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Column: LEADING THE WAY: CAN THE REVENUE DEPARTMENT REWRITE THE LAW?

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LEADING THE WAY

PwC

Where the interpretation of tax law is not clear, it is not uncommon for a taxpayer to seek a private ruling from the Revenue Department. Frequently, taxpayers find that the rulings that they receive are not in their favour. Perhaps, unsurprisingly, rulings tend to interpret the law in a manner that results in the payment of more, not less, tax.

In such cases, some taxpayers may follow the Revenue Department's interpretation and pay tax in accordance with the ruling. Other may choose not to follow the ruling with the result that they are issued a tax assessment and have to defend their position in court.

Rulings are sought where the interpretation of the law is unclear, or where the law does not address a specific situation. However, rulings issued by the Revenue Department often appear to be adding to or extending the law as set out in the Revenue Code.

One example of this extending of this adding to the law, concerns the conditions under which a company may claim exemption from tax on dividend income. Under the Revenue Code (Section 65 bis 10) Thai Company A, receiving dividend from Thai Company B, may be exempt from tax on the dividend provided it meets certain conditions.

One condition is that there is "no cross shareholding between the company paying the dividend and the company receiving the dividend, either directly or indirectly". This appears fairly straightforward, but like all law, is open to interpretation.

In a recent case, Company A received a dividend from Company B. The latter had held shares in Company A, but had sold the shares before paying the dividend. Company A believed the exemption applied, but the Revenue Department disagreed.

It was the department's view that the exemption applied only if Company B held no shares in Company A from the beginning of the accounting period in which the dividend was paid, to the date of actual payment. The Revenue Department interpretation has, therefore, added a condition to the exemption which is not present in the law itself.

The interpretation of the tax law by the Revenue Department may also seek to extend a specific provision to other circumstances. For example, Section 65 ter (19) of the Revenue Code does not allow a company to take a tax deduction for payments which are "determined on and payable out of profits after the end of an accounting period". This prohibition appears clear and applies in a specific set of circumstances.

However, in a recent ruling, the Revenue Department stated that, by virtue of this provision, no tax deduction was available for bonuses determined on and payable out of quarterly profits. Its interpretation appears to apply the specific prohibition where a payment is determined on profits "at the end of an accounting period" to other situations, such as where payments are determined on quarterly profits.

Does the Revenue Department have the right to extend the law in the manner illustrated in these two examples?

The answer, in brief, is "No". Almost two decades ago, the Supreme Court ruled that tax law is a public law. It determines the obligation of people to the State and affects the liberty and rights of the people. Consequently, the law must be considered complete in, and of, itself. It must be interpreted strictly according to the way it is written and in a way that does not create an additional burden or obligation on the taxpayer.

The position taken by the Supreme Court has recently been reinforced by a Central Tax Court decision in the case of the dividend example described above. In the case (Red Case no. 78/2555) the Central Tax Court ruled that the Revenue Code must be applied as it is written. The Revenue Department cannot interpret the law in a way that adds to the law.

Thus, as the exemption from tax on dividends does not include the condition there must be no cross-shareholding from the start of an accounting period, no such condition exists. All that is required is the cross-shareholding does not exist when the dividend is declared.

The Central Tax Court has thus stated its opinion that, a resolution of the Board of Taxation or a ruling of the Revenue Department cannot be used to interpret tax statute beyond what the law intended, if this results in adverse consequences to the taxpayer. If a condition is not stated in the law, the condition does not exist. Similarly, if the law applies to a specific situation, it cannot be applied to a different situation.

This ruling by the Central Tax Court is an important victory for taxpayers and goes some way to establishing a "level playing field" between the taxpayer and the Revenue Department. It suggests that the Tax Court will not side with the Revenue Department where it has sought to disadvantage the taxpayer in by "rewriting" the Revenue Code.

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