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 City Treasurer of Davao City, Petitioners,	CTA EB No. 1705 (CTA AC No. 153)
	Present:
-versus-	DEL ROSARIO, *PJ*; CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ*.
	Promulgated:
ARC INVESTORS, INC., Respondent.	DEC 21 2018 4:05 p.m.

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The following facts remain undisputed.

Petitioner City of Davao is a local government unit created by law with address at City Hall Building, San Pedro Street, Davao City. The other petitioner, Bella Linda N. Tanjili, was impleaded in her official capacity as the City Treasurer of Davao.

Respondent ARC Investors, Inc. is a domestic corporation, with principal office[3] located at Legaspi Oil Compound, Km. 9.5, Sasa, Davao City. It was incorporated in 1983 with the following primary purpose as indicated in its Amended Articles of Incorporation (AOI):

> 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 other securities, contracts, or 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 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.

Respondent has been the registered owner of 105,689,360 preferred shares of stock in San Miguel Corporation (SMC preferred shares) since October 2009.[4] The dividends it realized from the said SMC preferred shares

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[3] This was respondent's principal address as of December 16, 2009.

[4] The conversion of SMC common shares of stock to preferred shares of stock held by respondent was duly approved by the Supreme Court *En Banc*. See impugned Decision, p. 3.

were deposited in trust accounts which in turn, earned interest from money market placements.

In 2010, respondent received the combined amount of ₱801,634,060.07 from dividends in SMC preferred shares and interest from money market placements, broken down as follows:

Nature of income	Amount
Dividends	₱ 792,670,200.00
Interest	8,963,860.07
Total	₱ 801,634,060.07

On January 18 and April 25, 2011, petitioners collected from respondent 0.55% LBT for the 1st and 2nd quarters of 2011, respectively, in the sum of ₱2,204,494.00, based on the gross receipts derived from its realized dividends and interest from its money market placements for taxable year (TY) 2010. Such LBT was collected pursuant to Section 69(f), in relation to Section 5(b3) of the 2005 Revenue Code of Davao City.[5]

On September 13, 2012, respondent filed with petitioner City Treasurer a written claim for refund or credit of the LBT erroneously collected for the first and second quarters of TY 2011, in accordance with Section 196 of the Local Government Code (LGC).

On January 17, 2013, respondent filed with the Regional Trial Court[6] of Davao City (RTC-Davao) a petition for the refund/tax credit of the alleged erroneously collected LBT for the first and second quarters of 2011, citing inaction on the part of petitioner City Treasurer on the said claim for refund/tax credit. It was docketed as Civil Case No. 34,849-2013.

On June 22, 2015, RTC-Davao rendered a Decision in favor of petitioners, the decretal portion of which reads as follows:

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[5] Ordinance No. 0158-05, Series of 2005, see impugned Decision, p. 3.
[6] Branch 16.

> **FOR REASONS STATED**, the instant 'Petition for Tax Refund or Credit Under Section 156, R.A. No. 7160' filed by [respondent], is hereby DENIED and/or DISMISSED.
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> **SO ORDRED**.

The RTC-Davao rationalized that the dividends realized by respondent from the SMC preferred shares, plus the interests it earned from money market placements were principal income earned in the ordinary course of business per its Amended AOI, for which reason it was classified as a Non-Bank Financial Intermediary (NBFI) subject to LBT under Section 143(f) of the LGC.

On August 20, 2015, respondent moved to reconsider the RTC-Davao's Decision of June 22, 2015, it was however denied in the Order dated September 11, 2015.

On November 9, 2015, respondent elevated the case before the Court in Division via a Petition for Review, reiterating its stance that the LBT it paid covering the first and second quarters of 2011 in the aggregate amount of ₱2,204,494.00 was illegally and erroneously collected by petitioners.

On January 16, 2017, the Court in Division rendered the impugned Decision, disposing the case as follows:

> **WHEREFORE**, in light of the foregoing considerations, the instant *Petition for Review* is hereby **GRANTED**.
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> Accordingly, the assailed Decision dated June 22, 2015 and the Order dated September 11, 2015 of the RTC Branch 16 of Davao City in Civil Case No. 34,849-2013 are **REVERSED AND SET ASIDE**. (Petitioners) are **ORDERED** to refund or issue a tax credit certificate in favor of (respondent) ARCI in the aggregate amount of ₱2,204,494.00, representing the 0.55% local business taxes erroneously and illegally collected by (petitioners) for the first and second quarters of 2011.
>
> **SO ORDERED**.

In so ruling, the Court in Division explained that under Section 133(a) of the LGC, petitioners are proscribed from subjecting to LBT, the dividends and interest realized by a non-bank, non-financial institution like respondent. It added that since the dividends and interest sprung from government-owned SMC preferred shares, such civil fruits are as well government-owned, hence, petitioners are likewise barred from imposing LBT pursuant to Section 133(o) of the same Code.

On March 1, 2017, petitioners filed a Motion for Reconsideration of the adverse Decision, but the same was denied by the Court in Division in the equally impugned Resolution of July 19, 2017.

Unrelenting, petitioners filed the instant Petition for Review on October 7, 2017, raising the sole issue as follows:

> Whether or not respondent is a "non-bank financial intermediary," falling under the category of a "bank or financial institutions," so as to be subject to local business tax imposition, as provided under Section 143(f) of the Republic Act (R.A.) No. 7160, otherwise known as the "Local Government Code of 1991."

Petitioners argue that respondent's principal and regular business activity of investing in SMC preferred shares, plus its money market placements show that it is a NBFI. Besides, the purpose clause reflected in its Amended AOI falls within the descriptive functions of a NBFI under Section 4101Q.1 of the Manual of Regulations for Non-Bank Financial Institutions issued by the *Bangko Sentral ng Pilipinas* (BSP). The purported business venture undertaken by respondent, along with the purpose for which it was incorporated led to a conclusion that it falls within the definition of "banks and other financial institution" contemplated under Section 131(e) of the LGC, thus, subject to LBT under Section 143 of the same Code.

Further, its repeated activity[7] of investing on SMC preferred shares and placing resources in money markets

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[7]Allegedly admitted by respondent in paragraph 36.6, petition for review before the Court in Division.

militates against the statement in its Amended AOI that "it shall not act as an investment company or securities broker or dealer." Given that such proviso appears to be a convenient tool designed to elude acceptance of the existing regulations relative to NBFI, the Court should reject respondent's defense.

Moreover, organizing itself as a stock corporation suggests that respondent is in the business of stock investments and money market placements as a NBFI for profits, hence, subject to LBT, pursuant to Section 3 of *Batas Pambansa* (B.P.) Blg. 68.[8]

Petitioners further contend that a corresponding authority from the Monetary Board of the BSP (MB-BSP) is inconsequential for it to be deemed a NBFI for what is paramount is the purported repeated business activity i.e., investing in SMC preferred shares and money market placements.

Petitioners also claim that the Court in Division erred in ruling that they were bereft of authority to tax such SMC shares and the civil fruits realized therefrom since the SMC preferred shares held by respondent are owned by the government of the Republic of the Philippines, pursuant Section 133(o) of the LGC. For them, the *COCOFED* case[9] utilized as foundation of such ruling does not apply in this case. The fact that the SMC preferred shares are of public character only means that the nature of such fund was reclassified from private to a government asset. Neither is the said case law pregnant with a categorical declaration as to the taxability or non-taxability of the said shares. Hence, the said case may not constitute as a binding precedent.

Besides, the issue that the subject SMC preferred shares were public in character was never raised before the RTC-Davao, thus, the Court in Division erred in taking cognizance of the same.

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[8] Corporation Code of the Philippines.
[9] *Philippine Coconut Producers Federation, Inc. (COCOFED), et al. vs. Republic of the Philippines, et al.*, G.R. Nos. 177857-58, January 24, 2012.

Finally, petitioners give premium on the tenet that tax refunds, such as the present case, partake the nature of tax exemptions, which cannot rest on vague implications. Since respondent is a NBFI, and there being no express provision exempting its dividends and interest from LBT, its refund claim must be denied.

In refutation,[10] respondent counters that attending circumstances negate any impression that it is a NBFI. For one, it has not been authorized by the MB-BSP to perform quasi-banking activities. Neither has it been classified by the MB-BSP as a financial intermediary or institution. Further, it invested monies with the SMC once after its incorporation and has not capitalized in other entities; thus, the said venture was an isolated transaction. In addition, the mere holding of equities does not automatically render it as a NBFI. Also, petitioners merely speculated that it is a NBFI as evidence on record show the contrary. More importantly, the fact that it is a stock corporation is not conclusive proof that it is engaged in profit-making business.[11] Being a mere holding company and not a NBFI, dividends resulting from investments in SMC preferred shares, together with interest accruing from its money market placements are beyond the taxing power of petitioners.

Further, since the Supreme Court *En Banc* declared in the *COCOFED*[12] case that such equities are property of the national government, the fruits of which, i.e., interest and dividend income, are not subject to LBT pursuant to Section 133(o) of the LGC.

Respondent finally states that the above pronouncement of the Supreme Court cannot just be ignored since decisions of the High Court are subject to mandatory judicial notice under Section 4, Rule 129 of the Rules of Court. In other words, the Court in Division correctly allowed the refund of the 0.55% LBT imposed upon its dividends, and interest on money market placements,

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[10] Comment (On the Petition for Review dated 23 August 2017) dated November 16, 2017, *rollo*, pp. 48-80.
[11] Respondent cited *Collector of Internal Revenue vs. University of Visayas*, G.R. No. L-13554, February 28, 1961.
[12] See Note 8.

emanating from the SMC preferred shares it held for the 1st and 2nd Quarters of TY 2011.

THE RULING OF THE COURT

The crux of the controversy is certainly not new. Both Section 5, Article X of the Constitution[13] and Section 129 of the LGC[14] recognize the power of the local government units (LGUs) to create their 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.[15] Moreover, Section 143(f), in relation to Section 151 of the LGC, confers upon municipalities and cities the authority to impose taxes on certain businesses within their respective territorial boundaries, to wit:

> SEC. 143. *Tax on Business.* – The municipality may impose taxes on the following businesses:
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> 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.
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> xxx xxx xxx
>
> 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

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[13] 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.

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

[15] See *Pezizloy Realty Corporation, represented by its President, Gregory K. Loy vs. The Province of Benguet,* G.R. No. 183137, April 10, 2013.

> 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.

However, the taxing power of LGUs under Section 143 of the LGC is restricted by Section 133 of the same Code.[16] Among the limitations is paragraph (a)[17] thereof, which decrees that save for banks and other financial institutions, LGUs are proscribed from imposing taxes, fees or charges of any kind, on items of gain or yield which were levied income tax by the national government. The rule is animated by the doctrine of pre-emption, or the instance where national government elects to tax a particular area, impliedly withholding from the LGU the delegated power to tax the same field.[18] *Ergo*, the propriety of the subject refund rests on whether respondent is a financial institution contemplated under Section 131(e) of the LGC.

The term "banks and other financial institutions" is defined in Section 131(e) of the LGC which reads as follows:

> SEC. 131. *Definition of Terms.* – When used in this Title, the term:
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> 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)*

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[16] See *Batangas City vs. Pilipinas Shell Petroleum Corporation,* G.R. No. 187631, July 8, 2015; *City of Manila vs. Colet,* G.R. Nos. 120051, 121613, 121675, 121704, 121720-28, 121847-55, 122333, 122335, 122349 & 124855, December 10, 2014; and *Philippine Fisheries Development Authority (PFDA) vs. Central Board of Assessment Appeals, et al.*, G.R. No. 178030, December 15, 2010.

[17] 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: xxx

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

[18] See *Victorias Milling Co., Inc. vs. The Municipality of Victorias, Province of Negros Occidental,* G.R. No. L-21183, September 27, 1968.

While Section 131(e) of the LGC includes "non-bank financial intermediaries" in the term "banks and other financial institutions," it does not define the term "non-bank financial intermediaries," but alluded the legal meaning thereof to other pertinent laws, or rules and regulations.

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

> (W) The term *"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.**[19] *(Emphasis supplied)*

On the other hand, Section 2(D)(c) of Republic Act (R.A.) No. 337,[20] otherwise known as the General Banking Act, as amended, defines financial intermediaries as follows:

> Sec. 2-D. For purposes of Sections Two, Two-A, Two-B, and Two-C the following definition or terms shall apply:
>
> xxx xxx xxx
>
> (c) "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;

A more elaborate definition of the term financial intermediaries is found in Section 4101Q.1 of the Manual of Regulations for Non-Bank Financial Institutions, thus:

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[19] The determination of whether a person or entity is performing banking or quasi-banking functions without *Bangko Sentral* authority shall be decided by the Monetary Board. See Section 6 of R.A. No. 8791, otherwise known as *"AN ACT PROVIDING FOR THE REGULATION OF THE ORGANIZATION AND OPERATIONS OF BANKS, QUASI-BANKS, TRUST ENTITIES AND FOR OTHER PURPOSES."*

[20] In Section 2.3 of Revenue Regulations (RR) No. 9-2004, the BIR defines a NBFI as "persons or entities whose principal functions include the lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them or otherwise coursed through them, either for their own account or for the account of others xxx."

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

Evidently, petitioners collected LBT from respondent on the *assumption* that it is a NBFI. Apart from petitioners' reliance on respondent's amended AOI, they have nothing to show that indeed, respondent has been categorized as a financial intermediary by competent authority, or that it has habitually and principally held itself in the business of a financial institution/intermediary as enumerated or defined in the above-quoted laws, and rules and regulations.

Neither will respondent's primary purpose stated in its Amended AOI save the day for petitioners. The essence of the purpose clause in the AOI is to confer, as well as limit, the powers which a corporation may exercise.[21] However, it does not tend to prove the *actual* commercial undertaking of a corporation. Surely, it cannot be surmised that respondent is *actually* exercising functions of a NBFI on the mere fact that it is indicated as its primary purpose in its amended AOI.

Nor should the Court take hook, line and sinker petitioners' imputation of ill-will on the part of respondent in inserting an excepting clause[22] in its amended AOI to allegedly skirt pertinent rules and regulations relative to

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[21] See *Villanueva, Philippine Corporate Law,* 2001 Edition, p. 197.
[22] "respondent shall not act as a investment company or securities broker or dealer."

NBFIs since the assertion remain as such in the absence of clear and convincing proof in support thereof. Basic is the rule that good faith is always presumed, and upon him who alleges bad faith rests the burden of proof.[23] Bad faith implies a conscious and intentional design to do a wrongful act for a dishonest purpose or moral obliquity.[24] These are serious accusations that can be so conveniently and casually invoked, and that is why they are never presumed. They amount to mere slogans or mudslinging unless convincingly substantiated by whoever is alleging them,[25] by clear and convincing evidence.[26]

Equally incredulous is petitioners' argument that respondent is *presumed* to exercise the functions of a NBFI by virtue of being organized as a stock corporation. Such incorporation will establish how the juridical entity was structured, i.e., whether a stock or non-stock corporation, no more no less. The fact that it is a stock corporation will certainly not suffice; ample proof of its recurring and principal corporate activities as a NBFI is required, which as earlier discussed is wanting in the present case.

Further, petitioners' contention that a corresponding authority from the MB-BSP is insignificant to be regarded as a NBFI is as well unavailing.

Section 4 of R.A. No. 337, as amended, requires prior determination by the MB-BSP that a person or an entity is (a) performing banking or quasi-banking functions, or (b) engaged in other types of financial intermediation, to be legally regarded as a NBFI:

> Sec. 4. 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. xxx (emphasis supplied)

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[23] See *Balbuena vs. Sabay,* G.R. No. 154720, September 4, 2009.
[24] See *Laureano Investments and Development Corporation vs. The Hon. Court of Appeals*, G.R. No. 100468, May 6, 1997.
[25] See *Cathay Pacific Airways, LTD vs. Spouses Vasquez,* G.R. No. 150843, March 13, 2004.
[26] See *Arco Pulp and Paper Co., Inc. vs. Lim,* G.R. No. 206806, June 25, 2014.

Such interpretation conforms with jurisprudence and statutory construction that the word "shall" connotes mandatory character; it indicates a word of command, and one which has always or which must be given a compulsory meaning, and it is generally imperative or mandatory in nature.[27]

Again, the record is barren of any concrete evidence that respondent was determined by the MB-BSP as being engaged in quasi-banking activities as a NBFI, explicitly mandated by Section 22(W) of the NIRC, as amended, and Section 2(D)(c) in relation to Section 4 of R.A. No. 337, or the General Banking Act, as amended.

Plethora of jurisprudence consistently decrees that bare allegations, unsubstantiated by evidence, are not equivalent to proof, *i.e.,* mere allegations are not evidence.[28] A mere assumption may not be the basis in deciding a case, or in granting a relief. A judgment has to be based on facts. Conjectures and surmises cannot substitute for the facts.[29] There being no solid proof that respondent is a NBFI, it may not be held answerable for any LBT imposed upon the dividends realized on its SMC preferred shares, and interest from its money market placements. As such, the refund[30] of 0.55% LBT pertaining to the 1st and 2nd quarters of 2011 collected by petitioners from respondent is in order.

Even granting *arguendo* that respondent is indeed a NBFI as petitioners insinuate, the latter traversed the statutory impediment encapsulated in Section 133(o)[31] of the LGC, which forbids LGUs from imposing taxes, fees or

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[27] *UCPB General Insurance Company, Inc. vs. Hughes Electronics Corporation,* G.R. No. 190385, November 16, 2016.

[28] *Republic of the Philippines vs. Tobora-Tionglico,* G.R. No. 218630, July 11, 2018; *LNS International Manpower Services vs. Padua, Jr.,* G.R. No. 179792, March 5, 2010; *Dr. De Jesus vs. Guerrero III,* G.R. No. 171491, September 4, 2009; and *Domingo vs. Robles,* G.R. No. 153743, March 18, 2005.

[29] See *Spouses Guidangen vs. Wooden,* G.R. No. 174445, February 15, 2012.

[30] What may be a proper subject of refund is an illegal or erroneous tax, or one levied without any statutory authority. See *Commissioner of Internal Revenue vs. Philippine National Bank,* G.R. No. 161997, October 25, 2005.

[31] 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:
xxx
(o) Taxes, fees or charges of any kind on the National Government, its agencies and instrumentalities, and local government units.

charges of any kind on the National Government, its agencies and instrumentalities, and local government units.

Significantly, in the *COCOFED* case,[32] the Supreme Court *En Banc* decreed in no uncertain terms that the SMC preferred shares held by respondent are owned by the Philippine Government:

> **The CIIF Companies and the CIIF Block of SMC shares are public funds/assets**
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> **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.**
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> In this case, the 6 CIIF Oil Mills were acquired by the UCPB using coconut levy funds. On the other hand, the 14 CIIF holding companies are wholly owned subsidiaries of the CIIF Oil Mills. Conversely, these companies were acquired using or whose capitalization comes from the coconut levy funds. However, as in the case of UCPB, UCPB itself distributed a part of its investments in the CIIF oil mills to coconut farmers, and retained a part thereof as administrator. The portion distributed to the supposed coconut farmers followed the procedure outlined in PCA Resolution No. 033-78. And as the administrator of the CIIF holding companies, the UCPB authorized the acquisition of the SMC shares. In fact, these companies were formed or organized solely for the purpose of holding the SMC shares. As found by the Sandiganbayan, the 14 CIIF holding companies used borrowed funds from the UCPB to acquire the SMC shares in the aggregate amount of P1.656 Billion.
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> **Since the CIIF companies and the CIIF block of SMC shares were acquired using coconut levy funds – 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.**

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[32] See Note 9.

> 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.** *(Emphasis supplied)*

With the foregoing in mind, Article 440 of the Civil Code[33] essentially provides, *inter alia,* that the right to the fruits of the property legally pertains to the owner thereof. This proceeds from the principle of accession whereby the accessory follows the principal.[34] Given that respondent's SMC preferred shares are owned by the government, all the *fruges civile* ensuing therefrom, i.e., dividends and interests from money market placements are owned by the government as well, precisely beyond the taxing power of petitioners on the strength of Section 133(o) of the LGC.

To cap the discussion, the all too familiar complaint is that the government acts with dispatch when it comes to tax collection, but pays little, if any, attention to tax claims for refund or exemption. It is high time our tax collectors prove the cynics wrong.[35]

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[33] **Article 440.** The ownership of property gives the right by accession to everything which is produced thereby, or which is incorporated or attached thereto, either naturally or artificially.

[34] See *Briones vs. Macabagdal,* G.R. No. 150666, August 3, 2010; and *Heirs of Limense vs. Vda. De Ramos,* G.R. No. 152319, October 28, 2009.

[35] See *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.),* G.R. No. 172129, September 12, 2008.

WHEREFORE, the Petition for Review dated August 23, 2017, filed by petitioners the City of Davao and Bella Linda N. Tanjili, in her official capacity as City Treasurer of Davao City is **DENIED**. The impugned Decision and Resolution dated January 16, 2017 and July 17, 2017 respectively rendered by the Court in Division are **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

(With Dissenting Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

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.

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 City Treasurer of Davao City, Petitioners,	**CTA EB No. 1705** (CTA AC No. 153)
	Present: Del Rosario, *P.J.*, Castañeda, Jr., Uy, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, and Manahan *JJ.*
- versus –	
ARC INVESTORS, INC., Respondent.	Promulgated: DEC 21 2018 4:05 p.m.

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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).

Section 131(e) of the LGC of 1991 states the scope of the term "Banks and other financial institutions", as follows:

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

On the other hand, under Section 22(W) of the National Internal Revenue Code (NIRC) of 1997, as amended, an NBFI is as follows:

"(W) The term '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."

In relation thereto, Section 2(D)(c) of Republic Act (RA) No. 337, as amended by Presidential Decree (PD) No. 71, reads as follows:

"(c) '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 to them, acquired by them, or otherwise coursed through them, either for their own account or for the account of others;"

Further, Section 4101Q.1 of the BSP's Manual of Regulations for Non-Bank Financial Institutions, as follows, viz.:

"**§ 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 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."

From the foregoing, the following are the elements of an NBFI:

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:

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.

Meanwhile, emphasis must be given on the second (2nd) and third (3rd) elements of an NBFI, *i.e.*, investment and placement of funds and performance of the above-enumerated functions under the third (3rd) element on a regular and recurring, not on an isolated, basis. This is premised on the nature of business tax, which is imposed on the privilege of an entity to engage in business within a local government unit.

Petitioner failed to present proof regarding the authorization of respondent to act as an NBFI

A perusal of the records shows that there is no evidence showing that respondent was authorized by the BSP to engage in NBFI activities.

However, as discussed earlier, respondent's authorization or lack thereof, do not affect whether respondent may be the subject of local business taxation. What is controlling is respondent's principal activities, *i.e.*, whether it principally performs NBFI activities, in determining whether such privilege to engage in said activities is subject to local business tax. At any rate, whether respondent may engage in NBFI activities, with or without authority from the BSP, is an issue outside of this Court's jurisdiction and should be discussed in the proper forum.

Respondent's principal functions are solely to invest and make money market placements *vis-à-vis* its SMC shares

Respondent received dividends and made money market placements on a regular and recurring, and not on an isolated basis

Based on records, the lower court found that respondent's business operations only revolve around its dividends and money market placements. Thus:

> "To stress, the income of the Petitioner Corporation comes only from two sources, to wit:
>
> 1. ***Dividends from ARCI's SMC Shares; and***
> 2. ***Interest Income from ARCI's Money Market Placements***

> In short, these ***dividends and interests*** are not considered incidental to its business quest, but are the **principal** xxx incomes of Petitioner's Corporation in the regular course of its business in line with the Primary Purpose of its Amended Articles of Incorporation."[1]

However, the subject decision did not consider the above-findings of the lower court. Further scrutiny of the records shows that respondent did not question the foregoing findings of the lower court during the course of the trial. Evidently, these findings of fact by the lower court, without any opposition on the part of respondent, should be accorded respect.

Thus, it has been sufficiently established that respondent's income emanates only from dividends and money market placements, which activities fall within the purview of an NBFI. In other words, it was proven during the proceedings below that respondent has no other activity or business that generates income, except for the dividends it regularly receives and for its money market placements. Therefore, these exclusive activities of respondent are NBFI activities which may properly be subjected to local business tax.

The tax is levied upon the privilege of an entity to engage in NBFI activities 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 municipality[2] may impose taxes **on the following businesses**:
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> xxx xxx xxx
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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 premium."*(Emphasis supplied)*

Section 143(f) of the LGC of 1991 imposes local business tax **on banks and other financial institutions**, *i.e.*, NBFIs. In other words, while

[1] Court in Division Docket, p. 41.
[2] The city, may levy the taxes, fees, and charges which the province or municipality may impose, in accordance with Sec. 151, LGC of 1991.

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

On this score, the subject Decision held that respondent is one of the Coconut Industry Investment Fund holding companies. Therefore, respondent, including its SMC shares, are government-owned and excluded from petitioner's taxing powers.

However, in the instant case, while the SMC 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 NBFI 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.

Further, if the government owns respondent by reason of primarily dealing with San Miguel Shares, then this clearly supports the conclusion of the lower court that respondent's income comes only from dividends and money market placement *vis-à-vis* its SMC Shares. Thus, respondent's privilege to engage in NBFI activities should be subjected to local business tax.

To conclude, the crucial element to determine whether an entity is engaged in NBFI 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 NBFI activities as it principally performs its core business operations, such entity is not an NBFI. However, when an entity solely receives income from its NBFI activities, or when there is a showing that it performs no other business activity other than NBFI activities, then said entity should be categorized as an NBFI for purposes of local business taxation.

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

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