

SPECIAL SECOND DIVISION

[G.R. No. 171586, January 25, 2010]

NATIONAL POWER CORPORATION, PETITIONER, VS. PROVINCE OF QUEZON AND MUNICIPALITY OF PAGBILAO, RESPONDENT.

RESOLUTION

BRION, J.:

The petitioner National Power Corporation (*Napocor*) filed the present motion for reconsideration^[1] of the Court's Decision of July 15, 2009, in which we denied Napocor's claimed real property tax exemptions. For the resolution of the motion, we deem it proper to provide first a background of the case.

BACKGROUND FACTS

The Province of Quezon assessed Mirant Pagbilao Corporation (*Mirant*) for unpaid real property taxes in the amount of P1.5 Billion for the machineries located in its power plant in Pagbilao, Quezon. Napocor, which entered into a Build-Operate-Transfer (*BOT*) Agreement (entitled *Energy Conversion Agreement*) with Mirant, was furnished a copy of the tax assessment.

Napocor (*nota bene*, not Mirant) protested the assessment before the Local Board of Assessment Appeals (*LBAA*), claiming entitlement to the **tax exemptions** provided under Section 234 of the Local Government Code (*LGC*), which states:

Section 234. *Exemptions from Real Property Tax.* - The following are exempted from payment of the real property tax:

X X X X

(c) All machineries and equipment that are actually, directly, and exclusively used by local water districts and government-owned or -controlled corporations engaged in the supply and distribution of water and/or generation and transmission of electric power;

X X X X

(e) Machinery and equipment used for pollution control and environmental protection.

X X X X

Assuming that it cannot claim the above tax exemptions, Napocor argued that it is entitled to certain **tax privileges**, namely:

- a. the **lower assessment level of 10%** under Section 218(d) of the LGC for government-owned and controlled corporations engaged in the generation and transmission of electric power, instead of the 80% assessment level for commercial properties imposed in the assessment letter; and
- b. an **allowance for depreciation** of the subject machineries under Section 225 of the LGC.

In the Court's Decision of July 15, 2009, we ruled that Napocor is not entitled to any of these claimed tax exemptions and privileges on the basis primarily of the defective protest filed by the Napocor. We found that Napocor did not file a valid protest against the realty tax assessment because it did not possess the requisite legal standing. When a taxpayer fails to question the assessment before the LBAA, the assessment becomes final, executory, and demandable, precluding the taxpayer from questioning the correctness of the assessment or from invoking any defense that would reopen the question of its liability on the merits.^[2]

Under Section 226 of the LGC,^[3] any **owner or person having legal interest in the property** may appeal an assessment for real property taxes to the LBAA. Since Section 250 adopts the same language in enumerating who may pay the tax, we equated those who are liable to pay the tax to the same entities who may protest the tax assessment. A person legally burdened with the obligation to pay for the tax imposed on the property has the legal interest in the property and the personality to protest the tax assessment.

To prove that it had legal interest in the taxed machineries, Napocor relied on:

1. the stipulation in the BOT Agreement that authorized the transfer of ownership to Napocor after 25 years;
2. its authority to control and supervise the construction and operation of the power plant; and
3. its obligation to pay for all taxes that may be incurred, as provided in the BOT Agreement.

Napocor posited that these indicated that Mirant only possessed naked title to the machineries.

We denied the first argument by ruling that **legal interest should be one that is actual and material, direct and immediate, not simply contingent or expectant.**^[4] We disproved Napocor's claim of control and supervision under the second argument after reading the full terms of the BOT Agreement, which, contrary to Napocor's claims, granted Mirant substantial power in the control and supervision of the power plant's construction and operation.^[5]

For the third argument, we relied on the Court's rulings in *Baguio v. Busuego*^[6] and *Lim v. Manila*.^[7] In these cases, the Court essentially declared that contractual

assumption of tax liability alone is insufficient to make one liable for taxes. The contractual assumption of tax liability must be supplemented by an interest that the party assuming the liability had on the property; the person from whom payment is sought must have also acquired the beneficial use of the property taxed. In other words, he must have the *use and possession* of the property - an element that was missing in Napocor's case.

We further stated that the tax liability must be a liability that arises from law, which the local government unit can rightfully and successfully enforce, not the contractual liability that is enforceable only between the parties to the contract. In the present case, the Province of Quezon is a third party to the BOT Agreement and could thus not exact payment from Napocor without violating the principle of relativity of contracts.^[8] Corollarily, for reasons of fairness, the local government units cannot be compelled to recognize the protest of a tax assessment from Napocor, an entity against whom it cannot enforce the tax liability.

At any rate, even if the Court were to brush aside the issue of legal interest to protest, Napocor could still not successfully claim exemption under Section 234 (c) of the LGC because to be entitled to the exemption under that provision, there must be **actual, direct, and exclusive use** of machineries. Napocor failed to satisfy these requirements.

THE MOTION FOR RECONSIDERATION

Although Napocor insists that it is entitled to the tax exemptions and privileges claimed, the primary issue for the Court to resolve, however, is to determine **whether Napocor has sufficient legal interest to protest the tax assessment** because without the requisite interest, the tax assessment stands, and no claim of exemption or privilege can prevail.

Section 226 of the LGC, as mentioned, limits the right to appeal the local assessor's action to *the owner or the person having legal interest in the property*. Napocor posits that it is the beneficial owner of the subject machineries, with Mirant retaining merely a naked title to secure certain obligations. Thus, it argues that the BOT Agreement is a mere financing agreement and is similar to the arrangement authorized under Article 1503 of the Civil Code, which declares:

Art. 1503. When there is a contract of sale of specific goods, the seller may, by the terms of the contract, reserve the right of possession or ownership in the goods until certain conditions have been fulfilled. The right of possession or ownership may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the ownership in the goods. But, if except for the form of the bill of lading, the ownership would have passed to the buyer on shipment of the goods, **the seller's property in the goods shall be deemed to be only for the purpose of securing**

performance by the buyer of his obligations under the contract.

X X X X

Pursuant to this arrangement, Mirant's ownership over the subject machineries is merely a security interest, given only for the purpose of ensuring the performance of Napocor's obligations.

Napocor additionally contends that its contractual assumption liability (through the BOT Agreement) for all taxes vests it with sufficient legal interest because it is actually, directly, and materially affected by the assessment.

While its motion for reconsideration was pending, Napocor filed a *Motion to Refer the Case to the Court En Banc* considering that "the issues raised have far-reaching consequences in the power industry, the country's economy and the daily lives of the Filipino people, and since it involves the application of real property tax provision of the LGC against Napocor, an exempt government instrumentality."^[9]

Also, the Philippine Independent Power Producers Association, Inc. (PIPPA) filed a *Motion for Leave to Intervene* and a *Motion for Reconsideration-in-Intervention*. PIPPA is a non-stock corporation comprising of privately-owned power generating companies which includes TeaM Energy Corporation (*TeaM Energy*), successor of Mirant. PIPPA is claiming interest in the case since any decision here will affect the other members of PIPPA, all of which have executed similar BOT agreements with Napocor.

THE COURT'S RULING

At the outset, we resolve to deny the referral of the case to the Court *en banc*. We do not find the reasons raised by Napocor meritorious enough to warrant the attention of the members of the Court *en banc*, as they are merely reiterations of the arguments it raised in the petition for review on *certiorari* that it earlier filed with the Court.^[10]

Who may appeal a real property tax assessment

Legal interest is defined as interest in property or a claim cognizable at law, *equivalent to that of a legal owner who has legal title to the property*.^[11] Given this definition, Napocor is clearly not vested with the requisite interest to protest the tax assessment, as it is not an entity having the legal title over the machineries. It has absolutely no solid claim of ownership or even of use and possession of the machineries, as our July 15, 2009 Decision explained.

A BOT agreement is not a mere financing arrangement. In *Napocor v. CBAA*^[12] - a case strikingly similar to the one before us, we discussed the nature of BOT agreements in the following manner:

The underlying concept behind a BOT agreement is defined and described in the BOT law as follows:

Build-operate-and-transfer - A contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment, and operating and maintenance expenses in the project. **The project proponent transfers the facility to the government agency or local government unit concerned at the end of the fixed term** which shall not exceed fifty (50) years x x x x.

Under this concept, it is the project proponent who constructs the project at its own cost and subsequently operates and manages it. The proponent secures the return on its investments from those using the project's facilities through appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated. **At the end of the fixed term agreed upon, the project proponent transfers the ownership of the facility to the government agency.** Thus, the government is able to put up projects and provide immediate services without the burden of the heavy expenditures that a project start up requires.

A reading of the provisions of the parties' BOT Agreement shows that it fully conforms to this concept. **By its express terms, BPPC has complete ownership - both legal and beneficial - of the project, including the machineries and equipment used, subject only to the transfer of these properties without cost to NAPOCOR after the lapse of the period agreed upon.** As agreed upon, BPPC provided the funds for the construction of the power plant, including the machineries and equipment needed for power generation; thereafter, it actually operated and still operates the power plant, uses its machineries and equipment, and receives payment for these activities and the electricity generated under a defined compensation scheme. Notably, BPPC - as owner-user - is responsible for any defect in the machineries and equipment.

x x x x

That some kind of "financing" arrangement is contemplated - in the sense that the private sector proponent shall initially shoulder the heavy cost of constructing the project's buildings and structures and of purchasing the needed machineries and equipment - is undeniable. The arrangement, however, goes beyond the simple provision of funds, since the private sector proponent not only constructs and buys the necessary assets to put up the project, but operates and manages it as well during an agreed period that would allow it to recover its basic costs and earn profits. In other words, the private sector proponent goes into business