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, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
G&W ARCHITECTS, ENGINEERS AND PROJECT DEVELOPMENT CONSULTANTS, CO., *Respondent.*	Promulgated: MAR 14 2019 4:06 p.m.

x- -x

AMENDED DECISION

MANAHAN, J.:

This resolves the *Motion for Reconsideration*[1] filed by petitioner Commissioner of Internal Revenue (CIR), of the Court *En Banc*'s Amended Decision, dated August 29, 2018, disposing of the case as follows:

> **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,

[1] Through registered mail on September 21, 2018, and received by the Court on October 2, 2018.

> P132,852,679.05, and P149,414,228.66, respectively, or in the total amount of P5559,725,024.90.[2]

In his motion, the CIR states that he disagrees with the ratiocination of the Court *En Banc* for being erroneous, misplaced and bereft of factual and legal basis. The CIR's arguments are quoted thus:

> Accordingly, respondent's agreements with its clients under the Built-to-Own or Build-Your-Own-Home concept which purportedly pool condominium unit owners funds to be used for the construction of the condominium units on behalf of the fund owners constitute a **taxable sale**, exchange or disposition of real property, and are not *akin* to a contract for a piece of work or contract of service. ***Firstly***, all the attributes of ownership of the condominium project are integrated into, and are being exercised by herein respondent. It is worth nothing that under the said Contract to Manage and Execute the Construction of the Condominium, 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 clients who violated its terms or defaulted in the payment, and the supposed clients' only obligation under the said contract is confined to paying a specified amount and upon full payment, the clients will acquire ownership of their respective condominium units. Apparently, such arrangement cannot be any different from a contract to sell; ***Secondly***, all the essential elements of a contract of sale are present. The first element, consent to transfer ownership in exchange for the price, is clearly stated in the Contract to Manage and Execute the Construction of the Condominium. The second element, determinate subject matter, is the completed condominium unit, and the third element, 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 provision of the Trust Agreement and the Depository and Disbursement Agreement; ***Thirdly***, records clearly disclosed that respondent's contemporaneous and subsequent acts prove a contract of sale/contract to sell. Thus, respondent's own advertisement for the sale of the condominium units in its website to buyers, particularly that for Grand Hampton's Tower, is consistent with a seller's act;

[2] *Rollo*, Amended Decision dated August 29, 2018, p. 275.

> ***Fourthly***, respondent even applied for and was granted Licenses to Sell the condominium units by the Housing and Land Use Regulatory Board (HLURB), thereby tacitly admitting that it was engaged in the selling of condominium units.
>
> Hence, contrary to the findings of this Hon. Court En Banc, 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 wrongdoer to benefit from its own wrongdoing.[3] (*Emphasis and underscoring in the original*)

On the other hand, respondent G&W argues that the CIR's *Motion for Reconsideration* contains mere reiterations of its arguments raised before and which have already been found to be without merit. Respondent further states that the Contract to Manage and Execute the Construction of the Condominiums is not a sale transaction but merely a service contract. Respondent states:

> 2.9. This conclusion is supported by documentary evidence. The titles of the parcels of land where the condominium projects were built were directly transferred from Fort Bonifacio Development Corporation (FBDC) to the respective condominium corporations. Consequently, upon the completion of the condominium projects, the condominium certificates of titles (CCT) were then transferred from the condominium corporations to the respective unit owners.
>
> xxx xxx xxx
>
> 2.11. The foregoing chain of transaction indubitable demonstrates that Respondent never came to be the owner of the land and the condominium project. As such, there could have been no conveyance or transfer of ownership from Respondent to the unit owners

---

[3] *Rollo*, CIR's Motion for Reconsideration, pp. 320-321.

considering that Respondent was never the registered owner.

2.12. By reason of not being the registered or beneficial owner, Respondent could not convey a property not of its own. It is a vital element in a contract of sale that the seller should be the owner of the thing. This element is **not** present in this case. Thus, there is no sale transaction at all, which must be imposed with taxes.

2.13. More so, the Assailed Decision is spot-on in concluding that Respondent is only performing services as a project manager. The stipulation on the payment of professional (*sic*) bolsters the role of Respondent as project manager. By performing the foregoing obligations, Respondent is paid by the unit owners with service fees. In the Subject Contract, the unit owners paid Respondent a professional fee equivalent to four percent (4%) of the construction funding defined as the total costs for the development and completion of the unit and appurtenant parking units calculated on the basis of the projected total project cost.

2.14. This interpretation is consistent with the characteristics of a contract of service as compared to a contract of sale. xxx xxx xxx

xxx xxx xxx

2.15. It likewise bears emphasis that the construction funding was payable by the Unit Owners to an account held and managed by the depository bank (i.e. Banco De Oro Universal Bank Trust Banking Group) in accordance with the terms of the Depository and Disbursing Agreement executed between the Unit Owners and the depository bank. Under the terms of the Depository and Disbursing Agreement, the said account will be used for the necessary payments in connection with the construction and development of the Projects and the purchase of the land where the condominium building is situated. Respondent is required to provide photocopies of source documents, such as bills, invoices, certifications of indebtedness in relation to the services or materials procured for the Projects, to the depository bank for each disbursement instruction.

> 2.16. Suffice it to state, the construction funding which Petitioner alleged to be the consideration for the sale of the condominium units is actually the amount held in trust by the depository bank which was exclusively used for the construction of the project and purchase of the land. As correctly held by this Honorable Court, Respondent appears to have no complete control over the said amount; thus, no part of the said fund can be considered as payment for the transfer of the condominium units from which the assessed expanded withholding tax can be deducted.[4]

Respondent also states that the provisions with respect to respondent's right to terminate the Management Contract in the event of the client's default and the right to acquire or identify a substitute to acquire all the rights and interests of the defaulting client are not conclusive proof that respondent is the registered owner of the land or the condominium units. Finally, respondent argues that it is not liable to pay the deficiency EWT, even granting that the transaction can be considered as a contract of sale, since there is no law providing that the liability of the income payor or withholding agent is passed on to the income payee if the former fails to withhold tax.

Upon review of the arguments raised by the parties, the Court *En Banc* finds merit in the CIR's *Motion for Reconsideration*, which calls for the reversal of the assailed Amended Decision dated August 29, 2018, and the reinstatement of the Court *En Banc*'s Decision dated March 21, 2018 which found that there is a sale transaction instead of a mere contract of service.

We reiterate that the provisions of the various contracts entered into by respondent G&W belie its own assertion that it is acting as a mere Project Manager of the condominium projects. There are sufficient grounds to rule that there exists a contract of sale between respondent G&W and the various unit owners. Thus, We adopt the following disquisition:

> The three (3) agreements covering respondent's Built-to-Own or Build-Your-Own-Home business contain provisions that confirm and amplify [the CIR]'s theory that respondent is the seller *and* the

---

[4] *Rollo*, respondent's *Comment/Opposition (To Petitioner's Motion for Reconsideration dated 19 September 2018)*, pp. 338-340.

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 **Trust 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 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[5]

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.

xxx xxx xxx

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 of and for the collective benefit of the Clients and in furtherance of the development of the Project:

xxx xxx xxx

The power and authority hereby granted to G & W shall terminate upon the Acceptance and Turnover of

---

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

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 ad 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 additional 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.

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.

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[6]

DISTRIBUTION OF TRUST FUND

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

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 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 interest 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[7]

xxx xxx xxx

9. TERMINATION OF THE AGREEMENT

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

> 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 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.[8]

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 own advertisement for the sale of the condominium units in its website to buyers, particularly that for Grand Hampton's

---

[8] *Mila A. Reyes v. Victoria T. Tuparan*, G.R. No. 188064, June 1, 2011.

Tower,[9] 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:
>
> 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 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.[10] There would have

---

[9] 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.

[10]

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

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[11] 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.[12]

In HLURB Case No. REM-A-041130-0252, where respondent appealed the order of the Expanded National Capital Region Field Office of the

---

"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.

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

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

HLURB imposing an administrative fine on respondent: (i) for selling condominium units without 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.[13] 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 nay 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 clearly belie respondent's preposterous claim that it acted as a mere project manager or trustee.

---

[13] 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 as HLURB Case No. REM-A-041130-252) and "12-A" (Ruling/Order of the 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) and "7-a" (HLURB Decision/Disposition of the Case) in CTA Case No. 8426; Exhibit "R-7" (HLURB Decision dated July 26, 2005) in CTA Case No. 8489.

To be sure, respondent's agreements[14] 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.

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.*, [15] 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

---

[14] Contracts to Manage and Execute the Construction of the Condominium; Trust Agreements; and Depository and Disbursing Agreements.
[15] G.R. No. 52267, January 24, 1996.

> 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)

In *Celestino Co & Company vs. Collector of Internal Revenue*[16] (*Celestino case*), the Supreme Court ruled that Celestino Co & Company's services of making sashes, windows and doors were 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 to habitually 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

[16] G.R. No. L-8506, August 31, 1956.

> ordered by Don Toribio & 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)

xxx xxx xxx

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 own 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 [17] and Amended Articles of Partnership,**[18] *viz.*:

"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[19] 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

---

[17] Exhibit "A" in CTA Case No. 8489, p. 633.
[18] Exhibit "B" in CTA Case No. 8489, p. 638.
[19] 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.

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:

"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 receipts 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 of 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 records.

xxx xxx xxx

xxx [T]he 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.**"[20]

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-à-vis* what the parties declare or represent them to be.

As oft-repeated, the transaction contemplated under respondent's agreements[21] 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 wrongdoer to benefit from its own wrongdoing. *"Commodum Ex Injuria Sua Nemo Habere Debet"* (A wrongdoer should not

---

[20] Redwing Carriers, Inc. vs. Tomlinson, 399 F.2d 652 (5th Cir. 1968).
[21] Contracts to Manage and Execute the Construction of the Condominium; Trust Agreements; and Depository and Disbursing Agreements.

be enabled by law to take any advantage from his actions.)[22]

Based on the foregoing discussion, the assessments against respondent for deficiency expanded withholding tax and documentary stamp tax for the periods 2004, July 10, 2004 and June 2004 should be upheld.

Based on the foregoing, respondent should be ordered to pay the following:

Case No. 8358			
Expanded Withholding Tax	**Penhurst Parkplace**	**Kensington Place**	**Total**
Basic Tax	₱ 31,207,676.33	₱ 43,418,161.09	**₱ 74,625,837.42**
Add: 25% Surcharge	7,801,919.08	10,854,540.28	**18,656,459.36**
20% Deficiency Interest from February 11, 2004 to February 25, 2011 *(₱31,207,676.33 x 20% x 2,572/365 days)*	43,981,448.50		**43,981,448.50**
20% Deficiency Interest from July 11, 2004 to February 25, 2011 *(₱43,418,161.09 x 20% x 2,421/365 days)*		57,597,461.92	**57,597,461.92**
Total Amount Due as of February 25, 2011	**₱82,991,043.91**	**₱111,870,163.29**	**₱194,861,207.20**
Add: 20% Deficiency Interest from February 26, 2011 to December 31, 2017 *(₱31,207,676.33 x 20% x 2,501/365 days)* *(₱43,418,161.09 x 20% x 2,501/365 days)*	₱ 42,767,341.64	59,500,723.77	42,767,341.64 59,500,723.77
20% Delinquency Interest from February 26, 2011 to December 31, 2017 *(₱82,991,043.91 x 20% x 2,501/365 days)* *(₱111,870,163.29x 20% x 2,501/365 days)*	113,731,836.07	153,308,097.73	113,731,836.07 153,308,097.73
Total Amount Due as of December 31, 2017	**₱ 239,490,221.62**	**₱324,678,984.79**	**₱564,169,206.41**

Documentary Stamp Tax	**Penhurst Parkplace**	**Kensington Place**	**Total**
Basic Tax	₱ 9,363,195.00	₱ 13,026,795.00	**₱ 22,389,990.00**
Add: 25% Surcharge	2,340,798.75	3,256,698.75	**5,597,497.50**
20% Deficiency Interest from February 6, 2004 to February 25, 2011 *(₱9,363,195.00 x 20% x 2,577/365 days)*	13,221,344.39		**13,221,344.39**
20% Deficiency Interest from July 6, 2004 to February 25, 2011 *(₱13,026,795.00 x 20% x 2,426/365 days)*		17,316,714.89	**17,316,714.89**
Total Amount Due as of February 25, 2011	**₱24,925,338.14**	**₱33,600,208.64**	**₱ 58,525,546.78**
Add: 20% Deficiency Interest from February 26, 2011 to December 31, 2017 *(₱9,363,195.00 x 20% x 2,501/365 days)* *(₱13,026,795.00 x 20% x 2,501/365 days)*	₱ 12,831,425.04	₱ 17,852,062.63	12,831,425.04 17,852,062.63
20% Delinquency Interest from February 26, 2011 to December 31, 2017 *(₱24,925,338.14 x 20% x 2,501/365 days)* *(₱33,600,208.64 x 20% x 2,501/365 days)*	₱ 34,157,956.54	₱ 46,046,094.14	34,157,956.54 46,046,094.14
Total Amount Due as of December 31, 2017	**₱ 71,914,719.72**	**₱ 97,498,365.41**	**₱169,413,085.13**

[22] Rollo, Dissenting Opinion of Presiding Justice Roman G. Del Rosario, August 29, 2018, pp. 279-294.

Case No. 8426		
	EWT	**DST**
Basic Tax	₱ 35,380,369.18	₱ 10,650,045.00
Add: 25% Surcharge	8,845,092.30	2,662,511.25
20% Deficiency Interest from August 11, 2004 to July 11, 2011 *(₱35,380,369.18 x 20% x 2,526/365 days)*	48,970,308.25	
20% Deficiency Interest from August 6, 2004 to July 11, 2011 *(₱10,650,045.00 x 20% x 2,531/365 days)*		14,770,007.61
Total Amount Due as of July 11, 2011	**₱93,195,769.72**	**₱28,082,563.86**
Add: 20% Deficiency Interest from July 12, 2011 to December 31, 2017 *(₱35,380,369.18 x 20% x 2,365/365 days)* *(₱10,650,045.00 x 20% x 2,365/365 days)*	45,849,081.16	13,801,291.19
20% Delinquency Interest from July 12, 2011 to December 31, 2017 *(₱93,195,769.72 x 20% x 2,365/365 days)* *(₱28,082,563.86 x 20% x 2,365/365 days)*	127,716,504.15	38,484,653.27
Total Amount Due as of December 31, 2017	**₱266,761,355.03**	**₱80,368,508.32**

Case No. 8489		
	EWT	**DST**
Basic Tax	₱ 39,245,682.93	₱ 11,773,704.88
Add: 25% Surcharge	9,811,420.73	2,943,426.22
20% Deficiency Interest from July 11, 2004 to August 26, 2011 *(₱39,245,682.93 x 20% 2,603/365 days)*	55,976,171.32	
20% Deficiency Interest from July 6, 2004 to August 26, 2011 *(₱11,773,704.88 x 20% x 2,608/365 days)*		16,825,108.12
Total Amount Due as of August 26, 2011	**₱105,033,274.98**	**₱31,542,239.22**
Add: 20% Deficiency Interest from August 27, 2011 to December 31, 2017 *(₱39,245,682.93 x 20% x 2,319/365 days)* *(₱11,773,704.88 x 20% x 2,319/365 days)*	49,868,897.93	14,960,669.38
20% Delinquency Interest from August 27, 2011 to December 31, 2017 *(₱105,033,274.98 x 20% x 2,319/365 days)* *(₱31,542,239.22 x 20% x 2,319/365 days)*	133,464,199.83	40,080,248.09
Total Amount Due as of December 31, 2017	**₱288,366,372.74**	**₱86,583,156.69**

In addition, respondent should also pay the delinquency interest at the rate of twelve percent (12%) on the total unpaid amount of Php253,386,753.98, Php121,278,333.58, and Php136,575,514.21 as of February 25, 2011, July 11, 2011, and August 26, 2011, respectively, as determined above, computed from January 1, 2018 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended by R.A. No. 10963 or the TRAIN Law, and implemented by RR No. 21-2018.

However, Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9503, provides:

SEC 2. *Sitting En Banc or Division; Quorum; Proceedings.* –

> xxx xxx xxx
>
> The affirmative vote of five (5) members of the Court en banc shall be necessary to reverse a decision of a Division but a simple majority of the Justices present necessary to promulgate a resolution or decision in all other cases or two (2) members of a Division, as the case may be, shall be necessary for the rendition of a decision or resolution in the Division level. (*Underlining supplied*)

Likewise, Section 3, Rule 2 of the RRCTA states that the presence at the deliberation and the affirmative votes of at least five (5) members of the Court *en banc* shall be necessary to reverse a decision of a Division. Where the necessary majority vote cannot be had in appealed cases, the judgment or order appealed from shall stand affirmed, thus:

> Sec. 3. *Court en banc; quorum and voting.* – The presiding justice or, if absent, the most senior justice in attendance shall preside over the sessions of the Court *en banc*. The attendance of five (5) justices of the Court shall constitute a quorum for its session *en banc*. The presence at the deliberation and the affirmative vote of five (5) members of the Court *en banc* shall be necessary to reverse a decision of a Division xxx Where the necessary majority vote cannot be had, the petition shall be dismissed; in appealed cases, the judgment or order appealed from shall stand affirmed; and on all incidental matters, the petition or motion shall be denied. (*Underlining supplied*)

In the deliberation of the instant case, only the Presiding Justice Roman G. Del Rosario, Associate Justice Juanito C. Castañeda, Jr., and Associate Justice Esperanza R. Fabon-Victorino concurred with the opinion of the *ponente* that the assailed Court *En* Banc's Decision dated March 21, 2018 be reinstated, and in effect, the assailed Decision and Resolution of the Court in Division in CTA Case Nos. 8358, 8426, and 8489 should be reversed and set aside.

On the other hand, Associate Justice Erlinda P. Uy, Associate Justice Cielito N. Mindaro-Grulla, and Associate Justice Ma. Belen M. Ringpis-Liban voted to affirm the Decision of the Court in Division.

WHEREFORE, considering that the required affirmative votes of five (5) members of the Court *en banc* was not obtained in the instant case, pursuant to Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9503 in relation to Section 3 of Rule 2 of the RRCTA, the Motion for Reconsideration filed by the Commissioner of Internal Revenue is hereby **DENIED**. The assailed Decision dated August 29, 2018 is deemed affirmed.

Accordingly, the assessments for deficiency expanded withholding tax and documentary stamp tax issued against respondent for the periods 2004, July 10, 2004 and June 2004 are **CANCELLED AND WITHDRAWN.**

SO ORDERED.

Catherine T. Manahan

CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda, Jr.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla

CIELITO N. MINDARO-GRULLA
Associate Justice

Ma. Belen M. R. L.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above 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