REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

****

FIRST MERIDIAN DEVELOPMENT, INC., Petitioner,	**CTA EB No. 1607** (CTA AC No. 159)
	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:*** JUN 20 2018 4:09 p.m.

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DECISION

UY, *J.*:

Before the Court *En Banc* is the *Petition for Review*[1] filed by First Meridian Development, Inc. on March 29, 2017 against the City of Davao and Hon. Rodrigo S. Riola, in his capacity as the City Treasurer of Davao City, praying for the reversal and setting aside of the Decision dated November 29, 2016[2] and Resolution dated February 23, 2017[3], both promulgated by the Second Division of this Court (Court in Division) in CTA AC No. 159, entitled *"First Meridian Development, Inc., Petitioner, versus City of Davao and Hon. Rodrigo S. Riola, in his official capacity as the City Treasurer of Davao City,*

[1] EB Docket, pp. 8 to 42.
[2] EB Docket, pp. 46 to 57.
[3] EB Docket, pp. 59 to 63.

Respondents," the dispositive portions of which respectively read as follows:

Decision dated November 29, 2016:

> "**WHEREFORE,** premises considered, the Petition for Review is **DENIED** for lack of merit.
>
> **SO ORDERED.**"

Resolution dated February 23, 2017:

> "**WHEREFORE,** premises considered, petitioner's Motion for Reconsideration is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

Petitioner further prays that the Court *En Banc* orders respondents to refund or credit in its favor the amount of ₱456,394.00, plus legal interest, representing the 0.55% local business taxes for the first and second quarters of 2011, erroneously and illegally collected from petitioner on January 18, 2011 and April 25, 2011, respectively.

THE FACTS

Petitioner First Meridian Development, Inc. is a corporation duly organized and existing under Philippine laws with principal office address at Legaspi Oil Compound Km. 9.5, Sasa, Davao City.

Respondent City of Davao is a local government unit (LGU) duly created by law, while co-respondent Rodrigo S. Ariola is being impleaded in his official capacity as the City Treasurer of Davao City.

In 2010, petitioner obtained the amount of ₱165,961,458.25 from dividends on its San Miguel Corporation (SMC) Preferred Shares and interests on its money market placements, computed as follows:

Nature of Income	Amount
Dividends	₱163,989,405.00
Interest	1,972,053.25
Total	**₱165,961,458.25**

For the first half of the year 2011, respondent City of Davao, through respondent City Treasurer Riola, collected from petitioner the 0.55% local business taxes in the aggregate amount of ₱456,394.00 on the dividends derived from its SMC Preferred Shares and interests on money market placements. Petitioner paid the same under protest on January 18, 2011 and April 25, 2011.

On September 13, 2012, petitioner filed with respondent City Treasurer its written administrative claim for refund or credit of the said local business taxes collected.

Due to the alleged inaction of the City Treasurer on its protest, petitioner filed a *Petition for Review* before the Regional Trial Court (RTC) of Davao City on January 17, 2013. The case was docketed as RTC Civil Case No. 34,852,13.

On June 22, 2015, the RTC of Davao City, Branch 16, promulgated its Decision, dismissing the *Petition for Review* on the ground that petitioner is a non-bank financial intermediary and is therefore subject to local business tax on its dividends and interest income. The dispositive portion thereof reads as follows:

> "**FOR REASONS STATED,** the instant 'Petition for Tax Refund or Credit Under Section 156, R.A. 7160' filed by the Petitioner is hereby **DENIED** and/or **DISMISSED.**
>
> **SO ORDERED.**"

Thus, petitioner filed a *Motion for Reconsideration* on August 4, 2015, but the same was denied by the RTC in the Order dated September 11, 2015.

Consequently, petitioner filed its *Petition for Review* before the Court in Division on November 9, 2015, docketed as CTA AC No. 159. In the Resolution dated November 24, 2015, the Court in Division ordered respondents to file their comment, not a motion to dismiss, within ten (10) days from notice thereof. The same was complied with by respondents on January 4, 2016.

Subsequently, in the Resolution dated January 19, 2016, the Court in Division gave the parties a period of thirty (30) days from notice thereof to submit their simultaneous memoranda. CTA AC No. 159 was submitted for decision in the Resolution dated March 31, 2016, after taking into consideration petitioner's *Memorandum* filed on February 22, 2016 and respondent's *Memorandum* filed on March 14, 2016.

In the assailed Decision dated November 29, 2016,[4] the Court in Division denied the *Petition for Review* for lack of merit.

Petitioner then filed its *Motion for Reconsideration* on December 14, 2016,[5] to which respondents filed their *Comment to Petitioner's Motion for Reconsideration* filed on January 20, 2017.[6] In the assailed Resolution dated February 23, 2017,[7] the Court in Division denied petitioner's *Motion for Reconsideration* for lack of merit.

Undaunted, petitioner filed a *Motion for Extension of Time to File Petition for Review* on March 8, 2017.[8] The Court *En Banc* granted petitioner a final and non-extendible period of fifteen (15) days from March 14, 2017, or until March 29, 2017, within which to file its *Petition for Review.* [9] Petitioner filed the instant *Petition for Review* on March 29, 2017.[10]

Without necessarily giving due course to the instant *Petition for Review*, respondents were ordered by the Court *En Banc* to file their comment thereon.[11] In compliance, respondents filed their *Comment* on May 25, 2017.[12]

In the Resolution dated June 29, 2017,[13] the parties were ordered to submit their respective memorandum, within a period of thirty (30) days from receipt of the said Resolution. Accordingly, petitioner filed its *Memorandum* on August 23, 2017,[14] while

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[4] EB Docket, pp. 46 to 57; Division Docket (CTA AC No. 159), pp. 215 to 226.
[5] Division Docket (CTA AC No. 159), pp. 231 to 249.
[6] Division Docket (CTA AC No. 159), pp. 267 to 274.
[7] EB Docket, pp. 59 to 63; Division Docket (CTA AC No. 159), pp. 278 to 282.
[8] EB Docket, pp. 1 to 4.
[9] Minute Resolution dated March 10, 2017, EB Docket, p. 7.
[10] EB Docket, pp. 8 to 42.
[11] Resolution dated April 25, 2017, EB Docket, pp. 76 to 77.
[12] EB Docket, pp. 78 to 92.
[13] EB Docket, pp. 96 to 97.
[14] EB Docket, pp. 98 to 129.

respondents filed their *Memorandum* on August 25, 2017.[15] Thereafter, the case was submitted for decision on September 18, 2017.[16]

Hence, this Decision.

ISSUE

In the instant *Petition for Review*, petitioner raises a sole issue for the Court *En Banc*'s resolution, to wit:

> "WHETHER OR NOT FMDI IS ENTITLED TO A REFUND OR CREDIT OF THE 0.55% LOCAL BUSINESS TAXES COLLECTED FOR THE FIRST AND SECOND QUARTERS OF 2011 ON THE DIVIDENDS ON ITS SMC PREFERRED SHARES AND INTEREST FROM MONEY MARKET PLACEMENTS FOR THE TAXABLE YEAR 2010."[17]

Petitioner's arguments:

Petitioner contends that it is entitled to a refund or credit of the 0.55% local business taxes collected for the first and second quarters of 2011, on the dividend and interest income for the taxable year 2010, based on the following grounds:

a) Pursuant to Section 133 (A) of the Local Government Code, it is erroneous and illegal for respondents to collect local business tax on the dividends and interest income of petitioner because it is not a bank or a financial institution;

b) Being a holding company, petitioner's dividend and interest income are not subject to local business tax; and

c) Petitioner, as well as its SMC shares and income derived therefrom, are national government property exempt from local business tax.

According to petitioner, it does not fulfill any of the requirements of being a non-bank financial intermediary as it is not

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[15] EB Docket, pp. 133 to 148.
[16] Resolution dated September 18, 2017, EB Docket, pp. 152 to 153.
[17] EB Docket, p. 16.

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authorized by the *Bangko Sentral ng Pilipinas* (BSP) to perform quasi-banking functions; and that there is likewise no evidence that petitioner principally engaged in functions that would qualify a person or entity as a non-bank financial intermediary, and it was never shown that petitioner performed the activities enumerated in paragraph 4, §4101Q.1 of the BSP Manual on a regular and recurring basis.

Other circumstances allegedly point to the conclusion that it is not a bank or other financial institution, to wit: its Amended Articles indicate that it is a holding company; as stated in its primary purpose, it is expressly prohibited from acting as an investment company or a securities broker and/or dealer, which are all types or classifications of a non-bank financial intermediary; 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; it was not required by the Securities and Exchange Commission to secure a secondary license; it is not regulated by the BSP or the Insurance Commission, which is the case for those falling within the definition of banks and other financial institutions under Section 131 € of the LGC; and that petitioner and other holding companies funded by the coconut levy funds, were organized solely to hold SMC shares.

Petitioner further contends that it cannot be considered as a bank or other non-bank financial institution, more specifically as a non-bank financial intermediary, since 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 on a regular and recurring basis. Since its incorporation, it has allegedly not engaged in any business activity; that it acquired SMC shares only once after its incorporation and has not bought any shares of stocks or invested in any other corporation other than in SMC; that it placed dividends derived from said SMC shares in a trust fund that earned interest from money market placements, as any prudent administrator would; and that in other words, the investment made by petitioner in SMC shares happened only once and is an isolated transaction.

Finally, petitioner submits that under applicable laws and regulations, it is not a non-bank financial institution; and that the dividend and interest income of petitioner, therefore, are beyond the taxing powers of respondent City of Davao.

Respondents' counter-arguments:

Respondents counter that petitioner is deemed a "bank and other financial institution," specifically as a "non-bank financial intermediary or an investment company" by virtue of its investment and money placements in SMC; and that verily, by owning a substantial number of shares of stock and receiving dividends by millions of pesos as return of such investment and interest income from the petitioner's money market placements in SMC, without a doubt, constitute an act of investment or doing business.

According to respondents, the business purpose of the petitioner as contained in its Amended Articles of Incorporation is wittingly and unwittingly broad enough to catch all the descriptive function of a non-bank financial intermediary as provided under Section 4101Q.1 of the Manual of Regulations for Non-Bank Financial Institutions issued by the BSP.

Allegedly, petitioner's Articles of Incorporation stating that it shall not act as an investment company or securities broker or dealer is not conclusive proof that it is not a "bank or other financial institution"; that based on the tax audit conducted by the City Treasurer, and as shown in petitioner's Financial Statements, it was established that petitioner has no other business, except its investment in SMC; 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; and that the self-imposed prohibition as stated in the last phrase of petitioner's Primary Purpose in its Amended Articles of Incorporation is clearly a proviso that is intended to conceal or mislead, or exempt the petitioner from obtaining the necessary secondary license as Other Financial Institution.

Even if we assume that petitioner's income partakes the nature of public funds pursuant to the ruling of the Supreme Court in *Cocofed vs. Republic*,[18] and the fund should be treated as government assets, it does not allegedly exempt the petitioner from the payment of local business tax on its dividends and interest, pursuant to Section 143 (F) of R.A. No. 7160.

As regards petitioner's contention that it is a "holding company," rather than a "non-bank financial intermediary," based on the case of

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

"*Michigan Holdings, Inc. versus City Treasurer of Makati, Nelia A. Barlis*, CTA EB No. 1093 [CTA AC Case No. 99, June 17, 2015]," the same is allegedly misplaced because the main issue in this case is not whether petitioner is a holding company or not, but rather, it is whether petitioner is deemed a "non-bank financial intermediary," so as to be subject to the assailed tax imposition.

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".

And 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.

THE COURT *EN BANC*'S RULING

The instant *Petition for Review* is meritorious.

The taxing powers of respondent City of Davao is subject to the limitations provided for under the Local Government Code of 1991.

Section 129, Book II, of Republic Act (RA) No. 7160, otherwise known as the Local Government Code (LGC) of 1991, empowers each local government unit to create its own sources of revenue, and to levy taxes, fees, and charges subject to the provisions of the code, consistent with the basic policy of local autonomy.

In relation thereto, Section 143(f), in relation to Section 151, both of the LGC of 1991, grants the power to the City of Davao to impose taxes on banks and other financial institutions, to wit:

> "SEC.143. *Tax on Business.* — **The municipality may impose taxes on the following businesses**:
>
> xxx xxx xxx
>
> (f) **On banks and other financial institutions, at a rate not exceeding fifty percent (50%) of one**

percent (1%) on the gross receipts of the preceding calendar year derived from interest, commissions and discounts from lending activities, income from financial leasing, dividends, rentals on property and profit from exchange or sale of property, insurance premiums." *(Emphases and underscoring supplied)*

"SEC.151. *Scope of Taxing Powers.* — Except as otherwise provided in this Code, **the city, may levy the taxes, fees, and charges which the** province or **municipality may impose**: xxx

The rates of taxes that the city may levy may exceed the maximum rates allowed for the province or municipality by not more than fifty percent (50%) except the rates of professional and amusement taxes." *(Emphases supplied)*

The taxing power granted to respondent City of Davao, however, is not without its limitations. Section 133 of the LGC of 1991, specifies the common limitations on the taxing power of Local Government Units, to wit:

"**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;

(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, respondent City of Davao is empowered to impose income tax, *i.e.,* based on the gross receipts derived by petitioner from dividends and interest for taxable year 2010, at the rate of 0.55%, specifically on banks and other financial institutions, subject to further limitation with regard to the imposition of taxes, fees or charges of any kind on the National Government, its agencies and instrumentalities, and local government units.

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There is no showing that petitioner is a non-bank financial intermediary or an investment company, thus, respondent should not have imposed business taxes on the dividends and interest income received by the petitioner.

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

> "SEC. 131. *Definition of Terms.* — When used in this Title, the term:
>
> xxx xxx xxx
>
> (e) *'Banks and other financial institutions'* **include non-bank financial intermediaries**, lending investors, finance and **investment companies**, pawnshops, money shops, insurance companies, stock markets, stock brokers and dealers in securities and foreign exchange, **as defined under applicable laws, or rules and regulations thereunder**;" *(Emphases supplied)*

Based on the foregoing provision, *"non-bank financial intermediaries", inter alia*, are included in the term *"Banks and other financial institutions";* and that the term *"non-bank financial intermediaries"* are those that are *"as defined under applicable laws, or rules and regulations thereunder"*.

The term *"non-bank financial intermediary"*, is defined in Section 22(W) of the National Internal Revenue Code of 1997, which reads 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, reference is made to Section 2-D(c) of RA No. 337, as amended by Presidential Decree (PD) No. 71, which reads:

"(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;"

Moreover, Section 4101Q.1 of the BSP's Manual of Regulations for Non-Bank Financial Institutions, elaborated on this definition, as follows:

"§ 4101Q.1 *Financial intermediaries.* — *Financial intermediaries* shall mean persons or entities whose principal functions include the lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them, or otherwise coursed through them either for their own account or for the account of others.

<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>

<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</u>. 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.

<u>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:</u>

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.

<u>Non-banking financial intermediaries shall include the following:</u>

(1) <u>A person or entity licensed and/or registered with any government regulatory body as a non-bank financial intermediary</u>, 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.

<u>(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.</u>

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

Pursuant to the foregoing provisions, the basic requirements for a person or entity to be considered as a *"non-bank financial intermediary"* are as follows:

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";*

3) The person or entity must perform any of the following functions on a regular and recurring, not on an isolated basis, to wit:

   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.

In the present case, there is no indication that petitioner fulfills the first requirement, as there is no evidence showing that it was *"authorized by the Bangko Sentral ng Pilipinas (BSP) to perform quasi-banking activities"*. Even on this basis alone, petitioner cannot be considered as a non-bank financial intermediary.

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The second requirement is not likewise met. According to petitioner's Amended Articles of Incorporation,[19] the primary purpose of petitioner is as follows:

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

While it may be true that the functions of the petitioner, on the basis of its primary purpose as stated in its Amended Articles of Incorporation, may cover the supposed 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."* The records of this case are wanting of any proof that the stated functions were principally done by petitioner in 2010, so as to justify the subject tax imposition in the first half of 2011.

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[19] RTC Records, p. 46 to 47.

Likewise, it was never established that the enumerated functions under the third requirement were performed by petitioner *"on a regular and recurring, not on an isolated, basis."* In fact, no evidence was shown that petitioner ever performed any of the said functions.

Lastly, there is no evidence on record, showing that petitioner held itself out as a non-bank financial intermediary. Such being the case, this Court finds that petitioner is not a non-bank financial intermediary, and the interests and dividends it received in taxable year 2010 may not be the subject of local business tax imposed by respondent City of Davao. Thus, petitioner is entitled to the tax refund being sought.

Petitioner belongs to the CIIF block of SMC shares, which were declared to be owned by the Government. Thus, any tax imposed upon petitioner is, in effect, a tax on the Government.

In this case, for the first half of the year 2011, respondent collected from the petitioner, 0.55% local business taxes on the dividends it received from its SMC shares of stock and interest income on its money market placements for the year 2010.

In *Philippine Coconut Producers Federation, Inc. (COCOFED), et al. vs. Republic of the Philippines,*[20] the Supreme Court held that the SMC shares of stock are owned by the government, to wit:

> **"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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> x x x x

[20] G.R. Nos. 177857-58 and 178193, January 24, 2012.

> **Since the CIIF companies and the CIIF block of SMC shares were acquired using coconut levy funds, which have been established to be public in character it goes without saying that these acquired corporations and assets ought to be regarded and treated as government assets. Being government properties, they are accordingly owned by the Government, for the coconut industry pursuant to currently existing laws.**
>
> It may be conceded hypothetically, as COCOFED, *et al.* urge, that the 14 CIIF holding companies acquired the SMC shares in question using advances from the CIIF companies and from UCPB loans. But there can be no gainsaying that the same advances and UCPB loans are public in character, constituting as they do assets of the 14 holding companies, which in turn are wholly-owned subsidiaries of the 6 CIIF Oil Mills. And these oil mills were organized, capitalized and/or financed using coconut levy funds. In net effect, the CIIF block of SMC shares are simply the fruits of the coconut levy funds acquired at the expense of the coconut industry. In Republic v. COCOFED, the *en banc* Court, speaking through Justice (later Chief Justice) Artemio Panganiban, stated: *'Because the subject UCPB shares were acquired with government funds, the government becomes their prima facie beneficial and true owner.'* **By parity of reasoning, the adverted block of SMC shares, acquired as they were with government funds, belong to the government as, at the very least, their beneficial and true owner.**" *(Emphases supplied)*

In the said case, petitioner is one of the "CIIF companies" being referred to.[21] Thus, since petitioner is considered as Government property, any tax imposed upon petitioner is considered, in effect, as a tax on Government. Such being the case, the dividend income earned by petitioner may not be subjected to business tax under

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[21] 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)*

Section 131(e) of the LGC of 1991 by respondent City of Davao, pursuant to Section 133(o) of the same law.

No legal interests can be imposed on the refundable amount.

As already ruled, petitioner is entitled to the tax refund being sought. However, We **cannot** grant petitioner's prayer that the aggregate amount of ₱456,394.00 be refunded or credited, **plus interest**.

Well settled is the rule that in the absence of a statutory provision clearly or expressly directing or authorizing payment of interest on the amount to be refunded to taxpayer, the Government cannot be required to pay interest. Likewise, it is the rule that interest may be awarded only when the collection of tax sought to be refunded was attended with arbitrariness. [22]

Considering that there is no law directing or authorizing the payment of interest on the refundable amount to petitioner, and since there is no showing that the collection of the subject local taxes was arbitrarily made, the Court *En Banc* cannot award petitioner the legal interest it prayed for in the subject *Petition for Review.*

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is **GRANTED.** The Decision dated November 29, 2016 and the Resolution dated February 23, 2017 rendered by the Court in Division in CTA AC No. 159 are hereby **REVERSED AND SET ASIDE**.

Accordingly, respondents are hereby **ORDERED to REFUND or ISSUE a TAX CREDIT CERTIFICATE** to petitioner in the aggregate amount of ₱456,394.00, representing erroneously collected local business taxes for taxable year 2010.

SO ORDERED.

ERLINDA P. UY
Associate Justice

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[22] Refer to *Atlas Fertilizer Corporation vs. Commissioner of Internal Revenue, et al., etseq.*, G.R. Nos. L-26686 & L-26698, October 30, 1980.

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 concur with the Dissenting Opinion of Justice Castañeda)
CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(On Leave)
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

FIRST MERIDIAN DEVELOPMENT, INC., *Petitioner,*	**CTA EB NO. 1607** (CTA AC NO. 159)
	Present:
-versus-	**DEL ROSARIO,** ***P.J.,*** **CASTANEDA, 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: JUN 20 2018 4:09 p.m.

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* in granting the Petition for Review, reversing and setting aside the assailed Decision and Resolution of the Court in Division, and ordering respondents to refund or issue a tax credit certificate to petitioner in the amount of ₱456,394.00, representing erroneously collected local business taxes for taxable year 2010.

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., in his Dissenting Opinion, makes the following analogy in concluding that petitioner is a non-bank financial intermediary, thus:

> "However, lack of authority by the BSP for petitioner to engage in NBFI [non-bank financial intermediary] activities, or lack of determination by the Monetary Board whether it is an NBFI, cannot be used as bases for concluding that petitioner is not an NBFI. To my mind, these requirements are designed merely to regulate NBFI activities.
>
> In fact, the present situation may be compared by analogy, to a person presently and smoothly driving a car without a driver's

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

> license. **To argue that this person is not presently driving a car because he or she has no driver's license is simply fallacious. Basically, such argument would necessarily lead to a conclusion that the car is moving smoothly by itself. However, it wrongfully omits the fact that the smoothly moving car is being driven by a person without a driver's license.**" (Boldfacing supplied)

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

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

Anent the imposition of legal interest on tax refunds, by way of *obiter dictum*, I wish to state my humble view that a legal interest may be imposed on tax refunds upon finality of judgment until its satisfaction. Jurisprudence on the non-imposition of interest on tax refunds should appropriately be revisited as the development of laws and jurisprudence on the matter suggest that there is basis for its imposition.

The rule that legal interest is not imposable on tax refunds in the absence of statutory authority or only when there is arbitrariness by government in denying the claim was first enunciated in *Collector of Internal Revenue vs. St. Paul's Hospital of Iloilo*.[3] In that case, the Court of Tax Appeals (CTA) ordered the Collector of Internal Revenue to refund the sum of ₱485.00, with legal interest, to St. Paul's Hospital for overpayment of business tax on its operation of a pharmacy department. The Solicitor General appealed the CTA's decision and assigned as an error the imposition of legal interest on the refund. In resolving the issue, the Court made the following rationalization:

> "xxx However, the court *a quo* erred in ordering the payment of interest on the amount to be refunded. **In the absence of a statutory provision clearly or expressly directing or authorizing such payment, and none has been cited, the National government cannot be required to pay interests."**[4] *(Boldfacing supplied)*

Prior to *St. Paul's Hospital*, however, the Supreme Court had amplified the rule that a tax refund may be subject of legal interest. Thus, in *Carcar Electric & Ice Plant Co., Inc. vs. Collector of Internal Revenue*,[5] the Court elucidated the history of the tax laws then prevailing, and the basis for which interest may be imposed, as follows:

> "xxx Under the Internal Revenue Act of 1914, the Collector of Internal Revenue was held liable for such interests (Hongkong Shanghai Bank vs. Rafferty, 39 Phil. 153; Heacock Co. vs. Collector of Customs, 37 Phil. 970; Vda. e Hijos de P. Roxas vs. Rafferty, 37 Phil. 957, and authorities cited therein) in the absence of any exempting provision in the law, and on the strength of American authorities to the effect that the State's exemption from paying interest on its obligations was never applied to subordinate governmental agencies. In Heacock Co. vs. Collector of Customs, supra, p. 980–981, this Court said:
>
> > **While the sovereign State, in the absence of statute or contract, is not liable to pay interest, it has been held, however, that governmental agencies, whether individuals or boards, which have been given the power to sue and to defend suits may be compelled to pay interest upon their indebtedness even though the Government itself ultimately pays the indebtedness.** Tax collectors are almost universally given the power to defend suits against them for illegal collection of taxes. It is usually

[3] G.R. No. L-12127, 105 Phil. 1319, May 25, 1959.
[4] *Id.* at 1320.
[5] G.R. No. L-9257, 100 Phil. 57, November 27, 1956.

> provided that the person taxed may protest and appeal to the courts to have the question of the legality of the assessment determined. It is usually provided that when the courts determine that assessment was illegal, the Government itself will refund the money, relieving the collector of personal liability. (See Section 989, Revised Statutes of the United States.)

In the case of Erskine vs. Van Arsdale (15 Wall. [U.S.], 68–75), the Supreme Court of the United States held that—

> 'Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them. * * * **Where an illegal tax has been collected, the citizen who has paid it, and has been obliged to bring suit against the collector, is, we think, entitled to interest in the event of recovery, from the time of the illegal exaction.'** (See also Schell vs. Crockren, 107 U.S., 625; National Home vs. Parrish, 229 U.S., 196; White vs. Arthur, 10 Fed. Rep. 80; McClain vs. Pennsylvania Company, 108 Federal Republic 618.)

In the case of National Rome vs. Parrish (229 U.S., 496), the Supreme Court, discussing the question before us, said:

> 'It is quite true that the United States cannot be subjected to the treasury. (Erskine vs. Van Arsdale, 15 Wall., [U.S.], 68–75; to pay it or a statute permitting its recovery. (U.S. Ex rel. Angarica vs. Bayard, 127 U.S., 251; U.S. vs. State of North Carolina, 136 U.S., 211.) But this exemption has never as yet been applied to subordinate governmental agencies. On the contrary, **in suits against collectors to recover moneys illegally exacted as taxes and paid under protest, the settled rule is that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector, but directly from the treasury.'** (Erskine vs. Van Arsdale, 15 Wall. [U.S.], 68–75; Redfield vs. Bartels, 139 U.S. 694)"

Subsequently, section 1579 of the Administrative Code of 1917 (Act 2711) expressly authorized suits against the Collector of Internal Revenue 'for the recovery without interest of the sum alleged to have been illegally collected,' and thereafter, no judgments for interest were rendered against the Collector. **But in 1939, the National Internal Revenue Code came into effect and its section 306 authorized recovery of taxes erroneously or illegally collected, but omitting the expression 'without interest' employed in section 1579 of the 1917 Administrative**

> **Code that it superseded. Considering the repeated holdings of this Court that in the absence of words of exemption the Collector was liable for interest on taxes improperly collected, the legislature's failure to reenact the words 'without interest' of the Administrative Code of 1917 imparted a desire to return to the rule in force before 1917 and under the Internal Revenue Act of 1914.** This view is supported by sec. 310 of the National Internal Revenue Code, as follows:
>
> > 'SEC. 310. *Satisfaction of judgment recovered against treasurer or other officer.*—When an action is brought against any revenue officer to recover damages by reason of any act done in the performance of official duty, and the Collector of Internal Revenue is notified of such action in time to make defense against the same, through the Solicitor-General, any judgment, damages, or costs recovered in such action shall be satisfied by the Collector of Internal Revenue upon approval of the Department Head, or if the same be paid by the person sued, shall be repaid or reimbursed to him.'
>
> As observed by this Court in Heacock Co. vs. Collector of Customs, 37 Phil. 970, 982, the **damages for wrongful exaction of money is precisely interest at the legal rate**:
>
> > 'Section 144 of the Internal Revenue Act of 1914 authorizes the Collector of Internal Revenue, in cases like the present, to pay out of public funds in his hands 'any judgment, damages, or costs' recovered in an action brought against 'any revenue officer' by reason of any act done in the performance of official duties. The "damages" for the wrongful exaction or withholding of money is the payment of interest at the legal rate. (Article 1108, Civil Code.)'
>
> We conclude that under the present Internal Revenue Code the Collector of Internal Revenue may be made to answer for interest at the legal rate on taxes improperly collected. **<u>Such liability serves as additional safeguard in favor of the taxpayer against arbitrariness in the exaction or collection of taxes and imposts</u>**."[6] *(Boldfacing and emphasis supplied)*

It is noted that despite *Carcar,* the Supreme Court's ruling in *St. Paul's Hospital* was reiterated in subsequent cases[7] until it was eventually modified with a declaration that tax refunds are not subject to legal interest in the absence of statutory authority[8] and when there

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[6] *Id.* at 57-60.

[7] *See, e.g.,* Collector of Internal Revenue vs. Sweeney, G.R. No. L-12178, 106 Phil. 59, August 21, 1959; Commissioner of Customs vs. Borres, G.R. No. L-12867, 106 Phil. 625, November 28, 1959; and Collector of Internal Revenue vs. Fisher, G.R. Nos. L-11622 and L-11668, 110 Phil. 686, January 28, 1961.

[8] Atlas Fertilizer Corporation vs. Commissioner of Internal Revenue and Court of Tax Appeals, G.R. Nos. L-26686 and L-26698, October 30, 1980.

is no arbitrariness in the denial of the refund by the Commissioner of Internal Revenue.[9]

The foregoing notwithstanding, the rulings in *Carcar* and *St. Paul's Hospital* should be revisited in light of the provisions of the Civil Code, the Local Government Code (LGC) and the prevailing jurisprudence on the imposition of interest on loans and forbearance of money, as applied to tax refund.

Parenthetically, the Civil Code itself constitutes as the statutory authority in the imposition of interest. The seminal case of *Eastern Shipping Lines, Inc. vs. Court of Appeals*,[10] as restated in *Nacar v. Gallery Frames*,[11] is enlightening:

> "I. When an obligation, regardless of its source, *i.e.*, law, contracts, quasi-contracts, delicts or quasi-delicts is breached, the contravenor can be held liable for damages. The provisions under Title XVIII on 'Damages' of the Civil Code govern in determining the measure of recoverable damages.
>
> II. With regard particularly to an award of interest in the concept of actual and compensatory damages, the rate of interest, as well as the accrual thereof, is imposed, as follows:
>
>> 1. When the obligation is breached, and it consists in the payment of a sum of money, *i.e.*, a loan or forbearance of money, the interest due should be that which may have been stipulated in writing. Furthermore, the interest due shall itself earn legal interest from the time it is judicially demanded. In the absence of stipulation, the rate of interest shall be 6% *per annum* to be computed from default, *i.e.,* from judicial or extrajudicial demand under and subject to the provisions of Article 1169 of the Civil Code.
>>
>> 2. When an obligation, not constituting a loan or forbearance of money, is breached, an interest on the amount of damages awarded may be imposed at the *discretion of the court* at the rate of 6% *per annum*. No interest, however, shall be adjudged on unliquidated claims or damages, except when or until the demand can be established with reasonable certainty. Accordingly, where the demand is

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[9] *See, e.g.*, Collector of Internal Revenue vs. Prieto, G.R. No. L-11976, 2 SCRA 1007, August 29, 1961 (Decision) and G.R. No. L-11976, 3 SCRA 101, September 26, 1961 (Resolution); Commissioner of Internal Revenue vs. Asturias Sugar Central, Inc., G.R. No. L-15013, 2 SCRA 1140, August 31, 1961 (Decision) and G.R. No. L-15013, 3 SCRA 727, December 28, 1961 (Resolution); and Victorias Milling Co., Inc. vs. Commissioner of Internal Revenue, G.R. Nos. L-24769 and L-24779, 19 SCRA 430, February 25, 1967.
[10] G.R. No. 97412, 234 SCRA 78, July 12, 1994.
[11] G.R. No. 189871, 703 SCRA 439, August 13, 2013.

> established with reasonable certainty, the interest shall begin to run from the time the claim is made judicially or extrajudicially (Art. 1169, Civil Code), but when such certainty cannot be so reasonably established at the time the demand is made, the interest shall begin to run only from the date the judgment of the court is made (at which time the quantification of damages may be deemed to have been reasonably ascertained). The actual base for the computation of legal interest shall, in any case, be on the amount finally adjudged.
>
> 3. When the judgment of the court awarding a sum of money becomes final and executory, the rate of legal interest, whether the case falls under paragraph 1 or paragraph 2, above, shall be 6% per annum **from such finality until its satisfaction, this interim period being deemed to be by then an equivalent to a forbearance of credit.**"[12] *(Boldfacing supplied)*

It may be true that the foregoing pronouncement is confined to "loans or forbearance of money". Nonetheless, I humbly submit that **the amount of refund which the taxpayer is entitled to, and which the government fails to pay after the Court makes a favorable adjudication thereon in favor of the taxpayer, is no different from a "forbearance of money".**

In *Hermojina Estores vs. Spouses Arturo and Laura Supangan,*[13] the Supreme Court clarified the essence of "forbearance of money," *viz.*:

> "xxx This definition describes a loan where a debtor is given a period within which to pay a loan or debt. In such case, forbearance of money, goods or credits will have no distinct definition from a loan. We believe however, that the phrase forbearance of money, goods or credits is meant to have a separate meaning from a loan, otherwise there would have been no need to add that phrase as a loan is already sufficiently defined in the Civil Code. **Forbearance of money, goods or credits should therefore refer to arrangements other than loan agreements, where a person acquiesces to the temporary use of his money, goods or credits pending happening of certain events or fulfillment of certain conditions.**" *(Boldfacing supplied)*

Otherwise stated, a tax refund may be considered as an "arrangement other than loan agreement" where the taxpayer pays the government, albeit illegally or erroneously, an amount representing the tax which the taxpayer nonetheless expects to be

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[12] *Id.* at 457-458.

[13] G.R. No. 175139, 670 SCRA 95, April 18, 2012.

refunded. In the meantime, the taxpayer essentially allows the government to have "temporary use of his money pending the happening of certain events or fulfillment of certain conditions," i.e. - - the grant of the taxpayer's application for refund.

Applying Paragraph II (3) of the guidelines set forth in *Nacar* and there being no specific provision in the LGC categorically stating that the payment of refund is **without interest**, I submit that a tax refund is subject to the legal rate of interest upon finality of judgment until its satisfaction. In the language of the afore-quoted doctrine in *Carcar*:

> "We conclude that under the present Internal Revenue Code the Collector of Internal Revenue may be made to answer for interest at the legal rate on taxes improperly collected. **Such liability serves as additional safeguard in favor of the taxpayer against arbitrariness in the exaction or collection of taxes and imposts**."[14] *(Boldfacing and emphasis supplied)*

Indeed, any unreasonable delay in the payment of refund by government *sans* any adverse consequence, should no longer be countenanced:

> "xxx **The imposition of unreasonable requirements and vexatious delays before effecting payment is not only galling and arbitrary but a rich source of discontent with government. There should be some kind of swift and effective recourse against unfeeling and uncaring acts of middle or lower level bureaucrats.**"[15] *(Emphasis supplied)*

The foregoing disquisitions notwithstanding - - since the prevailing doctrine is that interest may not be imposed on tax refunds - - I am constrained to concur with the *ponencia* and uphold the non-imposition of interest on the tax refund. Unless and until modified by the Supreme Court, the prevailing doctrine should be applied in the present case. Indeed, the Supreme Court, by tradition and in our system of judicial administration, has the last word on what the law is; it is the final arbiter of any justiciable controversy. There is only one Supreme Court from whose decisions all other courts should take their bearings.

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[14] *Id.* at 57-60.
[15] *Provincial Government of Sorsogon vs. Rosa E. Vda. De Villaroya, et al.,*G.R. No. L-64037, August 27, 1987.

All told, I concur with the *ponencia*.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

FIRST MERIDIAN DEVELOPMENT, INC.,
Petitioner,

CTA EB No. 1607
(CTA AC No. 159)

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:

JUN 2 0 2018 4:09 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 granted primarily on the ground that petitioner is not a non-bank financial intermediary (NBFI).

In concluding that petitioner is an NBFI, the lower court found that:

"To stress, the income of the Petitioner Corporation come only from two sources, to wit:

1. ***Dividends from FMDI's SMC Shares; and***
2. ***Interest Income from FMDI'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]

A perusal of the subject Decision, however, disregarded these findings of fact by the lower court. The subject Decision pertinently states:

"In the present case, there is no indication that petitioner fulfills the first requirement, as there is no evidence showing that it was '*authorized by the Bangko Sentral ng Pilipinas (BSP) to perform quasi-banking activities.*' Even on this basis alone, petitioner cannot be considered as a non-bank financial intermediary.

The second requirement is not likewise met. According to petitioner's Amended Articles of Incorporation, the primary purpose of petitioner is as follows:

xxx xxx xxx

While it may be true that the functions of the petitioner, on the basis of its primary purpose as stated in its Amended Articles of Incorporation, may cover the supposed 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.*' The records of this case are wanting of any proof that the stated functions were principally done by petitioner in 2010, so as to justify the subject tax imposition in the first half of 2011.

Likewise, it was never established that the enumerated functions under the third requirement were performed by petitioner '*on a regular and recurring, not on an isolated, basis.*' In fact, no evidence was shown that petitioner even performed any of the said functions.

[1] Court in Division Docket, p. 41.

Lastly, there is no evidence on record, showing that petitioner held itself out as a non-bank financial intermediary. Such being the case, this Court finds that petitioner is not a non-bank financial intermediary, and the interests and dividends it received in taxable year 2010 may not be the subject of local business tax imposed by respondent City of Davao. Thus, petitioner is entitled to the tax refund being sought.

Petitioner belongs to the CIIF block of SMC shares, which were declared to be owned by the Government. Thus, any tax imposed upon petitioner is, in effect, a tax on the Government.

In this case, for the first half of year 2011, respondent collected from the petitioner, 0.55% local business taxes on the dividends it received from its SMC shares of stock and interest income on its money market placements for the year 2010.

In *Philippine Coconut Producers Federation, Inc. (COCOFED), et al. vs. Republic of the Philippines*, the Supreme Court held that the SMC shares of stock are owned by the government, to wit:

xxx xxx xxx

In the said case, petitioner is one of the 'CIIF companies' being referred to. Thus, since petitioner is considered as Government property, any tax imposed upon petitioner is considered, in effect, as a tax on Government. Such being the case, the dividend income earned by petitioner may not be subjected to business tax under Section 131(e) of the LGC of 1991 by respondent City of Davao, pursuant to Section 133(o) of the same law."

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

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

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

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

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

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

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

Petitioner's consistent receipt of dividends and interest income from its equity securities and money market placements leads to no other conclusion that it engaged in NBFI activities

As earlier discussed, the lower court found that FMDI's income emanated solely from dividends and money market placements. Despite these findings, the subject Decision found that there is nothing on record or there is no proof that respondent performed activities attributable to an NBFI. Yet, there is also nothing in the subject Decision that overturned the above findings of fact of the lower court. Without adequate foundation to support the conclusion of the subject Decision, *i.e.*, proof that FMDI did not engage in NBFI activities despite earnings from dividends and money market placements, it would be more prudent for the Court to sustain the factual findings of the lower court.

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

Finally, Section 143 of the LGC of 1991 pertinently states:

> "**Section 143. Tax on Business.** — The municipality[2] may impose taxes **on the following businesses**:
>
> xxx xxx xxx
>
> (f) **On banks and other financial institutions**, at a rate not exceeding fifty percent (50%) of one percent (1%) on the gross receipts of the preceding calendar year derived from interest, commissions and discounts from lending activities, income from financial leasing, dividends, rentals on property and profit from exchange or sale of property, insurance premium."*(Emphasis supplied)*

Section 143(f) of the LGC of 1991 imposes local business tax **on banks and other financial institutions**, *i.e.*, non-bank financial intermediaries. In other words, while the tax bases of Section 143(f) consist of interest, commissions and discounts from lending activities, income from financial leasing, dividends, rentals on property and profit from exchange or sale of property, and insurance premium, the tax is imposed directly on banks and other financial institutions. It directly imposes business tax on the entity and not on the sources of gross receipts.

In the instant case, while the San Miguel Shares had already been adjudged by the Supreme Court as belonging to the government, it is not directly the said shares, but FMDI as a non-bank financial intermediary, who

[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.

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 FMDI against whom the local business tax is being levied upon.

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

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