KUMMER COMMERCIAL CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 2960

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

8/28/81

D E C I S I O N

The basic question in this appeal is whether petitioner Kummer Commercial Corporation was a personal holding company in the year 1974, and this depends upon whether its gain of ₱540,094.36 realized in 1974 from the sale of its investments (San Miguel Corporation shares of stock) acquired after November 5, 1970 is to be classified as personal holding company income so as to be considered as a personal holding company.

Broadly stated, by Section 64 of the National Internal Revenue Code, a personal holding company is defined as any corporation at least 80% of whose gross income is personal holding company income as determined in Section 65 of the same Code, and at any time during the last half of the taxable year more than 50% in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals. Under the terms of Section 65 personal holding company income means the portion of gross income which consists of various gains, and, among others, pursuant to subsection (b) thereof, except in the case of regular dealers in stock or securities (as defined in subsection /s/ of Section 84) (now Section 20 /u/ of the Revenue Code, gains from the sale or exchange of stock or securities.

We come, then, to petitioner's status in the year involved. It is a domestic corporation duly organized and registered under the laws of the Philippines with its principal office at 503 China Bank Building, Dasmariñas, Manila. It had been organized in March, 1926 under the firm name of Kummer & Comins, Inc., for the purpose, among others, to carry on the business of a textile importer. On June 2, 1975, petitioner was renamed Kummer Commercial Corporation.

For the calendar year ended December 31, 1974, petitioner requested for tax credit in the amount of ₱23,565.72 resulting from overpayment of quarterly income tax corresponding to that year. On August 19, 1976, respondent Commissioner of Internal Revenue issued a tax credit memo in its favor for the amount of ₱23,565.72 representing overpaid income tax for 1974. After investigation, however, petitioner was found to be a personal holding company. Consequently, the additional 45% personal holding company tax for 1974 in the amount of ₱184,077.43, exclusive of interest was imposed on petitioner The said tax was computed as follows:

Net Income to Retained Earnings	₱604,579.35
Deduct: Cash Dividends	195,518.40
Amount Subject to 45% (Sec. 63)	₱409,060.95
45% Personal Holding Company Tax	₱184,077.43
Less: Tax Paid Per Return	23,565.72
T A X D U E	₱160,511.71

The amount of ₱160,511.71 was paid under Official Receipt No. CB242817 dated February 23, 1976. For late payment, however, petitioner was further assessed the amount of ₱21,674.61 representing interest imposed under Section 51(d) of the National Internal Revenue Code, as amended by Presidential Decree No. 69, details of which are as follows:

Personal holding company tax . . .	₱184,077.43
Less: Tax withheld	23,565.72
Balance:	₱160,511.71
Add: 14% int. fr. 4-16-76 2-23-76 . .	19,157.32
Amount due on Feb. 23, 1976 . . .	₱179,669.03
Less: Amount paid on 2-23-76 . .	160,511.71
Balance:	₱ 19,157.32
Add: 14% int. fr. 2-23-76 to 1-31-77	2,517.29
AMOUNT STILL DUE AND COLLECTIBLE .	₱ 21,674.61

In a letter dated January 31, 1977, with the corresponding assessment notice enclosed therein, respondent requested petitioner to pay the aforesaid amount in order that the case may be considered closed and terminated.

On March 17, 1977, petitioner protested the above assessment, questioning the legality of the imposition of the interest, and asked that the same be cancelled. By his letter dated April 18, 1978, respondent denied however the protest of petitioner and reiterated his demand for the payment of the aforesaid amount of ₱21,674.61. Hence, the present petition filed on June 27, 1978 for the review of the assessment of deficiency and delinquency interest and the refund of the sum of ₱184,077.43 representing payment of the personal holding company tax.

As special and affirmative defenses, respondent alleges in his answer that:

8. Petitioner failed to comply with the mandatory requirement of Section 292 of the Tax Code of 1977 that a claim for refund be duly filed with the Commissioner of Internal Revenue; hence, this action for refund of ₱160,511.71 (₱184,077.43 minus ₱23,565.72) is premature and this Court has no jurisdiction over this case;

9. Granting _arguendo_ that this Court has

jurisdiction over this action, nevertheless, petitioner is not entitled to a refund because -

(a) Withholding tax on inter-corporate dividend is not a final tax pursuant to Section 24(d), as amended by Presidential Decree No. 369, in relation to Sections 53(d) and 54(e), all of the Tax Code (before 1977 Tax Code) and, therefore, the amount of ₱152,937.29, being dividend income, should be included as part of the gross income of petitioner for 1974;

(b) Republic Act No. 6141, as amended, inserting Section 195-B (now Section 210) in the Tax Code, which provides for exemption from capital gains tax under certain conditions, for a period of five (5) years from November 5, 1970, is not applicable in the instant case, there being no proof that the conditions therein imposed have been complied with by petitioner. Said section, in part, reads:

> "For a period of five years from the effectivity of this Act, any capital gain arising from a stock transaction on which the tax herein imposed has been paid shall not be taken into account in computing net capital gain or loss under Section thirty four of this Code if (1) both the acquisition and the disposition of said stock by the taxpayer are effected after the effectivity of this Act; and (2) the sale, exchange, and transfer is bona fide and the consideration for the

> transaction represents the substantial fair market value of the stock; Provided, xxx xxx xxx."

10. In an action for refund, petitioner has the burden of proof to show that it is entitled to refund because taxes are presumed to have been collected in accordance with law and existing revenue regulations;

11. The claim of petitioner for refund has no factual nor legal basis.

Was petitioner Kummer Commercial Corporation a personal holding company in the year 1974 as defined in Section 64 of the National Internal Revenue Code and therefore liable, in addition to the normal tax on corporations imposed by Section 24, to the personal holding company tax equal to 45% of its undistributed income provided for by Section 63, both of the same Code?

As earlier stated, a personal holding company is defined as any corporation at least 80% of its gross income for the taxable year is personal holding company income and at any time during the last half of the taxable year more than 50% in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals. In the instant case, it is not controverted that the sources of income of petitioner during the taxable year involved were derived from the following revenue:

Dividends on investments	₱152,937.29
Gain on sale of investments acquired before Nov. 5, 1970	25,600.99
Gain on sale of investments acquired after November 5, 1970	540,094.36
Interest income	143,568.96
Miscellaneous income	2,433.50
Total gross income	₱864,635.10

Pursuant to Section 65(a) of the National Internal Revenue Code, as amended by Presidential Decree No. 299-A and implemented by Revenue Regulations No. 8-73, intercorporate company dividends are not considered personal holding company income and should not be considered as part of dividend income of the personal holding company for purposes of the gross income requirement provided for in Section 64 of the Revenue Code. In the instant case, the amount of ₱152,937.29 representing intercompany dividends received by petitioner in 1974 should therefore be excluded in the determination of the personal holding company income of petitioner.

Petitioner's submission that since the gain on sale of investments acquired after November 5, 1970 in the amount of ₱540,094.36 (capital gain realized in 1974 from the sale of its San Miguel Corporation shares of stock acquired after November 5, 1970) had already been subjected to the ¼ of 1% stock transaction tax under Presidential Decree No. 10 and said gain no longer formed part of its gross taxable income in 1974 should also be excluded from the determination of the gross income requirement and in the undistributed net income of a personal holding company is, however, positively without merit.

In its textual completeness, Section 64(1) provides: "Gross income requirement. - At least 80% of its gross income for the taxable year is personal holding company income as defined in Section 65, x x x." And Section 65(b) specifies: "Stock and securities transactions. - Except in the case of regular dealers in stock or securities (as defined in subsection (s) of Section 84) (now Section 20/u/), gains from the sale or exchange of stock or securities." While Section 29 of the National Internal Revenue Code defines Gross Income as "including gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interests, rents, dividends, securities, or the transactions of any business carried on for gain or profit, or gains, profits, and income derived from any source whatever."

From this, we cannot but extract the view that personal holding company income as defined in Section

65 is to be considered in the determination of the gross income requirement of a personal holding company even if it has already been subjected to the stock transaction tax, granted credit provision, or accorded exemption from income tax, unless such income by statutory provision is excluded from the gross income requirement of a personal holding company, like inter-corporate company dividends under Presidential Decree No. 299-A. The law employs the term gross income - NOT taxable gross income. Nothing there speaks of gains from the sale or exchange of stock or securities which are exempt from income tax, or already subjected to a final tax, being excluded from the determination of the gross income requirement of a personal holding company. Where the law does not exact the taxability of an income, to arrive at gross income, as a condition for its inclusion in the determination of the gross income requirement of a personal holding company for purposes of the additional 45% tax, that condition should not be read into the law. The law is clear and should therefore be applied as worded. If it had been the legislative intent to define personal holding company income to mean the portion of the gross taxable income which consists of personal holding company income as specified in Section 65, the legislative body, or the law-making authority, could have easily done so by

inserting the term "taxable", or the like, between the words "gross" and "income".

Accordingly, on the assumption that the amount of ₱540,094.36 realized in 1974 by petitioner from the sale of its San Miguel Corporation shares of stock acquired after November 5, 1970 was already subjected to the stock transaction tax of 1/4 of 1% and did not form part of its taxable gross income, it does not logically follow that said gain is excluded from the determination of the gross income requirement for purposes of its classification as a personal holding company. And neither is petitioner a regular dealer in stock or securities as defined in subsection (u) of Section 84 (now Section 20[u]) of the National Internal Revenue Code so as to fall within the purview of the exception. (p. 29, t.s.n., hearing on July 11, 1979.)

The net result is that under Section 65 of the Revenue Code, the following were the personal holding company income of petitioner in 1974, to wit:

Gain on sale of investments acquired before Nov. 5, 1970 (Sec. 63(b) . .	₱ 25,600.99
Gain on sale of investments acquired after Nov. 5, 1970 (Sec. 63(b) . .	540,094.36
Interest income (Sec. 63(a)	143,568.96
Total personal holding company income .	₱709,264.31

The total personal holding company income of ₱709,264.31 is equivalent to eighty-two (82%) per centum of the gross income of petitioner for the taxable year 1974 in the aggregate amount of ₱864,635.10, computed as follows:

$$\frac{₱709,264.31}{₱864,635.10} \quad X \quad 100 \quad = \quad 82\%$$

It seems clear beyond doubt therefore that at least eighty (80%) per centum of the gross income of petitioner for the taxable year under consideration is personal holding company income as defined in Section 65; hence, satisfying the gross income requirement prescribed under Section 64, both of the National Internal Revenue Code.

With regard to the stock ownership requirement of a personal holding company, the records of this case disclose that in 1974, the taxable year in question, more than 50% in value of the outstanding stock of petitioner is owned, directly or indirectly, by or for not more than five individuals, as shown by the books of petitioner, to wit: (Exhibit "6", pp. 131-135, BIR records)

Date	Shareholders	No. of Shares	Value	Percentage of Share-holding
1974				
Jan. 1	Max Kummer	8,478.13	₱847,813.00	84.78%
Dec. 31	Victor Tanlayco	8.50	850.00	.085%
	Pacita S. Trinidad	7.95	795.00	.0795%
	Heinz Woelke	7.95	795.00	.0795%
T o t a l s		8,502.53	₱850,253.00	85.024%
Number, value and percentage of unissued shares		1,497.47	149,747.00	14.976%
Grand Totals		10,000.00	₱1,000,000.00	100.00%

By these facts and figures, almost 85% in value of the outstanding stock of petitioner is owned by only one person, Max Kummer. While it appears that 14.976% remains unissued, the rest which is less than one (1) per cent (1%) is owned by other persons. Unquestionably, the stock ownership requirement prescribed in Section 64(1) of the National Internal Revenue Code is likewise fulfilled.

Clearly, therefore, petitioner Kummer Commercial Corporation falls within the definition of a personal holding company under Section 64 and is accordingly subject to the 45% personal holding company tax imposed under Section 63.

Given the fact that petitioner is a personal holding company in 1974, it however assails respondent's right to assess the additional 45% personal holding company tax on the ground that it had no taxable net income in that year. On the contrary, petitioner alleges that it incurred a net loss of ₱88,452.30, computed as follows:

Gross income		₱864,635.10
Less: Income already taxed:		
Dividends	₱152,937.29	
Capital gains	540,094.36	. . 693,031.65
Gross taxable income		₱171,603.45
Less: Operating expenses		260,055.75
Net loss		(₱ 88,452.30)

In other words, since the intercompany dividends of ₱152,937.29 had already been subjected to the final tax of 15% under Presidential Decree No. 299-A and the capital gain of ₱540,094.26 was also subjected to the stock transaction tax, and both were excluded from the taxable income of petitioner for purposes of the corporate income tax under Section 24 of the National Internal Revenue Code, the same should also be excluded from its undistributed net income for purposes of the personal holding company tax imposed by Section 63. There being no taxable net income in 1974 subject to corporate income tax, petitioner would argue that there is no legal basis for the assessment of the additional personal holding company tax.

The argument misses the point. It bears emphasis that petitioner did not incur a net loss of ₱88,452.30 in 1974 as claimed by it. The fallacy of the argument is its assumption that since the amounts of ₱152,937.29 and ₱540,694.36 had already been taxed and accorded statutory exclusion from the computation of the taxable net income under Section 24 of the Code, such receipts of income do not anymore form part of the net income of petitioner available for distribution. The personal holding company tax of 45% imposable under Section 63 is levied, collected and paid upon the <u>undistributed net income</u> of of the personal holding company, while the corporate income tax under Section 24 is imposed upon the taxable net income of the corporation. To say therefore that the amounts of ₱152,937.29 and ₱540,094.36 no longer form part of the net income of petitioner available for distribution is to create a book situation altogether contrary to the actual undistributed net assets of the corporation. By no stretch of the imagination is undistributed net income synonymous with taxable net income. Undistributed net income, whether accorded partial or total tax exemption, or excluded from taxable net income, is based upon actual net income in the hands of the corporation. The concept is much closer to the earned surplus determined by the accountant than to net income subject to tax under Section 24 of the Code.

In fine, the intercompany dividends of ₱152,937.29 and the gain of ₱540,094.36 on sale of investments acquired after November 5, 1970 form part of the undistributed net income of petitioner in 1974 for purposes of determining the basis of the additional 45% personal holding company tax. Having reached the result that petitioner was a personal holding company in 1974, no error was therefore committed by respondent in assessing, and by petitioner in paying, the amount of ₱184,077.93 representing personal holding company tax for the taxable year 1974. Since the personal holding company tax is in addition to the tax imposed by Section 24 of the Code and payable for each taxable year (Sec. 63, ibid), and the same was not fully paid on the due date, the assessment in question, computed as follows:

Total gross income	₱864,655.[illegible]
Less: Operating expenses	260,[illegible]
Net profit (p. 51 BIR rec.)	₱60[illegible]
Deduct: Cash dividends	195[illegible]
Amount subject to 45% (Sec. 63)	₱409,0[illegible]
45% personal holding company tax	₱184,077.43
Less: Tax withheld	23,565.72
Balance	₱160,511.71
Add: 14% int fr. 4-16-76 to 2-23-76	19,157.32
Amount due on 2-23-76	₱179,669.03
Less: Amount paid on 2-23-76	160,511.71
Balance	₱ 19,157.32
Add: 14% int fr. 2-23-76 to 1-31-77	2,[illegible]
Amount still due and collectible	₱ 21,[illegible]

is hereby sustained.

With this conclusion, it becomes unnecessary to decide the question posed by petitioner whether or not on the face of the return filed by it for the taxable year 1974, upon which the payment of the amount of ₱184,077.43 was made, respondent is authorized to refund the said amount even if no written claim for refund was filed by petitioner. Nonetheless, it should be stated by way of personal observation only that under Section 292 of the National Internal Revenue Code (formerly Section 306), in all cases for the recovery of any national internal revenue tax alle[illegible] to have been erroneously or illegally assessed or collected without authority the suit must be brought within two years from the date of payment thereof in order to confer jurisdiction upon the court. In the instant case, the petition for review was filed with this Court on June 27, 1978 or more than two years from February 23, 1976 when the amount of ₱160,511.[illegible]1 was paid or from April 15, 1975 when the tax credit of ₱23,565.72 was applied.

Accordingly, we find no merit in the instant petition for review and petitioner Kummer Commercial Corporation is ordered to pay to respondent Commissioner of Internal Revenue the amount of ₱21,674.61 representing interest for late payment of the personal holding company tax, plus the surcharge and interest which have accrued thereon incident to delinquency, pursuant to Section 51(e) of the National Internal Revenue Code, as amended.

WHEREFORE, the decision appealed from is hereby affirmed at petitioner's costs.

SO ORDERED.

Quezon City, Metro Manila, August 28, 1981.

AMANTE FILLER
Presiding Judge

WE CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge