

J. Y. Interpretation No.195 ( May 31, 1985 ) \*

**ISSUE:** Is the provision of Paragraph 2 of Article 25 of the Enforcement Rules of the Act of Encouragement of Investment in conflict with the Constitution?

**RELEVANT LAWS:**

Article 19 of the Constitution (憲法第十九條) ; Article 17, Paragraph 1, Subparagraphs 1 and 2 of the Act of Encouragement of Investment (獎勵投資條例第十七條第一項第一款、第二款) ; Articles 7 and 15 of the Income Tax Act (所得稅法第七條、第十五條) ; Article 25, Paragraph 2, 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第二項) .

**KEYWORDS:**

income tax (所得稅) , encouragement of investment (獎勵投資) , distribution of earnings (盈餘所得分配) .\*\*

**HOLDING:** The provision of Paragraph 2 of Article 25 of the Enforcement Rules of the Act of Encouragement of Investment promulgated in 1978 is not clear enough and may cause misapplication of Article 15 of the Income Tax Act,

**解釋文：**中華民國六十七年之獎勵投資條例施行細則第二十五條第二項之規定，有欠明晰，易滋所得稅法第十五條之誤用，致與獎勵投資條例之立法精神有所不符，惟尚不發生牴觸憲法第十九條之問題。

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

which is inconsistent with the legislative intent of the Act of Encouragement of Investment. However, there is no contradiction with Article 19 of the Constitution.

**REASONING:** Article 19 of the Constitution provides: “The people shall have the duty of paying taxes in accordance with law.” Under Article 17, Paragraph 1, Subparagraphs 1 and 2 of the Act of Encouragement of Investment promulgated on July 26, 1977, a non-resident individual who obtains earnings distributed to shareholders by a company within the territory of the R.O.C. is permitted to withhold and pay income tax from the source in accordance therewith, and the provision of filing a tax return under the Income Tax Act does not apply. The legislative purpose of the said provision of law is to attract foreign capital by lessening the tax burdens of investors and enhancing the willingness of overseas Chinese and foreign nationals to make investments. Therefore, the portion of income tax under the Act of Encouragement of Investment is a special law of the Income

**解釋理由書：**憲法第十九條規定：「人民有依法律納稅之義務」，中華民國六十六年七月二十六日公布之獎勵投資條例第十七條第一項第一、二兩款，對於非中華民國境內居住之個人而有由中華民國境內之公司分配與股東之盈餘所得者，准其依同條項各該款之規定，就源扣繳所得稅，不適用所得稅法結算申報之規定，原在藉減輕投資人之稅負，提高華僑及外人投資之意願，以達成吸引國外資本之立法目的。是獎勵投資條例有關所得稅部分，乃所得稅法之特別法，其因投資而受獎勵之人民之納稅義務，自應以上開獎勵投資條例為主要根據。

Tax Act. The tax payment duty of the people who are encouraged to make investments should be mainly based on the above-mentioned Act of Encouragement of Investment.

If both husband and wife reside in a foreign country, and they respectively apply and are approved for investment, and their investment meets the provisions of Subparagraph 1 of Paragraph 1 of Article 17 of the above-mentioned Act for the Encouragement of Investment, even though one of them acts as a director, supervisor or manager of the enterprise in which he or she invests and stays in the R.O.C. for 183 days in a taxable year to manage and operate such enterprise so that he or she should be regarded as an individual residing in the R.O.C. and file annual consolidated income tax in accordance with Subparagraph 2 of Paragraph 2 of Article 7 of the Income Tax Act, as his or her spouse meets the provision of Subparagraph 1 of Paragraph 1 of Article 17 of the Act of Encouragement of Investment, such spouse is entitled to the encouragement. The tax on the income

夫妻雙方如居留國外，分別依法申請投資，並經核准，而均合於上開獎勵投資條例第十七條第一項第一款之規定，雖夫妻之一方因擔任投資事業之董事、監察人或經理人，為經營管理其投資事業，於一課稅年度內在中華民國境內居留一百八十三天，認為應依所得稅法第七條第二項第二款之規定，視同中華民國境內居住之個人而辦理結算申報綜合所得稅，但他方既合獎勵投資條例第十七條第一項第一款規定，即應有單獨享受此項獎勵之權利，其分配之盈餘所得，自應就源扣繳所得稅，不適用結算申報之規定，始合國家獎勵投資之目的。

derived from the distribution of the earnings should be withheld and paid at the source, and the provision regarding filing an annual income tax return should not apply so as to meet the purpose of encouragement of investment of the nation.

Paragraph 2 of Article 25 of the 1978 Enforcement Rules of the Act of Encouragement of Investment provides: “The provision regarding exemption from filing an annual income tax return shall not apply to the income derived from earnings distributed by a company or distributable to a partner under Article 17 of the Act which should be filed by the individual residing in the R.O.C.” The meaning of this provision is not clear, and the application of this provision may cause the misapplication of Article 15 of the Income Tax Act, which provides: “Where the spouse of a taxpayer...has any of the income under the preceding Article, the taxpayer shall include such income in his income return for taxation.” As a result, the husband and wife who respectively apply and are approved for investment have to include in the tax return the

中華民國六十七年之獎勵投資條例施行細則第二十五條第二項規定：「本條例第十七條所稱公司分配之盈餘或合夥人應分配之盈餘所得，依法應由在中華民國境內之個人申報者，不適用免辦結算申報之規定」，意義有欠明晰，致適用此項施行細則，易於導致所得稅法第十五條「納稅義務人之配偶……有前條各類所得者，應由納稅義務人合併申報課稅」規定之誤用；使分別依法請准投資之夫妻，必須就其投資事業分配之盈餘所得，合併申報所得稅，增加投資人之稅負，與上開獎勵投資條例之立法精神有所不符，惟尚不發生牴觸憲法第十九條之問題。

income from distribution of earnings by the invested enterprise so that the investor's tax burden increases, which is inconsistent with the legislative intent of the above-mentioned Act for the Encouragement of Investment. However, Article 19 of the Constitution is not contradicted.