

**REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY**

EN BANC

**CITY OF DAVAO and BELLA
LINDA N. TANJILI, in her
official capacity as the Officer-
in-Charge City Treasurer's
Office of Davao City,**

Petitioners,

-versus-

TE DEUM RESOURCES, INC.,
Respondent.

CTA EB No. 1636
(CTA AC NO.142)

Present:
DEL ROSARIO, P.J.,
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, JJ.

Promulgated:

NOV 20 2018

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D E C I S I O N

MINDARO-GRULLA, J.:

Submitted for decision of this Court *En Banc* is a Petition for Review filed by the City of Davao and Bella Linda N. Tanjili, in her official capacity as the Officer-in-Charge City Treasurer of Davao City, under *Section 3(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals¹, as amended*, seeking the reversal of the Decision dated September 15, 2016² and the Resolution dated March 2, 2017³ rendered by the Third Division of this Court in the case

¹ RULE 8, Sec 3. *Who may appeal; period to file petition.* -

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(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review. (Rules of Court, Rule 42, sec. 1a)

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² Penned by Associate Ma. Belen M. Ringpis-Liban, concurred in by Associate Justice Lovell R. Bautista and Associate Justice Esperanza R. Fabon-Victorino, En Banc Docket, pp. 27-39.

³ *Id.*, pp.40-45.

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entitled "*Te Deum Resources, Inc. vs. City of Davao and Rodrigo S. Riola, in his official capacity as City Treasurer of Davao City*" docketed as CTA AC No. 142, the dispositive portions of which, respectively, read as follows:

Decision dated September 15, 2016:

"WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**. The Decision dated November 10, 2014 and the Order dated April 20, 2015 of the Regional Trial Court, Branch 17 of the City of Davao in Civil Case No. 35679-14 are hereby **REVERSED** and **SET ASIDE**. The Assessment dated January 20, 2014 is hereby **CANCELLED**.

SO ORDERED."

Resolution dated March 2, 2017:

"WHEREFORE, finding no compelling reason to reverse the ruling of the Court in the assailed Decision, respondents' Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED."

The following facts of the case as recited by the Court in Division in its Decision⁴ and as established by evidence on record, read as follows:

"Petitioner Te Deum Resources, Inc., (TDRI) is a corporation duly organized in 1983 and existing under Philippine laws. It is registered with the Securities and Exchange Commission (SEC). On December 22, 2009, the SEC approved the transfer of TDRI's principal office address from Makati City to Legaspi Oil Compound, Km 9.5, Sasa, Davao City.

Respondent City of Davao is a local government unit created by law, with principal office at City Hall,

⁴ Supra note 2.

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DECISION

San Pedro Street, Davao City. Respondent Rodrigo S. Riola is the City Treasurer of Davao City (respondent Treasurer, now petitioner).

TDRI was among the fourteen holding companies formed in 1983 for the purpose of owning and holding shares of stock of San Miguel Corporation (SMC). In 1986, the said holding companies, including TDRI, were sequestered by the Philippine Commission on Good Government (PCGG). Subsequently, various cases were filed to resolve the ownership of the holding companies and the SMC shares of stock held by them.

TDRI was a registered owner of SMC common shares, from which TDRI occasionally received cash and stock dividends. In October 2009, TDRI became the registered owner of 28,487,823 preferred shares of SMC, after the Supreme Court approved the conversion of an equal number of SMC common shares into preferred shares. The cash dividends received by TDRI from the SMC preferred shares were invested by it in Treasury Bills or other government securities from which it earned additional interest.

In 2010, TDRI received P443,823,123.35 from its SMC preferred shares, consisting of P438,658,672.50 in dividends and P5,164,450.85 in interest income from money market placements.

In the meantime, the Supreme Court *En Banc*, in *Philippine Coconut Producers Federation, Inc. (COCOFED) v. Republic of the Philippines*, declared the fourteen holding companies and the SMC shares held by them to be owned by the government.

On January 20, 2014, TDRI received from respondent Treasurer a Business Tax Order of Payment dated January 20, 2014 for P2,425,770.80. This amount corresponds to 0.55% local business tax on the dividends derived from its SMC shares and the interest on its money market placements for the third and fourth quarters of 2011, in accordance with

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Section 69(f) of the 2005 Revenue Code of the City of Davao.

On March 21, 2014, TDRI filed a written administrative protest against the assessment. TDRI's main contention is that the tax imposed on the dividends and its income was improper because it is not a bank or non-bank financial institution.

In a letter dated April 4, 2014, respondent Treasurer required TDRI to submit proof of payment of the assessed business tax before its protest may be resolved, citing Section 423 of the Revenue Code of the City of Davao.

In its letter dated April 15, 2014, TDRI argued that the City of Davao had no authority to impose additional requirements before a protest may be entertained, other than those required by the Local Government (LGC), which does not require payment under protest for business tax.

In a letter dated May 5, 2014, respondent Treasurer reiterated the requirement under the 2005 Revenue Code of the City of Davao. Respondent Treasurer pointed out that it is a valid ordinance, with which he shall abide. Not having made the requisite payment, respondent Treasurer did not act on TDRI's protest.

On June 19, 2014, TDRI filed a Petition for Review dated June 6, 2014 with the RTC of Davao City, pursuant to Section 195 of the LGC.

The Rulings of the Trial Court

In the Decision dated November 10, 2014, the trial court dismissed the petition for review. The trial court found that TDRI is a financial intermediary, and that the imposition by the City of Davao of the 0.55% local business tax on the dividends derived from its SMC shares and the interest on its money market placements for the third and fourth quarters of 2011 was proper. Consequently, for petitioner's failure to

DECISION

perfect its protest as prescribed by the Revenue Code of Davao City, the assessments made by respondents became final and executory. The dispositive portion reads:

'WHEREFORE, premises considered, for lack of merit, the Petition for Review under Section 195 of Republic Act No. 7160 filed by petitioner, Te Deum Resources, Inc., is hereby **DISMISSED**.

Accordingly, petitioner is hereby directed to pay respondents the amount of Two Million Four Hundred Twenty-Five Thousand Seven Hundred Seventy and 80/100 (P2,425,770.80) Pesos, representing the 0.55% local business tax for the third and fourth quarters of 2011 on the dividends derived from its shares of stock and interest on its market money placements derived from San Miguel Corporation.

SO ORDERED.'

The trial court denied TDRI's Motion for Reconsideration in the Order dated April 20, 2015, finding no cogent/imperative reason to disturb or modify its findings in the Decision dated November 10, 2014."

On June 8, 2015, TDRI filed a Petition for Review before the Court in Division. The Court gave due course to the petition and ordered the parties to file their respective Memoranda in a Resolution dated August 25, 2015. TDRI filed its Memorandum on October 1, 2015; while respondents filed their Memorandum on October 23, 2015. Thereafter, the Court deemed the case submitted for decision in a Resolution dated January 27, 2016.

On September 15, 2016, the Court in Division granted the Petition for Review and cancelled the assessment against TDRI on the ground that the imposition of the 0.55% local business tax on the dividends and interests on its money market placements from the SMC shares was beyond the

DECISION

taxing power of the City of Davao. Aggrieved, respondents filed a Motion for Reconsideration, but the same was denied in a Resolution dated March 2, 2017. Hence, this Petition for Review was filed.

In the instant case, TDRI was assessed for 0.55% local business tax for the 3rd and 4th quarters of 2011 on the dividends it received from its San Miguel Corporation (SMC) shares of stock and interest income on its money market placements. Petitioners insist that TDRI is a non-bank financial intermediary, and that as its pieces of evidence would prove, TDRI engaged in activities which would qualify it to be subject to local business tax.

This Court is not convinced.

It has been settled in a line of cases already decided by this Court that 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

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policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local government units."

Corollarily, Section 143⁵ in relation to Section 151⁶ of the LGC categorically enumerates which business may be subject to local tax. To implement the aforementioned provision, Section 69 of the 2005 Revenue Code of the City of Davao provides as follows:

"Section 69. Imposition of Tax. - There is hereby imposed on the following persons who establish, operate, conduct or maintain their respective business within the City a graduated business tax in the amounts hereafter prescribed:

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F. On Banks and Other Financial Institutions, at the rate of fifty-five percent (55%) of one percent (1%) of 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. All other income and receipts not herein enumerated shall be excluded in the computation of tax."

While Section 143(f) in relation to Section 151 both of the LGC of 1991, empowered local government units to levy taxes, fees and charges on banks and other financial institutions, it nonetheless expressly subjected such power to some common limitations, such as those enumerated

⁵ "SEC.143. Tax on Business. - **The municipality may impose taxes on the following businesses:**

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(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 premiums."(Emphases and underscoring supplied)

⁶ "SEC.151. Scope of Taxing Powers. - Except as otherwise provided in this Code, **the city, may levy the taxes, fees, and charges which the province or municipality may impose: xxx The rates of taxes that the city may levy may exceed the maximum rates allowed for the province or municipality by not more than fifty percent (50%)** except the rates of professional and amusement taxes." (Emphases supplied)

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under Section 133 of the LGC of 1991, the pertinent provisions of which, read as follows:

"SEC. 133. Common Limitations on the Taxing Powers of Local Government Units. –

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

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

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(o) **Taxes, fees or charges of any kind on the National Government**, its agencies and instrumentalities, and local government units." (*Emphases supplied*)

Petitioners' contention that the afore-mentioned provision does not prohibit a local government unit like Davao City from imposing taxes on holding companies which are similar to banks and other financial institutions is misplaced.

In the case of *Philippine Coconut Producers Federation, Inc. v. Republic of the Philippines*,⁷ the Supreme Court ruled that the said SMC shares of stock are owned by the government. The Supreme Court ruled in this wise:

"The CIIF Companies and the CIIF Block of SMC shares are public funds/assets

From the foregoing discussions, it is fairly established that the coconut levy funds are special public funds. Consequently, any property purchased by means of the coconut levy funds should likewise be treated as public funds or public property, subject to burdens and restrictions attached by law to such property.

⁷*Philippine Coconut Producers Federation, Inc. v. Republic of the Philippines*, G.R. Nos. 177857-58 & 178193, January 24, 2012.

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Since the CIIF companies and the CIIF block of SMC shares were acquired using coconut levy funds, which have been established to be public in character it goes without saying that these acquired corporations and assets ought to be regarded and treated as government assets. **Being government properties, they are accordingly owned by the Government, for the coconut industry pursuant to currently existing laws.**

It may be conceded hypothetically, as COCOFED *et al.* urge, that the 14 CIIF holding companies acquired the SMC shares in question using advances from the CIIF companies and from UCPB loans. But there can be no gainsaying that the same advances and UCPB loans are public in character, constituting as they do assets of the 14 holding companies, which in turn are wholly-owned subsidiaries of the 6 CIIF Oil Mills. And these oil mills were organized, capitalized and/or financed using coconut levy funds. In net effect, the CIIF block of SMC shares are simply the fruits of the coconut levy funds acquired at the expense of the coconut industry. In *Republic v. COCOFED*, the *en banc* Court, speaking through Justice (later Chief Justice) Artemio Panganiban, stated: '*Because the subject UCPB shares were acquired with government funds, the government becomes their prima facie beneficial and true owner.*' **By parity of reasoning, the adverted block of SMC shares, acquired as they were with government funds, belong to the government as, at the very least, their beneficial and true owner.**

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x x x Accordingly, We sustain the ruling of the Sandiganbayan in CC No. 0033-F that the **CIIF companies and the CIIF block of SMC shares**

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necessary to resort to other applicable laws which may enlighten us in its definition.

The National Internal Revenue Code (NIRC) of 1997, as amended, defines the term "non-bank financial intermediary in Section 22(W) as follows:

"The term *a non-bank financial intermediary*" means a financial intermediary, as defined in Section 2(D)(c) of Republic Act No. 337, as amended, otherwise known as the General Banking Act, authorized by the *Bangko Sentral ng Pilipinas* (BSP) to perform quasi-banking activities.

Accordingly, Section 2-D(c) of the General Banking Act defines "financial intermediaries" as follows:

"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."

Section 4.101 Q.1 of the Manual of Regulations for Non-Bank Financial Institutions (Manual) defines **"financial intermediaries" to be 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.** (Emphasis supplied)

The same section further clarifies the definition by elaborating the terms "Principal and Functions", to wit:

"*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."

Relevant thereto, in order to be considered a financial intermediary, any of the following functions must be performed 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 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.

On the other hand, non-banking financial intermediaries shall include the following:

DECISION

(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.

In sum, the following are the basic requirements for a person or entity to be considered as a "*non-bank financial intermediary*", to wit:

- 1) The person or entity is "*authorized by the Bangko Sentral ng Pilipinas (BSP) to perform quasi-banking activities*";
- 2) The principal functions of the said person or entity "*include the lending, investing or placement of funds or evidences of indebtedness or equity deposited to them, acquired by them, or otherwise coursed through them, either for their own account or for the account of others*"; and
- 3) The person or entity must perform any of the following functions on a regular and recurring, not on an isolated, basis, to wit:

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DECISION

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; and

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

Moreover, there is nothing in TDRI'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 purchase, subscribe for, or otherwise acquire and own, hold, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of real or personal property of every kind and description, include shares of stock, voting trust certificates for shares of 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, obligations, 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 stock owned; xxx"

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

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DECISION

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, 2011⁹, as follows:

"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."

In comparison with Section 4101Q.1 of the Manual, "the scope of TDRI's primary business purpose in its Amended Articles of Incorporation is not broad enough to catch all the descriptive functions of a Financial Intermediary". There is nothing on record that shows that TDRI can be categorized

⁹SEC-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.

as a financial intermediary, or that it has engaged in the activities defined and enumerated in the General Banking Act and in the Manual.

We summarize.

First, there is no indication that TDRI fulfills the first requirement, as there is no evidence found by the Court *quo* showing that it was "*authorized by the Bangko Sentral ng Pilipinas (BSP) to perform quasi-banking activities*". Thus, on this basis alone, TDRI cannot be treated as non-bank financial intermediary.

Second, and as already stated, the Court *En Banc* is not persuaded that the stated primary purpose of TDRI in the Amended Articles of Incorporation is broad enough to catch all the descriptive functions of a financial intermediary. It was not shown that said functions are "*principal*" in nature, *i.e.*, "*chief, main, most considerable or important, of first importance, leading, primary, foremost, dominant or preponderant, as distinguished from secondary or incidental*". Therefore, it is not proper to just assume that TDRI is engaged as a non-bank financial institution or intermediary based on the said primary purpose.

Likewise, it was also not established that the enumerated functions performed by TDRI are "*on a regular and recurring, not on an isolated, basis*". In fact, it was not shown that respondent ever performed the said functions.

Lastly, it must be emphasized that the determination of whether a person or an entity is (a) performing banking or quasi-banking functions, or (b) engaged in other types of financial intermediation is vested in the Monetary Board subject to judicial review. The mere fact that petitioner has investments in SMC and money market placements does not *per se* make it a non-bank financial intermediary. To insist otherwise would be absurd as any ordinary person who invests funds in money market or shares of stock will be considered as a non-bank financial intermediary.

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Notably, in *Commission (sic) of Internal Revenue vs. Hantex Trading Co., Inc.*¹⁰, the Supreme Court ruled that an assessment must be based on actual facts. Accordingly, the local business tax assessment should be based on actual facts, and since there is no proof that TDRI can be considered as a non-bank financial institution or intermediary or is engaged in such activities, the local business tax assessment has no factual basis. Such a conclusion is based on an assumption, with no support in evidence.

Based on all the foregoing, this Court finds that TDRI is not a non-bank financial intermediary, and the interests and dividends it received for the third and fourth quarters of the taxable year of 2011 may not be the subject of local business tax imposed by herein petitioners.

Accordingly, this Court agrees with the Court in Division's ruling that the local business tax assessment by herein petitioners against TDRI should be cancelled and set aside for being void *ab initio*, despite respondent's non-compliance with the filing of a protest.

To reiterate, the ruling in *COCOFED*¹¹ placed the subject SMC shares and its dividends, and any income therefrom, beyond the scope of the taxing power of Davao City pursuant to Section 133 of the 1991 LGC.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED**. The Decision of the Third Division of this Court in CTA AC No. 142 dated September 15, 2016, and its Resolution dated March 2, 2017, are **AFFIRMED**. No pronouncement as to costs.

SO ORDERED.

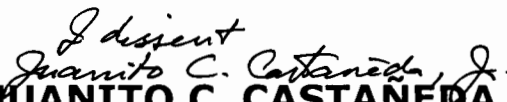

CIELITO N. MINDARO-GRULLA
Associate Justice

¹⁰Commission of Internal Revenue vs. Hantex Trading Co., Inc, G.R. No. 136975, March 31, 2005, citing Collector of Internal Revenue vs. Benipayo, 4 SCRA 182 (1962).

¹¹ Supra Note 8.

WE CONCUR:

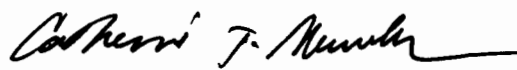

ROMAN G. DEL ROSARIO *See Concurring Opinion*
Presiding Justice

I dissent

JUANITO C. CASTANEDA, JR.
Associate Justice


ERLINDA P. UY
Associate Justice


ESPERANZA R. FABON-VICTORINO
Associate Justice

Ma. Belen S. -
MA. BELEN M. RINGPIS-LIBAN
Associate Justice


CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court En Banc.


ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

CITY OF DAVAO AND BELLA
LINDA N. TANJILI in her official
capacity as The Officer-in-
Charge City Treasurer's Office of
Davao City,

CTA EB NO. 1636
(CTA AC NO. 142)

Present:

Petitioners,

DEL ROSARIO, P.J.,
CASTANEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, JJ.

-versus-

TE DEUM RESOURCES, INC.,
Respondent,

Promulgated:

NOV 20 2018

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4:16 p.m.

CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* of my esteemed colleague, Honorable Associate Justice Cielito N. Mindaro-Grulla, in denying the Petition for Review, thereby affirming the assailed Decision and Resolution of the Court in Division.

As articulated in the *ponencia*, the City of Davao's power to impose local business tax (LBT) on banks and other financial institution, including non-bank financial intermediaries, emanates from Section 143(f) of the Local Government Code of 1991 (LGC)¹ in relation to Section 131(e) of the same Code. Section 131(e) of the

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¹ Republic Act No. 7160.

CONCURRING OPINION

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(CTA AC No. 142)

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LGC did not provide for a specific definition of the term “non-bank financial intermediary” as it states that it shall be defined under applicable laws, rules and regulations.

The term “non-bank financial intermediary” is defined in Section 22(W) of the National Internal Revenue Code (NIRC) of 1997, as amended, Section 2.3 of Revenue Regulations (RR) No. 09-2004, Section 2-D(c) of the General Banking Act,² and Section 4.101Q.1 of the Bangko Sentral ng Pilipinas’ (BSP) Manual of Regulations for Non-Bank Financial Institutions.

The foregoing laws and regulations specifically defined what constitutes “non-bank financial intermediary” as they provide for the specific requisites in order for an entity to be regarded as such. **While a person or entity must be “authorized by the BSP to perform quasi-banking activities”, Section 4 of the General Banking Act, as amended, is categorical in stating that the “determination of whether a person or an entity is (a) performing banking or quasi-banking functions, or (b) engaged in other types of financial intermediation shall be decided by the Monetary Board subject to judicial review”. Sorely, no such determination by the Monetary Board exists on record that may confirm, even remotely, that petitioner is a non-bank financial intermediary.**

The mere fact that petitioner has investments in San Miguel Corporation (SMC) and money market placements does not *per se* make it a non-bank financial intermediary. To insist otherwise would be absurd as any ordinary person who invests funds in money market or shares of stock will be considered non-bank financial intermediary.

Incidentally, my learned colleague, the Honorable Associate Justice Juanito C. Castañeda, Jr., in his Dissenting Opinion, makes the following analogy in concluding that petitioner is a non-bank financial intermediary, thus:

“However, lack of authority by the BSP for petitioner to engage in NBFIs [non-bank financial intermediary] activities, or lack of determination by the Monetary Board whether it is an NBFIs, cannot be used as bases for concluding that petitioner is not an NBFIs. To my mind, these requirements are designed merely to regulate NBFIs activities.

In fact, the present situation may be compared by analogy, to a person presently and smoothly driving a car without a driver's license. **To argue that this person is not presently driving a car**



² Republic Act No. 337, as amended by Presidential Decree No. 71.

CONCURRING OPINION

CTA EB No. 1636

(CTA AC No. 142)

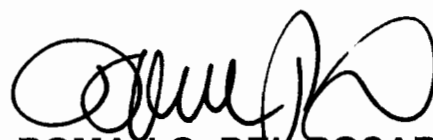
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because he or she has no driver's license is simply fallacious. Basically, such argument would necessarily lead to a conclusion that the car is moving smoothly by itself. However, it wrongfully omits the fact that the smoothly moving car is being driven by a person without a driver's license." (Boldfacing supplied)

With due respect, I submit that the analogy is inaccurate. Truth to tell, any driver who drives a motor vehicle is indeed a "driver" and no license is necessary to be called as such. **But when one is elevated to the category of a "professional driver", the term has to be taken within the context of the law that defines it.** A student driver or any person who actually drives without license cannot be considered as a "professional driver" unless he possesses a "professional driver's license" as defined and mandated by law. **In the same manner, a "non-bank financial intermediary" may not be considered as such in its legal sense unless it possesses all the requirements that qualify it to fall within its legal definition.**

The findings of the lower court that petitioner's income was derived solely from dividends and interest income on money market placements are not sufficient to justify the conclusion that petitioner is a non-bank financial intermediary. The imposition of LBT on non-bank financial intermediaries springs from Section 143(f) in relation to Section 131(e) of the LGC and it must be strictly exercised in accordance with its precepts. This is consistent with Article 1158 of the Civil Code of the Philippines which provides that "Obligations derived from law are not presumed. Only those expressly determined in this Code or in special laws are demandable, and **shall be regulated by the precepts of the law which establishes them; xxx.**" In the absence of any evidence showing that petitioner has met all the requirements set forth by law to be regarded as a non-bank financial intermediary, I submit there is no basis to impose LBT on the dividends derived by petitioner from its investments in SMC shares of stock or on the interest income it derived from its money market placements.

All told, I concur with the *ponencia*.



ROMAN G. DEL ROSARIO
Presiding Justice

**REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY**

EN BANC

**CITY OF DAVAO and BELLA
LINDA N. TANJILI, in her official
capacity as the Officer-in-Charge
City Treasurer's Office of Davao
City,**

Petitioners,

**CTA EB No. 1636
(CTA AC No. 142)**

Present:

Del Rosario, P.J.,
Castañeda, Jr.,
Uy,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban, and
Manahan JJ.

- versus -

TE DEUM RESOURCES, INC.,
Respondent.

Promulgated:

NOV 20 2018

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X

DISSENTING OPINION

CASTAÑEDA, JR., J.:

With due respect, I dissent to the conclusion reached by the *ponencia* that the instant Petition for Review should be denied primarily on the ground that petitioner is not a non-bank financial intermediary (NBFI).

The subject Decision pertinently states:

“In the case of *Philippine Coconut Producers Federation, Inc. v. Republic of the Philippines*, the Supreme Court ruled that the said SMC shares of stock are owned by the government. xxx

xxx

xxx

xxx



Applying the foregoing in the instant case, TDRI, being a '*CIIF company*', is deemed owned by the Government, thus, any tax imposed upon TDRI is considered, in effect, as a tax on Government.

Considering that the subject shares are owned by the government, it follows that the dividends and any income therefrom are also owned by the government. Consequently, the same is not within the power of the City of Davao to tax.

XXX XXX XXX

First, there is no indication that TDRI fulfills the first requirement, as there is no evidence found by the Court *a quo* showing that it was '*authorized by the Bangko Sentral ng Pilipinas (BSP) to perform quasi-banking activities*'. Thus, on this basis alone, TDRI cannot be treated as non-bank financial intermediary.

Second, and as already stated, the Court *En Banc* is not persuaded that the stated primary purpose of TDRI in the Amended Articles of Incorporation is broad enough to catch all the descriptive functions of a financial intermediary. It was not shown that said functions are '*principal*' in nature, *i.e.*, '*chief, main, most considerable or important, of first importance, leading, primary, foremost, dominant or preponderant, as distinguished from secondary or incidental*'. Therefore, it is not proper to just assume that TDRI is engaged as a non-bank financial institution or intermediary based on the said primary purpose.

Likewise, it was not also established that the enumerated functions performed by TDRI are '*on a regular or recurring, not on an isolated basis*'. In fact, it was not shown that respondent ever performed the said functions.

Lastly, it must be emphasized that the determination of whether a person or an entity is (a) performing banking or quasi-banking functions, or (b) engaged in other types of financial intermediation is vested in the Monetary Board subject to judicial review. The mere fact that petitioner has investments in SMC and money market placements does not *per se* make it a non-bank financial intermediary. To insist otherwise would be absurd as any ordinary person who invests funds in money market or shares of stock will be considered as a non-bank financial intermediary." *gr*

**The authorization by the BSP for
an entity to perform NBFI activities
is a mere regulatory measure**

**Respondent performed NBFI
activities despite the limitations set
in its Amended Articles of
Incorporation (AOI)**

As cited earlier, the subject Decision concluded that since there is no authorization by the BSP or the Monetary Board for respondent to act as an NBFI, it cannot be classified as an NBFI.

However, lack of authority by the BSP or the Monetary Board for respondent to engage in NBFI activities cannot be used as basis for concluding that it is not an NBFI. To my mind, this requirement is designed merely to regulate NBFI activities.

In fact, the present situation may be compared, by analogy, to a person presently and smoothly driving a car without driver's license. To argue that this person is not presently driving a car because he or she has no driver's license is simply fallacious. Basically, such argument would necessarily lead to a conclusion that the car is moving smoothly by itself. However, it wrongfully omits the fact that the smoothly moving car is being driven by a person without a driver's license.

In this case, respondent depicts the driver without license while the dividends and interest income from equity securities and money market placements depict the car. The car could not have smoothly moved, *i.e., respondent could not have regularly earned dividends and interest income from equity securities and money market placements*, if no driver is maneuvering it, *i.e., if respondent did not engage in NBFI activities*, albeit without driver's license, *i.e., without authority from the BSP*. Otherwise, respondent's consistent earnings from dividends and interest income emanating from an unknown activity, *i.e., if it did not engage in NBFI activities*, would border on the metaphysical, because it is as if such regular events had no cause.

The above-reasoning also applies to the fact that there can also be no guarantee that a holding company will not act as an NBFI despite the limitations provided in its Amended AOI. As the saying goes – *action speaks louder than words*. As will be further discussed, respondent's acts are clearly indicative of being engaged in NBFI activities. As such, respondent's actions spoke louder than its Amended AOI, such that it engaged in acts contrary to what was set forth therein. *gr*

Respondent's business operations consist solely of stock investments and money placements in San Miguel Corporation. Thus, it leads to no other conclusion that it is engaged in NBFIs activities

As earlier discussed, the lower court found that respondent's income emanated solely from dividends and money market placements. Despite these categorical findings, the subject Decision seems to have overlooked the same and proceeded to conclude that "it was not shown that petitioner ever performed the said functions". These glaring discrepancies between the factual findings of the lower court and this Court, without this Court laying the bases for its contrary findings, exposes the subject Decision to more questions rather than answers.

To reiterate, the lower court found that respondent's business operations consist solely of stock investments and money placements in San Miguel Corporation, as supported by petitioner's tax audit which was not rebutted by petitioner. Therefore, it was clearly established in the proceedings below that respondent is engaged in NBFIs activities. However, without laying the factual bases to validly overturn the lower court's factual findings, the subject Decision found that respondent did not perform such acts. What was the basis for rejecting the lower court's factual findings, then?

In addition, said findings of the lower court clearly support the conclusion that respondent engaged in NBFIs activities on a regular and recurring basis. Assuming that the subject Decision is correct when it found that respondent's acts were merely isolated, what then are the pieces of evidence which led the subject decision to conclude that respondent's business revolved around other principal activities other than what was found by the lower court? Stated otherwise, what are the principal activities of respondent which led the Court to believe that the subject transactions were merely isolated and were not conducted on a regular or recurring basis?

Upon careful review of the records of this case, no such evidence of respondent's principal activities can be found.

Furthermore, it cannot be said that any ordinary person who invests funds in money market or shares of stock can be considered as an NBFIs. Again, there are parameters that should be satisfied before an entity may be considered as an NBFIs. If such entity is primarily engaged in its principal activities, *i.e.*, manufacturing, realty, etc., while it is also engaged in stock 

investing or trading to augment or complement its principal business, said entity cannot be considered as an NBFI because obviously, its business operations revolve around its principal activities.

In this case, there is no evidence presented other than that which proves that respondent earned through stock investments and money placements on a regular and recurring basis. No other business activity can be attributed to respondent because there is no such proof of its principal activity. Therefore, respondent must be considered as an NBFI.

Thus, without proper factual basis to take a contrary position *vis-à-vis* the conclusion based on factual findings of the lower court, it would be more prudent for this Court to sustain the conclusion of the lower court.

**The tax is levied upon the entity
and not upon the shares or sources
of gross receipts which operate as
tax bases**

Section 143 of the LGC of 1991 pertinently states:

“Section 143. Tax on Business. — The municipality¹ may impose taxes **on the following businesses:**

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.” (*Emphasis supplied*)

Section 143(f) of the LGC of 1991 imposes local business tax **on banks and other financial institutions**, *i.e.*, non-bank financial intermediaries. In other words, while the tax bases of Section 143(f) consist of interest, commissions and discounts from lending activities, income from financial leasing, dividends, rentals on property and profit from exchange or sale of property, and insurance premium, the tax is imposed directly on the privilege enjoyed by banks and other financial institutions. It directly *je*

¹ The city, may levy the taxes, fees, and charges which the province or municipality may impose, in accordance with Sec. 151, LGC of 1991.

imposes business tax on the privilege being enjoyed by the entity and not on the sources of gross receipts.

In the instant case, while the San Miguel Shares had already been adjudged by the Supreme Court as belonging to the government, it is not directly the said shares, but the privilege enjoyed by respondent to engage in NBFIs activities, that is subject to local business tax. Simply put, the dividends and interest income from these shares are mere tax bases under Section 143(f) of the LGC of 1991. Ultimately, however, it is respondent's privilege against whom the local business tax is levied upon.

Finally, the subject Decision's finding that respondent is a government property directly contradicts its primary conclusion that respondent is not an NBFIs. If the government owns respondent by reason of primarily dealing with San Miguel Shares, then we can safely conclude that the lower court is correct when it found that respondent's income comes only from dividends and money market placement of its San Miguel Shares. Therefore, respondent clearly engaged in NBFIs activities. At any rate, I respectfully submit that it is the San Miguel Shares and not the respondent corporation, which is considered as government property.

At any rate, if respondent and its SMC shares were truly owned by the government, the income that respondent receives should redound to the benefit of the national government. The question however, is this: *Was there any evidence presented to the effect that respondent's profits were duly remitted to the national treasury?* There is none.

To end, the crucial element to determine whether an entity is engaged in NBFIs activities is its principal activity. To clarify, not all entities who engage in stock investments and money market placements can be categorized as NBFIs for purposes of local business taxation. If an entity is not primarily engaged in NBFIs activities as it principally performs its core business operations, such entity is not an NBFIs. However, when an entity solely receives income from its NBFIs activities, or when there is a showing that it performs no other business activity other than NBFIs activities, then such entity should be categorized as an NBFIs for purposes of local business taxation.

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


JUANITO C. CASTAÑEDA, JR.
Associate Justice