Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION

HARD ROCK CAFÉ (MAKATI CITY), INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 9135

Members:
DEL ROSARIO, *P.J., Chairperson*
UY, and
MINDARO-GRULLA, *JJ.*

Promulgated:
AUG 10 2018 10:11 a.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review filed[1] by petitioner, Hard Rock Café (Makati City) Inc. (HRCM) against respondent, Commissioner of Internal Revenue (CIR) pursuant to Section 7(a)(1)[2] of Republic Act (RA) No. 1125[3], as amended, as well as Section 3(a)(1)[4] of Rule 4 and Section 4(a)[5] of Rule 8 of the Revised Rules of the Court of Tax Appeals, as amended.

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[1] On October 28, 2010.
[2] Sec. 7. *Jurisdiction.* - The CTA shall exercise:
(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
(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; xxx.
[3] Act Creating the Court of Tax Appeals.
[4] Sec. 3. *Cases within the jurisdiction of the Court in Division.* – The Court in Division shall exercise:
(a) Exclusive original over or appellate jurisdiction to review by appeal the following:
(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.
[5] Sec. 4. *Where to appeal; mode of appeal.* –
(a) An appeal from a decision or ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claim for refund of internal revenue taxes erroneously or illegally collected, the decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade & Industry, the

Petitioner seeks the cancellation of the assessments issued by the respondent for calendar year 2012 covering deficiency percentage tax in the total amount of P22,098,415.04, inclusive of interest, for having been issued without basis in fact and in law.

The antecedent facts are undisputed.[6]

Petitioner is a corporation duly organized and existing under and by virtue of the Philippine laws, with principal office located at Level III, Glorietta 3, Ayala Center, Makati City, and duly registered with the Bureau of Internal Revenue (BIR) under Tax Identification Number (TIN) 004-730-226-000. On the other hand, respondent is the duly appointed Commissioner of Internal Revenue vested under the law to decide disputed assessments, cancel and abate tax liabilities.[7]

On October 21, 2014, petitioner received a copy of the Preliminary Assessment Notice (PAN) dated October 13, 2014 from the Revenue Region (RR) No. 8- Makati of the BIR. Based on the PAN, petitioner is liable for alleged deficiency percentage tax for calendar year (CY) 2012 in the amount of Php 21,773,118.44, inclusive of interest.[8]

On November 3, 2014, or within fifteen (15) days from receipt of the PAN, petitioner filed its Reply to the PAN.

On November 11, 2014, petitioner received the Formal Assessment Notice dated November 6, 2014 with Assessment No. PT-ELA52816-12-14-1024 and Details of Discrepancy. Based on the FAN, petitioner is liable for

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Secretary of Agriculture, and the Regional Trial Court in the exercise of their original jurisdiction, shall be taken to the Court by filing before it a petition for review as provided in Rule 42 of the Rules of Court. The Court in Division shall act on the appeal.

6 Based on the Joint Stipulation of Facts and Issues, CTA Docket, Vol. I, p. 479-502

7 Ibid.

8 Id.

alleged deficiency percentage tax for CY 2012 in the amount of Php 22,098,415.04, inclusive of interest.[9]

On December 10, 2014, or within thirty (30) days from receipt of the FAN, petitioner filed its protest requesting reinvestigation of the FAN. Petitioner did not receive any decision on the protest.[10]

On February 6, 2015, petitioner submitted additional documents in support of the protest to the FAN[11].

Hence, on September 4, 2015, petitioner filed this petition.

Respondent CIR filed an Answer[12] on October 21, 2015 and alleged by way of special and affirmative defenses the following:

> *"6. This Honorable Court has no jurisdiction to act on the instant petition. xxx.*
>
> *xxx xxx xxx.*
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> *In the instant case, it is worth noting that petitioner received the BIR Formal Assessment Notice (FAN) dated November 6, 2014 with Assessment No. PT-eLA52816-12-14-1024 and Details of Discrepancies bearing the assessed deficiency percentage tax for CY 2012 on November 11, 2014. Then, on December 10, 2014, petitioner filed with the BIR Regional Director a Letter Protest dated December 10, 2014 requesting for reinvestigation of the subject FAN, setting forth therein already all its arguments (i.e. factual and legal) and attaching therewith the complete documents in support of its protest. However, on February 6, 2015, petitioner allegedly transmitted a copy of a mere brochure/map entitled "A Walking Map & Guide, Makati in 10 Minutes" distributed by the City Government of Makati, which is an* ***immaterial and irrelevant document*** *to the case. Hence, the 180-day period to act on petitioner's administrative protest under Section 228 of the 1997 Tax Code should be counted NOT from February 6, 2015 but*

[9] Id.
[10] Id.
[11] Exhibit "P-8", CTA Division Docket, Vol. II, pp. 729-732.
[12] CTA Docket, Vol. I, pp.132-141.

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from December 10, 2014 (the date when petitioner filed its protest), which is to expire on June 8, 2015. Thus, counting from June 8, 2015, petitioner has a period of 30-days or until July 8, 2015 within which to file an appeal with this Honorable Court.

*However, the fact that petitioner opted to file the instant Petition for Review with this Honorable Court only on September 4, 2015, or after the lapse of fifty-eight (58) days from July 8, 2015, which is way beyond the 30 day reglementary period prescribed under Section 228 of the 1997 Tax Code, therefore, petitioner's judicial appeal with the Honorable Court has **already prescribed.** As such, the subject deficiency percentage tax of petitioner for CY2012 has already become **final, executory and demandable**, pursuant to Section 228 of the 1997 Tax Code. Consequently, this Honorable Court has no jurisdiction to act on the instant petition.*

xxx xxx xxx.

10. xxx, petitioner was assessed for deficiency percentage tax in the amount of Php22,098,415.04 (inclusive of interest) for CY 2012, pursuant to Section 125 (b) of the 1997 Tax Code in relation to Revenue Memorandum Circular (RMC) No. 18-2010, for the reason that during the administrative investigation xxx, petitioner failed to properly substantiate or controvert by substantial evidence the BIR factual findings, xxxxx:

xxx xxx xxx.

*In the instant case, after factual investigation/verification of pertinent records, petitioner was found by the respondent CIR as follows: **(i)** The business establishment of **HARD ROCK CAFÉ (MAKATI CITY), INCORPORATED (HRCM**, for brevity) is divided into seven areas, the main dining room, second floor restaurant, administrative offices, guitar bar, piano bar, saxophone bar and billiards area. The main dining room has an entertainment stage where live bands perform; **(ii) HRCM** enters into different contracts or booking confirmation with various artist to conduct series of performances at the restaurant every night. The main purpose of engaging the services of various artists was to promote **HRCM** and to augment its sales of drinks and food in its business establishment. Per booking confirmation, the payments for these performers are made in cash on the night of their performance. These talent fees are indirectly passed on the customers in the form of higher menu prices. Moreover, the customer of the*

> *restaurant especially during the night, when the gig has started, went there mainly to watch various artist perform and to dance and mingle with famous performers because if there (sic) purpose was for the dining experience, they should have gone to other cosy (sic) restaurants without loud music and with less expensive food and refreshment choices; **(iii)** The billiards area is open to all customers for a fee on a per game basis. This area was built to attract more customers of **HRCM** in the bar areas. As one of the traditional pastimes, playing billiards will prolong the customer's stay and will increase their orders of food and refreshment; **(iv)** The music in **HRCM** is either live bands or, more commonly, a mix of songs played by DJ through a powerful PA system. In front of the entertainment stage is a small area where the customer can dance with the artists, whereas, a DJ booth is located at back, where DJ plays recorded electronic disco, house, hip hop, R&B, rock, reggae, pop, and other music genres. The company's restaurant with three bar areas inside and offers entertainment or live music is categorized as music bars or nightclub.*
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> *xxx xxx xxx.*

On August 30, 2016, a Pre-trial Order[13] was issued terminating the pre-trial and setting the date for the presentation of evidence by the parties. During trial, petitioner presented Mr. Joseph Y. Ang as its sole witness.

Mr. Joseph Y. Ang identified his sworn statement which was marked as Exhibit "P-20", as well as Exhibits "P-1 to P-19". He further testified that petitioner is a themed restaurant or a house rock and roll and it serves as rock museum. Petitioner serves liquor and drinks; they have live band shows that cater to all kinds of customers and the moment the band plays, the customers are charged with their first drink like a cover charge.[14]

On September 29, 2016, petitioner filed its Formal Offer of Evidence presenting Exhibits "'P-1" to "P-20" (inclusive of sub-markings),[15] which the Court admitted in a Resolution dated November 28, 2016.

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[13] CTA Docket, Vol. II, pp.514-527.
[14] CTA Docket, Vol. II, pp.533-543.
[15] CTA Docket, Vol. II, pp. 552-570.

Petitioner's documentary exhibits are the following:

Exhibit:	Document:
P-1	Petitioner's Certificate of Filing of Amended Articles of Incorporation with attached Amended Articles of Incorporation issued by the Securities and Exchange Commission on December 23, 2014
P-2	Petitioner's Certificate of Registration (COR) issued by the Bureau of Internal Revenue (BIR) on January 31, 1998 with OCN 9RC0000218609, bearing Tax Identification Number (TIN) 004-730-226-000
P-3	Preliminary Assessment Notice (PAN) with attached Details of Discrepancies issued by the Revenue Region (RR) No. 8 - Makati of the BIR dated October 13, 2014
P-3-1	Petitioner's Logbook Entry showing the date of its receipt of the PAN on October 21, 2014
P-4	Petitioner's Reply to the PAN dated November 3, 2014 and filed with the RR No. 8 - Makati of the BIR on November 3, 2014
P-5	Formal Assessment Notice dated November 6, 2014 with Assessment No. PT-ELA52816-12-14-1024 and attached Details of Discrepancies (collectively, the FAN) issued by RR No. 8 -Makati of the BIR
P-5-1	Petitioner's Logbook Entry showing date of its receipt of the FAN on November 11, 2014
P-6	Petitioner's Protest to the FAN dated December 10, 2014 and filed with the RR No. 8 - Makati of the BIR on December 10, 2014
P-7	Petitioner's transmittal letter dated December 11, 2014 and addressed to RR No. 8 - Makati of the BIR regarding the submission of the copies of the PAN and FAN
P-8	Petitioner's transmittal letter dated February 6, 2015 and addressed to RR No. 8 - Makati of the BIR covering the supporting documents that were

	submitted to the BIR-RR No. 8
P-9	Petitioner's Audited Financial Statements for the Year Ended December 31, 2012
P-9-1	Note 12 of Petitioner's Audited Financial Statement for Year Ended December 31, 2012
P-9-2	Note 16 of Petitioner's Audited Financial Statement for Year Ended December 31, 2012
P-10	Certifications issued on July 6, 2011 and March 7, 2012 by the *Lungsod* of Makati in favor of Petitioner
P-11	Photographs of the event "Pinktober-Breast Cancer Awareness 2012" held by Petitioner
P-12	Photographs of the event "Earth Hour 2012" held by Petitioner
P-13	Screen shot of Petitioner's web page
P-13-1	Screen shot of Petitioner's web page
P-14	Certificate of Accreditation as a Restaurant issued by the Department of Tourism in favor of Petitioner
P-15	"A Walking Map and Guide, Makati in 10 Minutes" distributed by the City Government of Makati
P-16	Petitioner's Menu of Food and Drinks
P-17	Petitioner's Kiddie Party Packages
P-18	Petitioner's Corporate Packages
P-19	Petitioner's Kiddie Menu/Coloring Placemat
P-20	Sworn Statement of Mr. Joseph Y. Ang to Questions Propounded by Atty. Anezka Danett G. Cortina dated March 11, 2016
P-20-1	Signature of Mr. Joseph Y. Ang

On the other hand, respondent presented the following witnesses: (1) Revenue Officer Pauline Lydia M. Reyes and; (2) Revenue Officer Edwin A. Quejada.[16] The witnesses identified their judicial affidavits and exhibits. Thereafter, on March 23, 2017, respondent filed its Formal Offer of Evidence presenting Exhibits "'R-1" to "R-8" (inclusive of sub-markings),[17] which the Court admitted in a Resolution dated May 29, 2017.

[16] CTA Docket, Vol. II, pp. 868-871.
[17] CTA Docket, Vol. II, pp. 880-886.

The documentary exhibits offered by the respondent are as follows:

Exhibit	Description:
R-1	BIR Records bearing the deficiency percentage tax assessment of petitioner for taxable year 2012
R-2	Memorandum Report dated October 7, 2013 of Revenue Officer Pauline Lydia M. Reyes
R-2-a	Name and Specimen Signature of Revenue Officer Pauline Lydia M. Reyes
R-3	Memorandum dated February 19, 2014 of the BIR Regional Director, RR8-Makati
R-3-a	Name and Specimen Signature of Nestor S. Valeroso – Regional Director, BIR RR8-Makati
R-4	Memorandum Report dated July 30, 2014 of Revenue Officer Edwin A. Quejada
R-4-a	Name and Specimen Signature of Revenue Officer Edwin A. Quejada
R-4-b	Name and Specimen Signature of Jonas DP. Amora – Regional Director, BIR RR8-Makati
R-4-c	Detailed computation of petitioner's deficiency percentage tax liability for taxable year 2012, attached to the said Memorandum dated July 30, 2014
R-5	BIR Preliminary Assessment Notice (PAN) dated October 13, 2014
R-5-a	Details of Discrepancies attached to the BIR Preliminary Assessment Notice (PAN) dated October 13, 2014
R-5-b	Name and Specimen Signature of Jonas DP. Amora – Regional Director, BIR RR8-Makati
R-5-c	Name and Specimen Signature of Jonas DP. Amora – Regional Director, BIR RR8-Makati
R-6	BIR Formal Assessment Notice (FAN) dated November 6, 2014
R-6-a	Details of Discrepancies attached to the BIR Formal Assessment Notice (FAN) dated Nov. 6, 2014
R-6-b	Name and Specimen Signature of Jonas DP. Amora – Regional Director, BIR RR8-Makati

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R-6-c	Name and Specimen Signature of Jonas DP. Amora – Regional Director, BIR RR8-Makati
R-7	Sworn Judicial Affidavit dated May 3, 2016 of Revenue Officer Pauline Lydia M. Reyes
R-7-a	Name and Specimen Signature of Revenue Officer Pauline Lydia M. Reyes
R-8	Sworn Judicial Affidavit dated March 3, 2017 of Revenue Officer Edwin A. Quejada
R-8-a	Name and Specimen Signature of Revenue Officer Edwin A. Quejada

On June 27, 2017, petitioner presented its rebuttal evidence. Thereafter, a supplemental Formal Offer of Evidence was filed on June 30, 2017. In its Resolution dated August 18, 2017, the Court admitted the following exhibits of the petitioner, to wit:

Exhibit:	**Document:**
P-9-3	Floor Plan of the Main Floor of Petitioner's Premises
P-9-3a	Merchandise Store
P-9-3b	Saxophone Bar
P-9-3c	Guitar Bar
P-9-4	Floor Plan of the Mezzanine of Petitioner's Premises
P-9-4a	Piano Bar
P-21	Supplemental Sworn Statement of Mr. Joseph Y. Ang to Questions Propounded by Atty. Strella Marie G. Sacdalan dated April 3, 2017
P-21-1	Signature of Mr. Joseph Y. Ang

On August 18, 2017, the Court issued a Resolution requiring the parties to file their respective Memoranda within thirty (30) days from receipt thereof. On September 26, 2017, petitioner filed its Memorandum. Thus, on October 25, 2017, the case was submitted for decision sans respondent's memorandum as per Records Verification dated October 4, 2017.

As jointly stipulated by the parties, the main issue is whether respondent's assessment for deficiency percentage tax against petitioner for calendar year 2012 should be cancelled and withdrawn for lack of legal and factual basis. Otherwise stated, the main issue is whether petitioner is liable for amusement tax.

We resolve.

Before going into the merits of the case, the Court shall first determine the timeliness of the filing of the present Petition for Review in accordance with Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, which is quoted hereunder for ready reference:

> *"SEC. 228. Protesting of Assessment. - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: Provided, however, That a preassessment notice shall not be required in the following cases:*
>
> *xxx xxx xxx*
>
> *The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.*
>
> *Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.*
>
> *Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.*

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If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable."

In relation thereto, Revenue Regulation No. 18-2013[18] which amends the Due Process Requirement in the Issuance of a Deficiency Tax Assessment, provides as follows:

3.1.4 Disputed Assessment. — The taxpayer or its authorized representative or tax agent may protest administratively against the aforesaid FLD/FAN within thirty (30) days from date of receipt thereof. The taxpayer protesting an assessment may file a written request for reconsideration or reinvestigation defined as follows:

(i) Request for reconsideration — refers to a plea of re-evaluation of an assessment on the basis of existing records without need of additional evidence. It may involve both a question of fact or of law or both.

(ii) Request for reinvestigation — refers to a plea of re-evaluation of an assessment on the basis of newly discovered or additional evidence that a taxpayer intends to present in the reinvestigation. It may also involve a question of fact or of law or both.

xxx xxx xxx.

***For requests for reinvestigation, the taxpayer shall submit all relevant supporting documents in support of his protest within sixty (60) days from date of filing of his letter of protest**, otherwise, the assessment shall become final. The term "relevant supporting documents" refer to those documents necessary to support the legal and factual bases in disputing a tax assessment as determined by the taxpayer. The sixty (60)-day period for the submission of all relevant supporting documents shall not apply to requests for reconsideration. Furthermore, the term "the assessment shall become final" shall mean the taxpayer is barred from disputing the correctness of the issued assessment by introduction of newly discovered or additional evidence, and the FDDA shall consequently be denied. If the taxpayer fails to file a valid protest against the FLD/FAN*

[18] Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment

within thirty (30) days from date of receipt thereof, the assessment shall become final, executory and demandable. No request for reconsideration or reinvestigation shall be granted on tax assessments that have already become final, executory and demandable.

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If the protest is not acted upon by the Commissioner's duly authorized representative within one hundred eighty (180) days counted from the date of filing of the protest *in case of a request reconsideration; or* ***from date of submission by the taxpayer of the required documents within sixty (60) days from the date of filing of the protest in case of a request for reinvestigation, the taxpayer may either: (i) appeal to the CTA within thirty (30) days after the expiration of the one hundred eighty (180)-day period;*** *or (ii) await the final decision of the Commissioner's duly authorized representative on the disputed assessment.*

xxx xxx xxx. (Emphasis supplied)

In this case, petitioner received on November 11, 2014, the Formal Assessment Notice dated November 6, 2014 with Assessment No. PT-ELA52816-12-14-1024 and Details of Discrepancy for alleged deficiency percentage tax for CY 2012 in the amount of Php 22,098,415.04.

On December 10, 2014, or within thirty (30) days from receipt of the FAN, petitioner filed its protest requesting reinvestigation of the FAN. On February 6, 2015, petitioner submitted additional documents in support of the protest to the FAN.[19]

Applying Section 228 of the NIRC of 1997, as amended, in relation to Revenue Regulation No. 18-2013, if the protest is not acted upon within one hundred eighty (180) days counted from the date of submission by the taxpayer of the required documents, within sixty (60) days from the date of filing of the protest in case of a request for reinvestigation, the taxpayer may appeal to the CTA within thirty (30) days after the expiration of the one hundred eighty (180)-day period.

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[19] Exhibit "P-8", CTA Division Docket, Vol. II, pp. 792-732.

Thus, after the expiration of 180 days from February 6, 2015, petitioner had a period of 30 days from August 5, 2015 or until September 4, 2015 within which to file its Petition for Review before this Court. Petitioner filed its petition on September 4, 2015. Evidently, petitioner timely filed its petition and the Court has acquired jurisdiction over the instant case.

Having discussed the timeliness of the filing of the present Petition for Review, the next question is "whether the assessment has legal and factual basis for petitioner to be liable for amusement tax?"

We rule in the affirmative.

Petitioner was assessed for amusement tax on the ground that petitioner is allegedly engaged in the operation of **bar and cafe night clubs** pursuant to Section 125 (b) of the NIRC, as amended in relation to Revenue Memorandum Circular(RMC) No. 18-2010[20]. Petitioner claimed that it is a themed restaurant - a house rock and roll or rock museum which serves liquor and drinks, live band shows that cater to all kinds of customers and the moment the band plays, the customers are charged with their first drink like a cover charge.[21]

Section 125 of the NIRC, as amended, provides as follows:

> *SEC. 125. Amusement Taxes. — There shall be collected from the proprietor, lessee or operator of cockpits, cabarets, night or day clubs, boxing exhibitions, professional basketball games, Jai-Alai and racetracks, a tax equivalent to:*
>
> *a) Eighteen percent (18%) in the case of cockpits;*
> *b) Eighteen percent (18%) in the case of cabarets, night or day clubs;*
> *c) Ten percent (10%) in the case of boxing exhibitions: Provided, however, That boxing exhibitions wherein World or Oriental Championships in any division is*

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[20] Exhibit "P-3"
[21] CTA Docket, Vol. II, pp.533-543.

at stake shall be exempt from amusement tax: Provided, further, That at least one of the contenders for World or Oriental Championship is a citizen of the Philippines and said exhibitions are promoted by a citizen/s of the Philippines or by a corporation or association at least sixty percent (60%) of the capital of which is owned by such citizens;

d) Fifteen percent (15%) in the case of professional basketball games as envisioned in Presidential Decree No. 871: Provided, however, That the tax herein shall be in lieu of all other percentage taxes of whatever nature and description; and

e) Thirty percent (30%) in the case of Jai-Alai and racetracks of their gross receipts, irrespective of whether or not any amount is charged for admission.

For the purpose of the amusement tax, the term 'gross receipts' embraces all the receipts of the proprietor, lessee or operator of the amusement place. Said gross receipts also include income from television, radio and motion picture rights, if any. A person or entity or association conducting any activity subject to the tax herein imposed shall be similarly liable for said tax with respect to such portion of the receipts derived by him or it.

The taxes imposed herein shall be payable at the end of each quarter and it shall be the duty of the proprietor, lessee or operator concerned, as well as any party liable, within twenty (20) days after the end of each quarter, to make a true and complete return of the amount of the gross receipts derived during the preceding quarter and pay the tax due thereon.

On the other hand, RMC No. 18-2010, provides as follows:

"SUBJECT : Clarification on the Coverage and Taxability of Amusement Places under Section 125 (b) of the National Internal Revenue Code (Tax Code) of 1997, as Amended

TO : Internal Revenue Officials, Revenue Officers and Others Concerned

Section 125 (b) of the Tax Code, as amended, provides that an 18% amusement tax be imposed on proprietors, lessees or operators of cabarets, night or day clubs.

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Night and day clubs are drinking, dancing and entertainment venues which oftentimes also serve food and provide entertainment. Cabarets, on the other hand, are restaurants or clubs where liquor and food are served, with a stage provided for performances by musicians, dancers or comedians, including a venue for dancing by patrons/customers, similar to that of nightclubs. With the advent of modern interactive entertainment, along with recorded music (and/or music video) using a microphone and public address system, the proprietors/lessees or operators of these amusement places have pursued a new form of lounge and club entertainment. Most of these establishments provide facilities to allow patrons to sing with the expectation that sufficient revenue will be made selling food and drinks to the customers. The "terms" night and day clubs and cabarets have become passé. Amusement places which offer the same pleasurable diversion entertainment and function now include videoke bars, karaoke bars, karaoke televisions, karaoke boxes and music lounges.

As such, the proprietors, lessees or operators of the aforementioned establishments are deemed also subject to the 18% amusement tax under Section 125 (b) of the Tax Code of 1997, as amended, and not to the 12% VAT on gross receipts.

xxx"

Clearly, under Section 125 of the NIRC, as amended, amusement tax shall be collected from the proprietor, lessee or operator of the following:

1) cockpits,
2) cabarets,
3) night or day clubs,
4) boxing exhibitions,
5) professional basketball games,
6) Jai-Alai and
7) racetracks

Incidentally, the amusement tax imposed on "other places of amusement" such as cockpits, racetracks and cabaret were first imposed in 1939 under the

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Commonwealth Act (CA) No. 466[22] which have numerous revisions in coverage and/or rates as embodied in several laws such as Presidential Decree (PD) Nos. 871[23], 1299[24], 1456[25], 1959[26], among others[27].

Noticeably, bowling alleys, theaters, cinematographs, concert halls, and circuses which were previously included and subject to amusement tax were intentionally excluded in Section 125 of the NIRC, as amended. *Expressio unius est exclusio alterius*[28]. To elaborate, -

> *"Indeed, it is an elementary rule of statutory construction that the express mention of one person, thing, act, or consequence excludes all others. This rule is expressed in the familiar maxim expressio unius est exclusio alterius. Where a statute, by its terms, is expressly limited to certain matters, it may not, by interpretation or construction, be extended to others. The rule proceeds from the premise that the legislature would not have made specified enumerations in a statute had the intention been not to restrict its meaning and to confine its terms to those expressly mentioned."*[29]

The rule of *expressio unius est exclusio alterius* is formulated in a number of ways. One variation of the rule is the principle that what is expressed puts an end to that which is implied. *Expressium facit cessare tacitum.* Thus, where a statute, by its terms, is expressly limited to certain matters, it may not, by interpretation or construction, be

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[22] AN ACT TO REVISE, AMEND AND CODIFY THE INTERNAL REVENUE LAWS OF THE PHILIPPINES, otherwise known as the "National Internal Revenue Code"

[23] PLACING PROFESSIONAL BASKETBALL GAMES AND OTHER PROFESSIONAL GAMES UNDER THE SUPERVISION AND REGULATION OF THE GAMES AND AMUSEMENTS BOARD

[24] AMENDING SECTION 206 (CATERER'S TAX) AND SECTION 268 (AMUSEMENT TAXES) OF THE NATIONAL INTERNAL REVENUE CODE OF 1977

[25] AMENDING SECTION 268 OF THE NATIONAL INTERNAL REVENUE CODE OF 1977

[26] AMENDING CERTAIN SECTIONS OF THE NATIONAL INTERNAL REVENUE CODE, AS AMENDED.

[27] Assessment of the Amusement Tax Under Section 125, NIRC of 1997 (Prepared by Ms. Berlie M. Limon, Tax Specialist, Indirect Taxes Branch, NTRC)

[28] The express mention of one person, thing or consequence implies the exclusion of all others

[29] BENJAMIN (KOKOY) T. ROMUALDEZ vs. HON. SIMEON V. MARCELO, in his official capacity as the Ombudsman, and PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, G.R. Nos. 165510-33, July 28, 2006 citing Centeno v. Villalon-Pornillos, G.R. No. 113092, September 1, 1994, 236 SCRA 197, 203.

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extended to other matters. [30] Concomitantly, had the legislature intended to include amusement tax on bar or restaurant other than the cockpits, cabarets, night or day clubs, boxing exhibitions, professional basketball games, Jai-Alai and racetracks, the same could have been expressly provided in the law.

A case in point is despite various revisions in the National Internal Revenue Code, the legislature made its intention clear that amusement taxes shall only be collected from the proprietor, lessee or operator cockpits, cabarets, night or day clubs, boxing exhibitions, professional basketball games, Jai-Alai and racetracks.

Thus, in Revenue Regulation No. 14-67 [31] or the" Revised Amusement Tax Regulation" the term "cabaret", "night clubs" and "day clubs" are defined as follows:

> *"SECTION 2. Definition of Terms. – For purpose of these regulations, the following terms shall be understood in the sense given below:*
>
> *xxx xxx xxx.*
>
> *(m) 'cabaret' includes* ***cafes, restaurants and similar establishments where patrons are entertained by performers who dance and sing*** *and/or where the patrons are allowed to dance with performers or entertainers who are ordinarily professional hostesses.*
>
> *(n) '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 whether with their own partners*** *or professional hostesses furnished by such resorts.*
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> *(o) 'Day Clubs' are resorts* ***frequented by pleasure seekers during the day where food and wines and drinks are served and music furnished and the patrons allowed to dance whether with their own partner*** *or professional hostesses furnished by such resort.*

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[30] LUNG CENTER OF PHILIPPINES v. QUEZON CITY, GR No. 144104, Jun 29, 2004.
[31] May 3, 1967.

xxx xxx xxx." (Emphasis Supplied)

Evidently, a bar or restaurant can be subject to amusement tax if it operates and functions like those establishments subject to amusement tax specifically if **the patrons are entertained by performers who dance and sing** or it is frequented by pleasure seekers where music is furnished and patrons or customers are allowed to dance whether on their own, with their own partner, with the performer or other patrons, or professional hostesses furnished by the place. The commonality of this amusement establishment is the music and dancing privileges it gives. Suffice it to say, sales of food, refreshments, services, or merchandise served or provided in any bar, restaurant or other public place where there is music and dancing privileges or any other entertainment is an amusement establishment that should be subject to amusement tax.

To reiterate, the term "cabaret" includes cafes, restaurants and similar establishments where patrons are entertained by performers who dance and sing and/or where the patrons are allowed to dance with performers or entertainers who are ordinarily professional hostesses, while clubs are those resorts frequented by pleasure seekers where food and wines and drinks are served and music furnished and the patrons allowed to dance whether with their own partner or professional hostesses furnished by such resort. Thus, presence of professional hostesses or dancers is not a *sine qua non* for bar or restaurant to be considered a "nightclub" or "day club" subject to amusement tax.

The legislature is presumed to have full knowledge of the existing revenue regulations interpreting Section 125 of the NIRC and, with its subsequent substantial re-enactment, there is a presumption that the lawmakers have approved and confirmed the rules in question as carrying out the legislative purpose.[32] Hence, it can be concluded that with the continued duplication of the NIRC provision on

[32] GULF AIR COMPANY, PHILIPPINE BRANCH vs. COMMISSIONER OF INTERNAL REVENUE, G.R. No. 182045, September 19, 2012.

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amusement tax, the law-making body was aware of the existence of Revenue Regulation No. 14-67 and impliedly endorsed its interpretation of the NIRC and its definition of cabaret, nightclub or day club. Under the principle of legislative approval by re-enactment, "where a statute is susceptible of the meaning placed upon it by a ruling of the government agency charged with its enforcement and the Legislature thereafter re-enacts the provisions without substantial change, such action is to some extent confirmatory that the ruling carries out the legislative purpose."[33]

As clarified in RMC No. 18-2010, night and day clubs are drinking, dancing and entertainment venues which oftentimes also serve food and provide entertainment while cabarets, on the other hand, are restaurants or clubs where liquor and food are served, with a stage provided for performances by musicians, dancers or comedians, including a venue for dancing by patrons/customers, similar to that of nightclubs.

The definition set forth in Revenue Regulation No. 14-67 or the" Revised Amusement Tax Regulation" and described in RMC No. 18-2010 is in conformity with the standards of the law and similar to the ordinary definition of a night club which is a place of entertainment open at <u>night</u> usually serving food and liquor and providing music and space for dancing and often having a floor show.[34] Furthermore, it is a settled rule that construction given to a statute by an administrative agency charged with the interpretation and application of statute is entitled to great respect and should be accorded great weight by the courts.[35]

In the case at bar, while petitioner is registered as a restaurant, it behooves this Court to determine based on evidence, whether petitioner also operate and functions as

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[33] Ibid.
[34] https://www.merriam-webster.com/dictionary/nightclub
[35] Nestle Philippines, Inc. v. Court of Appeals and Securities and Exchange Commission, G.R. No.86738, November 13 1991, 203 SCRA 504.

an amusement establishment where aside from the sales of food, refreshments, services, or merchandise, whether the place is being used in giving music and dancing privileges and/or other entertainment subject to amusement tax.

Based on petitioner's witness, financial controller, Mr. Joseph Y. Ang, the testimony and clarificatory questions revealed that petitioner provides entertainment similar to a cabaret and nightclub. Quoted hereunder are the relevant portions of the Transcript of Stenographic Notes ("TSN"), viz.:[36]

> "ATTY. ARPON:
>
> Q. And 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 that was stated in this amended Articles of Incorporation of the petitioner?
>
> MR. ANG:
>
> A. Yes, sir.
>
> xxxxxx.
>
> ATTY. ARPON:
>
> Q. The main dining in this area has an entertainment stage where music or either live band or mix music played by DJ are performed. Is that correct?
>
> MR. ANG:
>
> A. Live band. Yes, sir. There's a stage, too, wherein the bands perform.
>
> ATTY. ARPON:
>
> Q. The billiard area is open to all customers for a fee on a per game basis. Is that correct?
>
> MR. ANG:
>
> A. Normally, sir, the area was open to guests as part of, you know, just to play. So, when they order drinks, they can play xxxxx.

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[36] TSN, August 30, 2016, pp.12-22.

ATTY. ARPON:

Q. Will you confirm also, Mr. Witness, that petitioner accepts contract or booking confirmation with various artist to conduct series of performances?

MR. ANG:

A. Yes, sir. Normally, when we hire an artist, local artist, there is always a contract.

ATTY. ARPON:

Q. and the main purpose of this is to attract more customers and to augment sales?

MR. ANG:

A. Yes, sir.

xxx xxx xxx.

PRESIDING JUSTICE DEL ROSARIO:

Mr. Ang, I'd like you to clarify whether it is really an amusement establishment. So, do you operate on a daily basis?

MR. ANG:

A. Yes, Your Honors.

PRESIDING JUSTICE DEL ROSARIO:

What are the operating hours?

MR. ANG:

A. We open at 11:30 a.m. for lunchtime until 1:00 a.m. the following morning during weekdays and until 2:00 a.m., during weekends, Fridays and Saturdays.

xxxxx.

PRESIDING JUSTICE DEL ROSARIO:

Is it also customary on the part of your establishment to accept guest, pay certain amount, just to listen to your music?

MR. ANG:

A. (No Answer.)

PRESIDING JUSTICE DEL ROSARIO:

Again, is it also customary on the part of your establishment to accept guests, pay certain amount, just to listen to your music?

MR. ANG:

A. No, sir, because, we charge a first drink charge. So, they pay for the drinks, So, we don't' charge a customer for the entertainment per se.

PRESIDING JUSTICE DEL ROSARIO:

So, whether it is a band or as mentioned by counsel, billiard, there is no instance wherein there is an arrangement for guests or customers to go there without ordering anything but only to, let us say play billiards or to listen to music. It does not happen?

MR. ANG:

A. No, sir, because our policy is that when the bands play, we start charging you the first drink charge.

PRESIDING JUSTICE DEL ROSARIO:

The first?

MR. ANG:

A. The first drink charge. It's just like it operates like a cover charge wherein you are supposed to spend that for food and drinks."

Furthermore, respondent's witness Revenue Officer Pauline M. Reyes testified that petitioner has signage of the different performers who will play during the week and that talent fees were usually incorporated in the menu. Reproduced hereunder are the relevant portions of the Transcript of Stenographic Notes ("TSN"), viz:[37]

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[37] TSN, November 29, 2016, pp.16-20.

"JUSTICE GRULLA:

Just a follow-up question.

Madam Witness, when you went to Hard Rock Cafe, you said you went there at 2:00 p.m. Did you observe any advertisement of shows or events that would take place in that café?

MS. REYES:

A. Yes, there are signage of the different performers who will play during the week.

JUSTICE GRULLA:

So, there are performing artists that are going to perform on specific dates?

MS. REYES:

A. Yes.

xxxxx.

JUSTICE UY:

You said that talent fees were usually incorporated in the menu. Can you expound on that? What did you mean?

MS. REYES:

A. It was stated by one of the interviews that I made with Ms. Rowena Dela Cruz, the finance officer. She stated that the talent fees are usually incorporated in the price of the menu.

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JUSTICE UY:

But if you will just look at the menu, you will not know this is so?

MS. REYES:

A. Yes.

xxxxx."

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Needless to say, even if petitioner is registered, functions and operate as a legitimate restaurant, it cannot deny based on evidence, that it likewise functions and operates like a club within the definition of Revenue Regulation No. 14-67 or the" Revised Amusement Tax Regulation", to wit:

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 starts charging a first drink charge which operates like a cover charge which can be spent for food and drink;

4) there were regular scheduled performers which petitioner has contract with and the purpose of this 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, the question on whether petitioner is liable for amusement tax. Petitioner was assessed as a "bar and café night club"[38] and not as a cabaret.

Night clubs are resorts frequented by pleasure seekers at night where foods and wines and drinks are served and music furnished and **the patrons allowed to dance whether with their own partners or professional hostesses furnished by such resorts.**[39]

The Supreme Court in the case of *Collector of Internal Revenue vs. Junior Women's Club of the Philippines*[40] had the occasion to define a night club as a "place or

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[38] Exhibit "P-3"
[39] Revenue Regulation 14-67 or the" Revised Amusement Tax Regulation
[40] G.R. No. L-6992. February 28, 1956.

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)*

In the case at hand, 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 customer. Clearly, respondent failed to present evidence that petitioner's establishment also functions as a night club. 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 is void for expanding the definition of cabaret, night clubs and day clubs to include videoke bars, karaoke bars, karaoke 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.[41]

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 No. 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 an amusement establishment similar to 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 a videoke bars, karaoke bars, karaoke televisions, karaoke boxes and music lounges.

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[41] 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)

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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.

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

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

<u>CERTIFICATION</u>

Pursuant to Section 13 Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice
Chairperson, 1st Division