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TAX EVASION

Divorce “Tax Planning” Schemes are Fictitious

Believe it or not, a popular “tax planning” scheme widely used in Thailand is to divorce at the end of a financial year and re-marry at the beginning of the following financial year.

This popular “tax planning” scheme exploits the law, which requires, in the case where a husband and wife are married for the entire year, the husband shall include his wife’s earnings in his personal income tax return (except for the wife’s salary income for which the wife can opt to file a separate personal income tax return).

This means that, in the case where a wife earns any type of personal services income, income from the sale of immovable property or any other type of non-salary income and the husband and wife are married for the entire year, the husband shall combine this income with his own income. The husband shall pay personal income tax on the combined income, and due to the progressive rates of personal income tax, the tax burden is higher than if the wife had filed and paid tax under a separate income tax return.

Since the law applies only to a husband and wife who remain married for an "entire year", a popular practice is to divorce before the end of the financial year and re-marry again some time in the new financial year, so that for both the year of divorce and the year of re-marriage, the husband is not required to include his wife’s non-salary income in his personal income tax returns for those years.

Foreigners who are aware of anti-tax evasion rules in their home countries would know that such a scheme is a “sham” arrangement, but this is not considered as such in Thailand, and is considered by many as legal “tax planning”.

This is despite the law prescribing, in Section 37(2) of the Revenue Code, that:

“Whoever by falsehood, fraud, artifice or any other similar device whatsoever, evades or attempts to evade payment of tax and duty under this Title shall be punished with imprisonment of three months to seven years and a fine of two thousand baht to two hundred thousand baht.”

In terms of the Thai law, divorcing and re-marrying for the purposes of evading tax is an “artifice”, which is punishable by imprisonment, but it is not Thai culture to imprison people for tax matters and thus, the Thai Revenue Department rarely prosecutes anyone under Section 37(2) of the Revenue Code.

Instead, the Revenue Department officers usually opt to prosecute according to the civil law prescriptions of just penalty and interest.

This has been demonstrated in a Supreme Court tax case that recently ruled against a divorcing husband’s “tax planning” scheme. The Revenue Department didn’t prosecute the husband under Section 37(2) of the Revenue Code, but instead, made a claim for the tax amount plus penalty and interest on the basis that the husband’s divorce scheme is fictitious and it could tax the husband as if the divorce and the re-marriage never took place under the provisions of the Civil and Commercial Code’s Section 155, which states:

“A declaration of intention made by conniving with an other party, which is fictitious, is void.

If a declaration of fictitious intention under paragraph one is made to conceal another act, the provisions of the law relating to the concealed act shall apply.”

The divorcing husband was held liable for the tax plus penalty and interest, but he needn’t spend any time in jail.

TAX SURCHARGE

How a tax assessment of 12BB turns into 16BB

The Thai business community is being treated to a free public seminar on how a tax assessment of Bt 12 billion turns into Bt 16 billion. The answer is of course, the continuing tax surcharge, which only stops accruing when the surcharge amount equals the tax assessment amount or when the tax payment is actually made, whichever occurs earlier.

In November 2006, two Shinawatra siblings received a notice of assessment of tax issued by the Revenue Department requiring the two to pay an amount of tax of Bt 11.9 billion, made up of assessed income tax of Bt 5.9 billion, penalty of Bt 5.9 billion and surcharge from 30 September 2006 to the date of assessment of Bt 0.1 billion.

The two siblings did not pay this tax assessment, and the Thai Revenue Department is now chasing a sum of around Bt 16 billion from the Shinawatras.

So, how does a Bt 12 billion assessment notice sum turn into Bt 16 billion?

Section 27 of the Revenue Code prescribes that:

“Any person who fails to pay or remit any assessment taxes and duty within the time specified, shall pay a surcharge of 1.5% per month or fraction thereof of the tax payable or remittable exclusive of penalties.

The surcharge under the first paragraph shall accrue from the expiration of the time limit for filing returns or remitting tax to the date on which the tax is paid or remitted, but in no case shall a surcharge exceed the amount of tax payable or remittable, whether such tax liability arose because of an assessment or order of an officer, or a ruling of appeal, or a court judgment.”

As the stated amount of tax payable under the notice of assessment issued in November 2006 has gone unpaid, the Revenue Department is (as each month goes by) adding 1.5% of the assessed tax amount to

the total amount owing under the assessment notice in accordance with Section 27 of the Revenue Code.

There are 42 months from September 2006 to March 2010, which means that the accrued surcharge to date is around Bt 3.7 billion, and adding this Bt 3.7 billion to the Bt 5.9 billion owing for the assessed tax and the Bt 5.9 billion owing for the penalty, produces a current amount owing to the Revenue Department of Bt 15.5 billion (or as the newspapers report it, Bt 16 billion).

The message in the free seminar provided to the Thai business community by the Revenue Department is clear - no matter who you are - if your taxes remain unpaid, or if you are late paying your taxes - you'll be held liable for the 1.5% per month surcharge under Section 27 of the Revenue Code.

PND90/91 Personal Income tax Returns

You should not forget that your PND90/91 personal income tax return for the year ended 31 December 2009 is to be filed, and any additional tax paid, on or before Wednesday 31 March 2010.

For those of you who have not already renewed your work permit visas, you should note that in the case where there is no additional tax payable on filing your PND90/91 tax return, the Immigration Authorities now require you to present them a copy of your tax return certified by the Revenue Department. This is best done at the time of filing the PND90/91 tax return, by additionally completing Form Kor Sor 1, which is the form for a request of a certified copy of a tax return.

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