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[G.R. No. 163583. April 15, 2009]

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. POLITICAL LAW; CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; LAW-MAKING POWER; A LEGISLATIVE CLASSIFICATION THAT IS REASONABLE DOES NOT OFFEND THE CONSTITUTIONAL GUARANTY OF EQUAL PROTECTION OF THE LAWS; REQUISITES.— x x x As held in the assailed Decision, the instant case neither involves a suspect classification nor impinges on a fundamental right. Consequently, the rational basis test was properly applied to gauge the constitutionality of the assailed law in the face of an equal protection challenge. It has been held that "in the areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Under the rational basis test, it is sufficient that the legislative classification is rationally related to achieving some legitimate State interest. As the Court ruled in the assailed Decision, *viz*: 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. 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 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. x x x 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.*

2. TAXATION; REPUBLIC ACT NO. 8240; CLASSIFICATION FREEZE PROVISION THEREOF IS NOT VIOLATIVE OF THE UNIFORMITY OF TAXATION RULE; EXPLAINED.— x x x [P]etitioner's contention that the assailed provisions violate the uniformity of taxation clause is similarly unavailing. In *Churchill v. Concepcion*, we explained that a tax "is uniform when it operates with the same force and effect in every place where the subject of it is found." It does not signify an intrinsic but simply a geographical uniformity. A levy of tax is not unconstitutional because it is not intrinsically equal and uniform in its operation. The uniformity rule does not prohibit classification for purposes of taxation. As ruled in *Tan v. Del Rosario, Jr.*: Uniformity of taxation, like the kindred concept of equal protection, merely requires that all subjects or objects of taxation, similarly situated, are to be treated alike both in privileges and liabilities (citations omitted). Uniformity does not forfend classification as long as: (1) the standards that are used therefor are substantial and not arbitrary, (2) the categorization is germane to achieve the legislative purpose, (3) the law applies, all things being equal, to both present and

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future conditions, and (4) the classification applies equally well to all those belonging to the same class (citations omitted). In the instant case, there is no question that the *classification freeze provision* meets the geographical uniformity requirement because the assailed law applies to all cigarette brands in the Philippines. And, for reasons already adverted to in our August 20, 2008 Decision, the above four-fold test has been met in the present case.

3. POLITICAL LAW; CONSTITUTIONAL LAW; PRINCIPLE OF SEPARATION OF POWERS; COURTS CANNOT INQUIRE INTO THE WISDOM AND EXPEDIENCY OF A LAW.— x x x [P]etitioner's real disagreement lies with the legitimate State interests. Although it concedes that the Court utilized the rationality test and that the *classification freeze provision* was necessitated by several legitimate State interests, however, it refuses to accept the justifications given by Congress for the *classification freeze provision*. As we elucidated in our August 20, 2008 Decision, this line of argumentation revolves around the wisdom and expediency of the assailed law which we cannot inquire into, much less overrule. Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. We reiterate, therefore, that petitioner's remedy is with Congress and not this Court.

4. TAXATION; REPUBLIC ACT NO. 8240; ASSAILED PROVISIONS THEREOF DO NOT VIOLATE THE CONSTITUTIONAL PROHIBITION ON UNFAIR COMPETITION.— x x x While previously arguing that the rational basis test was not satisfied, petitioner now asserts that this test does not apply in this case and that the proper matrix to evaluate the constitutionality of the assailed law is the prohibition on unfair competition under Section 19, Article XII of the Constitution. It should be noted that during the trial below, petitioner did not invoke said constitutional provision as it relied solely on the alleged violation of the equal protection and uniformity of taxation clauses. Well-settled is the rule that points of law, theories, issues and arguments not adequately brought to the attention of the lower court will not be ordinarily considered by a reviewing court as they cannot be raised for the first time on appeal. At any rate, even if we were to relax this rule, as previously stated, the evidence presented before the trial court is insufficient to establish the alleged violation of the constitutional proscription

against unfair competition. x x x [I]n *Tatad* we ruled that a law which imposes substantial barriers to the entry and exit of new players in our downstream oil industry may be struck down for being violative of Section 19, Article XII of the Constitution. However, we went on to say in that case that "if they are insignificant impediments, they need not be stricken down." As we stated in our August 20, 2008 Decision, petitioner failed to convincingly prove that there is a substantial barrier to the entry of new brands in the cigarette market due to the *classification freeze provision*. We further observed that several new brands were introduced in the market after the assailed law went into effect thus negating petitioner's sweeping claim that the *classification freeze provision* is an insurmountable barrier to the entry of new brands. We also noted that price is not the only factor affecting competition in the market for there are other factors such as taste, brand loyalty, *etc*.

5. REMEDIAL LAW; EVIDENCE; BURDEN OF PROOF AND PRESUMPTIONS; PETITIONER FAILED TO CARRY THE BURDEN OF PROOF IN CASE AT BAR; ASSAILED LAW ENJOYS A STRONG PRESUMPTION OF CONSTITUTIONALITY.— x x x [P]etitioner did not lay down the factual foundations, as supported by verifiable documentary proof, which would establish, among others, the cigarette brands in competition with each other; the current net retail prices of Annex "D" brands, as determined through a market survey, to provide a sufficient point of comparison with those covered by the BIR's market survey of new brands; and the causal connection with as well as the extent of the impact on the competition in the cigarette market of the *classification freeze provision*. Other than petitioner's self-serving allegations and testimonial evidence, no adequate documentary evidence was presented to substantiate its claims. Absent ample documentary proof, we cannot accept petitioner's claim that the *classification freeze provision* is an insurmountable barrier to the entry of new players. [T]he totality of the evidence presented by petitioner before the trial court failed to convincingly establish the alleged violation of the constitutional prohibition on unfair competition. It is a basic postulate that the one who challenges the constitutionality of a law carries the heavy burden of proof for laws enjoy a strong presumption of constitutionality as it is an act of a co-equal branch of government. Petitioner failed to carry this burden.

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6. TAXATION; REPUBLIC ACT NO. 8240; NOT A TRANSGRESSION OF THE CONSTITUTIONAL PROVISIONS ON REGRESSIVE AND INEQUITABLE TAXATION; EXPLAINED.— We note that the points raised by petitioner with respect to alleged inequitable taxation perpetuated by the *classification freeze provision* are a mere reformulation of its equal protection challenge. As stated earlier, the assailed provisions do not infringe the equal protection clause because the four-fold test is satisfied. In particular, the *classification freeze provision* has been found to rationally further legitimate State interests consistent with rationality review. Petitioner's repackaged argument has, therefore, no merit. Anent the issue of regressivity, it may be conceded that the assailed law imposes an excise tax on cigarettes which is a form of indirect tax, and thus, regressive in character. While there was an attempt to make the imposition of the excise tax more equitable by creating a four-tiered taxation system where higher priced cigarettes are taxed at a higher rate, still, every consumer, whether rich or poor, of a cigarette brand within a specific tax bracket pays the same tax rate. To this extent, the tax does not take into account the person's ability to pay. Nevertheless, this does not mean that the assailed law may be declared unconstitutional for being regressive in character because the Constitution does not prohibit the imposition of indirect taxes but merely provides that Congress shall evolve a progressive system of taxation. As we explained in *Tolentino v. Secretary of Finance*: [R]egressivity is not a negative standard for courts to enforce. What Congress is required by the Constitution to do is to "evolve a progressive system of taxation." This is a directive to Congress, just like the directive to it to give priority to the enactment of laws for the enhancement of human dignity and the reduction of social, economic and political inequalities [Art. XIII, Section 1] or for the promotion of the right to "quality education" [Art. XIV, Section 1]. These provisions are put in the Constitution as moral incentives to legislation, not as judicially enforceable rights.

7. POLITICAL LAW; CONSTITUTIONAL LAW; STATE; CANNOT BE ESTOPPED BY THE MISTAKES OF ITS AGENTS; CASE AT BAR.— x x x [T]he failure of the BIR to conduct the market survey within the three-month period under the revenue regulations then in force can in no way make the initial tax classification of Lucky Strike based on its suggested gross retail

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price permanent. Otherwise, this would contravene the clear mandate of the law which provides that the basis for the tax classification of a new brand shall be the current net retail price and not the suggested gross retail price. It is a basic principle of law that the State cannot be estopped by the mistakes of its agents.

8. REMEDIAL LAW; CIVIL PROCEDURE; APPEALS; THEORIES NOT ADEQUATELY BROUGHT TO THE ATTENTION OF THE LOWER COURT WILL NOT ORDINARILY BE CONSIDERED ON APPEAL.— x x x [T]he issue of timeliness of the market survey was never raised before the trial court because petitioner's theory of the case was wholly anchored on the alleged unconstitutionality of the *classification freeze provision*. As a consequence, no documentary evidence as to the actual net retail price of Lucky Strike in 2001, based on a market survey at least comparable to the one mandated by law, was presented before the trial court. Evidently, it cannot be assumed that had the BIR conducted the market survey within three months from its product launch sometime in 2001, Lucky Strike would have been found to fall under the high-priced tax bracket and not the premium-priced tax bracket. To so hold would run roughshod over the State's right to due process. Verily, petitioner prosecuted its case before the trial court solely on the theory that the assailed law is unconstitutional instead of merely challenging the timeliness of the market survey. The rule is that a party is bound by the theory he adopts and by the cause of action he stands on. He cannot be permitted after having lost thereon to repudiate his theory and cause of action, and thereafter, adopt another and seek to re-litigate the matter anew either in the same forum or on appeal. Having pursued one theory and lost thereon, petitioner may no longer pursue another inconsistent theory without thereby trifling with court processes and burdening the courts with endless litigation.

APPEARANCES OF COUNSEL

Baniqued & Baniqued for petitioner.

Romulo Mabanta Buenaventura Sayoc and Delos Angeles Law Office for movant PMPMI.

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Hector L. Hofilena & Miguelito V. Ocampo for movant Mighty Corporation.

Estelito Mendoza and *Luoie Ogsimer* for Fortune Tobacco Corp.

R E S O L U T I O N

YNARES-SANTIAGO, *J.*:

On August 20, 2008, the Court rendered a Decision partially granting the petition in this case, *viz*:

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

In its Motion for Reconsideration, petitioner insists that the assailed provisions (1) violate the equal protection and uniformity of taxation clauses of the Constitution, (2) contravene Section 19,[1] Article XII of the Constitution on unfair competition, and (3) infringe the constitutional provisions on regressive and inequitable taxation. Petitioner further argues that assuming the assailed provisions are constitutional, petitioner is entitled to a downward reclassification of Lucky Strike from the premium-priced to the high-priced tax bracket.

[1] The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

The Court is not persuaded.

The assailed law does not violate the equal protection and uniformity of taxation clauses.

Petitioner argues that the *classification freeze provision* violates the equal protection and uniformity of taxation clauses because Annex "D" brands are taxed based on their 1996 net retail prices while new brands are taxed based on their present day net retail prices. Citing *Ormoc Sugar Co. v. Treasurer of Ormoc City*,[2] petitioner asserts that the assailed provisions accord a special or privileged status to Annex "D" brands while at the same time discriminate against other brands.

These contentions are without merit and a rehash of petitioner's previous arguments before this Court. As held in the assailed Decision, the instant case neither involves a suspect classification nor impinges on a fundamental right. Consequently, the rational basis test was properly applied to gauge the constitutionality of the assailed law in the face of an equal protection challenge. It has been held that "in the areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[3] Under the rational basis test, it is sufficient that the legislative classification is rationally related to achieving some legitimate State interest. As the Court ruled in the assailed Decision, *viz*:

> 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.

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[2] G.R. No. L-23794, February 17, 1968, 22 SCRA 603.

[3] *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

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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 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. (However, as will be discussed later, the intent to apply the freezing 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.

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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, 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'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

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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. The incentive for tax 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." 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

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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 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.*

Moreover, petitioner's contention that the assailed provisions violate the uniformity of taxation clause is similarly unavailing. In *Churchill v. Concepcion*,[4] we explained that a tax "is uniform when it operates with the same force and effect in every place where the subject of it is found."[5] It does not signify an intrinsic but simply a geographical uniformity.[6] A levy of tax is not unconstitutional because it is not intrinsically equal and uniform in its operation.[7] The uniformity rule does not prohibit classification for purposes of taxation.[8] As ruled in *Tan v. Del Rosario, Jr.*:[9]

[4] 34 Phil. 969, 976-977 (1916).

[5] *Id.* at 976.

[6] *Id.*

[7] Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (2003), p. 777.

[8] *Id.*

[9] G.R. No. 109289, October 3, 1994, 237 SCRA 324.

Uniformity of taxation, like the kindred concept of equal protection, merely requires that all subjects or objects of taxation, similarly situated, are to be treated alike both in privileges and liabilities (citations omitted). Uniformity does not forfend classification as long as: (1) the standards that are used therefor are substantial and not arbitrary, (2) the categorization is germane to achieve the legislative purpose, (3) the law applies, all things being equal, to both present and future conditions, and (4) the classification applies equally well to all those belonging to the same class (citations omitted).[10]

In the instant case, there is no question that the *classification freeze provision* meets the geographical uniformity requirement because the assailed law applies to all cigarette brands in the Philippines. And, for reasons already adverted to in our August 20, 2008 Decision, the above four-fold test has been met in the present case.

Petitioner's reliance on *Ormoc Sugar Co.* is misplaced. In said case, the controverted municipal ordinance specifically named and taxed only the Ormoc Sugar Company, and excluded any subsequently established sugar central from its coverage. Thus, the ordinance was found unconstitutional on equal protection grounds because its terms do not apply to future conditions as well. This is not the case here. The *classification freeze provision* uniformly applies to all cigarette brands whether existing or to be introduced in the market at some future time. It does not purport to exempt any brand from its operation nor single out a brand for the purpose of imposition of excise taxes.

At any rate, petitioner's real disagreement lies with the legitimate State interests. Although it concedes that the Court utilized the rationality test and that the *classification freeze provision* was necessitated by several legitimate State interests, however, it refuses to accept the justifications given by Congress for the *classification freeze provision.* As we elucidated in our August 20, 2008 Decision, this line of argumentation revolves around the wisdom and expediency of the assailed law which we cannot inquire into, much less overrule. Equal protection is not a license for courts to judge the wisdom, fairness, or

[10] *Id.* at 331.

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logic of legislative choices.[11] We reiterate, therefore, that petitioner's remedy is with Congress and not this Court.

The assailed provisions do not violate the constitutional prohibition on unfair competition.

Petitioner asserts that the Court erroneously applied the rational basis test allegedly because this test does not apply in a constitutional challenge based on a violation of Section 19, Article XII of the Constitution on unfair competition. Citing *Tatad v. Secretary of the Department of Energy*,[12] it argues that the *classification freeze provision* gives the brands under Annex "D" a decisive edge because it constitutes a substantial barrier to the entry of prospective players; that the Annex "D" provision is no different from the 4% tariff differential which we invalidated in *Tatad*; that some of the new brands, like Astro, Memphis, Capri, L&M, Bowling Green, Forbes, and Canon, which were introduced into the market after the effectivity of the assailed law on January 1, 1997, were "killed" by Annex "D" brands because the former brands were reclassified by the BIR to higher tax brackets; that the finding that price is not the only factor in the market as there are other factors like consumer preference, active ingredients, *etc*. is contrary to the evidence presented and the deliberations in Congress; that the *classification freeze provision* will encourage predatory pricing in contravention of the constitutional prohibition on unfair competition; and that the cumulative effect of the operation of the *classification freeze provision* is to perpetuate the oligopoly of intervenors Philip Morris and Fortune Tobacco in contravention of the constitutional edict for the State to regulate or prohibit monopolies, and to disallow combinations in restraint of trade and unfair competition.

The argument lacks merit. While previously arguing that the rational basis test was not satisfied, petitioner now asserts that this test does not apply in this case and that the proper

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[11] *Supra* note 3.

[12] 346 Phil. 321 (1997).

matrix to evaluate the constitutionality of the assailed law is the prohibition on unfair competition under Section 19, Article XII of the Constitution. It should be noted that during the trial below, petitioner did not invoke said constitutional provision as it relied solely on the alleged violation of the equal protection and uniformity of taxation clauses. Well-settled is the rule that points of law, theories, issues and arguments not adequately brought to the attention of the lower court will not be ordinarily considered by a reviewing court as they cannot be raised for the first time on appeal.[13] At any rate, even if we were to relax this rule, as previously stated, the evidence presented before the trial court is insufficient to establish the alleged violation of the constitutional proscription against unfair competition.

Indeed, in *Tatad* we ruled that a law which imposes substantial barriers to the entry and exit of new players in our downstream oil industry may be struck down for being violative of Section 19, Article XII of the Constitution.[14] However, we went on to say in that case that "if they are insignificant impediments, they need not be stricken down."[15] As we stated in our August 20, 2008 Decision, petitioner failed to convincingly prove that there is a substantial barrier to the entry of new brands in the cigarette market due to the *classification freeze provision*. We further observed that several new brands were introduced in the market after the assailed law went into effect thus negating petitioner's sweeping claim that the *classification freeze provision* is an insurmountable barrier to the entry of new brands. We also noted that price is not the only factor affecting competition in the market for there are other factors such as taste, brand loyalty, *etc*.

We see no reason to depart from these findings for the following reasons:

First, petitioner did not lay down the factual foundations, as supported by verifiable documentary proof, which would establish,

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[13] *Natalia v. Court of Appeals*, G.R. No. 116216, June 20, 1997, 274 SCRA 527, 538-539.

[14] *Supra* note 12 at 368.

[15] *Id*.

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among others, the cigarette brands in competition with each other; the current net retail prices of Annex "D" brands, as determined through a market survey, to provide a sufficient point of comparison with those covered by the BIR's market survey of new brands; and the causal connection with as well as the extent of the impact on the competition in the cigarette market of the *classification freeze provision*. Other than petitioner's self-serving allegations and testimonial evidence, no adequate documentary evidence was presented to substantiate its claims. Absent ample documentary proof, we cannot accept petitioner's claim that the *classification freeze provision* is an insurmountable barrier to the entry of new players.

Second, we cannot lend credence to petitioner's claim that it cannot produce cigarettes that can compete with Marlboro and Philip Morris in the high-priced tax bracket. Except for its self-serving testimonial evidence, no sufficient documentary evidence was presented to substantiate this claim. The current net retail price, which is the basis for determining the tax bracket of a cigarette brand, more or less consists of the costs of raw materials, labor, advertising and profit margin. To a large extent, these factors are controllable by the manufacturer, as such, the decision to enter which tax bracket will depend on the pricing strategy adopted by the individual manufacturer. The same holds true for its claims that other new brands, like Astro, Memphis, Capri, L&M, Bowling Green, Forbes, and Canon, were "killed" by Annex "D" brands due to the effects of the operation of the *classification freeze provision* over time. The evidence that petitioner presented before the trial court failed to substantiate the basis for these claims.

Essentially, petitioner would want us to accept its conclusions of law without first laying down the factual foundations of its arguments. This Court, which is not a trier of facts, cannot take judicial notice of the factual premises of these arguments as petitioner now seems to suggest. The evidence should have been presented before the trial court to allow it to examine and determine for itself whether such factual premises, as supported by sufficient documentary evidence, provide reasonable basis for petitioner's conclusion that there arose an unconstitutional

unfair competition due to the operation of the *classification freeze provision*. Petitioner should be reminded that it appealed this case from the adverse ruling of the trial court directly to this Court on pure questions of law instead of resorting to the Court of Appeals.

Third, *Tatad* is not applicable to the instant case. In *Tatad*, we found that the 4% tariff differential between imported crude oil and imported refined petroleum products erects a high barrier to the entry of new players because (1) it imposes an undue burden on new players to spend billions of pesos to build refineries in order to compete with the old players, and (2) new players, who opt not to build refineries, suffer from the huge disadvantage of increasing their product cost by 4%.[16] The tariff was imposed on the raw materials uniformly used by the players in the oil industry. Thus, the adverse effect on competition arising from this discriminatory treatment was readily apparent. In contrast, the excise tax under the assailed law is imposed based on the current net retail price of a cigarette brand. As previously explained, the current net retail price is determined by the pricing strategy of the manufacturer. This Court cannot simply speculate that the reason why a new brand cannot enter a specific tax bracket and compete with the brands therein was because of the *classification freeze provision*, rather than the manufacturer's own pricing decision or some other factor solely attributable to the manufacturer. Again, the burden of proof in this regard is on petitioner which it failed to muster.

Fourth, the finding in our August 20, 2008 Decision that price is not the only factor which affects consumer behavior in the cigarette market is based on petitioner's own evidence. On cross-examination, petitioner's witness admitted that notwithstanding the change in price, a cigarette smoker may prefer the old brand because of its addictive formulation.[17] As

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[16] *Id.* at 369.

[17] Q- In other words, Mr. Witness, you are also suggesting in your expert opinion that there is also a possibility that notwithstanding the change in the price of the particular cigarette product considering that cigarette smoking is habit forming, and considering also that that cigarette product

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a result, even if we were to assume that the *classification freeze provision* distorts the pricing scheme of the market players, it is not clear whether a substantial barrier to the entry of new players would thereby be created because of these other factors affecting consumer behavior.

Last, the claim that the assailed provisions encourage predatory pricing was never raised nor substantiated before the trial court. It is merely an afterthought and cannot be given weight.

In sum, the totality of the evidence presented by petitioner before the trial court failed to convincingly establish the alleged violation of the constitutional prohibition on unfair competition. It is a basic postulate that the one who challenges the constitutionality of a law carries the heavy burden of proof for laws enjoy a strong presumption of constitutionality as it is an act of a co-equal branch of government. Petitioner failed to carry this burden.

The assailed law does not transgress the constitutional provisions on regressive and inequitable taxation.

Petitioner argues that the *classification freeze provision* is a form of regressive and inequitable tax system which is proscribed under Article VI, Section 28(1)[18] of the Constitution. It claims that people in equal positions should be treated alike. The use of different tax bases for brands under Annex "D" *vis-à-vis* new brands is discriminatory, and thus, iniquitous. Petitioner further posits that the *classification freeze provision* is regressive in character. It asserts that the harmonization of revenue flow projections and ease of tax administration cannot override this constitutional command.

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won or satisfied the taste of the market, there is a tendency that notwithstanding the price, a particular consumer would still stick on the particular product?

A- Yes, by your own word, you say that it is habit forming. So, it is loyalty to the brand. (Testimony of Dennis Belgira, TSN February 20, 2004, records, vol. II, pp. 679-680.)

[18] Section 28(1). The rule of taxation shall be uniform and equitable. The Congress shall evolve a progressive system of taxation.

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We note that the points raised by petitioner with respect to alleged inequitable taxation perpetuated by the *classification freeze provision* are a mere reformulation of its equal protection challenge. As stated earlier, the assailed provisions do not infringe the equal protection clause because the four-fold test is satisfied. In particular, the *classification freeze provision* has been found to rationally further legitimate State interests consistent with rationality review. Petitioner's repackaged argument has, therefore, no merit.

Anent the issue of regressivity, it may be conceded that the assailed law imposes an excise tax on cigarettes which is a form of indirect tax, and thus, regressive in character. While there was an attempt to make the imposition of the excise tax more equitable by creating a four-tiered taxation system where higher priced cigarettes are taxed at a higher rate, still, every consumer, whether rich or poor, of a cigarette brand within a specific tax bracket pays the same tax rate. To this extent, the tax does not take into account the person's ability to pay. Nevertheless, this does not mean that the assailed law may be declared unconstitutional for being regressive in character because the Constitution does not prohibit the imposition of indirect taxes but merely provides that Congress shall evolve a progressive system of taxation. As we explained in *Tolentino v. Secretary of Finance*:[19]

> [R]egressivity is not a negative standard for courts to enforce. What Congress is required by the Constitution to do is to "evolve a progressive system of taxation." This is a directive to Congress, just like the directive to it to give priority to the enactment of laws for the enhancement of human dignity and the reduction of social, economic and political inequalities [Art. XIII, Section 1] or for the promotion of the right to "quality education" [Art. XIV, Section 1]. These provisions are put in the Constitution as moral incentives to legislation, not as judicially enforceable rights.[20]

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[19] G.R. No. 115455, August 25, 1994, 235 SCRA 630.

[20] *Id.* at 684-685.

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Petitioner is not entitled to a downward reclassification of Lucky Strike.

Petitioner alleges that assuming the assailed law is constitutional, its Lucky Strike brand should be reclassified from the premium-priced to the high-priced tax bracket. Relying on BIR Ruling No. 018-2001 dated May 10, 2001, it claims that it timely sought redress from the BIR to have the market survey conducted within three months from product launch, as provided for under Section 4(B)[21] of Revenue Regulations No. 1-97, in order to determine the actual current net retail price of Lucky Strike, and thus, fix its tax classification. Further, the upward reclassification of Lucky Strike amounts to deprivation of property right without due process of law. The conduct of the market survey after two years from product launch constitutes gross

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

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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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neglect on the part of the BIR. Consequently, for failure of the BIR to conduct a timely market survey, Lucky Strike's classification based on its suggested gross retail price should be deemed its official tax classification. Finally, petitioner asserts that had the market survey been timely conducted sometime in 2001, the current net retail price of Lucky Strike would have been found to be under the high-priced tax bracket.

These contentions are untenable and misleading.

First, BIR Ruling No. 018-2001 was requested by petitioner for the purpose of fixing Lucky Strike's initial tax classification based on its suggested gross retail price relative to its planned introduction of Lucky Strike in the market sometime in 2001 and not for the conduct of the market survey within three months from product launch. In fact, the said Ruling contained an express reservation that the tax classification of Lucky Strike set therein "is without prejudice, however, to the subsequent conduct of a survey x x x in order to determine if the actual gross retail price thereof is consistent with [petitioner's] suggested gross retail price."[22] In short, petitioner acknowledged that the initial tax classification of Lucky Strike may be modified depending on the outcome of the survey which will determine the actual current net retail price of Lucky Strike in the market.

Second, there was no upward reclassification of Lucky Strike because it was taxed based on its suggested gross retail price from the time of its introduction in the market in 2001 until the BIR market survey in 2003. We reiterate that Lucky Strikes' *actual* current net retail price was surveyed for the first time in 2003 and was found to be from ₱10.34 to ₱11.53 per pack, which is within the premium-priced tax bracket. There was, thus, no prohibited upward reclassification of Lucky Strike by the BIR based on its current net retail price.

Third, the failure of the BIR to conduct the market survey within the three-month period under the revenue regulations then in force can in no way make the initial tax classification of Lucky Strike based on its suggested gross retail price

[22] Records, Vol. 1, p. 66.

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permanent. Otherwise, this would contravene the clear mandate of the law which provides that the basis for the tax classification of a new brand shall be the current net retail price and not the suggested gross retail price. It is a basic principle of law that the State cannot be estopped by the mistakes of its agents.

Last, the issue of timeliness of the market survey was never raised before the trial court because petitioner's theory of the case was wholly anchored on the alleged unconstitutionality of the *classification freeze provision*. As a consequence, no documentary evidence as to the actual net retail price of Lucky Strike in 2001, based on a market survey at least comparable to the one mandated by law, was presented before the trial court. Evidently, it cannot be assumed that had the BIR conducted the market survey within three months from its product launch sometime in 2001, Lucky Strike would have been found to fall under the high-priced tax bracket and not the premium-priced tax bracket. To so hold would run roughshod over the State's right to due process. Verily, petitioner prosecuted its case before the trial court solely on the theory that the assailed law is unconstitutional instead of merely challenging the timeliness of the market survey. The rule is that a party is bound by the theory he adopts and by the cause of action he stands on. He cannot be permitted after having lost thereon to repudiate his theory and cause of action, and thereafter, adopt another and seek to re-litigate the matter anew either in the same forum or on appeal.[23] Having pursued one theory and lost thereon, petitioner may no longer pursue another inconsistent theory without thereby trifling with court processes and burdening the courts with endless litigation.

WHEREFORE, the motion for reconsideration is *DENIED*.

SO ORDERED.

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

Nachura, J., no part.

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[23] *Bashier v. Commission on Elections*, G.R. No. L-33692, February 24, 1972, 43 SCRA 238, 266.