REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

NICHIMEN CORPORATION -
MANILA BRANCH,
Petitioner,

- versus -

C.T.A. CASE NO. 4667

COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 12 1996

x - x

DECISION

The case at bar refers to a disputed assessment amounting to P767,531.10, representing deficiency percentage tax for the fiscal year ended March 31, 1987, inclusive of surcharge and interest incident to delinquency.

Petitioner is a resident foreign corporation, organized and existing under the laws of Japan, and authorized to do business in the Philippines through its Manila branch, with office located at the 15th Floor, BPI Paseo de Roxas Condominium, 8753 Paseo de Roxas, Makati, Metro Manila, Philippines. It acts as a liaison office for and in behalf of its Head Office, Nichimen Corporation in Japan, and its local customers in the Philippines.

On January 19, 1990, it received a demand letter from respondent assessing it for deficiency income tax, fixed tax, withholding tax, expanded withholding tax and percentage tax for the fiscal year ending March 31, 1987, in the total amount of P1,092,459.94, breakdown of which is as follows:

FY-3-31-87 Deficiency Income Tax

Net Income per Return		P2,209,455.00
Add: Unallowable Deductions:		
Depreciation	P20,500.00	
Cost of Calculator, Beds, & Facsimile Xerox	24,711.00	45,211.00
Net Income per Investigation		P2,254,666.00
Income Tax Due Thereon		P 779,133.00
Less: Tax Due per Return		763,309.00
Deficiency Income Tax		P 15,824.00
Add: 25% Surcharge		3,956.00
20% Int. p/a fr. 7-15-87 to 1-30-90		9,725.03
Compromise Penalty		4,500.00
TOTAL AMOUNT DUE AND COLLECTIBLE		P 34,005.03

FY-3-31-87 Deficiency Fixed Tax (As Importer/Exporter)

Basic Tax	P 400.00
Add: 25% Surcharge	100.00
20% Int. p/a fr. 5-1-86 to 1-30-90	375.00
Compromise Penalty	100.00
TOTAL AMOUNT DUE AND COLLECTIBLE	P 975.00

FY-3-31-87 Deficiency Expanded Withholding Tax

Professional Fee	P 10,600.43
Contractor	103.00
Sub-total	P 10,703.43
Add: 25% Surcharge	2,675.86
20% Int. p/a fr. 5-1-87 to 1-30-90	7,358.61
Compromise Penalty	4,500.00
TOTAL AMOUNT DUE AND COLLECTIBLE	P 25,237.90

FY-3-31-87 Deficiency Withholding Tax on Compensation

Basic Tax Due	P 132,495.94
Add: 25% Surcharge	33,123.99
20% Int. p/a fr. 5-1-87 to 1-30-90	91,090.97
Compromise Penalty	8,000.00
TOTAL AMOUNT DUE AND COLLECTIBLE	P 264,710.91

FY-2-31-87 Deficiency Percentage Tax

	1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Total
Basic Tax Due	P 53,382.80	P 81,456.21	P116,590.27	P128,289.63	
Less: Payment per Return	611.26	1,594.48	627.05	1,247.39	
Deficiency Tax	P 52,771.54	P 79,861.73	P115,963.22	P127,042.24	P375,638.73
Add: 25% Surcharge	13,192.88	19,965.43	28,990.81	31,760.56	93,909.68
20% Int. p/a up to 1-30-90	46,541.20	65,441.69	87,776.91	88,222.89	287,982.69
Total	P112,505.62	P165,268.85	P232,730.94	P247,025.69	P757,531.10
Add: Compromise					10,000.00
TOTAL AMOUNT DUE AND COLLECTIBLE					P767,531.10

In a letter, dated February 6, 1990, filed on February 12, 1990, petitioner, through its external auditors, protested the above-stated assessments and requested for their withdrawal and cancellation. Respondent in his letter, dated August 7, 1991, received by petitioner on October 7, 1991, cancelled the assessment for fixed tax in the sum of P942.31. But respondent sustained and reiterated the other assessments for deficiency percentage, income, expanded withholding taxes and withholding tax on compensation.

On November 7, 1991, petitioner finally agreed to settle and fully pay its deficiency income, expanded withholding taxes and withholding tax on compensation, as evidenced by Central Bank Confirmation Receipt No. B 24068532 in the total amount of P313,953.84, computed as follows: (p. 297, BIR records)

Deficiency Income Tax	P 34,005.03
Expanded Withholding Tax	25,237.90
Withholding Tax	254,710.91
Total	P313,953.84

However, petitioner vehemently opposed the assessment for deficiency percentage tax which involved the amount of P767,531.00. Thus, the instant appeal filed with this Court on November 6, 1991.

After granting two requests for extension, respondent filed his Answer on January 27, 1992, alleging as his Special and Affirmative Defenses, the following:

"<u>SPECIAL AND AFFIRMATIVE DEFENSES</u>

(3) The assessment for deficiency percentage tax is based on the findings that there were receipts for the fiscal year ending March 31, 1987, which were derived as a result of the solicitations made of purchase orders from local customers related to the taxpayer's Home Office, which in turn solicited from manufacturer's abroad. Such receipts were not declared by petitioner as part of its gross receipts for commercial broker's tax purposes.

(4) The aforesaid undeclared receipts subjected to deficiency broker's tax were derived from sales consummated between Philippine customers and manufacturers abroad, other than Nichimen Corporation (Japan), although the said sales resulted due to the liaising services rendered by Nichimen Corporation (Philippine Branch).

(5) It is provided under Revenue Audit Memorandum Order No. 1-86, par. 3 subpar. 3.2, to wit -

> "3. **<u>Branch Operation and Consequences</u>**.
>
> "3.2. The branch solicits purchase orders from local buyers, relays information to its home office, the home office solicits prospective sellers abroad and eventually received compensation for services rendered.
>
> "In the second type of operation: (i) the branch shall be considered 'a commercial broker' or indentor; (ii) its share from compensation as allocated by its home office shall be subject to commercial broker gross receipts tax; (iii) the branch shall provide itself with corresponding fixed tax as a commercial broker; and (iv) pay

income on its share of the compensation."

(6) Under the foregoing paragraph, the branch office shall be considered a commercial broker since its activities is well within the ambit of the term "broker";

(7) Broker's are "...those who are engaged for others in the negotiations of contracts relative to property with the custody of which they have no concern. They act as negotiators in bringing other persons together to bargain; generally, they ought not to sell in their own names, have no implied authority to receive payment, are not entrusted with the physical possession of the principal's goods when engaged to buy or sell, and have no special property therein or lien thereon." (8 Am. Jur. 889-890, cited in Philipp Brothers Oceanic, Inc. vs. The Com. of Int. Revenue, CTA Case No. 3140. March 8, 1984);

(8) The assessment for deficiency percentage tax (broker's tax) was issued in accordance with law and BIR rules and regulations."

Evidently, the sole issue in this case lies on whether or not petitioner is a commercial broker. If in the affirmative, petitioner is liable for the subject deficiency percentage tax assessment. And if in the negative, the said assessment should be cancelled as petitioner is not liable for the payment of the same.

Petitioner claims it is not a commercial broker. It alleges that in all the sales consummated between its Home Office in Japan and the Philippine customers, it merely performed liaising activities for and in behalf of the former. It did not act as a broker or middleman, but only as an agent of the principal, Nichimen-Japan. There being only two parties, Nichimen-Japan as seller, and the Philippine customers as buyers, Nichimen Philippine Branch is not liable as a commercial broker. To be liable as a commercial broker, petitioner cited the provision of Section 157(t) of the Tax Code which requires the presence of three (3) parties in a sale transaction, namely: the seller, the buyer and the 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."

On the contrary, respondent insists that "the receipts subjected to the assessed deficiency broker's tax were derived from sales consummated <u>between Philippine customers and manufacturers abroad, other than Nichimen Corporation</u> (Japan), although the said sales resulted due to the liaising services rendered by Nichimen Corporation (Philippine Branch)." (p. 2, Exh. "10", Resp., p. 289, BIR rec.)

After careful consideration of all the evidence presented by both parties, as well as the records of the case, the Court is convinced to rule in favor of the respondent. The Court gives more weight to respondent's testimonial and documentary evidence showing the factual and legal bases for the deficiency broker's tax assessment issued against petitioner. The lone witness presented by respondent, Ms. Myrna Lou Tabije, one of the examiners who investigated the instant tax case, explained the bases for issuing the subject assessment. Her testimony during the direct examination ran as follows:

> "Q. Now, according to this report, one of your findings is for deficiency broker's tax in the amount of P718,851.68. Could you explain briefly the basis of this assessment?
>
> A. As stated here in the report, the broker's tax assessment here in this report is based on the compensation, these are share of commission of the branch from the head office or transactions wherein the branch solicits orders from local customers, Philippine customers and notify the head office who in turn look for the commodities that the Philippine branch needs. And another instance wherein the head office orders the branch to look for local products wherein the branch merely monitors the shipping to the importer of these local products. And the documents presented there show that the[y] are merely the agent of the buyer and the seller. The

head office does not have records of sale and purchases of these imports and exports.

Q. Now, you recommended a deficiency of P718,000.00 (sic) as broker's tax. How did you arrive at this amount?

A. In this docket, on page 181, this is the computation how we arrived at the deficiency tax.

Q. Where did you base the amount appearing in this computation of yours?

A. These are taken from the documents presented to us by the taxpayer. This amount was also computed here as shown in pages 155 to 158." (pp. 6-8, TSN, Hearing on March 23, 1995)

A glance at pages 155 to 158 of the BIR records of the case revealed that petitioner indeed earned commissions from companies other than Nichimen Company in Japan. And if ever petitioner received compensations from its head office, such amounts were also in the nature of commissions representing its share in the commissions received by the head office due to their brokerage activities here and abroad. In both instances, the commissions received by petitioner depended on the invoice amounts of import-export transactions. Thus, in petitioner's Notes to Financial Statements, No. 2 thereof, the following were clearly stated:

"2. COMPENSATIONS RECEIVED FROM HOME OFFICE AND COMMISSIONS

> Compensations received from Home Office represent income computed at certain percentages of invoice amounts of import and export transactions in the Philippines of the Home Office <u>and others</u>.
>
> Commissions represent income computed at certain percentage of invoice amounts of import and export transactions in the Philippines of certain affiliates of Nichimen Corporation <u>and of other parties</u>." (Underlining supplied, p. 159, BIR rec.)

Moreover, during the cross-examination of respondent's witness, it was established that petitioner receives more than the fixed subsidy given by its Head Office as evidenced by the notice of remittances. The following testimony has been extracted from the witness, to wit:

"ATTY. VILLANUEVA

Q. Then, Ms. Witness, on what documents or records did you base your conclusion that there was in fact a sharing of commission?

ATTY. PANGILINAN

If Your Honors please, I think it has already been answered by the witness based on the documents submitted to them. That's w[as] the answer of the witness.

JUDGE ACOSTA

That is why petitioner is asking what are those documents which made you to conclude about the sharing.

A. Per notice of remittances from the head office.

JUDGE ACOSTA

Q. And remittances of what, Ms. Witness?

A. Of compensation. I would like to add also here, Your Honors, that they claimed a fixed subsidy for their expenses.

x x x x x x x x x.

JUDGE ACOSTA

So they get more?

A. Yes, Your Honors. Over and above that fixed subsidy, they get more, that is taken from these transactions based on their soliciting." (pp. 12-14, TSN, Hearing of March 23, 1995)

The case at bar is not different from the case of **"Marubeni Corporation Manila Branch vs. The Commissioner of Internal Revenue," CTA Case No. 4589.** In the latter case, this Court ruled on April 10, 1995, that petitioner is a commercial broker subject to seven (7%) percent commercial broker's tax. The decision was patterned after another Marubeni decision in CTA Case No. 4110, promulgated on March 3, 1993, where We stated that:

"As it is, from the aforecited provision of the Tax Code, it can very well be concluded that indeed petitioner is a commercial broker. For all the brokerage services rendered by Marubeni Corporation branch in Manila, it received commissions from Marubeni Corporation, Head Office, a definite percentage from the commissions income received by the latter in a completed operation of brokerage services.

This commission income was declared by Marubeni Corporation, Manila Branch, as subsidy from home office. It is however reported by the latter as income in its Statement of Income and Expenses for the period ended March 31, 1985 and 1984 attached to its Corporation Annual Income Tax Return.

For the commissions that they earned from the brokerage transactions, Marubeni Corporation Japan allocates a certain portion of that income out of the transaction for the services rendered by Marubeni Branch. It can be readily seen, in the course of the transaction that the source of the subsidy is tied with the import and export transaction.

Now, with regard to the pattern of percentage being sent as subsidy, the same is computed as based on percentage on sales price or in fixed amount based on quantity. The Court considers said amount as commissions contrary to the petitioner's claim. It is likewise noted that it is the Head Office (Marubeni Japan) that allocates the commissions as compensation for the services rendered by its Philippine branch.

We cannot give due assent to petitioner's claim that what it allocates to the Marubeni Branch are mere subsidies in the truest sense of the word. To our mind, it is more of a commission considering the fact that the amount of subsidies remitted varies, dependent upon the sales price or based on quantities. Furthermore, if these subsidies are only given to finance the transaction being undertaken by the branch office in favor of the mother company, then there would then be no need to determine the percentage of the subsidies on the basis of sales price and quantity.

The bigger the amount involved in the transaction, the bigger the commissions, the amount given by the Head Office is always dependent on the import-export transaction." (Marubeni Corporation, Manila Branch vs. The Commissioner of Internal Revenue, CTA Case No. 4589, April 10, 1995, pp. 7-8)

The abovecited cases were appealed to the Court of Appeals, CTA Case No. 4110 was docketed as CA-G.R. SP. No. 31407 while CTA 4589 was docketed as CA-G.R. SP. No. 37508. Although these two cases were appealed separately, they were nonetheless consolidated by the Court of Appeals because the petitions involved principally the same issues.

In CA-G.R. SP No. 31407 (CTA Case No. 4110) the pivotal issue is whether or not petitioner comes within the exceptions contemplated under E.O. 41, as amended by E.O. 64 (Declaring a One-Time Amnesty Covering Income Taxes, Estate and Donor's Taxes Under Title II, and the Tax on Business under Chapter II, Title V, of the National Internal Revenue Code, as amended, for the years 1981 - 1985). The Court of Appeals came out with the findings that petitioner timely availed of the tax amnesty under E.O. 41, as amended by E.O. 64. Therefore, its commercial broker's tax liability has been extinguished by reason of such tax amnesty availment. Consequently, there was no more need for the Court of Appeals to discuss the issue regarding the commercial broker's tax.

It was in CA-G.R. SP. No. 37508 (CTA Case No. 4589) where the issue of commercial broker's tax was discussed by the Court of Appeals. In affirming our decision, the Court of Appeals stated that:

> "As found by the Court of Tax Appeals, the import-export trade business of petitioner's head office is conducted through brokerage services and since the import-export trade business transcends beyond the national boundary the brokerage services were rendered by its branch offices worldwide and here in the Philippines, the brokerage services is rendered by petitioner Marubeni Manila. For the said brokerage services, a certain portion of the commission income received by the latter is allocated and sent to the petitioner which it considered and declared as "subsidy" from home office. The "subsidy" coming from its head office is so tied up with the petitioner's import-export transactions such that the amount of the subsidies remitted to petitioner varies, depending upon the sales price and quantities of import and export." (Marubeni Corp. v. Court of Tax Appeals and Commissioner of Internal Revenue, CA-G.R. SP. No. 314047 and CA-G.R. SP. No. 37508, May 22, 1996, p. 6).

The instant case is identical in facts and issue with the Marubeni case (CTA Case No. 4589, CA-G.R. SP. No. 37508) just cited. The herein petitioner is a commercial broker. This was even admitted by Mr. C.C. Gison of the Tax Division of SGV and Co. in his letter of August 3, 1989, page 7 thereof (p. 194, BIR rec.), stating among others that:

> "As to the proposed deficiency fixed tax as alleged importer/exporter, we submit that our client is likewise not liable thereto as it is only engaging in business as a broker and is not engaged in the business of import and/or export." (Underscoring supplied)

WHEREFORE, in view of the foregoing, the petition for review is hereby **DENIED** and petitioner is **ORDERED** to **PAY** the amount of P767,531.10 as deficiency percentage tax for the fiscal year ended March 31, 1987, inclusive of increments, plus 20% interest per annum from February 1, 1990 until fully paid pursuant to Section 283(c) of the Tax Code.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

I CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals