

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

THE CITY OF MAKATI
represented in this case by
its City Mayor, the HON.
JEJOMAR C. BINAY, the OIC
City Treasurer, NELIA A.
BARLIS, and the OIC of the
Business Tax Division,
FELITO A. MANRIQUE,
Petitioner,

-versus-

TRANS-ASIA POWER
GENERATION
CORPORATION,
Respondent.

CTA EB CASE NO. 1086
(CTA AC Case No. 87)

Present:
DEL ROSARIO, P.J.,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS,
RINGPIS-LIBAN, JJ.

Promulgated:

JAN 21 2015

10:45a.m.

X-----X

DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under *Section 2(a)(2), Rule 4*, in relation to *Section 4(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals, as amended*, seeking the reversal of the Decision¹ and Resolution² rendered by the Special First Division of this Court on July 10, 2013 and October 23, 2013, respectively.

The antecedent facts as culled from the Decision of the Special First Division of this Court are as follows:

"Petitioner City of Makati is a local government unit and is sued herein as such through its City Mayor in the latter's capacity or official duty to enforce laws"

¹ Penned by Associate Justice Esperanza R. Fabon-Victorino and concurred in by Associate Justice Erlinda P. Uy; *En Banc* Docket, pp. 90-107.

² *Id.*, at 117-120.

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and regulations relative to the governance of and the exercise of corporate powers by the City.

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

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

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

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

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

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

After the exchange of various pleadings and trial, the Court *a quo* rendered the assailed Decision³ of December 22, 2010, the dispositive portion of which reads:

WHEREFORE, premises considered, judgment is hereby rendered in favor of the plaintiff Trans-Asia Power Generation Corporation and against defendant City of Makati, ordering the latter the following:

- 1) To go back to its earlier classification of plaintiff as 'Producer' or 'Manufacturer' as provided in the Makati Revenue Code for local business tax purposes;
- 2) To issue tax credit to plaintiff in the total amount of Php583,599.00 representing excess local business tax for the first, second, and third quarters of 2006;
- 3) To refund subsequent business tax payment made in excess of 52.5% of 1% that may have been paid by plaintiff under protest and;
- 4) To pay attorney's fees in the amount of Php20,000.00

SO ORDERED.

In finding for respondent, the RTC looked into the nature of respondent's business and its operation. It found that respondent is engaged in the business of transforming fuel into electricity and selling it to the end user. Following the *ejusdem generis* rule, the RTC ratiocinated that a careful analysis of respondent's business in line with the definition of 'manufacturer/producer' and 'contractor' and the

³ *En Banc* Docket, pp. 54-62.

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enumerations of persons and things that follows after each definition show that respondent's business operation falls within the scope of manufacturer/producer.

On April 19, 2011, petitioner moved for reconsideration but it was denied in the Order dated January 27, 2012."⁴

On July 10, 2013, the Special First Division of this Court promulgated a Decision⁵ affirming the Decision and Order of the RTC of Makati City, Branch 134, dated December 22, 2010 and January 27, 2012, respectively. The dispositive portion of the said Decision reads:

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

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

SO ORDERED."⁶

Petitioner thereafter filed a "Motion for Reconsideration (of the Decision dated 10 July 2013)"⁷ which was denied by the Court *a quo* in a Resolution⁸ dated October 23, 2013, the dispositive portion of which reads:

"WHEREFORE, there being no new matters and issues advanced that will merit reconsideration, let alone modification of the assailed Decision of July 10, 2013,

⁴ *Id.*, at 61-62.

⁵ *Supra* note 1.

⁶ *En Banc* Docket, p. 106; See Resolution dated October 23, 2013, *En Banc* Docket, p. 118.

⁷ Filed on August 14, 2013; *En Banc* Docket, pp. 108-115.

⁸ *Supra* note 2.

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2013, petitioner's Motion for Reconsideration dated August 13, 2013 is hereby **DENIED**, for lack of merit.

On the other hand, the Manifestation dated September 24, 2013 filed by respondent on September 26, 2013, is **NOTED**.

SO ORDERED.⁹

Hence, the instant Petition for Review was filed.

Petitioner raises the following arguments, to wit:¹⁰

- "I. Whether or not the Honorable Special First Division of the Court of Tax Appeals gravely erred in affirming the Decision dated 22 December 2010 and the Order dated January 27, 2012 both rendered by the Hon. Regional Trial Court of Makati City, Branch 134 in Civil Case No. 06-880, and thus classifying respondent Trans-Asia Power Generation Corporation as a '**MANUFACTURER**', and not as a '**CONTRACTOR**', for local business tax purposes, and order the petitioner:
 - a. To go back to its earlier classification of the herein respondent as *Producer*, albeit the overwhelming evidence to the contrary.
 - b. To credit/refund to herein respondent the amount representing alleged excess local business taxes for the 1st, 2nd and 3rd quarters of 2006, as well as the local business tax payment allegedly made in excess of 52.5% of 1% that may have been paid by respondent under protest.
- II. Whether or not the Honorable Special First Division of the Court of Tax Appeals gravely erred in failing to make a ruling that respondent Trans-Asia Power Generation Corporation miserably failed to overcome the presumption against tax refunds.⚡

⁹ *En Banc* Docket, p. 120.

¹⁰ *En Banc* Docket, pp. 6-7.

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III. Whether or not the Honorable Special First Division of the Court of Tax Appeals gravely erred in affirming the Honorable Regional Trial Court of Makati City's Decision dated December 22, 2010 and the Order dated January 27, 2012, erroneously awarding **P20,000.00 as attorney's fees** in favor of respondent, Trans-Asia Power Generation Corporation, despite the absence of awards for moral and exemplary damages."

The principal issue to be resolved in this case is whether petitioner correctly reclassified respondent as "Contractor" for local business tax purposes.

Petitioner vigorously argues that respondent's actual nature of business corresponds with the definition of a "Contractor" under Section 131(h) of the Local Government Code (LGC) of 1991. It contends that respondent not only supplies electricity to Hi-Cement but also manages, operates and maintains and even repairs the power plant/s of Hi-Cement, for a substantial fee or consideration. Petitioner therefore concludes that respondent is considered as a "Contractor", engaged in the installation of electricity, and even management and operation of power plants.

Petitioner anchors its argument that respondent is a "service-enterprise" based on the General Terms and Conditions of its Certificate of BOI Registration dated September 23, 1996 (Exhibit "A")¹¹ requiring the latter to submit the following reporting requirement to the Infrastructure & Service-Oriented Industries Department; and the Electricity Supply Agreement (ESA) between Hi Cement and Trans Asia-Power Generation Corporation (Exhibit "P")¹² requiring Hi Cement to pay for Electricity Fees for the services rendered by respondent.

In its comment, respondent argues that it is engaged in the business of manufacture and sale of electricity as it uses bunker fuel as raw material for its power generation plant and converts the same fuel by mechanical and chemical

¹¹ RTC Docket, pp. 107-111.

¹² *Id.*, at 142-177.

process to electricity. Respondent adds that it takes bunker fuel as a raw material then feeds it into the plant's diesel engine, which ignites and burns the fuel, producing heat energy. In the instant case, the fuel undergoes a process called combustion; while heat is used to activate the plant's turbine, converting heat energy into mechanical energy.

Respondent asserts that the nature of its business fits in the definition of a "manufacturer" under Section 131(o) of the LGC and Section 3A.01(II) of the Makati Revenue Code as it transforms the chemical energy in fuel into electrical energy in generating electricity. Thus, respondent claims that it is entitled to a refund of excess local business taxes that it paid to petitioner under protest.

Moreover, respondent counters that the General Terms and Conditions of its Certificate of Registration with the BOI do not establish that it is a contractor nor state that it is a "service-enterprise". Even assuming *arguendo* that the BOI Certificate of Registration classifies respondent as "service-enterprise", it was solely for the purpose of availing benefits under the Omnibus Investments Act and is neither relevant nor controlling for local business tax purposes. Similarly, respondent argues that the additional undertakings rendered by respondent under the ESA are merely ancillary to and in aid of its primary function as producer of electricity in order to ensure the safe and continuous delivery of the electricity sold.

The instant petition is partly meritorious.

The definitions of "Contractor" and "Manufacturer" provided under Section 131 (h) and (o), respectively, of the LGC of 1991, and Sections 3A.01(t) and 3A.01(II) of the Makati Revenue Code, are the guiding light in order to correctly classify respondent's nature of business, thus:

SEC. 131. Definition of Terms. — When used in this Title, the term:

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(h) "Contractor" includes persons, natural or juridical, not subject to professional tax under Section 139 of this Code, whose activity consists essentially of the sale of all

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kinds of services for a fee, regardless of whether or not the performance of the service calls for the exercise or use of the physical or mental faculties of such contractor or his employees.

As used in this Section, the term "contractor" shall include general engineering, general building and specialty contractors as defined under applicable laws; filling, demolition and salvage works contractors; proprietors or operators of mine drilling apparatus; proprietors or operators of dockyards; persons engaged in the installation of water system, and gas or electric light, heat, or power; proprietors or operators of smelting plants, engraving, plating, and plastic lamination establishments; proprietors or operators of establishments for repairing, repainting, upholstering, washing or greasing of vehicles, heavy equipment, vulcanizing, recapping and battery charging; proprietors or operators of furniture shops and establishments for planing or surfacing and recutting of lumber, and sawmills under contract to saw or cut logs belonging to others; proprietors or operators of dry cleaning or dyeing establishments, steam laundries, and laundries using washing machines; proprietors or owners of shops for the repair of any kind of mechanical and electrical devices, instruments, apparatus, or furniture and shoe repairing by machine or any mechanical contrivance; proprietors or operators of establishments or lots for parking purposes; proprietors or operators of tailor shops, dress shops, milliners and hatters, beauty parlors, barbershops, massage clinics, sauna, Turkish and Swedish baths, slenderizing and building saloons and similar establishments; photographic studios; funeral parlors; proprietors or operators of hotels, motels, and lodging houses; proprietors or operators of arrastre and stevedoring, warehousing, or forwarding establishments; master plumbers, smiths, and house or sign painters; printers, bookbinders, lithographers; publishers except those engaged in the

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publication or printing of any newspaper, magazine, review or bulletin which appears at regular intervals with fixed prices for subscription and sale and which is not devoted principally to the publication and advertisements; business agents, private detective or watchman agencies, commercial and immigration brokers, and cinematographic film owners, lessors and distributors.

xxx

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

xxx

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

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(t) Contractor — includes persons, natural or juridical, not subject to professional

tax whose activity consists essentially of the sale of all kinds of services for a fee regardless of whether or not the performance of the service calls for the exercise or use of the physical or mental faculties of such contractor or his employees.

xxx

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

Based on the foregoing definitions, We affirm the findings of the Special First Division of this Court in the assailed Decision that respondent's nature of business falls within the category of "manufacturer/producer" and not "contractor" of electricity. We quote, to wit:

"[T]here is no reason to doubt that respondent's business operation falls within the purview of a 'manufacturer/producer'. To stress the obvious, the ruling of the RTC on this point is hereby quoted with approval, thus:

A careful analysis of the nature of plaintiff's business in line with the definition of 'manufacturer/producer' and 'contractor' and the enumeration of persons and things that follows after each definition show that plaintiff's business

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

Petitioner's assertion that a scrutiny of the ESA would show that respondent not only supplies electricity to Hi Cement but also manages, operates, maintains and even repairs the power plant/s of Hi Cement for a fee, hence, it fits the definition of 'contractor' under the law also failed to make much impression.

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

The Court as well agrees with respondent that the additional undertakings under the ESA are merely ancillary to and in aid of its primary function as a producer of electricity, and are not even services

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rendered to Hi Cement, but rather are additional undertakings to ensure the safe and continuous delivery of the electricity sold.

Anent the Certificate of Registration issued by the BOI, respondent was correct in saying that although the said document classified respondent under the category of an 'Infrastructure & Service-Oriented Industries', the said classification is not definitive of its real business purpose. In fact, there is nothing in the document that explains the classification. It merely enumerates the documents for submission by respondent."¹³

However, We do not find the award of attorney's fees justified in this case. As a rule, no premium should be placed on the right to litigate. As aptly discussed by the Supreme Court in ***ABS-CBN Broadcasting Corporation v. Honorable Court of Appeals, et al.***,¹⁴ the power of the court to award attorney's fees under Article 2208 of the Civil Code¹⁵ demands factual, legal, and equitable justification, thus:

"As regards attorney's fees, the law is clear that in the absence of stipulation, attorney's fees may be recovered as actual or compensatory damages under any of the circumstances provided for in Article 2208 of the Civil Code. **2**

¹³ *En Banc* Docket, pp. 103-104.

¹⁴ G.R. No. 128690, January 21, 1999.

¹⁵ ART. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:

1. When exemplary damages are awarded;
2. When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;
3. In criminal cases of malicious prosecution against the plaintiff;
4. In case of a clearly unfounded civil action or proceeding against the plaintiff;
5. Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim;
6. In actions for legal support;
7. In actions for the recovery of wages of household helpers, laborers and skilled workers;
8. In actions for indemnity under workmen's compensation and employer's liability laws;
9. In a separate civil action to recover civil liability arising from a crime;

The general rule is that attorney's fees cannot be recovered as part of damages because of the policy that no premium should be placed on the right to litigate. They are not to be awarded every time a party wins a suit. The power of the court to award attorney's fees under Article 2208 demands factual, legal, and equitable justification. **Even when claimant is compelled to litigate with third persons or to incur expenses to protect his rights, still attorney's fees may not be awarded where no sufficient showing of bad faith could be reflected in a party's persistence in a case other than erroneous conviction of the righteousness of his cause.**¹⁶ [Emphasis supplied.]

Under the circumstances prevailing in the instant case, there is no factual or legal basis for an award of attorney's fees. In fact, petitioner merely exercised its function in classifying respondent's nature of business based on the documents they have gathered. Contrary to the assailed Decision, respondent was given an opportunity to challenge the said reclassification by filing an administrative protest on July 17, 2006 (Exhibit "J")¹⁷ and "Letter Request for Refund" on October 13, 2006 (Exhibit "L")¹⁸ before petitioner. Therefore, the reclassification of respondent's status from "producer" to a "services-other co." without showing of bad faith or fraud on the part of petitioner does not justify the award of attorney's fees.

WHEREFORE, the petition for review is hereby **PARTLY GRANTED.** The Decision of the Special First Division of this Court in CTA AC Case No. 87 dated July 10, 2013 and its Resolution dated October 23, 2013 are hereby **AFFIRMED WITH MODIFICATION.** We **DELETE** the award of attorney's fees in favor of respondent.

SO ORDERED.


CIELITO N. MINDARO-GRULLA
Associate Justice

¹⁶ *Id.*

¹⁷ RTC Docket, p. 120.

¹⁸ *Id.*, at 122-141.

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WE CONCUR:



ROMAN G. DEL ROSARIO

Presiding Justice



JUANITO C. CASTAÑEDA, JR.

Associate Justice



LOVELL R. BAUTISTA

Associate Justice



ERLINDA P. UY

Associate Justice



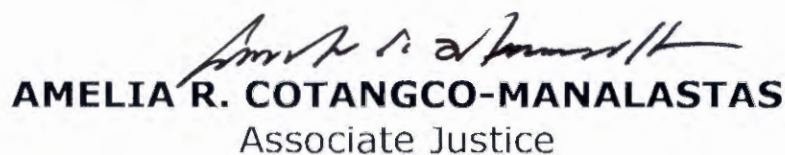
CAESAR A. CASANOVA

Associate Justice



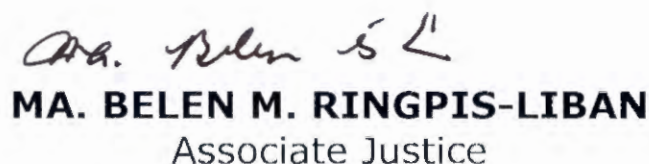
ESPERANZA R. FABON-VICTORINO

Associate Justice



AMELIA R. COTANGCO-MANALASTAS

Associate Justice

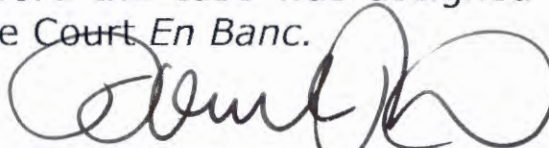


MA. BELEN M. RINGPIS-LIBAN

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 among the members
of the Court *En Banc* before the case was assigned to the
writer of the opinion of the Court *En Banc*.



ROMAN G. DEL ROSARIO

Presiding Justice