Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SPECIAL FIRST DIVISION

HARD ROCK CAFÉ (MAKATI CITY), INC., Petitioner,	**CTA CASE NO. 9135**
-versus-	Members: DEL ROSARIO, *P.J., Chairperson.* UY, and MINDARO-GRULLA, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: DEC 06 2018 3:20 pm

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RESOLUTION

MINDARO-GRULLA, J.:

This resolves petitioner's "Motion for Reconsideration" of the Decision dated April 2, 2018 of this Court, the pertinent portion of which states:

> *"While a bar or a restaurant can be held liable for amusement tax if the place is being used in giving dancing privileges within the term of "night clubs" and "day clubs" under Revenue Regulation No. 14-67 regardless of whether there are professional hostesses furnished or not, there is nothing on the records to prove otherwise.*
>
> ***WHEREFORE**, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, the Formal Assessment Notices dated November 6, 2014 issued by respondent Commissioner of Internal Revenue against petitioner Hard Rock Café (Makati City) for alleged deficiency percentage tax for the calendar year 2012 are hereby **CANCELLED** and **SET ASIDE**.*
>
> ***SO ORDERED.**"*

In assailing this Court's Decision, respondent asserts that the Court found that even if petitioner is registered, functions and operates as a legitimate restaurant it likewise functions and operates like a club. Petitioner claims that this

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Court has no power to rule on the constitutionality or validity of Revenue Memorandum circular (RMC) 18-2010 and the same have the force and effect of law. Moreover, factual investigation of the BIR on the premises of petitioner revealed that it is considered an amusement place within the definition of "night and day club" and/or "cabaret" under RMC 18-2010.

In its Comment, petitioner avers the following:

"a. While this Honorable Court noted that Petitioner functions like a club within the definition of Rev. Regs No. 14-67, this Honorable Court also noted that to come under the purview of Revenue Regulation No. 14-67, the establishment must "be used and operated as a night club in its true sense and not merely for some occasional celebration";

b. No less than the Supreme Court has confirmed that the CTA has jurisdiction to rule on the constitutionality or validity of a revenue issuance issued by the CIR, most especially in cases where the unconstitutionality or invalidity of the revenue issuance is the ground upon which the CIR's assessment is claimed to be void; and

c. RMC No. 18-2010 is void for unduly expanding the intended coverage of Section 125, Tax Code. This being the case, it cannot serve as sufficient legal basis for assessing petitioner of Amusement Tax."

Respondent's motion is denied.

To clarify, petitioner was assessed for amusement tax on the ground that petitioner is allegedly engaged in the operation of "bar and cafe night clubs" and not as cabaret. Thus, the question is "whether the assessment has legal and factual basis for petitioner to be liable for amusement tax?"

We rule on the negative.

Night clubs are resorts frequented by pleasure seekers at night where food and wines and drinks are served and music furnished and the **patrons allowed to dance**

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whether with their own partners or professional hostesses furnished by such resorts.[1]

The Supreme Court in the case of *Collector of Internal Revenue vs. Junior Women's Club of the Philippines*[2] had the occasion to define a night club as a "place or establishment selling to the public food or drinks, where the customers are allowed to dance", to wit:

> *"We agree with the Secretary of Justice in his opinion on the nature and character of the Manila Hotel rendered on December 10, 1951 to the Administrator of the Economic Cooperative Administration to the effect that **"hotel is one which furnishes a traveler with lodging in addition to food and drinks"**, and that a **night club is a "place or establishment selling to the public food or drinks, where the customers are allowed to dance"**, following the definition given to said club in Executive Order No. 319, series of 1941, issued in connection with the operation of different places of amusement in the Philippines. We also agree to the conclusion that the dancing pavilion of the **Manila Hotel squarely comes within said definition because it sells food or drinks to the public and its customers are allowed to dance therein.** But we disagree with the contention of Appellee that it stepped into the shoes of the Manila Hotel as an operator of a night club when it contracted the use of the Fiesta Pavilion for the celebration of its Malayan Festival and, therefore, it should be considered as a lessee or operator of a night club within the purview of the third paragraph of section 260. **Evidently, said paragraph contemplates the operation of a certain place of amusement as a business or for profit and not merely for special occasions more or less casual or circumstantial. In other words, to come under the purview of said paragraph, the place must be used and operated as a night club in its true sense and not merely for some occasional celebration.** Otherwise, the subject of the lease would be merely a place of amusement and in that case it would come under the first paragraph of the same section. In fact, it was only for this specific purpose that the Fiesta Pavilion was leased by Appellee, and certainly not for profit but for charitable purpose. It is therefore erroneous to hold that Appellee became the lessee or operator of a cabaret or night club when it leased the Fiesta Pavilion for the celebration of its Malayan Festival on September 20, 1952." (Emphasis supplied)*

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[1] Revenue Regulation 14-67 or the "Revised Amusement Tax Regulation".
[2] G.R. No. L-6992. February 28, 1956.

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Evidently, it is not enough that food and drinks are served, music furnished and customers are allowed to dance, the place must be used and operated as a night club in its true sense and not merely for some occasional celebration.

Consequently, the Court concluded the following:

1) Among the primary purpose for which petitioner was created is that it offers such other services to the public which includes the provision of music, disco dancing and other forms of entertainment;

2) There is an entertainment stage where music or either live band or mix music played by DJ are performed;

3) It is petitioner's policy that whenever the bands play petitioner start charging a first drink charge which operates like a cover charge which can be used to spend for food and drink;

4) There were regular schedules of performers which petitioner has contract with and the purpose of the artist or performer is to augment sales. With the live band, customers are allowed to dance and that the talent fees are usually incorporated in the price of the menu.

Thus, it was established that although petitioner provides some form of entertainment, the same are but incidental to its main line of business of serving food and drinks. While customers may dance within the dining area, there is no designated dance floor. Likewise, records are bereft of evidence that petitioner employ dancers to dance with its customers. Clearly, respondent failed to present evidence that petitioner's establishment also functions as a night club. Furthermore, records are bereft of evidence that petitioner's establishment was frequented by customers for dancing either with their own partners or professional dancers furnished by petitioner.

As to the claim of petitioner that RMC No. 18-2010 is void for expanding the definition of cabaret, night clubs and day clubs to include videoke bars, karaoke bars, karaoke

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televisions, karaoke boxes and music lounges, the Court notes that constructions of sort are neither controlling nor binding upon the court, the duty and power to interpret the law being primarily a judicial function. The court may disregard contemporaneous construction, where there is ambiguity in the law, where the construction is clearly erroneous, where strong reason to the contrary exists, and where the court has previously given the statute a different interpretation.[3]

However, the validity or invalidity of said issuance is inconsequential to the case at bar considering that petitioner was assessed pursuant to Section 125 (b) of the NIRC, as amended.

Revenue Regulation 14-67 or the" Revised Amusement Tax Regulation" remains valid to the present day and based on the evidence and testimony during trial, there is not enough evidence to prove that petitioner operates and functions as amusement establishment similar to the term described and defined in Revenue Regulation 14-67 or the" Revised Amusement Tax Regulation". Moreover, petitioner was assessed as a "bar and café night club" and not as a videoke bars, karaoke bars, karaoke televisions, karaoke boxes and music lounges.

In sum, We find that no substantial argument was raised to merit reconsideration of our Decision promulgated on August 10, 2018.

WHEREFORE, premises considered, respondent's "Motion for Reconsideration" is hereby **DENIED** for lack of merit.

SO ORDERED.

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

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[3] Statutory Construction 5th Edition, by Ruben E. Agpalo citing the cases of Regalado v. Yulo, 61 Phil. 173; Molina v. Rafferty, 37 Phil. 545; Phil. Long Distance Tel. Co. v. CIR, 90 Phil. 674; Chartered Bank Employees Assn. v. Ople, 138 SCRA 273)

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice