REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

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AP HOLDINGS, INC., Petitioner,	**CTA EB No. 1640** (CTA AC No. 156)
	Present:
- versus -	**DEL ROSARIO,** *P.J.*, **CASTAÑEDA, JR., 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:*** AUG 20 2018 9:04a.m.

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DECISION

UY, *J.*:

Before the Court *En Banc* is the *Petition for Review*[1] filed by AP Holdings, Inc., as petitioner, on May 24, 2017 against the City of Davao and Hon. Rodrigo S. Riola, in his capacity as the City Treasurer of Davao City, as respondents, praying for the reversal and setting aside of the Decision dated January 30, 2017[2] and Resolution dated April 17, 2017[3], both promulgated by the Second Division of this Court (Court in Division) in CTA AC No. 156, entitled *"AP*

[1] EB Docket, pp. 8 to 49.
[2] EB Docket, pp. 54 to 70. This Decision was penned by Associate Justice Caesar A. Casanova and concurred by Associate Justice Juanito C. Castañeda, Jr. Associate Justice Catherine T. Manahan entered her Dissenting Opinion.
[3] EB Docket, pp. 72 to 76. This Resolution was penned by Associate Justice Caesar A. Casanova and concurred by Associate Justice Juanito C. Castañeda, Jr. Associate Justice Catherine T. Manahan maintained her Dissenting Opinion.

Holdings, Inc., Petitioner, vs. City of Davao and Hon. Rodrigo S. Riola, in his official capacity as the City Treasurer of Davao City, Respondents," the dispositive portions of which respectively read as follows:

Decision dated January 30, 2017:

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

Resolution dated April 17, 2017:

> "**WHEREFORE,** premises considered, petitioner's Motion for Reconsideration is **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 ₱723,531.50, plus legal interest, representing the erroneously and illegally collected 0.55% local business taxes for the first and second quarters of 2011.

THE FACTS

Petitioner AP Holdings, Inc. (APHI) 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, whose address is located at City Hall Building, San Pedro Street, Davao City; while respondent Hon. Rodrigo S. Riola is the former City Treasurer of Davao City and is being impleaded in his official capacity as it was he who issued the 0.55% local business tax assessment on the dividends and interests received by APHI for taxable year 2010.

In 2010, petitioner received the total amount of ₱263,102,369.37, as dividends from its San Miguel Corporation (SMC) preferred shares of stock and interest from its money market placements, computed as follows:

Nature of Income	Amount
Dividends from SMC Shares	₱260,020,537.49
Interest from Money Market Placements	3,081,831.88
TOTAL	**₱263,102,369.37**

For the first half of 2011, respondent City of Davao, through respondent City Treasurer, issued a Business Tax Order of Payment against petitioner. Respondent City Treasurer assessed petitioner a 0.55% local business tax for the first and second quarters of 2011 on the dividends derived from its SMC shares of stock and interests on its money market placements for 2010, in the amount of ₱723,531.50. While petitioner disagreed with the Order of Payment, it nonetheless, paid the same under protest with the following details, to wit.:

Period Covered	Date of Payment	Official Receipt Nos.	Amount
January to March 2011	1/28/2011	5791192 A	₱361,765.75
April to June 2011	4/25/2011	9884248 A	361,765.75
		TOTAL	₱723,531.50

On September 13, 2012 petitioner filed with respondent City Treasurer its written administrative claim for refund or credit.

Claiming inaction by respondent City Treasurer, petitioner filed on January 17, 2013 a *Petition for Review* with the Regional Trial Court (RTC) of Davao City. The case was docketed as Civil Case No. 34,848-13 and was initially raffled to RTC-Branch 17. Thereafter, public respondents filed their *Answer* on April 1, 2013.

During the hearing held on August 18, 2014, the RTC-Branch 17 of Davao City ordered that the case be subjected to Judicial Dispute Resolution (JDR) for a possible settlement due to the parties' manifestation that they are currently in negotiations for a possible compromise.

However, on September 23, 2014, the parties expressed that there is no possibility of an amicable settlement as of the moment. Thus, in an Order of even date, the RTC-Branch 17 of Davao City remanded the record of the case to the Office of the Clerk of Court for re-raffling to the other branches.

The case was re-raffled to the RTC-Branch 16 of Davao City. Thereafter, trial ensued.

On June 22, 2015, the RTC of Davao, Branch 16, rendered its Decision, dismissing the *Petition for Review*, based on the ground that petitioner is considered as a non-bank financial intermediary, since its primary purpose in its Amended Articles of Incorporation, resembles the definition of a financial intermediary as defined under Section 4101Q.1 of the Manual of Regulations for Non-Bank Financial Institutions issued by the *Bangko Sentral ng Pilipinas* (BSP). The *fallo* of the 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.**"

On August 29, 2015, petitioner filed a *Motion for Reconsideration*, praying that the above Decision be reversed by ordering public respondents to refund or credit the amount of ₱723,531.50, plus legal interest, which was erroneously collected from petitioner.

On September 11, 2015, the RTC-Branch 16 of Davao City issued an Order denying petitioner's *Motion for Reconsideration* for lack of merit.

Petitioner then filed its *Petition for Review* before the Court in Division on November 9, 2015. The case was docketed as CTA AC No. 156.

On November 24, 2015, the Court in Division issued a Resolution ordering respondents to file their comment within ten (10) days from receipt thereof. In compliance thereto, respondents filed their *Comment* to the *Petition for Review* on January 4, 2016.

In the Resolution dated January 19, 2016, the Court in Division gave the parties a period of thirty (30) days to file their respective memorandum, and further ordered the Branch Clerk of Court or the Officer-In-Charge of the RTC-Branch 16, City of Davao, to elevate the entire original records of the case pursuant to Section 5(b), Rule 6 of the Revised Rules of the Court of Tax Appeals.

Thus, in the letter dated February 29, 2016, the Clerk of Court V of the RTC-Branch 16 of Davao City, Atty. Jocelyn M. Alibang-Salud, transmitted the entire original records of the case in compliance with this Court in Division's directive. On March 22, 2016, this Court noted the said transmittal.

Petitioner filed its *Memorandum* on February 22, 2016, while respondents filed their *Memorandum* on March 14, 2016.

CTA AC No. 156 was deemed submitted for decision in the Resolution dated March 31, 2016 issued by the Court in Division.

In the assailed Decision dated January 30, 2017, the Court in Division denied the *Petition for Review* for lack of merit.[4]

Petitioner then filed its *Motion for Reconsideration (Re: Decision promulgated 30 January 2017)* on February 15, 2017,[5] to which respondents filed their *Comment to Petitioner's Motion for Reconsideration* filed on March 13, 2017.[6] In the assailed Resolution dated April 17, 2017, the Court in Division denied petitioner's *Motion for Reconsideration* for lack of merit.[7]

Undaunted, petitioner filed a *Motion for Extension of Time to File Petition for Review* on May 3, 2017,[8] which Motion was granted by the Court *En Banc*, giving petitioner a final and non-extendible period of fifteen (15) days from May 9, 2017, or until May 24, 2017, within which to file its *Petition for Review*.[9]

Petitioner filed the instant *Petition for Review* on May 24, 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] Consequently, respondents filed their *Comment*

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[4] EB Docket, pp. 54 to 70; Division Docket (CTA AC No. 156), pp. 215 to 232.
[5] Division Docket (CTA AC No. 156), pp. 235 to 263.
[6] Division Docket (CTA AC No. 156), pp. 288 to 295.
[7] EB Docket, pp. 72 to 76; Division Docket (CTA AC No. 156), pp. 298 to 302.
[8] EB Docket, pp. 1 to 5.
[9] Minute Resolution dated May 5, 2017, EB Docket, p. 7.
[10] EB Docket, pp. 8 to 49.
[11] Resolution dated June 15, 2017, EB Docket, pp. 90 to 91.

on July 28, 2017.[12]

In the Resolution dated August 31, 2017,[13] the parties were ordered to submit their respective memorandum, within a period of thirty (30) days from notice. Thus, petitioner filed its *Memorandum* on October 13, 2017,[14] while respondents filed their *Memorandum* on October 20, 2017.[15] Thereafter, the case was submitted for decision on November 20, 2017.[16]

Hence, this Decision.

THE ISSUE

Petitioner raises this sole issue for the Court *En Banc*'s resolution, to wit.:

> "WHETHER OR NOT APHI 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 (LGC), it is erroneous and illegal for respondents to collect local business tax on the dividends and interest income of petitioner as it is not engaged in business that is subject to local business tax;

[12] EB Docket, pp. 92 to 106.
[13] EB Docket, pp. 110 to 111.
[14] EB Docket, pp. 112 to 151.
[15] EB Docket, pp. 155 to 171.
[16] EB Docket, pp. 175 to 176.
[17] EB Docket, pp. 18 and 122.

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i. Petitioner is not a bank or non-bank financial intermediary considering that it is not engaged in lending money, investing, reinvesting or trading securities on a regular and recurring basis;

ii. Merely owning or holding shares of stock of SMC does not *ipso facto* qualify petitioner as a non-bank financial intermediary.

iii. The main evidence of the petitioner's primary purpose is its Articles of Incorporation, which expressly prohibits it from acting as a financial institution or intermediary.

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

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

Petitioner posits that it does not fulfill any of the requirements of being a non-bank financial intermediary as it is not authorized by the *Bangko Sentral ng Pilipinas* (BSP) for perform quasi-banking functions. According to petitioner, there is 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.

In addition, petitioner argues that other circumstances point to the conclusion that petitioner is not a bank or other financial institution, as petitioner's Amended Articles indicate that it is a holding company; that 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; that it is not engaged in lending money, investing, reinvesting or trading securities and/or foreign exchange, either for its own account or for the account of others in a regular or recurring basis; that it was not required by the Securities and Exchange Commission to secure a secondary license; that petitioner 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 (e) of the LGC; that petitioner, and other holding companies funded by the coconut levy funds, were organized solely to hold SMC shares; and that the Monetary Board has not declared petitioner to be a financial intermediary or institution.

Thus, petitioner is of the view that it cannot be considered a bank or other non-bank financial institution, more specifically 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; that since its incorporation, it has 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 in fact, by virtue of the 2012 Decision of the Supreme Court, the SMC shares of petitioner and the other CIIF Holding Companies have been redeemed by SMC and are no longer in the hands of the respondent; and that it placed dividends derived from said SMC shares in a trust account, which then earned interest from money market placements.

Petitioner argues that there is no proof that petitioner engaged in the activities of a non-bank financial institution as a principal function and on a regular and recurring basis, or that petitioner held itself out as a non-bank financial institution, or a lending, investing or financing company.

Finally, petitioner is of the view 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 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.

Respondents likewise argue that 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 the 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.

As a stock corporation, petitioner is allegedly presumed to have been organized to engage in business with the end view of a profit; and hence, it cannot deny that it is not engaged in business.

The Opinion of the Bureau of Local Government Finance (BLGF), that petitioner is exempt from local business tax for not being a bank and other financial institution, is not binding upon the issue involved in this case, as BLGF is not an administrative agency whose findings on questions of fact and law are given weight and respect in the courts.

Moreover, respondent emphasizes that 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] that the fund be treated as government assets, nevertheless, it does not 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.

According to respondents, petitioner's contention that it is a "holding company," rather than a "non-bank financial intermediary," based on the case of "*Michigan Holdings, Inc. vs. City Treasurer of Makati, Nelia A. Barlis*, CTA EB No. 1093 [CTA AC Case No. 99, June 17, 2015]," is misplaced; and this is because the main issue in

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

this case is not whether petitioner is a holding company or not, rather, it is whether or not petitioner is deemed a "non-bank financial intermediary," so as to be subject to the said imposition.

Finally, 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".

THE COURT *EN BANC*'S RULING

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

There is no indication that petitioner is a non-bank financial intermediary or an investment company.

Respondents are of the view that petitioner is a "non-bank financial intermediary".

We disagree.

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*

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intermediaries" are those that are *"as defined under applicable laws, or rules and regulations thereunder"*.

One of such "applicable laws" is Section 22(W) of the NIRC of 1997, which defines *"non-bank financial intermediary"* 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)*

In relation 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 likewise provides a definition of "financial intermediaries", 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.
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> <u>*Principal* shall mean chief, main, most considerable or important, of first importance, leading, primary, foremost, dominant or preponderant, as distinguished from secondary or incidental.</u>
>
> <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

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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." *(Underscoring supplied)*

Based on the foregoing provisions, the basic requirements for a person or an 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 this case, there appears to be no indication that petitioner fulfills the first requirement, as there is no showing that it was *"authorized by the Bangko Sentral ng Pilipinas (BSP) to perform quasi-banking activities".* On this basis alone, petitioner cannot already be considered as a non-bank financial intermediary.

Nonetheless, 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

The primary purpose for which such Corporation is formed is:

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,

[19] RTC Records, p. 73 to 74.

> 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.

Similarly, it was not 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.

Finally, there was 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 may claim the refund being sought.

At any rate, We find another reason why petitioner should not have paid the amount of the amount of ₱723,531.50 to the City of Davao.

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, respondent collected from the petitioner, during the first half of 2011, 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**
>
> 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
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> **Since the CIIF companies and the CIIF block of SMC shares were acquired using coconut levy funds, which have been established to be public in character it goes without saying that these acquired corporations and assets ought to be regarded and treated as government assets. <u>Being government properties, they are accordingly owned by the Government,</u> 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

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

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> through Justice (later Chief Justice) Artemio Panganiban, stated: *'Because the subject UCPB shares were acquired with government funds, the government becomes their prima facie beneficial and true owner.'* **By parity of reasoning, the adverted block of SMC shares, acquired as they were with government funds, <u>belong to the government as, at the very least, their beneficial and true owner.</u>**" *(Emphases supplied)*

In the said case, petitioner is one of the "CIIF companies" being referred to.[21]

Consequently, petitioner is considered as Government property, and thus, the tax imposed upon petitioner in this case is considered, in effect, as a tax on Government. **However, such tax imposition is not allowed under the law.**

Without doubt, Section 129 of the LGC of 1991, empowers each LGU 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. Relative 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."

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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, **<u>AP Holdings</u>**, 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)*

(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)*

Nevertheless, the taxing power granted to LGUs, such as respondent City of Davao, is further limited by Section 133 of the LGC of 1991, 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:**

xxx xxx xxx

(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, it is clear that while respondent City of Davao is empowered to impose local business taxes on banks and other financial institutions, it is subject to the specific prohibition 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. Thus, respondent City of Davao should not have collected the amount of ₱723,531.50 from petitioner, being considered Government property.

Petitioner is entitled to the refund or credit being prayed for. However, petitioner has not shown evidence to prove that it is entitled to legal interest.

While it is Our ruling that petitioner is entitled to the refund of the aggregate amount ₱723,531.50, We cannot grant its prayer that the said amount should be granted "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]

Since 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 attended with arbitrariness, 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 **PARTIALLY GRANTED.**

The Decision dated January 30, 2017 and the Resolution dated April 17, 2017, both rendered by the Court in Division in CTA AC No. 156, are hereby **REVERSED AND SET ASIDE**.

Accordingly, respondents are hereby **ORDERED to REFUND or ISSUE a TAX CREDIT CERTIFICATE** to petitioner in the amount of ₱723,531.50, representing erroneously collected local business taxes for taxable year 2010.

Petitioner's claim for legal interest, is however, **DENIED**.

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

(I maintain my original position)
CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

AP HOLDINGS, INC., *Petitioner,*	**CTA EB NO. 1640** (CTA AC NO. 156)
	Present:
-versus-	**DEL ROSARIO, *P.J.*, CASTANEDA, JR., 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: AUG 20 2018 9:05 a.m.

x--x

CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* in partially 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 ₱723,531.50, 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 relation to Section 131(e) of the same Code. Section 131(e) of the

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[1] Republic Act No. 7160.

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 cannot be used as bases for concluding that petitioner 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 a 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.**

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

> **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 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 suggests 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 provided that the person taxed may protest and appeal to the courts to have the question of the

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[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.

> 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.**
>
> xxx xxx xxx
>
> 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 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.

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:

[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.
[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.

"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 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)*

While the foregoing pronouncement is confined to "loans or forbearance of money", I humbly submit that **the amount of refund which the taxpayer is entitled to, and which the government is obliged to pay on the basis of a final and executory judgment, is no different from a "forbearance of money".**

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

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)*

Indeed, 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 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**, it may be considered 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. **<u>Such liability serves as additional safeguard in favor of the taxpayer against arbitrariness in the exaction or collection of taxes and imposts</u>**."[14] *(Boldfacing and emphasis supplied)*

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 <u>vexatious delays before effecting payment is not only galling</u>**

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[13] G.R. No. 175139, 670 SCRA 95, April 18, 2012.
[14] *Id.* at 57-60.

> **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 as laid down by the Supreme Court 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. 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.

All told, I concur with the *ponencia*.

ROMAN G. DEL ROSARIO
Presiding Justice

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

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

AP HOLDINGS, INC.,
Petitioner,

CTA EB No. 1640
(CTA AC No. 156)

Present:

Del Rosario, P.J.,
Castañeda, Jr.,
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:

AUG 20 2018
9:05 a.m.

x--x

DISSENTING OPINION

CASTAÑEDA, JR., J.:

With due respect, I dissent to the conclusion reached by the *ponencia* that the instant Petition for Review should be partially 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 API's SMC Shares; and***
2. ***Interest Income from API'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 this case, there appears to be no indication that petitioner fulfills the first requirement, as there is no showing that it was '*authorized by the Bangko Sentral ng Pilipinas (BSP) to perform quasi-banking activities*.' On this basis alone, petitioner cannot already be considered as a non-bank financial intermediary.

Nonethless, 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.

Similarly, it was not 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.

Finally, there was 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

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

business tax imposed by respondent City of Davao. Thus, petitioner may claim the 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, respondent collected from the petitioner, during the first half of year 2011, 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.

Consequently, petitioner is considered as Government property, and thus, the tax imposed upon petitioner in this case is considered, in effect, as a tax on Government. **However, such tax imposition is not allowed under the 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 is engaged in NBFI activities

As earlier discussed, the lower court found that petitioner'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. *gr*

To reiterate, the lower court found that petitioner's business operations consist solely of stock investments and money market placements. Therefore, it was clearly established in the proceedings below that petitioner is engaged in NBFI activities. However, without laying the factual bases to validly overturn the lower court's factual findings, the subject Decision found that petitioner did not perform such acts. What was the basis for rejecting the lower court's factual findings, then?

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

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

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

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

Section 143 of the LGC of 1991 pertinently states:

> "**Section 143. Tax on Business.** — The municipality[2] may impose taxes **on the following businesses**:
>
> 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

[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.

and profit from exchange or sale of property, insurance premium."*(Emphasis supplied)*

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

In the instant case, while the San Miguel Shares had already been adjudged by the Supreme Court as belonging to the government, it is not directly the said shares, but the privilege enjoyed by petitioner 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 petitioner's privilege against whom the local business tax is levied upon.

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

To end, 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 such entity should be categorized as an NBFI for purposes of local business taxation.

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

JUANITO C. CASTAÑEDA, JR.
Associate Justice