

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

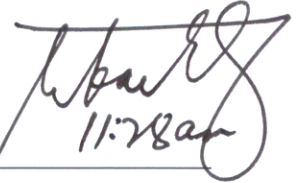
En Banc

FCF MINERALS CORPORATION, **CTA EB NO. 2622**
Petitioner, (CTA Case No. 10003)

-versus-

Present:
DEL ROSARIO, P.J.,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO,
CUI-DAVID, and
FERRER-FLORES, JJ.

COMMISSIONER OF INTERNAL REVENUE, Promulgated:
Respondent. **AUG 15 2023**



X ----- X

DECISION

MODESTO-SAN PEDRO, J.:

The Case

Before the Court *En Banc* is a Petition for Review,¹ filed on 20 May 2022, under **Section 4 (b), Rule 8² of the Revised Rules of the Court of Tax Appeals (“RRCTA”),**³ seeking the reversal of the Decision⁴ (“Assailed Decision”), promulgated on 18 October 2021, and the Resolution⁵ (“Assailed Resolution”), dated 21 April 2022, both issued by the Court’s First Division.

¹ See Petition for Review, *Rollo* Vols. 1 and 2, pp. 1-962, with annexes.

² SECTION 4. Where to appeal; mode of appeal. —

xxx xxx xxx

((b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court en banc shall act on the appeal.

³ A.M. No. 05-11-07-CTA, 22 November 2005.

⁴ See Decision, dated 18 October 2021 (“Assailed Decision”), *Rollo* Vol. 1, pp. 35-70, with Separate Concurring Opinion of Presiding Justice Roman G. del Rosario.

⁵ See Resolution, dated 21 April 2022 (“Assailed Resolution”), *id.*, p. 74-77.

(“Court in Division”); and the rendering of a new Decision granting the claim for refund of Documentary Stamp Tax (“DST”), for taxable year 2017.⁶

The Parties

Petitioner FCF Minerals Corporation (“FCF” or “petitioner”) is a domestic corporation engaged in the exploration, development, and commercial operation of mineral claims. It has its principal business address at Unit 1407, Pacific Star Building, Sen. Gil Puyat Avenue cor. Makati Avenue, Makati City, and is registered with the Bureau of Internal Revenue under Tax Identification Number (“TIN”) 238-154-069-000.⁷

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 charged with the administration and enforcement of national internal revenue laws, including the granting of refunds and tax credits of taxes erroneously and/or illegally collected. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.⁸

The Facts

On 19 September 2009, petitioner entered into a Financial or Technical Assistance Agreement (“FTAA”)⁹ No. 04-2009-II with the Republic of the Philippines, in accordance with *Republic Act (RA) No. 7942*.¹⁰

Under the FTAA, petitioner agreed to join and assist the government in the large-scale exploration, development, and commercial utilization of minerals in exchange for an exclusive right to conduct mining operations in the area.

On 18 October 2011, the Secretary of the Department of Environment and Natural Resources (DENR) issued an Order approving the Declaration of Mining Project Feasibility (DMPF) for the Runruno Gold-Molybdenum Project of petitioner.¹¹

⁶ See Prayer, Petition for Review, *id.*, p. 27.

⁷ See Par. 1, Parties, Petition for Review, *id.*, p. 3; Par. 1, The Facts, Assailed Decision, *id.*, p. 35.

⁸ See Par. 2, Parties, Petition for Review, *id.*, p. 3; Par. 2, The Facts, Assailed Decision, *id.*, p. 36.

⁹ Annex “G”, Financial or Technical Assistance Agreement (“FTTA”), *id.*, pp. 205, 299-324, 278-298. Exhibit “P-6”, Division Docket – Vol. III, pp. 1646, 1741-1766, 1720-1740, and 1702-1710.

¹⁰ An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation or the “Philippine Mining Act of 1995”, 3 March 1995.

¹¹ Annex “G”, Order dated 18 October 2011, *Rollo* Vol. 1, pp. 206-208. Exhibit “P-7”, Division Docket – Vol. III, pp. 1647-1649.

Related to the said FTAA, petitioner, together with Metals Exploration Plc, and Metals Exploration Pte. Ltd., entered into an Amendment Deed¹² with several financial institutions, covering a total loan commitment of USD28,160,000.00 on 15 December 2016. Petitioner paid DST for the said transaction, amounting to Php7,012,122.00 on 3 January 2017.¹³

On 9 and 16 September 2016, petitioner issued letters to the Director of the Mines and Geosciences Bureau (MGB), the Secretary of DENR, and the Undersecretary and Concurrent Director of MGB, stating its Declaration of Commencement of Commercial Operations on 9 September 2016.¹⁴ The same was approved by the DENR on 17 July 2017.¹⁵

On 14 March 2018, petitioner filed with the BIR an administrative claim¹⁶ for refund of the alleged erroneously paid DST on the Amendment Deed dated 15 December 2016. In the said claim, petitioner primarily argued that the transaction occurred during its period of exemption, pursuant to the *RA No. 7942*, its implementing rule, and FCF's FTAA.¹⁷

Petitioner then filed a Petition for Review before the Court of Tax Appeals ("CTA") on 3 January 2019, docketed as CTA Case No. 10003.¹⁸ The case was raffled to the Court's First Division.

On 18 October 2021, the Court in Division rendered the Assailed Decision denying the Petition for Review.

Thereafter, on 2 December 2021, petitioner filed a Motion for Reconsideration,¹⁹ which was likewise denied by the Court in Division on 21 April 2022.²⁰

This led to the filing of the current Petition for Review²¹ on 20 May 2022. Respondent, however, failed to file his Comment thereto.²²

¹² Annex "G", Amendment Deed, *Rollo* Vol. 1, pp. 134-186; Exhibit "P-2", Division Docket – Vol. III, pp. 1575-1627.

¹³ Annex "G", Documentary Stamp Tax Declaration/Return and Payment Details, *Rollo* Vol. 1, pp. 129-133; Exhibit "P-1", "P-1-a" and "P-1-b", Division Docket – Vol. III, pp. 1570-1574.

¹⁴ Annex "G", Declaration of Commencement of Commercial Operations, *Rollo* Vol. 1 pp. 443-445; Exhibit "P-10", "P-11", "P-12", Division Docket – Vol. III, pp. 1885-1887.

¹⁵ Annex "G", Approval Letter dated 17 July 2017, *Rollo* Vol. 1, pp. 447-448; Exhibit "P-14", Division Docket – Vol. III, pp. 1889-1890.

¹⁶ Annex "G", Letter dated 18 March 2018 and BIR Form No. 1914, *Rollo* Vol. 1, pp. 187-191; Exhibit "P-3" and "P-3-a", Division Docket – Vol. III, pp. 1628-1632.

¹⁷ See Par. 2, Antecedent Proceedings, Petition for Review, *Rollo* Vol. 1, p. 3; Par. 5, The Facts, Assailed Decision, *Rollo* Vol. 1 p. 36.

¹⁸ See Par. 3, Antecedent Proceedings, Petition for Review, *Rollo* Vol. 1, p. 4; Par. 6, The Facts, Assailed Decision, *Rollo* Vol. 1, p. 36.

¹⁹ Annex "C", Motion for Reconsideration, *Rollo* Vol. 1, pp. 79-103, with annex; Division Docket – Vol. III, pp. 2069-2093, with annex.

²⁰ Annex "B", Resolution dated 21 April 2022, *Rollo* Vol. 1, pp. 74-77, with annex; Division Docket – Vol. III, pp. 2101-2104, with annex.

²¹ *Supra* note 1.

²² Records Verification dated 19 July 2022, *Rollo* Vol. 2 p. 967.

In view thereof, the Court submitted the instant case for decision, on 16 August 2022.²³

The Issue

WHETHER FCF IS ENTITLED TO A REFUND OF THE ERRONEOUSLY PAID DOCUMENTARY STAMP TAX AMOUNTING TO PHP7,012,122.²⁴

The Arguments

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

- (1) The subject transaction falls within the period of exemption from DST payment of FCF;²⁵
- (2) 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;²⁶
- (3) In addition to CTA Case No. 9725, the CTA, in CTA Case No. 8789 entitled FCF vs. Commissioner of Customs, 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;²⁷
- (4) Respondent has no authority to interpret the provisions of *RA No. 7942*, also known as the *Philippine Mining Act*;²⁸
- (5) The Tax Exemption Certificates issued by MGB are the final written attestations on FCF's exemption from DST;²⁹
- (6) The FTAA creates a contractual obligation between the government and FCF which must be enforced and respected;³⁰ and
- (7) Ultimately, FCF is entitled to refund of Php7,012,122 representing the amount of DST which it erroneously paid to the BIR.³¹

The Ruling of the Court

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

²³ See Resolution dated 16 August 2022, *Rollo* Vol. 2, pp. 969-970.

²⁴ See Petition for Review, *Rollo* Vol. 1, p. 12.

²⁵ See Discussion, Petition for Review, *id.*

²⁶ *Id.*, p. 16.

²⁷ *Id.*, p. 18.

²⁸ *Id.*, p. 20.

²⁹ *Id.*, p. 22.

³⁰ *Id.*, p. 24.

³¹ *Id.*, p. 26.

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 fifteen (15) days from receipt of the assailed decision or resolution.

In the case at hand, the Assailed Resolution was received by the petitioner on 5 May 2022.³² Counting fifteen (15) days therefrom, the Court finds the instant Petition for Review timely filed on 20 May 2022.

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

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

Upon a judicious review of the records and the contentions of the petitioner, the Court *En Banc* upholds the Court in Divisions' denial of the Petition for Review but solely on the ground of petitioner's deemed waiver of the statutorily-granted tax exemption, as reflected in the contractual agreement among the parties to the Amendment Deed.

Petitioner is exempt from Documentary Stamp Tax until it has fully recovered its pre-operating expenses

Under the **1987 Philippine Constitution**, the exploration, development, and utilization of the country's natural resources shall be under the full control and supervision of the State.³³ In accordance thereto, **RA No. 7942 or the Philippine Mining Act**³⁴ was signed into law in 1995 for purposes of instituting a new system of exploration, development, utilization, and conservation of mineral resources.

It is, however, equally important to emphasize that the Constitution likewise authorizes the State to enter into co-production, joint venture, or production-sharing agreements with corporations, at least 60 percent of which must be owned by Filipino citizens.³⁵ Moreover, under the Constitution, the President is authorized to enter into technical and financial assistance.

³² See Notice of Resolution stamped "Received" by the petitioner's counsel, Fortun Narvasa & Salazar on 5 May 2022, Division Docket - Vol. III, p. 2100-A.

³³ Article XII, Section 2, par. 1 of the 1987 Philippine Constitution.

³⁴ *Supra* note 10.

³⁵ *Supra* note 34.

agreements for large-scale mineral activities, based on real contributions to the economy and general welfare of the country.³⁶

Accordingly, *RA No. 7942* allows qualified persons or entities with technical and financial capabilities to undertake large-scale exploration, development and utilization of mineral resources to enter into an FTAA with the government through the DENR.³⁷ It is in this regard that herein petitioner and the DENR entered into an FTAA on 19 September 2009.

The same law provides for certain measures to ensure equitable sharing of benefits between the government and the private sector in order to recognize their combined efforts in undertaking mineral resource activities. *Section 81* thereof determines the Government Share in mineral agreements other than mineral production sharing agreements, to wit:

“CHAPTER XIV GOVERNMENT SHARE

x x x

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:

- 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.

³⁶ *Id.*, at par. 4.

³⁷ Section 33, R.A. No. 7942.

(Emphasis and underscoring supplied.)

Pursuant to the foregoing, DENR issued *Administrative Order (DAO) No. 2007-12*,³⁸ which provides for the guidelines on the fiscal regime of FTAAAs. *Section 4* thereof discusses the coverage of 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;
- (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 ✓

³⁸ Revised Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements (FTAA), 20 June 2007.

- (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 same enumeration on the Government Share composition was reproduced in *Clause 9.2 of the FTAA*, dated 19 September 2009.³⁹

It is notably clear from the foregoing that the collection of the Government Share in FTAA's pertaining to **items (a) to (g)** in the enumeration above shall only commence **after the FTAA contractor has fully recovered its pre-operating expenses, exploration, and development costs**. Thus, the contractor is only liable to pay DST, listed as item (f), after the recovery period.

However, in the Assailed Decision, the Court in Division interpreted the foregoing as to mean that *RA No. 7942* does not contemplate exemption from DST, but rather a **mere deferment** of the payment of taxes after the recovery period. This was further anchored on the reading of the above-cited provisions together with *Section 97 of RA No. 7942* and the ruling of the Supreme Court in the *La Bugal-B'Laan Tribal Association, Inc., et al. vs. Victor O. Ramos, Secretary, Department of Environment and Natural Resources (La Bugal case)*.⁴⁰

Section 97 of RA No. 7942 provides; ✓

³⁹ Annex “G”, Financial or Technical Assistance Agreement (“FTTA”), *Rollo* Vol. 1, p. 317; Exhibit “P-6-a”, Division Docket – Vol. III, p. 1759.

⁴⁰ G.R. No. 127882, 1 December 2004.

**“Section 97
Non-Payment of Taxes and Fees**

Failure to pay the taxes and fees due the Government for two (2) consecutive years shall cause the cancellation of the exploration permit, mineral agreement, financial or technical assistance agreement and other agreements and the re-opening of the area subject thereof to new applicants.”
(Emphasis supplied.)

Meanwhile, the Court in Division referred to the following pronouncements in the *La Bugal case*:

[I]n 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 years counted from the commencement of commercial production.

X X X

The third or last paragraph of Section 81 of RA 7942 is slammed for **deferring the payment of the government share in FTAA's until after the contractor shall have recovered its pre-operating expenses, exploration and development expenditures**. Allegedly, the collection of the State's share is rendered uncertain, as there is no time limit in RA 7942 for this grace period or recovery period. But although RA 7942 did not limit the grace period, the concerned agencies (DENR and MGB) in formulating the 1995 and 1996 Implementing Rules and Regulations provided that the **period of recovery, reckoned from the date of commercial operation, shall be for a period not exceeding five years, or until the date of actual recovery, whichever comes earlier.”**
(Emphasis supplied.)

On the basis of the preceding discussions, the Court in Division held:

“Thus, unlike in the case of taxpayers who are required to pay DST within ten (10) days after the close of the month when taxable document was made, signed, issued, accepted, or transferred, the collection thereof from an FTAA contractor is merely deferred, or until it *“has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive,”* pursuant to the last paragraph of Section 81 of RA No. 7942.

What is clear, therefore, is that under RA No. 7942, there is no exemption from, inter alia, the DST, but merely a deferment on the collection thereof.”⁴¹

The Court *En Banc* disagrees. 

⁴¹ Assailed Decision, *supra* note 4, at p. 44.

The rule on statutory construction demands that statutes must be construed as to harmonize and put effect to all its provisions whenever possible. The law must not be read in truncated parts, but the totality and every part thereof must be considered in fixing the meaning of any of its clauses and phrases in order to produce a harmonious whole. Thus, **every part of the statute must be considered together and kept subservient to the general intent or the whole enactment.**⁴²

Here, **Section 97 of RA No. 7942** provides that the permit of an FTAA contractor may be cancelled if there is failure to pay taxes and fees due to the government for two (2) consecutive years. “[D]ue to the government” means that these tax payments should only cover those tax types that are mandated under the law to be paid by the contractor on a particular period in relation to the stages of the FTAA.

Note that **Section 81** unequivocally enumerates the specific tax types which must be paid by the contractor from the date of approval of the Declaration of Mining Project Feasibility (DMPF) up to the end of the recovery period, or after recovery period. Placing a penalty provision in **Section 97** for failure to pay taxes does not negate the exemption granted under the law. It merely recognizes that specific taxes are due in certain stages of the FTAA, and that eventually, after the recovery period, exemptions shall be lifted.

In addition, the intent of **Section 81 of RA 7942** was interpreted by the DENR in **DAO 2007-12** upon declaring in the administrative order that the same aims (1) to 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 mineral resources development; and (2) to **ensure a fair, equitable, competitive, and stable investment regime** for the large scale exploration, development and commercial utilization of minerals in accordance with the provisions of the **RA No. 7942** and its implementing rules and regulations.

In order to achieve this, the Supreme Court in the **La Bugal Case** emphasized that fiscal and non-fiscal incentives are granted to FTAA contractors to help support the latter’s cash flow during the recovery period, the most critical phase, and that it is only after such period when normal taxes and fees must be paid to the government, 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**”

⁴² Chevron Holdings, Inc. (Formerly Caltex Asia Limited) vs. Commissioner of Internal Revenue, G.R. No. 215159, 5 July 2022, citing Mactan-Cebu International Airport Authority vs. Urgello, G.R. No. 162288, 4 April 2007.

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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.

(Emphasis supplied.)

On what these fiscal incentives are, the Supreme Court elucidated as follows:

“These incentives consist principally of the waiver of national taxes during the cost recovery period of the FTAA. During such period, the contractor pays only part of the basic government's share in taxes consisting of local government taxes and fees. These are the local business tax, real property tax, community tax, occupation fees, regulatory fees, all other local taxes and fees in force, and royalty payments to indigenous cultural communities, if any. x x x”

(Emphasis and underscoring supplied.)

Accordingly, while the law and corresponding implementing rules do not explicitly state the phrase “tax exemption”, the granting of the same is clearly intended therein.

On another note, the Court *En Banc* recognizes the seeming undue administrative burden on the part of the contractor should the ruling of the Court in Division as regards “deferral of tax payment” be upheld.

To recall, the Court in Division ruled that any tax, including DST, shall accrue from the execution of the FTAA, but shall be paid only after the recovery period. This appears to suggest that at the end of such period, FCF should compute all back taxes, and file the corresponding tax returns covering those enumerated in the Government Share, specifically items (a) to (g) thereof, from the date of approval of the DMPF on 18 October 2011 until the end of the recovery period, which at the latest should end on 17 July 2022.

Aside from being administratively burdensome, a huge cash outflow on the part of the contractor would be expected. The Court *En Banc* believes that this resulting scenario is incongruous with the intent of the law to provide equitable sharing of benefits, and ensure fair, equitable, competitive, and stable investment regime. ✓

The subject transaction falls within the period of FCF's exemption from DST payment

In the Assailed Decision, the Court in Division stated that even assuming that *RA No. 7942* indeed grants exemption to FCF as FTAA contractor, the subject transaction occurred outside the period of entitlement to such exemption, thus:

“But even granting that this Court would accede to the notion that petitioner is exempt from the payment of DST during the subject recovery period, it is noteworthy that petitioner's Date of Commencement of Commercial Production was only on July 17, 2017, pursuant to the aforequoted paragraph 2.1 (m) of the FTAA No. 04-2009-II dated September 19, 2009. Thus, if at all, the supposed DST exemption should only commence from July 17, 2017, and not on any earlier date.

To recall, the date of the subject taxable document, i.e., the Amendment Deed entered into by petitioner, among other parties, is December 15, 2016. Such being the case, the contemplated recovery period has not yet begun. In other words, as of December 15, 2016, petitioner is not yet entitled to a DST exemption during the said period.”⁴³

It appears from the foregoing that the Court in Division limited petitioner's entitlement to exemption during the recovery period and even further discussed that the same should only start from the Date of Commencement of Commercial Production.

The Court *En Banc* dissents.

Section 81 of RA No. 7942, Section 4(b) of DAO 2007-12 and Clause 9.2 of the FTAA categorically mandate that it is only **after the recovery** period when DST must be paid by FCF. **The Date of Commencement of Commercial Production becomes relevant only for the purpose of determining when the recovery period shall end.** The same date, however, does not determine the start of petitioner's entitlement to the tax exemptions. FCF was already entitled to DST exemption from the date of approval of the DMPF on 18 October 2011,⁴⁴ and the same would be lifted at the end of the recovery period.

Section 7 of DAO No. 2007-12, as adopted in **Clause 9.7 of the FTAA**, dated 19 September 2009,⁴⁵ defines “recovery period” as follows, taking into consideration the high risk, high cost, and long term nature of an FTAA Mining Operation: ✓

⁴³ Assailed Decision, *supra* note 4, at p. 54.

⁴⁴ *Supra* note 11.

⁴⁵ Annex “G”, Financial or Technical Assistance Agreement (“FTTA”), *Rollo* Vol. 1, p. 321; Exhibit “P-6-b”, Division Docket – Vol. III, p. 1763.

“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 and underscoring supplied.)

Meanwhile, the Date of Commencement of Commercial Production is defined in *Clause 2.1 (m) of the FTAA*, dated September 19, 2009,⁴⁶ to wit:

**“Section II
Definition and Interpretation**

2.1 Definition. As used in this Agreement, the following words and terms shall have the following respective meanings:

x x x

m. "Date of Commencement of Commercial Production" or "Commencement of Commercial Production" refers to the **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.**”
(Emphasis and underscoring supplied.)

Accordingly, the recovery period is reckoned from the date of the commencement of commercial production, which is the date of written declaration by the FTAA contractor to start commercial operations, after the conduct of the test run **and** its approval by the regional office concerned. Here, petitioner declared its Commencement of Commercial Operations on 9 September 2016,⁴⁷ and the same was approved on 17 July 2017.⁴⁸ Thus, the official date of commencement of commercial production is on such later date.

Meanwhile, the recovery period shall only last for a maximum period of five (5) years or until the aggregate of the net cash flows from the mining operations is equal to the aggregate of its pre-operating expenses, whichever comes first. FCF's recovery period, in particular, would run from 17 July 2017 up to 17 July 2022, at the maximum. ✓

⁴⁶ Annex “G”, Financial or Technical Assistance Agreement (“FTTA”), *Rollo* Vol. 1, p. 301; Exhibit “P-6-c”, Division Docket – Vol. III, p. 1743.

⁴⁷ *Supra* note 14.

⁴⁸ *Supra* note 15.

To recall, the DMPF was approved on 18 October 2011.⁴⁹ Moreover, the Amendment Deed subjected to DST in the instant case was executed on 15 December 2016,⁵⁰ which falls even before the recovery period commenced. Thus, the subject transaction is well within the exemption period granted to petitioner under the law.

The Secretary of the DENR has the primary authority to interpret the provisions of RA No. 7942 and to promulgate rules and regulations pursuant thereto;

In the BIR's letter denial, dated 29 July 2019,⁵¹ of petitioner's administrative claim for refund, the BIR anchored its position on *Revenue Memorandum Circular No. 17-2013*,⁵² which explains that nowhere in *RA No. 7942* is there an express grant of tax exemptions to FTAA contractors. The BIR further posits that such exemption is likewise not provided in *DAO No. 2007-12* or in the FTAA between FCF and the government.

Petitioner, however, raised in its Petition for Review that the CIR has no authority to interpret the provisions of *RA No. 7942* based on *Section 8* thereof which provides:

**“SECTION 8.
Authority of the Department**

The Department shall be the primary government agency responsible for the conservation, management, development, and proper use of the State's mineral resources including those in reservations, watershed areas, and lands of the public domain. The **Secretary shall have the authority to enter into mineral agreements on behalf of the Government upon the recommendation of the Director, promulgate such rules and regulations as may be necessary to implement the intent and provisions of this Act.**”

(Emphasis supplied.)

The CTA *En Banc* agrees with petitioner.

Section 8 above clearly states that the DENR Secretary is the one who has the authority to promulgate rules and regulations to implement the intent and provisions of *RA No. 7942*. Such authority necessarily includes *Section 81* of the said law concerning petitioner's tax exemption. ✓

⁴⁹ *Supra* note 11.

⁵⁰ *Supra* note 12.

⁵¹ Annex “G”, Letter dated 29 July 2019 *Rollo* Vol. 1, p. 484; Exhibit “P-16”, Division Docket – Vol. III, p. 1926.

⁵² Clarifying the Taxes Due from Financial or Technical Assistance Agreement (FTAA) Contractors During “Recovery Periods”, 15 February 2013.

This is consistent with the ruling in *FCF Minerals Corporation vs. Commissioner of Customs*,⁵³ involving the same petitioner herein, where the Court likewise recognized the authority of the DENR Secretary to interpret the provisions of *RA No. 7942* according to the intent of the law.

Moreover, in the early case of *Acoje Mining Co., Inc. vs. Commissioner of Internal Revenue (Acoje Case)*,⁵⁴ the CTA held that:

“It is to be noted that under the provisions of Section 79-A, *supra*, it is the Secretary of Agriculture and Natural Resources, upon the recommendation of the Director of Mines, who is empowered to clarify as to what is a "new mine" or an "old mine which resumes operation" that is entitled to the tax exemption provided for therein. The meaning given by the said Secretary to the said phrases, as implemented by Mines Administrative Order No. V-31, is that *they refer to the mineral lands*. This reference conforms to the dictionary and jurisprudential definition of the word "mine." **Since the practice and interpretative regulations by officers, administrative agencies, departmental heads and other officials charged with the duty of administering and enforcing a statute will carry great weight in determining the operation of a statute** (Lim Hoa Ting v. Central Bank of the Philippines, 104 Phil. 573; 2 Sutherland, Statutory Construction 516), **the definition placed by the Secretary of Agriculture and Natural Resources, the official charged with the administration and enforcement of the Mining Act, cannot be ignored and disregarded by respondent.**”

X X X

It seems too clear for serious argument that respondent, even as head of the **Bureau of Internal Revenue**, **does not exercise any administrative supervision over the Secretary of Agriculture and Natural Resources** and, therefore, **said respondent is without authority to pass upon, amend, change, or revise the rules and regulations lawfully and validly promulgated by the said Secretary.** The power of interpretation affecting the validity of Mines Administrative Order No. V-31 is vested exclusively in our courts in view of the principle of separation of powers.”

(Emphasis and underscoring supplied.)

Thus, since the DENR Secretary has the authority to interpret *RA No. 7942*, then the rules and regulations issued pursuant thereto cannot be ignored and disregarded. Respondent should have primarily applied *DAO No. 2007-12*, specifically the meaning of “Government Share” therein, in relation to the unequivocal exemption granted to petitioner in its claim for refund. ✓

⁵³ Decision, CTA Case No. 8789, 21 June 2016; Amended Decision, CTA Case No. 8789, 15 March 2021.

⁵⁴ CTA Case No. 1835, 30 March 1970.

The Tax Exemption Certificates issued by Mines and Geosciences Bureau are the final written attestations on FCF's exemption from DST

In relation to the preceding discussions, the Court *En Banc* also holds that due regard should have been accorded by respondent to the Tax Exemption Certificates issued by MGB.

MGB is a line bureau under the DENR primarily responsible for the implementation of **RA NO. 7942**.⁵⁵ **Section 9 thereof** authorizes the Director of MGB to administer the implementation of the law, as well as to monitor the compliance of the FTAA contractors to the terms and conditions of the agreement, to wit:

**“Section 9
Authority of the Bureau**

The Bureau shall have direct charge in the administration and disposition of mineral lands and mineral resources and shall undertake geological, mining, metallurgical, chemical, and other researches as well as geological and mineral exploration surveys. The Director shall recommend to the Secretary the granting of mineral agreements to duly qualified persons and shall monitor the compliance by the contractor of the terms and conditions of the mineral agreements. The Bureau may confiscate surety, performance and guaranty bonds posted through an order to be promulgated by the Director. The Director may deputize, when necessary, any member or unit of the Philippine National Police, barangay, duly registered non-governmental organization (NGO) or any qualified person to police all mining activities.”

In line with its power to implement the law, MGB issued Certifications on FCF's Tax Exemption, which state:

“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:

- a. Contractor's income tax;
- b. Customs duties and fees on imported capital equipment;
- 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 stamp taxes; and**
- g. Capital gains tax.

⁵⁵ DAO No. 96-40, Revised Implementing Rules and Regulations of Republic Act No. 7942, Otherwise Known as the “Philippine Mining Act of 1995”, 20 December 1996.

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).”⁵⁶
(Emphasis and underscoring supplied.)

Based on the foregoing, MGB takes the unqualified position that FCF is entitled to DST exemption from the DMPF up to the end of the recovery period. This should serve as the final written attestation or declaration that petitioner is entitled to the tax exemption, consistent with the ruling in the *Acoje case*, where the CTA held that:

“To say, therefore, that the tax exemption certificate issued by the Secretary of Agriculture and Natural Resources to petitioner is without legal force and effect is to incur in self-contradiction. Section 79-A of the Mining Act, in providing for the grant of a five-year complete tax exemption, except income tax, to new mines and old mines which resume operation, indicated the procedure for the implementation and enforcement of the provisions thereof, including the officials empowered to adjudicate and process claims for tax-exemption. Consequently, the **tax exemption certificate issued by the Secretary of Agriculture and Natural Resources is the final written attestation or declaration that petitioner is entitled to the tax exemption, after its claim had been duly and properly processed, studied, and adjudicated by his office in accordance with the powers and duties conferred upon him by the provisions of Section 79-A of the Mining Act.**”
(Emphasis supplied.)

Thus, respondent’s disregard for the foregoing certifications and his reliance on *RMC No. 17-2013*, which serves as the BIR’s own interpretation of *RA No. 7942*, is deemed improper.

While FCF is exempt from DST at the time of the execution of the Amendment Deed, it waived its entitlement to such exemption

Notwithstanding petitioner’s exemption from DST when the Amendment Deed was executed on 15 December 2016, FCF is not entitled to the refund claimed under the instant case.

Section 173 of the 1997 National Internal Revenue Code (“Tax Code”), as amended, prescribes the imposition of DST on loan agreements, to wit; ✓

⁵⁶ Annex “G”, Certification dated 15 June 2012, *Rollo* Vol. 1, p. 465; Exhibit “P-15-L”, Division Docket – Vol. III, p. 1907.

“Section 173. Stamp Taxes Upon Documents, Loan Agreements, Instruments and Papers. — Upon documents, instruments, loan agreements and papers, and upon acceptances, assignments, sales and transfers of the obligation, right or property incident thereto, there shall be levied, collected and paid for, and in respect of the transaction so had or accomplished, the corresponding documentary stamp taxes prescribed in the following Sections of this Title, **by the person making, signing, issuing, accepting, or transferring the same** wherever the document is made, signed, issued, accepted or transferred when the obligation or right arises from Philippine sources or the property is situated in the Philippines, and the same time such act is done or transaction had: Provided, That **whenever one party to the taxable document enjoys exemption from the tax herein imposed, the other party who is not exempt shall be the one directly liable for the tax.**”
(Emphasis supplied.)

Thus, as a general rule, the DST on loan transactions shall be paid by any of the parties thereto. However, when one party enjoys exemption from tax, the other party who is not exempt shall be the one liable to pay the DST. The same mandate was emphasized by the Supreme Court in the case of *Domato-Togonon v. Commission on Audit*:⁵⁷

“[T]his Court explained who is liable to pay for the documentary stamp tax:

The persons primarily liable for the payment of the DST are the person[s] (1) making; (2) signing; (3) issuing; (4) accepting; or (5) transferring the taxable documents, instruments or papers. **Should these parties be exempted from paying tax, the other party who is not exempt would then be liable.**

xxx xxx xxx

Revenue Regulations No. 9-2000 interprets the law more widely so that all parties to a transaction are primarily liable for the DST, and not only the person making, signing, issuing, accepting or transferring the same becomes liable as the law provides. It provides:

SEC. 2. Nature of the Documentary Stamp Tax and Persons Liable for the Tax. —

(a) In General. — The documentary stamp taxes under Title VII of the Code is a tax on certain transactions. It is imposed against “the person making, signing, issuing, accepting, or transferring” the document or facility evidencing the aforesaid transactions. Thus, in general, it may be imposed on the transaction itself or upon the document underlying such act. Any of the parties thereto shall be liable for the full amount of the tax due: Provided, however, that as **between themselves, the said parties may agree on who shall be liable or how they may share on the cost of the tax.**

⁵⁷ G.R. No. 224516, 6 July 2021.

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(b) Exception. — Whenever one of the parties to the taxable transaction is exempt from the tax imposed under Title VII of the Code, **the other party thereto who is not exempt shall be the one directly liable for the tax.**

As a rule, the liability to pay documentary stamp taxes falls on any of the parties. The parties may, however, agree on who shall shoulder the amount due. Nonetheless, **when one of them enjoys exemption from paying documentary stamp taxes, the liability falls on the other party who is not tax-exempt.**”

(Emphasis and underscoring supplied; citations omitted.)

In this case, since petitioner enjoys DST exemption, the liability thereof would fall upon the other non-exempt parties to the Amendment Deed, in the absence of a clear stipulation to the contrary in such agreement.

Such a stipulation to the contrary, however, is present in *Clause 13 of the Amendment Deed*.⁵⁸

“The **Borrower must pay any DST payable in respect of the Omnibus Agreement** promptly upon execution of the Deed but in any event on or before the date falling on the fifth day of the month following the month during which this Deed was signed in accordance with applicable laws and regulations in the Philippines.”

(Emphasis supplied.)

The parties to the Amendment Deed explicitly agreed that the “Borrower” shall pay the DST on the transaction. The term “Borrower” refers solely to the petitioner, as stated in the declaration of the parties.⁵⁹ Evidently, petitioner waived the exception it enjoyed by virtue of this provision.

The DST paid by petitioner thus cannot be deemed made erroneously. The instant claim for refund must fail, and the denial of the Petition for Review is in order.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the Decision dated 18 October 2021 and the Resolution dated 21 April 2022 of the Court’s First Division are hereby **AFFIRMED**.

SO ORDERED.


MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

⁵⁸ Annex “G”, Amendment Deed, *Rollo* Vol. 1, p. 160; Exhibit “P-2”, Division Docket Vol. III, p. 1601.

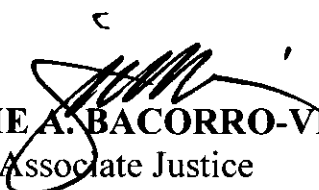
⁵⁹ See Parties, par. 1, Annex “G”, Amendment Deed, *Rollo* Vol. 1, p. 150; Exhibit “P-2”, Division Docket, Vol. III, p. 1591.

WE CONCUR:


ROMAN G. DEL ROSARIO
Presiding Justice


ON LEAVE
MA. BELEN M. RINGPIS-LIBAN
Associate Justice


CATHERINE T. MANAHAN
Associate Justice


JEAN MARIE A. BACORRO-VILLENA
Associate Justice

ON LEAVE
MARIAN IVY F. REYES-FAJARDO
Associate Justice


LANEE S. CUI-DAVID
Associate Justice


CORAZON G. FERRER-FLORES
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