library

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

December 23, 1960

CADWALLADER PACIFIC COMPANY,
Petitioner,

- versus -

C.T.A. CASE NO. 536

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

x - - - - - - - - - - - - - x

D E C I S I O N

The respondent assessed against the petitioner the sum of ₱4,112.05, representing deficiency sales tax and surcharge and commercial broker's fixed and percentage taxes and surcharge for the period from 1955 to 1957, itemized and computed as follows:

Taxable amount -------	₱20,993.78	
7% tax due thereon ---	1,469.37	
Less: Amount paid ----	1,265.62	
Deficiency sales tax ---------------	₱ 103.95	
25% surcharge --------	25.99	
Total ----------------------------		₱ 129.94
Total gross receipts ------------	₱35,569.16	
6% tax due thereon ---	₱ 2,134.15	
50% surcharge thereon -----------	1,067.08	
Fixed taxes (C-8) 1955-1957 ---------	450.00	
Total ----------------------------		3,651.23
Total landed cost ----	₱ 3,781.52	
25% mark-up ----------	945.38	
Taxable amount -------	₱ 4,726.90	
7% tax due thereon --------------		330.88
TOTAL AMOUNT DUE AND COLLECTIBLE -		₱4,112.05

Petitioner does not contest the legality of the assessment as regards the deficiency sales tax and surcharge in the sums of ₱129.94 and ₱330.88. However, it is alleged that it is not and has never engaged in business as commercial broker, and therefore it can not be held liable for the fixed and percentage taxes as commercial broker as provided in Sections 193(q)[1] and 195 of the National Internal Revenue Code. Failing to secure a reconsideration of respondent's assessment concerning the broker's fixed and percentage taxes, petitioner instituted the present appeal.

Petitioner is a domestic corporation with a branch office at Arcadia, Los Angeles, California. The primary purpose for which petitioner was organized, as stated in its Articles of Incorporation, is "To buy, manufacture, produce, or otherwise sell, import, export, trade, and deal in general merchandise, goods, wares, food products and commodities of every kind and description." The Los Angeles branch serves as petitioner's buying office.

With respect to the transactions for which petitioner is being held liable for the broker's fixed and percentage taxes, it appears that petitioner's Manila office secures orders from Philippine customers for the purchase of goods from abroad. Under the contract entered into between petitioner and the buyer, the seller is the California branch. A sample of such contract is reproduced below:

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[1] Now Sec. 182(A)(3)(s).

CADWALLADER PACIFIC COMPANY
IMPORTERS - DISTRIBUTORS - EXPORTERS
MANILA

Ref. 5939 Order No. 55/867

C O N T R A C T

BUYER: Balanga Hardware and Supply, Balanga, Bataan (SENG LEE HARDWARE), hereby orders and agrees to purchase the merchandise specified below from

SELLER: Cadwallader Pacific Company - P.O. Box 565, Arcadia, California, U.S.A., subject to the terms and conditions written hereon and printed on the reverse side hereof:

(Here follows the description of the articles)

ALL PRICES SUBJECT TO CHANGE
UP TO TIME OF SHIPMENT

Estimated C.I.F. Manila Total
Value $1,915.00

TERMS: Irrevocable Letter of Credit in favor of the SELLER for the above total amount.

SHIPMENT: Prompt. Subject to U. S. Export Regulations.

INSURANCE: Ordinary risks.

MARKINGS: BHS/MANILA.

Signed in the City of Manila, Philippines, on this 18th day of October, 1955.

CONFIRMED:	ACCEPTED:
CADWALLADER PACIFIC COMPANY	BALANGA HARDWARE & SUPPLY Buyer
By: (Sgd) MAURICE NAFTALY General Manager	By: (Sgd) DOMINGO JAVIER

The terms and conditions of the contract of sale appearing on the reverse side of the document are as follows:

1.-SELLER shall not be responsible for any loss, damage, or delay due to fire, mutiny, war, strikes, or any causes beyond their control. Failure to ship or deliver within the time specified shall not be deemed a breach of this contract and all time specifications, however worded, are only directory. SELLER will not be responsible for non-delivery due to force majeure or to any causes beyond their control. All deliveries are subject to reasonable variations from standard in color, form, size and quality.

2.-The SELLER may ship any portion of the merchandise as soon as completed at the manufacturers' works, and/or made ready for shipment, and payment for any portion of the goods as shipped shall become due in accordance with the terms of payment specified on the reverse side hereof.

3.-Defaults, delay or defect in any one or more deliveries and/or portions thereof shall be considered as segregated default and shall not give right for the BUYER to rescind the whole order covered by this contract.

4.-Title to merchandise shall pass to BUYER at time of shipment. The merchandise called for in this contract shall be shipped, traveled and be insured for account and risk of the BUYER, and the responsibility of the SELLER shall cease once the shipping documents have been signed by the steamship company and delivered to the forwarding Bank.

5.-The SELLER shall not be responsible in any way whatsoever for fines, charges, or any other expenses incurred because of late or non-arrival of shipping documents covering the merchandise called for in this contract.

6.-Orders and all other specifications and conditions as stipulated in this contract cannot be modified or changed without written permission of the SELLER.

7.-Should the BUYER secure release of the merchandise called for in this contract by means of trust receipt, or otherwise, from the Bank holding the draft or drafts, SELLER will in no event guarantee such trust receipt. Should the BUYER be unable to arrange for the release by trust receipt, or otherwise, on arrival of the merchandise called for in this contract, SELLER shall have the right to take delivery of said merchandise and to sell the same in the open market privately and should the price obtained from this forced sale or sales be less than the contract price, the difference shall be for the account of the BUYER, who agrees to pay the same to SELLER on demand. All expenses incurred in making such forced sale or sales likewise shall be for BUYER'S account.

8.-Should the BUYER refuse, fail or otherwise neglect to accept SELLER'S draft or drafts, or otherwise fail, or neglect to make immediate payment and/or take delivery of the merchandise called for in this contract on arrival thereof, the BUYER agrees and gives to the SELLER the right and authority to take delivery and possession of the said merchandise and to sell or offer for sale the merchandise privately without prior notice to the BUYER; and should the proceeds realized from the sale or sales thereof be insufficient to cover up the total cost or value of the merchandise as invoiced by the SELLER plus the expenses of handling and selling such shortage or deficit shall be made good, covered up and paid by the BUYER to the SELLER immediately upon demand by the SELLER.

9.-All existing revenue and/or taxes, and/or any increase in such revenue and/or taxes, and/or any new taxes imposed on the merchandise involved in this contract which may become effective after the date of this contract, shall be for account of the BUYER.

10.-All bank charges, such as exchange, interest, banking commission, etc., shall be for the account of the BUYER unless otherwise agreed upon in writing.

11.-In case of litigation arising out of this transaction, the parties herein BUYER and SELLER agree to submit themselves to the jurisdiction of the Courts of the City of Manila, and the Buyer further agrees to pay an additional amount equivalent to 20% of the total invoice value of the merchandise called for or subject of this contract, as attorney's fees and liquidated damages, plus all court costs.

12.-In case the BUYER refuses to accept SELLER'S draft or drafts, or to pay any amount which may become due or delinquent, the BUYER agrees to pay interest on such amount becoming due, delinquent or deficient at the rate of 12% per annum computed from date of shipment of the merchandise to date of complete payment in full, including such interest.

13.-All orders covered by this contract are subject to cancellation by the SELLER if the financial responsibility of the BUYER proves at any time to be unsatisfactory to the SELLER; or if the BUYER fails to pay any note or obligations due the SELLER; or if the BUYER has failed to make satisfactory settlement to the SELLER on previous orders or shipments.

14.-It is understood and agreed, that in the event there is violation of the conditions given hereof, BUYER recognizes the said CADWALLADER PACIFIC COMPANY, Manila as the SELLER'S representative authorized and empowered to bring suit in the name of the SELLER who is the CADWALLADER PACIFIC COMPANY alone, in which case the personality of the CADWALLADER PACIFIC COMPANY shall not be quetioned in court by the BUYER or by its agents and/or representatives.

15.-Should it be stipulated that BUYER shall open an irrevocable confirmed Letter of Credit or in such terms as indicated in this contract in favor of SELLER upon confirmation of this order and the same is confirmed, the BUYER hereby agrees and binds himself to open said letter of credit for the full value of this order, inclusive of such other expenses or charges indicated therein, or remit the foregoing by telegraphic transfer. In the event that BUYER fails, neglects or refuses to comply with the foregoing within ten (10) days from receipt of such confirmation, BUYER will be liable for all and whatsoever kind of expenses and damages incurred in connection with this order. (Page 178, C.T.A. records.)

After the contract is signed, the same is forwarded to the California branch which procures the goods described in the contract and ships them directly to the buyer. As title to the goods passes from the seller (the California branch) to the Philippine buyer from the time of shipment in California, the buyer is the importer of such goods and is the one liable for all taxes and duties due thereon and incident to their importation.

The profit derived by petitioner from the transaction is denominated as the "mark-up" on the price of the goods; respondent calls it "overprice;" it is entered in the books of petitioner as "commission earned." Although this profit is divided equally between petitioner and its California branch, it is entirely reported by petitioner as income earned by it subject to Philippine income tax.

Section 194(t) of the Revenue Code defines "commercial broker" thus -

> "(t) 'Commercial broker' includes all persons, other than importers, manufacturers, producers, or bona fide employees, who, for compensation or profit, sell or bring about sales or purchases of merchandise for other persons, or bring proposed buyers and sellers together, or negotiate freights or other business for owners of vessels, or other means of transportation, or for the shippers, or consignors or consignees of freight carried by vessels or other means of transportation. The term includes commission merchants."

Under the facts described above, and the law, respondent expressed the opinion that petitioner is a commercial broker. In his decision of April 8, 1958, respondent stated:

> In the light of the foregoing definition, we maintain that your client (petitioner herein) is a commercial broker because it brought about sales or purchases

> of merchandise between its local customers in the Philippines and its alleged branch office at Arcadia, California, or through its intervention brought about proposed buyers and foreign sellers together by executing the contract in the Philippines between the buyers and your client. Moreover, the intervention of your client in the transaction was made for compensation or profit as found by our agents. Consequently, your client is a commercial broker within the letter and meaning of Section 194(t) of the Tax Code.
>
> Your client and its alleged branch office in Arcadia, California, are distinct and separate entities engaged in different taxable kinds of business. The transactions made by your client's alleged branch office in the United States with local customers could not have been effected without the active intervention of your client as a commercial broker or seller's representative, thereby negating your contention that the sales of merchandise between your client's alleged branch in the United States were directly made to local customers. (Exh. 4, pp. 25-27, BIR records.)

In the decision quoted above, respondent based his opinion upon the theory that petitioner and its alleged California branch are distinct and separate entities; that being separate entities, petitioner acted merely as an intermediary between the Philippine buyers and the seller (the alleged California branch); and that as such intermediary between buyers and seller, it is a commercial broker within the meaning of Section 194(t) of the Revenue Code.

In this appeal, however, respondent has abandoned the theory that petitioner and its branch office in California are two distinct and separate entities. He has apparently conceded that the California branch is merely a buying office of petitioner, but maintains that petitioner acted as a broker or intermediary between the Philippine buyers and the foreign suppliers, sellers, manufacturers or producers whose merchandise were procured in the United States by the California branch office of petitioner. We quote:

> The law taxing a "commercial broker" requires the existence of three parties. In the case at bar, there are three parties, namely: (1) the customer or buyer - the Balanga Hardware & Supply (Exh. "A" in the example given above), (2) the commercial broker - the Manila branch office of petitioner securing the order from its customer or buyer in the Philippines and (3) the foreign supplier, seller, manufacturer or producer whose merchandise is procured in the United States by the California branch office of petitioner that invoiced and shipped said merchandise direct to the local customer or buyer. However, petitioner still insists that the seller is the California branch office. . . (Pp. 6-7, Memorandum for Respondent.)

We find no factual basis to support respondent's conclusion that petitioner acted as broker between the Philippine buyers and the U. S. manufacturers or suppliers from which the goods were acquired by the California branch of petitioner. All that appears of record is that petitioner entered into contracts of sale with Philippine buyers; that at the time the contracts were signed, the goods were not on hand; that the goods contracted to be sold were to be procured by its branch office in California; and that such goods were actually acquired or purchased by the California branch which shipped the goods in its own name directly to the Philippine buyers. Under these circumstances, we do not think that petitioner or its branch office in California acted as broker for and on behalf of the foreign manufacturers or suppliers. Petitioner simply sold goods which it undertook to procure through its California branch.]

It is also alleged that since petitioner claims that it is the seller of the goods, and as it is neither an importer, manufacturer or producer of the goods which it sold, or a bona fide employee of the manufacturer or supplier, it is a commercial broker, because the definition of "commercial broker" does not include an importer, manufacturer or producer, or a bona fide employee. We quote from the memorandum of counsel for respondent:

> If the petitioner's branch office in California is the seller of the merchandise and if we consider its act as also the act of the branch office of petitioner in the Philippines, it necessarily follows that the Philippines office of the Petitioner is the seller. We now analyze section 194(t) of the National Internal Revenue Code, which reads as follows: (Quotation omitted.)
>
> A "commercial broker," therefore, includes all persons, who, for compensation or profit, sells or brings about sales or purchases of merchandise for other persons. The term "commercial broker" does not include importers, manufacturers, producers or bona fide employees.

It cannot be disputed that peti-

> tioner is not an importer because the title to the merchandise involved in the case on hand passed to the buyer at the time of its shipment in the ports of California, U.S.A. (Paragraph 4, Exh. "D-1"). The Los Angeles, California branch of the petitioner did not pay for the merchandise, but the customer or buyer in the Philippines. (t.s.n., p. 20). It is neither the manufacturer or producer of the said merchandise nor the employee of another person. The Manila branch office of the petitioner, therefore, acted as an intermediary between the Philippine buyers and foreign manufacturers and producers while the California branch office of petitioner represents the Manila branch office abroad. Petitioner, therefore, is not an importer, producer, manufacturer or *bona fide* employee. Hence, petitioner is a "commercial broker" because the definition under Section 194(t) of the Tax Code includes all persons, who, for compensation or profit, sell merchandise not imported, manufactured, or produced by them. . . . (Pp. 7-8, Memorandum for Respondent; emphasis supplied.)

We do not think respondent realizes the implications to be drawn from the above line of reasoning. If it is correct, then all gasoline stations in the Philippines are commercial brokers because they sell gasoline and other fuel oils which they neither import, produce or manufacture. Neither are they employees of the importers. The Bureau of Internal Revenue has not, to our knowledge, required any gasoline station to pay the commercial broker's fixed and percentage taxes. They are only required to pay, and they do pay, the graduated fixed annual tax. The fallacy of respondent's theory may also be illustrated thus: The definition of "commercial broker" under Section 194(t) of the Revenue Code does not include a building contractor. Petitioner is not a building contractor. Therefore, petitioner is a commercial broker.

The Secretary of Finance, under a similar set of facts, has expressed the opinion that a person who contracts to sell goods to a Philippine customer, the goods to be procured in the United States through a buying agent or attorney-in-fact, is not a commercial broker. For convenience, we are quoting below in full the statement of facts and the opinion of the Secretary of Finance with which we are in complete agreement:

> It appears from the within papers that the Pacific Exchange Corporation, a domestic corporation doing business in Manila, after the usual public bidding, was issued purchase orders by the Division of Purchase and Supply calling for supplies for the use of the Government. The supplies were to be shipped c.i.f. Manila, and payments were to be made by the Philippine Purchasing Agency in New York upon presentation of shipping documents. The purchase orders were transmitted by Pacific Exchange Corporation to Polak, Winters & Co., a United States corporation, in whose favor the former has executed a General Power of Attorney appointing the latter its attorney-in-fact in the United States. Polak, Winters & Co. purchased the supplies called for in the purchase orders and loaded them on vessels for shipment to the Philippine Government as consignee, but before the vessels carrying the shipments left the ports of embarkation, Polak, Winters & Co. presented the bills of lading and other documents to the Philippine Purchasing Agency in New York which, after requiring the previous indorsements of the documents in blank, paid the amounts called for in the invoices. On each shipment, Polak, Winters & Co. made a liquidation by deducting from the selling price all expenses involved in said shipment and credited Pacific Exchange Corporation 65% of the resulting net profit and retained the balance of 35%. During the second quarter

of 1947, Pacific Exchange Corporation received the amount of ₱86,449.20 from Polak, Winters & Co. as its share of the profits from the above-mentioned transactions and paid the amount of ₱3,437.97 as commercial broker's percentage tax under the provisions of Section 195 in connection with section 194(t) of the National Internal Revenue Code. The request for refund of this amount has been denied and Pacific Exchange Corporation appealed the case to this Department. The question presented is whether under the arrangement mentioned above Pacific Exchange Corporation was a commercial broker. If it was a commercial broker it was liable to the tax; if otherwise, it was not subject to the tax and refund of the amount involved would be in order, the request for refund having been made within the statutory period.

Under section 194(t) of the Tax Code, the term "commercial broker" includes all persons, other than importers, manufacturers, producers, or bona fide employees, who, for compensation or profit, sell or bring about sales or purchases of merchandise for other persons, or bring proposed buyers and sellers together, x x x."

A broker is generally defined as one who is engaged for others, on a commission, negotiating contracts relative to property, with the custody of which he has no concern; the negotiator between other parties, never acting in his own name but in the name of those who employed him; he is strictly a middleman, and for some purposes the agent of both parties. A broker is one whose occupation it is to bring parties together to bargain or to bargain for them in matters of trade, commerce or navigation. (Behn, Meyer & Co., Ltd. v. Nolting and Garcia, 35 Phil. 274.)

A broker as distinguished from the commission merchant, does not sustain any relation to the object which he sells or buys. He is simply an intermediary between the seller and the buyer. He does not acquire the possession or custody of the object sold. His function is to bring together the parties to the transaction. (P. C. C. v. Yatco, G. R. 45976)

It appears clear from the admitted facts that the Pacific Exchange Corporation, in submitting bids to the Division of Purchase and Supply, acted in its own name and not in representation of another and that Division of Purchase and Supply issued the purchase orders to the said corporation in the same capacity. It also appears clear from the General Power of Attorney executed by Pacific Exchange Corporation appointing and constituting Polak, Winters & Co. its attorney-in-fact in the United States that all that Polak, Winters & Co. did in connection with the supplies referred to were within the limit of the powers granted to it as attorney-in-fact. Pacific Exchange Corporation, thru its counsel, has submitted to this Department, in addition, a letter of Polak, Winters & Co. dated April 30, 1947, addressed to the taxpayer, from which it appears that the relation of attorney-in-fact and principal had been existing between the two firms before the execution of the General Power of Attorney, with Pacific Exchange Corporation as the principal and Polak, Winters & Co. as attorney-in-fact. In view of the fundamental rule in relationships of this nature that the acts of the attorney-in-fact if within the limits of the grant are for all legal purposes the acts of the principal, this Department believes that the acts of Polak, Winters & Co. in purchasing the supplies called for in the purchase orders issued to Pacific Exchange Corporation by the Division of Purchase and Supply, in constructively delivering them to the New York Purchasing Agency and in accepting payment therefor from such agency were, likewise for all legal purposes, the acts of Pacific Exchange Corporation. Therefore, in relation to the sale of said supplies to the Philippine Government, Pacific Exchange Corporation acted for its own behalf and account and not as agent of Polak, Winters & Co. and was not a commercial broker within the meaning of Section 194(t) of the National Internal Revenue Code.

In view of the foregoing, and as the claim for refund of the amount involved was presented within the period prescribed in section 309 of the National Internal Rev-

> enue Code, this Department believes and holds that the amount of ₱3,437.97 paid by Pacific Exchange Corporation as commercial broker's percentage tax for the second quarter of 1947 should be refunded to it. (Op. Sec. of Finance, July 12, 1949.)

The foregoing opinion of the Secretary of Finance has been followed and applied by the Bureau of Internal Revenue. We quote from a ruling of said Bureau dated November 16, 1949:

> Investigation conducted by an agent of this Office disclosed that the Pacific Merchandising Corporation, Manila, is a domestic corporation duly authorized to do business in the Philippines with buying office in New York, United States of America. The Manila office secures orders from local merchants and forwards them to its New York buying office. These orders are accompanied by irrevocable letters of credit drawn in favor of the New York Office. The New York office buys the goods ordered and sends them directly to the respective customers in Manila. In some instances, however, where the customer prefers to pay the goods so ordered directly to the Manila office, no letter of credit is opened. At the close of the month, the New York office furnishes the Manila office with a monthly statement of these transactions, showing the total cost and profit realized from the goods purchased for each customer. The profit consists of the overprice charged the customers, interest and premium on exchange received by the corporation with respect to customers who pay the company directly in Manila. In these transactions, the Pacific Merchandising Corporation acts on its own behalf and account and not as agent of the American suppliers.
>
> From the foregoing facts and in the light of the decision of the Department of Finance in the case of the Pacific Exchange Corporation, this Office is of the opinion that your client, the Pacific Merchandising Corporation, did not act as a commercial broker and, consequently, it

> is not liable for the payment of the commercial broker's percentage tax on the overprice, interest and premium on exchange received by the aforesaid corporation under the foregoing transactions. (B.I.R. ruling, Nov. 16, 1949.)

The foregoing rulings have obviously overruled the ruling of the Bureau of Internal Revenue dated January 9, 1947, quoted on page 7 of respondent's memorandum.

FOR THE FOREGOING CONSIDERATIONS, the assessment against petitioner concerning the fixed and percentage taxes and surcharge as commercial broker in the sum of ₱3,651.23 must be, as the same is hereby, set aside. There being no question as regards the legality of the assessment with respect to the deficiency sales tax and surcharge in the sums of ₱129.94 and ₱330.88, the same is hereby affirmed. Petitioner is ordered to pay the sums of ₱129.94 and ₱330.99 within thirty (30) days from the date this decision becomes final. No costs.

SO ORDERED.

Manila, December 23, 1960.

ROMAN M. UMALI
Associate Judge

WE CONCUR:

MARIANO NABLE
Presiding Judge

AUGUSTO M. LUCIANO
Associate Judge