

Tax Break Article April 2009



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Shin Corp Case Results in more Uncertainty for Taxpayers

The long drawn out court case over the alleged tax evasion on the sale of shares from Thaksin's wife (Khunying Potjaman Shinawatra) to her step-brother (Bannapot Damapong) has resulted in a number of interesting issues that should be of concern to corporate tax payers. In short, the facts of the case were that Khunying Potjaman transferred her holding of 4.5 million shares in the Stock Exchange of Thailand ("SET") listed company Shinawatra Computer and Communications (better known as Shin Corp) to Khun Bannapot for no consideration.

Exemption for Tax on Gains on Trading Listed Shares Questioned

She initially argued that the shares were transacted through the SET because the transaction went through a stock broker. Under Section 42(17) of the Revenue Code, a gain on sale of shares of a SET listed company is exempt from income tax. The Court disagreed that the trade was a true purchase and sale within the SET framework but rather deemed it to be a transfer of shares.

This leads us to the first issue. Pursuant to Section 42(17), paragraph 23 of Ministerial Regulation No. 126 states that income from the sale of securities in the SET is exempt from personal income tax. However it does not stipulate that such sale has to be an on market transaction. Most large parcels of shares can only be sold off market and any attempt to sell on market could seriously distort the market price. The court decision did not address this issue. We would assume that off market transactions would still qualify for the exemption as long as it was considered a true purchase and sale arrangement (for example payment from one party to another at the market price).

Gifts May be Taxed under a Catch All Provision

The defense argument that shares were tax free as they were transferred as a wedding gift did not work as the Court deemed that gifts are assessable. This is despite section 42(1) of the Revenue Code which states that "*maintenance income derived under*

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moral obligation, corpus of a legacy or inheritance, or gifts made in a ceremony or on occasions in accordance with established custom” are exempt from tax.

Invocation of Previously Unused Section of the Revenue Code

Section 37 is particularly onerous and decrees that as a result of knowingly making false statements or producing false evidence with a view to evading tax, there is a punishment of between 3 months to 7 years and / or a fine of Bt 200,000

Time Bar of 5 Years did not Apply in this Case

The other interesting aspect of the case is that the transaction took place some 11 years ago (7 November 1997). Under Section 19 of the Revenue Code, an assessment officer has the power to issue a summons requiring a person to produce books of accounts and documents as well as attend and give evidence where he or she is of the opinion that the person reported false or inadequate information in a return. This power is only valid for a 2 year period from the date of filing the return unless there is documentary evidence or reason to suspect that the taxpayer had an intention to evade tax in which case this period can be extended to a maximum of 5 years. The Court, however, held that the Revenue Department was able to utilise its authority under Section 193/31 of the Civil and Commercial Code, which stipulates that the prescription period for claims by the Government for taxes and rates is 10 years. Furthermore, it is noted by the Court that the Civil and Commercial Code overrides the Revenue Code. It is therefore possible that the Revenue Department may invoke the Civil and Commercial Code when undertaking investigation that may otherwise fall outside the time period. This results in further uncertainty to taxpayers in view of both potential assessments and also record keeping. The Revenue Code does not specifically legislate a time period for record keeping but a period of 5 years was normally assumed based on the maximum amendment period allowed under Section 19. This ruling suggests it would be wiser to keep records for longer than 5 years.

These court decisions have interesting ramifications and in many ways pose more questions than answers.

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