

of the product or to improve the convenience of the product is displayed in a commonly used manner. Therefore, the trademark in the application consists only of a mark displaying the shape of the packaging of the product in a commonly used manner, and thus falls under Article 3(1)(iii) of the Trademark Act. Further, examining whether or not the use of the trademark in the application has enabled consumers to recognize the goods as being connected with a certain person's business, although the Applicant stated that he/she uses a label with a rhombus motif and has registered a trademark with a rhombus motif, since these and the shape according to the trademark in the application are clearly different in appearance, it cannot be said that the applied trademark is used, and due to the use of these, it cannot be said that the trademark in the application 'can essentially function as a distinguishing mark' as alleged by the Applicant. Then, considering the use of a shape that can be recognized to have similarity with the trademark in the application (hereinafter, referred to as 'the shape of the trademark in the application'), it was used in products (sauce for hamburger steak) in 1977, and it is presumed that it has been used continuously since then, mainly for sauce for barbecued meat; however, the designated goods in the application is 'seasoning,' and the use of seasoning other than 'sauce for barbecued meat' (such as miso, sugar) is not recognized. Furthermore, although the shape of the trademark in the application is used for 210 g and 400 g packages of 'Golden Taste' which is the Applicant's product (sauce for barbecued meat), the share and the like of products using the shape of the trademark in the application in all seasonings including miso, soy sauce, etc. is unknown. In addition, since the characters 'Ebara' and 'Golden Taste' are prominently used in all products using the shape of the trademark in the application, it cannot be said that the applied trademark portion alone independently has distinctiveness, from the use state and use aspect. From the above, it cannot be said that the use of the trademark in the application has enabled consumers to recognize the goods as being connected with a certain person's business," and rejected the present application.

3 Inquiry by the body

The chief administrative judge presented examples shown in Attachment 2 to the Appellant, on June 20, 2018 by the body, then sent an inquiry showing the opinion that the trademark in the application falls under Article 3(1)(iii) of the Trademark Act and does not fulfill the requirement stipulated in Article 3(2) of the Trademark Act, and required a reply to this within a designated period.

After that, the chief administrative judge required the Appellant to give a specific reply on whether he/she is willing to reply, regarding the point that the Appellant stated

in the previously submitted written reply (written reply to the above inquiry) dated October 7, 2018, that he/she would reply after confirming it.

4 Reply of the Appellant to the inquiry

The Appellant replied as follows to the inquiry of 3 above.

(1) Each example of another company's product illustrated in Attachment 2 is different from the trademark in the application. That is, it is recognized as "a product with this figure/shape attached to this position" and is deeply impressed in traders and consumers in the purchasing and consuming situations.

(2) Although the trademark in the application specifies the shape of a specific part of the packaging material of the designated goods "sauce for barbecued meat," as a general distribution form of products, it is usually impossible to sell it without giving the product name to the packaging material. However, this does not immediately lead to the finding that the trademark in the application "itself is not independently recognized as a mark indicating the origin of the products or a mark for distinguishing the products of one enterprise from those of other enterprises". The use of a plurality of distinguishing marks on one product is extremely common in ordinary transactions, and it is quite possible that the name of the product, the color and shape of the label with it, the specific decoration mode, and the shape of the packaging material itself remain in the memory of traders and consumers, respectively or in combination, and individual elements function as distinguishing marks.

(3) The continuous diamond cut (the trademark in the application) is recognized with a great presence when it is actually displayed in a retail store (Evidence A No. 25 to Evidence A No. 28). Furthermore, of the Appellant's products ("Ebara Sauce for Barbecued Meat Golden Taste"), the products containing 400 ml (360 g) have a large capacity, so that they are often placed at the bottom of a display stand. When viewed from a bird's-eye view, the trademark in the application provided from above the center of the container to the neck portion is more than just "exerting an aesthetic impression," strongly impresses consumers, and functions as a distinguishing mark, even at an angle at which the label is not clearly visible.

Then, the above-mentioned display of products is daily carried out in at least 50,000 retail stores nationwide (Evidence A No. 45 to Evidence A No. 48), and the continuous diamond cut (the trademark in the application) has been used continuously for more than 40 years in such a manner that many consumers see.

(4) What the Appellant appeals to consumers is the "sauce for barbecued meat" as a product, and does not sell the container thereof. In promoting the commercial value

within the limited time of 15 seconds or 30 seconds in TV commercials, it must not be done in commonsense advertising activities such as showing only a specific part of the container particularly or appealing the trademark in the application as a feature related to the container. Nevertheless, the Appellant is convinced that the trademark in the application exerts a distinguishing mark function by itself, since it has been used continuously for more than 40 years without changing the shape features that can be identified with the trademark in the application. If the element related to the trademark in the application is not used alone, it cannot be said that it does not exert its distinguishing mark function by itself, and it is reasonable to understand that the plurality of elements are organically intertwined. For example, each element of the product name "Golden Taste" that has been attached with the trademark in the application for many years and the house mark "Ebara" of the Appellant can fully exert its distinguishing mark function by continuous use for many years. Exactly the same as these, although the trademark in the application, which has been used continuously for many years, is not a "literal element," so it may be relatively rare to be mentioned by word of mouth among consumers; instead, it shows off its presence "visually" in the product display at retail stores nationwide, and even if it is placed on a lower shelf that is out of the line of sight, the trademark in the application, which is attached from the upper part of the body to the neck portion, definitely functions as a mark in the purchasing scene; that is, a distinguishing mark, and the reflection of light caused by the unevenness also attracts the eyes of consumers. The points here are that the display of the products with the trademark in the application has been carried out continuously for more than 40 years at retail stores nationwide, which constitutes direct contact with traders and consumers, and that it can be said that the visual presence at the time of display and the feel at the time of actually picking up each have continued to imprint the trademark in the application under the consciousness of consumers. In front of such an overwhelming presence, the length of time that the trademark part in the application part is shown in the TV commercials is insignificant, and even if an impression is not made by TV commercials, it has been sufficiently accumulated with the period and amount for imprinting it under the consciousness of consumers.

(5) The product "Ebara Sauce for barbecued meat Golden Taste" with the trademark in the application has been broadcasted in a large number of TV commercials for many years. At least, for the old ones, it is not always possible to completely grasp the number of times, region, etc. of broadcasting of each TV commercial; however, the purpose of the series of proofs regarding the advertising activities is to show that as a result of continuous advertising activities across newspapers, magazines, radio, and television for products

with the trademark in the application, sales of products with the trademark in the application have been favorable, and their existence has become widely known to traders and consumers. Although, in particular, there is no TV commercial that focuses on the trademark in the application on its own, the reason why the shape of the product container created based on a specific motif called a diamond (rhombus) has been used "stubbornly" even after renewing from glass bottles to PET bottles is that the distinctiveness of the trademark in the application is imprinted under the consciousness of consumers.

(6) Regarding the questionnaire result (Evidence A No. 24), the fact that approximately 30% of general consumers could come up with the product itself ("Golden Taste," "Golden Sauce," "Golden") just by looking at the container, and that in light of an indication of source, the percentage of people who recognized it as an Ebara product has reached 64%, can never be underestimated. Although it is considered that there is a difference in visual impression between "the Position mark" and "the shape of the entire container," it is clear that as for the shape, the portion of particular interest is the diamond-cut part specified as the trademark in the application. Furthermore, showing general consumers "a container of a virtual shape that is not currently on the market with the trademark in the application" and asking them what kind of source it displays exceed the requirements of distinctiveness required for the Position mark, and is not appropriate considering the attention of general consumers. The results of this questionnaire clearly show that, as a result of many years of use, the trademark in the application can function as a distinguishing mark by itself.

(7) The product "Golden Taste" with the trademark in the application is recognized as an icon that has customer attraction not only among general traders and consumers but also among the same food industry. The product package of the collaboration project also has a product photo of "Golden Taste" in a state where the trademark in the application can be clearly seen.

5 Judgment by the body

(1) Applicability of Article 3(1)(iii) of the Trademark Act

As shown in Attachment 1, the trademark in the application is the Position mark continuously arranged with three-dimensional shapes of vertically long rhombuses (the respective rhombuses are recessed towards the center) at a position from slightly above the center of the body portion to the neck portion of the product container. In "the detailed explanation of trademark," it is described that "the trademark for which registration is sought (hereinafter, referred to as 'the trademark') is the Position mark specifying a position to which the mark is affixed and consists of three-dimensional

shapes which are arranged from slightly above the center of the body portion to the neck portion of the container containing the product. The three-dimensional shapes are vertically long rhombuses that are continuously arranged on the periphery of the container, and the respective rhombuses are recessed toward the center. The broken line part shows an example of a product container and is not an element constituting the trademark," and the trademark in the application set Class 30 "Sauce for barbecued meat" to the designated goods.

Incidentally, it can be said that in many cases, the shape of a product and the like is selected for the purpose of more effectively exerting the functions expected of the product and the like or improving the aesthetic impression of the product and the like, and few are used as a mark to indicate the origin of the products and distinguish the products of one enterprise from those of other enterprises. Also in the industry that handles the designated goods in the application, it is generally widely performed to decorate the surface of the packaging container of the product with three-dimensional decorations having various shapes such as rectangles, parallelograms, and rhombuses as motifs (Attachment 2).

Then, it should be said that the three-dimensional shapes that constitute the trademark in the application and the position to which it is affixed are within a range such that consumers can recognize them as a type of three-dimensional decoration that is generally widely used for the purpose of contributing to the function or an aesthetic impression of a product for the packaging container of the product, and it is reasonable to assume that it is not recognized by itself as the mark indicating the origin of the products or the mark distinguishing the products of one enterprise from those of other enterprises.

Therefore, the trademark in the application is a trademark consisting only of a mark indicating the shape of packaging of a product in a commonly used manner, and thus falls under Article 3(1)(iii) of the Trademark Act.

(2) Whether or not it fulfills the requirement stipulated in Article 3(2) of the Trademark Act

The Appellant alleges that even if the trademark in the application falls under Article 3(1)(iii) of the Trademark Act, since the trademark in the application, as a result of its use, allows consumers to recognize the goods as being connected with the business of the Appellant, it should be registered in accordance with the provisions of Article 3(2) of the Trademark Act, and submitted Evidence A No. 1 to Evidence A No. 21 and Evidence A No. 24 to Evidence A No. 49 (including branch numbers; hereinafter, when all the branch numbers are cited, the branch numbers are omitted) as means of proof.

The Appellant's allegation and respective items of Evidence A submitted by the

Appellant will be examined as follows.

A Use period

The Appellant is a company that was established in May, 1958 and started manufacturing and selling sauces and ketchup, released a product "Sauce for barbecued meat" called "Ebara Sauce for barbecued meat Sauce Golden Taste" (Sweet/Medium Spicy, 210g) in June, 1978, and released a "Spicy" variety in October of the same year (Evidence A No. 1, Evidence A No. 2, Evidence A No. 4, and Evidence A No. 29). On the surface of the packaging container of the product, there are those elements that can be identified as the three-dimensional shape constituting the trademark in the application.

After that, regarding the product (Sweet, Medium Spicy, and Spicy) called "Ebara Sauce for barbecued meat Sauce Golden Taste," it can be seen that the capacity was added or changed (400 g added (in 1979, sales finishing in 2015, changed to 360 g and 480 g), 590 g added (1987), 920 g added (1994), 150 g added (2008), 40 ml added (2017). Since 2003, there are also commercial products (1 L, 1,550 g, 4.8 kg)), and several design changes (1997, 2011, 2017) were made (Evidence A No. 1, Evidence A No. 3, Evidence A No. 5, Evidence A No. 6, Evidence A No. 9, and Evidence A No. 29). However, those elements that can be identified as the three-dimensional shape constituting the trademark in the application can be seen only on the surface of the packaging container of the product called "Ebara Sauce for barbecued meat Sauce Golden Taste" of the products with a capacity "210 g," "400 g" (before 2015), "360 g" and "480 g" (after 2015) (hereinafter, one or a plurality of them may be collectively referred to "the product of this case"), and cannot be seen on the products with other capacities.

Further, on the body portion of the container of the product of the case, there is affixed a label with a mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Sweet," "Medium Spicy," or "Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name (Evidence A No. 1, Evidence A No. 3 to Evidence A No. 6, Evidence A No. 9, Evidence A No. 11, Evidence A No. 20, and Evidence A No. 29).

B Sales, Market share, and Sales area

The sales of the Appellant exceeded 10 billion yen in March 1979, 20 billion yen in March 1984, and 30 billion yen in March 1990. In fiscal year 2015, the food business was 44,569 million yen (87.9% of the 50,708 million yen of the entire group), of which meat-related seasonings including products called "Sauce for barbecued meat" and "Golden Taste" were 17,103 million yen (38.4% of the total food business) (Evidence A No. 1, Evidence A No. 3, Evidence A No. 12, and Evidence A No. 29).

Further, the market share of the Appellant since April 2013 to March 2014 related to the manufacturing and sales in the product field "Sauce for barbecued meat" including the products called "Sauce for barbecued meat" and "Golden Taste" related to the manufacturing and sales of the Appellant was 54.2 % (Evidence A No. 11).

Furthermore, although the product of the case has been sold nationwide from the beginning (Evidence A No. 1, Evidence A No. 2, Evidence A No. 4, Evidence A No. 5, Evidence A No. 20, Evidence A No. 21, and Evidence A No. 29), regarding the sales performance from 1998 to 2015, it can be seen that for the product of 210g, it was about 5.53 billion yen in 1998, but was gradually decreased after that, and became about 2 billion yen in 2015. On the other hand, it can be seen that for the product of 400g, it was about 7,140 million yen in 1998, but gradually increased after that, and became about 9,480 million yen in 2015 (Evidence A No. 14).

Then, in fiscal year 2015, the shipment value of the product of the case is said to account for 24% of the total shipment value of the Appellant, and it is said that it accounted for 36.2% on a monetary basis for "Sauces for barbecued meat" of SRI data (POS data from a national retail store panel survey by INTAGE Inc.)(Evidence A No. 13). Furthermore, in the same fiscal year, the number of shipments of products called "Golden Taste" was about 40 million, and the share in the sauce for barbecued meat market was about 40% (Evidence A No. 29).

C Advertisement

The Appellant alleges that the product of the case has been advertised nationwide through various media such as television, radio, general newspapers, and women's magazines since its release, and the allegation is as follows.

(A) TV commercials, etc.

a It can be seen that the Appellant has produced TV commercials for the product of the case by intermittently appointing entertainers since its release (June 1978) and has been broadcasting it nationwide (Evidence A No. 1, Evidence A No. 4, Evidence A No. 5, Evidence A No. 16 to Evidence A No. 18, Evidence A No. 29, Evidence A No. 30, and Evidence A No. 34 to Evidence A No. 36).

Also, according to the above-mentioned TV commercials whose entire contents are clear (Evidence A No. 16 and Evidence A No. 34), although there is shown a container of the product of the case affixed with a label with the mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Sweet," "Medium Spicy," or "Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name, the time for showing those

that can be identified with the three-dimensional shape constituting the trademark in the application on the surface of the product container so that it can be visually recognized is short. Also, during most of the time, the telop (superimposed text on the screen) of "Ebara Golden Taste" or "Ebara Sauce for barbecued meat Golden Taste" is displayed and the sound thereof is played at the same time, and there is no video or audio that strongly impresses itself as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises to viewers of the TV commercial, such as video or audio appealing those that can be identified with the three-dimensional shape constituting the trademark in the application on the surface of the product container as a feature related to the product or its container.

b There is no evidence to support the radio advertising alleged by the Appellant.

Further, even if the advertisement is made through the radio, in view that the trademark in the application is the Position trademark having a configuration as shown in Attachment 1, it should be said that it is difficult for the listener to recognize those elements that can be identified with the three-dimensional shape constituting the trademark in the application related to the product of the case by the advertisement.

(B) Pamphlets, leaflets

a It can be seen that the Appellant created the pamphlets (Evidence A No. 4) with the heading "Plenty of fruit/Ebara Sauce for barbecued meat Golden Taste/[new release!!]" for retailers that inform readers about the features and specifications of the product, the outline of sales promotion activities, etc., prior to the release of "Ebara Sauce for barbecued meat Golden Taste" (Sweet/Medium Spicy, 210g) in June 1978, and the pamphlets (Evidence A No. 5) with the heading "New release with great deliciousness!!/Ebara Sauce for barbecued meat Golden Taste Large type appears" for retailers that inform readers about the features and specifications of the product, the outline of sales promotion activities, etc., prior to the release of "Ebara Sauce for barbecued meat Golden Taste" (Sweet/Medium Spicy, 400g) in June 1979. Although the Appellant alleges that these pamphlets were distributed to business partners (food wholesalers, wholesalers, retailers) nationwide while developing PR as new products, the specific distribution destinations and the number of distributions are not clear.

Also, in the pamphlets, a photo of the front exterior of the product (a label displaying the mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Sweet," "Medium Spicy," or "Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name is affixed to the body portion of the container) is posted on the

cover, and although those elements that can be identified as the three-dimensional shape constituting the trademark in the application can be seen on the surface of the product container, there is no description that strongly impresses itself as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises to viewers of the pamphlets, such as a description appealing it as a feature related to the product or its container.

b It can be seen that the Appellant, in November 2000, created 23,000 copies of a leaflet (Evidence A No. 6) related to the product of the case with the heading "My home always has a Golden Taste!/Ebara Golden Taste," and although the Appellant alleges that the leaflets were distributed to business partners nationwide in the same manner as the pamphlets of a above, but the specific distribution destinations are not clear.

Also, on the surface of the leaflet, as changes in the product, there are descriptions that "Further pursuit of the feature of Golden!! The balance between refreshing sweetness and richness has become even more delicious" and "Glittering gold label! Appeal to customers with a new shining label. Eye-catching effects are outstanding," and there is posted a photo of the front exterior of the product (a label displaying the mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Sweet," "Medium Spicy," or "Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name is affixed to the body portion of the container). Those elements that can be identified as the three-dimensional shape constituting the trademark in the application can be seen on the surface of the packaging container of the product. On the back surface of the leaflet, as changes in the product, there are a description about the adoption of eco-friendly resin hinge caps and a description of cooking examples (photos) using the product of the case and product standards, but concerning those elements that can be identified with the three-dimensional shape constituting the trademark in the application on the surface of the product container, there is no description that strongly impresses itself as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises to viewers of the leaflets, such as a description appealing it as a feature related to the product or its container.

(C) Product guide

It can be seen that the Appellant created 7,000 copies (Evidence A No. 9) of his product guide in July 2003, 5,000 copies (Evidence A No. 9-2) in July 2008, 12,000 copies (Evidence A No. 9-3) in July 2011, and 10,100 copies (Evidence A No. 9-4) in December 2015, and although the Appellant alleges that most of the product guides have

already been distributed, the specific distribution destinations are not clear.

Further, the above product guides can be said to be for retailers, which informs readers of the outline, standards, front exterior and the like of various household or commercial products related to the manufacture and sales of the Appellant, and in any of them, the products of the case are classified by taste and capacity, and there is posted a photo of the front exterior of the product (a label displaying the mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Sweet," "Medium Spicy," or "Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name is affixed to the body portion of the container). Although those elements that can be identified as the three-dimensional shape constituting the trademark in the application can be seen on the surface of the product container, there is no description that strongly impresses it as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises to viewers of the product guides, such as a description appealing it as a feature related to the product or its container.

(D) Various collaboration projects, etc.

a In a collaboration with Morinaga & Co., Ltd., from February 3, 2009 to the end of May, "Barbecued meat taste" is sold nationwide as a new flavor of the product called "Ottoto" that is a snack of the company, and a photo of the front exterior of the product is displayed (Evidence A No. 38 and Evidence A No. 39).

Also, the specific number of sales of the above products is not clear.

b In a collaboration with SANYO FOODS. Co., Ltd., on May 24, 2010, as the company's cup fried needles, a product called "Sapporo Ichiban Sauce for barbecued meat Fried needles" was released, and a photo of the front exterior of the product of the case (Medium Spicy) (a label displaying the mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Medium Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name is affixed to the body portion of the container) is shown in the packaging thereof (Evidence A No. 42 and Evidence A No. 43).

The specific sales period, number of sales, and sales area of the above products are not clear.

c In the collaboration with Japan Frito-lay Ltd., from September 2011 to June 2012, it is said that a collaboration product with a product called "Cheetos", which is the company's snack food, was sold, and in the packaging bag thereof, in addition to the

display of a photo of the front exterior of the product of the case (Medium Spicy) (a label displaying the mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Medium Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name is affixed to the body portion of the container), only the label part is displayed (Evidence A No. 40).

It is said that 18,000 cases (12 bags/case) of the above-mentioned product were sold, but no evidence was submitted to support this, and the specific sales area of the product is not clear.

d In a collaboration with NATORI CO., LTD., from June 4, 2018 to October 31, 2018, as the company's beef jerky product, a product called "Sauce for barbecued meat taste Beef Jerky" is sold nationwide, and in the packaging bag thereof, there is displayed a photo of the front exterior of the product of the case (Medium Spicy) (a label displaying the mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Medium Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name is affixed to the body portion of the container) (Evidence A No. 41).

It is said that 170,000 bags of the above products have been sold in total, but no evidence has been submitted to support this.

(E) Others

a Although it can be seen that from April 2010 to March 2011, the Appellant carried out the advertisement activities such as providing "mobile recipes" for the product of the case, publishing in newspapers and magazines, creating TV commercials, and creating materials for store or event advertising via Yokohama Agency, Co., Ltd., which is said to be an advertising company related to the Appellant, the specific content of these advertising activities is not clear (Evidence A No. 19).

The Appellant stated that he/she posted a signboard at the stadium (Yokohama Stadium), which is extremely frequently used in the media, among the above advertising activities, but no evidence has been submitted to clarify the details, such as what kind of signboard was posted in which place in the stadium.

b Although it can be seen that the Appellant was involved in recipe design and supervision when "Gakken Publishing" issued a mook (Evidence A No. 20) entitled "GAKKEN HIT MOOK/Recipes for using up Ebara Sauce for barbecued meat Golden Taste" on March 27, 2013, the specific circulation of the mook is unknown.

Further, as the content of the mook, in addition of various recipes using "Ebara Sauce for barbecued meat Golden Taste," there are descriptions that the product has grown into a long-selling product that ships 37 million pieces a year (2011 results) after thirty-five years have passed since it was born in 1978, and that the product has three flavors (Sweet, Medium Spicy, Spicy) and three sizes (210g, 400g, 590g), and the description of the features and the like of the product, and also, there is posted a photo of the front exterior of the product (a label displaying the mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Medium Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the appellant and the mark consisting of the letters "Golden Taste" which is the individual product name is affixed to the body portion of the container). Although those elements that can be identified as the three-dimensional shape constituting the trademark in the application can be seen on the surface of the product container, there is no description that strongly impresses it as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises to readers of the mook, such as a description appealing it as a feature related to the product or its container.

D Questionnaire survey

(A) The Appellant ordered a research company to conduct "a 'Golden Taste' bottle design recall survey" (survey via the Internet) in which survey target people are "20-69 years old, men and women, nationwide, people who purchase one or more commercially available seasonings for barbecued meat by themselves," and the number of samples is "1000 people," in order to show that the trademark in the application is actually functioning as a distinguishing mark, and the survey result report (dated June 20, 2017) (Evidence A No. 24) is roughly as follows.

a As "Pure recall," photos of containers of four kinds of products including the product of the case (the flat marks such as letters are not affixed and the contents are not filled, but the shape (outline) of the entire container is specified) are shown, and then in response to the question that asked them to answer the product name of the seasoning for barbecued meat that came to their mind, regarding the container of the product of the case, 28% answered "Golden Taste/Golden sauce/Golden" and 36% answered "Ebara/Ebara Sauce for barbecued meat".

b As "Subsidized recall," after showing the choices of "Ebara Golden Taste," "Moranbong Jang," "Kikkoman My Home is a Yakiniku Restaurant," "Jojoen Sauce for barbecued meat," or "I don't know," in response to the question that asks you to answer the product name that you think applies to each of the four types of container photos

mentioned in a above, 66% of the respondents chose "Ebara Golden Taste" for the photo of the container related to the product of the case.

c As "misunderstanding/sales intention," in response to the question, "If another seasoning for barbecued meat that is not 'Ebara Golden Taste' is released with this bottle design, do you think you will mistake it for 'Ebara Golden Taste'?", 14% answered "I think I will make a mistake," 19% answered "Probably, I think I will make a mistake," 36% answered "I can't say either way," 21% answered "Probably, I don't think I will make a mistake," and 11% answered "I don't think I will make a mistake".

Further, in response to the question, "What do you think about the release of another seasoning for barbecued meat that is not 'Ebara Golden Taste' with this bottle design?," 9% answered "I don't want it to be released," 21% answered "If anything, I don't want it to be released," and 70% answered "I don't think anything in particular".

Also, for those who answered "I don't want it to be released," or "If anything, I don't want it to be released," the reasons for answering were, for example, "Because I have a strong image that this bottle is Ebara Sauce for barbecued meat," "Because I'm likely to pick up the product and buy it by mistake without looking at it carefully," and "Because the crystal part is a trademark of golden taste".

(B) According to (A) above, in the photo of the container shown to the respondents, the shape (outline) of the entire container, including the cap portion, is specified, although the contents and label have been removed, whereas the trademark in the application is the Position mark configured as indicated in the Attachment 1, and the shape (outline) of the entire container is not specified. Accordingly, it is reasonable to assume that there are differences between the two that have a considerable effect on the visual impression, and it is unclear which part (whole or part) of the container related to the photo the respondent answered in relation to, and thus with this matter, it is not possible to estimate whether or not the trademark in the application functions as a distinguishing mark for distinguishing the products of one enterprise from those of other enterprises.

Also, regarding the container of the product of the case, only 28% of the respondents answered "Golden Taste/Golden Sauce/Golden" in "Pure recall," and even in the case of "Subsidized recall," given the specific option of "Ebara Golden Taste," the correct answer rate was only 66%.

Furthermore, in response to the question as to whether or not it is mistaken for "Ebara Golden Taste" related to "Misunderstanding/sales intention," only 33% of the respondents answered "I think I will make a mistake" and "Probably, I think I will make a mistake," and those who gave such an answer, it is not clear how many people have cited reasons such as "Because I have a strong image that this bottle is Ebara Sauce for

barbecued meat," "Because I'm likely to pick up the product and buy it by mistake without looking at it carefully," and "Because the crystal part is a trademark of golden taste". Accordingly, it cannot be said that such answers are predominant, and these answers cannot be used to estimate the degree of normal perception among consumers.

E Summary

According to A to D above, although it can be said that the Appellant has been continuously selling "Sauce for barbecued meat" which is the designated goods of the present application since June 1978, and those elements that can be identified with the three-dimensional shapes constituting the trademark in the application at a peripheral edge position from slightly above the center of the body portion to the neck portion of the product container; in the advertisement of the product, as a whole, a method is not used which strongly impresses it as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises to consumers who come into contact with the advertisement, such as a method appealing it as a feature related to the product or its container.

Further, regarding the questionnaire survey on the product of the case conducted by the Appellant in 2017, there is a point that it is not always appropriate to estimate whether or not the trademark in the application functions as the mark for distinguishing the products of one enterprise from those of other enterprises, such as some differences that have a considerable effect on the visual impression in the photographs of the containers shown to the respondents, as compared with the trademark in the application. Even if that point is put aside, from the results of the survey, no fact can be found to recognize that those elements that can be identified with the three-dimensional shapes constituting the trademark in the application at a peripheral edge position from slightly above the center of the body portion to the neck portion of the container of the product of the case can be normally recognized as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises.

Then, in the first place, as mentioned in (1) above, considering the actual situation of transactions in the industry that handles the designated goods of the present application, those elements that can be identified with the three-dimensional shapes constituting the trademark in the application at a peripheral edge position from slightly above the center of the body portion to the neck portion of the container of the product of the case are within a range that enables consumers to recognize them as a type of three-dimensional decoration that is generally widely performed for the purpose of contributing to the function or an aesthetic impression of a product for the packaging container of the product, and it is reasonable to assume that it is not recognized by itself as the mark indicating the

origin of the products or the mark distinguishing the products of one enterprise from those of other enterprises. Further, since the body portion of the container is always affixed with a label displaying the mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Sweet," "Medium Spicy," or "Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name, it can be said that as an opportunity for consumers to select products, the mark consisting of the letters "Ebara" or the mark consisting of the letters "Golden Taste" functions as the mark indicating the origin of the products or the mark distinguishing the products of one enterprise from those of other enterprises, and that the mark indicating the contents of the product functions for confirming that it matches the product of the content to be purchased.

Then, even if the product of the case with those that can be identified with the three-dimensional shapes constituting the trademark in the application at a peripheral edge position from slightly above the center of the body portion to the neck portion of the container of the product has been sold nationwide since June in 1978 and has been advertised and has a share of more than 30% in the sauce for barbecued meat market in 2015, for the product of the case, it can be said that the mark consisting of the letters "Ebara" or the mark consisting of the letters "Golden Taste" is recognized by consumers as the mark indicating the origin of the products or the mark distinguishing the products of one enterprise from those of other enterprises, whereas it cannot be said that those elements that can be identified with the three-dimensional shapes constituting the trademark in the application at a peripheral edge position from slightly above the center of the body portion to the neck portion of the container are recognized by consumers as such a mark.

Therefore, it cannot be recognized that as a result of its use, the trademark in the application enables consumers to recognize the goods as being connected with a certain person's business.

(3) Appellant's allegation

A The Appellant alleges that by the fact that "rhombuses" have been continuously used as a symbol or pattern that symbolizes the company in the seasonings centered on sauces for barbecued meat for about 60 years from the beginning of its founding to the present, and the fact that labels and three-dimensional trademarks with rhombus motifs have been registered as trademarks (Evidence A No. 10 and Evidence A No. 15) and have excluded other companies, in the field of seasonings, the rhombus has come to function as a mark calling to mind the Appellant and because of this premise, the

trademark in the application consisting of a series of rhombuses is not merely a common shape, but can essentially function as a distinguishing mark.

However, in order to say that the rhombus has come to function as a mark calling to mind the Appellant in the field of seasonings, it is necessary that, for example, the rhombus itself has been used in a unified and continuous manner with extremely high frequency for many years, in such a way that it is recognized as an independent mark, in that field, and thus consumers recall the Appellant or the products manufactured or sold by the same person with only the rhombus. However, the house mark of the Appellant was a mark with the letters "Ebara" placed in a rhombus space created by combining four horizontally long trapezoids until 2011 (Heisei 23) and then was changed to a different mark mainly composed of the letters "Ebara". Furthermore, although it can be seen that rhombus-like figures were used in a part of the label affixed to the product called "Sauce for barbecued meat North Korean style" which was launched in earnest in 1969 (Showa 44) and similar figures are used for labels of some products, they are only part of the products manufactured and sold by the Appellant (Evidence A No. 3, Evidence A No. 7 to Evidence A No. 9, and Evidence A No. 29). Therefore, with these, it cannot be recognized that consumers recall the Appellant or the products manufactured or sold by the same person with only the rhombus.

Furthermore, the registered trademarks according to the Appellant's allegation are all marks consisting of a combination of letters, figures or three-dimensional shapes, and also include marks with rhombus-like figures or three-dimensional shapes in the configuration thereof (Evidence A No. 10 and Evidence A No. 15). In light of constitution, it is difficult to say that the rhombus-like figures or three-dimensional shape parts are independently recognized as the origin of the products or a mark for distinguishing the products of one enterprise from those of other enterprises, and although the Appellant alleges that they have excluded other companies under the registered trademarks, since it is not clarified what kind of exclusion was made by which registered trademark, it cannot be recognized that consumers recall the Appellant or the products manufactured or sold by the same person with only the rhombus, in this point.

Therefore, the Appellant's allegation is unreasonable on that premise and cannot be accepted.

B Regarding each example of other companies' products illustrated in Attachment 2, the Appellant alleges that all of them are different from the trademark in the application, and it is usually impossible to sell them without giving the product name to a packaging material as a general distribution form of the product "Sauce for barbecued meat," that the use of a plurality of distinguishing marks on one product is extremely

common in ordinary transactions, and it is quite possible that the name of the product, the color and shape of the label with it, the specific decoration mode, and the shape of the packaging material itself remain in the memory of traders and consumers, respectively or in combination and individual elements function as distinguishing marks, that actually the continuous diamond cut (the trademark in the application) is recognized with a great presence when it is actually displayed in a retail store (Evidence A No. 25 to Evidence A No. 28), and of the products of the case, the products containing 400 ml (360g) have a large capacity, so that they are often placed at the bottom of a display stand, and when viewed from a bird's-eye view, the trademark in the application provided from above the center of the container to the neck portion is more than just "exerting an aesthetic impression," strongly impresses consumers, and functions as a distinguishing mark, even at angle at which the label is not clearly visible.

Certainly, the use of a plurality of marks consisting of figures or three-dimensional shapes or a combination of them on one product is extremely common in ordinary transactions, and in that case, although it cannot be denied that each mark may function as a distinguishing mark, that is not to say that not all of the individual marks function as distinguishing marks.

The trademark in the application is the Position mark configured as described in Attachment 1 and is used for the product "Sauce for barbecued meat," and as shown in Attachment 2, based on the fact that in the industry that handles the products, it is generally widely performed to decorate the surface of the packaging container of the product with three-dimensional decorations having various shapes such as rectangles, parallelograms, and rhombuses as motifs, even considering that there are some differences in the details from the example shown in Attachment 2, the three-dimensional shape constituting the trademark in the application and the position to which it is attached are within a range that enables consumers to recognize them as a type of three-dimensional decoration that is generally widely used for the purpose of contributing to the function or an aesthetic impression of a product for the packaging container of the product, and it is not recognized by itself as the mark indicating the origin of the products or the mark distinguishing the products of one enterprise from those of other enterprises, as described in (1) above.

Of the product called "Ebara Sauce for barbecued meat Sauce Golden Taste" manufactured and sold by the Appellant, the product of the case is a product in which those elements that can be identified as the three-dimensional shape constituting the trademark in the application can be seen on the surface of the container, which has capacities "210g," "400g" (before 2015), "360g" and "480g" (after 2015). On the body

portion of the container of the product of the case, a label with a mark indicating the contents of the product (consisting of the letters of "Sauce for barbecued meat," and consisting of the letters of "Sweet," "Medium Spicy," or "Spicy"), in addition to the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name, is affixed, so that it can be said that as an opportunity for consumers to select products, the mark consisting of the letters "Ebara" or the mark consisting of the letters "Golden Taste" functions as the mark indicating the origin of the products or the mark distinguishing the products of one enterprise from those of other enterprises, and that the mark indicating the contents of the product functions for confirming that it matches the product of the content to be purchased, also in the actual display of products in stores.

Then, of the above marks used for the product of the case, the one functioning as the mark indicating the origin of the products or the mark distinguishing the products of one enterprise from those of other enterprises is the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name, and it should be said that other marks (those (marks) that can be identified as the three-dimensional shape constituting the trademark in the application on the surface of the container and the mark indicating the contents of the product) do not function as such a mark.

In this point, although the Appellant stated that when a product is placed at the bottom of the display stand, the label of the product is not clearly visible, since the product is a food product and incorrect product selection may affect health, it is reasonable to look at the label on a product, at least to confirm a source of the product when a consumer selects the product. Accordingly, even if the label of the product may not be visible when displaying the product, it cannot be said that those (marks) that can be identified with the three-dimensional shape constituting the trademark in the application on the surface of the container of the product of the case is strongly impressed as a mark for distinguishing the products of one enterprise from those of other enterprises.

Therefore, the Appellant's allegation cannot be accepted.

C The Appellant alleges that although the trademark in the application, which has been used continuously for many years, is not a "literal element," so it may be relatively rare to be mentioned as a word of mouth among consumers, as compared with the letters of "Golden Taste" that has been continuously used for many years and the letters of the house mark "Ebara," instead, it shows off its presence "visually" in the product display at retail stores nationwide, and alleges that the display of the products with the trademark in the application has been carried out continuously for more than 40

years at retail stores nationwide (at least 50,000 stores), which constitutes direct contact with traders and consumers, in a manner that many consumers see it, and it can be said that the visual presence at the time of display and the feel at the time of actually picking up each have continued to imprint the trademark in the application under the consciousness of consumers, so that even if an impression is not made by TV commercials, it has been sufficiently accumulated as the period and amount for imprinting it under the consciousness of consumers.

However, when the product of the case is displayed, usually, simultaneously with those (marks) that can be identified as the three-dimensional shape constituting the trademark in the application on the surface of the container of the product, the mark consisting of the letters "Ebara" which is the house mark of the Appellant and the mark consisting of the letters "Golden Taste" which is the individual product name on the label affixed to the body portion of the container of the product are visually recognized. Furthermore, those (marks) that can be identified as the three-dimensional shape constituting the trademark in the application are within a range that enables consumers to recognize them as a type of three-dimensional decoration that is generally widely used for the purpose of contributing to the function or an aesthetic impression of a product for the packaging container of the product, considering the actual situation of transactions in the industry that handles products of the same type as the product of the case, and as compared with the mark consisting of the letters "Ebara" or the mark consisting of the letters "Golden Taste" which is the individual product name, it is difficult to say that it gives a strong and dominant impression to consumers. Thus, if a method is not used, which strongly impresses it as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises to consumers who come into contact with the advertisement, such as a method appealing it as a feature related to the product or its container, even if the mark has been used for the product of the case for many years, it should be said that consumers recognize the mark as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises.

Therefore, the Appellant's allegation cannot be accepted.

D The Appellant alleges that regarding the results of the questionnaire (Evidence A No. 24), the fact that about 30% of consumers could recall the product itself ("Golden Taste," "Golden sauce," "Golden") just by looking at the container, and from the point of view of source display, the percentage of people who recognized it as an Ebara product has reached 64%, can never be neglected, and alleges that even if the container seen by consumer in the questionnaire is "the shape of the entire container," it is clear that as for

the shape, the portion of particular interest is the diamond-cut part specified as the trademark in the application, and showing general consumers "a container of a virtual shape that is not currently on the market with the trademark in the application" and asking them what kind of source it displays exceed the requirements of distinctiveness required for the Position mark, so that since it is not appropriate considering the attention of general consumers, the results of the questionnaire clearly show that, as a result of many years of use, the trademark in the application can function as a distinguishing mark by itself.

However, the trademark in the application is the Position mark configured as described in Attachment 1, and as described in "the detailed explanation of trademark," the shape (outline) of the entire container of the product is not specified, and on the basis of the fact that "The three-dimensional shapes that are vertically long rhombuses that are continuously arranged on the periphery of the container containing the product, and in which the respective rhombuses are recessed toward the center" are arranged at a position "from slightly above the center of the body portion to the neck portion of the container containing the product," it should be determined whether or not it can function as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises, by itself. Therefore, if you are conducting a questionnaire to estimate the consumer's perception of the trademark in the application, at least, it should be carried out after showing what the respondents of the questionnaire recognize as the same as the trademark in the application, but in the photo of the container shown to the respondents in the questionnaire carried out the Appellant, the shape (outline) of the entire container, including the cap portion, is specified, although the contents and label have been removed, and as compared with the trademark in the application, it should be seen that there are differences that have a considerable effect on the visual impression. Further, as long as there is such a difference, since it is unclear which part (whole or part) of the container related to the photograph the respondent answered in relation to, based on the results of the questionnaire, it cannot be inferred whether or not the trademark in the application can function as the mark indicating the origin of the products or the mark for distinguishing the products of one enterprise from those of other enterprises.

Also, although the Appellant alleges that the fact that about 30% of consumers could recall the product itself ("Golden Taste," "Golden sauce," "Golden") just by looking at the container, and from the point of view of source display, the percentage of people who recognized it as an Ebara product has reached 64%, can never be neglected, in the products manufactured and sold by the Appellant, it is only the product of the case that

has a three-dimensional shape (mark) that can be identified with the three-dimensional shape constituting the trademark in the application on the surface of the container of the product, and in light of the fact that only 28% of the respondents answered "Golden Taste/Golden Sauce/Golden" in "Pure recall" related to the questionnaire, and even in the case of "Subsidized recall," given the specific option of "Ebara Golden Taste," the correct answer rate was only 66%, it cannot be said that the degrees of those are high.

Therefore, the Appellant's allegation cannot be accepted.

(4) Summary

As described above, the trademark in the application falls under Article 3(1)(iii) of the Trademark Act, cannot be recognized to meets the requirements stipulated in Article 3(2) of the Trademark Act, and thus cannot be registered.

Therefore, the appeal decision shall be made as described in the conclusion.

March 30, 2020

Chief administrative judge: TANAKA, Takanori
Administrative judge: KANEKO, Naohito
Administrative judge: ISHIZUKA, Rie

Attachment

1 The trademark in the application

(1) The trademark for which registration is sought



(2) The detailed explanation of trademark

The trademark for which registration is sought (hereinafter, referred to as "the Trademark") is the Position mark specified in a position affixing a mark, and consists of

three-dimensional shapes arranged from slightly above the center of a body portion to a neck portion of a container containing a product. The three-dimensional shapes are vertically long rhombuses continuously arranged at a periphery of the container, and the respective rhombuses are recessed towards the center at a position from slightly above the center of the body portion to the neck portion of the product container. The broken line part shows an example of a product container and is not an element constituting the trademark.

2 Example submitted in the inquiry dated June 20, 2019 (example as a three-dimensional decoration on the surface of the packaging container for sauce for barbecued meat)

(1) On the website of "NH Foods Ltd.," under the tiles of "Sauce for barbecued meat Sweet," "Sauce for barbecued meat Medium Spicy," and "Sauce for barbecued meat Spicy," the following images are displayed.

(https://www.nipponham.co.jp/products/normal_temp/)





(2) On the website of "JOJ Co., Ltd," under the title of "Jojoen Salt Sauce for barbecued meat," the following images are displayed.

(https://joj.co.jp/products/detail.php?product_id=15)



(3) On the website of "Sorachi, Co., Ltd," the title of "Sauce for barbecued meat served with broth containing Hokkaido Gagome Kelp 215g," the following image is displayed.

(<http://shop.sorachi.ne.jp/modules/shop/index.php?lid=173>)



(4) On the website of "Tokushima Prefectural Product Association," in the title of "Sauce for barbecued meat containing Kawashima's specialty garlic! [Kawajima Town Life Improvement Group Liaison Council]," the following image is displayed.

(<http://www.arunet-awa.com/?pid=6273724>)



(5) On the website of "Limited liability company PRAY LIV," under the title of "Bulgogi Korean style sauce for barbecued meat," the following image is displayed.

(https://item.rakuten.co.jp/pray-liv/cos-516573/?scid=af_pc_etc&sc2id=af_109_1_100)



(6) On the website of "My town special product net," under the title of "Shimane Prefecture specialty sauce Sauce for barbecued meat 200g X 6," the following image is displayed.

(<https://www.wagamachi-tokusan.jp/product/1122.html>)



(7) On the website of "Ichikawa Regional Brand Council," under the title of "Pear sauce for barbecued meat," the following image is displayed.
(<http://www.ichikawa-chiikibrand.jp/nashi/n02034.html>)



(8) On the website of "COSMO SHOKUHIN CO., LTD," under the titles of "From the north Sauce for barbecued meat Medium Spicy 350g," and "From the north Sauce for barbecued meat Yakuzen Medium Spicy 350g," the following images are displayed.
(<http://store.e-cosmo.co.jp/shopdetail/000000000007/>)
(<http://store.e-cosmo.co.jp/shopdetail/0000000000026/>)



(9) On the website of "Food Label Holding, Co., Ltd," under the title of "Yakiniku TORAJI Sauce for barbecued meat 240g," the following image is displayed.
(http://www.foodlabel.co.jp/item/item_127.html)

