REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

KEPCO ILIJAN CORPORATION,
Petitioner,

CTA EB CASE NO. 453
(CTA AC NO. 30)

- versus -

Present:

ACOSTA, *P.J.*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, *JJ.*

THE CITY OF MAKATI,
Respondent.

Promulgated:
JUL 2 3 2009 MAApolinario 11:07 a.m.

x- x

DECISION

CASANOVA, J.:

This is a Petition for Review[1] filed by petitioner-Kepco Ilijan Corporation (KEPCO) under Rule 43 of the Rules of Court in relation to Rule 8, Section 4 (b) of A.M. 05-11-07 Revised Rules of the Court of Tax Appeals, seeking reversal of the Resolution[2] *(assailed Resolution)* issued by the 2nd Division of the CTA dated January 8, 2009, affirming its earlier Decision[3] *(assailed Decision)* dated September 5, 2008 which affirmed the Decision[4] and Order[5] dated November 24, 2006 and March 22, 2007 respectively, rendered by Branch 143 of the Regional

[1] En Banc Rollo, pp. 1-14.
[2] Division Docket, pp.123-124.
[3] Division Docket, pp. 100-115.
[4] Annex "B" Petition for Review, Division Docket, pp. 20-25.
[5] Annex "A", Petition for Review, Division Docket, pp. 17-19.

Trial Court of Makati City in Civil Case No. 05-437 entitled, *"Kepco Ilijan Corp. vs. The City of Makati"*.

As culled from the records[6] of the case, the facts are as follows:

> "Petitioner, Kepco Ilijan Corporation, 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. On the other hand, respondent City of Makati, is being sued in its capacity as the local government unit which classified petitioner as a 'contractor' for purposes of local business tax.
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> On November 5, 1997, petitioner entered into an Energy Conversion Agreement (ECA) with the National Power Corporation (NAPOCOR), whereby the latter shall build, operate and maintain the 1200 MW Ilijan Natural Gas Power Plant.[7]
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> On February 18, 2004, petitioner was issued a Mayor's Permit by respondent classifying it as 'SEO' or special contractor for local business tax purposes. Petitioner then requested that its classification be changed from 'contractor' to that of a 'manufacturer' since its classification as a 'contractor' is allegedly not in accordance with the definition of said word under existing laws and relevant Department of Finance circulars. Due to the fact however that it was still under Income Tax Holiday (ITH) then, and as a consequence of which, no tax collection or assessment could then be imposed by the respondent up to February 28, 2004, petitioner still sought to have its classification reconsidered through a series of written communications and appropriate meetings with officers of the respondent. Upon the expiration of its ITH, petitioner requested for a computation of its local business taxes normally due on January 2005 from the respondent.
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> On January 18, 2005, respondent issued the requested computation classifying petitioner as a 'contractor' and not a 'manufacturer' and assessed petitioner for the amount of P3,358,711.75, representing its local business tax. Despite its objections, petitioner paid the said assessment; but subsequently filed its protest on March 18, 2005. On April 14, 2005, the City of Makati issued its Resolution denying petitioner's protest.
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> In view of the said denial, petitioner filed its Appeal with Branch 143 of the Regional Trial Court of the City of Makati on May 18, 2005, in

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[6] Assailed Decision, Division Docket, pp. 101-104.
[7] Decision, Civil Case No. 05-437; Division Docket, p 20.

accordance with Section 195 of the Local Government Code (LGC) of 1991.[8] Petitioner submits that the nature of its business activity is more of a 'manufacturer' rather than a 'contractor' as defined under the Makati City Tax Code and Local Finance Circular No. 3-95. It averred that the process of converting natural gas into electricity is more of the role of a 'manufacturer' rather than a 'contractor'; and that it was not even a 'sub-contractor' under the current definition as provided under the Department of Finance (DOF) Circular 3-95.

Dispensing with the need to present any documentary or testimonial evidence, the Court *a quo* issued the Order dated August 22, 2005 requiring the parties to submit their respective memorandum there being no factual issues involved in said case.[9]

On November 24, 2006, the assailed Decision dismissing petitioner's appeal for lack of merit was rendered. The lower court found that petitioner was properly classified as a 'contractor' and not as a 'manufacturer', pursuant to Section 131(h) of the LGC of 1991; that the terms enumerated in petitioner's Articles of Incorporation which is to 'build, operate, maintain and manage a power plant', are services embodied under the definition of a 'contractor' – which includes persons whose activity consists essentially of sale of all kinds of services for a fee; that there was insufficiency of evidence to support petitioner's claim that it should fall under the classification of 'manufacturer'. Thus, the presumption of the correctness of the assessment made by the City of Makati was applied by the lower court.

Petitioner's Motion for Reconsideration filed on December 27, 2006[10] was likewise denied for lack of merit in the Order dated March 22, 2007.[11] The lower court maintained its stand on classifying petitioner as a 'contractor' as it undeniably provides services to NAPOCOR for a fee. It further held that as shown by evidence, the service petitioner rendered was to operate the power station principally for NAPOCOR; which included all the necessary commissioning and testing of the power station, guarantee tests, and conversion of fuel to electricity; while NAPOCOR, in turn, was required to reimburse the generator for the natural gas used and paid for during the other tests of the power station prior to the completion date.

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[8] Appeal, Kepco Ilijan Corporation vs. City of Makati, Civil Case No. 05-437; Division Docket, pp. 26-35.
[9] Division Docket, p. 36.
[10] Division Docket, pp. 37-45.
[11] Supra, note 5.

Dissatisfied, petitioner filed the instant Petition for Review on May 4, 2007.[12] Respondent filed its Comment on June 15, 2007,[13] arguing that the lower court did not err or commit grave abuse of discretion amounting to lack of or in excess of its jurisdiction when it classified petitioner as a 'contractor' and not as a 'manufacturer' for the settlement of its local taxes. A Reply was filed by petitioner on June 27, 2007[14] maintaining its stand that it should be classified as a 'manufacturer' based on prevailing jurisprudence on the matter.

On July 16, 2007, petitioner filed a 'Motion for Consolidation' of the instant case with the case entitled **Kepco Philippines Corporation vs. The City of Makati**, docketed as C.T.A. AC No. 23 also assigned to the Second Division of this Court.[15] However, in the Resolution dated October 19, 2007,[16] this Court denied said motion on the ground that a Decision has already been rendered in the aforementioned case on August 24, 2007 and considered the instant case submitted for decision considering that both parties have already filed their respective Memorandum."

On September 5, 2008, the CTA Second Division promulgated the *assailed Decision*[17], the dispositive portion of which reads as follows:

"**WHEREFORE**, finding no reversible error in the assailed Decision and Order dated November 24, 2006 and March 22, 2007, respectively, rendered by Branch 143 of the Regional Trial Court of Makati City in Civil Case No. 05-437, the instant Petition for Review is hereby **DISMISSED** for lack of merit. Accordingly, said assailed Decision and Order are hereby **AFFIRMED**.

SO ORDERED."

Not satisfied with the above pronouncement of the Court, petitioner filed a Motion for Reconsideration[18] on September 25, 2008. In the *assailed Resolution*[19], the CTA Second Division denied the said motion for lack of merit.

[12] Division Docket, pp. 1-15.
[13] Division Docket, pp. 48-55.
[14] Division Docket, pp. 56-61.
[15] Division Docket, pp. 64-66.
[16] Division Docket, p. 91.
[17] Supra, note 3.
[18] Division Docket, pp. 116-121.
[19] Supra, note 2.

On January 26, 2009, KEPCO filed the instant Petition for Review[20] with the *CTA En Banc*, praying that the *assailed Decision* dated September 5, 2008, in CTA AC Case No. 30 entitled, *"Kepco Ilijan Corporation vs. The City of Makati"* be set aside, and that petitioner be classified instead as a manufacturer for purposes of paying the local business tax.

Petitioner raised its sole assignment of error and ground relied upon for allowance of the petition[21] in the instant Petition for Review, to wit:

> THE HONORABLE COURT'S 2ND DIVISION ERRED WHEN IT CLASSIFIED THE PETITIONER AS A CONTRACTOR AND, NOT AS A MANUFACTURER, WITHOUT TAKING INTO CONSIDERATION THE NATURE OF ITS BUSINESS ACTIVITY.

The *CTA En Banc* promulgated a Resolution[22] on February 9, 2009, ordering the respondent-CITY OF MAKATI to file a Comment on the said Petition for Review. On February 24, 2009, respondent filed a "Comment (on the Petition for Review dated 23 January 2009)[23]" praying that the Petition for Review filed by herein petitioner be dismissed for utter lack of merit. The Court *En Banc* promulgated a Resolution[24] on February 27, 2009, giving due course on the instant petition thereby requiring the parties to submit their respective Memoranda. In compliance with the said Resolution, petitioner-KEPCO and respondent-CITY OF MAKATI filed their respective Memoranda[25] on March 31, 2009. On April 13, 2009, the CTA Second Division promulgated a Resolution[26] submitting the instant case for decision.

After a careful and thorough evaluation and consideration of the records of the case, the Court *En Banc* finds no new matters which have not yet been

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[20] Supra, note 1.
[21] Petition for Review CTA En Banc Rollo, p. 5.
[22] CTA En Banc Rollo, p. 34.
[23] CTA En Banc Rollo, pp. 36-42.
[24] CTA En Banc Rollo, p. 45.
[25] Memorandum of petitioner, CTA En Banc Rollo, pp. 47-58; Memorandum of respondent, CTA En Banc Rollo, pp. 59-66.
[26] CTA En Banc Rollo, p. 68.

considered and passed upon by the *CTA Second Division* in its *assailed Decision and assailed Resolution*.

As correctly found by the *CTA Second Division* in the *assailed Decision* and We quote, to wit:

> "In order for this Court to determine the true nature of petitioner's business activity, the Court will first look into the nature of the conversion of fuel into electricity; whether such act of converting the natural gas or the diesel fuel, through the use of its turbine generator equipment and applying specific engineering methods, into electricity is sufficient to classify petitioner as a 'manufacturer'.
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> Petitioner does not dispute the fact that the primary purpose for its incorporation is to build, operate, maintain and manage the 1200 MW Combined-Cycle Ilijan Power Plant for the conversion of fuel into electricity; and that it was established for the sole purpose of operating a power station principally for NAPOCOR which includes all necessary commissioning and testing of the power station and operate it in a manner that will allow tests, for conversion of fuel into electricity for NAPOCOR.
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> As found by the lower court, which factual findings this Court will not disturb in the absence of proof that the same are erroneously made, petitioner operates the power station principally for NAPOCOR, and in return, NAPOCOR is required to reimburse herein petitioner for the natural gas used and paid for during the other tests of the power station prior to the completion date; and that all electricity supplied whether before or after the completion date, would be owned by NAPOCOR.
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> In other words, NAPOCOR is obligated to supply and shoulder the cost of the fuel requirements of the power plant used by petitioner in converting the natural gas or diesel fuel into electricity. NAPOCOR then pays the 'fees' for the conversion of such fuel. As defined under Black's Law Dictionary, a 'fee' is a recompense for an official or professional service or a charge or emolument or compensation for a particular act or service. It is a fixed charge or perquisite charged as recompense for labor;

reward, compensation, or wage given to a person for performance of services or something done or to be done.[27]

There is thus no argument that these activities of petitioner come in the form of services. In the process of performing these services, the question that arises is whether petitioner, in the course of performing said services, does it as a 'contractor' or as a 'manufacturer'?

For a clearer understanding of what is a contractor and a manufacturer, We look into the definitions thereof as provided in Sections 131 (h) and (o) of the LGC of 1991,[28] to wit:

> 'SEC. 131. *Definition of Terms.* –When used in this Title, the term:
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> x x x x x
>
> (h) **'Contractor' includes persons, natural or juridical**, not subject to professional tax under Section 139 of this Code, **whose activity consists essentially of the sale of all kinds of services for a fee, regardless of whether or not the performance of the service calls for the exercise or use of the physical or mental faculties of such contractor or his employees**.
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> As used in this Section, the term 'contractor' shall include general engineering, general building, and specialty contractors as defined under applicable laws; filling, demolition and salvage works contractors; proprietors or operators of mine drilling apparatus; proprietors or operators of dockyards; persons engaged in the installation of water system, and gas or electric light, heat or power; proprietors or operators of smelting plants; engraving, plating and plastic lamination establishments; proprietors or operators of establishments for repairing, repainting, upholstering, washing or greasing of vehicles, heavy equipment, vulcanizing, recapping and battery

[27] Black's Law Dictionary, 6th Edition, p. 614.
[28] Republic Act No. 7160.

charging; proprietors or operators of furniture shops and establishments for planing or surfacing and recutting of lumber, and sawmills under contract to saw, or cut logs belonging to others; proprietors or operators of dry-cleaning or dyeing establishments, steam laundries and laundries using washing machines; proprietors or owners of shops for the repair of any kind of mechanical and electrical devices, instruments, apparatus, or furniture and shoe repairing by machine or any mechanical contrivance; proprietors or operators of establishments or lots for parking purposes; proprietors or operators of tailor shops, dress shops, milliners and hatters, beauty parlors, barbershops, massage clinics, sauna, Turkish and Swedish baths, slenderizing and building saloons and similar establishments; photographic studios; funeral parlors; proprietors or operators of hotels, motels and lodging houses; proprietors or operators of arrastre and stevedoring, warehousing, or forwarding establishments; master plumbers; smiths, and house or sign painters; printers, bookbinders, lithographers; publishers except those engaged in the publication or printing of any newspaper, magazine, review or bulletin which appears at regular intervals with fixed prices for subscription and sale and which is not devoted principally to the publication of advertisements; business agents, private detective or watchman agencies, commercial and immigration brokers, and cinematographic film owners, lessors and distributors.' *(Emphasis Ours)*

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'(o) **'Manufacturer'** includes every person who, by physical or chemical process, alters the exterior texture or form or inner substance of any raw material or manufactured or partially manufactured product in such manner as to prepare it for special use or uses to which it could not have been put in its original condition, or who by any such process alters the quality of any raw material or manufactured or

> partially manufactured products so as to reduce it to marketable shape or prepare it for any of the use of the industry, or who by any such process, combines any such raw materials or manufactured or partially manufactured products with other materials or products of the same or of different kinds and in such manner that the finished products of such process or manufacture can be put to a special use or uses to which such raw material or manufactured or partially manufactured products in their original condition could not have been put, and who in addition, alters such raw material or manufactured or partially manufactured products, or combines the same to produce such finished products for the purpose of their sale or distribution to others and not for his own use or consumption.'

Based on the foregoing definition, petitioner's act of converting the natural gas or diesel fuel into electricity definitely falls under Section 131(h) of the LGC of 1991. The Court finds petitioner's assertion, that it is a 'manufacturer' mainly because of the alleged alteration of the fuel through processing, to be self-serving. If indeed petitioner is a 'manufacturer' as it argues it to be, considerations as regards the supplier of raw materials/fuels needed to generate electricity, and ownership of the electricity thus generated by the power plant for transmission, and sale to end-users should be taken into account. It is quite unusual that NAPOCOR supplies the fuel needed by petitioner to generate fuel, as well as, receives all the electricity generated, and still conclude that petitioner is a 'manufacturer'. The fact that petitioner merely operates, maintains, and manages the power plant for the conversion of fuel supplied by NAPOCOR for the eventual transmission of electricity only to NAPOCOR show that the same all come in the nature of the rendition of service for a fee. All these lead to the conclusion that petitioner is a 'contractor' as defined under the LGC of 1991.

xxx xxx xxx. As earlier discussed, petitioner renders 'service' by operating, maintaining, and managing the power plant for the conversion of fuel supplied by NAPOCOR for the eventual transmission of electricity only to NAPOCOR. Hence, this Court affirms the ruling of the lower court that petitioner is a 'contractor' rather than a 'manufacturer'."[29]

In sum, the Court *En Banc* finds no cogent justification to disturb the findings and conclusion spelled out in the assailed September 5, 2008 Decision and January 8, 2009 Resolution, both promulgated by the *CTA Second Division*. What the instant petition seeks is for the Court *En Banc* to view and appreciate the argument/discussion raised by the petitioner in its own perspective of things, which unfortunately had already been considered and passed upon.

WHEREFORE, the instant Petition for Review is hereby **DISMISSED** for lack of merit. Accordingly, the September 5, 2008 Decision and January 8, 2009 Resolution of the *CTA Second Division* in CTA AC Case No. 30 entitled, *"Kepco Ilijan Corporation vs. The City of Makati"* are hereby **AFFIRMED *in toto*.**

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

[29] Supra, note 3, pp. 110-114.

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
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 before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice