

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.

DECISION

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 power to reclassify cigarette brands remains a prerogative of the legislature which cannot be usurped by the former.

More importantly, as previously discussed, the clear legislative intent was for new brands to benefit from the same freezing mechanism accorded to Annex "D" brands. To reiterate, in enacting RA 8240, Congress categorically rejected the DOF proposal and Senate Version which would have empowered the DOF and BIR to periodically adjust the excise tax rate and tax brackets, and to periodically resurvey and reclassify cigarette brands. (This resurvey and reclassification would have naturally encompassed both old and new brands.) It would thus, be absurd for us to conclude that Congress intended to allow the periodic reclassification of new brands by the BIR after their classification is determined based on their current net retail price while limiting the freezing of the classification to Annex "D" brands. Incidentally, Senator Ralph G. Recto expressed the following views during the deliberations on RA 9334, which later amended RA 8240:

Senator Recto: Because, like I said, when Congress agreed to adopt a specific tax system [under R.A. 8240], when Congress did not index the brackets, and Congress did not index the rates but only provided for a one rate increase in the year 2000, we shifted from *ad valorem* which was based on value to a system of specific which is based on volume. Congress then, in effect, determined the classification based on the prices at that particular period of time and classified these products accordingly.

Of course, Congress then decided on what will happen to the new brands or variants of existing brands. To favor government, a variant would be classified as the highest rate of tax for that particular brand. In case of a new brand, Mr. President, then the BIR should classify them. **But I do not think it was the intention of Congress then to**

give the BIR the authority to reclassify them every so often. I do not think it was the intention of Congress to allow the BIR to classify a new brand every two years, for example, because it will be arbitrary for the BIR to do so. x x x^[15] (Emphasis supplied)

For these reasons, the amendments introduced by RA 9334 to RA 8240, insofar as the freezing mechanism is concerned, must be seen merely as underscoring the legislative intent already in place then, *i.e.* new brands as being covered by the freezing mechanism after their classification based on their current net retail prices.

x x x x

It should be noted though that on August 8, 2003, the BIR issued Revenue Regulations No. 22-2003 which implemented the revised tax classifications of new brands based on their current net retail prices through the market survey conducted pursuant to Revenue Regulations No. 9-2003. Annex "A" of Revenue Regulations No. 22-2003 lists the result of the market survey and the corresponding recommended tax classification of the new brands therein aside from Lucky Strike. However, whether these other brands were illegally reclassified based on their actual current net retail prices by the BIR must be determined on a case-to-case basis because it is possible that these brands were classified based on their actual current net retail price for the first time in the year 2003 just like Lucky Strike. Thus, we shall not make any pronouncement as to the validity of the tax classifications of the other brands listed therein.

The reclassification of Astro and Memphis pursuant to Revenue Regulations Nos. 9-2003 and 22-2003 constitutes the prohibited reclassification contemplated in *British American Tobacco v. Camacho*. It will be recalled that these brands were already classified by the BIR based on their current net retail prices in 1999 through a market survey. Consequently, their upward reclassification in 2003 by the BIR through another market survey is a prohibited reclassification.^[16]

Petitioners do not dispute that the BIR conducted a survey in 1999 to determine the actual net retail prices of Astro and Memphis months after their launch into the market. However, in their Supplemental Memorandum before the trial court, they contended that the classification of Astro and Memphis, as contained in the letter of BIR Assistant Commissioner Leonardo Albar, is invalid because (1) it was contained in a mere letter and not in a numbered ruling; and (2) it was not signed by the BIR Commissioner.^[17]

The subject letter of the Assistant Commissioner, reads:

June 24, 1999

LA SUERTE CIGAR & CIGARETTE FACTORY

Km. 14, West Service Road, South Superhighway
Parañaque, Metro Manila

ATTENTION: Mr. Antonio B. Yao

Vice-President for Operations

This refers to the retail price survey conducted by this Office for purposes of determining the official and final tax classification of new brands of cigarette that your company has initially manufactured and distributed in major supermarkets located on designated regions, re:

Brands	Region
Astro Menthol 100's	Pangasinan
Astro Filter King	Pangasinan
Astro Menthol King	Pangasinan
Memphis Menthol 100's	Pangasinan
Memphis Filter King	Pangasinan

Based on the results of the survey conducted at the said regions, together with their tax classifications, the average retail price per pack of the different brands of cigarette are as follows:

Brand Names	Average Retail Price/Ream	VAT	Specific Tax	Average Net Retail Price/pack	Specific Tax Per Pack
1. Astro Menthol 100's	P63.71	P.579	P1.00	P 6.50	P1.00
2. Astro Filter King	60.06	.546	1.00	6.00	1.00
3. Astro Menthol King	62.40	.567	1.00	6.40	1.00
4. Memphis Menthol 100's	64.00	.58	1.00	6.50	1.00
5. Memphis Filter King	59.00	.54	1.00	6.07	1.00

Accordingly, you are hereby required to submit the corresponding Manufacturer's Sworn Statement for each brand of cigarette prescribed under existing rules and regulations to the Assistant Commissioner, Excise Tax Service within ten (10) days from receipt hereof.

For your information and guidance.

Very truly yours,

LEONARDO B. ALBAR
Assistant Commissioner

Excise Tax Service^[18]

Contrary to petitioners' contention, the above classification of Astro and Memphis cigarettes is valid. The revenue regulations then in force merely required that the concerned taxpayer be notified of the result of the market survey which is then used as basis for fixing the official and final tax classification of a new brand. This has been sufficiently satisfied by the letter of the Assistant Commissioner, hence, the fact that the same was not in the form of a numbered ruling will not invalidate the classification contained therein.

Further, the Assistant Commissioner acted within his jurisdiction in signing the letter informing respondents of the conduct of the survey, the results thereof, as well as the applicable excise tax rates on Astro and Memphis. Under Section 7^[19] of the NIRC, the Commissioner is authorized to delegate to his subordinates the powers vested in him except, among others, the power to issue rulings of first impression. Here, the subject matter of the letter does not involve the exercise of the power to rule on novel issues. It merely implemented the revenue regulations then in force. Verily, the classification of Astro and Memphis based on the 1999 market survey conducted by the BIR itself remains uncontroverted because petitioners neither denied that a survey was indeed conducted nor questioned the validity of the results thereof and of the applicable excise tax rates on Astro and Memphis as stated in the subject letter. Considering that the classification of Astro and Memphis based on their actual net retail prices in 1999 is valid, their upward reclassification in 2003 constituted a prohibited reclassification.

In sum, the trial court correctly ruled that Revenue Regulations Nos. 9-2003 and 22-2003 are void insofar as they empower the BIR to periodically review or re-determine the current net retail prices of cigarettes for purposes of updating their tax classification every two years or earlier consistent with the Court's pronouncements in *British American Tobacco v. Camacho*. Consequently, the upward reclassification of Astro and Memphis in Annex "A" of Revenue Regulations No. 22-2003 is invalid.

WHEREFORE, the petition is **DENIED**.

SO ORDERED.

Chico-Nazario, Velasco, Jr., Nachura, and Peralta, JJ., concur.

^[1] Penned by Judge Leoncia Real-Dimagiba; *rollo*, unpagged but attached as Annex "A" of the petition.

[2] 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," shall remain in force until revised by Congress. (NIRC, Section 145, par. 7)

[3] 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:

x x x x

(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.

[4] Exhibit "D," Folder of Exhibits, p. 5.

[5] Exhibit "D," Folder of Exhibits, p. 6.

[6] The rates of excise tax on cigars and cigarettes under paragraphs (1), (2), (3) and (4) hereof, shall be increased by twelve percent (12%) on January 1, 2000 (NIRC, Section 145 (C) (4) par. 4).

[7] *Id.* at 135.

[8] (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;

[9] *Rollo*, pp. 71-86.

[10] Amended Complaint, *rollo*, pp. 135-157.

[11] *Rollo*, pp. 145-146.

[12] *Id.*, unpagged but found in Annex "A" of the Petition.

[13] *Id.*, unpagged but the Order denying the motion is appended as Annex "B" of the petition.

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

[15] Record, Senate 13th Congress (December 6, 2004).

[16] The legislative intent not to delegate to the BIR the authority to reclassify cigarette brands was made explicit in RA No. 9334, which on January 1, 2005 further amended Section 145 of the NIRC. As amended, Section 145 now provides that the BIR's classification of cigarettes launched between January 1, 1997 to December 31, 2003, under which category Astro and Memphis belong, cannot be reclassified further except by Congressional act. Pertinent portions thereof, read:

New brands, as defined in the immediately following paragraph, shall initially be classified according to their suggested net retail price.

New brands shall mean a brand registered after the date of effectivity of R.A. No. 8240 [on January 1, 1997].

Suggested net retail price shall mean the net retail price at which new brands, as defined above, of locally manufactured or imported cigarettes are intended by the manufacturer or importer to be sold on retail in major supermarkets or retail outlets in Metro Manila for those marketed nationwide, and in other regions, for those with regional markets. At the end of three (3) months from the product launch, the Bureau of Internal Revenue shall validate the suggested net retail price of the new brand against the net retail price as defined herein and determine the correct tax bracket under which a particular new brand of cigarette, as defined above, shall be classified. After the end of eighteen (18) months from such validation, the Bureau of Internal Revenue shall revalidate the initially validated net retail price against the net retail price as of the time of revalidation in order to finally determine the correct tax bracket under which a particular new brand of cigarettes shall be classified; **Provided however, That brands of cigarettes introduced in the domestic market between January 1, 1997 and December 31, 2003 shall remain in the classification under which the Bureau of Internal Revenue has determined them to belong as of December 31, 2003. Such classification of new brands and brands introduced between January 1, 1997 and December 31, 2003 shall not be revised except by an act of Congress.** (Emphasis added)

[17] Records, vol. II, pp. 1573-1574.

[18] Exhibit "D," Folder of Exhibits, p. 6.

[19] SEC. 7. Authority of the Commissioner to Delegate Power. - The Commissioner may delegate the powers vested in him under pertinent provisions of this Code to any or such subordinate officials with the rank equivalent to a division chief or higher, subject to such limitations and restrictions as may be imposed under the rules and regulations to be

promulgated by the Secretary of Finance, upon recommendation for the Commissioner:
Provided, however, That the following powers of the Commissioner shall not be delegated:

X X X X

(b) The power to issue rulings of first impression or to reverse, revoke or modify any existing ruling of the Bureau;