REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA *EB* NO. 2287** *(CTA Case No. 9130)*
-versus-	Present: **DEL ROSARIO, P.J., UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO, REYES-FAJARDO,** *and* **CUI-DAVID,** *JJ.*
MERIDIEN EAST REALTY & DEVELOPMENT CORPORATION, *Respondent.*	Promulgated: JUL 14 2022

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DECISION

MODESTO-SAN PEDRO, J.:

The Case

Before the Court *En Banc* is a **PETITION FOR REVIEW ("Petition")**, filed through registered mail on 23 July 2020,[1] with respondent's **COMMENT (*Re: Petition for Review dated 23 July 2020*) ("Comment")**, filed through registered mail on 3 November 2020.[2]

The Parties

Petitioner **COMMISSIONER OF INTERNAL REVENUE** ("CIR") is the head of the Bureau of Internal Revenue ("BIR") tasked with the enforcement of revenue laws and the collection of taxes and duties under the

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1 Records, pp. 6-66.
2 *Id.*, pp. 78-93.

National Internal Revenue Code, as amended, ("NIRC") or other laws or portions thereof administered by the BIR.

Respondent **MERIDIEN EAST REALTY & DEVELOPMENT CORPORATION** is a corporation duly organized and existing under Philippine laws. Its primary purpose is to acquire by purchase, lease, donation, or otherwise, and to own, use, improve, develop, subdivide, sell, mortgage, exchange, lease, develop, and hold for investment or otherwise, real estate of all kinds, whether to improve, manage, or otherwise dispose of buildings, houses, apartments, and other structures of whatever kind, together with their appurtenances.

The Facts

On 7 June 2005, petitioner issued ***BIR Ruling No. DA-245-05***, wherein he confirmed, in favor of respondent, the opinion that "the conveyance of the land and common areas of the Project in favor of the condominium corporation being without monetary consideration and is not in connection with a sale made to the condominium corporation, no income was generated and *a fortiori*, no income and/or creditable withholding tax is payable and collectible. Since the said conveyance is not a sale, it is likewise not subject to the ten percent (10%) VAT imposed under Section 106 of the Tax Code of 1997, neither will it be subject to the documentary stamp tax on sale or conveyance of real property imposed under Section 196 of the same Code. xxx."[3]

Thereafter, petitioner revoked said ***BIR Ruling No. DA-245-05*** when he issued ***Revenue Memorandum Circular No. 20-2010 ("RMC 20-10")***.

As a result of the revocation of ***BIR Ruling No. DA-245-05***, petitioner sent to respondent, on 16 August 2013, Letter of Authority No. 044-2013-00000156, dated 15 August 2013,[4] authorizing the examination of respondent's books of accounts and other accounting records to determine if the correct internal revenue taxes for taxable year ("TY") 2010 have been paid.[5]

On 9 December 2013, respondent received petitioner's Preliminary Assessment Notice ("PAN"), assessing respondent for alleged deficiency Income Tax ("IT"), Value Added Tax ("VAT"), Expanded Withholding Tax ("EWT"), and Documentary Stamp Tax ("DST"), for TY 2010, in the total amount of Php425,806,483.14, inclusive of penalties and surcharge.[6]

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3 *Id.*, p. 19.
4 Exhibits "P-1" and "R-1", BIR Records, p. 2.
5 Par. 2, Admitted Facts, Joint Stipulation of Facts and Issue, Division Docket, p. 414.
6 Par. 3, *id.*, pp. 414 to 415.

Subsequently, on 3 January 2014, respondent received a copy of the Formal Assessment Notices ("FAN"), assessing it for alleged deficiency IT, VAT, EWT and DST, for TY 2010 in the total amount of Php429,482,031.85, inclusive of penalties and surcharge.[7]

In response to the FAN, respondent filed before petitioner its Protest[8] with a request for reinvestigation on 9 January 2014.[9] On 10 March 2014, respondent submitted its supporting documents to the Protest.[10]

On 28 July 2015, respondent received the Final Decision on Disputed Assessment ("FDDA"), dated 27 July 2015,[11] assessing respondent for deficiency IT, VAT, EWT and DST, for TY 2010 in the total amount of Php35,666,837.02, inclusive of interest, penalty and surcharge.[12]

On 27 August 2015, respondent filed a Petition for Review before the Court in Division.[13]

On 7 January 2020, the Court in Division rendered the Assailed Decision, the dispositive portion of which provides:[14]

> **"WHEREFORE,** in light of the foregoing considerations, the present *Petition for Review* is **GRANTED.** Accordingly, respondent's FDDA dated July 27, 2015, assessing petitioner for deficiency income tax, VAT, EWT, and DST, in the total amount of P35,666,837.02, inclusive of interest, penalty and surcharge, for TY 2010, is **WITHDRAWN** and **SET ASIDE.**
>
> **SO ORDERED."**

On 3 June 2020, the Court in Division denied petitioner's Motion for Reconsideration.[15]

On 23 July 2020, petitioner filed the instant **Petition** by registered mail. This was followed by respondent's filing of its **Comment** through registered mail on 3 November 2020.

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7 Par. 4, *id.*, p. 415.
8 Exhibit "P-4", BIR Records, pp. 123 to 129.
9 Par. 4, Admitted Facts, JSFI, Division Docket, p. 415.
10 Exhibit "P-5", BIR Records, pp. 138 to 141.
11 Exhibit "P-6", *id.*, pp. 205 to 210.
12 Par. 5, JSFI, Division Docket, p. 415.
13 Division Docket, pp. 10 to 31.
14 Records, pp. 17-33.
15 *Id.*, pp. 34-40.

This Court *En Banc* then issued the Resolution, dated 3 February 2021, referring the instant case to mediation.[16] However, on 31 May 2021, this Court *En Banc* received a No Agreement to Mediate from the Philippine Mediation Center Unit.[17] Thus, on 15 June 2021, this Court *En Banc* issued a Resolution submitting the instant case for Decision.[18]

Hence, this Decision.

The Assigned Errors[19]

The Petition did not raise any particular Assigned Errors for resolution by the Court *En Banc*. However, the totality of the arguments raised by the petitioner would show that the issue to be resolved is whether or not the Court in Division erred in withdrawing and setting aside the deficiency IT, VAT, EWT, and DST assessments issued against respondent, for TY 2010, in the total amount of Php35,666,837.02, inclusive of interest, penalty, and surcharge.

Arguments of the Parties

Petitioner presented the following arguments:[20]

1. The retroactive application of BIR Rulings or Circulars may be made if the facts subsequently gathered by the BIR are materially different from the facts on which the ruling is based or where the taxpayers acted in bad faith.

    a. The investigation made by Revenue District Office No. 44 – Taguig, as led by Revenue District Officer Gerry O. Dumaya and Assistant Revenue District Officer Christina C. Barroga, resulted in finding that respondent deliberately misrepresented material facts in its request for ruling. It was discovered that the co-development scheme employed by respondent and Century Properties, Inc., is considered as pre-selling, hence, subject to IT, VAT, EWT, and DST. It is precisely because of this blatant misrepresentation that petitioner issued ***RMC 20-10***.

2. The non-retroactivity principle does not apply when the ruling involved is null and void for being contrary to law. The subject BIR Ruling is one of first impression. Hence, it cannot be delegated to any subordinate

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16 *Id.*, pp. 102-105.
17 *Id.*, p. 116.
18 *Id.*, pp. 117-119.
19 *Id.*, pp. 9-13.
20 *Ibid.*

BIR officials but should only be issued by petitioner himself. Well-entrenched are the principles that the government is never estopped from collecting taxes because of mistakes and errors of its agents and that there are no vested rights in a wrong interpretation of the law.

3. The Built to Own or Build Your Own Home Concept of purportedly pooling condominium unit owners' funds to be used for the construction of the condominium units on behalf of the fund owners constitute a taxable sale, exchange or disposition of real property, hence, subject to IT, EWT, and DST.

In its **Comment**, respondent counter-alleged as follows:[21]

1. Petitioner failed to prove any misrepresentation and/or bad faith on the part of respondent. While petitioner argues that respondent committed misrepresentation and/or bad faith when it secured ***BIR Ruling No. DA-245-05***, which results in the retroactive application of ***RMC 20-10***, still, petitioner failed to provide proof that respondent indeed committed misrepresentation and/or bad faith.

2. Respondent did not derive any gain from the capital contributions of its co-investors. The creation of a Construction Fund Contribution ("CFC") is solely for the purpose of allowing respondent to satisfy all costs and expenses associated with the development of the project. Hence, there is no basis for the current assessment.

3. ***BIR Ruling No. DA-245-05*** is not contrary to law. The power to issue rulings of first impression may be delegated.

4. The Build to Own Concept is not a taxable transaction.

The Ruling of the Court En Banc

This Court resolves to **DENY** the **Petition** for lack of merit.

[21] *Id.*, pp. 79-88.

***Section 246 of the NIRC* prohibits the retroactive application of a reversal of a BIR Ruling if the same would be prejudicial to the taxpayer unless the exceptions under the said provision are present.**

Central to the case at hand is ***Section 246 of the NIRC.*** The said provision reads, as follows:

> "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 and underscoring, Ours.)

Accordingly, any change of opinion or position by the CIR with respect to a BIR Ruling which is prejudicial to the taxpayer shall only be applied prospectively. In numerous cases,[22] the Supreme Court has consistently ruled that reversals of BIR Rulings, Circulars, Rules, and Regulations issued by the CIR would have no retroactive application if the same would be prejudicial to the taxpayer.[23] This means that a taxpayer has the right to rely upon a BIR Ruling until the same has been reversed or overruled by the CIR or by the Supreme Court. This is known as the doctrine of operative fact.[24]

The only exceptions to this rule are: (1) where the taxpayer deliberately misstates or omits material facts from its return or in any document required of him by the BIR; (2) where the facts subsequently gathered by the BIR are

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22 Commissioner of Internal Revenue vs. Court of Appeals, et at., G.R. No. 117982, 6 February 1997, 267 SCRA 557, 564, *citing* Commissioner of Internal Revenue vs. Telefunken Semiconductor Philippines, Inc., G.R. No. 103915, 23 October 1995, 249 SCRA 401; Bank of America vs. Court of Appeals, G.R. No. 103092, 21 July 1994, 234 SCRA 302; Commissioner of Internal Revenue vs. CTA, G.R. No. L-44007, 20 March 1991, 195 SCRA 444; Commissioner of Internal Revenue vs. Mega General Merchandising Corp., G.R. No. 69136, 30 September 1988, 166 SCRA 166; Commissioner of Internal Revenue vs. Burroughs, G.R. No. 66653, 19 June 1986, 142 SCRA 324; ABS-CBN vs. CTA, G.R. No. 52306, 12 October 1981, 108 SCRA 142.

23 Commissioner of Internal Revenue v. Benguet Corporation, G.R. Nos. 134587 & 134588, 8 July 2005.

24 Commissioner of Internal Revenue vs. San Roque Power Corporation, G.R. Nos. 187485, 196113, and 197156, 8 October 2013.

materially different from the facts on which the ruling is based; or (3) where the taxpayer acted in bad faith.[25]

The proscription against the retroactive application of a reversal of a BIR Ruling is to preclude the CIR from adopting a position contrary to one previously taken that would result in injustice to the taxpayer or that would be contrary to the tenets of good faith, equity, and fair play.[26] This is why the framers of the ***NIRC*** limited the instances wherein the reversal of a previously issued BIR Ruling or Circular can be given retroactive effect.

Respondent was prejudiced when *RMC 20-10* was issued overturning *BIR Ruling No. DA-245-05.*

In the case at bar, there is no question that ***RMC 20-10*** was circularized by petitioner to overturn ***BIR Ruling No. DA-245-05,*** which, in turn, was issued on 7 June 2005 upon the request and in favor of respondent.

Initially, the BIR made the following statements under ***BIR Ruling No. DA-245-05***:

> "This refers to your letter dated June 1, 2005 requesting on behalf of MERIDIEN EAST REALTY AND DEVELOPMENT CORPORATION (MERIDIEN for brevity), an opinion on the proposed construction of a condominium project under a build-to-own concept pursuant to a Co-Development and Construction Management Agreement.
>
> xxx xxx xxx
>
> xxx **this Office confirms your opinion that the conveyance of the land and common areas of the Project in favor of the condominium corporation being without monetary consideration and is not in connection with a sale to the condominium corporation, no income was generated and a fortiori, no income and/or creditable withholding tax is payable and collectible. Since the said conveyance is not a sale, it is likewise not subject to the ten percent (10%) VAT imposed under Section 106 of the Tax Code of 1997, neither will it be subject to the documentary stamp tax on sale or conveyance of real property imposed under Section 196 of the same Code.** However, the notarial acknowledgment to the said deed of conveyance is subject to the documentary stamp tax of fifteen pesos (P15.00) pursuant to Section 188 of the Tax Code of 1997."
> (Emphasis and underscoring, Ours.)

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25 Commissioner of Internal Revenue vs. Philippine Health Care Providers, Inc., G.R. No. 168129, 24 April 2007.

26 *Ibid.*

In the said BIR Ruling, the BIR initially opined that the conveyance of the land and common areas to the condominium corporation is not a sale subject to IT, EWT, DST, and VAT.

However, under ***RMC 20-10***, this prior position was abandoned by petitioner, and a new one was issued declaring the subject transaction as part of a pre-selling arrangement, hence, subject to the aforementioned taxes:

> "For the information and guidance of all internal revenue officials, employees and other concerned, quoted hereunder is the full text of the memorandum letter to the Regional Director of Revenue Region No. 8, Makati, declaring BIR Ruling DA- 245-2005 dated June 7, 2005, null and void, as follows:
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> XXX XXX XXX
>
> **This refers to the memorandum of RDO Gerry O. Dumayas and ARDO Christina Barroga dated March 26, 2009, seeking confirmation that the co-development concept employed by Meridien and CPI is considered as pre-selling and that there is a need to re-examine the ruling exempting it from taxes.**
>
> **In the said memorandum, it was alleged that, upon investigation of RDO No. 44, the facts are not represented by the subject taxpayer in their request for ruling. Hence, the transactions should be treated as pre-selling and therefore subject to EWT and DST.**
>
> It must be noted that the ruling was issued with a very specific collatilla, to wit:
>
> 'This ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be disclosed that the facts are different, then this ruling shall be considered null and void.'
>
> Finding merit in the arguments of our revenue officers and considering the blatant misrepresentation by Meridien and CPI, it is hereby declared that the ruling is null and void.
>
> Furthermore, the revenue district offices under your region are ordered to:
>
> a. Conduct a full blown audit and investigation in order to ascertain the amount of taxes owed by the said taxpayers; and
>
> b. Determine whether other taxpayers granted similar rulings ought to be investigated as well.
>
> XXX XXX XXX
>
> **The nullification of DA-245-2005, supra, 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/co-developers 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/co-developers), as stipulated in the Agreement, is claimed to not be a taxable event being merely a transaction to effect the return of their respective capital contribution to the joint venture. The foregoing effectively resulted in the non-payment of income taxes and value-added tax by the developer on the gross project amount.**
>
> **In addition, the House and Land Use Regulatory Board (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).**
>
> The revocation of BIR Ruling No. DA-245-2005 dated June 7, 2005 is hereby circularized for the guidance and information of all revenue district offices. All concerned are hereby enjoined to report similar schemes for appropriate investigation, and to give this circular as wide a dissemination as possible."
> (Emphasis and underscoring, Ours.)

Clearly, therefore, respondent was prejudiced when the previous favorable ruling was overturned by ***RMC 20-10***. Indeed, under ***BIR Ruling No. DA-245-05***, its co-development concept was not considered a sale transaction subject to IT, EWT, VAT, and DST. Upon issuance of the said Circular, however, petitioner changed his position and sought the collection of the abovestated taxes upon his new view that respondent's Build-to-Own concept is a pre-selling scheme.

Considering that respondent was prejudiced as a result of the reversal of a prior BIR Ruling, ***RMC 20-10*** should not be given retroactive effect unless petitioner adequately proves the existence of the exceptions under ***Section 246 of the NIRC***.

Petitioner failed to prove the existence of any of the exceptions provided under *Section 246 of the NIRC.*

The Court notes that the reversal of ***BIR Ruling No. DA-245-05*** was given retroactive effect. This occurred through the issuance of the subject deficiency IT, EWT, VAT, and DST assessments for TY 2010 against respondent. The FDDA clearly shows the retroactive application of ***RMC 20-10,*** as follows:

> "DETAILS OF DISCREPANCIES
>
> REVOCATION OF BIR RULING NO. DA-245-2005

> **The hereunder deficiency taxes were assessed pursuant to the issuance of Revenue Memorandum Circular (RMC) No. 20-2010** providing for the publication of [the] Memorandum dated April 28, 2009 **declaring the nullity of BIR Ruling No. DA-245-2005 dated June 07, 2005, and for the conduct of a full blown audit and investigation in order to ascertain the amount of taxes owed relative to the blatant misrepresentation made in obtaining the ruling for exemption of taxes."**
> (Emphasis and underscoring, Ours.)

If none of the exceptions under ***Section 246 of the NIRC*** are present, undue prejudice will be caused to respondent as the retroactive application of ***RMC 20-10*** is not authorized. Again, basic is the rule that if any BIR Ruling or issuance by the CIR is subsequently revoked or nullified by respondent himself or by the court, the revocation/nullification cannot be applied retroactively to the prejudice of the taxpayers.[27]

As duly found by the Court in Division and as confirmed by the Court *En Banc*, petitioner failed to adduce evidence that: (1) respondent deliberately misstated or omitted material facts from its return or in any document required of him by the BIR; (2) the facts subsequently gathered by the BIR are materially different from the facts on which ***BIR Ruling No. DA-245-05*** was based; or (3) that respondent acted in bad faith.

This Court *En Banc* agrees with the following findings by the Court in Division:[28]

> "Unfortunately, however, respondent failed to prove the existence of any of the foregoing exceptions on the part of the petitioner. As already held in the assailed Decision, respondent's claim that petitioner committed misrepresentation of facts when it sought respondent's ruling leading the issuance of BIR Ruling No. DA-245-2005, is not supported by evidence. Respondent likewise failed to prove the existence any circumstance showing bad faith on the part of the petitioner. Bad faith imports a dishonest purpose or some moral obliquity and conscious doing of wrong. It partakes of the nature of fraud; a breach of a known duty through some motive of interest or ill will. It is worth stressing at this point that bad faith cannot be presumed. It is a question of fact that must be proven by clear and convincing evidence, and the burden of proving bad faith rests on the one alleging it.
>
> In the present case, respondent merely alleges that petitioner deliberately misstated material facts or acted in bad faith, when it sought the confirmation from the BIR since it was discovered that the co-development scheme employed by petitioner and Century Properties, Inc. is considered as pre-selling without further presenting any proof. Perforce, the Court has stressed time and again that allegations must be proven by sufficient evidence because mere allegation is definitely not evidence. Moreover, fraud is not presumed -it must be proved by clear and convincing evidence."

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27 Commissioner of Internal Revenue v. United Cadiz Sugar Farmers Association Multi-Purpose Cooperative, G.R. No. 209776, 7 December 2016.

28 Resolution, dated 8 June 2020.

Indeed, mere allegation is not proof.[29] Likewise, the burden of proof lies upon those who assert it, not upon those who deny, since, by the nature of things, those who deny a fact cannot produce any proof of it.[30] And with respect to a claim of bad faith, the same must be proven by the person alleging it.[31]

Petitioner failed to discharge these burdens of proof. He merely alleged that respondent committed misrepresentation and bad faith in obtaining ***BIR Ruling No. DA-245-05*** without even presenting any documentary evidence proving such factual matter.

A close scrutiny of the present case would reveal that the change of position made by petitioner in ***RMC 20-10*** was not brought about by a subsequent learning of a fact misrepresented or withheld by respondent when it obtained ***BIR Ruling No. DA-245-05***. Rather, the reversal of the BIR Ruling was merely due to a change of opinion by petitioner on the tax consequences of the same set of facts which respondent presented in obtaining ***BIR Ruling No. DA-245-05***.

As such, respondent did not misrepresent, provide materially different facts, or commit bad faith in obtaining the prior BIR Ruling in its favor. Consequently, there is no room for the retroactive application of ***RMC 20-10.***

Without sufficient evidence proving any of the exceptions under ***Section 246 of the NIRC***, petitioner cannot deprive respondent of the rights that it already obtained under ***BIR Ruling No. DA-245-05*** until its revocation through the issuance of ***RMC 20-10***. Accordingly, the subject deficiency IT, EWT, VAT, and DST assessments for TY 2010 against respondent are null and void as they are consequences of the retroactive application of ***RMC 20-10***.

BIR Ruling No. DA-245-05 is not contrary to law.

Further, there is no merit in petitioner's contention that since ***BIR Ruling No. DA-245-05*** is one of first impression, the same should have been issued by the CIR himself and not a mere subordinate.

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29 Amalia S. Menez (in behalf of the late Jonathan E. Menez) v. Status Maritime Corporation, etc., G.R. No. 227523, 29 August 2018.

30 MOF Company, Inc. vs. Shin Yang Brokerage Corporation, G.R. No. 172822, 18 December 2009.

31 Spouses Maximo Espinoza and Winifreda de Vera v. Spouses Antonio Mayandoc and Erlinda Cayabyab Mayandoc, G.R. No. 211170, 3 July 2017.

The power to interpret rules and regulations, while accorded by the ***NIRC*** to the CIR himself, may be delegated. This is one of the declarations made in the case of ***Procter and Gamble Asia PTE Ltd., v. Commissioner of Internal Revenue***,[32] to wit:

> ***"BIR Ruling No. DA-489-03 is valid even if issued by the Deputy Commissioner.***
>
> The respondent now impugns the validity of BIR Ruling No. DA-489-03. The CIR argues that the BIR ruling was issued only by the Deputy Commissioner and not by the CIR, who, under Section 4 of the NIRC, has original and exclusive jurisdiction in interpreting provisions of the NIRC.
>
> We are not persuaded by the CIR's contention.
>
> This issue has been settled in the Court En Banc's resolution dated October 8, 2013 in the consolidated cases of San Roque-Taganito where we upheld the validity of the BIR ruling, because **the power to interpret rules and regulations is not exclusive and may be delegated by the CIR to the Deputy Commissioner.**
> (Emphasis and underscoring, Ours.)

Hence, even if ***BIR Ruling No. DA-245-05*** was issued by a mere subordinate of petitioner, the same is still valid.

To conclude, as long as a taxpayer did not misrepresent, provide materially different facts, or commit bad faith in the issuance of a BIR Ruling in its favor, it has the right to rely on said BIR Ruling. Any subsequent reversal of such BIR Ruling that may cause prejudice to the taxpayer shall not be retroactively applied.

Given the foregoing disquisitions, there is no more need to address the remaining issues.

WHEREFORE, the instant Petition is hereby **DENIED** for lack of merit. Accordingly, the Decision, dated 7 January 2020, and Resolution, dated 8 June 2020, promulgated by the Court in Division are hereby **AFFIRMED**.

SO ORDERED.

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

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32 G.R. No. 204277, 30 May 2016.

WE CONCUR:

(With due respect, see Dissenting Opinion.)
ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

ON LEAVE
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

ON LEAVE
CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 2287** (CTA CASE NO. 9130)
	Present:
- versus -	DEL ROSARIO, P.J., UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO, REYES-FAJARDO, and, CUI-DAVID, JJ.
MERIDIEN EAST REALTY & DEVELOPMENT CORPORATION, Respondent.	Promulgated: JUL 14 2022 4:00 pm

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DISSENTING OPINION

DEL ROSARIO, P.J.:

With due respect, I withhold my assent to the *ponencia* which denies the present Petition for Review thereby affirming the Decision dated January 7, 2020 and Resolution dated June 8, 2020 of the Court in Division cancelling the assessments for deficiency income tax, value-added tax (VAT), expanded withholding tax (EWT), and documentary stamp tax (DST) in the total amount of ₱35,666,837.02, inclusive of interest, penalty and surcharge, against respondent.

I submit that that **Co-Development, Allocation and Construction Management Agreement (CACMA)** between respondent and its co-development partner, which purports to be a Build-to-Own scheme, is in truth a **contract of sale of a condominium unit** despite the contractual embellishments to conceal its true nature.

In the case at bar, the following provisions of the CACMA, suggest that respondent is the seller of the condominium units and its so-called co-development partners are the buyers thereof:

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2. DEVELOPMENT AND MANAGEMENT OF THE PROJECT

xxx xxx xxx

2.03 MERIDIEN as the Project Manager and Coordinator

Pursuant to the engagement of MERIDIEN as project manager and coordinator, MERIDIEN shall perform among others, the following acts on behalf and for the collective benefit of the CO-DEVELOPMENT PARTNERS and in furtherance of the development of the Project:

a) **To pre-qualify and select the construction management engineers, building and engineering overall coordinator and manager of the Project and to do such other acts as may be necessary and desirable for the development of the Project.**

xxx xxx xxx

3. APPOINTMENT OF MERIDIEN AS ATTORNEY-IN-FACT

3.01 The CO-DEVELOPMENT PARTNER hereby **irrevocably names, appoints and constitutes MERIDIEN as its true and lawful attorney-in-fact with full power and authority to do and perform every act** and thing whatsoever requisite and necessary to be done for the successful execution/completion of the Project including the **organization of the Condominium Corporation, the appointment of a professional property manager, break-up of the mother title, conveyance of CCTs and common areas to the co-development partners** and the Condominium Corporation respectively and other acts as fully to all intents and purposes as the CO-DEVELOPMENT PARTNER could do if personally present. The **CO-DEVELOPMENT PARTNER** likewise **ratifies and confirms all that MERIDIEN shall lawfully do or cause to be done** in connection with the exercise of the powers stated above.

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8. CO-DEVELOPMENT PARTNER'S SHARE OF INTEREST IN THE PROJECT

xxx xxx xxx

8.03 Non-Assignability of Interest

The Rights and interests of the CO-DEVELOPMENT PARTNER in the Project, the Subject Unit. The parking Lot, and the corresponding proportionate undivided interest in the Common

Areas of the Project prior to Acceptance or Turnover to the CO-DEVELOPMENT PARTNER, **shall not be assignable, unless with the prior written approval of MERIDIEN**. In the event that MERIDIEN should grant such an approval, the CO-DEVELOPMENT PARTNER shall be required to pay MERIDIEN a processing fee of Thirty Thousand (P30,000.00) Pesos.

xxx xxx xxx

8.05 Nature of Co-Development Partner's Interest in the Project

The CO-DEVELOPMENT PARTNER acknowledges that prior actual division of the Project into individual condominium units and the conveyance of the Condominium Certificate of Title covering the subject Unit to her, the CO-DEVELOPMENT PARTNER'S interest in the Project consists in a pro-indiviso, pro-rata share, held collectively with the other CO-DEVELOPMENT PARTNERS. **The CO-DEVELOPMENT PARTNER shall not mortgage, assign, dispose of, nor encumber her interest in the Project without the prior written consent of MERIDIEN**.

xxx xxx xxx

11. TERMINATION

11.01 Violation or Default

To protect the CO-DEVELOPMENT PARTNER from litigation arising hereunder and by way of automatic settlement in case of the occurrence of the events of default set forth below, **MERIDIEN shall have the right to rescind, terminate or cancel this Agreement**, without need of judicial action, in case of any one of the events of default stipulated hereunder occurs, and the CO-DEVELOPMENT PARTNER fails to remedy or cure to the satisfaction of MERIDIEN such default, within five (5) days from receipt of written notice from MERIDIEN of the occurrence of such default, as follows:

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

b) **Failure by the CO-DEVELOPMENT PARTNER to pay her proportionate share** of the Post-Completion and related costs, if any, or any proportion thereof;

c) Violation or failure of the CO-DEVELOPMENT PARTNER to comply with the other terms and conditions of this Agreement.

xxx xxx xxx

12. EFFECTS OF TERMINATION

12.01 Upon such termination, **MERIDIEN shall have the right to invite, nominate, or identify a substitute co-development partner to acquire all the rights and interests of the CO-DEVELOPMENT PARTNER in the Project and to assume the**

> **corresponding obligations hereunder**. xxx[1] *(Boldfacing added)*

The foregoing provisions speak for themselves. Altogether, they glaringly reveal that all the attributes of ownership of the condominium project are integrated into, and are being exercised by respondent, by virtue of the CACMA.

More specifically, all the essential elements of a contract of sale are present in the case at bar. The **consent to transfer ownership** for the price is provided under Paragraph 8.04 of the CACMA. The determinate subject matter is the completed **condominium unit**, and the **price** certain in money is the amount payable under Paragraph 6.02 of the CACMA, denominated as "Construction Funding Contribution". **Clearly, the transaction contemplated under the CACMA is a sale of condominium units despite the contractual embellishments to camouflage its real nature.**

In ***G&W Architects, Engineers and Project Development Consultants, Co. vs. Commissioner of Internal Revenue***, CTA Case Nos. 8358, 8426 and 8489, and ***Commissioner of Internal Revenue vs. G&W Architects, Engineers and Project Development Consultants, Co.***, CTA EB No. 1449, I have consistently taken the position that the Build-to-Own concept of purportedly pooling condominium unit owner's funds to be used for the construction of the condominium units on behalf of the fund owners constitute a taxable sale, exchange or disposition of real property; and as such, subject to income tax, VAT, EWT and DST.

Apropos is the discussion on the true nature of the Build-to-Own concept in my Dissenting Opinion on the Amended Decision dated August 29, 2018 in CTA EB No. 1449, *viz.*:

> "The three (3) agreements covering respondent's Built-to-Own or Build-Your-Own-Home business contain provisions that confirm and amplify respondent's theory that **respondent is the seller and the unit owners are the buyers thereof**. xxx
>
> xxx xxx xxx
>
> The Contract to Execute and Manage the Construction of the Condominium pretentiously suggests that respondent is simply the manager of the project, when

[1] Exhibit "P-9", Docket (CTA Case No. 9130), pp. 545-548.

in truth, ownership rights of respondent's 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, respondent has the potent 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' only 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 any different from a contract to sell. Upon full payment by the clients, the transaction is properly deemed a sale of condominium unit.**

xxx xxx xxx

xxx. The Contract to Execute and Manage the Construction of the Condominium reveals that respondent has the **potent authority to terminate the contract when the supposed "client" fails to pay the amounts payable, and the power to substitute the client who violated its terms or defaulted in the payment**. The real agreement of the parties in the transaction is that ownership rights of respondent's purported "clients" over the project or any of the condominium units accrue and become vested upon them only upon full payment of said units.

As the true nature of the transaction vests ownership rights to the purported "client" only upon full payment of the project or any of the condominium units, and considering the absolute power vested upon respondent to substitute a client in default, the same clearly belie respondent's preposterous claim that it acted as a mere project manager or trustee.

To be sure, respondent's agreements with its clients are not akin to a contract for a piece of work or contract of service. Records refute respondent's proposition that its clients, *i.e.*, investors/condominium unit owners, simply sought the services of respondent as a project manager or contractor to build the condominium units for them.

Article 1467 of the Civil Code distinguishes between a contract of sale and a contract for a piece of work, viz.:

> "Article 1467. 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."

In *Engineering & Machinery Corporation vs. Court of Appeals, et al.*, such distinction was further elucidated:

> "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. vs. Collector, 99 Phil. 841).
>
> xxx xxx xxx

In *Celestino Co & Company vs. Collector of Internal Revenue (Celestino case)*, the Supreme Court ruled that Celestino Co & Company's services of making sashes, windows and doors was considered a **contract of sale** and not a contract for a piece of work subject to a sales tax:

> "x x x 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 material-moulding, frames, panels-as it ordinarily manufactured or was in a position habitually to manufacture.
>
> xxx xxx xxx
>
> 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."

I reiterate that the similarity of the circumstances in the present case with the Celestino case cannot be denied.

As afore-discussed, respondent's agreements with its clients, taken together, are contracts of sale and not contracts for a piece of work or contracts of service. **Respondent did not commence to build its condominium projects on the basis of a special order from previously existing and identified investors/condominium unit owners; rather it builds condominium projects even without such previously made special order consistent with its business purpose as stated in its Articles of Partnership 13 and Amended Articles of Partnership**, *viz.*:

> "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)"
>
> xxx xxx xxx

While respondent claimed that the condominium unit owners are its unit investors and not buyers, it did not present any evidence

such as board resolutions or minutes of meetings that would establish any semblance of participation or control by the alleged investors/condominium unit owners, including any **collective agreement** on the bill of materials, technical specifications, identity of contractors and sub-contractors, if any, or even an agreement on the cost of construction vis-à-vis the fee payable to respondent that would have appraised them in making an intelligent decision whether to retain respondent as a supposed Project Manager.

In a contract for a piece of work, control as to the specifications and the details of the finished product remain with the client. In the present case, it is ironic that in a Built-to-Own or Build-Your-Own-Home condominium unit, the supposed investors/condominium unit owners have absolutely no say in the design or plan of the condominium units they want constructed. **Control over all the phases of construction — planning to implementation — is solely exercised by respondent**. The Contract to Manage and Execute the Construction of the Condominium categorically states:

"SECTION 8
TERMINATION

8.01 Violation or Default

G & W 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 such default, within five (5) days from receipt of written notice from G & W 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 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 obligations 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 paid by the Client **shall automatically be forfeited by way of liquidated damages in favor of G & W**, 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." (Boldfacing supplied)

If the condominium unit buyers are mere "clients" in the construction of the project as foisted by respondent, then such clients, at the very least, should have been consulted on the identity and qualification of the service provider. Sorely, nothing of this stipulation ever appeared on record.

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With due respect, I submit that the validity of the contract or the fact that it was freely and voluntarily executed by the parties and thus becomes the law between them does not by itself preclude the tax authority from imposing the taxes which are rightfully due from the parties. **Taxes are imposed and fixed by law and the liability to pay the same arises from law. The parties cannot defeat the right of the government to assess and collect taxes by simply wording or making their agreements appear to be what they actually are not.** In the language of the late Irving L. Goldberg, a former United States Federal Judge:

> **"A taxpayer may engineer his transactions to minimize taxes, but he cannot make a transaction appear to be what it is not."**

Thus, in determining the taxes to be imposed on transactions and agreements, what is important and controlling is their real nature and not the particular label or nomenclature of the document which embody them. Simply put, the taxability of transactions or agreements depends on their **substance which is paramount over their forms**. To prevent tax evasion, transactions are carefully scrutinized to establish their real nature or what they actually are *vis-a-vis* what the parties declare or represent them to be.

With regard to the EWT assessment issued against respondent, while the duty to withhold in a sale of real property is the responsibility of the withholding agent, i.e., condominium unit owners in the present case, the fact that it was respondent who misrepresented to the unsuspecting buyers that the transaction is not a sale, makes it liable for the EWT as a consequence of said misrepresentation. **To allow respondent to escape liability from the consequence of its mischievous tax scheme would *in esse* permit a wrong-doer to benefit from its own wrongdoing.** "*Commodum Ex Injuria Sua Nemo Habere Debet*" (A wrongdoer should not be enabled by law to take any advantage from his actions)." *(Additional boldfacing and underscoring supplied)*

As regards, respondent's claim that the revocation of BIR Ruling No. DA-245-05 is invalid for failure of petitioner to prove that it

committed any misrepresentation of fact when it sought the issuance of BIR Ruling No. DA-245-05, I disagree.

Generally, once a ruling has been issued, its revocation, modification or reversal cannot be given retroactive effect pursuant to Section 246 of the National Internal Revenue (NIRC) of 1997, as amended. The same provision, however, provides that "(a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of [it] 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", the CIR may revoke the same as an exception to Section 246 of the NIRC of 1997, as amended.

In the case at bar, the revoked BIR Ruling No. DA-245-05 involves respondent's request for an administrative confirmation of its opinion on the tax consequences of transactions pertaining to its proposed construction of a condominium project under the build-to-own concept pursuant to a Co-Development and Construction Management Agreement. The request contained conclusions of law based on facts in support thereof. Note the following, as contained in respondent's request for opinion:

1. The Joint Venture or Co-Development and Construction Management Agreement between and among the Joint Owners consisting of Century Properties, Inc. (CPI), respondent and their Co-Development Partners is **not subject to income tax as a separate corporation as it is not a taxable joint venture pursuant to Section 22(B) of the Tax Code of 1997**;

2. The contribution of land by CPI to the project is likewise not subject to the ten percent (10%) VAT because the transfer is not made in the course of business but **only a capital contribution and that the same property being transferred to the project is a capital asset**;

3. The assignment and delivery of the developed units to each Joint Owner, as stipulated in the Agreement, **is not a taxable event and not subject to income tax, withholding tax and VAT**, considering that **the same is not in connection with a sale**, but merely a transaction to effect the return of their respective capital contribution to the joint venture;

OM

4. The agreement for the partitioning of units embodied in the Co-Development and Construction Management Agreement, whereby the Joint Owners will allocate to each other their respective shares in the developed Project is subject to the documentary stamp tax imposed under Section 196 of the Tax Code of 1997 **since the allocation is made without monetary consideration and is made to segregate their respective areas representing the return of capital which each has contributed**; and,

5. **The conveyance of the land and common areas of the Project in favor of the condominium corporation being without monetary consideration and is not in connection with a sale made to the condominium corporation**, no income was generated and *a fortiori*, no income and/or creditable withholding tax is payable and collectible. Since the said conveyance is not a sale, it is likewise not subject to the ten percent (10%) VAT imposed under Section 106 of the Tax Code of 1997, neither will it be subject to the documentary stamp tax on sale or conveyance of real property imposed under Section 196 of the same Code. However, the notarial acknowledgment to the said deed of conveyance is subject to the documentary stamp tax of fifteen pesos (P15.00) pursuant to Section 188 of the Tax Code of 1997.

Petitioner undeniably answered in the affirmative through BIR Ruling No. DA-245-05, precisely because the legal premises as submitted, were valid. Upon determination of the facts and circumstances on which the legal conclusions were based, however, **it appears that the legal conclusions are not consistent with the real or true nature of the transactions involved.**

It must be emphasized that BIR Ruling No. DA-245-05 contained the following caveat:

> "This ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be disclosed that the facts are different, then this ruling shall be considered null and void."

Accordingly, I submit that the **revocation** of BIR Ruling No. DA-245-05 was proper and valid for respondent's misrepresentation of the facts, particularly for making it appear that the transactions under the CACMA are not sale transactions when in fact and in law, they are taxable sale transactions. In the same vein, the retroactive application of said revocation is a necessary legal consequence.

In fine, transactions crafted to appear as something they are not cannot be countenanced especially if such transactions are contrary to public policy or are used as a tool for committing tax evasion.

All told, I VOTE to grant the Petition for Review filed by the Commissioner of Internal Revenue and remand the case to the Court in Division for the determination of respondent's tax liability, if any.

ROMAN G. DEL ROSARIO
Presiding Justice