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Considering, however, the fact that Rodulfo Sabio has been in detention since 1965 and the recommendation of the trial judge that the death penalty imposed on him be commuted to life imprisonment on account of his youth, my vote as to the appropriate penalty is *reclusion perpetua.*

FIRST DIVISION

[G.R. No. L-26911. January 27, 1981]

ATLAS CONSOLIDATED MINING & DEVELOPMENT CORPORATION, petitioner, *vs.* COMMISSIONER OF INTERNAL REVENUE, respondent.

[G.R. No. L-26924. January 27, 1981]

COMMISSIONER OF INTERNAL REVENUE, petitioner *vs.* ATLAS CONSOLIDATED MINING & DEVELOPMENT CORPORATION and COURT OF TAX APPEALS, respondents.

SYNOPSIS

In an appeal, where Atlas Consolidated Mining and Development Corporation assailed the disallowance of the transfer agent's fee; stockholder's relation fee; U.S. stock listing expenses; suit expenses and provision for contingencies, as deductible expenses from its gross income which resulted in the deficiency income tax assessments made by the Commissioner of Internal Revenue against Atlas, the Court of Tax Appeals allowed said disallowed items except the stockholders relation service fee and suit expenses. Both parties appealed by filing two separate petitions for review, one filed by Atlas in L-26911 as to the portion disallowed and the other by the Commissioner in L-26924, not only raising for the first time lack of proof of payment of the expense deducted but questioning as well the allowance of said deductible expenses.

The Supreme Court ruled: in L-26911, that the stockholder's relation service fee was in effect spent as a capital expenditure and should be disallowed and in L-26924, that: (a) the Commissioner of Internal Revenue cannot raise for the first time on appeal the fact of payment of expense deducted; (b) the listing fee which was paid annually is deductible as

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an ordinary and necessary business expense; (c) the findings of the Court of Tax Appeals on the "provision for contingencies" are factual in nature and in the absence of grave abuse of discretion should not be disturbed on appeal; and (d) litigation expenses in defense of title of property are capital in nature and not deductible.

Judgment modified as to taxable amount.

SYLLABUS

1. ADMINISTRATIVE LAW; NATIONAL INTERNAL REVENUE CODE, INCOME TAX; ALLOWABLE DEDUCTIONS FROM GROSS INCOME.— The law allowing expenses as deduction from gross income for purposes of the income tax is Section 30(a) (1) of the National Internal Revenue Code which allows a deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

2. ID.; ID.; ID.; ID.; STATUTORY TEST OF DEDUCTIBILITY.— The statutory test of deductibility imposes three conditions, namely: (1) the expense must be ordinary and necessary; (2) it must be paid or incurred within the taxable year; and (3) it must be paid or incurred in carrying on a trade or business.

3. ID.; ID,. ID,. ID,. ORDINARY AND NECESSARY EXPENSES; GUIDING PRINCIPLES FOR CONSIDERATION.— This Court has never attempted to define with precision the terms "ordinary and necessary." There are however, certain guiding principles worthy of serious consideration in the proper adjudication of conflicting claims. Ordinarily, an expense will be considered "necessary" where the expenditure is appropriate and helpful in the development of the taxpayer's business. (Martens, Law of Federal, Income Taxation, Volume IV, p. 315) It is "ordinary" when it connotes a payment which is normal in relation to the business of the taxpayer and the surrounding circumstances. (p. 316, *Ibid)* The term "ordinary"does not require that the payments be habitual or normal in the sense that the same taxpayer will have to make them often; the payment may be unique or non-recurring to the particular taxpayer affected. (*Ibid.*)

4. ID.; ID.; ID.; ID.; NO HARD AND FAST RULE IN THE DETERMINATION OF.— There is no hard and fast rule on the right to a deduction which depends in each case on the particular facts and the relation of the payment to the type of business in which the taxpayer is engaged. The intention of the tax-payer often may be

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the controlling fact in making the determination. (Eaton *vs.* Comm.,81 F. (2d) 332 [CCA 9th, 1936]) Assuming that the expenditure is ordinary and necessary in the operation of the taxpayer's business, the answer to the question as to whether the expenditure is an allowable deduction as a business expense must be determined from the nature of the expenditure itself, which in turns depends on the extent and permanency of the work accomplished by the expenditure. (Duesenberg, Inc. of Del., 31 BTA 922, aff'd 84 F. (2d) 921 [CCA 7th, 1936] cited in Mertens, Law of Federal Income Taxation, Vol. IV, p. 339; Illinois Central Railroad Co. *vs.* Interstate Commerce Commission, 206 S. Court, 700 [1907], cited in Simons & Hammond, 1 BTA 803. Accordingly, as found by the Court of Tax Appeals, the stockholders relation service fee, which was in effect spent for the acquisition of additional capital, ergo, a capital expenditure, is not deductible from Atlas gross income in 1958 because expenses relating to recapitalization and reorganization of the corporation (*Missouri Kansas Pipe Line vs. Commissioner of Internal Revenue,* 148 F. [2d], 460; *Skenandos Rayon Corp. vs. Commissioner of Internal Revenue,* 122 F. [2d] 268, Cert. denied 314 U.S. 6961), the cost of obtaining stock subscription (*Simons Co.,* 8 BTA 631), promotion expenses (*Beneficial Industrial Loan Corp. vs. Handy,* 92 F. [2d] 74), and commission of fees paid for the sale of stock reorganization (*Protective Finance Corp.,* 23 BTA 308) are capital expenditures.

5. ID.; ID.; ID.; ID.; EXPENSE INCURRED TO CREATE FAVORABLE PUBLIC IMAGE; NOT DEDUCTIBLE AS BUSINESS EXPENSE.— An expense incurred to create a favorable image of the corporation in order to gain or maintain the public's and its stockholder's patronage, does not make it deductible as business expense. As held in the case of *Welch vs. Helvering,* (290 U.S. 111, 78 L Ed. 212, 54S Ct. 8 [1933]) efforts to establish reputation are akin to acquisition of capital assets and, therefore, expenses related thereto are not business expense but capital expenditures.

6. ID.; ID.; ID.; ID.; STOCK LISTING FEE; WHEN DEDUCTIBLE.— A listing fee is an ordinary and necessary business expense for the privilege of having its stock listed. In Dome Mines, Ltd. *vs.* Commissioner of Internal Revenue (20 BTA 377) the stock listing fee was disallowed as a deduction not only because the same was paid only once, and the benefit acquired thereby continued indefinitely, whereas, in the case of Chesapeake Corporation of Virginia *vs.* Com-

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missioner of Internal Revenue (17 T.C. 668), fee paid to the stock exchange was annual and recurring.

7. ID.; ID.; ID.; ID.; LITIGATION EXPENSES IN DEFENSE OF TITLE, NOT DEDUCTIBLE; CASE AT BAR.— In line with the decision of the U.S. Tax Court in the case of Safety Tube Corporation *vs.* Commissioner of Internal Revenue (8 T.C. 762-763, April 2, 1947 [citing Bowers *vs.* Lumpkin, 104 Fed. (2d) 927; Certiorari denied, 322 U.S. 88; Jones Estate *vs.* Commissioner, 127 Fed. (2d) 231; Brauner *vs.* Burnet, 63 Fed. (2d) 129; Murphy Oil Co. *vs.* Burnet, 55 Fed. (2d) 17, affirmed in another point, 287 U.S. 299], it is well settled that litigation expenses incurred in defense or protection of title are capital in nature and not deductible, likewise, it was ruled by the U.S. Tax Court that expenditures in defense of title of property constitute a part of the cost of the property, and are not deductible as expense. (Coughlin *vs.* Commissioner of Internal Revenue, 2 T.C. 422) Hence, there is no question that, as held by the Court of Tax Appeals, the litigation expenses under consideration were incurred in defense of Atlas title to its mining properties.

8. REMEDIAL LAW; APPEAL; COURT OF TAX APPEALS; FACT OF PAYMENT OF DEDUCTIBLE EXPENSES CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL; CASE AT BAR.— The Commissioner of Internal Revenue on appeal cannot be allowed to adopt a theory distinct and different from that he has previously pursued, as shown by the BIR records and the answer to the amended petition for review. (Agoncillo *vs.* Javier, 38 Phil. 424; American Express *vs.* Natividad, 46 Phil. 207; Balceta, et al. *vs.* Espe, et al., CA-G.R. No. 16115-R, April 5, 1957; Commissioner of Customs *vs.* Valencia, 100 Phil. 172-173, October 31, 1956) As this Court said in the case of Commissioner of Customs *vs.* Valencia (100 Phil. 172), such change in nature of the case may not be made on appeal, specially when the purpose of the latter is to seek a review of the action taken by an administrative body, forming part of a coordinate branch of the Government, such as the Executive Department. Under all the attendant circumstances in the case at bar, substantial justice would be served if the Commissioner be held as precluded from now attempting to raise an issue to disallow deduction of the item in question at this stage. Failure to assert a question within a reasonable time warrants a presumption that the party entitled to assert it either has abandoned or declined to assert it.

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9. ID.; ID.; ID.; FINDINGS OF FACT, NOT SUBJECT TO REVIEW IN THE ABSENCE OF GROSS ERROR OR ABUSE; CASE AT BAR.— The findings of facts by the Court of Tax Appeals will not be reviewed by the Supreme Court in the absence of showing of gross error or abuse on the part of the Tax Court. (Coca-Cola Export *vs.* Commissioner of Internal Revenue, 55 SCRA 5; Nasiad *vs.* Court of Tax Appeals, 61 SCRA 238) It is not within the province of this Court to resolve whether or not the ₱60,000.00 representing "provision for contingencies" was in fact added to or deducted from the taxable income. As ruled by the Court of Tax Appeals, the said amount was in effect added to Atlas' taxable income. The same being factual in nature and supported by substantial evidence, such findings should not be disturbed in this appeal.

10. ID.; EVIDENCE; DISPUTABLE PRESUMPTION; ORDINARY CARE OF PERSON OF HIS CONCERN; NOT APPLICABLE TO GOVERNMENT OFFICIALS' NEGLECT OR OMISSION IN THE COLLECTION OF TAXES.— Taxes are the lifeblood of the Government and their prompt and certain availability are imperious need. Upon taxation depends the Government's ability to serve the people for whose benefit taxes are collected. To safeguard such interest, neglect or omission of government officials entrusted with the collection of taxes should not be allowed to bring harm or detriment to the people, in the same manner as private persons may be made to suffer individually on account of his own negligence, the presumption being that they take good care of their personal affair. This should not hold true to government officials with respect to matters not of their own personal concern. This is the philosophy behind the government's exception, as a general rule, from the operation of the principle of estoppel. (G.R. No. L-31364, Vera *vs.* Fernandez, March 20, 1979, 89 SCRA 199).

APPEARANCES OF COUNSEL

Solicitor General Antonio P. Barredo, Assitant Solicitor General Feliciano R. Rosete, Solicitor Lolita O. Gal-lang and *Special Attorney Gamaliel H. Mantelino* for petitioner.

Gadioma and *Josue* for respondent.

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DECISION

DE CASTRO, *J.*:

These are two (2) petitions for review from the decision of the Court of Tax Appeals of October 25, 1966 in CTA Case No. 1312 entitled "Atlas Consolidated Mining and Development Corporation *vs.* Commissioner of Internal Revenue." One (L-26911) was filed by the Atlas Consolidated Mining & Development Corporation, and in the other (L-26924), the Commissioner of Internal Revenue is the petitioner.

This tax case (CTA No. 1312) arose from the 1957 and 1958 deficiency income tax assessments made by the Commissioner of Internal Revenue, hereinafter referred to as Commissioner, where the Atlas Consolidated Mining and Development Corporation, hereinafter referred to as Atlas, was assessed ₱546,295.16 for 1957 and ₱215,493.96 for 1958 deficiency income taxes.

Atlas is a corporation engaged in the mining industry registered under the laws of the Philippines. On August 20, 1962, the Commissioner assessed against Atlas the sum of ₱546,295.16 and ₱215,493.96 or a total of ₱761,789.12 as deficiency income taxes for the years 1957 and 1958. For the year 1957, it was the opinion of the Commissioner that Atlas is not entitled to exemption from the income tax under Section 4 of Republic Act 909[1] because same covers only gold mines, the provision of which reads:

"New mines, and old mines which resume operation, when certified to as such by the Secretary of Agriculture and Natural Resources upon the recommendation of the Director of Mines, shall be exempt from the payment of income tax during the first three (3) years of actual commer-

*Mr. Justice de Castro was designated to sit with the First Division under Special Order No. 225

[1]R.A. 909, *An act to amend Sections 242, 243 and to repeal Section 244 of Commonwealth Act No. 466, otherwise known as the National Internal Revenue Code* (Approved June 20, 1953).

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cial production. Provided that, any such mine and/or mines making a complete return of its capital investment at any time within the said period, shall pay income tax from that year."

For the year 1958, the assessment of deficiency income tax of ₱761,789.12 covers the disallowance of items claimed by Atlas as deductible from gross income.

On October 9, 1962, Atlas protested the assessment asking for its reconsideration and cancellation.[2] Acting on the protest, the Commissioner conducted a reinvestigation of the case.

On October 25, 1962, the Secretary of Finance ruled that the exemption provided in Republic Act 909 embraces all new mines and old mines whether gold or other minerals.[3] Accordingly, the Commissioner recomputed Atlas deficiency income tax liabilities in the light of the ruling of the Secretary of Finance. On June 9, 1964, the Commissioner issued a revised assessment entirely eliminating the assessment of ₱546,295.16 for the year 1957. The assessment for 1958 was reduced from ₱215,493.96 to ₱39,646.82 from which Atlas appealed to the Court of Tax Appeals, assailing the disallowance of the following items claimed as deductible from its gross income for 1958:

Transfer agent's fee.....	₱59,477.42
Stockholders relation service fee..	25,523.14
U.S. stock listing expenses.....	8,326.70
Suit expenses.....	6,666.65
Provision for contingencies	60,000.00
Total.....	₱159,993.91

After hearing, the Court of Tax Appeals rendered a decision on October 25, 1966 allowing the abovementioned disallowed items, except the items denominated by Atlas as stockholders relation service fee and suit expenses.[4] Pertinent portions of the decision of the Court of Tax Appeals read as follows:

[2] pp. 280-307, Folder III, BIR Records.

[3] p. 385, *Ibid.*

[4] p. 33, Rollo, G. R. No. L-26911.

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"Under the facts, circumstances and applicable law in this case, the unallowable deduction from petitioner's gross income in 1958 amounted to ₱32,189.79.

Stockholders relation service fee	₱25,523.14
Suit and litigation expenses	6,666.65
Total	₱32,189.79

"As the exemption of petitioner from the payment of corporate income tax under Section 4, Republic Act 909, was good only up to the 1st quarter of 1958 ending on March 31 of the same year, only three-fourth (¾) of the net taxable income of petitioner is subject to income tax, computed as follows:

1958	
Total net income for 1958	₱1,968.898.27
Net income corresponding to taxable period April 1 to Dec. 31, 1958, ¾ of ₱1,968.898.27	₱1,476.673.70
Add: ¾ of promotion fees of ₱25,523.14	₱19,142.35
Litigation expenses	6,666.65
Net income per decision	₱1,502.482.70
Tax due thereon	412,695.00
Less: Amount already assessed	405,468.00
DEFICIENCY INCOME TAX DUE	₱7,227.00
Add: ½% monthly interest from 6-20-59 to 6-20-62 (18%)	₱1,300.89
TOTAL AMOUNT DUE & COLLECTIBLE	₱8,526.22"

From the Court of Tax Appeals' decision of October 25, 1966, both parties appealed to this Court by way of two (2) separate petitions for review docketed as G.R. No. L-26911 (Atlas, petitioner) and G.R. No. L-29924 (Commissioner, petitioner).

G.R. No. L-26911 — Atlas appealed only that portion of the Court of Tax Appeals' decision disallowing the deduction from gross income of the so-called stockholders relation service fee amounting to ₱25,523.14, making a lone assignment of error that —

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"THE COURT OF TAX APPEALS ERRED IN ITS CONCLUSION THAT THE EXPENSE IN THE AMOUNT OF ₱25,523.14 PAID BY PETITIONER IN 1958 AS ANNUAL PUBLIC RELATIONS EXPENSES WAS INCURRED FOR ACQUISITION OF ADDITIONAL CAPITAL, THE SAME NOT BEING SUPPORTED BY THE EVIDENCE."

It is the contention of Atlas that the amount of ₱25,523.14 paid in 1958 as annual public relations expenses is a deductible expense from gross income under Section 30(a) (1) of the National Internal Revenue Code. Atlas claimed that it was paid for services of a public relations firm, P.K. Macker & Co., a reputable public relations consultant in New York City, U.S.A., hence, an ordinary and necessary business expense in order "to compete with other corporations also interested in the investment market in the United States."[5] It is the stand of Atlas that information given out to the public in general and to the stockholder in particular by the P.K. Macker & Co., concerning the operation of the Atlas was aimed at creating a favorable image and goodwill to gain or maintain their patronage.

The decisive question, therefore, in this particular appeal taken by Atlas to this Court is whether or not the expenses paid for the services rendered by a public relations firm P.K. Macker & Co. labelled as stockholders relation service fee is an allowable deduction as business expense under Section 30(a) (1) of the National Internal Revenue Code.

The principle is recognized that when a taxpayer claims a deduction, he must point to some specific provision of the statute in which that deduction is authorized and must be able to prove that he is entitled to the deduction which the law allows. As previously adverted to, the law allowing expenses as deduction from gross income for purposes of the income tax is Section 30 (a) (1) of the National Internal Revenue which allows a deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

[5]p. 11, Atlas Memorandum in the Court of Tax Appeals.

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An item of expenditure, in order to be deductible under this section of the statute must fall squarely within its language.

We come, then, to the statutory test of deductibility where it is axiomatic that to be deductible as a business expense, three conditions are imposed, namely: (1) the expense must be ordinary and necessary, (2) it must be paid or incurred within the taxable year, and (3) it must be paid or incurred in carrying in a trade or business.[6] In addition, not only must the taxpayer meet the business test, he must substantially prove by evidence or records the deductions claimed under the law, otherwise, the same will be disallowed. The mere allegation of the taxpayer that an item of expense is ordinary and necessary does not justify its deduction.[7]

While it is true that there is a number of decisions in the United States delving on the interpretation of the terms "ordinary and necessary" as used in the federal tax laws, no adequate or satisfactory definition of those terms is possible. Similarly, this Court has never attempted to define with precision the terms "ordinary and necessary." There are however, certain guiding principles worthy of serious consideration in the proper adjudication of conflicting claims. Ordinarily, an expense will be considered "necessary" where the expenditure is appropriate and helpful in the development of the taxpayer's business.[8] It is "ordinary" when it connotes a payment which is normal in relation to the business of the taxpayer and the surrounding circumstances.[9] The term "ordinary" does not require that the payments be habitual or normal in the sense that the same taxpayer will have to make them often; the payment

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[6]Collector of Internal Revenue *vs.* Philippine Education Co., 99 Phil. 319, (May 30, 1956).

[7]De Vera *vs.* Collector, CTA Case No. 164, March 23, 1959; Basilan Estates, Inc. *vs.* Commissioner, September 5, 1967, 21 SCRA 17.

[8]Mertens, Law of Federal Income Taxation, Volume IV, p. 315.

[9]p. 316, *Ibid.*

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may be unique or non-recurring to the particular taxpayer affected.[10]

There is thus no hard and fast rule on the matter. The right to a deduction depends in each case on the particular facts and the relation of the payment to the type of business in which the taxpayer is engaged. The intention of the taxpayer often may be the controlling fact in making the determination.[11] Assuming that the expenditure is ordinary and necessary in the operation of the taxpayer's business, the answer to the question as to whether the expenditure is an allowable deduction as a business expense must be determined from the nature of the expenditure itself, which in turn depends on the extent and permanency of the work accomplished by the expenditure.[12]

It appears that on December 27, 1957, Atlas increased its capital stock from ₱15,000,000 to ₱18,325,000.[13] It was claimed by Atlas that its shares of stock worth ₱3,325,000 were sold in the United States because of the services rendered by the public relations firm, P.K. Macker & Company. The Court of Tax Appeals ruled that the information about Atlas given out and played up in the mass communication media resulted in full subscription of the additional shares issued by Atlas; consequently, the questioned item, stockholders relation service fee, was in effect spent for the acquisition of additional capital, ergo, a capital expenditure.

We sustain the ruling of the tax court that the expenditure of ₱25,523.14 paid to P. K. Macker & Co. as compensation for services carrying on the selling campaign in an effort to

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[10] *Ibid.*

[11] Eaton *vs.* Comm., 81 F. (2d) 332 (CCA 9th, 1936) cited in Mertens, *supra.*

[12] Duesenberg, Inc. of Del. 31 BTA 922, aff'd 84 F. (2d) 921 (CCA 7th, 1936) cited in Mertens, Law of Federal Income Taxation, Vol. IV, p. 339 Illinois Central Railroad Co. *vs.* Interstate Commerce Commission, 206 S. Court. 700 (1907), cited in Simons & Hammond, 1 BTA 803.

[13] p. 24, Rollo. G. R. No. L-26911.

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sell Atlas' additional capital stock of ₱3,325,000 is not an ordinary expense in line with the decision of U.S. Board of Tax Appeals in the case of *Harrisburg Hospital, Inc. vs. Commissioner of Internal Revenue.*[14] Accordingly, as found by the Court of Tax Appeals, the said expense is not deductible from Atlas' gross income in 1958 because expenses relating to recapitalization and reorganization of the corporation (*Missouri-Kansas Pipe Line vs. Commissioner of Internal Revenue,* 148 F. (2d), 460; *Skenandos Rayon Corp. vs. Commissioner of Internal Revenue,* 122 F. (2d) 268, Cert. denied 314 U. S. 6961), the cost of obtaining stock subscription (*Simons Co.,* 8 BTA 631), promotion expenses (*Beneficial Industrial Loan Corp. vs. Handy,* 92 F. (2d) 74) and commission or fees paid for the sale of stock organization (*Protective Finance Corp.,* 23 BTA 308) are capital expenditures.

That the expense in question was incurred to create a favorable image of the corporation in order to gain or maintain the public's and its stockholders' patronage, does not make it deductible as business expense. As held in the case of *Welch vs. Helvering,*[15] efforts to establish reputation are akin to acquisition of capital assets and, therefore, expenses related thereto are not business expense but capital expenditures.

We do not agree with the contention of Atlas that the conclusion of the Court of Tax Appeals in holding that the expense of ₱25,523.14 was incurred for acquisition of additional capital is not supported by the evidence. The burden of proof that the expenses incurred are ordinary and necessary is on the taxpayer[16] and does not rest upon the Government. To avail of the claimed deduction under Section 30(a)(1) of the National

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[14]15 BTA 1016-1017.

[15]290 U.S. 111, 78 L Ed. 212, 54S Ct. 8 (1933).

[16]Alhambra Cigar & Cigarette Manufacturing Co. *vs.* Collector of Internal Revenue, CTA Case No. 143, July 31, 1956; De Vera *vs.* Collector, CTA Case No. 164, March 23, 1959.

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Internal Revenue Code, it is incumbent upon the taxpayer to adduce substantial evidence to establish a reasonably proximate relation between the expenses to the ordinary conduct of the business of the taxpayer. A logical link or nexus between the expense and the taxpayer's business must be established by the taxpayer.

G.R. No. L-26924 —In his petition for review, the Commissioner of Internal Revenue assigned as errors the following:

I

"THE COURT OF TAX APPEALS ERRED IN ALLOWING THE DEDUCTION FROM GROSS INCOME OF THE SO-CALLED TRANSFER AGENT'S FEES ALLEGEDLY PAID BY RESPONDENT;

II

"THE COURT OF TAX APPEALS ERRED IN ALLOWING THE DEDUCTION FROM GROSS INCOME OF LISTING EXPENSES ALLEGEDLY INCURRED BY RESPONDENT;

III

"THE COURT OF TAX APPEALS ERRED IN HOLDING THAT THE AMOUNT OF ₱60,000 REPRESENTED BY RESPONDENT AS "PROVISION FOR CONTINGENCIES" WAS ADDED BACK BY RESPONDENT TO ITS GROSS INCOME IN COMPUTING THE INCOME TAX DUE FROM IT FOR 1958;

IV

"THE COURT OF TAX APPEALS ERRED IN DISALLOWING ONLY THE AMOUNT OF ₱6,666.65 AS SUIT EXPENSES, THE CORRECT AMOUNT THAT SHOULD HAVE BEEN DISALLOWED BEING ₱17.499.98.

It is well to note that only in the Court of Tax Appeals did the Commissioner raise for the first time (in his memorandum) the question of whether or not the business expenses deducted from Atlas' gross income in 1958 may be allowed in the absence of proof of payments.[17] Before this Court, the Commissioner

[17] p. 158, Memorandum for Respondent (Commissioner of Internal Revenue), CTA Records.

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reiterated the same as ground against deductibility when he claimed that the Court of Tax Appeals erred in allowing the deduction of transfer agent's fee and stock listing fee from gross income in the absence of proof of payment thereof.

The Commissioner contended that under Section 30(a) (l) of the National Internal Revenue Code, it is a requirement for an expense to be deductible from gross income that it must have been "paid or incurred during the year" for which it is claimed; that in the absence of convincing and satisfactory evidence of payment, the deduction from gross income for the year 1958 income tax return cannot be sustained; and that the best evidence to prove payment, if at all any has been made, would be the vouchers or receipts issued therefor which ATLAS failed to present.

Atlas admitted that it failed to adduce evidence of payment of the deduction claimed in its 1958 income tax return, but explains the failure with the allegation that the Commissioner did not raise that question of fact in his pleadings, or even in the report of the investigating examiner and/or letters of demand and assessment notices of ATLAS which gave rise to its appeal to the Court of Tax Appeals.[18] It was emphasized by Atlas that it went to trial and finally submitted this case for decision on the assumption that inasmuch as the fact of payment was never raised as a vital issue by the Commissioner in his answer to the petition for review in the Court of Tax Appeals, the issue is limited only to pure question of law — whether or not the expenses deducted by petitioner from its gross income for 1958 are sanctioned by Section 30(a) (l) of the National Internal Revenue Code.

On this issue of whether or not the Commissioner can raise the fact of payment for the first time on appeal in its memorandum in the Court of Tax Appeals,We fully agree with

[18] p. 18, Rollo, G. R. No. L-26911.

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the ruling of the tax court that the Commissioner on appeal cannot be allowed to adopt a theory distinct and different from that he has previously pursued, as shown by the BIR records and the answer to the amended petition for review.[19] As this Court said in the case of Commissioner of Customs *vs.* Valencia[20] such change in the nature of the case may not be made on appeal, specially when the purpose of the latter is to seek a review of the action taken by an administrative body, forming part of a coordinate branch of the Government, such as the Executive department. In the case at bar, the Court of Tax Appeals found that the fact of payment of the claimed deduction from gross income was never controverted by the Commissioner even during the initial stages of routinary administrative scrutiny conducted by BIR examiners.[21] Specifically, in his answer to the amended petition for review in the Court of Tax Appeals, the Commissioner did not deny the fact of payment, merely contesting the legitimacy of the deduction on the ground that same was not ordinary and necessary business expenses.[22]

As consistently ruled by this Court, the findings of facts by the Court of Tax Appeals will not be reviewed in the absence of showing of gross error or abuse.[23] We, therefore, hold that it was too late for the Commissioner to raise the issue of fact of payment for the first time in his memorandum in the Court of Tax Appeals and in this instant appeal to the Supreme Court. If raised earlier, the matter ought to have been seriously delved

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[19]Agoncillo *vs.* Javier, 38 Phil. 424; American Express *vs.* Natividad, 46 Phil. 207; Balceta, et al. *vs.* Espe, et al., CA-G.R. No. 16115-R, April 5, 1957; Commissioner of Custom *vs.* Valencia, 100 Phil. 172-173, October 31, 1956.

[20]100 Phil. 172.

[21]pp. 150-153, Folder I, pp. 421, 422, Folder III, BIR Records.

[22]Par. 6(b) Commissioner of Internal Revenue's Answer to the Amended Petition for Review in CTA Case 1312, p. 57, CTA Records.

[23]Coca-Cola Export Corp. *vs.* Commissioner of Internal Revenue, 55 SCRA 5; Nasiad *vs.* Court of Tax Appeal, 61 SCRA 238.

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into by the Court of Tax Appeals. On this ground, We are of the opinion that under all the attendant circumstances of the case, substantial justice would be served if the Commissioner be held as precluded from now attempting to raise an issue to disallow deduction of the item in question at this stage. Failure to assert a question within a reasonable time warrants a presumption that the party entitled to assert it either has abandoned or declined to assert it.

On the second assignment of error, aside from alleging lack of proof of payment of the expense deducted, the Commissioner contended that such expense should be disallowed for not being ordinary and necessary and not incurred in trade or business, as required under Section 30, (a) (1) of the National Internal Revenue Code. He asserted that said fees were therefore incurred not for the production of income but for the acquisition of capital in view of the definition that an expense is deemed to be incurred in trade or business if it was incurred for the production of income, or in the expectation of producing income for the business. In support of his contention, the Commissioner cited the ruling in *Dome Mines, Ltd. vs. Commissioner of Internal Revenue*[24] involving the same issue as in the case at bar where the U.S. Board of Tax Appeal ruled that expenses for listing capital stock in the stock exchange are not ordinary and necessary expenses incurred in carrying on the taxpayer's business which was gold mining and selling, which business is strikingly similar to Atlas.

On the other hand, the Court of Tax Appeals relied on the ruling in the case of *Chesapeake Corporation of Virginia vs. Commissioner of Internal Revenue*[25] where the Tax Court allowed the deduction of stock exchange fee in dispute, which

[24] 20 BTA 377.

[25] 17 T. C. 668.

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is an annually recurring cost for the annual maintenance of the listing.

We find the *Chesapeake decision* controlling with the facts and circumstances of the instant case. In *Dome Mines, Ltd. case,* the stock listing fee was disallowed as a deduction not only because the expenditure did not meet the statutory test but also because the same was paid only once, and the benefit acquired thereby continued indefinitely, whereas, in the *Chesapeake Corporation case,* fee paid to the stock exchange was annual and recurring. In the instant case, We deal with the stock listing fee paid annually to a stock exchange for the privilege of having its stock listed. It must be noted that the Court of Tax Appeals rejected the *Dome Mines case,* because it involves a payment made only once, hence, it was held therein that the single payment made to the stock exchange was a capital expenditure, as distinguished from the instant case, where payments were made annually. For this reason, We hold that said listing fee is an ordinary and necessary business expense.

On the third assignment of error, the Commissioner contended that the Court of Tax Appeals erred when it held that the amount of ₱60,000 as "provisions for contingencies" was in effect added back to Atlas' income.

On this issue, this Court has consistently ruled in several cases adverted to earlier, that in the absence of grave abuse of discretion or error on the part of the tax court its findings of facts may not be disturbed by the Supreme Court.[26] It is not within the province of this Court to resolve whether or not the ₱60,000 representing "provision for contingencies" was in fact added to or deducted from the taxable income. As ruled by the Court of Tax Appeals, the said amount was in effect added to Atlas' taxable income.[27] The same factual in nature

[26]See Coca-Cola Export Corp. *vs.* Commissioner of Internal Revenue, *supra.*

[27]See Court of Tax Appeals Decision, p. 30, Rollo, G. R. No. L-26911.

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and supported by substantial evidence, such findings should not be disturbed in this appeal.

Finally, in its fourth assignment of error, the Commissioner contended that the CTA erred in disallowing only the amount of ₱6,666.65 as suit expenses instead of ₱17,499.98.

It appears that petitioner deducted from its 1958 gross income the amount of ₱23,333.30 as attorney's fees and litigation expenses in the defense of title to the Toledo Mining properties purchased by Atlas from Mindanao Lode Mines Inc. in Civil Case No. 30566 of the Court of First Instance of Manila for annulment of the sale of said mining properties. On the ground that the litigation expense was a capital expenditure under Section 121 of the Revenue Regulation No. 2, the investigating revenue examiner recommended the disallowance of ₱13,333.30. The Commissioner, however, reduced this amount of ₱6,666.65 which later amount was affirmed by the respondent Court of Tax Appeals on appeal.

There is no question that, as held by the Court of Tax Appeals, the litigation expenses under consideration were incurred in defense of Atlas' title to its mining properties. In line with the decision of the U.S. Tax Court in the case of *Safety Tube Corp. vs. Commissioner of Internal Revenue,*[28] it is well settled that litigation expenses incurred in defense or protection of title are capital in nature and not deductible. Likewise, it was ruled by the U.S. Tax Court that expenditures in defense of title of property constitute a part of the cost of the property and are not deductible as expense.[29]

Surprisingly, however, the investigating revenue examiner recommended a partial disallowance of ₱13,333.30 instead of

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[28] 8 T.C. 762-763, April 2, 1947 (citing Bowers *vs.* Lumpkin, 140 Fed. (2d) 297; Certiorari denied, 322 U.S. 88; Jones Estate *vs.* Commissioner, 127 Fed. (2d) 231; Brauner *vs.* Burnet, 63 Fed. (2d) 129; Murphy Oil Co. *vs.* Burnet, 55 Fed. (2d) 17 affirmed in another point, 287 U.S. 299.

[29] Coughlin *vs.* Commissioner of Internal Revenue, 2 T.C. 422.

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the entire amount of ₱23,333.30, which, upon review, was further reduced by the Commissioner of Internal Revenue. Whether it was due to mistake, negligence or omission of the officials concerned, the arithmetical error committed herein should not prejudice the Government. This Court will pass upon this particular question since there is a clear error committed by officials concerned in the computation of the deductible amount. As held in the case of Vera *vs.* Fernandez,[30] this Court emphatically said that taxes are the lifeblood of the Government and their prompt and certain availability are imperious need. Upon taxation depends the Government's ability to serve the people for whose benefit taxes are collected. To safeguard such interest, neglect or omission of government officials entrusted with the collection of taxes should not be allowed to bring harm or detriment to the people, in the same manner as private persons may be made to suffer individually on account of his own negligence, the presumption being that they take good care of their personal affair. This should not hold true to government officials with respect to matters not of their own personal concern. This is the philosophy behind the government's exception, as a general rule, from the operation of the principle of estoppel.[31]

WHEREFORE, judgment appealed from is hereby affirmed with modification that the amount of ₱17,499.98 (¾ of ₱23,333.30) representing suit expenses be disallowed as deduction instead of ₱6,666.65 only. With this amount as part of the net income, the corresponding income tax shall be paid thereon, with interest of 6% per annum from June 20, 1959 to June 20, 1962.

SO ORDERED.

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[30] G.R. No. L-31364, March 20, 1979, 89 SCRA 199.

[31] *Ibid.*

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Makasiar, Fernandez, Guerrero and *Melencio-Herrera, JJ.*, concur.

Teehankee, J., (Chairman), took no part.

EN BANC

[G.R. No. L-32791. January 27, 1981]

THE PEOPLE OF THE PHILIPPINES, plaintiff-appellee, *vs.* BONIFACIO YUTILA, AQUILINO and ESPERIDION YUTILA, defendants-appellants.

SYNOPSIS

Virginita Bederio followed her mother Fidela to their field where the latter had gone to gather some food, when she suddenly heard her mother's voice saying, "Pacio, Goyong, Pediong, Quilino because you have (had) sexual intercourse with me, please do not kill me." Hiding herself, Virginita saw her mother lying near the bank of a creek being stabbed by appellants and their brother Gregorio with a knife and bolos. Fidela died on the spot. Virginita reported the incident to the barrio captain and later to the police authorities. The medical report on the autopsy performed on the victim showed that the victim sustained multiple wounds on different parts of her body and that she was sexually abused. Charged with rape with homicide, appellants, who pleaded not guilty and who interposed the defense of alibi, were convicted as charged and sentenced to death by the trial court.

On automatic review, appellants assailed their conviction under the original information which had been supplanted by an amended information; the lack of preliminary investigation; and the finding that each one of them raped the victim.

The Supreme Court held, that reference in the decision to the information as one originally filed is of no moment because the original information and the amended one were substantially the same and the defendants were duly apprised of the contents of the latter; that the lack of preliminary investigation did not impair the validity of the proceedings and could not be raised for the first time on appeal; and that the fact that the victim was raped by each of the three defendants and Gregorio Yutila was established by the prosecution witness and the physician who conducted the autopsy.