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

***EN BANC***

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| **ASC INVESTORS, INC.,** Petitioner, | **CTA EB No. 1568** (CTA AC No. 134) |
| | ***Present:*** |
| **- versus -** | **DEL ROSARIO,** P.J., **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** and **MANAHAN,** JJ. |
| **CITY OF DAVAO and HON. RODRIGO S. RIOLA, in his capacity as the City Treasurer of Davao City,** Respondents. | ***Promulgated:*** |
| | MAY 17 2018 2:30 p.m. |

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# DECISION

**UY, J.:**

Before the Court *En Banc* is a *Petition for Review* filed by petitioner ASC Investors, Inc. against respondents City of Davao and Rodrigo S. Riola, City Treasurer of Davao City, on January 4, 2017, seeking the nullification, reversal, and setting aside of the Decision dated July 14, 2016[1] and Amended Decision dated December 1, 2016[2], both rendered by the Second Division of this Court (Court in Division) in CTA AC No. 134, entitled "*ASC Investors, Inc., Petitioner, versus City of Davao and Hon. Rodrigo S. Riola, in his capacity as*

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[1] Penned by Associate Justice Juanito C. Castañeda, concurred by Associate Justice Amelia R. Cotangco-Manalastas; while Associate Justice Caesar A. Casanova was on leave; EB Docket, pp. 62 to 70.

[2] Penned by Associate Justice Juanito C. Castañeda, concurred by Associate Justice Caesar A. Casanova; (Associate Justice Amelia R. Cotangco-Manalastas has retired) , pp. 71 to 84.

*the City Treasurer of Davao City, Respondents"*, the dispositive portions of which respectively read as follows:

**Decision dated July 14, 2016:**

"**WHEREFORE**, in view thereof, the instant Petition for Review is **DISMISSED**, for lack of jurisdiction.

**SO ORDERED.**"

**Amended Decision dated December 1, 2016:**

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

**SO ORDERED.**"

## THE FACTS

Petitioner ASC Investors, Inc. is a domestic corporation duly organized and existing under Philippine laws, with principal office address at Legaspi Oil Compound Km. 9.5, Sasa, Davao City. Its primary purpose as stated in its Articles of Incorporation is as follows:

"To purchase, subscribe for, or otherwise acquire and own, hold, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of real and personal property of every kind and description, including shares of stock, voting trust certificates for shares of the capital stock, bonds, debentures, notes, evidences of indebtedness, and other securities, contracts, or obligations of any corporation or corporations, association or associations, domestic or foreign, and to pay therefor in whole or in part in cash or by exchanging therefor stocks, bonds, or other evidences of indebtedness or securities, contracts, or obligation, to receive, collect, and dispose of the interest, dividends and income arising from

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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."

On the other hand, respondent City of Davao is a local government unit (LGU) duly created by law; while respondent Rodrigo S. Riola is the incumbent City Treasurer of Davao City, who is being sued in his official capacity. Both respondents hold office at the City Hall Building, San Pedro Street, Davao City.

On January 20, 2014, respondent City of Davao, through respondent City Treasurer Riola, issued a Business Tax Order of Payment, assessing petitioner for alleged 0.55% local business tax on the dividends derived from its shares of stock and interest on its money market placements for the third and fourth quarters of taxable year 2011 in the amount of ₱4,943,223.40.

Consequently, on March 21, 2014, petitioner filed with respondent City Treasurer Riola its written administrative protest on the alleged erroneously and illegally assessed local business tax.

On April 4, 2014, respondent City Treasurer Riola required petitioner to show proof of its payment of the local business taxes before the protest may be resolved. He informed petitioner that no protest shall be entertained unless the latter pays first the imposed tax pursuant to Section 423 of the 2005 Revenue Code of the City of Davao.

Petitioner then sent a letter-reply to respondent City Treasurer Riola on April 24, 2014, arguing that the requirement of payment under protest is invalid and unconstitutional for being inconsistent with Section 252 in relation to Section 195 of Republic Act (RA) No. 7160 which provides that payment under protest is required only for protests on real property tax assessments and not on other local taxes.

In the letter dated May 5, 2014, respondent City Treasurer Riola claimed that Section 423 of the 2005 Revenue Code of the City of Davao does not distinguish between real property and business taxes. He further contended that the Ordinance is a valid law. Hence, the Office of the City Treasurer is required to abide by it.

Due to the inaction of respondents on petitioner's protest, petitioner filed a *Petition for Review* before the Regional Trial Court (RTC) of Davao City on June 9, 2014. The case was docketed as Civil Case No. 35, 671-14.

In the Order dated October 15, 2014, the RTC of Davao City denied the *Petition for Review*. The same was received by petitioner on October 17, 2014. Pertinent portions of the said Order read as follows:

> "As such, being categorized as a **Financial Intermediary**, petitioner's principal income falls under the coverage of **paragraph (f), Section 143 of RA No. 7160 of the Local Government Code of 1991**, to wit:
>
> > 'SECTION 143. Tax on Business. – ***The municipality may impose taxes on the following businesses:***
> >
> > 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 other discounts from lending activities, income from financial leasing,* ***dividends****, rentals on property and profit from exchange for sale of property, insurance premium.'*
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> **FOR REASONS STATED**, the instant 'Petition for Review' filed by the Petitioner under Section 195 of Republic Act No. 7160 is hereby **DENIED** and/or **DISMISSED**.
>
> **SO ORDERED.**"

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On November 20, 2015, petitioner filed a *Motion for Reconsideration*, arguing that the trial court erroneously held that petitioner is a non-bank financial intermediary. This motion was denied by the trial court in its Order dated December 17, 2014, which petitioner received on the same date. The dispositive portion of the said Order reads:

> "As such, the **'Motion for Reconsideration'** filed by petitioner through counsel is hereby **DENIED**.
>
> **SO ORDERED."**

On February 6, 2015, petitioner filed a *Petition for Review* before the Court in Division. The case was docketed as CTA AC No. 134.

However, the Court in Division dismissed the *Petition* in the Resolution dated February 24, 2015, for failure of petitioner to furnish respondents a copy of the *Petition for Review*, pursuant to Sections 1 and 3, Rule 42 of the 1997 Rules of Civil Procedure, as amended.

On March 3, 2015, petitioner filed a *Motion for Reconsideration (Of the Resolution dated 24 February 2015)*, which was granted in the Resolution dated June 23, 2015.

On July 30, 2015, the Court in Division received the entire original records of Civil Case No. 35,671-14 from the RTC of Davao City.

As directed, petitioner filed its *Memorandum* on July 29, 2015 through registered mail, which was received by the Court in Division on August 10, 2015. On the other hand, respondents failed to file a *Memorandum* as per Records Verification dated August 14, 2015 issued by the Judicial Records Division of this Court.

In the Resolution dated August 20, 2015, CTA AC No. 134 was submitted for decision.

On July 14, 2016, the Court in Division issued the assailed Decision which dismissed petitioner's *Petition for Review* for lack of jurisdiction. [3]

On July 29, 2016, petitioner filed a *Motion for Reconsideration* of the said Decision.[4]

In the assailed Amended Decision dated December 1, 2016,[5] the Court in Division granted petitioner's *Motion for Reconsideration* insofar as the jurisdiction of the Court is concerned, but affirmed the assessment against petitioner for 0.55% local business tax for the third and fourth quarters of 2011 in the amount of ₱4,943,223.40.

On December 16, 2016, petitioner filed a *Motion for Extension of Time to File Petition for Review* before the Court *En Banc*, praying for an additional period of fifteen (15) days from December 20, 2016 or until January 4, 2017, within which to file its *Petition for Review.*[6] The Court *En Banc* granted petitioner a final and non-extendible period of fifteen (15) days from December 20, 2016 or until January 4, 2017, within which to file the said *Petition for Review.*[7]

On January 4, 2017, petitioner filed the instant *Petition for Review.*[8] In the Resolution dated January 18, 2017,[9] respondents were directed to file their comment on the instant *Petition for Review* within ten (10) days from notice. Only respondents filed their *Comment* on February 13, 2017.[10]

Thereafter, in the Resolution dated March 23, 2017,[11] the Court *En Banc*, ordered both parties to submit their respective memorandum within thirty (30) days from receipt of the said Resolution. Petitioner filed its *Memorandum* on May 8, 2017,[12] while respondents filed their *Memorandum* on May 11, 2017.[13]

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[3] EB Docket, pp. 62 to 70; Division Docket (CTA AC No. 134), pp. 287 to 295.
[4] Division Docket (CTA AC No. 134), pp. 298 to 303.
[5] EB Docket, pp. 71 to 84; Division Docket (CTA AC No. 134), pp. 329 to 343.
[6] EB Docket, pp. 1 to 5.
[7] Minute Resolution dated December 22, 2016, EB Docket, p. 23-A.
[8] EB Docket, pp. 24 to 57.
[9] EB Docket, pp. 115 to 116.
[10] EB Docket, pp. 139 to 153.
[11] EB Docket, pp. 166 to 167.
[12] EB Docket, pp. 174 to 207.
[13] EB Docket, pp. 210 to 226.

Accordingly, in the Resolution dated June 14, 2017,[14] the instant case was deemed submitted for decision.

Hence, this Decision.

## THE ISSUES

Petitioner raises the following issue in its *Petition for Review*, for the Court *En Banc*'s resolution, to wit:

> "WHETHER OR NOT THE CITY OF DAVAO MAY REQUIRE ASCI TO PAY 0.55% LOCAL BUSINESS TAX FOR THE THIRD AND FOURTH QUARTERS OF 2011 ON THE DIVIDENDS ON ITS SMC SHARES OF STOCK AND INTEREST INCOME ON ITS MONEY MARKET PLACEMENTS FOR THE YEAR 2010."[15]

***Petitioner's arguments:***

Petitioner contends that it is erroneous and illegal for respondents to assess a 0.55% local business tax on its dividends and interest income since it is not a bank or a financial institution as defined in Section 131 (c) of the Local Government Code and Section 4101Q.1 of the Manual of Regulations for Non-Bank Financial Institutions. Petitioner submits that the Court in Division is mistaken in holding that it is engaged in the business of a financial intermediary. According to petitioner, it is a mere holding company, which, pursuant to Philippine laws cannot be subject to local business tax on its dividend income and interest income on money market placements.

Further, petitioner argues that the Philippines adheres to the "dividend exclusion" principle, which provides that, in general, intercompany dividends, having been taxed already in the hands of the issuing corporation in the form of annual tax on income, should not be taxed again in the hands of a stockholder corporation. In addition thereto, petitioner asserts that local government units are expressly prohibited from imposing income tax under RA No. 7160, unless the same is levied on banks and other financial institutions.

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[14] EB Docket, pp. 230 to 231.
[15] EB Docket, p. 35.

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Consequently, petitioner submits that since it is not a bank of financial institution, local business tax cannot be imposed on its income.

Petitioner likewise argues that its Amended Articles of Incorporation indicates that it is a holding company and that its primary purpose expressly prohibits it from acting as an investment company or a securities broker and/or dealer. Further, petitioner claims that it is not engaged in lending money, investing, reinvesting or trading securities and/or foreign exchange either for its own account or for the account of others in a regular or recurring basis and that it is not regulated by the *Bangko Sentral ng Pilipinas* (BSP) or by the Insurance Commission.

Petitioner contends that it is a holding company as declared by the Supreme Court in *Philippine Coconut Producers Federation, Inc. vs. Republic of the Philippines* (hereinafter referred to as "*COCOFED* case");[16] and that being a holding company, it is not subject to local business tax on its dividends.

Petitioner also avers that its income partake the nature of public funds and as such, business tax cannot be imposed. According to petitioner, in the *COCOFED* case, the Supreme Court declared that since the Coconut Industry Investment Fund (CIIF) block of San Miguel Corporation (SMC) shares were acquired using coconut levy funds, the same should be treated as government assets. Consequently, petitioner submits that any income derived therefrom should also be considered government-owned and of public character.

Finally, petitioner argues that the act of the respondents in assessing petitioner for .55% local business tax runs afoul to the basic principle that local governments cannot tax the national government; and since the SMC shares of stock are declared by the Supreme Court as owned by the government, the SMC shares of stock and any income that may accrue therefrom cannot be subject to any local tax, fee or charge pursuant to Section 133 of Republic Act No. 7160.

***Respondents' counter-arguments:***

Respondents counter-argue that taking into consideration the

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[16] G.R. Nos. 177857-58 & 178193, January 24, 2012.

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nature of petitioner's business operation, which consists solely of stock investments and money placements in SMC, petitioner is well within the purview of the definition of banks and other financial institutions. According to respondents, by owning a substantial number of shares of stock and receiving dividends in billions of pesos as return of investment and interest income from its money market placements in SMC, constitute acts of investment or doing business.

Respondents also contend that the business purpose of petitioner as contained in its amended Articles of Incorporation is broad enough to include all the descriptive function of a non-bank financial intermediary as provided under Section 4101Q.1 of the Manual of Regulations for Non-Bank Financial Institutions issued by the BSP.

Respondents likewise assert that petitioner's Articles of Incorporation stating that it shall not act as investment company or securities broker or dealer is not a conclusive proof that it is not a bank and other financial institution. According to respondents, based on the tax audit conducted by the City Treasurer, and as shown itself on petitioner's Financial Statements, it was established that petitioner has no other business, except its investment in SMC. In view thereof, respondents submit that this only shows the real intent of petitioner to engage solely and primarily in the business of stock investment and money market placements in SMC.

Additionally, respondents argue that being a stock corporation, petitioner is presumed to have been organized to engage in business with the end view of a profit, hence it cannot deny that it is not engaged in business.

Respondents submits that even assuming that the subject income partakes the nature of public funds, petitioner is not exempt from payment of local business tax on its dividends and interest income pursuant to Section 143 (f) of RA No. 7160.

Moreover, respondents argue that the fact that there was no showing that petitioner was authorized by the BSP or Monetary Board to perform quasi-banking activities does not *ipso facto* exclude the petitioner from being a non-bank financial intermediary.

Respondents contends that petitioner's claim that it is a holding company and not a non-bank financial institution based on the case of *Michigan Holdings, Inc. vs City Treasurer of Makati*,[17] is misplaced. According to respondents, it would be inappropriate to apply the ruling on the said case considering that it does not involve the same set of facts and issues. Further, respondents claim that there is no provision in RA 7160 or the LGC Code, that defines, more so exempts holding company from payment of local business taxes.

**THE COURT *EN BANC*'S RULING**

We find merit in the instant *Petition for Review*.

As a preliminary undertaking, a review of the of the taxing power of a city over banks and other financial institutions is in order.

***A city may impose business taxes on banks and other financial institutions, but such taxing power is subject to certain limitations provided under the Local Government Code.***

Under Sec 143(f), in relation to Section 151, of the Local Government Code (LGC) of 1991, the city may impose taxes on banks and other financial institutions, *to wit*:

> "SECTION.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 premiums." (*Emphases and underscoring supplied)*

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[17] CTA EB Case No. 1093 (CTA AC Case No. 99), June 17, 2015.

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"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 and underscoring supplied*)

It bears emphasis, however, that the taxing power of local government units (LGUs) is not absolute and is subject to limitations. In particular, Section 133 of the LGC enumerates the common limitations on the taxing power of LGUs. Pertinent thereto, Section 133 (a) and (o) of the same law provides as follows:

"SEC. 133. *Common Limitations on the Taxing Power 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;**

(b) Documentary stamp tax;

(c) Taxes on estates, inheritance, gifts, legacies and other acquisitions mortis causa, except as otherwise provided herein;

(d) Customs duties, registration fees of vessel and wharfage on wharves, tonnage dues, and all other kinds of customs fees, charges and dues except wharfage on wharves constructed and maintained by the local government unit concerned;

(e) Taxes, fees and charges and other impositions upon goods carried into or out of, or passing through, the territorial jurisdictions of local government units in the guise of charges for wharfage, tolls for bridges or otherwise, or other taxes, fees or charges in any form whatsoever upon such goods or merchandise;

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(f) Taxes, fees or charges on agricultural and aquatic products when sold by marginal farmers or fishermen;

(g) Taxes on business enterprises certified to by the Board of Investments as pioneer or non-pioneer for a period of six (6) and four (4) years, respectively from the date of registration;

(h) Excise taxes on articles enumerated under the National Internal Revenue Code, as amended, and taxes, fees or charges on petroleum products;

(i) Percentage or value-added tax (VAT) on sales, barters or exchanges or similar transactions on goods or services except as otherwise provided herein;

(j) Taxes on the gross receipts of transportation contractors and persons engaged in the transportation of passengers or freight by hire and common carriers by air, land or water, except as provided in this Code;

(k) Taxes on premiums paid by way of reinsurance or retrocession;

(l) Taxes, fees or charges for the registration of motor vehicles and for the issuance of all kinds of licenses or permits for the driving thereof, except tricycles;

(m) Taxes, fees, or other charges on Philippine products actually exported, except as otherwise provided herein;

(n) Taxes, fees, or charges, on Countryside and Barangay Business Enterprises and cooperatives duly registered under R.A. No. 6810 and Republic Act Numbered Sixty-nine hundred thirty-eight (R.A. No. 6938) otherwise known as the "Cooperatives Code of the Philippines" respectively; and

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

Based on the foregoing, the city's taxing power extend to the imposition of income tax on the gross receipts derived by banks and other financial institutions on its interest and dividends. Such taxing power, however, shall not extend to the levy of taxes, fees or charges of any kind on the National Government, its agencies and instrumentalities, and local government units.

Accordingly, in the instant case, respondent City of Davao may impose tax on banks and financial institutions on its gross receipts derived from interest and dividends at the rate of 0.55%, subject to the limitations laid down under Section 133.

It becomes relevant, therefore, to determine whether petitioner is covered by the definition of a *"bank and other financial institution."*

***Petitioner is not a non-bank financial intermediary; hence, the interest and dividends it receives from the preceding calendar year may not be the subject of local business tax imposed by the City of Davao.***

Petitioner argues that it is not a bank or a financial institution as defined under the LGC and insists that it is merely a holding company. It further claims that it is not engaged in lending money, investing, reinvesting or trading securities and/or foreign exchange either for its own account or for the account of others in a regular or recurring basis

On the other hand, respondents argue that taking into consideration the nature of petitioner's business operation, which consists solely of stock investments and money placements in SMC, petitioner is well within the purview of the definition of banks and other financial institutions. Specifically, respondents are of the view that petitioner is deemed a non-bank financial intermediary.

We find merit in petitioner's arguments. Contrary to the assertion of respondents, there is no showing that petitioner is a non-bank financial intermediary.

The term *"Banks and other financial institutions"*, is defined under Section 131(e) of the LGC of 1991, to wit:

> "SECTION. 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;**" (Emphases supplied)

Evidently, *"non-bank financial intermediaries"* are included in the term *"banks and other financial intermediaries"*. Considering, however, that no definition for *"non-bank financial intermediaries"* is provided under the LGC of 1991, resort to applicable laws, rules and regulations is in order.

Under Section 22(W) of the National Internal Revenue Code (NIRC) of 1997, the term *"non-bank financial intermediary"* has been defined 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**." *(Emphasis supplied)*

Relative thereto, Section 2-D(c) of Republic Act (RA) No. 337, as amended by Presidential Decree (PD) No. 71, otherwise known as the General Banking Act, 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 with them, acquired by them, or otherwise coursed through them, either for their own account or for the account of others;"

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Revenue Regulations (RR) No. 09-2004, likewise defines *"non-bank financial intermediaries"* as follows:

> "Section 2. Definition of Terms. - For purposes of these Regulations, the terms enumerated hereunder shall have the following meaning:
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> xxx xxx xxx
>
> 2.3 *Non-bank Financial Intermediaries*. - shall refer to persons or entities whose *principal functions* include <u>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.</u> This includes all entities regularly engaged in the lending of funds or purchasing of receivables or other obligations with funds obtained from the public through the issuance, endorsement or acceptance of debt instruments of any kind for their own account, or through the issuance of certificates of assignment or similar instruments with recourse, trust certificates, or of repurchase agreements, whether any of these means of obtaining funds from the public is done on a regular basis or only occasionally." (*Underscoring supplied.)*

Furthermore, Section 41010.1 of the BSP's Manual of Regulations for Non-Bank Financial Institutions defines *"financial intermediaries"* as follows, viz:

> "**§ 41 01 Q.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.
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> <u>*Principal* shall mean chief, main, most considerable or important, of first importance, leading, primary, foremost. dominant or preponderant, as distinguished from secondary or incidental.</u>

*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, nonstock 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." (Underscoring supplied)

Taking all the foregoing provisions into account, to be considered a "non-bank financial intermediary", the following basic requirements must be met:

1) The person or entity is "authorized by the *Bangko Sentral ng Pilipinas* (BSP) to perform quasi-banking activities";[18]

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";[19] 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*:

    1. 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;

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[18] This is pursuant to Section 131 (e) of the LGC of 1991, in relation to Section 22(W) of the NIRC of 1997 and Section 2-D(c) of RA No. 337, as amended by PD No. 71.

[19] This is pursuant to Section 2-D(c) of RA No. 337, as amended by PD No. 71; Section 2.3 of RR No. 09-2004; and Section 4101Q.1 of the BSP's Manual of Regulations for Non-Bank Financial Institutions.

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

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

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

5. 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.

In the instant case, there is no showing that petitioner met the foregoing requirements so as to be considered as a non-bank financial intermediary.

On the *first requirement*, there is no indication that petitioner is authorized by the BSP to perform quasi-banking activities. Petitioner has specifically denied that it is being regulated by the BSP. On the other hand, respondents did not dispute such claim nor did it offer proof that petitioner has been duly authorized to perform quasi-banking activities. On this basis alone, petitioner cannot be treated as a non-bank financial intermediary.

The *second requirement* is likewise not shown. There is nothing on record that shows that petitioner is actually engaged in the functions of a financial intermediary as enumerated in the above-cited General Banking Act, RR No. 09-2004, and the BSP's Manual of Regulations for Non-Bank Financial Institutions. Further, while it may be true that the functions of petitioner on the basis of its primary purpose as stated in its Amended Articles of Incorporation may cover the functions of a non-bank 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". No evidence was presented to show that the stated functions were principally done by petitioner in the taxable year concerned.

Finally, as to the *third requirement*, it was never established that the enumerated functions were performed by petitioner "on a regular and recurring, not on an isolated, basis". Neither was it shown that petitioner held itself out, nor advertised itself, as a non-banking financial intermediary.

Needless to state, the determination of this Court must rest on all the evidence introduced and its ultimate determination must find support in credible evidence; and in order to stand judicial scrutiny, the assessment must be based on facts.[20]

Hence, the Court *En Banc* finds that petitioner is not a non-bank financial intermediary, and the interests and dividends it received may not be the subject of local business tax imposed by respondent City of Davao.

***Considering that petitioner is considered as a government asset, any tax imposed upon it is, in effect, a tax on the government.***

Petitioner further claims that the subject dividend and interest income partake the nature of public funds, hence, business tax cannot be imposed on the same.

We agree with petitioner.

In the *COCOFED* case, the Supreme Court declared that petitioner and the SMC shares held by the fourteen (14) holding companies, including the petitioner, are owned by the government. The Supreme Court ruled as follows:

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

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[20] *Commissioner of Internal Revenue vs. Hantex Trading Co., Inc.*, G.R. No. 136975, March 31, 2005.

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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.

xxx xxx xxx

**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. <u>Being government properties, they are accordingly owned by the Government, for the coconut industry pursuant to currently existing laws.</u>**

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*,[21] 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, <u>belong to the government as, at the very least, their beneficial and true owner.</u>**

We thus affirm the decision of the Sandiganbayan on this point. But as We have earlier discussed,

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[21] G.R. Nos. 147062-64, December 14, 2001.

> reiterating our holding in *Republic v. COCOFED*, the States avowed policy or purpose in creating the coconut levy fund is for the development of the entire coconut industry, which is one of the major industries that promotes sustained economic stability, and not merely the livelihood of a significant segment of the population. **Accordingly, We sustain the ruling of the Sandiganbayan in CC No. 0033-F that the CIIF companies and the CIIF block of SMC shares are public funds necessarily owned by the Government.** We, however, modify the same in the following wise: These shares shall belong to the Government, which shall be used only for the benefit of the coconut farmers and for the development of the coconut industry." *(Emphases supplied)*

Based on the foregoing, the CIIF companies and the CIIF block of SMC share are considered government assets or properties.

As found in the *COCOFED* case, petitioner is one of the "CIIF companies" being referred to.[22] Thus, since petitioner is considered as Government property, any tax imposed thereto is considered, in effect, as a tax on Government. Such being the case, under Section 133(o) of the LGC of 1991, the dividend income as well as the interest income earned by petitioner may not be subjected to the local business tax imposed by respondent City of Davao.

**WHEREFORE**, in light of the foregoing considerations, the *Petition for Review* is hereby **GRANTED**.

The assailed Decision dated July 14, 2016 and Amended Decision dated December 1, 2016 rendered by the Court in Division in CTA AC No. 134 are **REVERSED** and **SET ASIDE**. Correspondingly, the local business tax being assessed against petitioner for the third and fourth quarters of 2011 in the amount of ₱4,943,223.40 is **CANCELLED** and **SET ASIDE.**

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[22] See Footnote no. 4 of *Philippine Coconut Producers Federation, Inc. (COCOFED), et al. vs. Republic of the Philippines*, etseq., supra, to wit: "Composed of Soriano shares, **ASC Investors**, ARC Investors, Roxas Shares. Toda Holdings, AP Holdings, Fernandez Holdings, SMC Officers Corps., Te Deum Resources, and Anglo Ventures, Randy Allied Ventures, Rock Steel Resources, Valhalla Properties Ltd., and First Meridian Development, all names ending with the suffix 'Corp.' or 'Inc.'" *(Emphasis and underscoring supplied)*

NM

**SO ORDERED.**

**ERLINDA P. UY**
*Associate Justice*

WE CONCUR:

with concurring Opinion
**ROMAN G. DEL ROSARIO**
*Presiding Justice*

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

**LOVELL R. BAUTISTA**
*Associate Justice*

*( I join Justice Castañeda's Dissenting Opinion )*
**CAESAR A. CASANOVA**
*Associate Justice*

**ESPERANZA R. FABON-VICTORINO**
*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*

**ASC INVESTORS, INC.,**
*Petitioner,*

- versus -

**CITY OF DAVAO and HON. RODRIGO S. RIOLA, in his capacity as the City Treasurer of Davao City,**
*Respondents.*

**CTA EB NO. 1568**
(CTA AC No. 134)

*Present:*

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

Promulgated:
MAY 17 2018 2:30 p.m.

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## CONCURRING OPINION

***DEL ROSARIO, P.J.:***

I concur in the *ponencia* of my esteemed colleague, the Honorable Associate Justice Erlinda P. Uy, which grants the Petition for Review filed by ASC Investors, Inc. thereby reversing and setting aside the assailed Amended Decision of the Court in Division, and orders the cancellation of the assessment against petitioner for local business tax (LBT) for the third and fourth quarters of 2011 in the amount of P4,943,223.40, inclusive of surcharge and legal interest.

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

[1] Republic Act No. 7160.

relation to Section 131(e) of the same Code. Section 131(e) of the 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., makes the following analogy in concluding that petitioner is a non-bank financial intermediary, thus:

> "Furthermore, not being authorized by the BSP to act as a non-bank financial intermediary should not be a basis for concluding that petitioner is not a non-bank financial intermediary. To my mind, this requirement is a regulatory measure by the BSP rather than a criterion for determining what entity is considered as a non-bank financial intermediary. **It is as if saying, by analogy, that a person who is found driving a motor vehicle without the requisite license cannot be considered as driving a motor vehicle because the person has no driver's license issued by the proper authority. Yet, the facts clearly show that the**

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

> **person is driving a motor vehicle without, however, the requisite license or authority to drive.**" (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 driver without license cannot be considered as a "professional driver" unless he possesses a "professional driver's license" as 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 were 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 *ponente.*

**ROMAN G. DEL ROSARIO**
Presiding Justice

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

*EN BANC*

**ASC INVESTORS, INC.,**
Petitioner,

**CTA EB No. 1568**
(CTA AC No. 134)

Present:

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

*- versus –*

**CITY OF DAVAO and HON. RODRIGO S. RIOLA, in his capacity as the City Treasurer of Davao City,**
Respondents.

Promulgated:

MAY 17 2018 2:30 p.m.

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## DISSENTING OPINION

**CASTAÑEDA, JR., *J.*:**

With all due respect, I dissent from the *ponencia* of my esteemed colleague, the Honorable Associate Justice Erlinda P. Uy.

I take exception to the conclusion reached by the *ponencia* that the present Petition for Review should be granted primarily on the ground that petitioner is not a non-bank financial intermediary.

It bears stressing that in concluding that petitioner is a non-bank financial intermediary, the lower court found that:

> "Furthermore, the Court observes and therefore must stress that the income of the Petitioner Corporation come only from two sources, to wit:
>
> 1. ***Dividends from ASCI's SMC Shares; and***
> 2. ***Interest Income from ASCI's Money Market Placements***
>
> In short, these ***dividends and interests*** are not considered incidental to its business quest, but are the **principal** x x x 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]

A careful reading of the *ponencia* shows that the majority failed to take into account the foregoing factual findings by the lower court. The *ponencia* relevantly states:[2]

> "On the *first requirement*, there is no indication that petitioner is authorized by the BSP to perform quasi-banking activities. Petitioner has specifically denied that it is being regulated by the BSP. On the other hand, respondents did not dispute such claim nor did it offer proof that petitioner has been duly authorized to perform quasi-banking activities. On this basis alone, petitioner cannot be treated as a non-bank financial intermediary.
>
> The *second requirement* is likewise not shown. There is nothing on record that shows that petitioner is actually engaged in the functions of a financial intermediary as enumerated in the above-cited General Banking Act, RR No. 09-2004, and the BSP's Manual of Regulations for Non-Bank Financial Institutions. Further, while it may be true that the functions of petitioner on the basis of its primary purpose as stated in its Amended Articles of Incorporation may cover the functions of a non-bank 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'. No evidence was presented to show

[1] CTA AC No. 134 Docket, p. 41.
[2] Majority Opinion, pp. 18-19 (Citations omitted).

> that the stated functions were principally done by petitioner in the taxable year concerned.
>
> Finally, as to the *third requirement*, it was never established that the enumerated functions were performed by petitioner 'on a regular and recurring, not on an isolated, basis'. Neither was it shown that petitioner held itself out, nor advertised itself, as a non-banking financial intermediary.
>
> Needless to state, the determination of this Court must rest on all the evidence introduced and its ultimate determination must find support in credible evidence; and in order to stand judicial scrutiny, the assessment must be based on facts.
>
> xxx xxx xxx"

The *ponencia* provides that there is nothing on record or there is no proof that petitioner performed activities attributable to a non-bank financial intermediary. Yet, there is also nothing in the *ponencia* that overturned the aforesaid factual findings of the lower court, *i.e.*, that petitioner's income come only from dividends and interest income from ASCI's money market placements. Precisely, these findings of fact are on record and are proof that petitioner acts as a non-bank financial intermediary. Considering that there is no contrary finding by the Court *En Banc*, the findings of fact of the lower court must be considered in arriving at the decision.

Furthermore, not being authorized by the BSP to act as a non-bank financial intermediary should not be a basis for concluding that petitioner is not a non-bank financial intermediary. To my mind, this requirement is a regulatory measure by the BSP rather than a criterion for determining what entity is considered as a non-bank financial intermediary. It is as if saying, by analogy, that a person who is found driving a motor vehicle without the requisite license cannot be considered as driving a motor vehicle because the person has no driver's license issued by the proper authority. Yet, the facts clearly show that the person is driving a motor vehicle without, however, the requisite license or authority to drive.

The above illustration is equally applicable to the present case. Whether petitioner is a non-bank financial intermediary cannot be based on a finding that it is not authorized by the BSP to act as such. It is clear in this case that petitioner's income come only from dividends and interest income from ASCI's money market placements, which it could not have earned if it does not act as a non-bank financial intermediary albeit, without authority from the BSP.

In connection to the above discussion, there is also no guarantee that a holding company will not act as a non-bank financial intermediary despite the limitations provided in its Articles of Incorporation. Thus, a holding company may not have been included among the entities enumerated as banks and other financial institutions under Section 133(e) of the 1991 LGC, but it cannot be an assurance that a holding company cannot engage in acts outside of its authority.

In light of the foregoing, I **VOTE** to **DENY** the present Petition for Review and **AFFIRM** the assailed Amended Decision dated December 1, 2016 of the Second Division of this Court.

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