

## J. Y. Interpretation No.413 ( September 20, 1996 ) \*

**ISSUE:** Does the Administrative Court precedent restricting the privilege of tax reduction and exemption conferred by the Act of Encouragement of Investment and the Act for Upgrading Industries on nonresident aliens or overseas Chinese who have invested in an ROC business and resided in the ROC for over 183 days in a taxable year to manage their investment to those who have no spouse residing in the ROC add a new condition nonexistent in the laws, thus contravening the principle of taxation by law as enunciated in Article 19 of the Constitution?

**RELEVANT LAWS:**

Articles 7 and 19 of the Constitution (憲法第七條、第十九條) ; Article 16, Paragraph 1, Subparagraph 1, and 17 of the Act of Encouragement of Investment (獎勵投資條例第十六條第一項第一款、第十七條) ; Act of Investment by Foreign Nationals (外國人投資條例) ; Act of Investment by Overseas Chinese (華僑回國投資條例) ; Article 11, Paragraphs 1 and 2, of the Act for Upgrading Industries (促進產業升級條例第十一條第一項、第二項) ; Articles 2, Paragraph 2, 7, Paragraph 2, Subparagraph 2, and 15 of the Income Tax Act (所得稅法第二條第二項、第七條第二項第二款、第十五條) ; Article 1002 of the Civil Code (民法第一千零零二

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\* Translated by Raymond T. Chu.

\*\* Contents within frame, not part of the original text, are added for reference purpose only.

條) ; Article 25 (1) of the Enforcement Rules of the Act of Encouragement of Investment (獎勵投資條例施行細則第二十五條之(一)) ; J. Y. Interpretation Nos. 195, 217, 367 and 385 (司法院釋字第一九五號、第二一七號、第三六七號、第三八五號解釋) ; Administrative Court Judgment No. Pan-673 of 1974 (行政法院六十三年判字第六七三號判例) .

### KEYWORDS:

taxable year (課稅年度), dividend (股利), withholding at source (就源扣繳), filing of final tax return (結算申報), taxpayer (納稅義務人), taxpaying body (納稅主體), tax denomination (稅目), tax rate (稅率), method of tax payment (納稅方法), tax reduction and exemption (稅捐減免), tax benefit (租稅優惠), tax items (租稅項目), tax burden (稅負), special law (特別法), general law (普通法), to reside (居住), domicile (住所), *chui-fu* (贅夫), principle of tax per legislation (租稅法律主義).\*\*

**HOLDING:** Where an individual who is not a resident of the Republic of China makes an investment in the Republic of China in pursuance of an approval granted under the Act of Investment by Overseas Chinese or the Act of Investment by Foreign Nationals, holds the office of a director, supervisor, or manager

**解釋文：**非中華民國境內居住之個人，經依華僑回國投資條例或外國人投資條例核准在中華民國境內投資，並擔任該事業之董事、監察人或經理人者，如因經營或管理其投資事業需要，於一定課稅年度內在中華民國境內居留期間超過所得稅法第七條第二項第二款所定一百八十三天時，其自該事業所分

of the business in which he invests, and has resided within the Republic of China for over 183 days in a particular taxable year as set forth in Article 7, Paragraph 2, Subparagraph 2, of the Income Tax Act, for the purpose of handling or managing the business, the dividend he receives from such business shall be taxable by withholding at source at the fixed rate under Article 16, Paragraph 1, Subparagraph 1, of the Act of Encouragement of Investment (since repealed), and Article 11, Paragraph 1, of the Act for Upgrading Industries, and the provisions in the Income Tax Act in respect of filing of final tax return shall be made inapplicable. This is clearly prescribed in Article 17 of the Act of Encouragement of Investment, and Article 11, Paragraph 2, of the Act for Upgrading Industries. The Administrative Court Judgment No. Pan-673 of 1974, which quotes: "The term 'withholding at source' in the Income Tax Act, Article 2, Paragraph 2; the Act of Encouragement of Investment, Article 17; and the Enforcement Rules of the Act of Encouragement of Investment, Article 25(1) denotes an individual who is not a resident of the Re-

配之股利，即有獎勵投資條例（現已失效）第十六條第一項第一款及促進產業升級條例第十一條第一項之適用，按所定稅率就源扣繳，不適用所得稅法結算申報之規定，此觀獎勵投資條例第十七條及促進產業升級條例第十一條第二項之規定甚明。行政法院六十三年判字第六七三號判例：「所得稅法第二條第二項及獎勵投資條例第十七條暨同條例施行細則第二十五條之所稱就源扣繳，係指非中華民國境內居住之個人，且無配偶居住國內之情形而言。若配偶之一方居住國內，為中華民國之納稅義務人，則他方縱居住國外，其在國內之所得，仍應適用所得稅法第十五條規定合併申報課稅」，增列無配偶居住國內之情形，添加法律所無之限制，有違憲法所定租稅法律主義之本旨，應不予適用。

public of China and has no spouse residing in this country. If either the husband or the wife is a resident and taxpayer of the Republic of China, his or her income earned in this country shall be taxable, and he or she shall file a joint income tax return even though his or her spouse is a nonresident,” adding to the law an element requiring nonresident status of the spouse and imposing a restriction not legally provided, is contrary to the principle of taxation by law embodied in the Constitution and must therefore be ignored.

**REASONING:** The legislative purposes of the Act of Encouragement of Investment (repealed on December 31, 1990) and the Act for Upgrading Industries are to encourage investment and to accelerate the development of the national economy. The provisions in said Acts in respect of tax withholding at source shall be given prior applicability over the Income Tax Act clauses on the filing of final returns. To attain the aforesaid purposes by inviting foreign capital, such provisions are also made applicable to all persons making investment in this country

**解釋理由書：**獎勵投資條例（已於中華民國七十九年十二月三十一日失效）及促進產業升級條例之立法目的，在獎勵興辦生產事業，加速國家經濟發展。上開條例所定稅率就源扣繳之規定，優先於所得稅法有關結算申報規定之適用，其依華僑回國投資條例及外國人投資條例經核准在國內投資之人亦適用此一規定者，原在藉此減輕投資人之稅負，提升華僑及外國人投資之意願，以吸收國外資本之方法達成立法之目的。是獎勵投資條例及促進產業升級條例有關所得稅部分，乃所得稅法之特別法，因投資而受獎勵之人民其繳納義

under the Act of Investment by Overseas Chinese and the Act of Investment by Foreign Nationals in the hope of minimizing the investors' taxation and thereby increasing the interest of overseas Chinese and foreign investors. It must be noted that the provisions set forth in the Act of Encouragement of Investment and the Act for Upgrading Industries with respect to income tax are special laws of the Income Tax Act, and that the provisions therein contained in respect of reduced taxation shall naturally be applicable to the tax duty of those who have made investment under the legal incentive programs (See J. Y. Interpretation No. 195).

The Constitution provides in Article 19 that the people shall have the duty to pay tax in accordance with law. This means that the people have the duty to pay tax and the privilege to enjoy tax benefits pursuant to the taxpaying bodies, tax denominations, tax rates, methods of tax payment, and tax reduction and exemption as they are prescribed by law. Any tax matter that shall be explicitly prescribed by law may not be regulated by

務，自應適用上開條例有關減輕稅負之規定（參照本院釋字第一九五號解釋）。

憲法第十九條規定，人民有依法納稅之義務，係指人民祇有依法律所定之納稅主體、稅目、稅率、納稅方法及稅捐減免等項目而負繳納義務或享受優惠，舉凡應以法律明定之租稅項目，自不得以命令取代法律或作違背法律之規定，迭經本院釋字第二一七號、第三六七號及第三八五號等著有解釋。判例當然亦不得超越法律所定稅目、稅率、稅捐減免或優惠等項目之外，增加法律所無之規定，並加重人民之稅負，否則

administrative orders in lieu of or against law. This has been repeatedly maintained by us in our Interpretations Nos. 217, 367 and 385. It follows without doubt that court decisions, likewise, may not go beyond the tax denominations, tax rates, tax reduction or exemption, tax benefit, or other tax matters specified in law or add any rules not existing in the law, thereby increasing the taxation of the people and ultimately constituting a violation of the principle of taxation by law embodied in the Constitution.

The Act of Encouragement of Investment, as amended on January 26, 1987, provides in Article 16, Paragraph 1, Subparagraph 1: "The income tax payable by a person making investment pursuant to an approval granted under the Act of Investment by Overseas Chinese or the Act of Investment by Foreign Nationals shall be withheld at source by the withholder specified in the Income Tax Act at the rate of twenty percent (20%) of the amount to be paid or distributed to him." Article 17 of the same Act provides: "Where an individual who is not a resi-

即有違憲法上之租稅法律主義。

依七十六年一月二十六日修正公布之獎勵投資條例第十六條第一項第一款：「依華僑回國投資條例或外國人投資條例申請投資經核准者，其應納之所得稅，由所得稅法規定之扣繳義務人於給付時，按給付額或應分配額扣繳百分之二十」，又同條例第十七條：「非中華民國境內居住之個人，經依華僑回國投資條例或外國人投資條例核准在中華民國境內投資，並擔任該事業之董事、監察人或經理人者，如因經營或管理其投資事業需要，於一課稅年度內在中華民國境內居留期間超過所得稅法第七條第二項第二款所定一百八十三天時，其

dent of the Republic of China makes investment in the Republic of China in pursuance of an approval granted under the Act of Investment by Overseas Chinese or the Act of Investment by Foreign Nationals, holds the office of a director, supervisor, or manager of the business in which he invests, and has resided within the Republic of China for more than 183 days in a particular taxable year as set forth in the Income Tax Act, Article 7, Paragraph 2, Subparagraph 2, for the purpose of handling or managing the business, the provision of Subparagraph 1 of Paragraph 1 of the preceding article may be applicable to the dividend he receives from such business.” The same provision is incorporated in Article 11 of the Act for Upgrading Industries. Suffice it to say that, insofar as the elements required by the foregoing clauses are present, the provisions for withholding at source at the specified rate as quoted above shall govern, and the provisions in the Income Tax Act with respect to filing of final income tax returns shall be rendered inapplicable, so that the legislative intent of those provisions and the doctrine that a special law

自該事業所分配之股利，得適用前條第一項第一款之規定」，促進產業升級條例第十一條之規定亦同。是凡符合上開規定之情形者，即有前述所定稅率就源扣繳之適用，不再援引所得稅法結算申報之規定，方符上開條例立法之本意及特別法優於普通法之原理。獎勵投資條例第十七條僅稱非中華民國境內居住之個人，並未附加配偶之居住條件，乃行政法院六十三年判字第六七三號判例謂：「所得稅法第二條第二項及獎勵投資條例第十七條暨同條例施行細則第二十五條之所稱就源扣繳，係指非中華民國境內居住之個人，且無配偶居住國內之情形而言。若配偶之一方居住國內，為中華民國之納稅義務人，則他方縱居住國外，其在國內之所得，仍應適用所得稅法第十五條規定合併申報課稅」，增列無配偶居住國內之情形，添加法律所無之限制，與憲法上租稅法律主義自屬有違，與本解釋意旨不符，應不予適用。至納稅義務人或其配偶是否得因其一方在中華民國境內有住所或其他情事，而應認定納稅義務人或其配偶不合「非中華民國境內居住之個人」之要件，非獎勵投資條例或促進產業升級條例適用之對象者，應依所得稅法第十五條規定，合併申報其所得，則係另一認

prevails over a general law are followed. Nevertheless, the Administrative Court Judgment No. Pan-673 of 1974 rules that: “The term ‘withholding at source’ in the Income Tax Act, Article 2, Paragraph 2; the Act of the Encouragement of Investment, Article 17; and the Enforcement Rules of the Act of Encouragement of Investment, Article 25(1) denotes an individual who is not a resident of the Republic of China and has no spouse residing in this country. If either the husband or the wife is a resident and taxpayer of the Republic of China, his or her income earned in this country shall be taxable, and he or she shall file a joint income tax return even though his or her spouse is a non-resident.” Consequently, the court has added to the law an element requiring nonresident status of the spouse and imposed a restriction not legally provided, and this is certainly contrary to the principle of taxation by law embodied in the Constitution as well as the essence of this Interpretation, and must therefore be ignored. With regard to the question of whether the taxpayer or his/her spouse should be denied, on the ground of ab-

定事實適用法律問題，不在本解釋之列。



sence of the element required, his or her status as “a person who is not a resident of the Republic of China” because the taxpayer or his/her spouse maintains a domicile or does something in the Republic of China and is therefore not a subject to whom the Act of Encouragement of Investment or the Act for Upgrading Industries is applicable, and for this reason a joint income tax return must be filed under Article 15 of the Income Tax Act, is a separate issue of law to be resolved based upon the facts found, and is beyond the scope of this Interpretation.

Besides, the Petitioner asserts in general language that Article 1002 of the Civil Code, which provides that “a wife shall take the domicile of the husband as her domicile, and a chui-fu <sup>1</sup> (a son-in-law who takes the place of a son and lives in his wife’s home, usually an heirless family. [This definition was taken from the Far East Chinese-English Dictionary.]) shall take the domicile of the wife as his

聲請意旨又泛指民法第一千零零二條：「妻以夫之住所為住所，贅夫以妻之住所為住所。但約定夫以妻之住所為住所，或妻以贅夫之住所為住所者，從其約定」，違反憲法第七條男女平等之規定部分，並未具體指陳前述民法規定在客觀上有如何牴觸憲法之疑義，亦不在本件受理解釋範圍，併此說明。

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<sup>1</sup> In Chinese traditional marriage, a chui-fu (also called chui-hsu) is a man who is married into and lives with his wife’s family. He may or may not have to take or change to his wife’s family name.

domicile, except where it is agreed that the husband shall take the domicile of the wife as his domicile or the wife shall take the domicile of the chui-fu as her domicile” contradicts the provision of Article 7 of the Constitution with respect to gender equality. Inasmuch as the Petitioner has made no specific statement on the exact points of conflict between the Constitution and the Civil Code article quoted above, this issue is also beyond the scope of this Interpretation.

Justice Jyun-Hsiung Su filed dissenting opinion in part.

Justice Young-Mou Lin filed dissenting opinion.

Justice Vincent Sze filed dissenting opinion, in which Justice Chung-Mo Cheng joined.

本號解釋蘇大法官俊雄提出部分不同意見書；林大法官永謀提出不同意見書；施大法官文森、城大法官仲模共同提出不同意見書。