REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

OCEANAGOLD (PHILIPPINES), INC., *Petitioner,*	**CTA *EB* NO. 2663** (CTA Case Nos. 10021 & 10061)
	Present:
-versus-	**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: OCT 18 2023 3:31 p.m.

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D E C I S I O N

MANAHAN, *J.*:

Before the Court *En Banc* is a *Petition for Review* filed by Oceanagold (Philippines), Inc. praying for the setting aside of the Decision and Resolution, dated November 10, 2021 and July 11, 2022, respectively, in CTA Case Nos. 10021 and 10061, which denied Oceanagold's claim for refund/issuance of a tax credit certificate (TCC) in the amount of Php51,455,940.29 and Php104,069,819.57, allegedly representing excise taxes illegally assessed and collected by respondent Commissioner of Internal Revenue (CIR) for the 1st and 2nd quarters of taxable year (TY) 2017, respectively.

FACTS

The CTA 2nd Division narrated the facts, as follows:

Petitioner is a corporation existing by virtue of the laws of the Republic of the Philippines with principal office address at 2nd Floor, Carlos J. Valdes Building, 108 Aguirre St., Legaspi Village, 1229 Makati City.

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), the government agency tasked with the enforcement of tax laws and the assessment and collection of internal revenue taxes.

Petitioner is a mining service contractor of the Republic of the Philippines pursuant to a Financial or Technical Assistance Agreement (FTAA). Under the FTAA, petitioner is given a period of five (5) years from the commencement of its operations to recover its pre-operating expenses, part of which are excise taxes on minerals.

In conducting its exploration activities under the FTAA, petitioner was able to identify a portion of the Exploration Contract Area suitable for the Didipio Gold-Copper Project (Didipio Project). As a result thereof, it filed a Partial Declaration of Mining Feasibility (PDMF) with the Department of Environment and National Resources (DENR). The PDMF was finally approved by the DENR on 11 October 2005.

Seeking to confirm its exemption from payment of excise taxes, petitioner requested respondent to issue a ruling on the matter. On 04 May 2007, respondent issued BIR Ruling No. 10-2007, confirming petitioner's tax exemption within the recovery period beginning from the PDMF's approval.

Subsequently or on 14 January 2013, petitioner was able to obtain an Ore Transport Permit (OTP) from the Mines and Geosciences Bureau (MGB), authorizing the sale and delivery of 5,500 metric tons (MT) of copper concentrates from the Didipio Mine to Poro Point, La Union. However, on 07 December 2012, despite the affirmation of its tax exemption and its procurement of an OTP, the BIR detained about 800,000 MT of mineral ores it stockpiled for processing. In February 2013, the BIR seized another 100 MT of copper concentrates.

On 15 February 2013, respondent issued Revenue Memorandum Circular (RMC) No. 17-2013, denying petitioner's exemption from payment of excise taxes and thereby, revoking BIR Ruling 10-2007.

> On 20 February 2013, the BIR detained another delivery of 160 MT of copper concentrates on the premise that petitioner failed to pay the excise taxes on all of its previously seized ores and copper concentrates.
>
> To secure the release of its ores and copper concentrates and fulfill its scheduled deliveries, petitioner paid under protest the excise taxes in the amount of P13,942,179.39 and P417,743.20 on 25th and 26th of February 2013, respectively, over the 5,500 MT of ores covered by an OTP. Notwithstanding its payment, the BIR again seized 40 MT of copper concentrates covered by an OTP and petitioner's proof of the excise tax payments made on 01 March 2013.
>
> Distressed by the BIR's unrelenting seizures against it, petitioner continued to reluctantly pay excise taxes to ensure its unhampered operations.
>
> On 04 February 2019, petitioner filed an administrative claim for refund or tax credit with the Excise LT Audit Division I of the BIR. It sought a refund or credit of excise taxes in the aggregate amount of P455,409,873.97 covering TY 2017 and the first quarter of TY 2018. However, respondent did not act on its claim.[1]

On February 6, 2019, Oceanagold filed a Petition for Review, docketed as CTA Case No. 10021, seeking the refund/issuance of a TCC in the amount of Php51,455,940.29, covering the alleged excise taxes paid under protest for the 1st quarter of TY 2017.

On April 8, 2019, Oceanagold filed a Petition for Review, docketed as CTA Case No. 10061, seeking the refund/issuance of a TCC in the amount of Php104,069,819.57, covering the alleged excise taxes paid under protest for the 2nd quarter of TY 2017.

The petitions were consolidated pursuant to the Resolution dated July 10, 2019.

Thus, Oceanagold is claiming the aggregate amount of Php155,525,759.86, allegedly representing excise taxes illegally assessed and collected by the respondent.

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[1] EB Docket, Decision dated November 10, 2021, pp. 67-69.

After trial, the CTA 2nd Division rendered the assailed Decision:

> **WHEREFORE**, the foregoing considered, the Petition for Review filed by petitioner Oceanagold (Philippines), Inc. in CTA Case Nos. 10021 and 10061 are hereby **DENIED** for lack of merit.
>
> **SO ORDERED**.[2]

Oceanagold's *Motion for Reconsideration (of the Decision dated November 10, 2021)* was denied in the assailed Resolution dated July 11, 2022.

On August 12, 2022, Oceanagold filed the subject *Petition for Review*[3] praying for refund/issuance of TCC in the amount of Php155,525,759.86, representing excise taxes erroneously paid by petitioner and illegally and wrongfully collected by respondent, for the period January to June 2017.

Respondent CIR filed a *Comment/Opposition*,[4] through registered mail on September 22, 2022, which was received by the Court on October 4, 2022.

The instant case was submitted for decision on October 19, 2022.[5]

ISSUES

I. Whether or not petitioner's payments of excise taxes during the first to second quarters of TY 2017 were erroneous or illegal.

II. Whether or not petitioner's only recourse for excise taxes it paid during the first to second quarters of TY 2017, which were not recovered during the recovery period, is to deduct the same from the government's share.

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[2] EB Docket, Vol. 1, Decision dated November 10, 2021, p. 85.
[3] EB Docket, Vol. 1, pp. 38-63.
[4] EB Docket, Vol. 2, pp. 555-564.
[5] EB Docket, Vol. 2, pp. 567-568.

Oceanagold's arguments

Petitioner states that under Sections IX and X of the Financial or Technical Assistance Agreement (FTAA), it is required to develop and construct mining production facilities within three (3) years from approval of its Partial Declaration of Mining Feasibility (PDMF) on October 11, 2005. Petitioner is then required to submit within thirty (30) days from completion of construction facilities a work program for the period of three years. Petitioner also states that under Section X of the FTAA, failure of the FTAA contractor to commence commercial production within the period specified under the work program shall be considered a substantial breach of the FTAA.

Nevertheless, petitioner argues that the non-critical delay in the implementation of the timetable should not deprive the petitioner of its exemption under the law; that there can be no recovery without commencing "actual" commercial production; and, that the FTAA itself allows deviation from its own timeline.

Petitioner also states that the remedy provided under Section 204(C) of the 1997 National Internal Revenue Code (NIRC), as amended, to claim a refund/TCC of taxes erroneously or illegally paid or collected within two years after the payment of such tax remains available to petitioner even if the FTAA did not include such provision.

CIR's counter-arguments

The CIR states that the Philippine Mining Act does not grant petitioner exemption from the payment of excise taxes. Even assuming it does, the CIR states that the Court in Division correctly ruled that Oceanagold was not able to prove its entitlement to the refund being claimed.

RULING OF THE COURT

The Court *En Banc* finds the Petition for Review bereft of merit.

The Petition for Review was timely filed.

Pursuant to the Revised Rules of the Court of Tax Appeals (RRCTA), Rule 8, Section 3(b),[6] Oceanagold had fifteen (15) days from receipt of the assailed Resolution within which to file a Petition for Review before the CTA *En Banc*.

Petitioner received the assailed Resolution, dated July 11, 2022, on July 15, 2022. Counting fifteen (15) days therefrom, petitioner had until July 30, 2022 within which to file a Petition for Review.

On July 26, 2022, petitioner filed its *Motion for Extension of Time to File Petition for Review*,[7] praying for an additional fifteen (15) days, or until August 14, 2022 within which to file a Petition for Review. The extension was granted in the Minute Resolution dated July 28, 2022.[8]

On August 12, 2022, the present Petition for Review was timely filed.

Petitioner has not proven its entitlement to the refund.

Petitioner raised issues such as whether its payment of excise taxes during the 1st and 2nd quarters of TY 2017 are erroneous or illegal; and, whether petitioner's only recourse for said excise taxes paid, which were not recovered during the recovery period, is to deduct the same from the government's share.

These issues boil down to whether petitioner is entitled to a refund of the excise taxes it paid during the 1st and 2nd quarters of TY 2017.

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[6] Rule 8 Procedure in Civil Cases
Sec. 3. *Who may appeal; period to file petition.*
xxx xxx xxx
(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

[7] EB Docket, Vol. 1, pp. 1-4.

[8] EB Docket, Vol. 1, p. 37.

In *Oceanagold (Philippines), Inc. v. Commissioner of Internal Revenue*, CTA EB No. 2492,[9] the CTA *En Banc* extensively discussed that petitioner is exempt from the payment of excise tax during the Recovery Period. However, to be entitled to the refund, petitioner must show that the amount collected is detrimental to petitioner's recovery of pre-operating and property expenses, otherwise, petitioner's recourse is to deduct the unrecovered amount from the government's share.

The ruling is quoted below:

> It must be noted that the basis for the tax exemption granted to petitioner is the FTAA it executed with the Republic of the Philippines on June 20, 1994, or prior to the effectivity of RA No. 7942.
>
> Under Executive Order (EO) No. 279 issued on July 25, 1987 during which time the President exercised legislative powers, the Secretary of Environment and Natural Resources was authorized to negotiate with foreign investors who wish to enter into FTAAs with the Government.
>
> It is within the purview of EO No. 279 that the present FTAA was signed on June 20, 1994 by Executive Secretary Teofisto Guingona, Jr. and Bryce G. Roxburgh, President of Arimco Mining Corporation, with the recommendation of Angel C. Alcala, Secretary of Environment and Natural Resources. This FTAA with Arimco Mining Corporation was eventually assigned to petitioner with the approval of the Government.
>
> The FTAA, as a duly perfected contract between petitioner and the Republic of the Philippines, is the law between the parties, and the stipulations, conditions, and obligations arising therefrom have the force of law between the contracting parties and should be complied with in good faith.
>
> Section 11.2 of the FTAA reads:
>
> "11.2 Recovery of Pre[-]operating Expenses, Property Expenses and Taxes Paid During the Recovery Period. The CONTRACTOR shall have a period of up to five (5) Contract Years, counted from the Date of Commencement of Commercial Production within which to recover its: (a) Pre[-]operating Expenses; and (b) Property expenses incurred during the period in which Pre[-]operating Expenses are recovered, **after which period only shall the right of the GOVERNMENT to share in the**

[9] Decision dated May 31, 2022.

> **Net Revenue**, as hereinafter defined, **accrue**." [*Boldfacing supplied*]

The Government's share in the Net Revenue includes the collection of excise tax as provided for under Section 11.5 of the FTAA, which states:

> "11.5 The GOVERNMENT's Share. Provided that the Pre[-]operating Expenses of the CONTRACTOR and any of its Affiliates on the Contract Area, as defined in Section 2.42 in relation to Section 2.3 of this Agreement and as passed on audit by an independent and certified public accountant shall have been recovered by the CONTRACTOR pursuant to Section 11.2 of this Agreement, the GOVERNMENT's share of Net Revenue, as defined in the preceding section, shall be 60% while the CONTRACTOR's share shall be 40% of the same.
>
> **The GOVERNMENT shall receive 60% of Net Revenue less the following** costs, **taxes**, duties, fees and other expenses by the CONTRACTOR or otherwise **accrued by the CONTRACTOR in its books as an expense for any given Contract Year**, provided that payments made in any Contract Year of an expense accrued the previous Contract year and already charged to the GOVERNMENT for the previous CONTRACT YEAR shall no longer be chargeable:
>
> (a) **Excise tax, including excise tax paid during the recovery of Pre[-]operating Expenses** as provided for in par. 1 of Section 11.2 of this Agreement but which was not actually recovered by the CONTRACTOR from the GOVERNMENT during the said period, for any amount paid by the CONTRACTOR which was not subject to deletion by the Board of Investments' incentives or other incentives laws, unless legislation is required to allow the deduction of the excise tax, in which case the deduction shall be made only after the appropriate legislation has been passed[.]" (*Boldfacing supplied*)

Thus, it is clear from the foregoing provisions that during the so-called "Recovery Period" – or the five (5) Contract Years beginning from the Date of Commencement of Commercial Production – the Government cannot collect from petitioner, as the FTAA Contractor, the Government's Share in the Net Revenue, which includes excise tax, because the

Government's right to share shall **only accrue** after the Recovery Period.

The term "accrue" in legal parlance means "to come into existence as an enforceable claim." Per the terms of the FTAA, it is unambiguous that the Government's Share, including excise tax, shall only become an "enforceable claim" after the Recovery Period. To construe that excise tax is collectible during the Recovery Period is a contravention of the terms of the FTAA.

Even if the FTAA does not make use of the phrase "tax exemption" during the Recovery period, the construction of the words of Section 11.2, in relation to Section 11.5 of the FTAA, leads to no other conclusion than that the Government has no right to have a share in the taxpayer's Net Revenue and thus, precluded from collecting excise taxes from petitioner during the Recovery Period.

Verily, it was the intention of the parties when they entered into the FTAA to exempt petitioner from the payment not just of excise tax but all other applicable taxes and duties during the Recovery Period. As provided for in Section 11.1 thereof:

> "Section 11.1 General Principles. – x x x
>
> Furthermore, the Department of Environment and Natural Resources, exerting its best efforts, shall assist the CONTRACTOR in negotiations with the Board of Investments and all other relevant agencies and instrumentalities of the GOVERNMENT for corporate tax and **other tax and duty holiday or other incentives, including the appropriate legislation, consistent with this Agreement, particularly during the five-year period for recovery of Pre[-]operating Expenses** as provided for in Section 11.2 hereof. x x x" (*Boldfacing supplied*)

The contractual tax exemption granted to petitioner under the FTAA is protected by no less than Section 10, Articles III of the Constitution, which prohibits the State from passing any law that impairs the obligations of contracts. As held by the Supreme Court in *Manila Electric Company vs. Province of Laguna and Benito R. Balazo*:

> "x x x **Contractual tax exemptions, in the real sense of the term and where the non-impairment clause of the Constitution can rightly be invoked, are those agreed to by the taxing authority in contracts**, such as those contained in government bonds or debentures, lawfully entered into by them under enabling laws in which the government, acting in its private

> capacity, sheds its cloak of authority and waives its governmental immunity. Truly, **tax exemptions of this kind may not be revoked without impairing the obligations of contracts.** x x x" (*Boldfacing supplied*)

Thus, even with the enactment of RA No. 7942 after the execution of the FTAA, the former law cannot impair the contractual tax exemption already granted under the latter agreement.

In fact, the Supreme Court has ruled in *Lepanto Consolidated Mining Co. vs. WMC Resources Int'l. Pty. Ltd., WMC Philippines, Inc. and Sagittarius Mines, Inc.*, that the provisions of RA No. 7942 do not retroactively apply to FTAAs executed prior to the effectivity of the said law, thus:

> "The pivotal issue to be resolved herein involves the propriety of the application to the Columbio FTAA of Republic Act No. 7942 or the Philippine Mining Act of 1995, particularly Section 40 thereof requiring the approval of the President of the assignment or transfer of financial or technical assistance agreements. Petitioner maintains that respondents failed to comprehend the express language of Section 40 of the Philippine Mining Act of 1995 requiring the approval of the President on the transfer or assignment of a financial or technical assistance agreement.
>
> To resolve this matter, it is imperative at this point to stress the fact that the **Columbio FTAA was entered into by the Philippine Government and WMC Philippines on 22 March 1995, undoubtedly before the Philippine Mining Act of 1995 took effect on 14 April 1995**. Furthermore, it is undisputed that said FTAA was granted in accordance with Executive Order No. 279 and Department Administrative Order No. 63, Series of 1991, which does not contain any similar condition on the transfer or assignment of financial or technical assistance agreements. Thus, it would seem that what petitioner would want this Court to espouse is the retroactive application of the Philippine Mining Act of 1995 to the Columbio FTAA, a valid agreement concluded prior to the naissance of said piece of legislation.
>
> This posture of petitioner would clearly contradict the established legal doctrine that **statutes are to be construed as having only a prospective operation unless the contrary is expressly stated or necessarily implied from**

> **the language used in the law**. As reiterated in the case of *Segovia v. Noel*, a sound canon of statutory construction is that a statute operates prospectively only and never retroactively, unless the legislative intent to the contrary is made manifest either by the express terms of the statute or by necessary implication.
>
> Article 4 of the Civil Code provides that: "Laws shall not have a retroactive effect unless therein otherwise provided." According to this provision of law, **in order that a law may have retroactive effect it is necessary that an express provision to this effect be made in the law, otherwise nothing should be understood which is not embodied in the law**. Furthermore, it must be borne in mind that **a law is a rule established to guide our actions without binding effect until it is enacted, wherefore, it has no application to past times but only to future time, and that is why it is said that the law looks to the future only** and has no retroactive effect unless the legislator may have formally given that effect to some legal provisions.
>
> In the case at bar, **there is an absence of either an express declaration or an implication in the Philippine Mining Act of 1995 that the provisions of said law shall be made to apply retroactively, therefore, any section of said law must be made to apply only prospectively, in view of the rule that a statute ought not to receive a construction making it act retroactively, unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied**." (*Boldfacing supplied*)

In fine, the provisions of RA No. 7942 and its implementing rules cannot be used as bases to rule that petitioner does not enjoy any tax exemption during the Recovery Period, precisely because the said law cannot be retroactively applied to the FTAA.

Assuming *arguendo* that RA No. 7942 applies in this case, an examination of its provisions shows nonetheless that FTAA contractors are granted certain tax exemptions during the Recovery Period. Section 81 of RA No. 7942 reads:

> "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, (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 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**." (*Boldfacing and underscoring supplied*)

The intent of Section 81 of RA No. 7942 in allowing the collection of the government share in FTAAs to commence only after the FTAA contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive, is to grant the FTAA contractor an exemption from payment of such Government Share, which includes excise taxes, among others, until it has fully recovered its expenses. Such construction is consistent with the goal of allowing the FTAA contractor to fully recover its expenses before it is made to pay the Government Share in the FTAA.

DAO No. 99-56 dated December 27, 1999 provided for the "Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements." Section 3(g)(1) of DAO No. 99-56 reads:

> "Section 3. **Fiscal Regime of a Financial or Technical Assistance Agreement**. –
>
> xxx xxx xxx

g. Government Share.

1. Basic Government Share. The following taxes, fees and other such charges shall constitute the Basic Government Share:

   a) Excise tax on minerals;

   b) Contractor's income tax;

   c) Customs duties and fees on imported capital equipment;

   d) Value-added tax on the purchase of imported equipment, goods and services;

   e) Withholding tax on interest payments on foreign loans;

   f) Withholding tax on dividends to foreign stockholders;

   g) Royalties due the Government on Mineral Reservations;

   h) Documentary stamp taxes;

   i) Capital gains tax;

   j) Local business tax;

   k) Real property tax;

   l) Community tax;

   m) Occupation fees;

   n) All other local Government taxes, fees and imposts as of the effective date of the FTAA;

   o) Special Allowance, as defined in the Mining Act; and

   p) Royalty payments to any Indigenous People(s)/Indigenous Cultural Community(ies).

From the Effective Date, the foregoing taxes, fees and other such charges constituting the Basic Government Share, if applicable, shall be paid by the Contractor: *Provided*, **That above items (a) to (g) shall not be collected from the Contractor upon the date of approval of the Mining Project Feasibility Study up to the end of the Recovery Period**. Any taxes, fees, royalties, allowances or other imposts, which should not be collected by the Government, but

> nevertheless paid by the Contractor and are not refunded by the Government before the end of the next taxable year, shall be included in the Government Share in the next taxable year. Any Value-Added Tax refunded or credited shall not form part of Government Share." (*Boldfacing supplied*)

Under Section 3(g)(1)(a) of DAO No. 99-56, excise taxes are not collected from the FTAA contractor from approval of the Mining Project Feasibility Study up to the end of the Recovery Period, which necessarily includes the whole five (5)-year Recovery Period.

DAO No. 99-56 was superseded by DAO No. 2007-12 dated June 20, 2007, which provided for a new fiscal regime for FTAAs. Section 4 thereof provides:

> "Section 4. **Fiscal Regime of a Financial or Technical Assistance Agreement**. –
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> xxx xxx xxx
>
> 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 stamp taxes;
>
> (g) Capital gains tax;
>
> (h) **Excise tax on minerals;**

(i) Royalties for Mineral Reservations and to Indigenous Peoples, if applicable;

(j) Local business tax;

(k) Real property tax;

(l) Community tax;

(m) Occupation fees;

(n) Registration and permit fees; and

(o) All other national and local Government taxes, royalties and fees as of the effective date of the FTAA.

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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." (*Boldfacing supplied*)

Notwithstanding the amendment made in the fiscal regime of FTAAs as provided for under DAO No. 2007-12, Section 12 thereof provides:

"Section 12. **Status of Existing FTAAs**. –

All FTAAs approved prior to the effectivity of this Administrative Order shall remain valid and be recognized by the Government: *Provided,* That should a Contractor desires to amend its FTAA, it shall do so by filing a Letter of

> Intent (LOI) to the Secretary thru the Director: *Provided further,* **That if the Contractor desires to amend the fiscal regime of its FTAA, it may do so by seeking for the amendment of its FTAA's whole fiscal regime by adopting the fiscal regime provided herein**: *Provided finally,* That any amendment of an FTAA other than the provision on fiscal regime shall require negotiation with the FTAA Negotiating Panel and that every amendment of an FTAA shall require the recommendation of the Secretary for approval of the President of the Republic of the Philippines." (*Boldfacing supplied*)

DAO No. 2007-12 did not intend to amend the fiscal regime of existing FTAAs, including the subject FTAA. DAO No. 2007-12 is cognizant that the adoption of the fiscal regime provided therein requires the amendment of existing FTAAs. Thus, without such amendment, the fiscal regime in the subject FTAA remains the same.

Relevantly, the landmark case of *La Bugal B'laan Tribal Association, Inc. et al. vs. Victor O. Ramos, Secretary, Department of Environment and Natural Resources, et al.*, decided by the Supreme Court, held that an FTAA contractor is exempt from certain national internal revenue taxes, including excise tax, during the Recovery Period, thus:

> "Specifically, under the fiscal regime, the government's expectation is, *inter alia*, the receipt of its share from the taxes and fees normally paid by a mining enterprise. On the other hand, **the FTAA contractor is granted by the government certain fiscal and non-fiscal incentives to help support the former's cash flow during the most critical phase (cost recovery) and to make the Philippines competitive with other mineral-producing countries**. After the contractor has recovered its initial investment, it will pay all the normal taxes and fees comprising the basic share of the government, plus an additional share for the government based on the options and formulae set forth in DAO 99-56. (*Boldfacing supplied*)

On what these fiscal and non-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.
>
> **These national taxes, however, are <u>not to be paid</u> by the contractor: (i) excise tax on minerals**; (ii) contractor's income tax; (iii) customs duties and fees on imported capital equipment; (iv) value-added tax on purchases of imported equipment, goods and services; (v) withholding tax on interest payments on foreign loans; (vi) withholding tax on dividends to foreign stockholders; and (vii) royalties due the government on mineral reservations.
>
> Other incentives to the contractor include those under the Omnibus Investment Code of 1997; those for the use of pollution control devices and facilities; income tax carry forward of losses (five-year net loss carry forward); and income tax accelerated depreciation." (*Boldfacing and underscoring supplied*)

In sum, under the terms of the FTAA, respondent has no authority to collect excise taxes as the Government's right to have a share in the Net Revenue of petitioner during the Recovery Period has not accrued.

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Notwithstanding its excise tax exemption during the Recovery Period, petitioner failed to prove that the amount may be recovered

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The fourth paragraph of Section 11.2 of the FTAA provides:

> "11.2 <u>Recovery of Pre[-]operating Expenses, Property Expenses and Tax Paid During the Recovery Period</u>.
>
> xxx xxx xxx
>
> **<u>All taxes</u>, duties fees, costs, levies and imposts paid by the CONTRACTOR and which are <u>detrimental to the CONTRACTOR's recovery of Pre[-]operating Expenses and Property Expenses</u> during the five (5) Contract Years**

> **contemplated in this Section shall be recoverable by the CONTRACTOR, whenever possible during the year(s) such expenditures were actually incurred. Any amount not recovered shall be deducted from the GOVERNMENT's Share as more specifically provided in Section 11.5 of this Agreement,** unless legislation is required to allow the necessary deductions, in which case the deductions shall be made only after the appropriate legislation has been passed." (*Boldfacing and underscoring supplied*)

The FTAA is explicit that all taxes, including excise tax, collected during the Recovery Period is recoverable during the years they were incurred, provided that the amount collected is **detrimental to petitioner's recovery of Pre-operating and Property Expenses**. In the event that there is no recovery, or the recovered amount is less than the tax paid or incurred, then petitioner's recourse is to **deduct the amount not recovered from the Government's Share**.

It has been a jurisprudential rule that tax exemptions are construed against the one claiming it. As held in *Commissioner of Internal Revenue vs. Philippine Long Distance Telephone Company*:

> "Time and again, the [Supreme] Court has stated that taxation is the rule, exemption is the exception. Accordingly, statutes granting tax exemptions must be construed in *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority. To [them], therefore, who [claim] a refund or exemption from tax payments [rest] the burden of justifying the exemption by words too plain to be mistaken and too categorical to be misinterpreted."

Thus, petitioner has the burden of proof to show that the collection of excise tax during the Recovery Period was **detrimental** to its recovery of Pre-operating and Property Expenses.

Section II of the FTAA provides for a definition of terms. The definition of the word "detrimental" is, however, not provided therein. With the absence of a technical definition, resort to the plain or literal meaning of the word is in order.

The term "detriment" means "[a]ny loss or harm suffered in person or in property." Thus, per the FTAA, petitioner must show that the collection of excise tax during

> the Recovery Period resulted in loss or harm in its person or property.
>
> Review of the evidence formally offered by petitioner shows that the Court in Division correctly ruled that there is no specific evidence to show that its payment of excise tax during the Recovery Period resulted in loss or harm in the person or property of petitioner. Petitioner failed to present evidence that its payment of excise tax had an adverse effect on its financial performance and/or position.
>
> In fact, petitioner did not offer in evidence its Audited Financial Statements during the subject period. Even the Report of the ICPA did not discuss the alleged detrimental effects of paying the excise tax during the Recovery Period. The overall findings of the ICPA as found in the Report only showed that "[a]s of December 31, 2014, petitioner is still under the so-called [R]ecovery [P]eriod as neither five (5) years have elapsed from the commencement of commercial operations on April 1, 2013, nor has petitioner fully recovered its [P]re-operating [E]xpenses as well as [P]roperty [E]xpenses.
>
> Thus, the contention of petitioner that payment of excise tax during the Recovery Period is detrimental to it because such payment "would have been part of recovered pre-operating expenses" remains to be a mere allegation. The basic rule is that mere allegation is not evidence and is not equivalent to proof.
>
> Notwithstanding petitioner's failure to establish its entitlement to its refund claim of the excise taxes paid during the Recovery Period as discussed herein, it is not without any recourse. As provided for under Section 11.2 of the FTAA, "Any amount not recovered shall be deducted from the GOVERNMENT's Share[.]" Even Section 11.5 of the FTAA recognizes that "excise tax, including excise tax paid during the recovery of Pre[-]operating Expenses" may be deducted from the Government Share in Net Revenue. (*Emphasis and underscoring in the original, citations omitted*)

Applying the foregoing to the instant case, We find that the CTA 2nd Division correctly denied petitioner's claims for refund/issuance of TCC for the alleged illegally assessed and collected excise taxes for the 1st and 2nd quarters of TY 2017, in the aggregate amount of Php155,525,759.86.

Assuming that the recovery period starts from April 1, 2013, and ends on March 31, 2018, petitioner's payments of excise taxes for the 1st and 2nd quarters of TY 2017 were made

during the said recovery period. However, petitioner still failed to prove that it is entitled to the claimed refund.

As discussed in the abovequoted ruling, the FTAA states that all taxes, including excise tax, collected during the recovery period is recoverable during the years they were incurred, provided that the amount collected is **detrimental to petitioner's recovery of pre-operating and property expenses**. In the event that there is no recovery, or the recovered amount is less than the tax paid or incurred, then petitioner's recourse is to **deduct the amount not recovered from the Government's Share**.[10]

Petitioner, however, failed to prove that the payments of the subject excise taxes, were detrimental to its recovery of the pre-operating and property expenses. There is no specific evidence showing such fact.

Notwithstanding petitioner's failure to establish its entitlement to its refund claim of the excise taxes paid during the alleged recovery period, it is not without any recourse. As provided for under Section 11.2 of the FTAA, "Any amount not recovered shall be deducted from the GOVERNMENT'S Share[.]" Even Section 11.5 of the FTAA recognizes that "excise tax, including excise tax paid during the recovery of Pre-Operating Expenses" may be deducted from the Government Share in Net Revenue.[11]

In sum, We find no compelling reason to reverse or modify the findings of the Court in Division in denying petitioner's claim for refund.

Our consistent ruling is that actions for tax refund, as in the instant case, are in the nature of a claim for exemption and the law is not only construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence presented entitling a taxpayer to an exemption is *strictissimi* scrutinized and must be duly proven.[12]

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[10] *Oceanagold (Philippines), Inc. v. Commissioner of Internal Revenue*, CTA EB No. 2492, May 31, 2022.
[11] *Ibid.*
[12] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.

WHEREFORE, the instant Petition for Review is **DENIED** for lack of merit.

SO ORDERED.

CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:

ON LEAVE
ROMAN G. DEL ROSARIO
Presiding Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
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.

MA. BELEN M. RINGPIS-LIBAN
Acting Presiding Justice