REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MARIANO P. PASCUAL AND
RENATO P. DRAGON,
Petitioners,

- versus -

C.T.A. CASE NO. 3045

THE COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

12/29/86

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

D E C I S I O N

This case comes up on respondent's deficiency income tax assessment in the amount of ₱107,101.07 for the years 1968 and 1970 and raises the question of whether petitioners Mariano P. Pascual and Renato P. Dragon, who are held liable thereto, have formed an unregistered partnership or a joint venture taxable as a corporation subject to corporate income tax.

The material facts are not in dispute. As alleged in the petition for review and admitted in the answer:

1. Petitioners are of legal age, Filipinos and with postal address at c/o Royal Savings, Zapote, Las Piñas, Metro Manila; respondent is the duly appointed Commissioner of Internal Revenue and may be served with summons and other legal processes at his office in

BIR Building, Quezon City.

2. In a letter dated March 31, 1979 which was received by petitioners sometime in the last week of May 1979, respondent assessed and demanded petitioners to pay the amount of ₱107,101.07 as alleged deficiency income tax for the years 1968 and 1970, details of which are as follows:

1 9 6 8

Net income per investigation - - - - - - - -	₱165,224.70
Tax due thereon - - - - - - - - - - - - - - - - -	₱ 47,829.00
Add: 50% surcharge - - - - - - - - - - - - - -	23,914.50
½% mo. int. fr. 4-16-69 to 4-16-72 - -	8,609.22
TOTAL AMOUNT DUE & COLLECTIBLE - - - - - - -	₱ 80,352.72

1 9 7 0

Net income per investigation - - - - - - - -	₱ 60,000.00
Tax due thereon - - - - - - - - - - - - - - - - -	₱ 15,000.00
Add: 50% surcharge - - - - - - - - - - - - - -	7,500.00
½% int. fr. 4-16-71 to 12-31-72 - - -	1,537.05
14% int. fr. 1-1-73 to 4-16-74 - - - -	2,711.30
TOTAL AMOUNT DUE & COLLECTIBLE - - - - - - -	₱ 26,748.35

3. On June 26, 1979, petitioners wrote respondent protesting the deficiency income tax assessment, and in effect requesting for its withdrawal and cancellation, pertinent portions of which read:

> We wish to inform that we are protesting the above-cited assessment notices because we availed of Tax Amnesties detailed hereunder:

Tax Amnesty Nos.

Renato P. Dragon -29-1-0700015-71
Mariano Pascual -35-1-0700016-71

By way of background, Mr. Aquilino T. Larin, Chief, Financing Real Estate and Transfer Taxes (audit) Division at that time, was appraised last September, 1974 of said tax amnesties we availed of, when we received his letter of invitation dated September 6, 1974.

We have not heard from the Bureau of Internal Revenue from 1974 until your present letter was received and presumed that the information forwarded regarding the tax amnesties we availed of was sufficient.

xxx xxx xxx

4. In a letter dated August 22, 1979 which was received by petitioners on October 29, 1979, respondent denied petitioners' request for cancellation and withdrawal of said disputed assessment, and at the same time reiterated his demand for the payment of the same. To quote said letter which constitutes respondent's final decision in this case:

August 22, 1979

Messrs. Mariano P. Pascual
& Renato P. Dragon
c/o Renato P. Dragon
Metro Bank Building
Ayala Avenue, Makati
Metro Manila

Gentlemen:

This refers to your letter dated June 26, 1979 requesting in effect withdrawal and cancellation of the deficiency income tax assessment issued against you on March 31, 1979 in the total amount of ₱107,101.07 for the years 1968 and 1970 on the ground that you have availed of the tax amnesty under Presidential Decree No. 23, as amended.

In reply, I regret to inform you that after a restudy of the facts of the case and the law pertinent thereto, this Office cannot grant your request.

Our records show that in the years 1968 and 1970, as co-owners, you sold several parcels of land in Quezon City. As co-owners in the real estate transactions, you formed an unregistered partnership or a joint venture taxable as a corporation under Section 20(b) and its income subject to the tax as prescribed by Section 24, both of the National Internal Revenue Code. (Evangelista vs. Collector G.R. No. L-9996, Oct. 15, 1957) In other words, the above assessment representing corporate income tax was issued against you for having formed an unregistered partnership.

While the income of the unregistered partnership is subject to corporate income tax, the profits derived by the partners out of said income are still subject to individual income tax and must therefore, be declared in their respective individual income tax returns. Such being the case, the availment of the tax amnesty under P.D. No. 23, as amended, by the partners relieve them of their individual income tax liabilities based on the profits derived by them from the unregistered partnership and did not relieve from tax liability the unregistered partnership, unless the latter also availed of the amnesty, which fact does not appear to be so in the instant case.

In view thereof, it is requested that you pay the said deficiency income tax assessment in the total amount of ₱107,101.07 for the year 1968 and 1970 within thirty (30) days from your receipt of this letter, otherwise, this Office will be constrained to enforce collection of the tax by means of the remedies provided by law.

This constitutes our final decision in this case. If you are not agreeable, you may appeal to the Court of Tax Appeals within thirty (30) days from your receipt of this letter.

Very truly yours,

EFREN I. PLANA
Acting Commissioner

5. The deficiency income tax which is the subject of this appeal was assessed in view of petitioners' sale of parcels of land in 1968 and 1970 on account thereof, petitioners, being co-owners of the properties sold, were, according to respondent, deemed to have formed a partnership or a joint venture taxable as a corporation under Section 20(b) and its income subject to tax as prescribed by Section 24, both of the National Internal Revenue Code.

Hence, the present petition for review filed on November 23, 1979.

The issues are:

1. Whether petitioners have formed an unregistered

partnership taxable as a corporation under the Revenue Code;

2. Whether the assessment under consideration has prescribed;

3. Whether petitioners are liable to the fifty percent (50%) surcharge;

4. Whether the availment by petitioners individually of the tax amnesty under Presidential Decree No. 23 for 1970 and prior years relieved them from being assessed as an unregistered partnership.

From our view of the question of whether petitioners have formed an unregistered partnership taxable as a corporation, analogous to the case at bar on this point, by reason of the close similarity of the factual settings, identity of the laws involved and the issue litigated, is Evangelista, et al. vs. Collector of Internal Revenue, et al., L-9996, October 15, 1957, 102 Phil. 140. Because of its decisive effects on the present case, we will therefore resolve this issue in the light of, and alongside with the features and essential ingredients of Evangelista.

With respect to the tax on corporations, the issue hinges on the meaning of the terms "corporation" and "partnership", as used in Sections 24 and 84 of the applicable National Internal Revenue Code, the pertinent parts of which read:

> "SEC. 24. Rate of tax on corporations. - There shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding taxable year from all sources by every corporation organized in, or existing under the laws of the Philippines, no matter how created or organized but not including duly registered general co-partnerships (companias colectivas), a tax upon such income equal to the sum of the following: x x x."

> "SEC. 84(b). The term 'corporation' includes partnerships, no matter how created or organized, joint-stock companies, joint accounts (cuentas en participacion), associations or insurance companies, but does not include duly registered general copartnerships (compañias colectivas)."

Article 1767 of the Civil Code of the Philippines provides:

> "By the contract of partnership two or more persons bind themselves to contribute money, property, or industry to a common fund, with the intention of dividing the profits among themselves."

Pursuant to this article, the essential elements of a partnership are two, namely: (a) an agreement to contribute money, property or industry to a common fund; and (b) intent to divide the profits among the contracting parties. These elements are undoubtedly present in the case at bar, for, undisputedly, petitioners have agreed to, and did contribute money to a common fund, and intended to, as in fact did divide, the profits among themselves. This can be gleaned from the financial statement which petitioner Renato P. Dragon attached to his 1970 Income Tax Return, to wit: (p. 5, BIR records.)

RENATO P. DRAGON
26 Rizal St., Gen. Trias, Cavite

STATEMENT OF COST OF LOT SOLD

Sales		₱360,000.00
Less: Cost of Lot Sold		300,000.00
Total Gross Profit on sale of Lot		₱ 60,000.00
Less: Expenses:		
Registration & Doc. Stamps . .	₱2,633.00	
Representation & Entertainment.	896.40	
Interest & Other bank charges .	9,000.00	12,529.40
Total Net Profit before Income Tax		₱ 47,470.60
Multiply by 50% (sold after one (1) year) . . .		.50
T o t a l		₱ 23,735.30

₱23,735.30 ÷ 2 = ₱11,867.65

₱11,867.65 - For Mr. Renato P. Dragon
11,867.65 - For Dra. Concordia M. Pascual

Hence, the issue narrows down to the intent of petitioners in acting as they did. Upon consideration of all the facts and circumstances surrounding the case, we are fully satisfied that their purpose was to engage in real estate transactions for monetary gain and then divide the same among themselves, because:

1. Said common fund was not something they found already in existence. There is nothing in the records which indicates that it was a property inherited by them *pro indiviso*. They created it purposely.

2. They invested the same, not merely in one transaction, but in a series of transactions. The details of the buy-and-sell transactions as shown in Exhibit 9, page 1 of the Bureau of Internal Revenue records, are:

PURCHASES

Date	Name of Seller	Name of Buyer	Transfer Cert. of Title No.	Area & Location	Amt. of Consideration
6/22/65	Santiago Bernardino et al.	Renato P. Dragon & Mariano P. Pascual	124209	9,634 sq.m.	₱39,884.76
- do -	- do -	- do -	125373	9,011 sq.m. Q.C.	₱37,305.54
5/20/66	Juan Roque	- do -	105648 105649 105651	10,000 sq.m. -do- -do- Q.C.	₱300,000.00

SALES

Date	Name of Seller	Name of Buyer	Transfer Cert. of Title No.	Amt. of Consi- deration	Realized Profit
3/23/68	Renato P. Dragon & Mariano P. Pascual	Marenir Dev. Corp.	124209	₱125,242.00	₱85,357.24
7/8/68	- do -	- do -	125373	₱117,173.00	₱79,867.46
3/19/70	- do -	Erlinda M. Reyes & Maria M. Samson	105648 105649 105651	₱360,000.00	₱60,000.00

3. While it is true that there were only two (2) purchases made, one in 1965 and the other in 1966, and three (3) sales transactions entered into by petitioners, two in 1968 and one in 1970, from the size or area of the parcels of land purchased, ranging from a minimum of 9,011 square meters to a maximum of 10,000 square meters, which are located in Quezon City, one cannot but perceive, as aptly observed by respondent, the intent to create a partnership. And since the disposal of the large parcels of land was done through a series of sales transactions, after petitioners have held them for a period of time as can be seen above, the

element of profits, and bigger profits for that matter, is readily perceptible because real properties appreciate in value with the passing of time, which is peculiar to the real estate business.

4. The aforesaid parcels of land were not devoted to residential purposes, or to other personal uses, of petitioners. As has been discussed above, petitioners acquired them for sale for monetary gain and then divide the same, as they in fact did, among themselves. And to obtain bigger profits, petitioners held the properties for some time, and sold them in a series of transactions.

5. Petitioners have not testified or introduced any evidence on their purpose as partners in acquiring by purchase from different sellers parcels of land located in Quezon City, and subsequently selling them to various sellers and sharing the profits derived therefrom by them. They did not even try to offer an explanation therefor. The Court recognizes that in consonance with well-established principles, the determination of the Commissioner of Internal Revenue is presumptively correct and casts upon petitioners the burden of offering evidence in opposition thereto.

The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner 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; Wilfredo L. Caresosa vs. Bureau of Internal Revenue, CTA Case No. 3173, January 25, 1985, certiorari denied in G.R. No. L-70758, August 21, 1985.)

All of these facts and circumstances, taken together, tend to establish the intent on the part of petitioners to contribute money and industry to a common fund with the purpose of dividing the profits among themselves.

Petitioners contend, however, that they are mere co-owners, not copartners, for, under Article 1769(3) of the Civil Code sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or intent in any property from which the returns are derived. As amplified by the Supreme Court in Jose P. Obillos, Jr. et al vs. Commissioner of Internal Revenue, G.R. No. 68118, October 31, 1985, cited by petitioner, there must be an unmistakable intention to form a partnership or joint venture.

In attempting to draw support from Jose P. Obillos, petitioners have patently misapplied the said case to the case at bar. In Jose P. Obillos, the father of the petitioners therein, after having completed payment on two lots located at Greenhills, San Juan, Rizal, transferred his rights to his four children to enable them to build their residences. Later on, they found it not feasible to build their residences on the lots because of the high cost of construction. So they had no choice but to resell the same to dissolve the co-ownership. The Supreme Court thus stated that the division of the profit was merely incidental to the dissolution of the co-ownership. They had no intention to form a partnership. They were not engaged in any joint venture by reason of that isolated transaction.

In the instant case, however, as already discussed above, petitioners contributed to a common fund for the purpose of buying from different sellers and selling to various buyers parcels of land located in Quezon City with the intent to divide, as they did divide, the profits among themselves. As a result of the buying and selling transactions of petitioners, and the sharing of profits derived by them during the years 1968 and 1970, it is clear to our mind that petitioners herein constituted a partnership or joint venture taxable as a corporation under Section 24 of the Tax Code.

Coming to the question of whether the assessment in the instant case has prescribed, the period within which the Commissioner of Internal Revenue may assess internal revenue taxes is provided for in Sections 318 and 319 of the applicable National Internal Revenue Code, the pertinent portions of which read:

> "Sec. 318. Period of limitation upon assessment and collection. - Except as provided in the succeeding section, internal revenue taxes shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. x x x"
>
> "Sec. 319. Exceptions as to period of limitation of assessment and collection of taxes. - (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be began without assessment, at any time within ten years after the discovery of the falsity, fraud, or omission: Provided, x x x" (Underscoring supplied)

Where a return was filed, which is not fraudulent, the tax may be assessed within five (5) years from the date the return was due or was filed. The records of the case show however that no corporate income tax return was filed by petitioners. Where no return was filed, the tax may be assessed within ten (10) years from the date of discovery of the omission to file the return. /Sec. 319(a), supra; Republic vs. Lucia Tan, L-25483, May 23, 1969, 28 SCRA 325./

Respondent's examiner discovered petitioners' failure/omission to file corporate income tax returns for the years 1968 and 1970 only in 1971. Hence, from 1971, respondent had ten (10) years, or up to 1981, within which to assess the tax in the instant case. Since the assessment in question was issued on March 31, 1979, which is clearly within the ten-year period from 1971, respondent's right to assess has not prescribed.

At any rate, no competent evidence was presented by petitioners to the effect that the right of respondent to assess and to collect the tax involved herein has prescribed. The defense of prescription is an affirmative allegation and the burden of proof is upon the party laying claim to it. (Bollozos vs. Court of Tax Appeals, L-16441, March 31, 1965, 13 SCRA 469.) Prescription being a matter of defense, the burden is on petitioners to prove that the full period of limitation has expired, so that they should positively establish the date when the period started to run and when it ended. (Querol vs. Collector of Internal Revenue, L-16705, October 20, 1962, 6 SCRA 304.)

This brings us to the question of whether petitioners are liable to the fifty percent (50%) surcharge penalty under Section 72 of the then in force National Internal Revenue Code; and this in turn depends on whether there was willful neglect on the part of petitioners to file corporate income tax returns for the years 1968 and 1970.

To our mind, there was willful neglect to file the corporate income tax returns required by law on the part of petitioners because, as borne out by the records, both petitioners Mariano P. Pascual and Renato P. Dragon did not file separate individual income tax returns for 1968 reporting their respective share of the profits realized by them in said year from their real estate transactions. (p. 28, Bureau of Internal Revenue records.) If petitioners did not even bother to report their share of the profits derived by them from their buying and selling transactions, why should they take the trouble of filing corporate income tax return for their partnership? But assuming that for the year 1968 petitioners were not yet aware that they are taxable as an unregistered partnership subject to corporate income tax, they could at least have filed their separate individual income tax returns for this year. It seems clear therefore that there was intentional wrongdoing with the object of avoiding the tax on the part of petitioners.

Then for the years 1970, it was only petitioner Renato P. Dragon who filed an individual income tax return. No corporate income tax return was filed by petitioners for 1970. Petitioners have not testified or introduced any evidence that their failure to file a return either individually or as an unregistered partnership was due to a reasonable cause, as their belief in good faith that a return is not required. Error or mistake of law may not constitute fraud but willful neglect, which is the basis of the imposition of the 50% surcharge in this case, is not equivalent to fraud.

And on whether availment by petitioners individually of tax amnesty for 1970 and prior years relieved them from being assessed as an unregistered partnership, we agree with the observation of respondent, quoted above, that the availment of the tax amnesty under Presidential Decree No. 23, as amended, by petitioners might have relieved them of their individual income tax liabilities based on the profits derived by them from the unregistered partnership but did not relieve them from the tax liability of the unregistered partnership. The income of the unregistered partnership is subject to corporate income tax, while the profits derived by the partners out of said income are still subject to individual income tax. Such income must therefore be declared in their respective individual income tax returns. Since the availment of the tax amnesty under Presidential Decree No. 23, as amended, by petitioners was done in their individual capacities and not as partners in the real estate business, such availment did not relieve the unregistered partnership as such from tax liability.

Accordingly, petitioners Mariano P. Pascual and Renato P. Dragon are ordered to pay to respondent Commissioner of Internal Revenue the amounts of ₱80,352.72 and ₱26,748.35 as their 1968 and 1970 deficiency income tax liabilities respectively, plus surcharges and interest incident to delinquency pursuant to the provisions of Section 51(e) of the applicable National Internal Revenue Code, as amended.

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

SO ORDERED.

Quezon City, Metro Manila, December 29, 1986.

AMANTE FILLER
Presiding Judge

I CONCUR:

dissents in a separate opinion
CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
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MARIANO P. PASCUAL AND
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- versus -

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THE COMMISSIONER OF INTERNAL
REVENUE,
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x - - - - - - - - - - - - - - - x

1/23/87

DISSENTING OPINION

I can not agree with the conclusion reached by the majority members of this Court holding to the effect that petitioners Mariano P. Pascual and Renato P. Dragon are partners and they have formed an unregistered partnership or a joint venture the income from which during the years 1968 and 1970 is subject to corporate income tax under Section 24, in relation to Section 84, of the National Internal Revenue Code.

As far as may be pertinent, the facts in this case show that petitioners have purchased three (3) parcels of land, one (1) lot in 1962 (p. 28, tsn, Sept. 18, 1985); another lot in 1965 (p. 30, tsn, ibid.); and the third lot in 1966 (p. 30, tsn, ibid.).

Petitioners sold the first two (2) lots in 1968 and the third lot in 1970 (p. 30, tsn, ibid.). Petitioners realized profit in the sale made in 1968 in the amount of ₱85,357.24 and ₱79,867.46, respectively, for the first two (2) lots, and in 1970, the profit therefrom which amounted to ₱60,000.00. Based on these transactions, on the issue of whether or not petitioners have formed an unregistered partnership, the majority members of this Court held in the affirmative: that an unregistered partnership was here formed between petitioners for the reason that the instant case has a close similarity with the factual settings in Evangelista et al. vs. Collector of Internal Revenue, 102 Phil. 140, wherein the three (3) Evangelista sisters bought four pieces of real property and who leased the same to various tenants from whom they derived rental income; and wherein it was held that because of these circumstances they have formed an unregistered partnership, and which case was applied herein as their precedent. It is their view that "petitioners have agreed to, and did contribute money to a common fund, and intended to, as in fact did divide, the profits among themselves." (p. 8, Majority Decision, Dec. 29, 1986) The said majority came to the conclusion that, on the basis of the 1970 income tax return's financial statement of petitioner Renato P. Dragon, attached thereto, and in the "series of transactions" (buy-and-sell transactions) of petitioners Pascual and Dragon, these facts and circumstances show that the latters' "purpose was to engage in real estate transactions for monetary gain and then divide the same among themselves." (p. 9, Majority decision, ibid.)

Except for the fact that the lots in question were purchased in three separate years (1962, 1965 and 1966), two of which were sold by them in 1968 and the third in 1970 by petitioners aforesaid, nothing in the evidence however indicates directly that petitioners had contributed money, property and industry into a common fund out of which the acquisitions or purchases of the said lots in those years were made. Examiner Ocaya stated in open court that the only basis on which conclusion was reached by him that petitioners were considered partners in the undertaking from which profits were derived and which were subject to corporate income tax are the deeds of sale of petitioners in selling and conveying these properties (pp. 23, 24, 25, tsn, Sept. 18, 1985) to the purchasers in 1968 and 1970. When Examiner Ocaya was asked however what money or proceeds were used by petitioners in buying the properties, he matter of factly and non-chalantly said: "A. Well, they contributed to buy this (these) property (ies)." (p. 20, tsn, Nov. 18, 1985.) And when asked further whether he knew where petitioners got the fund with which petitioners bought the properties, as evidenced by the deeds of sale (Exhs. 6, 7, and 8), he stated repeatedly that he does not know (pp. 20, 21, 22, 28, tsn, Nov. 18, 1985). Examiner Ocaya, in explaining how the common fund was created, which is one vital element of the existence of the alleged partnership of petitioners and which was the principal basis of the assessment in question said: "A. When they (petitioners) acquired the properties (represented by Exhs. 6, 7 and 8), they contributed the fund to buy the properties and that was my (his) basis of assessment." (p. 25, tsn, *ibid.*) When petitioners acquired the properties aforesaid, Examiner Ocaya just concluded that the petitioners contributed money to a common fund. (p. 28, tsn, ibid.) And when asked whether petitioners have each given money to a common fund to buy the properties, he stated that from the fact of the acquisition of the properties, he presumed that they have made contributions to a common fund. However, he said he did not find out in reality of whether there was a common fund (p. 30, tsn, ibid.); and had only presumed that they contributed the funds out of which of the properties they acquired. (pp. 30-31, tsn, ibid.) I quote herein pertinent portions of the court proceedings of November 18, 1985 (pp. 29-31, tsn)

"JUDGE ROAQUIN.

When you say that they contributed, meaning, the petitioner contributed money to a common fund, how did you come to that conclusion?

A. When they acquired the property, Your Honor. In the deed of sale it appears that the two of them acquired the property.

JUDGE ROAQUIN.

Do you know whether or not the funds came from both petitioner?

A. Yes, Your Honor.

JUDGE ROAQUIN.

Did you ever see the bank account at least? No?

A. No, Your Honor.

JUDGE ROAQUIN.

Do you know whether actually x x x they have physically given money each to a common fund to buy that property?

A. The fact that they acquired property, the two of them, it is ...

JUDGE ROAQUIN.

In other words, you are now presuming that these are common contribution by common fund. You only presumed. You did not actually found out the reality whether there was a common fund formed from out of money commonly contributed by the two petitioners.

A. Well, I presumed that they contributed the funds out of the property they acquired.

JUDGE ROAQUIN.

Is that the way you examiners conduct examinations for tax deficiency?

A. It is no way of ... They will not say that they contributed the fund out of that.

JUDGE ROAQUIN.

You just presumed. You just come out of situations presented to you without actually finding out the truth whether there was really a contribution to a common fund? Do you know what I am asking?

A. Your Honor, I got your point.

JUDGE ROAQUIN.

You just take it ...

A. No, Your Honor.

JUDGE ROAQUIN.

... that because they have bought the property, the money used by them constitute a common fund, and that is all.

A. Yes, Your Honor, that is all.

JUDGE ROAQUIN.

How about the second time when they bought again, that is the same way? You just presumed that the money used in buying those properties in 1970 came from a common fund?

A. Yes, Your Honor.

JUDGE ROAQUIN.

That is all."

In the trial of this case, the testimonial evidence bears out the fact that there was no knowledge on the part of respondent's examiner of the existence of a common fund created by petitioners. When asked whether the proceeds of the sales of the lots evidenced by Exhs. 6, 7 and 8, were contributed again to a common fund, Examiner Ocaya, admittedly said that he does not know. (pp. 20, 22, 28, tsn, *ibid.*) His conclusion that there was a common fund between them was only based on assumption or presumption. So much so that the assessment and finding of liability for corporate income tax of petitioners and their existence as a partnership by respondent Commissioner of Internal Revenue was based on mere presumption, which violates the fundamental rule that an assessment should be based on actual facts and not on mere presumptions. On this basis alone, the assessment of respondent against petitioners must necessarily fall. There was no partnership as there was no common fund created between petitioners which is an essential element thereof. There being no partnership intended for business purposes as in the case of real estate the presumption of correctness of the assessment cannot stand, and the Court of Tax Appeals can never presume a taxpayer's liability without more, as an assessment must be based on actual facts established by evidence presented by respondent or likewise it cannot stand the test of judicial scrutiny. Presumption of the correctness of an assessment being a mere presumption cannot be made to rest on another presumption. (Benipayo vs. Coll. of Int. Rev., G.R. L-13656, Jan. 31, 1962; Holland Milk Products vs. Comm. of Int. Rev., CTA 3756, Aug. 29, 1986; Liberty Insurance Corp. vs. Comm. of Int. Rev., CTA 3551 & 3599, Oct. 15, 1986.) Moreover, where petitioners had specifically denied the assessment of the Bureau of Internal Revenue and in their pleadings (3rd par., Letter of counsel for petitioners to the Comm. of Int. Rev., Nov. 27, 1979, p. 110, BIR rec.; par. 6, Petition for Review, p. 2, CTA rec.) saying that what was formed was a co-ownership, as had happened in this case, this denial destroys the presumption of a _prima facie_ correctness of the assessment (Knowles v. Govt., 60 Phil. 461) and therefore it was incumbent for respondent to show that the assessment was based on hard actual facts and not upon presumptions. It is imperative that the decisions of this Court, since the facts it may find therein may not anymore reviewable by appeal to the Supreme Court, should be supported by substantial evidence, which implies competent and adequate evidence. (Phil. Explosives Corp. vs. BIR, CTA 3185, Sept. 26, 1986). In this instance, the evidence to prove the existence between petitioners as partners were not competent and adequate. Examiner Ocaya was not competent as he did not know of his own knowledge that petitioners have joined together and have contributed money, property and industry to a common fund. It is not our office either to presume the existence of such common fund in a partnership. It must be established by real evidence. We should bear in mind that in finding a true partnership relation, it principally depends upon contract, express or implied, and the underlying accepted test is the intention of the parties to become partners. (40 Am. Jur. Sec. 71, p. 178.) Situations or circumstances at times may indicate this intention, but when properly examined and analyzed, it will show that partnership was not in reality created. Some circumstances do not intend the establishment thereof. Article 1769 of the Civil Code points out that some circumstances on their face may lead to the belief that a partnership has been created, when in truth and in fact they are not indicative of the existence thereof but to another thing. (Ambrosio Padilla, Civil Code Annotated, 1956 Ed., Vol. IV, pp. 252-253.) For instance, pars. 2 and 3, of Article 1769, mandates the rules which negates the existence of partnership.

> Art. 1769. xxx xxx xxx
>
> (1) xxx xxx xxx
>
> (2) Co-ownership (Art. 484) or co-possession (Art. 538) does not of itself establish a partnership, whether such co-owners or co-possessors do or do not share any profits made by the use of the property;
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;
>
> xxx xxx xxx

Under paragraph 2 of Art. 1769, Ambrosio Padilla, op. cit., commented that "Although every partnership appears to be founded on a community of interest, every community of interest does not necessarily constitute a partnership (ibid, p. 253); and under said paragraph 3, Padilla said that the "Mere sharing of gross returns does not establish a partnership, since in a partnership, the partners share net profits after satisfying all partnership liabilities. (See Art. 1839, Civil Code, ibid, p. 253.) This is the precise situation of petitioners in the case at bar and the circumstances around which they were entwined.

On the basis of the just cited provisions of Art. 1769, enforced against the backdrop of the facts as shown by the undersigned minority member, they have clearly intended to establish themselves more in the nature of a co-ownership or co-possession and not as an unregistered partnership and, hence, they are not liable for corporate income tax on the profits derived from them. To my mind, when petitioners purchased the three lots in 1962, 1965 and 1966, it was manifestly with the intention to partition or subdivide the properties among themselves. (See Letter of counsel for petitioners dated Nov. 27, 1979, pp. 108-110, BIR rec.) Upon the purchase of said properties, they had since been governed only by a community or undivided interests over the said lots. And as shown by the deeds of sale, the petitioners were only co-owners or in possession over the undivided portions of the properties. Each therefore is co-owner over the properties, and each owns a portion of the properties which are not concretely determined or physically divided. (See my Dissenting Opinion, Obiilos et al. vs. Comm. of Int. Rev., CTA Case No. 3211, p. 24, which was sustained on appeal by the Supreme Court in G.R. No. 68118, Oct. 31, 1985.) When petitioners bought the said lots in 1962, 1965 and 1966, which are years prior to the sale of said properties in 1968 and 1970, and they did not purchase any other properties thereafter, they have not expanded their gain by using the proceeds of such sale in a partnership enterprise. They have not thereafter, or even during those transactions in question engaged themselves in a business in what may be considered as a continuous and repetitious enterprise. Otherwise, they could have embarked in an expanded business venture like in the Jose de Leon et al. vs. Com., CTA No. 738, Sept. 11, 1961 for which they could have under the circumstance formed themselves into a partnership; or had otherwise invested their gross returns for the purchase of other lots for resell at a profit; or an undoubtedly series of transactions had been made by them, since partnership as a rule and principle relates to a general business of a particular kind (40 Am. Jur. Sec. 3, pp. 127-128; Ambrosio Padilla, op. cit., p. 247.) and placed under the management of one person as in Reyes vs. Comm. of Int. Rev., 24 SCRA 198, 203), then the relation of petitioners could have been validly considered a partnership subject to corporate income tax. Finally, I would like to repeat at length portion of my dissenting opinion in the case of Obillos vs. Comm. of Int. Rev., CTA Case No. 3211, aforesaid, which I believe is very pertinent herein, wherein I cited as authority Supreme Court Justice Angelo Bautista, in his concurring opinion in the case of Evangelista vs. Coll. of Int. Rev., 102 Phil. 140, 145, thus -

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

any interest in the property by one with the consent of the others. Said Justice Angelo Bautista, in his concurring opinion, in the Evangelista case:

> "I wish however to make the following observation: Article 1769 of the New Civil Code lays down the rule for determining when a transaction should be deemed a partnership or a co-ownership. Said article paragraphs 2 and 3, provides:
>
> "(2) Co-ownership or co-possession does not of itself establish a partnership, whether such co-owners or co-possessors do or do not share any profits made by the use of the property;
> "(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;"
>
> "From the above it appears that the fact that those who agree to form a co-ownership share or do not share any profits made by the use of the property held in common does not convert their venture into a partnership. Or the sharing of the gross returns does not of itself establish a partnership whether or not the persons sharing therein have a joint or common right or interest in the property. This only means that, aside from the circumstance of profit, the presence of other elements constituting partnership is necessary, such as the clear intent to form a partnership, the existence of a juridical personality different from that of the individual partners, and the freedom to

transfer or assign any interest in the property by one with the consent of the others (Padilla, Civil Code of the Philippines Annotated, Vol. I, 1953 ed., pp. 635-636).

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

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

"A joint purchase of land, by two, does not constitute a co-partnership in respect thereto; nor does an agreement to share the profits and losses on the sale of land create a partnership; the parties are only tenants in common." (Clark vs. Sideway, 142 U.S. 682, 12 S. Ct. 327, 35 L. Ed., 1157.)

"Where plaintiff, his brother, and another agreed to become owners of a single tract of realty, holding as tenants in common, and to divide the profits of disposing of it, the brother and the other not being entitled to share in plaintiff's commissions, no partnership existed as between the three parties, whatever their relation

> may have been as to third parties." (Magee vs. Magee, 123 N.E. 673, 233 Mass. 341.)
>
> "The common ownership of property does not itself create a partnership between the owners, though they may use it for purpose of making gains; and they may, without becoming partners, agree among themselves as to the management and use of such property and the application of the proceeds therefrom." (Spurlock vs. Wilson, 142 S.W. 363, 160 No. App. 14.)
>
> "This is impliedly recognized in the following portion of the decision: "Although, taken singly, they might not suffice to establish the intent necessary to constitute a partnership, the collective effect of these circumstances (referring to the series of transcations) such as to leave no room for doubt on the existence of said intent in petitioners herein." (underlining mine.)

On the basis of the above discussion, I am of the opinion that there is in this case undoubtedly a co-ownership from which no corporate tax is imposable.

Considering, not only from the facts herein shown in this dissenting opinion, but also the applicable law in this case, that all these points to the existence of a co-ownership between the petitioners, there is justification in the annullment and cancellation of the assessment against petitioners as not having any basis in fact and in law.

Even assuming, for the sake of argument only, that petitioners have validly been found to have created a partnership and, hence, subject to the basic corporate income tax on their transactions, they cannot be held liable for 50% surcharge on the basic tax for not filing a corporate income tax as they had no willful intention not to file a corporate income tax since they had all along stood in the position or had honestly acted in good faith that they were under co-ownership and their profits and gains from their transactions were not subject to corporate income tax. Consequently, no 50% surcharge should be imposed under Section 72 of the then enforced National Internal Revenue Code as that would be a blatant error on the Court to do so.

In view of the foregoing discussion, I register my dissenting vote.

Quezon City, Metro Manila, January 23, 1987.

CONSTANTE C. ROAQUIN
Associate Judge