MARGUERITE WOLFSON,
Petitioner,

- versus - C.T.A. CASE NO. 273

THE COLLECTOR OF INTERNAL REVENUE,
Respondent.

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

July 16, 1958

D E C I S I O N

Petitioner Marquerite Wolfson seeks by this appeal to set aside the delinquency income tax assessments of respondent against her for the years 1948, 1949 and 1950 in the respective amounts of ₱181.56; ₱71.90 and ₱69,616.50 and to consider the income tax payments heretofore made by her to the Government for said years as full satisfaction of her obligation.

Petitioner Marquerite Wolfson is a resident of San Francisco, California.

At the outbreak of the last world war, she was in the Philippines and being an American was interned at Santo Tomas University.

After the war, or more particularly on April 9, 1945, the petitioner returned to the United States on a hospital ship and upon arrival was confined in a hospital until November 1945 (Exhibits A and 19, pp. 3-5, Vol. II, BIR rec.). Meanwhile, petitioner's parents died on October 29, 1942 and February 7, 1944, respectively, leaving properties in the Philippines. In 1945, probate proceedings to settle the estates of petitioner's parents was initiated in the Court of First Instance of Manila. On February 7, 1946, all the inventoried properties of petitioner's deceased parents were adjudicated by the court to her as sole and only heir (Exhibit F, p. 6, BIR rec., Vol. II), subject, among others, to a claim of ₱89,264.00 representing living, hospital, medical, nursing and funeral expenses incurred by petitioner's parents (Exhibits E and B, pp. 7, 27-28, BIR rec., Vol. II). Among the inventoried properties received by petitioner from her father were a house and lot located at No. 15, Del Pan, Pasay (hereinafter to be referred to as Del Pan property), which for estate and inheritance tax purposes, were valued at ₱77,900.00 (Exhibits K and 18, p. 18, BIR rec., Vol. II). However, in the estate and inheritance tax return filed on the estate of petitioner's father, the sum of ₱20,000.00 was claimed as loss in value of the house (Exhibits K and 18, p. 18, BIR rec., Vol. II), which claim was finally allowed by respondent (Exhibits W and 26, p.116, BIR rec., Vol. II).

On or about December 20, 1948, the petitioner came to the Philippines to attend to her various interests here. Some eight or ten days after her arrival in the Philippines, she became sick and was confined on bed, suffering from "shell shock". She remained here over one year, most of the time being confined to her bed and in the hospital. During her stay here, she sold her Del Pan property, made investments in the Philippines and tended to her personal as well as business interests. The Del Pan property was sold to Benjamin Jalandoni for the gross contract price of ₱166,124.40 on January 23, 1950 (Exhibits MM and 3, pp. 46-48, BIR rec., Vol. I). The sum of ₱3,623.89 was spent in the sale of the lot (Exhibits MM and 3, pp. 46-48, BIR rec., Vol. I).

Petitioner duly filed her income tax returns for the years 1948 (Exhibits GG and 6, p. 19, BIR rec., Vol. I), 1949 (Exhibits FF and 11, p. 16, BIR rec., Vol. I), and 1950 (Exhibits KK and 12, p. 41, BIR rec., Vol. I), claiming as deductible expenses sundry items such as traveling expenses, donations, entertainment and medical, excess baggage, hospital, doctors, hotel, etc. which, except for the donation allegedly made in 1949, were totally disallowed by respondent. The donation allegedly made in 1949 was disallowed by the respondent to the extent it exceeded the 6% authorized by law. In her 1950 income tax return, the petitioner reported the cost at which the Del Pan property was acquired to be ₱168,304.00, with deductible expenses amounting to ₱3,623.89 incurred in the sale of said property. (See Schedule "D" of Exhibits KK and 12) and a consequent loss in the sale in the sum of ₱5,803.49, the difference between the alleged acquisition cost of the property and the net price for which the same was sold. The alleged acquisition cost was arrived at by adding to the amount of ₱77,900.00, the value of the property as reported for estate and inheritance tax purposes, the uncollected rental of the property due from the U.S. Army in the amount of ₱1,140.00 and the approved claims against the estates of petitioner's parents in the sum of ₱89,264.00. Petitioner paid the income taxes reflected in the tax returns.

After investigation, respondent assessed against and demanded from the petitioner deficiency income taxes and surcharge for the tax years in question (1948, 1949 and 1950) in the respective amounts of ₱181.56, ₱71.90, and ₱69,616.50, plus the statutory penalties thereon incident to delinquency, and ₱70.00 as administrative penalty for petitioner's failure to pay on time real estate dealer's fixed tax for 1946 to 1952 (Exhibit VV, pp. 230-233, BIR rec., Vol. I). This assessment and demand is detailed as follows:

AR-10594-51-48

Net income as per return	₱ 12,411.85
Add: Traveling expenses	1,068.00
Net income as per examination ...	₱ 13,479.85
Less: Personal exemption	1,000.00
Taxable income	₱ 12,479.85
Income tax due thereon	₱ 1,301.57
Less: Tax already assessed	1,120.01
Deficiency income tax	₱ 181.56

A-21381-49

Net income as per return	₱ 9,752.74
Add: (1) Entertainment and medical expenses	466.64
(2) Donations in excess of 6% allowed by law	86.44
Net income as per investigation..	₱ 10,305.82
Less: Personal exemption	1,000.00
Taxable income	₱ 9,305.82

3dd

Income tax due thereon	₱ 789.76
Less: Amount already assessed and paid	717.86
Deficiency income tax	₱ 71.90

A-9157-1950

Net income as per return		₱ 14,682.38
Add: (1) Undeclared profit from the sale of real property		104,600.51
(2) Disallowed personal expenses -		
a. Passage to U.S.	₱3,934.10	
b. Baggage in excess	150.00	
c. Hospital, doctors, hotel, donations, etc.	4,738.75	
T o t a l	₱8,822.85	
Less: Living expenses included above	1,800.00	7,022.85
Net income as per investigation ..		₱126,305.74
Less: Personal exemption		1,800.00
Taxable income		₱124,505.74
Income tax due thereon		₱ 50,008.00
Less: Amount already assessed on which ₱1,911.77 was paid by HSBC check No. K157682		3,597.00
Income tax still assessable		₱ 46,411.00
Add: 50% surcharge		23,205.50
Deficiency income tax due		₱ 69,616.50

On September 8,1952, petitioner, in answer to respondent's previous letter of demand for the payment of her real estate dealer's fixed tax delinquency, paid the sum of ₱937.50 representing said tax for the period from the 4th quarter of 1946 to the end of 1952 (Exhibit NN, pp. 57-58, BIR rec., Vol. I).

On May 17, 1956, a petition to review the foregoing assessment was filed before this Court.

In a letter of even date and received by respondent on May 21, 1956, petitioner tendered a check for ₱323.46 in payment of the administrative penalty for failure to pay on time her real estate dealer's fixed tax liability for 1946 to 1952 in the amount of ₱70.00 and the deficiency income taxes for 1948 and 1949 in the respective sums of ₱181.56 and ₱71.90 (Exhibits WW and 5, pp. 241-242, BIR rec., Vol. I), which tender of payment was accepted by respondent. As indicated in said letter, the payment was effected to narrow the matters on the appeal and to avoid seizure and distraint.

The issues now before us could be condensed as follows:

> 1. Whether or not the voluntary payment made by the petitioner on May 21, 1956, four days after the filing of her present petition for review, of her 1948 and 1949 deficiency income taxes abated her causes of action with respect to said deficiency income taxes, and if in the negative -
>
> > (a) Whether or not the traveling expenses in the amount of ₱1,068.00 incurred by petitioner in her trip to the Philippines in 1948 may be deducted from her gross income for the tax year 1948?
> >
> > (b) Whether or not the entertainment and medical expense amounting to ₱466.64 and donations in excess of 6% in the sum of ₱86.44, all incurred or made in 1949, may be deducted from petitioner's gross income for the tax year 1949?;
>
> 2. Whether or not the traveling expense, including excess baggage fare, in the respective amounts of ₱3,934.10 and ₱150.00, and expenses for hospital, doctors, hotel, dona-

tions, etc. aggregating ₱4,738.75, all incurred in 1950 may be deducted from petitioner's gross income for the tax year 1950?;

3. Whether or not petitioner derived a gain or incurred losses in the sale of her Del Pan property and in the former case, whether the same is fully taxable?; and,

4. Whether or not petitioner is liable for the 50% surcharge sought to be imposed by respondent for the tax year 1950?

On the first issue as to whether or not petitioner's cause or causes of action on the deficiency income taxes for the tax years 1948 and 1949 have abated by reason of the payment thereof pending this appeal, respondent maintains the affirmative with the argument that the failure of the petitioner to file a protest and a claim for refund of the amounts paid, has abated her cause or causes of action with respect to these two items, there being no more issue related thereto that remains to be decided. We do not agree with respondent on this score. It is true that in ordinary civil proceedings, satisfaction of the judgment forecloses an appeal therefrom. But judicial proceedings involving tax cases are peculiarly different and distinguishable from ordinary civil proceedings. The satisfaction or payment of an assessment does not preclude the taxpayer from prosecuting an appeal from the assessment. Section 11, Republic Act No. 1125 provides that "no appeal taken to the Court of Tax Appeals x x x shall suspend the payment x x x for the satisfaction of his (taxpayer) liability". Hence, the filing of the appeal on May 17, 1956 did not suspend the right of the government to collect nor the duty of the taxpayer to pay the tax and should payment be made *ad interim*, as was done in the instant case, the same should in no way deprive the taxpayer of his remedy under Republic Act No. 1125. And although the taxpayer had voluntarily paid the same, it did not of itself terminate the proceedings nor withdraw the jurisdiction of this Court over the case. It may be stated further that the taxpayer, by authority of Section 306 of the Tax Code, may satisfy or pay the assessment, and subsequently contest the assessment by asking for a refund of what he has paid. If a taxpayer may pay the assessment and later on thusly seek a refund of what he has paid, thereby virtually contesting the legality of the assessment, we see no reason why he should not be permitted to challenge the deficiency assessment and meanwhile pending the litigation pay the deficiency without prejudice to the final outcome of the case, the claim for refund required by Section 306 of the Tax Code not being necessary in this instant case in view of the pendency of the appeal. This view is strengthened by the well known rule regarding the avoidance of multiplicity of actions thereby forestalling another subsequent petition for the refund of the payment under Section 306 of the Tax Code.

Having ruled that the payment of the deficiency income taxes for 1948 and 1949 has not abated petitioner's cause or causes of action in respect to the same, we shall now determine the rest of the issues which go into the merits of the case.

The first question is whether or not the traveling expense of ₱1,068.00 incurred by petitioner in her trip to the Philippines in 1948 may be deducted from her gross income. Traveling expenses are deductible from gross income when incurred "while away from home in the pursuit of a trade or business" (Sec. 30 (a) (1) of the Tax Code). Considering that traveling expenses are classified under the broad term of "expenses" for which a deduction may be claimed, three conditions must thus be satisfied before a travel expense deduction may be allowed, to wit: (1) the traveling expense must be a reasonable and necessary traveling expense; (2) the expense must be incurred "while away from home" and (3) the expense must be incurred in the pursuit of business (Commissioner v. Flowers, 326 U.S. 469, 470, 90 L. Ed. 203, 207). Failure to satisfy any one of these conditions destroys the traveling expense deduction (Id. 326 U. S. at 472, 90 L. Ed. at 208). Have all these conditions been satisfied?

Ordinarily, a taxpayer has his home in the same locality where he has his business. If he maintains his home in a place other than the place of his business, he does so for his own convenience. In such case, he is not allowed to deduct traveling expenses from his place of residence to his place of business and back, for the reason that the expenses are treated as personal, living or family expenses rather then business expenses. So it has been held that a lawyer practicing law in New York City, who maintained his residence in a distant part of New York State, was not allowed deduction of his traveling expenses covering his trips to his residence and back to New York City. (George F. Thompson, 6 TC 285, affirmed (CCA-2); 1947), 161 F. 2d 185, 35 AFTR 1227.) In the case of herein petitioner, it appears that immediately after the war in 1945 she went to the United States for medical treatment and established her residence there. She came back to the Philippines in 1948. During her absence, she appointed counsel for petitioner as her attorney-in-fact to manage her affairs during her absence. Upon her return to the Philippines, she cancelled the power of attorney. Under these circumstances, we are of the opinion that said expenses are more in the nature of personal than business expenses, and the decision of respondent disallowing the deduction must be sustained.

We shall now determine the question regarding the entertainment and medical expenses amounting to ₱466.64 and donations in excess of 6% in the sum of ₱86.44, all incurred or made in 1949 and the deduction of which was disallowed by respondent.

Entertainment and medical expenses - Under Section 30 (a) (1) of the Tax Code, a taxpayer is allowed to deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying any trade or business". (See also Collector vs. Philippine Education Co., Inc., G. R. No. L-8505, May 30, 1956.) In the instant case, we note that the entertainment expenditure incurred during the year 1949 was inseparably totalled with the medical expense defrayed in said year (see Petitioner's Income Tax Return for 1949, p. 16, BIR rec., Vol. I).

The medical expenses allegedly incurred by petitioner in 1949 cannot be deducted because they partake of personal expenses and are expressly declared as non-deductible by section 31 of our Tax Code. However, considering that the entertainment expenses which are deductible in some instances were declared as one lump sum together with the medical expenses which are not deductible, we have no means of determining the exact amount incurred under each. Moreover, entertainment expenses to a certain extent are personal expenses. Consequently, in the absence of adequate evidence in this regard, we have no means of determining whether or not the item representing the entertainment expense is ordinary and necessary business expense or personal expense (Mertens, Law of Federal Income Taxation, Vol. 4, Sec. 25.78, pp. 468-469) especially because the results are frequently intangible. The burden of proof is on the taxpayer to show that such expenditure was primarily business rather than personal expense (Hicks v. Collector of Internal Revenue, C.T.A. Case No. 38, October 19, 1955; 52 O.G. No. 6, p. 3157). Upon this foregoing lack of satisfactory and positive proof, we are constrained to uphold respondent's disallowance of the alleged entertainment and medical expenses in question.

We find no error in respondent's disallowance of ₱86.44 representing donations in excess of 6%. The disallowance is supported by Section 30 (h) of the Tax Code which authorizes the deduction from gross income of a contribution or donation to institutions or associations therein enumerated in an amount not in excess of six <u>per centum</u> in the case of an individual.

As regards the traveling expense and excess baggage fare, in the respective sums of ₱3,934.10 and ₱150.00 claimed for the year 1949, for the same reason stated as regards the traveling expenses claimed for the year 1948, the disallowance should equally apply here. Likewise, for the same reasons as heretofore discussed, we hold that the medical expense claimed by petitioner as deduction in the year 1950 was properly disallowed by respondent.

We now come to the issue of whether or not petitioner derived gain or incurred loss in the sale of her Del Pan property. Petitioner contends that she sustained a loss of ₱5,803.49 from said sale. She claims that the sums of ₱1,140.00, representing the uncollected rent for the lease of Del Pan property by the U.S. Army and ₱89,264.00, representing the claims approved by the probate court against the estates of her parents, should be added to the appraised value of the Del Pan property in the amount of ₱77,900.00, less the amount of ₱3,623.89, which was spent in the sale of the property. Accordingly, the value of this property at the date of its acquisition was ₱168,304.00. Consequently, there resulted, as contended, a loss of ₱5,803.49 in such transaction. By way of alternative argument, petitioner maintains that even assuming that there was a gain in the sale, the tax therefor should be cut down to 50% for the reason that the property was a capital asset. Contrarily, respondent maintains that a gain of ₱104,600.51 was realized from the sale. He avers that, for the purpose of determining the gain or loss arising from the sale, the basis should be the value of the Del Pan property as reported in the estate and inheritance tax return and approved by him. As urged by respondent, the value of the property at the time of sale was ₱57,900.00 which is the result after deducting the loss of ₱20,000.00 from the acquisition value of the house. As the amount realized on the sale of the property in 1950 was ₱162,500.51 there results a difference of ₱104,600.15 which represents the taxable gain. Respondent contends that the entire gain is fully returnable and taxable because the Del Pan property was an ordinary asset of petitioner.

The law applicable in the determination of gain or loss resulting from the sale of petitioner's property, is found in Section 35 of the Tax Code which reads as follows:

> "Sec. 35. Determination of gain or loss from the sale or other disposition of property.-
>
> x x x x
>
> "(b) In the case of property acquired on or after March first, nineteen hundred and thirteen, the cost thereof if such property was acquired by purchase or the fair market

> price or value as of the date of the acquisition if the same was acquired by gratuitous title."

As the property in question was inherited by petitioner, the basis thereof turns upon the question of what was the fair market price or value of the Del Pan property as of the date it was inherited. Section 139 of the Income Tax Regulations (Revenue Regulations No. 2 of the Department of Finance) which implements said Section 35 of the Tax Code defines the term "fair market value" in relation to property acquired by bequest, devise, or inheritance, as follows:

> "x x x In the case of property acquired by bequest, devise, or inheritance, <u>its value as appraised for the purpose of the inheritance tax shall be deemed to be its fair market value when acquired.</u>" (Underscoring supplied.)

As afore-stated, the Del Pan property was returned by petitioner for estate and inheritance tax at a value of ₱77,900.00. This value was previously approved by the probate court (see Exhibit H, p. 25, BIR rec., Vol. II; Exhibit F, p. 6, BIR rec., Vol. II). However, the sum of ₱20,000.00 was claimed as the loss in value of the house constructed thereon, which claim was allowed by respondent. This sum of ₱20,000.00 should, therefore, be deducted from the ₱77,900.00, the returned value of the Del Pan house and lot (Sec. 89 (1) (E) Tax Code). Consequently, the value of the Del Pan property as appraised for the purpose of the inheritance tax is, as correctly found by respondent, ₱57,900.00. Deducting this amount from the net selling price of ₱162,500.51, a gain of ₱104,600.15 was realized by petitioner from the sale of said property. We find no merit in the con- 334 tention that the debt of the estates of petitioner's parents in the aggregate amount of ₱89,264.00 should be considered in the computation of value of the Del Pan property at the time of its acquisition by petitioner for the reason that the proper basis for the determination of the fair market value of such property at the time of its acquisition is the value of the property, undiminished by charges. (See Crane v. Commissioner of Internal Revenue, 331 U.S. 1; 91 L. Ed 1301.) Nor is there any merit in the claim that the sum of ₱1,140.00, representing uncollected rents from the U.S. Army should be considered as affecting the value of the property for the reason that the same does not form a part of the value thereof. Be that as it may, with respect to this alleged uncollected rents, the petitioner is still free to pursue whatever legal or administrative remedy or remedies are available to her for the collection of the same.

As regards petitioner's alternative argument that the gain realized from the sale of the Del Pan property, if at all, is returnable and taxable only at 50%, we find that said property has not been used in petitioner's business as real estate dealer. "Mere ownership of houses, or other buildings, even when one receives rents therefrom and occupies oneself with the maintenance and repair thereof, has been held not to constitute business." (Arguelles v. Meer, G. R. No. 3730, April 25, 1952, citing 12 C.J.S. p. 772, in turn citing decisions from California, Kansas, Minnessota, Nebraska, Ohio and Texas.) Moreover, there is no showing that this particular property was rented out prior and/or subsequent to the time of its lease by the U.S. Army. We are inclined to the belief that the payment made by the U.S. Army was a compensation for the damage to petitioner's property as a dumping ground of its surplus goods. Moreover, it was but a single and isolated transaction, brought about by the exigencies of war, which compelled the American military authorities to unload and dump their supplies along Dewey Boulevard where petitioner's property is located. The Del Pan property could not, therefore, be deemed to have been used in petitioner's business as real estate dealer. (Imperial v. Collector of Internal Revenue, G. R. No. L-7924, September 30, 1955). Hence, the property constituted a capital asset of petitioner (Section 34, Tax Code) and since it was held by petitioner for more than twelve months, the gain realized from its sale is returnable and taxable only at 50% (Sec. 34 (b) (2) of the Tax Code) as contended by petitioner.

We now come to the last issue which relates to the imposition of the 50% surcharge. In determining the legality of the imposition of the 50% surcharge by respondent, it would be well to look into our jurisprudence on the matter. "The principle is well-settled that fraud can never be presumed (De Roda v. Lalk, 48 Phil. 104, quoting 12 RCL 426; Menzi & Co. v. Bastida, 63 Phil. 16). Respondent having alleged fraud, it is incumbent upon him to prove its existence. Since proof of fraud must center on "wilfulness" as its crucial core, and "wilfulness" being enmeshed as it must be with "intent" and "state of mind", it is hardly susceptible of proof by direct evidence. Circumstantial evidence is therefore admissible on the issue of fraud (U.S. v. Commerford, 44 F (2d) 28, 30, cited by Balter, Fraud Under the Federal Tax Law, p. 394; Li Yao v. Collector of Internal Revenue, C.T.A. Case No. 30, July 31, 1956). However, it is enough that the degree of proof be clear and convincing. (Griffiths v. Comm. 50 F (2d) 782, cited by Mertens, Law of Federal Income Taxation, Vol. 10, p. 29.)

With the foregoing well-established rules in mind, we find that respondent failed to prove the commission of fraud by petitioner. The facts as established do not clearly and convincingly show that petitioner filed a false or fraudulent return with intent to evade payment of taxes. The crux of the controversy relative to whether there was a gain or loss in the sale of the Del Pan property lies on the propriety or legality of adding the amounts, representing the claims against the estates of petitioner's parents and the uncollected rents, to the acquisition value or fair market price of said property. And, if at all, the error of petitioner consists of an honest misapprehension for which she should not be charged with and penalized for fraud. Moreover, petitioner, in an explanatory note to Schedule "D" of her income tax return (Exhibits KK and 12, p. 41, BIR rec., Vol. II), has furnished the data with which respondent could have determined the correct acquisition value of the property. By referring to the pertinent records of Estate of J. N. & E. Wolfson, Case No. 70073, Court of First Instance of Manila (cited in said Schedule "D"), respondent could have verified the correctness or incorrectness of the returned acquisition value of the Del Pan property. With this Schedule "D" attached thereto, petitioner's income tax return could not have misled respondent from arriving at the correct acquisition price of the property. And even in the absence of the Schedule, respondent could not likewise be misled because, by the mere fact that he previously assessed and collected the inheritance tax on the properties of petitioner's parents, he is charged with knowledge of the correct acquisition value of the Del Pan property, which is a part of said properties. In fine, petitioner has not been clearly and satisfactorily shown to have filed a false or fraudulent return with intent to evade the payment of taxes.

WHEREFORE, the decision appealed from is modified and petitioner is hereby ordered to pay to the respondent Collector of Internal Revenue or his authorized deputy the sum of ₱20,238.00 as deficiency income tax for the year 1950, as computed in Annex "A" hereof, plus surcharge and interest thereto incident to delinquency. We declare the income tax payments heretofore made by petitioner for the years 1948 and 1949 as full satisfaction thereof. Without pronouncement as to costs.

SO ORDERED.

Manila, Philippines, July 16, 1958.

AUGUSTO M. LUCIANO
Associate Judge

WE CONCUR:

MARIANO NABLE
Presiding Judge

ROMAN M. UMALI
Associate Judge

Aff'd. Appealed petition dismissed by S.C. in G.R. No. L-14886, Feb. 10, 1959

ANNEX "A"

Computation of 1950
Income Tax Deficiency

Net income as per return		₱14,682.38
Add: (1) 50% of capital gain from the sale of Del Pan property		52,300.25
(2) Disallowed personal expenses -		
a. Passage to U.S...	₱3,934.10	
b. Baggage - excess.	150.00	
c. Hospital, doctors hotel, donations, etc. ...	4,738.75	
Total	₱8,822.85	
Less: Living expenses included above	1,800.00	7,022.85
Net income		₱74,005.48
Less: Personal exemption		1,800.00
Taxable income		₱72,205.48
Income tax due thereon		₱23,835.00
Less: Amount already assessed on which ₱1,911.77 was paid		3,597.00
Deficiency income tax due		₱20,238.00