# 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 ...

*G.R. No. 171470. January 30, 2009*

Ponente: BRION, J.

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**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 Areement, 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.[1] and Bauang Private Power Corp. v. Sangguniang Panlalawigan ng La Union, et al.,[2] 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,[3] 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: [4]

> 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


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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.[5] 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-Appelless (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.[6] 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;[7] 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;[8] 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 conversion of bunker fuel to electricity for [NAPOCOR] for a fee," the CTA said.

Section 234(c) of the LGC, according to the CTA, is clear. The exemption under the law does not apply because BPPC is not a GOCC - it is an independent power corporation currently operating and maintaining the power

plant pursuant to the BOT Agreement. The BOT agreement cannot likewise be the basis for the claimed exemption; tax exemption cannot be agreed upon by mere contract between the parties (BPPC and NAPOCOR), as it must be expressly granted by the Constitution, statute, or franchise. A tax exemption, if and when granted, is also not transferrable, as it is a personal privilege and it must be strictly construed, the CTA said in closing.

THE SEPARATE APPEALS

Thereupon, NAPOCOR and BPPC sought separate reviews of the CTA decision with us.

G.R. No. 173811

BPPC filed on September 11, 2006 its petition separately from NAPOCOR. The BPPC petition was docketed as G.R. No. 173811 and was raffled to the First Division of the Court.

The First Division denied BPPC's petition in its Resolution dated October 4, 2006 on the reasoning that BPPC failed to sufficiently show that the CTA committed any reversible error in the challenged decision and resolution as to warrant the exercise of the Court's discretionary appellate jurisdiction.

BPPC moved to reconsider the denial of its petition, but the Third Division (after the Court's reorganization) denied the motion for reconsideration with finality after finding no substantial arguments to warrant reconsideration. The resolution denying BPPC's petition for review had become final and executory and was thus recorded in the Book of Entries of Judgment on April 3, 2007.

G.R. No. 171470 - The Present Case

The NAPOCOR petition now pending with us was filed on April 6, 2006 and was docketed as G.R. No. 171470. We required the respondents to comment on the petition in our Resolution of May 3, 2006. The respondents filed the required comments. NAPOCOR subsequently filed its Reply.

NAPOCOR cited the following as grounds for its petition:

> I.
>
> THE CTA ERRED ON A QUESTION OF LAW IN NOT RULING THAT PETITIONER IS THE ACTUAL, DIRECT, AND EXCLUSIVE USER OF THE BAUANG DIESEL POWER PLANT.
>
> II.
>
> THE CTA ERRED ON A QUESTION OF LAW IN DISREGARDING THAT THE REAL PROPERTY TAX EXEMPTION IS RETAINED UNDER R.A. NO. 7160.
>
> III.
>
> THE CTA ERRED ON A QUESTION OF LAW IN RULING THAT PETITIONER MUST BE ENGAGED IN BOTH GENERATION AND TRANSMISSION OF POWER BEFORE THE EXEMPTION UNDER SECTION 234(C) OF R.A. NO. 7160 CAN APPLY.
>
> IV.
>
> THE CTA ERRED ON A QUESTION OF LAW IN NOT CONSTRUING THE EXEMPTIONS UNDER R.A. NO. 7160 IN HARMONY WITH PETITIONER'S CHARTER AND THE BOT LAW.
>
> V.
>
> ASSUMING THE 215 MW BAUANG DIESEL POWER PLANT IS TAXABLE, THE SAME SHOULD BE


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> CLASSIFIED AS "SPECIAL" FOR REAL PROEPRTY TAX PURPOSES SUBJECT TO A 10% ASSESSMENT LEVEL, AND NOT AS COMMERCIAL/INDUSTRIAL PROPERTIES SUBJECT TO AN 80% ASSESSMENT RATE.

In the interim and in light of the sale at public auction of the machineries and equipments, NAPOCOR filed a Supplemental Petition based on the following grounds:

> I.
>
> THE CTA ERRED ON A QUESTION OF LAW IN DISMISSING PETITIONER'S APPEAL BECAUSE THE LATTER IS A GOVERNMENT INSTRUMENTALITY WHOSE FOREIGN AND DOMESTIC INDEBTEDNESS ARE GUARANTEED BY THE NATIONAL GOVERNMENT, IS THE BENEFICIAL OWNER OF THE SUBJECT POWER PLANT AND [IS] THUS EXEMPT FROM THE PAYMENT OF REAL PROPERTY TAXES.
>
> II.
>
> THE CTA ERRED ON A QUESTION OF LAW IN DISMISSING PETITIONER'S APPEAL BECAUSE THIS LED TO THE SALE OF THE BAUANG POWER PLANT TO THE PROVINCIAL GOVERNMENT OF LA UNION, THUS SERIOUSLY VIOLATING PETITIONER'S STATUTORY MANDATE TO CARRY OUT THE TOTAL ELECTRIFICATION OF THE COUNTRY.

To support its claim that it is entitled to tax exemption as the actual, direct, and exclusive user of the machineries and equipment, NAPOCOR argues that:

a. the BOT agreement is a financing agreement where it (NAPOCOR) is the beneficial owner and the actual, direct, and exclusive user of the power plant, while BPPC is the lender/creditor that retains the plant's legal ownership until it is fully paid; the power plant is a NAPOCOR project and BPPC is just the financier-contractor, and any BPPC activity is made on NAPOCOR's behalf as a contractor for NAPOCOR; in this way, NAPOCOR takes advantage of BPPC's financial resources and technical expertise to secure a continuous supply of electric power.

b. its payment of energy fees, fixed operating fees, and other infrastructure fees to BPPC is not inconsistent with its (NAPOCOR's) beneficial ownership and actual, direct, and exclusive use of the power plant, since the collection of the fees is the repayment scheme prescribed by Section 6[9] of Republic Act No. 6957,[10] as amended by Republic Act No. 7718 (BOT Law, as amended); its amortizations over the 15-year co-operation period constitute full payment for the power plant that would warrant the transfer of ownership without payment of additional compensation; finally, that Republic Act No. 9136 or the Electric Power Industry Reform Act of 2001 has booked the power plant as NAPOCOR's asset for privatization purposes.

c. its tax exemption should apply to a BOT project, citing the conditions that gave rise to the BOT law and its own mandate to provide electricity nationwide; BOT projects are really government projects where the private sector participates to provide the heavy initial financial requirements; and that Congress specifically considered NAPOCOR's situation in granting tax exemption to machineries and equipment used in power generation and distribution.

d. in the interpretation of Section 234(c) of the LGC, related statutes must be considered and the task of the courts is to harmonize all these laws, if possible; specifically, Section 234(c) of the LGC was enacted to clarify or restore NAPOCOR's real property tax exemption so that NAPOCOR can perform its public function of supplying electricity to the entire country at affordable rates, while the BOT law was enacted, among others, to authorize NAPOCOR to enter into BOT contracts with the private sector so that NAPOCOR can carry out its mandate; the

tax exemption under Section 234(c) of the LGC must be given effect as the only legal and cogent way of harmonizing it with NAPOCOR's Charter and the BOT law.

NAPOCOR concludes that the CTA's ruling clearly defeats the spirit behind its creation, the enactment of the BOT Law, and the tax exemption provision under the LGC.

## THE COURT'S RULING

We find the petition devoid of merit. Like the Court's First Division (later, Third Division) in G.R. No. 173811, we find that NAPOCOR failed to sufficiently show that the CTA committed any reversible error in its ruling.

NAPOCOR's basis for its claimed exemption - Section 234(c) of the LGC - is clear and not at all ambiguous in its terms. Exempt from real property taxation are: (a) all machineries and equipment; (b) [that are] actually, directly, and exclusively used by; (c) [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.

We note, in the first place, that the present case is not the first occasion where NAPOCOR claimed real property tax exemption for a contract partner under Sec. 234 (c) of the LGC. In FELS Energy, Inc. v. The Province of Batangas[11] (that was consolidated with NAPOCOR v. Local Board of Assessment Appeals of Batangas, et al.),[12] the Province of Batangas assessed real property taxes against FELS Energy, Inc. - the owner of a barge used in generating electricity under an agreement with NAPOCOR. Their agreement provided that NAPOCOR shall pay all of FELS' real estate taxes and assessments. We concluded in that case that we could not recognize the tax exemption claimed, since NAPOCOR was not the actual, direct and exclusive user of the barge as required by Sec. 234 (c). In making this ruling, we cited the required standard of construction applicable to tax exemptions and said:

> Time and again, the Supreme Court has stated that taxation is the rule and exemption is the exception. The law does not look with favor on tax exemptions and the entity that would seek to be thus privileged must justify it by words too plain to be mistaken and too categorical to be misinterpreted. Thus, applying the rule of strict construction of laws granting tax exemptions, and the rule that doubts should be resolved in favor of provincial corporations, we hold that FELS is considered a taxable entity.
>
> The mere undertaking of petitioner NPC under Section 10.1 of the Agreement, that it shall be responsible for the payment of all real estate taxes and assessments, does not justify the exemption. The privilege granted to petitioner NPC cannot be extended to FELS. The covenant is between FELS and NPC and does not bind a third person not privy thereto, in this case, the Province of Batangas.

We also recognized this strictissimi juris standard in NAPOCOR v. City of Cabanatuan.[13] Under this standard, the claimant must show beyond doubt, with clear and convincing evidence, the factual basis for the claim. Thus, the real issue in a tax exemption case such as the present case is whether NAPOCOR was able to convincingly show the factual basis for its claimed exception.

The records show that NAPOCOR, no less, admits BPPC's ownership of the machineries and equipment in the power plant.[14] Likewise, the provisions of the BOT agreement cited above clearly show BPPC's ownership. Thus, ownership is not a disputed issue.

Rather than ownership, NAPOCOR's use of the machineries and equipment is the critical issue, since its claim under Sec. 234(c) of the LGC is premised on actual, direct and exclusive use. To support this claim, NAPOCOR characterizes the BOT Agreement as a mere financing agreement where BPPC is the financier, while it (NAPOCOR) is the actual user of the properties.

As in the fact of ownership, NAPOCOR's assertion is belied by the documented arrangements between the contracting parties, viewed particularly from the prism of the BOT law.

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.[15]

As envisioned in the BOT law, the parties' agreement assumes that within the agreed BOT period, BPPC - the investor-private corporation - shall recover its investment and earn profits through the agreed compensation scheme; thereafter, it shall transfer the whole project, including machineries and equipment, to NAPOCOR without additional cost or compensation. The latter, for its part, derives benefit from the project through the fulfillment of its mandate of delivering electricity to consumers at the soonest possible time, without immediately shouldering the huge financial requirements that the project would entail if it were to undertake the project on its own. Its obligation, in exchange, is to shoulder specific operating costs under a compensation scheme that includes the purchase of all the electricity that BPPC generates.

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 for itself, assuming risks and incurring costs for its account. If it receives support from the government at all during the agreed period, these are pre-agreed items of assistance geared to ensure that the BOT agreement's objectives - both for the project proponent and for the government - are achieved. In this sense, a BOT arrangement is sui generis and is different from the usual financing arrangements where funds are advanced to a borrower who uses the funds to establish a project that it owns, subject only to a collateral security arrangement to guard against the nonpayment of the loan.


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It is different, too, from an arrangement where a government agency borrows funds to put a project from a private sector-lender who is thereafter commissioned to run the project for the government agency. In the latter case, the government agency is the owner of the project from the beginning, and the lender-operator is merely its agent in running the project.

If the BOT Agreement under consideration departs at all from the concept of a BOT project as defined by law, it is only in the way BPPC's cost recovery is achieved; instead of selling to facility users or to the general public at large, the generated electricity is purchased by NAPOCOR which then resells it to power distribution companies. This deviation, however, is dictated, more than anything else, by the structure and usages of the power industry and does not change the BOT nature of the transaction between the parties.

Consistent with the BOT concept and as implemented, BPPC - the owner-manager-operator of the project - is the actual user of its machineries and equipment. BPPC's ownership and use of the machineries and equipment are actual, direct, and immediate, while NAPOCOR's is contingent and, at this stage of the BOT Agreement, not sufficient to support its claim for tax exemption. Thus, the CTA committed no reversible error in denying NAPOCOR's claim for tax exemption.

For these same reasons, we reject NAPOCOR's argument that the machineries and equipment must be subjected to a lower assessment level. NAPOCOR cites as support Section 216 of the LGC which provides:

> Section 216. Special Classes of Real Property. - All lands, buildings, and other improvements thereon actually, directly and exclusively used for hospitals, cultural, or scientific purposes, and those owned and used by local water districts, and government-owned or controlled corporations rendering essential public services in the supply and distribution of water and/or generation and transmission of electric power shall be classified as special.

in relation with Section 218 (d) of the LGC which provides:

> Section 218. Assessment Levels. - The assessment levels to be applied to the fair market value of real property to determine its assessed value shall be fixed by ordinances of the Sangguniang Panlalawigan, Sangguniang Panlungsod or Sangguniang Bayan of a municipality within the Metropolitan Manila Area, at the rates not exceeding the following:
>
> x x x x
>
> (d) On Special Classes: The assessment levels for all lands buildings, machineries and other improvements;
>
> Actual Use
>
> Assessment Level
>
> Cultural
>
> 15%
>
> Scientific
>
> 15%
>
> Hospital
>
> 15%
>
> Local water districts
>
> 10%


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> Government-owned or controlled corporations engaged in the supply and distribution of water and/or generation and transmission of electric power
>
> 10%

Since the basis for the application of the claimed differential treatment or assessment level is the same as the claimed tax exemption, the lower tribunals correctly found that there is no basis to apply the lower assessment level of 10%.

As our last point, we note that a real concern for NAPOCOR in this case is its assumption under the BOT agreement of BPPC's real property tax liability (which in itself is a recognition that BPPC's real properties are not really tax exempt). NAPOCOR argues that if no tax exemption will be recognized, the responsibility it assumed carries practical implications that are very difficult to ignore. In fact, NAPOCOR's supplemental petition is anchored on these practical implications - the alleged detriment to the public interest that will result if the levy, sale, and transfer of the machineries and equipment were to be completed. NAPOCOR's reference is to the fact that the machineries and equipment have been sold in public auction and the buyer - the respondent Province - will consolidate its ownership over these properties on February 1, 2009.

We fully recognize these concerns. However, these considerations are not relevant to our disposition of the issues in this case. We are faced here with the application of clear provisions of law and settled jurisprudence to a case that, to our mind, should not be treated differently solely because of non-legal or practical considerations. Significantly, local government real property taxation also has constitutional underpinnings, based on Section 5 of Article X of the Constitution,[16] that we cannot simply ignore. In FELS

Energy, Inc. v. The Province of Batangas,[17] earlier cited, we said:

> The power to tax is an incident of sovereignty and is unlimited in its magnitude, acknowledging in its very nature no perimeter so that security against its abuse is to be found only in the responsibility of the legislature which imposes the tax on the constituency who are to pay for it. The right of local government units to collect taxes due must always be upheld to avoid severe tax erosion. This consideration is consistent with the State policy to guarantee the autonomy of local governments and the objective of the Local Government Code that they enjoy genuine and meaningful local autonomy to empower them to achieve their fullest development as self-reliant communities and make them effective partners in the attainment of national goals.
>
> In conclusion, we reiterate that the power to tax is the most potent instrument to raise the needed revenues to finance and support myriad activities of the local government units for the delivery of basic services essential to the promotion of the general welfare and the enhancement of peace, progress, and prosperity of the people. [Emphasis supplied.]

This ruling reminds us of the other side of the coin in terms of concerns and protection of interests. La Union, as a local government unit, has no less than its own constitutional interests to protect in pursuing this case. These are interests that this Court must also be sensitive to and has taken into account in this Decision.

We close with the observation that our role in addressing the concerns and the interests at stake is not all-encompassing. The Judiciary can only resolve the current dispute through our reading and interpretation of the law. The other branches of government which act on policy and which execute these policies, including NAPOCOR itself and the respondent local government unit, are more in the position to act in tackling feared practical consequences. This ruling on the law can be their springboard for action.

In light of these conclusions and observations, we need not discuss the other issues raised.

WHEREFORE, premises considered, we DENY NAPOCOR's petition for lack of merit. We AFFIRM the

appealed decision of the Court of Tax Appeals. Costs against NAPOCOR.

**SO ORDERED.**

Quisumbing, (Chairperson), Corona[*], Carpio Morales, and Tinga, JJ., concur.

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[*] Designated additional member per Special Order No. 558 dated January 15, 2009.

[1] Docketed as CTA E.B. No. 51.

[2] Docketed as CTA E.B. No. 58.

[3] 11. Fees

11.01 In respect of each Month from the Completion Date until and including the Month in which the Transfer Date falls, NAPOCOR shall pay to BPPC Capacity Fees and Energy Fees calculated as provided in the Eighth Schedule.

[4] The full text of Section 234 of the LGC reads as follows:

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

(a) Real property owned by the Republic of the Philippines or any of its political subdivisions except when the beneficial use thereof has been granted, for consideration or otherwise, to a taxable person;

(b) Charitable institutions, churches, parsonages or convents appurtenant thereto, mosques, nonprofit or religious cemeteries and all lands, buildings, and improvements actually, directly, and exclusively used for religious, charitable or educational purposes;

(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;

(d) All real property owned by duly registered cooperatives as provided for under R. A. No. 6938; and

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

Except as provided herein, any exemption from payment of real property tax previously granted to, or presently enjoyed by, all persons, whether natural or juridical, including all government-owned or -controlled corporations are hereby withdrawn upon the effectivity of this Code.

[5] Rollo, pp. 194-195.

[6] Cited in p. 3.

[7] Rule IV, Section 7.

[8] SEC. 206. Proof of Exemption of Real Property from Taxation. - Every person by or for whom real property is declared, who shall claim tax exemption for such property under this Title shall file with the provincial, city or municipal assessor within thirty (30) days from the date of the declaration of real property sufficient documentary evidence in support of such claim including corporate charters, title of ownership, articles of incorporation, bylaws, contracts, affidavits, certifications and mortgage deeds, and similar documents.


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If the required evidence is not submitted within the period herein prescribed, the property shall be listed as taxable in the assessment roll. However, if the property shall be proven to be tax exempt, the same shall be dropped from the assessment roll.

[9] SEC. 6. Repayment Scheme. - For the financing, construction, operation and maintenance of any infrastructure project undertaken through the build-operate-and-transfer arrangement or any of its variations pursuant to the provisions of this Act, the project proponent shall be repaid by authorizing it to charge and collect reasonable tolls, fees, and rentals for the use of the project facility not exceeding those incorporated in the contract and, where applicable, the proponent may likewise be repaid in the form of a share in the revenue of the project or other non-monetary payments, such as, but not limited to, the grant of a portion or percentage of the reclaimed land, subject to the constitutional requirements with respect to the ownership of land: Provided, That for negotiated contracts, and for projects which have been granted a natural monopoly or where the public has no access to alternative facilities, the appropriate government regulatory bodies, shall approve the tolls, fees, rentals, and charges based on a reasonable rate of return: Provided, further, That the imposition and collection of tolls, fees, rentals, and charges shall be for a fixed term as proposed in the bid and incorporated in the contract but in no case shall this term exceed fifty (50) years: Provided, furthermore, That the tolls, fees, rentals, and charges may be subject to adjustment during the life of the contract, based on a predetermined formula using official price indices and included in the instructions to bidders and in the contract: Provided, also, That all tolls, fees, rentals, and charges and adjustments thereof shall take into account the reasonableness of said rates to the end-users of private sector-built infrastructure: Provided, finally, That during the lifetime of the franchise, the project proponent shall undertake the necessary maintenance and repair of the facility in accordance with standards prescribed in the bidding documents and in the contract. In the case of a build-and-transfer arrangement, the repayment scheme is to be effected through amortization payments by the government agency or local government unit concerned to the project proponent according to the scheme proposed in the bid and incorporated in the contract.

[10] Entitled "AN ACT AUTHORIZING THE FINANCING, CONSTRUCTION, OPERATION AND MAINTENANCE OF INFRASTRUCTURE PROJECTS BY THE PRIVATE SECTOR, AND FOR OTHER PURPOSES"

[11] G.R. No. 168557, February 16, 2007, 516 SCRA 186.

[12] G.R. No. 170628, February 16, 2007, 516 SCRA 186.

[13] G.R. No. 149110, April 9, 2003, 401 SCRA 259.

[14] Rollo, p. 19.

[15] See the provisions of Clause 8 of the BOT Agreement (rollo, pp. 85-86); some of the pertinent provisions state:

8.01. CONTRACTOR, shall at its own cost, be responsible for the management, operation, maintenance and repair of the Power Station during the co-operation period and shall use its best endeavors to ensure that the Power Station is in good operating condition and capable of converting Fuel supplied by NAPOCOR into electricity in a safe and stable manner within the Operating Parameters.

8.04. In pursuance of its obligations under Clause 8.01, CONTRACTOR shall have the right to:

(i) Enter into contracts for the supply of materials and services, including contracts with NAPOCOR;

(ii) x x x x

(iii) Purchase replacement equipment;


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x x x x

[16] CONSTITUTION, Article X, Section 5. - Each Local Government unit shall have the power to create its own sources of revenue, to levy taxes, fees and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. Such taxes, fees and charges shall accrue exclusively to the Local Governments.

[17] Supra note 11, pp. 207-208.


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