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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

WARNER BARNES & CO., LTD.,
Petitioner,

- versus-

CTA CASE NO. 1825

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

Sept 21/72

D E C I S I O N

Petitioner has appealed to this Court from respondent's decision, dated December 21, 1966, holding it liable for deficiency commercial broker's percentage and advance sales taxes, surcharges, and compromise penalty amounting to ₱241,237.27 covering the period from the period January 1, 1954 to June 30, 1962.

Petitioner is a corporation organized and existing under the laws of Great Britain and duly licensed to transact business in the Philippines.

Petitioner's books of accounts and other pertinent papers were investigated for business tax purposes by Revenue Examiner Benjamin Fernandez from January 1, 1954 to June 30, 1962. As a result thereof, respondent's examiner reported and recommended on January 20, 1964 that a deficiency tax assessment of ₱239,537.27 be issued against petitioner.

Acting on the examiner's recommendation, respondent issued Letter-Demand No. 64-940, dated September 21, 1964, assessing and demanding from petitioner payment of ₱239,237.27 representing deficiency commercial broker's percentage and advance sales taxes plus ₱2,000.00 as compromise penalty, or a total of ₱241,237.27 covering the period from January 1, 1954 to June 30, 1962, computed as follows:

As Commercial Broker:

Period Covered	Gross Receipt	6% Tax due
1/1/54 to 12/31/58	₱4,760,153.00	₱285,609.18
1/1/59 to 6/30/62	4,188,162.81	251,289.95
T o t a l s	₱8,948,315.81	₱536,898.95(?)
Less: Tax paid		346,124.13
Total Deficiency percentage tax		₱190,774.82
Add: 25% surcharge		47,693.71

Total Deficiency percentage tax & surcharge ......₱238,468.53

As Importer:

January 1, 1954 to December 31, 1962:

Total Landed Cost	₱448,564.87
Add: 25% maŕk-up	112,141.22
Taxable Amount	₱560,706.09
7% Advance Sales Tax	₱ 39,249.43
Less: Tax Paid	38,786.19
Total Deficiency	₱463.24

January 1, 1959 to June 30, 1962:

Total Landed Cost	₱478,078.78
Add: 25% Mark-Up	119,519.70
Taxable Amount	₱597,598.48
7% Advance Sales Tax	₱ 41,831.89
Less: Tax Paid	41,526.19

Total ....₱305.50

Total Deficiency Advance Sales Tax ....₱768.74

TOTAL AMOUNT DUE AND COLLECTIBLE ₱239,237.27
(pp.137-138, B.I.R. Rec.)

On December 18, 1964, petitioner requested respondent an extension of 15 days from December 21, 1964 within which to protest the said assessment, contending that its accountant is still verifying the necessary papers for the preparation of a memorandum-protest on the aforesaid assessment. On December 31, 1964, petitioner protested respondent's assessment, contending that it could not be held liable for commercial broker's percentage tax on its compensation and fees received from companies managed by it; and that respondent's right to assess the assessment in question covering the period from January 1, 1954 to October 30, 1959 has already prescribed under Section 331 of the Tax Code.

On January 13, 1965, respondent issued a warrant of distraint and levy against the properties of the herein petitioner. On February 23, 1965, respondent received from petitioner a letter requesting that the said warrant be held in abeyance until the issues raised in petitioner's letter of December 31, 1964 are finally resolved by respondent. On a 1st Indorsement dated February 26, 1965, a Senior Revenue Seizure Agent reported that he was not able to serve the said warrant of distraint and levy because petitioner requested an extension of time to consult and seek the advice of its tax consultant and/or legal counsel.

On December 21, 1966, respondent denied petitioner's request for cancellation or withdrawal of the assessment and demanded payment of the said amount of ₱241,237.27, within ten (10) days from petitioner's receipt of respondent's letter. On January 14, 1967, petitioner appealed to this Court.

This case was submitted to the Court for decision by the parties on the basis of the pleadings, records and memoranda.

The issues to be resolved by the Court are the following:

> 1. Whether or not the petition for review was filed beyond the 30-day period prescribed by Section 11 of Rep. Act No. 1125;
>
> 2. Whether or not the right of respondent to assess petitioner for percentage taxes covering the period from January 1, 1954 to October 20, 1959 has prescribed under Section 331 of the Tax Code;
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> 3. Whether or not petitioner is subject to commercial broker's percentage tax on the commissions received by its Insurance Department as insurance agent of Commonwealth Insurance Company;
>
> 4. Whether or not petitioner is subject to the commercial broker's percentage tax on the compensation or management fees received by it as General Manager of Fuller Paint and Manufacturing Co., Centennial Trading Co., and Commonwealth Insurance Co.; and

5. Whether or not petitioner is subject to the deficiency advance sales tax of P768.74.

FIRST ISSUE:

Respondent alleged that this Court has no jurisdiction over the case as petitioner's appeal was filed beyond the 30-day period prescribed by Section 11, Republic Act No. 1125, because the warrant of distraint and levy issued on January 13, 1965 was served to the herein petitioner on February 23, 1965 and, therefore, the 30-day period commenced to run from the said date. Since petitioner filed the petition for review on January 14, 1967, or far beyond the 30-day period, this Court has no jurisdiction to entertain the appeal under said Section 11 of Republic Act No. 1125.

We cannot subscribe to respondent's theory. The record shows that, although respondent issued the warrant of distraint and levy on petitioner's properties, the same had not been served by respondent as admitted by his Senior Revenue Seizure Agent in his 1st indorsement dated February 26, 1965 (see p. 152, BIR rec.). For failure to serve the said warrant against petitioner, respondent can not consider the same as his decision and final assessment. The 30-day period should, therefore, be counted from the date petitioner received respondent's decision on the disputed assessment dated December 21, 1966. Even assuming that petitioner received respondent's decision on the same date it was issued (December 21, 1966), and inasmuch as the petition for review was filed in Court on January 14, 1967, or 24 days later, it is clear that the said petition was seasonably filed. Consequently, this Court has jurisdiction to entertain the appeal of petitioner.

SECOND ISSUE:

Petitioner contends that the right of respondent to assess the commercial broker's percentage tax for the period from January 1, 1954 to October 31, 1959 has already prescribed under Section 331 of the Tax Code. Respondent, however, contends that the said prescriptive period of five years does not apply in this case because petitioner deliberately failed to declare in its taxable gross receipts the commissions received by it as a broker or commission merchant and, therefore, had filed false or fraudulent percentage tax returns. Under Section 332 of the Tax Code, the prescriptive period is ten years from the discovery of such fraud. Respondent reportedly discovered the alleged false or fraudulent returns only on July 31, 1959 and, therefore, he could assess, at any time within ten years from July 31, 1959, the disputed tax in question.

The laws on prescription relied upon by both parties read as follows:

> SEC. 331. Period of limitation upon assessment and collection.— Except as provided in the succeeding section, internal-revenue taxes shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. For the purposes of this section a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day: x x x
>
> SEC. 332. Exceptions as to period of limitation of assessment and collection of taxes.—(a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within ten years after the discovery of the falsity, fraud, or omission.

We are not in accord with respondent's stand. Fraud is never imputed; it must be alleged and proved, at least satisfactorily if not conclusively, by one who alleges its existence. (Gomez vs. Domingo, C.T.A. Case No. 1168, February 15, 1964). To support a finding of fraud, there must be evidence that the taxpayer deliberately filed a false return with intent to evade payment of the tax. (See American Rubber Co. vs. Coll. of Int. Rev. C.T.A. Case No. 164, July 31, 1965).

In the instant case, respondent is estopped by his own act to invoke the existence of fraud. Under Section 183 of the Revenue Code, there are two (2) instances where the 50% surcharge as fraud penalty may be imposed, namely: (1) in case of willful neglect to file the return prescribed therein; or (2) in case a false or fraudulent return is willfully made. Respondent's failure to impose the 50% surcharge as fraud penalty on the disputed assessment is a clear evidence of the absence of fraud. In a number of cases, this Court held:

> "The fact that respondent did not include the fraud penalty in his first deficiency assessment, which was issued more than five(5) years after the filing of petitioner's income tax return, is an indication that respondent himself does not believe that the said filing was attended with fraud with intent to evade the payment of tax. In view of this, we are inclined to believe that the inclusion of the fraud penalty in the revised assessment dated September 2, 1961, was done merely to justify respondent's contention that, the assessment having been made within ten (10) years after the discovery of the fraud, the same was seasonably made." (See Gomez vs. Domingo, supra. American Rubber Company vs. Collector of Internal Revenue, supra. C.M. Hoskin & Co., Inc. vs. Commissioner of Internal Revenue, C.T.A. Case No. 1623, September 22, 1967.)

The report of the revenue examiner shows that petitioner has consistently filed its percentage tax returns and paid the taxes due thereon. Consequently, petitioner is not subject to the 50% surcharge. Neither is it subject to the 50% surcharge for willfully filing false or fraudulent returns with intent to evade payment of the tax because no evidence was adduced to prove the existence of fraud. This is so because the hearing in this Court is a trial de novo (on the merits) and, therefore, respondent's failure to enter into a trial of the case on the merits is a waiver of the imputation of fraud.)

For purposes of prescription, the filing of petitioner's percentage returns should be made within twenty days after the end of each month. In fact, Section 183 of the Tax Code provides:

> SEC. 183. Payment of percentage taxes—(a) In general.—It shall be the duty of every person conducting a business on which a percentage tax is imposed under this Title, to make a true and complete return of the amount of his, her or its gross monthly sales, receipts or earnings, or gross value of output actually removed from the factory or mill warehouse and within twenty days after the end of each month, pay the tax due thereon: x x x (Underlining supplied.)

(There is no dispute that petitioner has been filing and paying its percentage taxes as reflected in the revenue examiner's work sheets. (See pp. 76, 78, 81, 84, 87, 90, 92, 94 and 96, BIR rec.) It was shown therein that petitioner made payments of its percentage taxes and, therefore, it filed percentage tax returns from April 20, 1954 to July 19, 1962. As respondent's disputed assessment of September 21, 1964 was admittedly sent by registered mail to petitioner on November 19, 1964 (pp. 196-197, BIR rec.), it is clear that respondent's assessment for commercial broker's percentage tax covering the period from April 20, 1954 to October 20, 1959 (last day for filing returns) has already prescribed under Section 331 of the Revenue Code, supra.

THIRD ISSUE:

Petitioner alleged that the commissions received by its Insurance Department from the Commonwealth Insurance Company as an insurance agent thereof are not subject to the commercial broker's percentage tax because it is neither a commercial broker nor a commission merchant as defined in Section 194(t) of the Tax Code, quoted hereunder:

> (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.

Respondent contends, however, that the relation of agent and principal existed between petitioner and the Commonwealth Insurance Company. Consequently, respondent concluded that petitioner is a commission merchant within the purview of Section 194 of the Tax Code and, therefore, it is subject to the commercial broker's percentage tax of 6% imposed by Section 195 of the same Code.

The commissions received by petitioner as insurance agent of Commonwealth Insurance Company are not subject to the broker's percentage tax (6% of gross receipts) because petitioner is neither a commercial broker nor a commission merchant under the above statutory definition. A "commercial broker" embraces two distinct types of persons, namely: (a) commercial broker; and (b) commission merchant. To be a commercial broker, it is indispensable that the first and any of the following elements are present: (1) The payment and receipt of compensation or profit; (2) The intermediary sells or brings about sales or purchases of merchandise for other persons; or (3) brings proposed buyers and seller together; or (4) negotiate freights or other business for owners of vessels; or (5) other means of transportation; or (6) for shippers; or (7) consignees of freight carried by vessels or other means of transportation.

The Supreme Court in the case of Behn, Meyer & Co. Ltd. v. Nolting and Garcia (35 Phil. 274) defines a broker in its broad scope as follows:

> . . . A broker is generally defined as one who is engaged for others, on a commission, negotiating contract 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. (19 Cyc., 186; Henderson v. The State, 50 Ind., 234; Black's Law Dictionary.) A broker is one whose occupation is to bring parties together to bargain, or to bargain for them, in matters of trade, commerce or navigation.

From the foregoing statutory definition of a "commercial broker", the Supreme Court's definition of a "broker," and our analysis of the indispensable elements constituting the consideration and activity of a commercial broker, we hold that the compensation received by petitioner as an insurance agent is not subject to the commercial broker's percentage tax. In the first place, a commercial broker deals in transactions involving personal property like merchandise and freight. In the second place, an insurance agent deals on activity other than those enumerated in Section 194(t) of the Revenue Code, supra. And finally, an insurance contract involves indemnity while the services of a broker involves agency.

Our Supreme Court in the case of Pacific Commercial Company v. Yatco, 68 Phil. 398, defines a 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 purchaser or vendor, but also with the property which is the subject mat-

ter of the transaction. (Underlining supplied.)

Under the foregoing definition and considering the analysis and discussion previously made by this Court, we cannot hold petitioner a commission merchant subject to the commercial broker's percentage tax imposed by Section 195 of the Revenue Code.

FOURTH ISSUE:

Respondent contends that the work of petitioner as General Manager of Fuller Paint and Manufacturing Co., Centennial Trading Co., and Commonwealth Insurance Co. partakes the nature of a broker because it acts as exclusive distributor of the companies' products, undertakes advertising thereof, and lays down policies for insuring effective means of increasing the volume of sales.

To bolster his contention that petitioner is a commercial broker, respondent relied on the doctrine laid down by the Supreme Court in the case of A. Soriano y Cia v. Collector of Internal Revenue, G.R. No. L-5886, May 22, 1957, wherein it was ruled that the taxpayer is a commercial broker.

We have examined the Power of Attorney, Management Contract, and Management Agreement entered into by petitioner and Commonwealth Insurance Co., Centennial Trading Co., and Fuller Paint Manufacturing Co. (pp. 175-182, 104-108 and 170-171, BIR rec.)

to ascertain the functions, obligations, and activities of petitioner in connection with the companies managed by it. The main and principal feature of said instruments relates to managerial work and, incidentally, certain secondary activity as a commercial broker.

We are, therefore, constrained to distinguish the case of A. Soriano y Cia v. Collector of Internal Revenue, *supra*, with the case at bar. The salient facts and circumstances which were made the basis of the *ratio decidendi* of the Supreme Court in ruling that the taxpayer is a commercial broker in the Soriano case, *supra*, is not present in the instant case.

In the case of A. Soriano y Cia., Mr. A. Soriano's services were availed of principally and exclusively to negotiate and consummate the sales of mineral ores to Japan and that there was no necessity of employing A. Soriano y Cia. as manager and consultant of Philippine Iron Mines because it had already a Manager in the person of the Atlantic Gulf and Pacific Co. which, as engineers for more than half a century had established an enviable record of service. Philippine Iron Mines, therefore, had no need for A. Soriano y Cia. as a Manager but only as a commercial broker. The instant case has a different factual background than the case of A. Soriano y Cia, supra, and, consequently, the reason for the decision therein cannot be made controlling and applicable to petitioner's case.

FIFTH ISSUE:

Petitioner assailed the overlapping deficiency advance sales tax assessment because the amount of ₱463.24 covers the period from January 1, 1954 to December 31, 1962 while the additional amount of ₱305.50 refers to the period from January 1, 1959 to June 30, 1962. Petitioner alleged that the assessment of ₱463.24 could not have been extended to December 31, 1962 because the examiner's over-all investigation terminated up to June 30, 1962. Petitioner submitted, therefore, that the period covered by the first deficiency advance sales tax assessment of ₱463.24 is from January 1, 1954 to December 31, 1958 and the second assessment of ₱305.50 is from January 1, 1959 to June 30, 1962, following the sequence of the two periods in the commercial broker's percentage tax assessment. Respondent's counsel admitted the correctness thereof as to the division of the two (2) periods.

Petitioner, therefore, invoked the defense of prescription of assessment with respect to the deficiency advance sales tax covering the period from

January 1, 1954 to December 31, 1958 and from January 1, 1959 to June 30, 1962. An examination of the examiner's worksheet, particularly the Resumé of Computation, shows that the amount of ₱305.50 (not ₱463.24) was assessed for the period from January 1, 1954 to December 31, 1958 while the assessment of ₱463.24 (not ₱305.50) corresponds to the period from January 1, 1959 to June 30, 1962 (p. 103, BIR rec.).

(To determine the prescriptive period of five years under Section 331 of the Revenue Code, supra, the running thereof shall be computed from the last day of the filing of a return. For advance sales tax purposes, the corresponding importer's revenue declaration is considered a return. This Court can, therefore, take judicial notice that an importer, like the herein petitioner, filed a return or declaration before paying the advance sales tax to the Bureau of Customs (see Engineering Equipment and Supply Co. v. Commissioner of Internal Revenue, CTA Case No. 681, November 29, 1966; Dupro Philippines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 1341, December 16, 1968).)

Inasmuch as p titioner had paid the advance sales tax for the first period up to December 31, 1958, respondent's deficiency advance sales tax assessment of ₱305.50 under Letter-Demand No. 64-940, dated

September 21, 1964, was issued more than one (1) year beyond the prescriptive period of five years established by Section 331 of the Revenue Code. Moreover, another revenue examiner reported earlier that petitioner had already paid the said amount of ₱305.50 under Official Receipt No. A-605737, dated August 3, 1959 (p. 14, BIR rec.). Consequently, we hold that petitioner is not liable for the payment thereof.

As to the deficiency advance sales tax assessment of ₱463.24 for the period from January 1, 1959 to June 30, 1962, the Court is at a loss to determine whether or not the said assessment has prescribed when Letter-Demand No. 64-540, dated September 21, 1964, was issued. In a case like this, it is incumbent upon petitioner to prove the date when the return was filed in order to substantiate the defense of prescription of assessment. This is so because the hearing in this Court is a trial de novo (on the merits). Having failed to overcome the evidence of respondent, we hold petitioner liable for the payment of ₱463.24 as deficiency advance sales tax.

As to the compromise penalty of ₱2,000.00, it is a settled jurisprudence in this jurisdiction that the same cannot be imposed and collected without the consent of the taxpayer.

WHEREFORE, the decision of respondent Commis-

DECISION -
CTA CASE NO. 1825

sioner of Internal Revenue appealed from is modified. Petitioner is hereby declared exempt from the commercial broker's percentage tax covering the period from January 1, 1954 to December 31, 1958 based on prescription of assessment under Section 331 of the Revenue Code; the compensation or commission of petitioner as an insurance agent is not subject to the same tax; and the management fees of petitioner under the facts and circumstances of this case are likewise not subject to the aforesaid tax. However, petitioner is hereby ordered to pay respondent or his authorized collection agent the deficiency advance sales tax of ₱463.24. Without pronouncement as to costs.

SO ORDERED.

Quezon City, September 21, 1972.

Estanislao R. Alvarez
ESTANISLAO R. ALVAREZ
Associate Judge

WE CONCUR:

R. M. Umali
ROMAN M. UMALI
Presiding Judge

Ramon L. Avanceña
RAMON L. AVANCEÑA
Associate Judge