Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 1282
(CTA Case No. 8475)

Present:
DEL ROSARIO, P.J.,
CASTAÑEDA, JR.
BAUTISTA
UY
CASANOVA
FABON-VICTORINO
MINDARO-GRULLA
COTANGCO-MANALASTAS
RINGPIS-LIBAN, JJ.

Promulgated:
MAY 17 2016 4:20pm

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under Rule 4, Section 2(a)(1), in relation to Rule 8, Section 4(b) of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA)[1], as amended, of the Decision[2] dated December 2, 2014, rendered by the Third Division of

[1] Sec. 2. *Cases within the jurisdiction of the Court en banc.*- The Court en banc shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Division in the exercise of its exclusive appellate jurisdiction over:

(1) Cases arising from administrative agencies- Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture;

xxx xxx xxx

Sec. 4. *Where to appeal; mode of appeal.*-
(a) xxx.
(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court en banc shall act on the appeal.
(c) xxx.

[2] En banc Docket, pp. 29-48.

this Court in CTA Case No. 8475, and its Resolution[3] dated February 25, 2015. The Third Division of this Court held that petitioner Power Sector Assets and Liabilities Management Corporation is liable for Value Added Tax (VAT).

Petitioner assailed both the aforesaid Decision and Resolution, the dispositive portions of which, respectively, read as follows:

Decision dated December 2, 2014:

> ***WHEREFORE****, premises considered, the instant Petition for Review is hereby* ***PARTIALLY GRANTED****. Accordingly, the assessments issued by respondent against petitioner covering taxable year 2008 for deficiency value added tax are* ***UPHELD*** *but in the* ***MODIFIED AMOUNT of NINE BILLION FIVE HUNDRED SIXTY SIX MILLION SIXTY TWO THOUSAND FIVE HUNDRED SEVENTY ONE and 44/100 PESOS (P9,566,062,571.44),*** *inclusive of twenty percent (20%) interest imposed upon Section 249(A) of the Tax Code, as amended.*
>
> *In addition, petitioner is hereby* ***ORDERED TO PAY****:*
>
> *a) Deficiency interest at the rate of 20% per annum on the basic deficiency VAT of P6,439,713,829.91 computed from June 30, 2011 until full payment thereof pursuant to Section 249(B) of the NIRC of 1997;*
> *b) Delinquency interest at the rate of 20% per annum on the basic deficiency VAT of P6,439,713,829.91 June 30, 2011 51 until full payment thereof pursuant to Section 249 (C) (3) of the NIRC of 1997, as amended; and*
> *c) Delinquency interest at the rate of 20% per annum on the deficiency interest which have accrued as afore-stated in (a) computed from June 30, 2011 until full payment thereof pursuant to Section 249(C)(3) of the NIRC of 1997, as amended.*
>
> ***SO ORDERED."***

Resolution dated February 25, 2015:

> *"****WHEREFORE****, premises considered, respondent Commissioner of Internal Revenue's "Motion for Reconsideration" is hereby* ***DENIED*** *for lack of merit.*

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[3] En banc Docket, pp. 53-55.

SO ORDERED."

The pertinent facts as narrated by this Court's Division in its Decision read as follows:

> *"Petitioner is a Philippine government-owned entity created under Section 49 of Republic Act (R.A.) No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 (EPIRA) which took ownership of all existing National Power Corporation (NPC) generation assets, liabilities, Independent Power Producer (IPP) contracts, real estate and all other disposable assets. Furthermore, it was mandated to manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and IPP contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optional manner.*
>
> *Respondent is the duly appointed Commissioner of Internal Revenue (CIR), vested with authority to carry out all the functions, duties and responsibilities of the Bureau of Internal Revenue (BIR), including inter alia, the power to decide, approve and grant claims for refund or tax credit of internal revenue taxes. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City where she may be served with notices and other processes of this Honorable Court.*
>
> *On June 9, 2011, respondent issued a Final Assessment Notice (FAN) covered by Assessment VT-08-00072, alleging that for the taxable year-ending December 31, 2008, petitioner has an alleged deficiency VAT of P10,103,158,715.06, inclusive of penalties and interest, xxx:*
>
> *xxx xxx xxx.*
>
> *On July 7, 2011, petitioner filed its administrative protest against the FAN with the Large Taxpayers Service (LTS) of the LT Audit and Investigation Division II (LTAID) of the BIR. On September 5, 2011, petitioner flied its supplemental protest reiterating its substantive defenses.*
>
> *On March 19, 2012, respondent issued the Final Decision on the Disputed Assessment (FDDA) denying petitioner's protest for lack of factual and legal basis.*

Aggrieved thereby, petitioner flied herein Petition for Review.

In her Answer, respondent interposed the following special and affirmative defenses: (1) petitioner PSALM is liable to pay deficiency VAT for failure to declare gross receipts subject to VAT in its VAT returns for the year-ending December 31, 2008; (2) Section 105 of the Tax Code, as amended, provides that any person who in the course of trade or business, sells, barters, exchanges, leases goods or properties and renders services shall be subject to VAT imposed in Section 106 and 108 of the same code; and, (3) Revenue Regulation (RR) No. 04-2007, amending relevant provisions of RR No. 16-2005, subjected to VAT the sale of real properties not primarily held for sale or for lease but used in business.

On August 3, 2012, respondent filed her Pre-Trial Brief. Petitioner, on the other hand, filed its Pre-Trial Brief on August 14, 2012.

Thereafter, both parties submitted their Joint Stipulation of Facts and Issues (JSFI) on September 26, 2012. However, this Court in a Resolution dated October 2, 2012, directed both parties to submit a Supplemental Joint Stipulation of Facts and Issues since their initial JSFI failed to indicate the list of documents and witnesses for presentation as well as the hearing dates agreed upon.

In compliance, both parties submitted their Supplemental Joint Stipulation of Facts and Issues on November 5, 2012. Still feeling the need to include additional documents, the parties further submitted a Second Supplemental Joint Stipulation of Facts and Issues on January 30, 2013. This Court approved the same in our(sic)[a] Resolution dated February 20, 2013. Accordingly, this Court issued a Pre-Trial Order on March 1, 2013, declaring the pre-trial terminated and ordering petitioner to proceed with the initial presentation of its evidence.

On April 3, 2013, this Court issued an Order transferring the case to this Court's Third Division, chaired by Hon. Lovell R. Bautista, pursuant to CTA Administrative Circular No. 01-2013.

> *On June 24, 2013, petitioner filed its Formal Offer of Evidence, offering Exhibits "A" to "AAAAA", inclusive of sub-markings. In response, respondent flied her Comment (Re: Petitioner's Formal Offer of Evidence) on July 9, 2013, stating she has no objection to the admission of petitioner's enumerated exhibits, without however, necessarily admitting the materiality, relevancy, and probative value as well as the validity of the purpose for which the said exhibits were offered in evidence.*
>
> *In a Resolution dated July 15, 2013, this Court admitted all exhibits formally offered by petitioner and deemed the latter to have rested its case. Then, on September 24, 2013, respondent flied her Formal Offer of Evidence, offering Exhibits "R-1" to "R-18", inclusive of sub-markings. In its Comment, petitioner objected to the admission of respondent's formal offer of evidence for being baseless and self-serving. In the October 17, 2013 Resolution, this Court admitted all of respondent's exhibits and further ordered both parties to submit their respective memoranda within thirty (30) days thereafter. On December 6, 2013, petitioner submitted its Memorandum, while respondent submitted her Memorandum on December 20, 2013. Thus, this Court, in a Resolution dated January 2, 2014, deemed the case submitted for decision.*

On December 2, 2014, this Court's Division partially granted the petition. This Court's Division held that BIR Ruling No. 20-2002 has been superseded by the enactment of R.A. No. 9337[4], making petitioner liable for deficiency VAT. Accordingly, the assessments issued by respondent against petitioner covering the taxable year 2008 for deficiency value added tax were upheld but in a modified amount.

Petitioner filed a Motion for Reconsideration. Said motion was denied for lack of merit. Hence, the present petition.

Petitioner raised the following issues:

[4] AN ACT AMENDING SECTIONS 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES

"A. WHETHER PSALM IS LIABLE FOR VAT ON SALE OF GENERATING ASSETS.

B. WHETHER PSALM IS LIABLE FOR VAT ON THE LEASE OF NAGA COMPLEX.

C. WHETHER PSALM IS LIABLE FOR VAT ON THE COLLECTION OF INCOME.

D. WHETHER PSALM IS LIABLE FOR VAT ON COLLECTION OF RECEIVABLES."

Petitioner claims that the findings of this Court's Division lack factual and legal basis. Petitioner maintains that its privatization activities such as the sale of power, as mandated by the EPIRA, are not conducted in the ordinary course of trade or business. Petitioner argued that its privatization activities are a government undertaking coursed through petitioner. In sum, petitioner insists that it is not liable for VAT on sale of generating assets, lease of Naga Complex, collection of income and receivables on the ground that these do not arise in the ordinary course of trade or business.

Thereafter, the Court directed the parties to file their respective memoranda. Petitioner filed its memorandum on August 14, 2015 while respondent failed to file her memorandum. Thus, in a Resolution dated September 11, 2015, the case was submitted for decision.

The pivotal issue is whether petitioner's sale of generating assets, lease of Naga Complex, collection of income and receivables are done in the ordinary course of trade or business in order for it to be liable to VAT. Stated differently, the issue is whether petitioner is liable to pay the deficiency VAT of ₱9,566,062,571.44 and the assessed interest.

We resolve.

Petitioner Power Sector Assets and Liabilities Management Corporation (PSALM) is a government-owned and controlled corporation created by virtue of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA) of 2001[5], which shall take ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate and all other disposable assets. Likewise, all outstanding obligations of the NPC arising from loans, issuances of bonds, securities and other instruments of indebtedness were transferred to and assumed by petitioner PSALM Corp. Its principal purpose is to manage the orderly sale, disposition, and privatization of the National Power Corporations (NPCs) generation assets, real estate and other disposable assets, and Independent Power Producer (IPP) contracts, with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner[6]. Thus, petitioner's claim that its transactions are not "in course of trade or business" since the privatization activities is not in pursuit of any commercial or profitable activity, citing the case of CIR vs. Magsaysay Lines, Inc.[7]

Petitioner is subject to VAT and the sale of generating assets, lease of Naga Complex, collection of income and receivables are

[5] Section 49, Republic Act No. 9136 (Electric Power Industry Reform Act of 2001).

SEC. 49. Creation of Power Sector Assets and Liabilities Management Corporation. - There is hereby created a government-owned and -controlled corporation to be known as the "Power Sector Assets and Liabilities Management Corporation," hereinafter referred to as the "PSALM Corp.," which shall take ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate and all other disposable assets. All outstanding obligations of the NPC arising from loans, issuances of bonds, securities and other instruments of indebtedness shall be transferred to and assumed by the PSALM Corp. within one hundred eighty (180) days from the approval of this Act.

[6] Section 50, Republic Act No. 9136 (Electric Power Industry Reform Act of 2001).

SEC. 50. Purpose and Objective, Domicile and Term of Existence. – The principal purpose of the PSALM Corp. is to manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and IPP contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner.

[7] GR. No. 146984, dated July 28, 2006.

done in the course of trade or business.

Section 105 of the National Internal Revenue Code of 1997, as amended provides that:

> *Sec. 105. Persons Liable. — Any person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 and 108 of this Code.*
>
> *The value-added tax is an indirect tax and the amount of tax may be shifted or passed on to the buyer, transferee or lessee of the goods, properties or services. This rule shall likewise apply to existing sale or lease of goods, properties or services at the time of the effectivity of Republic Act No. 7716.*
>
> ***The phrase "in the course of trade or business" means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a nonstock, nonprofit organization (irrespective of the disposition of its net income and whether or not it sells exclusively to members of their guests), or government entity.***
>
> *The rule of regularity, to the contrary notwithstanding, services as defined in this Code rendered in the Philippines by nonresident foreign persons shall be considered as being rendered in the course of trade or business. (Emphasis supplied)*

The phrase "in course of trade or business" is defined as the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto by any person or government entity.

In the case of CIR vs. Magsaysay Lines, Inc.[8], The Supreme Court had the occasion to rule on what is not "in course of trade or business". The Supreme Court held that the sale of a vessel was an isolated transaction since it was

[8] Ibid.

involuntary, made pursuant to the declared policy of government for privatization and could no longer be repeated or carried on with regularity is not in the course of trade or business, to wit:

> "That the sale of the vessels was not in the ordinary course of trade or business of NDC was appreciated by both the CTA and the Court of Appeals, xxx. We cite with approval the CTA's explanation on this point:
>
> > *In **Imperial v. Collector of Internal Revenue**, G.R. No. L-7924, September 30, 1955 (97 Phil. 992), the term **carrying on business** does not mean the performance of a single disconnected act, but means conducting, prosecuting and continuing business by performing progressively all the acts normally incident thereof; while **doing business** conveys the idea of business being done, not from time to time, but all the time. [J. Aranas, UPDATED NATIONAL INTERNAL REVENUE CODE (WITH ANNOTATIONS), p. 608-9 (1988)]. **Course of business** is what is usually done in the management of trade or business. [**Idmi v. Weeks & Russel**, 99 So. 761, 764, 135 Miss. 65, cited in Words & Phrases, Vol. 10, (1984)].*
> >
> > *What is clear therefore, based on the aforecited jurisprudence, is that course of business or doing business connotes regularity of activity. In the instant case, the sale was an isolated transaction. The sale which was involuntary and made pursuant to the declared policy of Government for privatization could no longer be repeated or carried on with regularity. It should be emphasized that the normal VAT-registered activity of NDC is leasing personal property.*
> >
> > *This finding is confirmed by the Revised Charter of the NDC which bears no indication that the NDC was created for the primary purpose of selling real property.*
>
> *The conclusion that the sale was not in the course of trade or business, which the CIR does not dispute before this Court, should have definitively settled the matter. Any sale, barter or exchange of goods or services not in the course of trade or business is not subject to VAT."*

Thus, petitioner argued that PSALM's privatization activities is not in the course of trade or business as each sale is considered an isolated transaction not subject to VAT. However, the abovementioned jurisprudence is not in all fours with the instant case. While both sales were made pursuant to the declared policy of government for privatization, the sale in the instant case cannot be considered as isolated transaction. In the instant case, the sale of the National Power Corporation's (NPC's) generation assets, real estate and other disposable assets, and Independent Power Producer (IPP) contracts in an optimal manner is the main mandate of petitioner while in the case of CIR vs. Magsaysay Lines, Inc.[9], there was no indication that NDC was created for the primary purpose of selling real property and that the normal VAT-registered activity of NDC is leasing personal property.

Conducting, prosecuting and continuing the sale, disposition, and privatization of the National Power Corporation (NPC) by performing progressively all the acts normally incident thereof **to optimize the value and sale prices of these assets is the principal purpose for which petitioner was created.** It is for this purpose that that the sale, disposition, and privatization of the National Power Corporation (NPC) be in the optimal manner, mainly not for a loss but optimally for a gain. It is a regular conduct or economic activity of a government owned and controlled corporation, as such, the sale of generating assets, lease of Naga Complex, collection of income and receivables cannot be said to be isolated transactions not subject to VAT.

Nevertheless, VAT is a tax on transactions, imposed at every stage of the distribution process on the sale, barter, exchange of goods or property, and on the performance of services, even in the absence of profit attributable thereto.[10] The term "in the course of trade or business" requires the regular conduct or pursuit of a commercial or an economic

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[9] Ibid.
[10] COMMISSIONER OF INTERNAL REVENUE vs. COURT OF APPEALS and COMMONWEALTH MANAGEMENT AND SERVICES CORPORATION, G.R. No. 125355. March 30, 2000

activity, regardless of whether or not the entity is profit-oriented.[11]

Moreover, We find that the passage of R.A. No. 9337[12] on July 1, 2005 put the electric power industry, including National Power Corporation and PSALM under the VAT system, the Division of this Court correctly ruled as follows:

> *Based on the records of the case, it is undisputed that the enactment of R.A. 9337 on July 1, 2005 placed the Electric Power Industry under the VAT system. Particularly, the amended provisions therein mandated that the sale of electricity by generation companies, transmission and distributions companies shall be subject to VAT on the basis of Sections 106 and 108 of the Tax Code, as amended.*
>
> *Sections 106 and 108, as amended, now reads as follows:*
>
> *"SEC. 106. Value-Added Tax on Sale of Goods or Properties. -*
>
> *(A) Rate and Base of Tax. - There shall be levied, assessed and collected on every sale, barter or exchange of goods or properties, a value-added tax equivalent to ten percent (10%) of the gross selling price or gross value in money of the goods or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor.*
>
> *(1) The term 'goods or properties' shall mean all tangible and intangible objects which are capable of pecuniary estimation and shall include:*
>
> *(a) Real properties held primarily for sale to customers or held for lease in the ordinary course of trade or business;*
>
> *(b) The right or the privilege to use patent, copyright, design or model, plan secret formula or process, goodwill, trademark, trade brand or other like property or right;* C

[11] Ibid.
[12] AN ACT AMENDING SECTIONS 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES

(c) The right or the privilege to use in the Philippines of any industrial, commercial or scientific equipment;

(d) The right or the privilege to use motion picture films, films, tapes and discs; and

(e) Radio, television, satellite transmission and cable television time.

The term 'gross selling price' means the total amount of money or its equivalent which the purchaser pays or is obligated to pay to the seller in consideration of the sale, barter or exchange of the goods or properties, excluding the value-added tax. The excise tax, if any, on such goods or properties shall form part of the gross selling price.

xxx xxx xxx.

SEC. 108. Value-added Tax on Sale of Services and Use or Lease of Properties. –

(A) Rate and Base of Tax. - There shall be levied, assessed and collected, a value-added tax equivalent to ten percent (10%) of gross receipts derived from the sale or exchange of services, including the use or lease of properties.

The phrase 'sale or exchange of services' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration, including those performed or rendered by xxx <u>lessors of property, whether personal or real</u> xxx <u>sales of electricity by generation companies, transmission, and distribution companies</u>; xxx"

Section 106 imposes VAT on "all kinds of goods and properties" sold in the Philippines. The term "goods and properties" have been given an all encompassing meaning to include the sale of the generation assets of petitioner. Therefore, the sale of the Masinloc Plant, Ambuklao/Binga and the collection from the Pantabangan sales fall under that umbrella and should be deemed subject to VAT unless some provision of law expressly exempts it.

Likewise, Section 108 imposes VAT on gross receipts of lessors of property and to those arising from the sale of

> *electricity by generation companies, transmission and distribution companies.*
>
> *With the enactment of R.A. No. 9337, the electric power industry's main business activities were made subject to VAT. Therefore, by classifying petitioner's income from its main business activity as subject to VAT, it follows that its incidental income shall likewise be subject to VAT.*

Concomitantly, petitioner's sale of generating assets, lease of Naga Complex, collection of income and receivables are done in the course of trade or business and is subject to VAT. In fine, We find no cogent reason to reverse the Third Division's findings.

WHEREFORE premises considered, the petition is **DENIED** for lack of merit. The Decision of the Third Division of this Court in CTA Case No. 8475, promulgated on December 2, 2014 and its Resolution, promulgated on February 25, 2015, are hereby **AFFIRMED**. No pronouncement as to costs.

SO ORDERED.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

(with Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda Jr.
(with Separate Concurring Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

(with Concurring and Dissenting Opinion)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen

MA. BELEN RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation among the members of the Court En Banc before the case was assigned to the writer of the opinion of the Court En Banc.

ROMAN G. DEL ROSARIO
Presiding Justice