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COURT OF TAX APPEALS
MANILA

October 19, 1962

KER & CO., LTD.,
Petitioner,

- versus - C.T.A. CASE No. 944

MELECIO R. DOMINGO, as
Commissioner of Internal
Revenue,
Respondent.

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D E C I S I O N

The petitioner, Ker & Co., Ltd., has interposed this appeal from a decision of respondent assessing and demanding from it the payment of the sum of ₱20,272.33, as commercial broker's percentage tax, surcharge, and compromise penalty for the period from July 1, 1949 to December 31, 1953.

The petitioner, a corporation duly organized and existing under the laws of the Philippines, entered into a contract with the United States Rubber International, the provisions of which follow:

"UNITED STATES RUBBER INTERNATIONAL
166 Sixteenth Street, Port Area
Manila, Philippines

hereinafter called the "Company" and

KER & COMPANY., LTD.
Ayala Bldg.
Manila, P. I.

hereinafter called the "Distributor",

in consideration of the promises and undertakings herein do agree as follows:

1. This agreement shall apply to transactions between the Company and Distributor from July 1st/48 and to continue in force until terminated by either party giving to the other sixty (60) days' written or cabled notice, it being understood that such sixty day period shall begin at the time of sending of notice by the party giving any such notice.

2. All shipments of the products specified in paragraph five for consumption in Cebu, Bohol, Leyte, Samar, Jolo, Negros Oriental, and Mindanao except province of Davao shall be to the Distributor or to his order and such products will not intentionally be sold or offered for sale to anyone else for consumption in the specified territory, except as provided in paragraph four. Merchandise furnished under this agreement shall not be disposed of by the Distributor elsewhere than in the territory specified in this paragraph unless written consent shall have first been obtained from the Company.

3. The entire requirements of the class of products specified for sale by the Distributor and consumption in said territory shall be ordered from and supplied by the Company and every effort shall be made by the Distributor to make such requirements as large as possible and to promote in every way the sale of such products.

4. This agreement shall not include sales by the Company as detailed in this paragraph of the products specified in paragraph five.

a. All sales to mines, and oil companies, if any, operating in the territory designated above, made through their parent organizations in the United States, Canada, or Manila.

b. All sales to Original Equipment Accounts in the United States or Canada.

c. All sales to Government purchasing missions in the United States, or Manila.

5. The following products shall be subject to the terms of this agreement:

x x x x x

6. If it should appear that there are possible customers in the specified territory from whom the Distributor is not receiving business, the Company will call the Distributor's attention to them and allow a reasonable opportunity to obtain their business; in the event that the Distributor is not successful in so doing, the Company may at its option, negotiate direct with them with a view to obtaining their business either for the Distributor or for the Company and if the Company is successful in obtaining any such accounts a maximum discount of up to five per cent (5%) on any such sales will be reserved for the Distributor providing the prices at which such sales are made shall warrant such discount, it being understood that the Company's judgment shall be final in determining whether or not such a discount shall be paid.

7. The prices and terms as determined by the Company and as extended to the Distributor shall be as favorable as those extended to other distributors of the Company operating under similar conditions and the Company will advise the Distributor promptly of all changes made in such prices and terms from time to time. All prices, discounts, terms of payment, terms of delivery and other conditions of sale shall be subject to change in the discretion of the Company.

8. The Company shall from time to time consign to the Distributor and the Distributor will receive, accept and/or hold upon consignment the products specified under the terms of this agreement in such quantities as in the judgment of the Company may be necessary for the successful solicitation and maintenance of business in the territory, and the Distributor agrees that responsibility for the final sale of all goods delivered shall rest with him. All goods on consignment shall remain the property of the Company until sold by the Distributor to the purchaser or purchasers, but all sales made by the Distributor shall be in his name, in which case the sale price of all goods sold less the discount given to the Distributor by the Company in accordance with the provision of paragraph 13 of this agreement, whether or not such sale price shall have been collected by the Distributor from the purchaser or purchasers, shall immediately be paid and remitted by the

Distributor to the Company. It is further agreed that this agreement does not constitute Distributor the agent or legal representative of the Company for any purpose whatsoever. Distributor is not granted any right or authority to assume or to create any obligation or responsibility, express or implied, in behalf of or in the name of the Company, or to bind the Company in any manner or thing whatsoever.

9. All specifications ordering goods forward shall be subject to acceptance by the Company and the Distributor is to accept all goods ordered forward and shipped, and to clear the same through customs and to arrange for delivery in the Distributor's warehouse in Cebu City. Orders are to be filled in whole or in part from stocks carried by the Company's neighboring branches, subsidiaries, or other sources of Company brands.

10. Shipments will be invoiced on memorandum at prices to be agreed upon in order that invoices may be available as necessary for insurance, the payment of customs duties and other similar requirements. Customs duties are to be paid by the Distributor for account of the Company and such payments are to be reported promptly to the Company in the form of an invoice accompanied by an original customs house bill or certified copy.

11. In the event that exchange becomes unfavorable to the Company to such a degree as to cause a reduction which may be deemed material in the net amount received by the Company, at the option of the Company, it may direct the Distributor to discontinue deliveries to his customers until after exchange recovers or a mutually satisfactory agreement can be reached as to the method of dealing with the situation.

12. All resale prices, lists, discounts and general terms and conditions of local resale are to be subject to approval of the Company, and to change from time to time in the discretion of the Company.

13. The Company will allow the Distributor a discount of ten per cent (10%) on the net amount of sales of merchandise made under this agreement at Dealers Price level. On sales at "A" Fleet price level a discount of five per cent (5%) only will be allowed the Distributor.

14. On a date to be determined by the Company each month the Distributor shall render to the Company a report showing in detail all sales during the month immediately preceding, specifying therein quantities, sizes and types together with such information as may be required for accounting purposes; the Company will render an invoice on sales as described, to be dated as of the date of the inventory and sales report, with due date thirty (30) days thereafter; should the Distributor fail to make payment of such invoice or invoices, on due date, the Company will be privileged, at its option, to terminate and cancel the agreement forthwith, or to suspend it for such period as may be deemed necessary, and the Distributor will be held liable for all obligations incurred by him thereunder up to the time of such cancellation or suspension.

15. The Company agrees, at its own expense, to keep the consigned stock fully insured against loss or damage by fire or as the result of fire, the policies for such insurance to be payable to the Company in the event of such loss. The Distributor is to assume full responsibility with reference to the stock and its safety at all times, and upon request of the Company at any time the Distributor is to render an inventory of the existing stock which may be checked by an authorized representative of the Company. Any loss, damage or destruction of the consigned stock or any part thereof, except when such loss, damage or destruction shall have been the result of, or shall have arisen from, fire, earthquake, flood, hurricane, or any other contingency of similar nature which is unavoidable or beyond control, will be for the account of the Distributor, and the Company will invoice the Distributor and the latter will pay on demand for such lost or damaged stock according to the current price list issued by the Company, without any discount thereon.

16. Any charges that may arise in the way of license fees, taxes, imposts or other similar charges, due to the existence of the stock shall be paid by the Distributor for his own account.

17. This agreement does not constitute the Distributor an agent of the Company for any purpose other than those herein specified. The Distributor shall have no authority to sell or transfer or in any way dispose of the merchandise consigned hereunder except as herein expressly provided, or to accept orders for or commit the Com-

pany to the sale or delivery of any merchandise in excess of the consigned stock then in his custody.

18. Any withdrawal of merchandise from the official warehouse or warehouses ("official warehouse" is hereby defined as the Distributor's warehouse wherein the Company's products covered by the Company fire insurance policy are stored) of the Distributor, except under the specific instructions of the Company, for whatever purpose, shall constitute a sale under the terms of this agreement and must be indicated as such on the monthly inventory and sales report; once withdrawn from the consigned stock, for whatever purpose except under Company instructions, such withdrawal cannot be returned to the consigned stock but must thereafter remain in the account of the Distributor for disposition as the Distributor shall determine.

19. Upon the termination or any cancellation of this agreement all goods held on consignment shall be held by the Distributor for the account of the Company, without expense to the Company, until such time as provision can be made by the Company for disposition.

20. The products of the Company are not guaranteed for any specific length of time or measure of service, but are warranted only to be free from defects in workmanship and material at time of delivery.

21. In order to promote sales, the Company may elect to advertise in the specified territory to such a degree and in such amounts as may seem to be justified in the judgment of the Company.

22. The Distributor shall not use the Company's name, trade marks, copyrights or design patents in any way without written consent of the Company and in the event of the termination or cancellation of this agreement the Distributor shall return to the Company any and all blocks, cuts, or design patents, together with all advertising matter furnished to the Distributor by the Company and to discontinue the use of the Company's name, trade marks, copyrights or design patents forthwith.

23. The Company shall not be liable for any interruption, delay or default in the performance of this agreement or any part thereof,

when caused by shortages, breakdowns, impeded conditions in mills, factories or transportations, or by the act of God, the elements, strikes, lockouts or other labor troubles, fires, floods, wars, embargoes, or other causes beyond the control of the Company, and the Company may at its option, forthwith cancel or suspend this agreement for any of the foregoing causes, and after their cessation or removal may resume and complete the performance of this agreement. During such suspension the Distributor may, however, purchase from any sources the class of commodities herein specified, the amount of such purchases to be limited to the Distributor's immediate requirements during the period of such suspension.

24. In the event of a default by the Distributor in the performance of any of the terms, provisions, and conditions of this agreement, or of inability by reason of insolvency, bankruptcy, business difficulties, strikes, lockouts or other labor troubles, fires, floods, wars, embargoes or any other cause whatsoever to comply promptly with the terms and conditions of this agreement, or if the Distributor shall not conduct his business upon the scale contemplated, the Company shall be priviledged, at its option, to terminate and cancel the agreement forthwith, or to suspend it for such period as may be deemed necessary,and the Distributor will be held liable for all obligations incurred by him thereunder up to the time of such cancellation or suspension.

25. This agreement shall be subject to all regulations and conditions which may be imposed by the Government of the United States (or Canada) or any other government having jurisdiction over the exportation of the specified products from the United States (or Canada) or their importation into the specified territory.

26. The validity, interpretation and performance of this agreement, any disputes and claims arising hereunder, and the amount of any damages shall be determined under the laws of the Republic of the Philippines.

27. Failure of the Company to insist on the strict performance of the terms, agreements and conditions herein contained, or any of them shall not constitute or be construed as a waiver or relinquishment of the Company's right thereafter to enforce any such terms, agreements, or

condition, but the same shall continue in full force and effect.

Time is of the essence of this agreement.

28. This agreement constitutes the entire understanding between the parties relative to a consignment arrangement and supersedes all previous agreements on this subject, whether written or oral.

29. This agreement is not subject to any change or modification by any verbal statements or agreements, or by written communication of any kind except when signed by an officer of the Company, or other properly authorized person on his behalf." (Exh. "A", pp.129-133, BIR rec.; Exhibit "1-B", pp.37-42, BIR rec.)

On the basis of the said contract, respondent assessed and demanded from petitioner the sum of ₱27,484.00 as commercial broker's percentage tax and 25% surcharge covering the period from August 1948 to December 1953, plus compromise penalty amounting to ₱2,000.00, (Exh. "G", "3", pp.48-49, BIR Rec.). After a reinvestigation requested by petitioner (p.52, BIR rec.; Exh. "2", pp.62-64, BIR rec.), the assessment was reiterated (Exh. "4", pp. 65-67, BIR rec.).

Subsequently, petitioner, in a letter dated July 2, 1956, requested that the percentage tax and surcharge corresponding to 1948-1949 be excluded from the assessment because the right of the government to assess the same is already barred under Section 331 of the Revenue Code, thereby leaving a balance which petitioner requested to be referred to the Conference Staff (p.68, BIR rec.). After a reinvestigation (Exh. "4", pp.92-94 BIR rec.), respondent, in a letter dated December 29, 1958, reduced the assessment to ₱20,272.33, representing commercial broker's percentage tax, 25% surcharge and compromise penalty of ₱500.00 (Exhs."6" & "E", p. 101, BIR rec.).

Petitioner requested for the cancellation and withdrawal of the reduced assessment (pp.103-104, BIR rec.), which request was denied by respondent (Exh."7", pp.180-182,BIR rec.). Thereafter, petitioner filed the instant petition for review, to which respondent answered, seeking the payment of the sum of ₱19,772.33 as commercial broker's percentage tax and surcharge.

The issue to be resolved in this case is whether or not Ker & Co., Ltd. is a commercial broker within the purview of Section 194(t) of the Tax Code with respect to its transaction with the U. S. Rubber International.

Petitioner claims that its business relationship with the U. S. Rubber International is one of buyer and seller, not broker and principal. Hence, it is contended that it is not liable for commercial broker's percentage tax. Respondent contends the contrary.

The agreement entered into by ~~and~~ between petitioner Ker & Co., Ltd. and U. S. Rubber International is attended with contradictory provisions, some of which show that a contract of agency was contemplated by the parties, while the others negate such concept.

However, upon analysis of the contract, as a whole, together with the actual conduct of the parties in respect thereto, we have arrived at the conclusion that the relationship between them is one of brokerage or agency.

A commercial broker, as defined in Section 194 (t) of the Tax Code, 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. The term includes commission merchants. It does not, however, include a person or persons who purchase and/or sell merchandise on their own behalf. (Velasco vs. Universal Trading Co.,Inc.(CA) 45 O.G.4504; Puyat vs. Arco Amusement Co., 40 O.G. 1425).

That the petitioner Ker & Co., Ltd. is, by contractual stipulation, an agent of U. S. Rubber International is borne out by the facts that petitioner can dispose of the products of the Company only to certain persons or entities and within stipulated limits, unless excepted by the contract or by the Rubber Company (Par. 2); that it merely receives, accepts and/or holds upon consignment the products, which remain properties of the latter company (Par.8); that every effort shall be made by petitioner to promote in every way the sale of the products (Par.3); that sales made by petitioner are subject to approval by the company (Par.12); that on dates determined by the rubber company, petitioner shall render a detailed report showing sales during the month (Par.14); that the rubber company shall invoice the sales as of the dates of inventory and sales report (Par.14); that the rubber company agrees to keep the consigned goods fully insured under insurance policies payable to it in case of loss (Par.15); that upon request of the rubber company at any time, petitioner shall render an inventory of the existing stock which may be checked by an authorized representative of the former (Par.15); and that upon termination or cancellation of the Agreement, all goods held on consignment shall be held by petitioner for the account of the rubber company until their disposition is provided for by the latter (Par. 19). All these circumstances are irreconcilably antagonistic to the idea of an independent merchant.]

Petitioner's contention that the relationship under review is one of merchandising (sale), not brokerage or agency, is belied by paragraph 7 of the agreement, which provides that "all prices, discounts, terms of payment, terms of delivery and other conditions of sale shall be subject to change in the discretion of the Company"(p.41, BIR rec.). It has been held that:

> "The essence of an agency to sell is the delivery to an agent, not as his property, but as the property of the principal, who remains the owner and has the right to control sales, fix the price and terms, demand and receive the proceeds less the agent's commission upon sales made." (Salisbury vs. Brooks 94 S.E.117,118, 81 W. Va. 233 cited in 38 Words & Phrases 65).

Furthermore, petitioner contends that the use, in the agreement (Exhs. "A" & "1-B"), of the terms "final sale", "resale" and "resale price" indicates that a sale was contemplated, for these terms presuppose the existence of a prior sale between petitioner and the U. S. Rubber International. This contention is equally not well taken. The use of these terms alone are not conclusive of the nature of the relationship of the parties because of the frequent use, in the said agreement, of the word "consignment" in reference to the products received by petitioner from the rubber company.

Finally, the fact that some provisions indicating a buyer-seller relationship are found in the agreement does not impair the brokerage or agency relationship intended by the parties.

> "There may be a "consignment" of chattel for purpose of sale to stranger and no sale to consignee, without impairing true character of transaction as a "bailment", and usual common-law liabilities of bailee may be increased <u>without changing transaction from "bailment" to "sale", although some of indicia of sale may be present in bailment.</u>" (Charles M.Stieff Inc. vs. City of San Antonio,Tex. Com.App. III.S.W.2d 1086,1090,cited in 8-A Words & Phrases 335) (Underscoring supplied)

Having sustained the proposition that petitioner Ker & Co., Ltd. is a commercial broker, it follows that it is liable for the payment of percentage tax, plus surcharge, pursuant to Sections 183 and 195 of the Revenue Code.

Decision:+
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WHEREFORE, the petitioner Ker & Co., Ltd. is hereby ordered to pay to the respondent Commissioner of Internal Revenue or his authorized representative the sum of ₱19,772.33 as commercial broker's percentage tax and surcharge, with costs against the petitioner.

SO ORDERED.

Manila, October 19, 1962.

MARIANO NABLE
Presiding Judge

We concur:

AUGUSTO M. LUCIANO
Associate Judge

ROMAN M. UMALI
Associate Judge