

Republic of the Philippines
CENTRAL BOARD OF ASSESSMENT APPEALS
Manila

MINDANAO GEOTHERMAL
PARTNERSHIP AND MINDANAO II
GEOTHERMAL PARTNERSHIP
(MARUBENI-OXBOW CONSORTIUM),
Petitioner-Appellants,

CBAA CASE NO. M-16

In Re: Claim for refund of
real estate taxes paid under
protest in the amount of
P34,362,591.92
LBAA Case No. 02-2001

- versus -

CITY TREASURER OF KIDAPAWAN,
Respondent-Appellee,

- and -

LOCAL BOARD OF ASSESSMENT
APPEALS OF KIDAPAWAN CITY,
Appellee.

x - - - - - x

D E C I S I O N

This is an appeal filed with this Board on August 12, 2002 by Petitioners-Appellants from the decision rendered on July 2, 2002 by the Local Board of the City of Kidapawan in LBAA Case No. 02-2002, the dispositive portion of which decision reads:

“WHEREFORE IN VIEW OF THE PREMISES, this Local Board holds that Marubeni-Oxbow Consortium, a private corporation owns and actually, directly and exclusively uses the subject machinery and equipment in the Power Plant for conversion of PNOC-EDC’s supplied geothermal energy unto electric capacity and energy pursuant to Article 2. PROJECT, 2.1 Power Facility and 2.3 Ownership, of the Build-Operate-and Transfer (BOT) Arrangement executed between PNOC-EDC and Marubeni-Oxbow Consortium dated December 14, 1994, to wit:

“Article 2. PROJECT.

“2.1 POWER FACILITY – The Operator shall be responsible for the finance, design, supply, construction, testing, commissioning, operation, maintenance and repair (emphasis supplied) of a proposed approximately 47 MV Net Geothermal Power Plant, to be installed on the site whose net generation shall be delivered to NAPOCOR on behalf of PNOC-EDC during the cooperation period.

“2.2. ENERGY CONVERSION-PNOC-EDC shall supply and deliver all steam in conformity to steam specifications and at no cost to the Operator necessary for the power plant to generate the electric capacity and energy required by NAPOCOR up to nominated capacity. The Operator shall convert such steam and on behalf of the PNOC-EDC, shall deliver all electric capacity and energy generated by the power plant, less that required for auxiliary purposes by the Operator and that required by PNOC-EDC for its own use in accordance with this agreement. PNOC-

EDC shall pay to the Operator conversion fees as provided in Section 5.4 and Article 8.

“2.3 OWNERSHIP- (a) From the Effectivity Date until the Termination Date, the Buyout Date or the Transfer Date whichever comes earlier, the Operator shall **own** the Power Plant and all the fixtures, fittings, machinery and equipment on the Site and used in connection with the Power Plant which have been supplied by it or at its cost (but excluding the Site), and the Operator shall operate and maintain the Power Plant of PNOC-EDC delivered in accordance with this Agreement into electric capacity and energy.

“Thereby making it liable to pay real property taxes on the subject machinery and equipment as required by the Local Government Code or Republic Act 7160. Therefore the petition of the Marubeni-Oxbow consortium for refund of real property taxes paid under protest in the total amount of P34,362,591.92 is DENIED, the position of the respondent City Treasurer that the subject machinery and equipment are taxable is UPHHELD.

Claiming that it received the questioned decision on July 12, 2002,

Petitioners-Appellants assigned the following errors, to wit:

THE LOCAL BOARD OF ASSESSMENT APPEALS ERRED IN HOLDING THAT PNOC-EDC IS NOT EXEMPT FROM THE PAYMENT OF REAL ESTATE TAXES AND THAT THE APPELLANTS ARE THE APPROPRIATE TAXABLE ENTITIES.

Petitioners-Appellants submit that the PNOC-EDC is the appropriate taxable entity with respect to the machinery and equipment/Power Plants in question; that Appellants, in undertaking the construction, operation and maintenance of the Power Plants pursuant to BOT Agreements, were contracted by PNOC-EDC to do so for the purpose of fulfilling PNOC-EDC's obligations under its MOU and Power Purchase Agreements with NPC and as such, it is PNOC-EDC which is in actual, direct and exclusive possession of the Power Plants insofar as real property taxation is concerned; that Appellants operate the Power Plants pursuant to the BOT Agreements so that PNOC-EDC will be able to use the Power Plants to deliver electricity to NPC pursuant to the PPA.

Petitioners-Appellants cited Section 2(b) of Republic Act 6957, as amended, (otherwise known as the BOT Law) which defines “Build-operate-transfer” thus:

“(b) Build-operate-transfer – A contractual arrangement whereby the project proponent undertakes the construction, including financing of a given infrastructure facility, and the operation and maintenance thereof. The project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to

enable the project proponent to recover its investments, and operating and maintenance expenses in the project x x x.”

Petitioners-Appellants argue that, while they operate the Power Plants, they do so “upon the instruction and/or requirements of PNOC-EDC and/or NPC” and that, as the “facility user” of the Power Plants, it is the PNOC-EDC which is in actual, direct and exclusive use of the said Power Plants, making it (PNOC-EDC) the appropriate taxable entity.

Further, Petitioners-Appellants says that the subject machinery and equipment, on the premise that the same properties are owned by PNOC-EDC, are exempt from payment of the real property tax under Section 234(c) of R.A. 7160.

Petitioners-Appellants prays that the decision appealed from be reversed and a new one issued:

“1. ordering the appellee City Treasurer of Kidapawan to refund the real estate taxes paid under protest by appellants in the amount of P34,362,591.92;

“2. declaring PNOC-EDC as the appropriate taxable entity for the real property taxes in respect of the Power Plants; and

“3. declaring PNOC-EDC exempt from payment of real property taxes in respect of the Power Plants under Section 234 of the Local Government Code.

Broken down, the assigned error allegedly committed by the Local Board actually consist of two (2) separate and distinct parts, thus:

1. The LBAA erred in holding that PNOC-EDC is not exempt from the payment of real estate taxes; and

2. The LBAA erred in holding that the Appellants are the appropriate taxable entities.

This Board is not in a position to rule on the first part of the issue for the simple reason that it has no jurisdiction over the matter and the PNOC-EDC, the latter not being a party to the instant appeal.

Section 2, Rule 3 of the Revised Rules of Court provides that “every action must be prosecuted and defended in the name of the real party in interest . . .”

Interpreting the said provision, the Supreme Court has ruled that the real

property in interest is the one who would be benefited or injured by the judgment or the party entitled to the avails of the suit (Salonga vs. Warner-Barnes & Co., Ltd., G.R. No. L-2246, January 31, 1951). A corollary preposition to this rule is that actions must be brought by the real parties in interest and against the persons who are to be bound by the judgment obtained therein (Poblete vs. Court of First Instance of Cavite, 36 Phil. 556; Dequilla vs. Clodualog, CA-G.R. No. 17015-R, February 28, 1958).

If this Board were to decide on the first part of the issue, such decision would neither benefit nor injure PNOC-EDC. There is no showing that the herein Petitioners-Appellants are authorized by PNOC-EDC to sue on the latter's behalf.

This Board, however, is compelled to take exception to the Local Board's pronouncement with regard to the exemption from the payment of real property taxes granted government-owned and-controlled corporations under Section 234(c) of R.A. 7160 which reads:

"Sec. 234. *Exemption From Real Property Tax.* – The following are exempted from payment of the real property tax:

"x x x

(c) All machineries and equipment that are actually, directly and exclusively used by local water districts and government-owned or –controlled corporations engaged in the supply and distribution of water and/or generation and transmission of electric power;

"x x x."

"Except as provided herein, any exemption from payment of real property tax previously granted to, or presently enjoyed by, all persons, whether natural or juridical, including all government-owned or –controlled corporations are hereby withdrawn upon the effectivity of this Code."

The City Treasurer argued before the Local Board that, based on the 4th Indorsement of the Bureau of Local Government Finance (BLGF), Department of Finance, dated February 14, 2001, PNOC-EDC "is not exempt from real property taxes because it is now settled that tax exemptions previously granted to government-owned and –controlled corporations (GOCCs) have been expressly withdrawn under Section 234 of Republic Act No. 7160 or the Local Government Code of 1991."

The Local Board upheld the City Treasurer (who apparently misread the opinion of the BLGF), saying that “By express provision of section 234 of RA 7160, this exemption has been expressly revoked and petitioners have failed to show proof to prove otherwise. PNOC-EDC then is a non-tax-exempt entity, it is and will be liable to pay real property taxes.”

It is incredible how these authorities (the City Treasurer and the Local Board) have misread or misunderstood the last paragraph of Section 234 of R.A. 7160. It defies imagination how a provision of law enumerates certain exemptions and, at the same time, in the very same provision of law, withdraws or nullifies the same exemptions. Such a law would be utterly ridiculous and absurd. The only explanation this Board could think of is that the phrase Except as provided herein, which started the last paragraph of Section 234 of R.A. 7160, was completely and conveniently disregarded by said authorities.

The remaining and only issue, therefore, to be resolved is whether or not Petitioners-Appellants are the “appropriate taxable entity”, as Petitioners-Appellants put it, or, stated otherwise, whether or not Petitioners-Appellants are liable to the payment of the real property tax on the subject machinery and equipment.

This matter arose out of the Build-Operate-Transfer (BOT) Arrangement between December 14, 1994 between PNOC-ENERGY DEVELOPMENT CORPORATION, referred to as PNOC-EDC, a wholly owned subsidiary of the Philippine National Oil Company, Inc., and the MARUBENI-OXBOW CONSORTIUM, referred to as the Operator, a consortium consisting of Marubeni Corporation and Oxbow Mindanao I Partners C.V., the herein Petitioners-Appellants.

The salient provisions of said BOT Arrangement, insofar as they have bearing on this case, are as follows:

“ARTICLE 1. DEFINITIONS OF TERMS.

“x x x

“Power Plant. The Operator’s generating equipment, including all of the step-up transformers and switching facilities, together with all protective and associated equipment and improvements, necessary to produce electrical energy at the Point of Interconnection excluding associated land, land rights and interests in land, which equipment shall include a steam turbine-generator with a total net capacity of forty-seven (47) MW, generally conforming to the technical specifications set forth in the Operator’s bid document submitted as part of its bid for Build, Operate and Transfer (BOT) Geothermal Power Plant for PNOC-EDC as it relates to the Site, with such reasonably equivalent substitutions as the Operator deems necessary.

“x x x

“Site. The land located at the Mindanao I Geothermal Reservation to be provided by PNOC-EDC for the construction and operation (and purposes incidental thereto) of the Power Plant, as more particularly described in Annex A.

“ARTICLE 2. PROJECT.

“2.1 Power Facility – The Operator shall be responsible for the finance, design, supply, construction, testing, commissioning, operation, maintenance and repair (emphasis supplied) of a proposed approximately 47 MV Net Geothermal Power Plant, to be installed on the site whose net generation shall be delivered to NAPOCOR on behalf of PNOC-EDC during the Cooperation Period.

“2.2. Energy Conversion. PNOC-EDC shall supply and deliver all steam in conformity to steam specifications and at no cost to the Operator necessary for the power plant to generate the electric capacity and energy required by NAPOCOR up to nominated capacity. The Operator shall convert such steam and on behalf of the PNOC-EDC, shall deliver all electric capacity and energy generated by the power plant, less that required for auxiliary purposes by the Operator and that required by PNOC-EDC for its own use in accordance with this agreement. PNOC-EDC shall pay toe the Operator conversion fees as provided in Section 5.4 and Article 8.

“2.3 Ownership

“(a) From the Effectivity Date until the Termination Date, the Buyout Date or the Transfer Date whichever comes earlier, the Operator shall own the Power Plant and all the fixtures, fittings, machinery and equipment on the Site and used in connection with the Power Plant which have been supplied by it or at its cost (but excluding the Site), and the Operator shall operate and maintain the Power Plant of PNOC-EDC delivered in accordance with this Agreement into electric capacity and energy. (Emphasis supplied)

“(b) On the Buyout Date, the Transfer Date or the Termination Date, whichever comes earlier, ownership, management and operation of the Power Plant shall be transferred by the Operator to PNOC-EDC in accordance with Article 9, 13 or 15, as applicable. (Emphasis supplied)

“ARTICLE 8. DELIVERY OF CAPACITY AND ENERGY.

“x x x

“8.6 Taxes, Setoff.

“(a) All payments made to the Operator pursuant to this Agreement shall be paid together with all taxes, duties, fees, levies and other assessments to be paid by the Operator in respect of the Power Plant or this Agreement, including, “value added taxes” and all other taxes, but excluding national income taxes at rates of up to thirty-five percent (35%) assessed after the expiration of the tax holiday that would be applicable to the Operator (or the Operator Philippines) if it were granted pioneer enterprise status under the Omnibus Investment Code of 1987, as amended (whether or not the Operator or the Operator Philippines is granted such pioneer enterprises status and excluding withholding taxes imposed on the Operator (or the Operator Philippines) not in excess of fifteen percent (15%) (which shall be separately stated in all invoices) in dollars in and each sum payable shall be increased so as to ensure that after PNOC-EDC has

deducted therefrom any and all taxes or charges required to be deducted therefrom by PNOC-EDC there remains a sum equal to the amount that would have been payable to the Operator had there been no requirement to deduct or withhold such taxes or other charges. (Emphasis supplied)

“x x x

“ARTICLE 13. TRANSFER OF OWNERSHIP.

“13.1 Transfer of Title. – To the extent not previously vested, title to the Power Plant automatically vest to the PNOC-EDC on the Transfer Date provided that PNOC-EDC has made all payments required to be made by it pursuant to the Agreement. The Operator shall execute such documents as may be necessary to effect the transfer of the title to PNOC-EDC, including, without limitation, assignment of all contract rights, claims and other rights related to the Power Plant.” (Emphasis supplied)

The above provisions of the BOT Arrangement are clear enough. Ownership of and title to the machinery and equipment which comprise the said Power Plant belong to Petitioners-Appellants from the time they were installed until the tender of the required payment by PNOC-EDC to Petitioners-Appellants and the latter’s execution of the proper transfer documents.

Petitioners-Appellants imply that, since they assumed the obligations of PNOC-EDC under the MOU and Power Purchase Agreements with NAPOCOR, they (Petitioners-Appellants) are entitled to the privileges, particularly, the real property tax exemption, enjoyed by PNOC-EDC. The fact remains, however, that the above-quoted provisions of the BOT Arrangement between PNOC-EDC and Petitioners-Appellants with respect to the ownership of the Power Plant are explicit. Besides which, under Section 234, paragraph c, of R.A. 7160, otherwise known as the Local Government Code of 1991, only machineries and equipment that are actually, directly and exclusively used by government-owned or – controlled corporations engaged in the generation and transmission of electric power are exempt from the payment of the real property tax. Petitioners-Appellants are a private corporation.

WHEREFORE, this Board resolves to DENY the instant appeal for lack of merit.

Manila, Philippines, July 8, 2003.

(Signed)
CESAR S. GUTIERREZ
Chairman

(Signed)
ANGEL P. PALOMARES
Member

(VACANT)
Member