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Nos. 670~716
(2010~2013)

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Republic of China (Taiwan)

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J. Y. Interpretation No.670（January 29, 2010）*

ISSUE: Is Article 2, Section 3 of the Act of Compensation for Wrongful Detentions and Executions which denies indemnification should detention is the result of the victim's intentional or gross negligent conduct unconstitutional ?

RELEVANT LAWS:

Article 8, Paragraph 1, Articles 15, and 23 of the Constitution（憲法第八條第一項、第十五條、第二十三條）, J.Y. Interpretation Nos. 384, 400, 425, 487, 516, 588, 624, 652 and 665（司法院釋字第三八四號、第四〇〇號、第四二五號、第四八七號、第五一六號、第五八八號、第六二四號、第六五二號、第六六五號解釋）, Article 5, Paragraph 1, Section 2 of the Constitutional Interpretation Procedural Act（司法院大法官審理案件法第五條第一項第二款）, Arti-cle 1, Paragraph 1, Article 2, Section 3 of the Act of Compensation for Wrongful Detentions and Executions（冤獄賠償法第一條第一項、第二條第三款）, Article 101, Paragraph 1 of the Criminal Procedure Code（刑事訴訟法第一百零一條第一項）, and Article 102, Paragraph 1 of the Military Justice Act（軍事審判法第一百零二條第一項）.

KEYWORDS:

Compensation for Wrongful Detention（冤獄賠償）, state

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* Translated by Professor Dr. Ming-Woei Chang.

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

compensation（國家賠償）, final acquittal adjudication（無罪判決確定）, intention or recklessness（故意或重大過失）, obstruction or misleading of investigation or trial（妨礙誤導偵查審判）, degree of culpability（可歸責程度）, public interest（公共利益）, special sacrifice（特別犧牲）, indemnification（補償）, physical freedom（人身自由）, right of equal protection（平等權）, principle of proportionality（比例原則）**

HOLDING: For victims acquitted by final adjudication, in the event their detention is based on Article 101, Paragraph 1 of the Criminal Procedure Code or Article 102, Paragraph 1 of the Military Justice Act because of intentional or reckless conduct on their part, no damage award is available in accordance with Article 2, Section 3 of the Act of Compensation for Wrongful Detentions and Executions. Such acrossthe-board denial does not take into consideration whether the victim's conduct that caused the detention was to commit the crime or was to obstruct or mislead the investigation or the trial, nor con-sider the degree of culpability from the act that caused the detention and the losses resulted from the

解釋文：受無罪判決確定之受害人，因有故意或重大過失行為致依刑事訴訟法第一百零一條第一項或軍事審判法第一百零二條第一項受羈押者，依冤獄賠償法第二條第三款規定，不得請求賠償，並未斟酌受害人致受羈押之行為，係涉嫌實現犯罪構成要件或係妨礙、誤導偵查審判，亦無論受害人致受羈押行為可歸責程度之輕重及因羈押所受損失之大小，皆一律排除全部之補償請求，並非避免補償失當或浮濫等情事所必要，不符冤獄賠償法對個別人民身體之自由，因實現國家刑罰權之公共利益，受有超越一般應容忍程度之特別犧牲時，給予所規範之補償，以符合憲法保障人民身體自由及平等權之立法意旨，而與憲法第二十三條之比例原則有違，應自本解釋公布之日起至遲於屆滿

detention of the victim. Given that it is not a necessity to avoid inapprop-ropriate or abusive indemnification, and is not in compliance with the legisl-ative meaning and purpose of the Constitution on the protection of people's physical freedom and right of equal protection by which statutory indemnification is available under the Act of Compensation for Wrongful Detentions and Executions for an individual who has endured special sacrifices more than ordinary degree while the public interest through the exercise of the state's penal author-ity was realized, it contradicts the principle of proportionality under Article 23 of the Constitution and shall become invalid no later than two years since the issuance of this Interpretation .

二年時失其效力。

REASONING: This Yuan has repeatedly issued Interpretations regarding the fact that the state shall provide indemnification in accordance with the law for the people's property rights, protected un-der Article 15 of the Constitution, that have been specially sacrificed because of the need of the public interest

解釋理由書：人民受憲法第十五條保障之財產權，因公益需要而受特別犧牲者，應由國家依法律予以補償，已迭經本院解釋在案（本院釋字第四００號、第四二五號、第五一六號、第六五二號解釋參照）。人民受憲法第八條保障身體之自由，乃行使其憲法上所保障其他自由權利之前提，為重要基

(see J.Y. Interpretation Nos. 400, 425, 516, and 652). This Yuan has also repeatedly issued Interpretations regarding the fact that the people's right of physical freedom protected under Article 8 of the Constitution is the prerequisite [basis] for the exercise of other freedoms and rights protected under the Constitution, and is deemed to be a critical fundamen-tal human right that requires special protection (see J.Y. Interpretation Nos. 384 and 588). Thus for any individual whose specific physical freedom subject to legitimate restrictions by the public authority and for public interest, such as detention, custody, or constrain, but under the special circumstances has exceeded the degree that should be endured by people under ordi-nary condition, and constitute special personal sacrifice, there shall be the right to petition for reasonable indemnification in accordance with the law so as to comply with the meaning and purpose of the Constitution on the protection of people's physical freedom and right of equal protection.

本人權，尤其應受特別保護，亦迭經本院解釋在案（本院釋字第三八四號、第五八八號解釋參照）。是特定人民身體之自由，因公共利益受公權力之合法限制，諸如羈押、收容或留置等，而有特別情形致超越人民一般情況下所應容忍之程度，構成其個人之特別犧牲者，自應有依法向國家請求合理補償之權利，以符合憲法保障人民身體自由及平等權之意旨。

Article 1, Paragraph 1 of the Act of Compensation for Wrongful Detentions and Executions stipulates: "For cases filed and received under the Criminal Procedure Code, Military Justice Act, Juvenile Proceeding Act, or Gangster Prevention Act, the victim may petition for state compensation if one of the following conditions is met: (1) that he/she has been detained before the final non-prosecutorial disposition or acquittal; (2) that he/she has been detained, placed under custody, served a sentence or compelled to work before the final non-prosecutorial disposition, acquittal, or cancellation of compulsory work in a retrial or an extraordinary appeal proceeding; (3) that he/she has been placed under custody before the final dismissal of the case or protective disposition; (4) that he/she has placed under custody or served the juvenile correction program before the final dismissal of protective disposition in a retrial proceeding; (5) that he/she has been con-fined before the final dismissal of correction disposition; or (6) that he/she has been confined or subjected to correction program before the final dismissal of correction disposi-

冤獄賠償法第一條第一項規定：「依刑事訴訟法、軍事審判法、少年事件處理法或檢肅流氓條例受理之案件，具有下列情形之一者，受害人得依本法請求國家賠償：一、不起訴處分或無罪、不受理之判決確定前，曾受羈押或收容。二、依再審或非常上訴程序判決無罪、不受理或撤銷強制工作處分確定前，曾受羈押、收容、刑之執行或強制工作。三、不付審理或不付保護處分之裁定確定前，曾受收容。四、依重新審理程序裁定不付保護處分確定前，曾受收容或感化教育之執行。五、不付感訓處分之裁定確定前，曾受留置。六、依重新審理程序裁定不付感訓處分確定前，曾受留置或感訓處分之執行。」本條項規定之國家賠償，並非以行使公權力執行職務之公務員有故意或過失之不法侵害行為為要件。是冤獄賠償法於形式上為國家賠償法之特別法，然本條項所規定之國家賠償，實係國家因實現刑罰權或為實施教化、矯治之公共利益，對特定人民為羈押、收容、留置、刑或保安處分之執行，致其憲法保障之自由權利，受有超越一般應容忍程度之限制，構成其個人之特別犧牲時，依法律之規定，以金錢予以填補之刑事補償（以下稱本條項之賠償為補償）。

tion in a retrial proceeding." The state compensation stipulated under this provision is not premised on the intentional or negligent unlawful infringing conduct on the part of the public official in the capacity of carrying out public authority.. Thus, as a matter of form, the Act of Compensation for Wrongful Detentions and Executions is the special statute of the State Compensation Act, and the state compensation provided in this provision is in fact a statutory financial com-pensation to indemnify specific individual whose freedoms and rights protected under the Constitution endured more than ordinary degree of restrictions that constitute special sacrifices while the state, in realizing its penal authority or exercising the public interest through education or correction, put that specific individual under detention, custody, confinement, sentence serving, or corrective measures (the compensation in this provision is hereafter referred to as in-demnification).

When a statute provides indemnification to individuals whose freedoms and rights endure special sacrifices that

人民之自由權利因公共利益受有超越一般應容忍程度之特別犧牲，法律規定給予補償時，為避免補償失當或浮

exceeded the ordinary degree because of public interests, for the sake of avoiding inappropriate or abusive indemnification, such indemnification right may be excluded or reduced under different circumstances if the victim is culpable for the creation or expansion of damages. Yet it has to be necessary to achieve the statutory purpose so that there is no violation of the principle of proportionality under Article 23 of the Constitution. Article 2, Section 3 of the Act of Compensation for Wrongful Detentions and Executions (hereinafter the disputed provision), on the part that prohibits those who are detained because of intentional or reckless conduct from seeking indemnification, as far as dete-ntion under Article 101, Paragraph 1 of the Criminal Procedure Code or Article 102, Paragraph 1 of the Military Justice Act is concerned, it does not take into consideration whether the victim's conduct that caused the detention was to commit the crime or was to obstruct or mislead the investigation or the trial (such as escape, tampering with a witness, destruction of evidence or false confession, among other things), nor consider

濫等情事，受害人對損失之發生或擴大，如有可歸責之事由，固得審酌不同情狀而排除或減少其補償請求權，惟仍須為達成該目的所必要，始無違憲法第二十三條之比例原則。冤獄賠償法第二條第三款規定，因故意或重大過失行為致受羈押者，不得請求補償部分（以下稱系爭規定），就刑事訴訟法第一百零一條第一項及軍事審判法第一百零二條第一項所規定之羈押而言，並未斟酌受害人致受羈押之行為，係涉嫌實現犯罪構成要件，或係妨礙、誤導偵查審判（例如逃亡、串供、湮滅證據或虛偽自白等），亦無論受害人致受羈押行為可歸責程度之輕重及其因羈押所受損失之大小，皆一律排除全部之補償請求，並非避免補償失當或浮濫等情事所必要，不符冤獄賠償法對特定人民身體之自由，因實現刑罰權之公共利益受有干涉，構成超越一般應容忍程度之特別犧牲時，給予所規範之補償，以實現憲法保障人民身體自由及平等權之立法意旨，而與憲法第二十三條之比例原則有違。系爭規定應由相關機關自本解釋公布之日起二年內，依本解釋之意旨，衡酌受害人致受羈押行為之情狀、可歸責程度及所受損失等事由，就是否限制其補償請求權，予以限制時係全面排除或

the degree of culpability from the act that caused the detention and the losses resulted from the detention of the victim. Given that it is not a necessity to avoid inappropriate or abusive indemnification, and is not in compliance with the legislative meaning and purpose of the Constitution on the protection of people's physical freedom and right of equal protection by which statutory indemnification is available under the Act of Compensation for Wrongful Detentions and Executions for an individual who has endured special sacrifices more than ordinary degree while the public interest through the exercise of the state's penal authority was realized, it contradicts the principle of proportionality under Article 23 of the Constitution. The relevant government agencies should conduct a thorough review and provide proper revisions within two years since the issuance of this Interpretation, and based on the meaning and purpose of this Interpretation, on whether the right to indemnification shall be restricted, whether such restriction shall be across the board exclusion or partial reduction, among other things, while taking into consideration

部分減少等，配合冤獄賠償法相關規定通盤檢討，妥為規範，屆期未完成修法者，系爭規定失其效力。

circumstances such as the victim's conduct that caused the detention, the degree of culpability and the resulted damages, in association with the relevant provisions of the Act of Compensation for Wrongful Detentions and Executions. The disputed provision shall become invalid if no amendment is made within this period.

Justice Ming Chen filed concurring opinion, in which Justice Sea-Yau Lin joined.

Justice Tzong-Li Hsu filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opin-ion.

Justice Chen-Shan Li filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Ching-You Tsay filed dissenting opinion.

Justice Chi-Ming Chih filed dissenting opinion.

Justice Shin-Min Chen filed concurring opinion in part and dissenting opin-

本號解釋陳大法官敏、林大法官錫堯共同提出協同意見書；許大法官宗力提出協同意見書；葉大法官百修提出協同意見書；李大法官震山提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官春生提出協同意見書；蔡大法官清遊提出不同意見書；池大法官啟明提出不同意見書；陳大法官新民提出部分協同、部分不同意見書。

ion in part.

EDITOR'S NOTE:

Summary of Facts:The two petitioners were responsible for foreign exchange operations in a bank. In December 1978, after the foreign issuing bank refused to honor an export negotiation, the two petitioners were detained on February 28, 1979 by the prosecutor who considered them highly suspicious in committing corrupted conducts. The Taiwan High Court eventually granted bail and ended the detention on April 8, 1983 and September 28, 1981, resulting the petitioners being detained for 1,500 and 925 days respectively.

The Supreme Court subsequently and finally acquitted the two individuals in 2007, and the two petitioners filed petition for wrongful detention damages. On appeal, the Wrongful Detention Compensation Court of the Judicial Yuan denied their claims in 2008, holding that the two petitioners nevertheless committed significant flaws in processing the export negotiation, which, objectively and easily, can

編者註：

事實摘要：聲請人等原均於銀行負責外匯作業暨審核業務。67 年 12 月間因發生出口押匯遭國外開狀銀行拒付案，經檢察署認涉有犯貪污罪之重大嫌疑，於 68 年 2 月 28 日遭羈押，分於 72 年 4 月 8 日、70 年 9 月 9 日始由臺灣高等法院准予交保後停止羈押，分別受羈押 1500 日，925 日。

嗣該貪污案件經最高法院 96 年度台上字第 4591 號刑事判決無罪確定，爰依法請求冤獄賠償。經司法院冤獄賠償法庭 97 年度台覆字第 129 號覆審決定認聲請人經辦押匯作業仍有重大瑕疵，於客觀上易遭誤認其有主觀上圖利他人之犯行，故其受羈押，核有冤獄賠償法第 2 條第 3 款不得請求賠償情形，遂駁回其覆審之聲請。

be misconstrued to have engaged in the criminal conduct to benefit others, and the detention, therefore, is not qualified for indemnification under Article 2, Section 3 of the Act of Compensation for Wrongful Detentions and Executions.

The petitioners file for the present statutory interpretation, claiming that Article 2, Section 3 of the Act of Compensation for Wrongful Detentions and Executions contradicts the principles of presumption of innocence and proportionality, and contravenes the right of equal pro-tection under Article 7, the right to work under Article 15, and the fundamental basic rights under Article 23 of the Constitution.

In a separate case, the petitioner was detained for violation of the Securities on August 20, 2005, based on a decision of the Banciao District Court, and was released on bail on June 13, 2006, amounting to 298 days of detention.

The case was finalized with the acquittal judgment from the Taiwan High

聲請人不服，認冤獄賠償法第2條第3款規定，違反無罪推定及比例原則，有牴觸憲法第7條、第15條、第23條等規定之疑義，聲請解釋憲法。

聲請人因違反證券交易法等案件，經臺灣板橋地方法院裁定自94年8月20日起羈押禁見，迄95年6月13日准予交保後停止羈押，計受羈押298日。

嗣經臺灣高等法院以97年度金上重訴字第3號刑事判決無罪確定，爰依

Court in 2008, the petitioner then petitioned in accordance with the law for wrongful detention compensation. On appeal, the Wrongful Detention Compensation Court of the Judicial Yuan denied the claim in 2009, holding that the petitioner is nevertheless highly suspicious in violating the Security Transactions Act, the pretrial detention was the result of his improper conduct and, therefore, meet the conditions not to receive indemnification under Article 2, Section 3 of the Act of Compensation for Wrongful Detentions and Executions.

法請求冤獄賠償。該請求經司法院冤獄賠償法庭 98 年度台覆字第 319 號覆審決定認其違反證券交易法等犯罪嫌疑重大，聲請人受羈押乃因其不當行為所致，核有冤獄賠償法第 2 條第 3 款不得請求賠償之情形，遂駁回其覆審之聲請。

The petitioner files the present statutory interpretation, claiming that Article 2, Section 3 of the Act of Compensation for Wrongful Detentions and Executions contradicts the right of equal protection under Article 7 and the right to physical freedom under Article 8 of the Constitution.

聲請人不服，認冤獄賠償法第 2 條第 3 款規定，有牴觸憲法第 7 條、8 條等規定之疑義，聲請解釋憲法。

In the third case, the petitioner was an Army officer who was absent without leave (AWOL) in his base from January 26 1976 to February 9 1976. The brigade

聲請人為陸軍軍官，於 65 年 1 月 26 日不假離營，至同年 2 月 9 日自行返營。該旅司令部軍事檢察官認聲請人涉有犯逃亡罪之重大嫌疑，於 65 年 2

military prosecu-tor deemed the petitioner highly suspicious of committing the crime of escape and detained the petitioner from February 9, 1976 to March 14th, 1977, the day the officer was discharged from the Army, amounting to 399 days of detention.

月 9 日羈押聲請人，迄至 66 年 3 月 14 日准予退伍止，計羈押 399 日。

On November 3, 1976, the court-martial of the Army Development of War Training Command acquitted the petitioner, finding that he had no intent to escape and did not meet the statutory conditions of the offense. The petitioner then filed for wrongful detention compensation. On appeal, the Wrongful Detention Compensation Court of the Judicial Yuan denied the claim in 2008, holding that the detention was the result of the petitioner's improper conduct in that he failed to apply for leave in accordance with the regulations, and, therefore, meet the conditions not to receive indemnification under Article 2, Section 3 of the Act of Compensation for Wrongful Detentions and Executions.

65 年 11 月 3 日陸軍訓練作戰發展司令部 65 年判字第 196 號判決認聲請人並無逃亡犯意，與逃亡罪之構成要件不合，經諭知無罪，爰依法請求冤獄賠償。該請求經司法院冤獄賠償法庭 97 年度台覆字第 80 號覆審決定認聲請人受羈押乃因其未依規定辦理休假手續之不當行為所致，核有冤獄賠償法第 2 條第 3 款不得請求賠償之情形，遂駁回其覆審之聲請。

The petitioner files the present statutory interpretation, claiming that Article 2, Section 3 of the Act of Compensation for Wrongful De-tentions and Executions contradicts the right to physical freedom under Article 8 of the Consti-tution.

聲請人不服，認冤獄賠償法第 2 條第 3 款規定，有牴觸憲法第 8 條規定之疑義，聲請解釋憲法。

J. Y. Interpretation No.671（January 29, 2010）*

ISSUE: Is Article 107 of the Land Registration Regulation unconstitutional ?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）；Judicial Yuan Interpretation Nos. 141, 400, 562（司法院釋字第一四一號、第四〇〇號、第五六二號解釋）； Articles 819, 824-1, 825, 868 of the Civil Code（民法第八百十九條、第八百二十四條之一、第八百二十五條、第八百六十八條。）; Article 107 of the Land Registration Regulation (Amended and promulgated on September 14th, 2001)（土地登記規則第一百零七條（九十年九月十四日修正發布）.

KEYWORDS:

Autonomy in private law（司法自治）, joint ownership (tenancy in common（分別共有）, entitlement（應有部分）, partition of jointly owned property（共有物分割）, mortgage right（抵押權）, the registration of partition of the jointly owned property（共有物分割登記）, convey and record（轉載）, restoration of co-ownership（回復共有關係）.**

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* Translated by Amy Huey-Ling Shee.

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

HOLDING: The purpose of Article 15 of the Constitution concerning the protection of people's property right is to ensure the free exercise of usage, benefit, and disposition under the status quo of the given property, and may not be infringed by the legal act of others. For joint ownership (tenancy in common), once the real property is partitioned after the creation of a mortgage, the mortgage right on the individual ownership is not affected (*see* Articles 825 and 868 of the Civil Code). For those who did not obtain consent from the mortgagee(s) prior to engaging in the partition, the subject matter of the mortgage right shall naturally be the entitlement of the respective parcels of property being conveyed and recorded. Thus the compulsory enforcement is levied against the title of the respective real property being partitioned, conveyed and recorded. After the bidding is completed, given that the winning bidder obtains the title to the mortgaged subject matter, the winning bidder restores the joint ownership of the specific real property with other co-owner(s), who also reinstate the respective entitlement prior to the

解釋文：憲法第十五條關於人民財產權應予保障之規定，旨在確保個人依財產之存續狀態行使其自由使用、收益及處分之權能，不得因他人之法律行為而受侵害。分別共有不動產之應有部分，於設定抵押權後，共有物經分割者，其抵押權不因此而受影響（民法第八百二十五條及第八百六十八條規定參照）。於分割前未先徵得抵押權人同意者，於分割後，自係以原設定抵押權而經分別轉載於各宗土地之應有部分，為抵押權之客體。是強制執行時，係以分割後各宗土地經轉載抵押權之應有部分為其執行標的物。於拍定後，因拍定人取得抵押權客體之應有部分，由拍定人與其他共有人，就該不動產全部回復共有關係，其他共有人回復分割前之應有部分，經轉載之應有部分抵押權因已實行而消滅，從而得以維護其他共有人及抵押權人之權益。準此，中華民國九十年九月十四日修正發布之土地登記規則第一百零七條之規定，符合民法規定之意旨，亦與憲法第十五條保障人民財產權之規定，尚無牴觸。

partition, and the mortgage right on the partition being conveyed and recorded is eliminated by its enforcement, so that the rights and interests of the co-owner(s) and the mortgagee can be maintained. As such, Article 107 of the Land Registration Regulation, as amended and pro-mulgated on September 14th, 2001, is in compliance with the purpose of the Civil Code and does not contravene the stipulation to protect people's property right under Article 15 of the Constitution.

REASONING: The purpose of Article 15 of the Constitution concerning the protection of people's property right is to ensure the free exercise of usage, benefit, and disposition under the status quo of the given property, and may not be infringed by the legal act of others. The entitlement of a joint ownership is the proportion of the co-owners' ownership, by nature not different from fee simple absolute (*see* J. Y. Interpretation Nos.400 and 562). Article 819, Paragraph 1 of the Civil Code stipulates that each coowner may freely dispose of his/her entitlement. Disposal, as mentioned in that provision,

解釋理由書：憲法第十五條關於人民財產權應予保障之規定，旨在確保個人依財產之存續狀態行使其自由使用、收益及處分之權能，不得因他人之法律行為而受侵害。共有物之應有部分乃共有人對共有物所有權之比例，性質上與所有權本無不同（本院釋字第四００號、第五六二號解釋參照）。民法第八百十九條第一項規定，各分別共有人得自由處分其應有部分。該條項所謂處分，包括讓與應有部分，或以應有部分為客體設定抵押權（本院釋字第一四一號解釋參照），旨在保障應有部分之財產權。又抵押權亦屬憲法財產權保障之範圍，惟因分別共有人就其應有

includes the assignment of entitlement or creating mortgage right on the entitlement (*see* J. Y. Interpretation No. 141), that aims to protect the property right of the entitlement. Furthermore, mortgage right also falls within the scope of property right protection under the Constitution. However, since each coowner may individually create mortgage rights on his/her entitlement without the consent of other co-owners, as long as the result of such mortgage creation does not harm other co-owners' interests, it is in compliance with the principle of autonomy in private law and the meaning and purpose of Article 15 of the Constitution in protecting people's property right.

部分設定抵押權得單獨為之，不須其他分別共有人之同意；故就應有部分設定及實行抵押權之結果，無害於其他共有人之利益者，符合私法自治原則及憲法第十五條保障人民財產權規定之意旨。

For entitlement in a joint ownership (tenancy in common), once the real property is partit-ioned after the creation of a mortgage, the mortgage right on the individual ownership is not affected (*see* Articles 825 and 868 of the Civil Code). Article 107 of the Land Registration Regulation, as amended and promulgated on September 14th, 2001, stipulates: "For real property of joint ownership

分別共有不動產之應有部分，於設定抵押權後，共有物經分割者，其抵押權不因此而受影響（民法第八百二十五條及第八百六十八條規定參照）。九十年九月十四日修正發布之土地登記規則第一百零七條規定：「分別共有土地，部分共有人就應有部分設定抵押權者，於辦理共有物分割登記時，該抵押權按原應有部分轉載於分割後各宗土地之上。但經先徵得抵押權人同意

(tenancy in common) having some of the joint owners creating mortgages on their respective entitlements, the recordation of the partition of the joint property should duly record that each mortgage is fixed upon each respective parcel of land as conveyed in proportion with its original entitlement. However, in the event the mortgagee has provided prior consent, the mortgage right shall only be conveyed and recorded on the [specific] parcel of land acquired by the mortgagor." (*hereinafter* the disputed provision) In other words, to take the specific parcel of land acquired by the mortgagor after the partition as the subject matter of the mortgage is limited to the situation where the mortgagee has provided prior consent before the partition. In the situation that prior consent from the mortgagee was not obtained before the partition, although the method of conveyance and recordation of the mortgage right provided by the disputed provision can prevent the mortgagee(s) on the entitlement(s) from being disadvantaged due to the partition, the disputed provision, however, conveys and records the mortgage right on each

者，該抵押權僅轉載於原設定人分割後取得之土地上。」（下稱系爭規定）亦即限於分割前已先徵得抵押權人同意之情形，始以原設定人分割後取得之土地為抵押權之客體。對於分割前未先徵得抵押權人同意之情形，系爭規定抵押權之轉載方式，固可避免應有部分之抵押權人因分割而受不利益，但系爭規定將該抵押權轉載於分割後各宗土地之上，致使其他分別共有人取得之土地，亦有抵押權負擔，且抵押權人得以轉載於該土地經抵押之應有部分拍賣取償。然抵押權之客體既為原共有物之應有部分，故於分割前未先徵得抵押權人同意者，於分割後，自係以原設定抵押權而經分別轉載於各宗土地之應有部分，為抵押權之客體。是強制執行時，係以轉載於分割後各宗土地經抵押之應有部分，為其執行標的物。於拍定後，因拍定人取得抵押權客體之應有部分，由拍定人與其他共有人，就該不動產全部回復共有關係，其他共有人回復分割前之應有部分，經轉載之應有部分抵押權因已實行而消滅，從而得以維護其他共有人及抵押權人之權益。準此，系爭規定符合民法規定之意旨，亦與憲法第十五條保障人民財產權之規定，尚無牴觸。

parcel of the land after partitions, causing the parcels of land acquired by other co-owners also encumbered with the mortgage, and the mortgagee may foreclose the entitlement portion conveyed on each parcel to satisfy the debt payment. Since the mortgaged subject matter was the entitlement of the original joint ownership, for those who did not obtain consent from the mortgagee(s) prior to engaging in the partition, the subject matter of the mortgage right shall naturally be the entitlement of the respective parcels of property being conveyed and recorded. Thus the compulsory enforcement is levied against the title of the respective real property being partitioned, conveyed and recorded. After the bidding is completed, given that the winning bidder obtains the title to the mortgaged subject matter, the winning bidder restores the joint ownership of the specific real property with other co-owner(s), who also reinstate the respective entitlement prior to the partition, and the mortgage right on the partition being conveyed and recorded is eliminated by its enforcement, so that the rights and interests of the co-owner(s) and the mort-

gagee can be maintained. As such, the disputed provision is in compliance with the purpose of the Civil Code and does not contravene the stipulation to protect people's property right under Article 15 of the Constitution.

Justice Tsay-Chuan Hsieh filed concurring opinion, in which Justice PiHu Hsu, Justice Chi-Ming Chih and Justice Ching-You Tsay joined.

Justice Mao-Zong Huang filed concurring opinion.

本號解釋謝大法官在全、徐大法官璧湖、池大法官啟明及蔡大法官清遊共同提出協同意見書；黃大法官茂榮提出協同意見書。

EDITOR'S NOTE:

Summary of Facts:The petitioner and A, not a party to this case, co-own a parcel of land, which the petitioner owns two-thirds and A owns one-third. In December 2005, the land was partitioned with a judgment of the Taiwan Taoyuan District Court. As a result, the petitioner and A both obtained individual parcels. However, before the partition judgment, A had created three mortgages on his/her original one-third entitlement od the land with three different companies. The Land Office conveyed and recorded the

編者註：

事實摘要：聲請人與 A 共有土地一宗，聲請人持分三分之二，A 持分三分之一。嗣該宗土地於 94 年 12 月間經臺灣桃園地方法院裁判分割，聲請人與 A 均因該分割而取得各自單獨所有之土地。惟 A 在裁判分割前，已就其原所有之分割前土地三分之一應有部分，設定三筆本金最高限額抵押權與三家不同公司。地政機關於裁判分割後，依系爭規定，將該三筆抵押權按 A 之原應有部分比例，轉載至聲請人所分得之單獨所有土地上。

three mortgages, in accordance with the disputed provision, on the petitioner's individual parcel of land based on the proportion of A's entitlement after the court judgment.

聲請人不服轉載之結果，遂向法院訴請塗銷該三筆抵押權之登記。臺灣桃園地方法院判決聲請人敗訴，案經上訴至臺灣高等法院，該院一度判決聲請人勝訴，且三家公司中之二家公司並未上訴，該部份因而確定。

Dissatisfied with the conveyance and recordation, the petitioner brought the case to request the court to nullify the recordation concerning the three mortgages. The Taiwan Taoyuan District Court found against the petitioner, but the Taiwan High Court reversed on appeal. Since two of the three companies did not appeal, the judgment on that part was confirmed and finalized.

惟前揭臺灣高等法院判決中關於 B 公司部分，經該公司提起上訴，最高法院將該部分判決廢棄發回。臺灣高等法院 97 年度上更（一）字第 73 號民事判決，依最高法院發回意旨，駁回聲請人之訴；聲請人上訴後，復經最高法院 98 年度台上字第 135 號民事裁定駁回上訴，全案遂告確定（該判決與該裁定合稱確定終局裁判）。聲請人遂以確定終局裁判所適用之土地登記規則第 107 條（90.9.14）及民法第 825 條規定有違

Yet the other company, B, appealed to the Supreme Court, which vacated and remanded the judgment. On remand, the Taiwan high Court denied the petitioner's suit in accordance with the Supreme Court judgment (see Civil Judgment of the Taiwan High Court, Shang Keng (1) Tzu No.73 (2008)). The petitioner again appealed but was once again rejected by the Supreme Court (see Tai Shang Tzu No. 135 (2009)). The judgment was then

confirmed and finalized. The petitioner questioned the constitutionality of Article 107 of the Land Registration Regulation and petitioned for interpretation.

憲疑義，向本院聲請解釋。

J. Y. Interpretation No.672（February 12, 2010）*

ISSUE: Are the Provisions Prescribing the Custom Office to Confiscate a Traveler's Undeclared Foreign Currency with which She Carried when Crossing the Border under the Foreign Exchange Control Act and Regulations Promulgated *thereunder* in contravention of the Constitution ?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條與第二十三條）; J.Y. Interpretation Nos. 313, 400, 448 and 600（司法院大法官會議解釋釋字第三一三號、第四〇〇號、第四四八號與六〇〇號解釋）; Article 3 of the Standard Act for the Laws and Rules（中央法規標準法第三條）; Articles 11 and 24, Paragraph 3 of the Foreign Exchange Control Act（管理外匯條例第十一條與第二十四條第三項）; Articles 154 and 157 of the Administrative Procedure Act（行政程序法第一五四條與第一五七條）; Administrative Order of the Ministry of Finance, [5]-Tai-Chai-Jon-Tze, No. 925000075, March 21, 2003（財政部中華民國九十二年三月二十一日台財融(五)字第〇九二五〇〇〇〇七五號令）.

KEYWORDS:

foreign exchange（外匯）, foreign currency（外幣）, control（管制）, cross the border（入出境）, declaration（申報）

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* Translated by Professor Chun-Jen Chen.

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

confiscate（沒收）, administrative fine（行政罰）, traveler（旅客）, custom office（海關）, property right（財產權）, principle of proportionality（比例原則）, principle of clarity and definiteness of law（法律明確性原則）.**

HOLDING: TArticle 11 and Article 24, Paragraph 3 of the Foreign Exchange Control Act, and the Administrative Order of the Ministry of Finance, [5]-Tai-Chai-Jon-Tze, No. 925000075 (March 21, 2003) are all stipulations which prescribe the traveler's declaration and registration requirements for the carrying of foreign currencies while crossing the national border and prescribe the custom office to confiscate those undeclared foreign currencies. Those stipulations are not in contravention of the constitutional guarantee of the protection of people's property right under Article 15 of the Constitution and the constitutional mandate of the principle of proportionality and the principle of clarity and definiteness of law under Article 23 of the Constitution.

解釋文：管理外匯條例第十一條、第二十四條第三項及財政部中華民國九十二年三月二十一日台財融(五)字第０九二五０００七五號令，關於攜帶外幣出入國境須報明登記，違反者應予沒入之規定，與憲法第十五條保障人民財產權、第二十三條之比例原則及法律明確性原則，尚無牴觸。

REASONING: Article 15 of the Constitution guarantees people's property right. The essence of this constitutional guarantee is to protect the rights of property owners to freely use, to benefit from and to dispose their properties and to protect them from the interference and infringement of the public authorities or of third parties in order to realize personal freedom, to develop personal characteristics and to maintain personal dignities. (*See* J. Y. Interpretation No. 400.) The Judicial Yuan has repeatedly stated that the legislative branch may enact law to restrict or limit people's property right and will not give rise to the issue of constitutionality so long as the restriction or limitation does not exceed the degree of necessity as mandated under Article 23 of the Constitution and is stipulated by statute or by regulation promulgated under the clear authorization of law. (*See* J.Y. Interpretation Nos. 313, 488 and 600.) The confiscation is a kind of administrative punishments which compulsorily deprive of a person's property when she breaches her duty imposed by the ad-

解釋理由書：憲法第十五條規定人民財產權應予保障，旨在確保個人依財產之存續狀態行使其自由使用、收益及處分之權能，並免於遭受公權力或第三人之侵害，俾能實現個人自由、發展人格及維護尊嚴 (本院釋字第四００號解釋參照)。立法機關對人民財產權之限制，如合於憲法第二十三條所定必要程度，並以法律定之或明確授權行政機關訂定法規命令者，即與上開憲法意旨無違，迭經本院解釋在案（本院釋字第三一三號、第四八八號、第六００號解釋參照）。行政罰之沒入，係對人民財產不法所得或違反行政法上義務之行為，對其財產加以強制剝奪，其規定應合乎上開意旨，乃屬當然。

ministrative law or when her property is owned illegally. It goes without saying that the confiscation shall be promulgated in accordance with the foregoing constitutional guarantee and constitutional mandates.

Article 11 of the Foreign Exchange Control Act stipulates that, "Travelers or service crew personnel of transportation vehicles, vessels or airplanes who carry foreign currencies while crossing national border shall declare to and register with the custom office. The relevant regulations will be promulgated jointly by the Ministry of Finance and the Central Bank of the Republic of China (Taiwan)." On March 21, 2003, the Ministry of Finance issued the Administrative Order of the Ministry of Finance, [5]-Tai-Chai-Jon-Tze, No. 925000075(March 21, 2003) stipulated that, "Any traveler or service crew personnel of transportation vehicles, vessels or airplanes who carry foreign currencies while crossing national border that exceed USD$10,000.00 or its equivalent shall declare to and register

管理外匯條例第十一條規定:「旅客或隨交通工具服務之人員,攜帶外幣出入國境者,應報明海關登記;其有關辦法,由財政部會同中央銀行定之。」財政部九十二年三月二十一日台財融(五)字第０九二五０００七五號令:「旅客或隨交通工具服務之人員,攜帶外幣出、入國境超過等值壹萬美元者,應報明海關登記。」同條例第二十四條第三項規定:「攜帶外幣出入國境,不依第十一條規定報明登記者,沒入之;申報不實者,其超過申報部分沒入之。」上開關於申報與沒入之規定(下稱系爭規定),係為平衡國際收支,穩定金融(同條例第一條參照),兼有防制經濟犯罪之作用,其目的洵屬正當。

with the custom office." Besides, Article 24, Paragraph 3, of the Foreign Exchange Control Act stipulates that, "The custom office shall confiscate those foreign currencies carried by anyone who crosses the national border and fails to declare to and register with the custom office pursuant to Article 11 of this Act. When anyone files a false declaration of his carried foreign currency, the custom office shall confiscate the portion of foreign currency carried exceeding the declared amount." These statutory provisions and relevant administrative order (*hereinafter* referred to as"the provisions at issue") are enacted and promulgated in order to balance int-ernational payments and to stabilize national finance (*See* Article 1 of the Foreign Exchange Control Act.) while also carrying the function of preventing economic crimes. The provisions at issue were enacted and promulgated with a just legislative purpose.

The declaration system on the trafficking of foreign currencies, as prescribed by the provisions at issue, solely

系爭規定之出入國境申報外幣制度，僅對攜帶超過等值壹萬美元外幣之旅客或隨交通工具服務之人員，課予申

imposes the obligation of declaration and registration upon those tra-velers or service crew personnel of transportation vehicles, vessels or airplanes who carry foreign currencies while crossing national border exceeding USD$ 10,000.00 or its equivalent. When there is a truthful declaration, there shall be no violation of the provisions at issue. There declaration system is of great convenience to those travelers who are subject to the obligation of declaration and registration, to those travelers who are not subject to the obligation of declaration and reg-istration, and to the custom office as well. The declaration requirement is impo-rtant to the agency-in-charge to monitor the statuses and movements of foreign currencies in and out of the nation and to enable the agency-in-charge to take timely and necessary measures to stabilize the national finance and national economy, while also preventing economic crimes. Therefore, the declaration requirement is a necessary means to control foreign currencies.

報義務，一經依法申報即不違反系爭規定，對於依規定應申報者、無須申報者及執行機關均有其便利性。此申報之規定，有助於主管機關掌握外匯資金進出與外匯收支動態，並得適時採取必要之因應措施，以穩定金融及經濟，並防制經濟犯罪，係管理外匯之必要手段。

In order to ensure the compliance and the effectiveness of the declaration requirement, it is indeed necessary to impose compulsory measures or penalties on those people who fail to file a declaration or fail to declare truthfully. With respect to the question what compulsory measures or penalties shall be adopted, it shall be more suitable for the legislative branch to make the appropriate decision, taking into account both the policy of foreign exchange control and the protection of people's rights. The stipulation of confiscation under Article 24, Paragraph 3 of the Foreign Exchange Control Act is an administrative penalty against anyone who carries foreign currency exceeding USD$10,000.00 and fails to declare and register truthfully. The penalty is administrative in nature and is adopted with a view to prompt voluntary and truthful declaration and is less severe than its criminal counterpart. Taking into account the frequency and characteristics of travelers or service crew personnel of transportation vehicles, vessels or airplanes who carry foreign currencies in and out of the

為確保申報制度之實效，對於違反申報義務者，施以強制或處罰，實有必要。至其強制或處罰之措施應如何訂定，宜由立法者兼顧外匯管理政策與人民權利之保護，為妥適之決定。管理外匯條例第二十四條第三項之規定，係對於攜帶外幣超過等值壹萬美元而未申報者，予以沒入，以督促主動誠實申報，較科處刑罰之方式為輕，且鑑於旅客或隨交通工具服務人員攜帶外幣出入國境之動態與特性，上開處罰規定尚未牴觸憲法第二十三條之比例原則，而與憲法保障人民財產權之意旨無違。且系爭規定對出入國境旅客或隨交通工具服務之人員課予申報義務，其有關違反時之處罰規定，尚屬明確，並未牴觸法律明確性之要求。

nation, the provisions at issue are not in contravention of the constitutional mandate of the principle of proportionality under Article 23 of the Constitution and are not in contravention of the constitutional guarantee of the protection of people's property right. In addition, the provisions at issue clearly impose the obligation of declaration on travelers or service crew personnel of transportation vehicles, vessels or airplanes and clearly delineate the penalties against the violators; therefore, the provisions at issue are not in contravention of the constitutional mandate of the principle of clarity and definiteness of law (*Rechtsbestimmtheitprinzip*).

The second half of Article 11 of the Foreign Exchange Control Act stipulates that, "The relevant regulations will be promulgated jointly by the Ministry of Finance and the Central Bank of the Republic of China (Taiwan)." This is a statutory authorization which authorizes the agencies-in-charge to promulgate jointly regulations to govern the procedure, process and other relevant matters closely related

管理外匯條例第十一條規定，外幣申報之「有關辦法，由財政部會同中央銀行定之」，係授權主管機關共同就申報之程序、方式及其他有關事項訂定法規命令，其訂定並應遵循中央法規標準法及行政程序法之相關規定。惟上開財政部令，既未以辦法之名稱與法條形式，復未履行法規命令應遵循之預告程序，亦未會銜中央銀行發布，且其內容僅規定超過等值壹萬美元者應報明海

to the declaration. It goes without saying that the regulation shall be promulgated in accordance with the relevant provisions of the Standard Act for the Laws and Rules and the Administrative Procedure Act. However, the foregoing Administrative Order issued by the Ministry of Finance was neither promulgated under the name and the provisional format of an administrative regulation, nor in compliance with the public notice requirement for the implementation of a regulation. Further, the Ministry of Finance failed to promulgate the regulations jointly with the Central Bank of the Republic of China (Taiwan). Furthermore, the Administrative Order issued by the Ministry of Finance only prescribed that the traveler or service crew personnel who carry foreign currencies while crossing the national border exceeding USD$10,000.00 shall declare to the custom office, and is silent on the procedure and process of the declaration. Hence, the Administrative Order is inconsistent with Article 11 of the Foreign Exchange Control Act, Articles 154 and 157 of the Administrative Procedure Act, and

關登記之意旨，對於申報之程序、方式等事項則未規定，與管理外匯條例第十一條之授權意旨、行政程序法第一百五十四條、第一百五十七條及中央法規標準法第三條等規定不符，應由有關機關儘速檢討修正。

Article 3 of the Standard Act for the Laws and Rules, and shall be reviewed and revised by the relevant agencies as soon as possible.

Justice Mao-Zong Huang filed concurring opinion, in which Justice PaiHsiu Yeh joined.

Justice Shin-Min Chen filed dissenting opinion.

Justice Chun-Sheng Chen filed dissenting opinion

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本號解釋黃大法官茂榮、葉大法官百修共同提出協同意見書；陳大法官新民提出不同意見書；陳大法官春生提出不同意見書。

EDITOR'S NOTE:

Summary of Facts:I. Petition for Interpretation by Petitioner A

A. In April, 2007, before Petitioner A boarded an airplane, the custom office discovered that he carried ￥40,000,000.00 (Japanese Yen). Because Petitioner A failed to declare the carried foreign currencies truthfully under Article 11 of the Foreign Exchange Control Act, the custom office returned the exempted amount of ￥1,200,000.00, approximately USD$ 10,000.00, to Petitioner A on the scene and confiscated ￥38,800,000.00 pursuant

編者註：

事實摘要：（一）A 聲請案

1. 聲請人 A 於民國（下同）96 年 4 月間擬搭機出境時，被查獲攜帶日幣 4,000 萬元。因聲請人未依管理外匯條例第 11 條規定據實申報，經財政部臺北關稅局依財政部 92 年 3 月 21 日台財融（五）字第 0925000075 號令意旨，當場發還免申報等值美金 10,000 元之日幣外，其餘未依規定申報之日幣現鈔 3,880 萬元，依管理外匯條例第 24 條第 3 項規定沒入。

to the Administrative Order of the Ministry of Finance, [5]-Tai-Chai-Jon-Tze, No. 925000075, March 21, 2003 and Article 24, Paragraph 3, of the Foreign Exchange Control Act.

B. Petitioner A disagreed with the confiscation and filed an administrative appeal and instituted an administrative proceeding and lost. Petitioner A claimed that the statutory and regulatory provisions applied in the case, the Supreme Administrative Court, the Court in its Supreme Administrative Court Ruling [2009] Chai-Tze No. 128 are in contravention of the constitutional guarantee of the protection of people's property right under Article 15 of the Constitution and the constitutional mandate of the principle of proportionality and the principle of clarity and definiteness of law under Article 23 of the Constitution. Petitioner A filed the petition for interpretation to this Court.

II.Petition for Interpretation by Petitioner B

2. 聲請人不服，經訴願、行政訴訟後，認最高行政法院 98 年度裁字第 128 號裁定所適用之系爭規定，牴觸憲法第 15 條保障人民財產權、第 23 條之比例原則與法律保留原則，聲請解釋。

（二）B 聲請案

A. In October, 2008, Petitioner B flew to Taiwan and followed the green line to enter the checkpoint of the custom office. A custom officer discovered Petitioner B carried HKD$485,100.00 and deemed Petitioner B violating Article 11 of the Foreign Exchange Control Act. The custom officer returned the exempted amount of HKD$79,600.00, approximately USD$ 10,000.00, to Petitioner B on the scene and confiscated HKD$405,500.00 pursuant to Article 24, Paragraph 3, of the Foreign Exchange Control Act.

1. 聲請人 B，97 年 10 月搭乘班機入境，由綠線檯通過遭關員攔檢，查獲未依規定申報之港幣現鈔 485,100 元，認聲請人違反管理外匯條例第 11 條規定，當場發還免申報等值美金 10,000 元之港幣，其餘 405,500 元依同條例第 24 條第 3 項規定沒入。

B.Petitioner B disagreed with the confiscation and filed an administrative appeal and instituted an administrative proceeding and lost. Petitioner B claimed that the statutory and regulatory provisions applied in the case, the Supreme Administrative Court Ruling [2009] Chai-Tze No. 3171 are in contravention of the constitutional guarantee of the protection of people's property right under Article 15 of the Constitution and the constitutional mandate of the principle of proportionality and the principle of clarity and

2. 聲請人不服，經訴願、行政訴訟程序後，認最高行政法院 98 年度裁字第 3171 號裁定所適用之系爭規定，牴觸憲法第 15 條保障人民財產權及第 23 條比例原則，聲請解釋。

definiteness of law under Article 23 of the Constitution. Petitioner B filed the petition for interpretation to this Court.

III.Petition for Interpretation by Petitioner C

A. In December, 2005, Pet-itioner C flew to Taiwan and followed the green line to enter the checkpoint of the custom office. A custom officer discovered Petitioner C carried undeclared cash of RMB$20,000.00 and HKD$ 1,600.000.00 and deemed Petitioner C violating Article 11 of the Foreign Exchange Control Act. The custom officer returned HKD$80,000.00, approximately USD$ 10,000.00, to Petitioner C on the scene and confiscated RMB$20,000.00 and HKD$1,520,000.00 pursuant to Article 24, Paragraph 3, of the Foreign Exchange Control Act.

B. Petitioner C disagreed with the confiscation and filed an administrative appeal and instituted an administrative proceeding and lost. Petitioner C claimed that the statutory and regulatory provi-

（三）C 聲請案

1. 聲請人 C 於 94 年 12 月間搭乘班機入境，由綠線檯通過遭關員攔檢，查獲人民幣現鈔 20,000 元及未依規定申報之港幣現鈔 1,600,000 元，認聲請人涉及違反管理外匯條例第 11 條之情事。當場發還免申報之等值美金 10,000 元之港幣外，其餘港幣現金共 1,520,000 元，依同條例第 24 條第 3 項規定沒入。

2. 聲請人不服，經訴願、行政訴訟程序後，認最高行政法院 97 年度裁字第 12 號裁定所適用之系爭規定，違反憲法平等原則、財產權保障及比例原則，聲請解釋。

sions applied in the case, the Supreme Administrative Court Ruling [2008] Chai-Tze No. 12 are in contravention of the cons-titutional guarantee of the protection of people's property right under Article 15 of the Constitution and the constitutional mandate of the principle of proportionality and the principle of clarity and definiteness of law under Article 23 of the Constitution. Petitioner C filed the petition for interpretation to this Court.

J. Y. Interpretation No.673（March 26, 2010）*

ISSUE: (1) Is the designation of certain individuals as tax withholders for businesses or organizations and subject them to certain legal consequences for not or under reporting constitutional ?

(2) Are the administrative fines on tax withholder who fail to withhold or underreport under the Income Tax Act unconstitutional ?

RELEVANT LAWS:

Articles 7, 19, and 23 of the Constitution（憲法第七、十九、二十三條）；J.Y. Interpretation Nos. 317, and 517（司法院釋字第三一七號、第五一七號解釋）；Article 7, Paragraph 5, Article 71, Paragraph 1, Articles 88, 89, Paragraph 1, Subparagraph 2 (amended as of December 30, 1989, February 9, 1999, and May 30, 2006), Articles 92, 94, 114, Paragraph 1 of the Income Tax Act (amended on December 30, 1989)（所得稅法第七條第五項、第七十一條第一項、第八十八條、第八十九條第一項第二款（七十八年十二月三十日、八十八年二月九日及九十五年五月三十日修正公布）；第九十二條、第九十四條、第一百一十四條第一項（七十八年十二月三十日修正公布））；Article 95 of the Certified Public Accountant Act（會計師法第九十五條）, Article 48-3 of the Tax Collection Act（稅捐稽徵法第四十八條之三）.

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* Translated by Lawrence L. C. Lee,.

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

KEYWORDS:

Principle of proportionality （比例原則）, Principle of taxation by law （租稅法律主義）, equal rights （平等權）, tax withholder （納稅義務人）, property rights （財產權）, individual income（個人所得）, profit-seeking business（營利事業）, annual income （年度所得）, tax due （應納稅額）.**

HOLDING: On the anterior of Article 89, Paragraph 1, Subparagraph 2 of the Income Tax Act, amended as of December 30, 1989, concerning the use of the chief accounting officer of an institution or organization as the tax withholder (obligator) for tax withholding and the same provision, amended as of February 9, 1999 and May 30, 2006, by using the person in-charge of a business as the tax withholder do not contravene the principle of proportionality under Article 23 of the Constitution.

解釋文：中華民國七十八年十二月三十日修正公布之所得稅法第八十九條第一項第二款前段，有關以機關、團體之主辦會計人員為扣繳義務人部分，及八十八年二月九日修正公布與九十五年五月三十日修正公布之同條款前段，關於以事業負責人為扣繳義務人部分，與憲法第二十三條比例原則尚無牴觸。

The posterior of Article 114, Subparagraph 1 of Income Tax Act, amended as of December 31, 1989 and January 3, 2001, concerning the doubling of tax discrepancy amount as the administrative

七十八年十二月三十日修正公布及九十年一月三日修正公布之所得稅法第一百十四條第一款，有關限期責令扣繳義務人補繳應扣未扣或短扣之稅款及補報扣繳憑單，暨就已於限期內補繳應

fines for tax withholders who paid what should have been withheld but was not or under reported and submitted the supplemental withholding certificates within the designated deadline as well as trebling the discrepancy amount as administrative fines for those who did not pay within the designated deadline neither contravenes the principle of proportionality under Article 23 of the Constitution, nor the protection of people's property rights under Article 15 of the Constitution.

扣未扣或短扣之稅款及補報扣繳憑單，按應扣未扣或短扣之稅額處一倍之罰鍰部分；就未於限期內補繳應扣未扣或短扣之稅款，按應扣未扣或短扣之稅額處三倍之罰鍰部分，尚未牴觸憲法第二十三條比例原則，與憲法第十五條保障人民財產權之意旨無違。

On the latter part of Article 114, Paragraph 1 of the Income Tax Act concerning the trebling of tax discrepancy payment as the administrative fine for untruthful filing of withholding certificates (returns), given that it did not authorize the tax authorities to exercise discretion, by taking into consideration the circumstances of the specific violation and seriousness to determine the amount of fines, thus the penalty has apparently exceeded the necessary degree and, in this confine, is not consistent with the principle of proportionality under Article 23 of the Constitution and affronts the protection of

上開所得稅法第一百十四條第一款後段，有關扣繳義務人不按實補報扣繳憑單者，應按應扣未扣或短扣之稅額處三倍之罰鍰部分，未賦予稅捐稽徵機關得參酌具體違章狀況，按情節輕重裁量罰鍰之數額，其處罰顯已逾越必要程度，就此範圍內，不符憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之意旨有違，應自本解釋公布之日起停止適用。有關機關對未於限期內按實補報扣繳憑單，而處罰尚未確定之案件，應斟酌個案情節輕重，並參酌稅捐稽徵法第四十八條之三之規定，另為符合比例原則之適當處置，併予指明。

people's property rights under Article 15 of the Constitution. The provision shall cease to be applicable as of the issuance date of this Interpretation. It is also pointed out that by rendering penalties on cases yet to be ripened for not filing the withholding certificates (returns) within the deadline, the relevant authority shall take into account the seriousness of individual cases and make reference to Article 48-3 of the Tax Collection Act to render appropriate dispositions that meet the principle of proportionality

REASONING: The Income Tax Act adopts the system of pay-as-you-earn (PAYE) by designating specific individual as the tax withholder (obligator), who, at the time of paying tax payer's income, deducts the tax amount in accordance with the regulated withholding rate or procedure, submits to the national treasury within the statutory period, completes the tax withholding voucher to the taxing authority and issues the withholding certificates to the tax payers (*see* Article 7, Paragraph 5, Article 88, Article 89, Paragraph 1, and Article 92 of the Income Tax

解釋理由書：所得稅法設有就源扣繳制度，責成特定人為扣繳義務人，就納稅義務人之所得，於給付時依規定之扣繳率或扣繳辦法，扣取稅款，在法定期限內，向國庫繳清，並開具扣繳憑單彙報該管稽徵機關，及填具扣繳憑單發給納稅義務人（所得稅法第七條第五項、第八十八條、第八十九條第一項、第九十二條規定參照）。此項扣繳義務，其目的在使國家得即時獲取稅收，便利國庫資金調度，並確實掌握課稅資料，為增進公共利益所必要（本院釋字第三一七號解釋參照）。至於國家課予何人此項扣繳義務，立法機關自得

Act). The purpose of this tax withholding obligation is to ensure the state's timely collection of tax income, to facilitate the dispatching of funds, and to take actual control over the taxing information, necessity to enhance the public interests (*see* J.Y. Interpretation No. 317). With regard to whom should be designated as the tax withholder(s), it is for the legislative body to consider candidates who are [most] suitable to carry out the above-indicated withholding system and under the premises that the principle of proportionality is complied with.

在符合比例原則之前提下，斟酌可有效貫徹上開扣繳制度之人選而為決定。

The anterior of Article 89, Paragraph 1, Sub-paragraph 2 of the Income Tax Act, as amended on December 30, 1989, stipulates: "For salary, interest, rental, commission, royalty, remuneration for carrying out occupational works, cash award or gifts given in any contest or game competition, prizes from chance winning, and income of a foreign profit-seeking business having no fixed location of business or business agent within the territory of the Republic of China, the tax withholders shall be the chief accounting

七十八年十二月三十日修正公布之所得稅法第八十九條第一項第二款前段規定：「薪資、利息、租金、佣金、權利金、執行業務報酬、競技、競賽或機會中獎獎金或給與，及給付在中華民國境內無固定營業場所或營業代理人之國外營利事業之所得，其扣繳義務人為機關、團體之主辦會計人員、事業負責人及執行業務者」。八十八年二月九日修正公布之同條款前段規定：「薪資、利息、租金、佣金、權利金、執行業務報酬、競技、競賽或機會中獎獎金或給與，及給付在中華民國境內無固定營業

personnel of the relevant organizations or institutions, the responsible person(s) of the businesses and the business executive(s).” The same provision, as amended on February 9, 1999, stipulated: “For salary, interest, rental, commission, royalty, remuneration for carrying out occupational works, cash award or gifts given in any contest or game competition, prizes from chance winning and income of a foreign profitseeking business having no fixed location of business or business agent within the territory of the Republic of China, the tax withholders shall be the head of the unit responsible for tax withholding for the relevant organizations or institutions, the responsible person(s) of the businesses and business executive(s).” The amendment on May 30, 2006 to the same provision stipulates: “For salary, interest, rental, commission, royalty, remuneration for carrying out occupational works, cash award or gifts given in any contest or game competition, prizes from chance winning, retirement pension, severance payment, termination allowance, departure allowance, lifetime pension, retirement annuity not as insurance benefits,

場所或營業代理人之國外營利事業之所得，其扣繳義務人為機關、團體之責應扣繳單位主管、事業負責人及執行業務者」，及九十五年五月三十日修正公布之同條款前段規定：「薪資、利息、租金、佣金、權利金、執行業務報酬、競技、競賽或機會中獎獎金或給與、退休金、資遣費、退職金、離職金、終身俸、非屬保險給付之養老金、告發或檢舉獎金，及給付在中華民國境內無固定營業場所或營業代理人之國外營利事業之所得，其扣繳義務人為機關、團體、學校之責應扣繳單位主管、事業負責人、破產財團之破產管理人及執行業務者」。上開規定其中以機關、團體之主辦會計人員及事業負責人為扣繳義務人，旨在使就源扣繳事項得以有效執行，目的洵屬正當。

reward for crime information or reporting, and business income of a foreign profit-seeking business having no fixed location of business or business agent within the territory of the Republic of China, the tax withholders shall be the head of the unit responsible for tax withholding for the relevant organizations, institutions, or schools, the responsible person(s) of the businesses, the trustee(s) of bankrupt estates and the business executive(s)." In order to effectively enforce the PAYE items, by designating the chief accounting personnel of the organizations or institutions, and the responsible person(s) of the businesses as tax withholders carries an appropriate objective.

As far as a taxpayer's income received from institutions, organizations or businesses, as defined under Article 88, Paragraph 1, Subparagraph 2 of the Income Tax Act, is concerned, although the payers of the respective incomes are the institutions, organizations or businesses, not the chief accounting officers of organizations or institutions or the responsible persons of the businesses, the accounting

納稅義務人自機關、團體或事業受有所得稅法第八十八條第一項第二款之所得，雖給付各該所得者為機關、團體或事業，並非機關、團體之主辦會計人員或事業負責人。惟政府機關出納人員據以辦理扣繳事務等出納工作之會計憑證，須由主辦會計人員或其授權人簽名、蓋章，會計人員並負責機關內部各項收支之事前審核與事後複核（會計法第一百零一條第一項、第九十五條規定

certificates based on which the cashiers of the government agencies conduct withholding, require the signature or seal of the chief accounting personnel or his/her authorized agent, provided that the accounting personnel is responsible for the pre-examination and reexamination of all internal expenses and receipts of the institutions (*see* Article 101 Paragraph 1 and Article 95 of the Certified Public Accountant Act). Therefore, the accounting personnel are the ones who participate the substantive withholding businesses, or, in terms of an organization, possibly conduct the substantive withholding work for that organization. In addition, since the responsible person for a business carries out duties on behalf of that business and is responsible for its success or failure, the relevant financial- expenditures, including, among other things, income tax withholding, are indeed matters under his/her supervision. Thus by bestowing the withholding obligations to the chief accounting personnel and responsible person of the business, the above-indicated provision can better implement the legislative objectives of the PAYE withholding

參照），因此係由會計人員實質參與扣繳事務；而於團體之情形，可能由會計人員實際辦理團體之扣繳事務。另事業負責人則代表事業執行業務，實際負該事業經營成敗之責，有關財務之支出，包括所得稅法上之扣繳事項，自為其監督之事務。是上開規定課予主辦會計人員及事業負責人扣繳義務，較能貫徹就源扣繳制度之立法目的，且對上開人員業務執行所增加之負擔亦屬合理，並非不可期待，與憲法第二十三條比例原則尚無牴觸。

system, provided that the added burden to the above stated personnel in their conducting of businesses is reasonable and not unexpected, thus does not contravene the principle of proportionality under Article 23 of the Constitution.

Withholding is an important measure for the taxing authority to control tax income, tax information, and to achieve tax fairness. A tax withholder who fails to withhold, under-withhold or does not truthfully file withholding documents not only causes the source of taxes being unable to control, impacts the dispatching of state funds, but also makes it easier for taxpayer to evade taxes. Especially in the event the incomer earner is an individual not residing in the Republic of China or a foreign profitseeking business having no fixed location of business or business agent within the territory of the Republic of China, given that PAYE is the chief taxing measure, the tax withholder's failure to comply with the regulations is likely to result in tax evasion and jeopardize the state's tax revenue. Article 114, Paragraph 1 of the Income Tax Act,

扣繳為稽徵機關掌握稅收、課稅資料及達成租稅公平重要手段，扣繳義務人如未扣繳或扣繳不實，或未按實申報扣繳憑單，不僅使稅源無法掌握，影響國家資金調度，亦造成所得人易於逃漏稅。尤以所得人為非中華民國境內居住之個人或在中華民國境內無固定營業場所或營業代理人之國外營利事業，係以就源扣繳作為主要課稅手段，倘扣繳義務人未依規定辦理扣繳稅款，可能導致逃漏稅之結果，損及國家稅收。七十八年十二月三十日修正公布及九十年一月三日修正公布之所得稅法第一百十四條第一款（九十年一月三日僅就同條第二款而為修正，第一款並未修正）規定：「扣繳義務人未依第八十八條規定扣繳稅款者，除限期責令補繳應扣未扣或短扣之稅款及補報扣繳憑單外，並按應扣未扣或短扣之稅額處一倍之罰鍰；其未於限期內補繳應扣未扣或短扣之稅款，或不按實補報扣繳憑單

as amended on December 30, 1989 and January 3, 2001 (the latter only amended Subparagraph 2 and left Subparagraph 1 intact) stipulates: "A tax withholder who fails to withhold tax in accordance with the provision of Article 88 shall, in addition to being ordered to pay the tax amount which should be withheld but was not withheld or has underwithheld and to submit supplemental taxwithholding certificates within a given time limit, be subject to a fine of no more than one fold of the amount of the tax amount that should be withheld but was not withheld or was short withheld. If the tax withholder still does not comply with the order to pay the tax amount or to submit supplemental taxwithholding truthfully within the given time limit, he/she shall be subject to a fine of no more than three folds the amount of the tax amount which should be withheld but was not withheld or was short withheld" (*hereinafter* the disputed provision) (the amendments on May 27, 2009 has revised the administrative penalty from double and treble to a fine of no more than double or treble, respectively.) To subject tax withholders who fail to with-

者，應按應扣未扣或短扣之稅額處三倍之罰鍰。」（下稱系爭所得稅法第一百十四條第一款規定）（九十八年五月二十七日修正公布之本款規定，已將前、後段處一倍、三倍之罰鍰，分別修正為一倍以下、三倍以下之罰鍰）於扣繳義務人未依所得稅法第八十八條規定扣繳稅款者，限期責令其補繳應扣未扣或短扣之稅款及補報扣繳憑單，並予以處罰，以督促為扣繳義務人之機關、團體主辦會計人員、事業負責人依規定辦理扣繳稅款事項，乃為確保扣繳制度之貫徹及公共利益所必要。

hold in accordance with Article 88 of the Income Tax Act to pay the tax discrepancy and to supplement the withholding certificates (returns) within the designated deadline, together with penalties, serves to urge the chief accounting personnel of an institution or organization or person(s) responsible for a business, acting as tax withholders, conduct withholding in accordance with the regulations, and is necessary to ensure that the withholding system is carried out as well as the public interest.

How to sanction an act in violation of a duty under the administrative law is, by definition, subject to the discretionary authority of the legislative body, which should weigh in the particular nature of the matter, the extent of the legal interests being infringed upon, and the effectiveness of control it intends to achieve. As long as it does not exceed the principle of proportionality, it cannot be easily said to be unconstitutional (*see* J.Y. Interpretation No. 517). In the above-indicated provisions on the supplemental tax payment and submitting the withholding cer-

違反行政法上之義務應如何制裁，本屬立法機關衡酌事件之特性、侵害法益之輕重程度以及所欲達到之管制效果，所為立法裁量之權限，苟未逾越比例原則，要不能遽指其為違憲（本院釋字第五一七號解釋參照）。上開責令補繳稅款及補報扣繳憑單暨處罰之規定中，基於確保國家稅收，而命扣繳義務人補繳應扣未扣或短扣之稅款，扣繳義務人於補繳上開稅款後，納稅義務人固可抵繳其年度應繳納之稅額，然扣繳義務人仍可向納稅義務人追償之（所得稅法第七十一條第一項前段、第九十四條但書規定參照），亦即補繳之稅款仍須

tificates order, it is to ensure the state tax revenue that orders are issued to tax withholders to pay the unreported or underreported but should have been reported tax amount. After a tax withholder makes the supplemental tax withholding payment, while the taxpayer can offset it against the annual tax payment, the tax withholder can nevertheless file claim against the taxpayer. (*see* Article 71, Paragraph 1 and the proviso of Article 94 of the Income Tax Act). In other words, the taxpayers are obligated to restitute the tax withholders for the discrepancy. Therefore, by ordering the tax withholder to pay the supplemental tax withholding amount and the filing of certificates would not have caused excessive damages to the property right of the tax withholder. For tax withholder who pay the discrepant tax withholding amount and file the certificates within the deadline, given that it has caused relatively minor damages to the national treasury and tax fairness, by subjecting to a fine no more than double the discrepant tax amount is not excessive; for those who refuse to pay within the deadline after receiving the notice, since it constitutes a

由納稅義務人負返還扣繳義務人之責，是責令扣繳義務人補繳稅款及補報扣繳憑單部分，並未對扣繳義務人財產權造成過度之損害。而扣繳義務人已於限期內補繳應扣未扣或短扣之稅款及補報扣繳憑單者，因所造成國庫及租稅公平損害情節較輕，乃按應扣未扣或短扣之稅額處一倍之罰鍰，處罰尚未過重；其於通知補繳後仍拒未於限期內補繳應扣未扣或短扣之稅款者，因違反國家所課予扣繳稅捐之義務，尤其所得人如非中華民國境內居住之個人或在中華民國境內無固定營業場所或營業代理人之國外營利事業，扣繳義務人未補繳稅款，對國家稅收所造成損害之結果，與納稅義務人之漏稅實無二致，且又係於通知補繳後仍拒未補繳，違規情節自較已補繳稅款之情形為重，乃按上開稅額處三倍之罰鍰，其處罰尚非過當。準此，系爭所得稅法第一百十四條第一款規定，限期責令扣繳義務人補繳應扣未扣或短扣之稅款及補報扣繳憑單部分，暨就已於限期內補繳應扣未扣或短扣之稅款及補報扣繳憑單，按應扣未扣或短扣之稅額處一倍之罰鍰部分；就未於限期內補繳應扣未扣或短扣之稅款，按應扣未扣或短扣之稅額處三倍之罰鍰部分，尚未牴觸憲法第二十三條之比例原則，與憲法保

violation of the duty to pay tax, particularly for individuals who do not reside in the territory of the Republic of China or foreign profit-seeking businesses that do not have fixed locations for businesses or business agent within the territory of the Republic of China, the failure to pay withholding taxes by the tax withholders results in damages to the state tax revenue not different from tax payers' evasion of taxes. Furthermore, because the refusal to pay occurs after being notified, the degree of violation is certainly more significant than those who eventually pay in time. Thus, an administrative fine trebling the tax amount is not overbearing. As such, on the part of the disputed provision that provides an administrative fine doubling the withholding tax discrepancy for tax withholders who make the supplemental payment and filing of certificates in time, and the trebling of fines for those who fail to pay within the deadline, it neither contravenes. the principle of proportionality under Article 23 of the Constitution, nor the protection of people's property rights, equal protection under Article 7 of the Constitution, and the principle of taxation

障人民財產權之意旨無違，亦無違背憲法第七條平等權、第十九條租稅法律主義可言。

by law under Article 19 of the Constitution.

The withholding obligations bestowed to a tax withholder, however, consists of withholding tax payment and the submission of tax withholding certificates, the violation of which should carry different degrees of damage to the national treasury's tax revenue and public interests. On the posterior of the disputed provision, if the tax withholder should have timely paid the discrepant amount that should have been withheld, but did not truthfully submit the supplemental tax withholding certificates, while the tax authority's control over the taxing data and tax payers' return filing may be impacted, now that the discrepant tax amount has been paid, it should generate lesser adverse impact on tax revenue than those who fail to make the payment. Thus by imposing the same treble administrative fines on this part as those who do not make the payment within the deadline, and without authorizing the tax authorities to exercise discretion, by taking into consideration the circumstances of the

惟扣繳義務人之扣繳義務，包括扣繳稅款義務及申報扣繳憑單義務，二者之違反對國庫稅收及租稅公益之維護所造成之損害，程度上應有所差異。系爭所得稅法第一百十四條第一款後段規定中，如扣繳義務人已於限期內補繳應扣未扣或短扣之稅款，僅不按實補報扣繳憑單者，雖影響稅捐稽徵機關對課稅資料之掌握及納稅義務人之結算申報，然因其已補繳稅款，較諸不補繳稅款對國家稅收所造成之不利影響為輕，乃系爭所得稅法第一百十四條第一款後段規定，就此部分之處罰，與未於限期內補繳稅款之處罰等同視之，一律按應扣未扣或短扣之稅額處三倍之罰鍰，未賦予稅捐稽徵機關得參酌具體違章狀況，按情節輕重裁量罰鍰之數額，其處罰顯已逾越必要程度，不符憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之意旨有違，應自本解釋公布之日起停止適用。有關機關對未於限期內按實補報扣繳憑單，而處罰尚未確定之案件，應斟酌個案情節輕重，並參酌稅捐稽徵法第四十八條之三之規定，另為符合比例原則之適當處置，併予指明。

specific violation and seriousness to determine the amount of fines, the penalty has apparently exceeded the necessary degree and is not consistent with the principle of proportionality under Article 23 of the Constitution and affronts the protection of people's property rights under Article 15 of the Constitution. The provision shall cease to be applicable as of the issuance date of this Interpretation. It is also pointed out that by rendering penalties on cases yet to be ripened for not filing the withholding certificates (returns) within the deadline, the relevant authority shall take into account the seriousness of individual cases and make reference to Article 48-3 of the Tax Collection Act to render appropriate dispositions that meet the principle of proportionality.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Yu-hsiu Hsu filed dissenting opinion.

Justice Mao-Zong Huang filed dissenting opinion.

本號解釋葉大法官百修提出協同意見書；許大法官玉秀提出不同意見書；黃大法官茂榮提出不同意見書。

EDITOR'S NOTE:

Summary of Facts:I. Petition for Interpretation by Petitioner A

2. Summary of the four petitions:

(A)

Petitioner A is the responsible person of a technology company. The company purchased foreign computer online software in 2001, but did not withhold the tax in the amount of NT$4,507,940 in accordance with the regulations, nor tendered the payment and submitting the supplemental tax-withholding certificates within the deadlines, thus was subject to the treble fine of NT$ 13,523,820.

After the case was overturned through the administrative litigation, the technology company claimed that Article 89, Paragraph 1, Subparagraph 2 of the Income Tax Act, as amended on February 9, 1999 and applied by the Supreme Administrative Court in its (98) Pan Zi No. 275 judgment (2009), which designated the responsible persons of businesses as tax withholders and Article 114, Paragraph 1 of the Income Tax Acts, as

編者註：

事實摘要：我。請願人請求解釋

2. 四份請願書摘要：

A. 林0裕聲請案

聲請人為奧0科技股份有限公司負責人，90 年間購買外國電腦線上軟體，未依規定扣取稅款 4,507,940 元，且未依限補繳稅款、補報扣繳憑單，被按稅額處以 3 倍罰鍰 13,523,820 元。

案經提起行政爭訟均遭駁回，認最高行政法院 98 年度判字第 275 號判決所適用之第 89 條第 Ⅰ 項第 2 款前段（88.2.9 修正公布），以事業負責人為扣繳義務人規定；第 114 條第 1 款後段（90.1.3 修正公布），未補繳稅、未補報憑單，按應扣未扣稅額處 3 倍罰鍰規定違憲，聲請解釋。

amended on January 3, 2001, which imposes treble administrative fine over the discrepant tax amount for nonpayment of withholding taxes or nonsubmission of withholding certificates, are unconstitutional.

(B)

Petitioner B is the responsible person of a business and signed a contract with a foreign company in 2001 to rent certain offshore oil storage tanks, but did not deduct the 20% tax withholding based on the rental and management fee in the amount of NT$ 4,316,811. The Taipei National Tax Administration then ordered the Petitioner to pay what should have been withheld but did not and submitted supplemental tax withholding certificates, the Petitioner only paid the tax but did not submit supplemental tax withholding certificates, and was fined the treble amount of NT$ 1,295, 0433.

After the case was overturned through the administrative litigation, the present petition was filed, claiming that the posterior of Article 114, Paragraph 1

B. 鄒０明聲請案

聲請人為眾０實業股份有限公司負責人，於 90 年間與外國公司簽訂契約，出租境外儲油槽，未按租金及管理費之給付額扣繳 20％稅款 4,316,811 元，臺北市國稅局乃責令聲請人補繳應扣未扣稅款及補報扣繳憑單，聲請人於期限內補繳稅款，惟仍未依限按實補報扣繳憑單，被按稅額處以 3 倍罰鍰計 1,295,0433 元。

案經提起行政爭訟均遭駁回，認最高行政法院 98 年判字第 685 號判決所適用之所得稅法第 114 條第 1 款後段（90.1.3 修正公布），不按實補報扣繳

of the Income Tax Act, as amended on January 3, 2001 and applied by the Supreme Administrative Court in its (98) Pan Zi No. 685 (2009) judgment, which imposes treble administrative fines on the discrepant tax payment to those who did not truthfully submit their tax withholding certificates, is unconstitutional.

(C)

C is the responsible person of a technology company, thus also the tax withholder of income taxes. Because the company did not withhold taxes in accordance with the regulation between 2004-2006, nor pay the withholding taxes or submit supplemental tax withholding certificates within the deadline after being notified, the Kaoshiung National Tax Administration issued the discrepant tax in the amount of NT$ 92, 9138, 1,562,682, and 964,113 respectively and imposed the treble administrative fines on the company in the sum of NT$ 2,787,900, 4,688,000, and 2,892,300.

After the case was overturned through the administrative litigation, the present petition was filed, claiming that

憑單者，按應扣未扣或短扣之稅額處 3 倍罰鍰規定違憲，聲請解釋。

C. 薛 0 承聲請案

聲請人為詳 0 科技股份有限公司負責人，亦即所得稅規定之扣繳義務人，財政部高雄市國稅局以該公司於 93 年度、94 年度、95 年度給付納稅義務人薪資所得，未依規定辦理扣繳稅款，經通知限期補繳應扣未扣稅款及補報扣繳憑單，惟未依限補繳及補報，遂分別發單補徵應扣未扣稅款 92,9138 元、1,562,682 元、964,113 元，並按應扣繳稅額裁處 3 倍罰鍰，計 2,787,900 元、4,688,000 元、2,892,300 元。

案經提起行政爭訟均遭駁回，認為 97 年裁字第 3165 號裁字第 3163 號、第 3164 號、第 3165 號裁定，所適用之

Article 89, Paragraph 1, Subparagraph 2 of the Income Tax Act, as promulgated on February 9, 1999, amended on May 30, 2006 and applied by the Supreme Administrative Court (97) Zhai Zi Nos. 3165, 3163, 3164 and 3165 rulings, which designates the tax withholder shall be the responsible persons of businesses as tax withholders, is unconstitutional..

(D)

D, the responsible person and chief accounting officer of an cultural and educational foundation, also the tax withholder designated by the Income Tax Act, did not withhold tax and submit tax withholding certificates in accordance with the regulations. The Taipei National Tax Administration ordered D to pay NT$ 4,572,076, the amount that should have been withheld but did not from the performance remunerations in 1996, to submit the supplemental tax withholding certificates and NT$ 6,065,263 that should have been withheld from the performance remunerations, rental income and performing salaries in 1997, but D did not pay the taxes nor submitted the supplemental tax withholding certificate. Therefore, the

所得稅法第 89 條第 1 項第 2 款（88.2.9 修正公布、95.5.30 修正公布），以事業負責人為扣繳義務人，以及第 114 條第 1 款前、後段規定（90.1.3 修正公布），有違憲疑義，聲請解釋。

D. 樊 0 儂聲請案

聲請人為財團法人新 0 文教基金會負責人兼主辦會計，亦即所得稅法規定之扣繳義務人，未依法扣取稅款並申報扣繳憑單，經臺北市國稅局限期責令補繳 85 年度演出報酬之應扣未扣稅款 457 萬 2076 元及補申報扣繳憑單、86 年度演出薪資、租賃所得、演出報酬之應扣未扣稅款 6,065,263 元，惟聲請人未依限補繳及補報，臺北市財稅局乃按應扣未扣稅額處 3 倍罰鍰，計 85 年度 13,716,228 元、86 年度 18,195,789 元。

Taipei National Tax Administration imposed treble penalty of NT$ 13,716,228 for 1996 and NT$ 18,195,789 for 1997.

After the case was overturned through administrative litigation, D filed the present petition, claiming that Article 89, Paragraph 1, Subparagraph 2 of the Income Tax Acts, as amended on February 9, 1999 and applied by the Supreme Administrative Court in (95) Pan Zi Nos. 1817 and 1752 judgments, which designates the responsible persons of businesses as tax withholders and the anterior and posterior of Article 114, Paragraph 1 of the Income Tax Act, as amended on January 3, 2001, are unconstitutional.

案經提起行政爭訟均遭駁回，認最高行政法院 95 年度判字第 1817 號、第 1752 號判決，所適用之所得稅法第 89 條第 1 項第 2 款規定（78.12.30 修正公布），以機關、團體之主辦會計人員為扣繳義務人，以及第 114 條第 1 款前、後段規定（78.12.30 修正公布），有違憲疑義，聲請解釋。。

J. Y. Interpretation No.674（April 2, 2010）*

ISSUE: According to the administrative letter by Ministry of Finance and administrative order of Ministry of the Interior, whether the preclusion of the application of agricultural land tax levy to specific urban odd-shaped lots is unconstitutional?

RELEVANT LAWS:

Article 19 of the Constitution of the Republic of China（憲法第十九條）; J.Y. Interpretation Nos. 620, 622 and 625（司法院釋字第六二〇號、第六二二號、第六二五號解釋）; Article 14, Article 22, Paragraph 1, Subparagraph 4 of the Land Tax Act（土地稅法第十四條、第二十二條第一項第四款）; Article 22, Paragraph 1, Subparagraph 4 of the Equalization of Land Rights Act（平均地權條例第二十二條第一項第四款）; Article 44 of the Building Act（建築法第四十四條）; Administrative Letter *Tai Cai Shui Zi* No. 820570901 of December 16, 1993, issued by Ministry of Finance（財政部八十二年十二月十六日發布之台財稅字第八二〇五七〇九〇一號函）; Point 4 of the Operation Principles on the Delineation of Construction Limitations or Restrictions under Article 22 of the Equalization of Land Rights Act as published in Administrative Order Tai Nei Zi No. 0930069450 of April 12, 2004, issued by Ministry of the Interior（內政部九十三年四月十二日台內地

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* Translated by Spenser Y. Hor, Esq. and Chien Yeh Law Offices.

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

字第〇九三〇〇六九四五〇號令訂定發布之「平均地權條例第二十二條有關依法限制建築、依法不能建築之界定作業原則」第四點）.

KEYWORDS:

principle of taxation by law（租稅法律主義）, agricultural land tax levy（田賦）, land value tax（地價稅）, odd shaped lots（畸零地）.**

HOLDING: The Ministry of Finance Administrative Letter *Tai Cai Shui Zi* No. 820570901, issued on December 16, 1993, explicitly states: "For oddshaped lots not independently eligible for construction application and lands not suitable as building sites without rearrangement, Article 22, Paragraph 1, Subparagraph 4 of the Land Tax Act concerning the levy of agricultural tax does not apply." Point 4 of the Operation Principles on the Delineation of Construction Limitations or Restrictions under Article 22 of the Equalization of Land Rights Act, issued by Ministry of the Interior Administrative Order *Tai Nei Di Zi* No. 0930069450 of April 12, 2004, provides: "Since oddshaped lots can be agreed to

解釋文：財政部於中華民國八十二年十二月十六日發布之台財稅字第八二〇五七〇九〇一號函明示：「不能單獨申請建築之畸零地，及非經整理不能建築之土地，應無土地稅法第二十二條第一項第四款課徵田賦規定之適用」；內政部九十三年四月十二日台內地字第〇九三〇〇六九四五〇號令訂定發布之「平均地權條例第二十二條有關依法限制建築、依法不能建築之界定作業原則」第四點規定：「畸零地因尚可協議合併建築，不得視為依法限制建築或依法不能建築之土地」。上開兩項命令，就都市土地依法不能建築，仍作農業用地使用之畸零地適用課徵田賦之規定，均增加法律所無之要件，違反憲法第十九條租稅法律主義，其與本解釋意旨不符部分，應自本解釋公布之日起

merge with a construction, restriction cannot be placed on it as building sites and such odd lot can be used as building sites by law." The abovementioned administrative orders created additional requirements not provided under the statute concerning the application of agricultural land tax levy to urban odd-shaped lands that cannot be used as building sites by law for construction, but are still used for agricultural purpose contravenes the principle of taxation by law under Article 19 of the Constitution. To the extent that they are inconsistent with this Interpretation, these administrative orders shall no longer be applied as of the issuance date of this Interpretation.

不再援用。

REASONING: Article 19 of the Constitution states that the people shall have the duty to pay taxes in accordance with law. It means that the State must impose tax duty or provide preferential tax deduction or exemption treatment to its people based on laws or regulations having clear authorization of a given law, taken into consideration such conditions as the subject, subject matter, tax base or tax

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、租稅客體對租稅主體之歸屬、稅基、稅率、納稅方法及納稅期間等租稅構成要件，以法律明文規定。主管機關本於法定職權就相關法律規定所為之闡釋，自應秉持憲法原則及相關法律之立法意旨，遵守一般法律解釋方法而為

rates. The related statutory interpretations by the competent authority shall abide by the principles of the Constitution and the meanings and purpose of the relevant statutes, and comply with the general rules of legislative interpretation. Any interpretation that exceeds the boundary of the law that creates levy duties not provided under the statute is not permitted by the principle of taxation by law under Article 19 of the Constitution (*see* J.Y. Interpretation Nos. 620, 622 and 625).

之；如逾越法律解釋之範圍，而增加法律所無之租稅義務，則非憲法第十九條規定之租稅法律主義所許（本院釋字第六二0號、第六二二號、第六二五號解釋參照）。

Article 14 of the Land Tax Act states: “Except for lands subject to agricultural land tax levy under Article 22, lands whose value has been determined shall be subject to land value (real property) tax.” Pursuant to Article 22, Paragraph 1, Subparagraph 4 of the Land Tax Act and Article 22, Paragraph 1, Subparagraph 4 of the Equalization of Land Rights Act, non-urban lands designated by law for agricultural purpose or its value has not been determined are subject to agricultural land tax levy, so are urban lands which “cannot be building sites by law, but are still being used for agricul-

土地稅法第十四條規定：「已規定地價之土地，除依第二十二條規定課徵田賦者外，應課徵地價稅」；依同法第二十二條第一項第四款及平均地權條例第二十二條第一項第四款之規定，非都市土地依法編定之農業用地或未規定地價者，徵收田賦；而都市土地「依法不能建築，仍作農業用地使用者」，亦同。依土地稅法規定，田賦之負擔，一般較地價稅為輕（土地稅法第二章、第三章參照；實務上田賦自七十六年第二期起停徵，見行政院七十六年八月二十日台七十六財字第一九三六五號函）。都市土地已規定地價者，原應改課徵地價稅，惟依法不能建築之都市土地，仍

tural purpose." In general, the agricultural land tax levy under the Land Tax Act is less burdensome than land value tax (*see* Chapters 2 and 3 of the Land Tax Act; whereas in practice the agricultural land tax levy was halted as of the second period of 1987, see Executive Yuan Directive *Tai* (76) *Cai Zi* No. 19365 (August 20, 1987). While the levy of urban lands whose values have been determined should have been switched and subjected to land value tax, yet for the urban lands that cannot be used as building sites by law but still being used for agricultural purpose, due to their limited incomes, agricultural land tax levy is nevertheless levied upon farmers to release their burdens (*see* the Legislative Yuan Gazette: vol. 65, No. 71, pages 8, 11, 18; vol. 65, No. 95, page 28; vol. 66, No. 44, pages 6, 26; vol. 66, No. 51, pages 19-20; vol. 75, No. 45, page 39).

作農業用地使用者，收益有限，為減輕農民負擔，仍課徵田賦（立法院公報第六十五卷第七十一期第八頁、第十一頁、第十八頁；第六十五卷第九十五期第二十八頁；第六十六卷第四十四期第六頁、第二十六頁；第六十六卷第五十一期第十九至二十頁；第七十五卷第四十五期第三十九頁參照）。

The so-called "cannot be used as building sites by law" is not clearly defined in the Land Tax Act and the Equalization of Land Rights Act, and the competent authority is not explicitly

所謂「依法不能建築」，土地稅法及平均地權條例未明定其意義，亦未明確授權主管機關以命令為補充之規定。而依建築法第四十四條規定：「直轄市、縣（市）（局）政府應視當地實

authorized to promulgate supplemental regulations. Yet Article 44 of Building Act stipulates: "The special municipality or county (city) (bureau) government shall regulate, based on the actual condition of the locality, the width and depth of minimum square measurement for the construction foundation. For oddshaped or narrow square measurement not in compliance with the regulations, there shall be no construction unless the width and depth of the minimum square measurement is met with negotiated adjustment of landscape or combination of usage with the adjacent land(s)." Thus, for lands that have odd-shaped or narrow square measurement not in compliance with the regulations (*i.e.*, "odd-shaped lots") to reach the minimum width and depth square measurement for construction, they must be in negotiations for combined usage with the adjacent lands to reach that minimum requirement. Thus, before this combined usage is to take place, given that no independent construction can be made under the Building Act, the [odd-shaped] lot should be qualified as "cannot be used as building sites by law" under Article

際情形，規定建築基地最小面積之寬度及深度；建築基地面積畸零狹小不合規定者，非與鄰接土地協議調整地形或合併使用，達到規定最小面積之寬度及深度，不得建築。」故建築基地面積畸零狹小不合規定之土地（即「畸零地」），如欲建築者，必須與鄰接土地協議合併使用，達到規定最小面積之寬度及深度後，始得為之。是畸零地在與鄰接土地合併使用前，依建築法規定既不得單獨建築，應屬上開土地稅法第二十二條第一項第四款及平均地權條例第二十二條第一項第四款「依法不能建築」之情形。而仍作農業用地使用之畸零地，在與鄰接土地合併使用前，既無法建築以獲取較高之土地收益，依土地稅法及平均地權條例上開規定之立法意旨，自應課徵田賦。

22, Paragraph 1, Subparagraph 4 of the Land Tax Act and Article 22, Paragraph 1, Subparagraph 4 of the Equalization of Land Rights Act. As to the oddshaped lot still being used for agricultural purpose, before the combined usage with the adjacent land is to take place, since it cannot be constructed for higher profits, based on the legislative purpose of the above-mentioned provisions under the Land Tax Act and the Equalization of Land Rights Act, it shall naturally be subject to the levy of agricultural land tax.

The Ministry of Finance Administrative Letter *Tai Cai Shui Zi No*. 820570901, issued on December 16, 1993, explicitly states: "For oddshaped lots not independently eligible for construction application and lands not suitable for construction without rearrangement, Article 22, Paragraph 1, Subparagraph 4 of the Land Tax Act concerning the levy of agricultural tax does not apply." Point 4 of the Operation Principles on the Delineation of Construction Limitations or Restrictions under Article 22 of the Equalization of Land Rights Act, issued by the Ministry of

財政部八十二年十二月十六日台財稅字第八二０五七０九０一號函明示：「不能單獨申請建築之畸零地，及非經整理不能建築之土地，應無土地稅法第二十二條第一項第四款課徵田賦規定之適用」；內政部九十三年四月十二日台內地字第０九三００六九四五０號令訂定發布之「平均地權條例第二十二條有關依法限制建築、依法不能建築之界定作業原則」第四點規定：「畸零地因尚可協議合併建築，不得視為依法限制建築或依法不能建築之土地」。上開兩項命令，固為主管機關本於法定職權所發布，惟都市土地仍作農業用地使用

the Interior Administrative Order *Tai Nei Di Zi No*. 0930069450 on April 12, 2004, provides that odd-shaped lots subject to negotiated combined-construction may not be considered as limited or restrictive construction lands under the statute. "Since odd-shaped lots can be agreed to merge with a construction, restriction cannot be placed on it as building sites and such odd lot can be used as building sites by law." Although these two administrative orders were issued by the competent authority based on statutory authorization, yet by precluding the oddshaped urban lands still being used for agricultural purpose from applying the agricultural land tax levy under Article 22, Paragraph 1, Subparagraph 4 of the Land Tax Act and Article 22, Paragraph 1, Subparagraph 4 of the Equalization of Land Rights Act has exceeded the scope of statutory interpretation, created additional requirements not provided under the statute, and contravenes the principle of taxation by law under Article 19 of the Constitution. To the extent that they are inconsistent with this Interpretation, these administrative orders shall no longer be applied as of the

之畸零地，因而無從適用土地稅法第二十二條第一項第四款及平均地權條例第二十二條第一項第四款之規定課徵田賦，逾越法律解釋之範圍，增加土地稅法及平均地權條例上開課徵田賦規定所無之要件，違反憲法第十九條租稅法律主義，其與本解釋意旨不符部分，應自本解釋公布之日起不再援用。

issuance date of this Interpretation.

On the Petitioner's claim that the Ministry of Finance's Administrative Letter *Tai Cai Shui Zi* No. 37278 of October 30, 1976 (mistakenly identified as No. 37378 in the petition) also violates the Constitution, given that the Petitioner did not specify how his right protected under the Constitution was infringed, it does not meet the requirement under Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act and shall be dismissed under Subparagraph 3 of the same provision.

至於聲請人指稱財政部六十五年十月三十日台財稅字第三七二七八號（聲請書誤植為第三七三七八號）函釋亦有違憲疑義，並據以聲請解釋憲法部分，查聲請人並未具體指摘該號函釋如何侵害其受憲法所保障之權利，核與司法院大法官審理案件法第五條第一項第二款規定不符，依同條第三項規定，應不受理，併此指明。

EDITOR'S NOTE:

Summary of facts:In 2005, the Petitioner acquired two parcels of urban lands located in Changhua County, and both were odd-shaped lots being used for agricultural purpose (hereinafter disputed land), and were originally subject to the levy of agricultural land tax.

編者註：

事實摘要：（一）本件聲請人於94年間，取得2筆位於彰化縣的都市土地，該2筆土地是仍作農業用地使用之畸零地（下稱系爭土地）。

Then the tax-assessing authority determined that the disputed land does not qualify as "cannot be used as build-

（二）稽徵機關認為系爭土地不符合土地稅法第22條第1項第4款及平均地權條例第22條第1項第4款有關

ing sites by law and is still being used for agricultural purpose" under Article 22, Paragraph 1, Subparagraph 4 of the Land Tax Act and Article 22, Paragraph 1, Subparagraph 4 of the Equa-lization of Land Rights Act, thus ineligible for agricultural land tax levy and should be subject to property value tax levy. As a result, the taxing authority imposed back taxes in the amount of NT$5,308 each year for 2005 and 2006 respectively, bring the total to NT$10,616.

課徵田賦規定的要件，應課徵地價稅，於是發單補徵系爭土地 94、95 年度地價稅分別為 5,308 元，合計共 10,616 元。聲請人不服，提起複查、訴願、行政訴訟，經最高行政法院 98 年度裁字第 2108 號裁定駁回確定。

The Petitioner is not satisfied with the result and instituted the Administrative litigation. The Supreme Administrative Court denied the case in (98) Cai Zi No. 2108 (2009), and the judgment was final. The Petitioner asserted that the disputed administrative orders relied on in the judgment rendered the disputed land ineligible for agricultural land tax levy. The ruling was on the ground that "the odd-shaped lot may still be combined with the adjacent lot for construction, thus does not qualify as non-constructible land by the law." This has created additional requirements not provided under the stat-

（三）聲請人主張，上開裁定所適用之系爭行政命令，以「畸零地尚可與鄰地協議合併建築，故非依法不能建築之土地」為由，使都市土地仍作農業用地使用之畸零地，無法適用土地稅法及平均地權條例上開課徵田賦之規定，係增加法律所無之要件，有違反憲法第 19 條租稅法律主義之疑義，聲請解釋。

ute and raised the question of violating the principle of taxation by law under Article 19 of the Constitution.

J. Y. Interpretation No.675（April 9, 2010）*

ISSUE: Does the provision in the Act for the Establishment and Administration of the Financial Restructuring Fund, which prohibits distressed or non-performing financial institutions from paying out non-deposit liabilities unconstitutional ?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第 7 條）; J.Y. Inter-pretation Nos. 485, 488, and 596（司法院釋字第 485、488 及 596 號解釋）; Article 5, paragraph 3 of the Act for the Establishment and Administration of the Financial Restructuring Fund, as amended on July 9, 2001 (行政院金融重建基金設置及管理條例第 5 條第 3 項，90 年 7 月 9 日制定公布); Article 1 and Article 4, Paragraph 5 of the Act for the Establishment and Administration of the Financial Restructuring Fund, amended as of June 22, 2005(行政院金融重建基金設置及管理條例第 1 條、第 4 條第 5 項 , 94 年 6 月 22 日修正公布); Article 1 & Article 15, Paragraph 1 and Article 17, Paragraph 2, of the Deposit Insurance Act (存款保險條例第 1 條、第 15 條第 1 項、第 17 條第 2 項前段), Article 62 of the Banking Act（銀行法第 62 條）; Article 5, Paragraph 1, Sub-paragraphs 2 and 3 of the Constitutional Interpretation Procedure Act (司法院大法官審理案件法第 5 條第 1 項第 2 款、第 3 項).

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* Translated by Dr. Cheng-Hwa Kwang.

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

KEYWORDS:

payout, compensate (賠付), substantive equality (實質平等), deposit insurance (存款保險), deposit liabilities (存款債務), non-deposit liabilities (非存款債務), order of financial credibility (金融信用秩序), Financial Restructuring Fund (金融重建基金), subordinated bank debentures (bonds) (次順位金融債), Financial Supervisory Commission of the Executive Yuan (行政院金融監督管理委員會).**

HOLDING: Article 4, Paragraph 5 of the Act for the Establishment and Administration of the Financial Restructuring Fund, amended as of June 22, 2005, provides that "[s]ubsequent to the promulgation of the amended Act, when the competent authority or the central competent authority for agriculture finance handles a distressed financial institution, non-deposit debts of said institution will not be paid off." It is meant to enhance the utility of the Financial Restructuring Fund of the Executive Yuan, to protect the rights and interests of the depositors of the financial institution, and to stabilize the order of financial credibility, thus carries appropriate objectives. Given that

解釋文：中華民國九十四年六月二十二日修正公布之行政院金融重建基金設置及管理條例第四條第五項，關於「本條例修正施行後，主管機關或農業金融中央主管機關處理經營不善金融機構時，該金融機構非存款債務不予賠付」之規定，就非存款債務不予賠付部分，旨在增進行政院金融重建基金之使用效益，保障金融機構存款人權益及穩定金融信用秩序，其目的洵屬正當，該手段與立法目的之達成具有合理關聯性，與憲法第七條規定尚無牴觸。

there is a reasonable nexus between the means and the accomplishment of these legislative objectives, there is no contravention to Article 7 of the Constitution.

REASONING: The Petitioner requested an interpretation on the constitutionality of Article 4, Paragraph 5 of the Act for the Establishment and Administration of the Financial Restructuring Fund of the Executive Yuan, as amended on June 22, 2005 (hereinafter disputed provision), which was applied in the civil judgment of the Supreme Court, (97) Tai Shun No. 2252 (2008)(hereinafter final judgment). The final judgment, applying the illustrations in the memorandum docketed as Gin Guan Yin (2) No. 09700095310 (April 16, 2008) and issued by the Financial Supervisory Commission of the Executive Yuan, held that, The Chinese Bank (i.e., the financial institution being taken control) should tentatively halt its compensation of nondeposit debts upon being taken over. That memorandum, in turn, also relied upon the disputed provision by indicating that, in managing the nonperforming institutions, the governing

解釋理由書：本件聲請人就最高法院九十七年度台上字第二二五二號民事判決（下稱確定終局判決）所適用之九十四年六月二十二日修正公布之行政院金融重建基金設置及管理條例第四條第五項規定（下稱系爭規定）有違憲疑義，聲請解釋。查確定終局判決認中華商業銀行（即被接管之金融機構）遭接管後，應暫停非存款債務之清償，係引用行政院金融監督管理委員會九十七年四月十六日金管銀（二）字第０九七０００九五三一０號函之說明，而該函亦係依據系爭規定，認為主管機關處理經營不善金融機構時，該金融機構非存款債務不予賠付。可見確定終局判決已援用系爭規定作為判決理由之基礎，應認系爭規定已為確定終局判決所適用，合先敘明。

authority is prohibited from paying out non-deposit debts. It follows that the final judgment has cited the disputed provision as the basis for its reasoning and the disputed provision should, thus, be deemed to be applied by the final judgment. This should be pointed out first.

The principle of equality prescribed under Article 7 of the Constitution is not meant to be equality only in form nor in an absolute and mechanical sense. Rather, it aims to guarantee the substantive equal protection under the law. The legislative body, based on the value system of the Constitution and the purpose of enactment, may naturally consider the diversity of the regulated subject areas and provide reasonable differential treatment (*see* J. Y. Interpretation Nos. 485, 596).

The original Article 5, Paragraph 3 of the Act for the Establishment and Administration of the Financial Restructuring Fund, as amended on July 9, 2001, provided: "The Central Deposit Insurance Corporation, in compliance with Article 15, Paragraph 1 and Article 17,

憲法第七條規定，中華民國人民在法律上一律平等，其內涵並非指絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，立法機關基於憲法之價值體系及立法目的，自得斟酌規範事物性質之差異而為合理之區別對待（本院釋字第四八五號、第五九六號解釋參照）。

九十年七月九日制定公布之行政院金融重建基金設置及管理條例第五條第三項原規定：「中央存款保險公司依存款保險條例第十五條第一項、第十七條第二項前段規定辦理時，得申請運用本基金，全額賠付經營不善金融機構之存款及非存款債權……。」此規定於

Paragraph 2 of the Deposit Insurance Act, may apply for and dispose of this Fund to pay out in full the deposit and non-deposit liabilities of the distressed financial institution….” This provision was amended on June 22, 2005 and became Article 4, Paragraph 5: “Subsequent to the promulgation of the amended Act, when the competent authority or the central competent authority for agriculture finance handles a distressed financial institution, nondeposit debts of said institution will not be paid off.” Thus the scope of the coverage by the Financial Restructuring Fund of the Executive Yuan (hereinafter Restructuring Fund (Resolution Trust)) for distressed or non-performing financial institutions was revised from the original full compensation for deposit and non-deposit liabilities to nondeposit debts only. Hence, for non-deposit liabilities incurred after the 2005 amendment to the above provision, they will no longer be compensated. That the disputed provision, reverted to the system of deposit insurance and provided differential treatments between deposit non-deposit debts is meant to enhance the utility of the Financial Restructuring Fund of the

九十四年六月二十二日修正公布為第四條第五項：「本條例修正施行後，主管機關或農業金融中央主管機關處理經營不善金融機構時，該金融機構非存款債務不予賠付。」將行政院金融重建基金（下稱重建基金）賠付債務之範圍，由原規定全額賠付經營不善金融機構之存款及非存款債務，改為僅就存款債務予以賠付，對上開條例於九十四年修正施行後發生之非存款債務不予賠付。系爭規定回歸存款保險制度，就存款及非存款債務是否予以賠付作差別待遇，旨在增進重建基金之使用效益，保障金融機構存款人權益及穩定金融信用秩序（存款保險條例第一條及行政院金融重建基金設置及管理條例第一條規定參照），其立法目的洵屬正當。

Executive Yuan, to protect the rights and interests of the depositors of the financial institution, and to stabilize the order of financial credibility.(*see* Article 1 of the Deposit Insurance Act and Article 1 of the Act for the Establishment and Administration of the Financial Restructuring Fund), thus carries appropriate objectives.

Whether the scope of compensation for the Restructuring Fund should be limited to deposit liabilities or should also cover non-deposit liabilities involves the issue of how to effectively appropriate and utilize the Restructuring Fund. The legislative body may indeed make proper decisions after examining the financial condition of the state and the necessity to maintain the order of the financial market. Besides, the nature of deposit liabilities is different from that of non-deposit liabilities after all. The establishment of the Restructuring Fund is to ensure depositors' confidence in financial ins-titutions, so as to stabilize the order of financial credibility. In considering the limited scale of the Restructuring Fund and to reduce its burden so that the Restructuring Fund can be

重建基金賠付之範圍究應限於存款債務，或尚應包括非存款債務，既涉及重建基金應如何有效分配與運用之問題，立法機關自得斟酌國家財政狀況及維護金融市場秩序之必要性，而為適當之決定。況存款債務與非存款債務之法律性質究屬不同，且重建基金之設置，在於確保存款人對於金融機構之信心，以穩定金融信用秩序。立法機關考量重建基金規模有限，為減輕該重建基金之負擔，使重建基金之運用更有效率，系爭規定乃修正就非存款債務不予賠付，該手段與立法目的之達成具有合理關聯性，與憲法第七條規定尚無牴觸。

operated more effectively, the legislative body amended the disputed provision in the Act to exclude payout for nondeposit liabilities. Given that there is a reasonable nexus between the means and the accomplishment of these legislative objectives, there is no contravention to Article 7 of the Constitution.

With regard to the question raised by the Petitioner alleged that his property right and the freedom of contract was infringed by the governing authority's taking control over the distressed or nonperforming financial institution under Article 62 of the Banking Act, no specific illustrations were provided on how his rights protected by the Constitution was infringed. Furthermore, with regard to the Petitioner's request for supplementary interpretation to J.Y. Interpretation No. 488, since the final judgment that causes the present petition did not apply that Interpretation, no supplementary interpretation is permitted. Thus this part of the petition is deemed to be not in conformity with Article 5, Paragraph 1, Sub-Paragraph 2 of the Constitutional Interpretation Pro-

至於聲請人主張銀行法第六十二條關於主管機關接管經營不善之金融機構有侵害其財產權及契約自由之疑義，其並未具體敘明上開規定有如何侵害其受憲法所保障之權利；而聲請人就本院釋字第四八八號解釋聲請補充解釋部分，查本案原因案件之確定終局判決並未適用上開解釋，尚不得對之聲請本院補充解釋。是此部分聲請，核與司法院大法官審理案件法第五條第一項第二款規定不符，依同條第三項規定，均應不受理，併此指明。

cedure Act and is hereby dismissed in accordance with Subparagraph 3 of the same Act.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Chi-Ming Chih filed dissenting opinion in part, in which Justice Pi-Hu Hsu joined.

本號解釋葉大法官百修提出協同意見書；黃大法官茂榮提出協同意見書；池大法官啟明、徐大法官璧湖共同提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts:The Petitioner in 2006 purchased from The Chinese Bank, in three respective terms, subordinated bank debentures (bonds), which in their sequence provided an "Essential Points on the the Issuance of Financial Bonds (hereinafter Essential Points). Article 6 of this Essential Points provided the method for the accrual of interests and the repaying of the principal.

編者註：

事實摘要：聲請人於民國 95 年間，分別向中華商業銀行購買 3 期次順位金融債券，並依序訂有各該期次「金融債券發行要點」（下稱要點），於該要點第 6 條規定付息及償還本金之方式。

Subsequently, the holding company of the bank filed for reorganization due to a financial crisis, which caused a bank run. As a result, the Financial Supervi-

嗣該銀行母公司因財務危機聲請重整，引發存款擠兌，行政院金融監督管理委員會乃指定中央存款保險公司予以接管，並辦理資產標售，以完成經營

sory Commission of the Executive Yuan designated the Central Deposit Insurance Corporation to take control and arrange auction sales of the bank assets to complete the withdrawal of the nonperfoming financial institution.

不善金融機構的退場處理。

Considering The Chinese Bank was in effect bankrupt, subject to liquidation or reorganization, provided that the bank did not pay the interests in accordance with Point 6 of the Essential Points even after numerous summon attempts, the Petitioner then filed suit to request the cancellation of the contract and the return of principal in accordance with Article 234 of the Civil Code and Point 10 of the Essential Points.

聲請人認為此時中華商業銀行已形同公司破產、清算或重整，且該行亦未依要點第 6 點給付利息，經催告多次未果，乃依據民法第 234 條及要點第 10 點規定，起訴請求解除契約及返還本金。

The case was dismissed by the Taiwan Taipei District Court and on appeal, the Taiwan High Court, applying the disputed provision, also dismissed the case. The Supreme Court in civil judgment (97) Tai Shun No. 2252, again affirmed and finalized the decision. The Petitioner then requested an interpretation on the ground that the disputed provision violated the

本案經臺灣臺北地方法院駁回，復經臺灣高等法院以行政院金融重建基金設置及管理條例第 4 條第 5 項「非存款債務不予賠付」規定（下稱系爭規定）予以駁回，最高法院 97 年度台上字第 2252 號民事判決駁回確定，聲請人爰以系爭規定違反憲法第 7 條平等權保障，聲請解釋。

equal protection of rights under Article 7 of the Constitution.

J. Y. Interpretation No.676（April 30, 2010）*

ISSUE: Is it constitutional for an administrative regulation to impose and adjust the scales of national health insurance premium, particularly on temporary laborers or self-employed that have no fixed income?

RELEVANT LAWS:

Articles 15, 23, 155, and 157 of the Constitution（憲法第十五條、第二十三條、第一百五十五條、第一百五十七條）；Article 10, Paragraph 5 of the Amendment of the Constitution（憲法增修條文第十條第五項）；Article 41, Paragraph 1, Subparagraph 7 of the Enforcement Rules of the National Health Insurance Act (amended August 2, 1995 and November 18, 1999; amended as subparagraph 4, November 29, 2002)（全民健康保險法施行細則第四十一條第一項第七款（中華民國八十四年八月二日及八十八年十一月十八日修正發布，九十一年十一月二十九日修正改列第四款）；Article 8, Article 21 Paragraph 1, Article 22, Paragraph 2, and Article 86 of the National Health Insurance Act (amended January 30, 2001)（全民健康保險法第八條、第二十一條第一項、第二十二條第二項、第八十六條（九十年一月三十日修正公布））；J.Y. Interpretation Nos. 426, 472, 473, 524 and 538（司法院釋字第四二六號、第四七二號、第四七三號、第五二四號、

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* Translated by Professor Tze-Shiou Chien.

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

第五三八號解釋）.

KEYWORDS:

National Health Insurance（全民健康保險）, Insured Premium Table（投保金額分級表）, property right（財產權）, principle of statutory reservation (法律保留原則), principle of clarity of authorization of law (法律授權明確性原則), affordability (量能).**

HOLDING: Article 41, Paragraph 1, Subparagraph 7 of the Enforcement Rules of the National Health Insurance Act, as amended on August 2, 1995, stipulates: "For those … who join occupational unions but with no fixed employment or are self-employed, they shall file insurance from Level Six in accordance with the Table of Premium Levels." The same provision, as amended on November 18, 1999, stipulates: "For those who join occupational unions but with no fixed employment or are selfemployed, they shall file insurance from Level Six in accordance with the Table of Premium Levels" (Amended and redesignated as Subparagraph 4 on November 29, 2002.) It does not contravene the protection of people's property rights under Article 15

解釋文：中華民國八十四年八月二日修正發布之全民健康保險法施行細則第四十一條第一項第七款：「無一定雇主或自營作業而參加職業工會……者，按投保金額分級表第六級起申報。」及八十八年十一月十八日修正發布之同施行細則同條款：「無一定雇主或自營作業而參加職業工會者，按投保金額分級表第六級起申報。」之規定(九十一年十一月二十九日修正改列第四款)，與憲法第十五條保障人民財產權、第二十三條法律保留原則，以及法律授權明確性原則，尚無牴觸。惟於被保險人實際所得未達第六級時，相關機關自應考量設立適當之機制，合理調降保險費，以符社會保險制度中量能負擔之公平性及照顧低所得者之互助性，落實國家推行全民健康保險之憲法意旨，上開規定應本此意旨檢討改進，併予指

of the Constitution, as well as the principles of statutory reservation and clarity of authorization of law under Article 23 of the Constitution. However, for the insured whose actual income has not reached Level Six, the relevant agencies should certainly consider the establishment of an appropriate mechanism to reasonably reduce the premium so as to meet the fairness of burden-sharing based on affordability and the mutual assistance for low income individuals in the social insurance system, and to realize the constitutional mandate for the promotion of a national health insurance. Thus, it is also pointed out that the abovestated provision should be reexamined and reformed accordingly.

明。

REASONING: Articles 155 and 157 of the Constitution respectively and explicitly provides that the state, in order to promote social welfare, shall establish a social insurance system; and in order to improve national health, shall establish extensive services for sanitation and health protection. Article 10, Paragraph 5 of the Amendments to the Constitution

解釋理由書：國家為謀社會福利，應實施社會保險制度；國家為增進民族健康，應普遍推行衛生保健事業及公醫制度，憲法第一百五十五條及第一百五十七條分別定有明文。又憲法增修條文第十條第五項前段規定，國家應推行全民健康保險。全民健康保險法（下稱全民健保法）採強制納保並課被保險人繳納保險費之公法上金錢給付

further stipulates: “The State shall promote the national health insurance.” As the foundation of fairness to the national health insurance, the National Health Insurance Act adopts the compulsory insurance, imposes the insured the obligation to pay premium under the public law, and charges different premiums on individuals with different income, so as to meet the fairness of burden-sharing based on affordability. Yet the relevant laws and regulations concerning the calculation of and the criteria for the amount of the premium, given that it has the effect of restricting people’s property right, shall certainly comply with the principles of statutory reservation and clarity of authorization of law, as repetitively stated under J.Y. Interpretation Nos. 472, 473, and 524.

義務，並對於不同所得者，收取不同保險費，以符量能負擔之公平性，為全民健康保險賴以維繫之基礎。惟有關保險費之計算及額度決定方式之相關法令規定，涉及人民財產權之限制，自應遵守法律保留、授權明確性原則，迭經本院釋字第四七二號、第四七三號、第五二四號解釋在案。

Article 8 of the National Health Insurance Act places “those who join occupational unions but with no fixed employment or are self-employed” as the Second Category Insured. The level of premium for personnel at this level is regulated under Article 41, Paragraph

全民健保法第八條將「無一定雇主或自營作業而參加職業工會者」，列屬第二類被保險人，該類人員申報投保金額之等級則依八十四年八月二日修正發布之全民健保法施行細則第四十一條第一項第七款：「無一定雇主或自營作業而參加職業工會……者，按投保金額

1, Subparagraph 7 of the Enforcement Rules of the National Health Insurance Act, amended as of August 2, 1995: " For those… who join occupational unions but with no fixed employment or are self-employed, they shall file insurance from Level Six in accordance with the Table of Premium Levels[,]" and the same provision, amended as of November 18, 1999: "For those who join occupational unions but with no fixed employment or are self-employed, they shall file insurance from Level Six in accordance with the Table of Premium Levels." (Amended and re-designated as Subparagraph 4 on November 29, 2002, hereinafter disputed provision). The level of the insurance premium is for a critical element in determining the premium and the burden of ability to pay. Given that the application of the disputed provision concerns the public interest of government's finance and restrictions on people's property right, it is not merely a technical or detailed issue and, therefore, should in principle be stipulated explicitly by statute. If the legislative body should authorize the administrative agency to promulgate supplemental regulations, the

分級表第六級起申報。」及八十八年十一月十八日修正發布之同施行細則同條款規定：「無一定雇主或自營作業而參加職業工會者，按投保金額分級表第六級起申報。」（下稱系爭規定，九十一年十一月二十九日修正改列第四款）按投保金額之等級，係保險費實際應負擔數額之重要因素，並決定保險費量能負擔之標準。且系爭規定之適用，關係政府財務公共利益，並涉及人民財產權之限制，自非純屬技術性或細節性事項，是原則上應以法律明定之。若立法機關以法律授權行政機關發布命令為補充規定時，其授權之內容、目的、範圍應具體明確，命令之內容並應符合母法授權意旨。至授權條款之明確程度，不應拘泥於法條所用之文字，而應由法律整體解釋認定，或依其整體規定所表明之關聯意義為判斷（本院釋字第四二六號、第五三八號解釋參照）。

contents, objectives and scope of such authorization must be specific and unambiguous, and the content of the regulations must also comply with the meanings and objectives of the authorization. With regard to the degree of specificity of the authorization provision, it shall not be confined by the language of the statutory provision, rather shall be determined by the totality of statutory interpretation or the relevant meaning from the statute as a whole (see J.Y. Interpretation Nos. 426 and 538).

Article 86 of the National Health Insurance Act stipulates: "The enforcement rules of this Act shall be drafted by the governing agency and be submitted for approval by the Executive Yuan for its promulgation." While the disputed provision was based on this Article, yet from the perspective of the relevant meanings of the National Health Insurance Act as a whole, it actually connects to Article 21, Paragraph 1 of the Act, "[t]he premium amount for Categories One to Three of the insured shall be stipulated in a Table of Premium Levels by the governing agency

全民健保法第八十六條規定：「本法施行細則，由主管機關擬訂，報行政院核定後發布之。」系爭規定之訂定，固係以此一規定為依據。惟從全民健保法整體規定所表明之關聯意義上，實係聯結母法第二十一條第一項規定：「第一類至第三類被保險人之投保金額，由主管機關擬訂分級表，報請行政院核定之。」(經九十年一月三十日修正公布，修正前原規定「第一類至第四類」) 以及同法第二十二條第二項規定：「第一類及第二類被保險人為無固定所得者，其投保金額，由該被保險人依投保金額分級表所定數額自行申報，並由保險人

and be approved by the Executive Yuan." (Amended as of January 30, 2001, which changed the original language "from First to Fourth Categories") and Article 22, Paragraph 2 of the same Act: "For the insured under the First and Second Category who have no fixed income, they shall declare pro se the insurance premium in accordance with the Table of Premium Levels, and be subjected to the audit of the insurer. The insurer may summarily adjust [the premium] if it is inaccurate." (Originally with the language but designated as Paragraph 3 before the amendment on January 30, 2001). These provisions carry the objective to effectively implement the national health insurance program, and a rather clear authorization to calculate the amount of premium based on categorization methods as its contents and scope. It is with this authorization that the governing agency established the Table of Premium Levels as the basis for the calculation of premium the insured should undertake. In light of the fact that all the insured maintain certain independence in their working style and their income from workhours is diverse, taking

查核；如申報不實，保險人得逕予調整。」(經九十年一月三十日修正公布，修正前原列第三項，規定相同) 該等規定係以有效辦理全民健康保險為目的，而以類型化方式計算投保金額為內容與範圍，授權之意尚屬明確。依上開授權，主管機關乃以類型化方式訂定投保金額分級表，作為被保險人應負擔保險費之計算依據，而系爭規定鑒於被保險人均係於工作型態上具一定獨立性，工時勞務所得上有不特定性，衡酌行政效率及被保險人之所得狀況，指定投保金額分級表第六級為申報下限，尚難謂有違母法授權意旨致牴觸憲法第十五條保障人民財產權之規定。是系爭規定與憲法第十五條保障人民財產權、第二十三條法律保留原則，以及法律授權明確性原則，尚無牴觸。

into account the administrative efficiency and the insured's income status, the disputed provision designated Level Six of the Table of the Premium Levels as the minimum for submission can hardly be deemed to have violated the meanings and purposes of the authorization statute, and consequently, contravened the provision to protect people's property rights under Article 15 of the Constitution. Thus, the disputed provision does not contravene either the protection of people's property rights under Article 15 of the Constitution, or the principles of statutory reservation and clarity of authorization of law under Article 23 of the Constitution.

The National Health Insurance Act used the regular income of the insured as the basis of premium calculation, with the insured undertakes diverse financial responsibility that hinge on income level. Under this affordability test, a security system that entails both the common sharing of health risks and social assistance can be formed; therefore, the predesignation on the level of individual premium should match the actual income

全民健保法係以被保險人經常性所得為計算保險費之基礎，被保險人依所得高低承擔不同財務責任，於量能負擔下，形成兼具共同分擔健康風險與社會互助之安全保障制度，故個人投保金額等級之事先指定，應儘量與實際所得契合。然系爭規定所涉之被保險人職業種類不一，所得又經常隨社會或個人因素浮動，於其實際所得未達第六級時，仍應按第六級申報，造成該等本屬低所得之被保險人超額負擔保險費。是相關

as closely as possible. However, given that the insured under the disputed provision involve various occupations and their income levels constantly fluctuate due to social or personal factors, that they must still declare [insurance premium] as Level Six even though their actual income does not reached that level has resulted in excessive premium charge to those who belong to the low income [category]. The relevant agencies should certainly consider the establishment of an appropriate mechanism to reasonably reduce the premium so as to meet the fairness of burden-sharing based on affordability and the mutual assistance for low income individuals in the social insurance system, and to realize the constitutional mandate for the promotion of a national health insurance. Thus, it is also pointed out that the above-stated provision should be re-examined and reformed accordingly.

機關自應考量設立適當之機制，合理調降保險費，以符社會保險制度中量能負擔之公平性及照顧低所得者之互助性，落實國家推行全民健康保險之憲法意旨，系爭規定應本此意旨檢討改進，併予指明。

Justice Shin-Min Chen filed dissenting opinion in part.

本號解釋陳大法官新民提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts:The Petitioners,

編者註：

事實摘要：(一) 聲請人等1,502人，

1502 in total, consist of members of seven unions concerning respective occupations, such as agricultural services in Kaohsiung City. They have been enrolled in the national health program since March 1, 1995, the day the program began to operate, as the Second Category insured (those with no fixed income or are selfemployed) under Article 8 of the National Health Insurance Act, declared their insurance premium as Level Six on the Table of Premium Levels and under the disputed provision, and paid premium until June 30, 1997.

自中華民國（下同）84年3月1日全民健保開辦時起，即分別參加高雄市之農事服務等7家職業工會，依全民健康保險法第8條規定，以第2類被保險人身分加保（無一定雇主或自營作業而參加職業工會者），依系爭規定按投保金額分級表第6級起申報，且繳納保險費至86年6月止。

In July 1997, with the higher adjustment of the basic salary, the amount for Level Six was adjusted accordingly to NT$19,200. In July 1998, with another adjustment of the basic salary, the amount for Level Six was again adjusted to NT$20,100.

(二)86年7月基本工資調高，第6級投保金額分級表隨之調整為19,200元；87年7月基本工資再次調整，第6級投保金額再調整為20,100元。

Petitioners claimed that their actual income was not comparable to the basic salary due to economic recession. With the help of their unions, Petitioners successfully received the governing agen-

(三)聲請人等以景氣低迷，實際所得無法反映基本工資，透過工會協商，得主管機關同意准予暫緩實施上述調整，而將86年7月至12月投保金額定為18,300元，87年1月以後則定為

cy's approval to delay the implementation of the above adjustment, to set the premium at NT$18,300 from July to December 2007 and NT$19,200 as of January 2008.

19,200 元。

Petitioners, however, still have not declared their premium in accordance with the modified amount. On February 21, 2002, the Bureau of National Health Insurance notified petitioners that their premium was adjusted to NT$18,300 and NT$19,200 and began to collect the differences backward.

(四) 惟聲請人仍未依上開調整後之投保金額申報，91 年 2 月 21 日健保局分別函將聲請人之投保金額，逕予調整為 18,300 元及 19,200 元，並按該金額補收每月保險費差額。

Petitioners challenged these decisions and filed suits in administrative courts. The Kaohsiung High Administrative Court ((92) Su Zi No. 1184 (2003)) and the Supreme Administrative Court ((95) Pan Zi No. 1751 (2006)) both dismissed the case for lack of reasons. Petitioners then filed the present interpretation, claiming that by allowing an administrative regulation under the disputed provision to designate the premium and prohibiting "selfdeclaration of premium with proof of evidence" so as to make adjustment to the [premium] level, [the

(五) 聲請人不服，依法提起行政訴訟，經高雄高等行政法院 92 年度訴字第 1184 號判決、最高行政法院 95 年度判字第 1751 號判決，均以無理由駁回。聲請人不服，主張：系爭規定逕以行政命令指定投保金額、不得「自行舉證申報投保金額」而為級別之調整者，違反平等權、財產權保障及法律保留、授權明確性原則，違背憲法第 23 條規定意旨，聲請解釋

disputed provision] contravenes the right of equal protection, protection of property rights, as well as statutory reservation and clarity of authorization of law under Article 23 of the Constitution

J. Y. Interpretation No.677（May 14, 2010）*

ISSUE: Is the provision that prisoners may be released before noon of the next day after the enforcement of prison terms has been fulfilled under Article 83, Paragraph 1 of the Prison Act unconstitutional ?

RELEVANT LAWS:

Articles 8 and 23 of the Constitution（憲法第八條、第二十三條）；J.Y. Interpretation Nos. 384 and 588（司法院釋字第三八四號、第五八八號解釋）； Article 121, Paragraph 1 of Civil Code（民法第一百二十一條第一項）；Article 65 of the Criminal Procedure Code（刑事訴訟法第六十五條）；Article 83, Paragraph 1 of the Prison Act（監獄行刑法第八十三條第一項）.

KEYWORDS:

detention（拘禁）, release（釋放）, prisoners（受刑人）, personal freedom（人身自由）, physical freedom（身體自由）, necessary statutory procedure（法定程序）, fulfillment of prison term（刑期期滿）, due process of law（正當法律程序）.**

HOLDING: On the part that prisoners shall be released at noon of the

解釋文：監獄行刑法第八十三條第一項關於執行期滿者，應於其刑期終

* Translated by Fort Fu-Te Liao.

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

next day since the expiration of the prison terms under Article 83 Section 1 of the Prison Act, it causes the prisoners to remain detained after the enforcement of the prison term is fulfilled without proper procedure and infringes on the prisoners' physical liberty, and violates due process of law. Such means by restricting the prisoners' physical liberty is not necessary, and contravenes Articles 8 and 23 of the Constitution. The part of the statute not in consistent with this Interpretation shall be invalid as of June 1, 2010. The related governmental agencies shall promptly implement appropriate regulations on the release of prisoners in accordance with this Interpretation. Before the statute is amended, prisoners shall be released before noon on the day their prison terms are ended.

了之次日午前釋放之規定部分，使受刑人於刑期執行期滿後，未經法定程序仍受拘禁，侵害其人身自由，有違正當法律程序，且所採取限制受刑人身體自由之手段亦非必要，牴觸憲法第八條及第二十三條之規定，與本解釋意旨不符部分，應自中華民國九十九年六月一日起失其效力。有關機關應儘速依本解釋意旨，就受刑人釋放事宜予以妥善規範。相關規定修正前，受刑人應於其刑期終了當日之午前釋放。

On the part of the petition that concerns the interim disposition under Article 83, Paragraph 1 of the Prison Act, since it is no longer necessary to take that measure in light of this Interpretation, it is hereby dismissed.

本件聲請人就上開監獄行刑法第八十三條第一項規定所為暫時處分之聲請部分，因本案業經作成解釋，無作成暫時處分之必要，應予駁回。

REASONING: Article 8, Paragraph 1 of the Constitution stipulates: "Personal freedom shall be guaranteed to the people. Except in case of flagrante delicto as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law. No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law. Any arrest, detention, trial, or punishment which is not in accordance with the procedure prescribed by law may be resisted." The statutory procedure prescribed under this Article means any measure that limits the personal freedom, regardless of whether the status being a criminal defendant. In addition to statutory authorization, it can be imposed only after necessary judicial procedure and other due process of law being followed through respectively, and confirms to Article 23 of the Constitution (see J. Y. Interpretation Nos. 384 and 588)

解釋理由書：憲法第八條第一項規定：「人民身體之自由應予保障。除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。非由法院依法定程序，不得審問處罰。非依法定程序之逮捕、拘禁、審問、處罰，得拒絕之。」本條規定之法定程序，係指凡限制人民身體自由之處置，不問其是否屬於刑事被告之身分，除須有法律之依據外，尚應分別踐行必要之司法程序或其他正當法律程序，並符合憲法第二十三條之規定，始得為之（本院釋字第三八四號、第五八八號解釋參照）。

On the part of the stipulation under Article 83, Paragraph 1 of the Prison Act,

監獄行刑法第八十三條第一項關於「執行期滿者，……應於其刑期終了

"[h]aving served the term of imprisonments … [prisoners] shall be released at noon of the next day since the end of the prison terms[,]" (hereinafter the disputed provision) it was an expedient measure legislated against the backdrop of administrative difficulties for night time operations at the prison, provided that the transportation means were not convenient to and from the prison in the past, rendering it difficult to force the prisoners to depart at late night. Therefore, the release operations did not start until the next morning during business hours after the enforcement of the prison term is fulfilled so that the transportation and personal safety of the prisoners can both be looked after (see Ministry of Justice Memorandum No. Fa Jio Zi No. 0990900962 (March 25, 2010)). However, under Article 65 of the Criminal Procedure Code: "The calculation of term shall be in accordance with the stipulations of the Civil Code." As such, the calculation of prison terms is analogous to and shall apply, mutatis mutantis, Article 121, Paragraph 1 of the Civil Code, in that when a term is determined by a day, week, month or year, the

之次日午前釋放」之規定部分（下稱系爭規定），考其立法之初所處時空背景，係認監獄於深夜時間作業困難，且過往監獄對外交通聯繫不便，亦難強令受刑人於深夜立即離去等情所為之權宜處置，乃於刑期執行期滿之次日上午辦公時間始行辦理釋放作業，以兼顧受刑人釋放後之交通與人身安全（法務部九十九年三月二十五日法矯字第０九九０九００九六二號函參照）。然依刑事訴訟法第六十五條：「期間之計算，依民法之規定。」本此意旨，有關刑期期間之計算應類推適用民法第一百二十一條第一項規定，以日、星期、月或年定期間者，以期間末日之終止，為期間之終止。刑期執行期滿，除另有合憲之法定事由外，受刑人即應予以釋放，始與憲法第八條保障人民身體自由之意旨無違。

end of the term shall be the end of the last day of that term. Once the enforcement of the prison term is fulfilled, except otherwise with statutory justifications under the Constitution, the prisoners shall be released immediately so as not to contravene the protection of personal freedom under Article 8 of the Constitution.

The state's penal power over the prisoners extinguishes at the time the enforcement of the prison term is fulfilled. By having those prisoners who have fulfilled their imprisonments to be released before noon of the next day after the end of the prison terms, as stipulated by the disputed provision, is the continuous confinement of their personal freedom in a particular locale and is no different from the criminal penalty of depriving people's personal freedom. Now that the disputed provision did not clearly stipulate the due process under which such quasi–penal limitations on personal freedom of a criminal defendant can be carried out, it contravenes the due process of law under Article 8 of the Constitution. Separately, while the disputed provision has a justifi-

國家對於受刑人之刑罰權，於刑期執行期滿即已消滅。系爭規定以執行期滿者，應於其刑期終了之次日午前釋放，將使受刑人於刑期期滿後，仍拘束人民身體自由於特定處所，而與剝奪人民身體自由之刑罰無異，系爭規定未明確規範類似限制刑事被告人身自由所應踐行之正當法律程序，與憲法第八條規定之正當法律程序即屬有違。另系爭規定考量受刑人釋放後之交通與人身安全，延至刑期終了之次日午前始行釋放受刑人，目的固屬正當，惟所謂刑期執行期滿當日，就執行刑罰目的之達成，並不以執行至午夜二十四時為必要，是於期滿當日之午前釋放，既無違刑期執行期滿之意旨，亦無受刑人交通與人身安全之顧慮，足見系爭規定關於受刑人應於其刑期終了次日午前釋放部分，尚非必要，亦與憲法第二十三條所定比例

able purpose by taking into consideration the tra-nsportation and personal safety of the prisoners to postpone the release prior to noon of the next day after the enforcement of the prison term is fulfilled, the day the enforcement of the prison term is fulfilled does not necessarily mean to enforce the prison term literally until the midnight of that day. Therefore, by releasing the prisoners before noon of the day their prison terms are ended neither violates the tenet of fulfilling the enforcement of the imprisonment nor raises concerns over the prisoners' transportation and personal safety. It shows that the disputed provision is unnecessary and contravenes the principle of proportionality under Article 23 of the Constitution. The part of the disputed provision not in consistent with this Interpretation shall be invalid as of June 1, 2010. The related governmental agencies shall promptly implement appropriate regulations on the release of prisoner release in accordance with this Interpretation. Before the statute is amended, prisoners shall be released before noon on the day their prison terms are ended.

原則之意旨有違。系爭規定與本解釋意旨不符部分，應自九十九年六月一日起失其效力。有關機關應儘速依本解釋意旨，就受刑人釋放事宜予以妥善規範。相關規定修正前，受刑人應於其刑期終了當日之午前釋放。

On the part of the petition that concerns the interim disposition under the disputed provision, since it is no longer necessary to take that measure in light of this Interpretation, it is hereby dismissed.

本件聲請人就系爭規定所為暫時處分之聲請部分，因本案業經作成解釋，無作成暫時處分之必要，應予駁回

Justice Pai-Hsiu Yeh filed concurring opinion, in which Justice Yuhsiu Hsu joined.

Justice Mao-Zong Huang filed concurring opinion.

Justice Shin-Min Chen filed dissenting opinion in part.

本號解釋葉大法官百修、許大法官玉秀共同提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官新民提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts:The Petitioner was convicted under the charges of robbery, forging documents, among other crimes, and sentenced to five and half years and six months imprisonments, respectively, by the Taiwan High Court. The executable sentence should be five years and nine months imprisonments. The judgment was finalized on July 14, 2005.

編者註：

事實摘要：聲請人因犯強盜、偽造文書等案件，經臺灣高等法院分別判處有期徒刑 5 年 6 月及 6 月，應執行有期徒刑 5 年 9 月，於 94 年 7 月 14 日確定。

On July 16, 2007, the High Prosecutorial Office issued an enforcement order ((96) Jien Gon Shu Zi No. 4) and trans-

96 年 7 月 16 日，臺灣高等法院檢察署以 96 年度減更戊字第 4 號執行指揮書之執行命令，發送臺灣綠島監獄執

ferred the Petitioner to the Taiwan Green Island Prison, with the prison term ended on June 11, 2010.

行，其刑期應於 99 年 6 月 11 日期滿。

Note 3 of the above-indicated enforcement order stated: “If there should be no other criminal investigations in progress, in the morning of the next day after the prison term ends, the prison [authority] shall verify the identity and release the prisoner.” The Petitioner objected and claimed that his prison term ended on June 11, 2010 and he should have been released as soon as the enforcement of that sentence was ended as of the midnight of that day.

上開執行指揮書備註 3 記載，「如無其他刑事案件偵審中，執行期滿之翌日上午，由監獄驗明正身釋放」，聲請人主張其刑期屆滿日係 99 年 6 月 11 日，依法應執行至當日 24 時止，執行期滿即應予釋放，聲明異議。

In Criminal Judgment (98) Shun Zi no. 2722 (2009), the Taiwan High Court, based on the disputed provision, ruled that the enforcement order was neither unjustified nor in violation of the law.

臺灣高等法院 98 年度聲字 2722 號裁定，以監獄行刑法第 83 條第 1 項規定，執行期滿者，應於其刑期終了之次日午前釋放之（下稱系爭規定），認上開執行指揮書並無違法或不當，駁回異議。

The Petitioner disagreed and appealed to the Supreme Court but the case was dismissed for lack of proper claim (Criminal Judgment (98) *Kun Zi* No. 744 (2009)). The Petitioner, believing the dis-

聲請人不服，向最高法院提起抗告，經該院以 98 年度台抗字第 744 號刑事裁定以無理由駁回。聲請人乃認系爭規定有牴觸憲法第 8 條及第 23 條規定之疑義，聲請解釋暨暫時處分。

puted provision violated Articles 8 and 23 of the Constitution, petitioned a constitutional interpretation and interim disposition.

J. Y. Interpretation No.678（May 14, 2010）*

ISSUE: Are the provisions of the Telecommunications Act that penalize the unapproved use of radio frequency and confiscate the equipment therefrom a violation of the Constitution ?

RELEVANT LAWS:

Articles 11, 15 and 23 of the Constitution（中華民國憲法第十一、十五及二十三條）； J.Y. Interpretation Nos. 509, 613 and 617（司法院釋字第五〇九、六一三及六一七號解釋）；the front portion of Article 48, Paragraphs 1, Article 49, Paragraph 1, Article 58, Paragraph 2, Article 60, and Article 67, Paragraphs 3 and 4 of the Telecommunications Act（電信法第 48 條第 1 項前段、第 49 條第 1 項、第 58 條第 2 項、第 60 條、第 67 條第 3 項、第 4 項）；Article 2 of the National Communications Commission Organic Act（國家通訊傳播委員會組織法第二條）； Article 18 of the Radio Regulations of International Telecommunication Union（聯合國所屬國際電信聯合會之無線電規則第十八條）；Article 109 of United Nations Convention on the Law of the Sea（聯合國海洋法公約第一〇九條）.

KEYWORDS:

freedom of speech（言論自由）, confiscation（沒收）, prin-

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* Translated by Roger K. C. Wang.

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

ciple of proportionality（比例原則）, protection of property rights（財產權之保障）, criminal penalty（刑罰）, administrative penalty（行政罰）.**

HOLDING: The front portion of Article 48, Paragraph 1, Article 58, Paragraph 2, and Article 60 of the Telecommunications Act concerning the penalty and confiscation over the unapproved and willful usage of radio frequencies do not contradict the principle of proportionality under Article 23 of the Constitution nor the protection of free speech under Article 11 and the protection property rights under Article 15 of the Constitution.

解釋文：電信法第四十八條第一項前段、第五十八條第二項及第六十條關於未經核准擅自使用無線電頻率者，應予處罰及沒收之規定部分，與憲法第二十三條之比例原則尚無牴觸，亦與憲法第十一條保障人民言論自由、第十五條保障人民財產權之意旨無違。

REASONING: Article 11 of the Constitution stipulates that the people's freedom of speech shall be protected. Given that the freedom of speech carries the functions of self-fulfillment, communication of viewpoints, pursuing truth, gratification of the people's right to know, formation of public opinions and promotion of all kinds of rational political and social activities, thus constitutes an essential mechanism in the maintenance of the

解釋理由書：憲法第十一條規定，人民之言論自由應予保障，鑒於言論自由具有實現自我、溝通意見、追求真理、滿足人民知的權利，形成公意，促進各種合理之政治及社會活動之功能，乃維持民主多元社會正常發展不可或缺之機制，國家應給予最大限度之保障（本院釋字第五0九號解釋參照）。前開規定所保障之言論自由，其內容尚包括通訊傳播自由之保障，亦即人民得使用無線電廣播、電視或其他通訊傳播

normal development in a democratic and diverse society, the State must endeavor to provide protection to the maximum extent (J.Y. Interpretation No. 509). The safeguard of freedom of speech as such also includes the protection over the freedom of communications and broadcasting, that is, the people's freedom to access information and express opinions through the utilization of radio broadcasting, television or other means of communications or networks (J.Y. Interpretation No. 613). However, the constitutional safeguard over the freedom of speech and the methods of its communications is not absolute and should offer different scope of protection and guidelines of limitations based on the nature therein. Thus it is not that the State may not impose justifiable restrictions by the enactment of laws [as long as they are] in compliance with the meanings and scope of Article 23 of the Constitution (J.Y. Interpretation No. 617).

網路等設施，以取得資訊及發表言論之自由（本院釋字第六一三號解釋參照）。惟憲法對言論自由及其傳播方式之保障，並非絕對，應依其特性而有不同之保護範疇及限制之準則，國家尚非不得於符合憲法第二十三條規定意旨之範圍內，制定法律為適當之限制（本院釋字第六一七號解釋參照）。

The front portion of Arti-cle 48, Paragraph 1 of the Telecommunications Act stipulates: "The Ministry of Trans-

電信法第四十八條第一項前段規定：「無線電頻率、電功率、發射方式及電臺識別呼號等有關電波監理業務，

portation and Communications (MOTC) shall regulate radio frequency, power, mode of transmission, radio station identification signals and call signs, and other radio wave related matters; permission from the MOTC must be obtained for operation or alteration of radio wave related matters." (In accordance with Article 2 of the National Communications Commission (NCC) Organic Act, as of February 22, 2006, the date of the NCC's establishment, related laws and regulations concerning communication and broadcasting, including, among other things, the Telecommunications Act, that were heretofore under the governing authority of the Department of Transportation but involved with the jurisdiction of the NCC, were to be transferred to the NCC.) Article 58, Paragraph 2 of the Telecommunications Act sti[ulates: "Anyone who arbitrarily uses or alters radio frequency in violation of Paragraph 1 of Article 48 without authorization shall be penalized with detention, and/or a fine of not more than NT$200,000." Article 60 of the same Act further provides that violators of Article 58, Paragraph 2 shall resulted in

由交通部統籌管理，非經交通部核准，不得使用或變更」（依國家通訊傳播委員會組織法第二條規定，電信法等有關通訊傳播之相關法規，其原屬交通部之職權而涉及國家通訊傳播委員會職掌者，自中華民國九十五年二月二十二日國家通訊傳播委員會成立之日起，其主管機關變更為該委員會）。電信法第五十八條第二項規定：「違反第四十八條第一項規定，未經核准擅自使用或變更無線電頻率者，處拘役或科或併科新臺幣二十萬元以下罰金。」同法第六十條復規定，犯第五十八條第二項之罪者，其電信器材，不問屬於犯人與否，沒收之。準此，人民使用無線電頻率，依電信法第四十八條第一項前段規定，應先經主管機關核准，如有違反，即依同法第五十八條第二項及第六十條規定科處拘役、罰金，併沒收其電信器材。

the telecommunications equipment being confiscated regardless of ownership. By the same rule, the use of radio frequency, in accordance with Article 48, Paragraph 1 of the Telecommunications Act, is subject to the prior approval of the governing authority, and, in the event of violation, the penalty of detention, fine and confiscation of the equipment(s) in accordance with Article 58, Paragraph 2 and Article 60.

Radio frequencies are public resources that belong to all nationals. In order to prevent usage interference and to ensure efficient and harmonious usage so as to maintain the order of wave usage, public resources and to enhamce important public interest, the government must naturally manage with appropriate caution. Taken the above into consideration, the legislative body stipulates in Article 48, Paragraph 1 of the Telecommunications Act that the people's use of radio frequency shall be subject to prior approval. The purpose of such legislation is appropriate. While this regulation restricts the freedom of communications concern-

無線電波頻率屬於全體國民之公共資源，為避免無線電波頻率之使用互相干擾、確保頻率和諧使用之效率，以維護使用電波之秩序及公共資源，增進重要之公共利益，政府自應妥慎管理。立法機關衡酌上情，乃於電信法第四十八條第一項前段規定，人民使用無線電波頻率，採行事前許可制，其立法目的尚屬正當。上開規定固限制人民使用無線電波頻率之通訊傳播自由，惟為保障合法使用者之權益，防範發生妨害性干擾，並維護無線電波使用秩序及無線電通信安全（聯合國所屬國際電信聯合會－International Telecommunication Union之無線電規則－Radio Regulations第十八條，及聯合國海洋法公約－

ing the usage of radio frequency, in light of protecting the licensed users' rights and interests, preventing interruptive interferences and maintaining the orderly usage of radio wave and the safety of radio communications (Article 18 of the Radio Regulations of International Telecommunication Union and Article 109 of the United Nations Convention on the Law of the Sea), and in balance, the restrictive measures under this provision is necessary and helpful in achieving the above-stated purposes, and do not contradict the principle of proportionality or the protection of free speech under Article 11 of the Constitution.

United Nations Convention on the Law of the Sea 第一百零九條參照）。兩相權衡，該條項規定之限制手段自有必要，且有助於上開目的之達成，與比例原則尚無牴觸，並無違憲法第十一條保障人民言論自由之意旨。

To fulfill the pre-approval system under the front protion of Article 48, Paragraph 1 of the Telecommunications Act, Article 58, Paragraph 2 of the same Act provides that anyone who arbitrarily use or alter radio frequency without authorization shall be penalized with detention, and/or a fine of not more than NT$200,000. The legislators consider the act of unauthorized and arbitrary use of radio frequencies a violation of the li-

為貫徹電信法第四十八條第一項前段採行事前許可制，對未經核准而擅自使用無線電波頻率者，依同法第五十八條第二項規定處拘役或科或併科新臺幣二十萬元以下罰金，係立法者衡酌未經核准擅自使用無線電頻率之行為，違反證照制度，為維護無線電波使用秩序，俾澈底有效取締非法使用電波行為（立法院公報第八十八卷第三十七期第二四八頁參照），認為採取行政罰之手段，不足以達成立法目的，乃規定

cense system and the measure of administrative penalty is not sufficient to achieve the legislative purpose of maintaining the order of radio frequency usage as well as thoroughly and effectively banning the illegal usage activities (the Legislative Yuan Gazette, vol. 88, no. 37, p. 248), thus stipulate criminal penalty as the measure of control, which does not contradict the principle of proportionality under Article 23 of the Constitution. As to Article 60 of the Telecommunications Act, which stipulates that the telecommunication equipment used in violation of Article 58, Paragraph 2, regardless of ownership, shall be confiscated, is intended to prevent repeated unlawful use with the same equipment at different locations after the [initial] ban and is meant to prevent recidivism. Furthermore, radio transmitters or other devices used by radio stations to transmit radio frequencies are controlled goods that cannot be possessed or used at will (Article 49, Paragraph 1 and Article 67, Paragraphs 3 and 4 of the same Act). Therefore, the confiscation regulation under Article 60 for violation of Article 58, Paragraph 2 contradicts neither the prin-

以刑罰為管制手段，與憲法第二十三條之比例原則尚無牴觸。至電信法第六十條規定，對於犯同法第五十八條第二項之罪者，其使用之電信器材，不問屬於犯人與否沒收之，旨在防範取締之後，再以相同工具易地反覆非法使用，具有預防再犯之作用，且無線電臺發射電波頻率所使用之無線電發射機等電信管制射頻器材，係屬管制物品，不得任意持有、使用（同法第四十九條第一項、第六十七條第三項、第四項參照）。是上開第六十條有關違反第五十八條第二項之沒收規定，尚未逾越必要之程度，與憲法第二十三條之比例原則、第十五條人民財產權之保障，均無違背。

ciple of proportionality under Article 23 of the Constitution nor the protection of people's property rights under Article 15 of the Constitution.

The State should allocate radio frequencies fairly and reasonably to safeguard the freedom of expression under Article 11 of the Constitution. In light of the rapid research and development of radio communication technology, it needs to be pointed out that the governing authority shall timely review the related regulations in tandem with the condition of technology development.

Justice Tzong-Li Hsu filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Tzu-Yi Lin filed concurring

為保障憲法第十一條規定之言論自由，國家應對電波頻率之使用為公平合理之分配。鑒於無線電波通訊技術之研發進步迅速，主管機關並應依科技發展之情況，適時檢討相關管理規範，併此指明

本號解釋許大法官宗力提出協同意見書；葉大法官百修提出協同意見書；陳大法官新民提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官春生提出協同意見書；林大法官子儀、李大法官震山共同提出部分協同、部分不同意見書；許大法官玉秀提出一部協同、一部不同意見書。

opinion in part and dissenting opinion in part, in which Justice Chen-Shan Li joined.

Justice Yu-hsiu Hsu filed concurring opinion in part and dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts:The Petitioner arbitrarily used the 95.9Hz radio frequency somewhere in Taichung County and established a radio station named "Sound of XX" to broadcastunlawfully since May 2002, although such use did not interfere with the lawful use of radio waves. The Petitioner was raided by the police in March 2003.

The case was reviewed by the Summary Court of the Taichung District Court and the appellate panel of the Taichung District Court. In the final judgment, (92) *Fong Chien Shang Tze* No. 313, the appellate panel imposed a 50-day detention and confiscated all the equipment involved in the case. Believing that the applicable statutes of Article 48, Paragraph 1, Article 58, Paragraph 2, and

編者註：

事實摘要：（一）聲請人於民國91年5月間起，未經向主管機關申請許可核准，擅自在臺中縣某處使用無線電頻95.9兆赫，非法設置「海0之聲」廣播電臺，對外廣播，惟未干擾無線電波之合法使用，於92年3月間被警查獲。

（二）案經第一審臺灣臺中地方法院簡易庭及第二審臺灣臺中地方法院合議庭審理，第二審合議庭以92年度豐簡上字第313號判決，判處拘役50日，扣案之器材均沒收確定。聲請人認上開確定終局判決，所適用之電信法第48條第1項、第58條第2項及第60條等規定，發生有牴觸憲法第11條、第15條及第23條之疑義，聲請解釋。

Article 60 of the Telecommunications Act in the above final judgment, among other things, contradict the freedom of speech under Article 11 of the Constitution, the protection of property rights under Article 15 of the Constitution and the basic right under Article 23 of the Constitution, the petitioner requested for interpretation.

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J. Y. Interpretation No.679 (July 16, 2010) *

ISSUE: Is the non-declaration of fine conversion standards in the court judgment involving merging of sentences for multiple offences both permissible and not permissible for fine conversion constitutional ?

RELEVANT LAWS:

Articles 8 and 23 of the Constitution（憲法第八條、第二十三條）; Interpretation *Yuan Zi* No. 2702 of the Judicial Yuan（司法院院字第二七〇二號解釋）; J.Y. Interpretation Nos. 144, 366, and 662（司法院釋字第一四四號解釋、第三六六號解釋、第六六二號解釋）; Article 41 of the Criminal Code（刑法第四十一條）.

KEYWORDS:

conversion to fine（易科罰金）, merger of sentences for multiple offences（數罪併罰）, imprisonment（自由刑）, legislative discretion（立法裁量決定）, declared sentence（宣告刑）, set the enforceable sentence（定應執行刑）, penal policy（刑事政策）.**

HOLDING: Interpretation *Yuan Zi* No. 2702 of this Yuan and J.Y. Interpretation No. 144 do not contravene

解釋文：本院院字第二七０二號及釋字第一四四號解釋與憲法第二十三條尚無牴觸，無變更之必要。

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* Translated by Alex C.Y. Tsai, Esq. and Chien Yeh Law Offices.

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

Article 23 of the Constitution and thus no revision thereof shall be required.

REASONING: Article 8 of the Constitution expressly stipulates that an individual's right to physical freedom shall be protected. The restriction of one's physical freedom by imprisonment is the last resort for the deterrence of unlawful acts, and as long as it is not beyond what is necessary, it does not contravene the principle of proportionality under Article 23 of the Constitution. The system of conversion to fine is to prevent the flaws of short prison terms and to alleviate the severity of imprisonment so that what was originally punishable by imprisonment may, under certain statutory qualifications, convert to pecuniary fines. The purpose of merger of penalties for multiple offences is to weigh in the totality of unlawfulness and the degree of culpabilities as well as the necessity of imposing corrective actions on the perpetrator so as to determine the final criminal penalties to be enforced and to meet the requirement of corresponding liabilities with culpabilities (*See* J.Y. Interpretation No. 662). In the

解釋理由書：人民身體之自由應予保障，為憲法第八條所明定，以徒刑拘束人民身體之自由，乃遏止不法行為之不得已手段，如未逾越必要之程度者，即與憲法第二十三條規定之比例原則無違。易科罰金制度係將原屬自由刑之刑期，於為達成防止短期自由刑之流弊，並藉以緩和自由刑之嚴厲性時，得在一定法定要件下，更易為罰金刑之執行。而數罪併罰合併定應執行刑，旨在綜合斟酌犯罪行為之不法與罪責程度，及對犯罪行為人施以矯正之必要性，而決定所犯數罪最終具體應實現之刑罰，以符罪責相當之要求（本院釋字第六六二號解釋參照）。至若數罪併罰，於各宣告刑中，有得易科罰金者，亦有不得易科罰金者，於定應執行刑時，其原得易科罰金之罪，得否准予易科罰金，立法者自得於符合憲法意旨之範圍內裁量決定之。

event of a mixture of individual penalty that is convertible to fine with one that is not, whether the one that is convertible to fine may still be permitted to be as such in the final enforcement of declared sentence is subject to the legislative discretion within the scope of the Constitution.

Interpretation *Yuan Zi* No. 2702 of this Yuan holds that, for crimes involving permissible and non-permissible fine conversion, if the result of the merged penalty should not be convertible to fine, [the court] need not indicate the conversion standard in the announcement of the judgment. J.Y. Interpretation No. 144 further declares, "[i]n accordance with the Criminal Code, if a criminal penalty which may be convertible to fine is combined with another criminal penalty not convertible to fine and, as a result of the combination, the original convertible penalty becomes unconvertible, then the standard of conversion of the convertible penalty does not need to be stated in the judgment." It is with the consideration that, in merging the penalties involving crimes convertible and non-convertible to fine, for those

本院院字第二七０二號解釋認為得易科罰金之罪與不得易科罰金之罪，因併合處罰之結果，不得易科罰金，故於諭知判決時，無庸為易科折算標準之記載。本院釋字第一四四號解釋進而宣示「數罪併罰中之一罪，依刑法規定得易科罰金，若因與不得易科之他罪併合處罰結果而不得易科罰金時，原可易科部分所處之刑，自亦無庸為易科折算標準之記載。」係考量得易科罰金之罪與不得易科罰金之罪併合處罰，犯罪行為人因不得易科罰金之罪，本有受自由刑矯正之必要，而對犯罪行為人施以自由刑較能達到矯正犯罪之目的，故而認為得易科罰金之罪，如與不得易科罰金之罪併合處罰時，不許其易科罰金。上開解釋旨在藉由自由刑之執行矯正犯罪，目的洵屬正當，亦未選擇非必要而較嚴厲之刑罰手段，與數罪併罰定應執行刑制度之本旨無違，亦與憲法第二十三條

who, by the very nature of the crime committed, need to be subject to the correction of prison sentence in order to better achieve the objective of crime correction, fine conversion is not permitted in the merged penalty for both types of crimes. The purpose of the above Interpretation is to correct criminal behaviors through the imposition of imprisonment, and is justifiable. Neither does it opt for unnecessary and more severe penalties nor does it violate the objectives of the sentence merger system for multiple offences and the principle of proportionality under Article 23 of the Constitution, and therefore is unnecessary to be modified.

規定之比例原則尚無牴觸，並無變更之必要。

J.Y. Interpretation No. 144, however, focused on further illustration of Interpretation *Yuan Zi* No. 2702 of this Yuan due to diverse opinions regarding the application of law by different governing authorities, and was not decided in accordance with the principal of the Constitution to require that the merger of sentences involving crimes for both types shall be impermissible for fine conversion. The legislative body may naturally

惟本院釋字第一四四號解釋乃針對不同機關對法律適用之疑義，闡明本院院字第二七０二號解釋意旨，並非依據憲法原則，要求得易科罰金之罪與不得易科罰金之罪併合處罰時，即必然不得准予易科罰金。立法機關自得基於刑事政策之考量，針對得易科罰金之罪與不得易科罰金之罪併合處罰時，就得易科罰金之罪是否仍得准予易科罰金，於符合憲法意旨之範圍內裁量決定之。

consider on the basis of penal policy, and focus on the merging of sentences of crimes that may be converted to fine and those that may not be, and exercise its discretion within the scope of the meaning and purpose of the Constitution.

另本院釋字第三六六號、第六六二號解釋乃法院宣告數罪併罰，且該數宣告刑均得易科罰金，而定應執行之刑逾六個月時，仍否准予得易科罰金之情形所為之解釋。如各罪中，有不得易科罰金者，即非上述二號解釋之範圍，而無上述二號解釋意旨之適用。至是否得依刑法第四十一條規定易服社會勞動，乃屬檢察官指揮刑事執行之職權範圍，均併此指明

In addition, J.Y. Interpretation Nos. 366 and 662 concern with the permissibility of fine conversion in situations where the court declares the merged sentence to be more than six-month imprisonment on multiple offences, with each of which all subject to fine conversion. If fine conversion is not available to any of the offences committed, it does not fall within the scope of the above-mentioned Interpretations, making them inapplicable under such circumstances. It should also be pointed out that whether conversion to social services under Article 41 of the Criminal Code may be available is a matter within the authority of the criminal prosecutors.

本號解釋蔡大法官清遊提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官新民提出協同意見書；許大法

Justice Ching-You Tsay filed concurring opinion.

Justice Mao-Zong Huang filed con-

curring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Yu-hsiu Hsu filed concurring opinion.

Justice Chi-Ming Chih filed dissenting opinion.

Justice Tzong-Li Hsu filed dissenting opinion, in which Justice Tzu-Yi Lin and Justice Chen-Shan Li joined.

官玉秀提出協同意見書；池大法官啟明提出不同意見書；許大法官宗力、林大法官子儀及李大法官震山共同提出不同意見書。

EDITOR'S NOTE:

Summary of facts:Defendant X committed the offences of concealing handguns without permission under Article 7, Paragraph 4 of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife and threatening to endanger personal safety under Article 305 of the Criminal Code. In the final criminal judgment (98) *Shang Su Zi* No. 1576 (2009), the Taiwan High Court sentenced X to five and a half ye-ars and two months of imprisonment for the respective offences, and set the enforceable sentence of imprisonment for five and a half years. Yet no fine conversion stan-

編者註：

事實摘要：1. 被告因違反槍砲彈藥刀械管制條例第 7 條第 4 項未經許可寄藏手槍罪，及刑法第 305 條恐嚇危害安全罪，經臺灣高等法院以 98 年度上訴字第 1576 號判決，各判處有期徒刑 5 年 6 月、2 月，定應執行刑為有期徒刑 5 年 6 月確定在案，惟恐嚇危害安全罪部分，該判決並未諭知易科罰金標準。

dard was stated in the sentencing for the offence of threatening to endanger personal safety.

Subsequently, the Taiwan High Prosecutorial Office in its motion, (98) *Zhi Sheng Zhi* No. 1360 (2009), requested the Taiwan High Court for a ruling on the standards of calculation for fine conversion regarding the offence of threatening to endanger personal safety. Having reviewed the motion, the 17th Criminal Division was of the view that J.Y. Interpretation No. 144 (including Interpretation *Yuan Zi* No. 2702) is inconsistent with Article 23 of the Constitution and petitioned for interpretation.

2. 嗣臺灣高等法院檢察署以 98 年度執聲字第 1360 號，就受刑人所犯恐嚇危害安全罪部分，向臺灣高等法院聲請裁定易科罰金之標準，經本案聲請人，即該法院刑事第 17 庭審理結果，認司法院釋字第 144 號解釋（含院字第 2702 號解釋），有牴觸憲法第 23 條之疑義，爰裁定停止訴訟程序，聲請解釋。

J. Y. Interpretation No.680 (July 30, 2010) *

ISSUE: Do Article 2, Paragraphs 1 and 3 of the Smuggling Punishment Act contravene the principle of clarity with the authorization of law and the principle of clarity on criminal penalties ?

RELEVANT LAWS:

J. Y. Interpretation No. 552（司法院釋字第五二二號解釋)；Article 2, Paragraph 1 and Paragraph 3 and Article 11 of the Smuggling Punishment Act （懲治走私條例第二條第一項、第三項及第十一條）；Item C of the “Items and Quantities of the Controlled Articles” amended and published by the Administrative Yuan on October 23, 2003（九十二年十月二十三日行政院修正公告之「管制物品項目及其數額」丙項）；Article 5, Paragraph 1, Item 2 and Paragraph 3 of the Law Governing the Review of Cases by the Judicial Yuan Grand Justices（司法院大法官審理案件法第五條第一項第二款及第三項）.

KEYWORDS:

smuggling of controlled articles（私運管制物品）, import（進口）, export（出口）, public notice（公告）, the principle of clarity and accuracy of authorization of law（授權明確性）, the principle of clarity on criminal penalties（刑罰明確性原

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* Translated by Tzu-Yi Hung/ Ching-Yuan Huang.

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則）, *nullum crimen sine lege* (the principle of no crime without a previous penal law)（罪刑法定原則）.**

HOLDING: Article 2, Paragraph 1 of the Smuggling Punishment Act stipulates, "Import or export smuggling of controlled articles or substances which exceeds the published amount is subject to no more than seven years of imprisonment, or in addition thereto, a fine of no more than NT$3,000,000." Paragraph 3 of the same Article stipulates, "The controlled articles and its amounts, as indicated in Paragraph 1, shall be promulgated by the Executive Yuan." The purposes, contents, and scope of this authorization lack clarity, which contravenes the principle of clarity with the authorization of law and the principle of clarity on criminal penalties and shall cease to be effective no later than the second anniversary since the issuance of this Interpretation.

解釋文：本懲治走私條例第二條第一項規定：「私運管制物品進口、出口逾公告數額者，處七年以下有期徒刑，得併科新臺幣三百萬元以下罰金。」第三項規定：「第一項所稱管制物品及其數額，由行政院公告之。」其所為授權之目的、內容及範圍尚欠明確，有違授權明確性及刑罰明確性原則，應自本解釋公布之日起，至遲於屆滿二年時，失其效力。

REASONING: The petitioners argue that Article 2, Paragraph 1 of the Smuggling Punishment Act ("import or

解釋理由書：本件聲請人認最高法院九十八年度台上字第三四一七號刑事判決及臺灣高等法院高雄分院

export smuggling of the controlled articles or substances which exceeds the published amount is subject to no more than seven years of imprisonment, or in addition thereto, a fine of no more than NT$3,000,000"), as applied in the Supreme Court Criminal Judgment 98 *Tai Shang Zi* No. 3417 (2009) and the Taiwan High Court Kaohsiung Branch Criminal Judgment 97 *Shang Sue Zi* No. 2032 (2008), are unconstitutional. Paragraph 3 of the same provision stipulates, "The controlled articles and its amounts, as indicated in Paragraph 1, shall be published by the Executive Yuan." Since Paragraphs 1 and 3 must be combined to form an integral penal provision, it is pointed out that they are combined to be the subject matter of this Interpretation.

九十七年度上訴字第二〇三二號刑事判決，所適用之懲治走私條例第二條第一項「私運管制物品進口、出口逾公告數額者，處七年以下有期徒刑，得併科新臺幣三百萬元以下罰金」之規定，有違憲疑義，向本院聲請解釋。因同條第三項規定：「第一項所稱管制物品及其數額，由行政院公告之。」該條第一項與第三項規定須相結合，始為一完整之刑罰規定，而併得為釋憲之客體，合先說明。

Although the Constitution permits the legislative body to take the means of legislation by delegation, i.e. to authorize the administrative agencies to promulgate regulations to supplement the laws, the purposes, contents, and scopes of such authorization should be clear and

立法機關以委任立法之方式，授權行政機關發布命令，以為法律之補充，雖為憲法所許，惟其授權之目的、內容及範圍應具體明確。至於授權條款之明確程度，則應與所授權訂定之法規命令對人民權利之影響相稱。刑罰法規關係人民生命、自由及財產權益至鉅，

concrete. The degree of clarity in the authorizing provision should correspond with the impact on people's rights by the authorized regulations. Since criminal laws deeply concern the people's life, liberty, and property rights, they must be enacted through statutory legislation and in conformity with the principle of *nullum crimen sine lege*. When a law authorizes the governing authority to promulgate regulations to supplement the statute, the culpability of the act must be foreseeable in the authorizing law so that the authorization is clear and concrete, and in conformity with the principle of clarity on criminal penalties (*see* J.Y. Interpretation No. 522). Observing from the totality of the authorizing statute, as long as it is sufficient for the people to foresee that certain act is likely to be subject to criminal penalty, such authorization is not in contradiction with the doctrine of foreseeable culpability, and no affirmation of the culpable act is necessary.

自應依循罪刑法定原則，以制定法律之方式規定之。法律授權主管機關發布命令為補充規定時，須自授權之法律規定中得預見其行為之可罰，其授權始為明確，方符刑罰明確性原則（本院釋字第五二二號解釋參照）。其由授權之母法整體觀察，已足使人民預見行為有受處罰之可能，即與得預見行為可罰之意旨無違，不以確信其行為之可罰為必要。

The criminal penalty imposed under Article 2, Paragraph 1 of the Smuggling

懲治走私條例第二條第一項所科處之刑罰，對人民之自由及財產權影響

Punishment Act has an enormous effect on people's liberty and property rights. However, as to the contents of requirement that constitute the offence, such as the items and amounts of the controlled article, Paragraph 3 of the same Article authorizes the Executive Yuan to decide and publish. It does not specify the purposes of the control nor identify the factors that should be considered when the items and amounts of the controlled articles are published. Moreover, the authorizing statute lacks the regulations upon which other relevant matters may be based and inferred, thus the contents of the culpable acts can only be known from the "Items and Amounts of the Controlled Articles" promulgated and published by the Executive Yuan. Even by observing the totality of the Smuggling Punishment Act, it is still not foreseeable the smuggling of what items to what amount is likely to be penalized. As such, the authorization is certainly not clear and concrete, and thus not in conformity with the meaning and purpose of the Constitution to protect the people's right. Since

極為嚴重。然有關管制物品之項目及數額等犯罪構成要件內容，同條第三項則全部委由行政院公告之，既未規定為何種目的而為管制，亦未指明於公告管制物品項目及數額時應考量之因素，且授權之母法亦乏其他可據以推論相關事項之規定可稽，必須從行政院訂定公告之「管制物品項目及其數額」中，始能知悉可罰行為之內容，另縱由懲治走私條例整體觀察，亦無從預見私運何種物品達何等數額將因公告而有受處罰之可能，自屬授權不明確，而與上述憲法保障人民權利之意旨不符。鑒於懲治走私條例之修正，涉及國家安全、社會秩序及經貿政策等諸多因素，尚須經歷一定時程，該條例第二條第一項及第三項規定，應自本解釋公布之日起，至遲於屆滿二年時，失其效力。

the amendment to the Smuggling Punishment Act involves many elements such as national security, social order, and economic and trade policies, and the process may take certain period of time, Article 2, Paragraphs 1 and 3 of the Smuggling Punishment Act shall cease to be effective no later than the second anniversary since the issuance of this Interpretation.

On the part that concerns the petitioners' argument that Article 11 of the Smuggling Punishment Act and Item C of the "Items and Amounts of the Controlled Articles," as promulgated by the Executive Yuan on October 23, 2003, are unconstitutional, it was only based on their personal opinions to question the constitutionality without pointing out specifically what parts of the aboveindicated provisions contradict the Constitution. As this part of the petition is inconsistent with Article 5, Paragraph 1, Item 2 of the Constitutional Interpretation Procedure Act, it is hereby dismissed in accordance with Paragraph 3 of the same Article.

本件聲請人認懲治走私條例第十一條規定及中華民國九十二年十月二十三日行政院修正公告之「管制物品項目及其數額」丙項違憲部分，僅係以個人見解質疑其合憲性，並未具體指摘上開規定有何牴觸憲法之處。此部分聲請核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理

Justice Lai, In-Jaw filed concurring opinion, in which Justice Tzu-Yi Lin joined.

Justice Tzu-Yi Lin filed concurring opinion, in which Justice Lai, In-Jaw joined.

Justice Mao-Zong Huang filed concurring opinion, in which Justice Pai-Hsiu Yeh joined.

Justice Tzong-Li Hsu filed concurring opinion, in which Justice Tsay-Chuan Hsieh joined.

Justice Sea-Yau Lin filed dissenting opinion

本號解釋賴大法官英照、林大法官子儀共同提出協同意見書；林大法官子儀、賴大法官英照共同提出協同意見書；黃大法官茂榮、葉大法官百修共同提出協同意見書；許大法官宗力、謝大法官在全共同提出協同意見書；林大法官錫堯提出不同意見書。

EDITOR'S NOTE:

Summary of facts:The three petitioners are the captain, chief engineer, and engineer of a fishing vessel, respectively. In September, 2007, the petitioners purchased tuna and sailfish, among other things, from unidentified source in the open sea and smuggled the fish into the territory of Taiwan without truthful declaration. They were prosecuted after being discovered.

編者註：

事實摘要：聲請人3人分別為漁船船長、輪機長及輪機員。96年9月間，於外海向不詳人士購入鮪魚、旗魚等魚貨，未據實申報，即私運進入臺灣地區遭查獲及起訴。

The Taiwan High Court Kaohsiung Branch sentenced the petitioners to one year, nine months, and six months imprisonment respectively, for violation of Article 2, Paragraph 1 of the Smuggling Punishment Act. On appeal, the Supreme Court affirmed the judgment and dismissed the appeal on the procedural ground, holding that the petitioners did not specifically identify which parts of the High Court judgment were in violation of the laws. The judgment was final.

臺灣高等法院高雄分院以聲請人違反懲治走私條例第 2 條第 1 項走私罪，分別判處聲請人 1 年、9 月及 6 月有期徒刑。案經上訴至最高法院，該院以上訴未具體指摘二審判決有何違背法令之處，予以程序駁回，全案確定。

The petitioners filed for a constitutional Interpretation, arguing that Article 2, Paragraph 1 and Article 11 of the Smuggling Punishment Act and Item C of the "Items and Amounts of the Controlled Articles," as promulgated by the Executive Yuan on October 23, 2003 and applied in the Supreme Court Criminal Judgment 98 *Tai Shang Zi* No. 3417 and the Taiwan High Court Kaohsiung Branch Criminal Judgment 97 *Shang Sue Zi* No. 2032, are inconsistent with the principles of clarity with the authorization of law, equality, and proportionality, thus contra-

聲請人認最高法院 98 年度台上字第 3417 號刑事判決及臺灣高等法院高雄分院 97 年度上訴字第 2032 號刑事判決，所適用之懲治走私條例第 2 條第 1 項、第 11 條及 92 年 10 月 23 日行政院修正公告之「管制物品項目及其數額」丙類，違反授權明確性原則、平等原則及比例原則，有牴觸憲法第 7 條、第 15 條及第 23 條規定之疑義，聲請解釋。

vene the right to equal protection under Article 7 of the Constitution, the right to life, and property right under 15 of the Constitution, and contradict Article 23 of the Constitution regarding restrictions on people's fundamental rights.

J. Y. Interpretation No.681（September 10, 2010）*

ISSUE: A person cannot bring an administrative action to challenge the revocation of his or her parole. Objections, if any, shall be filed in the original court, which rendered the sentence whilst awaiting the execution of the remaining sentence. Is the foregoing unconstitutional ?

RELEVANT LAWS:

Articles 7, 8, and 16 of the Constitution（憲法第七條、第八條、第十六條）; J. Y. Interpretation Nos. 243, 382, 392, 418, 430, 462, 639, 653, 663, and 667（司法院釋字第二四三號、第三八二號、第三九二號、第四一八號、第四三０號、第四六二號、第六三九號、第六五三號、第六六三號、第六六七號解釋）; Article 405, Article 415, Paragraph 2, and Article 484 of the Code of Criminal Procedure（刑事訴訟法第四百零五條、第四百十五條第二項、第四百八十四條）; The Resolution of the Joint Conference of the Presiding Judges of the Supreme Administrative Court in February 2004（最高行政法院九十三年二月份庭長法官聯席會議決議）; Articles 77 and 78 of the Criminal Code（刑法第七十七條、第七十八條）; Article 81 of the Prison Act（監獄行刑法第八十一條）; Article 74–2, Subparagraphs 1 and 2, and Article 74-3, Paragraph 2, of the Rehabilitative Disposition Execution Act（保安

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* Translated by Alex C.Y. Tsai, Esq. and Chien Yeh Law Offices.

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處分執行法第七十四條之二第一款、第二款、第七十四條之三第二項）; Article 16 of the Statute for Narcotics Elimination as amended on July 27, 1992（八十一年七月二十七日修正公布之肅清煙毒條例第十六條）; Article 5, Paragraph 1, Subparagraphs 2 and 3 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款及第三項）.

KEYWORDS:

right to litigation（訴訟權）, physical freedom（人身自由）, due process（正當法律程序）, parole（假釋）, imprisonment（徒刑）, enforcement（執行）, objection（異議）, judicial administrative disposition（司法行政處分）, administrative litigation（行政爭訟）, criminal litigation（刑事訴訟）, timely remedy（適時救濟）, prisoner（受刑人）, privileged relationship（特別權力關係）.**

HOLDING: The Joint Conference of the Presiding Judges of the Supreme Administrative Court in February 2004 resolved that, "[T]he revocation of parole is a link in the enforcement of criminal judgments a judicial administrative disposition in the broad sense. The remedial procedures for any disagreement shall be in accordance with Article 484 of the Code of Criminal Procedure, that is,

解釋文：最高行政法院中華民國九十三年二月份庭長法官聯席會議決議：「假釋之撤銷屬刑事裁判執行之一環，為廣義之司法行政處分，如有不服，其救濟程序，應依刑事訴訟法第四百八十四條之規定，即俟檢察官指揮執行該假釋撤銷後之殘餘徒刑時，再由受刑人或其法定代理人或配偶向當初諭知該刑事裁判之法院聲明異議，不得提起行政爭訟。」及刑事訴訟法第

if and when the prosecutor have enforced the remaining sentence(s) following the revocation of parole, the prisoner, his/her legal representative or spouse who files a motion to object such revocation in the original court that rendered the criminal judgment may not bring forth an administrative litigation." Article 484 of the Code of Criminal Procedure stipulates that, "[A] prisoner, his/her legal representative or spouse who deems the prosecutor's enforcement inappropriate may file a motion to object in the court that rendered the criminal judgment." [These rules] do not deprive the people of the opportunity to seek remedies in court for the revocation of parole in accordance with the law and thus does not contravene the right to litigation as protected under the Constitution. However, once the parole is revoked, the parolee, under the above-indicated rules may only seek remedies in court after the prosecutor has enforced the remaining sentence(s). This is not a complete protection of the parolee's right to litigation. The relevant authorities shall promptly review and reform the regulations such that parolees who disagree with

四百八十四條規定：「受刑人或其法定代理人或配偶以檢察官執行之指揮為不當者，得向諭知該裁判之法院聲明異議。」並未剝奪人民就撤銷假釋處分依法向法院提起訴訟尋求救濟之機會，與憲法保障訴訟權之意旨尚無牴觸。惟受假釋人之假釋處分經撤銷者，依上開規定向法院聲明異議，須俟檢察官指揮執行殘餘刑期後，始得向法院提起救濟，對受假釋人訴訟權之保障尚非周全，相關機關應儘速予以檢討改進，俾使不服主管機關撤銷假釋之受假釋人，於入監執行殘餘刑期前，得適時向法院請求救濟。

the revocation of their parole may timely seek remedies in court prior to serving the remaining sentence(s).

REASONING: The protection of the people's right to litigation under Article 16 of the Constitution means the people have the right to seek remedy in courts when their rights have been infringed (*see* J.Y. Interpretation No. 418), and such right to litigation cannot be deprived due to one's social status (*see* J.Y. Interpretation Nos. 243, 382, 430, 462 and 653). As to the substantive contents of the right to litigation, it shall be realized through the enactment of relevant statutes consistent with due process by the legislature. As to whether the relevant procedural rules are appropriate, apart from considering whether the Constitution has any specific provisions and the various categories of fundamental rights involved, determination must be made based on a comprehensive consideration of the field the case is involved in, the severity and scope of the infringement on the fundamental rights, the public interests desired to pursue, the availability

解釋理由書：憲法第十六條保障人民訴訟權，係指人民於其權利遭受侵害時，有請求法院救濟之權利（本院釋字第四一八號解釋參照），不得因身分之不同而予以剝奪（本院釋字第二四三號、第三八二號、第四三０號、第四六二號、第六五三號解釋參照）。至訴訟權之具體內容，應由立法機關制定合乎正當法律程序之相關法律，始得實現。而相關程序規範是否正當，除考量憲法有無特別規定及所涉基本權之種類外，尚須視案件涉及之事物領域、侵害基本權之強度與範圍、所欲追求之公共利益、有無替代程序及各項可能程序之成本等因素，綜合判斷而為認定（本院釋字第六三九號、第六六三號、第六六七號解釋參照）。

of alternative procedures and the costs of various possible procedures, among other factors (*see* J.Y. Interpretation Nos. 639, 663 and 667).

The purpose of the parole system is to allow the halt of sentence enforcement for those imprisoned who has demonstrated repentance with concrete evidence and fulfilled the legal requirements and for the convicted to be actively reintegrated into the society (*see* Article 77 of the Criminal Code and Article 81 of the Prison Act). Once the governing authority decides to grant parole, the parolee will then be discharged from prison as the enforcement of sentence is on halt. Should the governing authority revoke its decision and reinforce the remaining sentence(s), it not only directly restricts the parolee's physical freedom but also severely impacts the various rights and interests enjoyed by the parolee since his/her reintegration into the society. Thus, any governing authority's decision concerning the revocation of a parole must follow certain due process and determined with due care. Thus, in a parole revocation decision, the parolee must be

假釋制度之目的在使受徒刑執行而有悛悔實據並符合法定要件者，得停止徒刑之執行，以促使受刑人積極復歸社會（刑法第七十七條、監獄行刑法第八十一條參照）。假釋處分經主管機關作成後，受假釋人因此停止徒刑之執行而出獄，如復予以撤銷，再執行殘刑，非特直接涉及受假釋人之人身自由限制，對其因復歸社會而業已享有之各種權益，亦生重大影響。是主管機關所為之撤銷假釋決定，允宜遵循一定之正當程序，慎重從事。是對於撤銷假釋之決定，應賦予受假釋人得循一定之救濟程序，請求法院依正當法律程序公平審判，以獲適時有效救濟之機會，始與憲法保障人民訴訟權之意旨無違。

afforded remedial procedures to seek a fair trial in accordance with due process of law in court such that opportunity for redress may be timely and effectively obtained and the intention to protect the people's right to litigation under the Constitution is not contravened.

The Joint Conference of the Presiding Judges of the Supreme Administrative Court in February 2004 resolved that, "[T]he revocation of parole is a link in the enforcement of criminal judgments a judicial administrative disposition in the broad sense. The remedial proce-dures for any disagreement shall be in accordance with Article 484 of the Code of Criminal Procedure, that is, if and when the prosecutor have enforced the remaining sentence(s) following the revocation of parole, the prisoner, his/her legal representative or spouse who files a motion to object such revocation in the original court that rendered the criminal judgment may not bring forth an administrative litigation." Article 484 of the Code of Criminal Procedure stipulates that, "[A] prisoner, his/her legal representative or

最高行政法院九十三年二月份庭長法官聯席會議決議：「假釋之撤銷屬刑事裁判執行之一環，為廣義之司法行政處分，如有不服，其救濟程序，應依刑事訴訟法第四百八十四條之規定，即俟檢察官指揮執行該假釋撤銷後之殘餘徒刑時，再由受刑人或其法定代理人或配偶向當初諭知該刑事裁判之法院聲明異議，不得提起行政爭訟。」刑事訴訟法第四百八十四條規定：「受刑人或其法定代理人或配偶以檢察官執行之指揮為不當者，得向諭知該裁判之法院聲明異議。」故受假釋人對於撤銷假釋執行殘刑如有不服，仍得依刑事訴訟法第四百八十四條規定，向當初諭知該刑事裁判之法院聲明異議，以求救濟。是上開最高行政法院決議及刑事訴訟法第四百八十四條規定並未剝奪人民依法向法院提起訴訟尋求救濟之機會，與憲法保障訴訟權之意旨尚無牴觸。惟受假釋

spouse who deems the prosecutor's enforcement inappropriate may file a motion to object in the court that rendered the criminal judgment." [These rules] do not deprive the people of the opportunity to seek remedies in court for the revocation of parole in accordance with the law and thus does not contravene the right to litigation as protected under the Constitution. However, once the parole is revoked, the parolee, under the above-indicated rules may only seek remedies in court after the prosecutor has enforced the remaining sentence(s). This is not a complete protection of the parolee's right to litigation. The relevant authorities shall promptly review and reform the regulations such that parolees who disagree with the revocation of their parole may timely seek remedies in court prior to serving the remaining sentence(s).

人之假釋處分經撤銷者，依刑事訴訟法第四百八十四條規定向法院聲明異議，須俟檢察官指揮執行殘餘刑期後，始得向法院提起救濟，對受假釋人訴訟權之保障尚非周全。相關機關應綜合考量相關因素，就該部分儘速予以檢討改進，俾使不服主管機關撤銷假釋之受假釋人，於入監執行殘餘刑期前，得適時向法院請求救濟。

Finally, one of the petitioners was of the view that Article 74-2, Paragraphs 1 and 2, and Article 74-3, Paragraph 2 of the Rehabilitation Penalty Enforcement Act violate Article 78 of the Criminal Code and the doctrine of presumption of

末查聲請人之一認保安處分執行法第七十四條之二第一款、第二款及第七十四條之三第二項等規定違反刑法第七十八條及無罪推定原則，與憲法第八條保障人身自由及司法院釋字第三九二號解釋意旨不符；另一聲請人認刑事訴

innocence and are inconsistent with the protection of physical freedom under Article 8 of the Constitution and J.Y. Interpretation No. 392. Another petitioner was of the view that Article 405 and Article 415, Paragraph 2 of the Code of Criminal Procedure, and Article 16 of the Statute for Narcotics Elimination, as amended on July 27, 1992, violate the principle of new rules take precedent in the litigation procedures and are inconsistent with Articles 7 and 16 of the Constitution. These are all contentions over the adequacy of a court's finding of facts and the application of law based on subjective personal views, and they have failed to specify exactly the rules that objectively contravene the Constitution, thus, is inconsistent with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act and [this part of the petition] shall be dismissed pursuant to Article 5, Paragraph 3 of the same Act.

訟法第四百零五條、第四百十五條第二項及八十一年七月二十七日修正公布之肅清煙毒條例第十六條等規定違反訴訟程序從新原則，牴觸憲法第七條及第十六條規定，聲請解釋憲法部分，均係以個人主觀見解爭執法院認事用法之當否，並未具體指摘該等規定於客觀上究有何牴觸憲法之處，核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理，併此指明。

Justice Tzu-Yi Lin filed concurring opinion, in which Justice Yu-hsiu Hsu joined.

本號解釋林大法官子儀、許大法官玉秀共同提出協同意見書；葉大法官百修提出協同意見書；黃大法官茂榮提

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Shin-Min Chen filed dissenting opinion.

大法官葉百修提出協同意見書；大法官黃茂榮提出協同意見書；陳大法官新民提出不同意見書。

EDITOR'S NOTE:

Summary of facts:(1) Petitioner X was convicted the offences of robbery, endangering public safety, and violations of the Anti-Corruption Act, and received respective imprisonment sentences that are to be enforced jointly. The Ministry of Justice later approved the Petitioner's parole. During the parole, the Petitioner again committed offences for the violation of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife, among other offences.

編者註：

事實摘要：（一）聲請人X因強盜、公共危險及違反貪污治罪條例等罪，經分別判處有期徒刑確定合併執行；嗣經法務部核准假釋出監，於假釋期間再犯違反槍砲彈藥刀械管制條例等罪。

The Ministry of Justice was of the view that the Petitioner severely breached the Rehabilitation Penalty Enforcement Act during parole, and revoked the parole. The Petitioner disagreed and petitioned to the Executive Yuan, but the case was dismissed. His appeal to the Taipei High

法務部認聲請人於假釋中違反保安處分執行法規定，情節重大，撤銷假釋。聲請人不服，向行政院提起訴願遭到駁回，遂向臺北高等行政法院起訴，均遭以不得提起行政訴訟為由，裁定駁回。

Administrative Court was denied on the ground that the no administrative litigation may be brought [under the circumstances].

The Petitioner continued to appeal the ruling. Yet, the Supreme Administrative Court, in the rulings of. (93) *Kan zi* No. 230 (2004) and (94) *Cai Zi* No. 1680 (2005), respectively, affirmed the dismissal and the rulings were final. The Petitioner argues that the resolution, as was applied in the aforementioned final rulings, is susceptible to being inconsistent with the protection of physical freedom under Article 8 of the Constitution and the right to litigation under Article 16 of the Constitution.

聲請人續行抗告，分別經最高行政法院 93 年度裁字第 230 號及 94 年度裁字第 1680 號裁定，駁回確定，爰認上開確定終局裁定所適用之系爭決議有牴觸憲法第 8 條及第 16 條之疑義，聲請解釋。

(2) Petitioner Y was a parolee released from the Yun Lin Prison and was subjected to a protective restriction order. The Ministry of Justice subsequently deemed the Petitioner to have committed serious violation of the Rehabilitation Penalty Enforcement Act during parole, and revoked the parole.

（二）聲請人 Y 係臺灣雲林監獄假釋出獄人，並接受保護管束。嗣法務部認聲請人於假釋中違反保安處分執行法規定，情節重大，撤銷假釋。

The Petitioner disagreed and filed an objection to the Taiwan Yun Lin District Court. After the court dismissed the case, the Petitioner appealed to the Taiwan High Court Tainan Branch, which confirmed the dismissal in criminal judgment (98) *Kan Zi* No. 24 (2009) on the ground that the Petitioner has not served the remaining of the sentence(s). The dismissal ruling was final. The Petitioner argued that the disputed resolution and provision, as applied in the aforementioned rulings, were susceptible to being contradictory to the protection of physical freedom under Article 8 of the Constitution and the right to litigation under Article 16 of the Constitution.

聲請人不服，向臺灣雲林地方法院聲明異議，案經該院裁定駁回後，向臺灣高等法院臺南分院提起抗告，亦遭該院 98 年度抗字第 24 號刑事裁定以尚未入監服刑為由，駁回確定，爰認上開確定終局裁定所適用之系爭決議及系爭規定，有牴觸憲法第 8 條及第 16 條規定之疑義，聲請解釋。

J. Y. Interpretation No.682（November 19, 2010）*

ISSUE: Some rules of the Special Examination for Doctors of Chinese Medicine provide that any examinee who scores zero points for any subject, has an average score of less than 50 points for professional subjects, scores less than 55 points for the subject of internal medicine, or scores less than 45 points for any of the other test subjects, does not pass the exam. Are such rules unconstitutional ?

RELEVANT LAWS:

Articles 7, 15, 18, 23 and Article 86, Paragraph 2 of the Constitution（憲法第七條、第十五條、第十八條、第二十三條、第八十六條第二款）；Judicial Yuan Interpretation No. 547 (2002.06.28)（司法院釋字第五四七號解釋）；Articles 2, 3, 9, 10, 11, 15, 19 and 22 of the Professionals and Technologists Examinations Act（專門職業及技術人員考試法第二條、第三條、第九條、第十條、第十一條、第十五條、第十九條、第二十二條）；Article 1 and 3 of the Physicians Act（2009.05.13)（醫師法第一條、第三條）；Article 15, Section 2 of the Enforcement Rules of the Professionals and Technologists Examinations Act (as amended on 2001.07.23)（中華民國（下同）九十年七月二十三日修正發布之專門職業及技術人員考試法施行細則第十五條

* Translated by Chi Chung.

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

第二項）；Article 10, Section 2 of the Enforcement Rules of the Professionals and Technologists Examinations Act (as amended on 2008.05.14)（九十七年五月十四日修正發布之專門職業及技術人員考試法施行細則第十條第二項）；Article 3, Section 1 of the Regulations on Score Calculation for the Professionals and Technologists Examinations（專門職業及技術人員考試總成績計算規則第三條第一項）；Article 9, Paragraph 3 of the Examination Rules on the Professional and Technical Special Examination for Doctors of Chinese Medicine (as amended on 2001.07.25)（九十年七月二十五日修正發布之專門職業及技術人員特種考試中醫師考試規則第九條第三項）；The Regulations on the Professional and Technical Special Examination for Doctors of Chinese Medicine (promulgated on 1962.02.23)（五十一年二月二十三日發布之特種考試中醫師考試規則）；The Regulations on the Qualification Screening Examination for Doctors of Chinese Medicine (promulgated on 1962.03.23)（五十一年三月二十三日發布之中醫師檢覈辦法）；The Regulations on the Preliminary Qualification Examination for Doctors of Chinese Medicine (promulgated on 1968.04.25)（五十七年四月二日發布之中醫師考試檢定考試規則）

KEYWORDS:

the right to work（工作權）, the right to take examinations（應考試權）, the freedom to choose an occupation（職業自由）, statutory reservation（法律保留）、the principle of proportionality（比例原則）, equal protection（平等

權）, the power to design and hold examinations（考試權）, professions（專門職業）, Doctor of Chinese Medicine（中醫師）, qualification for practice（執業資格）, Qualification Screening（檢覈）, Senior Examination（高等考試）, Initial Qualifying Examinations（檢定考試）, special examinations（特種考試）, qualifications to take examinations（應考資格）, test subjects（應試科目）, the standards used to determine who passes the examinations and who does not（及格方式）,the professional judgment（專業判斷）.**

HOLDING: Article 15, Paragraph 2 of the Enforcement Rules of the Professionals and Technologists Examinations Act, as amended on July 23, 2001, stipulates: "Where, in the preceding paragraph, the successful examinees are determined by using a total average score of not less than sixty or by a specific percentage of the total number of actual examinees in each category, if a candidate's score in any one of the examination subjects is zero, or if his or her average score in the professional subjects is less than fifty, or if any score in a specific subject fails to meet the minimum requirement, that candidate shall be deemed to have

解釋文：中華民國九十年七月二十三日修正發布之專門職業及技術人員考試法施行細則第十五條第二項規定:「前項總成績滿六十分及格……者，若其應試科目有一科成績為零分、專業科目平均不滿五十分、特定科目未達規定最低分數者，均不予及格。」（九十七年五月十四日修正發布之現行施行細則第十條第二項規定亦同）、專門職業及技術人員考試總成績計算規則第三條第一項規定：「……採總成績滿六十分及格……者，其應試科目有一科成績為零分，或專業科目平均成績不滿五十分，或特定科目未達規定最低分數者，均不予及格；……」及九十年七月二十五日修正發布之專門職業及技術人員特種考

failed the examination..” (The same text appears in Article 10, Paragraph 2 of the current Enforcement Rules, as amended on May 14, 2008.) Article 3, Paragraph 1 of the Final Score Calculation Rules of the Professionals and Technologists Examinations states: “An examinee passes a professionals and technologists examination if his or her final score is more than or equal to 60 points…. However, an examinee does not pass the examination if he or she scores zero points for any subject, has an average score of less than 50 points for professional subjects, or does not meet the minimum score requirements for specific subjects….” Article 9, Paragraph 3 of the Examination Rules of the Professional and Technical Special Examination for Doctors of Chinese Medicine, as amended on July 25, 2001, states: “Any examinee who scores zero points for any subject, has an average score of less than 50 points for professional subjects, scores less than 55 points for the subject of internal medicine, or scores less than 45 points for any of the other subjects tested, does not pass

試中醫師考試規則第九條第三項規定：「本考試應試科目有一科成績為零分或專業科目平均成績未滿五十分或專業科目中醫內科學成績未滿五十五分或其餘專業科目有一科成績未滿四十五分者，均不予及格。」尚未牴觸憲法第二十三條法律保留原則、比例原則及第七條平等權之保障，與憲法第十五條保障人民工作權及第十八條保障人民應考試權之意旨無違。

the exam…" The rules set out above are consistent with the principles of statutory reservation and proportionality under Article 23 of the Constitution, as well as the right of equal protection under Article 7 of the Constitution. These rules are also consistent with the protection of people's right to work under Article 15 of the Constitution and the protection of people's right to take examinations under Article 18 of the Constitution.

REASONING: The people's right to work, as protected by Article 15 of the Constitution, entails the freedom to choose and to pursue an occupation. Whether particular restrictions on the freedom to choose and to pursue an occupation imposed by a statute or a regulation explicitly authorized by a statute are constitutional is a question governed by several standards of review on the basis of their contents. Article 86, Paragraph 2 of the Constitution states that the qualifications for professional occupations shall be determined on the basis of examinations administered by the Exami-

解釋理由書：人民之工作權受憲法第十五條所保障，其內涵包括選擇及執行職業之自由，以法律或法律明確授權之命令對職業自由所為之限制是否合憲，因其內容之差異而有寬嚴不同之審查標準。憲法第八十六條第二款規定，專門職業人員之執業資格，應經考試院依法考選之。因此人民選擇從事專門職業之自由，根據憲法之規定，即受限制。憲法第十八條對人民應考試權之規定，除保障人民參加考試取得公務人員任用資格之權利外，亦包含人民參加考試取得專門職業及技術人員執業資格之權利，以符憲法保障人民工作權之意旨。又為實踐憲法保障人民應考試權之

nation Yuan. Thus the people's freedom to choose professional occupations is restricted by the Constitution itself. The right to take examinations under Article 18 of the Constitution not only guarantees the people's right to take examinations to become qualified to serve as civil servants, but also guarantees the people's right to take examinations to obtain license to work as professionals or technicians, which is consistent with the Constitution's protection of the people's right to work. In order to realize the protection of people's right to take examinations under the Constitution, the state is obliged to establish an objective and fair examination system and to ensure the fairness of the examination results. Should any regulation on the qualification to take examinations or the method of examinations constitute a limitation on the people's right to take examinations or the people's right to work, the regulation should not be inconsistent with the constitutional principles of statutory reservation, equal protection, and proportionality. However, adequate deference should be given to the

意旨，國家須設有客觀公平之考試制度，並確保整體考試結果之公正。對於參加考試資格或考試方法之規定，性質上如屬應考試權及工作權之限制，自應符合法律保留原則、比例原則及平等權保障等憲法原則。惟憲法設考試院賦予考試權，由總統提名、經立法院同意而任命之考試委員，以合議之方式獨立行使，旨在建立公平公正之考試制度；就專門職業人員考試而言，即在確保相關考試及格者具有執業所需之知識與能力，故考試主管機關有關考試資格及方法之規定，涉及考試之專業判斷者，應給予適度之尊重，始符憲法五權分治彼此相維之精神。

Examination Yuan, as the Constitution establishes the Examination Yuan and requires the Examiners, appointed by the President with the consent of the Legislative Yuan, to exercise independently the power to design and hold examinations to ensure a fair and objective examination system. Fairness in qualification examinations for professionals and technicians requires that all individuals who pass the examinations possess the necessary knowledge and abilities. As a result, if the regulations promulgated by the Examination Yuan with regard to qualifications to take examinations or methods of examination involve professional judgment about examinations, the regulations should be given adequate deference so as to conform to the constitutional spirit of the "separation and coordination of five powers."

Article 1 of the Physicians Act states that nationals of the Republic of China who pass the physicians' examination and receive the certificate of physician license accordingly may practice as

依醫師法第一條規定，中華民國人民經醫師考試及格並依該法領有醫師證書者，得充醫師。又依專門職業及技術人員考試法第二條規定，該法所稱專門職業人員，係指依法規應經考試及格

physicians. Article 2 of the Professionals and Technologists Examinations Act defines professionals and technologists as persons who are eligible to practice their professions only after passing examinations and obtaining certificates in accordance with laws and regulations. Through Article 1 of the Physicians Act, the Legislative Yuan classifies doctors of Chinese Medicine as professionals, who must obtain certificates of physician license in accordance with relevant statutes and regulations. (*see* J.Y. Interpretation No. 547). Article 15 of the Professionals and Technologists Examinations Act stipulates: "Regulations governing the different Special Examination for Professionals and Technologists shall be submitted by the Ministry of Examination to the Examination Yuan for approval (Paragraph 1). The examination regulations referred to in the preceding paragraph shall cover the grades and levels of examinations, as well as the qualifications for the different examination categories and the required examination subjects (Paragraph 2)." Article 19 of the Professionals and

領有證書始能執業之人員。是立法者將中醫師列為專門職業人員，其執業資格應依相關法令規定取得（本院釋字第五四七號解釋參照）。專門職業及技術人員考試法第十五條規定：「專門職業及技術人員各種特種考試之考試規則，由考選部報請考試院定之（第一項）。前項考試規則應包括考試等級及其分類、分科之應考資格、應試科目（第二項）。」第十九條規定：「專門職業及技術人員考試得視等級或類科之不同，其及格方式採科別及格、總成績滿六十分及格或以錄取各類科全程到考人數一定比例為及格（第一項）。前項及格方式，由考選部報請考試院定之（第二項）。專門職業及技術人員考試總成績計算規則，由考選部報請考試院定之（第三項）。」專門職業人員考試之應試科目暨及格標準之決定，關係人民能否取得專門職業之執業資格，對人民職業自由及應考試權雖有限制，惟上開事項涉及考試專業之判斷，除由立法者直接予以規定外，尚非不得由考試機關基於法律授權以命令規定之。上開規定除規定專門職業人員考試得採「科別及格」、「總成績滿六十分及格」及「錄取該類科全程到考人數一定比例為及

Technologists Examinations Act consists of three paragraphs. Paragraph 1 states: “with due regard to the different grades or categories of examinations, successful examinees in the Professionals and Technologists Examinations may be determined by their having passed each test subject, or by their achieving a total average score of not less than 60, or by a specific percentage of the total number of actual examination candidates in each category.” Paragraph 2 states: “the specific method of determining examination qualifiers with regard to the above shall be submitted by the Ministry of Examination to the Examination Yuan for approval.” Paragraph 3 states Regulations governing the calculation of total scores for Professionals and Technologists Examinations shall be submitted by the Ministry of Examination to the Examination Yuan for approval.. The test subjects and the standard used to determine who passes the Professionals and Technologists Examinations concern whether particular individuals may obtain licenses to work as professionals or technologists;

格」三種及格方式外，就各類專門職業人員考試應採之及格方式、各種特種考試之考試規則（包括考試等級及其分類、分科之應考資格、應試科目）、總成績計算規則等，明文授權考試機關本其職權及專業判斷訂定發布補充規定。考其立法意旨，即在賦予考試機關依其專業針對各該專門職業人員考試之需要，決定適合之及格方式暨及格標準，以達鑑別應考人是否已具專門職業人員執業所需之知識及能力之目的。考試院依據上開法律規定之授權，於中華民國九十年七月二十三日修正發布之專門職業及技術人員考試法施行細則第十五條第二項規定：「前項總成績滿六十分及格……者，若其應試科目有一科成績為零分、專業科目平均不滿五十分、特定科目未達規定最低分數者，均不予及格。」（九十七年五月十四日修正發布之現行施行細則第十條第二項規定亦同）、專門職業及技術人員考試總成績計算規則第三條第一項規定：「……採總成績滿六十分及格……者，其應試科目有一科成績為零分，或專業科目平均成績不滿五十分，或特定科目未達規定最低分數者，均不予及格；……」，及於九十年七月二十五日修正發布之專門

thus, they constitute limitations on the people's right to work and right to take examinations. However, the test subjects and the standard used to determine who passes the examinations involve professional judgment about examinations. As they involve professional judgment about examinations, not only may the Legislative Yuan legislate on such matters; the Examination Yuan may also promulgate administrative regulations on the basis of statutory authorization. In addition to setting out the three standards that may be used to determine who passes the examinations, *i.e.*, "achieving a score of 60 points on each and every test subjects," "achieving an average score of 60 points for all test subjects," and "achieving an average score better than a set percentage of all examinees," the Professionals and Technologists Examinations Act explicitly authorizes the Examination Yuan to, in accordance with its jurisdiction and professional judgment, promulgate supplemental regulations for all professionals and technologists examinations with regard to the methods used to determine

職業及技術人員特種考試中醫師考試規則第九條第三項規定：「本考試應試科目有一科成績為零分或專業科目平均成績未滿五十分或專業科目中醫內科學成績未滿五十五分或其餘專業科目有一科成績未滿四十五分者，均不予及格。」（以下併稱系爭規定）就中醫師特種考試所採「總成績滿六十分及格」之具體內容，明定尚包括應試科目不得有一科成績為零分、專業科目平均成績不得未滿五十分及特定科目應達最低分數之標準，尚未逾越上開法律授權範圍，與憲法第二十三條法律保留原則尚無牴觸。

who passes these examinations, the rules that govern these examinations (including those related to the level and classification of examinations, the qualifications required to take examinations, and the test subjects), and the calculation of examination scores. The legislative intent is to authorize the Examination Yuan to exercise its professional judgment to determine, for various examinations, the appropriate standards of passing by which the state may ensure that all examinees who pass examinations possess the necessary knowledge and abilities. With the statutory authorization set out above, Article 15, Paragraph 2 of the Enforcement Rules of the Professionals and Technologists Examinations Act, as amended on July 23, 2001 by the Examination Yuan, states: "For those whose total score has reached 60 points for qualification, … if any tested subject of the examinations should be zero point, the average score of the professional subjects is less than 50 points, or the score of specially designated subject(s) does not meet the minimum requirement, they shall all be deemed

to be not qualified." (The same text also appears in Article 10, Paragraph 2 of the current Enforcement Rules, as amended on May 14, 2008.) Article 3, Paragraph 1 of the General Score Calculation Rules of the Professionals and Technologists Examinations states: "… Among those qualified who have reached the general score of 60 points, … as long as there is a zero point on any tested subject, or the average score of the professional subjects is less than 50 points, or the score of specially designated subject(s) does not meet the minimum requirement, they shall all be disqualified…." Article 9, Paragraph 3 of the Rules of the Professionals and Technologists and Traditional Chinese Medicine Doctor Examination, as amended on July 25, 2001, states: "For the score on any of the test subject that is zero point or professional subjects that is less than 50 points in average, or the internal medicine of the Traditional Chinese Medicine that is less than 55 points, or any of the other professional subjects that is less than 45 points, they shall all be disqualified." (All these provisions are

referred to hereinafter as “disputed provisions.”) The disputed provisions, requiring that a successful examinee may not obtain zero points for any subjects, that a successful examinee’s average score be no less than 50 points, and that a successful examinee’s score for specific subjects should meet minimum requirements, provide more specific contents to the more general standard that “anyone who achieves an overall score of 60 points passes the examination” as applied in the Special Examination for Doctors of Chinese Medicine. Therefore, the disputed provisions do not violate the principle of statutory reservation under Article 23 of the Constitution.

Many patients in this country rely on doctors of Chinese medicine. As decades ago few formal schools of Chinese medicine existed, for the purpose of selecting qualified Chinese medicine doctors to meet the needs of the society, the Examination Yuan, authorized by the Examinations Act at the time, promulgated the Rules on Special Examination for

國人依賴中醫診療之患者眾多，早年因中醫正規教育尚未普及，考試院為甄拔適格之中醫人才以供社會所需，依據當時考試法規定之授權，於五十一年二月二十三日發布特種考試中醫師考試規則、同年三月二十三日發布中醫師檢覈辦法，及於五十七年四月二日發布中醫師考試檢定考試規則，以應考人學經歷之不同定其應考資格，分別舉辦中

Doctors of Chinese Medicine on February 23, 1962; the Measures on the Qualification Screening Examination for Doctors of Chinese Medicine on March 23 of the same year; and the Rules on the Initial Qualifying Examination for Doctors of Chinese Medicine on April 2, 1968. Pursuant to these regulations, examinees with various educational backgrounds and experiences could take three different kinds of examinations: Special Examinations, Certification Examinations, and Preliminary Qualification Examinations. Only those who pass the Special Examination or Certification Examination are qualified to practice as doctors of Chinese medicine. Later, as the society changed, more universities and independent colleges began to educate doctors of Chinese medicine, which is a result of the Legislative Yuan's policy decision, but the Legislative Yuan still enacted Article 3, Section 3 of the Physicians Act to allow those who pass the Initial Qualifying Examinations to take the Special Examination. As such a rule allows the individuals who do not possess an academic degree

醫師特種考試、檢覈考試及檢定考試，通過中醫師特種考試或檢覈考試者，始取得中醫師執業資格。嗣因社會變遷，大學或獨立學院之中醫學教育日漸普及，立法者雖選擇以大學或獨立學院之中醫學教育培養人才為中醫師之養成政策，仍於醫師法第三條第三項規定，經中醫師檢定考試及格者，得應中醫師特種考試，以保障非大學或獨立學院中醫學系畢業者、非醫學系、科畢業而修習中醫必要課程者或非醫學系選中醫學系雙主修畢業者，亦有參與考試以取得中醫師執業資格之機會，符合憲法第十八條保障人民應考試權之意旨。考試院即依此規定，依應考人是否經正式中醫學教育養成，而分別舉辦中醫師高等考試與中醫師特種考試兩類考試，並依專門職業及技術人員考試法規定之授權，及基於專業之判斷依法定程序訂定系爭規定。其就中醫師特種考試及格方式所為之規定，乃為鑑別應考人是否具有取得中醫師執業資格之合理手段，與憲法第二十三條規定之比例原則尚無牴觸，亦未違反第十五條保障人民職業自由及第十八條保障人民應考試權之意旨。

from a department of Chinese medicine but take courses required for Chinese medicine or obtain a degree in Chinese medicine to take examinations to become licensed to practice Chinese medicine, Article 3, Section 3 of the Physicians Act is consistent with the protection of the people's right to take examinations under Article 18 of the Constitution. Pursuant to Article 3, Section 3 of the Physicians Act, the Examination Yuan holds two kinds of examinations for doctors of Chinese medicine. Examinees who have already received formal education in Chinese medicine may take the Senior Examinations for doctors of Chinese medicine, while examinees who have not received formal education in Chinese medicine may take the Special Examination for doctors of Chinese medicine. The Examination Yuan duly promulgates the disputed provisions pursuant to the authorization of the Professionals and Technologists Examinations Act and on the basis of its professional judgment. The standards used to determine who passes the Special Examinations and who

does not are a rational means used to determine whether particular examinees are qualified to work as doctors of Chinese medicine. Therefore, such standards are consistent with the principle of proportionality under Article 23 of the Constitution, the protection of the people's right to work under Article 15 of the Constitution, and the protection of the people's right to take examinations under Article 18 of the Constitution.

The guarantee of people's right to equal protection under Article 7 of the Constitution is intended to prevent legislative arbitrariness and unreasonable differential treatment. For a statute or regulation to meet the equal protection requirement, the purpose of the differential treatment must be constitutional, and enough degree of nexus must exist between the classification set out in the regulation and the objectives that the regulation seeks to achieve. For examinees with various academic backgrounds and work experiences, the Examination Yuan holds three different examinations. Although

憲法第七條保障人民平等權，旨在防止立法者恣意，並避免對人民為不合理之差別待遇。法規範是否符合平等權保障之要求，其判斷應取決於該法規範所以為差別待遇之目的是否合憲，其所採取之分類與規範目的之達成之間，是否存有一定程度之關聯性而定。相關機關以應考人學經歷作為分類考試之標準，並進而採取不同考試內容暨及格標準，雖與人民職業選擇自由之限制及應考試權密切關聯，惟因考試方法之決定涉及考選專業判斷，如該分類標準及所採手段與鑑別應考人知識能力之考試目的間具合理關聯，即與平等原則無違。按立法者於專門職業及技術人員考試法

such differences in the knowledge tested and the minimum requirements may constitute limitations on the people's rights to choose occupations and to take examinations, the manner in which examinations are held involves the professional judgment about examinations. Therefore, as long as the classification is rationally related to the purpose of evaluating the knowledge and ability of the examinees, classification itself does not violate the principle of equal protection. Article 3 of the Professionals and Technologists Examinations Act divides Professionals and Technologists Examinations into three levels—senior, junior, and elementary—and authorizes the Examination Yuan to hold Special Examinations corresponding to these three levels to meet special needs. Articles 9, 10, and 11 of the same Act stipulate the qualifications, including both academic backgrounds and work experiences, required to take examinations. Article 22 further stipulates explicitly that depending on the needs of the particular kinds of professionals and technologists, additional training or education may be

第三條規定，專門職業及技術人員考試分為高等考試、普通考試、初等考試三等，並得為適應特殊需要而舉行相當於上開三等之特種考試；同法第九條、第十條及第十一條所規定各該等級考試之應考資格，係與應考人之學歷及經歷結合，第二十二條並明定得視類科需要於錄取後施以訓練或學習，期滿成績及格者，始發給考試及格證書。究其意旨即係認專門職業人員固應由考選機關依法考選，考選機關所舉辦之考試亦應符合整體結果公平公正之要求，惟無論採筆試、口試、測驗、實地考試、審查著作或發明、審查知能有關學歷經歷證明等考試方法，就應考人之專業素養鑑別度均有其侷限。且專門職業人員執業能力及倫理素養概須藉由相當程度系統化之教育始能培養，難謂僅憑考試方式即得予以鑑別。是為確保考試及格者之專業素養能達一定之執業程度，立法者即於上開規定依應考人教育養成之不同，舉行不同考試，並視需要於錄取後施以實務訓練或學習，相互接軌配套，期以形成合理之專業人員考選制度。考試院依醫師法第三條規定及專門職業及技術人員考試法相關規定，將中醫師執業資格考試區分為高等考試與特種考試兩類，

required after examinees pass examinations, and examinees may be licensed to work as professionals or technologists only after successfully completing this additional training or education. All of these rules imply the following policy consideration: Although professionals and technologists should be selected by the Examination Yuan through fair examinations held in accordance with the law, all methods of examination, including written examination, oral examination (interviews), on-site examination, review of publications, and review of diploma and work experience, cannot perfectly ascertain the professional abilities of examinees. In addition, professionals' and technologists' abilities and ethics must be cultivated by systematic education and cannot be ascertained through examinations only. Therefore, for the purpose of ensuring that the examinees that pass examinations have adequate professional abilities, the Legislative Yuan enacted the aforementioned articles in the Professionals and technologists Examinations Act, offering examinations for individuals

並因中醫師特種考試與高等考試兩類考試應考人所接受中醫學教育及訓練養成背景、基本學養等均有不同，為配合此一養成背景之差異，其考試規則有關及格方式、應試科目等之規定因而有所不同；且系爭專門職業及技術人員特種考試中醫師考試規則第九條第三項規定，就中醫師特考應考人之專業科目中醫內科學成績必須滿五十五分，其餘專業科目均須滿四十五分之及格要求，亦為考試主管機關依法定程序所為之專業判斷，與鑑別中醫師特考應考人是否具有中醫師執業所需之知識、技術與能力，有合理關聯性，並非考試主管機關之恣意選擇。是上開考試院發布之系爭規定尚無違背憲法第七條保障人民平等權之意旨。

with specific academic backgrounds and requiring additional training or learning. The purpose was to establish a reasonable examination system for professionals and technologists. Pursuant to Article 3 of the Physicians Act and the relevant rules in the Professionals and Technologists Examinations Act, the Examination Yuan divides the examinations for doctors of Chinese medicine into senior examinations and special examinations, and promulgates different examination rules with respect to the test subjects and the standards used to determine who passes the examinations and who does not, taking account of the fact that the examinees of these two examinations differ in their education and training in Chinese medicine. In addition, the requirement of Article 9, Section 3 of the Examination Rules on the Special Examination for doctors of Chinese Medicine, which states that successful examinees must receive at least 55 points for Chinese Internal Medicine and at least 45 points for other professional subjects, is a professional judgment made by the Examination Yuan in

accordance with the legal procedure, and is rationally, instead of arbitrarily, related to the purpose of the Special Examination for doctors of Chinese medicine—identifying examinees who have the knowledge, techniques, and ability to practice as doctors of Chinese medicine. For this reason, the aforementioned rules promulgated by the Examination Yuan do not violate the principle of equal protection under Article 7 of the Constitution.

In conclusion, the disputed regulations are consistent with the principle of statutory reservation and the principle of proportionality under Article 23 of the Constitution, as well as the right of equal protection under Article 7 of the Constitution. These rules are also consistent with the protection of people's right to work under Article 15 of the Constitution and right to take examinations under Article 18 of the Constitution.

Justice Tzu-Yi Lin filed concur-ring opinion.

Justice Yeong-Chin Su filed concur-

綜上所述，系爭規定與憲法第二十三條法律保留原則、比例原則及第七條平等權之保障尚無牴觸，亦無違背憲法第十五條保障人民工作權及第十八條保障人民應考試權之意旨

本號解釋林大法官子儀提出協同意見書；蘇大法官永欽提出協同意見書；林大法官錫堯提出協同意見書；陳大法

ring opinion.

Justice Sea-Yau Lin filed concurring opinion.

Justice Shin-Min Chen filed dissenting opinion.

Justice Mao-Zong Huang filed dissenting opinion.

Justice Chen-Shan Li filed dissenting opinion in part, in which Justice Yu-hsiu Hsu and Justice Chun-Sheng Chen joined

官新民提出不同意見書；黃大法官茂榮提出不同意見書；李大法官震山、許大法官玉秀、陳大法官春生共同提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts:The petitioner took the Special Examination for doctors of Chinese medicine in 2002. Although he achieved an overall average score of more than 60 points, his scores on two subjects, "Traditional Chinese Internal Medicine" and "Traditional Chinese Medicine Diagnostics", failed to meet the minimum passing requirements set out in Article 9, Paragraph 3 of the Examination Rules on the Special Examination for doctors of Chinese medicine. As a result, the petitioner failed to pass the exam.

編者註：

事實摘要：聲請人參加九十一年專門職業及技術人員特種考試中醫師考試，經評定總成績雖滿六十分，惟其專業科目之「中醫內科學」、「中醫診斷學」二科成績未達中醫師特考考試規則第九條第三項所定之及格標準，致未獲錄取。

The petitioner filed a request to the Ministry of Examination for reviewing his scores on all the test subjects. After reviewing and checking the petitioner's answer sheets and scorecards, no errors were found. The Ministry of Examination then notified the petitioner of the review results.

聲請人向考選部申請複查各科目考試成績。經該部調閱其試卷及試卡核對結果，並無漏未評閱情事，且評定成績亦與成績單所載相符，遂檢附成績複查表函知聲請人。

Unsatisfied with the disposition by the Ministry of Examination, the petitioner brought an administrative appeal to the Examination Yuan but the case was dismissed. The petitioner then appealed but the Taipei High Administrative Court ruled against the petitioner. The petitioner then appealed but the Supreme Administrative Court again ruled against the petitioner. Believing that several then applicable regulations, i.e., Article 15, Paragraph 2 of the Enforcement Rules of the Professionals and Technologists Examinations Act, Article 3, Section 1 of the Final Score Calculation Rules of the Professionals and Technologists Examinations, and Article 9, Paragraph 3 of the Examination Rules of the Professionals

聲請人不服考選部對其之不及格處分，提起訴願，遭考試院決定駁回；續提行政訴訟，迭經台北高等行政法院及最高行政法院判決駁回確定，乃認確定終局判決所適用之當時專門職業及技術人員考試法施行細則第十五條第二項、專門職業及技術人員考試總成績計算規則第三條第一項及專門職業及技術人員特種考試中醫師考試規則第九條第三項規定，有違反平等原則及法律保留原則之疑義，並致其工作權受侵害，聲請解釋。

and Technologists and Doctors of Chinese medicine Examination violated the constitutional principles of equal protection and statutory reservation and, therefore, adversely affected the petitioner's right to work, the petitioner filed for interpretation.

J. Y. Interpretation No.683（December 24, 2010）*

ISSUE: Is it unconstitutional for labor insurance cash payment not being made within ten days since the receipt of application and without the addition of delayed interests?

RELEVANT LAWS:

Article 153, Paragraph 1 and the front paragraph of Article 155 of the Constitution（憲法第一百五十三條第一項、第一百五十五條前段）；Article 10, Paragraph 8 of the Amendments to the Constitution（憲法增修條文第十條第八項）；Articles 17 of the Labor Insurance Act（勞工保險條例第十七條）；Article 57 of the Enforcement Rules of the Labor Insurance Act, amended and promulgated on September 13, 1996（中華民國八十五年九月十三日修正發布之勞工保險條例施行細則第五十七條）.

KEYWORDS:

fundamental national policies to protect laborers under the Constitution（憲法保護勞工基本國策）, social insurance （社會保險）, labor insurance（勞工保險）, labor insurance payments（勞工保險給付）, delayed payment（遲延給付）, delayed interest（遲延利息）, late fee（滯納金）.**

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* Translated by Prof. Dr. Ming Woei Chang.

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

HOLDING: Article 57 of the Enforcement Rules of the Labor Insurance Act, amended and promulgated on September 13, 1996, stipulates: "Once the application for cash payment by the insured or his/her beneficiaries is completed and approved for disbursement, the insurer shall disburse the payment within ten days since the date the application is received." The purpose is to prompt the labor insurer complete the cash payment of labor insurance as soon as possible, and to protect the livelihood of the insured laborers or their beneficiaries in the aftermath of the insured incidents, and is in compliance with the fundamental national policies of labor protection under the Constitution.

解釋文：中華民國八十五年九月十三日修正發布之勞工保險條例施行細則第五十七條規定：「被保險人或其受益人申請現金給付手續完備經審查應予發給者，保險人應於收到申請書之日起十日內發給之。」旨在促使勞工保險之保險人儘速完成勞工保險之現金給付，以保障被保險勞工或其受益人於保險事故發生後之生活，符合憲法保護勞工基本國策之本旨。

REASONING: Paragraph 1 of Article 153 of the Constitution stipulates: "The State, in order to improve the livelihood of laborers and farmers and to improve their productive skills, shall enact laws and carry out policies for their protection." The front paragraph of Article 155 stipulates: "The State, in order to promote social welfare, shall establish

解釋理由書：憲法第一百五十三條第一項規定：「國家為改良勞工及農民之生活，增進其生產技能，應制定保護勞工及農民之法律，實施保護勞工及農民之政策。」第一百五十五條前段規定：「國家為謀社會福利，應實施社會保險制度。」而憲法增修條文第十條第八項亦要求國家應重視社會保險之社會福利工作。故國家就勞工因其生活及

a social insurance system." Article 10, Paragraph 8 of the Amendments to the Constitution also mandates the State to put emphasis on social welfare services from social insurance. Therefore, the State shall establish a social insurance system to jointly undertake the risk of possible losses resulting from their lives or occupations. To realize this constitutional mandate, the legislative body enacts the Labor Insurance Act to ensure that laborers can promptly get various insurance payments in light of the occurrence of insurance incidents, so as to protect the livelihood of the laborers and to promote social security.

職業可能遭受之損害，應建立共同分擔風險之社會保險制度。為落實上開憲法委託，立法機關乃制定勞工保險條例，使勞工於保險事故發生時，能儘速獲得各項保險給付，以保障勞工生活，促進社會安全。

Article 57 of the Enforcement Rules of the Labor Insurance Act, amended and promulgated on September 13, 1996, stipulates: "Once the application for cash payment by the insured or his/her beneficiaries is completed and approved for disbursement, the insurer shall disburse the payment within ten days since the date the application is received." The purpose is to prompt the labor insurer complete the cash payment of labor insurance as

八十五年九月十三日修正發布之勞工保險條例施行細則第五十七條規定：「被保險人或其受益人申請現金給付手續完備經審查應予發給者，保險人應於收到申請書之日起十日內發給之。」旨在促使勞工保險之保險人儘速完成勞工保險之現金給付，以保障被保險勞工或其受益人於保險事故發生後之生活，符合勞工保險條例保障勞工生活之意旨，與憲法保護勞工基本國策之本旨無違。至於被保險勞工或其受益人，

soon as possible, and to protect the livelihood of the insured laborers or their beneficiaries in the aftermath of the insured incidents, and does not contravene the fundamental national policies of labor protection under the Constitution. With regard to how the insured laborers or their beneficiaries may seek remedy for damages resulting from the culpable delayed payment by the insurers, it should be pointed out that while the legislators have the naturally evolved authority, yet based on the aboveindicated fundamental purpose under the Constitution for labor protection, they should certainly weigh in the progresses of social security mechanism, coordinate with the development of other social insurance systems, and make reference to the provisions on late fees and provisional suspension of insurance payment under Article 17 of the Labor Insurance Act so as to review constantly how the status of laborers can be improved in the labor insurance relations.

因可歸責於保險人之遲延給付而受有損害時，如何獲得救濟，立法者固有自由形成之權限，惟基於上開憲法保護勞工之本旨，立法者自應衡酌社會安全機制之演進，配合其他社會保險制度之發展，並參酌勞工保險條例第十七條已有滯納金及暫行拒絕保險給付之規定，就勞工在保險關係地位之改善，隨時檢討之，併此指明。

Justice Sea-Yau Lin filed concurring opinion.

Justice Tzong-Li Hsu filed concur-

本號解釋林大法官錫堯提出協同意見書；許大法官宗力提出協同意見書；葉大法官百修提出協同意見書；黃大法

ring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Shin-Min Chen filed dissenting opinion in part.

官茂榮提出協同意見書；陳大法官新民提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts:

1. The Petitioner's spouse, X, died on August 21, 1998 and the Petitioner filed a death benefit claim under Article 64 of the Labor Insurance Act. The Bureau of Labor Insurance (*hereinafter* BLI), based on then effective Article 18 of the Enforcement Rules of the Labor Insurance Act, rejected the claim on the ground that the company X worked for before her death had failed to pay the insurance premium, thus resulting in its entire employees being withdrawn from the labor insurance since September 30, 1997. The Petitioner subsequently petitioned a constitutional interpretation and the Grand Justices rendered J.Y. Interpretation No. 568 on November 14,

編者註：

事實摘要：

1. 聲請人之配偶X於民國87年8月21日死亡，聲請人依勞工保險條例第64條規定請領死亡給付。經勞工保險局（以下簡稱勞保局）依當時有效之勞工保險條例施行細則第18條規定，認X生前服務之佷興公司積欠保費，所屬員工自86年9月30日起全體退保，而拒絕給予勞工保險給付。嗣聲請人聲請釋憲，本院大法官於92年11月14日作成釋字第五六八號解釋，認為上開施行細則以投保人積欠保費將被保險人退保，增加法律所未規定之事項而違憲。聲請人據該解釋提起再審，勞保局乃重新核定，同意回復X被保險人資格至死亡日止，並於93年3月2日核定給付。

2003, holding that by withdrawing the insured from the insurance due to premium payer's failure to pay, the above-indicated Enforcement Rules have added items not provided under the statute and thus contravened the Constitution. The Petitioner then filed for a reexamination based on the this J.Y. Interpretation, and after its review, the BLI agreed to reinstate the status of X's labor insurance until the date of her death, and approved the disbursement of her insurance benefits on March 2, 2004.

2. The Petitioner asserted that under Article 57 of the Enforcement Rules of the Labor Insurance Act, as amended and promulgated on September 13, 1996, delayed interests should be added for the BLI's non-payment until March 2, 2004. The BLI, however, rejected the request, claiming that there was no delay. Having gone through the administrative litigation, the case was finally dismissed by the Supreme Administrative Court ((98) *Pan Tzu* No. 654 Judgment (2009)).

2. 聲請人主張依據 85 年 9 月 13 日修正發布之勞工保險條例施行細則第 57 條規定，勞保局遲至 93 年 3 月 2 日始给付，應加計遲延利息。勞保局則以無遲延情事，拒絕其請求。聲請人歷經行政爭訟，經最高行政法院 98 年度判字第 654 號判決駁回確定，爰聲請解釋。

The Petitioner then filed the present interpretation.

J. Y. Interpretation No.684（January 17, 2011）*

ISSUE: Is a student who claims that his/her rights are violated by a university's administrative decision other than an expulsion or similar decision entitled to bring administrative appeal and litigation against the decision ?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）；J. Y. Interpretation Nos. 380, 382, 418, 462, 563, 626, 653, and 667（司法院釋字第三八〇號、第三八二號、第四一八號、第四六二號、第五六三號、第六二六號、第六五三號、第六六七號解釋）.

KEYWORDS:

right to administrative appeal（訴願權）, right to litigation（訴訟權）, J. Y. Interpretation No. 382（釋字第三八二號解釋）, expulsion（退學）, right to education（受教育之權利）, significant impact（重大影響）, administrative decision（行政處分）, other constitutional rights（其他基本權利）, Where there is a right, there is a remedy（有權利即有救濟）, university self-government（大學自治）.**

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* Translated by C. L. Chen

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

HOLDING: When a university makes administrative decisions or other public authority measures for realizing educational purposes of seeking academic truth and cultivating talents or for maintaining the campus order, if the decisions or measures infringe the student's right to education or other constitutional rights, even if the decisions or measures are not expulsions or similar decisions, based on the mandate that where there is a right, there is a remedy under Article 16 of the Constitution, the student whose right has been infringed shall be allowed to bring administrative appeal and litigation and there is no need to place special restrictions. To this extent, the holding of J. Y. Interpretation No. 382 is hereby modified.

解釋文：大學為實現研究學術及培育人才之教育目的或維持學校秩序，對學生所為行政處分或其他公權力措施，如侵害學生受教育權或其他基本權利，即使非屬退學或類此之處分，本於憲法第十六條有權利即有救濟之意旨，仍應許權利受侵害之學生提起行政爭訟，無特別限制之必要。在此範圍內，本院釋字第三八二號解釋應予變更。

REASONING: Article 16 of the Constitution guarantees the people the right to administrative appeal and the right to litigation. When the rights of an individual are violated by public authority, the individual may duly bring administrative appeal and litigation to seek adequate remedies (*see* J. Y. Interpretation

解釋理由書：人民之訴願權及訴訟權為憲法第十六條所保障。人民於其權利遭受公權力侵害時，得循法定程序提起行政爭訟，俾其權利獲得適當之救濟（本院釋字第四一八號、第六六七號解釋參照），而此項救濟權利，不得僅因身分之不同而予以剝奪。

Nos. 418 and 667). This right to remedy may not be deprived of merely because of the status of the individual.

On the question of whether people who, as students, are subject to schools' actions may bring administrative appeal and litigation, J. Y. Interpretation No. 382 holds the view that it depends on the contents of the actions. For an expulsion or similar decision based on enrollment rules or disciplinary regulations and sufficient to alter the student status of a student and to hinder the student's opportunity to receive education, because it has significant impact on the individual's constitutional right to education, it constitutes the administrative decision under the Administrative Appeal Act and the Administrative Litigation Act and, therefore, the student may bring administrative appeal and litigation against it. As to the school's actions against a student necessary for maintaining the campus order or realizing educational purposes and do not infringe the right to education, such as recording a demerit or reprimand, the student can

本院釋字第三八二號解釋就人民因學生身分受學校之處分得否提起行政爭訟之問題，認為應就其處分內容分別論斷，凡依有關學籍規則或懲處規定，對學生所為退學或類此之處分行為，足以改變其學生身分及損害其受教育之機會時，因已對人民憲法上受教育之權利有重大影響，即應為訴願法及行政訴訟法上之行政處分，而得提起行政爭訟。至於學生所受處分係為維持學校秩序、實現教育目的所必要，且未侵害其受教育之權利者（例如記過、申誡等處分），則除循學校內部申訴途徑謀求救濟外，尚無許其提起行政爭訟之餘地。惟大學為實現研究學術及培育人才之教育目的或維持學校秩序，對學生所為行政處分或其他公權力措施，如侵害學生受教育權或其他基本權利，即使非屬退學或類此之處分，本於憲法第十六條有權利即有救濟之意旨，仍應許權利受侵害之學生提起行政爭訟，無特別限制之必要。在此範圍內，本院釋字第三八二號解釋應予變更。

only appeal within the school and is not allowed to bring administrative appeal or litigation. However, when a university makes administrative decisions or other public authority measures for realizing educational purposes of seeking academic truth and cultivating talents or for maintaining the campus order, if the decisions or measures infringe the student's right to education or other constitutional rights, even if the decisions or measures are not expulsions or similar decisions, based on the mandate that where there is a right, there is a remedy under Article 16 of the Constitution, the student whose right has been infringed shall be allowed to bring administrative appeal and litigation and there is no need to place special restrictions. To this extent, the holding of J. Y. Interpretation No. 382 is hereby modified.

Teaching, research, and students' freedom of learning at university are all protected by the Constitution and a university is entitled to the right of self-government to the extent permitted by law (*see* J. Y. Interpretation No. 563).

大學教學、研究及學生之學習自由均受憲法之保障，在法律規定範圍內享有自治之權（本院釋字第五六三號解釋參照）。為避免學術自由受國家不當干預，不僅行政監督應受相當之限制（本院釋字第三八０號解釋參照），立

To prevent academic freedom from the undue interference of the state, not only the administrative supervision should be considerably restricted (*see* J. Y. Interpretation No. 380) but the legislature may regulate university affairs only to a reasonable extent (*see* J. Y. Interpretation Nos. 563 and 626). The agencies or courts that hear administrative appeal or administrative litigation cases brought by university students should, based on the principle of university self-government, to an adequate extent defer to the professional judgment of universities (*see* J. Y. Interpretation No. 462).

法機關亦僅得在合理範圍內對大學事務加以規範（本院釋字第五六三號、第六二六號解釋參照），受理行政爭訟之機關審理大學學生提起行政爭訟事件，亦應本於維護大學自治之原則，對大學之專業判斷予以適度之尊重（本院釋字第四六二號解釋參照）。

Separately, one of the petitioners argues that Article 4, Paragraph 1 of the Administrative Litigation Act violates Article 16 of the Constitution and is inconsistent with J. Y. Interpretation No.653. This part of the petition does not specifically indicate how the provision contravenes the Constitution objectively but merely disputes the appropriateness of fact-finding and law-application of the courts from a personal subjective per-

另聲請人之一認行政訴訟法第四條第一項規定，違反憲法第十六條，且與司法院釋字第六五三號解釋意旨不符，聲請解釋憲法部分，係以個人主觀見解爭執法院認事用法之當否，並未具體指摘該規定於客觀上究有何牴觸憲法之處，核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理，併此指明。

spective and, therefore, does not satisfy the requirement set forth in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act. According to Article 5, Paragraph 3 of the Constitutional Interpretation Procedure Act, this part of the petition shall be dismissed.

Justice Chen-Shan Li filed concurring opinion.

Justice Yeong-Chin Su filed concurring opinion.

Justice Tzong-Li Hsu filed concurring opinion.

Justice Ching-You Tsay filed concurring opinion.

Justice Yu-hsiu Hsu filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Shin-Min Chen filed dissenting opinion in part.

本號解釋李大法官震山提出協同意見書；蘇大法官永欽提出協同意見書；許大法官宗力提出協同意見書；蔡大法官清遊提出協同意見書；許大法官玉秀提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官春生提出協同意見書；陳大法官新民提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts:

1. Petitioner X was a first year master's student at a graduate school of a university. In the first semester of the 2008-09 academic year, he attempted to select a course entitled "Corporate Governance and Business Development" offered at the EMBA program by another college of the university. The university rejected this class selection on the ground that the petitioner was not a student of the EMBA program. After the petitioner went through the appeal within the university, administrative appeal and administrative litigation but the cases were all dismissed for lack of legal conformity, he filed this petition.

2. Petitioner Y was a fourth year master's student at another graduate school of the same university. On March 16, 2004, he sought the permission from the Extracurricular Activities Section of the Office of Student Affairs to put up on campus the poster in support of

編者註：

事實摘要：

1. 聲請人X為某大學研究所碩一學生，97學年度上學 期，跨院加選他學院EMBA學程所開設的「公司治理與企業發展」科目，學校認聲請人非該學院EMBA學生，否准其加選。聲請人迭經校內申訴、訴願不受理及行政訴訟以不合法為由駁回確定，爰聲請解釋。

2. 聲請人Y為同大學另系研究所碩四學生，93年3月16日向學校學生事務處課外活動指導組申請在該校公告欄及海報版張貼「挺扁海報」，時值公職人員競選期間，學校以違背國家法令為由否准所請。聲請人迭經校內申訴、訴願不受理及行政

a certain candidate during the period of an election of public officials. The university rejected his application on the ground that the act would violate national laws. After the petitioner went through the appeal within the university, administrative appeal and administrative litigation but the cases were all dismissed for lack of legal conformity, he filed this petition.

訴訟以不合法為由駁回確定，爰聲請解釋。

3. Petitioner Z was a sophomore at the Department of Tourism Industry of a private institute of technology. In the end of the second semester of the 2002-03 academic year, he requested the teacher of an obligatory course to reschedule the final examination to an earlier date because of the conflict of schedule between the original date of the examination and the date of the tourism Japanese tour guide examination of 2003, and the teacher agreed. However, subsequently, the teacher failed him in the course and, as a result, the petitioner could not graduate in 2003. The petitioner argued

3. 聲請人Z為某私立技術學院進修部觀光餐旅學群觀光事業科二年級學生，因91年度下學期期末必修科目考試日期，與92年觀光日語導遊筆試日期衝突，向授課教師申請提前考試獲准，然該必修科目嗣經授課教師評定成績不及格，致無法於92年畢業。聲請人主張成績評分不公影響畢業，迭經校內申訴、行政訴訟以不合法為由駁回確定，爰聲請解釋。

that the evaluation was not just and adversely affected his graduation, and after going through appeal within the university and administrative litigation but the cases were all dismissed, he filed this petition.

J. Y. Interpretation No.685（March 4, 2011）*

ISSUE: Is the administrative fine without a cap for the failures of a business entity, which has entered into a contract with a cooperative store to provide goods for sale, to issue uniform invoices to the customers of the cooperative store and to obtain invoices from the cooperative store in contravention of the Constitution ?

RELEVANT LAWS:

Articles 15, 19 and 23 of the Constitution（憲法第十五條、第十九條與第二十三條）；J.Y. Interpretations Nos. 252, 397, 607, 620, 622, 625, 635, 641, 642, 660 and 674（司法院大法官會議解釋釋字第二五二號、第三九七號、第六〇七號、第六二〇號、第六二二號、第六二五號、第六三五號、第六四一號、第六四二號、第六六〇號與六七四號解釋）；Value-Added and Non-Value-Added Business Tax Act: Article 2, Subparagraph 1; Article 3, Paragraph 1; Articles 14-16 Article 19; Article 32, Paragraph 1; Article 33 and Article 35 of the Value-Added and Non-Value-Added Business Tax Act（加值型及非加值型營業稅法第二條第一款、第三條第一項、第十四條、第十五條、第十六條、第十九條、第三十二條第一項、第三十三條與第三十五條）；Article 44 of the Tax Levy Act（稅捐稽徵法第四十四條）；Administrative In-

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* Translated by Professor Chun-Jen Chen.

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terpretation of the Ministry of Finance, Tai-Cai-Shui-Tze No. 761126555 (April 2, 1988)(abolished on March 19, 2009)（財政部七十七年四月二日台財稅字第七六一一二六五五五號函（九十八年三月十九日廢止））； Administrative Interpretation of the Ministry of Finance, Tai- Cai-Shui-Tze No. 910453902 (June 21, 2002)（財政部九十一年六月二十一日台財稅字第九一0四五三九0二號函）；Resolution of the First Joint Meeting of Chief Judges and Judges of the Administrative Court in July, 1998（行政法院八十七年七月份第一次庭長評事聯席會議決議）.

KEYWORDS:

value-added（加值型）, business tax（營業稅）, tax（稅）, levy（徵收）, administrative fine（行政罰）, business entity（營業人）, for-profit enterprise（營利事業）, statutory taxpayer（納稅義務人）, uniform invoice（統一發票）, property right（財產權）, principle of proportionality（比例原則）, principle of taxation by law（租稅法律主義）.**

HOLDING: The Adminis-trative Interpretation of the Ministry of Finance, Tai-Cai-Shui-Tze No. 910453902 (June 21, 2002) stated that a business entity is the seller of the goods when it sells the goods and collects the proceeds by itself. And, the Resolution of the First Joint Meeting of Chief Judges and Judges of

解釋文：財政部中華民國九十一年六月二十一日台財稅字第九一0四五九三九0二號函，係闡釋營業人若自己銷售貨物，其銷售所得之代價亦由該營業人自行向買受人收取，即為該項營業行為之銷售貨物人；又行政法院（現改制為最高行政法院）八十七年七月份第一次庭長評事聯席會議決議，關於非

the Administrative Court (now reorganized as the Supreme Administrative Court) in July, 1998, in the relevant part, stating that, regardless of whether the opposite party of a transaction files a tax return in accordance with the amount of the invoices issued, the obligation of providing a make-up payment for the business entity, which sells goods or services, remains unaffected. These rulings are both consistent with the legislative intent of the Value-Added and Non-Value-Added Business Tax Act (the Business Tax Act was renamed as the Value-Added and Non-Value-Added Business Tax Act on July 9, 2001, *hereinafter* referred to as the Business Tax Act.) Article 2, Subparagraph 1; Article 3, Paragraph 1, and the first half of Article 32, Paragraph 1 of the Business Tax Act and are not in contravention of the principle of taxation by law under Article 19 of the Constitution.

交易對象之人是否已按其開立發票之金額報繳營業稅額，不影響銷售貨物或勞務之營業人補繳加值型營業稅之義務部分，均符合加值型及非加值型營業稅法（營業稅法於九十年七月九日修正公布名稱為加值型及非加值型營業稅法，以下簡稱營業稅法）第二條第一款、第三條第一項、第三十二條第一項前段之立法意旨，與憲法第十九條之租稅法律主義尚無牴觸。

Article 44 of the Tax Levy Act, as amended on January 24, 1990, imposes an administrative fine of five percent of the verified sum of the total amount of

七十九年一月二十四日修正公布之稅捐稽徵法第四十四條關於營利事業依法規定應給與他人憑證而未給與，應自他人取得憑證而未取得者，應就其未

sales which should have been made with invoices when no invoice was given to, or obtained from, the for-profit enterprise, which should by law have given an invoice to, or should have obtained an invoice from the opposite party of the transaction and yet has failed to do so. The administrative fine thus imposed contains no ceiling of a reasonable maximum amount and hence renders statutory taxpayers in individual cases liable to suffer evident harshness of administrative punishments. The administrative fines imposed under Article 44 of the Tax Levy Act exceed the degree of necessity of administrative fines and are therefore in contravention of the principle of proportionality under Article 23 of the Constitution and of the constitutional guarantee of people's property rights under Article 15 of the Constitution and shall no longer be applicable.

給與憑證、未取得憑證，經查明認定之總額，處百分之五罰鍰之規定，其處罰金額未設合理最高額之限制，而造成個案顯然過苛之處罰部分，逾越處罰之必要程度而違反憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之意旨有違，應不予適用。

REASONING: I. The Administrative Interpretation of the Ministry of Finance, Tai- Cai-Shui-Tze No. 910453902 (June 21, 2002) and the resolution of the First Joint Meeting of Chief Judges and Judges of the Administrative

解釋理由書：一、財政部九十一年六月二十一日台財稅字第九一0四五三九0二號函，以及行政法院八十七年七月份第一次庭長評事聯席會議決議關於非交易對象之人是否已按其開立發票之金額報繳營業稅額，不影響

Court in July, 1998, in the relevant part, stated that regardless of whether the opposite party of a transaction files a tax return in accordance with the amount of the invoices issued, the obligation of providing a make-up payment for a business entity, which sells goods or services, remains unaffected.

銷售貨物或勞務之營業人補繳加值型營業稅之義務部分。

Article 19 of the Constitution mandates that nationals have the duty to pay tax in accordance with the law. The constitutional mandate stipulates that when the state imposes the duty to pay tax upon nationals or gives nationals tax benefits, there shall be a statutory basis which prescribes the elements of taxation such as the subject of taxation, the object of taxation, the relationship delineating how the object of taxation belongs to the subject of taxation, the tax basis, the tax rate, the method of levy and the taxable period. However, the agency-in-charge has the power to interpret laws which are within the domain of its legal authority, so long as the interpretation is conducted in accordance with the principles of the Constitution and with the relevant legisla-

憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、租稅客體對租稅主體之歸屬、稅基、稅率、納稅方法及納稅期間等租稅構成要件，以法律定之。惟主管機關於職權範圍內適用之法律條文，本於法定職權就相關規定予以闡釋，如係秉持憲法原則及相關之立法意旨，遵守一般法律解釋方法為之，即與租稅法律主義無違（本院釋字第六０七號、第六二五號、第六三五號、第六六０號、第六七四號解釋參照）；最高行政法院以決議之方式表示法律見解者，亦同（本院釋字第六二０號、第六二二號解釋參照）。

tive intent and with the general methods of statutory interpretation. Hence the interpretation thus made is not in contravention of the principle of no tax levy in the absence of law. (See Judicial Yuan Interpretations Nos. 607, 625, 635, 660 and 674.) The legal opinions expressed by the Supreme Administrative Court in the form of resolutions are also not in contravention of the principle of no tax levy in the absence of law. (See Judicial Yuan Interpretations Nos. 620 and 622.)

With regard to the fulfillment of the duty to pay tax, the subject of taxation, the object of taxation, and the relationship delineating how the object of taxation belongs to the subject of taxation shall be ascertained first before determining whether the statutory taxpayer has paid the tax in accordance the law or has failed to do so. A third party, of course, cannot pay the tax on behalf of, and under the name of, the statutory taxpayer under law. Although, unless it is prohibited by the tax law, it is not illegal to pay the tax on behalf of a statutory taxpayer when the law makes it clear who the statutory taxpayer is, the

租稅義務之履行，首應依法認定租稅主體、租稅客體及租稅客體對租稅主體之歸屬，始得論斷法定納稅義務人是否已依法納稅或違法漏稅。第三人固非不得依法以納稅義務人之名義，代為履行納稅義務，但除法律有特別規定外，不得以契約改變法律明定之納稅義務人之地位，而自為納稅義務人。因此非法定納稅義務人以自己名義向公庫繳納所謂「稅款」，僅生該筆「稅款」是否應依法退還之問題，但對法定納稅義務人而言，除法律有明文規定者外，並不因第三人將該筆「稅款」以該第三人名義解繳公庫，即可視同法定納稅義務人已履行其租稅義務，或法定納稅義務

legal status of the statutory taxpayer shall not be altered by any contract. Thus, if the "tax" was paid by any-one other than the statutory taxpayer, the "tax" so paid will give rise to the issue whether the government shall return the "tax". Unless the tax law stipulates otherwise, a statutory taxpayer shall not be deemed to have fulfilled his tax obligation and there shall be no exemption for, or relinquishment of, his responsibility to pay the tax merely because a third party paid the "tax" under its own name to the government treasury. In other words, neither the recipient of the government treasury nor the factual consequences of tax collections and makeup payments shall be able to alter the subject of taxation, the object of taxation, and the determinations of the subject of taxation and the object of taxation, all of which are expressly prescribed by the tax law. In order to be consistent with the above-mentioned principle of taxation by law, the question whether the tax obligation is fulfilled in accordance with the law and the Constitution shall be determined by whether, and how, the statutory taxpayer fulfills his tax obligation, and shall not be

人之租稅義務得因而免除或消滅，換言之，公庫財政上之收支情形，或加值型營業稅事實上可能發生之追補效果，均不能改變法律明定之租稅主體、租稅客體及租稅客體對租稅主體之歸屬，而租稅義務之履行是否符合法律及憲法意旨，並非僅依公庫財政上之收支情形或特定稅制之事實效果進行審查，仍應就法定納稅義務人是否及如何履行其納稅義務之行為認定之，始符前揭租稅法律主義之本旨。

determined only by the recipient of the tax or by the factual consequences for the government treasury.

Article 2, Paragraph 1 of the Business Tax Act prescribes that, the "Statutory taxpayers of the business tax are as follows: 1. Business entities that sell goods or services." Article 3, Paragraph 1 of the Business Tax Act prescribes that, "The definition of sale of goods is the transfer of ownership of goods to another or others for a consideration." Article 32, the first half of Paragraph 1 of the Business Tax Act prescribes that, "For the 'Table of the Time Limits for Issuing Documentary Evidence of Sales' under this Act, the business entities of a special nature or small business entities may be exempted from issuing uniform invoices, and may, instead, issue ordinary receipts." Accordingly, when the state imposes tax obligations of the business tax on its nationals, it expressly prescribes in the Business Tax Act the subject of taxation, the object of taxation, the determinations of the object of taxation as contrasted with the subject of taxation, and the duty to cooperate,

營業稅法第二條第一款規定：「營業稅之納稅義務人如左： 一、銷售貨物或勞務之營業人。」同法第三條第一項規定：「將貨物之所有權移轉與他人，以取得代價者，為銷售貨物。」同法第三十二條第一項前段規定：「營業人銷售貨物或勞務，應依本法營業人開立銷售憑證時限表規定之時限，開立統一發票交付買受人。」是國家課人民以繳納營業稅之義務時，就營業稅之租稅主體、租稅客體、租稅客體對租稅主體之歸屬等租稅構成要件，以及營業稅納稅義務人（營業人）應開立銷售憑證等納稅義務人之協力義務，皆係以法律為明文之規定。

such as to issue invoices, owed by the statutory taxpayers of the Business Tax (business entities).

The Administrative Interpretation of the Ministry of Finance, Tai-Cai-Shui-Tze No. 910453902 (June 21, 2002) stated that, "Although the businesses conducted by X company in its cooperative stores are similar to those conducted in sale units of a department store and although both share the same characteristics, namely that the commissions were stipulated by contracts and were calculated in accordance with a certain portion of the total sales, the proceeds of the sale[s] of goods in cooperative stores were collected by X company, the transactions shall be deemed as the sales of X company, and by law X company shall issue the invoices to the purchasers." (hereinafter referred to as the Interpretation) The Interpretation made it clear that if the businesses entities themselves sold the goods and the proceeds of the sales were collected by them directly from the purchasers, this arrangement should constitute "the transfer of ownership of goods to another or others

財政部九十一年六月二十一日台財稅字第九一０四五三九０二號函稱：「○○公司於合作店銷售之經營型態雖與於百貨公司設專櫃銷售之型態類似，且均以合約約定按銷售額之一定比率支付佣金，惟該公司於合作店銷售貨物所得之貨款，係由該公司自行收款，其交易性質應認屬該公司之銷貨，應由該公司依規定開立統一發票交付買受人。」（以下簡稱系爭財政部函釋）係闡釋營業人若自己銷售貨物，其銷售所得之代價亦由該營業人自行向買受人收取，即為該營業人「將貨物之所有權移轉與他人，以取得代價」，而屬該項營業行為之銷售貨物人，其合作店並未參與該營業人將貨物之所有權移轉與他人，以取得代價之營業行為，自非該項營業行為之銷售貨物人，依營業稅法第二條第一款、第三條第一項、第三十二條第一項前段之規定，應由銷售貨物之營業人開立統一發票，交付買受人。而財政部七十七年四月二日台財稅字第七六一一二六五五五號函（九十八年三月十九日廢止）所闡釋百貨公司採專櫃

for a consideration" and the businesses entities shall be deemed to be the sellers of the goods. The cooperative stores did not participate in the transfer of the ownership of the goods to others conducted by the business entities in order to obtain the consideration and therefore they should not be deemed as the sellers of the goods. Pursuant to Article 2, Paragraph 1; Article 3, Paragraph 1; Article 32, Paragraph 1 of the Business Tax Act, it is the business entities who shall issue invoices to the purchasers for the goods they sold. Under the Administrative Interpretation of the Ministry of Finance, Tai-Cai-Shui-Tze No. 761126555 (April 2, 1988) (abolished on March 19, 2009) [hereinafter referred to as Interpretation No. 761126555], when a department store is run in the business mode of leasing its sale units to leasees, it is the department store not its leasees that shall issue invoices to customers, as it is the former not the later that sells the goods to the purchasers and collects the proceeds and hence falls under the statutory definition of the "transfer of ownership of goods to an other or others for a consideration." Accordingly, Interpretation

銷售貨物之經營型態，則係由百貨公司將專櫃貨物銷售買受人，向買受人收取價款，故為該百貨公司「將貨物之所有權移轉與他人，以取得代價」，而非專櫃之貨物供應商銷售，依上開營業稅法之規定，自應以該百貨公司為營業人，開立統一發票，交付買受人。因兩者經營型態不同，其應由何人開立統一發票自應有所不同，系爭財政部函釋並未增加法律所未規定之租稅義務，與憲法第十九條之租稅法律主義及第七條之平等原則尚無牴觸。又該函釋既僅闡釋營業人若自己銷售貨物，且自行向買受人收款，應由該營業人依規定開立統一發票交付買受人，並未限制經營型態之選擇，自不生限制營業自由之問題。

No. 761126555 stated that pursuant to the foregoing provisions of the Business Tax Act, the department store shall be deemed a business entity which in turn shall issue invoices to the purchasers. Because of the business modes of department stores and ordinary stores, the determination of who bears the responsibility of issuing invoices may vary. The Interpretations at issue did not impose additional tax obligations without a legal basis and were not in contravention of the principle of taxation by law under Article 19 of the Constitution and of the principle of equality under Article 7 of the Constitution. Moreover, Interpretation No. 761126555 stated that only when the business entities themselves sell goods and collect the proceeds, shall they issue invoices to the purchasers in accordance with laws and regulations. Interpretation No. 761126555 did not restrict the selection of business modes. Therefore, there is no issue of restricting the freedom of business.

The value-added business tax is the tax on the difference, i.e., the added value, for the sale of goods or services in

加值型營業稅係對貨物或勞務在生產、提供或流通之各階段，就銷售金額扣抵進項金額後之餘額（即附加價

manufacturing, furnishing, or distributing stages after costs are deducted. (See Judicial Yuan Interpretation No. 397.) Pursuant to Articles 14, 15, 16, 19, 33 and 35 of the Business Tax Act, the valueadded tax is calculated by the difference between the amounts of the periodically filed sales and the costs evidenced by the detailed chart of the uniform invoices as well as other documents. After the calculation, the amount of business tax due or overpaid in the given period is thus determined. (See Judicial Yuan Interpretation No. 660. See also Article 29 of the Implementation Rules of the Value-Added and Non-Value-Added Business Tax Act.) Accordingly, the prevailing value-added business tax is a multi-period sales tax which levies the added value of a selling period. The business entities conducting business transactions in a given selling period are statutory taxpayers. The resolution of the First Joint Meeting of Chief Judges and Judges of the Administrative Court in July, 1998, in the relevant part, stated that, "The prevailing value-added business tax is a multi-period sales tax which levies the added value of a selling

值）所課徵之稅（本院釋字第三九七號解釋參照）。依營業稅法第十四條、第十五條、第十六條、第十九條、第三十三條及第三十五條規定，加值型營業稅採稅額相減法，並採按期申報銷售額及統一發票明細表暨依法申報進項稅額憑證，據以計算當期之應納或溢付營業稅額（本院釋字第六六０號解釋、同法施行細則第二十九條規定參照）。是我國現行加值型營業稅制，係就各個銷售階段之加值額分別予以課稅之多階段銷售稅，各銷售階段之營業人皆為營業稅之納稅義務人。行政法院八十七年七月份第一次庭長評事聯席會議決議，其中所稱：「我國現行加值型營業稅係就各個銷售階段之加值額分別予以課稅之多階段銷售稅，各銷售階段之營業人皆為營業稅之納稅義務人。故該非交易對象之人是否已按其開立發票之金額報繳營業稅額，並不影響本件營業人補繳營業稅之義務。」部分，乃依據我國採加值型營業稅制，各銷售階段之營業人皆為營業稅之納稅義務人之法制現況，敘明非交易對象，亦即非銷售相關貨物或勞務之營業人，依法本無就該相關銷售額開立統一發票或報繳營業稅額之義務，故其是否按已開立統一發票之金額報繳營業稅額，僅發生是否得依法請求

period. The business entities conducting business transactions in a given selling period are statutory taxpayers. Therefore, regardless of whether the opposite party of the transaction files the tax return and pays the tax in accordance with the amount of the invoices issued, the obligation of providing a make-up payment of a business entity, which sells goods or services, remains unaffected." This Resolution was made under the prevailing value-added business tax that treats the business entities conducting business transactions in a given selling period as statutory taxpayers and clarifies that anyone who is not the opposite party of a transaction is not a business entity which sells goods or services and hence by law has no duty to issue an invoice or to file a business tax return. Therefore, regardless of whether the one who files the tax return and pays the tax in accordance with the amount of the invoices issued, the filing of the tax return and the payment of tax only give rise to the issue whether there shall be a claim for the return of the tax so paid. Since the payment of tax can neither be deemed to be the fulfillment of the tax obligation

返還之問題，既無從視同法定納稅義務人已履行其租稅義務，亦不發生法定納稅義務人之租稅義務因而免除或消滅之效果，自不影響法定納稅義務人依法補繳營業稅之義務，法定納稅義務人如未依法繳納營業稅者，自應依法補繳營業稅，核與營業稅法第二條第一款、第三條第一項、第三十二條第一項前段規定之意旨無違，符合一般法律解釋方法，並未增加法律所未規定之租稅義務，於憲法第十九條之租稅法律主義尚無違背。

of the statutory taxpayers, nor can give rise to the legal effect of the exemption from, or relinquishment of, the obligation of the statutory taxpayers, the statutory taxpayers' legal obligations of providing make-up payments of business tax remain unaffected. If the statutory taxpayers have not paid the business tax due, they shall provide make-up payments. This Resolution is not in contravention of Article 2, Subparagraph 1, Article 3, Paragraph 1, and the first half of Article 32, Paragraph 1 of the Business Tax Act, and is in accordance with ordinary methods of statutory interpretation[s], and does not impose tax obligations on nationals without any statutory basis, and is not in contravention of the principle of taxation by law under Article 19 of the Constitution.

As to the statutory taxpayers who shall provide make-up payments of business tax by law, it goes without saying that before the competent authority may impose administrative fines in accordance with the Business Tax Act, the illegal actions of the statutory taxpayers shall fall under the statutory elements of the admin-

至對於應依法補繳營業稅款之納稅義務人，依營業稅法裁處漏稅罰時，除須納稅義務人之違法行為符合該法之處罰構成要件外，仍應符合行政罰法受處罰者須有故意、過失之規定，並按個案之情節，注意有無阻卻責任、阻卻違法以及減輕或免除處罰之事由，慎重審酌，乃屬當然。

istrative sanction, and whether the statutory taxpayers acted with scienter or with negligence, the competent authority shall meticulously take into account the special circumstances of any given cases, the availability of any privileges, exemptions, and either complete or partial immunities.

II. Article 44 of the Tax Levy Act, as amended on January 24, 1990 prescribes the administrative fine of five percent of the verified sum of the total amount of sales which should be made with invoices when no invoice was given, or obtained from, the forprofit enterprise which should by law have given an invoice to, or should have obtained an invoice from the opposite party of the transaction and yet has failed to do so.

二、七十九年一月二十四日修正公布之稅捐稽徵法第四十四條關於營利事業依法規定應給與他人憑證而未給與，應自他人取得憑證而未取得者，應就其未給與憑證、未取得憑證，經查明認定之總額，處百分之五罰鍰之規定

Article 44 of the Tax Levy Act, as amended on January 24, 1990 (*hereinafter* referred to as the provision at issue) prescribes an administrative fine of five percent of the verified sum of the total amount of sales which should be made with invoices when no invoice was given,

七十九年一月二十四日修正公布之稅捐稽徵法第四十四條規定，營利事業依法規定應給與他人憑證而未給與，應自他人取得憑證而未取得者，應就其未給與憑證、未取得憑證，經查明認定之總額，處百分之五罰鍰（以下簡稱系爭規定），係為使營利事業據實給與、

or obtained from, the for-profit enterprise which should by law have given an invoice to, or should have obtained an invoice from, the opposite party of the transaction and yet has failed to do so. The provision at issue was enacted with a view to rendering the business entities faithful to giving invoices to, and to obtaining invoices from, the opposite parties in order to establish reliable tax records of business transactions and in order to establish an accurate taxation system based upon tax records. The provision at issue was enacted to implement the constitutional mandate under Article 19 of the Constitution (See Judicial Yuan Interpretations Nos. 252 and 642) and its legislative intent was of course justified.

取得憑證，俾交易前後手稽徵資料臻於翔實，建立正確課稅憑證制度，以實現憲法第十九條之意旨（本院釋字第二五二號、第六四二號解釋參照），立法目的洵屬正當。

With respect to the content of the administrative sanction stipulated under the provision at issue, the legislative branch enjoyed the discretion after taking into account the punishable degree of the violation of the duty under the administrative law and the necessity and the urgency of maintaining public interests. (See Judicial Yuan Interpretation No. 641.)

至於處以罰鍰之內容，於符合責罰相當之前提下，立法者得視違反行政法上義務者應受責難之程度，以及維護公共利益之重要性與急迫性等，而有其形成之空間（本院釋字第六四一號解釋參照）。系爭規定以經查明認定未給與憑證或未取得憑證之總額之固定比例為罰鍰計算方式，固已考量違反協力義務之情節而異其處罰程度，

The administrative fines under the provision at issue are calculated by a certain percentage of the total verified amount of transactions conducted without invoices and are indeed formulated to reflect the degree of punishment based upon the circumstances of the breach of cooperative duty. However, the stipulated fixed percentage may run afoul of substantive justice in particular cases, especially when administrative fines so imposed contain no ceiling and may possibly attain an unlimited amount and render statutory taxpayers liable to suffer evident harshness of administrative punishment. This may lead to the inappropriate consequence of severe infringement of people's property rights. Statistics indicate that from 2006 to 2008 the total administrative fines for violating Article 44 of the Tax Levy Act reached over NT$2,480,000,000. More than ninety percent of this sum came from the violators who were fined over NT$1,000,000. (See the Legislative Yuan Gazette, Volume 98, Issue 75, Pages 326-327.) Accordingly, Article 44 of the Tax Levy Act was amended on January 6, 2010 to add Paragraph 2 stipulating that,

惟如此劃一之處罰方式，於特殊個案情形，難免無法兼顧其實質正義，尤其罰鍰金額有無限擴大之虞，可能造成個案顯然過苛之處罰，致有嚴重侵害人民財產權之不當後果。依統計，九十五年至九十七年間，營利事業依稅捐稽徵法第四十四條處罰之罰鍰金額合計為新臺幣二十四億八千萬餘元，其中處罰金額逾新臺幣一百萬元案件之合計處罰金額，約占總處罰金額之百分之九十（參閱立法院公報第九十八卷第七十五期第三二六頁、第三二七頁），稅捐稽徵法第四十四條因而於九十九年一月六日修正公布增訂第二項規定：「前項之處罰金額最高不得超過新臺幣一百萬元。」已設有最高額之限制。系爭規定之處罰金額未設合理最高額之限制，而造成個案顯然過苛之處罰部分，逾越處罰之必要程度而違反憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之意旨有違，應不予適用。

"The amount of the administrative fine under the preceding paragraph shall not exceed NT$1,000,000." A ceiling of the maximum administrative fine was enacted. With respect to the provision at issue that prescribed administrative fines without a reasonable ceiling and may result in evident harshness in individual cases, the provision at issue exceeds the degree of necessity of administrative fines and is therefore in contravention of the principle of proportionality under Article 23 of the Constitution and of the constitutional guarantee of people's property rights under Article 15 of the Constitution and shall no longer be applicable.

III. *Denied Petitions*

In the present case, all three petitioners claimed that the Administrative Interpretation of the Taxation Agency of the Ministry of Finance (The Supreme Administrative Court Decision [1997] Pan-Tze No. 851, the Taipei High Administrative Court Decision [1999] Su-Tze No. 138, and the petitions of all three petitioners mistakenly referred to as the

三、不受理部分

本件中三聲請人指稱財政部賦稅署（最高行政法院九十六年度判字第八五一號、臺北高等行政法院九十八年度訴字第一三八號判決及該三聲請人之聲請書均誤載為財政部）九十二年一月二十八日台稅二發字第九二0四五0七六一號函有違憲疑義，聲請解釋憲法部分，查該函係財政部賦稅署就個案事實對同部臺北市國稅局

Ministry of Finance.), and the Administrative Interpretation of the Taxation Agency of the Ministry of Finance, Tai-Shui-II-Fa-Tze No. 920450761 (June 28, 2003), are in contravention of the Constitution and filed petitions for our interpretation. Petitioners claimed that the Administrative Interpretation was a letter replying to the inquiry of the Taipei National Tax Administration of the Ministry of Finance, and did not fall under the domain of the administrative order under Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act, and therefore was unsuitable for the petition of interpretation. In addition, all three petitioners also claimed that the rest of the resolution of the First Joint Meeting of Chief Judges and Judges of the Administrative Court in July, 1998, which was not considered by us, was unconstitutional. The remaining part of the resolution of the First Joint Meeting of Chief Judges and Judges of the Administrative Court in July, 1998, which was not considered by us, was not applied by the court in its final and concluding judgments involving the three petitioners and hence is also

所為之函覆，非屬司法院大法官審理案件法第五條第一項第二款所稱之命令，自不得作為聲請解釋之客體；又該三聲請人主張行政法院八十七年七月份第一次庭長評事聯席會議決議其餘部分違憲聲請解釋部分，查上開決議其餘部分並未經該三聲請人據以聲請解釋之確定終局判決所適用，亦不得以之為聲請解釋之客體。其中一聲請人復聲請補充解釋本院釋字第六六０號解釋部分，該聲請人並未具體指明上開解釋有何文字晦澀或論證不周而有補充之必要，其補充解釋之聲請難謂有正當理由，並無受理補充解釋之必要。是前述部分之聲請，均核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理，併此指明。

unsuitable for the petition of interpretation. One petitioner again filed a petition for interpretation of J.Y. Interpretation No. 660. However, the petitioner failed to concretely delineate any ambiguity or incompleteness of the J.Y. Interpretation No. 660 which might warrant additional interpretation. Thus, the petition for additional interpretation was without just reason and the petition is denied. In sum, all the above mentioned petitions are inconsistent with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act and hence shall be denied under Article 3 of the Constitutional Interpretation Procedure Act.

Justice Sea-Yau Lin filed concurring opinion, in which Justice Tzong-Li Hsu joined.

Justice Shin-Min Chen filed concurring opinion.

Justice Yu-hsiu Hsu filed dissenting opinion in part, in which Justice Tzu-Yi Lin and Justice Tzong-Li Hsu joined.

Justice Mao-Zong Huang filed dissenting opinion in part.

Justice Pai-Hsiu Yeh filed dissenting

本號解釋林大法官錫堯提出，許大法官宗力加入之協同意見書；陳大法官新民提出協同意見書；許大法官玉秀提出，林大法官子儀、許大法官宗力加入之部分不同意見書；黃大法官茂榮提出部分不同意見書；葉大法官百修提出部分不同意見書。

opinion in part.

EDITOR'S NOTE:

Summary of facts: This Interpretation is made under the consolidation of four petitions. The facts of each individual petition are delineated below.

I. Petitions filed by the Taiwan Branch Companys of A international, Hong Kong, the Taiwan Branch Company of B Holdings Limited, British Virgin Islands, and the Taiwan Branch Company of C Enterprises Ltd., British Virgin Islands:

1. All three petitioners are brand name manufacturers of garments and cooperate with retailing stores to sell their garments. All three petitioners claimed that their relationship with cooperative stores is of sale of goods, and all relevant business taxes are collected by the cooperative stores with the issuance of uniform invoices in accordance with the amount of sales, and the petitioners will issue uniform invoices to each cooperative store as their certificate of income every month

編者註：

事實摘要：

一、香港商A海外貿易有限公司台灣分公司、英屬維京群島B股份有限公司台灣分公司、英屬維京群島C企業有限公司台灣分公司三聲請人部分：

1.上揭三聲請人均為品牌成衣經銷商，各與合作店合作銷售成衣。聲請人均認其與合作店之合約內容屬買賣關係，相關營業稅由合作店依銷售金額開立統一發票交付消費者，每月再由聲請人依合約約定之利潤分配方式，開立統一發票交付各合作店作為進項憑證。

in accordance with the profit-sharing methods under the contract between each petitioner and each cooperative store.

2. However, the Taipei National Tax Administration of the Ministry of Finance deemed the relationship between each petitioner and each of its cooperative stores as those of leasers and leasees, and ordered that the uniform invoices should be issued by each petitioner to the customers of its cooperative stores, and the cooperative stores shall issue uniform invoices to petitioners for services of leases rendered. Accordingly, the Taipei National Tax Administration of the Ministry of Finance notified the petitioners to provide make-up payments for the unfiled business taxes and imposed administrative sanctions on the petitioners for failing to file tax returns faithfully, for failing to issue uniform invoices to the customers of their cooperative stores, and for failing to obtain uniform invoices from their cooperative stores.

2. 惟臺北市國稅局認其等與各合作店之合約內容應屬租賃關係，故相關營業稅應由聲請人開立統一發票交付消費者，另由各合作店就其租賃服務開立統一發票交付聲請人等；並依此認定，核定各聲請人應補徵營業稅，並處以漏稅罰及未依法開立、取得統一發票之罰鍰處分。

3. The petitioners disagreed with the administrative sanctions, and filed administrative appeals, and instituted administrative proceedings. None of the administrative proceedings were in the petitioners' favor. Furthermore, the decisions of the administrative courts were final and conclusive. Therefore, the petitioners claimed that the Administrative Interpretation of the Ministry of Finance, Tai-Cai-Shui-Tze No. 761126555 (April 2, 1988), the Administrative Interpretation of the Ministry of Finance, Tai-Cai-Shui-Tze No. 910453902 (June 21, 2002), the Administrative Interpretation of the Taxation Agency of the Ministry of Finance, Tai-Shui-II-Fa-Tze No. 920450761 (June 28, 2003), the resolution of the First Joint Meeting of Chief Judges and Judges of the Administrative Court in July, 1998, and Article 44 of the Tax Levy Act with regard to the failures of issuing certificates and of obtaining certificates contained issues of unconstitutionality and respectively filed petitions for

3. 聲請人等不服，提起訴願、行政訴訟，均遭駁回確定，乃主張財政部77年4月2日台財稅字第761126555號、91年6月21日台財稅字第910453902號函、財政部賦稅署92年1月28日台稅二發字第920450761號函、87年7月份第1次庭長評事聯席會議決議及稅捐稽徵法第44條有關未給與憑證及未取得憑證部分規定，有違憲之疑義，分別聲請解釋。

interpretation.

4. The petitioner, the Taiwan Branch Company of C Enterprises Ltd., British Virgin Islands, filed a separate petition for an additional interpretation of J.Y. Interpretation No. 660.

4. 聲請人英屬維京群島C企業有限公司台灣分公司另就釋字第660號解釋，聲請補充解釋。

II. The petitioner, X, Inc., filed a petition for interpretation:

二、聲請人台灣X股份有限公司部分：

1. The petitioner entered into a contract with Y International Corporation to establish sales units in department stores. Under the contract, Y International Corporation promised to provide goods to the petitioner for sale and to pay the petitioner an agreed percentage of the amount of total monthly sales with a guaranteed minimum monthly payment. The petitioner also entered into a cooperative contract with Z Company and both parties agreed that the petitioner would provide Z Company its goods and those of B International Corporation for sale and to pay Jun-Yi Company an agreed amount of

1. 聲請人與Y公司締有專櫃設立合約書，約定由Y公司提供商品予聲請人販賣，Y公司依每月包底月營業額給付聲請人一定比例之金額。另聲請人與Z公司亦締有合作契約書，約定由聲請人提供其自身及Y公司之商品予Z公司販賣，每月並給付一定金額予Z公司。聲請人認為其與Y公司及Z公司間之合約內容係屬買賣關係，相關營業稅由Z公司依銷售金額開立統一發票交付消費者，每月再由聲請人依合約約定之利潤分配方式，開立統一發票交付Z公司作為進項憑證；由Y公司依合約約定之利潤分配方式，開立統一發票交付聲請人作為進項憑證。

money. The petitioner claimed that its relationships with B International Corporation and Z Company are of sale of goods, and all relevant business taxes are collected by Z Company with the issuance of uniform invoices in accordance with the amount of sale, and the petitioners will issue uniform invoices to Z Company as its certificates of income every month in accordance with the profit-sharing methods under the contract between the petitioner and Z Company. B International Corporation will issue uniform invoices to the petitioner as its certificates of income every month in accordance with the profit-sharing methods under the contract between the petitioner and B International Corporation.

2. However, the Taipei National Tax Administration of the Ministry of Finance deemed the relationships between B International Corporation and the petitioner and between the petitioner and Z Company as those of leasers and leasees, and ordered that

2. 惟臺北市國稅局認Y公司與聲請人間，聲請人與Z公司間之合約內容屬租賃關係，故相關營業稅應分別由Y公司及聲請人就其銷售額開立統一發票予消費者，另關於租賃服務部分，則由聲請人開立統一發票交付Y公司，由Z公司開立統一發

the uniform invoices should be issued by the petitioner to B International Corporation and that Z Company should issue uniform invoices to the petitioner. Accordingly, the Taipei National Tax Administration of the Ministry of Finance notified the petitioner to provide make-up payments for the unfiled business taxes and imposed administrative sanctions on the petitioner for failing to file tax returns faithfully, for failing to issue uniform invoices to its customers, and for failing to obtain uniform invoices from Z Company.

票交付聲請人；並依此認定，核定聲請人應補徵營業稅，並裁處漏稅罰及未依法開立、取得統一發票之罰鍰處分。

3. The petitioner disagreed with the administrative sanctions so imposed and instituted the administrative proceeding.The result of the administrative proceeding was not in the petitioner's favor and the petitioner claimed that the resolution of the First Joint Meeting of Chief Judges and Judges of the Administrative Court in July, 1998 applied by the administrative court in its final and concluding decision was unc-onstitutional and filed

3. 聲請人不服，提起行政爭訟，經駁回確定，乃主張確定終局判決所適用之系爭行政法院決議有違憲疑義，聲請解釋。

a petition for interpretation.

J. Y. Interpretation No.686（March 25, 2011）*

ISSUE: Shall an interpretation delivered by the Judicial Yuan following a certain petition be equally applied to other legally filed petition case(s) concerning the same law or regulation if such cases were filed prior to the delivery of the subject interpretation, yet not consolidated with the subject case for review ?

RELEVANT LAWS:

Articles 7 and 16 of the Constitution (憲法第七條、第十六條)；J. Y. Interpretation Nos. 177, 185, 193 and 586 (司法院釋字第一七七號、第一八五號、第一九三號、第五八六號解釋)；Article 273-II of the Administrative Litigation Act (行政訴訟法第二百七十三條第二項).

KEYWORDS:

effect of an interpretation（解釋效力）, supplemental interpretation（補充解釋）, the same law or regulation（同一法令）, prior to the delivery of an interpretation（解釋公布日前）, the subject case for the petition（據以聲請(案件)）, satisfying the statutory requirements（符合法定要件）, consolidation（合併辦理）, resolution（決議）, principle of equality（平等原則）.**

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* Translated by Ed Ming-Hui Huang.

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

HOLDING: In cases where, prior to the date that the Judicial Yuan delivers an interpretation ("the subject interpretation") in response to a particular petition ("the subject case"), an individual other than the petitioner of the subject case has also filed a petition to challenge the constitutionality of the same law or regulation while such petition having satisfied the statutory requirements by the resolution of the Council of Grand Justices but not consolidated in a joinder, the holding of J. Y. Interpretation No. 177 that "an interpretation given by this Yuan in response to a petition shall also be applicable with respect to the legal action of the petitioner, for which the original petition was made" shall be applied equally to make the subject interpretation applicable in the aforesaid individual's case. J. Y. Interpretation No. 193 is hereby supplemented.

解釋文：本院就人民聲請解釋之案件作成解釋公布前，原聲請人以外之人以同一法令牴觸憲法疑義聲請解釋，雖未合併辦理，但其聲請經本院大法官決議認定符合法定要件者，其據以聲請之案件，亦可適用本院釋字第一七七號解釋所稱「本院依人民聲請所為之解釋，對聲請人據以聲請之案件，亦有效力」。本院釋字第一九三號解釋應予補充。

REASONING: With regard to the effect on individual cases by the Grand Justices' interpretations of the Constitution, J. Y. Interpretation No. 177 states: "An interpretation given by this

解釋理由書：關於本院大法官解釋憲法對於個案之效力，本院釋字第一七七號解釋：「本院依人民聲請所為之解釋，對聲請人據以聲請之案件，亦有效力」，旨在使聲請人聲請解釋憲法

Yuan in response to a petition shall also be applicable with respect to the legal action of the petitioner, for which the original petition was made." Its purpose is to allow the petitioner to seek relief through statutory procedure based on the favorable outcome of the interpretation of Constitution. To elaborate further on this point, J. Y. Interpretation No. 193 adds that, if the constitutionality of the same law or regulation should be called into question with several cases by the same petitioner, provided that these petitions are filed respectively and sequentially prior to the delivery of the interpretation, for the one not consolidated in a joinder by this Yuan but is conformed with the statutory requirements, it can also apply J. Y. Interpretation No. 177 so as to be covered by the effect of the subject interpretation. However, J. Y. Interpretation No. 193 does not provide a clear guidance on whether J.Y. Interpretation No. 177 will be similarly applicable to those cases in the situation where petitions are legally filed by different petitioners on the same ground that the same law or regulation contradicts the Constitution but are

之結果，於聲請人有利者，得依法定程序請求救濟。又依本院釋字第一九三號解釋意旨，如同一聲請人有數案發生同一法令牴觸憲法疑義，於解釋公布前已先後提出聲請解釋，雖未經本院合併辦理，但其聲請符合法定要件者，其據以聲請之案件，亦可適用上開釋字第一七七號解釋，而為解釋效力所及。惟於本院就人民聲請解釋之案件作成解釋公布前，不同聲請人以同一法令牴觸憲法疑義聲請解釋，而未經合併辦理者，如其聲請符合法定要件者，其據以聲請之案件，是否亦可適用上開釋字第一七七號解釋，本院釋字第一九三號解釋尚未明確闡示，自有補充解釋之必要。

not consolidated. Therefore, it is necessary that J. Y. Interpretation No. 193 be supplemented.

Pursuant to the Principle of Equality, there should not be discriminatory treatment toward all petitioners whose petitions were filed before the delivery of the interpretation and have satisfied the statutory requirements. Besides, in order to carry through the objective of the J. Y. Interpretations No. 177 and No. 193 so that petitioner(s) may seek relief in accordance with the statutory procedure, it is held that in cases where, prior to the date that the Judicial Yuan delivers a particular interpretation, an individual other than the petitioner of the subject case has also filed a petition to challenge the constitutionality of the same law or regulation while such petition having satisfied the statutory requirements by the resolution of the Council of Grand Justices but not consolidated in a joinder, the holding of J. Y. Interpretation No. 177 that "an interpretation given by this Yuan in response to a petition shall also be applicable with respect to the legal action of the peti-

為貫徹上述釋字第一七七號及第一九三號解釋使聲請人得依法定程序請求救濟之意旨，且基於平等原則，對均於解釋公布前提出聲請且符合法定要件之各聲請人，不應予以差別待遇，故本院就人民聲請解釋之案件作成解釋公布前，原聲請人以外之人以同一法令牴觸憲法疑義聲請解釋，雖未合併辦理，但其聲請經本院大法官決議認定符合法定要件者，其據以聲請之案件，亦可適用本院釋字第一七七號解釋所稱「本院依人民聲請所為之解釋，對聲請人據以聲請之案件，亦有效力」。本院釋字第一九三號解釋應予補充。

tioner, for which the original petition was made" shall be applied equally to make the subject interpretation applicable in such cases. J. Y. Interpretation No. 193 is hereby supplemented.

Furthermore, as Article 273-II of the Administrative Litigation Act materializes the essence of J. Y. Interpretations No. 177 and No. 185, it is therefore followed that J. Y. Interpretation No. 193 would also apply to cover the cases of a single petitioner filing a number of separate petitions to challenge the constitutionality of the same law or regulation. That being the case, this Interpretation (No. 193) shall equally extend to allow for the action of retrial for those other individuals who have petitioned upon the same law or regulation interpreted in the subject case prior to the delivery of the subject interpretation, provided that each case has satisfied all statutory requirements.

另行政訴訟法第二百七十三條第二項之規定，係依本院釋字第一七七號、第一八五號解釋意旨所為之具體規定，同一聲請人以同一法令牴觸憲法疑義而聲請解釋之各案件，固得依本院釋字第一九三號解釋意旨加以適用。即不同聲請人以同一法令牴觸憲法疑義而於解釋公布前聲請解釋，且符合聲請法定要件之各案件，自亦有本號解釋之適用而得提起再審之訴請求救濟。

Justice Shin-Min Chen filed dissenting opinion.

Justice Pi-Hu Hsu filed dissenting opinion.

本號解釋陳大法官新民提出不同意見書；徐大法官璧湖提出不同意見書；黃大法官茂榮提出部分協同、部分不同意見書。

Justice Mao-Zong Huang filed concurring opinion in part and dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: Petitioners X and Y filed an administrative litigation for [the alleged] violation of the Security Transactions Act. The Supreme Administrative Court dismissed the action on appeal. X and Y claimed that Article 43-I of the Guidelines for Filing Reports on the Acquisition of Shares being applied in the judgment presents questions of constitutionality and thus filed this petition for interpretation on December 8, 2004.

However, before X and Y filed their petition, there had been other individuals petitioning against the same Guideline and J. Y. Interpretation No. 586 was thus delivered on December 17, 2004, declaring [the provision in question] unconstitutional and setting the date of its nullification. Because the present petition was not consolidated with the subject cases in No. 586 for review, it was dismissed at the 1260th Meeting of the Grand Justices

編者註：

事實摘要：聲請人X及Y因違反證券交易法案件提行政爭訟，嗣經最高行政法院判決駁回其上訴確定，而認判決所適用之「證券交易法第43條之1第1項取得股份申報事項要點」有違憲疑義，於93年12月8日聲請解釋。

然於聲請人聲請前，已另有他案聲請人就同要點聲請解釋，並經本院於93年12月17日公布釋字第586號解釋宣告違憲定期失效，惟聲請人之聲請案未併案處理，而於94年4月8日為大法官第1260次會議以無再解釋必要等理由，議決不受理。

on April 8, 2005 on the ground that it was not necessary to render another interpretation, among other things.

Claiming that their petition was filed prior to the delivery of J. Y. Interpretation No. 586 and thus should be entitled to the remedies rendered by the Interpretation, X and Y filed a motion for a retrial pursuant to Article 273-II of the Administrative Litigation Act. Nevertheless, in (96) *Pan-Tze* No. 2019 Judgment, this motion was dismissed by the Supreme Administrative Court for the reason that Article 273-II and J. Y. Interpretation No. 193 would not apply because X and Y were not the original parties to J.Y. Interpretation No. 586 . X and Y then filed the present petition for constitutional interpretation.

聲請人認其聲請在釋字第 586 號解釋公布之前，應為該解釋效力所及，乃依行政訴訟法第 273 條第 2 項規定聲請再審，惟最高行政法院 96 年度判字第 2019 號判決認，聲請人並非釋字第 586 號解釋之聲請人，不符該條規定及釋字第 193 號解釋意旨而駁回其再審，聲請人爰提本件釋憲聲請。

J. Y. Interpretation No.687（May 27, 2011）*

ISSUE: Is it unconstitutional to impose only imprisonment sentence on the responsible person of a company for his intentional act to cause the company to evade tax ?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）；Article 41 (as amended on January 24, 1990)； Article 47 (as promulgated on October 22, 1976, and amended on May 27, 2009) of the Tax Collection Act（稅捐稽徵法第四十一條（79 年 1 月 24 日修正公布）第四十七條（65 年 10 月 22 日制定公布，98 年 5 月 27 日修正公布））；Supreme Court Precedents 69 *Tai Shan Tsu* No. 3068 and 73 *Tai Shan Tsu* No. 5038（最高法院 69 年台上字第 3068 號、73 年台上字第 5038 號判例）.

KEYWORDS:

nulla poena sine culpa (no culpability carries no penalty)（無責任即無處罰）, principle of equality（平等原則）, criminally illegal and culpable（刑事違法且有責）, criminally unlawful（刑事不法）, statutory sentence（法定刑）, provision stipulating the imprisonment sentence（應處徒刑之規定）, imprisonment（有期徒刑）, detention（拘役）, differential treatment（差別待遇）, judicial precedent（判例）, J.Y. Interpretation No. 371（釋字第三七一號解釋）, J.Y. Interpretation No. 572（釋字第五七二號解釋）.**

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* Translated by Chun-yih Cheng.

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

HOLDING: Article 47, Item 1 of the Tax Collection Act, as promulgated on October 22, 1976, stipulates: "The provisions of this Act stipulating the imprisonment sentences which may be imposed on a taxpayer ... shall apply to the following persons: 1. The responsible person of a company as provided for under the Company Act." (It is the same as Paragraph 1, Item 1 of the same Article, as amended and promulgated on May 27, 2009.) It is designed to hold the responsible person of a company accountable for the criminally illegal and culpable act and to shoulder the criminal liability, and does not contradict the constitutional principle of "*nulla poena sine culpa* (no culpability carries no penalty)." With regard to "provision stipulating the imprisonment sentence", it contradicts the principle of equality under Article 7 of the Constitution, and shall become ineffective no later than the anniversary since the issuance of this Interpretation.

解釋文：中華民國六十五年十月二十二日制定公布之稅捐稽徵法第四十七條第一款規定：「本法關於納稅義務人……應處徒刑之規定，於左列之人適用之：一、公司法規定之公司負責人。」（即九十八年五月二十七日修正公布之同條第一項第一款）係使公司負責人因自己之刑事違法且有責之行為，承擔刑事責任，與無責任即無處罰之憲法原則並無牴觸。至「應處徒刑之規定」部分，有違憲法第七條之平等原則，應自本解釋公布日起，至遲於屆滿一年時，失其效力。

REASONING: Based on the constitutional principle of *nulla poena sine culpa* (no culpability carries no penalty),

解釋理由書：基於無責任即無處罰之憲法原則，人民僅因自己之刑事違法且有責行為而受刑事處罰，法律不

a person shall be subject to criminal penalty only for criminal violations and culpable acts. The law may not stipulate that a person assumes criminal liability for the criminally illegal act of the others. In addition, the purpose of the principle of equality stipulated under Article 7 of the Constitution is to prevent the legislators from arbitrarily setting unreasonable differential treatment among the people. Any unjustified differential treatment towards the same subject matter is contradictory to the principle of equality under Article 7 of the Constitution.

得規定人民為他人之刑事違法行為承擔刑事責任。又憲法第七條規定平等原則，旨在防止立法者恣意對人民為不合理之差別待遇。如對相同事物，為無正當理由之差別待遇，即與憲法第七條之平等原則有違。

Article 47, Item 1 of the Tax Collection Act, as promulgated on October 22, 1976, states: “The provisions of this Act stimulating the imprisonment sentences which may be imposed on a taxpayer... shall apply to persons listed as follows: 1. The responsible person of a company as provided under the Company Act.” (a Paragraph 2 was added on May 27, 2009, with the original provision adjusted as Paragraph 1, and the language “listed to the left” was amended to “listed as follows”; *hereinafter* the Disputed Provi-

六十五年十月二十二日制定公布之稅捐稽徵法第四十七條第一款規定：「本法關於納稅義務人……應處徒刑之規定，於左列之人適用之：一、公司法規定之公司負責人。」（九十八年五月二十七日增訂第二項，原條文移列為第一項，並修正「左列」為「下列」；下稱系爭規定）所稱「本法關於納稅義務人……應處徒刑之規定」，經查立法紀錄，係指同法第四十一條行政院原草案之規定「納稅義務人故意以詐欺或其他不正當方法逃漏稅捐者，處六月以上五年以下有期徒刑」。立法院審議時認為

sion). Having consulted with the legislative records, "the provisions of this Act stimulating the imprisonment sentences" refers to the Executive Yuan's draft Article 41 of the same Act, "[a] taxpayer who intentionally evades tax payment by fraud or other unjustified means is subject to the imprisonment of no less than 6 months and no more than 5 years." During the review sessions, the Legislative Yuan considered that "as far as the circumstances of the crime are concerned, tax evasion is more or less compatible with the crimes of fraud under Article 339, Paragraph 2 and forgery of documents under Articles 210 and 214 of the Penal Code. By references to the sentences of each respective provision, the basic penalty is set to be no more than 5 years imprisonment, and may be imposed jointly with detention or fine so that the court may take into account the totality of circumstances, pay attention to the respective factor stipulated under Article 57 of the Penal Code, weigh in and determine the appropriate sentence to avoid severity and in the hope to be adequate." Thus the statutory sentence of the Executive Yuan's draft stated above was

「按逃漏稅捐行為，就其犯罪情狀言，多與刑法第三三九條第二項之詐欺罪及第二一0條、第二一四條偽造文書罪相當。茲參照各該條所定刑度，規定最重本刑為五年以下有期徒刑，並得科處拘役、罰金。俾法院得就逃漏稅捐行為之一切情狀，注意刑法第五十七條所定各事項，加以審酌，從而量定適當之刑，以免失之過嚴，而期妥適」，乃將上開行政院原草案法定刑修正為「處五年以下有期徒刑、拘役或科或併科一千元以下罰金」（立法院公報第六十五卷第六十六期第四頁至第五頁、同卷第七十九期第八五頁至第八六頁及同卷第八十二期第一一頁參照；其中罰金部分於七十九年一月二十四日修正公布為新臺幣六萬元以下罰金），惟系爭規定並未隨之更改文字，所謂「應處徒刑之規定」，即限於「處五年以下有期徒刑」。

amended as "no more than 5 years imprisonment, detention, fine or jointly with fine of no more than 1,000 Yuan." (*see* the Legislative Yuan Gazette, vol. 65, No. 66, pp. 4-5, vol. 65, No. 79, pp. 85-86, the same volume, No. 82, p. 11; the fine was amended to no more than NT$ 60,000 on January 24, 1990). However, for the language not amended in the Disputed Provision, the so-called "the provisions stipulating the imprisonment sentences" is then limited to "no more than 5 years imprisonment".

In accordance with the Disputed Provision, if the responsible person of a company should intentionally instruct, participate in the implementation or fail to prevent the act of tax evasion, he shall be subject to criminal penalty. Therefore, the Disputed Provision is to have the responsible person of a company bear the criminal liability for the criminally illegal and culpable acts of his own. It does not make the responsible person of a company criminally liable for the criminally illegal and culpable acts of the others, which does not contradict the principle

依據系爭規定，公司負責人如故意指示、參與實施或未防止逃漏稅捐之行為，應受刑事處罰。故系爭規定係使公司負責人因自己之刑事違法且有責之行為，承擔刑事責任，並未使公司負責人為他人之刑事違法且有責行為而受刑事處罰，與無責任即無處罰之憲法原則並無牴觸。

of *nulla poena sine culpa* (no culpability carries no penalty) .

In addition, the imposition of criminal sanctions on the responsible person of a company who intentionally instructs, participates in or fails to prevent tax evasion, and resulting in the shortage of tax payment by the company, is to maintain tax equity and safeguard the revenue of the public treasury. Once the responsible person of a company is subject to the penalty of the Disputed Provision, the substantive conditions to constitute the criminal act and the statutory sentences have all been stipulated under Article 41 of the Tax Collection Act. The target of the penalties is the act of fraud or other unjustified means to evade taxes, and the statutory sentences include imprisonment, detention and fine. They are the evaluation of the legislators on such criminal unlawfulness as intentionally falsify tax returns that results in levy shortage. Given that the Disputed Provision penalizes the responsible person of a company bases on the same tax evasion act but separately limits the scope of those subject to im-

又公司負責人有故意指示、參與實施或未防止逃漏稅捐之行為，造成公司短漏稅捐之結果時，系爭規定對公司負責人施以刑事制裁，旨在維護租稅公平及確保公庫收入。查依系爭規定處罰公司負責人時，其具體構成要件行為及法定刑，均規定於上開稅捐稽徵法第四十一條。該規定所處罰之對象，為以詐術或其他不正當方法逃漏稅捐之行為，所設定之法定刑種類包括有期徒刑、拘役及罰金，係立法者對於故意不實申報稅捐導致稅捐短漏之行為，所為刑事不法之評價。系爭規定既根據同一逃漏稅捐之構成要件行為，處罰公司負責人，竟另限定僅適用有期徒刑之規定部分，係對同一逃漏稅捐之構成要件行為，為差別之不法評價。故系爭規定「應處徒刑之規定」部分，係無正當理由以設定較為嚴厲之法定刑為差別待遇，有違憲法第七條之平等原則，應自本解釋公布日起，至遲於屆滿一年時，失其效力。

prisonment, they are differential evaluations of unlawfulness out of the same tax evasion act. Therefore, the Disputed Provision that "provision stipulating imprisonment sentence" is the imposition of a more severe statutory sentence is a differential treatment without proper justification and contradicts the principle of equality under Article 7 of the Constitution, and shall become ineffective no later than the anniversary since the issuance of this Interpretation.

The Petitioner also petitioned for an interpretation of Article 47, Items 2-4 of the Tax Collection Act, as promulgated on 22 October 1976. Based on the description under the Petition, the abovestated provisions were not the applicable laws for the case the petition derives from. Separately, with regard to the petition for an interpretation of Supreme Court precedents 69 *Tai Shan Tsu* No. 3068 and 73 *Tai Shan Tsu* No. 5038, since judicial precedents are the expression of legal opinions of that Court to unify the views on laws and regulations, they are different from law and are not the subject

聲請人併聲請解釋六十五年十月二十二日制定公布之稅捐稽徵法第四十七條第二款至第四款規定部分，依聲請意旨所述，上開條款並非本件原因案件應適用之規定；另聲請解釋之最高法院六十九年台上字第三０六八號、七十三年台上字第五０三八號判例部分，因判例乃該院為統一法令上之見解，所表示之法律見解，與法律尚有不同，非屬法官得聲請解釋之客體。上開二聲請解釋部分，均核與本院釋字第三七一號及第五七二號解釋所定之聲請解釋要件有所不合，應不予受理，併此敘明。

matters that a judge may file petition for an interpretation. The above two parts in the petition do not meet the requirements for interpretation in accordance with J.Y. Interpretation Nos. 371 and 572, and are hereby denied.

Justice Sea-Yau Lin filed concurring opinion.

Justice Ching-You Tsay filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Shin-Min Chen filed dissenting opinion.

Justice Yu-hsiu Hsu filed concurring opinion in part.

Justice Yeong-Chin Su filed concurring opinion in part, in which Justice Pi-Hu Hsu joined.

Justice Tzong-Li Hsu filed dissenting opinion in part, in which Justice Tzu-Yi Lin joined.

Justice Chi-Ming Chih filed dissenting opinion in part.

Justice Chen-Shan Li filed dissenting opinion in part.

本號解釋林大法官錫堯提出協同意見書；蔡大法官清遊提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官新民提出不同意見書；許大法官玉秀提出部分協同意見書；蘇大法官永欽、徐大法官璧湖共同提出部分協同、部分不同意見書；許大法官宗力提出，林大法官子儀加入之部分不同意見書；池大法官啟明提出部分不同意見書；李大法官震山提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts: The petitioner, Judge Chien Ron Chien of the Taiwan Taoyuan District Court, while reviewing a case on the violation of Business Accounting Act by defendant Chiu Kun Fon (the responsible person of Mei Chien Corporation), believed that while the applicable Article 47, Item 1 of the Tax Collection Act is limited to "shall be subject to imprisonment," it was apparently a legislative error and was not that the defendant cannot apply it analogically in his favor, thus believed that the responsible person of a company may be subject to detention or fine under Article 41 of the same Act as well.

However, the Supreme Court precedents 69 *Tai Shan Tsu* No. 3068 and 73 *Tai Shan Tsu* No. 5038 were of the opinions that the Disputed Provision may impose only imprisonment, but no detention or fine on the responsible person of a company. The petitioner thus argued that the Disputed Provision and the above two Supreme Court precedents infringe upon the judge's discretionary power on decid-

編者註：

事實摘要：聲請人臺灣桃園地方法院法官錢建榮，於審理被告X（A公司負責人）違反商業會計法案件時，認為所應適用之稅捐稽徵法第47條第1款，條文雖限於「應處徒刑」，然而觀察立法過程，其限於「應處徒刑」顯係立法疏漏，而並非不能對被告為有利之類推適用，乃認為公司負責人亦得科處同法第41條規定之拘役、罰金刑罰。

但最高法院69年台上字第3068號、73年台上字第5038號二則判例要旨則認為，系爭規定僅得對公司負責人處以有期徒刑，不得科處拘役或罰金。聲請人因而認為系爭規定及上開二則最高法院判例，侵害法官適用法律選擇刑罰種類之裁量權，違背憲法之平等原則及比例原則，爰依本院釋字第371號解釋，裁定停止訴訟程序，聲請解釋。

ing the applicable laws and selection of penalty types, and contradicts the principle of equality and proportionality under the Constitution. The judge thus ordered to stay the proceedings and petition for an interpretation in accordance with J.Y. Interpretation No. 371.

J. Y. Interpretation No.688（June 10, 2011）*

ISSUE: Whether the requirement for package contracting businesses to issue sales certificate "at the time a receivable payment is due in each period under the construction agreement" is constitutional ?

RELEVANT LAWS:

Articles 7, 15 and 23 of the Constitution（憲法第七條、第十五條、第二十三條）; J.Y. Interpretation Nos. 397 and 682（釋字第三九七號、第六八二號號解釋）; Time Table of the Value-added and Non-value-added Business Tax Act concerning the timeframe for package contracting businesses to issue sales certificate（加值型及非加值型營業稅法之營業人開立銷售憑證時限表，有關包作業之開立銷售憑證時限規定）。

KEYWORDS:

Consumption tax（消費稅）, transfer（轉嫁）, principle of equality（平等原則）, principle of proportionality（比例原則）, integrity of the system（體系正義）, sales certificate（銷售憑證）.**

HOLDING: In the timetable of business operator's issuance of sales certificates under the Value-added and Non

解釋文：加值型及非加值型營業稅法（下稱營業稅法）之營業人開立銷售憑證時限表，有關包作業之開立憑證

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* Translated by Eleanor Chin, Esq. and Chien Yeh Law Offices.

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

value-added Business Tax Act (*hereinafter* Business Tax Act), the regulation on the timeframe for package contracting businesses to issue sales certificate is "at the time a receivable payment is due in each period under the construction agreement." It does not contravene the principle of equality under Article 7 of the Constitution, the principle of proportionality under Article 23 of the Constitution, nor does it contradict the meanings and purpose of protecting property rights and the freedom to operate business under Article 15 of the Constitution. However, [questions remain] when a business operator issues the sales certificate with time limit earlier than the actual receipt of payment, if the purchaser should subsequently become insolvent or for other reason render the business operator not able to transfer liability to the purchaser the already paid business tax. The Business Tax Act should appropriately address the nontransferrable business tax so that the legislative intent that business tax is a consumption tax and its integrity is conformed. The governing authority shall promptly review and improve the relevant provisions of the

時限規定為「依其工程合約所載每期應收價款時為限」，尚無悖於憲法第七條平等原則及第二十三條比例原則，而與第十五條保障人民財產權及營業自由之意旨無違。惟營業人開立銷售憑證之時限早於實際收款時，倘嗣後買受人因陷於無資力或其他事由，致營業人無從將已繳納之營業稅，轉嫁予買受人負擔，此際營業稅法對營業人已繳納但無從轉嫁之營業稅，宜為適當處理，以符合營業稅係屬消費稅之立法意旨暨體系正義。主管機關應依本解釋意旨就營業稅法相關規定儘速檢討改進。

Business Tax Act in accordance with the meaning and purpose of this Interpretation.

REASONING: The protection of the people's right to equality under Article 7 of the Constitution is intended to prevent arbitrary or capricious acts of the legislators and to avoid unreasonable differential treatment to people. Whether a law meets the requirement for the protection of equal rights shall hinge on whether the purpose of the differential treatment under that law is constitutional and whether there is a certain level of nexus between the categorization adopted and the objective [intended] to achieve under the law (*see* J.Y. Interpretation No. 682). With regard to the related matters on the imposition of a concerted obligation to assist in tax collection, given that they involve professional considerations on tax collection techniques, the judicial review shall give deference as long as the legislative authorities make reasonable differentiations based on adequate purpose and without acting arbitrarily or capriciously. Furthermore, the time limit provision for

解釋理由書：憲法第七條保障人民平等權，旨在防止立法者恣意，避免對人民為不合理之差別待遇。法規範是否符合平等權保障之要求，其判斷應取決於該法規範所以為差別待遇之目的是否合憲，其所採取之分類與規範目的之達成之間，是否存有一定程度之關聯性而定（本院釋字第六八二號解釋參照）。有關稅捐稽徵協力義務課予之相關事項，因涉及稽徵技術之專業考量，如立法機關係出於正當目的所為之合理區別，而非恣意為之，司法審查即應予以尊重。又營業人何時應開立銷售憑證之時限規定，為前開協力義務之具體落實，雖關係營業人營業稅額之申報及繳納，而影響其憲法第十五條保障之財產權與營業自由，惟如係為正當公益目的所採之合理手段，即與憲法第十五條及第二十三條之意旨無違。

business entities on when to issue sales certificate is the realization of the above joint obligations to assist. Although it concerns the filing and payment of the business operator's business tax and thus affects the protection of property rights and freedom to operate business under Article 15 of the Constitution, as long as the means thereof are reasonable and justified with legitimate public interest objective, it does not contradict the purpose of Articles 15 and 23 of the Constitution.

The levying of business tax under the Business Tax Act adopts a combination of value-added sales tax and cumulative transfer tax system, with the former being assessed on the difference between a business operator's input and output tax in accordance with Chapter 4, Section 1 of the Business Tax Act and the latter being levied on a business operator's total sales in accordance with Chapter 4, Section 2 of the same Act (*see* J.Y. Interpretation No. 397). As a matter of principle, a business operator shall file a tax return for the sales amount, payable taxes or overpaid taxes once every two months (*see*

營業稅法對於營業稅之課徵係採加值型營業稅及累積型轉手稅合併立法制，前者依營業稅法第四章第一節規定，係按營業人進、銷項稅額之差額課稅；後者依同法第四章第二節規定，係按營業人銷售總額課徵營業稅（本院釋字第三九七號解釋參照）。營業人原則上須以每二月為一期，按期申報銷售額、應納或溢付營業稅額（營業稅法第三十五條參照）。為使營業人之銷售事實及銷售額等，有適時、適當之證明方法，營業稅法第三十二條乃對營業人課以依法定期日開立銷售憑證之協力義務，規定營業人銷售貨物或勞務，應依同法所定營業人開立銷售憑證時限表

Article 35 of the Business Tax Act). To ensure that business operators have timely and appropriate means to prove the occurrence of a sale and the amount of such a sale, Article 32 of the Business Tax Act imposes on the business operators a concerted obligation to assist by issuing the uniform sales receipts to the purchasers for the goods or services provided within the timeframe stipulated under the Time Table for the Issuance of Sales Certificate by the Business Operators (*hereinafter* Time Table) of the same Act.

（下稱時限表）規定之時限，開立統一發票交付買受人。

The Time Table expressly states the timing at which business operators shall perform the obligation to issue sales certificate, and, depending on different industries, provides different timeframe to issue. Among the business operators in the sale of goods such as the retail, manufacturing, or handicraft sector, among others, the Time Table in principle sets the time for issuing the sales certificate at the time the goods is dispatched; for business operators in the sale of services, such as labor contracting service, warehousing, leasing, among others, the Time Table in

時限表明文規範營業人應履行憑證義務之時點，並依營業人所屬不同行業別，定有不同之開立銷售憑證時限。其中銷售貨物之營業人，如買賣業、製造業、手工業等，時限表原則上將其銷售憑證開立時限定於發貨時；銷售勞務之營業人，如勞務承攬業、倉庫業、租賃業等，時限表原則上將其開立銷售憑證時限定於收款時。至包作業之營業人開立銷售憑證，時限表則定於「依其工程合約所載每期應收價款時為限」。

principle sets the time for issuing the sales certificate at the time of payment collection. With regard to the timeframe of contracting business operators to issue sales certificate, the Time Table sets it "at the time a receivable payment is due in each period under the construction agreement."

The package contracting business is defined by the Time Table as "every contracting operation of civil construction, water, electric and gas utility installation, and construction painting whereby the contractor uses its own materials or provide pricing and sale of materials to the undertakers, including building construction, architecture, civil engineering contracting, road pavement and surfacing, well drilling, electrical and plumbing, paint contracting, among other things." Given that such business operators provide both their own materials and the undertaking of the construction services, their services simultaneously entail the nature of selling goods and services, which is different from business operators that purely engage in the sale of goods or services. The preparation of materials for

時限表所定之包作業，即「凡承包土木建築工程、水電煤氣裝置工程及建築物之油漆粉刷工程，而以自備之材料或由出包人作價供售材料施工者之營業。包括營造業、建築業、土木包作業、路面鋪設業、鑿井業、水電工程業、油漆承包業等」。其營業人既自備材料又出工施作，同時兼具銷售貨物及勞務之性質，與單純銷售貨物或勞務之營業人不同。其備料銷售部分即近似銷售貨物之營業人，但另方面，按包作業一般之交易習慣，合約常以完成特定施作進度作為收取部分價款之條件，如僅因其有銷售貨物性質，即要求其比照銷售貨物營業人於發貨時開立銷售憑證，產生銷項稅額，則包作業營業人負擔過重。又因其雖有銷售勞務性質，但雙方既屬分期給付，通常已可排除價款完全未獲履行之風險，是時限表就包作業之開立憑證時限乃折衷定為「依其工程合約所載

the sale is similar to the business operators in the sale of goods, yet on the other hand, in the ordinary course of package contracting businesses usually condition the installed payments on the completion of certain progress in the construction. Should the package contracting businesses, merely because it has a certain character of sale of goods, be required to issue sales certificate upon the delivery of goods similar to that of the operators for the sale of goods and as a result liable for output taxes, then it can overburden the package contracting operators. Furthermore, although package contract businesses also possess the character of sale of services, given that the payments between the parties are in installments, the risk of default payments can usually be excluded. Therefore, as a compromise, the Time Table stipulates that contracting businesses to issue the sales certificate "at the time a receivable payment is due in each period under the construction agreement," so that the business operators and the tax levying authority have a certain, objective date for reference. Accordingly, the regulation on the timeframe is for purpose of such

每期應收價款時為限」，俾使營業人及稽徵機關有明確客觀之期日可稽。準此，系爭時限規定係為促進稽徵效率與確立國家稅捐債權之公益目的，考量包作業之特性與交易習慣所為與銷售勞務者之不同規定，且該差別待遇與目的間具有合理關聯，尚非屬恣意為之；又所採之手段，係為確保營業稅之稽徵，有適時之證明方法可稽，對包作業之營業人難謂因系爭時限規定而對其財產權及營業自由構成過度負擔。是系爭時限規定尚無悖於憲法第七條平等原則及第二十三條比例原則，而與第十五條保障人民財產權及營業自由之意旨無違。

public interest as promoting the efficiency of tax levy and affirming the creditor's right of the state's taxing authority, taking into consideration that the nature and customary transactions of package contracting operations is different from those engaged in the sale of services, provided that there is a reasonable nexus between the differential treatments and the purpose it intends to achieve, and, therefore, not arbitrary or capricious. Furthermore, the means being adopted is to ensure that adequate and timely evidence is available to prove the collection of business tax. It can hardly be said that the disputed timeframe regulation overburdens the property rights and the freedom to operate on package contracting businesses. Thus, the disputed regulation does not contravene the principle of equality under Article 7 of the Constitution or the principle of proportionality under Article 23 of the Constitution, nor does it contradict the meanings and purpose of protecting the property rights and the freedom to operate businesses under Article 15 of the Constitution.

In accordance with the spirits of the business tax system, the business tax is a levy to the person who purchases goods or services, and reflected on the capacity to bear the tax burden through such consumption. Although technically the taxpayer is the business operator, [the burden] is transferred to and borne by the final purchaser, i.e., the consumer. Therefore, the rights and interests of the business operator to transfer the amount of business taxes must be adequately protected to comply with the legislative purpose and the integrity of the system that business tax is a consumption tax. To ensure the accuracy and efficiency of business tax levy, while it is not impossible to require business operators to issue sales certificate prior to the payment being made depending on the nature of the business, such a business operator who has legitimately issued the sales certificate, filed the return and made the tax payments may be unable to transfer such tax burden due to the purchaser's subsequent insolvency or other causes. This does not affect the constitutionality of the taxpayer's obligation to issue sales certificate and pay the

依營業稅之制度精神，營業稅係對買受貨物或勞務之人，藉由消費所表彰之租稅負擔能力課徵之稅捐，稽徵技術上雖以營業人為納稅義務人，但經由後續之交易轉嫁於最終之買受人，亦即由消費者負擔。是以營業人轉嫁營業稅額之權益應予適當保護，以符合營業稅係屬消費稅之立法意旨暨體系正義。為確保營業稅稽徵之正確及效率，雖非不得按營業別之特性，將營業人銷售憑證開立之時限，定於收款之前。惟營業人於收款前已依法開立銷售憑證、申報並繳納之銷項稅額，嗣後可能因買受人陷於無資力或其他事由，而未給付價款致無從轉嫁。此固不影響納稅義務人於實際收款前，即應開立銷售憑證及報繳營業稅之合憲性。然對於營業人因有正當之理由而無從轉嫁予買受人負擔之稅額，營業稅法仍宜有適當之處理，例如於適當要件與程序下，允許營業人雖不解除契約辦理銷貨退回，亦可請求退還營業人已納稅額或允其留抵應納稅額等。就此主管機關應儘速對營業稅法相關規定予以檢討改進。

business taxes prior to the actual receipt of payment. Yet the Business Tax Act should nevertheless take appropriate actions to deal with the taxes the business operators cannot transfer to the purchasers with proper justification such as allowing the business operator to request a refund of the already paid tax or credit it against the payable tax amount without rescinding the contract and returning the goods. The competent authority shall promptly review and improve the relevant provisions of the Business Tax Act.

Justice Yeong-Chin Su filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Shin-Min Chen filed dissenting opinion in part.

本號解釋蘇大法官永欽提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官新民提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts: The Petitioner subcontracted from A Construction Corporation for a project with the Taipei County Government in September 1995 for the agreed remuneration of NT$165 million. The final balance due was

編者註：

事實摘要：聲請人於民國 84 年 9 月向 A 營造公司轉承包臺北縣政府之工程，約定報酬金額新臺幣 1 億 6500 萬，其中尾款為 1706 萬，尾款給付依約應於「A 公司向業主臺北縣政府領得工程款後，於 3 作業天內開立現金支

NT$17.06 million, and according to the agreement such final payment shall be made “after receiving the project funds from the Taipei County Government, A Construction Corporation shall issue a cash check within 3 business days.”

票」為之。

The Petitioner completed the construction on July 31, 1998. However, the last installment was not paid because of A Construction Corporation’s insolvency. The Petitioner filed a lawsuit and participated in the distribution. In May 2000, the Petitioner was awarded NT$4,340,000; the Petitioner subsequently filed a supplemental business tax return on July 5, 2002 to pay an additional NT$206,727 business tax from the NT$4,340,000 received.

聲請人於87年7月31日完工，但工程尾款卻因A公司陷於無資力而未如期獲償。聲請人提起訴訟、參與分配，於89年5月間，獲償434萬餘元；嗣於91年7月5日補報繳所獲償434萬餘元之營業稅20萬6,727元。

The National Tax Administration of Northern Taiwan Province considered the construction the Petitioner engaged a package contracting operation involving the supplying of labor and materials, and the issuing of sales certificate should have been “at the time a receivable payment is due in each period under the construction agreement.” Therefore, upon the comple-

北區國稅局以聲請人承攬之工程屬包工包料之包作業，依營業人開立銷售憑證時限表規定，應於「依其工程合約所載每期應收價款時」開立發票，聲請人於87年7月31日完工並請求付款，即有開立全部尾款1700餘萬元統一發票，並依期限申報營業稅之義務；聲請人未依限履行上開義務，有漏開發票及漏繳營業稅情形，乃核定其逃漏營業稅

tion of the construction and request for payment on July 31, 1998, the Petitioner had an obligation to issue a uniform sales receipt for the entire final installment of more than NT$17 million and to file the business tax return within the deadline. Given that the Petitioner did not fulfill the abovementioned obligation within the deadline, a case of missing sales receipt and tax evasion is shown. The National Tax Administration determined that the Petitioner evaded an amount of NT$810,000 in taxes and imposed a treble fine of NT$2,437,800. The Petitioner instituted an appeal and administrative litigation but were all denied. The Petitioner then filed the petition for an interpretation.

款 81 萬，並處 3 倍罰鍰 243 萬 7800 元。聲請人不服，迭經訴願、行政訴訟均遭駁回，爰聲請解釋。

J. Y. Interpretation No.689（July 29, 2011）*

ISSUE: Does Article 89, Paragraph 2 of the Social Order Maintenance Act restricting the act of stalking by a journalist violate the Constitution ?

RELEVANT LAWS:

Articles 11, 15, 22, 23 of the Constitution of the Republic of China (1947)（憲法第十一條、第十五條、第二十二條、第二十三條）；J.Y. Interpretations No. 535, No. 585, No. 603（司法院釋字第五三五號、第五八五號、第六0三號解釋）；Article 5, Paragraph 1, Item 2 and Article 13, Paragraph 1 of the Constitutional Interpretation Procedure Act (1993.2.3)（司法院大法官審理案件法第五條第一項第二款、第十三條第一項）；Article 55 Article 89, Paragraph 2 Social Order Maintenance Act (2011.11.4)（社會秩序維護法第五十五條、第八十九條第二款）；Articles 18, 195 Civil Code (2012.12.26)（民法第十八條、第一百九十五條）；Article 28 of the Computer-Processed Personal Data Protection Act（revised and promulgated as Personal Data Protection Act on May 26, 2010, not yet implemented）（電腦處理個人資料保護法（九十九年五月二十六日修正公布為個人資料保護法，尚未施行）第二十八條)；Act Governing the Punishment of Police Offences (promulgated on September 3, 1943 by the Republic Government, implemented on October 1 of the same

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* Translated by Hsiaowei Kuan.

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

year, repealed on June 29, 1991.)（違警罰法第七十七條第一款（三十二年九月三日國民政府公布，同年十月一日施行，八十年六月二十九日廢止）

KEYWORDS:

human dignity（人性尊嚴）, freedom from intrusion（不受侵擾之自由）, freedom of general behavior（一般行為自由）, freedom of movement（行動自由）, personality right（人格權）, privacy（隱私）, private sphere（私密領域）, right to Informational self-determination（個人資料自主權）, body right（身體權）, physical and emotional safety（身心安全）, public sphere（公共場域）, reasonable expectation(合理期待）, tort（侵權行為）, freedom of press（新聞自由）, freedom of news gathering(新聞採訪）, journalist（記者）, news reporter（新聞採訪者）, right to work（工作權）, freedom of occupation（職業自由）, freedom to exercise one's profession（執行職業自由）, principle of clarity and definiteness of law（法律明確性）, principle of proportionality（比例原則）, due process（正當法律程序), stalking（跟追）, observing（監看）, monitoring（監聽), public disclosure（公開揭露)，legitimate reason（正當理由)，dissuasion（勸阻）; common Idea（社會通念）, tolerable limitation of common idea（社會通念所能容忍之界限）, balancing of interests（利益衡量）, public interest（公益性）, newsworthy（新聞價值）, public servant（公職人員）, political figure（政治人物）, public figure（公眾人物）, police（警察）, objection（異議）.**

HOLDING: Article 89, Paragraph 2 of the Social Order Maintenance Act aims to protect a person's freedom of movement, freedom from bodily and mental harms, freedom from intrusion with reasonable expectation in the public space and the right to autonomous control of personal information, and to punish a stalking behavior which has been urged to stop yet continues without any legitimate reason. We find the Provision at issue does not violate the principle of clarity and definitiveness of law. A journalist's following in person shall be considered to have legitimate reasons and shall not be subject to penalty by the aforementioned provision if judging from the facts a specific event is of concern to the public, of public interest, and newsworthy, it is not intolerable under the general social standard. Within this scope, although the aforementioned provision places a limit on the behavior of newsgathering, it is appropriate and proportionate and does not contradict the freedom of newsgathering provided by Article 11 of the Constitution or people's right to work guaranteed by

解釋文：社會秩序維護法第八十九條第二款規定，旨在保護個人之行動自由、免於身心傷害之身體權、及於公共場域中得合理期待不受侵擾之自由與個人資料自主權，而處罰無正當理由，且經勸阻後仍繼續跟追之行為，與法律明確性原則尚無牴觸。新聞採訪者於有事實足認特定事件屬大眾所關切並具一定公益性之事務，而具有新聞價值，如須以跟追方式進行採訪，其跟追倘依社會通念認非不能容忍者，即具正當理由，而不在首開規定處罰之列。於此範圍內，首開規定縱有限制新聞採訪行為，其限制並未過當而符合比例原則，與憲法第十一條保障新聞採訪自由及第十五條保障人民工作權之意旨尚無牴觸。又系爭規定以警察機關為裁罰機關，亦難謂與正當法律程序原則有違。

Article 15 of the Constitution. Furthermore, the provision at issue delegating the power of sanction to police authorities also does not violate the principle of due process of law.

REASONING: W claimed that the application of Article 89, Paragraph 2 of the Social Order Maintenance Act (hereinafter "Provision at issue") in the Ruling of Taipei District Court Bei-Jih-Seng-Tzi No. 16 (2008) has raised constitutional doubts. The Justices of the Constitutional Court granted to review the case and pursuant to Article 13, Paragraph 1 of the Constitutional Interpretation Procedure Act summoned the petitioner and his agent ad litem, as well as the representative and agent ad litem of the agency concerned, namely, the Ministry of Interior, to attend the oral argument session scheduled on June 16th, 2011 in the Constitutional Court; expert witnesses were also subpoenaed for deposition in court.

解釋理由書：本件係因W認臺灣臺北地方法院九十七年度北秩聲字第一六號裁定所適用之社會秩序維護法第八十九條第二款規定（以下簡稱系爭規定）有違憲疑義，聲請解釋憲法，經大法官議決應予受理，並依司法院大法官審理案件法第十三條第一項規定，通知聲請人及訴訟代理人、關係機關內政部指派代表及訴訟代理人，於中華民國一００年六月十六日在憲法法庭行言詞辯論，並邀請鑑定人到庭陳述意見。

The petitioner claimed that the Provision at issue violates the principle of clarity and definitiveness of law, the principle of proportionality and the principle of due process of law, infringes people's freedom of press and the right to work guaranteed by the Constitution. The reasons are summarized as followed: 1. The right of news reporters to gather information freely and the right to conduct interviews in order to verify news information are protected by Article 11 of the Constitution: (1) Based on the stipulated freedom of "publication" in Article 11 of the Constitution as well as on the conclusion of Number 613, Judicial Yuan Interpretation, freedom of press shall be one of the fundamental rights guaranteed in Article 11 of the Constitution; (2) The process of news production includes newsgathering, followed by news editing, news reporting. Therefore, freedom of press shall encompass newsgathering activities which are considered necessary for collecting information and verifying the source, otherwise the purpose of press freedom would be undermined. (3) The

本件聲請人主張系爭規定違反法律明確性原則、比例原則及正當法律程序原則，侵害人民受憲法所保障之新聞自由及工作權，其理由略謂：一、新聞記者得自由蒐集、採訪並查證新聞資料之權利，為憲法第十一條所保障：（一）依據憲法第十一條所謂之「出版」自由，參以司法院釋字第六一三號解釋意旨，新聞自由應為憲法第十一條所保障之基本權利。（二）新聞之產生流程，包括採訪行為及其後之編輯、報導行為，新聞自由之保障範圍應及於為蒐集查證資訊來源所必須進行之採訪行為，否則將形同架空憲法保障新聞自由之意旨。（三）應受新聞自由保障之新聞，除政治、經濟相關資訊以外，娛樂新聞亦在保障範圍內，故蒐集查證娛樂新聞資訊之採訪行為，亦應受新聞自由所保障。（四）凡從事新聞工作之每個個人，無論其在新聞產生過程之分工為何，均應為新聞自由所保障之主體，又因現代化新聞經營多採企業組織方式為之，該組織亦享有新聞自由之保障。二、系爭規定所限制者，包括新聞記者之採訪自由及工作權：（一）新聞記者持續近距離接觸新聞事件之被採訪者，以便觀察、拍攝或訪問，乃新聞採訪所必要之

news protected by freedom of press shall include entertainment news other than political and economic ones, thus the interviewing for gathering and verifying of materials regarding entertainment news shall also be protected. (4) Every individual person who works in the profession of journalism, no matter which part of work he does in the process of news production, shall be the subject of press freedom. Since modern journalism is often managed by corporate organizations, organizations shall as well enjoy the protection of press freedom. 2. The Provision at issue restrains both a journalist's freedom of newsgathering and his right to work: (1) In order to observe, photograph and interview when a news event occurs, it is necessary for a journalist to approach a subject in a short distance for a period of time. Accordingly, the prohibition on stalking in the Provision at issue constitutes a restraint on the freedom of newsgathering. (2) Since the Provision at issue limits a journalist's act of newsgathering, it likewise restrains a journalist's right to work. 3. The Provision at issue violates

行為，而系爭規定所禁止之跟追他人行為，即對新聞採訪自由形成限制。（二）系爭規定限制新聞記者之採訪行為，因而同時涉及新聞從業人員之工作權限制。三、系爭規定違反法律明確性原則：（一）依系爭規定立法說明，無法具體得知系爭規定所欲保護之法益究為他人之行動自由、人身安全、抑或免於恐懼之自由，其規範目的是否為一般人民所能理解，不無疑問。（二）系爭規定之行為規範要件包括「跟追他人」、「經勸阻不聽」及「無正當理由」，雖以跟追他人為中心，然系爭規定未言明須由何人以何種方式勸阻，以及如何情況下始可勸阻，且所謂正當理由之有無，須透過利益衡量判斷，惟系爭規定所欲保護之法益模糊不清，則受規範之一般人民顯然難以預見須受規範處罰之跟追行為為何，其違反法律明確性原則甚明。四、系爭規定違反比例原則：（一）於本件聲請，系爭規定所干預者，至少包括新聞採訪自由。（二）縱認系爭規定所欲保護者，係被跟追者之行動自由、人身安全或隱私，其所採取手段未將對於新聞採訪自由之干預效果降至最小，例如區分跟追手段是否具備高度攻擊性或侵入性，而限縮處罰要件，形成過度

the principle of clarity and definitiveness of law: (1) According to the legislative materials of the Provision at issue, one cannot specifically identify which legal interest is meant to be protected. May it be freedom of movement, security of the person or freedom from fear, it casts doubts on whether the purpose of the limitation can be conceived by ordinary people. (2) The conduct requirements of the Provision at issue include “to follow others”, ”not stop after being urged to do so” and “without legitimate reason”. While focusing on following others, the Provision at issue does not specify by whom, in what way and under what circumstances the following shall be urged to stop. The requirement of so called legitimate reasons shall be determined through a balancing of interests. Nevertheless, it is obviously at odds with the principle of clarity and definitiveness of law, since the protected interests in the Provision at issue are so ambiguous that ordinary people regulated by it would have difficulty to predict what kind of following will be subject to punishment. 4. The

侵害新聞採訪自由，而與比例原則有違。五、系爭規定違反正當法律程序原則：與外國立法例相較，系爭規定有關裁罰之規定，係循行政程序而非司法程序進行，並將衡量採訪自由與被跟追者權益之責全然委諸警察機關判斷，程序保障顯有不足，難謂符合正當法律程序原則等語。

Provision at issue violates the principle of proportionality: (1) Based on the present claim, the Provision at issue infringes at least the freedom of press. (2) Even if the protected interests include freedom of movement, security of the person, and privacy of the person being followed, the law fails to reduce the effects of interference with the freedom of press to a minimum extent. For instance, failure to distinguish whether the manner of following is highly offensive or intrusive so as to diminish the scope of punishment has excessively infringed upon freedom of press, and therefore violates the principle of proportionality. 5. The Provision at issue violates the principle of due process of law: Compared to anti-stalking laws in other countries, the imposition of penalty in the Provision at issue follows the rules of administrative procedures instead of judicial proceedings. Since the Provision at issue unreservedly delegates to police authorities the power of discretion to balance between the freedom of news-gathering and the rights or interests of the person being followed, it fails to provide

sufficient procedural protection and violates the principle of due process of law.

The agency concerned, namely, the Ministry of Interior, has argued summarily that: 1. The petitioner's claim, that his following based on the reason of news-gathering shall not be punished pursuant to the Provision at issue, is a dispute concerning the interpretation and application of law in a concrete case, not a case regarding the constitutionality of the Provision at issue. The court should dismiss the case as it does not fall under Article 5, Paragraph 1, Item 2 of the Constitutional Interpretation Procedure Act. 2. The Provision at issue is in tune with the rule of proportionality: (1) As can be known from the legislative intent, the legal interests protected by the Provision at issue include individual privacy and personality rights, freedom of movement and freedom of choice, which shall be protected by Article 22 of the Constitution. The Universal Declaration of Human Rights, the International Convention on Civil and Political Rights and the European Human

關係機關內政部略稱：一、聲請人主張基於新聞採訪之理由而跟追他人，不應受系爭規定所規範云云，係爭執系爭規定於該個案之解釋適用，並非系爭規定是否牴觸憲法之疑義，與司法院大法官審理案件法第五條第一項第二款規定不合，應不予受理。二、系爭規定符合比例原則：（一）依立法理由可知，系爭規定所保護之法益為個人之隱私及人格權、行動自由與決定自由權等，應受憲法第二十二條所保障，且依世界人權宣言、公民與政治權利國際公約及歐洲人權公約規定，私人生活領域有不受他人任意干涉之權利，國家負有積極的保護義務，應提供法律保護，以免個人之私人生活領域遭受不當干涉，是系爭規定之目的殊屬正當。（二）系爭規定所處罰之跟追，係故意或惡意對被跟追人重複緊追不捨之行為，形成被跟追人恐懼、不安；各國對於惡意跟追行為，若侵犯他人之基本權利，嚴重干擾被跟追人之生活作息，或對身體、生命法益形成威脅者，多以刑罰手段加以制裁，相對而言，系爭規定處以申誡或

Rights Convention all guarantee freedom from unwanted interference by others in private life. The State shall have a positive duty and provide legal protection to prevent unwanted interference in private life, therefore the purpose of the Provision at issue should be legitimate. (2) The Provision at issue punishes stalking behavior which was defined as the willful, malicious and repeated following and harassing which has caused the stalkee to feel fearful and insecure. Many countries sanction malicious stalking by means of criminal punishment, if the act of stalking has infringed other's basic rights, seriously interfered with other's everyday life, or caused a threat to one's body and life. In contrast, the punishment in the Provision at issue is relatively light, given it only reprimands the offender or imposes an administrative fine not exceeding 3,000 dollars. Since an individual's right to privacy is given a comparatively loose and very basic protection, it not only conforms with the principle of *ultimum remedium* but also does not exceed the requirement of necessity and appropriateness, and

新臺幣三千元以下之行政罰鍰，可認對隱私權之保護密度較為寬鬆，而提供個人隱私權最基本之保障，既符合刑罰謙抑原則，亦未逾越必要性及適當性之要求，而與比例原則無違。三、系爭規定仍應適用於新聞記者之採訪行為，並採合憲性解釋方式，而非全面排除適用，以保護他人自由權利：（一）新聞自由係一制度性基本權利，乃為保障新聞媒體自主獨立，免於政府干預，以發揮監督政府之功能，而與為維護人性尊嚴所設之其他人民基本權利有所不同。（二）新聞媒體雖享有新聞自由，其為蒐集、查證新聞資料而採跟追方式進行採訪，雖在所難免，惟若因此侵害他人權利行使，仍應受必要之限制。（三）新聞採訪之自由雖以真實報導為目的，但其手段方法仍應合法正當，本於誠信原則為之。系爭規定適用於新聞採訪行為侵害他人隱私，僅於以下情形，新聞記者得主張免責：１、被跟追人明示或默示的同意；２、被跟追人於公共場所參與社會公共活動。（四）新聞採訪自由與隱私權界限之判斷標準，主要應以事件公共性為區分界限，並參酌美國聯邦最高法院之見解，以下列因素為基準：１、新聞價值之有無；２、區分公

therefore does not violate the principle of proportionality. 3. In order to protect the liberty and rights of the stalkee, a journalist's act of newsgathering shall be subject to the provision, rather than be totally exempted . The provision shall be rulled constitutional according to the principle of interpretation in conformity with the Constitution, because: (1) Freedom of press is an institutional right to protect the autonomy and independence of news media from governmental interference and also has the function to supervise the government, thus differing from individual fundamental rights safeguarding human dignity. (2) Although news media enjoy freedom of press, they must be restrained when infringing other people's rights for purposes of newsgathering and verification, even if this may be inevitable. (3) Although the freedom of newsgathering aims to report the truth, the method should be legitimate and follow the principle of good faith. The Provision at issue should apply where a journalist's act of newsgathering infringes the right of privacy, except in the following situ-

眾人物與公共事務之關聯度，而採寬嚴不同的審查基準，關聯度愈高，隱私權保障愈為限縮；3、是否具有正當公共關切等語。

ations: (i) when the stalkee explicitly or implicitly gives his consent; (ii) when the stalkee participates in public activity at a public place. (4) The boundary between freedom of newsgathering and the right to privacy should be drawn primarily based on the publicity of the case. We summarize the opinions of the Supreme Court of the United States and conclude that the following criteria shall be considered: (i) whether the matter is newsworthy; (ii) Depending on the degree of the nexus between the public figure and to what extent the reported matter is of public concern, different standards apply. The closer the relationship between the public figure and public affairs is, the smaller the scope of the safeguard of privacy is; (iii) whether the matter is of legitimate concern to the public.

The Judicial Yuan has in its deliberation taken into account all arguments made by the parties and made this interpretation with the following reasons:

本院斟酌全辯論意旨，作成本解釋，理由如下：

Based on respect of human dignity, we believe that one's autonomy and the free development of personality shall be safeguarded by the Constitution (*See* J. Y. Interpretation Number 603). In addition to the various freedoms already protected by the Constitution, for the protection of individual autonomy and the free development of personality, an individual's freedom of willful action or inaction shall also be safeguarded in Article 22 of the Constitution, under the premise of not jeopardizing public order and interests. The freedom of movement guaranteeing a person's willful move toward or stay in a place (*see* J. Y. Interpretation Number 535) shall be protected within the scope of freedom of general behavior. Nevertheless, the freedom of movement is not an absolute right that cannot be appropriately restrained by laws or administrative regulations clearly authorized by laws, for instance if the restriction is necessary for preventing the impediment of another person's freedom or for preserving social order. For purposes of ensuring that news media can provide newsworthy diverse

基於人性尊嚴之理念，個人主體性及人格之自由發展，應受憲法保障（本院釋字第六０三號解釋參照）。為維護個人主體性及人格自由發展，除憲法已保障之各項自由外，於不妨害社會秩序公共利益之前提下，人民依其意志作為或不作為之一般行為自由，亦受憲法第二十二條所保障。人民隨時任意前往他方或停留一定處所之行動自由（本院釋字第五三五號解釋參照），自在一般行為自由保障範圍之內。惟此一行動自由之保障並非絕對，如為防止妨礙他人自由，維護社會秩序所必要，尚非不得以法律或法律明確授權之命令予以適當之限制。而為確保新聞媒體能提供具新聞價值之多元資訊，促進資訊充分流通，滿足人民知的權利，形成公共意見與達成公共監督，以維持民主多元社會正常發展，新聞自由乃不可或缺之機制，應受憲法第十一條所保障。新聞採訪行為則為提供新聞報導內容所不可或缺之資訊蒐集、查證行為，自應為新聞自由所保障之範疇。又新聞自由所保障之新聞採訪自由並非僅保障隸屬於新聞機構之新聞記者之採訪行為，亦保障一般人為提供具新聞價值之資訊於眾，或為促進公共事務討論以監督政府，而從

information, promoting full and adequate flow of information to satisfy the people's right to know, formation of public opinion and achieving public oversight, in order to maintain the normal development of a democratic and pluralistic society, freedom of press is an indispensable mechanism, and shall be protected under Article 11 of the Constitution. Newsgathering is indispensable for providing the contents of news reports through newsgathering and verification and shall be within the scope of the protection of press freedom. The freedom of newsgathering within the freedom of press not only protects the newsgathering of a journalist who works for a press institution but also protects an ordinary person who gathers information with the aim of providing newsworthy information to the public or promoting the discussion of public affairs to supervise the government. The freedom of newsgathering is by no means an absolute right, the State may within the range of Article 23 of the Constitution duly limit it by laws or regulations clearly authorized by law.

事之新聞採訪行為。惟新聞採訪自由亦非絕對，國家於不違反憲法第二十三條之範圍內，自得以法律或法律明確授權之命令予以適當之限制。

Article 89, Paragraph 2 of the Social Order Maintenance Act (the Provision at issue) provides that people who follow others without legitimate reason and do not stop after being urged to do so can be fined up to NT$3,000 or be reprimanded. From the records of the legislative process and the wording of the provision, we find that this provision was based on Article 77, Paragraph 1 of the Act Governing the Punishment of Police Offences which was promulgated on September 3, 1943 by the Republic Government, implemented on October 1 in the same year, and repealed on June 29, 1991. The Provision at issue purports to prohibit stalking or tailing others, including women, to protect people's freedom of movement. In addition, the Provision at issue also aims to protect an individual's bodily and mental security, individual's autonomy over his personal information and freedom from unwarranted intrusion in public spheres.

社會秩序維護法第八十九條第二款規定，無正當理由，跟追他人，經勸阻不聽者，處新臺幣三千元以下罰鍰或申誡（即系爭規定）。依系爭規定之文字及立法過程，可知其係參考違警罰法第七十七條第一款規定（三十二年九月三日國民政府公布，同年十月一日施行，八十年六月二十九日廢止）而制定，旨在禁止跟追他人之後，或盯梢婦女等行為，以保護個人之行動自由。此外，系爭規定亦寓有保護個人身心安全、個人資料自主及於公共場域中不受侵擾之自由。

The Provision at issue aims to protect a person's liberty to be free from physical and emotional harm, freedom

系爭規定所保護者，為人民免於身心傷害之身體權、行動自由、生活私密領域不受侵擾之自由、個人資料之自

of movement, freedom from intrusion into one's private sphere and individual's autonomy over his personal information. Among these liberties, the freedom from unwanted intrusion into one's private life and individual's autonomy over his personal information are recognized as constitutional rights as promulgated by previous Judicial Yuan interpretations (*see* Interpretation Number 585 and Number 603). Although a person's libertyt to be free from physical and emotional harm is not expressly enumerated in the Constitution, it shall, just as the above mentioned freedom of general behavior, be protected as a basic right under Article 22 of the Constitution, based on the concept of human dignity to safeguard personal autonomy and to develop one's personality. The protection of an individual's aforementioned liberties shall not be undermined just because he puts himself in the place of public sphere. In public places, everyone possesses the constitutionally protected freedom of movement. However, when participating in social life, a person's freedom of movement

主權。其中生活私密領域不受侵擾之自由及個人資料之自主權，屬憲法所保障之權利，迭經本院解釋在案（本院釋字第五八五號、第六０三號解釋參照）；免於身心傷害之身體權亦與上開闡釋之一般行為自由相同，雖非憲法明文列舉之自由權利，惟基於人性尊嚴理念，維護個人主體性及人格自由發展，亦屬憲法第二十二條所保障之基本權利。對個人前述自由權利之保護，並不因其身處公共場域，而失其必要性。在公共場域中，人人皆有受憲法保障之行動自由。惟在參與社會生活時，個人之行動自由，難免受他人行動自由之干擾，於合理範圍內，須相互容忍，乃屬當然。如行使行動自由，逾越合理範圍侵擾他人行動自由時，自得依法予以限制。在身體權或行動自由受到侵害之情形，該侵害行為固應受限制，即他人之私密領域及個人資料自主，在公共場域亦有可能受到干擾，而超出可容忍之範圍，該干擾行為亦有加以限制之必要。蓋個人之私人生活及社會活動，隨時受他人持續注視、監看、監聽或公開揭露，其言行舉止及人際互動即難自由從事，致影響其人格之自由發展。尤以現今資訊科技高度發展及相關設備之方便取得，

will inevitably suffer interference from other people's movements. To a reasonable extent, it is self-evident that people shall mutually tolerate such interference. If the exercise of one's liberty of movement has exceeded the reasonable extent and has interfered with free movement of other people, it shall be restricted by law. Where bodily rights or freedom of movement have been infringed, such tortious conduct should be restricted. Likewise, where a person's private sphere or the autonomy over his personal information has been infringed in a public space beyond a tolerable extent, it is also necessary to restrict such infringing conduct. If a person's private life and social activities would be constantly watched, monitored, eavesdropped or publicly exposed, such a person's words, conduct and social interactions can hardly be freely carried out, thus hindering free development of his personality. Especially since the rapid development of information technology and easy access to related equipment have greatly increased the possibility of intrusion into one's private life and privacy

個人之私人活動受注視、監看、監聽或公開揭露等侵擾之可能大為增加，個人之私人活動及隱私受保護之需要，亦隨之提升。是個人縱於公共場域中，亦應享有依社會通念得不受他人持續注視、監看、監聽、接近等侵擾之私人活動領域及個人資料自主，而受法律所保護。惟在公共場域中個人所得主張不受此等侵擾之自由，以得合理期待於他人者為限，亦即不僅其不受侵擾之期待已表現於外，且該期待須依社會通念認為合理者。系爭規定符合憲法課予國家對上開自由權利應予保護之要求。

by watching, monitoring, eavesdropping or public disclosure etc., the necessity of higher protection of privacy has accordingly increased. Even a person in the the public sphere should, within the scope of social expectation, shall enjoy the legal protection of the freedom from the intrusion of his private sphere and the autonomy to control his personal information by way of constant watching, monitoring, eavesdropping, approach etc. However, the liberty to be free from intrusion in the public sphere can only be asserted when it can be reasonably expected; that is, the expectation of nonintrusion must not only be manifested but also deemed reasonable by the general public. The Provision at issue has met the constitutional requirement of the State to guarantee the aforementioned rights and liberties.

Stalking in the Provision at issue means to continuously approach another person or to oversee another's whereabouts by following, tailing and keeping watch for or other similar methods to the extent of constituting an intrusion of

系爭規定所稱跟追，係指以尾隨、盯梢、守候或其他類似方式，持續接近他人或即時知悉他人行蹤，足以對他人身體、行動、私密領域或個人資料自主構成侵擾之行為。至跟追行為是否無正當理由，須視跟追者有無合理化跟追

another person's body, activity, private space or autonomy to control his personal information. Whether a stalking can be legally justified depends on whether the stalker has justifiable reasons based on an overall assessment of the factors, including the purpose, the circumstances of the relevant people, time, place and context, the extent to which the stalkee is intruded, and whether or not the intrusion caused by the stalking has exceeded the reasonable tolerance of the general public. The requirement of "being urged to stop yet continues the stalking" has the function of ascertaining that the stalkee has manifested the wish not to be followed or a warning. Only when a perpetrator continues stalking after being urged to stop by the police or the stalkee, does the behavior constitute an illegal act. If a perpetrator continues stalking after he has been urged to stop without legitimate reasons, he should be punished by the Provision at issue. In as much as whether the meaning and scope of application of the Provision at issue is difficult for the regulated to understand based on everyday life expe-

行為之事由而定，亦即綜合考量跟追之目的，行為當時之人、時、地、物等相關情況，及對被跟追人干擾之程度等因素，合理判斷跟追行為所構成之侵擾，是否逾越社會通念所能容忍之界限。至勸阻不聽之要件，具有確認被跟追人表示不受跟追之意願或警示之功能，若經警察或被跟追人勸阻後行為人仍繼續跟追，始構成經勸阻不聽之不法行為。如欠缺正當理由且經勸阻後仍繼續為跟追行為者，即應受系爭規定處罰。是系爭規定之意義及適用範圍，依據一般人民日常生活與語言經驗，均非受規範者所難以理解，亦得經司法審查予以確認，尚與法律明確性原則無違。

rience and language of ordinary people may be reviewed by the judiciary, the Provision at issue is not repugnant to the principle of clarity and definitiveness of law.

Although the Provision at issue restricts the freedom of movement of the stalker, the restriction is made to protect the fundamental rights and liberties of the stalkee. Since the restriction of the stalking behavior which is intolerable based on general social rules is reasonably connected with the aforementioned goals, and is considered a less intrusive means weighing all the related interests, we find the restriction does not exceed the scope of appropriateness. Furthermore, the Provision at issue does not punish the stalker unless he continues to stalk after being urged to stop, thus giving the perpetrator the opportunity to stop in time to avoid punishment; therefore this Provision does not violate the rule of proportionality provided in Article 23 of the Constitution. As to whether the restriction of the Provision at issue affects the stalker to exercise oth-

又系爭規定雖限制跟追人之行動自由，惟其係為保障被跟追者憲法上之重要自由權利，而所限制者為依社會通念不能容忍之跟追行為，對該行為之限制與上開目的之達成有合理關聯，且該限制經利益衡量後尚屬輕微，難謂過當。況依系爭規定，須先經勸阻，而行為人仍繼續跟追，始予處罰，已使行為人得適時終止跟追行為而避免受處罰。是系爭規定核與憲法第二十三條比例原則尚無牴觸。至系爭規定對於跟追行為之限制，如影響跟追人行使其他憲法所保障之權利，其限制是否合憲，自應為進一步之審查。

er constitutional rights and has violated the Constitution needs further examination.

The purpose of enacting the Provision at issue is not to restrict the behavior of newsgathering. If the indirect restriction on freedom of newsgathering aims to pursue important public interests and the applied method is substantively related to achieve the objective, it is not contradictory to the principle of proportionality. Even when the newsgatherer has stalked the subject in order to gather news information, as long as the stalking reaches an intensive degree so as to threaten the physical and mental safety or the freedom of movement for the stalkee without a legitimate cause, the Provision at issue authorizes the police to intervene and stop in time, hence it cannot be considered a violation of the freedom of newsgathering protected by Article 11 of the Constitution. If the stalking of the newsgatherer has intruded a person's private liberty and autonomy to control his personal information in the public space which he is enjoy-

考徵系爭規定之制定，原非針對新聞採訪行為所為之限制，其對新聞採訪行為所造成之限制，如係追求重要公益，且所採手段與目的之達成間具有實質關聯，即與比例原則無違。新聞採訪者縱為採訪新聞而為跟追，如其跟追已達緊迫程度，而可能危及被跟追人身心安全之身體權或行動自由時，即非足以合理化之正當理由，系爭規定授權警察及時介入、制止，要不能謂與憲法第十一條保障新聞採訪自由之意旨有違。新聞採訪者之跟追行為，如侵擾個人於公共場域中得合理期待其私密領域不受他人干擾之自由或個人資料自主，其行為是否受系爭規定所限制，則須衡量採訪內容是否具一定公益性與私人活動領域受干擾之程度，而為合理判斷，如依社會通念所認非屬不能容忍者，其跟追行為即非在系爭規定處罰之列。是新聞採訪者於有事實足認特定事件之報導具一定之公益性，而屬大眾所關切並具有新聞價值者（例如犯罪或重大不當行為之揭發、公共衛生或設施安全之維護、

ing with reasonable expectation, whether this sort of behavior shall be subject to punishment according to the Provision at issue should be decided by balancing the public nature of the news content and the extent to which the private sphere is disturbed. If the disturbance is not intolerable based on general social standards, the stalking shall not be punished by the Provision at issue. If the interviewer has reason to believe the specific event is of public value in nature, which means it is of concern to the public and worth reporting (for instance disclosure of a crime or major misconduct, maintenance of public health or safety of public facilities, appropriateness of public policy, competence and performance of public officials, trustworthiness of a politician, conduct of a public figure influencing society, etc.), the stalking shall be deemed justified and not be subject to punishment if it is necessary and is not intolerable based on general social standard. According to the aforementioned reasons, the Provision at issue does not exceed appropriateness and is not repugnant to freedom of newsgather-

政府施政之妥當性、公職人員之執行職務與適任性、政治人物言行之可信任性、公眾人物影響社會風氣之言行等），如須以跟追方式進行採訪，且其跟追行為依社會通念所認非屬不能容忍，該跟追行為即具正當理由而不在系爭規定處罰之列。依此解釋意旨，系爭規定縱有限制新聞採訪行為，其限制係經衡酌而並未過當，尚符合比例原則，與憲法第十一條保障新聞採訪自由之意旨並無牴觸。又系爭規定所欲維護者屬重要之利益，而限制經勸阻不聽且無正當理由，並依社會通念認屬不能容忍之侵擾行為，並未逾越比例原則，已如上述，是系爭規定縱對以跟追行為作為執行職業方法之執行職業自由有所限制，仍難謂有違憲法第十五條保障人民工作權之意旨。

ing provided in Article 11 of the Constitution. In addition, this interpretation has clearly demonstrated that the provision lies within the constitutional scope since the interests this provision purports to safeguard are important, the restriction is meant to punish the stalking, which is being urged to stop but yet is continued without legitimate reasons, that constitutes an intrusion intolerable by social standard. Although the provision restricts the freedom of work by limiting the way of newsgathering from stalking or following as a gathering method, it is not to be deemed a violation of the right to work protected in Article 15 of the Constitution.

According to the principle of due process of law in the Constitution, an opportunity and a system of remedy shall be available whenever people's rights are infringed or restricted, it also requires that legislators promulgate corresponding legal procedures taking into considerations all factors including the type of the underlying fundamental rights, intensity

憲法上正當法律程序原則之內涵，除要求人民權利受侵害或限制時，應有使其獲得救濟之機會與制度，亦要求立法者依據所涉基本權之種類、限制之強度及範圍、所欲追求之公共利益、決定機關之功能合適性、有無替代程序或各項可能程序成本等因素綜合考量，制定相應之法定程序。按個人之身體、行動、私密領域或個人資料自主遭受侵

and scope of the restrictions, the public interests pursued, proper functions of the decision-making institutions, availability of alternative procedures or possible costs under respective procedures etc. It is self-evident that when an individual's autonomy of body, movement, private spheres or personal information are invaded, according to the circumstances, that individual may request court remedies to remove the infringement or obtain compensation (*see* Articles 18 and 195 Civil Law, and Article 28 Computer Processing of Personal Data Protection Act) under relevant provisions on protection of personality rights and on tortious acts against an individual's body, health or privacy under laws such as the Civil Code or the Computer Processing of Personal Data Protection Act (amended and promulgated as the Personal Data Protection Act, May 26, 2010, not yet enforced). Legislators promulgated the Provision at issue to protect people's autonomy of his body, movements, private spheres or personal information so as to permit the stalkee to request police authorities for timely intervention to halt or

擾，依其情形或得依據民法、電腦處理個人資料保護法（九十九年五月二十六日修正公布為個人資料保護法，尚未施行）等有關人格權保護及侵害身體、健康或隱私之侵權行為規定，向法院請求排除侵害或損害賠償之救濟（民法第十八條、第一百九十五條、電腦處理個人資料保護法第二十八條規定參照），自不待言。立法者復制定系爭規定以保護個人之身體、行動、私密領域或個人資料自主，其功能在使被跟追人得請求警察機關及時介入，制止或排除因跟追行為對個人所生之危害或侵擾，並由警察機關採取必要措施（例如身分查證及資料蒐集、記錄事實等解決紛爭所必要之調查）。依系爭規定，警察機關就無正當理由之跟追行為，經勸阻而不聽者得予以裁罰，立法者雖未採取直接由法官裁罰之方式，然受裁罰處分者如有不服，尚得依社會秩序維護法第五十五條規定，於五日內經原處分之警察機關向該管法院簡易庭聲明異議以為救濟，就此而言，系爭規定尚難謂與正當法律程序原則有違。惟就新聞採訪者之跟追行為而論，是否符合上述處罰條件，除前述跟追方式已有侵擾被跟追人之身體安全、行動自由之虞之情形外，就其跟

timely intervention to halt or exclude the hazards or intrusion caused by the stalking, and the police authorities may thus take necessary measures (e.g. necessary investigations for resolving disputes such as identity verification, data collection, and recording facts). In accordance with the Provision at issue, police authorities may sanction the unjustifiable stalking of a stalker disregarding dissuasion. While legislators did not take the approach of direct penalty by a judge, the sanctioned stalker may, if he disagrees with the ruling, still file an objection to the sanction via the police authorities which originally made the sanction within five days after the original disposition to the proper court's division of summary judgment in accordance with Article 55 of the Social Order Maintenance Act. For that matter, the Provision at issue is difficult to be said as violating the principle of due process of law. However, as to whether the stalking behavior of journalists falls within the above-mentioned criteria for sanctions, in addition to the aforementioned circumstances where the stalking

追僅涉侵擾私密領域或個人資料自主之情形，應須就是否侵害被跟追人於公共場域中得合理期待不受侵擾之私人活動領域、跟追行為是否逾越依社會通念所認不能容忍之界限、所採訪之事件是否具一定之公益性等法律問題判斷，並應權衡新聞採訪自由與個人不受侵擾自由之具體內涵，始能決定。鑑於其所涉判斷與權衡之複雜性，並斟酌法院與警察機關職掌、專業、功能等之不同，為使國家機關發揮最有效之功能，並確保新聞採訪之自由及維護個人之私密領域及個人資料自主，是否宜由法院直接作裁罰之決定，相關機關應予檢討修法，或另定專法以為周全規定，併此敘明。

has infringed the bodily safety and freedom of movement of the stalkee, when the stalking only involves intruding into the private spheres or autonomy to control personal information, it shall not be determined until taking into account the following legal issues including whether the stalkee may reasonably expect to have an arena of private activity without intrusion in public places, whether the stalking exceeds intolerable boundaries generally recognized by society, whether the event interviewed for newsgathering involves a certain degree of public interests, …etc., and the connotations of freedom of journalism in newsgathering shall be weighed against personal freedom from intrusion. Given the complexity of the judgment and balancing of connotations, and considering the difference in the responsibilities, professional fields and functions of courts and police authorities, to develop the most effective functions of state organs, and to ensure the freedom of news gathering and to maintain the private spheres of individuals and autonomy of personal data, it should be clearly stated whether

penalties should be directly rendered by the court, the relevant authorities should review and amend the law, or alternatively, promulgate special law to provide comprehensive and thorough rules.

Justice Yeong-Chin Su filed concurring opinion.

Justice Sea-Yau Lin filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Tzu-Yi Lin filed concurring opinion in part and dissenting opinion in part, in which Justice Pi-Hu Hsu joined.

Justice Tzong-Li Hsu filed concurring opinion in part and dissenting opinion in part.

Justice Yu-hsiu Hsu filed concurring opinion in part and dissenting opinion in part.

本號解釋蘇大法官永欽提出協同意見書；林大法官錫堯提出協同意見書；黃大法官茂榮提出協同意見書；葉大法官百修提出協同意見書；陳大法官春生提出協同意見書；陳大法官新民提出協同意見書；林大法官子儀、徐大法官璧湖共同提出部分協同、部分不同意見書；許大法官宗力提出部分協同、部分不同意見書；許大法官玉秀提出一部協同、一部不同意見書；李大法官震山提出部分不同意見書。

Justice Chen-Shan Li filed dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: The petitioner is a journalist of X, mainly reporting entertainment and art performance news; during two periods in July 2008 he followed and photographed the Vice President of X Business Group, A, and his newly-married wife, previously a performing artist. They entrusted a lawyer with sending two certified mails by post for the purpose of dissuading such actions, however when the applicant again followed the couple on 7 September an entire day, they informed the police on the same day in the afternoon. Following an investigation of the Taipei City Government Police Office, Zhongshan Branch, a fine of NTD 1,500 was imposed based on the reason that the applicant had violated Article 89 Paragraph 2 of the Social Order Maintenance Act. The applicant was not satisfied and declared objection in accordance with Article 55 of the stated law. Following dismissal without cause by the Taiwan

編者註：

事實摘要：緣聲請人為X報社記者，主跑娛樂演藝新聞；分別於中華民國97年7月間二度跟追X電腦集團副總A及其曾為演藝人員之新婚夫人，並對彼等拍照，經A委託律師二度郵寄存證信函以為勸阻，惟聲請人復於同年9月7日整日跟追A夫婦，A遂於當日下午報警檢舉；案經臺北市政府警察局中山分局調查，以聲請人違反社會秩序維護法第八十九條第二款規定為由，裁處罰鍰新臺幣1,500元。聲請人不服，依同法第55條規定聲明異議，嗣經臺灣臺北地方法院97年度北秩聲字第16號裁定無理由駁回，全案確定。

聲請人認上開裁定所適用之系爭規定，有牴觸憲法第11條新聞自由、第15條工作權、第23條法律明確性、比例原則及正當法律程序等之疑義，爰提本件聲請。

Taipei District Court in its Decision No. 16 of the year 2008, the entire case was confirmed. The applicant finds that all disputed regulations applied in the above mentioned ruling contradict the Constitution's Article 11 freedom of press, Article 15 right to work, Article 23 clarity of law, raise concerns with regard to the principle of proportionality and legal due process, and has therefore filed this application.

J. Y. Interpretation No.690（September 30, 2011）*

ISSUE: Is the "necessary dispositions" provision of Article 37, Paragraph 1 of the Communicable Disease Control Act, including compulsory quarantine, unconstitutional ?

RELEVANT LAWS:

Articles 8 & 23 of the Constitution（憲法第八條、第二十三條）; J.Y. Interpretations No. 392, 432,521, 588, 594, 602, 636, 639, 664, and 677（司法院釋字第三九二號、第四三二號、第五二一號、第五八八號、第五九四號、第六０二號、第六三六號、第六三九號、第六六四號、第六七七號解釋）; Article 4 & Article 37, Paragraph 1 of the Communicable Disease Control Act (revised January 30, 2002)（傳染病防治法第四條、第三十七條第一項（中華民國九十一年一月三十日修正公布））; Article 5 of the Provisional Regulation Governing Prevention and Relief of SARS (promulgated May 2, 2003 retroactively effective March 1, 2003, and repealed December 31, 2004)（嚴重急性呼吸道症候群防治及紓困暫行條例第五條（九十二年五月二日制定公布溯自同年三月一日施行，九十三年十二月三十一日廢止））; Department of Health Regulation No. 0921700022, " serving as the legal basis for government measures adopted to control Severe Acute Respiratory Syndrome" (for parts related to concentrated quarantine),

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* Translated by Huai-Ching R. Tsai.

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

promulgated by the Executive Yuan, Department of Health, on May 8, 2003（行政院衛生署九十二年五月八日衛署法字第０九二一七０００二二號公告「政府所為嚴重急性呼吸道症候群防疫措施之法源依據」（集中隔離部分））

KEYWORDS:

contagious diseases（傳染病）, necessary dispositions（必要處置）, compulsory quarantine（強制隔離）, concentrated quarantine（集中隔離）, principle of legal clarity（法律明確性原則）, principle of proportionality（比例原則）, personal freedom（人身自由）, restriction of personal freedom（人身自由之限制）, deprivation of personal freedom（人身自由之剝奪）, due process of law（正當法律程序）, reasonable maximum time（合理最長期限）, apply for court remedy in time（及時請求法院救濟）, reasonable compensation（合理補償）.

HOLDING: Article 37, Paragraph 1 of the Communicable Disease Control Act, revised January 30, 2002, provides: "Any person who had physical contacts with patients of contagious diseases, or suspected of being infected, shall be detained and checked by the competent authority, and if necessary, shall be ordered to move into designated places for further examinations, or to take other

解釋文：中華民國九十一年一月三十日修正公布之傳染病防治法第三十七條第一項規定：「曾與傳染病病人接觸或疑似被傳染者，得由該管主管機關予以留驗；必要時，得令遷入指定之處所檢查，或施行預防接種等必要之處置。」關於必要之處置應包含強制隔離在內之部分，對人身自由之限制，尚不違反法律明確性原則，亦未牴觸憲法第二十三條之比例原則，與憲法第八條

necessary dispositions, including immunization, etc." As far as the provision of necessary dispositions is read to include compulsory quarantine, hence deprivation of personal freedom, said provision neither violates the principle of legal clarity, nor the principle of proportionality implicit in Article 23 of the Constitution. It also does not violate the due process requirement of Article 8 of the Constitution.

依正當法律程序之意旨尚無違背。

Any person who had physical contacts with patients of contagious diseases, or suspected of being infected, while compulsorily quarantined, is deprived of his or her personal freedom. In order to keep the length of quarantine period reasonable and not excessive, the law should prescribe a reasonable maximum time for compulsory quarantine, as well as organizational, procedural and other regulations for carrying out said compulsory quarantine. Moreover, prompt remedies and an adequate compensation system should be established for persons and their families disputing the compulsory quarantine. The authorities concerned should promptly review the Communicable Disease Control

曾與傳染病病人接觸或疑似被傳染者，於受強制隔離處置時，人身自由即遭受剝奪，為使其受隔離之期間能合理而不過長，仍宜明確規範強制隔離應有合理之最長期限，及決定施行強制隔離處置相關之組織、程序等辦法以資依循，並建立受隔離者或其親屬不服得及時請求法院救濟，暨對前述受強制隔離者予以合理補償之機制，相關機關宜儘速通盤檢討傳染病防治法制。

Act.

REASONING: Article 8 of the Constitution stipulates that personal freedom shall be safeguarded. However, if the government in accordance with the principle of legal clarity restricts personal freedom, does not violate the principle of proportionality implicit in Article 23 of the Constitution, and follows requisite judicial procedures or other due process of law, then it cannot be said that Article 8 of the Constitution is violated (*see* J. Y. Interpretations No. 602 & No. 677). Where the restriction of personal freedom has reached a degree of deprivation, in light of the manner of actual deprivation, purpose and resulting effects, adequate standards shall be defined for review (*see* J.Y. Interpretations No. 392, No. 588, No. 636 and No. 664).

解釋理由書：人民身體之自由應予保障，為憲法第八條所明定。惟國家以法律明確規定限制人民之身體自由者，倘與憲法第二十三條之比例原則無違，並踐行必要之司法程序或其他正當法律程序，即難謂其牴觸憲法第八條之規定（本院釋字第六０二號及第六七七號解釋參照）。而於人身自由之限制達到剝奪之情形，則應按其實際剝奪之方式、目的與造成之影響，在審查上定相當之標準（本院釋字第三九二號、第五八八號、第六三六號及第六六四號解釋參照）。

Because the occurrence and spread of contagious diseases endanger the life and health of people, the government should take appropriate preventive measures to counter it. To prevent the infection and spread of contagious diseases, Article

鑒於各種傳染病之發生、傳染及蔓延，危害人民生命與身體之健康，政府自應採行適當之防治措施以為因應。為杜絕傳染病之傳染及蔓延，九十一年一月三十日修正公布之傳染病防治法（下稱舊傳染病防治法）第三十七條第

37, Paragraph 1 of the Communicable Disease Control Act, revised January 30, 2001 (hereinafter "former Communicable Disease Control Act), provides: "Any person who had contacts with patients of contagious diseases, or suspected of being infected, shall be detained for examination by the competent authority, and if necessary, shall be ordered to move into designated places for inspection, or to receive immunization or other necessary dispositions (hereinafter "the provision at issue"). The term "necessary dispositions" refers to various statutes regulating the implementation of necessary measures to prevent the infection and spread of contagious diseases and is not limited to the examples of detention for examination, order to move into designated places for inspection, and immunization mentioned in the provision at issue. Article 5, Paragraph 1 of the Provisional Regulations Governing Prevention and Relief of SARS, promulgated on May 2, 2003, retroactively effective March 1, 2003 (repealed December 31, 2004), provides: "When implementing promptly effective epidemic prevention measures, govern-

一項規定：「曾與傳染病病人接觸或疑似被傳染者，得由該管主管機關予以留驗；必要時，得令遷入指定之處所檢查，或施行預防接種等必要之處置。」（下稱系爭規定）。所謂必要之處置，係指為控制各種不同法定、指定傳染病之傳染及蔓延所施行之必要防疫處置，而不以系爭規定所例示之留驗、令遷入指定之處所檢查及施行預防接種為限。九十二年五月二日制定公布溯自同年三月一日施行之嚴重急性呼吸道症候群防治及紓困暫行條例（已於九十三年十二月三十一日廢止）第五條第一項明定：「各級政府機關為防疫工作之迅速有效執行，得指定特定防疫區域實施管制；必要時，並得強制隔離、撤離居民或實施各項防疫措施。」可認立法者有意以此措施性法律溯及補強舊傳染病防治法，明認強制隔離屬系爭規定之必要處置。又行政院衛生署九十二年五月八日衛署法字第０九二一七０００二二號公告之「政府所為嚴重急性呼吸道症候群防疫措施之法源依據」，亦明示系爭規定所謂必要處置之防疫措施，包括集中隔離。而強制隔離使人民在一定期間內負有停留於一定處所，不與外人接觸之義務，否則應受一定之制裁，已屬人身自由之剝奪。

ment authorities at all levels shall designate specified areas for epidemic prevention or disease control; and if necessary, may compel quarantines, relocation of residents, or any other disease control measures." It can be said that the legislators intended to retroactively strengthen the Communicable Disease Control Act by this legislative measure, expressly recognizing that compulsory quarantine is a necessary disposition in the sense of the provision at issue. Furthermore, Regulation No. 0921700022, promulgated by the Department of Public Health, Executive Yuan, on May 8, 2003, "serving as the legal basis for government measures adopted to control Severe Acute Respiratory Syndrome (SARS)," clearly shows that the so called necessary dispositions for disease control measures mentioned in the provision at issue includes concentrated quarantine. Compulsory quarantine obliges people to stay at a specified place for a specified period, not to contact other persons, or else suffer mandatory punishment. This is a deprivation of personal freedom.

Since the requirement of legal certainty not only refers to a detailed legal style, but also means that legislators when drafting legislation may balance the complex nature of real life with the need of application to each case, uncertain legal concepts become appropriate provisions. If the meaning of a statute is not too difficult to ascertain from legislative intent and the entire context of the legal system, and whether the facts of case fall within the statute's normative objective or not is foreseeable by people subject to the regulation, as well as determinable by the judiciary, then the principle of legal clarity is not violated (*see* also J.Y. Interpretations No. 432, No. 521, No. 594 and No. 602). According to Article 8 of the Constitution, the government's right to restrict personal freedom, if it involves severe restriction of personal freedom tantamount to criminal punishment, shall be subject to strict scrutiny to determine whether its statutory elements conform to the principle of legal clarity (*see* J.Y. Interpretation No. 636). Although compulsory quarantine restricts personal freedom to a specified location, yet its purpose is to protect people's life,

法律明確性之要求，非僅指法律文義具體詳盡之體例而言，立法者於立法定制時，仍得衡酌法律所規範生活事實之複雜性及適用於個案之妥當性，從立法上適當運用不確定法律概念而為相應之規定。如法律規定之意義，自立法目的與法體系整體關聯性觀點非難以理解，且個案事實是否屬於法律所欲規範之對象，為一般受規範者所得預見，並可經由司法審查加以認定及判斷者，即無違反法律明確性原則（本院釋字第四三二號、第五二一號、第五九四號及第六０二號解釋參照）。又依憲法第八條之規定，國家公權力對人民身體自由之限制，若涉及嚴重拘束人民身體自由而與刑罰無異之法律規定，其法定要件是否符合法律明確性原則，固應受較為嚴格之審查（本院釋字第六三六號解釋參照），惟強制隔離雖拘束人身自由於一定處所，因其乃以保護人民生命安全與身體健康為目的，與刑事處罰之本質不同，且事涉醫療及公共衛生專業，其明確性之審查自得採一般之標準，毋須如刑事處罰拘束人民身體自由之採嚴格審查標準。又系爭規定雖未將強制隔離予以明文例示，惟系爭規定已有令遷入指定處所之明文，則將曾與傳染病病人接觸或疑似被傳染者令遷入一定處所，

safety and health. It differs from criminal punishment in nature. It also involves medical treatment and public health professions. Therefore, a general rationality test shall be adopted for judicial review in lieu of a strict scrutiny test used for reviewing criminal sanctions restraining personal freedom. Although the provision at issue does not explicitly mention compulsory quarantine in its illustrations, it does provide for ordering people to move into designated places, so that persons who have had contacts with patients of contagious disease, or suspected of being infected, cannot keep in touch with the outside world. This kind of compulsory quarantine is a necessary disposition for the provision at issue. Judging from literal interpretation and legislative intent of the statute, it is not unforeseeable by people subject to the regulation. Its meaning can also be determined by common sense in society, and must furthermore obtain affirmation by way of judicial review. Hence it does not violate the principle of legal clarity.

使其不能與外界接觸之強制隔離，係屬系爭規定之必要處置，自法條文義及立法目的，並非受法律規範之人民所不能預見，亦可憑社會通念加以判斷，並得經司法審查予以確認，與法律明確性原則尚無違背。

The purpose of compulsory quarantine contained in the controversial necessary dispositions provision is to authorize the competent authority to detain persons who had contacts with patients of contagious diseases or suspected of being infected in designated places, to isolate them from the outside world, to undertake further investigations, medical treatments or other measures, so as to prevent the spread of contagious diseases and to safeguard the life and health of citizens. This legislative purpose is legitimate. Although compulsory quarantine deprives the personal freedom of a quarantined person, whether or not this violates the principle of proportionality should still be subject to a strict scrutiny test. The purpose of compulsory quarantine prescribed by the provision at issue is not directly aimed at restraining the personal freedom of quarantined persons, but rather to deal with the abrupt outbreak of a new type of contagious disease, various statutes regulating the quick spread of contagious diseases inflicting (or will inflict) multiple deaths or serious injuries nationwide (e.g. the Severe Acute Respiratory Syndrome

系爭規定必要處置所包含之強制隔離，旨在使主管機關得將曾與傳染病病人接觸或疑似被傳染者留置於指定之處所，使與外界隔離，並進而為必要之檢查、治療等處置，以阻絕傳染病之傳染蔓延，維護國民生命與身體健康，其立法目的洵屬正當。雖強制隔離將使受隔離者人身自由遭受剝奪，其是否違反比例原則，仍應採嚴格標準予以審查。惟系爭規定之強制隔離，其目的並非直接出於拘束上開受隔離者之人身自由，而面對新型傳染病之突然爆發，或各種法定、指定傳染病之快速蔓延，已（或將）造成全國各地多人受感染死亡或重大傷害之嚴重疫情（例如九十二年三月間爆發之嚴重急性呼吸道症候群，Severe Acute Respiratory Syndrome， 以下簡稱 SARS），為阻絕疫情之蔓延，使疫情迅速獲得控制，降低社會之恐懼不安等重大公共利益，將曾與傳染病病人接觸或疑似被傳染者令遷入指定之處所施行適當期間之必要強制隔離處置，進而予以觀察、檢查、預防接種及治療，除可維護受隔離者個人之生命與身體健康外，且因無其他侵害較小之方法，自屬必要且有效控制疫情之手段。又雖系爭規定並未就強制隔離之期間詳為規定，惟必要處置期間之長

outbreak in March 2003, hereinafter SARS), to prevent the spread of disease, to obtain quick control of the epidemic situation, for important public interests to mitigate fear, anxiety etc. in society, ordering persons who had contacts with patients of contagious disease, or suspected of being infected, to move into designated places for a reasonable period of mandatory quarantine, for further observation, examination, immunization, and medical treatment. Apart from protecting the quarantined person's life and health and because there is no other less restrictive alternative, it is a necessary and effective method for disease control. Although the provision at issue did not prescribe in detail the length of period for compulsory quarantine, the length for necessary disposition is related to pathogeny, pathway, incubation period, and seriousness of the contagious disease. Hence it should be determined by the competent authority, weighing the surrounding circumstances and opinions of World Health Organization (WHO), in accordance with the principle of proportionality (taking the abovementioned SARS as an example,

短，事涉傳染病之病源、傳染途徑、潛伏期及其傷害之嚴重性，自應由該管主管機關衡酌各種情況，並參酌世界衛生組織（World Health Organization，WHO）之意見而為符合比例原則之決定（以前述 SARS 疫情為例，該管主管機關臺北市政府於衡量當時世界各國對該疫情尚無處理之經驗、醫界處理之方法亦無定論，及該疫情已造成國內外民眾嚴重之傷亡等情況，暨參酌世界衛生組織之意見，因而決定受隔離處分者之隔離期間為十四日，見臺北市政府衛生局一００年一月十八日北市衛疾字第０九九四五六八六四００號函）。且自人身自由所受侵害角度觀之，系爭規定必要處置所包含之強制隔離，雖使受隔離者人身自由受剝奪，但除可維護其生命與身體健康外，並無如拘禁處分對受拘禁者人格權之重大影響。綜上，強制隔離乃為保護重大公益所採之合理必要手段，對受隔離者尚未造成過度之負擔，並未牴觸憲法第二十三條之比例原則。

Taipei City Government, the competent authority, had determined that the quarantine period shall be 14 days, weighing factors such as lack of international experience, no conclusive medical method in handling this new disease, the fact that the epidemic has already caused many serious injuries and deaths etc. domestically and abroad, as well as WHO's opinions; see Public Health Disease Regulation Letter No. 09945686400, published January 18, 2011 by the Public Health Bureau, Taipei City Government). Moreover, from the viewpoint of personal freedom violation, although compulsory quarantine contained in the necessary disposition provision at issue deprives the personal freedom of quarantined persons, yet apart from protecting their life and health, it does not have the same severe impact on human dignity of quarantined persons as the sanction of detention. In sum, compulsory quarantine is a reasonable and necessary method for protecting important public interests. It does not constitute an excessive burden for quarantined persons and does not violate the principle of proportionality implicit in Article 23 of the

Constitution.

Personal freedom is an important fundamental human right. It shall receive adequate protection. Any deprivation or limitation of personal freedom shall abide by due process of law. In determining whether respective procedural standards are adequate and reasonable, besides considering specific provisions in the Constitution and types of fundamental rights involved, also the facts of a specific case, the extent and scope of the fundamental rights invaded, public interests pursued, possible alternative procedures, related costs and other factors must be comprehensively evaluated (*see* J.Y. Interpretation No. 639). As indicated above, the purpose of compulsory quarantine is to protect people's life and health, unlike the nature of criminal punishment. Therefore, the due process of law that must be followed is not necessarily the same as in a criminal proceeding restricting the personal freedom of a defendant. Compulsory quarantine and other disease control decisions must be made by the specialized competent authority, based on

人身自由為重要之基本人權，應受充分之保護，對人身自由之剝奪或限制尤應遵循正當法律程序之意旨，惟相關程序規範是否正當、合理，除考量憲法有無特別規定及所涉基本權之種類外，尚須視案件涉及之事物領域、侵害基本權之強度與範圍、所欲追求之公共利益、有無替代程序及各項可能程序之成本等因素，綜合判斷而為認定（本院釋字第六三九號解釋參照）。強制隔離既以保障人民生命與身體健康為目的，而與刑事處罰之本質不同，已如前述，故其所須踐行之正當法律程序，自毋須與刑事處罰之限制被告人身自由所須踐行之程序相類。強制隔離與其他防疫之決定，應由專業主管機關基於醫療與公共衛生之知識，通過嚴謹之組織程序，衡酌傳染病疫情之嚴重性及其他各種情況，作成客觀之決定，以確保其正確性，與必須由中立、公正第三者之法院就是否拘禁加以審問作成決定之情形有別。且疫情之防治貴在迅速採行正確之措施，方得以克竟其功。傳染病防治之中央主管機關須訂定傳染病防治政策及計畫，包括預防接種、傳染病預防、疫情監視、通報、調查、檢驗、處理及訓

knowledge of medical treatment and public health, follow stringent organizational procedures, balance seriousness of epidemic and surrounding circumstances, in order to form an objective decision and to ensure correctness. It differs from the case where an independent, impartial court determines whether or not to detain a person for trial and interrogation. The key to epidemic control lies in the swift adoption of adequate measures to achieve the goal. The central competent authority in charge of controlling contagious diseases shall lay down policies and plans for disease control, including immunization, disease prevention, monitoring, reporting, and investigation of epidemic situations, inspections, treatments, training and other measures. The local competent authority shall develop implementation plans based on the policies and plans of the central competent authority, taking into account the particular requirements for epidemic prevention in its locality, and carry out the plan (*see* former Communicable Disease Control Act, Article 4, Paragraph 1, Subparagraph 1, Item 1; Subparagraph 2, Item 1). Therefore, relevant measures for

練等措施；地方主管機關須依據中央主管機關訂定之傳染病防治政策、計畫及轄區特殊防疫需要，擬訂執行計畫，並付諸實施（舊傳染病防治法第四條第一項第一款第一目、第二款第一目規定參照）。是對傳染病相關防治措施，自以主管機關較為專業，由專業之主管機關衡酌傳染病疫情之嚴重性及其他各種情況，決定施行必要之強制隔離處置，自較由法院決定能收迅速防治之功。另就法制面而言，該管主管機關作成前述處分時，亦應依行政程序法及其他法律所規定之相關程序而為之。受令遷入指定之處所強制隔離者如不服該管主管機關之處分，仍得依行政爭訟程序訴求救濟。是系爭規定之強制隔離處置雖非由法院決定，與憲法第八條正當法律程序保障人民身體自由之意旨尚無違背。

controlling contagious diseases shall resort to the expertise of the competent authority. A decision made by the competent authority to impose necessary dispositions for compulsory quarantine, balancing seriousness of epidemic and surrounding circumstances, will be better than a decision made by the court for prompt disease control. As for the legality aspect, the competent authority, when making the abovementioned disposition, shall follow the Administrative Procedure Act and relevant procedures prescribed by other laws. Persons ordered to move into designated places for compulsory quarantine, if they refuse to accept the disposition of the competent authority, may still resort to administrative procedures for remedy. Therefore, compulsory quarantine for the provision at issue, although not ordered by courts, does not violate Article 8 of the Constitution guaranteeing due process to protect personal freedom.

The provision at issue did not prescribe the period of compulsory quarantine, nor did it leave the decision with the courts to impose compulsory quarantine.

系爭規定未就強制隔離之期間予以規範，及非由法院決定施行強制隔離處置，固不影響其合憲性，惟曾與傳染病病人接觸或疑似被傳染者，於受強

Although these do not affect its constitutionality, yet a person having contacts with patients of contagious disease, or suspected of being infected, while in compulsory quarantine, is deprived of his or her personal freedom. In order to keep his or her quarantine time within a reasonable length, it is better to stipulate in statute the maximum length of compulsory quarantine, the organs and procedures for implementing compulsory quarantine, the court remedies for quarantined persons or their families who refuse compulsory quarantine, and the mechanism for compensating the quarantined persons. The relevant organs shall thoroughly review the Contagious Disease Control Act for revision.

制隔離處置時，人身自由即遭受剝奪，為使其受隔離之期間能合理而不過長，仍宜明確規範強制隔離應有合理之最長期限，及決定施行強制隔離處置相關之組織、程序等辦法以資依循，並建立受隔離者或其親屬不服得及時請求法院救濟，暨對前述受強制隔離者予以合理補償之機制，相關機關宜儘速通盤檢討傳染病防治法制。

As for the allegations that Article 11, Article 24, Paragraph 1, Subparagraph 2, and Article 34, Paragraph 1 of the previous Contagious Disease Control Act violated Article 8 and Article 23 of the Constitution, petitioner merely disputed by subjective opinion the appropriateness of the court in applying the law to the fact, and did not allege concretely how

至聲請人認舊傳染病防治法第十一條、第二十四條第一項第二款、第三十四條第一項，違反憲法第八條、第二十三條規定，聲請解釋憲法部分，均係以個人主觀見解爭執法院認事用法之當否，並未具體指摘該等規定於客觀上究有何牴觸憲法之處，核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理，

the provision at issue contradicts the Constitution in an objective sense. Because these allegations do not conform to Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act, they shall be dismissed according Subparagraph 3 of the same article. It is hereby explained.

併此指明。

Justice Yeong-Chin Su filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Chen-Shan Li filed dissenting opinion in part, in which Justice Tzu-Yi Lin joined.

Justice Tzong-Li Hsu filed dissenting opinion in part.

Justice Yu-hsiu Hsu filed dissenting opinion.

本號解釋蘇大法官永欽提出協同意見書;黃大法官茂榮提出協同意見書;陳大法官春生提出協同意見書；陳大法官新民提出協同意見書；李大法官震山、林大法官子儀共同提出部分不同意見書；許大法官宗力提出部分不同意見書；許大法官玉秀提出不同意見書。

EDITOR'S NOTE:

Summary of facts: The petit-ioner was a medical doctor and the director of

編者註：

事實摘要：聲請人原為臺北市政府所屬市立和平醫院（下稱和平醫院）

Gastroenterology Department in Taipei Municipal Ho-Ping Hospital (hereinafter "Ho-Ping Hospital"). In April 2003, Ho-Ping Hospital experienced an outbreak of SARS group infections. Based on the provision at issue authorizing the government agency in charge of executing law to make "necessary dispositions" to "persons having contacts with patients of contagious disease, or suspected of being infected," Taipei Municipal Government promulgated "Emergency Measures of Taipei Municipal Government to Handle SARS" on April 24, ordered all Ho-Ping Hospital's employees to go back to the hospital for concentrated quarantine. Petitioner did not go back to the hospital before the deadline, and delayed until May 1 afternoon to report to the hospital. He was punished by 2 major demerits with immediate suspension of his hospital duty. Later, he was fined N.T. $240,000, and suspended from the practice of medicine for 3 months.

醫師兼消化系外科主任。92 年 4 月間，和平醫院發生院內集體感染 SARS 事件，臺北市政府依據系爭規定所定，對於「曾與傳染病病人接觸或疑似被傳染者」，主管機關必要時得為「必要之處置」，於 4 月 24 日公布「臺北市政府 SARS 緊急應變處理措施」，召回和平醫院員工返院集中隔離。聲請人當時未依限返院，遲至同年 5 月 1 日下午始返，嗣後因而被記 2 大過並先行停職，同時被處以新台幣 24 萬元罰鍰，另又受停業 3 個月之懲戒處分。

Petitioner refused to accept the punishment and instituted administrative proceedings. The cases were dismissed by

聲請人不服，提起行政爭訟，為最高行政法院 95 年度判字第 01651 號判決 (懲獎部分)、96 年度判字第

the Supreme Administrative Court Judgment No. 01651, 2006 (for demerits), Judgment No. 00043, 2007 (for fines), and Judgment No. 02054, 2006 (for suspension of practice). He also applied for National Damage Compensation, and the case was dismissed by Taiwan High Court in Re-Appeals for National Damage Compensation, Civil Judgment No.9, 2006. He contended that the hospital's ordering its employees back to the hospital for concentrated quarantine is a deprivation of his personal freedom guaranteed by the Constitution, and that the relevant provisions of law violated the principle of legal clarity, principle of proportionality, and due process of law. Therefore, he petitioned for a constitutional interpretation.

00043 號判決 (罰鍰部分)、95 年度判字第 02054 號判決 (停業部分) 予以駁回；又另請求國家賠償，亦為臺灣高等法院作成 95 年度重上國字第 9 號民事判決駁回，爰認命令醫院員工返院集中隔離，剝奪其人身自由，相關規定違反法律明確性、比例原則及正當法律程序，聲請釋憲。

J. Y. Interpretation No.691（October 21, 2011）*

ISSUE: Which court shall have the jurisdiction to adjudicate the inmate's petition against the denial of parole rendered by the administrative authority ?

RELEVANT LAWS:

Articles 16 of the Constitution（憲法第十六條）；Article 77, Paragraph 1 of the Criminal Code（刑法第七十七條第一項）Article 6, Paragraphs 1 and 3, and Article 81, Paragraph 1 of the Prison Act（監獄行刑法第六條第一項及第三項、第八十一條第一項）；Articles 75 and 76 of the Statute of Progressive Execution of Penalty（行刑累進處遇條例第七十五條、第七十六條）；Article 484 of the Criminal Procedure Law（刑事訴訟法第四百八十四條）；Article 2 of the Administrative Procedure Law（行政訴訟法第二條）.

KEYWORDS:

parole （假釋）, denial of parole（撤銷假釋）, the Administrative Court（行政法院）.**

HOLDING: The judicial relief for an inmate who files[d] a petition against the denial of parole rendered by the administrative authority, shall

解釋文：受刑人不服行政機關不予假釋之決定者，其救濟有待立法為通盤考量決定之。在相關法律修正前，由行政法院審理。

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* Translated by Li-Chih Lin, Esq., J.D.

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

be provided by the legislation after full consideration of all circumstances by the legislature. Thus, before the legislation is amended to provide judicial relief, the Administrative Court shall have the jurisdiction to adjudicate an inmate's petition against the denial of parole rendered by the administrative authority.

REASONING: Article 77, Paragraph 1 of the Criminal Code provides: If there is evidence of repentance during the execution of imprisonment, a parole may be granted upon application by the prison authority to the Ministry of Justice after twenty-five years of a sentence to life imprisonment or after one half of a sentence to imprisonment or after twothirds of the imprisonment of a recidivist has been served. Article 81, Paragraph 1 of the Prison Act provides: The cond-itional release of an inmate is to be dete-rmined in terms of his/her repentance, grade two or above in conformity with the conditions of parole, by a resolution of the parole board and after approval from the Ministry of Justice. Article 75 of the Statute of Progressive Execution

解釋理由書：刑法第七十七條第一項規定：「受徒刑之執行而有悛悔實據者，無期徒刑逾二十五年，有期徒刑逾二分之一、累犯逾三分之二，由監獄報請法務部，得許假釋出獄。」監獄行刑法第八十一條第一項規定：「對於受刑人累進處遇進至二級以上，悛悔向上，而與應許假釋情形相符合者，經假釋審查委員會決議，報請法務部核准後，假釋出獄。」行刑累進處遇條例第七十五條規定：「第一級受刑人合於法定假釋之規定者，應速報請假釋。」同條例第七十六條規定：「第二級受刑人已適於社會生活，而合於法定假釋之規定者，得報請假釋。」上開規定，乃係規範假釋之要件及核准程序，惟受刑人不服不予假釋之決定者，除得依監獄行刑法第六條第一項及第三項規定，經由典獄長申訴於監督機關、視察人員，或

of Penalty provides: The first class of inmates who are eligible for statutory parole shall promptly apply for parole. Article 76 of the Statute of Progressive Execution of Penalty provides: The second class of inmates who are fit for social life and are eligible for statutory parole, may apply for parole. The preceding regulations provide the parole eligibility requirements and procedures of approval. An inmate who objects to the denial of parole rendered by the administrative authority may file a petition against the decision to the prison supervisory authority or prison inspectors through the prison warden, or directly to the prison inspectors when they are inspecting the prison in accordance with provisions set forth in Article 6, Paragraphs 1 and 3 of the Prison Act. The Prison Act does not expressly provide other legal remedies for an inmate who wants to petition against the denial of parole rendered by the administrative authority.

於視察人員蒞監獄時逕向其提出外，監獄行刑法並無明文規定其他救濟途徑。

The Supreme Administrative Court T.T. No. 2391 held that the regular court shall have the jurisdiction to decide a peti-

最高行政法院九十九年度裁字第二三九一號裁定認為，聲請人不服行政機關不予假釋之決定，依據刑事訴訟法

tion filed by a petitioner against the denial of parole. This holding was based on the ground that the petitioner filed the petition to the Taiwan High Court (Kaohsiung Branch) in accordance with Article 484 of the Criminal Procedure Law and both the Supreme Court T.S.T. No. 605 and the Taiwan High Court (Kaohsiung Branch) have heard the petition and dismissed it for want of legal grounds. With reference to the petition against the revocation of parole also handled by the regular court, the Supreme Administrative Court thus determined that, before the legislation is amended to provide judicial relief, the proper court to decide the petition filed by the petitioner against the denial of parole shall be the regular court. On the other hand, the Supreme Court T.S.T. No. 605 held that because the parole was not granted by the prosecutor, and the denial of parole rendered by the administrative authority was not derived from an unlawful enforcement of law by the prosecutor, the petitioner had no right to petition to the regular court for judicial relief in accordance with relevant provisions set forth in the Prison Act. The Supreme

第四百八十四條規定向臺灣高等法院高雄分院聲明異議，並經該院及最高法院九十九年度台抗字第六０五號刑事裁定以無理由駁回，顯示職司刑事裁判之普通法院認為其就受刑人不予假釋之聲明異議具有審判權。參照同屬刑事裁判執行一環之假釋撤銷，其救濟程序係向刑事裁判之普通法院提出，則受刑人不服行政機關不予假釋之決定，於相關法律修正前，其救濟程序自仍應由刑事裁判之普通法院審判。而最高法院九十九年度台抗字第六０五號刑事裁定，則以受刑人不服行政機關不予假釋之決定，因假釋與否非由檢察官決定，不生檢察官執行之指揮是否違法或執行方法是否不當，而得向法院聲明異議之問題，於現行法下僅得依監獄行刑法相關規定提出申訴，於修法增列救濟途徑前，尚非該法院所得審究。是以，修法前受刑人不服行政機關不予假釋之決定，得向何法院訴請救濟，最高行政法院與最高法院所表示之見解發生歧異。

Court, therefore, held that before the legislation is amended to provide judicial relief, the proper court to decide the petition filed by the petitioner against the denial of parole is not the regular court. As a result, with regard to which court shall have the jurisdiction to adjudicate an inmate's petition against the denial of parole rendered by the administrative authority, the Supreme Administrative Court and the Supreme Court are in conflict.

Approval of parole terminates an inmate's term of imprisonment and ends the restrictions imposed on an inmate's personal liberty. The design of the current parole system allows the first or second class of inmates, who have shown repentance and who are eligible for statutory parole, to apply to the Prison Parole Commission for parole. After the Prison Parole Commission decides to grant the parole, the prison will submit the decision to the Department of Justice for approval in accordance with Article 77 of the Criminal Code and Article 81 of the Prison Act. Thus the approval of parole is made by the Department of Justice.

假釋與否，關係受刑人得否停止徒刑之執行，涉及人身自由之限制。現行假釋制度之設計，係以受刑人累進處遇進至二級以上，悛悔向上，而與假釋要件相符者，經監獄假釋審查委員會決議後，由監獄報請法務部予以假釋（刑法第七十七條、監獄行刑法第八十一條規定參照）。是作成假釋決定之機關為法務部，而是否予以假釋，係以法務部對受刑人於監獄內所為表現，是否符合刑法及行刑累進處遇條例等相關規定而為決定。受刑人如有不服，雖得依據監獄行刑法上開規定提起申訴，惟申訴在性質上屬行政機關自我審查糾正之途徑，與得向法院請求救濟並不相當，基於憲法第十六條保障人民訴訟權之意

Whether to grant [a]parole is determined by the applicant inmate's good behavior while in prison and the applicant inmate's compliance with relevant provisions of the Statute of Progressive Execution of Penalty. Should the prisoner not come up to the required standard, although he/she may appeal according to the stipulations of the Prison Act, yet the nature of the appeal is to instigate a review of the administrative authority's own procedure and is not equivalent to asking a court of law for redress. Pursuant to Article 16 of the Constitution to protect the people's right of action, the petition at issue cannot substitute for the right to obtain judicial redress (refer to J. Y. Interpretation No. 653). Thus an inmate who objects to the denial of parole rendered by the administrative authority may file a petition for judicial redress to a court. However, which court shall have the jurisdiction to hear the petition, and what type of procedure shall be adopted to resolve the issue, is to be decided by legislation after full consideration of the following matters by the legislature: the nature of the petition and relevance of the legal proceeding, im-

旨，自不得完全取代向法院請求救濟之訴訟制度（本院釋字第六五三號解釋參照）。從而受刑人不服行政機關不予假釋之決定，而請求司法救濟，自應由法院審理。然究應由何種法院審理、循何種程序解決，所須考慮因素甚多，諸如爭議案件之性質及與所涉訴訟程序之關聯、即時有效之權利保護、法院組織及人員之配置等，其相關程序及制度之設計，有待立法為通盤考量決定之。在相關法律修正前，鑑於行政機關不予假釋之決定具有行政行為之性質，依照行政訴訟法第二條以下有關規定，此類爭議由行政法院審理。

mediate and effective protection of the inmate's rights, the organization of the court and assignment of personnel, and the design of the relevant procedures and parole systems. Since a decision to grant parole is an administrative procedure in nature, the petition against denial of parole by the administrative authority shall be decided by the Administrative Court in accordance with Article 2 of the Administrative Procedure Law.

Justice Sea-Yau Lin filed concurring opinion.

Justice Ching-You Tsay filed concurring opinion, in which Justice Chi-Ming Chih joined.

Justice Mao-Zong Huang filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Chang-Fa Lo filed concurring opinion.

Justice Dennis Te-Chung Tang filed concurring opinion, in which Justice Chen-Shan Li joined.

Justice Pai-Hsiu Yeh filed concurring opinion.

本號解釋林大法官錫堯提出協同意見書；蔡大法官清遊、池大法官啟明共同提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官新民提出協同意見書;羅大法官昌發提出協同意見書;湯大法官德宗提出，李大法官震山加入之協同意見書；葉大法官百修提出部分協同意見書；李大法官震山提出部分協同部分不同意見書；黃大法官璽君提出不同意見書。

Justice Chen-Shan Li filed concurring opinion in part and dissenting opinion in part.

Justice Huang, Hsi-Chun filed dissenting opinion.

EDITOR'S NOTE:

Summary of facts: The petitioner was sentenced to 23 years of imprisonment for the crime of robbery. The petitioner served his sentence in the Taiwan (Kaohsiung) prison. During the term of imprisonment, the petitioner claimed he was eligible for statutory parole and applied for parole many times. The prison also submitted a parole application on behalf of the petitioner many times to the Prison Parole Commission. All of the parole applications were subsequently denied. Objecting to the denial of parole, the petitioner filed an administrative action and also filed a petition against the denial of parole to the regular court in accordance with Article 484 of the Criminal Procedure Law. In the case of the administrative action, the Supreme Administrative Court held that before the legislation is amended to provide judicial redress, the

編者註：

事實摘要：聲請人因強盜等罪，經判處徒刑 23 年餘，於臺灣高雄監獄執行中。其間聲請人多次以其已達法定假釋之條件，向該監獄申請假釋。該監獄亦數度將聲請人之假釋事項，提報該監獄假釋審查委員會審查，均未獲同意假釋。聲請人不服，乃 (1) 提起行政訴訟；(2) 依刑事訴訟法第 484 條規定向普通法院聲明異議。(1) 行政訴訟部分，最高行政法院 99 年度裁字第 2391 號裁定認為，目前並無不服假釋否准得請求訴訟救濟之規定，於立法完成前，應由普通法院審判，因而裁定移送臺灣高等法院高雄分院。(2) 聲明異議部分，最高法院 99 年度台抗字第 605 號裁定認為，假釋與否並非檢察官之決定，非普通法院所得審究，而予以裁定駁回。聲請人因此聲請統一解釋。

proper court to decide the petition filed by the petitioner against the denial of parole shall be the regular court. In the matter of the petition against the denial of parole, the Supreme Court T.S.T. No. 605 held that, because the parole was not decided by the prosecutor, and the denial of parole by the administrative authority was not derived from the unlawful enforcement of law by the prosecutor, the regular court had no jurisdiction to adjudicate the petitioner's petition against the denial of parole. The Supreme Court thus dismissed the petition. The petitioner therefore applied for uniform judicial interpretation.

J. Y. Interpretation No.692（November 4, 2011）*

ISSUE: Is Administrative Letter Tai-cai-shui-zi No. 841657896 issued on 15 November 1995 by the Ministry of Finance Administrative, reading: "If a taxpayer has children who are over twenty years old and are studying at schools in mainland China not recognized by Taiwan authorities, the taxpayer may not declare such dependants on his/her final consolidated tax return to claim tax exemption" unconstitutional ?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）；J. Y. Interpretation No. 620, No. 622, No. 640, No. 674（司法院釋字第六二0號、第六二二號、第六四0號、第六七四號解釋）；Item 2, Subparagraph 1, Paragraph 1, Article 17 of the Income Tax Act（所得稅法第十七條第一項第一款第二目）；Article 22 of the Act Governing Relations between the People of the Taiwan Area and the Mainland Area（臺灣地區與大陸地區人民關係條例第二十二條）；Subparagraph 2, Paragraph 1 and Paragraph 3, Article 5 of the Constitutional Interpretation Procedure Act.（司法院大法官審理案件法第五條第一項第二款及第三項）；The Ministry of Finance Administrative Letter Tai-cai-shui-zi No. 841657896 dated 15 November 1995（財政部八十四年十一月十五日台財稅第

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* Translated by Nigel N. T. Li and Jeffrey J. F. Li, both attorneys at Lee and Li, Attorneys-at-Law.
** Contents within frame, not part of the original text, are added for reference purposes only.

八四一六五七八九六號函釋）；The Ministry of Education Administrative Letter Tai-she-zi No. 27756 dated 30 May 1994（教育部八十三年五月三十日台社字第二七七五六號函）；The Ministry of Finance Administrative Letter Tai-cai-shui-zi No. 831602325, dated 27 July 1994（財政部八十三年七月二十七日台財稅第八三一六0二三二五號函釋）.

KEYWORDS:

In school（在校就學）, tax exemptions for supporting dependents（扶養親屬免稅額）, the principle of taxation by law（租稅法律主義）, the general principle of legal interpretation（一般法律解釋方法）, official degree（正式學籍）, the recognition of academic degrees from the mainland China area（大陸地區學校學歷認可）.**

HOLDING: The twice-amended Item 2, Subparagraph 1, Paragraph 1, Article 17 of the Income Tax Act, amended and promulgated on January 3, 2001 and June 25, 2003, reads: "If a taxpayer has children who are over twenty years old and are being supported by the taxpayer for being in school, the taxpayer may claim deduction when declaring individual consolidated income." However, Administrative Letter Tai-cai-shui-zi No. 841657896 ("Letter"), issued on 15

解釋文：中華民國九十年一月三日及九十二年六月二十五日修正公布之所得稅法第十七條第一項第一款第二目均規定，納稅義務人之子女滿二十歲以上，而因在校就學受納稅義務人扶養者，納稅義務人依該法規定計算個人綜合所得淨額時，得減除此項扶養親屬免稅額。惟迄今仍繼續援用之財政部八十四年十一月十五日台財稅第八四一六五七八九六號函釋：「現階段臺灣地區人民年滿二十歲，就讀學歷未經教育部認可之大陸地區學校，納稅義

November 1995 by the Ministry of Finance, still applicable to date, states: "If a taxpayer in Taiwan has children who are twenty years old and studying at the universities in mainland China that are not recognized by the Ministry of Education, the taxpayer may not claim the tax exemption for supporting dependents when filing a final consolidated income tax return." The Administrative letter, which limits the scope of the above Income Tax Act provisions and creates tax obligations not provided in the act, is in contravention of the principle of taxation by law under Article 19 of the Constitution. The Administrative letter shall no longer be applied as of the issuance date of this Interpretation.

務人於辦理綜合所得稅結算申報時，不得列報扶養親屬免稅額。」限縮上開所得稅法之適用，增加法律所無之租稅義務，違反憲法第十九條租稅法律主義，應自本解釋公布之日起不再援用。

REASONING: By Article 19 of the Constitution, all citizens have the duty to pay taxes in accordance with the law. It means that the State must impose the obligation to pay tax or provide preferential tax deduction or exemption treatment to its people based on laws or regulations having clear authorization of a given law, taking into consideration such conditions

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、租稅客體對租稅主體之歸屬、稅基、稅率、納稅方法及納稅期間等租稅構成要件，以法律明文規定。主管機關本於法定職權就相關法律所為之闡釋，自應秉持憲法原則及相關法律之立

as the subject, subject matter, tax base or tax rates. The related interpretations by the competent authority shall abide by the principles of the Constitution and the meanings and purposes of the relevant statutes, and comply with the general rules of legislative interpretation. Any interpretation that exceeds the scope of legal interpretation that creates tax obligations not provided under the statutes is forbidden by the principle of taxation by law under Article 19 of the Constitution (*see* J.Y. Interpretation Nos. 620, 622, 640 and 674).

法意旨，遵守一般法律解釋方法而為之；如逾越法律解釋之範圍，而增加法律所無之租稅義務，則非憲法第十九條規定之租稅法律主義所許（本院釋字第六二0號、第六二二號、第六四0號、第六七四號解釋參照）。

The twice-amended Item 2, Subparagraph 1, Paragraph 1, Article 17 of the Income Tax Act, as amended and promulgated on January 3, 2001 and June 25, 2003, reads: The net consolidated income of an individual shall be the gross consolidated income as computed in accordance with the preceding three Articles less the following exemption and deductions: 1. Exemption: Taxpayers may deduct a prescribed amount of exemption for themselves, their spouses, and dependents that meet any of the conditions below…

九十年一月三日及九十二年六月二十五日修正公布之所得稅法第十七條第一項第一款第二目均規定：「按前三條規定計得之個人綜合所得總額，減除下列免稅額及扣除額後之餘額，為個人之綜合所得淨額：一、免稅額：納稅義務人按規定減除其本人、配偶及合於下列規定扶養親屬之免稅額；……『(二)納稅義務人之子女……滿二十歲以上，而因在校就學……受納稅義務人扶養者。』（下稱上開所得稅法）」惟迄今仍繼續援用之財政部八十四年十一月十五日台財稅第八四一六五七八九六號

(2) Children of the taxpayer … who are over twenty years of age, and are being supported by the taxpayer by reason of being in school." (the "Income Tax Act") However, Administrative Letter Tai-cai-shui-zi No. 841657896 ("Letter"), issued on 15 November 1995 by the Ministry of Finance, still applicable to date, states: "If a taxpayer in Taiwan has children who are twenty years old and studying at the universities in mainland China that are not recognized by the Ministry of Education, the taxpayer may not claim the tax exemption for supporting dependents when filing a final consolidated income tax return."

函則認為：「現階段臺灣地區人民年滿二十歲，就讀學歷未經教育部認可之大陸地區學校，納稅義務人於辦理綜合所得稅結算申報時，不得列報扶養親屬免稅額。」（下稱系爭函釋）

According to the Income Tax Act, if a taxpayer has children who are over twenty years old and are being supported by the taxpayer for being in school, the taxpayer may claim deduction when declaring individual consolidated income. The deduction is not limited to children who are studying in school in the Taiwan area. As to the criterion of "being in school," there is no definition of it in the Income Tax Act. People who study in

依上開所得稅法規定，納稅義務人扶養之子女滿二十歲以上，而在校就學者，納稅義務人得減除其扶養親屬免稅額。惟並未限制該子女以在臺灣地區就學者為限。至於在校就學之認定標準如何，所得稅法並未明白規定。在臺灣地區就學者，其入學資格經學校報我國主管教育行政機關核備並領有學生證者，即具正式學籍，如其並依學校行事曆至校上課或其學籍在學年度內為有效之在校肄業學生者，固屬在校就學（參

Taiwan and are admitted to schools accredited by the educational authority of the R.O.C. and hold a student ID are regarded as students. If they attend school in accordance with the school calendar or drop out of school while being registered as students for the rest of the school year, they shall be deemed as students for "being in school" (*see* The Ministry of Education Administrative Letter No. Tai She Zi-27756, issued on 30 May 1994) However, since we cannot expect schools in mainland China area to report the student status of people studying in the mainland China area to the educational authority of the R.O.C., the standards to determine whether the student are "being in school" in the mainland China area cannot be the same as the standards applied in determining "being in school" in Taiwan area, and should be consistent with the legislative intent of the Income Tax Act and be interpreted by the general legal interpretation methods in accordance with the principle of taxation by law aforementioned. The legislative intent of the aforementioned Income Tax Act is to preserve the national tradition of valuing children's

見教育部八十三年五月三十日台社字第二七七五六號函說明二），然在大陸地區就學者，既不可能期待其入學資格經大陸地區學校報我國主管教育行政機關核備，自無從比照於臺灣地區求學之情形認定是否符合在校就學之要件，則在大陸地區求學是否具備在校就學之要件，自應秉持所得稅法之立法意旨及依一般法律解釋方法為闡釋，始符首開租稅法律主義之要求。查上開所得稅法之立法意旨在於維護我國重視子女教育之固有美德，考量納稅義務人因之增加扶養支出，而減少負擔所得稅之經濟能力；再參酌前述於臺灣地區在校就學之認定標準，對前往大陸地區求學，是否符合上開所得稅法在校就學之要件，應以確有就學之事實，且該子女所就讀者為當地政府權責機關所認可之正式學校，具有正式學籍，如其學籍在學年度內為有效之在校肄業學生，即堪認為在校就學，而符合上開所得稅法之要件。對在校就學之認定，縱因考量兩地區差異而有其他標準，仍應以符合在校就學之事實，且與上開所得稅法規定之意旨確實相關者為限，始不逾越租稅法律主義之界限。

education, taking into consideration the fact that taxpayers' ability to pay income tax is hampered by the extra expenditure from raising children. When applying the abovementioned criterion of "being in school" in the Taiwan area to taxpayers whose children attend schools in the mainland China, whether the children meet the requirement of "being in school" should depend on the fact of school attendance and whether the school the children are enrolled is officially recognized as a school by the local government authority. If a child drops out of school while his/her school registration is still valid for the rest of the school year, he/she shall be deemed "being in school" and fulfilling the Income Tax Act requirements. Given the differences between the Taiwan and mainland China areas and other standards may be adapted to determine whether a student "is in school," that the determination shall rest on whether the student is in school and not defy the abovementioned intent of the Income Tax Act to uphold the principle of taxation by law.

Given the educational systems and curricula of the Taiwan and mainland China areas are different, Article 22 of the Act Governing Relations between the People of the Taiwan Area and the Mainland Area ("Act") as amended and promulgated on 29 October 2003, authorizes the Ministry of Education ("MOE") to enact measures to recognize the mainland China area high school's research and teaching quality and to announce a list of the schools recognized to facilitate the recognition of the degree granted by mainland Chinese schools. In recognizing the mainland China school degrees, Students may be deemed to have a degree granted by a comparable school in Taiwan. However, the subject and legislative purpose of Article 22 of the Act are obviously different from the Income Tax Act and the two provisions are not reasonably related. Such degree recognition is also irrelevant to whether taxpayers can afford to pay tax. Therefore, the MOE cannot determine whether a mainland China area student is "being in school" on the basis of whether his/her mainland China area school's degree is recognized by the

鑒於兩地區教育學制及課程不一，九十二年十月二十九日修正公布之臺灣地區與大陸地區人民關係條例第二十二條規定，授權教育部擬訂採認辦法，就大陸地區高等學校之研究及教學品質進行認可，並公告認可名冊，俾據以辦理採認大陸地區學校學歷。此大陸地區學校學歷之認可，旨在採認與臺灣地區同級同類學校相當之大陸地區學歷，與上開所得稅法規定之立法意旨、適用對象，顯然有別，並無正當合理之關聯，亦與納稅義務人負稅能力減少之考量無涉，自非得據大陸地區學校學歷是否認可資為認定有無在校就學之標準。是系爭函釋逕以教育部對大陸地區學校學歷認可作為認定是否在校就學之標準，與上開所得稅法之立法意旨不符，逾越法律解釋之範圍，限制人民依法享有減除扶養親屬免稅額之權利，增加法律所無之租稅義務，違反憲法第十九條租稅法律主義，應自本解釋公布之日起不再援用。

MOE. The Letter, which arbitrarily considered the recognition of the mainland China area Schools' degrees by the MOE as the standard for determining whether certain students are "in school" is inconsistent with the legislative purpose of the Income Tax Act, and exceeds the scope of legal interpretation and restricts people's right to enjoy tax deduction for supporting dependents. The Letter therefore creates tax obligation not provided by law and violates the principle of taxation by law under Article 19 of the Constitution. The Letter shall no longer be applied as of the issuance date of this Interpretation.

The petitioner further argues that Ministry of Finance Administrative Letter Tai-cai-shui-zi No. 831602325 dated 27 July 1994, invoked in Taipei High Administrative Court Judgment 95 Jian-zi No. 576 (2006) and Judgment 96 Jian-zi No. 83 (2007), is unconstitutional. According to his submission, the petitioner only disputes the legal opinion expressed in Judgment 95 Jian-zi No. 576 (2006) regarding the Ministry of Finance Administrative Letter without specifically indicating

本件聲請人另認臺北高等行政法院九十五年度簡字第五七六號及九十六年度簡字第八三號確定終局判決所適用之財政部八十三年七月二十七日台財稅第八三一六0二三二五號函釋，有違憲疑義。核其所陳，關於前述九十五年度簡字第五七六號判決部分，聲請人僅係爭執法院適用上開函釋之法律見解為不當，並未具體指摘該函釋究有如何牴觸憲法之疑義；至於前述九十六年度簡字第八三號判決部分，經查該判決並未適用上開函釋。依司法院大法官審理案件

how such letter violates the Constitution. With regard to Judgment 96 Jian-zi No. 83 (2007), the court did not invoke the administrative letter and therefore the relevant part of the petition does not met the standards set forth in Subparagraph 2, Paragraph 1, and Paragraph 3, Article 5 of the Constitutional Interpretation Procedure Act. The Court therefore will not review this part of the petition.

法第五條第一項第二款及第三項之規定，此等部分之聲請，均應不受理，併此指明。

Justice Mao-Zong Huang filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Chang-Fa Lo filed concurring opinion.

Justice Dennis Te-Chung Tang filed dissenting opinion.

本號解釋黃大法官茂榮提出協同意見書;陳大法官新民提出協同意見書;羅大法官昌發提出協同意見書；湯大法官德宗提出不同意書。

EDITOR'S NOTE:

Summary of facts: When the petitioner Jian Fan-Sheng filed a consolidated income tax report in 2003 and 2004, he applied for a tax exemption of NT $74,000 for supporting his daughter, who was over twenty years old and studying at Beijing University. The Jhonghe

編者註：

事實摘要：聲請人簡繁勝 92 年及 93 年度綜合所得稅結算申報，以其女在北京大學就學，列報扶養滿 20 歲以上子女免稅額 7 萬 4000 元，均經財政部臺灣省北區國稅局所屬中和稽徵所以北京大學學歷當時並未經教育部認可，依財政部函釋意旨予以剔除並補徵應納

Office of the National Tax Administration of Northern Taiwan Province under the Ministry of Finance (MOF) found Beijing University degree were not yet recognized by the Ministry of Education at that time and rejected the deduction and issued a decision to request the petitioner to pay the tax.

The petitioner was not willing to accept the decision and brought an administrative appeal and litigation. However, the case was dismisse drespectively by Taipei High Administrative Court Judgment 95 Jian-zi No. 576 (2006) and the Judgment 96 Jian-zi No. 83 (2007). He further appealed to the Supreme Administrative Court, but the Supreme Administrative Court rendered Ruling 96 Cai-zi No. 2397 and Ruling 97 Cai-zi No. 1677 to dismiss the appeal on the grounds that the case did not meet the appeal requirements. He therefore petitioned for a constitutional interpretation respectfully to argue that Ministry of Finance Administrative Letter Tai-cai-shui-zi No. 841657896 dated 15 November 1995, in which whether MOE recognized a student's degree was

稅額。

聲請人不服，先後提起行政訴訟，經臺北高等行政法院 95 年度簡字第 576 號及 96 年度簡字第 83 號判決分別駁回；上訴後再經最高行政法院 96 年度裁字第 2397 號及 97 年度裁字第 1677 號裁定，以上訴不合法駁回，爰認判決所適用之財政部 84 年 11 月 15 日台財稅第 841657896 號函釋，以教育部認可學歷與否，作為核定是否符合所得稅法第 17 條第 1 項第 1 款第 2 目「在校就學」之免稅額標準，有牴觸憲法第 7 條與第 172 條等之疑義，先後聲請解釋。二案合併審理。

declared the basis to determine whether a student is "in school" and qualifies for the tax exemption of Item 2, Subparagraph 1, Paragraph 1, Article 17 of the Income Tax Act, defies Article 7 and Article 172 of the Constitution. The two cases were combined and reviewed as one.

J. Y. Interpretation No.693（December 9, 2011）*

ISSUE: 1.The offering prices of call (put) warrants are not income arising from securities exchange.

2.Capital loss arising from the exercise of rights or hedging shall not be deducted from taxable income. Are the above opinions constitutional or not ?

RELEVANT LAWS:

Article VII and Article XIX of the Constitution of the Republic of China（憲法第七條、第十九條）；J.Y. Interpretation Nos. 622, 660, and 685（司法院釋字第六二二號、第六六0號、第六八五號解釋）；Articles 4-1, 24-1, 24-2-(1) of the Income Tax Act（所得稅法第四條之一、第二十四條第一項、第二十四條之二第一項）；Point 2 in Points of Attention for Securities Exchange Tax Statute（證券交易稅條例實施注意事項第二點）；Clause 2-2 of the Guidelines for Handling Applications of Call (Put) Warrants by Issuers（ 發行人申請發行認購（售）權證處理準則第二點第二項）；Ministry of Finance Letter Tai-Cai-Shui No. 861922464 of December 11 1997（財政部中華民國八十六年十二月十一日台財稅第八六一九二二四六四號函）；Ministry of Finance['s] Letter [of] Tai-Cai-Shui No. 861909311 dated July 31, 1997 (Revoked under Ministry of Finance Letter Tai-Cai-Shui No.

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* Translated by Roger K. C. Wang.

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

10000400260 dated November 16, 2011)（財政部中華民國八十六年七月三十一日台財稅第八六一九０九三一一號函（業經財政部一００年十一月十六日台財稅字第一０００００四００二六０號令廢止）.

KEYWORDS:

Legal foundation of taxation（租稅法律主義）, principle of equity（平等原則）, taxation by capacity（量能課稅）, call (put) warrants（認購（售）權證）, premium income（權利金收入）, securities exchange（證券交易）, securities exchange tax（證券交易稅）, securities exchange income tax（證券交易所得稅）, exercise of rights or hedging（履約或避險交易）.**

HOLDING: The first section of the Ministry of Finance Letter Tai-Cai-Shui No. 861922464 of December 11, 1997 specifies that, "[the] proceeds paid to the issuers of call (put) warrants for issuing the instruments are premium income[s]", meaning that the proceeds from the issuance of the instruments are premium income[s], not securities exchange income, thereby [the] Article 4-1 of the Income Tax Act shall not be applicable, and this is not in defiance of the doctrine of the legal foundation of taxa-

解釋文：財政部中華民國八十六年十二月十一日台財稅第八六一九二二四六四號函前段謂：「認購（售）權證發行人於發行時所取得之發行價款，係屬權利金收入」，意指該發行價款係權利金收入，而非屬證券交易收入，無所得稅法第四條之一之適用，與憲法第十九條之租稅法律主義尚無違背。

tion under Article XIX of the Constitution of the Republic of China.

It is stated in the same document that, “after issuing call (put) warrants, the issuers may have capital gains or capital losses from [the] securities transactions at the time the investors elect to exercise their rights of selling or buying the underlying stocks and these shall be recognized for income or loss pursuant to Article 4-1 of the Income Tax Act”. The Ministry of Finance letter Tai-Cai-Shui No. 861909311 of July 31, 1997 also states that, “If the bearers of the call (put) warrants elect to seek settlement in cash at a particular point of time or at maturity… they shall be exempted from the levy of income tax as suggested in the aforementioned Income Tax Act.”. This is not in defiance of the doctrine of the legal foundation of taxation under Article XIX of the Constitution of the Republic of China, nor in defiance of the principle of equity under Article VII of the Constitution of the Republic of China.

同函中段謂：「認購（售）權證發行人於發行後，因投資人行使權利而售出或購入標的股票產生之證券交易所得或損失，應於履約時認列損益，並依所得稅法第四條之一規定辦理。」及財政部八十六年七月三十一日台財稅第八六一九０九三一一號函稱：「認購（售）權證持有人如於某一時間或特定到期日，以現金方式結算者……並依前開所得稅法規定停止課徵所得稅。」與憲法第十九條之租稅法律主義並無牴觸，亦不生違反憲法第七條平等原則之問題。

REASONING: According to Article XIX of the Constitution of the Republic of China, the people are obliged to pay tax according to law. This refers to the state assigning people the obligation in taxation or preferential treatment of waivers or reductions in tax payment under law whereby the subject of taxation, the object of taxation, the relation between the subject and object of taxation, the tax base, tax rate, and the method of tax payment and the time of payment and other components of taxation shall be defined by law. However, the competent authority may cite applicable laws within their jurisdiction with proper interpretation within their authority. If the interpretation of law by the competent authority is made in compliance with the principles of the Constitution and related legislation and the general method of the interpretation of law is duly observed, this does not defy the principle of the legal foundation of taxation (See J.Y. Interpretation Nos. 622, 660, and 685).

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、租稅客體對租稅主體之歸屬、稅基、稅率、納稅方法及納稅期間等租稅構成要件，以法律定之。惟主管機關於職權範圍內適用之法律條文，本於法定職權就相關規定予以闡釋，如係秉持憲法原則及相關之立法意旨，遵守一般法律解釋方法為之，即與租稅法律主義無違（本院釋字第六二二號、第六六0號、第六八五號解釋參照）。

The issuance of call (put) warrants approved by the competent authority shall

主管機關核准發行之認購(售)權證，係指標的證券發行公司以外之第三

be referred to the securities issued by a third party whereby the bearers of such securities may exercise their right under the securities within a specific period or at maturity to buy or sell the underlying securities from the issuers at the exercise price, or to close the deal with cash settlement for a spread (Clause 2-2 of the Guidelines for Handling Applications of Call (Put) Warrants by Issuers.) As such, call (put) warrants are securities representing the rights of the bearers to buy or sell the underlying securities and the issuers of which are still obliged to debts under the options specified in the warrants after the delivery of the securities to the investors. Obligation in this form is different from the selling of the warrants by the bearers where the bearers are merely obliged to deliver the warrants to the buyers.

者所發行表彰認購(售)權證持有人於履約期間內或特定到期日，有權按約定履約價格向發行人購入或售出標的證券，或以現金結算方式收取差價之有價證券(發行人申請發行認購(售)權證處理準則第二點第二項)。是認購（售）權證係表彰證券買賣選擇權之有價證券，其發行人將該權證交付後尚負有履行該權證所載選擇權債務之義務，此與發行後之權證持有人賣出該權證，僅負將該權證交付買受人之義務不同。

Whether the income from the issuance of call (put) warrants shall be subject to income tax or not shall depend on the definition of “securities exchange” as stated in Article 4-1 of the Income Tax Act, that “with effect from January 1,

發行認購（售）權證之收入是否課徵所得稅，關鍵在於該發行交易是否為所得稅法第四條之一：「自中華民國七十九年一月一日起，證券交易所得停止課徵所得稅，證券交易損失亦不得自所得額中減除。」所稱之「證券交

1990, securities exchange tax shall be waived. Accordingly, capital loss from securities exchange shall not be deducted from income". The cause of legislation for the waiver of the levy of securities exchange income tax is a simplification of procedure for the collection of securities exchange income and for the reasonable levy of tax. In practice, the Securities Exchange Tax Statute has been amended to move the rate of securities exchange tax upward thereby waiving the securities exchange income tax that should have been incorporated as parts of the total income for taxation. According to Article 1-1 of the Securities Exchange Tax Statute, only the transactions of securities in circulation shall be subject to securities exchange tax. This shows that securities exchange as defined in Article 4-1 of the Income Tax Act shall be confined to the transactions of securities in circulation. This is the rationale behind the substitution of Securities Exchange Income Tax by the Securities Exchange Tax. Transaction of the issuance of call (put) warrants is different from the trading of call (put) warrants. As such, there shall be no such thing as the levy

易」。查所得稅法第四條之一停徵證券交易所得稅之立法理由，係為簡化證券交易所得之稽徵手續並予合理課徵，以修正證券交易稅條例提高證券交易稅稅率方式，將原應併入所得總額課徵所得稅之證券交易所得稅停止課徵。而依證券交易稅條例第一條第一項規定，僅就買賣已發行之有價證券課徵證券交易稅，足見所得稅法第四條之一所稱之證券交易，亦應限於買賣已發行之有價證券，始符合該條以證券交易稅取代證券交易所得稅之意旨。發行認購（售）權證之交易與買賣認購（售）權證不同，自無庸課徵證券交易稅（證券交易稅條例實施注意事項第二點參照），若因發行交易而有收入，則應依所得稅法其他規定計算其所得並課徵所得稅。財政部八十六年十二月十一日台財稅第八六一九二二四六四號函（下稱系爭函一）前段謂：「認購（售）權證發行人於發行時所取得之發行價款，係屬權利金收入」，意指該發行價款係權利金收入，而非屬證券交易收入，無所得稅法第四條之一之適用，符合一般法律解釋方法，並未增加法律所未規定之租稅義務，與憲法第十九條之租稅法律主義尚無違背。

of securities exchange tax (Point 2 in the Points of Attention forthe Enforcement of Securities Exchange Tax Statute). If there is any income deriving from the transaction of issuing, income tax shall be levied and calculated under other requirements of the Tax Code. According to the first section of the Ministry of Finance Letter Tai-Cai-Shui No. 861922464 (hereinafter, "Letter No. 1") dated December 11, 1997, "the proceeds collected by the issuers of call (put) warrants at the time of issuance shall be premium income", meaning that the issuance price shall be premium income and not securities exchange income. As such, Article 4-1 of the Income Tax Act shall not be applied. This is in conformity with the general interpretation of law and has not added any obligation of taxation unregulated by law. It is thus not in defiance of the doctrine of the legal foundation of taxation under Article XIX of the Constitution of the Republic of China.

Issuers may conduct related securities transactions after the issuance of the call (put) warrants for the performance or prepare to perform (hedge) the obligations

至認購（售）權證發行後，發行人為履行或為準備履行（避險）約定之權證債務所為之相關證券交易（以下簡稱履約或避險交易），其所得如何課徵

under the warrants as agreed (hereinafter, "transaction for performance or hedge), and may have income. The levy of such income shall be carried out in accordance with the Income Tax Act. According to Article 24-1 of the Income Tax Act, "The calculation of corporate income shall be the total revenue of the year net of all costs and expenses, loss, and applicable tax, and the remainder shall be taxable income", which is the revenue or spending derived from transactions of performance or hedge by the issuers of call (put) warrants, and shall be included as other income[s] and expenses for the calculation of the annual corporate income as aforementioned for taxation. However, Article 4-1 of the same law, set forth on December 30, 1989, holds that securities exchange income has been regulated by other rules and the levy of securities exchange income tax shall cease. Related securities exchange income after the issuance of the call (put) warrants shall not be stated as taxable income for the levy of income tax. Accordingly, related capital loss from securities transactions for the performance or hedge after the issuance

所得稅，則應依所得稅法之規定辦理。所得稅法第二十四條第一項前段規定：「營利事業所得之計算，以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額。」是認購（售）權證發行人履約或避險交易之收入或支出，原應依前開規定合併其他收入支出計算營利事業全年課稅所得。惟七十八年十二月三十日增訂同法第四條之一規定，既就證券交易之所得已另設特別規定，停止課徵證券交易所得稅，則認購（售）權證發行後相關之證券交易所得，即不得列為應稅所得課徵所得稅；相應於此，與發行認購（售）權證後履約或避險交易之相關證券交易損失，亦不得將其自應稅所得中減除。此亦即須俟九十六年七月十一日增訂所得稅法第二十四條之二第一項前段，排除同法第四條之一特別規定之適用，發行認購（售）權證始得回歸同法第二十四條第一項前段，其相關證券買賣之收入均應併計課稅、損失亦均應減除之常態規定之故。系爭函一中段：「認購（售）權證發行人於發行後，因投資人行使權利而售出或購入標的股票產生之證券交易所得或損失，應於履約時認列損益，並依所得稅法第四條之一規定辦理。」及財政部八十六年七月三十一日台財稅

of call (put) warrants shall not be deducted from taxable income. This is the same as the addition to the first part of Article 24-2-(1) of the Income Tax Act on July 11, 2007 that excluded the application of the special requirement of Article 4-1 of the same law. With such a provision, the issuance of call (put) warrants shall be interpreted in the same way as the first part of Article 24-1 which states that the income from related securities trade shall be included in the calculation for taxation and the loss shall be deducted from regular forms of income. The mid section of the letter in contention suggests that, "After issuers have issued the call (put) warrants, investors may elect to exercise the rights thereof by selling or buying the underlying stocks and this may result in capital gain or loss from securities exchange, and shall be recognized for income or loss at the time of performing the obligations and subject to Article 4-1 of the Income Tax Act". The Ministry of Finance Letter Tai-Cai-Shui No. 861909311 dated July 31, 1997 (hereinafter, "Letter No. 2") also stated that, "If the bearers of the call (put) warrants elect to seek settle-

第八六一九０九三一一號函（下稱系爭函二）：「認購（售）權證持有人如於某一時間或特定到期日，以現金方式結算者…並依前開所得稅法規定停止課徵所得稅。」（後函業經財政部一００年十一月十六日台財稅字第一０００００四００二六０號令廢止）均核與所得稅法增訂第二十四條之二以前之相關規定之意旨無違，符合一般法律解釋方法，亦未增加法律所無之租稅義務，無違憲法第十九條之租稅法律主義。

ment in cash at a particular point of time or at maturity… they shall be exempted from the levy of income tax as suggested in the aforementioned Income Tax Act" (Revoked under Ministry of Finance Letter Tai-Cai-Shui No. 10000400260 of November 16, 2011). These norms are not in defiance of the meaning of the law before the addition of Article 24-2 of the Income Tax Act. This is also in compliance with the general interpretation of law and has not increased any obligation of taxation, nor is it in defiance of the doctrine of the legal foundation of taxation under Article XIX of the Constitution of the Republic of China.

No levy of income tax on securities exchange income is an exception to the levy of income tax on any income. The purpose is to substitute one tax for another and not the realization of taxation by capacity. According to the middle section of Letter No. 1 [and the] issuers of call (put) warrants as explained in Letter No. 2 shall be exempted from the levy of securities exchange income tax pursuant to Article 4-1 of the Income Tax Act but

有證券交易所得而不課徵所得稅，為有所得即應課徵所得稅之例外，其目的為以稅代稅業如前述，非在實現量能課稅。系爭函一中段及系爭函二闡明認購（售）權證之發行人，應依所得稅法第四條之一規定，免徵證券交易所得稅，亦不得減除證券交易損失。而所有其他有證券交易所得之個人及營利事業，適用所得稅法第四條之一時，並未規定得為不同之處理，故亦不生該二函違反量能課稅致牴觸憲法上平等原則之

cannot deduct any loss from securities exchange. Any other individuals and business entities that have other securities exchange income[s] shall be subject to taxation under Article 4-1 of the Income Tax Act and shall not be treated otherwise. As such, the aforementioned two letters are not in defiance of the principle of taxation by capacity nor are they in conflict to the principle of equity under the Constitution of the Republic of China.

In this case, the Claimant claimed that the issuer of the call (put) warrants which subscribed to the instruments by itself at the time of issuance should not substantiate premium income[s] as stated in the first section of Letter No. 1, and suggested that the requirement of Article 4-1 of the Income Tax Act and Verdict Pan-Zi No. 96 of the Administrative Court (reorganized as the Supreme Administrative Court) in 1973 are susceptible of violating the Constitution of the Republic of China. The statement presented by the Claimant only argued that the application of the law and ruling were improper, but failed to present solid evidence to sug-

問題。

本件聲請人聲請意旨另認為，關於認購（售）權證發行人於發行時自行認購其發行之權證，並無系爭函一前段所稱權利金收入，以及認為所得稅法第四條之一規定、行政法院（現改制為最高行政法院）六十二年判字第九六號判例亦有違憲疑義等語。查其所陳，僅係爭執法院認事用法之不當，並未具體指摘前開函釋、規定及判例究有如何牴觸憲法之疑義。依司法院大法官審理案件法第五條第一項第二款及第三項之規定，此等部分之聲請，均應不受理，併此指明。

gest the aforementioned letters, regulations, and verdicts were in violation of the Constitution of the Republic of China. According to Article 5-1-(2)~(3) of the Constitutional Interpretation Procedure Act, the aforementioned claims shall not be accepted.

Justice Yeong-Chin Su filed concurring opinion.

Justice Ching-You Tsai filed concurring opinion in part.

Justice Chang-Fa Lo filed dissenting opinion in part.

Justice Mao-Zong Huang filed dissenting opinion, in which Justice Pai-Hsiu Yeh and Justice Su Chen, Beyue joined.

本號解釋蘇大法官永欽提出協同意見書；蔡大法官清遊提出部分協同意見書；羅大法官昌發提出部分不同意見書；黃大法官茂榮、葉大法官百修及陳大法官碧玉共同提出不同意見書；

EDITOR'S NOTE:

Summary of facts: According to Article 4-1 of the Income Tax Act, which took effect on January 1, 1990, securities exchange tax shall be waived. Accordingly, capital loss from securities exchange shall not be deducted from income. Ministry of Finance Letter Tai-Cai-Shui No. 861922464 of December 11, 1997 specified that, "proceeds paid to the issuers of

編者註：

事實摘要：所得稅法第 4 條之 1 規定，自 79 年 1 月 1 日起，證券交易所得停徵所得稅，證券交易損失亦不得自所得額中減除。又財政部 86 年 12 月 11 日台財稅第 861922464 號函謂：「認購（售）權證發行人於發行時所取得之發行價款，係屬權利金收入」「認購（售）權證發行人於發行後，因投資人行使權利而售出或購入標的股票產

call (put) warrants for issuing the instruments are premium[s] income[s],” and “after issuing call (put) warrants, the issuers may have capital gain or capital loss from securities transactions at the time the investors elect to exercise their rights by selling or buying the underlying stocks and these shall be recognized for income or loss pursuant to Article 4-1 of the Income Tax Act”. Ministry of Finance Letter Tai-Cai-Shui No. 861909311 of July 31, 1997 also stated that, “If the bearers of the call (put) warrants elect to seek settlement in cash at a particular point of time or at maturity… they shall be exempted from the levy of income tax as suggested in the aforementioned Income Tax Act”.

生之證券交易所得或損失，應於履約時認列損益，並依所得稅法第 4 條之 1 規定辦理。」86 年 7 月 31 日台財稅第 861909311 號函亦稱：「認購（售）權證持有人如於某一時間或特定到期日，以現金方式結算者……並依前開所得稅法規定停止課徵所得稅。」

The 13 claimants of this case, including Mega Securities, issued call (put) warrants and declared corporate income tax for the fiscal year. The National Taxation Bureau of Taipei held that the proceeds collected by the issuers of the call (put) options at the time of issuance should be recognized as premium income, not securities exchange income, with reference to the aforementioned 2 Let-

本案聲請人 A 等 13 家公司因發行認購（售）權證，於辦理年度營利事業所得稅結算申報時，經臺北市國稅局依上開財政部函釋，認發行人於發行認購（售）權證時所取得之發行價款係權利金收入而非證券交易所得，及避險部位證券交易損失不得自應稅所得中減除，分別予以調增應稅所得、否准就發行後之交易損失於應稅所得減除。聲請人不服，提起行政訴訟，均遭駁回確定，

ters, and the capital loss from securities exchange in hedging should not be deducted from taxable income. As such, the taxation authorities adjusted the income tax upward and rejected the loss from securities exchange deductible from taxable income. The claimants objected to the decision and proceeded to administrative action, but were overruled. They suggested that the aforementioned interpretation of the letters of the Ministry of Finance were susceptible of violating the Constitution of the Republic of China, and requested interpretations. The two issues were filed in a joint action.

爰認上開財政部二函釋，有牴觸憲法疑義，分別聲請解釋，經合併審理。

J. Y. Interpretation No.694（December 30, 2011）*

ISSUE: Are the provisions of the Income Tax Act that allow only taxpayers who support relatives or family members under twenty years of age or over sixty years of age to claim an exemption when calculating tax unconstitutional ?

RELEVANT LAWS:

Articles 7, 15, 155 of the Constitution（憲法第七條、第十五條、第一百五十五條）；Judicial Yuan Interpretation Nos. 547, 584, 596, 605, 614, 647, 648, 666, 682（司法院釋字第五四七號、第五八四號、第五九六號、第六０五號、第六一四號、第六四七號、第六四八號、第六六六號、第六八二號解釋）；Article 17, Paragraph 1, Sub-paragraph 1, Item 4, of the Income Tax Act (as amended on January 3, 2001 and on January 19, 2011)（所得稅法第十七條第一項第一款第四目，中華民國九十年一月三日修正公布、一００年一月十九日修正公布）；Article 1114, Paragraph 4, and Article 1123, Paragraph 2 of the Civil Code（民法第一千一百十四條第四項、第一千一百二十三條第二項）；The Ministry of Finance Letle Tai-Chai-Shui-10004134920 of November 21, 2011（財政部中華民國一００年十一月二十一日台財稅字第一０００四一三四九二０號函）。

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* Translated by Chi Chung.

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

KEYWORDS:

Support（扶養）, taxpayers（納稅義務人）, other relatives or family members（其他親屬或家屬）, an exemption amount（免稅額）, the inability to earn a living（無謀生能力）, the principle of equality（平等原則）, differential treatment（差別待遇）, substantial relationship（實質關聯）, livelihood or sustainability of life（生存或生活上之維持）.**

HOLDING: Article 17, Paragraph 1, Sub-paragraph 1, Item 4, of the Income Tax Act as amended on January 3, 2001, stipulates: "The net consolidated income of an individual equals the gross consolidated income, as computed in accordance with the preceding three Articles, subtracted by the following exemption and deductions: 1. Exemption: Taxpayers may claim a prescribed amount of exemption for themselves, their spouses, and their family dependents that meet any of the conditions below. …(4) Other relatives or family members of the taxpayer within the meaning of Article 1114, Subparagraph 4, or Article 1123, Paragraph 3, of the Civil Code who are either under twenty years of age or over sixty years of age, are incapable of earning a livelihood,

解釋文：中華民國九十年一月三日修正公布之所得稅法第十七條第一項第一款第四目規定：「按前三條規定計得之個人綜合所得總額，減除下列免稅額及扣除額後之餘額，為個人之綜合所得淨額：一、免稅額：納稅義務人按規定減除其本人、配偶及合於下列規定扶養親屬之免稅額；……（四）納稅義務人其他親屬或家屬，合於民法第一千一百十四條第四款及第一千一百二十三條第三項之規定，未滿二十歲或滿六十歲以上無謀生能力，確係受納稅義務人扶養者。……」其中以「未滿二十歲或滿六十歲以上」為減除免稅額之限制要件部分(一００年一月十九日修正公布之所得稅法第十七條第一項第一款第四目亦有相同限制)，違反憲法第七條平等原則，應自本解釋公布日起，至遲於屆滿一年時，失其效

and are supported by the taxpayer.…" The requirement that dependents be "under twenty years of age or over sixty years of age" for taxpayers to claim the exemption (The same requirement appears in Article 17, Paragraph 1, Sub-paragraph 1, Item 4, of the Income Tax Act amended on January 19, 2011.) violates the principle of equality prescribed by Article 7 of the Constitution, and therefore it shall become void within one year from the date of this Interpretation.

REASONING: The principle of equality prescribed by Article 7 of the Constitution does not mean equality that is absolute, mechanical, or formal. Instead, the principle of equality protects substantive equal status under the law, which requires that matters that are similar in nature be handled similarly, and that differential treatment be justified by appropriate reasons (see J.Y. Interpretation Nos. 547, 584, 596, 605, 614, 647, 648 and 666). Whether a particular legal rule is consistent with the principle of equality depends on whether the purpose of the differential treatment is constitu-

力。

解釋理由書：憲法第七條所揭示之平等原則非指絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，要求本質上相同之事物應為相同之處理，不得恣意為無正當理由之差別待遇（本院釋字第五四七號、第五八四號、第五九六號、第六0五號、第六一四號、第六四七號、第六四八號、第六六六號解釋參照）。法規範是否符合平等權保障之要求，其判斷應取決於該法規範所以為差別待遇之目的是否合憲，其所採取之分類與規範目的之達成之間，是否存有一定程度之關聯性而定（本院釋字第六八二號解釋參照）。

tional, and whether there is a certain level of nexus between the classification and the purpose that the classification seeks to achieve (see J.Y. Interpretation No. 682).

Article 17, Paragraph 1, Subparagraph 1, Item 4, of the Income Tax Act as amended on January 3, 2001, stipulates: "The net consolidated income of an individual equals the gross consolidated income, as computed in accordance with the preceding three Articles, subtracted by the following exemption and deductions: 1. Exemption: Taxpayers may claim a prescribed amount of exemption for themselves, their spouses, and their family dependents that meet any of the conditions below. …(4) Other relatives or family members of the taxpayer within the meaning of Article 1114, Subparagraph 4, or Article 1123, Paragraph 3, of the Civil Code who are either under twenty years of age or over sixty years of age, are incapable of earning a livelihood, and are supported by the taxpayer.…" (The same requirement also appears in Article 17, Paragraph 1, Sub-paragraph 1, Item 4, of the Income Tax Act as amend-

九十年一月三日修正公布之所得稅法第十七條第一項第一款第四目規定：「按前三條規定計得之個人綜合所得總額，減除下列免稅額及扣除額後之餘額，為個人之綜合所得淨額：一、免稅額：納稅義務人按規定減除其本人、配偶及合於下列規定扶養親屬之免稅額；……（四）納稅義務人其他親屬或家屬，合於民法第一千一百十四條第四款及第一千一百二十三條第三項之規定，未滿二十歲或滿六十歲以上無謀生能力，確係受納稅義務人扶養者。……」（一００年一月十九日修正公布之所得稅法第十七條第一項第一款第四目規定，就有關以「未滿二十歲或滿六十歲以上」為減除免稅額之限制要件部分亦同；上開第四目規定以下簡稱系爭規定），其減除免稅額之要件，除受扶養人須為納稅義務人合於上開民法規定之親屬或家屬（以下簡稱其他親屬或家屬），無謀生能力並確係受納稅義務人扶養者外，且須未滿二十歲或滿六十歲以上。系爭規定之年齡限制，使

ed on January 19, 2011. The requirement in Item 4 is referred to hereinafter as the provision in dispute). Taxpayers who seek to claim the exemption have to satisfy the following requirements: Their relatives or family members (hereinafter referred to as "other relatives or family members") have to meet the requirement of the Civil Code set out above, to be incapable of earning a livelihood, to be supported by the taxpayer, and have to be under twenty years of age or over sixty years of age. The age requirement of the provision in dispute prevents the taxpayers who support other relatives or family members more than twenty years of age but less than sixty years of age from claiming an exemption, which constitutes differential treatment on the basis of the different ages of the dependents.

納稅義務人扶養滿二十歲而未滿六十歲無謀生能力之其他親屬或家屬，卻無法同樣減除免稅額，形成因受扶養人之年齡不同而為差別待遇。

According to Article 15 of the Constitution, people's right of existence shall be protected. Moreover, Article 155 of the Constitution stipulates that the State shall give appropriate assistance and relief to the aged, the infirm, and those who are unable to earn a living. One of the

憲法第十五條規定，人民之生存權應予保障。憲法第一百五十五條規定，人民之老弱殘廢，無力生活者，國家應予以適當之扶助與救濟。國家所採取保障人民生存與生活之扶助措施原有多端，所得稅法有關扶養無謀生能力者之免稅額規定，亦屬其中之一環。如因

measures that may be used by the State to ensure people's livelihood is the provision that taxpayers may claim an exemption when they support their relatives or family members who are incapable of earning a livelihood. If the State limits the age of the dependents to the range between twenty and sixty years of age, such a limit would decrease the will of taxpayers to support their relatives or family members who are more than twenty years of age but less than sixty years of age and are unable to earn a living. As a result, such a limit would adversely affect the livelihood or sustainability of these disadvantaged people. Therefore, whether the differential treatment caused by the provision in dispute violates the principle of equality should be subject to strict scrutiny, which means that the purpose of the provision in dispute has to be constitutional, and that the classifying standards and differential treatment are substantially related to the achievement of the purpose of the provision in dispute.

無謀生能力者之年齡限制，而使納稅義務人無法減除免稅額，將影響納稅義務人扶養滿二十歲而未滿六十歲無謀生能力者之意願，進而影響此等弱勢者生存或生活上之維持。故系爭規定所形成之差別待遇是否違反平等原則，應受較為嚴格之審查，除其目的須係合憲外，所採差別待遇與目的之達成間亦須有實質關聯，始合於平等原則。

According to the Ministry of Finance Letter Tai-Chai-Shui-10004134920

依財政部一００年十一月二十一日台財稅字第一０００四一三四九二

of November 21, 2011, the provision in dispute uses the age of dependents who are unable to earn a living as a classifying standard for the purpose of encouraging people to be filial, promoting fair taxation, raising tax revenue, and increasing the efficiency of tax administration.

However, those who need support due to their inability to earn a living do not become self-sustaining simply because they become more than twenty years old and less than sixty years old. Similarly, the taxpayers who support their relatives and family members who are more than twenty years old and less than sixty years old face a financial burden that is the same as that faced by taxpayers who support dependents who are less than twenty years old or more than sixty years old. In other words, the financial burden of the taxpayers who support their relatives who are unable to earn a living is fixed across the different age groups of the supported family members. The provision in dispute affects the will of taxpayers to support relatives or family members who are over twenty years old but less than sixty years old, which

0號函所示，系爭規定以無謀生能力之受扶養人之年齡作為分類標準，旨在鼓勵國人孝親、課稅公平、徵起適足稅收及提昇稅務行政效率。惟無謀生能力而有受扶養之需要者，不因其年齡滿二十歲及未滿六十歲，而改變其對於受扶養之需要，為扶養之納稅義務人亦因扶養而有相同之財務負擔，不因無謀生能力者之年齡而有所差異。系爭規定影響納稅義務人扶養較為年長而未滿六十歲之其他親屬或家屬之意願，致此等親屬或家屬可能無法獲得扶養，此與鼓勵國人孝親之目的有違；且僅因受扶養者之年齡因素，致已扶養其他親屬或家屬之納稅義務人不能減除扶養親屬免稅額，亦難謂合於課稅公平原則。

may decrease the level of family support provided to these relatives or family members. Therefore, the provision in dispute is inconsistent with the purpose of encouraging people to be filial. Moreover, it amounts to unfair taxation that some taxpayers who are supporting their relatives or family members cannot claim an exemption when calculating their taxable income simply because the supported relatives or family members are over twenty years old but less than sixty years old.

Furthermore, the taxpayers who want to claim the exemption pursuant to the provision in dispute have to provide documents proving that the dependents are indeed unable to earn a living. The provision in dispute not only requires that the dependents indeed are unable to earn a living, but also requires that the dependents be under twenty years old or over sixty years old. The requirement that the dependents be under twenty years old or over sixty years old does not enhance the efficiency of tax administration, but significantly harms the interests of taxpayers and their dependents. Therefore, the

再者，依系爭規定主張減除免稅額之納稅義務人，本即應提出受扶養者無謀生能力之證明文件，系爭規定除以受扶養者無謀生能力為要件外，另規定未滿二十歲或滿六十歲為限制要件，並無大幅提升稅務行政效率之效益，卻對納稅義務人及其受扶養親屬之權益構成重大不利影響。是系爭規定所採以年齡為分類標準之差別待遇，其所採手段與目的之達成尚欠實質關聯，其差別待遇乃屬恣意，違反憲法第七條平等原則。系爭規定有關年齡限制部分，應自本解釋公布日起，至遲於屆滿一年時，失其效力。

differential treatment caused by the age classification in the provision in dispute is a means that lacks substantial relationship to the end that the means seeks to achieve, which means that the differential treatment is arbitrary and thereby inconsistent with the principle of equality enshrined in Article 7 of the Constitution. The age restriction in the provision in dispute therefore shall become void within one year from the date of this Interpretation.

Justice Yeong-Chin Su filed concurring opinion.

Justice Si-Yao Lin filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Chang-Fa Lo filed concurring opinion in part and dissenting opinion in part.

Justice Dennis Te-Chung Tang filed concurring opinion in part and dissenting

本號解釋蘇大法官永欽提出協同意見書;林大法官錫堯提出協同意見書;黃大法官茂榮提出協同意見書；葉大法官百修提出協同意見書；陳大法官新民提出協同意見書；羅大法官昌發提出部分協同部分不同意見書；湯大法官德宗提出部分協同部分不同意見書；陳大法官春生、池大法官啟明及黃大法官璽君共同提出不同意見書。

opinion in part.

Justice Chun-Sheng Chen filed dissenting opinion, in which Justice Chi-Ming Chih and Justice Huang, Hsi-Chun joined.

EDITOR'S NOTE:

Summary of facts: Article 17, Paragraph 1, Sub-paragraph 1, Item 4, of the Income Tax Act as amended on January 3, 2001, stipulates: "The net consolidated income of an individual equals the gross consolidated income, as computed in accordance with the preceding three Articles, subtracted by the following exemption and deductions: 1. Exemption: Taxpayers may claim a prescribed amount of exemption for themselves, their spouses, and their family dependents that meet any of the conditions below. …(4) Other relatives or family members of the taxpayer within the meaning of Article 1114, Subparagraph 4, or Article 1123, Paragraph 3, of the Civil Code who are either under twenty years of age or over sixty years of age, are incapable of earning a livelihood, and are supported by the taxpayer.…" The same requirement appears in Article

編者註：

事實摘要：90.1.3 修訂之所得稅法 17 條 1 項本文規定，個人綜合所得總額，減除免稅額及扣除額後之餘額，為個人之綜合所得淨額。該項第 1 款並規定，納稅義務人按規定減除其本人、配偶及合於下列規定扶養親屬之免稅額。其第 4 目所定「納稅義務人其他親屬或家屬，合於民法第 1114 條第 4 款及第 1123 條第 3 項之規定，未滿 20 歲或滿 60 歲以上無謀生能力，確係受納稅義務人扶養者」（下稱系爭規定），即屬得扣除免稅額之受扶養親屬。(現行法亦有相同之年齡限制)。

17, Paragraph 1, Sub-paragraph 1, Item 4, of the Income Tax Act amended on January 19, 2011.

The applicant claimed an exemption for supporting other relatives or family members when filing annual tax returns in 2003, 2005, 2006, and 2007. The National Taxation Administration of the Northern Taiwan Province found that the applicant's claim failed to meet the requirement that other relatives or family members be less than twenty years old or more than sixty years old. The applicant disputed the government's finding and sued the National Taxation Administration in the Administrative Court. The applicant lost the suit and applied for interpretation on the question whether the provision in dispute as applied by the Administrative Court was unconstitutional.

聲請人於92、94至96年度綜合所得稅結算申報，分別列報扶養其他親屬免稅額，經財政部台灣省北區國稅局以該其他親屬未符合系爭規定未滿20歲或滿60歲之要件，予以剔除。聲請人不服，提起行政訴訟敗訴確定，認終局確定判決所適用之系爭規定，關於年齡之限制，有違憲疑義，聲請解釋。

J. Y. Interpretation No.695（30 December 2011）*

ISSUE: Given the dual system of litigation adopted by the Constitution, it is asked if disputes over the denial of a lease granted according to the Operational Guidelines for the Restoration of over-cultivated, state-owned Woodland, are to be resolved by administrative litigation or not.

RELEVANT LAWS:

J. Y. Interpretation No. 448, No. 466, and No. 540（司法院釋字第四四八號、第四六六號、第五四0號解釋）；the Operational Guidelines for the Restoration of over-cultivated, state-owned Woodland (Promulgated on 23 April 2008)（國有林地濫墾地補辦清理作業要點，中華民國九十七年四月二十三日訂定發布）；Article 5 of the Forest Law（森林法第五條）.

KEYWORDS:

public law relations（公法關係）, administrative litigation（行政爭訟）, administrative rroceedings（行政訴訟）, administrative court（行政法院）, private law relations（私法關係）, civil action（民事訴訟）, court of general jurisdiction（普通法院）, trial（審判）, remedy（救濟）, state-owned woodland（國有林地）, over-cultivation（濫墾）, homeland security（國土保安）, public interest（公共利益）, major public interest（重大公益）, public authorities（公權力）, lease（租賃契約）.**

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* Translated by Marie C.Y. Li .

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

HOLDING: Cases involving district offices of the Council of Agriculture of the Executive Yuan's Forestry Bureau which, in accordance with the Operational Guidelines for the Restoration of over-cultivated, state-owned Woodland, have denied applications for leases are to be considered as disputes arising from relations governed by public law, and therefore the injured party may seek remedy through administrative litigation duly adjudicated by the administrative courts.

解釋文：行政院農業委員會林務局所屬各林區管理處對於人民依據國有林地濫墾地補辦清理作業要點申請訂立租地契約未為准許之決定，具公法性質，申請人如有不服，應依法提起行政爭訟以為救濟，其訴訟應由行政法院審判。

REASONING: Under the existing law, trials of civil and administrative cases are conducted in separate courts: that is, the administrative courts and the courts of general jurisdiction. Unless otherwise stipulated by law, disputes arising from relations governed by private law shall be determined by courts of general jurisdiction; disputes arising from relations governed by public law shall be adjudicated by administrative courts (see J. Y. Interpretation No. 448 and No. 466). In cases involving civilians applying for contracts with the Authorities based on administrative regulations, the said Au-

解釋理由書：我國關於民事訴訟與行政訴訟之審判，依現行法律之規定，分由不同性質之法院審理。除法律別有規定外，關於因私法關係所生之爭執，由普通法院審判；因公法關係所生之爭議，則由行政法院審判之（本院釋字第四四八號、第四六六號解釋參照）。至於人民依行政法規向主管機關為訂約之申請，若主管機關依相關法規須基於公益之考量而為是否准許之決定，其因未准許致不能進入訂約程序者，此等申請人如有不服，應依法提起行政爭訟（本院釋字第五四0號解釋參照）。

thorities may grant rejection on grounds of public interests, and the injured party may resort to administrative litigation for relief (see J. Y. Interpretation No. 540).

To continue on the work of restoration mandated in Agriculture Order No. 35876 issued by the Secretary of the former Taiwan Province on 27 May 1969 (also known as the "Taiwan Provincial Plan for the Restoration of Over-cultivated State-owned Woodland"), the Council of Agriculture under the Executive Yuan enacted the Operational Guidelines for the Restoration of Overcultivated, State-owned Woodland (hereafter "the Guidelines at issue") along with an Enforcement Plan on 23 April 2008 in an attempt to handle persons who engage in illegal cultivation or reclamation, and further launched forestry restoration to improve forestland security and boost public welfare. To this end, District Offices of the Council of Agriculture under the Executive Yuan's Forestry Bureau (hereafter "Forestry District Offices") may only contract with civilian applicants after the said applicants have actually applied for

行政院農業委員會為接續清理前依臺灣省政府中華民國五十八年五月二十七日農秘字第三五八七六號令公告「臺灣省國有林事業區內濫墾地清理計畫」，尚未完成清理之舊有濫墾地，於九十七年四月二十三日訂定發布國有林地濫墾地補辦清理作業要點（下稱系爭要點）暨國有林地濫墾地補辦清理實施計畫，將違法墾植者導正納入管理，以進行復育造林，提高林地國土保安等公益功能。行政院農業委員會林務局所屬各林區管理處（下稱林區管理處）於人民依據系爭要點申請訂立租地契約時，經審查確認合於系爭要點及相關規定，始得與申請人辦理訂約。

a lease in accordance with the Guidelines at issue as well as other related ordinances.

The main purpose of such restoration task lies in resolving problems arisen from over-cultivation on stateowned woodland as well as preserving long-term public interests such as homeland security (see Article 5 of the Forest Law). Hence, the Forestry District office has the authority to reject any leasing contract proposed by civilian applicant on grounds of threats to maintain sustainable forestry management or to matters of major public interest such as homeland security during its investigation process or having confirmed the compliance of the said civilian occupier. As a result, the threshold lies in whether the decision made by the Forestry District Office is based on the exercise of public authority. In other words, if public policy plays a part in the determination by the Forestry District Office when weighing up whether or not to lease stateowned woodland to civilian applicants, the subsequent decision certainly pertains to public law. As a

按補辦清理之目的在於解決國有林地遭人民濫墾之問題，涉及國土保安長遠利益（森林法第五條規定參照）。故林區管理處於審查時，縱已確認占用事實及占用人身分與系爭要點及有關規定相符，如其訂約有違林地永續經營或國土保安等重大公益時，仍得不予出租。是林區管理處之決定，為是否與人民訂立國有林地租賃契約之前，基於公權力行使職權之行為，仍屬公法性質，如有不服，自應提起行政爭訟以為救濟，其訴訟應由行政法院審判。

consequence, an injured party must resort to administrative litigation for relief, and all related disputes of this kind shall be adjudicated by administrative courts.

Justice Chang-Fa Lo filed concurring opinion

Justice Si-Yao Lin filed dissenting opinion.

Justice Pai-Hsiu Yeh filed dissenting opinion in which Justice Mao-Zong Huang joined.

Justice Shin-Min Chen filed dissenting opinion.

Justice Hsi-Chun Huang filed dissenting opinion.

本號解釋羅大法官昌發提出協同意見書;林大法官錫堯提出不同意見書;葉大法官百修及黃大法官茂榮共同提出不同意見書；陳大法官新民提出不同意見書；黃大法官璽君提出不同意見書。

EDITOR'S NOTE:

Summary of facts: The Petitioner (for this Interpretation) serves as a civil court judge at Taiwan Yilan District Court (hereafter "Yilan Court"). The reason for this petition arose from the fact that the Yilan Court was the original trial court for the leasing dispute. The plaintiffs, including A applied to Luodong Forest District Office for a lease based on the Operational Guidelines for the Res-

編者註：

事實摘要：聲請人係臺灣宜蘭地方法院（下稱宜蘭地院）民事庭法官，原因案件係該庭審理之租地契約事件。原告 A 等二人先依據國有林地濫墾地補辦清理作業要點（下稱系爭要點）向羅東林管處申請補辦清理訂立租地契約，經該處以申請資格及申請標的俱與相關規定不符為由否准；原告乃提起訴願、行政訴訟，經臺北高等行政法院認無受理權限，以 98 年度訴字第 1590 號

toration of Over-cultivated, State-owned Woodland (hereafter "the Guidelines at issue"). Their application was rejected on grounds of poor qualifications as well as failure to attain objective compliance. The plaintiffs filed for petition and administrative litigation, but were then vacated (Judgment of 98 Su Zi No. 1590 (2009)) and remanded back to the Yilan Court by the Taipei High Administrative Court based on lacking of justified jurisdiction. After the case was dismissed by the Luodong Summary Division of the Yilan Court, the plaintiffs appealed. Chief Justice B of the Civil Division of the Yilan Court, and Justices C and D all held the same position that the case at issue was of public law nature and thus the Civil Division of the Yilan Court lacked jurisdiction over such case. Owing to the discrepancy of judicial opinions between the Civil Division of the Yilan Court and the Taipei High Administrative Court and pursuant to Article 182-1 Section 1 of the Code of Civil Procedure, the case at issue was ruled to cease and petition for interpretation by the Judicial Yuan was properly requested (Civil Judgment of 99

裁定移送宜蘭地院。案經宜蘭地院羅東簡易庭以判決駁回，原告遂向宜蘭地院提起上訴，宜蘭地院民事庭審判長B、法官C及D認該事件為公法爭議，其並無受理權限，因此一見解與上開臺北高等行政法院確定裁定有異，遂依民事訴訟法第182-1條第1項前段規定，以99年度簡上字第48號民事裁定，裁定停止訴訟，聲請統一解釋。

Jian Shang Zi No. 48 (2010)).

J. Y. Interpretation No.696（January 20, 2012）*

ISSUE: 1.Is the Income Tax Act provision constitutional in requiring a taxpayer and his/her spouse to file a joint tax return for their aggregate non-salary income ?

2.Is the Directive issued by the Ministry of Finance in 1987 constitutional in requiring the share of tax liability that a party of a separated couple must bear to be apportioned based on the ratio of the party's income to the couple's aggregate income ?

RELEVANT LAWS:

Articles 7, 15 and 23 of the Constitution（憲法第七條、第十五條、第二十三條）；J.Y. Interpretation Nos. 318, 547, 554, 584, 596, 605, 614, 647, 648, 666, 682 and 694（司法院釋字第三一八號、第五四七號、第五五四號、第五八四號、第五九六號、第六０五號、第六一四號、第六四七號、第六四八號、第六六六號、第六八二號、第六九四號解釋）；Article 15, Paragraph 1, of the Income Tax Act (as amended on December 30, 1989 and June 25, 2003)（所得稅法第十五條第一項（中華民國七十八年十二月三十日修正公布、九十二年六月二十五日修正公布））；Article 15, Paragraph 2, of the Income Tax Act (as amended on December 30, 1989 and June 25, 2003)（所得稅法第十五條第二項前段（中華民

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* Translated by Ya-Wen Yang/ Ching-Yuan Huang.

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國七十八年十二月三十日修正公布、九十二年六月二十五日修正公布））；The Directive Reference No. TTS-7519463 as issued by the Ministry of Finance on March 4, 1987（財政部七十六年三月四日台財稅第七五一九四六三號函）；The Directive Reference No. TTS-770653347 as issued by the Ministry of Finance on March 25, 1988（財政部七十七年三月二十五日台財稅第七七0六五三三四七號函）。

KEYWORDS:

non-salary income of a married couple（夫妻非薪資所得）, jointly filing tax return and paying tax liability（合併報繳）, joint computation of tax liability（合併計算）, joint tax return（合併申報）, separate computation of tax liability（單獨計算稅額）, progressive tax rate（累進稅率）, principle of equality（平等原則）, principle of equal taxation（租稅公平）, differential treatment（差別待遇）, marital relationship（婚姻關係）, marriage and family（婚姻與家庭）, free development of character（人格自由）, institutional safeguard（制度性保障）, substantial relation（實質關聯）, cost of taxation（稽徵成本）, fiscal revenue（財政收入）, household unit（家計單位）, separation（分居）, joint tax liability（全部應繳納稅額）, individual consolidated income（個人所得總額）, a couple's aggregate income（夫妻所得總額）.**

HOLDING: Article 15, Paragraph 1, of the Income Tax Act as amended on December 30, 1989 provided

解釋文：中華民國七十八年十二月三十日修正公布之所得稅法第十五條第一項規定：「納稅義務人之配偶，及

that, where the spouse of a taxpayer and/or a dependent whose support deduction may be made in accordance with Article 17 of this Act has any income as provided in the preceding Article, the taxpayer shall include such income in his/her income tax return. (It was later amended on June 25, 2003, although the requirement that a married couple files a tax return and pays the tax liability jointly was not amended.) Insofar as the said provision requires that tax is imposed on the basis of such a joint return, if a taxpayer's liability as computed in conjunction with the nonsalary income of his or her spouse exceeds the amount payable if it were separately computed, thereby increasing his or her taxation, the situation is contrary to the principle of equality as provided by Article 7 of the Constitution. The said provision shall cease to apply no later than two years after this Interpretation is made public.

合於第十七條規定得申報減除扶養親屬免稅額之受扶養親屬，有前條各類所得者，應由納稅義務人合併報繳。」（該項規定於九十二年六月二十五日修正，惟就夫妻所得應由納稅義務人合併報繳部分並無不同。）其中有關夫妻非薪資所得強制合併計算，較之單獨計算稅額，增加其稅負部分，違反憲法第七條平等原則，應自本解釋公布之日起至遲於屆滿二年時失其效力。

The Directive Reference No. TTS-7519463 as issued by the Ministry of Finance on March 4, 1987 (hereinafter the "Directive at issue") stipulated as follows: The husband and wife of a separated cou-

財政部七十六年三月四日台財稅第七五一九四六三號函：「夫妻分居，如已於綜合所得稅結算申報書內載明配偶姓名、身分證統一編號，並註明已分居，分別向其戶籍所在地稽徵機關辦理

ple may each file a consolidated tax return with the tax authority at the place of each one's household registration, stating therein the name and ID No. of the spouse and the fact that they are separated. In this event, the ratio of a party's tax liability to the couple's joint tax liability shall be computed based on the percentage that the party's consolidated income represents as compared to the couple's aggregate consolidated income. Upon either party's application, a separate tax assessment notice for each one's outstanding tax liability (*i.e*. the individual's tax liability minus the amounts withheld and paid) may be issued. The formula promulgated therein about how the joint tax liability is to be apportioned between the separated husband and wife violates fairness of taxation and hence shall be no longer applicable.

結算申報，其歸戶合併後全部應繳納稅額，如經申請分別開單者，准按個人所得總額占夫妻所得總額比率計算，減除其已扣繳及自繳稅款後，分別發單補徵。」其中關於分居之夫妻如何分擔其全部應繳納稅額之計算方式規定，與租稅公平有違，應不予援用。

REASONING: The principle of equality prescribed by Article 7 of the Constitution does not mean absolute and mechanical equality in formality, but is for the protection of substantive equal status under the law, which requires matters identical in nature be treated and handled

解釋理由書：憲法第七條所揭示之平等原則非指絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，要求本質上相同之事物應為相同之處理，不得恣意為無正當理由之差別待遇（本院釋字第五四七號、第五八四號、第五九六號、第六0五號、

identically without being subjected to differential treatment arbitrarily or for no proper justification. (See J.Y. Interpretation Nos. 547, 584, 596, 605, 614, 647, 648, 666 and 694.) For a statute or regulation to meet the equal protection requirement, the purpose of the differential treatment must be constitutional, and a sufficient degree of nexus must exist between the classification set out in the regulation and the objectives that the regulation seeks to achieve. (See J.Y. Interpretation Nos. 682 and 694.)

第六一四號、第六四七號、第六四八號、第六六六號、第六九四號解釋參照）。法規範是否符合平等權保障之要求，其判斷應取決於該法規範所以為差別待遇之目的是否合憲，其所採取之分類與規範目的之達成之間，是否存有一定程度之關聯性而定（本院釋字第六八二號、第六九四號解釋參照）。

Article 15, Paragraph 1, of the Income Tax Act as amended on December 30, 1989 (hereinafter "the provision at issue") provided that, where the spouse of a taxpayer and/or a dependent whose support deduction may be made in accordance with Article 17 of this Act has any income as provided in the preceding Article, the taxpayer shall include such income in his/her income tax return. (The provision at issue was later amended on June 25, 2003, although the requirement that a married couple files a tax return and pays the tax liability jointly was not

中華民國七十八年十二月三十日修正公布之所得稅法第十五條第一項規定：「納稅義務人之配偶，及合於第十七條規定得申報減除扶養親屬免稅額之受扶養親屬，有前條各類所得者，應由納稅義務人合併報繳。」（該項規定於九十二年六月二十五日修正，惟就夫妻所得應由納稅義務人合併報繳部分並無不同；下稱系爭規定）第二項前段規定：「納稅義務人之配偶得就其薪資所得分開計算稅額，由納稅義務人合併報繳。」（九十二年六月二十五日修正為：「納稅義務人得就其本人或配偶之薪資所得分開計算稅額，由納稅義務人合併

amended.) The anterior of Article 15, Paragraph 2, of the Income Tax Act, as amended on December 30, 1989, provided that the tax liability on the salary income of a taxpayer's spouse may be computed separately and then a tax return filed and the tax paid jointly by the taxpayer. (On June 25, 2003, this provision was further amended as follows: the tax liability on the salary income of a taxpayer or his/her spouse may be computed separately and then a tax return filed and paid jointly by the taxpayer.) Based on the above provisions, a married couple must file a joint tax return therein stating the husband and wife's aggregate non-salary income and compute the joint tax liability accordingly.

報繳。」）是夫妻非薪資所得應由納稅義務人及其配偶合併申報且合併計算其稅額。

Insofar as the procedure for filing the joint return is concerned, J.Y. Interpretation No. 318 has pointed out that the provisions are essential to the furtherance of the public interest and are not in conflict with the Constitution. Nevertheless, when tax is imposed on the basis of such a joint return, if the tax payable by a taxpayer as computed in conjunction with the income of his or her spouse and other

按合併申報之程序，係為增進公共利益之必要，與憲法尚無牴觸，惟如納稅義務人與有所得之配偶及其他受扶養親屬合併計算課稅時，較之單獨計算稅額，增加其稅負者，即與租稅公平原則不符，業經本院釋字第三一八號解釋在案。茲依系爭規定納稅義務人及其配偶就非薪資所得合併計算所得淨額後，適用累進稅率之結果，其稅負仍有高於分別計算後合計稅負之情形，因而形成

dependents exceeds the amount payable if it were separately computed, thereby increasing his or her taxation, the situation is contrary to the principle of fair taxation. Under progressive marginal tax rates, the tax liability computed based on a married couple's aggregate net non-salary income, as requested by the provision at issue, would exceed the sum of each party's separate tax liabilities computed individually based on each party's non-salary income. In this respect, the provision at issue constitutes tax discrimination based on marital status.

以婚姻關係之有無而為稅捐負擔之差別待遇。

Marriage and family serve as the foundation on which our society takes its shape and develops and are thus institutionally protected by the Constitution (See J.Y. Interpretation No. 554.) Tax discrimination based on marital status, which imposes heavier economic burdens on married couples, is equivalent to a marriage penalty and thus contravenes the intent of the Constitution to protect the institutions of family and marriage. For this reason, whether such discrimination under the provision at issue violates

按婚姻與家庭植基於人格自由，為社會形成與發展之基礎，受憲法制度性保障（本院釋字第五五四號解釋參照）。如因婚姻關係之有無而為稅捐負擔之差別待遇，致加重夫妻之經濟負擔，則形同對婚姻之懲罰，而有違憲法保障婚姻與家庭制度之本旨，故系爭規定所形成之差別待遇是否違反平等原則，應受較為嚴格之審查，除其目的須係合憲外，所採差別待遇與目的之達成間亦須有實質關聯，始合於平等原則。查系爭規定之立法目的旨在忠實反映家計單位之節省效果、避免納

the principle of equality shall be subject to stricter scrutiny. For the discrimination to comply with the principle of equality, it must aim at constitutional objects and bear a substantial relation to the accomplishment of such objects. The objects of the provision at issue are, inter alia, to reflect the saving effect of a household unit, to avoid illegitimate income splitting, to lower the cost of taxation and to generate sufficient fiscal revenue. (See the Legislative Yuan Gazettes, 79th Session, Vol. 59, p. 28 and p. 31, opinions of delegates of the Taxation Agency, Ministry of Finance, before this Court on September 21, 2010 and the Ministry of Finance Letter Reference No. TTS-10000190810 dated May 30, 2011, p 13.) However, the saving effect of a household unit, if any, does not necessarily occur when a couple live together, since people's life styles and spending habits vary. Even if there is such a saving effect, it is not a legitimate basis to impose heavier income tax liability. Moreover, although the legislature might adopt a joint taxation scheme to prevent the husband and wife from illegitimate income splitting, for such a scheme to have

稅義務人不當分散所得、考量稽徵成本與財稅收入等因素（參照立法院公報第七十九卷第五十九期第二十八頁及第三十一頁、財政部賦稅署代表於九十九年九月二十一日到本院之說明及財政部一００年五月三十日台財稅字第一０００００一九０八一０號函第十三頁）。惟夫妻共同生活，因生活型態、消費習慣之不同，未必產生家計單位之節省效果，且縱有節省效果，亦非得為加重課徵所得稅之正當理由。又立法者固得採合併計算制度，以避免夫妻間不當分散所得，惟應同時採取配套措施，消除因合併計算稅額，適用較高級距累進稅率所增加之負擔，以符實質公平原則。再立法者得經由改進稽徵程序等方式，以減少稽徵成本，而不得以影響租稅公平之措施為之。至於維持財政收入，雖攸關全民公益，亦不得採取對婚姻與家庭不利之差別待遇手段。綜上所述，系爭規定有關夫妻非薪資所得強制合併計算，較之單獨計算稅額，增加其稅負部分，因與上述立法目的之達成欠缺實質關聯，而與憲法第七條平等原則有違。

been in line with the principle of substantial fairness, the legislator should have taken auxiliary measures to eliminate the additional burden of computing the tax payable based on a couple's aggregate income, on which a higher tax bracket would apply. Also, the object of reducing taxation costs could be achieved by improving taxation procedures. In any event, measures that would impair tax equality must not be an option for the legislature to lower taxation costs. Finally, maintaining the desired level of fiscal revenue is indeed crucial to the public interest. Yet, such a goal must not be met through disfavored differential treatment of marriage and family. Conclusively, insofar as tax is imposed on the basis of such a joint return, if a taxpayer's liability as computed in conjunction with the non-salary income of his or her spouse exceeds the amount payable if it were separately computed, thereby increasing his or her taxation, the situation is contrary to the principle of equality as provided by Article 7 of the Constitution, since the tax burden thereby increased bears no substantial relation to the achievement of the aforesaid objects.

It would take an extensive period of time for the competent authority to redress the aforesaid unconstitutional provisions, given the wide impact of the amendment of such law and the complexity of taxation schemes. Under such circumstances, the unconstitutional provisions must cease to apply no later than two years after this Interpretation is made public.

上述違憲部分，考量其修正影響層面廣泛，以及稅捐制度設計之繁複性，主管機關需相當期間始克完成，應自本解釋公布之日起至遲於屆滿二年時失其效力。

The Directive Reference No. TTS-7519463 as issued by the Ministry of Finance on March 4, 1987 (hereinafter the "Directive at issue") stipulated as follows: The husband and wife of a separated couple may each file a consolidated tax return with the tax authority at the place of each one's household registration, stating therein the name and ID No. of the spouse and the fact that they are separated. In this event, the ratio of a party's tax liability to the couple's joint tax liability shall be computed based on the percentage that the party's consolidated income represents as compared to the couple's aggregate consolidated income. Upon either party's application, a separate tax assessment notice

財政部七十六年三月四日台財稅第七五一九四六三號函規定：「夫妻分居，如已於綜合所得稅結算申報書內載明配偶姓名、身分證統一編號，並註明已分居，分別向其戶籍所在地稽徵機關辦理結算申報，其歸戶合併後全部應繳納稅額，如經申請分別開單者，准按個人所得總額占夫妻所得總額比率計算，減除其已扣繳及自繳稅款後，分別發單補徵。」（下稱系爭函；該函依財政部九十八年九月十四日台財稅字第０九八０四五五八六八０號令不再援用）系爭函係主管機關為顧及分居中夫妻合併報繳之實際困難，而在申報程序上給予若干彈性，並以分別發單補徵之方式處理。查該函關於分居之夫妻如何分擔其全部應繳納稅額之計算方式規

for each one's outstanding tax liability (i.e. the individual's tax liability minus the amounts withheld and paid) may be issued. (The Directive at issue is no longer valid according to the Directive Reference No. TTS-09804558680 as issued by the Ministry of Finance on September 14, 2009.) By allowing a separate tax notice, the Directive at issue was meant by the authority incharge to be a flexible solution for separated couples' practical difficulty in filing a joint return and paying the tax together. However, as to how the joint tax liability is to be apportioned between the separated husband and wife, the formula promulgated in the Directive was based on the proportion of one party's individual consolidated income as compared to the couple's aggregate consolidated income. If the husband and wife's incomes are disparate, the party earning less income will bear tax liability disproportionate thereto. In this regard, the Directive did not comply with tax equality and shall not be applicable.

定，係依個人所得總額占夫妻所得總額之比率計算，以致在夫妻所得差距懸殊之情形下，低所得之一方須分擔與其所得顯然失衡之較重稅負，即與租稅公平有違，應不予援用。

With regard to the Petitioner's claim that the Directive Reference No. TTS-

關於聲請人指摘財政部七十七年三月二十五日台財稅第七七０六五三

770653347 as issued by the Ministry of Finance on March 25, 1988 violates Articles 7, 15 and 23 of the Constitution, it is found that the said Directive was only mentioned by the Taipei High Administrative Court decision No. 90-Su-Tzu-1982 in the summary of facts without being applied in the judgment. Hence, this part of the petition is not in conformity with Article 5, Paragraph 1, Sub-paragraph 2 of the Constitutional Interpretation Procedure Act and is hereby dismissed in accordance with Sub-paragraph 3 of the same Article.

三四七號函違反憲法第七條、第十五條及第二十三條部分，查臺北高等行政法院九十六年度訴字第一九八二號判決僅於事實概要中述及該函，並未援用該函為裁判，是此部分聲請核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理。

Justice Pai-Hsiu, Yeh filed concurring opinion in part.

Justice Mao-Zong, Huang filed concurring opinion.

Justice Beyue , Su Chen filed concurring opinion.

Justice Chang-Fa, Lo filed concurring opinion.

Justice Dennis Te-Chung, Tang filed concurring opinion.

Justice Yeong-Chin, Su filed dissenting opinion in part.

Justice Ching-You, Tsay filed dis-

本號解釋葉大法官百修提出部分協同意見書；黃大法官茂榮提出協同意見書；陳大法官碧玉提出協同意見書；羅大法官昌發提出協同意見書；湯大法官德宗提出協同意見書；蘇大法官永欽提出部分不同意見書；蔡大法官清遊提出部分不同意見書；陳大法官新民提出不同意見書。

senting opinion in part.

Justice Shin-Min, Chen filed dissenting opinion.

EDITOR'S NOTE:

Summary of facts: In filing the tax return for the taxable year of 2000, the petitioner did not include her spouse's income and interest of more than NT$40 million in her consolidated income as required under Article 15, Paragraph 1, of the Income Tax Act (the "provision at issue"). The petitioner's said tax return was later found to be illegal. When being fined for the violation, the petitioner claimed that she had no knowledge of her spouse's financial affairs, as they had been separated for several years. The Ministry of Finance thus agreed to issue a separate supplemental tax assessment notice pursuant to the Directive Reference No. TTS-770653347 dated March 25, 1988, and computed the applicant's outstanding tax liability in accordance with the formula applicable to a separated married couple as set forth in the Directive Reference No. TTS-7519463 dated March 4, 1987 ("Directive at issue"). As a result, despite

編者註：

事實摘要：聲請人於 89 年度綜合所得稅結算申報，未依所得稅法第 15 條第 1 項規定 (下稱系爭規定)，合併申報其配偶所得及利息所得 4 千餘萬元，遭查獲裁罰。聲請人主張與配偶分居多年，不知悉其財務狀況。財政部乃依 77 年 3 月 25 日台財稅第 770653347 號函規定，准予分別開單補徵，並依 76 年 3 月 4 日台財稅第 7519463 號函 (下稱系爭函) 所示分居夫妻之稅額計算方式，計算其應納稅額，扣除前已繳稅額後，補徵稅額 541,598 元。聲請人不服，循序提起行政訴訟，遭駁回確定，爰認確定終局判決所適用之系爭規定、系爭函及 77 年函，使夫妻併計結果，收入較少一方仍適用較高之累進稅率，有牴觸憲法疑義，聲請解釋。

the amount of tax that the petitioner had paid, she remained liable for NT$541,598 of tax. The applicant disagreed with the assessment and proceeded with administrative litigation, which was rejected by the court's final binding judgment. The petitioner filed this petition claiming that the provision at issue, Directive at issue and the Directive of 1988, on the basis of which the final binding judgment was rendered, were not constitutional, because, under a progressive income tax, when a married couple's tax liability is computed based on their aggregate income, the party with less income would be subject to the higher marginal tax rate applicable to the couple's aggregate income.

J. Y. Interpretation No.697（March 2, 2012）*

ISSUE: Is it unconstitutional the Commodity Tax Act provides that in a situation of consign process contract the consigned manufacturer be the taxpayer; and where all machine-made cool drinks be subject to commodity tax ?

RELEVANT LAWS:

Articles 7, 19, 23 of the Constitution（憲法第七條、第十九條、第二十三條）； J.Y. Interpretation Nos. 521, 635, 685（司法院釋字第五二一解釋、釋字第六三五號解釋、釋字第六八五號解釋）； Subparagraphs 1, 2, Paragraph 1, Article 2; Article 19; Paragraphs 1, 2, 3, Article 8 of the Commodity Tax Act（貨物稅條例第二條第一項第一款、第二款、第十九條第八條第一項、第二項、第三項）； Subparagraph 1, Article 32 of the Commodity Tax Act (amended and promulgated on 1997.5.7; effective on 2002.1.1)（貨物稅條例第第三十二條第一款（中華民國八十六年五月七日修正公布，九十一年一月一日施行））； Article 32 of the Commodity Tax Act (amended and promulgated on 2009.12.30)（貨物稅條例第三十二條（中華民國九十八年十二月三十日修正公布））；Articles 10, 15, 17 (Paragraph 1), 18 of the Regulations for the Collection of Commodity Tax（ 貨物稅稽徵規則第十條、第十五條、第十七條第一項、第

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* Translated by Chun-Yih Cheng.

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

十八條）；Ministry of Finance Letters 1990.11.1 Tai-Tsai-Suei No.790367324, 1995.11.24 Tai-Tsai-Suei No. 841660961, 1985.11.14 Tai-Tsai-Suei No. 24779, 1983.9.6 Tai-Tsai-Suei No. 36286, Ministry of Finance Order 2009.10.26 Tai-Tsai-Suei No. 09804564950（財政部中華民國七十九年十一月一日台財稅第七九0三六七三二四號函、八十四年十一月二十四日台財稅第八四一六六0九六一號函、七十四年十一月十四日台財稅第二四七七九號函、七十二年九月六日台財稅第三六二八六號函、財政部九十八年十月二十六日台財稅字第0九八0四五六四九五0號令）.

KEYWORDS:

explicitness of law（法律明確性）, principle of statutory taxpaying（租稅法律主義）, cool drinks（清涼飲料品）, commodity tax act（貨物稅條例）, indefinite concept of law（不確定法律概念）, penalty for tax evasion（漏稅罰）, legislative discretion（立法裁量）.**

HOLDING: The provision of Subparagraph 2, Paragraph 1, Article 1 of the Commodity Tax Act (hereafter, the Act) that "Commodity tax is levied upon removal of taxable commodities from the manufacturers' premises or upon importation. The taxpayers are as follows: … 2. For commodities manufactured on a consign process contract: the manufacturer

解釋文：貨物稅條例（下稱本條例）第二條第一項第二款規定：「貨物稅於應稅貨物出廠或進口時徵收之。其納稅義務人如左：……二、委託代製之貨物，為受託之產製廠商。」與法律明確性原則尚無違背。惟於委託多家廠商分工之情形，立法機關宜考量產製之分工、製程及各種委託製造關係，明定完成應稅貨物之產製階段，作為認定受託

of the processed taxable goods." is not contrary to the principle of explicitness of law. However, in a situation where there are several consigned manufacturers for division of works, the legislative body should better consider the division of works, process and all kinds of consign process contracts in the manufacturing process to determine the completion stage of the manufacture of taxable goods so as to identify the consigned manufacturer, and in due course to review and improve the relevant provisions.

產製廠商之依據，適時檢討相關規定改進之。

Paragraph 1, Article 8 of the Act provides that, "The tax rates for all kinds of machine-made cool drinks are as follows: 1. Diluted natural fruit/vegetable juice: taxed on an ad valorem basis at 8%; 2. Other beverage: tax on an ad valorem basis at 15%." The provision therein related to cool drinks is not contrary to the principle of explicitness of law. In addition, the above provision imposes commodity tax only on machine-made cool drinks, but not on non-machinemade ones, which is not contrary to the princi-

本條例第八條第一項規定：「飲料品：凡設廠機製之清涼飲料品均屬之。其稅率如左：一、稀釋天然果蔬汁從價徵收百分之八。二、其他飲料品從價徵收百分之十五」。其中有關清涼飲料品之規定，與法律明確性原則尚無不合。又上開規定僅對設廠機製之清涼飲料品課徵貨物稅，而未對非設廠機製者課徵貨物稅，並不違反憲法第七條之平等原則。

ple of equality as set forth in Article 7 of the Constitution.

Ministry of Finance Letter 1990.-11.1 Tai-Tsai-Suei No.790367324, which considered a drink based on the quantity of solid content reaching 50%, and Ministry of Finance Letter 1995.11.24 Tai-Tsai-Suei No. 841660961, which considered edible bird's nest drinks imported or manufactured by enterprises as taxable drinks under Article 8 of Commodity Tax Act, are not contrary to the principle of statutory taxpaying.

財政部中華民國七十九年十一月一日台財稅第七九0三六七三二四號函，以內含固體量是否達到百分之五十作為飲料品之認定標準，及財政部八十四年十一月二十四日台財稅第八四一六六0九六一號函，對廠商進口或產製之燕窩類飲料，認屬貨物稅條例第八條規定之應稅飲料品，尚不違反租稅法律主義之意旨。

Subparagraph 1, Article 32 of the Commodity Tax Act, which was amended and promulgated on 1997.5.7 and became effective on 2002.1.1, providing that, "In any of the following circumstances, the taxpayer shall be pursued for payment of taxes and fined from 5 to 15 times the amount of tax evaded: 1. Failing to complete necessary registration in compliance with Article 19, and illegally manufacturing commodities subject to commodity tax." (which penalty was amended to be 1

八十六年五月七日修正公布，九十一年一月一日施行之貨物稅條例第三十二條第一款規定：「納稅義務人有左列情形之一者，除補徵稅款外，按補徵稅額處五倍至十五倍罰鍰：一、未依第十九條規定辦理登記，擅自產製應稅貨物出廠者。」（九十八年十二月三十日修正為一倍至三倍罰鍰）與憲法比例原則並無牴觸。

to 3 times on 2009.12.30) is not contrary to the constitutional principle of proportionality.

REASONING: Article 19 of the Constitution provides that the people shall have the duty of paying taxes in accordance with law. And the legal conditions for taxation should comply with the principle of explicitness of law. However, where the legislation utilizes an indefinite concept of law or other abstract concepts, if the meaning is understandable, and is predictable by the regulated, and could be confirmed through judicial review, it may not be considered as being contrary to the principle of explicitness of law (see J.Y. Interpretation No. 521).

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，而法律規範之租稅構成要件，應遵守法律明確性原則。惟立法使用不確定法律概念或其他抽象概念者，苟其意義非難以理解，且為受規範者所得預見，並可經由司法審查加以確認，即不得謂與法律明確性原則相違（本院釋字第五二一號解釋參照）。

Subparagraphs 1, 2, Paragraph 1, Article 2 of the Act provide that, “Commodity tax is levied upon removal of taxable commodities from the manufacturers’ premises or upon importation. The taxpayers are as follows: 1. For commodities manufactured domestically: the manufacturer. 2. For commodity manufactured on a consign process contract:

本條例第二條第一項第一款、第二款規定：「貨物稅於應稅貨物出廠或進口時徵收之。其納稅義務人如左：一、國內產製之貨物，為產製廠商。二、委託代製之貨物，為受託之產製廠商。」是國內產製應稅貨物者，以產製廠商為納稅義務人。至於委託代製應稅貨物者，則以受託之產製廠商為納稅義務人。但不論係自行產製應稅貨物或是

the manufacturer of the processed taxable goods." Therefore, where taxable goods are manufactured domestically, the manufacturers are the taxpayers. As regards to taxable goods manufactured by consign process contract, the consigned manufacturers are the taxpayers. However, regardless of whether they are self-manufacturing manufacturers or consigned manufacturers, they should, in accordance with Article 19 of the Act, Articles 10 and 15 of the Regulations for the Collection of Commodity Tax (hereafter the Regulations), bear the obligation cooperation to complete the manufacturer's registration and product's registration. After these registrations have been approved by the tax authority, they can then manufacture taxable goods. Further, according to Paragraph 1, Article 17 of the Regulation, the consigned manufacturers may manufacture taxable goods only after they have submitted the consign process contracts to the tax authority for review and the tax authority has approved the same. In addition, according to Article 18 of the Regulations, "Except in cases that follow the

受託產製應稅貨物之廠商，均有依本條例第十九條，以及貨物稅稽徵規則（下稱稽徵規則）第十條、第十五條完成廠商登記及產品登記之協力義務，並經主管稽徵機關准予登記後，始得產製應稅貨物。且受託產製廠商，依稽徵規則第十七條第一項，尚須將委託代製合約書一併送請主管稽徵機關審查，經審查核准後，始得產製應稅貨物。再依稽徵規則第十八條之規定：「應稅貨物使用包裝者，除依第十六條規定辦理及經專案核准之規格外，其包裝上均應以中文載明貨物之名稱及產製廠商之名稱、地址。」本條例第二條第一項第二款之受委託代製廠商，如僅係單一產製廠商獨立完成產製，由其承擔納稅義務，自無疑問。如係多家廠商分工，各自先後所為部分之產製行為，均為完成應稅貨物所必須。本條例第二條第一項第二款之規定，雖未明定何階段之受託產製廠商為貨物稅繳納義務人，尚非不能根據貨物類型特徵及其產製過程認定之。是本條例第二條第一項第二款規定由受委託之產製廠商為納稅義務人，為該等廠商產製前所能預見，並可經由司法審查加以確認，與法律明確性原則尚無違背。惟於委託多家廠商分工之情形，立法機

provisions in Article 16 herein and where packing specifications are approved under special case status, packed taxable goods shall have the name of the goods as well as the name and address of the manufacturer noted in Chinese on the package." In respect of the consigned manufacturer as set forth in Subparagraph 2, Paragraph 1, Article 2 of the Act, if there is only one manufacturer completing the manufacturing independently, it is doubtless that this manufacturer should bear the taxpaying obligation. If there are several manufacturers for division of works, with each sequentially engaged in part of the manufacturing process, which is necessary to complete the taxable goods, although the provision of Subparagraph 2, Paragraph 1, Article 2 of the Act does not specify which stage's consigned manufacturer being the commodity tax taxpayer, it could be ascertained by the specific character and the manufacturing process of the goods. Therefore, Subparagraph 2, Paragraph 1, Article 2 of the Act provides that the consigned manufacturer should be the taxpayer, which is predictable in

關宜考量產製之分工、製程及各種委託製造關係，明定完成應稅貨物之產製階段，作為認定受託產製廠商之依據，適時檢討相關規定改進之。

advance by such manufacturer, and could be confirmed through judicial review, and therefore is not contrary to the principle of explicitness of law. However, in a situation where there are several consigned manufacturers for division of works, the legislative body should better consider the division of works, process and all kinds of consign process contracts used in the manufacturing process to determine the completion stage of the manufacture of taxable goods so as to identify the consigned manufacturer, and in due course to review and improve the relevant provisions.

Paragraph 1, Article 8 of the Act provides that, “The tax rates for all kinds of machine-made cool drinks are as follows: 1. Diluted natural fruit/vegetable juice: taxed on an ad valorem basis at 8%; 2. Other beverage: tax on an ad valorem basis at 15%.” Paragraph 3 of the same Article defines only the term “machinemade”, while without defining the term “cool drinks”. However, so called “cool” is a relative concept, and is not neces-

本條例第八條第一項規定：「飲料品：凡設廠機製之清涼飲料品均屬之。其稅率如左：一、稀釋天然果蔬汁從價徵收百分之八。二、其他飲料品從價徵收百分之十五。」同條第三項雖就「設廠機製」為明文之定義，而未就「清涼飲料品」予以定義。惟所謂「清涼」者，乃相對之概念，並非與溫度有絕對關連，而市售此類飲料種類眾多，立法者實無從預先鉅細靡遺悉加以規定。消費者於購買飲料品後，開封即可飲用，

sarily connected to temperature. There are many such drinks on the market, it is impossible for the legislators to list them all in advance. All drinks which have the character that the consumers can open the cap and drink belong to “cool drinks”. This is not unpredictable by the regulated, and is not contrary to the principle of explicitness of law.

凡符合此一特性者，即屬於清涼飲料品，此非受規範者所不能預見，與法律明確性原則尚無不合。

All machine-made cool drinks should be subject to commodity tax as expressly specified in Article 8 of the Act. In addition, Paragraph 3 of the same Article provides that, “The socalled “machine-made cold drinks” in the first Paragraph refer to either one of the conditions below: 1. The drinks are made at fixed premises and sealed in bottles (boxes, cans or barrels) using motor-driven or non-motor driven machinery. 2. The drinks are made at fixed premises where the raw materials or semi-finished products of the drinks are made using motor-driven or nonmotor driven machinery and loaded into a vending machine for mixture and sale.” The quantity of nonmachine made cool

凡設廠機製之清涼飲料品應課徵貨物稅，本條例第八條第一項定有明文。又同條第三項規定：「第一項所稱設廠機製，指左列情形之一：一、設有固定製造場所，使用電動或非電動之機具製造裝瓶（盒、罐、桶）固封者。二、設有固定製造場所，使用電動或非電動機具製造飲料品之原料或半成品裝入自動混合販賣機製造銷售者。」至於市面上非設廠而以手工或機具調製之清涼飲料品，產量有限，對之課徵貨物稅不符稽徵成本，與設廠產製之清涼飲料品，係以機具裝填、充入或分裝原物料，大量製造運銷出廠，始再轉售與消費者之情形不同。貨物稅之課徵，乃立法者針對國內產製或自國外輸入特定類別貨物所課徵之一種單一階段銷售稅，原則上

drinks, which are mixed and made by hand or tools, is limited on the market. To impose commodity tax on them is not cost-efficient. The situation is different for machine-made cool drinks, which are stuffed and packaged by machine, and mass produced in factories and resold to the consumers. The commodity tax is a single stage sales tax, which is imposed by the legislator on specific categories of goods which are manufactured domestically or imported from abroad. In principle, the target is on the machinemade, mass, and standardized production. The legislative choice to imposed tax on cool drinks is based on national economic and fiscal considerations, and is thus not abusive. Therefore, Article 8 of the Act, which imposes commodity tax only on machinemade cool drinks, and not on non-machine made drinks, is not contrary to the principle of equality of Article 7 of the Constitution.

以設廠集中生產、產量較大與標準化生產為課徵對象。立法者選擇設廠機製之清涼飲料品課稅，係基於國家經濟、財政政策之考量，自非恣意。是本條例第八條僅對設廠機製之清涼飲料品課徵貨物稅，而未對非設廠機製者課徵貨物稅，並不違反憲法第七條之平等原則。

"Other beverage" as defined in Subparagraph 2, Paragraph 1, Article 8 of the Act, does not refer to diluted natural

至於本條例第八條第一項第二款「其他飲料品」之定義，除其須非屬同條第一項第一款之稀釋天然果蔬

fruit/ vegetable juice under Subparagraph 1, Paragraph 1 of the same Article, or pure natural or condensed fruit or vegetable juice (jus) in conformance with national standards under Paragraph 2 of the same Article. In addition, the Ministry of Finance Letter 1990.11.1 Tai-Tsai-Suei No. 790367324 explained that, "2. For machine-made canned green bean soup, peanut soup etc, according to the principle of this Ministry's Letters (1983) Tai-Tsai-Suei No. 36286 and (1985) Tai-Tsai-Suei No. 24779, it should be reviewed whether the quantity of solid content reaches 50%; if not reaching 50%, it should be treated as drink, and subject to the commodity tax at the rate of 15%." (hereafter 1990 Letter; the above Letter (1983) Tai-Tsai-Suei No. 36286 was abolished by the Ministry of Finance Order 2009.10.26 Tai-Tsai-Suei No. 09804564950.) As such, whether machine-made drinks, which contain drinkable and edible liquid and additions, are subject to commodity tax depends on whether such drinks contain "50% solid" or not. These are explanations made by the competent authority based on their

汁及同條第二項合於國家標準之純天然與濃縮果、蔬菜汁（漿）外，財政部七十九年十一月一日台財稅第七九0三六七三二四號函示：「二、設廠機製之罐裝綠豆湯、花生湯等，依本部（72）台財稅第三六二八六號函及（74）台財稅第二四七七九號函規定之原則，應查明其內含固體量是否達到百分之五十，其內容量如未達百分之五十以上者，應按飲料品從價徵收百分之十五貨物稅。」（下稱七十九年函，上開（72）台財稅第三六二八六號函業經財政部九十八年十月二十六日台財稅字第0九八0四五六四九五0號令廢止）準此，設廠機製之飲料品，內含可供飲用及食用之液體與添加物，應否課徵貨物稅，以該項飲料品是否「內含固體量達到百分之五十」作為認定標準。此係由主管機關本於職權作成解釋性函釋，以供下級機關於個案中具體判斷，該認定標準符合社會通念對於飲料品之認知，與一般法律解釋方法無違，尚不違反租稅法律主義之意旨（本院釋字第六三五號、第六八五號解釋參照）。另財政部八十四年十一月二十四日台財稅第八四一六六0九六一號函謂：「廠商進口或產製之燕窩類飲料，核屬貨物稅

competence in order for their subordinate agencies to decide on individual cases. Such standards comply with general concept of the society, and are not contrary to the general principle of interpretation of law, and thus are not contrary to the concept of statutory taxpaying (see J.Y. Interpretation Nos. 635 and 685). In addition, the Ministry of Finance Letter 1995.11.24 Tai-Tsai-Suei No. 841660961 explained that, "edible bird's nest drinks imported or manufactured by enterprises are taxable drinks under Article 8 of Commodity Tax Act, and are subject to commodity tax according to the law." This was an explanatory letter issued by the competent authority following the standards of drinks set forth by the above 1990 Letter to decide whether edible bird's nest drinks are cool drinks or not. The opinion expressed in the Letter complies with general concept of the society regarding cool drinks, and is not contrary to the principle of statutory taxpaying. However, there are a wide variety of drinks, and new products emerge day by day. Whether the deciding standards for cool drinks, which are subject to

條例第八條規定之應稅飲料品，應依法課徵貨物稅。」乃屬主管機關循上開七十九年函釋認定飲料品之標準，就燕窩類飲料是否為清涼飲料之解釋性函釋，符合社會通念關於清涼飲料品概念之認知，亦未違反租稅法律主義。惟飲料品之種類繁多，產品日新月異，是否屬應課徵貨物稅之清涼飲料，其認定標準，有無由立法者以法律或授權主管機關以法規命令規定之必要，相關機關宜適時檢討改進，併此指明。

commodity tax, should be specified in the statute as enacted or in the statutory order of the competent authority as delegated by legislators should be reviewed by the relevant agencies in due course.

Subparagraph 1, Article 32 of the Commodity Tax Act, which was amended and promulgated on 1997.5.7 and became effective on 2002.1.1, provides that, "In any of the following circumstances, the taxpayer shall be pursued for payment of taxes and fined from 5 to 15 times the amount of tax evaded: 1. Failing to complete necessary registration in compliance with Article 19, and illegally manufacturing commodities subject to commodity tax." (which penalty was amended to be 1 to 3 times on 2009.12.30). The above provision bears the nature of penalty for tax evasion imposed on the taxpayer who does not complete the manufacturer's registration and product's registration in accordance with the law and who manufactures taxable goods so as to evade tax. The purpose of imposing a penalty of 5 to 15 times the amount of tax evaded is to

八十六年五月七日修正公布，九十一年一月一日施行之貨物稅條例第三十二條第一款規定：「納稅義務人有左列情形之一者，除補徵稅款外，按補徵稅額處五倍至十五倍罰鍰：一、未依第十九條規定辦理登記，擅自產製應稅貨物出廠者。」（九十八年十二月三十日修正為一倍至三倍罰鍰）上開規定係對納稅義務人未依法辦理廠商登記及產品登記，即自行產製應稅貨物出廠而逃漏稅捐所為之處罰，具漏稅罰性質。其按補徵稅額處五倍至十五倍罰鍰，乃為防止漏稅，以達正確課稅之目的，尚未逾越立法裁量範圍，與憲法比例原則並無牴觸。

prevent tax evasion so as to ensure correct taxation. It is not beyond the legislative discretion and is not contrary to the constitutional principle of proportionality.

Justice Beyue Su Chen filed concurring opinion in part

Justice Yeong-Chin Su filed concurring opinion in which Justice Chun-Sheng Chen joined.

Justice Pai-Hsiu Yeh filed concurring opinion in part and dissenting opinion in part.

Justice Dennis Te-Chung Tang filed dissenting opinion in part.

Justice Mao-Zong Huang filed dissenting opinion.

Justice Chang-Fa Lo filed dissenting opinion

陳大法官碧玉提出之部分協同意見書；蘇大法官永欽提出、陳大法官春生加入之協同意見書；葉大法官百修提出之部分不同部分協同意見書；湯大法官德宗提出之一部不同意見書；黃大法官茂榮提出之不同意見書；羅大法官昌發提出之不同意見書。

EDITOR'S NOTE:

Summary of facts: Tai-yen and Kuang-chen cooperated with each other for the manufacturing of "Tai-yen Kuangchen collagen bird's nest" and consigned the manufacturing to Hweichi. Because Hwei-chi did not have manu-

編者註：

事實摘要：緣A及B二公司合作生產「AB膠原蛋白燕窩」，委由C公司代為產製。因C公司無機械生產設備，亦無工廠登記證，乃委聲請人D食品廠代工，由聲請人負責產品之充填、裝瓶工作。嗣財政部臺灣省南區國

facturing equipment, and did not have a factory license, it further consigned the manufacturing to the applicant Taifang Food Factory, which was responsible for the stuffing and bottling. Later on, the National Tax Administration of Southern Taiwan Province considered that the products belonged to drinks under Article 8 of the Commodity Tax Act, and were taxable. The applicant was the taxpayer of commodity tax, but failed to complete the registration according to Article 19 and unlawfully manufactured taxable goods. It was decided that the taxpayer should make up the commodity tax at the amount of NTD 347,939, and, according to Subparagraph 1, Article 32, be fined as penalty 10 times the sum at the amount of NTD 3,473,900.

稅局認該產品為貨物稅條例第 8 條所規定之飲料品，係應稅貨物，聲請人為貨物稅納稅義務人，未依第 19 條規定辦理登記而擅自產製應稅貨物，核定應補繳貨物稅 347,393 元，並依第 32 條第 1 款規定，按補繳稅額處 10 倍罰鍰 3,473,900 元。

The applicant objected to the decision, and in turn initiated an administrative litigation, but the suit was bindingly rejected. The applicant considered unconstitutional that the related provisions of the Commodity Tax Act are ambiguous, and that the applicant was not the taxpay-

聲請人不服，循序提起行政訴訟，遭駁回確定，爰認貨物稅條例相關規定不明確，其並非貨物稅納稅義務人，財政部 79 年 11 月 1 日台財稅第 790367324 號函及 84 年 11 月 24 日台財稅第 841660961 號函，就其代工之燕窩類飲料品認定為第 8 條之清涼飲料品，

er of commodity tax; and that the Ministry of Finance Letters 1990.11.1 Tai-Tsai-Suei No.790367324 and 1995.11.24 Tai-Tsai-Suei No. 841660961 determined that the consigned manufactured edible bird's nest drinks were cool drinks under Article 8, and therefore according to Subparagraph 1, Article 32, imposed on the applicant a penalty of 10 times the amount of tax evaded, and applied for interpretation.

進而依第 32 條第 1 款罰處 10 倍罰鍰，均有違憲疑義，聲請解釋。

J. Y. Interpretation No.698（March 23, 2012）*

ISSUE: 1. Is it unconstitutional that the Commodity Tax Act provides that a color television set shall be subject to commodity tax ?

2. Is it unconstitutional that Ministry of Finance Ordinance provides that if a display and a tuner are not removed together from the manufacturer's premises at the same time, the items shall not be deemed a taxable "color television set" and therefore are not subject to commodity tax ?

RELEVANT LAWS:

Articles 7 and 19 of the Constitution（憲法第七條、第十九條）; Subparagraph 2, Paragraph 1, Article 11 of the Commodity Tax Act（貨物稅條例第十一條第一項第二款）;Subparagraph 1, Article 32 of the Commodity Tax Act (as amended on May 7, 1997 and effective on January 1, 2002)（貨物稅條例第三十二條第一款(中華民國八十六年五月七日修正公布、九十一年一月一日施行)）; Ministry of Finance Directive Tai-Tsai-Suei No.09604501870 (June 14, 2007)（財政部九十六年六月十四日台財稅字第０九六０四五０一八七０號函）; Ministry of Finance Directive Tai-Tsai-Suei No.57275 (August 7, 1984)（財政部七十三年八月七日台財稅第五七二七五號函）; Ministry of Finance Ordinance Tai-Tsai-Suei No.0920455616 (Novem-

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* Translated by Wei-Feng Huang.

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

ber 18, 2003)（財政部九十二年十一月十八日台財稅字第０九二０四五五六一六號令）.

KEYWORDS:

Commodity Tax（貨物稅）, Color Television Set（彩色電視機）, Color Display（彩色顯示器）, TV Tuner（電視調諧器）, Removal from the Manufacturer's Premises at the same time（併同產製出廠）, Main Function（主要功能）, Consumers' Recognition（消費者認知）, Principle of Equality（平等原則）, Principle of Taxation by Law（租稅法定主義）.**

HOLDING: The provision of Subparagraph 2, Paragraph 1, Article 11 of the Commodity Tax Act that "Taxable items and tax rates for electric appliances are as follows:..... 2. Color television sets: taxed on an ad valorem basis at 13%." is not in contravention of the principle of equality under Article 7 of the Constitution.

解釋文：貨物稅條例第十一條第一項第二款規定：「電器類之課稅項目及稅率如左：……二、彩色電視機：從價徵收百分之十三。」與憲法第七條平等原則並無牴觸。

Ministry of Finance Ordinance Tai-Tsai-Suei No.09604501870 (June 14, 2007) is not in contravention of the principle of taxation by law and the principle of equality by providing that: "(1)

財政部中華民國九十六年六月十四日台財稅字第０九六０四五０一八七０號令：「一、貨物稅條例第十一條第一項第二款規定之彩色電視機須同時具備彩色顯示器及電視調諧器二大主要

a color television set as set forth in Subparagraph 2, Paragraph 1, Article 11 of the Commodity Tax Act is required to be equipped with two key component parts at the same time, namely, a color display and a TV tuner; (2) if a manufactured or imported color display is not equipped with a TV tuner and its product name, operation manual as well as packing do not identify it as a TV, and if its removal from the manufacturer's premises (or if its importation) is not combined with a machine that possesses a TV tuner function, it shall not be deemed a taxable "color television set" because it cannot receive TV/video signals and broadcast TV programs, and therefore is not subject to commodity tax upon removal from the manufacturer's premises or upon importation; (3) if a manufactured or imported TV tuner alone or a machine equipped with a TV tuner function, and its main body is not equipped with a TV display, and if its removal from the manufacturer's premises (or if its importation) is not combined with a TV display at the same time, it shall not be subject to commodity tax upon removal from the manufac-

部分。二、廠商產製（或進口）之彩色顯示器，本體不具有電視調諧器（TV Tuner）裝置，且產品名稱、功能型錄及外包裝未標示有電視字樣，亦未併同具有電視調諧器功能之機具出廠（或進口）者，因無法直接接收電視視頻訊號及播放電視節目，核非屬彩色電視機之範圍，免於出廠（或進口）時課徵貨物稅。三、廠商產製（或進口）電視調諧器或具有電視調諧器功能之機具，本體不具有影像顯示功能，且未併同彩色顯示器出廠（或進口）者，亦免於出廠（或進口）時課徵貨物稅。」部分，與租稅法律主義及平等原則尚屬無違。

turer's premises or upon importation."

REASONING: Taking Supreme Administrative Court order T.T. 4224 (Supreme Administrative Court, 2008) (the "order in dispute") as a final and conclusive judgment, Petitioner requested an interpretation on the constitutionality of the Court's application of Subparagraph 2, Paragraph 1, Article 11 of the Commodity Tax Act, Ministry of Finance Ordinance Tai-Tsai-Suei No.09604501870 (June 14, 2007) (the "ordinance in dispute") and Article 32 of the Commodity Tax Act which was amended and promulgated on May 7, 1997 and became effective on January 1, 2002, to the order in dispute. Examination of the order in dispute shows that Petitioner failed to concretely specify the reasons why Taipei High Administrative Court decision No. 96-Su-Tzu-517 failed to apply the law, applied it improperly, or violated it, and so ruled that the appeal should not be deemed lawful, and on procedural grounds overruled the appeal. Consequently, this Yuan opined that Taipei High Administrative Court decision

解釋理由書：聲請人以最高行政法院九十七年度裁字第四二二四號裁定（下稱系爭裁定）為確定終局裁判，認其所適用之貨物稅條例第十一條第一項第二款、財政部九十六年六月十四日台財稅字第０九六０四五０一八七０號令（下稱系爭令）及八十六年五月七日修正公布、九十一年一月一日施行之同條例第三十二條有違憲疑義，聲請解釋憲法。查系爭裁定以聲請人未具體表明臺北高等行政法院九十六年度訴字第五一七號判決有何不適用法規、適用法規不當或有其他違背法令之情形，而認上訴為不合法，從程序上裁定駁回上訴，應以上開臺北高等行政法院判決為本件聲請之確定終局判決。次查系爭令形式上雖未經確定終局判決所援用，惟確定終局判決所審酌之財政部七十三年八月七日台財稅第五七二七五號函及九十二年十一月十八日台財稅字第０九二０四五五六一六號令，其內容實質上為確定終局判決時已發布實施之系爭令所涵括（財政部於發布系爭令之同時廢止上開二函令），應認系爭令業經確定終局判決實質援用（本院釋字第三九九號、第五八二號、第六二二號及

No. 96-Su-Tzu-517 should be the final and conclusive judgment, based on which this petition at issue has been filed. Although the Court did not formally cite the ordinance in dispute when rendering its final judgment, the rationale and wording employed in the two administrative orders, i.e., Ministry of Finance Directive Tai-Tsai-Suei No.57275 (August 7, 1984) and Ministry of Finance Ordinance Tai-Tsai-Suei No.0920455616 (November 18, 2003) (collectively, the "two administrative orders") as the basis for its reasoning, are identical with the contents of the ordinance in dispute (the ordinance in dispute was promulgated at the same time when the two administrative orders were abolished). Therefore, the ordinance in dispute should, thus, be deemed to have been applied, in substance, by the final and conclusive judgment (See J.Y. Interpretations Nos. 399, 582, 622 and 675).

第六七五號解釋參照），合先敘明。

Subparagraph 2, Paragraph 1, Article 11 of the Commodity Tax Act provides that: "Taxable items and tax rates for electric appliances are as follows: .... 2. Color television sets: taxed on an

貨物稅條例第十一條第一項第二款規定：「電器類之課稅項目及稅率如左：……二、彩色電視機：從價徵收百分之十三。」（下稱系爭規定）查立法者選擇對彩色電視機課徵貨物稅，而未

ad valorem basis at 13%." (the "rule in dispute") and the legislative choice to impose commodity tax on color television sets but not on other electric appliances equipped with color-videocapture function is based on national tax, industrial policy, and energy-saving considerations and does not exceed the scope of legislative discretion. Therefore, it is neither abusive nor contrary to the principle of equality under the Constitution (See J.Y. Interpretation No. 697).

對其他具有彩色收視功能之電器產品課徵貨物稅，原寓有國家稅收、產業政策、節約能源等多種考量，並未逾越立法裁量之範圍，尚難謂為恣意，與憲法平等原則無違（本院釋字第六九七號解釋參照）。

To assist its subordinate agencies to unify recognition of the definition of color TV sets as defined by the rule in dispute, Ministry of Finance issued the ordinance in dispute to clarify that: "(1) a color television set stipulated in Subparagraph 2, Paragraph 1, Article 11 of the Commodity Tax Act is required to be equipped with two key component parts at the same time, namely, a color display and a TV tuner; (2) if a manufactured or imported color display is not equipped with a TV tuner and its product name, operation manual as well as packing do not identify it as a TV, and if its removal

財政部為協助所屬機關統一認定系爭規定所稱彩色電視機，以系爭令釋示：「一、貨物稅條例第十一條第一項第二款規定之彩色電視機須同時具備彩色顯示器及電視調諧器二大主要部分。二、廠商產製（或進口）之彩色顯示器，本體不具有電視調諧器（TV Tuner）裝置，且產品名稱、功能型錄及外包裝未標示有電視字樣，亦未併同具有電視調諧器功能之機具出廠（或進口）者，因無法直接接收電視視頻訊號及播放電視節目，核非屬彩色電視機之範圍，免於出廠（或進口）時課徵貨物稅。三、廠商產製（或進口）電視調諧器或具有電視調諧器功能之機具，本體不具有影像

from the manufacturer's premises (or if its importation) is not combined with a machine that possesses a TV tuner function, it shall not be deemed a taxable "color television set" because it cannot receive TV/video signals and broadcast TV programs, and therefore is not subject to commodity tax upon removal from the manufacturer's premises or upon importation; and (3) if a manufactured or imported TV tuner alone or a machine equipped with a TV tuner function, and its main body is not equipped with a TV display, and if its removal from the manufacturer's premises (or if its importation) is not combined with a TV display at the same time, it shall not be subject to commodity tax upon removal from the manufacturer's premises or upon importation." Examination of the purpose of this ruling shows that because a color TV consists of a display unit and a tuner, if a display unit does not identify itself as a TV and its removal from the manufacturer's premises is not combined with a tuner, it shall not be deemed a "color television set", and therefore not be subject to commodity tax upon removal from the

顯示功能，且未併同彩色顯示器出廠（或進口）者，亦免於出廠（或進口）時課徵貨物稅。……」查其意旨，乃以彩色電視機可分為顯示器及電視調諧器二大主要部分，倘顯示器未標示電視字樣，二者亦未併同出廠，即非屬彩色電視機之範圍，免於出廠時課徵貨物稅。上開令釋既未不當擴張應稅貨物之定義，又未對其他情形造成差別待遇，應不違反租稅法律主義及平等原則。惟鑑於彩色電視機相關產品日新月異，主管機關宜考量貨物稅性質及消費大眾對於單一或組合之相關產品於出廠時主要功能之認知等，訂定較為明確之課徵貨物稅認定標準，以利遵行。

manufacturer's premises. Given that the ordinance in dispute did not improperly expand the definition of taxable commodities nor lead to discrimination, it is not in contravention of the principle of taxation by law and the principle of equality. Owing to the evolution of color TV related products and taking into consideration the nature of commodity tax and consumers' recognition of the main functions of a given single product or a combination of products upon their removal from the manufacturer's premises, the authorities should enact more specific standards so that the taxpayers may better determine which products are subject to commodity tax and hence facilitate compliance.

The provision of Paragraph 1, Article 32 of the Commodity Tax Act which was amended and promulgated on May 7, 1997 and became effective on January 1, 2002, that: " In any of the following circumstances, the taxpayer shall be pursued for payment of taxes and fined from 5 to 15 times the amount of tax evaded:1. Failing to complete necessary registration in compliance with Article 19, and

八十六年五月七日修正公布，九十一年一月一日施行之貨物稅條例第三十二條第一款規定：「納稅義務人有左列情形之一者，除補徵稅款外，按補徵稅額處五倍至十五倍罰鍰：一、未依第十九條規定辦理登記，擅自產製應稅貨物出廠者」，與憲法第二十三條比例原則尚無牴觸，業經本院釋字第六九七號解釋在案，無再為解釋之必要，併此指明。

illegally manufacturing commodities subject to commodity tax." is not in contravention of the principle of proportionality under Article 23 of the Constitution. Since J.Y. Interpretation No. 697 has been given by this Yuan to the same effect, it is thus not necessary to repeat what is written therein.

Justice Si-Yao Lin filed concurring opinion.

Justice Ching-You Tsay) filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Chi-Ming Chih filed dissenting opinion in part.

本號解釋林大法官錫堯提出協同意見書;蔡大法官清遊提出協同意見書;黃大法官茂榮提出協同意見書;葉大法官百修提出協同意見書;陳大法官春生提出協同意見書;池大法官啟明提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts: The Petitioner, A Co., failed to apply to the collection authority for registration as a taxable commodity manufacturer and failed to register the taxable commodities before

編者註：

事實摘要：聲請人A公司未辦理貨物稅廠商及產品登記，生產電漿顯示器、液晶顯示器及電視調諧器等產品，銷售予B公司。財政部臺北市國稅局認，A公司將顯示器及調諧器二種彩色

it started production of Plasma Display Panels, Liquid Crystal Displays and TV tuners, which it sold to B. Taipei National Tax Administration held that A Co., by removing the two key component parts, i.e., display and tuner, of color TV sets from its manufacturing premises at the same time for sales, was thus obliged to pay commodity tax. It was decided that A Co., should make up the commodity tax at the amount of NT$ 48,204,052, and, pursuant to Subparagraph 1, Article 32 of the Commodity Tax Act, be fined 10 times the sum of tax evaded, namely, NT$ 482,040,500.

電視機之主要部分併同出廠銷售，該等產品已屬彩色電視機，應徵貨物稅，核定應補稅款 48,204,052 元，並依貨物稅條例 32 條第 1 款規定，處 10 倍罰鍰 482,040,500 元。

Petitioner asserted that the products at issue were not subject to commodity tax, and therefore, initiated administrative litigation, but the suit was finally and conclusively rejected. Petitioner applied for interpretation on the constitutionality of the Court's application of Subparagraph 2, Paragraph 1, Article 11 of the Commodity Tax Act, Ministry of Finance Ordinance Tai-Tsai-Suei No.09604501870 (June 14, 2007) and Article 32 of the Commodity Tax Act which

聲請人主張該等產品非屬應稅貨物，經提起行政訴訟敗訴確定後，認裁判所適用之貨物稅條例第 11 條第 1 項第 2 款、財政部 96 年 6 月 14 日台財稅字第 09604501870 號令及 86 年 5 月 7 日修正公布、91 年 1 月 1 日施行之同條例第 32 條規定有違憲疑義，聲請解釋。

was amended and promulgated on May 7, 1997 and became effective on January 1, 2002, to the final and conclusive judgment.

J. Y. Interpretation No.699（May 18, 2012）*

ISSUE: Is a regulation unconstitutional which punishes a vehicle driver who refused to take the sobriety test by suspending his driver's license, prohibiting him from taking the driver's license test within a period of three years, and suspending all classes of vehicle licenses ?

RELEVANT LAWS:

Articles 15, 22 and 23 of the Constitution（憲法第十五條、第二十二條、第二十三條）；Article 1 of the Road Traffic Management Penalties Regulation（道路交通管理處罰條例第一條）；Article 35, Paragraph 1, Subparagraph 1, preceding part of Paragraph 4; Article 67, preceding part of Paragraph 2 of the Road Traffic Management Penalties Regulation (promulgated on December 28, 2005, implemented on July 1, 2006)（道路交通管理處罰條例第三十五條第一項第一款、第四項前段、第六十七條第二項前段 (中華民國九十四年十二月二十八日修正公布，九十五年七月一日施行)）；Article 68 of the Road Traffic Management Penalties Regulation (promulgated on December 14, 2005, implemented on March 1, 2006)（道路交通管理處罰條例第六十八條 (九十四年十二月十四日修正公布，九十五年三月一日施行)）；Article 2 of the Police Act（警察法第二條）；Article 8, Paragraph 1,

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* Translated by Spenser Y. Hor, Esq.

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

Subparagraph 3 of the Police Duties Enforcement Act（警察職權行使法第八條第一項第三款）；Article 185-3 of the Criminal Code (promulgated on April 21, 1999, amended on January 2, 2008 and November 30, 2011)（刑法第一百八十五條之三(八十八年四月二十一日增訂，九十七年一月二日、一００年十一月三十日修正公布)）；Article 114, Subparagraph 2 of the Road Traffic Safety Regulation（道路交通安全規則第一百十四條第二款）；J.Y. Interpretation Nos. 535 and 689（司法院釋字第五三五號、第六八九號解釋）.

KEYWORDS:

Road Traffic Management Penalties Regulation（道路交通管理處罰條例）, Criminal Code（刑法）, Road Traffic Safety Regulation（道路交通安全規則）, Police Act（警察法）, Police Duties Enforcement Act（警察職權行使法）, vehicle operator（汽車駕駛人）, spot check（臨檢）, driver's license（駕駛執照）, license suspension（吊銷）, prohibition of taking/receiving driver's license（禁止考領）, driving under influence（酒後駕車）, alcohol concentration（酒精濃度）, sobriety test（酒測）, caused accident（肇事）, refusal to take sobriety test（拒絕接受酒測）, operating a motor vehicle（駕駛汽車）, use of other modes of transportation（使用其他交通工具）, freedom of movement（行動自由）, right to work（工作權）, principle of proportionality（比例原則）.**

HOLDING: Article 35, the preceding part of Paragraph 4 of the Road Traffic Management Penalties Regulation states that motor vehicle operators who refuse to accept the sobriety test of alcohol concentration according to the first Paragraph, first Subparagraph, of the same Article, will be suspended of their driver's license. Article 67, the preceding part of Paragraph 2, of the Road Traffic Management Penalties Regulation further stipulates that motor vehicle operators who violate Article 35, the preceding part of Paragraph 4 will be suspended of his or her license, and be prohibited from taking/receiving a driver's license for three years. As promulgated and amended on December 14, 2005, Article 68 of the same Regulation furthermore states that a motor vehicle operator whose license was suspended due to Article 35, the preceding part of Paragraph 4, would be suspended of all classes of vehicle licenses. The above provisions do not contravene the principle of proportionality of Article 23 of the Constitution, and do not violate the constitutional safeguards of people's freedom of movement and right to work.

解釋文：道路交通管理處罰條例第三十五條第四項前段規定，汽車駕駛人拒絕接受同條第一項第一款酒精濃度測試之檢定者，吊銷其駕駛執照。同條例第六十七條第二項前段復規定，汽車駕駛人曾依第三十五條第四項前段規定吊銷駕駛執照者，三年內不得考領駕駛執照。又中華民國九十四年十二月十四日修正公布之同條例第六十八條另規定，汽車駕駛人因第三十五條第四項前段規定而受吊銷駕駛執照處分者，吊銷其持有各級車類之駕駛執照。上開規定與憲法第二十三條比例原則尚無牴觸，而與憲法保障人民行動自由及工作權之意旨無違。

REASONING: Under the premise of not offending the social order of public interests, people shall have the freedom of movement to arbitrarily head to another location at any time or remain at a certain premise, as is protected under Article 22 of the Constitution (with reference to J.Y. Interpretation Nos. 535 and 689 of this Yuan). This freedom of movement shall include the freedom of operating a motor vehicle or any other transportation vehicles. Moreover, Article 15 of the Constitution clearly stipulates that people's right to work shall be protected. Provided above mentioned freedoms and rights accord with the conditions in Article 23 of the Constitution, proper restraints set by statutes or by regulations explicitly authorized by law are not forbidden by the Constitution.

解釋理由書：人民有隨時任意前往他方或停留一定處所之行動自由，於不妨害社會秩序公共利益之前提下，受憲法第二十二條所保障（本院釋字第五三五號、第六八九號解釋參照）。此一行動自由應涵蓋駕駛汽車或使用其他交通工具之自由。又人民之工作權應予保障，亦為憲法第十五條所明定。惟上揭自由權利於合乎憲法第二十三條要件下，以法律或法律明確授權之命令加以適當之限制，尚非憲法所不許。

According to law, the duty of a police officer is to maintain public order, to protect social security, to prevent all kinds of harms, and to advance people's welfare (with reference to Article 2 of the Police Act). Where danger already exists or may result according to objective and reason-

依法維持公共秩序，保護社會安全，防止一切危害，促進人民福利，乃警察之任務（警察法第二條規定參照）。警察對於已發生危害或依客觀合理判斷易生危害之交通工具，得予以攔停，要求駕駛人接受酒精濃度測試之檢定（以下簡稱酒測；警察職權行使法第八條第

able judgment, the police shall have the right to pull over such transportation vehicles and request the driver to take a sobriety test to determine the alcohol concentration (hereinafter referred to as "sobriety test"; with reference to Article 8, Paragraph 1, Subparagraph 3 of the Police Duties Enforcement Act, Article 185-3 of the Criminal Code, Article 35 of the Road Traffic Management Penalties Regulation and Article 114, Subparagraph 2 of the Road Traffic Safety Regulation). The driver shall be obligated to cooperate pursuant to the law. The competent authorities have, in accordance with the abovementioned laws, stipulated operation procedures to combat driving under influence and regulated the procedure for the police to perform sobriety tests on those suspected of driving under influence. If the subject refuses to take the sobriety test, the police should first try to advice against the refusal and inform the subject of the legal consequences of refusing the test. If the subject continues to refuse the sobriety test, a penalty shall be imposed.

一項第三款、刑法第一百八十五條之三、道路交通管理處罰條例第三十五條及道路交通安全規則第一百十四條第二款規定參照），是駕駛人有依法配合酒測之義務。而主管機關已依上述法律，訂定取締酒後駕車作業程序，規定警察對疑似酒後駕車者實施酒測之程序，及受檢人如拒絕接受酒測，警察應先行勸導並告知拒絕之法律效果，如受檢人仍拒絕接受酒測，始得加以處罰。

In order to strengthen road traffic management, maintain traffic order and ensure traffic safety, the legislators enacted the Road Traffic Management Penalties Regulation (see Article 1 of the same Regulation; hereinafter referred to as the "Disputed Regulation"). Given that driving under influence is one of the main causes of traffic accidents, legislators have in accordance with Article 35, the preceding part of Paragraph 4 of the Disputed Regulation stipulated that, if the vehicle operator refuses the sobriety test of the same Article, Paragraph 1, Subparagraph 1, a NT$60,000 fine will be imposed with immediate seizure of the driver's motor vehicle and suspension of the driver's license. Article 67, the preceding part of Paragraph 2, of the Disputed Regulation further provides that a vehicle operator, whose driver's license has been suspended in accordance with Article 35, the preceding part of Paragraph 4, shall not take/receive the driver's license within three years. Article 68 of the Disputed Regulation promulgated on December 14, 2005 further states that any vehicle operator whose driver's license was suspended due

立法者為加強道路交通管理，維護交通秩序，確保交通安全之目的，制定道路交通管理處罰條例 (同條例第一條規定參照；下稱系爭條例)。有鑒於酒後駕車為道路交通事故主要肇事原因之一，立法者乃於系爭條例第三十五條第四項前段規定汽車駕駛人拒絕接受同條第一項第一款酒測，除處新臺幣六萬元罰鍰，當場移置保管該汽車外，並吊銷其駕駛執照。系爭條例第六十七條第二項前段復規定，汽車駕駛人曾依第三十五條第四項前段規定吊銷駕駛執照者，三年內不得考領駕駛執照。九十四年十二月十四日修正公布之系爭條例第六十八條另規定，汽車駕駛人因違反第三十五條第四項前段規定而受吊銷駕駛執照處分者，吊銷其持有各級車類之駕駛執照。上開系爭條例第三十五條第四項前段吊銷駕駛執照部分、第六十七條第二項前段暨第六十八條規定關於違反第三十五條第四項前段部分（以下合稱系爭規定），係為考量道路交通行車安全，保護大眾權益，其目的洵屬正當，且所採吊銷駕駛執照等手段，亦可促使駕駛人接受酒測，進而遏止酒後駕車之不當行為，防範發生交通事故，有助於上開目的之達成。

to violating Article 35, the preceding part of Paragraph 4 shall also be suspended of all licenses for all types of motor vehicles. The above mentioned suspension of the driver's license in accordance with Article 35, the preceding part of Paragraph 4 of the Disputed Regulation, Article 67, the preceding part of Paragraph 2, and Article 68 in relation to the violation of Article 35, the preceding part of Paragraph 4 (hereinafter together referred to as the "Disputed Provisions"), takes into consideration of road and traffic safety and the protection of public interests, which are appropriate objectives. Moreover, the method of suspending the driver's license can also encourage the driver to consent to the sobriety test, consequently deterring the improper behavior of driving under influence and preventing traffic accidents, thus helping to achieve the purpose set forth above.

In order to strengthen the ban on driving under influence and to ensure traffic safety, legislators passed an addendum to Article 185-3 of the Criminal Code on April 21, 1999 (subsequently amended to

為強化取締酒後駕車，維護交通安全，立法者於八十八年四月二十一日增訂刑法第一百八十五條之三規定（嗣後於九十七年一月二日及一００年十一月三十日更兩度修正提高法定刑）。惟

double the statutory penalty on January 2, 2008 and November 30, 2011). Pursuant to statistics collected from 1999 to 2001 by the National Police Administration, casualties resulting from driving under influence have increased year after year. As a result of vehicle operators' refusal to take the sobriety test or their objective to evade penalties against public safety offenses under Article 185-3 of the Criminal Code, legislators subsequently amended Article 35 of the Disputed Regulation on January 17, 2001 to increase the punishment for refusing to take the sobriety test (with reference to Volume 91, Issue 40, Page 577 et seq. of the Gazette of the Legislative Yuan, proposal explanation by Legislator John Chang, etc.), so as to avert any loopholes when controlling driving under influence and to effectively deter driving under influence. All methods adopted by the Disputed Provisions have the effect of preventing the offender from taking chances to evade the sobriety test and encourage vehicle operators to cooperate with the test. Additionally, a more moderate means of achieving the same effect is still lacking, hence the Disputed

依內政部警政署八十八年至九十年間之統計數字卻顯示，酒後駕車肇事傷亡事件有逐年上升之趨勢。鑒於汽車駕駛人拒絕接受酒測，或係為逃避其酒後駕車致可能受刑法第一百八十五條之三公共危險罪之處罰。立法者遂於九十年一月十七日修正系爭條例第三十五條提高拒絕酒測之罰責 (參考立法院公報第九十一卷第四十期，第五七七頁以下，立法委員章孝嚴等之提案說明)，以防堵酒駕管制之漏洞，有效遏阻酒後駕車行為。系爭規定所採手段，具有杜絕此種僥倖心理，促使汽車駕駛人接受酒測之效果，且尚乏可達成相同效果之較溫和手段，自應認系爭規定係達成前述立法目的之必要手段。

Provisions should be acknowledged as necessary means to achieve the aforementioned legislative purpose.

The penalty for the Disputed Provisions impedes the freedom of movement of driver's license holders, which is protected under the Constitution, yet drivers have the obligation to cooperate with the sobriety test in accordance with the law. In addition, driving under influence not only endangers the life, body, health and property of others and the person himself, it also obstructs public safety and traffic order, the legal interest lies between limiting and protecting without losing balance. As for professional drivers or other professions that rely heavily on operations of motor vehicles as part of their jobs (such as delivery persons, food trucks), apart from the limit on one's freedom of movement and restrictions on their right to work, they should follow road traffic safety rules and regulations even more closely and possess a higher moral for driving than ordinary vehicle drivers. Those professional drivers punished with suspension of their driver's licenses due

系爭規定之處罰，固限制駕駛執照持有人受憲法保障之行動自由，惟駕駛人本有依法配合酒測之義務，且由於酒後駕駛，不只危及他人及自己之生命、身體、健康、財產，亦妨害公共安全及交通秩序，是其所限制與所保護之法益間，尚非顯失均衡。縱對於以駕駛汽車為職業之駕駛人或其他工作上高度倚賴駕駛汽車為工具者（例如送貨員、餐車業者）而言，除行動自由外，尚涉工作權之限制，然作為職業駕駛人，本應更遵守道路交通安全法規，並具備較一般駕駛人為高之駕駛品德。故職業駕駛人因違反系爭規定而受吊銷駕駛執照之處罰者，即不得因工作權而受較輕之處罰。況在執行時警察亦已先行勸導並告知拒絕之法律效果，顯見受檢人已有將受此種處罰之認知，仍執意拒絕接受酒測，是系爭規定之處罰手段尚未過當。綜上所述，尚難遽認系爭規定牴觸憲法第二十三條之比例原則，其與憲法保障人民行動自由及工作權之意旨尚無違背。

to violation of the Disputed Provisions should not be subject to a lesser penalty because of their right to work. Under the condition that the police officer has first advised and informed the subject of the legal consequence if refusing to take the test, the subject is obviously informed of the penalties and yet continues to refuse the sobriety test, the methods of punishment imposed by the Disputed Provisions are not excessive. In summary, it is difficult to conclude that the Disputed Provisions contradict the principle of proportionality in Article 23, as they do not infringe the constitutional safeguards of people's freedom of movement and right to work.

Although the Disputed Provisions do not contradict the principle of proportionality, legislators should have legislative discretion to adopt provisions with separate measures based on different situations. Provided that law enforcement can realize the legislative intent, careful consideration of the specific circumstances of each case, such as whether a driver has previous records of driving

系爭規定雖不違反比例原則，惟立法者宜本其立法裁量，針對不同情況增設分別處理之規定，使執法者在能實現立法目的之前提下，斟酌個案具體情節，諸如駕駛人是否曾有酒駕或拒絕酒測之紀錄、拒絕酒測時所駕駛之車輛種類、所吊銷者是否屬其賴以維持生活之職業駕駛執照等狀況，而得為妥適之處理；另系爭條例有關酒後駕車之檢定測試，其檢測方式、檢測程序等事項，宜

under influence or refusing the sobriety test, the type of vehicle being operated when the driver refused the sobriety test, or whether the driver relies on the suspended professional driver's license for livelihood and other factors, is a proper measure. With regard to the examinations of the Disputed Regulation testing driving under influence, the methods, procedures and other pertinent issues should be in accordance with the law or clearly legally authorized regulations; and the competent authorities should conduct and specify an overall review to amend the relevant provisions with this intention in mind.

以法律或法律明確授權之規範為之，相關機關宜本此意旨通盤檢討修正有關規定，併此指明。

Justice Sea-Yau Lin filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion, in which Justice Beyue , Su Chen joined.

Justice Chang-Fa Lo filed concurring opinion.

Justice Dennis Te-Chung Tang filed concurring opinion in part and dissenting opinion in part.

Justice Chen-Shan Li filed dissenting opinion in part, in which Justice Den-

本號解釋林大法官錫堯提出之協同意見書；陳大法官春生提出、陳大法官碧玉加入之協同意見書；羅大法官昌發提出之協同意見書；湯大法官德宗提出之部分協同暨部分不同意見書；李大法官震山提出、湯大法官德宗加入之不同意見書；黃大法官茂榮與葉大法官百修共同提出之不同意見書。

nis Te-Chung, Tang joined.

Justice Mao-Zong Huang , Justice Pai-Hsiu Yeh filed dissenting opinion.

EDITOR'S NOTE:

Summary of facts: A petition case in which a judge of the Taiwan Changhua District Court reviewed a violation of the Road Traffic Management Penalties Regulation. The petitioner in this case had an ordinary truck driver's license and refused the sobriety test while driving a heavy-duty motorcycle. The petitioner received a NT$60,000 fine from the Motor Vehicle Supervision Station in accordance with the Disputed Provisions, all his vehicle licenses were suspended and he was not allowed to take any test for a new license within the next three years, thus losing his job as a driver.

An appeal concerning the ruling of the Sixth Criminal Court of the Taiwan High Court, Tainan Branch Court reviewing the Disputed Provisions. The appellant of this case held a professional truck driver's license. Due to refusing a sobriety test while driving a heavy-duty

編者註：

事實摘要：臺灣彰化地方法院法官審理違反道路交通管理處罰條例聲明異議案件。該案異議人持有普通大貨車駕照，於無照駕駛重機車時拒絕酒測，被監理站依系爭規定裁罰新台幣6萬元、吊銷各級車類駕照及三年內不得考領駕照之處分，致失去駕駛之工作。

又臺灣高等法院臺南分院刑事第六庭審理同條例聲明異議抗告案件。該案抗告人持有職業大貨車駕照，亦因駕駛重機車外出時拒絕接受酒測，被監理站處以相同罰鍰及處分，致失去駕駛之工作。

二案承審法官均認，系爭規定有

motorcycle, he was fined and punished as mentioned above by the Motor Vehicle Supervision Station, thus resulting in loss of his job as a driver. The judges in both cases deemed the Disputed Provisions to be in violation of the constitutionally safeguarded principle of proportionality and the right to work, doubting that the right to live was ensured. They separately ruled to suspend the review procedure. Petition for constitutional interpretation filed pursuant to the intent of J.Y. Interpretation No. 371.

牴觸憲法比例原則及工作權、生存權保障之疑義，爰分別裁定停止審理程序，依釋字第 371 號解釋之意旨聲請解釋。

J. Y. Interpretation No.700（June 29, 2012）*

【Case concerning Unreported Business and Underreported Business Tax Penalties Principle of Taxation by Law】

ISSUE: Is it unconstitutional to determinethe evaded taxamount without permittingtax deduction by providing certification for input tax after an investigation confirms that the business amount is not reported or under-reported ?

RELEVANT LAWS:

Article 19 of the Constitution （憲法第十九條）； Judicial Yuan Interpretations No. 420, 460, 496, 519, 597, 625, and 660（司法院釋字第四二0號、第四六0號、第四九六號、第五一九號、第五九七號、第六二五號、第六六0號、第六八五號解釋）；Article 15 Paragraph 1, Article 33, Article 35 Paragraph 1, Article 43 Paragraph 1 Subparagraph 3, and Article 51 Paragraph 1 Subparagraph 1 of the Value-Added and Non-Value-Added Business Tax Act（加值型及非加值型營業稅法第十五條第一項、第三十三條、第三十五條第一項、第四十三條第一項第三款、第五十一條第一項第一款）；Article 48-1 Paragraph 1 of the Tax Levy Act（稅捐稽徵法第四十八條之一第一項）；Article 52 Paragraph 2 Sub-paragraph 1 of the Enforcement Rules for the Value-Added and

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* Translated and edited by Lawrence L Lee.

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

Non-Value-Added Business Tax Act（加值型及非加值型營業稅法施行細則第五十二條第二項第一款）；Ministry of Finance letter of October 19, 2000, No. 890457254（財政部八十九年十月十九日台財稅第八九0四五七二五四號函）.

KEYWORDS:

principle of taxation by paw（租稅法律主義), value-added and non-value-added business tax act （加值型及非加值型營業稅法）, periodically impose tax（週期課徵）, practice business without applying for business registration in accordance with regulations（未依規定申請營業登記而營業）, input tax（進項稅額）, reporting obligation（申報義務）, examine automatically (自動勾稽), tax evasion fine（漏稅罰）.**

HOLDING: Illustration 3 of the Ministry of Finance letter of - October 19, 2000, No. 890457254, Article 52 Paragraph 2 Subparagraph 1 of the Enforcement Rules for the Business Tax Act (revisions promulgated on June 7, 2000) regarding the determination of unreported taxable income under Article 51 Paragraph 1 of the Business Tax Act (revisions promulgated on August 2, 1995, effective on September 1, 1995) is consistent with Article 15 Paragraph 1, Article 33, Article

解釋文：財政部中華民國八十九年十月十九日台財稅第八九0四五七二五四號函說明三，就同年六月七日修正發布之營業稅法施行細則第五十二條第二項第一款，有關如何認定八十四年八月二日修正公布，同年九月一日施行之營業稅法第五十一條第一款漏稅額所為釋示，符合該法第十五條第一項、第三十三條、第三十五條第一項、第四十三條第一項第三款及第五十一條第一款規定之立法意旨，與憲法第十九條之租稅法律主義尚無牴觸。

35 Paragraph 1, Article 43 Paragraph 1 Subparagraph 3, and Article 51 Paragraph 1 of the Business Tax Act and does not contravene the principle of taxation by law derived from Article 19 of the Constitution.

REASONING: Article 19 of the Constitution regulates that people shall have the duty of paying taxes in accordance with law. The Constitution stipulates that when the state imposes the duty to pay tax upon people or gives people tax benefits, there shall be a statutory basis which prescribes the elements of taxation such as the subject of taxation, the object of taxation, the relationship delineating how the object of taxation belongs to the subject of taxation, the tax basis, and the tax rate.

However, because it is actually impossible to set out all technical and detail matters in the laws, it is necessary that further specifications be set out in administrative ordinances. Therefore, a competent authority has the right to interpret relevant laws. As long as the inter-

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、租稅客體對租稅主體之歸屬、稅基、稅率等租稅構成要件，以法律定之。惟法律之規定不能鉅細靡遺，有關課稅之技術性及細節性事項，尚非不得以行政命令為必要之釋示。故主管機關本於法定職權就相關規定為闡釋，如其解釋符合各該法律之立法目的、租稅之經濟意義及實質課稅之公平原則，即與租稅法律主義尚無牴觸（本院釋字第四二0號、第四六0號、第四九六號、第五一九號、第五九七號、第六二五號解釋參照）。

pretation is conducted in accordance with the legislative purposes of the respective laws, the economic purposes of taxation, and the principle of fairness under substantive taxation, there is no violation of the principle of taxation by law (see J. Y. Interpretations No. 420, 460, 496, 519, 597 and 625).

The Business Tax Act, which was amended and promulgated on August 2, 1995 and became effective on September 1, 1995, was renamed as the Value-Added and Non-Value-Added Business Tax Act on July 9, 2001 (hereafter, the Business Tax Act). Article 51 (revised on December 8, 2010 to reduce the statutory penalty, Paragraph 2 was added on January 26, 2011) Subparagraph 1 of the Business Tax Act states that "the taxpayer shall be pursued for payment of taxes owed and be fined according to the amount of tax evaded, if the taxpayer conducts business without application for business registration as required."

八十四年八月二日修正公布，同年九月一日施行之營業稅法，於九十年七月九日修正公布更名為加值型及非加值型營業稅法（下稱營業稅法），其第五十一條（九十九年十二月八日修正降低罰鍰倍數、一００年一月二十六日增訂第二項）第一款規定，納稅義務人「未依規定申請營業登記而營業者」，追繳稅款並按所漏稅額科處罰鍰。

According to Article 52 Paragraph 2 Subparagraph 1 of the Enforcement Rules

所謂漏稅額，依八十九年六月七日修正發布之營業稅法施行細則，於

for the Business Tax Act, revised and promulgated on June 7, 2000 and later renamed as the Enforcement Rules for the Value-Added and Non-Value-Added Business Tax Act promulgated on October 17, 2001 (hereafter, Enforcement Rules for the Business Tax Act), the definition of "evaded tax amount" means "the additional tax amount that needs to be paid, as determined by the competent tax levying agency based on all the investigation documents" (on June 22, 2011revised as "the additional tax amount that needs to be paid, as determined by the competent tax levying agency based on all the investigation documents, including the input tax application regulated in Article 35 and not falling under Article 19, and the input tax calculated in accordance with Article 15 Paragraph1 Subparagraph 2 of the Enforcement Rules for the Business Tax Act ").

九十年十月十七日修正發布更名為加值型及非加值型營業稅法施行細則（下稱營業稅法施行細則），其第五十二條第二項第一款規定，係「以經主管稽徵機關依查得之資料，核定應補徵之應納稅額為漏稅額」（一００年六月二十二日修正為：「以經主管稽徵機關依查得之資料，包含已依本法第三十五條規定申報且非屬第十九條規定之進項稅額及依本法第十五條之一第二項規定計算之進項稅額，核定應補徵之應納稅額為漏稅額」）。

As the competent tax levying agency, the Ministry of Finance has previously specified the amount of tax evaded and later issued a letter on October 19, 2000 No. 890457254 stating in illustration 3: "In accordance with Article 35 Paragraph

主管機關財政部就前開漏稅額之認定，復作成八十九年十月十九日台財稅第八九０四五七二五四號函之說明三謂：「又依營業稅法第三十五條第一項規定，營業人不論有無銷售額，應按期填具申報書，檢附退抵稅款及其他有關

1 of the Business Tax Act, regardless of whether any sales amount is accrued, a business operator must file periodic tax returns to the competent tax levying agency concerning its sales amount, tax owed, or overpayment, with tax deduction and other related documents attached. In doing so, the deductible or refundable input value-added taxes of the business operator should be premised on the fact that they are reported. Therefore, in the event that a business operator should be held in violation of Article 51, Sections 1 to 4 and Section 6 of the Business Tax Act and subject to penalties accordingly, but a business operator provides valid input certificate only after being investigated and discovered, no output tax amount may be deducted by the tax levying agency in calculating the tax shortage."

Based on the letter, the deductible amount for input tax is limited to what the taxpayer has reported in accordance with Article 35 Paragraph 1 of the Business Tax Act. With regard to the determination of unreported taxable income under Article 51 Section 3 of the Business Tax

文件，向主管稽徵機關申報銷售額、應納或溢付營業稅額。準此，營業人之進項稅額准予扣抵或退還，應以已申報者為前提，故營業人違反營業稅法第五十一條第一款至第四款及第六款，據以處罰之案件，營業人如於經查獲後始提出合法進項憑證者，稽徵機關於計算其漏稅額時尚不宜准其扣抵銷項稅額。」

其中有關認定營業稅法第五十一條第三款漏稅額部分，業經本院釋字第六六０號解釋，認與憲法第十九條之租稅法律主義尚無牴觸。至於該函有關營業稅法第五十一條第一款部分（下稱系爭函）是否違憲，不在本院釋字第六六０號解釋範圍，應據本件聲請予以

Act, it is already stated in J. Y. Interpretation No. 660that there is no violation of the principle of taxation by law under Article 19 of the Constitution. However, whether the part of this letter concerning Article 5 Section 1 of the Business Tax Act (hereafter, the disputed letter) violates the constitution, lies not within the scope of J. Y. interpretation No. 660, but should be interpreted on the basis of this case.

解釋。

Pursuant to Articles 14, 15, 16, 19, 33 and 35 of the Business Tax Act, the amount of value-added tax is calculated by the difference between the amounts of periodically filed sales and the input taxes evidenced by the detailed chart of the uniform invoices. Based on this calculation, the amount of business tax due or overpaid in the given period is thus determined (see Judicial Yuan Interpretation No. 685). In addition, the "input tax amount" that is deductible from the output tax in the same period under Article 15 Section 1 of the Business Tax Act is premised on the condition that the registered business operator has obtained the valid certification stipulated under Article 33

依營業稅法第十四條、第十五條、第十六條、第十九條、第三十三條及第三十五條規定，加值型營業稅採稅額相減法，並採按期申報銷售額及統一發票明細表暨依法申報進項稅額憑證，據以計算當期之應納或溢付營業稅額（本院釋字第六八五號解釋參照）。且同法第十五條第一項規定當期銷項稅額得扣減之進項稅額，以依法登記之營業人取得同法第三十三條所列之合法要式憑證，且於申報期限內檢附向主管稽徵機關申報扣減，而據以計算當期應納或溢付營業稅額為前提要件（本院釋字第六六0號解釋參照）。

of the Business Tax Act and has attached that certification with the filing for deduction to the competent tax levying agency within the registration period, based on which the business tax owed or overpaid in the same period is calculated (see Judicial Yuan Interpretation No. 660).

Therefore, a business operator doing business without legal business registration, unless he makes up the business registration and pays business tax before an investigation of the competent tax levying agency, may apply Article 48-1, Paragraph 1 of the Tax Collection Act. Except in the event of a sanction under Article 51 Section 1 of the Business Tax Act, where following an investigation of the competent levying agency it is found that the obligation to file periodic reports has not been performed and income tax is reported only after discovery. The requirements of the abovementioned regulations for deductible output tax are not met.

As to a business operator, who has not applied for business registration in accordance with the regulations, the

故營業人未依規定申請營業登記而營業者，除於主管稽徵機關查獲前補辦理營業登記及報繳營業稅，而得適用稅捐稽徵法第四十八條之一第一項規定，免依營業稅法第五十一條第一款規定處罰外，如經主管稽徵機關查獲未履行定期申報之義務，於查獲後始提出之進項稅額，自與上開規定得扣抵銷項稅額之要件不符。

對未依規定申請營業登記而營業者，系爭函綜合營業稅法第十五條第一項、第三十三條、第三十五條第一項、

disputed letter integrates Article 15 Paragraph 1, Article 33, Article 35 Paragraph 1, Article 43 Paragraph 1 Subparagraph 3 and Article 51 Subparagraph 1 of the Business Tax Act, as well as Article 29, Article 52 Paragraph 2 Subparagraph 1 of the Enforcement Rules for the Business Tax Act by stipulating that only those who have obtained legal certification for input tax and filed an application within the prescribed period may deduct output tax. This is in line with the periodical imposition of value-added business taxes and automatically fulfills the overall legislative purposes of the Business Tax Act. Moreover, there is no conflict with the duty of assisting legal enforcement, the economic meaning of transferring business tax from the business operator to the consumer and the principle of fairness under substantive taxation. Giving business operators who do not fulfill the duty to act in concert the same legal status as those who act in accordance with law would destroy the foundation of value-added business tax registration and declaration system. The disputed letter at issue stipulating that the amount of payable tax should be the

第四十三條第一項第三款、第五十一條第一款及營業稅法施行細則第二十九條、第五十二條第二項第一款等規定，限以取得合法進項憑證，且依規定期限申報者，始得據以扣抵銷項稅額，符合加值型營業稅按週期課徵，並能自動勾稽之整體營業稅法立法目的，亦無違於依法履行協力義務之營業人得將營業稅轉嫁消費者負擔之經濟意義及實質課稅之公平原則，不使未依法履行協力義務之營業人，亦得與依法履行協力義務之營業人立於相同之法律地位，致破壞加值型營業稅立基之登記及申報制度。故系爭函以經稽徵機關循前開規定核定之應納稅額為漏稅額，並據以計算漏稅罰，並未增加營業人法律上所未規定之義務，於憲法第十九條之租稅法律主義尚無牴觸。

amount of evaded tax, as determined based on above regulations following an investigation of the competent tax levying agency, and be used for calculating the tax evasion fine which does not increase a business operator's legal obligations and does not contravene the principle of taxation by law under Article 19 of the Constitution.

In the present case, one petitioner claimed that Article 33 of the Business Tax Act, indicating that a business operator regardless of whether he has or has not registered properly, he is required to provide evidence of name, address and uniform serial number when applying to deduct input tax from output tax, is in contravention of the principle of equality under Article 7 of the Constitution and the principle of proportionality under Article 23 of the Constitution; Ministry of Finance letter of October 19, 2000, No. 890457254, would violate the constitution, hence the petitioner filed for judicial interpretation. However, given that the petitioner has failed to specifically indicate how Article 33 of the Business Tax

本件聲請人中一人指稱，營業稅法第三十三條就營業人以進項稅額扣抵銷項稅額時，不論營業人已、未辦妥登記，均要求應具有載明其名稱、地址、及統一編號之憑證始得為之，有違憲法第七條之平等原則、第二十三條之比例原則；財政部九十年六月六日台財稅字第０九０００四五三五一七號函亦屬違憲，聲請解釋憲法。查其所陳，並未具體指摘營業稅法第三十三條規定究有何牴觸憲法之疑義；而上開財政部函文係個案之函復，非屬法令，不得據以聲請釋憲。依司法院大法官審理案件法第五條第一項第二款及第三項之規定，此等部分之聲請，均應不受理，併此指明。

Act objectively contravenes the Constitution and the above-mentioned Ministry of Finance letter is the response to an individual case, not a legal directive, the requirements for a judicial interpretation are not met. Based on Article 5 Section 1 Paragraph 2 and Section 3 of the Constitutional Interpretation Procedure Act, this part of the petition shall therefore not be reviewed.

Justice Yeong-Chin Su filed concurring opinion.

Justice Ming Chen filed concurring opinion.

Justice Mao-Zong Huang filed dissenting opinion, in which Justice Chen-Shan Li joined.

Justice Chang-Fa Lo filed dissenting opinion.

Justice Dennis Te-Chung Tang filed dissenting opinion.

本號解釋蘇大法官永欽提出協同意見書；陳大法官敏提出協同意見書；黃大法官茂榮提出，李大法官震山加入之不同意見書；陳大法官新民提出不同意見書；陳大法官碧玉提出，湯大法官德宗加入之不同意見書；羅大法官昌發提出不同意見書；湯大法官德宗提出不同意見書。

EDITOR'S NOTE:

Summary of facts: When petitioner A was fined for selling real estate without having applied for business registration, after the National Tax Administration of

編者註：

事實摘要：聲請人A因未申請營業登記即銷售房地，經財政部臺灣省中區國稅局認建屋出售之行為屬營業行為，依營業稅法應追繳稅款並按所漏

Central Taiwan Province under the Ministry of Finance (MOF) found that the marketing of houses constitutes a business conduct, According to the Business Tax Act, subject to payment of tax and a fine equivalent to one to ten times of the evaded tax amount. Moreover input tax deduction was not allowed when calculating the evaded tax amount based on Ministry of Finance letter of October 19, 2000, No. 890457254. Subsequently, a business tax amounting to over NT$ 160,000 was imposed along with a triple fine of more than NT$ 497,000.When petitioner B was fined for selling real estate without having applied for business registration, the National Tax Administration of Northern Taiwan Province under the MOF also based on above letter did not permit her input tax deduction when calculating the amount of tax evaded, Thus a business tax amounting to over NT$ 1,200,000 was imposed along with a fine of more than NT$ 3,000,000.These two petitioners initiated administrative litigation, but their suits were finally and conclusively rejected. Therefore, these petitioners applied for interpretation respectively on the

稅額處一至十倍罰鍰，且計算漏稅額時依財政部 89 年 10 月 19 日台財稅第 890457254 號函示不准扣減進項稅額，進而核定補徵營業稅 16 萬餘元並科處三倍罰鍰 49 萬 7 千餘元；聲請人 B 亦未辦登記即售屋，經財政部臺灣省北區國稅局計算漏稅額時亦依上開函不准扣減進項稅額，而核定應補徵營業稅 120 餘萬元並科處罰鍰 300 餘萬元。二聲請人均提起行政訴訟敗訴確定，而認上開財政部函不准扣減進項稅額有違憲疑義，分別聲請解釋。

constitutionality of the above-mentioned Ministry of Finance letter prohibiting input tax deduction.

J. Y. Interpretation No.701（July 6, 2012）*

【Discrimination on itemized deductions of medical expenses for long-term care Principle of Equality, Right of Equality, Right of Survival】

ISSUE: Is the requirement limiting the itemized deductions of medical expenses for long term care of disabled persons to expenses paid to health care providers prescribed in the Income Tax Act unconstitutional ?

RELEVANT LAWS:

Articles 7, 15, 155 of the Constitution（憲法第七條、第十五條、第一五五條）；J.Y. Interpretations Nos. 682, 694（司法院釋字第六八二號、第六九四號解釋）；first part of Article 17, Paragraph 1, Subparagraph 2, Item 2, Division 3 of the Income Tax Act revised and publicized on December 28, 2005 and December 26, 2008（所得稅法第十七條第一項第二款第二目之3前段（中華民國九十四年十二月二十八日暨九十七年十二月二十六日修正公布））.

KEYWORDS:

right of equality（平等權）, rght of survival（生存權）, medical expenses（醫藥費）, mental dsability（失智症）, persons in a vgetative state（植物人）, long-term care（長期照護）, health care providers（醫療院所）, discrimination（差

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* Translated by Huai-Ching Tsai.

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

別待遇）, preferential tax treatment（租稅優惠）, Tax Avoidance（規避稅負）, cost of tax collection（稽徵成本）, Itemized deductions（列舉扣除額）, persons in long-term care（受長期照護者）.**

HOLDING: The first part of Article 17, Paragraph 1, Subparagraph 2, Item 2, Division 3 of the Income Tax Act revised and publicized on December 28, 2005 provides: ".....(2)Itemized Deductions: ..... 3.Medical Expenses: The medical expenses deductible by a taxpayer, spouse, and supported family members are limited to public hospitals, contract hospitals of the Civil Servants Insurance Plan, contract hospitals of the Labor Insurance Plan, and hospitals with sound accounting records certified by the Ministry of Finance (The name of the said "contract hospitals of the Civil Servants Insurance Plan, and contract hospitals of the Labor Insurance Plan" has been revised and publicized on December 26, 2008, as "contract hospitals of the Public Health Insurance Plan," with the same legislative intent.). For the medical expenses of disabled persons in need of

解釋文：中華民國九十四年十二月二十八日修正公布之所得稅法第十七條第一項第二款第二目之3前段規定：「……（二）列舉扣除額：……3.醫藥……費：納稅義務人及其配偶或受扶養親屬之醫藥費……，以付與公立醫院、公務人員保險特約醫院、勞工保險特約醫療院、所，或經財政部認定其會計紀錄完備正確之醫院者為限」（上開規定之「公務人員保險特約醫院、勞工保險特約醫療院、所」，於九十七年十二月二十六日經修正公布為「全民健康保險特約醫療院、所」，規定意旨相同），就身心失能無力自理生活而須長期照護者（如失智症、植物人、極重度慢性精神病、因中風或其他重症長期臥病在床等）之醫藥費，亦以付與上開規定之醫療院所為限始得列舉扣除，而對於付與其他合法醫療院所之醫藥費不得列舉扣除，與憲法第七條平等原則之意旨不符，在此範圍內，系爭規定應不予適用。

long-term care (e.g. persons with mental disability, persons in a vegetative state, persons with severe chronic psychosis, persons bedridden as the result of a stroke or other severe disease) to be eligible for itemized deductions, they must have been paid to health care providers prescribed in the abovementioned provision, thus disallowing deduction for medical expenses paid to other lawful health care providers. The said provision is inconsistent with the principle of equality in Article 7 of the Constitution, and to the extent that such inconsistency exists, the said provision shall not be applicable.

REASONING: Article 7 of the Constitution provides that the right to equality of the people shall be protected. The determination as to whether the stipulations of a law are in accordance with the requirement of protection of the right to equality should be decided inasmuch as the purpose of the discrimination is in accord with the Constitution, that is, whether between the distinctions created and the stated purpose of the law there is a certain degree of connection. (see J.Y.

解釋理由書：憲法第七條規定人民之平等權應予保障。法規範是否符合平等權保障之要求，其判斷應取決於該法規範所以為差別待遇之目的是否合憲，其所採取之分類與規範目的之達成之間，是否存有一定程度之關聯性而定（本院釋字第六八二號、第六九四號解釋參照）。

Interpretations Nos. 682 and 694).

The first part of Article 17, Paragraph 1, Subparagraph 2, Item 2, Division 3 of the Income Tax Act revised and publicized on December 28, 2005 provides: " The net consolidated income of an individual equals the gross consolidated income, as computed in accordance with the preceding three Articles, subtracted by the following exemptions and deductions:

…… Ⅱ、deductions: a taxpayer apart from according to the standards for deductions listed below or one of the itemized deductions listed below, and deducting special deductions:

.....(2)Itemized Deductions: ..... 3.Medical Expenses: The medical expenses deductible by a taxpayer, spouse, and supported family members are limited to public hospitals, contract hospitals of the Civil Servants Insurance Plan, contract hospitals of the Labor Insurance Plan, and hospitals with sound accounting records certified by the Ministry of Finance (The name of the said "contract hospitals of the Civil Servants Insurance Plan, and contract hospitals of the

九十四年十二月二十八日修正公布之所得稅法第十七條第一項第二款第二目之3前段規定：「按前三條規定計得之個人綜合所得總額，減除下列免稅額及扣除額後之餘額，為個人之綜合所得淨額：……二、扣除額：納稅義務人就下列標準扣除額或列舉扣除額擇一減除外，並減除特別扣除額：……（二）列舉扣除額：……3.醫藥……費：納稅義務人及其配偶或受扶養親屬之醫藥費……，以付與公立醫院、公務人員保險特約醫院、勞工保險特約醫療院、所，或經財政部認定其會計紀錄完備正確之醫院者為限」（上開規定之「公務人員保險特約醫院、勞工保險特約醫療院、所」，於九十七年十二月二十六日經修正公布為「全民健康保險特約醫療院、所」，規定意旨相同，下稱系爭規定），明定納稅義務人及其配偶或受扶養親屬之醫藥費須以付與上開醫療院所者，始得列舉扣除。系爭規定關於身心失能無力自理生活而須長期照護者（如失智症、植物人、極重度慢性精神病、因中風或其他重症長期臥病在床等；以下簡稱受長期照護者）所須支付之醫藥費部分，仍以付與上開醫療院所為限，

Labor Insurance Plan" has been revised and publicized on December 26, 2008, as "contract hospitals of the Public Health Insurance Plan," with the same legislative intent, hereafter called "the provision at issue")., This provides that for the medical expenses of a taxpayer, spouse, and supported family members to be eligible for itemized deductions, it must be paid to health care providers prescribed in the abovementioned provision. For the medical expenses of disabled persons in need of long-term care (e.g. persons with mental disability, persons in a vegetative state, persons with severe chronic psychosis, persons bedridden as the result of a stroke or other severe disease; hereinafter called persons in long-term care), the provision at issue allows itemized deduction only for expenses paid to the abovementioned health care providers and excludes expenses paid to other lawful health care providers. As a result, there is discrimination against patients receiving medical care from other health care providers. The scope of this Interpretation is confined to whether such discrimination violates the principle of equality guaranteed by Article

始得列舉扣除，而對於付與其他合法醫療院所之醫藥費，卻不得申報列舉扣除，形成因就診醫療院所不同所為之差別待遇，爰以此部分有無違反憲法第七條平等原則，為本件解釋範圍。

7 of the Constitution.

Article 15 of the Constitution provides that the right of survival of the people shall be protected. Article 155 of the Constitution provides that elderly persons, feeble and disabled persons incapable of being self-sufficient and victims of major catastrophes shall be liable to receive adequate help and relief from the government. There are many measures of assistance that can be taken by the government to protect people's survival and life, preferential tax treatment being one such. According to the provision at issue, medical expenses paid by a taxpayer for persons in need of longterm care may be permitted for inclusion in itemized deduction only if they were paid to the abovementioned health care providers, whilst expenses paid to other lawful health care providers not listed above are not allowed. This is due to a disparity in the distribution of the nation's medical resources and a limitation on the geographic spread of the abovementio-ned health care providers. As such the provision frustrates the constitutional intent of granting equal protec-

憲法第十五條規定，人民之生存權應予保障。又憲法第一百五十五條規定，人民之老弱殘廢，無力生活，及受非常災害者，國家應予以適當之扶助與救濟。國家所採取保障人民生存與生活之扶助措施原有多端，租稅優惠亦屬其中之一環。依系爭規定，納稅義務人就受長期照護者所支付之醫藥費，一律以付與上開醫療院所為限，始得列舉扣除，而對因受國家醫療資源分配使用及上開醫療院所分布情形之侷限，而至上開醫療院所以外之其他合法醫療院所就醫所支付之醫藥費，卻無法列舉扣除，將影響受長期照護者生存權受憲法平等保障之意旨。故系爭規定所形成之差別待遇是否違反平等原則，應受較為嚴格之審查，除其目的須係合憲外，所採差別待遇與目的之達成間亦須有實質關聯，始與憲法平等原則之意旨相符（本院釋字第六九四號解釋參照）。

tion of the right of survival for persons in need of long-term care. Therefore, whether the discriminatory measures taken by the said provision violate the principle of equality should be scrutinized closely. To be consistent with the Constitution's principle of equality, not only there shall be a legitimate government purpose, there must also be a substantial connection between the discriminatory measure taken and the purpose it aims to achieve.

The purpose of the provision at issue in classifying health care providers for itemized deduction was to avoid superfluous claims and to guard against tax avoidance. Furthermore the medical expenses of taxpayers are numerous and complicated, whilst the manpower of the tax agencies is limited and unable to verify all medical bills. In order for tax agencies to have a firm and accurate grip on all medical expense claims, also, in light of the verifiability of the abovementioned health care providers given their sound accounting system which can facilitate tax audits, it was determined that itemized deduction for medical expenses

系爭規定以上開醫療院所作為得否申報醫藥費列舉扣除額之分類標準，旨在避免浮濫或淪為規避稅負之工具；抑且，因全體納稅義務人之醫藥費支出，數量眾多龐雜，而稅捐稽徵機關人力有限，逐一查證不易，為使稅捐稽徵機關正確掌握醫藥費用支出，考量上開醫療院所健全會計制度具有公信力，有利稅捐稽徵機關之查核，而就醫藥費申報列舉扣除額須以付與上開醫療院所者為限始准予減除（財政部九十九年七月八日台財稅字第０九九００一八一二三０號函參照）。惟受長期照護者因醫療所生之費用，其性質屬維持生存所必需之支出，於計算應稅所得淨額時應予以扣除，不應因其

should be allowable only for expenses paid to the abovementioned health care providers (Letter of Ministry of Finance, Tai_Chai_Sui No. 09900181230, issued on July 8, 2010). Yet the nature of medical expenses for persons under long-term care is an expense essential for survival. They should be deductible when calculating net taxable income. There should be no difference solely because it was paid to a lawful health care provider other than the abovementioned health care providers. Also, whether it is a genuine medical expense may be reviewed by the tax agencies. The review will not add onerous administrative costs to the collection of taxes. Therefore, the benefit for tax enforcement generated by the discrimination of the provision at issue is not significant, yet it has an adverse and substantial effect on the right of survival of persons in long-term care. It cannot be said that this is in line with the intent of the Constitution. Therefore, with regard to the provision at issue limiting itemized deduction of medical expenses for long-term care to expenses paid to the abovementioned health care providers and disallowing expenses

醫療費用付與上開醫療院所以外之其他合法醫療院所而有所差異。況是否屬醫藥費支出，稅捐稽徵機關仍可基於職權予以審核，以免規避稅負，不致增加過多行政稽徵成本。故系爭規定所為之差別待遇對避免浮濫或淪為規避稅負達成之效果尚非顯著，卻對受長期照護者之生存權形成重大不利之影響，難謂合於憲法保障受長期照護者生存權之意旨。是系爭規定就受長期照護者之醫藥費，以付與上開醫療院所為限始得列舉扣除，而對於付與其他合法醫療院所之醫藥費不得列舉扣除，其差別待遇之手段與目的之達成間欠缺實質關聯，與憲法第七條平等原則之意旨不符，在此範圍內，系爭規定應不予適用。

paid to other lawful health care providers, there is no substantial connection between the discriminatory measures taken and the purpose it aims to achieve. The said provision is inconsistent with the principle of equality in Article 7 of the Constitution. To the extent that such inconsistency exists, the said provision shall not be applicable.

Justice Mao-Zong, Huang filed concurring opinion.

Justice Shin-Min, Chen filed concurring opinion.

Justice Chang-Fa, Lo filed concurring opinion.

Justice Dennis Te-Chung, Tang filed concurring opinion in part and dissenting opinion in part.

Justice Huang, Hsi-Chun filed dissenting opinion, in which Justice ChiMing, Chih joined.

本號解釋黃大法官茂榮提出協同意見書；陳大法官新民提出協同意見書；羅大法官昌發提出協同意見書；湯大法官德宗提出部分協同暨部分不同意見書；黃大法官璽君提出，池大法官啟明加入之不同意見書。

EDITOR'S NOTE:

Summary of facts: Petitioner A listed NT$680,000 in expenses for long-term medical care for relatives he supported as an itemized deduction in his 2005 in-

編者註：

事實摘要：聲請人 A 申報 94 年度綜合所得稅時，列報受其扶養、需長期照護親屬之醫藥費為列舉扣除額，計 68 萬餘元。財政部北區國稅局依 94 年

come tax return. Persuant to the first part of Article 17, Paragraph 1, Subparagraph 2, Item 2, Division 3 of the Income Tax Act revised and publicized on December 28, 2005, the Northern District Office of the National Taxation Bureau, Ministry of Finance determined that NT$460,000 of the said deductions were neither medical expenses, nor receipts issued by statutorily defined health care facilities, hence it disallowed the deduction and levied an additional tax of NT$1,950.

12 月 28 日修正公布之所得稅法第 17 條第 1 項第 2 款第 2 目之 3 前段規定，認定其中 46 萬餘元非醫療費用，亦非該規定所定之醫療院所出具之收據，而予剔除，並補徵應納稅額 1950 元。

The petitioner disagreed. The petitioner claimed that the said medical expenses were home care with hospital assistance, including regular visits and examinations by hospital staff—who performed actions such as replacing medical materials such as gastric tubes and respiratory tubes (pus suction bags, oxygen and respiratory tubes) —, service expenses for personal care and tube feeding, and traffic expenses for medical staff.

聲請人不服，主張該醫藥費係居家照護在醫院協助下，定期派員訪視，進行體檢、更換胃管及呼吸管等醫療相關之醫材費（抽痰包、氧氣及呼吸皮管）、照顧服務費、管灌食品費及醫事人員探訪車資等，為醫療行為之必要費用，而申請復查。

The result of a re-examination found that some NT$20,000 receipts were issued by statutorily defined health care

復查結果追認其中 2 萬餘元為上開規定所定醫療院所之特約機構所開立，屬醫療必要費用，其餘部分仍不准

facilities and hence were allowable medical expenses, while the rest of the claimed deductions were still not allowable. The petitioner was not satisfied with this decision and filed an administrative lawsuit. He is of the opinion that the provision at issue allowing deduction for medical expenses only for limited health care facilities violates the principle of equality in the Constitution. Therefore, after exhausting all remedies, he petitioned for a constitutional interpretation.

列扣。聲請人不服，於行政訴訟敗訴確定後，認系爭規定限定醫藥費出具之醫療院所，違反憲法平等原則，聲請解釋。

J. Y. Interpretation No. 702 (July 27, 2012) *

【Lifetime disqualification from teaching due to conduct that is inconsistent with teachers' morals and dignity】

ISSUE: If a person commits an act that is inconsistent with teachers'morals and dignity, the Act Governing Teachers prohibits him/her from teaching again in his/her lifetime and ends his/her employment if he/she is currently employed as a teacher. Is such a provision unconstitutional ?

RELEVANT LAWS:

Article 15, 23, 158 of the Constitution（憲法第十五條、第二十三條、第一五八條）；J. Y. Interpretations Nos. 521, 545, 584, 649, and 659（司法院釋字第五二一號、第五四五號、第五八四號、第六四九號、第六五九號解釋）；The Act Governing Teachers as amended and promulgated on November 25, 2009: Article 11; Article 14, Paragraph 2; Article 14, Paragraph 1, Subparagraph 6; Article 14, Paragraph 3; Article 17（教師法第十一條、第十四條第二項、第十四條第一項第六款、第十四條第三項、第十七條 (中華民國九十八年十一月二十五日修正公布)）；The Act Governing Teachers as amended and promulgated on January 4, 2012: Article 14, Paragraph 1, Subparagraph 7; Article 14, Paragraph 3（教

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* Translated by Chi Chung.

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

師法第十四條第一項第七款、第十四條第三項(一0一年一月四日修正公布)）；Articles 20 and 21 of the University Act（大學法第二十條、第二十一條）；Article 31 of the Act Governing the Employment of Teachers（教育人員任用條例第三十一條）；Articles 4 and 6 of the Regulations on the Evaluation of the Teachers Working at Public High Schools, Public Junior High Schools, and Public Elementary Schools（公立高級中等以下學校教師成績考核辦法第四條、第六條）；The Regulations Establishing Committees for the Evaluation of the Teachers Working at Public High Schools, Public Junior High Schools, and Public Elementary Schools（高級中學以下學校教師評審委員會設置辦法）.

KEYWORDS:

Rright to work（工作權）, freedom to choose one' s vocation（職業選擇自由）, subjective requirements (or qualifications)（主觀條件）, Act Governing Teachers（教師法）, principle of clarity （明確性原則）, principle of proportionality（比例原則）, incapable teachers（不適任教師）, teachers' morals and dignity（師道）.**

HOLDING: Article 14, Paragraph 1 of the Act Governing Teachers, as amended and promulgated on November 25, 2009, provides that "a teacher may not be dismissed by his/her employer unless one of the following conditions is satis-

解釋文：中華民國九十八年十一月二十五日修正公布之教師法第十四條第一項規定，教師除有該項所列各款情形之一者外，不得解聘、停聘或不續聘，其中第六款（即一0一年一月四日修正公布之同條第一項第七款）所定

fied." One such condition, as provided in Article 14, Paragraph 1, Subparagraph 6, is met when a relevant government agency finds a teacher has committed an act that is inconsistent with teachers' morals and dignity. (Subparagraph 6 became Subparagraph 7 when the Act Governing Teachers was amended on January 4, 2012.) Article 14, Paragraph 1, Subparagraph 6 is consistent with the constitutional requirement that the meaning of the law be clear to the public. Article 14, Paragraph 3 of the Act Governing Teachers requires that schools, after reporting to the government agency in charge of education administration and securing its approval, dismiss teachers whom a relevant government agency has found to have committed an act inconsistent with teachers' morals and dignity. (Article 14, Paragraph 3 was not fundamentally changed when the Act Governing Teachers was amended on January 4, 2012.) Article 14, Paragraph 3 restricts the right to work, but is consistent with the principle of proportionality guaranteed by Article 23 of the Constitution and the constitutional protec-

「行為不檢有損師道，經有關機關查證屬實」之要件，與憲法上法律明確性原則之要求尚無違背。又依同條第三項（即一０一年一月四日修正公布之同條第三項，意旨相同）後段規定，已聘任之教師有前開第六款之情形者，應報請主管教育行政機關核准後，予以解聘、停聘或不續聘，對人民職業自由之限制，與憲法第二十三條比例原則尚無牴觸，亦與憲法保障人民工作權之意旨無違。惟同條第三項前段使違反前開第六款者不得聘任為教師之規定部分，與憲法第二十三條比例原則有違，應自本解釋公布之日起，至遲於屆滿一年時失其效力。

tion of the right to choose an occupation. However, the prohibition on teaching after committing an act inconsistent with teachers' morals and dignity contradicts the principle of proportionality guaranteed by Article 23 of the Constitution and shall become invalid within a year of the date on which this interpretation is announced.

REASONING: Article 15 of the Constitution protects the right to work, including the right to choose and pursue an occupation. If the law imposes some conditions on the right to choose and pursue an occupation, such conditions constitute restrictions on those rights. The principle of clarity requires that such restrictions be set out clearly in laws and regulations. Moreover, the principle of clarity allows the legislature, after weighing the complexity of society and the propriety of application in specific cases, to use general terms in the statutory language as long as the meanings of such terms are (a) not difficult to understand, (b) foreseeable for the people affected, and (c) subject to judicial review. (Inter-

解釋理由書：憲法第十五條規定，人民之工作權應予保障，其內涵包括人民之職業自由。法律若課予人民一定職業上應遵守之義務，即屬對該自由之限制，有關該限制之規定應符合明確性原則。惟立法者仍得衡酌法律所規範生活事實之複雜性及適用於個案之妥當性，適當運用不確定法律概念或概括條款而為相應之規定，苟其意義非難以理解，且為受規範者所得預見，並可經由司法審查加以確認，即不得謂與前揭原則相違（本院釋字第五二一號、第五四五號、第六五九號解釋參照）。另對職業自由之限制，因內容之差異，在憲法上有寬嚴不同之容許標準，若所限制者為從事一定職業所應具備之主觀條件，則需所欲實現者為重要之公共利益，且其手段屬必要時，方得為適當之

pretations Nos. 521, 545, and 659) The question of whether a particular restriction on the right to choose and pursue an occupation is constitutional is governed by various standards. Whether a particular standard governs the constitutionality of a restriction depends on the content of the restriction. If a particular restriction sets out subjective requirements for an occupation, the principle of proportionality, as provided for in Article 23 of the Constitution, requires the purpose to be important to the public interest and the means to be necessary. (Interpretations Nos. 584 and 649)

限制，始符合憲法第二十三條比例原則之要求，迭經本院解釋在案（本院釋字第五八四號、第六四九號解釋參照）。

Article 14, Paragraph 1, Subparagraph 6 of the Act Governing Teachers, as amended on November 25, 2009, provides that "a teacher may not be dismissed by his/her employer unless… he/she is found by a relevant government agency to have committed an act that is inconsistent with teachers' morals and dignity." (hereafter referred to as the First Disputed Provision) (Subparagraph 6 became Subparagraph 7 after the Act Governing Teachers

九十八年十一月二十五日修正公布之教師法第十四條第一項第六款規定：「教師聘任後除有下列各款之一者外，不得解聘、停聘或不續聘：……六、行為不檢有損師道，經有關機關查證屬實。」（一〇一年一月四日修正增訂同條第一項第三款，原條文移列同項第七款；下稱系爭規定一）其以「行為不檢有損師道，經有關機關查證屬實」為解聘、停聘或不續聘之構成要件，係因行為人嚴重違反為人師表之倫理規範，致

was amended on January 4, 2012.) The First Disputed Provision was enacted because an individual had violated the ethical norms so seriously that it was no longer appropriate for him to be employed as a teacher.

已不宜繼續擔任教職。

As it is impossible for the Legislative Yuan to set out comprehensive rules for ethical norms and the circumstances of every violation, the Legislative Yuan chose to set out the rule using "broad legal concepts" (*unbestimmte Rechtsbegriffe*). The specific meanings of such broad legal concepts may be spelled out in each case by institutions that are properly constituted and unbiased according to both their professional knowledge and the general consensus of society. An example of such an institution is the teacher evaluation committee of each school, established by Article 11 and Article 14, Paragraph 2 of the Act Governing Teachers; Article 20 of the University Act; and the Regulations Establishing Committees for the Evaluation of the Teachers Working at Public High Schools, Public Junior High

惟法律就其具體內涵尚無從鉅細靡遺詳加規定，乃以不確定法律概念加以表述，而其涵義於個案中尚非不能經由適當組成、立場公正之機構，例如各級學校之教師評審委員會（教師法第十一條、第十四條第二項、大學法第二十條及高級中等以下學校教師評審委員會設置辦法參照），依其專業知識及社會通念加以認定及判斷；

Schools, and Public Elementary Schools .

In addition, through education and the many statutes, regulations, and voluntary commitments made by members of the teaching profession (Article 17 of the Act Governing Teachers; the Regulations on the Evaluation of the Teachers Working at Public High Schools, Public Junior High Schools, and Public Elementary Schools; and the Self-Regulation Commitments Made by All Teachers in the Nation), teachers are able to foresee whether a particular act or omission is inconsistent with teachers' morals and dignity. In addition, many cases in which teachers have behaved in a way inconsistent with the morals and dignity of their profession have arisen in practice, including engaging in sexual harassment, corporal punishment, cheating on examinations, and plagiarism. These cases allow teachers to foresee whether a particular act or omission is inconsistent with the morals and dignity of their profession.

而教師亦可藉由其養成教育及有關教師行為標準之各種法律、規約（教師法第十七條、公立高級中等以下學校教師成績考核辦法、全國教師自律公約等參照），預見何種作為或不作為將構成行為不檢有損師道之要件。且教育實務上已累積許多案例，例如校園性騷擾、嚴重體罰、主導考試舞弊、論文抄襲等，可供教師認知上之參考。

In conclusion, the meaning of "inconsistency with teachers' morals and dignity," as provided for in the First Disputed Provision, is (a) not difficult to understand, (b) foreseeable for the people who are affected, i.e., teachers, and (c) subject to judicial review. Therefore, the First Disputed Provision is consistent with the principle of clarity. However, in light of the clear patterns established in cases of behavior inconsistent with teachers' morals and dignity, these types of behavior should be set out clearly in a statute to ensure the highest level of foreseeability. Such a statute should be reviewed and amended as society changes over time.

綜上，系爭規定一之行為不檢有損師道，其意義非難以理解，且為受規範之教師得以預見，並可經由司法審查加以確認，與法律明確性原則尚無違背。惟所謂行為不檢有損師道之行為態樣，於實務形成相當明確之類型後，為提高其可預見性，以明文規定於法律為宜，並配合社會變遷隨時檢討調整，併此指明。

Article 14 of the Act Governing Teachers sets out the legal effects of the First Disputed Provision. The first half of Article 14, Paragraph 3 prohibits any teacher who commits any act or omission inconsistent with teachers' morals or dignity from being hired as a teacher again in his/her lifetime. (The same is provided for in the first half of Article 14, Paragraph 3 of the Act Governing Teachers as

前開教師法第十四條就有系爭規定一情形，以同條第三項前段規定：「不得聘任為教師」（一〇一年一月四日修正公布之教師法第十四條第三項前段之意旨相同，以下即以該前段適用於系爭規定一之情形為系爭規定二）；其已聘任者，則以後段規定：「應報請主管教育行政機關核准後，予以解聘、停聘或不續聘」（一〇一年一月四日修正公布之教師法第十四條第三項後段之意旨相

amended on January 4, 2012, which is referred to hereafter as the Second Disputed Provision.) The second half of Article 14, Paragraph 3 obliges all schools to fire any teacher who commits any act or omission inconsistent with teachers' morals or dignity. (The same is provided for in the second half of Article 14, Paragraph 3 of the Act Governing Teachers as amended on January 4, 2012, which is referred to hereafter as the Third Disputed Provision.) In other words, any teacher fired by any school for violating the First Disputed Provision may not be hired by any school as a teacher in his/her lifetime.

同，以下即以該後段適用於系爭規定一之情形為系爭規定三）。以致因系爭規定一之原因而被解聘、停聘或不續聘為教師者，亦不得再次聘任。使教師於有系爭規定一之情形，不僅應受三種強制退出現任教職方式之一之處置，且終身禁止再任教職。

The obligation of a school to fire a teacher for violating the First Disputed Provision and the prohibition against employing the individual again as a teacher are subjective restrictions on the freedom to choose one's occupation. The question of whether such restrictions are consistent with the principle of proportionality depends, first, on the question of whether the restrictions serve the public interest in an important way. Article 158 of the

不論無法保留教職或無法再任教職，均屬對人民職業選擇自由所為主觀條件之限制，是否符合比例原則，首應審查其所欲實現之公共利益是否重要。憲法第一百五十八條宣示之教育文化目的，包括發展國民之「自治精神」及「國民道德」，其意無非以教育為國家百年大計，為改善國民整體素質，提升國家文化水準之所繫，影響既深且遠。

Constitution of the Republic of China admonishes the government to formulate and realize educational and cultural policies that, among other things, develop the spirit of self-governance and morals among the citizenry. Such an admonition is recognition of the foundational importance of education, as education is the key to improving the overall quality of the citizenry and raising the level of the culture of a nation.

The Second and Third Disputed Provisions, requiring all schools to fire any teacher whose conduct is inconsistent with teachers' morals and dignity, are promulgated for the purpose of ensuring students' right to receive good education and realizing the admonition provided for in the Constitution of the Republic of China. In other words, the purpose of the Second and Third Disputed Provisions is indeed important to the public interest and therefore a legitimate purpose. (See also Interpretation No. 659)

系爭規定二、三明定教師於行為不檢有損師道時，即可剝奪其教職，係為確保學生良好之受教權及實現上開憲法規定之教育目的，其所欲維護者，確屬重要之公共利益，其目的洵屬正當（本院釋字第六五九號解釋參照）。

Respecting teachers is a long tradition of our country, and students respect teachers for more than their knowledge and skills. If a teacher's conduct seri-ously deviates from the common moral standards and good customs of the majority of society, he/she sets a bad example both for his/her students and for society. The Second and Third Disputed Provisions impose serious punishment on teachers whose conduct is inconsistent with teachers' morals and dignity in order to achieve the aforementioned purposes. As to the questions of whether the means are necessary and whether the restrictions are too strict, the Second and Third Disputed Provisions should be examined separately.

我國素有尊師重道之文化傳統，學生對教師之尊崇與學習，並不以學術技能為限，教師之言行如有嚴重悖離社會多數共通之道德標準與善良風俗，若任其擔任教職，將對眾多學子身心影響至鉅；其經傳播者，更可能有害於社會之教化。系爭規定二、三對行為不檢有損師道之教師施以較嚴之處置，自有助於上開目的之達成。至於手段是否必要與限制是否過當，系爭規定二、三則有分別審究之必要。

Under the existing law, there are various punishments for teacher misconduct. For example, Article 4 of the Regulations on the Evaluation of the Teachers Working at Public High Schools, Public Junior High Schools, and Public Elementary Schools punishes any teacher who commits minor misconduct by freezing his/her salary level. In addition, Article 6

現行教育法規對於教師行為不檢之各種情形，已多有不同之處置，以公立高級中等以下學校教師成績考核辦法而言，其第四條即有就「品德生活較差，情節尚非重大」為留支原薪，同辦法第六條就「有不實言論或不當行為致有損學校名譽」為申誡，就「有不當行為，致損害教育人員聲譽」為記過，或就「言行不檢，致損害教育人員聲譽，

punishes any teacher whose false speech or misconduct harms the school's reputation by formal admonition, any teacher who commits misconduct that harms the reputation of the teaching profession as a whole by making formal records of such misconduct, and any teacher who commits misconduct that seriously harms the reputation of the teaching profession as a whole by making formal records of such *serious* misconduct. The misconduct punishment system indicates that the nature of a teacher's misconduct has to be very serious to constitute "an act that is inconsistent with teachers' morals and dignity." As a result, teachers' misconduct must be serious enough to amount to "adversely affecting teacher's morals and dignity."

情節重大」為記大過等不同程度之處置，顯然「行為不檢」之情節須已達相當嚴重程度，始得認為構成「有損師道」。

The Act Governing Universities does not provide for a similar evaluation mechanism. However, through the Regulations on Teachers' Evaluation, a self-governance mechanism authorized by Act 21 of the Act Governing Universities, various types of punishment also exist for teachers' misconduct that does

大學法雖未規定類似之成績考核制度，但通過授權各校訂定之教師評鑑辦法（大學法第二十一條可參），對於教師行為不檢但未達有損師道之情形，亦可以自治方式為不同之處置。另按教師法第十四條第三項之規定，有同條第一項所列與行為不檢相關之事由者，既生相同之法律效果，解釋上系爭規定一

not reach the level of "adversely affecting teacher's morals and dignity." In addition, Article 14, Paragraph 3 of the Act Governing Teachers provides for the same legal consequences for all the types of misconduct listed in Article 14, Paragraph 1. Therefore, the misconduct referred to by the First Disputed Provision should be as serious as the other types of misconduct listed in Article 14, Paragraph 1. The Third Disputed Provision, which requires schools to fire teachers who commit serious misconduct, is a restriction as to the subjective requirements (or qualifications) that is the most lenient measure to achieve the same purpose. Therefore, the provision is consistent with the principle of proportionality as provided for in Article 23 of the Constitution and does not violate the constitutional protection of the right to work.

之嚴重性自亦應達到與其他各款相當之程度，始足當之。故系爭規定三對行為不檢而有損師道之教師，予以解聘、停聘、不續聘，其所為主觀條件之限制，並無其他較溫和手段可達成同樣目的，尚未過當，自未牴觸憲法第二十三條之比例原則，與憲法保障人民工作權之意旨尚無違背。系爭規定二限制教師終身不得再任教職，不啻完全扼殺其改正之機會，對其人格發展之影響至鉅。倘行為人嗣後因已自省自新，而得重返教職，繼續貢獻所學，對受教學生與整體社會而言，實亦不失為體現教育真諦之典範。

The Second Disputed Provision prohibits all schools from rehiring a teacher who has committed misconduct and therefore deprives such teachers of any opportunity to become a good teacher

系爭規定二一律禁止終身再任教職，而未針對行為人有改正可能之情形，訂定再受聘任之合理相隔期間或條件，使客觀上可判斷確已改正者，仍有機會再任教職，就該部分對人民工作權

and adversely affects the development of their character. If the teacher, after being punished by the school and relevant authorities, repents and can become a good teacher, such a transformation would exemplify the benefits of education for students and society as a whole. However, the Second Disputed Provision prohibits any such teacher from teaching again in his lifetime without providing for any exception under which such an individual can teach again, after the passage of a reasonable period of time and after satisfying certain conditions that indicate his/her repentance. The lack of such an exception restricts the right to work beyond the extent necessary; therefore the provision is inconsistent with the principle of proportionality as provided for in Article 23 of the Constitution. The relevant authorities should review and revise the Second Disputed Provision within one year of the promulgation of this interpretation. If the relevant authorities fail to complete such a review and revision within one year of the promulgation of this interpretation, the Second Disputed Provision loses its

之限制實已逾越必要之程度，有違憲法第二十三條之比例原則。有關機關應依本解釋意旨於本解釋公布之日起一年內完成系爭規定二之檢討修正，逾期未完成者，該部分規定失其效力。

legal effect from that date.

Justice Chang-Fa, Lo filed concurring opinion.

Justice Yeong-Chin, Su filed concurring opinion in part and dissenting opinion in part.

Justice Chen-Shan, Li filed dissenting opinion in part.

Justice Mao-Zong, Huang filed dissenting opinion in part.

Justice Pai-Hsiu, Yeh filed dissenting opinion in part.

Justice Shin-Min, Chen filed dissenting opinion in part

本號解釋羅大法官昌發提出之協同意見書；蘇大法官永欽提出之部分協同部分不同意見書；李大法官震山提出之部分不同意見書；黃大法官茂榮提出之部分不同意見書；葉大法官百修提出之部分不同意見書；陳大法官新民提出之部分不同意見書。

EDITOR'S NOTE:

Summary of facts: Article 14, Paragraph 1 of the Act Governing Teachers, as amended and promulgated on November 25, 2009, provides that "a teacher may not be dismissed by his/her employer unless one of the following conditions is satisfied." One such condition is, as provided in Article 14, Paragraph 1, Sub-Paragraph 6, that a teacher is found by a relevant government agency to have committed

編者註：

事實摘要：98.11.25 修訂之教師法第 14 條第 1 項規定，教師聘任後，除有該條各款所列情形外，不得解聘、停聘或不續聘。其中第 6 款規定「有行為不檢有損師道，經有關機關查證屬實」者，亦屬之（101.1.4 修正移列為第 7 款）。又有前述第 1 項第 6 款之情形，依同條第 3 項前段規定，終身不得聘任為教師；其已聘任者，依同項後段規定，應報請主管機關核准後，予以解聘、停

an act inconsistent with teachers' morals and dignity. (Sub-Paragraph 6 became Sub-Paragraph 7 when the Act Governing Teachers was amended on January 4, 2012.) The second half of Article 14, Paragraph 3 of the Act Governing Teachers requires that schools, after reporting to the government agency in charge of education administration and securing its approval, dismiss teachers found by a relevant government agency to have committed an act inconsistent with teachers' morals and dignity. The first half of Article 14, Paragraph 3 of the Act Governing Teachers prohibits such persons to teach again in their lifetime.

聘或不續聘。

The applicant was a married male who had taught at a public senior high school. While employed as a teacher, he had served as a counselor at the summer camp held by his school in July 2009, during which time he had been accused of raping a student. After an investigation, his school terminated his employment effective September 2010 on account of violating Article 14, Paragraph 1, Sub-

聲請人為公立高中已婚教師，於98年7月間該校暑期營隊活動擔任輔導員，被檢舉於活動期間對服務學員發生疑似違反其意願之性行為。該校隨即調查，調查結果並無性侵害情事，嗣該校教師評審委員會以上述第1項第6款規定為由，決定自99學年度起不予續聘；教育部亦核准該處分。聲請人不服，經申復、申訴及行政訴訟，均遭駁回，乃認上述各規定違反憲法比例原則及工

Paragraph 6 of the Act Governing Teachers. When the Ministry of Education affirmed his school's decision to terminate his employment, the applicant duly objected and litigated his school's decision in administrative courts. After exhausting all administrative remedies, the applicant applied for a Constitutional Interpretation, asserting that the provisions aforementioned were inconsistent with the principle of proportionality as provided for in the Constitution and the right to work protected by the Constitution.

作權保障，聲請解釋。

J. Y. Interpretation No.703（October 5, 2012）*

【Depreciation deductions for the capital expenditures for the fixed assets acquired by the hospitals established as non-profit foundations.】

ISSUE: As prescribed by an administrative regulation, hospitals that are affiliated with public interest groups are not allowed to take depreciation deductions if capital expenditures have been previously taken for the full amount for the purpose of qualifying for tax exemption. Does this administrative regulation violate the Constitution ?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）；Judicial Interpretation No. 399, No. 576, No. 582, No. 620, No. 622, No. 640, No. 664, No. 674, No. 675, No. 692, and No. 698（司法院釋字第三九九號、第五七六號、第五八二號、第六二０號、第六二二號、第六四０號、第六六四號、第六七四號、第六七五號、第六九二號及第六九八號解釋）；Article 4, Section 1, Paragraph 13 of the Income Tax Act, as amended on January 19, 1979（中華民國六十八年一月十九日修正公布之所得稅法第四條第一項第十三款）；Article 24, Section 1 of the Income Tax Act, as amended on May 30, 2006（九十五年五月三十日修正公布之所得稅法

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* Translated by Chun-Jen Chen.

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

第二十四條第一項）；Article 2, Section 1, Paragraph 8 of the Standards Applicable for Education, Culture, Public Charity Organizations or Groups on Their Exemption from Income Taxation, as amended on December 30, 1994（八十三年十二月三十日修正發布之教育文化公益慈善機關或團體免納所得稅適用標準第二條第一項第八款）；Point 1, Paragraph 5, Resolutions 1 and 3 of the Letter (han) Ruling Tai Shui Yi Fa No. 841664043, issued by the Taxation Administration, Ministry of Finance on December 19, 1995（財政部賦稅署八十四年十二月十九日台稅一發第八四一六六四０四三號函一（五）決議１及決議３）.

KEYWORDS:

rely upon in effect（實質援用）, material relevance（重要關聯）, taxation in accordance with the law（租稅法律主義）, the principle of matching income with costs and expenses（收入與成本費用配合原則）, public interest groups（公益團體）, the full amount of the expenses is listed as capital expenditures（全額列為資本支出）, depreciation deductions（按年提列折舊）, tax base（稅基）, tax fairness（租稅公平）, competition neutrality（競爭中立）.**

HOLDING: Point 1, Paragraph 5, Resolutions 1 and 3 of the Letter (han) Ruling Tai Shui Yi Fa No. 841664043, issued by the Taxation Administration, Ministry of Finance, on December 19,

解釋文：財政部賦稅署中華民國八十四年十二月十九日台稅一發第八四一六六四０四三號函一（五）決議１與３，關於財團法人醫院或財團法人附屬作業組織醫院依教育文化公益慈善

1995, interpreting Article 2, Section 1, Paragraph 8 of the Standards Applicable for Education, Culture, and Public Charity Organizations or Groups on Their Exemption from Income Taxation, state that, if capital expenditures have been taken for the full amount for assets such as buildings and equipment for health care purposes in the year of their procurement, hospitals established as nonprofit foundations or as part of such foundations have to deduct the amount of such expenditures from their "income arising from sources other than the sales of goods or services" (xiaoshou huowu huo laowu yiwai zhi shouru), and that such hospitals cannot take any depreciation deductions in the following years. Resolutions 1 and 3 violate Article 19 of the Constitution, which requires that taxation be in accordance with the law; therefore, they should cease to be relied upon on the day this Interpretation is announced.

機關或團體免納所得稅適用標準第二條第一項第八款規定之免稅要件，就其為醫療用途所購置之建物、設備等資產之支出，選擇全額列為購置年度之資本支出，於計算課稅所得額時，應自銷售貨物或勞務以外之收入中減除及以後年度不得再提列折舊部分，違反憲法第十九條租稅法律主義，應自本解釋公布之日起不再援用。

REASONING: The petitioner claimed that Point 1, Paragraph 5, Resolutions 3 of the Letter (han) Ruling Tai Shui Yi Fa No. 841664043 issued by the Taxa-

解釋理由書：本件聲請人主張最高行政法院九十六年度判字第一八六二號判決、臺北高等行政法院九十五年度訴字第二六八六號、第三一０三

tion Administration, Ministry of Finance on December 19, 1995 (hereinafter referred to as Disputed Resolution) may be unconstitutional and filed the current petition. The Letter Ruling is the basis upon which the following judgments were rendered: Pan Zi No. 1862 (2007) of the Supreme Administrative Court, Su Zi Nos. 2686 and 3103 (2006), Su Zi No. 2731 (2007), Su Zi No. 2838 (2008), Su Zi No. 1862 (2009), Su Zi No. 1866 (2010), and Su Zi No. 1476 (2011) of the Taipei High Administrative Court (together hereinafter referred to as the Final Judgments). Although the Disputed Resolution was not explicitly cited in the opinion of Su Zi No. 3103 (2006), judging from the legal opinions provided by Su Zi No. 3103 (2006) Disputed Resolution 3 was in effect relied upon by Su Zi No. 3103 (2006) and, therefore, was also reviewed when considering the current petition (see Judicial Interpretation Nos. 399, 582, 622, 675, and 698).

號、九十六年度訴字第二七三一號、九十七年度訴字第二八三八號、九十八年度訴字第一八六二號、九十九年度訴字第一八六六號及一００年度訴字第一四七六號判決（下併稱確定終局判決）所援用之財政部賦稅署八十四年十二月十九日台稅一發第八四一六六四０四三號函一（五）決議（下稱系爭決議）3有違憲疑義，聲請解釋。查其中臺北高等行政法院九十五年度訴字第三一０三號判決理由中雖未明確援用系爭決議3，但由其所持法律見解判斷，應認其已實質援用，應併予受理（本院釋字第三九九號、第五八二號、第六二二號、第六七五號、第六九八號解釋參照）。

When an individual whose rights protected by the Constitution are illegally infringed upon and initiates a litigation

人民於其憲法上所保障之權利，遭受不法侵害，經依法定程序提起訴訟，對於確定終局裁判所適用之法律或

to raise the issue of the constitutionality of the statute or regulation being applied by the final judgments in accordance with Article 5, Section 1, Paragraph 2 of the Constitutional Interpretation Procedure Act, the object of review by this Court is not limited to the law or regulation being challenged within the petition; instead, the object of review by this Court includes the laws or regulations relied upon as the basis of the final judgments that are materially relevant to the petition (see J.Y. Interpretation Nos. 664 and 576). Alleging that Disputed Resolution 3 as applied by Final Judgments may be unconstitutional, the petitioner complied with the procedural requirements for filing a petition. In addition, as the part of Resolution 1 of the same Letter Ruling stating that "the full amount taken as capital expenditure in the year of procurement concerning the activities that are related to the objectives of the establishment of the Education, Culture, and Public Charity Organizations or Groups shall be subtracted from 'revenue not arising from the sale of goods or labor services,'" is materially relevant to the attribution of costs in the same manner as

命令發生有牴觸憲法之疑義，依司法院大法官審理案件法第五條第一項第二款規定聲請本院解釋憲法時，本院審查之對象，不以聲請書所指摘者為限，尚可包含該確定終局裁判援引為裁判基礎之法令中，與聲請人聲請釋憲之法令具有重要關聯者在內（本院釋字第六六四號、第五七六號解釋參照）。本件聲請人就確定終局判決援用之系爭決議3，認為有違憲疑義，聲請本院解釋，符合聲請解釋之要件。又同決議1關於「全額列為購置年度與其創設目的活動有關之資本支出，自銷售貨物或勞務以外之收入中減除」部分，因與決議3具有成本歸屬意義下之重要關聯，故應為本案審查之對象，一併納入解釋範圍。

is Resolution 3 and, therefore, shall also be subject to review by this Court in this case.

Article 19 of the Constitution states that individuals have the obligation to pay taxes in accordance with the law, and it means that when the state levies taxes on, or provides preferential tax treatment to, individuals, the essential terms, such as the taxpayer, the subject matter of the taxation, the attribution between the subject matter and the taxpayer, the tax base, the tax rate, the taxing method, and the date on which the tax becomes payable, among other things, shall be explicitly stipulated by statute. The competent authority interpreting the relevant laws must uphold the constitutional principles and the legislative purposes of the relevant laws, and apply the generally accepted methods of legal interpretation; any decision that exceeds the scope of legal interpretation and increases tax obligations that are not mandated by the law is not permitted by the principle of taxation in accordance with the law under Article 19 of the Constitution (see J.Y. Interpretation Nos. 620, 622,

憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、租稅客體對租稅主體之歸屬、稅基、稅率、納稅方法及納稅期間等租稅構成要件，以法律明文規定。主管機關本於法定職權就相關法律所為之闡釋，自應秉持憲法原則及相關法律之立法意旨，遵守一般法律解釋方法而為之；如逾越法律解釋之範圍，而增加法律所無之租稅義務，則非憲法第十九條規定之租稅法律主義所許（本院釋字第六二0號、第六二二號、第六四0號、第六七四號、第六九二號解釋參照）。

640, 674, and 692).

The first part of Article 24, Section 1 of the Income Tax Act states: "The income of a profit-seeking enterprise is its net profit amount, having subtracted all costs, expenses, losses, and taxes from its gross revenue of the fiscal year." (This provision was amended on May 30, 2006 by adding a second part to the first paragraph; after the amendment, therefore, the original Section 1 became the first part of Section 1.) In other words, the revenue of a profit-seeking business becomes its net profit, after the subtraction of all costs, expenses, losses, and taxes. Based on the principle of matching income with costs and expenses, only the costs, expenses, losses, and taxes that are incurred for the purpose of producing the revenue may be deductible. For fixed assets with a useful life of two years or longer, the annual depreciable amount shall be considered as costs (see Article 51 of the Income Tax Act) to correctly reflect the costs and expenses for the procurement of fixed assets in each respective year. In essence, as long as a cost or an expense can be direct-

所得稅法第二十四條第一項前段規定：「營利事業所得之計算，以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額。」（本條項於九十五年五月三十日修正增訂後段規定，其修正前第一項之規定即為修正後第一項前段之規定）亦即營利事業之收入，於減除各項成本費用、損失及稅捐後之純益額，始為營利事業所得額。依收入與成本費用配合原則，得自收入減除之各項成本費用、損失及稅捐，應以為取得該收入所發生者為限。耐用年數二年以上之固定資產應以其逐年折舊數認列為成本（所得稅法第五十一條規定參照），以正確反映固定資產之採購使用在各年度之成本費用。要之，成本費用如可直接合理明確歸屬於應稅所得及免稅所得，即應依其實際之歸屬核實認列，始符合所得稅法第二十四條第一項之規定。

ly, reasonably, and clearly attributed to either "taxable income" or "income exempt from taxation," it should be so attributed, so as to comply with Article 24, Section 1 of the Income Tax Act.

The Disputed Resolution 1 states: "When hospitals established as nonprofit foundations or as part of such foundations calculate their taxable income in accordance with Article 2-1 (now Article 3) of the Standards Applicable for Education, Culture, and Public Charity Organizations or Groups on Their Exemption from Income Taxation, depreciation deductions shall be taken annually against the assets newly acquired for health care purposes, such as buildings and equipment, under the relevant provisions under the Income Tax Act, mutatis mutandis, and be categorized "the costs or expenses for the sales of goods or the rendition of services." Should the capital expenditures stated above are related to the activities of the purpose for which the organization was established, the hospital may choose one of two options: to take annual depreciation with deduction from "the income

系爭決議1：「財團法人醫院或財團法人附屬作業組織醫院依免稅標準第二條之一（現行第三條）計算課稅所得額時，其為醫療用途新購置之建物、設備等資產，應比照適用所得稅法相關規定按年提列折舊，列為銷售貨物或勞務之成本費用。上開資本支出如與其創設目的活動有關，得選擇按年提列折舊，自銷售貨物或勞務之收入中減除，或全額列為購置年度與其創設目的活動有關之資本支出，自銷售貨物或勞務以外之收入中減除；……」同決議3：「財團法人醫院或財團法人附屬作業組織醫院為醫療用途所購置之資產全額列為購置年度與其創設目的活動有關之資本支出者，以後年度不得再提列折舊。」依上述決議，上開資本支出如選擇全額列為購置年度與其創設目的活動有關之資本支出，於計算課稅所得額時，自銷售貨物或勞務以外之收入中減除，而不得按年自銷售貨物或勞務之收入中減除。

arising from the sales of goods or the rendition of services," or to list the full amount as "capital expenditures related to the objective of establishment" for the fiscal year of procurement." The Disputed Resolution 3 states: "If capital expenditures have been taken for the full amount for assets such as buildings and equipment for health care purposes in the year of their procurement, hospitals established as non-profit foundations or as part of such foundations cannot take any depreciation deductions in the following years." In accordance with Resolutions 1 and 3, if a taxpayer elects to treat the entire amount of the purchase as "capital expenditures related to the objective of its establishment in the year when the purchase was made," when calculating the taxable income, the amount of such expenditures shall be deducted from the "income arising from sources other than the sales of goods or the rendition of services," rather than from "income arising from the sales of goods or rendition of services."

Article 4, Section 1, Paragraph 13 查所得稅法第四條第一項第十三

of the Income Tax Act provides that if an educational, cultural, public interest, or charitable organization or group (hereinafter referred to as a public interest group) who meets the criteria set out by the regulations promulgated by the Executive Yuan, its own income or the income of its subordinate operations (fushu zuoye zuzhi) shall be exempt from income taxation. Under the authorization of Paragraph 13, the Executive Yuan amended, on December 30, 1994, the Standards Applicable for Education, Culture, and Public Charity Organizations or Groups on Their Exemption from Income Taxation (hereinafter referred to as Standards for Tax Exemption). Article 2, Section 1, Paragraph 8 stipulates: "For any educational, cultural, public charity organization or group that meets the following requirements, its own income or the income of its subordinate operations is exempt from income taxation., except for 'the income from the sale of goods or rendition of services,'… (8) The expenditures incurred for the activities related to its objective of establishment that do not fall below 80% of the sum of the proceeds that accrued

款規定，教育、文化、公益、慈善機關或團體（下稱公益團體），符合行政院規定標準者，其本身之所得及其附屬作業組織之所得，免納所得稅。依該款之授權，行政院訂定並於八十三年十二月三十日修正發布之教育文化公益慈善機關或團體免納所得稅適用標準（下稱免稅適用標準）第二條第一項第八款規定：「教育、文化、公益、慈善機關或團體符合左列規定者，其本身之所得及其所附屬作業組織之所得，除銷售貨物或勞務之所得外，免納所得稅。……八、其用於與其創設目的有關活動之支出，不低於基金之每年孳息及其他經常性收入百分之八十者，但經主管機關查明函請財政部同意者，不在此限。」（本款於九十二年三月二十六日修正為：「八、其用於與其創設目的有關活動之支出，不低於基金之每年孳息及其他各項收入百分之七十者。但經主管機關查明函請財政部同意者，不在此限。」）該款規定，公益團體之支出占收入之比率達百分之八十，為免稅適用標準所定免稅要件之一。縱然非銷售貨物或勞務所得達到免稅適用標準，惟於計算銷售貨物或勞務之所得時，就其為醫療用途所購置之建物、設備等資產之支出，仍應依所得稅法相關規定，按年

annually for its funds and its other regular income; however, this requirement is waived if, after the investigation done by the relevant government offices, the Ministry of Finance approved the exemption from taxation." (Paragraph 8 was amended on March 26, 2003 as follows: "The expenditures incurred for activities related to its objective of establishment that do not fall below 70% of the sum of the proceeds that accrued annually for its funds and its other regular income; however, this requirement is waived if, after the investigation done by the relevant government offices, the Ministry of Finance approved the exemption from taxation.") Paragraph 8 requires that the expenditures must have reached 80% of its revenue to qualify a public interest group for tax exemption. Even if "the income arising from sources other than the sales of goods or the rendition of services" has met the requirement set out by the Standards for Tax Exemption, depreciation deductions must be taken annually against the expenditures for the procurement of buildings or equipment for healthcare purposes and listed as costs and expenses for "the in-

提列折舊，列為銷售貨物或勞務之成本費用，自銷售貨物或勞務之收入中減除，俾成本費用依其實際之歸屬核實計算。系爭決議1准許財團法人醫院或財團法人附屬作業組織醫院得選擇將其為醫療用途新購之建物、設備等資產，全額列為購置年度與其創設目的活動有關之資本支出，則其於以後年度，即不得再將上開資本支出列為計算免稅適用標準之支出，然其銷售貨物或勞務所得之計算，則仍應按年提列折舊，列為銷售貨物或勞務之成本費用，始符所得稅法第二十四條第一項前段之規定。系爭決議1，有關上開資本支出如為適用上開免稅要件，而選擇全額列為購置年度之資本支出，於計算課稅所得額時，應自銷售貨物或勞務以外之收入中減除部分，及同決議3所示以後年度不得再提列折舊，此否准法律所定得為扣除之成本費用，與上開所得稅法第二十四條第一項前段之規定不符，無異以命令變更法律所規定之稅基，違反憲法第十九條租稅法律主義，應自本解釋公布之日起不再援用。惟在銷售貨物或勞務所得之計算上，財團法人醫院或財團法人附屬作業組織醫院為醫療用途所購置資產之支出，既經核實認列為銷售貨物或勞務之成本費用，而依所得稅法相關規定許

come arising from the sale of goods or the rendition of services" in accordance with the relevant provisions of the Income Tax Act. Such depreciation deductions have to be subtracted from "the revenue arising from the sales of goods or the rendition of services" so that the costs and expenses are accurately calculated. The part of Disputed Resolution 1 that requires, if the full amount of such capital expenditures is treated as "capital expenditures" in the year of procurement, the subtraction of capital expenditures from "the income arising from sources other than the sales of goods or the rendition of services" when calculating the amount of taxable income, and the part of Disputed Resolution 3 that disallows depreciation deductions in the following years, essentially deny the deductibility of the costs and expenses allowed by the first half of Article 24, Section 1. In other words, the administrative regulations promulgated by the Ministry of Finance changes the tax base stipulated by the Income Tax Act passed by the Legislative Yuan, which violates the principle of taxation in accordance with the law, and, therefore, should cease

其按年提列折舊，則在非銷售貨物或勞務所得之計算上，同筆資產支出即不得全額認列為購置年度之資本支出，並自銷售貨物或勞務以外之收入中減除，始能貫徹所得稅法第二十四條第一項前段規定之意旨，並符租稅公平之原則，乃屬當然。

to be applied on the day this Interpretation is announced. It should be noted, however, that as the expenditures incurred by hospitals established as non-profit foundations or as part of such foundations for the procurement of assets for healthcare purpose are, after verification, listed as “the costs and expenses for the sales of goods or the rendition of services” when calculating “the income arising from the sales of goods or the rendition of services,” and annual depreciation is allowed under the Income Tax Act, when calculating “the income arising from sources other than the sales of goods or the rendition of services,” the same expenditures cannot be listed as capital expenditures in the full amount for the year of procurement and be deducted from "the income arising from sources other than the sales of goods or the rendition of services." In so doing the intent of the front portion of Article 24, Section 1 of the Income Tax Act can be realized and the principle of tax fairness be upheld.

The immediate case of whether the

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law in question is unconstitutional arises from the fact that the Income Tax Act exempts the income of public interest groups from taxation. In order to realize the legislative purpose of encouraging public interest work while taking into account tax fairness, the Executive Yuan, being authorized to promulgate the Standards for Tax Exemption, allows public interest groups to engage in revenue-seeking activities, but explicitly excludes their profits from the scope of their exemption from taxation. In addition, as a mean to urge public interest groups to concentrate their resources on activities that are consistent with the purposes of their establishment, the Executive Yuan caps their profit-seeking income with a certain ratio between expense and income. Such a cap has already caused significant problems for groups whose principal activities are public interest in nature. Take hospitals—the subject matter of this Interpretation—for example. First, they are highly regulated by the relevant government offices over their public interest activities. Secondly, in terms of the sale of goods or the rendition of services, hospitals, whether they

公益團體所得免徵所得稅之規定。為落實立法意旨、兼顧鼓勵從事公益及租稅公平之考量，被授權訂定免稅適用標準之行政院，先開放公益團體同時從事收益活動，再明確排除其營利所得之免稅；且為促使公益團體集中其資源投入於符合創設目的之活動，並儘量降低營利所得於一定比率範圍內，而設有收支比之管制。此一管制對於主要活動為單純公益之團體，在免稅上已造成諸多困擾。而對本件解釋涉及之醫院而言，一則對於其投入公益原已處於目的事業主管機關之高度管制下，二則均以銷售貨物或勞務為主，公益與非公益團體之醫院間存有直接競爭關係，使得此一管制之操作極易影響租稅公平與競爭中立。主管機關允宜就此一併檢討，併此指明。

pursue public interest or not, compete directly. The cap is, therefore, susceptible to manipulation that adversely affects tax fairness and competition neutrality. The relevant government offices should also review this aspect.

With regard to the petitioner's claim that the Supreme Administrative Court judgment (98) Pan Zi No. 488 (2009) relied on Disputed Resolution 3, and should therefore be part of its petition for constitutional interpretation, this Court finds that the said judgment did not rely on Disputed Resolution 3, and that this part of the petition does not meet the requirements set out by Article 5, Section 1, Paragraph 2 of the Constitutional Interpretation Procedure Act (sifa yuan dafaguan shenli anjian fa), and should, therefore, be dismissed under Section 3 of the same provision.

Justice Mao-Zong Hung filed concurring opinion.

Justice Beyue Su Chen filed concurring opinion.

Justice Chang-fa Lo filed concur-

至聲請人指稱最高行政法院九十八年度判字第四八八號判決援用系爭決議3，並據以聲請解釋憲法部分，查上開判決並未援用該決議，是其聲請核與司法院大法官審理案件法第五條第一項第二款規定不符，依同條第三項規定，應不受理。

本號解釋黃大法官茂榮提出協同意見書；陳大法官碧玉提出協同意見書；羅大法官昌發提出協同意見書；湯大法官德宗提出協同意見書；蘇大法官永欽提出部分不同意見書；池大法官啟明提

ring opinion.

Justice Dennis Te-Chung Tang filed concurring opinion.

Justice Yeong-Chin Su filed dissenting opinion in part.

Justice Chi-Ming Chihf filed dissenting opinion, in which Justice Hsi-Chun Hung joined.

Justice Sea-Yau Lin filed dissenting opinion.

Justice Hung Hsi-Chun filed dissenting opinion, in which Justice by Justice Ming Chen joined

出，黃大法官璽君加入之部分不同意見書；林大法官錫堯提出不同意見書；黃大法官璽君提出，陳大法官敏加入之不同意見書。

EDITOR'S NOTE:

Summary of facts:The petitioner, Hsing Tian Kong Healthcare Services, (1) in its tax filings for Education, Culture, and Public Charity Organizations, Groups and Their Operations from 1997 to 2001, failed to report any depreciation and amortization expenses for the buildings and equipment purchased for healthcare purpose with the net balance accrued between 1993 and 1996 and with government approval. The petitioner subsequently applied to correct these tax filings by amortizing such expenses. (2) Part

編者註：

聲請人行天宮醫療志業醫療財團法人，(一)86至90年度教育文化公益慈善機關團體及其作業組織結算申報，未列報其82至85年度結餘款經核准保留所購建醫療建物設施、設備等資產按年提列之折舊費用及各項攤提，嗣始申請增列該等資產之折舊費用，更正86至90年度所得稅結算申報；(二)91至97年度結算申報所列報之部分支出，係上揭82至85年度結餘款所購建固定資產按年提列之折舊費用及各項攤提。上述更正申請及申報均經財政部臺灣省北區國稅局依財政部賦稅署中華民國

of the expenses reported on the tax filings from 2002 to 2008 were amortized depreciations for the fixed assets purchased with the net balance accrued from 1993 to 1996. The aforementioned applications and corrected tax filings were rejected for the reason that, once the full amount for the purchase of the aforementioned assets have been reported as capital expenditures in the year when the purchase was made, no depreciation deductions may be taken in the subsequent years. The rejection was done by the National Taxation Bureau for the Northern Area, Ministry of Finance in accordance with Disputed Resolutions 1 and 3 of Letter (han) Ruling Tai Shui Yi Fa No. 841664043, which was issued by the Taxation Administration, Ministry of Finance on December 19, 1995. The petitioner was therefore required to pay additional taxes of tens of millions of New Taiwan dollars.

84 年 12 月 19 日台稅一發第 841664043 號函決議 1、3，認其於購建上述資產時全額列為資本支出以後年度即不得提列折舊而否准，另核定應補繳稅捐計達數千萬元。

The petitioner disputed the tax assessment and sought remedies through administrative appeals (suyuan) and administrative litigation, but the petitioner lost the cases. The petitioner then request

聲請人不服，循序提起行政爭訟請求救濟，均遭駁回確定，爰以確定終局判決所適用之系爭決議 1、3 有牴觸憲法疑義，聲請解釋。

for a Judicial Interpretation on the ground that the aforementioned Disputed Resolutions 1 and 3, being relied upon by the final court judgment, may have violated the Constitution.

J. Y. Interpretation No.704（November 16, 2012）*

【The protection of the status of a military judge who applies to voluntarily remain in military camp】

ISSUE: Is it unconstitutional that the post of a military judge who has not yet reached the maximum number of years (or age) for military service should be ruled by the Procedure for Approval of Voluntarily Remaining in Camp and the Regulations for Exemption from Drafting upon Completion of Military Service ?

RELEVANT LAWS:

Articles 16 and 80 of the Constitution（憲法第十六條、第八十條）; J.Y. Interpretations Nos. 436 and 601（司法院釋字第四三六號、第六０一號解釋）; Articles 17, 21 and 22 of the Act of Military Service for Officers and Noncommissioned Officers of the Armed Forces（陸海空軍軍官士官服役條例第十七條、第二十一條及第二十二條）; Article 9, Subparagraph 1 of the Act of Assignment for Officers and Noncommissioned Officers of the Armed Forces（陸海空軍軍官士官任職條例第九條第一款）; Articles 3, 4, 5 and 7 of the Regulation of Military Service for Selecting Voluntary Personnel as Officers and Noncommissioned Officers of the Armed Forces (amended and promulgated on November 27, 2002)（中華民國九十一年十一月二十七日修正發布之陸海空軍軍官士

* Translated by Spenser Y. Hor, Esq. and Chien Yeh Law Offices.
** Contents within frame, not part of the original text, are added for reference purposes only.

官志願留營入營甄選服役規則第三條、第四條、第五條及第七條）;Points 12.1, 12.3 and 13.6 of the Operating Regulations of Military Service for Selecting Voluntary Personnel as Officers, Noncommissioned Officers and Soldiers of the Armed Forces（陸海空軍軍官士官士兵志願留營入營甄選服役作業規定拾貳、一、三及拾參、六）.

KEYWORDS:

Voluntarily remain in military camp（志願留營）, exemption from drafting upon completion of military service（服役期滿解除召集）, military judge（軍事審判官）, judicial authority based on constitutional principles（司法權建制之憲政原理）, judicial independence（審判獨立）, protection of status（身分保障）, right of instituting legal proceedings（訴訟權）, due process of law（正當法律程序）.**

HOLDING: That Article 7 of the Regulations of Military Service for Selecting Voluntary Personnel as Officers and Noncommissioned Officers of the Armed Forces, as amended on November 27, 2002—All articles were subsequently amended and promulgated on November 13, 2006, but the said article number and contents remain unchanged— with regard to Standing Officers on Reserve Service, who join the camp voluntarily, on com-

解釋文：中華民國九十一年十一月二十七日修正發布之陸海空軍軍官士官志願留營入營甄選服役規則第七條（九十五年十一月十三日全文修正，條次、內容無異），關於後備役軍官志願入營服役期滿而志願繼續服現役者，應依志願留營規定辦理，其中應經之核准程序規定，適用於經考試院特種考試及格志願入營服役，而尚未經核准得服現役至最大年限（齡）之軍事審判官部分，以及陸海空軍軍官士官服役條例第

pletion of military service, yet are willing to continue, by which they shall observe the rules applying to persons who voluntarily remain in camp, including the procedural norms for approval, should apply to those military judges who voluntarily join the service after passing the Special Examination by the Ministry of Examination, but have yet to receive approval for service up to the maximum number of years (or age) and Article 17 of the Act of Military Service for Officers and Noncommissioned Officers of the Armed Forces, concerning exemption from drafting upon completion of military service should apply to the afore-mentioned situation does not conform to the adjudicative independence of a tribunal established by judicial authority on constitutional principles, or to the right to institute legal proceedings as safeguarded by Article 16 of the Constitution, and so, from the date of the publication of this Interpretation to a maximum of two years, the said provisions shall become inapplicable to the foregoing military judges.

十七條關於服現役期滿予以解除召集之規定，適用於上開情形部分，與司法權建制之審判獨立憲政原理及憲法第十六條保障人民訴訟權之意旨不符，應自本解釋公布之日起至遲於屆滿二年時，對於上開類型軍事審判官不予適用。

To protect the status of the said military judges, the relevant competent authority shall, within the prescribed period, amend the pertinent laws and regulations in compliance with this Interpretation, and clearly stipulate the selection standards for the foregoing military judges, who voluntarily remain in camp, and the due process of law to be followed.

為保障上開類型軍事審判官之身分，有關機關應於上開期限內，依本解釋意旨，修正相關法律，明定適用於上開類型軍事審判官志願留營之甄選標準及應遵循之正當法律程序。

REASONING: The functioning of military tribunals, which are one kind of national criminal law authority, is judicial in nature. The initiation of proceedings and running of this judicial authority should conform to the minimum requirements of due legal process, including such matters as there being an independent and impartial legal body and process. Furthermore, it should not infringe Article 80 or other relevant provisions in the Constitution that deal with the constitutional origin on which the judicial authority is founded (cf. J.Y. Interpretation No. 436). However, it is not necessary that judges be in a position of lifetime tenure (cf. J.Y. Interpretation No. 601). Just as the guarantees given to judges are not the

解釋理由書：按軍事審判機關所行使者，屬國家刑罰權之一種，具司法權之性質。其審判權之發動與運作應符合正當法律程序之最低要求，包括獨立、公正之審判機關與程序，並不得違背憲法第八十條等有關司法權建制之憲政原理（本院釋字第四三六號解釋參照）。次按職司審判者固不以終身職為必要（本院釋字第六０一號解釋參照），然如同法官身分之保障與一般公務員不同，軍事審判官身分之保障亦應有別於一般軍官。為確保職司審判之軍事審判官唯本良知及其對法律之確信獨立行使審判職權，使受軍事審判之現役軍人能獲獨立、公正審判之憲法第十六條所保障之訴訟權得以實現，軍事審判官非受刑事或懲戒處分、監護宣告或有與受刑事或懲戒處分或監護宣告相當程

same as those for ordinary civil servants, so too the guarantees offered to military judges should differ from those applicable to ordinary military officers. To ensure that the judicial action of a military judge is undertaken solely on the basis of his/her conscience and an independent ruling based on the law, such that military persons in current service may receive an independent and fair trial as guaranteed by article 16 of the Constitution dealing with the right to institute legal proceedings, no military judge shall be removed from office unless he or she is guilty of a criminal offense or subject to disciplinary action, or declared to be under supervision, or to be in receipt of other legal measures equivalent to criminal conviction, disciplinary sanction or supervision, nor according to due legal process may he/she be removed from office. Unless the law provides otherwise, he/she may not be suspended, transferred or have his/her emolument annulled. These are important components of the principles founding judicial authority.

度之法定原因，並經正當法律程序，不得免職；非依法律，不得停職、轉任或減俸。此亦為司法權建制原理之重要內涵。

As amended and promulgated on November 27, 2002, Article 7 of the Regulations of Military Service for Selecting Voluntary Personnel as Officers and Noncommissioned Officers of the Armed Forces (hereafter referred to as the "Military Service Regulations") states that: "An Officer on Reserve Service … who voluntarily joins the camp for service may serve within the term of service, which is three years per term. Yet a Standing Officer on Reserve Service… who seeks to reapply to enter the camp after completing the period of service should apply to continue to serve. Once approved, he/she may continue to serve up to the maximum number of years or up to the age limit (Paragraph 1). Persons coming under the above paragraph who apply to continue to serve on completion of their term shall follow the provisions of these Regulations regarding voluntarily remaining in military camp. (Paragraph 2)" (All articles as amended on November 13, 2006, but the said article number and contents remain unchanged; hereinafter referred to as the "Disputed Provision I"). According to this regulation, (with reference to

中華民國九十一年十一月二十七日修正發布之陸海空軍軍官士官志願留營入營甄選服役規則（下稱服役規則）第七條：「後備役軍官……志願入營，服役期限，以三年為一期。但後備役常備軍官……再入營服現役期滿後，申請繼續服現役，經核准者，得繼續服現役至最大年限或年齡（第一項）。前項人員服役期滿志願繼續服現役者，依本規則志願留營之規定辦理（第二項）。」（九十五年十一月十三日全文修正，條次、內容無異；下稱系爭規定一）依此規定，應召（陸海空軍軍官士官士兵志願留營入營甄選服役作業規定《下稱服役作業規定》拾參六參照）申請志願入營服役經核准之後備役常備軍官，服役期限為三年，三年期滿時需再申請志願留營，經核准者，始得繼續服現役至最大年限（齡）。而應召申請志願入營服役經核准之後備役預備軍官，於服役三年期滿，亦需再申請志願留營，經核准者，始得依其被核准之一或二或三年之志願留營年限（服役規則第四條參照），繼續服現役；於各該繼續服役之年限屆滿時，需再為志願留營之申請，至前後經核准之志願服役年限滿六年時（陸海空軍軍官士官服役條例《下稱服役條例》第二十二條參照），始得轉

Point 13.6 of the Operating Regulations of Military Service for Selecting Voluntary Personnel as Officers, Noncommissioned Officers and Soldiers of the Armed Forces; hereafter referred to as the "Service Operating Regulations") Standing Officers on Reserve Service who apply to voluntarily join the camp, and are accepted, will fulfill a term of service of three years. Upon the completion of the three-year term they may reapply to voluntarily remain in camp. If accepted they then may continue to service up to the maximum number of years (or age). Reserve Officers who apply to voluntarily join the camp, and who are accepted, after completion of their three-year term of service are still required to reapply to voluntarily remain in camp. On acceptance they may begin to continue to serve for one, two or three years according to the time period permitted (cf. Article 4 of the Military Service Regulations). Upon completion of the agreed term, they shall reapply to voluntarily remain in camp, until they have completed a total of six years voluntary service (cf. Article 22 of the Act of Military Service for Officers and

服常備軍官，繼續服現役至最大年限（齡）。是尚未得繼續服現役至最大年限（齡）之軍官，為繼續其軍官職務，皆須申請志願留營，填具「官兵志願留營申請書」，經政戰主管、主官依據體格、考績考核、學歷、階級、職務需要、員額配置以及智力測驗等甄選標準（服役規則第三條、第五條參照）為初審，保防官、人事部門主管為複審後，由編階中將以上單位主官核定（服役規則第五條、服役作業規定拾貳一、三及附件「官兵志願留營申請書」參照）。對於未獲核准志願留營之各次申請者，即依服役條例第十七條規定：「常備軍官……預備役，應召再服現役人員，於再服現役期滿……者，予以解除召集。」（下稱系爭規定二，此規定於預備軍官準用之，服役條例第二十一條參照）並依陸海空軍軍官士官任職條例第九條第一款規定，免除其現役軍官職務。

Noncommissioned Officers of the Armed Forces; hereafter referred to as the "Military Service Act"), they will thereafter be qualified to serve as Standing Officers on Reserve Service, and continue to service up to the maximum number of years (or age). Therefore, officers who have not yet served up to the maximum number of years (or age), and who wish to retain their military post are required to apply to voluntarily remain in camp, by filling out the form "Officers and Soldiers applying to Voluntarily Remain in Military Camp". Having passed an initial examination by the political warfare chief or officer of their physical health, service rating and appraisal, level of education, rank, the requirements of their post, the number of persons required and an intelligence test (cf. Articles 3 and 5 of the Military Service Regulations) and upon passing a higher examination by the security officer or head of personnel, they may be accepted by a departmental supervision head with a rank no lower than that of a lieutenant-general (cf. Article 5 of the Military Service Regulations, Points 12.1 and 12.3 of the Service Operating Regulations and

their appendix, “Officers and Soldiers applying to Voluntarily Remain in Military Camp”). For those applicants who do not receive approval to remain in camp, Article 17 of the Military Service Act will apply, which states: “A Standing Officer on Reserve Service … or Reserved Officer Service, who submits an application for active service, upon the completion of the term of re-service …, will be discharged from service” (hereinafter referred to as the “Disputed Provision II.” The above-mentioned article is applicable mutatis mutandis to reserve officers, cf. Article 21 of the Military Service Act). Furthermore, the said officer will be discharged from active service according to Article 9, Subparagraph 1 of the Act of Assignment for Officers and Noncommissioned Officers of the Armed Forces.

The Disputed Provision I and Disputed Provision II are also applicable to military judges who voluntarily join the service after passing the Special Examination set by the Ministry of Examination, but have yet to receive approval for active service up to the maximum number

系爭規定一、二亦適用於經考試院特種考試及格志願入營服役之尚未經核准得服現役至最大年限（齡）之軍事審判官（以下所稱軍事審判官係指系爭類型之軍事審判官），並未因其審判官之身分而有特別考量。軍事審判官能否續任審判職務繫於權責長官對於志願留

of years (or age). (Military judges of this disputed category are hereafter referred to as "military judges".) They are not to be granted special consideration due to their status as judges. Whether a military judge may continue at his or her adjudicative post depends on the approval of the officer in charge of applications to remain in camp voluntarily. Moreover the grounds for making an assessment as to whether the person may continue to remain in camp, except in the case where the procedure does not follow the norms of the committee for fairness by which a military judge has an opportunity to appeal according to due process of law (cf. J.Y. Interpretation No. 491), are to follow the norms for selection and may mean that the judge is not permitted to continue in his/her post even if he/she is not guilty of a criminal offense nor subject to disciplinary action, nor declared to be under supervision, nor to be in receipt of other legal measures equivalent to criminal conviction, disciplinary sanction or supervision, nor found by due process of law to be lacking educational qualifications, dedication to work, due quality

營申請之核定。然查關此准否繼續留營申請之核定，除程序上未遵循諸如由立場公正之委員會決定、給予軍事審判官陳述申辯機會等正當法律程序為之（本院釋字第四九一號解釋參照）外，所依據之甄選標準，亦可能使軍事審判官非受刑事或懲戒處分、監護宣告且無與受刑事或懲戒處分或監護宣告相當程度之事由，又無依正當法律程序審查其學識能力、敬業精神、裁判品質及品德操守，認定確不適任軍事審判官職務之法定原因，而不能續任審判職務，致軍事審判官之身分無從確保。

of judgment or suitable moral conduct which might otherwise serve as a cause for determining incapacity for service as a military judge and so preventing the judge from continuing in office. Consequently, the status of military judge is never to be taken for granted.

The Disputed Provision I regarding a military judge of the Reserved Officer Service who, on completion of his/her period of service voluntarily applies to serve in the active service, should make use of that section which relates to military judges, following the norms for approval in the above process. The Disputed Provision II regarding the exemption from drafting granted to persons who have fulfilled their active service, when used for the above does not conform to the constitutionally guaranteed independence of judicial judgment nor to the meaning of Article 16 of the Constitution guaranteeing people's right to institute legal proceedings.Therefore, from the date of publication of this Interpretation to a maximum of two years, the said provisions shall become inapplicable to military judges.

是系爭規定一關於後備役軍官志願入營服役期滿而志願繼續服現役者，應經上開核准程序之規定，適用於軍事審判官部分，以及系爭規定二關於服現役期滿予以解除召集之規定，適用於上開情形部分，與司法權建制之審判獨立憲政原理及憲法第十六條保障人民訴訟權之意旨不符。應自本解釋公布之日起至遲於屆滿二年時，對於軍事審判官不予適用。為保障軍事審判官之身分，有關機關應於上開期限內，依本解釋意旨，修正相關法律，明定適用於軍事審判官志願留營之甄選標準及應遵循之正當法律程序。

To guarantee the status of military judges, the relevant authority shall within the prescribed period amend pertinent laws in compliance with the meaning of this Interpretation, and clearly stipulate both the selection standards for military judges who voluntarily remain in camp, and the due process of law to be followed.

The petitioner in this case raised-[has] another matter regarding qualification screening, alleging that in the Supreme Administrative Court, 96-Tzai-Tze No. 3189 (2007), the Court applied Articles 23 and 24 of the Military Justice Act and Article 9 of the Regulations for Special Examination for Military Judges (as amended and promulgated July 14, 2000) (hereinafter collectively referred to as the "Disputed Provisions III"), to be in violation of Articles 77, 85, 86 and 140 of the Constitution. It should be noted that in the above-referenced Supreme Administrative Court decision, the petitioner's appeal against the Taipei High Administrative Court, 94-Tsu-Tze No. 3084 (2005) was dismissed since the said appeal was not in conformity with the law. Hence, the

本件聲請人另因銓敘事件，認最高行政法院九十六年度裁字第三一八九號裁定所適用之軍事審判法第二十三條、第二十四條及八十九年七月十四日修正發布之特種考試軍法官考試規則第九條規定（下併稱系爭規定三），違反憲法第七十七條、第八十五條、第八十六條及第一百四十條之規定。查上開最高行政法院裁定係以聲請人就臺北高等行政法院九十四年度訴字第三０八四號判決所為上訴不合法為由予以駁回，應以上開臺北高等行政法院判決為確定終局判決，合先敘明。

above Taipei High Administrative Court ruling shall be the final and binding judgment.

Upon the review of allegations therein, the petitioner argued that the said Court should decide whether it is right to give military accreditation to military judges who voluntarily join the camp having passed the Special Examination of the Ministry of Examination. It is hard to say that the petitioner has objectively or substantively pointed out any contravention of the Constitution by asserting the Disputed Provisions III. Since this petition is not in conformity with the requirements set out in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act, this petition shall be dismissed pursuant to the same Article, Paragraph 3 thereof.

Justice Chen-Shan Li filed concurring opinion.

Justice Ching-You Tsai filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

核聲請人所陳，係在爭執法院就經考試院特種考試及格志願入營之軍法官應以武職任用等認事用法之當否，尚難謂於客觀上已具體指摘系爭規定三有何牴觸憲法之處。是其聲請，核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理。

本號解釋李大法官震山提出協同意見書；蔡大法官清遊提出協同意見書；黃大法官茂榮提出協同意見書；羅大法官昌發提出協同意見書；湯大法官德宗提出協同意見書；蘇大法官永欽提出不同意見書；陳大法官新民提出不同意見

Justice Chang-Fa Lo filed concurring opinion.

Justice Dennis Te-Chung Tang filed concurring opinion.

Justice Yeong-Chin Su filed dissenting opinion.

Justice Shin-Min Chen filed dissenting opinion.

EDITOR'S NOTE:

Summary of facts:The petitioner, X, formerly a Standing Officer in the Reserve Service, passed the 2001 Special Examination for Military Judges, and voluntarily joined camp to receive training, and thereafter became qualified to assume the office of military judge. Pursuant to Article 7 of the Regulations of Military Service for Selecting Voluntary Personnel as Officers and Noncommissioned Officers of the Armed Forces (amended and promulgated on November 27, 2002), in order to continue to remain on active duty in camp, the applicant shall, three (3) years prior to the completion of the service, apply to voluntarily remain in camp, and upon approval, will then be able to continue the service. The petitioner failed

書。

編者註：

事實摘要：聲請人X原係後備役常備軍官，獲90年特種考試軍法官考試錄取，志願入營並受訓及格，擔任軍事審判官；依91年11月27日修正發布之陸海空軍軍官士官志願留營入營甄選服役規則第7條規定，應於三年役滿前，申請志願留營，經核准後，始得繼續留營服役。聲請人因未申請志願留營，嗣經國防部陸軍司令部依陸海空軍軍官士官服役條例第17條規定，核定解除召集，致喪失軍事審判官身分。聲請人不服，認上開規定與憲法審判獨立等原則有違，循序提起行政訴訟，均遭駁回確定，爰聲請解釋。

to apply to voluntarily remain in camp. Subsequently, the Army Command of the Ministry of National Defense, in accordance with Article 17 of the Act of Military Service for Officers and Non-commissioned Officers of the Armed Forces, duly exempted him from drafting such that the petitioner lost his position as a military judge. The petitioner did not accept this ruling, holding, inter alia, that the above regulation contravened the constitutionally guaranteed independence of the judiciary. The petitioner appealed for administrative litigation, but the case was dismissed. Thus he filed a petition for constitutional interpretation.

J. Y. Interpretation No.705（November 21, 2012）*

【The Standard of Assessment in Tax Declarations for the Amount to be deducted for the Donation of Land】

ISSUE: Is the order requiring that the amount to be deducted for the donation of land in tax declarations be assessed on the basis of the standards prescribed by the Ministry of Finance unconstitutional ?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 13 and 17, Paragraph 1, Subparagraph 2, Item 2-1 of the Income Tax Law（所得稅法第十三條、第十七條第一項第二款第二目之１）; Ministry of Finance 1993.6.3 Tai-Tsai-Suei (TTS) No.0920452464 Order, 1994.5.21 TTS No.0930451432 Order,1995.2.18 TTS No.09404500070 Order, 1996.2.15 TTS No.09504507680 Order, 1997.2.7 TTS No.09604504850 Order, and 1998.1.30 TTS No. 09704510530 Order（ 財政部中華民國九十二年六月三日發布之台財稅字第０九二０四五二四六四號令。九十三年五月二十一日發布之台財稅字第０九三０四五一四三二號令。九十四年二月十八日發布之台財稅字第０九四０四五０００七０號令。九十五年二月十五日發布之台財稅字第

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* Translated by Dr. Ching-Yuan Huang and Dr. Hsin-Yang Wu of Tsar & Tsai Law Firm.

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

０九五０四五０七六八０號令。九十六年二月七日發布之台財稅字第０九六０四五０四八五０號令。九十七年一月三十日發布之台財稅字第０九七０四五一０五三０號令）；J.Y. Interpretation Nos 650 and 657（司法院釋字第六五０號、第六五七號解釋）.

KEYWORDS:

principle of taxation by law（租稅法律主義）, amount to be deducted for donation（捐贈列舉扣除額）, land reserved for public facilities（公共設施保留地）, sixteen percent of the government-declared value of the land（土地公告現值之百分之十六）.**

HOLDING: The Ministry of Finance proclaimed Tai Cai Shui Zi No. 0920452464 Order, Tai Cai Shui Zi No. 0930451432 Order, Tai Cai Shui Zi No. 09404500070 Order, Tai Cai Shui Zi No. 09504507680 Order, Tai Cai Shui Zi No. 09604504850 Order, and Tai Cai Shui Zi No. 09704510530 Order on June 3, 1993, May 21, 1994, February 18, 1995, February 15, 1996, February 7, 1997, and January 30, 1998 respectively. These Orders are to the effect that the calculation of the amount to be deducted for donation shall be assessed in accordance with the standard determined by the Ministry of

解釋文：財政部中華民國九十二年六月三日、九十三年五月二十一日、九十四年二月十八日、九十五年二月十五日、九十六年二月七日、九十七年一月三十日發布之台財稅字第０九二０四五二四六四號、第０九三０四五一四三二號、第０九四０四五０００七０號、第０九五０四五０七六八０號、第０九六０四五０四八五０號、第０九七０四五一０五三０號令，所釋示之捐贈列舉扣除額金額之計算依財政部核定之標準認定，以及非屬公共設施保留地且情形特殊得專案報部核定，或依土地公告現值之百分之十六計算部分，與憲法第十九條租稅法律主義不符，均應自本解

Finance, and that regarding the amount to be deducted for land not reserved for public facilities yet with special conditions attached, an application may be filed with the Ministry of Finance for assessment on a special case basis, or at sixteen percent of the governmentdeclared value of the land. These Orders violate the principle of taxation by law of Article 19 of the Constitution and shall not be applied from the date of proclamation of this Interpretation.

釋公布之日起不予援用。

REASONING: Article 19 of the Constitution specifies that people shall have the duty of paying taxes in accordance with law, which means when the State imposes a tax on, or provides preferential tax deductions or exemptions for, its people, it shall clearly specify, in the law or regulations clearly authorized by a given law, the conditions of tax, inter alia, the taxpaying entity, the object taxed, the connection between the taxpayer and the object taxed, the tax base, the tax rate, and how and when the tax is to be paid. The tax collecting authority may promulgate any other required regulations only

解釋理由書：憲法第十九條規定人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、租稅客體對租稅主體之歸屬、稅基、稅率、納稅方法及納稅期間等租稅構成要件，以法律或法律具體明確授權之法規命令定之；若僅屬執行法律之細節性、技術性次要事項，始得由主管機關發布行政規則為必要之規範（本院釋字第六五０號、第六五七號解釋參照）。

for detailed or technical secondary matters necessary for the enforcement of the law (see J. Y. Interpretation Nos. 650 and 657).

Article 17, Paragraph 1, Subparagraph 2, Item 2-1 of the Income Tax Law provides as below regarding the amount to be deducted for donation: "[f]or the taxpayer, his (her) spouse and dependent(s), contributions and donations made to educational, cultural, public welfare or charitable organizations or associations in a total amount not in excess of 20 percent of the total amount of the gross consolidated income are deductible. However, there is no limit to the amount of donations or contributions made for the support of national defense or entertainment for the troops or contributions to the government". If the objects donated are tangible properties, such as land, the Income Tax Law does not explicitly specify what the standard for calculating and listing the amount to be deducted is, nor does it specifically or clearly authorize the competent authority to prescribe such a standard. The Ministry of Finance

所得稅法第十七條第一項第二款第二目之1固就捐贈之列舉扣除額規定：「納稅義務人、配偶及受扶養親屬對於教育、文化、公益、慈善機構或團體之捐贈總額最高不超過綜合所得總額百分之二十為限。但有關國防、勞軍之捐贈及對政府之捐獻，不受金額之限制。」惟所捐贈者若為實物，例如土地，究應以何標準計算認列減除之扣除額度，所得稅法未有明文，亦未具體明確授權主管機關以命令定之。財政部中華民國九十二年六月三日台財稅字第0九二0四五二四六四號令：「三、個人以購入之土地捐贈未能提具土地取得成本確實證據或土地係受贈取得者，其捐贈列舉扣除金額之計算，稽徵機關得依本部核定之標準認定之。該標準由本部各地區國稅局參照捐贈年度土地市場交易情形擬訂，報請本部核定。」九十三年五月二十一日台財稅字第0九三0四五一四三二號令：「個人以繼承之土地捐贈，……，其綜合所得稅捐贈列舉扣除金額之計

1993.6.3 Tai Cai Shui Zi No. 0920452464 Order provides: "3. if an individual donates a piece of purchased land without submitting any actual evidence of the cost of procurement, or if the donated land was acquired through a gift, the tax collection authority may conduct the calculation of the amount to be deducted of the donation in accordance with the standard determined by this Ministry. The standard is to be drafted with reference to the transaction situation of the land market in the year of donation by the National Tax Administration of each district and filed with this Ministry for approval." The 1994.5.21 Tai Cai Shui Zi No. 0930451432 Order provides: "if an individual donates a piece of land acquired in heritage…… the calculation of the amount of the gross consolidated income to be deducted is to be assessed on the basis of the standard set forth in the third point of the 1993.6.3 Tai Cai Shui Zi No. 0920452464 Order of this Ministry." The 1995.2.18 Tai Cai Shui Zi No. 09404500070 Order and the 1996.2.15 Tai Cai Shui Zi No. 09504507680 Order both provide that: "if an individual donates a piece of pur-

算，依本部九十二年六月三日台財稅字第 0920452464 號令第 3 點規定之標準認定之。」九十四年二月十八日台財稅字第０九四０四五０００七０號令及九十五年二月十五日台財稅字第０九五０四五０七六八０號令，均以：「個人以購入之土地捐贈而未能提示土地取得成本確實證據，或土地係受贈或繼承取得者，除非屬公共設施保留地且情形特殊，經稽徵機關研析具體意見專案報部核定者外，其綜合所得稅捐贈列舉扣除金額依土地公告現值之 16% 計算。」九十六年二月七日台財稅字第０九六０四五０四八五０號令及九十七年一月三十日台財稅字第０九七０四五一０五三０號令分項說明，意旨相同。以上六令（下併稱系爭令），就個人捐贈土地如何計算列舉扣除金額，上述九十二年、九十三年令僅概括規定由稽徵機關依財政部核定之標準認定，九十四年令進而確定認定標準，九十五年、九十六年及九十七年令則採取與九十四年令相同之認定標準。

chased land without submitting any actual evidence of the cost of procurement, or if the donated land was acquired through a gift or in heritage—except for land not reserved for public facilities yet with special conditions attached, and where the tax collection authority has conducted research and made concrete proposals for approval by this Ministry—the amount of the gross consolidated income to be deducted is to be calculated at 16 percent of the government-declared value of the donated land." The itemized interpretations of the 1997.2.7 Tai Cai Shui Zi No. 09604504850 Order and the 1998.1.30 Tai Cai Shui Zi No. 09704510530 Order are to the same effect. The above six Orders (hereinafter referred to as "the Orders at issue") regulate how to calculate the amount to be deducted of a piece of land donated by an individual. The above 1993 and 1994 Orders only generally regulate that the tax collection authority shall assess the amount to be deducted according to the standards determined by the Ministry of Finance, and the 1995 Order further determines the standards to be applied, while the 1996, 1997, and 1998 Orders

adopt the same standards as those of the 1995 Order.

Article 13 of the Income Tax Law states: "Consolidated income tax of an individual shall be levied on the amount of his net consolidated income which shall be the gross consolidated income minus the amount of tax-exempt income, and various deductions." The interpretative rules and the standards of discretion issued by a superior authority to its lower units or its subordinate officers, for the purpose of unifying the interpretation of laws and regulations, the findings of facts, and the exercise of the power of discretion, are, by their nature, administrative rules (with reference to Article 159 of the Administrative Procedure Law) which may only regulate the detailed or technical secondary matters required for the enforcement of the law when necessary. The Orders at issue, which are aimed at a piece of donated land which was purchased without submitting any actual evidence of the cost of procurement or which was acquired through a gift or in heritage, are supplementary regulations issued for the

所得稅法第十三條規定：「個人之綜合所得稅，就個人綜合所得總額，減除免稅額及扣除額後之綜合所得淨額計徵之。」上級機關為協助下級機關或屬官統一解釋法令、認定事實、及行使裁量權，而訂頒之解釋性規定及裁量基準，性質上屬行政規則（行政程序法第一百五十九條參照），其僅得就執行法律之細節性、技術性之次要事項為必要之規範。系爭令針對所捐獻之土地原係購入但未能提示土地取得成本確實證據，或原係受贈或繼承取得者，如何依前揭所得稅法第十七條第一項第二款第二目之1規定認列所得稅減除之扣除額，所為之補充規定。惟其所釋示之捐贈列舉扣除額金額之計算依財政部核定之標準認定，以及非屬公共設施保留地且情形特殊得專案報部核定，或依土地公告現值之百分之十六計算，皆涉及稅基之計算標準，攸關列舉扣除額得認列之金額，並非僅屬執行前揭所得稅法規定之細節性或技術性事項，而係影響人民應納稅額及財產權實質且重要事項，自應以法律或法律具體明確授權之命令定之。是系爭令上開釋示部分與憲法第

purpose of determining the amount of the gross consolidated income to be deducted according to the aforementioned provision of Article 17, Paragraph 1, Subparagraph 1, Item 2-1 of the Income Tax Law. However, the interpretations which state that the calculation of the amount of the donation to be deducted is to be assessed on the basis of standards determined by the Ministry of Finance, and that, for land not reserved for public facilities yet with special conditions attached, a particular proposal can be submitted to the Ministry of Finance for approval, or the amount may be calculated at 16 percent of the government-declared value of the donated land, all involve the calculation of standards of the tax base and the amount to be deducted. As such, these regulations are not merely detailed or technical matters for the enforcement of the aforementioned Income Tax Law but are material and significant matters involving both the amount of tax payable by the people and their property rights. Such matters shall be specified by a law or regulations having the clear authorization of a given law. Therefore, the above sections of the

十九條租稅法律主義不符，均應自本解釋公布之日起不予援用。

interpretation of the Orders at issue do not comply with the principle of taxation by law of Article 19 of the Constitution, and shall not be applied from the date of proclamation of this Interpretation.

Justice Chen-Shan, Li filed concurring opinion.

Justice Mao-Zong, Huang filed concurring opinion.

Justice Chang-Fa, Lo filed concurring opinion.

Justice Yeong-Chin, Su filed dissenting opinion.

Justice Si-Yao, Lin filed dissenting opinion.

Justice Ming, Chen filed dissenting opinion, in which Justice Hsi-Chun ,Huang joined.

Justice Shin-Min, Chen filed dissenting opinion.

本號解釋李大法官震山提出協同意見書;黃大法官茂榮提出協同意見書;羅大法官昌發提出協同意見書；蘇大法官永欽提出不同意見書；林大法官錫堯提出不同意見書；陳大法官敏提出、黃大法官璽君加入之不同意見書；陳大法官新民提出不同意見書。

EDITOR'S NOTE:

Summary of facts: Including 'X', there are 23 applicants, who submitted 29 requests which are reviewed together in this case. For the purpose of filing tax returns, the applicants applied for an

編者註：

事實摘要：本件係聲請人X等23人分別提起共29件聲請案併案審理。聲請人等為結算申報綜合所得稅，分別以「購入」、「繼承」或「受贈」所取得之公共設施保留地或既成道路等用

amount to be deducted on the grounds of donation to the government of lands reserved for public facilities or of existing roads particularly acquired “by purchase”, “in heritage”, or “through a gift”. The tax collection authority determined that only 16 percent of the government-declared value of the lands could be deducted according to (1) the 1993.6.3 Tai Cai Shui Zi No. 0920452464 Order, (2) the 1994.5.21 Tai Cai Shui Zi No. 0930451432 Order, (3) the 1995.2.18 Tai Cai Shui Zi No. 09404500070 Order, (4) the 1996.2.15 Tai Cai Shui Zi No. 09504507680 Order, (5) the 1997.2.7 Tai Cai Shui Zi No. 09604504850 Order, and (6) the 1998.1.30 Tai Cai Shui Zi No. 09704510530 Order of the Ministry of Finance (among these cases, 5 of them were reassessed due to the notification of the local prosecutor’s offices, and they were changed from 16 percent to 14 percent, 20 percent, or 30 percent variously).

地，對政府捐獻而列報捐贈列舉扣除額。稽徵機關依財政部 (1)92 年 6 月 3 日台財稅字第 0920452464 號令、(2)93 年 5 月 21 日台財稅字第 0930451432 號令、(3)94 年 2 月 18 日台財稅字第 09404500070 號令、(4)95 年 2 月 15 日台財稅字第 09504507680 號令、(5)96 年 2 月 7 日台財稅字第 09604504850 號令、(6)97 年 1 月 30 日台財稅字第 09704510530 號令，核定僅能減除公告土地現值之 16%（其中有 5 件因地方檢察署通報而重行核定，由原 16% 更改為 14%、20%、30% 不等）。

The applicants did not accept the assessment and thought that the Orders at issue imposed extra requirements that are

聲請人等分別表示不服，咸認系爭令已增加法律所無之限制，有違租稅法律主義而違憲之疑義，而聲請解釋。

not authorized by the law, and, as such, might violate the principle of taxation by law and might be unconstitutional. Therefore, the applicants requested an interpretation. The Grand Justices of this Yuan accepted each application in turn and reviewed the cases together because the subject matter of their assertions of unconstitutionality was identical2.

本院大法官先後受理後，以各聲請人主張違憲之標的相同，乃予合併審理。

J. Y. Interpretation No.706（December 21, 2012）*

【Offset of input tax in cases where a business entity buys court-auctioned goods】

ISSUE: Is it unconstitutional where the input certificate shall be limited to the third copy (deduction copy) of a business tax payment slip as issued by the tax collection authority, which is not a seller business entity, in the case of buying court-auctioned goods ?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）；J.Y. Interpretation: Nos. 622, 640, 674, 692, 703（司法院釋字第六二二號、第六四０號、第六七四號、第六九二號、第七０三號解釋）； Article 1, Article 10, Paragraph 1 of Article 15, Paragraphs1-3 of Article 32, Article 33 of Value-added and Non-value-added Business Tax Act（加值型及非加值型營業稅法第一條、第十條、第十五條第一項、第三十二條第一項至第三項、第三十三條）；Article 38, Paragraph 1, Item 11 as amended and promulgated on June 22, 2011 and the current one of Enforcement Rules of the Value-added and Non-value-added Business Tax Act（加值型及非加值型營業稅法施行細則第三十八條第一項第十一款、現行該條款(中華民國一００年六月二十二日修正發布)）；Articles 1, 3,

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* Translated by Chun-Yih Cheng.

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

60,73and 113 of Compulsory Execution Act（強制執行法第一條、第三條、第六十條、第七十三條、第一百十三條）；Item 1, Sub-item 6, Item 4 of Point 3of Enforcement Notes for Business Tax Act as amended and promulgated on June 28, 1988（七十七年六月二十八日修正發布之修正營業稅法實施注意事項第三點第一項、第四項第六款）；Ministry of Finance Letter: 1996.10.30 Tai-Tsai-Shuei No. 851921699（財政部八十五年十月三十日台財稅第八五一九二一六九九號函）；Points 2,4 of Handling Notes for Levying Business Tax for Court-, Administrative Execution Agency- or Customs-auctioned or -sold Goods（法院行政執行機關及海關拍賣或變賣貨物課徵營業稅作業要點第二點、第四點）；Usage Rules for Government Unified Invoices:paragraph 22, Article 4（統一發票使用辦法第四條第二十二款）.

KEYWORDS:

principle of statutory taxpaying（租稅法律主義）, value-added business tax（加值型營業稅）, receipt other than government unified invoice（非統一發票之收據）, business tax payment slip for court-auctioned or -sold goods（法院拍賣或變賣貨物營業稅繳款書）, input certificate（進項憑證）, offsetting output tax（扣抵銷項稅額）.**

HOLDING: The provisions of Sub-item 6, Item 4, Point 3 of the Enforcement Notes for the Business Tax Act as amended and promulgated by the Ministry of Finance on June 28, 1988 (abolished on August 11, 2011) that "when a business entity reports and pays business tax based on the input certificate bearing the amount of the business tax to offset output tax, in addition to those provided for in Article 38 of the Enforcement Rules of this Act, acceptable certificates include: 6. … court-auctioned goods … the third copy (deduction copy) of a business tax payment slip as issued by the tax collection authority (relisted in Item 11, Paragraph 1, Article 38 of the Enforcement Rules of the Value-added and Non-value-added Business Tax Act as amended and promulgated on June 22, 2011: "… court-auctioned or -sold goods …the deduction copy of a business tax payment slip as issued by the tax collection authority." The said Item was amended and promulgated on March 6, 2011, but the above provision remains the same), and the Ministry of Finance Letter 1996.10.30 Tai-Tsai-Shuei No. 851921699: "… 2.

解釋文：財政部中華民國七十七年六月二十八日修正發布之修正營業稅法實施注意事項（一００年八月十一日廢止）第三點第四項第六款：「營業人報繳營業稅，以載有營業稅額之進項憑證扣抵銷項稅額者，除本法施行細則第三十八條所規定者外，包括左列憑證：六、……法院……拍賣貨物，由稽徵機關填發之營業稅繳款書第三聯（扣抵聯）。」（改列於一００年六月二十二日修正發布之加值型及非加值型營業稅法施行細則第三十八條第一項第十一款：「……法院……拍賣或變賣貨物，由稽徵機關填發之營業稅繳款書扣抵聯。」一０一年三月六日再度修正發布該條款，此部分相同）及八十五年十月三十日台財稅第八五一九二一六九九號函：「……二、法院拍賣或變賣之貨物屬應課徵營業稅者，稽徵機關應於取得法院分配之營業稅款後，就所分配稅款填發『法院拍賣或變賣貨物營業稅繳款書』，……如買受人屬依營業稅法第四章第一節計算稅額之營業人，其扣抵聯應送交買受人作為進項憑證，據以申報扣抵銷項稅額。三、至未獲分配之營業稅款，……如已徵起者，對買受人屬依營業稅法第四章第一節計算稅額之營業人，應通知其就所徵起之稅額專案申

For court-auctioned or -sold goods that are subject to business tax, the tax collection authority shall, after receiving the amount of courtdistributed tax, issue a "court-auctioned or -sold goods business tax payment slip" for the same amount … if the buyer is a business entity which should calculate the amount of tax in accordance with Section 1, Chapter 4 of the Business Tax Act, the deduction slip shall be delivered to the buyer as an input certificate to report and offset output tax. 3. As regards the amount of undistributed business tax … if it has been paid and the buyer is a business entity which should calculate the amount of tax in accordance with Section 1, Chapter 4 of the Business Tax Act, the tax collection authority shall notify the buyer to apply on a special case basis to offset the amount paid against the output tax" , are in breach of the Principle of Statutory Taxpaying as enshrined in Article 19 of the Constitution, and shall not be applied.

報扣抵銷項稅額。」部分，均違反憲法第十九條租稅法律主義，應不予援用。

REASONING: Article 19 of the Constitution provides that the people shall have the duty of paying taxes in accord-

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民

ance with law. This means that when the State imposes a tax or provides a preferential tax deduction or exemption treatment for its people, this must be based on laws or regulations clearly authorized by law, prescribing the constituent conditions of the tax such as the subject, subject matter, tax base, tax rates, methods of payment and period of payment. The interpretation of relevant laws by the competent authority within its competence shall abide by the principles of the Constitution and the meaning and purpose of the relevant laws, and comply with the general rules of legal interpretation. Any interpretation that exceeds the bounds of legal interpretation of law and that creates tax duties not provided for under the law is not permitted by the Principle of Statutory Taxpaying under Article 19 of the Constitution (see J.Y. Interpretation Nos. 622, 640, 674, 692 and 703).

減免稅捐之優惠時，應就租稅主體、租稅客體、稅基、稅率、納稅方法及納稅期間等租稅構成要件，以法律或法律明確授權之命令定之；主管機關本於法定職權就相關法律所為之闡釋，自應秉持憲法原則及相關法律之立法意旨，遵守一般法律解釋方法而為之；如逾越法律解釋之範圍，而增加法律所無之租稅義務，則非憲法第十九條規定之租稅法律主義所許（本院釋字第六二二號、第六四０號、第六七四號、第六九二號、第七０三號解釋參照）。

When a business entity which is subject to value-added business tax in the territory of the Republic of China sells taxable goods, it shall include the amount of the business tax in the price of

凡在中華民國境內適用加值型營業稅之營業人銷售應稅貨物，應將營業稅額內含於貨物之定價（原規定於中華民國七十七年六月二十八日修正發布之修正營業稅法實施注意事項《一００年

the goods (originally set forth in Item 1, Point 3 of the Enforcement Notes for the Amended Business Tax Act as amended and promulgated on June 28, 1988 (abolished on August 11, 2011); later incorporated into Paragraph 2, Article 32 of the Value-added and Non-value-added Business Tax Act (hereafter, Business Tax Act) on January 26, 2011) and, pursuant to the "Schedule for Business Entities Issuing Sales Certificates" and upon receipt of payment or dispatch of goods, shall issue and deliver government unified invoices identifying the name, address and unified business number of the buyer business entity and the amount of the business tax or other certificate bearing the amount of business tax as approved by the Ministry of Finance (see Article 1, Paragraphs 1 and 3, Article 32, Items 1 and 3, Article 33, Business Tax Act). When paying the price to the seller business entity, the buyer business entity pays the business tax as transferred from paying the goods, and shall, based on the certificate, be entitled to exercise the right to offset the amount of input tax against the amount of output tax, and is obliged to report and pay only

八月十一日廢止》第三點第一項，嗣於一００年一月二十六日另增訂於加值型及非加值型營業稅法《下稱營業稅法》第三十二條第二項），並依「營業人開立銷售憑證時限表」規定，於收款或發貨時開立、交付載明買方營業人名稱、地址、統一編號及營業稅額之統一發票或其他經財政部核定載有營業稅額之憑證（營業稅法第一條、第三十二條第一項、第三項、第三十三條第一款、第三款參照）。買方營業人於交付價金予賣方營業人時，因已支付買受該特定貨物而依法受轉嫁之營業稅，自得據該憑證行使進項稅額扣抵權，由當期銷項稅額中扣減，僅就其餘額負申報繳納營業稅之義務，不以開立憑證之賣方營業人已依限申報繳納營業稅款為要件（營業稅法第十五條第一項參照）。又營業稅法第三十三條第三款規定：「其他經財政部核定載有營業稅額之憑證。」乃為因應需要，授權財政部對於賣方營業人依法開立之同條前二款統一發票以外之憑證為核定。

the balance. This is not conditional upon the seller business entity reporting and paying the business tax in time (see Paragraph 1, Article 15, Business Tax Act). In addition, the provision of Item 3, Article 33 of the Business Tax Act: "other certificates bearing the amount of the business tax as approved by the Ministry of Finance" authorizes the Ministry of Finance to approve certificates other than government unified invoices issued in accordance with the preceding two Items of the same Article by the seller business entity to meet practical needs.

An auction or sale under the Compulsory Execution Act is made by the Execution Court as seller, on behalf of the debtor, to transfer, through a compulsory execution procedure, the title of the auctioned or sold goods and collect payment for the price. If the seller is a business entity subject to valueadded business tax and auctions or sells taxable goods, the auctioned or sold price shall also include business tax (see Point 4 of Handling Notes for Levying Business Tax for Court-, Administrative Execution

強制執行法上之拍賣或變賣，係由執行法院代債務人立於出賣人之地位，經由強制執行程序，為移轉拍賣或變賣物所有權以收取價金之行為。出賣人如係適用加值型營業稅之營業人，而拍賣或變賣應稅貨物者，其拍定或承受價額亦內含營業稅（法院行政執行機關及海關拍賣或變賣貨物課徵貨物營業稅作業要點第四點參照）。民事強制執行事件係由地方法院民事執行處之法官或司法事務官命書記官督同執達員辦理，並由書記官於拍賣或變賣程序終結後，作成經執行拍賣人簽名之載明拍賣或變

Agency- or Customs-auctioned or -sold Goods). Civil compulsory execution matters are handled by court clerks together with enforcement assistants as ordered by judges or judicial administration clerks of the District Court Civil Execution Department. When the auction or sale procedure is closed, the court clerk shall make a record signed by the auctioneer, indicating the type and quantity of the auctioned or sold goods, the names and addresses of the creditor, debtor, and buyer, and the highest bidding price (see Articles 1, 3, 60, 73, 113 of Compulsory Execution Act). The auction or sale procedure administered by the Execution Court in accordance with the law is rigorous. There is public faith in the receipt of non-government unified invoices. The business tax included in the auctioned or sold price may be ascertained in accordance with the statutory formula. Relevant information may be verified by the above court record (see Article 10, Business Tax Act, Points 2 and 4, Handling Notes for Levying Business Tax for Court-, Administrative Execution Agency- or Customs-auctioned or -sold Goods; Item 22, Article 4, Usage

賣物種類、數量、債權人、債務人、買受人之姓名、住址及其應買之最高價額之筆錄（強制執行法第一條、第三條、第六十條、第七十三條、第一百十三條參照）。執行法院依法進行之拍賣或變賣程序嚴謹，填發之非統一發票之收據有其公信力，拍定或承受價額內含之營業稅額可依法定公式計算而確定，相關資料亦可以上開法院筆錄為證（營業稅法第十條、法院行政執行機關及海關拍賣或變賣貨物課徵貨物營業稅作業要點第二點、第四點、統一發票使用辦法第四條第二十二款參照）。故執行法院於受領拍定或承受價額時開立予買方營業人之收據，亦相當於賣方營業人開立之憑證。

Rules for Government Unified Invoices). Therefore, the receipt issued by the Execution Court to the buyer upon receipt of the auctioned or sold price amounts to a certificate issued by a seller business entity.

Sub-item 6, Item 4, Point 3 of the amended Enforcement Notes for the Business Tax Act: "when the business entity reports and pays the business tax based on the input certificate bearing the amount of business tax to offset output tax, in addition to those certificates provided for in Article 38 of the Enforcement Rules of this Act, such certificates include: 6. … court-auctioned goods … the third copy (deduction copy) of the business tax payment slip as issued by the tax collection authority (relisted in Item 11, Paragraph 1, Article 38 of the Enforcement Rules of the Value-added and Non-value-added Business Tax Act as amended and promulgated on June 22, 2011: "… court-auctioned or -sold goods …the deduction copy of a business tax payment slip as issued by the tax collection authority." The said Item was amended and prom-

修正營業稅法實施注意事項第三點第四項第六款：「營業人報繳營業稅，以載有營業稅額之進項憑證扣抵銷項稅額者，除本法施行細則第三十八條所規定者外，包括左列憑證：六、……法院……拍賣貨物，由稽徵機關填發之營業稅繳款書第三聯（扣抵聯）。」（改列於一００年六月二十二日修正發布之營業稅法施行細則第三十八條第一項第十一款：「……法院……拍賣或變賣貨物，由稽徵機關填發之營業稅繳款書扣抵聯。」一０一年三月六日再度修正發布該條款，此部分相同。下稱系爭規定）及八十五年十月三十日台財稅第八五一九二一六九九號函：「……二、法院拍賣或變賣之貨物屬應課徵營業稅者，稽徵機關應於取得法院分配之營業稅款後，就所分配稅款填發『法院拍賣或變賣貨物營業稅繳款書』，……如買受人屬依營業稅法第四章第一節計算稅額之營業人，其扣抵聯應送交買受人作

ulgated on March 6, 2011, but the above provision remains the same; hereafter the "Provisions"), and the Letter 1996.10.30 Tai-Tsai-Shuei No. 851921699: "… 2. For court-auctioned or –sold goods that are subject to business tax, the tax collection authority shall, after receiving the amount of court-distributed tax, issue a "court-auctioned or-sold goods business tax payment slip" for the same amount … if the buyer is a business entity which should calculate the amount of tax in accordance with Section 1, Chapter 4 of the Business Tax Act, the deduction slip shall be delivered to the buyer as an input certificate to report and offset the output tax. 3. As regards the amount of undistributed business tax … if it has been paid and the buyer is a business entity which should calculate the amount of tax in accordance with Section 1, Chapter 4 of the Business Tax Act, the tax collection authority shall notify the buyer to apply on a special case basis to offset the amount paid against the output tax" expressly providing that the business entity buying court-auctioned or-sold goods shall use the third copy (deduction copy) of the business payment

為進項憑證，據以申報扣抵銷項稅額。三、至未獲分配之營業稅款，……如已徵起者，對買受人屬依營業稅法第四章第一節計算稅額之營業人，應通知其就所徵起之稅額專案申報扣抵銷項稅額。」明定法院拍賣或變賣應稅貨物之買方營業人須以非賣方營業人之稽徵機關所填發之營業稅繳款書第三聯（扣抵聯）作為進項稅額憑證，又附加以營業稅款之收取或徵起為稽徵機關填發營業稅繳款書之要件，排除執行法院所出具已載明或另以拍賣筆錄等文書為附件標示拍賣或變賣物種類與其拍定或承受價額之收據，得作為進項稅額之憑證，牴觸營業稅法第三十二條第一項賣方營業人應於收取價金時就營業稅之全額開立憑證，及第三十三條第三款財政部係對賣方營業人開立憑證為核定，而非命以稽徵機關開立之憑證為限之規定，使買方營業人不能依營業稅法第十五條第一項規定將其於該拍定或承受價額中受轉嫁之進項稅額，扣減其當期之銷項稅額，影響其於當期應納營業稅額，而增加法律所無之租稅義務，與租稅法律主義不符，均應不予援用。

slip as issued by the tax collection authority, which is not a seller business entity, as the input tax certificate. Furthermore, it is a condition precedent on the tax collection authority's issuing the business tax payment slip that the amount of business tax should have been collected or paid, excluding the eligibility of the receipt issued by the court, which indicates the type and price of the auctioned or sold goods or to which the court record that indicates the type and price of the auctioned or sold goods has been attached, as an input tax certificate. These rules contradict Paragraph 1, Article 32 of the Business Tax Act that a seller business entity shall issue a certificate for the full amount of business tax upon receipt of payment, and Item 3, Article 33 that the Ministry of Finance will approve the certificate issued by a seller business entity, and that the certificate shall not be limited to the one issued by a tax collection authority. They have prevented the buyer business entity from offsetting the input tax which is transferred through the auctioned or sold price against the current output tax in accordance with Paragraph 1, Article 15

of the Business Tax Act, thereby affecting the amount of business tax currently payable. They create tax payment obligations without a statutory ground, and are incompatible with the Principle of Statutory Taxpaying, and thus should not be applied.

Based on the meaning and purpose of this Interpretation, the relevant authorities shall have discussions as soon as possible, and the Ministry of Finance shall, in accordance with Item 3, Article 33 of the Business Tax Act, approve the eligibility of court-issued receipts, which indicate the type and price of the auctioned or sold goods or to which the court record indicating the type and price of the auctioned or sold goods has been attached, as the input tax certificate of the buyer business entity.

Justice Yeong-Chin Su filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

相關機關應依本解釋意旨儘速協商，並由財政部就執行法院出具已載明或另以拍賣筆錄等文書為附件標示拍賣或變賣物種類與其拍定或承受價額之收據，依營業稅法第三十三條第三款予以核定，作為買方營業人進項稅額之憑證。

本號解釋蘇大法官永欽提出協同意見書；黃大法官茂榮提出協同意見書；葉大法官百修提出協同意見書；羅大法官昌發提出協同意見書；湯大法官德宗提出協同意見書；林大法官錫堯提出部分不同意見書。

Justice Chang-Fa Lo filed concurring opinion.

Justice Dennis Te-Chung Tang filed concurring opinion.

Justice Si-Yao Lin filed dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: The applicants, A Leasing Co. and two other companies, were buyers at certain court-auctioned proceedings. When reporting business tax, they submitted the receipt of civil compulsory execution issued by the court to offset business tax. The relevant tax collection authorities refused to accept their offsets on the basis of Sub-item 6, Item 4, Point 3 of the Enforcement Notes for the Business Tax Act as amended and promulgated by the Ministry of Finance in 1988, and the Ministry of Finance Letter 1996 Tai-Tsai-Shuei No. 851921699 that in a court-auctioned or-sold procedure, only after the tax collection authority has actually collected the business tax amount can the buyer business entity report and offset the input tax with the third copy (deduction copy) of the business tax payment

編者註：

事實摘要：聲請人A租賃公司等3公司為法院拍賣程序之承受人或拍定人，為申報營業稅，分別檢附法院民事強制執行案款收據，申報扣抵營業稅。事經各國稅局主管機關援引財政部77年發布之修正營業稅法注意事項第3點第4項第6款及85年之台財稅第851921699號行政令函，關於法院之拍賣變賣程序，應於稽徵機關徵得營業稅款後，買受人依稽徵機關所填發之營業稅繳款書第三聯(扣抵聯)，始得申報扣抵銷項稅額之規定，以尚未向被拍賣物原所有人徵起營業稅款為由，否准其申報扣抵。聲請人不服，於行政爭訟敗訴後，認上開規定已增加法律所無之限制，違背租稅法律主義而違憲，分別聲請解釋。大法官先後受理後，以各聲請人主張違憲之標的相同，乃予合併審理。

slip as issued by the tax collection authority. The applicants appealed but failed in the administrative dispute proceedings. They believe the above provisions created restrictions that the law does not have, violated the Principle of Statutory Taxpaying and were unconstitutional; therefore, they applied for an interpretation. The Grand Justices accepted the cases respectively, and consolidated the applications because the unconstitutional issues raised by the applicants were the same.

J. Y. Interpretation No.707（December 28, 2012）*

【Unconstitutional Faculty Case relating to the Regulations for the Compensation of Public School Faculty and Staff 】

ISSUE: Is the Formulation of Compensation for Teachers of Public High School and Lower Levels without Reference either to Welfare Laws or to Authorized Orders considered Unconstitutional ?

RELEVANT LAWS:

Article 15 and Article 165 of the Constitution（憲法第十五條、第一百六十五條）; J. Y. Interpretations No. 289, No. 443, No. 614, and No. 658（司法院釋字第二八九、第四四三號、第六一四號、第六五八號）; Article 19, Article 20, and Article 39 of the Teachers' Act (Promulgated on August 9, 1995)（教師法第十九條、第二十條、第三十九條，八十四年八月九日制定公布）; Article 8 Paragraph 1 and Article 17 of the Educational Fundamental Act (Promulgated on June 23, 1999)（教育基本法第八條第二項及第十七條，八十八年六月二十三日制定公布）; Partial regulations relating to the teachers of public high school and lower levels within the "Regulations for the Compensation of Public School Faculty and Staff" (including its Annex and Standard Table for

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* Translated by Marie C.Y. Li.

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

the Compensation of Public School Faculty and Staff) amended by the Ministry of Education on December 22, 2004 （公立學校教職員敘薪辦法九十三年十二月二十二日修正發布）.

KEYWORDS:
teacher（教師）, welfare（待遇）, principle of legal reservation（法律保留原則）, public Interest（公共利益）, significant matter（重大事項）, property rights（財產權）.**

HOLDING: The Ministry of Education amended and promulgated the Regulations for the Compensation of Public School Faculty and Staff (including their Annex and Standard Table) on December 22, 2004. Within the Regulations for the Compensation of Public School Faculty and Staff, the part relating to teachers of public high school and lower levels seems to have violate the principle of legal reservation of the Constitution, and therefore shall be nullified on the date this Interpretation has been announced or at the most three years later.

解釋文：教育部於中華民國九十三年十二月二十二日修正發布之公立學校教職員敘薪辦法（含附表及其所附說明），關於公立高級中等以下學校教師部分之規定，與憲法上法律保留原則有違，應自本解釋公布之日起，至遲於屆滿三年時失其效力。

REASONING: Generally speaking, based on the Constitutional principle of legal reservation, even if the

解釋理由書：基於憲法上法律保留原則，政府之行政措施雖未限制人民之自由權利，但如涉及公共利益或實

government's administrative measures do not limit the people's freedom and rights, once the said measures involve significant matters such as the public interest or get in the way of a person's fulfillment of his or her fundamental civilian rights, the agency in charge may not codify regulations in associated with the aforesaid measures unless they are formulated according to relevant laws or evident legal authority (see Judicial Yuan Interpretations No. 443, No. 614, and No. 658). Education is the bedrock of a country's societal development, and teachers take upon themselves the mission of nurturing elites for the nation; thus, the virtue or vice of executing educational work is highly pertinent to the results of education as a whole, and this will also indirectly affect people's right to education. For the purpose of allowing teachers to fully commit themselves to their educational work and therefore aim for educational improvements, the government should help to ensure the quality of life and standard of teaching for teachers. Article 165 of the Constitution specifies that our nation ought to secure the life of educa-

現人民基本權利之保障等重大事項者，原則上仍應有法律或法律明確之授權為依據，主管機關始得據以訂定法規命令（本院釋字第四四三號、第六一四號、第六五八號解釋參照）。教育為國家社會發展之根基，教師肩負為國家造育人才之任務，其執行教育工作之良窳，攸關教育成敗至鉅，並間接影響人民之受教權。為使教師安心致力於教育工作，以提昇教育品質，其生活自應予以保障。憲法第一百六十五條即規定，國家應保障教育工作者之生活，並依國民經濟之進展，隨時提高其待遇。教師待遇之高低，包括其敘薪核計，關係教師生活之保障，除屬憲法第十五條財產權之保障外，亦屬涉及公共利益之重大事項。是有關教師之待遇事項，自應以法律或法律明確授權之命令予以規範，始為憲法所許。

tional workers, and to raise their salary or welfare benefits if the nation's economic growth allows it. The degree of compensation shall also be factored in when it comes to judging the full package of the compensation offered to teachers so as to make sure that their standing is protected. This is clearly stipulated in the Constitution, and as long as the compensation is outside of the realm of property rights specified in Article 15, it is deemed to be a significant matter involving the public interest. Consequently, in order to comply with the Constitution, matters relating to teachers' welfare and compensation must be regulated by means of laws or according to orders issued by evident legal authorities.

Only Article 19 of the Teac-hers' Act has regulations applicable to the compensation of teachers (though the full Act has not yet entered into force). No other Articles of the Teacher's Act nor any other laws have yet codified anything related to the said topic. The Ministry of Education promulgated the Regulations for the Compensation of Public School

有關教師之敘薪，除尚未施行之教師法第十九條規定外，教師法及其他法律尚無明文規定。教育部於六十二年九月十三日訂定發布公立學校教職員敘薪辦法（含附表及其所附說明），嗣於九十三年十二月二十二日修正發布（下稱系爭辦法），作為教師待遇完成法律制定前，公立高級中等以下學校教師（下稱上開教師）敘薪之處理依據（系

Faculty and Staff (including their Annex and Standard Table) on September 13, 1973, and it further amended the said Regulations for the Compensation of Public School Faculty and Staff (hereafter "the Regulation at issue") on December 22, 2004 as the basis (refer to Article 1 of the Regulation at issue) for handling compensation problems related to teachers of public high school and lower levels (hereafter "the aforesaid teachers") before any laws covering teacher's welfare or compensation had been completely enacted. Although the Regulation at issue was intended as a temporary mechanism before the enactment of relevant laws on teacher's welfare or compensation, an approach of this kind should not arbitrarily be permitted to remain in force for long. The Regulation at issue was promulgated in 1973 and has been in force since then. Within this time, both Article 20 of the Teachers' Act (promulgated on August 9, 1995, though the Executive Yuan never stated the date at which it should come into force), as well as Article 8 Paragraph 1 of the Educational Fundamental Act (promulgated on June 23, 1999) clearly

爭辦法第一條參照）。按系爭辦法固係教師待遇相關法律制定前之因應措施，惟此種情形實不宜任其長久繼續存在。系爭辦法自六十二年訂定施行迄今已久，其間，八十四年八月九日制定公布之教師法第二十條（尚未經行政院以命令定施行日期）及八十八年六月二十三日制定公布之教育基本法第八條第一項，均分別明定教師之待遇，應以法律定之，惟有關教師之待遇，迄今仍未能完成法律之制定。系爭辦法係規範上開教師薪級、薪額、計敘標準、本職最高薪級以及在職進修取得較高學歷之改敘等事項，事涉上開教師待遇之所得，係屬涉及上開教師財產權之保障及公共利益之重大事項，其未經法律之授權以為依據，核諸首開說明，與憲法上法律保留原則自屬有違。

state that teacher's welfare and compensation shall be governed by law, but until now this task has not yet been carried out. The Regulation at issue regulates the aforementioned ranking, amount and standard of compensation of a teacher's salary. It also states the highest salary scale according to the teacher's rank and relevant matters regarding changes to the compensation when a higher academic degree has been achieved while one is still on the job. Due to the importance of the above regulatory items, and their being related to the welfare benefits and earnings of teachers, these relevant provisions are closely bound to the security of teachers' property rights and to the public interest. Thus, if any incident involving these provisions was to be approved and publicized without any authorization in law, there is then an obvious violation against the principle of legal reservation within the Constitution.

The petitioner for this Inter-pretation merely argued about the part that was based upon Article 5 Paragraph 1 of the Standard Table for the Compensation of

聲請人雖僅就公立學校教職員敘薪標準表說明第五點第一項關於上開教師在職進修取得較高學歷改按新學歷起敘時，不採計進修期間內服務成績優良

Public School Faculty and Staff (hereinafter "Standard Table at issue"), which was relevant to the abovementioned matter regarding change of compensation when a teacher has received a higher degree while on the job, and the said compensation change was recalculated based on the higher academic degree. Based on the Standard Table at issue, the petitioner challenged that the Authority, while making a change in the compensation offered, did not take into account the petitioner's excellent service or the evaluation of his teaching during the petitioner's advanced study period. For this reason, the Standard Table at issue was deemed unconstitutional in the petitioner's case, and therefore a statutory interpretation was requested. The Standard Table for the Compensation of Public School Faculty and Staff served as the second appendix to the Regulation at issue, and thus should be viewed as part of the Regulation at issue. Given that the Regulation at issue violated the Constitutional principle of legal reservation, the Yuan ought to precisely interpret the Regulation at issue (refer to Judicial Yuan Interpretation No. 289). Furthermore, the

年資部分之規定，有牴觸憲法之疑義，聲請解釋。因上開說明為系爭辦法第二條附表所附之說明，即屬系爭辦法之一部分，系爭辦法既違反憲法上法律保留原則，本院自得以系爭辦法為解釋之對象予以解釋（本院釋字第二八九號解釋意旨參照）。惟上開教師之待遇制度，以法律明文或法律明確授權之命令加以規定，需相當期間妥為規劃，相關機關應於本解釋公布之日起三年內，依本解釋意旨，制定上開教師待遇相關法律，以完成上開教師待遇之法制化，屆期未完成制定者，系爭辦法關於上開教師部分之規定，失其效力。

abovementioned system of teacher's welfare and compensation shall be regulated by means of laws or according to orders issued by legal authorities. To comply with this requirement, a certain period of time is needed for proper planning, and the relevant authorities should promulgate laws regarding teacher's welfare and compensation in accordance with this Interpretation within three years after this Interpretation has been announced. By doing so, it is expected that the matter of teacher's welfare and compensation may be legalized. If the task is not finalized after the said three-year period, the part relating to teachers of public high school and lower levels within the Regulation at issue shall be nullified.

Justice Yeong-Chin Su filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Chang-Fa Lo filed concur-

本號解釋蘇大法官永欽提出協同意見書；黃大法官茂榮提出之協同意見書；葉大法官百修提出協同意見書；陳大法官新民提出協同意見書；羅大法官昌發提出協同意見書；湯大法官德宗提出部分不同意見書。

ring opinion.

Justice Dennis Te-Chung Tang filed dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: The Petitioner, X, is a primary school teacher who obtained a Master's degree in 2007, and who, through the school where he was employed, applied to the County Government for a change in the rank of his salary. The County Government recalculated the Petitioner's salary to a starting sum of NT$245 for holders of an MA degree according to the Standard Table appended to Article 2 of the Regulations for the Compensation of Public School Faculty and Staff and raised his salary scale by ten points taking into account the teacher's ten years of service (1993-2002). However, based on Article 5 Paragraph 1 of the Standard Table for the Compensation of Public School Faculty and Staff dealing with the period of time during which the teacher was studying-on-the-job which states that this period of service is not to be taken into account, the Petitioner's time of on-the-job study, namely

編者註：

事實摘要：聲請人X為國小教師，於96年間取得碩士學位，經任職學校向縣政府申請改敘薪級。縣政府依公立學校教職員敘薪辦法第2條所附敘薪標準表，以碩士學位自新臺幣245元起敘，採計其教師年資11年（82至91年）提敘十級；復依敘薪標準表說明第5點第1項關於在職進修改按新學歷起敘時，不採計進修期間服務成績優良年資之規定，就聲請人自92至94年間帶職進修年資不予採計提敘，而核定其本薪為430元。聲請人認敘薪標準表說明第5點第1項不採計進修期間年資之規定，損害其改敘之權益，有違憲法平等權與服公職權保障，於行政爭訟遭駁回確定後，聲請解釋。

2003-2005, was not taken into account, and so his salary was fixed at NT$430. The Petitioner deemed that the regulation excluding the period of on-the-job study contained in Article 5 Paragraph 1 of the Standard Table for the Compensation of Public School Faculty and Staff harmed his right to a change in compensation and infringed the right of equality in the Constitution and the guarantee of rights for civil servants. When his case was finally rejected by the administrative court, the Petitioner applied for a Constitutional interpretation.

J. Y. Interpretation No.708（February 6, 2013）*

【Immigration Detention of Foreign Nationals Pending Deportation】

ISSUE: 1.Is it constitutional to not provide prompt judicial relief to a foreign national who is facing deportation and is being temporarily detained by the National Immigration Agency ?

2.Is it constitutional to not have a court review an extension of a foreign national's temporary detention ?

RELEVANT LAWS:

Article 8, Paragraph 1 of the Constitution（憲法第八條第一項）; Article 38, Paragraphs 1 and 8 of the Immigration Act（入出國及移民法第三十八條第一項、第八項）; J.Y. Interpretation Nos. 392, 588, and 636（司法院釋字第三九二號、第五八八號、第六三六號解釋）; Regulations Governing the

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* Translated by Yen-Chia Chen and Margaret K. Lewis.

[1] Translators' note: Although "驅逐出國"（or "驅逐"）, "遣送回國"（or "遣返"）, and "遣送" all refer to a foreign national leaving a state involuntarily, they have slightly different meanings. In order to convey these nuances (e.g., that "驅逐" has a stronger tone than "遣送"), we have used different English terms for each.

[2] Translators' note: "法官保留（原則）" refers to the principle that, before police or prosecutors carry out a compulsory measure (e.g., search, detention, or seizure), the court must review and approve the measure. Although sometimes translated as "habeas corpus," this phrase does not refer to a legal writ whereby a person requests the court to determine whether a detention is lawful（i.e., "人身保護令狀"）. In using the translation "principle of prior judicial review," this concept should not be confused with the Chinese phrase "司法審查," which is generally used to refer to the exclusive power held by the Council of Grand Justices (i.e., Taiwan's constitutional court) to review the constitutionality of a statute.

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

Detention of Foreign Nationals（外國人收容管理規則）。

KEYWORDS:

deportation （驅逐出國）, repatriation （遣返 / 遣送回國）, foreign nationals （外國人）, detention （收容）, temporary detention（暫時收容）, principle of prior judicial review （法官保留原則）, protection of physical freedom （人身自由之保障）, due process of law （正當法律程序）.**

HOLDING: Article 38, Paragraph 1, of the Immigration Act (as amended on December 26, 2007; hereinafter the "Act") provides, "The National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ....." (this provision is the same as the provision promulgated on November 23, 2011, which provides, "The National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ....."). Under this provision, the temporary detention of a foreign national for a reasonable period in order to complete repatriation does not provide the detainee with prompt judicial relief. Moreover,

解釋文：中華民國九十六年十二月二十六日修正公布之入出國及移民法第三十八條第一項：「外國人有下列情形之一者，入出國及移民署得暫予收容……」（即一００年十一月二十三日修正公布同條項：「外國人有下列情形之一，……入出國及移民署得暫予收容……」）之規定，其因遣送所需合理作業期間之暫時收容部分，未賦予受暫時收容人即時之司法救濟；又逾越上開暫時收容期間之收容部分，非由法院審查決定，均有違憲法第八條第一項保障人民身體自由之意旨，應自本解釋公布之日起，至遲於屆滿二年時，失其效力。

an extension of the aforementioned temporary detention also is not subject to judicial review. These two aspects of the provision are both in violation of the meaning and purpose of physical freedom protection guaranteed under Article 8 of the Constitution, and shall be null and void no later than two years from the issuance of this Interpretation.

REASONING: Physical freedom is fully guaranteed. It is a prerequisite to the exercise of other freedoms and rights protected under the Constitution, and a critical and fundamental human right. Therefore, Article 8, Paragraph 1, of the Constitution expressly stipulates, "Physical freedom shall be guaranteed to the people. In no case except that of flagrante delicto, which shall be separately prescribed by law, shall any person be arrested or detained other than by judicial or police authorities in accordance with procedures prescribed by law. No person shall be tried or punished other than by a court in accordance with procedures prescribed by law. Any arrest, detention, trial, or punishment not carried out in ac-

解釋理由書：人民身體自由享有充分保障，乃行使其憲法上所保障其他自由權利之前提，為重要之基本人權。故憲法第八條第一項即明示：「人民身體之自由應予保障。除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。非由法院依法定程序，不得審問處罰。非依法定程序之逮捕、拘禁、審問、處罰，得拒絕之。」是國家剝奪或限制人民身體自由之處置，不問其是否屬於刑事被告之身分，除須有法律之依據外，尚應踐行必要之司法程序或其他正當法律程序，始符合上開憲法之意旨（本院釋字第五八八號、第六三六號解釋參照）。又人身自由係基本人權，為人類一切自由、權利之根本，任何人不分國籍均應受保障，此為現代法治國家共同之準

cordance with procedures prescribed by law may be resisted." In order to comply with the meaning and purpose of the foregoing constitutional provision, any disposition by the government that deprives or restricts a person's physical freedom—irrespective of whether the person is facing criminal charges—must have a legal basis and also fulfill required judicial procedures or other due process requirements (see J.Y. Interpretations Nos. 588 and 636). Furthermore, physical freedom is a fundamental human right and the foundation of all freedoms and rights of humankind. Protecting physical freedom of each individual, regardless of his nationality, is a common principle upheld by all modern rule-of-law states. Thus, the guarantee of physical freedom under Article 8 of the Constitution extends to foreign nationals, and they shall receive the same protection as domestic nationals.

則。故我國憲法第八條關於人身自由之保障亦應及於外國人，使與本國人同受保障。

Article 38, Paragraph 1, of the Act (as amended on December 26, 2007) provides: "The National Immigration Agency may temporarily detain a foreign national under any of the following circumstances

九十六年十二月二十六日修正公布之入出國及移民法第三十八條第一項規定：「外國人有下列情形之一者，入出國及移民署得暫予收容……」（即一００年十一月二十三日修正公布同條

項：「外國人有下列情形之一，……入出國及移民署得暫予收容……」，下稱系爭規定）。據此規定，內政部入出國及移民署（下稱入出國及移民署）得以行政處分收容外國人。

.....” (this is the same as the provision promulgated on November 23, 2011: “The National Immigration Agency may temporarily detain a foreign national under any of the following circumstances .....”) (hereinafter the “disputed provision”). Accordingly, the National Immigration Agency (hereinafter the “Agency”) may detain a foreign national through administrative acts.

系爭規定所稱之「收容」，雖與刑事羈押或處罰之性質不同，但仍係於一定期間拘束受收容外國人於一定處所，使其與外界隔離（入出國及移民法第三十八條第二項及「外國人收容管理規則」參照），亦屬剝奪人身自由之一種態樣，係嚴重干預人民身體自由之強制處分（本院釋字第三九二號解釋參照），依憲法第八條第一項規定意旨，自須踐行必要之司法程序或其他正當法律程序。惟刑事被告與非刑事被告之人身自由限制，在目的、方式與程度上畢竟有其差異，是其踐行之司法程序或其他正當法律程序，自非均須同一不可（本院釋字第五八八號解釋參照）。查外國人並無自由進入我國國境之權利，而入出國及移民署依系爭規定收容外國

While the term “detention” prescribed in the disputed provision differs from criminal detention or punishment in nature, it confines foreign nationals at a certain place for a certain period of time in order to isolate them from the outside world (see Article 38, Paragraph 2, of the Act, and the Regulations Governing the Detention of Foreign Nationals). Such detention constitutes a form of deprivation of physical freedom and a compulsory measure that severely interferes with physical freedom (see J.Y. Interpretation No. 392). Therefore, it must fulfill the required judicial procedures and other due process requirements in accordance with the meaning and purpose of Article

8, Paragraph 1, of the Constitution. Nonetheless, given that restrictions on physical freedom of criminal defendants and non-criminal defendants differ in terms of their purpose, methods, and degree, the required judicial procedures and other due process requirements for restrictions on physical freedom of non-criminal defendants and of criminal defendants need not be identical (see J.Y. Interpretation No. 588). A foreign national does not have the right to freely enter our state's territory. The Agency detains foreign nationals in accordance with the disputed provision in order to repatriate foreign nationals as soon as possible, rather than to arrest and detain them as criminal suspects. In the event that a foreign national can be quickly repatriated in a short period of time, the Agency needs a reasonable period of time to take care of repatriation related matters, such as purchasing plane tickets, applying for passports and other travel documents, contacting relevant institutions for assistance, and conducting other matters essential to repatriation. Thus, given the value judgments implicit in the entire legal system, it is reasonable

人之目的，在儘速將外國人遣送出國，非為逮捕拘禁犯罪嫌疑人，則在該外國人可立即於短期間內迅速遣送出國之情形下，入出國及移民署自須有合理之作業期間，以利執行遣送事宜，例如代為洽購機票、申辦護照及旅行文件、聯繫相關機構協助或其他應辦事項，乃遣送出國過程本質上所必要。因此，從整體法秩序為價值判斷，系爭規定賦予該署合理之遣送作業期間，且於此短暫期間內得處分暫時收容該外國人，以防範其脫逃，俾能迅速將該外國人遣送出國，當屬合理、必要，亦屬國家主權之行使，並不違反憲法第八條第一項保障人身自由之意旨，是此暫時收容之處分部分，尚無須經由法院為之。惟基於上述憲法意旨，為落實即時有效之保障功能，對上述處分仍應賦予受暫時收容之外國人有立即聲請法院審查決定之救濟機會，倘受收容人於暫時收容期間內，對於暫時收容處分表示不服，或要求由法院審查決定是否予以收容，入出國及移民署應即於二十四小時內將受收容人移送法院迅速裁定是否予以收容；且於處分或裁定收容之後，亦應即以受收容之外國人可理解之語言及書面，告知其處分收容之原因、法律依據及不服處分之司法救濟途徑，並通知其指定之在臺

and necessary that the disputed provision provides the Agency with a reasonable period for the repatriation operation, and permits the Agency to temporarily detain foreign nationals during this short period in order to prevent escape and to achieve quick repatriation. This is also an exercise of sovereignty and does not contravene the meaning and purpose of physical freedom protection under Article 8, Paragraph 1, of the Constitution. Accordingly, such temporary detention need not be subject to court review. However, based on the meaning and purpose of the aforementioned constitutional provision, and in order to ensure prompt and effective protection, foreign nationals under the foregoing temporary detention should be afforded a remedial opportunity to request an immediate judicial review of the detention. If a detainee objects to the temporary detention or requests judicial review while under detention, the Agency must transfer the detainee to the court within twenty-four hours for speedy review whether detention should be imposed. Once a temporary detention is imposed via an administrative act or a

親友或其原籍國駐華使領館或授權機關，俾受收容人善用上述救濟程序，得即時有效維護其權益，方符上開憲法保障人身自由之意旨。至於因執行遣送作業所需暫時收容之期間長短，則應由立法者斟酌行政作業所需時程及上述遣送前應行處理之事項等實際需要而以法律定之。惟考量暫時收容期間不宜過長，避免過度干預受暫時收容人之人身自由，並衡酌入出國及移民署現行作業實務，約百分之七十之受收容人可於十五日內遣送出國（入出國及移民署一０二年一月九日移署專一蓮字第一０二００一一四五七號函參照）等情，是得由該署處分暫時收容之期間，其上限不得超過十五日。

court ruling, the detained foreign national shall be notified in writing using a language comprehensible to him. The written notice should provide the rationale and the legal basis of the detention, as well as the channels for requesting judicial relief. In order that the detainee can avail himself of the aforementioned procedures for relief to promptly and effectively protect his rights, and thus comply with the meaning and purpose of physical freedom protection under the Constitution, notice shall also be given to the detainee's designated relatives or friends in Taiwan, or the embassy or authorized agency of the detainee's national origin. With regard to the length of the temporary detention for the enforcement of repatriation, the legislature should prescribe it by law after taking into consideration the time frame required for administrative processing and the practical concerns in the prerepatriation operations. Nonetheless, the length of the temporary detention may not be too long so as to avoid excessively interfering with the detainee's physical freedom. Moreover, the Agency's current practice results in around seventy percent of de-

tainees being repatriated within fifteen days (see National Immigration Agency Memorandum Yi-Shu-Zhuan-Yi-Lian No. 1020011457, January 9, 2013). Given the foregoing considerations, the maximum duration for the temporary detention imposed by the Agency shall not exceed fifteen days.

In the event that a detainee does not object to or request judicial review of the detention during the period of temporary detention and the detention period is about to expire, if the Agency deems it necessary to continue the detention, an impartial and independent court shall, in accordance with the law, review and decide whether the temporary detention, as stipulated in the disputed provision, shall be extended. This is because such extension involves a longterm deprivation of physical freedom and thus must comply with the due process requirements for physical freedom protection under the Constitution. Ac-cordingly, the Agency shall transfer the detainee to the court prior to the expiration of the temporary detention and petition for a ruling

至受收容人於暫時收容期間內，未表示不服或要求由法院審查決定是否收容，且暫時收容期間將屆滿者，入出國及移民署倘認有繼續收容之必要，因事關人身自由之長期剝奪，基於上述憲法保障人身自由之正當法律程序之要求，系爭規定關於逾越前述暫時收容期間之收容部分，自應由公正、獨立審判之法院依法審查決定。故入出國及移民署應於暫時收容期間屆滿之前，將受暫時收容人移送法院聲請裁定收容，始能續予收容；嗣後如依法有延長收容之必要者，亦同。

to continue the detention; thereafter, if, in accordance with the law, it is necessary to extend the detention again, such extension shall be handled in the same manner.

In sum, the disputed provision authorizes the Agency to temporarily detain foreign nationals facing deportation via administrative acts. It is not unconstitutional that the disputed provision allows a temporary detention for a reasonable period due to the repatriation operation. As far as the necessary protection of a detainee is concerned, Article 38, Paragraph 8, of the Act, as amended on November 23, 2011, has already provided that the detainee shall be notified in writing using a language comprehensible to him; the written notice shall contain the rationale of the detention, and the methods, time frame, and relevant authorities for requesting relief; and that notice shall also be given to the embassy or authorized agency from the detainee's national origin. Nevertheless, the disputed provision can hardly be deemed to have sufficiently protected the fundamental human rights of detainees because it does not afford temporary de-

綜上所述，系爭規定授權入出國及移民署對受驅逐出國之外國人得以行政處分暫予收容，其中就遣送所需合理作業期間之暫時收容部分，固非憲法所不許，惟對受收容人必要之保障，雖於一００年十一月二十三日已修正增訂入出國及移民法第三十八條第八項，規定收容之處分應以當事人理解之語文作成書面通知，附記處分理由及不服處分提起救濟之方法、期間、受理機關等相關規定，並聯繫當事人原籍國駐華使領館或授權機構，但仍未賦予受暫時收容人即時有效之司法救濟，難認已充分保障受收容人之基本人權，自與憲法第八條第一項正當法律程序有違；又逾越上開暫時收容期間之收容部分，系爭規定由入出國及移民署逕為處分，非由法院審查決定，亦牴觸上開憲法規定保障人身自由之意旨。

tainees with prompt and effective judicial relief. Therefore, the disputed provision violates due process of law under Article 8, Paragraph 1, of the Constitution. Furthermore, the disputed provision's allowance for the Agency to extend the temporary detention without court review also contravenes the aforementioned meaning and purpose of physical freedom protection under the Constitution.

Amending the laws relevant to this case will require a certain period of time. The amendment should contain a thoroughly studied and comprehensive set of supporting regulations for instance, whether to allow release on bail or release of detainees to the custody of another, as well as legal aid and how to structure the mechanisms for hearing cases, such as the courts' speedy review and appellate remedies. In order to preserve human dignity while also protecting the rights of foreign nationals and ensuring national security, the amendment should provide regulations for the facilities of immigration detention centers and the reasonableness of their management. The amendment

衡酌本案相關法律修正尚須經歷一定之時程，且須妥為研議完整之配套規定，例如是否增訂具保責付、法律扶助，以及如何建構法院迅速審查及審級救濟等審理機制，並應規範收容場所設施及管理方法之合理性，以維護人性尊嚴，兼顧保障外國人之權利及確保國家安全；受收容人對於暫時收容處分表示不服，或要求由法院審查決定是否予以收容，而由法院裁定時，原暫時收容處分之效力為何，以及法院裁定得審查之範圍，有無必要就驅逐出國處分一併納入審查等整體規定，相關機關應自本解釋公布之日起二年內，依本解釋意旨檢討修正系爭規定及相關法律，屆期未完成修法者，系爭規定與憲法不符部分失其效力。

should also include comprehensive regulations on issues including the effect of the original temporary detention disposition when the detainee objects to or requests judicial review on whether to impose detention, as well as whether the scope of judicial review should necessarily include the deportation decision. In light of the foregoing, the relevant authorities should review and amend the disputed provision and the relevant laws in accordance with the intent of this Interpretation within two years from the issuance of this Interpretation. The unconstitutional portions of the disputed provision shall become null and void if they have not been amended within two years from the issuance of this Interpretation.

The petitioners contend that the term "detention" in Article 1 of the Habeas Corpus Act should include the "[immigration] detention" in the disputed provision, and thus a person who is not otherwise being arrested and detained as a criminal suspect may petition for habeas corpus. Accordingly, the petitioners challenge the appropriateness of the final criminal

聲請人主張提審法第一條之拘禁應包括系爭規定之收容，無須因犯罪嫌疑受逮捕拘禁，亦得聲請提審，而分別指摘臺灣高等法院臺中分院九十九年度抗字第三００號及臺灣高等法院九十九年度抗字第五四三號刑事確定終局裁定之見解不當云云，係爭執確定終局裁定認事用法之當否，尚非具體指摘提審法第一條之規定客觀上有何牴觸

judgments of the Taiwan High Court Taichung Branch 99 Kang No. 300 (2010) and the Taiwan High Court 99 Kang No. 543 (2010). The petitioners' arguments actually dispute the appropriateness of the fact finding and application of law in the courts' final judgments rather than specifically challenging the constitutionality of Article 1 of the Habeas Corpus Act. The petitioners also challenge the constitutionality of Article 38, Paragraphs 2 and 3, of the Act (as amended on December 26, 2007), Article 36, Paragraphs 2 to 5, and Article 38, Paragraph 1, Subparagraph 4, of the Act (as amended on November 23, 2011), as well as Article 8 of the Habeas Corpus Act. However, the petitioners may not petition for an interpretation of these provisions because the courts did not apply them in the final judgments on which the petitioners rely. The aforementioned portions of the petitions do not comply with Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act and shall all be dismissed in accordance with Paragraph 3 of the same Article.

憲法之處；又聲請人指摘九十六年十二月二十六日修正公布之入出國及移民法第三十八條第二項，與聲請人之一另指摘同條第三項，以及一００年十一月二十三日修正公布之同法第三十六條第二項至第五項、第三十八條第一項第四款，暨提審法第八條等規定違憲部分，因各該條項款未經該聲請人執以聲請之確定終局裁定所適用，自不得對之聲請解釋。上揭聲請部分核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，均應不受理。

Justice Yeong-Chin Su filed concurring opinion.

Justice Ching-You Tsay filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Dennis Te-Chung Tang filed concurring opinion.

Justice Chen-Shan Li filed concurring opinion in part and dissenting opinion in part.

Justice Chun-Sheng Chen filed concurring opinion in part and dissenting opinion in part.

Justice Chang-Fa Lo filed concurring opinion in part and dissenting opinion in part.

Justice Shin-Min Chen filed dissenting opinion.

本號解釋蘇大法官永欽提出之協同意見書；蔡大法官清遊提出之協同意見書；黃大法官茂榮提出之協同意見書；葉大法官百修提出之協同意見書；湯大法官德宗提出之協同意見書；李大法官震山提出之部分協同部分不同意見書；陳大法官春生提出之部分協同部分不同意見書；羅大法官昌發提出之部分協同部分不同意見書；陳大法官新民提出之部分不同意見書。

EDITOR'S NOTE:

Summary of facts: (1) In 2008, the Agency issued X, a Thai national, a deportation order because she provided false information on her immigration documents. However, X did not physically

編者註：

事實摘要：(一)X 為泰國籍人，97 年間因填載資料不實為移民署為強制驅逐出國處分，惟未實際離境，嗣於 99 年間遭逮捕。該署以其有 (96.12.26) 入出國及移民法第 38 條第 1 項所定，

leave Taiwan after receiving the order and was arrested in 2010. Based on Article 38, Paragraph 1, Subparagraph 1 (failure to depart the state in accordance with a deportation order) and Subparagraph 2 (illegal entry or overstay of his period of stay or residence) of the Act, as amended on December 26, 2007, the Agency detained X at the Nantou Detention Center for 90 days before X was repatriated.

第 1 款受驅逐出國未辦妥出國手續、第 2 款非法入國或逾期停留、居留之事由，而收容在南投收容所，至遣返日止共收容 90 日。

(2) Y, an Indonesian national, was dismissed by her employer after she fled from her place of employment at the end of 2008. In 2010, the Agency detained Y based on Article 38, Paragraph 1, Subparagraph 2 (overstaying her period of residence), of the Act. Y was detained for 145 days before being repatriated.

(二)Y 為印尼籍人，97 年底自雇主處逃離遭撤銷聘僱，99 年間經移民署以其逾期居留有上開第 2 款事由而予收容，至遣返日止共收容 145 日。二人於收容期間分別聲請提審，均遭法院以非因犯罪嫌疑被逮捕拘禁，與提審法第 1 條規定不符而裁定駁回，乃分別主張上開規定違憲，聲請解釋。

While under detention, X and Y respectively petitioned for habeas corpus but were both rejected by the courts on the ground that they did not meet the requirements of Article 1 of the Habeas Corpus Act because they were not arrested and detained as criminal suspects. X and Y then respectively petitioned for

interpretation, arguing that the foregoing provisions are unconstitutional.

Note: The calculation of X's "90-day" detention was based on the report of the National Immigration Agency Memorandum Yi-Zhuan-Yi-Lian No. 1000005823 (January 5, 2011) that X left Taiwan on June 29, 2010. However, later the National Immigration Agency Memorandum Yi-Zhuan-Yi-Lian No. 1020042646 (March 11, 2013) indicated that the departure date of X was mistakenly reported as June 29, 2010, and should be corrected as November 26, 2010. Therefore, the original 90 days of detention as indicated above should be amended to read 240 days.

註：文中所載X共收容「90日」，係依內政部入出國及移民署100.1.5移專一蓮字第1000005823號函查復X出境日期為99年6月29日而計算。嗣該署102.3.11移專一蓮字第1020042646號函「出境日期誤植為99年6月29日，應更正為99年11月26日」。是該「90日」應更正為「240日」。

J. Y. Interpretation No.709（April 26, 2013）*

【Review and Approval of Urban Renewal Business Summaries and Plans】

ISSUE: Are the Urban Renewal Act's provisions governing the review and approval of urban renewal business summaries and plans constitutional ?

RELEVANT LAWS:

Articles 10, 15 & 23 of the Constitution（憲法第十條、第十五條、第二十三條）；J.Y. Interpretation Nos. 400, 443, 454, 596 & 689（司法院釋字第四００號、第四四三號、第四五四號、第五九六號、第六八九號解釋）； Article 11,Section 1 of the International Covenant on Economic, Social and Cultural Rights（經濟社會文化權利國際公約第十一條第二項）；Paragraph 1 of Article 7, Paragraphs 1 & 2 of Article 10,Article 11, Paragraph 1 of Article 26 and Paragraph 1 of Article 36 of the Urban Renewal Act (as amended on November 11, 1998)（都市更新條例第七條第一項、第十條第一項及第二項、第十一條、第二十六條第一項、第三十六條第一項（中華民國八十七年十一月十一日修正公布））；Article 3,9, Paragraph 3 of Article 19, Paragraph 1 of Article 22 and Article 22-1 of the Urban Renewal Act (as amended on

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* Translated by Yen-Chia Chen and Margaret K. Lewis.

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

January 29, 2003)（都市更新條例第三條、第九條、第十九條第三項、第二十二條第一項、第二十二條之一（中華民國九十二年一月二十九日修正公布））；Article 22-1 of the Urban Renewal Act (as amended on June 22, 2005)（都市更新條例第二十二條之一(中華民國九十四年一月二十二日修正公布)）；Paragraphs 1 & 2 of Article 10,Paragraph 1 of Article 22 Article 21, Paragraph 3 of Article 22, Paragraph 1 of Article 31 and Paragraph 1 of Article 36 of the Urban Renewal Act (as amended on January 16, 2008)（都市更新條例第十條第一項及第二項、第二十二條第一項、第二十一條、第二十二條第三項、第三十一條第一項、第三十六條第一項(中華民國九十七年十一月十六日修正公布)）；Paragraphs 3 & 4 of Article 19 and Paragraph 1 of Article 36 of the Urban Renewal Act (as amended on May 12, 2010)（都市更新條例第十九條第三項及第四項、第三十六條第一項(中華民國九十九年五月十二日修正公布））；Article 34 and Paragraph 1 of Article 92 of the Administrative Procedure Act（行政程序法第三十四條、第九十二條第一項(中華民國一0四年十二月三十日修正公布））。

KEYWORDS:

Right to property（財產權）, freedom of residence（居住自由）, adequate standard of living（適足居住）, principle of proportionality（比例原則）, due process in administrative procedures（正當行政程序）, Urban Renewal Act（都市更新條例）, renewal units（更新單元）, Urban Renewal Business Summary（都市更新事業概要）, Urban Renewal Business Plan（都市更新事業計畫）, Transfer of Rights（權

利變換）, substantial relation（重要關聯性）, appropriate organization（適當組織）, presenting opinions（陳述意見）, hearing（聽證）, public hearing（公聽會）, proportion of agreement（同意比率）, spirit of democracy（民主精神）, legislative discretion（立法形成）.**

HOLDING: Article 10, Paragraph 1, of the Urban Renewal Act, as amended on November 11, 2008 (the amendment on January 16, 2008, only changed the punctuation of this Article), which provides the competent authority's approval procedures for urban renewal business summaries, is inconsistent with the due process in administrative procedures required by the Constitution because it does not establish an appropriate organization to review urban renewal business summaries. It also fails to ensure that interested parties be kept informed of all relevant information or have the opportunity to present their opinions in a timely manner. Paragraph 2 of the same Article (as amended on January 16, 2008, which retained the same proportion of agreement as the prior version), which provides the required proportion of agreement needed

解釋文：中華民國八十七年十一月十一日制定公布之都市更新條例第十條第一項（於九十七年一月十六日僅為標點符號之修正）有關主管機關核准都市更新事業概要之程序規定，未設置適當組織以審議都市更新事業概要，且未確保利害關係人知悉相關資訊及適時陳述意見之機會，與憲法要求之正當行政程序不符。同條第二項（於九十七年一月十六日修正，同意比率部分相同）有關申請核准都市更新事業概要時應具備之同意比率之規定，不符憲法要求之正當行政程序。九十二年一月二十九日修正公布之都市更新條例第十九條第三項前段（該條於九十九年五月十二日修正公布將原第三項分列為第三項、第四項）規定，並未要求主管機關應將該計畫相關資訊，對更新單元內申請人以外之其他土地及合法建築物所有權人分別為送達，且未規定由主管機關以公開方式舉辦聽證，使利害關係人

for an urban renewal business summary application, is also inconsistent with the due process in administrative procedures required by the Constitution. Article 19, first part of Paragraph 3, of the Urban Renal Act, as amended on January 29, 2003 (the amendment on May 12, 2010, split Paragraph 3 of this Article into two paragraphs and organized them as Paragraphs 3 and 4 of this Article), does not request the competent authority to separately deliver the urban renewal business plan's relevant information to owners of lands and legal buildings within an area to be renewed other than to the applicants. This provision also fails to require the competent authority to hold hearings in public, which would allow interested parties to attend the hearing, present their statements and conduct oral argument. Nor does this provision ask the competent authority to take the entire records of the hearing into consideration, explain its rationale for accepting or declining the arguments when granting the approval, or deliver approved urban renewal business plans to owners of lands and legal buildings within an area to be renewed, owners of other legal

得到場以言詞為意見之陳述及論辯後，斟酌全部聽證紀錄，說明採納及不採納之理由作成核定，連同已核定之都市更新事業計畫，分別送達更新單元內各土地及合法建築物所有權人、他項權利人、囑託限制登記機關及預告登記請求權人，亦不符憲法要求之正當行政程序。上開規定均有違憲法保障人民財產權與居住自由之意旨。相關機關應依本解釋意旨就上開違憲部分，於本解釋公布之日起一年內檢討修正，逾期未完成者，該部分規定失其效力。

rights, relevant authorities of registration of request or restriction, and persons who may apply for advance notice registration. As a result, this provision does not comply with the due process in administrative procedures required by the Constitution either. All of the aforementioned provisions are in violation of the meaning and purpose of the constitutional guarantee of the people's rights to property and freedom of residence. The relevant authorities should review and amend the unconstitutional parts of the provisions stated above in accordance with the meaning and purpose of this Interpretation. The said unconstitutional parts of the provisions shall become null and void if they have not been amended within one year from the issuance of this Interpretation.

Article 22, Paragraph 1, of the Urban Renal Act, as amended on January 29, 2003, and January 16, 2008, which provides the required proportion of agreement needed for the application for approval of urban renewal business plans, is not in violation of the principle of proportionality under the Constitution. Neither

九十二年一月二十九日及九十七年一月十六日修正公布之都市更新條例第二十二條第一項有關申請核定都市更新事業計畫時應具備之同意比率之規定，與憲法上比例原則尚無牴觸，亦無違於憲法要求之正當行政程序。惟有關機關仍應考量實際實施情形、一般社會觀念與推動都市更新需要等因素，隨時

is there any violation of the due process in administrative procedures required by the Constitution. Nonetheless, the relevant authorities should consider factors such as the situation of practical implementation, general social attitudes, the need for promoting urban renewal, etc., and review and modify relevant provisions from time to time.

檢討修正之。

The application of Article 22-1 of the Urban Renal Act, as amended on January 29, 2003 (the amendment on June 22, 2005, only corrected the text of this Article), is limited to urban renewal applications in areas designated for renewal due to war, earthquake, fire, flood, storm or other major incidents prescribed in Article 7, Paragraph 1, Item 1, of the Urban Renal Act. This Article is also limited by not changing the differentiated ownership of other buildings and the ownership of the portion of the base lot they own. In this circumstance, this Article is consistent with the constitutional principle of proportionality.

九十二年一月二十九日修正公布之都市更新條例第二十二條之一（該條於九十四年六月二十二日為文字修正）之適用，以在直轄市、縣（市）主管機關業依同條例第七條第一項第一款規定因戰爭、地震、火災、水災、風災或其他重大事變遭受損壞而迅行劃定之更新地區內，申請辦理都市更新者為限；且係以不變更其他幢（或棟）建築物區分所有權人之區分所有權及其基地所有權應有部分為條件，在此範圍內，該條規定與憲法上比例原則尚無違背。

REASONING: In this case, the statutes applied by the courts in the final judgments (Supreme Administrative Court 100 Pan1905 (2011), Supreme Administrative Court 100 Pan 2004 (2011), Supreme Administrative Court 100 Pan 2092 (2011), and Taipei High Administrative Court 98 Su 2467 (2009)) include Article 10, Paragraphs 1 and 2, of the Urban Renal Act (as amended on November 11, 1998), Article 22, Paragraph 1, and the amended Article 22-1, of the Urban Renewal Act (as amended on January 29, 2003; hereinafter the "former Act"), and Article 22, Paragraph 1, of the Urban Renewal Act (as amended on January 16, 2008; hereinafter the "Act," including the former Act and the current Urban Renewal Act). In this Interpretation, these statutes all fall under this Court's scope of review according to Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act. The first part of Article 19, Paragraph 3, of the former Act applied in the final judgment of the Supreme Administrative Court 100 Pan1905 (2011) is not included in the petitions, but it provides procedures that

解釋理由書：查本件原因案件之確定終局判決（最高行政法院一００年度判字第一九０五號、第二００四號、第二０九二號判決及臺北高等行政法院九十八年度訴字第二四六七號判決）所適用之法律，包括八十七年十一月十一日制定公布之都市更新條例第十條第一項、第二項及九十二年一月二十九日修正公布之都市更新條例第二十二條第一項、增訂公布第二十二條之一（九十二年一月二十九日修正公布後都市更新條例下稱舊都市更新條例），以及九十七年一月十六日修正公布之都市更新條例第二十二條第一項（現行及舊都市更新條例合稱本條例），依司法院大法官審理案件法第五條第一項第二款規定，均為解釋之客體。又查最高行政法院一００年度判字第一九０五號確定終局判決所適用之舊都市更新條例第十九條第三項前段雖未經聲請人聲請釋憲，惟此係規定直轄市、縣（市）政府主管機關核定都市更新事業計畫前應遵行之程序，乃同條例第十條第一項直轄市、縣（市）主管機關核准都市更新事業概要之後續階段，都市更新事業概要是否核准為都市更新事業計畫是否核定之前提問題，足見舊都市更新條例第十九條第三項前段與第

the municipal or county (city) authority should follow before approving urban renewal business summaries. The approval of an urban renewal business summary is a prerequisite for the approval of an urban renewal business plan. The first part of Article 19, Paragraph 3, of the former Act has a substantial relation to the regulatory function of Article 10 of the same Act. Hence, as an initial point, this Court will also review the first part of Article 19, Paragraph 3, of the former Act in this Interpretation.

十條第一項之規範功能，具有重要關聯性，爰將舊都市更新條例第十九條第三項前段一併納入審查範圍，合先敘明。

Article 15 of the Constitution provides that the people's right to property shall be protected. The purpose of this Article is to guarantee each individual the freedom to exercise his rights to use, profit by, and dispose of his property during the existence of the property, and to prevent infringements by the government or any third party, so as to ensure that a person can realize his freedoms, develop his personality, and maintain his dignity (see Interpretation No. 400). In addition, Article 10 of the Constitution stipulates that people shall have freedom of resi-

憲法第十五條規定人民財產權應予保障，旨在確保個人依財產之存續狀態行使其自由使用、收益及處分之權能，並免於遭受公權力或第三人之侵害，俾能實現個人自由、發展人格及維護尊嚴（本院釋字第四００號解釋參照）。又憲法第十條規定人民有居住之自由，旨在保障人民有選擇其居住處所，營私人生活不受干預之自由（本院釋字第四四三號解釋參照）。然國家為增進公共利益之必要，於不違反憲法第二十三條比例原則之範圍內，非不得以法律對於人民之財產權或居住自由予以限制（本院釋字第五九六號、第四五四

dence. This Article guarantees people the freedom to choose their residence and to enjoy their life in privacy without intrusion (see Interpretation No. 443). However, in order to advance public welfare, a state may by law impose restrictions on the people's right to property or freedom of residence pursuant to the principle of proportionality under Article 23 of the Constitution (see Interpretation Nos. 596 and 454).

Urban renewal is a program of urban planning. Urban renewal promotes well-planned urban land redevelopment, revitalizes urban functions, improves the urban living environment, and advances public welfare. The Act was enacted for these purposes. It ensures that people can enjoy an adequate standard of living with safety, peace, and dignity (see Article 11(1) of the International Covenant on Economic, Social and Cultural Rights). The Act also serves as the legal basis for imposing restrictions on the people's rights to property and freedom of residence. The implementation of urban renewal involves concerns of politics,

號解釋參照）。

都市更新為都市計畫之一環，乃用以促進都市土地有計畫之再開發利用，復甦都市機能，改善居住環境，增進公共利益。都市更新條例即為此目的而制定，除具有使人民得享有安全、和平與尊嚴之適足居住環境之意義（經濟社會文化權利國際公約第十一條第一項規定參照）外，並作為限制財產權與居住自由之法律依據。都市更新之實施涉及政治、經濟、社會、實質環境及居民權利等因素之考量，本質上係屬國家或地方自治團體之公共事務，故縱使基於事實上需要及引入民間活力之政策考量，而以法律規定人民在一定條件下得申請自行辦理，國家或地方自治團體仍須以公權力為必要之監督及審查決定。

economics, society, physical environment, and residence rights, etc., and is, in essence, a public duty of the state or local autonomous body. Taking into account the actual need to introduce the vitality of private parties (into the implementation of urban renewal), the law can stipulate that people may apply to self-manage the implementation of renewal under certain conditions. Nonetheless, the state or local autonomous body still has to inspect and review the implementation of renewal according to its authority, which is public. According to the Act, the competent authority can implement an urban renewal business by itself, entrust it to an urban renewal business institution, or accept other organizations (institutions) as agents of implementation to undertake the business of urban renewal. In addition, after meeting certain criteria the owners of the lands and legal buildings (of an area that has been designated for implementation of urban renewal) may apply to the municipal, county (city) authority according to law for approval of their urban renewal business summary, and then organize a renewal group to implement the urban

依本條例之規定，都市更新事業除由主管機關自行實施或委託都市更新事業機構、同意其他機關（構）實施外，亦得由土地及合法建築物所有權人在一定條件下經由法定程序向直轄市、縣（市）主管機關申請核准，自行組織更新團體或委託都市更新事業機構實施（本條例第九條、第十條、第十一條規定參照）。而於土地及合法建築物所有權人自行組織更新團體或委託都市更新事業機構實施之情形，主管機關對私人所擬具之都市更新事業概要（含劃定更新單元，以下同）所為之核准（本條例第十條第一項規定參照），以及對都市更新事業計畫所為之核定（本條例第十九條第一項規定參照），乃主管機關依法定程序就都市更新事業概要或都市更新事業計畫，賦予法律上拘束力之公權力行為，其法律性質均屬就具體事件對特定人所為之行政處分（行政程序法第九十二條第一項規定參照）。其中經由核准都市更新事業概要之行政處分，在更新地區內劃定可單獨實施都市更新事業之更新單元範圍，影響更新單元內所有居民之法律權益，居民如有不願被劃入更新單元內者，得依法定救濟途徑謀求救濟。而主管機關核定都市更新事業計畫之行政處分，涉及建築物配置、費用負擔、

renewal business or entrust it to an urban renewal business institution for implementation (see Articles 9, 10 & 11 of the Act). When the owners of the lands and legal buildings organize a renewal group to implement the urban renewal business or entrust it to an urban renewal business institution for implementation, the competent authority's approval of an urban renewal business summary (including the designation of renewal units—the same shall apply hereinafter) (see Article 10, Paragraph 1, of the Act) and an urban renewal business plan (see Article 19, Paragraph 1, of the Act) drafted by private parties are the competent authority's exercise of public authority according to legal procedures making an urban renewal business summary or an urban renewal business plan legally binding. The legal essence of these administrative acts is an administrative disposition issued to a specific person concerning a specific matter (see Article 92, Paragraph 1, of the Administrative Procedure Act). An administrative disposition approving an urban renewal business summary defines the scope of the units to be renewed in the

拆遷安置、財務計畫等實施都市更新事業之規制措施。且於後續程序貫徹執行其核准或核定內容之結果，更可使土地或建築物所有權人或其他權利人，乃至更新單元以外之人之權利受到不同程度影響，甚至在一定情形下喪失其權利，並被強制遷離其居住處所（本條例第二十一條、第二十六條第一項、第三十一條第一項、第三十六條第一項等規定參照）。故上述核准或核定均屬限制人民財產權與居住自由之行政處分。

area that has been designated for renewal and exerts an influence on the rights and legal interests of all residents (residing) in the units to be renewed. If a resident is unwilling to be included in the units to be renewed, he may seek the judicial relief that is available according to law. An administrative disposition that is rendered by the competent authority and which approves an urban renewal business plan involves critical components of the implementation of the plan, including the layout of the building, sharing of expenses, plans for removal and resettlement, and financial plans. Moreover, the implementation of the approved summary or plan in the following procedures may have varying impact on the owners or other right holders of the lands or legal buildings, or even on the rights of someone residing outside the units to be renewed. In certain circumstances, it could even result in the forfeiture of those people's rights and a compulsory removal, forcing them to move out of their residences (see Article 21; Article 26, Paragraph 1; Article 31, Paragraph 1; and Article 36, Paragraph 1, of the Act). Therefore, the aforemen-

tioned approval of an urban renewal business summary and approval of an urban renewal business plan are both administrative dispositions imposing restrictions upon the people's rights to property and freedom of residence.

The legislature should formulate the content of the constitutional principle of due process by prescribing the corresponding legal procedures after the legislature takes into consideration the types of fundamental rights involved, the strength and scope of the restrictions, the public interests pursued, the proper function of the determining authority, as well as the existence of alternative procedures and their costs (see Interpretation No. 689). A renewal implementation not only involves the pursuit of an important public interest, but also has significant impact on the property rights and the freedom of residence of owners of various units to be renewed and surrounding lands and legal buildings. Furthermore, the implementation of renewal is prone to disputes due to the complicated interests involved. In order to ensure that the competent authori-

憲法上正當法律程序原則之內涵，應視所涉基本權之種類、限制之強度及範圍、所欲追求之公共利益、決定機關之功能合適性、有無替代程序或各項可能程序之成本等因素綜合考量，由立法者制定相應之法定程序（本院釋字第六八九號解釋參照）。都市更新之實施，不僅攸關重要公益之達成，且嚴重影響眾多更新單元及其週邊土地、建築物所有權人之財產權及居住自由，並因其利害關係複雜，容易產生紛爭。為使主管機關於核准都市更新事業概要、核定都市更新事業計畫時，能確實符合重要公益、比例原則及相關法律規定之要求，並促使人民積極參與，建立共識，以提高其接受度，本條例除應規定主管機關應設置公平、專業及多元之適當組織以行審議外，並應按主管機關之審查事項、處分之內容與效力、權利限制程度等之不同，規定應踐行之正當行政程序，包括應規定確保利害關係人知悉相

ty's approval of an urban renewal business summary or an urban renewal business plan matches an important public interest and complies with the principle of proportionality and the requirements of relevant laws—and also to pursue a broader acceptance of an approved urban renewal business summary or plan through building a consensus among people by encouraging people to get actively involved—the Act should require the competent authority to establish an impartial, professional, and diverse appropriate organization for the review of urban renewal business summaries and urban renewal business plans. Moreover, the Act should prescribe the due process for administrative procedures in light of the items to be reviewed by the competent authority, the content and effect of an administrative disposition, and the severity of restrictions imposed upon people's rights. These procedures should include rules ensuring that interested parties be kept informed of all relevant information, and should also provide interested parties with opportunities to present their opinions orally or in writing to the competent authority in a timely manner so as

關資訊之可能性，及許其適時向主管機關以言詞或書面陳述意見，以主張或維護其權利。而於都市更新事業計畫之核定，限制人民財產權及居住自由尤其直接、嚴重，本條例並應規定由主管機關以公開方式舉辦聽證，使利害關係人得到場以言詞為意見之陳述及論辯後，斟酌全部聽證紀錄，說明採納及不採納之理由作成核定，始無違於憲法保障人民財產權及居住自由之意旨。

to assert or preserve their rights. The approval of an urban renewal business plan in particular directly and significantly restricts the people's rights to property and freedom of residence. Therefore, the Act should require the competent authority to conduct hearings in public, allow interested parties to appear and present their statements and arguments orally during the proceedings, and explain their rationale for adopting or declining the arguments after taking into consideration all the records of the hearings. In this fashion the Act can be made consistent with the meaning and purpose of the constitutional guarantee of the people's rights to property and freedom of residence.

Article 10, Paragraph 1, of the former Act provides, "The owners of the lands and legal buildings of an area that has been designated for renewal may designate the units to be renewed by themselves as units defined by the competent authority, or according to the criteria for designating a unit to be renewed. They may also conduct a public hearing. They may then present a business summary

舊都市更新條例第十條第一項規定：「經劃定應實施更新之地區，其土地及合法建築物所有權人得就主管機關劃定之更新單元，或依所定更新單元劃定基準自行劃定更新單元，舉辦公聽會，擬具事業概要，連同公聽會紀錄申請當地直轄市、縣（市）主管機關核准，自行組織更新團體實施該地區之都市更新事業或委託都市更新事業機構為實施者實施之。」（於九十七年一月十六日

together with the public records of the hearing to the municipal, county (city) authority to apply for approval. Finally, they may organize a renewal group to implement the urban renewal business of that area or entrust it to an urban renewal business institution for implementation" (The amendment of January 16, 2008, only changed the punctuation in this sentence). Although this provision requires applicants or implementing agents to conduct a public hearing, it fails to sufficiently guarantee interested parties the opportunity to present their opinions to the competent authority in order to assert or preserve their rights in a timely manner. This provision and other relevant provisions do not require the competent authority to establish an appropriate organization to review urban renewal business summaries, nor do they ensure that interested parties be kept informed of all relevant information. As a result, this provision is inconsistent with the due process in administrative procedures required by the Constitution and in violation of the meaning and purpose of the constitutional guarantee of the

僅為標點符號之修正）雖有申請人或實施者應舉辦公聽會之規定，惟尚不足以保障利害關係人適時向主管機關陳述意見，以主張或維護其權利。上開規定及其他相關規定並未要求主管機關應設置適當組織以審議都市更新事業概要，且未確保利害關係人知悉相關資訊可能性，與前述憲法要求之正當行政程序不符，有違憲法保障人民財產權與居住自由之意旨。

people's rights to property and freedom of residence.

When people apply to an administrative agency for specific administrative actions, the administrative agency must first review the application to see whether it meets the procedural requirements prescribed by law. An administrative agency will conduct an administrative disposition only when the procedural requirements prescribed by law are met. In view of this, the people's application is part of the entire administrative procedure. Provisions regulating the people's application must therefore comply with due process in administrative procedures. Since the Act provides that the owners of lands and legal buildings within an area to be renewed may apply for approval of an urban renewal business summary or an urban renewal business plan, the Act should also properly specify that the application contain a minimum proportion of agreement among the owners of the lands and legal buildings within the area to be renewed in accordance with the state's constitutional duty to protect the people's rights to prop-

人民依法申請行政機關為特定行政行為時，行政機關須就其申請是否符合法定程序要件予以審查，於認為符合法定程序要件後，始據以作成行政處分，故人民申請之要件亦屬整體行政程序之一環，法律有關人民申請要件之規定，自亦應符合正當行政程序之要求。本條例既規定土地及合法建築物所有權人在一定條件下，得申請主管機關核准都市更新事業概要與核定都市更新事業計畫，則基於國家保護人民財產權與居住自由之憲法上義務，就提出申請時應具備之同意比率，亦應有適當之規定。舊都市更新條例第十條第二項規定：「前項之申請應經該更新單元範圍內土地及合法建築物所有權人均超過十分之一，並其所有土地總面積及合法建築物總樓地板面積均超過十分之一之同意。」（於九十七年一月十六日修正公布為：「前項之申請，應經該更新單元範圍內私有土地及私有合法建築物所有權人均超過十分之一，並其所有土地總面積及合法建築物總樓地板面積均超過十分之一之同意；……」）依其規定，申請核准都市更新事業概要之同意比

erty and freedom of residence. Article 10, Paragraph 2, of the former Act provides, “The application mentioned in the foregoing paragraph should be accepted by more than 10% of the owners of the lands and legal buildings within the area to be renewed, and the total land area and the total floor area of the legal buildings owned should also exceed 10%; ...” (After the amendment of January 16, 2008, this provision reads as “The application mentioned in the foregoing paragraph should be accepted by more than 10% of the owners of the private lands and legal private buildings within the area to be renewed, and the total land area and the total floor area of the legal buildings owned should also exceed 10%; ...”). Under this provision, any application for the approval of an urban renewal business summary is filed in accordance with the law as long as it meets the 10% requirement, regardless of whether the application is filed by more than 10% of owners of the lands and legal buildings within the area to be renewed or by owners who own more than 10% of the total land area and the total floor area of the legal buildings. Therefore, the

率，不論土地或合法建築物所有權人，或其所有土地總面積或合法建築物總樓地板面積，僅均超過十分之一即得提出合法申請，其規定之同意比率太低，形成同一更新單元內少數人申請之情形，引發居民參與意願及代表性不足之質疑，且因提出申請前溝通協調之不足，易使居民顧慮其權利可能被侵害，而陷於價值對立與權利衝突，尤其於多數人不願參與都市更新之情形，僅因少數人之申請即應進行行政程序（行政程序法第三十四條但書規定參照），將使多數人被迫參與都市更新程序，而面臨財產權與居住自由被侵害之危險。則此等同意比率太低之規定，尚難與尊重多數、擴大參與之民主精神相符，顯未盡國家保護人民財產權與居住自由之憲法上義務，即不符憲法要求之正當行政程序，亦有違於憲法保障人民財產權與居住自由之意旨。

minority owners of the area to be renewed may easily file an application because the required proportion of agreement prescribed under this provision is very low. However, it is doubtful whether such an application represents the will of all the residents. Moreover, due to insufficient communication conducted prior to the filing of the application, residents are likely to be concerned as to whether their rights will be violated and they also face the dilemma of the conflict of various values and rights. Particularly, in a case where most people are not willing to participate in an urban renewal plan, residents may be forced to participate in the procedure of urban renewal and thus risk their property rights and freedom of residence only because the administrative procedure is undertaken after an application filed by a few people (Article 34, proviso clause, of the Administrative Procedure Act). This provision, allowing such a low proportion of agreement, does not match the spirit of democracy by majority rule or expansion of citizen's participation, and obviously fails to fulfill the state's constitutional duty to protect the people's rights

to property and freedom of residence. It is inconsistent with the due process in administrative procedures required by the Constitution, and is also in violation of the meaning and purpose of the constitutional guarantee of the people's rights to property and freedom of residence.

Article 19, first part of Paragraph 3, of the former Act provides, "After an urban renewal business plan is drafted or revised, and before it is sent to a competent urban renewal review committee at a municipal, county (city) government or township (village, city) for review, the urban renewal business plan should be publicly exhibited for 30 days at each municipal, county (city) government or township (village, city) hall. The date and place of exhibition should be published in the newspaper for the public. A public hearing should be conducted as well. Within the exhibition period, any citizen or group can submit written suggestions with their names or titles and addresses to competent municipal, county (city) government or township (village, city) hall in order to provide reference to the compe-

舊都市更新條例第十九條第三項前段規定：「都市更新事業計畫擬定或變更後，送該管直轄市、縣（市）政府都市更新審議委員會審議前，應於各該直轄市、縣（市）政府或鄉（鎮、市）公所公開展覽三十日，並應將公開展覽日期及地點登報周知及舉行公聽會；任何人民或團體得於公開展覽期間內，以書面載明姓名或名稱及地址，向該管直轄市、縣（市）政府提出意見，由該管直轄市、縣（市）政府都市更新審議委員會予以參考審議。」（該條於九十九年五月十二日修正公布，將原第三項分列為第三項、第四項：「都市更新事業計畫擬訂或變更後，送各級主管機關審議前，應於各該直轄市、縣（市）政府或鄉（鎮、市）公所公開展覽三十日，並舉辦公聽會；實施者已取得更新單元內全體私有土地及私有合法建築物所有權人同意者，公開展覽期間得縮短

tent urban renewal review committee at a municipal, county (city) government or township (village, city) during review." (After the amendment of May 12, 2010, this paragraph was split into paragraphs 3 and 4, and reads as "After an urban renewal business plan is drafted or revised, and before it is sent to a competent authority for review, the urban renewal business plan should be publicly exhibited for 30 days at each municipal, county (city) government or township (village, city) hall, and a public hearing should be conducted as well. The date of public exhibit can be shortened to 15 days when the implementing agents have already obtained the consent of all the owners of private lands and private legal buildings within the area to be renewed." "The date and place of the exhibition and public hearing mentioned in the previous two paragraphs should be published in the newspaper for the public, and people who are party to the business should be notified, including owners of lands and legal buildings within the area to be renewed, owners of other legal rights, relevant authorities of registration of request or restriction,

為十五日。」「前二項公開展覽、公聽會之日期及地點，應登報周知，並通知更新單元範圍內土地、合法建築物所有權人、他項權利人、囑託限制登記機關及預告登記請求權人；任何人民或團體得於公開展覽期間內，以書面載明姓名或名稱及地址，向各級主管機關提出意見，由各級主管機關予以參考審議。……」）上開規定就都市更新事業計畫之核定雖已明文，送都市更新審議委員會審議前，應將都市更新事業計畫公開展覽，任何人民或團體得於公開展覽期間內提出意見，惟上開規定及其他相關規定並未要求主管機關應將該計畫相關資訊（含同意參與都市更新事業計畫之私有土地、私有合法建築物之所有權人清冊），對更新單元內申請人以外之其他土地及合法建築物所有權人分別為送達。且所規定之舉辦公聽會及由利害關係人向主管機關提出意見，亦僅供主管機關參考審議，並非由主管機關以公開方式舉辦聽證，使利害關係人得到場以言詞為意見之陳述及論辯後，斟酌全部聽證紀錄，說明採納及不採納之理由作成核定，連同已核定之都市更新事業計畫，分別送達更新單元內各土地及合法建築物所有權人、他項權利人、囑託限制登記機關及預告登記請求權人。

and persons who may apply for advance notice registration. Within the exhibition period, any citizen or group can submit written suggestions with their names or titles and addresses to the competent authority, and the competent authority should review the suggestions.”). The aforementioned provision has expressly prescribed the approval of an urban renewal business plan and requires a public exhibit of an urban renewal business plan and submission of suggestions by any citizen or group within the exhibition period before an urban renewal business plan is sent to an urban renewal committee for review. Nevertheless, the foregoing provision, and other relevant provisions, do not require the competent authority to separately deliver the urban renewal business plan’s relevant information (including a list of owners of private lands and private legal buildings who agree to participate in the urban renewal business plan) to those owners of lands and legal buildings within an area to be renewed other than applicants. Moreover, the conduct of the public hearing and the submission of suggestions by interested parties to

凡此均與前述憲法要求之正當行政程序不符，有違憲法保障人民財產權與居住自由之意旨。

the competent authority prescribed under this provision are only for the competent authority's reference. The provision does not require the competent authority to hold the hearing in public and thus fails to allow interested parties to attend the hearing, present their statements or conduct oral argument. Neither does the provision ask the competent authority to take the entire records of the hearing into consideration, explain its rationale for accepting or declining the arguments when granting its approval, or deliver approved urban renewal business plans to owners of lands and legal buildings within the area to be renewed, owners of other legal rights, relative authorities of registration of request or restriction, and persons who may apply for advance notice registration. All of the above are inconsistent with the due process in administrative procedures required by the Constitution and are also in violation of the meaning and purpose of the constitutional guarantee of the people's rights to property and freedom of residence.

Relevant authorizes should review and amend the unconstitutional parts of provisions stated in the foregoing paragraphs in accordance with the meaning and purpose of this Interpretation. The unconstitutional parts of provisions shall become null and void if they have not been amended within one year from the issuance of this Interpretation.

上述各段論述違憲部分，相關機關應依本解釋意旨，於本解釋公布之日起一年內檢討修正，逾期未完成者，該部分規定失其效力。

Article 22, Paragraph 1, of the former Act stipulates that, “When an implementing agent is drafting or revising urban renewal business plans to submit for approval, the application for approval of urban renewal business plans in accordance with the regulations in Article 10 should obtain sufficient agreement as follows. On the one hand, for an urban renewal area designated in accordance with Article 7, agreement should be reached by more than 50% of the owners of private lands and private legal buildings within a unit to be renewed. Furthermore, the sum of the land area and floor area of the legal buildings should be more than 50% of the total. On the other hand, for other areas, agreement should be reached by more

舊都市更新條例第二十二條第一項規定：「實施者擬定或變更都市更新事業計畫報核時，其屬依第十條規定申請獲准實施都市更新事業者，除依第七條劃定之都市更新地區，應經更新單元範圍內土地及合法建築物所有權人均超過二分之一，並其所有土地總面積及合法建築物總樓地板面積均超過二分之一之同意外，應經更新單元範圍內土地及合法建築物所有權人均超過五分之三，並其所有土地總面積及合法建築物總樓地板面積均超過三分之二之同意；其屬依第十一條規定申請獲准實施都市更新事業者，應經更新單元範圍內土地及合法建築物所有權人均超過三分之二，並其所有土地總面積及合法建築物總樓地板面積均超過四分之三以上之同意。」該項規定於九十七年一月十六日修正公

than 60% of the owners of private lands and private legal buildings within a unit to be renewed. Moreover, the sum of the land area and floor area of the legal buildings should be more than two thirds of the total. The application for approval of an urban renewal business in accordance with the regulations in Article 11 should obtain more than two thirds of the owners of private lands and private legal buildings owners within a unit to be renewed. Furthermore, the sum of the land area and floor area of the legal buildings should be more than 75% of the total." After the amendment of January 16, 2008, this paragraph reads as "When the implanting agent is drafting or revising urban renewal business plans to submit for approval, the application for approval of urban renewal business plans in accordance with the regulations in Article 10 should obtain sufficient agreement as follows. On the one hand, in an urban renewal area designated in accordance with Article 7, agreement should be reached by more than 50% of the owners of private lands and private legal buildings within a unit to be renewed. Furthermore, the sum of the land

布為：「實施者擬定或變更都市更新事業計畫報核時，其屬依第十條規定申請獲准實施都市更新事業者，除依第七條劃定之都市更新地區，應經更新單元範圍內私有土地及私有合法建築物所有權人均超過二分之一，並其所有土地總面積及合法建築物總樓地板面積均超過二分之一之同意外，應經更新單元範圍內私有土地及私有合法建築物所有權人均超過五分之三，並其所有土地總面積及合法建築物總樓地板面積均超過三分之二之同意；其屬依第十一條規定申請獲准實施都市更新事業者，應經更新單元範圍內私有土地及私有合法建築物所有權人均超過三分之二，並其所有土地總面積及合法建築物總樓地板面積均超過四分之三之同意。……」考其立法目的，一方面係為落實推動都市更新，避免因少數人之不同考量而影響多數人改善居住環境、促進都市土地有計畫再開發利用之權益，因而規定達一定人數及一定面積之同意比率，即得申請核定都市更新事業計畫；另一方面又為促使居民事先溝通協調，以減少抗爭，使都市更新事業計畫得以順利執行，同意比率亦不宜太低；復考量災區迅速重建之特殊需要，因而視更新單元是否在已劃定之更新地區內及是否屬迅行劃定之更新

area and floor area of the legal buildings should be more than 50% of the total. On the other hand, for other areas agreement should be reached by more than 60% of the owners of the owners of private lands and private legal buildings within a unit to be renewed. Moreover, the sum of the land area and floor area of the legal buildings should be more than two thirds of the total. In addition, the application for approval of urban renewal business in accordance with the regulations in Article 11 should obtain agreement from more than two thirds of the owners of private lands and private legal buildings within the unit to be renewed. Furthermore, the sum of the land area and floor area of the legal buildings should be more than 75% of the total .... The legislative intent of this provision is as follows: In order to carry out and promote urban renewal, and to protect the rights of the majority wanting to improve their living environment and promote the planned development and reuse of urban lands from being affected by different concerns of the minority group, this provision requires that the application for approval of urban renewal business

地區，而於上開條文分別就第七條、第十條或第十一條之情形為各種同意比率之規定（參考立法院公報第八十七卷第四期委員會紀錄第三０二頁至第三０三頁、第十二期委員會紀錄第二九一頁至第三０四頁、第四十二期院會紀錄第二八二頁至第二八三頁、第三三０頁至第三三一頁；第九十二卷第六期委員會紀錄第一０九頁至第一一０頁、第一四九頁至第一五０頁、第五期院會紀錄第七十七頁至第七十八頁、第八十四頁至第八十五頁）。其目的洵屬正當，且以一定比率之同意規定亦可達成上述立法目的。又查上開規定之同意比率均已過半，並無少數人申請之情形；而斟酌都市更新不僅涉及不願參加都市更新者之財產權與居住自由，亦涉及重要公益之實現、願意參與都市更新者之財產與適足居住環境之權益，以及更新單元周邊關係人之權利，立法者應有利益衡量空間；且有關同意之比率如非太低而違反憲法要求之正當行政程序，當屬立法形成之自由。立法者於斟酌實際實施情形、公益受影響之程度、社會情狀之需要及其他因素，而為上述同意比率之規定，核屬必要，且於相關利益之衡量上亦非顯失均衡，自未違反憲法上比例原則，亦無違於憲法要求之正當行政程

must be agreed by a certain number of people and a certain area of land (within a unit to be renewed). The required proportion of agreement should not be too low, because the law wants to encourage residents to communicate in advance so as to smoothly implement an urban renewal business plan without too much fighting and struggle. Moreover, considering a disaster area's need for speedy relief, the provision provides for a different proportion of agreement for applications filed in accordance with Articles 7, 10 or 11 based on whether a unit to be renewed is located in and belongs to a designated renewal area (see Committee Records, Gazette of the Legislative Yuan, vol. 87, no. 4, p. 302-303; Committee Records, Gazette of the Legislative Yuan, vol. 87, no. 12, p. 291-304; Records of Legislative Yuan, Gazette of the Legislative Yuan, vol. 87, no. 42, p. 282-283, 330-331; Committee Records, Gazette of the Legislative Yuan, vol. 92, no. 6, p. 109-110, 149-150; Records of Legislative Yuan, Gazette of the Legislative Yuan, vol. 92, no. 5, p. 77-78, 84-85). The foregoing legislative intent is proper and can be fulfilled by requiring a

序。惟有關機關仍應考量實際實施情形、一般社會觀念與推動都市更新需要等因素，隨時檢討修正之。又依本條例之規定，都市更新處理方式分為重建、整建、維護三種，其對土地及合法建築物所有權人權益影響之程度亦有重輕之別，則法律就相關申請之同意比率，允宜有不同之規定。另為使同意比率之計算基礎臻於確實，在同意都市更新事業計畫之徵詢時，是否應將權利變換內容納入同意之項目，以及在徵詢同意後，實施者就經同意之都市更新事業計畫之內容有變更者，是否應重新徵詢同意，亦應予檢討改進。

certain portion of agreement. Moreover, there is no application by the minority because the required proportion of agreement prescribed in all aforementioned provisions goes beyond 50%. The Legislature should have discretion in balancing different interests because urban renewal involves not only the property rights and freedom of residence of those not willing to participate in urban renewal, but also the realization of important public interests: the rights and interests of property and an appropriate living environment for those willing to participate in urban renewal, and the right of interested parties residing near the unit to be renewed. The Legislature should also have discretion in deciding the portion of agreement as long as it is not too low to violate due process in administrative procedures. It is necessary for the Legislature to lay down provisions with the aforementioned portion of agreement after considering its practical implementation, the degree of impact on the public interest, society's needs and other factors. As the balancing of relevant interests is not inappropriate, there is no violation of the principle of proportion-

ality under the Constitution. Neither is there any violation of the due process in administrative procedures required by the Constitution. Nonetheless, the relevant authorities should consider factors such as practical implementation, general social attitudes, the need for promoting urban renewal, etc., and the need to review and modify relevant provisions from time to time. In addition, under the Act there are three methods of implementing urban renewal, including reconstruction, renovation and maintenance. These three methods have different impacts upon the owners of private lands and private legal buildings, and the degree of the impact varies from one to the other. Accordingly, the law should have different proportions of agreement for relevant applications. Furthermore, in order to ensure that the computation of the proportion of agreement is true and accurate, the following should also be reviewed and improved: (1) whether listing the content of a transfer of rights as one of the items to be approved is necessary when seeking approval for an urban renewal business plan; and (2) whether an implementing agent should

seek approval for an approved urban renewal business plan again when the content of the approved urban renewal business plan has been changed.

Article 22-1 of the former Act provides, “When implementing the urban renewal business in an area designated in accordance with Article 7, and if several buildings on the same site have been demolished and are being processed for reconstruction, renovation, or maintenance, they can be computed separately, under the circumstances of not changing the differentiated ownership of other buildings and the ownership of the portion of the base lot they own, the proportion between the number of differentiated owners, the differentiated ownership and the ownership of the portion of the base lot they own.” (The amendment of June 22, 2005 corrected the text of this Article but did not significantly change the core idea of this Article). This Article was amended after referring to Article 17-2 of the Provisional Act Governing 921 Earthquake Post-Disaster Reconstruction. The purpose of this Amendment was to efficiently

舊都市更新條例第二十二條之一規定：「依第七條劃定之都市更新地區，於實施都市更新事業時，其同一建築基地上有數幢建築物，其中部分建築物毀損而辦理重建、整建或維護時，得在不變更其他幢建築物區分所有權人之區分所有權及其基地所有權應有部分之情形下，以各該幢受損建築物區分所有權人之人數、區分所有權及其基地所有權應有部分為計算基礎，分別計算其同意之比例。」（於九十四年六月二十二日修正公布，將「數幢」修正為「數幢或數棟」、「其他幢」修正為「其他幢或棟」、「各該幢」修正為「各該幢或棟」、「區分所有權人之人數、區分所有權」修正為「所有權人之人數、所有權」，其餘未修正）係參考九二一震災重建暫行條例第十七條之二規定而增訂，其目的係考量於同一建築基地內有多幢大樓，部分建築物因災害受損倒塌時，以該受損倒塌部分計算同意比率，較可迅速有效解決重建之困難問題（參考立法院公報第八十九卷第五十八

and effectively resolve the difficult problem of reconstruction by using the demolished portion to compute the proportion of agreement when several buildings on the same site have been demolished due to a disaster (see Records of Legislative Yuan, Gazette of the Legislative Yuan, vol. 89, no. 58, p. 38, 47-48; Committee Records, Gazette of the Legislative Yuan, vol. 92, no. 6, p. 107 & 109; Records of Legislative Yuan, Gazette of the Legislative Yuan, vol. 92, no. 5, p. 75-78, 85). In addition, when there is damage affected by disasters, any step taken to facilitate quick reconstruction of affected buildings certainly serves the public interest as it eliminates expansion of the damage. From this point of view, the legislative intent of this Article is proper and the computation of the proportion of agreement prescribed in this Article should be able to efficiently and effectively fulfil the legislative intent. Moreover, considering the text and the legislative intent of the foregoing Article as a whole, this Article has taken the rights of residents of other buildings into consideration because the application of this Article is limited to urban renewal ap-

期院會紀錄第三十八頁、第四十七頁至第四十八頁；第九十二卷第六期委員會紀錄第一０七頁及第一０九頁、第五期院會紀錄第七十五頁至第七十八頁、第八十五頁）。再者，既已因災害造成毀損，如能促使受損建築物迅速重建，自亦有避免危害擴散以維護公益之意義。準此以觀，該條規定之立法目的洵屬正當，且依其規定計算同意比率，當可迅速有效達成其立法目的。又綜觀上開規定之文義與立法目的，其適用既以在直轄市、縣（市）主管機關業依本條例第七條第一項第一款規定因戰爭、地震、火災、水災、風災或其他重大事變遭受損壞而迅行劃定之更新地區內，申請辦理都市更新者為限；且係以不變更其他幢（或棟）建築物區分所有權人之區分所有權及其基地所有權應有部分為條件，已兼顧其他幢（或棟）居民之權利。復考量受損倒塌之建築物已危及人民之生命、身體、財產與居住自由等權利，而有災後迅速重建、避免危害擴散之必要性與公益性，則上開規定以各該幢（或棟）受損建築物區分所有權人之人數、區分所有權及其基地所有權應有部分為同意比率之計算基礎，核屬必要，且於相關利益之衡量上亦非顯失均衡，自與憲法上比例原則無違。惟考量

plications in areas designated for renewal due to war, earthquake, fire, flood, storm or other major incidents prescribed in Article 7, Paragraph 1, Item 1, of the Act, and is conditioned by not changing the differentiated ownership of other buildings or the ownership of the portion of the base lot they own. Furthermore, it is necessary for the aforementioned Article to stipulate that the computation of the proportion of agreement is based on the number of differentiated owners, the differentiated ownership of each building affected, and the ownership of the portion of the base lot they own after taking into account that the affected or collapsed buildings have already endangered people's rights, including their right to life, bodily safety, property, freedom of residence, etc., and that quick post-disaster reconstruction and elimination of expansion of damage is both necessary and in the public interest. Also, this Article articulates a proper balance of relevant interests at stake and is therefore consistent with the principle of proportionality under the Constitution. However, it is more meaningful for the protection of residents' 同一建築基地一體利用與同時更新在居民權利保障與公益實現上較具意義，且為避免因割裂更新而可能產生之不良影響，如無窒礙難行之情形，宜儘可能使同一建築基地之其他幢（或棟）參與更新，故上開規定未設有受損建築物居民或其委託之實施者於都市更新事業計畫報核前，應先徵詢同一建築基地之其他幢（或棟）居民是否有參與更新意願之規定，亦有未周，允宜檢討改進。

rights and the realization of the public interest if all buildings on the same site are developed as a whole and renewed at the same time. Given the foregoing, and in order to avoid possible undesirable outcomes due to separate urban renewal processes, it is better to encourage other buildings on the same site to participate in urban renewal together. Thus, the aforementioned Article inappropriately fails to require residents of affected buildings or the persons entrusted to represent them to check the willingness of residents of other buildings on the same site to participate in urban renewal before submitting the urban renewal business plans for approval. It should be reviewed and amended accordingly.

One of the petitioners argued that Article 22, Paragraph 3, of the former Act (as amended on January 16, 2008), which provides, "If the owners disagree with the urban renewal plan exhibited publicly, they can revoke their agreements by the end of the exhibition", is unconstitutional based on the final judgment of the Supreme Administrative Court 100

聲請人之一據最高行政法院一００年度判字第一九０五號確定終局判決，指摘九十七年一月十六日增訂公布之都市更新條例第二十二條第三項中有關「所有權人不同意公開展覽之都市更新事業計畫者，得於公開展覽期滿前，撤銷其同意」之規定違憲乙節，經查該確定終局判決並未適用上開規定，自不得以之為聲請解釋之客體。至聲請

Pan No. 1905 (2011). Nonetheless, the disputed provision is not an object for interpretation because it was not applied in those final judgments. Article 36, first part of Paragraph 1, of the former Act (as amended on May 12, 2010) provides, "Within an area set for a transfer of rights, the implementing agent must publicly announce the land improvements made that require to be removed, and also notify the owners, managers or users to demolish or remove them within 30 days. If the land improvements are not removed before the given time limit, the implementing agent may remove the land improvements for the owners (or managers or users) or request the municipal, county (city) authority to demolish or remove the land improvements on behalf of the implementing agent. The municipal, county (city) authority has the obligation to carry out the removal on behalf of the owners (or managers or users); ..." (Article 36, first part of Paragraph 1, of the former Act amended on November 11, 1998, and on January 16, 2008, shares the same meaning and purpose). Petitioners contend that this provision is unconstitutional because

人等指摘九十九年五月十二日修正公布之都市更新條例第三十六條第一項前段規定：「權利變換範圍內應行拆除遷移之土地改良物，由實施者公告之，並通知其所有權人、管理人或使用人，限期三十日內自行拆除或遷移；屆期不拆除或遷移者，實施者得予代為或請求當地直轄市、縣（市）主管機關代為之，直轄市、縣（市）主管機關有代為拆除或遷移之義務；……」（八十七年十一月十一日制定公布及九十七年一月十六日修正公布之同條例第三十六條第一項前段規定之意旨相同）中，有關授權實施者得代為或請求主管機關代為拆除或遷移，並課予主管機關代為拆除或遷移義務之規定違憲乙節，經查確定終局判決均未適用該項規定，自亦不得以之為聲請解釋之客體。綜上所述，上開聲請均核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不予受理，併此敘明。

it authorizes the implementing agent to remove the land improvements for the owners (or managers or users) or request the municipal, county (city) authority to demolish or remove the land improvements on behalf of the implementing agent. However, this disputed provision is also not an object for interpretation because it was not applied in those final judgments either. The aforementioned petitions do not comply with Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act and shall all be dismissed in accordance with Paragraph 3 of the same Article.

Justice Sea-Yau Lin filed concurring opinion.

Justice Chen-Shan Li filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Beyue ,Su Chen filed concurring opinion.

本號解釋林大法官錫堯提出之協同意見書；李大法官震山提出之協同意見書；黃大法官茂榮提出之協同意見書；葉大法官百修提出之協同意見書；陳大法官春生提出之協同意見書；陳大法官碧玉提出之協同意見書；羅大法官昌發提出之部分協同部分不同意見書；湯大法官德宗提出之協同暨部分不同意見書；蘇大法官永欽提出之一部不同意見書；陳大法官新民提出之部分不同意見書。

Justice Chang-Fa Lo filed concurring opinion in part and dissenting opinion in part.

Justice Dennis Te-Chung Tang filed concurring opinion and dissenting opinion in part.

Justice Yeong-Chin Su filed dissenting opinion in part.

Justice Shin-Min Chen filed dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: (1) Daqing Xinyi Futun (大慶信義福邨) is a five story condominium complex with 90 units on the same site located at Tucheng District of New Taipei City. The 40 units at the front of the complex were damaged during the 921 Earthquake and should have been processed for reconstruction according to the Act. Later the City Government of New Taipei City (hereinafter "New Taipei City Government") publicly announced the implementation of a transfer of rights affecting the same 40 units. However, some owners of the 40 units were not satisfied with the plan to transfer rights. Moreover, some owners of other

編者註：

事實摘要：(一) 新北市土城區大慶信義福邨5層樓集合住宅共90戶座落同一基地，前排40戶因921地震受損依都市更新條例相關規定辦理重建。嗣新北市政府公告該40戶辦理權利變換，其中部分住戶不滿權利變換內容，又該40戶以外之其他住戶亦有主張有權參與重建者，乃有52人對市府核准之都市更新事業計畫暨權利變換計畫之行政處分，共同提起行政爭訟，遭駁回確定，爰主張都市更新條例相關規定違憲，聲請解釋。(二)1.A等3人土地及建物座落北市陽明段、2.B土地及建物座落萬隆段，均為臺北市政府分別納入實施都更，並核准相關都市更新事業計畫及權利變換計畫；3.C土地及建物

units not among the said 40 alleged that they had a right to participate in the plan to transfer rights as agents implementing reconstruction within the unit to be renewed. Accordingly, 52 people jointly filed an administrative suit to challenge New Taipei City Government's approval of the urban renewal business plan and the plan to transfer rights. The court rejected the challenge and the judgment was final. The parties then petitioned for an interpretation alleging that the relevant provisions of the Urban Renewal Act were unconstitutional. (2) 1. A and two other people own the land and buildings located at Yangming Road in Taipei City. 2. B owns the land and buildings located at Wanlong Road in Taipei City. The City Government of Taipei City (hereinafter "Taipei City Government") designated the aforementioned lands and buildings for renewal, and approved the urban renewal business plan and plan to transfer rights related to those lands. 3. C owns the land and buildings located at Yongji Road in Taipei City. In order to implement urban renewal, the Taipei City Government approved a revision of the original urban

座落永吉段，因實施都更，臺北市政府核准變更原擬定之都市更新事業計畫及權利變換計畫。三案當事人均不服臺北市政府相關行政處分，分別提起行政爭訟，遭駁回確定，乃併同聲請解釋。

大法官就二聲請案分別受理後，因聲請解釋之標的相同，乃併案審理。

renewal business plan and the original plan to transfer rights. The parties in the three aforementioned cases separately filed administrative lawsuits to challenge the relevant administrative acts of the Taipei City Government. Nevertheless, the court rejected their challenges and the judgments were final. Therefore, the parties petitioned together for interpretation. Upon accepting these two separate petitions, the Constitutional Court reviewed them together because both petitions request interpretation of the same issue.

J. Y. Interpretation No.710（July 5, 2013）*

【Mandatory Deportation and Detention of People from the Mainland Area】

ISSUE: 1. Is it constitutional that the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area provides no defense opportunity to a person from the Mainland Area prior to his mandatory deportation ?

2. Is it constitutional that the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area does not specify the grounds and duration for temporary detention ?

3. Is it constitutional that the grounds for detention prescribed in the Rules Governing Enforced Deportation of People from Mainland China, Hong Kong, and Macau have not been explicitly authorized by law ?

RELEVANT LAWS:

Articles 8, 10, and 23 of the Constitution（憲法第八條、第十條、第二十三條）; Article 11 of the Additional Articles of the Constitution（憲法增修條文第 11 條 (中華民國九十四年六月十日修正公布)）; Article 10, Paragraph 1, and Articles 10-1, 17, 95-4 of the Act Governing Relations between

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* Translated by Yen-Chia Chen and Margaret K. Lewis.

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

Peoples from the Taiwan Area and the Mainland Area（臺灣地區與大陸地區人民關係條例第十條第一項、第十條之一、第十七條、第九十五條之四）； Article 18, Paragraph 1, of the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area (as amended on October 29, 2003; the amendment on July 1, 2009, revised the text of Paragraph 1), and Article 18, Paragraph 2, of the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area (as amended on October 29, 2003; Paragraph 3 of the same Article after the amendment on July 1, 2009)（臺灣地區與大陸地區人民關係條例第十八條第一項（九十二年十月二十九日修正公布，九十八年七月一日修正公布，第一項為文字修正）、第二項（九十二年十月二十九日修正公布，九十八年七月一日修正公布之同條例第三項））； Article 15 of the Enforcement Rules for the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area（臺灣地區與大陸地區人民關係條例施行細則第十五條）； Article 10, Subparagraph 3, of the Regulations Governing the Approval of Entry of People from the Mainland Area into the Taiwan Area (as promulgated on March 1, 2004; Subparagraph 2 of Article 14 of the same Regulations after the amendment on August 20, 2009)（大陸地區人民申請進入臺灣地區面談管理辦法第十條第三款（九十三年三月一日訂定發布，九十八年八月二十日修正發布之同辦法第十四條第二款）、第十一條（九十三年三月一日訂定發布，九十八年八月二十日修正發布之同辦法第十五條））；Article 5 of the Rules Governing Enforced Deportation of People from Mainland China,

Hong Kong, and Macau (as promulgated on October 27, 1999; the amendment on March 24, 2010, moved this provision to Article 6 of the same Rules)（大陸地區人民及香港澳門居民強制出境處理辦法第五條（八十八年十月二十七日訂定發布，九十九年三月二十四日修正發布移列為同辦法第六條））； Articles 12 and 13 of the United Nations International Covenant on Civil and Political Rights（聯合國公民與政治權利國際公約第十二條、第十三條）； Paragraph 6 of General Comment No. 15 of the United Nations International Covenant on Civil and Political Rights（聯合國公民與政治權利國際公約第十二條、第十三條）；Article 1 of Protocol No. 7 to the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms)（歐洲人權公約第七號議定書第一條）；J.Y. Interpretation Nos. 384, 443, 497, 523, 558, 559, 588, 612, 618, 636, 676, 680, 689, 690, 708（司法院釋字第四四三號、第四九七號、第五二三號、第五五八號、第五五九號、第六一二號、第六三六號、第六七六號、第六八０號、第六八九號、第六九０號、第七０八號解釋）.

KEYWORDS:

mandatory deportation（強制出境）, people from the Mainland Area（大陸地區人民）, detention（收容）; temporary detention（暫時收容）, judicial review（法官保留）, protection of physical freedom（人身自由之保障）, protection of residence and migration freedom（居住及遷徙自由之保障）, due process of law（正當法律程序）.**

HOLDING: Article 18, Paragraph 1, of the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area (hereinafter the "Cross-Strait Relations Act"), as amended on October 29, 2003, provides, "In any of the following situations, any people from the Mainland Area who enter into the Taiwan Area may be deported by the police authorities ...." (the text of this Article was amended on July 1, 2009). Except where immediate actions are otherwise required in response to a threat to national security or social order, it is unconstitutional to mandatorily deport any person from the Mainland Area who has obtained permission to legally enter into the Taiwan Area without providing any defense opportunity to such person because it is in violation of the constitutional principle of due process of law and fails to comply with the meaning and purpose of the protection of migration freedom under Article 10 of the Constitution. Paragraph 2 of the same Article provides, "Any people from the Mainland Area specified in the preceding paragraph may be temporarily detained ...." (this is the same as Article

解釋文：中華民國九十二年十月二十九日修正公布之臺灣地區與大陸地區人民關係條例第十八條第一項規定：「進入臺灣地區之大陸地區人民，有下列情形之一者，治安機關得逕行強制出境。……」（該條於九十八年七月一日為文字修正）除因危害國家安全或社會秩序而須為急速處分之情形外，對於經許可合法入境之大陸地區人民，未予申辯之機會，即得逕行強制出境部分，有違憲法正當法律程序原則，不符憲法第十條保障遷徙自由之意旨。同條第二項規定：「前項大陸地區人民，於強制出境前，得暫予收容……」（即九十八年七月一日修正公布之同條例第十八條第三項），未能顯示應限於非暫予收容顯難強制出境者，始得暫予收容之意旨，亦未明定暫予收容之事由，有違法律明確性原則；於因執行遣送所需合理作業期間內之暫時收容部分，未予受暫時收容人即時之司法救濟；於逾越前開暫時收容期間之收容部分，未由法院審查決定，均有違憲法正當法律程序原則，不符憲法第八條保障人身自由之意旨。又同條例關於暫予收容未設期間限制，有導致受收容人身體自由遭受過度剝奪之虞，有違憲法第二十三條比例原則，亦不符憲法第八條保障人身自由

18, Paragraph 3, of the same Act after the amendment on July 1, 2009). This provision violates the principle of legal clarity because it does not express that temporary detention should be imposed only when mandatory deportation cannot be completed without such detention, and also because it does not specify the grounds for temporary detention. Providing no prompt judicial remedy to a detainee who is under temporary detention for a reasonable period in order to enforce deportation and failing to subject an extension of the foregoing temporary detention to judicial review violate both the principle of due process of law under the Constitution and the meaning and purpose of protecting physical freedom guaranteed under Article 8 of the Constitution. Moreover, failing to specify a certain period of time for temporary detention under the same Act is likely to excessively deprive a detainee of his physical freedom and is in violation of the principle of proportionality under Article 23 of the Constitution as well as the meaning and purpose of protecting physical freedom guaranteed under Article 8 of the Constitution. The aforementioned

之意旨。前揭第十八條第一項與本解釋意旨不符部分及第二項關於暫予收容之規定均應自本解釋公布之日起，至遲於屆滿二年時失其效力。

portion of Article 18, Paragraph 1, of the Cross-Strait Relations Act that is not consistent with this Interpretation, as well as the part of Paragraph 2 of the same Article with regard to temporary detention, shall be null and void no later than two years from the issuance of this Interpretation.

Article 15 of the Enforcement Rules for the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area (hereinafter the "Enforcement Rules of the Cross-Strait Act") provides, "Persons entering into the Taiwan Area without permission as referred to in Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations Act shall include those who enter into the Taiwan Area on fake or forged passports, travel papers, or other similar certifying documents, or by fraudulent marriage for which the registration or permission has been revoked or annulled as there exists sufficient evidence to establish that said marriage is false due to collusion, or by other illegal means." Article 10, Subparagraph 3, of the Regulations Governing the Approval of Entry of People from the

臺灣地區與大陸地區人民關係條例施行細則第十五條規定：「本條例第十八條第一項第一款所定未經許可入境者，包括持偽造、變造之護照、旅行證或其他相類之證書、有事實足認係通謀虛偽結婚經撤銷或廢止其許可或以其他非法之方法入境者在內。」九十三年三月一日訂定發布之大陸地區人民申請進入臺灣地區面談管理辦法第十條第三款規定：「大陸地區人民接受面談，有下列情形之一者，其申請案不予許可；已許可者，應撤銷或廢止其許可：……三、經面談後，申請人、依親對象無同居之事實或說詞有重大瑕疵。」（即九十八年八月二十日修正發布之同辦法第十四條第二款）及第十一條規定：「大陸地區人民抵達機場、港口或已入境，經通知面談，有前條各款情形之一者，其許可應予撤銷或廢止，並註銷其入出境許可證件，逕行強制出境或限令十日內出

Mainland Area into the Taiwan Area provides, "An application filed by any person from the Mainland Area who receives an interview for entry into the Taiwan Area may be denied, and any entry permission already granted may be revoked or annulled in any of the following situations:...(3) after conducting the interview, no fact shows that the applicant lives together with the spouse or there are significant discrepancies in the statements of the applicant and the spouse" (this provision is the same as Article 14, Subparagraph 2, of the same Regulations amended on August 20, 2009). Article 11 of the same Regulations stipulates, "Any person from the Mainland Area who receives an interview notification upon arrival at the airport or seaport, or after entering into the Taiwan Area will be subject to mandatory deportation or be ordered to exit within ten days, any entry permission already granted may be revoked or annulled, and the entry and exit permit may be cancelled if any of the situations referred to in the preceding Article exists" (Article 15 of the same Regulations amended and promulgated on August 20, 2009, removed

境。」（九十八年八月二十日修正發布之同辦法第十五條刪除「逕行強制出境或限令十日內出境」等字）均未逾越九十二年十月二十九日修正公布之臺灣地區與大陸地區人民關係條例第十八條第一項之規定，與法律保留原則尚無違背。

the words “will be subject to mandatory deportation or be ordered to exit within ten days”). These provisions are consistent with Article 18, Paragraph 1, of the Cross-Strait Relations Act, as amended on October 29, 2003, and therefore do not violate the principle of legal reservation.

Article 5 of the Rules Governing Enforced Deportation of People from Mainland China, Hong Kong, and Macau, as promulgated on October 27, 1999, provides, “A person may be temporarily detained prior to enforced deportation in any of the following situations: (1) any of the situations referred in Paragraph 2 of the preceding Article exists; (2) enforced deportation in accordance with laws is impossible due to a natural disaster or a breakdown of aircrafts or vessels; (3) the resident from the Mainland Area, Hong Kong, or Macau subject to mandatory deportation has no travel permit to enter the Mainland Area, Hong Kong, Macau, or any third country; (4) any other reason rendering an immediate mandatory deportation impossible” (the amendment of March 24, 2010, moved this provision

八十八年十月二十七日訂定發布之大陸地區人民及香港澳門居民強制出境處理辦法第五條規定：「強制出境前，有下列情形之一者，得暫予收容。一、前條第二項各款所定情形。二、因天災或航空器、船舶故障，不能依規定強制出境者。三、得逕行強制出境之大陸地區人民、香港或澳門居民，無大陸地區、香港、澳門或第三國家旅行證件者。四、其他因故不能立即強制出境者。」（九十九年三月二十四日修正發布移列為同辦法第六條：「執行大陸地區人民、香港或澳門居民強制出境前，有下列情形之一者，得暫予收容：一、因天災或航空器、船舶故障，不能依規定強制出境。二、得逕行強制出境之大陸地區人民、香港或澳門居民，無大陸地區、香港、澳門或第三國家旅行證件。三、其他因故不能立即強制出境。」）未經法律明確授權，違反法律

to Article 6 of the same Rules, which provides, “People from the Mainland Area, Hong Kong, or Macau subject to mandatory deportation may be temporarily detained prior to repatriation in any of the following situations: (1) enforced deportation in accordance with laws is impossible due to a natural disaster or a breakdown of aircrafts or vessels; (2) the resident from the Mainland Area, Hong Kong, or Macau subject to mandatory deportation has no travel permit to enter the Mainland Area, Hong Kong, Macau, or any third country; (3) any other reason rendering an immediate mandatory deportation impossible”). This Article violates the principle of legal reservation because it has not been explicitly authorized by a law prescribing the grounds for temporary detention. Therefore this provision shall be null and void no later than two years from the issuance of this Interpretation.

保留原則，應自本解釋公布之日起，至遲於屆滿二年時失其效力。

REASONING: Article 8, Paragraph 1, of the Constitution provides, “Physical freedom shall be guaranteed to the people. In no case except that of flagrante delicto, which shall be separately

解釋理由書：憲法第八條第一項規定：「人民身體之自由應予保障。除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。非由法院依法定程序，不得審問處

prescribed by law, shall any person be arrested or detained other than by judicial or police authorities in accordance with procedures prescribed by law. No person shall be tried or punished other than by a court in accordance with procedures prescribed by law. Any arrest, detention, trial, or punishment not carried out in accordance with procedures prescribed by law may be resisted." In order to comply with the meaning and purpose of the foregoing constitutional provision, any disposition by the government that deprives or restricts a person's physical freedom—irrespective of whether the person is facing criminal charges—must have a legal basis and also fulfill required judicial procedures or other due process requirements (see J.Y. Interpretations Nos. 384, 588, 636, and 708). Moreover, the principle of due process of law under the Constitution requires legislators to promulgate adequate procedures after taking into considerations all factors including the type of underlying fundamental rights, the intensity and scope of the restrictions, the public interests pursued, the proper functions of the decision-making organs, and the

罰。非依法定程序之逮捕、拘禁、審問、處罰，得拒絕之。」是國家剝奪或限制人民身體自由之處置，不問其是否屬於刑事被告之身分，除須有法律之依據外，尚應踐行必要之司法程序或其他正當法律程序，始符合上開憲法之意旨（本院釋字第三八四號、第五八八號、第六三六號、第七0八號解釋參照）。憲法上正當法律程序原則之內涵，應視所涉基本權之種類、限制之強度及範圍、所欲追求之公共利益、決定機關之功能合適性、有無替代程序或各項可能程序之成本等因素綜合考量，由立法者制定相應之適當程序（本院釋字第六八九號解釋參照）。又憲法第十條規定：「人民有居住及遷徙之自由」，係指人民有選擇其居住處所，營私人生活不受干預之自由，且有得依個人意願自由遷徙或旅居各地之權利（本院釋字第四四三號解釋參照）。

availability of alternative procedures or possible costs of the possible procedures (see J.Y. Interpretation No. 689). Furthermore, Article 10 of the Constitution provides, "The people shall have freedom of residence and of change of residence." This Article means that people have the freedom to choose their residence and enjoy their private lives without intrusion, and they also have the freedom to move or reside anywhere according to their free will (see J.Y. Interpretation No. 443).

The Preamble of the Additional Articles of the Constitution stipulates, "To meet the requirements of the nation prior to national unification, the following articles of the Constitution are added or amended to the Constitution in accordance with Article 27, Paragraph 1, Subparagraph 3; and Article 174, Subparagraph 1, of the Constitution: . . ." Article 11 of the Additional Articles of the Constitution provides, "Rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related affairs may be specified by law."

憲法增修條文前言明揭：「為因應國家統一前之需要，依照憲法第二十七條第一項第三款及第一百七十四條第一款之規定，增修本憲法條文如左：……」憲法增修條文第十一條明定：「自由地區與大陸地區間人民權利義務關係及其他事務之處理，得以法律為特別之規定。」臺灣地區與大陸地區人民關係條例（下稱兩岸關係條例）即為規範國家統一前，臺灣地區與大陸地區間人民權利義務及其他事務，所制定之特別立法（本院釋字第六一八號解釋參照）。兩岸關係條例第十條第一項規定：「大陸地區人民非經主管機關許可，不得進入臺灣地區。」是在兩岸分治之

The Cross-Strait Relations Act is the sui generis law enacted to regulate the rights and obligations between peoples from the Mainland Area and the Taiwan Area, as well as the disposition of other related affairs, prior to the nation's reunification (see J.Y. Interpretation No. 618). Article 10, Paragraph 1, of the Cross-Strait Relations Act provides, "No people from the Mainland Area may enter into the Taiwan Area without permission of the competent authorities." Given that the two sides of the Taiwan Strait are currently governed by different political entities, restrictions are therefore imposed on the freedom of people from the Mainland Area to enter into the Taiwan Area (see J.Y. Interpretations Nos. 497 and 588). However, after formally obtaining permission from the competent authorities and having legally entered the Taiwan Area, the freedom of movement of people from the Mainland Area should in principle be protected by the Constitution (see Article 12 and Paragraph 6 of the General Comment No. 15 of the UN International Covenant on Civil and Political Rights). Except where immediate actions are otherwise required

現況下，大陸地區人民入境臺灣地區之自由受有限制（本院釋字第四九七號、第五五八號解釋參照）。惟大陸地區人民形式上經主管機關許可，且已合法入境臺灣地區者，其遷徙之自由原則上即應受憲法保障（參酌聯合國公民與政治權利國際公約第十二條及第十五號一般性意見第六點）。除因危害國家安全或社會秩序而須為急速處分者外，強制經許可合法入境之大陸地區人民出境，應踐行相應之正當程序（參酌聯合國公民與政治權利國際公約第十三條、歐洲人權公約第七號議定書第一條）。尤其強制經許可合法入境之大陸配偶出境，影響人民之婚姻及家庭關係至鉅，更應審慎。九十二年十月二十九日修正公布之兩岸關係條例第十八條第一項規定：「進入臺灣地區之大陸地區人民，有下列情形之一者，治安機關得逕行強制出境。但其所涉案件已進入司法程序者，應先經司法機關之同意：一、未經許可入境者。二、經許可入境，已逾停留、居留期限者。三、從事與許可目的不符之活動或工作者。四、有事實足認為有犯罪行為者。五、有事實足認為有危害國家安全或社會安定之虞者。」（本條於九十八年七月一日修正公布，第一項僅為文字修正）九十八年七月一日修

in response to a threat to national security or social order, the mandatory deportation of a person from the Mainland Area who legally entered into the Taiwan Area must fulfill corresponding due process requirements (see Articles 13 of the UN International Covenant on Civil and Political Rights; Article 1 of Protocol No. 7 to the European Convention on Human Rights). In particular, mandatory deportation of Mainland spouses who have been permitted to legally enter into the Taiwan Area requires extra caution because it significantly affects marriages and family relationships. Article 18, Paragraph 1, of the Cross-Strait Relations Act, as amended on October 29, 2003, provides, "In any of the following situations, any people from the Mainland Area who enter into the Taiwan Area may be deported by the police authorities; provided, however, that prior approval shall be obtained from the judicial authorities where a judicial proceeding thereof is pending: (1) entering into the Taiwan Area without permission; (2) entering into the Taiwan Area with permission and staying or residing beyond the authorized duration; (3) engaging in

正公布同條例第十八條第二項固增訂：「進入臺灣地區之大陸地區人民已取得居留許可而有前項第三款至第五款情形之一者，內政部入出國及移民署於強制其出境前，得召開審查會，並給予當事人陳述意見之機會。」惟上開第十八條第一項規定就因危害國家安全或社會秩序而須為急速處分以外之情形，於強制經許可合法入境之大陸地區人民出境前，並未明定治安機關應給予申辯之機會，有違憲法上正當法律程序原則，不符憲法第十條保障遷徙自由之意旨。此規定與本解釋意旨不符部分，應自本解釋公布之日起，至遲於屆滿二年時失其效力。

any activity or employment inconsistent with the purposes of the permission; (4) there is sufficient evidence to establish that a crime has been committed; (5) there is sufficient evidence to establish that there is a threat to national security or social stability" (this Article was amended on July 1, 2009, only the text of Paragraph 1 was revised). On the other hand, Article 18, Paragraph 2, of the same Act as amended on July 1, 2009, stipulates, "Before the National Immigration Agency of the Ministry of the Interior deports any people from the Mainland Area who, having obtained permission to reside in and to enter into the Taiwan Area, is in any of the situations specified in Subparagraphs 3 to 5 of the preceding paragraph, it may convene a review meeting and provide an opportunity for the person concerned to state his/her opinions." Apart from the aforementioned Article 18, Paragraph 1, of the Cross-Strait Relations Act, where immediate actions are required in response to a threat to national security or social order, mandatory deportation of any person from the Mainland Area who has obtained permission to legally enter

into the Taiwan Area without requiring the police authorities to provide any defense opportunity to the deportee prior to his repatriation violates the constitutional principle of due process of law and also fails to comply with the meaning and purpose of the protection of residence and migration freedom guaranteed under Article 10 of the Constitution. The portions of Article 18 that are not consistent with this Interpretation shall be null and void no later than two years from the issuance of this Interpretation.

Article 18, Paragraph 2, of the Cross-Strait Relations Act, as amended on October 29, 2003, provides, "Any people from the Mainland Area specified in the preceding paragraph may be temporarily detained prior to enforced deportation..." (this is the same as Article 18, Paragraph 3, of the same Act amended on July 1, 2009). A temporary detention is a form of deprivation of people's physical freedom because it confines a detainee at a certain place in order to isolate him from the outside world (see the Rules Governing Establishment and Administration of

九十二年十月二十九日修正公布之兩岸關係條例第十八條第二項規定：「前項大陸地區人民，於強制出境前，得暫予收容……。」（即九十八年七月一日修正公布之同條例第十八條第三項）按暫予收容既拘束受收容人於一定處所，使與外界隔離（內政部發布之大陸地區人民及香港澳門居民收容處所設置及管理辦法參照），自屬對人民身體自由之剝奪。暫予收容之事由爰應以法律直接規定或法律具體明確授權之命令定之（本院釋字第四四三號、第五二三號解釋參照），始符合法律保留原則；法律規定之內容並應明確，始符合法律

Shelters for People from Mainland China, Hong Kong, and Macau, promulgated by the Ministry of the Interior). In order to comply with the principle of legal reservation, the grounds for temporary detention must be prescribed by law or by regulations explicitly authorized by law (see J.Y. Interpretation Nos. 443 and 523). Moreover, the content of the law must be clear and specific in order to meet the principle of legal clarity (see J.Y. Interpretation Nos. 636 and 690). The aforementioned Paragraph 2 of Article 18 of the Cross-Strait Relations Act, which allows predeportation temporary detention of any person from the Mainland Area receiving a removal order, is in violation of the principle of legal clarity because the content of this provision is overbroad. This provision does not express that temporary detention should be imposed only when mandatory deportation cannot be completed without such detention. Nor does this provision specify the grounds for temporary detention. Physical freedom is a prerequisite to the exercise of any of the freedoms and rights protected by the Constitution. Under the Constitution, in

明確性原則（本院釋字第六三六號、第六九0號解釋參照）。前揭第十八條第二項僅規定大陸地區人民受強制出境處分者，於強制出境前得暫予收容，其文義過於寬泛，未能顯示應限於非暫予收容顯難強制出境者，始得暫予收容之意旨，亦未明定暫予收容之事由，與法律明確性原則不符。次按人身自由乃人民行使其憲法上各項自由權利所不可或缺之前提，國家以法律明確規定限制人民之身體自由者，須踐行正當法律程序，並須符合憲法第二十三條之比例原則，方為憲法所許（本院釋字第三八四號、第五八八號解釋參照）。鑑於刑事被告與非刑事被告之人身自由限制，在目的、方式與程序上均有差異，是兩者應踐行之司法程序或其他正當法律程序，自非均須相同（本院釋字第五八八號、第七0八號解釋參照）。為防範受強制出境之大陸地區人民脫逃，俾能迅速將之遣送出境，治安機關依前揭第十八條第二項規定暫時收容受強制出境之大陸地區人民，於合理之遣送作業期間內，尚屬合理、必要，此暫時收容之處分固無須經由法院為之，惟仍應予受收容人即時司法救濟之機會，始符合憲法第八條第一項正當法律程序之意旨。是治安機關依前揭兩岸關係條例第十八條第二

order for a government disposition that is explicitly prescribed by law as restricting a person's physical freedom to be permissible, it must comply with due process and the principle of proportionality under Article 23 of the Constitution (see J.Y. Interpretation Nos. 384 and 588). Given that restrictions on physical freedom of criminal defendants and non-criminal defendants differ in terms of their purpose, methods, and procedure, the required judicial procedures and other due process requirements for restrictions on physical freedom of non-criminal defendants and of criminal defendants need not be identical (see J.Y. Interpretation Nos. 588 and 708). In order to prevent escape and to achieve quick repatriation, it is reasonable and necessary that police authorities may temporarily detain any person from the Mainland Area receiving a removal order for a reasonable period for the repatriation operation in accordance with the aforementioned Article 18, Paragraph 2, of the Cross-Strait Relations Act. Such temporary detention need not be subject to court review. Nevertheless, in order to ensure compliance with the meaning

項作成暫時收容之處分時，應以書面告知受收容人暫時收容之原因及不服之救濟方法，並通知其所指定在臺之親友或有關機關；受收容人一經表示不服，或要求由法院審查決定是否予以收容者，暫時收容機關應即於二十四小時內移送法院迅速裁定是否收容。至於暫時收容期間屆滿前，未能遣送出境者，暫時收容機關應將受暫時收容人移送法院聲請裁定收容，始能續予收容（本院釋字第七0八號解釋參照）。另兩岸關係條例關於暫予收容之期限未設有規定，不符合「迅速將受收容人強制出境」之目的，並有導致受收容人身體自由遭受過度剝奪之虞，有違憲法第二十三條比例原則，亦不符第八條保障人民身體自由之意旨。相關機關應自本解釋公布之日起二年內，依本解釋之意旨，審酌實際需要並避免過度干預人身自由，以法律或法律具體明確授權之命令規定得暫予收容之具體事由，並以法律規定執行遣送所需合理作業期間、合理之暫予收容期間及相應之正當法律程序。屆期未完成者，前揭兩岸關係條例第十八條第二項關於「得暫予收容」部分失其效力。

and purpose of due process under Article 8, Paragraph 1, of the Constitution, a detainee under the foregoing temporary detention should be afforded a remedial opportunity to request immediate judicial review of the detention. Therefore, when imposing temporary detention according to Article 18, Paragraph 2, of the Cross-Strait Relations Act, the police authorities should send the detainee a written notice with the rationale of the detention, as well as the channels for requesting judicial relief. The notice shall also be given to the detainee's designated relatives or relevant agencies in Taiwan. If a detainee objects to the temporary detention or requests judicial review while in detention, the temporary detention authorities must transfer the detainee to the court within twenty-four hours for speedy review whether detention should be imposed. In the event that the detention period is about to expire and a detainee has yet to be repatriated, the temporary detention authorities must transfer the detainee to the court for review whether detention should be extended, and the authorities may continue detaining the detainee after the court so

orders (see J.Y. Interpretation No. 708). Furthermore, because the Cross-Strait Relations Act does not specify a certain period of time for temporary detention, it fails to comply with the purpose of "speedy repatriation of detainees," is likely to excessively deprive a detainee of his physical freedom, and violates the principle of proportionality under Article 23 of the Constitution as well as the meaning and purpose of protecting physical freedom that is guaranteed under Article 8 of the Constitution. In light of the foregoing, the relevant authorities should review and amend the relevant laws in accordance with the intent of this Interpretation within two years from the issuance of this Interpretation. The amendments, which shall take into consideration the practical requirements of pre-deportation operations and also avoid excessive interference with a detainee's physical freedom, should prescribe the specific grounds for temporary detention by law or by regulations explicitly authorized by law, and also prescribe the following: a reasonable period for the repatriation operation as well as a reasonable period of temporary deten-

tion and its corresponding due process. The aforementioned portion of Article 18, Paragraph 2, of the Cross-Strait Relations Act, with regard to temporary detention, shall become null and void in case the amendment has not been promulgated by the time set forth in this Interpretation.

A restriction placed on physical freedom must be prescribed by law or by regulations explicitly authorized by law (see J.Y. Interpretation Nos. 443 and 559). The specificity of the authorization shall not be confined to the language of the statutory provision but shall be determined by the totality of statutory interpretation or the relevant meaning of the statute as a whole (see J.Y. Interpretation Nos. 612 and 676). Article 95-4 of the Cross-Strait Relations Act only provides a general authorization to the Executive Yuan to formulate enforcement rules of the Cross-Strait Relations Act. Nonetheless, the comprehensive approach of the Cross-Strait Relations Act suggests that the Cross-Strait Relations Act has authorized the Executive Yuan to clarify the meaning of “entering into the Taiwan

對人民自由權利之限制，應以法律或法律明確授權之命令為之（本院釋字第四四三號、第五五九號解釋參照）；至授權明確與否，則不應拘泥於法條所用之文字，而應由法律整體解釋認定，或依其整體規定所表明之關聯意義為判斷（本院釋字第六一二號、第六七六號解釋參照）。兩岸關係條例第九十五條之四固僅概括授權行政院訂定施行細則，惟自該條例整體觀之，應認已授權行政院為有效執行法律、落實入出境管理，得以施行細則闡明九十二年十月二十九日修正公布之兩岸關係條例第十八條第一項第一款所稱「未經許可入境」之涵義。兩岸關係條例施行細則第十五條規定：「本條例第十八條第一項第一款所定未經許可入境者，包括持偽造、變造之護照、旅行證或其他相類之證書、有事實足認係通謀虛偽結婚經撤銷或廢止其許可或以其他非法之方法

Area without permission" under Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations Act, as amended on October 29, 2003, in the Enforcement Rules of the Cross-Strait Relations Act in order to effectively enforce the law and to administer the borders. Article 15 of the Enforcement Rules of the Cross-Strait Act provides, "Persons entering into the Taiwan Area without permission as referred to in Subparagraph 1 of Paragraph 1 of Article 18 of the Cross-Strait Relations Act shall include those who enter into the Taiwan Area on fake or forged passports, travel papers, or other similar certifying documents, or by fraudulent marriage for which the registration or permission has been revoked or annulled as there exists sufficient evidence to establish that said marriage is false due to collusion, or by other illegal means." This provision aims to clarify that persons "entering into the Taiwan Area without permission" refers to those who initially illegally entered into the Taiwan Area. The content of this provision does not go beyond the literal meaning of Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations

入境者在內」，旨在闡明「未經許可入境」乃指以自始非法之方法入境臺灣地區而言。核其內容並未逾越前揭兩岸關係條例第十八條第一項第一款之文義，與法律保留原則尚屬無違。

Act, and therefore does not violate the principle of legal reservation.

Article 11 of the Regulations Governing the Approval of Entry of People from the Mainland Area into the Taiwan Area (hereinafter the "Regulations Governing Entrance Approval"), as promulgated on March 1, 2004, provides, "Any person from the Mainland Area who receives an interview notification upon arrival at the airport or seaport, or after entering into the Taiwan Area will be subject to mandatory deportation or be ordered to exit within ten days, any entry permission already granted may be revoked or annulled, and the entry and exit permit may be cancelled in any of the situations referred to in the preceding Article" (this provision is the same as Article 15 of the same Regulations amended on August 20, 2009, and the text of this provision was corrected by removing the words "will be subject to mandatory deportation or be ordered to exit within ten days"). Article 10, Subparagraph 3, of the same Regulations stipulates, "An application filed by any person from the Mainland Area

九十三年三月一日訂定發布之大陸地區人民申請進入臺灣地區面談管理辦法（下稱面談管理辦法）第十一條規定：「大陸地區人民抵達機場、港口或已入境，經通知面談，有前條各款情形之一者，其許可應予撤銷或廢止，並註銷其入出境許可證件，逕行強制出境或限令十日內出境。」（九十八年八月二十日修正發布之同辦法第十五條刪除「逕行強制出境或限令十日內出境」等字）同辦法第十條第三款規定：「大陸地區人民接受面談，有下列情形之一者，其申請案不予許可；已許可者，應撤銷或廢止其許可：……三、經面談後，申請人、依親對象無同居之事實或說詞有重大瑕疵。……」（即九十八年八月二十日修正發布之同辦法第十四條第二款）按兩岸關係條例第十條之一規定：「大陸地區人民申請進入臺灣地區團聚、居留或定居者，應接受面談、按捺指紋並建檔管理之；未接受面談、按捺指紋者，不予許可其團聚、居留或定居之申請。其管理辦法，由主管機關定之。」是面談為大陸地區人民申請進入臺灣地區團聚、居留或定居之法定程

who receives an interview for entry into the Taiwan Area may be denied, and any entry permission already granted may be revoked or annulled in any of the following situations: .... (3) after conducting the interview, no fact shows that the applicant lives together with the spouse or there are significant discrepancies in the statements of the applicant and the spouse" (this provision is the same as Article 14, Subparagraph 2, of the same Regulations amended on August 20, 2009). Article 10-1 of the Cross-Strait Relations Act provides, "Any people from the Mainland Area who applies to enter into the Taiwan Area for family reunion, residency, or permanent residency shall be interviewed, fingerprinted, and registered for record; when a person fails to be interviewed or fingerprinted, an application for family reunion, residency, or permanent residency shall not be granted. Governing rules thereof shall be prescribed by the competent authorities." Accordingly, an interview for entrance approval is part of the procedures required by law for an application filed by any person from the Mainland Area to enter into the Taiwan Area for

序。自該條例整體觀之，應認主管機關於面談時，發現有九十二年十月二十九日修正公布之兩岸關係條例第十八條第一項第一款所稱「未經許可入境」之情事，自得依法撤銷或廢止其入境許可。次按同條例第十七條第一項規定：「大陸地區人民為臺灣地區人民配偶，得依法令申請進入臺灣地區團聚；有下列情形之一者，得申請在臺灣地區依親居留：一、結婚已滿二年者。二、已生產子女者。」（九十八年七月一日修正文字為「大陸地區人民為臺灣地區人民配偶，得依法令申請進入臺灣地區團聚，經許可入境後，得申請在臺灣地區依親居留。」）同條第七項並規定：「第一項人員經許可依親居留、長期居留或許可定居，有事實足認係通謀而為虛偽結婚者，撤銷其依親居留、長期居留、定居許可及戶籍登記，並強制出境。」（該條於九十八年七月一日為文字修正）足徵前揭面談管理辦法第十條第三款所稱「說詞有重大瑕疵」，係指有事實足認申請人與依親對象間，自始即為通謀虛偽結婚，惟治安機關一時未察，而核發入境許可者而言。面談管理辦法第十條第三款規定就此並未增加前揭兩岸關係條例第十八條第一項第一款所稱「未經許可入境」所無之限制，與法律保留原

family reunion, residency, or permanent residency. Considering the comprehensive approach of the Cross-Strait Relations Act, the competent authorities may revoke or annul the entry permission of a person from the Mainland Area in accordance with laws if a finding is made following the interview that the interviewee "entered into the Taiwan Area without permission," as prescribed under Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations Act, as amended on October 29, 2003. Moreover, Article 17, Paragraph 1, of the Cross-Strait Relations Act provides, "Any people from the Mainland Area who are spouses of any people from the Taiwan Area may apply to enter into the Taiwan Area for family reunion and may apply for spouse residency in the Taiwan Area in any of the following situations: (1) the applicant has been married for at least two years; or (2) the applicant has already born children" (the amendment on July 1, 2009, changed the text of this provision to "Any people from the Mainland Area who are spouses of any people from the Taiwan Area may apply to enter into the Taiwan Area for family reunion in accor-

則尚無違背。

dance with laws and regulations and may apply for spouse residency in the Taiwan Area after obtaining permission to enter into the Taiwan Area"). Paragraph 7 of the same Article provides, "For any people from the Mainland Area who are permitted to have spousal residency, long-term residency, or permanent residency in accordance with Paragraph 1, if there exists sufficient evidence to establish that his/her marriage is false due to collusion, the permission for his/her spousal residency, long-term residency, permanent residency, and household registration shall be revoked and, in addition, he/she shall be deported" (the amendment on July 1, 2009, only corrected the text of this provision). All of the above provisions suggest that the so-called "significant discrepancies in the statements" prescribed under Article 10, Subparagraph 3, of the aforementioned Regulations Governing Entrance Approval refers to the situation where there are facts sufficient to establish that the applicant and the spouse colluded to enter into a sham marriage from the beginning, but the police authorities issued the entry permission without discovering

the marriage fraud. Article 10, Subparagraph 3, of the Regulations Governing Entrance Approval does not impose any additional condition on top of the "entering into the Taiwan Area without permission" requirement prescribed under Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations Act, as amended on October 29, 2003, and therefore does not violate the principle of legal reservation.

Article 5 of the Rules Governing Enforced Deportation of People from Mainland China, Hong Kong, and Macau (hereinafter the "Rules Governing Enforced Deportation"), as promulgated on October 27, 1999, provides, "A person may be temporarily detained prior to mandatory repatriation in any of the following situations: (1) any of the situations referred in Paragraph 2 of the preceding Article exists; (2) completing mandatory deportation in accordance with laws is impossible due to a natural disaster or a breakdown of aircrafts or vessels; (3) the resident from the Mainland Area, Hong Kong, or Macau subject to mandatory

八十八年十月二十七日訂定發布之大陸地區人民及香港澳門居民強制出境處理辦法（下稱強制出境辦法）第五條規定：「強制出境前，有下列情形之一者，得暫予收容：一、前條第二項各款所定情形。二、因天災或航空器、船舶故障，不能依規定強制出境者。三、得逕行強制出境之大陸地區人民、香港或澳門居民，無大陸地區、香港、澳門或第三國家旅行證件者。四、其他因故不能立即強制出境者。」（九十九年三月二十四日修正移列為同辦法第六條：「執行大陸地區人民、香港或澳門居民強制出境前，有下列情形之一者，得暫予收容：一、因天災或航空器、船舶故障，不能依規定強制出境。二、得逕行

deportation has no travel permit to enter the Mainland Area, Hong Kong, Macau, or any third country; (4) any other reason rendering an immediate mandatory deportation impossible" (the amendment on March 24, 2010, moved this provision to Article 6 of the same Rules, which provides, "People from the Mainland Area, Hong Kong, or Macau subject to mandatory deportation may be temporarily deported prior to repatriation in any of the following situations: (1) completing mandatory deportation in accordance with laws is impossible due to a natural disaster or a breakdown of aircrafts or vessels; (2) the resident from the Mainland Area, Hong Kong, or Macau subject to mandatory deportation has no travel permit to enter the Mainland Area, Hong Kong, Macau, or any third country; (3) any other reason rendering an immediate mandatory deportation impossible"). A temporary detention constitutes a form of deprivation of physical freedom. Grounds for temporary detention must be prescribed by law or by regulations explicitly authorized by law. In the event that the grounds for temporary detention are prescribed by regu-

強制出境之大陸地區人民、香港或澳門居民，無大陸地區、香港、澳門或第三國家旅行證件。三、其他因故不能立即強制出境。」）惟暫予收容乃剝奪人身自由之處分，其事由應以法律或法律具體明確授權之命令定之；如授權以命令定之，授權條款之明確程度應與所授權訂定之法規命令對人民權利之影響相稱（本院釋字第六八0號解釋參照）。九十二年十月二十九日修正公布之兩岸關係條例第十八條第六項（九十八年七月一日修正公布改列第七項）僅授權內政部訂定強制出境辦法及收容處所之設置及管理辦法，並未明確授權主管機關以前揭強制出境辦法補充規定得暫予收容之事由。前揭強制出境辦法第五條（現行第六條）之規定未經法律明確授權，牴觸法律保留原則，應自本解釋公布之日起，至遲於屆滿二年時失其效力。

lations authorized by law, the degree of clarity in the authorizing provision should correspond with the impact on people's rights by the authorized regulations (see J.Y. Interpretation No. 680). Article 18, Paragraph 6, of the Cross-Strait Relations Act, as amended on October 29, 2003 (the amendment on July 1, 2009, only moved this provision to Paragraph 7 of the same Article), only authorizes the Ministry of the Interior to prescribe the Rules Governing Enforced Deportation, as well as rules governing the establishment and administration of detention centers. However, this provision does not expressly authorize the competent authorities to use the foregoing Rules Governing Enforced Deportation as a supplementary regulation to provide the grounds for temporary detention. Thus, Article 5 (which is now Article 6) of the aforementioned Rules Governing Enforced Deportation violates the principle of legal reservation because it has not been explicitly authorized by law to prescribe the grounds for temporary detention. This provision shall be null and void no later than two years from the issuance of this Interpretation.

Justice Ching-You Tsay filed concurring opinion in part.

Justice Dennis Te-Chung Tang filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion in part and dissenting opinion in part.

Justice Pai-Hsiu Yeh filed concurring opinion in part and dissenting opinion in part.

Justice Chun-Sheng Chen filed concurring opinion in part and dissenting opinion in part.

Justice Beyue Su Chen filed concurring opinion in part and dissenting opinion in part.

Justice Chang-Fa Lo filed concurring opinion in part and dissenting opinion in part.

Justice Chen-Shan Li filed dissenting opinion in part.

Justice Shin-Min Chen filed dissenting opinion in part.

本號解釋蔡大法官清遊提出之部分協同意見書；湯大法官德宗提出之協同意見書；黃大法官茂榮提出之部分協同部分不同意見書；葉大法官百修提出之部分協同部分不同意見書；陳大法官春生提出之部分協同部分不同意見書；陳大法官碧玉提出之部分協同部分不同意見書；羅大法官昌發提出之部分協同部分不同意見書；李大法官震山提出之部分不同意見書；陳大法官新民提出之部分不同意見書。

EDITOR'S NOTE:

Summary of facts: Petitioner A is a person from the Mainland area who married a Taiwanese citizen, B, in 2003.

編者註：

事實摘要：聲請人A係大陸地區人民，於92年間與國人B結婚，以依親名義往返兩岸；期間曾因非法打工遭

A traveled between the two sides of the Taiwan Strait in her capacity as spouse. Soon thereafter, A was mandatorily deported because she engaged in illegal employment and because her residency expired. In 2007, the fourth time that A was permitted to enter Taiwan as a citizen's spouse, the National Immigration Agency found significant discrepancies in the statements of A and B during their interviews. Therefore, the National Immigration Agency cancelled A's Entry and Exit Permit in accordance with Article 10, Paragraph 1, Subparagraph 3, of the Regulations Governing the Approval of Entry of People from the Mainland Area into the Taiwan Area, and also Article 11 of the same Regulations. At the same time, the National Immigration Agency imposed a mandatory deportation on A according to Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area, and also temporarily detained A in accordance with Paragraph 2 of the same Article and Article 5, Subparagraph 4, of the Rules Governing Enforced Deportation.

強制出境，亦曾因居留期滿而離境。96年A四度來臺依親獲准，惟經內政部入出國移民署面談，認AB二人說詞有重大瑕疵，乃依大陸地區人民申請進入台灣地區面談管理辦法第10條第1項第3款及第11條規定，註銷其入出境證件，同時依台灣地區與大陸地區人民關係條例第18條第1項第1款作成強制出境處分；並依同條第2項及大陸地區人民及香港澳門居民強制出境處理辦法第5條第4款規定，自96年9月17日起暫予收容，97年1月21日始強制離境，計收容126日。

tion of People from Mainland China, Hong Kong, and Macau. A was temporarily detained for a total of one hundred and twenty-six days, from September 17, 2007, until January 21, 2008, the date she was mandatorily removed from Taiwan.

A visited Taiwan again in December 2008. She filed a lawsuit arguing that she is entitled to national compensation because she suffered damages for the aforementioned detention, which illegally deprived her of her physical freedom. However, the court rejected A's claim several times and the decision was final. Thus, A petitioned for an interpretation by arguing that the aforementioned provisions violate the Constitution.

A於97年12月間再次來臺，認前揭收容違法拘束其人身自由，並致生其損害，提起國家賠償訴訟迭遭駁回確定，乃主張上揭各項規定違憲，聲請解釋。

J. Y. Interpretation No.711（July 31, 2013）*

【Restriction of the location where a pharmacist may practice】

ISSUE: Is Article 11 of the Pharmacists Act, which provides that a pharmacist may only practice at one single location, unconstitutional? Is the competent authority's interpretation, which requires that a pharmacist who is also qualified as a nurse should practice at the same location, also unconstitutional ?

RELEVANT LAWS:

Articles 7, 15, and 23 of the Constitution（憲法第七條、第十五條、第二十三條）；J.Y. Interpretation Nos. 371, 572, 584, 590, 649, 659, 702（司法院釋字第三七一號、第五七二號、第五八四號、第五九0號、第六四九號、第六五九號、第七0二號解釋）；Article 5, Section 1, Paragraph 2、Article 13 Paragraph 1 of the Law Governing Adjudication by the Grand Justices of Judicial Yuan（司法院大法官審理案件法第五條第一項第二款、第十三條第一項(中華民國八十二年二月三日修正公布)）；Articles 11, 15, 102 of Pharmacists Act（藥師法第十一條、第十五條、第一0二條(一0三年七月十六日修正公布)）；Article 178-1 of Administrative Procedure Act（行政訴訟法第一七八條之一(一0三年六月十八日修正公布)）； Letter of 1 April

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* Translated by Chun-Yih Cheng.

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

2011, No. 1000007247 issued by the Executive Yuan, Department of Health（行政院衛生署一００年四月一日衛署醫字第一０００００七二四七號函）.

KEYWORDS:

right of work（工作權）, freedom of occupation（職業自由）, exercising the feedom of occupation（執行職業自由）, location of practice（職業處所）, limited to one location（限於一處）, public interests（公共利益）, full-time pharmacist（藥師專任）, practice division of medical doctor and pharmacist（醫藥分業）, vital public interest or emergency case（重大公益或緊急情況）, necessary reasonable exception（必要合理之例外規定）, principle of proportionality（比例原則）, principle of Statutory reservation（法律保留原則）, difference of occupational nature（職業性質之差異）, principle of equality（平等原則）, same location（同一處所）, permissible Standards（容許標準）, exception under certain conditions（一定條件之例外）, medical Service（醫療服務）, high degree of professional and technical distinction（高度專業及技術之差異性）, vital matter（重要事項）, constitutional court（憲法法庭）, oral argument（言詞辯論）, explicit authorization（明確授權）, pharmacological consultation（藥事諮詢）, professional knowledge（專業知識）, excessive restriction（過度限制）, mobile medical service（巡迴醫療工作）.**

HOLDING: Article 11 of the Pharmacists Act provides that "a pharmacist who has registered to practice shall practice at only one single location." Such provision does not constitute a necessary reasonable exception in a situation where the pharmacist does not violate the legislative purpose of the Article, or where there is a need due to vital public interests or emergency, imposes unnecessary restrictions on pharmacists exercising the freedom of occupation, violates the Principle of Proportionality of Article 23 under the Constitution, conflicts with the intent of Article 15 of the Constitution safeguarding the right of work, and shall lose its legal effect upon the expiration of one year after the publication of this Interpretation at the latest.

解釋文：藥師法第十一條規定：「藥師經登記領照執業者，其執業處所應以一處為限。」未就藥師於不違反該條立法目的之情形下，或於有重大公益或緊急情況之需要時，設必要合理之例外規定，已對藥師執行職業自由形成不必要之限制，有違憲法第二十三條比例原則，與憲法第十五條保障工作權之意旨相牴觸，應自本解釋公布之日起，至遲於屆滿一年時失其效力。

The Letter of 1 April 2011 No. 1000007247 issued by the Executive Yuan, Department of Health (now reorganized as Ministry of Health and Welfare), limiting the practice location of a pharmacist who is also qualified as a registered nurse to the same location, violates the Principle of Statutory Reservation under

改制前之行政院衛生署（現已改制為衛生福利部）中華民國一００年四月一日衛署醫字第一０００００七二四七號函限制兼具藥師及護理人員資格者，其執業場所應以同一處所為限，違反憲法第二十三條法律保留原則，應自本解釋公布之日起不再援用。

Article 23 of the Constitution and shall no longer be applied upon the publication of this Interpretation.

REASONING: This case arose because: 1) Yang Shiu Giun and four other persons separately considered Article 11 of the Pharmacists Act (hereinafter referred to as "the disputed Provision") and the Letter of 1 April 2011 No. 1000007247 issued by the then Department of Health (before its reorganization), Executive Yuan (hereinafter referred to as "the disputed Explanatory Letter") as applied by attached final judgments unconstitutional and applied for constitutional interpretation; 2) Judge Chien Chieng Ron of the Taiwan Taoyuan District Court Administrative Panel, while hearing case Chien-Tze No. 45 of the year 2012 regarding the Pharmaceutical Affairs Act, based on his reasonable belief considered the disputed Provision unconstitutional, and applied for constitutional interpretation in accordance with the intents of J.Y. Interpretation Nos. 371, 572, 590 and Article 178-1 of the Administrative Procedure Act. The Grand Justices decided

解釋理由書：本件係因一、楊岫涓等五人分別對附表所示之確定終局判決所適用之藥師法第十一條（下稱系爭規定）及所援用之改制前之行政院衛生署中華民國一００年四月一日衛署醫字第一０００００七二四七號函（下稱系爭函釋），認有違憲疑義，聲請解釋憲法；二、臺灣桃園地方法院行政訴訟庭法官錢建榮於審理該院一０一年度簡字第四五號藥事法事件時，對於應適用之系爭規定，依其合理之確信，認有牴觸憲法之疑義，依本院釋字第三七一號、第五七二號、第五九０號解釋意旨及行政訴訟法第一百七十八條之一規定，聲請解釋。經大法官議決應予受理及將上開各案合併審理，並依司法院大法官審理案件法第十三條第一項通知聲請人及關係機關改制前之行政院衛生署指派代表及訴訟代理人，於一０二年六月十三日到場，在憲法法庭行言詞辯論，並邀請鑑定人到庭陳述意見。

that above applications should be accepted and subject to consolidated review. In accordance with Article 13 Paragraph 1 of the Constitutional Interpretation Procedure Act the Grand Justices notified the applicants and the relevant authority, the then Department of Health, Executive Yuan to appoint representatives and agents ad litem to attend an oral argument in the Constitutional Court on June 13, 2013, and invited expert witness to make statements.

The applicants Yang Shiu Giun and four other persons asserted that the disputed Provision violated the Principle of Proportionality and Principle of Equality, and the disputed Letter violated the Principle of Statutory Reservation and the Principle of Equality, and infringed people's right of work as protected by the Constitution. Their reasons are, in brief, as follows: 1) The disputed Provision violates the right of work as protected by the Constitution: When the pharmacy where a pharmacist works does not open for business, the pharmacist may not support another pharmacy's work because of the disputed

聲請人楊岫涓等五人主張系爭規定違反比例原則與平等原則，及系爭函釋違反法律保留原則與平等原則，而侵害人民受憲法保障之工作權，其理由略謂：一、系爭規定侵害憲法保障之工作權：聲請人執業之藥局如休息不營業時，欲支援其他藥局工作，卻受限於系爭規定不得為之，已侵害其工作權。二、系爭規定未有例外規定，違反平等原則：其他各類醫事專業人員相關管理法規，與藥師法在性質上同為追求國民健康之公共利益，雖原則上亦限制執業處所以一處為限，但均設有報准制度，可因醫療機構間會診、應邀出診、急救等情形至他處支援之例外規定，系爭規

Provision. The pharmacist's right of work is infringed upon. 2) The disputed Provision does not have any exception, which violates the Principle of Equality: Other laws and regulations for various types of medical professionals just like the disputed Provision pursue public interests of national health. Although they also restrict the practice location to one, an approval system permits exceptions where support in another location is allowed because of joint consultations among medical institutions, invited house calls, emergency rescue etc. The disputed Provision has no exception at all, and obviously violates the Principle of Equality. 3) The legislative purpose of the disputed Provision is to ensure fulltime pharmacists, to prevent a pharmacist from lending his license, and to achieve the administrative purpose of regulating pharmaceutical businesses. However, now that the national health insurance system and the practice division between medical doctor and pharmacist have been established, in coordination with the registration of medical professionals, the disputed Provision should be reviewed and revised. 4) The disputed

定完全未設有例外規定，明顯違反平等原則。三、系爭規定立法時，目的在落實藥師專任，防止不肖藥師出租借牌外，更兼負管理藥商之行政目的。惟今日全民健康保險與醫藥分業制度業已建立，配合主管機關就醫事人員執業登錄之管理，系爭規定已有重新檢討修正之必要。四、系爭規定限制藥師執業處所，將導致專任藥師超時工作，醫療機構租借牌照情形更加猖獗，偏遠地區民眾反無法接受專業藥師服務，其欲保障國民用藥安全之目的更難達成。五、藥師人力仍有不足：根據相關學術研究，目前門診藥師人力尚嫌不足，已導致專任藥師超時工作，危害國民健康。六、關於系爭函釋，規定兼具藥師及護士雙重醫事人員資格者，執業登記處所以同一處為限，乃牴觸法律保留原則及平等原則：（一）現行對多重醫事人員限制，既然無法律依據，本無從管制，況現行醫事人員擁有多項專業證照者，均可自由選擇工作（例如醫師兼有律師或會計師證照者），但具有多重醫事資格者卻受到管制，違反憲法保障之平等權。（二）執業處所不限於同一處，僅增加交通成本，對提供的專業服務品質不致造成影響。（三）將多重醫事人員資格之執業處所限於「同一處」，由於各醫

Provision restricts the practice location of pharmacists; as a result, full-time pharmacists will work over time. License lending will become more popular, and people in rural areas will not receive professional pharmaceutical services. The purpose of ensuring the safe use of medicine by citizens will be more difficult to achieve. 5) Lack of pharmacists: According to relevant academic research, outpatient pharmaceutical services are currently still insufficient, resulting in full-time pharmacists working overtime and jeopardizing national health. 6) The disputed Explanatory Letter, requiring a medical person who is double qualified as pharmacist and nurse to practice at the same registered location, violates the Principle of Statutory Reservation and the Principle of Equality: a) The current restriction on multi-qualified medical professionals is without statutory basis and hard to control. On the other hand, if a medical professional currently possesses other professional licenses, he may freely choose his job (for example, a medical doctor is also qualified as a lawyer or an accountant). But those who have multiple medical licenses

事人員申請執業處所都有設備資格上的限制，故只有醫院診所才能同時具備多項醫事人員資格之登記條件，不無獨厚醫院診所之嫌等情。

are subject to restrictions; this violates the Principle of Equality as protected by the Constitution. b) Multiple practice locations only increase traffic costs, the quality of provided professional service will not be comprised. c) The practice location of a multi-qualified medical professional is limited to the same location. Because there are requirements of equipment for registering a practice location by various medical professionals, only hospitals and clinics are simultaneously qualified for registrations of various medical professionals. It seems beneficial only to hospitals and clinics.

In addition, the applicant Judge Chien Chieng Ron asserted that the disputed Provision violates the Principle of Proportionality and the Principle of Equality, and infringes upon people's right of work as protected by the Constitution. His Honorable Judge's reasons are, in brief, as follows: 1) The disputed Provision imposes an objective restriction on people's freedom to choose an occupation, and infringes upon the right of work as stipulated in Article 15 of the Constitu-

另聲請人錢建榮法官主張系爭規定違反比例原則與平等原則，而侵害人民受憲法保障之工作權，其理由略謂：一、系爭規定對人民職業選擇自由形成客觀限制，侵害憲法第十五條工作權：（一）職業自由為人民充實生活內涵及自我發展人格所必要，不因職業之性質而有差異，均應受憲法第十五條工作權所保障。其內涵包括選擇職業自由與執行職業自由。參照司法院釋字第五八四號解釋意旨，人民對於從事一定職業應具備之資格或其他要件，於符合憲法第

tion: a) Freedom of occupation is necessary for a fulfilled and cultivated life and the development of a person's dignity. A distinction should not be made as to the nature of occupations. They are all protected by the right of work under Article 15 of the Constitution. The freedom of occupation includes the freedom to choose an occupation and the freedom to exercise an occupation. By reference to the intent of J.Y. Interpretation No 584, within the scope of Article 23 of the Constitution, qualifications and other requirements for exercising certain occupations may be restricted by statutes or ordinances as expressly authorized by statutes. b) Restrictions on the freedom of occupation may have different permissible standards due to different contents. With regard to manner, time, location, counterpart or content when exercising one's freedom of occupation, legislators may impose appropriate restrictions when necessary due to public interests. As to objective conditions required of people choosing an occupation, this refers to conditions for undertaking specific occupations, which cannot be achieved by personal hardworking. It

二十三條規定之限度內，得以法律或法律明確授權之命令加以限制。（二）對職業自由之限制，因其內容之差異，在憲法上有寬嚴不同之容許標準。關於從事職業之方法、時間、地點、對象或內容等執行職業之自由，立法者為公共利益之必要，即非不得予以適當之限制。而人民選擇職業應具備之客觀條件，係指對從事特定職業之條件限制，非個人努力所可達成，則應以保護特別重要之公共利益始得為之。惟不論何種情形之限制，所採之手段均須與比例原則無違。（三）系爭規定限制藥師執業處所以一處為限，已非單純對於執行職業自由之限制，而係對於職業選擇自由之客觀限制。則其立法目的須在追求特別重要之公共利益，方能符合憲法第二十三條比例原則之要求。（四）惟系爭規定禁止藥師支援他處，致使需要藥師人力支援之醫療機構，迫於成本考量，藉租用牌照方式來執行業務，反有害於國民健康，無助於公共利益之追求。二、主管機關對藥事人力之統計，是以「領照人數」為依據，惟「實際執業人數」與「領照人數」有高達一萬兩千七百人之落差，能否遽稱我國藥事人力充足，不無可議之處。三、系爭規定違反平等原則：（一）平等原則為所有基本權之基

should be imposed only for the protection of vital public interests. In any event, the method should be in compliance with the Principle of Proportionality. c) The disputed Provision restricting a pharmacist's practice to only one location does not simply restrict the freedom of exercising an occupation. Rather, it objectively restricts the freedom to choose an occupation. The legislative purpose must be to pursue special vital public interests in order to meet requirements of the Principle of Proportionality under Article 23 of the Constitution. d) However, the disputed Provision restrains a pharmacist from supporting other locations. As a result, medical institutions which need the support of pharmacists will, due to cost consideration, borrow licenses from pharmacists for their practice, this will cause harm to national health and is not beneficial for the pursuit of public interests. 2) The statistics regarding pharmaceutical manpower by the competent authority are based on the number of registrations. However, the difference between the practicing number and the registered number is as high as 12700 persons. It is doubtful to claim that

礎，國家公權力之行使，必須保障人民在法律上地位之實質平等，要求本質上相同之事物應為相同之處理，不得恣意為無正當理由之差別待遇。(二)法規範是否符合平等原則之要求，參照司法院釋字第六九四號解釋意旨，其判斷應取決於該法規範所以為差別待遇之目的是否合憲，其所採取之分類與規範目的之達成之間，是否存有一定程度之關聯性而定，因此差別待遇都必須具備憲法之正當性方可。（三）與藥師同樣在性質上特重維護或促進國民健康之公益要求的其他醫事專業人員，雖原則上限制於一處執業，但法律上均設有報備支援之例外規定，且以我國目前統計資料可知，醫師與藥師之領證人數約略相當，但醫師登記執業者猶多於藥師甚多，卻許可醫師於例外時可支援他處醫療機構執行業務，顯見對藥師產生更不合理之差別對待，有違平等原則等語。

there is sufficient manpower of pharmacists in Taiwan. 3) The disputed Provision violates the Principle of Equality: a) The Principle of Equality is the foundation of all basic rights. When exercising public powers, the substantive equality of people's legal standing must be safeguarded. It is required that same substantive matters should be treated in the same manner, and arbitrary differential treatment without reasonable justification is not allowed. b) Whether a legal norm meets the requirements of the Principle of Equality depends on, by reference to the intent of J.Y. Interpretation No 694, whether the purpose of such legal norm for differential treatment is constitutional, whether there is a certain degree of connection between the categorization and the achievement of the purpose of the norm. Therefore, all differential treatments must have a constitutional justification. c) Other medical professionals, whose nature, like pharmacists, emphasizes public interests of maintaining or promoting national health, are in principle subject to one single practice location, but the law provides statutory exceptions for approval. Furthermore,

according to current statistics, the numbers of registered medical doctors and pharmacists are roughly equal, but there are far more practicing medical doctors than practicing pharmacists. However, under exceptional circumstances, medical doctors are permitted to practice in other medical institutions. Obviously, this constitutes an unreasonable differential treatment for pharmacists and violates the Principle of Equality.

The relevant competent authority, the then Department of Health, Executive Yuan states that: 1) Although the disputed Provision infringes upon people's right of work, it does not violate the Principle of Proportionality and is still constitutional: a) According to the legislative reasons, the disputed Provision is designed to adopt necessary measures for coordinating and ensuring a system of full-time resident pharmacists who manage (supervise) business (factory) and operate pharmacies in person in order to ensure the safe use of medicine and to establish a comprehensive public health system, as well as to secure the people's right of

關係機關改制前之行政院衛生署略稱：一、系爭規定雖侵害人民工作權，但未違反比例原則，仍屬合憲：（一）從立法理由可知，系爭規定係為配合並落實專任藥師駐店(廠)管理(監製)之制度及親自主持藥局業務而設，乃為保障用藥安全，建構整體公共衛生體系，並維護憲法第一百五十七條國民健康權，所採取不得不然之必要措施。（二）醫療業務執行係高密度、持續性、專業性及技術性之行為。是以在維護醫療品質考量下，我國現行醫事人員法規對登記執業處所概以限於一處為原則。（三）藥師業務除執行調劑相關業務外，也負擔管理藥品責任，包括產品管理、監製等，其執業場所也更具多

health under Article 157 of the Constitution. b) The practice of medical business is of high density, continuity, professional and technical activities. Based on the consideration of maintaining medical quality, current laws and regulations applicable to medical professions stipulate the principle that the registered practice location shall be limited to one location. c) In addition to disbursing prescription, the practice of pharmacists also undertakes the responsibility of administering medicine, including product management and supervision of manufacturing, the practice locations vary accordingly. Thus, they must work full-time in one location to strengthen their professionalism. d) The disputed Provision restricts a pharmacist's freedom of occupation in terms of practice location. However, the legislative purpose is to ensure full-time pharmacists so as to achieve vital public interests of protecting the right of national health; the restrictive measure has a reasonable connection with the purpose and is necessary for the protection of public interests. It does not excessively restrict a pharmacist's right of work and does not

樣性，因此必須專職一處以厚植專業。（四）系爭規定對藥師從事工作地點之職業自由有所限制，惟審酌其立法目的係出於落實藥師專任，達成國民健康權保障之重大公共利益；且限制手段與目的間具有合理關聯，並為保全公共利益之必要手段，對藥師之工作權尚無造成過度之限制，與比例原則無違。二、系爭規定未開放藥師如其他各類醫事人員一般，可支援他處，乃基於保障國民健康之考量：（一）依現行相關法規，醫事人員概以限於一處執業為原則，其目的在確保醫療資源被妥適運用，僅有在人力不足，緊急狀況下才例外准予支援，協助緊急狀況下之病患。（二）由藥師業務內容可知，在藥品儲備管理上，結合執業處所一併採行風險控管措施，有其必要性。（三）系爭規定未比照其他醫事人員法規，開放藥師支援他處執業，乃基於藥品管理安全上及民眾用藥安全之重大公益考量所採取之必要手段。三、開放藥師支援，將使其真正執業處所無法確定，形成有登錄之名卻無在場之實之流弊，直接造成醫療資源分布不均、人力分布無法掌握之窘境，更增加健保費用核付勾稽等審理作業成本負擔，影響全體國民之健康。四、基於整體醫療資源分配及緊急醫療救護之

violate the Principle of Proportionality. 2) The disputed Provision does not allow pharmacists to support other places as otherwise permissible for medical professionals, considering the protection of national health: a) According to current relevant regulations, medical professionals must in principle exercise their profession at a single location. The purpose is to ensure proper application of medical resources. The exception is only applicable where there is manpower shortage and in emergency cases to help patients in critical situations. b) Given the subject matter of the pharmaceutical business, in terms of storage and management of medicines, the combination of practice location and risk management measures is necessary. c) The disputed Provision does not, as in the event of other medical professionals, allow pharmacists to support other places. This necessary measure was adopted in light of vital public interests for safe management of pharmaceuticals and safe use of medicine by people. 3) Once a pharmacist may support other places, it becomes hard to ascertain the real practice location so that there may be practice registrations

考量，現行實務對系爭規定已採取合目的性之限縮解釋，彈性准許藥師於下述情形，得例外前往執行業務：（一）藥事人員以執業登錄處所之藥局、醫院或診所名義至護理之家、安養機構提供藥事諮詢服務。（二）基於推廣公共衛生業務及義診服務需求，參與醫療團體義診服務，執行藥品調劑工作。（三）巡迴醫療於山地、離島或於無藥事人員執業之偏遠地區執行藥品調劑工作等。五、藥師人力充足：（一）根據至一０一年十二月為止統計，我國藥師人力將近四萬五千人，依據改制前之行政院衛生署委託財團法人國家衛生研究院進行之「藥事人力發展評估計畫」，至一０九年我國藥師人力總需求在三萬五千九百八十六人至三萬六千三百二十一人之間，人力不虞匱乏。（二）禁止藥師支援他處醫療機構或藥局工作，並不影響國民健康或醫療權利，相對而言是透過系爭規定建立藥師專任責任制，更有助其專業服務質量之提升。六、系爭規定並不違反平等原則：憲法平等原則並非絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，立法機關基於憲法之價值體系及立法目的，自得斟酌規範事務性質之差異而為合理之不同規定。故系爭

without actual practice there. This will directly cause an unbalanced distribution of medical resources and a situation where it is difficult to control the distribution of manpower. Moreover, the handling cost of auditing national health insurance cost will increase. As a result, national health will be jeopardized. 4) Considering the distribution of all medical resources and emergency medical care, current practice has relaxed the application of the disputed Provision to flexibly allow pharmacists to practice in following exceptional cases: a) In the name of the drugstore, hospital or clinic where the pharmacist registers his practice, to provide pharmaceutical consultation to nursing homes or pension institutions. b) For the promotion of public health business and volunteer medical services, to participate in volunteer medical services of medical groups to dispense medicines. c) To disperse medicines in mobile medical services in mountain areas, isolated islands or rural areas where there is no practicing pharmacist. 5) The manpower of pharmacist is sufficient: a) According to statistics as of December 2012, there are 45000 pharmacists in Tai-

規定未如其他各類醫事人員，明文許可支援或報備許可，無非期能以此健全完整藥品安全管理機制，使國民享有穩定而安全之藥事服務環境，具有合理性，而無違反平等原則。七、關於系爭函釋的合憲性：（一）基於專業可以多重、人格不可分之原則，又為維護國民健康及就醫安全、提升醫療專業品質等公益考量，限制兼具多重醫事人員資格者執業登記有其必要性。（二）依現行法制，不論藥師或護士，其法定登記執業處所本即以一處為限，是不論兼具藥師與護士資格者係本於何資格別登記執行業務，本均以一處為限而無例外。（三）藥師兼具其他醫事人員資格者，囿於藥師業務內容之特殊性，同時執業已非妥適，至於其執業處所，由其兼具雙重身分執行業務本應肩負多重權責義務，並適用全部各該身分別之法令規範以觀，法理上本即應適用較嚴格之藥師執業處所限制，以同一處所為限，故不違反法律保留原則等語。

wan. According to the Evaluation Project of Pharmaceutical Manpower Development conducted by the National Health Research Institutes commissioned by the then Department of Health, Executive Yuan, the demand for pharmaceutical manpower by the year 2020 lies between 35986 and 36321. There is no lack of manpower. b) Prohibiting pharmacists from supporting other medical institutions or drugstores will not affect national health or right of medical treatment. On the contrary, it is helpful to enhance the quality of professional service by way of full-time pharmacists as mandated by the disputed Provision. 6) The disputed Provision does not violate the Principle of Equality: The constitutional Principle of Equality does not mean absolute, mechanical, formal equality. Rather, it protects the substantive equality of legal standing of the people. Based on the constitutional value system and legislative purpose, the legislature may take into account the different nature of regulated matters and thus provide for reasonable differential treatments. Unlike other medical professionals, the disputed Provision does not allow

supporting other places. As such it is expected to ensure a sound and comprehensive system for pharmaceutical safety and management, to provide a stable and safe pharmaceutical service environment for the people. The disputed Provision is reasonable and does not violate the Principle of Equality. 7) Regarding the constitutionality of the disputed Explanatory Letter: a) Based on the principle that there may be various types of professions, but personality is indivisible, and in consideration of the public interests to ensure national health and safety of medical treatment, and to enhance medical professional quality, it is necessary to restrict the practice registration of medical professionals with multiple qualifications. b) According to the current legal system, the registered practice location of both pharmacists and nurses is limited to one only. Therefore, for a dual-qualified pharmacist and nurse, regardless whether he registers his practice under the qualification of pharmacist or nurse, his registered practice location is limited to one only without exception. c) If a pharmacist is also qualified for other medical professions, in view of the

special nature of the pharmaceutical business, it is improper to exercise dual practice. As to the practice location, because he possesses dual positions to practice and therefore should be subject to multiple obligations and to all the laws and regulations applicable to the respective qualifications, under legal jurisprudence the stricter regulations of a pharmacist's practice location should be applied, and it should be limited to the same single one. Therefore, it does not violate the Principle of Statutory Reservation.

This Yuan considered all the arguments and made this Interpretation. The reasons are as follows:

Article 15 of the Constitution provides that people's right of work should be protected. Its content includes people's freedom of occupation. If a law imposes obligations on people for certain occupations, it is a restriction on such freedom. Statutory restrictions on freedom of occupation are subject to loose or strict constitutional standards depending on their contents. With respect to exercising the

本院斟酌全辯論意旨，作成本解釋，理由如下：

憲法第十五條規定，人民之工作權應予保障，其內涵包括人民之職業自由。法律若課予人民一定職業上應遵守之義務，即屬對該自由之限制。法律對職業自由之限制，因其內容之差異，在憲法上有寬嚴不同之容許標準。關於從事工作之方法、時間、地點等執行職業自由，立法者為追求公共利益，且採行之限制手段確屬必要者，始符合憲法第二十三條比例原則之要求，迭經本院

freedom of occupation in terms of manner, time and location of working, legislators have stipulated that only in the case of pursuing public interests and where a restrictive measure is strictly necessary such restriction meets the requirements of the Principle of Proportionality under Article 23 of the Constitution. It has been reiterated by this Yuan as such (see J.Y. Interpretation Nos. 584, 649, 702).

The disputed Provision provides that "a pharmacist who has registered his practice shall practice at only one location." It restricts a pharmacist to practice at only one location after his registration of practice, and is a restriction on the manner and location of a pharmacist's practice. The legislative purpose of the disputed Provision is to promote the policy of fulltime pharmacists and to prevent the illegal practice of license lending (see Legislative Gazette Vol. 67, No. 87, committee minutes p. 31). Ever since Article 102 of the Pharmaceutical Affairs Act was amended on 18 January 1993 and a system of practice division between medical doctors and pharmacists has

解釋在案（本院釋字第五八四號、第六四九號、第七０二號解釋參照）。

系爭規定明定：「藥師經登記領照執業者，其執業處所應以一處為限。」限制藥師於登記領照執業後，僅得於一處所執業，核屬對藥師執行職業之方法、地點所為之限制。查系爭規定之立法目的，係為推行藥師專任之政策及防止租借牌照營業之不法情事（立法院公報第六十七卷第八十七期委員會紀錄第三十一頁參照）。且自八十二年一月十八日修正公布之藥事法第一百零二條規定，推行醫藥分業制度後，藥師係以專門知識技能，核對醫師開立之處方以調配藥劑，並為病人提供正確藥物資訊、諮詢等服務。系爭規定限制藥師執業處所於一處，乃出於確保醫藥管理制度之完善、妥善運用分配整體醫療人力資源，並維護人民用藥安全等公共利益

been implemented, a pharmacist, based on his professional knowledge and skill, checks a medical doctor's prescription to disperse medicine, and provides patients with proper medicine information, advice and similar services. The disputed Provision's restriction of a pharmacist's practice location to one is derived from considerations of public interest to ensure a perfect medicine management system, to properly use and distribute total medical manpower resources, and to protect the safe use of medicine by people. The purpose of such restriction by the legislature is justified, but it should not exceed the necessary extent by excessively restricting a pharmacist from exercising his freedom of occupation so that the Principle of Proportionality under Article 23 of the Constitution is complied with.

之考量。立法者為此限制，其目的雖屬正當，惟仍不得逾越必要之程度，而對藥師之執行職業自由為過度限制，始符憲法第二十三條之比例原則。

The disputed Provision restricts a pharmacist's practice to one location. This helps to achieve the above legislative purpose. However, a pharmacist may by law practice various businesses (see Article 15 Pharmacists Act). Society has different expectations with regard to pharmacists

系爭規定將藥師執業處所限於一處，固有助於前揭立法目的之達成。惟藥師依法本得執行各種不同之業務（藥師法第十五條參照），社會對執行不同業務藥師之期待因而有所不同，且因執業場所及其規模之差異而應有彈性有效運用藥師專業知識之可能。又於醫療義

practicing different businesses. Due to differing practice locations and scopes, it is possible to flexibly and effectively use the professional knowledge of pharmacists. In the case of volunteer medical services or in rural areas or disaster areas where there is lack of pharmacists, in cooperation with mobile medical services and to provide medicine consultation services to pension institutions, pharmacists' support will not violate the above legislative purpose, and there is no necessity to have any restriction. In addition, in view of the current practice, the competent authority in the above circumstances flexibly interprets the disputed Provision and so allows under certain conditions. Obviously, it is necessary to have, under certain conditions, exceptions to the rule that the practice location of a pharmacist should be limited to one only. Where it is not against the above legislative purpose or it is needed for vital public interests or in case of an emergency, the disputed Provision generally prohibits pharmacists from practicing various pharmaceutical businesses in different locations without any necessary reasonable exception; as such it imposes

診，或於缺乏藥師之偏遠地區或災區，配合巡迴醫療工作及至安養機構提供藥事諮詢服務等活動，由執業之藥師前往支援，並不違反前揭立法目的，實無限制之必要。且參諸現行實務，主管機關於有上揭情形時皆對系爭規定為彈性解釋，有條件允許之。足見就藥師執業處所僅限於一處之規範，設置一定條件之例外確有其必要。系爭規定於藥師不違反前揭立法目的之情形下，或於有重大公益或緊急情況之需要時，一律禁止藥師於其他處所執行各種不同之藥事業務，未設必要合理之例外規定，已對藥師執行職業自由形成不必要之限制，有違憲法第二十三條比例原則，而與憲法第十五條保障工作權之意旨相牴觸。相關機關至遲應於本解釋公布之日起一年內，依本解釋意旨檢討修正，屆時未完成修法者，系爭規定失其效力。

unnecessary restrictions on pharmacists exercising their freedom of occupation, violates the Principle of Proportionality under Article 23 of the Constitution and contradicts the protection of right of work under Article 15 of the Constitution. The relevant authority should review and revise the disputed Provision within one year of the publication of this Interpretation at the latest. Otherwise, the disputed Provision shall lose its legal effect.

The way how medical services are provided by various medical professionals differs greatly in terms of professional and technological nature. In consideration of maintaining medical quality and protecting national health, legislators may enact different restrictions concerning manner, time and location of practice with regard to various medical professionals. Although the disputed Provision differs from other regulations for other medical professionals regarding the practice location, such difference is made by legislators in view of the different professional nature of pharmacists and other medical professionals and other relevant factors, it

按各類醫事人員如何提供醫療服務，具有高度專業及技術之差異性。立法者基於維護醫療品質與保障國民健康之考量，得針對各類專門醫事人員執業之方法、時間及地點而為不同限制。系爭規定與規範其他醫事人員執業處所之規定雖有不同，惟係立法者衡量藥師與其他醫事人員職業性質之差異及其他相關因素所為之不同規定，尚不生牴觸憲法第七條平等原則之問題。

does not contradict the Principle of Equality under Article 7 of the Constitution.

It has been reiterated in this Yuan's Interpretations (see J.Y. Interpretations Nos. 584, 659) that within the boundary of Article 23 of the Constitution, people's freedoms and rights may be restricted by statute or by order as expressly authorized by statute. In the case of a medical professional possessing multiple practice qualifications for various medical professionals, with regard to restrictions of practice qualification, manner or location, involving restriction of people's freedom of occupation and public interests of safeguarding national health, the legislature should provide for the same by statute or expressly authorize administrative agencies to promulgate supplemental orders so as to comply with the Principle of Statutory Reservation of Article 23 of the Constitution. The disputed Explanatory Letter specifies that "4. As regards a pharmacist simultaneously possessing the qualification of a nurse, he may separately apply for practice licenses in accordance with the laws of respective medical profession-

有關人民之自由權利，於符合憲法第二十三條規定之限度內，得以法律或法律明確授權之命令加以限制，迭經本院解釋在案（本院釋字第五八四號、第六五九號解釋參照）。醫事人員如具備多重醫事人員執業資格，關於醫事人員執業資格、方式或執業場所之限制等規範，涉及人民職業自由之限制及維護國民健康之公共利益等重要事項，應由立法機關以法律明定或明確授權行政機關發布命令為補充規定，始符合憲法第二十三條法律保留原則。系爭函釋謂：「四、至於藥師兼具護士雙重醫事人員資格，雖得依各該醫事人員專門職業法律之規定，分別申請執業執照，惟其雙重資格執業場所以同一處所為限。」惟藥師法並未規定人民同時領有藥師及護理人員證書，其執業場所僅得以同一處所為限。系爭函釋已對人民工作權增加法律所無之限制，與法律保留原則有違，應自本解釋公布之日起，不再援用。

als, but the practice location of the dual-qualifications shall be limited to the same location." However, the Pharmacists Act does not provide that if a person simultaneously possesses a pharmacist certificate and a nurse certificate, his practice location shall be limited to the same location. The disputed Explanatory Letter additionally imposes a restriction on people's right of work without legal basis. It violates the Principle of Statutory Reservation and shall not be applied anymore from the publication date of this Interpretation.

One of the applicants argued that Article 37 of the Pharmacists Act and Annex 6 of Article 9 of the Criteria for the Establishment of Medical Institutions regarding the criteria for the establishment of Chinese medicine institution as applied by the Taiwan High Court Tainan Branch final judgment No. 12 of the year 2011 violated the Principle of Equality and the Principle of Statutory Explicitness; another applicant argued that Article 8 of the Nurses Act as applied by Kaohsiung Administrative High Court final judgment No. 606 of the year 2011 violated his

聲請人之一主張臺灣高等法院臺南分院一００年度上國易字第一二號確定終局判決所適用之藥師法第三十七條及醫療機構設置標準第九條之附表（六）關於中醫診所設置標準部分，違反平等原則及法律明確性原則；另一聲請人主張高雄高等行政法院一００年度訴字第六０六號確定終局判決所適用之護理人員法第八條規定，侵害其工作權等語。核其所陳，均未具體敘明上開規定究有何牴觸憲法之處。是此部分聲請核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不予受理，併此敘明。

right of work. However, in view of their arguments, they failed to specify how the above provisions violate the Constitution. These applications are inconsistent with Article 5 Paragraph 1 Subparagraph 2 of the Constitutional Interpretation Procedure Act and should be rejected in accordance with Paragraph 3 of the same Article. It is so noted here.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Chang-Fa Lo filed concurring opinion.

Justice Dennis Te-Chung Tang filed concurring opinion.

Justice Yeong-Chin Su filed concurring opinion in part and dissenting opinion in part.

Justice Ming Chen filed dissenting opinion in part, in which Justice Si-Yao Lin, Justice Chi-Ming Chih, Justice Ching-You Tsay and Justice Hsi-Chun Huang joined

本號解釋黃大法官茂榮協同意見書；葉大法官百修協同意見書；陳大法官新民協同意見書；羅大法官昌發協同意見書；湯大法官德宗協同意見書；蘇大法官永欽一部協同一部不同意見書；陳大法官敏提出，林大法官錫堯、池大法官啟明、蔡大法官清遊、黃大法官璽君加入部分不同意見書。

EDITOR'S NOTE:

Summary of facts: 1) Pharmacists A, B, C and D respectively registered in Chiayi County, Tainan County and Taichung City to practice general pharmacy business; they subsequently applied to local Bureaus of Health of their registered places to support other drugstores. The applications were rejected because of inconsistency with Article 11 of the Pharmacists Act (hereinafter referred to as "the disputed Provision"). The applicants initiated administrative proceedings but lost their cases in final judgments. They argued that the disputed Provision and the Letter of 1 April 2011, No. 1000007247 issued by the Executive Yuan, Department of Health (now Ministry of Health and Welfare), were unconstitutional and applied for Interpretation respectively. 2) Medical Doctor E argued that the Department of Health did not revise the disputed Provision but agreed that Pharmacists may provide visiting services and volunteer services, and ordered the Bureau of National Health Insurance to reserve budget to encourage such services, thus

編者註：

事實摘要：(一) 藥師 A、B、C、D4 人各登錄於嘉義縣、台南縣及臺中市等地藥局執行一般藥師業務；嗣分別向登錄所在地衛生局申請支援他處藥局，均因與藥師法第 11 條 (下稱系爭規定) 規定不符而遭否准。聲請人不服，提起行政爭訟敗訴確定，乃主張系爭規定及行政院衛生署（現衛生福利部）中華民國 100 年 4 月 1 日衛署醫字第 1000007247 號函違憲，分別聲請解釋。（二）醫師 E 認衛生署不修改系爭規定，卻同意藥師可居家照護及義診，並命健保局編列預算鼓勵之，導致其可領得之醫療給付降低，損其財產權，提起國家賠償訴訟敗訴確定後，乃主張系爭規定內容不明確且不公平而違憲，聲請解釋。(三) 臺灣桃園地方法院行政訴訟庭法官錢建榮審理該院 101 年度簡字第 45 號違反藥事法案件，依其合理確信認所應適用之系爭規定有違憲疑義，乃依本院釋字第 371 號、第 572 號、第 590 號解釋意旨及行政訴訟法第 178 條之 1 規定，聲請解釋。大法官就各案先後受理，因所主張違憲之標的相同，乃合併審理。

lowering his entitlement to medical payment and infringing his property rights. He initiated a national compensation suit but lost his case in a final judgment. Therefore, he argued that the content of the disputed Provision was unclear and unfair and, as a result, unconstitutional and applied for Interpretation. 3) When hearing case Chien-Tze No. 45 of the year 2012 regarding violation of the Pharmacists Act, the Taiwan Taoyuan District Court Administrative Panel Judge Chien Chieng Ron reasonably believed that the applicable disputed Provision might be unconstitutional, and therefore applied for Interpretation in accordance with the intents of J.Y. Interpretations Nos. 371, 572, 590 and Article 178-1 of the Administrative Procedure Act. The Grand Justices accepted these cases at different times. Because the subject matters were the same, the applications were consolidated for review.

J. Y. Interpretation No.712（October 4, 2013）*

【Case concerning restrictions on the adoption of people of the Mainland Chinese Area】

ISSUE: Is it unconstitutional for a court to rule that Taiwanese parents with children or adopted children may not adopt children of their spouse from the Mainland Area.

RELEVANT LAWS:

Article 22, Article 23, of Article 27 Paragraph 1 Subparagraph 3, and Article 174 Paragraph 1 of the Constitution(憲 法 第二十二條、第二十三條、第二十七條第一項第三款、第一百七十四條第一款)；Preamble and Article 11 of the Additional Articles of the Constitution (憲法增修條文前言、第十 一 條)；J.Y.Interpretations Nos. 362, 552, 554, 618, 689, 696, and 710 (司法院釋字第三六二號、第五五二號、第五五四號、第六一八號、第六八九號、第六九六號、第七一0號解釋)； Article 65 Paragraph 1 of the Act Governing the Relations Between People of the Taiwan Area and the Mainland Area(臺灣地區與大陸地區人民關係條例第六十五條第一款).

KEYWORDS:

human dignity (人性尊嚴), principle of proportionality (比

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* Translated and edited by Lawrence L Lee.

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

例原則), proportion of the population (人口比例), family system (家庭制度), institutional protection (制度性保障), free development of personality (人格自由發展), overregulation(限制過當), freedom to adopt (收養子女之自由).**

HOLDING: Article 65 Paragraph 1 of the Act Governing the Relations Between People of the Taiwan Area and the Mainland Area states that "the court shall not approve People of the Taiwan Area adopting [the] children of the Mainland Area under any one of the following circumstances: 1. where any one of the adoptive parents already has a child or adopted child…" The section of the clause pertaining to the restriction of people of the Taiwan area adopting children of a spouse from the Mainland Area violates Articles 22 and 23 of the Constitution of the Republic of China and the principle of proportionality. It is to be held invalid from the date of issuance date of this.

解釋文：臺灣地區與大陸地區人民關係條例第六十五條第一款規定：「臺灣地區人民收養大陸地區人民為養子女，……有下列情形之一者，法院亦應不予認可：一、已有子女或養子女者。」其中有關臺灣地區人民收養其配偶之大陸地區子女，法院亦應不予認可部分，與憲法第二十二條保障收養自由之意旨及第二十三條比例原則不符，應自本解釋公布之日起失其效力。

REASONING: Based on the notion of human dignity, an individual's autonomy and the free development of his/her personality shall be safeguarded

解釋理由書：基於人性尊嚴之理念，個人主體性及人格之自由發展，應受憲法保障（本院釋字第六八九號解釋參照）。婚姻與家庭為社會形成與發

by the Constitution (see Judicial Yuan Interpretation No. 689). Marriage and family serve as the foundation by which society develops and shapes itself, and are thus institutionally protected by the Constitution (see Judicial Yuan Interpretations Nos. 362, 552, 554, and 696). The family system is based on the free development of personality and is essential for ensuring the functions of inheritance, education, the economy and culture. It is vital for an individual's growth in society and is the foundation of the creation and development of our society. Adoption is part of our country's family system. It is an action that establishes a parent-child relationship with a view to creating an identity. In this way it forms human relationships between the adopter and adopted of education, nurturing, support, belonging and inheritance of property. It plays an important role in developing the mind and body and molding the personality of both adopter and adopted. The people's freedom to adopt children, in particular the freedom of development of personality for both adopter and adopted, is protected under Article 22 of the Constitution.

展之基礎，受憲法制度性保障（本院釋字第三六二號、第五五二號、第五五四號及第六九六號解釋參照）。家庭制度植基於人格自由，具有繁衍、教育、經濟、文化等多重功能，乃提供個人於社會生活之必要支持，並為社會形成與發展之基礎。而收養為我國家庭制度之一環，係以創設親子關係為目的之身分行為，藉此形成收養人與被收養人間教養、撫育、扶持、認同、家業傳承之人倫關係，對於收養人及被收養人之身心發展與人格之形塑具有重要功能。是人民收養子女之自由，攸關收養人及被收養人之人格自由發展，應受憲法第二十二條所保障。

The Additional Articles of the Constitution clearly state "… responding to necessity before national reunification, according to Article 27 Paragraph 1, Subparagraph 3, and Article 174, Paragraph 1, enacted the Additional Articles of the Constitution, Article 11 of which provides that "For managing affairs and the relations of rights and obligations between people living in the free area and the mainland area, relevant laws may be specifically enacted." Consequently, Article 65 Paragraph 1 of the Act Governing the Relations Between People of the Taiwan Area and the Mainland Area serve as a specially enacted law to protect the rights and obligations between the people from the two areas (see Judicial Yuan Interpretations Nos. 618, and 710). Article 65 Paragraph 1 of the Act Governing the Relations Between People of the Taiwan Area and the Mainland Area states: "The court shall not approve People of the Taiwan Area adopting children of the Mainland Area under any one of the following circumstances: 1. where any one of the adoptive parents already has a child or adopted child. " Under the current state

憲法增修條文前言明揭：「為因應國家統一前之需要，依照憲法第二十七條第一項第三款及第一百七十四條第一款之規定，增修本憲法條文如左：……。」憲法增修條文第十一條亦明定：「自由地區與大陸地區間人民權利義務關係及其他事務之處理，得以法律為特別之規定。」而臺灣地區與大陸地區人民關係條例即為規範國家統一前，臺灣地區與大陸地區間人民權利義務及其他事務所制定之特別立法（本院釋字第六一八號、第七一0號解釋參照）。該條例第六十五條第一款規定：「臺灣地區人民收養大陸地區人民為養子女，……有下列情形之一者，法院亦應不予認可：一、已有子女或養子女者。」（下稱系爭規定）是在兩岸分治之現況下，就臺灣地區人民已有子女或養子女而欲收養大陸地區人民者，明定法院應不予認可，對臺灣地區人民收養大陸地區人民之自由有所限制。

of separate governing bodies in the two areas, this Act prohibits parents of the Taiwan area with a child or adopted child from adopting a child from the Mainland Area. The current Act prohibits the court from approving such an adoption and is a violation of the right to adopt for the people of the Taiwan Area.

Dealing with cross-strait affairs requires consideration[s] of and judgment[s] regarding[on] numerous economic, political, and social factors. The constitutional interpreters should rightfully give due respect to the decisions made by the legislative branch, which represents the diverse opinions of the people, and have ample information on hand in that regard unless there has been any noticeable or significant oversight on the part of the legislative branch (see Judicial Yuan Interpretation No. 618). However, restrictions placed on the people of the Taiwan area adopting people of the Mainland area should not violate Article 23 of the Constitution.

鑑於兩岸關係事務，涉及政治、經濟與社會等諸多因素之考量與判斷，對於代表多元民意及掌握充分資訊之立法機關就此所為之決定，如非具有明顯之重大瑕疵，職司法律違憲審查之釋憲機關固宜予以尊重（本院釋字第六一八號解釋參照）。惟對臺灣地區人民收養大陸地區人民自由之限制，仍應符合憲法第二十三條比例原則之要求。

Legislators took into consideration the close cultural and ancestral ties between people of Taiwan and the Mainland area before legislating against the adoption of people from the Mainland Area. Should the people of the Taiwan Area be free to adopt people of the Mainland Area without limitation, a large displacement of population from the Mainland Area to the Taiwan Area may occur, threatening the stability and safety of society (see Legislative Yuan Gazette, vol. 81, no. 51 p. 152). Thus in the interests of the welfare and well-being of the general public, the Act prohibits the adoption of people of the Mainland Area by persons who already have a child or adopted child. This prevents a population displacement from the Mainland Area to the Taiwan Area, and meets the original intent of the legislation.

立法者鑑於臺灣與大陸地區人民血統、語言、文化相近，如許臺灣地區人民依民法相關規定收養大陸地區人民，而無其他限制，將造成大陸地區人民大量來臺，而使臺灣地區人口比例失衡，嚴重影響臺灣地區人口發展及社會安全，乃制定系爭規定，以確保臺灣地區安全及社會安定（立法院公報第八十一卷第五十一期（上）第一五二頁參照），核屬維護重要之公共利益，目的洵屬正當。系爭規定就已有子女或養子女之臺灣地區人民收養大陸地區人民時，明定法院應不予認可，使大陸地區人民不致因被臺灣地區人民收養而大量進入臺灣地區，亦有助於前揭立法目的之達成。

However, for people of the Taiwan Area to adopt[ing] children of a spouse from the Mainland Area [spouse's child(ren), may encourage] is conducive to encouraging marital happiness, family harmony. It also[and] fosters the adopted

惟臺灣地區人民收養其配偶之大陸地區子女，將有助於其婚姻幸福、家庭和諧及其與被收養人之身心發展與人格之形塑，系爭規定並未就此種情形排除法院應不予認可之適用，實與憲法強調人民婚姻與家庭應受制度性保障，及

children's physical and mental well-being and helps develop their personality. The provision in dispute does not address such areas, and is a de facto contradiction of the Constitution's principle to protect the marriage and family of the people['s rights to marriage and family system] as well as their human dignity and freedom to develop their personality. From this perspective, the constraint placed on the adoption of people of Mainland Area is an overregulation and opposes the intent to protect the general welfare of the public. This section of the clause pertaining to the restriction of people of the Taiwan area adopting children of a spouse of the Mainland Area[spouse's child] violates the principle of proportionality of Article 23 of the Constitution and the freedom to adopt of Article 22 of the Constitution and shall be held invalid on the date of issuance of this Interpretation.

維護人性尊嚴與人格自由發展之意旨不符。就此而言，系爭規定對人民收養其配偶之大陸地區子女自由限制所造成之效果，與其所欲保護之公共利益，顯失均衡，其限制已屬過當，與憲法第二十三條比例原則不符，而牴觸憲法第二十二條保障人民收養子女自由之意旨。於此範圍內，系爭規定與本解釋意旨不符部分，應自本解釋公布之日起失其效力。

To lessen the court's intervention in the people's freedom to adopt, relevant agencies should consider the political, economic, and social implications when processing requests for adoption from the

為減少干預人民收養子女之自由，相關機關對臺灣地區人民收養大陸地區人民之其他相關規定，仍應考量兩岸政治、經濟及社會因素之變遷，適時檢討修正，併此指明。

people of the Taiwan Area who wish to adopt people of the Mainland Area. Relevant regulations should also be examined and updated in a timely way.

Justice Yeong-Chin Su filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion, in Justice Beyue C. Su joined.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion in part and dissenting opinion in part.

Justice Chang-Fa Lo filed concurring opinion in part and dissenting opinion in part.

Justice Shin-Min Chen filed dissenting opinion in part.

本號解釋蘇大法官永欽提出之協同意見書；黃大法官茂榮及陳大法官碧玉共同提出之協同意見書；陳大法官春生提出之協同意見書；葉大法官百修提出之部分協同部分不同意見書；羅大法官昌發提出之部分協同部分不同意見書；陳大法官新民提出之部分不同意見書。

EDITOR'S NOTE:

Summary of facts: 1.A has three daughters from his prior marriage. He applied to adopt the children of his present spouse from the Mainland Area. The Taiwan Taipei District Court denied his application to adopt children from the

編者註：

事實摘要：（一）聲請人A於前婚姻育有三女，再婚後欲收養其配偶與前夫所生之大陸地區子女，向臺北地方法院聲請認可收養，經法院依系爭規定駁回。（二）B原為大陸地區人民已有一子，改嫁臺灣地區人民取得中華民

Mainland Area based on the Act Governing the Relations between People of the Taiwan Area and People of the Mainland Area.2.B was a Mainland Area National with one son who later divorced and remarried in Taiwan. After obtaining his Taiwanese citizenship, he divorced his Taiwanese spouse and applied to adopt his orphan son from the Mainland Area. The Taiwan New Taipei District Court denied his application based on the Act Governing the Relations between People of the Taiwan Area and People of the Mainland Area.

國國籍來台後離婚，欲收養已在大陸地區辦妥收養程序之大陸地區孤兒，向臺灣板橋地方法院（現為臺灣新北地方法院）聲請認可收養，經法院依系爭規定駁回。

The two applicants appealed the decisions twice but were twice dismissed by the court. The petitioners filed for a judicial interpretation and argued that the rulings were unconstitutional and contravened the equal protection clause of Articles 5 and 7 as well as the right to adoption of Article 22 and the principle of proportionality of Article 23 of the Constitution. The Justices of the Constitutional Court considered the two cases to be of the same nature and made the above Interpretation.

二聲請人均不服，分別抗告及再抗告，均遭裁定駁回而確定，爰認系爭規定有牴觸憲法第 5 條、第 7 條保障之平等權及第 22 條保障人民收養子女自由之意旨，與憲法第 23 條比例原則不符，分別聲請解釋。大法官就二案先後受理，因二聲請人主張違憲標的相同，乃予以併案審理。

J. Y. Interpretation No.713（October 18,2013）*

【Case regarding penalty for belated filing of tax withholding statement】

ISSUE: Is it unconstitutional to impose a 1.5 fold penalty on tax withholders who fail to file the tax withholding statement in the same way as on those who fail to withhold money for taxation ?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）；Article 6 Section 1 Paragraph 2 of the Standards for Reducing Penalties in Cases of Tax Violations (revised and promulgated on 20 June 2002, revised and repealed on 27 May 2011)（稅務違章案件減免處罰標準第六條第一項第二款（中華民國九十一年六月二十日修正發布，一００年五月二十七日修正刪除））；Article 48-3 of the Tax Collection Act（稅捐稽徵法第 48 條之 3（一０六年一月十八日修正公布））；J. Y.Interpretations Number 399,Nos 582, 622,675 and 698（司法院釋字第三九九號、第五八二號、第六二二號、第六七五號、第六九八號解釋）；Article 5 Section 1 Paragraph 2 and Section 3 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款及第三項（八十二年二月三日修正公布））.

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* Translated by John Chia-Chieh Cheng.

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

KEYWORDS:

duty to withhold money for taxation（扣繳義務）, tax withholding statement（扣繳憑單）, principle of proportionality（比例原則）, to impose a penalty（罰鍰制裁）, weighing the merit of each case（斟酌個案情節輕重）, other appropriate measures（另為適當處置）.**

HOLDING: Article 6 Section 1 Paragraph 2 of the Standards for Reducing Penalties in Cases of Tax Violations (revised and promulgated by the Ministry of Finance on 20 June 2002) provides:"In cases falling under Article 114 Paragraph 1 of the Income Tax Act the penalty may be reduced or exempted under one of the following circumstances: ... 2. A tax withholder, who has subsequently paid up in full the tax that should have been withheld but was not or insufficiently withheld, and who has not within the given time limit filed a tax withholding statement but prior to the imposition of penalty truthfully submitted a supplement, shall be subject to a 1.5 fold penalty of the insufficient amount (revised and repealed on 27 May 2011). The amount of penalty has exceeded the degree of necessity and to this

解釋文：財政部中華民國九十一年六月二十日修正發布之稅務違章案件減免處罰標準第六條第一項第二款規定：「依所得稅法第一百十四條第一款規定應處罰鍰案件，有下列情事之一者，減輕或免予處罰：……二、扣繳義務人已於期限內補繳應扣未扣或短扣之稅款，未在期限內補報扣繳憑單，於裁罰處分核定前已按實補報者，按應扣未扣或短扣之稅額處一・五倍之罰鍰」（一００年五月二十七日修正刪除），關於裁處罰鍰數額部分，已逾越必要程度，就此範圍內，不符憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之意旨有違，應自本解釋公布之日起不再適用。

extent is not consistent with the principle of proportionality under Article 23 of the Constitution. It violates Article 15 of the Constitution protecting people's property right and therefore shall be inapplicable upon publication of this Judicial Interpretation.

REASONING: The petitioner has filed for constitutional interpretation on grounds of possible unconstitutionality of Article 6 Section 1 Paragraph 2 of the Standards for Reducing Penalties in Cases of Tax Violations as applied by the Highest Administrative Court in Decision No. 1000 of the year 2008 (hereinafter referred to as the affirmed final decision). Article 6 Section 1 Paragraph 2 of the Standards for Reducing Penalties in Cases of Tax Violations issued by the Ministry of Finance on 20 June 2002 provides: "In cases falling under Article 114 Paragraph 1 of the Income Tax Act the penalty may be reduced or exempted under one of the following circumstances: ... 2. A tax withholder, who has subsequently paid in full the tax that should have been withheld but was not or insufficiently withheld, and

解釋理由書：聲請人以最高行政法院九十七年度判字第一０００號判決（下稱確定終局判決）所適用之財政部九十一年六月二十日修正發布之稅務違章案件減免處罰標準第六條第一項第二款：「依所得稅法第一百十四條第一款規定應處罰鍰案件，有下列情事之一者，減輕或免予處罰：……二、扣繳義務人已於期限內補繳應扣未扣或短扣之稅款，未在期限內補報扣繳憑單，於裁罰處分核定前已按實補報者，按應扣未扣或短扣之稅額處一・五倍之罰鍰」（下稱系爭規定，嗣於一００年五月二十七日修正刪除）有違憲疑義，聲請解釋憲法。查確定終局判決雖未明載系爭規定，然由其所持法律見解，可判斷係以系爭規定為判決之部分基礎，應認確定終局判決實質上業已適用系爭規定，系爭規定自得作為憲法解釋之客體（本院釋字第三九九號、第五八二號、

who has not within the given time limit filed a tax withholding statement but prior to the imposition of penalty truthfully submitted a supplement, shall be subject to a 1.5 fold penalty.” (hereinafter referred to as disputed clause, subsequently repealed on 27 May 2011). An affirmed final decision, though not in direct reference to the disputed clause, should be viewed as applying such clause in essence and may be an object for constitutional interpretation if the disputed clause may be regarded as forming the partial basis of the decision (see Judicial Yuan Interpretations Number 399, Number 582, Number 622, Number 675 and Number 698).

第六二二號、第六七五號及第六九八號解釋參照）。

Tax withholders are obliged to withhold tax and to file tax withholding statements. Violations of these two obligations apparently cause different degrees of harm to national revenues and the maintenance of public interest in taxation.

扣繳義務人之扣繳義務，包括扣繳稅款義務及申報扣繳憑單義務，二者之違反對國庫稅收及租稅公益之維護所造成之損害，程度上顯有差異。如扣繳義務人已於限期內補繳應扣未扣或短扣之稅款，僅不按實補報扣繳憑單者，雖影響稅捐稽徵機關對課稅資料之掌握及納稅義務人之結算申報，然因其已補繳稅款，所造成之不利影響較不補繳稅款為輕，乃系爭規定就此部分之處罰，與同標準第六條第一項第三款所定未於限

If a tax withholder who has subsequently paid up in full the tax that should have been withheld but was not or insufficiently withheld and only fails to duly file

the tax withholding statement, the damages incurred by such late payment of withholding tax, though affecting the Revenue Service Authorities' data management regarding tax liability and taxpayer's tax return filings, are less severe than in cases where taxes have not been subsequently paid up. The fact that the penalty imposed by the disputed clause for the late full payment by a tax withholder prior to the administrative ruling of penalty is the same 1.5 fold amount as for insufficient withholding taxes, denies any discretion to Revenue Service Authorities to take into account the merits of each individual case when determining the amount of penalty. It obviously exceeds the necessary extent and is inconsistent with the proportionality principle under Article 23 of the Constitution and Article 15 protecting people's property right and shall be inapplicable upon the date of publication of this Judicial Interpretation. It should also be pointed out that all concerned authorities shall consider the weight of each individual case where a tax withholder has subsequently paid up in full his tax withholding liability yet fails to file tax

期內補繳應扣未扣或短扣之稅款，於裁罰處分核定前已按實補繳者之處罰等同視之，一律按應扣未扣或短扣之稅額處一・五倍之罰鍰，未許稅捐稽徵機關得參酌具體違章狀況，依情節輕重裁量罰鍰之數額，其處罰顯已逾越必要程度，不符憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之意旨有違，應自本解釋公布之日起不再適用。有關機關對未於限期內補報扣繳憑單，於裁罰處分核定前已按實補報之案件，應斟酌個案情節輕重，並依稅捐稽徵法第四十八條之三之規定，另為符合比例原則之適當處置，併予指明。

withholding statement before a penalty is imposed, and adequate measures shall be taken in accordance with Article 48-3 Tax Collection Act and the Proportionality Principle.

The petitioner also claims possible violation of the Constitution, thus requesting an interpretation of Article 8 Paragraph 11 of the Income Tax Act: “The term "income from sources in the Republic of China" used in this Act refers to income of the following categories: ... 11. Any other income obtained within the territory of the Republic of China.”. As to the claim that the definition of the term 「income from sources in the Republic of China」violates the principle of clarity and definiteness of law, we find no clear and objective violation of the Constitution. Petitioner furthermore claims that the mentioned provision violates the principle of equality, as the affirmed final decision inappropriately considers the payment of satellite transmission fees to a foreign organization to be 「income from sources in the Republic of China」. Since the admission of facts and application of

聲請人另以所得稅法第八條第十一款規定：「本法稱中華民國來源所得，係指左列各項所得：……十一、在中華民國境內取得之其他收益」有違憲疑義，聲請解釋。惟查其指摘前揭「中華民國來源所得」之定義過於模糊，有違法律明確性部分，尚難謂已具體敘明前揭規定於客觀上有何牴觸憲法之處；至其指摘該款規定違反平等原則部分，乃爭執確定終局判決將聲請人支付國外機構之衛星傳送費，認定為「中華民國來源所得」之見解不當，核屬關於法院認事用法之爭執，均與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理，併此指明。

laws are determined by the courts, this issue is not within the scope of Article 5 Section 1 Paragraph 2 of the Constitutional Interpretation Procedure Act and therefore should be dismissed according to Section 3 of that Article.

Justice Mao-Zong Huang filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Chang-Fa Lo filed concurring opinion in part and dissenting opinion in part.

Justice Dennis Te-Chung Tang filed dissenting opinion in part.

Justice Si-Yao Lin filed dissenting opinion, in which Justice Ming Chen and Justice Hsi-Chun Huang joined.

本號解釋黃大法官茂榮提出協同意見書;陳大法官新民提出協同意見書;羅大法官昌發提出部分協同部分不同意見書;湯大法官德宗提出部分不同意見書;林大法官錫堯提出,陳大法官敏、黃大法官璽君加入不同意見書。

EDITOR'S NOTE:

Summary of facts: Summary of facts: The petitioner A was the responsible person at TVBS Company from 2000 to 2003 and therefore the tax withholder under the Tax Law. In the preceding year the Company paid satellite transmission fees to a foreign enterprise but failed to with-

編者註：

事實摘要：聲請人A於89至92年度為B製作公司負責人，係稅法所定扣繳義務人。該公司於上揭年度給付國外機構衛星傳送費，因未依所得稅法第88條規定扣繳20%稅款，經財政部臺北市國稅局限期責令補繳「應扣未扣稅款」並補報各年度之「扣繳憑單」。

hold 20% tax in accordance with Article 88 of the Income Tax Act. The National Taxation Bureau of Taipei, Ministry of Finance, ordered him to pay up the insufficient withholding amount and to file the withholding statements of the respective years. The petitioner has subsequently paid up the insufficient withholding amount but did not within the given time limit file the tax withholding statements. The National Taxation Bureau of Taipei therefore imposed a 1.5 fold penalty of more than NTD$ 20,000,000 according to Article 114 Paragraph 1 Income Tax Act and Article 6 Section 1 Paragraph 2 of the Standards for Reducing Penalties in Cases of Tax Violations. The petitioner did not accept this ruling of penalty and initiated administrative litigation. Upon affirmation of the decision he filed petition for Judicial Interpretation on the constitutionality of the aforementioned Standards for Reducing Penalties in Cases of Tax Violations.

嗣聲請人依限補繳稅款，惟未在期限內補報扣繳憑單，臺北市國稅局乃依所得稅法第 114 條第 1 款及稅務違章案件減免處罰標準第 6 條第 1 項第 2 款規定，處聲請人該稅款 1.5 倍之罰鍰，計 2 千餘萬元。聲請人不服，循序提起行政訴訟，經判決確定，爰主張前揭處罰標準規定等違憲，聲請解釋。

J. Y. Interpretation No.714 （November 15, 2013）*

【Liability for Pollution produced prior to the entry into force of the Soil and Underground Water Pollution Control Act】

ISSUE: Is Article 48 of the Soil and Underground Water Pollution Control Act which holds a polluter liable for pollution produced prior to the entry into force of the law and which has continued thereafter unconstitutional ?

RELEVANT LAWS:

Articles 15, 23 of the Consititution （憲法第十五條、第二十三條）；Article 1, Section 12 of Article 2, Article 48 of the Soil and Groundwater Pollution Remediation Act , promulgated on February 2, 2000（土壤及地下水污染整治法第一條、第二條第十二款、第四十八條(中華民國八十九年二月二日制定公布））；Article 13 of the Waste Disposal Act, promulgated on July 26, 1974（廢棄物清理法第十三條（六十三年七月二十六日制定公布））；Article 18, Article 26 of the Waste Management Act Taiwan Implemention Rules, promulgated on May 21, 1975 and repealed on February 1, 2002（廢棄物清理法臺灣省施行細則第十八條、第二十條（六十四年五月二十一日訂定發布、九十一年二月一日廢止））.

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* Translated by Assistant Professor Huai-Ching Tsai.

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

KEYWORDS:

Soil and Groundwater Pollution Remediation Act（土壤及地下水污染整治法）, the polluter pays for his own pollution（污染者付費）, right to property （財產權）, right to work （工作權）, freedom to carry on business （營業自由）, principle of prohibition against retroactive laws （法律不溯及既往原則）, principle of protection of reliability（信賴保護原則）, principle of proportionality （比例原則）.**

HOLDING: Article 48 of the Soil and Underground Water Pollution Control Act, promulgated on February 2, 2000, provides: "The provisions of Articles 7, 12, 13, 16 through 18, 32, 36, 38, and 41 are applicable to acts which pollute the soil and underground water occurring before the entry into force of this Act. The relevant part at issue "the provisions are applicable to acts which pollute the soil and underground water occurring before the entry into force of this Act" is a regulation aimed at contamination which persisted after enactment of the said Act. It does not violate the principle of prohibition against retroactive law, or the principle of proportionality stated in Article 23 of the Constitution, nor does it violate

解釋文：中華民國八十九年二月二日制定公布之土壤及地下水污染整治法第四十八條規定：「第七條、第十二條、第十三條、第十六條至第十八條、第三十二條、第三十六條、第三十八條及第四十一條之規定，於本法施行前已發生土壤或地下水污染之污染行為人適用之。」其中有關「於本法施行前已發生土壤或地下水污染之污染行為人適用之」部分，係對該法施行後，其污染狀況仍繼續存在之情形而為規範，尚未牴觸法律不溯及既往原則及憲法第二十三條之比例原則，與憲法第十五條保障人民工作權及財產權之意旨均無違背。

the intent of Article 15 of the Constitution guaranteeing people's right to work and right to property.

REASONING: Article 48 of the Soil and Underground Water Pollution Control Act (hereinafter called the Soil Pollution Act), promulgated on February 2, 2000, provides: "The provisions of Articles 7, 12, 13, 16 through 18, 32, 36, 38, and 41 are applicable to acts which pollute the soil and underground water occurring before the entry into force of this Act." (hereafter called the provisions at issue). The provisions imposed a duty on the polluter to avoid spreading pollution and to clean up any contamination which persisted after the entry into force of the Soil Pollution Act, and prescribed penalties and enforcement measures for violating the abovementioned duty. The provisions at issue were applicable to polluters whose acts of pollution of soil or underground water occurred prior to the entry into force of the Act (hereafter called a pre-Act polluter). Such polluters are deemed liable for post-Act contamination. The intent of these provisions was to pre-

解釋理由書：八十九年二月二日制定公布之土壤及地下水污染整治法（下稱土污法）第四十八條規定：「第七條、第十二條、第十三條、第十六條至第十八條、第三十二條、第三十六條、第三十八條及第四十一條之規定，於本法施行前已發生土壤或地下水污染之污染行為人適用之。」（下稱系爭規定）所列規定係課污染行為人就土污法施行後仍繼續存在之污染狀況，有避免污染擴大及除去之整治等相關義務，以防止或減輕該污染對國民健康及環境之危害，並對違反土污法所定前述義務之處罰及強制執行。系爭規定將所列規定適用於本法施行前已發生土壤或地下水污染之污染行為人（下稱施行前之污染行為人），使其就土污法施行後之污染狀況負整治義務等。其意旨僅在揭示前述整治義務以仍繼續存在之污染狀況為規範客體，不因污染之行為發生於土污法施行前或施行後而有所不同；反之，施行前終了之污染行為，如於施行後已無污染狀況，系爭規定則無適用之餘地，是尚難謂牴觸法律不溯及既往原

scribe, as the regulatory object, a duty to clean up continuing contamination. They did not intend to distinguish pollution which occurred before, from that which occurred after, implementation of the Soil Pollution Act. Indeed, if the pollution ended before the Act was implemented, and no more pollution occurred after the Act came into force, then the provisions at issue do not apply. Therefore, they cannot be said to have violated the principle of prohibition against retroactive law. Also, Article 2, Section 12 of the Soil Pollution Act provides: " A polluter means a person who has caused soil or underground water contamination by acts described below: (1) unlawful discharge, leaks, pumping, or disposal of a contaminant; (2) acting as a conduit for or tolerating an unlawful discharge, leak, pumping, or disposal of a contaminant; (3) failure to clean up contamination as required by law. When the alleged contamination is attributable to unlawful acts undertaken by the polluter (for example, Article 13 of Waste Management Act promulgated on July 26, 1974, Article 18 and Article 26 of Taiwan Implemention Rules for the same Act

則。且依土污法第二條第十二款規定：「污染行為人：指因有下列行為之一而造成土壤或地下水污染之人：（一）非法排放、洩漏、灌注或棄置污染物。（二）仲介或容許非法排放、洩漏、灌注或棄置污染物。（三）未依法令規定清理污染物。」該污染係由施行前之污染行為人之非法行為（例如六十三年七月二十六日制定公布之廢棄物清理法第十三條；六十四年五月二十一日訂定發布、九十一年二月一日廢止之同法臺灣省施行細則第十八條、第二十條規定）造成，亦無值得保護之信賴而須制定過渡條款或為其他合理補救措施之問題。

promulgated on May 21, 1975, repealed on February 1, 2002), there is no need to make transitional regulations or take other reasonable remedial measures to protect legal reliability.

Most acts of soil and underground water pollution were caused by agricultural, industrial, or business operations. The provisions at issue imposed a duty on the pre-Act polluter to clean up, to pay for the clean-up, and to shut down operations, because contamination persisted after enactment of the Soil Pollution Act. This is a restriction on people's right to work and right to property guaranteed by Article 15 of the Constitution, and a restriction on freedom to carry on business implicit in that Article. Therefore, the Act must be made to accord with the principle of proportionality set out in Article 23.

土壤及地下水之污染多肇因於農、工、商之執業或營業行為，系爭規定課土污法施行前之污染行為人就施行後仍繼續存在之污染狀況負整治、支付費用及停業、停工等義務，即屬對憲法第十五條所保障之人民工作權、財產權及其內涵之營業自由所為限制，自應符合憲法第二十三條之比例原則。

The purpose of the enactment of the Soil Pollution Act was to clean up soil and underground water contamination, to ensure the continued use of soil and underground water, to improve the living environment, and to protect public health

查土污法之制定，係為整治土壤及地下水污染，確保土地及地下水資源永續利用，改善生活環境，維護國民健康（土污法第一條參照）。系爭規定為妥善有效處理前述土壤或地下水污染問題，使土污法施行前發生而施行後仍繼

(refer to Article 1 of the Soil Pollution Act). The provisions at issue are aimed at properly disposing of the abovementioned soil and underground water contamination, eliminating any contamination which existed before, and persisted after, the Act, carrying out a complete clean-up, whilst avoiding any spreading of the contamination. The Act has a proper purpose, and the means employed are helpful to achieving the end.

續存在之污染問題可併予解決，俾能全面進行整治工作，避免污染繼續擴大，目的洵屬正當，且所採手段亦有助於上開目的之達成。

If we do not make a pre-Act polluter responsible for existing pollution, the damage will be born by others or by the nation. This offends social justice and affects national finances. Therefore, the provisions at issue make a pre-Act polluter responsible for the clean-up in order to properly resolve the issue of soil and underground water contamination. There being no other less restrictive means to attain the same effect, the provisions at issue shall be regarded as a necessary means to achieve the legislative purpose.

對施行前之污染行為人若不命其就現存污染狀況負整治責任，該污染狀況之危害，勢必由其他人或國家負擔，有違社會正義，並衝擊國家財政。是系爭規定明定施行前之污染行為人負整治責任，始足以妥善有效處理土壤及地下水污染問題，而又無其他侵害較小之手段可產生相同效果，自應認系爭規定係達成前述立法目的之必要手段。

Pre-Act contamination persisting after the Act will jeopardize public health

土污法施行前發生之污染狀況於土污法施行後仍繼續存在者，將對國民

and the environment. Effective resolution of the issue of contamination is both necessary and in the public interest. The contamination caused by the pre-Act polluter was illegal. By law, the polluter was responsible to a certain degree for eliminating the contamination. The provisions at issue imposed a duty to clean-up, and placed certain restrictions on a polluter's right to property. In comparison with the public interest protected, this is not evidently excessive. Overall, it does not violate the principle of proportionality stated in Article 23 of the Constitution, nor does it violate the intent of Article 15 of the Constitution guaranteeing people's right to work and right to property.

健康及環境造成危害，須予以整治，方能妥善有效解決污染問題，以維公共利益。況施行前之污染行為人之污染行為原屬非法，在法律上本應負一定除去污染狀況之責任，系爭規定課予相關整治責任，而對其財產權等所為之限制，與所保護之公共利益間，並非顯失均衡。綜上，系爭規定尚未牴觸憲法第二十三條之比例原則，與憲法保障人民工作權、財產權及其內涵之營業自由之意旨均無違背。

According to Article 2, Section 12 of the Soil Pollution Act, a polluter is any person who commits acts listed in the law. Therefore, the provisions at issue take a person committing the abovementioned acts as the regulatory object. Whether an assignee of the polluter should assume the clean-up duty is not a question within the regulatory scheme of the provisions at issue. Therefore, there is no question as to

依土污法第二條第十二款規定，污染行為人指為該款所列各目行為之人。是系爭規定係以為上開污染行為之行為人為規範對象。至污染行為人之概括繼受人是否承受其整治義務，非屬系爭規定之規範範疇，自亦不生系爭規定未區分污染行為人與概括繼受人之整治義務是否違反平等原則之問題，併此指明。

whether the provisions at issue violate the principle of equality by failing to distinguish if the duty to clean-up falls on the polluter or an assignee.

Justice Yeong-Chin Su filed concurring opinion.

Justice Si-Yao Lin filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Chang-Fa Lo filed concurring opinion.

Justice Beyue Su Chen filed concurring opinion in part and dissenting opinion in part.

Justice Shin-Min Chen filed dissenting opinion.

本號解釋蘇大法官永欽提出協同意見書；林大法官錫堯提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官春生提出協同意見書；羅大法官昌發提出協同意見書；陳大法官碧玉提出部分協同部分不同意見書；陳大法官新民提出不同意見書。

EDITOR'S NOTE:

Summary of facts: Article 48 of the Soil and Underground Water Pollution Control Act, promulgated on February 2, 2000, provides that the said Act's pollution control measures and related penalties (8 articles in total) are applicable to

編者註：

事實摘要：89 年 2 月 2 日制定公布之土壤及地下水污染整治法第 48 條規定，該法所定污染防治等措施及相關罰則 (計 8 條)，於該法施行前已發生土壤或地下水污染之污染行為人適用之 (下稱系爭規定)。

polluters for soil and underground water pollution occurring prior to the said Act's entry into force.

Petitioner A Industrial Development Corporation merged with Taiwan Alkali Industry Corporation (hereafter called B Co., a now defunct corporation) in 1983 under the direction of the Ministry of Economic Affairs. In 2004, the Tainan City Government determined that the dioxin and mercury pollution of C Factory and other facilities originally belonging to the B Corporation, were attributable to its processing of Pentachlorophenol and the exposure of residual piles penetrating the soil during the period 1965–1978, and that the company was the polluter. It was held responsible for liability under the Soil Pollution Act. Since the petitioner had merged with and absorbed its legal personality, all general liability was to be assumed by the petitioner. Tainan City ordered the petitioner to pay NT$652,221 as a clean-up fee, and to provide land to store the pollutants. The petitioner did not comply. The cost was doubled, with a penalty and late fee, in accordance with

聲請人A化學工業開發公司於72年間奉經濟部令合併B公司(下稱B公司，該公司因而消滅)。93年間臺南市政府認原屬B公司C廠等場址之戴奧辛及汞污染情形，係該公司54年至67年間，生產五氯酚等產製過程及剩餘產品露天堆放滲入土壤所造成，該公司為污染行為人，應依系爭規定負土污法所定整治責任，聲請人既合併吸收其法人人格，自應概括承受其責任，乃命聲請人繳納652,221元整治費用，另命提供土地以供設置汙染物安置區等。聲請人均未遵行，又被依相關規定加計2倍費用，並課處罰鍰及怠金，總計2,858,881元。聲請人不服，提起行政爭訟，並認經濟部未妥善監督且命二公司合併係違法行使公權力行為，提起國家賠償訴訟，惟均遭駁回確定，爰主張系爭規定有違法律不溯及既往等原則疑義，聲請解釋。

relevant rules, totaling NT$2,858,881. The petitioner instituted an administrative litigation to contest the order. It contended that the Ministry of Economic Affairs had failed to supervise the two corporations properly, and that the Ministry's ordering the merger of the two corporations was an illegal exercise of public power. The petitioner sued for national compensation. However, it was affirmed that all claims were to be denied. Thereafter, a petition for a constitutional interpretation on the ground that the relevant law is suspected of violating the principle of prohibition of retroactive laws was lodged.

J. Y. Interpretation No.715（December 20, 2013）*

【Case concerning inadmissibility of persons who have a record of conviction to examinations for reserve military or noncommissioned officers】

ISSUE: Is it unconstitutional to prohibit people with a record of conviction from registering for the reserve military or reserve noncommissioned officer examination as stipulated by the Ministry of National Defense in the recruitment and admission guidelines ?

RELEVANT LAWS:

Articles 18 and 23 of the Constitution（憲法第十八條、第二十三條條）；Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）；Point 1.2(2) of the 2010 Examination and Admission Guidelines for the Volunteer Reserve Military Officer and Reserve Noncommissioned Officer Examination（中華民國九十九年國軍志願役專業預備軍官預備士官班考選簡章壹、二、(二)）；Article 11, Paragraph 1 of the Act Of Military Service System」）（兵役法第十一條第一項(一0五年五月十八日修正公布)）；Article 5, Paragraph 1, Subparagraph 4, and Paragraph 3 of the

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* Translated by Spenser Y. Hor, Esq. and Chien Yeh Law Offices.

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

Act of Military Education（軍事教育條例第 5 條第 1 項第 4 款、第 3 項 (一 0 五年十一月九日修正公布)）；Article 3, Paragraph 1 of Article 5, and Paragraph 1 of Article 16 of the Enforcement Regulations regarding Selection and Training of Reserve Ranking Officers and Reserve Noncommissioned Officers for Military Services (as amended on April 27, 2009)（預備軍官預備士官選訓服役實施辦法第三條、第五條第一項、第十六條第一項（九十八年四月二十七日修正公布））；Article 8-3, Subparagraph 3 of the Military Academy Attendance Rules（軍事學校學員生修業規則第八條之三第三款）.

KEYWORDS:

Right to hold public office（服公職權）, principle of legal reservation（法律保留原則）, principle of proportionality（比例原則）, reserve military officers（預備軍官）, reserve noncommissioned officers（預備士官）, military（軍職）, examination（考選）, record of conviction（刑之宣告）, negative qualifications（消極資格）, military service（兵役）, military education（軍事教育）, discretion（裁量）, public interest（公共利益）, intention（故意）, negligence（過失）, minor offense（情節輕微）.**

HOLDING: Point 1.2(2) of the "2010 Examination and Adm-ission Guidelines for the Volunteer Reserve Military Officer and Reserve Noncommissioned Officer Examination" regulating

解釋文：中華民國九十九年國軍志願役專業預備軍官預備士官班考選簡章壹、二、（二）規定：「曾受刑之宣告……者，不得報考。……」與憲法第二十三條法律保留原則無違。惟其對

that "Those who have a record of conviction … cannot register for the examination" complies with the principle of legal reservation provided by Article 23 of the Constitution. However, if restrictions on examination qualifications are applied beyond the extent necessary, it violates the principle of proportionality, as set out in Article 23 of the Constitution, and people's right to hold public office under Article 18 of the Constitution. Recruitment and admission guidelines for similar examinations held by relevant government agencies in the future should thus follow the intent provided in this Interpretation.

應考試資格所為之限制，逾越必要程度，牴觸憲法第二十三條比例原則，與憲法第十八條保障人民服公職之權利意旨不符。相關機關就嗣後同類考試應依本解釋意旨妥為訂定招生簡章。

REASONING: According to Article 5, Paragraph 1, Sub-paragraph 2 of the Constitutional Interpretation Procedure Act, if rights guaranteed to the people by the Constitution have been violated and legal proceedings initiated, and there are doubts whether the laws or ordinances applied in the final judgment conflict with the constitution, constitutional interpretation may be sought. National Planning Ordinance No. 098003746 of December 14, 2009 issued by the Department of

解釋理由書：按人民於其憲法上所保障之權利，遭受不法侵害，經依法定程序提起訴訟，對於確定終局裁判所適用之法律或命令發生有牴觸憲法之疑義者，得聲請解釋憲法，司法院大法官審理案件法第五條第一項第二款定有明文。國防部九十八年十二月十四日國力規劃字第０九八００三七四六號令頒「九十九年國軍志願役專業預備軍官預備士官班考選簡章」（下稱系爭簡章）係就有關九十九年國軍志願役專業預備軍官預備士官班之招生考選（下稱系爭

National Defense authorizes the "2010 Examination and Admission Guidelines for the Volunteer Reserve Military Officer and Reserve Noncommissioned Officer Examination" (hereinafter referred to as the "Disputed Guidelines"), which set forth matters related to the 2010 class recruitment examination for volunteer reserve military officers and reserve noncommissioned officers (hereinafter referred to as the "Disputed Examination"). It is a general regulation announced to the public and thus shall be considered an ordinance as referred to above. Therefore the court may review these Disputed Guidelines to confirm its conformity with constitutional law.

考選）事項所訂定，並對外發布之一般性法規範，屬前開規定所稱之命令，得為本院違憲審查之客體，合先敘明。

Article 18 of the Constitution protects people's right to hold public office and the right to engage in public service works. Volunteer reserve military officers and volunteer reserve noncommissioned officers are cadres at the basic level in the military and shall be considered public service officers under Article 18 of the Constitution, since they are selected and trained pursuant to statutory procedures

憲法第十八條規定人民有服公職之權利，旨在保障人民有依法令從事於公務之權利。志願役預備軍官及預備士官為軍中基層幹部，係依法定程序選訓、任官，並依國防法等相關法令執行訓練、作戰、後勤、協助災害防救等勤務，自屬憲法第十八條所稱之公職。人民依法令所定方式及程序選擇擔任預備軍官或預備士官以服公職之權利，自應予以保障。九十八年四月二十七日修正

and perform duties such as training, military operations, logistical service, and disaster prevention assistance in accordance with the National Defense Act and other relevant regulations. Therefore, a person's right to choose to become either a reserve military officer or a reserve noncommissioned officer pursuant to the methods and procedures stipulated by law should be protected. Article 16, Paragraph 1 of the Enforcement Regulations regarding Selection and Training of Reserve Ranking Officers and Reserve Noncommissioned Officers for Military Services (hereinafter referred to as "Selection and Training Enforcement Regulations") as amended and announced on April 27, 2009 provides that reserve military officers or reserve noncommissioned officers who pass the basic education will, unless otherwise stipulated, be promoted to either Second Lieutenant or Corporal with their active duty commencing on the date of appointment. Any university or college graduate wishing to enter military service as reserve military or reserve noncommissioned officer shall be admitted by the Disputed Examination and be required

發布之預備軍官預備士官選訓服役實施辦法（下稱選訓服役辦法）第十六條第一項規定，受預備軍官或預備士官基礎教育期滿成績合格者，除該辦法另有規定外，分別以少尉或下士任官分發，並自任官之日起服現役。故大學或專科以上畢業者，如志願以預備軍官或預備士官官階服軍旅，須經系爭考選錄取及完成基礎教育。系爭簡章壹、二、（二）規定：「曾受刑之宣告……者，不得報考。……」（下稱系爭規定）雖非直接禁止受刑之宣告者擔任預備軍官或預備士官之公職，然參加國軍志願役專業預備軍官預備士官班之考選，為大學或專科畢業者擔任前述軍事公職之必要條件；且入學考選錄取者，於受基礎教育期滿成績合格時，即分別以少尉或下士任官分發，而無另外任官考試之程序。系爭規定所為消極資格之限制，使曾受刑之宣告者不得參加系爭考選，因而造成其無法選擇服志願役預備軍官預備士官之公職之結果，自屬對人民服公職權利之限制。

to complete the basic education. Point 1.2(2) of the Disputed Guidelines states: "Those who have a record of conviction ...cannot take the examination" (hereinafter referred to as "Disputed Provision"). Although the Disputed Provision does not directly prohibit those with a record of conviction from becoming a reserve military officer or reserve noncommissioned officer, participation in the Volunteer Reserve Military Officer and Reserve Noncommissioned Officer Examination is a necessary requirement for university or college graduates to serve in the aforementioned military rank. Furthermore, those admitted by said Examination and having passed the basic education are promoted to either Second Lieutenant or Corporal without any further examination procedures. Hence the Disputed Provision is a negative qualification that does not allow those with a record of conviction to take the Disputed Examination. As a result, those with a record of conviction do not have the choice to become either volunteer reserve military or reserve noncommissioned officers, thus restricting people's right to serve in public office.

Article 11, Paragraph 1 of the Conscription Act provides: “The Enforcement Regulations regarding Selection and Training of Reserve Ranking Officers and Reserve Noncommissioned Officers for Military Services stated in the above two articles are issued by the Ministry of National Defense together with the related agencies.” Article 5 of the Act of Military Education states: “The basic education has the objective to cultivate the military officers and noncommissioned officers and is being handled by the military academy, the classification and objectives of the basic education are as follows: … 4. Military habitual education: targeting those with college degrees, vocational degrees or high school degrees, to pursue a military habitual education as its objective; can set up a Standing Ranking Officers class, Standing Junior Officers Class, Reserve Ranking Officers class, Reserve Junior Officers Class or its equivalent classes can be established (Paragraph 1) … The regulations of … enrollment qualification … as stated in Paragraph 1, Subparagraph 4 are determined by the

兵役法第十一條第一項規定：「前二條預備軍官、預備士官選訓服役實施辦法，由國防部會同相關機關定之。」軍事教育條例第五條規定：「基礎教育以培養國軍軍官及士官為目的，由軍事學校辦理，其類別及宗旨如下：……四、軍事養成教育：以對具有大學、專科或中等教育學歷者，施予軍事養成教育為宗旨；得設常備軍官班、常備士官班、預備軍官班、預備士官班或同等班隊（第一項）。……第一項第四款……入學資格……等事項之規則，由國防部定之（第三項）。」而選訓服役辦法第三條規定：「預備軍官或預備士官年度考選之對象、方式、員額、專長職類、資格、報名方式及其他相關事宜，由國防部訂定考選計畫實施，或委任國防部陸軍司令部、國防部海軍司令部、國防部空軍司令部、國防部聯合後勤司令部、國防部後備司令部、國防部憲兵司令部……，擬訂考選計畫陳報國防部核定後實施。」同辦法第五條第一項規定：「預備軍官或預備士官之考選，由國防部、內政部、教育部等相關機關依考選計畫組成考選委員會，訂定考選簡章辦理。但志願役預備軍官、志願役預備士官或義務役預備士官之考選，得由

Ministry of National Defense (Paragraph 3).” Article 3 of the Selection and Training Enforcement stipulates: “The target applicants, methods, quota, subject matter, eligibility, method of registration and other related matters for the annual selection of reserve military officers or noncommissioned officers shall be implemented by the Selection Plan of the Ministry of National Defense, or the Land Command Headquarters of the Ministry of National Defense, Navy Command Headquarters of the Ministry of National Defense, Air Force Command Headquarters of the Ministry of National Defense, the Combined Logistics Command of the Ministry of National Defense, the Reserve Command of the Ministry of National Defense, or the Military Police Command of the Ministry of National Defense shall be appointed to devise the Selection Plan and report such Plan to the Ministry of National Defense and implemented upon approval.” Article 5, Paragraph 1 of the same Enforcement Regulations also mandates: “For the selection of reserve military officers or reserve noncommissioned officer, the Ministry of National Defense,

委任機關依國防部核定之考選計畫組成考選委員會，訂定考選簡章辦理。」故志願役預備軍官預備士官之選訓服役及入學資格等事項之規範，係由立法者基於國防事務之特殊性及專業性，授權國防部訂定；國防部復於依立法授權訂定之選訓服役辦法，明定志願役預備軍官預備士官之考選，得委任機關訂定計畫並經其核定後實施，再依該計畫實際組成考選委員會訂定考選簡章，據以辦理考選。是系爭考選之重要事項如考選對象、方式、員額、專長職類、資格、報名方式等，均係由國防部自行訂定或依其核定之考選計畫形成規範，以為實施之依據。系爭簡章形式上最終雖係由考選委員會依考選計畫所訂定，惟系爭考選之事項仍屬由國防部決定至明。參以軍事教育條例第五條第三項及該條例其他相關規定所訂定之軍事學校學員生修業規則第八條之三第三款亦規定：「學員生入學，應具備下列條件：……三、未曾受刑之宣告……者。但符合少年事件處理法第八十三條之一第一項規定者不在此限。」其雖非直接規定應考資格，然入學資格與考試資格，有直接密切關聯，其入學規定之限制與系爭規定類似。足見系爭規定並未逾越兵役法第十一條第一項及軍事教育條例第五條第

the Ministry of Interior, the Ministry of Education and other relevant agencies shall set up a selection committee pursuant to the Selection Plan to formulate and administer the general guidelines governing the examination. However, for volunteer reserve military officers, volunteer reserve noncommissioned officers or mandatory reserve noncommissioned officers, the appointed agency may form a selection committee to issue the examination guidelines in accordance with the Selection Plan approved by the Ministry of National Defense." Hence, due to the special and professional nature of defense affairs, the legislators have authorized the Ministry of National Defense to prescribe regulations regarding matters such as the selection and training for military services and admission qualifications. The Selection and Training Enforcement Regulations prescribed by the Ministry of National Defense in accordance with legal authorization expressly stipulates that for the selection of volunteer reserve military officers and reserve noncommissioned officers, an agency may be appointed to formulate the plan and implement such

三項規定之直接或間接授權範圍，與憲法第二十三條法律保留原則無違。

plan upon approval, pursuant to which a selection committee will be formed to formulate the guidelines for the selection and administration of examinations. As such, important matters related to the selection such as target applicants, methods, quota, subject matter, eligibility, and method of registration are prescribed unilaterally by the Ministry of National Defense or formulated in accordance with the approved Selection Plan to serve as basis for implementation. Although the Disputed Guidelines are formally issued by the Selection Committee pursuant to the Selection Plan, the Ministry of National Defense still has the authority to decide the content of the Disputed Examination. With reference to Article 8-3, Subparagraph 3 of the Military Academy Attendance Rules prescribed in accordance with Article 5, Paragraph 3 of the Act of Military Education and other relevant provisions, which states: "Student enrollment should meet the following qualifications … 3. Applicants should not have a record of conviction, but those falling under Article 83-1, Paragraph 1 of the Juvenile Proceeding Act are not restricted." Although this

does not directly concern eligibility to participate in examinations, admission eligibility and examination eligibility are very closely related and restrictions of class enrollment rules are similar to the Disputed Provision. This is sufficient to show that the Disputed Regulation does not go beyond the direct or indirect scope of authorization granted under Article 11, Paragraph 1 of the Conscription Act, and Article 5, Paragraph 3 of the Act of Military Education and is consistent with the principle of legal reservation provided by Article 23 of the Constitution.

When state organizations hold examinations to select public employees, in order to differentiate and select the appropriate persons, restrictions on applicant qualifications are not prohibited. This is within the competent authority's discretion and should be respected. Nevertheless, such restrictions should still comply with the principle of proportionality provided by Article 23 of the Constitution.

國家機關因選用公職人員而舉辦考選，為達鑑別並選取適當人才之目的，固非不得針對其需要而限制應考資格，此係主管機關裁量範圍，本應予尊重，然其限制仍應符合憲法第二十三條比例原則。

Volunteer reserve milit-ary officers and reserve noncom-missioned officers

國軍志願役預備軍官預備士官可合法持有國防武器、裝備，必要時並能

can legally possess arms, equipment, and use military force when necessary. Military students are the future national army members or cadres, their personal integrity and ability will have significant impact on the strength of the military. To ensure the quality of military students and cadres as well as the supervision of the military command, the Disputed Provision stipulates that a record of conviction restricts an applicant's qualification to take an exam, so as to prevent lack of integrity or ability among the candidates that may endanger national or military security. This constitutes an important public interest, a legitimate aim, and the method will help achieve the stated purpose.

用武力執行軍事任務；而軍校學生日後均為國軍成員或幹部，其個人品德、能力之優劣與國軍戰力之良窳關係至鉅。為確保軍事學校學生及國軍幹部之素質，維持軍隊指揮監督，系爭規定乃以是否曾受刑之宣告，作為有無應考資格之限制，以預防報考之考生品德、能力不足等情事，肇生危害國家或軍事安全之虞，所欲維護者，確屬重要之公共利益，其目的洵屬正當，且所採手段亦有助於前揭目的之達成。

If a record of conviction arises from intentional criminal offense, it shows a clear lack of integrity. If the criminal offense is committed due to negligence, it means that there is lack of attentiveness. Permitting these people to become cadres at the basic level in the military may be detrimental to the standard of the troop's quality as a whole and the improvement of the overall capability of the troops and

行為人觸犯刑事法律而受刑之宣告，如係出於故意犯罪，顯示其欠缺恪遵法紀之品德；如屬過失犯，則係欠缺相當之注意能力，倘許其擔任國軍基層幹部，或將不利於部隊整體素質及整體職能之提升，或有危害國防安全之虞。系爭規定限制其報考，固屬必要。然過失犯因疏忽而觸法，本無如同故意犯罪之惡性可言，苟係偶然一次，且其過失情節輕微者，難認其必然欠缺應具備之

hence might jeopardize national security. Therefore, the restrictions placed by the Disputed Provision are necessary. However, if an offender committed the crime due to negligence with no malignance of an intentional offense and such act is only an occasional occurrence with slight consequences of minor offense, then it is difficult to say that the offender necessarily lacks integrity and capability and has an impact on military strength. The Disputed Provision deprives such persons the opportunity to hold military posts via the Disputed Examination and does not constitute the mildest way to achieve the stated purpose. It exceeds the necessary extent in contravention of the principle of proportionality under Article 23 of the Constitution and violates people's right to hold public office granted by Article 18 of the Constitution. Relevant agencies should subsequently formulate their recruitment and admission guidelines in accordance with this Interpretation.

服役品德、能力而影響國軍戰力。系爭規定剝奪其透過系爭考選以擔任軍職之機會，非屬達成目的之最小侵害手段，逾越必要程度，牴觸憲法第二十三條比例原則，與憲法第十八條保障人民服公職之權利意旨不符。相關機關就嗣後同類考試應依本解釋意旨妥為訂定招生簡章。

Justice Shin-Min Chen filed concurring opinion.

Justice Chang-Fa Lo filed concur-

本號解釋陳大法官新民提出協同意見書；羅大法官昌發提出協同意見書；蘇大法官永欽提出一部協同一部不同意

ring opinion.

Justice Yeong-Chin Su filed concurring opinion in part and dissenting opinion in part.

Justice Dennis Te-Chung Tang filed concurring opinion in part and dissenting opinion in part.

Justice Chen-Shan Li filed dissenting opinion in part.

Justice Mao-Zong Huang filed dissenting opinion in part.

Justice Pai-Hsiu Yeh filed dissenting opinion in part .

見書；湯大法官德宗提出部分協同暨部分不同意見書；李大法官震山提出部分不同意見書；黃大法官茂榮提出部分不同意見書；葉大法官百修提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts: As stipulated in Point 1.2(2) of the "2010 Examination and Admission Guidelines for the Volunteer Reserve Military Officer and Reserve Noncommissioned Officer Examination" based on National Planning Ordinance No. 098003746 of December 14, 2009 issued by the Ministry of National Defense, persons with a record of conviction cannot register for the examination.

編者註：

事實摘要：國防部中華民國 98 年 12 月 14 日國力規劃字第 098003746 號令頒「99 年國軍志願役專業預備軍官預備士官班考選簡章」壹、二、（二）規定，曾受刑之宣告者，不得報考。

The petitioner, A, registered for the second session of the "2010 Volunteer

聲請人 A 報名參加 99 年國軍志願役專業預備軍官預備士官第二梯次考

Reserve Military Officer and Reserve Noncommissioned Officer Examination", but did not pass the qualification review conducted by the Selection Committee of the Ministry of National Defense. Since the petitioner committed a crime of negligently causing injury in 2005, the Taiwan Taoyuan District Court sentenced him to 50 days of Detention. In accordance with above provision, the Selection Committee decided that he was not admitted to the exam due to disqualifying safety inquiries. The applicant was formally before the examination. The petitioner appealed the decision, but in the course of administrative litigation the case was finally dismissed. Claiming that the decision was based on the above provision, petitioner applied for constitutional interpretation.

選，其報名資格經國防部所屬志願役專業預備軍官預備士官考選委員會審查。因聲請人曾於94年犯過失傷害罪，經臺灣桃園地方法院刑事判決判處拘役50日定讞，考選委員會乃依上開規定，以其安全調查不合格為由，作成報名不合格之審查結果，於考試期日前發函通知聲請人。聲請人不服審查結果，主張該處分違法，提起行政爭訟迭遭駁回而確定，爰認確定終局判決所適用之前揭規定有違憲疑義，聲請解釋。

J. Y. Interpretation No.716（December 27, 2013）*

【On the prohibition on civil servants and persons to whom they are related transacting business with the offices which they are working in or supervising】

ISSUE: The Law Prohibiting Conflicts of Interests for Civil Servants prohibits civil servants and persons to whom they are related transacting business with the offices which they are working in or supervising and punishes those who violate the prohibition with an administrative fine equal to the amount of the transaction or up to three times the amount of the transaction. Are these two rules unconstitutional ?

RELEVANT LAWS:

Articles 15, 22, and 23 of the Constitution（憲法第十五條、第二十二條、第二十三條）；Article 5, Section 1, Paragraph 2 of Constitutional Interpretation Procedure ACT（司法院大法官審理案件法第五條第一項第二款）；J.Y. Interpretation Nos. 371, 514, 572, 576, 580, 590, 606, and 641（司法院釋字第三七一號、第五一四號、第五七二號、第五七六號、第五八0號、第五九0號、第六0六號、第六四一號解釋）；Articles 2, 3, 9, and 15 of the Law Prohibiting Conflicts

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* Translated by Chi Chung.

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

of Interests for Civil Servants（公職人員利益衝突迴避法第二條、第三條、第九條、第十五條(中華民國一０三年十一月二十六日修正公布)）；Letter Ruling Fa Zheng Jue Zi No. 0930041998 issued by the Ministry of Justice on November 16, 2004（法務部九十三年十一月十六日法政決字第０九三００四一九九八號函釋）.

KEYWORDS:

right to work（工作權）, right to property（財產權）, freedom to conduct business（營業自由）, freedom of contract（契約自由）, principle of proportionality（比例原則）, civil servants（公職人員）, persons to whom civil servants are related（公職人員之關係人）, conflict of interests（利益衝突）, improper conferral of benefits（利益輸送）, the principle of punishment in proportion to responsibility（責罰相當）.**

HOLDING: Article 9 of the Law Prohibiting Conflicts of Interests for Civil Servants, which prohibits civil servants and persons to whom they are related (such as family members and the corporations over which they exert control) from transacting business (including sales, leases, and contracts for labor) with the offices they work in or supervise, is consistent with the constitutional principle of proportionality (Article 23) and the constitutional protections of the right to work,

解釋文：公職人員利益衝突迴避法第九條規定：「公職人員或其關係人，不得與公職人員服務之機關或受其監督之機關為買賣、租賃、承攬等交易行為。」尚未牴觸憲法第二十三條之比例原則，與憲法第十五條、第二十二條保障人民工作權、財產權及契約自由之意旨均無違背。惟於公職人員之關係人部分，若因禁止其參與交易之競爭，將造成其他少數參與交易者之壟斷，反而顯不利於公共利益，於此情形，苟上開機關於交易過程中已行公開公平之程

the right to property, and freedom of contract (Articles 15 and 22). However, if this prohibition might cause a monopoly by a small number of market participants, the public interest would be adversely affected. In the case of a monopoly, if the government has sufficiently open and fair procedures to prevent corruption, relevant government officials should promptly review whether it remains necessary to prohibit persons related to civil servants from transacting business with the government offices where the civil servants work.

序，而有充分之防弊規制，是否仍有造成不當利益輸送或利益衝突之虞，而有禁止公職人員之關係人交易之必要，相關機關應儘速通盤檢討改進。

Article 15 of the same law states that violators of Article 9 should be fined at least the total amount of the transaction or, at most, three times the amount of the transaction. No proper adjustment mechanism has been established for cases of excessive punishment. For this reason, Article 15 is inconsistent with the constitutional principle of proportionality (Article 23) and the constitutional protection of the right to property (Article 15). Therefore, Article 15 of the Law Prohibiting Conflicts of Interests for Civil Servants should become invalid no later than

公職人員利益衝突迴避法第十五條規定：「違反第九條規定者，處該交易行為金額一倍至三倍之罰鍰。」於可能造成顯然過苛處罰之情形，未設適當之調整機制，其處罰已逾越必要之程度，不符憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之意旨有違，應自本解釋公布之日起，至遲於屆滿一年時失其效力。

one year from today.

REASONING: Article 15 of the Constitution protects the right to work, the right to property, and the right of individuals to conduct business. As a result of the constitutional protection of the right to work, individuals may freely choose their occupations, including whether to open or close their own businesses, their business hours, their time of business, the location of their business, with whom to do business, and the manner in which to do business. The constitutional protection of the right to property allows individuals to freely conduct business—including the production, transaction, and disposition of products—without government interference (see Interpretation Nos. 514 and 606).

解釋理由書：按憲法第十五條保障人民之工作權及財產權，人民營業之自由亦為其所保障之內涵。基於憲法上工作權之保障，人民得自由選擇從事一定之營業為其職業，而有開業、停業與否及從事營業之時間、地點、對象及方式之自由；基於憲法上財產權之保障，人民並有營業活動之自由，例如對其商品之生產、交易或處分均得自由為之（本院釋字第五一四號、第六０六號解釋參照）。

In addition, Articles 15 and 22 both protect freedom of contract, an important mechanism for the development of personal autonomy and self-realization. Freedom of contract enables contracting parties to freely choose how and with whom to conclude contracts, and the content of

又契約自由為個人自主發展與實現自我之重要機制，為憲法第十五條財產權及第二十二條所保障之權利，使契約當事人得自由決定其締約方式、內容及對象，以確保與他人交易商品或交換其他生活資源之自由（本院釋字第五七六號、第五八０號解釋意旨參

the contracts. It ensures that an individual has the freedom to trade goods or services with others (see Interpretation Nos. 576 and 580). Any restrictions imposed by the state on individuals' freedoms and rights should comply with the principle of proportionality as stipulated in Article 23. Moreover, when administrative fines are imposed upon individuals who violate their obligations under the administrative law, if it is possible and necessary to distinguish the different degrees of the seriousness of the violation, these fines should be in proportion to the seriousness of the violation, thereby making the punishment proportional to the responsibility. Legislators may punish violations of obligations under administrative law with administrative fines, but the Constitution requires that appropriate adjustment mechanisms be established to avoid punishments that are excessive in particular cases (see Interpretation No. 641).

照）。國家對人民上開自由權利之限制，均應符合憲法第二十三條之比例原則。另對人民違反行政法上義務之行為處以罰鍰，其違規情節有區分輕重程度之可能與必要者，應根據違反義務情節之輕重程度為之，使責罰相當。立法者針對特別應予非難之違反行政法上義務行為，視違規情節之輕重處以罰鍰，固非憲法所不許，惟為避免個案顯然過苛之處罰，應設適當之調整機制（本院釋字第六四一號解釋意旨參照）。

Article 9 of the Law Prohi-biting Conflicts of Interests for Civil Servants states that civil servants and persons to whom they are related, such as their fam-

公職人員利益衝突迴避法（下稱利益衝突迴避法）第九條規定：「公職人員或其關係人，不得與公職人員服務之機關或受其監督之機關為買賣、租

ily members and the corporations over which they exert control (see Articles 2 and 3 of the Law Prohibiting Conflicts of Interests for Civil Servants), may not transact business (including sales, leases, and contracts for labor) with offices (hereafter referred to as Foregoing Offices) that they work in or supervise (hereafter referred to as the First Disputed Rule). Article 15 of the Law Prohibiting Conflicts of Interests for Civil Servants, meanwhile, states that violators of Article 9 should be fined not less than the total amount of the transaction and not more than three times the amount of the transaction (hereafter referred to as the Second Disputed Rule). The First Disputed Rule restricts the right to property and the freedom to make contracts for civil servants, as well as the right of persons to whom civil servants are related to work and possess property and its components (such as freedom of business and of contract). The Second Disputed Rule, fining civil servants and persons to whom they are related for violating the First Disputed Rule, is a restriction on the right to property guaranteed under Article 15 of the Constitution.

賃、承攬等交易行為。」（下稱系爭規定一）第十五條規定：「違反第九條規定者，處該交易行為金額一倍至三倍之罰鍰。」（下稱系爭規定二）系爭規定一禁止公職人員及其關係人（利益衝突迴避法第二條、第三條規定參照）與公職人員服務之機關或受其監督之機關（下稱上開機關）為買賣等交易行為，就公職人員而言，乃屬對其財產權及契約自由所為之限制；就公職人員之關係人而言，乃屬對其工作權、財產權及其內涵之營業自由暨契約自由所為之限制。系爭規定二對公職人員及其關係人違反系爭規定一者處以罰鍰，則屬對憲法第十五條所保障之人民財產權所為限制。

Both the First and Second Disputed Rules were legislated for legitimate purposes, and the means adopted indeed help achieve their legislative purposes. If civil servants' relatives or other persons to whom they are related transact business with the Foregoing Offices, these persons might compete unfairly or benefit improperly from their relationships with the civil servants. The Law Prohibiting Conflicts of Interests for Civil Servants was enacted for the purposes of promoting clean and capable politics, establishing norms to avoid conflicts of interests, and deterring corruption and the improper conferral of benefits (see Article 1 of the Law Prohibiting Conflicts of Interests for Civil Servants). The First Disputed Rule was enacted to prevent civil servants and persons to whom they are related from securing opportunities or creating conditions that are unfair or otherwise superior to those provided to other members of the public who contract with government offices. The Second Disputed Rule was enacted to ensure that civil servants and persons to whom they are related do not violate the First Disputed Rule, a goal met through

鑑於公職人員之親屬或其他關係人，與上開機關為買賣、租賃、承攬等交易行為，易衍生不公平競爭、不當利益輸送之弊端，立法者為促進廉能政治、端正政治風氣，建立公職人員利益衝突迴避之規範，有效遏阻貪污腐化暨不當利益輸送，乃制定利益衝突迴避法（該法第一條參照）。系爭規定一旨在防範公職人員及其關係人憑恃公職人員在政府機關任職所擁有之職權或影響力，取得較一般人更為優越或不公平之機會或條件，而與政府機關進行交易，造成利益衝突或不當利益輸送甚或圖利之弊端；系爭規定二乃欲藉由處罰鍰之手段，以確保公職人員及其關係人不致違反系爭規定一，進而有效遏阻上開情弊之發生，其目的均屬正當，且所採手段均有助於上開立法目的之達成。

the application of administrative fines. Thus, both the First and Second Disputed Rules were legislated for legitimate purposes, and the means adopted have helped to achieve these purposes.

When the Foregoing Offices need to enter into transactions (such as sales, leases, or contracts for labor), if the law does not prohibit civil servants and persons to whom they are related from contracting with the Foregoing Offices, civil servants might be tempted to utilize their official powers, opportunities, or knowledge to confer benefits improperly, creating conflicts of interest. The First Disputed Rule prohibits civil servants and persons to whom they are related from entering into such transactions, while the Second Disputed Rule imposes administrative fines on the violators of the First Disputed Rule to ensure that civil servants and persons to whom they are related do not have opportunities to confer benefits improperly and thereby create conflicts of interest. As there are no other means for achieving the same results without creating more restrictions, the First and Second Disputed

於上開機關行買賣、租賃或承攬等交易行為之際，苟不禁止公職人員及其關係人與上開機關交易，易使公職人員利用其職務上之權力、機會或方法進行不當之利益輸送或造成利益衝突情形。系爭規定一一律禁止公職人員及其關係人為上開交易行為；系爭規定二明定違反系爭規定一者處以罰鍰，以確保系爭規定一規範之事項能獲得落實，從而杜絕公職人員及其關係人有上述不當利益輸送或造成利益衝突之機會。而又無其他侵害較小之手段可產生相同效果，自應認系爭規定一、二係達成前揭立法目的之必要手段。

Rules are the means necessary to achieving the foregoing legislative purposes.

Although the First Disputed Rule restricts the right to work, as well as the right to property and its components (e.g., the freedom of business and of contract), for civil servants and persons to whom they are related, the scope of this prohibition is limited to the Foregoing Offices. In other words, civil servants and persons to whom they are related can transact business with individual persons and legal entities that are not the Foregoing Offices. Therefore, the First Disputed Rule does not excessively restrict the right to work, the right to property, and so on of civil servants and the persons to whom they are related, and the restriction is not out of balance with the public interest. Therefore, the First Disputed Rule does not violate the principle of proportionality as provided by Article 23 of the Constitution, and it is consistent with Articles 15 and 22 of the Constitution, which protect the right to work and the right to property and its components (e.g., freedom of business and of contract).

系爭規定一雖限制公職人員及其關係人之工作權、財產權及其內涵之營業自由暨契約自由，惟禁止交易之對象僅及於上開機關，並非全面禁止與上開機關以外之對象進行交易，公職人員及其關係人尚非不能與其他營業對象交易，以降低其因交易對象受限所遭受之損失，系爭規定一對公職人員及其關係人工作權、財產權等之限制尚未過當，與其所保護之公共利益間，並非顯失均衡。綜上，系爭規定一尚未牴觸憲法第二十三條之比例原則，與憲法第十五條、第二十二條保障人民工作權、財產權及其內涵之營業自由暨契約自由之意旨均無違背。

Although the First Disputed Rule is not unconstitutional, relevant government offices should still review its appropriateness. Civil servants are obliged by law to be honest, clean, prudent, and diligent and to avoid arbitrary, corrupt, or lazy behavior that adversely affects their reputations. They are also legally obliged to recuse themselves when necessary and to avoid conferring benefits on themselves and persons to whom they are related through the application of official powers, opportunities, or knowledge. Violations of these obligations are punishable under Articles 5 and 6 of the Law on the Service of Civil Servants; under Articles 6, 7, 14, and 16 through 18 of the Law Prohibiting Conflicts of Interests for Civil Servants; and under Article 32 of the Administrative Procedure Act. In contrast, persons related to civil servants do not have the aforementioned obligations arising from a civil-servant status. Therefore, the state's requirements for civil servants should be higher than those for persons to whom civil servants are related.

系爭規定一完全禁止公職人員及其關係人與上開機關為買賣、租賃、承攬等交易行為，固難謂為違憲。惟公務員本應誠實清廉，謹慎勤勞，不得有驕恣貪惰等損害名譽之行為；公職人員亦依法有迴避及不得假藉職務上之權力、機會或方法圖其本人及其關係人利益之義務，違反者應受處罰（公務員服務法第五條、第六條；利益衝突迴避法第六條、第七條、第十四條、第十六條至第十八條；行政程序法第三十二條規定參照）。而公職人員之關係人因未具有公職人員身分，並無上開迴避或禁止圖利之義務可言。故國家對公職人員之要求自應較公職人員之關係人為高。

If the stipulated prohibition on persons to whom civil servants are related in the First Disputed Rule could cause a monopoly of the market by a small number of market participants, the public interest would be adversely affected. In the case of a monopoly, if the Foregoing Offices have administered sufficiently open and fair procedures so as to prevent corruption, the relevant government offices should promptly review whether it is still necessary to prohibit persons to whom civil servants are related from transacting business with the government offices where civil servants work.

系爭規定一就公職人員之關係人部分，若因禁止其參與交易之競爭，將造成其他少數參與交易者之壟斷，反而顯不利於公共利益，於此情形，苟上開機關於交易過程中已行公開公平之程序，而有充分之防弊規制，是否仍有造成不當利益輸送或利益衝突之虞，而有禁止公職人員之關係人交易之必要，相關機關應儘速通盤檢討改進。

The judiciary has discretion that helps it to ensure that punishments are proportional to the seriousness of a violation. Violators can be fined no less than the amount of the law-breaking transaction and, at most, three times the amount of the law-breaking transaction. However, the amount of the law-breaking transaction is usually far greater, or several times greater, than the amount of the benefits that arise from the transaction itself. For example, the amount of a transaction re-

系爭規定二處違規交易行為金額一倍至三倍之罰鍰，固已預留視違規情節輕重而予處罰之裁量範圍，惟交易行為之金額通常遠高甚或數倍於交易行為所得利益，又例如於重大工程之交易，其交易金額往往甚鉅，縱然處最低度交易金額一倍之罰鍰，違規者恐亦無力負擔。系爭規定二可能造成個案顯然過苛之處罰，立法者就此未設適當之調整機制，其處罰已逾越必要之程度，不符憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之意旨有違，應

lated to a significant construction project is usually so large that even the minimum administrative fine is likely to be beyond the ability of the punished person to pay. In other words, the Second Disputed Rule may result in a punishment that is excessive in some cases. Since legislators have failed to establish proper adjustment mechanisms, punishments may exceed the extent necessary, which is inconsistent with the constitutional principle of proportionality (Article 23) and the constitutional protection of individuals' right to property (Article 15). Therefore, the Second Disputed Rule should become invalid no later than one year from today.

自本解釋公布之日起，至遲於屆滿一年時失其效力。

The applicants applied for the constitutional interpretation of two additional issues. First, they alleged that Article 2 of the Law Prohibiting Conflicts of Interests for Civil Servants (hereafter referred to as the Third Disputed Rule) was too wide in scope and therefore violated the constitutional principle of proportionality. Second, they alleged that Letter Ruling Fa Zheng Jue Zi No. 0930041998, issued by the Ministry of Justice on November 16,

至聲請人認利益衝突迴避法第二條規定（下稱系爭規定三）規範對象過廣，違反憲法比例原則；法務部中華民國九十三年十一月十六日法政決字第０九三００四一九九八號函釋（下稱系爭函釋），牴觸憲法平等原則、比例原則、法律明確性原則、信賴保護原則及法律不溯及既往原則之疑義，聲請解釋部分，核其等指摘，僅係爭執法院認事用法之當否，泛稱系爭規定三及系爭函釋違憲，尚難謂於客觀上已具體指摘系

2004, violated the following constitutional principles: of equality and proportionality, the minimum requirement for clarity, the protection of reliance on existing law (Vertrauenschutz in German), and the prohibition against ex post facto rules. Their allegations—that the Third Disputed Rule and the Letter Ruling violated constitutional principles—are, in effect, disputing the propriety of fact finding and legal analysis by the court, instead of noting how the Third Disputed Rule and the Letter Ruling objectively violated the Constitution. Therefore, the applications do not satisfy the requirements set out by Article 5, Section 1, Paragraph 2 of the Law Governing Adjudication by the Grand Justices of Judicial Yuan and, therefore, should be dismissed pursuant to Article 5, Section 3 of the same law.

爭規定三及系爭函釋有何牴觸憲法之處。是此部分之聲請，核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理，併此指明。

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Chang-Fa Lo filed concurring opinion.

Justice Yeong-Chin Su filed dissent-

本黃大法官茂榮提出之協同意見書；葉大法官百修提出之協同意見書；羅大法官昌發提出之協同意見書；蘇大法官永欽提出之一部不同意見書；湯大法官德宗提出之部分不同意見書。

ing opinion in part.

Justice Dennis Te-Chung Tang filed dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: 1. The Ministry of Justice fined six enterprises for transacting business with government offices where persons related to civil servants were working or supervising. The amount of these transactions ranged between approximately NT$8,000,000 and approximately NT$500,000,000. In accordance with Article 9 of the Law on the Avoidance of Conflicts of Interests for Civil Servants, which sets out a minimum fine of the amount of the prohibited transaction and a maximum fine three times the amount of the prohibited transactions, the Ministry of Justice imposed on these six enterprises a fine that equaled the amount of the prohibited transactions. The applicants disputed the administrative fines but lost their litigations. They argued that the First and Second Disputed Rules violated the Constitution and applied for constitutional interpretation.

編者註：

事實摘要：(一) 聲請人 1.A 公司、2.B 營造廠、3.C 公司、4.D 公司、5.E 公司、6.F 公司，或因代表人之配偶或手足或公司監察人之配偶或代表人自身任職縣市議員，或因代表人配偶之兄任職台電核安處處長，而參與各該公職人員任職機關或受其監督機關之投標案或簽訂營建承攬契約，交易金額小自 8 百餘萬元，大至 5 億餘元不等，先後遭法務部認定違反公職人員利益衝突迴避法第 9 條禁與公職人員服務或受其監督機關交易之規定，依同法第 15 條違者處交易金額一至三倍罰鍰之規定，處以各該交易金額一倍罰鍰。聲請人均不服，提起行政爭訟敗訴確定，爰認確定終局判決所適用之上揭二規定有違憲疑義，分別聲請解釋。

2. The Third Adjudication Panel of the Supreme Administrative Court, in its adjudication of a case concerning the Law Prohibiting Conflicts of Interests for Civil Servants, held that, on the basis of its reasonable belief, Article 15 of the Law Prohibiting Conflicts of Interests for Civil Servants violates the constitutional principle of proportionality and the protection of the right to property. The Third Adjudication Panel, therefore, applied for constitutional interpretation.

(二)最高行政法院第三庭為審理上訴人G環保公司公職人員利益衝突迴避事件，依其合理確信認應適用之上揭第15條有牴觸憲法比例原則及財產權保障之疑義，聲請解釋。

Since the seven cases concerned the same subject matter, the Grand Justices of the Judicial Yuan decided to adjudicate these seven cases in one procedure.

大法官就上開七案先後受理，因所主張違憲之標的相同，乃合併審理。

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Chang, Ming-Woei（張明偉）	639(Ⅵ)、683(Ⅶ)
Wen-Chen Chang（張文貞）	528(Ⅳ)、530(Ⅳ)、535(Ⅳ)
Chun-Jen Chen（陳俊仁）	293(Ⅱ)、305(Ⅱ)、381(Ⅱ)、383(Ⅱ)、395(Ⅲ)、411(Ⅲ)、586(Ⅴ)、602(Ⅴ)、606(Ⅴ)、634(Ⅵ)、638(Ⅵ)、648(Ⅵ)、663(Ⅵ)、665(Ⅵ)、672(Ⅶ)、685(Ⅶ)、703(Ⅶ)
Jui-Jen Chen（陳瑞仁）	271(Ⅱ)
Louis Chen（陳春山）	173(Ⅰ)、174(Ⅰ)、180(Ⅰ)、196(Ⅰ)、200(Ⅰ)
John C. Chen（陳傳岳）	100(Ⅰ)、275(Ⅱ)、302(Ⅱ)、304(Ⅱ)、308(Ⅱ)、317(Ⅱ)、339(Ⅱ)、355(Ⅱ)、362(Ⅱ)、366(Ⅱ)、416(Ⅲ)
Tsung-Fu Chen（陳聰富）	251(Ⅱ)、364(Ⅱ)、387(Ⅱ)
Yen-Chia Chen（陳彥嘉）	708(Ⅶ)、709(Ⅶ)、710(Ⅶ)
Chia -Chieh Cheng（鄭家捷）	713(Ⅶ)
Chin-Chin Cheng（鄭津津）	285(Ⅱ)、360(Ⅱ)、390(Ⅱ)、514(Ⅳ)、549(Ⅳ)、658(Ⅵ)
Chun-Yih Cheng（程春益）	327(Ⅱ)、356(Ⅱ)、633(Ⅵ)、655(Ⅵ)、697(Ⅶ)、706(Ⅶ)、711(Ⅶ)
Chi Chung（鍾騏）	667(Ⅵ)、694(Ⅶ)、702(Ⅶ)、716(Ⅶ)
Chung Jen Cheng（鄭中人）	213(Ⅰ)、492(Ⅲ)、507(Ⅳ)
Eleanor Y.Y. Chin（金玉瑩）	267(Ⅱ)、333(Ⅱ)
Raymond T. Chu（朱定初）	132(Ⅰ)、135(Ⅰ)、136(Ⅰ)、138(Ⅰ)、139(Ⅰ)、141(Ⅰ)、170(Ⅰ)、179(Ⅰ)、186(Ⅰ)、188(Ⅰ)、192(Ⅰ)、197(Ⅰ)、198(Ⅰ)、209(Ⅰ)、217(Ⅰ)、218(Ⅰ)、221(Ⅰ)、225(Ⅰ)、227(Ⅰ)、228(Ⅰ)、229(Ⅰ)、230(Ⅰ)、240(Ⅱ)、244(Ⅱ)、249(Ⅱ)、252(Ⅱ)、256(Ⅱ)、288(Ⅱ)、291(Ⅱ)、292(Ⅱ)、297(Ⅱ)、300(Ⅱ)、306(Ⅱ)、309(Ⅱ)、311(Ⅱ)、315(Ⅱ)、318(Ⅱ)、321(Ⅱ)、330(Ⅱ)、335(Ⅱ)、

	337(Ⅱ)、353(Ⅱ)、358(Ⅱ)、361(Ⅱ)、367(Ⅱ)、368(Ⅱ)、369(Ⅱ)、379(Ⅱ)、393(Ⅲ)、394(Ⅲ)、413(Ⅲ)、423(Ⅲ)、426(Ⅲ)、428(Ⅲ)、437(Ⅲ)、438(Ⅲ)、441(Ⅲ)、448(Ⅲ)、451(Ⅲ)、460(Ⅲ)、482(Ⅲ)、511(Ⅳ)、515(Ⅳ)、517(Ⅳ)、550(Ⅳ)、552(Ⅳ)、554(Ⅳ)、556(Ⅳ)、559(Ⅳ)、560(Ⅳ)、562(Ⅳ)、564(Ⅳ)、565(Ⅳ)、566(Ⅳ)、568(Ⅳ)、569(Ⅳ)、579(Ⅴ)、580(Ⅴ)、581(Ⅴ)、584(Ⅴ)、600(Ⅴ)、610(Ⅴ)、616(Ⅴ)、625(Ⅵ)、630(Ⅵ)、635(Ⅵ)、637(Ⅵ)、643(Ⅵ)、645(Ⅵ)
Eric Yao-Kuo Chiang（江耀國）	38(Ⅰ)、262(Ⅱ)、463(Ⅲ)、501(Ⅳ)
Cing-Kae Chiao（焦興鎧）	226(Ⅰ)、270(Ⅱ)、301(Ⅱ)、310(Ⅱ)、365(Ⅱ)、373(Ⅱ)、456(Ⅲ)
Tze-Shiou Chien（簡資修）	242(Ⅱ)、372(Ⅱ)、374(Ⅱ)、400(Ⅲ)、409(Ⅲ)、440(Ⅲ)、475(Ⅲ)、513(Ⅳ)、524(Ⅳ)、676(Ⅶ)
Jyh-Pin Fa（法治斌）	161(Ⅰ)、166(Ⅰ)、178(Ⅰ)、189(Ⅰ)、289(Ⅱ)、328(Ⅱ)、357(Ⅱ)、467(Ⅲ)、481(Ⅲ)
Fan,Chien-Te（范建得）	351(Ⅱ)、518(Ⅳ)
Spenser Y. Hor（何曜琛）	268(Ⅱ)、278(Ⅱ)、303(Ⅱ)、334(Ⅱ)、385(Ⅱ)、397(Ⅲ)、405(Ⅲ)、412(Ⅲ)、429(Ⅲ)、430(Ⅲ)、433(Ⅲ)、449(Ⅲ)、529(Ⅳ)、642(Ⅵ)、652(Ⅵ)、699(Ⅶ) 、704(Ⅶ)、715(Ⅶ)
C. Y. Huang（黃慶源）	389(Ⅱ)、406(Ⅲ)、431(Ⅲ)、472(Ⅲ)、473(Ⅲ)、493(Ⅲ)、495(Ⅲ)、496(Ⅲ)、500(Ⅳ)、504(Ⅳ)、519(Ⅳ)、537(Ⅳ)、561(Ⅳ)、578(Ⅴ)、696(Ⅶ)、705(Ⅶ)
Wei-Feng Huang（黃偉峯）	9(Ⅰ)、10(Ⅰ)、101(Ⅰ)、102(Ⅰ)、103(Ⅰ)、105(Ⅰ)、107(Ⅰ)、108(Ⅰ)、111(Ⅰ)、113(Ⅰ)、118(Ⅰ)、148(Ⅰ)、

	155(Ⅰ)、156(Ⅰ)、181(Ⅰ)、182(Ⅰ)、183(Ⅰ)、184(Ⅰ)、187(Ⅰ)、190(Ⅰ)、193(Ⅰ)、199(Ⅰ)、201(Ⅰ)、202(Ⅰ)、204(Ⅰ)、207(Ⅰ)、258(Ⅱ)、259(Ⅱ)、260(Ⅱ)、272(Ⅱ)、314(Ⅱ)、401(Ⅲ)、454(Ⅲ)、466(Ⅲ)、498(Ⅲ)、508(Ⅳ)、512(Ⅳ)、525(Ⅳ)、533(Ⅳ)、534(Ⅳ)、536(Ⅳ)、540(Ⅳ)、542(Ⅳ)、543(Ⅳ)、545(Ⅳ)、548(Ⅳ)、551(Ⅳ)、555(Ⅳ)、557(Ⅳ)、558(Ⅳ)、563(Ⅳ)、572(Ⅴ)、575(Ⅴ)、576(Ⅴ)、659(Ⅵ)、698(Ⅶ)
Yuh-Kae Huang（黃裕凱）	126(Ⅰ)、211(Ⅰ)、219(Ⅰ)、281(Ⅱ)、324(Ⅱ)、402(Ⅲ)、494(Ⅲ)
Jau-Yuan Hwang（黃昭元）	31(Ⅰ)、85(Ⅰ)、261(Ⅱ)、450(Ⅲ)
Bernard Y. Kao（高玉泉）	510(Ⅳ)
Su-Po Kao（高思博）	290(Ⅱ)、295(Ⅱ)、378(Ⅱ)、485(Ⅲ)
Wellington L. Koo（顧立雄）	145(Ⅰ)、176(Ⅰ)、269(Ⅱ)、422(Ⅲ)
Vincent C. Kuan（關重熙）	243(Ⅱ)、255(Ⅱ)、257(Ⅱ)、265(Ⅱ)、273(Ⅱ)、320(Ⅱ)、340(Ⅱ)、343(Ⅱ)、344(Ⅱ)、345(Ⅱ)、347(Ⅱ)、348(Ⅱ)、350(Ⅱ)、354(Ⅱ)、377(Ⅱ)、445(Ⅲ)、446(Ⅲ)、457(Ⅲ)、465(Ⅲ)、468(Ⅲ)、521(Ⅳ)、522(Ⅳ)、527(Ⅳ)、538(Ⅳ)、546(Ⅳ)、573(Ⅴ)、582(Ⅴ)、583(Ⅴ)、585(Ⅴ)、588(Ⅴ)、589(Ⅴ)、591(Ⅴ)、592(Ⅴ)、593(Ⅴ)、594(Ⅴ)、595(Ⅴ)、596(Ⅴ)、597(Ⅴ)、599(Ⅴ)、601(Ⅴ)、603(Ⅴ)、607(Ⅴ)、608(Ⅴ)、609(Ⅴ)、611(Ⅴ)、612(Ⅴ)、613(Ⅴ)、614(Ⅴ)、615(Ⅴ)、617(Ⅴ)、618(Ⅴ)、619(Ⅴ)、621(Ⅴ)、622(Ⅴ)、623(Ⅵ)、624(Ⅵ)、626(Ⅵ)、627(Ⅵ)、628(Ⅵ)、629(Ⅵ)、660(Ⅵ)
Cheng-Hwa Kwang（鄺承華）	341(Ⅱ)、352(Ⅱ)、359(Ⅱ)、506(Ⅳ)

Lawrence L. C. Lee（李禮仲）	28(Ⅰ)、51(Ⅰ)、53(Ⅰ)、55(Ⅰ)、56(Ⅰ)、57(Ⅰ)、58(Ⅰ)、60(Ⅰ)、61(Ⅰ)、62(Ⅰ)、63(Ⅰ)、64(Ⅰ)、65(Ⅰ)、66(Ⅰ)、67(Ⅰ)、69(Ⅰ)、70(Ⅰ)、71(Ⅰ)、73(Ⅰ)、74(Ⅰ)、77(Ⅰ)、78(Ⅰ)、79(Ⅰ)、80(Ⅰ)、82(Ⅰ)、83(Ⅰ)、84(Ⅰ)、87(Ⅰ)、88(Ⅰ)、89(Ⅰ)、91(Ⅰ)、93(Ⅰ)、94(Ⅰ)、95(Ⅰ)、97(Ⅰ)、99(Ⅰ)、410(Ⅲ)、657(Ⅵ)、700(Ⅶ)、712(Ⅶ)
Chia-Yi Li（李佳逸）	695(Ⅶ)、707(Ⅶ)
Fuldien Li（李復甸）	276(Ⅱ)、280(Ⅱ)、497(Ⅲ)、503(Ⅳ)
Li-Ju Lee（李立如）	666(Ⅵ)
Nigel N.T.Li（李念祖）	216(Ⅰ)、239(Ⅱ)、254(Ⅱ)、264(Ⅱ)、399(Ⅲ)、407(Ⅲ)、435(Ⅲ)、664(Ⅵ)
Fort Fu-Te Liao（廖福特）	13(Ⅰ)、76(Ⅰ)、86(Ⅰ)、123(Ⅰ)、124(Ⅰ)、125(Ⅰ)、194(Ⅰ)、263(Ⅱ)、329(Ⅱ)、631(Ⅵ)、677(Ⅶ)、
Jennifer Lin（林秋琴）	283(Ⅱ)
Li-Chih Lin（林利芝）	4(Ⅰ)、5(Ⅰ)、6(Ⅰ)、7(Ⅰ)、8(Ⅰ)、11(Ⅰ)、17(Ⅰ)、21(Ⅰ)、22(Ⅰ)、23(Ⅰ)、41(Ⅰ)、42(Ⅰ)、44(Ⅰ)、59(Ⅰ)、72(Ⅰ)、81(Ⅰ)、90(Ⅰ)、92(Ⅰ)、96(Ⅰ)、98(Ⅰ)、104(Ⅰ)、109(Ⅰ)、120(Ⅰ)、122(Ⅰ)、127(Ⅰ)、131(Ⅰ)、134(Ⅰ)、137(Ⅰ)、143(Ⅰ)、146(Ⅰ)、152(Ⅰ)、157(Ⅰ)、158(Ⅰ)、159(Ⅰ)、160(Ⅰ)、162(Ⅰ)、175(Ⅰ)、191(Ⅰ)、206(Ⅰ)、284(Ⅱ)、376(Ⅱ)、404(Ⅲ)、414(Ⅲ)、417(Ⅲ)、476(Ⅲ)、486(Ⅲ)、531(Ⅳ)、541(Ⅳ)、544(Ⅳ)、547(Ⅳ)、577(Ⅴ)、641(Ⅵ)、646(Ⅵ)、654(Ⅵ)、661(Ⅵ)、662(Ⅵ)、 691(Ⅶ)
David T. Liou（劉宗欣）	325(Ⅱ)、342(Ⅱ)、418(Ⅲ)、421(Ⅲ)、

	474(Ⅲ)
Lawrence S. Liu（劉紹樑）	282(Ⅱ)、322(Ⅱ)、323(Ⅱ)、331(Ⅱ)、338(Ⅱ)、380(Ⅱ)
Amy H.L. Shee（施慧玲）	147(Ⅰ)、171(Ⅰ)、502(Ⅳ)、587(Ⅴ)、590(Ⅴ)、620(Ⅴ)、 671(Ⅶ)
Jer-Shenq Shieh（謝哲勝）	149(Ⅰ)、153(Ⅰ)、163(Ⅰ)、164(Ⅰ)、172(Ⅰ)、286(Ⅱ)、326(Ⅱ)、336(Ⅱ)、425(Ⅲ)、444(Ⅲ)、532(Ⅳ)、598(Ⅴ)
Ching P. Shih（史慶璞）	203(Ⅰ)、205(Ⅰ)、208(Ⅰ)、210(Ⅰ)、212(Ⅰ)、214(Ⅰ)、215(Ⅰ)、220(Ⅰ)、222(Ⅰ)、223(Ⅰ)、232(Ⅰ)、233(Ⅰ)、235(Ⅱ)、604(Ⅴ)、605(Ⅴ)、651(Ⅵ)
Amy H.L. Shee（施慧玲）	656(Ⅵ)
Andy Y. Sun（孫遠釗）	2(Ⅰ)、3(Ⅰ)、14(Ⅰ)、15(Ⅰ)、18(Ⅰ)、19(Ⅰ)、20(Ⅰ)、24(Ⅰ)、25(Ⅰ)、26(Ⅰ)、27(Ⅰ)、29(Ⅰ)、33(Ⅰ)、36(Ⅰ)、39(Ⅰ)、40(Ⅰ)、43(Ⅰ)、45(Ⅰ)、46(Ⅰ)、47(Ⅰ)、48(Ⅰ)、49(Ⅰ)、50(Ⅰ)、133(Ⅰ)、150(Ⅰ)、154(Ⅰ)、168(Ⅰ)、169(Ⅰ)、370(Ⅱ)、391(Ⅱ)、419(Ⅲ)、477(Ⅲ)、499(Ⅳ)、520(Ⅳ)、553(Ⅳ)、567(Ⅳ)、632(Ⅵ)、644(Ⅵ)、649(Ⅵ)、650(Ⅵ)
Dennis T.C.Tong（湯德宗）	382(Ⅱ)、462(Ⅲ)、491(Ⅲ)
Alex C. Y. Tsai（蔡欽源）	266(Ⅱ)、332(Ⅱ)、363(Ⅱ)、679(Ⅶ)
Tsai Chiou-ming（蔡秋明）	238(Ⅱ)、245(Ⅱ)、346(Ⅱ)、669(Ⅵ)
Huai-Ching Robert, Tsai（蔡懷卿）	1(Ⅰ)、30(Ⅰ)、75(Ⅰ)、106(Ⅰ)、110(Ⅰ)、114(Ⅰ)、115(Ⅰ)、116(Ⅰ)、117(Ⅰ)、119(Ⅰ)、121(Ⅰ)、236(Ⅱ)、241(Ⅱ)、250(Ⅱ)、392(Ⅱ)、640(Ⅵ)、647(Ⅵ)、653(Ⅵ)、668(Ⅵ)、701(Ⅶ)、714(Ⅶ)
Jaw-Perng Wang（王兆鵬）	68(Ⅰ)、129(Ⅰ)、371(Ⅱ)、384(Ⅱ)、

	471(Ⅲ)、523(Ⅳ)、636(Ⅵ)
Roger K. C. Wang（王國傑）	574(Ⅴ)、678(Ⅶ)、693(Ⅶ)
Wen-Yeu Wang（王文宇）	287(Ⅱ)、296(Ⅱ)、349(Ⅱ)、386(Ⅱ)、489(Ⅲ)
Joe Y. C. Wu（吳永乾）	294(Ⅱ)、505(Ⅳ)、509(Ⅳ)、539(Ⅳ)
Pijan Wu （吳必然）	246(Ⅱ)、307(Ⅱ)、312(Ⅱ)、319(Ⅱ)、432(Ⅲ)、453(Ⅲ)、461(Ⅲ)、487(Ⅲ)、516(Ⅳ)
David H.J. Yang（楊鴻基）	128(Ⅰ)、142(Ⅰ)、144(Ⅰ)、274(Ⅱ)、277(Ⅱ)、299(Ⅱ)、570(Ⅳ)、571(Ⅴ)
Jiunn-Rong Yeh（葉俊榮）	165(Ⅰ)、479(Ⅲ)、490(Ⅲ)
Chi-Chang Yu（游啟璋）	12(Ⅰ)、32(Ⅰ)、34(Ⅰ)、247(Ⅱ)、248(Ⅱ)、253(Ⅱ)、436(Ⅲ)、443(Ⅲ)、452(Ⅲ)
Syue-Ming Yu（余雪明）	434(Ⅲ)、447(Ⅲ)、455(Ⅲ)、464(Ⅲ)、483(Ⅲ)、488(Ⅲ)、526(Ⅳ)
BAKER & McKENZIE（國際通商法律事務所）	279(Ⅱ)、396(Ⅲ)、403(Ⅲ)、408(Ⅲ)、415(Ⅲ)、420(Ⅲ)、424(Ⅲ)、427(Ⅲ)、442(Ⅲ)、459(Ⅲ)、469(Ⅲ)、470(Ⅲ)、
FORMOSA TRANSNATIONAL, ATTORNEYS AT LAW（萬國法律事務所）	177(Ⅰ)、185(Ⅰ)、375(Ⅱ)、388(Ⅱ)
LEE & LI, ATTORNEYS-AT-LAW（理律法律事務所）	16(Ⅰ)、35(Ⅰ)、37(Ⅰ)、52(Ⅰ)、54(Ⅰ)、112(Ⅰ)、130(Ⅰ)、140(Ⅰ)、224(Ⅰ)、313(Ⅱ)、692 (Ⅶ)
TSAR & TSAI LAW FIRM （常在國際法律事務所）	151(Ⅰ)、167(Ⅰ)、195(Ⅰ)、231(Ⅰ)、234(Ⅱ)、237(Ⅱ)、298(Ⅱ)、316(Ⅱ)、398(Ⅲ)、439(Ⅲ)、458(Ⅲ)、478(Ⅲ)、480(Ⅲ)、484(Ⅲ)