REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

LINBERG PHILIPPINES, INC., Petitioner,	**C.T.A. E.B. NO. 349** **(C.T.A. AC NO. 19)**
	Present:
- versus -	**ACOSTA,** *P.J.* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA,** *and* **PALANCA-ENRIQUEZ,** *JJ.*
CITY OF MAKATI and NELIA A. BARLIS, in her capacity as the TREASURER OF THE CITY OF MAKATI, Respondents.	**Promulgated:** NOV 1 1 2008 Apolinario 1:45 p.m.

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D E C I S I O N

UY, J.:

Petitioner seeks a review of the Decision dated June 28, 2007 and Resolution dated November 28, 2007, both rendered by the First Division of this Court[1] (Court in Division) in C.T.A. AC Case No. 19 entitled "Linberg Philippines, Inc., petitioner, vs. City of Makati and Nelia A. Barlis, respondents", pursuant to Section 18 of Republic Act No. 1125, as amended by Republic Act No. 9282. The dispositive portions thereof read as follows:

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[1] Ponencia of Presiding Justice Ernesto D. Acosta, concurred by Associate Justice Lovell R. Bautista and Associate Justice Caesar A. Casanova.

***Decision promulgated on June 28, 2007*:**

"In view of the foregoing, the Petition for Review is **PARTIALLY GRANTED** and the tax due against petitioner is hereby reduced to the amount of Nine Hundred Ninety Three Thousand Nine Hundred One Pesos 29/100 (P993,901.29), representing unpaid deficiency tax as contractor for the years, 2000, 2001, 2002, including surcharges and interest provided under Section 168 of the Local Government Code computed as follows:

	2000	2001	2002	Totals
Total Service Revenue	212,738,652.00	300,844,703.00	364,410,627.00	877,993,982.00
Allocation	30%	30%	30%	30%
Taxable Base	63,821,595.60	90,253,410.90	109,323,188.10	263,398,194.60
Tax Due				
P50m	299,500.00	299,500.00	299,500.00	898,500.00
Over P50m x 75% of 1%	103,661.97	301,900.58	444,923.91	850,486.46
Total Tax Due	403,161.97	601,400.58	744,423.91	1,748,986.46
Less: Tax Payment	348,523.36	451,267.07	486,916.36	1,286,706.79
Tax Deficiency	54,638.61	150,133.51	257,507.55	462,279.67
Add: Surcharge (25%)	13,659.65	37,533.38	64,376.89	115,569.92
Total	68,298.26	187,666.89	321,884.44	577,849.59
Add: Interest (2% for 36 mos.)	49,174.75	135,120.16	231,756.80	416,051.70
Total Tax Deficiency	117,473.01	322,787.05	553,641.23	993,901.29

SO ORDERED." [2]

Resolution promulgated on November 28, 2007:

"**WHEREFORE**, the Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED."[3]

THE FACTS

The facts, as found by the Court in Division, are undisputed.

[2] Docket, pp. 41-59.
[3] Docket, pp. 60-62.

Petitioner is a duly organized corporation, existing under Philippine laws, with principal office at Suite 20-D, Rufino Pacific Tower, corner Herrera Street, Ayala Avenue, Makati City. It is engaged in the business of financing the construction and operation of power plants primarily through "Build-Operate-Transfer" (BOT) agreements with its customers.

Respondent City of Makati is a public corporation created and existing pursuant to law. It may be served with notices and other court processes through the Office of the City Mayor at the Makati City Hall, City of Makati, Metro Manila. Co-respondent Nelia A. Barlis is the incumbent Treasurer of the City of Makati and is impleaded in her official capacity. She may be served with notices and other processes of this Honorable Court through the Office of the City Treasurer, Makati City Hall, City of Makati, Metro Manila.

On March 7, 2003, petitioner received the questioned Notice of Assessment [4] for deficiency business taxes plus surcharges and interests covering the taxable years 2000, 2001 and 2002 in the aggregate amount of Php8,714,744.53. The alleged deficiency business taxes arose from respondent's reclassification of petitioner's business from a "holding or investment" company to a "contractor". Not in agreement with the questioned assessment, petitioner on May 6, 2003 filed a Letter Protest dated May 5, 2003,[5] but this was denied by respondent City Treasurer in a Letter dated May 19, 2003[6], and received by petitioner on June 4, 2003.

On July 3, 2003, petitioner assailed the denial of the protest before the Regional Trial Court (RTC) of Makati City docketed as Civil Case No. 03-754

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[4] Annex "C", Petition for Review; Docket; p. 63.
[5] Annex "E", Petition for Review; Docket; pp. 65-71.
[6] Annex "F", Petition for Review; Docket, pp. 72-73.

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entitled Linberg Philippines, Inc. v. City of Makati and Luz R. Yamane, in her capacity as the Treasurer of Makati by way of "Appeal with prayer for Prohibition and Preliminary Injunction"[7] pursuant to Section 195 of the Local Government Code.

In a Decision dated August 30, 2005, said case was dismissed for lack of merit. The Motion for Reconsideration of said Decision was likewise denied on October 28, 2005.[8] Dissatisfied, petitioner appealed the said denial before this Court on December 19, 2005, docketed as C.T.A. AC No. 19.[9]

On June 28, 2007,[10] the Court in Division rendered the subject assailed Decision partially granting the petition and reducing the deficiency taxes of petitioner. Thereafter, a Motion for Reconsideration of the aforesaid Decision was filed by petitioner on July 24, 2007, but the same was denied in the assailed Resolution dated November 28, 2007 of the Court in Division.[11]

Hence, this recourse before the Court *En Banc* praying that: (a) the assailed Decision and Resolution dated June 28, 2007 and November 28, 2007, respectively, be reconsidered; (b) petitioner be declared as not liable to pay alleged deficiency business tax plus surcharge and interest in the amount of Nine Hundred Ninety Three Thousand Nine Hundred One and 29/100 Pesos (Php993,901.29) for the years 2000, 2001 and 2002; (c) respondents City of Makati and City Treasurer be enjoined from further collecting business taxes from petitioner; (d) the outstanding Notice of Assessment be withdrawn and cancelled; and (e) in the alternative, if the Assessment is not cancelled,

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[7] Annex "G", Petition for Review; Docket, p. 74.
[8] Annex "C", Petition for Review, Docket, p. 150.
[9] Annex "N", Petition for Review; Docket, pp. 151-184.
[10] Annex "A", Petition for Review, Docket pp. 41 – 59.
[11] Annex "B", Petition for Review; Docket, pp. 60-62.

the City Treasurer be ordered to deduct the uncollected sales from the tax base for the years 2000, 2001 and 2002 upon presentation of proof by petitioner.

Respondents filed their Comment to the instant petition on February 29, 2008[12] and this case was deemed submitted for decision in the Resolution dated March 24, 2008.[13]

Hence, this Decision.

THE ISSUES

Petitioner raises the following grounds in support of the instant petition for the Court *En Banc*'s consideration:

A. Respondent Makati City does not have jurisdiction to tax petitioner;

B. It is not legally incumbent upon petitioner to show that it had paid business taxes in the different localities where its branch offices are located;

C. Uncollected sales should be deducted from the tax base;

D. Petitioner is not a contractor;

E. Petitioner acted in good faith in representing itself to be a financing/holding company.

Based on the foregoing grounds, the sole issue for the Court *En Banc's* resolution is whether or not the Court in Division committed errors of

[12] Docket, pp. 565-574.
[13] Docket, p. 576.

fact or law that would warrant a reversal or modification of its assailed Decision and Resolution.[14]

Petitioner's Arguments

Petitioner submits that upholding the taxing jurisdiction of respondent Makati City on thirty percent (30%) of sales made in the locality where petitioner has a branch office is contrary to the situs rules under Section 150 of the Local Government Code and Article 243 of its Implementing Rules and Regulations (IRR). The Court in Division allegedly assumed that petitioner and its customers negotiated and planned the construction of the power plants in Makati City, and that its sales are recorded in Makati City because its sales invoices are reviewed and approved in its principal office in Makati. However, petitioner contends that these are merely assumptions that are not supported by evidence. If petitioner is classified as a contractor, as respondent Makati City maintains, all if not substantially all, of the controlling or operative acts that constitute petitioner's sale of services, must be done in Makati City.

Further, petitioner argues that Section 150 of the Local Government Code and Article 243 of the IRR of said Code clearly provide that if a sale made in a locality where the taxpayer maintains a branch or sales office, the tax thereon shall accrue and be paid to the city or municipality where such branch or sales office is located. It is only in a case when there is no branch office in the locality where the sale transaction is made, that the sale shall allegedly be duly recorded in the principal office, and the taxes due thereon

[14] Section 10 of Rule 43 of the 1997 Rules of Civil Procedure, in relation with Section 4(b) of the Revised Rules of the Court of Tax Appeals.

shall be allocated between the principal office and the factory, project office, plant or plantation using the 30-70 formula prescribed in Section 150.

Petitioner stresses that it is not a contractor because it does not perform services to its customers for a fee, as it merely finances the construction of the power plants for its customers through BOT arrangements. Petitioner's business cannot allegedly be described as essentially the sale of services, but is more of a business of a financing company. Contrary to the conclusions by the Court in Division, petitioner points out that it is of no consequence that it causes the construction, and/or manages/operates the power plants, because the fact remains that it advances the necessary capital for the construction of the power plant, and transfers the ownership thereof, after the agreed BOT period, to its customer in exchange for a nominal fee, in some instances, even without the payment of any fee; and that transfer of ownership, undoubtedly proves that it merely finances the purchase of the power plant by its customer, and that it does not sell services for a fee.

Respondents' Counter-arguments

Respondents counter-argue that the existence of petitioner's principal office in Makati City, and the admission thereof, constitutes prima facie evidence that it is conducting business in said territorial jurisdiction, and therefore, respondent Makati City has jurisdiction to tax petitioner. Although petitioner has been insistent, contradicting itself at times, that it has not been doing business in Makati City but only in its branch offices, it is necessarily obligated to prove its claim that indeed, the offices maintained outside the City of Makati are branch offices as defined by law, and that, it has been paying its due taxes thereat, otherwise, such bare and naked argument, allegedly stays as it is, bare and naked.

According to respondents, uncollected sales should be deducted from the tax base; that the Court in Division noted the definition of gross sales or receipts, which specifically mention that exclusions from the computation only enumerate the following: discounts, if determinable at the time of sales, sales return, excise tax and VAT. Uncollected sales is not allegedly included in the said definition, hence, it could not be deducted from the tax base.

Petitioner's nature of business allegedly falls squarely under the definition of a "contractor" under Sections 3A.01(q) and 3A.02(f) of the Makati Revenue Code,[15] as well as, under Section 131 of the Local Government Code. Furthermore, the documents presented by petitioner, such as its Amended Articles of Incorporation, Statements of Income and Returned Earnings for the Years ended December 31, 1999 and 1998, Statements of Cash Flows for the years ended December 31, 1999 and 1998 and Notes to Financial Statements, show that it is engaged in the sale of services and it serves as an independent contractor.

Lastly, respondents maintain that petitioner was never in good faith in representing itself to be a financing/holding company, and that the Court in Division aptly declared that petitioner cannot rightfully claim good faith having made the representation itself as a holding company during the initial application of its business permit; and that for its willful neglect to file a correct return for the proper evaluation of the taxing authority, the taxpayer should pay a deficiency tax, and if payment has been made before the discovery, a

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[15] Referring to Municipal Ordinance No. 072-92, otherwise known as the Makati Revenue Code.

surcharge of the amount of such tax is proper to be collected.

THE COURT *EN BANC'S* RULING

Petitioner's arguments are devoid of merit.

A careful and closer look at the arguments set forth by petitioner in the instant petition for review would readily reveal that the grounds relied upon and the matters raised herein, are mere restatements of petitioner's previous arguments raised before the Court in Division, which had already been exhaustively discussed and passed upon by it in the assailed Decision and Resolution.

At the outset, petitioner questions the jurisdiction of respondent City of Makati to tax its business. The Court in Division settled this issue by pronouncing that the City of Makati, where petitioner's principal office is found, has the power to tax its business, but as much as only thirty (30%) percent of petitioner's gross sales/receipts.

We note that aside from petitioner's admission that its principal office is in Makati City,[16] the Court in Division found that its principal office is in charge of reviewing and approving the correctness of the invoices issued by the branch offices. Such activities done in the principal office is evident of business transactions which should necessarily be recorded. This, petitioner failed to refute as it did not adduce evidence to prove that there are no recorded sales or business transactions in its office in Makati City, and its alleged payments of its business taxes to the municipalities where it has its branch offices were also not proven.

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[16] Paragraph 2.1, Petition for Review, p. 3, Docket, p. 10.

It bears emphasizing that petitioner cannot merely deny the fact that it is covered by the taxing jurisdiction of Makati City without adducing evidence to prove otherwise. Even if it raised mere questions of law in its petition, petitioner should have strengthened its claim by credibly presenting all its evidence at the trial court level in order to secure a favorable resolution of the questions that were raised in its petition.

Petitioner's business involves financing the construction and operation of private power plants through a Built-Operate-Transfer (BOT) arrangements with its customers. Admittedly, under the BOT arrangement, petitioner advances the necessary capital by employing and paying for the services of a contractor which will build the power plant. These transactions, prior to the completion of the power plants and branch offices of petitioner, are considered as activities of doing business, which are necessarily taxable in its principal office, considering that all the documents and deals were arranged in its principal office in Makati City.

In this regard, petitioner is correct in invoking the applicability of Section 150 of the Local Government Code for purposes of determining the situs of tax in the instant case. However, We would like to stress the importance of the relevant portion of said provision, to wit:

> "**Section 150. Situs of the Tax**.-(a) xxx. In cases where there is no such branch or sales outlet in the city or municipality where the sale or transaction is made, the sale shall be duly recorded in the principal office and the taxes due shall accrue and shall be paid to such city or municipality."

We reiterate that in the ordinary course of business, particularly in the nature of a BOT business, prior to the building and construction of any power

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plant at any locality, the usual negotiations thereon, until the full completion of the contract of BOT, is usually done in the principal office. Naturally, this transaction is taxable as it is an exercise of a business. Although the power plants, which are subject of petitioner's contract of BOT, are situated at different localities, still the act of financing the construction and operation thereof, are considered as "doing business" which appears to have been performed at petitioner's principal office in Makati City. It is therefore clear that respondent City of Makati has jurisdiction to tax petitioner.

Moving on to the issue regarding the uncollected sales as part of the tax base, We agree with the Court in Division that such amount should be deducted from the tax base. However, as found by the Court in Division, petitioner failed to prove which part of the tax base was uncollected and which part should be deducted. As petitioner was remiss in presenting sufficient evidence to establish its case during trial, it cannot be made to correct its negligence before the Court *En Banc,* as it should have been watchful of the proceedings at the trial court, much more, of the outcome of the same.

Anent the nature of petitioner's business, We maintain that petitioner is a contractor, and not a financing or holding company. *Contractor* is referred to in the Local Government Code of 1991 as to include *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.*[17] The same definition is likewise provided now under Section 3A.01(t) of the Revised Makati Revenue Code.[18]

In other words, the term "contractor" includes any person whether natural or juridical as long as the activity of such person consists essentially of the sale of services for a fee. In the case at bench, petitioner is definitely engaged in such sale of services.

In addition, the fact that petitioner is a contractor, and not a financing or holding company, is further bolstered by petitioner's Amended Articles of Incorporation which provides, that petitioner's primary purpose is "[t]o carry on the business of managing and operating power plants, including, but not limited to, the acquisition by purchase, exchange, assignment, importation or otherwise, and to sell, assign, transfer, exchange, mortgage, pledge, traffic or otherwise to enjoy and dispose of machineries, equipment and buildings, and generally perform, preserve, improve or enhance the value of any such machineries, equipment and buildings to the extent permitted by law".[19] Based on the aforementioned primary purpose of petitioner, it is readily apparent that the business it is supposed to carry on, fall within the ambit of performing some form or kind of service.

Moreover, as found by the Court in Division, the nature of petitioner's operations as described in its financial statements, can be categorized as a contractor based on the Makati Revenue Code, the provisions of which are

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[17] Section 131(h) of the Local Government Code of 1991.
[18] City Ordinance No. 2004-A-025, otherwise known as "An Ordinance Adopting The Revised Makati Revenue Code" [formerly under Section 3A.01(q) of Municipal Ordinance No. 072-92, otherwise known as the Makati Revenue Code].
[19] Assailed Decision, p. 10 (adopting the factual findings of the Regional Trial Court of Makati City in Civil Case No. 03-754, entitled "Lindberg Philippines, Inc. vs. The City of Makati and Luz R. Yamane, in her capacity as the Treasurer of Makati"); Docket, p. 50.

applicable to petitioner. Further, it is worth pointing out that even in the case of Tatad vs. Garcia[20] cited by petitioner, it was expressly mentioned therein that under the BOT arrangement (which petitioner is engaged in), there is not only the financing of the project that is involved, but also the construction, maintenance and operation thereof. Thus, petitioner is undeniably not only engaged in financing or investment activities, but also in the sale of services which readily classifies it as a contractor.

Finally, on the issue regarding the imposition of surcharge and penalties, We find that the same to be in accordance with law.

Section 168 of the Local Government Code of 1991, categorically provides:

> "SEC. 168. *Surcharges and Penalties on Unpaid Taxes, Fees, or Charges.* – The sanggunian may impose a surcharge not exceeding twenty-five percent (25%) of the amount of taxes, fees or charges not paid on time and an interest at the rate not exceeding two percent (2%) per month of the unpaid taxes, fees or charges including surcharges, until such amount is fully paid but in no case shall the total interest on the unpaid amount or portion thereof exceed thirty-six (36) months."

Clearly, under the authority granted in the foregoing provision, respondent City of Makati can impose surcharges for late payments of and interests on unpaid taxes, and penalties thereto, as provided in Sections 3B.04, 3B.05, and 3B.06, respectively, of City Ordinance No. 2004-A-025 otherwise known as the Revised Makati Revenue Code (formerly under Sections 3A.09 and 3A.10 of the Makati Revenue Code[21]).

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[20] 243 SCRA 436.
[21] Municipal Ordinance No. 072-92.

Consequently, upon discovery by the local government that petitioner misrepresented itself and caused a different tax rate to be applied to it, there is legal basis to impose surcharge and penalties.

Even granting for the sake of argument that it was respondent who classified petitioner as a holding or investment company, still, it was petitioner who submitted certain documents which misled or caused respondent to believe that petitioner was engaged in an investment business. Petitioner's failure to cause the correction of such classification is a sign of bad faith on its part because such classification appears to be more beneficial to it with regard to tax liabilities.

In the light of the foregoing discussions, the Court *En Banc* finds no reversible error committed by the Court in Division that would merit a reversal of its assailed Decision and Resolution dated June 28, 2007 and November 28, 2007, respectively.

WHEREFORE, premises considered, the instant petition is hereby **DENIED DUE COURSE**, and, accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII 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 *En Banc*.

ERNESTO D. ACOSTA
Presiding Justice

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