

Summary of Constitutional Court Ruling* No. 51/2554 (2011)

Dated 28th December B.E. 2554 (2011)

Re: Whether or not section 34(2) of the Organic Act on State Audit B.E. 2542 (1999) was contrary to or inconsistent with section 309 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and section 36 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006).

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1. Summary of background and facts

The plaintiff (Ombudsman) filed an action against the defendant (Khun Ying Jaruvan Maintaka) in the Administrative Court of First Instance (Central Administrative Court) claiming that the defendant issued Order of the Office of the Auditor General No. 184/2553 Re: Annulment of the Order Appointing the Deputy Auditor General as the Authorised Person to Act for the Auditor General, dated 18th August B.E. 2553 (2010), after the defendant had attained the age of sixty-five years. The defendant was deemed to have retired from the position of Auditor General as of 5th July B.E. 2553 (2010). The defendant therefore did not have the power to issue such an order. The applicant therefore sought a judgment or order to revoke such Order of the Office of the Auditor General.

The defendant gave a reply that, at present, the defendant remained in the capacity of Auditor General under the Announcement of the Council for Democratic Reform No. 29, dated 30th September B.E. 2549 (2006). Article 3 paragraph two of such Announcement was deemed as an exception to section 34(2) of the Organic Act on State Audit B.E. 2542 (1999). Hence, the defendant's performance duties pursuant to such Announcement were therefore lawful and constitutional.

The intervenor (Mr. Pisit Leelavachiropas) submitted an intervention stating that the defendant's issue of Order of the Office of the Auditor General No. 184/2553 dated 18th August B.E. 2553 (2010) to annul the order appointing the Deputy Auditor General as the authorised official to act for the Auditor General caused unavoidable hardship on the intervenor who had a direct interest in the matter. The intervenor therefore sought a judgment or order to revoke such order as well as to order safeguard measures or procedures to temporarily alleviate the intervenor's hardship pending judgment.

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The Administrative Court of First Instance ordered a temporary stay of execution of Order of the Office of the Auditor General No. 184/2553 dated 18th August B.E. 2553 (2010) issued by the defendant. Subsequently, the Administrative Court of First Instance delivered a judgment that the defendant vacated the position of Auditor General upon the attainment of the age of sixty-five years pursuant to section 34(2) of the Organic Act on State Audit B.E. 2542 (1999). As a consequence, the order issued by the defendant after vacating office was regarded as an unauthorized issue of order by the defendant. In addition, the Administrative Court of First Instance extended the stay of execution of Order of the Office of the Auditor General No. 184/2553 dated 18th August B.E. 2553 (2010) to remain effective until otherwise ordered by the Supreme Administrative Court.

The defendant appealed against the judgment in the Supreme Administrative Court together with an objection which requested a referral to the Constitutional Court for a ruling under section 211 of the Constitution that article 2 and article 3 of the Announcement of the Council for Democratic Reform No. 29 dated 30th September B.E. 2549 (2006) stipulated the retirement of the Auditor General in only 2 events, i.e. to perform duties according to the stated limit of 30th September B.E. 2550 (2007) and to perform duties on a provisional basis until the establishment of a State Audit Commission and Auditor General. Thus, it was argued that the defendant should continue to provisionally perform the duties of the State Audit Commission and the Auditor General while those positions were not filled. The provisions on age or qualifications of the Auditor General under any section of the Organic Act on State Audit B.E. 2542 (1999) did not apply. As a consequence, the Administrative Court of First Instance's application of provisions of law to rule that the defendant vacated the position of Auditor General upon the attainment of the age of sixty-five years pursuant to section 34(2) of the Organic Act on State Audit B.E. 2542 (1999) was therefore contrary to or inconsistent with section 309 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) in conjunction with section 36 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) and the Announcements of the Council for Democratic Reform No. 12 dated 20th September B.E. 2549 (2006) and No. 29 dated 30th September B.E. 2549 (2006).

The Supreme Administrative Court found that there was a question on whether or not section 34(2) of the Organic Act on State Audit B.E. 2542 (1999) was contrary to or inconsistent with section 309 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and section 36 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006), and that there had not yet been a ruling of the Constitutional Court in relation to such provisions. The Supreme Administrative Court therefore referred the objection to the Constitutional Court for a ruling.

2. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 34(2) of the Organic Act on State Audit B.E. 2542 (1999) was contrary to or inconsistent with

section 309 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and section 36 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006).

The Constitutional Court, after consideration, found as follows. The Announcement of the Council for Democratic Reform No. 12 dated 20th September B.E. 2549 (2006) and Announcement of the Council for Democratic Reform No. 29 dated 30th September B.E. 2549 (2006) provided that the Organic Act on State Audit B.E. 2542 (1999) should remain in force, except for the provisions in Part 1 Chapter 1, until an amending or repealing law was enacted, and that the Auditor General who was in office on the 18th September B.E. 2549 (2006) should remain in office until 30th September B.E. 2550 (2007). Procedures should be undertaken to select and appoint a new State Audit Commission and Auditor General under the Organic Act on State Audit B.E. 2542 (1999) within ninety days. While there is no State Audit Commission and Auditor General, the retiring Auditor General should continue to perform the duties of the State Audit Commission and Auditor General on a provisional basis.

Subsequently, section 36 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006), a transitory provision, provided another level for the lawful and constitutional continuance of the Announcement of the Council for Democratic Reform. In addition, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided a transitory provision in section 309 which continued its constitutional application under the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Section 302 paragraph one (3) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) also provided for the Organic Act on State Audit B.E. 2542 (1999) to remain in force.

It is conceivable that both Announcements of the Council for Democratic Reform and the Organic Act on State Audit B.E. 2542 (1999) all remained in force to the extent that they are not mutually contrary or inconsistent. In other words, any matter which was provided under the Announcement of the Council for Democratic Reform would provisionally apply accordingly in order to ensure the continuity of national administration and scrutiny of the exercise of state powers. Section 34(2) of the Organic Act on State Audit B.E. 2542 (1999), on the other hand, provided that in addition to the vacation of office pursuant to section 33, the Auditor General vacated office upon the attainment of sixty-five years of age.

Upon examination of section 309 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and section 36 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) in conjunction with section 34(2) of the Organic Act on State Audit B.E. 2542 (1999), the Constitutional Court found that such provisions of the Constitution and law intended to apply on different occasions. Thus, section 34(2) of the Organic Act on State Audit B.E. 2542 (1999) was neither contrary to nor inconsistent with section 309 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and section 36 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006).

3. Ruling of the Constitutional Court

The Constitutional Court held that section 34(2) of the Organic Act on State Audit B.E. 2542 (1999) was neither contrary to nor inconsistent with section 309 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and section 36 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006).
