act.

The Tax Exemption Certificates issued by the MGB are allegedly final written attestations on FCF's exemption from DST; and that the FTAA also creates a contractual obligation between the government and FCF which must be enforced and respected.

Lastly, petitioner avers that the assessment is void for failure to state the facts and the law on which it was based. In addition, the FLD does not amount to a formal demand as there was no due date for payment.

Respondent's counter-arguments:

As mentioned earlier, respondent filed a Manifestation on July 6, 2020 alleging that he is adopting his Answer as his Memorandum for the instant case.

Thus, as raised in his Answer, FCF is allegedly liable for deficiency DST for taxable year 2013 arising from advances and lease agreements transacted during the year 2013 which were not subjected to the corresponding documentary stamp tax, together with administrative penalties amounting to P50,000.00 for failure to pay internal revenue taxes within the period required by law or regulation (Section 255, NIRC and Revenue Memorandum Order No. 7-2015).

On another note, respondent alleges that although petitioner argued that it is exempt from taxes until the end of the recovery period, audit disclosed that it voluntarily paid portion of the deficiency taxes assessed. As assessed in the Preliminary Assessment Notice for taxable year 2013, petitioner voluntarily paid the deficiency withholding tax on compensation, expanded withholding tax, and corresponding administrative penalties. Moreover, while petitioner protested the assessment for DST, petitioner also made payment for DST in the amount of P9,139,171.00 which was deducted from the Total Basic DST due as shown in the computation provided in the FLD.

Said payment allegedly shows positive act of petitioner which concludes its admission of its own tax liabilities for taxable year 2013, hence, it voluntarily performed its legal obligation to pay the tax due.

THE COURT'S RULING

In the instant Petition for Review, petitioner contends that it is not liable for deficiency DST, citing Section 81 of the Mining Act, which states that the "Government Share" in FTAA, which includes DST, shall only be collected after the FTAA contractor has fully recovered its pre-operating expenses and exploration and development expenditures.

We agree with the petitioner.

The collection of DST, as part of the "Basic Government Share," as stated in the FTAA, shall commence only <u>after</u> the FTAA contractor has fully recovered its pre-operating expenses.

Republic Act No. 7942,[29] otherwise known as the "*Philippine Mining Act of 1995*," declares that "all mineral resources in public and

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[29] An Act Instituting A New System of Mineral Resources Exploration, Development, Utilization, and Conservation.

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private lands within the territory and exclusive economic zone of the Republic of the Philippines are owned by the State."[30] Accordingly, it is the "responsibility of the State to promote their rational exploration, development, utilization and conservation through the combined efforts of government and private sector in order to enhance national growth in a way that effectively safeguards the environment and protect the rights of affected communities."[31]

Pursuant thereto, the government is authorized to enter into various agreements with the private sector, in order to fully realize this objective. For instance, the State can enter into mineral production sharing agreements,[32] co-production[33] and joint-venture agreements,[34] or financial or technical assistance agreements (FTAAs).[35]

As defined under the Philippine Mining Act of 1995, an FTAA is a contract involving financial or technical assistance for large-scale exploration, development, and utilization of mineral resources.[36] In this case, petitioner entered into an FTAA[37] with the government September 19, 2009.

In order to ensure that there is mutual benefit to the parties, and that there will be an equitable sharing of benefits derived from entering into an FTAA, Section 81 of the Philippine Mining Act of 1995 sets forth the fiscal regime that will apply between the parties, to wit:

> **"CHAPTER XIV**
> **GOVERNMENT SHARE**
>
> **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:

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[30] Section 2, R.A. No. 7942.
[31] *Id.*
[32] Section 3 (ab), R.A. No. 7942.
[33] Section 3 (h), R.A. No. 7942.
[34] Section 3 (x), R.A. No. 7942.
[35] Section 3 (r), R.A. No. 7942.
[36] *Id.*
[37] Exhibit "P-7," Docket – Vol. 3, pp. 1387 to 1440.

1721

a. capital investment of the project;
b. risks involved;
c. contribution of the project to the economy; and
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 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 stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national **and all such other taxes, duties and fees as provided for under existing laws**.

The collection of Government share in financial or technical assistance agreement shall commence *after* the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive." *(Emphasis supplied.)*

In accordance with the foregoing provision, DENR Administrative Order (DAO) No. 2007-12[38] was issued, establishing the fiscal regime of FTAAs, in order to: a) achieve an equitable sharing among the national and local governments, the FTAA contractor, and concerned communities of the benefits derived from mineral resources to ensure sustainable development; and b) ensure a fair, equitable, competitive, and stable investment regime for the large scale exploration, development and commercial utilization of

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[38] Revised Guidelines Establishing The Fiscal Regime of Financial or Technical Assistance Agreements (FTAA).

minerals in accordance with the provisions of the Philippine Mining Act of 1995 and its implementing rules and regulations.[39]

Pursuant to the foregoing objectives, Section 4 of DAO No. 2007-12 enumerates the items that would constitute the *government share* in an FTAA, to wit:

> **"Section 4. *Fiscal Regime of a Financial or Technical Assistance Agreement***
>
> The fiscal regime of FTAA entered into by and between the Government of the Republic of the Philippines and FTAA Contractors shall be guided by the following provisions:
>
> a. General Principles.
>
> 1. The Total Government Share shall consist of a Basic Government Share and an Additional Government Share.
> 2. The Basic Government Share shall consist of direct taxes, royalties, fees and other related payments as defined in this Order.
> 3. The Additional Government Share is the amount to be paid by the Contractor when the Basic Government Share is less than fifty percent (50%) of the Net Mining Revenue.
> 4. The Net Mining Revenue is Gross Output less Deductible Expenses.
>
> b. Basic Government Share
>
> The Basic Government Share shall consist of all direct taxes, royalties, fees and related payments required by existing laws, rules and regulations to be paid by the Contractor. It shall be the minimum share that Government shall receive during any Calendar Year. The following national and local taxes, royalties and fees paid by the Contractor to the Government during a Calendar Year constitute the Basic Government Share:
>
> (a) Contractor's income tax;
> (b) Customs duties and fees on imported capital equipment;

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[39] Section 2 (a) and (b), DAO No. 2007-12.

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

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

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." *(Emphasis supplied.)*

The abovementioned fiscal regime is likewise incorporated in the subject FTAA dated September 19, 2009, entered into by the petitioner and the Philippine government.[40]

From the foregoing, it is clear that the collection of the *government share* in FTAAs shall only commence after the FTAA contractor has *fully recovered* its pre-operating expenses, exploration, and development expenditures. To be specific, an FTAA contractor is only liable for ***documentary stamp taxes***, as part of the ***basic government share,*** **after** the "***recovery period.***"

The "*recovery period*" referred to, is defined under Section 7 of DAO No. 2007-12, taking into consideration the high risk, high cost, and long term nature of an FTAA Mining Operation, to wit:

> "**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**." *(Emphasis supplied.)*

The foregoing reckoning point for the recovery period was reiterated in DAO No. 2010-21,[41] otherwise known as the "*Revised Implementing Rules and Regulations of R.A. 7942, otherwise known as the Philippine Mining Act of 1995,*" which provides that the subject period of recovery, "which is reckoned from the date of commencement of commercial operation, shall be for a period not exceeding 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, whichever comes earlier xxx xxx xxx ."[42]

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[40] Section IX, Exhibit "P-7," Docket – Vol. 3, pp. 1387 to 1440, at 1405 to 1406.
[41] Providing for a Consolidated Department of Environment and Natural Resources Administrative Order for the Implementing Rules and Regulations of Republic Act No. 7942, otherwise known as the "Philippine Mining Act of 1995."
[42] Section 214, DAO No. 2010-21.

In addition, the recovery period was likewise defined in the subject FTAA dated September 19, 2009, to wit:

> **"9.7. *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, <u>reckoned from the Date of Commencement of Commercial Production</u>, whichever comes first**."[43] *(Emphasis supplied.)*

On the other hand, the "*Date of Commencement of Commercial Production*" is defined in Section 2.1 (m) of the FTAA dated September 19, 2009, to wit:

> **"Section II**
> **Definition and Interpretation**
>
> 2.1 <u>Definition.</u> As used in this Agreement, the following words and terms shall have the following respective meanings:
>
> xxx xxx xxx
>
> m. "Date of Commencement of Commercial Production" or "Commencement of Commercial Production" refers to the <u>date of written declaration by the Contractor to start commercial operations after the conduct of Test Run, including Debugging, ***and*** its approval by the Regional Office concerned</u>."[44] *(Emphasis supplied.)*

The *recovery period*, therefore, is reckoned from the date of commencement of commercial production, which shall be for a maximum period of five (5) years, or at a date when the aggregate of

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[43] Exhibit "P-7," Docket – Vol. 3, pp. 1387 to 1440, at 1410.
[44] Exhibit "P-7," Docket – Vol. 3, pp. 1387 to 1440, at 1389 to 1390.

1726

the net cash flows from the mining operations is equal to the aggregate of its pre-operating expenses. In turn, the date of commencement of commercial production is reckoned from the date of written declaration by the FTAA contractor to start commercial operations, after the conduct of the Test Run, including Debugging, **and** its approval by the Regional Office concerned.

To establish the *date of commencement of commercial production* in this case, the petitioner submitted the following documents:

1) Declaration of Commencement of Commercial Operations[45] dated September 9, 2016 addressed to the Regional Director of the Mines and Geosciences Bureau;
2) Declaration of Commencement of Commercial Operations[46] dated September 16, 2016 addressed to the DENR Secretary;
3) Declaration of Commencement of Commercial Operations[47] dated September 16, 2016 addressed to the Undersecretary and Concurrent Director of the Mines and Geosciences Bureau; and
4) Approval of the Declaration of Commencement of Commercial Operations[48] dated July 17, 2017.

Considering that petitioner submitted its Declaration of Commencement of Commercial Operations on September 9, 2016, which was subsequently approved on July 17, 2017, the official *date of commencement of commercial production* in this case is July 17, 2017.

In other words, the start of the *recovery period* is on July 17, 2017. Prior to said date, petitioner is not liable for any of the taxes under Section 4 b (a) to (g) of DAO No. 2007-12, or Section 9.2 (a) to (g) of the FTAA dated September 19, 2009. To be specific, petitioner cannot be held liable for deficiency documentary stamp taxes, and administrative penalties for non-payment thereof at any period ***prior*** to July 17, 2017.

In fact, this is also confirmed by the Certification[49] issued by the MGB, to wit:

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[45] Exhibit "P-10," Docket – Vol. 4, p. 1569.
[46] Exhibit "P-11," Docket – Vol. 4, p. 1570.
[47] Exhibit "P-12," Docket – Vol. 4, p. 1571.
[48] Exhibit "P-13," Docket – Vol. 4, pp. 1573 to 1574.
[49] Exhibit "P-14-l," Docket – Vol. 4, p. 1586 to 1587.

1727

> "From the date of approval of the Declaration of Mining Project Feasibility, or on October 18, 2011, up to the end of the Recovery Period, FCF shall not be required to pay items (a) to (g) of Section IX subsection 9.2 of the FTAA enumerated as follows:
>
> xxx xxx xxx
>
> (f) Documentary stamps taxes;
>
> xxx xxx xxx
>
> After the Recovery Period, FCF shall then pay all applicable taxes, fees, royalties, and other related payments to the national and local Governments (Items (a) to (o) of Section IX subsection 9.2 of the FTAA).
>
> Pursuant to Section IX, subsection 9.2 of the FTAA, recovery period shall be a maximum of five (5) years or at a date when the aggregate of the Net Cash Flows from the mining operations is equal to the aggregate of the Pre-Operating Expenses reckoned from the Date of Commencement of Commercial Production, whichever comes first." *(Emphasis supplied.)*

The validity of the express grant of fiscal incentives to an FTAA contractor was upheld by the Supreme Court in the case of *La Bugal-B'laan Tribal Association, Inc. etc., et al., vs. Victor O. Ramos, Secretary, Department of Environment and Natural Resources (DENR), et al.,* to wit:

> "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."[50]

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

1725

In fact, the High Court, was categorical in ruling that there can be **no recovery** to speak of, without the commencement of actual commercial production, to wit:

> "Granted that the contractors are allowed subsequently to recover their pre-operating expenses, still, that eventuality will happen only after they shall have *first put out the cash* and fueled the economy. Moreover, in the process of recouping their investments and costs, the foreign contractors *do not actually pull out the money from the economy.* Rather, they recover or recoup their investments out of actual commercial production by not paying a portion of the basic government share corresponding to national taxes, along with the additional government share, for a period of not more than five (5) years counted from the commencement of commercial production.
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> **It must be noted that there can be *no recovery* without *commencing actual commercial production*.**[51] *(Emphasis supplied.)*

From the foregoing, it is clear that the BIR has no basis for issuing the subject deficiency DST assessment for taxable year 2013, as petitioner cannot be held liable for DST from the effective date of the FTAA on October 28, 2009,[52] until *after* the recovery period, which only *began* on July 17, 2017.

Considering that the subject deficiency DST assessment is void, it can bear no fruit.[53] Thus, it becomes unnecessary to discuss the other incidental issues raised in the Petition for Review relative to the subject assessment.

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is hereby **GRANTED**. Accordingly, the assessments for deficiency DST and administrative penalty for taxable year 2013 issued against petitioner are hereby **CANCELLED** and **SET ASIDE**.

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[51] *La Bugal-B'laan Tribal Association, Inc. etc., et al., vs. Victor O. Ramos, Secretary, Department of Environment and Natural Resources (DENR), et al.,* G.R. No. 127882, December 1, 2004.
[52] Certificate of Registration, Docket – Vol. 3, p. 1441.
[53] *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.,* G.R. No. 185371, December 8, 2010.

1774

Moreover, unless reversed by higher courts, respondent is hereby **ORDERED** to **DESIST** from undertaking any collection proceedings of the subject deficiency DST for taxable year 2013.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

MA. BELEN RINGPIS-LIBAN
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

ATTESTATION

I attest 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.

ERLINDA P. UY
Associate Justice
Chairperson, 3rd Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution and the Division Chairperson's Attestation, 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