REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA *EB* NO. 1630** (CTA Case No. 8944)
	Present:
-*versus*-	**DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
BAHAY BONDS 2 SPECIAL PURPOSE TRUST, administered by Land Bank of the Philippines through its Trust Banking Group, *Respondent.*	Promulgated: MAY 03 2018 3:32 p.m.

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DECISION

MANAHAN, J.:

This resolves the *Petition for Review*[1] filed by the Commissioner of Internal Revenue (CIR) on April 26, 2017 pursuant to Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals (RRCTA), as amended,[2], which seeks the reversal of the November 25, 2016 *Decision*[3] and March 23, 2017 *Resolution,*[4] promulgated by the First Division of the Court of Tax Appeals (CTA) in CTA Case No. 8944, entitled "*Bahay Bonds 2 Special Purpose Trust, administered by Land Bank of the Philippines through its Trust Banking Group vs.*

[1] *Rollo*, CTA EB No. 1630, pp. 10-24.
[2] Rules of the Court of Tax Appeals – approved by the Supreme Court on November 22, 2005 (A.M. No. 05-11-07-CTA); Amendments to the 2005 Rules of Court of the Court of Tax Appeals – approved by the Supreme Court on September 16, 2008 (A.M. No. 05-11-07-CTA; and Additional Amendments to the 2005 Revised Rules of the Court of Tax Appeals – approved by the Supreme Court on February 10, 2009 (A.M. No. 05-11-07-CTA).
[3] *Rollo*, pp. 25-43.
[4] *Rollo*, pp. 44-49.

Commissioner of Internal Revenue," and the issuance of a new decision instead.

The dispositive portions of the assailed Decision and Resolution read:

Decision[5] dated November 25, 2016:

> "**WHEREFORE**, premises considered, petitioner's Petition for Review is hereby **GRANTED**. Respondent is **ORDERED** to **REFUND** or to **ISSUE A TAX CREDIT CERTIFICATE** to petitioner Bahay Bonds 2 special Purpose Trust, administered by the Land Bank of the Philippines through its Trust Banking Group, in the aggregate amount of Php7,560,000.00 representing erroneously paid final withholding tax covering the period from November 2012 to December 2014. Petitioner is **ORDERED** to **REMIT** to the holders of Bahay Bonds the final withholding taxes respectively due them.
>
> **SO ORDERED**."

Resolution[6] dated March 23, 2017:

> "**WHEREFORE**, premises considered, respondent's Motion for Reconsideration is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

The Facts

Petitioner is the duly appointed Commissioner of Internal Revenue (CIR) vested under appropriate laws with the authority to carry out the functions, duties and responsibilities of said office, including, *inter alia*, to act upon and approve claims for refund or tax credit.[7]

Respondent Bahay Bonds 2 Special Purpose Trust (SPT) is a special purpose trust formed under Philippine laws, with special purpose vehicle status under Republic Act (RA) No. 9627 otherwise known as the Securitization Act of 2004, which is duly registered and qualified as such by the Bangko Sentral ng Pilipinas under the General Banking Law and

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[5] *Supra*, Note 3.
[6] *Supra*, Note 4.
[7] *Rollo*, Decision dated November 25, 2016, p. 26.

administered by the Land Bank of the Philippines, a government-owned and controlled financial institution duly authorized to engage in trust business through its Trust Banking Group, with address at 21/F Landbank Plaza, 1598 M.H. Del Pilar corner Dr. J. Quintos Sts., Malate Manila. It is a registered taxpayer of the Bureau of Internal Revenue (BIR), Revenue Region No. 6-Manila, Revenue District Office (RDO) No. 33.[8]

The National Home Mortgage Finance Corporation (NHMFC), a corporation duly created by virtue of Presidential Decree (PD) No. 1267, has provided financing for various low-cost housing projects and acquired various mortgage-loan accounts of buyers of houses and lots from their originators.[9]

The Board of Directors of NHMFC approved the securitization of up to Six Hundred Million Pesos (php600,000,000.00) worth of receivables from long-term secured low cost and socialized housing loans to be undertaken pursuant to RA 9627.[10]

In accordance with the approved Securitization Plan, a select pool of long term secured residential loans which were required by NHMFC in accordance with its Unified Home Loan Program (UHLP), were transferred on a "true sale" basis, as defined in RA No. 9627, to respondent as the SPT at book value, and on a "without recourse" basis.[11]

In order to fund the purchase of the residential loans, respondent issued Asset-Backed Security (ABS).[12] Collections from the residential loans held by the respondent are the main source of funds to meet its obligations to make payments on the Senior Subordinated Notes and to pay all its expenses. Each residential loan account sold by NHMFC to respondent under the Securitization Plan has a principal loan amount of not exceeding Four Hundred Thousand Pesos (Php400,000.00).[13]

As stated in the Securitization Plan, the Home Guaranty Corporation (HGC) issued a cash flow guarantee for each

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[8] *Rollo*, Decision dated November 25, 2016, pp. 25-26.
[9] *Id.* at 26.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 27.
[13] *Id.*

residential loan sold by NHMFC to the SPT, covering the full outstanding principal amount of all defaulted residential loans and up to eleven percent (11%) per annum of the interest amount due or the actual interest rate stipulated in the residential loan agreement, whichever is lower. The HGC guaranty may be invoked when the size of the subordinated notes has been reduced to zero due to absorption of losses from defaulted residential loans. The payment from HGC shall be in the form of an (a) Initial Cash Payment equivalent to up to twelve (12) monthly installments to cover the preceding unpaid fourteen (14) monthly amortizations by borrowers and unpaid monthly amortizations from the processing period required to receive the claims; and (b) HGC Amortizing Bonds for the remaining scheduled monthly installments covering the outstanding principal and guaranteed interest for each of the defaulted residential loans.[14]

On July 9, 2012, NHMFC filed a letter request with the BIR seeking confirmation of its opinion that:[15]

1. The interest earned by the holders of the Senior and Subordinated Notes including NHMFC, being income from a low cost and socialized housing-related ABS, is exempt from income and withholding tax under Section 33 of RA No. 9267, and;

2. All secondary trades and subsequent transfers of the Senior and Subordinated Notes shall be exempt from documentary stamp tax (DST) and value-added tax (VAT), or any other taxes imposed in lieu thereof.

On August 3, 2012, the CIR issued BIR Ruling No. 516-2012 addressed to NHMFC opining that the subject ABS is deemed a "deposit substitute" as defined in Section 22(Y) of the National Internal Revenue Code (NIRC) of 1997, as amended, and interest income derived therefrom shall be subject to the following:[16]

a) 20% final withholding tax imposed under Section 25(B)(1) and 25(A)(2) of the NIRC of 1997, if the bondholder is an individual citizen or a resident alien, respectively;

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[14] *Rollo,* Decision, p. 27.
[15] *Id.* at 28.
[16] *Id.*

b) 25% tax imposed under Section 25(B) of the NIRC of 1997, as amended, if the bondholder is a non-resident alien individual not engaged in trade or business within the Philippines;

c) 20% final tax imposed under Section 27(D)(1) and 28(A)(7)(a) of the NIRC of 1997, as amended if the bondholders are domestic and resident foreign corporations, respectively;

d) 32% final withholding tax under Section 28(B)(1) of the NIRC of 1997, as amended if the bondholder is a non-resident foreign corporation; and

e) Such other rate that may be imposed under the appropriate tax treaty to which the Philippines is a signatory.

On August 14, 2012, NHMFC filed a request for reconsideration with the BIR arguing that: (i) the ABS is not a deposit substitute; and (ii) tax exemption privileges are extended to ABS issued pursuant to Secularization Act of 2004, as further guaranteed by the HGC, are applicable.[17]

Pending the ruling of the BIR on NHMFC's request for reconsideration, petitioner through the Development Bank of the Philippines (DBP) as the appointed Trustee for the Bondholders, paid the BIR the mandated final withholding taxes quarterly starting from November 2012 to May 2014 amounting to Php7,560,000.00.[18]

On November 25, 2013, NHMFC submitted to the BIR a complete list of the long term secured residential loans acquired by NHMFC.[19]

In a letter dated October 29, 2014, NHMFC requested for a refund of the final withholding taxes (FWT) it paid in the amount of Php7,560,000.00 and reiterated its stand that the Bahay Bonds were issued as ABS under RA 9267. At the time

[17] *Rollo*, Decision dated November 25, 2016, pp. 28-29.
[18] *Id.* at 29.
[19] *Id.*

of the filing of the claim for refund, the BIR has yet to rule on the previous request for reconsideration of NHMFC.[20]

On December 10, 2014 respondent filed the Petition for Review. After the trial, judgment was rendered under the assailed Decision dated November 25, 2016 granting respondent's petition and ordering herein petitioner to pay the amount of Php7,560,000.00 to respondent representing erroneously paid final withholding taxes covering the period from November 2012 to December 2014.

Petitioner moved for the reconsideration of said assailed decision but was denied by the Court in Division under Resolution dated March 23, 2017.

On April 26, 2017, petitioner elevated the case on appeal by filing a petition for review.[21] This Court gave due course[22] on the said petition after evaluating the same and the comment[23] submitted by the respondent. Both parties were directed to submit their respective Memoranda.

Petitioner submitted his Memorandum[24] on August 18, 2017 while respondent submitted its Memorandum [25] on September 14, 2017 after its motion[26] for additional time to file said memorandum was granted.[27] Thus, the court declared the instant case deemed submitted for decision.[28]

The Issue

Whether or not respondent is entitled to claim for refund the alleged erroneously collected FWT covering the period from November 2012 to May 2014 amounting to Php7,560,000.00.

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[20] *Rollo*, Decision dated November 25, 2016, p. 29.
[21] *Supra.*, Note 1.
[22] *Rollo*, Resolution dated July 7, 2017.
[23] *Id.*, Comment, pp. 59-65.
[24] *Id.* at 70-81.
[25] *Id.* at 87-98.
[26] *Id.* at 82-84.
[27] *Id.*, Minute Resolution dated September 7, 2017, p. 86.
[28] *Id.*, Resolution dated October 4, 2017, pp. 100-101.

Arguments of Petitioner[29]

Petitioner interposed the following arguments in the instant petition:

1. Respondent is not entitled to refund as it has no legal personality to claim the same;

2. Assuming that respondent has legal personality to claim for refund, it failed to prove that it is entitled to a claim for refund; and

3. The Bahay Bonds, as ABS, are deposit substitutes within the ambit of Section 22(Y) of the NIRC of 1997, as amended.

Arguments of Respondent[30]

In response to the allegations in the subject petition, respondent insists that the interest earned by the holders of the Senior and Subordinated Notes including NHMFC, being income from a low cost and socialized housing-related ABS, is exempt from income and withholding tax under Section 33[31] of RA No. 9267.

Further, the Bahay Bonds 2 being under guaranty of the HGC, the interest of and yields of said ABS are exempt from all taxation as provided under Section 15(a)[32] of RA No. 8763, otherwise known as the Home Guaranty Corporation Act of 2000.

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[29] *Supra.*, Note 30.
[30] *Supra.*, Note 29.
[31] SEC. 33. *Incentives for Securitization.* — In order to promote the securitization of the mortgage and housing-related receivables of the government housing agencies as may be determined by the Housing and Urban Development Coordinating Council (HUDCC) and the Department of Finance (DOF), the yield or income of the investor from any low-cost or socialized housing-related ABS shall be exempt from income tax.
[32] Section 15. *Guaranty Coverage and Composition of Guaranteed Accounts.* -
(a) The Corporation shall guaranty payments of the balance outstanding and due on the guaranteed principal obligation, plus interest and yields thereon up to eleven percent (11%) per ten percent (10%) per annum for low-cost housing packages; nine and one-half percent (9.5%) per annum for medium-cost housing packages; and eight and one-half percent (8.5%) per annum for open housing packages;

Ruling of the Court *En Banc*

A close scrutiny of the Answer[33] filed by the herein petitioner as respondent under CTA Case No. 8944 reveals that the petitioner never questioned the legal personality of the herein respondent in its claim for refund of said erroneously paid FWT. Below are the special and affirmative defenses raised by herein petitioner in the said pleading, to wit:

> 7. Petitioner's alleged claim for refund is subject to administrative investigation/examination by the Bureau of Internal Revenue....
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> xxx xxx
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> 10. ... Petitioner must file its administrative and judicial claims for refund or issuance of tax credit certificate within two (2) years from the date of payment of the tax.
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> 11. The amount of Seven Million Five Hundred Sixty Thousand pesos (Php7,560,000.00) being claimed by petitioner allegedly arising from final withholding tax it paid starting December 31, 2012 is not properly documented.
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> 12. In the foregoing case, it should be noted that nowhere in the petition did petitioner aver that it complied with the required submission of supporting documents to justify its claim for refund.
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> 13. Moreover, the Bahay Bonds of NHMFC are deemed to be "deposit substitutes" as defined in Section 22(Y) of the Tax Code of 1997, ...
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> 14. Since the object of the issuance is to obtain the required government funding, the issuance and subsequent distribution (exchange and trading) of debts instruments and securities in the secondary market to other market participants, specifically, the investors, is in itself a public borrowing of the government. The financial assets (i.e. debt instruments and securities) in the hands of the investors represent claim to future cash for which the borrowing entity, at maturity date, must have to pay.
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> xxx xxx

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[33] Docket, Vol. I, CTA Case No. 8944, pp. 80-86.

> 16. Thus, the mere issuance of government debt instruments and securities is deemed as falling within the coverage of "deposit substitutes" irrespective of the number of lenders at the time of origination. Accordingly since government debt instruments and securities are not exempt from taxes, interest income derived therefrom shall be subject to ....
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> xxx xxx
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> 20. In sum, petitioner must present clear and convincing evidence to merit a tax refund. The taxpayer bears the burden of establishing the factual and legal basis of its claim for refund.

The foregoing arguments were substantially reiterated in the Memorandum[34] submitted by the herein petitioner after the latter rested its case and submitted the case for decision.

Nowhere in the said pleadings did herein petitioner raise the issue of the incomplete list and details of the long-term secured residential loans subject of the Bahay Bonds as well as the collaterals on loans not exceeding four hundred thousand pesos (Php400,000.00).[35]

It is only after the decision of the Court in Division which was adverse to herein petitioner did he change his theory of the case as well as his arguments.

Petitioner should be aware that he is not allowed to change his theory of the case on appeal. In the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.),*[36] the Supreme Court ruled that a party may not change his theory of the case as stated in his Answer, to wit:

> It is already well-settled in this jurisdiction that a party may not change his theory of the case on appeal. Such a rule has been expressly adopted in Rule 44, Section 15 of the 1997 Rules of Civil Procedure, which provides -
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> > SEC. 15. Questions that may be raised on appeal. - Whether or not the appellant has filed a motion for new trial in the court below, he may include in his assignment of errors any question of

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[34] Docket, Vol. II, CTA Case No. 8944, pp. 932-939.
[35] *Rollo,* Petition for Review, p. 16; Memorandum, p. 75.
[36] G.R. No. 159593 dated October 12, 2006.

> law or fact that has been raised in the court below and which is within the issues framed by the parties.
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> Thus, in *Carantes v. Court of Appeals,* this Court emphasized that -
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> > The settled rule is that **defenses not pleaded in the answer may not be raised for the first time on appeal.** A party cannot, on appeal, change fundamentally the nature of the issue in the case. When a party deliberately adopts a certain theory and the case is decided upon that theory in the court below, he will not be permitted to change the same on appeal, because to permit him to do so would be unfair to the adverse party.
>
> In the more recent case of *Mon v. Court of Appeals,* this Court again pronounced that, in this jurisdiction, the settled rule is that a party cannot change his theory of the case or his cause of action on appeal. It affirms that "courts of justice have no jurisdiction or power to decide a question not in issue." Thus, a judgment that goes beyond the issues and purports to adjudicate something on which the court did not hear the parties, is not only irregular but also extrajudicial and invalid. The rule rests on the fundamental tenets of fair play. (*Emphasis supplied*)

Thus, this Court has no jurisdiction to take cognizance of this newly raised argument which directly attacks the legal personality of the respondent.

As to petitioner's argument that the Bahay Bonds are deemed deposit substitutes in the parlance of Section 22(Y) of the 1997 NIRC, as amended, the assailed Decision thoroughly discussed and explained it already that they are not deposit substitutes.

To recapitulate the findings of the Court in Division, the respondent is a special purpose trust (SPT) or a special purpose entity (SPE) that issued the Bahay Bonds pursuant to Securities and Exchange Commission (SEC)-approved Securitization Plan, hence, not to be considered as deposit substitutes consistent with Sections 30 and 31 of Republic Act No. 9267 otherwise known as The Securitization Act of 2004 which provide that:

> SEC. 30. *Non-Classification of SPE as a Bank, Quasi-Bank or Financial Intermediary.* — **The SPE, created pursuant to a Plan, shall not be classified as** a bank, am

> quasi-bank or **financial intermediary under the provisions of** the New Central Bank Act, the General Banking Law and the **National Internal Revenue Code of 1997**, and shall not be subject to the gross receipts tax (GRT) or any other tax imposed in lieu thereof.
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> SEC. 31. *Securities not to be Categorized as Deposit Substitutes.* — **The ABS issued by an SPE pursuant to the Plan approved by the Commission shall not be considered as deposit substitutes under the laws mentioned in Section 30 hereof**: *Provided, however,* That for purposes of taxation, the yield from the ABS shall be subject to a twenty percent (20%) final withholding tax, except those held by tax-exempt investors. (*Emphasis supplied*)

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit. The November 25, 2016 *Decision*[37] and March 23, 2017 *Resolution*[38] of the CTA First Division in CTA Case No. 8944, are hereby **AFFIRMED**.

SO ORDERED.

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

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[37] *Supra*, Note 3.
[38] *Supra*, Note 4.

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
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