

FIRST DIVISION

[G.R. No. 202943, March 25, 2015]

THE DEPARTMENT OF HEALTH, REPRESENTED BY SECRETARY ENRIQUE T. ONA, AND THE FOOD AND DRUG ADMINISTRATION (FORMERLY THE BUREAU OF FOOD AND DRUGS), REPRESENTED BY ASSISTANT SECRETARY OF HEALTH NICOLAS B. LUTERO III, OFFICER-IN-CHARGE, PETITIONERS, VS. PHILIP MORRIS PHILIPPINES MANUFACTURING, INC., RESPONDENT.

DECISION

PERLAS-BERNABE, J.:

Assailed in this petition for review on *certiorari*^[1] are the Decision^[2] dated August 26, 2011 and the Resolution^[3] dated August 3, 2012 rendered by the Court of Appeals (CA) in CA-G.R. SP No. 109493, finding grave abuse of discretion on the part of petitioners the Department of Health (DOH) and the Food and Drug Administration (FDA), then known as the Bureau of Food and Drugs (BFAD), for denying respondent Philip Morris Philippines Manufacturing, Inc.'s (PMPMI) permit applications for its tobacco sales promotions.

The Facts

On November 19, 2008, PMPMI, through the advertising agency PCN Promopro, Inc. (PCN), by virtue of Article 116^[4] of Republic Act No. (RA) 7394^[5] or the "Consumer Act of the Philippines," applied for a sales promotion permit before the BFAD, now the FDA, for its *Gear Up Promotional Activity (Gear Up Promo)*.^[6] The application included the mechanics for the promotional activity, as well as relevant materials and fees.^[7]

With more than fifteen (15) days lapsing without the BFAD formally acting upon the application, PMPMI then inquired about its status. However, PMPMI was only verbally informed of the existence of a Memorandum issued by the DOH purportedly prohibiting tobacco companies from conducting any tobacco promotional activities in the country. On January 8, 2009, PCN requested^[8] the BFAD to formally place on record the lack of any formal action on its *Gear Up Promo* application.^[9]

Meanwhile, on November 28, 2008, PMPMI, through another advertising agency, Arc Worldwide Philippines Co. (AWPC), filed another application for a sales promotional permit, this time for its Golden Stick Promotional Activity (*Golden Stick Promo*) which the BFAD, however, refused outright, pursuant to a directive of the BFAD Director that all permit applications for promotional activities of tobacco companies will no longer be accepted. Despite inquiries, the BFAD merely advised AWPC to await the formal written notice regarding its application.^[10]

Eventually, in a letter^[11] dated January 5, 2009, the BFAD, through Director IV Leticia Barbara B. Gutierrez, M.S. (Dir. Gutierrez), denied PMPMI's *Gear Up Promo* application in accordance with the instructions of the Undersecretary of Health for Standards and Regulations, directing that as of July 1, 2008, "all promotions, advertisements and/or sponsorships of tobacco products are already prohibited," based on the provisions of RA 9211^[12] or the "Tobacco Regulation Act of 2003."^[13]

On January 19, 2009, PMPMI filed an administrative appeal^[14] before the DOH Secretary, assailing the BFAD's denial of its *Gear Up Promo* application, as well as its refusal to accept the *Golden Stick Promo application*. In its appeal, PMPMI maintained that under RA 9211, *promotion* is not prohibited but merely *restricted*, and that while there are specific provisions therein totally banning tobacco advertising and sponsorships, no similar provision could be found banning *promotion*.^[15] It likewise averred that it had acquired a vested right over the granting of its sales promotional permit applications, considering that the BFAD has been granting such applications prior to January 5, 2009. Finally, it insisted that the denial of its promotional permit applications was tantamount to a violation of its right to due process as well as their right to property.^[16]

The DOH Ruling

In a Consolidated Decision^[17] dated April 30, 2009, then DOH Secretary Francisco T. Duque III (Sec. Duque) denied PMPMI's appeal, as well as all other similar actions filed by other tobacco companies and thereby affirmed the action of the BFAD denying their sales promotional permit applications, pursuant to the provisions of RA 9211.^[18]

In denying PMPMI's and other tobacco companies' promotional applications, the DOH ruled that the issuance of permits for sales promotional activities was never a ministerial duty of the BFAD; rather, it was a discretionary power to be exercised within the confines of the law. Moreover, previous approvals of sales promotional permit applications made by the BFAD did not create a vested right on the part of the tobacco companies to have all applications approved.^[19]

The DOH likewise ruled that the intent and purpose of RA 9211 was to *completely* ban tobacco advertisements, *promotions*, and sponsorships, as promotion is inherent in both advertising and sponsorship. As such, if RA 9211 completely prohibited *advertisements* and *sponsorships*, then it is clear that *promotion*, which is necessarily included in both activities, is likewise prohibited, explaining further that the provisions of RA 9211 should not be interpreted in a way as would render them ridiculous or meaningless.^[20]

Lastly, the DOH cited the Philippines' obligation to observe the provisions of the Framework Convention on Tobacco Control (FCTC), an international treaty, which has been duly ratified and adopted by the country on June 6, 2005.^[21]

Aggrieved, PMPMI elevated the matter to the CA *via* petition for *certiorari* and *mandamus*,^[22] docketed as CA G.R. SP No. 109493, ascribing grave abuse of discretion upon the DOH in refusing to grant its sales promotional permit applications, maintaining, *inter alia*, that RA 9211 still allows promotion activities

notwithstanding the phase-out of advertising and sponsorship activities after July 1, 2008.

The CA Ruling

In a Decision^[23] dated August 26, 2011, the CA granted the petition and nullified the Consolidated Decision of the DOH upon a finding that the provisions of RA 9211 were clear when it distinguished *promotion* from *advertising* and *sponsorship*, so much so that while the latter two (2) activities were completely banned as of July 1, 2008, the same does not hold true with regard to *promotion*, which was only *restricted*. The CA held that the DOH cannot exercise *carte blanche* authority to deny PMPMI's promotional permit applications, adding that "[w]hen the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation, only for application."^[24]

Furthermore, it ruled that the DOH is bereft of any authority to enforce the provisions of RA 9211, in view of the creation of the Inter-Agency Committee-Tobacco (IAC-Tobacco) under Section 29 of the said law, which shall have the "exclusive power and function to administer and implement the provisions of [RA 9211] x x x."^[25] Thus, even though PMPMI originally applied for sales promotional permits under Article 116 in relation to Article 109 of RA 7394, from which the DOH derives its authority to regulate tobacco sales promotions, the said provision has already been repealed by Section 39 of RA 9211,^[26] which states:

Section 39. Repealing Clause. – DOH Administrative Orders No. 10[,] s. 1993 and No. 24[,] s. 2003 are hereby repealed. Article 94 of Republic Act No. 7394, as amended, otherwise known as the Consumer Act of the Philippines, is hereby amended.

All other laws, decrees, ordinances, administrative orders, rules and regulations, or any part thereof, which are inconsistent with this Act are likewise repealed or amended accordingly.

Hence, the CA ruled that the DOH wrongfully arrogated unto itself the authority given to the IAC-Tobacco to administer and implement the provisions of RA 9211, which includes regulation of tobacco promotions.^[27]

Dissatisfied, the DOH, through the Office of the Solicitor General (OSG), moved for the reconsideration^[28] of the said Decision, which the CA denied in a Resolution^[29] dated August 3, 2012, hence, this petition.

The Issues Before the Court

The essential issues to be resolved are: (a) whether or not the CA erred in finding that the authority of the DOH, through the BFAD, to regulate tobacco sales promotions under Article 116 in relation to Article 109 of RA 7394 had already been impliedly repealed by RA 9211, which created the IAC-Tobacco and granted upon it the exclusive authority to administer and implement the provisions thereof; and (b) whether or not the CA erred in ascribing grave abuse of discretion upon the DOH

when the latter held that RA 9211 has also completely prohibited tobacco promotions as of July 1, 2008.

The Court's Ruling

The petition is bereft of merit.

At the core of the present controversy are the pertinent provisions of RA 7394, *i.e.*, Article 116 in relation to Article 109, to wit:

Article 116. *Permit to Conduct Promotion.* – No person shall conduct any sales campaigns, including beauty contest, national in character, sponsored and promoted by manufacturing enterprises **without first securing a permit from the concerned department** at least thirty (30) calendar days prior to the commencement thereof. Unless an objection or denial is received within fifteen (15) days from filing of the application, the same shall be deemed approved and the promotion campaign or activity may be conducted: Provided, That any sales promotion campaign using medical prescriptions or any part thereof or attachment thereto for raffles or a promise of reward shall not be allowed, nor a permit be issued therefor. (Emphasis supplied)

Article 109. *Implementing Agency.* – The Department of Trade and Industry shall enforce the provisions of this Chapter and its implementing rules and regulations: Provided, **That with respect to food, drugs, cosmetics, devices, and hazardous substances, it shall be enforced by the Department of Health.** (Emphasis and underscoring supplied)

The DOH derives its authority to rule upon applications for *sales promotion* permits from the above-cited provisions. On the other hand, Section 29 of RA 9211 creating the IAC-Tobacco provides:

Section 29. *Implementing Agency.* – An Inter-Agency Committee-Tobacco (IAC-Tobacco), which shall have the **exclusive power and function to administer and implement the provisions of this Act**, is hereby created. The IAC-Tobacco shall be chaired by the Secretary of the Department of Trade and Industry (DTI) with the Secretary of the Department of Health (DOH) as Vice Chairperson. The IAC-Tobacco shall have the following as members:

- a. Secretary of the Department of Agriculture (DA);
- b. Secretary of the Department of Justice (DOJ);
- c. Secretary of the Department of Finance (DOF);
- d. Secretary of the Department of Environment and Natural Resources (DENR);
- e. Secretary of the Department of Science and Technology (DOST);
- f. Secretary of the Department of Education (DepEd);
- g. Administrator of the National Tobacco Administration (NTA);

- h. A representative from the Tobacco Industry to be nominated by the legitimate and recognized associations of the industry; and
- i. A representative from a nongovernment organization (NGO) involved in public health promotion nominated by DOH in consultation with the concerned NGOs[.]

The Department Secretaries may designate their Undersecretaries as their authorized representative to the IAC. (Emphasis and underscoring supplied)

It is the CA's pronouncement that the creation of the IAC-Tobacco effectively and impliedly repealed^[30] the above-quoted provisions of RA 7394, thereby removing the authority of the DOH to rule upon applications for sales promotional permits filed by tobacco companies such as those filed by PMPMI subject of this case.

On the other hand, while the DOH and the BFAD concede that the creation of the IAC-Tobacco expressly grants upon the IAC-Tobacco the exclusive power and function to administer and implement its provisions, they nevertheless maintain that RA 9211 did not remove their authority under RA 7394 to regulate tobacco *sales promotions*.^[31] They point out that this much can be deduced from the lack of provisions in RA 9211 and its implementing rules laying down the procedure for the processing of applications for tobacco sales promotions permit.^[32] As such, the DOH, through the BFAD, retains the authority to rule on PMPMI's promotional permit applications.

The Court agrees with the CA.

After a meticulous examination of the above-quoted pertinent provisions of RA 7394 and RA 9211, the Court finds that the latter law ***impliedly repealed*** the relevant provisions of the former with respect to the authority of the DOH to regulate tobacco sales promotions.

At this point, the Court notes that both laws separately treat "promotion" as one of the activities related to tobacco: RA 7394 defines "*sales promotion*" under Article 4 (bm), while RA 9211 speaks of "*promotion*" or "*tobacco promotion*" under Section 4 (I).

"*Sales promotion*" is defined in Article 4 (bm) of RA 7394, to wit:

Article 4. Definition of Terms. – For purposes of this Act, the term:

x x x x

bm) "*Sales Promotion*" means **techniques** intended for **broad consumer participation** which **contain promises of gain such as prizes**, in cash or in kind, as **reward for the purchase of a product, security, service or winning in contest, game, tournament** and other similar competitions which **involve determination of winner/s** and which utilize mass media or other widespread media of information. It also means **techniques purely intended to increase the sales**,