

J. Y. Interpretation No.420 (January 17, 1997) \*

**ISSUE:** Does the resolution of the en banc Conference of the Administrative Court stating that an enterprise with no investment in buying and selling securities specified in its business registration but engaging in such activities with returns far outweighing regular business income shall be subjected to business income tax violate the principle of taxation by law as provided in Article 19 of the Constitution?

**RELEVANT LAWS:**

Article 19 of the Constitution (憲法第十九條); Article 27 of the Act of Encouragement of Investment (獎勵投資條例第二十七條); Article 12 and Article 15, Paragraph 1, of the Company Act (公司法第十二條、第十五條第一項); Article 32 of the Enforcement Rules of the Act of Encouragement of Investment (獎勵投資條例施行細則第三十二條).

**KEYWORDS:**

taxation (租稅), securities exchange tax (證券交易稅), securities exchange income tax (證券交易所所得稅), tax reduction or exemption (減稅或免稅), principle of tax per legislation (租稅法律主義).\*\*

**HOLDING:** In relation to laws involving taxation, they should be con-

**解釋文：**涉及租稅事項之法律，其解釋應本於租稅法律主義之精

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\* Translated by BAKER & MCKENZIE.

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

strued in accordance with the principle of taxation by law and the respective purposes of the laws, balancing therewith the economic purposes and the principle of equality in substantive taxation. The en banc Conference of the Administrative Court dated October 14, 1992, resolved that: “ ‘those not in the profession of buying or selling of securities,’ as referred to in Article 27 of the Act of Encouragement of Investment, should be factually determined according to the real operating situation of the enterprise for profit. Where the business scope indicated in the company registration or business registration does not include investment or its registered investment scope does not include buying or selling of securities, but it is in reality engaged in large volumes of buying or selling of securities, with its non-business income far outweighing its business income, then there is sufficient evidence to establish that its main business is in the buying or selling of securities, in which case, it cannot be viewed as one whose profession is not in the buying or selling of securities,” and it does not fall within the parameters in which pay-

神：依各該法律之立法目的，衡酌經濟上之意義及實質課稅之公平原則為之。行政法院中華民國八十一年十月十四日庭長、評事聯席會議所為：「獎勵投資條例第二十七條所指『非以有價證券買賣為專業者』，應就營利事業實際營業情形，核實認定。公司登記或商業登記之營業項目，雖未包括投資或其所登記投資範圍未包括有價證券買賣，然其實際上從事龐大有價證券買賣，其非營業收入遠超過營業收入時，足證其係以買賣有價證券為主要營業，即難謂非以有價證券買賣為專業」不在停徵證券交易所所得稅之範圍之決議，符合首開原則，與獎勵投資條例第二十七條之規定並無不符，尚難謂與憲法第十九條租稅法律主義有何牴觸。

ment of securities income tax is suspended. The foregoing is consistent with the principle set out in the beginning, is not incongruous with Article 27 of the Act of Encouragement of Investment, and does not contravene the principle of taxation by law provided for in Article 19 of the Constitution.

**REASONING:** The Act of Encouragement of Investment (which became ineffective on December 31, 1990, upon expiration of the implementation period) was formulated with the aims of encouraging investment and accelerating economic development. The main means of encouragement is through the benefit of tax deduction. The Act stipulates various conditions on which a benefit may be enjoyed, to prevent illegitimate receipt of the benefit of tax deduction by means of tax evasion activities, with a view to benefit fairly every manufacturing enterprise and enterprise for profit.

A company is a kind of enterprise for profit. To ensure its legal and normal operations, Article 12 and Article 15, Para-

**解釋理由書：**按獎勵投資條例（七十九年十二月三十一日因施行期間屆滿而失效）之制定，係以獎勵投資，加速經濟發展為目的，藉稅捐減免之優惠為其主要獎勵方法。為期各種生產事業及營利事業均能公平同霑其利，並防止有以迴避租稅行為，獲取不正當減免稅捐優惠，該條例乃規定各種享受獎勵之條件，予以節制。

公司為營利事業之一種，為確保其合法正常經營，公司法第十二條、第十五條第一項規定：「公司設立登記

graph 1, of the Company Act stipulate: “where a duly established and registered company has not registered some item required to be registered, or has not registered an amendment to some registered item, the company may not cite that item to defend against third parties,” and “a company may not operate in business activities beyond its registered business scope.” Where a company operates in certain business activities beyond its registered business scope, therefore falling short of the registration requirement of Article 12 of the Company Act and violating the restrictions of Article 15, Paragraph 1 of the same Act, then, despite the fact that the required items or changes have not been properly registered and are therefore ineffective against third parties and that the responsible person of the company is civilly or criminally liable, the fact of the company’s operation in those businesses is not affected.

Article 27 of the Act of Encouragement of Investment amended and promulgated on January 26, 1987, stipulates that: “to facilitate the development of the capi-

後，有應登記之事項而不登記，或已登記之事項有變更而不為變更之登記者，不得以其事項對抗第三人。」「公司不得經營登記範圍以外之業務。」公司如經營某種登記範圍以外之業務，而怠於公司法第十二條之登記並違反同法第十五條第一項所規定之限制，除前者不得以其事項對抗第三人，後者公司負責人應負民、刑事責任外，尚不影響該公司以經營該種事業為其營業之事實。

七十六年一月二十六日修正公布之獎勵投資條例第二十七條規定：「為促進資本市場之發展，行政院得視經濟發展及資本形成之需要及證券市場之狀

tal market, the Executive Yuan may, upon consideration of the needs of economic development and capital formation and the situation of the securities market, decide to suspend taxation of part or all of the securities transaction tax, and to suspend taxation of part or all of the capital gain tax for securities from those whose profession is not in the buying or selling of securities.” Pursuant to this stipulation, the Executive Yuan approved on December 1, 1987, Tai (76) Tsai No. 27947, under which the taxation of capital gain tax for securities of those whose profession is not in the buying or selling of securities is suspended from January 1, 1988, to December 31 of the same year. In relation to laws involving taxation, they should be construed in accordance with the principle of taxation by law and the respective purposes of the laws, balancing therewith the economic purposes and the principle of substantive fairness of taxation. On the basis of the principle of fair taxation, the reference to “those whose profession is not in the buying or selling of securities” in Article 27 of the Act of Encouragement of Investment should be determined in the

況，決定暫停徵全部或部分有價證券之證券交易稅，及暫停徵全部或部分非以有價證券買賣為專業之證券交易所得稅。」行政院依此規定，於七十六年十二月一日以台（七六）財第二七九四七號函核定自七十七年一月一日起至同年十二月三十一日止繼續停徵非以有價證券買賣為專業者之證券交易所得稅。涉及租稅事項之法律，其解釋應本於租稅法律主義之精神，依各該法律之立法目的，衡酌經濟上之意義及實質課稅之公平原則為之。是基於公平課稅原則，獎勵投資條例第二十七條所定「非以有價證券買賣為專業者」，自應就營利事業實際營業情形，核實認定。公司登記（包括商業登記）之營業項目，雖未包括投資或其所登記投資範圍未包括有價證券買賣，然其實際上從事龐大有價證券買賣，其買賣收入遠超過其已登記之營業收入，足認其為以有價證券之買賣為主要營業時，自不得以怠於公司法第十二條之登記義務或違反同法第十五條第一項所規定之限制等迴避租稅行為，主張其非以有價證券買賣為專業，而享受免徵證券交易所得稅之優惠。行政院八十一年十月十四日庭長、評事聯席會議所為：「獎勵投資條例第二十七條所指『非以有價證券買賣為專業者』，

light of the real operating situation of the enterprise for profit. Where a company's registered business scope indicated in its company registration (including business registration) does not include investment or its registered investment scope does not include the buying or selling of securities, but it is in reality engaged in large volumes of buying or selling of securities, and its income generated from the buying or selling [of securities] is well beyond its income generated from its registered business activities, such that it may be said that its main business activities are in the buying or selling of securities, then it may not, through tax evading activities such as falling short of the registration requirement of Article 12 of the Company Act or violating the restrictions of Article 15, Paragraph 1, of the same Act, assert that its profession is not in the buying or selling of securities so as to enjoy the benefits of capital gain tax for securities exemptions. The en banc Conference of the Administrative Court dated October 14, 1992 resolved that: " 'those not in the profession of buying or selling of securities' as referred to in Article 27 of the Act

應就營利事業實際營業情形，核實認定。公司登記或商業登記之營業項目，雖未包括投資或其所登記投資範圍未包括有價證券買賣，然其實際上從事龐大有價證券買賣，其非營業收入遠超過營業收入時，足證其係以買賣有價證券為主要營業，即難謂非以有價證券買賣為專業」不在停徵證券交易所得稅之範圍之決議，符合首開原則，與獎勵投資條例第二十七條之規定並無不符，尚難謂與憲法第十九條租稅法律主義有何牴觸。

of Encouragement of Investment should be determined according to the real operating situation of the enterprise for profit. Where the business scope indicated in the company registration or business registration does not include investment or its registered investment scope does not include buying or selling of securities, but it is in reality engaged in large volumes of buying or selling of securities, with its non-business income far outweighing its business income, then there is sufficient evidence to establish that its main business is in the buying or selling of securities, in which case it cannot be viewed as one whose profession is not in the buying or selling of securities,” and it does not fall within the parameters in which payment of securities income tax is suspended. The foregoing is consistent with the principle set out in the beginning, is not incongruous with Article 27 of the Act of Encouragement of Investment, and does not contravene the principle of taxation by law provided for in Article 19 of the Constitution.

Rules of the Act of Encouragement of Investment, which provides: “the statement ‘those whose profession is in the buying and selling of securities’ in Article 27 of this Act refers to dealers that are in the business of buying and selling of securities and to enterprises for profit whose profession is investment as indicated in their company registrations or business registrations,” following the explanations provided above and to the extent it is incongruous with the statutory intention, it is herein expounded that this [Article 32] should not be applicable.

Justice Sen-Yen Sun filed dissenting opinion.

二條規定：「本條例第二十七條所稱『以有價證券買賣為專業者』，係指經營有價證券自行買賣業務之證券自營商及經公司登記或商業登記以投資為專業之營利事業」，依上開說明，與立法意旨未盡相符部分，應不適用，併予敘明。

本號解釋孫大法官森焱提出不同意見書。