REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ALFONSO T. YUCHENGCO,
Petitioner,

- versus - C.T.A. CASE NO. 3429

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

1/6/88

D E C I S I O N

This appeal seeks a redetermination of a deficiency in income tax which respondent has asserted against petitioner for the year 1974.

In a letter-assessment dated November 29, 1979, respondent Commissioner of Internal Revenue informed petitioner Alfonso T. Yuchengco that upon investigation there has been found due from him deficiency income tax for the year 1974 in the amount of ₱5,453,451.78, details of which are as follows: (Exh. "3", p. 116, BIR records.)

1 9 7 4

Net income per return	₱	399,339.87
Add: Unallowable deductions:		
Bad debts	₱ 127,056.08	
Travel expenses, personal	48,054.64	

Expenses claimed as taxes and licenses.	1,835.00	
Disguised dividends, treated as advances	1,890,000.00	
Dividend income from RCBC shares under his name	324,655.00	
Disguised dividends treated as advances from E.T. Yuchengco	126,000.00	
Gain on sale of RCBC shares sold to Connil Bank, USA	650,250.00	
Gain on sale of investments (securities) claimed under R.A. 6141 treated now as ordinary gain	2,320,138.01	5,487,988.73
Net income per investigation		₱ 5,887,328.60
Less: Personal & additional exemptions.		6,000.00
Net income subject to tax		₱ 5,881,328.60
Income tax due thereon		4,072,170.00
Income tax already paid		₱ 231,711.00
B a l a n c e		3,840,459.00
Add: 14% int. p.a. fr. 4/16/75 - 4/16/78		1,612,992.78
TOTAL AMOUNT DUE		₱ 5,453,451.78

Petitioner protested the deficiency income tax assessment on December 21, 1974 and requested for reinvestigation. The protest was denied by respondent in a letter dated January 29, 1982. (Exh. 5, p. 162, BIR record.) Hence this appeal.

The deficiency income tax liability of petitioner arose from the disallowance of certain deductions claimed by petitioner in his income tax

return for 1974 and the addition of incomes he allegedly earned in the same year. The issues as summarized by respondent are enumerated herein below: (Respondent's Memorandum, pp. 140-141, CTA records.)

> "1. Whether the deductions for bad debts, travel expenses and taxes and licenses from petitioner's taxable income for 1974 are properly allowable.
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> 2. Whether the advances taken by petitioner from Pan Malayan Management and Investment Corporation (PMMIC) and from E.T. Yuchengco, Inc. in the year 1974 are disguised dividends.
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> 3. Whether the dividend income from Rizal Commercial Banking Corporation's (RCBC) shares in petitioner's name are taxable income to him in 1974.
>
> 4. Whether the gain on sale of RCBC shares to Connil Bank, USA, is taxable income to petitioner in 1974.
>
> 5. Whether petitioner is a dealer in securities within the purview of the Tax Code, as amended."

The first issue deals with the disallowance of deductions for the following expenses:

Bad debts	₱127,056.08
Travel expenses	48,054.64
Taxes & Licenses	1,835.00

Bad Debts

The deductions for bad debts disallowed by respondent amounting to ₱127,056.08 are as follows: (Examiners' Worksheet, p. 146, BIR records.)

1.	Annabelle Puey	₱56,250.00
2.	Dee K. Chiong	20,000.00
3.	A. Mendoza	350.00
4.	Super Travel, Inc.	50,456.08
		₱127,056.08

Respondent disallowed these deductions on the ground that there is no showing that efforts were exerted by petitioner to collect from Annabelle Puey, who is his daughter; Dee K. Chiong, who is a very wealthy man; A. Mendoza; and Super Travel, Inc. which is practically owned by petitioner.

Petitioner disputes the disallowance of the above bad debts, denying that he claimed them as deductions. In his memorandum, petitioner points out that in the itemization of expenses in Schedule 2 of his income tax return for 1974 (Exh. "F-1"), the space provided for bad debt is completely blank, indicating that no bad debts have been claimed as deductions therein.

We find no merit in petitioner's position.

With the exception of A. Mendoza's debt in the sum of ₱350.00 which was not disputed, the representatives of petitioner clearly admitted in their letters dated March 18, 1977 and March 27, 1979 contesting the proposed assessment, that the above debts were written off and claimed as deductions in 1974. The pertinent portions of these letters are quoted hereunder:

> "The account of Dee K. Chiong has been outstanding since May, 1970. After several collection efforts yielded negative results, our clients, as a practical matter, decided to consider the debt worthless in 1974 and claimed the same as deduction in said year." (p. 95, BIR records.)
>
> "The receivables from Annabelle Puey, has been outstanding for several years when it was written off as worthless in 1974 x x x x. Considering, therefore, that our client has not been able to collect this account which has been outstanding for several years due to the fact that the debtor is now residing abroad, we submit that our client is correct in claiming the same as a bad debt deduction." (p. 95, BIR records.)
>
> "Under these circumstances, we submit that as of 1974, our client's receivables from Super Travel became completely worthless, and no further efforts to collect could be required

> in order that he can claim the amounts thereof as bad debt deduction." (p. 95, BIR records.)
>
> "The account of 'Super Travel' totalling ₱50,456.08 was written off in 1974 for the same reason that Pan Malayan Management & Investment Co. wrote off its receivable against said debtor. x x x x As you can see, the deficit which virtually wiped out the paid up capital and the operating losses during the years 1972 and 1973 are sufficient justification for deciding to write off the accounts in 1974 - the year when the 1973 figures became known to Mr. Yuchengco." (p. 48, BIR records.)

In view of the above admissions, petitioner can not now refuse to acknowledge that these receivables had been written off and claimed as deductions in 1974. If the receivables written off did not appear as bad debt deductions in petitioner's income tax return, they must have been taken up as losses or under other expense accounts. The unmistakable fact remains that they were claimed as deductions in 1974.

In the alternative, petitioner contends that in the case of the bad debt of Super Travel, Inc. totalling ₱50,456.08, he had exerted sufficient efforts to collect said account but his claim therein

was worthless, because the assets of Super Travel, Inc. had a practically negative value due to substantial losses.

On his part, respondent argues that while subject debts may not have been collectible in 1974, there is no evidence showing that they were uncollectible at anytime in the future, nor is there evidence showing the steps taken to collect these debts.

The then applicable provision of Section 30 of the National Internal Revenue Code governing the deductibility of bad debts reads as follows:

> "(e) Bad debts:
> (1) In general. - Debts due to the taxpayer actually ascertained to be worthless and charged off within the taxable year."

Thus, in order that a bad debt deduction may be validly claimed, it is essential (1) that there be a valid and subsisting debt, (2) that the debt is actually ascertained to be worthless and that it be charged off within the taxable year. A debt is bad when it has been actually ascertained to be worthless and uncollectible. Before a taxpayer may

charge off and deduct a debt, he must ascertain and be able to demonstrate, with a reasonable degree of certainty, the uncollectibility of the debt. (Section 102, Income Tax Regulations, Revenue Regulations No. 2.)

As proof of the incapacity of Super Travel, Inc. to pay its debt, petitioner presented the Balance Sheet and Statement of Income and Expenses of Super Travel, Inc. for the year ending December 31, 1974 with comparative figures for 1973. These financial statements disclose that the company, which had a paid up capital of ₱300,000.00, incurred a loss of ₱83,648.80 in 1973 and showed a deficit of ₱294,173.19 and a net stockholders' equity of ₱5,826.81 at the end of that year. But in 1974, the year in question, Super Travel, Inc. earned a net profit of ₱44,462.38, thereby reducing the deficit to ₱249,710.81 and increasing its net stockholders' equity from ₱5,826.81 in 1973 to ₱50,289.19 at the end of 1974. (Exh. "N-2".) Considering that in 1974 Super Travel, Inc. realized a net profit of ₱44,462.38 and its assets totalling ₱842,985.90 exceeded its liabilities amounting to ₱792,696.71

by ₱50,289.19, its financial condition at that time was not so hopeless that there could not have been any possibility of future repayment of its indebtedness to petitioner. The fact that its capital was impaired is by itself of no moment. (See James M. Hawkins, 20 T.C. 1069.) In short, where, as here, the debtor corporation was solvent, in the sense that its assets exceeded its liabilities exclusive of proprietorship, no bad debt deduction is allowable. (Earl V. Perry, 22 T.C.968, Mills Bennet, 20 B.T.A. 171; Irving L. Ernst, 18 B.T.A. 928; First National Bank of Los Angeles et al., 6 B.T.A. 850.)

Furthermore, there is no evidence whatsoever that Super Travel, Inc. ceased operations during or after the end of the year 1974. It has been held that if the debtor corporation although losing money or insolvent was still operating at the end of the taxable year, the debt is not considered worthless and therefore not deductible. (Fernandez Hermanos, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 789, June 10, 1963, affirmed in G.R. Nos. L-21551 & L-21557, September 30, 1969, 29 SCRA

552.) It is abundantly clear, that petitioner failed to establish the worthlessness of the debt of Super Travel, Inc. in the amount of ₱50,456.08.

The same holds true with respect to the bad debt deductions of Annabelle Puey, Dee K. Chiong and A. Mendoza in the sums of ₱56,250.00, ₱20,000.00 and ₱350.00 respectively. There is a complete lack of evidence showing their worthlessness and un-collectibility. Consequently, petitioner is not entitled to any of the foregoing bad debt deductions.

Travel expenses

As stipulated by the parties, the claimed deduction of ₱48,054.64 for travel expenses is broken down as follows:

1.	Alfonso Yuchengco, Jr.'s plane fare	₱10,018.80
2.	Alberto Yuchengco's plane fare	5,069.21
3.	Mrs. Paz Yuchengco's plane fare	31,851.75
4.	Travel expenses at the Regency Hotel	1,114.88
	Total	₱48,054.64

It was also stipulated that the travel expenses were incurred by the abovementioned wife and sons of petitioner who accompanied him on his various trips abroad "to act as his secretary and assistants for the arrangement of his social and business

appointments and help him entertain business friends and colleagues and do errands for him." (t.s.n., p. 29, May 13, 1985.)

Respondent's basis for disallowing the travel expenses is that they were not properly substantiated as the records do not show the business project or trade carried out to justify the expenses claimed.

We agree with respondent.

The requisites for the deductibility of traveling expenses are: (1) the expenses must be reasonable and necessary traveling expenses as that term is generally understood; (2) the expenses must be incurred while away from home; and (3) the expenses must be incurred in the pursuit of a trade or business. (See Section 30 (a)(1) Internal Revenue Code; 1955 P.H. Fed. Tax Course, Par. 1827.) Under Section 66, Revenue Regulations No. 2, "a taxpayer claiming the benefit of the deduction for traveling expenses must attach to his return a statement showing (1) the nature of the business in which he is engaged; (2) the number of days away from home during the taxable year on account of business; (3) the total amount of expenses incident to meals and lodging

while absent from home and business during the taxable year; (4) the total amount of other expenses incident to travel and claimed as a deduction.

Claim for the deductions referred to herein must be substantiated, when required by the Commissioner of Internal Revenue by record showing in detail the amount and nature of the expenses incurred."

In the case at bar, not a shred of evidence was adduced by petitioner to prove that the particular trips on which his wife and sons accompanied him and incurred these travel expenses, were for business purposes and not for pleasure or vacation. Petitioner relied merely on his stipulation with respondent that these expenses were incurred by petitioner's wife and sons, who accompanied him on his various trips abroad to act as his secretary and assistant on his business and social engagements. This is not sufficient. There must be evidence that the particular trips wherein the travel expenses in question were spent, were for business and not for social purposes. Not only must the taxpayer meet

the business test, he must substantially prove by evidence or records the deductions claimed under the law, otherwise, the same will be disallowed. (Atlas Consolidated Mining & Development Corporation vs. Commissioner of Internal Revenue, L-26911 and Commissioner of Internal Revenue vs. Atlas Consolidated Mining & Development Corporation, L-26924, January 27, 1981, 102 SCRA 246.)

The two cases cited by petitioner, that of Allenberg Cotton Co., Inc. vs. US, 61-1 USTC 9131 and Collector of Internal Revenue vs. Arthur Henderson, L-13049, February 28, 1961 to support his contention that the cost of taking own wife or son when essential or necessary to the success of her husband's or the father's business trip constitutes a legitimate business expense, are not in point.

In both cases, the deductions for travel expenses of the wives of the taxpayers' were allowed by the courts, based on ample evidence that the trips where the traveling expenses were incurred were undertaken in connection with their husbands' business. Here, there is no evidence whatsoever to that effect.

To restate a recognized rule, "Deductions are a matter of legislative grace and the taxpayer in every instance has the burden of justifying the allowance of any deduction claimed". (Mertens, Law of Federal Income Taxation, Vol. 4a, Chapter 25, pp. 9-10.) Having failed to carry his burden, petitioner loses his right to the claimed deduction.

Taxes and Licenses

Expenses in the amount of ₱1,835.00 allegedly claimed by petitioner as deductions for taxes and licenses were disallowed by respondent on the ground that these payments were actually expenses for a petition for guardianship and therefore are personal expenses. As found by respondent's examiners, the details of these expenses charged to taxes and licenses are as follows: (See working sheet, p. 146, BIR records.)

Date	Voucher No.	Check No.	Amount	Remarks
May 30	74/247	695273	₱1,485.00	Expenses for guardianship
June 17	280	729130	350.00	Expenses for guardianship
Total			₱1,835.00	

Petitioner did not refute the above findings, however, he disclaims having deducted these expenses from his gross income. He offers as proof, Exhibit "F-11", the supporting "Schedule of Taxes Paid" in the amount of ₱8,778.92 attached to his income tax return for the year ended December 31, 1974, which does not include said expenses.

The working sheet of respondent's examiners shows a total of ₱101,601.85 paid for taxes and licenses for the year 1974 based on petitioner's accounting records (See working sheet, p. 142, BIR records), but in the Statement of Income and Expenses for the year ended December 31, 1974 prepared by petitioner's auditors which was reflected in petitioner's income tax return, the amount was reduced to ₱8,778.92 (see Exhs. "F-6" & "F-11"). Apparently, some payments, including these expenses, which were originally recorded as taxes and licenses in the books of accounts were adjusted to other accounts at the end of the year. Since petitioner did not controvert the examiners' findings that the amount of ₱1,835.00 charged to taxes and licenses were expended for personal purposes, it is incumbent upon him to show that these expenses,

so transferred to another account, were not claimed as deductions from his gross income, otherwise respondent's determination will have to be sustained. Assessments of the Commissioner of Internal Revenue are presumptively correct. The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but that he (taxpayer) is right. (Lino Gutierrez vs. Collector of Internal Revenue, CTA Case No. 504, January 28, 1962; Tan Guan vs. Court of Tax Appeals, L-23676, April 27, 1967, 19 SCRA 903.) The presumption in favor of the correctness of respondent's determination on the expenses in question has not been overcome.

We now come to the second issue as to whether the advances taken by petitioner from Pan Malayan Management and Investment Corporation and from E.T. Yuchengco, Inc. in the year 1974 are disguised dividends. Upon investigation by respondent's examiners, the records of petitioner revealed that in the year 1974, petitioner and his family owned

and controlled 99.99% of the total issued and outstanding shares of Pan Malayan Management and Investment Corporation (PMMIC for short). (Exh. G, p. 149, BIR records.) In that year, petitioner received from PMMIC, advances in the total amount of ₱1,890,000.00 listed below as found by respondent's examiners: (Worksheet, p. 145, BIR records.)

SCHEDULE SHOWING ADVANCES TAKEN FROM PAN MALAYAN MGT. & INV. CORPORATION

Date	From Whom Received	Official Re. No.	Amount
2/18	Partial Payment of Acct.- Pan Malayan Mgt.	4107	₱ 150,000.00
2/18	Pan Malayan Mgt. Inv. Corp. - partial pay't acct.	4108	7,000.00
2/26	Pan Malayan Mgt. - Reimbursement of advances for Blancas painting	4118	14,000.00
5/16	Pan Malayan Mgt. - Advances to payee	4179	250,000.00
5/31	Pan Malayan Mgt. - advances extended	4197	540,000.00
6/03	Pan Malayan Mgt. - advances extended	4201	63,000.00
6/21	Pan Malayan Mgt. - return of advances to R.P. Land	4222	140,000.00
7/08	Pan Malayan Mgt. - advances	4239	50,000.00
7/08	Pan Malayan Mgt. - advances	4240	39,000.00
7/13	Pan Malayan Mgt. - advances	4247	70,000.00
8/20	" " " - advances	4267	12,000.00
10/04	" " " - advances	4298	10,000.00
10/23	" " " - advances	4314	96,000.00
10/25	" " " - advances	4315	10,000.00
11/04	" " " - advances	4323	12,000.00
11/11	" " " - advances	4327	7,200.00
12/02	" " " - advances	4346	176,000.00
12/10	" " " - advances	4357	7,000.00
12/10	" " " - advances	4359	237,000.00
	Total advances taken from Pan Malayan Mgt. Inv. Corp.		₱1,890,000.00

Based on the regularity and facility with which the advances were released and their finding that petitioner completely controlled PMMIC, respondent's examiners considered these advances as disguised dividends.

Petitioner contends that the theory of disguised dividends does not apply to the funds loaned to him by PMMIC as these loans were extinguished by the end of 1974, prior to his being investigated by respondent, by the assignment to PMMIC of his shares of stock of Mico Equities, Inc. In support of his contention, petitioner presented as witness, his financial assistant and bookkeeper, who testified that petitioner assigned to PMMIC on a staggered basis, 11,592 shares of Mico Equities, Inc. valued at ₱2,521,839.60 to pay off his debts. (t.s.n., pp. 4-9, May 2, 1985.) She produced two Deeds of Assignment and the subsidiary ledger of petitioner from PMMIC, showing that the first assignment of 7,500 shares of ₱1,631,625.00 was made on June 14, 1974 (Exhs. "A" & "B-1"), while the second assignment of 4,092 shares for ₱890,214.60 was made on October 16, 1974. (Exhs. "A-1" & "B-2".) It is argued that

petitioner has thus paid for the loans extended to him by PMMIC to the extent that the value of the Mico Securities, Inc. shares equaled his outstanding loans in the year 1974.

Petitioner misses the point. Although the ultimate effect of the assignments of the Mico Securities, Inc. shares was the liquidation by the end of 1974 of all the amounts owed by petitioner to PMMIC, the mere offsetting of the advances is not enough to prove that they were bona fide loans.

Under applicable American jurisprudence:

> "When a company regularly lends large sums of money to its controlling shareholders, the Treasury may treat the loan as a dividend and leave it to the shareholders to prove that a true debt existed. The cases involving this issue are legion, because the issue involves purely a factual determination. The test is: Did the shareholder and the corporation actually and reasonably intend at the time the money was "lent" that it would be repaid within a reasonable time, or was repayment never really intended?"
>
> "The courts take into consideration the following objective factors in finding the intention of the parties:
>
> . . . whether the shareholder gave a note or other instrument containing

> fixed terms for repayment, interest, etc. (loan), or whether it was a loan on open account (dividend);
>
> . . . whether the shareholder gave security for the loan (loan);
>
> . . . whether the shareholder usually repaid prior loans (loan), or whether there's a record of continual net increases in his loan account (dividend);
>
> . . . whether the shareholder was expected to have ample funds available when repayment was due (loan), or whether there were continual borrowings with no other source for repayment (dividend);
>
> . . . whether the shareholder repaid the loan with interest before its status was challenged by the Treasury (loan);
>
> . . . whether the company regularly paid a reasonable dividend as such (loan); and
>
> . . . whether the borrower was the sole or controlling shareholder (dividend)." (34 Am. Jur. 2d, p. 167, 1966 Edition.)

In the present case, thereis no evidence that petitioner gave a note or other instrument containing fixed terms for repayment, paid any interest, or gave security for the loans. No evidence was presented to show that PMMIC regularly paid dividends.

Petitioner has not rebutted respondent's allegation that he is the controlling stockholder of PMMIC. The burden of proving that a true debt existed is upon petitioner, by establishing his intention at the time the advances were withdrawn, that these would be repaid within a reasonable time. The important question in such cases is whether it was intended that the amount withdrawn be repaid. It is the intention at the time the withdrawals are made which is determinative; that intention cannot be changed by changed circumstances, or by subsequent or newly discover d difficulties unforseen at the time of withdrawal. This question of intention is a factual one to be decided from all the circumstances. (Mertens, Law of Federal Income Taxation, Vol. I, Chapter 9, pp. 68-71.)

Aside from the testimony of petitioner's bookkeeper which is self-serving, no other evidence was offered by petitioner to prove that he had the intention to repay the advances by means of assigning the Mico Equities, Inc. shares. The two Deeds of Assignment contained nothing to this effect. It will

be worthy to note that while the two assignments of the Mico Equities, Inc. shares were made on June 14, 1974 and October 16, 1974, the advances from PMMIC were received by petitioner in varying amounts from February up to December 1974. (See List of Advances.) Petitioner's argument that these Deeds of Assignment were resorted to as the mode of payment appears to be a mere afterthought directed towards an effort to counterbalance the strong indication of a distribution of earnings with respect to the advances.

The offsetting of the advances in question as a result of the assignment of the Mico Securities, Inc. shares to PMMIC has no significance as indicating that the advances constituted bona fide loans. In fact, it supports a contrary view. As stated earlier, petitioner and his immediate family owned and controlled 99.99% of the issued and outstanding shares of PMMIC in the year 1974. Petitioner's daughter as Vice-President of PMMIC approved the disbursement of the advances. Being in complete control of PMMIC, petitioner merely transferred his Mico Securities, Inc. shares from one pocket to the other when he

purportedly sold these shares to PMMIC. The advances in the amount of ₱1,890,000.00 which were offset as payment for the shares became part of the gross proceeds from the sale, subject only to the ¼ of 1% stock transaction tax under Republic Act No. 6141 as amended by Presidential Decree No. 10. By reason of this sale, petitioner paid a much lower rate of tax on the funds he withdrew from PMMIC than he would have had if these funds were declared as dividends. (See Breakdown on Gain on Sales of Investment, p. 145, BIR records.) It is apparent that in the exercise of his absolute control over PMMIC, petitioner had withdrawn funds therefrom at such times and in such amounts as he desired, without any specific requirement for repayment except as and when he chose.

In the light of all the facts and circumstances, we conclude that the advances to petitioner from PMMIC in the amount of ₱1,890,000.00 were not bona fide loans but were in reality informal dividend distributions, taxable as income to petitioner.

With regard to the advances to petitioner from Enrique T. Yuchengco Co., Inc. in the year 1974,

amounting to ₱126,000.00 similarly considered by respondent as disguised dividends, the record discloses that they were received as follows: (Worksheet, p. 145, BIR records, Exh. "C-1" & "C-2".)

March 9, 1974	O.R. No. 4127	₱ 20,000.00
March 15, 1974	O.R. No. 4131	106,000.00
Total		₱126,000.00

To prove that he had paid the above loans in the same year and prior to respondent's investigation in 1976, petitioner submitted cash voucher No. 74/259 dated June 5, 1974 (Exh. "C-3") covering the full payment to Enrique T. Yuchengco, Inc. of advances totalling ₱260,993.70 and subscriptions payable in the amount of ₱9,169.34; and the corresponding official receipt no. 13066 for ₱270,163.04 issued on June 19, 1974 by the latter confirming the payment (Exh. "C-6"). Also introduced in evidence, the accounts payable ledger of petitioner for Enrique T. Yuchengco, Inc. shows that after this payment, all advances from Enrique T. Yuchengco, Inc. including the ₱126,000.00 loan were liquidated, with a balance of ₱54,941.00 in favor of petitioner as of June 30, 1974. (Exh. "C-5".) Unlike in the case

of the advances from PMMIC, petitioner has met here the test of his intent to repay by showing the reasonably prompt cash repayment in 1974 of the advances received from Enrique T. Yuchengco, Inc. As a consequence, we cannot uphold respondent's determination on these advances.

The third issue for consideration is whether the dividend income from the Rizal Commercial Banking Corporation's shares in petitioner's name is taxable income to him in 1974.

Respondent determined as taxable income to petitioner, dividends declared by Rizal Commercial Banking Corporation (RCBC for short) in the amount of ₱324,655.00 on its shares of stock registered in the name of petitioner, which were reimbursed by petitioner to the different corporations allegedly controlled by him. It is asserted by respondent that petitioner utilizes his controlled corporations as custodians of the RCBC shares under his name and merely reimburses these companies for the dividends declared by RCBC pertaining to these shares, so that these corporations would pay income tax on such

dividends up to a rate of only 35% instead of petitioner's paying thereon the income tax on individuals of up to a high rate of 70%.

On the other hand, petitioner maintains that the beneficial owners of the RCBC shares were the Pan Malayan Management & Investment Corporation, the First Nationwide Assurance Corporation, the Industrial Finance Corporation, Enrique T. Yuchengco, Inc. and the Malayan Insurance Company, Inc., and that these shares were transferred in his name as nominee of these corporations only to comply with certain restrictions imposed by the Central Bank of the Philippines regarding the ownership of shares in commercial banks.

The restrictions as provided for under Central Bank Circular No. 198 dated May 24, 1965 and Resolution No. 1573 dated December 10, 1965 read thus:

> "Financing companies shall not be eligible to hold shares of stock of any bank." (Circular No. 198, Exh. "O".)

> "1) In the case of shares of stock of a commercial bank held by individuals, at least 80% thereof shall be owned by natural-born Filipinos, and the balance of 20% of such

> shares of stock may be owned by natural-born Filipinos and/or naturalized Filipinos; and
>
> 2) The shares of stock of a commercial bank which may be held by a single corporation or entity shall not exceed 10% of the outstanding stock of such bank and the aggregate holdings of corporations/entities shall not exceed 40% of such outstanding stock. Only corporations/entities at least 70% of the equity of which is owned by natural-born Filipinos shall be eligible to own shares of stock of any commercial bank; provided, however, that with respect to the balance of 30%, at least 2/3 thereof (20% of the equity) shall be owned by natural-born Filipinos and/or naturalized Filipinos. The remaining 10% of the equity may be owned by aliens." (Resolution No. 1573, Exh. "O-1".)

Petitioner submitted certifications from the officers of the abovementioned corporations to the effect that the RCBC shares, although registered in the name of petitioner, were merely held in trust by him for the corporations and that all dividends arising therefrom were paid to these corporations which declared and paid the taxes due thereon. The certifications show the number of shares held in trust by petitioner as follows:

Exh. No.	Corporation	No. of Shares
"J"	Pan Malayan Management & Insurance Corporation	27,815
"J-1"	The First Nationwide Assurance Corporation	475
"J-2"	Malayan Insurance Company, Inc.	1,516
"J-3"	Enrique T. Yuchengco, Inc.	549
"J-4"	Industrial Finance Corporation	7,751
	Total	38,106

Petitioner's witness, his personal lawyer, President of Industrial Finance Corporation and counsel for the other corporations known as members of the Yuchengco group, testified that after the Central Bank relaxed the restrictions, the RCBC shares held in trust by petitioner were re-transferred back to the respective corporations. (t.s.n., p. 9-12, July 19, 1985.) This re-transfer is evidenced by the letter of the accountant of the Pan Malayan Management and Investment Corporation dated June 26, 1974, requesting the Trust Department of the Rizal Commercial Banking Corporation to transfer the duly endorsed RCBC stock certificates for a total of 16,153 shares registered under petitioner's name, back to their respective owners, to wit: (Exh. "K-1".)

Issued in the name of	No. of shares
Malayan Insurance Company, Inc.	1,516
Enrique T. Yuchengco Company, Inc.	540

Industrial Finance Corporation	7,751
First Nationwide Assurance Corporation	475
Pan Malayan Management and Investment Corporation	5,820
Alfonso T. Yuchengco	51
Total	16,153

Reproduced below is the certification by the same accountant, that, there was no sale involved in the above transfers: (Exh. "K-2")

"C E R T I F I C A T I O N

This is to certify that in connection with our request to Rizal Commercial Banking Corporation to cancel the following stock certificates under Mr. Yuchengco's name who acts as nominee only, and to transfer the said stock certificates to its respective owner, please be advised that there was no sale involved.

Stock Cert. No.	No. of shs.
2014	3,800
1857	5,498
1858	84
1644	1,619
1638	2
2142	2,995
1191	96
810	2
1359	1,164
1645	20
1378	100
1643	232
1907	540
1704	1

This Certification was issued upon request of the stock transfer office of RCBC regarding payment of ¼% transfer tax.

AIDA T. YU
(Sgd) Accountant

June 26, 1974."

The transfer of the 16,153 shares was duly accomplished by the Stock Transfer Section, Trust Division of RCBC as per certification of the Manager. (Exh. "K".) The veracity of the accountant's letter request and certification was not controverted by respondent. We believe that this evidence has sufficiently established that the RCBC shares, subject of the request for re-transfer, were held in trust by petitioner for the corporations stated therein.

It will be observed, however, that while the certifications from the corporations for which petitioner acted as nominee reflected a total of 38,106 shares entrusted to petitioner (see Exhs. "J" & "J-1" to "J-4"), the above letter-request was for only a total of 16,153 shares to be re-transferred to their respective owners. A comparison of the two lists will show that the discrepancy is largely due to the difference of 21,995 shares in the number of RCBC

shares held in trust by petitioner for Pan Malayan Management and Insurance Corporation as shown in the certification to be 27,815 shares (Exh. "J") and that in the letter-request for re-transfer which was stated at 5,820 shares. No other evidence was adduced by petitioner to show that there were other shares subsequently re-transferred. The difference of 21,995 shares was not accounted for by petitioner. Considering that Pan Malayan Management and Insurance Corporation was totally controlled by petitioner and his family in 1974 and the certification for a greater number of RCBC shares held by petitioner for PMMIC would be in his favor, we are inclined to give more weight to the letter-request of the accountant than to the certification of the president of the said corporation, who is petitioner's daughter. Furthermore, the letter-request was issued and received on June 26, 1974 long before the investigation of this case was conducted while the certification of the president of the corporation was prepared during the pendency of this case in court.

Based on the letter-request of the accountant, but excluding the 51 shares in petitioner's name,

the RCBC shares held in trust by petitioner for the various companies in 1974 were:

Malayan Insurance Company, Inc.	1,516
Enrique T. Yuchengco, Inc.	540
Industrial Finance Corporation	7,751
The First Nationwide Assurance Corp.	475
Pan Malayan Management and Industrial Corporation	5,820
Total	16,102

As would be gathered from the official receipts and the cash vouchers proffered by petitioner, the amount of ₱324,655.00 dividend income received on the RCBC shares in petitioner's name and reimbursed to the above corporations were for the fourth quarter of 1973 and the first quarter of 1974 at ₱5.00 per share. (See Exhs. "H", "H-1" to "H-18".) Since we have determined that only 16,102 RCBC shares were held in trust by petitioner for these corporations, then the sum of ₱161,020.00 corresponding to dividend income received on such shares for the fourth quarter of 1973 and the first quarter of 1974 was income to the said corporations for 1974. The balance of ₱163,635.00, the dividend income pertaining to the rest of the shares in petitioner's name, should be taxable income to him in 1974.

The fourth issue is whether the gain on sale of the RCBC shares to the subsidiary of the Continental Illinois Bank is taxable income to petitioner in 1974.

In 1974, petitioner sold 5,100 RCBC shares of stock, registered in his name, to the Continental International Finance Corporation, a subsidiary of the Continental Illinois Bank of Chicago, USA. Averring that this sale is not covered by the Stock Transaction Act since petitioner acquired these shares on December 17, 1969 prior to the effectivity of Republic Act No. 6141 on November 4, 1970 and petitioner being allegedly a dealer in securities, respondent considered such gain taxable in full as ordinary gain to petitioner, computed as follows: (p. 145, BIR records.)

"No. of Shares	Selling Price per share	Total Amount
5100	₱412.50	₱2,103,750.00
Less: Cost of acquisition at ₱285.00 per share		1,453,500.00
Gain on sales of RCBC shares to Connil Bank of USA		₱ 650,250.00"

Petitioner claims that of the 5,100 RCBC shares sold in 1974 to the Continental International Finance

Corporation, only 100 shares were sold for his own account, that the 5,000 shares, which he had held in trust for the Industrial Finance Corporation to comply with Central Bank circulars, were sold for the latter's account and as the beneficial owner of the shares, it was the Industrial Finance Corporation that received the purchase price and paid for the stock transaction tax. The controversy boils down to, who was the real owner of the 5,000 RCBC shares sold to the Continental International Finance Corporation?

To justify petitioner's claim that the beneficial owner of the 5,000 RCBC shares in question was the Industrial Finance Corporation, petitioner's same witness, the president of the Industrial Finance Corporation testified that the shares were transferred in trust to petitioner on December 17, 1969 by its original shareholders, the Industrial Finance Corporation to comply with the circulars of the Central Bank. (See Exh. "P-1".) He explained the circumstances under which the RCBC shares were sold to the Continental International Finance Corporation in 1974.

As a result of the stockholders' fight between the Yuchengco group and the Bancom group over the control of RCBC, the Bancom group agreed to sell all their RCBC shares to the Yuchengco group. To finance the purchase of the RCBC shares from the Bancom stockholders, the Pan Malayan Management & Investment Corporation, as the syndicate leader of the Yuchengco group of corporations, obtained a loan of $5,000,000.00 from the Continental Illinois Bank. There was a bank to bank arrangement with PMMIC whereby said loan would be assumed by the corporations in the Yuchengco group corresponding to what each of them borrowed from the proceeds of the loan in order to buy their respective RCBC shares. These shares would then be purchased by the creditor bank or its subsidiary. Petitioner's witness further testified that when the subsidiary of the Continental Illinois Bank purchased the 5,000 RCBC shares from the Industrial Finance Corporation, PMMIC as the syndicate leader, merely offset the purchase price of the shares against the corresponding loan obtained by the Industrial Finance Corporation from the Continental Illinois Bank, as shown by the

following entry in PMMIC's books: (t.s.n., pp. 16-22, July 19, 1985.) (Exh. "Q")

"Loan payable	₱ 2,157,295.58	
Due to ATY Inc.		₱ 52,800.00
Due to officers - AY		41,250.00
Accounts payable - IFC		2,062,500.00
Reserve for gain/loss in F/Exchange		745.58

To record application to Connil loan the proceeds from sale of RCBC shrs. owned by the ff. companies @ ₱412.50/ share.

IFC - (5,000 shrs.)	$ 306,478.87
AY 100	6,129.13
ATY Inc.	7,845.89
	$ 320,453.89"

Petitioner's witness points to this journal entry as evidencing payment to the Industrial Finance Corporation of the purchase price of the 5,000 RCBC shares, thus establishing the latter's ownership of these shares. It is stressed that "no cash changed hands and an offset was merely made whereby the proportionate loan of the Industrial Finance Corporation from the Continental Illinois Bank was extinguished by the application of the proceeds from the sale of the 5,000 RCBC shares". (Memorandum for petitioner, pp. 114-115, CTA records.)

The testimony of petitioner's witness that the purchase price of the 5,000 RCBC shares in the amount of ₱2,062,500.00 was not actually paid to the Industrial Finance Corporation but was merely offset against its corresponding loan obtained from the Continental Illinois Bank is belied by petitioner's own documentary evidence. As per certification of the Assistant Vice President of the Trust Operations Department of RCBC (Exh. "P-1"), these RCBC shares were transferred to petitioner from the Industrial Finance Corporation on December 17, 1969. The $5,000,000.00 foreign loan from the Continental Illinois Bank to be used by Pan Malayan Management and Investment Corporation to acquire shares of stock of the Rizal Commercial Banking Corporation, which in turn will be sold to a foreign bank, was approved by the Governor of the Central Bank of the Philippines in a letter dated April 10, 1973 (Exh. "R"). Since the RCBC shares in question were in the possession of the Industrial Finance Corporation prior to December 17, 1969, the date they were transferred to petitioner, clearly these shares could not have been acquired by the

former through funds borrowed from the $5,000,000.00 loan from the Continental Illinois Bank which was approved only on April 10, 1973. Under the circumstances, the Industrial Finance Corporation could not have had a corresponding loan from the said bank against which the purchase price of the RCBC shares sold could have been offset.

The journal entry in the books of PMMIC (see Exh. "Q") presented by petitioner, confirms the above finding. In so far as the Industrial Finance Corporation is concerned, the journal entry shows that the proceeds from the sale of the RCBC shares in the amount of ₱2,062,500.00 were charged against the loan payable to the Continental Illinois Bank and recorded as an account payable by PMMIC to the Industrial Finance Corporation. For PMMIC to take up as its obligation to the Industrial Finance Corporation the purchase price of the 5,000 RCBC shares, it appears that it was PMMIC's share of the loan which was offset. In other words, the journal entry indicates that the payment to the Industrial Finance Corporation of the 5,000 RCBC shares in the amount of ₱2,062,500.00

was applied not on its proportionate loan from the Continental Illinois Bank as stated by petitioner's witness, but on the loan of PMMIC from the said bank and this amount was assumed by PMMIC as its obligation to the Industrial Finance Corporation. In effect, it was PMMIC that received the cash proceeds from the sale of the RCBC shares and reflected these in its books of accounts as its liability to the Industrial Finance Corporation. If as alleged by petitioner, the Industrial Finance Corporation was the beneficial owner of the RCBC shares sold, then why was the purchase price of ₱2,062,500.00 not paid directly to that corporation in cash from the proceeds of the $5,000,000.00 loan since it had no corresponding loan to be offset?

As President of the Industrial Finance Corporation petitioner's witness had access to the corporation's books of accounts, yet it seems strange that the corresponding entries in these books were not presented to substantiate his testimony. There is a complete lack of evidence as to when and how PMMIC paid to the Industrial Finance Corporation

its debt, representing the purchase price of the RCBC shares. Proof of payment is material, considering that PMMIC which controlled the funds of the $5,000,000.00 loan, was closely held by petitioner and his family. Petitioner stood to benefit from the transaction. Contrary to petitioner's contention, the journal entry, standing alone, has not established payment nor ownership of the RCBC shares in question.

Another statement of the abovementioned witness which is not supported by his own certification, is his testimony that the transfer to petitioner of the 5,000 RCBC shares from the Industrial Finance Corporation was merely a transfer in trust and not a sale.

In connection with the preceding issue on the dividend income received by petitioner pertaining to the RCBC shares he held in trust for the members of the Yuchengco group of companies to comply with Central Bank Circulars, petitioner submitted certifications from the officers of these corporations attesting to the number of shares petitioner held in trust for each corporation. One of these is the

certification dated June 4, 1984 of petitioner's witness as president of the Industrial Finance Corporation, which reads thus: (Exh. "J-4".)

"June 4, 1984

C E R T I F I C A T I O N

TO WHOM IT MAY CONCERN:

This is to certify that 7,751 shares of Rizal Commercial Banking Corporation owned and paid for by our corporation were transferred and registered in the name of Mr. Alfonso Yuchengco and that the latter has never paid for the said shares but merely held them in trust, and our books of accounts do not carry the value of the said shares as a liability of the petitioner while the said shares were held in trust by him for the corporation. All dividends received on the said shares during the time that they were registered in his name in trust were paid to the corporation which declared the said dividend and paid the tax due thereon.

Makati, Metro Manila, Philippines.

(SGD) MARCELO T. DY
President"

The above certification which was accomplished prior to the appearance in court of said witness on July 19, 1985 refers only to 7,751 shares as held in trust by petitioner for the corporation. These shares were subsequently sold to PMMIC on December 27,

1974. (See Deed of Sale, Exh. "K-3".) Obviously, the 5,000 RCBC shares are not included in the certification.

Finally, petitioner insists that the fact that the gain on the sale of the RCBC shares was reported in the financial statements of the Industrial Finance Corporation for the year 1974, the corresponding tax thereon paid and the economic benefits enjoyed exclusively by that corporation, are indications that the Industrial Finance Corporation was the beneficial owner of the 5,000 RCBC shares sold to the Continental International Finance Corporation.

Petitioner's argument is not persuasive.

Although it is true that the Industrial Finance Corporation reported in its income tax return the gain on the sale of the RCBC shares, it did not pay the correct tax thereon. The ¼ of 1% of the stock transaction tax paid by the Industrial Finance Corporation on ₱2,062,500.00 the gross selling price of the RCBC shares (see Rejoinder, p. 170, CTA records), is much less than the income tax it should have paid on the gain on the sale of these shares. In accordance with

Republic Act No. 6141 or Section 195-B of the National Internal Revenue Code as amended by Presidential Decree No. 10, the stock transaction tax shall not apply to "(5) The sale, exchange or transfer of shares acquired before the effectivity of this Act, in which case the pertinent provisions of this Code shall apply". As previously discussed, the 5,000 RCBC shares belonged to the Industrial Finance Corporation before they were transferred to petitioner on December 17, 1969 which is prior to the effectivity of Republic Act No. 6141 on November 4, 1970. Assuming that the Industrial Finance Corporation was the owner of the RCBC shares sold, the gain on the sale of said shares should have been taxable in full to the corporation under the income tax provisions of the National Internal Revenue Code, as the provisions of Republic Act No. 6141 did not apply to the sale.

Moreover, it is doubtful whether the economic benefits redounded to the corporation. As adverted to before, there is no evidence of payment to the Industrial Finance Corporation of PMMIC's liability for the purchase price of the RCBC shares. In the

absence of proof that the proceeds from the sale of the 5,000 RCBC shares were turned over by PMMIC to the Industrial Finance Corporation, it cannot be concluded that the economic benefits resulting therefrom were enjoyed by the Industrial Finance Corporation.

All presumptions are in favor of the correctness of tax assessments. Respondent's determination that petitioner is the taxable owner of the 5,000 RCBC shares sold to the Continental International Finance Corporation is presumptively correct and the burden of proof is upon petitioner by a preponderance of evidence to show the contrary. After considering and weighing all the evidence, we hold that petitioner has not sustained his burden.

The final issue is whether petitioner is a dealer in securities within the purview of the National Internal Revenue Code, as amended.

Section 84(t) now Section 20(u) of the National Internal Revenue Code defines a dealer in securities as follows:

> "(t) The term "dealer in securities" means a merchant of stocks or securities, whether an individual, partnership, or corporation, with an

> established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom."

Respondent contends that petitioner falls under the above definition since he maintains a stock investment ledger where the transactions on his purchase and sale of securities of forty-seven various companies are kept, with a substantial year-end inventory value of ₱6,147,833.10 in 1974 and he holds office at the Tenth Floor of the G.P.L. Building, Buendia Avenue, Makati, Metro Manila, hence, being a dealer in securities, petitioner's gain realized from the sales of his securities in the total amount of ₱2,320,138.01 in 1974 and the gain from the sale of the 5,100 RCBC shares to the Continental International Finance Corporation, amounting to ₱650,250.00 are taxable in full as ordinary gain.

Petitioner argues that in the year 1974 up to the present, he has held office at the Tenth Floor of the Great Pacific Life Building as a Director and Chairman of the Executive Committee and Investment

Committee of the Great Pacific Life Assurance Corporation which owns the building; and that he has never advertised or held himself out to the public as having on hand securities for sale to the public. He maintains a stock investment ledger, only to keep track of all his stock investments, but such a ledger is not a stock inventory ledger similar to that which is kept by a dealer in securities. He did not declare the gain on the sale of securities in the amount of ₱2,320,138.01 as taxable income in his income tax return, inasmuch as the stock transaction tax pursuant to Republic Act 6141 had already been paid on these sales. Petitioner avers that since all the elements and factors that are considered to be vital in determining whether a taxpayer is a dealer in securities do not concur in his case, he cannot be considered as one.

Petitioner's stand is well taken.

A dealer in securities is defined in Section 148 of the Income Tax Regulations, Revenue Regulations No. 2 as:

> "For the purposes of this rule a dealer in securities is a merchant of securities, whether an individual,

> partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom. If such business is simply a branch of the activities carried on by such person, the securities inventoried as here provided may include only those held for purposes of resale and not for investment. Taxpayers who buy and sell or hold securities for investment or speculation, irrespective of whether such buying or selling constitutes the carrying on of a trade or business, and officers of corporations and members of partnerships who in their individual capacities buy and sell securities, are not dealers in securities within the meaning of this rule."

As defined in the above section which was lifted from that of the U.S. regulations, the meaning of "dealer in securities" has been considered many times by the U.S. Federal Courts. It is limited to one who as a merchant buys and sells securities to customers for the profit thereon. (Schafer v. Helvering, 299 U.S. 171 affirming 32 BTA 289.) Other opinions expressed on what constitutes a dealer in securities are:

> "A taxpayer is not within the favored group if he holds securities merely for investment or speculation or for their income yield even if he

meets all of the other requirements. The controlling test in all cases has been stated to be whether the taxpayer 'purchased securities and held them, not for investment or speculation, but for resale at a profit to anyone who desired to buy' and most of the litigation in connection with this provision of the Regulations has involved the application of this generic test. The Regulations, in defining a dealer in securities use the merchant analogy. A merchant is one who buys and sells primarily for what may be a handling or distributing profit." (Mertens, Law of Federal Income Taxation, Vol. 2, Chapter 16, pp. 82-83.)

"A speculator trading through a broker generally is not considered to be selling to 'customers' and therefore his securities transactions are deemed to be of a capital nature even though the securities are held for sale in the course of such trade or business. A speculator in the stock market may engage in hundreds of trades each year and still obtain capital gains treatment for his profits because, according to prevailing concepts, he has no 'customers'." (Mertens, Law of Federal Income Taxation, Vol. 3B, Chapter 22, p. 1090.)

"Merchants and speculators alike hope for gain on their turnover, but this is not enough. The taxpayer must be <u>regularly engaged</u> in the purchase of securities and their resale to <u>customers</u>. It must hold itself out as a merchant to any who would buy, and would thus presumably acquire in time regular customers." (Securities Allied Corporation v. Comm., 95(F 2d) 384 (C.C.A. 2d, 1938) affg. 36 B.T.A. 168,

Oil Shares Inc., 29 B.T.A. 664; Schafer v. Helvering, supra.)

The emphasis throughout is on the necessity that the taxpayer hold securities for the purpose of eventual resale to customers. (Mertens, Law of Federal Income Taxation, Vol. 2, Chapter 16, p. 87.)

Webster's New International Dictionary defines customer as "one who regularly or repeatedly makes purchases of, or has business dealings with, a tradesman or business house; one who customarily has dealings with a business establishment; a buyer or purchaser; a patron". This definition, in substance, has received judicial approval. (Weinhouse v. Cronin (Conn) 36 Atl. 45, Estate of Harry E.R. Hall, 29 B.T.A., 1255.)

In the instant case, we find no indication in the record that the shares traded by petitioner in 1974 were sold to "customers" or that petitioner regularly sold securities to "customers". In 1974, petitioner sold only seven kinds of securities. The details of these sales of securities as shown in the worksheet of respondent's examiners are as follows: (p. 145, BIR records.)

"BREAKDOWN OF GAIN ON SALES OF INVESTMENTS
(Per Profit & Loss Statement)

Date	Details	Amount
2/28	600,000 shares of Island Mining Corp.	₱ 4,368.75
4/30	100 shares R.C.B.C. at ₱412.50 to Connil Bank	15,549.00
9/30	7,500 shares MICO Equities Inc. to Pan Malayan Mgt. Inv. Corp. at ₱217.55	1,520,975.25
10/31	4092 shares MICO Equities Inc. to Pan Malayan Mgt. Inv. Corp. at ₱217.55	829,844.10
11/30	Assignment of Subscription to Asean Dev. Corp.	40,680.00
12/31	Holiday Hills - liq. & cash div.	13,696.00
12/31	¼% tax on Island Mining	26.25
	Total	₱2,425,139.35
6/30	Less: Loss on Enrique T. Yuchengco, shares	105,001.34
	Net Gain on sales of investments (as per profit & loss)	₱2,320,138.01"

Petitioner's witness, his financial assistant and bookkeeper, identified the buyers not listed above, of the Asean Development Corporation shares and the Enrique T. Yuchengco shares, as the Industrial Finance Corporation and Maria Elena del Rosario, the stepdaughter of petitioner, respectively. The Holiday Hills shares were sold back to Holiday Hills as treasury shares while the Island Mining shares were traded

through the stock exchange. (t.s.n., pp. 27-30, May 2, 1985.) The Mico Equities, Inc. shares were bought by the Pan Malayan Management & Investment Corporation and the RCBC shares were bought by the Continental Illinois Bank. There is no question that the above-mentioned buyers of the securities of petitioner were not "customers" and there is no proof that he had any.

In support of his determination, respondent lays stress on the fact that in 1974, petitioner held securities of forty-seven various companies with a substantial year-end inventory value of ₱6,147,883.10. It has been held, however, that although the taxpayer may have large holdings of securities in which he constantly trades, such trading will not constitute a trade or business where it occupies but a few moments of his day which is primarily devoted to other business matters. Even though the taxpayer's activities meet the test of constituting a trade or business, the sale or exchange of the securities does not fall outside of the capital gain and loss provisions unless the taxpayer is a dealer in securities or holds

his securities primarily for sale to customers. (Mertens, Law of Federal Income Taxation, Vol. 3B, Chapter 22, p. 1091.)

In determining whether the taxpayer is a dealer in securities rather than a trader, the courts have considered the following factors: (1) whether the taxpayer is licensed as a "dealer"; (2) whether the taxpayer advertises as a "dealer"; (3) whether the taxpayer transacts a large volume of business; (4) whether he subscribes to certain services commonly used by "dealers"; (5) whether the taxpayer has salesmen, "customers' men", customers' accounts or a board room; (6) whether the taxpayer advertises himself or holds himself out to the public as having on hand securities for sale. (Mertens, Law of Federal Income Taxation, Vol. 3B, Chapter 22, p. 1093.) There is nothing in the record that shows petitioner was licensed as a dealer or advertised himself as one. The number of securities he traded during the year was only seven. But what is most decisive is that petitioner had no "customers". Undisputedly, petitioner was not a dealer in securities

in the year involved.

Consequently, the gain from the sale of petitioner's investments in the total amount of ₱2,320,138.01 on which gross sales the stock transaction tax has been paid, is not taxable as ordinary gain.

As to the gain of ₱650,250.00 on the sale of the 5,100 RCBC shares sold to the Continental International Finance Corporation, which we have determined to be income to petitioner, the sale is not covered by the percentage tax on stock transactions provided for in Republic Act No. 6141 or Section 195-B of the Internal Revenue Code, as the shares sold were acquired by petitioner on December 17, 1969 prior to the effectivity of said Act on November 4, 1970, therefore, the pertinent provisions of the Tax Code will apply. Since petitioner is not a dealer in securities, his gain on the sale of the shares falls under the capital gains provision of the Tax Code. Thus, only 50% of the gain of ₱650,250.00 or ₱325,125.00 is taxable income to petitioner.

In line with the foregoing opinion, the deficiency income tax due from petitioner for the year 1974 is hereby computed as follows:

Net income per return		₱ 399,339.87
Add: Unallowable deductions and additional incomes:		
Bad debts	₱ 127,056.08	
Travel expenses, personal	48,054.64	
Personal expenses	1,835.00	
Disguised dividends, treated as advances	1,890,000.00	
Dividend income from RCBC shares under taxpayer's name	163,635.00	
Gain on sale of RCBC shares sold to Connil Bank, U.S.A. 50% of ₱650,250.00	325,125.00	2,555,705.72
Net income		₱2,955,045.59
Less: Personal & additional exemptions		6,000.00
Net income subject to tax		₱2,949,045.59
Income tax due thereon		₱2,019,572.00
Income tax already paid		231,711.00
Balance		₱1,787,861.00
Add: 14% interest p.a. from 4/16/75 to 4/16/78		750,901.62
Total Amount Due		₱2,538,762.62

Accordingly, petitioner Alfonso T. Yuchengco is hereby ordered to pay the sum of ₱2,538,762.62 as deficiency income tax for 1974, plus 5% surcharge and 14% annual interest from November 29, 1979 up to July 31, 1980 and 20% annual interest from August 1, 1980

up to the date of full payment thereof but not to exceed the amount corresponding to three years pursuant to Section 51(e) of the National Internal Revenue Code as amended by Presidential Decree No. 1705.

WHEREFORE, the decision appealed from is modified as indicated in the above opinion of the Court. With costs.

SO ORDERED.

Quezon City, Metro Manila, January 6, 1988.

AMANTE FILLER
Presiding Judge

WE CONCUR:

(Concurred and Dissents in separate opinion)
CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge

C E R T I F I C A T I O N

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

AMANTE FILLER
Presiding Judge
Court of Tax Appeals

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ALFONSO T. YUCHENGCO,
Petitioner,

- versus - C.T.A. CASE NO. 3429

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

1/26/88

CONCURRING AND DISSENTING OPINION

It is the opinion of the majority that the total amount of bad debt to be disallowed is in the total amount of ₱127,956.08 broken down as follows:

Annabelle Puey	₱ 56,250.00
Dee K. Chiong	20,000.00
A. Mendoza	350.00
Super Travel, Inc. . . .	50,456.00
	₱127,056.08

But how was this arrived at? After investigation conducted by Examiners Arriola and Erfe, these items were extracted from petitioner's books of accounts appearing in the "Reserve for Bad Debts". They have not therefore been actually written off and claimed as deduction from the given income in taxpayer's return. Any attempt to disallow a deduction, not claimed in the return, would indeed distort the net income of petitioner

and would result in the imposition of deficiency income tax assessment devoid of the support of law.

At any rate, representatives of petitioner defended the latter in their letters dated March 18, 1977 and March 27, 1979 stating that the above debts were written off and claimed as deductions in 1974 perhaps as an afterthought. On page 2, par. 3 of the memorandum of Examiners Arriola and Erfe dated September 16, 1976 (Exh. 2), they explained that they have recommended the disallowance of the items of bad debts in view of the fact that "x x x efforts were not exerted to collect these accounts and that they were claimed as deductions arbitrarily, Super Travel is a sister company and holds offices under the same building as taxpayer (G.P.I.) while Mr. A. Puey is a relation to the taxpayer and the non-collectibility of his account has not yet established".

It must have to be stated that a disallowance of a deduction must be predicated on the deduction sought to be disallowed. In other words, the bad debts must have to be claimed as deduction from gross income in the taxpayer's income tax return. The petitioner's

income tax return for the year 1974 consists of three (3) pages (Exhs. F, F-1 and F-2). Exh. F-2, in particular, contains schedule 2 itemizing the deductions from business and/or professional income of petitioner. In No. 14 of the said schedule form entitled "Bad Debts", it is clear that no bad debts were written off by petitioner and claimed as a deduction from his gross income for the year 1974. Consequently, it is my opinion that no bad debt should ever be disallowed.

The ₱50,456.08 owed by Super Travel, Inc., may be allowed. The fact that Super Travel, Inc., is a sister company and holds office under the same building as petitioner furnishes no legal or factual basis for the disallowance. In the balance sheet of the Super Travel, Inc. (Exh. N-1 and N-2), the erosion of the stockholders equity and depletion of its assets can be derived therefrom. The stockholder's equity in the amount of ₱300,000 had been eroded by ₱249,710.81 as of December 31, 1974, resulting in a net stockholders equity remaining at year end of only ₱50,289.19. This amount is not even enough to answer for the liability of Super Travel, Inc. had petitioner decided to file a collection suit.

A review of the balance sheet of Super Travel, Inc., will readily conclude any hope of collecting the amount owing Super Travel, Inc., for that is a mere illusion and that the claim has indeed become worthless. At this point, petitioner had to face the problem of successfully collecting the loan; and the recovery by judicial action is remote if not non-existent. The filing of a suit could therefore be tantamount to putting in good money after bad.

The authorities are to the effect that:

> "It is not necessary, to sustain a bad debt deduction, that the debt be demonstrated to be worthless by a suit at law or in equity. The requirement that the taxpayer must resort to the usual and reasonable means for collection does not compel recourse to suit or where the suit is brought, does not compel garnishment proceedings or proceedings in aid of execution of a judgment obtained. The regulations specifically provided that:
>
> > 'Where the surrounding circumstances indicate that a debit is worthless and uncollectible and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, a showing of these facts will be sufficient evidence of the worthlessness of the debt for the

purpose of deduction under section 166.' (Mertens, Law of Federal Income Taxation, Vol. 5, Chap. 30-40, 1975 Ed.).

This view also holds true to the case of Annabelle Puey and Dee K. Chiong, who owed petitioner the sums of ₱56,250.00 and ₱20,000.00, that it would be equally futile to file collection suit against them. In sum, the total disallowance of bad debts on the amount of ₱127,956.08 should, therefore, be allowed.

With respect to the travel expenses in the amount of ₱48,054.64, this item of expense should be allowed. The parties have stipulated and counsel for respondent admitted that the travel expenses were incurred by the wife and sons of petitioner to this effect.

"ATTY. MEER

With reference to the issue of travel expenses may we stipulate and admit that the amount of ₱48,054.64 is broken down as follows:

1.	Alfonso Yuchengco, Jr.'s plane fare	₱10,018.00
2.	Alberto Yuchengco's plane fare	5,069.21
3.	Mrs. Paz Yuchengco's plane fare	31,851.75
4.	Travel expenses at the Regency Hotel	1,114.88
		₱48,054.64

Further, we invite stipulation that these travel expenses were incurred by the respective persons accompanying the petitioner in his frequent trips abroad.

That Mrs. Paz Yuchengco is the wife of the petitioner and Alberto & Alfonso, Jr. are his sons.

That the wife and the sons accompanied the petitioner in his various trips abroad to act as his secretary and assistants for the arrangement of his social and business appointments and help him entertain business friends and colleagues and do errands for him.

That lastly, the only issue to be determined is whether or not all the said expenses can be considered legitimate and allowable deductions for petitioner's income for 1974.

ATTY. PANGILINAN

Admitted."

(p. 29, t.s.n., May 13, 1985.)

It having been admitted by counsel for respondent that petitioner's wife and sons have acted as his secretary and assistants for arrangement of his social and business appointments and help him in entertaining friends and do errands for him will readily show that this expense is a business and not a personal expense and, hence, is deductible. Travel expenses of one's wife or son, when essential or necessary to the success of her husband's or father's business trip, constitutes

a legitimate business expense (Allenberg Cotton Co. Inc. vs. U.S., 61-1 1931). The Supreme Court, in the case of Coll. vs. Henderson, 1 SCRA 650, 662 held that the costs of a trip to New York at the behest of her husband to help in drawing up plans and speculations of the proposed building is deductible as travelling expense as it redounded to the benefit of the taxpayer.

> "Likewise, the findings of the Court of Tax Appeals that the wife-taxpayer had to make the trip to New York at the behest of her husband's employer-corporation to help in drawing up the plans and specifications of a proposed building, is also supported by the evidence. The parts of the letters written by the wife-taxpayer to her husband while in New York and the letter written by the husband to Mr. C.V. Starr supported the findings (Exhibits U-2, V-1, W-1 & X). No part of the allowance for travelling expenses redounded to the benefit of the taxpayer. Neither was a part thereof retain by them. The fact that she had herself operated on for tumors while in New York was but incidental to her stay there and she must have merely taken advantage of her presence in that city to undergo the operation."

Regarding the treatment of loans or advances as disguised dividends in the amount of ₱1,890,000.00 I say that these loans and advances must be deductible. This total amount of ₱1,890,000.00 represents loans and advances granted to petitioner by the Pan Malayan

Management & Investment, Inc., (PMMIC) in 1974. It was treated by Examiner Arriola and Erfe "constructive dividends" or "disguised dividends". In the said examiners memorandum dated September 16, 1977 (Exh. 2), they said, in effect, that loans made by a corporation to a stockholder are considered "constructive dividends" where there exists no reasonable possibility that the loans will be repaid or that the corporation has conferred a benefit on a stockholder in order to distribute available earnings and profits without expectation of a repayment.

Mrs. Nene Trajano, Financial Assistant Bookkeeper of Alfonso T. Yuchengco had testified that the advances or loans by the Pan Malayan Management and Investment Corporation were given to petitioner from time to time in varying amounts in 1974.

These loans were repaid by a sale in September 30, 1974 of 7,500 Mico Equity shares and entered in his subsidiary ledger, Exh. B in Entry No. 15, in the amount of ₱1,631,625, leaving thereby a balance after that payment of ₱346,410.16. (Exh. B-1.)

On October 31, 1974, subsidiary ledger, Exh. B,

shows another sale of 4,092 shares of Mico Equities to Pan Malayan Management & Investment Corporation under Journal Folio Entry No. J-16, in the amount of ₱890,214.60. (Exh. B-2.)

In support of these entries, two Deeds of Assignment to the Pan Malayan Management and Investment Corporation were presented whereby petitioner transferred 7,500 share of capital stock of Mico Equities, Inc. with a total value of ₱1,631,625 (Exh. B-1); and another Deed of Assignment made by petitioner in favor of the Pan Malayan Management and Investment Corporation transferring 4,092 shares of capital stock of Mico Equities, Inc. in the total amount of ₱890,044.16 (Exh. B-2).

It was explained by Mrs. Trajano that the amount advanced by the Pan Malayan Management & Investment Corporation covering 7,500 shares (Exh. A) and 4,092 shares (Exh. A-1) amounted to a total of ₱2,521,839.60, the year end balance, after off-setting the amount of the loans of ₱1,890,000 against the value of shares transferred, amounted to ₱670,712.86 in favor of the petitioner, as shown by entry marked on the subsidiary

ledger as Exh. B-3. (t.s.n., Mrs. N. Trajano, pp. 2-13, May 2, 1985.) This will readily show that the loans or advances made by the Pan Malayan Management & Investment Corporation in favor of the petitioner have been fully paid and were non-existent at the year end 1974. Respondent meantime has not presented any evidence to rebut these facts. Indeed, compensation shall take place when two persons, in their own right are creditor and debtor of each other (Art. 1278, Civil Code) and the debts of both parties are reciprocally extinguished to the extent of the respective values. (Art. 1245, Civil Code.) It is clear, therefore, that petitioner has paid for the loans and advances extended to him by Pan Malayan Management & Investment Corp. in 1974, and the sum of ₱1,890,000, cannot be considered as constructive or disguised dividends.

> "x x x The important question in such cases is whether it was intended that the amount withdrawn be repaid.
> x x x
>
> The question of the intention is a factual one to be decided in all the circumstances x x x.
>
> Repayments by the stockholder on the purported loan support an inference that a genuine loan is intended. A

repayment made before the tax audit began would be more meaningful than one made as an afterthought after the status of the withdrawal had come into controversy. Failure of the stockholder to make repayments supports the inference that a permanent distribution of earnings was intended rather than a loan. x x x

xxx xxx xxx

On the whole, the Courts have tended to be lenient to the taxpayer in these cases and to treat alleged loans as dividends only where there was obviously never any intention to repay. x x x" (Mertens, Law of Federal Income Taxation, Vol. 1, Chap. 921, pp. 68-76, 1974 Ed.) (Underlining ours.)

I, however, agree with the majority on all other issues.

Quezon City, Metro Manila, January 26, 1988.

CONSTANTE C. ROAQUIN
Associate Judge