

COMMISSIONER OF INTERNAL REVENUE, PETITIONER, VS. G&W ARCHITECTS, ENGINEERS AND PROJECT DEVELOPMENT CONSULTANTS CO., RESPONDENT.

G.R. No. 246026, April 21, 2026

Ponente: DIMAAMPAO, J.

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DIMAAMPAO, J.:

Assailed in this Petition for Review on Certiorari[1] are the August 29, 2018 Amended Decision[2] (First Amended Decision) and the March 14, 2019 Amended Decision[3] (Second Amended Decision) of the Court of Tax Appeals (CTA) sitting En Banc, in CTA EB No. 1449, for having been purportedly rendered without the required affirmative votes of the Justices of the CTA En Banc. For brevity, the two amended decisions shall be collectively referred to as the Amended Decisions.

The factual antecedents of the case unfurl as follows:

Petitioner Commissioner of Internal Revenue (CIR) is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), the agency mandated by law to assess and collect all national government revenue taxes, fees, and charges, and to enforce all forfeitures, penalties, and fines connected therewith, including the execution of judgments in all cases decided in its favor by the CTA. On the other hand, respondent G&W Architects, Engineers and Project Development Consultants Co. (G&W Architects) is a partnership engaged in the general practice of architecture and construction and to purchase, own, hold, manage, lease and operate any and all kinds of property.[4] It is duly registered with BIR Revenue District Office No. 30 of Revenue Region No. 6-Manila.[5]

G&W Architects adopts a build-to-own scheme in the construction of its projects, under which funds of condominium unit owners are pooled together to construct such units on their behalf. In this regard, G&W Architects obtained several confirmatory BIR rulings for its projects,[6] namely:

BIR Ruling

Condominium Project

DA-338-2007

Grand Hamptons Tower I

DA-337-2007

Grand Hamptons Tower II[7]

DA-056-2003

Penhurst Parkplace

DA-455-2007

Kensington Condominium Project

The BIR rulings declared G&W Architects's build-to-own scheme as tax-exempt as it did not constitute a taxable sale, exchange, or disposition of real property. Concomitantly, transactions under such scheme were not subject to creditable withholding tax (CWT) or capital gains tax (CGT), value-added tax (VAT), and Documentary Stamp Tax (DST), except the PHP 15.00 DST on the contractual agreement.[8] On the basis thereof, G&W Architects implemented its build-to-own scheme in the construction of its condominium projects.[9]

On September 29, 2009, G&W Architects received from the BIR letters of authority for the conduct of examination of its books of accounts for transfer taxes, i.e., expanded withholding taxes (EWT) and DST. These letters of authority covered the following projects:

Project

Letter of Authority No.

Penhurst Parkplace and

Kensington Place

00027636[10]

Grand Hamptons Tower I

00027639[11]

The Grand Hamptons

00027637[12]

At the interstice, the BIR Regional Director requested the CIR to nullify the abovementioned BIR rulings in favor of G&W Architects after finding that its build-to-own scheme was one of pre-selling/selling subject to EWT and DST.[13] Thusly, on June 28, 2010, the CIR issued Revenue Memorandum Circular (RMC) No. 55-2010,[14] declaring, inter alia, BIR Ruling Nos. DA-056-2003, DA-455-2007, and DA-337-2007, as void.

Ensuingly, the CIR issued two Preliminary Assessment Notices dated June 8, 2010 and July 1, 2010, finding G&W Architects liable to pay EWT and DST for the transfer of the 111 condominium units in Penhurst Parkplace and 229 units in Kensington Place.[15] This was followed by the CIR's issuances of Formal Assessment Notices (FANs)[16] dated January 25, 2011, June 10, 2011, and July 26, 2011, also finding G&W Architects liable to pay EWT and DST on the transfer of condominium units in Penhurst Parkplace, Kensington Place, Grand Hampton I, and Grand Hampton II, broken down as follows—

Expanded Withholding Tax

Penhurst
Parkplace

Kensington
Place

TOTAL

Basic Tax

[PHP] 31,207,676.33

[PHP] 43,418,151.09

[PHP] 74,625,837.42

Add: 50% surcharge

15,603,838.16

21,709,080.55

37,312,918.71

Interest

02/11/2004

to 02/25/2011

43,933,230.51

43,933,230.51

07/11/2004 to

02/25/2011

57,504,619.02

57,504,619.02

Total EWT Due

[PHP] 90,744,745.00

[PHP] 122,631,860.65

[PHP] 213,376,605.65

Documentary Stamp Tax

Basic Tax

[PHP] 9,363,195.00

[PHP] 13,026,795.00

[PHP] 22,389,980.00

Add: 50% surcharge

4,581,597.50

6,513,397.50

11,194,995.00

Interest

02/06/2004 to

02/25/2011

13,207,207.89

13,207,207.89

07/06/2004 to

02/25/2011

17,289,313.65

17,289,318.65

Total DST Due

[PHP] 27,252,000.39

[PHP] 36,829,511.15

[PHP] 64,081,511.54

Grand Total

[PHP] 117,996,745.39

[PHP] 159,461,371.80

[PHP] 277,458,117.19

Expanded Withholding Tax

Grand Hampton I

Basic Tax

[PHP] 35,380,369.18

Add: 50% surcharge

17,690,184.59

Interest 08/11/2004 to 07/15/2011

49,021,376.66

Total EWT Due

[PHP] 102,091,930.43

Documentary Stamp Tax

Basic Tax

[PHP] 10,650,045.00

Add: 50% surcharge

5,325,022.50

Interest 08/06/2004 to 07/15/2011

14,785,681.12

Total DST Due

[PHP] 30,760,748.62

Expanded Withholding Tax

Grand Hampton II

Basic Tax

[PHP] 39,245,682.93

Add: 50% surcharge

19,622,841.47

Interest 07/11/2004 to 08/30/2011

56,040,684.78

Total EWT Due

[PHP] 114,909,209.18

Documentary Stamp Tax

Basic Tax

[PHP] 11,773,704.88

Add: 50% surcharge

5,886,852.44

Interest 07/06/2004 to 08/30/2011

16,844,462.16

Total DST Due

[PHP] 34,505,019.48

Expectedly, G&W Architects protested to the FANs and filed three petitions for review before the CTA, which were eventually docketed as CTA Case Nos. 8358, 8426, and 8489. These cases were consolidated by the CTA First Division.[17]

Incidentally, the CTA First Division rendered its Decision[18] dated November 3, 2015, ordering the cancellation of the deficiency EWT and DST, which the CIR had assessed. In so ruling, the CTA First Division found that there was nothing in the contracts entered between G&W Architects and its clients as would show a transfer of ownership of the condominium units. From the agreements, all acts of G&W Architects were understood to be for and on behalf of its clients. On this score, the CTA First Decision disposed in this wise—

WHEREFORE, the instant Petitions for Review filed on October 21, 2011, February 15, 2012 and May 11, 2012 are hereby GRANTED. Accordingly, the deficiency expanded withholding tax and documentary stamp tax assessed for the periods 2004, July 10, 2004, and June 2004, in the amounts of [PHP] 277,458,117.19, [PHP] 132,852,679.05, and [PHP] 149,414,228.66, respectively, or in the total amount of [PHP] 559,725,024.90, are hereby CANCELLED.

SO ORDERED.[19] (Emphasis in the original)

The CIR sought reconsideration of the foregoing disposition, postulating that G&W Architects's build-to-own scheme or build-your-own-home concept of purportedly pooling the funds of condominium unit owners to be used for the construction of the condominium units on behalf of the fund owners constituted a taxable sale, exchange or disposition of the property. In its Resolution[20] dated April 7, 2016, the CIR's plea for reconsideration was given short shrift by the CTA First Division.

Unfazed, the CIR sought refuge before the CTA En Banc. The appeal was docketed as CTA EB Case No. 1449.[21]

Voting 6-3, the CTA En Banc reversed and set aside the adjudication of its First Division. In the Decision[22] dated March 21, 2018 (Original Decision), the CTA En Banc agreed with Presiding Justice Roman G. Del Rosario (Presiding Justice Del Rosario), who opined that the contracts executed between G&W Architects and its clients, as well as its contemporaneous and subsequent acts, belied the farmer's assertion that G&W Architects was merely a project manager, and not the owner, of the condominium units, viz.:

WHEREFORE, premises considered, the Petition for Review is hereby GRANTED. The Assailed Decision dated November 3, 2015 and Assailed Resolution dated April 7, 2016 of the CTA-First Division in the consolidated cases of CTA Case Nos. 8358, 8426, and 8489, are hereby REVERSED and SET ASIDE. Respondent is ordered to pay the assessed deficiency expanded withholding tax (EWT) and documentary stamp tax for the periods 2004, July 10, 2004, and June 2004, in the amounts of [PHP] 277,458,117.19, [PHP] 132,852,679.05, and [PHP] 149,414,228.66, respectively, or in the total amount of [PHP] 559,725,024.90, plus accrued 25% surcharge for late payment and 20% interest per annum until fully paid.

SO ORDERED.[23] (Emphasis in the original)

Unflinching, G&W Architects filed a motion for reconsideration thereof.

With the retirement of Associate Justice Lovell R. Bautista (Associate Justice Bautista), the CTA En Banc rendered the challenged First Amended Decision,[24] where the CTA En Banc, voting 4-4, granted G&W Architects motion for reconsideration, thereby reversing the March 21, 2018 Original Decision, thusly—

WHEREFORE, the Motion for Reconsideration (Of the Decision dated 21 March 2018) filed by [G&W Architects], is GRANTED. Accordingly, the March 21, 2018 Decision of the Court En Banc is hereby SET ASIDE and the Decision dated November 3, 2015 and Resolution dated April 7, 2016 of the CTA First Division is hereby AFFIRMED in toto. [The CIR] is ORDERED to CANCEL and WITHDRAW the deficiency expanded withholding tax and documentary stamp tax issued against [G&W Architects] for the periods 2004, July 10, 2004 and June 2004, in the amounts of [PHP] 277,458,117.19, [PHP] 132,852,679.05, and [PHP] 149,414,228.66, respectively, or in the total amount of [PHP] 559,725,024.90.

SO ORDERED.[25] (Emphasis in the original)

Perplexed, the CIR moved for the reconsideration of the First Amended Decision. At this juncture, the CTA En Banc was composed of only seven members in view of the retirement of Associate Justice Caesar A. Casanova (Associate Justice Casanova). Despite finding the CIR's plea meritorious, the CTA En Banc resolved to deny the same via the Second Amended Decision,[26] thereby affirming its First Amended Decision. The CTA En Banc ratiocinated that the number of votes required to grant the CIR's motion for reconsideration was not reached pursuant to the requirements of Section 2 of Republic Act No. 1125,[27] as amended by Republic Act No. 9503,[28] in relation to Section 3, Rule 2[29] of the Revised Rules of the CTA.

Saddled with disbelief, the CIR seeks succor before this Court via the instant Petition, invoking grave abuse of discretion on the part of the CTA En Banc, for: one, having rendered the Amended Decisions despite failure to meet the required votes, and two, having ruled that the transactions of G&W Architects do not contemplate a contract of sale of condominium units for which it should be held liable for EWT and DST.[30]

Perceivably, the CIR anchors its Petition on two main arguments:

First. The First Amended Decision is a void judgment for having been rendered by the CTA En Banc without the required affirmative votes of a simple majority of the eight Justices then present to render such decision.[31]

Although the affirmative votes of five of the nine members of the CTA En Banc is required to reverse a decision rendered by the CTA Division, a simple majority of the justices present would suffice in promulgating a decision or resolution.[32] Resultantly, without the required simple majority, the First Amended Decision is a void judgment.[33]

Second. There exists a contract of sale between G&W Architects and the various unit owners thereby properly subjecting the agreements to EWT and DST.

The CIR avouches that the various agreements executed by G&W Architects pursuant to its build-to-own scheme

contemplates a sale of condominium units.[34] The elements of a contract of sale are present in the transactions covered by the Contract to Manage and Execute the Construction of the Condominium (Management Contract).[35] Moreover, its contemporaneous and subsequent acts, i.e., advertising the sale of the condominium units and securing licenses to sell condominium units from the HLURB, bolster the claim that it is engaged in a contract of sale or contract to sell condominium units.[36] To further solidify its stance, the CIR turns to the position of Presiding Justice Del Rosario, who opined that the agreements entered into by G&W Architects were not contracts for rendition of service for a piece of work as it did not commence to build its condominium projects based on a special order from previously existing and identified investors or condominium unit owners. Rather, it built the condominium projects even without such previously made special order consistent with its business purpose as stated in its Articles of Partnership and Amended Articles of Partnership.[37]

All told, the CIR echoes Presiding Justice Del Rosario's dissenting opinion that G&W Architects should not be permitted to escape liability from the consequence of its mischievous scheme; it should be ordered to pay the assessed EWT and DST because of its misrepresentation to the condominium unit owners.[38]

In its comment, G&W Architects asserts that the instant Petition should be denied for putting forth an issue not raised on appeal.[39] In any case, the First Amended Decision is valid, while the Second Amended Decision complies with the provision of the Revised Rules of CTA.[40] Moreover, it is engaged in a contract for a piece of work—not a contract of sale—and, therefore, not liable for any EWT and DST.[41]

The CIR filed its reply,[42] obstinate in its stance that the Amended Decisions of the CTA En Banc are void for failure to meet the vote requirement. It asseverates that the Court's ruling in *Legaspi v. COMELEC*[43] should be applied. Indeed, it beseeches this Court to interpret Section 3, Rule 2 of the Revised Rules of the CTA.

Ruling of the Court

Petitioner's hypotheses deserve great weight and consideration. The Petition must perforce be granted.

The procedure in the deliberation of cases before the CTA En Banc is laid down in Republic Act No. 1125, as amended, and in the 2005 Revised Rules of the Court of Tax Appeals (RRCTA),[44] as amended.[45]

Section 2 of Republic Act No. 1125, as amended by Section 2[46] of Republic Act No. 9503,[47] provides for the composition of the CTA En Banc and Division, as well as the required quorum and votes in its proceedings:

SEC 2. Section 2 of the same Act, as amended, is further amended, to reach [sic] as follows:

"SEC. 2. Sitting En Banc or Division; Quorum; Proceedings. — The CTA may sit en banc or in three (3) Divisions, each Division consisting of three (3) Justices.

"Five (5) Justices shall constitute a quorum for sessions en banc and two (2) Justices for sessions of a Division. Provided, That when the required quorum cannot be constituted due to any vacancy, disqualification, inhibition, disability, or any other lawful cause, the Presiding Justice shall designate any Justice of other Divisions of the Court to sit temporarily therein.

"The affirmative votes of five (5) members of the Court en banc shall be necessary to reverse a decision of a Division but a simple majority of the Justices present necessary to promulgate a resolution or decision in all other cases or two (2) members of a Division, as the case may be, shall be necessary for the rendition of a decision or resolution in the Division level." (Emphasis supplied)

Corollary thereto, Section 3, Rule 2 of the RRCTA provides—

SEC. 3. Court en banc; quorum; and voting. — The presiding justice or, if absent, the most senior justice in attendance shall preside over the sessions of the Court en banc. The attendance of five (5) justices of the Court

shall constitute a quorum for its session en banc. The presence at the deliberation and the affirmative vote of five (5) members of the Court en banc shall be necessary to reverse a decision of a Division but only a simple majority of the justices present to promulgate a resolution or decision in all other cases. Where the necessary majority vote cannot be had, the petition shall be dismissed; in appealed cases, the judgment or order appealed from shall stand affirmed; and on all incidental matters, the petition or motion shall be denied. (Emphasis supplied)

The foregoing provisions plainly lay down two requirements in the deliberations of cases by the CTA En Banc: first, the presence of five justices to constitute a quorum; and second, the votes required in the En Banc's promulgation of judgment. To reverse a decision rendered by the Division, the affirmative vote of five members of the Court En Banc is required. In the promulgation of resolutions and decisions other than reversal of a Division's decision, a simple majority of the justices present during the deliberations would suffice. Failing to meet these voting requirements, i.e., in case of tie or when the dissents outnumber the affirmative votes, the petition shall be dismissed, the judgment or order subject of the appeal shall be affirmed, or, in incidental matters, the petition or motion shall be denied.

Illumined by Section 3, Rule 2 of the RRCTA, the failure to secure the required majority vote in CTA En Banc proceedings shall have the following effects:

- The petition shall be dismissed;
- In appealed cases, the judgment or order appealed from shall stand affirmed; and
- In incidental matters, the petition or motion shall be denied.

With the foregoing disquisitions, this Court calls to fore the decisions rendered by the CTA En Banc vis-à-vis the requirements and effects of Section 2 of Republic Act No. 1125, as amended, as well as Section 3, Rule 2 of the RRCTA.

During the deliberations of its March 21, 2018 Original Decision, the CTA En Banc was composed of nine justices, six of whom voted to grant the petition. Thus, there can be no gainsaying that the CTA En Banc obtained the required votes to reverse the November 3, 2015 Decision and the April 7, 2016 Resolution of the CTA First Division. Needless to state, the March 21, 2018 Original Decision was validly rendered by the CTA En Banc.

Thereupon, G&W Architects moved for the reconsideration of the said March 21, 2018 Original Decision, which was deliberated by eight justices in view of the retirement of Associate Justice Bautista. To recapitulate, the Justices of the CTA En Banc were equally divided during the deliberation of the motion. Voting 4-4, it rendered its First Amended Decision granting the motion and reversing its Original Decision. As explicitly provided in its dispositive portion, the CTA En Banc set aside its earlier decision and affirmed the disposition of the CTA First Division.[48]

Discernibly, the subject of G&W Architects's motion for reconsideration was the CTA En Banc's Original Decision dated March 21, 2018, and not the decision and resolution of the CTA First Division. To be sure, the CTA First Division's disposition of CTA Case Nos. 8358, 8426, and 8489 was effectively reversed upon the promulgation of the CTA En Banc's Original Decision. G&W Architects's plea for reconsideration was merely an incident of the CTA En Banc's Original Decision. Pursuant to Section 2 of Republic Act No. 1125, as amended, and Section 3, Rule 2 of the RRCTA, a simple majority shall be required to grant the same, and where no majority is had, as in this case where the members of the CTA En Banc reached a tie vote, the motion shall be denied. Veritably, the draw vote should have been treated as a denial of G&W Architects' motion for reconsideration of the CTA En Banc's March 21, 2018 Original Decision. Quite the contrary, the CTA En Banc, via the First

Amended Decision, granted G& W Architects' motion, without any rationalization as to how it did so despite the clear absence of a simple majority.

Expectedly, the CIR moved for the reconsideration of the First Amended Decision, during which Associate Justice Casanova had already retired, leaving only seven incumbent CTA justices. Upon deliberation on the motion, four justices voted to grant the motion while three others dissented, viz.:

In the deliberation of the instant case, only the Presiding Justice Roman G. Del Rosario, Associate Justice Juanito C. Castañeda, Jr., and Associate Justice Esperanza R. Fabon-Victorino concurred with the opinion of the ponente that the assailed Court En Banc's Decision dated March 21, 2018 be reinstated, and in effect, the assailed Decision and Resolution of the Court in Division in CTA Case Nos. 8358, 8426, and 8489 should be reversed and set aside.

On the other hand, Associate Justice Erlinda P. Uy, Associate Justice Cielito N. Mindaro-Grulla, and Associate Justice Ma. Belen M. Ringpis-Liban voted to affirm the Decision of the Court in Division.[49]

However, despite gaining the affirmative votes during the deliberations on the basis of simple majority, the CTA En Banc nevertheless denied the motion. The Second Amended Decision, concurred in by all of the remaining justices, ratiocinated that it needed "[t]he affirmative votes of at least [5] members of the Court [E]n [B]anc [. . .] to reverse a decision of a Division." [50]

The CTA En Banc's appreciation of Section 3, Rule 2 of the RRCTA is misplaced.

Similar to the first motion for reconsideration filed by G&W Architects, the CIR's motion for reconsideration is merely an offshoot, i.e., an incident, of the First Amended Decision and of the Original Decision. It cannot be emphasized enough that the subject of the CIR's motion is the CTA En Banc's First Amended Decision. It plainly sought the reversal of the First Amended Decision and the reinstatement of the Original Decision, making no reference to the disposition of the CTA First Division in CTA Case Nos. 8358, 8426, and 8489.

As an incidental matter, the CIR's motion needed only the affirmative vote of a simple majority of those present during the deliberations in order for it to be granted. It goes without saying that the requirement of an affirmative vote of at least five members of the CTA En Banc applies only in cases where the decision of the CTA Division is to be reversed. This is not the case here. As correctly argued by the CIR, the CTA En Banc's Original Decision dated March 21, 2018 garnered the sufficient votes to overturn the CTA First Division's disposition. It would be the height of injustice to require it to meet this criterion twice—first, during its appeal to the CTA En Banc and second, upon reconsideration thereof. With four affirmative votes in a membership of seven, the CTA En Banc should have granted the CIR's motion.

In specifying the voting requirements during the deliberation of cases before the CTA En Banc, Section 2 of Republic Act No. 1125, as amended, and Section 3, Rule 2 of the RRCTA used the word "shall," underscoring their mandatory character.[51] The law and the rules expressly require five affirmative votes in the reversal of decisions of the CTA division, and an affirmative vote of the simple majority to grant a petition, appeal and other incidental matters. In case of failure to meet the required votes, the CTA division's decision is upheld; the petition, dismissed; the judgment appealed from, affirmed; and the incidental matters, denied. Any other manner of disposition is not sanctioned by the law and by the rules. Consequently, such deviations from the mandatory provision of the law and the rules are void.[52]

Here, the First Amended Decision granted G&W Architects's motion for reconsideration despite a tie vote while the Second Amended Decision denied the CIR's motion for reconsideration despite garnering the affirmative votes of a simple majority. Indeed, the CTA En Banc erred in its interpretation of the voting requirements and

effects thereof when it rendered the Amended Decisions. Had it denied G&W Architects's motion for reconsideration following a tie vote during the deliberations, there would have been no need for this Court to settle the niggling controversy. Yet, despite being presented another opportunity to correct its mistake through the CIR's motion for reconsideration, the CTA En Banc still failed to do so. Instead, it incorrectly denied the motion despite the affirmative votes of a simple majority. Simply stated, in both cases, the voting requirement and effect thereof as laid down in Republic Act No. 1125, as amended, and the RRCTA were violated.

Consequently, both Amended Decisions are void.

Inevitably, the Amended Decisions could never attain final and executory status. The CTA En Banc completely disregarded and violated Section 2 of Republic Act No. 1125, as amended, and Section 3, Rule 2 of the RRCTA, which categorically mandate the affirmative votes of a simple majority on incidental matters. Surely, acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity.[53] As such, the Amended Decisions of the CTA En Banc in this case are deemed void *ab initio*, and therefore, non-existent.

The Court, in *National Power Corp. v. Delta, P, Inc.*[54] explicated—

A void judgment or order has no legal and binding effect. It does not divest rights and no rights can be obtained under it; all proceedings founded upon a void judgment are equally worthless. Void judgments, because they are legally nonexistent, are susceptible to collateral attacks. A collateral attack is an attack, made as an incident in another action, whose purpose is to obtain a different relief. In other words, a party need not file an action to purposely attack a void judgment; he may attack the void judgment as part of some other proceeding. A void judgment or order is a lawless thing, which can be treated as an outlaw and slain at sight or ignored wherever and whenever it exhibits its head. Thus, it can never become final, and could be assailed at any time.[55]

In point of fact, it is immaterial whether an appeal from the Amended Decisions was perfected or not, since a judgment void *ab initio* is non-existent and cannot acquire finality. The judgment is vulnerable to attack even when no appeal has been taken. Hence, such judgment does not become final in the sense of depriving a party of his right to question its validity.[56]

Having passed upon the threshold issue in this case, the next query leaps to the eye: Is G&W Architects liable for the EWT and the DST?

G&W Architects steadfastly avows that it merely acted as a project manager in relation to the management contracts. As such, it entered into a contract of service or a contract for a piece of work with the unit owners, rather than sale. Moreover, title to the land and the condominium was never registered in its name. Thus, it could not have transferred titles over the land and the units to their owners. There being no sale transaction, it cannot be held liable for EWT and DST.

The avowal cannot pass judicial muster. The Court reinstates the March 21, 2018 Original Decision of the CTA En Banc, and echoes with approbation the findings and conclusions therein.

Taxpayers may engineer their transactions to minimize taxes, but they cannot make it appear to be what it is not.[57] Parties to a transaction cannot defeat the right of the government to assess and collect taxes by simply wording or making it appear something it is not. The taxability of transactions or agreements depends on their substance which is paramount over its forms. To curb tax evasion, transactions are scrutinized to establish their true intent or real nature *vis-à-vis* what the parties declare or represent them to be. Concomitantly, the primary consideration in determining the true nature of a contract is the intention of the parties. When a conflict exists between the express terms of an agreement and the evident intention of the parties, the latter prevails.[58] Thus,

such intention is judged not only from the words of the contract, but also from the contemporaneous and subsequent acts of the contracting parties.[59]

Guided by the foregoing jurisprudential precepts, the Court shall now write *finis* to the true nature of G&W Architects's contractual relationship with the unit owners.

A contract for a piece of work is one where the contractor binds himself to execute a piece of work for the employer, in consideration of a certain price or compensation.[60] On the other hand, in a contract of sale, one of the contracting parties obligates himself to transfer the ownership of and to deliver a determinate thing, and the other to pay therefor a price certain in money or its equivalent.[61]

Apropos is the doctrine enunciated by the Court in *Commissioner of Internal Revenue v. Engineering Equipment and Supply Company*,[62] where the test to distinguish a contract of sale from a contract of work, labor, and materials was laid down.

The Court further elucidated this distinction in *Engineering & Machinery Corp. v. CA*[63]—

A contract for a piece of work, labor and materials may be distinguished from a contract of sale by the inquiry as to whether the thing transferred is one not in existence and which would never have existed but for the order, of the person desiring it. In such case, the contract is one for a piece of work, not a sale. On the other hand, if the thing subject of the contract would have existed and been the subject of a sale to some other person even if the order had not been given, then the contract is one of sale.

Thus, Mr. Justice Vitug explains that —

A contract for the delivery at a certain price of an article which the vendor in the ordinary course of his business manufactures or procures for the general market, whether the same is on hand at the time or not is a contract of sale, but if the goods are to be manufactured specially for the customer and upon his special order, and not for the general market, it is a contract for a piece of work (Art. 1467, Civil Code). The mere fact alone that certain articles are made upon previous orders of customers will not argue against the imposition of the sales tax if such articles are ordinarily manufactured by the taxpayer for sale to the public (*Celestino Co & Co. vs. Collector of Internal Revenue*, 99 Phil. 841).

To Tolentino, the distinction between the two contracts depends on the intention of the parties. Thus, if the parties intended that at some future date an object has to be delivered, without considering the work or labor of the party bound to deliver, the contract is one of sale. But if one of the parties accepts that undertaking on the basis of some plan, taking into account the work he will employ personally or through another, there is a contract for a piece of work.[64] (Emphasis in the original)

Appositely, in *Celestino Co. & Co. v. Collector of Internal Revenue*,[65] the Court ruled that the services of therein petitioner of making sashes, windows, and doors, were considered a contract of sale and not a contract for a piece of work subject to a sales tax, viz.:

The important thing to remember is that Celestino Co & Company habitually makes sash, windows and doors, as it has represented in its stationery and advertisements to the public. That it "manufactures" the same is practically admitted by appellant itself. The fact that windows and doors are made by it only when customers place their orders, does not alter the nature of the establishment, for it is obvious that it only accepted such orders as called for the employment of such materials-moulding, frames, panels-as it ordinarily manufactured or was in a position habitually to manufacture.

....

But the argument rests on a false foundation. Any builder or homeowner, with sufficient money, may order windows or doors of the kind manufactured by this appellant. Therefore, it is not true that it serves special

customers only or confines its services to them alone. And anyone who sees, and likes, the doors ordered by Don Toribio Teodoro & Sons Inc. may purchase from appellant doors of the same kind, provided he pays the price. Surely, the appellant will not refuse, for it can easily duplicate or even mass-produce the same doors — it is mechanically equipped to do so.

....

The Oriental Sash Factory does nothing more than sell the goods that it mass-produces or habitually makes; sash, panels, mouldings, frames, cutting them to such sizes and combining them in such forms as its customers may desire.

....

It is at once apparent that the Oriental Sash Factory did not merely sell its services to Don Toribio Teodoro & Co. (To take one instance) because it also sold the materials. The truth of the matter is that it sold materials ordinarily manufactured by it—sash, panels, mouldings—to Teodoro & Co., although in such form or combination as suited the fancy of the purchaser. Such new form does not divest the Oriental Sash Factory of its character as manufacturer. Neither does it take the transaction out of the category of sales under Article 1467 above quoted, because although the Factory does not, in the ordinary course of its business, manufacture and keep on stock doors of the kind sold to Teodoro, it could stock and/or probably had in stock the sash, mouldings and panels it used therefor (some of them at least).[66]

A perspicacious analysis of the management contracts executed between G&W Architects and its clients reveals that the real intention of the parties was to enter into a contract of sale of the condominium units. Section 8 of the management contracts belie G&W Architects's claim of merely performing its duties or functions as project manager of the condominium project.

As outlined in the such contracts, G&W Architects, as project manager, is duty-bound to act for and in behalf of its clients whenever it exercises its obligations as project manager, trustee and attorney-in-fact. Its power and authority as project manager shall terminate upon acceptance and turnover of the units by the clients and the conveyance of the common areas of the project to the condominium corporation.[67]

However, Section 5 of the contract provides that title over the property shall be conveyed to the clients only upon completion of the project and full payment of the units.[68] Rivetingly, the clients, despite being the purported real owners of the condominium units as asseverated by G&W Architects, do not have an absolute right to transfer or assign their rights or obligation—

5.04 Non-assignability of Interest

The rights and interests of the Client in the Project, the Subject Unit, the Parking Unit, and the corresponding proportionate undivided interests in the Common Areas of Project shall not be assignable, unless with the prior written approval of G & W [Architects]. In the event G & W [Architects] should grant such an approval, the Client shall be required to pay G & W [Architects] a processing fee of Pesos: Fifteen Thousand ([PHP] 15,000.00).[69]

11.03 Binding Effect

This Contract shall be binding upon and shall be enforceable against the Client and G & W [Architects] and their respective successors and assigns; provided, however, that the Client shall not have the right to transfer or assign any and all of his rights or obligations herein without the prior written consent of G & W [Architects].[70]

In addition, Section 8, which allows the termination of the contracts, provides that G&W Architects may

unilaterally rescind the same, viz.:

SECTION 8

TERMINATION

8.01 Violation or Default

G & W [Architects] shall have the right to rescind, terminate or cancel this Contract, including the trust herein created with respect to the Subject Land, without need of judicial action, in case anyone of the events of default stipulated hereunder occurs, and the Client fails to remedy or cure to the satisfaction of G & W [Architects] such default, within five (5) days from receipt of written notice from G & W [Architects] of the occurrence of such default:

(a) Failure to pay any of the Construction Funding payments in accordance with the schedule of payment herein provided for over 60 days;

(b) Failure to pay the Client's portion of the Cost Advances or Labor Cost Overruns if any, or any portion thereof;

Upon such termination, G & W [Architects] shall have the right to acquire or identify a substitute client to acquire all the rights and interests of the Client in the Project and to assume the corresponding remaining obligation hereunder. If at the time the violation or default occurs, Client had paid thirty five percent (35%) or less of the Construction Funding (including accrued cost Overruns and Cost Advances), any and all amounts already by the Client shall automatically be forfeited by way of liquidated damages in favor of G & W [Architects], without need of judicial intervention. If at the time the violation or default occurs, Client had paid more than thirty five percent (35%) of the Construction Funding (including accrued Cost Overruns and Cost Advances), the excess over the said percentage shall be returned to the Client after deducting all expenses and costs involved including the Bank's professional fees, attorney's fees and other acts of administration.

The remedy herein granted is without prejudice to the right of G & W [Architects] to avail of the remedies to which it is entitled under Section 7 hereof.

Should G & W [Architects] deem that it is not feasible to continue with the Project, it may also terminate this Contract by advance written notice to the Client of at least five working days. In such case, all Construction Funding payments which have been deposited in the Account shall be returned to the Client, together with all interests which in the meantime have accrued thereon after deducting professional fees due to the Bank under the terms of this Contract and the Depository and Disbursement Agreement. Should professional fees due to the Bank exceed interest earned from the Account, G & W [Architects] undertakes to pay the aforesaid deficiency.[71] (Emphasis omitted)

As eruditely pointed out by Presiding Justice Del Rosario, the Management Contracts pretentiously suggest that G&W Architects is simply the manager of the project, when in truth, ownership rights of the purported clients over the project or any of the condominium units accrue and become vested upon them only upon full payment of the said units. Under the said contract, it has the authority to terminate the contract when the supposed clients fail to pay the amounts payable, and the power to substitute the client who violated its terms or defaulted in the payment. The supposed clients' obligation under the said contract is confined to paying a specified amount and upon full payment, the clients will acquire ownership of their respective condominium units. Such arrangement cannot be different from a conditional contract of sale. Upon full payment by the clients, the transaction is properly deemed a sale of condominium unit.[72]

It is immaterial that title over the land was never registered in G&W Architects' s name as it is primal that ownership is different from a certificate of title. The certificate of title is only the best proof of ownership of a

piece of land. Besides, the certificate cannot always be considered as conclusive evidence of ownership. Mere issuance of the certificate of title in the name of any person does not foreclose the possibility that the real property may be under co-ownership with persons not named in the certificate or that the registrant may only be a trustee or that other parties may have acquired interest subsequent to the issuance of the certificate of title.[73]

It sticks out like a sore thumb that G&W Architects did not commence building its condominium projects on the basis of a special order from previously existing and identified investors/condominium unit owners; rather, it built condominium projects even without such previously made special order consistent with its business purpose as stated in its Articles of Partnership and Amended Articles of Partnership, thus—

ARTICLE II

Purpose and Office

Section 1. The purpose and business of this partnership shall be to engage in the general practice of Architecture and Construction and to purchase, own, hold, manage, lease and operate any and all kinds of property. (as amended on 21 November 1997)[74]

Similar to Celestino, G&W Architects advertised its project to the general public. Its contemporaneous and subsequent acts further belie its claim that it merely intended to enter into a contract for a piece of work with its clients. The representation made in its advertisement that the condominium units were for sale indubitably affirms that it was indeed a seller of condominium units precisely because it would dispose of the condominium units regardless of who, ultimately, would acquire them. With such open invitation to the public on the mode and manner of acquiring a condominium unit, G&W Architects made its product available to whoever has the means to avail it, and not only based on a special order.

So, too, contrary to G&W Architects's posture, the elements of a contract of sale are present in this case.

The first element, i.e., consent to transfer ownership in exchange for the price, is apparent in the management contracts—

5.05 Conveyance of Title to the Subject Unit and Common Areas

Upon completion of the Project and full payment by the Client of all amounts payable under this Contract, title to the Subject Unit including the Parking Unit shall be conveyed by G & W [Architects] to the Client. Upon completion of the Project, title to the Common Areas shall be conveyed by G & W to the Condominium Corporation which shall be established in accordance with the provisions of the Master Deed.[75] (Emphasis supplied)

Contracts that are consensual in nature, like a contract of sale, are perfected upon mere meeting of minds. Once there is concurrence between the offer and the acceptance upon the subject matter, consideration, and terms of payment, a contract is produced.[76] Here, G&W Architects and its clients executed contracts involving the covered transactions. The former's consent to transfer ownership over the subject units in exchange for the latter's full payment of the price is readily discernible from subsection 5.05 of the contract, as quoted above.

The determinate subject matter in the subject contracts, which is the second element, is the completed condominium unit, whereas the third element, or the price certain in money, is the amount payable under the purported management contracts.

Therewithal, the CTA En Banc aptly pointed out that G&W Architects' s registration with the Housing and Land Use Regulatory Board (HLURB) blows to smithereens its postulation that it is not engaged in the sale of condominium units. It bears stressing that G&W Architects takes no issue with the proceedings before the HLURB, docketed as HLURB Case No. REM-A-041130-0252. As it happened, G&W Architects appealed to the

HLURB Central Office the order of its Expanded National Capital Region (NCR) Field Office imposing an administrative fine on respondent for selling condominium units without a license to sell, for failure to secure certificate of registration and for advertising without prior approval, and ordering it to cease and desist from further selling and advertising until all the necessary permits or license is secured.[77] In resolving the appeal, the HLURB affirmed the order of NCR Field Office. Whence, G&W Architects was required to secure licenses to sell, and eventually, was granted by the HLURB Licenses to Sell,[78] as follows:

Exhibits

Descriptions

"R-20"

Certificate of Registration No. 20133 issued to [G&W Architects] as the project owner and developer of THE GRAND HAMPTONS TOWER 1

"R-20-1"

License to Sell No. 21947 issued to [G&W Architects] as the project owner and developer of THE GRAND HAMPTONS TOWER 1

"R-21"

Certificate of Registration No. 24027 issued to [G&W Architects] as the project owner and developer of THE GRAND HAMPTONS TOWER II

"R-21-1"

License to Sell No. 25720 issued to [G&W Architects] as the project owner and developer of THE GRAND HAMPTONS TOWER II

"R-22"

Certificate of Registration No. 24426 issued to [G&W Architects] as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM

"R-22-1"

License to Sell No. 26181 issued to [G&W Architects] as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM

"R-23"

Certificate of Registration No. 24418 issued to [G&W Architects] as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM

"R-23-1"

License to Sell No. 26169 issued to [G&W Architects] as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM

"R-24"

Certificate of registration No. 24028 issued to [G&W Architects] as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM

"R-24-1"

License to Sell No. 25271 issued to [G&W Architects] as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM

All the same, G&W Architects obdurately avouches that its act of securing licenses should not be interpreted to mean that it is engaged in the sale of condominium units.

The Court refuses to pander to the avouchment.

Section 5 of Presidential Decree No. 957[79] requires a license to sell as a condition sine qua non for the sale of condominium units:

Section 5. License to sell. — Such owner or dealer to whom has been issued a registration certificate shall, not, however, be authorized to sell any subdivision lot or condominium unit in the registered project unless he shall have first obtained a license to sell the project within two weeks from the registration of such project.

The Authority, upon proper application therefor, shall issue to such owner or dealer of a registered project a license to sell the project if, after an examination of the registration statement filed by said owner or dealer and all the pertinent documents attached thereto, he is convinced that the owner or dealer is of good repute, that his business is financially stable, and that the proposed sale of the subdivision lots or condominium units to the public would not be fraudulent. (Emphasis in the original)

Veritably, there would have been no necessity to secure licenses to sell from the HLURB if G&W Architects were not engaged in selling condominium units, as it steadfastly insists.

Necessarily intertwined with the issue on G&W Architects's taxability is the question of whether the principle of non-retroactivity of rulings may apply in its favor to prevent RMC No. 55-2010 from revoking BIR Ruling Nos. DA-056-2003, DA-455-2007, and DA-337-2007. Certainly, this principle, as enshrined in Section 246 of the Tax Code, operates to guard taxpayers who relied in good faith on the pertinent BIR ruling prior to its reversal.[80] However, this principle admits of certain exceptions:

SEC. 246. Non-Retroactivity of Rulings. — Any revocation, modification, or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers, except in the following cases:

(a)

Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;

(b)

Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or

(c)

Where the taxpayer acted in bad faith. (Emphasis supplied)

A judicious review of the records evinces that the second exception applies in this instance. A plain reading of the provision reveals that the second exception, unlike the first, does not require proof that the taxpayer deliberately

or intentionally misstated or omitted material facts. It only requires that the facts later gathered by the BIR are "materially different" from the facts on which the ruling is based.

To recall, in BIR Ruling No. DA-455-2007, G&W Architects essentially represented that it undertook to act merely as a project proponent and organizer of the condominium projects, and did not make any representations as to engaging in the sale of condominium units.

In nullifying the foregoing, then CIR Joel L. Tan-Torres ratiocinated that the BIR Rulings were revoked as they did not reveal the true nature of G&W Architects's Built-To-Own system. As stated in RMC No. 55-2010, which he issued, it was stated that the basis for overturning the said rulings stemmed from an "investigation of RDO No. 44, [that] the facts are not as represented by the subject taxpayer in their requests for ruling." Specifically, the BIR's investigation concluded that G&W Architects had misrepresented its concept and it was actually one of "pre-selling/selling" which is subject to EWT and DST.[81] RMC No. 55-2010 further continues—

The nullification of the abovementioned rulings, Is anchored on the findings that the scheme of build-to-own, build-your-own, and similar concepts mainly consist of the developer making it appear that it merely manages the construction of the condominium project, and that the funds as contributed by the individual investors are pooled in a bank with the developer, as project manager, receiving a project management fee only. Moreover, in the above scheme, the assignment and delivery of the developed units to joint owners (individual investors), is claimed not to be a taxable event being merely a transfer of property held in trust by the Trustee for the individual Trustors. The foregoing effectively resulted in the non-payment of income taxes and value-added tax by the developer on the gross project amount.[82] (Emphasis in the original)

It must also be noted that these BIR rulings were issued with a very specific caveat that they would be rendered null and void if a subsequent BIR investigation reveals a discrepancy in the presented facts—

This ruling is being issued based on the foregoing facts as represented. However, if upon investigation, it shall be disclosed that the facts as represented are different, this ruling shall [be] considered null and void.[83]

Indeed, the material difference in the facts represented by G&W in securing the BIR rulings, as well as the facts subsequently gathered by the BIR snugly fits into the realm of the second exception set forth in Section 246. Hence, RMC No. 55-2010, which revoked the said rulings, can be applied retroactively.

The Court now proceeds to rule on G&W Architects's tax liabilities for EWT and DST. In retrospect, it was assessed for deficiency EWT and DST for the periods 2004, 10 July 2004, and June 2004, in the amounts of PHP 277,458,117.19, PHP 132,852,679.05, and PHP 149,414,228.66, respectively, or in the aggregate amount of PHP 559,725,024.90.

Section 196[84] of the Tax Code imposes DST on all deeds of sale and conveyances. Having settled that the build-to-own scheme of G&W Architects is a sale transaction, it follows that it must pay the deficiency DST for the subject transactions.

In the same vein, it is liable for deficiency EWT. EWT is a withholding tax prescribed on certain income payments and is creditable against the income tax due of the payee for the taxable quarter/year in which the particular income was earned.[85] Elsewise put, it is a tax taken in advance by the withholding agent, usually the buyer, from the seller's income on behalf of the government.

The withholding tax system was devised for three primary purposes: (1) to provide taxpayers a convenient manner to meet their probable income tax liability; (2) to ensure the collection of income tax which can otherwise be lost or substantially reduced through failure to file the corresponding returns; and (3) to improve the government's cash flow.[86] This results in administrative savings, prompt and efficient collection of taxes, prevention of

delinquencies, and reduction of governmental effort to collect taxes through more complicated means and remedies. Simply put, withholding tax is intended to facilitate the collection of income tax.[87]

Through this system, "the withholding agent retains a portion of the amount received by the income earner. In turn, the said amount is credited to the total income tax payable in transactions covered by the EWT." [88] Concomitantly, the "payee is the taxpayer" upon whom the tax is imposed, while "the payor, a separate entity, acts as the government's agent for the collection of the tax in order to ensure its payment." [89] As a consequence of the withholding tax system, two distinct liabilities arise – one for the income earner/payee and another for the withholding agent.[90]

In *Rizal Commercial Banking Corp. v. Commissioner of Internal Revenue*, [91] the Court elucidated:

It is, therefore, indisputable that the withholding agent is merely a tax collector and not a taxpayer, as elucidated by this Court in the case of *Commissioner of Internal Revenue v. Court of Appeals*, to wit:

In the operation of the withholding tax system, the withholding agent is the payor, a separate entity acting no more than an agent of the government for the collection of the tax in order to ensure its payments; the payer is the taxpayer — he is the person subject to tax imposed by law; and the payee is the taxing authority. In other words, the withholding agent is merely a tax collector, not a taxpayer. Under the withholding system, however, the agent-payor becomes a payee by fiction of law. His (agent) liability is direct and independent from the taxpayer, because the income tax is still imposed on and due from the latter. The agent is not liable for the tax as no wealth flowed into him — he earned no income. The Tax Code only makes the agent personally liable for the tax arising from the breach of its legal duty to withhold as distinguished from its duty to pay tax since:

"the government's cause of action against the withholding agent is not for the collection of income tax, but for the enforcement of the withholding provision of Section 53 of the Tax Code, compliance with which is imposed on the withholding agent and not upon the taxpayer."

Based on the foregoing, the liability of the withholding agent is independent from that of the taxpayer. The former cannot be made liable for the tax due because it is the latter who earned the income subject to withholding tax. The withholding agent is liable only insofar as he failed to perform his duty to withhold the tax and remit the same to the government. The liability for the tax, however, remains with the taxpayer because the gain was realized and received by him.[92] (Emphasis omitted)

Surely, the withholding agent can be held accountable for its negligence in performing its duty to withhold the amount of tax due on the transaction. However, the taxpayer who earned the income on the transaction remains ultimately liable for the tax.

In the instant case, there is neither rhyme nor reason to hold G&W Architects's unsuspecting clients accountable for failure to withhold EWT as they merely relied in good faith on its representation that the transactions were tax-exempt. To rule otherwise would allow the wrongdoer to escape liability from the consequence of its mischievous tax scheme and, in esse, permit it to benefit from its own wrongdoing. In any event, considering that G&W Architects ultimately realized the income on the transactions, this Court holds it liable for the deficiency EWT.

A final inflection. Given the declaration of nullity of the Second Amended Decision of the CTA En Banc, the Court cannot rely upon the computation set forth therein. Thence, it is most appropriate to remand the case to the CTA First Division, whose disposition is being reinstated, for the determination and computation of respondent's tax liabilities.

ACCORDINGLY, the Petition for Review on Certiorari is GRANTED. The August 29, 2018 Amended Decision

and the March 14, 2019 Amended Decision of the Court of Tax Appeals En Banc in CTA EB Case No. 1449 are DECLARED NULL and VOID. The March 21, 2018 Decision of the Court of Tax Appeals En Banc is REINSTATED.

Let the case be REMANDED to the Court of Tax Appeals First Division for the proper computation of the tax liabilities of respondent G&W Architects, Engineers and Project Development Consultants Company.

SO ORDERED.

Gaerlan and Singh, JJ., concur.

Caguioa (Chairperson) and Inting, JJ., see concurring and dissenting opinions.

[1] Rollo, pp. 10-64.

[2] Id. at 66-80. Penned by Associate Justice Caesar A. Casanova, with the concurrence of Associate Justices Erlinda P. Uy, Cielito N. Mindaro-Grulla, Ma. Belen M. Ringpis-Liban. Presiding Justice Roman G. del Rosario, Associate Justices Juanito C. Castañeda, Jr., Esperanza R. Fabon-Victorino, and Catherine T. Manahan, dissented.

[3] Id. at 99-125. Penned by Associate Justice Catherine T. Manahan, with the concurrence of Presiding Justice Roman G. del Rosario, Associate Justices Juanito C. Castañeda, Jr., Erlinda P. Uy, Esperanza R. Fabon-Victorino, Cielito N. Mindaro-Grulla and Ma. Belen M. Ringpis-Liban.

[4] Id. at 117, CTA En Banc Second Amended Decision.

[5] Id. at 207-208, CTA First Division Decision.

[6] Id. at 209.

[7] In some parts of the rollos, Grand Hamptons Tower II is referred to as Grand Hamptons II and The Grand Hamptons.

[8] Rollo, p. 209.

[9] Id.

[10] Id. at 325.

[11] Id. at 326.

[12] Id. at 327.

[13] Id. at 329-334, BIR Memorandum dated March 28, 2010.

[14] Id. at 335-336, Revenue Memorandum Circular No. 55-2010.

[15] Id. at 211.

[16] Id. at 337-345, Formal Assessment Notice.

[17] Id. at 212.

[18] Id. at 207-264. Penned by Associate Justice Cielito N. Mindaro-Grulla with the concurrence of Associate Justice Erlinda P. Uy, Presiding Justice Roman G. del Rosario, dissented.

[19] Id. at 264.

[20] Id. at 282-292.

[21] Id. at 161.

[22] Id. at 161-174. Penned by Associate Justice Caesar A. Casanova with the concurrence of Presiding Justice Roman G. del Rosario and Associate Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Esperanza R. Fabon-Victorino and Catherine T. Manahan, Associate Justices Cielito N. Mindaro-Grulla, Erlinda P. Uy, and Ma. Belen M. Ringpis-Liban, dissented.

[23] Id. at 173.

[24] Id. at 66-80.

[25] Id. at 78.

[26] Id. at 99-125.

[27] AN ACT CREATING THE COURT OF APPEALS (1954).

[28] AN ACT ENLARGING THE ORGANIZATIONAL STRUCTURE OF THE COURT OF TAX APPEALS, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES (2008).

[29] SEC. 3. Court en banc; quorum and voting.— The presiding justice or, if absent, the most senior justice in attendance shall preside over the sessions of the Court en banc. The attendance of five (5) justices of the Court shall constitute a quorum for its session en banc. The presence at the deliberation and the affirmative vote of five (5) members of the Court en banc shall be necessary to reverse a decision of a Division but only a simple majority of the justices present to promulgate a resolution or decision in all other cases. Where the necessary majority vote cannot be had, the petition shall be dismissed; in appealed cases, the judgment or order appealed from shall stand affirmed; and on all incidental matters, the petition or motion shall be denied.

[30] Id. at 26, Petition for Review.

[31] Id. at 27-34.

[32] Id. at 32.

[33] Id. at 33-34.

[34] Id. at 35-44.

[35] Id.

[36] Id. at 45-48.

[37] Id. at 48-56.

[38] Id. at 56-57.

[39] Id. at 665-666, Comment.

[40] Id. at 661-663.

[41] Id. at 666-681.

[42] Id. 692-726, Reply.

[43] 768 Phil. 99 (2016) [Per J. Perez, En Banc].

[44] Docketed as A.M. No. 05-11-07-CTA.

[45] The amendments to the 2005 Rules of Court of the Court of Tax Appeals were approved by the Supreme Court on September 16, 2008. On February 10, 2009, the Supreme Court approved the additional amendments to the 2005 Revised Rules of the Court of Tax Appeals.

[46] SEC. 2. Section 2 of the same Act, as amended, is hereby further amended, to reach as follows:

"SEC. 2. Sitting En Banc or Division; Quorum; Proceedings. - The CTA may sit en banc or in three (3) Divisions, each Division consisting of three (3) Justices.

"Five (5) Justices shall constitute a quorum for sessions en banc and two (2) Justices for sessions of a Division. Provided, That when the required quorum cannot be constituted due to any vacancy, disqualification, inhibition, disability, or any other lawful cause, the Presiding Justice shall designate any Justice of other Divisions of the Court to sit temporarily therein.

"The affirmative votes of five (5) members of the Court en banc shall be necessary to reverse a decision of a Division but a simple majority of the Justices present necessary to promulgate a resolution or decision in all other cases or two (2) members of a Division, as the case may be, shall be necessary for the rendition of a decision or resolution in the Division Level."

[47] AN ACT ENLARGING THE ORGANIZATIONAL STRUCTURE OF THE COURT OF TAX APPEALS, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES (2008).

[48] Rollo, p. 78.

[49] Id. at 123.

[50] Id.

[51] See *Power Sector Assets and Liabilities Management Corporation v. Commissioner of Internal Revenue*, 815 Phil. 966, 993 (2017) [Per J. Carpio, En Banc].

[52] See *Kaizen Builders, Inc. v. Court of Appeals*, 881 Phil. 375, 390 (2020) [Per J. Lopez, First Division]. (Citation omitted). See also Article 5 of the New Civil Code.

[53] See *Commissioner of Internal Revenue v. Unioil Corp.*, G.R. No. 204405, August 4, 2021 [Per J. Hernando, Second Division].

[54] 865 Phil. 891 (2019) [Per J. A. Reyes, Jr., Third Division].

[55] See id. at 906.

[56] See *Technical Education and Skills Development v. Abragar*, G.R. No. 201022, March 17, 2021 [Per J. Hernando, Third Division].

[57] See *Redwing Carriers Inc. v. Tomlinson*, 399 F.2d 652 (5th Cir 1968) [United States of America].

[58] See *De Joya v. Madlangbayan*, 901 Phil. 153, 169 (2021) [Per J. Gaerlan, First Division].

[59] Id.

[60] CIVIL CODE, art. 1713.

[61] CIVIL CODE, art. 1458.

[62] 159-A Phil. 843 (1975) [Per J. Esguerra, First Division].

[63] 322 Phil. 161, 170 (1996) [Per J. Panganiban, Third Division].

[64] Id. at 170-171. See also rollo, pp. 197-198, Petition for Review filed by the CIR with the CTA En Banc. (Emphasis supplied)

[65] 99 Phil. 841 (1956) [Per J. Bengzon, First Division].

[66] Id. at 842-846.

[67] Rollo, pp. 69-72, CTA En Banc First Amended Decision.

[68] Id. at 105, CTA En Banc Second Amended Decision.

[69] Id. at 106.

[70] Id. at 107-108. See also id. at 166-167, CTA En Banc Original Decision.

[71] Id.

[72] Id. at 87-88. Presiding Justice Del Rosario's Dissenting Opinion, p. 8.

[73] See Ulay v. Bustamante, 899 Phil. 209, 222 (2021) [Per J. Caguioa, First Division] (Citation omitted)

[74] Rollo, p. 117, CTA En Banc Second Amended Decision.

[75] Id. at 106 and 169.

[76] Heirs of Fausto C. Ignacio v. Home Bankers Savings and Trust Company, 702 Phil. 109, 121 (2013) [Per J. Villarama, Jr., First Division].

[77] Rollo, pp. 674-676, Comment (To: Petition for Review on Certiorari dated May 6, 2019).

[78] See id. at 169-173.

[79] REGULATING THE SALE OF SUBDIVISION LOTS AND CONDOMINIUMS, PROVIDING PENALTIES FOR VIOLATIONS THEREOF (1976).

[80] See Energy Development Corporation v. Commissioner of Internal Revenue, 898 Phil. 740, 760 (2021) [Per J. Hernando, Third Division].

[81] Rollo, pp. 335-336.

[82] Id. at 336.

[83] BIR Ruling No. DA-455-07.

[84] SEC. 196. Stamp Tax on Deeds of Sale, Conveyances and Donation of Real Property. - On all conveyances, donations, deeds, instruments, or writings other than grants, patents or original certificates of adjudication issued by the Government, whereby any land, tenement, or other realty sold shall be granted, assigned, transferred, donated or otherwise conveyed to the purchaser, or purchasers, or to any other person or persons designated by such purchaser or purchasers or done, there shall be collected a documentary stamp tax at the rates herein below prescribed, based on the consideration contracted to be paid for such realty or on its fair market value determined in accordance with Section 6(E) of this Code, whichever is higher: Provided, That when one of the contracting parties is the Government, the tax herein imposed shall be based on the actual consideration.

- (a) When the consideration, or value received or contracted to be paid for such realty after making proper allowance of any encumbrance, does not exceed One thousand pesos (P1,000) fifteen pesos (P15.00)
- (b) For each additional One thousand Pesos (P1,000), or fractional part thereof in excess of One thousand pesos (P1,000) of such consideration or value, Fifteen pesos (P15.00)

Transfers exempt from donor's tax under Section 101(a) and (b) of this Code shall be exempt from the tax imposed under this Section.

When it appears that the amount of the documentary stamp tax payable hereunder has been reduced by an incorrect statement of the consideration in any conveyance, deed, instrument or writing subject to such tax the Commissioner, provincial or city Treasurer, or other revenue officer shall, form the assessment rolls or other reliable source of information, assess the property of its true market value and collect the proper tax thereon. (Emphasis in the original)

[85] See Revenue Regulation No. 02-98 (1998).

[86] Commissioner of Internal Revenue v. Commission on Elections, 902 Phil. 1083, 1106 (2021) [Per J. M. Lopez, En Banc] (Citation omitted)

[87] Id. (Citation omitted)

[88] See Commissioner of Internal Revenue v. La Flor Dela Isabela, Inc., 845 Phil. 568, 580 (2019) [Per J. J. Reyes, Jr., Second Division].

[89] Id.

[90] Id. at 581.

[91] 672 Phil. 514 (2011) [Per J. Mendoza, Third Division].

[92] Id. at 528-529.

G.R. No. 246026 — COMMISSIONER OF INTERNAL REVENUE, Petitioner, v. G&W ARCHITECTS, ENGINEERS AND PROJECT CONSULTANTS CO.,[*] Respondent.

CONCURRING and DISSENTING OPINION

CAGUIOA, J.:

While I agree with the ponencia that the Court of Tax Appeals (CTA) En Banc erred in applying the voting requirements under Republic Act No. 1125,[1] as amended,[2] and the Revised Rules of the CTA (RRCTA), I respectfully dissent to the ponencia's conclusion that respondent G&W Architects, Engineers and Project Consultants Co. (G&W Architects) engaged in taxable sale transactions under its Build-to-Own scheme, and its ultimate disposition that G&W Architects is liable for deficiency expanded withholding tax (EWT) and documentary stamp tax (DST).

I submit that G&W Architects's Build-to-Own system is not a taxable event or sale since the allocation of the condominium units to G&W Architects's clients is a mere return of capital that each client contributed to fund the acquisition of land and development of the condominium project. At any rate, the revocation of the Bureau of Internal Revenue (BIR) rulings rendered in favor of G&W Architects, which held that the Build-to-Own scheme is not subject to creditable withholding tax (CWT) or capital gains tax (CGT), value-added tax (VAT), and DST, except the PHP 15.00-DST on the contractual agreement, cannot adversely prejudice G&W Architects who in

good faith relied on the subject BIR rulings prior to their revocation.

Brief review of the facts

G&W Architects adopted a Build-to-Own scheme in the construction of its projects, under which funds of condominium unit owners are pooled together to construct such units on their behalf. In this regard, G&W Architects obtained several confirmatory BIR rulings[3] for its projects (subject BIR rulings), which uniformly held that the arrangement does not constitute a taxable sale, exchange, or disposition of real property by G&W Architects, and was thus not subject to CWT or CGT, VAT, and DST, except minimal DST on the agreements.

Relying in good faith on these BIR rulings, G&W Architects proceeded with the projects. The parcels of land upon which the projects were built were originally owned by Fort Bonifacio Development Corporation (FBDC) and these were subsequently sold to the projects' respective condominium corporations through Deeds of Absolute Sale.

Subsequently, the BIR nullified the subject BIR rulings through Revenue Memorandum Circular (RMC) No. 55-2010, and issued deficiency assessments against G&W Architects for EWT and DST on the supposed transfer of condominium units.

G&W Architects protested the assessments and filed petitions for review before the CTA due to the CIR's inaction on the protests.

The CTA First Division (CTA Division) ordered the cancellation of the deficiency EWT and DST. In so ruling, the CTA Division found that there was nothing in the contracts entered into by G&W Architects and its clients as would show a transfer of ownership of the condominium units. From the agreements, all acts of G&W Architects were understood to be for and on behalf of its clients.[4] The CTA Division denied the CIR's Motion for Reconsideration (MR).[5]

Voting 6-3, the CTA En Banc reversed and set aside the ruling of the CTA Division in its Decision[6] dated March 21, 2018 (original Decision). The CTA En Banc held that the contracts executed between G&W Architects and its clients, as well as its contemporaneous and subsequent acts, belied its assertion that G&W Architects was merely a project manager, and not the owner, of the condominium units. Thus, G&W Architects was ordered to pay the assessed deficiency EWT and DST.

Subsequently, G&W Architects filed an MR.

With the retirement of Associate Justice Lovell R. Bautista, the CTA En Banc rendered the challenged first Amended Decision[7] dated August 29, 2018 (First Amended Decision), where the CTA En Banc, voting 4-4, granted G&W Architects's MR, thereby reversing the original Decision of the CTA En Banc. It then ordered the Commissioner of Internal Revenue (CIR) to cancel and withdraw the deficiency EWT and DST against G&W Architects.

The CIR filed an MR. At this juncture, the CTA En Banc was composed of only seven members in view of the retirement of Associate Justice Caesar A. Casanova. Upon deliberation on the MR, four justices voted to grant the CIR's motion while three others dissented. However, despite gaining the affirmative votes during the deliberations on the basis of simple majority, the CTA En Banc, nevertheless, denied the MR via the second Amended Decision[8] dated March 14, 2019 (Second Amended Decision), thereby affirming its First Amended Decision.

As stated at the outset, the ponencia renders void the First and Second Amended Decisions of the CTA En Banc.

Citing several cases as to the distinction between a contract of sale and a contract for a piece of work, the ponencia reinstates the original Decision of the CTA En Banc, and echoes the findings and conclusions therein.[9]

An analysis of the management contracts executed between G&W Architects and its clients reveals that the real intention of the parties was to enter into a contract of sale of the condominium units, evidenced by the clients' obligation to pay a specified amount and acquire ownership upon full payment.[10]

The ponencia holds that the lack of registered title in G&W Architects' s name is deemed irrelevant, as ownership is separate from a certificate of title. G&W Architects initiated condominium projects without specific orders and advertised units for sale to the public, confirming its role as a seller.[11] The elements of a contract of sale are present, including consent, determinate subject matter, and price.[12] Furthermore, G&W Architects was required to obtain licenses to sell from the Housing and Land Use Regulatory Board (HLURB), confirming its sales activity.[13]

Considering G&W Architects's Build-to-Own scheme to be a sale transaction, the ponencia concludes that it must pay the deficiency DST and EWT on the income realized from the transactions. However, the nullification of the Second Amended Decision rendered by the CTA En Banc requires remanding the case to the CTA Division for the computation of G&W Architects' s tax liabilities.[14]

G&W Architects's Build-to-Own's scheme does not amount to a contract of sale between G&W Architects and its clients

I respectfully disagree with the ponencia's ruling that G&W Architects' s Build-to-Own system is a sale transaction. The Build-to-Own concept of pooling the funds owned by condominium unit owners to be used for the construction of the condominium units on their behalf does not constitute a taxable sale, exchange or disposition of real property, hence, not subject to income tax, EWT, and DST.

Article 1458 of the Civil Code defines a contract of sale as follows:

Article 1458. By the contract of sale one of the contracting parties obligates himself to transfer the ownership and to deliver a determinate thing, and the other to pay therefor a price certain in money or its equivalent.

A contract of sale may be absolute or conditional.

A contract of sale is therefore a reciprocal obligation "to give," and the prestation or obligation of the seller or vendor is "to transfer the ownership of and to deliver a determinate thing" while the prestation or obligation of the buyer or vendee is "to pay therefor a price certain in money or its equivalent." The full payment of the purchase price is the buyer's prestation.[15]

G&W Architects's Build-to-Own scheme does not fit the definition of a sale.

To recall, in G&W Architects's Build-to-Own system, clients or unit owners individually enter into a contract with G&W Architects, the project manager, to build a residential condominium building for them using their funds. For its part, and precisely because the funds to be used to build the residential condominium building are not G&W Architects's, what the latter does is to charge a professional fee to each client. The clients then pool their funds in a trust account, which are used to purchase land and construct the condominium project. The clients appointed G&W Architects as attorney-in-fact to purchase the land on their collective behalf, as well as constituted G&W Architects as their trustee to hold title to the land and condominium project. G&W Architects oversees the project, and upon completion, each client receives a specific condominium unit in exchange for the funds that were initially invested in the pooled funds.[16]

The Build-to-Own scheme operates on a distinct premise—an obligation "to do." An obligation "to do" includes all kinds of work or service, whereas an obligation "to give" is a prestation which consists in the delivery of a movable or an immovable thing in order to create a real right, or for the use of the recipient, or for its simple

possession, or in order to return it to its owner.[17]

Unlike a sale which is an obligation "to give" such that one party transfers ownership of a thing to another in exchange for payment, the Build-to-Own scheme revolves around the pooling of funds owned by clients in exchange for G&W Architects's services as the project manager. In fact, G&W Architects's Build-to-Own scheme bears a striking resemblance to a situation where siblings or friends unite to pool their resources to construct a building. In this collaborative effort, each participant invests his or her capital, appoints a project manager and architect to provide their services, and eventually co-owns the building. This scheme is resorted to because, individually, the participants may not possess the necessary financial capabilities to undertake such a sizable project. However, by pooling their resources, they create a substantial capital base that empowers them to initiate and complete the construction. Just as siblings or friends may designate specific floors or areas of the building to each of them, G&W Architects's Build-to-Own scheme allows its clients to claim their share of the property after construction, which corresponds to their respective contributions.

As the project manager, G&W Architects's responsibilities are outlined in the Contract to Manage and Execute the Construction of the Condominium Projects (management contract), which directs G&W Architects to acquire the subject land, supervise the construction of the condominium project, and facilitate the necessary documentation for the transfer of ownership of the land to the condominium corporation and of the condominium units to the clients, thus:

(a)

To prequalify and select the construction management engineers, general building contractor, specialty engineering contractors and in general, to act as overall coordinator and manager of the Project;

(b)

During the initial stages of the Project, and all throughout the construction period, to set up and implement a system for the billing and collection of any and all amounts required from the Clients, including without limitation, the Construction Funding and the sums to cover Miscellaneous Expenses.

(c)

To do such other acts as may be necessary and desirable for the development of the Project.

(d)

The Client hereby irrevocably names, appoints[,] and constitutes [G&W Architects] as its true and lawful attorney-in-fact for the execution of acts properly within the knowledge and expertise of [G&W Architects] and to do the following acts in its stead:

(i)

To prepare or cause the preparation of all the necessary documents for the purchase of the Subject Land and the subsequent registration thereof in the name of the Trustee for the benefit of the Clients;

(ii)

To secure or cause to be secured all the necessary permits and/or licenses which may be required or necessary for the Project, including those registration requirements from, or required by, the [HLURB] and the proper local government unit;

(iii)

To file the application for, and secure the issuance of, the HLURB development permits;

(iv)

To cause to be secured the building permit and any and all other permits from the local government unit which are necessary for the development and construction of the Project;

(v)

To negotiate and enter into contracts as may be required for the development of the Project with such construction management engineers, general building contractors, specialty engineering contractors[,] and other parties as deemed fit and necessary by [G&W Architects];

(vi)

To prepare or cause the preparation of any and all contracts for execution by and between [G&W Architects] for and in behalf of the collective benefit of the Clients and such construction management engineers, general building contractors, specialty engineering contractors[,] and other parties as deemed fit and necessary by [G&W Architects];

(vii)

To execute or cause the timely execution of the Master Deed;

(viii)

To apply for the issuance of individual Condominium Certificates of Title in the name of the Trustee, with the proper Registry of Deeds subject always to Section 6;

(ix)

To prepare or cause the preparation of the necessary contracts for the conveyance by the Trustee of the Condominium Certificates of Title over the units comprising the Project to the Clients and the Condominium Certificate of Title over the Common Areas to the Condominium Corporation;

(x)

To enter into, endorse, sign[,] or execute any and all other contracts, documents, registration statements[,] and other instruments necessary for the expeditious development of the Project;

(xi)

To instruct the Trustee to issue payments from the Trust to third parties contracted by [G&W Architects] to perform and/or complete tasks for the Project;

(xii)

To appear, answer, plead[,] and defend in all actions, suits and proceedings whatsoever in which Client(s) and/or [G&W Architects] is named party defendant, jointly or severally, for causes of action arising from the Project.

provided, that any and all necessary contracts and/or documents arising out of or as a consequence of the foregoing acts while executed by and in the name of [G&W Architects] shall be understood to be for and in behalf of the Clients. In fulfilling its above-delegated responsibilities, [G&W Architects] may engage the services of legal counsel, which may be the counsel of [G&W Architects].

The Client hereby gives and grants unto [G&W Architects], as the Client's attorney-in-fact, full power and authority to do and perform every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as the Client could do if personally present. The Client likewise ratifies and confirms all that [G&W Architects] shall lawfully do or cause to be done in connection with the exercise of the powers stated above.[18] (Emphasis supplied)

On the other hand, as project manager and trustee of the Kensington Place Condominium, Hampston Place Condominium, and Grand Hampston Place, G&W Architects assumes the aforementioned responsibilities and is tasked with purchasing and holding title to the subject land in trust:

Sec. 3.03. [G&W Architects] as Project Manager and Trustee

....

(c)

To purchase and hold title to the Subject Land as trustee for and in behalf of the Clients, who shall be trustors and beneficiaries of the same and in this connection to accordingly pay the purchase price of the Subject Land, including such taxes and expenses as may be lawfully assessed, and to register the Subject Land [] in its name, for and in behalf of the Clients. The Subject [L]and shall be beneficially owned by the Clients who shall be both the trustors and beneficiaries in respect of the same in common and in proportion to their respective interests in the Project.[19] (Emphasis supplied)

The above provisions clearly show that G&W Architects only offered its expertise and services as a project manager to develop the condominium project. At no point did G&W Architects sell condominium units to clients. Instead, its involvement centered on overseeing and facilitating the condominium project's development. A crucial aspect of G&W Architects' s responsibilities was the acquisition of the land for the condominium building, a task performed on behalf of and for the benefit of its clients.

The Build-to-Own system is characterized by the direct involvement of G&W Architects' s clients or individual

unit owners in both the acquisition of the land and subsequent development of the condominium project. G&W Architects did not finance the acquisition of the land on which the condominium projects were developed, nor did it finance the actual construction of the condominium projects. G&W Architects's clients provided all of the capital required to acquire the land and begin construction.

G&W Architects's Build-to-Own system differs from the typical condominium project in which a real estate developer finances, constructs, and sells units to third-party buyers. To emphasize, in a typical condominium project, the developer bears the financial burden and retains control of the construction, later selling finished units to third-party buyers with the goal of making a significant profit margin.

That G&W Architects's Build-to-Own scheme is different from a typical condominium project is confirmed by one of G&W Architects's witnesses, thus:

Q14:

In a typical condominium project which is constructed and sold by a real estate developer, who are the parties which are involved in the project?

A:

The main player is a real estate developer, who in reality, acts as a middleman to finance the construction and the land of the condominium project, and thereafter, sell the condominium units to the general public in exchange for a sizeable profit margin. Since the developer is a businessman, with no professional background and technical knowledge to build a building, it engages the services of the following experts: (a) an Architect to design, produce construction drawings and material specifications for the project. Furthermore, the Architect also assists the middleman developer to select a qualified General Contractor; (b) a general contractor; which undertake to follow the Architect's plans and construct the building.

Q15:

For the Grand Hamptons Tower I Project, wherein a pool of like-minded individuals, who wished to build and own their condominium units, band together, what is the difference of [G&W Architects's] responsibility as compared to that of a typical real estate developer?

A:

For the implementation of this project, [G&W Architects] directly acted as an architect for and on behalf of the individuals following an architect's traditional duties by preparing plans, construction drawings and assisting in the selection of a qualified general contractor to construct the building. [G&W Architects] did not finance the purchase of the lot upon which the condominium projects were constructed, nor did [G&W Architects] finance the construction of the condominium projects.

Q16:

What benefit, if any, did you see in this kind of collective and direct arrangement vis-a-vis the inclusion of a middleman developer?

A:

In a collective and direct arrangement of individuals such as the Grand Hamptons Tower I Project, the major benefit that the individual owners enjoy is that the overall cost of owning a condominium unit is less expensive by 20% to 25% per square meter. This is realized through the avoidance of the middleman developer's participation, thereby eliminating his add on profit.[20] (Emphasis supplied)

In this regard, I agree with the findings of the CTA Division that there is no sale of condominium units from G&W Architects to its clients, but merely a sale of G&W Architects's services:

However, in the instant case, the fact of actual sale of condominium units from [G&W Architects] to the unit owners was not clearly established in the investigation as well as in the [Formal Assessment Notice] issued by [the CIR] against [G&W Architects].

Notably, the construction funding which [the CIR] considered as the clients payment for the sale of the condominium units is actually the amount held in trust by the bank pursuant to the trust agreement/depository and disbursement agreement in favor of the clients which will be exclusively used for the construction of the project and purchase of the land. In other words, [G&W Architects] appears to have no complete control over the said amount; thus, no part of the said fund can be considered as payment for the transfer of the condominium units from which the assessed creditable withholding tax can be deducted.

Also, the evidence of [G&W Architects], such as the Transfer Certificates of Title of the subject lots from which the condominium projects were built and the respective Deeds of Sale, show that the said lots were directly transferred from Fort Bonifacio Development Corporation to the Grand Hamptons Tower I Condominium Corporation, Grand Hamptons Tower II Condominium Corporation, Penhurst Parkplace Condominium Corporation[,] and Kensington Parkplace Condominium Corporation. Furthermore, the Condominium Certificates of Title that [G&W Architects] presented indicate that the condominium units were transferred directly from the said condominium corporations to the unit owners.

As already mentioned, the participation of [G&W Architects] in the transactions was based on the Contracts to Manage and Execute the Construction of the [C]ondominium [P]rojects, which in essence directed [G&W Architects] to prepare the documents necessary for the transfer of ownership of the subject land to the condominium corporation and the construction of the condominium units for a professional fee of four percent (4%) of the construction funding. The Court observes that nothing in the said contracts indicate that the ownership of the subject land and the condominium units will first be transferred from FBDC to [G&W Architects] in its personal capacity and that after the construction of the condominium units, the ownership of the subject land and condominium units will be transferred from [G&W Architects] to their clients. Thus, the transaction between [G&W Architects] and its clients, while it may still be considered as sale, is actually a sale of [G&W Architects's] services to its clients and not a sale of real property.[21] (Emphasis supplied)

The ponencia, however, relies on specific provisions of the management contracts, particularly Sections 5.04, 5.05, and 8.01, as well as G&W Architects's procurement of licenses to sell, to conclude that the parties intended a contract of sale and that G&W Architects in effect acted as a seller of condominium units.[22]

I disagree. The ponencia's reliance on these provisions does not alter the nature of the transaction, as they must be read in light of the entire agreement, which expressly states that G&W Architects acts for and on behalf of the clients.

Section 5.04,[23] which restricts the assignment of the clients' interests without G&W Architects's prior written approval, does not evince ownership by G&W Architects over the condominium units. Rather, it ensures that participation in the project remains limited to those who are able and willing to comply with their proportionate funding obligations. In a pooled arrangement such as the Build-to-Own scheme, unrestricted transfers could

jeopardize the financial viability of the project. Thus, this restriction is a reasonable safeguard, not an indicium of a seller-buyer relationship.

Section 5.05,[24] which provides for the conveyance of title upon completion of the project and full payment by the clients, likewise does not prove a sale. In the context of the Build-to-Own scheme, such conveyance merely implements the parties' prior beneficial ownership arrangement. From the outset, the clients, having funded the acquisition and construction, are the real beneficial owners of the property, while G&W Architects holds title only in a fiduciary capacity. Thus, the eventual conveyance of title does not transfer ownership from G&W Architects to the clients, but merely formalizes the latter's pre-existing ownership interests.

Section 8.01,[25] which grants G&W Architects the authority to rescind the contract, impose forfeiture, and identify substitute clients in case of default, is similarly not indicative of ownership by G&W Architects over the units. These powers are necessary incidents of its role as project manager tasked to preserve the viability of the project. Considering that the development depends on the timely and proportionate contributions of all clients, G&W Architects must be empowered to address defaults that could prejudice the entire undertaking. These mechanisms are not badges of a contract of sale.

Nor does the fact that G&W Architects obtained licenses to sell from the HLURB conclusively establish a taxable sale for purposes of EWT and DST. The ponencia treats such procurement as indicative that G&W Architects was engaged in the sale of condominium units, citing the requirement under Presidential Decree No. 957 that a license to sell is necessary before any such activity may be undertaken.[26]

Again, I disagree.

The procurement of such licenses was made in compliance with the HLURB directive and the regulatory framework under Presidential Decree No. 957. As stated in the ponencia, G&W Architects was required to secure the necessary licenses and permits under pain of administrative sanction.[27] Its compliance with these requirements cannot be taken as an admission that it was engaged in the sale of condominium units. G&W Architects merely adhered to a regulatory requirement imposed upon it.

G&W Architects's compliance cannot substitute for proof that G&W Architects actually sold condominium units to its clients. Regulatory classification by the HLURB does not control the tax characterization of a transaction. The determination of whether a transaction constitutes a taxable sale must be based on the nature of the contractual relationship and the actual flow of rights and obligations between the parties. At most, the issuance of licenses to sell reflects the HLURB's determination that compliance with the regulatory requirements of Presidential Decree No. 957 was necessary for the project. It does not conclusively establish that G&W Architects, in its own capacity, transferred ownership of condominium units to buyers for a price, which is the essential element of a contract of sale under Article 1458 of the Civil Code.

In essence, the transaction between G&W Architects and its clients is not a contract for the sale of condominium units. Instead, it is classified as a sale of service or an obligation "to do" because the primary nature of the engagement is to provide construction-related services rather than to sell real property. The emphasis on the service-oriented nature of the transaction, coupled with the absence of sale of the condominium units, reinforces the position that G&W Architects's role is centered on providing professional services rather than selling real estate.

Note that G&W Architects's Build-to-Own scheme functions similarly to an individual hiring the services of a professional, such as an architect. In this arrangement, the individual seeks the architect's expertise to carry out the project. Throughout the engagement, the architect, with the necessary skills and experience, provides services

to the client. Notably, the architect does not hold title over the house being constructed. Despite contributing significantly to the project's realization, the architect is not involved in the sale of the house to the client.

Similarly, in the Build-to-Own scheme, G&W Architects as the one overseeing the project, like the architect, only offers its professional services to clients for the development of the condominium project. In both cases, the clients in the Build-to-Own scheme and the individual who hired the architect are the true owners of the finished product. Additionally, in the Build-to-Own scheme, the clients collectively fund the construction and are assigned specific units, similar to how an individual hires an architect and eventually owns the house.

In neither situation is there a sale of real property. The architect is compensated for his or her services, not by selling the house. Similarly, in the Build-to-Own scheme, clients provide funds for the purchase of land designated for the condominium building and the subsequent development of the condominium project, while G&W Architects receives a professional fee for project management services. In other words, G&W Architects does not act as a developer selling the units comprising the project. It was simply hired as the project manager and charged a professional fee to each client.

Consequently, the allocation of condominium units and parking slots to the clients, who are the beneficiaries under the Build-to-Own scheme, is not a taxable event—as this is a mere return of the clients' capital contributions.

In *Chamber of Real Estate and Builders' Association, Inc. v. Hon. Executive Secretary Romulo*,^[28] the Court explained that:

Income means all the wealth which flows into the taxpayer other than a mere return on capital. Capital is a fund or property existing at one distinct point in time while income denotes a flow of wealth during a definite period of time. Income is gain derived and severed from capital. For income to be taxable, the following requisites must exist:

- (1) there must be gain;
- (2) the gain must be realized or received[;] and
- (3) the gain must not be excluded by law or treaty from taxation.^[29] (Citations omitted)

Here, G&W Architects's Build-to-Own concept is not a sale of real property, but rather a mere return of capital.

Accordingly, absent a sale of real property by G&W Architects to its clients-beneficiaries, no deficiency EWT or DST may be imposed on the conveyance of the condominium units and parking slots. The allocation thereof to the clients merely recognizes and formalizes their respective beneficial interests in the project corresponding to their capital contributions under the Build-to-Own scheme.

RMC No. 55-2010 cannot adversely prejudice G&W Architects who in good faith relied on the subject BIR rulings prior to their revocation

At any rate, the Court should not lose sight of the fact that G&W Architects relied in good faith on the subject BIR rulings which confirmed that the implementation of the Build-to-Own system is not subject to CGT or CWT, VAT, and DST. Therefore, it is the height of injustice if, after relying on said BIR rulings, it becomes liable because such rulings were subsequently reversed by the CIR.

G&W Architects is entitled to the benefit of non-retroactivity of rulings or circulars guaranteed under Section 246 of the 1997 National Internal Revenue Code, as amended (1997 NIRC), in the absence of showing that G&W Architects falls under any of the exceptions therein.

Section 246 of the 1997 NIRC reads:

Section 246. Non-Retroactivity of Rulings. - Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application of the revocation, modification or reversal will be prejudicial to the taxpayers, except in the following cases:

- (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the [BIR];
- (b) Where the facts subsequently gathered by the [BIR] are materially different from the facts on which the ruling is based; or
- (c) Where the taxpayer acted in bad faith. (Emphasis supplied)

The foregoing provision clearly and categorically prohibits the retroactive application of the revocation, modification or reversal, as the case may be, of previously established BIR rulings when the taxpayer's interest would be prejudiced thereby. The situations where retroactive application is still allowed do not obtain in G&W Architects's case.

The following cases illustrate that rulings, circulars, rules, and regulations promulgated by the BIR would have no retroactive application if to so apply them would be prejudicial to the taxpayers.

In the 1981 case of *ABS-CBN Broadcasting Corp. v. CTA*,^[30] the BIR issued RMC No. 4-71 revoking an earlier circular for being "erroneous for lack of legal basis."^[31] When the prior circular was still in effect, petitioner therein relied on it and consummated its transactions on the basis thereof. Ruling in favor of petitioner therein, the Court held that under Section 246 of the 1997 NIRC, the BIR is precluded from adopting a position inconsistent with one previously taken where injustice would result to the taxpayer. To rule otherwise, opined the Court, would be contrary to the tenets of good faith, equity, and fair play, thus:

In point is Sec. 338-A (now Sec. 327) of the Tax Code. As inserted by Republic Act No. 6110 on August 9, 1969, it provides:

"Sec. 338-A. Non-retroactivity of rulings.— Any revocation, modification, or reversal of any of the rules and regulations promulgated in accordance with the preceding Section or any of the rulings or circulars promulgated by the [CIR] shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayers, except in the following cases: (a) where the taxpayer deliberately [misstates] or omits material facts from his return or any document required of him by the [BIR]; (b) where the facts subsequently gathered by the [BIR] are materially different from the facts on which the ruling is based; or (c) where the taxpayer acted in bad faith." . . .

It is clear from the foregoing that rulings or circulars promulgated by the [CIR] have no retroactive application where to so apply them would be prejudicial to taxpayers. The prejudice to petitioner of the retroactive application of Memorandum Circular No. 4-71 is beyond question. It was issued only in 1971, or three years after 1968, the last year that petitioner had withheld taxes under General Circular No. V-334. The assessment and demand on petitioner to pay deficiency withholding income tax was also made three years after 1968 for a period of time commencing in 1965. Petitioner was no longer in a position to withhold taxes due from foreign corporations because it had already remitted all film rentals and no longer had any control over them when the new Circular was issued. And in so far as the enumerated exceptions are concerned, admittedly, petitioner does not fall under any of them.^[32] (Emphasis supplied)

The Court has consistently reaffirmed the foregoing ruling in *ABS-CBN Broadcasting Corp.* in the following cases:

In *CIR v. Burroughs Ltd.*,^[33] the Court held that the repeal or revocation of a BIR ruling cannot be given retroactive effect in light of Section 327 (now Section 246 of the 1997 NIRC) because to do so would prejudice the taxpayer, thus:

Petitioner contends that respondent is no longer entitled to a refund because Memorandum Circular No. 8-82 dated March 17, 1982 had revoked and/or repealed the BIR ruling of January 21, 1980. The said memorandum circular states —

"Considering that the 15% branch profit remittance tax is imposed and collected at source, necessarily the tax base should be the amount actually applied for by the branch with the Central Bank of the Philippines as profit to be remitted abroad."

Petitioner's aforesaid contention is without merit. What is applicable in the case at bar is still the Revenue Ruling of January 21, 1980 because private respondent Burroughs Limited paid the branch profit remittance tax in question on March 14, 1979. Memorandum Circular No. 8-82 dated March 17, 1982 cannot be given retroactive effect in the light of Section 327 of the National Internal Revenue Code which provides —

....

The prejudice that would result to private respondent Burroughs Limited by a retroactive application of Memorandum Circular No. 8-82 is beyond question for it would be deprived of the substantial amount of [PHP]172,058.90. And, insofar as the enumerated exceptions are concerned, admittedly, Burroughs Limited does not fall under any of them.^[34] (Emphasis supplied)

Furthermore, in *CIR v. Court of Appeals*,^[35] the question as to the correct computation of the excise tax on cigarettes had been addressed by BIR Ruling No. 017-91 dated February 11, 1991 which revoked BIR Ruling No. 473-88 dated October 4, 1988. The Court, however, concluded that the deficiency tax assessment issued by BIR against therein taxpayer was without legal basis because of the prohibition against the retroactive application of the revocation of BIR rulings in the absence of bad faith on the part of the taxpayer, thus:

The present dispute arose from the discrepancy in the taxable base on which the excise tax is to apply on account of two incongruous BIR Rulings: (1) BIR Ruling 473-88 dated [October 4,] 1988 which excluded the VAT from the tax base in computing the [15%] excise tax due; and, (2) BIR Ruling 017-91 dated [February 11,] 1991 which included back the VAT in computing the tax base for purposes of the [15%] ad valorem tax.

The question as to the correct computation of the excise tax on cigarettes in the case at bar has been sufficiently addressed by BIR Ruling 017-91 dated [February 11,] 1991 which revoked BIR Ruling 473-88 dated [October 4,] 1988[.]

....

Private respondent did not question the correctness of the above BIR ruling. In fact, upon knowledge of the effectivity of BIR Ruling No. 017-91, private respondent immediately implemented the method of computation mandated therein by restoring the VAT in computing the tax base for purposes of the 15% ad valorem tax.

However, well-entrenched is the rule that rulings and circulars, rules and regulations promulgated by the [CIR] would have no retroactive application if to so apply them would be prejudicial to the taxpayers.

....

Without doubt, private respondent would be prejudiced by the retroactive application of the revocation as it would be assessed deficiency excise tax.^[36] (Emphasis supplied, citation omitted)

Then, in *CIR v. Benguet Corporation*,^[37] wherein the taxpayer was entitled to tax refunds or credits based on

BIR's own issuances but later was suddenly saddled with deficiency taxes due to its subsequent ruling changing the category of the taxpayer's transactions for the purpose of paying its VAT, the Court ruled that applying such ruling retroactively would be prejudicial to the taxpayer.

In the 2007 case of *CIR v. Philippine Health Care Providers, Inc.*,^[38] the Court also upheld the application of Section 246 of the 1997 NIRC and agreed with both the CTA and Court of Appeals that Philippine Health Care Providers, Inc. (PHCPI) acted in good faith. When VAT Ruling No. 231-88 was issued in favor of PHCPI, confirming its entitlement to VAT exemption, the term "health maintenance organization" was yet unknown or had no significance for taxation purposes. PHCPI believed in good faith that it was VAT exempt for the taxable years 1996 and 1997 on the basis of VAT Ruling No. 231-88.

Additionally, in the *En Banc* case of *CIR v. San Roque Power Corp.*,^[39] the Court found that taxpayers acting in good faith should not be made to suffer for adhering to interpretative rules issued by BIR should such interpretation later turn out to be erroneous and be reversed by BIR or the Court. The Court, in *San Roque Power*, recognized BIR Ruling No. DA-489-03 as an equitable estoppel in favor of taxpayers and whose date of issuance on December 10, 2003 up to October 6, 2010 (when *CIR v. Aichi Forging Company of Asia, Inc.*^[40] was adopted), may be relied upon by taxpayers for purposes of filing tax refunds or credits. The Court reasoned:

Section 4 of the Tax Code, a new provision introduced by [Republic Act No.] 8424, expressly grants to the Commissioner the power to interpret tax laws, thus:

Sec. 4. Power of the Commissioner To Interpret Tax Laws and To Decide Tax Cases. — The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.

The power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the [BIR] is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the [CTA].

Since the Commissioner has exclusive and original jurisdiction to interpret tax laws, taxpayers acting in good faith should not be made to suffer for adhering to general interpretative rules of the Commissioner interpreting tax laws, should such interpretation later turn out to be erroneous and be reversed by the Commissioner or this Court. Indeed, Section 246 of the Tax Code expressly provides that a reversal of a BIR regulation or ruling cannot adversely prejudice a taxpayer who in good faith relied on the BIR regulation or ruling prior to its reversal. . . .

. . . .

Thus, a general interpretative rule issued by the Commissioner may be relied upon by taxpayers from the time the rule is issued up to its reversal by the Commissioner or this Court. Section 246 is not limited to a reversal only by the Commissioner because this Section expressly states, "Any revocation, modification or reversal" without specifying who made the revocation, modification or reversal. Hence, a reversal by this Court is covered under Section 246.

Taxpayers should not be prejudiced by an erroneous interpretation by the Commissioner, particularly on a difficult question of law. The abandonment of the *Atlas* doctrine by *Mirant* and *Aichi* is proof that the reckoning of the prescriptive periods for input VAT tax refund or credit is a difficult question of law. The abandonment of the *Atlas* doctrine did not result in *Atlas*, or other taxpayers similarly situated, being made to return the tax refund or credit they received or could have received under *Atlas* prior to its abandonment. This Court is applying *Mirant* and *Aichi* prospectively. Absent fraud, bad faith or misrepresentation, the reversal by this Court of a general interpretative rule issued by the Commissioner, like the reversal of a specific BIR ruling under Section 246,

should also apply prospectively. . . .[41] (Emphasis supplied, citation omitted)

Still more, in *Banco De Oro v. Republic*,[42] the Court said that the previous interpretations given to an ambiguous law by the CIR, who is charged to carry out its provisions, are entitled to great weight, and taxpayers who relied on the same should not be prejudiced in their rights. Accordingly, the Court's ruling in *Banco De Oro* construing the phrase "at any one time" to determine the phrase "20 or more lenders" to include both the primary and secondary market was applied prospectively. Otherwise, there would be a violation of due process for failure to accord persons, especially the parties affected by it, fair notice of the special burdens imposed on them. The Court explained:

We find merit on the claim of petitioners-intervenors RCBC, RCBC Capital, and CODE-NGO for prospective application of our Decision.

The phrase "at any one time" is ambiguous in the context of the financial market. Hence, petitioner-intervenor RCBC and the rest of the investors relied on the opinions of the [BIR] in BIR Ruling Nos. 020-2001, 035-2001 dated August 16, 2001, and DA-175-01 dated September 29, 2001 to vest their rights in the exemption from the final withholding tax. In sum, these rulings pronounced that to determine whether the financial assets, [i.e.], debt instruments and securities, are deposit substitutes, the "20 or more individual or corporate lenders" rule must apply. Moreover, the determination of the phrase "at any one time" to determine the "20 or more lenders" is to be determined at the time of the original issuance. This being the case, the PEACe Bonds were not to be treated as deposit substitutes.[43] (Citations omitted)

G&W Architects has similarly been put on the receiving end of a grossly unfair deal. Based on the subject BIR rulings, it was favorably ruled that G&W Architects's Build-to-Own concept on pooling of owners' funds for the construction of condominium projects is tax-exempt for the same does not constitute a taxable sale, exchange, or disposition, hence, not subject to CWT or CGT, VAT, and DST, except the PHP 15.00-DST on the document. Then suddenly, the rug under G&W Architects was suddenly pulled as it then found itself being made to pay deficiency taxes with the retroactive application of the revocation of the subject BIR rulings. This is the sort of unjust treatment of a taxpayer which the law in Section 246 of the 1997 NIRC abhors and forbids.[44]

Applying the same principle in *San Roque Power* to the instant case, the subject BIR rulings can be considered specific interpretative rulings as they were tailored to address the specific concerns of G&W Architects. Logically, being specific interpretative rulings, they bind the CIR. The CIR is estopped.

G&W Architects acted in good faith when it relied upon the subject BIR rulings to guide its actions. In *Civil Service Commission v. Maala*,[45] the Court described good faith as "that state of mind denoting 'honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry; an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious.'"[46]

Prior to the implementation of the projects, G&W Architects exercised due diligence by requesting confirmatory rulings and guidance from the BIR for each condominium project. The deliberate decision to await official pronouncements from the competent authority before initiating its projects exemplifies G&W Architects's commitment to comply with the 1997 NIRC. Thus, it would be wholly inequitable and against the principles of fair play to now penalize G&W Architects who relied on the pronouncements of the BIR, which is authorized under the law to interpret tax statutes.[47] The higher interests of justice demand that the Court refrain from applying RMC No. 55-2010 retroactively to a time period when the BIR itself held and pronounced a contrary view. To stress, the retroactive application in this case would lead to an unfair and unjust outcome, disregarding the legitimate expectations of G& W Architects based on the authoritative guidance provided by the BIR itself.

I also submit that, similar to San Roque Power, G&W Architects should not be prejudiced by the erroneous interpretation by the BIR, particularly on a difficult question of law. The revocation of the subject BIR rulings through RMC No. 55-2010 is proof that the nature of the Build-to-Own scheme is a difficult question of law. It is also worth highlighting that even the CTA had arrived at different conclusions as to whether the Build-to-Own system is considered a sale transaction that should have been subjected to EWT and DST.

To recall, the CTA Division held that there was no sale transaction, emphasizing that G&W Architects acted solely on behalf of its clients. Thus, there can be no transfer of ownership of the condominium units from G&W Architects to its clients. Subsequently, in the original Decision, the CTA En Banc reversed the CTA Division, holding the presence of all the essential elements of a contract of sale. Consequently, G&W Architects was ordered to pay the assessed deficiency EWT and DST with surcharge and interest.

Subsequently, the First Amended Decision of the CTA En Banc aligned with the CTA Division's disquisitions that there is no sale. However, the Second Amended Decision of the CTA En Banc reinstated the original Decision, which found that there is a sale transaction instead of a mere contract of service. Notably, due to the lack of the required affirmative votes, the MR filed by the CIR was denied. Thus, the CTA En Banc affirmed the First Amended Decision, cancelling the assessments for deficiency EWT and DST against G&W Architects.

The sequence of the CTA's findings unfolded as follows: initially, there was a determination of no sale transaction, followed by a recognition of a contract of sale, then a reversal to a finding of no sale, and ultimately, the reinstatement of the presence of all the elements of a contract of sale. This evident flip-flopping in the rulings of the CTA reflects the presence of a difficult question of law.

What is left to be resolved is the CIR's claim that G&W Architects falls under the second exception in Section 246, i.e., that the facts subsequently gathered by the BIR are materially different from the facts on which the rulings were based.[48]

The ponencia sustains this position, holding that the BIR's subsequent investigation revealed that G&W Architects's Build-to-Own scheme was in truth a pre-selling or selling arrangement, and thus materially different from the facts originally represented by G&W Architects in securing the subject BIR rulings.[49]

For the second exception under Section 246 of the 1997 NIRC to apply, however, there must be a clear showing that the facts presented at the time of the representation are materially different from those subsequently gathered by the BIR. Here, a careful review of the subject BIR rulings and RMC No. 55-2010 would show that there is a lack of material difference in the facts as initially stated by G&W Architects and those later discovered by the BIR. For reference, the facts under BIR Ruling No. DA-455-2007 states:

[G&W Architects] is a professional partnership duly organized and existing under and by virtue of the laws of the Republic of the Philippines. [G&W Architects] adopted a tax efficient, innovative approach to commercial, office and residential condominium ownership adapted from the Spanish model practiced for [25] years known as the Regimen de Comunidad de Proprietario ("Private Ownership Community"). This model was modified to take into account the relevant laws, regulations[,] and practices in the Philippines. . . .

Thereafter, [G&W Architects] adopted the Private Ownership Community model, calling it the Build-[-]To-[-]Own (BTO) System. Under this System, [G&W Architects] implemented and constructed its maiden project, Penhurst Parkplace Condominium, located at the Fort Bonifacio Township. Having successfully implemented the Penhurst Parkplace Condominium Project under the BTO System, [G&W Architects] undertook to act as project proponent/organizer of the Kensington Place Condominium. Project likewise located at the Fort Bonifacio Township.

Similar to the Parque Espana and Penhurst Park-place projects, [G&W Architects] identified a parcel of land

then covered by Transfer Certificate of Title No. 35849 of the Registry of Deeds for Taguig (the Subject Land) on which the Kensington Place Condominium Project (the "Project") would be established. [G&W Architects] found clients who themselves undertook and participated in the collective development of the Project and who would eventually become the owners of the individual units which comprise the same (the "Clients"). The Clients hired [G&W Architects] to act as project manager.

To begin the Project, each Client entered into a Contract to Manage and Execute the Construction of Kensington Place Condominium (the Contract). In said Contract, each Client undertook to collectively develop the Project and to put up his/her respective construction funding contributions for the same. In return for such participation and as part of his/her interest in the Project, each Client was assigned specific condominium units and parking units in the Project (the Condominium Units and Parking Units). In addition, each Client was to have a proportionate undivided interest in the common areas of the Project, which common areas include the Subject Land (the Common Areas).

For its part [G&W Architects] was given a mandate to manage and execute the development of the Project and in connection thereto, to execute acts on behalf of and for the collective benefit of the Clients. [G&W Architects], however, did not and does not assume the role of developer and hence, has not made any representation that it is, in its own capacity, selling the units comprising the Project.

Under the terms of the Contract, each Client agreed that prior to the actual division of the Project into individual units, their respective interests in the Project would consist in a pro-indiviso, pro-rata share, held collectively with the other Clients. Realizing, however, that it would be cumbersome and administratively difficult for all the Clients to be named as owners of the Subject Land and the Project, the Clients appointed [G&W Architects], as Trustee, for the purpose of allowing the Trustee to hold title to the Subject Land and the Project. [G&W Architects] was thus instructed under the Contracts, to purchase and hold title to the Subject Land for the collective benefit of the Clients and in proportion to their respective interests in the Project. . . .

To facilitate the collection and allocation of construction funding payments from the Clients to the Project's suppliers and service contractors, separate Depository and Disbursing Agreements (hereinafter, the Disbursing Agreements) were executed by each Client with the Banco de Oro Universal Bank-Trust Banking Group (the Bank).

Simultaneous to execution of Disbursing Agreements, Clients remitted their respective initial construction funding payments to the Bank with the instructions for the Bank to disburse the funds, among others, for the necessary payments in connection with the construction and development of the Project and the purchase of the land where the Project will be situated, in accordance with the instruction of the Trustee. Moreover, the Bank was instructed to hold and disburse the funds as and when necessary for the development of the Project using the Clients' additional construction funding payments. . . .

In accordance with such directions, the Trustee then purchased the Subject Land covered by Transfer Certificate Title (TCT) No. 35849. . . .

As part of its function, [G&W Architects] was mandated to effect the condominiumization of the Project and obtain necessary registrations for the same and the individual Condominium Certificates of Title for the Condominium and Parking Units and the Common Areas. Finally, under the terms of the Contract, upon completion of the Project, the Trustee was to execute deeds conveying in favor of the Clients their respective Condominium and Parking Units and the Common Areas in favor of a Condominium Corporation. (Emphasis supplied)

On the other hand, RMC No. 55-2010 states:

The nullification of the abovementioned rulings, is anchored on the findings that the scheme of build-to-own, build-your-own, and similar concepts mainly consist of the developer making it appear that it merely manages

the construction of the condominium project, and that the funds as contributed by the individual investors are pooled in a bank with the developer, as project manager, receiving a project management fee only. Moreover, in the above scheme, the assignment and delivery of the developed units to joint owners (individual investors), is claimed not to be a taxable event being merely a transfer of property held in trust by the Trustee for the individual Trustors. The foregoing effectively resulted in the nonpayment of income taxes and value-added tax by the developer on the gross project amount.

In addition, the [HLURB] rejects the above scheme being contrary to the policy behind Presidential Decree (P.D.) No. 957, otherwise known as "The Subdivision And Condominium Buyer's Protective Decree" (as amended by P.D. 1216). (Emphasis supplied)

Clearly, contrary to the ponencia, there is an absence of any material difference in the facts as represented by G&W Architects when it requested the subject BIR rulings and the subsequent information the BIR gathered. There is simply no way the BIR could have been misled by G&W Architects's representations as to the nature of its business. The very features now relied upon by the BIR to characterize the scheme as a sale, i.e., pooling of funds, assignment of units, and G&W Architects's role in managing and implementing the project, were all expressly disclosed in the original representations and formed the basis of the BIR's earlier rulings.

RMC No. 55-2010 does not point to any newly discovered factual circumstance that was previously withheld or unknown. Instead, it merely reinterprets the same set of facts and concludes that the Build-to-Own scheme is in reality a pre-selling or selling arrangement. This is not a discovery of materially different facts. Jurisprudence and Section 246 of the 1997 NIRC contemplate a difference in factual milieu, not a subsequent shift in the BIR's characterization of an already disclosed arrangement.

To my mind, the revocation of the subject BIR rulings is rooted in the CIR's belief that the subject rulings do not conform to established precedents. Such reconsideration of the legal consequences of a disclosed transaction cannot be made to operate retroactively to the prejudice of a taxpayer who relied in good faith on prior rulings. Otherwise, the protection afforded by Section 246 of the 1997 NIRC would be rendered illusory.

In this connection, I agree with the findings of the CTA Division in its Resolution dated April 7, 2016, thus:

In this regard, it must be noted that the application of licenses to sell is merely in compliance with the HLURB Decision dated July 26, 2005 which required [G&W Architects] to obtain license to sell.

Notably, the Court found that the HLURB Decision which required [G&W Architects] to obtain a license as a seller is based on variables which, at the time of the issuance of the ruling, remains uncertain and may not materialize. These uncertainties were found before the alleged transfer or delivery of the condominium units to the individual unit owners. While this may be considered in the determination of the tax liability of a taxpayer, the BIR should also have determined whether these uncertainties still existed at the time of the transfer of the condominium units. The BIR should have investigated on the true nature of the transaction between [G&W Architects] and the unit owners, whether there is a sale of condominium units between them, upon the transfer of the condominium units based on facts and not based solely on the HLURB Decision.

At this juncture, it must be reiterated that in order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption. Hence, assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be.

The presumption of correctness of the assessment does not apply in this case considering that [CIR's] conclusion, that the transaction between [G&W Architects] and the unit owners is a sale or transfer of ownership from the former to the latter, is not based on actual facts and thus, is a mere presumption.[50] (Emphasis supplied)

As such, the CIR has not met the burden of proving the material difference, given that the revocation appears to be driven by a shift in interpretation rather than any factual discrepancy. The invocation of the second exception under Section 246 cannot rest on generalized assertions that the true nature of the transaction is different, absent a showing of specific facts that were not previously disclosed or were inaccurately represented. Hence, the revocation of the subject BIR rulings cannot be grounded under the second exception in Section 246 of the 1997 NIRC.

Insofar as the other enumerated exceptions under Section 246 are concerned, G&W Architects does not fall under any of them. The facts of the case do not show that G&W Architects deliberately committed mistakes or omitted material facts when it obtained the subject BIR rulings, and G&W Architects did not act in bad faith. In the absence of proof of the existence of any of the exceptions in Section 246 of the 1997 NIRC, RMC No. 55-2010 cannot be given retroactive effect. The CIR cannot effectively deprive G&W Architects of its rights under the subject BIR rulings prior to their revocation.

I am not unaware of the well-entrenched principle that the Government is never estopped from collecting taxes because of mistakes or errors on the part of its agents. But, like other principles of law, this also admits of exceptions in the interest of justice and fair play, as where injustice will result to the taxpayer.^[51] It is primordial that every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.^[52] To reiterate, G&W Architects relied on the formal assurances of the BIR through the subject rulings that the Build-to-Own scheme was not subject to any tax. To retroact a later issuance—RMC No. 55-2010—revoking the subject BIR rulings and applying a new and contrary position that the Build-to-Own scheme is subject to taxes, is clearly inconsistent with justice and the elementary requirements of fair play.

To summarize, G&W Architects's Build-to-Own concept is not a sale transaction. In any event, considering that the retroactive application of RMC No. 55-2010 will surely prejudice the interest of G&W Architects, which had relied on the subject BIR rulings in good faith on the non-taxability of the Build-to-Own scheme, RMC No. 55-2010 should not be applied retroactively for fairness, equity, and compassionate social justice.

All told, "[i]t is said that taxes are what we pay for civilized society. Without taxes, the government would be paralyzed for lack of the motive power to activate and operate it. Hence, despite the natural reluctance to surrender part of one's hard-earned income to the taxing authorities, every person who is able to must contribute his [or her] share in the running of the government. The government for its part, is expected to respond in the form of tangible and intangible benefits intended to improve the lives of the people and enhance their moral and material values. This symbiotic relationship is the rationale of taxation and should dispel the erroneous notion that it is an arbitrary method of exaction by those in the seat of power. But even as [the Court] concede[s] the inevitability and indispensability of taxation, it is a requirement in all democratic regimes that it be exercised reasonably and in accordance with the prescribed procedure. If it is not, then the taxpayer has a right to complain and the courts will then come to his [or her] succor. For all the awesome power of the [BIR], [it] may still be stopped in [its] tracks if the taxpayer can demonstrate, as it has here, that the law has not been observed,"^[53] which is Section 246 of the 1997 NIRC on the non-retroactivity of circulars that would prejudice a taxpayer.

ACCORDINGLY, I vote to PARTLY GRANT the Petition for Review. I CONCUR with the ponencia that the first Amended Decision dated August 29, 2018 and the second Amended Decision dated March 14, 2019 of the Court of Tax Appeals En Banc are void for failure to comply with the voting requirements under Republic Act No. 1125, as amended, and the Revised Rules of the Court of Tax Appeals.

However, I strongly DISSENT to the ponencia's conclusion that G&W Architects, Engineers and Project

Consultants Co. engaged in taxable sale transactions under its Build-to-Own scheme. Accordingly, the Decision dated March 21, 2018 of the Court of Tax Appeals En Banc should be REVERSED and SET ASIDE, and the deficiency expanded withholding tax and documentary stamp tax assessments against G&W Architects, Engineers and Project Consultants Co. should be CANCELLED.

[*] Also mentioned as G&W Architects, Engineers and Project Development Consultants Co. and G&W Architects, Engineering, and Project Development Consultants Co. in some parts of the rollo.

[1] Republic Act No. 1125 (1954), An Act Creating the Court of Tax Appeals.

[2] Republic Act No. 1125 was amended by Republic Act No. 9282 (2004) and Republic Act No. 9503 (2008).

[3] BIR Rulings Condominium Project DA-056-2003 dated February 24, 2003 Penhurst Parkplace Condominium DA-337-2007 dated June 20, 2007 Grand Hamptons Tower II DA-338-2007 Grand Hamptons Tower I DA-455-2007 dated August 17, 2007 Kensington Condominium Project

[4] See ponencia, pp. 4-5. See also rollo, pp. 207-264, CTA First Division Decision dated November 3, 2015, in CTA Case Nos. 8358, 8426, and 8489 penned by Associate Justice Cielito N. Mindaro-Grulla, with Presiding Justice Roman G. Del Rosario dissenting and Associate Justice Erlinda P. Uy concurring.

[5] See ponencia, p. 5. See also rollo, pp. 282-292, CTA First Division Resolution dated April 7, 2016.

[6] Rollo, pp. 161-174. Penned by Associate Justice Caesar A. Casanova, with the concurrence of Associate Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Esperanza R. Fabon-Victorino, Catherine T. Manahan; Presiding Justice Roman G. Del Rosario, with Concurring Opinion; Associate Justice Cielito N. Mindaro-Grulla, with Dissenting Opinion; Associate Justices Erlinda P. Uy and Ma. Belen M. Ringpis-Liban, joining the dissent of Associate Justice Cielito N. Mindaro-Grulla.

[7] Id. at 66-80. Penned by Associate Justice Caesar A. Casanova, with the concurrence of Associate Justices Erlinda P. Uy, Cielito N. Mindaro-Grulla, and Ma. Belen M. Ringpis-Liban; Presiding Justice Roman G. Del Rosario, with Dissenting Opinion; Associate Justices Juanito C. Castañeda, Jr., Esperanza R. Fabon-Victorino, and Catherine T. Manahan, joining the dissent of Presiding Justice Roman G. Del Rosario.

[8] Id. at 99-125. Penned by Associate Justice Catherine T. Manahan, with the concurrence of Presiding Justice Roman G. Del Rosario, Associate Justices Juanito C. Castañeda, Jr., Erlinda P. Uy, Esperanza R. Fabon-Victorino, Cielito N. Mindaro-Grulla, and Ma. Belen M. Ringpis-Liban.

[9] Ponencia, p. 13.

[10] Id. at 16-19.

[11] Id. at 18-19.

[12] Id. at 19-20.

[13] Id. at 20-21.

[14] Id. at 23-25.

[15] Vito, et al. v. Moises-Palma, 850 Phil. 838, 863 (2019) [Per J. Caguioa, Second Division].

[16] See rollo, pp. 254-255, CTA Division Decision. See also BIR Ruling No. DA-455-2007.

[17] Philippine National Construction Co. v. Court of Appeals, 338 Phil. 691, 700 (1997) [Per J. Davide, Jr.,

Third Division].

[18] Rollo, pp. 69-72, CTA En Banc First Amended Decision.

[19] Id. at 72.

[20] Id. at 554-555, Memorandum for G&W Architects filed before the CTA Division.

[21] Id. at 257-258, CTA Division Decision.

[22] Ponencia, pp. 16-18.

[23] See rollo, p. 106, CTA En Banc Second Amended Decision.

5.04 Non-assignability of Interest

The rights and interests of the Client in the Project, the Subject Unit, the Parking Unit, and the corresponding proportionate undivided interests in the Common Areas of Project shall not be assignable, unless with the prior written approval of [G&W Architects]. In the event [G&W Architects] should grant such an approval, the Client shall be required to pay [G&W Architects] a processing fee of Pesos: [PHP 15,000.00]. (Emphasis supplied)

[24] Id., CTA En Banc Second Amended Decision.

5.05 Conveyance of [T]itle to the Subject Unit and Common Areas

Upon completion of the Project and full payment by the Client of all amounts payable under this Contract, title to the Subject Unit including the Parking Unit shall be conveyed by [G&W Architects] to the Client. Upon completion of the Project, title to the Common Areas shall be conveyed by [G&W Architects] to the Condominium Corporation which shall be established in accordance with the provisions of the Master Deed. (Emphasis supplied)

[25] Id. at 107-108, CTA En Banc Second Amended Decision.

8.01 Violation or Default

[G&W Architects] shall have the right to rescind, terminate or cancel this Contract, including the trust herein created with respect to the Subject Land, without need of judicial action, in case any one of the events of default stipulated hereunder occurs, and the Client fails to remedy or cure to the satisfaction of [G&W Architects] such default, within five (5) days from receipt of written notice from [G&W Architects] of the occurrence of such default[.]

....

Upon such termination, [G&W Architects] shall have the right to acquire or identify a substitute client to acquire all the rights and interests of the Client in the Project and to assume the corresponding remaining obligation hereunder. . . . (Emphasis supplied)

[26] Ponencia, pp. 20-21.

[27] Id. at 20.

[28] 628 Phil. 508 (2010) [Per J. Corona, En Banc].

[29] Id. at 530-531.

[30] 195 Phil. 33 (1981) [Per J. Melencio-Herrera, First Division].

[31] Id. at 38.

[32] Id. at 40-41.

- [33] 226 Phil. 236 (1986) [Per J. Paras, Second Division].
- [34] Id. at 240-241.
- [35] 335 Phil. 219 (1997) [Per J. Bellosillo, First Division].
- [36] Id. at 226-227.
- [37] 501 Phil. 343 (2005) [Per J. Tinga, Second Division].
- [38] 550 Phil. 304 (2007) [Per J. Sandoval-Gutierrez, First Division].
- [39] 703 Phil. 310 (2013) [Per J. Carpio, En Banc].
- [40] 646 Phil. 710 (2010) [Per J. Del Castillo, First Division].
- [41] CIR v. San Roque Power Corp., supra note 39, at 373-375.
- [42] 793 Phil. 97 (2016) [Per J. Leonen, En Banc].
- [43] Id. at 154-155.
- [44] See CIR v. Benguet Corporation, supra note 37.
- [45] 504 Phil. 646 (2005) [Per J. Sandoval-Gutierrez, En Banc].
- [46] Id. at 654, citing BLACK'S LAW DICTIONARY 693 (6[th] Ed., 1990).
- [47] TAX CODE, sec. 4.
- [48] Rollo, p. 569, CIR's Consolidated Memorandum.
- [49] Ponencia, pp. 22-23.
- [50] Rollo, pp. 291-292, CTA First Division Resolution.
- [51] CIR v. Benguet Corporation, supra note 37, at 359, citing ABS-CBN Broadcasting Corp. v. CTA, supra note 30, at 43-44.
- [52] CIVIL CODE, art. 19.
- [53] CIR v. Algue, Inc., 241 Phil. 829, 836 (1988) [Per J. Cruz, First Division]. (Emphasis supplied)

CONCURRING AND DISSENTING OPINION

INTING, J.:

I concur with the ponencia in declaring the assailed issuances of the Court of Tax Appeals (CTA) En Banc null and void for having been rendered in violation of its internal rules of procedure. Upon a careful review of the CTA records, I likewise agree with the finding that the transactions between G&W Architects, Engineers and Project Development Consultants Co. (G&W) and its clients are, in truth and in fact, contracts of sale. Consequently, G&W is liable for the corresponding deficiency documentary stamp tax (DST) arising from such transactions.

Nonetheless, I dissent from the ponencia insofar as it holds G&W liable for deficiency expanded withholding tax (EWT). While G&W was the party who devised the contractual arrangement and obtained the BIR Ruling in the

case, the obligation to withhold and remit EWT is imposed by law upon its clients—the condominium unit owners—who are the statutory withholding agents. Absent a clear statutory basis, the consequences of the withholding agents' failure to withhold EWT from their payments, which may have been caused by the BIR Ruling characterizing the arrangement as tax-exempt, cannot be shifted to G&W, the income payee.

Discussion

Per the ponencia, the Petition for Review on Certiorari filed by the Commissioner of Internal Revenue (CIR) was granted based on the following findings:

First, the assailed CTA En Banc issuances are procedurally infirm. Pursuant to Section 2 of Republic Act No. 1125,[1] as amended by Republic Act No. 9503,[2] and Section 3 of the 2005 Revised Rules of the Court of Tax Appeals, a simple majority shall be required to grant the motion for reconsideration. Where no majority is had, as in this case where the members of the CTA En Banc reached a tie vote, the motion shall be denied. Hence, both the August 29, 2018, Amended Decision and the March 14, 2019, Amended Decision of the CTA En Banc are void for having been issued in violation of its own internal rules.

Second, the substantive nature of the transactions. The ponencia affirmed the findings of the CTA En Banc in the Decision dated March 21, 2018, (Original Decision) that the true nature of the transactions between G&W and its clients, the condominium unit owners of Penhurst Parkplace Condominium, are contracts of sale. It aptly emphasized that under Section 5 of the Contracts to Project Management and Execute the Construction of Penhurst Parkplace Condominium (Management Contracts),[3] title over the condominium units shall be conveyed to the clients only upon completion of the project and full payment of the units; hence, they do not have an absolute right to transfer or assign their rights or obligation.

I fully agree with the ponencia with respect to both points.

The economic reality of the transactions reveals contracts of sale, justifying the imposition of DST

The present controversy centers on the proper characterization of the transactions between G&W and its clients under the Management Contracts. If the transactions are investment contracts, then the eventual transfer of ownership of the condominium units constitutes merely the return or realization of the clients' investments. If, however, the transactions are in substance contracts of sale, then the transfer of the condominium units represents a conveyance of real property and is consequently subject to DST under Section 196[4] of the National Internal Revenue Code (NIRC).[5] Thus, the resolution depends on determining the true nature of the parties' contractual arrangement.

In resolving this question, the Court is guided by the analytical framework in *Securities and Exchange Commission v. W.J. Howey Co.*,[6] which was incorporated into our jurisprudence in *Power Homes Unlimited Corp. vs. SEC, et al.*[7] as the Howey test.

Under the Howey test, an investment contract exists when there is: (1) an investment of money; (2) in a common enterprise; (3) with an expectation of profits; (4) to be derived solely from the efforts of others.[8] The test reflects the principle that substance prevails over form.[9] Thus, regardless of how the parties characterize the Management Contracts, the Court must examine whether they embody the essential elements of an investment contract as defined in the implementing rules and regulations of Republic Act No. 8799, otherwise known as the Securities and Regulation Code,[10] as contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits primarily from the efforts of others.[11]

Upon a careful review of the Management Contracts, I concur with the ponencia's conclusion that the contractual

arrangement of the parties is, in substance, a contract of sale rather than an investment contract. Here, the essential elements of an investment contract, as contemplated under the Howey test, are lacking.

First, there was no expectation of profits to be derived primarily from the efforts of others. The acquisition of the condominium units was the very object of the parties' undertaking. G&W's clients did not contribute funds to a common venture with the expectation of sharing in profits generated through G&W's entrepreneurial or managerial efforts. Rather, they contributed funds in exchange for the eventual delivery and transfer of ownership of specifically identified condominium units.

Second, the element of a common enterprise is likewise absent. Each of G&W's clients entered into a separate contractual arrangement with G&W and acquired distinct rights over a particular condominium unit. There was no pooling of investments among the clients nor any horizontal relationship among them from which profits and losses would be shared. The contractual relationships existed solely between G&W and each individual client.

Significantly, the characterization advanced by G&W is also difficult to reconcile with the requirements of the Securities Regulation Code. Investment contracts are expressly included within the statutory definition of "securities" and, as a rule, must be registered with the Securities and Exchange Commission (SEC) before they may be offered to the public. Yet, nothing in the records shows that G&W registered the Management Contracts with the SEC prior to offering them to prospective clients. While the absence of SEC registration is not by itself conclusive of the nature of the transaction, it substantially undermines G&W's assertion that the contracts were intended and understood to be investment contracts, not contracts of sale.

Furthermore, G&W relies on the individual trust agreements executed with trustee banks (e.g., BDO Unibank.[12] and International Exchange Bank.[13]) to argue that the arrangement was merely a project management and investment structure and that it was not the recipient of the contributions made by its clients. A deeper scrutiny of the records, however, reveals that these trust instruments do not alter the fundamental nature of the transaction—a contract of sale.

Crucially, the trust agreements reveal that any remaining balance of the Construction Funding upon completion of the project accrues to G&W, not to its clients which were supposedly the "trustors" and "beneficiaries", to wit:

2.04 Any remaining Funds in the CTF Account after the completion of the Project, as certified by G & W, shall be turned over to G & W upon instruction of the same.[14]

4.1 The Trust hereby created as well as this Agreement shall automatically be terminated upon: (i) violation or default of the Trustor or in his obligations under the Contract which results in G & W acquiring the right, or identifying a substitute client to acquire all the rights and interests of the Trustor, and to assume the corresponding obligations; (ii) the return of the Construction Funding to the Trustor in accordance with Subsection 4.0 (g) above, or, (iii) completion of the Project and the complete delivery and transfer of title to the Subject Unit to the Trustor and the Subject Land and Common Areas to the Condominium Corporation. Any remaining balance of the Trust upon the occurrence of the latter event shall accrue to G & W. The Trust may also be terminated in accordance with the procedure set forth in Subsection 5.04 of the Contract.[15] (Emphasis supplied)

Conversely, the return of Construction Funding to the clients is dependent solely upon the discretion of G&W:

DISTRIBUTION OF TRUST FUND

(g) To return the Construction Funding to the Trustor together with all accrued income and interests thereon where instructed by G & W; and,[16]

....

USE AND DISBURSEMENT OF THE FUNDS

2.02 On or before 15 August 2004, if G & W deems it not feasible to continue with the Project in the manner set forth in Sections 8.01 and 8.02 of the Contract, G & W shall instruct the BANK to return to the PRINCIPAL the following: 1) all payments hereunder; 2) the interest thereof; and 3) all unnegotiated checks issued by the PRINCIPAL, always in accordance with the provisions of Section 8.02 of the Contract.[17]

These provisions unequivocally contradict G&W's earlier representations to the BIR that its remuneration was limited to a 4% project management fee. Under the contractual arrangement, G&W is entitled to retain any excess of the Construction Funding after project completion, a feature fundamentally incompatible with a bona fide trust or investment structure. In effect, the difference between the total Construction Funding from all of G&W's clients and the actual project cost constitutes G&W's gross income from the project. This confirms that G&W was not acting merely as a project manager, but functioned as the project developer.

Moreover, the financial exposure of the clients (the required contributions) and their expected return (the assigned unit)[18] are fixed and predetermined, irrespective of the actual project cost. Under Section 4.01[19] of the Management Contracts, the client pays a specific, calculated amount. Section 4.05[20] explicitly states that this amount is a "guaranteed maximum," and in exchange, any remaining balance upon turnover "shall be awarded to G & W."

These circumstances utterly negate the existence of shared risk and return inherent in an investment or joint venture. Instead, the arrangement contains all the essential elements of a contract of sale: consent (meeting of the minds), a determinate subject matter (the assigned unit), and a price certain in money (the fixed Construction Funding per client). Therefore, the transactions were correctly characterized as sales, making them properly subject to DST.

Evidently, the trust agreements merely facilitated the pooling, safekeeping of the purchase price payments made by G&W's clients, ensuring that funds collected from condominium unit buyers of Penhurst Parkplace Condominium were not commingled with payments relating to G&W's other projects. They further ensure that disbursements were applied exclusively to the construction expenses of the Penhurst Parkplace Condominium project. These trust agreements did not transform the transactions into investments or a joint venture; rather they reinforced their true nature as contracts of sale, properly subject to DST.

G&W is not liable for deficiency EWT

As earlier stated, I take exception to the ponencia insofar as it holds G&W liable for deficiency EWT.

From the perspective of the withholding agent, tax withheld at source or EWT refers to the tax that the withholding agent (payor) is required by law to withhold from income payments and remit to the government. The statutory basis of this obligation is Section 57(B) of the NIRC, which provides:[21]

SECTION 57. Withholding of Tax at Source.—

....

B) Withholding of Creditable Tax at Source.— The Secretary of Finance may, upon the recommendation of the Commissioner, require the withholding of a tax on the items of income payable to natural or juridical persons, residing in the Philippines, by payor-corporation/persons as provided for by law, at the rate of not less than one percent (1%) but not more than thirty-two percent (32%) thereof, which shall be credited against the income tax liability of the taxpayer for the taxable year.

....

In contrast, from the perspective of the income payee—here, G&W—the tax withheld by its payors is reported as a

creditable withholding tax (CWT), which is deductible from its income tax due. For clarity, the withholding of creditable tax at source shall hereinafter be referred to as EWT/CWT.

The nature and purpose of the withholding tax system are well-established in jurisprudence. As elucidated in *Citibank, N.A. v. Court of Appeals*:^[22]

The withholding tax system was devised for two main reasons: first, to provide the taxpayer a convenient manner to meet his probable income tax liability; and second, to ensure the collection of the income tax which could otherwise be lost or substantially reduced through failure to file the corresponding returns. To these, a third reason may be added: to improve the government's cash flow. . . .

. . . .

Under the [1977] Tax Code, the types of income subject to withholding tax in Section 53, now Section 50, is simplified into three categories: (a) withholding of final tax on certain incomes; (b) withholding of creditable tax at source; and (c) tax free covenant bonds.

Accordingly, the withheld amounts equivalent to five percent of the gross rental are remitted to the BIR and are considered creditable withholding taxes under Section 53-f, i.e., creditable against income tax liability for that year. The taxes withheld, as ruled in *Gibbs vs. Commissioner of Internal Revenue*, are in the nature of payment by a taxpayer in order to extinguish his possible tax obligation. They are installments on the annual tax which may be due at the end of the taxable year.

. . . .

The taxes thus withheld and remitted are provisional in nature. We repeat: five per cent of the rental income withheld and remitted to the BIR pursuant to Rev. Reg. No. 13-78 is, unlike the withholding of final taxes on passive incomes, a creditable withholding tax; that is, creditable against income tax liability if any, for that taxable year.^[23]

Relying on *Commissioner of Internal Revenue v. TMX Sales, Inc.*,^[24] the Court in *Citibank* further emphasized that EWT/CWT are, in substance, deposits or advances of the income payee, to be credited against its income tax liability at the end of the taxable year.

Thus, while EWT/CWT is a personal statutory obligation of the withholding agent, it is not a separate or independent tax imposed on the income payee distinct from its income tax liability.

In the present case, G&W is the income payee—not the statutory withholding agent. The obligation to withhold and remit EWT/CWT to the government rests squarely on the payors, namely, the condominium unit buyers.

Nonetheless, the CIR held G&W liable for EWT deficiency solely on the ground that it devised the contractual arrangement.

I disagree.

Where there is doubt, tax laws are strictly construed against the government and in favor of the taxpayer. Taxes are burdens imposed by law and should never be assessed or collected by implication, inference, or presumption. They must rest on clear, express, and unambiguous statutory authority.^[25]

Here, there is no provision in the NIRC that allows the CIR to transfer the deficiency EWT liability from the statutory withholding agents (payors) to the income payee. Absent a clear legal basis, the CIR cannot lawfully hold G&W liable for an EWT deficiency that properly belongs to its clients. Simply put, G&W cannot be penalized with an EWT deficiency assessment intended for its clients merely because it structured the transactions and sought a BIR Ruling.

To impose the EWT deficiency upon G&W betrays a fundamental misunderstanding of the mechanics of withholding of creditable tax at source. If a withholding agent fails to withhold EWT/CWT, the payee receives the gross amount but still bears the burden of paying its full income tax liability at the end of the year. The income payee obtains no benefit from the payor's failure to withhold, unless it fraudulently deducts EWT/CWT from its income tax liability for taxes that were never actually withheld by its clients.

In the case, the CIR made no finding that G&W improperly reduced its income tax liability. More tellingly, the CIR did not assess G&W for deficiency income tax—an omission that strongly suggests that G&W declared and paid its correct corporate income tax. Having done so, holding G&W separately liable for the EWT/CWT—which is merely an advance installment of that exact same corporate income tax—would result in an unjust double taxation and penalize the payee for the statutory breach of the payors.

Had the transactions been correctly treated as contracts of sale from the outset, the buyers would have withheld EWT/CWT from their payments. G&W would have then reported the withheld amounts as tax credits/payments under Lines 48 and 49 of its BIR Form No. 1702-RT, reducing its income tax liability. Because no withholding occurred, G&W received the gross payments and, absent any contrary finding, paid its full income tax liability. The CIR's recourse for the unremitted EWT/CWT lies with the statutory withholding agents, not with the income payee.

In fine, it is my position that the CIR's Petition for Review on Certiorari should be only **PARTIALLY GRANTED**. While the transactions between G&W and its clients are contracts of sale, rendering G&W liable for deficiency DST, G&W should not be held liable for deficiency EWT arising from its clients' failure to withhold. Liability for such deficiency rests exclusively with the withholding agents alone.

[1] An Act Creating The Court of Tax Appeals (1954).

[2] An Act Enlarging The Organizational Structure of The Court of Tax Appeals, Amending For The Purpose Certain Sections of The Law Creating The Court of Tax Appeals, And For Other Purposes (2008).

[3] Rollo, pp. 106-121, 122-134, CTA records.

[4] Sec. 196. Stamp tax on Deeds of Sale und Conveyances of Real Property. - On all conveyances, deeds, instruments, or writings, other than grants, patents or original certificates of adjudication issued by the Government, whereby any land, tenement, or other realty sold shall be granted, assigned, transferred or otherwise conveyed to the purchaser, or purchasers, or to any other person or persons designated by such purchaser or purchasers, there shall be collected a documentary stamp tax, at the rates herein below prescribed, based on the consideration contracted to be paid for such realty or on its fair market value determined in accordance with Section 6(E) of this Code, whichever is higher: Provided, That when one of the contracting parties is the Government the tax herein imposed shall be based on the actual consideration.

[5] Republic Act No. 8424 (1997), Tax Reform Act of 1997.

[6] 328 U.S. 293 (1946).

[7] 570 Phil. 161 (2008) [Per C.J. Puno, First Division].

[8] Id. at 170.

[9] 274 Phil. 1060 (1991) [Per J. Gancayco, En Banc].

[10] Approved on July 19, 2000.

[11] Amended implementing Rules and Regulations of Republic Act No. 8799, Rule 3.1-1.

[12] CTA records, pp. 142-147.

[13] Id. at 135-141.

[14] Id. at 143.

[15] Id. at 137.

[16] Id.

[17] Id. at 143.

[18] Id. at 129.

SECTION 5

CLIENT'S SHARE OF INTEREST IN THE PROJECT

5.01 Subject Unit(s)/ Parking Unit(s)

As part of his interest in the Project, the Client shall be assigned: (i) the Subject Unit(s), which is/ are more particularly described in Schedule "A" hereof, and (ii) the Parking Unit(s), which is/ are more particularly described also in Schedule "A" hereof, and which represents a percent proportionate of the entire project which shall be indicated in the Master Deed.

[19] Id. at 127.

4.01 Construction Funding

To defray costs for the development and completion of the Subject Unit and the Parking Unit/s, the Client shall pay the amount of PESOS: ONE MILLION NINE HUNDRED EIGHT THOUSAND EIGHT HUNDRED FORTY-NINE & 80/100 ONLY (Php1,908,849.80) in accordance with the schedule of payments set forth in Schedule A, which is hereto attached and made an integral part of this Contract. The Client acknowledges that the Construction Funding has been calculated on the basis of the projected Total Project Cost, arrived at based on the best estimates of material, labor and other development costs available to G & W. The Client further acknowledges that the Construction Funding is established on an approximation of the size of the Subject Unit(s). Accordingly, variances in the actual size or dimensions of the Subject Unit(s) shall not constitute a basis for the reduction or increase in the Construction Funding amount.

All Construction Funding payments shall be made by post-dated checks drawn on a Metro Manila bank and payable to the Account, to be delivered by the Client to G & W together with the signed copies of this Contract and the Depository and Disbursing Agreement. Construction Funding payments shall not be credited as such unless the aforesaid check payments are cleared and properly credited to the Account.

[20] Id. at 128.

4.05 Cost Overruns

(a) The Client understands that the Construction Funding amount set forth in Section 4.01 is a guaranteed maximum. In exchange, any remaining balance of the Account upon: (i) the Acceptance and Turnover of the Subject Unit(s) and appurtenant Parking Unit(s) as defined in Subsection 3.03, and (ii) the conveyance by G & W of the common areas of the Project to the Condominium Corporation, shall be awarded to G & W.

(b) G & W shall endeavor to ensure that the project costs shall not exceed the project estimates on which the Construction Funding amount is based. G & W undertakes to guarantee any Cost Overruns with its Professional Fee; provided, that the Cost Overruns arise solely from increases in the cost of equipment rentals, construction materials or supplies. Government mandated increase arising from costs of labor ("Labor Cost Overruns") shall be for the sole and exclusive account of the Client, who will be charged proportionately in relation to his interest in the Project as shall be provided in the Master Deed. Payments for Labor Cost

Overruns will be assessed upon the Client by G & W and shall be payable to G & W within fifteen days if any from receipt. Any and all assessments for the Labor Cost Overruns shall, however, be always subject to liquidation.

[21] Republic Act No. 8424 (1997), Tax Reform Act of 1997.

[22] 345 Phil. 695, 705-708 (1997) [Per J. Panganiban, Third Division].

[23] Id.

[24] 282 Phil. 199 (1992) [Per J. Gutierrez, Jr., En Banc].

[25] Commissioner of Internal Revenue v. The Phil. American Accident Insurance Company, Inc., 493 Phil. 785, 793-794 (2005) [Per J. Carpio, First Division].

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