REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

THE CITY OF MAKATI AND THE CITY TREASURER OF MAKATI, *Petitioners,*	CTA AC No. 166
	Members:
-versus-	**DEL ROSARIO,** *Chairperson,* **UY,** and **MINDARO-GRULLA,** *JJ.*
CEMCO HOLDINGS, INC., *Respondent.*	Promulgated: JAN 06 2017 3:49 pm

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DECISION

MINDARO-GRULLA, J.:

This is a Petition for Review[1] filed by The City of Makati and The City Treasurer of Makati on December 22, 2015, pursuant to Section 7(a)(3)[2] 2 of Republic Act No. 1125[3], as amended, in relation to Section 4(a) of Rule 8 of the Revised Rules of the Court of Tax Appeals (RRCTA), seeking to reverse and set aside the Decision[4] dated September 22, 2015 and Order[5] dated December 07, 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".

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[1] CTA Docket, pp. 8-19.
[2] Sec 7. Jurisdiction . - The CTA shall exercise:

(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:

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(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;

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[3] An Act Creating the Court of Tax Appeals.
[4] CTA Docket, pp. 20-30.
[5] CTA Docket, pp. 31-32.

Petitioner City of Makati is a duly created and existing local government unit empowered under the Local Government Code to assess and collect local business taxes through Petitioner City Treasurer Nelia Barlis (hereinafter collectively referred to as "Petitioners". The latter is impleaded in this case in her official capacity[6].

Respondent CEMCO Holdings, Inc., is a corporation duly organized and existing under the laws of the Philippines, with principal business address at 815-816 Tower One & Exchange Plaza, Ayala Triangle, Ayala Avenue, Makati City[7].

Pursuant to Letter of Authority No. 2013-0393 dated June 21, 2013, Makati City Revenue Examiner Ms. Maureen Macadaeg conducted an examination of the books of accounts and other accounting records of respondent for the taxable years 2008-2012. Consequently, respondent received a copy of the Notice of Assessment dated October 8, 2013 (the "Assessment") demanding payment of Php 19, 114,772.80, representing deficiency local business tax ("LBT"), fees, and charges for taxable period 2008 to 2012, inclusive of interest and penalties.

Petitioner imposed local business tax on Plaintiff's alleged undeclared gross sales per audit, which are more or less equivalent to the dividend income received by respondent for taxable period 2008-2012, as reported in its annual audited financial statements[8] (AFS) for the same period, and are as follows:

Year	Gross Sales per Audit	Dividend Income
2008	Php 191,809,615.00	Php 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 filed a written protest contesting the Assessment and requested for its cancellation. No payment of the local business tax accompanied the protest. In a letter dated January 6, 2014,

[6] Petition for Review, CTA Docket, p. 8.
[7] Ibid, p. 9.
[8] RTC Records, Exhibits "I", "K", "L", and "M".

the City Treasurer denied the protest, attaching to it as well was a Final Notice Assessment.

Respondents elevated the matter to the Regional Trial Court of Makati City in a complaint dated February 3, 2014, wherein it sought for the cancellation of the Assessment of the deficiency local business tax for the taxable period 2008 to 2012 in the total amount of Php19,114,772.80. Incidentally, no "payment under protest" was made by the respondent since the filing of the complaint until the present.

After filing of the parties' respective memoranda and submission of the case for the RTC of Makati's disposition, the Assailed Decision was promulgated on September 22, 2015, the dispositive portion of which reads as follows:

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

Aggrieved by said Decision, the City of Makati filed its Motion for Reconsideration on October 22, 2015, which was later denied in an Order[9] promulgated by the RTC of Makati on December 07, 2015.

On December 18, 2015, the instant Petition for Review[10] was filed by the City of Makati and the City Treasurer of Makati, now the petitioners in this case, and interposed one assignment of error, specifically, that the Court a quo erred in cancelling the assessment of local business taxes.

On February 9, 2016, respondent filed its Comment (Re: Petition for Review dated December 18, 2015)[11]. Thereafter, this Court granted both parties thirty (30) days within which to file their simultaneous memoranda.[12]

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[9] Supra note 6.
[10] Supra note 1.
[11] CTA Docket, pp. 42-62.
[12] Resolution dated February 22, 2016.

The case was deemed submitted for decision per Resolution[13] promulgated on April 1, 2016 after petitioners filed their Memorandum[14] on March 29, 2016, while respondent filed its Memorandum[15] on March 30, 2016, hence, this petition for review.

Petitioners insist that respondent is a holding company clearly engaging in activities under Section 3A.02(h)[16] of the Revised Makati Revenue Code and not under Section 3A.02(g); that, as its pieces of evidence would prove, respondent engaged in activities which would qualify it to be taxed under Section 3A.02(h) of the Revised Makati Revenue Code. Further, they assert that under Section 3a.02(p)[17] "Gross sales or receipts" refer to those earned from among others, interest, commissions, discounts from lending activities, income from (i) leasing (ii) investments (iii) dividends (iv) insurance premiums, profit from exchange of sale of property; that the Honorable RTC-Makati City, Branch 65 erred when it isolated the meaning of "gross sales or receipts" to Section 18.01 of the Revised Makati Revenue Code as the term "gross receipts is clearly defined in Section

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[13] Ibid., p.112.
[14] Ibid., pp.65-76.
[15] Ibid., pp.77-99.
[16]Section 3A.02(h). Imposition of Tax- there is hereby levied an annual tax on the following business at the rates prescribed therefore:

"xxx xxx xxx

> (h) On owners or operators of banks and other financial institutions which include offshore banking, non-bank, financial intermediaries, lending investors, finance and investment companies, pawnshops, money shops, insurance companies,stock markets, stock brokers, dealers in securities including pre-need companies, investment house, foreign exchange shall be taxed at the rate of twenty percent (20°/o) of one percent (1 °/o) of the gross receipts of the preceding calendar year derived from interest, commissions, and discounts from lending activities, income from financial leasing, investments, dividends, insurance premium and profit from exchange or sale of property, provided, however, on gross sales/receipts derived from rental of property during the preceding calendar year shall be subject to the business tax at the rate prescribed under subsection (I) 1, as provided in this code.

[17] Section 3A.02(p). Imposition of Tax- there is hereby levied an annual tax on the following business at the rates prescribed therefore:

"xxx xxx xxx

> (p) On Holding Company shall be taxed at the rate prescribed either under subsection (g) or (h), of the gross sales and/or receipts during the preceding year.

3A.02(h) of the Revised Makati Revenue Code which definition is similar to Section 143(f) of the Local Government Code of 1991.

This Court is not convinced.

In a line of cases already decided by this Court, the power of local government units to levy taxes, fees and charges emanates from Sec. 5, Article X of the 1987 Constitution, subject to the guidelines and limitations as Congress may provide. Sec. 5, Article X of the 1987 Constitution reads, thus:

> "Section 5. Each local government unit shall have the power 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. Such taxes, fees and charges shall accrue exclusively to the local governments."

Notably, Section 129 of the Local Government Code (LGC) of 1991 vests local government units, such as the petitioner in this case, with the authority to create their own sources of revenue, to wit:

> "SECTION 129. Power to Create Sources of Revenue. -
>
> Each local government unit shall exercise its power to create its own sources of revenue and to levy taxes, fees, and charges subject to the provisions herein, consistent with the basic policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local government units."

While the LGC of 1991 empowered local government units to levy taxes, fees and charges, it nonetheless, expressly subjected such power to some common limitations, such as those enumerated under Section 133(a) of the LGC of 1991, which reads as follows:

> "SEC. 133. Common Limitations on the Taxing Powers of Local Government Units. -
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> 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:
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> (a) **Income tax, except when levied on banks and other financial institutions**- (emphasis supplied)

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Petitioners' contention that the afore-mentioned provision does not prohibit a local government unit like Makati City from imposing taxes on holding companies which are similar to banks and other financial institutions is misplaced. A close scrutiny of Section 3A.02(p), in relation to Section 3A.02(g) and (h), of the Revised Makati Revenue Code, shows that respondent cannot be categorized as a non-bank financial intermediary.

Non-bank financial intermediaries are defined as "persons or entities whose principal functions include the lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them, or otherwise coursed through them, either for their own account or for the account of others. [18]" The person or entity must perform the aforementioned functions on a regular and recurring basis, and not on an isolated basis.

Moreover, there is nothing in CEMCO's Amended Articles of Incorporation that suggests, even remotely, that such entity may perform the functions of a financial intermediary. Rather, under the Second Article of the Amended Articles, respondent has been classified as a holding company, wherein the primary purpose for which it was incorporated is "to invest, purchase, or otherwise acquire and own, hold, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of real and personal

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[18] BIR Revenue Regulations No. 12-2003.

property of every kind and description, including, but not limited to shares of stock, bonds, debentures, notes, evidences of indebtedness, and other securities or obligation of any corporation or association engaged in the business of manufacturing cement; to pay for such in money or by exchanging stocks, bonds, securities, contracts, obligations, or other evidences of indebtedness of this or any other corporation; to receive, collect, and dispose of the interest, dividends, and income arising from such property; to possess and exercise in respect thereof all the rights, powers and privileges of ownership, including voting powers of any stock so owned."

It bears stressing that the primary purpose stated in the Articles of Incorporation of a corporation only serves to show what a corporation is empowered or authorized to do. It does not, and cannot, however, prove what the business of a corporation actually is. More so, it is the corporation's purpose clause that confers, as well as limits, the powers which a corporation may exercise. The main evidence of the purpose of a corporation is its articles of incorporation considering that such information is required by statute to be stated in the incorporation document.

Also, although the purpose clause in respondent's Amended Articles of Incorporation is broad and do allow for the acquisition of shares of stock of other corporations and "to receive, collect and dispose of the interest dividends and income arising from such property", it is clear from a reading of the same that its primary purpose is not to engage in business as a non-bank financial intermediary. The receipt of dividend and interest income is patently incidental.

Thus, its identification as a holding company is consistent with the definition of a holding company provided for in Securities and Exchange Commission, Office of the General Counsel (SEC-OGC) Opinion No. 11-15 dated February 10, 2011[19], as follows:

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[19]SEC-OGC Opinion No. 11-15, Applicability of Foreign Ownership Restriction; Holding Companies, cited in Anglo Ventures Corporation vs. City of Davao and Hon. Rodrigo S. Riola, in his capacity as the City Treasurer of Davao City, CTA AC No.155, July 12, 2016.

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> "A holding company has been defined by the Commission in several opinions. A holding company has been aptly defined as "a corporation organized to hold the stock of another or other corporations. Its essential feature is that it holds stock. The term "holding company" is equivalent to a parent corporation, having such an interest in another corporation, or power of control, that it may elect its directors and influence its management. A parent or holding company is one that controls another as a subsidiary or affiliate by the power to elect its management. Affiliates are those concerns that are subject to common control and operated as part of a system."

We now resolve whether petitioners' assessment of respondent for LBT under Section 3A.02(h) of the Makati Revenue Code has factual and legal bases. The Court answers in the negative.

Under the premises, it was clearly established that, indeed, respondent is a holding company and not a bank or financial intermediary, as erroneously categorized by petitioner. Thus, there was no factual nor legal basis in assessing respondent for local business tax based on the dividend income it received as stated in its Annual Financial Statements for taxable years 2008-2012.

Lastly, in the case of *Michigan Holdings, Inc. vs. The City Treasurer of Makati, Nelia A. Barlis*[20], this Court had already ruled that dividend income is not subject to local business tax except when levied on banks and other financial institutions.

We, thus, uphold our ruling therein and quote hereunder the relevant portion thereof, to wit;

> **"Dividend Income Not Subject to Local Business Tax**

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[20] CTA EB No. 1093 (CTA AC No. 99), June 17, 2015.

Section 133(a) of the Local Government Code expressly provides that the taxing powers of provinces, cities, municipalities, and barangays shall not extend to the levy of income tax, except when levied on banks and other financial institutions.

Section 131(e) of the LGC defines 'banks and other financial institutions' to include 'non-bank financial intermediaries, lending investors, finance and investment companies, pawnshops, money shops, insurance companies, stock markets, stock brokers and dealers in securities and foreign exchange, as defined under applicable laws, or rules and regulations thereunder.' This enumeration appears to be exclusive of other entities. Nowhere in the entirety of Section 131 is a holding company mentioned. However, this, by itself, does not place holding companies beyond the reach of local taxation, except on their income.

Section 143 of the Local Government Code is the law on local business taxes. Subsection (f) thereof expressly allows local taxation on banks and other financial institutions on their income from dividends, based on gross receipts of the preceding calendar year. What Section 3A.02(h) of the Revised Makati Revenue Code did was to expand the taxpayer base to encompass' owners or operators of banks and other financial institutions which include offshore banking, non-bank, financial intermediaries, lending investors, finance and investment companies, investment house, pawnshops, money shops, insurance companies, stock markets, stock brokers, dealers in securities, including pre-need companies, foreign exchange.' The Treasurer of Makati City, while invoking this Section 3A.02(h), made it applicable to holding companies, such as Michigan Holdings, by virtue of Section 3A.02(p), which provides that holding companies 'shall be taxed at the rate

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prescribed either under subsection (g) or (h), of the gross sales and/or receipts during the preceding calendar year.

Section 3A.02(h) of the Revised Makati Revenue Code, which took effect on January 1, 2006, imposes a local business tax on the dividend income of certain taxable entities. Section 3A.02(p) makes holding companies liable for this business tax.

> 'Section 3A.02(p). On Holding Company shall be taxed at the rate prescribed either under subsection (g) or (h) of the gross sales and/or receipts during the preceding calendar year.'

Thus, Section 3A.02(p) in relation to Section 3A.02(h), both of the Revised Makati Revenue Code, violates the limit set by Section 133(a) of the Local Government Code.

Indeed, if the business of a holding company is in the same class as that of a bank or other financial institutions, the Makati City tax ordinance could simply have included holding companies in its Section 3A.02(h), instead of placing them all by themselves in Section 3A.02(p) and then making the tax rates in either Section 3A.02(h) or (g) applicable to them. That holding companies, exclusively, were placed in a separate section, shows that they comprise a category distinct from the class of 'banks and other financial institutions' as defined by Section 131(e) of the LGC. That holding companies were subjected to a tax on dividend income which the LGU is not authorized and is in fact prohibited from levying on businesses other than banks and financial institutions, shows a deliberate intent to circumvent the prohibition laid down by Section 133(a) that the taxing powers of LGUs shall not extend to the levy of income tax, except on banks and other financial institutions.

There is more.

Section 27 (D) of the National Internal Revenue Code deals with rates of tax on certain passive incomes. Subsection (4) thereof, covering intercorporate dividends, states that 'Dividends received by a domestic corporation from another domestic corporation shall not be subject to tax'- meaning corporate income tax. Dividends are instead subject, under Section 27(D)(1), to "a final tax at the rate of twenty percent (20°/o).

> 'Under Section 27(D)(4) of the Tax Code, dividends received by a domestic corporation from another corporation are not subject to the corporate income tax. Such intra-corporate dividends are some of the passive incomes that are subject to the 20°/o final tax, just like interest on bank deposits. Intra-corporate dividends, being already subject to the final tax on income, no longer form part of the bank's gross income under Section 32 of the Tax Code for purposes of the corporate income tax.'

Thus, Section 3A.02(p) in relation to Section 3A.02(h), both of the Revised Makati Revenue Code, likewise violates Section 27(D)(4) of the National Internal Revenue Code.

Section 3A.02(p) of the Revised Makati Revenue Code is thus an ultra vires exercise of local taxing power, and cannot be given effect without violating the principle that an ordinance can neither amend nor repeal but must conform to a statute."

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

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

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
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
Chairperson, 1st Division