

## J. Y. Interpretation No.173 ( March 5, 1982 ) \*

**ISSUE:** Is the directive issued by the Ministry of Finance unconstitutional to the effect that a person receiving more value of jointly owned land gratuitously transferred upon partition than prior to the partition should pay land value increment tax?

**RELEVANT LAWS:**

Article 19 of the Constitution ( 憲法第十九條 ) ; Article 5 of the Land Tax Act ( 土地稅法第五條 ) .

**KEYWORDS:**

land transferred without compensation ( 土地無償移轉 ) , subdivision of co-owned land ( 共有土地分割 ) , land value increment tax ( 土地增值稅 ) .\*\*

**HOLDING:** It is clearly prescribed in Article 5, Paragraph 1, Subparagraph 2, of the Land Tax Act that where land is transferred without compensation, the person who pays the land value increment tax is the person who acquires the land ownership. With regard to the subdivision of co-owned land, when the value of land acquired through subdivi-

**解釋文：**土地為無償移轉者，土地增值稅之納稅義務人為取得所有權人，土地稅法第五條第一項第二款定有明文。共有土地之分割，共有人因分割所取得之土地價值，與依其應有部分所算得之價值較少而未受補償時，自屬無償移轉之一種，應向取得土地價值增多者，就其增多部分課徵土地增值稅。財政部（六七）台財稅第三四八九六號

---

\* Translated by Louis Chen, Professor of Law.

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

sion by co-owners is lower than the value calculated based on their respective portions and they are not compensated, this is considered one form of transfer without compensation. Therefore, the land value increment tax should be levied on that incremental portion of land of the co-owner who obtained a higher land value. The Ministry of Finance Directive (67) Tai-Tsai-Shui-Tze No. 34896, regarding the expropriation of the land value increment tax does not contravene the aforementioned rule, and is therefore not in conflict with Article 19 of the Constitution.

**REASONING:** It should first be noted that, the directive at issue, i.e., the Ministry of Finance Directive No. (67)-T.T.S.-34896, was in response to the request made by Hsu Ming-Fu on May 23, 1978, which was also made known to various tax offices under the said Ministry, and was later applied by the Administrative Court in rendering one of its final decisions, i.e., Judgment P.T. No. 225 (Adm. Ct. 1981), and thus should be considered as an order. Accordingly, the

函，關於徵收土地增值稅之部分，與首開規定並無不符，亦難認為與憲法第十九條有所牴觸。

**解釋理由書：**本件財政部（六七）臺財稅第三四八九六號函，係對於徐明夫六十七年五月二十三日請示之釋答，經該部分知所屬財稅機關，為行政法院七十年度判字第二二五號確定終局判決所適用，具有命令性質，聲請人聲請解釋，核與司法院大法官會議法第四條第一項第二款規定相符，應予受理，合先說明。

petition for interpretation made by the Petitioner has satisfied the requirements of Article 4-I (ii) of the Grand Justices Council Adjudication Act and hence should be heard by this Court.

Article 5, Paragraph 1, Subparagraph 2, of the Land Tax Act clearly provides that where land is transferred without compensation, the person who pays the land value increment tax is the person who acquired the land ownership. Paragraph 2 of the same article further provides that the term “transfer without compensation” refers to transfer by legacy and gift, and by other such comparable forms of transfer; therefore, such transfer is not limited to legacies and gifts alone. This can be perceived by the term “other such comparable forms of transfer”. Where co-owned land is subdivided, the sole ownership of each subdivided portion is derived from the intra-transfer of each co-owner’s respective share. When the value of the land acquired by a co-owner through subdivision is higher than his or her respective share, and such co-owner has not compensated other co-owners who

按土地為無償移轉者，土地增值稅之納稅義務人為取得所有權人，土地稅法第五條第一項第二款定有明文，同條第二項復規定，所稱無償移轉，指遺贈及贈與等方式之移轉，並非以遺贈及贈與為限，此觀其下列有「等方式之移轉」六字甚明。共有土地之分割，係各共有人以其應有部分相互移轉而取得分得部分之單獨所有權，共有人取得土地之價值超過其應有部分，而未對於取得土地價值少於其應有部分之共有人補償者，自屬無償移轉之一種，應向取得土地價值增多者就其增多部分課徵土地增值稅，以免土地之自然漲價，不能歸公。至平均地權條例施行細則第六十五條第一項：「共有土地分割者，分割後各共有人取得之土地價值，與依原持有比例所算得之價值相等時，免徵土地增值稅，但其價值不等時，應向取得之土地價值減少者，就其減少部分課徵土地增值稅」。及土地稅法施行細則第四十二條第二項：「共有土地照原有持分比

received lower land values for their respective portions, this is considered one form of transfer without compensation. Therefore, the land value increment tax shall be levied on that portion of land calculated at a higher value and be paid by such co-owner who obtained the higher land value, so as to ensure that the increment will be shared by the people in common. With respect to the rules under Article 65, Paragraph 1, of the Enforcement Rules of the Equalization of Land Rights Act: “Where co-owned land is subdivided, if the value of the portion of land each co-owner acquired after subdivision is comparable to the value as computed from his or her own original share, no land value increment tax will be levied, but if the value is not comparable, co-owners whose land is calculated at a lower value should pay the land value increment tax on that lesser portion of land value” and Article 42, Paragraph 2, of the Enforcement Rules of the Land Tax Act: “When the co-owned land value for subdivision uses the original owner’s share as the basis of calculation, no land value increment tax will be levied.

例計算所得之價值分割者，不徵土地增值稅。但不依原有持分比例計算所得之價值分割者，應向取得土地價值減少者，就其減少部分課徵土地增值稅」各規定，就取得土地價值減少而未受補償者言，與上開法律之規定不合，自難適用。財政部（六七）臺財稅第三四八九六號函：「共有土地辦理分割後，各人取得之土地價值，按分割時之公告現值計算與依原持有比例所算得之價值不等，而彼此間又無補償之約定者，依照遺產及贈與稅法第五條第二款規定：『以顯著不相當之代價讓與財產、免除或承擔債務者，其差額部分』以贈與論，應依法課徵贈與稅，此時，取得土地價值增多者，為受贈人，應由稅捐稽徵機關就其增多部分，課徵土地增值稅。」其理由雖有未洽，但關於向無償移轉而取得所有權人徵收土地增值稅之部分，核與土地稅法第五條第一項第二款及同條第二項規定並無不符，自不受上開施行細則規定之影響，亦難認為與憲法第十九條有所牴觸。又共有土地因分割而移轉，其共有人所取得之土地價值與依其應有部分所算得之價值相等，如於分割時該土地有漲價情形，應否課徵土地增值稅，不在聲請解釋範圍內，無庸解釋，併予敘明。

However, if the land value for subdivision did not use the original owner's share as a basis for calculation, the land value increment tax should be levied upon the co-owner who received the lower land value on that lesser portion of land" or co-owners whose land is calculated at a lower value and have not been compensated. However, the aforementioned rules are incompatible and difficult to apply. The Ministry of Finance Directive (67) Tai-Tsai-Shui-Tze No. 34896, issued on March 5, 1971, states: "After the subdivision of co-owned land, in case each co-owner's land value as determined from the calculation of the publicly announced land value at the time of subdivision and the land value computed from the original owner's share is not comparable, and there is no agreement on compensation between co-owners, the rule under Article 5, Subparagraph 2, of the Estate and Gift Tax Act states: "Where a property is transferred, and a debt is remitted or undertaken with apparent disparity of price, that deficit portion" shall be deemed as inheritance, and estate tax shall be levied in accordance with act; at this time, the

owner whose land was appraised at a higher value will be the beneficiary, and the competent tax authority shall levy the land value increment tax upon that excess portion of land value? Although the reasoning is inappropriate, regarding that portion of the land value increment tax levied upon the owner who obtained land ownership from transfer without compensation, it is deemed to be consistent with the rules provided under Article 5, Paragraph 1, Subparagraph 2, and Paragraph 2 of the same article, and thus shall not be affected by the enforcement rules stated above, and should not be considered contradictory to Article 19 of the Constitution. In addition, when co-owned land is transferred due to subdivision, the land value obtained by all co-owners and the value as calculated based on their own respective shares are comparable. In case there is an increase in price of the land during the subdivision, or whether a land value increment tax should be levied or not, is not within the scope of this petition for reasoning. Thus, we point out that there is no need to provide reasoning for these issues.

Justice Wei-Kuang Yiau filed dissenting opinion.

Justice Shih-Ron Chen filed dissenting opinion.

本號解釋姚大法官瑞光、陳大法官世榮分別提出不同意見書。