

## SECOND DIVISION

[ G.R. No. 171470, January 30, 2009 ]

**NATIONAL POWER CORPORATION, PETITIONER, VS. CENTRAL BOARD OF ASSESSMENT APPEALS (CBAA), LOCAL BOARD OF ASSESSMENT APPEALS (LBAA) OF LA UNION, PROVINCIAL TREASURER, LA UNION AND MUNICIPAL ASSESSOR OF BAUANG, LA UNION, RESPONDENTS.**

### DECISION

**BRION, J.:**

What are the real property tax implications of a Build-Operate-Transfer (*BOT*) agreement between a government-owned and controlled corporation (*GOCC*) that enjoys tax exemption and a private corporation? Specifically, under the terms of the BOT Agreement, can the *GOCC* be deemed the actual, direct, and exclusive user of machineries and equipment for tax exemption purposes? If not, can it pass on its tax-exempt status to its BOT partner, a private corporation, through the BOT agreement?

The National Power Corporation (*NAPOCOR*) claims in this case that the machineries and equipment used in a project covered by a BOT agreement, to which it is a party, should be accorded the tax-exempt status it enjoys. The Local Board of Assessment Appeals of the Province of La Union (*LBAA*), the Central Board of Assessment Appeals (*CBAA*) and the Court of Tax Appeals (*CTA*) were one in rejecting *NAPOCOR*'s claim.

The present petition for review on *certiorari* filed under Rule 45 of the Rules of Court by *NAPOCOR* challenges this uniform ruling and seeks the reversal of the *CTA*'s Decision dated February 13, 2006 in the consolidated cases of *NAPOCOR v. CBAA, et al.*<sup>[1]</sup> and *Bauang Private Power Corp. v. Sangguniang Panlalawigan ng La Union, et al.*,<sup>[2]</sup> and of the denial of the motion for reconsideration that followed.

### THE ANTECEDENTS

On January 11, 1993, First Private Power Corporation (*FPPC*) entered into a BOT agreement with *NAPOCOR* for the construction of the 215 Megawatt Bauang Diesel Power Plant in Payocpoc, Bauang, La Union. The BOT Agreement provided, *via* an Accession Undertaking, for the creation of the Bauang Private Power Corporation (*BPPC*) that will **own, manage** and **operate** the power plant/station, and assume and perform *FPPC*'s obligations under the BOT agreement. For a fee,<sup>[3]</sup> *BPPC* will convert *NAPOCOR*'s supplied diesel fuel into electricity and deliver the product to *NAPOCOR*.

The pertinent provisions of the BOT agreement, as they relate to the submitted issues in the present case, read:

2.03 NAPOCOR shall make available the Site to CONTRACTOR for the purpose of building and operating the Power Station at no cost to CONTRACTOR for the period commencing on the Effective Date and ending on the Transfer Date and NAPOCOR shall be responsible for the payment of all real estate taxes and assessments, rates, and other charges in respect of the Site and the buildings and improvements thereon.

X X X X

2.08 From the date hereof ***until the Transfer Date***, **CONTRACTOR shall, directly or indirectly, own the Power Station and all the fixtures, fittings, machinery, and equipment on the Site or used in connection with the Power Station which have been supplied by it or at its cost and it shall operate and manage the Power Station for the purpose of converting fuel of NAPOCOR into electricity.**

2.09 ***Until the Transfer Date***, NAPOCOR shall, at its own cost, supply and deliver all Fuel for the Power Station and shall take all electricity generated by the Power Station at the request of NAPOCOR which shall pay to CONTRACTOR fees as provided in Clause 11.

X X X X

2.11 On the Transfer Date, the Power Station shall be transferred by the CONTRACTOR to NAPOCOR without payment of any compensation.

The Officer-in-Charge of the Municipal Assessor's Office of Bauang, La Union initially issued Declaration of Real Property Nos. 25016 and 25022 to 25029 declaring BPPC's machineries and equipment as tax-exempt. On the initiative of the Bauang Vice Mayor, the municipality questioned before the Regional Director of the Bureau of Local Government Finance (BLGF) the declared tax exemption; later, the issue was elevated to the Deputy Executive Director and Officer-in-Charge of the BLGF, Department of Finance, who ruled that BPPC's machineries and equipments are subject to real property tax and directed the Assessors' Office to take appropriate action.

The Provincial/Municipal Assessors thereupon issued Revised Tax Declaration Nos. 30026 to 30033 and 30337, and cancelled the earlier issued Declarations of Real Property. The Municipal Assessor of Bauang then issued a Notice of Assessment and Tax Bill to BPPC assessing/taxing the machineries and equipments in the total sum of P288,582,848.00 for the 1995-1998 period, *sans* interest of two percent (2%) on the unpaid amounts. BPPC's Vice-President and Plant Manager received the Notice of Assessment and Tax Bill on August 7, 1998.

On October 5, 1998, NAPOCOR filed a petition (styled *In Re Petition to Declare Exempt the Revised and Retroactive to 1995 Tax Declaration Nos. 30026 to 30033 and 30037*) with the LBAA. The petition asked that, retroactive to 1995, the machineries covered by the tax declarations be exempt from real property tax under Section 234(c) of Republic Act No. 7160 (the Local Government Code or LGC); and,

that these properties be dropped from the assessment roll pursuant to Section 206 of the LGC. Section 234(c) of the LGC provides: <sup>[4]</sup>

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

The LBAA denied NAPOCOR's petition for exemption in a Decision dated October 26, 2001. It ruled that the exemption provided by Section 234(c) of the LGC applies only when a government-owned or controlled corporation like NAPOCOR owns and/or actually uses machineries and equipment for the generation and transmission of electric power; in this case, NAPOCOR does not own and does not even actually and directly use the machineries. It is the BPPC, a non-government entity, which owns, maintains, and operates the machineries and equipment; using these, it generates electricity and then sells this to NAPOCOR. Additionally, it ruled that the liability for the payment of the real estate taxes is determined by law and not by the agreement of the parties; hence, the provision in the BOT Agreement whereby NAPOCOR assumed responsibility for the payment of all real estate taxes and assessments, rates, and other charges, in relation with the site, buildings, and improvements in the BOT project, is an arrangement between the parties that cannot be the basis in identifying who is liable to the government for the real estate tax.

NAPOCOR appealed the LBAA ruling to the CBAA. BPPC moved to intervene on the ground that it has a direct interest in the outcome of the litigation.<sup>[5]</sup> The CBAA subsequently dismissed the appeal based on its finding that the BPPC, and not NAPOCOR, is the actual, direct and exclusive user of the equipment and machineries; thus, the exemption under Section 234(c) does not apply. The CBAA ruled:

Sec. 234 (c), R.A. 7160 (supra), is clear and unambiguous: "there is no room for construction." (citations omitted)

x x x x

Actual use, according to Sec. 199 (b) of R.A. 7160, "refers to the purpose for which the property is principally or predominantly utilized by the person in possession thereof." *In Velez v. Locsin*, 55 SCRA 152: "The word 'use' means to employ for the attainment of some purpose or end." In the "Operation of the Power Station" (Clause 8.01 of the BOT Agreement), CONTRACTOR shall, at its own cost, be responsible for the management, operation, maintenance and repair of the Power Station during the Co-operation period x x x." Said Co-operation period is fifteen (15) years, after which the Power Station will be turned over or

transferred to NAPOCOR. Does this determine when NAPOCOR should take over the actual, direct and exclusive use of the Power Station? That is fifteen (15) years therefrom?

It has been established that BPPC manufactures or generates the power which is sold to NAPOCOR and NAPOCOR distributes said power to the consumers. In other words, the relationship between BPPC and NAPOCOR is one of manufacturer or seller and exclusive distributor or buyer. The general perception is that the exclusive distributor or buyer of goods has nothing to do with the manufacturing thereof but as exclusive distributor the latter has the right to acquire all the goods to be sold to the exclusion of all others.

In terms of the definitions under Sec. 199 (b) and that offered by Respondents-Appellants (*supra*), the machineries and equipment are principally or predominantly utilized by BPPC. In terms of the *Velez vs. Locsin* case (*supra*), BPPC employs the machineries and equipment to attain its purpose of generating power to be sold to NAPOCOR and collect payment therefrom to compensate for its investment. The BOT Agreement is not a contract for nothing.

The following definitions are given by Black's Law Dictionary, Third Edition:

"Actually is opposed to seemingly, pretendedly, or feignedly, as actually engaged in farming means really, truly in fact."

"Directly. In a direct way without anything intervening; not by secondary, but by direct means."

"Exclusively. Apart from all others; without admission of others to participation; in a manner to exclude."

Indeed BPPC does not use said machineries and equipment pretendedly or feignedly but truly and factually hence, "actually." BPPC uses them without anything intervening hence, directly. BPPC uses the same machineries and equipment apart from all others hence, exclusively. This is the fact - against the fact there is no argument. This same fact will also deny NAPOCOR's claim to a ten (10%) assessment level provided for under Sec. 218 of R.A. 7160 (*supra*) as to the requirement thereto is simply the same as that in realty tax exemption. The BPPC is a private entity, not a Government Owned or Controlled Corporation (GOCC), hence, not entitled to a 10% assessment level.

NAPOCOR then filed with the CTA a petition for review, docketed as CTA E.B. No. 51, to challenge the CBAA decision. BPPC filed its own petition for review of the CBAA decision with the CTA which was docketed as CTA E.B. No. 58. The two petitions were subsequently consolidated.

### **THE APPEALED CTA RULING**

**The CTA rendered on February 13, 2006 a decision dismissing the**

**consolidated petitions.** It ruled on two issues: (1) whether BPPC seasonably filed its protest against the assessment; and (2) whether the machineries and equipments are actually, directly, and exclusively used by NAPOCOR in the generation and transmission of electric power, and are therefore not subject to tax.

On the first issue, the CTA applied Section 226 of the LGC which provides the remedy from an assessment as follows:

SEC. 226. Local Board of Assessment Appeals. - Any owner or person having legal interest in the property who is not satisfied with the action of the provincial, city or municipal assessor in the assessment of his property may, within sixty (60) days from the date of receipt of the written notice of assessment, appeal to the Board of Assessment Appeals in the province or city by filing a petition under oath in the form prescribed for the purpose, together with copies of tax declarations and such affidavits or documents submitted in support of the appeal.

It found that BPPC never filed an appeal to contest or question the assessment; instead, it was NAPOCOR that filed the purported appeal - a petition for exemption of the machineries and equipment. The CTA, however, said that NAPOCOR is not the proper party, and the purported appeal did not substantially comply with the requisites of the law.

According to the CTA, NAPOCOR is not the registered owner of the machineries and equipment. These are registered in BPPC's name as further confirmed by Section 2.08 of the BOT Agreement.<sup>[6]</sup> Thus, the CTA declared that until the transfer date of the power station, NAPOCOR does not own any of the machineries and equipment, and therefore has no legal right, title, or interest over these properties. Thus, the CTA concluded that NAPOCOR has no cause of action and no legal personality to question the assessment. As the respondent local government units claim, NAPOCOR is an interloper in the issue of BPPC's real estate tax liabilities.

The CTA additionally found that BPPC's subsequent attempt to question the assessment *via* a motion for intervention with the CBAA failed to follow the correct process prescribed by the Rules Governing Appeals to the CBAA;<sup>[7]</sup> its appeal was not accompanied by an appeal bond.

Also, the CTA found NAPOCOR's petition to be an inappropriate remedy, as it is not the appeal contemplated by law; NAPOCOR was in fact asserting an exemption on the basis of the provisions of the BOT Agreement. An exemption is an evidentiary matter for the assessors, not for the LBAA, to decide pursuant to Section 206 of the LGC;<sup>[8]</sup> NAPOCOR cannot simply bypass the authority granted to concerned administrative agencies, as these available administrative remedies must first be exhausted.

On the more substantive second issue, the CTA saw it clear from the BOT Agreement that BPPC owns and uses the machineries and equipment in the power station, thus directly addressing and disproving NAPOCOR's "actual, direct, and exclusive use" argument. It noted that under the BOT Agreement, NAPOCOR shall have a right over the machineries and equipments only after their transfer at the end of the 15-year co-operation period. "By the nature of the agreement and work of BPPC, the [machineries] are actually, directly, and exclusively used by it in the