REPUBLIC OF THE PHILIPPINES,
Plaintiff,

- versus -

MANILA CIVIL
CASE NO. 18013

MACONDRAY & CO., INC., and
FIDELITY & SURETY COMPANY
OF THE PHILIPPINE ISLANDS,
Defendants.

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

Sept 28, 1956

D E C I S I O N

Republic Act No. 1125 requires that all cases involving disputed assessment of internal revenue taxes pending determination before the Court of First Instance at the time of the creation of the Court of Tax Appeals be certified and remanded to this Court for final disposition. This is one of those cases.

This action was instituted by the Republic of the Philippines upon the instance of the Collector of Internal Revenue to collect from defendant Macondray & Company, Inc. (hereinafter referred to as MACONDRAY) the sum of ₱587.60 as alleged unpaid percentage tax due from it pertaining to 1933 and the sum of ₱2,844.46 as 25 percent surcharge for late payment of the percentage taxes for the second quarter of 1948. The Fidelity & Surety Company of the Philippine Islands (hereinafter referred to as FIDELITY) was joined as co-defendant for the purpose of obtaining the forfeiture of surety Bond Nos. 223-49 and 225-49 (Annexes "A" and "B" of Complaint) issued

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by it in favor of the Republic of the Philippines. Under said bonds FIDELITY as surety bound itself solidarily with MACONDRAY, as principal to the performance of the obligation of the latter to pay the percentage tax and surcharge first mentioned above in the event the final decision is against said principal. The FIDELITY filed its answer to the complaint with a cross-complaint against co-defendant MACONDRAY. The latter has in effect admitted liability to the cross-complaint in the event plaintiff's principal action will prosper.

At the time this case was remanded to this Court pursuant to Republic Act No. 1125, all parties had filed their respective pleadings and the issues therefore already joined.

There is no dispute as to most of the facts of the case as the parties had entered into the following stipulation of facts:

> "Without prejudice to presenting such evidence as the parties may deem necessary, they hereby submit the following stipulation of facts:
>
> "1. The plaintiff is a political entity with juridical capacity to sue and with principal office in the City of Manila;
>
> "2. Defendants Macondray & Co., Inc. & Fidelity & Surety Company of the Philippine Islands are both corporations duly organized and existing under and by virtue of the laws of the Philippines with their principal offices in the City of Manila;
>
> "3. On or about January 31, 1949, defendants subscribed to a bond in favor of the Collector of Internal Re-

venue, marked Annex 'A' of the complaint to guarantee the payment of the sum of five hundred eighty seven and 60/00 pesos (₱587.60), for alleged taxes due if payment thereof is finally decided against Macondray & Co., Inc.;

"4. The only record of the plaintiff of the supposed tax assessment against Macondray & Co., Inc. is an index card, in words and figures as follows:

'BIR FORM NO. 27.05

MACONDRAY & CO., INC.
Municipality - Cebu

Province - Cebu
Schedule - C   Date of letter - 2/25/33
Paragraph- 6   Tax- 1-1/2% - - ₱470.08
Surcharge 25% - 117.52
₱587.60'

"5. On January 31, 1949, the defendants executed another bond marked Annex 'B' of the complaint in favor of the Collector of Internal Revenue to answer for the sum of two thousand eight hundred forty four and 46/100 pesos (₱2,844.46), representing twenty five per cent (25%) alleged surcharge for late payment of percentage tax for the second quarter of 1948 if payment thereof is finally decided against Macondray & Co., Inc.;

"6. The percentage tax due the plaintiff from defendant Macondray & Co., Inc. for the second quarter of 1948, amounted to one hundred seventy seven thousand fifty eight and 26/100 pesos (₱177,058.26), this amount being payable during the first twenty (20) days of July, 1948;

"7. That during the first twenty (20) days of July, 1948, defendant Macondray & Co., Inc. has paid to the Bureau of Customs the sum of eleven thousand two hundred ninety seven and 85/100 pesos (₱11,297.85) as advance sales tax on importations during the said first twenty (20) days of July 1948, which is within the third quarter of 1948;

"8. That the defendant Macondray & Co., Inc. applied the sum of eleven thousand two hundred ninety seven and 85/100 pesos (₱11,297.85) to the portion of the taxes due during the first twenty (20) days of July 1948, thereby leaving a balance of one hundred sixty five thousand seven hundred sixty and 41/100 pesos (₱165,760.41), which was paid on July 20, 1948, by the company, as follows:

Official Receipt No. 107501	₱148,780.00
Official Receipt No. 107500	10,754.51
Official Receipt No. 107499	6,225.90
	₱165,760.41"

In connection with its liability for surcharge MACONDRAY presented its accountant, Manuel Miranda, who testified that before paying the percentage taxes for the second quarter of 1948, he inquired from the Office of the Bureau of Internal Revenue whether the advance sales tax paid by it during the first twenty (20) days of July 1948 may be applied to the amount of tax due for the second quarter of 1948. Miranda testified further that he received an affirmative reply, so in making payment of taxes for the second quarter of 1948, a statement of the same was submitted to the City Treasurer (Exhibit "1") purporting to show the tax liability of MACONDRAY for the second quarter of 1948 after deducting advance sales tax in the amount of ₱11,297.85 paid by it during the first twenty days of July 1948. He also testified that in paying the taxes for MACONDRAY corresponding to the third quarter of 1948, the said ₱11,297.85 previously taken up as above was not discounted in the computation of the tax liability for that quarter (see Exhibit "2"). The Collector of Internal Revenue thus treated the payment for taxes on the second quarter of 1948 as paid only after the due date of July 20, 1948.

From the foregoing we are called upon to consider the following issues:

1. Whether defendant MACONDRAY maybe held liable for the alleged unpaid percentage tax of ₱587.60 on the basis of an index card (Exhibit A); and

2. Whether the amount of ₱11,297.85 paid as advance sales tax during the third quarter of 1948 may be applied for the payment of the taxes due for the second quarter of 1948.

The first issue centers upon an index card (Exhibit A) which were among the pre-war records of the Bureau of Internal Revenue salvaged by it upon liberation. The card purports to be a memorandum record of a letter sent to MACONDRAY on February 25, 1933 demanding payment of percentage tax and surcharge in the amount of ₱587.60 and does not contain any entry that the same had been paid. On this alone, the plaintiff herein contends that the index card is sufficient to support the claim against MACONDRAY for such alleged unpaid tax obligation on the ground that the said card is a public record with entries therein being made in the regular course of business, and therefore entitled to full faith and credit. MACON-

DRAY, on the other hand, denies this obligation of ₱587.60 and argues that the index card is inadequate to support the government's claim. By way of special defense, MACONDRAY maintained further, that the plaintiff is guilty of laches in enforcing the collection of the tax liability.

We find defendant's contention meritorious. In the case of Warner, Barnes & Co., Ltd. vs. Collector of Internal Revenue, B.T.A. Case No. 51, decided by the defunct Board of Tax Appeals on July 1, 1952, involving the question of the use of index cards as the basis of a tax liability, the Board said:

> "The issue here is this: Can a taxpayer be required to pay taxes, dating as far back as fifteen years on the basis of a notation in an index card, a secondary record, a 'record of a record?' Can he be made to pay a percentage tax on nobody knows what price? We are inclined to answer these questions negatively. It seems to us highly improbable that during the long lapse of time between the making of the index card and the demand for the payment of the taxes alleged to be due these cards should not have been noticed by any official of the Internal Revenue and no action should have been taken in an attempt to collect the not insignificant amount of nearly seventeen thousand pesos. We would rather believe that the present record cover taxes already paid by the petitioner and which payment had been entered in the main record but not in the index card."

In the case of Republic of the Philippines vs. Philippine Manufacturing Co., (Manila Civil Case No. 19602, March 19, 1955) involving substantially the same question, this Court concurred in the above view and thus held:

"It is true that taxpayers should not be allowed to take undue advantage of the loss or destruction of important records of the Government by disclaiming responsibility for tax obligations merely because of the failure of tax officials to produce the main records of a case, but side by side with the supreme and inherent power of the State to collect taxes is the right of a citizen not to be deprived of his property without due process of law. (Sec. 1 par. 1, Art. III Constitution of the Philippines). A demand for alleged deficiency tax which is uncertain, vague and indefinite deprives the taxpayer of the right to question the legality and validity of the assessment and in effect would deprive him of his property without due process of law. In the instant case the Collector of Internal Revenue would require the Philippine Manufacturing Company to pay a tax without informing the latter why and for what it is being taxed. And the company has no means of knowing whether the tax demanded is valid or invalid, paid or unpaid. In the last analysis, the defendant Philippine Manufacturing Company is deprived of the means by which it can question the legality of the demand of the Collector of Internal Revenue. x x x x x x In justice and fairness to the defendant, Philippine Manufacturing Company, we believe that it is entitled to know the tax for which it is being required to pay, its source and the manner the obligation was arrived at, so that it could have a basis in determining not only its legality but also the correctness of the amount."

We see no reason to depart from our previous ruling and therefore find that the defendant MACONDRAY cannot be held liable for the alleged unpaid percentage tax for 1933 in the amount of ₱587.60 on the sole basis of the index card (Exhibit A).

Moreover, even assuming that there was in fact such an unpaid liability for percentage tax due in 1933, we nevertheless find that the revenue officials have failed to collect the tax within the statute of limitations applicable in the premises. Since the tax had already been assessed at the time the National Internal Revenue Code took effect on July 1, 1939, MACONDRAY was thereby entitled to the benefits of the prescriptive period given in section 332 therein. The fact that the government failed to exercise the right to collect the tax herein involved within the prescribed period of five years thereby bars the collection thereof and constrains this Court to hold that there is no longer a deficiency in respect of such tax (Sec. 14, Republic Act No. 1125).

We now proceed to the other issue. Plaintiff claims that the advance sales tax paid by MACONDRAY during the third quarter of 1948 cannot be applied to the taxes due for the second quarter of the same year. MACONDRAY on the other hand argues that this may be done under Section 183-B of the National Internal Revenue Code as amended by Republic Act No. 253. This codal provision reads:

> "(B) Advance payment of the sales tax on imported and locally produced and manufactured articles.- In the case of imported articles, the percentage taxes established in sections one hundred eighty four, one hundred eighty five, and one hundred eighty six of this Code shall be paid in advance by the importer, in accordance with regulations promulgated by the Secretary of Finance and prior to the release of such articles from customs' custody based on the total value thereof at the time they are received by the importer, including freight, insurance, commission, customs' duty, and all similar charges. In the case of locally produced or manufactured articles,

> the percentage taxes established in the said sections shall likewise be paid in advance on the total value thereof prior to removal from the producer's or manufacturer's warehouse. The amount so paid in advance in accordance with this sub-section, shall be credited against the percentage taxes due on the sales by the taxpayer for each calendar quarter. (As amended by Section 1, Republic Act No. 253.)"

Section 5 of Revenue Regulations No. V-3 promulgated in pursuance of the above law, provides thus:

> "Section 5. Quarterly return and payment of sales tax.- It shall be the duty of every importer, manufacturer or producer, within twenty days after the end of every calendar quarter, to make a true and complete return of the amount of the gross sales during the preceding calendar quarter and pay the tax due thereon (Sec. 183-A), National Internal Revenue Code, as amended by Republic Act No. 253). The amount paid in advance by importers, manufacturers and producers shall be credited against the percentage taxes due on their sales for each calendar quarter. (Sec. 183, id.)" (Published 44 O.G. No. 5, p. 1459).

From the aforecited statutory rule and the implementing regulation, it is clear that the advance sales tax paid by importers, manufacturers and producers may be credited against the percentage taxes due on the sales by them for each calendar quarter. Contrary to the claim of MACONDRAY said advance sales taxes can be applied only to percentage taxes corresponding to the quarter in which they were paid.

In the instant case, MACONDRAY paid as advance sales taxes the sum of ₱11,297.85 during the third quarter of 1948 and applied it to percentage taxes due for the second quarter contrary to the aforecited provision of law and regulation. There is no question that the sum of ₱11,297.85 paid as advance sales tax is deductible but the crux of the matter is the particular quarter in which it is to be applied. In this case, the credit should not have been made against the percentage taxes due for the second quarter. Thus, MACONDRAY cannot be considered as having fully paid on the due date of July 20, 1948 the taxes corresponding to the second quarter of 1948 and should therefore be liable for the 25% surcharge for late payment thereof.

Defendant MACONDRAY further contends that the 25% surcharge should not be imposed because it partakes of the nature of a penalty based on the non-fulfillment of a principal obligation, and argues that upon the satisfaction of such obligation, it follows that the subsidiary liability attached thereto is also extinguished.

We believe this contention of defendant to be without merit. Paragraph (A) of Section 183 of the Tax Code provides:

> "The percentage taxes on business shall be payable at the end of each calender quarter in the amount lawfully due on the business transacted during each quarter; x x x x x"
>
> "If the percentage tax on any business is not paid within the time prescribed above, the amount of the tax shall be increased by twenty-five per centum, the increment to be a part of the tax."

It is apparent from the above rule that when MACONDRAY made payments on its tax liability, the percentage taxes for the second quarter should have been paid in full. Having failed to do so, it became liable not only for the tax deficiency but also for the penalty which is to be paid as part of the tax. The imposition of this surcharge for late payment as an increment of the tax is mandatory or operates automatically and the Collector of Internal Revenue or even this Court has no discretion in the matter (Lim Co Chiu v. Posadas, 47 Phil. 460; Koppel v. Collector, 48 O.G. No. 1, p. 98). We therefore find and so hold MACONDRAY liable for the 25% surcharge for late payment of percentage tax corresponding to the second quarter of 1948 in the amount of ₱2,844.46.

By virtue of the surety bond provided by defendant FIDELITY (see Annex "B" of Complaint) it bound itself to be jointly and severally liable, with defendant MACONDRAY for the payment of the tax liability of ₱2,844.46 in the event the final decision is against the latter as principal. However, under an indemnity agreement (Annex "2", Answer with Cross-claim) FIDELITY is entitled to indemnification from MACONDRAY for whatever is paid by the former under the bond which obligation the latter admits (par. 3, Answer to Cross-claim). Finding that MACONDRAY is liable for the sum of ₱2,844.46, we are of the opinion and so hold that FIDELITY is likewise liable jointly and severally for the said amount of ₱2,844.46

by virtue of the bond it executed in favor of plaintiff. However, in the event FIDELITY shall pay the said tax liability of ₱2,844.46 unto the herein plaintiff by virtue hereof we further hold that the former should be entitled to reimbursement from MACONDRAY under the cross-claim. Suffice it to say that jurisdiction over the subject matter and the parties once acquired by the Court of First Instance the same may not be lost, we have therefore determined accordingly the right of plaintiff against FIDELITY as well as the cross-claim of FIDELITY against MACONDRAY.

IN VIEW OF THE FOREGOING, Macondray & Company, Inc. together with the Fidelity & Surety Company of the Philippine Islands are hereby ordered to pay jointly and severally the sum of ₱2,844.46 to the plaintiff Republic of the Philippines thru the Collector of Internal Revenue. The defendants are hereby absolved of the plaintiff's claim of ₱587.60 and the bond executed by defendants for said sum is hereby declared of no effect.

In the event the defendant Fidelity & Surety Company of the Philippine Islands should pay the herein sum of ₱2,844.46 unto the plaintiff, the defendant Macondray & Company, Inc. is hereby ordered to reimburse the said Fidelity & Surety Company the same amount. With costs against defendants.

SO ORDERED.

Manila, Philippines, September 28, 1956.

MARIANO NABLE
Presiding Judge

I CON-

CUR:

AUGUSTO M. MAGIANO
Associate Judge

Associate Judge ROMAN M. UMALI
dissents in a separate
opinion.

REPUBLIC OF THE PHILIPPINES,
Plaintiff,

- versus -

MANILA CIVIL
CASE NO. 18013

MACONDRAY AND COMPANY and
FIDELITY AND SURETY COMPANY
OF THE PHILIPPINE ISLANDS,
Defendants.

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DISSENTING OPINION

I reiterate the view expressed in my dissenting opinion in the cases of Republic of the Philippines vs. Limsco & De Guzman Co., Inc., et al., Manila Civil Case No. 18859, decided by this Court on January 16, 1956, and Republic of the Philippines vs. Serile, et al., Manila Civil Case No. 9839, decided by this Court on January 18, 1956. For this reason, I vote to have the records of this case returned to the court of origin for proper disposition thereof.

ROMAN M. UMALI
Associate Judge

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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

J. M. TUASON & CO., INC.,
Petitioner,

- versus - C.T.A. CASE NO. 193

COLLECTOR OF INTERNAL
REVENUE,
Respondent.

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

Sept. 29, 1956

D E C I S I O N

This is a claim for refund of the amount of ₱9,024.84 alleged to have been illegally assessed and collected by respondent Collector of Internal Revenue from the petitioner J. M. Tuason & Co., Inc., representing deficiency broker's percentage tax, surcharge and compromise penalty for the period from November 1951 to the 2nd quarter of 1953.

The petitioner is a corporation duly organized and existing under Philippine Law as a realtor, engaged in the business of developing subdivisions and promoting sales of lots therein.

On November 6, 1951, the petitioner entered into a contract (Exhibit "A") with the Varsity Hills, Inc., real estate owners, by the terms of which the petitioner agreed in brief to: (a) develop into a subdivision, real estate property belonging to the Varsity Hills, Inc. consisting of about 106 hectares of contiguous land located at Balara, Quezon City; and (b) sell or lease the lots of the subdivision at prices and terms recommended by the former and approved by the latter. The petitioner was authorized by power of attorney not only to sell or lease the lots but also to cancel contracts of sale and lease affecting the property and to take charge of collection of accounts relative thereto, expenses being borne by the herein petitioner. The subdivision development plan recommended by petitioner was subject to the approval of Varsity Hills, Inc. For such services rendered, petitioner would get the following as compensation: (1) as "selling commission" an amount equal to 10% (ten per cent) on all the sales of lots in the subdivision; and in addition (2) as "administration fee" an amount equivalent to eight (8%) per cent on the gross sums collected and received by the petitioner in connection with the discharge of its duties. As an implementation of the above-mentioned contract, the Varsity Hills, Inc., on November 26, 1951 executed a "Special Power of Attorney" (Exhibit "B") in favor of petitioner for the proper discharge of the latter's duties under the contract.

There is no dispute that the petitioner, J. M. Tuason & Co., Inc., during the period from the 4th quarter of 1951 to the 2nd quarter of 1953, inclusive, received from the Varsity Hills, Inc., as compensation, pursuant to the contract Exhibit "A", the amount of ₱282,852.70 as 10% selling commission for the sale of the lots in subdivision, and another amount of ₱116,331.21 as "administration fee" (Exhibit "1", p. 5, BIR rec.). It is likewise admitted that on the amount of ₱282,852.70, the petitioner had duly paid for the corresponding quarter involved the percentage tax of 6% thereof prescribed in section 195 of the Tax Code.

After examination of the taxpayer's records the respondent determined that the so-called "administration fee" received by petitioner pursuant to the contract Exhibit "A", should have been included in its returns as part of the gross compensation of the latter as realtor and which is subject to the 6% broker's tax prescribed by section 195 of the Tax Code. Accordingly, the respondent on August 29, 1953 assessed against and demanded from J. M. Tuason & Co., Inc. the sum of ₱8,724.84 as deficiency broker's percentage tax and surcharge corresponding to the period from the 4th quarter of 1951 to the 2nd quarter of 1953. On September 10, 1953, and on several dates thereafter, the petitioner contested the legality of the above mentioned assessment (par. 3, Petition for Review, admitted in Answer). On February 23, 1954, the respondent sustaining the legality of the aforesaid assessment, demanding from the petitioner the sum of ₱9,024.84 which consisted of the deficiency percentage tax and surcharge of ₱8,724.84 as previously determined plus ₱300.00 compromise penalty, requiring that payment be made within ten (10) days from receipt of demand otherwise the collection thereof would be effected by summary procedures. In view of this demand, the petitioner on May 14, 1954 paid to the Bureau of Internal Revenue the amount of ₱9,024.84. On March 31, 1955, the petitioner filed a claim for refund of the aforesaid amount of ₱9,024.84, which petitioner followed with another letter of similar import dated May 13,1955. The respondent denied the afore-mentioned petitioner's claim for refund in a letter dated September 7, 1955, which letter, as shown by Exhibit "D-2", was posted by ordinary mail to petitioner on September 12, 1955. Thereupon, on October 11, 1955, the petitioner through counsel filed the herein petition for review of this decision denying the refund claim.

In the course of the trial of this case, the respondent raised the question of jurisdiction, contending that the present petition for review was filed out of time or beyond the reglementary period of thirty (30) days as prescribed in section 11 of Republic Act No. 1125. The jurisdictional question was submitted for resolution together with the issue on the merits, that is, whether the amount of ₱9,024.84 paid by petitioner as deficiency broker's tax was illegally assessed and collected by respondent Collector of Internal Revenue.

On the jurisdictional issue, the court notes that the envelope (Exhibit "D-2"), in which was contained respondent's decision dated September 7, 1955, denying the petitioner's claim for refund, clearly manifest that the same was posted only on September 12, 1955. Even if we were to assume that the petitioner received the aforesaid letter on the very day it was mailed, the fact that the herein petition for review was filed on October 11, 1955 undoubtedly show that the appeal was brought within the 30-day period prescribed by section 11, Republic Act No. 1125. In accordance with the oft-repeated rule, applicable in the computation of the period to appeal, i.e. excluding the first and including the last day (Federal Films v. C.F.I. Judge of Manila, 78 Phil. 475), we find that from September 12, 1955 to October 11, 1955, only 29 days had elapsed and we therefore hold that the present petition for review was seasonably filed.

We proceed now to consider the principal question. Under section 195 of the National Internal Revenue Code, real estate brokers are subject to the payment of "a percentage tax equivalent to six per centum (6%) of the gross compensation received by them", payable quarterly. In this case, the dispute in the main lies in the scope and interpretation of the phrase "gross compensation received by them (brokers)" as applied to the J. M. Tuason & Co., Inc.

Petitioner maintains that under the terms of its contract with Varsity Hills, Inc. (Exhibit "A") the former had two obligations to perform, each prestation distinct and separate from the other, i.e. one as "administrator" and the other as "broker" in the strict sense of the word. Hence, petitioner argues that the gross compensation received by it under the said contract should not en toto be subject to the

6% broker's tax, but only such part of its income denominated as selling commission, which is derived in consideration of the performance of its duties of a broker in the strict sense. In other words, petitioner contends that the compensation denominated as administration fee, received in payment of its duties of "administrator" under said contract should not be subject to the percentage tax imposed by said section 195. This argument of petitioner stems from the theory that the contract herein involved (Exhibit "A"), is in fact composed of two parts, one of administration and the other of brokerage.

Respondent on the other hand, maintains that notwithstanding the appellation given it by petitioner, the contract is a single or indivisible contract of brokerage, in that the duties which purport to be acts of administration were in fact part and parcel of the contract of brokerage. It is contended that the duty to subdivide and the duty to collect accounts are not distinct and severable from the other duties but are in fact preparatory and incidental to the primary purpose for which the agreement was entered into—the sale or lease of the property by the petitioner as subdivided lots. Hence, respondent argues that the entire compensation received by petitioner under the agreement is subject to the 6% broker's tax.

A careful perusal of the contents of the contract (Exhibit "A") show the following salient points:

(1) That the principal motive or inducement which moved the Varsity Hills, Inc., to contract the services of petitioner herein, J. M. Tuason & Co., Inc., to sell or have leased the real property of the former as subdivided lots is the fact that the latter "is engaged in the business of developing subdivisions and in promoting the sales of lots therein". (Exhibit "A", Clause (b), p. 2);

(2) That the consideration is: (a) with regard to the Varsity Hills, Inc., the development into a subdivision of its property and the sale or lease of the same by J. M. Tuason & Co., Inc. in the form of subdivided lots; and (b) with regard to J. M. Tuason & Co., Inc., - the monetary compensation it would receive from the sale or lease of the subdivided property of the former;

(3) That without prejudice to the right of the owner to terminate for cause, the duration of the agreement "shall continue until all of the lots into which said property described in paragraph (a) hereof is subdivided, shall have been sold or leased, and thereafter, so long as there are still collections to be made." (Exhibit "A", par. 16, p. 7);

(4) That the principal obligations of the "Administrator" (petitioner herein) are: (a) to develop the property into a subdivision (Exhibit "A", pars. 1 and 2, p. 2, and par. 9, p. 4); (b) to sell or

lease the subdivided lots of the aforesaid subdivision (Exhibit "A", pars. 3 to 6, pp. 2-3, par. 11, p. 4, and par. 17, p. 7); and (c) to perform acts relative to collection of accounts, disbursement of expenses incurred in the subdivision sale and lease of the property; and the ejection of tenants or squatters on the property at the owner's expense if the latter fails to do so (Exhibit "A", pars. 7 and 8, pp. 3-4, pars. 10 and 12, pp. 4-5);

(5) That the OWNER (Varsity Hills, Inc.) is to pay the ADMINISTRATOR (Petitioner) as "selling commission" - 10% on all sales of lots of the subdivision whether or not effected by the Administrator payable in full immediately (Exhibit "A", par. 13, p. 5) plus 8% on the gross sums collected and received by the Administrator as "administration fee" (Exhibit "A", par. 14, p. 6).

The foregoing analysis of the contract Exhibit "A", was arrived at bearing in mind the rule that the various stipulations of a contract shall be interpreted together (Art. 1374, Civil Code). Thus viewing the contract as a whole, we find that it was the intention of the parties that the duty of the petitioner under the contract were individible in the same manner as the obligation of the Varsity Hills, Inc. to pay compensation for such services rendered. At the outset and at the time the contract was enter8d into the land was still undeveloped and undivided. Hence, when the services of petitioner were obtained for the purpose of selling the land in question in the form of marketable subdivision lots, it was an essential preparatory or incidental act that the land of Varsity Hills, Inc. be first developed and subdivided. Thus the duties undertaken by J. M. Tuason & Co., Inc. under the contract constituted several related but nevertheless inseparable acts and obligations of first developing the lands into a subdivision, then selling or leasing the subdivided lots, and finally collecting the price or rents in connection with the contracts of sale or lease that may be entered into by the petitioner in behalf of Varsity Hills, Inc.

From another viewpoint, the indivisibility of the performance of the obligation of the parties may likewise be taken in relation to the consideration thereof as to treat the contract as indivisible. Thus, where the consideration giving rise to the existence of the contract is entire and indivisible, the contract is indivisible.

> "Divisible and indivisible obligations are not synonymous with divisible or indivisible contracts. The divisibility or indivisibility of obligations refers to the prestation, the possibility or impossibility of partial prestation. On the other hand, whether a contract is entire or severable depends in general upon the consideration, not upon its object. When the consideration is entire and single, the contract must be held to be indivisible, so that if part of such consideration is illegal, the whole consideration is generally declared unenforceable." (Vol. II, Civil Code Annotated, Padilla, pp. 542-543 citing: 12 Am. Jur. 740)

This test of indivisibility of consideration giving rise to an indivisible contract applies equally to commercial contracts such as sale, as well as to contracts involving services as the case at bar.

> "The question of indivisibility is difficult, and this difficulty has resulted in a direct conflict of decisions. 'The contract may be entire or severable, according to the circumstances of its particular case' it has been said in speaking of contracts of sale, 'and the criterion is to be found in the question whether the whole quantity--all of the things as a whole--is of the essence of the contract. If it appears that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable....' Though this was said in reference to a contract of sale, the reason applies to other contracts as well." (3rd. Ed. Clark on Contracts, p. 569, citing: Wooten v. Walters, 110 N.C. 251, 14 SE 734; Brouner v. Rayner, 68 Md. 47, 11 Atl. 833) (underscoring supplied.)

In the present case, as we see it the consideration is single, entire and indivisible. As far as Varsity Hills, Inc. is concerned, the property in question must be sold or leased as subdivided lots. Until and unless the sale or lease of the property in question as subdivided lots is effected, the Varsity Hils, Inc., is not liable to pay any compensation to petitioner in any form as the same is based on the proceed derived from the sale or lease thereof. Hence, the mere completion of the subdivision of the property in question does not entitle the petitioner to the compensation agreed and the same does not attach unless and until a sale or lease of a subdivided lot is first effected. Neither will compensation be due the petitioner for the sale or lease of the whole or part of the property in question, unless the same be first subdivided into lots by petitioner. Stated otherwise, in order that petitioner would be entitled to compensation under the terms of the contract Exhibit "A" there must first be a subdivision of the property into lots, followed by a sale or lease of the same. Because of this "oneness" or indivisibility of the consideration of the contract Exhibit "A", we are of the opinion that the activities of the petitioner of subdividing the property or collecting accounts, which petitioner denominated "acts of administration" are not in fact detached, distinct, nor transcendental to the brokerage relationship created by aforesaid contract, but rather acts which are merely incidental to the primary purpose for which the agreement was entered into.

This conclusion becomes more significant and clear when we take into account the legal rule applicable to the relationship of petitioner and Varsity Hills, Inc. as broker and principal from the tax viewpoint. Under section 194 (s) of the National Internal Revenue Code a "real estate broker" is defined thus:

> "(s) 'Real estate broker' includes any person, other than a real estate salesman as hereinafter defined, who for another, and for a compensation or in the expectation or promise of receiving compensation, (1) sells or offers for sale, buys or offers to buy, lists, or solicits for prospective purchasers, or negotiates the purchase, sale or exchange of real estate or interests therein; (2) or negotiates loans on real estate; (3) of leases or offers to lease or negotiates the sale, purchase or exchange of a lease, or rents or places for rent or

> collects rent from real estate or improvements thereon; (4) or shall be employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary, on commission, or otherwise, to sell such real estate or any parts thereof in lots or parcels. x x x x But the foregoing definitions do not include a person who shall directly perform any of the acts aforesaid with reference to his own property, where such acts are performed in the regular course of or as an incident to the management of such property; nor shall they apply to persons acting pursuant to a duly executed power of attorney from the owner authorizing final consummation by performance of a contract conveying real estate by sale, mortgage or lease; x x x "

We find that the herein petitioner clearly falls within the definition. On behalf of Varsity Hills, Inc., the petitioner J. M. Tuason & Co., Inc. undertook to develop a subdivision out of the former's property and to promote sales of lots therein for compensation. In connection therewith the petitioner under the contract Exhibit "A" was to advertise the sale of the lots (par. 11), and to execute contracts to effect the sale or lease of the lots having been granted power and authority to make such contracts with power to cancel said contracts (par. 4).

However, petitioner seeks exclusion from the above definition of a real estate broker and invokes the proviso that the same does not "apply to persons acting pursuant to a duly executed power of attorney from the owner authorizing final consummation by performance of a contract conveying real estate by sale, mortgage or lease." This contention is without merit.

The exemption of those persons duly provided with a power of attorney refers only to those persons acting pursuant to such power authorizing final consummation by performance of a contract conveying real estate by sale, mortgage or lease as distinguished from negotiating it.

> "Such a construction of the act, however is not a reasonable one. It would not only render the act invalid, but, even if it did not do this, it would practically render it ineffective, since as has been said, any broker could secure escape from its provisions merely by being careful to secure written authority in every case. A much more natural construction is that by power of attorney is meant written authority to act for and in place of the principal in consumating the transaction as distinguished from merely negotiating it. This construction removes the objection of unreasonable discrimination; for such an agent is much more than a broker, and there is nothing unreasonable in not applying to him the regulations applicable to brokers." (Riley v. Chambers, (Cal), 185 Pac 855, 8 A.L.R. 418).

There is indeed a substantial distinction between the phases of the generation and perfection of a contract on the one hand and that of consummation on the other. While the former includes the preliminary steps of negotiation and the birth of a juridical relation, the latter refers to the performance and execution of the prestations derived from the contract (see 3 Castan, Derecho Civil Español, 7th Ed. p. 379-380).

Be that as it may, the tax herein imposed is not by reason alone of the act of petitioner in executing the contracts of sale or lease but upon its rendition of acts in behalf of another for compensation, of selling or leasing, offering to sell or lease, soliciting for prospective purchasers, negotiating the sale or lease or collecting rents of real estate (see Sec. 195, National Internal Revenue Code) belonging to Varsity Hills, Inc.

Since petitioner's "acts of administration" so-called under brokerage contract Exhibit "A", were incidental to or intimately linked with and did in fact form part of petitioner's necessary obligations to effect the sale of subdivided lots as a broker under the terms of said agreement, such incidental acts should not be given a distinct and different treatment from the principal acts. Hence, whatever amount petitioner received as compensation for the services rendered by it, by virtue of the contract of brokerage Exhibit "A" may be rightly considered part of the "gross compensation" subject to brokers percentage tax imposed by section 195 of the Tax Code.

Inasmuch as the law uses the term "gross compensation" and that the payments made by Varsity Hills, Inc. were made to compensate the services of petitioner taken in its entirety, we believe that any and all amounts received by petitioner pursuant to the contract Exhibit "A", whether designated as "administrator's fee" or "selling commission", fall within the purview of "gross compensation" as provided for by section 195 of the Tax Code, and therefore subject to the 6% broker's tax imposed therein.

WHEREFORE, the decision of the respondent Collector of Internal Revenue denying the petitioner's claim for refund of the amount of ₱9,024.64 is hereby affirmed, and the petition for review should be, as it is hereby, dismissed with costs against petitioner.

SO ORDERED.

Manila, Philippines, September 29, 1956.

MARIANO NABLE
Presiding Judge

WE CONCUR:

AUGUSTO M. LUCIANO
Associate Judge

ROMAN M. UMALI
Associate Judge