REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

THE CITY OF MAKATI represented in this case by this City Mayor, the HON. JEJOMAR C. BINAY, et. al., Petitioner,	C.T.A. AC CASE NO. 87
	Members:
- versus -	UY, *Chairperson and* FABON-VICTORINO, *JJ.*
TRANS-ASIA POWER GENERATION CORPORATION, Respondent.	Promulgated: JUL 10 2013; 10:40a.m.

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DECISION

Fabon-Victorino, J.:

At hand is the *Petition for Review* filed by the City of Makati pursuant to Section 3(a)(3), Rule 4 of the Revised Rules of the Court of Tax Appeals, assailing the Decision[1] dated December 22, 2010 and the Order[2] dated January 27, 2012, both rendered by the Regional Trial Court (RTC) of Makati City, Branch 134, in Civil Case No. 06-880 entitled "*Trans-Asia Power Generation Corporation vs. City of Makati, represented in this case by the City Mayor, the Hon. Jejomar C. Binay, the OIC City Treasurer, Nelia A. Barlis, and the OIC of the Business Tax Division, Felito A. Manrique*."

The facts as established before the court *a quo* remain undisputed.

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[1] Docket, pp. 000038-000046.
[2] Id., p. 000058.

Petitioner City of Makati is a local government unit and is sued herein as such through its City Mayor in the latter's capacity or official duty to enforce laws and regulations relative to the governance of and the exercise of corporate powers by the City.

Respondent Trans-Asia Power Generation Corporation is a domestic corporation, with principal business address at Level 11, Phinma Plaza, 39 Plaza Drive, Rockwell Center, Makati City 1200. It is primarily engaged in the business of building, erecting, owning, installing, operating, maintaining, selling, leasing power generation plants; and purchasing, importing, acquiring, owning, leasing, or letting power generation, transmission, telecommunications, transportation and other kinds of equipment, materials and facilities.

For the years 1996 to 2005, petitioner classified respondent as "PRODUCER" for Local Business Tax (LBT) purposes and respondent paid the corresponding business tax. For the first two quarters of 2006, petitioner also paid LBT as a "PRODUCER".[3]

In the Order of Payment dated June 14, 2006, petitioner changed respondent's classification from "PRODUCER" to "SERVICES-OTHER CO".[4] Consequently, the quarterly LBT payment was increased from Php453,910.35 to Php648,443.35, and the additional amount of P389,066.00 LBT for the first and second quarters was imposed.

On July 17, 2006, respondent paid under protest the business tax of Php648,443.35 for the 3rd Quarter of 2006 and Php389,066.00 deficiency business taxes for the 1st and 2nd quarters of 2006, all in the total amount of Php1,039,196.85 (inclusive of garbage fees of P1,687.50).[5]

[3] Exhibit "C", RTC Records, p. 113.
[4] Exhibit "I", RTC Records, p. 119.
[5] Exhibits "J" and "K", RTC Records, pp. 120-121.

On October 13, 2006, or within the reglementary period of two (2) years from payment of taxes, respondent requested a return from its former classification of business from "SERVICES–OTHER CO" to "PRODUCER" and a refund of Php583,599.00, representing erroneously and illegally collected excess local business taxes for the first, second and third quarters of 2006.[6]

As the protest letter remained unresolved, respondent filed a civil action for *Protest of Assessment of Business Tax with Claim for Refund* against petitioner on October 16, 2006 before Branch 134 of the RTC of Makati City. The case entitled "Trans-Asia Power Generation Corporation vs. City of Makati, represented by the City Mayor, the Hon. Jejomar C. Binay, the OIC City Treasurer, Nelia A. Barlis, and the OIC of the Business Tax Division, Felito A. Manrique" was docketed as Civil Case No. 06-880.

After the exchange of various pleadings and trial, the Court *a quo* rendered the assailed Decision of December 22, 2010, the dispositive portion of which reads:

> **WHEREFORE**, premises considered, judgment is hereby rendered in favor of the plaintiff Trans-Asia Power Generation Corporation and against defendant City of Makati, ordering the latter the following:
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> 1) To go back to its earlier classification of plaintiff as 'Producer' or 'Manufacturer' as provided in the Makati Revenue Code for local business tax purposes;
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> 2) To issue tax credit to plaintiff in the total amount of Php583,599.00 representing excess local business tax for the first, second, and third quarters of 2006;

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[6] Exhibit "L", RTC Records, pp. 122-128.

> 3) To refund subsequent business tax payment made in excess of 52.5% of 1% that may have been paid by plaintiff under protest and;
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> 4) To pay attorney's fees in the amount of Php20,000.00
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> SO ORDERED.

In finding for respondent, the RTC looked into the nature of respondent's business and its operation. It found that respondent is engaged in the business of transforming fuel into electricity and sale it to the end user. Following the *ejusdem generis*[7] rule, the RTC ratiocinated that a careful analysis of respondent's business in line with the definition of "manufacturer/producer" and "contractor" and the enumerations of persons and things that follows after each definition show that respondent's business operation falls within the scope of manufacturer/producer.

On April 19, 2011, petitioner moved for reconsideration[8] but it was denied in the Order dated January 27, 2012.[9]

Hence, this *Petition for Review* where petitioner submits the following errors[10] allegedly committed by the RTC:

> I. Whether or not the Honorable Trial Court gravely erred in ordering the herein petitioner to go back to its earlier classification of the herein respondent as

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[7] The rule of ejusdem generis provides that "where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class or nature as those specifically enumerated." [*Genato Commercial Corporation vs. Court of Tax Appeals, et. al.*, G.R. No. L-1172]

[8] Annex "D", Petition, docket, pp. 47-57; RTC Records, pp. 217-223.

[9] Annex "F", Petition, docket, p. 58; RTC Records, p. 238.

[10] Docket, p. 8.

> *Producer*, albeit the overwhelming evidence to the contrary.
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> II. Whether or not the Honorable Trial Court gravely erred in ordering the petitioner to credit/refund to herein respondent the amount representing alleged excess local business taxes for the 1st, 2nd and 3rd quarters of 2006, as well as the local business tax payment allegedly made in excess of 52.5% of 1% that may have been paid by respondent under protest;
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> III. Whether or not the Honorable Trial Court gravely erred in awarding P20,000.00 attorney's fees in favor of the respondent herein.

Petitioner claims that other than the Certificate of Registration issued by the Board of Investment (BOI), which categorized respondent as a "service enterprise" or a mere "operator of power-generating plant", the official documents, i.e., the *Trans-Asia Power Generation Corporation General Terms and Conditions*[11] and the *Electricity Supply Agreement* ("ESA")[12], attest that respondent undertakes all kinds of services for a fee. Thus, it insists that respondent is a "contractor" and not a "manufacturer" for tax purposes.

To bolster its stance that respondent is a "contractor", petitioner suggest serious examination of the ESA which shows that respondent will not only supply electricity to Hi Cement Corporation but will also manage, operate, maintain and even repair the power plant/s of the latter for a substantial fee or consideration. This, according to petitioner, squarely fits the definition of a "contractor" under

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[11] Annex "2", respondent's "Comment/Opposition (To Petition for Review dated February 27, 2012)", docket, pp. 84-85.
[12] Annex "3", respondent's "Comment/Opposition (To Petition for Review dated February 27, 2012)", docket, pp. 88-103.

Section 131(h) of the Local Government Code (LGC) and provided in Section 3a.01(q) of the Makati Revenue Code.

Petitioner likewise argues that in favoring respondent's arguments, the RTC failed to appreciate the "actual services" that respondent provides its customers, such as but not limited to supplying electricity, even managing and operating power plants.

Finally, quoting the Supreme Court ruling in the case of *The Commissioner of Internal Revenue vs. Engineering Equipment and Supply Company and The Court of Tax Appeals*[13], to wit:

> (W)e see that the supply of air conditioning units to Engineer's various customers, whether the said machineries were in hand or not, was especially made for each customer and installed in his building upon his special order. The air conditioning units installed in a central type of air conditioning system would not have existed but for the order of the party desiring to acquire it and if it existed without the special order of Engineering's customer, the said air conditioning units were not intended for sale to the general public. Therefore, **We have but to affirm the conclusion of the Court of Tax Appeals that Engineering is a contractor rather than a manufacturer**, subject to the contractors tax prescribed by Section 191 of the Code and not to the advance sales tax imposed by Section 185(m) in relation to Section 194 of the same Code. Since it has been proved to Our satisfaction that Engineering imported air conditioning units, parts or accessories thereof for use in its construction business and these items were never sold, resold,

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[13] G.R. No. L-27044, June 30, 1975.

> bartered or exchanged xxx *(Emphasis supplied)*

petitioner concludes that respondent cannot, under the law and the definition provided, be considered as a "manufacturer" as it supplies electricity only to Hi Cement Corporation, and the supplied electricity was never resold, bartered, or exchanged.

In its *Comment/Opposition (To the Petition for Review dated February 27, 2012)*, respondent counters that the RTC committed no error in directing petitioner to re-classify respondent as a "manufacturer" under Section 131(o) of the LGC. Contrary to petitioner's assertion, the BOI's classification of respondent as a "service enterprise" or a "mere operator" of a power generating plant is neither controlling nor relevant for local business tax purposes. What is determinative is the nature of its business and the activities it undertakes in the conduct of its business.

Likewise, the reclassification made by petitioner of respondent's status from "Manufacturer" to "Contractor" was without prior notice depriving it the opportunity to challenge the said reclassification. Besides, there was no fundamental change in its business to warrant a reclassification. In fine, there is no legal basis to justify the reclassification.

Further, a close examination of the ESA relied upon by petitioner supports its status as a "manufacturer". First, as provided under the final sentence of Section 131(o) of the LGC, a manufacturer, *inter alia*, "produce(s) such finished products for the purpose of their sale or distribution to others and not for his own use or consumption". Second, the provisions of the ESA did not convert the nature of its business from that of a "Manufacturer" to that of a "Contractor", rather, it remained to be a "Manufacturer" considering that its primary business is to sell directly its product, which is, electricity, for its consumer. The additional undertakings were merely ancillaries to and in aid of its primary function as a producer of electricity. The services it rendered to Hi Cement are but additional undertakings to ensure its safe and continuous delivery of the electricity sold.

The Supreme Court has always recognized the principle that the right to manufacture implies the right to sell/distribute the manufactured products. Hence, for tax purposes, a manufacturer does not necessarily become engaged in the separate business of selling simply because it sells the products it manufactures.[14]

Respondent also claims that petitioner's reliance on doctrine laid down in the case of *The Commissioner of Internal Revenue vs. Engineering Equipment and Supply Company, et al.*[15] is misplaced as it is not on all fours with the present case. The Supreme Court ruled that Engineering Equipment and Supply Company is a contractor as it is not the manufacturer of the air-conditioning units which it used to render the services. This is not obtaining in the instant case as respondent owns the power generation facility that it uses to produce electricity for sale to customers.

Respondent as well finds no fault in the RTC's directive to refund the excess local business taxes for the first three quarters of taxable year 2006 amounting to Php583,599.00, and the local business tax payment made in excess of 52.5% of 1% that it may have paid under protest. Since petitioner had collected local business taxes from respondent based on the rates imposed on "Services-Other Co.", it effectively paid more than what it owed to pay had it been classified as a "manufacturer".

Finally, it is not also fallacious for the RTC to order petitioner to pay attorney's fees for it is consistent with Article 2208 of the Civil Code of the Philippines. Allegedly due to petitioner's action, respondent was compelled to

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[14] *Iloilo Bottlers vs. City of Iloilo*, G.R. No. 52019, August 19, 1988.
[15] *Supra.*

litigate to recover the overpaid local business tax which petitioner refused to refund.

On August 30, 2012, the instant petition was submitted for decision after respondent filed its *Memorandum*[16] on July 17, 2012, and that of petitioner on July 24, 2012[17].

THE RULING OF THE COURT

The crux of the controversy lies in the determination of whether or not respondent should be classified as a "Contractor" or as a "Manufacturer" for local business tax purposes.

To solve the issue, it is important therefore to examine the nature of respondent's business activity.

Per the parties' stipulation, respondent is primarily engaged in the business of building, erecting, owning, installing, operating, maintaining, selling, leasing power generation plants, facilities, machineries, equipment; **selling electricity generated by such Power Plants**; and purchasing, importing, acquiring, owning, leasing, or letting power generation, transmission, telecommunications, transportation and other kinds of equipment, materials and facilities.

The parties likewise stipulated that respondent operates and maintains a 52-megawatt power generation plant in Matictic, Norzagaray, Bulacan and that it uses bunker fuel to generate electricity.

Evidently, respondent is engaged in the production and sale of electricity. The Court is in unison with the RTC in its finding quoted below:

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[16] Docket, pp. 122-138.
[17] Docket, pp. 139-152.

> Assessing the nature of the business of the plaintiff as it demonstrates how it operates, it is engaged in the production and sale of electricity wherein it buys bunker fuel as its chief raw material, feeds it into the plant's diesel engine which ignites and burns the fuel producing heat energy. The heat is used to activate the plant's turbine converting the energy to mechanical energy. The mechanical energy then drives the generator, which by spinning motion generates electric current. This electric current is then transmitted through transmission lines to Holcim (HPI) cement plant. In short, plaintiff is engaged in the business of transforming fuel into electricity and the sale of such electricity to the end user.

As to whether respondent is a "Contractor/Services-other Co." or a "Manufacturer/ Producer" for local business tax purposes, Section 131(h) and (o), respectively, of the LGC of 1991, as well as in Sections 3A.01(t) and 3A.01(ll) of the Makati Revenue Code, are keys, to wit:

> SEC. 131. *Definition of Terms*. - When used in this Title, the term:
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> xxx xxx xxx
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> (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 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 planing or surfacing and recutting 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 and advertisements; business agents, private detective or watchman agencies, commercial and immigration brokers, and cinematographic film owners, lessors and distributors.

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(o) **'Manufacturer'** includes every person who, by physical or chemical process, alters the exterior texture or form or inner substance of any raw material or manufactured or partially manufactured product in such manner as to prepare it for special use or uses as to which it could not have been put in its original condition, or who by any such process alters the quality of any raw material or manufactured or partially manufactured products so as to reduce it to marketable shape or prepare it for any of the use of industry, or who by any such process combines any such raw material or manufactured or partially manufactured products with other materials or products of the same or of different kinds and in such manner that the finished products of such process or manufacture can be put to a special use or uses to which such raw material or manufactured or partially manufactured products in their original condition could not have been put, and who in addition **alters such raw material or manufactured or partially manufactured products, or combines the same to produce such finished products for the purpose of their sale or distribution to others and not for his own use or consumption**. *(Emphasis supplied)* xxx xxx xxx

SECTION 3A.01. *Definitions*. – When used in this Article:

xxx xxx xxx

(t) *Contractor* - includes persons, natural or juridical, not subject to professional tax 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.

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(ll) *Manufacturer* - includes every person who, for the purpose of sale or distribution to others and not for his own use or consumption, by physical or chemical process: (1) alter the exterior texture of form, or inner substance of any raw material or manufactured or partially manufactured product in such manner as to prepare it for a special use or uses to which it could not have been put in its original condition; (2) alters the quality of any such raw material or manufactured or partially manufactured product so as to reduce it to marketable shape or prepare it for any use of industry; or (3) combines any raw material or manufactured or partially manufactured product with other materials or products of the same or different kind in such manner that the finished product of such process or manufacture can be put to a special use or uses to which such material, or manufactured or partially manufactured product in its original condition could not have been put.

From the foregoing definitions, there is no reason to doubt that respondent's business operation falls within the purview of a "manufacturer/producer". To stress the obvious, the ruling of the RTC on this point is hereby quoted with approval, thus:

> A careful analysis of the nature of plaintiff's business in line with the definition of "manufacturer/producer" and "contractor" and the enumeration of persons and things that follows after each definition show that plaintiff's business operation falls within the scope of manufacturer/producer and while defendant pressed that plaintiff's business is covered and included under the word "other co.", the Court disagrees. Under the principle of ejusdem generis, where general words follow an enumeration of person and things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same kind or class as those specifically mentioned (PNOC Shipping and Transport Corporation vs. Court of Appeals 297 SCRA 402, 422 citing Republic vs. Migriño, 189 SCRA 289). Thus, in determining the meaning of the phrase "other co." one must refer to prior enumeration of what "contractor" or kinds of services must it include. **Going over the enumeration given under the term "contractor", it is clear that plaintiff's business does not fall under such category but rather under the category of "manufacturer/producer**. *(Emphasis supplied*)

Petitioner's assertion that a scrutiny of the ESA would show that respondent not only supplies electricity to Hi

Cement but also manages, operates, maintains and even repairs the power plant/s of Hi Cement for a fee, hence, it fits the definition of "contractor" under the law also failed to make much impression.

It was never disputed that respondent buys bunker fuel as its chief raw material and converts it through mechanical and chemical processes to electricity. Respondent subsequently sells this electricity to Hi Cement by virtue of the ESA. It is also erroneous to say Hi Cement owns the power plant. While Hi Cement initially owned the property where the Power Plant is located, it was later sold to respondent as provided under Article 3.1 of the ESA. In fine, respondent owns the Power Plant where the electricity is generated. As the owner of the Power Plant, respondent needs to manage, operate, maintain, and repair its own Power Plant.

The Court as well agrees with respondent that the additional undertakings[18] under the ESA are merely ancillary to and in aid of its primary function as a producer of electricity, and are not even services rendered to Hi Cement, but rather are additional undertakings to ensure the safe and continuous delivery of the electricity sold.

Anent the Certificate of Registration issued by the BOI, respondent was correct in saying that although the said document classified respondent under the category of an "Infrastructure & Service-Oriented Industries", the said classification is not definitive of its real business purpose. In fact, there is nothing in the document that explains the classification. It merely enumerates the documents for submission by respondent.

Finally, on the award of attorney's fees in favor of respondent, a revisit of the parties' Joint Stipulation of Facts submitted to the RTC on July 22, 2008 is apropos, thus:

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[18] Exhibit "P", Article 2 of the Electricity Supply Agreement.

> 3. For the years 1996 to 2005, petitioner classified respondent as "PRODUCER" for Local Business Tax (LBT) purposes and respondent paid the corresponding business tax. For the first two quarters of 2006, petitioner also paid LBT as a "PRODUCER".
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> 4. In the Order of Payment dated June 14, 2006, petitioner changed respondent's classification from "PRODUCER" to "SERVICES-OTHER CO".[19] As a result, the quarterly LBT payment was increased from Php453,910.35 to Php648,443.35, and the additional amount of P389,066.00 LBT for the first and second quarters was imposed.

Note that the reclassification of respondent's status from "producer" to a "services-other co." was made by petitioner without any prior notice effectively depriving the former of the opportunity to challenge the said reclassification to the prejudice of respondent. Left with no recourse and if only to protect its interest, respondent was compelled to litigate to recover the overpaid local business tax which petitioner refused to refund. The award of attorney's fees is consistent with Article 2208(2) of the Civil Code which provides that attorney's fees may be awarded "[w]hen the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest."

All said, the Court finds no reason to depart from the factual findings and the ruling of the RTC duly supported by laws and jurisprudence. As a "Manufacturer" or "Producer", respondent is entitled to a refund of the excess local business taxes it paid to petitioner under protest.

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[19] Exhibit "I", RTC Records, p. 119.

WHEREFORE, the instant Petition for Review filed by respondent is hereby **DISMISSED,** for lack of merit.

The Decision dated December 22, 2010 and the Order dated January 27, 2012, both rendered by the Regional Trial Court of Makati City, Branch 134 in Civil Case No. 06-880 entitled "Trans-Asia Power Generation Corporation vs. City of Makati, represented in this case by the City Mayor, the Hon. Jejomar C. Binay, the OIC City Treasurer, Nelia A. Barlis, and the OIC of the Business Tax Division, Felito A. Manrique" are hereby **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

I concur:

ERLINDA P. UY
Associate Justice

ATTESTATION

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.

ERLINDA P. UY
Chairperson

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.

ROMAN G. DEL ROSARIO
Presiding Justice