REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

G & W ARCHITECTS, ENGINEERS AND PROJECT CONSULTANTS CO., Petitioner,	**CTA CASE NOS. 8358, 8426 and 8489**
	Members:
-versus-	**DEL ROSARIO,** *Chairperson,* **UY,** *and* **MINDARO-GRULLA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: APR 07 2016 ; 1:20 p.m.

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RESOLUTION

MINDARO-GRULLA, J.:

For this Court's resolution is respondent's **Motion for Reconsideration**, filed on November 23, 2015, with petitioner's **Opposition (to Respondent's Motion for Reconsideration)**, filed by registered mail on December 14, 2015, and received by the Court on December 18, 2015.

Respondent seeks reconsideration of the Decision promulgated on November 3, 2015 (assailed Decision), the dispositive portion of which reads:

> "**WHEREFORE**, the instant Petitions for Review filed on October 21, 2011, February 15, 2012 and May 11, 2012 are hereby **GRANTED**. Accordingly, the deficiency expanded withholding tax and documentary stamp tax assessed for the periods 2004, July 10, 2004, and June 2004, in the amounts of ₱277,458,117.19,

₱132,852,679.05, and ₱149,414,228.66, respectively, or in the total amount of ₱559,725,024.90, are hereby **CANCELLED**.

SO ORDERED."[1]

Respondent contends that petitioner's Built-to-Own or Build-Your-Own-Home concept of purportedly pooling condominium unit owners' funds to be used for the construction of the condominium units on behalf of the fund owners constitute a taxable sale, exchange or disposition of real property, hence, it is subject to expanded withholding tax (EWT) and documentary stamp tax (DST) assessments for the periods June 24, 2004, July 10, 2004 and June 2004.

On the other hand, petitioner opposes the above arguments based on the following grounds:

1. Allegations, issues and arguments raised in the Motion for Reconsideration are a mere rehash of issues already passed upon by the Court in its decision;

2. A reading of the contracts executed in relation to the projects clearly show that the petitioner was merely the project manager of the condominium projects and trustee of the subject land; and

3. In order for a sale to be valid, it is necessary that the vendor be the owner of the thing sold.

A careful review of the arguments in the instant motion shows that the same were sufficiently addressed and passed upon in the assailed Decision. In any event, We shall reiterate our ruling in order to highlight the important points of the assailed Decision which led the Court to cancel respondent's assessment for lack of factual bases.

The evidence presented failed to show that there is ⁄

[1] CTA Case No. 8358, Docket, Vol. III, p. 1565.

a contract of sale between petitioner and its clients.

According to respondent, the essential elements of a contract of sale are present in this case as follows: (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.

Respondent claims that some provisions of the Contract to Manage and Execute the Construction of the Condominium show the existence of the elements of a contract of sale.

The Court does not agree.

In interpreting a contract, its provisions should be read not in isolation but in relation to each other and in their entirety so as to render them effective, having in mind the intention of the parties and the purpose to be achieved. The various stipulations of a contract are to be interpreted together, attributing to the doubtful ones that sense which may result from all of them taken jointly.[2]

For instance, paragraph 5.05 of the Contract to Manage and Execute the Construction of the Condominium, which pertains to the conveyance of title of the units and common areas, should be read in connection with the following stipulations in the contracts[3]:

> "3.03 **G&W as Project Manager and Trustee**
>
> Pursuant to the engagement of G&W as project manager and trustee, **Client requires G&W to do the following acts on behalf and for the collective benefit of the Clients and in furtherance of the development of the Project**:
>
> xxx xxx xxx
>
> (c) To purchase and hold title to the Subject Land as trustee for and in behalf of the Clients, who shall be trustors and beneficiaries of the same and in

[2] *Manila International Airport Authority vs. Gingoyon*, G.R. No. 155879, December 2, 2005, 476 SCRA 570.
[3] Exhibit "D-1", CTA Case No. 8489, Docket, Vol. II, pp. 657-664.

this connection to accordingly pay the purchase price of the Subject Land, including such taxes and expenses as may be lawfully assessed, and to register the Subject Land in its name, for and in behalf of the Clients. The Subject Land shall be beneficially owned by the Clients who shall be both the trustors and beneficiaries in respect of the same in common and in proportion to their respective interests in the Project.

xxx xxx xxx

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

xxx xxx xxx

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

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

xxx xxx xxx

3.07 **Scope of Obligations**

Any and all acts to be done and performed by G&W pursuant to its responsibilities hereunder and under Section 4.01 of this Contract shall be deemed **to have been done and performed by it in representation and on behalf of the Clients for the effective development of the Project**. xxx"

xxx xxx xxx

> 5.06 **Nature of Client's Interest in the Project**
>
> The Client acknowledges that prior to actual division of the Project into individual condominium units and the conveyance of the Condominium Certificate of Title covering the Subject Unit(s) to him, the Client's interest in the Project consists in a pro-indiviso, pro-rata share, **held collectively with the other Clients**. The Client shall not mortgage nor encumber his interest in the Project without the prior written consent of G&W and the other Clients." (*Emphasis supplied*)

The stipulation on the conveyance of title of the condominium units in favor of the clients should be read in connection with petitioner's obligation as project manager, trustee and attorney-in-fact, which obligation includes the preparation of all necessary documents for conveyance of title of the units to the clients. Such conveyance is necessary considering that before the actual division of the project into individual condominium units, the interest of the clients in the project consists in a pro-indiviso, pro rata share, being held collectively with the other clients. Therefore, the preparation of the necessary contracts for the conveyance of the unit title to a client is part of petitioner's *onus* as the project manager, trustee and attorney-in-fact, but not as owner of the unit.

While it is true that petitioner has the potent authority to terminate the contract when the supposed "clients" fail to pay the amounts payable, and the power to substitute the clients who violated its terms or defaulted in the payment, however, these provisions do not and will not automatically make petitioner the owner of the project. These provisions should be read in relation to petitioner's obligation as project manager and trustee. Again, the provisions should be properly read and evaluated not in isolation from, but in connection with the rest of the stipulations in the contract.

Also, as to the element of a price certain in money or its equivalent, respondent alleges that the consideration for the delivery of the condominium unit is the amount payable under the purported Contract to Manage and Execute the Construction of the Condominium. However, a review of the evidence presented shows that the said amount pertains to the construction funding held in trust by the bank pursuant to the trust agreement/depository and disbursement agreement in favor of the clients which will be used exclusively for the construction of the project and purchase of the land. As found by the Court, the trust agreements show that petitioner has no complete control over the said amount, thus, no part of the said fund can be considered as the payment for the transfer of the condominium units from which the assessed creditable withholding tax can be deducted[4].

In sum, the participation of petitioner in the subject transactions was based on the Contracts to Manage & Execute the Construction of the subject condominium projects[5], which in essence directed petitioner to buy the subject land, to construct the condominium project and to prepare the documents necessary for the transfer of ownership of the subject land to the condominium corporation and of the condominium units to the respective clients, for a professional fee of 4% of the construction funding. Thus, the transaction between petitioner and its clients is NOT a contract of sale of condominium units. If at all, the transaction is one of sale of service and not a sale of real property.

The income payor is the one liable to withhold and remit the EWT, and to file the Withholding Remittance Return.

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

"SEC. 57. **Withholding of Tax at Source.** –

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[4] Assailed Decision promulgated on November 3, 2015, CTA Case No. 8358, Docket, Vol. II, p. 1558.

[5] Exhibits "K" and "L", CTA Case No. 8358, Petitioner's Exhibits in expanding envelope; Exhibits "D", "D-1", "D-2" and "D-3", CTA Case No. 8426, Docket, Vol. I, pp. 525-560; Exhibits "D", "D-1" and "D-2", CTA Case No.8489, Docket, Vol. II, pp. 648-674.

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

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

"***Sec. 2.57.2. Income Payments Subject to Creditable Withholding Tax and Rates Prescribed Thereon*** — Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:

xxx xxx xxx

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

xxx xxx xxx

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

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

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

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

xxx xxx xxx

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

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

(1) ***WHERE TO FILE.*** Creditable withholding taxes (Expanded Withholding Tax) deducted and withheld by the withholding agent shall be remitted by accomplishing the Monthly Remittance Return of Creditable Income Taxes Withheld (BIR Form No. 1601-E) xxx." (*Emphasis supplied*)

In this case, respondent assessed petitioner because it allegedly failed to file the Withholding Remittance Return and pay the corresponding basic withholding tax on the alleged transfer of the condominium units in violation of Section 2.58 of RR 2-98, among others. It is respondent's contention that since the buyer failed to remit the withholding tax on the transfer of the condominium units, and the entire contract price was paid to petitioner, the latter should be held liable for the withholding tax.[6]

Applying the provisions of the law and the implementing revenue regulation, the withholding agent is the one required to file the return, withhold the tax and remit the same to the Bureau of Internal Revenue (BIR). Since petitioner is NOT a withholding agent,

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[6] Exhibit "M", CTA Case No. 8489, Docket, Vol. II, pp. 727-734.

it cannot be held liable for the non-filing of the Withholding Remittance Return, non-withholding and non-payment of the alleged deficiency EWT. Further, no evidence was presented to prove that the entire contract price was paid to petitioner, if it is indeed the seller.

The intent of the parties is clearly shown in the contracts.

After consideration of the instant motion, the Court still finds that there can be no transfer of ownership of the condominium units between petitioner and its clients considering that petitioner merely acts for and in behalf of its clients and that its act of conveyance of the condominium units is only pursuant to its duty as project manager and trustee as provided in the contract.

In the case of *Norton Resources and Development Corporation, vs. All Asia Bank Corporation,*[7] it was held that "the agreement or contract between the parties is the formal expression of the parties' rights, duties and obligations. It is the best evidence of the intention of the parties. Thus, when the terms of an agreement have been reduced to writing, it is considered as containing all the terms agreed upon and **there can be no evidence of such terms other than the contents of the written agreement between the parties and their successors in interest.**"[8]

Also, as already cited in the assailed Decision, the Supreme Court, in *Bautista vs. Court of Appeals,*[9] held that "the rule is that where the language of a contract is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids. The intention of the parties must be gathered from that language, and from that language alone. xxx"[10]

The true intention of the parties is clearly expressed in the contracts presented in this case. If there are other terms agreed to by the parties, respondent could have at least taken the testimony under oath of petitioner's clients to determine their true intention in entering into the Contract of Management and Execution of the

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[7] G.R. No. 162523, November 25, 2009, 605 SCRA 370.
[8] *Ibid.*
[9] G.R. No. 123655, January 19, 2000, 322 SCRA 365.
[10] *Ibid.*

Condominium projects or of third parties as may be relevant or material to the assessment. Instead, and as already found by the Court, respondent chose to resort to presumptions and heavily relied on the HLURB Decision and on the nullification of the BIR Rulings, **which may have supported the legal basis of the assessment, but failed to sufficiently establish its factual basis.**[11]

In connection thereto, respondent alleges that its own advertisement for the sale of the condominium units in its website to buyers, is consistent with a seller's act. However, this alone is not a sufficient basis to conclude that the intention of the parties in the contract to manage is actually to enter into a contract of sale.

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

In this regard, it must be noted that the application of licenses to sell is merely in compliance with the HLURB Decision dated July 26, 2005[12] which required petitioner to obtain license to sell.

Notably, the Court found that the HLURB Decision which required petitioner to obtain a license as a seller is based on variables which, at the time of the issuance of the ruling, remains uncertain and may not materialize. These uncertainties were found before the alleged transfer or delivery of the condominium units to the individual unit owners. While this may be considered in the determination of the tax liability of a taxpayer, **the BIR should also have determined whether these uncertainties still existed at the time of the transfer of the condominium units. The BIR should have investigated on the true nature of the transaction between petitioner and the unit owners, whether there is a sale of condominium units between them, upon the transfer of the condominium units based on facts and not based solely on the HLURB Decision.**[13]

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[11] Assailed Decision promulgated on November 3, 2015, CTA Case No. 8358, Docket, Vol. II, p. 1564.

[12] Exhibit "R-7" for CTA Case No. 8489, CTA Case No. 8358, Docket, Vol. II, pp. 1149-1151.

[13] Assailed Decision promulgated on November 3, 2015, CTA Case No. 8358, Docket, Vol. II, p. 1560.

At this juncture, it must be reiterated that in order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption.[14] Hence, assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be.[15]

The presumption of correctness of the assessment does not apply in this case considering that respondent's conclusion, that the transaction between petitioner and the unit owners is a sale or transfer of ownership from the former to the latter, is not based on actual facts and thus, is a mere presumption.

In view of the foregoing, the Court finds no cogent reason to reverse the ruling in the assailed Decision.

WHEREFORE, premises considered, respondent's **Motion for Reconsideration** filed on November 23, 2015, is **DENIED** for lack of merit.

SO ORDERED.

CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

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

ERLINDA P. UY
Associate Justice

[14] *Collector of Internal Revenue vs. Benipayo,* G.R. No. L-13656, January 31, 1962, 4 SCRA 182; *Commissioner of Internal Revenue vs. Island Garment Manufacturing Corporation and the Court of Tax Appeals,* G.R. No. L-46644, September 11, 1987, 153 SCRA 665.
[15] *Ibid.*

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G & W ARCHITECTS, ENGINEERS AND PROJECT CONSULTANTS CO., *Petitioner,*	**CTA CASE Nos. 8358, 8426 and 8489**
	Members:
-versus-	**DEL ROSARIO**, *Chairperson,* **UY**, *and* **MINDARO-GRULLA**, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: APR 07 2016 ; 1:20 p.m.

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DISSENTING OPINION

DEL ROSARIO, PJ.:

With due respect, I maintain my dissent in the Decision promulgated on November 3, 2015. Still, I will take this opportunity to further expound my position in this case.

In its Opposition (to Respondent's Motion for Reconsideration), petitioner insists that it is a mere project manager of the condominium projects and trustee of the subject land. It posits that the terms and conditions of the Contract to Manage the Kensington Place are consistent with the general attributes of an express trust as defined by law and jurisprudence. Petitioner reiterates that it is not the lawful owner of the condominium projects and subject lands over which the condominium projects were built; thus, it could not have legally disposed of the same inasmuch as it is a basic principle of law that in order for a sale to be valid, it is necessary that the vendor be the owner of the thing sold.

The theory of petitioner that it acted as a mere project manager of the condominium projects and trustee of the land is belied by petitioner's own pieces of evidence. As discussed in my earlier

Dissenting Opinion dated November 3, 2015, the Contract to Execute and Manage the Construction of the Condominium reveals that petitioner has the potent authority to terminate the contract when the supposed "client" fails to pay the amounts payable, and the power to substitute the client who violated its terms or defaulted in the payment. The real agreement of the parties in the transaction is that ownership rights of petitioner's purported "clients" over the project or any of the condominium units accrue and become vested upon them only upon full payment of said units.

As the true nature of the transaction vests ownership rights to the purported "client" only upon full payment of the project or any of the condominium units, and considering the absolute power vested upon petitioner to substitute a client in default, the same are clear indications that petitioner does not act as a mere project manager or trustee.

Notwithstanding the clear indication of the existence of a sales transaction, petitioner would have us believe that its agreements[1] with its clients are akin to a contract for a piece of work or contract of service where its clients, *i.e.* investors/condominium unit owners, sought the services of petitioner as a project manager or contractor to build the condominium units for them.

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

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

In *Engineering & Machinery Corporation vs. Court of Appeals et al.*[2], such distinction was further elucidated:

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

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

In *Celestino Co & Company vs. Collector of Internal Revenue*[3] *(Celestino case)*, the Supreme Court ruled that Celestino Co & Company's services of making sashes, windows and doors was considered a contract of sale and not a contract for a piece of work subject to a sales tax:

> "xxx The important thing to remember is that Celestino Co & Company ***habitually makes*** **sash, windows and doors, as it has represented in its stationery and advertisements to the public.** That it 'manufactures' the same is practically admitted by appellant itself. The fact that windows and doors are made by it only when customers place their orders, does not alter the nature of the establishment, for it is obvious that it only accepted such orders as called for the employment of such material-moulding, frames,

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

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panels-as it ordinarily manufactured or was in a position habitually to manufacture.

xxx xxx xxx

But the argument rests on a false foundation. Any builder or homeowner, with sufficient money, may order windows or doors of the kind manufactured by this appellant. Therefore it is not true that it serves special customers *only* or confines its services to them alone. And anyone who sees, and likes, the doors ordered by Don Toribio Teodoro & Sons Inc. may purchase from appellant doors of the same kind, provided he pays the price. Surely, the appellant will not refuse, for it can easily duplicate or even mass-produce the same doors-it is mechanically equipped to do so.

That the doors and windows must meet desired specifications is neither here nor there. If these specifications do not happen to be of the kind habitually manufactured by appellant — special forms for sash, mouldings of panels — it would not accept the order — and no sale is made. If they do, the transaction would be no different from a purchasers of manufactured goods held is stock for sale; they are bought because they meet the specifications desired by the purchaser.

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Appellant invokes Article 1467 of the New Civil Code to bolster its contention that in filing orders for windows and doors according to specifications, it did not sell, but merely contracted for particular pieces of work or 'merely sold its services.'

Said article reads as follows:

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

It is at once apparent that the Oriental Sash Factory did not merely sell *its services* to Don Toribio Teodoro & Co. (to take one instance) because it also sold the materials. The truth of the matter is that it sold materials ordinarily manufactured by it — sash, panels, mouldings — to Teodoro & Co., although in such form or combination as suited the fancy of the purchaser. Such new form does not divest the Oriental Sash Factory of its character as manufacturer. Neither does it take the transaction out of the category of sales under Article 1467 above quoted, because although the Factory does not, in the

> ordinary course of its business, manufacture and keep on stock *doors of the kind* sold to Teodoro, it could stock and/or probably had in stock the sash, mouldings and panels it used therefor (some of them at least).
>
> In our opinion when this Factory accepts a job that requires the use of extraordinary or additional equipment, or involves services not generally performed by it-it thereby contracts for a *piece of work* — filing special orders within the meaning of Article 1467. The orders herein exhibited were not shown to be special. They were merely orders for work — nothing is shown to call them special requiring extraordinary service of the factory.
>
> The thought occurs to us that if, as alleged-all the work of appellant is only to fill orders previously made, such orders should not be called *special* work, but regular work. Would a factory do business performing only special, extraordinary or peculiar merchandise?
>
> Anyway, supposing for the moment that the transactions were not sales, they were neither lease of services nor contract jobs by a contractor. But as the doors and windows had been admittedly 'manufactured' by the Oriental Sash Factory, such transactions could be, and should be taxed as 'transfers' thereof under section 186 of the National Revenue Code." (*Boldfacing supplied*)

The similarity of the circumstances in the present case with the *Celestino case* cannot be denied.

As afore-discussed, petitioner's agreements with its clients, taken together, are contracts of sale and not contracts for a piece of work or contracts of service. **Petitioner did not commence to build its condominium projects on the basis of a special order from previously existing and identified investors/condominium unit owners; rather it builds condominium projects even without such previously made special order consistent with its business purpose as stated in its Articles of Partnership**[4] **and Amended Articles of Partnership,**[5] *viz*:

> "ARTICLE II
>
> Purpose and Office
>
> Section 1. The purpose and business of this partnership shall be **to engage in the general practice of Architecture and**

[4] Exhibit "A" in CTA Case No. 8489, p. 633.
[5] Exhibit "B" in CTA Case No. 8489, p. 638.

> **Construction and to purchase, own, hold, manage, lease and operate any and all kinds of property.** (as amended on 21 November 1997)" (*Boldfacing supplied)*

Both petitioner and Celestino & Co. also advertised their merchandise to the general public. Records[6] reveal that petitioner solicited foreign buyers through advertisements on its website clearly contradicting its stand that the agreements it executed are merely in furtherance of a contract for a piece of work or a contract of service. Petitioner's representation in its advertisement that the condominium units are for sale affirm that it is indeed a seller of condominium units, precisely because petitioner would dispose of the condominium units, regardless of who, ultimately, would acquire them.

Interestingly, while petitioner claimed that the condominium unit owners are its unit investors and not buyers, it did not present any evidence such as board resolutions or minutes of meetings that would establish any semblance of participation or control by the alleged investors/condominium unit owners, including any **collective agreement** on the bill of materials, technical specifications, identity of contractors and sub-contractors, if any, or even an agreement on the cost of construction *vis-à-vis* the fee payable to petitioner that would have appraised them in making an intelligent decision whether to retain petitioner as a supposed Project Manager. In a contract for a piece of work, control as to the specifications and the details of the finished product remain with the client. In the present case, it is ironic that in a Built-to-Own or Build–Your-Own-Home condominium unit, the supposed investors/condominium unit owners have no say in the design or plan of the condominium units they want constructed. **Control over all the phases of construction – planning to implementation - is solely exercised by petitioner.** The Contract to Manage and Execute the Construction of the Condominium categorically states:

"SECTION 8
TERMINATION

8.01 Violation or Default

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

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> **G & W shall have the right to rescind, terminate or cancel this Contract** including the trust herein created with respect to the Subject Land, without need of judicial action, in case any one of the events of default stipulated hereunder occurs, and the Client fails to remedy or cure to the satisfaction of G & W such default, within five (5) days from receipt of written notice from G & W pf the occurrence of such default:
>
> **(a) Failure to pay any of the Construction Funding payments in accordance with the schedule of payment herein provided for over 60 days;**
> **(b) Failure to pay the Client's portion of the Cost Advances or Labor Cost Overruns if any, or any portion thereof;**
>
> **Upon such termination, G & W shall have the right to acquire, or identify a substitute client to acquire all the rights and interests of the Client in the Project and to assume the corresponding remaining obligations hereunder.** If at the time the violation or default occurs, Client had paid thirty five percent (35%) or less of the Construction Funding (including accrued cost Overruns and Cost Advances), any and all amounts already paid by the Client **shall automatically be forfeited by way of liquidated damages in favor of G & W**, without need of judicial intervention. If at the time the violation or default occurs, Client had paid more than thirty five percent (35%) of the Construction Funding (including accrued Cost Overruns and Cost Advances), the excess over the said percentage shall be returned to the Client after deducting all expenses and costs involved including the Bank's professional fees, attorney's fees and other acts of administration." (*Boldfacing supplied*)

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

In the language of the late Irving L. Goldberg, a former United States Federal Judge:

> **"A taxpayer may engineer his transactions to minimize taxes, but he cannot make a transaction appear to be what it is not.**[7]"

[7] Redwing Carriers, Inc. vs. Tomlinson, 399 F.2d 652 (5th Cir. 1968).

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Anent the EWT assessment issued against petitioner, I am aware that the duty to withhold in a sale of real property is the responsibility of the withholding agent, *i.e.* condominium unit owners. Considering however that it was petitioner who misrepresented to the unsuspecting buyers that the transaction is not a sale, it must bear the EWT as a consequence. To allow petitioner to escape liability from the consequence of its mischievous tax scheme would *in esse* permit a wrong-doer to benefit from its own wrongdoing. "*Commodum Ex Injuria Sua Nemo Habere* Debet" (A wrongdoer should not be enabled by law to take any advantage from his actions).

All told, I **VOTE** to **GRANT** respondent Commissioner of Internal Revenue's "**Motion for Reconsideration**" filed on November 23, 2015, **REVERSE** and **SET ASIDE** the Decision promulgated on November 3, 2015, **DENY** the Petition for Review filed by G & W Architects, Engineers and Project Consultants in CTA Case Nos. 8358, 8426 and 8489, and **UPHOLD** the subject assessments for deficiency EWT and DST for the taxable periods of 2004, July 10, 2004, and June 2004, in the amounts of ₱277,458.117.19, ₱132,852,679.05, and ₱149,414,228.66, respectively, or in the total amount of ₱559,725,024.90.

ROMAN G. DEL ROSARIO
Presiding Justice