

SPECIAL THIRD DIVISION

AUG 13 2018

G.R. Nos. 198916-17 (*Malayan Insurance Company, Inc. vs. St. Francis Square Realty Corporation*); and G.R. Nos. 198920-21 (*St. Francis Square Realty Corporation vs. Malayan Insurance Company, Inc.*)

Promulgated:

July 23, 2018

x-----*Wilfredo V. Laditan*-----x

DISSENTING OPINION

VELASCO, JR., J.:

I am constrained to register my dissent from so much of the Resolution that deducts the Input Value Added Tax (VAT) and excludes Items 1.0 and Items 5.3 and 5.4 in the computation of the Actual Remaining Construction Cost (ARCC).

Input VAT

While the Resolution understandably corrects the miscalculation in the Decision and restored the erroneously deducted Interest Expense from the Construction Cost as Per Receipt, it has taken a complete turn-around on the matter of the Input VAT, deducting it from the Construction as Per Receipt. To this, I regret that I cannot agree. Instead, I maintain my concurrence to the previous disposition as written in the Court's original Decision, viz:

The Court finds no compelling reason to disturb the consistent findings of the CA and the CIAC that Input VAT should be allowed to remain in the ARCC. As aptly pointed out by the CA and the CIAC, ARCC refers to the actual expenditures made by Malayan to complete the project. The Court thus agrees with Malayan that in determining whether input VAT should be included as ARCC, **the issue is not the technical classification of taxes under accounting rules, but whether such tax was incurred and paid as part of the construction cost. Given that input VAT is, strictly speaking, a financial cost and not a direct construction cost, **it cannot be denied that Malayan had to pay input VAT as part of the contract price of goods and properties purchased, and services procured in order to complete the project.** Moreover, that burden of such tax was shifted to Malayan by its suppliers and contractors is evident from the photocopies of cash vouchers and official receipts on record, which separately indicated the VAT component in accordance with Section 113(B) of the Tax Code.**

Anent the claim that it would be unjust and inequitable if Malayan would be allowed to include its input VAT in the ARCC, as well as to offset such tax against its output tax, the Court finds that such coincidence does not result in unjust enrichment at the expense of St. Francis. **Unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully. In offsetting its input VAT against output VAT, Malayan is merely availing of the benefits of the tax credit provisions of the law, and it cannot be said to have benefitted at the expense or to the damage of St. Francis. After all, Malayan is justified in including in the ARCC the input VAT it had paid as part of the contract price of goods, properties and services it had procured to complete the project.**

At any rate, St. Francis would also be entitled to avail of the same tax credit provisions upon the eventual sale of its proportionate share of the reserved units allocated and transferred to it by Malayan. It bears emphasis that the allocation of and share of such units to St. Francis is subject to output VAT which Malayan could offset against its input VAT. In turn, St. Francis would incur input VAT which it may later offset against its output VAT upon the sale of the said units. This is in accordance with the tax credit method of computing the VAT of a taxpayer whereby the input tax shifted by the seller to the buyer is credited against the buyer's output taxes when it in turn sells as the taxable goods, properties, or services.¹

Given that the ARCC was construed as “the actual expenditures made by Malayan to complete the project,” the Court did not take into consideration the “technical classification” of an Input VAT “under accounting rules but whether such tax was incurred and paid as part of the construction cost.”

The Court cannot be considered, as the Resolution makes it appear, to have “*overlooked* the nature of VAT as an indirect and consumption tax... [and that] it is passed on to final consumers.”² This Court was all too aware of this aspect of input VAT; thus, the majority's Decision held that “[i]n offsetting its input VAT against output VAT, Malayan is merely availing of the benefits of the tax credit provisions of the law.” But this aspect of the Input VAT as creditable tax finds no relevance in a case between two parties whose ultimate issue is the determination of their proportionate participation in the remaining units of the project.³

¹ Emphasis and underscoring supplied.

² Resolution, p. 8.

³ As the Resolution itself puts it, “[t]he core issue is the pro rata sharing in the remaining net saleable area of the building, consisting of 39 condominium units and 38 parking slots worth ₱175,856,325.05, which can be resolved by determining how much the exact amount of the [ARCC] exceeded the Remaining Construction Cost (₱452,424,849.00).” Resolution, p. 11.



This case is not concerned with the tax liabilities of a party; it does not involve a “question of law” to classify and construe the technical meaning of an Input VAT – that has long been established. Neither does this case call on this Court to rule on whether the allocation or distribution of the remaining reserved units between St. Francis and Malayan is subject to tax; there is no quibbling that it does not. A thorough examination of this issue is unnecessary and is but a deviation from the real question: how much was actually expended by Malayan to complete the project?

Indeed, the present case concerns the determination of the meaning of the ARCC and it has been taken to mean, to reiterate for emphasis, as “the **actual expenditures made by Malayan** to complete the project.”

In other words, the ARCC has been established as that which has been **incurred and paid out** by Malayan Insurance Company, Inc. (Malayan) to complete the construction of the project and *not* what it has actually suffered. It is not germane to the resolution of this case whether Malayan may be able to recoup its expenses. And the fact that it is in a position to offset the Input VAT with Output VAT does not justify the application of the doctrine of unjust enrichment to favor St. Francis.

The principle of unjust enrichment is provided under Article 22 of the Civil Code which states:

Art. 22. Every person who through an act of performance by another, or any other means, acquires or comes into possession of something at the expense of the latter **without just or legal ground**, shall return the same to him.⁴

Consistent therewith, this Court held that the fundamental doctrine of unjust enrichment is the transfer of value **without just cause or consideration**.⁵ As wisely stated in this Court’s January 11, 2016 Decision in this case, “unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead **it must be shown that a party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully**.”⁶ Thus, the first condition for the application of the doctrine is that that **a person is benefited without a valid basis or justification**.⁷

Surely, this condition is absent in this case as Malayan has a just cause or valid basis to credit the Input VAT against the Output VAT under Section

⁴ Emphasis supplied.

⁵ *Spouses Golez v. Nemeño*, G.R. No. 178317, September 23, 2015, citing *P.C. Javier & Sons Inc. v. Court of Appeals*, 500 Phil. 419 (2005).

⁶ Emphasis supplied.

⁷ *Flores v. Spouses Lindo, Jr.*, 664 Phil. 210 (2011).

110 of the National Internal Revenue.⁸ As this Court first held, “in offsetting its input VAT against output VAT, **Malayan is merely availing of the benefits of the tax credit provisions of the law**, and it cannot be said to have benefitted at the expense or to the damage of St. Francis. After all, **Malayan is justified in including in the ARCC the input VAT** it had paid as part of the contract price of the goods, properties and services it had procured to complete the project.”⁹

Guilty of reiteration, the controversy hinges on what has been **disbursed** from the coffers of Malayan that was necessary for the construction of the project. As it is established that the “check vouchers, official receipts and other supporting documents indicate that payments made to contractors and suppliers of the construction project are VAT-inclusive,”¹⁰ the **Input VAT incurred and paid by Malayan** should be considered part of the ARCC.

This finding has been made by the Construction Industry Arbitration Commission (CIAC) when it first had the opportunity to resolve the controversy and so allowed the inclusion of Input VAT in the computation of the ARCC. The CIAC held:

RESOLUTION OF ISSUE ON VAT

Unlike the issue of interest, here, **there is no question that input VAT is a direct construction cost and therefore, should be included in the ARCC.** The only question that remains is: What was the arrangement between Respondent on the one hand and its contractors/suppliers on the other?

[St. Francis’] draft decision admits that VAT “*appear to have been deducted from the billings of the concerned supplier or subcontractor totalling P45,419,770.44 as reflected in the pertinent cash vouchers in Exhibit “R-48 series.”* [St. Francis] questions whether said amounts deducted for VAT was actually remitted by [Malayan]. Thus, **[St. Francis] inferentially admits that [Malayan] is entitled to add the input VAT as part of the ARCC.**

While “*submission of the quarterly and annual VAT return*” would have provided incontrovertible proof of [Malayan]’s remittance to the BIR, as [St. Francis] asserts, there is no prohibition against considering the pertinent cash vouchers. Examination of the documentary evidence submitted by [Malayan] (Exhibit R-44 and Exhibit R-48, series) as well as those submitted by [St. Francis] itself (Exhibits C-37 up to C-40) has persuaded the Tribunal of their sufficiency to show such remittance. As earlier pointed out, the two reports (Surequest and DSL) support this

⁸ SEC. 110. Tax Credits. -

A. Creditable Input Tax. -

(1) Any input tax evidenced by a VAT invoice or official receipt issued in accordance with Section 113 hereof on the following transactions shall be creditable against the output tax: x x x

⁹ Emphasis supplied.

¹⁰ Resolution, p. 9.

conclusion. **Moreover, the contract entered into by [St. Francis] which were assumed by [Malayan] under the MOA, included the VAT as part of the costs.**

It is accordingly the holding of this Arbitral Tribunal to **ALLOW the input Value Added Taxes ("VAT") paid to the government for goods and services utilized for the Project to remain in the ARCC.**¹¹

The Resolution, however, takes exception to the CIAC's ruling on the inclusion of the Input VAT in the ARCC supposedly because "the CIAC failed to explain why input VAT is a direct construction cost." A closer scrutiny of the foregoing excerpt from the CIAC's Award Order should provide the explanation forgone in the Resolution.

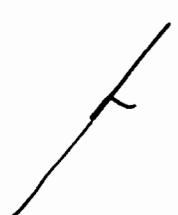
The CIAC clearly provided the following reasons why Input VAT is a direct cost that should be included in the ARCC: (1) St. Francis inferentially admitted that Malayan is entitled to add the input VAT as part of the ARCC given that St. Francis only questioned whether the amounts deducted for VAT were actually remitted by Malayan; and, more importantly, (2) the contract entered into by St. Francis which was assumed by Malayan under the MOA, included the VAT as part of the costs.

After discussing the nature of Input VAT as defined by law and jurisprudence, the appellate court in turn held, as pointed out in the draft Resolution, that "payment of input VAT was automatically deducted from the total obligations paid to contractors and suppliers, and that the documentary evidence submitted by Malayan and St. Francis had led the CIAC to [conclude] that they were sufficient to show proof of remittance to the government of the input VAT."¹² Ergo, the CA sustained the finding of the CIAC that the Input VAT is direct construction cost and therefore, should be included in the ARCC. The CA held, thus:

In the instant case, a meticulous examination of the voluminous records related to it would clearly show that, in the payment of contracts and construction materials, Malayan has deducted Input VAT of 1/11% and 2% withholding tax from the contract price or construction cost and this was clearly specified in the check vouchers issued by it. Clearly, **the payment of input VAT was, in effect, shifted to Malayan** considering that 1/11% Input VAT was automatically deducted from the total obligations paid to contractors and suppliers concerned. Here, **the documentary evidence submitted by Malayan and St. Francis had led the CIAC to conclude that they are sufficient to show proof of remittance to the government of the Input VAT. Thus, We find it unnecessary to disturb the findings of the CIAC as it is generally conclusive and binding with the Court.** In sum, the summary of the Cash Vouchers presented by Malayan totalling ₱47,593,994.29 are sufficient proof of the filing and payment of input VAT by it in the

¹¹ CIAC Award, p. 17; emphasis supplied.

¹² Resolution, p. 6, citing CA Decision.



absence of proof to the contrary evidencing grave abuse of discretion on the part of the CIAC.¹³

As stated at the outset, in its January 11, 2016 Decision, this Court through the Third Division, affirmed the consistent ruling of both CIAC and CA on the inclusion of the Input VAT on the ARCC.

It is oft-repeated that findings of fact of quasi-judicial bodies, which have acquired expertise because their jurisdiction is confined to specific matters, are generally **accorded not only respect, but also finality, especially when affirmed by the CA¹⁴ and this very Court.** The CIAC possesses that required expertise in the field of construction arbitration and **the factual findings of its construction arbitrators are final and conclusive, not reviewable by this Court on appeal.**¹⁵ The only exceptions are when:

(1) [T]he award was procured by corruption, fraud or other undue means; (2) there was evident partiality or corruption of the arbitrators or of any of them; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; (4) one or more of the arbitrators were disqualified to act as such under section nine of Republic Act No. 876 and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or (5) the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.¹⁶

None of these exceptions finds application in this case. Least of all, given the aforequoted rationalizations provided by the CIAC in ruling on the inclusion of the Input VAT in the ARCC, this Court cannot plausibly conclude that it has so “imperfectly executed its powers such that a final and definite award was not made on the issue of whether input VAT should be included in the ARCC.”¹⁷ St. Francis has not even attempted to show, as it cannot, that the CIAC arbitral tribunal conducted its affairs in a “haphazard, immodest manner that the most basic integrity of the arbitral process was imperiled.”¹⁸ Instead, St. Francis offered no new argument or any strong and compelling reason to warrant the reversal of the **uniform finding made by the CIAC, the CA, and this Court in its Decision as to the inclusion of**

¹³ CA Decision, pp. 41 to 42; emphasis supplied.

¹⁴ *De Guzman v. Tomulva*, 675 Phil. 808 (2011), citing *Shinryo (Philippines) Company, Inc. v. RRN Incorporated*, G.R. No. 172525, October 20, 2010, 634 SCRA 123, 130, citing *IBEX International, Inc. v. Government Service Insurance System*, G.R. No. 162095, October 12, 2009, 603 SCRA 306.

¹⁵ *National Transmission Corp. v. Alphaomega Integrated Corp.*, G.R. No. 184295, July 30, 2014; *Philippine Race Horse Trainer's Association, Inc. v. Piedras Negras Construction and Development Corp.*, G.R. No. 192659, December 2, 2015.

¹⁶ *Metro Rail Transit Development Corp. v. Gammon Philippines, Inc.*, G.R. No. 200401, January 17, 2018 and *CE Construction Corp. v. Araneta Center, Inc.*, G.R. No. 192725, August 9, 2017, citing *Spouses David v. Construction Industry and Arbitration Commission*, 479 Phil. 578 (2004).

¹⁷ Resolution, p. 5.

¹⁸ *CE Construction Corp. v. Araneta Center, Inc.*, G.R. No. 192725, August 9, 2017.

the Input VAT. Thus, there need not be a reconsideration of the issue as to the Input VAT.

Given the same arguments proffered by both parties on the issue of the inclusion or exclusion of the Input VAT in the ARCC, **this Court need only observe consistency in its rulings and that of both the CIAC and the CA.** It can hardly flip or flop as it wishes when it has been confronted with the very same evidence, the same facts, the same legal provisions, and the same contentions as when it first promulgated the Decision. Motions for reconsideration should be granted only upon a showing that “the evidence is insufficient to justify the decision or final order, or that the decision or final order is contrary to law.”¹⁹ Decisions of this Court should only be set aside, abandoned, and reversed “only on strong and compelling reasons, otherwise, the becoming virtue of predictability which is expected from this Court would be immeasurably affected and the public’s confidence in the stability of the solemn pronouncements diminished.”²⁰ This guideline, usually applied to emphasize the doctrine of *stare decisis*, finds more relevance in this case when the Court is dealing with the same parties, facts, and arguments. Again, St. Francis offered no new argument, much less any strong and compelling reason, to reverse this Court’s original ruling on the issue of the Input VAT’s inclusion in the ARCC. At the very least, the parties are entitled to the reasonable expectation that this Court will rule on a certain manner when confronted with the very same set of facts and propositions. It cannot adopt as a norm the possibility of changing the rules in the middle of the game. That will be contrary to the most basic principles of fair play.

This Court can do no worse than disregard St. Francis’ own use of Input VAT as part of its own computation of the cost needed for the project. Per the telefax dated August 1, 2000 that St. Francis sent to Malayan, St. Francis included VAT in its “computation for reimbursement” for certain units in the Project:

| I. COMPUTATION FOR REIMBURSEMENT | |
|----------------------------------|---------------------|
| Sales | ₱638,132,759 |
| Disbursement: | |
| Pay to Malayan | 427,231,953 |
| Cost incurred | 451,419,858 |
| Advances to Contractor | 35,298,336 |
| Com. & VAT | 47,739,805 |
| <u>Interest Expense</u> | <u>207,500,000</u> |
| | 1,169,189,952 |
| | <u>(65,804,831)</u> |
| | 1,103,385,571 |
| Amount spent by ASB | 465,252,812 |

¹⁹ Section 1, Rule 37, Rules of Court.

²⁰ *Lazatin v. Desierto*, 606 Phil. 271 (2009).

St. Francis is estopped from claiming that Input VAT is, thus, excluded from the ARCC spent by Malayan on the project. Article 1431 of the New Civil Code (NCC) provides that “through estoppel, an admission or representation is rendered **conclusive** upon the person making it and cannot be denied or disproved as against the person relying thereon.” This substantive law is echoed in Section 2(a) of Rule 131, which states that “[w]henever a party has by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission be permitted to falsify it.” The fundamental considerations of equity and fair play underlying the principle of estoppel were explained by case law, thus:

Estoppel in pais arises when one, by his acts, representations or admissions, or by his own silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. **The principle of estoppel would step in to prevent one party from going back on his or her own acts and representations to the prejudice of the other party who relied upon them. It is a principle of equity and natural justice,** expressly adopted in Article 1431 of the New Civil Code and articulated as one of the conclusive presumptions in Rule 131, Section 2 (a) of our Rules of Court.²¹

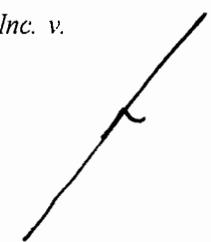
For the principle of estoppel to apply, the following elements must be established: 1) conduct which amounts to a false representation or concealment of material facts, or, at least, which calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the actual facts.²²

All the foregoing elements are extant in the present case. By St. Francis’ own inclusion of VAT in calculating its own expenses and costs, which it had communicated to Malayan, it cannot be allowed to renege on its own representation and deny Malayan the same privilege of using VAT as a component of the ARCC. That would simply be inequitable.

It is not necessary for Malayan “to prove that when St. Francis sent the telefax dated August 1, 2000, it was aware that input VAT cannot be considered as a construction cost if credited against output VAT.” St. Francis’ present action that is inconsistent with its prior posture on the Input VAT speaks for itself.

²¹ *Guison v. Heirs of Terry*, G.R. No. 191914, August 9, 2017, citing *GE Money Bank, Inc. v. Spouses Dizon*, G.R. No. 184301, March 23, 2015. Emphasis supplied.

²² *Dizon v. Philippine Veterans Bank*, 620 Phil. 456 (2009).



It cannot likewise be claimed that this inclusion of the VAT in the costs has been trounced by the parties' MOA, as it is made to appear in the Resolution. **Nothing in the MOA explicitly excludes Input VAT from the ARCC.** On the contrary, as correctly observed by the CIAC, **"the contract entered by [St. Francis] which were assumed by [Malayan] under the MOA, included VAT as part of costs."**²³ It would then follow, as a matter of logic, that input VAT remains included in the computation of the expenses necessary to complete the project or the ARCC.

As repeatedly pointed out, the core issue of this case is the determination of what expenditures are included in the ARCC in the context of Section 9 of the MOA,²⁴ which treats "Remaining Construction Cost" (RCC) in the following general terms:

Section 9. Remaining Construction Cost. – (a) [St. Francis] represents and warrants to Malayan that Malayan can complete the Project at a cost not exceeding Four Hundred Fifty-Two Million Four Hundred Twenty-Four Thousand Eight Hundred Forty-Nine Pesos (P452,424,849) as set forth in [St. Francis'] Construction Budget Report attached hereto and made an integral part hereof as Schedule 9 x x x

On this note, the estimated RCC of P452,424,849 in Section 9 of the MOA included the unpaid balance on SEAPAC's contract amounting to P35,606,000.00, which was VAT-inclusive. Malayan's witness, Gema Cheng, explained, thus:

Q.2.2.4.1 How did you know that the unpaid balance of the SEAPAC Contract was VAT inclusive?

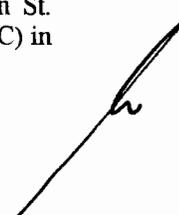
GOC: By virtue of a Deed of Assignment, [St. Francis] assigned to MALAYAN the SEAPAC Contract for the curtain wall and aluminum doors and windows. Upon completion of the SEAPAC's works, **MALAYAN paid SEAPAC. These payments to SEAPAC were all Input VAT inclusive.**

Q.2.2.4.2. Apart from the SEAPAC Contract, do you have any other proof to show that the Php942,529,824 Construction Cost Budget in Exhibit I of the SGV Report is VAT inclusive?

GOC: Note that the amounts of the items composing the Construction Cost Budget are the prices of the works contracted with Claimant's contractors. These prices are already VAT inclusive. Thus, the sum of these amounts, which are VAT inclusive, would necessarily result to a total amount which is likewise VAT inclusive.

²³ *Infra.*

²⁴ January 11, 2016 Decision, p. 16. "As duly noted by the CA, the controversy between St. Francis and Malayan lies in the interpretation of the term 'Actual Remaining Construction Cost' (ARCC) in relation to the Estimated Remaining Construction Cost..."



For instance, in [St. Francis'] contract for sewerage treatment plant works with Polystone Builders, Inc., the price was set at Php2,800,000.00. This price is VAT inclusive and as such, was included in the computation of the Construction Cost Budget in Exhibit I of the SGV Report.²⁵

If the benchmark is Section 9 of the MOA, which contains the amount initially warranted by St. Francis to Malayan as the amount necessary to complete the project, then the ARCC should include the Input VAT as the warranted RCC in Section 9 included the Input VAT.

It would be most illogical for this Court to conclude that the Input VAT should be excluded from the amount spent by Malayan in excess of St. Francis' original estimate when such estimate included the Input VAT at the outset. Trite as it may be, the age old adage should find application in this case: what is sauce for the goose is sauce for the gander. **Malayan cannot be refused to include Input VAT in its computation of the construction costs when St. Francis had been including Input VAT in its computation of construction costs.**

Further, it bears reiterating that this Court adopted the CIAC's interpretation of ARCC as referring to the "actual expenditures necessary to complete the project"²⁶ based on the "restrictive construction industry definition of 'construction cost,' to wit: the cost of all construction portions of the project, **generally based upon the sum of the construction contract(s) and other direct construction costs.**"²⁷ And St. Francis' very own witness, Adrian Josue, admits that "the sum of the construction contract[s]" in the construction industry is usually VAT-inclusive, viz:

ATTY. D. TAMAYO (COUNSEL RESPONDENT):

x x x Can you just read on and I ask Mr. Josue if you can see any indication on (sic) the SGV report that the information you gave and [St. Francis] gave to SGV would indicate that the contracts were not VAT-inclusive? Tingnan ninyo nalang po. **Contracts in the construction industry are usually VAT-inclusive?**

MR. A.L. JOSUE (CLAIMANT WITNESS):

Yes.

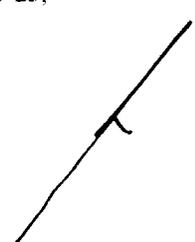
ATTY. D. TAMAYO (COUNSEL RESPONDENT):

Okay.

²⁵ Joint Affidavit of Respondent's Witnesses by way of: (1) Evidence for New Issue No. 3 Defined under the Amended Terms of Reference; (2) Sur-Rejoinder to Joint Rejoinder Affidavit of Claimant's Witnesses; and (3) Redirect Examination, Annex "I" of Malayan's Petition for Partial Review, pp. 23-25, cited in Malayan's Opposition, pp. 10 and 11. Emphasis and underscoring supplied.

²⁶ Decision, pp. 12 and 18.

²⁷ Id., p. 21.



MR. A.L. JOSUE (CLAIMANT WITNESS):

And actually, based on your contracts we discussed with TVI, it is VAT inclusive.

ATTY. D. TAMAYO (COUNSEL RESPONDENT):

Okay. Now, the 452 Million remaining construction costs that you worked ... okay, all of the contracts there are also VAT inclusive? That would be your position?

MR. A.L. JOSUE (CLAIMANT WITNESS):

Yes.²⁸

There is, therefore, no reason to reverse our initial Decision, refusing to exclude from the ARCC the Input VAT paid by Malayan in order to complete the Project.

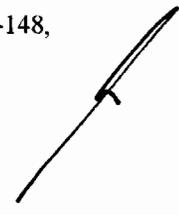
Items 1.0, 5.3 and 5.4

Independent of St. Francis' silence on the issue of the "Total Exclusions," a reexamination of the "Total Exclusions" in our Decision is urged by Malayan. The Resolution concedes removing Item 6.12.3 but maintains as exclusions Items 1, 5.3 and 5.4 on the ground that they are unsubstantiated costs. I regret that I cannot concur.

Item 1.0 in the column for "Total Exclusions" was for ₱9,297,947.22 and referred to the supposedly unsubstantiated portion of the contract award to Total Ventures, Inc. (TVI). In our Decision, this was taken from R-48-a-series where ₱95,116,269.94 is recorded as the "contract award" and ₱85,818,322.72 is the amount supported by receipts; ₱9,297,947.22 is the difference between these two figures. However, as Malayan correctly points out, R-48-a-series also indicate that Malayan had actually made two downpayments of ₱9,338,688.33 each, plus the withholding tax of ₱172,938.67 each, or a total of ₱19,023,254.01 to TVI. The last two Official Receipts (ORs) included in R-48-a-series, which were also reproduced by Malayan as annexes to its Motion for Partial Reconsideration—OR No. 1629 dated July 28, 2003 and OR No. 1653 dated October 24, 2003—show as much. Thus, the amount supported by receipts totals ₱104,841,576.73 and exceeds the "contract award" of ₱95,166,269.94. The entirety of Item 1.0 should, therefore, be eliminated from "Total Exclusions."

Similarly, Items 5.3 and 5.4 which referred to Exhibits R-48-E-4-series for "Total Net Payment including 11% Attendance Fee" have been explained to be substantiated by OR No. 1912 dated December 10, 2004.

²⁸ Transcript of Stenographic Notes of the March 19, 2000 Hearing before the CIAC, pp. 147-148, cited in Malayan's Opposition, pp. 9-10.



That the receipt bears an amount larger than what has been declared by Malayan is of no moment as the difference will even be for the benefit of St. Francis. What is crucial is that the expense has been supported by a receipt that has been submitted as evidence of the cost incurred by the Malayan to complete the project.

Proportionate Share in the Remaining Units

With the foregoing discussion on the Input VAT as an item that should be included in the ARCC and the deletion of Items 1, 5.3 and 5.4 from the Total Exclusions, I propose the following computation to determine the ARCC:

| | |
|---|---------------------------------|
| Construction Cost as per receipts (Exhibit "R-48-series") with 1/11% Input VAT and 2% Withholding Tax | ₱554,583,160.20 |
| Total Inclusion: (Award to TVI) | ₱8,282,974.82 |
| | + <u>₱17,807,364.98</u> |
| TOTAL ARCC (Construction Costs as per Receipt + Inclusion) | ₱572,390,525.18 |
| Total Deductions: | ₱2,357,036.78 |
| Interest Expense paid by Malayan to RCBC | ₱39,348,659.88 |
| Change Orders not due to Reconfiguration | 971,796.29 |
| Contingencies | 631,154.39 |
| Interior Design Works | + 754,086.10 |
| Input VAT | <u>45,419,770.44</u> |
| | ₱2,357,036.78 |
| Total Exclusions: | |
| Item 1.0 | <u>₱9,297,947.22</u> |
| Item 5.3 and 5.4 | 530,563.65 |
| Item 5.3 and 5.4 | 725,877.62 |
| Item 5.7.1 | 50,710.61 |
| Item 6.2.25 | 194,171.00 |
| Item 6.11 | 3,499.64 |
| Item 6.11 | 1,360.00 |
| Item 6.12.3 | <u>2,397,047.89</u> |
| Item F3 | 368,397.52 |
| Item F3 | 448,534.59 |
| Item F3 | 634,232.26 |
| Professional Fees C&D | 427,500.00 |
| Professional Fees N | + <u>79,022.73</u> |
| | ₱2,737,992.00 |
| NET ARCC | |
| (Total ARCC | ₱572,390,525.18 |
| Less – Total Deductions and Exclusions) | <u>- ₱5,095,028.78</u> |
| | ₱567,295,496.40 |

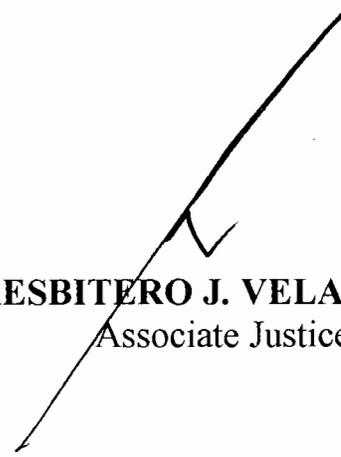
Given the Net ARCC of ₱567,295,496.40, Malayan should have 65%, while St. Francis should have 35% of the remaining units in the project, as computed below:

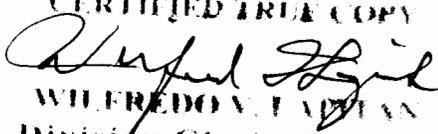
| | |
|---|--|
| ₱567,295,496.40 (Net ARCC) | |
| - 452,424,849 (RCC per Sec. 9) | |
| | |
| ₱114,870,647.40 (Excess ARCC) | |
| ÷175,856,325.05 (Total Aggregate Value of Reserved Units) | |
| | |
| <u>0.653207369 or 65% to Malayan</u> | |
| ₱60,985,677.65 | |
| ÷175,856,325.05 | |
| | |
| <u>0.346792631 or 35% to St. Francis</u> | |

With the foregoing, I vote to PARTIALLY GRANT Malayan's Motion for Partial Reconsideration and DENY St. Francis' Motion for Partial Reconsideration. Accordingly, I vote to AFFIRM the Court of Appeals' Decision in CA-G.R. SP Nos. 109286 and 109298 with the following MODIFICATIONS:

- 1) The total amount of ₱5,095,028.78 should be deducted and excluded from the gross Actual Remaining Construction Cost (ARCC) of ₱572,390,525.18 to arrive at the net ARCC of ₱567,295,496.40.
- 2) **Malayan is entitled to 65% ownership over the reserved units (₱114,870,647.40/₱175,856,325.05), together with the corresponding interest in the income realized thereon in the same proportion; while St. Francis is entitled to 35% (₱60,985,677.65/₱175,856,325.05) ownership of the said units, as well as its corresponding share in the said income. The distribution of the parties' proportionate share in the units shall be made by drawing of lots;**
- 3) Malayan is directed to deliver possession and transfer title over the reserved units in the proportion stated above, to pay St. Francis its proportionate share of the income from the reserved units reckoned from the date of the completion of the project on June 7, 2006 up to the finality of this decision, and to render full accounting of all the upkeep expenses, rentals and such other income derived from the reserved units so awarded to St. Francis;

- 4) Arbitration costs are maintained pursuant to the *pro rata* sharing that the parties had initially shared in accordance with the amounts claimed and counterclaimed by them.
- 5) Malayan and all others claiming rights under it, are enjoined from exercising acts of ownership over the reserved units relative to the proportionate share awarded to St. Francis;
- 6) The Register of Deeds of Pasig City is directed to immediately reinstate the name of St. Francis Square Realty Corporation (formerly ASB Realty Corporation) as the registered owner in the corresponding Certificates of Title covering the reserved units awarded to St. Francis; and
- 7) All other awards granted by CIAC in its Award dated May 27, 2009 which are not affected by the above modifications are affirmed. Nos costs.


PRESBITERO J. VELASCO, JR.
Associate Justice

CERTIFIED TRUE COPY

WILFREDO V. ADNAN
Division Clerk of Court
Third Division

AUG 13 2018