

6. *Surcharge Imposed by the Fair Trade Commission* (15-2(A) KCCR 1, 2001Hun-Ka25, July 24, 2003)

Held, the provision of the Monopoly Regulation and Fair Trade Act providing that the Fair Trade Commission may impose a sanction of surcharge upon a business operator found to have conducted an unjust act of support within the scope of 2% of its gross revenue is not unconstitutional.

A. Background of the Case

(1) The provision of the Monopoly Regulation And Fair Trade Act (hereinafter referred to as the "Fair Trade Act") at issue in this case provides that the Fair Trade Commission may impose a sanction of surcharge upon a business operator who conducted an unjust act of support, which is a type of unfair transactions, within the scope of 2% of its gross revenue. Such sanctionable act of unjust support as originally defined for the law's application includes the act of unjust support between individual business operators. However, what frequently becomes an issue is an act of unjust support among related business entities belonging to one business conglomerate. An act of unjust support among related business entities within a single conglomerate means an act of one business entity within a conglomerate business structure that unjustly supports another such related business entity by providing, free of charge or on a conspicuously beneficial condition, goods, services, capital, assets, and human resources.

(2) In this case, the Fair Trade Commission imposed a large sum of surcharge pursuant to the above provision of the Fair Trade Act (hereinafter referred to as the "provision at issue in this case") upon related business entities of a conglomerate that had conducted acts of unjust support. The related business entities subjected to the above surcharge thereupon filed a lawsuit seeking to void the measure imposing surcharge, and the court during the pendency of this lawsuit requested *sua sponte* a constitutional review upon the provision at issue in this case on which the surcharge was based.

B. Summary of the Decision

The Constitutional Court, by the majority of five out of nine Justices, held that the provision at issue in this case is constitutional as it is not in violation of the principle against double jeopardy, the principle of proportionality, or the principle of due process. The

summary of the ground for this decision is stated in the following paragraphs.

(1) Summary of the Majority Opinion

(A) Unjust internal transactions among the related business entities within a single business conglomerate generate monopolistic and oligopolistic profits among them, thereby causing the harm of concentration of economic power by reinforcing the monopolistic power of the related business entities belonging to the conglomerate, and result in the danger that the business conglomerate simultaneously falters in its entirety as the competitiveness of superior business entity decreases through dispersion and outflow of the core capability of the superior business entity to the faltering business entity. The provision at issue in this case is a provision intended to inhibit such harm.

(B) Article 13(1) of the Constitution provides that "no citizen shall be subject to double jeopardy for the same crime," thereby declaring the principle against double jeopardy. The Constitutional Court, in its precedents, has repeatedly declared, with respect to the meaning of the principle against double jeopardy, that double jeopardy prohibited by Article 13(1) of the Constitution is the repeated exercise of the state authority to criminal punishment, but it does not prohibit imposition of any and all sanction or disadvantageous measure in addition to the exercise of authority to criminal punishment.

The administrative law intends to achieve certain administrative purposes by ordering obligations or establishing prohibitions. In order to secure effectiveness thereof, it is necessary to induce to no further violation by a party in violation of the obligation or by others under the same obligation through imposition of disadvantages such as administrative punishment, non-penal fines or civil penalties, cancellation or suspension of business licenses, and surcharge. Such 'prevention and inhibition through sanction' is the original function of administrative regulations.

The surcharge to be imposed for unjust internal transactions pursuant to the provision at issue in this case, considering its purpose and function and the subject and procedure of its imposition, is of the nature of administrative pecuniary sanction imposed for the violation of the administrative purpose of inhibition of unjust internal transactions for the realization of the same purpose. Thus, the surcharge pursuant to the provision at issue in this case is not punishment as the exercise of the state authority to criminal punishment prohibited by Article 13(1) of the Constitution, and is not in violation of the principle against double jeopardy.

(C) Permitting simultaneous imposition of criminal punishment and surcharge for one act of unjust support does not mean that the state is permitted to impose repeated sanctions for a single unlawful act without restrictions. As the functioning of the state power burdening the citizens may not be free from the restriction of the constitutional principle of proportionality, the aggregate of various sanctions should not be excessively grave compared with the unlawful act that is being sanctioned.

The provision at issue in this case provides that the amount of surcharge should be within the scope of 2% of the gross revenue of the business operator found to have conducted an act of unjust support. The legislators concluded that the gross revenue of a business operator would be an indicator to measure the increase of economic profit through the unlawful conduct, and determined to use the amount of the gross revenue as the standard in calculating the upper limit of the amount of surcharge. Such judgment of the legislators is reasonable. Furthermore, such legislative judgment was also based upon a policy consideration to secure sufficient effect of sanction and inhibition on larger business entities with plentiful funds. Such sanction is not excessively severe considering the extent of the criminal punishment that may simultaneously be imposed (imprisonment for up to two years or a fine up to ₩150,000,000).

In summary, it is not an excessive sanction in violation of the principle of proportionality to employ the gross revenue of the business entity subject to sanction to calculate the upper limit of the amount of surcharge as well as to provide for the surcharge that may be imposed simultaneously with the criminal punishment, for an effective regulation of unjust internal transactions.

(D) The legislators gave authority to determine, under the provision at issue in this case, matters with respect to the imposition of surcharge to the Fair Trade Commission based on the policy decision that it would be desirable for an institution equipped with expert knowledge and experience to take charge in gathering and assessing the facts and the data concerning the negative effect of various unfair conducts including unjust internal transactions upon the market. Furthermore, the Fair Trade Commission, which determines the imposition of surcharge and the amount thereof, is a deliberative administrative institution endowed with a certain degree of independence in its organization and composition. In imposing surcharge, the parties concerned may participate in the procedure therefor through, for example, an opportunity to state their opinions, and a judicial review process subsequent to the imposition of surcharge by way of administrative litigation is further guaranteed. Therefore, considering the above factors, the procedure for the imposition of surcharge pursuant to

the provision at issue in this case is not in violation of the principle of due process or the principle of separation of powers that gives the judicial power to the court.

(2) Summary of the Dissenting Opinion

The surcharge pursuant to the provision at issue in this case has the nature of pecuniary sanction imposed upon a business entity found to have conducted an act of unjust support for other business entities. Even if it is necessary to sanction and punish acts of unjust support by business entities, the constitutional principle of personal responsibility that requires a just interrelationship between an unlawful conduct and the punishment or sanction therefor should still be observed. Here, however, there can hardly be any relationship between the scale of revenue and the act of unjust support, as a matter of principle. Therefore, determining the amount of surcharge based on the amount of gross revenue for an act of unjust support allows determination of the scope of responsibility by an element of the amount of revenue that is irrelevant to the act by the subject of surcharge of unjust support. As such, it is against the principle of personal responsibility.

Furthermore, under the principle of due process, in the procedure for imposing surcharge, there should be separate institutions for investigation and adjudication, there should be a sufficient guarantee of the decisionmaker's expertise and independence and the examination of evidence and the oral argument, and there should be a strict guarantee for the status of the decisionmaker, to the extent corresponding to the judicial process. The current system is conspicuously lacking these aspects; therefore, it is in violation of the principle of due process.

On the other hand, one of the Justices who have joined this dissenting opinion agrees with the above dissenting opinion of the other three justices, and, further yet, is of the opinion that the provision at issue in this case is also against the principle of double jeopardy and the principle of presumption of innocence.