

J. Y. Interpretation No.700 ( June 29, 2012 ) \*

【Case concerning Unreported Business and Underreported Business Tax Penalties Principle of Taxation by Law】

**ISSUE:** Is it unconstitutional to determine the evaded tax amount without permitting tax deduction by providing certification for input tax after an investigation confirms that the business amount is not reported or under-reported ?

**RELEVANT LAWS:**

Article 19 of the Constitution ( 憲法第十九條 ) ; Judicial Yuan Interpretations No. 420, 460, 496, 519, 597, 625, and 660 ( 司法院釋字第四二〇號、第四六〇號、第四九六號、第五一九號、第五九七號、第六二五號、第六六〇號、第六八五號解釋 ) ; Article 15 Paragraph 1, Article 33, Article 35 Paragraph 1, Article 43 Paragraph 1 Subparagraph 3, and Article 51 Paragraph 1 Subparagraph 1 of the Value-Added and Non-Value-Added Business Tax Act ( 加值型及非加值型營業稅法第十五條第一項、第三十三條、第三十五條第一項、第四十三條第一項第三款、第五十一條第一項第一款 ) ; Article 48-1 Paragraph 1 of the Tax Levy Act ( 稅捐稽徵法第四十八條之一第一項 ) ; Article 52 Paragraph 2 Subparagraph 1 of the Enforcement Rules for the Value-Added and

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\* Translated and edited by Lawrence L Lee.

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Non-Value-Added Business Tax Act ( 加 值 型 及 非 加 值 型 營 業 稅 法 施 行 細 則 第 五 十 二 條 第 二 項 第 一 款 ) ; Ministry of Finance letter of October 19, 2000, No. 890457254 ( 財 政 部 八 十 九 年 十 月 十 九 日 台 財 稅 第 八 九 〇 四 五 七 二 五 四 號 函 ) .

**KEYWORDS:**

principle of taxation by law ( 租 稅 法 律 主 義 ), value-added and non-value-added business tax act ( 加 值 型 及 非 加 值 型 營 業 稅 法 ), periodically impose tax ( 週 期 課 徵 ), practice business without applying for business registration in accordance with regulations ( 未 依 規 定 申 請 營 業 登 記 而 營 業 ), input tax ( 進 項 稅 額 ), reporting obligation ( 申 報 義 務 ), examine automatically ( 自 動 勾 稽 ), tax evasion fine ( 漏 稅 罰 ) .\*\*

**HOLDING:** Illustration 3 of the Ministry of Finance letter of - October 19, 2000, No. 890457254, Article 52 Paragraph 2 Subparagraph 1 of the Enforcement Rules for the Business Tax Act (revisions promulgated on June 7, 2000) regarding the determination of unreported taxable income under Article 51 Paragraph 1 of the Business Tax Act (revisions promulgated on August 2, 1995, effective on September 1, 1995) is consistent with Article 15 Paragraph 1, Article 33, Article

**解釋文：**財政部中華民國八十九年十月十九日台財稅第八九〇四五七二五四號函說明三，就同年六月七日修正發布之營業稅法施行細則第五十二條第二項第一款，有關如何認定八十四年八月二日修正公布，同年九月一日施行之營業稅法第五十一條第一款漏稅額所為釋示，符合該法第十五條第一項、第三十三條、第三十五條第一項、第四十三條第一項第三款及第五十一條第一款規定之立法意旨，與憲法第十九條之租稅法律主義尚無抵觸。

35 Paragraph 1, Article 43 Paragraph 1 Subparagraph 3, and Article 51 Paragraph 1 of the Business Tax Act and does not contravene the principle of taxation by law derived from Article 19 of the Constitution.

**REASONING:** Article 19 of the Constitution regulates that people shall have the duty of paying taxes in accordance with law. The Constitution stipulates that when the state imposes the duty to pay tax upon people or gives people tax benefits, there shall be a statutory basis which prescribes the elements of taxation such as the subject of taxation, the object of taxation, the relationship delineating how the object of taxation belongs to the subject of taxation, the tax basis, and the tax rate.

However, because it is actually impossible to set out all technical and detail matters in the laws, it is necessary that further specifications be set out in administrative ordinances. Therefore, a competent authority has the right to interpret relevant laws. As long as the inter-

**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、稅率等租稅構成要件，以法律定之。惟法律之規定不能鉅細靡遺，有關課稅之技術性及細節性事項，尚非不得以行政命令為必要之釋示。故主管機關本於法定職權就相關規定為闡釋，如其解釋符合各該法律之立法目的、租稅之經濟意義及實質課稅之公平原則，即與租稅法律主義尚無牴觸（本院釋字第四二〇號、第四六〇號、第四九六號、第五一九號、第五九七號、第六二五號解釋參照）。

pretation is conducted in accordance with the legislative purposes of the respective laws, the economic purposes of taxation, and the principle of fairness under substantive taxation, there is no violation of the principle of taxation by law (see J. Y. Interpretations No. 420, 460, 496, 519, 597 and 625).

The Business Tax Act, which was amended and promulgated on August 2, 1995 and became effective on September 1, 1995, was renamed as the Value-Added and Non-Value-Added Business Tax Act on July 9, 2001 (hereafter, the Business Tax Act). Article 51 (revised on December 8, 2010 to reduce the statutory penalty, Paragraph 2 was added on January 26, 2011) Subparagraph 1 of the Business Tax Act states that “the taxpayer shall be pursued for payment of taxes owed and be fined according to the amount of tax evaded, if the taxpayer conducts business without application for business registration as required.”

According to Article 52 Paragraph 2 Subparagraph 1 of the Enforcement Rules

八十四年八月二日修正公布，同年九月一日施行之營業稅法，於九十年七月九日修正公布更名為加值型及非加值型營業稅法（下稱營業稅法），其第五十一條（九十九年十二月八日修正降低罰鍰倍數、一〇〇年一月二十六日增訂第二項）第一款規定，納稅義務人「未依規定申請營業登記而營業者」，追繳稅款並按所漏稅額科處罰鍰。

所謂漏稅額，依八十九年六月七日修正發布之營業稅法施行細則，於

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for the Business Tax Act, revised and promulgated on June 7, 2000 and later renamed as the Enforcement Rules for the Value-Added and Non-Value-Added Business Tax Act promulgated on October 17, 2001 (hereafter, Enforcement Rules for the Business Tax Act), the definition of “evaded tax amount” means “the additional tax amount that needs to be paid, as determined by the competent tax levying agency based on all the investigation documents” (on June 22, 2011 revised as “the additional tax amount that needs to be paid, as determined by the competent tax levying agency based on all the investigation documents, including the input tax application regulated in Article 35 and not falling under Article 19, and the input tax calculated in accordance with Article 15 Paragraph 1 Subparagraph 2 of the Enforcement Rules for the Business Tax Act”).

As the competent tax levying agency, the Ministry of Finance has previously specified the amount of tax evaded and later issued a letter on October 19, 2000 No. 890457254 stating in illustration 3: “In accordance with Article 35 Paragraph

九十年十月十七日修正發布更名為加值型及非加值型營業稅法施行細則（下稱營業稅法施行細則），其第五十二條第二項第一款規定，係「以經主管稽徵機關依查得之資料，核定應補徵之應納稅額為漏稅額」（一〇〇年六月二十二日修正為：「以經主管稽徵機關依查得之資料，包含已依本法第三十五條規定申報且非屬第十九條規定之進項稅額及依本法第十五條之一第二項規定計算之進項稅額，核定應補徵之應納稅額為漏稅額」）。

主管機關財政部就前開漏稅額之認定，復作成八十九年十月十九日台財稅第八九〇四五七二五四號函之說明三謂：「又依營業稅法第三十五條第一項規定，營業人不論有無銷售額，應按期填具申報書，檢附退抵稅款及其他有關

1 of the Business Tax Act, regardless of whether any sales amount is accrued, a business operator must file periodic tax returns to the competent tax levying agency concerning its sales amount, tax owed, or overpayment, with tax deduction and other related documents attached. In doing so, the deductible or refundable input value-added taxes of the business operator should be premised on the fact that they are reported. Therefore, in the event that a business operator should be held in violation of Article 51, Sections 1 to 4 and Section 6 of the Business Tax Act and subject to penalties accordingly, but a business operator provides valid input certificate only after being investigated and discovered, no output tax amount may be deducted by the tax levying agency in calculating the tax shortage.”

Based on the letter, the deductible amount for input tax is limited to what the taxpayer has reported in accordance with Article 35 Paragraph 1 of the Business Tax Act. With regard to the determination of unreported taxable income under Article 51 Section 3 of the Business Tax

文件，向主管稽徵機關申報銷售額、應納或溢付營業稅額。準此，營業人之進項稅額准予扣抵或退還，應以已申報者為前提，故營業人違反營業稅法第五十一條第一款至第四款及第六款，據以處罰之案件，營業人如於經查獲後始提出合法進項憑證者，稽徵機關於計算其漏稅額時尚不宜准其扣抵銷項稅額。」

其中有關認定營業稅法第五十一條第三款漏稅額部分，業經本院釋字第六六〇號解釋，認與憲法第十九條之租稅法律主義尚無抵觸。至於該函有關營業稅法第五十一條第一款部分（下稱系爭函）是否違憲，不在本院釋字第六六〇號解釋範圍，應據本件聲請予以

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Act, it is already stated in J. Y. Interpretation No. 660 that there is no violation of the principle of taxation by law under Article 19 of the Constitution. However, whether the part of this letter concerning Article 5 Section 1 of the Business Tax Act (hereafter, the disputed letter) violates the constitution, lies not within the scope of J. Y. interpretation No. 660, but should be interpreted on the basis of this case.

Pursuant to Articles 14, 15, 16, 19, 33 and 35 of the Business Tax Act, the amount of value-added tax is calculated by the difference between the amounts of periodically filed sales and the input taxes evidenced by the detailed chart of the uniform invoices. Based on this calculation, the amount of business tax due or overpaid in the given period is thus determined (see Judicial Yuan Interpretation No. 685). In addition, the “input tax amount” that is deductible from the output tax in the same period under Article 15 Section 1 of the Business Tax Act is premised on the condition that the registered business operator has obtained the valid certification stipulated under Article 33

解釋。

依營業稅法第十四條、第十五條、第十六條、第十九條、第三十三條及第三十五條規定，加值型營業稅採稅額相減法，並採按期申報銷售額及統一發票明細表暨依法申報進項稅額憑證，據以計算當期之應納或溢付營業稅額（本院釋字第六八五號解釋參照）。且同法第十五條第一項規定當期銷項稅額得扣減之進項稅額，以依法登記之營業人取得同法第三十三條所列之合法要式憑證，且於申報期限內檢附向主管稽徵機關申報扣減，而據以計算當期應納或溢付營業稅額為前提要件（本院釋字第六六〇號解釋參照）。

of the Business Tax Act and has attached that certification with the filing for deduction to the competent tax levying agency within the registration period, based on which the business tax owed or overpaid in the same period is calculated (see Judicial Yuan Interpretation No. 660).

Therefore, a business operator doing business without legal business registration, unless he makes up the business registration and pays business tax before an investigation of the competent tax levying agency, may apply Article 48-1, Paragraph 1 of the Tax Collection Act. Except in the event of a sanction under Article 51 Section 1 of the Business Tax Act, where following an investigation of the competent levying agency it is found that the obligation to file periodic reports has not been performed and income tax is reported only after discovery. The requirements of the abovementioned regulations for deductible output tax are not met.

As to a business operator, who has not applied for business registration in accordance with the regulations, the

故營業人未依規定申請營業登記而營業者，除於主管稽徵機關查獲前補辦營業登記及報繳營業稅，而得適用稅捐稽徵法第四十八條之一第一項規定，免依營業稅法第五十一條第一款規定處罰外，如經主管稽徵機關查獲未履行定期申報之義務，於查獲後始提出之進項稅額，自與上開規定得扣抵銷項稅額之要件不符。

對未依規定申請營業登記而營業者，系爭函綜合營業稅法第十五條第一項、第三十三條、第三十五條第一項、

disputed letter integrates Article 15 Paragraph 1, Article 33, Article 35 Paragraph 1, Article 43 Paragraph 1 Subparagraph 3 and Article 51 Subparagraph 1 of the Business Tax Act, as well as Article 29, Article 52 Paragraph 2 Subparagraph 1 of the Enforcement Rules for the Business Tax Act by stipulating that only those who have obtained legal certification for input tax and filed an application within the prescribed period may deduct output tax. This is in line with the periodical imposition of value-added business taxes and automatically fulfills the overall legislative purposes of the Business Tax Act. Moreover, there is no conflict with the duty of assisting legal enforcement, the economic meaning of transferring business tax from the business operator to the consumer and the principle of fairness under substantive taxation. Giving business operators who do not fulfill the duty to act in concert the same legal status as those who act in accordance with law would destroy the foundation of value-added business tax registration and declaration system. The disputed letter at issue stipulating that the amount of payable tax should be the

第四十三條第一項第三款、第五十一條第一款及營業稅法施行細則第二十九條、第五十二條第二項第一款等規定，限以取得合法進項憑證，且依規定期限申報者，始得據以扣抵銷項稅額，符合加值型營業稅按週期課徵，並能自動勾稽之整體營業稅立法目的，亦無違於依法履行協力義務之營業人得將營業稅轉嫁消費者負擔之經濟意義及實質課稅之公平原則，不使未依法履行協力義務之營業人，亦得與依法履行協力義務之營業人立於相同之法律地位，致破壞加值型營業稅立基之登記及申報制度。故系爭函以經稽徵機關循前開規定核定之應納稅額為漏稅額，並據以計算漏稅罰，並未增加營業人法律上所未規定之義務，於憲法第十九條之租稅法律主義尚無抵觸。

amount of evaded tax, as determined based on above regulations following an investigation of the competent tax levying agency, and be used for calculating the tax evasion fine which does not increase a business operator's legal obligations and does not contravene the principle of taxation by law under Article 19 of the Constitution.

In the present case, one petitioner claimed that Article 33 of the Business Tax Act, indicating that a business operator regardless of whether he has or has not registered properly, he is required to provide evidence of name, address and uniform serial number when applying to deduct input tax from output tax, is in contravention of the principle of equality under Article 7 of the Constitution and the principle of proportionality under Article 23 of the Constitution; Ministry of Finance letter of October 19, 2000, No. 890457254, would violate the constitution, hence the petitioner filed for judicial interpretation. However, given that the petitioner has failed to specifically indicate how Article 33 of the Business Tax

本件聲請人中一人指稱，營業稅法第三十三條就營業人以進項稅額扣抵銷項稅額時，不論營業人已、未辦妥登記，均要求應具有載明其名稱、地址、及統一編號之憑證始得為之，有違憲法第七條之平等原則、第二十三條之比例原則；財政部九十年六月六日台財稅字第0900四五三五—七號函亦屬違憲，聲請解釋憲法。查其所陳，並未具體指摘營業稅法第三十三條規定究有何牴觸憲法之疑義；而上開財政部函文係個案之函復，非屬法令，不得據以聲請釋憲。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。

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Act objectively contravenes the Constitution and the above-mentioned Ministry of Finance letter is the response to an individual case, not a legal directive, the requirements for a judicial interpretation are not met. Based on Article 5 Section 1 Paragraph 2 and Section 3 of the Constitutional Interpretation Procedure Act, this part of the petition shall therefore not be reviewed.

Justice Yeong-Chin Su filed concurring opinion.

Justice Ming Chen filed concurring opinion.

Justice Mao-Zong Huang filed dissenting opinion, in which Justice Chen-Shan Li joined.

Justice Chang-Fa Lo filed dissenting opinion.

Justice Dennis Te-Chung Tang filed dissenting opinion.

**EDITOR'S NOTE:**

Summary of facts: When petitioner A was fined for selling real estate without having applied for business registration, after the National Tax Administration of

本號解釋蘇大法官永欽提出協同意見書；陳大法官敏提出協同意見書；黃大法官茂榮提出，李大法官震山加入之不同意見書；陳大法官新民提出不同意見書；陳大法官碧玉提出，湯大法官德宗加入之不同意見書；羅大法官昌發提出不同意見書；湯大法官德宗提出不同意見書。

**編者註：**

事實摘要：聲請人 A 因未申請營業登記即銷售房地，經財政部臺灣省中區國稅局認建屋出售之行為屬營業行為，依營業稅法應追繳稅款並按所漏

Central Taiwan Province under the Ministry of Finance (MOF) found that the marketing of houses constitutes a business conduct, According to the Business Tax Act, subject to payment of tax and a fine equivalent to one to ten times of the evaded tax amount. Moreover input tax deduction was not allowed when calculating the evaded tax amount based on Ministry of Finance letter of October 19, 2000, No. 890457254. Subsequently, a business tax amounting to over NT\$ 160,000 was imposed along with a triple fine of more than NT\$ 497,000. When petitioner B was fined for selling real estate without having applied for business registration, the National Tax Administration of Northern Taiwan Province under the MOF also based on above letter did not permit her input tax deduction when calculating the amount of tax evaded, Thus a business tax amounting to over NT\$ 1,200,000 was imposed along with a fine of more than NT\$ 3,000,000. These two petitioners initiated administrative litigation, but their suits were finally and conclusively rejected. Therefore, these petitioners applied for interpretation respectively on the

稅額處一至十倍罰鍰，且計算漏稅額時依財政部 89 年 10 月 19 日台財稅第 890457254 號函示不准扣減進項稅額，進而核定補徵營業稅 16 萬餘元並科處三倍罰鍰 49 萬 7 千餘元；聲請人 B 亦未辦登記即售屋，經財政部臺灣省北區國稅局計算漏稅額時亦依上開函不准扣減進項稅額，而核定應補徵營業稅 120 餘萬元並科處罰鍰 300 餘萬元。二聲請人均提起行政訴訟敗訴確定，而認上開財政部函不准扣減進項稅額有違憲疑義，分別聲請解釋。

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constitutionality of the above-mentioned  
Ministry of Finance letter prohibiting in-  
put tax deduction.