REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

GLORIA ELUMBA - MEMPIN, MARIETTA ELUMBA - CEBALLOS, SOCORRO P. ELUMBA - DELCUTO, MA. VICTORIA ELUMBA - MARQUEZ, NANCY P. ELUMBA, VIRGILIO P. ELUMBA, JR., LETICIA ELUMBA - SAN DIEGO, MILAGROS ELUMBA - MARQUEZ and ASTER ELUMBA - AQUITANIA,
Petitioners,

- versus -

C.T.A. CASE NO. 5103

THE HONORABLE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
AUG 16 1996

x - x

DECISION

Submitted before this Court is a petition for review of the decision of the respondent Commissioner of Internal Revenue expressed by way of issuance of a Warrant of Distraint and/or Levy against the properties of the petitioners, with regard to the deficiency income tax assessment of the petitioners.

Petitioners are the surviving legitimate heirs of spouses Hilarion Z. Elumba and Caridad Elumba who both died intestate in 1944 and 1972, respectively. During their marriage, the spouses were able to acquire several properties, including Lot 251-A which is covered by TCT No. RT 1508. Lot 251-A was purchased before the second world war, and was leased in 1953 to a certain Dr. Manuel Santos who built a house where he had his clinic for sometime. When Mr. Santos vacated the house in 1960, Caridad and her children occupied the same. (TSN, G. Empin, Sept. 27, 1994).

In 1964, Mr. Yu Yek Dy, a Filipino-Chinese businessman started to lease the property. It was leased at P400/month in 1964 to 1980; increased to P2,500 in 1980 to 1985; and P3,500 in 1985 until the expiration of the lease in 1990. During the duration of the lease, structures for commercial purpose was introduced by lessee Yu Yek including a movie house, which was eventually abandoned upon the termination of the lease sometime in March 1990. (TSN, ibid.)

During the same period, the children of Caridad, now the petitioners, pursued their studies in Manila and eventually worked and lived in Manila.

On July 2, 1990, petitioners executed a deed of absolute sale of lot 251-A in favor of Metropolitan Bank (Metrobank) for P4,635,000.00 (Exh. 2). Petitioners allegedly paid the corresponding capital gains tax and documentary stamp tax accruing thereon. On August 1, 1991, respondent through the National Assessment Office sent a preliminary assessment by way of deficiency capital gains tax, inclusive of surcharge amounting to

P1,477,829.25. Not convinced with the assessment, petitioners made verbal representations with the Bureau of Internal Revenue and claimed that the capital gains tax that they paid is the final tax on the property sold. Respondent stood firm on her assessment and reiterated on the tax liability of the petitioners. On June 29, 1992, respondent issued assessment No. FAN - 190-92002924 (Exh. 6) in the amount of P2,167,852.41 which include the corresponding interest and compromise penalty amounting to P665,023.16 and P25,000.00 respectively. On July 24, 1992, petitioners filed a protest letter seeking the nullification of the assessment, and even signed a waiver of the statute of limitations relative to the same on August 21, 1992.

Respondent, without answering the protest, issued on January 29, 1994, a warrant of distraint and levy which was served on the petitioners on March 22, 1994 (BIR records, p. 120). Taking the issuance and service of the aforesaid warrant as a denial of petitioners' letter protest, petitioner filed the instant petition with the Court on April 21, 1994.

The thrust of this petition is the determination of whether or not petitioner is engage in the realty business and therefore the corresponding sale of lot

251-A is a sale of ordinary asset and not capital asset subject to final gains tax.

The pertinent provision of law is quoted as follows:

> Sec. 33. *Capital gains and losses.*
>
> (1) Capital assets - The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business) but does not include stocks in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property which in trade or business, of a character which is subject to the allowance for depreciation provided in sub-section (f) of section twenty-nine, or real property used in trade or business of the taxpayer.

As thus defined by law, the term 'capital asset' include all the properties of a taxpayer whether or not connected with his trade or business except (1) stock in trade or other property included in the taxpayer's inventory; (2) property primarily for sale to customers in the course of his trade or business; (3) property used in the trade or business of the taxpayer and subject to depreciation allowance; and (4) real property used in trade or business. If the taxpayer sells or exchange all of the above-enumerated exceptions, any gain or loss relative thereto is an ordinary gain or loss; the gain or loss from the sale or exchange of all the other properties of the taxpayer is a capital gain or capital loss. [Tuason, Jr. vs. Lingad, 58 SCRA 170, Citing Alejandro, Law on Taxation (2nd edition)]

In Calaranz vs. Commissioner of Internal Revenue, 144 SCRA 664, it is stated that there are no rigid rules or fixed formula by which it can be determined with finality whether the property sold by a taxpayer was held primarily for sale to customers in the ordinary cause of his trade or business or whether it was sold as a capital asset. Hence, each case, must on the last analysis shall rest upon its own peculiar facts and circumstances.

However, there are several factors which have been recognized as helpful guides in making a determination, to wit:

a) the purpose for which the property was initially acquired;

b) the purpose for which the property was subsequently held;

c) the extent to which the improvements, if any, were made by the taxpayer;

d) the frequency, number and continuity of sales;

e) the extent and nature of the transactions involved;

f) the ordinary business of the taxpayer;

g) the extent of advertising, promotion, or other activities used in soliciting buyers for the sale of the property;

h) the listing of property with brokers; and

i) the purpose for which the property was held at the time of sale.

Upon examination of the facts on record, this Court is convinced that the transaction entered into by the petitioners is distinct from those employed by one engaged in the business of selling real estate properties or leasing realty property.

Firstly, applying the guidelines above-mentioned, the facts revealed the following:

i) all the real properties including the lot sold to Metrobank (lot 251-A) were inherited by the petitioners. And only lot 251-A was previously subject of lease to a certain Mr. Dy for a meager sum of P400/month from 1960 to 1980, P2,500 thereafter and P3,500 from 1985 up to its expiration (CTA records, p. 56);

ii) only the leased property had improvements, which was introduced by the lessee, and no other properties were leased or sold by the petitioners (CTA records, ibid.);

iii) petitioners testified that they were not registered to engage in the business of leasing real estate property (TSN San Diego, September 27, 1994).

Thus, petitioners are not habitually engaged in the real estate business. For the taxpayer to be considered engaged in or transacting to the same, the term implies a continuity of commercial dealings and arrangements, and contemplates to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain which is clearly absent in the case at bar.

When used in tax statutes, 'business' or 'doing business' connotes something more than the ownership of property and the receipt of income derived from the property ... one who allocates the active administration of the properties to others and to himself performs only such acts as are appropriate to safeguard his ownership is to be distinguished from one who himself actively participates in administering the management of the properties [Roxas Angeles vs. Mar, 91 Phil. 146, citing Naus vs. Grave, 128 N. E. (2d) 1081].

Respondent pushed the theory that petitioners are engaged in the business of real estate, due to the presence of a lease contract. This is of no moment because it is but natural for the owners to have a contract to protect their rights, - an acknowledgment and/or recognition by the lessee that the petitioners are the owners of the lot, considering the lessee took the active management of the property as amplified by the introduction of the building and other structures introduced by the latter.

This Court believes that renting a single piece of property does not necessarily constitute using the property in a trade or business to distinguish one who is engaged in leasing apartment house (Jose Arañas, National Internal Revenue Code, pp. 318).

Moreover, as We see it, petitioners never took active participation in the management of the property, at most they merely receive the rent accruing therefrom. And it is only in one instance that the petitioners took the active role, that is, when they disposed the property - an act of dominion by an owner trying to liquidate his property.

One may liquidate his capital asset. To do so, it is necessary to sell. The sale may be conducted in the most advantageous manner to the seller and he will not lose the benefit of the capital gain provision of the statute unless he enters into the real estate business and carries on the sale in the manner in which such a business is ordinarily conducted which, however, is not present in this case, the same being a capital transaction.

For the essence of a capital transaction is that the sale or exchange of an asset results in the return of a capital investment coupled with realized gain or loss that accrues to the investment over a certain period of time. (Holt vs. Comm., 83 F2d 687, CA9, 1962)

In view of the foregoing, We hold that in the course of selling Lot 251-A, petitioners did not subject themselves to the capital gains tax accruing thereon, as they were not engaged in the business of real estate as ruled by the Commissioner of Internal Revenue.

WHEREFORE, the decision of the Commissioner is hereby **REVERSED**. No costs.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

I CONCUR:

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals