REPUBLIC OF THE PHILIPPINES
Court Of Tax Appeals
QUEZON CITY

THIRD DIVISION

ORLEYTE COMPANY (PHILIPPINE BRANCH),
Petitioner,

-versus-

THE CITY OF MAKATI and DULCE P. CRUZ, in her capacity as Treasurer of Makati,
Respondents.

C.T.A. AC NO. 80

Members:

BAUTISTA, Chairperson,
PALANCA-ENRIQUEZ, and
COTANGCO-MANALASTAS, JJ.

Promulgated:

NOV 14 2012
ABFernando 2:07 p.m.

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review filed by Orleyte Company (Philippine Branch) (hereafter "petitioner"), under *Section 3(a) Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals, as amended,* in relation to *Rule 42 of the 1997 Rules of Civil Procedure, as amended,* which seeks to set aside the Decision dated March 14, 2011 and Order dated June 7, 2011 rendered by the Regional Trial Court of Makati, Branch 133 (hereafter " RTC Makati") in Civil Case No.05-461, the respective dispositive portions of which read, as follows:

> "**WHEREFORE,** finding no merit in the instant appeal, the same is ordered **DISMISSED.** Consequently, the denial of the Tax Protest dated 14 April 2005 and the Notice of Assessment dated 28 March 2005 are **AFFIRMED.**
>
> Without costs.
>
> **SO ORDERED.**"
>
> "**WHEREFORE,** in view of the foregoing, the Motion for Reconsideration of the plaintiff Orleyte Company is **DENIED.**
>
> Notify the parties and their counsels of this order.
>
> **SO ORDERED.**"

THE PARTIES

Petitioner is a corporation organized and existing under the laws of the Cayman Islands. It is licensed to establish a branch office in the Philippines, under SEC License No. AFO96-014, "to engage in the construction and operation of geothermal power plants, including investment in or forming of enterprises that will design, construct, erect and assemble, commission and operate power-generating plants and related facilities." Petitioner's branch office is located at 18/f, PSBank Center, 777 Paseo de Roxas, Makati City.

On the other hand, respondent City of Makati is a duly organized and existing local government unit. Respondent Dulce P. Cruz is being sued in her official capacity, as Treasurer of Makati City. The respondents are charged with the implementation of the Revenue Code of the City of Makati, as well as the collection and assessment of business taxes, license fees, and permit fees in the City of Makati.

THE FACTS

The facts of the case, as culled from the records, are, as follows:

In January 1996, to establish a branch in the Philippines, petitioner's head office inwardly remitted the amount of USD 500,000.00, as the assigned capital of the branch office.

Petitioner, together with another entity, established Ormat Leyte Company, Ltd. (hereafter "OLCL"), a limited partnership established under Philippine laws for the purpose, among others, " of developing, financing, constructing, owning, operating and maintaining power production geothermal electrical generating facilities in Leyte Province, Philippines." Later on, two additional foreign investors joined the partnership.

Petitioner's investment in OCLC was financed partly by its branch capital and partly by advances from its shareholders. Petitioner deposited the remainder of its branch capital in several bank accounts.

On March 28, 2005, petitioner received a Notice of Assessment from respondent City. In issuing the assessment, respondent City imposed local business tax on petitioner's foreign exchange gains (from its bank deposit of the remainder of its branch capital), interest income (likewise from its bank deposit of the remainder of its branch capital), and dividends received (from its shareholding in OCLC).

On April 14, 2005, within 60 days from receipt of the Notice of Assessment, petitioner filed with respondent City a written protest contesting the assessment and requesting its cancellation.

On April 26, 2005, petitioner received a letter from respondent City denying the Tax Protest.

On May 9, 2005, petitioner filed a Motion for Reconsideration reiterating its request to respondent City to cancel the assessment.

On May 11, 2005, respondent City denied petitioner's Motion for Reconsideration and reiterated its denial of petitioner's protest.

On May 26, 2005, petitioner filed a Complaint/Appeal, with the RTC Makati, Branch 133.

On March 14, 2011, the RTC Makati rendered the assailed Decision affirming the denial of the Tax Protest and Notice of Assessment.

Hence, the present appeal by petitioner assigning the following:

ERRORS

I

WHETHER OR NOT ORLEYTE IS LIABLE FOR LOCAL BUSINESS TAX.

II

WHETHER OR NOT ORLEYTE'S INTEREST INCOME, DIVIDENDS AND FOREIGN EXCHANGE GAINS ARE SUBJECT TO LOCAL BUSINESS TAX.

III

WHETHER OR NOT THE RESPONDENTS HAVE THE BURDEN OF PROOF THAT ORLEYTE'S INTEREST INCOME, DIVIDENDS, AND FOREIGN EXCHANGE GAINS ARE SUBJECT TO LOCAL BUSINESS TAX.

THE COURT'S RULING

The petition is meritorious.

Sections 143 of the Local Government Code of 1991, as amended, (hereafter "LGC"), in relation to *Section 151 of the same Code*, provides that a City, like the City of Makati, may impose taxes on the following businesses:

"SEC. 143. Tax on Business. – The municipality may impose taxes on the following businesses:

xxx xxx

(e) On contractors and other independent contractors, in accordance with the following schedule:

xxx"

While *Section 151 of the same Code* provides:

"Sec. 151. Scope of Taxing Powers. – Except as otherwise provided in this Code, the city, may levy the taxes, fees, and charges which the province or municipality may impose: Provided, however, that taxes, fees and charges levied and collected by highly urbanized and independent component cities shall accrue to them and distributed in accordance with the provisions of this Code."

Corollary thereto, *Section 131 (h) of the LGC* defines "contractor", as follows:

"SEC. 131. *Definition of Terms.* - When used in this Title, the term:

(h) "Contractor" includes persons, natural or juridical, not subject to professional tax under Section 139 of this Code, whose activity consists essentially of the sale of all kinds of services for a fee, regardless of whether or not the performance of the service calls for the exercise or use of the physical or mental faculties of such contractor or his employees.

As used in this Section, the term "contractor" shall include general engineering, general building and specialty contractors as defined under applicable laws; filling, demolition and salvage works contractors; proprietors or operators of mine drilling apparatus; proprietors or operators of dockyards; persons engaged in the installation of water

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> system, and gas or electric light, heat, or power; proprietors or operators of smelting plants; engraving, plating, and plastic lamination establishments; proprietors or operators of establishments for repairing, repainting, upholstering, washing or greasing of vehicles, heavy equipment, vulcanizing, recapping and battery charging; proprietors or operators of furniture shops and establishments for planning or surfacing and recruiting of lumber, and sawmills under contract to saw or cut logs belonging to others; proprietors or operators of dry- cleaning or dyeing establishments, steam laundries, and laundries using washing machines; proprietors or owners of shops for the repair of any kind of mechanical and electrical devices, instruments, apparatus, or furniture and shoe repairing by machine or any mechanical contrivance; proprietors or operators of establishments or lots for parking purposes; proprietors or operators of tailor shops, dress shops, milliners and hatters, beauty parlors, barbershops, massage clinics, sauna, Turkish and Swedish baths, slenderizing and building saloons and similar establishments; photographic studios; funeral parlors; proprietors or operators of hotels, motels, and lodging houses; proprietors or operators of arrastre and stevedoring, warehousing, or forwarding establishments; master plumbers, smiths, and house or sign painters; printers, bookbinders, lithographers; publishers except those engaged in the publication or printing of any newspaper, magazine, review or bulletin which appears at regular intervals with fixed prices for subscription and sale and which is not devoted principally to the publication of advertisements; business agents, private detective or watchman agencies, commercial and immigration brokers, and cinematographic film owners, lessors and distributors."

Pursuant to the above provisions, for an entity to be liable for local business tax, such entity must be a contractor whose activity consists essentially of sale of all kinds of services for a fee.

A perusal of the Notice of Assessment shows that respondent City of Makati classified Orleyte as a Holding Company-Management Service. This classification was sustained by the lower court when it held that the primary purpose indicated in the Certification of Orleyte reveals that services embodied under the definition of a contractor includes persons whose activity consists essentially of the sale of all kinds of services for a fee.

On the other hand, petitioner claims that it is not liable for local business tax as it is not a "Holding Company-Management Service", as classified by respondent City of Makati.

We find merit in petitioner's contention.

It bears stressing that the primary purpose stated in the Articles of Incorporation of a corporation only serves to show what a corporation is empowered or authorized to do. It does not, and cannot, however, prove what the business of a corporation actually is.

In determining whether Orleyte is a "Holding Company-Management Service," Orleyte's actual operations must be determined on the basis of the evidence relating to its operations, rather than simply inferring from a reading of the primary purpose clause stated in its Articles of Incorporation. A perusal of the records shows that Orleyte has consistently submitted an affidavit of non-operation with its application for business permit. Orleyte never conducted any business or commercial operation in the Philippines. Orleyte merely invested in a company, which under its primary purpose, it is authorized to do so. In addition, Orleyte's non-operation is further shown by its financial statements showing that it had only three sources of revenues; namely, equity in net earnings of OLCL, foreign exchange gain, and interest income. Clearly, Orleyte is not a contractor engaged in providing a service for a fee. Thus, we find and so hold that the RTC Makati erred in classifying Orleyte as a Holding Company-Management Service.

Petitioner's contention that its dividend income, gain or loss from foreign exchange and interest income are exempt from local business tax is likewise meritorious.

In this regard, Section 131(n) of the LGC defines "gross sales or receipts," as follows:

> "SEC. 131. *Definition of terms.* – When used in this Title, the term:
>
> xxx xxx
>
> (n) 'Gross Sales or Receipts' include the total amount of money or its equivalent representing the contract price, compensation or service fee, including the amount charged or materials supplied with the services and deposits or

> advance payments actually or constructively received during the taxable quarter for the services performed or to be performed for another person excluding discounts if determinable at the time of sales, sales returns, excise tax and value-added tax."

It is clear from the above provision that the total amount of money or its equivalent, representing the contract price, compensation or service fee, including the amount charged or material supplied with the services and deposits or advance payments actually or constructively received during the taxable quarter for the services performed or to be performed for another person, is subject to local business tax. Therefore, only income arising from Orleyte's services performed or to be performed to its customers is subject to local business tax.

As heretofore discussed, Orleyte is not engaged in any commercial business, as it has consistently submitted an affidavit of non-operation. Having no income arising from services performed or to be performed to its customers, Orleyte's foreign exchange gain, dividend income and interest income do not form part of gross receipts that are subject to local business tax. Hence, Orleyte's foreign exchange gain, dividend income and interest income are not subject to local business tax.

For all the foregoing, the Court finds that the assessment issued by the City Treasurer of Makati have no factual and legal bases. We have, therefore, no alternative but to cancel the questioned Notice of Assessment.

WHEREFORE, premises considered, the present Petition for Review is hereby **GRANTED.** Accordingly, the assailed Decision dated March 14, 2011 of the RTC Makati, Branch 133 is hereby **REVERSED** and **SET ASIDE** and the Notice of Assessment dated March 28, 2005 issued by the City Treasurer of Makati is hereby ordered **CANCELLED** and **SET ASIDE**.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

A T T E S T A T I O N

I attest 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.

LOVELL R. BAUTISTA
Associate Justice
Chairperson, Third Division

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice