



Republic of the Philippines
Supreme Court
Manila

EN BANC

**POWER SECTOR ASSETS AND
LIABILITIES MANAGEMENT
CORPORATION,**

Petitioner,

G.R. No. 198146

Present:

SERENO, C.J.,
CARPIO,
VELASCO, JR.,
LEONARDO-DE CASTRO,
PERALTA,
BERSAMIN,
DEL CASTILLO,
MENDOZA,
PERLAS-BERNABE,*
LEONEN,
JARDELEZA,
CAGUIOA,
MARTIRES,
TIJAM, and
REYES, JJ.

- versus -

**COMMISSIONER OF INTERNAL
REVENUE,**

Respondent.

Promulgated:
August 8, 2017

X ----- *Perfructingon - Arana* X

DECISION

CARPIO, J.:

The Case

This petition for review¹ assails the 27 September 2010 Decision² and the 3 August 2011 Resolution³ of the Court of Appeals in CA-G.R. SP No. 108156. The Court of Appeals nullified the Decisions dated 13 March

* No part.
¹ Under Rule 45 of the 1997 Rules of Civil Procedure.
² *Rollo* (Vol. I), pp. 37-54. Penned by Associate Justice Bienvenido L. Reyes (a retired member of this Court), with Associate Justices Estela M. Perlas-Bernabe (now a member of this Court) and Elihu A. Ybañez concurring.
³ *Id.* at 55-57.

2008 and 14 January 2009 of the Secretary of Justice in OSJ Case No. 2007-3 for lack of jurisdiction.

The Facts

Petitioner Power Sector Assets and Liabilities Management Corporation (PSALM) is a government-owned and controlled corporation created under Republic Act No. 9136 (RA 9136), also known as the Electric Power Industry Reform Act of 2001 (EPIRA).⁴ Section 50 of RA 9136 states that the principal purpose of PSALM is to manage the orderly sale, disposition, and privatization of the National Power Corporation (NPC) generation assets, real estate and other disposable assets, and Independent Power Producer (IPP) contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner.

PSALM conducted public biddings for the privatization of the Pantabangan-Masiway Hydroelectric Power Plant (Pantabangan-Masiway Plant) and Magat Hydroelectric Power Plant (Magat Plant) on 8 September 2006 and 14 December 2006, respectively. First Gen Hydropower Corporation with its \$129 Million bid and SN Aboitiz Power Corporation with its \$530 Million bid were the winning bidders for the Pantabangan-Masiway Plant and Magat Plant, respectively.

On 28 August 2007, the NPC received a letter⁵ dated 14 August 2007 from the Bureau of Internal Revenue (BIR) demanding immediate payment of ₱3,813,080,472⁶ deficiency value-added tax (VAT) for the sale of the Pantabangan-Masiway Plant and Magat Plant. The NPC indorsed BIR's demand letter to PSALM.

On 30 August 2007, the BIR, NPC, and PSALM executed a Memorandum of Agreement (MOA),⁷ wherein they agreed that:

⁴ Section 49 of RA 9136 reads:

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

⁵ *Rollo* (Vol. I), pp. 96-99. The letter, signed by the OIC-Commissioner of Internal Revenue, informed NPC that it is liable for deficiency VAT and documentary stamp tax in the total amount of ₱5,819,110,335.81, inclusive of interests and penalties, for the sale of the Pantabangan-Masiway and Magat power plants.

⁶ The amount represents only the total basic VAT due, excluding the 25% surcharge and interest.

⁷ *Rollo* (Vol. I), pp. 100-103.

- A) NPC/PSALM shall remit under protest to the BIR the amount of Php 3,813,080,472.00, representing basic VAT as shown in the BIR letter dated August 14, 2007, upon execution of this Memorandum of Agreement (MOA).
- B) This remittance shall be without prejudice to the outcome of the resolution of the Issues before the appropriate courts or body.
- C) NPC/PSALM and BIR mutually undertake to seek final resolution of the Issues by the appropriate courts or body.
- D) BIR shall waive any and all interests and surcharges on the aforesaid BIR letter, except when the case is elevated by the BIR before an appellate court.
- E) Nothing contained in this MOA shall be claimed or construed to be an admission against interest as to any party or evidence of any liability or wrongdoing whatsoever nor an abandonment of any position taken by NPC/PSALM in connection with the Issues.
- F) Each Party to this MOA hereto expressly represents that the authorized signatory hereto has the legal authority to bind [the] party to all the terms of this MOA.
- G) Any resolution by the appropriate courts or body in favor of the BIR, other than a decision by the Supreme Court, shall not constitute as precedent and sufficient legal basis as to the taxability of NPC/PSALM's transactions pursuant to the privatization of NPC's assets as mandated by the EPIRA Law.
- H) Any resolution in favor of NPC/PSALM by any appropriate court or body shall be immediately executory without necessity of notice or demand from NPC/PSALM. A ruling from the Department of Justice (DOJ) that is favorable to NPC/PSALM shall be tantamount to the filing of an application for refund (in cash)/tax credit certificate (TCC), at the option of NPC/PSALM. BIR undertakes to immediately process and approve the application, and release the tax refund/TCC within fifteen (15) working days from issuance of the DOJ ruling that is favorable to NPC/PSALM.
- I) Either party has the right to appeal any adverse decision against it before any appropriate court or body.
- J) In the event of failure by the BIR to fulfill the undertaking referred to in (H) above, NPC/PSALM shall assign to DOJ its right to the refund of the subject remittance, and the DOJ shall offset such amount against any liability of NPC/PSALM to the National Government pursuant to the objectives of the EPIRA on the application of the privatization proceeds.⁸

In compliance with the MOA, PSALM remitted under protest to the BIR the amount of ₱3,813,080,472, representing the total basic VAT due.

⁸ Id. at 101-102.



On 21 September 2007, PSALM filed with the Department of Justice (DOJ) a petition for the adjudication of the dispute with the BIR to resolve the issue of whether the sale of the power plants should be subject to VAT. The case was docketed as OSJ Case No. 2007-3.

On 13 March 2008, the DOJ ruled in favor of PSALM, thus:

In cases involving purely question[s] of law, such as in the instant case, between and among the government-owned and controlled corporation and government bureau, the issue is best settled in this Department. In the final analysis, there is but one party in interest, the Government itself in this litigation.

x x x x

The instant petition is an original petition involving only [a] question of law on whether or not the sale of the Pantabangan-Masiway and Magat Power Plants to private entities under the mandate of the EPIRA is subject to VAT. It is to be stressed that this is not an appeal from the decision of the Commissioner of Internal Revenue involving disputed assessments, refunds of internal revenue taxes, fees or other charges, or other matters arising under the National Internal Revenue Code or other law.

x x x x

Moreover, it must be noted that respondent already invoked this Office's jurisdiction over it by praying in respondent's Motion for Extension of Time to File Comment (On Petitioner's Petition dated 21 September 2007) and later, Omnibus Motion To Lift Order dated 22 October 2007 and To Admit Attached Comment. The Court has held that the filing of motions seeking affirmative relief, such as, to admit answer, for additional time to answer, for reconsideration of a default judgment, and to lift order of default with motion for reconsideration, are considered voluntary submission to the jurisdiction of the court. Having sought this Office to grant extension of time to file answer or comment to the instant petition, thereby submitting to the jurisdiction of this Court [sic], respondent cannot now repudiate the very same authority it sought.

x x x x

When petitioner was created under Section 49 of R.A. No. 9136, for the principal purpose to manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, IPP contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner, there was, by operation of law, the transfer of ownership of NPC assets. Such transfer of ownership was not carried out in the ordinary course of transfer which must be accorded with the required elements present for a valid transfer, but in this case, in accordance with the mandate of the law, *that is*, EPIRA. Thus, respondent cannot assert that it was NPC who was the actual seller of the Pantabangan-Masiway and Magat Power Plants, because at the time of selling the aforesaid power plants, the owner then was already the petitioner and not the NPC. Consequently, petitioner cannot also be considered a successor-in-interest of NPC.

Since it was petitioner who sold the Pantabangan-Masiway and Magat Power Plants and not the NPC, through a competitive and public bidding to the private entities, Section 24(A) of R.A. No. 9337 cannot be applied to the instant case. Neither the grant of exemption and revocation of the tax exemption accorded to the NPC, be also affected to petitioner.

x x x x

Clearly, the disposition of Pantabangan-Masiway and Magat Power Plants was not in the regular conduct or pursuit of a commercial or an economic activity, but was effected by the mandate of the EPIRA upon petitioner to direct the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and IPP contracts, and afterward, to liquidate the outstanding obligations of the NPC.

x x x x

Verily, to subject the sale of generation assets in accordance with a privatization plan submitted to and approved by the President, which is a one time sale, to VAT would run counter to the purpose of obtaining optimal proceeds since potential bidders would necessarily have to take into account such extra cost of VAT.

WHEREFORE, premises considered, the imposition by respondent Bureau of Internal Revenue of deficiency Value-Added Tax in the amount of ₱3,813,080,472.00 on the privatization sale of the Pantabangan-Masiway and Magat Power Plants, done in accordance with the mandate of the Electric Power Industry Reform Act of 2001, is hereby declared NULL and VOID. Respondent is directed to refund the amount of ₱3,813,080,472.00 remitted under protest by petitioner to respondent.⁹

The BIR moved for reconsideration, alleging that the DOJ had no jurisdiction since the dispute involved tax laws administered by the BIR and therefore within the jurisdiction of the Court of Tax Appeals (CTA). Furthermore, the BIR stated that the sale of the subject power plants by PSALM to private entities is in the course of trade or business, as contemplated under Section 105 of the National Internal Revenue Code (NIRC) of 1997, which covers incidental transactions. Thus, the sale is subject to VAT. On 14 January 2009, the DOJ denied BIR's Motion for Reconsideration.¹⁰

On 7 April 2009,¹¹ the BIR Commissioner (Commissioner of Internal Revenue) filed with the Court of Appeals a petition for certiorari, seeking to set aside the DOJ's decision for lack of jurisdiction. In a Resolution dated 23 April 2009, the Court of Appeals dismissed the petition for failure to attach

⁹ Id. at 203-209.

¹⁰ Id. at 237-239.

¹¹ The Court of Appeals' Decision erroneously stated the date as "April 9, 2007," but the petition was in fact filed on 7 April 2009 through registered mail, as evidenced by Registry Receipt Nos. 397-L and 398-L. Id. at 285.

the relevant pleadings and documents.¹² Upon motion for reconsideration, the Court of Appeals reinstated the petition in its Resolution dated 10 July 2009.¹³

The Ruling of the Court of Appeals

The Court of Appeals held that the petition filed by PSALM with the DOJ was really a protest against the assessment of deficiency VAT, which under Section 204¹⁴ of the NIRC of 1997 is within the authority of the Commissioner of Internal Revenue (CIR) to resolve. In fact, PSALM's objective in filing the petition was to recover the ₱3,813,080,472 VAT which was allegedly assessed erroneously and which PSALM paid under protest to the BIR.

Quoting paragraph H¹⁵ of the MOA among the BIR, NPC, and PSALM, the Court of Appeals stated that the parties in effect agreed to consider a DOJ ruling favorable to PSALM as the latter's application for refund.

Citing Section 4¹⁶ of the NIRC of 1997, as amended by Section 3 of Republic Act No. 8424 (RA 8424)¹⁷ and Section 7¹⁸ of Republic Act

¹² *Rollo* (Vol. I), p. 42.

¹³ *Id.*

¹⁴ Sec. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –

x x x x

(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund.

x x x x

¹⁵ H) x x x. A ruling from the Department of Justice (DOJ) that is favorable to NPC/PSALM shall be tantamount to the filing of an application for refund (in cash)/tax credit certificate (TCC), at the option of NPC/PSALM. BIR undertakes to immediately process and approve the application, and release the tax refund/TCC within fifteen (15) working days from issuance of the DOJ ruling that is favorable to NPC/PSALM.

¹⁶ SEC. 4. *Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.* – The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.

The power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals.

¹⁷ An Act Amending the National Internal Revenue Code, as Amended, and for Other Purposes.

¹⁸ SEC. 7. Section 7 of the same Act [Republic Act No. 1125, as amended] is hereby amended to read as follows:

Sec. 7. *Jurisdiction.* – The CTA shall exercise:

- a. Exclusive appellate jurisdiction to review by appeal, as herein provided:

No. 9282 (RA 9282),¹⁹ the Court of Appeals ruled that the CIR is the proper body to resolve cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the NIRC or other laws administered by the BIR. The Court of Appeals stressed that jurisdiction is conferred by law or by the Constitution; the parties, such as in this case, cannot agree or stipulate on it by conferring jurisdiction in a body that has none. Jurisdiction over the person can be waived but not the jurisdiction over the subject matter which is neither subject to agreement nor conferred by consent of the parties. The Court of Appeals held that the DOJ Secretary erred in ruling that the CIR is estopped from assailing the jurisdiction of the DOJ after having agreed to submit to its jurisdiction. As a general rule, estoppel does not confer jurisdiction over a cause of action to a tribunal where none, by law, exists.

In conclusion, the Court of Appeals found that the DOJ Secretary gravely abused his discretion amounting to lack of jurisdiction when he assumed jurisdiction over OSJ Case No. 2007-3. The dispositive portion of the Court of Appeals' 27 September 2010 Decision reads:

WHEREFORE, premises considered, we hereby GRANT the petition. Accordingly: (1) the [D]ecision dated March 13, 2008, and the Decision dated January 14, 2009 both issued by the public respondent Secretary of Justice in [OSJ Case No.] 2007-3 are declared NULL and VOID for having been issued without jurisdiction.

No costs.

SO ORDERED.²⁰

PSALM moved for reconsideration, which the Court of Appeals denied in its 3 August 2011 Resolution. Hence, this petition.

1. Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;

x x x x

¹⁹ An Act Expanding the Jurisdiction of the Court of Tax Appeals (CTA), Elevating its Rank to the Level of a Collegiate Court with Special Jurisdiction and Enlarging its Membership, Amending for the Purpose Certain Sections of Republic Act No. 1125, as Amended, Otherwise Known as the Law Creating the Court of Tax Appeals, and for Other Purposes.

²⁰ *Rollo* (Vol. I), p. 54.

The Issues

Petitioner PSALM raises the following issues:

- I. DID THE COURT OF APPEALS MISAPPLY THE LAW IN GIVING DUE COURSE TO THE PETITION FOR CERTIORARI IN CA-G.R. SP NO. 108156?
- II. DID THE SECRETARY OF JUSTICE ACT IN ACCORDANCE WITH THE LAW IN ASSUMING JURISDICTION AND SETTLING THE DISPUTE BY AND BETWEEN THE BIR AND PSALM?
- III. DID THE SECRETARY OF JUSTICE ACT IN ACCORDANCE WITH THE LAW AND JURISPRUDENCE IN RENDERING JUDGMENT THAT THERE SHOULD BE NO VAT ON THE PRIVATIZATION, SALE OR DISPOSAL OF GENERATION ASSETS?
- IV. DOES PUBLIC RESPONDENT DESERVE THE RELIEF OF CERTIORARI?²¹

The Ruling of the Court

We find the petition meritorious.

I. Whether the Secretary of Justice has jurisdiction over the case.

The primary issue in this case is whether the DOJ Secretary has jurisdiction over OSJ Case No. 2007-3 which involves the resolution of whether the sale of the Pantabangan-Masiway Plant and Magat Plant is subject to VAT.

We agree with the Court of Appeals that jurisdiction over the subject matter is vested by the Constitution or by law, and not by the parties to an action.²² Jurisdiction cannot be conferred by consent or acquiescence of the parties²³ or by erroneous belief of the court, quasi-judicial office or government agency that it exists.

However, contrary to the ruling of the Court of Appeals, we find that the DOJ is vested by law with jurisdiction over this case. This case involves a dispute between PSALM and NPC, **which are both wholly government-owned corporations, and the BIR, a government office, over the imposition of VAT on the sale of the two power plants.** There is no

²¹ Id. at 13

²² *Magno v. People*, 662 Phil. 726 (2011); *Republic of the Philippines v. Sandiganbayan*, 454 Phil. 504 (2003).

²³ *Nippon Express (Philippines) Corporation v. Commissioner of Internal Revenue*, 706 Phil. 442 (2013); *Cojuangco, Jr. v. Republic of the Philippines*, 699 Phil. 443 (2012).

question that **original** jurisdiction is with the CIR, who issues the preliminary and the final tax assessments. However, if the government entity disputes the tax assessment, the dispute is already between the BIR (represented by the CIR) and another government entity, in this case, the petitioner PSALM. Under **Presidential Decree No. 242²⁴ (PD 242)**, **all disputes and claims solely between government agencies and offices, including government-owned or controlled corporations, shall be administratively settled or adjudicated by the Secretary of Justice, the Solicitor General, or the Government Corporate Counsel, depending on the issues and government agencies involved.** As regards cases involving only questions of law, it is the Secretary of Justice who has jurisdiction. Sections 1, 2, and 3 of PD 242 read:

Section 1. Provisions of law to the contrary notwithstanding, all disputes, claims and controversies solely between or among the departments, bureaus, offices, agencies and instrumentalities of the National Government, including constitutional offices or agencies, arising from the interpretation and application of statutes, contracts or agreements, shall henceforth be administratively settled or adjudicated as provided hereinafter: Provided, That, this shall not apply to cases already pending in court at the time of the effectivity of this decree.

Section 2. In all cases involving only questions of law, the same shall be submitted to and settled or adjudicated by the Secretary of Justice, as Attorney General and ex officio adviser of all government-owned or controlled corporations and entities, in consonance with Section 83 of the Revised Administrative Code. His ruling or determination of the question in each case shall be conclusive and binding upon all the parties concerned.

Section 3. Cases involving mixed questions of law and of fact or only factual issues shall be submitted to and settled or adjudicated by:

- (a) The Solicitor General, with respect to disputes or claims [or] controversies between or among the departments, bureaus, offices and other agencies of the National Government;
- (b) The Government Corporate Counsel, with respect to disputes or claims or controversies between or among the government-owned or controlled corporations or entities being served by the Office of the Government Corporate Counsel; and
- (c) The Secretary of Justice, with respect to all other disputes or claims or controversies which do not fall under the categories mentioned in paragraphs (a) and (b).
(Emphasis supplied)

²⁴ PRESCRIBING THE PROCEDURE FOR ADMINISTRATIVE SETTLEMENT OR ADJUDICATION OF DISPUTES, CLAIMS AND CONTROVERSIES BETWEEN OR AMONG GOVERNMENT OFFICES, AGENCIES AND INSTRUMENTALITIES, INCLUDING GOVERNMENT-OWNED OR CONTROLLED CORPORATIONS, AND FOR OTHER PURPOSES. Issued on 9 July 1973.

The use of the word “shall” in a statute connotes a mandatory order or an imperative obligation.²⁵ Its use rendered the provisions mandatory and not merely permissive, and unless PD 242 is declared unconstitutional, its provisions must be followed. The use of the word “shall” means that administrative settlement or adjudication of disputes and claims between government agencies and offices, including government-owned or controlled corporations, is not merely permissive but mandatory and imperative. Thus, under PD 242, it is mandatory that disputes and claims “solely” between government agencies and offices, including government-owned or controlled corporations, involving only questions of law, be submitted to and settled or adjudicated by the Secretary of Justice.

The law is clear and covers “*all disputes, claims and controversies solely between or among the departments, bureaus, offices, agencies and instrumentalities of the National Government, including constitutional offices or agencies arising from the interpretation and application of statutes, contracts or agreements.*” When the law says “all disputes, claims and controversies solely” among government agencies, the law means *all, without exception*. Only those cases already pending in court at the time of the effectivity of PD 242 are not covered by the law.

The purpose of PD 242 is to provide for a **speedy and efficient administrative settlement or adjudication of disputes between government offices or agencies under the Executive branch, as well as to filter cases to lessen the clogged dockets of the courts.** As explained by the Court in *Philippine Veterans Investment Development Corp. (PHIVIDEC) v. Judge Velez*:²⁶

Contrary to the opinion of the lower court, P.D. No. 242 is not unconstitutional. It does not diminish the jurisdiction of [the] courts but only prescribes an administrative procedure for the settlement of certain types of disputes between or among departments, bureaus, offices, agencies, and instrumentalities of the National Government, including government-owned or controlled corporations, so that they need not always repair to the courts for the settlement of controversies arising from the interpretation and application of statutes, contracts or agreements. The procedure is not much different, and no less desirable, than the arbitration procedures provided in Republic Act No. 876 (Arbitration Law) and in Section 26, R.A. 6715 (The Labor Code). It is an alternative to, or a substitute for, traditional litigation in court with the added advantage of avoiding the delays, vexations and expense of court proceedings. Or, as P.D. No. 242 itself explains, its purpose is “the elimination of needless clogging of court dockets to prevent the waste of time and energies not only of the government lawyers but also of the courts, and eliminates expenses incurred in the filing and prosecution of judicial actions.”²⁷

²⁵ *Abakada Guro Party List v. Hon. Exec. Sec. Ermita*, 506 Phil. 1 (2005); *Enriquez v. Enriquez*, 505 Phil. 193 (2005); *Province of Batangas v. Hon. Romulo*, 473 Phil. 806 (2004).

²⁶ 276 Phil. 439 (1991).

²⁷ *Id.* at 443.

PD 242 is only applicable to disputes, claims, and controversies **solely** between or among the departments, bureaus, offices, agencies and instrumentalities of the National Government, including government-owned or controlled corporations, and where no private party is involved. **In other words, PD 242 will only apply when all the parties involved are purely government offices and government-owned or controlled corporations.**²⁸ Since this case is a dispute between PSALM and NPC, both government-owned and controlled corporations, and the BIR, a National Government office, PD 242 clearly applies and the Secretary of Justice has jurisdiction over this case. In fact, the MOA executed by the BIR, NPC, and PSALM explicitly provides that “[a] ruling from the Department of Justice (DOJ) that is favorable to NPC/PSALM shall be tantamount to the filing of an application for refund (in cash)/tax credit certificate (TCC), at the option of NPC/PSALM.”²⁹ Such provision indicates that the BIR and petitioner PSALM and the NPC acknowledged that the Secretary of Justice indeed has jurisdiction to resolve their dispute.

This case is different from the case of *Philippine National Oil Company v. Court of Appeals*,³⁰ (*PNOC v. CA*) which involves not only the BIR (a government bureau) and the PNOC and PNB (both government-owned or controlled corporations), but also respondent Tirso Savellano, a **private citizen**. Clearly, PD 242 is not applicable to the case of *PNOC v. CA*. Even the *ponencia* in *PNOC v. CA* stated that the dispute in that case is not covered by PD 242, thus:

Even if, for the sake of argument, that P.D. No. 242 should prevail over Rep. Act No. 1125, the present dispute would still not be covered by P.D. No. 242. Section 1 of P.D. No. 242 explicitly provides that only disputes, claims and controversies *solely* between or among departments, bureaus, offices, agencies, and instrumentalities of the National Government, including constitutional offices or agencies, as well as government-owned and controlled corporations, shall be administratively settled or adjudicated. **While the BIR is obviously a government bureau, and both PNOC and PNB are government-owned and controlled corporations, respondent Savellano is a private citizen.** His standing in the controversy could not be lightly brushed aside. It was private respondent Savellano who gave the BIR the information that resulted in the investigation of PNOC and PNB; who requested the BIR Commissioner to reconsider the compromise agreement in question; and

²⁸ Under Section 66, Chapter 14, Book IV of the Administrative Code of 1987, which incorporated PD 242, not covered in the administrative settlement or adjudication are disputes involving the Congress, the Supreme Court, the Constitutional Commissions, and local governments.

²⁹ The pertinent provision in the MOA reads:

H) Any resolution in favor of NPC/PSALM by any appropriate court or body shall be immediately executory without necessity of notice or demand from NPC/PSALM. **A ruling from the Department of Justice (DOJ) that is favorable to NPC/PSALM shall be tantamount to the filing of an application for refund (in cash)/tax credit certificate (TCC), at the option of NPC/PSALM. BIR undertakes to immediately process and approve the application, and release the tax refund/TCC within fifteen (15) working days from issuance of the DOJ ruling that is favorable to NPC/PSALM.** (Emphasis supplied)

³⁰ 496 Phil. 506 (2005).

who initiated the CTA Case No. 4249 by filing a Petition for Review.³¹
(Emphasis supplied)

In contrast, since this case is a dispute **solely** between PSALM and NPC, both government-owned and controlled corporations, and the BIR, a National Government office, PD 242 clearly applies and the Secretary of Justice has jurisdiction over this case.

It is only proper that intra-governmental disputes be settled administratively since the **opposing government offices, agencies and instrumentalities are all under the President's executive control and supervision.** Section 17, Article VII of the Constitution states unequivocally that: "**The President shall have control of all the executive departments, bureaus and offices.** He shall ensure that the laws be faithfully executed." In *Carpio v. Executive Secretary*,³² the Court expounded on the President's control over all the executive departments, bureaus and offices, thus:

This presidential power of control over the executive branch of government extends over all executive officers from Cabinet Secretary to the lowliest clerk and has been held by us, in the landmark case of *Mondano vs. Silvosa*, to mean "the power of [the President] to alter or modify or nullify or set aside what a subordinate officer had done in the performance of his duties and to substitute the judgment of the former with that of the latter." It is said to be at the very "heart of the meaning of Chief Executive."

Equally well accepted, as a corollary rule to the control powers of the President, is the "Doctrine of Qualified Political Agency." As the President cannot be expected to exercise his control powers all at the same time and in person, he will have to delegate some of them to his Cabinet members.

Under this doctrine, which recognizes the establishment of a single executive, "all executive and administrative organizations are adjuncts of the Executive Department, the heads of the various executive departments are assistants and agents of the Chief Executive, and, except in cases where the Chief Executive is required by the Constitution or law to act in person on the exigencies of the situation demand that he act personally, the multifarious executive and administrative functions of the Chief Executive are performed by and through the executive departments, and the acts of the Secretaries of such departments, performed and promulgated in the regular course of business, are, unless disapproved or reprobated by the Chief Executive presumptively the acts of the Chief Executive."

Thus, and in short, "the President's power of control is directly exercised by him over the members of the Cabinet who, in turn, and by his authority, control the bureaus and other offices under their respective jurisdictions in the executive department."³³

³¹ Id. at 558.

³² 283 Phil. 196 (1992).

³³ Id. at 204-205.

This power of control vested by the Constitution in the President cannot be diminished by law. As held in *Rufino v. Endriga*,³⁴ Congress cannot by law deprive the President of his power of control, thus:

The Legislature cannot validly enact a law that puts a government office in the Executive branch outside the control of the President in the guise of insulating that office from politics or making it independent. **If the office is part of the Executive branch, it must remain subject to the control of the President. Otherwise, the Legislature can deprive the President of his constitutional power of control over “all the executive x x x offices.” If the Legislature can do this with the Executive branch, then the Legislature can also deal a similar blow to the Judicial branch by enacting a law putting decisions of certain lower courts beyond the review power of the Supreme Court.** This will destroy the system of checks and balances finely structured in the 1987 Constitution among the Executive, Legislative, and Judicial branches.³⁵ (Emphasis supplied)

Clearly, the President’s constitutional power of control over all the executive departments, bureaus and offices cannot be curtailed or diminished by law. “Since the Constitution has given the President the power of control, with all its awesome implications, it is the Constitution alone which can curtail such power.”³⁶ **This constitutional power of control of the President cannot be diminished by the CTA. Thus, if two executive offices or agencies cannot agree, it is only proper and logical that the President, as the sole Executive who under the Constitution has control over both offices or agencies in dispute, should resolve the dispute instead of the courts. The judiciary should not intrude in this executive function of determining which is correct between the opposing government offices or agencies, which are both under the sole control of the President. Under his constitutional power of control, the President decides the dispute between the two executive offices. The judiciary cannot substitute its decision over that of the President.** Only after the President has decided or settled the dispute can the courts’ jurisdiction be invoked. Until such time, the judiciary should not interfere since the issue is not yet ripe for judicial adjudication. Otherwise, the judiciary would infringe on the President’s exercise of his constitutional power of control over all the executive departments, bureaus, and offices.

Furthermore, under the doctrine of exhaustion of administrative remedies, it is mandated that where a remedy before an administrative body is provided by statute, relief must be sought by exhausting this remedy prior to bringing an action in court in order to give the administrative body every opportunity to decide a matter that comes within its jurisdiction.³⁷ A litigant cannot go to court without first pursuing

³⁴ 528 Phil. 473 (2006).

³⁵ Id. at 506.

³⁶ J. Bernas, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 859 (2003).

³⁷ *Smart Communications, Inc. v. Aldecoa*, 717 Phil. 577 (2013); *Special People, Inc. Foundation v. Canda*, 701 Phil. 365 (2013); *Addition Hills Mandaluyong Civic & Social Organization, Inc. v.*

his administrative remedies; otherwise, his action is premature and his case is not ripe for judicial determination.³⁸ PD 242 (now Chapter 14, Book IV of Executive Order No. 292), provides for such administrative remedy. Thus, only after the President has decided the dispute between government offices and agencies can the losing party resort to the courts, if it so desires. Otherwise, a resort to the courts would be premature for failure to exhaust administrative remedies. Non-observance of the doctrine of exhaustion of administrative remedies would result in lack of cause of action,³⁹ which is one of the grounds for the dismissal of a complaint.

The rationale of the doctrine of exhaustion of administrative remedies was aptly explained by the Court in *Universal Robina Corp. (Corn Division) v. Laguna Lake Development Authority*:⁴⁰

The doctrine of exhaustion of administrative remedies is a cornerstone of our judicial system. The thrust of the rule is that courts must allow administrative agencies to carry out their functions and discharge their responsibilities within the specialized areas of their respective competence. The rationale for this doctrine is obvious. It entails lesser expenses and provides for the speedier resolution of the controversies. Comity and convenience also impel courts of justice to shy away from a dispute until the system of administrative redress has been completed.⁴¹

In requiring parties to exhaust administrative remedies before pursuing action in a court, the doctrine prevents overworked courts from considering issues when remedies are available through administrative channels.⁴² Furthermore, the doctrine endorses a more economical and less formal means of resolving disputes,⁴³ and promotes efficiency since disputes and claims are generally resolved more quickly and economically through administrative proceedings rather than through court litigations.⁴⁴

The Court of Appeals ruled that under the 1997 NIRC, the dispute between the parties is within the authority of the CIR to resolve. Section 4 of the 1997 NIRC reads:

SEC 4. *Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.* – The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, **subject to review by the Secretary of Finance.**

The power to decide disputed assessments, refunds in internal revenue taxes, fees or other charges, penalties imposed in relation

Megaworld Properties & Holdings, Inc., 686 Phil. 76 (2012); *Laguna CATV Network, Inc. v. Hon. Maraan*, 440 Phil. 734 (2002).

³⁸ *Gov. Joson III v. Court of Appeals*, 517 Phil. 555 (2006).

³⁹ *Ejera v. Merto*, 725 Phil. 180 (2014).

⁴⁰ 664 Phil. 754 (2011).

⁴¹ *Id.* at 759-760.

⁴² *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2D 796 (1990).

⁴³ *Rojo v. Kliger*, 52 Cal. 3D 65, 276 Cal. Rptr. 130, 801 P.2d 373 (1990).

⁴⁴ *Woodford v. Ngo*, 126 S. Ct. 2378, 165 L. Ed. 2D 368 (2006).

thereto, or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals. (Emphasis supplied)

The first paragraph of Section 4 of the 1997 NIRC provides that the power of the CIR to interpret the NIRC provisions and other tax laws is **subject to review by the Secretary of Finance, who is the alter ego of the President.** Thus, the constitutional power of control of the President over all the executive departments, bureaus, and offices⁴⁵ is still preserved. The President's power of control, which cannot be limited or withdrawn by Congress, means the power of the President to alter, modify, nullify, or set aside the judgment or action of a subordinate in the performance of his duties.⁴⁶

The second paragraph of Section 4 of the 1997 NIRC, providing for the exclusive appellate jurisdiction of the CTA as regards the CIR's decisions on matters involving disputed assessments, refunds in internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under NIRC, is in conflict with PD 242. Under PD 242, **all** disputes and claims **solely** between government agencies and offices, including government-owned or controlled corporations, shall be administratively settled or adjudicated by the Secretary of Justice, the Solicitor General, or the Government Corporate Counsel, depending on the issues and government agencies involved.

To harmonize Section 4 of the 1997 NIRC with PD 242, the following interpretation should be adopted: (1) As regards **private entities and the BIR**, the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the NIRC or other laws administered by the BIR is vested in the CIR subject to the exclusive appellate jurisdiction of the CTA, in accordance with Section 4 of the NIRC; and (2) Where the disputing parties are **all public entities** (covers disputes between the BIR and other government entities), the case shall be governed by PD 242.

Furthermore, it should be noted that the 1997 NIRC is a general law governing the imposition of national internal revenue taxes, fees, and charges.⁴⁷ **On the other hand, PD 242 is a special law that applies only to disputes involving solely government offices, agencies, or instrumentalities.** The difference between a special law and a general law was clarified in *Vinzons-Chato v. Fortune Tobacco Corporation*:⁴⁸

⁴⁵ Section 17, Article VII of the Constitution unequivocally states that: "The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed."

⁴⁶ *Orosa v. Roa*, 527 Phil. 347 (2006).

⁴⁷ *Commissioner of Internal Revenue v. Philippine Airlines, Inc.*, 609 Phil. 695 (2009).

⁴⁸ 552 Phil. 101 (2007).

A general statute is one which embraces a class of subjects or places and does not omit any subject or place naturally belonging to such class. A special statute, as the term is generally understood, is one which relates to particular persons or things of a class or to a particular portion or section of the state only.

A general law and a special law on the same subject are statutes in *pari materia* and should, accordingly, be read together and harmonized, if possible, with a view to giving effect to both. The rule is that where there are two acts, one of which is special and particular and the other general which, if standing alone, would include the same matter and thus conflict with the special act, the special law must prevail since it evinces the legislative intent more clearly than that of a general statute and must not be taken as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.

The circumstance that the special law is passed before or after the general act does not change the principle. Where the special law is later, it will be regarded as an exception to, or a qualification of, the prior general act; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless repealed expressly or by necessary implication.⁴⁹

Thus, even if the 1997 NIRC, a general statute, is a later act, PD 242, which is a special law, will still prevail and is treated as an exception to the terms of the 1997 NIRC with regard solely to intra-governmental disputes. PD 242 is a special law while the 1997 NIRC is a general law, insofar as disputes solely between or among government agencies are concerned. Necessarily, such disputes must be resolved under PD 242 and not under the NIRC, precisely because PD 242 specifically mandates the settlement of such disputes in accordance with PD 242. PD 242 is a valid law prescribing the procedure for administrative settlement or adjudication of disputes among government offices, agencies, and instrumentalities under the executive control and supervision of the President.⁵⁰

Even the BIR, through its authorized representative, then OIC-Commissioner of Internal Revenue Lilian B. Hefti, acknowledged in the MOA executed by the BIR, NPC, and PSALM, that the Secretary of Justice has jurisdiction to resolve its dispute with petitioner PSALM and the NPC. This is clear from the provision in the MOA which states:

H) Any resolution in favor of NPC/PSALM by any appropriate court or body shall be immediately executory without necessity of notice or demand from NPC/PSALM. **A ruling from the Department of Justice (DOJ) that is favorable to NPC/PSALM shall be tantamount to the filing of an application for refund (in cash)/tax credit certificate (TCC), at the option of NPC/PSALM. BIR undertakes to immediately process and approve the application, and release the tax refund/TCC**

⁴⁹ Id. at 110-111.

⁵⁰ *Philippine Veterans Investment Development Corp. (PHIVIDEC) v. Judge Velez*, supra note 26.

within fifteen (15) working days from issuance of the DOJ ruling that is favorable to NPC/PSALM. (Emphasis supplied)

PD 242 is now embodied in Chapter 14, Book IV of Executive Order No. 292 (EO 292), otherwise known as the Administrative Code of 1987, which took effect on 24 November 1989.⁵¹ The pertinent provisions read:

**Chapter 14 – Controversies Among Government
Offices and Corporations**

SEC. 66. *How Settled.* – All disputes, claims and controversies, solely between or among the departments, bureaus, offices, agencies and instrumentalities of the National Government, including government-owned or controlled corporations, such as those arising from the interpretation and application of statutes, contracts or agreements, shall be administratively settled or adjudicated in the manner provided in this Chapter. This Chapter shall, however, not apply to disputes involving the Congress, the Supreme Court, the Constitutional Commissions, and local governments.

SEC. 67. *Disputes Involving Questions of Law.* – All cases involving only questions of law shall be submitted to and settled or adjudicated by the Secretary of Justice as Attorney-General of the National Government and as *ex officio* legal adviser of all government-owned or controlled corporations. His ruling or decision thereon shall be conclusive and binding on all the parties concerned.

SEC. 68. *Disputes Involving Questions of Fact and Law.* – Cases involving mixed questions of law and of fact or only factual issues shall be submitted to and settled or adjudicated by:

(1) The Solicitor General, if the dispute, claim or controversy involves only departments, bureaus, offices and other agencies of the National Government as well as government-owned or controlled corporations or entities of whom he is the principal law officer or general counsel; and

(2) The Secretary of Justice, in all other cases not falling under paragraph (1).

SEC. 69. *Arbitration.* – The determination of factual issues may be referred to an arbitration panel composed of one representative each of the parties involved and presided over by a representative of the Secretary of Justice or the Solicitor General, as the case may be.

SEC. 70. *Appeals.* – The decision of the Secretary of Justice as well as that of the Solicitor General, when approved by the Secretary of Justice, shall be final and binding upon the parties involved. Appeals may, however, be taken to the President where the amount of the claim or the value of the property exceeds one million pesos. The decision of the President shall be final.

⁵¹ *Dr. Pandi v. Court of Appeals*, 430 Phil. 239 (2002). Republic Act No. 6682 amended the effectivity clause of EO 292, directing that “[T]his Code shall take effect two years after its publication in the Official Gazette.”

SEC. 71. *Rules and Regulations.* – The Secretary of Justice shall promulgate the rules and regulations necessary to carry out the provisions of this Chapter.

Since the amount involved in this case is more than one million pesos, the DOJ Secretary's decision may be appealed to the Office of the President in accordance with Section 70, Chapter 14, Book IV of EO 292 and Section 5⁵² of PD 242. If the appeal to the Office of the President is denied, the aggrieved party can still appeal to the Court of Appeals under Section 1, Rule 43 of the 1997 Rules of Civil Procedure.⁵³ However, in order not to further delay the disposition of this case, the Court resolves to decide the substantive issue raised in the petition.⁵⁴

II. Whether the sale of the power plants is subject to VAT.

To resolve the issue of whether the sale of the Pantabangan-Masiway and Magat Power Plants by petitioner PSALM to private entities is subject to VAT, the Court must determine whether the sale is “in the course of trade or business” as contemplated under Section 105 of the NIRC, which reads:

SEC 105. *Persons Liable.* – Any person who, in the course of trade or business, sells, barter, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 to 108 of this Code.

The value-added tax is an indirect tax and the amount of tax may be shifted or passed on to the buyer, transferee or lessee of the goods, properties or services. This rule shall likewise apply to existing contracts of sale or lease of goods, properties or services at the time of the effectivity of Republic Act 7716.

⁵² Section 5. The decisions of the Secretary of Justice, as well as those of the Solicitor General or the Government Corporate Counsel, when approved by the Secretary of Justice, shall be final and binding upon the parties involved. Appeals may be taken to and entertained by the Office of the President only in cases wherein the amount of the claim or value of the property exceeds ₱1 million. The decisions of the Office of the President on appeal cases shall be final.

⁵³ Section 1, Rule 43 of the 1997 Rules of Civil Procedure reads:

RULE 43
APPEALS FROM THE COURT OF TAX APPEALS AND QUASI-JUDICIAL
AGENCIES TO THE COURT OF APPEALS

SECTION 1. *Scope.* – This Rule shall apply to appeals from judgments or final orders of the Court of Tax Appeals and from awards, judgments, final orders or resolutions of or authorized by any quasi-judicial agency in the exercise of its quasi-judicial functions. Among these agencies are the Civil Service Commission, Central Board of Assessment Appeals, Securities and Exchange Commission, **Office of the President**, Land Registration Authority, Social Security Commission, Civil Aeronautics Board, Bureau of Patents, Trademarks and Technology Transfer, National Electrification Administration, Energy Regulatory Board, National Telecommunications Commission, Department of Agrarian Reform under Republic Act No. 6657, Government Service Insurance System, Employees Compensation Commission, Agricultural Inventions Board, Insurance Commission, Philippine Atomic Energy Commission, Board of Investments, Construction Industry Arbitration Commission, and voluntary arbitrators authorized by law.

⁵⁴ *Traveño v. Bobongon Banana Growers Multi-Purpose Cooperative*, 614 Phil. 222 (2009).



The phrase ‘in the course of trade or business’ means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a nonstock, nonprofit private organization (irrespective of the disposition of its net income and whether or not it sells exclusively to members or their guests), or government entity.

The rule of regularity, to the contrary notwithstanding, services as defined in this Code rendered in the Philippines by nonresident foreign persons shall be considered as being rendered in the course of trade or business. (Emphasis supplied)

Under Section 50 of the EPIRA law, PSALM’s principal purpose is to manage the orderly sale, disposition, and privatization of the NPC generation assets, real estate and other disposable assets, and IPP contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner.

PSALM asserts that the privatization of NPC assets, such as the sale of the Pantabangan-Masiway and Magat Power Plants, is pursuant to PSALM’s mandate under the EPIRA law and is not conducted in the course of trade or business. PSALM cited the 13 May 2002 BIR Ruling No. 020-02, that PSALM’s sale of assets is not conducted in pursuit of any commercial or profitable activity as to fall within the ambit of a VAT-able transaction under Sections 105 and 106 of the NIRC. The pertinent portion of the ruling adverted to states:

2. Privatization of assets by PSALM is not subject to VAT.

Pursuant to Section 105 in relation to Section 106, both of the Tax Code of 1997, a value-added tax equivalent to ten percent (10%) of the gross selling price or gross value in money of the goods, is collected from any person, who, in the course of trade or business, sells, barter, exchanges, leases goods or properties, which tax shall be paid by the seller or transferor.

The phrase “in the course of trade or business” means the regular conduct or pursuit of a commercial activity, including transactions incidental thereto.

Since the disposition or sale of the assets is a consequence of PSALM’s mandate to ensure the orderly sale or disposition of the property and thereafter to liquidate the outstanding loans and obligations of NPC, utilizing the proceeds from sales and other property contributed to it, including the proceeds from the Universal Charge, and not conducted in pursuit of any commercial or profitable activity, including transactions incidental thereto, **the same will be considered an isolated transaction, which will therefore not be subject to VAT.** (BIR Ruling No. 113-98 dated July 23, 1998)⁵⁵ (Emphasis supplied)

⁵⁵ *Rollo* (Vol. 11), p. 624.

On the other hand, the CIR argues that the previous exemption of NPC from VAT under Section 13 of Republic Act No. 6395⁵⁶ (RA 6395) was expressly repealed by Section 24 of Republic Act No. 9337⁵⁷ (RA 9337), which reads:

SEC. 24. *Repealing Clause.* – The following laws or provisions of laws are hereby repealed and the persons and/or transactions affected herein are made subject to the value-added tax subject to the provisions of Title IV of the National Internal Revenue Code of 1997, as amended:

- (A) Section 13 of R.A. No. 6395 on the exemption from value-added tax of National Power Corporation (NPC);
- (B) Section 6, fifth paragraph of R.A. No. 9136 on the zero VAT rate imposed on the sale of generated power by generation companies; and
- (C) All other laws, acts, decrees, executive orders, issuances and rules and regulations or parts thereof which are contrary to and inconsistent with any provisions of this Act are hereby repealed, amended or modified accordingly.

As a consequence, the CIR posits that the VAT exemption accorded to PSALM under BIR Ruling No. 020-02 is also deemed revoked since PSALM is a successor-in-interest of NPC. Furthermore, the CIR avers that prior to the sale, NPC still owned the power plants and not PSALM, which is just considered as the trustee of the NPC properties. Thus, the sale made by NPC or its successors-in-interest of its power plants should be subject to the 10% VAT beginning 1 November 2005 and 12% VAT beginning 1 February 2007.

We do not agree with the CIR's position, which is anchored on the wrong premise that PSALM is a successor-in-interest of NPC. PSALM is not a successor-in-interest of NPC. Under its charter, NPC is mandated to "undertake the development of hydroelectric generation of power and the production of electricity from nuclear, geothermal and other sources, as well as the transmission of electric power on a nationwide basis."⁵⁸ With the passage of the EPIRA law which restructured the electric power industry into generation, transmission, distribution, and supply sectors, the NPC is now primarily mandated to perform missionary electrification function through the Small Power Utilities Group (SPUG) and is responsible for providing power generation and associated power delivery systems in areas that are not connected to the transmission system.⁵⁹ On the other hand,

⁵⁶ AN ACT REVISING THE CHARTER OF THE NATIONAL POWER CORPORATION.

⁵⁷ AN ACT AMENDING SECTIONS 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES.

⁵⁸ Section 1, RA 6395.

⁵⁹ Section 70 of the EPIRA law states:

SEC. 70. *Missionary Electrification.* – Notwithstanding the divestment and/or privatization of NPC assets, IPP contracts and spun-off corporations, NPC shall remain

PSALM, a government-owned and controlled corporation, was created under the EPIRA law to manage the orderly sale and privatization of NPC assets with the objective of liquidating all of NPC's financial obligations in an optimal manner. Clearly, NPC and PSALM have different functions. **Since PSALM is not a successor-in-interest of NPC, the repeal by RA 9337 of NPC's VAT exemption does not affect PSALM.**

In any event, even if PSALM is deemed a successor-in-interest of NPC, still the sale of the power plants is not "in the course of trade or business" as contemplated under Section 105 of the NIRC, and thus, not subject to VAT. **The sale of the power plants is not in pursuit of a commercial or economic activity but a governmental function mandated by law to privatize NPC generation assets.** PSALM was created primarily to liquidate all NPC financial obligations and stranded contract costs in an optimal manner. The purpose and objective of PSALM are explicitly stated in Section 50 of the EPIRA law, thus:

SEC. 50. Purpose and Objective, Domicile and Term of Existence.

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

The PSALM Corp. shall have its principal office and place of business within Metro Manila.

The PSALM Corp. shall exist for a period of twenty-five (25) years from the effectivity of this Act, unless otherwise provided by law, and all assets held by it, all moneys and properties belonging to it, and all its liabilities outstanding upon the expiration of its term of existence shall revert to and be assumed by the National Government. (Emphasis supplied)

PSALM is limited to selling only NPC assets and IPP contracts of NPC. The sale of NPC assets by PSALM is not "in the course of trade or business" but purely for the specific purpose of privatizing NPC assets in order to liquidate all NPC financial obligations. PSALM is tasked to sell and privatize the NPC assets within the term of its existence.⁶⁰ The EPIRA law

as a National Government-owned and -controlled corporation to perform the missionary electrification function through the Small Power Utilities Group (SPUG) and shall be responsible for providing power generation and its associated power delivery systems in areas that are not connected to the transmission system. The missionary electrification function shall be funded from the revenues from sales in missionary areas and from the universal charge to be collected from all electricity end-users as determined by the ERC.

⁶⁰ Section 51 of the EPIRA law enumerates the powers of PSALM:

SEC. 51. Powers. – The Corporation shall, in the performance of its functions and for the attainment of its objectives, have the following powers:

(a) **To formulate and implement a program for the sale and privatization of the NPC assets and IPP contracts and the**



even requires PSALM to submit a plan for the endorsement by the Joint Congressional Power Commission and the approval of the President of the total privatization of the NPC assets and IPP contracts. Section 47 of the EPIRA law provides:

SEC 47. *NPC Privatization.* – Except for the assets of SPUG, the generation assets, real estate, and other disposable assets as well as IPP contracts of NPC shall be privatized in accordance with this Act. Within six (6) months from the effectivity of this Act, the PSALM Corp. shall submit a plan for the endorsement by the Joint Congressional Power Commission and the approval of the President of the Philippines, on the total privatization of the generation assets, real estate, other disposable assets as well as existing IPP contracts of NPC and thereafter, implement the same, in accordance with the following guidelines, except as provided for in Paragraph (f) herein:

(a) The privatization value to the National Government of the NPC generation assets, real estate, other disposable assets as well as IPP contracts shall be optimized;

liquidation of NPC debts and stranded contract costs, such liquidation to be completed within the term of existence of the PSALM Corp.

(b) **To take title to and possession of, administer and conserve the assets transferred to it; to sell or dispose of the same at such price and under such terms and conditions as it may deem necessary or proper, subject to applicable laws, rules and regulations;**

(c) To take title to and possession of the NPC IPP contracts and to appoint, after public bidding in transparent and open manner, qualified independent entities who shall act as the IPP Administrators in accordance with this Act;

(d) To calculate the amount of the stranded debts and stranded contract costs of NPC which shall form the basis for ERC in the determination of the universal charge;

(e) **To liquidate the NPC stranded contract costs, utilizing the proceeds from sales and other property contributed to it, including the proceeds from the universal charge;**

(f) To adopt rules and regulations as may be necessary or proper for the orderly conduct of its business or operations;

(g) To sue and be sued in its name;

(h) To appoint or hire, transfer, remove and fix the compensation of its personnel: *Provided, however,* That the Corporation shall hire its own personnel only if absolutely necessary, and as far as practicable, shall avail itself of the services of personnel detailed from other government agencies;

(i) To own, hold, acquire, or lease real and personal properties as may be necessary or required in the discharge of its functions;

(j) To borrow money and incur such liabilities, including the issuance of bonds, securities or other evidences of indebtedness utilizing its assets as collateral and/or through the guarantees of the National Government: *Provided, however,* That all such debts or borrowings shall have been paid off before the end of its corporate life;

(k) To restructure existing loans of the NPC;

(l) To collect, administer, and apply NPC's portion of the universal charge; and

(m) **To structure the sale, privatization or disposition of NPC assets and IPP contracts and/or their energy output based on such terms and conditions which shall optimize the value and sale of said assets.** (Emphasis supplied)

(b) The participation by Filipino citizens and corporations in the purchase of NPC assets shall be encouraged.

In the case of foreign investors, at least seventy-five percent (75%) of the funds used to acquire NPC-generation assets and IPP contracts shall be inwardly remitted and registered with the Bangko Sentral ng Pilipinas;

(c) The NPC plants and/or its IPP contracts assigned to IPP Administrators, its related assets and assigned liabilities, if any, shall be grouped in a manner which shall promote the viability of the resulting generation companies (gencos), ensure economic efficiency, encourage competition, foster reasonable electricity rates and create market appeal to optimize returns to the government from the sale and disposition of such assets in a manner consistent with the objectives of this Act. In the grouping of the generation assets and IPP contracts of NPC, the following criteria shall be considered:

(1) A sufficient scale of operations and balance sheet strength to promote the financial viability of the restructured units;

(2) Broad geographical groupings to ensure efficiency of operations but without the formation of regional companies or consolidation of market power;

(3) Portfolio of plants and IPP contracts to achieve management and operational synergy without dominating any part of the market or the load curve; and

(4) Such other factors as may be deemed beneficial to the best interest of the National Government while ensuring attractiveness to potential investors.

(d) All assets of NPC shall be sold in open and transparent manner through public bidding, and the same shall apply to the disposition of IPP contracts;

(e) In cases of transfer of possession, control, operation or privatization of multi-purpose hydro facilities, safeguards shall be prescribed to ensure that the national government may direct water usage in cases of shortage to protect potable water, irrigation, and all other requirements imbued with public interest;

(f) The Agus and Pulangi complexes in Mindanao shall be excluded from among the generation companies that will be initially privatized. Their ownership shall be transferred to the PSALM Corp. and both shall continue to be operated by the NPC. Said complexes may be privatized not earlier than ten (10) years from the effectivity of this Act, and, except for Agus III, shall not be subject to Build-Operate-Transfer (B-O-T), Build-Rehabilitate-Operate-Transfer (B-R-O-T) and other variations thereof pursuant to Republic Act No. 6957, as amended by Republic Act No. 7718. The privatization of Agus and Pulangi complexes

shall be left to the discretion of PSALM Corp. in consultation with Congress;

(g) The steamfield assets and generating plants of each geothermal complex shall not be sold separately. They shall be combined and each geothermal complex shall be sold as one package through public bidding. The geothermal complexes covered by this requirement include, but are not limited to, Tiwi-Makban, Leyte A and B (Tongonan), Palinpinon, and Mt. Apo;

(h) The ownership of the Caliraya-Botokan-Kalayaan (CBK) pump storage complex shall be transferred to the PSALM Corporation;

(i) Not later than three (3) years from the effectivity of this Act, and in no case later than the initial implementation of open access, at least seventy percent (70%) of the total capacity of generating assets of NPC and of the total capacity of the power plants under contract with NPC located in Luzon and Visayas shall have been privatized: *Provided*, That any unsold capacity shall be privatized not later than eight (8) years from the effectivity of this Act; and

(j) NPC may generate and sell electricity only from the undisposed generating assets and IPP contracts of PSALM Corp. and shall not incur any new obligations to purchase power through bilateral contracts with generation companies or other suppliers.

Thus, it is very clear that the sale of the power plants was an exercise of a governmental function mandated by law for the primary purpose of privatizing NPC assets in accordance with the guidelines imposed by the EPIRA law.

In the 2006 case of *Commissioner of Internal Revenue v. Magsaysay Lines, Inc. (Magsaysay)*,⁶¹ the Court ruled that the sale of the vessels of the National Development Company (NDC) to Magsaysay Lines, Inc. is not subject to VAT since it was not in the course of trade or business, as it was involuntary and made pursuant to the government's policy of privatization. The Court cited the CTA ruling that the phrase "course of business" or "doing business" connotes regularity of activity. Thus, since the sale of the vessels was an isolated transaction, made pursuant to the government's privatization policy, and which transaction could no longer be repeated or carried on with regularity, such sale was not in the course of trade or business and was not subject to VAT.

Similarly, the sale of the power plants in this case is not subject to VAT since the sale was made pursuant to PSALM's mandate to privatize NPC assets, and was not undertaken in the course of trade or business. In selling the power plants, PSALM was merely exercising a governmental function for which it was created under the EPIRA law.

⁶¹ 529 Phil. 64 (2006).

The CIR argues that the *Magsaysay* case, which involved the sale in 1988 of NDC vessels, is not applicable in this case since it was decided under the 1986 NIRC. The CIR maintains that under Section 105 of the 1997 NIRC, which amended Section 99⁶² of the 1986 NIRC, the phrase “in the course of trade or business” was expanded, and now covers incidental transactions. Since NPC still owns the power plants and PSALM may only be considered as trustee of the NPC assets, the sale of the power plants is considered an incidental transaction which is subject to VAT.

We disagree with the CIR’s position. PSALM owned the power plants which were sold. PSALM’s ownership of the NPC assets is clearly stated under Sections 49, 51, and 55 of the EPIRA law. The pertinent provisions read:

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

SEC 51. *Powers.* – The Corporation shall, in the performance of its functions and for the attainment of its objectives, have the following powers:

(a) To formulate and implement a program for the sale and privatization of the NPC assets and IPP contracts and the liquidation of the NPC debts and stranded costs, such liquidation to be completed within the term of existence of the PSALM Corp.;

(b) **To take title to and possession of, administer and conserve the assets transferred to it;** to sell or dispose of the same at such price and under such terms and conditions as it may deem necessary or proper, subject to applicable laws, rules and regulations;

X X X X

SEC. 55. *Property of PSALM Corp.* – **The following funds, assets, contributions and other property shall constitute the property of PSALM Corp.:**

⁶² Section 99 of the 1986 NIRC, as amended by Executive Order No. 273 (issued on 25 July 1987), reads:

Sec. 99. Persons liable. – Any person who, in the course of trade or business, sells, barter or exchanges goods, renders services, or engages in similar transactions and any person who imports goods shall be subject to the value-added tax (VAT) imposed in sections 100 to 102 of this Code.

- (a) **The generation assets, real estate, IPP contracts, other disposable assets of NPC**, proceeds from the sale or disposition of such assets and residual assets from B-O-T, R-O-T, and other variations thereof;
- (b) Transfers from the National Government;
- (c) Proceeds from loans incurred to restructure or refinance NPC's transferred liabilities: *Provided, however*, That all borrowings shall be fully paid for by the end of the life of the PSALM Corp.;
- (d) Proceeds from the universal charge allocated for stranded contract costs and the stranded debts of the NPC;
- (e) Net profit of NPC;
- (f) Net profit of TRANSCO;
- (g) Official assistance, grants, and donations from external sources; and
- (h) Other sources of funds as may be determined by PSALM Corp. necessary for the above-mentioned purposes. (Emphasis supplied)

Under the EPIRA law, the ownership of the generation assets, real estate, IPP contracts, and other disposable assets of the NPC was transferred to PSALM. Clearly, PSALM is not a mere trustee of the NPC assets but is the owner thereof. Precisely, PSALM, as the owner of the NPC assets, is the government entity tasked under the EPIRA law to privatize such NPC assets.

In the more recent case of *Mindanao II Geothermal Partnership v. Commissioner of Internal Revenue (Mindanao II)*,⁶³ which was decided under the 1997 NIRC, the Court held that the sale of a fully depreciated vehicle that had been used in Mindanao II's business was subject to VAT, even if such sale may be considered isolated. The Court ruled that it does not follow that an isolated transaction cannot be an incidental transaction for VAT purposes. The Court then cited Section 105 of the 1997 NIRC which shows that a transaction "in the course of trade or business" includes "transactions incidental thereto." Thus, the Court held that the sale of the vehicle is an incidental transaction made in the course of Mindanao II's business which should be subject to VAT.

The CIR alleges that the sale made by NPC and/or its successors-in-interest of the power plants is an incidental transaction which should be subject to VAT. This is erroneous. As previously discussed, the power plants are already owned by PSALM, not NPC. Under the EPIRA law, the ownership of these power plants was transferred to PSALM for sale,

⁶³ 706 Phil. 48 (2013).

disposition, and privatization in order to liquidate all NPC financial obligations. Unlike the *Mindanao II* case, the power plants in this case were not previously used in PSALM's business. The power plants, which were previously owned by NPC were transferred to PSALM for the specific purpose of privatizing such assets. The sale of the power plants cannot be considered as an incidental transaction made in the course of NPC's or PSALM's business. Therefore, the sale of the power plants should not be subject to VAT.

Hence, we agree with the Decisions dated 13 March 2008 and 14 January 2009 of the Secretary of Justice in OSJ Case No. 2007-3 that it was erroneous for the BIR to hold PSALM liable for deficiency VAT in the amount of ₱3,813,080,472 for the sale of the Pantabangan-Masiway and Magat Power Plants. The ₱3,813,080,472 deficiency VAT remitted by PSALM under protest should therefore be refunded to PSALM.

However, to give effect to Section 70, Chapter 14, Book IV of the Administrative Code of 1987 on appeals from decisions of the Secretary of Justice, the BIR is given an opportunity to appeal the Decisions dated 13 March 2008 and 14 January 2009 of the Secretary of Justice to the Office of the President within 10 days from finality of this Decision.⁶⁴

WHEREFORE, we **GRANT** the petition. We **SET ASIDE** the 27 September 2010 Decision and the 3 August 2011 Resolution of the Court of Appeals in CA-G.R. SP No. 108156. The Decisions dated 13 March 2008 and 14 January 2009 of the Secretary of Justice in OSJ Case No. 2007-3 are **REINSTATED**. No costs.

SO ORDERED.



ANTONIO T. CARPIO
Associate Justice

⁶⁴ Section 10 of the DOJ Administrative Order No. 121 (RULES IMPLEMENTING PRESIDENTIAL DECREE NO. 242 "PRESCRIBING THE PROCEDURE FOR ADMINISTRATIVE SETTLEMENT OR ADJUDICATION OF DISPUTES, CLAIMS AND CONTROVERSIES BETWEEN OR AMONG GOVERNMENT OFFICES, AGENCIES AND INSTRUMENTALITIES, INCLUDING GOVERNMENT-OWNED OR CONTROLLED CORPORATIONS, AND FOR OTHER PURPOSES") issued on 25 July 1973 reads:

SEC. 10. In cases where the movant of the claim or the value of the property involved exceeds one million pesos, an appeal may be taken to the Office of the President by filing a notice of appeal and serving the same upon all parties within a period of ten (10) days from receipt of a copy of the final action taken by the Secretary of Justice. In such event, the decision shall become final and executory only upon affirmation by the Office of the President. If no appeal is taken within the said period, the final decision taken in the case shall become immediately executory upon the expiration of the said period.

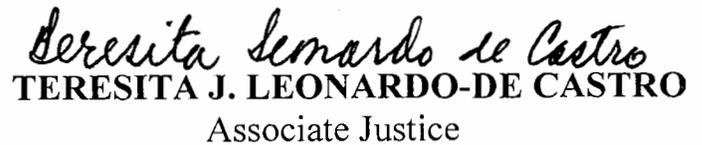
WE CONCUR:



MARIA LOURDES P. A. SERENO
Chief Justice

Please see concurring opinion

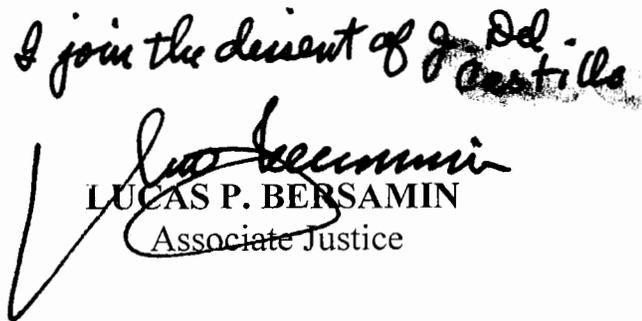

PRESBITERO J. VELASCO, JR.
Associate Justice

Teresita Leonardo de Castro


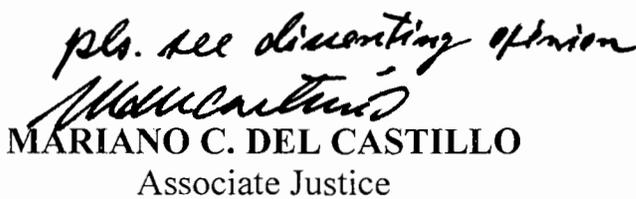
TERESITA J. LEONARDO-DE CASTRO
Associate Justice



DIOSDADO M. PERALTA
Associate Justice

I join the dissent of J. Del Castillo


LUCAS P. BERSAMIN
Associate Justice

pls. see dissenting opinion
Mariano C. Del Castillo


MARIANO C. DEL CASTILLO
Associate Justice



JOSE CATRAL MENDOZA
Associate Justice

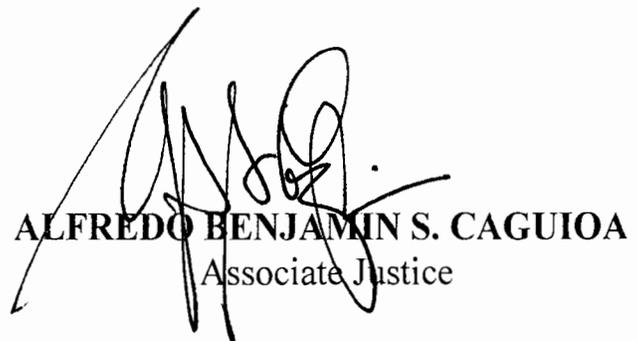
(no part)
ESTELA M. PERLAS-BERNABE
Associate Justice



MARVIC M.V.F. LEONEN
Associate Justice



FRANCIS H. JARDELEZA
Associate Justice



ALFREDO BENJAMIN S. CAGUIOA
Associate Justice


SAMUEL R. MARTIRES
Associate Justice


NOEL GIMENEZ TIJAM
Associate Justice

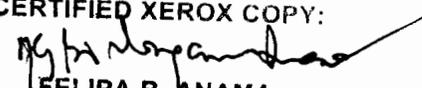

ANDRES B. REYES, JR.
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.


MARIA LOURDES P. A. SERENO
Chief Justice

CERTIFIED XEROX COPY:


FELIPA B. ANAMA
CLERK OF COURT, EN BANC
SUPREME COURT