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 SECRETA...

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

Ponente: PERLAS-BERNABE, J.

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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

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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:
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> - Secretary of the Department of Agriculture (DA);
>
> - Secretary of the Department of Justice (DOJ);

- Secretary of the Department of Finance (DOF);

- Secretary of the Department of Environment and Natural Resources (DENR);

- Secretary of the Department of Science and Technology (DOST);

- Secretary of the Department of Education (DepEd);

- Administrator of the National Tobacco Administration (NTA);

- A representative from the Tobacco Industry to be nominated by the legitimate and recognized associations of the industry; and

- 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 (l).

"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:

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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, patronage and/or goodwill of a product. (Emphases and underscoring supplied)

Identifying its Gear Up Promo and Golden Stick Promo to be activities that fall under sales promotion as contemplated in the said provision, PMPMI filed its permit applications under Article 116 of RA 7394 before the

BFAD.

Meanwhile, Section 4 (l) of RA 9211 defines "promotion" as follows:

> Section 4. Definition of Terms. – As used in this Act:
>
> x x x x x x x x x
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> l. "Promotion" – refers to an event or activity organized by or on behalf of a tobacco manufacturer, distributor or retailer with the aim of promoting a brand of tobacco product, which event or activity would not occur but for the support given to it by or on behalf of the tobacco manufacturer, distributor or retailer. It may also refer to the display of a tobacco product or manufacturer's name, trademark, logo, etc. on non-tobacco products. This includes the paid use of tobacco products bearing the brand names, trademarks, logos, etc. in movies, television and other forms of entertainment. For the purpose of this Act, promotion shall be understood as tobacco promotion[.] (Emphases and underscoring supplied)

As adverted to elsewhere, the IAC-Tobacco shall have the exclusive power and function to administer and implement the provisions of RA 9211, which includes the conduct of regulating promotion.

The Court has judiciously scrutinized the above definitions and finds that there is no substantial difference between the activities that would fall under the purview of "sales promotion" in RA 7394, as well as those under "promotion" in RA 9211, as would warrant a delineation in the authority to regulate its conduct. In fact, the techniques, activities, and methods mentioned in the definition of "sales promotion" can be subsumed under the more comprehensive and broad scope of "promotion."

In order to fully understand the depth and scope of these marketing activities, the Court finds it necessary to go beyond the ambit of the definitions provided in our laws.

Outside RA 7394, "sales promotion" refers to activities which make use of "media and non-media marketing communication for a pre-determined, limited time to increase consumer demand, stimulate market demand or improve product availability,"[33] "to provide added value or incentives to consumers, wholesalers, retailers, or other organizational customers to stimulate immediate sales" and "product interest, trial, or purchase." [34] Examples of devices used in "sales promotion" are contests, coupons, freebies, point-of-purchase displays, premiums, raffle prizes, product samples, sweepstakes, and rebates.[35]

On the other hand, "promotion" is a term frequently used in marketing which pertains to "raising customer awareness of a product or brand, generating sales, and creating brand loyalty"[36] which utilize the following subcategories: personal selling, advertising, sales promotion, direct marketing, and publicity.[37] The three basic objectives of promotion are: (1) to present information to consumers as well as others; (2) to increase demand; and (3) to differentiate a product.[38] "Promotion" can be done through various methods, e.g., internet advertisements, special events, endorsements, incentives in the purchase of a product like discounts (i.e., coupons), free items, or contests.[39]

Consequently, if "sales promotion" is considered as one of the subcategories of "promotion," it is clear, therefore, that "promotion" necessarily incorporates the activities that fall under "sales promotion." Considering that the common and fundamental purpose of these marketing strategies is to raise customer awareness in order to increase consumer demand or sales, drawing a demarcation line between "promotion" and "sales promotion" as two distinct and separate activities would be unnecessarily stretching their meanings and, accordingly, sow more confusion. Moreover, the techniques, methods, and devices through which "sales promotion" are usually accomplished can likewise be considered as activities relating to "promotion," like raffle contests, which necessarily require prizes and drawing of winners, discounts, and freebies.

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Concomitantly, while the Court acknowledges the attempt of the Department of Justice (DOJ), through its DOJ Opinion No. 29, series of 2004,[40] (DOJ Opinion) to reconcile and harmonize the apparently conflicting provisions of RA 7394 and RA 9211 in this respect, to the Court's mind, it is more logical to conclude that "sales promotion" and "promotion" are actually one and the same. The DOJ, in fact, referred[41] to "product promotion" in RA 9211 as "promotion per se" which, therefore, can be taken to mean an all-encompassing activity or marketing strategy which may reasonably and logically include "sales promotion." Besides, the DOJ Opinion is merely persuasive and not necessarily controlling.[42]

Furthermore, the declared policy of RA 9211 where "promotion" is defined includes the institution of "a balanced policy whereby the use, sale and advertisements of tobacco products shall be regulated in order to promote a healthful environment and protect the citizens from the hazards of tobacco smoke x x x."[43] Hence, if the IAC-Tobacco was created and expressly given the exclusive authority to implement the provisions of RA 9211 in accordance with the foregoing State policy, it signifies that it shall also take charge of the regulation of the use, sale, distribution, and advertisements of tobacco products, as well as all forms of "promotion" which essentially includes "sales promotion." Therefore, with this regulatory power conferred upon the IAC-Tobacco by RA 9211, the DOH and the BFAD have been effectively and impliedly divested of any authority to act upon applications for tobacco sales promotional permit, including PMPMI's.

Finally, it must be stressed that RA 9211 is a special legislation which exclusively deals with the subject of tobacco products and related activities. On the other hand, RA 7394 is broader and more general in scope, and treats of the general welfare and interests of consumers vis-à-vis proper conduct for business and industry. As such, lex specialis derogat generali. General legislation must give way to special legislation on the same subject, and generally is so interpreted as to embrace only cases in which the special provisions are not applicable. In other words, where two statutes are of equal theoretical application to a particular case, the one specially designed therefore should prevail.[44]

In fine, the Court agrees with the CA that it is the IAC-Tobacco and not the DOH which has the primary jurisdiction to regulate sales promotion activities as explained in the foregoing discussion. As such, the DOH's ruling, including its construction of RA 9211 (i.e., that it completely banned tobacco advertisements, promotions, and sponsorships, as promotion is inherent in both advertising and sponsorship), are declared null and void, which, as a necessary consequence, precludes the Court from further delving on the same. As it stands, the present applications filed by PMPMI are thus remanded to the IAC-Tobacco for its appropriate action. Notably, in the proper exercise of its rule-making authority, nothing precludes the IAC-Tobacco from designating any of its pilot agencies (which, for instance, may even be the DOH[45]) to perform its multifarious functions under RA 9211.

WHEREFORE, the petition is DENIED. The Decision dated August 26, 2011 and the Resolution dated August 3, 2012 of the Court of Appeals in CA-G.R. SP No. 109493 are hereby AFFIRMED with the MODIFICATION in that the present permit applications filed by respondent Philip Morris Philippines Manufacturing, Inc. for its tobacco sales promotions are hereby REMANDED to the Inter-Agency Committee-Tobacco for appropriate action.

SO ORDERED.

Sereno, C.J., (Chairperson), Leonardo-De Castro, Bersamin, and Perez, JJ., concur.

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[1] Rollo, pp. 38-63.

[2] Id. at 70-90. Penned by Associate Justice Noel G. Tijam with Associate Justices Marlene Gonzales-Sison and

Jane Aurora C. Lantion concurring.

[3] Id. at 91-97.

[4] Inadvertently mentioned as Section 16; id. at 71.

[5] Approved on April 13, 1992.

[6] Rollo, p. 71.

[7] Id.

[8] See letter dated January 8, 2009; id. at 474.

[9] Id. at 71.

[10] Id. at 71-72.

[11] Id. at 475.

[12] Entitled "AN ACT REGULATING THE PACKAGING, USE, SALE, DISTRIBUTION AND ADVERTISEMENTS OF TOBACCO PRODUCTS AND FOR OTHER PURPOSES"; approved on June 23, 2003.

[13] Rollo, p. 72. See also memorandum dated February 16, 2009; id. at 131.

[14] See letter of PMPMI, through its counsel, dated January 19, 2009; id. at 476.

[15] Id. at 136.

[16] Id.

[17] Id. at 135-143. Penned by Secretary of Health Francisco T. Duque, III, MD, MSC.

[18] Id. at 143.

[19] Id. at 137.

[20] See id. at 138-141.

[21] See id. at 141-142.

[22] Dated July 13, 2009. Id. at 478-516.

[23] Id. at 70-90.

[24] Id. at 82, citing Bolos v. Bolos, 648 Phil. 630, 637 (2010).

[25] Id. at 83.

[26] See id. at 84.

[27] Id.

[28] See Motion for Reconsideration dated September 20, 2011; id. at 408-432.

[29] Id. at 91-97.

[30] See Section 39 of RA 9211.

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[31] Rollo, pp. 52-53.

[32] Id. at 55.

[33] Charles M. Futrell. Just the Facts 101 Textbook Key Facts: Fundamentals of Selling, 11[th] Ed., 2015. (visited February 28, 2015).

[34] Rob Peters. The Social Media Marketing Handbook – Everything You Need to Know About Social Media, 2012. (visited April 20, 2015).

[35] Id.

[36] Supra note 33.

[37] See Hasan, K. and Khan, R. (2011). Building International Brand Through Promotional Strategy. University of Skovde, Sweden.
(visited April 20, 2015).

[38] Kurtz, Dave. (2010). Contemporary Marketing Mason, OH: South-Western Cengage Learning, cited in (visited April 20, 2015).

[39] See Supra note 34.

[40] Rollo, pp. 117-121.

[41] Id. at 120.

[42] Associated Communications & Wireless Services-United Broadcasting Networks v. NTC, 445 Phil. 621, 643 (2003).

[43] SECTION 2. Policy. – It is the policy of the State to protect the populace from hazardous products and promote the right to health and instill health consciousness among them. It is also the policy of the State, consistent with the Constitutional ideal to promote the general welfare, to safeguard the interests of the workers and other stakeholders in the tobacco industry. For these purposes, the government shall institute a balanced policy whereby the use, sale and advertisements of tobacco products shall be regulated in order to promote a healthful environment and protect the citizens from the hazards of tobacco smoke, and at the same time ensure that the interests of tobacco farmers, growers, workers and stakeholders are not adversely compromised.

[44] See Nieves v. Duldulao, G.R. No. 190276, April 2, 2014, citing Jalosjos v. Commission on Elections, G.R. No. 205033, June 18, 2013, 698 SCRA 742, 762.

[45] See Inter-Agency Committee on Tobacco Memorandum Circular (I-ACT MC No. 1 s. 2008), wherein the DOH was designated as pilot agency in the implementation of provisions on Healthful Environment and Advertising and Promotions.

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