

M. M. HOLDINGS

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THE HIGH COURT

1981 No. 9342P



M.M. HOLDINGS LTD.
MOTOR MANUFACTURES LTD.
MOTOR DISTRIBUTORS LTD.

- and -

SEAMUS O'PAIRCEIR
PATRICK McMAHON
SEAMUS MAC GARBHAIGH

Judgment of Mr. Justice Costello delivered on the 2nd
day of May 1983

Mary P. Bony Lee
Recd.

This action comes about because of a difference of opinion between the Plaintiffs and the Revenue concerning the imposition of an excise duty levied by the Imposition of Duties (No. 236) (Excise Duties on Motor Vehicles, Television and Gramophone Records) Order, 1979 (S.I. No. 57 of 1979) ("the 1979 Order"). This duty became payable on motor vehicles delivered in the State or imported into the State on or after the 1st March, 1979 (paragraph 4 of the 1979 Order). Elaborate conditions governing the importation manufacture and warehousing of vehicles liable for the duty were contained in the Motor Vehicle Excise Duty Regulations, 1979 (S.I. No. 60 of 1979) ("the 1979 Regulations") but as the point which I have to consider is a very net one and concerns only one aspect of the 1979 Order I need not detail them here. At some time during the relevant period one or other of the Plaintiffs as licensed manufacturers or authorised importers became liable to pay the excise duty under the 1979 Order and for ease of reference (but at the sacrifice of some accuracy) I will assume that the sum in

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dispute in these proceedings is payable (if at all) by all three Plaintiffs.

Motor vehicles which are subject to the duty are stored in approved warehouses until the motor vehicle duties are paid or accounted for and when delivered to one of their dealers by the Plaintiffs the duty becomes payable. The rate of duty payable in the case of the vehicles with which we are concerned in this case was 40% "of the chargeable value" of the vehicle (paragraph 4 (3) (a) of the 1979 Order, as amended), a term which gets a special definition in Paragraph 19 of the 1979 Order. The "chargeable value" is the "open market selling price of the vehicle at the time of the charging of the duty thereon" (i.e. at the time of delivery to the dealer) and the term "open market selling price" is itself defined as meaning

"the price, excluding value-added tax and excise duty, which, in the opinion of the Revenue Commissioners, a motor vehicle ... might reasonably be expected to fetch on a first arm's length sale thereof after manufacture or importation in the open market in the State to a dealer".

Two features of this definition are to be noted. "The open market selling price" by which the duty is calculated

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is a matter for the determination by the Commissioners, who have a complete discretion, subject of course, to the terms of the Order, in the matter. In making their determination they can if they wish treat the transaction between the Plaintiffs and their dealers as an arm's length one (as defined) and they may or may not adopt the actual price (excluding excise duty) paid by the dealer to the manufacturer/importer for the vehicle. Secondly, although the dealer may pay a gross sum to the manufacturer/importer, the market price is to be calculated by reference to a price which excludes any element of duty.

As I have pointed out the duty becomes payable on delivery to a dealer. But payment may be deferred by Paragraph 8 of the 1979 Order which provides that the Commissioners may, subject to conditions which they may impose, permit payment of duties imposed by paragraphs 4 and 5 of the Order to be deferred to a day not later than the last day of the month following that in which the duties are charged. Deferment in fact was permitted and in fact

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occurred in this case.

Let me explain in a little detail how the system worked in practice. The Plaintiffs import vehicles or manufacture them and then sell them to authorised dealer. They work out a price for their vehicles based on their cost and a profit margin on their costs. To give an example, in the case of their "Derby" model the price is made up of the F.O.B. price of the vehicle, freight marine insurance and dock handling charges, de-waxing costs and the cost of a radio, an item called "rebate" (to which I will return in a moment) and to these is added their profit margin. These total a figure which they call the "main dealer price". To avoid confusion I will hereinafter call this price the "manufacturer's wholesale price" and I will use this expression to describe the price, excluding duty, which the Plaintiffs require their dealers to pay them for each delivered vehicle. But dealers are also required to pay the 40% excise duty levied by the 1979 Order and so the Plaintiffs invoice them with a sum made up of (a) the

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manufacturers wholesale price and (b) 40% of this sum.

Each month (because the payment of the duty has been deferred) they make returns to the Revenue on forms known as MV 3 form. In the column marked "chargeable value" of the vehicles they insert as the chargeable value the manufacturers wholesale price and they then insert 40% of this in the column in which the amount of duty is to be inserted. By this form they declare on a monthly basis what they say is the "chargeable value" of the vehicles they have delivered from their warehouses and they account for the duties that are charged on these vehicles and send to the Revenue a cheque for the amount due.

The Revenue Commissioners are of course well aware of conditions in the motor trade and monitor closely the level of retail prices. From these they can assess the level of prices which should reasonably be charged by manufacturers/importers to their dealers. They accept that the trade is a competitive one, and they administer the 1979 Order and the 1979 Regulations by applying the general principle (which

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may, of course, have to be reviewed from time to time) that they make a determination under paragraph 19 by regarding the actual manufacturer's wholesale price payable by the dealer to the manufacturer/importer, as payable as a result of an arm's length transaction.

So far it is hard to see how difficulties in interpretation of the Order could come about. To explain how they did it is necessary to refer to the question of rebates and discounts. All manufacturers/importers in the motor industry operate incentive schemes for their dealers. In the case of the Plaintiffs the scheme involves the setting for each dealer a sales target. If the dealer attains the target then a payment is made to him by way of rebate of a certain sum in respect of every vehicle purchased by him in the particular target period. In the period with which we are concerned the amount of the rebate per vehicle was £35 and the payment of rebates was made on an annual basis in the month of September in each year. Thus, if the target figure is, say, 100 vehicles for a year and the dealer reached this target, he becomes entitled to a rebate of £35 on each vehicle

delivered during the previous 12 months. In practice 95% of the Plaintiffs dealers reach their target figures and become entitled to the dealer's rebate. As I have already pointed out this £35 rebate is included by the Plaintiffs when fixing the manufacturers wholesale price which, along with the duty, their dealers are initially required to pay.

The question that has arisen between the Revenue and the Plaintiffs is how these retrospective rebates are to be taken into account when calculating the amount of duty payable by the Plaintiffs.

Up to the institution of these proceedings the Revenue accepted that account should be taken of these retrospective rebates in calculating the chargeable value of each vehicle. When the new duty was being introduced discussions had taken place between the Revenue and representatives of the Motor Industry and the existence of incentive schemes, including the operation of retrospective discounts was made known to the Revenue who informally indicated their willingness to take them into account in determining the "chargeable value"

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of vehicles subject to the new duty. Accordingly, after payment of rebates had been made by the Plaintiffs they proceeded to recalculate the amount of duty which they had paid on vehicles delivered in the previous 12 months. What they did was this. Working on their manufacturers wholesale price (which was treated as "chargeable value" in the MV 3 Forms), they deducted £35 from the manufacturers wholesale price for each vehicle. They then calculated 40% of this revised figure and they found out the amount of the overpayment to duty. On their next monthly return they claimed a credit for this overpayment. The Revenue, for reasons I will explain in a moment, claimed that the basis of the Plaintiffs calculation was wrong, that the credit claimed was too large, and when these proceedings were instituted they maintained that on the 1st July, 1981 a sum of £46,952-41 was due to them. Instead of instituting proceedings for this sum, the Revenue revoked the deferred payment facilities. This triggered off these proceedings in which inter alia injunctive relief relating to these

facilities was claimed. Now, in effect, the Plaintiffs ask me to hold that the calculation of the amount of duty which they made in the light of the rebates is correct and that the credit they claimed was not excessive. The Defendants have two principal answers to this claim, one of which (and the one I will consider first) is that the basis of the Plaintiffs calculation of the revised duty is wrong; that the proper way to ascertain the "open market selling price" of each vehicle, taking the rebate into account, is not to deduct the £35 rebate from the "chargeable value" figure in the Plaintiffs MV 3 forms, but to deduct it from the gross price shown on the Plaintiffs invoices, that is the sum actually paid by distributors when the vehicle was delivered (a sum which, of course, included the manufacturers wholesale price and the 40% duty)

The Commissioners explained their position and the method by which they had calculated the revised "chargeable value" in a letter of 7th October, 1980 as follows. Having pointed out that the duty under the 1979 Order is calculated

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on a "chargeable value" and that this is defined in paragraph 19 of the 1979 Order as the "open market selling price" and that this in turn is essentially the price to the dealer excluding the excise duty, the letter went on -

"When your company sells a car to a dealer there is only one known or actual price and that is the price paid by the dealer to your company. From this known price it is possible to arrive at the "chargeable value" (using the definition contained in the Order) and so calculate the motor vehicle excise duty payable."

There follows an example based on a gross actual price of £2,000 paid by a dealer, and assuming a £50 rebate, and the letter then proceeds -

"When a discount is given to a dealer by you it is a discount off the only known or actual price i.e. the price paid by the dealer. It follows, then, that whilst the discount obviously has a proportionate effect on the "chargeable value", the absolute amount of the discount itself is not allowable in calculating the motor vehicle excise duty payable".

A further example is then given, which shows how the "chargeable value" is arrived at if the discount of £50 is taken off the gross (invoice) price paid by the dealer.

Before examining the reasons given for this method of calculation let me consider it a little more closely. If I have a gross figure in an invoice given by a manufacturer to

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a wholesaler and I know that it is made up of two items (a) the manufacturers wholesale price and (b) a duty on the manufacturers wholesale price of 40% and I want to know how much of the content of gross price is duty and how much is the manufacturers wholesale price I can obtain this information by multiplying the gross price by 40 and dividing the result by 140, or more simply, ascertain two-sevenths of the gross figure. This will give me the duty content of the invoice and the balance will be the manufacturers wholesale price. This is obviously the nature of the calculation which the Revenue made in this case. Firstly, they took the gross price on the Plaintiffs original invoice, ascertained two-sevenths of the price and thus worked out (a) the duty and (b) the manufacturers wholesale price and treated the wholesale price as the "chargeable value" for the purposes of the order. Then they considered what duty was payable in the light of the £35 rebate. They revised their calculation in the following way. They subtracted the sum of £35 from the gross invoice price, then ascertained what two-sevenths of

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this reduced figure was and so arrived at the duty payable, and treated the balance on the invoice as the manufacturer's wholesale price. This they determined as the open market selling price for the purposes of paragraph 19. (They may have undertaken the further exercise of obtaining 40% of this open market selling price to work out the duty, but I think it is unlikely that this supererogatory act was performed as they already knew the amount of the duty when they had taken two-sevenths of the reduced gross invoice price). This explains why a difference arises between the Plaintiffs calculation of the revised amount of duty and the Revenue's. If the £35 rebate is taken off the gross invoice price and two-sevenths of this price is ascertained the result will be a figure for duty larger than if the calculation was made by taking the £35 from the original manufacturers wholesale price included in the original invoice (and shown as "chargeable value" in the MV 3 Forms) and ascertaining what 40% of that figure is. It will be seen therefore that the dispute turns on whether the Revenue are correct in

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calculating backwards from the gross invoice price in the way I have described.

I think it is perfectly clear that the Commissioners were prepared to make a determination under paragraph 19 by reference to actual market conditions and, in particular, to regard the prices actually received by the Plaintiffs for their vehicles (including tax) as the fruit of a first arm's length transaction and as "the open market selling price". They were, of course, well aware that in transactions between the Plaintiffs and their dealers two different prices were involved (a) the manufacturers wholesale price (a price which would exclude the excise duty) and (b) the gross price payable on the Plaintiffs invoices (a price which the dealer would have to pay for each vehicle which would include the amount of duty levied on it). In their letter of the 7th October, 1980 they wrote that "when your company sells a car to a dealer there is only one known or actual price and that is the price paid by the dealer to your company". This statement is not correct. The Revenue could obtain the

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manufacturers wholesale price from the monthly MV 3 Forms and from these they could see the price paid by dealers, excluding excise duty, on each transaction. Their justification for working back from the gross invoice price is therefore based on a false premise. I think it wholly unlikely that the Revenue were unaware that the price paid by the dealers to the Plaintiffs excluding the duty could be ascertained from the MV 3 Forms, and I must conclude that for some reason which has not been explained to me that they considered that they could not base their determination of the "open market selling price" on these figures. I can only conclude that they acted on some wrong principle in doing so. Having accepted for the purposes of Paragraph 19 the validity of the actual transaction between the Plaintiffs and their dealers, it seems to me that an error occurred in not deducting the £35 rebate from the figure for "chargeable value" contained in the MV 3 Forms.

The error in ignoring the information in the MV 3 Forms had a further consequence. Because they considered that the

must base their determination under Paragraph 19 on the gross price paid by the dealer they then made a determination by means of the mathematical calculation I have described. This result is obtained by using a gross figure which includes an item of excise duty, but paragraph 19 specifically enjoins the Commissioners to determine a price which excludes duty.

Whilst it is true that at the end of their calculations the Commissioners arrive at a figure which excludes duty, a figure which they then treat as the "open market selling price", nonetheless essentially they have arrived at this figure by a process which involved them in taking into account the duty a process which seems to me to be contrary to requirements of the 1979 Order.

I conclude therefore that the Commissioners having decided to treat the transaction between the Plaintiffs as an arm's length one as required by Paragraph 19, and having decided that they could properly take into account the retrospective £35 rebates should have reassessed the duty by reference to the chargeable value figures given in the

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Plaintiffs MV 3 Forms.

I have expressed my opinion on the controversy on the interpretation and operation of paragraph 19 before dealing with the first arguments made by Mr. Kearns on the Defendants behalf. He argued that as the paragraph gave to the Commissioners a power to decide what in their opinion the open market selling price of the vehicle was the Court in this case has no jurisdiction to review the exercise of an administrative discretionary decision and in effect alter a valuation bona fide made by the Commissioners. He relies on the decision in A.G. -v- A.W. Gamage Ltd. (1949) 2 A.E.R 732, a case in which the jurisdiction of the Court to review the exercise of a comparable power of the Revenue Commissioners in England was considered. I agree that this Court has no business in substituting its view of the correct "open market selling price" of the Plaintiffs vehicle in place of the Commissioners. But it is not being asked to do that. Clearly the Court (as I think Gamage made clear) has jurisdiction to review an administrative decision if it had

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been arrived at by the application of wrong principles. The proceedings before me have taken a somewhat unusual form and I am asked to make declaratory orders which will articulate an opinion on the validity of certain administrative decisions.

The courts supervisory function is a very limited one but I think it does arise where, as herein, it can be shown that in arriving at an administrative decision a wrong principle was applied and an error made in the application of a statutory power.

As I have already pointed out the Commissioners in their preliminary discussions with the Plaintiffs indicated that they were prepared to take into account the retrospective dealer rebates which the Plaintiffs might be called upon to pay in accordance with their incentive schemes. But doubts about their power to do so were raised in the correspondence and the Defendants in their defence formally denied that they could properly be considered when making a determination of market value under paragraph 19 of the 1979 Order. At the hearing the Commissioners very fairly conceded that as far as

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these proceedings were concerned they were prepared to accept that the 1979 Order should be interpreted as permitting them to take the rebates into account, but they had reservations about their power to do so and they have asked me to make a formal declaration on the point.

Their doubts arise from the fact that the dealer's right to rebate is contingent on the dealer reaching certain targets and upwards of nine months could elapse after a vehicle had been delivered from an approved warehouse before a rebate would be payable. The obligation to pay the duty arises when the vehicle is first delivered and it is suggested that whilst bulk discounts (which arise at the time of sale) can properly be taken into account for a determination under paragraph 19 the situation may well be different in the case of rebates with retrospective operation.

I do not think that the Revenue Commissioners are precluded by anything in the 1979 Order from taking into account the type of rebates we are considering in this case and I am satisfied they would not be acting in any way ultra

vires if they do so. They are required to determine the market price (as defined) at a certain date, and if the payment of a rebate by the manufacturer/importer at a later date reduces the original price paid in the market by the dealer the Commissioners are fully entitled to make a fresh assessment in the light of this fact if they consider it relevant to their duties under paragraph 19. I will, if required, make a declaration to that effect. But I want to make it clear that I do not think that the Commissioners are in any way bound to do so and if in the light of further consideration they consider that the rebates should be entirely excluded for the purpose of paragraph 19 nothing that has happened heretofore and nothing which arises from this judgement should preclude them from so doing.

Approved 10/5/33
JL