REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB NO. 1960** *(CTA Case No. 9279)*
	Present:
-versus-	**DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR.,** **UY,** **FABON-VICTORINO,** **MINDARO-GRULLA,** **RINGPIS-LIBAN,** **MANAHAN,** **BACORRO-VILLENA,** *and* **MODESTO-SAN PEDRO,** *JJ.*
HARD ROCK CAFÉ (MAKATI CITY), INC., *Respondent.*	Promulgated: **OCT 01 2019** 3:10 pm

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DECISION

DEL ROSARIO, P.J.:

This pertains to the Petition for Review[1] filed through registered mail by the Commissioner of Internal Revenue (CIR) on November 15, 2018, questioning the July 12, 2018 Decision[2] and October 10, 2018 Resolution[3] of the Court in Division in the case entitled *Hard Rock Café (Makati City), Inc., vs. Commissioner of Internal Revenue*. The assailed Decision granted the Petition for Review dated February 29, 2016 filed by Hard Rock Café (Makati City), Inc., and cancelled and set aside the Formal Assessment Notices (FAN) Part I and Part II both dated May 5, 2015 issued by the CIR against Hard Rock Café (Makati City), Inc. for alleged deficiency percentage tax for the calendar year

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[1] CTA EB No. 1960 Docket, pp. 5-56.
[2] Penned by Associate Justice Esperanza R. Fabon-Victorino with Associate Justice Lovell R. Bautista and Associate Justice Ma. Belen M. Ringpis-Liban, concurring; CTA EB No. 1960, pp. 27-48.
[3] Penned by Associate Justice Esperanza R. Fabon-Victorino with Associate Associate Justice Ma. Belen M. Ringpis-Liban, concurring; CTA EB No. 1960, pp. 50-56.

(CY) 2013, while the assailed Resolution denied the CIR's Motion for Reconsideration dated July 31, 2018.

THE FACTS

The undisputed facts, as narrated by the Court in Division, are as follows:

The CIR[4] *[respondent in the Court in Division, now petitioner]* is the head of the Bureau of Internal Revenue (BIR), which has the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the National Internal Revenue Code (NIRC), as amended, or other laws or portions thereof administered by the BIR. He holds office at the BIR National Office, Agham Road, Diliman, Quezon City.

On the other hand, Hard Rock Café (Makati City), Inc. *[petitioner in the Court in Division, now respondent]* is a domestic corporation, with principal office located at Level III, Glorietta 3, Ayala Center, Makati City. It is registered with the BIR with Tax Identification Number (TIN) 004-730-226-000 and Certificate of Registration No. OCN9RC0000218609 issued on January 31, 1996.

According to its Articles of Incorporation, respondent's primary purpose is to "establish and maintain restaurants, coffee shops, refreshment parlors, cocktail lounges, make, cook, arrange, serve and cater goods, drinks, refreshments and other foods or commodities commonly served in such establishments, to offer such other services to the public in connection with the operation of restaurant and catering enterprises, including the provision of music, disco dancing and other forms of entertainment, to buy, sell and generally deal in souvenir goods, wares, and merchandise of any and every description related to its restaurant and catering business, and to do and perform such other acts and things necessary or incidental to the accomplishment of the foregoing corporate business and objects in so far as may be allowed by applicable laws and rules and regulations."

On August 6, 2014, respondent received Letter of Authority (LOA) No. LOA-047-2014-00000373 with SN eLA201100079185 dated July 15, 2014, authorizing revenue officers to examine its books of accounts and other accounting records for all internal revenue taxes for the period January 1, 2013 to December 31, 2013.

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[4] The incumbent CIR is Hon. Caesar R. Dulay.

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On December 18, 2014, respondent received a copy of the Preliminary Assessment Notice (PAN) Part I, with Details of Discrepancies and PAN Part II, all dated November 28, 2014 issued by BIR Revenue Region No. 8 – Makati, assessing it for alleged deficiency percentage tax for CY 2013 in the amount of Php26,158,906.16, inclusive of surcharge and interest, as well as compromise penalty in the amount of Php25,000.00. Respondent filed a Reply to the said PAN on January 5, 2015.

On May 6, 2015, respondent received the FAN Part I, with Details of Discrepancies and FAN Part II, with Assessment Notices, all dated May 5, 2015, issued by BIR Revenue Region No. 8 – Makati, assessing it for alleged deficiency percentage tax in an increased amount of Php27,799,898.28, inclusive of surcharge and interest, as well as compromise penalty in the amount of Php25,000.00 for CY 2013, pursuant to Sections 125 (b) and 255 of the NIRC of 1997, as amended, in relation to Revenue Memorandum Circular (RMC) No. 18-2010.

On June 5, 2015, respondent filed a Protest to the FAN. On August 4, 2015, respondent submitted additional documents in support of its Protest to BIR Revenue Region No. 8.

For failure of petitioner to act on the Protest, respondent filed a Petition for Review before the Court in Division on February 29, 2016.

On April 14, 2016, petitioner posted his Answer within the extended period. In response thereto, respondent filed a Reply (To [Petitioner's] Answer dated April 14, 2016) on April 28, 2016.

The Pre-Trial Conference was conducted on August 9, 2016. [5] On September 2, 2016, the parties filed their Joint Stipulation of Facts and Issues.

On September 15, 2016, the Court issued the Pre-trial Order to govern the proceedings of the case.

During trial, respondent presented Mr. Joseph Y. Ang, its Treasurer and Finance Controller, as its sole witness. On February 8, 2017, respondent timely filed its Formal Offer of Evidence. In the Resolution dated March 24, 2017, the Court in Division admitted all of

[5] CTA Case No. 9279 Docket, pp. 646-648.

respondent's offered exhibits *sans* petitioner's comment thereon despite due notice.[6]

Petitioner, on the other hand, presented Revenue Officer Erwin G. Mallari, as its sole witness. On April 26, 2017, petitioner belatedly posted his Formal Offer of Evidence.[7] In the Resolution dated May 30, 2017,[8] the Court in Division admitted all of petitioner's offered exhibits and granted the parties a period of thirty (30) days from notice to file their simultaneous memoranda.

With the filing of respondent's Memorandum[9] on August 22, 2019 and petitioner's Manifestation and Motion[10] on July 17, 2017, the Court in Division submitted for decision CTA Case No. 9279 on August 30, 2017.[11]

The Court in Division rendered the assailed Decision on July 12, 2018, granting the Petition for Review filed by herein respondent, the dispositive part of which reads:

> "**WHEREFORE**, the Petition for Review dated February 29, 2016 filed by Hard Rock Café (Makati City), Inc. is **GRANTED**.
>
> Accordingly, the Formal Assessment Notices Part I and Part II both dated May 5, 2015 issued by respondent Commissioner of Internal Revenue against petitioner Hard Rock Café (Makati City) for alleged deficiency percentage tax for the calendar year 2013, are hereby **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED**."

The Court in Division ruled that: (1) respondent's Petition for Review was timely filed; (2) to hold respondent liable for percentage or amusement tax, there must be sufficient proof that it operates as a cabaret, night or day club; (3) the business activities of petitioner are those of a restaurant and do not fall within the scope or coverage of cabarets and/or night or day clubs; (4) RMC No. 18-2010 unilaterally changed and expanded or widened the scope or meaning of the terms "cabarets," "night and day clubs" as defined under the NIRC of 1997, as amended and in existing jurisprudence; and (5) respondent cannot be held liable for the payment of percentage tax (amusement tax) under Section 125 (b) of the NIRC of 1997, as amended.

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[6] Records Verification dated March 17, 2017, CTA Case No. 9279 Docket, p. 924.
[7] CTA Case No. 9279 Docket, pp. 934-938.
[8] CTA Case No. 9279 Docket, pp. 947-948.
[9] CTA Case No. 9279 Docket, pp. 970-1010.
[10] CTA Case No. 9279 Docket, pp. 960-962.
[11] CTA Case No. 9279 Docket, p. 1012.

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Petitioner filed his Motion for Reconsideration[12] on August 2, 2018, while respondent filed its Comment (Re: Motion for Reconsideration dated July 31, 2018)[13] on September 13, 2018.

On October 10, 2018, the Court in Division issued a Resolution denying petitioner's motion for reconsideration, the dispositive portion of which reads:

> "**WHEREFORE**, respondent's [CIR's] Motion for Reconsideration dated July 31, 2018 is **DENIED**. The Decision dated July 12, 2018 is **AFFIRMED**.
>
> **SO ORDERED**."

Dissatisfied, petitioner filed his Petition for Review before the Court *En Banc* on November 15, 2018, docketed as CTA EB No. 1960.

Respondent belatedly filed its Comment (Re: Petition for Review dated November 12, 2018) on February 1, 2019,[14] which was noted without action in the Resolution dated February 21, 2019.[15] In the same Resolution, the Court *En Banc* gave due course to the Petition for Review and directed the parties to submit simultaneously their respective memoranda within thirty (30) days from receipt of the Resolution.

On April 29, 2019, respondent filed its Memorandum.[16] Meanwhile, on May 6, 2019, petitioner filed his Manifestation & Motion,[17] manifesting and moving to adopt all the factual and legal arguments found in his Petition for Review as part of his memorandum.

The case was submitted for decision on June 11, 2019.[18]

ISSUE

Petitioner submits the following issue for resolution of the Court *En Banc*:

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[12] CTA Case No. 9279 Docket, pp. 1036-1047.
[13] CTA Case No. 9279 Docket, pp. 1051-1063.
[14] CTA EB No. 1960 Docket, pp. 71-94.
[15] CTA EB No. 1960 Docket, pp. 96-97.
[16] CTA EB No. 1960 Docket, pp. 107-131.
[17] CTA EB No. 1960 Docket, pp. 133-134.
[18] CTA EB No. 1960 Docket, p. 138.

Whether or not Court in Division blatantly erred in granting the Petition for Review of herein respondent in CTA Case No. 9279, which cancelled and set aside the deficiency percentage tax assessment of respondent for CY 2013, declaring that it cannot be held liable to pay the said deficiency percentage tax (amusement tax) under Section 125 (b) of the NIRC of 1997, since respondent is not expressly covered by the terms "cabaret" and "night or day club," under RR No. 14-67 and the 1960 Decision of the Supreme Court in *Sy Chiuco vs. Commissioner of Internal Revenue*[19] *("Sy Chiuco")* case. [20]

PARTIES' ARGUMENTS

CIR's arguments

The Court in Division erred in cancelling and setting aside the deficiency percentage tax assessment of respondent for CY 2013, and holding that it cannot be held liable to pay the deficiency percentage tax (amusement tax) under Section 125 (b) of the NIRC of 1997, as amended.[21]

Revenue Regulations (RR) and jurisprudence cited by the Court in Division, specifically RR No. 14-67 and the decisions of the Supreme Court in the 1960 case of *Sy Chiuco*, and the 1956 case of *Collector of Internal Revenue vs. Junior Women's Club of the Philippines*[22] *("Junior Women's Club")* are irrelevant and inapplicable to the issues involved in the instant case.[23]

RMC No. 18-2010, which modifies the previous definition of the terms "night and day clubs" and "cabarets" under Section 2 of RR No. 14-67 was issued by the CIR pursuant to its quasi-legislative or rule-making powers provided in the first paragraph of Section 4 of the NIRC of 1997, as amended, and not under respondent's power to decide tax cases, including "other matters" arising under tax laws provided in the second paragraph of the same section of the NIRC of 1997, as amended.[24]

In a similar case involving the same parties entitled "*Hard Rock Café (Makati City), Inc. vs. Commissioner of Internal Revenue,*"

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[19] G.R. No. L-13387, March 28, 1960.
[20] CTA EB No. 1960 Docket, p. 9.
[21] CTA EB No. 1960 Docket, p. 9.
[22] G.R. No. L-6992, February 28, 1956.
[23] CTA EB No. 1960 Docket, p. 9-12.
[24] CTA EB No. 1960 Docket, p. 9-10.

docketed as CTA Case No. 9135, the Court in Division found that respondent's business provides entertainment similar to a "cabaret and nightclub" and its sales of food, refreshments, services, or merchandise should be subject to amusement tax,[25] [albeit, as hereafter discussed, this assertion is inaccurate].

The Court of Tax Appeals (CTA) has no power to rule on the constitutionality or validity of RMC No. 18-2010 since it does not fall under "other matters" to which it has jurisdiction. RMC No. 18-2010 has the force and effect of law and enjoys the presumption of constitutionality and legality until they are set aside with finality in an appropriate case by a competent court, and not the CTA.[26]

Hard Rock Café (Makati City) Inc.'s arguments

In its Memorandum, respondent manifests that the arguments of petitioner are merely reiterations of his arguments in his Motion for Reconsideration of the assailed Decision. Thus, the issues raised in the present petition have already been carefully considered and passed upon by the Court in Division in its assailed Resolution.[27]

In any case, respondent submits that the grounds relied upon by petitioner for the reversal of the assailed Decision and Resolution are devoid of merit and maintains that *(i)* RR No. 14-67 and the Supreme Court decisions cited by the Court in Division have not been overturned by any subsequent law or jurisprudence and, therefore, remain the controlling definition of the terms 'night and day clubs' and 'cabarets'; *(ii)* RMC No. 18-2010 is void for unduly expanding the intended coverage of Section 125 of the NIRC of 1997, as amended; *(iii)* the Court in Division correctly ruled that RMCs are actually opinions of the CIR issued in connection with the implementation of the provisions of the internal revenue law as authorized under Section 4 of the NIRC of 1997, as amended; *(iv)* the Supreme Court has already ruled that the CTA has jurisdiction to rule on the constitutionality or validity of a revenue issuance issued by the CIR in the exercise of its powers under Section 4 of the NIRC of 1997, as amended, most especially in cases where the invalidity of the assessment is based on the unconstitutionality or invalidity of the assailed revenue issuance; and, *(v)* contrary to petitioner's allegation, the Court in Division, in CTA Case No. 9135, ordered petitioner to cancel his deficiency percentage tax

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[25] CTA EB No. 1960 Docket, p. 13.
[26] CTA EB No. 1960 Docket, p. 17.
[27] CTA EB No. 1960 Docket, p. 113.

(amusement tax) assessment against respondent because it was not proven that respondent's establishment functions as a night club.[28]

RULING OF THE COURT *EN BANC*

Petition for Review with the Court En Banc is timely filed.

The Revised Rules of the Court of Tax Appeals (RRCTA) provides:

> "Rule 8
> Procedure in Civil Cases
>
> xxx xxx xxx
>
> SEC. 3. *Who may appeal; period to file petition.* –
>
> xxx xxx xxx
>
> (b) A party adversely affected by a decision or resolution of a Division of the Court on motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review **within fifteen days from receipt of a copy of the questioned decision or resolution.** Xxx" *(Boldfacing supplied)*

Petitioner received the assailed Resolution of the Court in Division on October 18, 2018. Thus, he had fifteen (15) days from October 18, 2018 or until November 2, 2018 within which to file his Petition for Review before the Court *En Banc.*

On October 30, 2018, petitioner filed his Motion for Extension of Time to File Petition for Review, which was granted by the Court *En Banc* in the Minute Resolution dated November 6, 2018 giving him until November 17, 2018 within which to file his Petition for Review. The Petition for Review was filed through registered mail on November 15, 2018 and was received by the Court *En Banc* on November 20, 2018.

As the present Petition was filed within the reglementary period, the Court *En Banc* is vested with jurisdiction to take cognizance of the same.

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[28] CTA EB No. 1960 Docket, pp. 113-129.

Respondent does not conduct its business as a cabaret, night club or day club, subject to amusement tax.

The crux of the controversy revolves around whether or not respondent is engaged in a business that is subject to amusement tax.

The amusement tax on amusement places was first imposed under Section 260 of the NIRC of 1939 (Commonwealth Act No. 466) which provides, among others, that gross receipts of proprietors, lessees, or operators of **"cabarets"** are subject to tax at the rate of ten percentum (10%). Section 260 of the NIRC of 1939 did not provide for the specific definitions of "cabarets" and "night clubs".

In 1956, the Supreme Court, in *Junior Women's Club*, defined a **night club** as a place or establishment selling to the public food or drinks, **where the customers are allowed to dance.**[29]

Subsequently, in the 1960 case of *Sy Chiuco*,[30] the Supreme Court defined "cabaret" in this manner, *viz.*:

> **A cabaret is a place of amusement where customers go because of their desire to dance and where the "bailarinas" are the main attraction. Dancing is the main business and customers patronize the place attracted by the "bailarinas".** As a matter of fact, "bailarinas" are the indispensable factor in the operation of the business. Whatever is paid to them should, therefore, be considered as paid on account of the business, and as such it should be considered as part of petitioner's gross receipts. (Boldfacing and underscoring supplied)

In 1967, RR No. 14-67, otherwise known as the *"Revised Amusement Tax Regulations,"* was issued to implement the provisions of the NIRC of 1939 on amusement tax. Under RR No. 14-67, the terms "cabaret," "night clubs" and "day clubs" are specifically defined, *viz.*:

> "(m) 'Cabaret' includes cafes, restaurants and all similar establishments where patrons are entertained by performers who dance and sing and/or where the patrons are allowed to dance with said performers or entertainers who are ordinarily **professional hostesses**.

[29] G.R. No. L-6992, February 28, 1956.
[30] G.R. No. L-13387, March 28, 1960.

> (n) '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.**
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> (o) 'Day Clubs' are **resorts frequented by pleasure seekers** during the day 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."**[31] *(Boldfacing supplied)*

In 1977, Section 260 of the NIRC of 1939 was subsequently re-enacted and carried over to the NIRC of 1977 (Presidential Decree No. 1158). Under Section 123 of the NIRC of 1977, amusement tax of 18% is imposed on the gross receipts of proprietors, lessees, or operators of **"cabarets" and "night or day clubs"**. No specific definitions of cabarets and night or day clubs were provided in the NIRC of 1977.

In 1997, when the NIRC of 1997 superseded the NIRC of 1977, Section 125 (b) was worded similar to Section 123 of the NIRC of 1977. Like its predecessors, Section 125 (b) of the NIRC of 1997 enumerated the amusement places which are subject to amusement tax but did not specifically define the terms "cabarets," "night clubs" and "day clubs". Section 125 (b) of the NIRC of 1997, as amended, states:

> "SECTION 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) xxx
>
> xxx xxx xxx
>
> 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.
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> Xxx." *(Boldfacing supplied)*

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[31] As quoted in CTA Case No. 9279.

Since Section 125 (b) of the NIRC of 1997 is similarly or substantially worded as Section 260 of the NIRC of 1939 and Section 123 of the NIRC of 1977, the definitions of cabarets, night clubs or day clubs in the aforecited jurisprudence and RR No. 14-67 should be applied in interpreting Section 125 (b) of the NIRC of 1997 and in determining whether or not an establishment may be classified as a cabaret, night club or day club for purposes of imposing the 18% amusement tax on gross receipts.

A plain reading of their definitions as contained in the aforecited jurisprudence and RR No. 14-67 reveals that the common characteristic of cabarets, night clubs and day clubs is that they are considered places of amusement where pleasure seekers are allowed **to dance with their own partners or professional hostesses**. Otherwise stated, **dancing (and not dining) is the main business of cabarets, night clubs and day clubs**. Their customers frequent or patronize said establishments, <u>not primarily for dining purposes</u>, but for dancing <u>either with their own partners or with professional hostesses employed, engaged or furnished by the establishments specifically for said purpose</u>.

Amusement places such as cabarets, night clubs and day clubs, by their very nature, are a class of their own. As such, they cannot include an ordinary restaurant or dining place, albeit entertainment may be provided by the latter for the sole purpose of attracting more customers to dine therein.

As correctly held by the Court in Division, a careful consideration of respondent's business would show that it **does not fall within the definition of a cabaret, night or day club**.

Respondent's primary purposes as stated in its Amended Articles of Incorporation show that it is registered to primarily engage in the busines of operating restaurants, coffee shops, refreshment parlors and cocktail lounges, although it may provide other services, including music, disco dancing and other forms of entertainment.[32] As testified by petitioner's Finance Controller, Mr. Joseph Y. Ang, petitioner operates a "themed restaurant" under the international brand Hard Rock Café, displaying the memorabilia of popular international music icons and legends, and offering great American food and selling Hard Rock Café merchandise. Respondent is open to all dining public and caters to family needs by offering kiddie meals bundled with coloring placemats and crayons given for free and selling assorted kids and/or infants merchandise.[33] Respondent also provides catering

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[32] Exhibit "P-1," CTA Case No. 9279 Docket, p. 771
[33] Exhibit "P-20," CTA Case No. 9279 Docket, pp. 737-738.

services, within or outside its restaurant, for corporate events and banquets and for individual functions, such as birthday parties, wedding and baptismal receptions, anniversary and engagement parties.[34]

It was also established during trial that although respondent provides some forms of entertainment, the same are but incidental to its main line of business of serving food and drinks to its customers. While respondent's customers may dance within the dining area where their food is served, neither respondent's establishment has a separate or designated dance floor[35] nor does respondent provide or employ dancers to dance with its customers.

As clarified by Mr. Ang, the music being played in the area and the performances were provided as part of advertising and promotion and that no separate charge for the entertainment is being collected by petitioner. During trial, he stated:

> "JUSTICE VICTORINO
> Question: In connection with the questions previously asked by counsel for respondent. Does petitioner sell tickets for any performance being done inside the establishment?
>
> MR. ANG
> No, your Honors.
>
> JUSTICE VICTORINO
> No. So is there any change in food pricing whenever there is a special performance inside the establishment?
>
> MR. ANG
> No, your Honors. It's the same... interrupted
>
> JUSTICE VICTORINO
> It's the same price.
>
> MR. ANG
> Price. Yes, your Honors.
>
> JUSTICE VICTORINO
> So the performances are supposed to be an additional expense on the part of the establishment?
>
> MR. ANG
> Yes, your Honors. It's part of the advertising and promotion to promote the restaurant and also these performances

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[34] Exhibits "P-17 and "P-18," CTA Case No. 9279 Docket, pp. 908-922; Exhibit "P-20," CTA Case No. 9279 Docket, pp. 742-743.
[35] Exhibit "P-20," CTA Case No. 9279 Docket, pp. 743-744.

have been held only after the dinner time which is about 9:30. Because as a restaurant, a theme restaurant mostly our theme is on music, being Hardrock Cafe, we operate like Planet Hollywood which is their theme is movie or rainforest cafe, their theme [sic] is rain, atmosphere [sic], having a jungle, us we thrive on a music. So Hardrock International is an international brand [sic] cafe so we also house memorabilias of known icons and legend of music industries both international and local [sic].

JUSTICE VICTORINO
So the expense for the performances are supposed to be part of your marketing expense?

MR. ANG
Yes, your Honors." [36]

In his Judicial Affidavit dated August 3, 2016,[37] respondent's witness, Revenue Officer Erwin Mallari stated that customers go to petitioner's establishment not for the dining experience and mostly to watch various artists perform and to dance and mingle with famous performers. During cross-examination, however, he admitted that the same is merely his impression or assumption, *viz.*:

"ATTY. SACDALAN
Mr. Witness, in your answer to Question 15, you said that the customers go there specially during the night when the show has started where they mainly watch various artists perform and to dance and mingle with famous performers. Because if their purpose was for the dining experience, they should have gone to other cozy restaurants without loud music and with best expensive food and refreshment choices.

Q What is your basis for the statement, Mr. Witness?

MR. MALLARI

A By experience, if I may elaborate. Prior to examination, early in 1990s, may I say a regular or do I visit Hard Rock Cafe, yes, sometime in 1990, 1995, 1996 when their Hard Rock Cafe has a buffet lunch, buffet lunch then my taxpayer invited me to buffet lunch in Hard Rock Cafe and then I asked the personnel then what is your time for the entertainment, live band, sabi nila ganito gabi ho kami nag-i-istart diyan and then that was 1990s, late 1990s. When I handled Hard Rock Cafe, I've talked to Joseph. That was when I served the letter of authority, I told Joseph ba't wala na iyong ano nyo

[36] Transcript of Stenographic Notes (TSN) of the January 24, 2017 Hearing, pp. 16-17.
[37] Exhibit "R-7" (Judicial Affidavit of Revenue Officer Erwin G. Mallari), CTA Case No. 9279 Docket, pp. 311-317

rito Joseph wala na rito iyong buffet lunch ninyo? Natalo kami sa buffet lunch. Nandito na lang kami sa band. Sabi niya sa akin noon araw na 'yon and that was 2:00 P.M. in the afternoon. So ano'ng oras kayo nagsisimula? Pag close na iyong mall then we are able to start kasi maingay na iyong venue namin dito. With that information, I've conducted a covert act investigation to confirm what he said and truly there is a live band.

ATTY. SACDALAN

Q Yes, Mr. Witness, you've mentioned it earlier that there was a live band, but my question is focused on what is your basis for saying that customers go there not for the dining experience because had they gone there for, had they wanted a dining experience, they would have gone to other restaurants if you went there covertly actually you went there during the evening for the very purpose of listening or checking if a live band would be playing at that time? What is your basis particularly for this statement? Did you speak to any customers?

MR. MALLARI

A I did not.

ATTY. SACDALAN

Q Have you conducted any survey?

MR. MALLARI

A I did not.

ATTY. SACDALAN

Q So this is based merely on your impression or assumption?

A Yes."[38]

Clearly, **nothing is said about customers going there for dancing either with their own partners or with professional hostesses or dancers employed, engaged or furnished by petitioner.**

On the basis of the foregoing, there is no denying that the amusement or entertainment provided by respondent to its customers is intended merely to attract more customers to dine in the establishment and is merely incidental to its restaurant business. Not being a cabaret, night or day club, respondent cannot be assessed and

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[38] TSN of the April 3, 2017 Hearing, pp. 10-12.

be held liable for deficiency percentage tax (amusement tax) under Section 125 (b) of the NIRC of 1997, as amended, for the year ending December 31, 2012.

Revenue Regulations No. 14-67 and the Supreme Court Decisions cited by the Court in Division are applicable to the instant case.

Petitioner insists that the Court in Division erred in relying on RR No. 14-67, *Sy Chiuco* and *Junior Women's Club of the Philippines* as bases for holding that respondent cannot be held liable for amusement tax on its gross revenues. Petitioner argues that the definition of the terms "cabaret" and "night and day clubs" in the foregoing jurisprudence and in RR No. 14-67 have already been superseded by the provisions of RMC No. 18-2010, which expanded the definitions of "cabaret" and "night and day clubs" to include amusement places such as "videoke bars, karaoke bars, karaoke televisions, karaoke boxes and music lounges".

We disagree with petitioner.

As correctly held by the Court in Division, RMC's are actually opinions of the CIR issued in connection with the implementation of the provisions of the internal revenue law as authorized under Section 4 of the NIRC of 1997, as amended.[39] Administrative issuances such as RMC No. 18-2010, must be interpreted and implemented in a manner consistent with statutes, jurisprudence and other rules and cannot amend the law they merely seek to interpret.[40] Hence, RMC No. 18-2010 cannot validly change, expand or widen the scope or meaning of the terms "cabarets" and "night and day clubs" as defined under the NIRC of 1997, as amended, and in existing jurisprudence.

CTA has power to rule on the validity of RMC No. 18-2010.

Petitioner further argues that RMC No. 18-2010 as issued by the CIR pursuant to its quasi-legislative or rule-making powers provided in the first paragraph of Section 4 of the NIRC of 1997, as amended, and not under the CIR's power to decide tax cases including "other matters"

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[39] *Bloomberry Resorts and Hotels, Inc. vs. Bureau of Internal Revenue, represented by Commissioner Kim S. Jacinto-Henares,* G.R. No. 212530, August 10, 2016.
[40] *Secretary of Finance Cesar V. Purisima and Commissioner of Internal Revenue Kim S. Jacinto-Henares vs. Philippine Tobacco Institute, Inc.*, G.R. No. 210251, April 17, 2017.

arising under tax laws provided in the second paragraph of Section 4 of the NIRC of 1997, as amended.

No less than the Supreme Court *En Banc* has confirmed the exclusive jurisdiction of the Court of Tax Appeals (CTA) to determine the validity or constitutionality of tax laws, rules and regulations, and other administrative issuances. Said the Supreme Court in *Banco De Oro, et al. vs. Republic of the Philippines, et al.*:[41]

> We revert to the earlier rulings in *Rodriguez, Leal*, and *Asia International Auctioneers, Inc.* **The Court of Tax Appeals has exclusive jurisdiction to determine the constitutionality or validity of tax laws, rules and regulations, and other administrative issuances of the Commissioner of Internal Revenue.**
>
> xxx xxx xxx
>
> **Section 7, as amended, grants the Court of Tax Appeals the exclusive jurisdiction to resolve all tax-related issues:**
>
> Section 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;
>
> 2) Inaction by 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, where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial;
>
> 3) Decisions, orders or resolutions of the Regional Trial Courts in local tax cases originally decided or resolved by them in the exercise of their original or appellate jurisdiction;
>
> 4) Decisions of the Commissioner of Customs in cases involving liability for customs duties, fees or other money charges, seizure, detention or release of property affected, fines, forfeitures or other penalties in relation thereto, or other

[41] G.R. No. 198756, August 16, 2016.

matters arising under the Customs Law or other laws administered by the Bureau of Customs;

5) Decisions of the Central Board of Assessment Appeals in the exercise of its appellate jurisdiction over cases involving the assessment and taxation of real property originally decided by the provincial or city board of assessment appeals;

6) Decisions of the Secretary of Finance on customs cases elevated to him automatically for review from decisions of the Commissioner of Customs which are adverse to the Government under Section 2315 of the Tariff and Customs Code;

7) Decisions of the Secretary of Trade and Industry, in the case of non-agricultural product, commodity or article, and the Secretary of Agriculture in the case of agricultural product, commodity or article, involving dumping and countervailing duties under Section 301 and 302, respectively, of the Tariff and Customs Code, and safeguard measures under Republic Act No. 8800, where either party may appeal the decision to impose or not to impose said duties.

The Court of Tax Appeals has undoubted jurisdiction to pass upon the constitutionality or validity of a tax law or regulation when raised by the taxpayer as a defense in disputing or contesting an assessment or claiming a refund. It is only in the lawful exercise of its power to pass upon all maters brought before it, as sanctioned by Section 7 of Republic Act No. 1125, as amended.

This Court, however, declares that the Court of Tax Appeals may likewise take cognizance of cases directly challenging the constitutionality or validity of a tax law or regulation or administrative issuance (revenue orders, revenue memorandum circulars, rulings).

Section 7 of Republic Act No. 1125, as amended, is explicit that, except for local taxes, appeals from the decisions of quasi-judicial agencies (Commissioner of Internal Revenue, Commissioner of Customs, Secretary of Finance, Central Board of Assessment Appeals, Secretary of Trade and Industry) on tax-related problems must be brought *exclusively* to the Court of Tax Appeals.

In other words, within the judicial system, the law intends the Court of Tax Appeals to have exclusive jurisdiction to resolve all tax problems. Petitions for writs of certiorari against the acts and omissions of the said quasi-judicial agencies should, thus, be filed before the Court of Tax Appeals.

Republic Act No. 9282, a special and later law than Batas Pambansa Blg. 129 provides an exception to the original jurisdiction of the Regional Trial Courts over actions questioning the constitutionality or validity of tax laws or regulations. Except for local tax cases, actions directly challenging the constitutionality or validity

> of a tax law or regulation or administrative issuance may be filed directly before the Court of Tax Appeals.
>
> Furthermore, with respect to administrative issuances (revenue orders, revenue memorandum circulars, or rulings), these are issued by the Commissioner under its power to make rulings or opinions in connection with the implementation of the provisions of internal revenue laws. Tax rulings, on the other hand, are official positions of the Bureau on inquiries of taxpayers who request clarification on certain provisions of the National Internal Revenue Code, other tax laws, or their implementing regulations. Hence, the determination of the validity of these issuances clearly falls within the exclusive appellate jurisdiction of the Court of Tax Appeals under Section 7(1) of Republic Act No. 1125, as amended, subject to prior review by the Secretary of Finance, as required under Republic Act No. 8424. *(Boldfacing supplied; citations omitted)*

Indubitably, rulings or opinions of the CIR implementing tax laws, such as RMC No. 18-2010 are reviewable by the CTA as they pertain to "other matters" arising under the NIRC or other laws administered by the BIR. Hence, the Court has the power to rule on the validity of RMC No. 18-2010.

Ruling in CTA Case No. 9135 is consistent with assailed Decision and Resolution.

Petitioner contends that in a similar case involving the same parties entitled "*Hard Rock Café (Makati City), Inc. vs. Commissioner of Internal Revenue,*" docketed as CTA Case No. 9135, the Court in Division found that respondent's business is an amusement establishment that should be subject to amusement tax because it provides entertainment similar to a "cabaret and nightclub".[42]

On the other hand, respondent submits that the foregoing allegation of petitioner is misleading, as the conclusion reached by the Court in Division in said case was clearly contrary to petitioner's assertion that respondent is liable for amusement tax.[43]

We agree with respondent.

A careful perusal of the Decision dated August 10, 2018 in CTA Case No. 9135 would show that the FAN issued against Hard Rock Café (Makati City), Inc. were cancelled and set aside because the

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[42] CTA EB No. 1960 Docket, p. 13.
[43] CTA EB No. 1960 Docket, pp. 90-92.

Court in Division found that the latter was not liable for amusement tax, *viz.*:

> "In the case at hand, it was established that although petitioner [Hard Rock Café (Makati City), Inc.] 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 [Hard Rock Café (Makati City), Inc.] employ dancers to dance with its customer. Clearly, respondent [CIR] failed to present evidence that petitioner's [Hard Rock Café (Makati City), Inc.'s] establishment also functions as a night club. Records are bereft of evidence that petitioner's [Hard Rock Café (Makati City), Inc.'s] establishment was frequented by customers for dancing either with their own partners or professional dancers furnished by petitioner [Hard Rock Café (Makati City), Inc.].
>
> xxx xxx xxx
>
> 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 [herein petitioner] Commissioner of Internal Revenue against petitioner [herein respondent] Hard Rock Cafe (Makati City) for alleged deficiency percentage tax for the calendar year 2012, are hereby **CANCELLED** and **SET ASIDE.**"

In fact, in its Resolution dated December 6, 2018, the Court in Division denied the CIR's Motion for Reconsideration and reiterated that there is no legal and factual basis to hold Hard Rock Café (Makati City), Inc. liable for amusement tax.

All told, not being a cabaret, night or day club, respondent cannot be assessed and held liable for deficiency percentage tax (amusement tax) under Section 125 (b) of the NIRC of 1997, as amended, in the aggregate amount of Php22,098,415.04 for the year ending December 31, 2012.

WHEREFORE, premises considered, the Petition for Review filed by the Commissioner of Internal Revenue on October 30, 2018 is **DENIED** for lack of merit. Accordingly, the July 12, 2018 Decision and October 10, 2018 Resolution of the Court in Division in CTA Case No. 9279 are **AFFIRMED**.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 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.

ROMAN G. DEL ROSARIO
Presiding Justice