REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ATLAS CONSOLIDATED MINING
& DEVELOPMENT CORPORATION,
Petitioner,

- versus - C.T.A. CASES NOS. 3467
& 3825

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.
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D E C I S I O N

The Commissioner of Internal Revenue on April 29, 1980 served an assessment notice and demand for payment of the amount of P12,391,070.51 representing deficiency ad valorem, percentage and fixed taxes, including increments, for the year 1975 against petitioner Atlas Consolidated Mining & Development Corporation (ACMDC).

Similarly, another assessment notice with a demand for payment of the amount of P13,531,466.80 representing 1976 deficiency ad valorem tax and business taxes plus P5,000.00 compromise penalty, was served on September 23, 1980 by the Commissioner on petitioner.

Petitioner protested both assessments but the protests were denied, and so, the subject petitions for review were filed.

The two cases being identical in most respect, except for the taxable periods and the amounts involved, were eventually consolidated.

One issue presented by the consolidated cases is whether petitioner paid the correct **ad valorem** taxes on copper extracted from its mining site in 1975 and 1976. It is the view of respondent that "the costs of refining and smelting should not be deducted in arriving at the final gross value of the copper concentrates"; and that the actual market value of the minerals from which the **ad valorem** taxes shall be based, is "that what petitioner realized from the sale of the copper concentrate without any deductions from mining, milling, refining, transporting, handling, marketing, or any other expenses".

The correctness of the aforementioned contention by the respondent had already been passed upon previously by this court. As accurately noted by petitioner, the case of **Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue** (C.T.A. Case No. 2842, January 23, 1981) is the case in point. The issue that was resolved therein was precisely delineated as involving the question of whether, in determining the basis or measure of the **ad valorem** tax on copper mineral exported in 1975 by petitioner to Japan in the form of concentrate, the costs of smelting and refining should be deducted to arrive at the actual market value of the mineral or mineral product (ACMDC v. CTA, supra., p. 15 of Decision). The contention of the respondent was disproved in that earlier case just cited.

> After carefully examining all the evidence of petitioner, which were not disputed by respondent, as well as the records of this case, we are more than ever convinced that despite the seemingly conflicting positions taken by the parties, there is no real dispute between them on the fundamental principles by which the basis or measure of the ad valorem tax payable by petitioner on the actual market value of the copper minerals exported to Japan or other countries is to be computed. A lot of ground can at once be covered, and it will greatly simplify matters, if the uncontroverted evidence of petitioner, both oral and documentary, including the depositions taken in Tokyo, Japan, New York, United States, London, United Kingdom, and Berno, Switzerland, are reduced to basic factual propositions or situations that are beyond dispute, to wit: (Underscoring supplied)
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> 1. The mineral mined or extracted by petitioner from its mine site in Toledo City, Cebu, is copper, (p. 20, BIR Records; see also petition for review, p. 1, CTA records and respondent's memorandum, p. 119, CTA records.) In its raw, unmarketable form, it is a rock called copper ore. (Exh. "D", p. 20, BIR

records.) The mineral rocks or ores are crushed, grund and reduced to powder form known as copper concentrate. While the ores contain about 1/2% copper, the copper concentrate contains about 28-31% copper. (t.s.n., p. 31, hearing on November 15, 1977; p. 8, deposition, Japan; p. 8, deposition, London; Exhibit "A" - London.) It is the copper concentrate - the powdered rocks with copper contents - that is exported to foreign buyers in Japan, like the Mitsubishi Metal Corporation. (p. 20, BIR records.).

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"5. With the London Metal Exchange price quotation of electrolytic copper wire bar as starting point, which as discussed above is used by petitioner and Mitsubishi Metal Corporation as reference point, the actual market value of copper mineral or concentrate is determined by the parties by allowing for the deduction from the London Metal Exchange price quotation of copper wire bar all costs of manufacturing or processing into copper wire bar. In other words, the actual market value of copper concentrate is ascertained by deducting the freight, insurance, smelting, refining and fabrication charges from the London Metal Exchange price quotation of copper wire bar. (p. 20, BIR records.) The remainder, after all these deductions, represents to a reasonable degree the actual market value in the mine site of the copper mineral extracted from the earth, which in its marketable form, is copper concentrate.

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"9. In paying the ad valorem tax pursuant to Section 243 of the then in force National Internal Revenue Code, petitioner deducted from the London Metal Exchange price quotation of wire bar all

> costs of fabrication, refining, treatment (smelting) process, freight and insurance. In other words, there being no market price quotation of copper concentrate in the commodity exchanges or markets of the world, which petitioner claims is the mineral or mineral product extracted or produced from its mineral lands in Toledo City, Cebu, it started from a known quantity to determine the actual market value (in Toledo) of copper concentrate. That known quantity is the London Metal Exchange price quotation of wire bar. From this known quantity, petitioner worked backwards by deducting all charges and costs incurred, after the raw copper concentrate has been shipped from Toledo City to the time such copper concentrate has been converted into saleable copper metal called wire bar. These are the costs of fabrication, refining, smelting, freight and insurance. The remainder, after all these items have been deducted from the London Metal Exchange selling price of copper wire bar represents to a reasonable degree, according to petitioner, the actual market value in the mine site of the copper concentrate, the copper mineral extracted from the earth in its marketable form."

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We believe that this finding should still stand in the absence of any reason the court could have seen or convincing averments that could have come from those offered by respondent. The insistence by the respondent of his reading of Sections 243 and 246, the pertinent provisions involved (of P.D. 69, later, Sections 255 and 257 of P.D. 1158), inspite of what proved to be sound interpretation given by this court (as subsequently adopted through B.P. Blg. 84, September 19, 1980) is futile as his allegations leave much to be desired.

The decision in C.T.A. Case No. 2842 (ACMDC V. CTA, *supra*) still being good law, the same can likewise be decisively applied as to the correctness of the ad valorem taxes assessed against petitioner on the copper concentrate it removed from its mining site for the taxable period 1976. Respondent, in computing the 2% **ad valorem** tax on the copper and silver, should not include the expenses for smelting and refining as part of the taxable base.

Respondent added 25% surcharges to the royalty taxes due against petitioner on the extracted copper, silver and gold in 1975 and 1976 for failure to pay within the period prescribed in Section 245, that is, upon removal of the said minerals from the mines.

Petitioner in explaining its case traces the route and processes undergone by the minerals and alleges that:

> "The rock was dug out of the earth. It was crushed into powder and transformed into the raw mineral product called copper concentrate. In the process of separating the copper mineral from foreign matter, the mineral called pyrite was separated and collected.
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> The copper concentrate was batched or heaped into piles. Samples were taken from each batch for assay in the petitioner's laboratory in Toledo City. In the assay, the grade of the copper was determined, including the grade of the silver and gold content. These two minerals were not physically separated at this stage. The estimated commercial quantity of the copper mineral was based on the grade of the ore determined in the assay. All these data were furnished to the petitioner's Head Office in Makati."

Despite the above allegations of petitioner, we see that the imposition of the 25% surcharge was improperly applied only on the copper mineral; and that the addition of the 25% surcharges on the royalty taxes due on the gold and silver minerals is well-founded.

Petitioner is able to convince the court that practical considerations make possible the provisional computation and payment of **ad valorem** taxes for the copper mineral. The practical considerations include the Philippine's lack of a smelter of its own and the need to ship the copper concentrate to Japan where the smelter was located during the periods under review.

Petitioner established that "the estimated commercial quantity of the copper mineral was based on the grade of the (copper) ore determined in the assay in its laboratory". (Petitioner's Memorandum, p. 207, Record). From this approximated quantity petitioner computed the ad valorem taxes due on the copper mineral and paid the estimated taxes for such mineral in full before actual loading of the shipment in the vessel. (Ibid.).

The respondent would construe and denominate said payments as mere "deposits with the BIR Collection Agent of Toledo City", an unacceptable substitute for a bond which is the requirement (Examiner's Report, Exh. 1, p. 311, Folder III, BIR Record). But the filing of a bond takes place only if there is no prepayment of royalties or ad valorem taxes. Section 245 of P.D. 69 (Section 256 of P.D. 1158 or the 1977 Tax Code) is clear on this point as it provides.

> Sec. 245. Time and manner of payment of royalties or ad valorem taxes. - The royalties or ad valorem taxes, as the case may be, shall be due and payable upon the removal of the mineral products from the locality where mined. However, the output of the mine may be removed from such locality without the prepayment of such royalties or ad valorem taxes if the lessee, owner, or operator shall file

> a bond in the form and amount and with such sureties as the Commissioner of Internal Revenue may require, conditioned upon the payment of such royalties or ad valorem taxes, in which case, it shall be the duty of every lessee, owner, or operator of a mine to make a true and complete return in duplicate under oath setting forth the quantity and the actual market value of the output of his mine removed during each calendar quarter and pay the royalties or ad valorem taxes due thereon within twenty days after the close of said quarter.
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There being prepayments made by petitioner of **ad valorem** taxes for the copper mineral, the filing of a bond has necessarily been dispensed with.

The tentative payment of **ad valorem** taxes, as had been said, is justified by the fact that the final and precise quantity of copper cannot be known until after the smelting and refining which is done in Japan. It is this recognition of the character of manufacture and trade of copper that Section 256 of the 1977 Tax Code (formerly Section 245 of P.D. 69) was amended by B.P. Blg. 84 to read thus, in part:

> Section 256. Time, manner and place of payment of royalties.-
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"However, the output of the mine may be removed from such locality without the prepayment of such royalty taxes if the lessee, owner, or operator shall file a bond in the form and amount and with such sureties as the Commissioner may require, conditioned upon the payment of such royalty taxes. It shall be the duty of every lessee, owner, or operator to make a true and complete return in duplicate setting forth the quantity and the actual market value of the minerals or mineral products or quarry resources removed during each calendar quarter, of the balance, if any, in cases where payments are made upon removal, and pay the royalty taxes due thereon within twenty days after the end of each quarter to the revenue district officer, collection agent, or the treasurer of the city or municipality of the place where the mine is located." (Underscoring supplied)

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Upon the other hand, petitioner argues against the imposition of the 25% surcharge for late payment of the ad valorem tax and late notice of removal for silver and gold by pointing out that the silver and gold "cannot be separated physically from the copper concentrate until the processes were done in the smelter and refining plants in Japan". Thus, "as to notice of removal, that submitted for the copper concentrate sufficiently satisfied the requirement of the law and served as notice of removal too of these two minerals. If timely for copper, the same notice was timely too for the silver and gold contained in the copper concentrate."

We disagree with this contention of the petitioner.

We see it that even if the silver and gold cannot as yet be physically separated from the copper concentrate until the process of smelting and refining was completed, the estimated commercial quantity of the silver and gold could have been determined in much the same way that petitioner is able to estimate the commercial quantity of copper during the assay. If, as stated by petitioner, it is able to estimate the commercial quantity of the copper based on the grade of the copper ore, and it has determined the grade not only of the copper but also those of the gold and silver during the assay (Petitioner's Memorandum, p. 207, Record), ergo, the estimated commercial quantity of the silver and gold subject to **ad valorem** tax could have also been determined and provisionally paid as for copper.

A 25 % surcharge on ad valorem taxes due on the sale of pyrite was also imposed by respondent on petitioner for late filing of notice of removal of the pyrite from the mines and late payment of said taxes. It is the impression of petitioner that even as to the quantity that was used by its sister company Atlas Fertilizer Corporation (AFC) there is "no removal as contemplated by the law because the AFC plant is located inside the mineral concession of the petitioner in Sangi, Toledo". Petitioner apparently attaches to the phrase "removal of the mineral products from the locality where mined" in Section 245 of the Tax Code an excessively prosaic interpretation so as to believe that the mineral product need be transferred or removed to a different "locality" or "place" from that of the mineral concession for the ad valorem tax on the pyrite used by AFC to be due and payable.

The above construction suggested by petitioner is inaccurate and erroneous. The surcharge is justified. The second to the last paragraph of Section 242 and the last paragraph of Section 243 of the Tax Code should guide us to the manner of interpreting the phrase "locality where mined" as it merely provides that "Before the minerals or mineral products are removed from the mines, the Commissioner of Internal Revenue or his representatives shall first be notified of such removal on a form prescribed for the purpose"

(Underscoring ours). The construction to be given to the phrase "locality where mined" should be closely hued to the definitions that have been assigned to the word "mine". The Tax Code or the Revenue Regulations do not provide for its definition/s but American jurisprudence as a source is available.

In its "primary and restricted meaning", "mine" usually refers to underground excavations and open workings where minerals or deposits are obtained. (**Grover vs. Terrace Mining Co.**, 92 ALR 2d 861, 867). In its broad and enlarged sense, "mine" is any place where minerals are found (Id.). Verily, therefore, the construction of the term admits of variation depending on the circumstances. In the instant case, to agree to the interpretation suggested by petitioner would make for inefficient revenue regulation where the recordation and payment of ad valorem tax for pyrite would be left entirely to the convenience of petitioner. What should have been done is that, before pyrite is transported, from the place where it is extracted during the flotation process to the point of destination, whether it be in the AFC plant inside the concession area or some other place outside the concession area, notice of the removal and payment of the tax, should have been made first by petitioner.

In fine, some distinction can be and has been made in this case between the removal of pyrite and the removal of copper concentrate for the latter is actually transported out of the concession area while the pyrite is used by the AFC located within the concession area or shipped to other locations. With respect to pyrite shipped out of the concession area, petitioner does not make any allegation that it has filed the requisite notice upon removal or prepayments of taxes due or timely payments of the taxes upon removal as required. Petitioner could only pretend that there was no removal of the pyrite from the concession area. This is belied by evidence showing that there were shipments of pyrite to other locations aside from those used by the AFC. (Exh. "Z", Folder I, BIR Record).

As to the defense of prescription availed of by petitioner to shield itself from the assessments issued for shipments of copper concentrate during the period November 1, 1974 through April 8, 1975, we find it to be unavailing under the circumstances. The effect is, of course, now limited to the surcharges for late payment imposed against the pertinent shipments of silver and gold or pyrite considering the discussion above already made. The surcharges should, nonetheless, be imposed since the defense of prescription was raised only during the appeal, as correctly noted by respondent. The case of **Aguinaldo Industries Corporation v. Commissioner of Internal Revenue**, G.R. No. L-29790, February 25, 1982, 112 SCRA 136, 140) cited by respondent is appropriate as it was there said:

> "To allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level, would be to sanction a procedure whereby the court - which is supposed to review administrative determinations would not review, but determine and decide for the first time, a question not raised at the administrative forum. This cannot be permitted, for the same reason that underlies the requirement of prior exhaustion of administrative remedies to give administrative authorities the prior opportunity to decide within its competence, and in much the same way that, on the judicial level, issues not raised in the lower court cannot be raised for the first time on appeal."

And, even if a case in this court stands for trial de novo, the effect is still subject to the limitation laid for appeals from different courts, and applicable in our court that the parties cannot allege in their new pleadings causes of action or defenses that have not been pleaded initially (**Bernardo v. Genato**, 11 Phil. 603, 605, [1908]; **Beech v. Jimenez**, 12 Phil. 212, 218 [1908]).

We have noted, however, that certain shipments already covered in C.T.A. Case No. 3467 were inadvertently still included by respondent in C.T.A. Case No. 3825. When we referred to the worksheets forming part of the evidence for the computation of the taxes to be imposed against petitioner, this error was, accordingly, taken due of.

There were other assessments made against petitioner. Another involves liability for **ad valorem** tax on limestone plus 25% surcharge for late payment. It is the position of petitioner that it is not engaged in the business of mining limestone. For the respondent, the limestone or lime extracted or produced was indispensable and not merely incidental to its business of mining copper.

This issue is not new. In a case decided by this court involving the same parties herein

(**C.T.A. Case No. 2778**, February 16, 1988), we found for petitioner on such an issue. The Court of Appeals in **Commissioner of Internal Revenue v. CTA & ACMDC**, (C.A. - G.R. S.P. NO. 15429, January 20, 1989) subsequently affirmed our ruling by reiterating that:

> "The utilization of waste limestone by petitioner, which is engaged in mining copper ore, by converting such waste into lime as a cleansing reagent in the conversion of copper ore into a copper concentrate, was merely incidental to its mining copper ore operation for which it is adequately taxed (p. 64, Rollo).
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> Further, that:
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> This is also clear from the following ruling of the Supreme Court:
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> "Pursuant to the provision of Section 243 of the Tax Code, the ad valorem tax is computed on the actual market value of the minerals or mineral products extracted or produced from all mineral lands. In other words, the assessment shall be based, not upon the costs of production or extraction of said minerals or mineral products, but on the price which the same before or without undergoing a process of manufacture - would command in the ordinary course of business,... (**Republic Cement Corporation vs. Commissioner of Internal Revenue**, 23 SCRA 967).
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> In the case of ATLAS, however, the limestone removed from its mineral lands together with other surface materials like soil and rocks has no "actual market

value", as is clear from the evidence and as found by respondent court (p. 56, Rollo)

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In short, the extraction or removal by respondent Atlas of limestone from its mineral lands is a mere incident to its copper ore mining operation for which it is already properly and adequately taxed; hence, respondent Atlas should not be further taxed for such incidental activity, as aptly held by the respondent C.T.A. (p. 65, Rollo). To impose on it another set of tax on said limestone which has no commercial value would be tantamount to double taxation.

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The High Court has laid down the doctrine applicable to the situation involved in this case as early as 1955, to wit:

Where a person or corporation is engaged in a distinct business and, as a feature thereof, in an activity merely incidental which serves no other person or business, the incidental and restricted activity is not to be considered as intended to be separately or additionally taxed." (Standard Vacuum Oil Co., vs. Antique, 96 Phil. 909).

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In a final effort to support his case, petitioner (herein respondent) Commissioner finally argues that the extraction of limestone ... although incidental to ... Atlas' main business, should be subjected to the tax in question, since the provision of law imposing said tax makes no exception nor qualification in terms of whether the extraction is incidental or essential to the taxpayer's main business, ... (p. 21,

> Rollo). While we admire petitioner's zeal in trying to raise revenue for the government, we cannot countenance an illegal tax collection. The power of taxation should be exercised carefully, wisely, and clearly within the limitations of the power which may be vested on a governmental agency (Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356, 124 Fla. 659, 84 c.j.s. 45)."

As far as the assessed contractor's tax on the sale by petitioner of electric power is concerned, we find that, as cited by petitioner, a case (C.T.A. Case No. 3022, September 30, 1980) where we also had the instant parties had already settled this question. As had already been said in that case, since P.D. NO. 69 (effective January 1, 1973) had repealed the tax on the sale of electric power, respondent had lost the right to impose and collect it.

Upon the other hand, the assessment of contractor's tax for lease of personal property should hold against allegations by petitioner that it did not gain any profit or income or that it is not engaged in the business of being a common carrier. The taxable activity is specified as the act of leasing personal property to others. It is enough, for purposes of the tax prescribed in Section 191 of P.D. 69 that petitioner performs the activity enumerated for a price , that is, lease of things (as defined in Article 1643, New Civil Code) without regard to whether gain or income is derived or that petitioner is not engaged in the lease business. There should not also be any problem with the admissibility of these findings as they are adequately supported by other documents on record (Exhs." 12 & 13", Exhs. "1 & 6"; pp. 294-295, p. 180 and 213, respectively, BIR Record III and 3825). As it is, the denial by petitioner's witness and the aforestated arguments were not enough to overcome these evidence.

We cannot hold likewise, however, on the real estate dealer's tax assessed against petitioner. The working papers submitted by respondent merely contain a plain computation of the real estate dealer's tax allegedly due devoid of any supporting basis. And so, while petitioner with regard to the above mentioned contractors tax found the necessity to defend against its imposition, this assessment was left to stand on its legs if it has any. It has none, for the rule is settled that assessments must rest on facts but these assessments do not appear to have factual basis.

Apropos the manufacturer's sales tax computed against petitioner, we find the same well-grounded. The records show that some of the grinding balls which were manufactured by petitioner originally for its own use were, in effect, sold by petitioner to some of its competitors like Marcopper. The nature of the transaction as one of "sale" is not diminished by the declaration of petitioner that "ACMDC agreed to share its grinding balls at cost" (Exh. "U", p. 131, Record) The intention of deriving profit is not material in a "sale". The respondent found the value of the consideration in the books of accounts of ACMDC, and, rightfully, based the tax from the gross value of the consideration in the absence of other factors (Exh. "Y", p. 8; p. 306 BIR Record, Folder III).

WHEREFORE, petitioner should and is hereby ORDERED to PAY the total amount of the following:

a) P297,900.39 as 25% surcharge on silver extracted during the period November 1, 1974 to December 31, 1975.

b) P161,027.53 as 25% surcharge on silver extracted for the taxable year 1976.

c) P315,027.30 as 25% surcharge on gold

extracted during the period November 1, 1974 to December 31, 1975.

d) P260,180.55 as 25% surcharge on gold during the taxable year 1976.

e) P53,585.30 as 25% surcharge on pyrite extracted during the period November 1, 1974 to December 31, 1975.

f) P53,283.69 as 25% surcharge on pyrite extracted during the taxable year 1976.

g) P316,117.53 as deficiency manufacturer's sales tax and surcharge during the taxable year 1975; plus 14% interest from January 21, 1976 until fully paid as provided under Section 183 of P.D. No. 69.

h) P23,631.44 as deficiency contractor's tax and surcharge on the lease of personal property during the taxable year 1975; plus 14% interest from January 21, 1976 until fully paid as provided under Section 183 of P.D. No. 69.

i) P91,883.75 as deficiency contractor's tax and surcharge on the lease of personal property during the taxable year 1976; plus 14% interest from April 21, 1976 until fully paid as provided under Section 183 of P.D. No. 69.

With costs against petitioner.

SO ORDERED.

Quezon City, Metro Manila, May 31, 1991.

CONSTANTE C. ROAQUIN
Associate Judge

WE CONCUR:

ALEX Z. REYES
Presiding Judge

ERNESTO D. ACOSTA
Associate Judge

C E R T I F I C A T I O N

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ALEX Z. REYES
Presiding Judge
Court of Tax Appeals