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[G.R. No. 163583. August 20, 2008]

BRITISH AMERICAN TOBACCO, *petitioner, vs.* **JOSE ISIDRO N. CAMACHO, in his capacity as Secretary of the Department of Finance and GUILLERMO L. PARAYNO, JR., in his capacity as Commissioner of the Bureau of Internal Revenue,** *respondents.*

PHILIP MORRIS PHILIPPINES MANUFACTURING, INC., FORTUNE TOBACCO, CORP., MIGHTY CORPORATION, and JT INTERNATIONAL, S.A., *respondents-in-intervention.*

SYLLABUS

1. REMEDIAL LAW; COURTS; COURT OF TAX APPEALS; NO JURISDICTION OVER CASES WHERE THE CONSTITUTIONALITY OF A LAW OR RULE IS CHALLENGED; THE DETERMINATION OF WHETHER A SPECIFIC RULE ISSUED BY AN ADMINISTRATIVE AGENCY CONTRAVENES THE LAW OR THE CONSTITUTION IS WITHIN THE JURISDICTION OF THE REGULAR COURTS; ELABORATED.— The jurisdiction of the Court of Tax Appeals is defined in Section 7 of Republic Act No. 1125, as amended by Republic Act No. 9282. xxx While the above statute confers on the CTA jurisdiction to resolve tax disputes in general, this does not include cases where the constitutionality of a law or rule is challenged. Where what is assailed is the validity or constitutionality of a law, or a rule or regulation issued by the administrative agency in the performance of its quasi-legislative function, the regular courts have jurisdiction to pass upon the same. The determination of whether a specific rule or set of rules issued by an administrative agency contravenes the law or the constitution is within the jurisdiction of the regular courts. Indeed, the Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation in the courts, including the regional trial courts.

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This is within the scope of judicial power, which includes the authority of the courts to determine in an appropriate action the validity of the acts of the political departments. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

2. POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIAL DEPARTMENT; THE DETERMINATION OF WHETHER THE ASSAILED LAW AND ITS IMPLEMENTING RULES AND REGULATIONS CONTRAVENE THE CONSTITUTION IS WITHIN THE JURISDICTION OF REGULAR COURTS.— The petition for injunction filed by petitioner before the RTC is a direct attack on the constitutionality of Section 145(C) of the NIRC, as amended, and the validity of its implementing rules and regulations. In fact, the RTC limited the resolution of the subject case to the issue of the constitutionality of the assailed provisions. The determination of whether the assailed law and its implementing rules and regulations contravene the Constitution is within the jurisdiction of regular courts. The Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation in the courts, including the regional trial courts. Petitioner, therefore, properly filed the subject case before the RTC.

3. CIVIL LAW; ESTOPPEL; ELEMENTS.— Estoppel, an equitable principle rooted **in** natural justice, prevents persons from going back on their own acts and representations, to the prejudice of others who have relied on them. The principle is codified in Article 1431 of the Civil Code xxx Estoppel can also be found in Rule 131, Section 2 (a) of the Rules of Court xxx The elements of estoppel are: *first*, the actor who usually must have knowledge, notice or suspicion of the true facts, communicates something to another in a misleading way, either by words, conduct or silence; *second*, the other in fact relies, and relies reasonably or justifiably, upon that communication; *third*, the other would be harmed materially if the actor is later permitted to assert any claim inconsistent with his earlier conduct; and

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fourth, the actor knows, expects or foresees that the other would act upon the information given or that a reasonable person in the actor's position would expect or foresee such action. In the early case of *Kalalo v. Luz*, the elements of estoppel, as related to the party to be estopped, are: (1) conduct amounting to false representation or concealment of material facts; or at least calculated to convey the impression that the facts are other than, and inconsistent with, those which the party subsequently attempts to assert; (2) intent, or at least expectation that this conduct shall be acted upon by, or at least influence, the other party; and (3) knowledge, actual or constructive, of the real facts.

4. ID.; ID.; THE MERE FACT THAT A LAW HAS BEEN RELIED UPON IN THE PAST AND ALL THAT TIME HAS NOT BEEN ATTACKED AS UNCONSTITUTIONAL IS NOT A GROUND FOR CONSIDERING THE PARTY ESTOPPED FROM ASSAILING ITS VALIDITY.— We find that petitioner was not guilty of estoppel. When it made the undertaking to comply with all issuances of the BIR, which at that time it considered as valid, petitioner did not commit any false misrepresentation or misleading act. Indeed, petitioner cannot be faulted for initially undertaking to comply with, and subjecting itself to the operation of Section 145(C), and only later on filing the subject case praying for the declaration of its unconstitutionality when the circumstances change and the law results in what it perceives to be unlawful discrimination. The mere fact that a law has been relied upon in the past and all that time has not been attacked as unconstitutional is not a ground for considering petitioner estopped from assailing its validity. For courts will pass upon a constitutional question only when presented before it in *bona fide* cases for determination, and the fact that the question has not been raised before is not a valid reason for refusing to allow it to be raised later.

5. POLITICAL LAW; EQUAL PROTECTION CLAUSE; RATIONAL BASIS TEST; EXPLAINED.— [W]e have held that "*in our jurisdiction*, the standard and analysis of equal protection challenges in the main have followed the '*rational basis' test*, coupled with a deferential attitude to legislative classifications and a reluctance to invalidate a law unless there is a showing of a clear and unequivocal breach of the Constitution." Within

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the present context of tax legislation on sin products which neither contains a suspect classification nor impinges on a fundamental right, the rational-basis test thus finds application. Under this test, a legislative classification, to survive an equal protection challenge, must be shown to rationally further a legitimate state interest. The classifications must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation. Since every law has in its favor the presumption of constitutionality, the burden of proof is on the one attacking the constitutionality of the law to prove beyond reasonable doubt that the legislative classification is without rational basis. The presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes, and that there is no conceivable basis which might support it.

6. ID.; ID.; CLASSIFICATION WHEN CONSIDERED VALID AND REASONABLE.— A legislative classification that is reasonable does not offend the constitutional guaranty of the equal protection of the laws. The classification is considered valid and reasonable provided that: (1) it rests on substantial distinctions; (2) it is germane to the purpose of the law; (3) it applies, all things being equal, to both present and future conditions; and (4) it applies equally to all those belonging to the same class. The first, third and fourth requisites are satisfied.

7. TAXATION; REPUBLIC ACT 8240, AS AMENDED BY REPUBLIC ACT 9334; SECTION 145 THEREOF; CLASSIFICATION FREEZE PROVISION; CANNOT BE CONSIDERED ARBITRARY, OR MOTIVATED BY A HOSTILE OR OPPRESSIVE ATTITUDE TO UNDULY FAVOR OLDER BRANDS OVER NEWER BRANDS.— [I]t is quite evident that the *classification freeze provision* could hardly be considered arbitrary, or motivated by a hostile or oppressive attitude to unduly favor older brands over newer brands. Congress was unequivocal in its unwillingness to delegate the power to periodically adjust the excise tax rate and tax brackets as well as to periodically resurvey and reclassify the cigarette brands based on the increase in the consumer price index to the DOF and the BIR. Congress doubted the constitutionality of such delegation of power, and likewise, considered the ethical

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implications thereof. Curiously, the *classification freeze provision* was put in place of the periodic adjustment and reclassification provision because of the belief that the latter would foster an anti-competitive atmosphere in the market. Yet, as it is, this same criticism is being foisted by petitioner upon the *classification freeze provision*. [T]he *classification freeze provision* was in the main the result of Congress's earnest efforts to improve the efficiency and effectivity of the tax administration over sin products while trying to balance the same with other state interests. In particular, the questioned provision addressed Congress's administrative concerns regarding delegating too much authority to the DOF and BIR as this will open the tax system to potential areas for abuse and corruption. Congress may have reasonably conceived that a tax system which would give the least amount of discretion to the tax implementers would address the problems of tax avoidance and tax evasion.

8. ID.; ID.; ID.; ADMINISTRATIVE CONCERNS MAY PROVIDE A LEGITIMATE, RATIONAL BASIS FOR LEGISLATIVE CLASSIFICATION.— [C]ongress sought to, among others, simplify the whole tax system for sin products to remove these potential areas of abuse and corruption from both the side of the taxpayer and the government. Without doubt, the *classification freeze provision* was an integral part of this overall plan. This is in line with one of the avowed objectives of the assailed law "to simplify the tax administration and compliance with the tax laws that are about to unfold in order to minimize losses arising from inefficiencies and tax avoidance scheme, if not outright tax evasion." RA 9334 did not alter this *classification freeze provision* of RA 8240. On the contrary, Congress affirmed this freezing mechanism by clarifying the wording of the law. We can thus reasonably conclude, as the deliberations on RA 9334 readily show, that the administrative concerns in tax administration, which moved Congress to enact the *classification freeze provision* in RA 8240, were merely continued by RA 9334. Indeed, administrative concerns may provide a legitimate, rational basis for legislative classification. In the case at bar, these administrative concerns in the measurement and collection of excise taxes on sin products are readily apparent as afore-discussed.

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9. ID.; ID.; ID.; ID.; PURPOSE THEREOF, EXPLAINED; NO DENIAL OF THE EQUAL PROTECTION OF THE LAWS WHERE THE RATIONAL-BASIS TEST IS AMPLY SATISFIED.— Aside from the major concern regarding the elimination of potential areas for abuse and corruption from the tax administration of sin products, the legislative deliberations also show that the *classification freeze provision* was intended to generate buoyant and stable revenues for government. With the frozen tax classifications, the revenue inflow would remain stable and the government would be able to predict with a greater degree of certainty the amount of taxes that a cigarette manufacturer would pay given the trend in its sales volume over time. The reason for this is that the previously classified cigarette brands would be prevented from moving either upward or downward their tax brackets despite the changes in their net retail prices in the future and, as a result, the amount of taxes due from them would remain predictable. The *classification freeze provision* would, thus, aid in the revenue planning of the government. All in all, the *classification freeze provision* addressed Congress's administrative concerns in the simplification of tax administration of sin products, elimination of potential areas for abuse and corruption in tax collection, buoyant and stable revenue generation, and ease of projection of revenues. *Consequently, there can be no denial of the equal protection of the laws since the rational-basis test is amply satisfied.*

10. POLITICAL LAW; EQUAL PROTECTION CLAUSE; WHERE THERE IS A CLAIM OF BREACH THEREOF AND OF THE DUE PROCESS CLAUSE, CONSIDERING THAT THEY ARE NOT FIXED RULES BUT RATHER BROAD STANDARDS, THERE IS A NEED FOR PROOF OF SUCH PERSUASIVE CHARACTER AS WOULD LEAD TO SUCH A CONCLUSION.— [P]etitioner generalizes that the differential tax treatment arising from the *classification freeze provision* adversely impacts the fairness of the playing field in the industry, particularly, between older and newer brands. Thus, it is virtually impossible for new brands to enter the market. Petitioner did not clearly demonstrate the exact extent of such impact. It has not been shown that the net retail prices of other older brands previously classified under this classification system have already pierced their tax brackets, and, if so, how

this has affected the overall competition in the market. Further, it does not necessarily follow that newer brands cannot compete against older brands because price is not the only factor in the market as there are other factors like consumer preference, brand loyalty, *etc*. In other words, even if the newer brands are priced higher due to the differential tax treatment, it does not mean that they cannot compete in the market especially since cigarettes contain addictive ingredients so that a consumer may be willing to pay a higher price for a particular brand solely due to its unique formulation. It may also be noted that in 2003, the BIR surveyed 29 new brands that were introduced in the market after the effectivity of RA 8240 on January 1, 1997, thus negating the sweeping generalization of petitioner that the *classification freeze provision* has become an insurmountable barrier to the entry of new brands. Verily, where there is a claim of breach of the due process and equal protection clauses, considering that they are not fixed rules but rather broad standards, there is a need for proof of such persuasive character as would lead to such a conclusion. Absent such a showing, the presumption of validity must prevail.

11. POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIAL DEPARTMENT; SUPREME COURT; CANNOT INQUIRE INTO THE WISDOM OF THE LAW; DISCUSSED; CLASSIFICATION FREEZE PROVISION DOES NOT UNDULY FAVOR OLDER BRANDS OVER NEWER BRANDS.— Whether Congress acted improvidently in derogating, to a limited extent, the state's interest in promoting fair competition among the players in the industry, while pursuing other state interests regarding the simplification of tax administration of sin products, elimination of potential areas for abuse and corruption in tax collection, buoyant and stable revenue generation, and ease of projection of revenues through the *classification freeze provision*, and whether the questioned provision is the best means to achieve these state interests, necessarily go into the wisdom of the assailed law which we cannot inquire into, much less overrule. The *classification freeze provision* has not been shown to be precipitated by a veiled attempt, or hostile attitude on the part of Congress to unduly favor older brands over newer brands. On the contrary, we must reasonably assume, owing to the respect due a co-equal branch of government and as revealed by the Congressional

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deliberations, that the enactment of the questioned provision was impelled by an earnest desire to improve the efficiency and effectivity of the tax administration of sin products. For as long as the legislative classification is rationally related to furthering some legitimate state interest, as here, the rational-basis test is satisfied and the constitutional challenge is perfunctorily defeated.

12. ID.; ID.; ID.; ID.; THE JUDICIARY DOES NOT SETTLE POLICY ISSUES; ELABORATED.— We do not sit in judgment as a supra-legislature to decide, after a law is passed by Congress, which state interest is superior over another, or which method is better suited to achieve one, some or all of the state's interests, or what these interests should be in the first place. This policy-determining power, by constitutional fiat, belongs to Congress as it is its function to determine and balance these interests or choose which ones to pursue. Time and again we have ruled that the judiciary does not settle policy issues. The Court can only declare what the law is and not what the law should be. Under our system of government, policy issues are within the domain of the political branches of government and of the people themselves as the repository of all state power. Thus, the legislative classification under the *classification freeze provision*, after having been shown to be rationally related to achieve certain legitimate state interests and done in good faith, must, perforce, end our inquiry.

13. ID.; ID.; ID.; ID.; CANNOT DECLARE A STATUTE UNCONSTITUTIONAL MERELY BECAUSE IT CAN BE IMPROVED OR THAT IT DOES NOT TEND TO ACHIEVE ALL OF ITS STATED OBJECTIVES.— Concededly, the finding that the assailed law seems to derogate, to a limited extent, one of its avowed objectives (*i.e.* promoting fair competition among the players in the industry) would suggest that, by Congress's own standards, the current excise tax system on sin products is imperfect. But, certainly, we cannot declare a statute unconstitutional merely because it can be improved or that it does not tend to achieve all of its stated objectives. This is especially true for tax legislation which simultaneously addresses and impacts multiple state interests. Absent a clear showing of breach of constitutional limitations, Congress, owing to its vast experience and expertise in the field of taxation, must

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be given sufficient leeway to formulate and experiment with different tax systems to address the complex issues and problems related to tax administration. Whatever imperfections that may occur, the same should be addressed to the democratic process to refine and evolve a taxation system which ideally will achieve most, if not all, of the state's objectives.

14. TAXATION; NATIONAL INTERNAL REVENUE CODE; UNLESS EXPRESSLY GRANTED, THE COMMISSIONER OF INTERNAL REVENUE HAS NO POWER TO RECLASSIFY OR UPDATE THE CLASSIFICATION OF NEW BRANDS EVERY TWO YEARS OR EARLIER; THE POWER TO RECLASSIFY CIGARETTE BRANDS IS A PREROGATIVE OF THE LEGISLATURE.— It is clear that Revenue Regulations No. 1-97, as amended by Section 2 of Revenue Regulations 9-2003, and Revenue Memorandum Order No. 6-2003 unjustifiably emasculate the operation of Section 145 of the NIRC because they authorize the Commissioner of Internal Revenue to update the tax classification of new brands every two years or earlier subject only to its issuance of the appropriate Revenue Regulations, when nowhere in Section 145 is such authority granted to the Bureau. Unless expressly granted to the BIR, the power to reclassify cigarette brands remains a prerogative of the legislature which cannot be usurped by the former.

15. ID.; SECTION 145 OF REPUBLIC ACT NO. 8240, AS AMENDED BY REPUBLIC ACT 9334; CLASSIFICATION FREEZE PROVISION; UNIFORMLY APPLIES TO ALL NEWLY INTRODUCED BRANDS IN THE MARKET, WHETHER IMPORTED OR LOCALLY MANUFACTURED.— The *classification freeze provision* uniformly applies to all newly introduced brands in the market, whether imported or locally manufactured. It does not purport to single out imported cigarettes in order to unduly favor locally produced ones. Further, petitioner's evidence was anchored on the alleged unequal tax treatment between old and new brands which involves a different frame of reference *vis-à-vis* local and imported products. Petitioner has, therefore, failed to clearly prove its case, both factually and legally, within the parameters of the GATT.

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16. STATUTORY CONSTRUCTION; STATUTES; IRRECONCILABLE CONFLICT BETWEEN STATUTES; REPUBLIC ACT 8240, AS AMENDED BY REPUBLIC ACT 9334 PREVAILS OVER GATT EITHER AS A LATER ENACTMENT BY CONGRESS OR AS A SPECIAL LAW DEALING WITH THE TAXATION OF SIN PRODUCTS.— [E]ven assuming *arguendo* that petitioner was able to prove that the *classification freeze provision* violates the GATT, the outcome would still be the same. The GATT is a treaty duly ratified by the Philippine Senate and under Article VII, Section 21 of the Constitution, it merely acquired the status of a statute. Applying the basic principles of statutory construction in case of irreconcilable conflict between statutes, RA 8240, as amended by RA 9334, would prevail over the GATT either as a later enactment by Congress or as a special law dealing with the taxation of sin products.

APPEARANCES OF COUNSEL

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Estelito P. Mendoza & Ma. Claudette A. Dela Cerna for intervenor Fortune Tobacco Corp.

Ocampo & Ocampo for Mighty Corp.

Sycip Salazar Hernandez & Gatmaitan for Intervenor JT International.

D E C I S I O N

YNARES-SANTIAGO, *J.*:

This petition for review assails the validity of: (1) Section 145 of the National Internal Revenue Code (NIRC), as recodified by Republic Act (RA) 8424; (2) RA 9334, which further amended Section 145 of the NIRC on January 1, 2005; (3) Revenue Regulations Nos. 1-97, 9-2003, and 22-2003; and (4) Revenue Memorandum Order No. 6-2003. Petitioner argues that the said provisions are violative of the equal protection and uniformity clauses of the Constitution.

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RA 8240, entitled "An Act Amending Sections 138, 139, 140, and 142 of the NIRC, as Amended and For Other Purposes," took effect on January 1, 1997. In the same year, Congress passed RA 8424 or The Tax Reform Act of 1997, re-codifying the NIRC. Section 142 was renumbered as Section 145 of the NIRC.

Paragraph (c) of Section 145 provides for four tiers of tax rates based on the **net retail price** per pack of cigarettes. To determine the applicable tax rates of existing cigarette brands, a survey of the net retail prices per pack of cigarettes was conducted as of October 1, 1996, the results of which were embodied in **Annex "D"** of the NIRC as the duly registered, existing or active brands of cigarettes.

Paragraph (c) of Section 145,[1] states –

SEC. 145. *Cigars and cigarettes*. –

x x x x x x x x x

(c) *Cigarettes packed by machine*. – There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below:

(1) If the net retail price (excluding the excise tax and the value-added tax) is above Ten pesos (₱10.00) per pack, the tax shall be Thirteen pesos and forty-four centavos (₱13.44) per pack;

(2) If the net retail price (excluding the excise tax and the value-added tax) exceeds Six pesos and fifty centavos (₱6.50) but does not exceed Ten pesos (10.00) per pack, the tax shall be Eight pesos and ninety-six centavos (₱8.96) per pack;

(3) If the net retail price (excluding the excise tax and the value-added tax) is Five pesos (₱5.00) but does not exceed Six pesos and fifty centavos (₱6.50) per pack, the tax shall be Five pesos and sixty centavos (₱5.60) per pack;

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[1] Based on the updated rates, effective January 1, 2000.

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(4) If the net retail price (excluding the excise tax and the value-added tax) is below Five pesos (₱5.00) per pack, the tax shall be One peso and twelve centavos (₱1.12) per pack.

Variants of existing brands of cigarettes which are introduced in the domestic market after the effectivity of this Act shall be taxed under the highest classification of any variant of that brand.

x x x x x x x x x

New brands shall be classified according to their **current net retail price.**

For the above purpose, **net retail price** shall mean the price at which the cigarette is sold on retail in 20 major supermarkets in Metro Manila (for brands of cigarettes marketed nationally), excluding the amount intended to cover the applicable excise tax and the value-added tax. For brands which are marketed only outside Metro Manila, the net retail price shall mean the price at which the cigarette is sold in five major supermarkets in the region excluding the amount intended to cover the applicable excise tax and the value-added tax.

The **classification of each brand of cigarettes based on its average net retail price as of October 1, 1996, as set forth in Annex "D" of this Act, shall remain in force until revised by Congress.** (Emphasis supplied)

As such, new brands of cigarettes shall be taxed according to their **current net retail price** while existing or "old" brands shall be taxed based on their **net retail price as of October 1, 1996**.

To implement RA 8240, the Bureau of Internal Revenue (BIR) issued **Revenue Regulations No. 1-97**,[2] which classified the existing brands of cigarettes as those duly registered or active brands prior to January 1, 1997. New brands, or those registered after January 1, 1997, shall be initially assessed at their suggested retail price until such time that the appropriate survey to determine their current net retail price is conducted. Pertinent portion of the regulations reads –

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[2] *Rollo*, pp. 50-113.

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SECTION 2. *Definition of Terms*.

x x x x x x x x x

3. *Duly registered or existing brand of cigarettes* – shall include duly registered, existing or active brands of cigarettes, prior to January 1, 1997.

x x x x x x x x x

6. *New Brands* – shall mean brands duly registered after January 1, 1997 and shall include duly registered, inactive brands of cigarette not sold in commercial quantity before January 1, 1997.

SECTION 4. *Classification and Manner of Taxation of Existing Brands, New Brands and Variant of Existing Brands*.

x x x x x x x x x

B. *New Brand*

New brands shall be classified according to their current net retail price. In the meantime that the current net retail price has not yet been established, the suggested net retail price shall be used to determine the specific tax classification. Thereafter, a survey shall be conducted in 20 major supermarkets or retail outlets in Metro Manila (for brands of cigarette marketed nationally) or in five (5) major supermarkets or retail outlets in the region (for brands which are marketed only outside Metro Manila) at which the cigarette is sold on retail in reams/cartons, three (3) months after the initial removal of the new brand to determine the actual net retail price excluding the excise tax and value added tax which shall then be the basis in determining the specific tax classification. In case the current net retail price is higher than the suggested net retail price, the former shall prevail. Any difference in specific tax due shall be assessed and collected inclusive of increments as provided for by the National Internal Revenue Code, as amended.

In June 2001, petitioner British American Tobacco introduced into the market Lucky Strike Filter, Lucky Strike Lights and Lucky Strike Menthol Lights cigarettes, with a suggested retail price of ₱9.90 per pack.[3] Pursuant to Sec. 145 (c) quoted above,

[3] Annex "A," Revenue Regulations No. 22-2003.

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the Lucky Strike brands were initially assessed the excise tax at ₱8.96 per pack.

On February 17, 2003, **Revenue Regulations No. 9-2003**,[4] amended Revenue Regulations No. 1-97 by providing, among others, a periodic review every two years or earlier of the current net retail price of new brands and variants thereof for the purpose of establishing and updating their tax classification, thus:

> For the purpose of establishing or updating the tax classification of new brands and variant(s) thereof, their current net retail price shall be reviewed periodically through the conduct of survey or any other appropriate activity, as mentioned above, every two (2) years unless earlier ordered by the Commissioner. However, notwithstanding any increase in the current net retail price, the tax classification of such new brands shall remain in force until the same is altered or changed through the issuance of an appropriate Revenue Regulations.

Pursuant thereto, **Revenue Memorandum Order No. 6-2003**[5] was issued on March 11, 2003, prescribing the guidelines and procedures in establishing current net retail prices of new brands of cigarettes and alcohol products.

Subsequently, **Revenue Regulations No. 22-2003**[6] was issued on August 8, 2003 to implement the revised tax classification of certain new brands introduced in the market after January 1, 1997, based on the survey of their current net retail price. The survey revealed that Lucky Strike Filter, Lucky Strike Lights, and Lucky Strike Menthol Lights, are sold at the current net retail price of ₱22.54, P22.61 and ₱21.23, per pack, respectively.[7] Respondent Commissioner of the Bureau of Internal Revenue thus recommended the applicable tax rate of ₱13.44 per pack inasmuch as Lucky Strike's average net retail price is above ₱10.00 per pack.

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[4] *Rollo,* pp. 114-120.

[5] *Id.* at 121-134.

[6] *Id.* at 135.

[7] *Id.* at 136.

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Thus, on September 1, 2003, petitioner filed before the Regional Trial Court (RTC) of Makati, Branch 61, a petition for injunction with prayer for the issuance of a temporary restraining order (TRO) and/or writ of preliminary injunction, docketed as Civil Case No. 03-1032. Said petition sought to enjoin the implementation of Section 145 of the NIRC, Revenue Regulations Nos. 1-97, 9-2003, 22-2003 and Revenue Memorandum Order No. 6-2003 on the ground that they discriminate against new brands of cigarettes, in violation of the equal protection and uniformity provisions of the Constitution.

Respondent Commissioner of Internal Revenue filed an Opposition[8] to the application for the issuance of a TRO. On September 4, 2003, the trial court denied the application for TRO, holding that the courts have no authority to restrain the collection of taxes.[9] Meanwhile, respondent Secretary of Finance filed a Motion to Dismiss,[10] contending that the petition is premature for lack of an actual controversy or urgent necessity to justify judicial intervention.

In an Order dated March 4, 2004, the trial court denied the motion to dismiss and issued a writ of preliminary injunction to enjoin the implementation of Revenue Regulations Nos. 1-97, 9-2003, 22-2003 and Revenue Memorandum Order No. 6-2003.[11] Respondents filed a Motion for Reconsideration[12] and Supplemental Motion for Reconsideration.[13] At the hearing on the said motions, petitioner and respondent Commissioner of Internal Revenue stipulated that the only issue in this case is the constitutionality of the assailed law, order, and regulations.[14]

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[8] *Id.* at 162-166.

[9] *Id.* at 167-168.

[10] *Id.* at 169-181.

[11] *Id.* at 201-203.

[12] *Id.* at 204-218.

[13] *Id.* at 219-233.

[14] *Id.* at 281.

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On May 12, 2004, the trial court rendered a decision[15] upholding the constitutionality of Section 145 of the NIRC, Revenue Regulations Nos. 1-97, 9-2003, 22-2003 and Revenue Memorandum Order No. 6-2003. The trial court also lifted the writ of preliminary injunction. The dispositive portion of the decision reads:

> WHEREFORE, premises considered, the instant Petition is hereby DISMISSED for lack of merit. The Writ of Preliminary Injunction previously issued is hereby lifted and dissolved.
>
> SO ORDERED.[16]

Petitioner brought the instant petition for review directly with this Court on a pure question of law.

While the petition was pending, RA 9334 (An Act Increasing The Excise Tax Rates Imposed on Alcohol And Tobacco Products, Amending For The Purpose Sections 131, 141, 143, 144, 145 and 288 of the NIRC of 1997, As Amended), took effect on January 1, 2005. The statute, among others,–

> (1) increased the excise tax rates provided in paragraph (c) of Section 145;
>
> (2) mandated that new brands of cigarettes shall initially be classified according to their suggested net retail price, until such time that their correct tax bracket is finally determined under a specified period and, after which, their classification shall remain in force until revised by Congress;
>
> (3) retained Annex "D" as tax base of those surveyed as of October 1, 1996 including the classification of brands for the same products which, although not set forth in said Annex "D," were registered on or before January 1, 1997 and were being commercially produced and marketed on or after October 1, 1996, and which continue to be commercially produced and marketed after the effectivity of this Act. Said

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[15] *Id.* at 42-47.

[16] *Id.* at 47; penned by Judge Romeo F. Barza.

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classification shall remain in force until revised by Congress; and

(4) provided a legislative freeze on brands of cigarettes introduced between the period January 2, 1997[17] to December 31, 2003, such that said cigarettes shall remain in the classification under which the BIR has determined them to belong as of December 31, 2003, until revised by Congress.

Pertinent portions, of RA 9334, provides:

SEC. 145. Cigars and Cigarettes. –

x x x x x x x x x

(C) Cigarettes Packed by Machine. – There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below:

(1) If the net retail price (excluding the excise tax and the value-added tax) is below Five pesos (₱5.00) per pack, the tax shall be:

Effective on January 1, 2005, Two pesos (₱2.00) per pack;

Effective on January 1, 2007, Two pesos and twenty-three centavos (₱2.23) per pack;

Effective on January 1, 2009, Two pesos and forty-seven centavos (₱2.47) per pack; and

Effective on January 1, 2011, Two pesos and seventy-two centavos (₱2.72) per pack.

(2) If the net retail price (excluding the excise tax and the value-added tax) is Five pesos (₱5.00) but does not exceed Six pesos and fifty centavos (₱6.50) per pack, the tax shall be:

Effective on January 1, 2005, Six pesos and thirty-five centavos (₱6.35) per pack;

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[17] New brands as defined are those introduced into the market after the effectivity of R.A. 8240 on January 1, 1997, meaning, on January 2, 1997; while existing brands for purposes of inclusion in Annex "D" are those registered on or before January 1, 1997.

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Effective on January 1, 2007, Six pesos and seventy-four centavos (P6.74) per pack;

Effective on January 1, 2009, Seven pesos and fourteen centavos (₱7.14) per pack; and

Effective on January 1, 2011, Seven pesos and fifty-six centavos (₱7.56) per pack.

(3) If the net retail price (excluding the excise tax and the value-added tax) exceeds Six pesos and fifty centavos (₱6.50) but does not exceed Ten pesos (₱10.00) per pack, the tax shall be:

Effective on January 1, 2005, Ten pesos and thirty-five centavos (10.35) per pack;

Effective on January 1, 2007, Ten pesos and eighty-eight centavos (₱10.88) per pack;

Effective on January 1, 2009, Eleven pesos and forty-three centavos (₱11.43) per pack; and

Effective on January 1, 2011, Twelve pesos (₱12.00) per pack.

(4) If the net retail price (excluding the excise tax and the value-added tax) is above Ten pesos (₱10.00) per pack, the tax shall be:

Effective on January 1, 2005, Twenty-five pesos (₱25.00) per pack;

Effective on January 1, 2007, Twenty-six pesos and six centavos (₱26.06) per pack;

Effective on January 1, 2009, Twenty-seven pesos and sixteen centavos (₱27.16) per pack; and

Effective on January 1, 2011, Twenty-eight pesos and thirty centavos (₱28.30) per pack.

x x x x x x x x x

New brands, as defined in the immediately following paragraph, shall initially be classified according to their suggested net retail price.

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New brands shall mean a brand registered after the date of effectivity of R.A. No. 8240.

Suggested net retail price shall mean the net retail price at which new brands, as defined above, of locally manufactured or imported cigarettes are intended by the manufacturer or importer to be sold on retail in major supermarkets or retail outlets in Metro Manila for those marketed nationwide, and in other regions, for those with regional markets. At the end of three (3) months from the product launch, the Bureau of Internal Revenue shall validate the suggested net retail price of the new brand against the net retail price as defined herein and determine the correct tax bracket under which a particular new brand of cigarette, as defined above, shall be classified. After the end of eighteen (18) months from such validation, the Bureau of Internal Revenue shall revalidate the initially validated net retail price against the net retail price as of the time of revalidation in order to finally determine the correct tax bracket under which a particular new brand of cigarettes shall be classified; **Provided however, That brands of cigarettes introduced in the domestic market between January 1, 1997** [should be January 2, 1997] **and December 31, 2003 shall remain in the classification under which the Bureau of Internal Revenue has determined them to belong as of December 31, 2003. Such classification of new brands and brands introduced between January 1, 1997 and December 31, 2003 shall not be revised except by an act of Congress.**

Net retail price, as determined by the Bureau of Internal Revenue through a price survey to be conducted by the Bureau of Internal Revenue itself, or the National Statistics Office when deputized for the purpose by the Bureau of Internal Revenue, shall mean the price at which the cigarette is sold in retail in at least twenty (20) major supermarkets in Metro Manila (for brands of cigarettes marketed nationally), excluding the amount intended to cover the applicable excise tax and the value-added tax. For brands which are marketed only outside Metro Manila, the "net retail price" shall mean the price at which the cigarette is sold in at least five (5) major supermarkets in the region excluding the amount intended to cover the applicable excise tax and value-added tax.

The classification of each brand of cigarettes based on its average net retail price as of October 1, 1996, as set forth in Annex "D", including the classification of brands for the same products which, although not set forth in said Annex "D", were registered and were

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being commercially produced and marketed on or after October 1, 1996, and which continue to be commercially produced and marketed after the effectivity of this Act, shall remain in force until revised by Congress. (Emphasis added)

Under RA 9334, the excise tax due on petitioner's products was increased to ₱25.00 per pack. In the implementation thereof, respondent Commissioner assessed petitioner's importation of 911,000 packs of Lucky Strike cigarettes at the increased tax rate of ₱25.00 per pack, rendering it liable for taxes in the total sum of ₱22,775,000.00.[18]

Hence, petitioner filed a Motion to Admit Attached Supplement[19] and a Supplement[20] to the petition for review, assailing the constitutionality of RA 9334 insofar as it retained Annex "D" and praying for a downward classification of Lucky Strike products at the bracket taxable at ₱8.96 per pack. Petitioner contended that the continued use of Annex "D" as the tax base of existing brands of cigarettes gives undue protection to said brands which are still taxed based on their price as of October 1996 notwithstanding that they are now sold at the same or even at a higher price than new brands like Lucky Strike. Thus, old brands of cigarettes such as Marlboro and Philip Morris which, like Lucky Strike, are sold at or more than ₱22.00 per pack, are taxed at the rate of ₱10.88 per pack, while Lucky Strike products are taxed at ₱26.06 per pack.

In its Comment to the supplemental petition, respondents, through the Office of the Solicitor General (OSG), argued that the passage of RA 9334, specifically the provision imposing a legislative freeze on the classification of cigarettes introduced into the market between January 2, 1997 and December 31, 2003, rendered the instant petition academic. The OSG claims that the provision in Section 145, as amended by RA 9334,

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[18] *Id.* at 828.

[19] *Id.* at 805-814.

[20] *Id.* at 818-836.

prohibiting the reclassification of cigarettes introduced during said period, "cured' the perceived defect of Section 145 considering that, like the cigarettes under Annex "D", petitioner's brands and other brands introduced between January 2, 1997 and December 31, 2003, shall remain in the classification under which the BIR has placed them and only Congress has the power to reclassify them.

On March 20, 2006, Philip Morris Philippines Manufacturing Incorporated filed a Motion for Leave to Intervene with attached Comment-in-Intervention.[21] This was followed by the Motions for Leave to Intervene of Fortune Tobacco Corporation,[22] Mighty Corporation,[23] and JT International, S.A., with their respective Comments-in-Intervention. The Intervenors claim that they are parties-in-interest who stand to be affected by the ruling of the Court on the constitutionality of Section 145 of the NIRC and its Annex "D" because they are manufacturers of cigarette brands which are included in the said Annex. Hence, their intervention is proper since the protection of their interest cannot be addressed in a separate proceeding.

According to the Intervenors, no inequality exists because cigarettes classified by the BIR based on their net retail price as of December 31, 2003 now enjoy the same *status quo* provision that prevents the BIR from reclassifying cigarettes included in Annex "D". It added that the Court has no power to pass upon the wisdom of the legislature in retaining Annex "D" in RA 9334; and that the nullification of said Annex would bring about tremendous loss of revenue to the government, chaos in the collection of taxes, illicit trade of cigarettes, and cause decline in cigarette demand to the detriment of the farmers who depend on the tobacco industry.

Intervenor Fortune Tobacco further contends that petitioner is estopped from questioning the constitutionality of Section

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[21] *Id.* at 912-952.

[22] *Id.* at 992-1001.

[23] *Id.* at 1116-1119.

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145 and its implementing rules and regulations because it entered into the cigarette industry fully aware of the existing tax system and its consequences. Petitioner imported cigarettes into the country knowing that its suggested retail price, which will be the initial basis of its tax classification, will be confirmed and validated through a survey by the BIR to determine the correct tax that would be levied on its cigarettes.

Moreover, Fortune Tobacco claims that the challenge to the validity of the BIR issuances should have been brought by petitioner before the Court of Tax Appeals (CTA) and not the RTC because it is the CTA which has exclusive appellate jurisdiction over decisions of the BIR in tax disputes.

On August 7, 2006, the OSG manifested that it interposes no objection to the motions for intervention.[24] Therefore, considering the substantial interest of the intervenors, and in the higher interest of justice, the Court admits their intervention.

Before going into the substantive issues of this case, we must first address the matter of jurisdiction, in light of Fortune Tobacco's contention that petitioner should have brought its petition before the Court of Tax Appeals rather than the regional trial court.

The jurisdiction of the Court of Tax Appeals is defined in Republic Act No. 1125, as amended by Republic Act No. 9282. Section 7 thereof states, in pertinent part:

Sec. 7. *Jurisdiction.* — The CTA shall exercise:

a. Exclusive appellate jurisdiction to review by appeal, as herein provided:

1. Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue;

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[24] *Id.* at 1157.

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2. Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relations thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial; xxx.[25]

While the above statute confers on the CTA jurisdiction to resolve tax disputes in general, this does not include cases where the constitutionality of a law or rule is challenged. Where what is assailed is the validity or constitutionality of a law, or a rule or regulation issued by the administrative agency in the performance of its quasi-legislative function, the regular courts have jurisdiction to pass upon the same. The determination of whether a specific rule or set of rules issued by an administrative agency contravenes the law or the constitution is within the jurisdiction of the regular courts. Indeed, the Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation in the courts, including the regional trial courts. This is within the scope of judicial power, which includes the authority of the courts to determine in an appropriate action the validity of the acts of the political departments. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[26]

In *Drilon v. Lim*,[27] it was held:

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[25] Republic Act No. 9282.

[26] *Smart Communications, Inc. v. National Telecommunications Commission,* G.R. No. 151908, August 12, 2003, 408 SCRA 678, 689.

[27] G.R. No. 112497, August 4, 1994, 235 SCRA 135.

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We stress at the outset that the lower court had jurisdiction to consider the constitutionality of Section 187, this authority being embraced in the general definition of the judicial power to determine what are the valid and binding laws by the criterion of their conformity to the fundamental law. Specifically, B.P. 129 vests in the regional trial courts jurisdiction over all civil cases in which the subject of the litigation is incapable of pecuniary estimation, even as the accused in a criminal action has the right to question in his defense the constitutionality of a law he is charged with violating and of the proceedings taken against him, particularly as they contravene the Bill of Rights. Moreover, Article X, Section 5(2), of the Constitution vests in the Supreme Court appellate jurisdiction over final judgments and orders of lower courts in all cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

The petition for injunction filed by petitioner before the RTC is a direct attack on the constitutionality of Section 145(C) of the NIRC, as amended, and the validity of its implementing rules and regulations. In fact, the RTC limited the resolution of the subject case to the issue of the constitutionality of the assailed provisions. The determination of whether the assailed law and its implementing rules and regulations contravene the Constitution is within the jurisdiction of regular courts. The Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation in the courts, including the regional trial courts.[28] Petitioner, therefore, properly filed the subject case before the RTC.

We come now to the issue of whether petitioner is estopped from assailing the authority of the Commissioner of Internal Revenue. Fortune Tobacco raises this objection by pointing out that when petitioner requested the Commissioner for a ruling that its Lucky Strike Soft Pack cigarettes was a "new brand"

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[28] *Smart Communications, Inc. v. National Telecommunications Commission, supra.*

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rather than a variant of an existing brand, and thus subject to a lower specific tax rate, petitioner executed an undertaking to comply with the procedures under existing regulations for the assessment of deficiency internal revenue taxes.

Fortune Tobacco argues that petitioner, after invoking the authority of the Commissioner of Internal Revenue, cannot later on turn around when the ruling is adverse to it.

Estoppel, an equitable principle rooted **in** natural justice, prevents persons from going back on their own acts and representations, to the prejudice of others who have relied on them.[29] The principle is codified in Article 1431 of the Civil Code, which provides:

> Through estoppel, an admission or representation is rendered conclusive upon the person making it and cannot be denied or disproved as against the person relying thereon.

Estoppel can also be found in Rule 131, Section 2 (a) of the Rules of Court, *viz*:

> Sec. 2. *Conclusive presumptions*. — The following are instances of conclusive presumptions:
>
> (a) Whenever a party has by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission be permitted to falsify it.

The elements of estoppel are: *first*, the actor who usually must have knowledge, notice or suspicion of the true facts, communicates something to another in a misleading way, either by words, conduct or silence; *second*, the other in fact relies, and relies reasonably or justifiably, upon that communication; *third*, the other would be harmed materially if the actor is later permitted to assert any claim inconsistent with his earlier conduct; and *fourth*, the actor knows, expects or foresees that the other

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[29] *Philippine National Bank v. Palma*, G.R. No. 157279, August 9, 2005, 466 SCRA 307, 324.

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would act upon the information given or that a reasonable person in the actor's position would expect or foresee such action.[30]

In the early case of *Kalalo v. Luz*,[31] the elements of estoppel, as related to the party to be estopped, are: (1) conduct amounting to false representation or concealment of material facts; or at least calculated to convey the impression that the facts are other than, and inconsistent with, those which the party subsequently attempts to assert; (2) intent, or at least expectation that this conduct shall be acted upon by, or at least influence, the other party; and (3) knowledge, actual or constructive, of the real facts.

We find that petitioner was not guilty of estoppel. When it made the undertaking to comply with all issuances of the BIR, which at that time it considered as valid, petitioner did not commit any false misrepresentation or misleading act. Indeed, petitioner cannot be faulted for initially undertaking to comply with, and subjecting itself to the operation of Section 145(C), and only later on filing the subject case praying for the declaration of its unconstitutionality when the circumstances change and the law results in what it perceives to be unlawful discrimination. The mere fact that a law has been relied upon in the past and all that time has not been attacked as unconstitutional is not a ground for considering petitioner estopped from assailing its validity. For courts will pass upon a constitutional question only when presented before it in *bona fide* cases for determination, and the fact that the question has not been raised before is not a valid reason for refusing to allow it to be raised later.[32]

Now to the substantive issues.

To place this case in its proper context, we deem it necessary to first discuss how the assailed law operates in order to identify,

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[30] *Philippine Bank of Communication v. Court of Appeals*, 352 Phil. 1, 9 (1998).

[31] G.R. No. L-27782, July 31, 1970, 34 SCRA 377, 347.

[32] *People v. Vera*, 65 Phil. 56, 93 (1937).

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with precision, the specific provisions which, according to petitioner, have created a grossly discriminatory classification scheme between old and new brands. The pertinent portions of RA 8240, as amended by RA 9334, are reproduced below for ready reference:

SEC. 145. Cigars and Cigarettes. –

x x x x x x x x x

(C) Cigarettes Packed by Machine. – There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below:

(1) If the net retail price (excluding the excise tax and the value-added tax) is below Five pesos (₱5.00) per pack, the tax shall be:

Effective on January 1, 2005, Two pesos (₱2.00) per pack;

Effective on January 1, 2007, Two pesos and twenty-three centavos (₱2.23) per pack;

Effective on January 1, 2009, Two pesos and forty-seven centavos (₱2.47) per pack; and

Effective on January 1, 2011, Two pesos and seventy-two centavos (₱2.72) per pack.

(2) If the net retail price (excluding the excise tax and the value-added tax) is Five pesos (₱5.00) but does not exceed Six pesos and fifty centavos (₱6.50) per pack, the tax shall be:

Effective on January 1, 2005, Six pesos and thirty-five centavos (₱6.35) per pack;

Effective on January 1, 2007, Six pesos and seventy-four centavos (₱6.74) per pack;

Effective on January 1, 2009, Seven pesos and fourteen centavos (₱7.14) per pack; and

Effective on January 1, 2011, Seven pesos and fifty-six centavos (₱7.56) per pack.

(3) If the net retail price (excluding the excise tax and the value-added tax) exceeds Six pesos and fifty centavos (₱6.50) but does not exceed Ten pesos (₱10.00) per pack, the tax shall be:

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Effective on January 1, 2005, Ten pesos and thirty-five centavos (10.35) per pack;

Effective on January 1, 2007, Ten pesos and eighty-eight centavos (₱10.88) per pack;

Effective on January 1, 2009, Eleven pesos and forty-three centavos (₱11.43) per pack; and

Effective on January 1, 2011, Twelve pesos (₱12.00) per pack.

(4) If the net retail price (excluding the excise tax and the value-added tax) is above Ten pesos (₱ 10.00) per pack, the tax shall be:

Effective on January 1, 2005, Twenty-five pesos (₱25.00) per pack;

Effective on January 1, 2007, Twenty-six pesos and six centavos (₱26.06) per pack;

Effective on January 1, 2009, Twenty-seven pesos and sixteen centavos (₱27.16) per pack; and

Effective on January 1, 2011, Twenty-eight pesos and thirty centavos (₱28.30) per pack.

x x x x x x x x x

New brands, as defined in the immediately following paragraph, shall initially be classified according to their suggested net retail price.

New brands shall mean a brand registered after the date of effectivity of R.A. No. 8240.

Suggested net retail price shall mean the net retail price at which new brands, as defined above, of locally manufactured or imported cigarettes are intended by the manufacturer or importer to be sold on retail in major supermarkets or retail outlets in Metro Manila for those marketed nationwide, and in other regions, for those with regional markets. At the end of three (3) months from the product launch, the Bureau of Internal Revenue shall validate the suggested net retail price of the new brand against the net retail price as defined herein and determine the correct tax bracket under which a particular new brand of cigarette, as defined above, shall be classified. After

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the end of eighteen (18) months from such validation, the Bureau of Internal Revenue shall revalidate the initially validated net retail price against the net retail price as of the time of revalidation in order to finally determine the correct tax bracket under which a particular new brand of cigarettes shall be classified; Provided however, That brands of cigarettes introduced in the domestic market between January 1, 1997 [should be January 2, 1997] and December 31, 2003 shall remain in the classification under which the Bureau of Internal Revenue has determined them to belong as of December 31, 2003. Such classification of new brands and brands introduced between January 1, 1997 and December 31, 2003 shall not be revised except by an act of Congress.

Net retail price, as determined by the Bureau of Internal Revenue through a price survey to be conducted by the Bureau of Internal Revenue itself, or the National Statistics Office when deputized for the purpose by the Bureau of Internal Revenue, shall mean the price at which the cigarette is sold in retail in at least twenty (20) major supermarkets in Metro Manila (for brands of cigarettes marketed nationally), excluding the amount intended to cover the applicable excise tax and the value-added tax. For brands which are marketed only outside Metro Manila, the "net retail price" shall mean the price at which the cigarette is sold in at least five (5) major supermarkets in the region excluding the amount intended to cover the applicable excise tax and value-added tax.

The classification of each brand of cigarettes based on its average net retail price as of October 1, 1996, as set forth in Annex "D", including the classification of brands for the same products which, although not set forth in said Annex "D", were registered and were being commercially produced and marketed on or after October 1, 1996, and which continue to be commercially produced and marketed after the effectivity of this Act, shall remain in force until revised by Congress.

As can be seen, the law creates a four-tiered system which we may refer to as the low-priced,[33] medium-priced,[34] high-

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[33] If the net retail price (excluding the excise tax and the value-added tax) of a brand is below Five pesos (₱5.00) per pack.

[34] If the net retail price (excluding the excise tax and the value-added tax) of a brand is Five pesos (₱5.00) but does not exceed Six pesos and fifty centavos (₱6.50) per pack.

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priced,[35] and premium-priced[36] tax brackets. When a brand is introduced in the market, the current net retail price is determined through the aforequoted specified procedure. The current net retail price is then used to classify under which tax bracket the brand belongs in order to finally determine the corresponding excise tax rate on a per pack basis. The assailed feature of this law pertains to the mechanism where, after a brand is classified based on its current net retail price, the classification is frozen and only Congress can thereafter reclassify the same. From a practical point of view, Annex "D" is merely a *by-product* of the whole mechanism and philosophy of the assailed law. That is, the brands under Annex "D" were also classified based on their current net retail price, the only difference being that they were the first ones so classified since they were the only brands surveyed as of October 1, 1996, or prior to the effectivity of RA 8240 on January 1, 1997.[37]

Due to this legislative classification scheme, it is *possible* that over time the net retail price of a previously classified brand, whether it be a brand under Annex "D" or a new brand classified after the effectivity of RA 8240 on January 1, 1997, *would increase* (due to inflation, increase of production costs, manufacturer's decision to increase its prices, *etc*.) *to a point that its net retail price pierces the tax bracket to which it was previously classified.*[38] Consequently, even if its present

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[35] If the net retail price (excluding the excise tax and the value-added tax) of a brand exceeds Six pesos and fifty centavos (₱6.50) but does not exceed Ten pesos (₱10.00) per pack.

[36] If the net retail price (excluding the excise tax and the value-added tax) of a brand is above Ten pesos (₱10.00) per pack.

[37] Upon the request of the Senate Committee on Ways and Means and prior to the effectivity of R.A. 8240 on January 1, 1997, the BIR conducted a survey on the average net retail prices of existing brands of cigarettes as of October 1, 1996 which is now embodied in Annex "D" and which became the basis for determining the applicable specific excise tax rates of said brands.

[38] The exception, of course, would be those brands classified under the premium-priced tax bracket (or the highest tax bracket). No matter how

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day net retail price would make it fall under a higher tax bracket, the previously classified brand would continue to be subject to the excise tax rate under the lower tax bracket by virtue of the legislative classification freeze.

Petitioner claims that this is what happened in 2004 to the Marlboro and Philip Morris brands, which were permanently classified under Annex "D". As of October 1, 1996, Marlboro had net retail prices ranging from ₱6.78 to ₱6.84 while Philip Morris had net retail prices ranging from ₱7.39 to ₱7.48. Thus, pursuant to RA 8240,[39] Marlboro and Philip Morris were classified under the high-priced tax bracket and subjected to an excise tax rate of ₱8.96 per pack. Petitioner then presented evidence showing that after the lapse of about seven years or sometime in 2004, Marlboro's and Philip Morris' net retail prices per pack both increased to about ₱15.59.[40] This meant that they would fall under the premium-priced tax bracket, with a higher

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high their net retail price increases in the future, they would still remain in the premium-priced bracket. Further, the assumption is that the norm in the future is inflation. If it were deflation, than the older brands would possibly be the ones which would encounter a tax disadvantage after the lapse of some time.

[39] SEC. 145. Cigars and cigarettes. –

x x x x x x x x x

(c) Cigarettes packed by machine. – There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below: x x x

(2) If the net retail price (excluding the excise tax and the value-added tax) exceeds Six pesos and fifty centavos (₱6.50) but does not exceed Ten pesos (₱10.00) per pack, the tax shall be Eight pesos and ninety-six centavos (₱8.96) per pack; x x x

[40] This was computed as follows: Net Retail Price (₱15.59) = Gross Retail Price (₱27.00)*- Value-Added Tax (₱2.45) – Excise Tax (₱8.96)

*The gross retail price was established through the receipt of purchase of Marlboro and Philip Morris from a grocery store. (Exhibit "B", records, vol. II, p. 407. See also TSN, February 20, 2004, records, vol. II, pp. 614-617)

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excise tax rate of ₱13.44 per pack,[41] had they been classified based on their 2004 net retail prices. However, due to the legislative classification freeze, they continued to be classified under the high-priced tax bracket with a lower excise tax rate. Petitioner thereafter deplores the fact that its Lucky Strike Filter, Lucky Strike Lights, and Lucky Strike Menthol Lights cigarettes, introduced in the market sometime in 2001 and validated by a BIR survey in 2003, were found to have net retail prices of ₱11.53, ₱11.59 and ₱10.34,[42] respectively, which are lower than those of Marlboro and Philip Morris. However, since petitioner's cigarettes were newly introduced brands in the market, they were taxed based on their current net retail prices and, thus, fall under the premium-priced tax bracket with a higher excise tax rate of ₱13.44 per pack. This unequal tax treatment between Marlboro and Philip Morris, on the one hand, and Lucky Strike, on the other, is the crux of petitioner's contention that the legislative classification freeze violates the equal protection and uniformity of taxation clauses of the Constitution.

It is apparent that, contrary to its assertions, petitioner is not only questioning the undue favoritism accorded to brands under Annex "D", but the entire mechanism and philosophy of the law which freezes the tax classification of a cigarette brand based on its current net retail price. Stated differently, the alleged discrimination arising from the legislative classification freeze between the brands under Annex "D" and petitioner's newly introduced brands arose *only because* the former were classified

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[41] SEC. 145. Cigars and cigarettes. –

x x x x x x x x x

(c) Cigarettes packed by machine. – There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below: x x x

(1) If the net retail price (excluding the excise tax and the value-added tax) is above Ten pesos (₱10.00) per pack, the tax shall be Thirteen pesos and forty-four centavos (₱13.44) per pack;

[42] Annex "A", Revenue Regulations No. 22-2003.

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based on their "current" net retail price as of October 1, 1996 *and* petitioner's newly introduced brands were classified based on their "current" net retail price as of 2003. Without this corresponding freezing of the classification of petitioner's newly introduced brands based on their current net retail price, it would be impossible to establish that a disparate tax treatment occurred between the Annex "D" brands and petitioner's newly introduced brands.

This clarification is significant because, under these circumstances, a declaration of unconstitutionality would necessarily entail nullifying the whole mechanism of the law and not just Annex "D.." Consequently, if the assailed law is declared unconstitutional on equal protection grounds, the entire method by which a brand of cigarette is classified would have to be invalidated. As a result, no method to classify brands under Annex "D" as well as new brands would be left behind and the whole Section 145 of the NIRC, as amended, would become inoperative.[43]

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[43] It may be argued that, perhaps, only the freezing mechanism of the law may be declared unconstitutional so that the current net retail price can still be used to determine the corresponding tax brackets of old and new brands. This becomes problematic since there is no guide as to when or how frequent the current net retail prices shall be determined *precisely because* the freezing mechanism assumes this function in the assailed law. This Court cannot fill this void that will be created in the law; otherwise, it would be tantamount to judicial legislation. In short, the freezing mechanism is an integral and indispensable part of the classification scheme devised by Congress, without which, it cannot function. Thus, the whole of Section 145(C) of the NIRC, as amended, becomes unavoidably inoperative should a declaration of unconstitutionality be decreed.

This result is in accordance with the ruling case law on the matter:

The general rule is that where part of a statute is void as repugnant to the Constitution, while another part is valid, the valid portion, if separable from the invalid, may stand and be enforced. The presence of a separability clause in a statute creates the presumption that the legislature intended separability, rather than complete nullity of the statute. To justify this result, the valid portion must be so far independent of the invalid portion that it is fair to presume that the legislature would have enacted it by itself if it had supposed that it could not constitutionally enact the other.

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To simplify the succeeding discussions, we shall refer to the whole mechanism and philosophy of the assailed law which freezes the tax classification of a cigarette brand based on its current net retail price and which, thus, produced different classes of brands based on the time of their introduction in the market (starting with the brands in Annex "D" since they were the first brands so classified as of October 1, 1996) as the *classification freeze provision*.[44]

Enough must remain to make a complete, intelligible and valid statute, which carries out the legislative intent. x x x

The exception to the general rule is that when the parts of a statute are so mutually dependent and connected, as conditions, considerations, inducements, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, the nullity of one part will vitiate the rest. In making the parts of the statute dependent, conditional, or connected with one another, the legislature intended the statute to be carried out as a whole and would not have enacted it if one part is void, in which case if some parts are unconstitutional, all the other provisions thus dependent, conditional, or connected must fall with them. (Agpalo, *Statutory Construction*, 1986 ed., pp. 28-29)

[44] The practical effect of the operation of the *classification freeze provision* may be visualized as a timeline starting with brands in Annex "D" which were classified based on their net retail prices as of October 1, 1996. As new brands were introduced in the market, new classes of brands were likewise created depending on the time they were introduced and the time their classifications were finally fixed by the BIR pursuant to the relevant revenue regulations. The characterization of petitioner that the *classification freeze provision* merely created two classes of brands, *i.e.*, old brands under Annex "D" and new brands introduced after the effectivity of R.A. 8240 is thus, inaccurate.

In line with this observation, the succeeding discussions shall make use as point of comparison *older* brands *vis-à-vis newer* brands and *not* old brands (under Annex "D") *vis-à-vis* new brands. In concrete terms, the disparate tax treatment that appears to have taken place between brands in Annex "D" classified in 1996 and petitioner's new brands classified in 2003 may, under the same conditions (*i.e.*, piercing of the tax bracket by the older brand through increase of net retail price over time), occur between an older brand classified in 2004 (assuming that it is not classified under the highest tax bracket) and a newer brand that will be classified, say, in 2010.

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As thus formulated, the central issue is whether or not the *classification freeze provision* violates the equal protection and uniformity of taxation clauses of the Constitution.

In *Sison, Jr. v. Ancheta*,[45] this Court, through Chief Justice Fernando, explained the applicable standard in deciding equal protection and uniformity of taxation challenges:

> Now for equal protection. The applicable standard to avoid the charge that there is a denial of this constitutional mandate whether the assailed act is in the exercise of the police power or the power of eminent domain is to demonstrate "that the governmental act assailed, far from being inspired by the attainment of the common weal was prompted by the spirit of hostility, or at the very least, discrimination that finds no support in reason. It suffices then that the laws operate equally and uniformly on all persons under similar circumstances or that all persons must be treated in the same manner, the conditions not being different, both in the privileges conferred and the liabilities imposed. Favoritism and undue preference cannot be allowed. For the principle is that equal protection and security shall be given to every person under circumstances, which if not identical are analogous. If law be looks upon in terms of burden or charges, those that fall within a class should be treated in the same fashion, whatever restrictions cast on some in the group equally binding on the rest." That same formulation applies as well to taxation measures. The equal protection clause is, of course, inspired by the noble concept of approximating the ideal of the laws's (sic) benefits being available to all and the affairs of men being governed by that serene and impartial uniformity, which is of the very essence of the idea of law. There is, however, wisdom, as well as realism, in these words of Justice Frankfurter: "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." **Hence the constant reiteration of the view that classification if rational**

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[45] 215 Phil. 582 (1984).

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in character is allowable. As a matter of fact, in a leading case of *Lutz v. Araneta*, this Court, through Justice J.B.L. Reyes, went so far as to hold "at any rate, it is inherent in the power to tax that a state be free to select the subjects of taxation, and it has been repeatedly held that 'inequalities which result from a singling out of one particular class for taxation, or exemption infringe no constitutional limitation.'"

Petitioner likewise invoked the kindred concept of uniformity. According to the Constitution: "The rule of taxation shall be uniform and equitable." This requirement is met according to Justice Laurel in *Philippine Trust Company v. Yatco*, decided in 1940, when the tax "operates with the same force and effect in every place where the subject may be found." He likewise added: "The rule of uniformity does not call for perfect uniformity or perfect equality, because this is hardly attainable." The problem of classification did not present itself in that case. It did not arise until nine years later, when the Supreme Court held: "Equality and uniformity in taxation means that all taxable articles or kinds of property of the same class shall be taxed at the same rate. **The taxing power has the authority to make reasonable and natural classifications for purposes of taxation,** . . . As clarified by Justice Tuason, where "the differentiation" complained of "conforms to the practical dictates of justice and equity" it "is not discriminatory within the meaning of this clause and is therefore uniform." There is quite a similarity then to the standard of equal protection for all that is required is that the tax "applies equally to all persons, firms and corporations placed in similar situation."[46] (Emphasis supplied)

In consonance thereto, we have held that "*in our jurisdiction*, the standard and analysis of equal protection challenges in the main have followed the *'rational basis' test*, coupled with a deferential attitude to legislative classifications and a reluctance to invalidate a law unless there is a showing of a clear and unequivocal breach of the Constitution."[47] Within the present context of tax legislation on sin products which

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[46] *Id.* at 589-590.

[47] *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas*, G.R. No. 148208, December 15, 2004, 446 SCRA 299, 370.

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neither contains a suspect classification nor impinges on a fundamental right, the rational-basis test thus finds application. Under this test, a legislative classification, to survive an equal protection challenge, must be shown to rationally further a legitimate state interest.[48] The classifications must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation.[49] Since every law has in its favor the presumption of constitutionality, the burden of proof is on the one attacking the constitutionality of the law to prove beyond reasonable doubt that the legislative classification is without rational basis.[50] The presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes, and that there is no conceivable basis which might support it.[51]

A legislative classification that is reasonable does not offend the constitutional guaranty of the equal protection of the laws. The classification is considered valid and reasonable provided that: (1) it rests on substantial distinctions; (2) it is germane to the purpose of the law; (3) it applies, all things being equal, to both present and future conditions; and (4) it applies equally to all those belonging to the same class.[52]

The first, third and fourth requisites are satisfied. The *classification freeze provision* was inserted in the law for reasons of practicality and expediency. That is, since a new brand was not yet in existence at the time of the passage of RA 8240, then Congress needed a uniform mechanism to fix

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[48] *Nordlinger v. Hahn*, 505 U.S. 1 (1992).

[49] *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920).

[50] See *Basco v. Philippine Amusements and Gaming Corp.*, 274 Phil. 323, 334-335 (1991).

[51] *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 88 (1940).

[52] *Government Service Insurance System v. Montesclaros*, G.R. No. 146494, July 14, 2004, 434 SCRA 441, 451-452.

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the tax bracket of a new brand. The current net retail price, similar to what was used to classify the brands under Annex "D" as of October 1, 1996, was thus the logical and practical choice. Further, with the amendments introduced by RA 9334, the freezing of the tax classifications now expressly applies not just to Annex "D" brands but to newer brands introduced after the effectivity of RA 8240 on January 1, 1997 and any new brand that will be introduced in the future.[53] (However, as will be discussed later, the intent to apply the freezing

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[53] The application of the freezing mechanism to newer brands is reflected in the following amendments introduced by R.A. No. 9334 to R.A. No. 8240, to wit:

Suggested net retail price shall mean the net retail price at which new brands, as defined above, of locally manufactured or imported cigarettes are intended by the manufacturer or importer to be sold on retail in major supermarkets or retail outlets in Metro Manila for those marketed nationwide, and in other regions, for those with regional markets. At the end of three (3) months from the product launch, the Bureau of Internal Revenue shall validate the suggested net retail price of the new brand against the net retail price as defined herein and determine the correct tax bracket under which a particular new brand of cigarette, as defined above, shall be classified. After the end of eighteen (18) months from such validation, the Bureau of Internal Revenue shall revalidate the initially validated net retail price against the net retail price as of the time of revalidation in order to finally determine the correct tax bracket under which a particular new brand of cigarettes shall be classified; **Provided however, That brands of cigarettes introduced in the domestic market between January 1, 1997 and December 31, 2003 shall remain in the classification under which the Bureau of Internal Revenue has determined them to belong as of December 31, 2003**. **Such classification of new brands and brands introduced between January 1, 1997 and December 31, 2003 shall not be revised except by an act of Congress.**

x x x x x x x x x

The classification of each brand of cigarettes based on its average net retail price as of October 1, 1996, as set forth in Annex "D", **including the classification of brands for the same products which, although not set forth in said Annex "D", were registered and were being commercially produced and marketed on or after October 1, 1996, and which continue to be commercially produced and marketed after the effectivity of this Act, shall remain in force until revised by Congress.** (Emphasis supplied)

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mechanism to newer brands was already in place even prior to the amendments introduced by RA 9334 to RA 8240.) This does not explain, however, why the classification is "frozen" after its determination based on current net retail price and how this is germane to the purpose of the assailed law. An examination of the legislative history of RA 8240 provides interesting answers to this question.

RA 8240 was the first of three parts in the Comprehensive Tax Reform Package then being pushed by the Ramos Administration. It was enacted with the following objectives stated in the Sponsorship Speech of Senator Juan Ponce Enrile (Senator Enrile), *viz*:

> **First**, to evolve a tax structure which will promote fair competition among the players in the industries concerned and generate buoyant and stable revenue for the government.
>
> **Second**, to ensure that the tax burden is equitably distributed not only amongst the industries affected but equally amongst the various levels of our society that are involved in various markets that are going to be affected by the excise tax on distilled spirits, fermented liquor, cigars and cigarettes.
>
> In the case of firms engaged in the industries producing the products that we are about to tax, this means relating the tax burden to their market share, not only in terms of quantity, Mr. President, but in terms of value.
>
> In case of consumers, this will mean evolving a multi-tiered rate structure so that low-priced products are subject to lower tax rates and higher-priced products are subject to higher tax rates.
>
> **Third**, to simplify the tax administration and compliance with the tax laws that are about to unfold in order to minimize losses arising from inefficiencies and tax avoidance scheme, if not outright tax evasion.[54]

In the initial stages of the crafting of the assailed law, the Department of Finance (DOF) recommended to Congress a

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[54] II RECORD, SENATE 10TH CONGRESS (October 15, 1996).

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shift from the then existing *ad valorem* taxation system to a specific taxation system with respect to sin products, including cigarettes. The DOF noted that the *ad valorem* taxation system was a source of massive tax leakages because the taxpayer was able to evade paying the correct amount of taxes through the undervaluation of the price of cigarettes using various marketing arms and dummy corporations. In order to address this problem, the DOF proposed a specific taxation system where the cigarettes would be taxed based on volume or on a per pack basis which was believed to be less susceptible to price manipulation. The reason was that the BIR would only need to monitor the sales volume of cigarettes, from which it could easily compute the corresponding tax liability of cigarette manufacturers. Thus, the DOF suggested the use of a three-tiered system which operates in substantially the same manner as the four-tiered system under RA 8240 as earlier discussed. The proposal of the DOF was embodied in House Bill (H.B.) No. 6060, the pertinent portions of which states—

SEC. 142. Cigars and cigarettes.—

(c) Cigarettes packed by machine.— There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below:

(1) If the manufacturer's or importer's wholesale price (net of excise tax and value-added tax) per pack exceeds four pesos and twenty centavos (₱4.20), the tax shall be seven pesos and fifty centavos (₱7.50);

(2) If the manufacturer's or importer's wholesale price (net of excise tax and value-added tax) per pack exceeds three pesos and ninety centavos (₱3.90) but does not exceed four pesos and twenty centavos (₱4.20), the tax shall be five pesos and fifty centavos (₱5.50): *provided*, that after two (2) years from the effectivity of this Act, cigarettes otherwise subject to tax under this subparagraph shall be taxed under subparagraph (1) above.

(3) If the manufacturer's or importer's wholesale price (net of excise tax and value-added tax) per pack does not exceeds three pesos and ninety centavos (₱3.90), the tax rate shall be one peso (₱1.00).

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Variants of existing brands and new brands of cigarettes packed by machine to be introduced in the domestic market after the effectivity of this Act, shall be taxed under paragraph (c)(1) hereof.

The rates of specific tax on cigars and cigarettes under paragraphs (a), (b), and (c) hereof, including the price levels for purposes of classifying cigarettes packed by machine, shall be revised upward two (2) years after the effectivity of this Act and every two years thereafter by the Commissioner of Internal Revenue, subject to the approval of the Secretary of Finance, taking into account the movement of the consumer price index for cigars and cigarettes as established by the National Statistics Office: *provided,* that the increase in taxes and/or price levels shall be equal to the present change in such consumer price index for the two-year period: *provided, further,* that the President, upon the recommendation of the Secretary of Finance, may suspend or defer the adjustment in price levels and tax rates when the interest of the national economy and general welfare so require, such as the need to obviate unemployment, and economic and social dislocation: *provided, finally,* that the revised price levels and tax rates authorized herein shall in all cases be rounded off to the nearest centavo and shall be in force and effect on the date of publication thereof in a newspaper of general circulation. x x x (Emphasis supplied)

What is of particular interest with respect to the proposal of the DOF is that it contained a provision for the periodic adjustment of the excise tax rates and tax brackets, and a corresponding periodic resurvey and reclassification of cigarette brands based on the increase in the consumer price index as determined by the Commissioner of Internal Revenue subject to certain guidelines. The evident intent was to prevent inflation from eroding the value of the excise taxes that would be collected from cigarettes over time by adjusting the tax rate and tax brackets based on the increase in the consumer price index. Further, under this proposal, old brands as well as new brands introduced thereafter would be subjected to a resurvey and reclassification based on their respective values at the end of every two years in order to align them with the adjustment of

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the excise tax rate and tax brackets due to the movement in the consumer price index.[55]

Of course, we now know that the DOF proposal, insofar as the periodic adjustment of tax rates and tax brackets, and the periodic resurvey and reclassification of cigarette brands are concerned, did not gain approval from Congress. The House and Senate pushed through with their own versions of the excise tax system on beers and cigarettes both denominated as H.B. No. 7198. For convenience, we shall refer to the bill deliberated upon by the House as the House Version and that of the Senate as the Senate Version.

The House's Committee on Ways and Means, then chaired by Congressman Exequiel B. Javier (Congressman Javier), roundly rejected the DOF proposal. Instead, in its Committee Report submitted to the plenary, it proposed a different excise tax system which used a specific tax as a basic tax with an *ad valorem* comparator. Further, it deleted the proposal to have a periodic adjustment of tax rates and the tax brackets as well as periodic resurvey and reclassification of cigarette brands, to wit:

> The rigidity of the specific tax system calls for the need for frequent congressional intervention to adjust the tax rates to inflation and to keep pace with the expanding needs of government for more revenues. The DOF admits this flaw inherent in the tax system it proposed.

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[55] It may be noted that after six (6) years from the passage of R.A. No. 8240 or in 2003, several bills were filed in Congress seeking to amend the *classification freeze provision* by shifting to a periodic adjustment of tax rate and tax brackets as well as periodic resurvey and reclassification of old and new brands to be conducted by the BIR. This was intended to address the perceived unfair differential tax treatment between old and new brands that occurs over the lapse of time. Petitioner views these bills as the remedy to solve the alleged unfair tax treatment arising from the *classification freeze provision* (See petitioner's petition before the trial court, records, vol. I, p. 21) Interestingly, these bills filed in 2003 are substantially the same as the above discussed DOF proposal which was rejected by Congress in enacting R.A. No. 8240 for reasons that will be discussed in what follows.

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Hence, to obviate the need for remedial legislation, the DOF is asking Congress to grant to the Commissioner the power to revise, one, the specific tax rates: and two, the price levels of beer and cigarettes. What the DOF is asking, Mr. Speaker, is for Congress to delegate to the Commissioner of Internal Revenue the power to fix the tax rates and classify the subjects of taxation based on their price levels for purposes of fixing the tax rates. While we sympathize with the predicament of the DOF, it is not for Congress to abdicate such power. The power sought to be delegated to be exercised by the Commissioner of Internal Revenue is a legislative power vested by the Constitution in Congress pursuant to Section 1, Article VI of the Constitution. Where the power is vested, there it must remain— in Congress, a body of representatives elected by the people. Congress may not delegate such power, much less abdicate it.

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Moreover, the grant of such power, if at all constitutionally permissible, to the Commissioner of Internal Revenue is fraught with ethical implications. The debates on how much revenue will be raised, how much money will be taken from the pockets of taxpayers, will inexorably shift from the democratic Halls of Congress to the secret and non-transparent corridors of unelected agencies of government, the Department of Finance and the Bureau of Internal Revenue, which are not accountable to our people. We cannot countenance the shift for ethical reasons, lest we be accused of betraying the trust reposed on this Chamber by the people. x x x

A final point on this proposal, Mr. Speaker, is the exercise of the taxing power of the Commissioner of Internal Revenue which will be triggered by inflation rates based on the consumer price index. Simply stated, Mr. Speaker, the specific tax rates will be fixed by the Commissioner depending on the price levels of beers and cigarettes as determined by the consumers' price index. This is a novel idea, if not necessarily weird in the field of taxation. What if the brewer or the cigarette manufacturer sells at a price below the consumers' price index? Will it be taxed on the basis of the consumer's price index which is over and above its wholesale or retail price as the case may be? This is a weird form of exaction where the tax is based not on what the brewer or manufacturer actually realized but on an imaginary wholesale or retail price. This amounts to a taxation based on presumptive price levels and renders the specific tax a presumptive

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tax. We hope, the DOF and the BIR will also honor a presumptive tax payment.

Moreover, specific tax rates based on price levels tied to consumer's price index as proposed by the DOF engenders anti-trust concerns. The proposal if enacted into law will serve as a barrier to the entry of new players in the beer and cigarette industries which are presently dominated by shared monopolies. A new player in these industries will be denied business flexibility to fix its price levels to promote its product and penetrate the market as the price levels are dictated by the consumer price index. The proposed tax regime, Mr. Speaker, will merely enhance the stranglehold of the oligopolies in the beer and cigarette industries, thus, reversing the government's policy of dismantling monopolies and combinations in restraint of trade.[56]

For its part, the Senate's Committee on Ways and Means, then chaired by Senator Juan Ponce Enrile (Senator Enrile), developed its own version of the excise tax system on cigarettes. The Senate Version consisted of a four-tiered system and, interestingly enough, contained a periodic excise tax rate and tax bracket adjustment as well as a periodic resurvey and reclassification of brands provision ("periodic adjustment and reclassification provision," for brevity) to be conducted by the DOF in coordination with the BIR and the National Statistics Office based on the increase in the consumer price index—similar to the one proposed by the DOF, *viz*:

SEC. 4 Section 142 of the National Internal Revenue Code, as amended, is hereby further amended to read as follows:

"SEC. 142. Cigars and cigarettes. –

x x x x x x x x x

(c) Cigarettes packed by machine. – There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below:

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[56] RECORD, HOUSE 10TH CONGRESS (March 11, 1996).

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(1) If the net retail price (excluding the excise tax and the value-added tax) is above Ten pesos (₱10.00) per pack, the tax shall be Twelve pesos (₱12.00) per pack;

(2) If the net retail price (excluding the excise tax and the value-added tax) exceeds Six pesos and fifty centavos (₱6.50) per pack, the tax shall be Eight pesos (₱8.00) per pack;

(3) If the net retail price (excluding the excise tax and the value-added tax) is Five pesos (₱5.00) up to Six pesos and fifty centavos (₱6.50) per pack, the tax shall be Five pesos (₱5.00) per pack;

(4) If the net retail price (excluding the excise tax and the value-added tax) is below Five pesos (₱5.00) per pack, the tax shall be One peso (₱1.00) per pack.

Variants of existing brands of cigarettes which are introduced in the domestic market after the effectivity of this Act shall be taxed under the highest classification of any variant of that brand.

xxx x x x xxx

The rates of specific tax on cigars and cigarettes under subparagraph (a), (b) and (c) hereof, including the net retail prices for purposes of classification, shall be adjusted on the sixth of January three years after the effectivity of this Act and every three years thereafter. The adjustment shall be in accordance with the inflation rate measured by the average increase in the consumer price index over the three-year period. The adjusted tax rates and net price levels shall be in force on the eighth of January.

Within the period hereinabove mentioned, the Secretary of Finance shall direct the conduct of a survey of retail prices of each brand of cigarettes in coordination with the Bureau of Internal Revenue and the National Statistics Office.

For purposes of this Section, net retail price shall mean the price at which the cigarette is sold on retail in 20 major supermarkets in Metro Manila (for brands of cigarettes marketed nationally), excluding the amount intended to cover the applicable excise tax and the value-added tax. For brands which are marketed only outside Metro Manila, the net retail price shall mean the price at which the cigarette is sold

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in five major supermarkets in the region excluding the amount intended to cover the applicable excise tax and the value-added tax.

The classification of each brand of cigarettes in the initial year of implementation of this Act shall be based on its average net retail price as of October 1, 1996. The said classification by brand shall remain in force until January 7, 2000.

New brands shall be classified according to their current net retail price.[57] (Emphasis supplied)

During the period of interpellations, the late Senator Raul S. Roco (Senator Roco) expressed doubts as to the legality and wisdom of putting a periodic adjustment and reclassification provision:

Senator Enrile: This will be the first time that a tax burden will be allowed to be automatically adjusted upwards based on a system of indexing tied up with the Consumers Price Index (CPI). Although I must add that we have adopted a similar system in adjusting the personal tax exemption from income tax of our individual taxpayers.

Senator Roco: They are not exactly the same, Mr. President. But even then, we do note that this the first time we are trying to put an automatic adjustment. My concern is, why do we propose now this automatic adjustment? What is the reason that impels the committee? Maybe we can be enlightened and maybe we shall embrace it forthwith. But what is the reason?

Senator Enrile: Mr. President, we will recall that in the House of Representatives, it has adopted a tax proposal on these products based on a specific tax as a basic tax with an *ad valorem* comparator.

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[57] Senator Enrile explained how this periodic adjustment and reclassification provision would operate, thusly:

Since 1996 is the year during which we are adopting this law— and it will take effect January of next year— the two-year period covered will be 1997 and 1998. So in order to find out the rate of adjustment both of the cutoff point price (tax bracket), retail price and the corresponding specific tax rate, we divide the CPI of 1998 by the CPI of 1996 and then we get a factor or a quotient which is 1.1272. The figure "one(1)" before the decimal point represents the CPI of 1996 and the numbers after the decimal point would represent the rate of increase.

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The Committee on Ways and Means of the Senate has not seen it fit to adopt this system, but it recognized the possibility that there may be an occasion where the price movement in the country might unwarrantedly move upwards, in which case, if we peg the government to a specific tax rate of ₱6.30, ₱9.30 and ₱12.30 for beer, since we are talking of beer,[58] the government might lose in the process.

In order to consider the interest of the government in this, Mr. President, and in order to obviate the possibility that some of these products categorized under the different tiers with different specific tax rates from moving upwards and piercing their own tiers and thereby expose themselves to an incremental tax of higher magnitude, it was felt that we should adopt a system where, in spite of any escalation in the price of these products in the future, the tax rates could be adjusted upwards so that none of these products would leave their own tier. That was the basic principle under which we crafted this portion of the tax proposal.

Senator Roco: Mr. President, we certainly share the judgment of the distinguished gentleman as regards the comparator provision in the House of Representatives and we appreciate the reasons given. But we are under the impression that the House also, aside from the comparator, has an adjustment clause that is fixed. It has fixed rates for the adjustment. So that one of the basic differences between the Senate proposed version now and the House version is that, the House of Representatives has manifested its will and judgment as regards the tax to which we will adjust, whereas the Senate version relegates fundamentally that judgment to the Department of Finance.

So, in effect, what I am saying is, if we take 100% out of 1.1272 which is the quotient of dividing 257, the CPI of 1998 by 228, the CPI of 1996, then, we end up with .1272 or 12%, a little less than 13%.

If we multiply the net retail price now, which is the cut off point (of the tax brackets) established by law as of the time we enact this law, by approximately 13%, that will be the cutoff point price, and we increase the net retail price used as a base when we adopted this law by 13%. It increases the corresponding specific tax by 13% and this will be the adjusted cutoff point and adjusted specific tax as of 1999.

[58] The discussion is in reference to the periodic adjustment and reclassification provision of *beer*. However, under the Senate Version, the same periodic adjustment and reclassification provision is applied to cigarettes so that the same reasoning is applicable to cigarettes.

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Senator Enrile: That is correct, Mr. President, because we felt that in imposing a fixed adjustment, we might be fixing an amount that is either too high or too low. We cannot foresee the economic trends in this country over a period of two years, three years, let alone ten years. So we felt that a mechanism ought to be adopted in order to serve the interest of the government, the interest of the producers, and the interest of the consuming public.

Senator Roco: This is where, Mr. President, my policy difficulties start. Under the Constitution— I think it is Article VI, Section 24, and it was the distinguished chairman of the Committee on Ways and Means who made this Chamber very conscious of this provision— revenue measures and tariff measures shall originate exclusively from the House of Representatives.

The reason for this, Mr. President, is, there is a long history why the House of Representatives must originate judgments on tax. The House members represent specific districts. They represent specific constituencies, and the whole history of parliamentarism, the whole history of Congress as an institution is founded on the proposition that the direct representatives of the people must speak about taxes.

Mr. President, while the Senate can concur and can introduce amendments, the proposed change here is radical. This is the policy difficulty that I wish to clarify with the gentleman because the judgment call now on the amount of tax to be imposed is not coming from Congress. It is shifted to the Department of Finance. True, the Secretary of Finance may have been the best finance officer two years ago and now the best finance officer in Asia, but that does not make him qualified to replace the judgment call of the House of Representatives. That is my first difficulty.

Senator Enrile: Mr. President, precisely the law, in effect, authorizes this rate beforehand. The computation of the rate is the only thing that was left to the Department of Finance as a tax implementor of Congress. This is not unusual because we have already, as I said, adopted a system similar to this. If we adjust the personal exemption of an individual taxpayer, we are in effect adjusting the applicable tax rate to him.

Senator Roco: But the point I was trying to demonstrate, Mr. President, is that we depart precisely from the mandate of the Constitution that judgment on revenue must emanate from Congress.

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Here, it is shifted to the Department of Finance for no visible or patent reason insofar as I could understand. The only difference is, who will make the judgment? Should it be Congress?

Senator Enrile: Mr. President, forgive me for answering sooner than I should. My understanding of the Constitution is that all revenue measures must emanate from the House. That is all the Constitution says.

Now, it does not say that the judgment call must belong to the House. The judgment call can belong both to the House and to the Senate. We can change whatever proposal the House did. Precisely, we are now crafting a measure, and we are saying that this is the rate subject to an adjustment which we also provide. We are not giving any unusual power to the Secretary of Finance because we tell him, "This is the formula that you must adopt in arriving at the adjustment so that you do not have to come back to us."[59]

Apart from his doubts as to the legality of the delegation of taxing power to the DOF and BIR, Senator Roco also voiced out his concern about the possible abuse and corruption that will arise from the periodic adjustment and reclassification provision. Continuing—

Senator Roco: Mr. President, if that is the argument, that the distinguished gentleman has a different legal interpretation, we will then now examine the choice. Because his legal interpretation is different from mine, then the issues becomes: **Is it more advantageous that this judgment be exercised by the House? Should we not concur or modify in terms of the exercise by the House of its power or are we better off giving this judgment call to the Department of Finance?**

Let me now submit, Mr. President, that in so doing, it is more advantageous to fix the rate so that even if we modify the rates identified by Congress, it is better and less susceptible to abuse.

For instance, Mr. President, would the gentlemen wish to demonstrate to us how this will be done? On page 8, lines 5 to 9, there is a provision here as to when the Secretary of Finance shall direct the conduct of survey of retail prices of each brand of fermented

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[59] II RECORD, SENATE 10TH CONGRESS (November 4, 1996).

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liquor in coordination with the Bureau of Internal Revenue and the National Statistics Office.

These offices are not exactly noted, Mr. President, for having been sanctified by the Holy Spirit in their noble intentions. x x x [60] (Emphasis supplied)

Pressing this point, Senator Roco continued his query:

Senator Roco: x x x [On page 8, lines 5 to 9] it says that during the two-year period, the Secretary of Finance shall direct the conduct of the survey. How? When? Which retail prices and what brand shall he consider? When he coordinates with the Bureau of Internal Revenue, what is the Bureau of Internal Revenue supposed to be doing? What is the National Statistics Office supposed to be doing, and under what guides and standards?

May the gentleman wish to demonstrate how this will be done? **My point, Mr. President, is, by giving the Secretary of Finance, the BIR and the National Statistics Office discretion over a two-year period will invite corruption and arbitrariness, which is more dangerous than letting the House of Representatives and this Chamber set the adjustment rate.** Why not set the adjustment rate? Why should Congress not exercise that judgment now? x x x

Senator Enrile: x x x

Senator Roco: x x x We respectfully submit that the Chairman consider choosing the judgment of this Chamber and the House of Representatives over a delegated judgment of the Department of Finance.

Again, it is not to say that I do not trust the Department of Finance. It has won awards, and I also trust the undersecretary. But that is beside the point. Tomorrow, they may not be there.[61] (Emphasis supplied)

This point was further dissected by the two senators. There was a genuine difference of opinion as to which system— one

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[60] *Id.*

[61] *Id.*

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with a fixed excise tax rate and classification or the other with a periodic adjustment of excise tax rate and reclassification—was less susceptible to abuse, as the following exchanges show:

> Senator Enrile: Mr. President, considering the sensitivity of these products from the viewpoint of exerted pressures because of the understandable impact of this measure on the pockets of the major players producing these products, the committee felt that perhaps to lessen such pressures, it is best that we now establish a norm where the tax will be adjusted without incurring too much political controversy as has happened in the case of this proposal.
>
> Senator Roco: But that is exactly the same reason we say we must rely upon Congress because Congress, if it is subjected to pressure, at least balances off because of political factors.
>
> When the Secretary of Finance is now subjected to pressure, are we saying that the Secretary of Finance and the Department of Finance is better-suited to withstand the pressure? Or are we saying "Let the Finance Secretary decide whom to yield"?
>
> I am saying that the temptation and the pressure on the Secretary of Finance is more dangerous and more corruption-friendly than ascertaining for ourselves now a fixed rate of increase for a fixed period.
>
> Senator Enrile: Mr. President, perhaps the gentleman may not agree with this representation, but in my humble opinion, this formulation is less susceptible to pressure because there is a definite point of reference which is the consumer price index, and that consumer price index is not going to be used only for this purpose. The CPI is used for a national purpose, and there is less possibility of tinkering with it.[62]

Further, Senator Roco, like Congressman Javier, expressed the view that the periodic adjustment and reclassification provision would create an anti-competitive atmosphere. Again, Senators Roco and Enrile had genuine divergence of opinions on this matter, to wit:

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[62] *Id.*

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Senator Roco: x x x On the marketing level, an adjustment clause may, in fact, be disadvantageous to both companies, whether it is the Lucio Tan companies or the San Miguel companies. If we have to adjust our marketing position every two years based on the adjustment clause, the established company may survive, but the new ones will have tremendous difficulty. Therefore, this provision tends to indicate an anticompetitive bias.

It is good for San Miguel and the Lucio Tan companies, but the new companies— assuming there may be new companies and we want to encourage them because of the old point of liberalization— will be at a disadvantage under this situation. If this observation will find receptivity in the policy consideration of the distinguished Gentleman, maybe we can also further, later on, seek amendments to this automatic adjustment clause in some manner.

Senator Enrile: Mr. President, I cannot foresee any anti-competitiveness of this provision with respect to a new entrant, because a new entrant will not just come in without studying the market. He is a lousy businessman if he will just come in without studying the market. If he comes in, he will determine at what retail price level he will market his product, and he will be coming under any of the tiers depending upon his net retail price. Therefore, I do not see how this particular provision will affect a new entrant.

Senator Roco: Be that as it may, Mr. President, we obviously will not resort to debate until this evening, and we will have to look for other ways of resolving the policy options.

Let me just close that particular area of my interpellation, by summarizing the points we were hoping could be clarified.

1. That the automatic adjustment clause is at best questionable in law.

2. It is corruption-friendly in the sense that it shifts the discretion from the House of Representatives and this Chamber to the Secretary of Finance, no matter how saintly he may be.

3. There is,— although the judgment call of the gentleman disagrees— to our view, an anticompetitive situation that is geared at…[63]

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[63] *Id.*

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After these lengthy exchanges, it appears that the views of Senator Enrile were sustained by the Senate Body because the Senate Version was passed on Third Reading without substantially altering the periodic adjustment and reclassification provision.

It was actually at the Bicameral Conference Committee level where the Senate Version underwent major changes. The Senate Panel prevailed upon the House Panel to abandon the basic excise tax rate and *ad valorem* comparator as the means to determine the applicable excise tax rate. Thus, the Senate's four-tiered system was retained with minor adjustments as to the excise tax rate per tier. However, the House Panel prevailed upon the Senate Panel to delete the power of the DOF and BIR to periodically adjust the excise tax rate and tax brackets, and periodically resurvey and reclassify the cigarette brands based on the increase in the consumer price index.

In lieu thereof, the classification of existing brands based on their average net retail price as of October 1, 1996 was "frozen" and a fixed across-the-board 12% increase in the excise tax rate of each tier after three years from the effectivity of the Act was put in place. There is a dearth of discussion in the deliberations as to the applicability of the freezing mechanism to new brands after their classification is determined based on their current net retail price. But a plain reading of the text of RA 8240, even before its amendment by RA 9334, as well as the previously discussed deliberations would readily lead to the conclusion that the intent of Congress was to likewise apply the freezing mechanism to new brands. Precisely, Congress rejected the proposal to allow the DOF and BIR to periodically adjust the excise tax rate and tax brackets as well as to periodically resurvey and reclassify cigarettes brands which would have encompassed old *and* new brands alike. Thus, it would be absurd for us to conclude that Congress intended to allow the periodic reclassification of new brands by the BIR after their classification is determined based on their current net retail price. We shall return to this point when we tackle the second issue.

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In explaining the changes made at the Bicameral Conference Committee level, Senator Enrile, in his report to the Senate plenary, noted that the fixing of the excise tax rates was done to avoid confusion.[64] Congressman Javier, for his part, reported to the House plenary the reasons for fixing the excise tax rate and freezing the classification, thus:

> Finally, this twin feature, Mr. Speaker, fixed specific tax rates and frozen classification, rejects the Senate version which seeks to abdicate the power of Congress to tax by pegging the rates as well as the classification of sin products to consumer price index **which practically vests in the Secretary of Finance the power to fix the rates and to classify the products for tax purposes.**[65] (Emphasis supplied)

Congressman Javier later added that the frozen classification was intended to give stability to the industry as the BIR would be prevented from tinkering with the classification since it would remain unchanged despite the increase in the net retail prices of the previously classified brands.[66] This would also assure the industry players that there would be no new impositions as long as the law is unchanged.[67]

From the foregoing, it is quite evident that the *classification freeze provision* could hardly be considered arbitrary, or motivated by a hostile or oppressive attitude to unduly favor older brands over newer brands. Congress was unequivocal in its unwillingness to delegate the power to periodically adjust the excise tax rate and tax brackets as well as to periodically resurvey and reclassify the cigarette brands based on the increase in the consumer price index to the DOF and the BIR. Congress doubted the constitutionality of such delegation of power, and likewise, considered the ethical implications thereof. Curiously,

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[64] II RECORD, SENATE 10TH CONGRESS (November 21, 1996).

[65] RECORD, HOUSE 10TH CONGRESS (November 21, 1996).

[66] *Id.*

[67] *Id.*

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the *classification freeze provision* was put in place of the periodic adjustment and reclassification provision because of the belief that the latter would foster an anti-competitive atmosphere in the market. Yet, as it is, this same criticism is being foisted by petitioner upon the *classification freeze provision*.

To our mind, the *classification freeze provision* was in the main the result of Congress' earnest efforts to improve the efficiency and effectivity of the tax administration over sin products while trying to balance the same with other state interests. In particular, the questioned provision addressed Congress' administrative concerns regarding delegating too much authority to the DOF and BIR as this will open the tax system to potential areas for abuse and corruption. Congress may have reasonably conceived that a tax system which would give the least amount of discretion to the tax implementers would address the problems of tax avoidance and tax evasion.

To elaborate a little, Congress could have reasonably foreseen that, under the DOF proposal and the Senate Version, the periodic reclassification of brands would tempt the cigarette manufacturers to manipulate their price levels or bribe the tax implementers in order to allow their brands to be classified at a lower tax bracket even if their net retail prices have already migrated to a higher tax bracket after the adjustment of the tax brackets to the increase in the consumer price index. Presumably, this could be done when a resurvey and reclassification is forthcoming. As briefly touched upon in the Congressional deliberations, the difference of the excise tax rate between the medium-priced and the high-priced tax brackets under RA 8240, prior to its amendment, was ₱3.36. For a moderately popular brand which sells around 100 million packs per year, this easily translates to ₱336,000,000.[68] The incentive for tax

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[68] To give a better perspective of the cigarette market based on volume, in 2003 alone, sales volume was as follows: 2.1 billion packs under the low-priced segment, 898 million packs under the medium-priced segment, 1.3 billion packs under the high-priced segment. [RECORD, SENATE 13TH CONGRESS (November 17, 2004)]

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avoidance, if not outright tax evasion, would clearly be present. Then again, the tax implementers may use the power to periodically adjust the tax rate and reclassify the brands as a tool to unduly oppress the taxpayer in order for the government to achieve its revenue targets for a given year.

Thus, Congress sought to, among others, simplify the whole tax system for sin products to remove these potential areas of abuse and corruption from both the side of the taxpayer and the government. Without doubt, the *classification freeze provision* was an integral part of this overall plan. This is in line with one of the avowed objectives of the assailed law "to simplify the tax administration and compliance with the tax laws that are about to unfold in order to minimize losses arising from inefficiencies and tax avoidance scheme, if not outright tax evasion."[69] RA 9334 did not alter this *classification freeze provision* of RA 8240. On the contrary, Congress affirmed this freezing mechanism by clarifying the wording of the law. We can thus reasonably conclude, as the deliberations on RA 9334 readily show, that the administrative concerns in tax administration, which moved Congress to enact the *classification freeze provision* in RA 8240, were merely continued by RA 9334. Indeed, administrative concerns may provide a legitimate, rational basis for legislative classification.[70] In the case at bar, these administrative concerns in the measurement and collection of excise taxes on sin products are readily apparent as afore-discussed.

Aside from the major concern regarding the elimination of potential areas for abuse and corruption from the tax administration of sin products, the legislative deliberations also show that the *classification freeze provision* was intended to generate

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[69] *Supra* note 47.

[70] AMJUR STATELOCL § 122 citing *Chicago Freight Car Leasing Co. v. Limbach*, 62 Ohio St. 3d 489, 584 N.E.2d 690 (1992); *Sandy Springs Water Co. v. Department of Health and Environmental Control*, 324 S.C. 177, 478 S.E.2d 60 (1996). See also *Skyscraper Corporation v. County of Newberry*, 323 S.C. 412, 475 S.E.2d 764 (1996).

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buoyant and stable revenues for government. With the frozen tax classifications, the revenue inflow would remain stable and the government would be able to predict with a greater degree of certainty the amount of taxes that a cigarette manufacturer would pay given the trend in its sales volume over time. The reason for this is that the previously classified cigarette brands would be prevented from moving either upward or downward their tax brackets despite the changes in their net retail prices in the future and, as a result, the amount of taxes due from them would remain predictable. The *classification freeze provision* would, thus, aid in the revenue planning of the government.[71]

All in all, the *classification freeze provision* addressed Congress' administrative concerns in the simplification of tax administration of sin products, elimination of potential areas for abuse and corruption in tax collection, buoyant and stable revenue generation, and ease of projection of revenues. *Consequently, there can be no denial of the equal protection of the laws since the rational-basis test is amply satisfied.*

Going now to the contention of petitioner that the *classification freeze provision* unduly favors older brands over newer brands, we must first contextualize the basis of this claim. As previously discussed, the evidence presented by the petitioner merely showed that in 2004, Marlboro and Philip Morris, on the one hand, and Lucky Strike, on the other, would have been taxed at the same rate had the *classification freeze provision* been not in place. But due to the operation of the *classification freeze provision*, Lucky Strike was taxed higher. From here, petitioner generalizes that this differential tax treatment arising from the *classification freeze provision* adversely impacts the fairness of the playing field in the industry, particularly, between older and newer brands. Thus, it is virtually impossible for new brands to enter the market.

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[71] II RECORD, SENATE 10TH CONGRESS (October 15, 1996).

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Petitioner did not, however, clearly demonstrate the exact extent of such impact. It has not been shown that the net retail prices of other older brands previously classified under this classification system have already pierced their tax brackets, and, if so, how this has affected the overall competition in the market. Further, it does not necessarily follow that newer brands cannot compete against older brands because price is not the only factor in the market as there are other factors like consumer preference, brand loyalty, *etc*. In other words, even if the newer brands are priced higher due to the differential tax treatment, it does not mean that they cannot compete in the market especially since cigarettes contain addictive ingredients so that a consumer may be willing to pay a higher price for a particular brand solely due to its unique formulation. It may also be noted that in 2003, the BIR surveyed 29 new brands[72] that were introduced in the market after the effectivity of RA 8240 on January 1, 1997, thus negating the sweeping generalization of petitioner that the *classification freeze provision* has become an insurmountable barrier to the entry of new brands. Verily, where there is a claim of breach of the due process and equal protection clauses, considering that they are not fixed rules but rather broad standards, there is a need for proof of such persuasive character as would lead to such a conclusion. Absent such a showing, the presumption of validity must prevail.[73]

Be that as it may, petitioner's evidence does suggest that, at least in 2004, Philip Morris and Marlboro, older brands, would have been taxed at the same rate as Lucky Strike, a newer brand, due to certain conditions (*i.e.*, the increase of the older brands' net retail prices beyond the tax bracket to which they were previously classified after the lapse of some time) were it not for the *classification freeze provision*. It may be conceded that this has adversely affected, to a certain extent, the ability of petitioner to competitively price its newer brands *vis-à-vis* the subject older brands. Thus, to a limited extent, the assailed

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[72] See Annex "A", Revenue Regulations No. 22-2003.

[73] *Supra* note 40 at 588-589.

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law seems to derogate one of its avowed objectives, *i.e.* promoting fair competition among the players in the industry. Yet, will this occurrence, by itself, render the assailed law unconstitutional on equal protection grounds?

We answer in the negative.

Whether Congress acted improvidently in derogating, to a limited extent, the state's interest in promoting fair competition among the players in the industry, while pursuing other state interests regarding the simplification of tax administration of sin products, elimination of potential areas for abuse and corruption in tax collection, buoyant and stable revenue generation, and ease of projection of revenues through the *classification freeze provision*, and whether the questioned provision is the best means to achieve these state interests, necessarily go into the wisdom of the assailed law which we cannot inquire into, much less overrule. The *classification freeze provision* has not been shown to be precipitated by a veiled attempt, or hostile attitude on the part of Congress to unduly favor older brands over newer brands. On the contrary, we must reasonably assume, owing to the respect due a co-equal branch of government and as revealed by the Congressional deliberations, that the enactment of the questioned provision was impelled by an earnest desire to improve the efficiency and effectivity of the tax administration of sin products. For as long as the legislative classification is rationally related to furthering some legitimate state interest, as here, the rational-basis test is satisfied and the constitutional challenge is perfunctorily defeated.

We do not sit in judgment as a supra-legislature to decide, after a law is passed by Congress, which state interest is superior over another, or which method is better suited to achieve one, some or all of the state's interests, or what these interests should be in the first place. This policy-determining power, by constitutional fiat, belongs to Congress as it is its function to determine and balance these interests or choose which ones to pursue. Time and again we have ruled that the judiciary does not settle policy issues. The Court can only declare what the

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law is and not what the law should be. Under our system of government, policy issues are within the domain of the political branches of government and of the people themselves as the repository of all state power.[74] Thus, the legislative classification under the *classification freeze provision*, after having been shown to be rationally related to achieve certain legitimate state interests and done in good faith, must, perforce, end our inquiry.

Concededly, the finding that the assailed law seems to derogate, to a limited extent, one of its avowed objectives (*i.e.* promoting fair competition among the players in the industry) would suggest that, by Congress' own standards, the current excise tax system on sin products is imperfect. But, certainly, we cannot declare a statute unconstitutional merely because it can be improved or that it does not tend to achieve all of its stated objectives.[75] This is especially true for tax legislation which simultaneously addresses and impacts multiple state interests.[76] Absent a clear showing of breach of constitutional limitations, Congress, owing to its vast experience and expertise in the field of taxation, must be given sufficient leeway to formulate and experiment with different tax systems to address the complex issues and problems related to tax administration. Whatever imperfections that may occur, the same should be addressed to the democratic process to refine and evolve a taxation system which ideally will achieve most, if not all, of the state's objectives.

In fine, petitioner may have valid reasons to disagree with the policy decision of Congress and the method by which the latter sought to achieve the same. But its remedy is with Congress and not this Court. As succinctly articulated in *Vance v. Bradley*:[77]

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[74] *Valmonte v. Belmonte, Jr.*, G.R. No. 74930, February 13, 1989, 170 SCRA 256, 268.

[75] Cf. *Roschen v. Ward*, 279 U.S. 337, 339 (1929).

[76] It may be observed that tax legislation is not solely a revenue-generating measure as it also functions as a regulatory tool, a policy instrument to affect consumer behavior (*e.g.*, sumptuary effect), *etc*..

[77] 440 U.S. 93 (1979).

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The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process, and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.[78]

We now tackle the second issue.

Petitioner asserts that Revenue Regulations No. 1-97, as amended by Revenue Regulations No. 9-2003, Revenue Regulations No. 22-2003 and Revenue Memorandum Order No. 6-2003, are invalid insofar as they empower the BIR to reclassify or update the classification of new brands of cigarettes based on their current net retail prices every two years or earlier. It claims that RA 8240, even prior to its amendment by RA 9334, did not authorize the BIR to conduct said periodic resurvey and reclassification.

The questioned provisions are found in the following sections of the assailed issuances:

(1) Section 4(B)(e)(c), 2nd paragraph of Revenue Regulations No. 1-97, as amended by Section 2 of Revenue Regulations 9-2003, *viz*:

For the purpose of establishing or updating the tax classification of new brands and variant(s) thereof, their current net retail price shall be reviewed periodically through the conduct of survey or any other appropriate activity, as mentioned above, every two (2) years unless earlier ordered by the Commissioner. However, notwithstanding any increase in the current net retail price, the tax classification of such new brands shall remain in force until the same is altered or changed through the issuance of an appropriate Revenue Regulations.

(2) Sections II(1)(b), II(4)(b), II(6), II(7), III (*Large Tax Payers Assistance Division II)* II(b) of Revenue

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[78] *Id.* at 97.

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Memorandum Order No. 6-2003, insofar as pertinent to cigarettes packed by machine, *viz*:

II. POLICIES AND GUIDELINES

1. The conduct of survey covered by this Order, for purposes of determining the current retail prices of new brands of cigarettes and alcohol products introduced in the market on or after January 1, 1997, shall be undertaken in the following instances:

x x x x x x x x x

b. For reclassification of new brands of said excisable products that were introduced in the market after January 1, 1997.

x x x x x x x x x

4. The determination of the current retail prices of new brands of the aforesaid excisable products shall be initiated as follows:

x x x x x x x x x

b. After the lapse of the prescribed two-year period or as the Commissioner may otherwise direct, the appropriate tax reclassification of these brands based on the current net retail prices thereof shall be determined by a survey to be conducted upon a written directive by the Commissioner.

For this purpose, a memorandum order to the Assistant Commissioner, Large Taxpayers Service, Heads, Excise Tax Areas, and Regional Directors of all Revenue Regions, except Revenue Region Nos. 4, 5, 6, 7, 8 and 9, shall be issued by the Commissioner for the submission of the list of major supermarkets/retail outlets where the above excisable products are being sold, as well as the list of selected revenue officers who shall be designated to conduct the said activity(ies).

x x x x x x x x x

6. The results of the survey conducted in Revenue Region Nos. 4 to 9 shall be submitted directly to the Chief, LT Assistance Division II (LTAD II), National Office for consolidation. On the other hand, the results of the survey conducted in Revenue Regions other than Revenue Region Nos. 4 to 9, shall be submitted to the Office of the Regional Director for regional consolidation. The consolidated regional

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survey, together with the accomplished survey forms shall be transmitted to the Chief, LTAD II for national consolidation within three (3) days from date of actual receipt from the survey teams. The LTAD II shall be responsible for the evaluation and analysis of the submitted survey forms and the preparation of the recommendation for the updating/revision of the tax classification of each brand of cigarettes and alcohol products. The said recommendation, duly validated by the ACIR, LTS, shall be submitted to the Commissioner for final review within ten (10) days from the date of actual receipt of complete reports from all the surveying Offices.

7. Upon final review by the Commissioner of the revised tax classification of the different new brands of cigarettes and alcohol products, the appropriate revenue regulations shall be prepared and submitted for approval by the Secretary of Finance.

x x x x x x x x x

III. PROCEDURES

x x x x x x x x x

Large Taxpayers Assistance Division II

x x x x x x x x x

1. Perform the following preparatory procedures on the identification of brands to be surveyed, supermarkets/retail outlets where the survey shall be conducted, and the personnel selected to conduct the survey.

x x x x x x x x x

b. On the tax reclassification of new brands

i. Submit a master list of registered brands covered by the survey pursuant to the provisions of Item II.2 of this Order containing the complete description of each brand, existing net retail price and the corresponding tax rate thereof.

ii. Submit to the ACIR, LTS, a list of major supermarkets/retail outlets within the territorial jurisdiction of the concerned revenue regions where the survey will be conducted to be used as basis in the issuance of Mission Orders. Ensure that the minimum number of establishments to be surveyed, as prescribed under existing revenue laws and regulations, is complied with. In addition, the names and

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designations of revenue officers selected to conduct the survey shall be clearly indicated opposite the names of the establishments to be surveyed.

There is merit to the contention.

In order to implement RA 8240 following its effectivity on January 1, 1997, the BIR issued Revenue Regulations No. 1-97, dated December 13, 1996, which mandates a one-time classification only.[79] Upon their launch, new brands shall be initially taxed based on their suggested net retail price. Thereafter, a survey shall be conducted within three (3) months to determine their current net retail prices and, thus, fix their official tax

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[79] Section 4(B) of Revenue Regulations No. 1-97 provides:

Section 4. *Classification and Manner of Taxation of Existing Brands, New Brands and Variant of Existing Brands.*

x x x

B. *New Brand*

New brands shall be classified according to their current net retail price. In the meantime that the current net retail price has not yet been established, the suggested net retail price shall be used to determine the specific tax classification. Thereafter, a survey shall be conducted in 20 major supermarkets or retail outlets in Metro Manila (for brands of cigarette marketed nationally) or in five (5) major supermarkets or retail outlets in the region (for brands which are marketed only outside Metro Manila) at which the cigarette is sold on retail in reams/carton, three (3) months after the initial removal of the new brand to determine the actual net retail price excluding the excise tax and value added tax which shall then be the basis in determining the specific tax classification. In case the current net retail price is higher than the suggested net retail price, the former shall prevail. Otherwise, the suggested net retail price shall prevail. Any difference in the specific tax due shall be assessed and collected inclusive of increments as provided for by the National Internal Revenue Code, as amended.

The survey contemplated herein to establish the current net retail price on locally manufactured and imported cigarettes shall be conducted by the duly authorized representatives of the Commissioner of Internal Revenue together with a representative of the Regional Director from each Regional Office having jurisdiction over the retail outlet within the Region being surveyed, and who shall submit, without delay, their consolidated written report to the Commissioner of Internal Revenue.

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classifications. However, the BIR made a turnaround by issuing Revenue Regulations No. 9-2003, dated February 17, 2003, which partly amended Revenue Regulations No. 1-97, by authorizing the BIR to periodically reclassify new brands (*i.e.*, every two years or earlier) based on their current net retail prices. Thereafter, the BIR issued Revenue Memorandum Order No. 6-2003, dated March 11, 2003, prescribing the guidelines on the implementation of Revenue Regulations No. 9-2003. This was patent error on the part of the BIR for being contrary to the plain text and legislative intent of RA 8240.

It is clear that the afore-quoted portions of Revenue Regulations No. 1-97, as amended by Section 2 of Revenue Regulations 9-2003, and Revenue Memorandum Order No. 6-2003 unjustifiably emasculate the operation of Section 145 of the NIRC because they authorize the Commissioner of Internal Revenue to update the tax classification of new brands every two years or earlier subject only to its issuance of the appropriate Revenue Regulations, when nowhere in Section 145 is such authority granted to the Bureau. Unless expressly granted to the BIR, the power to reclassify cigarette brands remains a prerogative of the legislature which cannot be usurped by the former.

More importantly, as previously discussed, the clear legislative intent was for new brands to benefit from the same freezing mechanism accorded to Annex "D" brands. To reiterate, in enacting RA 8240, Congress categorically rejected the DOF proposal and Senate Version which would have empowered the DOF and BIR to periodically adjust the excise tax rate and tax brackets, and to periodically resurvey and reclassify cigarette brands. (This resurvey and reclassification would have naturally encompassed both old and new brands.) It would thus, be absurd for us to conclude that Congress intended to allow the periodic reclassification of new brands by the BIR after their classification is determined based on their current net retail price while limiting the freezing of the classification to Annex "D" brands. Incidentally, Senator Ralph G. Recto expressed the following views during the deliberations on RA 9334, which later amended RA 8240:

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Senator Recto: Because, like I said, when Congress agreed to adopt a specific tax system [under R.A. 8240], when Congress did not index the brackets, and Congress did not index the rates but only provided for a one rate increase in the year 2000, we shifted from *ad valorem* which was based on value to a system of specific which is based on volume. Congress then, in effect, determined the classification based on the prices at that particular period of time and classified these products accordingly.

Of course, Congress then decided on what will happen to the new brands or variants of existing brands. To favor government, a variant would be classified as the highest rate of tax for that particular brand. In case of a new brand, Mr. President, then the BIR should classify them. **But I do not think it was the intention of Congress then to give the BIR the authority to reclassify them every so often. I do not think it was the intention of Congress to allow the BIR to classify a new brand every two years, for example, because it will be arbitrary for the BIR to do so.** x x x [80] (Emphasis supplied)

For these reasons, the amendments introduced by RA 9334 to RA 8240, insofar as the freezing mechanism is concerned, must be seen merely as underscoring the legislative intent already in place then, *i.e.* new brands as being covered by the freezing mechanism after their classification based on their current net retail prices.

Unfortunately for petitioner, this result will not cause a downward reclassification of Lucky Strike. It will be recalled that petitioner introduced Lucky Strike in June 2001. However, as admitted by petitioner itself, the BIR did not conduct the required market survey within three months from product launch. As a result, Lucky Strike was never classified based on its actual current net retail price. Petitioner failed to timely seek redress to compel the BIR to conduct the requisite market survey in order to fix the tax classification of Lucky Strike. In the meantime, Lucky Strike was taxed based on its *suggested* net retail price of ₱9.90 per pack, which is within the high-priced tax bracket. It was only after the lapse of two years or in 2003

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[80] RECORD, SENATE 13TH CONGRESS (December 6, 2004).

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that the BIR conducted a market survey which was the *first time* that Lucky Strike's *actual* current net retail price was surveyed and found to be from ₱10.34 to ₱11.53 per pack, which is within the premium-priced tax bracket. The case of petitioner falls under a situation where there was no reclassification based on its current net retail price which would have been invalid as previously explained. Thus, we cannot grant petitioner's prayer for a downward reclassification of Lucky Strike because it was never reclassified by the BIR based on its *actual* current net retail price.

It should be noted though that on August 8, 2003, the BIR issued Revenue Regulations No. 22-2003 which implemented the revised tax classifications of new brands based on their current net retail prices through the market survey conducted pursuant to Revenue Regulations No. 9-2003. Annex "A" of Revenue Regulations No. 22-2003 lists the result of the market survey and the corresponding recommended tax classification of the new brands therein aside from Lucky Strike. However, whether these other brands were illegally reclassified based on their actual current net retail prices by the BIR must be determined on a case-to-case basis because it is possible that these brands were classified based on their actual current net retail price for the first time in the year 2003 just like Lucky Strike. Thus, we shall not make any pronouncement as to the validity of the tax classifications of the other brands listed therein.

Finally, it must be noted that RA 9334 introduced changes in the manner by which the current net retail price of a new brand is determined and how its classification is permanently fixed, to wit:

> New brands, as defined in the immediately following paragraph, shall initially be classified according to their suggested net retail price.
>
> New brands shall mean a brand registered after the date of effectivity of R.A. No. 8240 [on January 1, 1997].
>
> Suggested net retail price shall mean the net retail price at which new brands, as defined above, of locally manufactured or imported

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cigarettes are intended by the manufacture or importer to be sold on retail in major supermarkets or retail outlets in Metro Manila for those marketed nationwide, and in other regions, for those with regional markets. **At the end of three (3) months from the product launch, the Bureau of Internal Revenue shall validate the suggested net retail price of the new brand against the net retail price as defined herein and determine the correct tax bracket under which a particular new brand of cigarette, as defined above, shall be classified. After the end of eighteen (18) months from such validation, the Bureau of Internal Revenue shall revalidate the initially validated net retail price against the net retail price as of the time of revalidation in order to finally determine the correct tax bracket under which a particular new brand of cigarettes shall be classified;** Provided however, That brands of cigarettes introduced in the domestic market between January 1, 1997 and December 31, 2003 shall remain in the classification under which the Bureau of Internal Revenue has determined them to belong as of December 31, 2003. **Such classification of new brands and brands introduced between January 1, 1997 and December 31, 2003 shall not be revised except by an act of Congress.** (Emphasis supplied)

Thus, Revenue Regulations No. 9-2003 and Revenue Memorandum Order No. 6-2003 should be deemed modified by the above provisions from the date of effectivity of RA 9334 on January 1, 2005.

In sum, Section 4(B)(e)(c), 2nd paragraph of Revenue Regulations No. 1-97, as amended by Section 2 of Revenue Regulations 9-2003, and Sections II(1)(b), II(4)(b), II(6), II(7), III (*Large Tax Payers Assistance Division II)* II(b) of Revenue Memorandum Order No. 6-2003, as pertinent to cigarettes packed by machine, are invalid insofar as they grant the BIR the power to reclassify or update the classification of new brands every two years or earlier. Further, these provisions are deemed modified upon the effectivity of RA 9334 on January 1, 2005 insofar as the manner of determining the permanent classification of new brands is concerned.

We now tackle the last issue.

Petitioner contends that RA 8240, as amended by RA 9334, and its implementing rules and regulations violate the General

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Agreement on Tariffs and Trade (GATT) of 1947, as amended, specifically, Paragraph 2, Article III, Part II:

> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

It claims that it is the duty of this Court to correct, in favor of the GATT, whatever inconsistency exists between the assailed law and the GATT in order to prevent triggering the international dispute settlement mechanism under the GATT-WTO Agreement.

We disagree.

The *classification freeze provision* uniformly applies to all newly introduced brands in the market, whether imported or locally manufactured. It does not purport to single out imported cigarettes in order to unduly favor locally produced ones. Further, petitioner's evidence was anchored on the alleged unequal tax treatment between old and new brands which involves a different frame of reference *vis-à-vis* local and imported products. Petitioner has, therefore, failed to clearly prove its case, both factually and legally, within the parameters of the GATT.

At any rate, even assuming *arguendo* that petitioner was able to prove that the *classification freeze provision* violates the GATT, the outcome would still be the same. The GATT is a treaty duly ratified by the Philippine Senate and under Article VII, Section 21[81] of the Constitution, it merely acquired the

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[81] Section 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

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status of a statute.[82] Applying the basic principles of statutory construction in case of irreconcilable conflict between statutes, RA 8240, as amended by RA 9334, would prevail over the GATT either as a later enactment by Congress or as a special law dealing with the taxation of sin products. Thus, in *Abbas v. Commission on Elections*,[83] we had occasion to explain:

> Petitioners premise their arguments on the assumption that the Tripoli Agreement is part of the law of the land, being a binding international agreement. The Solicitor General asserts that the Tripoli Agreement is neither a binding treaty, not having been entered into by the Republic of the Philippines with a sovereign state and ratified according to the provisions of the 1973 or 1987 Constitutions, nor a binding international agreement.
>
> We find it neither necessary nor determinative of the case to rule on the nature of the Tripoli Agreement and its binding effect on the Philippine Government whether under public international or internal Philippine law. In the first place, it is now the Constitution itself that provides for the creation of an autonomous region in Muslim Mindanao. The standard for any inquiry into the validity of R.A. No. 6734 would therefore be what is so provided in the Constitution. Thus, any conflict between the provisions of R.A. No. 6734 and the provisions of the Tripoli Agreement will not have the effect of enjoining the implementation of the Organic Act. **Assuming for the sake of argument that the Tripoli Agreement is a binding treaty or international agreement, it would then constitute part of the law of the land. But as internal law it would not be superior to R.A. No. 6734, an enactment of the Congress of the Philippines, rather it would be in the same class as the latter** [SALONGA, *PUBLIC INTERNATIONAL LAW* 320 (4th ed., 1974), citing Head Money Cases, 112 U.S. 580 (1884) and *Foster v. Nelson*, 2 Pet. 253 (1829)]. **Thus, if at all, R.A. No. 6734 would be amendatory of the Tripoli Agreement, being a subsequent law.** Only a determination by this Court that R.A.

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[82] The Philippine Senate ratified the GATT on December 14, 1994. See Merlin M. Magallona, *Fundamentals of Public International Law*, 2005 ed., pp. 545-546.

[83] G.R. No. 89651, November 10, 1989, 179 SCRA 287, 294 cited in Magallona, *supra* at 552.

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No. 6734 contravenes the Constitution would result in the granting of the reliefs sought. (Emphasis supplied)

WHEREFORE, the petition is *PARTIALLY GRANTED* and the decision of the Regional Trial Court of Makati, Branch 61, in Civil Case No. 03-1032, is *AFFIRMED* with *MODIFICATION*. As modified, this Court declares that:

(1) Section 145 of the NIRC, as amended by Republic Act No. 9334, is *CONSTITUTIONAL*; and that

(2) Section 4(B)(e)(c), 2nd paragraph of Revenue Regulations No. 1-97, as amended by Section 2 of Revenue Regulations 9-2003, and Sections II(1)(b), II(4)(b), II(6), II(7), III (*Large Tax Payers Assistance Division II)* II(b) of Revenue Memorandum Order No. 6-2003, insofar as pertinent to cigarettes packed by machine, are *INVALID* insofar as they grant the BIR the power to reclassify or update the classification of new brands every two years or earlier.

SO ORDERED.

Puno, C.J., Quisumbing, Austria-Martinez, Corona, Carpio Morales, Azcuna, Tinga, Chico-Nazario, Velasco, Jr., Reyes, Leonardo-de Castro, and *Brion, JJ.*, concur.

Carpio, J., on official leave.

Nachura, J., no part. Signed pleading as Solicitor General.