REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

ASC INVESTORS, INC., Petitioner,	**CTA AC NO. 134** **(Civil Case No. 35,671-14)**
- versus -	Members:
CITY OF DAVAO and HON. RODRIGO S. RIOLA, in his official capacity as the City Treasurer of Davao City, Respondents.	**CASTAÑEDA, JR.,** *Chairperson, and* **CASANOVA,** *JJ.* Promulgated: DEC 01 2016 4:30 p.m.

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AMENDED DECISION

CASTAÑEDA, JR., *J.*:

For this Court's resolution is petitioner's **Motion for Reconsideration**, filed on July 29, 2016, without respondent's comment despite notice as per Records Verification dated September 13, 2016.

Petitioner seeks reconsideration of the Court's Decision promulgated on July 14, 2016 (assailed Decision)[1], the dispositive portion of which reads:

> "**WHEREFORE**, in view thereof, the instant Petition for Review is **DISMISSED**, for lack of jurisdiction.
>
> **SO ORDERED**."[2]

[1] Docket, pp. 287-295.
[2] Docket, pp. 294-295.

In the assailed Decision, the Court ruled that it had no jurisdiction to entertain the appeal considering that petitioner failed to file its appeal with the Court within the thirty (30)-day period from receipt of the denial of its Motion for Reconsideration. The Court found that petitioner received the Order dated December 17, 2014[3] of the Regional Trial Court (RTC) of Davao City, Branch 16, denying its Motion for Reconsideration in Civil Case No. 35,671-14 on December 17, 2014. Hence, petitioner had thirty (30) days from said date or until January 16, 2015 within which to file its Petition for Review before this Court. However, petitioner only filed its Petition for Review on February 6, 2015.

Petitioner moves for reconsideration of the assailed Decision on the ground that petitioner actually received a copy of the Order dated December 17, 2014 of the RTC of Davao City, Branch 16, on January 8, 2015. Hence, when it filed the Petition for Review on February 6, 2015, it filed the present appeal within the 30-day reglementary period. According to petitioner, while there is a stamp on the face of the Order which bears the date December 17, 2014, the said stamp shows that it belongs to the RTC of Davao City, Branch 16, and not that of petitioner or petitioner's counsel.

Moreover, petitioner submits that the face of the envelope containing the Order dated December 17, 2014 shows that it was mailed to petitioner's counsel as Registered Mail No. 30 on December 22, 2014 and was received by the San Juan Post Office on December 30, 2014.

Furthermore, petitioner claims that its counsel confirmed with the RTC of Davao City, Branch 16 that the Order dated December 17, 2014 in Civil Case No. 35,671-14 was mailed to petitioner's counsel on December 22, 2014. As proof, it submits a Certification dated July 27, 2016 issued by Atty. Jocelyn Alibang-Salud, Branch Clerk of Court of RTC of Davao City, Branch 16, attesting to that fact and a certified true copy of the RTC of Davao City, Branch 16's Daily Statement of Mailing.

Lastly, petitioner submits a Certification issued by the San Juan Central Post Office stating that Registered Mail No. 30 addressed to petitioner's counsel Carag De Mesa Zaballero San Pablo & Abiera Law Offices was delivered by the postman and was duly received on January 8, 2015.

[3] Annex "P-2", Petition for Review, docket, p. 42; RTC Records, p. 160.

Thus, petitioner maintains that its Petition for Review was filed within the reglementary period and the Court, therefore, has jurisdiction to entertain the instant petition.

After re-examination of the records of the case and taking into consideration petitioner's evidence, the Court finds that petitioner actually received on January 8, 2015 a copy of the Order of RTC of Davao City, Branch 16 dated December 17, 2014. Thus, when petitioner filed the instant Petition for Review on February 6, 2015, it was filed within the 30-day reglementary period.

Considering the foregoing, petitioner is correct in saying that the Court has jurisdiction to entertain the petition.

We shall now resolve the petition based on the merits.

The issues for resolution are as follows: [4]

1. Whether or not the City of Davao may require ASCI to pay 0.55% local business tax for the third and fourth quarters of 2011 on the dividends on its SMC shares of stock and interest income on its money market placements for the year 2010; and

2. Whether or not Davao City's requirement that petitioners should pay under protest the alleged deficiency local business tax before acting on its protest is valid.

Petitioner argues that the assessment against it for 0.55% local business tax for the third and fourth quarters of 2011 on the dividends on its San Miguel Corporation (SMC) shares of stock and interest income on its money market placements for the year 2010 should be cancelled on the following grounds:

1. Section 133(a) of Republic Act (R.A.) No. 7160 provides that it is erroneous and illegal for respondents to collect a 0.55% local business tax on the dividends and interest income of petitioner because it is not a bank or a financial institution; gr

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[4] Docket, p. 256.

2. petitioner is not engaged in business that is subject to local business tax under Section 143 of R.A. No. 7160; and

3. petitioner's income partake the nature of public funds; thus, business tax cannot be imposed on the same.

Moreover, petitioner contends that Section 423 of the 2005 Revenue Code of the City of Davao requiring payment under protest before a protest on local business tax assessments may be acted upon is null and void and has no basis in fact and law.

On the other hand, respondents, in their Comment, argue that the imposition of local business tax against the petitioner's receipt of dividends and interest income from SMC, being a non-bank financial intermediary, is a valid exercise of the taxing power of the City and duly sanctioned under Section 143(f) of R.A. No. 7160, otherwise known as the "Local Government Code of 1991".

Respondents claim that petitioner is deemed a "bank and other financial institution", specifically as a "non-bank financial intermediary or an investment company" by virtue of its investment and money placements in SMC. They contend that the business purpose of petitioner as contained in its Amended Articles of Incorporation is wittingly and unwittingly broad enough to catch all the descriptive function of a non-bank financial intermediary, as provided under Section 4101Q.1 of the Manual of Regulations for Non-Bank Financial Institutions issued by the Bangko Sentral ng Pilipinas.

Moreover, according to respondents, petitioner's Articles of Incorporation stating that it shall not act as an investment company or securities broker or dealer is not a conclusive proof that it is not a "bank and other financial institution". They allege that being a stock corporation, petitioner is presumed to have been organized to engage in business with the end in view of a profit.

Respondents contend that the definition of gross sales/receipts under Section 131(n) of R.A. No. 7160 that does not include dividends and interest income as component of sales or receipts is a general definition of such term which cannot defeat a specific and clear provision of taxability of dividends and interest income as provided under Section 143(f) of the same Code.

Likewise, respondents point out that the opinion of the Bureau of Local Government Finance (BLGF), that petitioner is exempt from local business tax for not being a bank and other financial institution, is not binding upon the issue involved in this case as it is not an administrative agency whose findings on questions of fact and law are given weight and respect in the courts.

Furthermore, respondents claim that even if it is assumed that petitioner's income is in the nature of public funds, petitioner is not exempt from the payment of local business tax on its dividends and interest income pursuant to Section 143(f) of R.A. No. 7160.

Lastly, respondents stress that the court *a quo* and this Court did not acquire jurisdiction to hear this case because the subject tax assessment had already become conclusive and unappealable for failure of the petitioner to pay the tax assessed before filing the protest as required under Section 423 of Ordinance No. 158-05, Series of 2005.

We shall first resolve the second issue.

Respondents may not require petitioner to first pay the deficiency local business tax before acting on its protest.

Section 423 of City Ordinance No. 158-05, Series of 2005, otherwise known as the "2005 Revenue Code of Davao City", provides that protests shall not be entertained unless the taxpayer first pays the tax. The provision reads as follows:

> "SECTION 423. *Payment Under Protest.* – No protest shall be entertained unless the taxpayer first pays the tax. There shall be annotated on the tax receipts the words 'paid under protest'. The protest in writing must be filed within thirty (30) days from payment of the tax with the City Treasurer who shall decide the protest within sixty (60) days from receipt."

This provision is inconsistent with Section 195 of the Local Government Code (LGC) of 1991, as amended, which provides:

> "SEC 195. *Protest of Assessment.* - When the local treasurer or his duly authorized representative finds that correct taxes, fees, or charges have not been paid, he shall issue a notice of assessment stating the nature of the tax, fee, or charge, the amount of deficiency, the surcharges, interests and penalties. **Within sixty (60) days from the receipt of the notice of assessment, the taxpayer may file a written protest with the local treasurer contesting the assessment; otherwise, the assessment shall become final and executory. The local treasurer shall decide the protest within sixty (60) days from the time of its filing.** If the local treasurer finds the protest to be wholly or partly meritorious, he shall issue a notice cancelling wholly or partially the assessment. However, if the local treasurer finds the assessment to be wholly or partly correct, he shall deny the protest wholly or partly with notice to the taxpayer. The taxpayer shall have thirty (30) days from the receipt of the denial of the protest or from the lapse of the sixty (60) day period prescribed herein within which to appeal with the court of competent jurisdiction otherwise the assessment becomes conclusive and unappealable." (*Emphasis supplied*)

Based on the foregoing, the only requirement imposed by law is that the protest must be filed within sixty (60) days from the receipt of the notice of assessment; otherwise, the assessment shall become final and executory. Nowhere is it stated therein that a taxpayer is required to first pay the tax assessed before the local treasurer may act on the said protest.

In the case of *White Light Corporation vs. City of Manila*[5], the Supreme Court restates the test of a valid ordinance, to wit:

> "The test of a valid ordinance is well established. A long line of decisions including *City of Manila* has held that for an ordinance to be valid, it must not only be within the corporate powers of the local government unit to enact and pass according to the procedure prescribed by law, it must

[5] G.R. No. 122846, January 20, 2009.

> also conform to the following substantive requirements: (1) must not contravene the Constitution or any statute; (2) must not be unfair or oppressive; (3) must not be partial or discriminatory; (4) must not prohibit but may regulate trade; (5) must be general and consistent with public policy; and (6) must not be unreasonable."

Consequently, one of the requisites for an ordinance to be valid is that it "must not contravene the Constitution or any statute". In this case, Section 423 of the 2005 Revenue Code of Davao City required the payment of the assessed local business tax in order that the local treasurer may act on the protest. This contravenes the provision of Section 195 of the LGC of 1991 which only requires that the protest be filed within sixty (60) days from the receipt of the notice of assessment. In view of this, Section 195 of the LGC of 1991 prevails, and thus, prior payment of the tax assessed before filing its protest is not required.

Petitioner is liable to pay 0.55% local business tax for the third and fourth quarters of 2011 on the dividends on its SMC shares of stock and interest income on its money market placements.

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.[6] These guidelines and limitations as provided by Congress are in main contained in the LGC of 1991, which provides for comprehensive instances when and how local government units may impose taxes. The significant limitations are enumerated primarily in Section 133 of the Code, which include among others, a prohibition on the imposition of income taxes except when levied on banks and other financial institutions.[7]

Section 133(a) of the LGC of 1991, reads:

> "SEC. 133. *Common Limitations on the Taxing Powers of Local Government Units.* - Unless otherwise

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[6] Section 5, Article X, 1987 Constitution.
[7] *Yamane vs. BA Lepanto Condominium Corporation*, G.R. No. 154993, October 25, 2005.

provided herein, the exercise of the taxing powers of provinces, cities, municipalities, and barangays shall not extend to the levy of the following:

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

xxx xxx xxx."

In relation to this, Section 143 of the LGC provides that a municipality is authorized to impose business taxes on banks and other financial institutions, to wit:

"SEC. 143. *Tax on Business* - The municipality may impose taxes on the following business:

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."

Based on the foregoing, the imposition of income taxes by local government units is prohibited, except when levied on banks and other financial institutions. The Court is now left with the question of whether or not petitioner may be considered a financial institution, specifically a non-banking financial intermediary.

Banks and other financial institutions are defined under Section 131(e) of the LGC of 1991, as follows:

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

xxx xxx xxx

(e) 'Banks and other financial institutions' **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**;" (*Emphasis supplied*)

Incidentally, the above definition was adopted in Section 5(b3) of the 2005 Revenue Code of the City of Davao. In defining the term 'banks and other financial institutions', Section 131(e) gives no precise definition but merely describes the concept by enumerating the entities that may fall within such term. However, in including the phrase 'as defined under applicable laws, or rules and regulations thereunder', reference to other definitions of the same term under applicable laws, or rules and regulations may be resorted to.

Under Section 2.3 of Revenue Regulations (RR) No. 9-2004, the Bureau of Internal Revenue defines "non-bank financial intermediaries" in the following manner:

> "2.3. **Non-bank Financial Intermediaries** – shall refer to 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**. This includes all entities regularly engaged in the lending of funds or purchasing of receivables or other obligations with funds obtained from the public through the issuance, endorsement or acceptance of debt instruments of any kind for their own account, or through the issuance of certificates of assignment or similar instruments with recourse, trust certificates, or of repurchase agreements, whether any of these means of obtaining funds from the public is done on a regular basis or only occasionally." (*Emphasis supplied*)

Also, Section 4101Q.1 of the Manual of Regulations for Non-Bank Financial Institutions of the Bangko Sentral ng Pilipinas defines financial intermediaries as follows:

> "**§ 4101Q.1** ***Financial intermediaries*** Financial intermediaries shall mean 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.

Principal shall mean chief, main, most considerable or important, of first importance, leading, primary, foremost, dominant or preponderant, as distinguished from secondary or incidental.

Functions shall mean actions, activities or operations of a person or entity by which his/its business or purpose is fulfilled or carried out. The business or purpose of a person or entity may be determined from the purpose clause in its articles of incorporation/partnership, and from the nature of the business indicated in his/its application for registration of business filed with the appropriate government agency.

To be considered a financial intermediary, a person or entity must perform any of the following functions on a regular and recurring, not on an isolated basis:

a. Receive funds from one (1) group of persons, irrespective of number, through traditional deposits, or issuance of debt or equity securities; and make available/lend these funds to another person or entity, and in the process acquire debt or equity securities;

b. Use principally the funds received for acquiring various types of debt or equity securities;

c. Borrow against, or lend on, or buy or sell debt or equity securities;

d. **Hold assets consisting principally of debt or equity securities such as promissory notes, bills of exchange, mortgages, stocks, bonds, and commercial papers;**

e. **Realize regular income in the nature of, but need not be limited to, interest, discounts, capital gains, underwriting** ge

fees, guarantees, fees, commissions, and service fees, principally from transactions in debt or equity securities or by being an intermediary between suppliers and users of funds.

Non-banking financial intermediaries shall include the following:

(1) A person or entity licensed and/or registered with any government regulatory body as a non-bank financial intermediary, such as investment house, investment company, financing company, securities dealer/broker, lending investor, pawnshop, money broker, fund manager, cooperative, insurance company, non-stock savings and loan association and building and loan association.

(2) A person or entity which holds itself out as a non-banking financial intermediary, such as by the use of a business name, which includes the term financing, finance, investment, lending and/or any word/phrase of similar import which connotes financial intermediation, or an entity which advertises itself as a financial intermediary and is engaged in the function(s) where financial intermediation is implied.

(3) **A person or entity performing any of the functions enumerated in Items "a" to "e" of this Subsection**." (*Emphasis supplied*)

Based on the foregoing, financial intermediaries are those whose principal functions include 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. Moreover, "non-banking financial intermediaries" include a person or entity performing any of the functions of a financial intermediary, including, holding assets consisting principally of debt or equity securities such as promissory notes, bills of exchange, mortgages, stocks, bonds, and commercial papers.

In determining whether petitioner's business includes the principal function of a financial intermediary, reference to petitioner's primary purpose as indicated in its Amended Articles of Incorporation is necessary. It reads as follows:

"PRIMARY PURPOSE

The primary purpose for which such Corporation is formed is:

> **To purchase, subscribe for, or otherwise acquire and own, hold, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of real and personal property of every kind and description, including shares of stock, voting trust certificates for shares of the capital stock, bonds, debentures, notes, evidences of indebtedness, and other securities, contracts, or obligations of any corporation or corporations, association or associations, domestic or foreign, and to pay therefor in whole or in part in cash or by exchanging therefor stocks, bonds, or other evidences of indebtedness or securities, contracts, or obligation, to receive, collect, and dispose of the interest, dividends and income arising from such property, and to possess and exercise in respect thereof, all the rights, powers and privileges of ownership**, including all voting powers on any stocks so owned; and to do every act and thing covered generally by the denomination 'holding corporation', and especially to direct the operations of other corporations through the ownership of stock therein, provided however that the Corporation shall not act as an investment company or a securities broker and/or dealer nor exercise the functions of a trust corporation."[8]

A reading of petitioner's Amended Articles of Incorporation shows that the scope of its primary purpose is extensive enough to cover most of the principal functions of a financial intermediary.

[8] Annex "P-9", Petition for Review, docket, pp. 105-106; Annex "F-1", RTC Records, pp. 59-60.

Moreover, petitioner's business consists of owning a substantial number of shares of stock and equity in SMC, from which it regularly receives dividends that it reinvests in money market placements to maximize its profit. Petitioner in its Petition for Review admits that "the dividends received by ASCI from its SMC Preferred (shares) were deposited in a trust account which earned interest from money market placements." This continued receipt of dividends and interest income from its equity securities and money market placements is a direct consequence of its business engagements and not merely incidental to its business. Thus, petitioner is deemed engaged in the business of investing or placement of funds or evidences of indebtedness which is well within the definition of a financial intermediary.

Furthermore, there is no merit in petitioner's averment that to be considered a financial intermediary, a person must perform any of the functions stated in the given definition on a regular and recurring, not on an isolated basis.

Considering that petitioner is a stock corporation, it is presumed to have been organized for profit. Petitioner's primary purpose in its Amended Articles of Incorporation, coupled by the fact that petitioner has a continuing huge investment in shares of stocks of SMC to which it regularly receives millions of pesos in dividends which it reinvests in money placement in the same company to attain maximum profit negates petitioner's argument that it does not perform the principal functions of a financial intermediary on a regular and recurring basis. Likewise, the fact that petitioner has no other business, except its investment in SMC, shows its real intent to engage solely and primarily in the business of stock investment and money market placements in the said company; thus, any profit it received is a direct consequence of its business engagements and not just mere incidental thereto.

As regards the last phrase of petitioner's primary purpose, that it "cannot act as an investment company or a securities broker and/ or dealer nor exercise the functions of a trust corporation", the same cannot prevail over the real nature of petitioner's business, which is mainly holding stocks and investing the interests therein in money market placements. Petitioner therefore cannot hide under the said proviso as it is clearly under the category of non-bank financial intermediary.

In view of the foregoing, petitioner is a non-bank financial intermediary, and its income is subject to local business tax under Section 143(f) of the LGC of 1991. Thus, petitioner is liable for deficiency business tax of 0.55% for the third and fourth quarters of 2011 imposed on the dividends from SMC preferred shares and interest income it received on its money market placements.

WHEREFORE, in view of the foregoing, petitioner's **Motion for Reconsideration** is **GRANTED** insofar as the jurisdiction of the Court is concerned. Meanwhile, the assessment against petitioner for 0.55% local business tax for the third and fourth quarters of 2011 in the amount of **FOUR MILLION NINE HUNDRED FORTY THREE THOUSAND TWO HUNDRED TWENTY THREE and 40/100 PESOS** (₱4,943,223.40), inclusive of surcharge and interest is **AFFIRMED**.

SO ORDERED.

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

I CONCUR:

CAESAR A. CASANOVA
Associate Justice

ATTESTATION

I attest that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

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

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Amended 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