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IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION

M NO 31/81
M NO 145/81

WELLINGTON REGISTRY

543

BETWEEN WELLINGTON WHOLESALE LIQUOR LIMITED a duly incorporated company having its registered office at Christchurch, Wine & Spirit Merchant

Appellant

AND THE COLLECTOR OF CUSTOMS Feltex House, 8-10 Sturdee Street, Wellington

Respondent

Hearing: 21 - 22 March 1984

Counsel: I L McKay and J R Fox for Appellant
C H Toogood for Respondent

Judgment: 15 May 1984

JUDGMENT OF JEFFRIES J

These are two appeals (M.31/81 and M.145/81) under the Sales Tax Act 1974 against assessments made by the respondent on 9 January and 19 February 1981.

There is a group of companies which operate outlets in Auckland, Christchurch, Palmerston North, Napier, Wellington and Petone selling liquor and using the trade name of "Superliquorman" in various ways. The

operation was apparently conducted by four separate companies, three of which have "Superliquorman" in their names. None of the companies owned shares in any of the other companies in the group. During the relevant period the shares in each company were owned equally by Messrs W.J. Butterfield and P.J. Sullivan. As the name of appellant indicates it has its business in Wellington, holds a wholesale licence and operates liquor reselling outlets to the public. Appellant acquired and has operated its wholesale licence from 1 April 1980. Prior to that date retail outlets bought from suppliers who were independent of the group but at lower prices because of the group's bargaining power.

The group operates liquor reselling outlets of a kind which has developed over recent years. These outlets sell to the public at discounted prices in a supermarket type operation. For the generation of business massive advertising is done with sharply competitive prices offered. The prices are achieved by substantial turnover which enables the bulk purchases to be obtained at keen prices. Appellant has supplied its resale outlets at the same margin as the previous independent suppliers.

The respondent in January and February 1981 caused a reassessment to be done of the sales tax paid by appellant for the period 1 April 1980 to 31 December 1980. In that period appellant had paid a sum in excess of $700,000 in sales tax related to sales of wine, beer and spirits and the sum was based on actual selling prices. The respondent claims that the actual prices should be disregarded and tax assessed on "fair market

value" at a figure which for both assessments yields further tax in the total sum of $59,520.27. In addition to the additional duty in issue the appellant is liable if the appeal fails to pay interest at 10% per annum from 6 March 1981 for $42,267.10 and from 19 April 1981 for $17,253.17.

By arrangement between the parties the decision on this appeal will be applied to assessments for subsequent periods up to 6 August 1982. On that date the whole basis of assessment was changed by s 15 of the Customs Act Amendment Act 1982. Since then sales tax has been payable not on sales value but at a rate per litre.

The short point in issue is the figure upon which sales tax should be calculated. Appellant contends that tax should be assessed on the actual selling price. Alternatively, appellant disputes the value which respondent has assessed as the "fair market value".

It is necessary now to examine more closely the operation of Superliquorman trading and appellant's role. The group had its beginnings with Mr P.J.Sullivan in Christchurch about 1973. Discounting on a substantial scale was confined up to that time to the Dunedin district, with the rest of New Zealand operating in the traditional manner through merchants. The ruling prices were generally of the order of cost plus 15% for hotels, taverns and other trade customers, and cost plus 30% for retail customers of the merchants. The group's original aim was to exploit the market by offering a price between the merchants' retail price and the ordinary hotel retail

price to the public which was 15% again above the merchants' retail price. The entry for supplies was through smaller wholesalers having problems obtaining access to the hotel and tavern trade. It became known a Rangiora wholesaler was involved in discounting to independent hotels throughout New Zealand. They did this by reducing the 15% mark up to 10%. Using the wholesaler at discounted prices the group got under way. Another merchant in the North Island joined. The end result was that both merchants, because of greatly increased orders, dealt with the group on the basis of cost plus 5%. Later another merchant joined on that basis.

The first Superliquorman company was formed in early 1978 and operated from the Grand National Hotel at Petone. Other outlets have followed in Palmerston North, Napier, Wellington and Auckland. The group with its increased purchasing power began dealing with a wider range of established merchants in New Zealand. The Johnsonville Licensing Trust began supplying the Grand National at cost plus 5%. In 1980 the group purchased the wholesale licence of W.D. Dobson Wholesale Limited and began operating through appellant from 1 April 1980. Appellant supplies the group's outlets at the same rate that it used to purchase from other merchants, namely, cost plus 5%. Further reductions in cost to the group's outlets were achieved by appellant dealing direct with master agents and distilleries themselves whereby the margin above cost was reduced to the range between 2 and 5%. As might be expected discounting of liquor has grown and apparently five major groups are operating on a nationwide basis. Appellant has based calculation of

sales tax on their attainable profit, namely, 5% over cost which Mr Sullivan believes is the maximum mark-up which the current competitive market would sustain. He maintains cost plus 5% has become the fair market value of the liquor by a wholesaler.

The respondent does not accept that calculation and seeks to calculate the sales tax on the sale value of the liquor and beverages computed in accordance with the "fair market value" authorised by application of a 19(1) and (2) of the Act which states as follows:-

> (1) "For the purposes of this Act, the fair market value of any goods at any date shall be the price which those goods would generally fetch if sold to a retailer at that date in the open market in New Zealand on sales freely offered and made on ordinary trade terms between buyers and sellers independent of each other.
>
> Provided that, where in respect of any goods at any date, there is no open market in New Zealand on which sales of those goods are freely offered and made on ordinary trade terms between buyers and sellers independent of each other, the fair market value of those goods shall be the price which, in the opinion of the Collector, the goods would most probably fetch if there were such an open market at that date.

(2) For the purposes of this section -

(a) A sale in the open market between buyer and seller independent of each other presupposes -

(i) That the price is the sole consideration; and

(ii) That the price is not influenced by any commercial, financial, or other ties, whether by contract or otherwise, between the seller, or any person associated in business with the seller, and the buyer, or any person associated in business with the buyer (other than the relationship created by the sale of the goods in question); and

(iii) That no part of the proceeds of any subsequent resale, use, or disposal of the goods will accrue, either directly or indirectly, to the seller, or to any person associated in business with the seller:

(b) Two persons shall be deemed to be associated in business with each other if, whether directly or indirectly, either of them has any interest in the business or property of the other, or both have a common interest in any

> business or property, or some third person has an interest in the business or property of both of them."

It has since been amended. The claim of the respondent for duty is the difference between respondent's calculations and the tax paid by appellant.

In the opinion of the respondent formed as he argues he was authorised to do under s 26(b) of the Act the sale price between appellant and its associated retailers bore no relation whatsoever to the sale price which most probably would have pertained in the case of purchases by retailers generally and was not the price which, according to the meaning of the sales tax legislation, was appropriate for the assessment of sales tax. In the respondent's view the sale price did not bear any relation to the fair market value of the goods in question. Evidence was given in an affidavit of David George Head, Supervising Customs Officer in the sales tax branch of the Customs Department at the Port of Wellington of a survey of four companies operating in the Wellington region over the relevant period of hotel prices being merchant price plus between 15-20% depending on the product itself. That, says the respondent, is the "fair market value" and he did his assessments accordingly.

For this case there was a material amount of evidence and I think the court should make specific findings of fact because they are an essential basis for the decision reached. Needless to say neither party greatly disputed the factual evidence and minor matters

were resolved by statements by counsel from the Bar. Of importance to the respondent's view was the survey of the four merchants operating in the Wellington region who, it was conceded by appellant, sold at prices in excess of appellant. However, the court is satisfied, particularly from the evidence of Brian Douglas Duncan, area manager for New Zealand, Wines & Spirits Ltd, and Denis Francis Connolly, an employee of appellant, but with wide experience in the trade, that there are special reasons. Basically the special reasons derive from the finding by the court there are two markets, not one. The court accepts appellant's counsel's submission that the four named wholesalers were selling in a different market by selling to traditional retail outlets and not to the new cut price supermarket type of operation based on cost oriented advertising, large throughput and therefore different prices from merchant suppliers. The evidence of appellant amply supports this finding of a traditional market and a cut price market which developed from the late 1970's and snowballed. To deal specifically with respondent counsel's point that in the relevant period the discounting was uncommon and not part of the "ordinary" market I hold the supermarket market was established much earlier in the Wellington region. This is an important subsidiary fact finding because respondent conceded that by 1982 the cut price method was of sufficient proportions to justify the description of "ordinary". It was not a convincing argument that in 1980 the changes were of form and not of substance in the market. The companies relied on by respondent in fixing fair market value were not in the market of suppying to the new type of cut price resellers. The court is satisfied the traditional

wholesale margin would have made the existence of such a resellers' market impossible, or to put it more directly such resellers could not have arisen if drawing supplies from the traditional market. The reason why the cut price market did not overwhelm the traditional wholesale market is because of underlying commercial arrangements. As appellant's argument developed in court it was emphasised that the new trading pattern at retail level had had the back flow effect of creating a new market at the wholesale level. With that finding of two markets at the wholesale level it remains to examine the statute to decide how its provisions are to be applied in such circumstances.

Sales tax is payable by wholesalers pursuant to s 12(1)(b) of the Act. About that there is no dispute. Section 22 is quite specific in stating (before amendment) ...[T]he sale value of goods sold by a wholesaler ... shall be the price for which the goods are actually sold ...." The dispute arises because respondent seeks to use the special provisions as to valuation contained in s 26(b) (before amendment) in the following terms:-

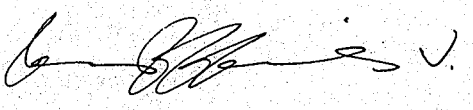
> "Notwithstanding anything in this Part of this Act -
>
> (a) ...
>
> (b) Where any taxable goods are disposed of in circumstances which, in the opinion of the Collector, have the effect of reducing the price of those goods below the fair market value, the sale value shall be deemed to be the fair market value."

In this court's view the goods were not disposed of in circumstances which have the effect of reducing the price of those goods below the fair market value. The price was not reduced below the previously established and still continuing fair market value in this particular wholesale market. The price was established in an open market. To test this proposition there was evidence appellant sold at the same price to resellers with whom it had no other direct commercial involvement. As might be expected "fair market value" of s 19(1) and (2) refer to open market which in substance is the concept of value generally recognised throughout the law of willing but not anxious buyers and sellers. Counsel does not dispute that appellant and Superliquorman outlets are "associated" within s 19(2)(b) and that sales from one to another are probably not sales "in the open market" by reason of s 19(2)(a)(iii). However the sales "in the open market" are met both by the sales to the same resellers by independent suppliers such as Johnsonville Licensing Trust and by sales made by appellant to independent resellers. The "open market" is not a purely hypothetical market. See Priestman Collieries Ltd v Northern District Valuation Board [1950] 2 K.B. 398 at pages 406 to 407.

If two markets existed, clearly identifiable, there is no logical or lawful reason why one should prevail over the other for the assessment of duty. This seemed to be the view accepted by the learned Chief Justice, Sir Ronald Davison in EMI Manufacturing (NZ) Ltd v Collector of Customs (Unreported, Wellington Registry, M.644 and 710/81 - 24 May 1983) and in Morris v Commissioner of Customs and Excise [1969] 3 All E.R. 1096

C.A. Insofar as an onus rested upon appellant pursuant to s 32 of the Act it has been discharged.

The appeals therefore succeed and the court declares the short payment of sales tax notices issued by the Department to be invalid. I award appellant $1,000 costs plus disbursements on motions and writ.



Solicitors for Appellant: White Fox & Jones, Christchurch

Solicitors for Respondent: Crown Solicitor, Wellington