REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

CE CEBU GEOTHERMAL POWER COMPANY, INC. and VISAYAS GEOTHERMAL POWER COMPANY, Petitioners, -versus- PROVINCE OF LEYTE and LORETO B. BALLAIS, in his capacity as Treasurer of the Province of Leyte, Respondents.	CTA AC CASE NO. 89 Members: BAUTISTA, *Chairperson* FABON-VICTORINO, *and* RINGPIS-LIBAN, *JJ.* Promulgated: JAN 24 2014 2:47 p.m.

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Petitioner CE Cebu is a Philippine corporation with principal office at the Municipality of Kananga, Leyte.[1] It was the plaintiff in Civil Case Nos. 4558-O, 4618-O, and R-ORM-07-00050-CV. The other petitioner VGPC is a duly organized and existing local partnership, with principal office at 24/F 6750 Building, Ayala Avenue, Makati City.[2] It was the plaintiff in Civil Case Nos. 4559-O, 4617-O, and R-ORM-07-00052-CV. After consolidation, all the cases were heard before the RTC of Ormoc City, Branch 35.

Respondent Province of Leyte is a local government unit, while respondent Loreto B. Ballais was its Treasurer during the relevant periods. The respondents hold office at the Provincial Capitol, Tacloban City, Province of Leyte and were the defendants in all of the above-cited cases before the RTC.[3]

The following facts of the cases as found by the RTC[4] remain undisputed:

> Plaintiff CE Cebu is operating a geothermal power plant in the greater Tongonan area within the Province of Leyte. On May 14, 1981, a Service Contract[5] (geothermal resources) was executed between the Republic of the Philippines and PNOC Energy Development Corporation (PNOC-EDC) where PNOC-EDC in agreement with the government was appointed and constituted as the exclusive party to conduct geothermal operations pursuant to the provisions under Presidential Decree No. 1442 otherwise known as 'An Act to Promote the Exploration and Development of Geothermal Resources'.
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> On September 6, 1993, PNOC-EDC as a government infrastructure agency authorized under RA No. 6957 or the BOT

[1] Exhibit "NN-1", RTC Records, Civil Case No. 4558-O, pp. 876 to 889.
[2] Exhibit "OO-1", RTC Records, Civil Case No. 4558-O, pp. 946 to 953.
[3] Par. 3, Petition for Review, docket, p. 7.
[4] RTC of Ormoc City-Branch 35 Decision, Annex "A", Petition for Review, docket, pp. 71 to 79.
[5] Exhibit "I", RTC Records, Civil Case No. 4558-O, pp. 28 to 79.

Law entered into an agreement known as the '125 MW Power Plant – Upper Mahiao Agreement'[6] with Ormat, Inc., a private contractor that will finance, design, construct, own and operate a geothermal electricity generating plant utilizing the geothermal resources of the greater Tongonan area and to deliver electricity exclusively to PNOC-EDC.

On April 8, 1994, PNOC-EDC, Ormat, Inc. and plaintiff CE Cebu entered into an Accession Undertaking[7] wherein plaintiff CE Cebu acceded to assume all obligations of Ormat, Inc. in that September 6, 1993 agreement.

On (sic) the same way, plaintiff VGPC is also operating a geothermal power plant within the Province of Leyte. In furtherance of the Service Contract Executed on May 14, 1981 between PNOC-EDC and the Government of the Republic of the Philippines, PNOC-EDC engaged (sub)contractors that will construct and operate a geothermal power plant. On September 10, 1993, PNOC-EDC entered into an agreement known as the 231 MW Power Plant – Malitbog Agreement[8] with Magma Power Company, the latter known as the operator, will design, construct, own and operate geothermal electric generating plants, utilizing the geothermal resources of the Greater Tongonan area in behalf of PNOC-EDC.

That on February 17, 1994 VGPC and PNOC-EDC executed an Assignment and Assumption Agreement[9] with respect to the Malitbog Agreement, whereby in said agreement plaintiff VGPC assumed the rights and obligations of the Operator (Magma Power Company) under the Malitbog Agreement.

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[6] Exhibit "J", RTC Records, Civil Case No. 4558-O, pp. 80 to 127.
[7] Exhibit "K", RTC Records, Civil Case No. 4558-O, pp. 132 to 134.
[8] Exhibit "M", RTC Records, Civil Case No. 4559-O, pp. 80 to 122.
[9] Acknowledgment and Consent Agreement, Exhibit "N", RTC Records, Civil Case No. 4559-O, pp. 123 to 133.

> Common to these agreements separately executed by CE Cebu and VGPC are the rights and obligations assumed by them which among others is that – CE Cebu and VGPC are to operate a geothermal power plant within the Province of Leyte utilizing the latter's geothermal resources.
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> For operating a geothermal power plant within the Province of Leyte, defendant on its part sent notices of assessment to plaintiffs."

The tax assessments issued against CE Cebu are detailed as follows:

Date Issued	Taxable Year	Amount Assessed
November 23, 2005[10]	2000 to 2004	P95,097,013.16
January 6, 2006[11]		
March 27, 2006[12]	2005	P15,291,199.58
March 1, 2007[13]	January 1, 2006 to August 31, 2006	P 9,861,967.15

The tax assessments issued against VGPC are as follows:

Date Issued	Taxable Year	Amount Assessed
December 14, 2005[14]	2000 to 2004	P170,772,960.10
March 27, 2006[15]	2005	P 21,804,805.15
March 1,	2006	P 21,902,266.04

[10] Exhibit "B", RTC Records, Civil Case No. 4558-O, p. 316.
[11] Exhibit "C", RTC Records, Civil Case No. 4558-O, p. 318.
[12] Exhibit "AA", RTC Records, Civil Case No. 4618-O, p. 408.
[13] Exhibit "CC", RTC Records, Civil Case No. 4618-O, p. 453.
[14] Exhibit "E", RTC Records, Civil Case No. 4558-O, p. 320
[15] Exhibit "FF", RTC Records, Civil Case No. 4618-O, p. 437.

2007[16]		

In accord with Section 195[17] of the Local Government Code (LGC) of 1991, both petitioners filed several protests with respondent Provincial Treasurer of Leyte. The protests and the corresponding actions thereon are summarized as follows:

Date of Assessment	**Period Covered**	**Date of Protest by CE Cebu**	**Action by respondent treasurer**
November 23, 2005 January 6, 2006	2000 to 2004	January 27, 2006[18]	Sent Final Notice of Assessment and Demand for Payment dated February 6, 2006[19]
March 27, 2006	2005	April 5, 2006[20]	No action
March 1, 2007	January 1, 2006 to August 31, 2006	April 27, 2007[21]	No action

Date of Assessment	**Period Covered**	**Date of Protest by VGPC**	**Action by respondent treasurer**
December 14, 2005	2000 to 2004	February 2, 2006[22]	Sent Final Notice of Assessment and Demand for Payment dated February 6, 2006[23]

[16] Exhibit "HH", RTC Records, Civil Case No. 4618-O, p. 607.
[17] SEC. 195. *Protest of Assessment.* - When the local treasurer or his duly authorized representative finds that correct taxes, fees, or charges have not been paid, he shall issue a notice of assessment stating the nature of the tax, fee, or charge, the amount of deficiency, the surcharges, interests and penalties. Within sixty (60) days from the receipt of the notice of assessment, the taxpayer may file a written protest with the local treasurer contesting the assessment; otherwise, the assessment shall become final and executory. The local treasurer shall decide the protest within sixty (60) days from the time of its filing. If the local treasurer finds the protest to be wholly or partly meritorious, he shall issue a notice cancelling wholly or partially the assessment. However, if the local treasurer finds the assessment to be wholly or partly correct, he shall deny the protest wholly or partly with notice to the taxpayer. The taxpayer shall have thirty (30) days from the receipt of the denial of the protest or from the lapse of the sixty (60) day period prescribed herein within which to appeal with the court of competent jurisdiction otherwise the assessment becomes conclusive and unappealable.
[18] Exhibit "Q", RTC Records, Civil Case No. 4558-O, pp. 138 to 156.
[19] Exhibit "D", RTC Records, Civil Case No. 4558-O, p. 319.
[20] Exhibit "BB", RTC Records, Civil Case No. 4618-O, p. 410.
[21] Exhibit "DD", RTC Records, Civil Case No. 4618-O, p. 455.
[22] Exhibit "P", RTC Records, Civil Case No. 4559-O, pp. 137 to 155.
[23] Exhibit "G", RTC Records, Civil Case No. 4558-O, p. 323.

March 27, 2006	2005	April 5, 2006[24]	No action
March 1, 2007	2006	April 27, 2007[25]	No action

Aggrieved by the denial of their protests against the 2000 to 2004 assessments, and the inaction of respondent Provincial Treasurer on their protests against the 2005 and 2006 assessments, petitioners elevated the matter to the RTC of Ormoc City via a Complaint/Appeal with Urgent Application for Temporary Restraining Order and Writ of Preliminary Injunction they separately filed on February 14, 2006 for the 2000 to 2004 assessments, respectively docketed as Civil Case No. 4558-0 and Civil Case No. 4559-0.

The appeals pertaining to the 2005 assessments were separately filed by petitioners on June 30, 2006, docketed as Civil Case No. 4618-0 and Civil Case No. 4617-0, while the appeals for the January to August 2006, and the year 2006 assessments were instituted on July 19, 2007 and docketed as Civil Case No. R-ORM-07-00050-CV and Civil Case No. R-ORM-07-00052-CV.

On February 14, 2006, the cases were consolidated at the instance of petitioner VGPC.

On September 9, 2011, the RTC rendered the assailed Decision[26] finding petitioners liable for franchise taxes for the years 2000 to 2006, with surcharges and interests, to wit:

> **WHEREFORE**, premises considered, it is hereby Ordered that:
>
> 1. plaintiffs pay defendants the franchise taxes assessed as follows:
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> For CE Cebu:

[24] Exhibit "GG", RTC Records, Civil Case No. 4618-O, p. 493.
[25] Exhibit "II", RTC Records, Civil Case No. 4618-O, p. 478.
[26] Annex "A", Petition for Review, docket, pp. 71 to 79.

Year 2000-2004	P95,097,013.16
Year 2005	P15,291,199.58
Jan. 1, 2006-Aug. 31, 2006	P9,861,967.15

For VGPC:

Year 2000-2004	P170,772,960.10
Year 2005	P 21,804,805.15
Year 2006	P 21,902,266.04

2. Pay applicable interests and surcharges that accrued from the time of their assessment until fully paid.

SO ORDERED.

In the assailed Resolution dated February 9, 2012,[27] petitioners' Motion for Reconsideration was denied.

Aggrieved, petitioners filed the instant Petition For Review[28] on March 15, 2012, raising the following issues[29] for the resolution of the Court:

I. The RTC grossly erred when it ruled that Petitioners cannot invoke the privileges of the EPIRA. The EPIRA is applicable because (a) it was the governing law at the time the Assessments were issued and during the period from its effectivity on June 26, 2001 to 2006 covered by the Assessments; and (b) even before the passage of the EPIRA, the construction and operation of power plants did not require any franchise.

II. The RTC's finding that Petitioners assumed PNOC-EDC's obligations under the Geothermal Service Contract is clearly misplaced, unfounded and inaccurate

[27] Annex "B", Petition for Review, docket, pp. 80 to 82.
[28] Docket, pp. 5 to 70.
[29] Assignment of Errors, Petition for Review, docket, pp. 25 to 26.

because (a) Petitioners were never privy to that service contract; and (b) the execution of the Project Agreements and Accession Agreements were pursuant to the BOT law.

III. The RTC's finding in the assailed Decision that Petitioners assumed PNOC-EDC's obligations under the Geothermal Service Contract is clearly erroneous because the rights and obligations under that service contract and the Project Agreements and Accession Agreements involve different subject matters and are independent, separate and distinct from one another.

IV. The RTC's finding in the assailed Decision that Petitioners were granted an exclusive privilege of operating power plants within respondent Province is equally baseless and unjustified.

V. The RTC gravely erred in finding that *NPC v. Cabanatuan* applies to Petitioners because (a) NPC's powers and functions were conferred by special laws (*i.e.*, its charter) while Petitioners' powers are based on general corporate and partnership laws; (b) NPC's powers are significantly different from those of Petitioners; and (c) unlike NPC, Petitioners are not engaged in public utility operations.

VI. The RTC's finding that the assessment for the year 2000 had not yet prescribed because Respondents were purportedly prevented from assessing the franchise tax is absolutely devoid of basis and merit.

VII. Both the Assailed Decision and Assailed Resolution failed to address Petitioners' other equally meritorious arguments on (a) their tax-exempt status as Board of Investments ('BOI')-registered enterprises; (b) their tax exemption under PD 1442; and (c) PNOC-EDC's assumption

of liability under the Geothermal Service Contract.

Petitioners argue that the RTC erred in upholding the subject assessments for franchise taxes issued by respondent Provincial Treasurer. They claim that they cannot be held liable for franchise taxes since no franchise was issued in their favor either by the legislature through an enabling law, or by respondent Province as a local government unit.

Their stance is anchored on Section 6 of Republic Act (RA) No. 9136 or the Electric Power Industry Reform Act (EPIRA), which provides that power generation, to which petitioners are engaged, is not a public utility operation hence, no franchise is required. Without such franchise, there is no legal basis for the imposition of franchise tax. Similarly, the Bureau of Local Government Finance (BLGF), in its Opinion dated November 29, 2011[30] advanced the belief that power generation should not be considered a public utility operation and an entity engaged therein should not be required to secure a national or local franchise. Consequently, it cannot be held liable for franchise tax under Section 137 of the Local Government Code (LGC).

The petitioners also find erroneous the RTC ruling that they cannot invoke the EPIRA as their contracts were executed prior to EPIRA's effectivity on June 26, 2001. The same circumstance also prevents the application of the said law for such would be giving them new or better rights not otherwise provided in their existing contracts in violation of Section 75 of the EPIRA which mandates that nothing in the said law shall be construed as a conferment of new or better rights to creditors and IPP contractors in addition to subsisting rights granted by the NPC or the Philippine Government under existing contracts.

Petitioners insist that the EPIRA applies to them since it was the law in effect at the time the subject assessments were issued. In addition, Section 2, Rule 5, Part II of its

[30] Annex C, Petition For Review dated March 13, 2012, docket pp. 83-88.

Implementing Rules and Regulations (IRR) specifically provides that the law applies to all facilities used or to be used for the generation of electricity, including but not limited to accredited facilities under Build, Operate Transfer (BOT) arrangement with PNOC-EDC, as petitioners.

Assuming that the EPIRA is not applicable, there is no statute or rule even before the passage of said law that requires a franchise for the business of power generation to which petitioners are engaged. Further, jurisprudence prior to the EPIRA holds that power generation is not deemed as a public utility, hence, no franchise is needed. Without any such franchise, there is no legal basis for the imposition of franchise tax.

Neither did petitioners indirectly acquire a franchise, as erroneously held by the RTC, when they assumed the rights and obligations of PNOC-EDC under the latter's geothermal service contract with the Philippine government. For one, they were never privy to such geothermal service contract. For another, the geothermal service contract of PNOC-EDC with the government was pursuant to P.D. No. 1442 while their respective project agreements with PNOC-EDC were pursuant to the BOT Law. Moreover, under the said project agreements they merely assumed the rights and obligations of the original operators, namely Ormat, Inc. and Magma Power Company such as the right to build and operate a geothermal power plant and not the rights of PNOC-EDC to explore, develop, and produce geothermal fluids under PNOC-EDC's geothermal service contract.

Also unfounded is the RTC's conclusion that they were granted the exclusive right to operate a geothermal power plant within the jurisdiction of respondent Province of Leyte, which it deemed a franchise justifying the imposition of franchise tax. The cited case to support this conclusion involves the National Power Corporation (NPC) which has powers and functions conferred by special law, hence, not applicable to petitioners whose powers are merely those of ordinary corporations.

Contrary to the RTC's observation citing Section 194 of the LGC, the subject assessments had already prescribed. Respondents were not legally prevented from making the assessment within the 5-year prescriptive period on account of lack of the pertinent records of petitioners. Under Section 171 of the LGC, respondents may examine the books of accounts and pertinent records of taxpayers, delinquent or otherwise. Precisely, respondents were able to issue the subject assessments using alternative methods negating the contention that they were legally prevented from issuing the assessment.

Finally, petitioner faults the RTC for not considering the fact that they were registered with the Board of Investments (BOI) as pioneering industry and as such exempt from local franchise taxes by virtue of Presidential Decree (PD) No. 1442. Thus, they were entitled to a tax holiday of six (6) years commencing from the time of registration on February 23, 1994 or until February 22, 2000 for petitioner CE Cebu, and on March 4, 1994 or until March 3, 2000 for VGPC. Thus, the assessments which include these periods when petitioners were still tax exempt must be partially cancelled.

Respondents however insist that petitioners are liable for local franchise tax and the EPIRA does not apply to them since it took effect only in 2001 or way after petitioners executed their agreement with PNOC-EDC.

Further, under Section 137 of the LGC, imposition of local franchise tax does not require that the entity be a public utility or have a national franchise. Applying the principle laid down in the case of National Power Corporation vs. City of Cabanatuan,[31] all the requisites were present to assess petitioners for local franchise tax since they had an exclusive privilege to do business and harness the geothermal resources of respondent Province.

Petitioners cannot invoke as well the tax exemption under P.D. 1442, in relation to P.D. 87, under the Geothermal Service Contract of PNOC-EDC for only the latter was bound by it. The agreements of petitioners with PNOC-EDC were separate and distinct contracts. Further, P.D.

[31] G.R. No. 1491110, April 9, 2003

1442 had already been superseded by Section 193 and 534(e) of the LGC which withdrew all the tax exemption granted except those of the local water districts, cooperatives under R.A. 6938, non-stock and non-profit hospitals and educational institutions. Not being included in the enumeration, any previous tax exemption of petitioners are deemed withdrawn.

Finally, respondents claim prescription of the assessments cannot be raised for the first time on appeal. This issue was never raised in the pre-trial and trial stages and only raised in the memoranda filed with the RTC. Respondents posit that the parties are bound by what is contained in the pre-trial order. Even assuming that prescription is a valid issue, still the subject assessments were issued within the 5-year prescriptive period which in this case did not run since respondent Provincial Treasurer was legally prevented from making such assessment per testimony of respondents' witness, Gerardo A. Avorque that pertinent records were not made available for purposes of computing the franchise tax due.

DISCUSSION/RULING

The issues submitted for the resolution of the Court can be narrowed down to a single main issue of whether petitioners are liable for franchise taxes under the Local Government Code of 1991, in relation to Resolution No. 840, Provincial Tax Ordinance No. 1[32] enacted by respondent Province of Leyte.

In the assailed Decision, the RTC of Ormoc City-Branch 35 sustained respondents' view that petitioners' exclusive operation of the geothermal power plants situated within the Province of Leyte was a privilege not otherwise granted to any other ordinary businesses. This exclusive privilege to harness and generate geothermal resources in the specified concession area pursuant to their agreements with PNOC-EDC was considered a franchise in itself rendering petitioners liable for franchise taxes. This view sprung from

[32] An Ordinance Levying Taxes, Fees, and Charges, and other Impositions in the Province of Leyte, Annex "1', Consolidated Answer, RTC Records, Civil Case No. 4558-0, pp. 294 to 300.

the case of *National Power Corporation vs. City of Cabanatuan,*[33] in which the Supreme Court held that:

> (I)n its specific sense, a franchise may refer to a general or primary franchise, or to a special or secondary franchise. The former relates to the right to exist as a corporation, by virtue of duly approved articles of incorporation, or a charter pursuant to a special law creating the corporation. The right under a primary or general franchise is vested in the individuals who compose the corporation and not in the corporation itself. On the other hand, the latter refers to the right or privileges conferred upon an existing corporation such as the right to use the streets of a municipality to lay pipes of tracks, erect poles or string wires. The rights under a secondary or special franchise are vested in the corporation and may ordinarily be conveyed or mortgaged under a general power granted to a corporation to dispose of its property, except such special or secondary franchises as are charged with a public use.
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> xxx xxx xxx
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> 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 context of taxation. As commonly used, a **franchise tax** is 'a tax on the 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 its 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

[33] G.R. No. 149110, April 9, 2003.

> business and exercise its franchise. It is within this context that the phrase **'tax on businesses enjoying a franchise'** in Section 137 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.

For the RTC, petitioners, under the Accession Undertakings[34], assumed all the obligations of PNOC-EDC under its service contract with the Republic of the Philippines and ultimately became the grantee of the privilege to conduct business previously granted by government[35] to PNOC-EDC alone and to no other.[36]

The Court cannot sustain the foregoing proposition.

The authority of respondent Province of Leyte to impose a franchise tax is anchored on Section 137 of the LGC of 1991, to wit:

> SEC. 137. *Franchise Tax.* - Notwithstanding any exemption granted by any law or other special law, **the province may impose a tax on businesses 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 (1/20) of one percent (1%) of the capital investment. In

[34] Exhibits "K" and "T", RTC Records, Civil Case No. 4558-O, pp. 132 to 134 and p. 331.
[35] RTC Decision, docket, p. 76.
[36] *Ibid.*

> 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 fraction thereof, as provided herein. *(Emphasis supplied)*

Section 131(m) of the same Code defines the term "franchise" in the following manner:

> SEC. 131. *Definition of Terms.* - When used in this Title, the term:
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> xxx xxx xxx
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> (m) 'Franchise' is a right or privilege, affected with public interest **which is conferred upon private persons or corporations**, under such terms and conditions as the government and its political subdivisions may impose in the interest of public welfare, security, and safety; *(Emphasis supplied)*

Thus, franchise refers to the special privilege conferred by the government on an individual or corporation to do certain things, which does not belong to citizens generally of common right.[37]

A serious examination of the Accession Undertaking Agreements upon which the RTC based its conclusion shows that petitioners merely assumed the rights and obligations of the former Operators of the Upper Mahiao and Malitbog power plants, namely Ormat, Inc. in the case of CE Cebu,[38] and Magma Power Company, in the case of VGPC.[39] No additional obligations were conferred thereunder.

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[37] *Land Transportation Office, et al. vs. City of Butuan*, G.R. No. 131512, January 20, 2000.
[38] Exhibit "K", RTC Records, Civil Case No. 4558-O, pp. 132 to 134.
[39] Exhibit "T", RTC Records, Civil Case No. 4558-O, p. 331.

Moreover, in the Geothermal Service Contract[40] with the Republic of the Philippines pursuant to PD No. 1442,[41] PNOC-EDC was obliged to "execute the geothermal operations", defined under the said contract as "exploration, development and production". On the other hand, the Project Agreements[42] executed by petitioners' predecessors for the Upper Mahiao Power Plant and Malitbog Power Plant contemplate petitioner's undertaking to finance, design, supply, construct, test, operate, and maintain the power plants only. In other words, PNOC-EDC was the one to explore, supply, and deliver all geothermal requirements of the power plants. In return, petitioners shall convert the geothermal fluid by the PNOC-EDC into electricity and deliver the same to the National Power Corporation (NPC), in behalf of PNOC-EDC. The NPC shall sell it to different power contractors on a nationwide basis.[43] CE Cebu's Articles of Incorporation expressly provides that "in no event shall the corporation itself engage in the general supply or distribution of electricity, in retail trade or in the business of a public utility, or furnish electricity to end-users or consumers, or provide a public service".[44]

As admitted by respondents during trial,[45] PNOC-EDC's contracts with the original Operators for the Upper Mahiao Agreement[46] dated September 6, 1993 and Malitbog Agreement[47] dated September 10, 1993 were based on a Build-Operate-Transfer (BOT) Agreement,[48] where PNOC-EDC was authorized to enter into contracts, on its own, with project proponents for the financing, construction and operation of an infrastructure or development facility such as a power plant. [49]

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[40] Exhibit "I", RTC Records, Civil Case No. 4558-O, pp. 28 to 79.
[41] An Act to promote the Exploration and Development of Geothermal Resources, June 11, 1978.
[42] Exhibits "J" and "M", RTC Records, Civil Case No. 4558-O, pp. 80 to 127 and Case No. 4559-O, pp. 80 to 122.
[43] Section 2, Republic Act No. 6395.
[44] Exhibit "NN", RTC Records, Civil Case No. 4558-O, p. 881.
[45] Par. 5 and 6, Admitted Stipulations, Pre-Trial Order, RTC Records, Civil Case No. 4558-O, p. 688.
[46] Exhibit "J", RTC Records, Civil Case No. 4558-O, pp. 80 to 127.
[47] Exhibit "M", RTC Records, Civil Case No. 4559-O, pp. 80 to 122.
[48] Republic Act No. 6957 otherwise known as "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for the other purposes" (BOT Law), July 9, 1990.
[49] Section 2(b), Republic Act No. 7718, May 5, 1994.
(b) Build-operate-and-transfer - A contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation maintenance thereof. xxx

The Project Agreements executed by PNOC-EDC and the former Operators provide that:

> WHEREAS, **Republic Act No. 6957 dated July 9, 1990 (BOT Law) authorized government infrastructure agencies, including PNOC-EDC, to enter into contracts with private contractors for the financing, construction, operation and maintenance of infrastructure projects**;
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> WHEREAS, NAPOCOR and PNOC-EDC have previously executed a Memorandum of Understanding for the Development of Geothermal Power Plant in PNOC-EDC Projects, including the geothermal resources of the Greater Tongonan area of Leyte, comprising the Upper and Lower Mahiao, Sambaloran, Malitbog and Mahanagdong sectors, **where PNOC-EDC holds an existing Geothermal Service Contract**;
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> xxx xxx xxx
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> WHEREAS, NAPOCOR and PNOC-EDC intend to execute a Power Purchase Agreement **for the purchase by NAPOCOR of electric power capacity and electric energy produced by PNOC-EDC** from the geothermal resources of Greater Tongonan area of Leyte;
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> WHEREAS, PNOC-EDC has invited several contractors to submit proposals **for the design, construction, operation and maintenance of a geothermal power plant on a build-operate-transfer (BOT) basis for the Upper Mahiao portion of the said Geothermal Service Contract area, which power plant will convert PNOC-EDC's geothermal energy into electricity for sale to NAPOCOR**; *(Emphasis supplied)*

Evident from the foregoing that what PNOC-EDC and its counter-parties had was a contractual arrangement, where the Operators in consideration for the services rendered, i.e. supply of electricity and energy to NPC, receive "energy fee" as payment from PNOC-EDC. Thus, petitioners were into generation and supply of geothermal power, in behalf of PNOC-EDC, deliver the same exclusively to NPC by virtue of the BOT Agreement. The said contractual arrangement was private in nature which did not require a franchise from the government, since petitioners only sell the electricity they produce to NPC and none other. It is PNOC-EDC which had a geothermal service contract with the Republic of the Philippines and not petitioners.

Furthermore, the RTC finding of "exclusive" privilege granted to petitioners in operating a power plant to harness the geothermal resources of respondent Province has inadequate basis. The term "exclusive" in its usual and generally accepted sense, means possessed to the exclusion of others; appertaining to the subject alone, not including, admitting or pertaining to another or others, undivided, sole.[50] A scrutiny of the Project Agreements proves that PNOC-EDC has invited several contractors to submit proposals for the construction and operation of power plants. As admitted by Mr. Gerardo Avorque, Local Treasury Operations Officer III of the Office of the Provincial Treasurer, during his cross-examination, there are other geothermal power plants operating in respondent Province that also have contracts with PNOC-EDC.[51] Hence, there can be no "exclusivity" to speak of since there is actually more than one entity contracted by PNOC-EDC to construct and operate geothermal power plants within the service area.

With regard to the RTC's application of the *Cabanatuan case*[52], the same is erroneous since the said case has a different factual and legal milieu. The discussion therein as to the primary and secondary franchise pertains only to NPC's own charter and none other. The Supreme Court held NPC liable for franchise tax, for under its charter, it was

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[50] *The City Mayor, et al. vs. The Chief, Philippine Constabulary, et al.*, G.R. No. L-20346, October 31, 1967.
[51] TSN of the March 22, 2006 hearing, p. 27.
[52] G.R. No. 149110, April 9, 2003.

generating, transmitting and selling electricity in bulk directly to end-users which "do not partake of the sovereign functions of the government" for "they are purely private and commercial undertakings", to wit:

> Petitioner fulfills the first requisite. Commonwealth Act No. 120, as amended by Rep. Act No. 7395, 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, **vests the petitioner the following powers which are not available to ordinary corporations**, *viz:*
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> xxx xxx xxx
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> g) To construct, operate and maintain power plants, auxiliary plants, dams, reservoirs, pipes, mains, transmission lines, power stations and substations, and other works for the purpose of developing hydraulic power from any river, creek, lake, spring and waterfall in the Philippines and supplying such power to the inhabitants thereof; to acquire, construct, install, maintain, operate, and improve gas, oil, or steam engines, and/or other prime movers, generators and machinery in plants and/or auxiliary plants for the production of electric power; to establish, develop, operate, maintain and administer power and lighting systems for the transmission and utilization of its power generation; **to sell electric power in bulk to (1) industrial enterprises, (2) city, municipal or provincial systems and other government institutions, (3) electric cooperatives, (4) franchise holders, and (5) real estate subdivisions** xxx; *(Emphasis supplied)*

In other words, there can be no franchise conferred to petitioners based simply on the Accession Undertakings and Project Agreements. In the absence of a secondary or special franchise granted by the Government or its agency, respondents have no legal and factual bases to impose a franchise tax on petitioners. The grant is inherently a legislative power.[53] As a matter of fact, in the September 30, 2008 Pre-Trial Order[54] of the RTC, respondents themselves admitted that the "Province of Leyte did not issue franchise in favor of the plaintiffs".

Clearly, respondent Province cannot impose franchise taxes on petitioners by virtue of its Provincial Tax Ordinance No. 1 for Section 20 of said ordinance provides that: "There is hereby imposed a tax at the rate of one-half of one percent (½ of 1%) of the gross annual receipts which shall include both cash sales and sales on account realized during the preceding calendar year on all business *enjoying a franchise* in any municipality within the territorial jurisdiction of the Province of Leyte to exclude the territorial limits of the Cities (of) Ormoc and Tacloban, notwithstanding any exemption granted by any law or other special law." There is a qualifying requirement that a business must first be enjoying a franchise for it to be liable under said Provincial Tax Ordinance, which is not the case with petitioners.

In view of the Court's finding that petitioners are not subject to local franchise taxes, the Court will no longer resolve the other issues raised by petitioners.

WHEREFORE, premises considered, the instant Petition for Review dated March 13, 2012 filed by petitioners CE Cebu Geothermal Power Company Inc. and Visayas Geothermal Power Company is hereby **GRANTED**.

The Decision dated September 9, 2011 and the Resolution dated February 9, 2012 of the Regional Trial Court of Ormoc City-Branch 35 in Civil Case Nos. 4558-0, 4618-0, and R-ORM-07-00050-CV and in Civil Case Nos. 4559-0, 4617-0, and R-ORM-07-00052-CV are hereby

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[53] *Raoul Del Mar vs. Philippine Amusement and Gaming Corporation, et al.*, G.R. No. 138298, November 29, 2000.

[54] Par. 1, Admitted Stipulations, RTC Records, Civil Case No. 4558-O, p. 688 .

REVERSED. Accordingly, the tax assessments issued against petitioners CE Cebu Geothermal Power Company, Inc. and Visayas Geothermal Power Company are hereby **CANCELLED** and **SET ASIDE,** for lack of factual and legal bases.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

LOVELL R. BAUTISTA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
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.

LOVELL R. BAUTISTA
Chairperson

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