

J. Y. Interpretation No.385 (September 8, 1995) \*

**ISSUE:** Are the relevant provisions of the Act of Encouragement of Investment, providing to the effect that, upon expiry of the said Act, a foreign company which still enjoys tax benefits thereunder shall be subject to the 20% withholding income tax after paying the after-tax surplus to its head office, in line with the Constitution?

**RELEVANT LAWS:**

Article 19 of the Constitution (憲法第十九條); Articles 3 and 16, Paragraph 3 of the Act of Encouragement of Investment (獎勵投資條例第三條、第十六條第三項).

**KEYWORDS:**

pay tax (納稅), duty (義務), foreign company (外國公司), expire (屆滿), preferential tax treatment (租稅優惠), head office (總公司), branch office (分公司), in contravention to (牴觸), after-tax earning (稅後盈餘), income tax (所得稅). \*\*

**HOLDING:** Article 19 of the Constitution mandates that people have duties to pay taxes prescribed by law. In addition, Article 19 stipulates that people

**解釋文：**憲法第十九條規定人民有依法律納稅之義務，固係指人民有依據法律所定之納稅主體、稅目、稅率、納稅方法及納稅期間等項而負納稅

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\* Translated by Professor Spenser Y. Hor.

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

have duties to pay taxes according to the taxpaying entities, items, rates, payment methods and payment periods so prescribed by tax laws. However, when such a tax law imposes co-related rights and duties on people, in order to preserve the integrity of the application of law and to balance the imposed rights and duties, it shall not be applied partially and selectively. Those qualified foreign companies that were approved under the then-in-effect Article 3 of the Act of Encouragement of Investment may still enjoy the preferential tax treatments after its expiration. Therefore, in order to be consistent with the legislative intent, those qualified foreign companies shall pay twenty percent income taxes under Article 16, Paragraph 3, of the same Act while paying after-tax earnings to their head offices. The Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 800356032, September 24, 1992, is consistent with the foregoing, and is therefore not in contravention to the Constitution.

**REASONING:** Article 19 of the Constitution mandates that people have

義務之意，然課人民以繳納租稅之法律，於適用時，該法律所定之事項若權利義務相關連者，本於法律適用之整體性及權利義務之平衡，當不得任意割裂適用。獎勵投資條例施行期間內，經依該條例第三條核准受獎勵之外國公司，於該條例施行期間屆滿後，既仍得繼續適用該條例享受租稅優惠，自應一併依同條例第十六條第三項之規定，於其稅後盈餘給付總公司時，扣繳百分之二十所得稅，方符立法原意。財政部八十年九月二十四日臺財稅字第八〇〇三五六〇三二號對此之函釋，符合上開意旨，與憲法並無牴觸。

**解釋理由書：**憲法第十九條規定人民有依法律納稅之義務，固係指人

duties to pay taxes prescribed by law. In addition, Article 19 stipulates that people have duties to pay taxes according to the taxpaying entities, items, rates, payment methods and payment periods so prescribed by tax laws. However, when such a tax law imposes co-related rights and duties on people, in order to preserve the integrity of the application of law and to balance the imposed rights and duties, it shall not be applied partially and selectively. Those foreign companies that were approved for preferential tax treatments under Article 3 of the Act of Encouragement of Investment, as amended on January 26, 1987, shall pay twenty percent income taxes under Article 16, Paragraph 3, of the same Act while paying after-tax earnings to their head offices. The legislative intent is that since those qualified foreign companies' Taiwan branch offices enjoy preferential tax treatments, they shall pay the income taxes mentioned above while paying after-tax earnings to their head offices; otherwise, foreign companies may simply set up Taiwan branches to avoid paying taxes in Taiwan. Therefore, the two Articles of the same

民有依據法律所定之納稅主體、稅目、稅率、納稅方法及納稅期間等項而負納稅義務之意，然課人民以繳納租稅之法律，於適用時，該法律所定之事項若權利義務相關連者，本於法律適用之整體性及權利義務之平衡性，當不得任意割裂適用。中華民國七十六年一月二十六日修正公布之獎勵投資條例第三條核准獎勵之外國公司，依同條例第十六條第三項規定，其所設分公司之所得，於繳納營利事業所得後，將其稅後盈餘給付總公司時，應按其給付額扣繳百分之二十所得稅，立法意旨係因外國公司在我國境內之分公司既享受租稅減免之優惠，則其稅後盈餘欲給付總公司時，自應負擔上述所得稅扣繳之義務，否則，外國公司即得以成立分公司之方式規避我國稅負。故兩者係相互關連之規定，要不得割裂適用。茲前述獎勵投資條例雖於七十九年十二月三十一日施行期間屆滿而失效，惟在該條例施行期間內核准之案件（五年或四年免稅），就該個案言，尚不因該條例施行期間屆滿而失效，仍繼續適用該條例予以獎勵，俾保障投資人之權益。是經核准獎勵投資之外國公司於獎勵投資條例施行期間屆滿後，既仍得享受免稅優惠，其與此相關連之總公司稅負，自應併依同條例第十

statute are co-related and shall not be applied partially and selectively. Though the above mentioned statute had expired and was no longer in effect on December 31, 1990, those qualified foreign companies that were approved (for four-or five-year exemptions) under Article 3 of the same statute while it was still in effect may still enjoy preferential tax treatments to protect investors' rights. Since those qualified foreign companies may still enjoy preferential tax treatments after the expiration of the same statute, to be consistent with the legislative intent, Article 16, Paragraph 3, shall also be applicable to impose co-related income taxes on their head offices. The Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 800356032, September 24, 1992, states that: "To ensure a fair tax policy, those foreign companies that have enjoyed and been enjoying tax preferential treatments given by the Act of Encouragement of Investment shall pay twenty percent income taxes under Article 16, Paragraph 3, of the same Act while paying after-tax earnings to their head offices." This Directive is consistent with the foregoing in prohibiting partial and

六條第三項扣繳所得稅，方符原立法意旨。財政部八十年九月二十四日臺財稅字第八〇〇三五六〇三二號函稱：「如原已享受及繼續享受獎勵投資條例租稅優惠之外國公司，其在臺分公司所產生之相關稅後盈餘，於八十年以後匯回總公司時，為期課稅公平，仍應依獎勵投資條例第十六條第三項規定，按給付額扣繳百分之二十所得稅」，乃係本於法律適用之整體性，不得任意割裂所為之釋示，符合上開意旨，與憲法並無牴觸。

selective applications and preserving the integrity of the application of law, and is therefore not in contravention to the Constitution.

Justice Tieh-Cheng Liu filed concurring opinion.

Justice Jyun-Hsiung Su filed concurring opinion.

本號解釋劉大法官鐵錚、蘇大法官俊雄分別提出協同意見書。