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February 29, 1960

TAN ENG HONG,
Petitioner,

- versus -

C.T.A. CASE NO. 436

COLLECTOR OF INTERNAL REVENUE,
Respondent.

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D E C I S I O N

This is an appeal from the decision of the respondent Collector (now Commissioner) of Internal Revenue, assessing against and demanding from the petitioner as commercial broker the amount of ₱7,513.94 as fixed and percentage taxes and surcharge, covering the period from the first quarter of 1952 to the second quarter of 1954 inclusive, and the first quarter of 1955, plus the sum of ₱50.00 as compromise penalty. (Exh. 3, p. 11 BIR rec.; see also letter dated Aug. 14, 1957, pp. 87-92 BIR rec.)

It appears that during the period in question, petitioner Tan Eng Hong had some business transactions with the Philippine Council for United States Aid (hereinafter referred to as PHILCUSA) whereby the former, as a successful bidder, supplied the latter with goods which it wanted to be given as aid from the United States to the Philippines. This aid from the United States was the result of the Memorandum of Agreement signed on November 14, 1950, by the late President Elpidio Quirino in behalf of the Philippine Government and ECA Administrator William C. Foster, representing Harry S. Truman, President of the

United States. (46 OG 5410-5413.) The aid is in the form of dollar exchange for import, and applicable regulations do not permit the use of the dollars within the Philippines, and no offers can be entertained for furnishing materials or supplies which are (1) manufactured in the Philippines; (2) existing stock in the Philippines, and (3) those already shipped from countries specified as source in the project authorization at the time of the bid. The PHILCUSA represents the Philippine Government in its relationship with the agency (the ECA and later the MSA) selected by the United States Government to represent in the assistance program for the Philippines.

The transactions of the petitioner with PHILCUSA were not of the common run of contracts and were governed by Exhibits 8 and 9, which were denominated as "General Provisions and Conditions" and "General Conditions", respectively. (Pp. 16-26 & 11-15 BIR rec.; see also Exh. F, pp. 52-63 CTA rec.) To understand better the nature and scope of the contracts in question between the parties, it is necessary to describe *ad seriatim* the different steps taken leading to their final execution and performance.

To start with, PHILCUSA announced that "Sealed bids x x x x will be received x x x x and then publicly opened for furnishing x x x commodities for delivery C & F Manila." (Exh. 7, pp. 44-46 BIR rec.; Exh. H, p. 65 CTA rec.) The petitioner, as a qualified bidder, submits his signed proposal together with a proposal bond. He "offers and agrees, if this (his) bid be accepted within 20 calendar days from the date of opening, to furnish any or all of the items of which prices are quoted, at the price set opposite each item and delivered at the point(s) specified xxxx." (Exh. 7, pp. 44-46, BIR rec.; Exh. H, p. 65, CTA rec.) The quotations of the petitioner is in Philippine currency for the C & F Philippine Port Value. In computing his bid, the total C & F dollar cost is converted to pesos on the basis of ₱2.00 to $1.00, and his profit in pesos which he personally and solely fixes, is then added thereto in order to arrive at the correct total quotation.

If the bid of the petitioner is accepted by PHILCUSA, he receives a letter of award wherein he is required to inform PHILCUSA of the (1) Net C & F dollar cost to his suppliers per item and per each supplier's group; (2) Names and addresses of his suppliers; and (3) Names of independent inspection firms that will undertake the inspection prior to the shipment of the goods. Hence, it is only after the petitioner has been finally awarded the bid contract that PHILCUSA comes to know of the names of the foreign suppliers of the commodities to be imported and the sole purpose seems to be to secure and facilitate the dollar payment of the imported goods to said suppliers abroad. Then, the petitioner is also requested to submit a performance bond and to apply at the Philippine National Bank for the corresponding letter(s) of credit in favor of his suppliers abroad. (Exh. A, p. 32 CTA rec.) However, he is not required to secure an import license for the goods imported for PHILCUSA.

Accordingly, the petitioner applies for a letter of credit with the Philippine National Bank in his own name and for his own account and in favor of his suppliers abroad. He pays the usual bank charges, but is not required to make payment of pesos into the counterpart fund nor pay the foreign exchange premium as no actual sale of dollars is involved. He is also exempt from the payment of the following: (1) Foreign exchange tax; (2) sales tax; (3) customs duties; (4) municipal taxes; (5) arrastre charges; and (6) delivery charges except when otherwise provided in the contract. The dollars that are being used in all the PHILCUSA purchases belong to the United States Mutual Security Administration (hereinafter referred to as MSA) and are actually paid for by the Philippine Government by general payments from the special appropriation directly into the counterpart fund. (Par. 14, Exh. F, pp. 55-56 CTA rec.; also Exh. 8, pp. 19-20 BIR rec.) And most probably for this reason, the petitioner authorizes the Philippine National Bank to "deliver all documents drawn under this credit to PHILCUSA". (Exh. G, p. 64 CTA, rec.)

It should be noted that the delivery time for the purposes of the bid contracts of the petitioner with the PHILCUSA means the delivery of the commodities aboard the ship, properly packed and labelled for export, in accordance with ECA regulations No. 1, as amended. Petitioner's suppliers abroad are paid in dollars by the MSA Washington (U.S.A.) thru the United States or foreign correspondent of the Philippine National Bank while the petitioner receives as his profit the difference between the quotation in Philippine currency and the equivalent of C & F dollar cost which is considered the "peso portion" of the contract and is paid in pesos upon receipt of the documents by PHILCUSA, except when otherwise provided for in the contract.

During the period under review, the petitioner received from PHILCUSA the total amount of ₱94,685.71 (Exh. 2, p. 3 BIR rec.) on the basis of which the respondent assessed the present disputed tax assessment.

The petitioner and the respondent are in complete agreement that the only issue in this case is whether or not the petitioner acted as a commercial broker in his business dealings with the PHILCUSA during the period in question. On one hand, the petitioner contends that he was not a commercial broker but an ordinary importer doing business in his own behalf as seller of goods and commodities to PHILCUSA, the buyer, while on the other hand, the respondent, claims that the petitioner engaged in business as a commercial broker without providing itself with the necessary privilege tax receipt and also without paying the 6% tax on the amount of ₱94,685.71 which he derived from his business transactions with the PHILCUSA.

The parties also agree as to the definitiån of the term "commercial broker" as the same is defined in Section 194(t) of the National Internal Revenue Code as follows:

> "(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. (Underscoring supplied.)

It should be noted from the above definition of the term "commercial broker" that the most essential distinguishing characteristic of a commercial broker, or any broker for that matter, is that he acts for another. (Kerr & Co., Ltd. vs. Collector of Internal Revenue, 70 Phil. 36, Behn, Meyer & Co., Ltd. vs. Nolting, 35 Phil. 274.) In the case at bar, did the petitioner act for another person or persons in his business dealings under review? There is no question that the petitioner never acted for and in behalf of PHILCUSA, a national government agency. As a matter of fact, the respondent Collector of Internal Revenue never claimed nor even hinted that the petitioner was the broker of PHILCUSA. And, as a matter of general policy, the government does not have to avail itself of the services of private brokers to act for itself in buying any article or commodity there being a government agency known as the Bureau of Supply Coordination especially organized for this purpose.

Now - was the petitioner merely the broker of the foreign suppliers of the imported goods in the sale of said goods to PHILCUSA? Did he act in the name, and for and in behalf of other persons in accepting the invitations to bid issued by PHILCUSA and in submitting his duly signed proposals? Was the petitioner merely the representative of the foreign suppliers - and the latter the real bidders?

From the records of the case, we find beyond any doubt that petitioner Tan Eng Hong never acted for and in behalf of his suppliers abroad in submitting his bids with PHILCUSA, but for himself only. He signed and submitted his bids or proposals under his name (Exh. H, p. 65 CTA rec.) and the corresponding letters of award were sent to him at 216-218 San Vicente, Manila, his business address. (Exh. A, p. 32, CTA rec.; Exh. 10, p. 43 BIR rec.) The letters of credit (Exh. G, p. 64, CTA rec.) performance bonds, invoices (Exhs. B & C, pp. 33-49 CTA rec.) and other pertinent papers to the bid contracts in question (Exh. 11, p. 40 BIR rec.; Exh. 13, p. 37 BIR rec.) were all in the name of the petitioner and not of any other person. From the nature of the transactions of the petitioner with PHILCUSA, the bid contracts were entered into by and between the petitioner and PHILCUSA, and the former in turn entered into a different and distinct set of agreements with his suppliers abroad such that in case of any breach of any contract or agreement, PHILCUSA could not have had any cause of action against the foreign suppliers for lack of contractual relation, and vice-versa.

Therefore, considering that petitioner Tan Eng Hong did not act for and in representation of PHILCUSA, nor for the foreign suppliers of the imported commodities furnished the PHILCUSA, nor for any other person or persons with regard to his bid contracts with PHILCUSA, we believe and so hold that petitioner Tan Eng Hong was not a commercial broker during the period under review.

Moreover, we note that the petitioner never received any fixed commission from the PHILCUSA nor from his suppliers abroad and it was the petitioner himself and no other person or persons that determined the prices or quotations of the commodities sold to PHILCUSA. He conducted his business at his own risk, assumed all the losses and received all the profits, and all the complaints against the merchandise furnished by the petitioner to PHILCUSA were addressed to the former and for which he acknowledged personal responsibility. (Exh. I-1, I-2, I-3, I-4, pp. 94-97 BIR rec.) To our mind, these are clear and unmistakeable indications that petitioner Tan Eng Hong was not a mere commercial broker with regard to his business dealings with the PHILCUSA, and therefore, the disputed assessment for the payment of fixed and percentage taxes has no basis whatsoever.

Furthermore, the case at bar is substantially on all fours with the case entitled Kerr & Company, Ltd. vs. Collector of Internal Revenue, supra. The facts of that case as found and stated by the Court of First Instance of Manila, and quoted in full by the Supreme Court, are as follows:

> "It appears from the stipulation of fact that in effecting the sales under consideration the plaintiff sent a cable to Shaw, Wallace & Co. of Calcutta, India, offering a price for certain merchandise or asking for quotation. The Calcutta firm either accepted the offer or gave its quotation of the price. After the price was thus agreed upon, plaintiff entered into a contract of sale with local buyers quoting a price higher than that agreed upon or fixed by the Calcutta firm; and the price of the merchandise for local buyers was fixed by the plaintiff. After the

> contract of sale was thus entered into, plaintiff instructed the Calcutta firm to send the goods to, and draw a draft on, the local buyers. This draft bore the price agreed upon between the plaintiff and local buyers, and was drawn against a local bank in accordance with the letter of guarantee executed in the form of the local bank by the buyer and by the plaintiff. After receiving the draft and shipping documents, the local bank released the merchandise to the buyer against a trust receipt. In due course, the draft was paid by the buyers to the local bank and after the proceeds of the draft were received by the Calcutta firm, the latter paid the plaintiff the difference between the price agreed upon between plaintiff and the Calcutta firm, and the price for which the merchandise was actually sold to the local buyers." (p. 37)

The Supreme Court, in holding thru Mr. Justice Concepcion that the plaintiff-taxpayer therein - Kerr & Company, Ltd. - was not a broker but a merchant subject to the percentage sales tax, said:

> "1.º Que el corredor nunca contrata en nombre propio, sino en el de su mandante. En el presente caso, Kerr & Company al contratar con Shaw, Wallace & Company ofreciendo comprar ciertas mercancias a un precio que ha ofrecido y que Shaw, Wallace & Company ha aceptado, o a un precio que Shaw, Wallace & Company ha cotizado y que Kerr & Company ha aceptado, ha celebrado un contrato de compra-venta perfecto. (Art. 1450 del Codigo Civil.)
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> "2.º El corredor efectua la transaccion con un tercero a nombre de su mandante, a base de una comision fija y determinada. En el presente caso, Kerr & Company y Shaw, Wallace & Company en ningun tiempo habian fijado una comision a base de la cual Kerr & Company efectuaria la venta de mercancias a los comerciantes locales.
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"3.º El corredor no garantiza el pago de las mercancias que vende a un tercero, porque solamente es un mediador que se ocupa en hacer que las partes interesadas se entiendan en un negocio o negocios en asuntos mercantiles o de navegacion. (Behn, Meyer & Co., Ltd. contra Nolting y Garcia supra; Pacific Commercial Company contra Alfredo L. Yatco, R.G. No. 45976, Julio 20, 1939.) En el presente caso Kerr & Company garantizo a Shaw, Wallace & Company el pago de la letra girada por esta compañia contra los compradores locales." (pp. 40-41.)

We wish to state in detail the following close and striking factual similarities between the Kerr & Company case, *supra*, and the case under consideration:

1. In the case of Kerr & Company, it was the plaintiff-taxpayer that "sent a cable to Shaw, Wallace & Co. of Calcutta, India, offering a price for certain merchandise or asking for quotation," and in the instant case, it was also petitioner Tan Eng Hong that asked for the quotation or price from his suppliers abroad of the commodities furnished the PHILCUSA; (2) in the said case, "after the price was thus agreed upon, plaintiff entered into a contract of sale with local buyers quoting a price higher than that agreed upon or fixed by the Calcutta firm," and in the present case, it was also the petitioner-taxpayer that entered into a contract of purchase and sale with his local buyer - the PHILCUSA - also quoting a price higher than that agreed upon or fixed by his foreign suppliers; (3) in the said case, "the price of the merchandise for local buyers was fixed by the plaintiff" - Kerr & Company, and in the instant case, the quotation or price offered to the local buyer - the PHILCUSA - was also fixed by the petitioner

herein - Tan Eng Hong; (4) in the said case, the "plaintiff instructed the Calcutta firm to send the goods to x x x the local buyers", and in the case at bar, the petitioner-taxpayer also gave the instructions to send the commodities ordered direct to his local buyer - the PHILCUSA; (5) in the said case, "the draft was paid by the (local) buyers to the local bank". In short, the money used to pay for the imported goods did not belong to the plaintiff-taxpayer which is similar to the case now under review, in that it was also the local buyer - the PHILCUSA, and not the petitioner-taxpayer that paid for the cost of the imported merchandise; and (6) in the said case, Kerr & Company, the plaintiff-taxpayer received as its profit "the difference between the price agreed upon between the plaintiff and the Calcutta firm, and the price for which the merchandise was actually sold to the local buyers" and similarly, in the instant case, the petitioner received as his profit, not a fixed commission on the percentage basis, but also the difference between the C & F price as agreed upon between the petitioner and his suppliers abroad, and the price for which the goods were actually sold to PHILCUSA.

There can be no doubt that the Kerr & Company case, supra, and the case at bar have practically the same fundamental facts, both involving transactions of the same nature. There can also be no question that both cases call for the determination and resolution of the same issue, i.e., whether or not the taxpayers therein are brokers.

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Inasmuch as the Supreme Court held in the former case that Kerr & Company was not a broker, and considering that no valid reason appears to us why we should rule otherwise in the present case, we are of the opinion and so hold that petitioner Tan Eng Hong was not a broker but the importer of the goods sold to PHILCUSA.

WHEREFORE, in view of the foregoing considerations, the decision appealed from is hereby reversed, and the deficiency assessment for fixed and percentage taxes in the total amount of ₱7,513.94 issued by the respondent Collector of Internal Revenue is hereby cancelled and withdrawn. Without pronouncement as to costs.

SO ORDERED.

Manila, February 29, 1960.

AUGUSTO M. LUCIANO
Associate Judge

I CONCUR:

MARIANO NABLE
Presiding Judge

Associate Judge Roman M. Umali dissents in separate opinion.

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Petitioner,

- versus -

C.T.A.
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COLLECTOR OF INTERNAL
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DISSENTING OPINION

I dissent.

I can not subscribe to the view that petitioner herein was an importer with respect to the articles sold to PHILCUSA by foreign suppliers. It is true that under the contract entered into between PHILCUSA and petitioner, the latter undertook to sell to the former certain specified articles. But what actually transpired was that petitioner merely canvassed for manufacturers in the United States which could supply PHILCUSA the needed articles at prices agreed upon, plus a certain margin to cover the compensation or profit of petitioner. The articles supplied by American manufacturers were not shipped to petitioner so that he could not have been an importer under our law. He never acquired title to the goods, hence, he could not have sold to PHILCUSA what he did not own.

While the provisions of a contract are admissible in evidence to prove the nature of the transaction between the parties, they are by no means conclusive. For tax purposes, it is not the provisions of the contract but what is actually done by the parties that determine the taxability of the transaction. In this case, I have no doubt that petitioner merely acted as a broker. If the case of Ker & Co. v. Collector of Internal Revenue, 70 Phil. 36, is to be carefully scrutinized, it will be found to be inapplicable to the instant case.

I vote to affirm the decision of respondent.

R M Umali
ROMAN M. UMALI
Associate Judge