

ANTONIO PORTA FERRER, PETITIONER, VS. (COLLECTOR) NOW COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

G.R. No. L-16021. August 31, 1962

Ponente: REGALA, J.

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REGALA, J.:

This is a petition to review the decision of the Court of Tax Appeals, denying petitioner's claim for refund against respondent.

The petitioner was the sole proprietor of the "La Suiza Bakery" on R. Hidalgo, Quiapo, Manila. He owned this bakery from October 16, 1951 up to September 15, 1955, when he sold the same to Juan Pons for the sum of P100,000.00. The assets of the bakery consisted of accounts receivable, raw materials, wrapping supplies, firewood, unexpired insurance, good-will, machinery and equipment, and furniture and fixtures, with a total book value of P74,321.91. In selling the bakery, petitioner spent P5,000.00 for broker's commission and P1,000.00 for accountant's fee, or a total of P6,000.00.

After deducting the total book value of the assets and the incidental expenses from the gross selling price, petitioner filed on February 14, 1956 his income tax return, showing a net profit of P19,678.09 as having been realized from the sale of the bakery. On the basis of this amount, he paid P2,439.00 as income tax on February 15, 1956.

Petitioner later requested the respondent to refund to him the sum of P2,030.00, claiming that the bakery was a capital asset which he had held for more than twelve months so that the profit from its sale was a long term capital gain, and therefore, only 50 per cent of it was taxable under the National Internal Revenue Code. When no action was taken by respondent on his request, petitioner filed a petition for refund in the Court of Tax Appeals.

The Tax Court held that the sale of the bakery did not constitute a sale of a single asset but of individual assets, some of which were capital assets while others were ordinary assets. But since petitioner failed to show what portion of the selling price of the bakery was fairly attributable to each asset, the Tax Court held that it could not ascertain the capital and/or ordinary gains taxes properly payable upon the sale of the business. For this reason, it denied petitioner's claim for refund.

In his first assignment of error, the petitioner contends that the Tax Court erred in holding that he had made a profit of P19,678.09 from the sale of the bakery, upon which amount the income tax was based. The petitioner now claims that the business had liabilities amounting to P19,183.01 which, if deducted along with the book value of the assets and the incidental expenses from the selling price of P100,000.00, would show a profit of P495.05 only.

We agree with the contention of the respondent that the matter of computation of profit cannot be taken up in this appeal because the same was neither raised in the Tax Court nor made within the issues of the pleadings of the parties. (Sec. 19, Rule 48, Rules of Court.) There, the only issues were whether the Tax Court had jurisdiction

over this case and whether or not the sale of the bakery was a sale of capital asset or of individual assets comprising the business. The rule is well settled that no question will be considered by the appellate court which has not been raised in the court below. When a party deliberately adopts a certain theory, and the case is tried and decided upon the theory in the court below, he will not be permitted to change his theory on appeal, because to permit him to do so would be unfair to the adverse party. (*Northern Motors Inc. vs. Prince Line, et al.*, 107 Phil., 258, citing *Toribio vs. Decasa*, 55 Phil. 461; *San Agustin vs. Barrios*, 68 Phil. 475; *Molina vs. Somes*, 24 Phil. 49; and *Agoncillo and Marino vs. Javier*, 38 Phil. 424).

In his second assignment of error, petitioner contends that the sale of the business known as "La Suiza Bakery" was a sale not of the individual assets comprising the same but of an entire, single asset which, under the law, is a capital asset.

Section 34 of the Tax Code provides in part:

"Capital gains and losses.—(a) Definitions.—

As used in this Title—

(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, stock 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 used in the trade or business, of a character which is subject to allowance for depreciation provided in subsection (f) of section thirty; or real property used in the trade or business of the taxpayer.

* * *

(b) Percentage taken into account.—In the case of a taxpayer, other than a corporation, only the following percentage of the gain or loss recognized upon the sale shall be taken into account in computing net capital gain, net capital loss, and net income.

(1) One hundred per centum if the capital asset has been held for not more than twelve months;

(2) Fifty per centum, if the capital asset; has been held for more than twelve months.

Parenthetically, it may be noted that tax rates are graduated upwards as the total amount of income increases. But capital assets are generally held for a period in excess of a year. When held for more than a year, the profit or loss realized is reported for tax purposes only in the year that the asset was sold or exchanged even though the increment might have developed over several years or was the result of years of effort. Since the gain is taxed all in one year, a higher rate of tax would necessarily be paid than if a part of the gain were reported each year the asset was held. In an attempt to compensate for this, only a percentage of the gain on such sales is required to be included; similarly, only a limited amount of any loss can be deducted in the year in which realized. (Alexander, *Federal Tax Handbook* 411, 1959 ed.)

The issue then is whether or not the sale of the La Suiza Bakery was a sale of a capital asset so that the profits derived from the sale is taxable up to 50 per cent only, considering that petitioner owned it for more than twelve months, or whether the business is to be comminuted into its component parts, each part to be tested against the definition of a capital asset in the Tax Code.

We find that Section 34(a) (1) of our Tax Code is patterned after Section 117 (a) (1) of the U.S. Internal Revenue Code (26 USCA, Sec. 117 [a] [1]). In interpreting this latter provision, the United States Circuit Court of Appeals held in the leading case of *Williams vs. McGowan*, 152 F2d 570, 162 ALR 1036 thus—

"* * * We have to decide only whether upon the sale of a going business it is to be comminuted into its fragments, and these are to be separately matched against the definition in Section 117 (a) (1), or whether the whole business is to be treated as if it were a single piece of property.

"Our law has been sparing in the creation of juristic entities; it has never, for example, taken over the Roman 'universitas facti', and indeed for many years it fumbled uncertainly with the concept of a corporation. One might have supposed that partnership would have been an especially promising field in which to raise up an entity, particularly since merchants have always kept their accounts upon that basis. Yet there too our law resisted at the price of great and continuing confusion; and even when it might be thought that a statute admitted, if it did not demand, recognition of the firm as an entity, the old concepts prevailed. *Francis vs. McNeal*, 228 US 695, 33 S Ct 701, 57 L. ed. 1029, LRA 1915 E 706. And so, even though we might agree that under the influence of the Uniform Partnership Act a partner's interest in the firm should be treated as indivisible, and for that reason a 'capital asset' within Section 117 (a) (1), we should be chary about extending further so exotic a jural concept. Be that as it may, in this instance the section itself furnishes the answer. It starts in the broadest way by declaring that all 'property' is 'capital asset', and then makes three exceptions. The first is 'stock in trade . . . or other property of a kind which would properly be included in the inventory'; next comes 'property held . . . primarily for sale to customers'; and finally property 'used in the trade or business of a character which is subject to . . . allowance for depreciation.' In the face of this language, although it may be true that a 'stock in trade,' taken by itself should be treated as a 'universitas facti' by no possibility can a whole business be so treated; and the same is true as to any property within the other exceptions. Congress plainly did mean to communicate the elements of a business; plainly it did not regard the whole as 'capital assets.' "

This ruling was cited with approval by the United States Supreme Court in *Watson vs. Commissioner*, 345 U.S. 544, 97 L ed 1232.

In line with this ruling, We hold that the sale of the "La Suiza Bakery" was a sale not of a single asset but of individual assets that made up the business. And since petitioner failed to point out what part of the price he had received could be fairly attributed to each asset, the Tax Court correctly denied his claim.

While agreeing with the Tax Court that the good-will of the business is a capital asset, petitioner nevertheless contends that there is neither factual nor legal basis for concluding that the good-will of the bakery which he had acquired for P10,000.00 was sold at the same price. The petitioner states that he sold the assets of the bakery at their stated book value and that whatever amount of the selling price exceeded the total book value of the assets minus the good-will should be attributed to the latter alone. In short, it is urged that whatever profit was made from the sale came solely from the bakery's good-will which the Tax Court held to be a capital asset, only 50 per cent of which was taxable.

The Tax Court's finding that the petitioner acquired and sold the good-will of the bakery for the same amount is supported by evidence (Exhibit "4" of respondent) which has not been rebutted. Indeed, it is inconceivable how a business, which was heavily indebted as petitioner contends, can ever possess a good-will that can command so high a price.

For this reason, We believe that any profit which the petitioner may have gained in the sale must have come from the sale of the other assets of the business which must have been sold for amounts other than their stated book value. As the Tax Court held, in order to ascertain the capital and/or ordinary gains taxes properly payable on the sale of a business, including its tangible assets, it is incumbent upon the taxpayer to show not only the cost basis of each asset, but also what portion of the selling price is fairly attributable to each asset. (*Cohen vs. Kelm*, 119 F supp. 376.)

Wherefore, the decision of the Court of Tax Appeals is hereby affirmed, with costs against the petitioner.

Bengzon, C. J., Bautista Angelo, Labrador, Paredes, Dizon, and Makalintal, JJ., concur.
Concepcion and Barrera, JJ., concur in the result.

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