REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

NATIONAL POWER CORPORATION, Petitioner,	**C.T.A. AC NO. 113**
	Members: **CASTAÑEDA, JR.,** *Chairperson*, **CASANOVA,** and **COTANGCO-MANALASTAS,** *JJ.*
- versus -	
THE PROVINCE OF PAMPANGA and PIA MAGDALENA D. QUIBAL, Respondents.	**Promulgated:** AUG 01 2014 4:33 p.m.

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DECISION

CASANOVA, *J.*:

Before Us is an appeal, by way of Petition for Review[1], filed by petitioner-National Power Corporation, from the Decision[2] dated July 23, 2013 (the "Assailed Decision"), rendered by Branch 47 of the Regional Trial Court ("RTC") of the City of San Fernando, Pampanga in Civil Case No. 13738 entitled *National Power Corporation vs. Province of Pampanga and Pia Magdalena D. Quibal.*

Petitioner National Power Corporation is a government-owned and controlled corporation created and existing by virtue of Republic Act No. 6395, as amended, with principal office address at NPC Office Building Complex, corner Quezon Avenue and BIR Road, East Triangle, Diliman, Quezon City, Philippines. It may be served with court

[1] CTA Docket, pp. 11-26
[2] RTC Docket (Civil Case No. 13738), pp. 191-199

processes through its counsel, the Office of the Solicitor General, with address at 134 Amorsolo Street, Legaspi Village, Makati City.[3]

Respondent Province of Pampanga is a local government unit organized and existing under the Philippine laws with postal address at the Provincial Capitol Building, City of San Fernando, Pampanga; while respondent Pia Magdalena D. Quibal is impleaded herein in her capacity as Provincial Treasurer of Pampanga. They may be served with court processes through their counsel, Provincial Legal Officers Maria Rosario M. Arce and Cecil L. Andin, at the Provincial Legal Office, Provincial Capitol, Sto. Niño, City of San Fernando, Pampanga.[4]

The facts of the case, as culled from the records, are as follows:

On June 26, 2009, petitioner received an Assessment Letter[5] dated June 24, 2009 from respondent-Provincial Treasurer of Pampanga Pia D. Quibal, demanding payment of franchise tax pursuant to Sec. 5-a, b, c and Sec. 11c and d, of Tax Ordinance No. 1 or the Provincial Tax Code of 1992 of the Province of Pampanga.

On August 24, 2009, petitioner protested the assessment through a Protest Letter[6] arguing, among others, that upon effectivity of the Electric Power Industry Reform Act (Republic Act 9136) in 2001, the power generation of NPC is no longer considered as a public utility operation for which a franchise is required. Thus, NPC can no longer be considered as a business enjoying a franchise for the purpose of the franchise tax collection under Section 137 of the Local Government Code (LGC).

Respondent, having failed to resolve petitioner's protest within the period of sixty (60) days, petitioner, hence, filed an Appeal[7] to the RTC of San Fernando City, Pampanga on October 22, 2009, docketed as Civil Case No. 13738.

Respondents filed their Answer on August 24, 2010 and interposed the following Special and Affirmative Defenses, to wit:

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[3] Par. 1, Parties, Petition for Review, CTA Docket, p. 12
[4] Pars. 2 and 3, Ibid
[5] Annex "B" to Petition for Review
[6] Annex "C" to Petition for Review
[7] Annex "D" to Petition for Review

"(6) **The APPEAL fails to state a valid cause of action against the appellees herein. It is basic rule in evidence that 'He who alleges must prove'.**

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(7) **Appellant's claim that it is not liable for franchise tax is belied by the Supreme Court in the case of *NPC v. Cabanatuan* by saying that:**

> 'In the case at bar, <u>section 151 in relation to section 137 of the LGC clearly authorizes the respondent city government to impose on the petitioner the franchise tax in question</u>.'

xxx xxx xxx

(8) **Appellant is not exclusively a generation company. Its services under its franchise include supply of power to the general public.**

(9) **True, the enactment of RA 9136 took away the transmission functions of the NPC. However, the NPC did not become exclusively a generation company by virtue of said enactment.**

xxx xxx xxx

(10) **NPC can be burdened with the payment of franchise tax.**

(11) **The Cabanatuan case is applicable in the case at bar. Hence, NPC should be made liable for franchise tax after the effectivity of the EPIRA.**

(12) **NPC was given a franchise by the Congress of the Philippines to enjoy its business, and this franchise was the very reason for its existence, the basis why it is now clothed with personality to file the present appeal in court. To deny this franchise would be to deny appellant's existence as a whole.**

(13) **In view of all the foregoing, appellees strongly oppose the setting aside and nullification of the franchise tax assessment.**"

A REPLY (to the Answer of the Appellees) dated September 6, 2010, was, thereafter, filed by petitioner and, subsequently the respondents filed their REJOINDER dated September 30, 2010.

The case was set for trial proper on January 20, 2012 and there being no factual issue/s to be resolved, the parties agreed to file their memoranda.

On July 23, 2013, the RTC of San Fernando City, Pampanga rendered the Assailed Decision[8] ordering petitioner to pay the assessed franchise tax to the Province of Pampanga plus surcharge and interest.

Aggrieved, petitioner filed the instant Petition for Review on September 5, 2013 praying that (i) the assessment issued by respondents in the letter dated June 24, 2009 be nullified and set aside; and (ii) petitioner NPC be declared exempt from payment of franchise tax.

On October 10, 2013, respondents filed their Comment[9] thru registered mail. Subsequently, petitioner filed its Memorandum[10] on January 14, 2014 while respondents filed their Memorandum[11], thru registered mail, on January 27, 2014.

In a Resolution[12] promulgated on January 30, 2014, the case was considered submitted for decision.

Hence, this Decision.

The lone issue submitted for this Court's consideration is whether or not NPC is liable for the payment of franchise tax.

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[8] Annex "A" to Petition for Review
[9] CTA Docket, pp. 127-133
[10] Ibid, pp. 144-155
[11] Id., pp. 157-172
[12] Id., p. 186

It is petitioner's contention that, under the EPIRA Law (RA 9136), NPC, being a generation company only, is not required to secure a franchise, thus, should be exempt from the payment of franchise tax; that, Sec. 137 of the LGC limits the imposition of franchise tax to only those business enjoying a franchise; thus, absent any "franchise" by an individual or corporation, he cannot be burdened with the payment of franchise tax.

Petitioner further posits that NPC cannot be considered as engaged in the distribution of electricity as said function is reserved by the EPIRA for distribution facilities such as MERALCO, Pampanga Electric Cooperative, and others; nor can it be classified as a government entity considering that the EPIRA defines such activity as the sale of electricity by any party other than a generator or distributor in the franchise area of a distribution utility. And, by respondents' (appellees) own admission, the EPIRA took away the transmission functions of the NPC and transferred the same to TRANSCO.

Petitioner, likewise, asseverates that the Supreme Court decisions in *Cabanatuan*[13] and *Isabela*[14] cases are only "law of the case" and may not be invoked in cases after the enactment of the EPIRA. That, with the enactment of the EPIRA on June 26, 2001, petitioner should be exempt from payment of franchise tax.

Respondent, on the other hand, argues that Section 137 of the Local Government Code expressly authorizes the Province of Pampanga to impose franchise and business taxes as it is operating within the territorial jurisdiction of the Province; that, the previous rulings of the Supreme Court uniformly held petitioner liable to pay franchise tax; that the enactment of EPIRA Law took away only the transmission functions of the petitioner leaving behind its generation, distribution and supply furctions; and, that, under doctrine of *stare decisis*, the Cabanatuan and Isabela cases, holding the petitioner liable for franchise tax after the effectivity of the EPIRA Law, are applicable in this case.

The power of a province to impose franchise tax springs from Sec. 137 of the Local Government Code which reads a follows:

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[13] NPC vs. Cabanatuan City, G.R. No. 149110, April 9, 2003
[14] NPC vs. Isabela City, G.R. No. 165827, June 16, 2006

> "***Sec. 137. Franchise Tax.*** Notwithstanding any exemption granted by any law or other special law, the province may impose a tax on business enjoying a franchise, at a rate not exceeding fifty percent (50%) of one percent (1%) of the gross annual receipts for the preceding calendar year based on the incoming receipt, or realized, within its territorial jurisdiction.
>
> In the case of a newly started business, the tax shall not exceed one-twentieth of one percent (1%) of the capital investment. In the succeeding calendar year, regardless of when the business started to operate, the tax shall be based on the gross receipts for the preceding calendar year; or any faction thereof, as provided herein."

The issue involved in the instant case is not one of first impression. Pursuant to the above-quoted provision of the LGC, the Supreme Court has, in number of cases, consistently ruled that petitioner is liable to pay franchise tax.

In the case of *National Power Corporation vs. City of Cabanatuan*[15], the Supreme Court laid down the following requisites to determine whether petitioner is liable for franchise tax, which requisites must concur, to wit: (1) that petitioner has a "franchise" in the sense of a secondary or special franchise; and (2) that it is exercising its rights or privileges under this franchise within the territory of respondent city government.

Subsequently, the Supreme Court, in the case of *National Power Corporation vs. Province of Isabela*[16], ruled that petitioner, indeed, may be held liable for franchise tax. The Supreme Court ruled as follows:

> "The fundamental issue to be resolved in this case is whether or not petitioner is subject to franchise tax under the LGC.
>
> The petition has no merit. The case is on all fours with the case of *National Power Corporation vs. City of*

[15] Supra, Note 13
[16] Supra, Note 14

Cabanatuan[17] where this very same issue was settled by the Court. x x x x x x x x x

Even prior to the Cabanatuan case, the Court already declared in *City Government of San Pablo, Laguna v. Reyes*[18]that the franchise tax may still be imposed despite any exemption enjoyed under special laws, explaining thus:

> 'x x x. The legislative purpose to withdraw tax privileges enjoyed under existing law or charter is clearly manifested by the language used in Sections 137 and 193 categorically withdrawing such exemption subject only to the exceptions enumerated. Since it would be not only tedious and impractical to attempt to enumerate all the existing statutes providing for an express, albeit general, withdrawal of such exemptions or privilege, no more unequivocal language could have been used.'[19]

Nonetheless, petitioner seeks to avoid paying the franchise tax by arguing further that it is not liable therefor under section 137 of the LGC because said tax applies only to a 'business enjoying a franchise'. It contends that it is not a private corporation or a business for profit. The Court also declared in the Cabanatuan case that petitioner qualifies as a 'business enjoying a franchise'.

In Section 131(m) of the LGC, Congress unmistakably defined a franchise in the sense of a secondary or special franchise, this is to avoid any confusion when the word franchise is used in the concept of taxation. As commonly used, a franchise tax is a 'tax on privilege of transacting business in the state and exercising corporate franchises granted by the state.' It is not levied on the corporation simply for existing as a corporation, upon its property or its income, but on it exercise of the rights or privileges granted to it by the government. Hence, a corporation need not pay franchise tax from the time it ceased to do business and exercise its franchise. It is within this context that the phrase 'tax on business enjoying a franchise' in Section 137

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[17] Supra, Note 13

[18] National Power Corporation v. City of Cabanatuan, Supra Note 13 at pp. 259-260; p. 280

[19] Id., at 854; p. 362

of the LGC should be interpreted and understood. Verily, to determine whether the petitioner is covered by the franchise tax in question, the following requisites should concur: (1) that petitioner has a 'franchise' in the sense of a secondary or special franchise; and (2) that it is exercising its rights or privileges under this franchise within the territory of the respondent city government.

Petitioner fulfills the first requisite. Commonwealth Act No. 120, as amended by Rep. Act No. 6395, constitutes petitioner's primary and secondary franchises. It serves as the petitioner's charter, defining its composition, capitalization, the appointment and the specific duties of its corporate officers, and its corporate life span. As its secondary franchise, Commonwealth Act No. 120, as amended, nests petitioner [with xxx certain powers which are not available to ordinary corporations x x x.

x x x x x x x x x

Petitioner also fulfills the second requisite. It is operating within the respondent city government's territorial jurisdiction pursuant to the power granted to it by Commonwealth Act No. 120, as amended. x x x."

Following the above-quoted rulings of the Supreme Court, petitioner, indubitably, may be subjected to franchise tax. For one, petitioner has a franchise in the sense of a secondary or special franchise and, by petitioner's counsel's own admission, it is selling electricity in the Province of Pampanga, thus, satisfying the second requisite that "it is operating within the respondent's territorial jurisdiction".[20]

Petitioner, likewise, contends that pursuant to Sec. 6 of the EPIRA Law (RA No. 9136), it is no longer required to secure a franchise being a mere generation company as its transmission function had already been transferred to the National Transmission Corporation (TRANSCO). Again, this contention is devoid of merit. As ruled by the CTA Special Second Division in the case of *National Power Corporation vs. The Provincial Government of Bukidnon and Luis L. Oro, in his capacity as*

[20] RTC Order dated January 4, 2013, RTC Records, pp. 186-189

Provincial Treasurer of Bukidnon[21], while it is true that petitioner's transmission function was transferred to TRANSCO pursuant to Section 8 of the EPIRA Law, it was not, however, divested of its other powers vested under Commonwealth Act No. 120, as amended.

We quote pertinent portions of the above-cited CTA decision, to wit:

> "As regards petitioner's contention that since it is now a mere generation company because its transmission function was already transferred to the National Transmission Corporation (TRANSCO) and, therefore, is not required to secure a franchise pursuant to Section 6 of RA No. 9136 (EPIRA Law), We find the same bereft of merit.
>
> We look into the pertinent provisions of RA 9136, to wit:
>
>> '***Section 5. Organization***. - The electric power industry shall be divided into four (4) sectors, namely: generation; transmission; distribution and supply.'
>>
>> '***Section 6. Generation Sector***. - Generation of electric power shall be competitive and open.
>>
>> x x x x x x x x x
>>
>> Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a local or national franchise.'
>>
>> '***Section 8. Creation of the National Transmission Company***. - There is hereby created a National Transmission Corporation, hereinafter referred to as TRANSCO, which shall assume the electrical transmission function of the National Power Corporation, and have the power and functions

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[21] National Power Corporation vs. Provincial Government of Bukidnon, CTA AC No. 57, August 10, 2010

> hereinafter granted. The TRANSCO shall assume the authority and responsibility of NPC for the planning, construction and centralized operation and maintenance of its high voltage transmission facilities, including grid interconnections and ancillary services.'

In its Amended Decision[22], the CTA Special Second Division, further stated thus:

> "x x x x x x. Save in the case contemplated in Section 70 of the EPIRA, Section 8 thereof has removed from petitioner its 'monopoly' in the transmission of electricity by virtue of the assumption of the National Transmission Corporation of petitioner's transmission function, to wit:
>
> > Sec. 8. Creation of the National Transmission Company. - **There is hereby created a National Transmission Corporation, hereinafter referred to as TRANSCO, which shall assume the electrical transmission function of the National Power Corporation (NPC)**, and have the powers and functions hereinafter granted. The TRANSCO shall assume the authority and responsibility of NPC for the planning, construction and centralized operation and maintenance of its high voltage transmission facilities, including grid interconnections and ancillary services.
> >
> > **Within six (6) months from the effectivity of this Act, the transmission and substransmission facilities of NPC and all other assets related to transmission operations, including the nationwide franchise of NPC for the operation of the transmission system and the grid, shall be transferred to TRANSCO**. The TRANSCO shall be wholly owned by the Power Sector Assets and Liabilities Management Corporation (PSALM Corp.).
>
> However, We cannot totally ignore the doctrine or guideline laid down in the said previous NPC cases, particularly in determining whether petitioner is covered by the imposition of the franchise tax, which involve the

[22] Amended Decision, CTA AC No. 57, December 13, 2010

concurrence of the following requisites: (1) that petitioner has a 'franchise' in the sense of a secondary or special franchise; and (2) that it is exercising its rights or privileges under this franchise within the territory of the local government concerned.

This must be so because petitioner may still be held liable for the subject franchise tax, since the EPIRA nonetheless gave petitioner a missionary electrification function, under Section 70 thereof, viz:

> *'Section 70. Missionary Electrification.* – Notwithstanding the divestment and/or privatization of NPC assets, IPP contacts and spun-off corporations, **NPC shall remain as a National Government Owned and -controlled corporation to perform the missionary electrification function through the Small Power Utilities Group (SPUG) and shall be responsible for providing power generation and its associated power delivery systems in areas that are not connected to the transmission system.** The missionary electrification function shall be funded from the revenues from sales in missionary areas and from the universal change to be collected from all electricity end-users as determined by the ERC.' (Emphasis supplied)

The said Small Power Utilities Group or SPUG refers to the functional unit of petitioner created to pursue missionary electrification function, the performance of which involves the provision of basic electricity service in unviable areas."

Clearly, based on the above-quoted ruling, petitioner's function is not limited to power generation and distribution only but likewise includes a missionary function as mandated under the EPIRA Law. Thus, petitioner may still be held liable for the questioned franchise tax assessment of respondents.

While petitioner admitted selling electricity in the Province of Pampanga[23], respondents, in their letter dated June 24, 2009 sent to

[23] Supra, Note 20

petitioner, however, failed to indicate the amount of the franchise tax being assessed and the period covered by the assessment.

This Court could not, therefore, determine with certainty the amount of franchise tax petitioner is liable to pay to respondents and for what period the said tax shall correspond to.

Moreover, this Court could not likewise determine whether or not petitioner has performed its missionary electrification function in the territorial jurisdiction of the Province of Pampanga and for what period.

The records of the case show that since the parties agreed that the issue involved in the case is purely a question of law, the RTC rendered a summary judgment. Thus, the factual issues on whether or not petitioner performs its missionary function in the Province of Pampanga and the amount of franchise tax liability of petitioner and the period covered by respondent's assessment was not fully ventilated court.

Thus, We have no recourse but to remand the case to the court *a quo* for further proceedings to give both petitioner and respondents the opportunity to substantiate their respective claims.

WHEREFORE, premises considered, the Assailed Decision dated July 23, 2013 of Branch 47 of the Regional Trial Court of the City of San Fernando, Pampanga is hereby **SET ASIDE** and the records of the case are hereby **REMANDED** to the court *a quo* for further proceedings in accordance with the pronouncements in this Decision.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice