DEPARTMENT OF BUDGET AND MANAGEMENT PROCUREMENT SERVICE (DBM-PS) AND THE INTER-AGENCY BIDS AND AWARDS COMMITTEE (IABAC), PETITIONERS, VS. KOLONWEL TRADING, RESPONDENT.

G.R. No. 175608. June 08, 2007

Ponente: GARCIA, J.

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GARCIA, J.:

Before the Court are these consolidated three (3) petitions for review under Rule 45 of the Rules of Court, with a prayer for a temporary restraining order, to nullify and set aside the Order[1] dated December 4, 2006 of the Manila Regional Trial Court (RTC), Branch 18, in SP Civil Case No. 06-116010, a special civil action for certiorari and prohibition thereat commenced by herein respondent Kolonwel Trading (Kolonwel for short) against the Department of Budget and Management Procurement Service (DBM-PS), et al.

At the core of the controversy are the bidding and the eventual contract awards for the supply and delivery of some 17.5 million copies of Makabayan (social studies) textbooks and teachers manuals, a project of the Department of Education (DepEd).

The factual antecedents:

In the middle of 2005, the DepEd requested the services of the DBM-PS to undertake the aforementioned procurement project which is to be jointly funded by the World Bank (WB), through the Second Social Expenditure Management Program (SEMP2) of the Philippines (RP) – International Bank for Reconstruction and Development (IBRD) Loan Agreement No. 7118-PH[2] (Loan No. 7118-PH, hereinafter) dated September 12, 2002; and the Asian Development Bank (ADB), through SEDIP Loan No. 1654-PHI. Earlier, the Executive Director of the Government Procurement Policy Board (GPPB), in reply to a DepEd query, stated that "procurement[s] for MAKABAYAN ...textbooks where funds therefore (sic) are sourced from World Bank Loan shall be governed by the applicable procurement guidelines of the foreign lending institution. The 2005 Call for Submission of Textbooks and Teacher's Manuals shall be viewed vis-á-vis relevant World Bank guidelines."[3]

On October 27, 2005, the DBM-PS Inter-Agency Bids and Awards Committee (IABAC) called for a bidding for the supply of the Makabayan textbooks and manuals, divided into three (3) lots, to wit: Lot 1 for Sibika Grades 1-3; Lot 2 for HeKaSi Grades 4-6 and Lot 3 for Araling Panlipunan Years I-IV. Of the entities, foreign and local, which responded and procured the Bidding Documents,[4] only eleven (11) bidders submitted, either as principal or in joint venture arrangement, proposals for the different lots. Among them were Watana Phanit Printing & Publishing Co., Ltd., of Thailand (Watana, for short), petitioner Vibal Publishing House, Inc., (Vibal, hereinafter), Daewoo International Corporation of South Korea (Daewoo, for brevity) and respondent Kolonwel. Kolonwel's tender appeared to cover all three (3) lots.[5]

Following the bid and the book content/body evaluation process, the IABAC, via Resolution (Res.) No.

001-2006[6] dated March 9, 2006, resolved "to recommend to the [WB] and the [ADB] failure of bids for all lots in view of the abovementioned disqualifications, non-compliance and reservations of [DepEd]." Issues of "Conflict of interest" with respect to Watana and Vibal, "failure in cover stock testing" for Kolonwel and DepEd's "reservation" were among the disqualifying reasons stated in the resolution.

On March 15, 2006, the IABAC submitted to WB for its review and information Res. No. 001-2006. Appended to the covering letter was a document entitled "Bid Evaluation Report and Recommendation for Award of Contract."[7]

The following events, as recited in the assailed Manila RTC order and as borne out by the records, then transpired:

> - In a letter[8] dated April 24, 2006 to the DepEd and the DBM-PS IABAC Chairman, the WB, through its Regional Senior Economist, Ms. Rekha Menon, disagreed, for stated reasons, with the IABAC's finding of conflict of interest on the part of Vibal and Watana and the rejection of their bids. Ms. Menon, however, upheld the disqualification of all the other bidders. She thus asked the IABAC to review its evaluation and to provide the WB with the revised Bid Evaluation Report (BER), taking into account the December 31, 2006 RP-IBRD Loan closing date.
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> - On May 11, 2006, the IABAC informed Kolonwel of its or its bid's failure to post qualify and of the grounds for the failure.[9]
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> In its reply-letter of May 18, 2006,[10] Kolonwel raised several issues and requested that its disqualification be reconsidered and set aside. In reaction, IABAC apprised WB of Kolonwel's concerns stated in its letter-reply.
>
> - Subsequently, the IABAC, agreeing with WB's position articulated in Ms. Menon, issued Res. No. 001-2006-A effectively recommending to WB the contract award to Vibal of Sibika 1 & 3 and HekaSi 5; to Watana of Sibika 2 and HeKaSi 4 & 5 and to Daewoo of Sibika 3. Upon review, WB offered "no objection" to the recommended award.[11]
>
> - The issuance of notices of award and the execution on September 12, 2006 of the corresponding Purchaser-Supplier contracts followed.[12]
>
> - On June 23, 2006, the DBM-PS IABAC chairman informed Kolonwel of the denial of its request for reconsideration and of the WB's concurrence with the denial.[13] The IABAC denied, on September 8, 2006, a second request for reconsideration of Kolonwel[14] after WB found the reasons therefor, as detailed in PS IABAC Res. No. 001-2006-B[15] dated July 18, 2006, unmeritorious, particularly on the aspect of cover stock testing.

Such was the state of things when on, October 12, 2006, Kolonwel filed with the RTC of Manila a special civil action for certiorari and prohibition with a prayer for a temporary restraining order (TRO) and/or writ of preliminary injunction. Docketed as SP Civil Case No. 06-116010, and raffled to Branch 18 of the court,[16] the petition sought to nullify IABAC Res. Nos. 001-2006 and 001-2006-A and to set aside the contract awards in favor of Vibal and Watana. In support of its TRO application, Kolonwel alleged, among other things, that the supply-awardees were rushing with the implementation of the void supply contracts to beat the loan closing-date deadline.

A week after, the Manila RTC scheduled - and eventually conducted - a summary hearing on the TRO application. In an order[17] of October 31, 2006, as amended in another order[18] dated November 20, 2006, the court granted a 20-day TRO enjoining the IABAC, et al, starting November 6, 2006, from proceeding with the subject September 12, 2006 purchase- supply contracts. In the original order, the court set the preliminary conference and hearing for the applied preliminary injunction on November 7, and 8, 2006, respectively.

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In the meantime, Vibal filed an urgent motion to dismiss[19] Kolonwel's petition on several grounds, among them want of jurisdiction and lack of cause of action, inter alia alleging that the latter had pursued judicial relief without first complying with the protest procedure prescribed by Republic Act (R.A.) No. 9184, otherwise known as the "Government Procurement Reform Act." The DepEd later followed with its own motion to dismiss, partly based on the same protest provision. As records show, the trial court did not conduct a hearing on either dismissal motions, albeit it heard the parties on their opposing claims respecting the propriety of issuing a writ of preliminary injunction.

On December 4, 2006, the Manila RTC issued its assailed Order [20] finding for Kolonwel, as petitioner a quo, disposing as follows:

> WHEREFORE, the court grants the petition for certiorari and prohibition. The IABAC Resolution No. 001-2006-A dated May 30, 2006 is annulled and set aside. IABAC Resolution No. 001-2006 is declared validly and regularly issued in the absence of a showing of grave abuse of discretion or excess of jurisdiction. All subsequent actions of the respondents resulting from the issuance of IABAC Resolution No. 001-2006-A are consequently nullified and set aside. This court grants a final injunction pursuant to Sec. 9 of Rule 58 of the Rules of Court as amended, restraining respondents Department of Education and Culture (sic), [DBM-PS], [IABAC], Vibal Publishing House, Inc., LG & M Corporation and SD Publications from the commission or continuance of acts, contracts or transactions proceeding from the issuance of IABAC Resolution No. 001-2006-A.
>
> SO ORDERED. (Emphasis and words in brackets supplied)

Hence, these three (3) petitions which the Court, per its Resolution[21] of January 16, 2007, ordered consolidated. Earlier, the Court issued, in G. R. No. 175616, a TRO[22] enjoining the presiding judge[23] of the RTC of Manila, Branch 18, from proceeding with SP Civil Case No. 06-116010 or implementing its assailed order.

Petitioners urge the annulment of the assailed RTC Order dated December 4, 2006, on jurisdictional ground, among others. It is their parallel posture that the Manila RTC erred in assuming jurisdiction over the case despite respondent Kolonwel's failure to observe the protest mechanism provided under Sec. 55 in relation to Secs. 57 and 58 of R.A. No. 9184, respectively reading as follows:

> Sec. 55. Protest on Decision of the BAC.- Decisions of the BAC [Bids and Awards Committee] in all stages of procurement may be protested to the head of the procuring entity.... Decisions of the BAC may be protested by filing a verified position paper and paying a non-refundable protest fee. The amount of the protest fee and the periods during which the protest may be filed and resolved shall be specific in the IRR.
>
> Sec. 57. Non-interruption of the Bidding Process. In no case shall any process taken from any decision treated in this Article stay or delay the bidding process. Protests must first be resolved before any award is made.
>
> Sec. 58. Report to Regular Courts; Certiorari.-Court action may be resorted to only after the protests contemplated in this Article shall have been completed. Cases that are filed in violation of the process specified in this article shall be dismissed for lack of jurisdiction. The [RTC] shall have jurisdiction over final decisions of the head of the procuring entity. (Emphasis and words in bracket added.)

As a counterpoint, the respondent draws attention to its having twice asked, and having been twice spurned by, the IABAC to reconsider its disqualification, obviously agreeing with the Manila RTC that the judicial window was already opened under the exhaustion of available administrative remedies principle. In the same breath, however, the respondent would argue, again following the RTC's line, that it was prevented from filing a protest inasmuch as the government had not issued the Implementing Rules and Regulations (IRR) of R.A. No. 9184 to render the protest mechanism of the law operative for foreign-funded projects.

The Court is unable to lend concurrence to the trial court's and respondent's positions on the interplay of the protest and jurisdictional issues. As may be noted, the aforequoted Section 55 of R.A. No. 9184 sets three (3) requirements that must be met by the party desiring to protest the decision of the Bids and Awards Committee (BAC). These are: 1) the protest must be in writing, in the form of a verified position paper; 2) the protest must be submitted to the head of the procuring entity; and 3) the payment of a non-refundable protest fee. The jurisdictional caveat that authorizes courts to assume or, inversely, precludes courts from assuming, jurisdiction over suits assailing the BAC's decisions is in turn found in the succeeding Section 58 which provides that the courts would have jurisdiction over such suits only if the protest procedure has already been completed.

Respondent's letters of May 18, 2006[24] and June 28, 2006[25] in which it requested reconsideration of its disqualification cannot plausibly be given the status of a protest in the context of the aforequoted provisions of R.A. No. 9184. For one, neither of the letter-request was addressed to the head of the procuring entity, in this case the DepEd Secretary or the head of the DBM Procurement Service, as required by law. For another, the same letters were unverified. And not to be overlooked of course is the fact that the third protest-completing requirement, i.e., payment of protest fee, was not complied with.

Given the above perspective, it cannot really be said that the respondent availed itself of the protest procedure prescribed under Section 55 of R.A. No. 9184 before going to the RTC of Manila via a petition for certiorari. Stated a bit differently, respondent sought judicial intervention even before duly completing the protest process. Hence, its filing of SP Civil Case No. 06-116010 was precipitate. Or, as the law itself would put it, cases that are filed in violation of the protest process "shall be dismissed for lack of jurisdiction."

Considering that the respondent's petition in RTC Manila was actually filed in violation of the protest process set forth in Section 55 of R.A. No. 9184, that court could not have lawfully acquired jurisdiction over the subject matter of this case. In fact, Section 58, supra, of R.A. No. 9184 emphatically states that cases filed in violation of the protest process therein provided "shall be dismissed for lack of jurisdiction."

It is to be stressed that the protest mechanism adverted to is a built-in administrative remedy embodied in the law itself. It was not prescribed by an administrative agency tasked with implementing a statute through the medium of interpretative circulars or bulletins. Ignoring thus this administrative remedy would be to defy the law itself.

It will not avail the respondent any to argue that the absence of an IRR to make the protest mechanism under R.A. No. 9184 become operative for foreign-funded projects was what prevented it from complying with the protest procedure. As the last sentence of the afore-quoted Section 55 of R.A. No. 9184 is couched, the specific office of an IRR for foreign-funded project, vis-á-vis the matter of protest, is limited to fixing "the amount of the protest fee and the periods during which the protest may be filed and resolved." Surely, the absence of provisions on protest fee and reglementary period does not signify the deferment of the implementation of the protest mechanism as a condition sine qua non to resort to judicial relief. As applied to the present case, the respondent had to file a protest and pursue it until its completion before going to court. There was hardly any need to wait for the specific filing period to be prescribed by the IRR because the protest, as a matter of necessity, has to be lodged before court action.

Neither is it necessary that the amount of protest fee be prescribed first. Respondent could very well have proceeded with its protest without paying the required protest fee, remitting the proper amount once the appropriate IRR fixed the protest fee.

There may perhaps be room for relaxing the prescription on protest if a bona fide attempt to comply with legal requirements had been made. But the fact alone that the respondent did not even submit a verified position paper by way of protest argues against such plausibility. Significantly, none of the reconsideration-seeking letters of the

respondent advert to the protest procedure under Section 55 of R.A. No. 9184, even by way of noting that it was at a loss as to the inoperativeness of such provision in the light of the absence of an IRR.

In its petition before the Manila RTC, the respondent veritably admitted to not complying with the protest requirement, albeit with the lame excuse that it was effectively barred from complying with the required administrative remedies of protest. Neither did the respondent then argue that it was not able to comply due to the absence of an IRR for foreign- funded projects.

At any rate, there is, in fact a set of implementing rules and regulations, denominated as "IRR-A," issued on July 11, 2003 by the GPPB and the Joint Congressional Oversight Committee, Section 55.1[26] of which provides that prior to a resort to protest, the aggrieved party must first file a motion for reconsideration of the decision of the BAC. It is only after the BAC itself denies reconsideration that the protest, accompanied by a fixed protest fee, shall be filed within the period defined in the IRR.

It may be that IRR-A specifically defines its coverage to "all fully domestically-funded procurement activities," it being also provided that "foreign-funded procurement activities shall be the subject of a subsequent issuance." [27] However, a similarly drawn argument involving IRR-A was set aside in Abaya v. Ebdane,[28] a case involving Loan Agreement No. PH-P204 entered into by and between the RP and the Japan Bank for International Cooperation (JBIC) for the implementation DPWH Contract Package No. I (CP I). Wrote the Court in Abaya:

> Admittedly, IRR-A covers only fully domestically-funded procurement activities from procurement planning up to contract implementation and that it is expressly stated that IRR-B for foreign-funded procurement activities shall be subject of a subsequent issuance. Nonetheless, there is no reason why the policy behind Section 77 of IRR-A cannot be applied to foreign-funded procurement projects like the CP I project. Stated differently, the policy on the prospective or non-retroactive application of RA 9184 with respect to domestically-funded procurement projects cannot be any different with respect to foreign-funded procurement projects .... It would be incongruous, even absurd, to provide for the prospective application of RA 9184 with respect to domestically-funded procurement projects and, on the other hand, as urged by the petitioners, apply RA 9184 retroactively with respect to foreign-funded procurement projects. To be sure, the lawmakers could not have intended such an absurdity.

As in Abaya, there really should be no reason why the policy behind Section 55.l of IRR-A on the procedure for protest cannot be applied, even analogously, to foreign-funded procurement projects, such as those in this case. Indeed, there is no discernable justification why a different procedure should obtain with respect to foreign-funded procurement undertakings as opposed to a locally funded project, and certainly there is no concrete foundation in R.A. 9184 to indicate that Congress intended such a variance in the protest procedure.

The Manila RTC, in granting the petition for certiorari and prohibition, stated the observation that there was "substantial compliance of the requirement of protest."[29]Yet, it is not even clear that respondent Kolonwel, in its dealings with the IABAC, particularly in seeking reconsideration of its decision, was even aware of the protest requirements. What is beyond dispute, however, is that courts are precluded by express legislative command from entertaining protests from decisions of the BAC. What Congress contextually intended under the premises was that not only would there be a distinct administrative grievance mechanism to be observed in assailing decisions of the BAC, but that courts would be without jurisdiction over actions impugning decisions of the BACs, unless, in the meantime, the protest procedure mandated under Section 55 of R.A. No. 9184 is brought to its logical completion.

It is Congress by law, not the courts by discretion, which defines the court's jurisdiction not otherwise conferred by the Constitution. Through the same medium, Congress also draws the parameters in the exercise of the functions of administrative agencies. Section 55 of R.A. No. 9184 could not be any clearer when it mandates the

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manner of protesting the decision of bids and awards committees. Similarly, there can be no quibbling that, under Section 58 of the same law, courts do not have jurisdiction over decisions of the BACs unless the appropriate protest has been made and completed. The absence of the IRR does not detract from the reality that R.A. No. 9184 requires a protest to be filed under the form therein prescribed.

Given the above perspective, the Manila RTC had no jurisdiction over respondent Kolonwel's petition for certiorari and prohibition. Accordingly, it ought to have granted herein petitioners' motion to dismiss, but it did not. Worse, the court even added another layer to its grievous error when it granted the respondent's basic petition for certiorari and prohibition itself.

Compounding the Manila RTC's error is its having proceeded with SP Civil Case No. 06-116010 even without acquiring jurisdiction over Watana. As may be recalled, the respondent, in its petition before the RTC, impleaded Watana as one of the defendants, the latter having been awarded by the IABAC Sibika 2 and HeKaSi 4 &5. The records, however, show that Watana was not served with summons. The Sheriff's Return dated October 18, 2006, noted that summons was not served on Watana and another defendant at "No. 1281 G. Araneta Avenue cor. Ma. Clara Street, Quezon City, on the ground that said companies were not holding office thereat according to Mr. Marvin V. Catacutan."

There can be no dispute that Watana is an indispensable party to the respondent's petition in SP Civil Case No. 06-116010, Kolonwel having therein assailed and sought to nullify the contract-award made in its and Vibal's favor. Indispensable parties are those with such interest in the controversy that a final decree would necessarily affect their rights so that courts cannot proceed without their presence.[30] All of them must be included in a suit for an action to prosper or for a final determination to be had.[31] Watana, to repeat, was never served with summons; neither did it participate in the proceedings below. Plainly, then, the Manila RTC did not acquire jurisdiction over one of the indispensable parties, the joinder of whom is compulsory.[32]

With the foregoing disquisitions, the Court finds it unnecessary to even dwell on the other points raised in this consolidated cases. In the light, however, of the Manila RTC's holding that the WB Guidelines on Procurement under IBRD Loans do not in any way provided superiority over local laws on the matter,[33] the Court wishes to state the following observation:

As may be recalled, all interested bidders were put on notice that the DepEd's procurement project was to be funded from the proceeds of the RP-IBRD Loan No. 7118-PH,[34] Section 1, Schedule 4 of which stipulates that "Goods ... shall be procured in accordance with the provisions of Section 1[35] of the 'Guidelines for Procurement under IBRD Loans.'" Accordingly, the IABAC conducted the bidding for the supply of textbooks and manuals based on the WB Guidelines, particularly the provisions on International Competitive Bidding (ICB). Section 4 of R.A. No. 9184 expressly recognized this particular process, thus:

> Sec. 4. Scope and application. - This Act shall apply to the Procurement of ... Goods and Consulting Services, regardless of source of funds, whether local or foreign by all branches and instrumentalities of government .... Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed. (Emphasis added.)

The question as to whether or not foreign loan agreements with international financial institutions, such as Loan No. 7118-PH, partake of an executive or international agreement within the purview of the Section 4 of R.A. No. 9184, has been answered by the Court in the affirmative in Abaya, supra. Significantly, Abaya declared that the RP-JBIC loan agreement was to be of governing application over the CP I project and that the JBIC Procurement Guidelines, as stipulated in the loan agreement, shall primarily govern the procurement of goods necessary to implement the main project.

Under the fundamental international law principle of pacta sunt servanda,[36] which is in fact embodied in the afore-quoted Section 4 of R.A. No. 9184, the RP, as borrower, bound itself to perform in good faith its duties and obligation under Loan No. 7118- PH. Applying this postulate in the concrete to this case, the IABAC was legally obliged to comply with, or accord primacy to, the WB Guidelines on the conduct and implementation of the bidding/procurement process in question.

WHEREFORE, the instant consolidated petitions are GRANTED and the assailed Order dated December 4, 2006 of the Regional Trial Court of Manila in its SP Case No. 06-116010 is NULLIFIED and SET ASIDE.

No cost.

SO ORDERED.

Puno, C.J., on official leave.
Sandoval-Gutierrez, Carpio, Austria-Martinez, Corona, Azcuna, Chico-Nazario, and Velasco, Jr., JJ., concur.
Quisumbing, Acting C.J., and Ynares-Santiago, JJ., in the result.
Carpio-Morales, J., on leave.
Tinga, J., Please see concurring opinion.
Nachura, J., No part. Filed pleadings as Sol Gen.

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[1] Rollo (G.R. No. 175659), pp. 44-103.

[2] Annex "D" of Petition (G.R. No. 175608); id. (G.R. No. 175608), at 122 et seq.

[3] Id. (G.R. No. 175659), at 108 et seq.

[4] Annex "G" of Petition (G.R. No. 175608); id. (G.R. No. 175608), at 187-348.

[5] Id. (G.R. No. 175659), at 143 et seq.

[6] Id. at 135 et seq.

[7] Id. at 143 et seq.

[8] Id. at 195 et seq.

[9] Id. at 198 et seq.

[10] Id. at 200 et seq.

[11] Id. at 214 et seq.

[12] Id. at 245-250 [Watana–DBM-PS]; 262-266 [Vibal-DBM-PS]; at 272-275 [Daewoo-DBM-PS].

[13] Id. at 223 et seq.

[14] Embodied in a letter of June 28, 2006; Id. at 244 et seq.

[15] Id. at 234 et seq.

[16] Presided by RTC Judge Myra V. Garcia Hernandez .

[17] Rollo, (G. R. No. 175659), pp. 318 et seq.

[18] Id. at 340.

[19] Id. (G.R. No. 175608), at 576 et seq.

[20] Supra note 1.

[21] Id. (G.R. No. 175659), at 360.

[22] Id. (G.R. No. 175616), at 470-71.

[23] Supra note16.

[24] Supra note10.

[25] Supra note 14.

[26] Sec. 55.1. Decisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity: Provided, however, That a prior motion for reconsideration should have been filed by the party concerned within the reglementary periods specified in this IRR-A, and the same has been resolved. The protest must be filed within seven (7) days from receipt ... of the resolution of the BAC denying its motion for reconsideration. A protest may be made by filing a verified position paper ... accompanied by the payment of a non-refundable protest fee. The non-refundable protest fee shall be in an amount equivalent to no less than one (1%) of the ABC.

[27] Section, Rule l.

[28] G.R. No. 167919, February 14, 2007.

[29] Page 15 of the RTC Order.

[30] Seno v. Mangubat, G.R. No. L-44339, December 2, 1987, 156 SCRA 113.

[31] Rule 3, Sec. 7 of the Rules of Court.

[32] Ibid; Nery v. Leyson, G.R. No. 139306, August 29, 2000, 339 SCRA 232.

[33] Page 59 of the RTC Order.

[34] Supra note 2.

[35] Sec. 1 of the Guidelines provides that the "procedures outlined [herein] apply to all contracts for goods ... financed in whole or in part from Bank loans."

[36] An agreement must be kept; a treaty must be kept in good faith.

CONCURRING OPINION

Tinga, J.:

I concur in the thoughtful ponencia of Justice Garcia on the jurisdictional aspects of the case. However, as regards the concluding discussion prefaced by reference to "the Manila RTC's holding that the WB Guidelines on Procurement under IBRD Loans do not provide in any way superiority over local laws on the matter,"[1] I withhold comment until the point is raised as a determinative issue in an appropriate case. Said closing discussion is rightly intended by the ponencia as dictum, and indeed any conclusion on that point will not affect the jurisdictional flaws that attended the petition filed before the RTC.

DANTE O. TINGA

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Associate Justice

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[1]Decision, p. 13.

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