REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL SECOND DIVISION

JTKC LAND, INC.,
Petitioner,

CTA CASE NO. **10059**

Members:

- versus -

BACORRO-VILLENA, *Acting Chairperson, and*
CUI-DAVID, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 04 2023 3:45 pm

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RESOLUTION

BACORRO-VILLENA, J.:

For the Court's resolution is the "Motion for Reconsideration (to the Decision dated April 26, 2023)"[1] (**MR**) filed by respondent Commissioner of Internal Revenue (**respondent/CIR**) on 29 May 2023, with "Comment on Motion for Reconsideration (to the Decision dated April 26, 2023) dated 29 May 2023"[2] filed by petitioner JTKC Land, Inc. (**petitioner/JTKC**) on 13 June 2023, pursuant to Section 1[3], Rule 15 of the Revised Rules of the Court of Tax Appeals (**RRCTA**).

The MR assails the Decision[4] promulgated on 26 April 2023 (**assailed Decision**), the dispositive portion of which reads:

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[1] Division Docket, Volume III, pp. 1524-1536.
[2] Id., pp. 1539-1563.
[3] **SEC. 1**. *Who may and when to file motion.* — Any aggrieved party may seek a reconsideration or new trial of any decision, resolution or order of the Court by filing a motion for reconsideration or new trial within fifteen days from the date of receipt of notice of the decision, resolution or order of the Court in question.
[4] Division Docket, Volume III, pp. 1477-1523.

> ...
>
> **WHEREFORE**, the foregoing considered, the Petition for Review filed by petitioner JTKC Land, Inc. on 05 April 2019 is hereby **GRANTED**. Accordingly, the Final Assessment Notice (FAN) dated 23 September 2016 and the Final Decision on Disputed Assessment (FDDA) dated 27 February 2019 issued by respondent Commissioner of Internal Revenue are **CANCELLED** and **SET ASIDE**.
>
> Respondent Commissioner of Internal Revenue or any person duly acting on his or her behalf is hereby **ENJOINED** from proceeding with the collection of the taxes arising from the said FAN and FDDA.
>
> **SO ORDERED.**
>
> ...

In the MR, respondent mainly argues that petitioner's transactions, as covered by its Project Investment Agreements (**PIAs**) executed with various "investors", should be subjected to withholding tax (**WT**) and documentary stamp tax (**DST**) pursuant to the provisions of the National Internal Revenue Code (**NIRC**) of 1997, as amended. Respondent justifies the same by considering the said transactions as contracts of sale which constitute a taxable event.

Reiterating the arguments in his or her previous memorandum, respondent avers that petitioner could not rely on the exemption granted by Bureau of Internal Revenue Ruling No. (DA-JV-023) 178-08[5] (**BIR Ruling 178-08**) as it was merely hinged on BIR Ruling No. DA-455-2007[6] (which was claimed to have already been revoked by Revenue Memorandum Circular (**RMC**) No. 55-2010).[7] It is thus maintained that BIR Ruling 178-08 was nullified automatically.

Respondent further argues that RMC No. 55-2010 could not be applied retroactively as the assessment under consideration is for taxable year (**TY**) 2012, or two (2) years after the said RMC was issued. Respondent thus insists that petitioner is liable to pay the deficiency taxes and compromise penalty as reflected in the Final Decision on Disputed Assessment (**FDDA**) and Formal Assessment Notice (**FAN**).

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5 Dated 28 August 2008, Gerodias Suchianco Estrella, BIR Ruling.

6 Dated 17 August 2007, Pacis & Reyes, BIR Ruling.

7 Circularizing Revocation of BIR Rulings Issued to G&W Architects, Engineers and Project Development Consultants Relative to Its "Build-to-Own" Transactions.

Petitioner counters that respondent did not raise compelling reasons or new arguments in his or her MR to warrant the reversal of the assailed Decision. It asserts that the PIAs are neither contracts of sale nor contracts to sell but are investment contracts. To bolster its stand, petitioner states that: (1) the main purpose of the PIAs was to pool funds (from small or minor investors) for the construction of Discovery Primea (the subject condominium project) with an expectation of returns and/or conversion of their investments; (2) the area allocation of the condominium project to each "investors" is merely a return of investment and that there is no realized gain from it that could constitute a taxable event; (3) petitioner offered the PIAs to 19 minor "investors" only and not to the public; (4) an "investor's" non-participation in the structural elements and construction of Discovery Primea is irrelevant in investment undertakings; and, (5) the Court's application of the Howey Test is restrictive as investment contracts are intended to cover a wide range of investment transactions.

As to the supposed prospective application of RMC No. 55-2010, petitioner declares that the said RMC should apply retroactively since the object of the disputed assessment are transactions that took place after it secured BIR Ruling 178-08 and prior to the issuance of the RMC No. 55-2010.

Additionally, petitioner faults respondent for impliedly carrying out the alleged revocation of the BIR Ruling 178-08 and instantly assessing the former with the alleged tax liability without any notice or opportunity for the latter to contest it. As a result, its right to due process was violated.

Lastly, petitioner claims that the FAN and FDDA issued against it are void for being devoid of factual and legal bases. The Details of Discrepancies did not help as they merely stated that the units indicated therein were considered sold without any explanation or discussion as to why the transactions were considered as sale. Thus, petitioner insists that it was not able to protest intelligently on the alleged assessment.

We resolve.

After a thorough and careful review of the parties' arguments, this Court still fails to find compelling grounds to deviate from our earlier ruling. Readily, even at first glance, respondent's MR is a mere rehash of the arguments raised in his or her memorandum that was already passed upon by this Court in the assailed Decision. At any rate, for emphasis, the Court will elaborate on its reasons for upholding the assailed Decision, as will be essayed below.

THE PROJECT INVESTMENT AGREEMENTS (PIAs) ARE NEITHER CONTRACTS OF SALE NOR INVESTMENT CONTRACTS.

Both parties assail the nature of the PIAs wherein respondent contends that these are contracts of sale while petitioner counters that they are investment contracts. However, We already ruled that PIAs are *akin* to contracts to sell.

The distinction between a contract of sale and a contract to sell is well-settled. In a contract of sale, title passes to the vendee upon the delivery of the thing sold; whereas in a contract to sell, by agreement, the ownership is reserved in the vendor and is not to pass until the full payment of the price. In a contract of sale, the vendor has lost and cannot recover ownership until and unless the contract is resolved or rescinded; whereas in a contract to sell, title is retained by the vendor until the full payment of the price.[8]

In the assailed Decision, We have pointed out that petitioner retains ownership of the subject condominium units until the purported "investor's" full payment of the consideration. It is only upon full payment of the latter that petitioner shall transfer the subject units to them and the PIAs shall be terminated accordingly. The relevant portions of the assailed Decision[9] state:

> ...
>
> Evidently, petitioner, through the PIAs, intends to transfer ownership of the subject condominium units to the purported investors with the supposed investments acting as consideration. However, petitioner retains ownership of the units until the full amount of the investment has been paid. This can be seen in the following provisions of the PIAs:

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[8] *Hipolito Agustin, et al. v. Romana De Vera*, G.R. No. 233455, 03 April 2019.
[9] Supra at note 4, pp. 1511-1512; Citations omitted and emphasis in the original text.

...

2. AREA ALLOCATION

...

a. **Upon <u>full compliance</u> by INVESTOR of all of its obligations under this Project Investment Agreement** and upon completion of the Condominium Project, a Deed of Partition and Conveyance shall be executed by DEVELOPER in favor of INVESTOR transferring and conveying all rights and interests in fee simple over the Designated Unit in favor of INVESTOR. **The corresponding Condominium Certificate of Title shall be delivered to INVESTOR**, should it be available at that time. **Unless INVESTOR has remitted the Total Investment Contribution, as defined under Section 3.(a) below, no Deed of Partition and Conveyance shall be executed in favor of the INVESTOR.**

...

6. BREACH/TERMINATION

...

b. This Project Investment Agreement shall be terminated by:

...

5) **The actual delivery of the possession of the Designated Unit to INVESTOR** representing the return of INVESTOR's invested capital, with the accompanying Condominium Certificate of Title.

...

We also cannot subscribe to petitioner's claim that the PIAs are investment contracts. Contrary to petitioner's argument that this Court narrowly applied the Howey test to the PIAs, the Supreme Court in *Power Homes Unlimited Corporation v. Securities and Exchange Commission, et al.*[10] explained that the concept of Howey test[11] was adopted to define investment contracts under Republic Act (**RA**) No. 8799 or "The Securities Regulation Code" (**SRC**). Thus, in Our jurisdiction, to be classified as an investment contract, there must be: (1) an investment of money; (2) in a common enterprise; (3) with expectation of profits; and, (4) primarily from efforts of others. Being a judicial precedent, it serves as a rule for future determination in similar or substantially similar cases[12], such as the instant case.

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[10] G.R. No. 164182, 26 February 2008.

[11] As later used in the 1973 US case of *SEC v. Glenn W. Turner Enterprises, Inc. et al.* (474 F.2d 476, Fed.Sec. L. Rep. P 93, 748).

[12] *Pilipinas Shell Petroleum Corporation v. Commissioner of Customs*, G.R. No. 195876 (Resolution), 19 June 2017.

Using the above parameters, as also already discussed in the assailed Decision[13], the Court observed that petitioner failed to establish the common enterprise among the 19 alleged "investors", to wit:

> ...
>
> Tested against the foregoing parameters, the PIAs herein are clearly not investment contracts. The purported investments were made in consideration of the respective designated condominium units of each investor. Hence, *there was no expectation of profits nor profits arising primarily from the efforts of others*. Moreover, it bears noting that each supposed investor executed a **separate** contract with petitioner, not with each other. Thus, *there was no common enterprise among the investors*. Petitioner did not also present any board resolutions or minutes of meetings that would establish any semblance of participation or control by the supposed investors/condominium unit owners.
>
> ...

Petitioner even went far as to compare the execution of PIAs to the purchase of a share of stock. However, petitioner failed to note that shares of stock offered to the public as investment contracts are duly registered with the Securities and Exchange Commission (**SEC**) in accordance with the SRC as discussed in the case of *Securities and Exchange Commission v. Prosperity.com, Inc.*[14], *viz*:

> ...
>
> **The Securities Regulation Code treats investment contracts as "securities" that have to be registered with the SEC before they can be distributed and sold.** An investment contract is a contract, transaction, or scheme where a person invests his money in a common enterprise and is led to expect profits primarily from the efforts of others.
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> ...
>
> The United States Supreme Court held in *Securities and Exchange Commission v. W.J. Howey Co.* that, for an investment contract to exist, the following elements, referred to as the Howey test must concur: (1) a contract, transaction, or scheme; (2) an investment of money; (3) investment is made in a common enterprise; (4) expectation of profits; and (5) profits arising primarily from the efforts of others. Thus, to sustain the SEC position in this case, PCI's scheme or contract with its buyers must have all these elements.

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[13] Supra at note 4, p. 1513; Emphasis and italics in the original text.

[14] G.R. No. 164197, 25 January 2012; Citations omitted, emphasis supplied and italics in the original text.

> An example that comes to mind would be the long-term commercial papers that large companies, like San Miguel Corporation (SMC), offer to the public for raising funds that it needs for expansion. When an investor buys these papers or securities, he invests his money, together with others, in SMC with an expectation of profits arising from the efforts of those who manage and operate that company. **SMC has to register these commercial papers with the SEC before offering them to investors.**
>
> ...

Applying the foregoing, if the PIAs are indeed no different from shares of stock (treated as investment contract), then petitioner should have initially registered them in the SEC before offering them to the alleged "investors". But as it is, these PIAs were not registered in the SEC henceforth contradicting petitioner's own claim.

THE FORMAL ASSESSMENT NOTICE (FAN) AND THE FINAL DECISION ON DISPUTED ASSESSMENT (FDDA) ARE VALID.

The parties also take an opposing stand as regards the validity of the FAN and the FDDA. Petitioner submits that both failed to expressly state the facts and law on which the assessment is based, thus they are void.

We rule otherwise.

As discussed in the assailed Decision, the FAN and the FDDA substantially informed petitioner of its tax liabilities. The pertinent parts provide:[15]

> ...
>
> In the present case, a perusal of the FAN and the FDDA (that indicated the alleged deficiency WT for TY 2012) will show that both substantially informed petitioner of its tax liabilities. *First*, the FAN and the FDDA were with Details of Discrepancies that provided the basis of the computation of the deficiency tax. *Second*, the Details of Discrepancies indicate clearly that the tax liability arose from the review of petitioner's PIAs. *Lastly*, the unit numbers of the assessed condominium project were placed evidently in the Details of Discrepancies, allowing petitioner to verify the amounts that

[15] Supra at note 4, pp. 1516-1517; Citations omitted and italics in the original text.

respondent gathered by referring to the relevant PIA of the concerned condominium unit.

It is important to note that it was petitioner who gave respondent the PIAs pursuant to a valid LOA and the First and Second Notices, which contain the entire consideration for the pertinent condominium units and the related payment schedules. The payment schedules were thereafter used as basis for the assessment. Thus, contrary to petitioner's assertion, it was clearly apprised of the facts and the law on which the alleged deficiency assessment made against it was based.

...

PETITIONER CAN RELY ON RULING NO. DA-(JV-023) 178-08 (BIR RULING 178-08) OF THE BUREAU OF INTERNAL REVENUE (BIR).

Lastly, respondent's allegation that petitioner cannot rely on BIR Ruling 178-08 deserves scant consideration. As explained in the assailed Decision, We applied the non-retroactivity principle, *viz:*[16]

...

Applying the same principle in the instant case, We can conclude that Ruling 178-08 is a specific interpretative ruling as it was issued by the CIR to address the particular concerns that petitioner had raised. Logically, being a specific interpretative ruling, it binds respondent. Therefore, respondent cannot be allowed to later on take a contrary position where injustice would result to the taxpayer (since equitable estoppel has set in as expressly authorized under Section 246 of the NIRC of 1997, as amended).

In addition, the exceptions under Section 246 of the NIRC of 1997, as amended, are not present here. Petitioner did not deliberately misstate or omit material facts from when it applied for the ruling; the actual facts are not materially different from the facts on which the ruling is based; and, petitioner did not act in bad faith.

Contrary to respondent's contention, there is nothing in RMC No. 55-2010 that states, expressly or impliedly, that Ruling 178-08 is revoked or reversed. The said RMC only revoked expressly the rulings issued to G&W Architects, Engineers and Project Development Consultants, which is not the petitioner in the instant case, as shown by the subject of the said RMC *i.e., Circularizing* ***Revocation of BIR Rulings Issued to G&W Architects, Engineers and Project Development Consultants*** *Relative to Its "Build-to-Own"*

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[16] Supra at note 4, pp. 1521-1522; Citations omitted, emphasis and italics in the original text.

> *Transactions*. As other taxpayers are not at liberty to rely on other taxpayers' ruling, then it is reasonable to say that the revocation of the other taxpayers' ruling should not also affect other taxpayers given the different factual circumstances upon which the revocation or reversal was based. The same is bolstered by the provision of the RMC, which enjoins revenue officials and employees to report similar schemes **for appropriate investigation**. Hence, there is no specific, concrete proof or documentary evidence that would show that Ruling 178-08 was revoked or reversed in TY 2012. As such, it is binding to both petitioner and respondent.
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> Furthermore, even if We consider that the PAN dated 10 April 2015 (issued by RD Amora) as an implied reversal of Ruling 178-08 after the aforementioned appropriate investigation, the same could not be given retroactive application to TY 2012.
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> With the exemption granted by Ruling 178-08, petitioner is not liable to pay the deficiency WT. Consequently, it is also not liable to pay the compromise penalty of ₱125,000.00 arising from its alleged failure to pay the said taxes.
>
> ...

Furthermore, respondent did not proffer any evidence in his or her MR to prove that RMC No. 55-2010 also pertains to the revocation of BIR Ruling 178-08. Thus, petitioner should not be condemned for relying on the exemption granted by the said ruling.

In view of the foregoing circumstances, We find no reason to depart from our earlier ruling.

WHEREFORE, the foregoing premises considered, the "Motion for Reconsideration (to the Decision dated April 26, 2023)" filed by respondent Commissioner of Internal Revenue on 29 May 2023 is hereby **DENIED** for lack of merit.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

I CONCUR:

LANEE S. CUI-DAVID
Associate Justice