REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
MANILA

PHILIP MORRIS PHILIPPINES MANUFACTURING, INC.,
Petitioner,

– **versus -**

CA-G.R. SP NO. 109493

THE DEPARTMENT OF HEALTH, rep. by Sec. FRANCISCO T. DUQUE, III, ET AL.,
Respondents.

X----------X

NOTICE OF RESOLUTION

SIR:

Please take notice that on **August 3, 2012**, a **RESOLUTION,** copy attached, was rendered by the **FORMER SPECIAL ELEVENTH** Division of the Court of Appeals in the above entitled case, the original of which is now on file with this Court.

You are hereby required to inform this Court, within five (5) days from receipt hereof, the date when you received this notice together with copy of the **resolution.**

Very truly yours,

DONNA LARA B. OROPESA
Division Clerk of Court

Copy furnished:

ROMULO MABANTA BUENAVENTURA SAYOC & DE LOS ANGELES - reg.
(Counsel for Petitioner)
21st Floor, Philamlife Tower, 8767 Paso de Roxas, Makati City

THE BUREAU OF FOOD AND DRUGS - reg.
Rep. by DR. LETICIA BARBARA B. GUTIERREZ
Civic Drive, Filinvest Corporate City, Alabang, Muntinlupa City

HONORABLE SECRETARY - reg.
Department of Health
San Lazaro Compound, Sta. Cruz, Manila

OFFICE OF THE SOLICITOR GENERAL - reg. w/card
134 Amorsolo St., Legaspi Village, Makati City

ATTY. CECILIO DELA CRUZ - reg.
(Counsel for Fortune Tobacco Corp.)
7/F, Allied Bank Bldg., 6754 Ayala Ave., Makati City

Republic of the Philippines

COURT OF APPEALS

Manila

FORMER
SPECIAL ELEVENTH DIVISION

* * * * *

PHILIP MORRIS PHILIPPINES MANUFACTURING, INC,
Petitioner,

-versus-

THE DEPARTMENT OF HEALTH, represented by Secretary Francisco T. Duque, III and THE BUREAU OF FOOD AND DRUGS, represented by Director Leticia Barbara B. Gutierrez,
Respondents.

CA-G.R. SP No. 109493

Members:

TIJAM, *Chairperson*
GONZALES-SISON, M., *and*
LANTION, J. A. C., *JJ.:

Promulgated:

AUG 0 3 2012

x----------x

RESOLUTION

TIJAM, *J.*:

On August 26, 2011, this Court promulgated a *Decision*[1] disposing as follows:

> **"WHEREFORE,** the petition is ***GRANTED***. The assailed Consolidated Decision, dated April 30, 2009, of the public respondent DOH is hereby ***NULLIFIED and SET ASIDE.***
>
> **SO ORDERED."**

---

*vice *J. Dimagiba,* on leave, per Office Order No. 237-11-ABR, dated August 12, 2011.
[1]Rollo, pp. 882-902.

Unconvinced, the Office of the Solicitor General (OSG) filed, for respondents Department of Health (DOH) and Bureau of Food and Drugs (BFAD), a *Motion for Reconsideration*[2] arguing that:

"I
THIS HONORABLE COURT ERRED IN GRANTING FORTUNE TOBACCO CORPORATION (FTC)'S MOTION FOR INTERVENTION WITH
ATTACHED PETITION-IN-INTERVENTION.

II
THIS HONORABLE COURT ERRED IN APPLYING THE STANDARD OF GRAVE ABUSE OF DISCRETION.

III
THIS HONORABLE COURT EXCEEDED IT'S JURISDICTION WHEN IT MADE A FINDING ON THE ALLEGED ABSOLUTE PROHIBITIONS BY THE DOH ON ADVERTISING, PROMOTION, AND SPONSORSHIP OF TOBACCO PRODUCTS.

IV
THE DOH RIGHTLY DENIED PETITIONERS PHILIP MORRIS PHILIPPINES MANUFACTURING, INC. (PMPI)'S APPLICATIONS FOR PROMOTIONAL ACTIVITIES

V
THE ADVERTISING, PROMOTION AND SPONSORSHIP ACTIVITIES OF TOBACCO PRODUCTS ARE BANNED UNDER THE LAW.

VI
IT IS NOT THE IAC-T, BUT THE DOH, THROUGH THE BFAD (NOW, FDA), WHICH IS THE AGENCY RESPONSIBLE FOR THE REGULATION OF PROMOTIONAL ACTIVITIES FOR TOBACCO PRODUCTS

[2]Rollo, pp. 928-952.

VII

EVEN ASSUMING, FOR THE SAKE OF ARGUMENT, THAT IT IS THE IAC-T WHICH IS NOW THE AGENCY WITH THE AUTHORITY TO ISSUE PERMITS FOR THE PROMOTIONAL ACTIVITIES OF TOBACCO PRODUCTS, THE IAC-T ITSELF HAS DESIGNATED THE DOH AS THE PILOT AGENCY IN CHARGE."

In due course, petitioner *Philip Morris Philippines Manufacturing, Inc.* filed its Comment on the instant motion contending that: ***1)*** the Tobacco Regulation Act (TRA) of 2003 allows Tobacco Promotion, a distinct and separate activity from Tobacco Sponsorship which latter activity is already an absolutely prohibited activity after July 1, 2008; ***2)*** Tobacco Advertising is not altogether prohibited even after July 1, 2008 so long as it is placed inside the premises of point-of-sale retail establishments. And even assuming that advertising activities are absolutely banned under the TRA, the same cannot extend to tobacco promotional activities because promotion is not inherent in advertising contrary to respondents' postulation. Accordingly, the TRA treats and classifies advertisement and promotions differently as evidenced by the different definitions given to these acts by the law and by the different provisions under the TRA that either regulate or prohibit them; ***3)*** the Tobacco Promotions are allowed under the TRA although the manner by which said promotion may be conducted is concededly subject to restrictions; ***4)*** the Framework Convention on Tobacco Control (FCTC) is not self-executing and cannot be the direct legal basis for the respondents to justify the supposed ban on Tobacco Promotions when Our own law says otherwise; and ***5)*** the IAC-T has the exclusive jurisdiction over the regulation of Tobacco products as clearly mandated by the TRA.

After taking a second hard look at respondents' arguments, We are convinced that, still, no valid reason exists to warrant the reversal of Our questioned Decision.

Notwithstanding the extent by which respondents have articulated on its arguments again in the instant motion, there is actually no new matter raised that could compel this Court to change its previous ruling. Respondents practically anchor their claims on the same arguments and defenses which have already been squarely addressed and ruled upon in the questioned decision.

At any rate, if only for clarity and more emphasis, We deem it prudent to address respondents' main predicaments.

We are not unaware of the fact that FTC's sought intervention might truly be construed as a substitute for its lost remedy of certiorari. For, indeed, unlike herein Petitioner PMPMI, FTC did not pursue a remedy before Us to question the denial of its own promotional application with herein respondents. Hence, We acknowledged in Our assailed Decision that FTC should not, as a general rule, be allowed to avail of intervention for that would otherwise amount to sanctioning its failure to question, or inaction over, an adverse decision, which PMPMI has been overly zealous to question. Nonetheless, inasmuch as We took into account the fact that the ultimate issue that hinged in this case dwells on an interpretation of a law that affects the Tobacco industry in general and also the fact that since respondents denied petitioner's application for permit along with all similar applications for promotional permits filed by other tobacco companies, the issue then is, ***technically,*** not personal to petitioner PMPMI but to the entire tobacco industry as well. It was on this score that We admit FTC's motion for intervention.

Another issue raised by Respondents in the instant motion is that We allegedly exceeded Our jurisdiction as We made a ruling on the DOH's supposed unlawful absolute prohibitions on advertising, promotions and sponsorships of tobacco products. Respondents

argued that since the petition before Us was merely one for certiorari anent the respondent DOH's Consolidated Decision on the pending petitions for review, appeals and/or motions for reconsiderations before it, they maintained that We were supposed to rule only on the particular action of issuing the said Consolidated Decision and nothing else.

Obviously, Respondents have missed the point. In passing upon the issue on whether or not grave abuse of discretion amounting to lack or excess of jurisdiction has attended the issuance of the assailed Consolidated Decision, We necessarily had to determine the legal basis upon which said Decision was made. In so doing, We found that the respondent DOH held on to the unlawful view that promotions, advertisings and sponsorships of tobacco products are fully prohibited without any distinction. To date, respondent DOH stood firm on such an erroneous ground. This is despite the fact that the law is clear in distinguishing promotions from advertising and sponsorship. Consequently, We stand by Our ruling that respondent DOH gravely abused its discretion amounting to lack or excess in jurisdiction in not only holding a contrary view but, more so, in exercising a *carte blanche* authority to deny all promotional permit applications by all other tobacco companies, all without any legal basis. That the respondent DOH had departed from the expressed provisions of the law, despite them being clear and unequivocal, not only translated said act into an error in judgment but actually to a grave abuse of discretion amounting to lack or excess in jurisdiction. Without a doubt, only by the issuance of a writ of certiorari could respondent DOH's blanket denial of promotional applications be corrected.

In a belated attempt to justify its denial of PMPMI's promotional permits both for its *Golden Stick* and *Gear-Up* promotional activities, respondent *DOH* now contends that said applications were denied as they did not contain any clearly-marked age prerequisite for

participation. Interestingly, this is the first time that respondents brought up this issue.

The same must fail though. It is an elementary rule that no new issue or evidence shall be allowed to be raised for the first time on appeal, much less on a motion for reconsideration of the decision of the appellate court.[3] Besides, We scoured the records anew and actually found no basis for respondents' belated assertion.

Moreover, We do not depart from Our previous ruling that it is the IAC-Tobacco that has exclusive authority to administer and implement the provisions of *R.A. No. 9211*. On this point, neither respondents DOH nor BFAD, by itself, can rule whether or not a tobacco promotional applicant is compliant with the law. It serves no more legal purpose, therefore, to address respondents' contrary arguments on this issue.

We agree with petitioner in contending that the Framework Convention on Tobacco Control (FCTC) is not self-executing and cannot be the direct legal basis for the respondents to justify its mistaken stance that Tobacco Promotions are now fully prohibited. For indeed, although the *World Health Organization Framework Convention on Tobacco Control* aims at total elimination of tobacco products and related activities, it provides only for a ***gradual elimination*** of tobacco due to health concerns and takes into account the "**legal environment and technical means available**" to the signatory-Country.

Until such time when there is already a new law *totally* eliminating all forms of tobacco use and tobacco-related activities, this Court has no other recourse but to act only in accordance with the prevailing *R.A. No. 9211*.

---

[3] *Landoil Resources Corp. vs. Al Rabiah Lighting Co.*, G.R. No. 174720, September 7, 2011.

WHEREFORE, the motion for reconsideration is **DENIED**.

SO ORDERED.

ORIGINAL SIGNED
NOEL G. TIJAM
Associate Justice

WE CONCUR:

ORIGINAL SIGNED
MARLENE GONZALES-SISON
Associate Justice

ORIGINAL SIGNED
JANE AURORA C. LANTION
Associate Justice

CERTIFIED TRUE COPY

ATTY. DONNA LARA B. OROPESA
DIVISION CLERK OF COURT
COURT OF APPEALS