CHANROBLES PUBLISHING COMPANY

SUPREME COURT
EN BANC

YUTIVO SONS HARDWARE COMPANY,
***Petitioner*,**

-versus-

G.R. No. L-13203
January 28, 1961

COURT OF TAX APPEALS and COLLECTOR OF INTERNAL REVENUE,
***Respondents*.**
x----------x

D E C I S I O N

GUTIERREZ DAVID, *J.*:

This is a Petition for Review of a Decision of the Court of Tax Appeals ordering petitioner to pay to respondent Collector of Internal Revenue the sum of P1,266,176.73 as sales tax deficiency for the third quarter of 1947 to the fourth quarter of 1950; inclusive, plus 75% surcharge thereon, equivalent to P349,632.54, or a sum total of P2,215,809.27, plus costs of the suit.

From the stipulation of facts and the evidence adduced by both parties, it appears that petitioner Yutivo Sons Hardware Co. (hereafter referred to as Yutivo) is a domestic corporation, organized under the laws of the Philippines, with principal office at 404 Dasmariñas St., Manila. Incorporated in 1916, it was engaged, prior to the last world war, in the importation and sale of hardware supplies and equipment. After the liberation, it resumed its business and until June of 1946 bought a number of cars and trucks from General Motors Overseas Corporation (hereafter referred to as GM for short), an American corporation licensed to do business in the Philippines. As importer, GM paid sales tax prescribed by sections 184, 185 and 186 of the Tax Code on the basis of its selling price to Yutivo. Said tax being collected only once on original sales, Yutivo paid no further sales tax on its sales to the public.

On June 13, 1946, the Southern Motors, Inc. (hereafter referred to as SM) was organized to engaged in the business of selling cars, trucks and spare parts. Its original authorized capital stock was P1,000,000 divided into 10,000 shares with a par value of P100 each.

At the time of its incorporation 2,500 shares worth P250,000 appear to have been subscribed in 5 equal proportions by Yu Khe Thai, Yu Khe Siong, Hu Kho Jin, Yu Eng Poh, and Washington Sycip. The first three named subscribers are brothers, being sons of Yu Tiong Yee, one of Yutivo's founders. The latter two are respectively sons of Yu Tiong Sin and Albino Sycip, who are among the founders of Yutivo.

After the incorporation of SM and until the withdrawal of GM from the Philippines in the middle of 1947, the cars and trucks purchased by Yutivo from GM were sold by Yutivo to SM which, in turn, sold them to the public in the Visayas and Mindanao.

When GM decided to withdraw from the Philippines in the middle of 1947, the U.S. manufacturer of GM cars and trucks appointed Yutivo as importer for the Visayas and Mindanao, and Yutivo continued its previous arrangement of selling exclusively to SM. In the same way that GM used to pay sales taxes based on its sales to Yutivo, the latter, as importer, paid sales tax prescribed on the basis of its selling price

to SM, and since such sales tax, as already stated, is collected only once on original sales, SM paid no sales tax on its sales to the public.

On November 7, 1950, after several months of investigation by revenue officers started in July, 1948, the Collector of Internal Revenue made an assessment upon Yutivo and demanded from the latter P1,804,769.85 as deficiency sales tax plus surcharge covering the period from the third quarter of 1947 to the fourth quarter of 1949; or from July 1, 1947 to December 31, 1949, claiming that the taxable sales were the retail sales by SM to the public and not the sales at wholesale made by Yutivo to the latter inasmuch as SM and Yutivo were one and the same corporation, the former being the subsidiary of the latter.

The assessment was disputed by the petitioner, and a reinvestigation of the case having been made by the agents of the Bureau of Internal Revenue, the respondent Collector in his letter dated November 15, 1952 countermanded his demand for sales tax deficiency on the ground that "after several investigations conducted into the matter no sufficient evidence could be gathered to sustain the assessment of this Office based on the theory that Southern Motors is a mere instrumentality or subsidiary of Yutivo." The withdrawal was subject, however, to the general power of review by the now defunct Board of Tax Appeals. The Secretary of Finance to whom the papers relative to the case were endorsed, apparently not agreeing with the withdrawal of the assessment, returned them to the respondent Collector for reinvestigation.

After another investigation, the respondent Collector, in a letter to petitioner dated December 18, 1954, redetermined that the aforementioned tax assessment was lawfully due the government and in addition assessed deficiency sales tax due from petitioner for the four quarters of 1950; the respondents' last demand was in the total sum of P2,215,809.27 detailed as follows:

	Deficiency Sales Tax	75% Surcharge	Total Amount Due
Assessment (First) of November 7, 1950 for deficiency sales Tax for the period from 3rd Qrtr. 1947 to			

4th Qrtr. 1949 inclusive	1,031,296.60	P773,473.45	P1,804,769.05
Additional Assessment for period from 1st to 4th Qrtr. 1950, inclusive	P234,880.13	P176,160.09	P411,040.22
Total amount demanded per letter of December 16, 1954	P1,266,176.73	P949,632.54	P2,215,809.27

This second assessment was contested by the petitioner Yutivo before the Court of Tax Appeals, alleging that there is no valid ground to disregard the corporate personality of SM and to hold that it is an adjunct of petitioner Yutivo; (2) that assuming the separate personality of SM may be disregarded, the sales tax already paid by Yutivo should first he deducted from the selling price of SM in computing the sales tax due on each vehicle; and (3) that the surcharge has been erroneously imposed by respondent. Finding against Yutivo and sustaining the respondent Collector's theory that there was no legitimate or bona fide purpose in the organization of SM — the apparent objective of its organization being to evade the payment of taxes — and that it was owned (or the majority of the stocks thereof are owned) and controlled by Yutivo and is a mere subsidiary, branch, adjunct conduit, instrumentality or alter ego of the latter, the Court of Tax Appeals — with Judge Roman Umali not taking part — disregarded its separate corporate existence and on April 27, 1957, rendered the decision now complained of. Of the two Judges who signed the decision, one voted for the modification of the computation of the sales tax as determined by the respondent Collector in his decision so as to give allowance for the reduction of the tax already paid (resulting in the reduction of the assessment to P820,509.91 exclusive of surcharges), while the other voted for affirmance. The dispositive part of the decision, however, affirmed the assessment made by the Collector. Reconsideration of this decision having been denied, Yutivo brought the case to this Court thru the present petition for review.

It is an elementary and fundamental principle of corporation law that a corporation is an entity separate and distinct from its stockholders and from other corporations to which it may be connected. However, "when the notion of legal entity is used to defeat public convenience,

justify wrong, protect fraud, or defend crime," the law will regard the corporation as an association of persons, or in the case of two corporations merge them into one. (Koppel [Phil.], Inc. vs. Yatco, 77 Phil., 496, citing I Fletcher Cyclopedia of Corporation, Perm. Ed., pp. 135-136; United States vs. Milwaukee Refrigeration Transit Co., 142 Fed., 247; 255 per Sanborn, J.) Another rule is that, when the corporation is the "mere alter ego or business conduit of a person, it may be disregarded." (Koppel [Phil.], Inc. vs. Yatco, supra.)

After going over the voluminous record of the present case, we are inclined to rule that the Court of Tax Appeals was not justified in finding that SM was organized for no other purpose than to defraud the Government of its lawful revenues. In the first place, this corporation was organized in June, 1946 when it could not have caused Yutivo any tax savings. From that date up to June 30, 1947, or a period of more than one year, GM was the importer of the cars and trucks sold to Yutivo, which, in turn resold them to SM. During that period, it is not disputed that GM, as importer, was the one solely liable for sales taxes. Neither Yutivo nor SM was subject to the sales taxes on their sales of cars and trucks. The sales tax liability of Yutivo did not arise until July 1, 1947 when it became the importer and simply continued its practice of selling to SM. The decision, therefore, of the Tax Court that SM was organized purposely as a tax evasion device runs counter to the fact that there was no tax to evade.

Making the observation from a newspaper clipping (Exh. "T") that "as early as 1945 it was known that GM was preparing to leave the Philippines and terminate its business of importing vehicles," the court below speculated that Yutivo anticipated the withdrawal of GM from business in the Philippines in June, 1947. This observation, which was made only in the resolution on the motion for reconsideration, however, finds no basis in the record. On the other hand, GM had been an importer of cars in the Philippines even before the war and had but recently resumed its operation in the Philippines in 1946 under an ambitious plan to expand its operation by establishing an assembly plant here, so that it could not have been expected to make so drastic a turnabout of not merely abandoning the assembly plant project but also totally ceasing to do business as an importer. Moreover the newspaper clipping Exh. "T", was published on March 24, 1947, and merely reported a rumored plan that GM

would abandon the assembly plant project in the Philippines. There was no mention of the cessation of business by GM which must not be confused with the abandonment of the assembly plant project. Even as respect the assembly plant, the newspaper clipping was quite explicit in saying that the Acting Manager refused to confirm the rumor as late as March 24, 1947, almost a year after SM was organized.

At this juncture, it should be stated that the intention to minimize taxes, when used in the context of fraud, must be proved to exist by clear and convincing evidence amounting to more than mere preponderance, and cannot be justified by a mere speculation. This is because fraud is never lightly to be presumed. (Vitelli & Sons vs. U.S., 250 U.S. 355; Duffin vs. Lucas, 55 F [2d] 786; Budd vs. Commr., 43 F [2d] 509; Maryland Casualty Co. vs. Palmette Coal Co., 40 F [2d] 374; Schoonfield Bros., Inc. vs. Commr., 38 BTA 943; Charles Heiss vs. Commr., 36 BTA 833; Kerbaugh vs. Commr., 74 F [2d] 749; Maddas vs. Commr., 114 F [2d] 548; Moore vs. Commr., 37 BTA 378; National City Bank of New York vs. Commr., 98 F [2d] 93; Richard vs. Commr., l5 BTA 316; Rea Gano vs. Commr., 19 BTA 518.) (See also Balter, Fraud Under Federal Law, pp. 301-302, citing numerous authorities; Arroyo vs. Granada, et al., 18 Phil., 484.) Fraud is never imputed and the courts never sustain findings of fraud upon circumstances which, at the most, create only suspicion. (Haygood Lumber & Mining Co. vs. Commr., 178 F [2d] 769; Dalone vs. Commr., 100 F [2d] 507).

In the second place, SM was organized and it operated, under circumstance that belied any intention to evade sales taxes. “Tax evasion” is a term that connotes fraud thru the use of pretenses and forbidden devices to lessen or defeat taxes. The transactions between Yutivo and SM, however, have always been in the open, embodied in private and public documents, constantly subject to inspection by the tax authorities. As a matter of fact, after Yutivo became the importer of GM cars and trucks for Visayas and Mindanao, it merely continued the method of distribution that it had initiated long before GM withdrew from the Philippines.

On the other hand, if tax saving was the only justification for the organization of SM, such justification certainly ceased with the

passage of Republic Act No. 594 on February 16, 1951, governing payment of advance sales tax by the importer based on the landed cost of the imported article, increased by mark-ups of 25%, 50% and 100%, depending on whether the imported article is taxed under sections 186, 185 and 184, respectively, of the Tax Code. Under Republic Act No. 594, the amount at which the article is sold is immaterial to the amount of the sales tax. And yet after the passage of that Act, SM continued to exist up to the present and operates as it did many years past in the promotion and pursuit of the business purposes for which it was organized.

In the third place, sections 184 to 186 of the said Code provide that the sales tax shall be collected "once only on every original sale, barter, exchange . . ., to be paid by the manufacturer, producer or importer." The use of the word "original" and the express provision that the tax was collectible "once only" evidently has made the provisions susceptible of different interpretations. In this connection, it should be stated that a taxpayer has the legal right to decrease the amount of what otherwise would be his taxes or altogether avoid them by means which the law permits. (U.S. vs. Isham. 17 Wall. 496, 596; Gregory vs. Helvering, 293 U.S. 465, 469; Commr. vs. Tower, 327 U.S. 280; Lawton vs. Commr. 194 F [2d] 380). Any legal means used by the tax payer to reduce taxes are all right (Benny vs. Commr. 25 T. Cl. 78). A man may, therefore, perform an act that he honestly believes to be sufficient to exempt him from taxes. He does not incur fraud thereby even if the act is thereafter found to be insufficient. Thus in the case of Court Holding Co. vs. Commr., 2 T. Cl. 531, it was held that though an incorrect position in law had been taken by the corporation there was no suppression of the facts, and a fraud penalty was not justified.

The evidence for the Collector, in our opinion, falls short of the standard of clear and convincing proof of fraud. As a matter of fact, the respondent Collector himself showed a great deal of doubt or hesitancy as to the existence of fraud. He even doubted the validity of his first assessment dated November 7, 1950. It must be remembered that the fraud which respondent Collector imputed to Yutivo must be related to its filing of sales tax returns for less taxes than were legally due. The allegation of fraud, however, cannot be sustained without the showing that Yutivo, in filing said returns, did so fully knowing

that the taxes called for therein were less than what were legally due. Considering that respondent Collector himself with the aid of his legal staff, and after some two years of investigation and study concluded in 1952 that Yutivo's sales tax returns were correct — only to reverse himself after another two years — it would seem harsh and unfair for him to say in 1954 that Yutivo fully knew in October 1947 that its sales tax returns were inaccurate.

On this point, one other consideration would show that the intent to save taxes could not have existed in the minds of the organizers of SM. The sales tax imposed, in theory and in practice, is passed on to the vendee, and is usually billed separately as such in the sales invoice. As pointed out by petitioner Yutivo, had not SM handled the retail, the additional tax that would have been payable by it, could have been easily passed off to the consumer, especially since the period covered by the assessment was a "seller's market" due to the post-war scarcity up to late 1948, and the imposition of controls in late 1949.

It is true that the arrastre charges constitute expenses of Yutivo and its non-inclusion in the selling price by Yutivo cost the Government P4.00 per vehicle, but said non-inclusion was explained to have been due to an inadvertent accounting omission, and could hardly be considered as proof of willful channelling and fraudulent evasion of sales tax. Mere understatement of tax in itself does not prove fraud. (James Nicholson, 32 BTA 377, affirmed 90 F [2] 978, cited in Merten's Sec. 55.11 p. 21.) The amount involved, moreover is extremely small inducement for Yutivo to go thru all the trouble of organizing SM. Besides, the non-inclusion of these small arrastre charge in the sales tax returns of Yutivo is clearly shown in the records of Yutivo, which is uncharacteristic of fraud (See Insular Lumber Co. vs. Collector, G.R. No. L-719, April 28, 1956.)

We are, however, inclined to agree with the court below that SM was actually owned and controlled by petitioner as to make it a mere subsidiary or branch of the latter created for the purpose of selling the vehicles at retail and maintaining stores for spare parts as well as service repair shops. It is not disputed that the petitioner, which is engaged principally in hardware supplies and equipment, is completely controlled by the Yutivo, Young or Yu family. The

founders of the corporation are closely related to each other either by blood or affinity, and most of its stockholders are members of the Yu (Yutivo or Young) family. It is, likewise, admitted that SM was organized by the leading stockholders of Yutivo headed by Yu Khe Thai. At the time of its incorporation, 2,500 shares worth P250,000.00 appear to have been subscribed in five equal proportions by Yu Khe Thai, Yu Khe Siong, Yu Khe Jin, Yu Eng Poh and Washington Sycip. The first three named subscribers are brothers, being the sons of Yu Tien Yee, one of Yutivo's founders. Yu Eng Poh and Washington Sycip are respectively sons of Yu Tiong Sing and Albino Sycip who are co-founders of Yutivo. According to the Articles of Incorporation of the said subscriptions, the amount of P62,500 was paid by the aforenamed subscribers, but actually the said sum was advanced by Yutivo. The additional subscriptions to the capital stock of SM and subsequent transfers thereof were paid by Yutivo itself. The payments were made, however, without any transfer of funds from Yutivo to SM. Yutivo simply charged the accounts of the subscribers for the amount allegedly advanced by Yutivo in payment of the shares. Whether a charge was to be made against the accounts of the subscribers or said subscribers were to subscribe shares appears to constitute a unilateral act on the part of Yutivo, there being no showing that the former initiated the subscription.

The transactions were made solely by and between SM and Yutivo. In effect, it was Yutivo who undertook the subscription of shares, employing the persons named or "charged" with corresponding account as nominal stockholders. Of course, Yu Khe Thai, Yu Khe Jin, Yu Khe Siong and Yu Eng Poh were manifestly aware of these subscriptions, but considering that they were the principal officers and constituted the majority of the board of Directors of both Yutivo and SM, their subscriptions could readily or easily be that of Yutivo's. Moreover, these persons were related to each other as brothers or first cousins. There was every reason for them to agree in order to protect their common interest in Yutivo and SM.

The issued capital stock of SM was increased by additional subscriptions made by various persons, but except Ng Sam Bak and David Sycip, "payments" thereof were effected by merely debiting or charging the accounts of said stockholders and crediting the corresponding amounts in favor of SM, without actually transferring

cash from Yutivo. Again, in this instance, the "payments" were effected by the mere unilateral act of Yutivo. Yutivo, by virtue of its control over the individual accounts of the persons charged, would necessarily exercise preferential rights and control, directly or indirectly, over the shares, it being the party which really undertook to pay or underwrite payment thereof.

The shareholders in SM are mere nominal stockholders holding the shares for and in behalf of Yutivo, so even conceding that the original subscribers were stockholders bona fide, Yutivo was at all times in control of the majority of the stock of SM and that the latter was a mere subsidiary of the former.

True, petitioner and other recorded stockholders transferred their shareholdings, but the transfers were made to their immediate relatives, either to their respective spouses and children or sometimes brothers or sisters. Yutivo's shares in SM were transferred to immediate relatives of persons who constituted its controlling stockholders, directors and officers. Despite these purported changes in stock ownership in both corporations, the Board of Directors and officers of both corporations remained unchanged and Messrs. Yu Khe Thai, Yu Khe Siong, Yu Khe Jin and Yu Eng Poh (all of the Yu or Young family) continued to constitute the majority in both boards. All these, as observed by the Court of Tax Appeals, merely serve to corroborate the fact that there was a common ownership and interest in the two corporations.

SM is under the management and control of Yutivo by virtue of a management contract entered into between the two parties. In fact, the controlling majority of the Board of Directors of Yutivo is also the controlling majority of the Board of Directors of SM. At the same time the principal officers of both corporations are identical. In addition both corporations have a common comptroller in the person of Simeon Sy, who is a brother-in-law of Yutivo's president, Yu Khe Thai. There is therefore no doubt that by virtue of such control, the business, financial and management policies of both corporations could be directed towards common ends.

Another aspect relative to Yutivo's control over SM operations relates to its cash transactions. All cash assets of SM were handled by Yutivo

and all cash transactions of SM were actually maintained thru Yutivo. Any and all receipts of cash by SM including its branches were transmitted or transferred immediately and directly to Yutivo in Manila upon receipt thereof. Likewise, all expenses, purchases or other obligations incurred by SM are referred to Yutivo which in turn prepares the corresponding disbursement vouchers and payments in relation thereto, the payment being made out of the cash deposits of SM with Yutivo, if any, or in the absence thereof which occurs generally, a corresponding charge is made against the account of SM in Yutivo's books. The payments for and charges against SM are made by Yutivo as a matter of course and without need of any further request, the latter would advanced all such cash requirements for the benefit of SM. Any and all payments and cash vouchers are made on Yutivo stationery and made under authority of Yutivo's corporate officers, without any copy thereof being furnished to SM. All detailed records such as cash disbursements, such as expenses, purchases, etc. for the account of SM, are kept by Yutivo and SM merely keeps a summary record thereof on the basis of information received from Yutivo.

All the above plainly show that cash or funds of SM, including those of its branches which are directly remitted to Yutivo, are placed in the custody and control of Yutivo, and subject to withdrawal only by Yutivo. SM's resources being under Yutivo's control, the former's operations and existence became dependent upon the latter.

Consideration of various other circumstances, especially when taken together, indicates that Yutivo treated SM merely as its department or adjunct. For one thing, the accounting system maintained by Yutivo shows that it maintained a high degree of control over SM accounts. All transactions between Yutivo and SM are recorded and effected by mere debit or credit entries against the reciprocal account maintained in their respective books of accounts and indicate the dependency of SM as branch upon Yutivo.

Apart from the accounting system, other facts corroborate or independently show that SM is a branch or department of Yutivo. Even the branches of SM in Bacolod, Iloilo, Cebu, and Davao treat Yutivo- Manila as their "Head-Office" or "Home Office" as shown by their letter of remittances or other correspondences. These

correspondences were actually received by Yutivo and the reference to Yutivo as the head or home office is obvious from the fact that all cash collections of the SM's branches are remitted directly to Yutivo. Added to this fact, is that SM may freely use forms or stationery of Yutivo.

The fact that SM is a mere department or adjunct of Yutivo is made more patent by the fact that arrastre charges paid for the "operation of receiving, conveying, and loading or unloading" of imported cars and trucks on piers and wharves, were charged against SM. Overtime charges for the unloading of cars and trucks as requested by Yutivo and incurred as part of its acquisition cost thereof, were likewise charged against and treated as expenses of SM. If Yutivo were the importer, these arrastre and overtime charges were Yutivo's expenses in importing goods and not SM's. But since those charges were made against SM, it plainly appears that Yutivo has sole authority to allocate its expenses even as against SM in the sense that the latter is a mere adjunct, branch or department of the former.

Proceeding to another aspect of the relation of the parties, the management fees due from SM to Yutivo were taken up as expenses of SM and credited to the account of Yutivo. If it were to be assumed that the two organizations are separate juridical entities, the corresponding receipts or receivables should have been treated as income on the part of Yutivo. But such management fees were recorded as "Reserve for Bonus" and were therefore a liability reserve and not an income account. This reserve for bonus were subsequently distributed directly to and credited in favor of the employees and directors of Yutivo, thereby clearly showing that the management fees were paid directly to Yutivo officers and employees.

Briefly stated, Yutivo financed principally, if not wholly, the business of SM and actually extended all the credit to the latter not only in the form of starting capital but also in the form of credits extended for the cars and vehicles allegedly sold by Yutivo to SM as well as advances or loans for the expenses of the latter when the capital had been exhausted. Thus the increases in the capital stock were made in advances or "Guarantee" payments by Yutivo and credited in favor of SM. The funds of SM were all merged in the cash fund of Yutivo. At all times Yutivo thru officers and directors common to it and SM,

exercised full control over the cash funds, politics, expenditures and obligations of the latter.

Southern Motors being but a mere instrumentality or adjunct of Yutivo, the Court of Tax Appeals correctly disregarded the technical defense of separate corporate entity in order to arrive at the true tax liability of Yutivo.

Petitioner contends that the respondent Collector had lost his right or authority to issue the disputed assessment by reason of prescription. The contention, in our opinion, cannot be sustained. It will be noted that the first assessment was made on November 7, 1950 for deficiency sales tax from 1947 to 1949. The corresponding returns filed by petitioner covering the said period was made at the earliest on October 1 as regards the third quarter of 1947, so that it cannot be claimed that the assessment was not made within the five-year period prescribed in section 331 of the Tax Code invoked by petitioner. The assessment, it is admitted, was withdrawn by the Collector on November 15, 1952 due to insufficiency of evidence, but the withdrawal was made subject to the approval of the Secretary of Finance and the Board of Tax Appeals, pursuant to the provisions of section 9 of Executive Order No. 401-A, series of 1951. The decision of the previous Collector counter-manding the assessment of November 7, 1950 was forwarded to the Board of Tax Appeals through the Secretary of Finance but that official, apparently disagreeing with the decision, sent it back for re-investigation. Consequently, the assessment of November 7, 1950 cannot be considered to have been finally withdrawn. That the assessment was subsequently reiterated in the decision of respondent Collector on December 16, 1954 did not alter the fact that it was made seasonably. In this connection, it would appear that a warrant of distraint and levy has been issued on March 28, 1951 in relation with this case and by virtue thereof the properties of Yutivo were placed under constructive distraint. Said warrant and constructive distraint have not been lifted up to the present, which shows that the assessment of November 7, 1950 has always been valid and subsisting.

Anent the deficiency sales tax for 1950, considering that the assessment thereof was made on December 16, 1954, the same was assessed well within the prescribed five-year period.

Petitioner argues that the original assessment of November 7, 1950 did not extend the prescriptive period on assessment. The argument is untenable, for, as already seen, the assessment was never finally withdrawn, since it was not approved by the Secretary of Finance or of the Board of Tax Appeals. The authority of the Secretary to act upon the assessment cannot be questioned, for he is expressly granted such authority under section 9 of Executive Order No. 401-A and under section 79(c) of the Revised Administrative Code, he has "direct control, direction and supervision over all bureaus and offices under his jurisdiction and may, any provision of existing law to the contrary notwithstanding, repeal or modify the decision of the chief of said Bureaus or offices when advisable in the public interest."

It should here also be stated that the assessment in question was consistently protested by petitioner, making several requests for reinvestigation thereof. Under the circumstances, petitioner may be considered to have waived the defense of prescription.

> "Estoppel has been employed to prevent the application of the statute of limitations against the government in certain instances in which the taxpayer has taken some affirmative action to prevent the collection of the tax within the statutory period. It is generally held that a taxpayer is estopped to repudiate waivers of the statute of limitations upon which the government relied. The cases frequently involve dissolved corporations. If no waiver has been given, the cases usually show some conduct directed to a postponement of collection, such, for example, as some variety of request to apply an over assessment. The taxpayer has 'benefited' and 'is not in a position to contest' his tax liability. A definite representation of implied authority may be involved, and in many cases the taxpayer has received the 'benefit' of being saved from the inconvenience, if not hardship of immediate collection.
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> "Conceivably even in these cases a fully informed Commissioner may err to the sorrow of the revenues, but generally speaking, the cases present a strong combination of equities against the taxpayer, and few will seriously quarrel with their application of

> the doctrine of estoppel." (Mertens Law of Federal Income Taxation, Vol. 10-A, pp. 159-160.)

It is also claimed that section 9 of Executive Order No. 401-A, series of 1951 — requiring the approval of the Secretary of Finance and the Board of Tax Appeals in cases involving an original assessment of more than P5,000 - refers only to compromises and refunds of taxes, but not to total withdrawal of the assessment. The contention is without merit. A careful examination of the provisions of both sections 8 and 9 of Executive Order No. 401-A, series of 1951, reveals the procedure prescribed therein is intended as a check or control upon the powers of the Collector of Internal Revenue in respect to assessment and refunds of taxes. If it be conceded that a decision of the Collector of Internal Revenue on partial remission of taxes is subject to review by the Secretary of Finance and the Board of Tax Appeals, then with more reason should the power of the Collector to withdraw totally an assessment be subject to such review.

We find merit, however, in petitioner's contention that the Court of Tax Appeals erred in the imposition of the 50% fraud surcharge. As already shown in the early part of this decision, no element of fraud is present.

Pursuant to Section 183 of the National Internal Revenue Code the 50% surcharge should be added to the deficiency sales tax "in case a false or fraudulent return is willfully made." Although the sales made by SM are in substance by Yutivo this does not necessarily establish fraud nor the willful filing of a false or fraudulent return.

The case of Court Holding Co. vs. Commissioner of Internal Revenue (August 9, 1943, 2 T.C. 531, 541-549) is in point. The petitioner Court Holding Co. was a corporation consisting of only two stockholders, to wit: Minnie Miller and her husband Louis Miller. The only assets of this husband and wife corporation consisted of an apartment building which had been acquired for a very low price at a judicial sale. Louis Miller, the husband who directed the company's business, verbally agreed to sell this property to Abe C. Fine and Margaret Fine, husband and wife, for the sum of $54,000.00, payable in various installments. He received $1,000.00 as down payment. The sale of this property for the price mentioned would have netted the

corporation a handsome profit on which a large corporate income tax would have to be paid. On the afternoon of February 23, 1940, when the Millers and the Fines got together for the execution of the document of sale, the Millers announced that their attorney had called their attention to the large corporate tax which would have to be paid if the sale was made by the corporation itself. So instead of proceeding with the sale as planned, the Millers approved a resolution to declare a dividend to themselves "payable in the assets of the corporation, in complete liquidation and surrender of all the outstanding corporate stock." The building, which as above stated was the only property of the corporation, was then transferred to Mr. and Mrs. Miller who in turn sold it to Mr. and Mrs. Fine for exactly the same price and under the same terms as had been previously agreed upon between the corporation and the Fines.

The return filed by the Court Holding Co. with the respondent Commissioner of Internal Revenue reported no taxable gain as having been received from the sale of its assets. The Millers, of course, reported a long term capital gain on the exchange of their corporate stock with the corporate property. The commissioner of Internal Revenue contended that the liquidating dividend to stockholders had no purpose other than that of tax avoidance and that, therefore, the sale by the Millers to the Fines of the corporation's property was in substance a sale by the corporation itself, for which the corporation is subject to the taxable profit thereon. In requiring the corporation to pay the taxable profit on account of the sale, the Commissioner of Internal Revenue, imposed a surcharged of 25% for delinquency, plus an additional surcharge as fraud penalties.

The U.S. Court of Tax Appeals held that the sale by the Millers was for no other purpose than to avoid the tax and was, in substance, a sale by the Court Holding Co., and that, therefore, the said corporation should be liable for the assessed taxable profit thereon. The Court of Tax Appeals also sustained the Commissioner of Internal Revenue on the delinquency penalty of 25%. However, the Court of Tax Appeals disapproved the fraud penalties, holding that an attempt to void a tax does not necessarily establish fraud; that it is a settled principles that a taxpayer may diminish his tax liability by means which the law permits; that if the petitioner, the Court Holding Co., was of the opinion that the method by which it attempted to effect the sale in

question was legally sufficient to avoid the imposition of a tax upon it, its adoption of that method is not subject to censure; and that in taking a position with respect to a question of law, the substance of which was disclosed by the statement indorsed on its return, it may not be said that position was taken fraudulently. We quote in full the pertinent portion of the decision of the Court of Tax Appeals:

> "The respondent's answer alleges that the petitioner's failure to report as income the taxable profit on the real estate sale was fraudulent and with intent to evade the tax. The petitioner filed a reply denying fraud and averring that the loss reported on its return was correct to the best of its knowledge and belief. We think the respondent has not sustained the burden of proving a fraudulent intent. We have concluded that the sale of the petitioner's property was in substance a sale by the petitioner, and that the liquidating dividend to stockholders had no purpose other than that of tax avoidance. But the attempt to avoid tax does not necessarily establish fraud. It is a settled principle that a tax payer may diminish his liability by any means which the law permits. United States vs. Isham, 17 Wall. 496; Gregory vs. Helvering, supra; Chisholm vs. Commissioner, 79 Fed. (2d) 14. If the petitioner here was of the opinion that the method by which it attempted to effect the sale in question was legally sufficient to avoid the imposition of tax upon it, its adoption of that method is not subject to censure. Petitioner took a position with respect to a question of law, the substance of which was disclosed by the statement endorsed on its return. We can not say, under the record before us, that position was taken fraudulently. The determination of the fraud penalties is reversed."

When GM was the importer and Yutivo, the wholesaler, of the cars and trucks, the sales tax was paid only once and on the original sales by the former and neither the latter nor SM paid taxes on their subsequent sales. Yutivo might have, therefore, honestly believed that the payment by it, as importer, of the sales tax was enough as in the case of GM. Consequently, in filing its return on the basis of its sales to SM and not on those by the latter to the public, it cannot be said that Yutivo deliberately made a false return for the purpose of

defrauding the government of its revenues which will justify the imposition of the surcharge penalty.

We likewise find meritorious the contention that the Tax Court erred in computing the alleged deficiency sales tax on the selling price of SM without previously deducting therefrom the sales tax due thereon. The sales tax provisions (secs. 184-186, Tax Code) impose a tax on original sales measured by "gross selling price" or "gross value in money." These terms, as interpreted by the respondent Collector, do not include the amount of the sales tax, if invoiced separately. Thus General Circular No. 431 of the Bureau of Internal Revenue dated July 29, 1939, which implements sections 184-186 of the Tax Code provides:

> "'Gross selling price' or 'gross value in money' of the articles sold, bartered, exchanged, or transferred as the term is used in the aforecited sections (sections 184, 185 and 186) of the National Internal Revenue Code, is the total amount of money or its equivalent which the purchaser pays to the vendor to receive or get the goods. However, if a manufacturer producer, or importer, in fixing the gross selling price of an article sold by him has included an amount intended to cover the sales tax in the gross selling price of the articles, the sales tax shall be based on the gross selling price less the amount intended to cover the tax, if the same is billed to the purchaser as a separate item."

General Circular No. 440 of the same Bureau reads:

> "Amount intended to cover the tax must be billed as a separate item so as not to pay a tax on the tax. — On sales made after the third quarter of 1939, the amount intended to cover the sales tax must be billed to the purchaser as separate items in the invoices in order that the reduction thereof from the gross selling price may be allowed in the computation of the merchants' percentage tax on the sales. Unless billed to the purchaser as a separate item in the invoice, the amount intended to cover the sales tax shall be considered as part of the gross selling price of the articles sold, and deductions thereof will not be allowed." (Cited in Dalupan, Nat. Int. Rev. Code, Annoted, Vol. II, pp. 52-53.)

Yutivo complied with the above circulars on its sales to SM, and as separately billed, the sales taxes did not form part of the "gross selling price" as the measure of the tax. Since Yutivo has previously billed the sales tax separately in its sales invoices to SM. General Circulars Nos. 431 and 440 should be deemed to have been complied with. Respondent Collector's method of computation, as opined by Judge Nable in the decision complained of —

> "Is unfair, because (it is) practically imposing a tax on a tax already paid. Besides, the adoption of the procedure would in certain cases elevate the bracket under which the tax is based. The late payment is already penalized, thru the imposition of surcharges; by adopting the theory of the Collector, we will be creating an additional penalty not contemplated by law."

If the taxes based on the sales of SM are computed in accordance with Gen. Circulars Nos. 431 and 440, the total deficiency sales taxes, exclusive of the 25% and 50% surcharges for the late payment and for fraud, would amount only to P820,549.91 as shown in the following computation:

Rates of Sales Tax	Gross Sales of Vehicles Exclusive of Sales Tax	Sales Taxes Due and Computed under Gen. Cir. Nos. 431 & 400	Total Gross Selling Price Charged to the Public
5%	P11,912,219.57	P595,610.98	P12,507,830.55
7%	909,559.50	63,669.16	973,228.66
10%	2,618,695.28	261,896.53	2,880,564.81
15%	3,602,397.65	540,359.65	4,142,757.30
20%	267,150.50	53,430.10	320,580.60
30%	837,146.97	251,144.09	1,088,291.06
50%	74,244.30	37,122.16	111,366.46
75%	8,000.00	6,000.00	14,000.00
TOTAL	P20,220,413.77	P1,809,205.67	P22,038,619.44
Less Taxes Paid by Yutivo:		988,655.76	
Deficiency tax still due:		P820,549.91	

This is the exact amount which, according to Presiding Judge Nable of the Court of Tax Appeals, Yutivo would pay, exclusive of the surcharges.

Petitioner finally contends that the Court of Tax Appeals erred or acted in excess of its jurisdiction in promulgating judgment for the affirmance of the decision of respondent Collector by less than the statutory requirement of at least two votes of its judges. Anent this contention, section 2 of Republic Act No. 1125, creating the Court of Tax Appeals, provides that "Any two judges of the Court of Tax Appeals shall constitute a quorum, and the concurrence of two judges shall be necessary to promulgate any decision thereof." It is on record that the present case was heard by two judges of the lower court. And while Judge Nable expressed his opinion on the issue of whether or not the amount of the sales tax should be excluded from the gross selling price in computing the deficiency sales tax due from the petitioner, the opinion, apparently, is merely an expression of his general or "private sentiment" on the particular issue, for he concurred in the dispositive part of the decision. At any rate, assuming that there is no valid decision for lack or concurrence of two judges, the case was submitted for decision to the court below on March 28, 1957 and under section 13 of Republic Act 1125, cases brought before said court shall be decided within 30 days after submission thereof. "If no decision is rendered by the Court within thirty days from the date a case is submitted for decision, the party adversely affected by said ruling, order or decision may file with said Court a notice of his intention to appeal to the Supreme Court, and if no decision has as yet been rendered by the Court, the aggrieved party may file directly with the Supreme Court an appeal from said ruling, order or decision, notwithstanding the foregoing provisions of this section." The case having been brought before us on appeal, the question raised by petitioner has become purely academic.

IN VIEW OF THE FOREGOING, the Decision of the Court of Tax Appeals under review is hereby modified in that petitioner shall be ordered to pay to respondent the sum of P820,549.91, plus 25% surcharge thereon for late payment. So ordered without costs.

Bengzon, Labrador, Concepcion, Reyes, Barrera and Paredes, *JJ.*, concur.
Padilla, *J.*, took no part.

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