Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

**MARUBENI CORPORATION,**
Petitioner,

- versus - **C.T.A. CASE NO. 4110**

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

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3/1/93

# D E C I S I O N

Petitioner Marubeni Corporation (Philippine Branch) seeks a review of the decision of respondent Commissioner of Internal Revenue, in assessing petitioner's deficiency in commercial broker's tax, surcharges and interests totalling P3,601,535.68 for the fiscal year ending March 31, 1985, under Section 208 (now Section 194) of the National Internal Revenue Code (NIRC) of 1977, as amended. The questioned assessment is itemized as follows:

**DEFICIENCY COMMERCIAL BROKER'S TAX**
**FY ended March 31, 1985**

| | |
|---|---|
| Underclared share from commission income (denominated as "Subsidy from Home Office) | P24,683,114.50 |
| Tax due thereon | P1,628,569.00 |
| Add: 50% surcharge for non-declaration | P814,284.50 |
| 25% surcharge for late payment | P407,142.55 |
| Sub-total | P2,849,995.75 |
| Add: 20% int. p.a. from 4/21-85 to 8-15-86 | P751,539.93 |
| TOTAL AMOUNT DUE | P3,601,535.68 |

To support its case, petitioner alleges that :

a. It is a foreign corporation duly organized under the laws of Japan and licensed to do business in the Philippines, and that it maintains a Philippine branch, with address at 8th and 9th Floor, L.V. Locsin Bldg., Corner Ayala and Makati Avenue, Makati, Metro Manila.

b. It is engaged in, among other things, the business of buying, selling and trading of ores, metals, minerals, chemicals, animal feeds, agricultural commodities and other raw materials;

c. In the transactions subject of the assessment, the Marubeni Branch in the Philippines acted as a liason of its Head Office in Japan;

d. For the liason work of Marubeni Branch, the Head Office transmitted certain amounts to the branch as its "subsidy";

e. The "subsidy" was paid by the Head office in the form of foreign remittances and this "subsidy" was declared as petitioner's income in its income tax return and the corresponding income tax paid;

f. It has also availed of the tax amnesty under Executive Order Nos. 41 and 64.

Petitioner contends that the subsidy received by the Marubeni Branch from the Marubeni Head Office is not subject to the percentage tax on commercial brokers because the Marubeni Branch was not a commercial broker in the transactions involved in the assessment; and that its availment of the tax amnesty under Executive Order Nos. 41 and 64 extinguished any tax liability in the subject transactions.

Respondent, upon the other hand, contends that the "legal structures" of the Marubeni Head Office and Marubeni Branch are "separate and distinct" as to constitute two separate taxable entities. Respondent considered as "commissions" for "brokerage services" from Marubeni Head Office, the alleged "subsidy" received and thus he imposed "a definite percentage from the commission income" received by the Philippine branch "in a completed operation of brokerage services". In line with his theory, respondent notes in his memorandum the findings of the Revenue Examiner who testified in Court, the substantive parts of which are as follows:

**Atty. Abad**

Q. You said that you found it in their income statement as subsidy from home office, Why then did you recommend for the assessment of commercial broker's tax considering that the taxpayer declared it a subsidy from home office? Will you explain to this Honorable Court?

A. Marubeni, Philippine Branch as against Marubeni Corporation, Japan, the main office, it being a mere branch, the taxpayer merely acts as a trading house for buyers and sellers. Now, there are suppliers coming from the Philippines and there are buyers coming from abroad, outside the Philippines, and that looking at the way that this company operate, one is that they don't buy. There is nothing shown to me in the record that they are buying goods for their own account. They did not store it neither did they sell it and neither did they represent that they are the owner of the goods, rather that they look for the buyers here, sellers here and they look for the buyers abroad. So Marubeni Corporation, Japan, is like an access and a broker and kind of traffic policeman between that branch here which is their extension here in the Philippines and then also for the buyer abroad. So, for the commissions that they earn for the brokering or the commissions that they earn as a broker, in this transaction, what Marubeni Japan does is that it allocates a certain portion of that income from the transaction as pertaining to the services perform by Marubeni Branch, Philippines within the Philippines.

So that part of the services in the entire transaction that is perform here in the services in the transaction outside the Philippines, what the home office gives to the Philippine branch that is what they call, subsidy. So I consider even if you call it subsidy but the transaction the source of the subsidy is linked with the import or export transaction.

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**Q.** Do you have any document or were you able to gather some documents which will show that Marubeni Philippine Branch received commission out of the commission received by Marubeni Home Office as well as Marubeni Philippine Branch in a particular transaction?

**A.** I was only able to gather these vouchers. These are those vouchers on file in the Philippine branch showing how the Manila Branch of Marubeni bills their mother, the home office in Tokyo or subsidiary abroad like Marubeni America or a branch corporation as in London branch because the set up of this as far as I can recall is, Marubeni Corporation based in Japan has plenty of branches in other countries not only in the Philippines. Aside from branches they also have subsidiaries in other countries. So these documents we have here, these vouchers that we obtained from them show how they received the commissions.

x x x

**Q.** Mr. Manalac, do Marubeni Home Office show a definite pattern of percentage in sending a subsidy as they denominated it in their income statement what they received from the home office? Do they have pattern or do they have specific percentage given to Marubeni Philippine Branch in so far as they act as broker acting through the home office, Marubeni Tokyo?

A. They are charging, they are computing based on a certain percentage based on sales price or a fixed amount based on quantity.

x x x

Q. You want to tell this Honorable Court that they followed a definite percentage in transmitting the shares of Marubeni, Philippine Branch from the commission received by Marubeni Tokyo, Japan?

A. When we talked about subsidy, it comes from home ways let's say it's like giving allowance or stipend. It comes from funds of home office. But when the giving of these funds is linked up based on export transaction at a certain percentage or fixed amount based on quantity, we consider that as commissions although they classify that, they described that in the book as subsidy.

x x x

Atty. Abad:

Q. Mr. Witness, did you encounter any situation where Marubeni, Philippine Branch is the seller or the buyer of goods in the Philippines?

A. In the course of the investigation I interviewed some personnel of their office at Makati and even their Japanese Managers, I forgot their names, in the course of the investigation in passing, asking them, Do you buy for your own account and sell it out? No. What they have is only their office here and that they engaged of export and import. There is nothing in the books or the financial statements showing that they are acting as buyer for their own account and selling for their own account.

x x x

Q. So in your entire investigation, you did not encounter a situation wherein Marubeni, Philippine Branch is the buyer or the seller?

A. None, Because I asked them, Do you buy goods and store it or where do you store it, do you have any storage? None at all."

Additionally, respondent urges that "petitioner's act of devising a sophisticated cloak of semantics as 'subsidy from the home office' is a manifestation of a willful and fraudulent intent to mislead the respondent and to avoid payment of correct tax due thereon "justifies the charge of 50% of fraud penalty.

Respondent does not also concede that the tax liability of petitioner had already been extinguished with its availment of Executive Order

Nos. 41 and 64. There is allegedly no voluntary disclosure of untaxed income by petitioner, and that this case was already before this Court on September 26, 1986 when petitioner filed its Amnesty Tax Returns on November 3, 1986 and December 13, 1986.

Marubeni Corp. has its subsidiaries and offices worldwide, as it is Marubeni Corporation (Manila Branch is a multinational enterprise).

As defined a multinational enterprise is a combination of companies of different nationality connected by means of shareholdings, managerial control and constituting an economic unity. One basic idea which is common to all multinational enterprises the disparity between economic and legal entity. Whereas, they are viewed as single unit, yet they are in truth and in fact separate legal units (Multinational Enterprises by Robert Emmett Tindal, page V, XV).

From the above cited definition of what a multinational enterprise is, we can very well opine that Marubeni Corporation, Manila Branch and its head office constitute a single economic unit but the legal structures are separate and distinct from each other thus constituting two (2) taxable entities. The fact remains that petitioner is engaged as commercial broker for its export - import trade considering that its export - import trade transcends national boundaries, Marubeni Corporation, Manila Branch is rendering brokerage services in the Philippines in bringing about sales or purchases of merchandise of Japanese and other foreign traders and Filipino businessmen or in bringing together proposed Filipino buyers and Japanese or other foreign sellers in the Philippines.

Under Section 187 (t) of the 1977 Tax Code, a commercial broker is defined as follows :

"(t). "Commercial broker" includes all persons, other than importers, manufacturers, producers or bona fide employees, who for compensation or profit, sell or bring about sales or purchases of merchandise for other persons, or bring proposed buyers and sellers together, or negotiate freights or other business owners of vessels or other means of transportation, or for the shippers, or consignors or consignee of freight carried by vessels or other means of transportation. The term includes commission merchants".

As it is, from the aforecited provision of the Tax Code, it can very well be concluded that indeed petitioner is a commercial broker. For all the brokerage services rendered by Marubeni Corporation branch in Manila, it received commissions from Marubeni Corporation, Head Office, a definite percentage from the commissions income received by the latter in a completed operation of brokerage services. This commission income was declared by Marubeni Corporation, Manila Branch, as subsidy from home office. It is however reported by the latter as income in its Statement of Income and Expenses for the period ended March 31, 1985 and 1984 attached to its Corporation Annual Income Tax Return.

For the commissions that they earned from the brokerage transactions, Marubeni Japan allocates a certain portion of that income out of the transaction for the services rendered by Marubeni Branch. It can be readily seen, in the course of the transaction that the source of the subsidy is tied with the import and export transaction.

Now, with regard to the pattern of percentage being sent as subsidy, the same is computed as based on percentage on sales price or on fixed amount based on quantity. The Court considers said amount as commissions contrary to the petitioner's claim. It is likewise noted that it is the Head Office (Marubeni Japan) that allocates the commissions as compensation for the services rendered by its Philippine branch.

We cannot give due assent to petitioner's claim that what it allocates to the Marubeni Branch are mere subsidies in the truest sense of the word. To our mind, it is more of a commission considering the fact that the amount of subsidies remitted varies, dependent upon the sales price or based on quantities. Furthermore, if these subsidies are only given to finance the transactions being undertaken by the branch office in favor of the mother company, then there would then be no need to determine the percentage of the subsidies on the basis of sales price and quantity.

The bigger the amount involved in the transaction, the bigger the commissions, the amount given by the Head Office is always dependent on the import - export transaction.

The term commissions, as defined are the allowances to an agent or factor for transacting business for another.(Citing Words and Phrases, Volume 7A, page 558)

- Commissions when used to express compensation for services rendered, it usually denotes a percentage on the amount of money paid out or received (ibid page 559)

- The word commission is usually employed to mean the compensation to an agent, broker or person who handles the affairs of others in payment for their services (ibid 559).

From the definitions cited above, the foreign remittances given to Manila Branch fall squarely within the definition of a commission.

In the instant case, petitioner laid out the nature of the transactions as involving two types. One, is where Marubeni Japan is itself the buyer or seller in a transaction, with a counterpart buyer or seller in the Philippines; and the other is where the Marubeni Head Office is neither the buyer nor the seller, there being Philippine buyers or sellers and counterpart foreign buyers or sellers.

In both types of transactions, there was alleged to be active participation by Marubeni Branch by obtaining information, arranging for shipment, communicating and negotiating the terms and conditions with the Philippine parties involved, and other liason services.

It was shown that Marubeni Head Office was itself the seller or the buyer in this activity in the Philippines. The role of the branch involved facilitation of the said transaction. For this it received "commissions from Home Office" amounting to P22,031,993.00. The second type of transaction was shown as one where petitioner was not a buyer or seller there being Philippine buyers or sellers and counterpart foreign buyers or sellers. The participation of the branch in this transaction also involved liason service and the commission paid to it represents all income allocated to it by the Head Office.

Moreover, the Court sustains its deviation from the case of *Philipp Brothers Oceanic Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 3140 with the case at bar based on the following considerations :

In the Philipp Brothers Oceanic case, the amount of Commissions allocated to the Philippine Branch is not dictated by the amount, bulk, quantity or volume of the import and/or export transaction. It is based on a uniform Intercompany Commission schedule supplied by the Head Office.

Secondly, instead of subsidy the term used is Commission intercompany, and the amount of Commission is based on a pre-determined rates.

Lastly, the Commissions paid by the Head Office (PhiBro New York) to Philippine Branch in the form of foreign remittances are paid only after the latter has submitted a debit memo. (Philipp Brothers Oceanic, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 3140, p. 80 CTA records)

On the question of the effect of petitioner's availment of the tax amnesty under Executive Order Nos. 41 and 64, the Court resolves the same in the following manner.

Clearly, filing of a tax amnesty return under E.O.41 extinguishes the filer's <u>income</u> tax liability (and the penalties imposed thereon). As enunciated in Section 6 (a) of E.O. 41, upon compliance with the conditions of the amnesty declared thereby:

> "The taxpayer shall be relieved of any <u>income</u> tax liability on any untaxed income from January 1, 1981 to December 31, 1985, including increments thereto and penalties on account of the non-payment of the said tax. Civil, criminal or administrative liability arising from the non-payment of the said tax, which are actionable under the National Internal Revenue Code, as amended, are likewise deemed extinguished."

It does not extinguished any other tax liability of the petitioner like for instance, its business tax liabilities. The records show that petitioner did not have any income tax liabilities during the period covered by E.O. 41. The only assessment made by the respondent against petitioner for taxes covering the said period is one for unpaid commercial broker's tax, which is a business, and not an income tax. Petitioner's act in filing its amnesty return under E.O. 41 on October 15, 1986 did not have any practical result. It certainly did not extinguish petitioner's business tax liability.

Executive Order 41, which took effect on August 22, 1986, is an amnesty on income tax while

Executive Order 64, which became effective on November 17, 1986, expanded the scope of the amnesty to include estate, donors and business tax. Unlike E.O. 41, E.O. 64 does not expressly provide for exceptions from the amnesty declared thereby. Instead, E.O. 64, in its Section 8 states that:

> "The provisions of Executive Order Nos. 41 and 64 which are not contrary or inconsistent with the amendatory Executive Order shall remain in force and effect.

Obviously, Section 4 of E.O. 41, which enumerates the exceptions to the income tax amnesty, is not contrary to or inconsistent with E.O. 64. Therefore, it is safe to say that it continued to be in force and effect even after the promulgation of E.O. 64. The same may be said of Section 6 of E.O. 41, which enumerates the immunities and priveleges enjoyed by taxpayer who avail of the tax amnesty declared thereby. Accordingly, Section 4 on the exception to availment of tax amnesty under E.O. 41 should likewise be applicable to those who will avail of the tax amnesty under E.O. 64. Thus, the exception or disqualification under subsection (b) of the said Section 4 that:

> "Those with income tax cases already filed in court as of the effectivity hereof" should likewise be applicable to those who will avail of the amnesty under E.O. 64. Obviously, as E.O. 64 refers to estate, donor's and and business taxes. The said disqualification should likewise be read as to refer to these taxes.

Considering that as of the effectivity of E.O. 64 on November 17, 1986, there is already a business tax (commercial brokers tax assessment) case pending before this Court (filed on September 26, 1986), Petitioner is disqualified to avail of the amnesty under E.O. 64, reiterating as basis subsection (b), Section 4 of E.O. 41. Petitioner availed of the tax amnesty under E.O. 64 on December 15, 1986.

Furthermore, the Court is bound to interpret the amnesty law strictly against the taxpayer. There must be clear showing of compliance with the requirements of the amnesty law. (People vs. Castaneda G.R. No. L.-46881, September 15,1988)

**WHEREFORE,** the decision of the Commissioner of Internal Revenue assessing petitioner the amount of P3,601,535.68 is **SUSTAINED.**

SO ORDERED.

Quezon City, Metro Manila, March 1, 1993.

MANUEL K. GRUBA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

(Dissenting)
RAMON O. DE VEYRA
Associate Judge

## CERTIFICATION

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals