



**BEFORE THE
APPELLATE BENCH
COMPETITION COMMISSION OF PAKISTAN**

Appeal No. 18/2017

**PAKISTAN TOBACCO COMPANY LTD
V/S
COMPETITION COMMISSION OF PAKISTAN AND OTHERS**

**Appeal filed under Section 41 of the Competition Act, 2010 read with
Competition Commission (Appeal) Rules, 2007**

(File No. 4(18)/Reg/PTC APP Bench/CCP/2017)

Date of Hearing	23 rd January 2018
Adjudicating Members	Dr. Shahzad Ansar Member Dr. Muhammad Saleem Member
On behalf of Pakistan Tobacco Company Limited Appellant	Mr. Umair Mansoor, Legal Counsel Mr. Shahab Qutab, Advocate Mr. Usama Jamshed, Advocate <i>Axis Law Chambers</i>
Competition Commission of Pakistan Respondent No. 1	Mr. Noman Amin Farooqi
Director General (Legal & Exemptions) Competition Commission of Pakistan Respondent No. 2	-do-



AA *[Signature]*

ORDER

1. This Appeal was filed on 18th September 2017 against the Order dated 18th August 2017 issued by the Director General (Exemptions) (hereinafter referred to as the '**Impugned Order**') whereby an extension in the exemption was granted to M/s Pakistan Tobacco Company Limited (hereinafter the '**Appellant**') with the following conditions:


“(i) *The word Max. R.P. shall be printed on the product of the undertaking and proof of that shall be provided to the Commission once materialized;*

(i) *This Certificate shall take effect upon provision of the proof of intimation to the other party(s) to the agreement. In case, the proof of intimation is not provided to the Commission within fifteen (15) days from the date of the issuance of the certificate, the certificate shall be deemed withdrawn with immediate effect.”*

A. BACKGROUND:

2. The Competition Commission of Pakistan (hereinafter the '**Commission**') was established through the Competition Ordinance, 2007 (hereinafter the '**2007 Ordinance**') and the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 was repealed and consequently, the Monopoly Control Authority (hereinafter the '**MCA**') was dissolved.
3. In terms of sub-section (1) of Section 4 of the 2007 Ordinance, it is prohibited for all the undertakings to enter into any agreement or in case of an association of undertakings to make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of "**preventing, restricting or reducing competition**" unless exempted under Section 5 of the 2007 Ordinance. Further, in terms of sub-section (3) of Section 4 of the 2007 Ordinance, any agreement entered into in contravention of sub-section (1) of Section 4 thereof shall be void.



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4. The legislature in its wisdom under Section 59 of the 2007 Ordinance had not specifically provided for saving of the agreements envisaged under Section 4 of the 2007 Ordinance which might have been entered into, with or without the approval of or under intimation to the former MCA, prior to and subsisting at the time of the promulgation of the 2007 Ordinance, in contravention with Section 4 thereof. Further, Section 5 of the 2007 Ordinance provides for exemptions with respect to particular practice or agreement and sub-sections (3) & (4) thereof, envisage that a period must be specified in the exemption order effective from a date earlier than on which it is granted.
5. The Commission in order to remove the difficulty arising out of the ambiguity in Section 59 thereof and to give effect to the provisions of Sections 4 & 5 of the 2007 Ordinance, issued a general order, published in the Official Gazette of 15th January 2008. All the undertakings were directed to seek individual exemptions under Section 5, from the Commission not later than ninety (90) days from the date of the issuance of the said order, in respect of all such agreements that are in contravention of Section 4 of the 2007 Ordinance and are entered into prior to and subsisting at the time of the promulgation of the 2007 Ordinance, whether entered into with or without the approval of, or under intimation to the former MCA.
6. In compliance of the aforesaid General Order of the Commission, the Appellant filed an application seeking individual exemption of its Standard Distribution Agreement vide application dated 11th April 2008. The Commission granted conditional exemption on 02nd May 2008. The exemption was valid till 31st December 2010. The condition imposed by the Commission was "*the parties shall not fix minimum resale price of the products which are subject of the distribution agreement*".
7. It is relevant to highlight that competition law which was promulgated through the 2007 Ordinance, after passing through the rigors of time was given permanence through enactment of the Competition Act, 2010 (hereinafter the '2010 Act') representing the solemn intent to harmonize the business environment and market mechanisms of Pakistan domestically as well as internationally within a world that has become extensively interconnected, consequent to the process of globalization.



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8. Subsequent to the expiry of the exemption granted to the Appellant, an extension of the exemption was applied by the Appellant vide their application dated 28th December 2010. The Commission after analyzing the justifications granted an extension in the exemption vide certificate dated 28th January 2011. The extension was a conditional extension and was valid till 31st January 2014. The condition imposed was "Clause 4.5 be amended to delete the text, " or which constitute any other type of tobacco product including, without limitation, cigars, cigarillos, snuff and roll your own tobacco"".
9. The Appellant, upon expiry of the extension in exemption again applied for extension in exemption vide their application dated 15th January 2014. The Commission again granted an extension to the Appellant vide certificate dated 15th April 2014. The extension was granted till 01st May 2017. The Appellant, again upon expiry of the above extension applied for extension in exemption vide application dated 25th May 2017. The Respondent No. 1 after considering the application issued the Impugned Order.
10. At the time of filing of the instant appeal, the quorum of the Commission (hereinafter the 'Commission') was not complete, therefore, the Appellant was informed that upon the quorum being complete, the Appellate Bench will be constituted to hear and adjudicate upon the instant appeal. Subsequent to the foregoing, the Appellant preferred a writ petition against the Impugned Order before the Honorable Islamabad High Court, Islamabad being Writ Petition No. 3670 of 2017, wherein the Honorable Court was pleased to pass the following ad-interim Order on 27th October 2017:

"CM No. 02/2017

Notice. Until the next date of hearing, the operation of the impugned condition in respondent no. 2's order dated 18-08-2017 is suspended."

B. HEARING & COMMITMENTS:

11. Thereafter, upon completion of the quorum of the Commission, the Appellate Bench was constituted in terms of S.R.O. No. 339(1)/2009 dated 15th April 2009, and a hearing in the matter was scheduled for 23rd January 2018.
12. On 23rd January 2018 the Appellants' Counsel along with its representatives appeared before the Appellate Bench and made submissions with respect to the chronology of



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the issuance of exemption and extensions issued by the Commission from time to time. The Counsel for the Appellant after giving the brief background, submitted that the Appellant is obligated to print the retail price on the cigarette packs by the Federal Board of Revenue, however, they are willing to address the concerns of the Commission with reference to the fixation of minimum retail price and it would be addressed if the condition (i) of the Impugned Order is replaced / modified with the condition imposed in the Exemption Certificate dated 02nd May 2008, which is as follows:

“The parties shall not fix minimum resale price of the products which are subject of the distribution agreement.”

13. The Counsel further submitted that they will not further press this appeal in case the above submission is accepted by the Appellate Bench and will also withdraw the Writ Petition No. 3670 of 2017 from the Honorable Islamabad High Court, Islamabad.
14. The Respondent No. 1 in attendance while explaining the reasoning for imposing the conditions in the Impugned Order referred to the Opinion issued by the Commission on 02nd June 2009 in the matter of fixing of minimum prices by the cigarette manufacturers, wherein the primary concern of the Commission was to discourage the fixing of minimum retail price in the cigarette industry. He also submitted that, while acknowledging the legal framework, in particular the Federal Excise Act, 2005 read with the Federal Excise Rules, 2005, the Commission observed and recommended that it is clear that the spirit and intent of the law is to print the maximum retail price and not the minimum retail price. It was further, submitted that the purpose of imposing the condition was also to reinforce the condition imposed by the Commission in the exemption certificate dated 02nd May 2008 i.e. ***“the parties shall not fix minimum resale price of the products which are subject of the distribution agreement”***. After hearing the parties, the Appellant was directed to file the undertaking in writing with the Registrar of the Bench.

C. ANALYSIS & DECISION:

15. We note that the Commission in 2009 took a *suo moto* notice of advertisements made in leading newspapers pertaining to pack prices of cigarette brands on various dates.

The Appellant was also one of the undertakings who published such advertisements. It



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was the case that through an advertisement made by the Federal Board of Revenue (hereinafter the 'FBR') dated 23rd August 2008 minimum price of cigarettes in the country was fixed which was to take effect from 11th June 2008. The minimum price of a pack of 10 cigarettes was fixed at Rs.7.24 (Seven Rupees & Twenty Two Paisas inclusive of sales tax and the minimum price for a pack of 20 cigarettes was fixed at Rs.14.48 (Fourteen Rupees & Forty Eight Paisas inclusive of sales tax). It was also stated in the advertisement that the printing of retail price and sales tax on every cigarette pack is mandatory under the law and that cigarette manufacturers and other persons associated with the cigarette business are to abide by the above minimum prices, below which, it would not be legal to sell cigarettes. It was cautioned that violators of these mandatory provisions would face penal consequence in the form of imprisonment, fine or both. After conducting public hearing in the matter, the Commission expressed its opinion and with reference to the "MRP" in cigarette industry. While doing so, the Commission made a reference to the EU jurisdiction where a similar issue was dealt with by the EU Competition Authority, the relevant excerpts from the opinion are reproduced below:

27. *It would also be useful to share how EU and EU states have dealt with this issue. The Commission found that EU states evolved a particular system of taxing the tobacco industry back in the 90's which was implemented through Council Directives 92/79/EEC, 92/80/ECC of 19 October 1992 and Council Directive 95/59/EC of 27 November 1995. With these directives, it was decided that all member countries would implement a common tax system for tobacco and that both specific and ad valorem taxes would be imposed on cigarettes. The specific taxes would ensure that there is a bare minimum cost attached to the cigarette packs regardless of their price, while the ad valorem tax would attach further tax cost based on the price of the pack itself. The council directives had to be made consistent with other EU trade policies including their competition regime. In directive 95/59/EC, Article 9 (1) stated, inter alia, that manufacturers would be free to determine the maximum retail price for each of their products. The structure of the taxation system indicates that it was intended that a particular amount of taxes would be made specific i.e. in Euros while the ad valorem would*



be charged on the maximum retail price given by the manufacturer. This way no tax can be evaded and at the same time competition is ensured.

28. *The Commission of the European Union for competition has taken the view that minimum price fixing by the governments has the effect of affecting competition and is against EU legislation. It believes that while governments should take anti-smoking measures according to the health policies, but it should be done by increasing taxation rather than fixing price which decreases price competition in the market. The European Court of Justice has in the past upheld on two occasions, Commission v. Greece [ECJ C-216/98. Judgement given on 19 October 2000] in 2000 and Commission v. France [Case C-302/00 - [2002] ECR I-2055], the principles that minimum price fixing, whether done directly by the government or through reference marks, is against European laws and distorts competition and that manufacturers have the right to set the maximum retail price.*

29. *Keeping in view the previous judgments of the ECJ, the European Commission in February 2008 took Ireland, Austria and Italy to the ECJ over their minimum price laws regarding tobacco. The governments of these countries were accused of being in collusion with the tobacco industry to fix prices in a bid to safeguard the manufacturer's profits. In its official opinion to the three countries, it said that minimum price fixing is inconsistent with EU laws and distorts competition. By fixing minimum prices, the manufacturer's profits margins are saved in the name of health benefits. It suggested that rather than keeping minimum prices, countries should increase taxes to raise prices of cigarettes and let the manufacturers compete on price. As an example, the European Commission cited Belgium, which had scrapped its minimum price laws and replaced them with an increased tax system. This not only increased their tax revenue but also addressed health concerns by raising the cost of using tobacco products.*



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16. Keeping in view the above and after reviewing the overall legal framework of FBR with reference to the conditions of printing the price on the cigarette packs the Commission opined as follows:

“30. Keeping in view that the existing legal framework makes printing of retail price mandatory and the fact that Section 12 (4) also envisages printing the highest price where there is a variation of price within a brand, it is clear that the spirit and intent of the law is to print the maximum retail price. Where the manufacturers enjoy market power in the relevant market, as is the case with PTC and Lakson, printing either the maximum and minimum retail price may have their anti-competitive effects. However, if a choice is to be made, for obvious reasons, it has to be the maximum retail price. In this regard, support can be drawn from the EU jurisdiction which regards maximum retail price as a more pro-competitive practice. In our considered view the EU current state of the law in this respect appears to be reasonable as it is based on major economic assumptions acknowledging pro-competitiveness of vertical maximum price fixing.

31. Simply put, imposing a maximum retail price of cigarettes promises lower prices for consumers, as competition on price is below the prescribed level and to this extent it protects consumers from anti-competitive behaviour. Printing the minimum retail price on cigarette packs, on one hand, may operate as a bench mark for the manufacturer to recover fixed price irrespective of the quality of goods. While on the other hand it may be used by manufacturers having market power to give retailers an incentive not to sell the products of lesser known or minor manufacturers at that price (i.e. effectively a quasi-entry barrier); thus reducing competition in the relevant market. Printing the maximum price may encourage manufacturers/distributors/retailers to raise prices which may have an impact on the consumption of cigarettes, hence, also addressing the Health Ministry's concerns and would be, prima facie, a pro consumer measure. Moreover, as noted above, since generally cigarette packs are sold at a higher price than the printed



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price; therefore, printing of maximum retail price would not only ensure that the consumer is better informed regarding the price beyond which the product cannot be sold, it would also place him in a better bargaining position.

32. In view of the foregoing, we are of the considered opinion that having appreciated the scheme of law, the conflict does not exist in the legal framework but rather it arises when FBR oversteps the mandate envisaged under law. The restriction imposed by FBR on manufacturers and other persons associated with the cigarette business for not selling cigarettes below its prescribed minimum price is not envisaged under law. Thus it is the implementation and not the law that is giving rise to an anomalous situation.

33. It is also important to appreciate that the current imposition to print the retail price whether on cigarette packs or in newspapers is neither contributing, facilitating, improving or ensuring due collection of taxes in any manner, nor is it in compliance with the spirit of the law. Parties are, therefore, advised to stop such practice with immediate effect. FBR, however, is empowered to intimate to the concerned undertaking as to what it shall deem as the minimum price for the purposes of levying tax on the concerned goods and collect the same accordingly. As discussed above, the retail price required to be printed under law is intended to be the maximum and not the minimum price. Therefore, FBR may require the undertakings to print on the cigarettes packs in unambiguous terms the maximum retail price. Perhaps, it is also advisable that consumers be notified that the retail price printed on the goods is the "Max. Retail Price".


17. We are in agreement with the opinion expressed by the Commission regarding fixing of minimum price by the cigarette manufacturers and reiterate that *printing either the maximum and minimum retail price may have their anti-competitive effects. However, if a choice is to be made, for obvious reasons, it has to be the maximum retail price.*"




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In this regard we are guided by the jurisprudence of European Commission highlighted in Para 15 *ibid* and hereby hold that same accordingly.

18. The Appellant itself has made an undertaking during the hearing and also filed the same in writing with the Registrar of this Bench, and the Respondent No. 1 has also agreed with the undertaking and commitment made and accordingly prayed before the Bench to dispose of the Appeal in terms thereof. Therefore, condition no. 1 in the Impugned Order is set-aside and the Respondent No. 1 is directed to issue a fresh extension in exemption certificate to the Appellant with the condition that "the parties shall not fix minimum resale price of the products which are subject of the distribution agreement". The Respondent No. 1 is directed to ensure the compliance of the foregoing direction within thirty (30) days of the receipt of the Order.
19. The Appellant, however, is cautioned not to infringe provisions of Section 4 of the 2010 Act and exploit the exemption so granted by engaging in fixing the minimum retail price with reference to the products which are subject of their standard distribution agreement. If, the Appellant is found engaged in such practices, the Commission shall be at liberty to initiate proceedings against the Appellant in accordance with law.
20. In terms of the above and in pursuance of sub-rule (4) of Rule 23 of the Competition Commission (Appeal) Rules, 2007, this appeal is disposed of accordingly.


Dr. Shahzad Ansar
Member


Dr. Muhammad Saleem
Member



Islamabad, the 27th March, 2018