

# Call in for a Coffee

RSM Nelson Wheeler, Thailand

Edition No 5

January 2003

## Introduction

Welcome to RSM's first 2003 edition of the "Call in for a Coffee" Newsletter. We trust that you had a great Christmas and wish you a happy and prosperous year.

This issue focusses on Thai tax evasion legislation and case law and it also introduces the financial advisory services of **Mr Christopher Coleridge Cole and MLI Limited** to Thailand.

## TAX EVASION

### Introduction

Tax evasion legislation worldwide attempts to strike down "blatant", "artificial", "contrived" or "sham" arrangements entered into for the sole or dominant purpose of evading tax.

### Thai Taxation Law

Thailand does not have detailed tax evasion provisions in its law. However, some Supreme Court decisions made in the late 80's and 90's confirm that Thailand's tax system has at least one tax evasion provision that has teeth which is Section 65 ter (13) of the Revenue Code.

Section 65 ter (13) is drafted in simple terms:

*"Any expenses not exclusively expended for the purpose of acquiring profits or for the purpose of business" are not allowed as tax expenses.*

The provision refers to a "purpose of business" factor. The Supreme Court has confirmed that the application of Section 65 ter (13) is determined by an analysis of a number of factors, namely, the manner, form and substance of the transaction. Accordingly, the degree to which a transaction is "blatant", "artificial", "contrived" or a "sham" will be relevant.

There is no mention of the words, "blatant", "artificial", "contrived" or "sham" in Section 65 ter (13). The Supreme Court has rendered arrangements ineffective, where tax benefits have been obtained, the arrangements were entered into for the sole or dominant purpose of obtaining tax benefits, other than for the purpose of business.

### Thai Tax Evasion Case Law

The following Supreme Court decisions, set out the principles for the application of Section 65 ter (13) that flow from the following decisions:

#### Case 1478/2531 (1988)

A company obtained a loan from a bank and paid interest

on that loan claiming that the loan was to repay an advance received from one of its directors.

The Court held for the Revenue Department concluding that the loan had no demonstrated business purpose so the interest on the loan did not constitute a deductible expense under Section 65 ter (13). Accordingly, for Section 65 ter (13), it is not sufficient for a transaction to have a mere legal form it must have an underlying commercial or business purpose.

#### Case 4184/2533 and 4483/2533 (1990)

A mining company concluded management arrangements with a related enterprise. Every couple of weeks, months, or sometimes a year, the two parties concluded new management agreements that were identical, except for the amount of fees payable. The parties could not demonstrate the reason why there were different fees paid, as well as the interest paid on the bank loan.

The Court held for the Revenue Department and determined that:

- Payments for services under agreements that were not actually performed, are not deductible under Section 65 (13);
- Payments for services that are not actually rendered are not deductible under Section 65 (13) and (9);
- Interest on loans obtained to transfer funds to another company without a business purpose is not deductible under Section 65 (13);
- A service contract that is a "sham" merely to avoid taxation actually conceals a loan to the other party upon which interest should be charged under Section 65 bis (4); and
- From the irregularity of the agreement periods and payments, and the fact that the payments were not always as contractually determined, this transaction was not in accordance with common business practices

This decision emphasizes that the concept of "sham", which is common in other countries tax evasion legislation, has a role in Thai tax law. The Court said that agreements may be ignored if they are never meant to be really performed, but drafted to avoid taxes and conceal another, real agreement between the parties.

#### Case 123/2540 (1997)

Company A bought property and assumed a debt from company "B" (related) in Thailand for Baht 300 million. Company A argued that, as the value of the property was insured for Baht 300 million, this proves the normal character of the price. The debt was to a third party, but was not included in the contract between Company A

and B. The Revenue Department disputed the purpose information about the transaction or proposed transaction. of the purchase of the property and refused a deduction for the interest on the debt transferred, on the basis of Section 65 ter (13).

The Court held for the Revenue Department citing its concern as to why company A bought the property from company B which had accumulated tax losses, whilst company A would also be allowed depreciation on a higher value for the property and that the interest on the debt was not incurred for business purposes.

### **Case 6704/2541 (1998)**

In this case, a company buys a large amount of shares in Siam Kraft from the shareholders of that company for Baht 50 per share. Three years later, the company sells the shares for Baht 1 per share to a newly established 100% owned subsidiary of the company. The company claims the loss of Baht 49 per share for tax purposes. The company argues that the transactions were conducted for the purposes of reorganising Siam Kraft.

The Court held that the loss on sale of the shares is not deductible under Section 65 ter (13). The Court saw it as relevant that the company established the 100% owned subsidiary with the same objective and with the same area of business as Siam Kraft, and if the company wanted to reorganise Siam Kraft, there was no need to establish the subsidiary.

The Court concluded that there was no business reason why the company bought the shares, but rather it was the company's intention to help the shareholders of Siam Kraft and to use the loss for tax purposes. This, the Court said, was not in accordance with Section 65 ter (13).

This case demonstrates the Court's emphasis on intent for the purposes of Section 65 ter (13).

### **Conclusion**

The Supreme Court cases were decided on the surrounding facts which led the Court to a conclusion that the arrangements were primarily contrived to achieve the benefit of that feature.

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

Many large corporations apply for tax rulings when entering into major transactions, so there are no surprises for them from the Revenue Department. If you want to follow the same approach, you should be prepared to

disclose all the relevant facts and background

### **Steven Herring : Tax Consultant, RSMNW**

#### **New Financial Advisor**

RSM Nelson Wheeler (Thailand) Limited has recently entered into a business arrangement with **Mr Christopher Coleridge Cole, I.R.I.D. director of MLI Limited**, currently based in Hong Kong with intentions to commence operations in Thailand to provide investment opportunities to high wealth individuals. **Mr Cole** will provide articles for inclusion in future editions of "Call in for a Coffee". Whilst RSM cannot endorse **Mr Cole** or his company, several of our Hong Kong partners have used his services in the past with success.

If you have financial, legal or other problems that require innovative solutions, please contact the RSM team and "Call In For A Coffee" for a free consultation.

### **Our Team**

<b>Gareth Hughes</b>	- Director, Operations, Business Services & Audit
<b>Stephen Darley</b>	- Director, Corporate Services.
<b>Mark Butters</b>	- Associate Director, Business Services & Audit
<b>Surachai Damnoenwong-</b>	Audit Principal
<b>Atchara Threepapin</b>	- Senior Manager, Legal
<b>Steven Herring</b>	- Senior Consultant, Tax Consulting

### **Free Consultation**

Translation of business ideas into realistic projects requires expert advice. RSM can assist you in formulating practical solutions to obstacles which may be encountered while undertaking business in Thailand.

### **Contact Details**

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