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September 22, 1960

KUENZLE & STREIFF, INC.,
Petitioner,

- versus -

C.T.A.
CASE NO. 522

THE COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

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

D E C I S I O N

This is an appeal from the decision of the respondent Commissioner of Internal Revenue, dated March 20, 1958, assessing and demanding from petitioner as commercial broker the amount of ₱8,276.40 (later corrected to ₱8,283.90 as per par. 9, Partial Stipulation of Facts, p. 25, CTA rec.), as percentage tax and surcharge, covering the period from January, 1951 to September, 1956, inclusive, plus the sum of ₱500.00 as compromise penalty in extrajudicial settlement of the penal liability. (See p. 13, BIR rec.)

The facts are not disputed. The parties submitted the case on the basis of the following "Partial Stipulation of Facts":

> "1. That the correct amount of gross compensation received by the petitioner's branch office in Zamboanga for the period from January, 1951 to September, 1956, on which the respondent seeks to collect the 6% 'commercial broker' percentage tax is ₱110,452.05 and not ₱110,352.00 as alleged in the petition for review, nor ₱110,352.05 as alleged in paragraph 1 of respondent's answer;
>
> "2. That the said sum of ₱110,452.05 consists of the following:

	Agency Fees	Husbanding Fees	Total
For 1951	₱10,950.00	₱ 4,549.99	₱ 15,499.99
For 1952	11,050.00	5,142.00	16,192.00
For 1953	11,130.00	9,675.00	20,805.00
For 1954	9,600.00	8,132.00	17,732.00
For 1955	12,600.00	11,764.00	24,364.00
For 1956 (Jan. to Sept.)	9,450.00	6,409.06	15,859.06
T O T A L ----------------------			₱110,452.05

"3. That the amounts shown under the heading 'Agency Fees' consist of fixed, regular monthly fees received by petitioner's branch office in Zamboanga from the following firms:

a. Philippine Rubber Project Co., Inc.
b. Basilan Plantation Co., Inc.
c. Basilan Lumber Company
d. Mangal Development Co., Inc.
e. Vakan Plantation Company
f. Patalon Coconut Estate

"4. That the amounts shown under the heading 'Husbanding Fees' consist of amounts received from time to time by the petitioner's branch office in Zamboanga, as compensation for services rendered to various vessels and/or shipping companies;

"5. That the services rendered by petitioner's branch office in Zamboanga, which is hereunder simply referred to as the petitioner, for which the 'Husbanding Fees' are paid to it are described as follows:

The Manila agents of the various shipping lines, which are represented by the petitioner in the port of Zamboanga, notify the petitioner of the arrival of their vessel at said port. On receipt of this advice, the petitioner gives a written notice to the Collector of Customs of the time of arrival of subject vessel. If the vessel comes from a foreign port, the petitioner notifies the Quarantine Officer, the Immigration Officer, Plant Quarantine Officer and the Pilot Station of the expected time of arrival. It sometimes happens that the petitioner receives notice of change of arrival hours; this is relayed to the abovementioned government officers concerned at their respective residences. The petitioner also notifies the Port Pilot of the arrival hour of the vessel.

The petitioner contacts the shippers and inquires from them as to readiness of cargo, and such information is cabled by the petitioner to the Manila agents. If the shippers' cargo is not ready, the petitioner requests the Manila agents of the vessel to divert the vessel to other ports first, in order to gain time to have the cargoes ready, and the petitioner urges shippers to rush preparation of their cargoes. The petitioner then notifies the stevedores of the expected arrival hour of the vessel and of cargoes to be loaded. On the expected hour of arrival, a representative of the petitioner is sent down to the pier to meet the vessel and check whether respective government officers are standing-by. In the negative case, the petitioner calls for them. After Quarantine clearance has been accomplished, Customs and Immigration officers as well as petitioner's representative board the vessel.

The petitioner obtains data from the Master of the vessel regarding cargo for discharge, if any, and informs him of cargoes to be loaded. The petitioner prepares the inward and outward foreign manifests for cargoes discharged and loaded, for the signature of the Master. The petitioner also inquires from the Master whether he requires any ship's provisions or cash and inquires from the Purser as to medical requirements of crew members. The petitioner's representative remains on board the vessel in order to attend to further requirements while vessel is in port and to supervise the loading with the purpose of giving the vessel prompt possible dispatch. If the vessel requires fresh water, the petitioner notifies the NAWASA and arranges for loading of same. If minor defects and breakdowns have been found, the petitioner arranges for the necessary repairs to be done. On request of the Master, the petitioner also assists passengers on a sight-seeing tour of the City.

Upon completion of loading, the petitioner presents to the Master, for approval of payment, the bills which are for account of vessel. The petitioner then notifies the Pilot of the sailing hour and arranges for stevedores to release mooring lines.

After the ship sails, the petitioner notifies Manila Agents the time of departure and estimated time arrival at the next port. The petitioner also furnishes the Manila agents with data on cargo loaded, bunkers, fresh water aboard and drafts of the vessel. If crew members remain behind, the petitioner traces them with the assistance of Police and Immigration officers, and makes arrangements for such crew members to rejoin the vessel at the next port of call. Thereafter, for some of the shipping lines, the petitioner prepares stowage plan of cargo loaded, schedule of daily movement of cargo loading and vessel's port performance report. Then all accounts in behalf of the vessel for the particular voyage which are paid by the petitioner in behalf of the Manila agents and an accumulative statement of all disbursements made is forwarded to the Manila agents together with the petitioner's comments of the loading. The petitioner prepares Bills of Lading covering cargoes shipped and turns them over to shippers against Mate's receipts.

"6. That the services rendered by petitioner's branch office in Zamboanga, which is hereunder simply referred to as the petitioner, for which the 'Agency Fees' are paid to it by the firms mentioned in paragraph 3 hereof are described as follows:

a. PHILIPPINE RUBBER PROJECT CO., INC., Kabasalan, Zamboanga del Sur:-

The Philippine Rubber Project Co., Inc. (PRPC) operates a motor launch which makes weekly trips from their rubber plantation, at Kabasalan, to Zamboanga. When the launch arrives, the petitioner requests the hauling contractors to discharge the rubber stocks, empty gasoline and diesel drums and other items which are forwarded to the petitioner. The petitioner receives various mails which are dropped at the Post Office. Requisitions received from the PRPC are being filled and supplies demanded by PRPC are ordered from various suppliers in behalf of PRPC. These supplies are delivered directly to the launch by the suppliers. Such supplies are invoiced by the suppliers directly to the PRPC and copies thereof are forwarded by suppliers to the PRPC at Kabasalan which issues the corresponding checks in payment. These checks are forwarded to the petitioner for delivery to respective suppliers. Petty expenses such as clearance of launch thru

Customs, stationeries, personal accounts of staff members, postage stamps, incidental expenses of employees and other small items are paid by the petitioner for the account of the PRPC; and at the end of each month, an accumulative statement of disbursements is made and corresponding expenses are reimbursed to the petitioner by the PRPC office. Incoming rubber stocks for the PRPC are checked with the delivery slips received, and these are shipped to Manila. Transfer invoices are issued by and forwarded together with the bill of lading and accompanying letter to PRPC, Manila. Payroll checks are received from the PRPC and funds are withdrawn from the bank and forwarded to the PRPC by the petitioner. The petitioner attends to any and all matters in the port of Zamboanga in behalf of the PRPC. The petitioner answers correspondences to PRPC and corresponds in their behalf with suppliers. The petitioner contacts government offices for licenses for PRPC and obtains permits as required.

b. <u>BASILAN PLANTATION CO., INC., Isabela, Basilan City</u>:-

x x x x x

c. <u>BASILAN LUMBER CO., Isabela, Basilan City</u>:-

x x x x x

d. <u>MANGAL DEVELOPMENT CO., INC., Mangal, Basilan City</u>:-

The Mangal Development Co. plantation is situated at Mangal, Basilan City, and the petitioner is handling this agency in a similar manner as the Philippine Rubber Project Co., Inc., x x x.

e. <u>YAKAN PLANTATION CO., Lamitan, Basilan City</u>:-

x x x x x

(<u>Some</u> of the services rendered by the petitioner for the Philippine Rubber Project Co., Inc. were also similarly rendered by the petitioner for the other firms mentioned above.)

f. PATALON COCONUT ESTATE:-

The manager of the Patalon Coconut Estate (PCE) usually attended to all purchases of supplies required by the estate, personally. Such orders of spare parts and plantation supplies were, if shipped from Manila or Cebu, consigned to the petitioner and stored at petitioner's bodega until such time as the truck of PCE picked up such merchandise. Payments for supplies bought locally were often made by the petitioner, and PCE reimbursed such accounts to the petitioner against petitioner's statement of disbursements submitted to PCE at the end of each month. All mail matters addressed to the PCE were picked up by the petitioner at the Post Office daily and kept at petitioner's Office until the manager of PCE called for them. Likewise, the petitioner delivered all outgoing mail from PCE to the Post Office. Inasmuch as generally not much work was done for this agency, the petitioner's agency fee was quite low and the handling of this agency was discontinued end of 1953.

"7. That, aside from the said 'Husbanding Fees' and 'Agency Fees', on which the respondent seeks to collect the commercial brokers percentage tax in question, the petitioner's branch office in Zamboanga receives commissions for soliciting freight on vessels; that on such commissions, the petitioner pays the 6% commercial brokers' tax; x x x.

x x x x x

"9. That the correct amount of commercial brokers percentage tax which respondent claims to be due on the aforesaid amount of ₱110,452.05 is ₱8,283.90, and not ₱8,276.40 only, as demanded in respondent's letter dated March 20, 1958;

"10. That the aforesaid amount of ₱8,276.40 (corrected amount being ₱8,283.90) is sought to be collected by respondent from the petitioner pursuant to the provisions of section 195 in relation to section 194 (t), both of the National Internal Revenue Code." (Pp. 17-26, CTA rec.)

The issues to be decided in this case are as follows:

1. Whether or not the petitioner is a commercial broker as defined in Section 194 (t) of the National Internal Revenue Code with regard to the "agency fees" and "husbanding fees" it received from certain companies;

2. Whether or not the "agency fees" and "husbanding fees" are subject to percentage tax imposed by Section 195 of the same Code; and

3. Whether or not, petitioner is likewise liable for the 25% surcharge and ₱500.00 compromise penalty assessed by the respondent.

Respondent contends that in view of the activities and/or services of the petitioner for which it was paid "agency fees" and "husbanding fees", it should be classified as a commercial broker as defined by Section 194 (t) of the Tax Code. On the other hand, the petitioner claims that it cannot be considered a commercial broker.

The term "commercial broker", as defined by Section 194 (t) of the National Internal Revenue Code, means:

> "(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."

In a recent case decided by this Court, we made the following observation:

"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." (Tan Eng Hong vs. Collector of Internal Revenue, C.T.A. No. 436, Feb. 29, 1960, citing Kerr & Co., Ltd. vs. Collector of Internal Revenue, 70 Phil. 36; Behn, Meyer & Co., Ltd. vs. Nolting, 35 Phil. 274.)

"x x x A broker acts for another. x x x. By the contract of brokerage a person binds himself to render some service or to do something in behalf of or at the request of another person." (Behn, Meyer, supra, p. 280.)

The American Jurisprudence defines a broker thus:

"As generally defined, a broker is an agent who, for a commission or brokerage fee, bargains or carries on negotiations in behalf of his principal as an intermediary between the latter and third persons in transacting business relative to the acquisition of contractual rights, or to the sale or purchase of any form of property, x x x." (Vol. 8, par. 2, Am. Jur., p. 989.)

"x x x the sole function of the broker is the negotiation of contracts in behalf of others, and the duties of his position require him to deal merely with the contracting parties, rather than with the property to which the contract relates. (Vol. 8, par. 5, Am. Jur., p. 992.)

From the records of the case, we find that there is no question that the petitioner acted as a broker for the different firms it represents. For one thing, it undertakes for its clients the giving of notice to the Collector of Customs, and in the case of foreign vessels, also to the Quarantine Officer, the Immigration Officer, the Plant Quarantine Officer and the Pilot Station of the time of arrival of vessels. It also prepares and accomplishes all papers pertinent to the unloading, loading, clearing and sailing of vessels in behalf of its clients. Likewise, it performs for them all transactions necessary for supplying or provisioning, and/or repairing of the vessels. All requisitions are invoiced in the name of the firms and chargeable to them, not to the petitioner. Disbursements from funds advanced by the petitioner for the companies are all for and in behalf of the latter. In all the various services which petitioner extends to its clients, there is no instance that it acts for itself. Thus, we come to the inevitable conclusion that it is a commercial broker within the purview of Section 194 (t) of the Tax Code.

In connection with the second issue, the petitioner claims that the services for which the "agency fees" and "husbanding fees" were paid, do not constitute commercial brokerage as defined in Section 194 (t) of the Tax Code. Petitioner bases its contention on the fact that the monthly agency fees remain the same and fixed regardless of the amount of orders or purchases made through petitioner for any given month, thus, they partake of the nature of retainer's fees or salaries to the petitioner and therefore are not taxable under Section 195 of the Tax Code.

Section 195 provides:

> "Sec. 195. Percentage tax on stock, real estate, commercial, customs and immigration brokers and cinematographic film owners, lessors, or distributors. Stock,

real estate, commercial customs and immigration brokers shall pay a percentage tax equivalent to six per centum of the gross compensation received by them. x x x.

"The records kept by said brokers x x x may be used as evidence to determine the amount of the percentage tax due from them, and the Collector of Internal Revenue may assess and collect the tax due on the compensation or gross receipts earned in accordance with said records.

"In any case, the amount of the compensation or gross receipts of said brokers x x x shall be reported quarterly within the time established for the other quarterly reports of sales and receipts." (Underscoring supplied.)

The question now arises as to whether or not the "agency fees" and "husbanding fees" fall within the meaning of the term "compensation" as used in the aforecited section.

"'Compensation' is return which is given for something else; in other words, a consideration. (Searchy vs. Crow, 15 Cal. 117.) Payments made in whatever form in consideration of services rendered constitute compensation. So it was held that the following constituted compensation: fees (13 BTA 834); salary (Burns vs. Comm. 31 F [2d] 399); x x x (See Formileza, Commentaries on the National Internal Revenue Code, Vol. II, p. 767).

"The ordinary meaning of the term 'compensation' as applied to officers, is remuneration in whatever form it may be given, whether it be salaries and fees, or both combined. State vs. Bland, 136 P. 947, 949, 91 Kan. 160. (See Vol. 8, Words & Phrases, p. 300.)

"The term 'compensation', in its ordinary acceptation, applies not only to salaries, but to compensation by fees for specific services, x x x (see Words & Phrases, supra, p. 302).

> "The word 'salary' signifies the periodical compensation due to men in official and other situations; the word is derived from 'salarium', which is from the word 'sal' (salt), that being an article in which the Roman soldiers were paid. While the term 'salary' in its original and strict sense signifies a fixed compensation, it is frequently used in our Constitution and laws as the equivalent of 'compensation'. Reynolds vs. Reynolds, 58 P. 2d 660, 661, 14 Cal. App. 2d 481." (Cited in Words and Phrases, supra, p. 302.)

It could be gleaned from the above definitions that the term "compensation" is broad in its scope as to include all kinds and forms of remuneration; thus, "fees" and "salaries" fall within its meaning. Petitioner's claim that the "agency fees" and "husbanding fees" it received are of the nature of retainer's fees or salaries and therefore not taxable, is untenable, because in whatever form they were received they nevertheless constitute remuneration for services rendered. Hence, they fall within the purview of Section 195 of the Tax Code.

In all probability, petitioner believes that it is exempted from the brokerage tax because of the proviso found in Section 194 (t) of the same Code removing from the meaning of "commercial broker" the following "x x x, importers, manufacturers, producers, or *bona fide* employees, x x x." Petitioner cannot fall under any of the above categories except perhaps under the term "*bona fide* employees". However, "*bona fide* employee" has been construed thus -

> "A *bona fide* employee is one who works exclusively for one person or firm and who has no office or place of business of his own and whose activities are under the exclusive direction and control of the person or firm employing him. Ruling, BIR 110.1, Sept. 12, 1939, Bull. 4th Qr. 1940.] (See Formilleza, Commentaries on the National Internal Revenue Code, Vol. II, p. 764.)

Based on the above-quoted definition which we find to be reasonable and accurate, it is obvious that the petitioner is not a *bona fide* employee of the firms it represents, therefore it does not fall under the exception provided for in Section 194 (t) of the Tax Code. Hence, the amounts it received as "agency fees" and "husbanding fees" should be charged 6% commercial brokerage tax.

In connection with the surcharge, Section 183 (a) of the Tax Code provides:

> "Sec. 183. Payment of percentage taxes.- (A) In general: 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."

The Supreme Court in interpreting and construing the above provision said:

> "In this instance the law directs the collection of 25% surcharge, and this we held to be mandatory on the Collector, who has no discretion on the matter." (See Republic of the Philippines, vs. Luzon Industrial Corp., G.R. No. L-7992, Oct. 30, 1957.)
>
> "x x x This provision is mandatory. It confers no discretion on the Collector of Internal Revenue. That official may

> not disregard the law and substitute therefore his own personal judgment." (See Lim Co Chiu vs. Posadas, 47 Phil. 460, 462-463.)

Therefore, the petitioner is liable for the 25% surcharge imposed by the respondent for failure to pay the percentage tax on its broker's fees within the time prescribed by law.

With regard to the compromise penalty of ₱500.00 sought to be collected by the respondent, the rule is settled in this jurisdiction that the same cannot be imposed unless the taxpayer agrees. Our Supreme Court ruled in one case that:

> "Compromise implies mutual agreement between the parties involved in the compromise. One party cannot exact from or impose upon another a compromise." (See Collector of Internal Revenue v. U.S.T., G. R. Nos. L-11274 & 11280, Nov. 28, 1958.)

Hence, the compromise penalty should not be imposed on the petitioner.

IN VIEW OF THE ABOVE FINDINGS, petitioner Kuenzle & Streiff, Inc. is hereby ordered to pay ₱8,283.90 as commercial brokers' percentage tax, inclusive of the 25% surcharge for late payment, on the amount of ₱110,452.05 received by it as "agency fees" and "husbanding fees" during the period from January, 1951 to September, 1956. However, the petitioner can not be compelled to pay the compromise penalty of ₱500.00.

With costs against the petitioner.

SO ORDERED.

Manila, September 22, 1960.

AUGUSTO M. LUCIANO
Associate Judge

WE CONCUR:

MARIANO NABLE
Presiding Judge

ROMAN M. UMALI
Associate Judge