

THIRD DIVISION

[G.R. No. 166498, June 11, 2009]

HON. SECRETARY OF FINANCE, AND HON. GUILLERMO L. PARAYNO, JR., IN HIS CAPACITY AS COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, PETITIONERS, VS. LA SUERTE CIGAR AND CIGARETTE FACTORY, TELENGTAN BROTHERS & SONS, INC., RESPONDENTS.

D E C I S I O N

YNARES-SANTIAGO, J.:

This petition assails the July 12, 2004 Decision^[1] of the Regional Trial Court of Parañaque City, Branch 194, in Civil Case No. 03-0117 declaring as void Revenue Regulations Nos. 9-2003 and 22-2003 insofar as they authorize the Bureau of Internal Revenue (BIR) to periodically conduct a survey on the current net retail prices of cigarettes registered after January 1, 1997 for the purpose of updating their tax classification.

Republic Act (RA) No. 8240, entitled "An Act Amending Sections 138, 139, 140 and 142 of the National Internal Revenue Code (NIRC), as Amended and For Other Purposes" took effect on January 1, 1997. Subsequently, RA No. 8424 was passed recodifying the NIRC. Section 142 of the NIRC was renumbered as Section 145, paragraph (C) thereof provides for four tiers of tax rates based on the net retail price per pack of cigarettes, *viz*:

SEC. 145. *Cigars and cigarettes.* -

x x x x

(C) *Cigarettes Packed by Machine.* - There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below:

(1) If the net retail price (excluding the excise tax and the value-added tax) is above Ten pesos (P10.00) per pack, the tax shall be Twelve pesos (P12.00) per pack; [P13.44 effective January 1, 2000]

(2) If the net retail price (excluding the excise tax and the value-added tax) exceeds Six pesos and fifty centavos (P6.50) but does not exceed Ten pesos (10.00) per pack, the tax shall be Eight pesos (P8.00) per pack; [P8.96 effective January 1, 2000]

(3) If the net retail price (excluding the excise tax and the value-added tax) is Five pesos (P5.00) but does not exceed

Six pesos and fifty centavos (P6.50) per pack, the tax shall be Five pesos (P5.00) per pack; [P5.60 effective January 1, 2000]

(4) If the net retail price (excluding the excise tax and the value-added tax) is below Five pesos (P5.00) per pack, the tax shall be One peso (P1.00) per pack. [P1. 12 effective January 1, 2000]

x x x x

The rates of specific tax on cigars and cigarettes under paragraphs (1), (2), (3) and (4) hereof, shall be increased by twelve percent (12%) on January 1, 2000.

Prior to the effectivity of RA 8240 on January 1, 1997, a survey of the net retail prices per pack of cigarettes as of October 1, 1996 was conducted. The results thereof were embodied as Annex "D" of the NIRC and classified existing brands as those registered and existing prior to January 1, 1997 which classification cannot be revised except by an act of Congress.^[2]

To implement RA 8240, the BIR issued Revenue Regulations No. 1-97 which provided that new brands, or those registered after January 1, 1997, shall be initially assessed at their suggested retail prices. Three months after a new brand is launched in the market, a survey shall be conducted to determine its actual net retail price which shall be the basis in determining its specific tax classification. Pertinent portions thereof, read -

SECTION 2. Definition of Terms.

x x x x

3. Duly registered or existing brand of cigarettes - shall include duly registered, existing or active brands of cigarettes, prior to January 1, 1997.

x x x x

6. **New Brands** - shall mean duly registered after January 1, 1997 and shall include duly registered, inactive brands of cigarette not sold in commercial quantity before January 1, 1997.

x x x x

Section 4. Classification and Manner of Taxation of Existing Brands, New Brands and Variant of Existing Brands.

x x x x

B. New Brand

New brands shall be classified according to their current net retail

price. In the meantime that the current net retail price has not yet been established, the suggested net retail price shall be used to determine the specific tax classification. Thereafter, a survey shall be conducted in 20 major supermarkets or retail outlets in Metro Manila (for brands of cigarette marketed nationally) or in five (5) major supermarkets or retail outlets in the region (for brands which are marketed only outside Metro Manila) at which the cigarette is sold on retail in reams/cartons, **three (3) months after the initial removal of the new brand to determine the actual net retail price excluding the excise tax and value added tax which shall then be the basis in determining the specific tax classification.** In case the current net retail price is higher than the suggested net retail price, the former shall prevail. Otherwise, the suggested net retail price shall prevail. Any difference in specific tax due shall be assessed and collected inclusive of increments as provided for by the National Internal Revenue Code, as amended. (Emphasis supplied)

In February 1999, respondents introduced into the market Astro and Memphis cigarettes and their variants with suggested net retail prices below P5.00 per pack and a temporary excise tax pegged at P1.00 per pack.^[3] On May 15, 1999, respondents requested the BIR to conduct a survey to determine the final tax classification of said brands of cigarettes.^[4]

In the BIR's reply dated June 24, 1999,^[5] Assistant Commissioner Leonardo B. Albar informed respondents that based on the survey conducted by the BIR for purposes of determining the official and final tax classification, the specific tax per pack of Astro and Memphis cigarettes is P1.00. The survey showed that the average net retail prices per pack of said cigarettes is below P5.00, hence, the corresponding excise tax under Section 145 (C) (4) is P1.00 per pack. This was increased to P1.12 per pack, pursuant to the 12% tax rate increase under Section 145 of the NIRC, effective January 1, 2000.^[6]

On February 17, 2003, the BIR issued the assailed **Revenue Regulations No. 9-2003**, Section 2 of which amended Revenue Regulations No. 1-97, by providing for a periodic review every two years or earlier of the current net retail prices of new brands and their variants to establish and update their tax classification. Section 4(B)(e)(c), 2nd paragraph of Revenue Regulations No. 1-97, as amended by Revenue Regulations No. 9-2003, reads:

For the purpose of establishing or **updating the tax classification** of new brands and variant(s) thereof, their current net retail price shall be **reviewed periodically through the conduct of survey or any other appropriate activity, as mentioned above, every two (2) years unless earlier ordered by the Commissioner.** However, notwithstanding any increase in the current net retail price, the tax classification of such new brands shall remain in force until the same is altered or changed through the issuance of an appropriate Revenue Regulations. (Emphasis supplied)

Section 4 of Revenue Regulations No. 9-2003 also mandated the determination and re-determination of the current net retail prices of cigarettes launched into the

market starting January 1, 1997 and which were not surveyed within the last two years from the effectivity of Revenue Regulations No. 9-2003. Thus -

SEC. 4. TRANSITORY CLAUSE. - For all brands duly registered and introduced in the market beginning January 1, 1997 the current net retail price of which was not determined for the last two (2) years from the effectivity hereof, a determination or **re-determination** of the current net retail prices thereof shall be conducted immediately upon the effectivity of these Regulations. (Emphasis supplied)

Subsequently, **Revenue Regulations No. 22-2003**^[7] was issued on August 8, 2003 to implement the revised tax classification of certain new brands introduced in the market after January 1, 1997. This was based on the survey of the current net retail prices of new brands as mandated by Revenue Regulations No. 9-2003. The results of the survey (embodied as Annex "A" of Revenue Regulations No. 22-2003), revealed that the average net retail prices of Astro and Memphis cigarettes ranged from P5.72 to P6.13, thus increasing the applicable excise tax from P1.12 per pack to P5.60 per pack.^[8]

On March 14, 2003, respondents filed a case for injunction with the trial court assailing the validity of Revenue Regulations No. 9-2003 and praying for the issuance of a temporary restraining order and/or writ of preliminary injunction to enjoin the implementation of said regulation insofar as it authorizes the BIR to update the tax classification of cigarettes registered after January 1, 1997.^[9] The complaint was later amended^[10] to include Revenue Regulations No. 22-2003. Respondents asserted that Section 145 of the NIRC does not give the BIR the power to reclassify cigarettes introduced into the market after January 1, 1997, hence, the reclassification thereof by the BIR constitutes usurpation of legislative powers.^[11]

Petitioners, on the other hand, maintained that the assailed revenue regulations constitute a valid exercise of subordinate legislation having been issued pursuant to the powers of the Commissioner of Internal Revenue and the Secretary of Finance.

On July 12, 2004, the trial court rendered a decision declaring Revenue Regulations Nos. 9-2003 and 22-2003 unconstitutional insofar as they empower the BIR to reclassify cigarette brands; and enjoining petitioners from implementing the same insofar as they actually reclassified Astro and Memphis. The dispositive portion thereof reads:

WHEREFORE, finding RR Nos. 9-2003 and 22-2003 not in conformity with Section 145 in relation to Section 244 of the Tax Code as they tend to infringe upon the legislative power of taxation, and therefore violative of the constitutional provision that tax laws should originate from Congress, the same are hereby declared unconstitutional and ineffective and as such, the defendants Secretary of Finance and Commissioner of Internal Revenue are hereby permanently enjoined from implementing thereof (sic) insofar as they require the re-determination and re-classification of Astro and Memphis brands and their variants for purposes of computing excise tax on such products.

SO ORDERED.^[12]

Petitioners filed a motion for reconsideration but the same was denied on December 22, 2004.^[13]

Hence, the instant petition raising the issue of whether the BIR has the power to periodically review or re-determine the current net retail prices of new brands for the purpose of updating their tax classification pursuant to Revenue Regulations Nos. 9-2003 and 22-2003.

This issue has been settled in the recent case of *British American Tobacco v. Camacho*^[14] where the Court held, among others, that Revenue Regulations Nos. 9-2003, 22-2003, and Revenue Memorandum Order No. 6-2003, as pertinent to cigarettes packed by machine, are invalid insofar as they grant the BIR the power to reclassify or update the classification of new brands every two years or earlier, to wit:

Petitioner asserts that Revenue Regulations No. 1-97, as amended by Revenue Regulations No. 9-2003, Revenue Regulations No. 22-2003 and Revenue Memorandum Order No. 6-2003, are invalid insofar as they empower the BIR to reclassify or update the classification of new brands of cigarettes based on their current net retail prices every two years or earlier. It claims that RA 8240, even prior to its amendment by RA 9334, did not authorize the BIR to conduct said periodic resurvey and reclassification.

x x x x

There is merit to the contention.

In order to implement RA 8240 following its effectivity on January 1, 1997, the BIR issued Revenue Regulations No. 1-97, dated December 13, 1996, which mandates a one-time classification only. Upon their launch, new brands shall be initially taxed based on their suggested net retail price. Thereafter, a survey shall be conducted within three (3) months to determine their current net retail prices and, thus, fix their official tax classifications. However, the BIR made a turnaround by issuing Revenue Regulations No. 9-2003, dated February 17, 2003, which partly amended Revenue Regulations No. 1-97, by authorizing the BIR to periodically reclassify new brands (*i.e.*, every two years or earlier) based on their current net retail prices. Thereafter, the BIR issued Revenue Memorandum Order No. 6-2003, dated March 11, 2003, prescribing the guidelines on the implementation of Revenue Regulations No. 9-2003. This was patent error on the part of the BIR for being contrary to the plain text and legislative intent of RA 8240.

It is clear that the afore-quoted portions of Revenue Regulations No. 1-97, as amended by Section 2 of Revenue Regulations 9-2003, and Revenue Memorandum Order No. 6-2003 unjustifiably emasculate the operation of Section 145 of the NIRC because they authorize the Commissioner of Internal Revenue to update the tax classification of new brands every two years or earlier subject only to its issuance of the appropriate Revenue Regulations, when nowhere in Section 145 is such authority granted to the Bureau. Unless expressly granted to the BIR, the