REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CITY OF DAVAO and BELLA LINDA N. TANJILI, in her official capacity as City Treasurer of Davao City, *Petitioner,*	CTA EB No. 1708 (CTA AC No. 162)
	Present:
-versus-	DEL ROSARIO, P.J, CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.*
FERNANDEZ HOLDINGS INC., *Respondent.*	
	Promulgated: JAN 15 2019 10:36 a.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is the Petition for Review for the Court *En Banc* under *Section 4(b), Rule 8*[1] *of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA), as*

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[1] **SEC. 4.** *Where to appeal; mode of appeal.* –

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(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court *en banc* shall act on the appeal.

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amended, of the Decision dated April 6, 2017,[2] and the Resolution dated July 20, 2017,[3] both rendered by the Third Division of this Court, the dispositive portions of which read as follows:

Decision dated April 6, 2017:

"**WHEREFORE**, the Petition for Review is **GRANTED**. Accordingly, the Assailed Decision dated June 22, 2015 and the Assailed Order dated September 11, 2015 of Branch 16 of the Regional Trial Court of Davao City in Civil Case No. 34,851-13 are **REVERSED** and **SET ASIDE**. Respondents are **ORDERED TO REFUND OR CREDIT** in favor of petitioner the amount of **THREE HUNDRED EIGHTY-TWO THOUSAND EIGHT HUNDRED FIFTY-NINE PESOS AND 55/100 (PHP382,859.55)**, representing the 0.55% local business tax petitioner paid under protest for the first and second quarters of 2011.

SO ORDERED."

Resolution dated July 20, 2017:

"**WHEREFORE**, premises considered, respondents' Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED."

The facts of the case, as recited by the Third Division in its Decision, read as follows:

"[Petitioner] Fernandez Holdings, Inc. is a corporation duly organized and existing under

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[2] Penned by Former Associate Justice Lovell R. Bautista, concurred in by Associate Justice Esperanza R. Fabon-Victorino and Associate Justice Ma. Belen M. Ringpis-Liban, *En Banc* Docket, pp. 18-34.
[3] *Ibid.,* pp. 35-40.

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 respondent Hon. Rodrigo S. Riola is its City Treasurer. Respondents' address is at City Hall Building, San Pedro Street, Davao City.

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Since October 2009, petitioner has been the registered owner of 18,341,390 preferred shares of stock in San Miguel Corporation ("SMC") after the Supreme Court *En Banc* approved the conversion of petitioner's common shares to preferred shares. The dividends earned by petitioner from its preferred shares of stock were deposited in a trust account which earned interest from money market placements.

In 2010, petitioner earned a total of Php139,221,650.65 from dividends on its SMC preferred shares and interest on its money market placements, computed as follows:

INCOME	AMOUNT
Dividends	Php 137,560,425.00
Interest	1,661,225.65
TOTAL	PHP 139,221,650.651

For the first half of 2011, respondent City of Davao, through respondent Riola, demanded from petitioner payment for the 0.55% LBT on the dividends from petitioner's SMC preferred shares and on the interest from petitioner's money market placements in the aggregate amount of Php382,859.55. Petitioner paid the same under protest, broken down as follows:

PERIOD COVERED	**DATE OF PAYMENT**	**OFFICIAL RECEIPT NO.**	**AMOUNT**
January to March 2011	January 18, 2011	5791186 A	Php 191,429.78
April to June 2011	April 25, 2011	9884251	191,429.77
TOTAL			**PHP 382,859.55**

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On September 13, 2012, petitioner filed its administrative claim for refund or credit of erroneously and illegally collected LBT.

Due to the alleged inaction of respondent on petitioner's administrative claim, petitioner filed a Petition with the RTC on January 17, 2013.

On June 22, 2015, the RTC promulgated the Assailed Decision denying the Petition. The dispositive portion of the Assailed Decision reads:

> **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**.

In its Decision, the RTC held that petitioner's primary purpose, as indicated in its Amended Articles of Incorporation, is broad enough for petitioner to be considered as a financial intermediary. Considering the dividends and interests are the principal sources of income of petitioner, it should be categorized as a financial intermediary subject to tax under Section *143(f) of the Local Government Code of 1991, as amended (the "1991 LGC").*

Petitioner moved for the reconsideration of the Assailed Decision. However, the RTC issued the Assailed Order dated September 11, 2015 denying petitioner's Motion for Reconsideration. The dispositive portion of the Assailed Order reads:

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

Undaunted, on November 9, 2011, petitioner filed the present Petition for Review. Respondents filed their Comment by registered mail on January 7, 2016.

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The Court resolved to give due course to the Petition for Review in a Resolution dated January 28, 2016.

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The Court's Third Division ruled that while the City of Davao enacted Davao City Ordinance No. 158-05, which imposes business tax on banks and other financial institutions within its jurisdiction, Fernandez Holdings, Inc. is not considered as a bank or a financial institution in accordance with Section 131(e) of the 1991 LGC,[4] as well as Section 4101Q.1[5] of the Manual of Regulations for Non-Bank

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[4] Sec. 131. Definition of Terms.- When used in this Title, the term:

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(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 insecurities and foreign exchange, as defined under applicable laws, or rules and regulations thereunder;

[5] **"§ 4101Q.1 Financial intermediaries** Financial intermediaries shall mean persons or entities whose principal functions include the lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them, or otherwise coursed through them either for their own account or for the account of others.

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

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

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

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

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

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

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

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Financial Institutions ("MORNBFI") issued by the Bangko Sentral ng Pilipinas ("BSP"). The Court's Third Division ruled that records are bereft of any showing that Fernandez Holdings, Inc.'s principal activities will qualify it as a financial intermediary, or a non-banking financial intermediary to be specific. It has no secondary license and does not hold itself out as a financial intermediary. It does not perform the functions of a financial intermediary on a regular and recurring basis. Further, the Court's Third Division ruled that Fernandez Holdings, Inc.'s primary purpose, as outlined in its Amended Articles of Incorporation (AOI),[6] shows that its principal activities cannot fall under the definition of a financial intermediary. Section 22(W) of the 1997 National Internal Revenue Code, as amended ("1997 NIRC") also requires non-bank financial intermediaries to secure authorization from the BSP to perform quasi banking activities and absent this, the Court's Third Division further strengthen its ruling that Fernandez Holdings, Inc. cannot be subjected to local business tax by the LGU. Lastly, the Court's Third Division ruled that since in the case of *Philippine Coconut Producers Federation, Inc. v. Republic of the Philippines (the "Cocofed Case"),*[7] the Supreme Court

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> e. Realize regular income in the nature of, but need not be limited to, interest, discounts, capital gains, underwriting fees, guarantees, fees, commissions, and service fees, principally from transactions in debt or equity securities or by being an intermediary between suppliers and users of funds.

Non-banking financial intermediaries shall include the following:

> (1) A person or entity licensed and/or registered with any government regulatory body as a non-bank financial intermediary, such as investment house, investment company, financing company, securities dealer/broker, lending investor, pawnshop, money broker, fund manager, cooperative, insurance company, non-stock savings and loan association and building and loan association.
>
> (2) A person or entity which holds itself out as a non-banking financial intermediary, such as by the use of a business name, which includes the term financing, finance, investment, lending and/or any word/phrase of similar import which connotes financial intermediation, or an entity which advertises itself as a financial intermediary and is engaged in the function(s) where financial intermediation is implied.
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> (3) A person or entity performing any of the functions enumerated in Items a to e of this Subsection."

[6] Division Docket, pp. 105-106, Annex "P-10."
[7] G.R. Nos. 177857-58 and 178193, January 24, 2012.

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ruled that since the income of Fernandez Holdings, Inc. partakes of a public fund, it cannot be subjected to tax.

As *per* assailed Resolution herein, the Court's Third Division denied LGU's Motion for Reconsideration.

The LGU filed its Petition for Review[8] before the Court *En Banc* on August 30, 2017.

As alleged in its Petition for Review, the LGU insists that Fernandez Holdings, Inc. is specifically a non-bank financial intermediary by virtue of its investment and money placements in SMC, as enunciated in Section 131(e) of the 1991 LGC. As defined by the Bureau of Internal Revenue (BIR) pursuant to its Revenue Regulation No. 12-2003, non-bank financial intermediaries refer to persons or entities whose principal functions include investing or placement of funds and this is Fernandez Holdings, Inc.'s principal and actual function or business operation. According to the LGU, the investing and holding of shares of SMC are the sole and principal business operation and source of revenue of Fernandez Holdings, Inc. as revealed in its Audited Financial Statements.

Also, the LGU insists that Fernandez Holdings, Inc.'s Amended AOI is broad enough to catch all the descriptive function of a non-bank financial intermediary as provided under Section 4101Q.1 of the MORNBFI. The statement that Fernandez Holdings, Inc. shall not act as an investment company or securities broker or dealer is an evasive proviso to evade compliance with regulations for non-bank financial intermediaries.

Moreover, the LGU mentioned that Fernandez Holdings, Inc. never raised the ruling on *Cocofed* and even if its funds were deemed public by the said Supreme Court ruling, it does not exempt it from paying local business tax and being a stock corporation, as Fernandez Holdings, Inc. is presumed to have been organized to engage in business for profit. Lastly, the non-issuance of secondary license by the BSP or

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[8] *En Banc* Docket, pp. 1-17.

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the Monetary Board does not *ipso facto* exclude Fernandez Holdings, Inc. from being a non-bank financial intermediary.

Comment[9] was filed by Fernandez Holdings, Inc. on October 23, 2017, while Memoranda were filed by the LGU[10] and Fernandez Holdings, Inc.[11] on January 29, 2018 and February 5, 2018, respectively.

Fernandez Holdings, Inc. argues that it is erroneous and illegal for the LGU to assess local business tax on its dividends and interest income because it is not a bank or a financial institution. Fernandez Holdings, Inc. insists that it is a holding company and is prohibited from acting as an investment company or a securities broker and/or dealer as shown in its Amended AOI. It argues that it is not a bank within the definition/meaning under Section 131 of the LGC or within the definition/meaning under Section 4101Q.1 of the MORNBFI.

Allegedly, it was not required to secure a secondary license by the BSP for Fernandez Holdings, Inc. to fall within the ambit of the phrase "banks and other financial institutions" under Section 131(e) of the 1991 LGC.

It is Fernandez Holdings, Inc.'s position that its receipt of dividends and interest income as a consequence of its ownership of SMC shares of stock and money market placements is not a business activity but an isolated transaction that is not subject to local business tax. It likewise alleges that its income partake the nature of public funds, hence, business tax cannot be imposed on the same, and the case of *Cocofed* need not be raised by it before the Court as the Court may take judicial notice of such.

The crux of the issue is whether Fernandez Holdings, Inc. is a non-bank financial intermediary so that its dividends and interest income are subject to local business tax.

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[9] *En Banc* Docket, pp. 45-78.
[10] *En Banc* Docket, pp. 84-100.
[11] *En Banc* Docket, pp. 102-137.

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Consistent with the 1991 LGC, Section 69(f) of Davao City's Ordinance No. 158-05, Series of 2005, otherwise known as the 2005 Revenue Code of Davao City, is explicit in imposing business tax on banks and financial institutions based on gross receipts derived from interest and dividends, *viz.:*

> "Section 69. Imposition of Tax. - There is hereby imposed on the following persons who establish, operate, conduct or maintain their respective business within the City a graduated business tax in the amounts hereafter prescribed: XXX
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> > F. <u>On Banks and Other Financial Institutions</u>, at the rate of fifty-five percent (55%) of one percent (1%) of the gross receipts of the preceding calendar year derived from interest, commissions and discounts from lending activities, income from financial leasing, dividends, rentals on property, and profit from exchange or sale of property, insurance premium. All other income and receipts not herein enumerated shall be excluded in the computation of the tax." (Underlining supplied)

Non-bank financial intermediaries are defined as "persons or entities whose principal functions include the lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them, or otherwise coursed through them, either for their own account or for the account of others."[12] The person or entity must perform the aforementioned functions on a regular and recurring basis, and not on an isolated basis.

Likewise, the 1997 NIRC defines the term "non-bank financial intermediary in Section 22(W) as follows:

> "The term a "*non-bank financial intermediary*" means a financial intermediary, as defined in Section 2(D)(c) of Republic Act No. 337, as amended, otherwise known as the General Banking Act,

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[12] BIR Revenue Regulations No. 12-2003.

authorized by the *Bangko Sentral ng Pilipinas* (BSP) to perform quasi-banking activities."

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

1. The person or entity is authorized by the BSP to perform quasi-banking activities;

2. The principal functions of the said person or entity "include the lending, investing or placement of funds or evidences of indebtedness or equity deposited to them, acquired by them, or otherwise coursed through them, either for their own account or for the account of others"; and

3. The person or entity must perform any of the following functions on a regular and recurring, not on an isolated, basis, to wit:[13]

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

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

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

After a careful examination of the records, it appears that there is no sufficient evidence proving that Fernandez Holdings, Inc. is a non-bank financial intermediary or has even engaged in the activities of a financial institution/intermediary.

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[13] *Supra,* note 5.

First, there is no indication that Fernandez Holdings, Inc. fulfills the first requirement, as there is no evidence found by the Court in Division showing that it was authorized by the BSP to perform quasi-banking activities. Thus, on this basis alone, it cannot be treated as non-bank financial intermediary.[14]

The Court is also not convinced that the stated primary purpose of Fernandez Holdings, Inc. in the Amended AOI is broad enough to catch all the descriptive functions of a financial intermediary. It is not proper to just assume that it is engaged as a non-bank financial intermediary based on the said primary purpose. Together with the LGU's argument that the statement in the AOI that Fernandez Holdings, Inc. shall not act as an investment company or securities broker or dealer is an evasive proviso to evade compliance with regulations for non-bank financial intermediaries, these mere allegations without hard evidence are not equivalent to proof.[15]

Parenthetically, there is nothing in Fernandez Holdings, Inc.'s Amended AOI that suggests, even remotely, that such entity may perform the functions of a financial intermediary. Rather, the primary purpose for which it was incorporated is to "direct the operations of other corporations through the ownership of stock therein", and "to do every act and thing covered generally by the denomination 'holding company'", to wit:

> "To purchase, subscribe for, or otherwise acquire and own, hold, use, sell, assign, transfer, mortgage,

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[14] *City of Davao and Bella Linda N. Tanjili as The Officer-in-Charge City Treasurer's Office of Davao City vs. Te Deum Resources, Inc.*, CTA EB No. 1636, November 20, 2018.

[15] *United Claimants Association Of Nea (UNICAN),represented by its representative Bienvenido R. Leal, in his official capacity as its President and in his own individual capacity, Eduardo R. Lacson, Orencio F. Venida, Jr., Thelma V.Ogena, Bobby M. Caranto,Marilou B. De Jesus, Edna G. Raa, and Zenaida P. Oliquino, in their own capacities and in behalf of all those similarly situated officials and employees of the National Electrification Administration, vs. National Electrification Administration (Nea), NEA Board Of Administrators (NEA BOARD), Angelo T. Reyes as Chairman of the NEA Board of Administrators, Editha S. Bueno, Ex-Officio Member and NEA Administrator, and Wilfred L. Billena, Jospeph D. Khonghun, and Fr. Jose Victor E. Lobrigo, Members, NEA Board*, G.R. No. 187107, January 31, 2012.

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."

It was also not established that the enumerated functions performed by Fernandez Holdings, Inc. are on a regular and recurring and not on an isolated basis. Moreover, while the Amended AOI is categorical in proscribing Fernandez Holdings, Inc. from acting "as an investment company or a securities broker and/or dealer nor exercise the functions of a trust corporation", its identification as a holding company is consistent with the definition of a holding company provided for in Securities and Exchange Commission, Office of the General Counsel (SEC-OGC) Opinion No. 11-15 dated February 10, 2011,[16] as follows:

"A holding company has been defined by the Commission in several opinions. A holding company has been aptly defined as "a corporation organized to hold the stock of another or other

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[16] SEC-OGC Opinion No. 11-15, Applicability of Foreign Ownership Restriction; Holding Companies, cited in *Anglo Ventures Corporation vs. City of Davao and Hon. Rodrigo S. Riola, in his capacity as the City Treasurer of Davao City,* CTA AC No. 155, July 12, 2016.

> corporations. Its essential feature is that it holds stock. The term "holding company" is equivalent to a parent corporation, having such an interest in another corporation, or power of control, that it may elect its directors and influence its management. A parent or holding company is one that controls another as a subsidiary or affiliate by the power to elect its management. Affiliates are those concerns that are subject to common control and operated as part of a system."

Being a holding company, it is beyond the reach of local taxation.[17]

It must be stressed that it is the corporation's purpose clause that confers, as well as limits, the powers which a corporation may exercise. The main evidence of the purpose of a corporation is its articles of incorporation considering that such information is required by statute to be stated in the incorporation document.[18]

Also, although the purpose clause in Fernandez Holdings, Inc.'s Amended AOI is broad and does allow for the acquisition of shares of stock of other corporations and "to receive, collect and dispose of the interest dividends and income arising from such property", it is clear from a reading of the same that its primary purpose is not to engage in business as a non-bank financial intermediary. The receipt of dividend and interest income is patently incidental.[19] As a holding company, Fernandez Holdings, Inc., and the other holding companies funded by the coconut levy fund, were created to hold SMC shares of stock,[20] and not to engage in the business of lending or investing money or securities acquired by them or through them, on a regular basis.

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[17] *Michigan Holdings Inc., vs. the City Treasurer of Makati City, Nelia A. Barlis*, CTA EB No. 1093, June 17, 2015.
[18] *Jesus Sacred Heart College vs. Collector of Internal Revenue*, G.R. No. L-6807, May 24, 1954, cited in *Anglo Ventures Corporation, Supra* note 23; *Commissioner of Internal Revenue vs. Court of Appeals,* G.R. No. 124043, October 14, 1998.
[19] *San Miguel Officers Corps, Inc., vs. City of Davao and Hon. Rodrigo S. Riola, in his capacity as the City Treasurer of Davao City,* CTA AC Case No. 161, October 3, 2016.
[20] *Supra* note 7.

It must be emphasized that the determination of whether a person or an entity is (a) performing banking or quasi-banking functions, or (b) engaged in other types of financial intermediation is vested in the Monetary Board subject to judicial review.[21] The mere fact that Fernandez Holdings, Inc. has investments in SMC and money market placements does not *per se* make it a non-bank financial intermediary.[22] To insist otherwise would be absurd as any ordinary person who invests funds in money market or shares of stock will be considered as a non-bank financial intermediary.[23]

Notably, in *Commission of Internal Revenue vs. Hantex Trading Co., Inc.,*[24] the Supreme Court ruled that an assessment must be based on actual facts. Accordingly, the local business tax assessment should be based on actual facts. Since there is no proof that Fernandez Holdings, Inc. can be considered as a non-bank financial intermediary or is engaged in such activities, the local business tax assessment has no factual basis.

Lastly, the *Cocofed Case,* being a Supreme Court decision, forms part of the law of the land, may be taken judicial notice by this Court.[25] Considering that the subject shares are owned by the government, it follows that the dividends and any income therefrom are also owned by the government.[26] Consequently, the same is not within the power of the LGU to tax.[27] Nonetheless, even without this

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[21] Section 4 of R.A. No. 337, as amended and further amended by P.O. No. 1828
[22] *Supra,* note 14.
[23] *Ibid.*
[24] G.R. No. 136975, March 31, 2005, citing *Collector of Internal Revenue vs. Benipayo,* 4 SCRA 182 (1962).

[25] **RULE 129**

What Need Not Be Proved

Section 1. *Judicial notice, when mandatory.* — A court shall take judicial notice, without the introduction of evidence, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, the official acts of legislative, executive and judicial departments of the Philippines, the laws of nature, the measure of time, and the geographical divisions.

[26] *Supra,* note 14.
[27] *Ibid.*

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Court taking judicial notice of the *Cocofed* case, such is a fact that Fernandez Holdings, Inc. does not qualify as a non-bank financial intermediary.

In fine, it is clear that the LGU's collection of the local business tax is erroneous. As it received the amount when in fact it is not legally due to the City of Davao, it is duty-bound to credit or to refund the same to Fernandez Holdings, Inc.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED**. Accordingly, the assailed Decision and Order are hereby **AFFIRMED**, and the City of Davao is hereby **ORDERED** to **REFUND** or **CREDIT** the amount of **THREE HUNDRED EIGHTY-TWO THOUSAND EIGHT HUNDRED FIFTY-NINE PESOS AND 55/100 (PHP382,859.55),** representing the 0.55% local business tax Fernandez Holdings, Inc. paid under protest for the first and second quarters of 2011.

SO ORDERED.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda, Jr.
(see Dissenting Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
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 among the members of the Court En Banc before the case was assigned to the writer of the opinion of the Court En Banc.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CITY OF DAVAO and BELLA LINDA N. TANJILI, in her official capacity as City Treasurer of Davao City,
Petitioners,

- *versus* –

FERNANDEZ HOLDINGS, INC.,
Respondent.

CTA EB No. 1708
(CTA AC No. 162)

Present:

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

Promulgated:

JAN 15 2019
10:36 a.m.

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DISSENTING OPINION

CASTAÑEDA, JR., *J.*:

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

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

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

> (e) *'Banks and other financial institutions'* include non-bank financial intermediaries, lending investors, finance and investment companies, pawnshops, money shops, insurance companies, stock markets, stock brokers and dealers in securities and foreign exchange, as defined under applicable laws, or rules and regulations thereunder;"

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

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

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

> "(c) 'Financial Intermediaries' shall mean persons or entities whose principal functions include the lending, investing or placement of funds or evidences of indebtedness or equity deposited to them, acquired by them, or otherwise coursed through them, either for their own account or for the account of others;"

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

> "**§ 4101Q.1.** ***Financial intermediaries.*** — Financial intermediaries shall mean persons or entities whose principal functions include the lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them, or otherwise coursed through them either for their own account or for the account of others.
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> Principal shall mean chief, main, most considerable or important, of first importance, leading, primary, foremost, dominant or preponderant, as distinguished from secondary or incidental.
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> Functions shall mean actions, activities or operations of a person or entity by which his/its business or purpose is fulfilled or carried out. The business or purpose of a person or entity

may be determined from the purpose clause in its articles of incorporation/partnership, and from the nature of the business indicated in his/its application for registration of business filed with the appropriate government agency.

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

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

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

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

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

e. Realize regular income in the nature of, but need not be limited to, interest, discounts, capital gains, underwriting fees, guarantees, fees, commissions, and service fees, principally from transactions in debt or equity securities or by being an intermediary between suppliers and users of funds.

Non-banking financial intermediaries shall include the following:

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

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

which advertises itself as a financial intermediary and is engaged in the function(s) where financial intermediation is implied.

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

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

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

2) The principal functions of the said person or entity include the lending, investing or placement of funds or evidences of indebtedness or equity deposited to them, acquired by them, or otherwise coursed through them, either for their own account or for the account of others; and

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

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

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

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

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

e. Realize regular income in the nature of, but need not be limited to, interest, discounts, capital gains, underwriting fees, guarantees, fees, commissions, and service fees, principally from transactions in debt or equity securities or by being an intermediary between suppliers and users of funds.

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

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

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

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

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

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

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

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

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

The tax is levied upon the privilege of an entity to engage in NBFI activities and not upon the shares or sources of gross receipts which operate as tax bases

Section 143 of the LGC of 1991 pertinently states:

> "**Section 143. Tax on Business.** — The municipality[1] 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.*, NBFIs. In other words, while the tax bases of Section 143(f) consist of interest, commissions and discounts from lending activities, income from financial leasing, dividends, rentals on property and profit from exchange or sale of property, and insurance premium, the tax is imposed directly on the privilege enjoyed by banks and other financial institutions. It directly imposes business tax on the privilege being enjoyed by the entity and not on the sources of gross receipts.

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

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

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

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

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

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

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