REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

THE CITY OF MAKATI AND THE CITY TREASURER OF MAKATI, Petitioners,	CTA EB No. 1661 (CTA AC No. 166)
	Present:
-versus-	DEL ROSARIO, *PJ*; CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ*.
	Promulgated:
CEMCO HOLDINGS, INC., Respondent.	DEC 12 2018 3:53 p.m.

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DECISION

Fabon-Victorino, J.:

For adjudication is the Petition for Review[1] dated May 29, 2017 filed by petitioners the City of Makati and the City Treasurer of Makati, seeking to reverse and set aside the Decision dated January 6, 2017[2] and the Resolution dated May 11, 2017,[3] both rendered by the Court in Division in CTA AC No. 166. The challenged Decision and Resolution sustained the ruling of the Regional Trial Court[4] of Makati City (RTC-Makati), cancelling the local business tax (LBT) assessment issued against respondent CEMCO Holdings, Inc. for taxable years (TYs) 2008-2012.

[1] *Rollo,* pp. 1-14.
[2] Ibid. at pp. 16-27.
[3] Id. at pp. 29-34.
[4] Branch 65.

The facts as found by the Court in Division are as follows.

Petitioner City of Makati is a local government unit authorized under the Local Government Code to assess and collect LBT through petitioner City Treasurer Nelia Barlis, who is impleaded in her official capacity.

Respondent CEMCO Holdings, Inc. is a domestic corporation, with principal business address at 815-816 Tower One & Exchange Plaza, Ayala Triangle, Ayala Avenue, Makati City.

Pursuant to Letter of Authority (LOA) No. 2013-0393 dated June 21, 2013, Makati City Revenue Examiner Maureen Macadaeg conducted an examination of respondent's books of account and other accounting record for TYs 2008-2012.

On October 11, 2013, respondent received a Notice of Assessment dated October 8, 2013, demanding from it payment of ₱19,114,772.80 representing deficiency LBT, fees and charges for TYs 2008-2012, inclusive of interest and penalties. The said LBT was imposed on its alleged undeclared gross sales per audit, which were more or less equivalent to the dividend income it received for TYs 2008-2012 per its annual Audited Financial Statements (AFS) of even years, broken down as follows:

Year	Gross Sales per Audit	Dividend Income
2008	₱ 191,809,615.00	₱ 191,809,615.00
2009	1,834,338,212.00	1,834,338,212.00
2010	2,729,169,428.00	2,727,456,262.00
2011	189,675,824.00	182,675,824.00

On December 10, 2013, respondent protested the LBT assessment without 'payment under protest' and moved for its cancellation and withdrawal.

On January 8, 2014, respondent received a letter dated January 6, 2014 issued by petitioner City Treasurer denying its protest with appended Final Notice of Assessment.

On February 6, 2014, respondent instituted a complaint before the RTC-Makati, for the invalidation of the alleged deficiency LBT for TYs 2008-2012 in the total amount of ₱19,114,772.80, docketed as Civil Case No. 14-137.

On September 22, 2015, the RTC-Makati rendered a Decision, the *fallo* of which reads as follows:

> **WHEREFORE**, premises considered, the assessment of deficiency local business taxes in the sum of P19,114,772.80 for the period 2008-2012 is hereby **CANCELLED**.
>
> **SO ORDERED**.

The RTC-Makati explained that the dividends realized on respondent's investments on stocks/securities as a holding company were passive income which was not derived in the active pursuit of business, hence, do not form part of its gross receipts for purposes of imposing LBT under Section 143 of the LGC. In addition, petitioners were also proscribed to impose LBT on dividend income earned by holding companies, such as respondent, pursuant to Section 133(a) of the same Code.

On October 22, 2015, petitioners moved to reconsider the RTC-Makati's Decision. It was however denied in the Order dated December 7, 2015.

On December 22, 2015, petitioners filed a Petition for Review before the Court in Division, contending that the RTC-Makati egregiously erred in invalidating the subject LBT assessment.

On January 6, 2017, the Court in Division rendered the challenged Decision, disposing the case in the following fashion:

> **WHEREFORE**, premises considered, the instant Petition for Review is hereby **DENIED**. The Assailed Decision dated September 22, 2015 and Order dated

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December 7, 2015 issued by the Regional Trial Court (RTC) Branch 65, Makati City, in Civil Case No. 14-137 entitled "CEMCO Holdings, Inc. vs. The City of Makati and Hon. Nelia A. Barlis, in her capacity as City Treasurer," are hereby **AFFIRMED**.

SO ORDERED.

Petitioners challenged the adverse Decision in a motion for reconsideration, which was denied by the Court in Division in the Resolution dated May 11, 2017.

Undeterred, petitioners elevated their case to the Court *En Banc* via a Petition for Review dated May 29, 2017,[5] predicated upon the following considerations:

I. As a holding company, respondent was taxed under Section 3A.02(p) in relation to Section 3A.02(h) of the Revised Makati Revenue Code (RMRC);

II. Section 3A.02(p) in relation to Sections 3A.02(g) and 3A.02(h), was never questioned in accordance with Section 7B.14 (Taxpayers' Remedies) paragraph (d) of the RMRC, and therefore remains to be valid;

III. The Supreme Court has consistently ruled that tax assessments made by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise.

Petitioners contend that under the RMRC, respondent need not be a contractor or owner of banks and/or financial institution to be liable for payment of LBT. Allegedly, Section 3A.02(p) of the RMRC treats a holding company a class of its own on which LBT may be imposed[6] on its gross sales/receipts for the preceding calendar year. Since respondent is categorized as a holding company, it is liable to pay LBT on its dividend and passive income for TYs 2008-2012 as indicated in the Notice of Assessment dated October 8, 2013.

Petitioners also fault respondent for its failure to impugn the validity and/or constitutionality of Section

[5] *Rollo*, pp. 1-14.
[6] 20% of 1% or 0.002 of a taxpayer's gross receipts/sales for the preceding taxable year.

3A.02(p) in relation to Sections 3A.02(g) and 3A.02(h) of the RMRC with the Secretary of Justice as mandated under Section 187 of the LGC and Section 7B.14 of the RMRC. For this reason, the provisions remain valid and enforceable.

Finally, petitioners assert that tax assessments issued after the conduct of tax examination are presumed correct until the contrary is proved, a burden which respondent failed to discharge. Hence, respondent must be adjudged liable to pay the aggregate amount of ₱19,114,772.80, representing deficiency LBT for TYs 2008-2012.

In its Comment,[7] respondent counters that petitioners may not impose LBT on gains or yields subject to income tax except if the same were earned by a bank or financial institution, which it is not. Moreover, the parties stipulated that respondent is neither a bank or a financial institution on which LBT may be imposed on its dividend income. Therefore, petitioners' Notice of Assessment dated October 8, 2013 is ineffectual for it is directly opposite of the specific limitation enshrined in Section 133(a) of the LGC.

Respondent believes that petitioner's imposition of LBT on its dividend income anchored on Section 3A.02(p) in relation to Sections 3A.02(g) and 3A.02(h) of the RMRC likewise transgresses Section 27(D)(4)[8] of the NIRC, as amended. Invoking *Michigan Holdings*[9] case as authority, it theorizes that subjecting to LBT the dividend income realized by a non-bank, non-financial institution, i.e., holding company, is tantamount to levying income tax on inter-corporate dividends which the legislature itself opted not to tax. On this ground, petitioners acted beyond their taxing authority when they issued the subject assessment.

And since petitioners' LBT assessment is offensive of both Section 131(a) of the LGC, and Section 27(D)(4) of the

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[7] *Rollo,* pp. 38- 57.

[8] **SEC. 27. Rates of Income tax on Domestic Corporations.** - xxx

(D) Rates of Tax on Certain Passive Incomes. – xxx

(4) Intercorporate Dividends. - Dividends received by a domestic corporation from another domestic corporation shall not be subject to tax.

[9] *Michigan Holdings, Inc. vs. The City Treasurer of Makati City, Nelia A. Barlis,* CTA EB No. 1093, June 17, 2015.

NIRC, as amended, the Court may not ignore the glaring impropriety thereof notwithstanding the fact that it did not impugn the validity of the provisions[10] of the RMRC with the Secretary of Justice as required under Section 187 of the LGC, posits respondent.

Additionally, petitioners may not take refuge under Section 3A.02(p), in relation to Section 3A.02(h), of the RMRC as foundation of the subject LBT assessment since by treating a holding company on the same class as that of a bank or other financial institution, they unduly stretched the covered entities defined under Section 143(f) of the LGC.

Moreover, gross sales/receipts as defined in Section 131(n)[11] of the LGC do not cover its dividend income arising from its investments. To seal its position, respondent cites several opinions issued by Bureau of Local Government Finance (BLGF), wherein it was held that only interest and/or dividend realized in the ordinary course of business, or one treated as active income constitutes gross receipts. Respondent also invokes the *Orleyte*[12] case wherein it was ruled that income not arising from services rendered do not form part of gross receipts. Since the civil fruits, i.e., dividends, derived from its investments as a holding company is merely passive in character, the same do not constitute gross receipts for purposes of LBT. In fine, the Court in Division committed no reversible error in invalidating the subject assessment issued against it.

THE RULING OF THE COURT

We deny the instant petition.

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[10] Section 3A.02(p) in relation to Sections 3A.02(g) and 3A.02(h).

[11] **Section 131.** *Definition of Terms.* - When used in this Title, the term:

(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 return, excise tax, and value-added tax (VAT);

[12] *Orleyte Company (Philippine Branch) vs. The City of Makati,* CTA Case No. 80, November 4, 2012.

Section 5, Article X of the Constitution recognizes the power of the local government units (LGUs) to create its own sources of revenues and to levy taxes, fees and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy.[13] Undeniably, the power to tax is the most effective instrument to raise needed revenues to finance and support the myriad activities of local government units for the delivery of basic services essential to the promotion of the general welfare and enhancement of peace, progress, and prosperity of the people.[14] Thus, Section 143(f) in relation to Section 151 of the LGC endows municipalities and cities with the authority to impose taxes on certain businesses within their respective territorial boundaries, to wit:

> SEC. 143. *Tax on Business.* - The municipality may impose taxes on the following businesses:
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> xxx xxx xxx
>
> (f) On banks and other financial institutions, at a rate not exceeding fifty percent (50%) of one percent (1%) on the gross receipts of the preceding calendar year derived from interest, commissions and discounts from lending activities, income from financial leasing, dividends, rentals on property and profit from exchange or sale of property, insurance premium.
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> xxx xxx xxx
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> 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: xxx
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> The rates of taxes that the city may levy may exceed the maximum rates allowed for the province or municipality by not more than fifty percent (50%) except the rates of professional and amusement taxes.

However, such omnibus grant of taxing power in favor of LGUs under Section 143 of the LGC is not unbridled as

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[13] See *Pezizloy Realty Corporation, represented by its President, Gregory K. Loy vs. The Province of Benguet,* G.R. No. 183137, April 10, 2013.
[14] *Reyes vs. Court of Appeals,* G.R. No. 118233, December 10, 1999; *Mactan Cebu International Airport Authority vs. Marcos,* G.R. No. 120082, September 11, 1996.

enshrined in Section 133 of the same Code.[15] In particular, paragraph (a)[16] thereof decrees that save for banks and other financial institutions, LGUs are explicitly proscribed from imposing taxes, fees or charges of any kind, on items of gain or yield which were levied income tax by the national government. The rule is animated by the doctrine of pre-emption, or the instance where the national government elects to tax a particular area, impliedly withholding from the local government the delegated power to tax the same field.[17] *Ergo,* as diametrically opposed with petitioners' posture, Section 133(a) of the LGC does not allow, and in fact forbids the imposition of LBT on income realized by entities not classified as a bank or financial institution.

Significantly, petitioners and respondent expressly acknowledged in their Joint Stipulation of Facts[18] that respondent is not a bank or financial institution as defined under Section 131(e) of the LGC. This fact certainly rocks their argument to its foundation. Note that once the stipulations are reduced into writing and signed by the parties and their counsels, as in this case, they become binding on the parties who made them.[19] Such judicial admission also removes an admitted fact from the field of controversy,[20] and no amount of rationalization can offset it.[21] With the parties' admission that respondent does not fall under the classification of a bank or a financial institution, petitioners' imposition of LBT on dividend income realized by respondent undoubtedly traverses the statutory impediment enshrined under Section 133(a) of the LGC, rendering the issuance of the subject assessment *ultra vires* and without any legal consequence, effectively warranting its cancellation and withdrawal.

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[15] See *Batangas City vs. Pilipinas Shell Petroleum Corporation,* G.R. No. 187631, July 8, 2015; *City of Manila vs. Colet,* G.R. Nos. 120051, 121613, 121675, 121704, 121720-28, 121847-55, 122333, 122335, 122349 & 124855, December 10, 2014; and *Philippine Fisheries Development Authority (PFDA) vs. Central Board of Assessment Appeals, et al.*, G.R. No. 178030, December 15, 2010.

[16] SEC. 133. *Common Limitations on the Taxing Powers of Local Government Units.* - Unless otherwise provided herein, the exercise of the taxing powers of provinces, cities, municipalities, and barangays shall not extend to the levy of the following: xxx

(a) Income tax except when levied on banks and other financial institutions; xxx

[17] See *Victorias Milling Co., Inc. vs. The Municipality of Victorias, Province of Negros Occidental,* G.R. No. L-21183, September 27, 1968.

[18] RTC Record, p. 554.

[19] *Bayas vs. Sandiganbayan,* G.R. Nos. 143689-91, November 12, 2002.

[20] See *Constantino vs. Heirs of Constantino, Jr.,* G.R. No. 181508, October 2, 2013.

[21] See *Spouses Binarao vs. Plus Builders, Inc.,* G.R. No. 154430, June 16, 2006.

Equally unavailing is petitioners' insinuation that the pertinent RMRC provisions[22] upon which the LBT assessment is based, binds respondent for its neglect to challenge the same before the Secretary of Justice per Section 187 of the LGC and paragraph (d), Section 7B.14 of the RMRC.

Section 131(b)(4)[23] of the LGC mandates, *inter alia,* that the taxing power of LGUs shall not extend to acts which are repugnant to, or inconsistent with the laws enacted by Congress. The rationale of the requirement that the ordinances should not contravene a statute is obvious. Municipal governments are only agents of the national government. Local councils exercise only delegated legislative powers conferred on them by Congress as the national lawmaking body. The delegate cannot be superior to the principal or exercise powers higher than those of the latter. It is a heresy to suggest that the local government units can undo the acts of Congress, from which they have derived their power in the first place, and negate by mere ordinance the mandate of the statute.[24] Definitely, the spring cannot rise above its source.

As earlier discussed, petitioners disregarded Section 133(a) of the LGC by subjecting to LBT dividend income realized by a non-bank, non-financial institution, like respondent. To sustain petitioners' LBT assessment is tantamount to condoning verboten acts which the Court cannot countenance.

Besides, petitioners' invocation of paragraph (d), Section 7B.14 of the RMRC, which in turn is anchored on Section 187 of the LGC is utterly misplaced. The latter provision reads:

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[22] Section 3A.02(p) in relation to Sections 3A.02(g) and 3A.02(h) of the RMRC.

[23] **Section 130.** *Fundamental Principles.* - The following fundamental principles shall govern the exercise of the taxing and other revenue-raising powers of local government units: xxx

(b) Taxes, fees, charges and other impositions shall: xxx

(4) not be contrary to law, public policy, national economic policy, or in the restraint of trade; xxx

[24] *Magtajas vs. Pryce Properties Corporation, Inc.,* G.R. No. 111097, July 20, 1994.

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> **Section 187.** *Procedure for Approval and Effectivity of Tax, Ordinances and Revenue Measures; Mandatory Public Hearings.* – xxx Provided, further, That any question on the constitutionality or legality of tax ordinances or revenue measures may be raised on appeal within thirty (30) days from the effectivity thereof to the Secretary of Justice who shall render a decision within sixty (60) days from the date of receipt of the appeal: Provided, however, That such appeal shall not have the effect of suspending the effectivity of the ordinance and the accrual and payment of the tax, fee, or charge levied therein: Provided, finally, That within thirty (30) days after receipt of the decision or the lapse of the sixty-day period without the Secretary of Justice acting upon the appeal, the aggrieved party may file appropriate proceedings with a court of competent jurisdiction. (underscoring supplied)

Plain from the foregoing that prior appeal with the Secretary of Justice before court action may be had is only mandated in cases when the nature of the action specifically pertains to questions involving the constitutionality and/or validity of local tax measure, no more, no less. Thus, it is imperative to determine respondent's cause of action in this case.

Catena of jurisprudence[25] teaches us that the nature of the action, as well as the court or body which has jurisdiction over it is defined by the material allegations in the complaint, as well as the character of the relief sought.

A scrutiny of respondent's complaint before the RTC-Makati spells out the following material averments, to wit: 1) its books of account and other accounting record were examined per LOA No. 2013-0393;[26] 2) on account of such audit, petitioner local treasurer issued the subject assessment against it, holding the latter accountable for LBT for years 2008-2012;[27] 3) it protested such assessment before petitioner local treasurer per Section 195 of the

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[25] See *De Vera vs. Spouses Santiago, Sr.,* G.R. No. 179457, June 22, 2015; *Samson vs. Spouses Gabor,* G.R. No. 182970, July 23, 2014; *Ruby Shelter Builders and Realty Development Corporation vs. Hon. Formaran III,* G.R. No. 175914, February 10, 2009; *Spouses Mansalud vs. National Housing Authority,* G.R. No. 167181, December 23, 2008; *Villena vs. Payoyo,* G.R. No. 163021, April 27, 2007; *Huguete vs. Embudo,* G.R. No. 149554, July 1, 2003; and *Caiza vs. Court of Appeals,* G.R. No. 110427, February 24, 1997.

[26] Par. 6, RTC-Makati Complaint, RTC Record, p. 3.

[27] Par. 7, id.

LGC;[28] and 4) such protest was denied by petitioner local treasurer, for which reason, a Final Notice of Assessment was issued against it.[29] Anent the relief sought, the complaint solely seeks for the cancellation of the subject LBT assessment.[30]

Given that the material allegations thereof, side by side with the prayer sought therein veer towards the abrogation of petitioners' LBT assessment anchored on the RMRC, and not the validity of the provisions of the RMRC itself, it stands to reason that the procedure provided for in Section 187 of the LGC, as well as paragraph (d), Section 7B.14 of the RMRC finds no application in this case.

WHEREFORE, the Petition for Review dated May 29, 2017 filed by petitioners the City of Makati and the City Treasurer of Makati is **DENIED**. The challenged Decision and Resolution dated January 6, 2017 and May 11, 2017 respectively, both rendered by the Court in Division are **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

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[28] Par. 9, id. at pp. 3-4.
[29] Par. 11, id. at p. 4.
[30] Prayer, id. at p.14.

(with Separate Concurring Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
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

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

THE CITY OF MAKATI AND THE CITY TREASURER OF MAKATI, Petitioners,	**CTA EB No. 1661** (CTA AC No. 166)
	Present:
	Del Rosario, P.J., Castañeda, Jr., Uy, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, and Manahan JJ.
- versus -	
	Promulgated:
CEMCO HOLDINGS, INC., Respondent.	DEC 12 2018 3:53p.m.

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SEPARATE CONCURRING OPINION

CASTAÑEDA, JR., J.:

I agree with the conclusion reached by the *ponencia* that the Petition for Review should be denied on the ground, among others, that petitioners are proscribed from imposing taxes, fees or charges of any kind, on items of gain or yield which are being levied income tax by the national government, save for banks and other financial institutions.

In this regard, the lower court's factual basis is relevant as explained in the subject Decision, thus:

> "The RTC-Makati explained that the dividends realized on respondent's investments on stocks/securities as a holding company were passive income which was not derived in the active pursuit of business, hence, do not form part of its gross

receipts for purposes of imposing LBT under Section 143 of the LGC. xxx"

The crucial element, therefore, in determining whether an entity is engaged in banking or other activities of financial institutions is its principal activity. If an entity passively derives income from investments and not in the active pursuit of its business, it cannot be categorized as a bank or financial institution for purposes of Section 133(a) of the Local Government Code. Conversely, if the facts show that an entity earns income from investments as its sole and primary activity in the pursuit of its business, then it may be properly subjected to local business tax.

Considering the foregoing, I **VOTE** to **DENY** the instant Petition for Review.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice