REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL SECOND DIVISION

JTKC LAND, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 10059

Members:

BACORRO-VILLENA, *Acting Chairperson, and*
CUI-DAVID, *JJ.*

Promulgated:

APR 26 2023
4:30 p.m.

x - x

DECISION

BACORRO-VILLENA, J.:

At bar is a Petition for Review with Application for Issuance of Temporary Restraining Order and/or Writ of Preliminary Injunction[1] filed by petitioner JTKC Land, Inc. (**petitioner**) on 05 April 2019, pursuant to Section 3(a)[2], Rule 8 of the Revised Rules of the Court of Tax Appeals (**RRCTA**). It seeks the nullification of the Final Decision on Disputed Assessment (**FDDA**)[3] issued by respondent Commissioner of

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1 Division Docket, Volume I, pp. 1-240 including attached annexes.

2 **SEC. 3.** *Who may appeal; period to file petition. –*
(a) A party adversely affected by a decision, ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claims for refund of internal revenue taxes, or by a decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction may appeal to the Court by petition for review filed within thirty days after receipt of a copy of such decision or ruling, or expiration of the period fixed by law for the Commissioner of Internal Revenue to act on the disputed assessments. In case of inaction of the Commissioner of Internal Revenue on claims for refund of internal revenue taxes erroneously or illegally collected, the taxpayer must file a petition for review within the two-year period prescribed by law from payment or collection of the taxes.

3 Exhibit "R-11", BIR Records, pp. 536-539.

Internal Revenue (**respondent/CIR**), finding it liable for the deficiency withholding tax (**WT**) of ₱20,424,868.48 and a compromise penalty of ₱125,000.00 for the taxable year (**TY**) 2012.

PARTIES OF THE CASE

Petitioner is a corporation duly organized and existing under the laws of the Republic of the Philippines with office address at G/F Amorsolo Mansion, 130 Amorsolo St., Legaspi Village, San Lorenzo, Makati City as evidenced by its Certificate of Registration (BIR Form No. 2303).[4]

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue (**BIR**), vested with the power to assess and collect taxes, and rule on disputed assessments, among others.

FACTS OF THE CASE

On 28 August 2008, respondent issued BIR Ruling DA-(JV-023) 178-08[5] (hereinafter referred to as **Ruling 178-08**) as a response to petitioner's request for a ruling on the various tax consequences arising from the development and construction of a condominium project. The ruling is replicated below:

> ...
> The facts as you represented are as follows:
>
> a. Aldex Realty Corporation (Aldex) is the absolute and registered owner of two (2) parcels of land located at Apartment Ridge Row, Ayala Avenue, Makati City with a total area of Four Thousand Eighty-Seven (4,087) square meters, more or less, and covered by and more particularly described in Transfer Certificates of Title Nos. 173683 and 173684 issued by the Registry of Deeds for Makati City (collectively, the "Property") which shall be developed into a high-end residential condominium building with service apartments to be known as "Discovery Primea" ("Condominium Project").

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4 Division Docket, Volume I, p. 54.
5 See Petition for Review, Annex D, id., pp. 56-60.

JTKC is a corporation duly organized and existing under the laws of the Republic of the Philippines, and is engaged in the business of acquiring, developing and selling real estate, including commercial lots and residential condominiums.

b. Aldex and JTKC entered into a Joint Venture Agreement whereby Aldex commits to contribute the Property as its capital contribution to the Condominium Project. In consideration of such capital contribution, Aldex shall be entitled to a *pro rata* ownership share in the Project, specifically full ownership to the service apartments consisting of 142 units on 12 floors and 381 parking spaces appurtenant thereto. JTKC, on the other hand, commits to develop the Property into the Condominium Project. As a return of capital, JTKC shall be entitled to full ownership of the residential units in the Condominium Project.

c. Further, investors shall enter into a Project Investment Agreement with JTKC. The Project Investment Agreement between JTKC and the Investors provides that each Investor commits to invest in the Condominium Project through a capital contribution for the financing and/or funding of the Condominium Project in an amount equivalent to a percentage share in the total cost of development of the Condominium Project. The share of the Investor will be computed based on the estimate of the actual cost of the floor area of a particular condominium unit, subject to any cost adjustment arising from changes in the actual cost and/or the floor area. In return for his capital contribution each Investor will receive the corresponding Condominium Certificates of Title (CCTs) for the condominium unit and its appurtenant parking spaces.

d. JTKC shall deposit the Investor's capital contribution and any additional contributions in a risk-free money market placement with a reputable bank acceptable to both JTKC and the Investor. JTKC shall open an account for each Investor. All contributions by the Investor will be held, managed and disbursed by the bank which shall hold in trust the capital contribution for each Investor. Prior to the construction of the Project, every Investor shall deposit Ten Percent (10%) of his required capital contribution to the bank account. Investor will then deposit the remaining Ninety Percent (90%) through internally generated funds and/or by availing of a construction credit line during the construction period. Upon completion of the Project, any excess funds or properties of the bank account, including ownership over the condominium units and its appurtenant parking spaces, shall be released to the Investors.

The bank shall review and approve all disbursements for the Condominium Project for the account of the Investor, and shall hold custody of any and all documents relating thereto. Upon approval of each disbursement, the bank shall debit from the bank account of the

Investor the *pro rata* share of the Investor in such disbursement and issue a check payable directly to the approved payee thereof.

e. JTKC shall be the Project Manager of the Condominium Project. It will be authorized to, among others, negotiate and execute contracts as may be required for the development of the Condominium Project with architects, construction management engineers, general building contractors, and other parties deemed fit and necessary by JTKC for the construction of the Condominium Project; to do the marketing and advertising of the Condominium Project concept; to secure sufficient number of Investors; to secure the necessary permits and licenses that may be required; and to do other acts necessary in the expeditious development of the Condominium Project. In return, JTKC will receive a management fee.

f. Prior to the completion of the Condominium Project, an Investor can assign its/his participation, rights and proportionate interest in the Condominium Project provided it/he secures the written consent of JTKC.

g. Upon completion of the Condominium Project, Aldex, the Investors and the buyers of condominium units in the Condominium Project will form a condominium corporation for the purpose of holding title to, managing and maintaining the land and the common areas of the Condominium Project pursuant to the provisions of the Condominium Act. Subsequently, the ownership of the common areas will be conveyed to the condominium corporation.

You now request for confirmation of the following:

1. The Joint Venture Agreement and the Project Investment Agreements will not give rise to separate taxable joint ventures within the meaning of Section 22 (B) in relation to Section 27 (A) of the 1997 Tax Code, as amended. Hence, the unincorporated joint ventures created by the parties are not subject to the corporate income tax under Section 27 of the 1997 Tax Code.

2. The conveyance of the parcel of land from Aldex to the condominium corporation as its capital contribution is not subject to income tax/creditable withholding tax and value-added tax (VAT).

3. The assignment of rights by an Investor with respect to the Project Investment Agreement between JTKC and an Investor is not subject to capital gains tax, creditable withholding tax, VAT and documentary stamp tax under Section 196 of the Tax Code of 1997.

4. The distribution of the condominium units and appurtenant parking slots to Aldex, JTKC and the Investors, as a return of their capital contributions, is not subject to income tax, capital gains tax,

creditable withholding tax, VAT and documentary stamp tax under Section 196 of the 1997 Tax Code.

5. The conveyance of the common areas in the condominium without any monetary consideration to a condominium corporation is not subject to income tax, VAT and documentary stamp tax under Section 196 of the same Code.

In reply, please be informed as follows:

1. Pursuant to Section 22 (B) of the Tax Code of 1997, the term corporation includes partnership, no matter how created or organized, joint stock companies, joint accounts (*cuentas en participacion*), associations or insurance companies, but does not include general professional partnerships and a joint venture or consortium formed for the purpose of undertaking construction projects or engaging in petroleum, coal, geothermal and other energy operations pursuant to an operating or consortium agreement under a service contract with the Government.

P.D. No. 929 amended the definition of the taxable corporation so as not to include joint venture formed for the purpose of undertaking construction projects. The reasons for such amendment are: (1) Local contractors contribute substantially to the development program of the country; (2) Local contractors are at a disadvantage in competitive bidding with foreign contractors in view of limited capital and financial resources; (3) In order to be able to compete with big foreign contractors, it may be necessary for them to enter into joint ventures to pool their limited resources in undertaking big construction projects; (4) To assist them in achieving competitiveness with foreign contractors, the joint ventures formed by them should not be considered an additional income tax lien.

Considering the provision of Sec. 22 (B) which clearly manifests the intention of the legislature to exclude from the definition of taxable corporation joint venture/s (or consortium) formed for the purpose of undertaking construction projects, this Office hereby confirms your opinion that the joint venture by and among Aldex, JTKC and the Investors is not a corporation subject to corporate income tax. (BIR Ruling No. DA-506-2005 dated December 16, 2005) However, for VAT purposes, the joint venture (or consortium) is by itself a taxable entity.

2. The conveyance of the parcel of land from Aldex to the condominium corporation as its capital contribution is not subject to income tax/creditable withholding tax and value-added tax (VAT).

The conveyance of the parcel of land from Aldex to a condominium corporation as its capital contribution to the Project is not a taxable event that will give rise to the payment of regular income tax/creditable withholding tax. The conveyance of the property is merely a capital contribution to the joint venture and therefore, not a taxable event.

The conveyance is likewise not subject to VAT because VAT is imposed on any person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, or imports goods as stated in Section 105 of the Tax Code of 1997. The contribution by Aldex of its parcels of land is by way of capital contribution and not by way of sale, barter or exchange of goods or property nor rendering of service or importation of goods and as such, the transaction is not subject to VAT. (BIR Ruling No. DA-240-2001 dated November 16, 2001)

3. The assignment of rights under the Project Investment Agreement by an Investor is not subject to capital gains tax, creditable withholding tax, VAT and documentary stamp tax under Section 196 of the 1997 Tax Code, as amended. The transaction is not deemed a sale or assignment of real property. Rather, the transaction is a mere assignment of rights whereby the assignee merely steps into the shoes of the assignor without acquiring a better right than what the assignor had in the property to which the rights assigned pertains. A deed of assignment of rights in real property is not a deed of sale of real property itself but only the rights pertaining to such property. (BIR Ruling No. DA-506-2005 dated December 16, 2005)

4. The consequent allocation and delivery of serviced apartments to Aldex and residential condominium units to JTKC and the Investors, and their appurtenant parking spaces, in consideration of their respective contributions, as stipulated in the Joint Venture Agreement and the Project Investment Agreements, respectively, is likewise not a taxable event. The delivery of the properties is not subject to income tax or any withholding tax because the allocation is a mere return of capital that each has contributed. (BIR Ruling No. DA-455-2007 dated August 17, 2007)

The transaction is neither in the nature of a sale, barter, exchange or lease of goods and properties, or rendering of services, or importation of goods as defined under Section 105 of the Tax Code of 1997 and therefore, not subject to VAT under Sections 106 and 108 of the same Tax Code.

The Partition Agreement allocating to Aldex, JTKC and the Investors their respective units in the Project in consideration of their respective contributions is not subject to the documentary stamp tax imposed under Section 196 of the Tax Code of 1997 because the allocation is made without monetary consideration and is not in connection with a sale. The allocation is made merely to segregate the saleable area among the parties as the return of the capital which each has contributed. However, the acknowledgment to said Partition Agreement is subject to the documentary stamp tax pursuant to Section 188 of the Tax Code of 1997, as amended.

However, upon the subsequent disposition by Aldex and JTKC of the areas allocated to them, being corporations engaged in real estate development, the gain that may be realized by them from such sale will be subject to the creditable withholding tax, under Revenue Regulations (RR) No. 2-98, as amended by RR No. 6-2001, and VAT. The sale of the unit or parking space by the Investor (either an individual or corporation not engaged in real estate development) shall be subject to capital gains tax under Sections 24 (D) (1) or 27 (D) (5) based on the gross selling price or fair market value of the properties, whichever is higher. Consequently, all such sales shall be subject to the documentary stamp tax imposed under Section 196 of the Tax Code of 1997, based on the gross selling price or fair market value of the properties, whichever is higher.

5. Conveyances of realty, not in connection with a sale, to trustees or other persons without consideration are not taxable. Thus, the transaction transferring to the condominium corporation the management of the common areas of the Project will not be subject to creditable withholding tax pursuant to Section 57 (B) in relation to Section 27 of the Tax Code of 1997. Neither is it subject to the documentary stamp tax imposed under Section 196 of the same Code. (BIR Ruling No. DA-506-2005 dated December 16, 2005)

This will authorize the Revenue District Officer (RDO) of the revenue district where the properties are located to issue the corresponding Certificate Authorizing Registration (CAR) and Tax Clearance Certificate (TCL) involving the transfer of the titles to the parties based on their respective allocations pursuant to the Project Partition, without need of the presentation of proof of payment of the creditable withholding tax, VAT and the corresponding documentary stamp tax. Provided, that the parties to the joint venture shall cause the Register of Deeds to annotate on the TCT that a development project is being undertaken on the land and is the object of the joint venture agreement between the parties, and that the joint venture is held to be a tax-exempt entity pursuant to this Ruling issued by this Office. Provided further, that parties to the joint venture shall inform the Bureau of Internal Revenue, through the Law Division, of the fulfillment of the requirement on the distribution of the units/parking spaces in accordance with the allocation ratio in the joint venture agreement. For this purpose, a compliance report of the project indicating the number of units/parking spaces, the respective CCTs and the party in whose name the corresponding title was issued. (BIR Ruling No. DA (JV-007) 019-2008 dated July 9, 2008)

> This ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be ascertained that the facts are different, then this ruling shall be considered as null and void.
>
> ...

Based on the foregoing ruling, ALDEX Realty Corporation (**ALDEX**) and petitioner entered into a Joint Venture Agreement (**JVA**) for the construction of the condominium project (later known as Discovery Primea).[6] Petitioner then executed several Project Investment Agreements (**PIAs**)[7] with different "investors" in exchange for their capital contributions that shall be invested and infused in the construction of the condominium project. The construction of Discovery Primea started in 2009.

On 09 February 2015, petitioner received a Letter of Authority (**LOA**) No. LOA-050-2015-00000059 (eLA201100080567)[8] for the assessment of its Capital Gains Tax (**CGT**) for the period of <u>01 January 2012 to 31 December 2012 or TY 2012</u>. The LOA was issued by Regional Director Jonas DP Amora (**RD Amora**) of Revenue Region No. 008 – Makati City. On 03 October 2016, petitioner received the following notices:

a. Formal Assessment Notice (**FAN**) Part I, dated 23 September 2016[9], with the attached Details of Discrepancies[10] and Assessment Notice No. WO-ELA80567-12-16-885[11] for the alleged WT liability in the amount of ₱15,585,232.79 for TY 2012; and,

b. FAN Part II, dated 23 September 2016[12], with Assessment Notice No. MC-ELA80567-12-16-885[13] for the compromise penalty of ₱125,000.00 for TY 2012.[14]

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6 See Recitals A, Master Deed with Declaration of Restrictions of Discovery Primea, BIR Records, p. 108.
7 Id., pp. 201-333.
8 Exhibit "R-1", id., p. 2.
9 Exhibit "R-6", id., pp. 389-390.
10 Exhibit "R-8", id., pp. 386-388.
11 Exhibit "R-4", id., p. 394.
12 Exhibit "R-7", id., p. 386.
13 Exhibit "R-5", id., p. 391.
14 Paragraph 6, Joint Stipulation of Facts and Issues (**JSFI**), Division Docket, Volume II, pp. 588-589.

On 24 October 2016[15], petitioner then filed its protest against the assessment. On 06 March 2019, petitioner received the FDDA with the attached Details of Discrepancies dated 27 February 2019[16], finding petitioner liable for the alleged WT deficiency of ₱20,424,868.48 (inclusive of surcharge and interest) and a compromise penalty of ₱125,000.00. In the Details of Discrepancies, respondent explained the reason for the assessment, to wit:

> ...
>
> Verification disclosed that the **Units** described hereunder, which [have] been sold under Project Investment Agreement (PIA) have been partially paid but no withholding tax and withholding tax return [were] remitted/filed to the BIR[;] such being the case, [they are] hereby assessed pursuant to the provisions of **Revenue Regulations (RR) 2-98, as amended, in relation to Section 4 of RR 17-2003.**
>
> **Since you failed to prove during the conduct of reinvestigation, the exemption from tax on distribution or delivery of the condominium units to the investors pursuant to Project Investment Agreements nor adduced evidence to support the same, the reiteration of the herein case is warranted.**
>
> **In addition, your contention anchored [on] BIR Ruling No. DA-455-2007 is bereft of merit considering that the said ruling has been voided by the subsequent issuance of RMC No. 055-2010. Furthermore, the said ruling constitute violation of PD 957.**[17]
>
> ...

PROCEEDINGS BEFORE THE SECOND DIVISION

Aggrieved, on 05 April 2019, petitioner filed the present Petition for Review with Motion for Suspension of Collection of Taxes. In an Order dated 29 April 2019[18], the Court granted the motion subject to the posting of bond. After petitioner posted a *Supersedeas* Bond in the

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15 BIR Records, pp. 443-456.
16 Supra at note 3.
17 Emphasis in the original text.
18 Division Docket, Volume I, pp. 294-295.

amount of ₱20,549,868.48[19], the Court ordered the respondent to refrain from collecting the alleged deficiency taxes against petitioner.[20]

On 03 June 2019, respondent filed the Answer[21] to the petition essentially contending that the FAN and the FDDA contained factual and legal bases for the deficiency tax assessments against petitioner.

On 14 June 2019, the Court issued a Notice of Pre-Trial Conference.[22] On 28 June 2019, petitioner and respondent filed their respective Pre-Trial Briefs[23] (**PTBs**). Later, the case was referred to the Philippine Mediation Center - Court of Tax Appeals (**PMC-CTA**) for a possible amicable settlement.[24] However, the parties decided not to have their case mediated.[25]

During the pre-trial conference conducted on 29 August 2019, the Court ordered the parties to submit their Joint Stipulation of Facts and Issues (**JSFI**) within fifteen (15) days from the hearing date.[26] On 13 September 2019, petitioner requested for an additional 15 days or until 28 September 2019 to file the JSFI[27], which request the Court granted.[28] On 27 September 2019, the parties filed their JSFI.[29]

Petitioner also filed a motion to commission Clark Joseph C. Babor (**Babor**) as an Independent Certified Public Accountant (**ICPA**).[30] After due hearing, the Court commissioned Babor as the ICPA and directed him to file his report.[31] Within the allowed extended period[32], the ICPA report was filed on 12 November 2019.[33]

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19 See Compliance/Submission (Re: Surety Bond) filed on 24 June 2019, id., pp. 345-376.
20 See Resolution dated 27 June 2019, id., pp. 378-379.
21 Id., pp. 333-336.
22 Id., pp. 340-341.
23 Pre-Trial Brief of petitioner, id., pp. 384-398 and Pre-Trial Brief of respondent, id., pp. 399-406, respectively.
24 See Order dated 04 July 2019, id., pp. 444-445.
25 See No Agreement to Mediate, id., Volume II, p. 538.
26 See Order dated 29 August 2019, id., p. 548.
27 See Motion for Extension of Time to File Joint Stipulation of Facts and Issues, id., pp. 578-580.
28 See Order dated 18 September 2019, id., p. 581.
29 See Motion to Admit (Attached Joint Stipulation of Facts and Issues), id., pp. 585-598.
30 See Motion for Commissioning of Independent Certified Public Accountant filed on 13 September 2019, id., pp. 556-577.
31 See Order dated 26 September 2019, id., p. 584.
32 See Order dated 31 October 2019, id., p. 610.
33 Exhibit "P-116", id., pp. 644-665.

Thereafter, the Court issued the Pre-Trial Order adopting the parties' JSFI and setting the hearing dates.[34] When trial ensued, petitioner presented two (2) witnesses, namely: (1) Romualdo Macasaet (**Macasaet**), its Managing Director and former Vice-President for Finance; and, (2) Babor, the court commissioned ICPA.

In his Judicial Affidavit[35], Macasaet testified that: (1) upon petitioner's request, the BIR issued Ruling 178-08 on 28 August 2008; (2) Ruling 178-08 confirmed that the distribution of condominium units and parking lots (of Discovery Primea) to Aldex and to various investors are *not* subject to income tax (**IT**), CGT, creditable withholding tax (**CWT**), value-added tax (**VAT**) and documentary stamp tax (**DST**); (3) the BIR did not revoke the said ruling; (4) petitioner relied heavily on the exemption granted by Ruling 178-08; and, (5) petitioner will suffer prejudice or damage if the collection of the alleged deficiency taxes will proceed.

In his cross-examination[36], Macasaet stated that taxes are withheld only when the transactions are sales and not when they are investments (as in this case). Macasaet also reiterated that petitioner relied on the exemption granted by Ruling 178-08. No re-direct and re-cross examinations were conducted.

For his part, Babor, by way of Judicial Affidavit[37], testified that: (1) he reviewed the JVA and the PIAs, together with the non-VAT Official Receipts (**ORs**) and WT returns, as part of the audit procedures performed; (2) based on the documents he reviewed, he noted that the "investor's" participation in the condominium project was purely investment and funding hence, there was no sharing of profits among them; (3) based on the JVA, ALDEX has been assigned with 142 units of service apartment on 12 floors and 381 parking spaces while petitioner was to be entitled to 90 residential units on 47 floors and 274 parking spaces, representing a return of their invested capital. With the arrangement, no sale of units transpired between the two; (4) pursuant to the Deed of Partition and Conveyance, a condominium certificate title shall be issued in the investor's name and the corresponding

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34 Dated 09 October 2019, id., pp. 600-605.
35 See Judicial Affidavit of Romualdo Macasaet, Exhibit "P-4", id., Volume I, pp. 248-256.
36 TSN dated 18 November 2019, pp. 10-11.
37 See Judicial Affidavit of Clark Joseph C. Babor, Exhibit "P-123", Division Docket, Volume II, pp. 618-637.

transfer taxes and fees shall be for the investor's own personal account; (5) the amounts stated in the non-VAT ORs only pertained to the investment payments and no WT and VAT were passed on; (6) based on petitioner's Annual Information Return of Creditable Income Taxes Withheld (Expanded)/Income Tax Payments Exempt from Withholding Tax (BIR Form No. 1604-E) and the "Alphalist of Payees subject to Expanded Withholding Tax", petitioner did not withhold any taxes from the investors; and, (7) he reviewed and studied Ruling 178-08 in relation to the transactions subject of this case.

In his cross-examination[38], Babor explained that, in his ICPA Report, the PIA's (executed between the "investors") carry identical provisions. According to Babor, the details of columns 1-4 in "Table 2-Investors"[39] were lifted from the JVA and PIAs, while the amounts reflected as receipts from "investors" in column 5 are the summary of the non-VAT ORs obtained from petitioner. Babor clarified further that although the assessment pertains to TY 2012, he extended the validation of the non-VAT ORs from 2009 until 2015. Hence, the non-VAT ORs pertaining to TY 2012 are complete.

During his re-direct examination[40], Babor stated that he has yet to see the BIR Assessment Division reversing a BIR ruling. No re-cross examination was conducted.

Without other witnesses to present, the Court directed petitioner to file a Formal Offer of Evidence (**FOE**) within five (5) days from the hearing date. Respondent was also granted an equal period from its receipt of the FOE to file a comment/opposition thereto.[41] After petitioner filed its FOE[42] on 10 February 2020, respondent belatedly filed his/her Comment thereto.[43] Petitioner filed a Reply to the Comment[44] and respondent filed a Rejoinder to the Reply.[45] Petitioner then still filed its Surrejoinder *Ad Cautelam*.[46] Further, petitioner filed a "Motion for

[38] TSN dated 27 January 2020, pp. 3-8.
[39] Page 9 of the ICPA Report.
[40] TSN dated 27 January 2020, pp. 8-9.
[41] See Order dated 27 January 2020, Division Docket, Volume II, p. 674.
[42] Id., pp. 679-737.
[43] See Manifestation/Motion to Admit Comment and Rejoinder to Petitioner's Reply, id., pp. 801-804. See Comment (To Petitioner's Formal Offer of Evidence), id., pp. 806-808.
[44] Filed on 23 July 2020, id., 792-798.
[45] Filed on 20 August 2020, id., pp. 801-819.
[46] See Motion to Admit Surrejoinder *Ad Cautelam* (*to Respondent's Manifestation and Rejoinder to Petitioner's Reply*), id., pp. 810-812.

Remarking of Evidence"[47] to which respondent filed a Comment thereto.[48] Petitioner thereafter filed a "Second Motion for Remarking".[49]

In a Resolution dated 06 October 2020[50], the Court considered the first motion for remarking as withdrawn and granted the second motion for remarking, and set a new commissioner's hearing. After the said hearing[51], petitioner filed its Amended FOE on 09 December 2020.[52]

Acting on all the aforesaid incidents, in a Resolution dated 28 January 2021[53], the Court denied Exhibits "P-1", "P-2", "P-3", "P-5",

See Surrejoinder *Ad Cautelam* (On Respondent's Manifestation/Motion to Admit Comment and Rejoinder to Petitioner's Reply), id., pp. 814-819.

47 Filed on 12 February 2020, id., pp. 740-746.

48 Id., pp. 769-771.

49 Filed on 15 June 2020, id., pp. 778-781.

50 Id., pp. 828-831.

51 See Commissioner's Report on the hearing on 02 December 2020, id., p. 844.

52 Id., pp. 885-914.

53 Id., pp. 918-925.

Exhibit	Description
"P-1"	Certified Reproduction of Original of Final Decision on Disputed Assessment ("FDDA") dated 27 February 2019.
"P-2"	Certified Reproduction of Original of Details of Discrepancies dated 17 February 2019.
"P-3"	Certified Photocopy of the Copy on File of BIR Ruling (DA-JV-023) 178-08 dated August 28, 2008.
"P-5"	Faithful Reproduction of the Original of Assessment Notice for Withholding Tax dated 23 September 2016 for Taxpayer: JTKC LAND, INC. for the period of 2012 with Assessment No. WO-ELA80567-12-16-885 in the amount of Php 15,585,232.79.
"P-5a"	Faithful Reproduction of the Original of Assessment Notice for Compromise Penalty dated 23 September 2016 for Taxpayer: JTKC LAND, INC. for the period of 2012 with Assessment No. WO-ELA80567-12-16-885 in the amount of Php 125,000.00.
"P-5b"	Faithful Reproduction of the Original of Formal Assessment Notice (Part 1) dated 23 September 2016 addressed to the President of JTKC Land for deficiency withholding tax-others (ONETT Transaction not subject to CGT) for year 2012 in the amount of Php 15,585,232.79.
"P-5c"	Faithful Reproduction of the Original of Details of Discrepancies (Marked as Annex A-1) dated 23 September 2016.
"P-5d"	Faithful Reproduction of the Original Formal Assessment Notice (Part II) dated 23 September 2016 addressed to the President of JTKC Land for compromise penalty in the amount of Php 125,000.00
"P-6"	Faithful Reproduction of the Original of the Letter dated 12 October 2016 from Bernas Law Offices on behalf of Petitioner addressed to BIR Revenue Region No. 8 with stamp received on 13 October 2016 by BIR Collector's Office, RR8 Makati City.
"P-7"	Faithful Reproduction of the Original of the Letter Re: Protest to the Formal Assessment Notice for the Year 2012 dated 23 September 2016 from Bernas Law Offices on behalf of Petitioner addressed to BIR Revenue Region No. 8.
"P-8"	Faithful Reproduction of the Original of the Letter dated 02 December 2016 from BIR Revenue Region No. 8's Officer-in-Charge Ms. Clavelina S. Nacar (OIC Nacar) stating that JTKC Land Inc's request for reinvestigation is granted.

"P-9"	Faithful Reproduction of the Original of the Letter dated 20 December 2016 from BERNAS LAW OFFICES to BIR Revenue District Office No. 50 requesting for the facts and documents on which the assessment of the alleged deficiency withholding tax in the amount of Php 15,585,232.79 was based.
"P-10"	Faithful Reproduction of the Original of the Letter dated 25 January 2017 from BERNAS LAW OFFICES reiterating its letter dated 20 December 2016 stating that no reply from the BIR has been received regarding the facts and documents on which the assessment of the alleged deficiency withholding tax was based.
"P-11"	Faithful Reproduction of the Original of the Letter of Authority dated 18 October 2013 addressed to Petitioner JTKC Land, Inc.
"P-14"	Original Computer Print Out of RMC No. 55-2010 dated 28 June 2010.
"P-16"	Faithful Reproduction of the Original of the Secretary's Certificate dated 02 April 2019 evidencing the authority of Mr. Ruben C. Tiu, Romualdo Macasaet and BERNAS LAW OFFICES or any of its lawyers …
"P-13"	Faithful Reproduction of the Original of the Memorandum for Revenue District Officer, Revenue District No. 050, South Makati dated 30 January 2018 with Subject JTKC Land, Inc. for Taxable Years: December 31, 2010/2011/2012/2013/2014.
"P-15"	Photocopy of the Petition for Review filed by the Petitioner JTKC Land, Inc. at the Court of Tax Appeals docketed as CTA Case No. 9508.
"P-46"	Faithful Reproduction of original Non-Vat Official Receipt No. 2695 issued to Datem, Inc.
"P-47"	Faithful Reproduction of original Non-Vat Official Receipt No. 2706 issued to Datem, Inc.
"P-48"	Faithful Reproduction of original Non-Vat Official Receipt No. 2707 issued to Datem, Inc.
"P-49"	Faithful Reproduction of original Non-Vat Official Receipt issued to Datem, Inc. No. 2741
"P-50"	Faithful Reproduction of original Non-Vat Official Receipt No. 2742 issued to Datem, Inc.
"P-51"	Faithful Reproduction of original Non-Vat Official Receipt No. 2817 issued to Datem, Inc.
"P-52"	Faithful Reproduction of original Non-Vat Official Receipt No. 2825 issued to Datem, Inc.
"P-53"	Faithful Reproduction of original Non-Vat Official Receipt No. 2848 issued to Datem, Inc.
"P-54"	Faithful Reproduction of original Non-Vat Official Receipt No. 2851 issued to Datem, Inc.
"P-55"	Faithful Reproduction of original Non-Vat Official Receipt No. 2870 issued to Datem, Inc.
"P-56"	Faithful Reproduction of original Non-Vat Official Receipt No. 2878 issued to Datem, Inc.
"P-57"	Faithful Reproduction of original Non-Vat Official Receipt No. 2896 issued to Datem, Inc.
"P-58"	Faithful Reproduction of original Non-Vat Official Receipt No. 2906 issued to Datem, Inc.
"P-59"	Faithful Reproduction of original Non-Vat Official Receipt No. 2915 issued to Datem, Inc.
"P-60"	Faithful Reproduction of original Non-Vat Official Receipt issued to Datem, Inc. No. 2918
"P-61"	Faithful Reproduction of original Non-Vat Official Receipt No. 2962 issued to Datem, Inc.
"P-62"	Faithful Reproduction of original Non-Vat Official Receipt No. 2970 issued to Datem, Inc.
"P-63"	Faithful Reproduction of original Non-Vat Official Receipt No. 2981 issued to Datem, Inc.
"P-89"	Faithful Reproduction of original Non-Vat Official Receipt No. 2828 issued to All Venus, Inc.
"P-90"	Faithful Reproduction of original Non-Vat Official Receipt No. 2830 issued to All Venus, Inc.

"P-5a", **"P-5b"**, **"P-5c"**, **"P-5d"**, **"P-6"**, **"P-7"**, **"P-8"**, **"P-9"**, **"P-10"**, **"P-11"**, **"P-14"**, and **"P-16"** for failure to submit the duly marked exhibits; **"P-13"** for failure to present the original for comparison, failure to submit the duly marked exhibit and failure to identify; **"P-15"** for failure to present the original for comparison and failure to submit the duly marked exhibit; **"P-46"**, **"P-47"**, **"P-48"**, **"P-49"**, **"P-50"**, **"P-51"**, **"P-52"**, **"P-53"**, **"P-54"**, **"P-55"**, **"P-56"**, **"P-57"**, **"P-58"**, **"P-59"**, **"P-60"**, **"P-61"**, **"P-62"**, **"P-63"**, **"P-89"**, and **"P-90"** for failure of the exhibit formally offered and identified in the ICPA Report to correspond to the document actually marked.

As for respondent's witnesses, Revenue Officers (**ROs**) Raymond A. Pasco (**Pasco**) and Joey Fragrante (**Fragrante**) were presented.

In his direct examination by way of Judicial Affidiavit[54], RO Fragrante testified that he conducted an audit of petitioner's books of accounts pursuant to the original LOA (LOA-050-2015-00000059/eLA201100080567).[55] Upon his investigation, he discovered that the PIAs between petitioner and several investors were not subjected to any withholding taxes. As the result of his investigation, the Preliminary Assessment Notice dated 10 April 2015[56] (**PAN**) and FAN were subsequently issued.

During his cross-examination[57], RO Fragrante explained that at the time the report was made, Ruling 178-08 was yet to be revoked. However, when he made the assessment, he disregarded it because there were similar rulings with the same scheme as petitioner that were revoked subsequently. When asked to elaborate on the said scheme, RO Fragrante stated that there have been instances when real estate developers made it appear that a buyer (of a condominium unit) was an investor (in the condominium project) to avoid paying taxes. According to him, petitioner was insisting on the same scheme when it invoked an investor-investee relationship rather than a buyer-seller relationship with its supposed "investors".

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54 See Judicial Affidavit of Joey Fragrante, Exhibit "R-12", id., Volume I, pp. 426-430.
55 Supra at note 8.
56 Exhibit "P-3", BIR Records, pp. 356-360.
57 TSN dated 15 February 2021, pp. 6-21.

RO Fragrante attested that although no written evidence could be proffered, the revocation of Ruling 178-08 was explained verbally to petitioner during the informal conferences conducted. In addition, RO Fragrante stated that he was not aware of the earlier BIR Ruling No. 317-92[58] that declared investments in building constructions to be a non-taxable event. He also admitted that he also has yet to see a BIR Ruling providing that an investment should be considered as a sale.

In his re-direct examination[59], RO Fragrante stated further that he is aware of Revenue Memorandum Circular (**RMC**) No. 55-2010.[60] As for BIR Ruling No. 317-92, he averred that petitioner was not mentioned therein. In his re-cross examination[61], RO Fragrante said that although it was part of the BIR Records, he did not read the decision in *G&W Architects, Engineers and Project Consultants Co. v. Commissioner of Internal Revenue* docketed as CTA Case Nos. 8358, 8426 and 8489[62] so he was not aware of RMC No. 55-2010's revocation.

When called to the witness stand, RO Pasco testified through his Judicial Affidavit[63] that he was assigned to handle the reinvestigation of petitioner's books of account pursuant to Memorandum of Assignment (**MOA**) No. RR8-050-REA/PRO-100318-460.[64] The reinvestigation covered petitioner's protest filed against the FAN. According to him, petitioner failed to prove that the distribution and/or delivery of the condominium units to the "investors" were exempt from taxes. He averred that petitioner's alleged legal basis (BIR Ruling No. 455-2007[65]) was rendered null and void by RMC No. 55-2010.

In his cross-examination[66], Pasco answered that there was no document or written evidence that would show that petitioner was informed of the revocation of Ruling 178-08 although he attested that in a series of meetings with the latter, he and his Group Supervisor (**GS**)

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58 Exhibit "P-130", BIR Records, pp. 428-430.

59 TSN dated 15 February 2021, pp. 21-24.

60 Circularizing Revocation of BIR Rulings issued to G&W Architects, Engineers and Project Development Consultants Relative to its "Build-To-Own" Transactions.

61 TSN dated 15 February 2021, pp. 24-26.

62 Promulgated on 03 November 2015. Penned by Justice Cielito N. Mindaro-Grulla (Ret.) of the First Division.

63 See Judicial Affidavit of Raymond A. Pasco, Exhibit "R-13", Division Docket, Volume I, pp. 409-413.

64 Exhibit "R-9", BIR Records, p. 524.

65 Issued on 17 August 2007 at the request of G&W Architects, Engineers and Project Development Consultants.

66 TSN dated 15 February 2021, pp. 28-57.

had mentioned the revocation to petitioner. When asked if the meetings with petitioner were recorded, he replied in the negative explaining that there were only verbal communications. When also asked about Memorandum dated 30 January 2018[67] (which recommended the cancellation of the FAN), he answered that he was not aware of it and he made a different recommendation because he based his findings on RMC No. 55-2010 (as the original examiner [RO Fragrante] had advised). For the content of his Memorandum[68], he stated that he had not seen any document which considered the transaction on the units under the PIAs as sale transactions.

In his re-direct examination[69], RO Pasco stated that when he conducted the reinvestigation, he evaluated petitioner's protest letter with the supporting documents against the available regulations applicable at that time. In his re-cross examination[70], he answered that the applicable issuance was RMC No. 55-2010 which revoked BIR Ruling 455-2007. He admitted that petitioner was never mentioned in both issuances.

After respondent's witnesses were presented, the Court ordered respondent to file his or her FOE within twenty (20) days from the last hearing date. Petitioner was given a similar period from receipt of the FOE within which to file a comment/opposition thereto. Also, another hearing date was set for the presentation of petitioner's rebuttal evidence.[71] Respondent filed the FOE on 04 March 2021[72] while petitioner filed a Motion to Admit Comment on respondent's FOE on 31 March 2021.[73] Respondent then filed an Opposition to the said motion on 20 May 2021.[74]

Later, petitioner requested for the issuance of a Subpoena *Ad Testificandum*" for Joel L. Tan-Torres (**Torres**), the previous CIR who

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67 Exhibit "P-133", BIR Records, p. 425.
68 Exhibit "R-10", id., p. 530.
69 TSN dated 15 February 2021, pp. 57-58.
70 Id., pp. 58-61.
71 See Order dated 15 February 2021, Division Docket, Volume II, p. 929.
72 Id., pp. 931-936.
73 See Motion to Admit Comment on Respondent's Formal Offer of Evidence, id, pp. 939-949.
74 Id., pp. 966-969.

issued RMC No. 55-2010.[75] Respondent then interposed an objection to the request for subpoena.[76]

In a Resolution dated 19 July 2021[77], the Court admitted all of respondent's exhibits and denied petitioner's request for a Subpoena *Ad Testificandum*. Afterwards, petitioner presented Torres as a rebuttal witness.

In his Judicial Affidavit[78], Torres attested that: (1) he was the previous CIR from November 2009 until July 2010; (2) he issued RMC No. 55-2010 that specifically revoked BIR Ruling No. DA-455-2007 and it does not extend to other BIR Rulings that were not mentioned; (3) the said RMC did not revoke Ruling 178-08 because petitioner's factual circumstances are not similar with the "build to own" transactions of G&W Architects; (4) the RMC was issued because there was a finding that G&W Architects misrepresented itself when it applied for the revoked ruling; (5) there is no provision in the RMC that would conclude that Ruling 178-08 was automatically revoked; (6) there were previous BIR rulings that treated the distribution of condominium units in proportion to the "investor's" contribution as a non-taxable event; and, (7) there was no application for the revocation of Ruling 178-08 nor was there any investigation regarding that matter.

In his cross-examination[79], Torres only confirmed that BIR Ruling DA-455-2007 was revoked in RMC No. 55-2010. No re-direct and re-cross examinations were conducted.

Petitioner then filed the following: (1) Motion for Remarking on 29 November 2021[80], (2) Supplemental FOE on 02 December 2021[81]; and, (3) Manifestation with Motion to Admit on 15 December 2021.[82] Acting on the motions and supplemental FOE, in a Resolution dated 24 February 2022[83], the Court granted the motions and admitted

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75 See Amended Request for Issuance of Subpeona *Ad Testificandum*, id., pp. 961-963.
76 See Omnibus Opposition to Petitioner's Motion to Reset Hearing and Amended Request for Issuance of Subpoena *Ad Testificandum*, id., pp. 972-975.
77 Id., pp. 978-985.
78 See Judicial Affidavit of Joel L. Tan-Torres, id., Volume III, pp. 994-1021.
79 TSN dated 17 November 2021, pp. 4-9.
80 Division Docket, Volume III, pp. 1098-1100.
81 Id., pp. 1122-1133.
82 Id., pp. 1101-1104.
83 Id., pp. 1317-1320.

petitioner's supplemental offer of evidence except Exhibit "**P-132**"[84] which was denied admission for failure of identification. The Court thereafter directed the parties to submit their memoranda within 30 days from receipt of such resolution. Respondent filed his or her Memorandum[85] on 05 April 2022 while petitioner filed its Memorandum on 20 April 2022.[86] Accordingly, the case was submitted for decision.[87]

ISSUES

As culled from the JSFI, the main issues for this Court's determination -

I.

WHETHER REVENUE REGION NO. 008 – MAKATI CITY HAS THE AUTHORITY TO ISSUE THE ASSESSMENT NOTICE AGAINST PETITIONER JTKC LAND, INC.;

II.

WHETHER THE FINAL DECISION ON DISPUTED ASSESSMENT (FDDA) DATED 27 FEBRUARY 2019 IS VOID BECAUSE IT DOES NOT STATE THE FACTS AND THE LAW ON WHICH IT IS BASED;

III.

WHETHER PETITIONER JTKC LAND, INC. COULD RELY ON THE BUREAU OF INTERNAL REVENUE (BIR) RULING NO. (DA-JV-023) 178-08 ISSUED IN ITS FAVOR BY RESPONDENT COMMISSIONER OF INTERNAL REVENUE; AND,

IV.

WHETHER PETITIONER JTKC LAND, INC. IS LIABLE FOR THE ALLEGED DEFICIENCY WITHHOLDING TAX OF ₱20,424,868.48, INCLUSIVE OF INTERESTS AND PENALTIES, AND COMPROMISE PENALTY OF ₱125,000.00 FOR TAXABLE YEAR 2012.

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84 Memorandum for the Regional Director, Revenue Region No. 8, Makati City dated 14 July 2017 signed by Alvin B. Lucas and reviewed by Ma. Carmen V. Sy is found on pages 522 and 523 of the BIR docket, which was elevated to the CTA by the Respondent and is authenticated or admitted to be authentic by Respondent and is likewise part of the case records.

85 Division Docket, Volume III, pp. 1326-1340.

86 Id., pp. 1343-1472.

87 See Resolution dated 26 April 2022, id., p. 1474.

ARGUMENTS

In support of the above issues, petitioner argues that Revenue Region No. 008 – Makati City did not have the authority to issue an LOA for the assessment of CGT against it since the same was already covered by an LOA issued by Revenue Region No. 007 – Quezon City (which authorized the audit of petitioner's books for all internal revenue taxes for TY 2012). Thus, without a valid LOA, the assessment against it is void.

Petitioner adds that, assuming that the LOA is valid, its reliance on Ruling 178-08 issued in its favor is not incorrect since it was not specifically revoked by any subsequent issuances. Assuming it was cancelled, it was also never informed of such revocation.

Petitioner likewise asserts that RMC No. 55-2010 was issued to specifically revoke certain BIR Rulings namely: *BIR Ruling No. DA-056-2003* dated February 24, 2003 (Penhurst Parkplace Condominium); *BIR Ruling No. DA-624-2004* dated December 10, 2004 (Kensington Place Condominium); *BIR Ruling No. DA-455-2007* dated August 17, 2007 (Kensington Condominium); *BIR Ruling No. DA-410-2007* dated July 26, 2007 (Sapphire Residences); *BIR Ruling No. DA-409-2007* dated July 26, 2007 (Blue Sapphire Residences Condominium); and *BIR Ruling No. DA-337-2007* dated June 20, 2007 (Grand Hamptoms Place Condominium). According to it, RMC No. 55-2010 did not mention Ruling 178-08 that was issued to petitioner nor did it include a clause for the automatic revocation of other BIR rulings not identified therein. To bolster its claim, petitioner presented Torres (then CIR who issued the RMC) who confirmed that the said issuance was not intended to affect Ruling 178-08 or other rulings not mentioned therein. Petitioner claims that if the said RMC was interpreted to automatically revoke rulings not particularly identified, it would violate the taxpayer's right to due process. Moreover, petitioner cites Section 7[88] of Revenue

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88 **Sec. 7. Effect and Validity of Issued Rulings**
A taxpayer ordinarily may rely on a valid ruling received from the Bureau pertaining to the transaction it was applied for. For the ruling to be valid, the taxpayer must fully and accurately describe the transaction in the request.

Tax rulings cannot be cited as precedent by other taxpayers, but they can provide useful information on how the Bureau may treat a similar transaction.

The BIR ruling can only be used for purposes of internal revenue taxes. No ruling involving local taxes, customs duties or other taxes, fees and charges not within the powers of the Bureau to assess and collect shall be issued.

Memorandum Order (**RMO**) No. 9-2014[89] which states that a taxpayer may rely on a valid ruling received from the BIR pertaining to the transaction it applied for. Petitioner thus maintains that it cannot be faulted when it relied on Ruling 178-08 for its claimed exemption.

In addition, petitioner argues that its circumstances are different from the factual scenarios covered by the revoked rulings in RMC No. 55-2010. In the latter scenarios, no developer paid and reported taxes on the transactions arising from the construction of any condominium project. Petitioner, on the other hand, is the developer that paid the related construction taxes.

Petitioner also avers that there were previous BIR rulings, particularly BIR Ruling Nos. DA-069-02[90] and 317-92[91], which confirmed that the distribution of condominium units to investors in a condominium project (in proportionate to their contributions) is *not* a taxable event.

Further, petitioner alleges that assuming Ruling 178-08 was revoked, its retroactive application is prohibited because it acted in good faith when it requested for the ruling as held similarly in the case of *Commissioner of Internal Revenue v. Court of Appeals et al.*[92] Petitioner asserts further that it was actually respondent who acted in bad faith when he or she failed to comply with the instructions laid down in the Memorandum dated 30 January 2018[93] (recommending the cancellation of the FAN).

Lastly, petitioner claims that both the FAN and the FDDA against it are void because they are devoid of facts and law on which the assessment of the alleged deficiency was based.

89 Requests for Rulings with the Law and Legislative Division.
90 Issued on 15 April 2002 by then CIR Milagros V. Regalado to Filinvest Alabang, Inc.
91 Issued on 28 October 1992 by then CIR Jose U. Ong to Sycip, Gorres, Velayo & Co.; Exhibit "P-130", BIR Records, pp. 428-430.
92 G.R. No. 117982, 06 February 1997.
93 Supra at note 67.

On the other hand, respondent argues the Revenue Region No. 008 - Makati City is authorized to issue the LOA since it has jurisdiction over the location of the condominium project in Makati City. Thus, the FAN and the FDDA are valid.

As for the substantive issues, respondent counters that Ruling 178-08 was only anchored on the validity of the BIR Ruling No. DA-455-2007. However, with the revocation of the latter ruling due to the issuance of RMC No. 55-2010, Ruling 178-08 was nullified automatically. Consequently, at the time of the assessment in 2015, petitioner was no longer exempted from taxes arising from transactions covered by the JVA and the PIAs.

Respondent further argues that contracts entered into between petitioner and its "investors" are considered as contracts of sale. He or she avers that petitioner exercised full control and ownership over the condominium project, and that the distribution of the units to the alleged investors was actually a sale of real property that ought to be subjected to withholding taxes.

At the outset, the LOA issued to petitioner authorized the examinations of its books for CGT in relation to the transfer of properties treated as capital assets pursuant to Section 27(D)(5)[94] of the National Internal Revenue Code (**NIRC**) of 1997, as amended. However, respondent did not find any disposition, sale or transfer of capital assets that should be subjected to CGT. Instead, he or she determined that petitioner is liable to pay WT arising from the executed PIAs due to alleged revocation of the exemption granted under Ruling 178-08.

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[94] **SEC. 27.** *Rates of Income Tax on Domestic Corporations.* –

...

(D) *Rates of Tax on Certain Passive Incomes.* –

...

(5) *Capital Gains Realized from the Sale, Exchange or Disposition of Lands and/or Buildings.* - A final tax of six percent (6%) is hereby imposed on the gain presumed to have been realized on the sale, exchange or disposition of lands and/or buildings which are not actually used in the business of a corporation and are treated as capital assets, based on the gross selling price or fair market value as determined in accordance with Section 6(E) of this Code, whichever is higher, of such lands and/or buildings.

...

According to respondent, based on the PIAs, the properties to be transferred to the "investors" are considered as ordinary assets used in petitioner's business. Therefore, these transactions should have been subjected to income tax or WT pursuant to Section 2.57.2(J) of Revenue Regulations (RR) No. 02-98[95], which requires a 5% WT rate for the transfer of properties used in the ordinary course of business wherein the gross selling price or total consideration exceeds ₱2,000,000.00, to wit:

> ...
>
> SEC. 2.57.2. *Income Payment Subject to Creditable Withholding Tax and Rates Prescribed Thereon.* — Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:
>
> ...
>
> (J) *Gross selling price or total amount of consideration or its equivalent paid to the seller/owner for the sale, exchange or transfer of.* — Real property, other than capital assets, sold by an individual, corporation, estate, trust, trust fund or pension fund and the seller/transferor is habitually engaged in the real estate business in accordance with the following schedule —
>
> ...
>
> With selling price of more than two million pesos (P2,000,000.00) 5.0%
>
> ...

Corollarily, Section 2.57.3 of the said regulation, as amended by RR No. 17-2003[96], provides that in transfers of real property, the buyer is constituted as the withholding agent for the creditable taxes required to be withheld on income payments. The pertinent part states:

[95] Implementing Republic Act No. 8424, "An Act Amending the National Internal Revenue Code, as Amended" Relative to the Withholding on Income Subject to the Expanded Withholding Tax and Final Withholding Tax, Withholding of Income Tax on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes.

[96] Amending Further Pertinent Provisions of Revenue Regulations No. 2-98, as Amended, Providing for Additional Transactions Subject to Creditable Withholding Tax; Re-Establishing the Policy that the Capital Gains Tax on the Sale, Exchange or Other Disposition of Real Property Classified as Capital Assets Shall be Collected as a Final Withholding Tax, Thereby Further Amending Revenue Regulations Nos. 8-98 and 13-99, as Amended by Revenue Regulations No. 14-2000; and for Other Purposes. (Italics in the original text)

> ...
>
> 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:
>
> ...
>
> (B) An individual, with respect to payments made in connection with his trade or business.
>
> However, insofar as taxable sales, exchanges or transfers of real property are concerned, *the buyers, whether or not engaged in trade or business, are constituted as withholding agents. In any case, no Certificate Authorizing Registration (CAR)/Tax Clearance Certificate (TCL) shall be issued to the buyer unless the withholding tax due on the sale, transfer or exchange of real property has been duly paid.*
>
> *Since the tax herein involved and being withheld is income tax, the burden of the tax is really upon the seller although the mode of payment of the tax is through withholding by the buyer. As such, the tax withheld is considered a part of the consideration agreed upon between the seller and buyer resulting, therefore, to a net take to the seller of only the difference between the agreed consideration/selling price and the tax withheld.*
>
> ...

Based on the foregoing, respondent deemed that the investors should have withheld 5% WT from their payments to petitioner. Since there were no previous withholdings made by the investors due to petitioner's reliance on Ruling 178-08, respondent imposed the 5% WT on the collections (or payments made by the investors) to remedy the situation and to collect petitioner's deficiency income taxes. Concurrently, finding that petitioner failed to pay the taxes, respondent also imposed a compromise penalty of ₱125,000.00 pursuant to Section 255[97] of the NIRC of 1997, as amended.

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[97] **SEC. 255.** *Failure to File Return, Supply Correct and Accurate Information, Pay Tax, Withhold and Remit Tax and Refund Excess Taxes Withheld on Compensation.* - Any person required under this Code or by rules and regulations promulgated thereunder to pay any tax, make a return, keep any record, or supply correct and accurate information, who willfully fails to pay such tax, make such return, keep such record, or supply correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, at the time or times required by law or rules and regulations shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Ten thousand pesos (P10,000) and suffer imprisonment of not less than one (1) year but not more than ten (10) years.

Any person who attempts to make it appear for any reason that he or another has in fact filed a return or statement, or actually files a return or statement and subsequently withdraws the same return or statement after securing the official receiving seal or stamp of receipt of internal revenue office

RULING OF THE COURT

Before ascertaining the tax implications in the instant case, We shall first determine the authority of the Revenue Region to issue the LOA covering the subject assessment.

REVENUE REGION NO. 008 – MAKATI CITY HAS AUTHORITY TO ASSESS PETITIONER.

Petitioner argues that Revenue Region No. 008 – Makati City is barred to issue an LOA covering CGT because this is already within the scope of an LOA issued by Revenue Region No. 007 – Quezon City. It contends that Revenue Region No. 007 – Quezon City, which has been authorized to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for TY 2012, could have issued an assessment for deficiency "withholding tax-others" against it.

Respondent, on the other hand, asserts that it has jurisdiction over the subject assessment because: (1) a valid LOA was duly issued by Revenue Region No. 008 – Makati City and was duly received by petitioner's authorized representative; and, (2) Revenue Region No. 008 – Makati City has jurisdiction over the address of petitioner's condominium project.

We agree with respondent.

Section 13 of the NIRC of 1997, as amended, reads:

> ...
>
> **SEC. 13.** *Authority of a Revenue Officer.* - Subject to the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner, a Revenue Officer assigned to **perform assessment functions in any district may, pursuant to a Letter of Authority issued by the Revenue Regional Director, examine taxpayers within the jurisdiction of the district in order to collect the correct amount of tax**, or to recommend the

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wherein the same was actually filed shall, upon conviction therefor, be punished by a fine of not less than Ten thousand pesos (P10,000) but not more than Twenty thousand pesos (P20,000) and suffer imprisonment of not less than one (1) year but not more than three (3) years.

> assessment of any deficiency tax due in the same manner that the said acts could have been performed by the Revenue Regional Director himself.[98]
>
> ...

As can be gleaned from the aforecited, for the RO to proceed validly with his or her assessment, (1) a LOA must first be secured from the Revenue Regional Director; and, (2) the assessment must be conducted within the jurisdiction of the district to **collect** the correct amount of tax.

In the instant case, it is undisputed that the subject assessment was done pursuant to a valid LOA[99] issued by RD Amora of Revenue Region No. 008 – Makati City which petitioner had duly received. Thus, the *first* requirement was satisfied. As to the *second* requirement, it is crucial to determine which revenue region has the legal duty to collect taxes arising from the sale, transfer or exchange of real property.

Sections 3 and 5 of RR No. 08-98[100] are instructive:

> ...
>
> SEC. 3. *Time and Place of Payment of Capital Gains Tax.* — Within thirty (30) days following each sale or disposition, the Capital Gains Tax Return shall be filed by the seller and payment made to an Authorized Agent Bank (AAB) located **within the Revenue District Office (RDO) having jurisdiction over the place where the property being transferred is located**.
>
> ...
>
> SEC. 5. *Time and Place of Payment of Creditable Withholding Tax.* — Creditable withholding taxes deducted and withheld by the withholding agent/buyer on the sale, transfer or exchange of real property classified as ordinary asset, shall be paid by the withholding agent/buyer upon filing of the return with the Authorized Agent Bank (AAB) located **within the Revenue District Office (RDO) having jurisdiction over the place where the property being transferred is located** within ten (10) days following the end of the month in which the transaction occurred. Provided, however, that taxes

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[98] Emphasis and underscoring supplied.

[99] Supra at note 8.

[100] Revenue Regulations Amending Pertinent Portions of Revenue Regulations Nos. 11-96 and 2-98 Relative to the Tax Treatment on the Sale, Transfer or Exchange of Real Property and for this Purpose Revising the Time and Place of Payment of the Capital Gains Tax Due Thereon.

> withheld in December shall be filed on or before January 25 of the following year.[101]
>
> ...

Considering that petitioner's condominium project (the subject of the assessment in the instant case) is undoubtedly located within the territorial jurisdiction of Revenue Region No. 008 – Makati City, it is logical to conclude that Revenue Region No. 008 – Makati City has the authority to conduct assessments in its jurisdiction, thereby fulfilling the *second* requirement.

With the foregoing, it has been established that respondent Revenue Region No. 008 – Makati City has jurisdiction over petitioner's case. Notwithstanding the previous LOA-046-2013-00000275[102] issued by Revenue Region No. 007 – Quezon City, petitioner's argument that only the said regional office (where petitioner was registered at the time of the subject assessment) has the authority to audit petitioner must fail as RR No. 08-98 clearly states that the RDO, having jurisdiction over the place where the property is located is imbued with the authority to collect (and to assess) CGT or WT on the sale or transfer of real properties. Thus, it is evident that Revenue Region No. 007 – Quezon City could not have initially assessed petitioner for deficiency "withholding tax-others" since it has no legal authority to do so.

THE PROJECT INVESTMENT AGREEMENTS (PIAS) ARE NOT CONTRACTS OF SALE BUT CONTRACTS TO SELL.

Relying on previous BIR Rulings and on Ruling 178-08, petitioner contends that the PIAs do not constitute a taxable event or sale since the allocation of the condominium units to individual investors is a mere return of capital that each contributed to fund the condominium project.

Respondent, on the other hand, asserts that the PIAs constitute a taxable sale since petitioner has the complete control over the condominium project, as shown in the PIAs.

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101 Emphasis and underscoring supplied.

102 Exhibit "P-11", Division Docket, Volume I, p. 536.

While the Court could not infer a sale transactions from the PIAs, the PIAs appear to carry contracts to sell.

It is settled that a contract is what the law defines it to be, taking into consideration its essential elements and not what the contracting parties choose to call it.[103] The rule has always been that the title or designation of the contract is *not* controlling in classifying a contract, rather it is the intent of the parties which may be gathered from the provisions of the contract itself. *Animus hominis est anima scripti.* The intention of the party is the soul of the instrument.[104]

Compared to a contract of sale, a contract to sell has all the elements[105] of the former except the *first element*[106], *i.e.* consent to transfer ownership in exchange of the price. In a contract to sell, the prospective seller explicitly reserves the transfer of title to the prospective buyer, or the prospective seller does not as yet agree or consent to transfer ownership of the property subject of the contract to sell until the happening of an event (which for present purposes We shall take as the full payment of the purchase price). What the seller agrees or obliges himself or herself to do is to fulfill the promise to sell the subject property when the entire amount of the purchase price is delivered. In other words, the full payment of the purchase price is a suspensive condition, the non-fulfillment of which prevents the obligation to sell from arising and thus, ownership is retained by the prospective seller without further remedies by the prospective buyer.[107]

As to the *second element*, a thing is determinate when it is particularly designated or physically segregated from all others of the same class.[108] This requirement is satisfied if at the time the contract is entered into, the thing is capable of being made determinate without the necessity of a new or further agreement between the parties.[109] As applied in the instant case, all the PIAs (Item No. 2 – "AREA

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103 *Sps. Fortunato Santos and Rosalinda R. Santos v. Court of Appeals, et al*, G.R. No. 120820, 1 August 2000.

104 *Kilosbayan, Incorporated, et al. v. Teofisto Guingona, Jr., et al.*, G.R. No. 113375, 5 May 1994.

105 The essential elements of a contract of sale are the following:
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.

106 *Romulo A. Coronel, et al. v. The Court of Appeals, et al.*, G.R. No. 103577, 7 October 1996.

107 Id.

108 Civil Code, Article 1460.

109 Id.

ALLOCATION") clearly designate the subject condominium unit in exchange of the alleged contribution of each investor, to wit:

...

i. PIA with Cay International Ltd.:[110]

...

For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Unit 21B** of the **21st Floor** with a total area of **three hundred eighty-two (382) square meters, more or less, and appurtenant rights to three (3) parking spaces designated as Parking Slot No. 3 at Basement 3, Parking Slot Nos. 14 and 15 at Basement** 4 (the "Designated Unit").

...

ii. PIA with Oro Bueno, Inc.:[111]

...

For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Unit 19B** of the **19th Floor** with a total area of **three hundred eighty-two (382) square meters, more or less, and appurtenant rights to three (3) parking spaces designated as Parking Slot Nos. 71, 72 and 73 at Basement** 3 (the "Designated Unit").

...

iii. PIA with West 38 Capital Resources, Inc.:[112]

...

For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Unit 38-B** of the **38TH Floor** with a total area of **three hundred eighty-two (382) square meters, more or less, and appurtenant rights to three (3) parking spaces designated as Parking Slot No. 19 at Basement 2, Parking Slot Nos. 41 and 42 at Basement** 3 (the "Designated Unit").

...

110 Exhibit "P-101", Universal Serial Bus (USB). Also attached in BIR Records p. 320.
111 Exhibit "P-102", id. Also attached in BIR Records, p. 333.
112 Exhibit "P-103", id.

iv. PIA with Atrium Sky Limited:[113]

...

For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Lower Penthouse B of the 61st/62nd Floors** with a total area of **six hundred sixty-eight and 53/100 (668.53) square meters, more or less,** and **appurtenant rights to four (4) parking spaces designated as Parking Space Nos. 3, 4, at Basement 2 and Parking Space Nos. 3 and 4 at Basement 5** (the "Designated Unit").

...

v. PIA with Datem, Inc.:[114]

...

For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Unit 57B** of the 57TH Floor with a total area **of four hundred nine (409) square meters, more or less, and appurtenant rights to three (3) parking spaces designated as Parking Slot Nos. 9 and 10 at Basement 2 and Parking Slot No. 33 at Basement** 3 (the "Designated Unit").

...

vi. Another PIA with Datem, Inc.:[115]

...

For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Unit 57A** of the 57TH Floor with a total area **of three hundred eighty two (382) square meters, more or less, and appurtenant rights to three (3) parking spaces designated as Parking Slot Nos. 73 and 74 at Basement 2 and Parking Slot No. 66 at Basement** 3 (the "Designated Unit").

...

vii. PIA with Smart Asia Group Limited:[116]

...

---

113 Exhibit "P-104", id. Also attached in BIR Records, p. 221.
114 Exhibit "P-105", id. Also attached in BIR Records, p. 252.
115 Exhibit "P-105", id. Also attached in BIR Records, p. 262.
116 Exhibit "P-106", id. Also attached in BIR Records, pp. 305-306.

For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Unit 25-A** of the **25^{TH} Floor** with a total area of **four hundred six (406) square meters, more or less, and appurtenant rights to three (3) parking spaces designated as Parking Slot Nos. 59, 60 and 61 at Basement 4** (the "Designated Unit").

...

viii. PIA with Alister G. Moss:"[117]

...

For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Unit 25B** of the **25^{TH} Floor** with a total area of **four hundred six (406.00) square meters, more or less, and appurtenant rights to three (3) parking spaces designated as Parking Space No. 7 at Basement 3 and Parking Space Nos. 10 and 11 at Basement 4** (the "Designated Unit").

...

ix. PIA with Prince Pacific Enterprise Limited:"[118]

...

For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Unit 60 B** of the **60^{th} Floor** with a total area of **four hundred twenty six (426) square meters, more or less, and appurtenant rights to three (3) parking spaces designated as Parking Slot Nos. 29 and 30 at Basement 2, Parking Slot No. 35 at Basement 3** (the "Designated Unit").

...

x. PIA with All Venus Limited:"[119]

...

For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Lower Penthouse A of the $61^{st}/62^{nd}$ Floors** with a total area of **six hundred sixty-eight and 53/100 (668.53) square meters, more or less,** and **appurtenant rights to six (6) parking**

117 Exhibit "P-107", id. Also attached in BIR Records, p. 287.
118 Exhibit "P-108", id. Also attached in BIR Records, p. 244.
119 Exhibit "P-109", id. Also attached in BIR Records, p. 230.

> **spaces designated as Parking Space Nos. 1, 2, 89 and 90 at Basement 2 and Parking Space Nos. 1 and 2 at Basement 5** (the "Designated Unit").
>
> ...
>
> xi. PIA with NIV Holding Co., Inc.:[120]
>
> ...
>
> For and in consideration of the investment contributions referred to in Section 3.a, and subject to Section 2.b, DEVELOPER shall allocate in favor of INVESTOR an area in the Condominium Project identified as **Upper Penthouse A of the 63rd and 64th Floors** with a total area of **six hundred six and 75/100 (606.75) square meters, more or less,** and **appurtenant rights to three (3) parking spaces designated as Parking Space Nos. 62, 63 and 64 at Basement 2** (the "Designated Unit").
>
> ...

Although the condominium units were non-existent at the time the contracts were entered into, our laws allow the sale of things having a potential existence as well as future goods as objects of said sale.[121]

In relation to the *second element*, the PIAs could not also be classified as *contracts for a piece of work*. 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 of 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. [122]

According to the Supreme Court in *Celestino Co & Company v. Collector of Internal Revenue* (**Celestino**)[123], 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:

---

120 Exhibit "P-110", id. Also attached in BIR Records, p. 212.
121 Civil Code, Articles 1461 and 1462.
122 *Inocencia Yu Dino, et al. v. Court of Appeals, et al.*, G.R. No. 113564, 20 June 2001.
123 G.R. No. L-8506, 31 August 1956; Emphasis supplied and italics in the original text.

> ...
> ... **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.
> ...
>
> 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. ...
> ...

The instant case bears a striking similarity to *Celestino*. Petitioner does not engage to commence and build its condominium project on the basis of a special order from previously existing and identified investors/condominium unit owners. Rather, it builds the condominium project as part of its regular business of acquiring, developing, and selling real estate, including commercial lots and residential condominiums.[124] The records further reveal that based on the PIAs petitioner executed with the supposed investors, the latter have no power to specify the major structural elements of the design of the condominium units before the construction thereof begins and/or specify major structural changes once construction is in progress. The supposed investors' only participation in the project would be purely funding, to wit:[125]

> ...
> 4. RESPONSIBILITIES AND OBLIGATIONS OF THE PARTIES
> ...
>
> b. As part of its participation in the Condominium Project, **DEVELOPER shall have the exclusive right and prerogative with regard to the construction, development, design and management aspects of the**

[124] Par. a, BIR Ruling [DA-(JV-023) 178-08] dated 28 August 2008.
[125] Exhibits "P-101" to "P-110", USB.

> **Condominium Project**. In accordance with this right and prerogative, DEVELOPER shall utilize all means and methods it deems necessary to complete the Condominium Project, and these shall include but shall not be limited to the hiring of developers, professionals, consultants, managers, personnel and workers of its choice, and the making, implementation of any and all designs and specifications of and modifications to the Condominium Project.
>
> ...
>
> e. **INVESTOR's participation** in the Condominium Project **shall be limited solely to the investment and funding of the Designated Unit**. INVESTOR shall faithfully and timely remit its investment contributions and comply with its other obligations embodied in this Project Investment Agreement.
>
> f. **DEVELOPER shall handle and be exclusively responsible for managing, directing, and supervising the planning, development and construction of the Condominium Project in accordance with its plans, specifications and designs**, including obtaining the necessary government permits and licenses, the bidding or award or specific works and the selection and choice of design architects and engineers, Condominium Project managers, contractors and material suppliers. INVESTOR hereby commits its full support and cooperation to DEVELOPER as the manager of the Condominium Project during its construction.[126]
>
> ...

As can be gleaned from the foregoing, the supposed investors have no say in the design or plan of the condominium units. The control over all the phases of construction — from planning to implementation — is solely exercised by petitioner.

The *third element* of the contract pertains to the cause or consideration or the sum stipulated as the equivalent of the thing sold, and also every incident taken into consideration for the fixing of the same, put to the debit of the vendee, and agreed to by him.[127] In this case, the supposed investment made by an investor to petitioner is to

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[126] Emphasis supplied.

[127] *Timoteo Unson, et al. v. Urquijo, Zuloaga and Escubi*, G.R. No. 26293, 24 March 1927.

finance the designated condominium units satisfy this element, as they represent a form of consideration.

Reverting to the *first element*, the intent to transfer the title to the property or an agreement to transfer title for a price actually paid or promised to be paid is the essence of sale.[128] Here, it is undisputed that petitioner owns the subject condominium units to be transferred to the supposed investors, as shown in the following provision of JVA[129] between petitioner and ALDEX:

> ...
>
> 5. PROJECT CONTRIBUTION AND DIVISION OF PROCEEDS
>
> a. For and in consideration of the contribution by the OWNER of the Property, and the development by the DEVELOPER of the Condominium Project, **OWNER and DEVELOPER shall allocate the <u>saleable units</u>** in proportion for their respective contributions, as follows:
>
> 1) The service apartments in the Condominium Unit consisting of 142 units on 12 floors and 381 parking spaces shall be allocated to OWNER;
>
> 2) **The residential units in the Condominium Unit consisting of 90 units on 47 floors and 274 parking spaces shall be allocated to DEVELOPER.**[130]
>
> ...

Evidently, petitioner, through the PIAs, intends to transfer ownership of the subject condominium units to the purported investors with the supposed investments acting as consideration. However, petitioner retains ownership of the units until the full amount of the investment has been paid. This can be seen in the following provisions of the PIAs:[131]

128 *Commissioner of Internal Revenue v. The Court of Appeals, et al.*, G.R. No. 115349, 18 April 1997.
129 Exhibit "P-111", USB.
130 Emphasis and underscoring supplied.
131 Supra at note 125.

...

2. AREA ALLOCATION

...

b. **Upon <u>full compliance</u> by INVESTOR of all of its obligations under this Project Investment Agreement** and upon completion of the Condominium Project, a Deed of Partition and Conveyance shall be executed by DEVELOPER in favor of INVESTOR transferring and conveying all rights and interests in fee simple over the Designated Unit in favor of INVESTOR. **The corresponding Condominium Certificate of Title shall be delivered to INVESTOR**, should it be available at that time. **Unless INVESTOR has remitted the Total Investment Contribution, as defined under Section 3.(a) below, no Deed of Partition and Conveyance shall be executed in favor of the INVESTOR.**

...

6. BREACH/TERMINATION

...

b. This Project Investment Agreement shall be terminated by:

...

5) **The actual delivery of the possession of the Designated Unit to INVESTOR** representing the return of INVESTOR's invested capital, with the accompanying Condominium Certificate of Title.[132]

...

Furthermore, the PIAs could not also be identified as an investment contract. An investment contract refers to a contract, transaction, or scheme whereby a person invests his or her money in a common enterprise and is led to expect profits primarily from the efforts of others. It is presumed to exist whenever a person seeks to use the money or property of others on the promise of profits.[133]

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[132] Emphasis and underscoring supplied.

[133] *Luis Juan L. Virata, et al. v. Alejandro Ng Wee, et al.*, G.R. No. 220926, 05 July 2017.

In Our jurisdiction, the "Howey Test"[134] is employed to determine whether an agreement is an investment contract or not. For a contract to be considered as such, the following requisites must concur: (1) there is a contract, transaction; or scheme; (2) there exists an investment of money; (3) the investment is made in a common enterprise; (4) there is an expectation of profits; and, (5) profits arise primarily from the efforts of others.[135]

Tested against the foregoing parameters, the PIAs herein are clearly not investment contracts. The purported investments were made in consideration of the respective designated condominium units of each investor. Hence, *there was no expectation of profits nor profits arising primarily from the efforts of others*. Moreover, it bears noting that each supposed investor executed a **separate** contract with petitioner, not with each other. Thus, *there was no common enterprise among the investors*. Petitioner did not also present any board resolutions or minutes of meetings that would establish any semblance of participation or control by the supposed investors/condominium unit owners.

In view of the foregoing, the Court finds that respondent erred when he or she decreed in Ruling 178-08 that the PIAs are just investment contracts, and the subsequent allocation or delivery of the residential condominium units to the supposed investors was a mere return of capital and is not a taxable event.

CONTRACTS TO SELL ARE SUBJECT TO WITHHOLDING TAX (WT).

RR No. 2-98[136], as amended by RR No. 17-2003[137], provides clearly that transfers of real properties used as ordinary assets through a Contract To Sell are subject to WT, *viz*:

> ...
>
> Sec. 2.57.2. *Income Payments Subject To Creditable Withholding Tax and Rates Prescribed Thereon*. — Except as herein

134 Named after the US case of *Securities and Exchange Commission v. W.J. Howey Co.*, 328 US 293 (1946).

135 Supra at note 133.

136 Supra at note 95.

137 Supra at note 96.

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:

...

(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. —

...

If the buyer is an individual not engaged in trade or business, the following rules shall apply:

(i) If the sale is a sale of property on the installment plan (i.e., payments in the year of sale do not exceed twenty five percent (25%) of the selling price), no withholding is required to be made on the periodic installment payments. In such a case, the applicable rate of tax based on the gross selling price or fair market value of the property at the time of the **execution of the contract to sell**, whichever is higher, shall be withheld on the last installment or installments immediately prior to such last installment, if the last installment is not sufficient to cover the tax due, to be paid to the seller until the tax is fully paid.

(ii) . . .

However, if the buyer is engaged in trade or business, whether a corporation or otherwise, these rules shall apply:

(i) If the sale is a sale of property on the installment plan [i.e., payments in the year of sale do not exceed twenty five percent (25%) of the selling price], the tax shall be deducted and withheld by the buyer from every installment which tax shall be based on the ratio of actual collection of the consideration against the **agreed consideration appearing in the Contract to Sell applied to the gross selling price or fair market value of the property at the time of the execution of the Contract to Sell, whichever is higher.**

The term 'consideration' refers to the selling price exclusive of interest. Interest earned as an incident of installment payment, if any, shall be subject to the ordinary income tax rate.[138]

...

Applying the foregoing in this case, the PIAs *akin* to Contracts to Sell are subject to WT.

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138 Emphasis and underscoring supplied.

THE FORMAL ASSESSMENT NOTICE (FAN) AND FINAL DECISION ON DISPUTED ASSESSMENT (FDDA) STATE THE FACTS AND LAWS ON WHICH THE ASSESSMENT WAS BASED.

We also find no merit in petitioner's argument that the FAN[139] and Details of Discrepancies[140] attached thereto and the FDDA[141] do not state the facts and law on which the assessment has been based since it merely provides that *"after investigation, there has been found from (petitioner) deficiency Withholding Tax - Others (ONETT transaction not subject to CGT) for the taxable year 2012"* and it does not indicate the documents and/or records relied upon by respondent in assessing petitioner for the deficiency withholding taxes.

Section 228 of the NIRC of 1997, as amended, requires that a taxpayer must be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void. In implementing Section 228 of the NIRC of 1997, as amended, RR No. 12-99[142], as amended by RR No. 18-13[143], reiterates the requirement that a taxpayer must be informed in writing of the law and the facts on which his tax liability was based, to wit:

> ...
>
> SECTION 3. *Due Process Requirement in the Issuance of a Deficiency Tax Assessment.* —
>
> 3.1 Mode of procedure in the issuance of a deficiency tax assessment:
>
> ...
>
> 3.1.3 *Formal Letter of Demand and Final Assessment Notice (FLD/FAN).* — The Formal Letter of Demand and Final Assessment Notice (FLD/FAN) shall be issued by the Commissioner or his duly authorized representative. **The FLD/FAN calling for payment of the**

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139 Supra at note 9.

140 Supra at note 10.

141 Supra at note 3.

142 Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty.

143 Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment.

> **taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based; otherwise, the assessment shall be void** (see illustration in ANNEX "B" hereof).
>
> ...
>
> 3.1.5 *Final Decision on a Disputed Assessment (FDDA).* — **The decision of the Commissioner or his duly authorized representative shall state the (i) facts, the applicable law, rules and regulations, or jurisprudence on which such decision is based, otherwise, the decision shall be void** (see illustration in ANNEX "C" hereof), and (ii) that the same is his final decision.[144]
>
> ...

It is indispensable to provide the taxpayer a sufficient written notice of its tax liability. According to Section 228 of the NIRC of 1997, as amended, if the taxpayer is not informed in writing about the facts and law on which it is based, **the assessment shall be void**. Similarly, under Sections 3.1.3 and 3.1.5 of RR No. 12-99, as amended by RR No. 18-13, the FAN/FLD and the FDDA must include the facts, laws, rules and regulations or jurisprudence on which the assessment is based; **otherwise, the assessment and/or decision shall be considered void.**

It is noted that the Constitution, as the highest law of the land, mandates that the taxpayers should be informed in writing of the facts and law on which the assessment is made. This is part and parcel of due process stating that no person shall be deprived of his or her property without due process of law. With this requirement, the taxpayer will be able to prepare an intelligent protest on or make an appeal of the assessment or decision.[145] Perforce, a mere notice to the taxpayer of his or her tax liabilities *sans* the details for such is insufficient.[146]

In the present case, a perusal of the FAN and the FDDA (that indicated the alleged deficiency WT for TY 2012) will show that both substantially informed petitioner of its tax liabilities. *First*, the FAN and the FDDA were with Details of Discrepancies[147] that provided the basis of the computation of the deficiency tax. *Second*, the Details of

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144 Emphasis and underscoring supplied.
145 Id.
146 *Commissioner of Internal Revenue v. Liquigaz Philippines Corporation*, G.R. No. 215534, 18 April 2016.
147 Supra at note 9 for the FAN; Supra at note 3 for the FDDA.

Discrepancies indicate clearly that the tax liability arose from the review of petitioner's PIAs. *Lastly,* the unit numbers of the assessed condominium project were placed evidently in the Details of Discrepancies, allowing petitioner to verify the amounts that respondent gathered by referring to the relevant PIA of the concerned condominium unit.

It is important to note that it was petitioner who gave respondent the PIAs pursuant to a valid LOA[148] and the First and Second Notices[149], which contain the entire consideration for the pertinent condominium units and the related payment schedules. The payment schedules were thereafter used as basis for the assessment. Thus, contrary to petitioner's assertion, it was clearly apprised of the facts and the law on which the alleged deficiency assessment made against it was based.

Notwithstanding Our findings that the FAN and FDDA are valid, and that the PIAs, being *akin* to contracts to sell should be subject to WT, We still cannot allow the assessment and subsequent collection of the deficiency taxes because it is barred by the exemption granted under Ruling 178-08 issued in petitioner's favor.

PETITIONER CAN RELY ON RULING NO. DA-(JV-023) 178-08 OF THE BUREAU OF INTERNAL REVENUE (BIR).

Petitioner asseverates that it only relied in good faith on Ruling 178-08[150] in not subjecting the same to WT. The said BIR Ruling expressly states that the allocation and delivery of the residential condominium units to the supposed investors pursuant to the PIAs is just a mere return of capital and is not a taxable event.

In contrast, respondent argues that Ruling 178-08 has no legal leg to stand on considering that the legal basis cited in the said ruling, *i.e.*,

148 Supra at note 8.
149 See First Request for Presentation of Records, BIR Records, p. 3; and, Second and Final Notice, id., p. 4.
150 Dated 28 August 2008.

BIR Ruling No. DA-455-2007[151], has been voided by respondent in RMC No. 55-2010.

We find merit in petitioner's argument.

In the well-recognized case of *Commissioner of Internal Revenue v. San Roque Power Corporation*[152], the Supreme Court had the occasion to rule that taxpayers who filed their judicial appeal prior to the lapse of the 120-day period (as opposed to the 120+30 day mandate) due to their innocent reliance on the provisions of BIR Ruling [DA-489-03][153] cannot be faulted and, thus, the Court can acquire jurisdiction over the said appeal. The pertinent parts of the case provide:

> ...
> **VI. <u>BIR Ruling No. DA-489-03 dated 10 December 2003</u>**
>
> BIR Ruling No. DA-489-03 does provide a valid claim for equitable estoppel under Section 246 of the Tax Code. BIR Ruling No. DA-489-03 *expressly* states that the "**taxpayer-claimant need not wait for the lapse of the 120-day period before it could seek judicial relief with the CTA by way of Petition for Review.**" Prior to this ruling, the BIR held, as shown by its position in the Court of Appeals, that the expiration of the 120-day period is mandatory and jurisdictional before a judicial claim can be filed.
>
> There is no dispute that the 120-day period is mandatory and jurisdictional, and that the CTA does not acquire jurisdiction over a judicial claim that is filed before the expiration of the 120-day period. There are, however, two exceptions to this rule. The first exception is if the Commissioner, through a specific ruling, misleads a particular taxpayer to prematurely file a judicial claim with the CTA. Such specific ruling is applicable only to such particular taxpayer. The second exception is where the Commissioner, *through a general interpretative rule* issued under Section 4 of the Tax Code, misleads all taxpayers into filing prematurely judicial claims with the CTA. In these cases, the Commissioner cannot be allowed to later on question the CTA's assumption of jurisdiction over such claim since equitable estoppel has set in as expressly authorized under Section 246 of the Tax Code.

151 Dated 17 August 2007.
152 G.R. No. 187485, 12 February 2013; Citations omitted, emphasis and italics in the original text.
153 Re: Lazi Bay Resources Development, Inc., dated 10 December 2003.

Section 4 of the Tax Code, a new provision introduced by RA 8424, expressly grants to the Commissioner the power to interpret tax laws, thus:

> Sec. 4. *Power of the Commissioner To Interpret Tax Laws and To Decide Tax Cases.* — The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.
>
> The power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals.

Since the Commissioner has **exclusive and original jurisdiction to interpret tax laws**, taxpayers acting in good faith should not be made to suffer for adhering to general interpretative rules of the Commissioner interpreting tax laws, should such interpretation later turn out to be erroneous and be reversed by the Commissioner or this Court. Indeed, Section 246 of the Tax Code expressly provides that a reversal of a BIR regulation or ruling cannot adversely prejudice a taxpayer who in good faith relied on the BIR regulation or ruling prior to its reversal. Section 246 provides as follows:

> Sec. 246. *Non-Retroactivity of Rulings.* — Any revocation, modification or reversal of any of the **rules and regulations** promulgated in accordance with the preceding Sections or any of the rulings or circulars promulgated by the Commissioner **shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers**, except in the following cases:
>
> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
>
> (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
>
> (c) Where the taxpayer acted in bad faith.

Thus, a general interpretative rule issued by the Commissioner may be relied upon by taxpayers from the time the rule is issued up to its reversal by the Commissioner or this Court. Section 246 is not limited to a reversal only by the Commissioner because this Section expressly states, "***Any*** revocation, modification or reversal" without specifying who made the revocation, modification or reversal. Hence, a reversal by this Court is covered under Section 246.

Taxpayers should not be prejudiced by an erroneous interpretation by the Commissioner, particularly on a difficult question of law. The abandonment of the *Atlas* doctrine by *Mirant* and *Aichi* is proof that the reckoning of the prescriptive periods for input VAT tax refund or credit is a difficult question of law. The abandonment of the *Atlas* doctrine did not result in *Atlas*, or other taxpayers similarly situated, being made to return the tax refund or credit they received or could have received under Atlas prior to its abandonment. This Court is applying *Mirant* and *Aichi* prospectively. Absent fraud, bad faith or misrepresentation, the reversal by this Court of a general interpretative rule issued by the Commissioner, like the reversal of a specific BIR ruling under Section 246, should also apply prospectively. As held by this Court in *CIR v. Philippine Health Care Providers, Inc.*:

> In *ABS-CBN Broadcasting Corp. v. Court of Tax Appeals*, this Court held that under Section 246 of the 1997 Tax Code, **the Commissioner of Internal Revenue is precluded from adopting a position contrary to one previously taken where injustice would result to the taxpayer**. Hence, where an assessment for deficiency withholding income taxes was made, three years after a new BIR Circular reversed a previous one upon which the taxpayer had relied upon, such an assessment was prejudicial to the taxpayer. To rule otherwise, opined the Court, would be contrary to the tenets of good faith, equity, and fair play.
>
> This Court has consistently reaffirmed its ruling in *ABS-CBN Broadcasting Corp.* in the later cases of *Commissioner of Internal Revenue v. Borroughs, Ltd., Commissioner of Internal Revenue v. Mega Gen. Mdsg. Corp., Commissioner of Internal Revenue v. Telefunken Semiconductor (Phils.), Inc.*, and *Commissioner of Internal Revenue v. Court of Appeals*. **The rule is that the BIR rulings have no retroactive effect where a grossly unfair deal would result to the prejudice of the taxpayer, as in this case.**
>
> More recently, in Commissioner of Internal Revenue v. Benguet Corporation, wherein the taxpayer was entitled to tax refunds or credits based on the BIR's own issuances but later was suddenly saddled with deficiency taxes due to its subsequent ruling changing the category of the taxpayer's transactions for the purpose of paying its VAT, this Court ruled that applying such ruling retroactively would be prejudicial to the taxpayer.

...

Applying the same principle in the instant case, We can conclude that Ruling 178-08 is a specific interpretative ruling as it was issued by the CIR[154] to address the particular concerns that petitioner had raised. Logically, being a specific interpretative ruling, it binds respondent. Therefore, respondent cannot be allowed to later on take a contrary position where injustice would result to the taxpayer (since equitable estoppel has set in as expressly authorized under Section 246 of the NIRC of 1997, as amended).

In addition, the exceptions under Section 246 of the NIRC of 1997, as amended, are not present here. Petitioner did not deliberately misstate or omit material facts from when it applied for the ruling; the actual facts are not materially different from the facts on which the ruling is based; and, petitioner did not act in bad faith.

Contrary to respondent's contention, there is nothing in RMC No. 55-2010 that states, expressly or impliedly, that Ruling 178-08 is revoked or reversed. The said RMC only revoked expressly the rulings issued to G&W Architects, Engineers and Project Development Consultants, which is not the petitioner in the instant case, as shown by the subject of the said RMC *i.e., Circularizing* ***Revocation of BIR Rulings Issued to G&W Architects, Engineers and Project Development Consultants*** *Relative to Its "Build-to-Own" Transactions*. As other taxpayers are not at liberty to rely on other taxpayers' ruling, then it is reasonable to say that the revocation of the other taxpayers' ruling should not also affect other taxpayers given the different factual circumstances upon which the revocation or reversal was based. The same is bolstered by the provision of the RMC, which enjoins revenue officials and employees to report similar schemes **for appropriate investigation**. Hence, there is no specific, concrete proof or documentary evidence that would show that Ruling 178-08 was revoked or reversed in TY 2012. As such, it is binding to both petitioner and respondent.

Furthermore, even if We consider that the PAN[155] dated 10 April 2015 (issued by RD Amora) as an implied reversal of Ruling 178-08 after the aforementioned appropriate investigation, the same could not be given retroactive application to TY 2012.

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154 Signed by James H. Roldan, Assistant Commissioner, BIR Legal Service, in behalf of CIR.
155 Supra at note 56.

With the exemption granted by Ruling 178-08, petitioner is not liable to pay the deficiency WT. Consequently, it is also not liable to pay the compromise penalty of ₱125,000.00 arising from its alleged failure to pay the said taxes.

While it is true that the government is not estopped from collecting taxes legally due because of mistakes or errors of its agents; however, like other principles of law, this admits of exceptions in the interest of justice and fair play, as where injustice will result to the taxpayer.[156]

WHEREFORE, the foregoing considered, the Petition for Review filed by petitioner JTKC Land, Inc. on 05 April 2019 is hereby **GRANTED**. Accordingly, the Final Assessment Notice (FAN) dated 23 September 2016 and the Final Decision on Disputed Assessment (FDDA) dated 27 February 2019 issued by respondent Commissioner of Internal Revenue are **CANCELLED** and **SET ASIDE**.

Respondent Commissioner of Internal Revenue or any person duly acting on his or her behalf is hereby **ENJOINED** from proceeding with the collection of the taxes arising from the said FAN and FDDA.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

I CONCUR:

LANEE S. CUI-DAVID
Associate Justice

156 *Commissioner of Internal Revenue v. Court of Appeals, et al.*, G.R. No. 117982, 06 February 1997.

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice
Special 2nd Division Acting Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Special 2nd Division Acting Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice