

F. E. ZUELLIG, INC., PLAINTIFF AND APPELLEE, VS. THE COLLECTOR OF INTERNAL REVENUE, DEFENDANT AND APPELLANT.

G.R. No. 27887. March 09, 1928

Ponente: STATEMENT After the formal pleas, plaintiff alleges: "I. That it is a corporation organized and existing by virtue of the laws of the Philippine Islands, with its principal office in the City of Manila, Philippine Islands; "II. That the defendant is the Insular Collector of Internal Revenue; "III. That on May 4, 1923, the plaintiff and the Neuss, Hesslein Corporation, which is also a corporation organized and existing by virtue of the laws of the Philippine Islands, with its principal office in the City of Manila and branches established in the municipalities of Cebu and Iloilo, Provinces of Cebu and Iloilo, respectively, executed an agreement in writing by virtue of which the plaintiff secured to said Neuss, Hesslein Corporation that the managers of the branches of said Neuss, Hesslein Corporation in the municipalities of Cebu and Iloilo shall faithfully comply with their duties as such managers; "IV. That in consideration of the aforesaid security given by the plaintiff in favor of the Neuss, Hesslein Corporation, the latter binding itself to pay to plaintiff a compensation of a certain per cent upon the merchandise sold by the said managers of the branches of the Neuss, Hesslein Corporation at Cebu and Iloilo, Provinces of Cebu and Iloilo, respectively; "V. That in or about the month of November, 1924, and subsequent to said month and year, the defendant, through his agents duly authorized in the Provinces of Cebu and Iloilo, alleging that the plaintiff is, by virtue of the agreement had between it and the Neuss, Hesslein Corporation mentioned in paragraphs 3 and 4 of this complaint, a commission merchant, collected from the plaintiff the tax upon the sales made by the managers of the branches of the Neuss, Hesslein Corporation at Cebu and Iloilo, to wit: "Iloilo P5,002.41 "Cebu 4,957.78 that is a total of P9,960.19 which the plaintiff paid said defendant under protest in writing. "VI. That on December 13, 1925, the defendant overruled the protest of the plaintiff, and has refused and still refuses to refund to the plaintiff said sum of P9,960.19 or any part thereof. "Wherefore, the plaintiff respectfully prays this Honorable Court that judgment be rendered ordering the defendant to pay the plaintiff the sum of P9,960.19, with legal interest and the costs of this action. It prays, further, for such further other remedies as may be proper in justice and equity." To which the defendant filed the following answer and special defense: "The defendant, for his answer, alleges: "1. That he admits the allegations contained in paragraphs 1, 2, 5 and 6 of the complaint; and "2. That he denies each and everyone of the other allegations of the complaint. "SPECIAL DEFENSE "As special defense, the defendant alleges: "1. That the plaintiff company acted as commission merchant in regard to the transactions upon which was imposed and collected by the defendant the sum claimed in the complaint." Later, the parties stipulated the following facts: "The undersigned, counsel for the plaintiff and the defendant herein, hereby agree and stipulate that the following facts be considered by the court as proven without the introduction of evidence. "I. That the plaintiff is a corporation duly organized, registered, and doing business under the laws of the Philippine Islands, with its principal office in the City of Manila and with branches in the City of Cebu, Province of Cebu, and in the City of Iloilo, Province of Iloilo; and that the defendant is the duly appointed, qualified, and acting Collector of Internal Revenue of the Philippine Islands. "II. That the Neuss, Hesslein Corporation is a corporation duly organized, registered, and doing business under the laws of the Philippine Islands, with its principal office in the City of Manila, and branches in Iloilo and Cebu. "III. That Walter Meyer and O. Schulthess, acting as agents for Neuss, Hesslein Corporation, according to the plaintiff, or the plaintiff itself, according to the defendant, during the month of November, 1924, and thereafter sold in the Cities of Cebu and Iloilo goods, wares, and merchandise in such an amount that applying the rate of the percentage tax thereon, the latter is as follows: "Cebu P4,957.78 "Iloilo 5,002.41 or a total of P9,960.19. "IV. The defendant herein claiming that the sales referred to in the preceding paragraph were made by the plaintiff acting as a commission merchant for the Neuss, Hesslein Corporation as principal, levied and assessed thereon as percentage tax the sum of

P9,960.19, above mentioned and demanded of the plaintiff to pay said amount, which plaintiff paid under written protest. "V. That the plaintiff has demanded from the defendant the refund of said amount, but the defendant refused and still refuses to make the refund thereof. "Reservation.—The parties herein reserve the right to present evidence on all points and matters not covered by the above agreed statement of facts, which may be material to the present case." In addition to which, H. Gassel, the Vice-President of the plaintiff, was called and testified as a witness for the plaintiff. Upon his testimony and the stipulated facts, the lower court rendered judgment for the plaintiff for the full amount of its claim. On appeal the defendant contends that the trial court erred in holding that the plaintiff did not act as a commission merchant, and in denying defendant's motion for a new trial. JOHNS, J.

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STATEMENT

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"II. That the defendant is the Insular Collector of Internal Revenue;

"III. That on May 4, 1923, the plaintiff and the Neuss, Hesslein Corporation, which is also a corporation organized and existing by virtue of the laws of the Philippine Islands, with its principal office in the City of Manila and branches established in the municipalities of Cebu and Iloilo, Provinces of Cebu and Iloilo, respectively, executed an agreement in writing by virtue of which the plaintiff secured to said Neuss, Hesslein Corporation that the managers of the branches of said Neuss, Hesslein Corporation in the municipalities of Cebu and Iloilo shall faithfully comply with their duties as such managers;

"IV. That in consideration of the aforesaid security given by the plaintiff in favor of the Neuss, Hesslein Corporation, the latter binding itself to pay to plaintiff a compensation of a certain per cent upon the merchandise sold by the said managers of the branches of the Neuss, Hesslein Corporation at Cebu and Iloilo, Provinces of Cebu and Iloilo, respectively;

"V. That in or about the month of November, 1924, and subsequent to said month and year, the defendant, through his agents duly authorized in the Provinces of Cebu and Iloilo, alleging that the plaintiff is, by virtue of the agreement had between it and the Neuss, Hesslein Corporation mentioned in paragraphs 3 and 4 of this complaint, a commission merchant, collected from the plaintiff the tax upon the sales made by the managers of the branches of the Neuss, Hesslein Corporation at Cebu and Iloilo, to wit:

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"Cebu 4,957.78

that is a total of P9,960.19 which the plaintiff paid said defendant under protest in writing.

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"Wherefore, the plaintiff respectfully prays this Honorable Court that judgment be rendered ordering the defendant to pay the plaintiff the sum of P9,960.19, with legal interest and the costs of this action. It prays, further, for such further other remedies as may be proper in justice and equity."

To which the defendant filed the following answer and special defense:

"The defendant, for his answer, alleges:

"1. That he admits the allegations contained in paragraphs 1, 2, 5 and 6 of the complaint; and

"2. That he denies each and everyone of the other allegations of the complaint.

"SPECIAL DEFENSE

"As special defense, the defendant alleges:

"1. That the plaintiff company acted as commission merchant in regard to the transactions upon which was imposed and collected by the defendant the sum claimed in the complaint."

Later, the parties stipulated the following facts:

"The undersigned, counsel for the plaintiff and the defendant herein, hereby agree and stipulate that the following facts be considered by the court as proven without the introduction of evidence.

"I. That the plaintiff is a corporation duly organized, registered, and doing business under the laws of the Philippine Islands, with its principal office in the City of Manila and with branches in the City of Cebu, Province of Cebu, and in the City of Iloilo, Province of Iloilo; and that the defendant is the duly appointed, qualified, and acting Collector of Internal Revenue of the Philippine Islands.

"II. That the Neuss, Hesslein Corporation is a corporation duly organized, registered, and doing business under the laws of the Philippine Islands, with its principal office in the City of Manila, and branches in Iloilo and Cebu.

"III. That Walter Meyer and O. Schulthess, acting as agents for Neuss, Hesslein Corporation, according to the plaintiff, or the plaintiff itself, according to the defendant, during the month of November, 1924, and thereafter sold in the Cities of Cebu and Iloilo goods, wares, and merchandise in such an amount that applying the rate of the percentage tax thereon, the latter is as follows:

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"IV. The defendant herein claiming that the sales referred to in the preceding paragraph were made by the plaintiff acting as a commission merchant for the Neuss, Hesslein Corporation as principal, levied and assessed thereon as percentage tax the sum of P9,960.19, above mentioned and demanded of the plaintiff to pay said amount, which plaintiff paid under written protest.

"V. That the plaintiff has demanded from the defendant the refund of said amount, but the defendant refused and still refuses to make the refund thereof.

"Reservation.—The parties herein reserve the right to present evidence on all points and matters not covered by the above agreed statement of facts, which may be material to the present case."

In addition to which, H. Gassel, the Vice-President of the plaintiff, was called and testified as a witness for the plaintiff. Upon his testimony and the stipulated facts, the lower court rendered judgment for the plaintiff for the full amount of its claim. On appeal the defendant contends that the trial court erred in holding that the plaintiff did not act as a commission merchant, and in denying defendant's motion for a new trial.

JOHNS, J.:

It appears from the testimony of Mr. Gassel, Vice-President of the plaintiff, that it had an arrangement with Neuss, Hesslein, a foreign corporation, to represent it in Cebu and Iloilo, and that the sales taxes on all of such sales were paid by that corporation, and that later the defendant demanded from the plaintiff the payment of another and a different tax, which was paid under protest. That O. Schulthess and Mr. Meyer were the agents of

the plaintiff, and that "they were made by the two agents in Iloilo and Cebu, but they were agents of Neuss, Hesslein Corporation; the two agents were representatives of Neuss, Hesslein Corporation," and that the offices of the two firms "were in the same house but they had separate offices," and that the books of the two agencies were kept separately, and that the sales made by the two agents were also made separately.

"Q. How are the orders obtained by your agency?—A. When any of the agencies asked for goods, they ordered them directly from the Neuss, Hesslein Corporation and F. E. Zuellig, Inc."

On cross-examination, the witness testified that Meyer and Schulthess were the agents at Cebu of both the plaintiff and the Neuss, Hesslein Corporation, and that the expenses of the branch of the office at that place were paid by the plaintiff, and that it received "a commission to pay for the expenses and gain something."

"Q. Did not Walter Meyer and O. Schulthess receive any commission from the Neuss, Hesslein Corporation for the sales mentioned in the complaint?—A. They themselves know; the commission pertaining to them was transferred to the firm of F. E. Zuellig, because the firm of F. E. Zuellig paid the expenses.

"Q. You said that the firm of F. E. Zuellig, Inc., receives a certain commission from Neuss, Hesslein Corporation; in what does that commission consist?—A. The commission consists in a certain per cent upon the sale, for instance, 5 per cent or 3 per cent.

"Q. And why is that commission given?—A. As F. E. Zuellig, Inc., paid all the expenses, the commission was a compensation to cover those expenses and to gain something if there is any gain."

In answer to the question as to why that commission was paid, the witness testified:

"A. This arrangement was made to the effect that F. E. Zuellig, Inc., should represent Neuss, Hesslein Corporation in Iloilo and Cebu, because from the beginning it was seen that to maintain two separate offices with all the expenses also separate would be a failure, would be a loss, that is why we combined the two houses; that is to say, we already had or F. E. Zuellig already had his office with all his employees, and as Neuss, Hesslein Corporation saw that it was impossible to do business in Iloilo and Cebu through a representative with employees on account of the great expenses to be made, such as the payment of the rent of the house and the salaries of the employees, and as we already had our office and our employees, so that combination was made, giving us a certain commission for our labor and our expenses and especially for the labor of our agency.

"Q. For the labor of whom?—A. Of the agent.

"Q. But those gentlemen Messrs. Walter Meyer and O. Schulthess are agents of F. E. Zuellig, are they not?—A. At the same time.

"Q. What do you mean by that?—A. They are agents of F. E. Zuellig, Inc., and at the same time agents of Neuss, Hesslein Corporation."

From which it appears that the goods, wares and merchandise of the foreign corporation were shipped to, and delivered in, the bodega of the plaintiff at Cebu, and when sold they were distributed from its warehouse to the purchasers. That Schulthess and Meyer were the agents of both the plaintiff and the Neuss, Hesslein Corporation, and that for such sales, the plaintiff received a commission of from 3 to 5 per cent of the amount of such sales.

Among other things, section 1459 of the Administrative Code provides:

" 'Merchant,' as here used, means a person engaged in the sale, barter, or exchange of personal property of whatever character. Except as specially provided, the term includes manufacturers who sell articles of their own production and commission merchants having establishments of their own for the keeping and disposal of goods of which sales or exchanges are effected, but does not include merchandise brokers."

In the instant case, the record is conclusive that the plaintiff had an establishment of its own in Cebu for the keeping and disposal of goods of which sales or exchanges were effected. As stated, the plaintiff was the owner of the bodega in which the goods, wares and merchandise were received, stored and kept, and from and out of which they were delivered by the agents, to the different purchasers to whom the sales were made, and for and on account of which sales, the plaintiff received a commission ranging from 3 to 5 per cent.

Upon the admitted facts, we are clearly of the opinion that as to the transactions in question, the plaintiff was a commission merchant within the meaning of the provisions of section 1459 above quoted. It had an establishment of its own for the keeping and disposal of the goods of the Neuss, Hesslein Corporation, from and out of which the sales were made. This construction is materially strengthened by section 1453 of the Administrative Code which provides:

"Privilege taxes on business and occupation.—A privilege tax must be paid before any business or occupation hereinafter specified can be lawfully begun or pursued. The tax on business is payable for every separate or distinct establishment or place where business subject to the tax is conducted; and one occupation or line of business does not become exempt by being conducted with some other occupation or business for which such tax has been paid."

In the final analysis and upon the stipulated facts, the plaintiff was a commission merchant as to the sales in question and had a bodega of its own for the keeping and disposal of the goods from which the sales were made. It is true that upon such facts one sale only was made, but it is also true that such sales were made by and through the plaintiff as a commission merchant upon the terms and conditions specified and defined in section 1459 above quoted.

The judgment of the lower court is reversed, and one will be entered here for the defendant, with costs. So ordered.

Malcolm, Villamor, Ostrand, Romualdez, and Villa-Real, JJ., concur.
Johnson, J., reserves his vote.

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