

J. Y. Interpretation No.688 (June 10, 2011) *

ISSUE: Whether the requirement for package contracting businesses to issue sales certificate “at the time a receivable payment is due in each period under the construction agreement” is constitutional ?

RELEVANT LAWS:

Articles 7, 15 and 23 of the Constitution (憲法第七條、第十五條、第二十三條) ; J.Y. Interpretation Nos. 397 and 682 (釋字第三九七號、第六八二號號解釋) ; Time Table of the Value-added and Non-value-added Business Tax Act concerning the timeframe for package contracting businesses to issue sales certificate (加值型及非加值型營業稅法之營業人開立銷售憑證時限表，有關包作業之開立銷售憑證時限規定) 。

KEYWORDS:

Consumption tax (消費稅) , transfer (轉嫁) , principle of equality (平等原則) , principle of proportionality (比例原則) , integrity of the system (體系正義) , sales certificate (銷售憑證) .**

HOLDING: In the timetable of business operator’s issuance of sales certificates under the Value-added and Non

解釋文：加值型及非加值型營業稅法（下稱營業稅法）之營業人開立銷售憑證時限表，有關包作業之開立憑證

* Translated by Eleanor Chin, Esq. and Chien Yeh Law Offices.

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value-added Business Tax Act (*hereinafter* Business Tax Act), the regulation on the timeframe for package contracting businesses to issue sales certificate is “at the time a receivable payment is due in each period under the construction agreement.” It does not contravene the principle of equality under Article 7 of the Constitution, the principle of proportionality under Article 23 of the Constitution, nor does it contradict the meanings and purpose of protecting property rights and the freedom to operate business under Article 15 of the Constitution. However, [questions remain] when a business operator issues the sales certificate with time limit earlier than the actual receipt of payment, if the purchaser should subsequently become insolvent or for other reason render the business operator not able to transfer liability to the purchaser the already paid business tax. The Business Tax Act should appropriately address the nontransferrable business tax so that the legislative intent that business tax is a consumption tax and its integrity is conformed. The governing authority shall promptly review and improve the relevant provisions of the

時限規定為「依其工程合約所載每期應收價款時為限」，尚無悖於憲法第七條平等原則及第二十三條比例原則，而與第十五條保障人民財產權及營業自由之意旨無違。惟營業人開立銷售憑證之時限早於實際收款時，倘嗣後買受人因陷於無資力或其他事由，致營業人無從將已繳納之營業稅，轉嫁予買受人負擔，此際營業稅法對營業人已繳納但無從轉嫁之營業稅，宜為適當處理，以符合營業稅係屬消費稅之立法意旨暨體系正義。主管機關應依本解釋意旨就營業稅法相關規定儘速檢討改進。

Business Tax Act in accordance with the meaning and purpose of this Interpretation.

REASONING: The protection of the people's right to equality under Article 7 of the Constitution is intended to prevent arbitrary or capricious acts of the legislators and to avoid unreasonable differential treatment to people. Whether a law meets the requirement for the protection of equal rights shall hinge on whether the purpose of the differential treatment under that law is constitutional and whether there is a certain level of nexus between the categorization adopted and the objective [intended] to achieve under the law (*see* J.Y. Interpretation No. 682). With regard to the related matters on the imposition of a concerted obligation to assist in tax collection, given that they involve professional considerations on tax collection techniques, the judicial review shall give deference as long as the legislative authorities make reasonable differentiations based on adequate purpose and without acting arbitrarily or capriciously. Furthermore, the time limit provision for

解釋理由書：憲法第七條保障人民平等權，旨在防止立法者恣意，避免對人民為不合理之差別待遇。法規範是否符合平等權保障之要求，其判斷應取決於該法規範所以為差別待遇之目的是否合憲，其所採取之分類與規範目的之達成之間，是否存有一定程度之關聯性而定（本院釋字第六八二號解釋參照）。有關稅捐稽徵協力義務課予之相關事項，因涉及稽徵技術之專業考量，如立法機關係出於正當目的所為之合理區別，而非恣意為之，司法審查即應予以尊重。又營業人何時應開立銷售憑證之時限規定，為前開協力義務之具體落實，雖關係營業人營業稅額之申報及繳納，而影響其憲法第十五條保障之財產權與營業自由，惟如係為正當公益目的所採之合理手段，即與憲法第十五條及第二十三條之意旨無違。

business entities on when to issue sales certificate is the realization of the above joint obligations to assist. Although it concerns the filing and payment of the business operator's business tax and thus affects the protection of property rights and freedom to operate business under Article 15 of the Constitution, as long as the means thereof are reasonable and justified with legitimate public interest objective, it does not contradict the purpose of Articles 15 and 23 of the Constitution.

The levying of business tax under the Business Tax Act adopts a combination of value-added sales tax and cumulative transfer tax system, with the former being assessed on the difference between a business operator's input and output tax in accordance with Chapter 4, Section 1 of the Business Tax Act and the latter being levied on a business operator's total sales in accordance with Chapter 4, Section 2 of the same Act (*see* J.Y. Interpretation No. 397). As a matter of principle, a business operator shall file a tax return for the sales amount, payable taxes or overpaid taxes once every two months (*see*

營業稅法對於營業稅之課徵係採加值型營業稅及累積型轉手稅合併立法制，前者依營業稅法第四章第一節規定，係按營業人進、銷項稅額之差額課稅；後者依同法第四章第二節規定，係按營業人銷售總額課徵營業稅（本院釋字第三九七號解釋參照）。營業人原則上須以每二月為一期，按期申報銷售額、應納或溢付營業稅額（營業稅法第三十五條參照）。為使營業人之銷售事實及銷售額等，有適時、適當之證明方法，營業稅法第三十二條乃對營業人課以依法定期日開立銷售憑證之協力義務，規定營業人銷售貨物或勞務，應依同法所定營業人開立銷售憑證時限表

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Article 35 of the Business Tax Act). To ensure that business operators have timely and appropriate means to prove the occurrence of a sale and the amount of such a sale, Article 32 of the Business Tax Act imposes on the business operators a concerted obligation to assist by issuing the uniform sales receipts to the purchasers for the goods or services provided within the timeframe stipulated under the Time Table for the Issuance of Sales Certificate by the Business Operators (*hereinafter* Time Table) of the same Act.

The Time Table expressly states the timing at which business operators shall perform the obligation to issue sales certificate, and, depending on different industries, provides different timeframe to issue. Among the business operators in the sale of goods such as the retail, manufacturing, or handicraft sector, among others, the Time Table in principle sets the time for issuing the sales certificate at the time the goods is dispatched; for business operators in the sale of services, such as labor contracting service, warehousing, leasing, among others, the Time Table in

(下稱時限表) 規定之時限，開立統一發票交付買受人。

時限表明文規範營業人應履行憑證義務之時點，並依營業人所屬不同行業別，定有不同之開立銷售憑證時限。其中銷售貨物之營業人，如買賣業、製造業、手工業等，時限表原則上將其銷售憑證開立時限定於發貨時；銷售勞務之營業人，如勞務承攬業、倉庫業、租賃業等，時限表原則上將其開立銷售憑證時限定於收款時。至包作業之營業人開立銷售憑證，時限表則定於「依其工程合約所載每期應收價款時為限」。

principle sets the time for issuing the sales certificate at the time of payment collection. With regard to the timeframe of contracting business operators to issue sales certificate, the Time Table sets it “at the time a receivable payment is due in each period under the construction agreement.”

The package contracting business is defined by the Time Table as “every contracting operation of civil construction, water, electric and gas utility installation, and construction painting whereby the contractor uses its own materials or provide pricing and sale of materials to the undertakers, including building construction, architecture, civil engineering contracting, road pavement and surfacing, well drilling, electrical and plumbing, paint contracting, among other things.” Given that such business operators provide both their own materials and the undertaking of the construction services, their services simultaneously entail the nature of selling goods and services, which is different from business operators that purely engage in the sale of goods or services. The preparation of materials for

時限表所定之包作業，即「凡承包土木工程、水電煤氣裝置工程及建築物之油漆粉刷工程，而以自備之材料或由出包人作價供售材料施工者之營業。包括營造業、建築業、土木包作業、路面鋪設業、鑿井業、水電工程業、油漆承包業等」。其營業人既自備材料又出工施作，同時兼具銷售貨物及勞務之性質，與單純銷售貨物或勞務之營業人不同。其備料銷售部分即近似銷售貨物之營業人，但另一方面，按包作業一般之交易習慣，合約常以完成特定施作進度作為收取部分價款之條件，如僅因其有銷售貨物性質，即要求其比照銷售貨物營業人於發貨時開立銷售憑證，產生銷項稅額，則包作業營業人負擔過重。又因其雖有銷售勞務性質，但雙方既屬分期給付，通常已可排除價款完全未獲履行之風險，是時限表就包作業之開立憑證時限乃折衷定為「依其工程合約所載

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the sale is similar to the business operators in the sale of goods, yet on the other hand, in the ordinary course of package contracting businesses usually condition the installed payments on the completion of certain progress in the construction. Should the package contracting businesses, merely because it has a certain character of sale of goods, be required to issue sales certificate upon the delivery of goods similar to that of the operators for the sale of goods and as a result liable for output taxes, then it can overburden the package contracting operators. Furthermore, although package contract businesses also possess the character of sale of services, given that the payments between the parties are in installments, the risk of default payments can usually be excluded. Therefore, as a compromise, the Time Table stipulates that contracting businesses to issue the sales certificate “at the time a receivable payment is due in each period under the construction agreement,” so that the business operators and the tax levying authority have a certain, objective date for reference. Accordingly, the regulation on the timeframe is for purpose of such

每期應收價款時為限」，俾使營業人及稽徵機關有明確客觀之期日可稽。準此，系爭時限規定係為促進稽徵效率與確立國家稅捐債權之公益目的，考量包作業之特性與交易習慣所為與銷售勞務者之不同規定，且該差別待遇與目的間具有合理關聯，尚非屬恣意為之；又所採之手段，係為確保營業稅之稽徵，有適時之證明方法可稽，對包作業之營業人難謂因系爭時限規定而對其財產權及營業自由構成過度負擔。是系爭時限規定尚無悖於憲法第七條平等原則及第二十三條比例原則，而與第十五條保障人民財產權及營業自由之意旨無違。

public interest as promoting the efficiency of tax levy and affirming the creditor's right of the state's taxing authority, taking into consideration that the nature and customary transactions of package contracting operations is different from those engaged in the sale of services, provided that there is a reasonable nexus between the differential treatments and the purpose it intends to achieve, and, therefore, not arbitrary or capricious. Furthermore, the means being adopted is to ensure that adequate and timely evidence is available to prove the collection of business tax. It can hardly be said that the disputed timeframe regulation overburdens the property rights and the freedom to operate on package contracting businesses. Thus, the disputed regulation does not contravene the principle of equality under Article 7 of the Constitution or the principle of proportionality under Article 23 of the Constitution, nor does it contradict the meanings and purpose of protecting the property rights and the freedom to operate businesses under Article 15 of the Constitution.

In accordance with the spirits of the business tax system, the business tax is a levy to the person who purchases goods or services, and reflected on the capacity to bear the tax burden through such consumption. Although technically the taxpayer is the business operator, [the burden] is transferred to and borne by the final purchaser, i.e., the consumer. Therefore, the rights and interests of the business operator to transfer the amount of business taxes must be adequately protected to comply with the legislative purpose and the integrity of the system that business tax is a consumption tax. To ensure the accuracy and efficiency of business tax levy, while it is not impossible to require business operators to issue sales certificate prior to the payment being made depending on the nature of the business, such a business operator who has legitimately issued the sales certificate, filed the return and made the tax payments may be unable to transfer such tax burden due to the purchaser's subsequent insolvency or other causes. This does not affect the constitutionality of the taxpayer's obligation to issue sales certificate and pay the

依營業稅之制度精神，營業稅係對買受貨物或勞務之人，藉由消費所表彰之租稅負擔能力課徵之稅捐，稽徵技術上雖以營業人為納稅義務人，但經由後續之交易轉嫁於最終之買受人，亦即由消費者負擔。是以營業人轉嫁營業稅額之權益應予適當保護，以符合營業稅係屬消費稅之立法意旨暨體系正義。為確保營業稅稽徵之正確及效率，雖非不得按營業別之特性，將營業人銷售憑證開立之時限，定於收款之前。惟營業人於收款前已依法開立銷售憑證、申報並繳納之銷項稅額，嗣後可能因買受人陷於無資力或其他事由，而未給付價款致無從轉嫁。此固不影響納稅義務人於實際收款前，即應開立銷售憑證及報繳營業稅之合憲性。然對於營業人因有正當之理由而無從轉嫁予買受人負擔之稅額，營業稅法仍宜有適當之處理，例如於適當要件與程序下，允許營業人雖不解除契約辦理銷貨退回，亦可請求退還營業人已納稅額或允其留抵應納稅額等。就此主管機關應儘速對營業稅法相關規定予以檢討改進。

business taxes prior to the actual receipt of payment. Yet the Business Tax Act should nevertheless take appropriate actions to deal with the taxes the business operators cannot transfer to the purchasers with proper justification such as allowing the business operator to request a refund of the already paid tax or credit it against the payable tax amount without rescinding the contract and returning the goods. The competent authority shall promptly review and improve the relevant provisions of the Business Tax Act.

Justice Yeong-Chin Su filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Shin-Min Chen filed dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: The Petitioner subcontracted from A Construction Corporation for a project with the Taipei County Government in September 1995 for the agreed remuneration of NT\$165 million. The final balance due was

本號解釋蘇大法官永欽提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官新民提出部分不同意見書。

編者註：

事實摘要：聲請人於民國 84 年 9 月向 A 營造公司轉承包臺北縣政府之工程，約定報酬金額新臺幣 1 億 6500 萬，其中尾款為 1706 萬，尾款給付依約應於「A 公司向業主臺北縣政府領得工程款後，於 3 作業天內開立現金支

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NT\$17.06 million, and according to the agreement such final payment shall be made “after receiving the project funds from the Taipei County Government, A Construction Corporation shall issue a cash check within 3 business days.”

The Petitioner completed the construction on July 31, 1998. However, the last installment was not paid because of A Construction Corporation’s insolvency. The Petitioner filed a lawsuit and participated in the distribution. In May 2000, the Petitioner was awarded NT\$4,340,000; the Petitioner subsequently filed a supplemental business tax return on July 5, 2002 to pay an additional NT\$206,727 business tax from the NT\$4,340,000 received.

The National Tax Administration of Northern Taiwan Province considered the construction the Petitioner engaged a package contracting operation involving the supplying of labor and materials, and the issuing of sales certificate should have been “at the time a receivable payment is due in each period under the construction agreement.” Therefore, upon the comple-

票」為之。

聲請人於 87 年 7 月 31 日完工，但工程尾款卻因 A 公司陷於無資力而未如期獲償。聲請人提起訴訟、參與分配，於 89 年 5 月間，獲償 434 萬餘元；嗣於 91 年 7 月 5 日補報繳所獲償 434 萬餘元之營業稅 20 萬 6,727 元。

北區國稅局以聲請人承攬之工程屬包工包料之包作業，依營業人開立銷售憑證時限表規定，應於「依其工程合約所載每期應收價款時」開立發票，聲請人於 87 年 7 月 31 日完工並請求付款，即有開立全部尾款 1700 餘萬元統一發票，並依期限申報營業稅之義務；聲請人未依限履行上開義務，有漏開發票及漏繳營業稅情形，乃核定其逃漏營業稅

tion of the construction and request for payment on July 31, 1998, the Petitioner had an obligation to issue a uniform sales receipt for the entire final installment of more than NT\$17 million and to file the business tax return within the deadline. Given that the Petitioner did not fulfill the abovementioned obligation within the deadline, a case of missing sales receipt and tax evasion is shown. The National Tax Administration determined that the Petitioner evaded an amount of NT\$810,000 in taxes and imposed a treble fine of NT\$2,437,800. The Petitioner instituted an appeal and administrative litigation but were all denied. The Petitioner then filed the petition for an interpretation.

款 81 萬，並處 3 倍罰鍰 243 萬 7800 元。聲請人不服，迭經訴願、行政訴訟均遭駁回，爰聲請解釋。