REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION
****

SM_RESIDENCES CORP.,
Petitioner,

- versus -

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9395

Members:

DEL ROSARIO, P.J., Chairperson,
UY, and
MINDARO-GRULLA, JJ.

Promulgated:

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RESOLUTION

UY, J.:

For resolution are the following:

1) Respondent's **"MOTION FOR PARTIAL RECONSIDERATION (Re: Decision promulgated 10 April 2019)"** filed on April 26, 2019,[1] with petitioner's **"COMMENT AND OPPOSITION (to the Motion for Partial Reconsideration dated April 26, 2019)"** filed on May 29, 2019;[2] and

2) Petitioner's **"MOTION FOR PARTIAL RECONSIDERATION"** filed on May 16, 2019,[3] without respondent's comment thereto despite due notice.[4]

Both Motions assail this Court's Decision dated April 10, 2019, the dispositive portion of which reads:

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[1] Docket – Vol. II, pp. 1337 to 1342.
[2] Docket – Vol. II, pp. 1364 to 1368.
[3] Docket – Vol. II, pp. 1348 to 1358.
[4] Records Verification dated August 1, 2019 issued by the Judicial Records Division of this Court, Docket – Vol. II, p. 1373.

"**WHEREFORE**, in light of the foregoing considerations, the *Petition for Review* is **PARTIALLY GRANTED.** The deficiency DST, including increments, for TY 2009, in the total amount of ₱46,626.25, is **CANCELLED** and **SET ASIDE**.

Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **₱19,271,999.00**, representing the reduced deficiency income tax and VAT, for TY 2009, inclusive of the twenty-five percent (25%) surcharge, and twenty percent (20%) deficiency interest and delinquency interest imposed under Sections 248(A) and 249(B) and (C), of the NIRC of 1997, as amended, respectively, computed until December 31, 2017, as follows:

	Income Tax	**VAT**	**TOTAL**
Basic Tax Due	₱ 456,899.70	₱4,902,993.42	₱5,359,893.12
Add: 25% Surcharge	114,224.93	1,225,748.36	1,339,937.29
Add: 20% Deficiency Interest from:			
April 16, 2010 to June 30, 2016 *[₱456,899.70 x 20% x 2,268 days /365]*	567,807.41		567,807.41
January 26, 2010 to June 30, 2016 *[₱4,902,993.42 x 20% x 2,348 days /365]*		6,308,070.44	6,308,070.44
Total Amount Due, June 30, 2016[5]	**₱1,138,932.04**	**₱12,436,812.22**	**₱13,575,744.26**
Add: 20% Deficiency Interest from July 1, 2016 to December 31, 2017			
[₱456,899.70 x 20% x 549 days /365]	137,445.44		137,445.44
[₱4,902,993.42 x 20% x 549 days /365]		1,474,927.88	1,474,927.88
Add: 20% Delinquency Interest from July 1, 2016 to December 31, 2017			
[₱1,138,932.04 x 20% x 549 days /365]	342,615.72		342,615.72
[₱12,436,812.22 x 20% x 549 days /365]		3,741,265.70	3,741,265.70
Total Amount Due, December 31, 2017	**₱1,618,993.20**	**₱17,653,005.80**	**₱19,271,999.00**

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[5] Exhibit "P-30", Docket – Vol. II, at pp. 1028 to1029.

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In addition, petitioner is **ORDERED TO PAY** delinquency interest at the rate of twelve percent (12%), on the total unpaid amount as of June 30, 2016 in the amount of **₱13,575,744.26**, as determined above, computed from January 1, 2018 until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997, as amended by RA No. 10963, and as implemented by RR No. 21-2018.

SO ORDERED."

In respondent's *Motion*, the latter contends that his basis in arriving at the amount of ₱909,201,897.62, as the taxable sales of the Sea Residences Project per audit, is the *Schedule of Collections* which formed part of the BIR Records in the instant case. Allegedly, the said *Schedule* is based on the documents gathered by respondent's Revenue Officers (ROs) in conducting the audit/investigation of the deficiency income tax and value-added tax (VAT) assessments against petitioner. Respondent further claims that petitioner's *Schedule of Collections for 2009* is self-serving as the same was prepared by petitioner; and that it was not presented to respondent when the audit/ investigation was still on-going.

In its *Comment/Opposition* to respondent's *Motion*, petitioner avers that the said *Motion* merely reiterated the arguments stated in respondent's *Memorandum* dated February 27, 2018; and that respondent failed to provide a valid ground for the non-admissibility of the *Schedule of Collections* presented by petitioner.

On the other hand, in its *Motion*, petitioner argues that this Court committed: (1) reversible error when it held that respondent properly disallowed petitioner's *Net Operating Loss Carry-Over* (NOLCO) for taxable year 2009; and (2) serious reversible error when it ruled that part of the deficiency VAT assessment may be sustained.

Furthermore, petitioner claims that the deficiency interest under Section 249(B) of the National Internal Revenue Code (NIRC) of 1997 is applicable only to deficiency income tax, estate tax and donor's tax.

THE COURT'S RULING

Both *Motions for Partial Reconsideration* lack merit.

As between the unsubstantiated* Schedule of collections *of respondent, and the certified / verified* Schedule of Collections for 2009 *of petitioner, the latter Schedule prevails.

Respondent alleges that the *Schedule of Collections* he provided is based on the documents gathered by his ROs in conducting the audit/investigation of the deficiency income and VAT assessments issued against petitioner. While the *Schedule of Collections for 2009* of petitioner is self-serving as the same was prepared by petitioner, and that the same was not presented to respondent when the audit/investigation was still on-going.

In effect, respondent is insisting that its *Schedule of Collections* should prevail over the *Schedule of Collections for 2009* of petitioner.

We are not convinced.

In the assailed Decision, We already found that the *Schedule of Collections* provided by respondent is unsubstantiated, *i.e.*, the source of the entries made therein and as to who prepared the same were not disclosed. On the other hand, the *Schedule of Collections for 2009* presented by petitioner was certified by the Tax Manager, Kristine Marie Sy, and AVP-Controller, Gemma Mangaliman, one of petitioner's witnesses,[6] and was also verified by the Independent Certified Public Accountant, as stated in the latter's *Report*.[7] Thus, petitioner's *Schedule* must perforce prevail.

As for the claim of respondent that petitioner's *Schedule* was not presented to him when the audit/investigation was still on-going, suffice it to state that the power of this Court to exercise its appellate jurisdiction does not preclude it from considering evidence that was not presented in the administrative level in the BIR.[8]

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[6] Exhibit "P-33", Docket – Vol. II, pp. 1063 to 1080.
[7] Exhibit "P-12,397", at pp. 4 to 6, and 8 to 11.
[8] *Philippine Airlines, Inc. (PAL) vs. Commissioner of Internal Revenue, etseq.*, G.R. Nos. 206079-80, and 206309, January 17, 2018.

The NOLCO was properly disallowed.

Petitioner contends that nowhere can it be found in Section 34(D)(3) of the NIRC of 1997 that NOLCO can be claimed if it was shown as a separate item of deduction in the income tax return. According to petitioner, this was *only* required when the BIR issued Revenue Regulations (RR) No. 14-2001 as a presentation requirement in order that compliance with the three-year statutory requisite may be effectively monitored by the BIR. With regard to its supposed compliance with the requisite that there was no substantial change in the ownership of petitioner in that not less than 75% in nominal value of its outstanding issued shares or not less than 75% of the paid up capital of petitioner is held by or on behalf of the same persons, petitioner points to Note 7 of its 2009 Audited Financial Statements.

We are not convinced.

Petitioner cannot simply disregard the provisions of RR No. 14-2001. Revenue Regulations or administrative issuances have the force of law and are entitled to great weight.[9] They benefit from the same presumption of validity and constitutionality enjoyed by statutes.[10] Such being the case, the provisions of RR No. 14-2001, having the force of law, must be considered and applied, particularly in the determination of whether the subject NOLCO must be disallowed.

Furthermore, We cannot subscribe to petitioner's argument that Note 7 of its 2009 Audited Financial Statements proves that there was no substantial change in the ownership of petitioner in that not less than 75% in nominal value of its outstanding issued shares or not less than 75% of the paid up capital of petitioner is held by or on behalf of the same persons. This must be so because the said 2009 Audited Financial Statements was not offered to prove such fact.

It must be remembered that the said documentary evidence was offered in this wise:[11]

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[9] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.
[10] *Chevron Phils., Inc. vs. Bases Conversion and Development Authority, et al.*, G.R. No. 173863, September 15, 2010.
[11] Docket – Vol. II, p. 919.

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EXHIBIT	DESCRIPTION	PURPOSE OF OFFER OF EVIDENCE
Exhibit "P-32" Exhibit "P-32-A"	Audited Financial Statements of SM Residences Corp. for 2009 and Note 7© of the Notes to Financial Statements	**To show that SMDC and the Petitioner agreed to share the gross proceeds from the sale of units on a sharing method of 85% and 15%, respectively.** *(Emphasis supplied)*

It is well-settled that evidence submitted for one purpose may not be considered for any other purpose.[12] Thus, We cannot consider petitioner's 2009 Audited Financial Statements, including Note 7 thereof, as evidence to prove that there was no substantial change in the ownership of petitioner for purposes of claiming NOLCO for TY 2009.

In any event, even granting that petitioner's 2009 Audited Financial Statements may be used as evidence other than the purpose for which it was offered, petitioner still failed to substantiate by documentary evidence, the items of gross income and allowable deductions for taxable year (TY) 2008, on the basis of which, the net operating loss from the said year was computed and carried over to TY 2009.

Needless to state, in cases filed before this Court, which are litigated *de novo*, party-litigants must prove <u>every minute aspect</u> of their case.[13] Furthermore, deductions for income tax purposes partake the nature of tax exemptions and are strictly construed against the taxpayer, who must prove by convincing evidence that he is entitled to the deduction claimed.[14]

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[12] *Uniwide Sales Realty and Resources Corporation vs. Titan-Ikeda Construction and Development*, G.R. No. 126619, December 20, 2006.

[13] *Edison (Bataan) Cogeneration Corporation vs. Commissioner of Internal Revenue, etseq.*, G.R. Nos. 201665 and 201668, August 30, 2017; *Commissioner of Internal Revenue vs. Philippine National Bank*, G.R. No. 180290, September 29, 2014; *Commissioner of Internal Revenue vs. United Salvage and Towage (Phils.), Inc.*, G.R. No. 197515, July 2, 2014; *Dizon vs. Court of Tax Appeals, et al.*, G.R. No. 140944, April 30, 2008; *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue,* G.R. No. 145526, March 16, 2007; and *Commissioner of Internal Revenue vs. Manila Mining Corporation,* G.R. No. 153204, August 31, 2005.

[14] *H. Tambunting Pawnshop, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 173373, July 29, 2013.

Correspondingly, We maintain the disallowance of the NOLCO claimed by petitioner in the amount of ₱1,344,416.00 for TY 2009, for being unsupported.

Petitioner and SM_Development Corporation are liable to the VAT for their respective share.

It is the contention of petitioner that being a co-venturer, it should not be held liable to VAT on the sale of units to buyers, since the joint venture itself is the one liable for the payment of VAT thereof.

Petitioner is gravely mistaken.

Indeed, a joint venture is a form of partnership and should be governed by the law of partnerships.[15] As such, it can be treated as having a juridical personality separate and distinct from that of each of the partners.[16]

However, the rule is that whether the parties to a particular contract have thereby established among themselves a joint venture or some other relation depends upon their actual intention which is determined in accordance with the rules governing the interpretation and construction of contracts.[17]

To reiterate, in the *Memorandum of Agreement* dated November 14, 2008,[18] petitioner, as the "LANDOWNER", and SM_Development Corporation, as the "DEVELOPER", agreed as follows:

> "WHEREAS, the LANDOWNER[19] is the owner of a parcel of land with an area of EIGHTEEN THOUSAND FOUR HUNDRED EIGHTY square meter (18,480 sq. m.), more or less, located at Lot 4 Road Lot 11 corner Road

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[15] *Philex Mining Corporation vs. Commissioner of Internal Revenue*, G.R. No. 148187, April 16, 2008, citing *Aurbach vs. Sanitary Wares Manufacturing Corporation*, G.R. No. 75875, December 15, 1989.
[16] Refer to Article 1768, Civil Code of the Philippines (Republic Act No. 386)
[17] *Aurbach, et al. vs. Sanitary Wares Manufacturing Corporation, et al., etseq.*, G.R. Nos. 75875, 75951, and 75975-76, December 15, 1989.
[18] Exhibit "P-31", Docket – Vol. II, at pp. 1033 to1039.
[19] Referring to petitioner.

Lot 23, SM Mall of Asia Complex, CBP 1-A, Pasay City, Metro Manila and presently covered by Transfer Certificate of Title No, 149281 of the Register of Deeds for Pasay City (PROPERTY)...

WHEREAS, the DEVELOPER is a corporation engaged in the development of real estate properties;

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I. DEVELOPMENT

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2. The DEVELOPER shall develop the PROPERTY into a commercial/residential condominium development project (Project) whose design shall be in accordance with government regulations. The Project shall be registered and known as "Sea Residences."

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II. OBLIGATIONS OF THE LANDOWNER

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4. xxx. In addition, the LANDOWNER shall, through a Board Resolution, designate the DEVELOPER as the signatory to the reservation agreements, contracts to sell, deeds of absolute sale and other relevant documents for the sale of the individual condominium units at the Sea Residences to the buyers thereof.

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V. SHARING STRUCTURE

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2. The LANDOWNER and DEVELOPER agree that the each shall be entitled to the following percentage shares based on the proceeds of the sale of the units:

LANDOWNER	Fifteen Percent (15%)
DEVELOPER	Eighty-five Percent (85%)
Total:	One Hundred Percent (100%)

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VI. MARKETING AND SELLING OF UNITS

1. The DEVELOPER is hereby designated as the exclusive Marketing and Sales Group for the Project. The Sales Administration shall be exclusively undertaken by the DEVELOPER.

2. The DEVELOPER shall be entitled to a Marketing Fee of Twelve percent (12%) based on the Total Contract Price as stated in the contract to sell or other similar document executed with the buyer of a unit.

3. The selling price and payment terms for the condominium units shall be subject to the mutual agreement of the LANDOWNER and DEVELOPER. The selling price and payment terms may be revised or modified upon mutual agreement of the LANDOWNER and DEVELOPER.

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XI. MORTGAGE AND OTHER DISPOSITION

1. It is further agreed that neither party shall mortgage, transfer, encumber or otherwise dispose the PROPERTY or any portion thereof, or any of their respective rights and interests in the PROPERTY or the Project to any person, entity, bank or financial institution. However, both the LANDOWNER and DEVELOPER shall have the right to assign, in whole or in part, any of its rights, interests and obligations granted under this MOA to any of the corporations within its group of companies, subject to the prior written consent of the LANDOWNER or the DEVELOPER, as the case may be.

xxx xxx xxx."

A careful reading of the foregoing provisions would readily reveal that the parties thereto never intended that a joint venture, which has separate and distinct personality, was formed, by virtue of the same *Memorandum of Agreement* dated November 14, 2008. This is so because of the following indications: (1) petitioner designated SM_Development Corporation as the signatory to the

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reservation agreements, etc.; (2) the said *Memorandum of Agreement* designated SM_Development Corporation as the exclusive Marketing and Sales Group of the Project; and (3) the selling price and payment terms for the condominium units are still subject to the mutual agreement of petitioner and SM_Development Corporation. If it is true that the said parties intended the supposed joint venture to have a separate and distinct personality from them, the said acts should have been performed by the said business organization.

Moreover, the fact that petitioner and SM_Development Corporation are prohibited to mortgage, transfer, encumber or otherwise dispose the subject property or any portion thereof, or any of their rights and interests in the same property or the Project to any person, entity, bank or financial institution, simply shows that the supposed joint venture is not the owner, and thus, not the seller, of the said property or the Project. As already intimated in the assailed Decision, only the sellers of the property are subject to the VAT.

If the terms of a contract are clear and leave no doubt the intention of the contracting parties, the literal meaning of its stipulations shall control.[20] In other words, absent any ambiguity, the provision on the face of the contract will be read as it is written and treated as the binding law of the parties to the contract.[21] When the language of the contract is explicit leaving no doubt as to the intention of the drafters thereof, the courts may not read into it any other intention that would contradict its plain import.[22]

Moreover, if the real intention of petitioner and SM_Development Corporation is to treat their business relations as a joint venture, having a separate and distinct personality from them, the filing of the pertinent Quarterly VAT Returns and the payment of the corresponding VAT, should have been made under the name of the said joint venture. However, the fact that SM_Development Corporation is the entity that made the payment, plainly shows that it was never their intention to treat their business relations as such.

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[20] Article 1370, Civil Code of the Philippines (Republic Act No. 386).

[21] Refer to *The Wellex Group, Inc. vs. U-Land Airlines, Co. Ltd.*, G.R. No. 167519, January 14, 2015.

[22] *Buenaventura vs. Metropolitan Bank and Trust Company*, G.R. No. 167082, August 3, 2016, citing *The Insular Life Assurance Company, Ltd. vs. Court of Appeals, et al.*, G.R. No. 126850, April 28, 2004.

Clearly, petitioner's reasoning that it is merely a "co-venturer" not to be held liable to VAT, is without merit.

Correspondingly, Our ruling to the effect that for each sale of the units under the Sea Residences Project, both petitioner and SM_Development Corporation are considered the sellers thereof, and thus, each of them must be held liable to the VAT for their respective share, stands.

The imposition of deficiency interest covers deficiency VAT assessments.

Petitioner is of the view that the deficiency interest under Section 249(B) of the NIRC of 1997 is only applicable to deficiency income tax, estate tax and donor's tax, and not deficiency VAT.

We disagree.

Section 247(a) of the NIRC of 1997 provides as follows:

> "TITLE X – STATUTORY OFFENSES AND PENALTIES
>
> **CHAPTER I – ADDITIONS TO THE TAX**
>
> SEC. 247. *General Provisions.* —
>
> (a) **The additions to the tax or deficiency tax prescribed in this Chapter shall apply to <u>all taxes</u>, fees and charges in this Code.** The amount so added to the tax shall be collected at the same time, in the same manner and as part of the tax." *(Emphasis and underscoring supplied)*

Based on the foregoing, the additions to the tax or deficiency tax, as prescribed in Chapter I, Title X, of the NIRC of 1997, shall apply to *"all taxes"* in this Code. The word *"all"* means *"(t)he whole collectively considered; the complete totality"*.[23] Correspondingly,

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[23] Philippine Law Dictionary – Third Edition ©1988, (citing *Jacinto vs. Jacinto*, 52 OG 2589), p. 53.

when the law states *"all taxes"*, it perforce includes VAT or any deficiency VAT. As a corollary, since the deficiency interest under Section 249(B) of the same Code is one of the said additions in the said Chapter I, such deficiency interest also applies to the deficiency VAT, as in the instant case.

WHEREFORE, in light of the foregoing considerations, respondent's *Motion for Partial Reconsideration* and petitioner's *Motion for Partial Reconsideration* are both **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

(On Leave)
CIELITO N. MINDARO-GRULLA
Associate Justice