Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 1449** (CTA Case Nos. 8358, 8426 & 8489)
-versus-	Present: DEL ROSARIO, *P.J.*, CASTAÑEDA, JR., UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.*
G & W ARCHITECTS, ENGINEERS & PROJECT DEVELOPMENT CONSULTANTS CO., Respondent.	Promulgated: AUG 29 2018 9:21 a.m.

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AMENDED DECISION

CASANOVA, J.:

Before this Court is respondent's Motion for Reconsideration (Of the Decision dated 21 March 2018)[1], filed on April 16, 2018, with petitioner's Comment/Opposition (To Respondent's Motion for Reconsideration)[2], filed on June 11, 2018.

Respondent seeks reconsideration of the Court's Decision[3] promulgated on March 21, 2018, the dispositive portion of which reads as follows:

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[1] En Banc Rollo, pp. 218-252.
[2] Ibid., pp. 256-259.
[3] Id., pp. 193-206.

> "**WHEREFORE**, premises considered, the Petition for Review is hereby **GRANTED**. The Assailed Decision dated November 3, 2015 and Assailed Resolution dated April 7, 2016 of the CTA-First Division in the consolidated cases of CTA Case Nos. 8358, 8426 and 8489, are hereby **REVERSED** and **SET ASIDE**. Respondent is ordered to pay the assessed deficiency expanded withholding tax (EWT) and documentary stamp tax for the periods 2004, July 10, 2004 and June 2004, in the amounts of P277,458,117.19, P132,852,679.05, and P149,414,228.66, respectively, or in the total amount of P559,725,024.90, plus accrued 25% surcharge for late payment and 20% interest per annum until fully paid.
>
> **SO ORDERED**."

Respondent assigns the following errors allegedly committed by the Court En Banc, to wit:

1. The Court seriously erred in disregarding conclusive documentary evidence that respondent NEVER owned the land or condominium units and, therefore, it is legally incapable of transferring ownership of such real properties; and,

2. The Court seriously erred in penalizing respondent the withholding tax liability despite the fact that the management contract is not a contract of sale.

In support of the afore-cited first assigned error, respondent argues the following: that the title to the land and the condominium units was never registered under its name, thus, there can be no sale or transfer of title from respondent to the unit owners; that the Management Contract clearly indicates that respondent only rendered professional services to the unit owners; that the provisions on respondent's right to terminate the Management Contract in the event of client's default and the right to acquire or identify a substitute to acquire all the rights and interests of the defaulting clients are not conclusive proof that respondent is the registered owner of the parcels of land or condominium units; that Section 11.03 of the Management Contract does not prevent the unit owners to transfer or assign their rights.

As regards to the second assign error, respondent contends that there is no law providing that the liability of the withholding agent is passed on to the payee if the former fails to withhold tax; that there is no law passing on the un-withheld taxes to a person who supposedly participates in a fraudulent transaction in a Civil Case; and, that the imposition of the withholding tax liability upon respondent as a form of penalty or damages is beyond the jurisdiction of this Court.

Petitioner, on the other hand, mainly moves to adopt the factual findings and legal conclusions of the majority members of the Court En Banc in its Decision dated March 21, 2018, as well as the Concurring Opinion dated March 21, 2018 of Hon. Presiding Justice Roman G. Del Rosario.

Upon taking a second hard look at the factual circumstances and pertinent provisions of the Management Contracts, the Court En Banc finds merit in respondent's Motion for Reconsideration.

In interpreting a contract, Articles 1370 and 1374 of the New Civil Code is instructive:

> "Art. 1370. If the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control.
>
> If the words appear to be contrary to the evident intention of the parties, the latter shall prevail over the former.
>
> xxx xxx xxx
>
> Art. 1374. The various stipulations of a contract shall be interpreted together, attributing to the doubtful ones that sense which may result from all of them taken jointly."

In relation thereto, the Rules on Evidence states that:

> "RULE 130
>
> xxx xxx xxx
>
> Sec. 11. Instrument construed so as to give effect to all provisions. — In the construction of an instrument

> where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

Likewise, jurisprudence provides that, except when the terms are ambiguous, the literal meaning of a contract's stipulation is controlling.[4] The Court cannot enforce the contract contrary to its express terms, otherwise, it would trample the right of the parties to stipulate the terms of their agreement.

Here, petitioner maintains that there is a sale transaction from respondent to the unit owners. Thus, respondent should be held liable to the deficiency expanded withholding tax and documentary stamp tax. On the other hand, respondent tenaciously insists that it merely acts as a Project Manager of the subject Condominium Projects.

Thus, to effectively resolve the issue at hand, the Court deems it proper to look into once again the terms and conditions of the subject Contracts to Project Management and Execute the Construction of Condominium[5] ("Management Contracts") in order to ascertain the actual relationship between respondent and the unit owners.

Records show that, as "Project Manager" of Penhurst Parkplace Condominium, respondent is expected to do the following acts[6] on behalf and for the collective benefit of its clients, to wit:

> "(a) To prequalify and select the construction management engineers, general building contractor, specialty engineering contractors and in general, to act as overall coordinator and manager of the Project;
>
> (b) During the initial stages of the Project, and all throughout the construction period, to set up and implement a system for the billing and collection of any and all amounts required from the Clients, including without limitation, the Construction Funding and the sums to cover Miscellaneous Expenses.

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[4] Henson vs. Intermediate Appellate Court, G. R. No. 72456, February 19, 1987.

[5] Exhibit "K" (CTA Case No. 8358); Exhibit "L" (CTA Case No. 8358); Exhibit "D" (CTA Case No. 8426); Exhibit "D-1" (CTA Case No. 8426); Exhibit "D-2" (CTA Case No. 8426); Exhibit "D-3" (CTA Case No. 8426); Exhibit "D" (CTA Case No. 8489); Exhibit "D-1" (CTA Case No. 8489); and Exhibit "D-2" (CTA Case No. 8489).

[6] Section 3.03, Contract to Manage and Execute the Construction of Penhurst Parkplace Condominium between respondent and Mr. Pek Eng Lim, Exhibit "K" (CTA Case No. 8358).

(c) To do such other acts as may be necessary and desirable for the development of the Project.

(d) The Client hereby irrevocably names, appoints and constitutes G & W as its true and lawful attorney-in-fact for the execution of acts properly within the knowledge and expertise of G & W and to do the following acts in its stead:

(i) To prepare or cause the preparation of all the necessary documents for the purchase of the Subject Land and the subsequent registration thereof in the name of the Trustee for the benefit of the Clients;

(ii) To secure or cause to be secured all the necessary permits and/or licenses which may be required or necessary for the Project, including those registration requirements from, or required by, the Housing and Land Use Regulatory Board (HLURB) and the proper local government unit;

(iii) To file the application for, and secure the issuance of, the HLURB development permits;

(iv) To cause to be secured the building permit and any and all other permits from the local government unit which are necessary for the development and construction of the Project;

(v) To negotiate and enter into contracts as may be required for the development of the Project with such construction management engineers, general building contractors, specialty engineering contractors and other parties as deemed fit and necessary by G & W;

(vi) To prepare or cause the preparation of any and all contracts for execution by and between G & W for and in behalf of the collective benefit of the Clients and such construction management engineers, general building contractors, specialty engineering contractors and other parties as deemed fit and necessary by G & W;

(vii) To execute or cause the timely execution of the Master Deed;

(viii) To apply for the issuance of individual Condominium Certificates of Title in the name of the Trustee, with the proper Registry of Deeds subject always to Section 6;

(ix) To prepare or cause the preparation of the necessary contracts for the conveyance by the Trustee of the Condominium Certificates of Title over the units comprising the Project to the Clients and the Condominium Certificate of Title over the Common Areas to the Condominium Corporation;

(x) To enter into, endorse, sign or execute any and all other contracts, documents, registration statements and other instruments necessary for the expeditious development of the Project;

(xi) To instruct the Trustee to issue payments from the Trust to third parties contracted by G & W to perform and/or complete tasks for the Project;

(xii) To appear, answer, plead and defend in all actions, suits and proceedings whatsoever in which Client(s) and/or G & W is named party defendant, jointly or severally, for causes of action arising from the Project.

provided, that any and all necessary contracts and/or documents arising out of or as a consequence of the foregoing acts while executed by and in the name of G & W shall be understood to be for and in behalf of the Clients. In fulfilling its above-delegated

> responsibilities, G & W may engage the services of legal counsel, which may be the counsel of G & W.
>
> The Client hereby gives and grants unto G & W, as the Client's attorney-in-fact, full power and authority to do and perform every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as the Client could do if personally present. The Client likewise ratifies and confirms all that G & W shall lawfully do or cause to be done in connection with the exercise of the powers stated above.
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> x x x x x x x x x".

On the other hand, as "Project Manager and Trustee" of the Kensington Place Condominium, Hampston Place Condominium and Grand Hampston Place, respondent, likewise, assumes the aforementioned responsibilities and, is tasked to purchase and hold title to the subject land in trust, *viz.*:

> "Sec. 3.03 G & W as Project Manager and Trustee
>
> x x x x x x x x x
>
> (c) To purchase and hold title to the Subject Land as trustee for and in behalf of the Clients, who shall be trustors and beneficiaries of the same and in this connection to accordingly pay the purchase price of the Subject Land, including such taxes and expenses as may be lawfully assessed, and to register the Subject Land and to register the Subject Land in its name, for and in behalf of the Clients. The Subject land shall be beneficially owned by the Clients who shall be both the trustors and beneficiaries in respect of the same in common and in proportion to their respective interests in the Project."[7]

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[7] Section 3 (3.03) Contract to Manage and Execute the Construction of Kensington Place Condominium between Ellen S. Francisco and respondent, Exhibit "L" (CTA Case No. 8358).

A plain reading of the foregoing terms of the Management Contracts would show that nowhere it mentioned that respondent would be the lawful owner of the subject Condominium Projects, as well as of the parcels of land where the said Condominium Projects were built. All that has been stated is that respondent would merely act for and in behalf of its clients whenever it exercises its obligations as project manager, trustee and attorney-in-fact of its clients.

Further, Section 3 (3.01) of the subject Management Contracts is clear and unequivocal. It plainly states that respondent "does not assume the role of developer of the Project and hence, has not made and is not making any representation that it is, in its own capacity, selling the units comprising the Project". Thus, as remuneration for the services rendered, respondent received "an amount equivalent to Four Percent (4%) of the Construction Funding as and by way of Professional Fee"[8].

Basic is the rule that a contract is the law between the parties, and the stipulations therein — provided that they are not contrary to law, morals, good customs, public order or public policy — shall be binding as between the parties. In contractual relations, the law allows the parties much leeway and considers their agreement to be the law between them. This is because 'courts cannot follow one every step of his life and extricate him from bad bargains x x x relieve him from one-sided contracts, or annul the effects of foolish acts.' The courts are obliged to give effect to the agreement and enforce the contract to the letter.[9]

In these cases, respondent and its clients voluntarily and freely executed the subject Contracts, thus, the terms contained therein are the law between them, until and unless declared null and void by the competent Court. Even petitioner's witness, Atty. Ma. Luisa Pangan, Director of the Appeals/Review Group of the HLURB, was aware of such as shown in her testimony in the hearing held on February 20, 2014. Pertinent portions of which are herein quoted for ready reference:

"JUSTICE DEL ROSARIO

The question is simple, since there is an existing contract, it would seem that the HLURB has no jurisdiction to declare that

[8] Section 3.06 of the subject Contracts to Project Management and Execute Construction of Condominium.

[9] National Power Corporation v. Premier Shipping Lines, G.R. Nos. 179103 & 180209, September 17, 2009, 600 SCRA 153, 175-176.

contract invalid, null and void, it is not within your competence or authority to invoke the jurisdiction of the competent Court to have certain contracts be declared null and void?

ATTY. PANGAN

We usually state without prejudice to the determination of the competent Court regarding the contract, your Honors.

JUSTICE DEL ROSARIO

As a lawyer, is it correct to say that a contract remains valid and existing until otherwise declared as null and void by a competent Court?

ATTY. PANGAN

Yes, Your Honors."[10]

Considering that the Contracts under scrutiny is so explicit and unambiguous that it does not justify any attempt to read into it any supposed intention of the parties, the Court En Banc is more inclined to give weight to the written agreements/contracts of the parties. Thus, we quote with approval the following ruling of the Court in Division, to wit:

> "The true intention of the parties is clearly expressed in the contracts presented in this case. If there are other terms agreed to by the parties, respondent (petitioner herein) could have at least taken the testimony under oath of petitioner's (respondent's herein) clients to determine their true intention in entering into the Contract of Management and Execution of the Condominium projects or of third parties as may be relevant or material to the assessment. Instead, and as already found by the Court, respondent chose to resort to presumptions and heavily relied on the HLURB Decision and on the nullification of the BIR Rulings, **which may have supported the legal basis of the assessment, but failed to sufficiently establish its factual basis.**"
>
> In connection thereto, respondent alleges that its own advertisement for the sale of the condominium units in its website to buyers, is consistent with a seller's act. However, this alone is not a sufficient basis to conclude

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[10] Pages 27-28 of the Transcript of the Stenographic Notes Taken During the Hearing Held on February 20, 2014.

that the intention of the parties in the contract to manage is actually to enter into a contract of sale.

Another factor considered by respondent is the application for and grant of licenses to sell the condominium units by the Housing and Land Use Regulatory Board (HLURB), alleging that the same is a tacit admission that it was engaged in the selling of condominium units.

In this regard, it must be noted that the application of licenses to sell is merely in compliance with the HLURB Decision dated July 26, 2005 which required petitioner to obtain license to sell.

Notably, the Court found that the HLURB Decision which required petitioner to obtain a license as a seller is based on variables which, at the time of the issuance of the ruling, remains uncertain and may not materialize. These uncertainties were found before the alleged transfer or delivery of the condominium units to the individual unit owners. While this may be considered in the determination of the tax liability of a taxpayer, **the BIR should also have determined whether these uncertainties still existed at the time of the transfer of the condominium units. The BIR should have investigated on the true nature of the transaction between petitioner and the unit owners, whether there is a sale of condominium units between them, upon the transfer of the condominium units based on facts and not based solely on the HLURB Decision.**

At this juncture, it must be reiterated that in order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption. Hence, assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be."[11]

As regards to respondent's alleged liability for deficiency expanded withholding tax and documentary stamp tax, again, the Court En Banc agrees with the disquisitions of the Court in Division, thus:

[11] CTA First Division's Resolution dated April 7, 2016, pp. 114-116.

"Even granting that the transaction can be considered as a contract of sale, the subject of assessment here is the alleged deficiency EWT wherein the buyer-client, being the income payor in this case, is the one liable to withhold the EWT and to file the Withholding Remittance Return for such alleged sale. Section 57 (B) of the National Internal Revenue Code (NIRC) of 1997, provides:

> 'SEC. 57. **Withholding of Tax at Source.** —
>
> xxx xxx xxx
>
> (B) Withholding of Creditable Tax at Source. — The Secretary of Finance may, upon the recommendation of the Commissioner, **require the withholding of a tax on the items of income payable to natural or juridical persons, residing in the Philippines, by payor-corporation/persons as provided for by law**, at the rate of not less than one percent (1%) but not more than thirty-two percent (32%) thereof, which shall be credited against the income tax liability of the taxpayer for the taxable year.' (Emphasis supplied)

Relevantly, Section 2.57.2 of Revenue Regulations (RR) No. 2-98, as amended, in relation to Sections 2.57.3 and 2.58 of the same RR, provides for the income payments subject to creditable withholding tax, including the gross selling price or total amount of consideration paid to the seller for the sale of real property classified as ordinary asset as follows:

> 'Sec. 2.57.2. **Income Payments 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 classified as ordinary asset. A creditable withholding tax based on the gross selling price/total amount of consideration or the fair market value determined in accordance with Section 6(E) of the Code, whichever is higher, paid to the seller/owner for the sale, transfer or exchange of real property, other than capital asset, shall be imposed upon the withholding agent/buyer, in accordance with the following schedule:

xxx xxx xxx

Sec. 2.57.3. Persons required to deduct and withhold. — The following persons are hereby constituted as withholding agents for purposes of the creditable tax required to be withheld on income payments enumerated in Section 2.57.2:

(A) In general, any juridical person, whether or not engaged in trade or business;

(B) An individual, with respect to payments made in connection with his trade or business.

However, insofar as taxable sale, exchange or transfer of real property are concerned, the buyers whether or not engaged in trade or business are constituted as withholding agent x x x

xxx xxx xxx

Sec. 2.58. RETURNS AND PAYMENT OF TAXES WITHHELD AT SOURCE. —

(A) Monthly return and payment of taxes withheld at source —

(1) WHERE TO FILE. Creditable withholding taxes (Expanded Withholding Tax) deducted and withheld by the withholding agent shall be remitted by accomplishing the Monthly Remittance

> Return of Creditable Income Taxes Withheld (BIR Form No. 1601-E) x x x" (Emphasis supplied)

In this case, respondent (petitioner herein) assessed petitioner (respondent herein) because it allegedly failed to file the Withholding Remittance Return and pay the corresponding basic withholding tax on the alleged transfer of the condominium units in violation of Section 2.58 of RR 2-98, among others. It is respondent's contention that since the buyer failed to remit the withholding tax on the transfer of the condominium units, and the entire contract price was paid to petitioner, the latter should be held liable for the withholding tax.

Applying the provisions of the law and the implementing revenue regulation, the withholding agent is the one required to file the return, withhold the tax and remit the same to the Bureau of Internal Revenue (BIR). Since petitioner is NOT a withholding agent, it cannot be held liable for the non-filing of the Withholding Remittance Return, non-withholding and non-payment of the alleged deficiency EWT. Further, no evidence was presented to prove that the entire contract price was paid to petitioner, if it is indeed the seller."

WHEREFORE, the Motion for Reconsideration (Of the Decision dated 21 March 2018) filed by G & W Architects, Engineers and Project Development Consultants Co., is **GRANTED**. Accordingly, the March 21, 2018 Decision of the Court En Banc is hereby **SET ASIDE** and the Decision dated November 3, 2015 and Resolution dated April 7, 2016 of the CTA First Division is hereby **AFFIRMED *in toto***. Petitioner is **ORDERED** to **CANCEL** and **WITHDRAW** the deficiency expanded withholding tax and documentary stamp tax issued against respondent for the periods 2004, July 10, 2004 and June 2004, in the amounts of P277,458,117.19, P132,852,679.05, and P149,414,228.66, respectively, or in the total amount of P559,725,024.90.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

(With due respect, I Join the Dissenting Opinion of Presiding Justice Del Rosario)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

(With due respect, I Join the Dissenting Opinion of Presiding Justice Del Rosario)
ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

I join PJ's DO.
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB No. 1449** *(CTA Case Nos. 8358, 8426 and 8489)*
	Present:
- versus -	Del Rosario, *P.J.*, Castañeda, Jr., Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, and Manahan, *JJ.*
G & W ARCHITECTS, ENGINEERS & PROJECT DEVELOPMENT CONSULTANTS, CO., *Respondent.*	Promulgated: AUG 29 2018 9:21a.m.

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DISSENTING OPINION

DEL ROSARIO, P.J.:

Since **no new matter** was raised in respondent's Motion for Reconsideration (Of the Decision dated 21 March 2018) that would warrant a sudden and total reversal of the assailed Decision, **I submit that the Decision dated March 21, 2018 of the Court *En Banc* should stand.**

To begin with, the *ponencia* does not even cite any specific argument that has not been previously presented and considered by the Court when it rendered the assailed Decision *and* which may now justify the **surprising cancellation** of the deficiency Expanded Withholding Tax (EWT) and Documentary Stamp Tax (DST) assessments in the total amount of **₱559,725,024.90**.

I maintain the position I have taken in my Dissenting Opinions in the Decision dated November 3, 2015 and the Resolution dated April 7, 2016, both rendered by the Court in Division, and in my Concurring Opinion in the Decision dated March 21, 2018 of the Court *En Banc*.

The three (3) agreements covering respondent's Built-to-Own or Build-Your-Own-Home business contain provisions that confirm and amplify respondent's theory that respondent is the seller *and* the unit owners are the buyers thereof. These agreements consist of: (i) the **Contracts to Manage and Execute the Construction of the Condominium** between respondent and the condominium unit owners; (2) the T**rust Agreements** established by the condominium unit owners, naming a trustee to hold in trust the pooled funds of the condominium unit owners and the land where the condominium project will be located; and, (3) the **Depository and Disbursing Agreements** between Banco De Oro Universal Bank Trust Banking Group and the condominium unit owners, the relevant provisions of which are quoted hereunder:

I.

"CONTRACT TO MANAGE & EXECUTE THE CONSTRUCTION OF CONDOMINIUM[1]

xxx xxx xxx

SECTION 3
DEVELOPMENT AND MANAGEMENT OF THE PROJECT

3.01 Engagement of G & W

The Client hereby engages the services of G & W as project manager in relation to the Project and trustee in relation to, the Subject Land and G & W, by virtue of such engagement, shall assume the responsibilities enumerated in this Section. The Client, however, acknowledges and confirms that G & W does not assume the role of developer of the Project and hence, has not made and is not making any representation that it is, in its own capacity, selling the units comprising the Project.

3.03 G & W as Project Manager

Pursuant to the engagement of G & W as project manager, Client requires G & W to do the following acts on behalf and for the collective benefit of the Clients and in furtherance of the development of the Project:

xxx xxx xxx

[1] Exhibits "K" and "L".

The power and authority hereby granted to G & W shall terminate upon the Acceptance and Turnover of the Subject Unit(s) by the Client and the conveyance of the common areas of the Project to the Condominium Corporation as provided in Subsection 5.05. **For purposes of this Contract, Acceptance and Turnover shall mean that point in time when the Project is conclusively deemed completed through the joint certification of G & W and the Construction Manager.** The Client expressly acknowledges that the aforesaid entities possess the required technical expertise to properly ascertain that the Project is completed. Without in any manner limiting the exclusive authority of G & W and the Construction Manager to jointly certify that the Project is completed, Project completion shall consist of the following:

xxx xxx xxx

Upon Acceptance and Turnover and the Trustee's certification of full payment by the Client of all amounts provided in this Contract, the Subject Unit shall be conveyed by the Trustee to the Client and this Contract shall terminate.

xxx xxx xxx

3.07 Scope of Obligations

Any and all acts to be done and performed by G & W pursuant to its responsibilities hereunder shall be deemed to have been done and performed by it in representation and on behalf of the Clients for the effective development of the Project. In the absence of willful default or misconduct, fraud, bad faith or gross negligence or violation of any provision of this Contract on the part of G & W, the Clients shall be bound by all the obligations which G & W may have contracted within the scope of its authority. The Client agrees to hold G & W free and harmless from any and all losses, claims, damages, liabilities and expenses, or actions with respect thereto arising out or by virtue of the failure of the Client to comply with any of its undertakings, covenants or obligations herein not otherwise attributable to the fault or negligence o[f] G & W.

xxx xxx xxx

SECTION 5
CLIENT'S SHARE OF INTEREST IN THE PROJECT

5.01 Subject Unit(s)/Parking Unit(s)

As part of his interest in the Project, the Client shall be assigned: (i) the Subject Unit(s), which is/are more particularly described in Schedule "A" hereof, and (ii) the Parking Unit(s), which is/are more particularly described also in Schedule "A" hereof, which represents a percent proportionate of the entire project which shall be indicated in the Master Deed.

xxx xxx xxx

5.04 Non-assignability of Interest

The rights and interests of the Client in the Project, the Subject Unit, the Parking Unit, and the corresponding proportionate undivided interest in the Common Areas of Project shall not be assignable, unless with the prior written approval of G & W. In the event G & W should grant such an approval, the Client shall be required to pay G & W a processing fee of Pesos: Fifteen Thousand (Php15,000.00).

5.05 Conveyance of Title to the Subject Unit and Common Areas

Upon completion of the Project and full payment by the Client of all amounts payable under this Contract, title to the Subject Unit including the Parking Unit shall be conveyed by G & W to the Client. Upon completion of the Project, title to the Common Areas shall be conveyed by G & W to the Condominium Corporation which shall be established in accordance with the provisions of the Master Deed.

xxx xxx xxx

SECTION 7
REMEDIES FOR DELAY IN PAYMENT

7.01 Payment of Penalty

The Client hereby acknowledges that time is of the essence in this contract. Furthermore, the Client hereby agrees and acknowledges that any delay in payments to the Trustee through G & W of the Construction Funding or any delay in payments to G & W of Labor Cost Overruns or Miscellaneous Expenses in accordance with the schedule of payments provided herein will cause the delay of the completion of the whole project. **Accordingly, a penalty of one and a half percent (1.5%) a month shall be imposed for such late payments, based on the amount which should have been contributed or paid for every calendar day of delay.**

7.02 Free and Harmless Cause

The Client acknowledges that his delay in any payment to the Trustee through G & W of the Construction Funding, or his delay in any payment to G & W of the Miscellaneous Fees or Labor Cost Overruns, or his failure to comply with any of his other obligations under this Contract, may result in a default by G & W on its obligations to the other Clients under the Contracts with such other Clients. In addition to the penalty interest under Section 7.01, the Client hereby agrees to hold G & W free and harmless against any and all claims for damages which may be made or filed against G & W by the other Clients or other third parties as a result of or arising from the delay by the Client in any payment of the Construction Funding or his failure to comply with any of his other obligations under this Contract.

OM

xxx xxx xxx

SECTION 8
TERMINATION

8.01 Violation or Default

G & W shall have the right to rescind, terminate or cancel this Contract including the trust herein created with respect to the Subject Land, without need of judicial action, in case any one of the events of default stipulated hereunder occurs, and the Client fails to remedy or cure to the satisfaction of G & W such default, within five (5) days from receipt of written notice from G & W of the occurrence of such default:

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

(b) Failure to pay the Client's portion of the Cost Advances or Labor Cost Overruns if any, or any portion thereof;

Upon such termination, G & W shall have the right to acquire, or identify a substitute client to acquire all the rights and interests of the Client in the Project and to assume the corresponding remaining obligations hereunder. If at the time the violation or default occurs, Client had paid thirty five percent (35%) or less of the Construction Funding (including accrued cost Overruns and Cost Advances), any and all amounts already paid by the Client **shall automatically be forfeited by way of liquidated damages in favor of G & W,** without need of judicial intervention. If at the time the violation or default occurs, Client had paid more than thirty five percent (35%) of the Construction Funding (including accrued Cost Overruns and Cost Advances), the excess over the said percentage shall be returned to the Client after deducting all expenses and costs involved including the Bank's professional fees, attorney's fees and other acts of administration.

The remedy herein granted is without prejudice to the right of G & W to avail of the remedies to which it is entitled under Section 7 hereof.

Should G & W deem that it is not feasible to continue with the Project, it may also terminate this Contract by advance written notice to the Client of at least five working days. In such case, all Construction Funding payments which have been deposited in the Account shall be returned to the Client, together with all interests which in the meantime have accrued thereon after deducting professional fees due to the Bank under the terms of this Contract and the Depository and Disbursement Agreement. Should professional fees due to the Bank exceed interest earned from the Account, G & W undertakes to pay the aforesaid deficiency. *om*

8.02 Effect of Termination

Unless termination was made in accordance with Section 8.01 above, **termination of this Contract shall not relieve the Client from the obligation to pay or remit any amounts payable under this Contract and accrued as of the effective date of termination.**

xxx xxx xxx

11.03 Binding Effect

This Contract shall be binding upon and shall be enforceable against the Client and G & W and their respective successors and assigns; provided, however, that **the Client shall not have the right to transfer or assign any and all of his rights or obligations herein without the prior written consent of G & W**." (Boldfacing supplied)

xxx xxx xxx

II.

"**TRUST AGREEMENT**[2]

DISTRIBUTION OF TRUST FUND

4.0 The Trustee shall distribute the Trust Fund in accordance with the following instructions of the Trustor:

xxx xxx xxx

(d) To convey the Condominium Certificate of Title over the Subject Unit(s) to and in favor of the Trustor;
(e) To convey the Condominium Certificate of Title over the Common Areas to the Condominium Corporation;
(f) **To transfer to the name of G & W or a substitute client identified by G & W the amounts in trust as liquidated damages in cases of violation or default of the Trustor of or in his obligations under the Contract which results in G & W acquiring the right, or identifying a substitute client to acquire all the rights and interests of the Trustor thereunder, including any and all contracts and agreements arising in connection therewith;**
(g) To return the Construction Funding to the Trustor together with all accrued income and interests thereon where instructed by G & W; and,
(h) To sign, execute and deliver such documents as may be necessary to carry out the foregoing instructions.

4.1 The Trust hereby created as well as this Agreement shall automatically be terminated upon: (i) **violation or default of the**

[2] Exhibit "M" in CTA Case No. 8358.

> **Trustor of or in his obligations under the Contract which results in G & W acquiring the right, or identifying a substitute client to acquire all the rights and interests of the Trustor of or in identifying a substitute client to acquire all the rights and interests of the Trustor, and to assume the corresponding obligations;** (ii) the return of the Construction Funding to the Trustor in accordance with Subsection 4.0 (g) above, or, (iii) completion of the Project and the complete delivery and transfer of title to the Subject Unit to the Trustor and the Subject Land and Common Areas to the Condominium Corporation. Any remaining balance of the Trust may also be terminated in accordance with the procedure set forth in Subsection 5.04 of the Contract." (Boldfacing supplied)
>
> xxx xxx xxx
>
> III.
>
> **"DEPOSITORY AND DISBURSING AGREEMENT**[3]
>
> xxx xxx xxx
>
> 9. TERMINATION OF THE AGREEMENT
>
> 9.01 This Agreement shall automatically terminate upon: a) violation or default of the PRINCIPAL of his obligation under the Contract which results in G & W acquiring the right or identifying a substitute client to acquire all the rights and interests of the PRINCIPAL and assume the corresponding obligations in the Contract; b) the return of the Funds to the PRINCIPAL in accordance with Sec. 2.02 hereof; c) completion of the Project as certified by G & W." (Boldfacing supplied)

A simple perusal of the foregoing provisions unmistakenly proves that all the attributes of ownership of the condominium project are integrated into, and are being exercised by, the respondent.

The Contract to Execute and Manage the Construction of the Condominium pretentiously suggests that respondent is simply the manager of the project, when in truth, ownership rights of respondent's purported "clients" over the project or any of the condominium units accrue and become vested upon them only upon full payment of the said units. **Under the said contract, respondent has the potent authority to terminate the contract when the supposed "clients" fail to pay the amounts payable, and the power to substitute the client who violated its terms or defaulted in the payment. The supposed *clients'* only obligation under the**

[3] Exhibit "N", respondent's Formal Offer of Evidence folder.

said contract is confined to paying a specified amount and upon full payment, the clients will acquire ownership of their respective condominium units. Such arrangement cannot be any different from a contract to sell. Upon full payment by the clients, the transaction is properly deemed a sale of condominium unit.

Interestingly, all the essential elements of a contract of sale are present in the case at bar. Article 1458 of the Civil Code defines a contract of sale as one where the contracting parties obligates himself to transfer the ownership and to deliver a determinate thing, and the other to pay therefor a price certain in money or its equivalent. Thus, the essential elements of a contract of sale are the: (a) consent or meeting of the minds, that is, consent to transfer ownership in exchange for the price; (b) determinate subject matter; and (c) price certain in money or its equivalent.[4]

The consent to transfer ownership in exchange for the price, is embodied in the Contract to Manage and Execute the Construction of the Condominium, *viz.*:

> "5.05 Conveyance of Title to the Subject Unit and Common Areas
>
> **Upon completion of the Project and full payment by the Client of all amounts payable under this Contract, title to the Subject Unit including the Parking Unit shall be conveyed by G & W to the Client.** Upon completion of the Project, title to the Common Areas shall be conveyed by G & W to the Condominium Corporation which shall be established in accordance with the provisions of the Master Deed." (Boldfacing supplied)

The determinate subject matter is the completed condominium unit, and the price certain in money is the amount payable under the purported Contract to Manage and Execute the Construction of the Condominium which is further subject to the relevant provisions of the Trust Agreement and the Depository and Disbursement Agreement.

Clearly, the transaction contemplated under the Contract to Manage and Execute the Construction of the Condominium is a sale of condominium units despite the contractual embellishments that attempt to conceal its true nature.

In addition, respondent's contemporaneous and subsequent acts point to a contract of sale/contract to sell. Its

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[4] Mila A. Reyes vs. Victoria T. Tuparan, G.R. No. 188064, June 1, 2011.

own advertisement for the sale of the condominium units in its website to buyers, particularly that for Grand Hampton's Tower,[5] is consistent with a seller's act as it tellingly reads:

> "4 Easy Steps for Foreign Buyers
>
> STEP 1
>
> Select a Desired Unit
>
> xxx xxx xxx
>
> STEP 2
>
> Reserve Your Unit
>
> xxx xxx xxx
>
> Reservation Fees are as follows:
> 1) Penthouse [171.75 sq.m. (1848.70 sq. ft.)] — Php75,000
> 2) 3-Bedroom [128.27 sq.m. (1,380.69 sq. ft.)] — Php75,000
> 3) 2-Bedroom [77.91 sq.m. (838.62 sq. ft.)] — Php50,000
> 4) 1-Bedroom [48.28 sq.m. (519.68 sq. ft.)] — Php50,000
> 5) 1-Bedroom [46.00 sq.m. (495.14 sq. ft.)] — Php50,000
>
> xxx xxx xxx
>
> STEP 3
>
> Sign Contract
>
> xxx xxx xxx
>
> STEP 4
>
> Directly Remit payments to Banco De Oro under your account name
> xxx xxx xxx."

With such open invitation to the public on the mode and manner of acquiring a condominium unit, one must indeed be extremely naive to accept respondent's claim that it is merely a "contractor" under the Contract to Manage and Execute the Construction of the Condominium.

Not only that. Respondent even applied for and was granted Licenses to Sell the condominium units by the Housing and Land Use

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[5] Exhibits "28" (Copy of the printouts gathered from the website (http://www.gw-architects.com/grandhamptons) which advertised respondent's sale of condo units to prospective buyers) and "28-a" (Page two of the Copy of the printouts gathered from the website (http://www.gw-architects.com/grandhamptons) which advertised respondent's sale of condo. units to prospective buyers) in CTA Case No. 8426, and Exhibit "R-10" (Computer Print-Out of respondent's Advertisement for the Grand Hampton's Tower) in CTA Case No. 8489.

Regulatory Board (HLURB), thereby tacitly admitting that it was engaged in the selling of condominium units. Respondent's Licenses to Sell bolster its status as a seller of condominium units.[6] There would have been no necessity to secure the afore-listed Licenses to Sell, if respondent was not engaged in selling condominium units, as it tenaciously claims.

Section 5 of Presidential Decree 957[7] requires a license to sell as a condition *sine qua non* first obtained before selling condominium units:

> **"Section 5. *License to sell.* Such owner or dealer to whom has been issued a registration certificate shall not, however, be authorized to sell any subdivision lot or condominium unit in the registered project unless he shall have first obtained a license to sell the project within two weeks from the registration of such project.**
>
> The Authority, upon proper application therefor, shall issue to such owner or dealer of a registered project a license to sell the project if, after an examination of the registration statement filed by said owner or dealer and all the pertinent documents attached thereto, he is convinced that the owner or dealer is of good repute, that his business is financially stable, and that the proposed sale of the subdivision lots or condominium units to the public would not be fraudulent." (Boldfacing supplied)

Presidential Decree No. 957 is implemented by the HLURB.[8]

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[6]

Exhibits	Descriptions
"R-20"	Certificate of Registration No. 20133 issued to respondent as the project owner and developer of THE GRAND HAMPTONS TOWER I
"R-20-1"	License to Sell No. 21947 issued to respondent as the project owner and developer of THE GRAND HAMPTONS TOWER I
"R-21"	Certificate of Registration No. 24027 issued to respondent as the project owner and developer of THE GRAND HAMPTONS TOWER II
"R-21-1"	License to Sell No. 25720 issued to respondent as the project owner and developer of THE GRAND HAMPTONS TOWER II
"R-22"	Certificate of Registration No. 24426 issued to respondent as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM
"R-22-1"	License to Sell No. 26181 issued to respondent as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM
"R-23"	Certificate of Registration No. 24418 issued to respondent as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM
"R-23-1"	License to Sell No. 26169 issued to respondent as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM
"R-24"	Certificate of Registration No. 24028 issued to respondent as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM
"R-24-1"	License to Sell No. 25271 issued to respondent as the project owner and developer of CRESCENT PARK RESIDENCES CONDOMINIUM.

[7] The Subdivision and Condominium Buyer' Protective Decree.

[8] Executive Order No. 90, December 17, 1986; Executive Order No. 648, February 7, 1981.

In HLURB Case No. REM-A-041130-0252, where respondent appealed the order of the Expanded National Capital Region Field Office of the HLURB imposing an administrative fine on respondent: (i) for selling condominium units without a license to sell; (ii) for failure to secure certificate of registration; and, (iii) for advertising without prior approval, with concomitant directive to cease and desist from further selling and advertising until all the necessary permits or license is secured, the HLURB denied respondent's appeal and affirmed the order of imposition of fine, and cease and desist order.[9] Expectedly, the HLURB required respondent to secure licenses to sell. Respondent eventually complied with the said directive.

Anent the theory of respondent that it acted as a mere project manager of the condominium projects and trustee of the land, the same is belied by respondent's own pieces of evidence. The Contract to Execute and Manage the Construction of the Condominium reveals that respondent has the potent authority to terminate the contract when the supposed "client" fails to pay the amounts payable, and the power to substitute the client who violated its terms or defaulted in the payment. The real agreement of the parties in the transaction is that ownership rights of respondent's purported "clients" over the project or any of the condominium units accrue and become vested upon them only upon full payment of said units.

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

To be sure, respondent's agreements[10] with its clients are not *akin* to a contract for a piece of work or contract of service. Records refute respondent's proposition that its clients, *i.e.* investors/condominium unit owners, simply sought the services of respondent as a project manager or contractor to build the condominium units for them.

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[9] Exhibits "12" (Certified True Copy of the Housing and Land Use Regulatory Board (HLURB) Decision dated 26 July 2005 in the case entitled "In the Matter of Imposition of Administrative Fine and Cease and Desist Order — G & W Architect, Engineer and Project Dev't. Consultants, Inc.", docketed HLURB Case No. REM-A-041130-0252) and "12-A" (Ruling/Order of the Housing and Land Use Regulatory Board (HLURB) on the appeal filed by respondent in HLURB Case No. REM-A-041130-0252) in CTA Case No. 8358; Exhibits "7" (Notice of Decision in HLURB Case No.) and "7-a" (HLURB Decision/Disposition of the Case) in CTA Case No. 8426; Exhibit "R-7" (Housing and Land Use Regulatory Board (HLURB) Decision dated July 26, 2005) in CTA Case No. 8489.

[10] Contracts to Manage and Execute the Construction of the Condominium; Trust Agreements; and Depository and Disbursing Agreements.

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

> "**Article 1467.** A contract for the delivery at a certain price of an article which the vendor in the ordinary course of his business manufactures or procures for the general market, whether the same is on hand at the time or not, is a contract of sale, but if the goods are to be manufactured specially for the customer and upon his special order, and not for the general market, it is a contract for a piece of work."

In *Engineering & Machinery Corporation vs. Court of Appeals et al.*[11], such distinction was further elucidated:

> "A contract for a piece of work, labor and materials may be distinguished from a contract of sale by the inquiry as to **whether the thing transferred is one not in existence and which would never have existed but for the order, of the person desiring it**. In such case, the contract is one for a piece of work, not a sale. On the other hand, if the thing subject of the contract would have existed and been the subject of a sale to **some other person even if the order had not been given, then the contract is one of sale**.
>
> Thus, Mr. Justice Vitug explains that –
>
> A contract for the delivery at a certain price of an article which the vendor in the ordinary course of his business manufactures or procures for the general market, whether the same is on hand at the time or not is a contract of sale, but if the goods are to be manufactured specially for the customer and upon his special order, and not for the general market, it is a *contract for a piece of work* (Art. 1467, Civil Code). The mere fact alone that **certain articles are made upon previous orders of customers will not argue against the imposition of the sales tax if such articles are ordinarily manufactured by the taxpayer for sale to the public** (Celestino Co. vs. Collector, 99 Phil. 841).
>
> To Tolentino, the distinction between the two contracts depends on the intention of the parties. Thus, if the parties intended that at some future date an object has to be delivered, without considering the work or labor of the party bound to deliver, the contract is one of sale. But if one of the parties accepts the undertaking on the basis of some plan, taking into account the work he will employ personally or through another, there is a contract for a piece of work." (Citations omitted and boldfacing supplied)

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[11] G.R. No. 52267, January 24, 1996.

In *Celestino Co & Company vs. Collector of Internal Revenue*[12] *(Celestino case)*, the Supreme Court ruled that Celestino Co & Company's services of making sashes, windows and doors was considered a **contract of sale** and not a contract for a piece of work subject to a sales tax:

> "xxx The important thing to remember is that Celestino Co & Company ***habitually makes*** **sash, windows and doors, as it has represented in its stationery and advertisements to the public.** That it 'manufactures' the same is practically admitted by appellant itself. The fact that windows and doors are made by it only when customers place their orders, does not alter the nature of the establishment, for it is obvious that it only accepted such orders as called for the employment of such material-moulding, frames, panels-as it ordinarily manufactured or was in a position habitually to manufacture.
>
> xxx xxx xxx
>
> But the argument rests on a false foundation. Any builder or homeowner, with sufficient money, may order windows or doors of the kind manufactured by this appellant. Therefore it is not true that it serves special customers *only* or confines its services to them alone. And anyone who sees, and likes, the doors ordered by Don Toribio Teodoro & Sons Inc. may purchase from appellant doors of the same kind, provided he pays the price. Surely, the appellant will not refuse, for it can easily duplicate or even mass-produce the same doors-it is mechanically equipped to do so." (Boldfacing supplied)

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

As afore-discussed, respondent's agreements with its clients, taken together, are contracts of sale and not contracts for a piece of work or contracts of service. **Respondent did not commence to build its condominium projects on the basis of a special order from previously existing and identified investors/condominium unit owners; rather it builds condominium projects even without such previously made special order consistent with its business purpose as stated in its Articles of Partnership[13] and Amended Articles of Partnership,[14]** *viz.*:

[12] G.R. No. L-8506, August 31, 1956.
[13] Exhibit "A" in CTA Case No. 8489, p. 633.
[14] Exhibit "B" in CTA Case No. 8489, p. 638.

"ARTICLE II

Purpose and Office

> Section 1. The purpose and business of this partnership shall be **to engage in the general practice of Architecture and Construction and to purchase, own, hold, manage, lease and operate any and all kinds of property.** (as amended on 21 November 1997)" *(Boldfacing supplied)*

Both respondent and Celestino & Co. also advertised their merchandise to the general public. Evidence[15] disclosed that respondent solicited foreign buyers through advertisements on its website clearly contradicting its stand that the agreements it executed are merely in furtherance of a contract for a piece of work or a contract of service. Respondent's representation in its advertisement that the condominium units are for sale affirm that it is indeed a seller of condominium units, precisely because respondent would dispose of the condominium units, regardless of who, ultimately, would acquire them.

While respondent claimed that the condominium unit owners are its unit investors and not buyers, it did not present any evidence such as board resolutions or minutes of meetings that would establish any semblance of participation or control by the alleged investors/condominium unit owners, including any **collective agreement** on the bill of materials, technical specifications, identity of contractors and sub-contractors, if any, or even an agreement on the cost of construction *vis-à-vis* the fee payable to respondent that would have appraised them in making an intelligent decision whether to retain respondent as a supposed Project Manager.

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

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[15] Exhibits "28" (Copy of the printouts gathered from the website (http://www.gw-architects.com/grandhamptons) which advertised respondent's sale of condo. Units to prospective buyers) and "28-a" (Page two of the Copy of the printouts gathered from the website (http://www.gw-architects.com/grandhamptons) which advertised respondent's sale of condo. units to prospective buyers) in CTA Case No. 8426, and Exhibit "R-10" (Computer Print-Out of respondent's Advertisement for the Grand Hampton's Tower) in CTA Case No. 8489.

"SECTION 8
TERMINATION

8.01 Violation or Default

G & W shall have the right to rescind, terminate or cancel this Contract including the trust herein created with respect to the Subject Land, without need of judicial action, in case any one of the events of default stipulated hereunder occurs, and the Client fails to remedy or cure to the satisfaction of G & W such default, within five (5) days from receipt of written notice from G & W pf the occurrence of such default:

(a) Failure to pay any of the Construction Funding payments in accordance with the schedule of payment herein provided for over 60 days;
(b) Failure to pay the Client's portion of the Cost Advances or Labor Cost Overruns if any, or any portion thereof;

Upon such termination, G & W shall have the right to acquire, or identify a substitute client to acquire all the rights and interests of the Client in the Project and to assume the corresponding remaining obligations hereunder. If at the time the violation or default occurs, Client had paid thirty five percent (35%) or less of the Construction Funding (including accrued cost Overruns and Cost Advances), any and all amounts already paid by the Client **shall automatically be forfeited by way of liquidated damages in favor of G & W**, without need of judicial intervention. If at the time the violation or default occurs, Client had paid more than thirty five percent (35%) of the Construction Funding (including accrued Cost Overruns and Cost Advances), the excess over the said percentage shall be returned to the Client after deducting all expenses and costs involved including the Bank's professional fees, attorney's fees and other acts of administration." (Boldfacing supplied)

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

Incidentally, quoting the clarificatory questions I propounded to petitioner's witness, Atty. Ma. Luisa Pangan, Director of the Appeals/Review Group of the HLURB, during the hearing held on February 20, 2014, the *ponencia* stresses that respondent and its clients voluntarily and freely executed the

subject agreements, thus, the terms thereof become the law between them, until and unless declared null and void.[16]

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

> "**A taxpayer may engineer his transactions to minimize taxes, but he cannot make a transaction appear to be what it is not.**[17]"

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

As oft-repeated, the transaction contemplated under respondent's agreements[18] with its clients is a contract of sale of condominium units notwithstanding the parties' attempt to camouflage its real nature.

With regard to the EWT assessment issued against respondent, while the duty to withhold in a sale of real property is the responsibility of the withholding agent, *i.e.* condominium unit owners in the present case, the fact that it was respondent who misrepresented to the unsuspecting buyers that the transaction is not a sale, makes it liable for the EWT as a consequence of said misrepresentation. To allow respondent to escape liability from the consequence of its mischievous tax scheme would *in esse* permit a wrong-doer to benefit from its own wrongdoing. "*Commodum Ex*

[16] Pages 8-9 of the *ponencia*.
[17] Redwing Carriers, Inc. vs. Tomlinson, 399 F.2d 652 (5th Cir. 1968).
[18] Contracts to Manage and Execute the Construction of the Condominium; Trust Agreements; and Depository and Disbursing Agreements.

Injuria Sua Nemo Habere Debet" (A wrongdoer should not be enabled by law to take any advantage from his actions).

All told, I VOTE to AFFIRM the Decision dated March 21, 2018 of the Court *En Banc*, with modification anent the imposition of the 12% deficiency and delinquency interests pursuant to Section 249 of the National Internal Revenue Code of 1997, as amended by Republic Act No. 10963, otherwise known as the *"Tax Reform for Acceleration and Inclusion"*.

ROMAN G. DEL ROSARIO
Presiding Justice