Library

CIRILO D. CONSTANTINO,
Petitioner,

-versus- C.T.A. CASE No. 1016

THE COMMISSIONER OF
INTERNAL REVENUE,
Respondent.
x- - - - - - - - - - - - -x

March 14/66

D E C I S I O N

Reversed

The Commissioner of Internal Revenue assessed against and demanded from petitioner the amount of ₱2,979.25 as commercial broker's percentage tax for 1956, inclusive of 25% surcharge and compromise penalty, computed as follows:

Total discount for 1956	₱38,390.40
6% broker's percentage tax due thereon	2,303.40
25% surcharge	575.85
Compromise penalty	100.00
Total amount due and collectible	₱ 2,979.25

Petitioner is a businessman engaged as a commercial broker for various truck owners who transport products purchased by San Pablo Oil Factory from the suppliers to its factory. He is also an exclusive distributor and/or dealer of trucks, machineries, equipment, spare parts, and accessories of the International Harvester Macleod, Inc. (formerly International Harvester of Philippines), hereinafter referred to as IHM for brevity. He has a business establishment in San Pablo City known as "C. C. Motor Service" where he stores, displays, stocks, and sells the merchandise above-mentioned.

In 1956, petitioner acted as a dealer of IHM and sold its aforementioned merchandise to the public. The business relationship between petitioner and IHM is governed by a contract entitled "Dealers Sales and Service Agreement" (Exhs. A & 5, pp. 36-45), the essential features of which provide as follows:

> "The purpose of this Agreement is to govern the relations of the Company (IHM) and the Dealer (petitioner herein) in the sale of merchandise offered for sale by the Company to the Dealer and to the public, to the end that such relations may be mutually satisfactory and enduring x x x.
>
> x x x x x x
>
> 3. ORDERS FOR GOODS.
>
> "The goods covered by this Agreement which the Dealer desires to purchase shall be covered by orders x x x.
>
> "x x x the Company's obligation to sell goods to the Dealer, and the Dealer's obligation to purchase goods from the Company, shall be limited to the goods described in written orders from the Dealer that are accepted by the Company.
>
> 4. PRICES, DISCOUNTS, TERMS AND FREIGHT DELIVERY.
>
> "Prices, discounts and terms applying to the goods ordered by the Dealer shall be those established by the Company and in effect at the time of shipment of delivery of the goods to the Dealer.
>
> x x x x x x
>
> "When the Company delivers goods ordered by the Dealer, the Dealer will accept delivery at points of delivery selected by the Company and pay all transportation charges

thereon from the F. O. B. point or points named by the Company to destination.

"The Dealer agrees to reimburse the Company for all expenses incurred by the Company for boxing, crating, packing, loading and handling goods covered by this Agreement.

x x x x x x

6. SALES ON CREDIT.

"The Dealer may be allowed to purchase goods covered by this Agreement on credit either by charge to open account of the Dealer, or by Floor Plan or other terms established by the Company. x x x.

"To protect the Company when credit is extended to the Dealer on goods delivered under this Agreement, it is agreed that immediately upon the shipment or delivery of the goods, the Dealer shall execute and deliver to the Company a chattel mortgage or other security instrument acceptable to the Company, upon the said goods to secure the payment of the unpaid balance of the purchase price. Such chattel mortgage or other security instrument shall constitute a first and superior lien on the goods.

"Prior to full payment of the purchase price to the Company, the Dealer shall have no right to sell or dispose of any goods delivered under this Agreement without first securing the written approval of the Company.

x x x x x x

7. COLLATERAL SECURITY.

"When the Dealer is indebted to the Company on past due notes or open account, or for goods resold by the Dealer, or upon his guaranty of the payment of retail notes or contracts that are in default, he shall, when the Company requests, assign or endorse and promptly deliver to the Company, sufficient good accounts or well-secured notes, or both, to cover said indebtedness, to be held by the

Company as collateral security. x x x.

x x x x x x

8. FINANCE PLAN.

"Any finance plan which the Company may have in force while this Agreement remains in effect, covering the acceptance from the Dealer of retail contracts for direct credit to the Dealer's obligations for goods purchased under this Agreement, shall be made available to the Dealer upon his application, x x x.

9. DIRECT SALES TO GOVERNMENT AND SPECIAL CLASSES OF CUSTOMERS.

x x x x x x

"Both the Company and the Dealer may sell goods covered by this Agreement for use in the Dealer's trade territory to educational institutions, charitable organizations, cooperative associations organized under the Philippine Laws and the members of the same; x x x.

x x x x x x

10. DEALER FACILITIES AND ACTIVITIES.

x x x x x x

"(e) To maintain an inventory of motor trucks, tractors, machines, power units, attachments, service parts and accessories in keeping with the reasonable sales possibilities of his trade territory.

11. GENUINE SERVICE PARTS.

"The Company makes available for purchase by the Dealer, Service Parts designed for use on equipment covered by this Agreement. The Dealer agrees that he will not sell or offer for sale or use on goods covered by this Agreement, any part or parts except those manufactured by or for the Company or supplied by the Company for use on goods covered by this Agreement and distributed by the Company.

"The Dealer agrees to purchase and properly stock a supply of such Service Parts as may be considered adequate in the judgment of the Company.

"The Dealer agrees to pay in full for all Service Parts purchased at Manila list prices less discounts established by the Company x x x. The price of all Service Parts shall be paid to the Company in cash on delivery or if placed on open account in accordance with the current or subsequently published effective terms and discounts.

x x x x x x

12. ACCOUNTING RECORDS AND FINANCIAL REPORTS.

"To justify the extension of credit facilities on goods purchased, the Dealer agrees to maintain accounting records x x.

14. STORAGE, ASSEMBLY AND RETAIL DELIVERY.

"The Dealer shall properly store and care for all gods purchased under this Agreement and protect the same from injury or damage from any cause.

"The Dealer agrees to properly assemble and adjust each machine purchased from the Company before delivery to a user, and upon delivery to instruct the user concerning the operation and proper manner of adjustment of the same.

15. INSURANCE.

"The Company will undertake to insure, at their fair insurable value, against the risk of loss and/or damage by fire only those goods purchased by the Dealer from the Company for which the Dealer is indebted to the Company under the terms of the Floor Plan as provided for in paragraph 6 of this Agreement, and with such insurance providing payment for losses to the Company and the Dealer as their respective interests may appear. The Dealer will reimburse the Company for the premium paid upon receipt of a debit note covering charges for said premium.

16. DELIVERY, RISKS OF SHIPMENT AND ROUTING OF SHIPMENTS.

"Delivery of goods by the Company to a carrier consigned to the Dealer or consigned to another dealer for the account of the Dealer, or delivery to any other person other than a Company employe for the account of the Dealer, shall constitute delivery to the Dealer. x x x.

19. DEALER NOT COMPANY'S AGENT.

"The Dealer is not the Company's agent in any respect and is not authorized to incur any obligations or make any promises or representation in its behalf.

22. CUSTOMER ORDER FORMS AND WARRANTY ADJUSTMENTS.

"The Dealer agrees, in reselling the goods purchased under this Agreement, to enter into a Sales Contract with each customer x x x.

24. REPURCHASE OF DEALER'S STOCK AND SIGNS UPON TERMINATION OF THIS AGREEMENT.

"Upon termination of this Agreement, the Company agrees to repurchase and the Dealer agrees to resell all new, unused, current and salable equipment and attachments on hand in the Dealer's place of business that have been delivered to the Dealer under this Agreement. x x x.

"Upon termination of this Agreement, the Company will repurchase from the Dealer those service parts and accessories purchased from the Company under this Agreement on hand in the Dealer's place of business x x x.

"Upon termination of this Agreement, the Company also agrees to purchase from the Dealer and the Dealer agrees to sell and deliver to the Company any business signs purchased from the Company in good condition, belonging to the Dealer and bearing any trade name or registered trademarks of the Company. x x x." (Underscoring supplied).

On the basis of the foregoing agreement, petitioner purchased from IHM, either in cash or on installment, (Exhs. B & 5-A, pp. 28-36 BIR rec; Exh. C, pp. 32-35 CTA rec.), trucks, machineries, equipment, spare parts, and accessories thereto. In the purchase of the products of IHM, petitioner was given by the former trade discounts ranging from 16% on trucks, tractors, machineries, construction and electrical equipment, and attachments thereto, to 30% on service parts, in addition to cash discounts of 5%. (Exhs. B & 5-A, ibid.)

Whenever purchases of IHM merchandise and goods were made by petitioner on installment under the so-called "Retail Financing Agreement" (Exh. C, op. cit.), petitioner invariably executed a chattel mortgage in favor of IHM as a security for the indebtedness or in settlement of, or credit to, his obligation. With respect to those goods purchased on installment and which were eventually sold to his customers, petitioner required his buyers to execute in his favor a chattel mortgage, which he, in turn, assigned to IHM. In the case of the sale of diesel engines which were installed on or affixed to the ground or other property, petitioner executed in favor of his buyers deeds of sale with reservation of title, which were then assigned to IHM. Thereupon, the said engines were delivered to the buyers of petitioner.

The goods purchased from IHM, irrespective of the terms of payment, were delivered to petitioner "ex-bodega" Manila. From there, he transported them to his establishment in San Pablo City where they were stocked and serviced, before their delivery to his customers.

From the moment the goods were delivered to and received by petitioner from IHM, said goods were insured and the policies assigned to the latter to the extent of their respective interests.

The goods acquired by petitioner from IHM were sold to his customers either at dealer's price, or at prices higher than the dealer's price (pp. 54-55, t.s.n.). Where the sale was at dealer's price, petitioner's profit consisted of the "discount" allowed by IHM on his purchases. The purchases of petitioner from IHM were covered by the latter's sales invoices (see Exhs. E, E-1, E-2, and E-3), and petitioner's sales to his customers were covered by his sales invoices (see Exhs. H, H-1, H-2 and H-3).

At the end of each fiscal year, petitioner took an inventory of his goods on hand or in stock (Exhs. P, P-1, and P-2) and paid the graduated fixed annual tax on his gross sales as required by Section 182(b) of the Tax Code.

Respondent's examiner found that, in 1956, petitioner's "trade discounts" on trucks, machineries, equipment, attachments thereto, and service parts acquired from IHM and sold to his customers, amounted to ₱38,390.40. Consequently, under Section 195, in relation to Section 183, of the Tax Code, petitioner was assessed by the Government a total of ₱2,979.25 as 6% commercial broker's tax, 25% surcharge for late payment of the percentage tax, and ₱100.00 as compromise penalty.

The only issue presented for our determination is whether or not petitioner is a commercial broker as defined in Section 194(t) of the National Internal Revenue Code which provides as follows:

> "'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. The term includes commission merchants." (Underscoring supplied)

The statutory definition of "commercial broker" embraces two (2) distinct types of persons, namely: (1) commercial broker and (2) commission merchant.

On the other hand, before the effectivity on

July 1, 1939 of Commonwealth Act No. 466, otherwise known as the National Internal Revenue Code, the term "commercial broker" does not include a commission merchant. This exclusion is explicit in the prior law (Revised Administrative Code) which defines a commercial broker as follows:

> "Sec. 1465. Words and phrases defined.- In applying the provisions of the preceding section words and phrases shall be taken in the sense and extension indicated below:
>
> "(x) '<u>Commercial broker' includes all persons, other than commission merchants</u> and salaried employees, whose business it is to bring about sales or purchases of merchandise for other persons, or to bring proposed buyers and sellers together, or to negotiate freights or other business for the owners of vessels, or for the shippers, or consignors or consignees of freight carried by vessels, for a compensation. (Underscoring supplied)

The National Internal Revenue Code failed to define the words "commission merchant" in its definition of words and phrases under Section 194 of the same Code. However, under Section 1459 of the Revised Administrative Code, the words "commission merchant" was included in the term "merchant" who is "a person engaged in the sale, barter, or exchange of personal property of whatever character." Under the provisions of the last paragraph of said Section 1459 of the Revised Administrative Code, "commission merchants" must have "establishments of their own for the keeping and disposal of goods of which sales or exchanges are effected, but does not include merchandise (sic commercial) brokers."

For tax purposes, it can be said that the term "commission merchant" under Sections 1459 and 1465(x) of the Revised Administrative Code is distinct and different from the meaning of the same words under Section 194(t) of the National Internal Revenue Code, supra. Under the former internal revenue law, the term "commission merchant" is included in the same category as a "merchant" as distinguished from a "commercial broker", while in our Tax Code the term "commission merchant" is placed in the same class as a "commercial broker." From the evolution of the meaning of the term "commission merchant" embodied in our tax laws, it is now clear that the "commission merchant" referred to and found in Section 194(t) of the National Internal Revenue Code is nothing more but a commercial agency or an agency to sell as distinguished from a merchant or dealer who is engaged in the purchase and sale of merchandise.

Petitioner contends that he is a merchant under the terms and conditions of the "Dealers Sales and Service Agreement" (Exhs. A & 5) entered into by him and IHM because the merchandise and goods purchased by the former from the latter were subsequently sold by petitioner to his customers and buyers. On the other hand, respondent contends that petitioner is not a merchant but either a commercial broker or commission merchant as defined in Section 194(t) of the National Internal Revenue Code because petitioner acted as the broker or agent of IHM in the sales of its merchandise and goods to the public. In short, respondent adopted the view that the sales of merchandise and goods made by IHM to petitioner in pursuance of their agreement were no sales at all because the parties thereto intended that their relationship be that of principal and agent. To bolster his theory, respondent alleged that the purchases of merchandise made by petitioner from IHM were generally based upon previous orders of petitioner's customers; the funds used in the said purchases belong to petitioner's customers; petitioner merely acquired possession of the merchandise and goods purchased from IHM but not the ownership thereof; petitioner does not sell for his own account the goods acquired from IHM because the latter fixes the price thereof; petitioner shares with IHM his profit in the sales of goods; and petitioner has no authority to repossess the merchandise and goods sold by him to his buyers and customers. As authorities for his stand that petitioner is a commercial broker or commission merchant, respondent cites the cases of Perez vs. Rafferty (41 Phil. 74) and Pacific Commercial Company vs. Yatco (68 Phil. 398).

We agree with petitioner that, as regards the transactions between him and IHM, he is not a commercial broker. The records show that in selling goods and merchandise to his customers, petitioner used and issued his sales invoices instead of selling for and in behalf of IHM. He has not received any sales commission or compensation from IHM in order to be considered as a broker because he was satisfied with the purchase discount given him by IHM. Moreover, petitioner is the owner of the merchandise and goods purchased by him from IHM before the same were sold to his buyers and customers. Under the circumstances, the essential elements of brokerage are not present in this case and, therefore, petitioner is not a commercial broker in consonance with the decision of the Supreme Court which held:

> "x x x. A broker is generally defined as one who is <u>engaged for others, on a commission, negotiating contracts relative to property, with the custody of which he has no concern</u>; the negotiator between other parties, <u>never acting in his own name but in the name of those who employed him; he is strictly a middleman</u>, 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. vs. Nolting and Garcia, 35 Phil. 274) (Underscoring supplied).

As a logical corollary to the principal question of brokerage, it may be asked: Is petitioner a commission merchant? Respondent answers the question in the affirmative and cites as authority the case of Pacific Commercial Company vs. Yatco, 68 Phil. 398, wherein the court defined the term "commission merchant" as follows:

> "A commission merchant is one engaged in the purchase or sale for another of personal property which, for this purpose, is placed in his possession and at his disposal. He maintains a relation not only with his principal and the purchasers or vendors, but also with the property which is the subject matter of the transaction." (Underscoring supplied)

It is clear from the foregoing definition that, in order that the petitioner may be classified as a commission merchant, he must be engaged in the purchase or sale of personal property for another. A close scrutiny of the evidence on record shows that the merchandise and goods of IHM were purchased by petitioner and sold in his own behalf. Consequently, a person who is engaged in the purchase or sale of merchandise in his own behalf, either in his store, warehouse, or establishment where sales or exchanges of personal property were effected, is a merchant and not a commercial broker or commission merchant. (Manila Tobacco Association, Inc. vs. The City of

Manila, G. R. No. L-9549, Dec. 21, 1957; Velasco vs. Universal Trading Co., Inc. (CA) 45 O.G. 4504 and Puyat vs. Arco Amusement Co., 40 O.G. 1425, cited in Ker & Co., Ltd. vs. Melecio R. Domingo, CTA Case No. 944, Oct. 19, 1962; and Government vs. Jervasio, 71 Phil. 1).

In an attempt to clinch his case, respondent capitalizes on the distinction between a commission merchant and a merchant (independent dealer) in the following language:

> "On the other hand, an independent dealer is one who buys to sell again. He buys with his own funds, takes title in his own name and sells in his own name and for his own account at whatever price he may deem advisable. (Neild v. District of Columbia, 110 F 2d 246, 71 App. D. C. 306)
>
> "The distinctions between a commission merchant and an independent dealer are that the latter buys with his own funds, takes title of the goods in his own name and sells in his own name and for his own account at whatever price he may desire, whereas, the former does not buy with his own funds nor acquire ownership of the goods and does not also fix the price of the goods, the price being fixed by his principal. An independent dealer takes all the profits realized from the sales he makes, while a commission merchant merely shares, with his principal, in the profits from sales made by him.
>
> "Applying the foregoing definitions and jurisprudence to the essential facts of this case, it will be readily seen that the herein petitioner is more of a commercial broker or a

> commission merchant rather than an independent dealer." (Memorandum for Respondent, p. 8).

We find no merit in respondent's contention. As we have discussed earlier in this decision, the term "commission merchant" found in Section 1459, in relation to Section 1465(x), of the Revised Administrative Code, is distinct and different from the meaning of the same words under Section 194(t) of the National Internal Revenue Code, supra. In other words, considering the evolution of the meaning of the term "commission merchant" embodied in the Revised Administrative Code and the National Internal Revenue Code, we are of the opinion that a "commission merchant" in order to be included in the term "commercial broker" must perform essentially the functions of the latter in that the commission merchant, for compensation or profit, brings about sales or purchases of merchandise for other persons as envisioned by Section 194(t) of the National Internal Revenue Code. The allegations, therefore, of respondent to the effect that the purchases of merchandise made by petitioner from IHM were generally based upon previous orders of petitioner's customers, the funds used in the said purchases belong to petitioner's customers, the petitioner merely acquired possession of the merchandise and goods purchased from IBM but not the ownership thereof, etc. are of no moment in the resolution of the principal issue in this case because our law making body classified the term "commission merchant" in the same category as a "commercial broker." Moreover, the cases cited by respondent, namely: Perez vs. Rafferty, supra, and Pacific Commercial Company, supra, are not authoritative as the facts in those cases are entirely different from the facts of this case. The cases cited by respondent are clearly inapplicable to the instant case because they refer to purchases and sales of merchandise for another person, or between principals and agents, as distinguished from the sales to the public of petitioner in his own behalf.

In a final bid to clinch his case, respondent invokes the doctrine of estoppel by alleging that petitioner is now estopped from denying his status as a commercial broker in 1956 because for that year he paid the fixed and percentage taxes as a commercial broker in addition to the deficiency percentage tax. The doctrine of estoppel invoked by respondent has no factual basis. The evidences disclose that the commercial broker's fixed, percentage and deficiency taxes paid by petitioner for 1956 relate to his business as a commercial broker for various truck owners who transport products purchased by San Pablo Oil Factory from the suppliers to its factory and for which he earned ₱5,872.38 as compensation (Exhs. 1-A & 1-D, in relation to Exh. 1, 2nd par., p. 21 BIR rec). These brokerage transactions of petitioner have no relation at all to the amount of ₱38,390.40 which he earned as "discount" or rebate on his purchases of merchandise and goods from IHM.

IN VIEW OF THE FOREGOING CONSIDERATIONS, the decision appealed from should be, as it is hereby, reversed, without pronouncement as to costs.

SO ORDERED.

Quezon City, March 14, 1966.

Estanislao R. Alvarez

ESTANISLAO R. ALVAREZ
Associate Judge

I CONCUR:

R M Umali

ROMAN M. UMALI
Acting Presiding Judge