

# Call in for a Coffee – Tax News

## Introduction

Welcome to RSM's latest edition of "Call in for a Coffee". This article features some of the aspects and consequences of tax evasion and avoidance legislation. We hope that you enjoy the content of this edition and look forward to your feedback.

## Tax Avoidance or Tax Evasion?

Anti-avoidance tax legislation has been adopted by many of the advanced nations around the world. The legislation generally consists of a comprehensive set of provisions that strike down "blatant", "artificial", "contrived" or "sham" arrangements that have been entered into, not for normal commercial purposes, but for a sole or dominant purpose of obtaining a tax benefit or advantage.

Thailand does not have such detailed and specific anti-avoidance legislation in its tax code, and the code doesn't mention the words, "blatant", "artificial", "contrived" or "sham transactions". However, there does exist one small provision in Thailand's Revenue Code, which seems to have been largely ignored by taxpayers and the Revenue authorities alike, and that provision is Section 37(2), which reads as follows:

"Whoever by falsehood, fraud, artifice or any other similar device whatever, evades or attempts to evade payment of tax and duty under this Title [of the Revenue Code] shall be punished with imprisonment of three months to seven years and a fine of two thousand baht to two hundred thousand baht."

The Section clearly refers to "evasion" - a term referred to as a reduction of tax by illegal means.

The distinction between evasion and avoidance should be clearly understood. Some examples of avoidance (which are legal) are repatriation of profits to low-tax jurisdictions, earning of capital gains rather than income to take advantage of lower tax rates, spreading of income to other taxpayers with low marginal tax rates and taking advantages of tax incentives.

However, where a transaction is entered into for the sole or dominant purpose of obtaining a tax benefit or advantage without a normal commercial reason for doing so, would, in the international arena, be generally seen as evasion.

Of course, the Revenue Code does not contain definitions for the words, "falsehood", "fraud", "artifice", "device" or "evasion", and it is certainly not the intention of this article to provide any opinion of these adjectives, nor to pre-empt any court interpretation of this provision. Rather, the purpose of this article is to express an objective view for the application of section 37 (2).

Searching the International Tax Glossary, you will find that "fraud" is a form of deliberate evasion of tax, which is generally punishable by law. The term includes the deliberate making and submission of false statements and fake documents.

Also in the International Tax Glossary, you will find that an "artificial" transaction is pretence or something which is simulated and which is intended to create the appearance that a particular transaction took place, whereas in fact another transaction or no transaction took place. It says an artificial transaction is a form of tax evasion and may be disregarded.

The writer believes the international views are also true for Thailand and that there are many Supreme Court cases that have been decided upon, based on what is a normal commercial purpose.

For example, Supreme Court Case No 6704/2541 (1998) concerned a company that had bought a large amount of shares in ABC Limited from the shareholders of that company for 50 Baht per share. Three years later, the company sold the shares for 1 Baht per share to a newly established 100% owned subsidiary of the company. The company claimed a loss of 49 Baht per share for tax purposes. The company argued that the transactions were conducted for the purposes of re-organising ABC Limited, and the Revenue Department challenged this argument.

The Court held that the loss on sale of the shares was not deductible under Section 65 ter (13) of the Revenue Code. The Court reasoned that the company established the 100% owned subsidiary with the same objectives as ABC Limited and if the company wanted to reorganize ABC Limited, there was no need to establish the subsidiary.

The Court concluded that there was no business purpose for the company buying the shares, but rather it was the company's intention to help the shareholders of ABC Limited and to use the loss for tax purposes.

This case clearly indicates the Supreme Court's emphasis on a "device" or an "artificial" transaction entered into for the purposes of obtaining a tax benefit or advantage rather than for normal business or commercial purposes.

Section 37(2) has potential application to a large number of transactions, with substantial discretionary powers being vested in the Revenue Department officers as a stand-alone weapon against tax evasion arrangements that do not have a commercial or business purpose.

Clearly, it would be incongruous for Section 37(2) to apply across the board to deny access to specific features of the tax system, and the writer is certainly not suggesting this to be the case.

In broad terms, tax evasion can be detected, not on the availability of specific features of the tax system, but on an analysis of the surrounding facts, which can lead a Court to the conclusion that the arrangements were primarily contrived to achieve the benefit of that feature. That is, regard must be had to the wider view.

The great majority of companies and people should not be too concerned, and it should be noted that the large majority of blue chip corporations apply for tax rulings when entering into major transactions, so there are no surprises for them or the Revenue Department concerned.

If you want to follow the same approach, you should be prepared to disclose all the relevant facts and background information about the transaction or proposed transaction.

No reasonable Revenue Department should inhibit normal business arrangements or normal commercial dealings where companies or people legitimately take advantage of opportunities available under their taxation laws for the arrangement of their affairs.

Rather, the Revenue Departments generally approach each case on its own merits, and on the basis of the facts, determine whether the dominant purpose of a transaction is to evade tax.

It is essential that tax planning for business arrangements is commercially realistic, and a simple test one could apply is the 'smell test'. That is, if you get a strong aroma of contrivance in the arrangements, take caution, and enter at your own risk.

Steven Herring CA  
Corporate Tax Consultant

## RSM Thailand

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[Mark.Butters@rsmnw.com](mailto:Mark.Butters@rsmnw.com) Accounting & Tax Compliance  
[Mike.Holloway@rsmnw.com](mailto:Mike.Holloway@rsmnw.com) Recruitment  
[Pardorn.Suchiva@rsmnw.com](mailto:Pardorn.Suchiva@rsmnw.com) Business Services & Legal  
[Prawit.Wipusirikup@rsmnw.com](mailto:Prawit.Wipusirikup@rsmnw.com) Audit & Assurance  
[Steven.Herring@rsmnw.com](mailto:Steven.Herring@rsmnw.com) Taxation Consulting  
[Surachai.Damnoenwong@rsmnw.com](mailto:Surachai.Damnoenwong@rsmnw.com) Audit & Assurance

## Contact Details

### RSM Nelson Wheeler (Thailand) Limited

26th Floor, Sathorn City Tower,  
175 South Sathorn Road,  
Bangkok 10120, Thailand

Telephone: 66 (0) 2670-9002-6

Facsimile: 66 (0) 2670-9027-8

Website: [www.rsmnelsonwheeler.co.th](http://www.rsmnelsonwheeler.co.th)

Email Address: [askus.bangkok@rsmnw.com](mailto:askus.bangkok@rsmnw.com)