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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MANILA MACHINERY & SUPPLY
COMPANY, INC.,
Petitioner,

-versus- C.T.A. CASE No. 1250

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

Dec. 13/65

D E C I S I O N

This pertains to petitioner's claim for the refund of the sum of ₱21,620.36 which it alleged have been erroneously paid to respondent as broker's percentage tax for the period covering June, 1960 to May, 1962.

Petitioner is engaged in business as importer, local dealer, repairer and commercial broker for which it paid the corresponding privilege taxes. It is also a sales representative and/or distributor of certain United States manufacturers and/or suppliers of machinery, equipment and spare parts. In connection with its transactions as sales representative and/or distributor, it appointed Mrs. M. A. Smith as its agent in the United States.

From the stipulation of facts, it appears that

(1) as sales representative of certain United States manufacturers and/or suppliers, petitioner's transactions or activities are outlined as follows:

"(1) Philippine buyer ascertains from petitioner whether or not a certain machinery or equipment it desires to buy is available from the U.S. manufacturers or suppliers represented by the former and, if available, requests for price quotations of the desired machinery or equipment;

(2) If agreeable, Philippine buyer places purchase order either directly with the United States manufacturer and/or supplier or with petitioner who forwards it to the U.S. manufacturer;

(3) Upon notification that the purchase order is accepted, the Philippine buyer opens with a local bank a letter of credit in favor of the United States manufacturer or supplier to cover payment of the goods ordered;

(4) United States manufacturer or supplier ships the goods to Philippine buyer and collects from the U.S. correspondent of the local bank where the letter of credit was opened, payment of the goods;

(5) United States manufacturer or supplier credits the petitioner for commission. (pp. 70-73, CTA rec.)

(2) As distributor of the United States manufacturers and/or suppliers, its transactions or activities are outlined as follows:

"(1) Philippine buyer ascertains from petitioner whether or not a certain machinery or equipment which the said buyer desires to purchase is available from the U.S. manufacturers or suppliers for whom petitioner acts as distributor and, if available, requests for price quotation of the desired machinery or equipment;

(2) Petitioner furnishes the Philippine buyer with price quotation based on list price f.o.b. factory which is fur-

nished petitioner and fixed by the United States manufacturer or supplier;

(3) If agreeable, Philippine buyer places the purchase order with the petitioner;

(4) Upon notice of the acceptance of the purchase order, the buyer opens with a local bank a letter of credit in favor of the petitioner's agent in San Francisco, California, United States of America to cover the price of the goods ordered;

(5) Petitioner prepares the purchase instructions in accordance with purchase order of Philippine buyer and forwards the same to its Agent in the United States;

(6) The said agent procures the goods from the U.S. manufacturer or supplier;

(7) United States manufacturer or supplier invoices goods to petitioner's Agent in San Francisco, California;

(8) Petitioner's Agent prepares sales invoice of the petitioner and ships the goods to the Philippine buyer." (pp. 70-73, CTA rec.)

During the period from June, 1960 to May, 1962 petitioner reported its income from the transactions or activities outlined above in the sum of ₱630,635.62 as commission, on which it paid ₱37,837.94 as broker's percentage tax (Exh. "1", pp. 53-56, BIR rec.; Pars. VII & VIII, Stifacts, pp. 70-73, CTA rec.). Later, it filed a claim for refund of the sum of ₱21,620.36 which was alleged to have been erroneously paid, on the ground that out of the total sum of ₱630,635.62, the sum of ₱360,339.35 was not subject to the broker's percentage tax. (Exh. "A-1", pp. 1-23, BIR rec.; Exh. "1-A", p. 32, BIR rec; pp. 10-13, CTA rec.; pp. 24-25, t.s.n.) The alleged erroneous payment refers to the overprice on sales and exchange income on overprice from contracts entered into by petitioner with Philippine buyers. As correctly pointed out by respondent's examiner, these incomes were earned in the following manner:

> "3. Overprice on Sales Treated as Commission Income - This is the subject of the herein claim for refund. The Manila Machinery & Supply Co., Inc. (Manila) accepts purchase orders from Philippine buyers of certain machinery. If the Manila Machinery & Supply Co. Inc. (Manila) has no stock of the machinery desired by Philippine buyers, it forwards the purchase orders to its alleged San Francisco Agent, the M.A. Smith. M. A. Smith in turn procures or buys the desired machinery from the U. S. manufacturers or suppliers and pays therefore the cost or invoice price and other charges. The U. S. manufacturers invoiced and shipped the machinery to the Manila Machinery & Supply Co. (San Francisco) and not to the M. A. Smith. On the other hand, the letter of credit opened by the Philippine buyer are in favor of M. A. Smith. The difference between the cost or invoice price (purchase price and other charges paid by M. A. Smith to the U. S. manufacturers) and the selling price (the cost of the machinery paid by Philippine buyers thru letters of credit) is the overprice which were treated as commissions earned on which the corresponding 6% broker's tax was paid.
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> "4. Exchange Income on Overprice - The aforesaid overprice which are in dollars were converted at ₱2.00 per dollar in the books of the Manila Machinery,

> & Supply Co., Inc. (Manila). When the overprice in dollars are remitted by M. A. Smith here in Manila the same are converted at the prevailing exchange rate which is higher than the exchange rate of ₱2.00 per dollar as previously recorded in the books. The difference between the original conversion of the overprice (at ₱2.00 to $1.00) and the higher prevailing exchange rate were treated as commissions earned and the corresponding 6% broker's tax paid. (Nos. 3 & 4, p. 54, BIR rec.)

As one of his special and affirmative defenses, respondent avers that petitioner's claim for refund, insofar as it pertains to taxes paid on or before June 29, 1960, has already prescribed. (Answer, pp. 36-38, CTA rec.) We take it, however, that respondent has abandoned this defense in view of his failure to discuss it in his memorandum.

The only question involved in this case is whether or not the overprice on sales and exchange income on overprice amounting to ₱360,339.35 on contracts entered into by the petitioner with Philippine buyers through its agent in California, U.S.A., are subject to 6% broker's tax under Section 195 of the Revenue Code, in relation to Section 194(t) of the same Code.

Petitioner contends that it is not a commercial broker within the definition provided in Section 194(t) of the Revenue Code, which reads:

> "(t) 'Commercial broker' includes all persons, other than importers, manu-

> facturers, 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."

One of the purposes of petitioner corporation, as stated in its articles of incorporation, is "to make and enter into all kinds of contracts, agreements, and obligations with any person or persons, corporation or corporations, or other associations for the purchasing, acquiring, selling, or otherwise disposing of goods, wares, and merchandise of all kinds, either as principal or agent, upon commission, consignment, or indent orders." (pp. 43-48, BR rec.) Petitioner is, therefore, authorized to act either as principal or agent in the transaction of its business. However, the evidence of record regarding petitioner's transactions which gave rise to the income in question indicates the status of petitioner as an independent dealer and not as a commercial broker. Petitioner's contracts with several U. S. manufacturers indubitably show that it acted as an independent dealer. Pertinent portions of these contracts read:

Joy Manufacturing Company

"1. Subject to the terms and conditions hereinafter set forth, the Company grants to the Distributor the exclusive right to purchase for resale the following listed articles and machines x x x x, manufactured or sold by the Company within the territory indicated hereinafter." (Underscoring supplied; Distributor's Contract, p. 78 CTA rec.)

Briggs & Stratton Corporation

"'Distributor' is an individual or firm under agreement with Briggs & Stratton Corporation, whose principal business is the resale of products or commodities at wholesale to dealers, etc., x x x x. Distributor shall not act as the agent for the Company under this agreement, nor shall Distributor have any right or power hereunder to act for or to bind the Company in any respect or to pledge its credit. x x x x." (Underscoring supplied; Distributor Agreement, p. 83, CTA rec.)

The Jeffrey Manufacturing Company

"The purpose of this agreement is to effect through the Representative a wider sales outlet for the Manufacturer's products. This is to be accomplished by the Representative purchasing certain products, hereinafter listed, and produced by the Manufacturer, for resale, and diligently promoting their sale in the Representative's territory." (Underscoring supplied; Export Representative Agreement, p. 85, CTA rec.)

Toledo Scale Corporation

"II. (a) To sell only to the Distributor Toledo Machines for use in the Distributor's territory, except the following machines: x x x x

"IV. (d) The responsibility of the Company for merchandise ordered by the Distributor x x x x shall end

> with its delivery f.o.b. factory; all risks of fire, loss or damage after the shipment has been delivered f.o.b. factory or while in possession of any transportation company x x x, shall be borne by the Distributor.
>
> "IV. (h) x x x It is expressly the intention of the parties hereto that the Distributor's status is that of an independent contractor." (Underscoring supplied; Export Distributor's Sales Agreement, pp. 90-93, CTA rec.)

Respondent cites the agreement of petitioner with the Toledo Scale Corporation (pp. 90-93, CTA rec.), which authorizes petitioner "to solicit sales of" certain products of the latter corporation, as an indication of brokerage. But respondent merely quoted that portion wherein petitioner is authorized to act as agent or representative but did not mention petitioner's equal authority to act as distributor or independent dealer with respect to the same corporation.

A perusal of the records of the case at bar equally yields the conclusion that petitioner, through its agent, M. S. Smith, in San Francisco, California, U.S.A. (pp. 49-50, BIR rec.), was the purchaser and owner of the machineries it sent to the Philippine buyers. This conclusion is established by the fact that when petitioner received purchase orders from local buyers and there was no stock available, it sent the orders to its agent in California and required the latter "to purchase from x x x" the U. S. manufacturers or suppliers the items called for in the purchase orders (See pp. 63, 79, 93, 111 & 124, BIR rec.). Petitioner was in turn paid through the letters of credit opened by the Philippine buyers with local banks in favor of agent M. A. Smith (See pp. 59-128, BIR rec.).

The facts (1) that petitioner shouldered the losses resulting from some of the transactions in question (See pp. 21-22, BIR rec.); (2) that if petitioner had no stock available in the Philippines, it forwarded the purchase order to its agent in California who procured the machineries from U. S. manufacturers (Exh. "1", pp. 53-56, BIR rec.); and (3) that the U. S. manufacturers invoiced the goods to petitioner's agent in California who prepared the sales invoice and shipped the goods to the Philippine buyers (See Stifacts, pp. 70-73, CTA rec.) negate agency.

We agree with petitioner that a seller need not have the goods he is selling at the time the contract of sale is perfected (Art. 1462, New Civil Code). The goods may be delivered afterwards and his status as independent dealer is not affected.

This Court, in Cadwallader Pacific Company v. Commissioner of Internal Revenue, CTA Case 536, December 23, 1960, where petitioner therein is similarly situated, held:

> "With respect to the transactions for which petitioner is being held liable for the broker's fixed and percentage

taxes, it appears that petitioner's Manila office secures orders from Philippine customers for the purchase of goods from abroad. Under the contract entered into between petitioner and the buyer, the seller is the California branch. x x x.

"After the contract is signed, the same is forwarded to the California branch which procures the goods described in the contract and ships them directly to the buyer. As title to the goods passes from the seller (the California branch) to the Philippine buyer from the time of shipment in California, the buyer is the importer of such goods and is the one liable for all taxes and duties due thereon and incident to their importation.

"The profit derived by petitioner from the transaction is denominated as the 'mark-up' on the price of the goods; respondent calls it 'overprice;' it is entered in the books of petitioner as 'commission earned.' x x x x.

"We find no factual basis to support respondent's conclusion that petitioner acted as broker between the Philippine buyers and the U. S. manufacturers or suppliers from which the goods were acquired by the California branch of petitioner. All that appears of record is that petitioner entered into contracts of sale with Philippine buyers; that at the time the contracts were signed, the goods were not on hand; that the goods contracted to be sold were to be procured by its branch office in California; and that such goods were actually acquired or purchased by the California branch which shipped the goods in its own name directly to the Philippine buyers. Under these circumstances, we do not think that petitioner or its branch office in California acted as broker for and on behalf of the foreign manufacturers or suppliers. Petitioner simply sold goods which it undertook to procure through its California branch."

Respondent cited the case of Perez v. Rafferty, 41 Phil. 74, to justify his stand. This case, however, is not in point. The issue there is: Is a licensed commission merchant, who is a salaried agent of a producer, liable for the 1% tax imposed on commission merchants for selling the agricultural products of the producer?

IN VIEW OF ALL THE FOREGOING, respondent is ordered to refund to petitioner the sum of ₱21,620.36 which the latter has erroneously paid as broker's percentage tax for the period covering June, 1960 to May, 1962. Without pronouncement as to costs.

SO ORDERED.

Quezon City, December 23, 1965.

TEOFILO D. REYES, SR.
Presiding Judge

WE CONCUR:

ROMAN M. UMALI
Associate Judge

ALEJANDRO D. ALMONG
Associate Judge