

KER & CO., LTD., PETITIONER, VS. JOSE B. LINGAD, AS ACTING COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.*G.R. No. L-20871. April 30, 1971*

Ponente: FERNANDO, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/8f5ff687bfbe/>**FERNANDO, J.:**

Petitioner Ker & Co., Ltd. would have us reverse a decision of the Court of Tax Appeals, holding it liable as a commercial broker under Section 194 (t) of the National Internal Revenue Code. Its plea, notwithstanding the vigorous effort of its counsel, is not sufficiently persuasive. An obstacle, well-nigh insuperable, stands in the way. The decision under review conforms to and is in accordance with the controlling doctrine announced in the recent case of Commissioner of Internal Revenue v. Constantino.[1] The decisive test, as therein set forth, is the retention of the ownership of the goods delivered to the possession of the dealer, like herein petitioner, for resale to customers, the price and terms remaining subject to the control of the firm consigning such goods. The facts, as found by respondent Court, to which we defer, unmistakably indicate that such a situation does exist. The juridical consequences must inevitably follow. We affirm.

It was shown that petitioner was assessed by the then Commissioner of Internal Revenue Melecio R. Domingo the sum of P20,272.33 as the commercial broker's percentage tax, surcharge, and compromise penalty for the period from July 1, 1949 to December 31, 1953. There was a request on the part of petitioner for the cancellation of such assessment, which request was turned down. As a result, it filed a petition for review with the Court of Tax Appeals. In its answer, the then Commissioner Domingo maintained his stand that petitioner should be taxed in such amount as a commercial broker. In the decision now under review, promulgated on October 19, 1962, the Court of Tax Appeals held petitioner taxable except as to the compromise penalty of P500.00, the amount due from it being fixed at P19,772.33.

Such liability arose from a contract of petitioner with the United States Rubber International, the former being referred to as the Distributor and the latter specifically designated as the Company. The contract was to apply to transactions between the former and petitioner, as Distributor, from July 1, 1948 to continue in force until terminated by either party giving to the other sixty days' notice.[2] The shipments would cover products "for consumption in Cebu, Bohol, Leyte, Samar, Jolo, Negros Oriental, and Mindanao except [the] province of Davao," petitioner, as Distributor, being precluded from disposing such products elsewhere than in the above places unless written consent would first be obtained from the Company.[3] Petitioner, as Distributor, is required to exert every effort to have the shipment of the products in the maximum quantity and to promote in every way the sale thereof.[4] The prices, discounts, terms of payment, terms of delivery and other conditions of sale were subject to change in the discretion of the Company.[5]

Then came this crucial stipulation: "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." [6]

All specifications for the goods ordered were subject to acceptance by the Company with petitioner, as Distributor, required to accept such goods shipped as well as to clear the same through customs and to arrange for delivery in its warehouse in Cebu City. Moreover, orders are to be filled in whole or in part from the stocks carried by the Company's neighboring branches, subsidiaries or other sources of company's brands. [7] Shipments were to be invoiced at prices to be agreed upon, with the customs duties being paid by petitioner, as Distributor, for account of the Company. [8] Moreover, all resale prices, lists, discounts and general terms and conditions of local resale were to be subject to the approval of the Company and to change from time to time in its discretion. [9] The dealer, as Distributor, is allowed a discount of ten percent on the net amount of sales of merchandise made under such agreement. [10] On a date to be determined by the Company, the petitioner, as Distributor, was required to report to it data showing in detail all sales during the month immediately preceding, specifying therein the quantities, sizes and types together with such information as may be required for accounting purposes, with the Company rendering an invoice on sales as described to be dated as of the date of inventory and sales report. As Distributor, petitioner had to make payment on such invoice or invoices on due date with the Company being privileged at its option to terminate and cancel the agreement forthwith upon the failure to comply with this obligation. [11] The Company, at its own expense, was to keep the consigned stock fully insured against loss or damage by fire or as a result of fire, the policy of such insurance to be payable to it in the event of loss. Petitioner, as Distributor, assumed full responsibility with reference to the stock and its safety at all times; and upon request of the Company at any time, it was to render inventory of the existing stock which could be subject to change. [12] There was furthermore this equally tell-tale covenant: "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." [13]

The issue with the Court of Tax Appeals, as with us now, is whether the relationship thus created is one of vendor and vendee or of broker and principal. Not that there would have been the slightest doubt were it not for the categorical denial in the contract that petitioner was not constituted as "the agent or legal representative of the Company for any purpose whatsoever." It would be, however, to impart to such an express disclaimer a meaning it should not possess to ignore what is manifestly the role assigned to petitioner considering the instrument as a whole. That would be to lose sight altogether of what has been agreed upon. The Court of Tax Appeals was not misled. In the language of the decision now on appeal: "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." [14] Hence its conclusion: "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." [15] We find ourselves in agreement, notwithstanding the able brief filed on behalf of petitioner by its counsel. As noted at the outset, we cannot heed petitioner's plea for reversal.

- According to the National Internal Revenue Code, a 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." [16] The controlling decision as to the test to be followed as to who falls within the above definition of a commercial broker is that of *Commissioner of Internal Revenue v. Constantino*. [17] In the language of Justice J.B.L. Reyes, who penned the opinion: "Since the company retained ownership of the goods, even as it delivered possession unto the dealer for resale to customers, the price and terms of which were subject to the company's control, the relationship between the company and the dealer is one of agency, * * *." [18] An excerpt from *Salisbury v. Brooks* [19] cited in support of such a view follows: "The difficulty in distinguishing between contracts of sale and the creation of an agency to sell has led to the establishment of rules by the application of which this difficulty may be solved. The decisions say the transfer of title or agreement to transfer it for a price paid or promised is the essence of sale. If such transfer puts the transferee in the attitude or position of an owner and makes him liable to the transferor as a debtor for the agreed price, and not merely as an agent who must account for the proceeds of a resale, the transaction is a sale; while 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." [20] The opinion relied on the work of Mechem on Sales as well as Mechem on Agency. Williston and Tiedman, both of whom wrote treatises on Sales, were likewise referred to.

Equally relevant is this portion of the *Salisbury* opinion: "It is difficult to understand or appreciate the necessity or presence of these mutual requirements and obligations on any theory other, than that of a contract of agency. *Salisbury* was to furnish the mill and put the timber owned by him into a marketable condition in the form of lumber; *Brooks* was to furnish the funds necessary for that purpose, sell the manufactured product, and account therefor to *Salisbury* upon the specific terms of the agreement, less the compensation fixed by the parties in lieu of interest on the money advanced and for services as agent. These requirements and stipulations are inconsistent with any other conception of the contract. If it constitutes an agreement to sell, they are meaningless. But they cannot be ignored. They were placed there for some purpose, doubtless as the result of definite antecedent negotiations therefore, consummated by the final written expression of the agreement." [21] Hence the *Constantino* opinion could categorically affirm that the mere disclaimer in a contract that an entity like petitioner is not "the agent or legal representative * * * for any purpose whatsoever" does not suffice to yield the conclusion that it is an independent merchant if the control over the goods for resale of the goods consigned is pervasive in character. The Court of Tax Appeals decision now under review pays fealty to such an applicable doctrine.

- No merit therefore attaches to the first error imputed by petitioner to the Court of Tax Appeals. Neither did such Court fail to appreciate in its true significance the act and conduct pursued in the implementation of the contract by both the United States Rubber International and petitioner, as was contended in the second assignment of error. Petitioner ought to have been aware that there was no need for, such an inquiry. The terms of the contract, as noted, speak quite clearly. There is lacking that degree of ambiguity sufficient to give rise to serious doubt as to what was contemplated by the parties. A reading thereof discloses that the relationship arising therefrom was not one of seller and purchaser. If it were thus intended, then it would not have included covenants which in their totality would negate the concept of a firm acquiring as vendee goods from another. Instead, the stipulations were so worded as to lead to no other conclusion than that the control by the United States Rubber International over the goods in question is, in the language of the Constantino opinion, "pervasive." The insistence on a relationship opposed to that apparent from the language employed might even yield the impression that such a mode of construction was resorted to in order that the applicability of a taxing statute might be rendered nugatory. Certainly, such a result is to be avoided.

Nor is it to be lost sight of that on a matter left to the discretion of the Court of Tax Appeals which has developed an expertise in view of its function being limited solely to the interpretation of revenue laws, this Court is not prepared to substitute its own judgment unless a grave abuse of discretion is manifest. It would be to frustrate the objective for which administrative tribunals are created if the judiciary, absent such a showing, is to ignore their appraisal on a matter that forms the staple of their specialized competence. While it is to be admitted that counsel for petitioner did scrutinize with care the decision under review with a view to exposing what was considered its flaws, it cannot be said that there was such a failure to apply what the law commands as to call for its reversal. Instead, what cannot be denied is that the Court of Tax Appeals reached a result to which the Court in the recent Constantino decision gave the imprimatur of its approval,

WHEREFORE, the Court of Tax Appeals decision of October 19, 1962 is affirmed. With costs against petitioner.

Concepcion, C.J., Reyes, J.B.L, Dizon, Makalintal, Zaldivar, Ruiz Castro, Teehankee, Barredo, Villamor and Makasiar, JJ., concur.

[1] L-25926, February 27, 1970, 31 SCRA 779.

[2] Contract between the United States Rubber International and petitioner, par. 1 quoted in the Decision of the Court of Tax Appeals, Annex A to Petition, p.2.

[3] Ibid., par. 2, p. 2.

[4] Ibid., par. 3, p. 2.

[5] Ibid., par. 7, p. 3.

[6] Ibid., par. 8, pp. 3 and 4.

[7] Ibid., par. 9, p. 4

[8] Ibid., par. 10, p. 4.

[9] Ibid, par. 12, p. 4.

[10] Ibid., par. 13, p. 4.

[11] Ibid., par. 14, p. 5.

[12] Ibid., par. 15, p. 5.

[13] Ibid., par. 19, p. 6.

[14] Decision, Annex A to the Petition, pp. 10-11.

[15] Ibid., p. 10.

[16] Section 194(t).

[17] L-25926, February 27, 1970, 31 SCRA 779.

[18] Ibid., p. 785.

[19] 94SE 117(1917).

[20] L-25926, February 27, 1970, 31 SCRA 779, 785.

[21] 94 SE 117, 118(1917).

ABOUT BATAS.ORG

Study smarter at BATAS.org

The Philippine bar review and law-school companion built around how your brain actually remembers.

The complete Philippine law library - free for everyone.

More than 100,000 Supreme Court decisions, Republic Acts, and executive issuances - full-text searchable, browsable by category and year, and always free. No paywall, no login. This PDF came from it.

Audio case-brief lectures.

Any decision becomes a podcast-style lecture - facts, issues, ruling, and doctrine - with read-along highlighting and a hands-free presentation mode. Study while commuting, working out, or resting your eyes.

Bar review built on the science of memory.

Complete, sequenced courses for all eight bar subjects, narrated like podcasts and reinforced with retrieval practice and spaced review - the study techniques with the strongest evidence behind them.

The full law-school curriculum.

One subscription unlocks the entire J.D. curriculum - every subject, every lesson, with your progress tracked down to the paragraph so you can pick up exactly where you left off, on any device.

Mock exams that tell you where you stand.

Timed multiple-choice exams graded instantly, with per-subject score breakdowns and focus suggestions that point you at your weakest topics first.

A study planner that keeps you on pace.

Set your schedule and BATAS tells you every day whether you are on track for bar day - and exactly which lesson to take next.

Start free at <https://batas.org>

The law library is free forever - and your first lesson is one click away.

The text of this document is an official public record and remains in the public domain. Formatting, presentation, and compilation © 2026 batas.org.

Downloaded free from the batas.org Law Library. Share it freely - the library is free for every law student, bar reviewee, and practitioner.