REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

KEPCO PHILIPPINES CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB N0. 1161
(CTA Case No. 8112)

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COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

KEPCO PHILIPPINES CORPORATION,
Respondent.

CTA EB NO. 1166
(CTA Case No. 8112)

Present:

DEL ROSARIO, *PJ,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

NOV 26 2015
3:25 p.m.

x -- x

DECISION

DEL ROSARIO, PJ.:

These are Petitions for Review filed by Kepco Philippines Corporation (KPC) and the Commissioner of Internal Revenue (CIR) from the

Resolution dated April 11, 2014[1] which denied their respective Motions for Partial Reconsideration for lack of merit and affirmed the Decision dated December 6, 2013,[2] both rendered by the Special First Division[3] of this Court in CTA Case No. 8112, entitled *Kepco Philippines Corporation vs. The Commissioner of Internal Revenue.*

The dispositive portions of the assailed Decision and Resolution read, as follows:

Decision dated December 6, 2013:

> "**WHEREFORE,** the instant *Petition for Review* is hereby **PARTIALLY GRANTED.** The assessment representing deficiency FWT in the aggregate amount of ₱124,286,821.11 for taxable year 2006 and the compromise penalties are **CANCELLED** and **SET ASIDE.** However, the assessment for deficiency VAT for taxable year 2006 is **AFFIRMED** with **MODIFICATIONS**. Accordingly, petitioner is **ORDERED to PAY** respondent the amount of ₱71,799,941.35 representing basic deficiency VAT for taxable year 2006 in the amount of ₱57,439,953.08 and the twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, in the amount of ₱14,359,988.27, as shown below:

Basic Deficiency VAT	₱ 57,439,953.08
Add: 25% Surcharge	14,359,988.27
Total Amount Due	**₱ 71,799,941.35**

> In addition, petitioner is **ORDERED TO PAY**:
>
> a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency VAT of ₱57,439,953.08 computed from January 25, 2007 until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended;
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> b) Delinquency interest at the rate of 20% per annum on the amount of ₱71,799,941.35 representing the basic deficiency VAT of ₱57,439,953.08 and 25% surcharge of ₱14,359,988.27 computed from November 15, 2009 until full payment thereof pursuant to Section 249(C)(3) of the NIRC of 1997, as amended; and

[1] Division Docket, pp. 2086 to 2092.
[2] Division Docket, pp. 1952 to 1996
[3] Composed of Associate Justice Erlinda P. Uy as Chairperson and Associate Justice Esperanza R. Fabon-Victorino.

c) Delinquency interest at the rate of 20% per annum on the deficiency interest which have accrued as afore-stated in (a) computed from November 15, 2009 until full payment thereof pursuant to Section 249(C)(3) of the NIRC of 1997, as amended.

SO ORDERED."

Resolution dated April 11, 2014:

"**WHEREFORE**, the Motion for Partial Reconsideration filed by petitioner Kepco Philippines Corporation on January 3, 2014 and the Motion for Partial Reconsideration filed by respondent Commissioner of Internal Revenue on January 10, 2014, are hereby **DENIED,** for lack of merit.

SO ORDERED."

THE PARTIES

Kepco Philippines Corporation, the petitioner in CTA EB No. 1161, is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal place of business at the 18th Floor Citibank Tower, 8741 Paseo de Roxas, Salcedo Village, Makati City.[4]

On the other hand, the Commissioner of Internal Revenue (CIR), petitioner in CTA EB No. 116, is vested with the authority to carry out all the functions, duties and responsibilities of the said Office, including, *inter alia,* the power to decide disputed assessments and holds office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.[5]

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[4] Rollo (CTA EB No. 1161), p. 2.
[5] Rollo (CTA EB No. 1166), p. 7.

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THE FACTS

On May 17, 1995, KPC and National Power Corporation executed a Rehabilitation, Operation, Maintenance, and Management Agreement for the 650 MW Malaya Thermal Power Plant Complex (ROMM Agreement).[6]

On November 10, 2000, KPC together with Korea Electric Power Corporation (KEPCO), KEPCO International Philippines, Inc. (KIPI) and KEPCO Ilijan Corporation (KEILCO) executed the Kepco Replacement Loan Agreement, wherein KPC, KEPCO and KIPI agreed to extend credit to KEILCO to finance the cost of the construction of the power plant located in Ilijan, Batangas City.[7]

On August 29, 2005, KPC contracted OCE Catering Services for the food requirements of KPC's employees and guests at Malaya Thermal Power Plant, Bo. Malaya, Pililla, Rizal.[8]

On February 10, 2006, KPC and KEPCO Philippines Holdings, Inc. (KPHI) executed a contract wherein KPC agreed to extend a loan facility to KPHI to fund its equity investment in Salcon Power Corporation.[9]

On September 8, 2009, KPC received a Preliminary Assessment Notice (PAN) dated September 4, 2009 with attached Details of Discrepancy and Audit Result/Assessment Notice issued by the CIR for deficiency income tax, value-added tax (VAT), expanded withholding tax (EWT), and final withholding tax (FWT) for 2006.[10]

On October 30, 2009, KPC received a Final Letter of Demand (FLD)[11] with attached Details of Discrepancy and Audit Result/Assessment Notice, dated October 28, 2009, issued by the CIR for deficiency VAT under Assessment Notice No. LTAID II/VT-06-00028, in the amount of ₱159,640,750.79 and for deficiency FWT under Assessment Notice No. LTAID II/WF-06-00032, in the amount of ₱283,927,571.90.

[6] Division Docket, p. 1953.
[7] Division Docket, p. 1954.
[8] *Id.*
[9] *Id.*
[10] Exhibit "11", BIR Records, pp. 1085 to 1096.
[11] Exhibit "A", Division Docket, p. 1303 to 1307.

On November 26, 2009, KPC filed its formal protest[12] against the FLD with supporting documents, pursuant to Section 228 of the 1997 NIRC.

The CIR failed to act on KPC's protest within the 180-day period from November 26, 2009. Hence, on June 25, 2010, KPC filed a Petition for Review[13] with the Court in Division.

On September 29, 2010, the CIR filed her Answer[14] raising the following special and affirmative defenses:

a) The deficiency VAT was assessed on receipts which were not subjected to VAT such as escalation fees for the year 2005 collected in the year 2006 amounting to P374,714,642.25, interest income earned on loans extended to affiliates amounting to P477,094,128.55, and miscellaneous income amounting to P1,605,200.67, which were subject to VAT, pursuant to Section 108 of the NIRC of 1997, as amended;

b) The income payments in the total amount of P248,311,387.00 which were not subjected to FWT were assessed, pursuant to Section 57(A) of the NIRC of 1997, as amended;

c) The deficiency VAT assessment on the P374,714,642.25 escalation fees was due to petitioner's failure to submit the required inventory or information return to the Revenue District Office (RDO) concerned within thirty (30) days after the effectivity of RA No. 9337, in violation of the transitory provision of RA No. 9337.;

d) The imposition of VAT on petitioner's miscellaneous income from the lease of its canteen and dormitory amounting to P10,298.39, inclusive of penalties, sales of used/empty computer toners, interest income earned from advances to NPC amounting to P289,428.23, inclusive of interest and penalty, for petitioner's loans extended to its affiliates and Final Taxes with respect to the payments made to petitioner pertaining to the TSA between petitioner and KEPCO, a non-resident foreign corporation domiciled in Korea, is correct and made in good faith; and,

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[12] Exhibit "B", Division Docket, pp. 1308 to 1313.
[13] Petition for Review dated June 22, 2010 docketed as CTA Case No. 8112, Division Docket, pp. 1 to 307.
[14] Answer, Division Docket, pp. 336 to 350.

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e) The subject assessment enjoys the presumption of correctness and regularity. In the absence of proof of any irregularities in the performance of duties, an assessment made by the BIR will not be disturbed.

Pre-trial having been terminated, trial ensued during which both parties presented their respective testimonial and documentary evidence. On January 4, 2013, the case was deemed submitted for decision[15] upon filing of KPC's "Memorandum"[16] on November 26, 2012 and the CIR's "Memorandum"[17] on January 2, 2013.

On December 6, 2013, the Court in Division rendered the assailed Decision partially granting KPC's Petition for Review. Aggrieved, both parties filed their respective Motion for Partial Reconsideration, which were both denied for lack of merit.

Hence, on May 5, 2014, KPC filed its Petition for Review[18] (CTA EB No. 1161) while the CIR filed her Petition for Review[19] on May 22, 2014 (CTA EB No. 1166).

On June 10, 2014, the Court *En Banc* issued a Resolution[20] in CTA EB No. 1161 ordering the CIR to comment on KPC's Petition for Review, within ten (10) days from notice.

On June 18, 2014, the Court *En Banc* consolidated CTA EB No. 1166 with CTA EB No. 1161, the case bearing the lower docket number.[21]

On July 9, 2014, the CIR filed her Comment (Re: Petition for Review dated 5 May 2014).[22]

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[15] Resolution, Division Docket, p. 1947.
[16] Division Docket, pp. 1888 to 1908.
[17] Division Docket, pp. 1921 to 1945.
[18] Rollo (CTA EB No. 1161), pp. 1 to 68.
[19] Rollo (CTA EB No. 1166), pp. 6 to 79.
[20] Rollo (CTA EB No. 1161), pp. 70 to 71.
[21] Rollo (CTA EB No. 1161), pp. 72 to 73.
[22] Rollo (CTA EB No. 1161), pp. 80 to 90.

On August 18, 2014, the Court *En Banc* ordered KPC to comment on the Petition for Review in CTA EB No. 1166, within ten (10) days from receipt thereof. [23] KPC filed its Comment on October 2, 2014.[24]

On October 14, 2014, the Court *En Banc* gave due course to both Petitions for Review and ordered the parties to file their simultaneous memoranda, within thirty (30) days from notice, after which the petitions shall be deemed submitted for decision. [25]

Considering the CIR's "Manifestation"[26] filed on November 25, 2014 stating that she is adopting her Petition for Review filed on May 22, 2014 and Comment filed on July 9, 2014 as her memorandum, and with the filing of KPC's "Memorandum"[27] on November 24, 2014, both Petitions for Review were deemed submitted for decision on January 8, 2015.

ISSUES

In CTA EB No. 1161, KPC raised the sole issue of:

> Whether [KPC] is liable to pay VAT for the (a) loans extended to its affiliates [KEILCO] and [KPHI]; (b) sale of used and empty computer toner and cartridges; and (c) interest income earned from the payment it received from NPC due to the advances [KPC] extended to NPC for the payment of the retirement pay of former NPC employees.[28]

On the other hand, in CTA EB No. 1166, the CIR raised the following issues:

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> Whether or not the Honorable Special First Division erred in ruling that [KPC] is not liable for assessed deficiency VAT on

[23] Rollo (CTA EB No. 1161), pp. 107 to 109.
[24] Rollo (CTA EB No. 1161), pp. 110 to 117.
[25] Rollo (CTA EB No. 1161), pp. 120 to 121.
[26] Rollo (CTA EB No. 1161), pp. 133 to 134.
[27] Rollo (CTA EB No. 1161), pp. 122 to 132.
[28] Petition for Review dated May 5, 2014, Rollo (CTA EB No. 1161), p. 3.

> the sales adjustments relative to the sale of generated electricity to the National Power Corporation (NPC), covering the period December 25, 2003 to October 31, 2005 as reflected in respondent's fourth quarter return for taxable year 2006;
>
> II
>
> Whether or not the Honorable Special First Division erred in ruling that [KPC] is not liable for assessed deficiency VAT for the lease of [KPC]'s premises as dormitory;
>
> III.
>
> Whether or not the Honorable Special First Division erred in ruling that [KPC] is not liable for assessed deficiency final withholding tax on payments made to KEPCO.[29]

In its Petition, KPC contends that it is not a lending investor; as such, the interest income it derived from extending loans to its affiliates should not be subject to VAT. Allegedly, the loans it extended are merely incidental to its main line of business, which is the rehabilitation, operation, maintenance and management of the Malaya Power Plant or other power generating plants. As regards the sale of used and empty computer toner and cartridges, KPC invokes the case of *Manila Mandarin Hotels, Inc. vs. The Commissioner of Internal Revenue,*[30] wherein the CTA held that the sales of unserviceable equipment are not subject to VAT.

On the other hand, in her Petition, the CIR claims that KPC is liable for deficiency VAT relative to the sales adjustments of its generated electricity for the period covering December 25, 2003 to October 31, 2005, pursuant to RR No. 15-2005, which implements the transitory provisions of RA No. 9337, for failure to submit the required inventory or information return to the RDO concerned, within thirty (30) days after the effectivity of said law; and that KPC's lease of its premises as dormitory is subject to VAT since it is incidental to its main business. As to the deficiency final withholding tax assessment, the CIR maintains that KPC failed to comply with the provisions of BIR Revenue Memorandum Order No. 1-2000, which prescribed the procedure for processing tax treaty relief applications.

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[29] Petition for Review dated May 22, 2014, Rollo (CTA EB No. 1166), pp. 8 to 9.
[30] CTA Case No. 5046, March 24, 1997.

RULING OF THE COURT *EN BANC*

Settled is the rule that a court's lack of jurisdiction may be raised at any stage of the proceedings, even on appeal.[31] Moreover, where prescription, lack of jurisdiction or failure to state a cause of action clearly appear from the complaint filed with the trial court, the action may be dismissed *motu proprio* by the appellate court, even if the case has been elevated for review on different grounds. Verily, the dismissal of such cases appropriately ends useless litigations.[32]

Guided by the above jurisprudential rule, the Court *En Banc* deems it necessary to first resolve the issue of whether or not the Petition for Review in CTA Case No. 8112, was filed within the prescribed period.

Pursuant to Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, and Section 3 of Revenue Regulations No. 12-99,[33] if the protest is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the inaction may appeal to the CTA, within thirty (30) days from the lapse of said period.

In the case at bar, records show that on September 8, 2009, KPC received a copy of the PAN. On October 30, 2009, KPC received the FLD with attached Details of Discrepancy and Audit Results/Assessment Notices. On November 26, 2009, KPC filed its protest to the FLD together with the supporting documents. From November 26, 2009, the date of filing of KPC's protest, the CIR had one hundred eighty (180) days or until May 25, 2010 within which to act on said protest. The CIR, however, did not act on KPC's protest, within the prescribed 180-day period.

Under Section 228 of the NIRC of 1997, as amended, KPC had thirty (30) days from May 25, 2010, the date of the lapse of the 180-day period for the CIR to act on the protest, or until June 24, 2010, within which to appeal to the CTA due to the inaction of the CIR. KPC, however, filed its Petition

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[31] *Francel Realty Corporation vs. Ricardo T. Sycip,* G.R. No. 154684, September 8, 2005.
[32] *George Katon vs. Manuel Palanca, Jr., et al.,* G.R. No. 151149, September 7, 2004.
[33] Dated September 14, 1999.

for Review in CTA Case No. 8112 only on June 25, 2010, one (1) day beyond the reglementary period for filing the Petition for Review.

The Petition for Review in CTA Case No. 8112, having been filed late, the disputed assessment against KPC had already become final, executory and demandable. Consequently, the Petition for Review should have been dismissed outright for being filed beyond the reglementary period. Further, records show that no valid or compelling reason has been shown by KPC for the late filing of its petition.

The right to appeal is not a constitutional, natural or inherent right — it is a statutory privilege and of statutory origin and, therefore, available only if granted or as provided by statutes. It may be exercised only in the manner prescribed by the provisions of the law.[34] **Moreover, the perfection of an appeal in the manner and within the period set by law is not only mandatory, but jurisdictional as well, hence failure to perfect the same renders the judgment final and executory.** And, just as a losing party has the privilege to file an appeal within the prescribed period, so also does the prevailing party has the correlative right to enjoy the finality of a decision in his favor.[35]

For all the foregoing, the Court *En Banc* is left with no recourse but to dismiss the Petition for Review in CTA Case No. 8112, for being filed beyond the period set by law.

With the above conclusion thus reached, the Court *En Banc* finds it unnecessary to discuss the other issues raised for being academic.

WHEREFORE, foregoing premises considered:

1) The Petition for Review filed by Kepco Philippines Corporation, docketed as CTA EB No. 1161, is hereby **DENIED** for lack of merit; and,

2) The Petition for Review filed by the Commissioner on Internal Revenue, docketed as CTA EB No. 1166, is hereby

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[34] *Yu vs. Samson-Tatad*, G.R. No. 170979, February 9, 2011.

[35] *Apex Mining Co., Inc. vs. Commissioner of Internal Revenue and Court of Appeals*, G.R. No. 122472, October 20, 2005.

GRANTED. Accordingly, the Decision dated December 6, 2013 rendered by the Special First Division is hereby **REVERSED** and **SET ASIDE**. A new one is hereby entered dismissing the Petition for Review filed by Kepco Philippines Corporation in CTA Case No. 8112. Accordingly, Assessment Notice No. LTAID II/WF-06-00032 and LTAID II/VT-06-00028 issued by the BIR are hereby **UPHELD**.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen S. L.
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice