REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

JOSE P. OBILLOS, Jr., SARAH P. OBILLOS, ROMEO P. OBILLOS and REMEDIOS P. OBILLOS, brothers and sisters,
Petitioners,

- versus - C.T.A. CASE NO. 3211

COMMISSIONER OF INTERNAL REVENUE,
Respondent.
x - - - - - - - - - - - - - - - x

11/30/83

D E C I S I O N

The action is one of deficiency assessment for income tax in the amount of ₱71,074.56 for the un-registered co-partnership and an aggregate of ₱56,707.20 for the partners' individual share of the gain realized from the sales of two parcels of residential lots which petitioners alleged as illegally imposed by the respondent.

As set forth: 1) petitioners are brothers and sisters owners of two residential lots located in Greenhills, San Juan, Rizal, purchased from Ortigas & Co., Ltd., under a Deed of Absolute Sale dated March 13, 1973; 2) the same property was the subject of earlier Installment Sales Contract Nos. 11423-A and 11501 dated June 25, 1970 and April 2, 1971, respectively, made and entered between Jose J. Obillos (petitioners' father) with the Ortigas & Co., Ltd., whose rights after full payment thereof were

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transferred to the petitioners to locate their own residences; 3) petitioners after over slightly a year from acquisition sold the parcels separately: the lot of 1,124 square meters to the Walled City Securities on March 15, 1974 for ₱168,600.00 and the lot of 963 square meters to Olga Cruz Candu on May 10, 1974 for ₱144,450.00, with a realized profit computed as follows:

	1,124 sq. m.	963 sq. m.
Selling price	₱168,600.00	₱144,450.00
Acquisition cost	88,809.39	89,899.73
	79,790.61	54,550.27
Total capital gain	₱134,340.88	
Divided by 4	33,584.00	
50% thereof	16,792.00	

4) petitioners returned 50% of their individual share of ₱33,584.00 for income tax purposes for the year 1974, having held the property for more than 12 months; 5) upon examination and investigation on the basis of the available data of the returns respondent Commissioner of Internal Revenue considered the undertaking as one of an un-registered co-partnership subject to corporate income tax under Section 24 of the Tax Code, as amended, thus, the deficiency assessment inclusive of surcharge and interest, to wit:

Total gain derived	₱134,336.00
Corporate income tax due	37,018.00
Add: 50% surcharge	18,509.00
14% interest per annum (max. 42%)	15,547.56
Amount due and collectible ...	₱ 71,074.56

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Likewise a deficiency income tax assessment on petitioners' respective shares of the profits considered as distributive dividends to individual partners, and taxable in full inclusive of surcharge and interests, as follows:

a) <u>Jose P. Obillos, Jr.</u>

Taxable net income per investigation - - - - - - -	₱67,668.81
Income tax due thereon -	22,114.00
Less: Amount assessed/ paid - - - - - - - -	14,146.30
Deficiency Income Tax - -	₱ 7,967.70
Add: 50% Surcharge - - -	3,983.85
14% interest per annum (Max. 42%) -	3,346.43
TOTAL AMOUNT STILL DUE & COLLECTIBLE - - - - - - -	₱15,297.98

b) <u>Romeo P. Obillos</u>

Taxable net income per investigation - - - - - - -	₱58,079.57
Income tax due thereon -	₱17,438.00
Less: Amount assessed/ paid - - - - - - - -	10,100.00
Deficiency Income Tax -	₱ 7,338.00
Add: 50% Surcharge - - -	3,669.00
14% Interest per annum (max. 42%) -	3,081.96
TOTAL AMOUNT STILL DUE & COLLECTIBLE - - - - - -	₱14,088.96

c) <u>Remedios P. Obillos</u>

Taxable net income per investigation - - - - - - -	₱57,779.57
Income tax due thereon -	₱17,298.00
Less: Amount assessed/ paid - - - - - - - -	9,968.70
Deficiency Income Tax - -	₱ 7,329.30
Add: 50% Surcharge - - -	3,664.65
14% Interest per annum (max. 42%) -	3,078.31
TOTAL AMOUNT STILL DUE & COLLECTIBLE - - - - - - -	₱14,072.26

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d) Sarah P. Obillos

Taxable net income per investigation - - - - - - -	₱53,679.57
Income Tax due thereon -	₱15,412.00
Less: Amount assessed/ paid - - - - - - - -	8,512.00
Deficiency Income Tax - -	₱ 6,900.00
Add: Surcharge of 50% -	3,450.00
14% interest per annum (Max. 42%) -	2,898.00
TOTAL AMOUNT STILL DUE & COLLECTIBLE - - - - - - -	₱13,248.00

6) petitioners protested the deficiency assessment on April 30, 1980 but the same was denied by the respondent in a decision dated January 12, 1981.

Hence, this appeal.

By and large petitioners would consider themselves as co-owners in the purchase of the parcels of land primarily intended for their residential homes; did not form a partnership express or implied; did not buy the lots to engage in business; did not disburse any expenditures to improve or enhance the value of the lots with the intention of selling them later as a business proposition nor did they introduce any change or improvements thereon; the subsequent sale of the lots, however, was not an act proving that they engaged in business nor an act sufficient in form and law to constitute a partnership under the Civil Code and Tax Code; the sale was an isolated transaction. Hence, the treatment by each of the petitioners of their respective share of the profits realized as capital gain returnable at 50% for having held the property for more than a year.

Respondent poses the rub wrapped up this wise: That an unregistered partnership was formed, taxable as a corporation within the purview of the Section 24 of the Tax Code as amended, when petitioners contributed cash to purchase the lots which were later sold and the profits realized therefrom divided among themselves; that the respective shares in the gains in the amount received by each of petitioners represents distribution of profits realized from the sale of ordinary asset, and therefore taxable in full against each of the recipients.

The case revolves itself into the question of whether under the given facts there existed a partnership subject to the corporate tax as to warrant an assessment for deficiency income tax on the profits derived from the separate sale of the two lots.

By Section 24(a) of the Tax Code, "A tax is hereby imposed upon the taxable net income received during each taxable year from all sources by every corporation organized in, or existing under the laws of the Philippines, and partnerships, no matter how created or organized but not including general professional partnerships. xx" And, "By a contract of partnership two or more persons bind themselves to contribute money, property or industry to a common fund, with the intention of dividing the profits among themselves." (Article 1767, Civil Code of the Philippines).

We think that the language of the provisions is broad enough to cover the petitioners' undertaking. The essential elements of (1) an agreement to contribute money, property or industry to a common fund; and (2) intent to divide the profits among themselves, are present under the situation disclosed. The <u>first</u> hardly presents a gripping question. There was the common fund expediently installed in the acquisition of the two parcels of land, which, allegedly were to be devoted to the petitioners' own residences. Petitioners did not hold the lots for the purpose; they made a sciamachy of the intendment. The resale of the lots after slightly over a year from acquisition, one after another, on March 15, 1974 and then on May 10, 1974, assumed more importance than the need for building the residences. Not for naught however as the yield of a clean 75% profit over cost was more than enough by any investment standard. Thus the <u>second</u>, intention to divide the profits among the petitioners came to a fitting finale when each shared ₱33,584.00 from the transactions of neither accident nor error. The petitioners bought the land for resale as in fact the same were sold at a fat and respectable profit of ₱134,340.00.

It is in this respect that we perceive that invisible hand in the venture jointly acquiesced as could readily slip into that warm cubbyhole of the loosely defined partnership "no matter how created or organized" (Sec. 24(a), Tax Code) which "qualifying expression clearly indicates that a joint venture need not be undertaken in any of the standard forms, or in conformity with the usual requirements of the law on partnerships, in order that one could be deemed constituted for purposes of the tax on corporations." (Florencio Reyes, et al. v. Commissioner of Internal Revenue and CTA, G.R. L-24020, July 1968). Moreover, a "joint adventure" and a "partnership" are closely akin and their rights, duties and liabilities are to be treated by the rules substantially the same. (Larson v. Robinson, D.C. Mont. 136 F. Supp. 469-471).

The apparent quibble on the aspect of an isolated transaction can hardly be a reassuring prospect that can easily be reconciled with the statutory intendment. "A joint purchase with a view of a joint sale and communion of profit and loss though for a single transaction, will constitute a partnership." (In re: Warren, 29 Fed. Cas. 266, 268). But there can be a first that well pressage the next. Likewise, the absence of any improvement to enhance the value of the lots for income generating purposes may not all be necessary. Business thrives on an "as is where

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is" proposition. As a very factly matter the instant undertaking had netted for petitioners a clean 75% return on capital for such a brief period of a little more than a year from acquisition.

We therefore view with ease respondent's righteous indignation in assessing the petitioners for deficiency income tax considered thus:

> "The gain realized from the sale of the two lots in the amount of ₱134,336.00 (per income tax return) is an ordinary gain subject to corporate income tax under Section 24(a) of the Tax Code, as amended. Hence, the assessment against petitioner, Jose P. Obillos, Jr., et al. as an Unregistered Co-partnership, in the amount of ₱71,074.56, is in accordance with law, and therefore, valid.
>
> "As the Obillos created a partnership among themselves, a fortiori, the gains realized from the venture and distributed equally among the partners, are ordinary gains which are taxable in full in the hands of the recipients, the Obillos in this case. Thus, the following deficiency income tax assessments against the Obillos are valid, viz.:
>
> a) Jose P. Obillos, Jr. . . . ₱15,297.98
> b) Romeo P. Obillos . . . 14,088.96
> c) Remedios P. Obillos . . . 14,072.26
> d) Sarah P. Obillos . . . 13,248.00"

We likewise find the imposition of the surcharge and interest well taken. As shown, all the material facts and/or figures in the Schedule 4 (Gain and Losses from the sales or Exchange of Capital Assets) of said BIR Form No. 1701 for purposes of determining the correct capital gains were not supplied. Neither were the said informative data furnished the examiner,

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in spite of repeated demands made (Ref. p. 22 and pp. 124-126, BIR rec.). Thus, respondent was constrained to determine and assess the taxes in question on the best data available; not merely on the basis of the return, but from other sources as well. The non-Compliance with the requirements of the BIR Form constitute fraud with intent to evade the tax. "The law imposes upon the taxpayer the burden of supplying by the return the information upon which an assessment would be based. His duty complied with, the taxpayer is not bound to do anything more than to wait for the Commissioner to assess the tax. x x x. Non-observance consists in filing a false or fraudulent return with intent to evade the tax or in filing no return at all." (CIR v. Lilia Yusay Gonzales and CTA G.R. L-19595, Nov. 24, 1966). Moreover, the Obillos substantially underdeclared their income in 1974, which is also constitutive of fraud. Having thus fallen sharply at odds with the statutory proscriptions, the incremental imposition could not be sheer malarkey.

FOR ALL THE FOREGOING, we hold petitioners liable for the deficiency income tax for the year 1974 in accordance with the respondent's assessments for the same which are hereby affirmed and the petition for review dismissed with costs against petitioners.

SO ORDERED.

Quezon City, Metro Manila, November 30, 1983.

ALEX Z. REYES
Associate Judge

WE CONCUR:

AMANTE FILLER
Presiding Judge

CONSTANTE C. ROAQUIN
Associate Judge
Dissents in a separate opinion

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JOSE P. OBILLOS, Jr., SARAH P. OBILLOS, ROMEO P. OBILLOS and REMEDIOS P. OBILLOS, brothers and sisters,
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- versus - C.T.A. CASE NO. 3211

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x - - - - - - - - - - - - - - - x

DISSENTING OPINION

I am in full and complete disagreement with the finding of my majority colleagues in their decision that there was in this case a partnership that was created by and between petitioners, the Obillos, two brothers, Jose Jr. and Romeo, and two sisters, Sarah and Remedios, and hence, the gains received by them from the sale of their real properties, consisting of two (2) lots, are subject to corporate tax under Section 24 (a), in relation to Section 84 (b) of the National Internal Revenue Code, as amended.

Contrarily, and to my mind, what was formed and created between and among said Obillos brothers and sisters, is in reality a co-ownership or tenancy in

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common; consequently, the income derived from the sale of said lots are not subject to the aforesaid corporate income tax.

But let us first find out whether there was, in fact or in law, a partnership created as found by the majority judges in the instant case.

At the outset, certain laws and relevant and applicable jurisprudence must have to be cited and emphasized here. Under Article 1767 of the Civil Code of the Philippines, partnership has been defined as a contract whereby two or more persons bind themselves to contribute money, property, or industry to a common fund, with the intention of dividing the profits among themselves. It is also a status and a fiduciary relation between persons carrying on a business in common with a view of profit. (Paras, Civil Code of the Philippines Annotated, 9th Ed., Vol. V, p. 405.) The object must be for profit and not merely for common enjoyment (Ibid, p. 406.) There must be a desire to formulate an active union with people whom there exist mutual confidence and trust. (Ibid, citing Fernandez v. De la Rosa, 1 Phil. 671.) And in Article 1771, the Civil Code says that a partnership may be constituted in any form, except where immovable property or real rights are contributed thereto, in which case a public instrument shall be necessary. However, where a contract provides that there was a community of interest in the business as such, and there was no right to participate in the management of the business, there is no partnership. (Tolentino, Civil Code of the Philippines, 1959 Ed., Vol. V, p. 271.)

In the existence of a partnership, no particular form of contract is necessary for its creation. (R.A. Bartley, 4 BTA 874.) A contract of partnership may be oral or written. (Article 1771, Civil Code of the Philippines; Mertens, Law of Federal Income Taxation, Vol. 6, 1977 Ed., Chap. 35, p. 16.) Whether or not, in truth and in fact, a partnership exists is basically a question of intention of the parties. (Mertens, Law of Federal Income Taxation, Ibid.) And where there is no proof of the real intent to become partners in the operation of a business, profit sharing arrangements as a rule do not constitute partnership for tax purposes. (Ibid., citing Edward C. James, 16 TC 930; Estate of Louis L. Briden, 11 TC 1095; Mamie Tindall, 14 TC 1120, 1125; Tolentino, op. cit; p. 273). An agreement to share profits and losses on the sale of land purchased by two or more persons, does not create a partnership but a co-ownership. (Tolentino, ibid.)

In the American case of Carnie-Goudie Manufacturing Co. (24 BTA 679, 684), it cited the Supreme Court of Oklahoma (Citizens National Bank of Chickasaw, 24 Okla. 408; 103 Pac 720), which said that -

> "A partnership exists as a result of a voluntary contract between the parties, and never solely by operation of law. Causler v. Wharton, 62 Ala. 358; Cowles v. Garret, 30 Ala. 341; Haycock v. Williams, 54 Ark. 384, 16 S.W. 3; Einstein v. Gourdin, 4 Woods, 415, 8 Fed. Cas. No. 4, 320; 22 Am. & Eng. Ency. of Law (2d Ed) p. 14, footnote 3. It is a relation arising out of a contract to do certain things, and exists only where the parties intend to enter into a contract of partnership and, unless they have estopped themselves by holding themselves out to the world as partners, their intention as derived from the contract is decisive of the question."

Moreover, the overriding question is whether or not the partnership is real and the answer to that greatly depends upon whether the partners really and truly intended to join together for the purpose of carrying on business of partnership and sharing in the profits and losses or both. In this respect, their intention to form a partnership is a question of fact, to be determined from the testimony disclosed by their agreement, considered as a whole, and by their conduct in the execution of its provisions. This is what, in effect, the Supreme Court of the United States, in the case of Commissioner of Internal Revenue v. W.O.

Culbertson, 337 US 733, 741-746, have said:

> "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower Case, but whether, considering all the facts - the agreement, the conduct of the parties in the execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent - the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise. There is nothing new or particularly difficult about such a test. Triers of fact are constantly called upon to determine the intent with which a person acted. The Tax Court, for example, must make such a determination in every estate tax case in which it is contended that a transfer was made in contemplation of death, for 'The question, necessarily, is as to the state of mind of the donor.' United States v. Wells, 283 US 102, 117, 75 L ed 867, 875, 51 S Ct 446 (1931). See Allen v. Trust Co. of Ga. 326 US 630, 90 L ed 367, 66 S Ct 389 (1946). Whether the parties really intended to carry on business as partners is not, we think, any more difficult of determination or the manifestations of such intent any less perceptible than is ordinarily true of inquiries into the subjective.
>
> But the Tax Court did not view the question as one concerning the bona fide intent of the parties to join together as partners. Not once in its opinion is there even an oblique reference to any lack of intent on the part of respondent and his sons to combine their capital and services 'for the purpose of carrying on the business.' Instead, the court, focusing entirely upon concepts of 'vital services' and 'original

capital', simply decided that the alleged partners had not satisfied those test when the facts were compared with those in the Tower Case. The court's opinion is replete with such statements as 'we discern nothing constituting what we think is a requisite contribution to a real partnership', 'we find no son adding 'vital additional service' which would take the place of capital contribution within the sense of the Tower Case. 6 CCH TCM 698, 699'.

Unquestionably a court's determination that the services contributed by a partner are not 'vital' and that he has not participated in 'management and control of the business' or contributed 'original capital' has the effect of placing a heavy burden on the taxpayer to show the bona fide intent of the parties to join together as partners. But such determination is not conclusive, and that is the vice in the 'tests' adopted by the Tax Court. It assumes that there is no room for an honest difference of opinion as to whether the services or capital furnished by the alleged partner are of sufficient importance to justify his inclusion in the partnership. If, upon a consideration of all the facts, it is found that the partners joined together in good faith to conduct a business, having agreed that the services or capital to be contributed presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient. The Tower Case did not purport to authorize the Tax Court to substitute its judgment for that of the parties; it simply furnished some guides to the determination of their true intent. Even though it was admitted in the Tower Case that the wife contributed no original capital, *management* of the business, or other vital services, this Court did not say as a matter of law that there was no valid partnership. We said, instead, that "There was, thus, more than ample evidence to support the Tax Court's finding that no genuine union for partnership business purposes was ever intended and that the husband earned the income.' 327 US at 292, 90 L ed 678, 66 S Ct 532, 164 ALR 1135. (Italics added.)" /Underscoring mine./

Indeed, a partnership may exist without a formal agreement and the formal execution of the articles of partnership does not necessarily create a partnership in the absence of a true business purpose. (Mertens, Law of Federal Income Taxation, op. cit.)

It is a fundamental postulate in this and in American jurisdiction that an agreement to share in the profits does not necessarily constitute a partnership agreement. (Art. 1769, Civil Code of the Philippines; Evangelista vs. Coll. of Int. Rev., 54 Off. Gaz. 996, 1003; Jessie James Finch, 55, 179 P-H Memo TC; Mertens, op. cit., Chap. 35, p. 21.)

At this stage, it is appropriate for me to restate some of the most popular and often quoted definitions of partnership. Among the historic definitions of partnership is that one stated by Chancelloer Kent and who declared that it is "A contract of two or more competent persons (1) to place their money, effects, labor and skill, or business, and (2) to divide the profit and bear the loss in certain proportions." (John W. Graham, 8 BTA 1081, 1083, aff'd 44 F2d 566; Samuel J. Lidor, 16 BTA 1421; R.C. McKnight, 13 BTA 885; Joe Gilovich & Co., 6 BTA 864; Inserted nos. (1) and (2) mine; Underlining supplied.)

Another is that definition given by Justice Story:

"A voluntary contract between two or more persons to place their money effects, labor and skill or some or all of them in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them." (John W. Graham, op. cit.; Carnie-Goudie Mfg. Co., op. cit., pp. 683-684; Emphasis mine.)

And another frequently quoted definition is stated as follows: "The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits." (Howard Coombs, 20 BTA 1021, 1024, quoting Meehan v. Valentine, 145 US 611, 36 L ed. 835, 12 S Ct 972; Leonard Gunderson, op. cit., 6 BTA 1123, and C.C. Cooke, TC Op. Dkt 2000 4 (1951) aff'd 203 F 2d 258; 98 L ed 342, 74 S Ct 25; Italics supplied.)

Also, Judge Black, citing Comm. v. Tower, 327 US 280; Ward v. Thompson, 22 How 330, 166 L Ed. 249, in the case of Edward C. James, 16 TC 930, 939, defined partnership generally "xxx as a joining together the money, goods, labor or skill of two or more persons for the purpose of carrying on a business and sharing in the profits or losses or both." (Underlining mine.)

The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits. (Meehan v. Valentine, 145 US 611, 618, cited in R.A. Bartley, 4 BTA 874, 878; underscoring supplied.)

"The basis of a partnership is a contract and a generally accepted test for determining whether a partnership exists between two individuals is whether they have entered into a contract for the sharing of profits and losses of a business enterprise." (R.A. Bartley, ibid., p. 879; Emphasis mine.)

The Tax Court of the United States has held that when there is no proof of a real intent to become partners in the operation of a business, profit sharing arrangements do not constitute partnership. (Edward C. James, 16 TC 930, affd 197 F 2d 813; Estate of Louis Briden, 11 TC 1095; Mamie Tindall, 14 TC 1120.)

Consequently, to me, there is no principle in tax law which requires or permits the trier of facts to set up a special concept of *partnership for tax purposes*, or otherwise treat the facts in a tax case differently from the way they should be treated in any other kind of litigation. (Neil v. Comm., 269 F 2d 563.)

Stated in another way, the concept of partnership should be understood in the same light regardless of the case, whether tax or in an ordinary civil case, in which the question of the existence thereof is involved.

It may be difficult or problematical, but not undeterminable to hold, whether or not under a given sets of facts, a partnership in reality exist. This question is either one of fact, or law, or both; but the term parnership does not include two or more persons owning real property as tenants in common. (Jerry Maiatico, 12 TC 146; Charles E. Tibbals, 58,044 P-H Memo TC.)

Under Section 24(a) of our Philippine Internal Revenue Code, and as defined in Section 84 (b) of the same, a "corporation," for purposes of corporate income tax, does not refer only to corporation proper but includes partnership, no matter how it is created or organized, as well. But under this provision, the determination of whether a partnership was created or has existed for purposes of taxability as a corporation is fundamentally based upon and governed by the general provision of the law of partnership in the Civil Code of the Philippines, which has, as its legal outgrowth not only our Old Civil Code but on American

Partnership Statutes as well (Uniform Partnership Act and the Uniform Limited Partnership Act), which laws have been reputedly framed in keeping with modern business practices. (Report of the Code Commission, p. 67.) Under Section 6 of the Uniform Partnership Act, "A partnership is an association of two or more persons to carry on as co-owners a business for profit." (Underlining mine.) And in Mechem, Elements of Partnership, 2nd Ed., p. 1, cited by Hector S. de Leon, in his book entitled "The Law on Partnerships and Private Corporation," 1973 Ed., p. 1, partnership is defined as "x x x a legal relation based upon the express or implied agreement of two or more competent persons whereby they unite their property, labor or skill in carrying on some lawful business as principals for their joint profit." Persons who did not intend to be partners as to each other are not partners to third persons or even to the Government. (Art. 1769, Civil Code of the Philippines.) It is now plain that the determination of whether a partnership exist regardless of whether it is a tax or an ordinary case where it is being litigated, our courts shall always be guided by the facts with care in the light not only under our local law and jurisprudence, but by American law and jurisprudence on the subject as well.

The law and judicial pronouncements here and in American jurisdiction on the subject of partnership had consistently zeroed in, and was emphatic on the intention of two (2) or more persons to form a business enterprise, express or implied, for profit purposes that will cause the creation and existence of a partnership. This was stressed heretofore and the authorities cited overwhelmed me. The aforesaid authorities as guideposts, therefore, had the petitioners, the Obillos brothers and sisters, intended themselves to be partners, or otherwise have intended to create, among themselves, a partnership for business purposes?

I have personally heard the testimony of petitioner Jose P. Obillos, Jr. in this case. I believe that said witness had testified positively, frankly and honestly that he and his brothers and sisters bought the two real properties in question for the purpose solely of building on them their residences. But because they cannot build thereon their said residences due to the problem of rising costs, and, finally, tempted by the many offers to buy the said lots, they succumbed thereto, finally decided, sold the same at a profit which they admittedly divided among themselves. And taking advantage of their privilege under the law of reporting only 50% of their share in the profits earned under the capital gains tax provision, each one of them reported their equal share of the profits in their income tax returns and paid their corresponding individual income tax liability. From the simple facts of this case, it can be gathered that the father of petitioner, Jose Obillos, Sr., had transferred to the petitioners the property in question. It was not, however, altogether made clear in the trial whether the father had already paid in full the purchase price by installments of the two parcels of land at the time of sale by Ortigas, Inc. to his children, petitioners herein. Whether petitioners brothers or sisters have paid their father for the transfer to them of the properties is not also quite clear. At any rate, it was due to the said transfer that the brothers and sisters were in fact holding, or were in actual possession over the said lots prior to the sales made by them to the Walled City Securities and to Olga Cruz Candu in 1974. My personal impression is that no partnership agreement was entered into by and between the brothers and sisters with respect to the acquisition of the two lots which they held over a year. There was not any proof which will show the intent to form a partnership among themselves, either prior to, or at the time of the purchase of the two properties from the Ortigas, Co. Petitioners have never held themselves as such to the Ortigas, Co. or to the buyers of the two lots. They were merely holding the said properties as co-owners. The mere purchase of a real property for the purpose of using it does not show the intent to enter into a business for profit. The fact that their father transferred the right to own the same by purchase negatives their intention, therefore, to form and create a partnership. It is important to so state here that there is no proof that they have retained the proceeds of sale in a common fund for the purpose of securing by subsequent purchase other lots, again to be sold for profit. This is negated by the testimony of petitioners' witness, Obillos, Jr., who said that the money received by them as purchase price shall be used to purchase another lot with which they will finally locate their residences. In order that there can be a partnership between and among them, there must be proof that they were engaged in a bona fide business of real estate. A relation to engage in business is never evident; there was no evidence to show that they reinvested their money in the similar activity of purchasing and acquiring lots to be resold for the purpose of gain or profit. The only presumption from which one can deduce the existence, of a partnership, which is lacking, is the intent to create a partnership. The fact that petitioners, brothers and sisters, have equally shared in the profits realized by the sale of their two lots is insufficient to presume their partnership existence. As was said heretofore, the mere sharing in the gross profits or returns does not make up a partnership. There is need to show that petitioners have contributed the money with which to purchase the lots for business purposes, or otherwise for profit, and not for their use as residence which is not a business enterprise. Here, there is absent a contract of partnership, express or implied, between them.

To my mind, petitioners have held the properties more in the nature as co-owners owning an undivided interest in said properties, and sharing in the profits from the sales made, and which finally terminated the co-ownership relation among them. The respondent has not, by his evidence, shown that the petitioners were in fact joined as partners, or presented proof of the intention of petitioners to be partners among themselves. Furthermore, the sales made by petitioners were merely isolated and not habitual and this fact does not transform, or otherwise contitute, petitioners impliedly as partners in a business enterprise.

In a particular American case, it was held that a holding of an undivided one half interest in a second mortgage would not constitute carrying on a business, venture, or a financial operation but would constitute merely the holding of property, and not a valid partnership. (Hallbrett Realty Corporation v. Comm. of Int. Rev., 15 TC 157, 159.) In this case of Hallbrett Realty Corporation, the question was whether or not Sam Rosen and Jacob Brickman were engaged in a joint venture or partnership by means of which some business, financial operation or venture was carried on by them. These two persons had paid a lump sum for the stock of Hallbrett Realty Corporation and the securities of the same. Each of these two paid one-half of the stock. The mere ownership of the stock under such circumstances did not make them joint venturers or partners. Rosen became President of Hallbrett Realty and operated its hotel. Brickman never became officer of the Hallbrett Realty and had nothing to do with the operation of the hotel. There was no joint venture there. They had the second mortgage assigned to a nominee. Such holding of an undivided one half interest in a second mortgage would not constitute a carrying on a business, a venture, or a financial operation but would constitute merely the holding of property.

The fundamental criterion, citing Hallbrett Realty Corporation case above, ibid., in determining the existence of a valid partnership is an existence of an intent to join together in the conduct of a business. Towards this end, each of the partners must signify such intent to the others and enter into an agreement, either oral or written, that they will share in the profits and losses of the enterprise. (Hooper Body Corp., 60,168 P-H Memo TC.)

The law of the State of Virginia, in the United States, which is the same as ours in the Philippines, defines "partnership" as "an association of two or more persons to carry on as co-owners a business for profit." It was said that the statutory rules of the State of Virginia for determining the existence of partnership include one which provides that "Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property," and another providing that "The sharing of gross returns does not itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived. (Hooper Body Corp., 60,168 P-H Memo TC.)

Judicial pronouncements in the State of Virginia have amplified the bare words of the statute. In Walker, Mosby & Calbert v. Burgess, 153 Va 779, 151 S.E. 165, 167 (1930), the Supreme Court of Appeals there said that "carrying on" a business, as used in the statutory definition of "partnership," was a well-defined term and meant the conduct of a business for a sustained period for the purposes of livelihood or profit, and not merely the carrying on of some single transaction. It was in this case that the court stated another essential element of partnership which was the element of "co-ownership." This same court has also said that the particular test as to the existence of the partnership relation which is most widely accepted and which is applicable especially as between the parties themselves, irrespective of the rights of third persons, is that a partnership is formed and exists only when it was the intention of the parties that they should be partners. Partnership contracts, like other contracts, are governed by the intention of the parties. Every partnership rests on the mutual consent of the members. This intent may be manifested by the terms of the agreement if there is one or by the conduct of the parties to each other under it, or by the circumstances surrounding the transaction. In respect to the existence of a partnership as to third persons, the court concluded that it was generally agreed that it is essential that the parties charged as partners have a community of interest as common owners of the business which constitutes the joint undertaking, and that this community of interest be of such nature as makes each member a co-principal and an agent of all members, with joint authority or right in the administration, control, disposal of the business or its property. Partnership relations, said the court, are formed by a contract expressed or implied between two or more parties for joining together their money, goods, labor or skill in a venture or business, upon an agreement to divide the gains or losses between them. x x x." (Hooper Body Corp., 60,168 P-H Memo TC.)

In the case of Lorenzo T. Oña, et. al. vs. The Commissioner of Internal Revenue (G.R. L-19342, May 25, 1972), the petitioners in said Oña case, who are father and children, had actually joined together and engaged themselves in a business enterprise by using their properties, and the profits derived were made a part of the common fund. In said case, petitioners therein have actually engaged themselves in the purchase and sell of real properties and securities. They earned considerable profits from such transactions. They have, therefore, allowed not only their shares of the inheritance and their inherited properties and gross earnings to be used as a common fund in undertaking several transactions and in engaging business with the clearest intention of deriving profit to be proportionately shared by them. They have thereby formed, in effect, an unregistered partnership.

In the case of Evangelista v. Coll. of Int. Revenue (102 Phil. 140, 145), petitioners therein have created a common fund for purposes of profits. In contrast, in the case at bar, petitioners have not per se created a common fund for business purposes. They have not contributed property for purposes of business either. The only inference which can be gathered from the evidence of both parties is that the petitioners, Obillos brothers and sisters, only jointly bought two parcels of land which they later sold, which as a whole, is not constitutive of a "series of transactions" or which cannot properly dubbed as a business transaction characterized by habituality for purposes of gain. What petitioners in this case did is an isolated transaction which they never repeatedly pursued since there was no showing that they have subsequently bought other lots or properties from out of the proceeds of the two lots for purposes of resell. In fact, and in reality, their intention was only to buy a lot to finally locate their residence from out of the proceeds of the original sales of their lots. At the time of the sale of the two lots owned by them in common, they were handicapped by the circumstance of the increase of the costs of construction of buildings and said costs were beyond their financial capabilities to defray. These circumstances, unlike in the Evangelista case, where the circumstances there were sufficiently strong to arrive at a finding that they had an intention to create, as among them, a partnership, petitioners, the Obillos brothers and sisters in this case, did not create a partnership for business purposes.

There is another analogous American case wherein under a judicial settlement in 1941, T.J. Rester and

Coffin, the parties of an alleged partnership (Coffin v. U.S., 120 F Suppl 9, 10), became the owners of an undivided one-half interest of two tracts of land which were to be subdivided and the lots sold therefrom. The proceeds from the said sales of the lots, after expenses, were equally divided between them. There was not a time, after the acquisition of the property, or during the existence of their relationship, that they were formed as a partnership; no partnership return was filed, nor was there a testimony that their relationship were that of partners. Although the sales were made during their relationship, and the profits reported on the parties' individual returns, neither party indicated such profits were from a partnership. The United States District Court S.D. Alabama, S.D., in the aforecited case, on page 11, based on the above facts, made a finding and arrived at a final conclusion that -

> "5. A partnership did not exist between plaintiff (Coffin) and Rester during the time in question. Pursuant to the (judicial) settlement in 1941, the parties became tenants in common, each owning an undivided one-half interest in the property set forth in the agreement. They chose to avail themselves of the use of a trustee to facilitate the liquidation of their interest; but this use did not transform their status as tenants in common into partners.
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> "x x x x x x x x x

"Conclusions of Law

"x x x x x x x x x

"/3/ The ownership of property by tenants in common does not make such tenants partners in the absence of an intention to become partners. Gilford v. Commissioner of Internal Revenue, 2 Cir., 201 F. 2d 735; Appleby's Estate v. Commissioner of Internal Revenue, 41 B.T.A. 18, aff'd 2 Cir., 123 F 2d 700, on other grounds."

There is in the above cited case a complete analogy with the facts of the case at bar. Consequently, it is my strong opinion that what was created by the Obillos brothers and sisters, is a tenancy in common, or co-ownership as understood in this jurisdiction. Hence, my dissent to the majority conclusion that there was in this case a partnership, which is liable to corporate tax as a corporation under Section 24 (a) of the National Internal Revenue Code.

In the case at bar, my view that there was co-ownership is not without authority to support it. In this instant case, the Obillos brothers and sisters have agreed to purchase a piece of land and each one paying a part of the purchase price with the intention to use the property for the building of their respective residences. Each one had an undivided interest over the two lots they have purchased. (20 Am Jur 2d 115, 116; Art. 484, Civil Code of the Philippines.) Under their relation, there was a co-ownership as the said brothers and sisters owned and were in possession of an undivided part over the two properties. Everyone of them is the co-owner of the properties, and over which they exercise domain, but each one owns a portion and which is not concretely determined or physically divided. (Felicer vs. Colegado, 35 SCRA 173, 178; Paras, Civil Code of the Philippines Annotated, Vol. II, 9th ed., p. 244.) A co-owner cannot sell a definite part of his property. (Lopez v. Illustre, 5 Phil. 568-569.) Had they bought properties subsequent to the sale of the two (2) real properties, or have otherwise expanded their gain by using the proceeds of their selling price to embark in an expanded business venture, like in the case of Jose de Leon et. al. vs. The Commissioner (CTA Case No. 738, Sept. 11, 1961), they should have been considered as a partnership; or had they invested their gross returns for the sale of their two (2) lots in the purchase of another lot for resell at a profit, or a series of transactions had been pursued by them, and the said enterprise placed under the management of one person, like in the Reyes v. Comm. of Int. Rev. Case (24 SCRA 198, 203), then their relation could have been validly considered a partnership subject to corporate tax as a corporation.

Finally, I would like to quote at length a similar observation and admonition made by, or the words of caution of Justice Angelo Bautista in the case of Evangelista, et. al. vs. Collector of Int. Rev., op. cit., on page 150, where he pointed out that the sharing of the gross return does not, by itself, create a partnership, whether or not the persons sharing them have a joint or common right or interest in the property; that aside from the circumstance of profit, the presence of other elements is necessary to arrive at a conclusion that a partnership existed, such as the clear intent to form a partnership, to create a juridical personality different from that of the individual partners, and to transfer or assign any interest in the property by one with the consent of the others. Said Justice Angelo Bautista, in his concurring opinion, in the Evangelista case:

> "I wish however to make the following observation: Article 1769 of the New Civil Code lays down the rule for determining when a transaction should be deemed a partnership or a co-ownership. Said article paragraphs 2 and 3, provides:
>
> "(2) Co-ownership or co-possession does not of itself establish a partnership, whether such co-owners or co-possessors do or do not share any profits made by the use of the property;
> "(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a

joint or common right or interest in any property from which the returns are derived;"

"From the above it appears that the fact that those who agree to form a co-ownership share or do not share any profits made by the use of the property held in common does not convert their venture into a partnership. Or the sharing of the gross returns does not of itself establish a partnership whether or not the persons sharing therein have a joint or common right or interest in the property. This only means that, aside from the circumstance of profit, the presence of other elements constituting partnership is necessary, such as the clear intent to form a partnership, the existence of a juridical personality different from that of the individual partners, and the freedom to transfer or assign any interest in the property by one with the consent of the others (Padilla, Civil Code of the Philippines Annotated, Vol. I, 1953 ed., pp. 635-636).

"It is evident that an isolated transaction whereby two or more persons contribute funds to buy certain real estate for profit in the absence of other circumstances showing a contrary intention cannot be considered a partnership.

"Persons who contribute property or funds for a common enterprise and agree to share the gross returns of that enterprise in proportion to their contribution, but who severally retain the title to their respective contribution, are not thereby rendered partners. They have no common stock or capital, and no community of interest as principal proprietors in the business itself which the proceeds derived." (Elements of the law of Partnership by Floyd R. Mechem, 2n Ed., section 83, p. 74.)

"A joint purchase of land, by two, does not constitute a co-partnership in respect thereto; nor does an agreement to share the

> profits and losses on the sale of land create a partnership; the parties are only tenants in common." (Clark vs. Sideway, 142 U.S. 682, 12 S. Ct. 327, 35 L. Ed., 1157.)
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> "Where plaintiff, his brother, and another agreed to become owners of a single tract of realty, holding as tenants in common, and to divide the profits of disposing of it, the brother and the other not being entitled to share in plaintiff's commissions, no partnership existed as between the three parties, whatever their relation may have been as to third parties." (Magee vs. Magee, 123 N.E. 673, 233 Mass. 341.)
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> "The common ownership of property does not itself create a partnership between the owners, though they may use it for purpose of making gains; and they may, without becoming partners, agree among themselves as to the management and use of such property and the application of the proceeds therefrom." (Spurlock vs. Wilson, 142 S.W. 363, 160 No. App. 14.)
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> "This is impliedly recognized in the following portion of the decision: "Although, taken singly, they might not suffice to establish the intent necessary to constitute a partnership, the collective effect of these circumstances (referring to the series of transactions) such as to leave no room for doubt on the existence of said intent in petitioners herein." (underlining mine.)

Hence, on the basis of the above discussion, I am of the humble opinion that there existed in this case a co-ownership, and for that I hereby register my dissenting vote.

Quezon City, July 6, 1984.

CONSTANTE C. ROAQUIN
Associate Judge