

Summary of the Constitutional Court Ruling No. 14/2546

Dated 1st May B.E. 2546 (2003)*

Re : The President of the House of Representatives referred the opinion of members of the House of Representatives to the Constitutional Court for a ruling under section 219 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in the case of whether or not the Emergency Decree Amending the Excise Tax Rates Act, B.E. 2527 (1984), (No. 4), B.E. 2546 (2003), and the Emergency Decree Amending the Excise Tax Act, B.E. 2527 (1984), B.E. 2546 (2003), were enacted in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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1. Background and summarized facts

A group of 113 members of the House of Representatives had entered their signatures in submission of an opinion to the President of the House of Representatives that the Emergency Decree Amending the Excise Tax Rates Act, B.E. 2527 (1984), (No. 4), B.E. 2546 (2003), and the Emergency Decree Amending the Excise Tax Act, B.E. 2527 (1984), B.E. 2546 (2003), were not enacted in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The reasons in support of such opinion may be summarized as follows.

The decision of whether or not to enact laws for the State and the contents of such laws were the powers, duties and functions of the National Assembly. The power of the government to enact an Emergency Decree, which was enforceable as law, was therefore an exceptional rule, which section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), conferred authority only for the purpose of maintaining national economic security, etc. In addition, the enactment of the Emergency Decrees on excise tax for such purposes must be a case of a public crisis or an eminent public calamity to the extent that the Council of Ministers could not await the enactment of laws through the usual legislative procedure to remedy or avert such calamities. Nonetheless, a Council of Ministers' decision in respect of economic policies did not qualify as an act for "maintaining national economic security" per se. An examination of the essential substance and the reasons for enacting both Emergency Decrees had led to an opinion that they were discrepant

*Published in the Government Gazette, Vol. 121, Part 9a , dated 21st January B.E. 2547 (2004)

with the conditions for enacting an Emergency Decree. In other words, even if State revenues increased, there was no implication that the absence of such increases would be injurious to the national economy or adversely affect economic security such that the enactment of Emergency Decrees was necessary. In the meantime, the government had repeatedly affirmed that the country's public finances were secure and reported that it had been able to raise taxes beyond the set targets. If attention was drawn to the operations licensed under State concessions in respect of telecommunications, the amount of funds paid to the State remained unchanged despite the division of payments into two portions, namely one portion which was converted to excise tax while another portion remained as funds under a profit sharing agreement which were remitted to the State through a State agency responsible as the concession contracting party. Arguments relating to the liberalization of telecommunications were equally untenable because of the many years prescribed as time condition precedents for enforcement. The enactment of both Emergency Decrees were therefore inconsistent with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Moreover, in addition to the transgression of powers under the Constitution, the enactment of Emergency Decrees in this case was also inconsistent with the fundamental principles of a democratic government. It was contended that the Constitutional Court should rule that both Emergency Decrees were unenforceable *ab initio*.

The Constitutional Court gave opportunities to the applicant to submit supplemental applications and to the Council of Ministers to submit documents on the background of and reasons for the proposal of both Emergency Decrees as well as any relevant statements and opinions. The applicant did not submit any supplemental application. On the other hand, the Council of Ministers submitted a memorandum of statement and opinion of the Council of Ministers. In addition, the Constitutional Court allowed members of the House of Representatives who submitted the opinion and the Council of Ministers to send representatives to give statements. The Constitutional Court also heard opinions from experts in macroeconomics from the Economics Faculties of Thammasat University, Chulalongkorn University and University of the Thai Chamber of Commerce as part of its deliberations.

2. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not the Emergency Decree Amending the Excise Tax Rates Act, B.E. 2527 (1984), (No. 4), B.E. 2546 (2003), and the Emergency Decree Amending the Excise Tax Act, B.E. 2527 (1984), B.E. 2546 (2003), were enacted in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held the following opinion. Section 3 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), stated that the King should exercise powers through the National Assembly, the Council of Ministers and the Courts in accordance with the provisions of the Constitution. As the Constitution had provided for the enactment of Emergency Decrees in section 218, section 219 and section 220, which were provisions

under Chapter 7 Council of Ministers, such powers were therefore vested in the Council of Ministers to advise the King to enact an Emergency Decree that had the force of an Act subject to the conditions set forth in the Constitution. The Emergency Decree must thereafter be submitted to the National Assembly without delay. In respect of the enactment of an Emergency Decree under section 218 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the King would enact an Emergency Decree that had the force of an Act upon the advice of the Council of Ministers. Two conditions were prescribed for the enactment of an Emergency Decree by the Council of Ministers. Firstly, under section 218 paragraph one, the enactment must be made for the purpose of maintaining national or public safety or national economic security, or averting public calamity. Secondly, under section 218 paragraph two, the enactment could be made only when the Council of Ministers was of the opinion that the case was an emergency and an unavoidable necessary urgency. Once the Emergency Decree had been enacted, the Constitution provided for the scrutiny of the enactment of such Emergency Decree by the Constitutional Court and the National Assembly in order to balance the exercise of powers by the Council of Ministers. In this regard, the Constitution had provided two different rules and outcomes of the scrutiny, as mentioned below.

Regarding the scrutiny by the National Assembly, section 218 paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), stated that the Council of Ministers should, without delay, submit the Emergency Decree to the National Assembly for consideration of whether to approve or disapprove the Emergency Decree. If the National Assembly disapproved the Emergency Decree or approved the Emergency Decree but the Emergency Decree was disapproved by the Senate and subsequently affirmed by the votes of not more than one-half of the total number of existing members of the House of Representatives, the Emergency Decree would lapse. However, there would be no effect on acts done whilst the Emergency Decree was still in force.

As for scrutiny by the Constitutional Court, section 219 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), stated that members of the House of Representatives or senators of not less than one-fifth of the total number of the existing members of their respective Houses had the right to submit an opinion to the President of the House of which they were members that an Emergency Decree was not enacted in accordance with section 218 paragraph one. In the case where the Constitutional Court ruled that any Emergency Decree was not enacted in accordance with section 218 paragraph one, such Emergency Decree would not have the force of law *ab initio*. In this connection, the ruling of the Constitutional Court that an Emergency Decree was not enacted in accordance with section 218 paragraph one must be given by the votes of not less than two-thirds of the total number of Constitutional Court judges. A deduction could therefore be made that the Constitution did not intend to confer the Constitutional Court wide powers to scrutinize an Emergency Decree as in the case of the National Assembly. The Constitutional Court was not empowered to examine the constitutionality of an Emergency Decree under section 218 paragraph two which restricted the enactment of an Emergency Decree to cases where the Council of Ministers was of the opinion that there was an emergency and

an unavoidable necessary urgency. A ruling on this point had already been made by the Constitutional Court in Ruling No. 1/2541, dated 23rd May B.E. 2541 (1998).

The scrutiny of an Emergency Decree relating to the implementation of the Council of Minister's policies and the scrutiny of the appropriateness of the exercise of the Council of Minister's discretion in remedying economic problems by enacting an Emergency Decree to impose excise taxes on various enterprises, including telecommunication enterprises, were matters in respect of which the Council of Ministers was accountable to the National Assembly. The National Assembly would either approve or disapprove of the Emergency Decree pursuant to section 218 paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). As per section 182, which stated that "the House of Representatives and the Senate are, by virtue of this Constitution, vested with the power to control the administration of the State affairs", the Constitution had provided for several measures for controlling the administration of State affairs by the Council of Ministers. This was in accordance with the principles of checks and balances between the National Assembly and the Council of Ministers under the parliamentary democracy regime of government and in accordance with the principle of separation of exercise of sovereign powers under section 3 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Therefore, a Constitutional Court ruling on whether or not both Emergency Decrees were in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), was not an affirmation or otherwise the appropriateness of the implementation of policies by the Council of Ministers.

In determining whether or not the Emergency Decree Amending the Excise Tax Rates Act, B.E. 2527 (1984), (No. 4), B.E. 2546 (2003), and the Emergency Decree Amending the Excise Tax Act, B.E. 2527 (1984), B.E. 2546 (2003), were in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the Constitutional Court must rule whether or not both Emergency Decrees were enacted for the benefit of maintaining national economic security.

The Constitutional Court held on the facts that Thailand had suffered from a severe economic recession as a result of the monetary crisis in the year B.E. 2540 (1997). As a consequence, Thailand had to implement several measures in order to remedy the problems and revive the national economic security. Even though at present the Thai economy had already been revived, there were still no clear signs of security in the revival of the national economy. In other words, the government had to employ continuous measures to stimulate the economy in support of the economy in the year B.E. 2545 (2002). Several measures had been employed, such as the deficit budget. As the Thai economy still lacked security in its revival in all business sectors, and as there were several levels of economic security both in normal times and in times of crises, together with the fact that several measures could be employed for the benefit of maintaining economic security, it was the government's choice as to which measure it chose to employ.

After considering the essential substance of the Emergency Decree Amending the Excise Tax Rates Act, B.E. 2527 (1984) (No. 4), B.E. 2546 (2003), it appeared that the law

was essentially directed at the restructuring of certain aspects of excise taxes by consolidating tax collections from “services” into systemized categories, namely Part 9 entertainment and recreation businesses, Part 10 luck draw businesses, Part 11 businesses affecting the environment, Part 12 businesses licensed by or under concession from the state and Part 13 other services not included in part 9 to part 12 as prescribed by a Royal Decree.

As the economic conditions in Thailand still lacked security as mentioned above and the Emergency Decree Amending the Excise Tax Rates Act, B.E. 2527 (1984) (No. 4), B.E. 2546 (2003), contained provisions on the restructuring of excise taxes, being tools for the collection of excise taxes from certain types of service businesses, the effect was an increase in tax revenues of the State which enhanced the country’s administration budget in terms of volume and speed. This in turn played a part in reducing public finance deficits and enabled the government to more expediently achieve a balanced budget as well as reduce public debts. This was an important factor in investors’ confidence and a benefit for the movement of funds from foreign countries. The measure was also beneficial for the stability of the national economy. Thus, it could be deemed that the Emergency Decree Amending the Excise Tax Rates Act, B.E. 2527 (1984) (No. 4), B.E. 2546 (2003), was enacted for the purpose of maintaining the national economic security in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

Similarly, the Emergency Decree Amending the Excise Tax Act, B.E. 2527 (1984), B.E. 2546 (2003), which was a law necessary for amendments parallel to the Emergency Decree Amending the Excise Tax Rates Act, B.E. 2527 (1984) (No. 4), B.E. 2546 (2003), in relation to the definitions of “service” and “service premises”, was therefore an enactment for the purpose of maintaining national economic security.

By virtue of the reasons stated above, eight Constitutional Court judges held that the Emergency Decree Amending the Excise Tax Rates Act, B.E. 2527 (1984) (No. 4), B.E. 2546 (2003), and the Emergency Decree Amending the Excise Tax Act, B.E. 2527 (1984), B.E. 2546 (2003), were enacted in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

Six Constitutional Court judges, however, held that both Emergency Decrees had not been enacted for the purpose of maintaining the national economic security and were therefore not in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Under the principle of separation of exercise of sovereign powers, the enactment of laws was the exclusive power of the National Assembly. The enactment of an Emergency Decree by the Council of Ministers was an exercise of legislative powers in an exceptional case. The National Assembly could not alter the contents of an Emergency Decree as its action was limited to granting its approval or disapproval of the Emergency Decree. If the Council of Ministers was given an unfettered discretion in enacting Emergency Decrees, the checks and balances pertaining to the enactment of laws as between the Council of Ministers and the National Assembly would be impaired and discordant with the democratic regime of parliamentary government. In addition, the essential substance of both Emergency Decrees was the imposition of excise taxes on luxury

businesses which were not essential for the people's living, such as bathhouses or saunas and massage parlours, golf courses, nightclubs and racecourses. Few people were subject to such excise taxes and revenues arising thereof minimal. As for the telecommunications business licensed by or under concession from the State, even in the absence of the Emergency Decrees, the State was already generating revenue from the concession contracts. There was no subsequent increase in State revenues. Telecommunications businesses were also an essential public utility for the people, in respect of which the current Constitution had already prescribed specific procedures for their management. Moreover, the time schedule agreed with the World Trade Organisation stipulated that liberalisation of telecommunications businesses be effected in the year B.E. 2549 (2006). Therefore, in this case, enactment as an Act would allow the National Assembly to make a close examination of the matter as well as an opportunity for a hearing of the opinions of the wider public. After taking into consideration the essential substances and reasons for the enactment of both Emergency Decrees, the statement of the Council of Ministers, together with the economic conditions of the country according to the reports of various agencies such as the Bank of Thailand, the Fiscal Policy Office, the Ministry of Finance, the Office of the National Economic and Social Development Board and the National Economic and Social Advisory Council, as well as the statements of experts in macroeconomics from the Economics Faculties of various universities, it was held that the economic condition in Thailand at the time of the enactment of both Emergency Decrees was not in a state of an economic crisis and nor was there a necessity to quickly raise taxes to maintain the national economic security. Moreover, there were only seven days remaining to the opening of the National Assembly's ordinary session. The National Assembly could deliberate the enactment through its normal procedures. The requirement of enacting an Emergency Decree for the purpose of maintaining national economic security under section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), had therefore not been satisfied.

3. Ruling of the Constitutional Court

The Constitutional Court, by fourteen Constitutional Court judges, held votes in order to decide whether or not the Emergency Decree Amending the Excise Tax Rates Act, B.E. 2527 (1984) (No. 4), B.E. 2546 (2003), and the Emergency Decree Amending the Excise Tax Act, B.E. 2527 (1984), B.E. 2546 (2003), were enacted in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). In the result, six Constitutional Court judges held that both Emergency Decrees were not enacted in accordance with section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which was less than the requirement of two-thirds of the number of existing Constitutional Court judges under section 219 paragraph four of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Therefore, it was deemed that the two such Emergency Decrees had been enacted constitutionally pursuant to section 218 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
