

Summary of the Constitutional Court Ruling No. 32/2548

Dated 3rd March B.E. 2548 (2005)

Re: The Ombudsman requested for a Constitutional Court ruling under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), on whether or not section 3 of the Emergency Decree Amending the Excise Tax Rates Act B.E. 2527 (1984) (No. 4) B.E. 2546 (2003) with respect to Part 12 on Businesses Licensed or Granted Concessions by the State, Type 12.01 Telecommunications Business, was consistent with section 40 paragraph one and section 40 paragraph two in conjunction with section 335(2) and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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1. Background and summarized facts

Senator Chermesak Pinthong and others together with Miss Sairoong Thongplorn, a representative of the People's Organization Network, and others submitted a petition to the Ombudsman (applicant) 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), which prescribed new excise tax rates by extending excise taxes to telecommunication businesses at a rate of 50 percent of the value of services pursuant to its status as a business that had been licensed or granted a concession by the State, was inconsistent with the Constitution. It was therefore requested that the applicant refer the matter together with an opinion to the Constitutional Court for a ruling under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The applicant submitted an application together with an opinion, dated 24th September B.E. 2546 (2003), requesting for a Constitutional Court ruling 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 consistent with section 40 paragraph one and section 40 paragraph two in conjunction with section 335(2) and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

2. Preliminary issue

The preliminary issue considered was whether or not the Constitutional Court had the power to accept the Ombudsman's application and opinion for consideration under section

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198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court ruled that a preliminary consideration which had to be made was whether or not the issues in the application concerned provisions of law within the meaning in section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). It was held that the meaning of provisions of law under section 198 of the Constitution was practically identical to provisions of law under section 264 of the Constitution. On the latter, the Constitutional Court had already made numerous rulings that provisions of law meant laws enacted by the legislature pursuant to the procedures provided in the Constitution, i.e. Acts, Organic Acts and other laws enacted by the executive pursuant to procedures specified in the Constitution and whereby the Constitution provided that such law should have the same level and status as laws or Acts enacted by the National Assembly such as Emergency Decrees under section 218 and section 220 and Royal Decrees enacted under section 230 paragraph five. Therefore, such Emergency Decree was a provision of law under the definition in section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). In addition, upon a consideration of the contents of the application and the contents of the petition submitted to the applicant, it could be inferred that the applicant requested for a ruling on the constitutionality of section 3, Part 12 on service businesses licensed or granted a concession by the State, Type 12.01 Telecommunications Businesses, tax rate per value at 50%. Since the excise tax rate was provided in the Schedule to the Emergency Decree pursuant to section 3, it was deemed to be a part of the provisions having the effect of law. By virtue of the aforementioned reasons, the issue presented in the Ombudsman's application which was submitted together with an opinion was therefore within the powers of the Constitutional Court to accept for consideration under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

3. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 3 of the Emergency Decree Amending the Excise Tax Rates Act B.E. 2527 (1984) (No. 4) B.E. 2546 (2003) with respect to Part 12 on Businesses Licensed or Granted Concessions by the State, Type 12.01 Telecommunications Business, was consistent with section 40 paragraph one and section 40 paragraph two in conjunction with section 335(2) and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. Section 40 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), recognized the principle that frequencies used for radio, television and telecommunication transmissions were national resources for the benefit of the public. The establishment of a body for distributing frequencies and supervising radio, television and telecommunication businesses was specifically provided for subject to provisions of law. With respect to telecommunication businesses, the Organization for Frequency Distribution and Radio, Television and Telecommunication Businesses Supervision Act B.E. 2543 (2000) and the Telecommunication Businesses Act

B.E. 2544 (2001) were enacted. Those Acts stipulated the establishment of a National Telecommunications Commission (NTC) to perform the principal function of administering radio frequencies, licensing and supervision of frequency use, including the prescription of rules and procedures on licensing, conditions, commissions or licensing fees and the supervision of radio frequencies, specifically for telecommunication businesses so as to implement the intent of section 40 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

Section 335(2) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), recognized the guarantee of security in concession licenses and contracts. The licenses and contracts would remain enforceable so long as the law implementing section 40 of the Constitution was still in force or until the expiration of the concession license or contract.

Section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), was a provision which protected a person's liberty to engage in an enterprise or occupation as well as fair and free competition. Such liberties could not be restricted except only by virtue of provisions of law specifically enacted for purposes provided in section 50 paragraph two.

With regard to the collection excise taxes under the Emergency Decree amending the Excise Tax Rates Act B.E. 2527 (1984) (No. 4) B.E. 2546 (2003), upon a consideration of the legislative intent as evident in the endnote to the Emergency Decree together with the Prime Minister's statement, it was found that the government exercised powers to collect taxes under section 69 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which provided that a person had the duty to pay taxes. Excise tax in this case was levied under the government's tax policies that businesses under concession from the State or enjoying the benefits of a concession from the State should pay taxes for the enjoyment of benefits accruing from such concessions. There was also a necessity arising from the fact that State enterprises operating telecommunication businesses, i.e. the Telephone Organization of Thailand and the Communications Authority of Thailand, were being incorporated as public companies, depriving the State of revenues from shares in the profits of such State enterprises accrued from the grant of concessions to participating private entities under concession contracts. After the incorporation of these two State enterprises, most of the revenue would fall into the hands of the shareholders and no longer the State in the entire amount. With respect to the collection provisions which were stated in terms of excise taxes, it was deemed that telecommunication businesses were not essential to the subsistence of the people or had an effect on the environment. The government therefore applied excise tax measures, which was a tax collected on specific types of goods and services where there were sound reasons for imposing additional tax burdens on top of taxes on incomes or revenues, to supplement the collection of taxes from revenues generated from telecommunication businesses. It was thus apparent that the collection of excise taxes from telecommunication businesses only constituted a State policy on the collection of revenues for the purpose of reimbursing expenses arising from the provision of public services. The measure did not constitute a restraint on rights or liberties or a restriction of access to public benefits from national communications resources. To whatever extent the people enjoyed constitutional

rights and liberties recognized by the Constitution, those rights and liberties continued to be enjoyed as before. Hence, the people's rights to utilize national communications resources were not affected in any way.

Moreover, the exercise of State powers to levy excise taxes on the operation of telecommunication businesses under this Emergency Decree did not interfere with the exercise of powers by the NTC specifically provided in section 40 of the Constitution. This was because the levy of excise taxes under the Emergency Decree was not a condition or an essential factor in the prescription of a structure for fees and service charges of customers and service providers, and nor did it have the purpose of supervising telecommunication businesses. The NTC still retained all the powers and duties provided by the Constitution and the law, especially with respect to the powers to prescribe the proceeds or fees for licensing the use of frequencies and the operation of telecommunication businesses. Therefore, the levy of excise taxes under this Emergency Decree was an exercise of governmental powers pursuant to the provisions of tax law, and not an exercise of powers which overlapped or interfered with the powers of the NTC.

As for section 50, the Constitutional Court held that the provisions recognized that the liberty to engage in an occupation could not be restricted, but the prohibition against restriction was not absolute. The restriction of such liberty could be effected subject to the satisfaction of prerequisites stated in section 50 paragraph two. In this instance, the levy of excise taxes under the Emergency Decree was a measure for obtaining revenues for the State in order to maintain the country's fiscal and economic security by making collections from the earnings of telecommunication business operators. In addition, this measure eliminated unfair competition by levying excise taxes at a constant rate on all operators on an equal and fair basis.

4. Ruling of the Constitutional Court

The Constitutional Court, by a majority of Constitutional Court judges, held that section 3 of the Emergency Decree Amending the Excise Tax Rates Act B.E. 2527 (1984) (No. 4) B.E. 2546 (2003) with respect to Part 12 on Businesses Licensed or Granted Concessions by the State, Type 12.01 Telecommunications Business, was not unconstitutional because it was neither contrary to nor inconsistent with section 40 paragraph one, section 40 paragraph two in conjunction with section 335(2) and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
