

Interpretation

No.794 【 Case on Restrictions over Tobacco Industry Sponsorship Under the Corporate Name】

Date

2020/08/28

Issue

Do Article 2, Subparagraphs 4 and 5, and Article 9, Subparagraph 8 of the Tobacco Hazards Prevention Act contravene the principle of clarity and definiteness of law?

Does Article 9, Subparagraph 8 of the same Act, which restricts the tobacco industry from sponsoring any activities under the corporate name, violate the freedom of speech under the Constitution?

Does Article 9, Subparagraph 8 of the same Act, which restricts the tobacco industry from sponsoring any activities under the corporate name, violate the right to equal protection under the Constitution?

Does the Health Promotion Administration, Ministry of Health and Welfare Letter Kuo-Chien-Yen No.1029911263 of October 11, 2013, Point 2, violate the Gesetzesvorbehalt principle, the principle of prohibition of retroactive law, the principle of reliance protection, or the principle of proportionality?

Holding

Article 2, Subparagraphs 4 and 5, and Article 9, Subparagraph 8 of the Tobacco Hazards Prevention Act do not contravene the principle of clarity and definiteness of law. 1

Article 9, Subparagraph 8 of the same Act does not contravene freedom of speech and the right to equal protection under the Constitution. 2

The Health Promotion Administration, Ministry of Health and Welfare Letter Kuo-Chien-Yen No.1029911263 of October 11, 2013, Point 2, does not violate the Gesetzesvorbehalt principle, the principle of prohibition of retroactive law, the principle of reliance protection, or the principle of 3

proportionality.

Reasoning

The Petitioner Japan Tobacco, Inc. sponsored Hondao Senior Citizen's Welfare Foundation to implement a project titled "Ageless Dream Fulfillment Train" (hereinafter referred to as "the Disputed Project"). Due to someone reported that the execution of the Disputed Project was suspectable of violating the Tobacco Hazards Prevention Act, the Health Promotion Administration of the Ministry of Health and Welfare (the then-Health Promotion Administrative Agency of the Health and Welfare Administration, Executive Yuan before the government reorganization, hereinafter referred to as "the Health Promotion Administration") transferred abovementioned petition documents to the Department of Health, Taipei City Government for investigation and disposition. After investigation, the Department of Health, Taipei City Government found that the Petitioner sponsored the Disputed Project by donating funds and providing volunteer services from the period June 2011 to June 2013, and publicized the information of the Petitioner's sponsorship in the media, all of which help promote corporate image, increase the public's preference to and the sense of recognition with the product, and therefore improve the public's willingness to purchase. The Petitioner's sponsorship of the Disputed Project had directly or indirectly resulted in tobacco promotion or enhancement of smoking's image and, therefore, violated Article 9, Subparagraph 8 of the Tobacco Hazards Prevention Act. According to Article 26, Paragraph 1 of the same Act, the Department of Health, Taipei City Government issued the Taipei City Government Decision Letter Wei-Jian No. 10331052600600 of March 17, 2014, which imposed a fine of 5 million NTDs on the Petitioner. Disagreeing with the abovementioned administrative decision, the Petitioner sought an administrative appeal, which was later rejected. The Petitioner further filed an administrative litigation, but the case was later dismissed by the Taipei Administrative High Court Judgement 103-Su-1232 (2015) and the Supreme Administrative Court Judgement 104-Pan-576 (2015) (hereinafter referred to as "the Final Judgment") and was finalized.

The Petitioner believed the laws applied by the Final Judgement, including Article 2, Subparagraph 4 (hereinafter referred to as "the Disputed Provision I"), Subparagraph 5 (hereinafter referred to as "the Disputed

Provision II”), Article 9, Subparagraph 8 (hereinafter referred to as “the Disputed Provision III”), and the Health Promotion Administration, Ministry of Health and Welfare Letter Kuo-Chien-Yen No.1029911263 of October 11, 2013 (hereinafter referred to as “the Disputed Letter”), restrict the tobacco industry to disclose its corporate name when sponsoring charitable activities, and hence are susceptible of violating the principle of clarity and definiteness of law as well as violating people's right to freedom of speech and right to equal protection under the Constitution. The Petitioner also contended that Point 2 of the Disputed Letter possibly violates the Gesetzesvorbehalt principle, the principle of prohibition of retroactive law, the principle of reliance protection, and the principle of proportionality. The Petitioner filed a motion to this Court for constitutional interpretation. Considering the Petitioner's motion fulfills the criterion stipulated in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act, this Court admits this motion and delivers this interpretation with the following reasons:

1. Disputed Provisions I and III Do Not Contravene the Principle of Clarity and Definiteness of Law

The requirement of the principle of clarity and definiteness of law is not solely meant to be that all legal terms must be definite and exhaustive. When legislators make the laws, they may adequately employ indefinite concepts of law or general clauses to address the complexity of social activities governed by the law and the appropriateness of the law's application in specific cases. According to previous interpretations of the Court, The principle of clarity and definiteness of the law is not violated if: the meanings of abstract clauses are understandable when viewed from the perspectives of the text of the law, legislative purposes, and the overall coherence of the legal system; it is foreseeable for regulated persons to predict whether specific facts fall within the scope of the law intended to regulate; and such matters can be adjudicated and scrutinized by the judiciary (see J.Y. Interpretation Nos. 432, 594, 768, and 793).

Article 2 of the Tobacco Hazards Prevention Act defines essential terms of this Act. The Disputed Provision I provides: “(4) “Tobacco advertisement” refers to any forms of commercial promotion, marketing, suggestion or action, whose direct or indirect purposes or effects are to market or to promote the use of tobacco products to unspecified consumers.” The said “commercial” is a common term used in our legal system (e.g., the Commercial Group Act, the

Commercial Registration Act, the Commercial Entity Accounting Act, etc.). In addition to taking a systematic interpretation approach by referring to other relevant laws, it is essential to understand the term comprehensively within the context of other provisions in Disputed Provision I and not interpret them separately. Concerning "direct or indirect purposes or effects," the aim is to prevent tobacco industries (including tobacco manufacturers, importers, retailers, ditto) from advertising under the guise of sponsorship. However, the interpretation relies upon the competent authority to adjudicate case-by-case; it is not much different from other terms in the law. Legal terms usually adopt natural language rather than precisely defined words, numbers, or signals; even if the interpretation allows case-by-case discretion, it does not necessarily lead to unclearness and indefiniteness. The said "commercial" promotion, marketing, suggestion, or action in Disputed Provision I should refer to tobacco "advertisement" or other tobacco promotion activities, i.e., economic activities which have directly or indirectly marketing or promotion effects for earning proprietary benefits of tobacco merchandise. These economic activities take earning economic benefits as the direct purpose; nevertheless, the legislator intends to prohibit tobacco industries from using atypical advertisement methods to reach similar promotion effects with tobacco advertisements indirectly, and therefore, the Disputed Provision I explicitly stipulates those "whose directly or indirectly purposes or effects are to sell or to promote use of tobacco products to general consumers" are all regarded as tobacco advertisements. The regulated persons should understand that the said "commercial" promotion activities in the Disputed Provision I refer to respective activities earning economic benefits.

The Disputed Provision II provides: “ (5) “Tobacco sponsorship” refers to any form of donation to any events, activities or persons, whose direct or indirect purposes or effects are to market or to promote the use of tobacco products to unspecified consumers.” The said tobacco "sponsorship" generally refers to "any forms of donation to any events, activities or persons" that involves sponsoring tobacco. The regulated scope is thus clear and definite.

The Disputed Provision III provides: “ Tobacco marketing or tobacco advertisement cannot be taken place in following methods: (8) using tea parties, dining parties, orientation conferences, tasting events, concerts, lectures, sports events, charity events, or other similar methods to promote.” The said terms of “marketing,” “advertisement,” “promotion” have appeared in

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the Disputed Provisions I and II and should be interpreted similarly with those terms in those disputed provisions.

To sum up, the “tobacco advertisement” defined in the Disputed Provision I, the “tobacco sponsorship” defined in the Disputed Provision II, and the text stipulated in the Disputed Provision III are all understandable for those governed by the law and not challenging to comprehend. It is also foreseeable for regulated persons to predict whether the facts of a specific case fall within the scope of the abovementioned provision. The relevant matters can also be adjudicated and scrutinized by the judiciary. The disputed provisions do not contravene the principle of clarity and definiteness of law. 8

2. The Disputed Provision III Does Violate the Freedom of Speech Under the Constitution 9

2.1 Involved Rights and Review Scrutiny 10

Article 11 of the Constitution guarantees people’s right to freedom of speech to ensure the free flow of opinions and provide people with opportunities to acquire sufficient information and attain self-fulfillment. The protected speech may be political, academic, religious, or commercial, and the scope of protection and restriction may differ according to their nature. Despite its nature with opinion expression, commercial speech is irrelevant to the formation of public opinion, truth-finding, or expression of beliefs. It does not enjoy the high degree of protection equivalent to other categories of speech. The legislator can impose stricter restrictions on commercial speech. In the case of product advertisement, if the information contained therein is not false and misleading, and if its purpose serves for lawful transactions and may help the general consuming public to make economically sound decisions, it should then be subject to the protection of freedom of speech under Article 11 of the Constitution. To provide consumers with truthful and complete information, to prevent the content of product advertisements or labeling from causing misleading effects, or to advance other important public interests that protect consumers to acquire truthful and complete information (such as protecting the health of people), the state may adopt legislative measures which are substantially related to abovementioned objectives to regulate commercial advertisement (see J.Y. Interpretation Nos. 414, 577 and 744). 11

2.2 The Disputed Provision III Restrains the Tobacco Industry’s Freedom of Speech 12

The Disputed Provision III explicitly prohibits any persons (including tobacco industries) from marketing or advertising tobacco products through tea parties, dining parties, orientation conferences, tasting events, concerts, lectures, sports events, charity events, or other similar promotion methods. This provision has resulted in restraints on the tobacco industry's freedom to express commercial speech. 13

Before the amendment of Article 9 of the Tobacco Hazards Prevention Act on July 11, 2007, Paragraph 1, Subparagraphs 7 and 8 of the old Article 9 provided: "Promotion or advertisement of tobacco products should not employ the following methods: (7) Sponsoring or holding sports, arts, or other activities under the brand names of tobacco products. (8) Holding or sponsoring tasting events, concerts, lectures under the brand names of tobacco products...." Paragraph 3 of the same article provided: "Manufacturers, importers or retailers of tobacco products may sponsor or hold any activities under their corporate names. However, tasting, selling or promoting tobacco products is not allowed in the event venues." According to the above clauses, sponsoring or holding any activities by the brand names of tobacco products was always prohibited, regardless of whether it directly involved tobacco products. Nevertheless, the tobacco industry can still sponsor or hold activities under their corporate names (but not under tobacco product brand names) as long as they do not involve tasting, selling, or promoting tobacco products as specified in the proviso. The abovementioned old provisions were deleted or combined by the amendment on July 11, 2007, and the amended law no longer distinguishes "sponsorship under tobacco product brand names" from "sponsorship under tobacco corporate names." The legislative rationale provided: "... (12) Paragraph 3 of this article is deleted to prohibit current practices that corporate industries sponsor activities under corporate names to advertise tobacco products indirectly. Regulations over related activities should refer to each subparagraph of Paragraph 1 of this article, which prohibits specific methods of promoting or advertising tobacco products." (see the Legislative Yuan Gazette 95(2): 180-183). Based on the abovementioned legislative rationale, if any tobacco industry sponsors an activity under its corporate name, the legality of this action should be referred to in each paragraph of Article 9 of the Tobacco Hazards Prevention Act. The competent authority should decide case-by-case whether each sponsorship involves any prohibited methods of promotion or advertising of tobacco 14

products stipulated in each paragraph of Article 9. It cannot be said that the Disputed Provision III has prohibited tobacco industries from sponsoring any forms of activities under their corporate names.

2.3 The Disputed Provision III Does Not Violate the Purpose of Constitutional Protection of Freedom of Speech 15

Article 1, First Part of the Tobacco Hazards Prevention Act stipulates: 16
“This Act is enacted to prevent and control tobacco hazards to protect the health of people.” The purposes of the Disputed Provision III restraining advertising or promoting tobacco products are to reduce the use of tobacco products, to prevent tobacco hazards and, to protect the health of people. The purposes pursue important public interests and are constitutional. Additionally, suppose the competent authority considers that the purpose or the effect of the tobacco industry's sponsorship under its corporate name is meant to directly or indirectly market or promote the use of tobacco products towards general consumers in a specific case. In that case, this action is prohibited by the Disputed Provision III. The primary regulatory rationale is to ban the tobacco industry from advertising or promoting tobacco products under the disguise of sponsorship, which may also cause adverse effects, ruining the policy of de-normalization of tobacco products and bringing impact to the tobacco hazard prevention policy. Based on the above reasons, the Disputed Provision III is constitutional, given that its measures of restraints are substantially related to the abovementioned legislative purposes. The Disputed Provision III does not violate the purpose of constitutional protection of freedom of speech.

3. The Disputed Provision III Does Not Violate the Right to Equal Protection Under the Constitution 17

Article 7 of the Constitution guarantees people's right to equal protection 18
but does not necessarily prohibit all the different treatments by the state. Whether different treatments stipulated by the law comply with the principle of equality should hinge on whether the purpose of the differential treatment is justifiable and whether there is a certain degree of relation between the classifications created and the objective of the law (see J.Y. Interpretation Nos 682, 722, 745, 750 and 791). If the law is based on classifications such as race, gender, or sexual orientation, such classifications usually involve immutable personal characteristics, groups who have been excluded or

discriminated against de facto or de jure, or insular and isolated groups who are politically vulnerable. Hence, this Court should apply a more rigorous level of scrutiny, using strict or higher standards of review, to determine the constitutionality of such classifications (see J.Y. Interpretation No. 748). On the other hand, this Court could apply a lower standard of review if the classifications taken by the law do not adopt the abovementioned distinctions and the different treatments do not involve essential fundamental rights such as the development of personality and human dignity. The statutory classification would be in coherence with Article 7 of the Constitution as long as the legislative purpose is to pursue legitimate public interests and the classification is reasonably related to achieving the purpose.

The purpose of the Disputed Provision III is to prevent and control tobacco hazards to protect the health of people. Such purpose pursues public interests that are not only legitimate but also important. Concerning the Disputed Provision III's abovementioned restrictions over tobacco industries, a heightened standard of review should not be applied, even if the provision is based on the speaker's identity classifications. Furthermore, various types of food, tobacco products, and alcohols have different impacts on human health, making it difficult to establish a basis for comparison (see J.Y. Interpretation No. 577). Even taking account of the Petitioner's contention, that is, to compare products harming individual health, such as tobacco products, alcohols, and betel nuts, it is clear that tobacco products not only damage the health of the smokers themselves but also cause harm to others through secondhand smoke. Using tobacco products can even negatively impact the health of fetuses in pregnant women. The harms caused are distinct from those possibly caused by betel nuts and alcohols. Therefore, the classifications based on the identity of the tobacco industry adopted by the Disputed Provision III are reasonably related to the purpose of pursuing the health of people. 19

To conclude, the Disputed Provision III pursues a legitimate purpose, and its classification is reasonably related to the purpose. The Disputed Provision III does not violate the purpose of the right to equal protection protected by Article 7 of the Constitution. 20

4. The Disputed Letter, Point 2, Does Not Violate the Gesetzesvorbehalt principle, the principle of prohibition of retroactive law, the principle of reliance protection, or the principle of proportionality. 21

The Disputed Letter, Point 2, provides: “....(2) Article 9, Paragraph 3 of the Tobacco Hazards Prevention Act before the amendment on January 11, 2009, stipulated: “Manufacturers, importers or retailers of tobacco products may sponsor or hold any activities under their corporate names. However, tasting, selling or promoting tobacco products is not allowed in the event venues.” The rationale for deleting this clause is to prohibit the practices that corporate industries sponsor activities under corporate names to advertise tobacco products indirectly. Regulations over related activities should refer to each subparagraph of Article 9, which prohibits specific methods of promoting or advertising tobacco products.” Meanwhile, the newly-added Article 2, Subparagraph 5 of the Tobacco Hazards Prevention Act stipulates: “Tobacco sponsorship refers to any form of donation to any events, activities or persons, whose direct or indirect purposes or effects are to market or to promote the use of tobacco products to general consumers.” Hence, the legality of tobacco sponsorship should refer to each subparagraph of Article 9, which prohibits specific methods of promoting or advertising tobacco products. In other words, the sponsorship is susceptible to violating Article 9 if the sponsorship has caused direct or indirect effects of marketing promoting the image of smoking.” The above content is based on the competent authority's statutory jurisdiction to elucidate the meaning of the Disputed Provision III and to explain the legislative rationale for deletion of Article 9, Paragraph 3 of the 2007 amendment, that is, “to prohibit current practices that corporate industries sponsors activities under corporate names to advertise tobacco products indirectly.” As mentioned above, the Disputed Provision III has restrained tobacco industries from sponsoring any activities involving tobacco advertisement or promotion to prevent marketing or promotion effects of tobacco products to general consumers. The Disputed Letter, Point 2 only reiterates the Disputed Provision III's meaning and the scope of application, which is coherent with the regulatory intent of the Disputed Provision III. Neither does it increase restraints beyond what the law requires. Therefore, the Disputed Letter, Point 2, does not contravene Article 23 of the Constitution. 22

The Petitioner contended that the Disputed Letter, Point 2, retroactively applies to concluded facts and deviates from previous standard practices, which violates the principle of prohibition of retroactive law and the principle of reliance protection. If the newly-enacted regulation involves restraining or depriving individual rights, or imposing additional legal obligations, in principle, 23

the regulation should not be applied to concluded facts or legal relationships before the regulation comes into effect (see J.Y. Interpretation Nos. 620, 717, 781, 782 and 783). The Disputed Letter, Point 2, is meant to clarify the scope of the Disputed Provision III, which is already been effective and does not create effects detrimental to the people beyond the law. It does not violate the principle of prohibition of retroactive law or the principle of reliance protection.

The Petitioner also asserted that the Disputed Letter, Point 2, violates the principle of proportionality. However, since the part of Disputed Provision III concerning restraining tobacco industry sponsorship does not contravene the freedom of speech protected by the Constitution, and the Disputed Letter, Point 2 creates restrictions beyond the law, the Disputed Letter, Point 2 does not violate the principle of proportionality. 24

To conclude, the Disputed Letter, Point 2 does not violate the the Gesetzesvorbehalt principle, the principle of prohibition of retroactive law, the principle of reliance protection, or the principle of proportionality. 25

As for the Petitioner's contention on the Disputed Letter violating the principle of statutory jurisdiction, since the Tobacco Hazards Prevention Act has already delegated the authority to both the central and the local competent authorities, the central competent authority has the power to issue explanatory rules to assist lower authorities to interpret the law and to determine the fact uniformly. As a result, the Court states that the Disputed Letter, Point 2, does not violate the principle of statutory jurisdiction. 26

5. The Dismissed Part 27

Regarding Petitioner's claims on the unconstitutionality of Article 26, Paragraph 1 of the Tobacco Hazards Prevention Act, this Court finds the Petitioner not concretely specify why the provision objectively contravene the Constitution. As for the Petitioner's claims on the WHO Framework Convention on Tobacco Control (FCTC)'s suspects of unconstitutionality, this Court finds that this claim cannot be taken to be the object of interpretation because the Final Judgement does not apply to the FCTC. The Petitioner also contended the part of the Disputed Letter, Point 3, explaining the Petitioner's action in the specific case to be unconstitutional; however, the Disputed Letter, Point 3, only explained how regulations can be applied to the particular case and cannot be the object of interpretation. This Court hereby stated that these parts of the petition are not in compliance with Article 5, Paragraph 1, 28

Subparagraph 2 of the Constitutional Court Procedure Act and should be dismissed by Paragraph 3 of the same article.

*Translated by Chao-Tien Chang

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