REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

J. M. TUASON & CO., INC.,
Petitioner,

- versus - C.T.A. CASE NO. 193

COLLECTOR OF INTERNAL REVENUE,
Respondent.

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DECISION

This is a claim for refund of the amount of ₱9,024.84 alleged to have been illegally assessed and collected by respondent Collector of Internal Revenue from the petitioner J. M. Tuason & Co., Inc., representing deficiency broker's percentage tax, surcharge and compromise penalty for the period from November 1951 to the 2nd quarter of 1953.

The petitioner is a corporation duly organized and existing under Philippine Law as a realtor, engaged in the business of developing subdivisions and promoting sales of lots therein.

On November 6, 1951, the petitioner entered into a contract (Exhibit "A") with the Varsity Hills, Inc., real estate owners, by the terms of which the petitioner agreed in brief to: (a) develop into a subdivision, real estate property belonging to the Varsity Hills, Inc. consisting of about 106 hectares of contiguous land located at Balara, Quezon City; and (b) sell or lease the lots of the subdivision at prices and terms recommended by the former and approved by the latter. The petitioner was authorized

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by power of attorney not only to sell or lease the lots but also to cancel contracts of sale and lease affecting the property and to take charge of collection of accounts relative thereto, expenses being borne by the herein petitioner. The subdivision development plan recommended by petitioner was subject to the approval of Varsity Hills, Inc. For such services rendered, petitioner would get the following as compensation: (1) as "selling commission" an amount equal to 10% (ten per cent) on all the sales of lots in the subdivision; and in addition (2) as "administration fee" an amount equivalent to eight (8%) per cent on the gross sums collected and received by the petitioner in connection with the discharge of its duties. As an implementation of the above-mentioned contract, the Varsity Hills, Inc., on November 26, 1951 executed a "Special Power of Attorney" (Exhibit "B") in favor of petitioner for the proper discharge of the latter's duties under the contract.

There is no dispute that the petitioner, J. M. Tuason & Co., Inc., during the period from the 4th quarter of 1951 to the 2nd quarter of 1953, inclusive, received from the Varsity Hills, Inc., as compensation, pursuant to the contract Exhibit "A", the amount of ₱282,852.70 as 10% selling commission for the sale of the lots in subdivision, and another amount of ₱116,331.21 as "administration fee" (Exhibit "1", p. 5, BIR rec.). It is likewise admitted that on the amount of ₱282,852.70, the petitioner had duly paid for the corresponding quarter involved the

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percentage tax of 6% thereof prescribed in section 195 of the Tax Code.

After examination of the taxpayer's records the respondent determined that the so-called "administration fee" received by petitioner pursuant to the contract Exhibit "A", should have been included in its returns as part of the gross compensation of the latter as realtor and which is subject to the 6% broker's tax prescribed by section 195 of the Tax Code. Accordingly, the respondent on August 29, 1953 assessed against and demanded from J. M. Tuason & Co., Inc. the sum of ₱8,724.84 as deficiency broker's percentage tax and surcharge corresponding to the period from the 4th quarter of 1951 to the 2nd quarter of 1953. On September 10, 1953, and on several dates thereafter, the petitioner contested the legality of the above mentioned assessment (par. 3, Petition for Review, admitted in Answer). On February 23, 1954, the respondent sustaining the legality of the aforesaid assessment, demanding from the petitioner the sum of ₱9,024.84 which consisted of the deficiency percentage tax and surcharge of ₱8,724.84 as previously determined plus ₱300.00 compromise penalty, requiring that payment be made within ten (10) days from receipt of demand otherwise the collection thereof would be effected by summary procedures. In view of this demand, the petitioner on May 14, 1954 paid to the Bureau of Internal Revenue the amount of ₱9,024.84. On March 31, 1955, the petitioner filed a claim for refund of the aforesaid amount of ₱9,024.84, which petitioner followed with another letter of similar import dated May 13,1955. The respondent denied the afore-mentioned petitioner's claim for refund in a letter dated September 7, 1955, which letter, as shown by Exhibit "D-2", was posted by ordinary mail to petitioner on September 12, 1955. Thereupon, on October 11, 1955, the petitioner through counsel filed the herein petition for review of this decision denying the refund claim.

In the course of the trial of this case, the respondent raised the question of jurisdiction, contending that the present petition for review was filed out of time or beyond the reglementary period of thirty (30) days as prescribed in section 11 of Republic Act No. 1125. The jurisdictional question was submitted for resolution together with the issue on the merits, that is, whether the amount of ₱9,024.84 paid by petitioner as deficiency broker's tax was illegally assessed and collected by respondent Collector of Internal Revenue.

On the jurisdictional issue, the court notes that the envelope (Exhibit "D-2"), in which was contained respondent's decision dated September 7, 1955, denying the petitioner's claim for refund, clearly manifest that the same was posted only on September 12, 1955. Even if we were to assume that the petitioner received the aforesaid letter on the very day it was

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mailed, the fact that the herein petition for review was filed on October 11, 1955 undoubtedly show that the appeal was brought within the 30-day period prescribed by section 11, Republic Act No. 1125. In accordance with the oft-repeated rule, applicable in the computation of the period to appeal, i.e. excluding the first and including the last day (Federal Films v. C.F.I. Judge of Manila, 78 Phil. 475), we find that from September 12, 1955 to October 11, 1955, only 29 days had elapsed and we therefore hold that the present petition for review was seasonably filed.

We proceed now to consider the principal question. Under section 195 of the National Internal Revenue Code, real estate brokers are subject to the payment of "a percentage tax equivalent to six per centum (6%) of the gross compensation received by them", payable quarterly. In this case, the dispute in the main lies in the scope and interpretation of the phrase "gross compensation received by them (brokers)" as applied to the J. M. Tuason & Co., Inc.

Petitioner maintains that under the terms of its contract with Varsity Hills, Inc. (Exhibit "A") the former had two obligations to perform, each prestation distinct and separate from the other, i.e. one as "administrator" and the other as "broker" in the strict sense of the word. Hence, petitioner argues that the gross compensation received by it under the said contract should not en toto be subject to the

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6% broker's tax, but only such part of its income denominated as selling commission, which is derived in consideration of the performance of its duties of a broker in the strict sense. In other words, petitioner contends that the compensation denominated as administration fee, received in payment of its duties of "administrator" under said contract should not be subject to the percentage tax imposed by said section 195. This argument of petitioner stems from the theory that the contract herein involved (Exhibit "A"), is in fact composed of two parts, one of administration and the other of brokerage.

Respondent on the other hand, maintains that notwithstanding the appellation given it by petitioner, the contract is a single or indivisible contract of brokerage, in that the duties which purport to be acts of administration were in fact part and parcel of the contract of brokerage. It is contended that the duty to subdivide and the duty to collect accounts are not distinct and severable from the other duties but are in fact preparatory and incidental to the primary purpose for which the agreement was entered into—the sale or lease of the property by the petitioner as subdivided lots. Hence, respondent argues that the entire compensation received by petitioner under the agreement is subject to the 6% broker's tax.

A careful perusal of the contents of the contract (Exhibit "A") show the following salient points:

(1) That the principal motive or inducement which moved the Varsity Hills, Inc., to contract the services of petitioner herein, J. M. Tuason & Co., Inc., to sell or have leased the real property of the former as subdivided lots is the fact that the latter's "is engaged in the business of developing subdivisions and in promoting the sales of lots therein". (Exhibit "A", Clause (b), p. 2);

(2) That the consideration is: (a) with regard to the Varsity Hills, Inc., the development into a subdivision of its property and the sale or lease of the same by J. M. Tuason & Co., Inc. in the form of subdivided lots; and (b) with regard to J. M. Tuason & Co., Inc., - the monetary compensation it would receive from the sale or lease of the subdivided property of the former;

(3) That without prejudice to the right of the owner to terminate for cause, the duration of the agreement "shall continue until all of the lots into which said property described in paragraph (a) hereof is subdivided, shall have been sold or leased, and thereafter, so long as there are still collections to be made." (Exhibit "A", par. 16, p. 7);

(4) That the principal obligations of the "Administrator" (petitioner herein) are: (a) to develop the property into a subdivision (Exhibit "A", pars. 1 and 2, p. 2, and par. 9, p. 4); (b) to sell or

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lease the subdivided lots of the aforesaid subdivision (Exhibit "A", pars. 3 to 6, pp. 2-3, par. 11, p. 4, and par. 17, p. 7); and (c) to perform acts relative to collection of accounts, disbursement of expenses incurred in the subdivision sale and lease of the property; and the ejection of tenants or squatters on the property at the owner's expense if the latter fails to do so (Exhibit "A", pars. 7 and 8, pp. 3-4, pars. 10 and 12, pp. 4-5);

(5) That the OWNER (Varsity Hills, Inc.) is to pay the ADMINISTRATOR (Petitioner) as "selling commission" - 10% on all sales of lots of the subdivision whether or not effected by the Administrator payable in full immediately (Exhibit "A", par. 13, p. 5) plus 8% on the gross sums collected and received by the Administrator as "administration fee" (Exhibit "A", par. 14, p. 6).

The foregoing analysis of the contract Exhibit "A", was arrived at bearing in mind the rule that the various stipulations of a contract shall be interpreted together (Art. 1374, Civil Code). Thus viewing the contract as a whole, we find that it was the intention of the parties that the duty of the petitioner under the contract were indivisible in the same manner as the obligation of the Varsity Hills, Inc. to pay compensation for such services rendered. At the outset and at the time the contract was entered into the land was still undeveloped and undivided. Hence, when the services of petitioner were obtained for the purpose of selling the land in question in the form of marketable subdivision lots, it was an essential preparatory or incidental act that the land of Varsity Hills, Inc. be first developed and subdivided. Thus the duties undertaken by J. M. Tuason & Co., Inc. under the contract constituted several related but nevertheless inseparable acts and obligations of first developing the lands into a subdivision, then selling or leasing the subdivided lots, and finally collecting the price or rents in connection with the contracts of sale or lease that may be entered into by the petitioner in behalf of Varsity Hills, Inc.

From another viewpoint, the indivisibility of the performance of the obligation of the parties may likewise be taken in relation to the consideration thereof as to treat the contract as indivisible. Thus, where the consideration giving rise to the existence of the contract is entire and indivisible, the contract is indivisible.

> "Divisible and indivisible obligations are not synonymous with divisible or indivisible contracts. The divisibility or indivisibility of obligations refers to the prestation, the possibility or impossibility of partial prestation. On the other hand, whether a contract is entire or severable depends in general upon the consideration, not upon its object. When the consideration is entire and single, the contract must be held to be indivisible, so that if part of such consideration is illegal, the whole consideration is generally declared unenforceable." (Vol. II, Civil Code Annotated, Padilla, pp. 542-543 citing: 12 Am. Jur. 740)

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This test of indivisibility of consideration giving rise to an indivisible contract applies equally to commercial contracts such as sale, as well as to contracts involving services as the case at bar.

> "The question of indivisibility is difficult, and this difficulty has resulted in a direct conflict of decisions. 'The contract may be entire or severable, according to the circumstances of its particular case' it has been said in speaking of contracts of sale, 'and the criterion is to be found in the question whether the whole quantity--all of the things as a whole--is of the essence of the contract. If it appears that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable....' <u>Though this was said in reference to a contract of sale, the reason applies to other contracts as well</u>." (3rd. Ed. Clark on Contracts, p. 569, citing: Wooten v. Walters, 110 N.C. 251, 14 SE 734; Brouner v. Rayner, 68 Md. 47, 11 Atl. 833) (underscoring supplied.)

In the present case, as we see it the consideration is single, entire and indivisible. As far as Varsity Hills, Inc. is concerned, the property in question must be sold or leased as subdivided lots. Until and unless the sale or lease of the property in question as subdivided lots is effected, the Varsity Hils, Inc., is not liable to pay any compensation to petitioner in any form as the same is based on the proceed derived from the sale or lease thereof. Hence, the mere completion of the subdivision of the property in question does not entitle the petitioner to the compensation agreed and the same does not attach unless and until a sale or lease of a subdivided lot is first effected. Neither will compensation be due the peti-

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tioner for the sale or lease of the whole or part of the property in question, unless the same be first subdivided into lots by petitioner. Stated otherwise, in order that petitioner would be entitled to compensation under the terms of the contract Exhibit "A" there must first be a subdivision of the property into lots, followed by a sale or lease of the same. Because of this "oneness" or indivisibility of the consideration of the contract Exhibit "A", we are of the opinion that the activities of the petitioner of subdividing the property or collecting accounts, which petitioner denominated "acts of administration" are not in fact detached, distinct, nor transcendental to the brokerage relationship created by aforesaid contract, but rather acts which are merely incidental to the primary purpose for which the agreement was entered into.

This conclusion becomes more significant and clear when we take into account the legal rule applicable to the relationship of petitioner and Varsity Hills, Inc. as broker and principal from the tax viewpoint. Under section 194 (s) of the National Internal Revenue Code a "real estate broker" is defined thus:

> "(s) 'Real estate broker' includes any person, other than a real estate salesman as hereinafter defined, who for another, and for a compensation or in the expectation or promise of receiving compensation, (1) sells or offers for sale, buys or offers to buy, lists, or solicits for prospective purchasers, or negotiates the purchase, sale or exchange of real estate or interests therein; (2) or negotiates loans on real estate; (3) or leases or offers to lease or negotiates the sale, purchase or exchange of a lease, or rents or places for rent or

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> collects rent from real estate or improvements thereon; (4) or shall be employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary, on commission, or otherwise, to sell such real estate or any parts thereof in lots or parcels. x x x x But the foregoing definitions do not include a person who shall directly perform any of the acts aforesaid with reference to his own property, where such acts are performed in the regular course of or as an incident to the management of such property; nor shall they apply to persons acting pursuant to a duly executed power of attorney from the owner authorizing final consummation by performance of a contract conveying real estate by sale, mortgage or lease; x x x "

We find that the herein petitioner clearly falls within the definition. On behalf of Varsity Hills, Inc., the petitioner J. M. Tuason & Co., Inc. undertook to develop a subdivision out of the former's property and to promote sales of lots therein for compensation. In connection therewith the petitioner under the contract Exhibit "A" was to advertise the sale of the lots (par. 11), and to execute contracts to effect the sale or lease of the lots having been granted power and authority to make such contracts with power to cancel said contracts (par. 4).

However, petitioner seeks exclusion from the above definition of a real estate broker and invokes the proviso that the same does not "apply to persons acting pursuant to a duly executed power of attorney from the owner authorizing final consummation by performance of a contract conveying real estate by sale, mortgage or lease." This contention is without merit.

The exemption of those persons duly provided with a power of attorney refers only to those persons acting pursuant to such power authorizing final consummation by performance of a contract conveying real estate by sale, mortgage or lease as distinguished from negotiating it.

> "Such a construction of the act, however is not a reasonable one. It would not only render the act invalid, but, even if it did not do this, it would practically render it ineffective, since as has been said, any broker could secure escape from its provisions merely by being careful to secure written authority in every case. A much more natural construction is that by power of attorney is meant written authority to act for and in place of the principal in consumating the transaction as distinguished from merely negotiating it. This construction removes the objection of unreasonable discrimination; for such an agent is much more than a broker, and there is nothing unreasonable in not applying to him the regulations applicable to brokers." (Riley v. Chambers, (Cal), 185 Pac 855, 8 A.L.R. 418).

There is indeed a substantial distinction between the phases of the generation and perfection of a contract on the one hand and that of consummation on the other. While the former includes the preliminary steps of negotiation and the birth of a juridical relation, the latter refers to the performance and execution of the prestations derived from the contract (see 3 Casten, Derecho Civil Español, 7th Ed. p. 379-380).

Be that as it may, the tax herein imposed is not by reason alone of the act of petitioner in executing the contracts of sale or lease but upon its rendition of acts in behalf of another for compensation, of selling or leasing, offering to sell or lease, soliciting for prospective purchasers, negotiating the sale or lease or collecting rents of real estate (see Sec. 195, National Internal Revenue Code) belonging to Varsity Hills, Inc.

Since petitioner's "acts of administration" so-called under brokerage contract Exhibit "A", were incidental to or intimately linked with and did in fact form part of petitioner's necessary obligations to effect the sale of subdivided lots as a broker under the terms of said agreement, such incidental acts should not be given a distinct and different treatment from the principal acts. Hence, whatever amount petitioner received as compensation for the services rendered by it, by virtue of the contract of brokerage Exhibit "A" may be rightly considered part of the "gross compensation" subject to brokers percentage tax imposed by section 195 of the Tax Code.

Inasmuch as the law uses the term "gross compensation" and that the payments made by Varsity Hills, Inc. were made to compensate the services of petitioner taken in its entirety, we believe that any and all amounts received by petitioner pursuant to the contract Exhibit "A", whether designated as "administrator's fee" or "selling commission", fall within the purview of "gross compensation" as provided for by section 195 of the Tax Code, and therefore subject to the 6% broker's tax imposed therein.

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WHEREFORE, the decision of the respondent Collector of Internal Revenue denying the petitioner's claim for refund of the amount of ₱9,024.84 is hereby affirmed, and the petition for review should be, as it is hereby, dismissed with costs against petitioner.

SO ORDERED.

Manila, Philippines, September 29, 1956.

MARIANO NABLE
Presiding Judge

WE CONCUR:

AUGUSTO M. LUCIANO
Associate Judge

ROMAN M. UMALI
Associate Judge