

## EN BANC

[ G.R. No. 163583, August 20, 2008 ]

**BRITISH AMERICAN TOBACCO, PETITIONER, VS. JOSE ISIDRO N. CAMACHO, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF FINANCE AND GUILLERMO L. PARAYNO, JR., IN HIS CAPACITY AS COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, RESPONDENTS.**

**PHILIP MORRIS PHILIPPINES MANUFACTURING, INC., FORTUNE TOBACCO, CORP., MIGHTY CORPORATION, AND JT INTERNATIONAL, S.A., RESPONDENTS-IN-INTERVENTION.**

### DECISION

**YNARES-SATIAGO, J.:**

This petition for review assails the validity of: (1) Section 145 of the National Internal Revenue Code (NIRC), as recodified by Republic Act (RA) 8424; (2) RA 9334, which further amended Section 145 of the NIRC on January 1, 2005; (3) Revenue Regulations Nos. 1-97, 9-2003, and 22-2003; and (4) Revenue Memorandum Order No. 6-2003. Petitioner argues that the said provisions are violative of the equal protection and uniformity clauses of the Constitution.

RA 8240, entitled "An Act Amending Sections 138, 139, 140, and 142 of the NIRC, as Amended and For Other Purposes," took effect on January 1, 1997. In the same year, Congress passed RA 8424 or The Tax Reform Act of 1997, re-codifying the NIRC. Section 142 was renumbered as Section 145 of the NIRC.

Paragraph (c) of Section 145 provides for four tiers of tax rates based on the **net retail price** per pack of cigarettes. To determine the applicable tax rates of existing cigarette brands, a survey of the net retail prices per pack of cigarettes was conducted as of October 1, 1996, the results of which were embodied in **Annex "D"** of the NIRC as the duly registered, existing or active brands of cigarettes.

Paragraph (c) of Section 145, <sup>[1]</sup> states -

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 Thirteen pesos and forty-four centavos (P13.44)

per pack;

(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 and ninety-six centavos (P8.96) per pack;

(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 and sixty centavos (P5.60) per pack;

(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 and twelve centavos (P1.12) per pack.

Variants of existing brands of cigarettes which are introduced in the domestic market after the effectivity of this Act shall be taxed under the highest classification of any variant of that brand.

x x x x

**New brands** shall be classified according to their **current net retail price**.

For the above purpose, **net retail price** shall mean the price at which the cigarette is sold on retail in 20 major supermarkets in Metro Manila (for brands of cigarettes marketed nationally), excluding the amount intended to cover the applicable excise tax and the value-added tax. For brands which are marketed only outside Metro Manila, the net retail price shall mean the price at which the cigarette is sold in five major supermarkets in the region excluding the amount intended to cover the applicable excise tax and the value-added tax.

The **classification of each brand of cigarettes based on its average net retail price as of October 1, 1996, as set forth in Annex "D" of this Act, shall remain in force until revised by Congress.** (Emphasis supplied)

As such, new brands of cigarettes shall be taxed according to their **current net retail price** while existing or "old" brands shall be taxed based on their **net retail price as of October 1, 1996**.

To implement RA 8240, the Bureau of Internal Revenue (BIR) issued **Revenue Regulations No. 1-97**,<sup>[2]</sup> which classified the existing brands of cigarettes as those duly registered or active brands prior to January 1, 1997. New brands, or those registered after January 1, 1997, shall be initially assessed at their suggested retail price until such time that the appropriate survey to determine their current net retail price is conducted. Pertinent portion of the regulations reads -

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 brands duly registered after January 1, 1997 and shall include duly registered, inactive brands of cigarette not sold in commercial quantity before January 1, 1997.

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. 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.

In June 2001, petitioner British American Tobacco introduced into the market Lucky Strike Filter, Lucky Strike Lights and Lucky Strike Menthol Lights cigarettes, with a suggested retail price of P9.90 per pack.<sup>[3]</sup> Pursuant to Sec. 145 (c) quoted above, the Lucky Strike brands were initially assessed the excise tax at P8.96 per pack.

On February 17, 2003, **Revenue Regulations No. 9-2003**,<sup>[4]</sup> amended Revenue Regulations No. 1-97 by providing, among others, a periodic review every two years or earlier of the current net retail price of new brands and variants thereof for the purpose of establishing and updating their tax classification, thus:

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.

Pursuant thereto, **Revenue Memorandum Order No. 6-2003**<sup>[5]</sup> was issued on March 11, 2003, prescribing the guidelines and procedures in establishing current net retail prices of new brands of cigarettes and alcohol products.

Subsequently, **Revenue Regulations No. 22-2003**<sup>[6]</sup> was issued on August 8, 2003 to implement the revised tax classification of certain new brands introduced in the market after January 1, 1997, based on the survey of their current net retail price. The survey revealed that Lucky Strike Filter, Lucky Strike Lights, and Lucky Strike Menthol Lights, are sold at the current net retail price of P22.54, P22.61 and P21.23, per pack, respectively.<sup>[7]</sup> Respondent Commissioner of the Bureau of Internal Revenue thus recommended the applicable tax rate of P13.44 per pack inasmuch as Lucky Strike's average net retail price is above P10.00 per pack.

Thus, on September 1, 2003, petitioner filed before the Regional Trial Court (RTC) of Makati, Branch 61, a petition for injunction with prayer for the issuance of a temporary restraining order (TRO) and/or writ of preliminary injunction, docketed as Civil Case No. 03-1032. Said petition sought to enjoin the implementation of Section 145 of the NIRC, Revenue Regulations Nos. 1-97, 9-2003, 22-2003 and Revenue Memorandum Order No. 6-2003 on the ground that they discriminate against new brands of cigarettes, in violation of the equal protection and uniformity provisions of the Constitution.

Respondent Commissioner of Internal Revenue filed an Opposition<sup>[8]</sup> to the application for the issuance of a TRO. On September 4, 2003, the trial court denied the application for TRO, holding that the courts have no authority to restrain the collection of taxes.<sup>[9]</sup> Meanwhile, respondent Secretary of Finance filed a Motion to Dismiss,<sup>[10]</sup> contending that the petition is premature for lack of an actual controversy or urgent necessity to justify judicial intervention.

In an Order dated March 4, 2004, the trial court denied the motion to dismiss and issued a writ of preliminary injunction to enjoin the implementation of Revenue Regulations Nos. 1-97, 9-2003, 22-2003 and Revenue Memorandum Order No. 6-2003.<sup>[11]</sup> Respondents filed a Motion for Reconsideration<sup>[12]</sup> and Supplemental Motion for Reconsideration.<sup>[13]</sup> At the hearing on the said motions, petitioner and respondent Commissioner of Internal Revenue stipulated that the only issue in this case is the constitutionality of the assailed law, order, and regulations.<sup>[14]</sup>

On May 12, 2004, the trial court rendered a decision<sup>[15]</sup> upholding the constitutionality of Section 145 of the NIRC, Revenue Regulations Nos. 1-97, 9-2003, 22-2003 and Revenue Memorandum Order No. 6-2003. The trial court also lifted the writ of preliminary injunction. The dispositive portion of the decision reads:

WHEREFORE, premises considered, the instant Petition is hereby DISMISSED for lack of merit. The Writ of Preliminary Injunction previously issued is hereby lifted and dissolved.

SO ORDERED.<sup>[16]</sup>

Petitioner brought the instant petition for review directly with this Court on a pure question of law.

While the petition was pending, RA 9334 (An Act Increasing The Excise Tax Rates Imposed on Alcohol And Tobacco Products, Amending For The Purpose Sections 131, 141, 143, 144, 145 and 288 of the NIRC of 1997, As Amended), took effect on January 1, 2005. The statute, among others,-

(1) increased the excise tax rates provided in paragraph (c) of Section 145;

(2) mandated that new brands of cigarettes shall initially be classified according to their suggested net retail price, until such time that their correct tax bracket is finally determined under a specified period and, after which, their classification shall remain in force until revised by Congress;

(3) retained Annex "D" as tax base of those surveyed as of October 1, 1996 including the classification of brands for the same products which, although not set forth in said Annex "D," were registered on or before January 1, 1997 and were being commercially produced and marketed on or after October 1, 1996, and which continue to be commercially produced and marketed after the effectivity of this Act. Said classification shall remain in force until revised by Congress; and

(4) provided a legislative freeze on brands of cigarettes introduced between the period January 2, 1997<sup>[17]</sup> to December 31, 2003, such that said cigarettes shall remain in the classification under which the BIR has determined them to belong as of December 31, 2003, until revised by Congress.

Pertinent portions, of RA 9334, provides:

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 below Five pesos (P5.00) per pack, the tax shall be:

Effective on January 1, 2005, Two pesos (P2.00) per pack;

Effective on January 1, 2007, Two pesos and twenty-three centavos (P2.23) per pack;

Effective on January 1, 2009, Two pesos and forty-seven centavos (P2.47) per pack; and

Effective on January 1, 2011, Two pesos and seventy-two centavos (P2.72) per pack.