REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

OCEANAGOLD (PHILIPPINES), INC., *Petitioner,*	**CTA *EB* NO. 2876** (CTA Case Nos. 9627, 9697, 9760, 9830, & 9856)
-versus-	Present: **DEL ROSARIO, P.J., RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO, REYES-FAJARDO, CUI-DAVID, FERRER-FLORES,** *and* **ANGELES,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: MAY 09 2025

x ---------- x

D E C I S I O N

MODESTO-SAN PEDRO, J.:

The Case

Before the Court *En Banc* is a Petition for Review,[1] filed on February 21, 2024, under *Section 2(a)(1), Rule 4* in relation to *Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals ("RRCTA")*,[2] seeking the reversal of the Decision[3] ("Assailed Decision"), promulgated on September 8, 2023, and the Resolution[4] ("Assailed Resolution"), dated January 29, 2024, both issued by the Court's Special Second Division ("Court in Division"); and the rendering of a new Decision declaring petitioner entitled to a refund of, or issuance of a tax credit certificate ("TCC") for, the amount of Php407,374,710.75 representing excise taxes allegedly

---

1 Petition for Review, *Rollo*, pp. 1-33, with annexes.
2 A.M. No. 05-11-07-CTA, 22 November 2005.
3 Decision, dated September 8, 2023 ("Assailed Decision"), *Rollo*, pp. 77-109.
4 Resolution, dated January 29, 2024 Assailed Resolution"), *id.*, p. 42-49.

erroneously paid by petitioner to respondent for the period July 2015 to December 2016.[5]

The Parties

Petitioner Oceanagold (Philippines), Inc. ("OGPI" or "petitioner") is a corporation organized and existing under the laws of the Philippines, with principal place of business at the 2nd Floor, Carlos J. Valdes Building, 108 Aguirre St., Legaspi Village, 1229 Makati City.[6]

On the other hand, respondent Commissioner of Internal Revenue ("CIR" or "respondent") is the duly appointed Commissioner of the Bureau of Internal Revenue ("BIR") 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 BIR National Office Building, Agham Road, Diliman, Quezon City.[7]

The Facts

On June 20, 1994, the Republic of the Philippines entered into a Financial or Technical Assistance Agreement[8] ("FTAA") with Arimco Mining Corporation (later renamed as Climax-Arimco Mining Corporation or CAMC)[9], involving the mineral exploration and large-scale development and commercial utilization of mineral deposits existing within the Mining Area[10] located in Nueva Vizcaya and Quirino. This is known as the Didipio Gold-Copper Project ("Didipio Project").

Meanwhile, on March 3, 1995, *Republic Act No. 7942 — An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation,* otherwise known as the *Philippine Mining Act of 1995* ("*Mining Act*"), was enacted. It was meant to promote the rational exploration, development, utilization, and conservation of mineral resources through the combined efforts of government and the private sector to enhance national growth.[11]

On December 23, 1996, CAMC entered into an Assignment, Accession and Assumption Agreement[12] with petitioner which, at the time of signing the said agreement is still operating under the name Australian Philippines Mining Inc.

---

5 See Prayer, Petition for Review, *id.*, p. 32.

6 See Par. 1, The Parties, Petition for Review, *id.*, p. 2; Par. 1, The Parties of the Case, Assailed Decision, *id.*, p. 79.

7 See Par. 2, The Parties, Petition for Review, *id.*, p. 2; Par. 2, The Parties of the Case, Assailed Decision, *id.*, p. 79.

8 Exhibit "P-2", Division Docket (CTA Case No. 9627, 9697, 9760, 9830 & 9856), Vol. IV, pp. 1869-1922.

9 See Certificate of Filing Amended Articles of Incorporation, Exhibit "P-3", *id.*, pp. 1923.

10 Defined under Section 2.32 of the FTAA as "the portion of the Exploration Contract Area delineated for mine development and production as specified in the Declaration of Mining Feasibility as prepared by the Contractor under Section VII of this Agreement."

11 See Section 2. Declaration of Policy of the Philippine Mining Act of 1995, promulgated on March 3, 1995.

12 Exhibit "P-4", Division Docket (CTA Case No. 9627, 9697, 9760, 9830 & 9856), Vol. IV, pp. 1933-1936.

Pursuant to said agreement, all rights and obligations under the FTAA would be transferred by CAMC to petitioner. The same agreement was later amended on September 15, 2004.[13]

On December 9, 2004, the Department of Environment and Natural Resources ("DENR") approved the assignment subject to certain conditions including petitioner's compliance with the terms and conditions of the FTAA and pertinent provisions of the Mining Act and its implementing rules and regulations.[14]

Thereafter, on March 15, 2005, petitioner filed with the DENR a Partial Declaration of Mining Feasibility ("PDMF")[15] stating that the former has found ore reserves and diluted resource of gold and copper reserves sufficient to sustain the mining operations of petitioner for some 14 years.

The said PDMF was approved by the DENR on October 11, 2005, subject to several conditions including (1) petitioner's full compliance with the contractual obligations under the FTAA including the reporting requirement in accordance with pertinent portions of the *DENR Administrative Order ("DAO") No. 96-40*,[16] as amended; and (2) conduct of mining operations in the area subject of the PDMF in accordance with existing applicable laws, their implementing rules and regulations, and the pertinent provisions of the FTAA.[17]

On May 4, 2007, pursuant to petitioner's request, respondent issued *BIR Ruling No. 10-2007*[18] confirming petitioner's opinion that it is exempt from payment of excise tax on minerals from the date of approval of the Mining Project Feasibility Study up to the end of the recovery period. Respondent further discussed therein that the recovery period shall be reckoned from the date of commercial operations and shall be for a maximum of five 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 Mining Act*, its implementing rules and regulations particularly *DAO No. 96-40*, and the FTAA between the Philippine Government and petitioner.

However, petitioner halted and suspended its mining development in 2008 and resumed the same only in December 2010. According to petitioner, this was due to escalating costs and uncertainty in the financial markets.[19] In late 2012, petitioner

---

13 See Assignment, Accession and Assumption Agreement (Amended and Restated), Exhibit "P-4-a", *id.*, pp. 1938-1941.

14 See Order, dated December 9, 20024, Exhibit "P-5", *id.*, pp. 1942-1944.

15 Exhibit "P-7", *id.*, pp. 1954-1955.

16 Revised Implementing Rules and Regulations of Republic Act No. 7942, otherwise known as the "Philippine Mining Act of 1995", promulgated on December 20, 1996.

17 See Order, dated October 11, 2005, Exhibit "P-8", Division Docket (CTA Case No. 9627, 9697, 9760, 9830 & 9856), Vol. IV, pp. 1956-1957.

18 Exhibit "P-25", *id.*, pp. 1997-2002.

19 See Answer Nos. 24-26, Exhibit "P-120", Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, Division Docket (CTA Case No. 9627), Vol. II, p. 393.

commenced the commissioning of the Didipio Project, then mined and stockpiled approximately 800,000 metric tons of ore for further processing.[20]

Meanwhile, on February 15, 2013, respondent issued *Revenue Memorandum Circular No. 17-2013* clarifying the taxes due from FTAA contractors during "recovery periods" and effectively revoking *BIR Ruling No. 10-2007.*

On March 27, 2013, petitioner filed a letter with the DENR Secretary, copy furnished the Mines and Geosciences Bureau ("MGB") of the DENR, stating that on February 26, 2013, the Didipio Project was able to mill 301,903 tons, thus achieving the 15% of the design annual ore throughput of 2,000,000 tons, as provided in the Declaration of Mining Feasibility. In this regard, petitioner declared that the Date of Commencement of Commercial Production pursuant to *Section 2.14 of the FTAA*[21] was on April 1, 2013.

On several occasions in 2012 to 2013, the BIR conducted a series of seizures, apprehensions, and detentions of the copper concentrates being transported to petitioner's buyer.[22] Petitioner claims to have paid the related excise taxes in protest, raising the exemption confirmed by respondent in *BIR Ruling No. 10-2007.*

Emphasizing the need to further comply with its obligations to its buyer, petitioner made a series of payments of excise taxes to the BIR, allegedly under protest, for the delivery of copper concentrates to its buyer in the succeeding years.

In this light, petitioner wrote the BIR on January 9, 2017,[23] requesting the refund or issuance of TCC allegedly covering erroneously paid and/or illegally collected excise taxes for the taxable year (TY) 2015, in the aggregate amount of Php260,126,405.09, on petitioner's removals of copper concentrates and doré bars.

Further, on January 22, 2018, petitioner sent another letter dated January 19, 2018,[24] to the BIR with a similar request covering TY 2016, in the aggregate amount of Php272,288,393.08. Such claim for TY 2016 was denied by the respondent in his letter-reply, dated April 30, 2018.[25]

Aggrieved, petitioner filed various judicial claims, which were eventually consolidated, for refund or issuance of TCC: on June 28, 2017, docketed as CTA Case No. 9627;[26] on October 6, 2017, docketed as CTA Case No. 9697;[27] on January

---

20 See Answer No. 28, Exhibit "P-120", Judicial Affidavit of Atty. Joan D. Adaci-Cattiling, *id.*

21 Section 2.14. "Date of Commencement of Commercial Production" shall mean the first day of the calendar quarter following the quarter in which production equals fifteen percent (15%) of the project's initial annual design capacity as outlined in the Declaration of Mining Feasibility as hereinafter defined.

22 See Apprehension Slip Nos. APS 2003-00013424, 2003-00013426, 2003-00013427, 2003-00013051, 2003-00013054, 2003-00013060, 2003-00013052, 2003-00013053, 2003-00013055, 2003-00013059, 2001-00006245, 2003-00013451, 2003-00013452, Exhibits "P-11", "P-13"-"P-24", Division Docket (CTA Case No. 9627, 9697, 9760, 9830 & 9856), Vol. IV, pp. 1962, 1985-1996.

23 See Letter to BIR Excise LT Audit Division I, dated January 6, 2017, Exhibit "P-32", *id.*, pp. 2032-2041.

24 See Letter to BIR Excise LT Audit Division I, dated January 19, 2018, Exhibit "P-32-A", *id.*, pp. 2092-2101.

25 See Letter, dated April 30, 2018, Exhibit "P-32-b", *id.*, Vol. V, pp. 2159-2160.

26 Division Docket (CTA Case No. 9627), Vol. 1, pp. 10-43.

27 Division Docket (CTA Case No. 9697), pp. 10-48.

31, 2018, docketed as CTA Case No. 9760;[28] on May 2, 2018, docketed as CTA Case No. 9830;[29] and on June 13, 2018, docketed as CTA Case No. 9856.[30]

The details of the excise tax payments and the corresponding administrative and judicial refund claims, as summarized by the Court in Division in the Assailed Decision, are as follows:

Date of Payment	Amount	Date of Administrative Claim	Date of Judicial Claim
July 1, 2015	Php 21,354,901.27	January 9, 2017	June 28, 2017 (CTA Case No. 9627)
August 18, 2015	22,326,518.12		
August 27, 2015	5,222,296.67		
September 10, 2015	21,396,875.25		
October 14, 2015	4,097,439.21		October 6, 2017 (CTA Case No. 9697)
November 10, 2015	21,205,565.64		
December 3, 2015	21,733,663.42		
December 17, 2015	6,598,015.94		
December 18, 2015	11,251,042.15		
February 5, 2016	5,053,245.89	January 22, 2018	January 31, 2018 (CTA Case No. 9760)
February 9, 2016	24,068,629.18		
March 15, 2016	23,662,264.92		
March 15, 2016	7,131,533.90		
March 18, 2016	133,788.75		
March 18, 2016	37,878.45		
May 3, 2016	6,017,805.51		May 2, 2018 (CTA Case No. 9830)
May 6, 2016	24,335,178.44		
June 22, 2016	7,722,130.29		
June 23, 2016	23,142,031.77		
July 29, 2016	25,951,813.05		June 13, 2018 (CTA Case No. 9856)
August 9, 2016	5,716,938.23		

After a full blown trial, the Court in Division rendered the Assailed Decision on September 8, 2023,[31] denying the consolidated Petitions for Review, the dispositive portion of which states:

> **WHEREFORE**, the foregoing premises considered, the Petitions for Review in CTA Case Nos. 9627, 9697, 9760, 9830 and 9856 filed by petitioner Oceanagold (Philippines), Inc. are hereby **DENIED** for lack of merit.

[28] Division Docket (CTA Case No. 9760), Vol. 1, pp. 10-49.
[29] Division Docket (CTA Case No. 9830), pp. 10-58.
[30] Division Docket (CTA Case No. 9856), pp. 10-68.
[31] *Supra* note 3.

Thereafter, on September 29, 2023, petitioner filed a Motion for Reconsideration,[32] which was likewise denied by the Court in Division on January 29, 2024.[33]

This led to the filing of the current Petition for Review on February 21, 2024.[34] Respondent, on the other hand, filed his Comment on March 25, 2024.[35]

In view thereof, the Court submitted the instant case for decision on April 12, 2024.[36]

The Issues

The issues, as raised by petitioner, are as follows:

I. WHETHER PETITIONER'S DATE OF COMMENCEMENT OF COMMERCIAL PRODUCTION, WHICH MARKS THE START OF THE FIVE-YEAR RECOVERY PERIOD, IS ON THE 3RD QUARTER OF 2010 UP TO 4TH QUARTER OF 2011; and

II. WHETHER THE PAYMENT OF EXCISE TAX DURING THE RECOVERY PERIOD SHOULD BE DETRIMENTAL TO THE PETITIONER BEFORE IT MAY INVOKE ITS TAX EXEMPTION.[37]

The Arguments

In its Petition for Review, petitioner raises the following arguments:

(1) The date of commencement of commercial production, which is deemed the start of the five-year recovery period, should be on April 1, 2013. Specifically, petitioner posits that:

   (a) The definition of "Commercial Production" under the FTAA must prevail over the definition under DAO No. 96-40;

   (b) Assuming arguendo that the definition of "Commercial Production" under DAO No. 96-40 prevails, both petitioner's FTAA and DAO No. 96-40 provide that "Commercial Production" can only commence if there is production of sufficient quantity of materials; and

---

32 Motion for Reconsideration, dated September 29, 2023, *Rollo*, pp. 50-74.
33 See Assailed Resolution, dated January 29, 2024, *supra* note 4.
34 *Supra* note 1.
35 Comment (Re: Petitioner's Petition for Review), dated February 21, 2024, *Rollo*, pp. 112-115.
36 See Notice issued by CTA *En Banc*, *id.*, p. 117.
37 See Petition for Review, *Rollo*, p. 10.

(c) There can be no recovery without commencing "actual" commercial production.

(2) The payments of excise tax during the recovery period need not be detrimental to petitioner before it may invoke its tax exemption. Petitioner particularly highlights that:

(a) RA No. 7942 effectively amended or modified the provisions of petitioner's FTAA pertaining to government's share thereto;

(b) Jurisprudence provide that an FTAA contractor is exempt from excise tax during the recovery period; and

(c) Assuming for the sake of argument that payment of excise tax during the recovery period should be detrimental to petitioner as a requirement before petitioner may invoke its tax exemption, petitioner has sufficiently established that such tax payment was in fact detrimental to petitioner.

On the other hand, respondent, in his Comment counters that there is no cogent reason to disturb the Decision rendered by the Court in Division. He advances that it was correctly held in the Assailed Decision that the payments made by petitioner between July 2015 and December 2016 are not rendered erroneous or illegal. Further, according to respondent, petitioner failed to present evidence to prove that the latter's payment of excise tax is detrimental to its recovery of pre-operating and property expenses and neither did it show any valid losses for the petitioner; thus, making the claim untenable.

The Ruling of the Court

The instant Petition for Review was timely filed before the Court En Banc

We shall first look into the timeliness of the filing of the Petition for Review before the Court *En Banc*.

Section 3 (b), Rule 8 of the RRCTA provides that a party adversely affected by a decision or resolution of a Division of the CTA on a motion for reconsideration or new trial may appeal to the Court *En Banc* by filing a petition for review within 15 days from receipt of the assailed decision or resolution.

In the case at hand, the Assailed Resolution was received by the petitioner on February 6, 2024.[38] Counting 15 days therefrom, petitioner had until February 21, 2024 within which to file an appeal. Hence, the instant Petition for Review was timely filed.

We shall now proceed to determine the merits of the instant case.

At the outset, the Court notes that OGPI's arguments in its Petition for Review are a mere rehash of the issues already raised by petitioner in its Motion for Reconsideration and considered by the Court in the Assailed Resolution. Nonetheless, the Court shall pass upon the arguments to fully resolve the case.

Upon judicious review of the records and the contentions of the petitioner, the Court *En Banc* upholds the Court in Division's denial of the Petition for Review based on Our findings discussed below.

The Court in Division did not err in finding that petitioner failed to prove that the subject claim is still within the recovery period

In seeking to shield itself from the fatal effect of the Court in Division's finding that the subject payments of excise taxes were made beyond the recovery period, petitioner insists on the non-applicability of *DAO No. 96-40*, specifically the provision stating the definition of the "date of commencement of commercial production."

To recall, the FTAA was signed in 1994 while the *Mining Act* was promulgated in 1995. *DAO No. 96-40*, which provides for the implementing rules and regulations of the Mining Act, was naturally promulgated subsequent to the signing of the FTAA.

In light of the foregoing, reference should be made to the transitory provision provided by the *Mining Act* for FTAAs already existing at the time the law became effective. *Section 112* thereof provides that:

CHAPTER XX

TRANSITORY AND MISCELLANEOUS PROVISIONS

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*

[38] See Notice of Resolution stamped "Received" by the petitioner's counsel, Baniqued and Bello, on February 6, 2024, *Rollo*, p. 41.

> *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 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.***
> (Emphasis and italics supplied)

On the other hand, *DAO No. 96-40* substantially reiterated the above provision in *Section 272* of the said implementing rules and regulations, to wit:

> CHAPTER XXX
>
> Transitory and Miscellaneous Provisions
>
> SECTION 272. Non-Impairment of Existing Mining/Quarrying Rights. — *All valid and existing mining lease contracts, permits/licenses, leases pending renewal, Mineral Production Sharing Agreements, FTAA granted under Executive Order No. 279, at the date of the Act shall remain valid, shall not be impaired and shall be recognized by the Government*: Provided, That the provisions of Chapter XXI on Government share in Mineral Production Sharing Agreement and of Chapter XVI on incentives of the Act shall immediately govern and apply to a mining Lessee or Contractor unless the mining Lessee or Contractor indicates its intention to the Secretary, in writing, not to avail of said provisions: Provided, further, That no renewal of mining lease contracts shall be granted after the expiration of its term: ***Provided, finally, That such leases, Production-Sharing Agreements, FTAAs shall comply with the applicable provisions of these implementing rules and regulations***."
> (Emphasis and italics supplied)

Petitioner argues that the first sentence of *Section 272 of DAO No. 96-40* above must be respected and that the last sentence thereof must give way to the former. Thus, according to petitioner, the date of commencement of commercial production must be based on the definition provided by the FTAA, not of *DAO No. 96-40*.

The Court is not convinced.

A cardinal rule in statutory construction is that when the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation. There is only room for application. As the statute is clear, plain, and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation.[39]

---

[39] *National Grid Corporation of the Philippines v. Manila Electric Company*, G.R. No. 239829, May 29, 2024.

We find the foregoing *verba legis* interpretation applicable in the above-cited *Section 112 of the Mining Act* and *Section 272 of DAO No. 96-40*. These provisions appear to be non-ambiguous in expressly stating that the FTAAs shall remain valid but should nonetheless comply with the Mining Act and its implementing rules and regulations. Thus, for purposes of determining the rules and other requirements applicable to FTAA contractors like the petitioner, greater weight should be given on those promulgated pursuant to the Mining Act.

Such interpretation is consistent with the conditions required by DENR in the Order, dated December 9, 2004,[40] approving the transfer of the FTAA from CAMC to petitioner, as well as in the Order, dated October 11, 2005,[41] approving petitioner's PDMF, which respectively state:

Order, dated December 9, 2004

> **WHEREAS**, the application for transfer of FTAA No. 001 went through the prescribed procedure and other requirements set forth under Section 66 of DAO 96-40, as amended, as follows:
>
> . . . .
>
> 6. ***Compliance*** of CAMC with all the relevant terms and conditions of the FTAA and the ***pertinent provisions of the*** [*sic*] ***RA No. 7942 and DAO No. 96-40*** , as amended, and
>
> . . . .
>
> (Emphasis and italics supplied)

Order, dated October 11, 2005

> **WHEREFORE**, the foregoing premises considered, the Partial Declaration Mining Project Feasibility for the Didipio Gold/Copper Project of Australasian Philippines Mining, Inc. the Financial or Technical Assistance Agreement No. 001 is hereby approved, subject to the following conditions:
>
> . . . .
>
> 3. That the conduct of mining operation in the Contract Area subject of the Declaration of Mining Project Feasibility shall be undertaken in accordance with the existing applicable laws, their implementing rules and regulations and pertinent provisions of the FTAA.
>
> . . . .
>
> (Emphasis and italics supplied)

After finding for the applicability of *DAO No. 96-40* based on the above discussions, We deem it proper to first look into the relevant provision related to payment of excise tax and when it should be collected from a FTAA contractor.

---

[40] *Supra* note 14.
[41] *Supra* note 17.

before zooming into the specific contention raised by petitioner regarding the proper date of commencement of commercial production.

Section 214 of DAO No. 96-40 provides for the payment of Government Share, which includes excise taxes, and the period as to when collection thereof shall commence, to wit:

> SECTION 214. Government Share in FTAA. — ***The Government share in an FTAA 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-owned corporation and all such other taxes, duties and fees as provided for in existing laws.
>
> The Government share in an FTAA shall be negotiated by the Government and the Contractor taking into consideration:
>
> a. Capital investment of the project;
>
> b. Risks involved;
>
> c. Contribution of the project to the economy;
>
> d. Technical complexity of the project;
>
> e. Contribution to community and Local Government; and
>
> f. Other factors that will provide for a fair and equitable sharing between the parties.
>
> The collection of Government share shall commence after the FTAA Contractor has fully recovered its pre-operating, exploration and development expenses, inclusive. ***The period of recovery which is reckoned from the date of commercial operation shall be for a period not exceeding five (5) years or until the date of actual recovery, whichever comes earlier.***
> (Emphasis and italics supplied)

Based on the foregoing, it is clear that excise taxes shall be collected from the contractor only after the FTAA contractor has fully recovered its pre-operating, exploration and development expenses. In the determination of the period of recovery, however, the following requisites must be satisfied:

1. It must be reckoned from the date of commercial operation; and

2. It must *not* (a) exceed five years; or (b) go beyond the date of actual recovery of said expenses, whichever is earlier.

In the instant Petition for Review before the Court *En Banc*, OGPI focuses on the *first* requisite (i.e., which date should be considered the date of commercial operation). It contends that the five-year period must be reckoned from April 1,

2013, the date declared by petitioner as the start of its commercial production, based on definition provided by the FTAA which states:

> 2.14 "Date of Commencement of Commercial Production" shall mean the first day of the calendar quarter following the quarter in which production equals fifteen percent (15%) of the project's initial annual design capacity as outlined in the Declaration of Mining Feasibility as hereinafter defined.

However, as already established, *DAO No. 96-40*, or the implementing rules and regulations of the Mining Act is deemed applicable to petitioner. Thus, reference should be made to the definition of commercial production under the said rules, to wit:

> Section 5. Definition of Terms
>
> As used in and for purposes of these regulations, the following shall mean:
>
> . . . .
>
> i. "**Commercial Production**" refers to the production of sufficient quantity of minerals to sustain 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***
>
> . . . .
>
> (Emphasis and italics supplied)

It is clear from the foregoing that the *commencement of commercial production* should be the ***earlier date*** between:

(i) the date of commercial operation declared by the contractor; and

(ii) the date stated in the feasibility study.

To recall, it is uncontested that petitioner's declared commencement of commercial production is on April 1, 2013.

On the other hand, for purposes of determining the date stated in the feasibility study, We note that while the PDMF was submitted, the corresponding Mining Project Feasibility Study ("MPFS") and Work Program was not presented to the Court. The PDMF[42] merely states that:

> That, in relation to the foregoing, and subject to pertinent rules, I am executing this affidavit to partially declare mining project feasibility over an area covering 975 hectares within the FTAA contract are and do hereby conform to the Mining Project Feasibility Study conducted over the FTAA

---

42 *Supra* note 15.

Absent the proof of date of commercial operation, as stated in the approved MPFS, the Court cannot determine the proper reckoning point which, as discussed, is the *first* requisite that must be established in ascertaining the proper period of recovery.

Also, even assuming that reliance on evidence other than the MPFS is permissible in this case, We note that the only other document that can be used as reference is *BIR Ruling No. 10-2007*.[43] The BIR mentioned therein that as per petitioner's representation, the initial commercial production was expected to commence on the 4th quarter of 2008. As the letter request for the BIR Ruling was filed on February 13, 2007, it can be inferred, although by a long shot, that the same timeline was presented to the DENR in the MPFS mentioned in the PDMF.

Thus, if the five-year period is reckoned from the 4th quarter of 2008, the recovery period should have ended in the 4th quarter of 2013—a few years earlier than the period covered by excise tax payments subject herein (i.e., July 2015 to December 2016).

On another note related to OGPI's position regarding the proper reckoning point, We find no merit in petitioner's other contentions that there must be production of sufficient quantity of materials before commercial operations commence, pursuant to *DAO No. 96-40*, and that there must be an actual commencement of commercial production before the recovery period begins.

Following these arguments, petitioner is trying to convince the Court *En Banc* to plainly disregard the date of commercial operations indicated in the feasibility study and solely consider the actual productions made during operations. However, it should be highlighted again that as per *DAO No. 96-40*, the reckoning point of commercial production is clear and unequivocal. The rules are unambiguous in their intention to reckon the commercial production from the date specified in the feasibility study if it appears to be earlier than the date declared by the contractor.

This interpretation is consistent with the required control that must be exercised by the State on exploration, development, and utilization of the country's mineral resources, as discussed in the case of *La Bugal-B'laan Tribal Association, Inc., et al. vs. Secretary of DENR ("La Bugal-B'laan case")*.[44]

In upholding the constitutionality of the *Mining Act* and *DAO No. 96-40*, the Supreme Court elucidated in the *La Bugal-B'laan case* that the fact that the there is a gamut of restrictions and requirements, which include the approval of a MPFS, imposed upon the FTAA contractor confirms the government's control over the mining enterprise, as mandated by the constitution. The High Court even further emphasized that once these plans and reports are approved, the contractor is bound to comply with its commitments therein.

---

[43] *Supra* note 18.
[44] G.R. No. 127882, December 1, 2004.

Thus, We find that by having the date of commercial operation per feasibility study as a possible reckoning point for recovery period, the State is actually placing a control mechanism to ensure that the contractor shall be more compelled to follow the timeline indicated in the feasibility study approved by the government. That being so, there is no merit in petitioner's position to disregard the dates and timelines in the feasibility study which, in the first place, were submitted by the contractor itself.

Considering the above discussions, We find that petitioner failed to prove the appropriate reckoning point of the recovery period. Thus, for failure to establish the *first* requisite above, the instant Petition for Review must necessarily fail.

Petitioner failed to establish that it has valid pre-operating expenses to recover due to failure to prove that it secured approval of the DENR Secretary required under DAO No. 99-56

Assuming arguendo that the recovery period may be reckoned from the date of commercial operation as declared by petitioner, We find that the instant claim still lacks merit due to failure to satisfy the *second* requisite discussed above. This mandates that the recovery period must not exceed five years and must not be beyond the date of *actual recovery* of pre-operating expenses.

Accordingly, it is first necessary to account for the *recoverable pre-operating, exploration and development expenses*. For this purpose, the rules for the identification of these expenses are prescribed under *DAO No. 99-56,*[45] which states:

> e. Recovery of Pre-Operating Expenses. Considering the high risk, high cost and long term nature of Mining Operations, the Contractor is given the opportunity to recover its Pre-Operating Expenses incurred during the pre-operating period, after which the Government shall receive its rightful share of the national patrimony. The Recovery Period, which refers to the period allowed to the Contractor to recover its Pre-Operating Expenses as provided in the Mining Act and the IRR, shall be for 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. ***The basis for determining the Recovery Period shall be the actual Net Cash Flows from Mining Operations and actual Pre- Operating Expenses*** converted into its US dollar equivalent at the time the expenditure was incurred.
>
> "Net Cash Flow" means the Gross Output less Deductible Expenses, Pre-Operating Expenses, Ongoing Capital Expenditures and Working Capital charges.

[45] Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements, December 27, 1999.

f. Recoverable Pre-Operating Expenses. *Pre-Operating Expenses for recovery which **shall be approved by the Secretary** upon recommendation of the Director shall consist of actual expenses and capital expenditures relating to the following:*

1. Acquisition, maintenance and administration of any mining or exploration tenements or agreements covered by the FTAA;
2. Exploration, evaluation, feasibility and environmental studies, production, mining, milling, processing and rehabilitation;
3. Stockpiling, handling, transport services, utilities and marketing of minerals and mineral products;
4. Development within the Contract Area relating to the Mining Operations;
5. All Government taxes and fees;
6. Payments made to local Governments and infrastructure contributions;
7. Payments to landowners, surface rights holders, Claimowners, including the Indigenous Cultural Communities, if any;
8. Expenses incurred in fulfilling the Contractor's obligations to contribute to national development and training of Philippine personnel;
9. Consulting fees incurred inside and outside the Philippines for work related directly to the Mining Operations;
10. The establishment and administration of field and regional offices including administrative overheads incurred within the Philippines which are properly allocatable to the Mining Operations and directly related to the performance of the Contractor's obligations and exercise of its rights under the FTAA;
11. Costs incurred in financial development, including interest on loans payable within or outside the Philippines, subject to the financing requirements required in the FTAA and to a limit on debt-equity ratio of 5:1 for investments equivalent to 200 Million US Dollars or less, or for the first 200 Million US Dollars of investments in excess of 200 Million US Dollars; or 8:1 for that part of the investment which exceeds 200 Million US Dollars: Provided, That the interests shall not be more than the prevailing international rates charged for similar types of transaction at the time the financing was arranged;
12. All costs of constructing and developing the mine incurred before the Date of Commencement of Commercial Production, including capital and property as hereinafter defined irrespective as to their means of financing, subject to the limitations defined by Clause 3-f-11 hereof, and inclusive of the principal obligation and the interests arising from any Contractor's leasing, hiring, purchasing or similar financing arrangements including all payments made to Government, both National and Local; and
13. General and administrative expenses actually incurred by the Contractor for the benefit of the Contract Area.

The foregoing recoverable Pre-Operating Expenses shall be subject to verification of its actual expenditure by an independent audit recognized by the Government and chargeable against the Contractor.

(Emphasis and italics supplied.)

OGPI alleges that its pre-operating expenses amounted to USD310,519,081 as of March 31, 2013.[46] However, while petitioner offered the testimony of Independent Certified Public Accountant (ICPA) Elaine E. De Guzman that OGPI has not yet recovered its pre-operating expenditures, it failed to present pre-operating expenses duly approved by the Secretary of the DENR, as recommended by the Director of MGC, as mandated by the above-cited *DAO No. 99-56*.

Further, while the Order, dated October 11, 2005,[47] issued by the DENR Secretary shows that the PDMF for the Didipio Project has been approved, the approval of the pre-operating expenses was not stated.

The significance of having the pre-operating expenses approved by the government cannot be simply disregarded in establishing claims for recovery thereof, as discussed in the *La Bugal-B'laan case*:

> Naturally, with the submission of approved work programs and budgets for the exploration and the development/construction phases, the government will be able to scrutinize and approve or reject such expenditures. It will be well-informed as to the amounts of pre-operating and other expenses that the contractor may legitimately recover and the approximate period of time needed to effect such a recovery. There is therefore no way the contractor can just randomly post any amount of pre-operating expenses and expect to recover the same.

Accordingly, for failure of OGPI to prove that it has valid pre-operating expenses to recover, that it has yet to recover the same, and, thus, it is still under the period of recovery, the Court cannot grant the instant Petition of Review and is constrained to uphold the denial of the claim for refund or issuance of TCC by the Court in Division.

In view of the foregoing, the Court *En Banc* shall no longer belabor the other issue raised by petitioner regarding the requirement of pre-operating expenses being "detrimental", as held by the Court in Division.

At this juncture, the Court *En Banc* reiterates that tax refunds are in the nature of a claim for exemption and, therefore, the law is construed in *strictissimi juris* against the taxpayer. Accordingly, the pieces of evidence presented entitling a taxpayer to an exemption must also *strictissimi* scrutinized and must be duly proven.[48] In this case, petitioner was not able to prove with competent evidence its entitlement to a refund or issuance of a TCC.

All told, the Court *En Banc* finds no reason to disturb the findings of the Court in Division. The denial of the Petition for Review is in order.

---

[46] See Answer Nos. 9 and 13, Exhibit "P-122", Judicial Affidavit of Ms. Elaine E. De Guzman, Division Docket (CTA Case No. 9627, 9697, 9760, 9830 & 9856), Vol. IV, p. 1807.

[47] *Supra* note 17.

[48] Atlas Consolidated Mining and Development Corporation v. CIR, G.R. No. 159490, 18 February 2008.

ACCORDINGLY, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the Decision, dated September 8, 2023, and the Resolution, dated Janaury 29, 2024, of the Court's Special Second Division are hereby **AFFIRMED**.

SO ORDERED.

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
Associate Justice

CORAZON G. FERRER-FLORES
Associate Justice

HENRY S. ANGELES
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice