

Abstract

According to the Civil law, a person can deal with each other in a juristic relationship unless it was prohibited by the law, public order or good morals. There are two principles which allow the contracting party to enter into the contract to provide the substance of the contract, the duty of the party or the performance of contract or to rescind the contract as they wish unless that contract is contrary to the law, public order, good morals or the form of contract; these are the Autonomy of will principle and the Freedom of contract principle. When the party concludes or performs the contract, they are changing their wealth and this leads to the duty to pay taxes and duties. Since each contract has different taxes and duties, the party usually tries to enter into the contract which may save their money and cause them the least taxes and duties. There are many ways to do such as separate or integrate the contract, or by providing the substance or considerations, or by separating the transactions into two or more steps. If these actions are legal and acceptable, they are tax planning. If not, it is called tax evasions. In case of tax avoidance, that is the actions which use the loopholes of the law or actions that are taken to minimize tax, while within the letter of the law, those actions contravene the object and spirit of the law. Tax avoidance is unacceptable, so many countries have counter measures by judgment or by legislative. In Common law countries, there is Substance over form doctrine whereas the Civil law countries use Abuse of law doctrine against those actions. In Britain, the House of Lords launched the Fiscal nullity doctrine known as Ramsay principle. The United States of America created the Step transaction Principle. France, Australia and Canada regulated General Anti Avoidance Rule to counter tax avoidance. There are many Rulings and Determinations for certain cases. In the contrary, United Kingdom and United States have none of these provisions, but their judgment plays an important role.

Thailand has no General Anti Avoidance Provision and there are some Specific provisions and a few judgments in these cases. None of these cases created the

principle to anti tax avoidance. That is not enough to combat with tax avoidance from transactions.

So, Should we amend the General Anti Avoidance provisions? If the answer is yes, how should it be written.

As we study the example of the United Kingdom, the United States, Australia, Canada and Thailand. It is properly to amend the General Anti Avoidance Rule and some Specific Anti Avoidance Rule in the Revenue Code. For General Anti Avoidance Rule, it should be amended as part 4 in Chapter 2 after section 37 bis. There are six sections in this part that is from section 37 ter to section 37 octo.

These provisions adapted from the General Anti Avoidance Rule of Australia and Canada to prevent tax avoidance. These sections contains of legal definitions, the element of the transaction which cause the tax avoidance, the factor which the assessment officer and the court should consider, the authority of the assessment officer and the court to reject the tax benefit which result from the transactions, the right to appeal, fine and surcharges and the power of the minister to enact the regulations for specific circumstances and details of the transactions which cause tax avoidance.

The General Anti Avoidance Provisions will be one of the mechanism that help the taxation in Thailand more effective and benefit the wealth of the nation.