Singapore Law Review
(2024) 41 Sing L Rev

JUDICIAL GENERAL ANTI-TAX AVOIDANCE DOCTRINES IN THAILAND

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I. INTRODUCTION

Tax-planning arrangements have become increasingly sophisticated over time due to the increasing mobility of capital, and there are many financial tools in place to achieve this end. This, in turn, gives rise to challenges in applying tax laws to determine whether certain tax-planning arrangements should be considered unacceptable tax avoidance and, consequently, be disregarded. In this regard, some countries have enacted statutory general anti-tax avoidance rules (GAARs), while others have relied mainly – or partially – on judicial doctrines to develop their anti-tax avoidance regime, depending on their historical developments, legal system, and tax policies.

Thailand does not have statutory GAARs, and its legal system does not recognise judicial precedents as the law. However, in some Thai cases, there have been visible judicial attempts to follow and adopt classical tax doctrines to disregard unacceptable tax arrangements. This article will thus delve into the fundamental concepts of the Thai legal system, general anti-tax avoidance measures that jurisdictions may adopt to guard against unacceptable tax avoidance, discuss selected Thai tax cases to elaborate on the legal basis of how Thai courts apply and interpret the judicial doctrines first created by common law courts, and the implication of this line of cases to the Thai legal and tax systems.

This article will proceed in four parts. Part II will provide an overview of the Thai legal system, in term of its sources of law and the status of Thai judicial decisions, as well as Thailand's anti-tax avoidance regimes. Part III provides some classical judicial doctrines that are widely accepted, particularly the substance-over-form and economic substance doctrines. Part IV analyses Thai judicial cases that are likely to adopt the judicial doctrines in two sets of case studies: taxation of share premiums and royalty fees. The final part concludes with the implication of such interpretation in the Thai context and discusses the way forward.

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II. FUNDAMENTAL PRINCIPLES

A. Legal System and the Status of Judicial Decisions

In the Thai legal system, statutory law is considered as the primary source of law and will prevail over other sources of law, such as customary law and general principles of law.[2] Customary law applies only if there is no applicable statutory law, and general principles apply only if there is no applicable customary and neatly applicable statutory law for a given circumstance.[3] Unlike the common law system, a judicial decision is not considered as a source of law, and the principle of precedent does not exist in the Thai legal system.[4]

In terms of statutory laws, taxation in Thailand is mainly levied by the central administration under the Ministry of Finance, namely the Revenue Department, Excise Department, and Customs Department. The local administration also has the authority to collect certain taxes. Taxation is the principal source of public revenue of which value-added tax, corporate income tax, and personal income tax are the main components. Tax laws are primarily prescribed in the Revenue Code of Thailand ("the Revenue Code") and other specific acts such as the Excise Tax Act B.E. 2560 (2017), the Customs Act B.E. 2560 (2017) and the Customs Tariff Decree B.E. 2530 (1987) (as amended), and the Land and Building Tax Act B.E. 2562 (2019). These primary tax laws are supplemented by secondary legislation.

In relation to judicial review, tax disputes fall generally under the jurisdiction of the Court of Justice, which in turn consists of three levels.[5] The court of first instance is the Central Tax Court as established under the Act on the Establishment of and Procedure for Tax Court B.E. 2528 (1985). The Central Tax Court's decisions can be appealed to the Court of Appeal for Specialised

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[2] Somyos Chuethai, *General Knowledge of Law*, 2nd ed (Thailand: Thammasat University Press, B.E. 2552) at 126.

[3] Thailand Civil and Commercial Code, s 4 at para 2.

[4] Munin Pongsapan, "Remedies for Breach of Contract in Thai Law" in Mindy Chen-Wishart et al, eds, *Studies in the Contract Laws of Asia 1: Remedies for Breach of Contract* (Oxford: Oxford University Press, 2016) at 370.

[5] Act Promulgating the Law for the Organisation of the Court of Justice B.E. 2543, c 1, s 1.

Cases, Tax Division.[6] A further appeal can be submitted to the Supreme Court, Tax Division, in limited circumstances which is contingent upon permission being granted by the Supreme Court.[7]

As mentioned above, judicial decisions are not a source of Thai law, and they do not bind other Thai courts deciding future cases. Thus, they have limited precedential value. However, in practice, the decisions made by the Thai Supreme Court – the highest court of the land – serve as an example of how a particular law should be interpreted and what rationale should undergird that specific law. Therefore, decisions made by the Thai Supreme Court have some guiding value in that they are usually followed by a lower court to reach a similar decision in subsequent cases with similar disputes and factual problems.[8] On this basis, the Thai Supreme Court's decisions can influence general practices to mitigate the risk of non-compliance.

B. *Anti-Tax Avoidance Rules*

It is normal for taxpayers to want and keep their tax exposure to a minimum for their own financial benefit. Hence, taxpayers adopt the use of tax planning which in one way could be defined as the capacity of a taxpayer to conduct their financial activities that would cost the least in terms of taxes.[9] This includes utilising deductible expenses and tax exemptions granted by the laws of their jurisdictions. Therefore, the aim of tax planning is to minimise tax liabilities in legally acceptable ways.

The terms 'tax avoidance' and 'tax evasion' should not be used interchangeably. Unlike tax evasion, tax avoidance should fall within the scope of the law.[10] However, tax avoidance could fall out of the scope allowed by the law if it results in unacceptable tax avoidance.

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[6] The Act for the establishment of and procedure for Tax Court B.E. 2528, s 24.

[7] *Ibid* at s 26.

[8] Pongsapan, *supra* note 4 at 370.

[9] William H. Hoffman Jr, "The Theory of Tax Planning" (1961) 36:2 Accounting Rev at 274.

[10] Sukumar Mukhopadhyay, "General Anti-Avoidance Rule in Income Tax Law" (2012) 47:22 Economic & Political Weekly at 24.

Tax arrangements that are made as part of a taxpayers' tax avoidance can thus be categorised into two categories: (i) acceptable tax mitigation; and (ii) unacceptable tax avoidance.[11] An acceptable tax mitigation is one where a taxpayer's tax burden is reduced by utilising a gap in, or a provision of, the tax laws to make certain arrangements or carry out certain transactions. In contrast, unacceptable tax avoidance is when the taxpayer enters into certain arrangements or transactions with the primary purpose of avoiding tax. This infringes upon the spirit of the law, even if such arrangements and/or transactions do not strictly offend the letter of the law.[12] Therefore, anti-tax avoidance rules are rules created for the purpose of preventing such unacceptable tax avoidance. Generally, there are two types of anti-tax avoidance rules: specific anti-tax avoidance rules and general anti-tax avoidance rules. Both types will be explained in turn.

1. *Specific anti-tax avoidance rules*

Specific anti-tax avoidance rules (SAARs) aim, as its name suggests, to deny the tax benefit when a specific type of transaction is undertaken;[13] for example, the exchange of goods and services between related parties situated in different countries to lower the tax burden (i.e. transfer pricing). As SAARs are specific in nature, taxpayers could avoid being subjected to the rules by following the SAAR in form but not the substance of the rules, and this creates a loophole for taxpayers to exploit such rules.[14] However, a country's GAARs can override the loophole found in the SAARs. For example, in India's Income Tax Act 1961, by virtue of sections 95 and 96, a transaction that has the main purpose of obtaining a tax benefit can be rendered impermissible even if the SAAR does not apply. Therefore, GAARs and SAARs are complementary to each other, and a jurisdiction that has SAARs can use such specific rules in conjunction with its GAARs.[15]

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[11] Zoë Prebble & John Prebble, "Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law" (2008) Bull Intl Tax at 151.

[12] Reuven Avi-Yonah, Nicola Sartori & Omri Marian, "Tax Avoidance" in Reuven Avi-Yonah et al., eds, *Global Perspectives on Income Taxation Law* (Oxford: Oxford University Press, 2011) at 101.

[13] Irish Tax and Customs, online: Legislative tools to challenge tax avoidance <https://www.revenue.ie/en/self-assessment-and-self-employment/tax-avoidance/legislative-tools-to-challenge-tax-avoidance>.

[14] Overview of GAAR, WIRC Reference Manual 2022-2023 <https://wirc-icai.org/wirc-reference-manual/part3/overview-of-gaar>.

[15] Richar Krever, "General Report: GAARs" in Michael Lang et al., eds, *GAAR - A Key Element of Tax Systems in the Post BEPS World*, (Amsterdam: IBFD, 2016) at 13.

In the Thai context, there are no SAARs that address specific types of abuse, e.g., thin capitalisation, controlled foreign company (CFC) regime, or anti-treaty shopping measures. However, certain provisions under the Thai Civil and Commercial Code and the Revenue Code can apply to deal with sham transactions that can be rendered null and void;[16] or render certain commercial transactions as being conducted "without reasonable cause" which, in turn, can lead to a re-assessment by the tax officials for the purpose of adjusting tax liabilities.[17]

2. *General anti-tax avoidance rules*

In contrast to the SAARs, GAARs provide a general rule on what will be considered an unacceptable tax avoidance practice which, as previously mentioned, is a practice that undermines the purpose and intention of tax laws. GAARs can be broadly divided into two types: (i) statutory GAAR; and (ii) judicial GAAR. They are not mutually exclusive and can co-exist as well as operate together in the legal system of a jurisdiction.[18] Statutory GAARs are legal provisions that give a tax authority the power to "strike down unacceptable tax avoidance practices that would otherwise comply with the terms and statutory interpretation of the ordinary tax law".[19] Many countries, such as the United Kingdom (UK), Singapore, France, the Netherlands, Canada, China, and Australia, have enacted their own set of GAARs.[20] Judicial GAARs will be articulated in the next part of this paper.

Generally, the wording of statutory GAARs will address two main elements: (i) tax schemes in scope; and (ii) criteria to consider whether the schemes is carried out solely for a tax benefit. An example of a GAAR provision can be seen in section 33 of the Singapore Income Tax Act 1947, which addresses "the arrangements" that directly or indirectly alter the incidence of any tax that is payable by or that would otherwise have been payable by any person, relieve any person from any liability to pay tax or to file a tax return, or reduce or avoid any liability imposed or which would

[16] Thailand Civil and Commercial Code, s 155.

[17] Thailand Revenue Code, s 65 bis (4) and 65 ter (15).

[18] Compare Brian Arnold, "A comparison of statutory general anti-avoidance rules and judicial general anti-avoidance doctrines as a means of controlling tax avoidance: Which is better? (What would John Tiley think?) in: Avery Jones J et al., eds. *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley* (Cambridge: Cambridge University Press; 2008).

[19] See Introducing a general anti-avoidance rule (GAAR)—Ensuring that a GAAR achieves its purpose, IMF, Technical Note 2016/1 at 1.

[20] *Ibid.*

otherwise have been imposed on any person.[21] Tax authorities are empowered to disregard the arrangements, vary the arrangements, and make adjustments which they consider appropriate, including the computation and re-computation of taxes.[22] However, the GAAR does not apply to any arrangement carried out for *bona fide* commercial reasons and did not have, as one of its main purposes, the avoidance or reduction of tax.[23]

In the Thai context, no statutory GAARs are generally applicable to disregard, vary, or make adjustments to taxpayers' tax-planning arrangements or to treat certain tax arrangements as unacceptable tax avoidance. This also means that any GAARs in Thailand – to the extent that they exist – are primarily creatures of judicial interpretation. Judicial GAARs is what this paper will now turn to, and the next part will explore whether judicial GAARs are used as mechanism from Thai courts to address (unacceptable) tax avoidance practices.

III. JUDICIAL GENERAL ANTI-AVOIDANCE RULES

Judicial GAARs are developed from judicial pronouncements, particularly in the context of common law jurisdictions. Such pronouncements are not codified in the way that statutory GAARs are. The development of judicial GAARs vary from jurisdiction to jurisdiction. Crucially, some statutory GAARs enacted in various jurisdictions started their doctrinal life as judicial GAARs. Some examples include the substance over form doctrine and the economic substance doctrine. Both doctrines will be discussed in turn.

A. Substance Over Form Doctrine

The substance over form doctrine is a common law doctrine that allows a court to disregard a form of an arrangement and assess the true nature of the transaction.[24] The substance over form doctrine has been adopted by many countries, e.g., the United States of America (USA) and the

[21] Singapore Income Tax Act 1947, s 33 (1).
[22] See generally Tan How Teck and Jimmy Oei, *Singapore Master Tax Guide Handbook 2016/17*, 35th ed (Singapore: Wolters Kluwer, 2016) at 699.
[23] Singapore Income Tax Act 1947, s 33 (7).
[24] Paladini Law Firm, "What is the Substance Over Form Doctrine" (20 October 2019), online: Paladini Law Firm < https://paladinilaw.com/substance-over-form/>.

UK.[25] As each jurisdiction has developed the doctrine in a unique fashion, it should come as no surprise that the doctrine in stated differently across jurisdictions. For example, in the landmark English case of *Inland Revenue v Duke of Westminster*,[26] Lord Tomlin, deciding as part of the majority, stated that:

> [I]n revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter" … This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable ... [H]ere the substance is that which results from the legal rights and obligations of the parties ascertained upon ordinary legal principles…

This landmark statement by Lord Tomlin showed that, at least in 1936, the form of the tax arrangement was seen as more important than its substance.[27] Courts, in interpreting the taxpayer's financial arrangements, should thus give due weight to the form of the arrangements rather than its substance. This form over substance approach was subsequently followed in *Floor v Davis*[28] as well as in other cases, at least up till the early 1980s. The substance over form doctrine was then further elaborated in the case of *W.T. Ramsay Ltd v Inland Revenue Commissioner*,[29] which had the effect of restricting the prior form over substance approach that was adopted. A summary of the facts can be seen in Lord Wilberforce's statement as follows:

> The first of these appeals is an appeal by W. T. Ramsay Ltd, a farming company. In its accounting period ending 31 May 1973, it made a "chargeable gain" for purposes of corporation tax by a sale-leaseback transaction. This gain it desired to counteract, so as to avoid the tax, by establishing an allowable loss. The method chosen was to purchase from a company specialising in such matters a ready-made

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[25] Reuven, Sartori & Marian, *supra* note 12 at 104.

[26] *Inland Revenue Comm'rs v Duke of Westminster* [1935] UKHL 4 at 390-91[*Duke of Westminster*].

[27] Karen B. Brown, "Applying Circular Reasoning to Linear Transactions: Substance over Form Theory in U.S. and U.K. Tax Law" (1992) Hastings Int'l & Comp L Rev.

[28] *Floor v Davis* [1978] EWCA Civ J0317-1.

[29] *W. T. Ramsay Ltd. v Inland Revenue Commissioners* [1981] UKHL 1 [*W.T. Ramsay Ltd*].

> scheme. The general nature of this was to create out of a neutral situation two assets one of which would decrease in value for the benefit of the other. The decreasing asset would be sold, so as to create the desired loss; the increasing asset would be sold, yielding a gain which it was hoped would be exempt from tax.

In this case, Lord Wilberforce decided to elaborate on the applicable extent of the form over substance approach and its relationship with the substance over form doctrine:

> Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of *Duke of Westminster*. This is a cardinal principle, but it must not be overstated or overextended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transactions to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded.

As made clear by Lord Wilberforce in the foregoing quote, the form of an arrangement should not overrule the substance. This is consistent with the earlier case of *Duke of Westminster*. However, following *W.T. Ramsay Ltd*, courts were now empowered to go behind to strict legal form to ascertain the true nature of transactions and, in cases where the arrangements and/or transactions were found to lack substance, the court could disregard the strict legal form for the purposes of taxation. The ruling has since been followed by both courts and taxpayers within the UK and has since been accepted as an authoritative judicial precedent.

B. Economic Substance Doctrine

The economic substance doctrine is a common law doctrine which holds that transactions with no economic purpose(s) will not be recognised for tax benefit.[30] Therefore, a transaction may be disallowed for the tax benefit if there is no economic impact on persons that carried out the transaction. The principle of the economic substance doctrine can be traced back to the American case of *Helvering v Gregory*.[31] This case involved the tax commissioner's refusal to accept the taxpayer's argument the impugned transaction was part of a tax-free corporate reorganisation. Instead, the tax commissioner argued that the taxpayer was simply abiding by legal form to make it appear as if a reorganisation had taken place, just so that she could get out of paying substantial income tax. In agreeing with the tax commissioner, Justice Learned Hand stated that:

> [A] transaction ... does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes … Nevertheless, it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition. ... the meaning of a sentence may be more than that of the separate words ... and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create. The purpose of the section is plain enough; men engaged in enterprises ... might wish to consolidate ... their holdings. ... But the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand. ... To dodge the shareholders' taxes is not one of the transactions contemplated as corporate "reorganizations".

It is clear from this decision that there is no law forbidding transactions with the purpose of minimising tax payment; however, transactions that do not have any underlying economic substance will not be allowed for tax purposes. Furthermore, an example of the codification of the

[30] John F. Robertson, Tina Quinn & Rebecca Carr, "Codification of the Economic Substance Doctrine" (2010) 9:2 J Bus Admin Online.
[31] *Helvering v Gregory* 69 F.2d 809 (2d Cir. 1934).

common law economic substance doctrine can be found in the US I.R.C. § 7701, which states that a transaction will be considered to have economic substance only if: (i) the transaction changes in a meaningful way the taxpayer's economic position, and (ii) the taxpayer has a substantial purpose for entering into such transaction (other than the tax purpose). In the case of the United States, a transaction that lacking economic substance may be liable to be disregarded. In addition, the taxpayer might also be liable to certain penalties for the underpayment of tax.[32]

IV. JUDICIAL CASES IN THAILAND

Even though statutory GAARs have not yet been enacted in the Thai legal system, there have been some cases where the Thai court appeared to accept the existence of some judicial GAARs to disregard, vary, or adjust transactions in order to re-assess the taxpayer's true tax liability. As aforementioned, this is out of step with the civil law legal tradition that Thailand has, and it is tantamount to judicial law-making in the absence of codified laws. More interestingly, such judicial creation and acceptance of GAARs have been followed by subsequent Thai courts. This part provides selected cases in the ambit of taxation of share premium and royalties.

A. Taxation of Share Premium

1. Supreme Court Decision No. 5812/2557 (2014)

A Co. has a registered capital of 722,000,000 THB which can be divided into 7,220,000 shares at 100 THB per share. *A Co.* has a collective net operating loss of more than 1,567,000,000 THB. *A Co.* has a lot of debt due and owes a total of US$ 30,219,000 to an overseas bank ("the Bank"). The Bank and *B Co.* made a Release and Settlement Agreement ("the Agreement") for *A Co.* in which the Bank agreed to release US$ 30,219,000 worth of debt from *A Co.* on the condition that *B Co.* transfers US$ 20,000,000 to *A Co.* to pay the debt owed to the Bank.

A Co., having a financial shortfall at the material time, could not increase its capital by issuing ordinary shares totaling US$ 20,000,000 to be sold to *B Co.* as *B Co.* is a foreign juristic person and is a major shareholder of *A Co.* without paying a premium on those shares.

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[32] Reuven, Sartori & Marian, *supra* note 12 at 104.

Therefore, *A Co.* increased its capital by issuing 1,000 new shares at 100 THB per share. Thereafter, *A Co.* conducted an entire business transfer of its business to *C Co.* and sold all the newly issued shares to *B Co.* at a price exceeding its par value, whereas *B Co.* paid a total of US$ 20,000,000 higher than the par value, which is 100,000 THB. The share premium was thus 906,296,000 THB. *A Co.* did not include this amount in its corporate income tax calculation.

The Revenue Department made an assessment stating that share premium of 906,296,00 THB in the financial accounts of *A Co.* was a result of the increase of capital through the issuance of 1,000 shares which had a par value of only 100,000 THB. The share premium should, in the Revenue Department's view, be considered as a subsidy or an ancillary payment which should be considered in the corporate income tax calculation as revenue. Thus, *A Co.* was liable to pay tax on the said amount.

This case was brought before the court by *A Co.* to revoke the assessment made by the Thai Revenue Department officers claiming that the share premium should not be treated as revenue but equity of *A Co.* and that the reason for the increase of capital was because *A Co.* suffered losses for many consecutive years due to the global economic situation. The Central Tax Court dismissed the case. *A Co.* then appealed to the Supreme Court.

The Supreme Court upheld the judgment passed by the Central Tax Court. The Agreement between *A Co.* and the Bank and *B Co.* came into effect after the resolution of the increase of capital, and the disposal of all the additional shares, was passed by the shareholders of *A Co.* so that *A Co.* could pay its debt to the Bank. Therefore, the Supreme Court concluded that *A Co.* had created a scheme to make the amount flowing from the increase of capital fall outside the scope of assessable income or revenue, which was deemed to be an unacceptable form of tax avoidance.

2. Supreme Court Decision No. 2050/2559 (2016)

In this case, *A Co.* registered one preference share at a value of 1,000 THB per share and sold the share to NEC Corporation at a value of 410,000,000 THB. In this regard, *A Co.* recorded the 409,999,000 THB share premium as its equity. The Revenue Department assessed that the share premium was an income for tax purposes.

The case was brought to the Supreme Court, which ruled that the share premium was to be considered as a subsidy, which was an income from a tax perspective, as the share premium was an excessive amount. Therefore, the share premium was held to be taxable income in A Co.'s corporate income tax calculation. This was in line with the judgment in Supreme Court Decision No. 5812/2557.

3. *Analysis*

According to the Thai Civil and Commercial Code, the law does not prohibit the issuance of shares higher than its par value.[33] In the aforementioned cases, the corporate taxpayers had increased their share capital with premiums in accordance with the corporate law. Generally, share premiums are not recorded in the profit and loss statement as revenue but are recorded as part of the shareholder's equity. Therefore, the share premiums in both cases should have been treated as equity, not taxable income.

However, even if the strict legal form (the increased share capital with premiums) was abided by the law, the Supreme Court had doubts over the true substance of the issuance of the share premiums in both cases. In Supreme Court Decision No. 5812/2557 (the first case discussed), the issuance of shares was made along with several complex transactions with related parties so as to set-off the outstanding debt. These transactions were deemed to have taken place outside the normal course of business operations. In Supreme Court Decision No. 2050/2559, the Supreme Court took a suspicious view of the excessive price of the issued shares which was inexplicable. The Supreme Court therefore concluded that, to the extent that the issue price was excessive, it should be considered as a grant or subsidy that the company received, and should thus be treated as taxable income.

The Supreme Court in both cases took the view that the underlying intention of the corporate taxpayers was to exploit an existing law with the purpose of avoiding its income tax liabilities. Ultimately, the decision in both cases had turned on each case's unique facts and both decisions should be seen as an exception to the general rule that share premiums are generally non-taxable. In this regard, it must be emphasised that the courts in both cases had disregarded the strict legal

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[33] Thailand Civil and Commercial Code, s 1105, para. 2.

form of the impugned transactions, went behind it to scrutinise the true intent of the taxpayers in entering such transactions, and thereafter adjusted the taxpayer's tax liabilities. It is thus clear that the both the substance over form doctrine and the economic substance doctrine do exist in Thailand, despite their non-codification. In particular, the court had adopted the economic substance doctrine by stating that the issuance of shares at a value higher than its par value ought to reflect the company's future economic prospects, for it to be justified and thus excluded from the corporate income tax calculation.

B. Taxation of Royalty Fees

1. Supreme Court Decision No. 1056/2549 (2006)

A Co. entered into an agreement with *B Co.* to appoint *B Co.* as its sole distributor in the USA. Later, *A Co.* decided to terminate the contract and agreed to pay US$ 3,000,000 as remuneration to *B Co.* for the marketing and sales services provided before the termination of the contract. *B Co.*, in turn, was to supply the necessary customers' information of *B Co.* and its affiliates. The purpose of this agreement was to terminate the role of *B Co.* as its sole distributor for *A Co.* in the USA without breaching any contract with *B Co.* The Revenue Department made an assessment that the remuneration payment should be deemed as a royalty fee. On this basis, *A Co.* should have withheld taxes from its payment to *B Co.*.

A Co. brought the case before the Central Tax Court to revoke the assessment made by the Revenue Department. The judgment made by the Central Tax Court ruled in favour of *A Co.*. The Revenue Department thus appealed to the Supreme Court. The Supreme Court overturned the Central Tax Court's decision and ruled that the agreement gave the right to *A Co.* to sell its product in the USA while utilising the information relating to specific knowledge and commercial experiences of *B Co.* As a result, the renumeration payment was considered to be a royalty fee, which *A Co.* needed to pay tax on.

2. Supreme Court Decision No. 5808/2557 (2014)

A Co. entered into a marketing service agreement with its overseas affiliate, *B Co.*. Under the agreement, *B Co.* agreed to provide ancillary services to *A Co.*'s marketing activity by supplying publication materials (e.g., brochures, catalogues, and advertising flyers) to *A Co.* They agreed that all the publication materials belong to A Co., and A Co. had the right to use them for marketing.

In turn, *A Co.* agreed to pay 5% of its annual net sales to *B Co.* as service fees. *A Co.* treated the payment as a business profit for the purpose of the income tax filing.

The Thai Revenue Department issued an assessment to *A Co.* that they viewed the service fees as royalty fees since the fees paid to *B Co.* for the advice involved information concerning commercial experience. *A Co.* thus had the obligation to deduct a 15% withholding tax from the payment. Therefore, any payment under the agreement to obtain the right to reproduction and communication to the public regarding copyrighted literary and lithography works would be considered as royalty fees. *A Co.* disagreed with the Revenue Department on the basis that they only received the printed advertisement materials and not secret information or any undivulged information. *A Co.* then brought the case to the court to revoke the assessment made by the Revenue Department. Specifically, the case was brought to the Central Tax Court, and the Central Tax Court ruled in favour of *A Co.*, but the Revenue Department appealed the case to the Supreme Court.

The Supreme Court overturned the Central Tax Court's decision and ruled that, due to the lack of documentary evidence that should ordinarily be provided by *A Co.*, it could not ascertain whether the advisory services were in fact provided and whether the advice contained undivulged information. In addition, the evidence that was placed before the Supreme Court, in this case, was that *B Co.* gave *A Co.* the right to print advertisements that contained copyrighted literary and lithography works. Therefore, the Supreme Court ruled in favour of the Revenue Department, finding that the payment paid by *A Co.* to *B Co.* was to be considered as royalty fees for information concerning commercial experience.

3. *Analysis*

In cross-border transactions, one of the most challenging issues is to determine whether non-resident companies' income arising from the host country (Thailand in the above cases) should be categorised as business profits or royalties. The primary reason is that the taxability and burdens of proof in the two categories are substantially different. Tax authorities seem to treat income as royalties as it is uncomplicated to prove the payment that triggers withholding taxes while taxpayers seem to argue for business profits as the tax authorities must prove that there is a permanent establishment in their jurisdictions.

However, the Thai Revenue Code ("TRC") does not provide a specific definition for "royalty." Generally, royalty fees are considered as assessable income under section 40(3) of the TRC, which includes the "fee of goodwill, copyright or any other rights, annuity or annual payment of income derived from a will, any other juristic act, or court decision." As seen in both cases, the Supreme Court applied the substance-over-form doctrine in the legal interpretation of whether the disputed payment is considered as royalty fees rather than business profits. Although the agreement's formal title and terms therein may make reference to business profits, the courts will nevertheless still consider the taxpayer's underlying purpose for entering into such an agreement, and scrutinise the specific clauses within the agreement to identify any payment that should, in substance, be construed as royalty fees. In this regard, the courts have ruled that if there are payments for any utilisation of specific knowledge and commercial experience, then such payments should be considered royalty fees, even if the name or the "form" of those transactions may not give rise to royalties.

V. CONCLUSION

The lack of codified SAARs and GAARs within the Thai legal system also means that Thai tax authorities generally do not have any legal basis to determine unacceptable tax avoidance and disregard, vary, or adjust impugned transactions for the purposes of applying tax law. This conclusion is well supported by the fact Thailand is a civil law jurisdiction wherein statutory law is seen as the primary source of law, where courts generally are not bound by prior judicial decisions (even those flowing from the highest court of the land, the Supreme Court), and where judges do not have the power to make laws. However, as this paper has shown, Thai courts and judges are capable of utilising common law doctrines in exceptional cases so as to fill a statutory lacuna. Insofar as the Thai legal system is concerned, this can be seen as judicial law-making.

Despite lower Thai courts not being bound by the decisions of superior courts, the Thai Supreme Court's pronouncements – and implicit acceptance of the common law GAARs – have nevertheless influenced how such lower courts apply and interpret Thailand's tax laws. In this regard, despite the lack of a legal basis of judicial GAARs, there is no risk of uncertainty as the courts have generally applied the rules consistently. Taxpayers are thus aware of the potential consequences of unacceptable tax avoidance practices.

Nonetheless, there remains an argument that the unprincipled basis of judicial GAARs might one day come back to haunt the Thai taxation system and create uncertainty. There are two reasons

for this. From the tax authority's point of view, it remains unclear if the tax authority and court are – in fact – overstepping their authority; authority that solely belongs to the ambit of the Legislature. As the argument goes, if the Legislature has not enacted any statutory SAARs or GAARs, then it must be the case that such rules do not exist in Thailand in the first place. Similarly, from the taxpayer's point of view, the lack of legal basis for the judicial GAARs also means that existing practice might one day be overturned – by either the Thai Supreme Court or the Thai legislature – and rendered non-applicable. If the taxpayer's current arrangements, as informed by the current legal position, is lawful; but subsequently rendered unlawful by a judicial decision or by a legislative act, then this would be foisting upon the taxpayer an unjustifiable burden that is likely to be unfair and unjust. The lack of a legal basis for judicial GAARs might also open the doors to unnecessary and wasteful litigation, as taxpayers attempt to persuade the Supreme Court that their financial arrangements comply with the existing statutory tax law and that the judicial GAARs should not apply.

Therefore, the author recommends that statutory GAARs should be enacted to provide clear rules for both the taxpayer and tax authority of what tax arrangements are acceptable and unacceptable; as well as delineate the scope of the tax authority's power to disregard, vary, or adjust impugned arrangements; and the tax consequences flowing thereon. In this regard, tax certainty is one of the canons of a good tax system that should be observed by the government to protect taxpayers' rights and ensure due process.