REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ANNEX " A "

FIRST DIVISION

****

PHILIPPINE NATIONAL BANK,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7130

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:
SEP 16 2008, 9:25 AM

x - x

DECISION

BAUTISTA, *J.*:

For decision is the *Petition for Review* filed by Philippine National Bank on January 21, 2005, seeking refund of the amount of **EIGHT HUNDRED SIXTY-FIVE THOUSAND SEVEN HUNDRED THIRTY PESOS AND 26/100 (P865,730.26)**, allegedly representing erroneous payment of six percent (6%) capital gains tax, instead of five percent (5%) creditable withholding tax arising from the *Dacion en Pago* of properties by Guadalupe Realty Corporation.

Petitioner is a domestic corporation organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal business address at the PNB Financial Center, President Diosdado Macapagal Blvd., Pasay City.[1] On the other hand, respondent is the duly appointed Commissioner of Internal Revenue who is vested with authority to administer and enforce national internal revenue laws, including, *inter alia*, the power to

[1] Par. 1, Joint Stipulation of Facts and Issues, *Rollo*, pp. 71-72.

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grant claims for refund of any internal revenue taxes erroneously or excessively paid, assessed or collected. He may be served with summons and other legal processes at his office at the BIR National Office Building, BIR Road, Diliman, Quezon City.[2]

Guadalupe Realty Corporation (GRC) had an original loans payable to petitioner in the amount of P68 million, which went up to P83 million due to dollar component.[3] In the middle part of 1997, GRC failed to continue its loan payments due to the economic crisis. Thus, on January 6, 2003, petitioner and GRC entered into a *Dacion En Pago* Agreement[4], where GRC settled its outstanding obligation of P86,573,025.00 by transferring to petitioner properties mortgaged to it. The properties subject of the *Dacion En Pago* consisted of three (3) parcels of land with improvements and eight (8) condominium units described as follows:[5]

	UNIT	**AREA**
Transfer Certificate of Title No. 76036		667 sqm.
Transfer Certificate of Title No. 76041		662 sqm.
Transfer Certificate of Title No. 76039		653 sqm.
Condominium Certificate of Title No. C-386	No. 206	221.70 sqm.
Condominium Certificate of Title No. C-388	No. 302	187.85 sqm.
Condominium Certificate of Title No. C-397	No. 405	187.85 sqm.
Condominium Certificate of Title No. C-400	No. 502	187.85 sqm.
Condominium Certificate of Title No. C-408	No. 604	221.70 sqm.
Condominium Certificate of Title No. C-412	No. PH2	187.85 sqm.
Condominium Certificate of Title No. C-413	No. PH3	221.70 sqm.
Condominium Certificate of Title No. C-1640	No. PH1	654.91 sqm.

[2] Par. 2, Joint Stipulation of Facts and Issues, *Rollo*, p. 72.
[3] TSN, October 25, 2005, pp. 9-10.
[4] Pars. 7-9,Petition for Review, *Rollo*, pp. 5-7; Exhibit "A", *Rollo*, pp. 128-133.
[5] Exhibit "A", *Rollo*, pp. 132-133.

Likewise, GRC and petitioner stipulated that taxes, fees, and expenses to be incurred in connection with the transaction such as, but not limited to, capital gains tax, documentary stamp tax, transfer tax, registration fees, and other expenses shall be paid by petitioner.[6]

In compliance with the Agreement, petitioner sought the assistance of Revenue District Office No. 82 (RDO No. 82) for the computation of the corresponding taxes relative to the transaction.[7] Using the outstanding obligation of GRC to petitioner in the amount of P86,573,025.67 as tax base, RDO No. 82 computed petitioner's capital gains tax at P5,194,381.54 and documentary stamp tax at P1,298,610.00.

On January 24, 2003, petitioner filed its Capital Gains Tax Return (CGTR) and Documentary Stamp Tax Return (DSTR); and paid the corresponding taxes.[8] Having settled its tax dues, petitioner was issued a Certificate Authorizing Registration by the Bureau of Internal Revenue (BIR) on July 28, 2003.[9]

Sometime in 2004, petitioner received a letter from the lawyer of GRC informing the former of an assessment against GRC for Value-added Tax (VAT). The letter further reminded petitioner to comply with its obligation to pay all taxes arising from the *Dacion en Pago* Agreement.[10] In response to the letter, petitioner settled the VAT deficiency of P7,870,275.06 on January 21, 2003.[11]

In the process of settling the VAT deficiency, petitioner reviewed the computation sheet[12] of its capital gains and documentary stamp tax liabilities that was provided by RDO No. 82. Petitioner realized that the BIR, based on the latter's computation, made an improper classification of the properties subject of the *Dacion en Pago* Agreement as capital assets, instead of ordinary assets as recognized in the books of GRC and based on the nature of its use. Petitioner argued that as ordinary assets, it is only required to withhold

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[6] Exhibit "A-3", *Rollo*, p. 128.
[7] Exhibit "L", *Rollo*, p. 157; TSN, January 26, 2006, pp. 10-11.
[8] Exhibits "C", "D", "E", and "F", *Rollo*, pp. 147,148,149, and 151, respectively.
[9] Exhibit "G", *Rollo*, p. 152..
[10] TSN, January 26, 2006, p. 15.
[11] Exhibits "J" and "K", *Rollo*, pp. 155-156; TSN, January 26, 2007, p. 15.
[12] Exhibit "L", *Rollo*, p. 157.

five percent (5%) creditable withholding tax based on the consideration of the *Dacion* or fair market value of the property, whichever is higher.[13] Clearly, petitioner erroneously filed a CGTR and paid 6% withholding tax rate. At the rate of 5% withholding tax, petitioner should have paid only P4,328,651.28 not P5,194,381.54. This resulted in an overpayment of P865,730.26.[14]

Hence, on January 19, 2005, petitioner filed with the BIR a claim for tax refund, representing the alleged excess payment of P865,730.26.[15]

On January 21, 2005, petitioner filed this *Petition for Review* inasmuch as the statutory period of two years mandated by Sections 204(C) and 229 of the National Internal Revenue Code (NIRC) of 1997 for tax refund claim was due to prescribe on January 23, 2005.

In his *Answer*[16] filed on March 28, 2005, respondent asserted the following Special and Affirmative defenses:

> "4. Petitioner's alleged claim for refund is subject to administrative investigation/examination by the respondent;
>
> 5. The amount of Php 865,730.26 being claimed by the petitioner as allegedly representing erroneously remitted/paid tax on the *dacion,* conveyance or transfer of real properties not considered as capital assets for the year 2003 was not properly documented.
>
> 6. Petitioner must show that it has complied with the provisions of Section 204 (C) in relation to Section 229, both of the 1997 Tax Code.
>
> 7. Furthermore, in an action for refund the burden of proof is on the taxpayer to establish its right to refund and failure to sustain the burden is fatal to the claim for refund/credit. This is so because exemptions from taxation are highly disfavored in law and he who claims exemption must be able to justify his claim by the clearest grant of organic or statutory law. An exemption from common burden cannot be permitted to exist upon vague implications (Asiatic Petroleum Co. {P.I.} v. Llanes, 49 Phil. 466 cited in Collector of Internal Revenue v. Manila Jockey Club, Inc. 98 Phil 670);
>
> 9. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation."

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[13] Sec. 2.57.2 (J)(B) of Revenue Regulations 2-98.
[14] Par. 15, Petition for Review, *Rollo*, p. 9.
[15] Exhibit "B", *Rollo*, pp. 134-135.
[16] *Rollo*, pp. 49-50.

During the hearing of the case, petitioner submitted various documentary and testamentary evidence, such as GRC's Articles of Incorporation from the Securities and Exchange Commission (SEC) and Certificate of Registration and License to Sell from the Housing and Land Use Regulatory Board (HLURB), to establish that GRC is a corporation primarily engaged in realty business.[17] Respondent, on the other hand, waived his right to present evidence during the hearing on August 2, 2007.[18]

The case was submitted for decision on October 8, 2007, taking into consideration petitioner's Memorandum filed on October 3, 2007, sans respondent's Memorandum.

The issues[19] for resolution as stipulated by the parties are as follows:

"1. Whether or not the filing of the administrative claim for refund and the Petition for Review were both within the two-year prescriptive period as required by law.

2. Whether the real properties subject of the tax are capital assets or ordinary assets.

3. Whether or not the transferor or the conveyor of the real properties is an entity habitually engaged in real estate business.

4. Whether or not the Petitioner paid or remitted to the BIR the amount of taxes withheld representing 6% of the selling price.

5. Whether or not the payment or remittance of the 6% final withholding tax on the transfer or conveyance of real properties is erroneous.

6. Whether or not the Petitioner has the right to claim for the refund or the issuance of the tax credit certificate.

7. Whether or not the Petitioner is entitled to the refund or the issuance of tax credit certificate for the amount of Php865,730.26."

Pertinent to the issue of prescriptive period for filing refund claim are Sections 204 and 229 of the NIRC of 1997, which are hereunder quoted for ready reference, to wit:

"**SEC. 204.** *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* — The Commissioner may —

xxx xxx xxx

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[17] Exhibits "M", "H", and "I", *Rollo,* pp. 158-186, 153, and 154, respectively.
[18] TSN, August 2, 2007, p. 3.
[19] Joint Stipulation of Facts and Issues, *Rollo*, pp. 73-74.

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> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty**: xxx"

"**SEC. 229.** *Recovery of Tax Erroneously or Illegally Collected.* — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: xxx." (*Emphasis supplied*)

Since it made its payment on January 24, 2003,[20] petitioner had until January 23, 2005 to file its claims for refund before the Commissioner and before this Court. A review of the records shows that the letter[21] claim for refund dated January 17, 2005 was received by respondent on January 19, 2005. Thereafter, the *Petition for Review* of petitioner was filed on January 21, 2005. Hence, the Court finds petitioner to have filed both its administrative and judicial claims for refund within the prescriptive period.

The second, third and fifth issues all seek to address the issue of whether or not the properties subject of the *Dacion en Pago* are capital assets. Being interrelated, these three issues shall be discussed together.

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[20] Exhibits "D" and "F", *Rollo*, pp. 148 and 151.
[21] Exhibit "B", *Rollo*, pp. 134-135.

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Petitioner cites Revenue Regulations 7-2003 in support of its claim that the properties subject of the *Dacion en Pago* are ordinary assets not capital assets, which states in part:[22]

> "SECTION 3. Guidelines in Determining Whether a Particular Real Property is a Capital Asset or Ordinary Asset. -
>
> a. *Taxpayers engaged in real estate business.* - Real property shall be classified with respect to taxpayers engaged in real estate business as follows:
>
> xxx xxx xxx
>
> 2. *Real Estate Developer.* – **All real properties acquired by the real estate developer**, whether developed or underdeveloped as of the time of acquisition, **and all real properties which are held by the real estate developer primarily for sale** or for lease to customers in the ordinary course of his trade or business or which would be properly included in the inventory of taxpayer if on hand at the close of the taxable year and **all real properties used in the trade or business, whether in the form of land, building or other improvements, shall be considered as ordinary assets**.
>
> xxx xxx xxx
>
> 4. *Taxpayers habitually engaged in the real estate business.* – **All real properties acquired in the course of trade or business by a taxpayer habitually engaged in the sale of real estate shall be considered as ordinary assets. Registration with the HLURB or HUDCC as a real estate dealer or developer shall be sufficient for a taxpayer to be considered as habitually engaged in the sale of real estate.** If the taxpayer is not registered with the HLURB or HUDCC as a real estate dealer or developer, he/it may nevertheless be deemed to be engaged in the real estate business through the establishment of substantial relevant evidence (such as consummation during the preceding year of at least six (6) taxable real estate sale transactions, regardless of amount; registration as habitually engaged in real estate business with the Local Government Unit of the Bureau of Internal Revenue, etc.)
>
> **A property purchased for future use in business, even though this purpose is later thwarted by circumstances beyond taxpayer's control, does not lose its character as ordinary asset. Nor does a mere discontinuance of the active use of the property change its character previously established as a business property.**" (*Emphasis supplied*)

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[22] Par. 6.13, Petitioner's Memorandum, *Rollo*, pp. 229-230.

To substantiate its claim that the *dacioned* real properties were ordinary assets and not capital assets of GRC, petitioner submitted GRC's list of inventory[23] of properties normally held for sale. According to Mr. Luis Cañete, GRC's external auditor, the *dacioned* properties were part of this inventory of properties.[24]

In addition, petitioner cites Section 2 of the same Revenue Regulation to convince this Court that GRC is an entity engaged in real estate, which states:[25]

> "SECTION 2. Definition of Terms. – For purposes of these Regulations, the following terms shall be defined as follows:
>
> xxx xxx xxx
>
> d. *Real estate dealer* shall refer to any person engaged in the business of buying and selling or exchanging real properties on his own account as a principal and holding himself out as a full or part-time dealer in real estate.
>
> e. *Real estate developer* shall refer to any person engaged in the business of developing real properties into subdivision, or building houses on subdivided lots, or constructing residential or commercial units, townhouses and other similar units for his own account and offering them for sale or lease.
>
> xxx xxx xxx
>
> g. *Taxpayers engaged in the real estate business* shall refer collectively to real estate dealers, real estate developers, and/or real estate lessors. Conversely, the term *'taxpayers not engaged in the real estate business'* shall refer to persons other than real estate dealers, real estate developers and/or real estate lessors. A taxpayer whose primary purpose of engaging in business, or whose Articles of Incorporation states that its primary purpose is to engage in the real estate business shall be deemed to be engaged in the real estate business for purposes of these Regulations."

Petitioner likewise presented GRC's Articles of Incorporation, Certificate of Registration and License to Sell issued by HLURB, and Mayor's Permit. GRC's Articles of Incorporation declares its primary purpose as:

> "To purchase or otherwise acquire, own, hold, use, occupy, improve, develop, mortgage, let on lease, take on lease, sell, convey and in any manner deal in

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[23] Exhibit "O-1", *Rollo*, p. 189.
[24] TSN, October 5, 2006, pp. 31-32.
[25] Par. 6.19, Petitioner's Memorandum, *Rollo*, pp. 232- 233.

> and with real estate, buildings and other improvements, hereditaments, easements and appurtenances of every kind and nature in connection therewith, wheresoever situated, or any estate or interest therein of any nature or description, to the fullest extent permitted by law, without however engaging in the subdivision business."[26]

The Certificate of Registration and License to Sell from HLURB corroborate petitioner's allegation, the pertinent portions of which are hereunder quoted:

HLURB CERTIFICATE OF REGISTRATION No. 05276[27]

> "Be it known:
>
> THAT BUENAVENTURA CONDOMINIUMS project covered by DP No. 07-03-062 dated October 21, 1993 and located at Guadalupe, Cebu City with an area of 0.2565 has. has been REGISTERED pursuant to Section 4 of PD 957 as well as the rules and regulations issued pursuant thereto.
>
> xxx xxx xxx
>
> AND THAT its owner/developer GUADALUPE REALTY CORP. takes on the joint and solidary responsibility of complying with all the rules and regulations issued pursuant to the issuance of the CERTIFICATE."

HLURB LICENSE TO SELL No. 05272[28]

> "BE IT KNOWN THAT this License to Sell is hereby issued for the sale of lots/units within BUENAVENTURA CONDOMINIUMS located at Guadalupe, Cebu City pursuant to Section 5 of PD 957 as well as the rules and regulations issued pursuant thereto.
>
> AND THAT its owner/developer GUADALUPE REALTY CORP. shall be obliged to do and perform the following: xxx"

Its Mayor's Permit, likewise confirms that GRC is an entity engaged in real estate business.[29]

From the above pieces of evidence presented by petitioner, the Court is inclined to agree with petitioner.

Section 39(A)(1) of the NIRC of 1997 provides that:

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[26] Exhibit "M-4", *Rollo*, p. 159.
[27] Exhibit "H", *Rollo*, p. 153.
[28] Exhibit "I", *Rollo*, p. 154.
[29] Exhibit "P", *Rollo*, p. 190.

"**SEC. 39.** *Capital Gains and Losses.* —

(A) Definitions. — As used in this Title —

1. Capital Assets. — The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Subsection (F) of Section 34; or real property used in trade or business of the taxpayer."

In the case of **Tomas Calasanz, *et al.* vs. Commissioner of Internal Revenue, *et al.***[30], the Supreme Court defined "capital assets", as described in the NIRC of 1997, as one of exclusion, to wit:

"The statutory definition of capital assets is negative in nature. If the asset is not among the exceptions, it is a capital asset; conversely, assets falling within the exceptions are ordinary assets. And necessarily, any gain resulting from the sale or exchange of an asset is a capital gain or an ordinary gain depending on the kind of asset involved in the transaction."

Based on the said rule of exclusion, Section 39 of the NIRC of 1997 enumerates what are considered as ordinary assets, namely:

1. stocks in trade or inventoriable items;
2. property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;
3. property used in trade or business of the taxpayer of a character which is subject to the allowance for depreciation provided in subsection (F) of Section 34; and
4. real property used in trade or business.

Of the four, petitioner considers the *dacioned* properties falling under the category of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business".

The following elements must concur so that an asset or property can qualify as ordinary asset under the second classification: (1) property must be held primarily for sale;

[30] G.R. No. L-26284, October 8, 1986.

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(2) property must be held for sale to customers; and (3) property must be sold in the ordinary course of taxpayer's trade or business.[31]

"Primary" is defined as "first, principal, chief, leading, first in order of time, or development, or in intention".[32] While, the word "sale" is used by the statute to include kindred transactions of exchange.[33]

A "customer", on the other hand, is a buyer, purchaser, consumer or patron.[34] Meanwhile, the term "ordinary course of business" was explained in the case of **Commissioner of Internal Revenue vs. Magsaysay Lines**[35] as:

> **"the term 'carrying on business' does not mean the performance of a single disconnected act, but means conducting, prosecuting and continuing business by performing progressively all the acts normally incident thereof; while 'doing business' conveys the idea of business being done, not from time to time, but all the time.** [J. Aranas, UPDATED NATIONAL INTERNAL REVENUE CODE (WITH ANNOTATIONS), p. 608-9 (1988)]. 'Course of business' is what is usually done in the management of trade or business. [*Idmi v. Weeks & Russel*, 99 So. 761, 764, 135 Miss. 65, cited in Words & Phrases, Vol. 10, (1984)].
>
> What is clear therefore, based on the aforecited jurisprudence, is that **'course of business' or 'doing business' connotes regularity of activity**. xxx" (*Emphasis supplied*)

Therefore, where the transaction of sale is an isolated one, it cannot be deemed as done in the ordinary course of business and shall be deemed as sale of a capital asset.

In **Commissioner of Internal Revenue vs. Court of Appeals, *et al.***[36], the High Tribunal further elucidated that:

> "To engage' is to embark on a business or to employ oneself therein. The word 'engaged' connotes more than a single act or a single transaction; it involves some continuity of action. **'To engage in business' is uniformly construed as signifying an employment or occupation which occupies one's time, attention, and labor for the purpose of a livelihood or profit.** The expressions 'engage in business,' 'carrying on business' or 'doing business' do not have different meanings, but separately or connectedly convey the idea of **progression, continuity, or sustained activity**." (*Emphasis supplied*)

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[31] Tax Law and Jurisprudence, Justices Jose C. Vitug and Ernesto D. Acosta, 2nd Edition, pp. 147-148.
[32] Black's Law Dictionary, Sixth Edition, p. 1190.
[33] Tax Law and Jurisprudence, Vitug and Acosta, 2nd Edition, p. 148, citing *Gruver vs. Commissioner*, 142 F. (2d) 363.
[34] Black's Law Dictionary, Sixth Edition, p. 386.
[35] July 28, 2006, G.R. No. 146984.
[36] G.R. No. 104151, March 10, 2005.

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Upon review of the records, this Court is convinced that the activities of GRC are similar to those done by one engaged in the business of selling real estate.

The HLURB Certificate of Registration and License to Sell alone already bring GRC within the definition of one engaged in real estate business. This was further affirmed by Revenue Regulation 2-98 (RR 2-98), which is herein reproduced for easy reference:

> "**SECTION 2.57.2. Income Payment Subject to Creditable Withholding Tax and Rates Prescribed Thereon.** – Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:
>
> xxx xxx xxx
>
> (J) *Gross selling price or total amount of consideration or its equivalent paid to the seller/owner for the sale, exchange or transfer of.* - **Real property, other than capital assets, held by** an individual, **corporation**, estate, trust, trust fund or pension fund and the **seller/transferor is habitually engaged in the real estate business** in accordance with the following schedule -

Those which are exempt from withholding tax at source as prescribed in Sec. 2.57.5 of these regulations	Exempt
With a selling price of five hundred thousand pesos (P500,000) or less	1.5%
With a selling price of more than five hundred thousand pesos (P500,000) but not more than two million pesos (P2,000,000)	3.0%
With a selling price of more than two million pesos (P2,000,000)	5.0%

> **A seller/transferor must show proof or registration with HLURB or HUDCC to be considered as habitually engaged in the real estate business.**" (*Emphasis supplied*)

Likewise, GRC's Articles of Incorporation and Mayor's Permit bolster this claim of petitioner that GRC is habitually engaged in realty business.

The fact of GRC being engaged in trade or business has been duly established by documentary evidence presented by petitioner. Even the sales activities of petitioner show "progression", "continuity" and "regularity". Its inventory of properties held for sale is reproduced below:

Sold In	Unit No.	Unit Owners	Total Area	Inventory	Inventory	PH
1995	201	Dr. Philip S. Chua	221.70			
1996	202	Mr. Vicente Tinsay	187.85			
1997	203	Mrs. Caroline Cagang	221.70			
1996	204	Mrs. Siti Zubaidah Bte Haji Adnin	221.70			
1998	205	Archt. Jose Mari Cañizares	187.85			
	206	Guadalupe Realty Corporation	221.70	221.70		
1996	301	Dr. Potenciano Larrazable Jr.	221.70			
	302	Guadalupe Realty Corporation	187.85		187.85	
1995	303	Dr. Potenciano Larrazable Jr.	221.70			
1996	304	Mr. Jugo Streegan	221.70			
	305	Guadalupe Realty Corporation	187.85		187.85	
1996	306	Marine Accommodation	221.70			
1995	401	Mr. Wilfredo Suarez	221.70			
1995	402	Mr. Manuel Lim	187.85			
1995	403	Mr. & Mrs. John Kiener	221.70			
1996	404	Mr. George Gillott	221.70			
	405	Guadalupe Realty Corporation	187.85		187.85	
	406	Guadalupe Realty Corporation	221.70	221.70		
	501	Guadalupe Realty Corporation	221.70	221.70		
	502	Guadalupe Realty Corporation	187.85		187.85	
	503	Guadalupe Realty Corporation	221.70	221.70		
	504	Guadalupe Realty Corporation	221.70	221.70		
	505	Guadalupe Realty Corporation	187.85		187.85	
	506	Guadalupe Realty Corporation	221.70	221.70		
1995	601	JNJ Realty Corporation	221.70			
1998	602	JNJ Realty Corporation	187.85			
1995	603	Mr. & Mrs. Ceferino Go	221.70			
	604	Guadalupe Realty Corporation	221.70	221.70		
	605	Guadalupe Realty Corporation	187.85		187.85	
	606	Guadalupe Realty Corporation	221.70	221.70		
	701	Guadalupe Realty Corporation	654.91			654.91
	702	Guadalupe Realty Corporation	187.85			187.85
	703	Guadalupe Realty Corporation	221.70			221.70
	704	Guadalupe Realty Corporation	221.70			221.70
	705	Guadalupe Realty Corporation	187.85			187.85
	706	Guadalupe Realty Corporation	523.16			523.16
				1,773.60	1,727.10	1,997.17

The table indicates that from the period of 1995 up to 1998, there was a "sustained activity" of selling units or real properties by GRC.

The element that the properties should be held primarily for sale is proved by the list of inventory of properties of GRC submitted by petitioner. The same was explained by petitioner's Credit Management Division Account Officer in her uncontroverted testimony[37], to wit:

"xxx xxx xxx

ATTY. LEE:
Q. You said parcels of land and condominium units, how many are these parcels of land and condominium units?

MS. CABRERA:
A. Subject of the Dacion en Pago was three (3) parcels of land on which the condominium stands and the eight (8) unsold residential condominium units.

ATTY. LEE:
Q. Based on your understanding of the transactions, what are the nature of these properties in relation to the Dacion en Pago and in relation also to the business of the petitioner?

MS. CABRERA:
A. **Even before the execution of the Dacion en Pago, the Guadalupe Realty Corporation has presented these properties to us as properties that were for sale. In fact, in their 2002 Financial Statements, these properties, the subject of the Dacion en Pago, were mentioned as part of the inventory of the business.**" (*Emphasis supplied*)

The testimony of the Independent Auditor of GRC further attests that:[38]

"xxx xxx xxx

ATTY. LEE:
Q. What is your basis in saying that the documents you identified in this Annex A of the Dacion en Pago are found in your inventory? What is you basis in saying while conferring it a while ago as part of the real estate for sale?

Mr. CAÑETE
A. The condominium units that were covered in the Dacion en Pago are part of the real estate for sale inventory. **Well, we have a working paper that keeps track of the status of all of the condominium units which are already presented earlier that specify the unit number and the area and square meters. The Dacion en Pago also specify the units that are dacioned, and the unit number and the area. These two (2) information correspond, so we conclude that the condominium units which were subject of the Dacion en Pago were really included in the real estate inventory for sale.**" (*Emphasis supplied*)

[37] TSN, October 25, 2005, pp. 15-16.
[38] TSN, October 5, 2006, pp. 31-32.

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The second element states that the property must be sold to "customers". Mr. Cañete's testimony states that the inventory is a "working paper" that keeps track of the status of units. A perusal of the list shows a list of owners, the unit type, and areas. Under the column "unit owners", there are names that can only be concluded as buyers, purchasers, consumers or patrons. It likewise shows the year when the units were sold to these "customers".

The testimony of Ms. Cabrera explains that the inventory is a list of properties that are normally held for sale pursuant to GRC's realty business. Mr. Cañete on the other hand, accounts that the properties subject of the *Dacion en Pago* Agreement were part of this list. The foregoing proves that the *dacioned* properties were held primarily for sale to customers by GRC in the ordinary course of its trade or business as real estate developer/dealer.

Considering that the properties subject of the *Dacion en Pago* Agreement meet the elements of those primarily sold to customers in the ordinary course of business; the logical conclusion is that the payment of the 6% capital gains tax is in excess of the 5% withholding tax required by RR 2-98.

Anent the fourth issue of whether or not petitioner paid or remitted to the BIR the amount of taxes withheld representing 6% of the selling price, this Court again rules in the affirmative.

In a contract of *Dacion en Pago*, what is deemed as the purchase price is the amount of the debt or mortgage; in this case, the amount of P86,573,025.67. In the case of **Vda. De Jayme, *et al.* vs. Court of Appeals, *et al.***[39], the High Court said that:

> "Dacion en pago is the delivery and transmission of ownership of a thing by the debtor to the creditor as an accepted equivalent of the performance of the obligation. **It is a special mode of payment where the debtor offers another thing to the creditor who accepts it as equivalent of payment of an outstanding debt. The undertaking really partakes in one sense of the nature of sale, that is, the creditor is really buying the thing or property of the debtor, payment for which is to be charged against the debtor's debt.** As

[39] G.R. No. 128669, October 4, 2002.

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Court of Tax Appeals

such, the essential elements of a contract of sale, namely, consent, object certain, and cause or consideration must be present. **In its modern concept, what actually takes place in dacion en pago is an objective novation of the obligation where the thing offered as an accepted equivalent of the performance of an obligation is considered as the object of the contract of sale, while the debt is considered as the purchase price.** In any case, common consent is an essential prerequisite, be it sale or novation, to have the effect of totally extinguishing the debt or obligation." (*Emphasis supplied*)

Petitioner submitted to the Court its CGTR[40], together with the corresponding bank deposit slip[41] proving payment, and its Certificate Authorizing Registration[42]; all showing that 6% of the selling price of P86,573,025.67, or P5,194,381.54 was duly settled by petitioner.

Going now to the sixth and seventh issue pertaining to the right of petitioner to claim for tax refund, the Court also rules in petitioner's favor.

It has been an established rule in taxation that a withholding agent is not an ordinary agent, he is an agent of both the State and the taxpayer. With respect to the collection and/or withholding of the tax, he is the Government's agent. In regard to the filing of the necessary Income Tax Return and the payment of the tax to the Government, he is the agent of the taxpayer. The withholding agent, therefore, is held personally liable for the tax he is duty bound to withhold.[43] The authority of filing the necessary income tax and payment thereof necessarily implies the authority of the withholding agent to file a claim for refund and to bring an action in recovery of that claim.

Petitioner was able to sufficiently establish its personality to file this case and that no double claim for the same excess tax payment was made. Petitioner proved these by presenting a Certification issued by BIR Revenue District No. 82 of Cebu City, stating that GRC did not file any administrative claim for refund worth P865,730.26 relative to the *Dacion* Agreement. It also showed that no future claim for refund shall be filed by GRC

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[40] Exhibit "C", *Rollo*, p.147.
[41] Exhibit "D", *Rollo*, p. 148.
[42] Exhibit "G", *Rollo*, p. 152.
[43] *Filipinas Synthetic Fiber Corp. vs. Court of Appeals, et al.*, G.R. Nos. 118498 and 124377, October 12, 1999.

considering that it is already a dissolved corporation beginning March 31, 2003 when GRC sought the cancellation of its registration.[44]

The above discussion has adequately ascertained the fact of erroneous payment of capital gain tax of 6% instead of the withholding tax of 5%. It is thus, unfair for the Government to deny this valid claim of petitioner as it has the duty to act fairly at all times.

WHEREFORE, the instant *Petition for Review* is hereby **GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** to petitioner the amount of **EIGHT HUNDRED SIXTY-FIVE THOUSAND SEVEN HUNDRED THIRTY PESOS AND 26/100 (P865,730.26)**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division

[44] Exhibits "R" and "S", *Rollo*, pp. 193 and 194, respectively.