

OCEANAGOLD (PHILIPPINES), INC., PETITIONER, VS. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

G.R. Nos. 251453 & 263004, December 03, 2025

Ponente: SINGH, J.

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SINGH, J.:

G.R. No. 263004 presents the Court with a Petition for Review on Certiorari[1] under Rule 45 of the Rules of Court filed by Oceanagold (Philippines), Inc. (Oceanagold) seeking to reverse the Decision,[2] dated May 31, 2022, and the Resolution,[3] dated September 1, 2022, of the Court of Tax Appeals (CTA) En Banc in CTA EB No. 2492. The CTA En Banc affirmed the Decision,[4] dated October 7, 2020, and the Resolution,[5] dated March 12, 2021, of the CTA Third Division (CTA Division), which denied Oceanagold's claim for refund of erroneously paid excise taxes of PHP 136,407,793.17 for the period of June to December 2014.

On the other hand, G.R. No. 251453 presents the Court with a Motion for Reconsideration seeking to reverse the Resolution of the Supreme Court, dated February 15, 2022, which denied the Petition for Review on Certiorari[6] under Rule 45 of the Rules of Court filed by Oceanagold. The Supreme Court upheld the Decision,[7] dated August 16, 2019, and the Resolution,[8] dated January 23, 2020, of the CTA En Banc in CTA EB No. 1904. The CTA En Banc affirmed the Decision,[9] dated March 22, 2018, and the Resolution,[10] dated July 20, 2018, of the CTA Division, which denied Oceanagold's claim for refund or for the issuance of a tax credit certificate (TCC) in the amounts of PHP 25,843,462.11 and PHP 42,785,549.13, representing alleged erroneously paid excise taxes for the periods of February to March 2013 and April to June 2013.

The Facts

Facts common to G.R. Nos.
251453 and 263004

On June 20, 1994, a Financial and Technical Assistance Agreement (FTAA) was executed by then Executive Secretary Teofisto Guingona and Bryce G. Roxburgh, then President of Arimco Mining Corporation. This FTAA bore the recommendation of then Secretary of Environment and Natural Resources Angel C. Alcala. This FTAA was eventually assigned to Oceanagold with the approval of the Government.[11]

Known as the Didipio Gold-Copper Project (Didipio Project), the FTAA involves the large-scale exploration, subsequent development, and commercial utilization of mineral deposits over a contract area spanning the Provinces of Nueva Vizcaya and Quirino.[12]

On March 3, 1995, Congress enacted Republic Act No. 7942 or the Philippine Mining Act of 1995, which provided a legal framework for the exploration, development, utilization, and conservation of the country's mineral resources.

Shortly thereafter, the Department of Environment and Natural Resources (DENR) released the implementing rules and regulations (IRR) of Republic Act No. 7942 in the form of DENR Administrative Order No. 95-23. In

December 1999, the DENR promulgated DENR Administrative Order 99-56, providing the guidelines establishing the fiscal regime of FTAAAs.[13]

After conducting mineral exploration activities, Oceanagold identified a portion of the Exploration Contract Area as being suitable for the Didipio Project and subsequently filed a Partial Declaration of Mining Feasibility (PDMF) with the DENR. The DENR approved the PDMF on October 11, 2005, and constituted a portion of the Exploration Contract Area as the mining area.[14]

On February 13, 2007, on the basis of Section 81 of the FTAA and Section 236 of DENR Administrative Order 95-23, Oceanagold filed with the Bureau of Internal Revenue (BIR) a request for ruling, requesting confirmation that it is exempt from the payment of excise tax on minerals during the recovery period.[15]

In response, on May 4, 2007, the BIR issued BIR Ruling No. 10-2007, declaring that Oceanagold is exempt from the payment of excise tax from the date of approval of its mining project feasibility study up to the end of the recovery period, which period shall be reckoned from the date of commercial operation and shall be for a maximum period of five years, or until the date of recovery of pre-operating expenses and exploration and development expenditures, whichever comes earlier.[16]

In 2008, Oceanagold halted further mine development in the Didipio Project due to escalating costs and uncertainty in the financial markets. Oceanagold thus placed the Didipio Project under "care and maintenance," from December 2008 to December 2010.[17]

In December 2010, after completing a strategic review and securing further financing, Oceanagold resumed work on the Didipio Project.[18]

In 2012, Oceanagold successfully commenced the commissioning of the Didipio Project and mined and stockpiled approximately 800,000 metric tons (MT) of ore for further processing. As part of the commissioning process, Oceanagold commenced milling operations to produce copper concentrates.[19] The very first sale and delivery of copper concentrates was expected in April 2013.[20]

Mission Order No. 00030182, dated September 3, 2012, was issued by BIR Revenue Region No. 3, authorizing certain revenue officers to search Oceanagold's premises for articles subject to excise tax and to detain packages containing taxable articles.[21]

On December 7, 2012, pursuant to the Mission Order, and to prevent Oceanagold from making removals of copper concentrates without pre-payment of excise tax, the BIR seized and detained approximately 800,000 MT of mineral ores stockpiled in the mine site.[22]

On December 10, 2012, Oceanagold wrote a letter to the Revenue Region No. 3, protesting the seizure and detention of 800,000 MT of mineral ores.[23]

G.R. No. 251453: Refund of excise tax of PHP 68,629,011.54, collected from February to March 2013 and April to June 2013

On January 13, 2013, in connection with its planned first delivery and sale of copper concentrates in April 2013, Oceanagold obtained an Ore Transport Permit (OTP) from the Mines and Geosciences Bureau (MGB), authorizing the sale and delivery of 5,500 MT of copper concentrates from the Didipio mine site up to the shipping point in Poro Point, La Union. Another OTP was issued by the MGB on February 13, 2013, which extended the OTP issued on January 14, 2013 until March 13, 2013.[24]

On February 11 and 12, 2013, while Oceanagold was transporting copper concentrates for delivery to its buyer, a total of 100 MT with an estimated value of USD 320,000.00 of copper concentrates were seized and detained by

the BIR.[25]

On February 15, 2013, the BIR issued Revenue Memorandum Circular (RMC) No. 17-2013 revoking BIR Ruling No. 10-2007, which confirmed Oceanagold's exemption from excise tax during the Recovery Period.[26]

On February 25 and 26, 2013, Oceanagold paid under protest excise taxes amounting to PHP13,942,179.39 and PHP 417,743.20, respectively, allegedly due on the seized copper concentrates and the remaining concentrates awaiting removal from the site, or a total of 5,500 MT.[27]

On February 20, 2013, while Oceanagold was again transporting copper concentrates for delivery to a buyer, the BIR seized, apprehended, and detained 160 MT of copper concentrates with an estimated value of USD 512,000.00.[28]

Considering that it was able to mine 15% of its initial annual production capacity by the end of February 2013, Oceanagold notified the DENR, through a letter dated March 27, 2013, that the date of its commencement of commercial production is April 1, 2013.[29]

On March 1, 2013, the BIR seized and detained 40 MT of Oceanagold's copper concentrates while in transit.[30]

On March 26, 2013, Oceanagold pre-paid the amount of PHP 11,483,539.82 representing its excise tax for its next scheduled removals of copper concentrates for transport and sale to its buyers.[31]

On April 29, 2013, Oceanagold again pre-paid excise taxes in the amount of PHP 20,420,131.15 allegedly due on 11,000 wet metric tons (WMT) of copper concentrates awaiting removal from the mine site pursuant to the OTP issued by MGB. Another payment was made on May 30, 2013, in the amount of PHP 20,783,962.43 allegedly to cover the next scheduled removals of 11,000 WMT of copper concentrates for transport and sale to its buyer.[32]

On June 25, 2013, Oceanagold prepaid the amount of PHP 1,581,455.55 representing alleged excise taxes to cover its next scheduled removals of 1,685.57 ounces of doré bars for transport and sale to its buyer.[33]

On February 20, 2015, Oceanagold filed a letter addressed to Ms. Sarah B. Mopia, Chief of Excise LT Audit Division I, seeking the recovery of: (1) excise taxes paid for the period from February to March 2013 in the aggregate amount of PHP 25,843,462.41; and (2) excise taxes paid for the period from April to June 2013 in the aggregate amount of PHP 42,785,549.13.[34]

The BIR failed to act on the letter. Thus, on April 28, 2015, Oceanagold filed two separate Petitions for Review before the CTA Division docketed as CTA Case Nos. 8995 and 9035, raffled to the Third and Second Division, respectively.[35]

In its Petitions, Oceanagold prayed for the following:

- In CTA Case No. 8995, to (a) declare Oceanagold entitled to a refund of, or the issuance of a TCC for PHP 25,843,462.11, representing alleged erroneously paid and illegally and wrongfully collected excise taxes for the period from February to March 2015; and (b) order the BIR to refund or to issue a TCC in favor of Oceanagold in the said amount;[36] and
- In CTA Case No. 9034, to (a) render a judgment declaring Oceanagold entitled to a refund of, or the issuance of a TCC, in the amount of PHP 42,785,549.13, representing alleged erroneously paid and illegally and wrongfully collected excise taxes on Oceanagold's removals of copper concentrates and doré bars for the period from April to June 2013; and (b) order the BIR to refund or to issue a TCC in favor of Oceanagold in the said amount.[37]

In the Resolutions, dated August 4 and September 4, 2015, the CTA Second and Third Divisions granted the

Motion for Consolidation of the two cases. Accordingly, CTA Case No. 9034 was consolidated with Case No. 8995, the latter bearing the lower docket number.[38]

The Ruling of the CTA Division in G.R. No. 251453

In the Decision, dated March 22, 2018, the CTA Division denied Oceanagold's Petition for Review. The dispositive portion of the Decision reads, as follows:

WHEREFORE premises considered, the Petitions for Review filed by [Oceanagold] in CTA Case Nos. 8995 and 9034, claiming for the refund of or for the issuance of a tax credit certificate in the amounts of [PHP] 25,843,462.11 and [PHP] 42,785,549.13 representing alleged erroneously paid and illegally and wrongfully collected excise taxes for the period[s] from February to March 2013, and April to June 2013, respectively, are hereby DENIED for lack of merit.

SO ORDERED.[39] (Emphasis in the original)

The CTA Division held that Oceanagold failed to present evidence to prove that the imposition of excise tax was made during the Recovery Period.[40]

From a review of the FTAA, Republic Act No. 7942 and its IRR, the CTA Division held that (1) the government's share includes excise tax; (2) the collection of the government's share shall not commence until the contractor has fully recovered its pre-operating, exploration and development expenses; and (3) the period of recovery shall be from the date of commercial operation, which shall not exceed five years, or until the date of actual recovery, whichever comes earlier.[41]

Clearly, Oceanagold has a maximum of five years of exemption from excise tax, or the period 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.[42]

Thus, to determine the date when the aggregate of the "Net Cash Flows from the Mining Operations" is equal to the aggregate of Oceanagold's pre-operating expenses, and ultimately, to ascertain whether it is proper to impose excise taxes, the amount of "Net Cash Flows" and "Pre-Operating Expenses" should first be determined. Oceanagold alleged that its pre-operating expenses amounted to USD 429,153.92 as of March 31, 2013. However, other than the testimony of Independent Certified Public Accountant Richard R. Lapres that Oceanagold is yet to recover its pre-operating expenditures amounting to USD 293,500.00, Oceanagold failed to present pre-operating expenses duly approved by the Secretary of the DENR, as recommended by the Director of the MGB, and as mandated under DENR AO No. 1999-56.[43]

The CTA Division thus denied Oceanagold's Motion for Reconsideration in a Resolution, dated July 20, 2018.[44]

The Ruling of the CTA En Banc in G.R. No. 251453

In a Decision, dated August 16, 2019, the CTA En Banc denied Oceanagold's Petition for Review, as it found no reason to disturb the findings of the CTA Division. The dispositive portion of the Decision reads:

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

SO ORDERED.[45] (Emphasis in the original)

First, the CTA En Banc ruled that Oceanagold was entitled to the benefit of the principle of non-retroactivity of rulings and circulars under the National Internal Revenue Code (NIRC).[46] The effect of applying RMC No. 17-2013 retroactively, along with the consequent revocation of BIR Ruling No. 10-2007, was indeed

prejudicial.[47]

Second, based on the FTAA and the PDMF, Oceanagold should have commenced commercial operations and production in the fourth quarter of 2008.[48] The FTAA provisions would reveal that Oceanagold had three years from the approval of its PDMF on October 11, 2005, or until October 11, 2008, to develop and construct mining production facilities. After which, Oceanagold had to submit within 30 days another work program for three years for the actual production activities. Oceanagold should have started commercial production accordingly and should have advised the government within 15 days that commercial production had commenced. Failure to commence production shall be considered a substantial breach of the FTAA.[49]

Lastly, the CTA En Banc ruled that DENR Administrative Order No. 99-56 is applicable to Oceanagold. Thus, the requirement that its pre-operating expenses be approved by the Secretary of the DENR upon recommendation of the Director of the MGB.[50]

The CTA En Banc denied Oceanagold's Motion for Reconsideration in a Resolution, dated January 23, 2020, for lack of merit.[51]

The Ruling of the Court in G.R. No. 251453

The Court denied the Petition in a Resolution, dated February 15, 2022, the dispositive portion of which reads:

FOR THESE REASONS, the petition is DENIED.

SO ORDERED.[52] (Emphasis in the original)

Essentially, the Court ruled that Oceanagold was not able to prove that it paid the subject excise taxes within the Recovery Period.

The Court agreed that Oceanagold had three years from the approval of its PDMF on October 11, 2005, or until October 11, 2008, to develop and construct mining production facilities. After which, it had to submit a work program for three years for the actual production activities and start commercial production. Failure to begin production within the prescribed period is a substantial breach of the FTAA.[53]

Although Oceanagold is given latitude in setting the reckoning point of the five-year recovery period, there is a specific and strict timetable for the conduct of pre-operation activities, including the period within which Oceanagold should start commercial production.[54] Oceanagold cannot delay pre-operation activities of its own free will without observing the conditions specified in the FTAA.[55]

In this case, there is insufficient evidence that Oceanagold complied with the conditions that would justify the suspension of the performance of its obligations under the FTAA, and consequently, the deferment of the reckoning point of the recovery period.[56]

Thus, since Oceanagold failed to establish that the excise taxes were collected during the recovery period, the Court did not find the need to discuss delve into the issue of the applicability of DENR Administrative Order No. 99-561 regarding the requirement of prior approval by the DENR Secretary of the pre-operating expenses.[57]

G.R. No. 263004: Refund of excise taxes of PHP 136,407,793.17 collected from June to December 2014

To recall, on December 7, 2012, the BIR ordered the detention of the mineral ores in the stockpile of Oceanagold to prevent the latter from removing them for eventual sale.[58]

From June to December 2014, Oceanagold paid under protest the excise taxes allegedly due on its mineral ores in the total amount of PHP 136,407,793.17.[59]

On February 20, 2015, Oceanagold filed an administrative claim for refund with the BIR for the recovery of the alleged erroneously or illegally collected excise taxes which it paid under protest.[60]

The BIR issued a Letter, which Oceanagold received on February 12, 2016, denying the latter's administrative claim for refund of the excise taxes which it paid from June to December 2014.[61]

Aggrieved, Oceanagold filed a Petition for Review with the CTA on March 11, 2016.[62]

The Ruling of the CTA Division in G.R. No. 263004

In the Decision, dated October 7, 2020, the CTA Division denied Oceanagold's Petition for Review. The dispositive portion of the said Decision reads:

WHEREFORE, in light of the foregoing considerations, the instant Petition for Review is DENIED for lack of merit.

SO ORDERED.[63] (Emphasis in the original)

The CTA Division first held that Oceanagold was able to timely file both the administrative and judicial claims for refund within the two-year period prescribed under Sections 204 (C) and 229 of the NIRC.[64]

It then ruled that Oceanagold is not exempt from the payment of excise tax during the recovery period, but its collection is merely deferred. The CTA Division held that under Section 11.2 of the FTAA, Oceanagold is required to prove that the payment of excise tax during the recovery period was detrimental to its recovery of pre-operating and property expenses. The CTA Division found that Oceanagold failed to comply with this requirement.[65]

The CTA Division ruled that RMC No. 17-2013 is void for failure to provide due notice to Oceanagold in accordance with RMC No. 10-1986. Notwithstanding, the CTA Division likewise ruled that BIR Ruling No. 10-2007, which was the subject of revocation by RMC No. 17-2013, is likewise void for Oceanagold's alleged misrepresentation. It held that the said Ruling, which was based on Oceanagold's averment that its "initial commercial production is now expected to commence on the 4[th] quarter of 2008,"[66] belies its allegation in the Petition that it commenced commercial production on the 2[nd] quarter of 2013.

Oceanagold filed a Motion for Reconsideration,[67] which was denied by the CTA Division in the Resolution,[68] dated March 12, 2021.

Oceanagold then filed a Petition for Review[69] with the CTA En Banc.

The Ruling of the CTA En Banc in G.R. No. 263004

The CTA En Banc denied Oceanagold's Petition for Review of the Decision, dated May 31, 2022, the dispositive portion of which reads:

WHEREFORE, the Petition for Review filed on July 13, 2021 is DENIED. The Decision[,] dated October 7, 2020[,] and [the] Resolution[,] dated March 12, 2021[,] rendered by the Court in Division in CTA Case No. 9289 are AFFIRMED.

SO ORDERED.[70] (Emphasis in the original)

The CTA En Banc held that, under the FTAA and as supported by Section 81 of Republic Act No. 7942, Oceanagold is exempt from the payment of excise tax during the recovery period. In particular, Section 11.2, in relation to Section 11.5, of the FTAA provides that the government's share in Oceanagold's net revenue, which includes excise tax, will only accrue after the recovery period. It was also ruled that even though Republic Act

No. 7942 did not retroactively affect the FTAA, the intent of the law in granting fiscal incentives supports the view that Oceanagold is exempt from payment of excise tax during the recovery period.[71]

The CTA En Banc corrected the CTA Division by holding that BIR Ruling No. 10-2007 is invalid. It held that the said BIR Ruling was explicit that Oceanagold's Recovery Period was only "expected" to commence in the fourth quarter of 2008. This did not operate to invalidate the BIR Ruling, which confirmed Oceanagold's tax exemption.[72]

Notwithstanding, the CTA En Banc ruled that Oceanagold is not entitled to the recovery of the excise taxes paid since it failed to prove that these collections were detrimental to the latter's recovery of pre-operating and property expenses. It found that Oceanagold failed to produce Oceanagold's audited financial statements during the recovery period. Moreover, the report of the independent certified public accountant did not discuss the detrimental effects of the collection of excise tax on Oceanagold. Thus, Oceanagold may not recover the paid excise tax, but may apply it in the future by deducting the said amount from the government's share, in accordance with Section 11.2 of the FTAA.[73]

Oceanagold's Motion for Reconsideration was denied in the assailed Resolution, dated September 1, 2022.[74]

The Issues

In G.R. No. 251453, did the Court commit a reversible error in denying Oceanagold's refund claim for its failure to establish that the excise taxes, which are the subject of its claim, were collected within the recovery period?

In G.R. No. 263004, did the CTA En Banc commit a reversible error when it denied Oceanagold's refund claim for erroneously or illegally collected excise tax due to the latter's failure to prove that the excise tax payment was not detrimental to recovery of its Pre-operating and property expenses?

The Ruling of the Court

The resolution of the core question in these cases revolves around the proper interpretation of the FTAA and its surrounding legal framework. After a thorough review of the same, the Court finds no merit in both the Motion for Reconsideration in G.R. No. 251453 and the Petition for Review on Certiorari in G.R. No. 263004.

The legal framework for Philippine mining

The Philippines has a well-established history as a significant producer of metals. In the mid-1970s, the mining sector contributed up to 24% of the country's foreign exchange earnings. By 1980, copper, nickel, chrome, and gold mines generated an average of USD 1.2 billion in annual export revenues.[75]

A review of the legal framework governing mining in the Philippines is essential in understanding the FTAA because it provides context for the evolution of mining policies, regulatory priorities, and the balance between national development and foreign investment.

The legal landscape of mining in the Philippines has undergone significant changes over time, reflecting shifts in governmental approaches to resource management, environmental protection, and economic benefit-sharing.

On May 17, 1974, Presidential Decree No. 463, or the Mineral Resources Decree of 1974, was issued to promote and encourage the development of mineral resources in the Philippines. In its Whereas Clauses, Presidential Decree No. 463 recognizes that mineral production is vital to the national economy, requiring urgent exploration, development, and utilization of the country's resources, and was the first statute to regulate the exploration, development, and utilization of mineral resources in the Philippines. It outlines the procedures for granting

mineral rights to private entities while ensuring that the government maintains ownership over the country's mineral resources. The decree establishes guidelines for responsible mining operations, setting environmental and safety standards for mining activities.

However, upon the effectivity of the 1987 Constitution, "the State assumed a more dynamic role in the exploration, development and utilization of the natural resources of the country." [76] This marked a significant shift in policy, emphasizing that all natural resources are owned by the State, and their exploration, development, and utilization must be under its full control and supervision. The Constitution introduced stricter safeguards to ensure that natural resources are used sustainably and primarily for the benefit of Filipinos. It underscored the importance of protecting national patrimony by limiting the direct participation of foreign entities, except through specific agreements where the State retains control.

Thus, Article XII, Section 2 of the 1987 Constitution explicitly mandates that the exploration, development, and utilization of natural resources must be under the full control and supervision of the State. In line with this directive, the State may undertake such activities directly, or opt to engage in co-production, joint venture, or production-sharing agreements. Additionally, it may enter into agreements with foreign-owned corporations for technical or financial assistance in large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils, provided these are conducted under the general terms and conditions prescribed by law. Such agreements must demonstrate real contributions to the country's economic growth and general welfare, ensuring that the nation's resources are managed responsibly and for the benefit of its people. [77] Article XII, Section 2 of the 1987 Constitution reads:

ARTICLE XII

NATIONAL ECONOMY AND PATRIMONY

Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least [60] per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding [25] years, renewable for not more than [25] years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of waterpower, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within [30] days from its execution.

To operationalize the constitutional mandate regarding the State's full control and supervision over natural resources while ensuring the continuity of mining operations, then President Corazon C. Aquino issued Executive Order No. 211 on July 10, 1987, titled "Prescribing the Interim Procedures in the Processing and Approval of Applications for the Exploration, Development, and Utilization of Minerals." This Executive Order aimed to bridge the transition period by providing interim guidelines for processing both pending and new applications, thereby avoiding disruptions in the mining sector. Recognizing the mining industry's vital role in national economic development, the law sought not only to streamline administrative processes, but also to uphold the constitutional directive of responsible resource management. The same also underscored the Government's commitment to facilitating investments and ensuring that mining activities contribute to the country's economic growth while adhering to the principles of sustainability and national patrimony outlined in the 1987 Constitution.[78]

Recognizing the "existing and expected proposals from interested parties, including foreign-owned corporations, for agreements involving the exploration, development[,] and utilization of minerals,"[79] then President Corazon C. Aquino issued Executive Order No. 279 on July 25, 1987, titled "Authorizing the Secretary of Environment and Natural Resources to Negotiate and Conclude Joint Venture, Co-Production, or Production-Sharing Agreements for the Exploration, Development[,] and Utilization of Mineral Resources, and Prescribing the Guidelines for such Agreements and those Agreements Involving Technical or Financial Assistance by Foreign-Owned Corporations for Large-Scale Exploration, Development, and Utilization Of Minerals." This Executive Order meant to provide an interim legal basis for such agreements until Congress could pass comprehensive legislation pursuant to Article XII, Section 2 of the 1987 Constitution.[80]

In light of the authority delegated to the Secretary of the DENR under Executive Order No. 279, the DENR issued Administrative Orders Nos. 57, 82, and 82-A.

DENR Administrative Order No. 57 was issued on June 23, 1989 and was captioned "Guidelines of Mineral Production Sharing Agreement under Executive Order No. 279." [81] Under the transitory provision of DENR Administrative Order No. 57, all existing mining leases or agreements which were granted after the effectivity of the 1987 Constitution pursuant to Executive Order No. 211, shall be converted into production-sharing agreements within one year from the effectivity of the guidelines, except small scale mining leases and those pertaining to sand and gravel and quarry resources covering an area of 20 hectares or less.[82]

DENR Administrative Order No. 82 was issued on November 20, 1990, laying down the "Procedural Guidelines on the Award of Mineral Production Sharing Agreement (MPSA) through Negotiation." [83]

The constitutionality of Administrative Order Nos. 57 and 82 was questioned in *Miners Association of the Philippines, Inc. v. Factoran*, [84] on the grounds that said Administrative Orders were issued in excess of the DENR's rule-making powers, and were violative of the non-impairment clause. The Court, sitting en banc, upheld the constitutionality of both DENR Administrative Orders, ruling that there was no clear showing that the DENR Secretary exceeded the powers granted to him by Executive Order No. 279. The Court also found no violation of the non-impairment clause because "the privileges as well as the terms and conditions of all existing mining leases or agreements granted after the effectivity of the 1987 Constitution pursuant to Executive Order No. 211, shall be subject to any and all modifications or alterations which Congress may adopt pursuant to Article XII, Section 2 of the 1987 Constitution." [85] Hence, the strictures of the non-impairment clause do not apply to leases and agreements granted after the 1987 Constitution as the same may be amended, modified, or altered by statute passed by Congress to achieve the purposes of Article XII, Section 2 of the 1987 Constitution.

DENR Administrative Order No. 82-A, issued on December 3, 1990, amends a specific provision of the earlier

DENR Administrative Order No. 82, which established the procedural guidelines for awarding MPSAs through negotiation. The primary objective of this amendment is to provide clarity on the basis for determining the Government's interim share in MPSA proposals, ensuring its alignment with the prevailing excise tax rates.[86]

In 1991, the International Mining Annual Review ranked the Philippines third for gold and fifth for copper, in terms of mineral endowment. However, in 1995, production was down, and the closure or marginalization of certain mines has brought about drastic retrenchment of the workforce. This presented such a serious situation that Congress was compelled to grant tax relief to the industry to help it keep its workers and enable it to survive the continuous shocks in the world market.[87]

While the tax incentives already in place were helpful, the legislature recognized that the passage of a unified legal framework for mining was necessary to revitalize the mining industry. Thus, Republic Act No. 7942, or the Philippine Mining Act, was enacted with the purpose of creating a unified legal framework and offering attractive incentives to encourage both domestic and foreign investment in the mining industry. In crafting this law, lawmakers sought not only to stabilize the industry, but also to provide immediate, tangible benefits through the application of its provisions on incentives and Government share. During the Senate deliberations, then Senator Francisco S. Tatad, in his Sponsorship Speech of Senate Bill No. 1639, the precursor of Republic Act No. 7942, noted that:

The purpose of this bill is to revive the distressed mining industry and make it a major contributor to the country's economic development and growth. The enactment of this measure has become imperative following our decision to become truly globally competitive upon the ratification of the Agreement establishing the World Trade Organization. Its urgency derives from the fact that mining remains a most obvious non-performer, despite the fact that the Philippines remains one of the most heavily mineralized countries in the world, and that foreign direct investments in mining are on the uptrend in many parts of the world.

Depressed world market prices, plus a regime of high excise taxes, and the absence of a mining law comparable to other countries in terms of [financial] incentives offered to investors have made mining a distressed industry. Although in 1991, the International Mining Annual Review ranked the Philippines third for gold and fifth for copper, in terms of mineral endowment, production is down, and the closure or marginalization of certain mines has brought about drastic retrenchment of the workforce. This presented such a serious situation last year that Congress was compelled to grant tax relief to the industry to help it keep its workers and enable it to survive the continuous shocks in the world market.

. . . .

But the tax relief, while necessary and entirely helpful, is not enough to fully revitalize the industry and make it truly competitive. Only the passage of the proposed bill, Madam President, can hope to do that.

The long-term development of the mining industry depends a great deal on the kind of mining law that is in place. Until now, mining practices have been governed by provisions of [Presidential Decree No.] 463 issued in 1974, Executive Order Nos. 211 and 279, and Administrative Order Nos. 57, 82 and 82-A, but not by a unified mining law.

The Constitution provides that all minerals are under the full control and supervision of the State and that exploration, development, and utilization of those resources may be undertaken by mineral production sharing agreements which are joint venture, co-production or production-sharing agreements with any Filipino citizen, corporation or[,] association at least 60 [%] of its capital owned by Filipino citizens. Or, alternatively, through [FTAAs] in which the President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration development and utilization of minerals.

Administrative interpretation of this constitutional provision has led to law suits and legal questions which

have not been satisfactorily resolved at this point. This is where legislation must now come in to provide clear and stable laws as well as implementing rules and regulations so as to ultimately attract direct foreign investments which are now waiting for those guidelines.

....

Given the present provisions of the bill, . . . We are very confident that the mining industry could be relied upon to perform a significant role in the economic turnaround. In the recent reports by the Executive Department, we noticed that all the industries are performing very well, but there is one negative performer and that is the mining industry. We are convinced there is no reason for this to continue. We are convinced that the mining industry deserves to perform better especially since world market prices have begun to improve, the technology is available, and there are large investors waiting on the wings, waiting for the passage of this very important measure.[88]

Republic Act No. 7942 or the Philippine Mining Act of 1995, was signed into law by then President Fidel V. Ramos on March 3, 1995. It sought to implement Article XII, Section 2 of the Constitution.[89]

The declared policy of Republic Act No. 7942 is "to promote . . . rational exploration, development, utilization[,] and conservation [of all mineral resources] through the combined efforts of government and the private sector in order to enhance national growth." [90]

Republic Act No. 7942 served to amend or modify the terms of the subject FTAA

In its Petition docketed as G.R. No. 263004, Oceanagold contends that, with the passage of Republic Act No. 7942, the terms of the FTAA, specifically with respect to the provision on the government's share, have been amended or modified. It cites Section 112 of Republic Act No. 7942 in arguing that the changes in fiscal incentives introduced in the said law were made to retroactively apply to the FTAA's executed prior to its enactment. Oceanagold further cites the landmark case of *La Bugal-B'laan Tribal Association, Inc. v. Ramos* [91] in support of its view that there is no requirement that the payment of excise tax be detrimental before it can be recovered.[92]

Oceanagold's arguments are meritorious.

Section 112 of Republic Act No. 7942, which Oceanagold invokes as the basis for the retroactive application of the said law, does not cover, on its face, FTAA's. The provision reads:

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, 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 of 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 supplied)

The above-quoted provision expressly covers "existing mining/quarrying rights," particularly mining lease contracts, permits or licenses, leases pending renewal, and mineral production-sharing agreements, which term has a technical definition under Republic Act No. 7942. It refers to "a valid and subsisting mining claim or permit

or quarry permit or any mining lease contract or agreement covering a mineralized area granted/issued under pertinent mining laws." [93] On the other hand, "FTAA" has its own definition under the law. It pertains to "a contract involving financial or technical assistance for large-scale exploration, development, and utilization of mineral resources." [94]

However, the same section also provides "[t]hat the provisions of Chapter XIV on government share in mineral production-sharing agreement and of 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." The terms "lessee" and "contractor" also have technical meanings under Republic Act No. 7942. "Lessee" means "a person or entity with a valid and existing mining lease contract." [95] On the other hand, "contractor" means "a qualified person acting alone or in consortium who is a party to a mineral agreement or to a financial or technical assistance agreement." [96] Thus, by including the term "contractor," Section 112 intended for the provisions of Republic Act No. 7942 on Chapter XIV on government share in mineral production-sharing agreement and of Chapter XVI on incentives to apply to FTAAAs.

The same is also contained in the Implementing Rules and Regulations (IRR) of Republic Act No. 7942:

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 [of the IRR or Chapter XIV of Republic Act No. 7942] 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, FTAAAs shall comply with the applicable provisions of these implementing rules and regulations. [97] (Emphasis supplied)

The IRR clarifies that the non-impairment clause also applies to FTAAAs and includes the same mandate on the provisions of Chapter XIV on the government share in MPSAs and of Chapter XVI on incentives of the Act immediately govern and apply to a mining lessee or contractor.

Moreover, the FTAA itself contains a clause on Future Legislation in Section 20.2:

Future Legislation. Any term and condition more favorable to the financial or technical assistance agreement and the mineral production sharing agreement resulting from the repeal or amendment of any existing law or regulation or from the enactment of a law, regulation, or administrative order shall inure to the benefit of the Contractor and such law, regulation, or administrative order shall be considered a part of this agreement. [98] (Underscoring in the original)

Thus, the enactment of Republic Act No. 7942, which aims to revitalize the distressed mining industry by creating a unified legal framework and offering attractive incentives to encourage both domestic and foreign investment, [99] is clearly a law that is beneficial to Oceanagold, and should therefore inure to its benefit.

It is clear that Section 81 of Republic Act No. 7942, which provides for the government share in FTAAAs, including the supposed excise tax exemption of contractors during the recovery period, is included in Chapter XIV. Evidently, the new fiscal regime provided for under Section 81 immediately governed and applied to existing FTAA contractors, including Oceanagold, upon the effectivity of Republic Act No. 7942.

There is, however, a saving clause to this rule—that is, when the FTAA contractor indicates in writing to the DENR Secretary its choice not to avail of the said provision. In these consolidated cases, the records are bereft of any indication that Oceanagold has chosen not to avail of the new fiscal regime under Section 81. In fact, Oceanagold has argued in its Petition before the Court that it is a beneficiary of such new fiscal regime.[100]

In its Decision, dated May 31, 2022, the CTA En Banc cited the case of *Lepanto Consolidated Mining Co. v. WMC Resources Int'l. Pty.*[101] to support the view that Republic Act No. 7942 did not retroactively apply to FTAAAs executed prior to the effectivity of the said law, which includes the subject FTAA here. There, the Court held that there is no express provision, or even an implication, in Republic Act No. 7942 that would make the law retroactively apply to the FTAA in that case. Thus, the requirement under Section 40 of securing the approval of the president of the Philippines on the transfer or assignment of an FTAA did not apply to the transaction in that case.[102]

It must be noted, however, that the lack of retroactive application of Republic Act No. 7942 is not a determinative factor in deciding these consolidated cases. Section 112 is clear that the new fiscal regime applicable to FTAA contractors shall govern and be effective upon the enactment of the said statute. By such instruction, the exemption from payment of excise tax during the recovery period under Section 81 of Republic Act No. 7942 was made applicable to existing FTAA contractors upon the effectivity of the law. However, as will be discussed later, Oceanagold was not yet in the recovery period when Republic Act No. 7942 became effective. Indeed, Oceanagold was still in its mineral exploration stage in 1995 and was not yet declared to be in the recovery period.[103] In examining whether Oceanagold complied with the requirements to avail of such exemption during the recovery period, reference must now be made to the relevant provisions of Republic Act No. 7942, which have superseded the terms of the FTAA in accordance with the first proviso of Section 112.

Effect of the application of Republic Act No. 7942 to the detriment requirement under the FTAA

Essentially, there are two important provisions in the FTAA that are at play with regard to the detriment requirement. The first provision, embodied in Section 11.2 of the FTAA, pertains to the recovery by Oceanagold of its pre-operating and property expenses for a certain period, after which the government's share in Oceanagold's net revenue will begin to accrue. It 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 [] 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 NET REVENUE, as hereinafter defined, accrue.[104]

. . . .

All taxes, duties, fees, costs, levies[,] and imposts paid by the CONTRACTOR and which are detrimental to the CONTRACTOR's recovery of Pre[-]operating Expenses and Property Expenses during the five [] 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.[105] (Emphasis supplied)

Evident from the above-quoted provision is that during the so-called recovery period, or the five contract years starting from the date of commencement of commercial production, Oceanagold is not obligated to remit the

Government's share in its net revenue. Only after such period shall the government's share accrue.

The term "accrue" means "to come into existence as an enforceable claim." [106] Thus, the government's share in the net revenue of Oceanagold will only become an "enforceable claim" upon the lapse of the five-year recovery period.

However, in another paragraph of Section 11.2 of the FTAA, it is provided that a tax, that is detrimental to Oceanagold's recovery of pre-operating and property expenses, may be recovered, whenever possible, during the year such tax was paid. The provision is clear as to the inclusion of a specific qualifier—that the tax collected, even during the recovery period, must be detrimental to Oceanagold's recovery of pre-operating and property expenses.

Moreover, the FTAA contemplates a scenario where excise tax, which was collected by the government during the recovery period, may be recovered by Oceanagold. If recovery or refund is not feasible, then such payment may be deducted from the government's share in the net revenue.

The other important provision in the FTAA can be found in its Section 11.5 which, recognizes the scenario that the excise tax paid even during the recovery period may be deducted from the government's share in the net revenue of Oceanagold. The provision reads:

11.5 The GOVERNMENT's Share. . . .

. . . .

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 the 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 raid 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 excise tax, in which case the deduction shall be made only after the appropriate legislation has been passed[.][107] (Emphasis in the original)

Section 11.5 of the FTAA provides that 60% of the net revenue of Oceanagold will be shared to the government, while the 40% is retained by the former. However, the government's share will be deducted by the amount of excise tax that Oceanagold had paid, including excise tax paid during the recovery period. Thus, the FTAA recognizes that, even if the government's share in the net revenue will only accrue after the lapse of the recovery period, there is still that instance when excise tax may be paid by Oceanagold during the recovery period.

However, as previously discussed, Republic Act No. 7942, although enacted later than the FTAA, should also be applied. Of particular importance is Section 81 of Republic Act No. 7942, which reads:

Section 81

Government Share in Other Mineral Agreements

. . . .

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.[108] (Emphasis supplied)

Contrary to the CTA En Banc's ruling, the requirement that a tax must be "detrimental" to Oceanagold's recovery of Pre-operating and Property Expenses is no longer applicable, as Republic Act No. 7942 explicitly allows for the recovery of these relevant expenses. While the FTAA provisions recognize Oceanagold's entitlement to recover excise taxes paid during the Recovery Period—either through a direct refund or by deducting the amount from the Government's share in net revenue—Republic Act No. 7942 further reinforces this entitlement. The law provides that the Government's share in the FTAA shall only commence after the contractor has fully recovered its pre-operating expenses, including exploration and development expenditures. Section 81 of Republic Act No. 7942 aligns with and strengthens the FTAA's framework by ensuring that Oceanagold is not prematurely burdened with tax obligations that could hinder its cost recovery during the Recovery Period.

It is a rule in statutory interpretation that the deletion of certain words or phrases indicates of an intention to change the law's meaning.[109] The authors of Republic Act No. 7942 did not impose a detriment requirement similar to that found in Section 11.2 of the subject FTAA when they drafted Section 81. Noticeably, there is nothing in Section 81 or in any other provision of Republic Act No. 7942 which imposes such requirement. Consequently, any excise taxes paid during the recovery period should be recoverable without the need to establish detriment, as the law itself grants this right unequivocally.

This view is further supported by DENR Administrative Order 99-56,[110] which provided the guidelines in establishing the fiscal regime of FTAA's. Section 2(g) reads:

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 stamps 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. (Emphasis supplied)

Thus, under the fiscal regime for FTAAAs as implemented by the DENR, excise taxes should not be collected from FTAA contractors upon the date of approval of its Mining Project Feasibility Study until the end of the Recovery Period. In the event that excise taxes are collected during this period, the government shall refund the same to the FTAA contractor within the end of the next taxable year. If this is not applicable, the excise taxes thus paid shall form part of the Government Share in such period.

Evident from this interpretation by the DENR Secretary when DENR Administrative Order 99-56 was issued, is

that excise taxes erroneously collected within the recovery period of the FTAA Contractor shall be refunded sans any mention of the detriment requirement. This contemporaneous construction of the DENR Secretary, who is the primary officer reposed with the authority to promulgate such rules and regulations necessary to implement Republic Act No. 7942,[111] is entitled to great weight by the Court.[112]

Section 81 of Republic Act No. 7942 has made it clear that FTAA contractors shall enjoy excise tax exemption during their respective recovery periods. To impose an additional requirement not present in the written statute contravenes the purpose that animated its enactment: to promote the mining industry and grant the necessary incentives to operationalize such objective. As succinctly held by the Court, "taxpayer-claimant should not be required to submit additional documents beyond what is required by the law; the taxpayer-claimant should enjoy the exemption it has, by law, always been entitled to." [113]

However, despite the non-application of the detriment requirement, as will be discussed in the following paragraphs, the excise taxes in G.R. No. 263004 were paid beyond the recovery period, precluding Oceanagold's entitlement to any refund.

Proper reckoning of the Recovery Period

In its Motion for Reconsideration[114] in G.R. No 251453, dated June 14, 2022, Oceanagold insists that the subject excise taxes collected from February to March 2013 and April to June 2013 were paid within the five-year recovery period.[115] Thus, the payment of such excise taxes should be refunded as the same were erroneously collected.

Oceanagold submits that: (a) the failure to strictly comply with the timetable under the FTAA constitutes a mere slight or casual breach of contract; (b) it was able to achieve the 15% production capacity only on February 26, 2013; (c) there is nothing in the FTAA that provides for the withdrawal of its entitlement on the full recovery of pre-operating expenses in the event it fails to comply with the FTAA's timeline; and (d) since the government did not rescind the FTAA pursuant to Section 19.2 of the FTAA, the obligations of the parties thereon, including the government's obligation to allow the Oceanagold to recover its pre-operating expenses, shall continue.[116]

The arguments are unmeritorious.

The Recovery Period is one of the tax incentives provided to contractors under Republic Act No. 7942. The purpose is to allow contractors to recoup their expenses in the pre-operation stage before mandating them to pay the government's share, which includes excise taxes. This is essentially a grace period extended to contractors in recognition of the fact that mining is a capital-intensive industry, and all risks are assumed by the contractor. As the Court recognized in the landmark case of *La Bugal-B'laan v. Ramos*[117] "[r]esources valued in the tens or hundreds of millions of dollars, are invested in a mining project that provides no assurance whatsoever that any part of the investment will be ultimately recouped." [118]

Section 81 of Republic Act No. 7942 provides that the Government's share in the FTAA, which includes excise taxes, shall be collected after the contractor has fully recovered its pre-operating expenses, exploration, and development expenditures.

Evidently, as noted by the Court, Republic Act No. 7942 does not set a limit for the period of non-collection or a specific recovery period. However, DENR Administrative Order Nos. 95-23 and 96-40, both of which implement Republic Act No. 7942, consistently provide that the recovery period is five years from the date of commercial operation or until the date of actual recovery, whichever comes earlier.[119]

Section 214 of DENR Administrative Order No. 96-40 provides that:

Section 214. Government Share in FTM. – [...]

....

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.[120] (Emphasis supplied)

Moreover, as observed by the Court, the term "commercial operation" is defined in reference to "commercial production," or the date "declared by the Contractor or as stated in the feasibility study, whichever comes first." [121] The pertinent provision's read:

Administrative Order No. 95-23

Chapter II

Section 4(g) "Commercial Production" refers to the production of sufficient quantity of minerals of sustained 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 supplied.)

....

Administrative Order No. 96-40

Chapter I

Section 5(i) "Commercial Production" refers to the production of sufficient quantity of materials 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 supplied.)

Meanwhile, Section 11.2 of the FTAA provides that Oceanagold shall have up to five years counted from the date of commencement of commercial production to recover pre-operating expenses. Thus:

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 [] 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 NET REVENUE, as hereinafter defined, accrue.[122]

Section 2.14 of the FTAA also defines the Date of Commencement of Commercial Production, as:

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.[123]

Clearly, under DENR Administrative Order Nos. 95-23 and 96-40, two dates are important to determine the reckoning of the recovery period: (a) the date declared as the start of commercial operation by the contractor or the date of commencement of commercial production, as defined under the FTAA; or (b) the date Oceanagold declared as the start of commercial production in its feasibility study, as defined under DENR Administrative Order Nos. 95-23 and 96-40. Whichever of the two dates comes earlier marks the start of the recovery period. According to the Administrative Orders, the reckoning point is not left solely to the discretion of the contractor

but is objectively fixed as whichever of these two dates occurs first. This dual framework ensures a balance between allowing the contractor to manage operational realities, and safeguarding the government's right to timely receive its share of revenues. The mandate for the earlier date serves as the definitive start of the recovery period, preventing any undue delay in the contractor's financial obligations and upholding the regulatory framework governing mining operations.

In this regard, Oceanagold submitted a PDMF on March 15, 2005, stating that it found "sufficient Ore reserves and diluted resource of 23.7 million tonnes of 1.8g/t Au and 0.64% Cu ... and such ore reserves have been delineated to sustain the mining operation of the corporation for some 14 years," and that "mining operation... will process gold and copper at 2 million ton[s] per annum...." The same was approved by the MGB on October 11, 2005.[124]

On the other hand, Oceanagold insists that on March 27, 2013, it advised the DENR Secretary that "on February 2, 2013, the Didipio Project was able to mill 301,903 tonnes and achieve [] 15% production capacity." Thus, according to it, the "Date of Commencement of Commercial Production in accordance with Section 2.14 of the FTAA is April 1, 2013, which is the first day of the second calendar quarter." [125]

On this point, the Court ruled that:

[Oceanagold] had three years from the approval of its Partial Declaration of Mining Feasibility on October 11, 2005, or until October 11, 2008, to develop and construct mining production facilities. After that, [Oceanagold] had to submit within 30 days another Work Program for three years for the actual production activities. [Oceanagold] shall start commercial production. Failure to begin production within the prescribed period is a substantial breach of the FTAA.[126] (Emphasis supplied)

However, it was only on March 27, 2013, or eight years from the approval of the PDMF when Oceanagold advised the DENR Secretary that it was able to mill 301,903 tonnes and achieve the 15% production capacity, and thus, Oceanagold claimed that the date of commencement of commercial production in accordance with Section 2.14 of the FTAA is April 1, 2013.[127] This claim is wholly erroneous.

Pursuant to the FTAA and based on the PDMF, Oceanagold should have commenced commercial operation and production in the fourth quarter of the year 2008. To be more precise, the PDMF was approved on October 11, 2005. Oceanagold had three years to complete the development of the mine, including the construction and production facilities, from the date of approval of the PDMF until October 2008. After which, the contractor shall commence actual production and had 30 days to submit a work program of such actual production for a period of three years. The Contractor shall further have 15 days to notify the government of such commencement of commercial production.

Based on the above, the commencement of the recovery period should have been in October 2008, which is the date earlier than the date of commencement of commercial production or the date declared by Oceanagold to be the start of commercial production, which is April 1, 2013. The relevant provisions of the FTAA read:

SECTION VII

FEASIBILITY STUDY AND RELINQUISHMENT

7.1 Mining Feasibility. During the Exploration Period, the CONTRACTOR shall conduct feasibility studies for any part of the Exploration Contract area as may be warranted. At any time prior to six (6) months from the expiration of the Exploration Period, the CONTRACTOR, if it elects to transform the Exploration Contract Area into a Mining Area as provided in Section VIII of this Agreement, shall submit a Declaration of Mining Feasibility with a Work Program and Budget for development for the next succeeding three [] years, indicating therein the Mining Area.

Areas not delineated as part of the Mining Area shall be relinquished pursuant to the following section.

Failure of the CONTRACTOR to submit a Declaration of Mining Feasibility within the prescribed period shall be considered a waiver of the CONTRACTOR's right to transform the Exploration Contract Area into a Mining Area as provided in Section VIII of this Agreement.

....

SECTION IX

MINE DEVELOPMENT AND CONSTRUCTION PERIOD

9.1 Timetable. The CONTRACTOR shall complete the development of the mine, including the construction of production facilities, within [36] months from the date of the approval of the Declaration of Mining Feasibility, subject to such extension based on justifiable reasons as the Secretary may approve.

9.2 Work Program and Budget. The CONTRACTOR shall develop and construct the production facilities in the Mining Area in accordance with the Work Program included in the Declaration of Mining Feasibility referred to in Section 7.1 of this Agreement, spending at least US[D] 50,000,000, less any amount of Exploration expenditures it has already spent.

....

SECTION X

PRODUCTION PERIOD

10.1. Timetable. The CONTRACTOR shall submit to the Government, through the Secretary, copy furnished to the Director of the Mines and Geosciences Bureau, within [30] days from the completion of the construction facilities, a Work Program for a period of three [] years.

The CONTRACTOR shall commence Commercial Production according to the period(s) specified in the approved Work Program and the CONTRACTOR shall advise the Government within [15] days therefrom that Commercial Production has commenced.

Failure of the CONTRACTOR to commence Commercial Production within the period, except as may be excused by Force Majeure as stated in Section 20.4 hereof or other justifiable causes, shall be considered a substantial breach of this Agreement.[128] (Emphasis supplied)

Moreover, in BIR Ruling No. 10-07, dated May 4, 2007, Oceanagold represented that it was "expected to start commercial operations in June 2007, which was, however, extended to December 2007; that [the] initial commercial production is now expected to commence on the 4th quarter of 2008." [129] Under Article 1431 of the Civil Code, a representation is rendered conclusive upon the party making it, and it cannot be denied against the person relying on such representation.[130] The doctrine of estoppel is applicable here. Thus, Oceanagold is precluded from claiming a different starting date of the recovery period when it benefitted from the confirmation of tax exemptions under BIR Ruling No. 10-07 based on its own representations.

Having failed to comply with the pertinent provisions of the FTAA, Oceanagold cannot now seek a refund under the very same agreement it did not adhere to. Although it paid the excise taxes within the recovery period, it did not satisfy the conditions necessary to avail of the corresponding benefit. As the Court emphasized in the assailed Resolution, tax refunds must be construed in strictissimi juris against the party claiming the exemption.[131]

While the recovery period under the FTAA is undeniably a form of tax incentive aimed at fostering investment in the Philippine mining industry, it is not an unconditional privilege but rather one granted under specific and well-defined circumstances. The primary objective of this incentive is to contribute to the broader goal of national

development. Although the contractor benefits from this provision, such benefit must be balanced against the paramount interest of the State. The overarching purpose of the recovery period cannot be undermined by allowing the contractor to exercise unchecked discretion in determining compliance with the FTAA provisions. It must be emphasized that taxes are the lifeblood of the government, and any undue delay in their collection affects the government's ability to deliver public services.[132]

The Court emphasizes that to fully benefit from the recovery period, the contractor must not only establish that the relevant taxes were collected or paid during the recovery period, but must also demonstrate compliance with all applicable legal and contractual conditions under the applicable FTAA, as well as with Republic Act No. 7942 and its IRR.

Applying the same framework to the excise taxes paid in G.R. No. 263004, the Court rules that Oceanagold failed to establish that the excise taxes were paid within the recovery period. Records show that the excise taxes were paid from June to December 2014, whereas the recovery period commenced in October 2008 and concluded five years later or in October 2013. Clearly, the payments were made beyond this prescribed period. While the Court acknowledges that the issue of the reckoning of the recovery period was not raised in the Petition—thus preventing Oceanagold from presenting evidence of compliance with the relevant legal and contractual conditions—it finds no compelling reason to grant further opportunity for such demonstration, as the excise taxes were indisputably paid beyond the recovery period.

To be precise, non-compliance with the timelines set under the FTAA cannot be regarded as a mere casual breach, as Oceanagold posits. The FTAA itself provides that the same is a substantial breach.

SECTION X PRODUCTION PERIOD

10.1 Timetable.

....

Failure of the CONTRACTOR to commence Commercial Production within the period, except as may be excused by Force Majeure as stated in Section 20.4 hereof or other justifiable causes, shall be considered a substantial breach of this Agreement.[133] (Emphasis supplied)

As a matter of fact, the FTAA recognizes the realities faced by the contractors by allowing the suspension of obligations to defer the recovery period under Section 20.4 of the FTAA. The same provides:

20.4 Suspension of Obligations.

(a) Any failure or delay on the part of any party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to Force Majeure.

(b) If Mineral Exploration and/or Mining Operations are delayed, curtailed or prevented by such Force Majeure causes, then the time for enjoying the rights and carrying out the obligations thereby affected, the term of this Agreement and all rights and obligations hereunder shall be extended for a period equal to the period thus involved.

(c) The party whose ability to perform its obligations is affected (i) shall promptly give Notice to the other in writing of any such delay or failure in performance, the expected duration thereof, and its anticipated effect on the party expected to perform, and (ii) shall use its best effort to remedy such delay, except that neither party shall be under any obligation to settle a labor dispute.

(d) This Agreement and the performance all the obligations of the CONTRACTOR under the same shall be

deemed suspended if the prosecution of the CONTRACTOR's obligations under this Agreement is prevented by delays in obtaining approvals of the GOVERNMENT, both national and local, including statutory authorities, to any matter or aspect of this Agreement in which such approvals are necessary, provided that the delays are not due to the fault of the CONTRACTOR.[134]

Oceanagold would have been granted leeway under the terms of the FTAA had it sufficiently proven that it was compelled to halt operations due to escalating costs or uncertainties in the financial market and that the same is tantamount to force majeure under Section 20.4 of the FTAA. However, as ruled by the CTA En Banc, Oceanagold failed to present adequate evidence to substantiate its claims. Without such proof, it cannot now invoke the Court to take judicial notice as a last resort, and claim that "it may take as many as 11 years before a FTAA contractor can start commercial production." [135] Allowing such a proposition would render the timelines in the FTAA meaningless and open the door to untold abuse of the recovery period provision.

In sum, Oceanagold cannot be permitted to breach or manipulate the terms of the FTAA by arbitrarily postponing the commencement of commercial operations. Such an approach would effectively delay the start of the recovery period, resulting in an undue deferment of the government's rightful share of revenues. While fostering a favorable investment climate in the mining industry is vital, this cannot come at the expense of the State's fiscal stability or its long-term development objectives, not to mention the depletion of its finite resources. Hence, strict compliance with the terms of the FTAA is imperative in order to benefit from its fiscal incentives.

In conclusion, the request for a refund of excise taxes or the issuance of tax credit certificates in G.R. No. 251453, covering payments made from February to June 2013, and in G.R. No. 263004, for payments made from June to December 2014, are denied for lack of merit.

ACCORDINGLY, the Motion for Reconsideration in G.R. No. 251453 and the Petition for Review on Certiorari in G.R. No. 263004 are DENIED. The Resolution, dated February 15, 2022, of the Court in G.R. No. 251453 STANDS AFFIRMED. The Decision, dated May 31, 2022, and the Resolution, dated September 1, 2022, of the Court of Tax Appeals En Banc in CTA EB No. 2492, are also AFFIRMED.

SO ORDERED.

Gesmundo, C.J., Leonen, S.J., Hernando, Lazaro-Javier, Inting, Zalameda, Gaerlan, Rosario, Dimaampao, Marquez, and Villanueva, JJ., concur.

Caguioa, [*] J., dissent.

Lopez, [*][*] J., on official leave but left a concurring vote.

Kho, Jr., [*][*][*] J., on official business.

[*] Dissenting.

[*][*] On official leave but left a concurring vote.

[*][*][*] On official business.

[1] Rollo (G.R. No. 263004), pp. 44-76.

[2] Id. at 80-100. The May 31, 2022 Decision in CTA EB No. 2492 was penned by Presiding Justice Roman G. Del Rosario and concurred in by Associate Justices Juanito C. Castañeda, Jr., Erlinda P. Uy, Catherine T. Manahan, Jean Marie A. Bacorro-Villena, Maria Rowena Modesto-San Pedro, Marian Ivy F. Reyes-Fajardo, and Lane S. Cui-David of the Court of Tax Appeals En Banc, Quezon City. Associate Justice Ma. Belen M. Ringpis-Liban issued a Concurring and Dissenting Opinion.

[3] Id. at 108-112. The September 1, 2022 Resolution in CTA EB No. 2492 was penned by Presiding Justice Roman G. Del Rosario and concurred in by Associate Justices Erlinda P. Uy, Catherine T. Manahan, Jean Marie A. Bacorro-Villena, Maria Rowena Modesto-San Pedro, and Lane S. Cui-David of the Court of Tax Appeals En Banc, Quezon City.

[4] Id. at 120-147. The October 7, 2020 Decision in CTA Case No. 9289 was penned by Associate Justice Ma. Belen M. Ringpis-Liban and concurred in by Associate Justice Erlinda P. Uy of the Third Division, Court of Tax Appeals, Quezon City. Associate Justice Maria Rowena Modesto-San Pedro issued a Concurring and Dissenting Opinion.

[5] Id. at 114-118. The March 12, 2021 Resolution in CTA Case No. 9289 was penned by Associate Justice Ma. Belen M. Ringpis-Liban and concurred in by Associate Justices Erlinda P. Uy and Maria Rowena Modesto-San Pedro of the Third Division, Court of Tax Appeals, Quezon City.

[6] Id. at 12-45.

[7] Rollo (G.R. No. 251453), pp. 46-75. Penned by Associate Justice Juanita C. Castañeda, Jr. and concurred in by Associate Justices Roman G. Del Rosario, Erlinda P. Uy, Cielito N. Mindaro-Grulla, Ma. Bellen M. Ringpis-Liban, Catherine T. Manahan, Jean Marie A. Bacorro-Villena and Maria Rowena Modesto-San Pedro of the Court of Tax Appeals En Banc, Quezon City.

[8] Id. at 76-85. Penned by Associate Justice Juanito C. Castañeda, Jr. and concurred in by Associate Justices Roman G. Del Rosario, Cielito N. Mindaro-Grulla, Ma. Bellen M. Ringpis-Liban, Catherine T. Manahan, Jean Marie A. Bacorro-Villena, Maria Rowena Modesto-San Pedro of the Court of Tax Appeals En Banc, Quezon City.

[9] Id. at 104-134. Penned by Associate Justice Lovell R. Bautista, and concurred in by Associate Justices Esperanza R. Fabon-Victorino, and Ma. Belen M. Ringpis-Liban of the Third Division, Court of Tax Appeals, Quezon City.

[10] Id. at 87-101. Penned by Associate Justice Ma. Belen M. Ringpis-Liban and concurred in by Associate Justices Erlinda P. Uy and Maria Rowena Modesto-San Pedro of the Third Division, Court of Tax Appeals, Quezon City.

[11] Id. at 18.

[12] Id.

[13] Id. at 19.

[14] Id. at 21.

[15] Id.

[16] Id. at 21-22, 49.

[17] Id. at 48-49.

[18] Id. at 49.

[19] Id.

[20] Id. at 22.

[21] Id. at 49.

- [22] Id.
- [23] Id.
- [24] Id. at 22.
- [25] Id. at 22, 50.
- [26] Id. at 50.
- [27] Id.
- [28] Id. at 23.
- [29] Id.
- [30] Id. at 50.
- [31] Id.
- [32] Id.
- [33] Id. at 51.
- [34] Id.
- [35] Id.
- [36] Id. at 104.
- [37] Id.
- [38] Id. at 52.
- [39] Id. at 133-134.
- [40] Id. at 130.
- [41] Id. at 128.
- [42] Id. at 130.
- [43] Id. at 131-132.
- [44] Id. at 87-101.
- [45] Id. at 74.
- [46] Id. at 63.
- [47] Id. at 64.
- [48] Id. at 69.
- [49] Id.
- [50] Id. at 73, 78.
- [51] Id. at 76-85.
- [52] Id. at 345.

[53] Id. at 343.

[54] Id. at 342.

[55] Id. at 344.

[56] Id.

[57] Id. at 345.

[58] Rollo (G.R. No. 263004), p. 81.

[59] Id. at 82.

[60] Id.

[61] Id.

[62] Id. at 83.

[63] Id. at 144.

[64] Id. at 131-133.

[65] Id. at 133-138.

[66] Id. at 143.

[67] Id. at 461-476.

[68] Id. at 114-118.

[69] Id. at 482-522.

[70] Id. at 102.

[71] Id. at 88-98.

[72] Id. at 98-99.

[73] Id. at 99-102.

[74] Id. at 39.

[75] III Record, Senate, 9th Congress, Third Regular Session (January 16, 1995).

[76] See *Miners Association of the Philippines, Inc. v. Factoran*, 310 Phil. 113, 130-131 (1995) [Per J. Romero, En Banc].

[77] Id. at 131.

[78] Executive Order No. 211 (1987), Whereas clauses.

[79] Executive Order No. 279 (1987), Whereas clause, par. 3.

[80] Executive Order No. 279 (1987), Whereas clause, par. 4

[81] Published in the July 3, 1989 issue of the *Philippine Daily Inquirer*, a newspaper of general circulation, and became effective on July 18, 1989.

[82] See *Miners Association of the Philippines, Inc. v. Factoran*, 310 Phil. 113, 124 (1995) [Per J. Romero, En Banc].

[83] Published in the December 21, 1990 issue of the *Philippine Daily Inquirer*, a newspaper of general circulation, and became effective on January 5, 1991.

[84] 310 Phil. 113 (1995) [Per J. Romero, En Banc].

[85] *Id.* at 135.

[86] DENR Administrative Order No. 82-A (1990).

[87] III Record, Senate, 9th Congress, Third Regular Session (January 16, 1995).

[88] III Record, Senate, 9th Congress, Third Regular Session (January 16, 1995).

[89] *Id.*

[90] Republic Act No. 7942 (1995), sec. 2.

[91] 486 Phil. 754 (2004) [Per J. Panganiban En Banc].

[92] Rollo (G.R. No. 263004), pp. 59-63.

[93] Republic Act No. 7942 (1995), sec. 3(p).

[94] *Id.* sec. 3(r).

[95] DENR Administrative Order No. 95-936 (1995), sec. 3(ag).

[96] Republic Act No. 7942 (1995), sec. 3(g). Emphasis supplied.

[97] DENR Administrative Order No. 96-40 (1996), sec. 272.

[98] Rollo (G.R. No. 251453), p. 185.

[99] III Record, Senate, 9th Congress, Third Regular Session (January 16, 1995).

[100] Rollo (G.R. No. 263004), pp. 59-66.

[101] 537 Phil. 473 (2006) [Per J. Chico-Nazario, First Division].

[102] *Id.* at 486-487.

[103] Rollo (G.R. No. 251453), p. 21.

[104] Rollo (G.R. No. 263004), p. 89.

[105] *Id.* at 100.

[106] *H. Villarica Pawnshop, Inc. v. Social Security Commission*, 824 Phil. 613, 630 (2018) [Per J. Gesmundo Third Division].

[107] Rollo (G.R. No. 263004), pp. 89-90.

[108] Republic Act No. 7942 (1995), sec. 81.

[109] *Obiasca v. Basallote*, 626 Phil. 775, 794 (2010) [Per J. Corona, En Banc].

[110] Guidelines establishing the Fiscal Regime of Financial and Technical Assistance Agreements, December

27, 1999.

[111] Republic Act No. 7942 (1995), sec. 8.

[112] See Nestle Philippines, Inc. v. Court of Appeals, 280 Phil. 548, 556 (1991) [Per J. Feliciano First Division].

[113] Commissioner of Internal Revenue v. United Cadiz Sugar Farmers Association Multi-Purpose Cooperative, 802 Phil. 636, 657 (2016) [Per J. Brion, Second Division].

[114] Rollo (G.R. No. 251453), pp. 360-382.

[115] Id. at 361.

[116] Id. at 370-371.

[117] La Bugal-B-laan, Tribal Association, Inc. v. Ramos, et. al., 486 Phil. 754 (2004) [Per J. Panganiban, En Banc].

[118] Id. at 876.

[119] See DENR Administrative Order No. 95-23 (1995), sec. 236; DENR Administrative Order No. 96-40 (1996), sec. 214.

[120] DENR Administrative Order No. 96-40 (1996), sec. 214.

[121] See DENR Administrative Order No. 95-23 (1995), sec. 4(g), DENR Administrative Order No. 96-40 (1996), sec. 5(i).

[122] Rollo (G.R. No. 251453), p. 300.

[123] Id.

[124] Id. at 302.

[125] Id. at 301.

[126] Id. at 343.

[127] Id. at 301.

[128] Id. at 302-304.

[129] Id. at 304. Emphasis supplied.

[130] CIVIL CODE, art. 1431 states:

Through estoppel an admission or representation is rendered conclusive upon the person making it, and cannot be denied or disproved as against the person relying thereon.

[131] Rollo (G.R. No. 251453), p. 345.

[132] See Commissioner of Internal Revenue v. Yumex Philippines Corporation, 902 Phil. 87, 100 (2021) [Per C.J. Gesmundo, First Division].

[133] Rollo (G.R. No. 251453), pp. 155-156.

[134] Id. at 185-186.

[135] Id. at 367.

DISSENTING OPINION

CAGUIOA, J.:

The crux of the controversy in the consolidated cases is whether petitioner Oceanagold (Philippines), Inc.[1] (OGPI) is entitled to a refund or the issuance of a tax credit certificate (TCC) for the allegedly erroneous or illegal collection of excise taxes. Specifically, OGPI seeks the refund of or the issuance of a TCC for the following: (1) PHP 25,843,462.11 and PHP 42,785,549.13; representing excise taxes paid for the periods from February to March 2013 and April to June 2013, respectively, in G.R. No. 251453;[2] and (2) PHP 136,407,793.17, representing excise taxes paid for the period covering June to December 2014, in G.R. No. 263004.[3]

The ponencia finds that OGPI is not entitled, primarily because OGPI failed to establish that its collection of copper concentrates from February to June 2013 and from June to December 2014, upon which excise taxes were paid, was still within the "tax-exempt" five-year recovery period provided under Republic Act No. 7942,[4] and the Financial or Technical Assistance Agreement (FTAA) it had entered into with the Philippine Government. For the ponencia, the five-year recovery period commenced in the fourth quarter of 2008.

Notably, however, the ponencia now recognizes two key propositions that I had earlier set forth: first, that Republic Act No. 7942 effectively amended the FTAA by imposing a statutory fiscal regime governing government share; and second, that OGPI is not required to prove that the payment of excise taxes during the recovery period was detrimental to the recovery of its pre-operating and property expenses. These are important clarifications that align with both the letter and the spirit of Republic Act No. 7942.

Nonetheless, I respectfully disagree with the ruling insofar as it takes a different view of the proper reckoning of the recovery period, and thereby erroneously denies OGPI's rightful claims for refund or issuance of TCC.

I submit that, pursuant to both the FTAA and Republic Act No. 7942, OGPI was still within its five-year recovery period when it paid the subject excise taxes during the period from April to June 2013 and June to December 2014. Accordingly, OGPI's claim for tax refund or the issuance of TCCs should be granted.

The proper reckoning point of the five-year recovery period during which OGPI is exempt from taxes.

In 1994, OGPI and the Philippine Government entered into an FTAA. for the mineral exploration and subsequent large-scale development and commercial utilization of mineral deposits. A salient feature of the FTAA is that it provides OGPI with a five-year period to recover its pre-operating expenses.

OGPI filed a Partial Declaration of Mining Feasibility (PDMF) with the Department of Environment and Natural Resources (DENR), which was approved in an Order dated October 11, 2005.[5]

Subsequently, on February 13, 2007, OGPI submitted a request for ruling with the respondent. Commissioner of Internal Revenue (CIR) confirming its exemption from the payment of excise tax on minerals during the recovery period. Accordingly, under the Bureau of Internal Revenue (BIR) Ruling No. 010-07, the BIR declared that OGPI is exempt from payment of excise tax from the date of approval of its Mining Project Feasibility Study up to the end of the recovery period pursuant to the FTAA, Republic Act No. 7942, and its Implementing Rules and Regulations.

In December 2008, OGPI halted further mine development due to escalating costs and uncertainty in the financial markets, which lasted until December 2010.

Given that OGPI had already mined 15% of its initial annual production capacity by the end of February 2013,

OGPI informed the DENR, through a letter dated March 27, 2013, that the date of commencement of its commercial production is April 1, 2013.

On various dates in February 2013, the BIR seized and detained OGPI's copper concentrates in transit to the buyer. As a result, OGPI paid excise taxes under protest.

Thereafter, OGPI filed with the BIR a claim for refund or issuance of TCC for the excise taxes paid from February to June 2013. This is the refund claim subject of G.R. No. 251453.

OGPI likewise filed with the BIR a claim for refund or issuance of TCC for the excise taxes paid from June to December 2014, which the BIR denied. This is the refund claim subject of G.R. No. 263004.

The ponencia holds that the recovery period in the subject FTAA began in October 2008, or five years before the date OGPI advised the Government that it had achieved 15% of its design production capacity, and accordingly concludes that the excise taxes paid by OGPI from February to June 2013 (in G.R. No. 251453) and from June to December 2014 (in G.R. No. 263004) were made beyond the recovery period and are therefore non-refundable. In my view, this conclusion is not supported by the text of the FTAA, Republic Act No. 7942, and the established facts on record. It rewrites the fiscal regime agreed upon by the parties and substitutes a hypothetical production date for the objective production threshold expressly required by Section 2.14 of the FTAA.

In the 2022 case of *OGPI v. CIR*[6] (2022 OGPI case, or in G.R. No. 251453), involving the same parties but for a different period of excise tax payments, specifically from February to June 2013, the Court was called upon to decide the commencement of the five-year recovery period during which OGPI is exempt from taxes. The First Division of the Court concluded that OGPI failed to establish that the excise taxes paid from February to June 2013 were collected within the five-year recovery period. Pertinent portions of the said ruling are herein quoted for ready reference:

[A] scrutiny of the FTAA reveals that although OGPI is given latitude in setting the reckoning point of the five-year recovery period, there is a specific and strict timetable for the conduct of pre-operation activities, i.e., mining feasibility, the development of the mine, and construction of production facilities, as well as the period within which OGPI should start commercial production.

....

The CTA En Banc aptly observed that OGPI had three years (3) from the approval of its Partial Declaration of Mining Feasibility on October 11, 2005, or until October 11, 2008, to develop and construct mining production facilities. After that, OGPI had to submit within thirty (30) days another Work Program for three (3) years for the actual production activities. OGPI shall start commercial production accordingly. Failure to begin production within the prescribed period is a substantial breach of the FTAA.

....

It was only in 2013, or about eight (8) years after the approval of the Partial Declaration of Mining Feasibility on October 11, 2005, that OGPI officially declared the start of its commercial production. OGPI claimed it was "constrained to halt further mine development in the Didipio Project due to escalating costs and uncertainty in the financial markets." Thus, it placed Didipio Project on "care and maintenance." Yet, apart from the testimony of OGPI's Senior Vice President for Legal and Human Resources, OGPI did not submit supporting documents to show that it indeed stopped pre-operation activities from December 2008 to December 2010, how the market conditions affected OGPI's operation, and that it promptly notified the Government of the delay or its inability to continue operations. We reiterate that bare allegations are not proof. Therefore, the Court agrees with the tax court that, in the circumstances, OGPI failed to convince that at the time it paid the excise taxes from February to June 2013, OGPI is still within the five-year recovery period.[7] (Emphasis

supplied, italics in the original)

Simply stated, in the 2022 OGPI case, the majority of the First Division ruled that OGPI "should have commenced" commercial operation and production in the fourth quarter of the year 2008. Based on this determination, the majority concluded that OGPI's payment of excise taxes from February to June 2013 was neither erroneous nor illegal, as it was well beyond the recovery period.

I registered a Dissenting Opinion in the 2022 OGPI case, where I took the position that OGPI commenced its commercial production only on April 1, 2013. Thus, it had until April 1, 2018 to recover its pre-operating expenses and thereby qualify for tax exemption.

I explain my reasons for my Dissent in the 2022 OGPI case:

To provide the proper context on the tax exemption of OGPI during the recovery period, it is necessary to examine the relevant provisions of the FTAA and Republic Act No. 7942.

Section 81 of Republic Act No. 7942 provides for the collection of government share in FTAA:

Section 81

Government Share in Other Mineral Agreements.

....

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

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

In recognition of the FTAA contractors' heavily funded investments in a mining project that provides no assurance whatsoever that any part of their investment will be ultimately recouped,[8] Section 81 of Republic Act No. 7942 grants them tax relief in such a way that the collection of government share, including excise taxes, shall commence only after they have fully recovered their pre-operating expenses. In *San Roque Power Corp. v. CIR*,^[9] the Court stated that the grant of tax reliefs is especially important for those "who have been enticed to invest heavily in our [country], and who have done so on the firm assurance that certain tax reliefs and incentives can be availed of in order to enable them to achieve their projected returns on [the] very long-term and heavily funded investments."^[10]

While Section 81 of Republic Act No. 7942 does not specify the exact period for recovering pre-operating expenses, exploration, and development expenditures, the FTAA nonetheless provides for a maximum period of five years, reckoned from the date of commencement of commercial production:

SECTION XI

FISCAL REGIME

....

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 [E]xpenses 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 Net Revenue, as hereinafter defined, accrue.

However, if after the lapse of the period mentioned in the preceding paragraph, the CONTRACTOR has not yet fully recovered its Pre[-]operating Expenses and Property Expense[s] incurred during the Period in which Pre-operating Expenses were incurred, it shall be allowed to recover the same as a depreciation allowance deductible against the distributable Net Revenues over the period of the succeeding three Contract Years.[11] (Emphasis supplied)

Relevantly, the FTAA defines the term "date of commencement of commercial production" as follows:

SECTION II

DEFINITIONS

....

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.[12] (Emphasis supplied)

The definition under Section 2.14 of the FTAA is clear and specific. It ties the start of commercial production—and by extension, the commencement of the recovery period—to an objective production milestone.

From all the foregoing, it is clear that:

a)

The government's share in the FTAA, which it receives through, among others, excise taxes, shall be collected only after OGPI has fully recovered its pre-operating, exploration, and development expenditures;

b)

OGPI has five years from the date of commercial production to recover pre-operating expenses and property expenses incurred during the period in which pre-operating expenses are recovered; and

c)

The date of commencement of commercial production means the first day of the calendar quarter following the quarter in which production equals 15% of the initial annual design capacity.

In sum, the recovery period begins to run only upon the commencement of commercial production and shall be for a maximum period of five years. In turn, the date of commencement of commercial production is reckoned to begin from the first day of the calendar quarter following the quarter in which production equals 15% of the initial annual design capacity. This contractual definition controls. Nothing in the FTAA authorizes the Government, the BIR or even the Court to disregard the 15% production threshold and replace it with a projected date or unfulfilled estimate. Indeed, to allow such substitution would negate the parties' agreed standard and inject uncertainty into a regime meant to provide stability and predictability for long-term extractive investments.

OGPI achieved the required 15% production threshold on February 26, 2013, as confirmed in its letter to the DENR Secretary dated March 27, 2013, wherein it declared:

"We are pleased to advise that on February 26, 2013, the Didipio Project was able to mill 301,903 tonnes and achieve the 15% production capacity. With this development, we wish to inform you that the Date of Commencement of Commercial Production in accordance with Section 2.14 of the FTAA is April 1, 2013, which is the first day of the second calendar quarter." [13] (Emphasis supplied)

Clearly, OGPI has sufficiently established the commencement date of its commercial production to be April 1, 2013, which corresponds to the start of the five-year recovery period. Thus, the five-year recovery period, in which OGPI is exempt from excise taxes, started on April 1, 2013, and ended on April 1, 2018. Even the Court of Tax Appeals (CTA) Division in G.R. No. 263004 applied the abovementioned letter dated March 27, 2013 in concluding that OGPI's recovery period started on April 1, 2013. [14] No contrary evidence exists showing that commercial production occurred earlier, much less in 2008. The ponencia's reliance on a projected timetable, rather than actual production data, has no textual anchor in either Republic Act No. 7942 or the FTAA.

In the case of *La Bugal-B'laan Tribal Association, Inc. v. Ramos* [15] (*La Bugal-B'laan*), the Court explained the rationale behind the contractor's exemption from national taxes during the recovery period, viz.:

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. [16] (Emphasis supplied, citation omitted)

Here, OGPI paid the subject excise taxes in 2013 to 2014 or while the recovery period was still in effect. As such, the payments are considered erroneously or illegally collected taxes. Notably, the BIR itself confirmed OGPI's tax-exempt status during the recovery period. In BIR Ruling No. 010-07 issued in favor of OGPI, it was stated that "[e]xcise tax shall not be collected from [OGPI] upon the date of approval of the Mining Project Feasibility Study up to the end of the recovery period." [17]

Furthermore, OGPI's representation in BIR Ruling No. 010-07 that it is "expected to start commercial operations in June 2007, which was, however, extended to December 2007" [18] and that its "initial commercial production is now expected to commence on the 4th quarter 2008" [19] should not be interpreted to mean that the fourth quarter of 2008 marks the beginning of its recovery period. In BIR Ruling No. 010-07, OGPI simply represented its expected commencement date of commercial production to be the fourth quarter of 2008. Indeed, the wording used is that the initial commercial production is "expected to commence" in the fourth quarter of 2008.

The fourth quarter of 2008 referenced in BIR Ruling No. 010-07 is merely an estimate of when OGPI will start its commercial production. Even the BIR did not state in its ruling that the fourth quarter of 2008 marked the start of the recovery period. What it confirmed was that the recovery period would begin on the date of commercial production. The pertinent portion of BIR Ruling No. 010-07 reads as follows:

WHEREFORE, in view of the foregoing, this Office confirms your opinion that APMI is exempt from the payment of excise tax. Excise tax shall not be collected from APMI upon the date of approval of the Mining Project Feasibility Study up to the end of the recovery period. The recovery period shall be reckoned from the date of commercial operation and shall be for a maximum of five (5) 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 Philippine Mining Act, its implementing rules and regulations particularly DAO 96-40; and the FTAA between the Philippine Government and APMI. It is understood that after the expiration of the said recovery period or until the date of aforesaid actual recovery, whichever comes earlier, APMI shall become subject to excise tax. (Emphasis supplied)

Further, OGPI's letter to the DENR declaring the start of its commercial production to be April 1, 2013 does not in any way contradict BIR Ruling No. 010-07 inasmuch as the latter does not explicitly state that OGPI's recovery period began in the fourth quarter of 2008. On the contrary, BIR Ruling No. 010-07, which confirms OGPI's five-year exemption from excise taxes beginning on the date of commercial production, supports OGPI's letter to the DENR. Undoubtedly, OGPI has clearly established that the excise taxes upon which the refund is being claimed, were paid within the period it is exempt from excise taxes.

The ponencia, however, applies estoppel, citing OGPI's 2007 representation that it expected to commence operations in 2008.[20] Contrary to the ponencia, expectations are not controlling. The FTAA does not provide that projected dates or hopeful estimates override the express contractual definition based on a production threshold. Estoppel cannot serve to reframe a contract or to substitute intention for factual occurrence. Estoppel cannot even be used to rewrite statutes or contracts, much less to impose tax liability where the law expressly prohibits collection. The recovery period is not a matter of intent but a matter of concrete production threshold. Estoppel, in this context, is totally misapplied.

Additionally, the ponencia rules that OGPI is not entitled to the refund claim because it violated the FTAA. Similar to the reasoning in the majority ruling in the 2022 OGPI case, the ponencia holds that OGPI's failure to strictly comply with the timetable under the FTAA within which it should start commercial production is a substantial breach of the FTAA.[21] It was not until 2013 or about eight years after the PDMF was approved on October 11, 2005, that OGPI officially declared the start of its commercial production.[22]

Again, I disagree. The five-year recovery period, within which OGPI is exempt from excise taxes, should be reckoned from the date when the actual commercial production commences. It should not strictly be based on the timetables provided under the FTAA. Otherwise, OGPI's or any other contractor's entitlement to the tax exemption explicitly granted by law would be rendered nugatory. The ponencia's approach treats compliance with construction timetables as a condition precedent to the statutory tax exemption, even though neither Republic Act No. 7942 nor the FTAA provides for such forfeiture.

Under the FTAA's timetable for the development and construction period, OGPI had to construct production facilities within three years from the approval of PDMF[23] on October 11, 2005, or until October 11, 2008. Thereafter, within 30 days from the completion of the construction facilities, OGPI had to submit a Work Program for a period of three years. After which, OGPI is expected to begin commercial production and must advise the government of the commencement of its commercial production.[24]

Following the timetable under the FTAA, the ponencia applies the ruling in the 2022 OGPI case and concludes, quite erroneously, that OGPI should have commenced commercial production in the fourth quarter of 2008.[25] The ponencia further relies on DENR Administrative Order Nos. 95-23 and 96-40, which define "commercial production" by reference to the date "declared by the Contractor or as stated in the feasibility study, whichever comes first." [26] Based on this framework, the ponencia holds that the feasibility-study projection, identified as the fourth quarter of 2008 in the PDMF and reflected in OGPI's representations in BIR Ruling No. 010-07, is the earlier of the two dates and therefore marks the start of the recovery period. The ponencia reasons that adopting the earlier feasibility-study date prevents any undue delay in the Government's receipt of its share.[27]

With due respect, this reliance is completely misplaced. Republic Act No. 7942 itself does not provide any definition of "commercial production," nor does it prescribe a reckoning point for the recovery period. The statute merely states that the Government's share in an FTAA "shall commence after the contractor has fully recovered its pre-operating expenses" and leaves the mechanics of that determination to the FTAA. Therefore, administrative issuances cannot supply a definition or create a reckoning point that the statute itself does not contain, much less

one that is inconsistent with the parties' negotiated terms.

Administrative regulations cannot amend, expand, or override the FTAA's express contractual definition of the "date of commencement of commercial production," which is tied solely to the attainment of 15% production capacity. Section 2.14 of the FTAA is a binding and negotiated contractual term that governs the parties' rights and obligations. It cannot be superseded by an administrative issuance that introduces a different and earlier reckoning point. Administrative issuances may implement Republic Act No. 7942, but they cannot supply a definition inconsistent with, or in substitution of, the terms of an existing FTAA. The recovery period is triggered by the operative fact agreed upon by the parties, which is the actual attainment of the production threshold.

The FTAA provisions the ponencia cites on feasibility studies, construction periods, and work programs govern development, not commercial production. They prescribe phases of project execution but do not purport to establish the start of commercial production for tax purposes. Converting a timetable for construction into a legal start of the recovery period conflates two distinct stages recognized in both the FTAA and Republic Act No. 7942: development (which may span several years) and commercial production (which begins only upon actual output at the specified threshold).

While OGPI failed to strictly comply with the timetable under the FTAA for beginning commercial production due to uncertainty in the financial markets in 2008, the reason for the delay in meeting the timetable in the FTAA is that it can take up to over a decade for contractors to begin commercial production from which they will eventually earn revenue. The Court recognized this in *La Bugal-B'laan* as follows:

Foreign contractors do not just waltz into town one day and leave the next, taking away mineral resources without paying anything. In order to get at the minerals, they have to invest huge sums of money (tens or hundreds of millions of dollars) in exploration works first. If the exploration proves unsuccessful, all the cash spent thereon will not be returned to the foreign investors; rather, those funds will have been infused into the local economy, to remain there permanently. The benefits therefrom cannot be simply ignored. And assuming that the foreign contractors are successful in finding ore bodies that are viable for commercial exploitation, they do not just pluck out the minerals and cart them off. They have first to build camp sites and roadways; dig mine shafts and connecting tunnels; prepare tailing ponds, storage areas and vehicle depots; install their machinery and equipment, generator sets, pumps, water tanks and sewer systems, and so on.

In short, they need to expend a great deal more of their funds for facilities, equipment and supplies, fuel, salaries of local labor and technical staff, and other operating expenses. In the meantime, they also have to pay taxes, duties, fees, and royalties. All told, the exploration, pre-feasibility, feasibility, development and construction phases together add up to as many as eleven years. The contractors have to continually shell out funds for the duration of over a decade, before they can commence commercial production from which they would eventually derive revenues. All that money translates into a lot of "pump-priming" for the local economy.[28] (Emphasis supplied, citations omitted)

Given that the tax exemption granted by the law is premised on achieving production capacity, it would therefore mean that the timetable under the FTAA for development and construction should not be the only period to consider in determining the commencement of the recovery period. Taking into consideration the whole purpose behind the FTAA's, and the animating spirit to entice mining for the benefit of the country, the better approach would be, to look at the commencement date of actual commercial production, as this is the real mark of the start of the recovery period. This approach is supported by *La Bugal-B'laan*, in which the Court stated unequivocally that there can be no recovery without the commencement of actual commercial production:

Granted that the contractors are allowed subsequently to recover their pre-operating expenses, still, that eventuality will happen only after they shall have first put out the cash and fueled the economy. Moreover, in

the process of recouping their investments and costs, the foreign contractors do not actually pull out the money from the economy. Rather, they recover or recoup their investments out of actual commercial production by not paying a portion of the basic government share corresponding to national taxes, along with the additional government share, for a period of not more than five years counted from the commencement of commercial production.

It must be noted that there can be no recovery without commencing actual commercial production.[29] (Emphasis supplied, citation omitted)

Without actual commercial production, the recovery period will not commence to run. In other words, it is the date of the actual commercial production which triggers the running of the recovery period and not the timelines provided in the FTAA. Although the DENR approved OGPI's PDMF on October 11, 2005, and the FTAA contained projected development schedules anticipating construction of facilities by 2008, these timetables were never intended to trigger the recovery period. Again, they merely guided the sequencing of development work. To rule otherwise, that commercial production should be reckoned from the fourth quarter of 2008 following the timetable in the FTAA, renders the definition of the term "date of commencement of commercial production" under Section 2.14 of the FTAA useless and superfluous.

The factual record also shows that OGPI halted all mine development from December 2008 to December 2010 due to escalating costs and global financial uncertainty. This alone defeats the notion that commercial production commenced in 2008. More importantly, the FTAA identifies remedies for noncompliance, but none include deeming commercial production to have commenced by legal fiction. The Government never issued a notice of breach, never suspended the FTAA, and never rescinded it under Section 19.2 of the FTAA.[30] Its own failure to invoke these contractual remedies confirms that projected dates were not regarded as binding production milestones. Absent any governmental declaration of breach, there is no basis to replace Section 2.14's production-based definition with a timetable-based presumption that commercial production occurred in 2008, contrary to the undisputed factual record.

The ponencia's concern that allowing the contractor to determine the start of the recovery period opens the door to abuse[31] is completely misplaced and unwittingly betrays an ignorance of the business of mining. The FTAA does not leave the determination to unchecked discretion, but rather pegs the date to an objective threshold, which is when production reaches 15% of the project's design capacity. This threshold was reached on February 26, 2013, with OGPI promptly notifying the DENR Secretary. This is not arbitrary, as it is compliance with the very definition agreed upon in the FTAA.

To re-emphasize, Republic Act No. 7942 seeks to encourage mining investment in the Philippines by providing a clear fiscal regime, including a recovery period in which contractors are exempt from paying excise taxes. Interpreting this incentive as dependent on strict adherence to projected timetables without regard to actual production defeats the very purpose of the law. The statute was enacted precisely because pre-operating and exploration expenditures span many years before revenues materialize. Conditioning tax relief on perfect adherence to projected construction timetables undermines the legislative intent to provide a predictable fiscal environment and would deter, not encourage, investment.

Therefore, regardless of the timetable provided under the FTAA, the recovery period should commence from the date of the actual commercial production. Simply put, the fourth quarter of 2008 cannot be considered the reckoning point of the recovery period because, at that time, OGPI had not yet reached commercial production or the 15% production capacity required under the FTAA.

Thus, while OGPI was not able to strictly adhere to the timetable in the FTAA, still, the government's share in the

FTAA, which includes excise taxes, may be collected only after the lapse of the recovery period. Consequently, OGPI, during the said recovery period, is not liable to pay any excise tax. Otherwise stated, OGPI is exempt from excise taxes for a period of not more than five years, counted from the date of the commencement of actual commercial production. Considering that OGPI paid the excise taxes during the said recovery period, or from April to June 2013, and June to December 2014, it is therefore entitled to a refund or the issuance of a TCC of the said excise taxes paid.

Even assuming that the recovery period commenced in October 2008 and ended in October 2013, as the ponencia holds, this would only reinforce OGPI's entitlement to a refund in the 2022 OGPI case or in G.R No. 251453. The excise taxes sought to be refunded in that case were paid from February to June 2013, well within the five-year window ending in October 2013. These payments therefore clearly fall within the recovery period, even under the ponencia's own reckoning, and must be considered as erroneously collected. It is internally inconsistent to deny the refund in the 2022 OGPI case while simultaneously applying a timeline that actually supports OGPI's claim.

Even the ponencia acknowledges that the excise taxes paid from February to June 2013 were within the recovery period, but nonetheless denies the refund on the ground of OGPI's alleged noncompliance with the FTAA's development timetable.[32]

Again, with due respect, this approach imposes an extraneous requirement not found in Republic Act No. 7942. The Government's share, excise tax included, was not yet due and demandable during the recovery period. Section 81 of Republic Act No. 7942 does not authorize the Government to collect excise taxes before the end of the recovery period under any circumstance. If the Government was not entitled to collect the tax, then the amounts paid, whether voluntarily or under protest, are, by definition, erroneously or illegally collected and must be refunded.

Hence OGPI is entitled to the refund of excise taxes paid from February to June 2013, if the Court follows the ponencia's conclusion that the recovery period commenced in October 2008 and ended in October 2013.

Under the FTAA and Section 81 of Republic Act No. 7942, OGPI is exempt from payment of excise tax during the recovery period.

The ponencia now agrees that Republic Act No. 7942 served to amend or modify the terms of the subject FTAA.[33] This is a position I have consistently maintained—that Section 112 of Republic Act No. 7942, in express and unequivocal terms, mandates compliance by existing FTAA's with the provisions of the law and its implementing rules and regulations.

Indeed, Republic Act No. 7942 applies to the subject FTAA, as the transitory provision of Republic Act No. 7942 categorically states that all existing FTAA's shall comply with its provisions:

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, 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 of 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 supplied)

The term "all valid and existing mining" contracts includes every mining contract in effect as of the date Republic Act No. 7942 took effect, without any exceptions. Further, the last proviso of Section 112 unequivocally mandates that "financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations." The language of Section 112 is clear, unambiguous, and leaves no room for doubt that FTAA's must adhere to the provisions of Republic Act No. 7942.[34] Consequently, the FTAA in question must comply with Republic Act No. 7942.

Additionally, Section 1.1 of the subject FTAA explicitly states, "[t]his Agreement is a financial or technical assistance agreement entered into pursuant to Executive Order No. 279." [35] Section 112, in unequivocal terms, states that "all valid and existing" agreements "granted under Executive Order No. 279" are immediately subjected to the fiscal regime under Chapter XIV on government share of Republic Act No. 7942.

The CTA En Banc's (CTA EB) reliance on *Lepanto Consolidated Mining Co. v. WMC Resources Int'l. Pty. Ltd.* [36] (*Lepanto*) which held that Republic Act No. 7942 does not retroactively apply to FTAA's executed prior to its enactment, is misplaced.

The Court's ruling in *Lepanto* must be read in its proper context as to why it held that Republic Act No. 7942 must be made to apply only prospectively. The Court in *Lepanto* explained that:

Section 40 of the Philippine Mining Act of 1995 requiring the approval of the President with respect to assignment or transfer of FTAA's, if made applicable retroactively to the *Cumbio* FTAA, would be tantamount to an impairment of the obligations under said contract as it would effectively restrict the right of the parties thereto to assign or transfer their interests in the said FTAA.

By imposing a new condition apart from those already contained in the agreement, before the parties to the *Cumbio* FTAA may assign or transfer its rights and interest in the said agreement, Section 40 of the Philippine Mining Act of 1995, if made to apply to the *Cumbio* FTAA, will effectively modify the terms of the original contract and thus impair the obligations of the parties thereto and restrict the exercise of their vested rights under the original agreement. Such modification to the *Cumbio* FTAA, particularly in the conditions imposed for its valid transfer is equivalent to an impairment of said contract violative of the Constitution. [37] (Emphasis supplied)

The ruling in *Lepanto* merely emphasized the non-retroactive application concerning alterations in terms, but it did not exempt the FTAA's from compliance with the overarching framework established by Republic Act No. 7942. The non-retroactive application as discussed in *Lepanto* was specifically about preventing new conditions from impairing vested contractual rights.

Thus, OGPI's tax exemption during the recovery period, and consequently entitlement to the claimed refund, must be determined based not only on the provisions of the FTAA but also on Republic Act No. 7942.

Payment of excise tax during the recovery period is not required to be detrimental to OGPI before it may be recovered.

The next question that the Court must resolve is whether payment of excise taxes should be shown to be detrimental to OGPI before it can be entitled to the refund.

Following this, the ponencia rejects the CTA EB's imposition of a "detriment" requirement [38] in G.R. No.

263004, and adopts the position I originally advanced that under Republic Act No. 7942, the recovery of excise taxes paid during the recovery period does not depend on a showing that such payments were detrimental to the contractor's recovery of pre-operating and property expenses.

In ruling that OGPI is not entitled to the claimed refund, the CTA EB in G.R. No. 263004 cites as basis the fourth paragraph of Sections 11.2 and 11.5 of the FTAA.[39] Section 11.2 stipulates that excise taxes paid should be detrimental to OGPI's recovery of pre-operating and property expenses before such taxes can be recovered. In the event that there is no recovery, OGPI's recourse is to deduct the amount not recovered from the Government's share. Section 11.2 of the FTAA reads:

11.2 Recovery of Pre[-]operating Expenses, Property Expenses and Tax Paid During the Recovery Period. . . .

. . . .

All taxes, duties, fees, costs, levies and imposts paid by the CONTRACTOR and which are detrimental to the CONTRACTOR's recovery of Pre[-]operating Expenses and Property Expenses 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.[40] (Emphasis supplied)

In turn, Section 11.5 of the FTAA provides that the excise tax, including the excise tax paid during the recovery period, is included as part of the 60% Government share, thus:

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.[41] (Emphasis supplied)

Under the FTAA, OGPI was not granted full exemption from the payment of excise tax during the recovery period. Such understanding is emphasized in Section 11.5 of the FTAA, which explicitly recognizes a scenario whereby an excise tax has been paid during the recovery period.

The above provisions under the FTAA are different from Section 81 of Republic Act No. 7942. Section 81 of Republic Act No. 7942 is referenced again:

Section 81

Government Share in Other Mineral Agreements.

....

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

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

Even as the FTAA and Section 81 of Republic Act No. 7942 grant OGPI tax exemption during the recovery period, Republic Act No. 7942 does not recognize any scenario involving the payment of excise taxes during the recovery period. Unlike the FTAA which allows for the payment of excise tax during this period and its recovery if detrimental to expense recovery, Republic Act No. 7942 provides no such provision. Section 81 of Republic Act No. 7942 mandates that the government's share in the FTAA shall consist of excise tax, with the collection of said share commencing only after the FTAA contractor has fully recovered its pre-operating expenses. Thus, any collection of excise tax during the recovery period under Republic Act No. 7942 is prohibited and unlawful.

Although the FTAA requires excise taxes paid must be detrimental to OGPI's recovery of pre-operating and property expenses before they can be recouped, the enactment of Republic Act No. 7942 effectively amended the FTAA by stating that the Government's share shall consist of excise tax and that its collection shall commence only after the FTAA contractor has fully recovered its pre-operating expenses. Moreso, as discussed above, since the FTAA was executed in 1994 and Republic Act No. 7942 was enacted in 1995, Section 112 of Republic Act No. 7942 or its transitory provision applies. This provision mandates that FTAA's must adhere to the requirements of Republic Act No. 7942, particularly regarding government shares and incentives. The absence of conditions in Republic Act No. 7942 ensures that the FTAA contractor's recovery of expenses is not hindered by excise tax payments during the recovery period. Consequently, under Republic Act No. 7942, OGPI is not required to prove that the payment of the excise taxes during the recovery period was detrimental to its recovery of the pre-operating and property expenses.

By not imposing additional conditions on the recovery of excise taxes, it was the obvious intent of Republic Act No. 7942 to promote investment in the mining sector as it ensures that FTAA contractors can recover their initial expenditures without the added burden of proving the detrimental impact of excise taxes. The Legislature deliberately removed all qualifiers and conditions on the contractor's right to operate tax-free during the recovery period. Reintroducing detriment as a factual hurdle would judicially add what Congress expressly omitted. With the enactment of Republic Act No. 7942, all excise taxes paid during the recovery period, or from April 1, 2013 to April 1, 2018, are recoverable by OGPI without qualifications, regardless of their impact on the recovery of pre-operating expenses.

The CTA EB in G.R. No. 263004 further ruled that notwithstanding OGPI's failure to establish its entitlement to refund claim of the excise taxes paid during the recovery period, OGPI is not without any recourse. Sections 11.2 and 11.5 of the FTAA provide that such payment may be deducted from the government's share in net revenue that OGPI is obligated to settle with the government.[42]

Again, while the ponencia now correctly recognizes that there is no requirement to prove detriment to recover excise taxes paid during the recovery period, I emphasize that the proper remedy is a refund or issuance of TCC, and not a future deduction, when the tax was illegally or erroneously collected.

OGPI's exemption from excise taxes during the recovery period was clearly intended to alleviate its financial

burden during the initial phase of its operations. It should be emphasized that OGPI was forced to pay excise taxes under protest after the CIR physically detained the mineral ores in the stockpile of OGPI. Considering the lengthy and uncertain refund process in the country, OGPI was made to bear an undue financial burden. The protracted nature of the refund process effectively nullifies the intended benefits of OGPI's tax exemption during the recovery period, as OGPI cannot promptly recoup the funds necessary for its continued operations and development.

Furthermore, the CTA EB faulted OGPI for not offering in evidence its Audited Financial Statements and for the Independent Certified Public Accountant (ICPA) report not having discussed the detrimental effects of paying the excise tax. However, such expectation is misplaced. To emphasize once more, under the FTAA, as amended by Republic Act No. 7942, the right of the government to collect a share in the net revenue of OGPI during the recovery period has not yet accrued. Consequently, the CIR lacked the authority to impose excise taxes during this Specified period. The recovery period allows OGPI to recover its pre-operating and property expenses before the government's revenue-sharing entitlement becomes effective. Therefore, any imposition of excise taxes during this period is premature and unauthorized.

In other words, given the inapplicability of excise tax collection during the recovery period, OGPI is not obligated to prove that the payment of these taxes negatively impacted its financial performance. The burden placed by the CTA EB on OGPI to submit such proof, including Audited Financial Statements and detailed reports from ICPA, is therefore totally misplaced. Since the imposition of excise taxes itself is improper during the recovery period, any requirement to demonstrate adverse effects arising from such payments is equally improper.

It must be emphasized that the purpose of the recovery period under Republic Act No. 7942 is to encourage investment in the mining sector by providing a period free from tax burdens, thereby allowing FTAA contractors to recoup their initial expenditures and establish a stable operational foundation. La Bugal-B'laan recognized the extensive funding and technical and managerial expertise required of an FTAA contractor in this wise:

Capital and Expertise Provided,
Yet All Risks Assumed by Contractor

Here, we will repeat what has not been emphasized and appreciated enough: the fact that the contractor in an FTAA provides all the needed capital, technical and managerial expertise, and technology required to undertake the project.

In regard to the WMCP FTAA, the then foreign-owned WMCP as contractor committed, at the very outset, to make capital investments of up to US\$50 million in that single mining project. WMCP claims to have already poured in well over P800 million into the country as of February 1998, with more in the pipeline. These resources, valued in the tens or hundreds of millions of dollars, are invested in a mining project that provides no assurance whatsoever that any part of the investment will be ultimately recouped.

At the same time, the contractor must comply with legally imposed environmental standards and the social obligations, for which it also commits to make significant expenditures of funds. Throughout, the contractor assumes all the risks of the business; as mentioned earlier. These risks are indeed very high, considering that the rate of success in exploration is extremely low. The probability of finding any mineral or petroleum in commercially viable quantities is estimated to be about 1:1,000 only. On that slim chance rides the contractor's hope of recouping investments and generating profits. And when the contractor has recouped its initial investments in the project, the government share increases to sixty percent of net benefits — without the State ever being in peril of incurring costs, expenses and losses.

And even in the worst possible scenario — an absence of commercial quantities of minerals to justify development — the contractor would already have spent several million pesos for exploration works, before

arriving at the point in which it can make that determination and decide to cut its losses. In fact, during the first year alone of the exploration period, the contractor was already committed to spend not less than P24 million. The FTAA therefore clearly ensures benefits for the local economy, courtesy of the contractor.[43] (Emphasis supplied, citation omitted)

Finally, I recognize that the burden of proof to establish entitlement to refund is on the taxpayer-claimant. Being in the nature of a claim for exemption, refund is construed in strictissimi juris against the entity claiming the refund and in favor of the taxing power. This is why, in order to successfully pursue a claim, a taxpayer-claimant must positively show compliance with the statutory requirements. Consequently, once the taxpayer-claimant has proven its entitlement to the refund claim, as in this case, it should be considered successful in discharging its burden of proving its right to refund.[44] And the government's only duty is to return the money erroneously paid to it.

To summarize my position, while the ponencia agrees that OGPI's tax exemption is grounded not only on the FTAA but also on Section 81 of Republic Act No. 7942, and that there is no requirement to prove the detrimental effect of tax payments during the recovery period, I respectfully disagree from its determination of the period's proper reckoning point. In contrast to the ponencia, I maintain that the recovery period began on April 1, 2013, pursuant to Section 2.14 of the FTAA, which expressly provides that the recovery period starts on the first day of the calendar quarter following the quarter in which production reaches 15% of the project's initial annual design capacity. That production threshold was reached on February 26, 2013. Thus, adherence to the FTAA's definition of commercial production and to the statutory framework under Republic Act No. 7942 leads to one conclusion: OGPI's recovery period commenced on April 1, 2013, and remained in effect for five years when the disputed excise taxes were paid. These taxes were therefore collected in violation of the law and must be refunded or credited: Respect for legislative intent, contractual clarity, and the stability of the fiscal regime governing FTAA's requires nothing less. To deny the refund despite the absence of legal authority to impose the tax would erode the predictability essential to mining investments and contradict the very policy foundation of the FTAA and Republic Act No. 7942, as only actual commercial production triggers the recovery period.

Accordingly, considering that the recovery period under the FTAA began on April 1, 2013—or the first day of the calendar quarter following the date OGPI achieved 15% of its production capacity—the refund claims in both cases should be resolved as follows:

- In G.R. No. 251453, the Motion for Reconsideration should be partly granted, in that the CIR should be ordered to refund the excise taxes paid by OGPI from April to June 2013, amounting to PHP 42,785,549.13, as these were made during the recovery period and are thus deemed erroneously or illegally collected.
- In G.R. No. 263004, the Petition should be granted in full. OGPI is entitled to a refund of, or the issuance of a TCC for, the amount of PHP 136,407,793.17, representing excise taxes it erroneously paid, and which were illegally and wrongfully collected by the CIR from June to December 2014, during which OGPI remained within the five-year recovery period as properly reckoned under the FTAA and Republic Act No. 7942.

Even if the Court were to adopt the ponencia's ruling that the recovery period commenced in October 2008 and ended in October 2013, it would still follow that OGPI is entitled to a refund in G.R. No. 251453. The excise taxes it paid from February to June 2013 undeniably fall within the recovery period under that framework and should be refunded. These include the amounts of PHP 25,843,462.11 (for the period February to March 2013) and PHP 42,785,549.13 (for the period April to June 2013), which were erroneously or illegally collected and or which OGPI remains entitled to relief.

- [1] Formerly Arimco Mining Corporation.
- [2] Ponencia, pp. 2-3.
- [3] Id. at 2.
- [4] Philippine Mining Act of 1995 (1995).
- [5] Ponencia, p. 9.
- [6] G.R. No. 251453, February 16, 2022 [Unsigned Resolution, First Division].
- [7] Id.
- [8] La Bugal-B'laan Tribal Association, Inc. v. Ramos, 486 Phil. 754, 876 (2004) [Per J. Panganiban, En Banc].
- [9] 620 Phil. 554 (2009) [Per J. Chico-Nazario, Third Division].
- [10] Id. at 583.
- [11] Rollo (G.R. No. 251453), pp. 157-159.
- [12] Id. at 139-141.
- [13] Rollo (G.R. No. 263004), p. 138.
- [14] Id.
- [15] Supra note 8.
- [16] Id. at 846-847.
- [17] BIR Ruling No. 010-07, May 4, 2007.
- [18] Id.
- [19] Id.
- [20] Ponencia, p. 34.
- [21] Id. at 33-37.
- [22] Id. at 32.
- [23] Rollo (G.R. No. 251453), p. 154, Section 9.1 of the FTAA.
- [24] Id. at 155-156, Section 10.1 of the FTAA.
- [25] Ponencia, p. 32.
- [26] Id. at 30.
- [27] Id. at 29-31.
- [28] La Bugal-B'laan Tribal Association, Inc. v. Ramos, supra note 8, at 866-867.
- [29] Id. at 867.
- [30] Rollo (G.R. No. 251453), p. 184. Section 19.2 of the FTAA reads:

Without prejudice to Section XVII hereof, this agreement may be terminated by either the GOVERNMENT, or

the CONTRACTOR if either the GOVERNMENT or the CONTRACTOR shall commit substantial breach of this agreement, provided in such event that the innocent party shall give Notice to the defaulting party specifying the claimed breach within ninety (90) days from the date of such alleged breach, and the defaulting party shall have one hundred and eighty (180) days from receipt of such Notice within which to correct or remedy such breach subject to such extension as may reasonably be necessary and approved by the Secretary. As soon as the defaulting party corrects or remedies the breach within the period of one hundred and eighty (180) days aforementioned or any allowed extensions thereof, the innocent party will have no more right to terminate this agreement.

[31] Ponencia, p. 36.

[32] *Id.* at 34-35.

[33] *Id.* at 20-24.

[34] See J. Carpio, Dissenting Opinion in *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, *supra* note 8, at 1030-1035.

[35] *Rollo* (G.R. No. 251453), p. 138.

[36] 537 Phil. 473 (2006) [Per J. Chico-Nazario, First Division].

[37] *Id.* at 489.

[38] Ponencia, pp. 23-28.

[39] See *id.* at 13.

[40] *Rollo* (G.R. No. 251453), p. 159.

[41] *Id.* at 162.

[42] Ponencia, p. 13.

[43] *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, *supra* note 8, at 876-877.

[44] See *Winebrenner & Iñigo Insurance Brokers, Inc. v. CIR*, 752 Phil. 375, 395 (2015) [Per J. Mendoza, Second Division].

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