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This case should be returned to the Court of Appeals because the appeal poses a basic question of fact: did Antiquera receive a copy of the order of the municipal court dated September 11, 1967 only on October 5, 1967 and not on October 3, 1967? A resolution of this question of fact will also resolve the issue of whether Antiquera's appeal from the municipal court to the Court of First Instance was timely filed or was time-barred.

ACCORDINGLY, this case is hereby ordered remanded to the Court of Appeals for action and decision in accordance with law. No costs.

Makalintal, C.J., Teehankee, Makasiar, Esguerra, and *Muñoz Palma, JJ.,* concur.

FIRST DIVISION

[G.R. No. L-24248. July 31, 1974]

ANTONIO TUASON, JR., *petitioner, vs.* **JOSE B. LINGAD, as Commissioner of Internal Revenue,** *respondent.*

SYLLABUS

1. **TAXATION; TAXABLE INCOME; CAPITAL ASSETS AND CAPITAL GAINS DEFINED.**— The term "capital assets" includes 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 ordinary 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 exchanges any of the properties above enumerated, any gain or loss relative thereto is an ordinary gain or an ordinary loss; the gain or loss from the sale or exchange of all other properties of the taxpayer is a capital gain or a capital loss.

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2. **ID.; ID.; ID.; LONG TERM CAPITAL GAIN PARTIALLY EXEMPT FROM TAXATION.**— Under Section 34(b) (2) of the Tax Code, if a gain is realized by a taxpayer (other than a corporation) from the sale or exchange of capital assets held for more than twelve months, only 50% of the net capital gain shall be taken into account in computing the net income.

3. **ID.; ID.; ID.; ID.; PARTIAL EXEMPTION STRICTLY CONSTRUED AGAINST TAXPAYER.**— The Tax Code's provision on so-called long term capital gains constitutes a statutes of partial exemption, and must be construed in *strictissimi juris* against the taxpayer who must bring himself clearly within the terms of the provision, otherwise, all fair doubts will be resolved against him.

4. **ID.; ID.; NON-CAPITAL ASSETS, SALES OF; INDICATIONS.**— When a heir-taxpayer continues to receive and enjoy rentals from lots which he inherited, and when he is known to have leased some other property and thereby derived income therefrom, for which income he had to pay real estate dealer's tax, the sales of the inherited lots forming part of rental business cannot be characterized as other than sales of non-capital assets.

5. **ID.; ID.; REAL ESTATE BUSINESS; CIRCUMSTANCES SHOWING ENGAGEMENT THEREIN.**— Where parcels of land inherited by taxpayer are big enough to be transformed into a subdivision as, in fact, they have been subdivided into small lots, improved to make them saleable, and then sold on installment basis from which considerable income has been derived; and when said taxpayer has engaged the services of an attorney-in-fact, indicating an owner-real estate broker relationship between them, and income tax returns itself shows that taxpayer is no stranger to the real estate business, the conclusion is that he is engaged in real estate business.

6. **ID.; DEFICIENCY INCOME TAX, PAYMENT OF; NO SURCHARGE IF TAXPAYER WAS IN GOOD FAITH.**— A taxpayer required to pay deficiency income tax should not be made to pay the surcharge and monthly interest required in Sec. 51 (3) of the Internal Revenue Code if the deficiency was brought about by his reliance, in good faith, upon the opinions of officials of the Bureau of Internal Revenue.

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APPEARANCES OF COUNSEL

Araneta, Mendoza & Papa for petitioner.

Solicitor General Arturo A. Alafriz, Assistant Solicitor General Felicisimo R. Rosete and *Special Attorney Antonio H. Garces* for respondent.

DECISION

RUIZ CASTRO, *J.*:

In this petition for review of the decision of the Court of Tax Appeals in CTA Case 1398, the petitioner Antonio Tuason, Jr. (hereinafter referred to as the petitioner) assails the Tax Court's conclusion that the gains he realized from the sale of residential lots (inherited from his mother) were ordinary gains and not gains from the sale of capital assets under Section 34(1) of the National Internal Revenue Code.

The essential facts are not in dispute.

In 1948 the petitioner inherited from his mother several tracts of land, among which were two contiguous parcels situated on Pureza and Sta. Mesa streets in Manila, with an area of 318 and 67,684 square meters, respectively.

When the petitioner's mother was yet alive she had these two parcels subdivided into twenty-nine lots. Twenty-eight were allocated to their then occupants who had lease contracts with the petitioner's predecessor at various times from 1900 to 1903, which contracts expired on December 31, 1953. The 29th lot (hereinafter referred to as Lot 29), with an area of 48,000 square meters, more or less, was not leased to any person. It needed filling because of its very low elevation, and was planted to *kangkong* and other crops.

After the petitioner took possession of the mentioned parcels in 1950, he instructed his attorney-in-fact, J. Antonio Araneta, to sell them.

There was no difficulty encountered in selling the 28 small lots as their respective occupants bought them on a 10-year installment

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basis. Lot 29 could not however be sold immediately due to its low elevation.

Sometime in 1952 the petitioner's attorney-in-fact had Lot 29 filled, then subdivided into small lots and paved with macadam roads. The small lots were then sold over the years on a uniform 10-year annual amortization basis. J. Antonio Araneta, the petitioner's attorney-in-fact, did not employ any broker nor did he put up advertisements in the matter of the sale thereof.

In 1953 and 1954 the petitioner reported his income from the sale of the small lots (P102,050.79 and P103,468.56, respectively) as long-term capital gains. On May 17, 1957 the Collector of Internal Revenue upheld the petitioner's treatment of his gains from the said sale of small lots, against a contrary ruling of a revenue examiner.

In his 1957 tax return the petitioner as before treated his income from the sale of the small lots (P119,072.18) as capital gains and included only 1/2 thereof as taxable income. In this return, the petitioner deducted the real estate dealer's tax he paid for 1957. It was explained, however, that the payment of the dealer's tax was on account of rentals received from the mentioned 28 lots and other properties of the petitioner. On the basis of the 1957 opinion of the Collector of Internal Revenue, the revenue examiner approved the petitioner's treatment of his income from the sale of the lots in question. In a memorandum dated July 16, 1962 to the Commissioner of Internal Revenue, the chief of the BIR Assessment Department advanced the same opinion, which was concurred in by the Commissioner of Internal Revenue.

On January 9, 1963, however, the Commissioner reversed himself and considered the petitioner's profits from the sales of the mentioned lots as ordinary gains. On January 28, 1963 the petitioner received a letter from the Bureau of Internal Revenue advising him to pay deficiency income tax for 1957, as follows:

Net income per orig. investigation.....	P211,095.36
Add:	
56% of realized profit on sale of lots which was deducted in the	

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income tax return and allowed in the original report of examination	59,539.09
Net income per final investigation	P270,824.70
Less:	
Personal exemption	1,800.00
Amount subject to tax	269,024.70
Tax due thereon	P98,551.00
Less: Amount already assessed	72,199.00
Balance	P26,352.00
Add:	
1/2% monthly interest from 6-20-59 to 6-29-62	4,742.36
TOTAL AMOUNT DUE AND COLLECTIBLE	P31,095.36

The petitioner's motion for reconsideration of the foregoing deficiency assessment was denied, and so he went up to the Court of Tax Appeals, which however rejected his posture in a decision dated January 16, 1965, and ordered him, in addition, to pay a 5% surcharge and 1% monthly interest "pursuant to Sec. 51(e) of the Revenue Code."

Hence, the present petition.

The petitioner assails the correctness of the opinion below that as he was engaged in the business of leasing the lots he inherited from his mother as well other real properties, his subsequent sales of the mentioned lots cannot be recognized as sales of capital assets but of "real property used in trade or business of the taxpayer." The petitioner argues that (1) he is not the one who leased the lots in question; (2) the lots were residential, not commercial lots; and (3) the leases on the 28 small lots were to last until 1953, before which date he was powerless to eject the lessees therefrom.

The basic issue thus raised is whether the properties in question which the petitioner had inherited and subsequently sold in small lots to other persons should be regarded as capital assets.

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1. The National Internal Revenue Code (C.A. 466, as amended) defines the term "capital assets" as follows:

"(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 the allowance for depreciation provided in subsection (f) of section thirty; or real property used in the trade or business of the taxpayer."

As thus defined by law, the term "capital assets" includes 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 ordinary 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.[1] If the taxpayer sells or exchanges any of the properties above-enumerated, any gain or loss relative thereto is an ordinary gain or an ordinary loss; the gain or loss from the sale or exchange of all other properties of the taxpayer is a capital gain or a capital loss.[2]

Under Section 34(b) (2) of the Tax Code, if a gain is realized by a taxpayer (other than a corporation) from the sale or exchange of capital assets held for more than twelve months, only 50% of the net capital gain shall be taken into account in computing the net income.

The Tax Code's provision on so-called long-term capital gains constitutes a statute of partial exemption. In view of the familiar and settled rule that tax exemptions are construed *in strictissimi*

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[1] Jose P. Alejandro, *Law on Taxation.* (2nd edition), p. 228.

[2] *Ibid.*

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juris against the taxpayer and liberally in favor of the taxing authority,[3] the field of application of the term "capital assets" is necessarily narrow, while its exclusions must be interpreted broadly.[4] Consequently, it is the taxpayer's burden to bring himself clearly and squarely within the terms of a tax-exempting statutory provision, otherwise, all fair doubts will be resolved against him.[5] It bears emphasis nonetheless that in the determination of whether a piece of property is a capital asset or an ordinary asset, a careful examination and weighing of all circumstances revealed in each case must be made.[6]

In the case at bar, after a thoroughgoing study of all the circumstances relevant to the resolution of the issue raised, this Court is of the view, and so holds, that the petitioner's thesis is bereft of merit.

When the petitioner obtained by inheritance the parcels in question, transferred to him was not merely the duty to respect

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[3] Esso Standard Eastern, Inc. *vs.* Acting Commissioner of Customs, 18 SCRA 488; Philippine Acetylene Co., Inc. *vs.* Commissioner of Internal Revenue, 20 SCRA 1056; Philippine Guaranty Co., Inc. *vs.* Commissioner of Internal Revenue, 15 SCRA 1 citing La Carlota Sugar Central *vs.* Jimenez, L-12436, May 31, 1961. See also Cooley on Taxation, 4th edition, Vol. 2, pp. 1403-1404.

[4] See Corn Products Refining Co. *vs.* Commissioner, 350 U.S. 46, 100 L. Ed. 29, 76 S. Ct. 20.

[5] See Sloane *vs.* Commissioner, 188 F (2d) 254 (CA-6, 1951).

[6] See Klarkowski, TCM 1965-328. Aff'd. 385 F (2d) 398 (CA-7, 1967) which held that in determining the correct boundary between these two types of assets the following must be considered: "(1) the purpose for which the property was initially acquired; (2) the purpose for which the property was subsequently held; (3) the extent to which improvements, if any, were made to the property by the taxpayer; (4) the frequency, number, and continuity of sales; (5) the extent and nature of the transactions involved; (6) the ordinary business of the taxpayer; (7) the extent of advertising, promotion, or other activities used in soliciting buyers for the sale of the property; (8) the listing of property with brokers; and (9) the purpose for which the property was held at the time of sale."

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the terms of any contract thereon, but as well the correlative right to receive and enjoy the fruits of the business and property which the decedent had established and maintained.[7] Moreover, the record discloses that the petitioner owned other real properties which he was putting out for rent, from which he periodically derived a substantial income, and for which he had to pay the real estate dealer's tax (which he used to deduct from his gross income).[8] In fact, as far back as 1957 the petitioner was receiving rental payments from the mentioned 28 small lots, even if the leases executed by his deceased mother thereon expired in 1953. Under the circumstances, the petitioner's sales of the several lots forming part of his rental business cannot be characterized as other than sales of non-capital assets.

The sales concluded on installment basis of the subdivided lots comprising Lot 29 do not deserve a different characterization for tax purposes. The following circumstances in combination show unequivocally that the petitioner was, at the time material to this case, engaged in the real estate business: (1) the parcels of land involved have in totality a substantially large area, nearly seven (7) hectares, big enough to be transformed into a subdivision, and in the case at bar, the said properties are located in the heart of Metropolitan Manila; (2) they were subdivided into small lots and then sold on installment basis (this manner of selling residential

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[7] See Article 781, New Civil Code. "The inheritance of a person includes not only the property and the transmissible rights and obligations existing at the time of his death, but also those which have accrued thereto since the opening of the succession."

[8] Section 182(3) (aa) of the National Internal Revenue Code prescribes an annual fixed tax on real estate dealers. Section 194(s) defines a "real estate dealer" as including "any person engaged in the business of buying, selling, exchanging, leasing, or renting property as principal and holding himself out as a full or part-time dealer in real estate or as an owner of rental property or properties rented or offered to rent for an aggregate amount of four thousand pesos or more a year. Any person shall be considered as engaged in business as real estate dealer by the mere fact that he is the owner or sublessor of property rented or offered to rent for an aggregate amount of four thousand pesos or more a year. x x x"

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lots is one of the basic earmarks of a real estate business); (3) comparatively valuable improvements were introduced in the subdivided lots for the unmistakable purpose of not simply liquidating the estate but of making the lots more saleable to the general public; (4) the employment of J. Antonio Araneta, the petitioner's attorney-in-fact, for the purpose of developing, managing, administering and selling the lots in question indicates the existence of owner-realty broker relationship; (5) the sales were made with frequency and continuity, and from these the petitioner consequently received substantial income periodically; (6) the annual sales volume of the petitioner from the said lots was considerable, *e.g.*, P102,050.79 in 1953; P103,468.56 in 1954; and P119,072.18 in 1957; and (7) the petitioner, by his own tax returns, was not a person who can be indubitably adjudged as a stranger to the real estate business. Under the circumstances, this Court finds no error in the holding below that the income of the petitioner from the sales of the lots in question should be considered as ordinary income.

2. This Court notes, however, that in ordering the petitioner to pay the deficiency income tax, the Tax Court also required him to pay a 5% surcharge plus 1% monthly interest. In our opinion this additional requirement should be eliminated because the petitioner relied in good faith upon opinions rendered by no less than the highest officials of the Bureau of Internal Revenue, including the Commissioner himself. The following ruling in *Connell Bros. Co. (Phil.) vs. Collector of Internal Revenue*[9] applies with reason to the case at bar:

"We do not think Section 183(a) of the National Internal Revenue Code is applicable. The same imposes the penalty of 25% when the percentage tax is not paid on time, and contemplates a case where the liability for the tax is undisputed or indisputable. In the present case the taxes were paid, the delay being with reference to the deficiency, owing to a controversy as to the proper interpretation of Circulars Nos. 431 and 440 of the office of respondent-appellee. The controversy was generated in good faith, since that office itself appears to have formerly taken the

[9] 10 SCRA 470; see also Republic *vs.* Heras, 32 SCRA 507.

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view that the inclusion of the words 'tax included' on invoices issued by the taxpayer was sufficient compliance with the requirements of said circulars."[10]

ACCORDINGLY, the judgment of the Court of Tax Appeals is affirmed, except the portion thereof that imposes 5% surcharge and 1% monthly interest, which is hereby set aside. No costs.

Makalintal, C.J., Makasiar, Esguerra, and *Muñoz Palma, JJ.,* concur.

Teehankee, J., took no part.

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[10] R.A. 6110 (approved on August 9, 1969) which substantially amended the National Internal Revenue Code seems to support the principle of good faith. Sec. 338-A thus provides:

"*Non-retroactivity of rulings.* — Any revocation, modification, or reversal of any of the rules and regulations promulgated in accordance with the preceding section or any of the rulings or circulars promulgated by the Commissioner of Internal Revenue shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayers, except in the following cases; (a) where the taxpayer deliberately mis-states or omits material facts from his return or in any document required of him by the Bureau of Internal Revenue; (b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or (c) where the taxpayer acted in bad faith."