

Summary of the Constitutional Court Ruling No. 4/2544

Dated 6th February B.E. 2544 (2001)*

Re : The President of the Senate referred the application of Senators to the Constitutional Court for a ruling on whether or not the ministership of ten individual Ministers terminated in the case of holding positions in partnerships or companies.

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1. Background and summarized facts

Senator Vichit Punlarp and company, or a total of thirty-two senators, which was not less than one-tenth of the total number of existing members of the Senate, exercised their rights under section 216 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) to lodge an application with the President of the Senate to refer their application to the Constitutional Court for a ruling on whether or not the ministership of Ministers in Prime Minister Chuan Leekphai's Council of Ministers had terminated under section 216 paragraph one subparagraph (6) of the Constitution for having done acts prohibited by section 208 of the Constitution, i.e. "holding a position in a partnership, company or any organization which engages in a business with a view to sharing profits or incomes" during their term as Ministers. Such Ministers were:

(1) Mr. Surin Pitsuwan, Minister of Foreign Affairs, who was a director of Sirinakhorn Tourism Company Limited;

(2) Mr. Arthit U-rairat, Minister for Science, Technology and the Environment, who was a director of Barn Athit Company Limited, A.O. Enterprise Company Limited and Rangsit Fruit Juices Company Limited;

(3) Mr. Suwat Liptapallop, Minister of Industry, who was a director P.S.D.N. Company Limited and Kensung Construction Company Limited;

(4) Khun Ying Supatra Massadit, Minister of the Office of the Prime Minister, who was a director of Prisma Info Company Limited;

(5) Mr. Pichet Panvichatikul, Deputy Minister of Finance, who was a director of Pinai Prasit Company Limited;

(6) M.R.W. Sukhumphan Boripat, Deputy Minister of Foreign Affairs, who was the

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managing partner of Suan Payom Partnership Limited and a director of Ngamdoolpi Company Limited and Panthip Park Company Limited;

(7) Mr. Pradit Patraprasit, Deputy Minister of Transport and Communications, who was a director of Impolex Company Limited and Royal Holdings Company Limited;

(8) Mr. Chaiya Sasomsap, Deputy Minister of Transport and Communications, who was a director of Mobil Tel Company Limited and Superior Audio Company Limited;

(9) Mr. Wattana Asawahame, Deputy Minister of the Interior, who was the managing partner of Palangarn Thai Partnership Limited; and

(10) Mr. Raks Tantisunton, Deputy Minister of Commerce, who was a partner of Peunchamnarn Partnership Limited.

The President of the Senate therefore made a reference, dated 1st November B.E. 2543 (2000), referring such an application by thirty-two Senators to the Constitutional Court for a ruling on whether or not the ministership of the ten individual Ministers terminated under section 96 and section 208 of the Constitution in conjunction with section 216 paragraph one subparagraph (6) of the Constitution.

2. Preliminary issue

Did the Constitutional Court have the power to accept such a matter for consideration under section 96 and section 208 in conjunction with section 216 paragraph one subparagraph (6) of the Constitution?

The Constitutional Court held that the application lodged by the Senators with the President of the Senate contained the signature of thirty-two senators, which was not less than one-tenth the number of existing members of the Senate, and was therefore in accordance with the criteria under section 96 in conjunction with section 216 paragraph one subparagraph (6) of the Constitution. The Constitutional Court therefore had the power to accept the matter for consideration when the application was referred to it by the President of the Senate.

However, as a Royal Decree dissolving the House of Representatives had been issued on 9th November B.E. 2543 (2000), a preliminary legal issue arose as to whether or not the Constitutional Court still had the power to continue its consideration of this application.

The Constitutional Court held the following opinion. Even though Ministers of the Council of Ministers vacated office en masse pursuant to section 215 paragraph one subparagraph (2) of the Constitution, which stated that “Ministers vacated office en masse upon... (2) the expiration of the term or the dissolution of the House of Representatives,” section 215 paragraph two of the Constitution stated that “the outgoing Council of Ministers shall remain in office for carrying out duties until the newly appointed Council of

Ministers takes office...?”. In other words, in order to prevent a situation of a gap in the administration of the State, pursuant to the principle that a country could not be devoid of a government, during the period prior to the appointment or taking office of a new Council of Ministers, the Constitution therefore provided that the outgoing Council of Ministers under section 215 paragraph one should remain in office for carrying out duties. Thus a Council of Ministers in such a situation possessed identical powers and duties to a Council of Ministers under normal circumstances. The Constitutional Court therefore had the power to continue its consideration of this application.

3. The issues considered by the Constitutional Court

The issue in the application was whether or not the ministership of the ten individual Ministers terminated by reason of having done a prohibited act under section 208 of the Constitution in holding positions in partnerships or companies whilst being Ministers.

The Constitutional Court held that, for the benefit of considering this issue, it was first of all necessary to prescribe the general rules which would be applied to the consideration of the issue. Such general rules consisted of:

(1) The general rule on assumptions. It was held that under section 1015 of the Civil and Commercial Code, a partnership or company acquired a legal identity distinct from its partners or shareholders upon registration under the provisions of the 22nd Incident of Chapter 3 of the Civil and Commercial Code. An application for registration necessarily contained much information, which included the names of every partner or director. Therefore, it could be deemed that the existence of names in the official registry provided for an assumption that a person whose name appeared in such a registry was a partner or director as stated in the registry. However, such an assumption was not final or decisive in any manner because information which appeared on the registry were only information which the partnership or company itself registered with the partnerships and companies registrar. Such information was therefore only accurate at the time of the registration. Thereafter, the registrar could not know of the actual facts and could not be held responsible for the accuracy of the information because the facts could alter after the registration without registering the corrections to the registry. Therefore, such an assumption could be rebutted by evidence showing that the facts were not the same as the information which appeared on the registry.

(2) The rule on the application of relevant legal principles to the consideration. It was held that section 208 of the Constitution prohibited a Minister from holding any position in a partnership or a company. However, the Constitution did not contain specific provisions for the taking or vacation of office in a partnership or a company. As the formation of partnership or a company was a matter provided for by the Civil and Commercial Code, the taking or vacation of office in a partnership or a company should depend on the provisions of the Civil and Commercial Code. For this reason, the analysis on which position was held in which partnership or company and by which Minister and whether or not a

Minister had already vacated such a position or otherwise should only be made according to the provisions in the 22nd Incident of Chapter 3 of the Civil and Commercial Code on Partnerships and Companies.

(3) The rule on vacation of office in a partnership or company. Section 1042 of the Civil and Commercial Code provided that the relationship between a managing partner and other partners should be governed by the provisions on agency. Section 1167 of the Civil and Commercial Code provided that the relationships among directors and a company and third parties should be governed by the provisions on agency. Section 826 paragraph one of the Civil and Commercial Code provided that an agency contract terminated upon the withdrawal of an agent or the termination of agency by the agent. Section 827 paragraph one of the Civil and Commercial Code provided that the principal could withdraw the agent or the agent could terminate the agency at all times. Section 386 of the Civil and Commercial Code provided that if either party to a contract was entitled to terminate the contract by virtue of the contractual provisions or by virtue of the law, termination of the contract could be effected by an expression of such an intent to the other party, and such an expression of intent was irrevocable. From such provisions of the Civil and Commercial Code and other relevant provisions, it could be seen that resignation from a position in a partnership or company could be done at all times. The person intending to resign should express such intent to the authorised person of the partnership or company, which could either be made verbally or in writing. The law did not impose a requirement on the person who intended to resign to register such an intent with the partnerships and companies registrar in order to withdraw his/her name from the registry. In the case of a partnership, an agreement of all the partners should be reached before such a registration could be made with the partnerships and companies registrar. In the case of a company, proceeding with the notification of the registrar was the duty of the authorised director of the company.

(4) The rule on holding a position in a partnership or company which did not operate any business or carry out any activity. It was held that the intention behind section 208 of the Constitution was to prevent a conflict of interests between the public and an individual Minister by preventing such a Minister from relying on the powers in his/her position to acquire personal benefits or conferring benefits on the partnership or company in which he/she had a stake or held an office. The intention was also to allow the Minister to fully devote his/her time and energy to the administration of the State, which was an important function entrusted by the Constitution. Therefore, the partnership or company relevant to this case had to be a juristic person which operated or carried on normal activities which potentially lead to a conflict of interests or compelled the Minister to apportion part of his time for the administration of the State, and not a juristic person that had terminated its operations or ceased to carry out any activity.

By virtue of the above rules, the Constitutional Court individually considered the case of each of the ten respondents on whether or not each person had committed a prohibited act under section 208 of the Constitution and whether or not their individual ministerships had terminated under section 216 paragraph one subparagraph (6) of the Constitution.

(1) In the case of Mr. Surin Pitsuwan, it was believed that Srinakhorn Tourism Company Limited did not operate any business or carried out any activity. The company was not in a position to constitute a cause for the respondent to commit a prohibited act inconsistent with the intentions behind section 208 of the Constitution.

(2) In the case of Mr. Arthit U-rairat, evidence showed that the respondent had expressed an intent to resign from the directorship of Barn Athit Company Limited, A.O. Enterprise Company Limited and Rangsit Fruit Juices Company Limited as from 9th July B.E. 2542 (1999), the same day as the taking of office as Minister of Science, Technology and the Environment. It was therefore believed that the respondent did not commit a prohibited act under section 208 of the Constitution. As for Rangsit Fruit Juices Company Limited, it was believed that the operations were only in its preparatory stages. Actual operations had not yet commenced. Hence the company was not in a position to constitute a cause for the respondent to commit a prohibited act inconsistent with section 208 of the Constitution.

(3) In the case of Mr. Suwat Liptapallop, from the evidence, it was believed that the respondent actually submitted a resignation from the directorship of P.S.D.N. Company Limited and Kensung Construction Company Limited which was effective as from 27th August, B.E. 2533 (1990). This was a resignation prior to the taking of office as Minister of Industry on 5th October B.E. 2541 (1998). It was therefore believed that the respondent did not commit a prohibited act under section 208 of the Constitution.

(4) In the case of Khun Ying Supatra Massadit, from the evidence, it was accepted that the respondent had expressed an intent to resign from the directorship of Prisma Info Company Limited circa B.E. 2539 (1996). In addition, a meeting of shareholders on 14th September B.E. 2539 (1996) resolved to terminate the company and such termination had already been registered. The special resolution was effective as from 14th September B.E. 2539 (1996), which was prior to the taking of office as Minister of the Office of the Prime Minister on 14th November B.E. 2540 (1997). It was therefore believed that the respondent did not commit a prohibited act under section 208 of the Constitution.

(5) In the case of Mr. Pichet Panvichatikul, from the evidence, it was accepted on the facts that Pinai Prasit Company Limited neither possessed an office building for business contact nor had any property, employee or executive. An investigation of the Revenue Department did not reveal a corporation income tax return. It was believed that the company did not operate any business or carried out any activity. The company was therefore not in a position to constitute a cause for the respondent to commit a prohibited act inconsistent with the intentions behind section 208 of the Constitution.

(6) In the case of M.R.W. Sukhumphan Boripat, from the evidence, it was accepted that the respondent submitted a resignation from the position of managing partner of Suan Payom Partnership Limited, with the consent of all the partners, on 12th November B.E. 2540 (1997). As for Ngamdoopli Company Limited, the respondent expressed intent to resign from the directorship of such company to the managing director at the beginning of

B.E. 2538 (1995). Finally, for Panthip Park Company Limited, it was believed that the respondent did not have knowledge of his reappointment as director by the company after the expiration of his term in the year B.E. 2537 (1994) because such an appointment was a unilateral act by the company. After considering the three cases, it was believed that the respondent did not commit a prohibited act under section 208 of the Constitution.

(7) In the case of Mr. Pradit Patraprasit, from the evidence, it was believed that the respondent had already submitted a resignation from the directorship of Impolex Company Limited and Royal Holdings Company Limited, which was effective as from the expression of such an intent to terminate the agency, i.e. as from 17th January B.E. 2540 (1997) for Impolex Company Limited and as from 18th February B.E. 2540 (1997) for Royal Holdings Company Limited. The resignations were made prior to the taking of office as Deputy Minister of Transport and Communications on 14th November B.E. 2540 (1997). Therefore, it was believed that the respondent did not commit a prohibited act under section 208 of the Constitution.

(8) In the case of Mr. Chaiya Sasomsap, the respondent submitted a letter of resignation from the directorship of Mobil Tel Company Limited and Superior Audio Company Limited. The respondent also submitted the relevant minutes of meetings and presented witnesses, one of which held the position of managing director and the other the position of President, who testified to the Court and verified the documents presented by the respondent. This was considered as a complete expression of intent to terminate an agency under the law on agency. Even though the registry had not been altered, the facts could be deemed as refuting the registry data. The resignation was effective as from the expression of an intent to terminate the agency, i.e. as from 10th August B.E. 2538 (1995) for Mobile Tel Company Limited and as from 2nd July B.E. 2542 (1999) for Superior Audio Company Limited. Such resignations were made prior to the taking of office as Deputy Minister of Transport and Communications on 9th July B.E. 2542 (1999). It was therefore believed that the respondent did not commit a prohibited act under section 208 of the Constitution.

(9) In the case of Mr. Wattana Asawahame, from the evidence, it could be accepted on the facts that the respondent vacated the office of managing partner of Palangarn Thai Partnership Limited as from 14th November B.E. 2539 (1996) prior to the taking of office as Deputy Minister of the Interior on 14th November B.E. 2540 (1997). It was therefore believed that the respondent did not commit a prohibited act under section 208 of the Constitution.

(10) In the case of Mr. Raks Tantisuntorn, it appeared that Mr. Jirasak Limsongprot, the managing partner of Peunchamnarn Partnership Limited, died on 28th May B.E. 2529 (1986) causing the partnership to terminate under section 1055 in conjunction with section 1080 of the Civil and Commercial Code. Nevertheless, Mrs. Bunchu Limsongprot, the liquidator of the Peunchamnarn Partnership Limited, filed an application to register the termination of the partnership on 1st November B.E. 2543 (2000) and the registrar accepted the registration of termination on the same day, which was effective as from 1st September B.E. 2543 (2000), prior to the respondent taking office as Deputy Minister of Commerce on

8th September B.E. 2543 (2000). It was deemed that the respondent did not commit a prohibited act under section 208 of the Constitution.

Also in the case of Peunchamnarn Partnership Limited, in spite of the fact that the partnership's objects were stated as the trade arms and ammunition, no official license was ever obtained for such trade of arms and ammunition. It was therefore believed that the partnership did not operate any business from the beginning and not in a position to constitute a cause for the respondent to commit a prohibited act inconsistent with the intentions behind section 208 of the Constitution.

Moreover, by being merely a partner in Peunchamnarn Partnership Limited, the respondent did not have any power to govern or manage the partnership. Therefore, the case was not within the scope of consideration on which position in the partnership was held by the respondent under section 208 of the Constitution. The respondent was thus not in a position to commit a prohibited act under section 208 of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court held that all ten respondents, i.e. (1) Mr. Surin Pitsuwan, Minister of Foreign Affairs, (2) Mr. Arthit U-rairat, Minister for Science, Technology and the Environment, (3) Mr. Suwat Liptapallop, Minister of Industry, (4) Khun Ying Supatra Massadit, Minister of the Office of the Prime Minister, (5) Mr. Pichet Panvichatikul, Deputy Minister of Finance, (6) M.R.W. Sukhumphan Boripat, Deputy Minister of Foreign Affairs, (7) Mr. Pradit Patraprasit, Deputy Minister of Transport and Communications, (8) Mr. Chaiya Sasomsap, Deputy Minister of Transport and Communications, (9) Mr. Wattana Asawahame, Deputy Minister of the Interior and (10) Mr. Raks Tantisuntorn, Deputy Minister of Commerce, did not commit acts which were prohibited acts under section 208 of the Constitution in relation to the part which prohibited a Minister to hold any position in a partnership or a company. Consequently, the ministership of all ten such respondents did not terminate under section 216 paragraph one subparagraph (6) of the Constitution.
