

J. Y. Interpretation No.693 (December 9, 2011) *

- ISSUE:**
- 1.The offering prices of call (put) warrants are not income arising from securities exchange.
 - 2.Capital loss arising from the exercise of rights or hedging shall not be deducted from taxable income. Are the above opinions constitutional or not ?

RELEVANT LAWS:

Article VII and Article XIX of the Constitution of the Republic of China (憲法第七條、第十九條) ; J.Y. Interpretation Nos. 622, 660, and 685 (司法院釋字第六二二號、第六六〇號、第六八五號解釋) ; Articles 4-1, 24-1, 24-2-(1) of the Income Tax Act (所得稅法第四條之一、第二十四條第一項、第二十四條之二第一項) ; Point 2 in Points of Attention for Securities Exchange Tax Statute (證券交易稅條例實施注意事項第二點) ; Clause 2-2 of the Guidelines for Handling Applications of Call (Put) Warrants by Issuers (發行人申請發行認購(售)權證處理準則第二點第二項) ; Ministry of Finance Letter Tai-Cai-Shui No. 861922464 of December 11 1997 (財政部中華民國八十六年十二月十一日台財稅第八六一九二二四六四號函) ; Ministry of Finance[’s] Letter [of] Tai-Cai-Shui No. 861909311 dated July 31, 1997 (Revoked under Ministry of Finance Letter Tai-Cai-Shui No.

* Translated by Roger K. C. Wang.

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10000400260 dated November 16, 2011) (財政部中華民國八十六年七月三十一日台財稅第八六一九〇九三一號函(業經財政部一〇〇年十一月十六日台財稅字第一〇〇〇〇四〇〇二六〇號令廢止)。

KEYWORDS:

Legal foundation of taxation (租稅法律主義), principle of equity (平等原則), taxation by capacity (量能課稅), call (put) warrants (認購(售)權證), premium income (權利金收入), securities exchange (證券交易), securities exchange tax (證券交易稅), securities exchange income tax (證券交易所得稅), exercise of rights or hedging (履約或避險交易).**

HOLDING: The first section of the Ministry of Finance Letter Tai-Cai-Shui No. 861922464 of December 11, 1997 specifies that, “[the] proceeds paid to the issuers of call (put) warrants for issuing the instruments are premium income[s]”, meaning that the proceeds from the issuance of the instruments are premium income[s], not securities exchange income, thereby [the] Article 4-1 of the Income Tax Act shall not be applicable, and this is not in defiance of the doctrine of the legal foundation of tax-

解釋文: 財政部中華民國八十六年十二月十一日台財稅第八六一九二二四六四號函前段謂：「認購(售)權證發行人於發行時所取得之發行價款，係屬權利金收入」，意指該發行價款係權利金收入，而非屬證券交易收入，無所得稅法第四條之一之適用，與憲法第十九條之租稅法律主義尚無違背。

tion under Article XIX of the Constitution of the Republic of China.

It is stated in the same document that, “after issuing call (put) warrants, the issuers may have capital gains or capital losses from [the] securities transactions at the time the investors elect to exercise their rights of selling or buying the underlying stocks and these shall be recognized for income or loss pursuant to Article 4-1 of the Income Tax Act”. The Ministry of Finance letter Tai-Cai-Shui No. 861909311 of July 31, 1997 also states that, “If the bearers of the call (put) warrants elect to seek settlement in cash at a particular point of time or at maturity... they shall be exempted from the levy of income tax as suggested in the aforementioned Income Tax Act.”. This is not in defiance of the doctrine of the legal foundation of taxation under Article XIX of the Constitution of the Republic of China, nor in defiance of the principle of equity under Article VII of the Constitution of the Republic of China.

同函中段謂：「認購（售）權證發行人於發行後，因投資人行使權利而售出或購入標的股票產生之證券交易所得或損失，應於履約時認列損益，並依所得稅法第四條之一規定辦理。」及財政部八十六年七月三十一日台財稅第八六一九〇九三一號函稱：「認購（售）權證持有人如於某一時間或特定到期日，以現金方式結算者……並依前開所得稅法規定停止課徵所得稅。」與憲法第十九條之租稅法律主義並無牴觸，亦不生違反憲法第七條平等原則之問題。

REASONING: According to Article XIX of the Constitution of the Republic of China, the people are obliged to pay tax according to law. This refers to the state assigning people the obligation in taxation or preferential treatment of waivers or reductions in tax payment under law whereby the subject of taxation, the object of taxation, the relation between the subject and object of taxation, the tax base, tax rate, and the method of tax payment and the time of payment and other components of taxation shall be defined by law. However, the competent authority may cite applicable laws within their jurisdiction with proper interpretation within their authority. If the interpretation of law by the competent authority is made in compliance with the principles of the Constitution and related legislation and the general method of the interpretation of law is duly observed, this does not defy the principle of the legal foundation of taxation (See J.Y. Interpretation Nos. 622, 660, and 685).

The issuance of call (put) warrants approved by the competent authority shall

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、租稅客體對租稅主體之歸屬、稅基、稅率、納稅方法及納稅期間等租稅構成要件，以法律定之。惟主管機關於職權範圍內適用之法律條文，本於法定職權就相關規定予以闡釋，如係秉持憲法原則及相關之立法意旨，遵守一般法律解釋方法為之，即與租稅法律主義無違（本院釋字第六二二號、第六六〇號、第六八五號解釋參照）。

主管機關核准發行之認購(售)權證，係指標的證券發行公司以外之第三

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be referred to the securities issued by a third party whereby the bearers of such securities may exercise their right under the securities within a specific period or at maturity to buy or sell the underlying securities from the issuers at the exercise price, or to close the deal with cash settlement for a spread (Clause 2-2 of the Guidelines for Handling Applications of Call (Put) Warrants by Issuers.) As such, call (put) warrants are securities representing the rights of the bearers to buy or sell the underlying securities and the issuers of which are still obliged to debts under the options specified in the warrants after the delivery of the securities to the investors. Obligation in this form is different from the selling of the warrants by the bearers where the bearers are merely obliged to deliver the warrants to the buyers.

Whether the income from the issuance of call (put) warrants shall be subject to income tax or not shall depend on the definition of “securities exchange” as stated in Article 4-1 of the Income Tax Act, that “with effect from January 1,

者所發行表彰認購(售)權證持有人於履約期間內或特定到期日，有權按約定履約價格向發行人購入或售出標的證券，或以現金結算方式收取差價之有價證券(發行人申請發行認購(售)權證處理準則第二點第二項)。是認購(售)權證係表彰證券買賣選擇權之有價證券，其發行人將該權證交付後尚負有履行該權證所載選擇權債務之義務，此與發行後之權證持有人賣出該權證，僅負將該權證交付買受人之義務不同。

發行認購(售)權證之收入是否課徵所得稅，關鍵在於該發行交易是否為所得稅法第四條之一：「自中華民國七十九年一月一日起，證券交易所停止課徵所得稅，證券交易損失亦不得自所得額中減除。」所稱之「證券交

1990, securities exchange tax shall be waived. Accordingly, capital loss from securities exchange shall not be deducted from income". The cause of legislation for the waiver of the levy of securities exchange income tax is a simplification of procedure for the collection of securities exchange income and for the reasonable levy of tax. In practice, the Securities Exchange Tax Statute has been amended to move the rate of securities exchange tax upward thereby waiving the securities exchange income tax that should have been incorporated as parts of the total income for taxation. According to Article 1-1 of the Securities Exchange Tax Statute, only the transactions of securities in circulation shall be subject to securities exchange tax. This shows that securities exchange as defined in Article 4-1 of the Income Tax Act shall be confined to the transactions of securities in circulation. This is the rationale behind the substitution of Securities Exchange Income Tax by the Securities Exchange Tax. Transaction of the issuance of call (put) warrants is different from the trading of call (put) warrants. As such, there shall be no such thing as the levy

易」。查所得稅法第四條之一停徵證券交易所得稅之立法理由，係為簡化證券交易所得之稽徵手續並予合理課徵，以修正證券交易稅條例提高證券交易稅稅率方式，將原應併入所得總額課徵所得稅之證券交易所得稅停止課徵。而依證券交易稅條例第一條第一項規定，僅就買賣已發行之有價證券課徵證券交易稅，足見所得稅法第四條之一所稱之證券交易，亦應限於買賣已發行之有價證券，始符合該條以證券交易稅取代證券交易所得稅之意旨。發行認購（售）權證之交易與買賣認購（售）權證不同，自無庸課徵證券交易稅（證券交易稅條例實施注意事項第二點參照），若因發行交易而有收入，則應依所得稅法其他規定計算其所得並課徵所得稅。財政部八十六年十二月十一日台財稅第八六一九二二四六四號函（下稱系爭函一）前段謂：「認購（售）權證發行人於發行時所取得之發行價款，係屬權利金收入」，意指該發行價款係權利金收入，而非屬證券交易收入，無所得稅法第四條之一之適用，符合一般法律解釋方法，並未增加法律所未規定之租稅義務，與憲法第十九條之租稅法律主義尚無違背。

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of securities exchange tax (Point 2 in the Points of Attention for the Enforcement of Securities Exchange Tax Statute). If there is any income deriving from the transaction of issuing, income tax shall be levied and calculated under other requirements of the Tax Code. According to the first section of the Ministry of Finance Letter Tai-Cai-Shui No. 861922464 (hereinafter, "Letter No. 1") dated December 11, 1997, "the proceeds collected by the issuers of call (put) warrants at the time of issuance shall be premium income", meaning that the issuance price shall be premium income and not securities exchange income. As such, Article 4-1 of the Income Tax Act shall not be applied. This is in conformity with the general interpretation of law and has not added any obligation of taxation unregulated by law. It is thus not in defiance of the doctrine of the legal foundation of taxation under Article XIX of the Constitution of the Republic of China.

Issuers may conduct related securities transactions after the issuance of the call (put) warrants for the performance or prepare to perform (hedge) the obligations

至認購(售)權證發行後，發行人為履行或為準備履行(避險)約定之權證債務所為之相關證券交易(以下簡稱履約或避險交易)，其所得如何課徵

under the warrants as agreed (hereinafter, “transaction for performance or hedge), and may have income. The levy of such income shall be carried out in accordance with the Income Tax Act. According to Article 24-1 of the Income Tax Act, “The calculation of corporate income shall be the total revenue of the year net of all costs and expenses, loss, and applicable tax, and the remainder shall be taxable income”, which is the revenue or spending derived from transactions of performance or hedge by the issuers of call (put) warrants, and shall be included as other income[s] and expenses for the calculation of the annual corporate income as aforementioned for taxation. However, Article 4-1 of the same law, set forth on December 30, 1989, holds that securities exchange income has been regulated by other rules and the levy of securities exchange income tax shall cease. Related securities exchange income after the issuance of the call (put) warrants shall not be stated as taxable income for the levy of income tax. Accordingly, related capital loss from securities transactions for the performance or hedge after the issuance

所得稅，則應依所得稅法之規定辦理。所得稅法第二十四條第一項前段規定：「營利事業所得之計算，以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額。」是認購（售）權證發行人履約或避險交易之收入或支出，原應依前開規定合併其他收入支出計算營利事業全年課稅所得。惟七十八年十二月三十日增訂同法第四條之一規定，既就證券交易之所得已另設特別規定，停止課徵證券交易所稅，則認購（售）權證發行後相關之證券交易所所得，即不得列為應稅所得課徵所得稅；相應於此，與發行認購（售）權證後履約或避險交易之相關證券交易損失，亦不得將其自應稅所得中減除。此亦即須俟九十六年七月十一日增訂所得稅法第二十四條之二第一項前段，排除同法第四條之一特別規定之適用，發行認購（售）權證始得回歸同法第二十四條第一項前段，其相關證券買賣之收入均應併計課稅、損失亦均應減除之常態規定之故。系爭函一中段：「認購（售）權證發行人於發行後，因投資人行使權利而售出或購入標的股票產生之證券交易所所得或損失，應於履約時認列損益，並依所得稅法第四條之一規定辦理。」及財政部八十六年七月三十一日台財稅

of call (put) warrants shall not be deducted from taxable income. This is the same as the addition to the first part of Article 24-2-(1) of the Income Tax Act on July 11, 2007 that excluded the application of the special requirement of Article 4-1 of the same law. With such a provision, the issuance of call (put) warrants shall be interpreted in the same way as the first part of Article 24-1 which states that the income from related securities trade shall be included in the calculation for taxation and the loss shall be deducted from regular forms of income. The mid section of the letter in contention suggests that, “After issuers have issued the call (put) warrants, investors may elect to exercise the rights thereof by selling or buying the underlying stocks and this may result in capital gain or loss from securities exchange, and shall be recognized for income or loss at the time of performing the obligations and subject to Article 4-1 of the Income Tax Act”. The Ministry of Finance Letter Tai-Cai-Shui No. 861909311 dated July 31, 1997 (hereinafter, “Letter No. 2”) also stated that, “If the bearers of the call (put) warrants elect to seek settle-

第八六一九〇九三一號函（下稱系爭函二）：「認購（售）權證持有人如於某一時間或特定到期日，以現金方式結算者…並依前開所得稅法規定停止課徵所得稅。」（後函業經財政部一〇〇年十一月十六日台財稅字第一〇〇〇〇四〇〇二六〇號令廢止）均核與所得稅法增訂第二十四條之二以前之相關規定之意旨無違，符合一般法律解釋方法，亦未增加法律所無之租稅義務，無違憲法第十九條之租稅法律主義。

ment in cash at a particular point of time or at maturity... they shall be exempted from the levy of income tax as suggested in the aforementioned Income Tax Act” (Revoked under Ministry of Finance Letter Tai-Cai-Shui No. 10000400260 of November 16, 2011). These norms are not in defiance of the meaning of the law before the addition of Article 24-2 of the Income Tax Act. This is also in compliance with the general interpretation of law and has not increased any obligation of taxation, nor is it in defiance of the doctrine of the legal foundation of taxation under Article XIX of the Constitution of the Republic of China.

No levy of income tax on securities exchange income is an exception to the levy of income tax on any income. The purpose is to substitute one tax for another and not the realization of taxation by capacity. According to the middle section of Letter No. 1 [and the] issuers of call (put) warrants as explained in Letter No. 2 shall be exempted from the levy of securities exchange income tax pursuant to Article 4-1 of the Income Tax Act but

有證券交易所得而不課徵所得稅，為有所得即應課徵所得稅之例外，其目的為以稅代稅業如前述，非在實現量能課稅。系爭函一中段及系爭函二闡明認購（售）權證之發行人，應依所得稅法第四條之一規定，免徵證券交易所得稅，亦不得減除證券交易損失。而所有其他有證券交易所得之個人及營利事業，適用所得稅法第四條之一時，並未規定得為不同之處理，故亦不生該二函違反量能課稅致抵觸憲法上平等原則之

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cannot deduct any loss from securities exchange. Any other individuals and business entities that have other securities exchange income[s] shall be subject to taxation under Article 4-1 of the Income Tax Act and shall not be treated otherwise. As such, the aforementioned two letters are not in defiance of the principle of taxation by capacity nor are they in conflict to the principle of equity under the Constitution of the Republic of China.

In this case, the Claimant claimed that the issuer of the call (put) warrants which subscribed to the instruments by itself at the time of issuance should not substantiate premium income[s] as stated in the first section of Letter No. 1, and suggested that the requirement of Article 4-1 of the Income Tax Act and Verdict Pan-Zi No. 96 of the Administrative Court (reorganized as the Supreme Administrative Court) in 1973 are susceptible of violating the Constitution of the Republic of China. The statement presented by the Claimant only argued that the application of the law and ruling were improper, but failed to present solid evidence to sug-

問題。

本件聲請人聲請意旨另認為，關於認購（售）權證發行人於發行時自行認購其發行之權證，並無系爭函一前段所稱權利金收入，以及認為所得稅法第四條之一規定、行政法院（現改制為最高行政法院）六十二年判字第九六號判例亦有違憲疑義等語。查其所陳，僅係爭執法院認事用法之不當，並未具體指摘前開函釋、規定及判例究有如何抵觸憲法之疑義。依司法院大法官審理案件法第五條第一項第二款及第三項之規定，此等部分之聲請，均應不受理，併此指明。

gest the aforementioned letters, regulations, and verdicts were in violation of the Constitution of the Republic of China. According to Article 5-1-(2)~(3) of the Constitutional Interpretation Procedure Act, the aforementioned claims shall not be accepted.

Justice Yeong-Chin Su filed concurring opinion.

Justice Ching-You Tsai filed concurring opinion in part.

Justice Chang-Fa Lo filed dissenting opinion in part.

Justice Mao-Zong Huang filed dissenting opinion, in which Justice Pai-Hsiu Yeh and Justice Su Chen, Beyue joined.

EDITOR'S NOTE:

Summary of facts: According to Article 4-1 of the Income Tax Act, which took effect on January 1, 1990, securities exchange tax shall be waived. Accordingly, capital loss from securities exchange shall not be deducted from income. Ministry of Finance Letter Tai-Cai-Shui No. 861922464 of December 11, 1997 specified that, "proceeds paid to the issuers of

本號解釋蘇大法官永欽提出協同意見書；蔡大法官清遊提出部分協同意見書；羅大法官昌發提出部分不同意見書；黃大法官茂榮、葉大法官百修及陳大法官碧玉共同提出不同意見書；

編者註：

事實摘要：所得稅法第4條之1規定，自79年1月1日起，證券交易所所得停徵所得稅，證券交易損失亦不得自所得額中減除。又財政部86年12月11日台財稅第861922464號函謂：「認購（售）權證發行人於發行時所取得之發行價款，係屬權利金收入」「認購（售）權證發行人於發行後，因投資人行使權利而售出或購入標的股票產

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call (put) warrants for issuing the instruments are premium[s] income[s],” and “after issuing call (put) warrants, the issuers may have capital gain or capital loss from securities transactions at the time the investors elect to exercise their rights by selling or buying the underlying stocks and these shall be recognized for income or loss pursuant to Article 4-1 of the Income Tax Act”. Ministry of Finance Letter Tai-Cai-Shui No. 861909311 of July 31, 1997 also stated that, “If the bearers of the call (put) warrants elect to seek settlement in cash at a particular point of time or at maturity... they shall be exempted from the levy of income tax as suggested in the aforementioned Income Tax Act”.

The 13 claimants of this case, including Mega Securities, issued call (put) warrants and declared corporate income tax for the fiscal year. The National Taxation Bureau of Taipei held that the proceeds collected by the issuers of the call (put) options at the time of issuance should be recognized as premium income, not securities exchange income, with reference to the aforementioned 2 Let-

生之證券交易所得或損失，應於履約時認列損益，並依所得稅法第4條之1規定辦理。」86年7月31日台財稅第861909311號函亦稱：「認購（售）權證持有人如於某一時間或特定到期日，以現金方式結算者……並依前開所得稅法規定停止課徵所得稅。」

本案聲請人A等13家公司因發行認購（售）權證，於辦理年度營利事業所得稅結算申報時，經臺北市國稅局依上開財政部函釋，認發行人於發行認購（售）權證時所取得之發行價款係權利金收入而非證券交易所得，及避險部位證券交易損失不得自應稅所得中減除，分別予以調增應稅所得、否准就發行後之交易損失於應稅所得減除。聲請人不服，提起行政訴訟，均遭駁回確定，

ters, and the capital loss from securities exchange in hedging should not be deducted from taxable income. As such, the taxation authorities adjusted the income tax upward and rejected the loss from securities exchange deductible from taxable income. The claimants objected to the decision and proceeded to administrative action, but were overruled. They suggested that the aforementioned interpretation of the letters of the Ministry of Finance were susceptible of violating the Constitution of the Republic of China, and requested interpretations. The two issues were filed in a joint action.

爰認上開財政部二函釋，有牴觸憲法疑義，分別聲請解釋，經合併審理。