

Summary of Constitutional Court Ruling* No. 6/2556 (2013)

Dated 13th June B.E. 2556 (2013)

Re: Whether or not section 267 paragraph four of the Securities and Exchange Act B.E. 2535 (1992) was contrary to or inconsistent with section 34 paragraph one and paragraph two of the Constitution.

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1. Summary of background and facts

The Office of the Securities and Exchange Commission, applicant, charged against Mr. Suriya Lapwisutsin and others, a total of twelve alleged persons, with the Department of Special Investigation, calling for investigation under section 307, section 308, section 311, section 313, section 314 and section 315 of the Securities and Exchange Act B.E. 2535 (1992) in conjunction with section 83, section 84 and section 86 of the Criminal Code. During investigation by the Department of Special Investigation, the applicant filed a motion to the Criminal Court for an order to prohibit the alleged persons from leaving the Kingdom pursuant to section 267 paragraph four of the Securities and Exchange Act B.E. 2535 (1992). During the trial of the Court of Appeal, the fifth alleged person submitted a motion for a Constitutional Court ruling. Such person objected that, whilst the applicant had charged and requested the Criminal Court's order to prohibit the fifth alleged person from leaving the Kingdom before a final judgment by the court, the alleged person should not be treated as an offender. Moreover, section 34 of the Constitution provided for a person's freedom of travel as a fundamental right and liberty of the people. The fifth alleged person claimed that he should be entitled to enjoy the freedom of travel as provided by the law. Any restriction of rights had to be subject to clear duration conditions. Section 267 paragraph four did not provide a clear duration for the restriction of travel from the Kingdom, where such provision was contrary to or inconsistent with section 34 of the Constitution. Furthermore, section 267 paragraph one, paragraph two and paragraph three authorized the Office of the Securities and Exchange Commission to seize or attach assets of such person or assets with probable evidence of ownership by a person who had committed an offence under this Act, and with probable cause where the offender would relocate or distribute his or her assets. The seizure or attachment could not exceed one hundred and eighty days, In case of filing to the court, the seizure or attachment order would continue to be valid until the court ordered otherwise. This action over assets pursuant to section 267 paragraph one provided a definite duration. The restriction of travel under section 267 paragraph four, however, did not provide a clear

* Published in the Government Gazette Vol. 130, Part 88a, dated 8th October B.E. 2556 (2013).

duration or an expiration. The Court of Appeal found that the objection made by the fifth alleged person was a case under section 211 of the Constitution. The matter was therefore referred to the Constitutional Court for a ruling.

2. Preliminary issue

The preliminary issue was whether or not the Constitutional Court had the competence to admit this application for a ruling under section 211 paragraph one of the Constitution.

The Constitutional Court found that this application raised an objection on whether or not section 267 paragraph four of the Securities and Exchange Act B.E. 2535 (1992) was contrary to or inconsistent with section 34 paragraph one and paragraph two of the Constitution had not yet been a ruling of the Constitutional Court in relation to such provision. The case was in accordance with section 211 paragraph one in conjunction with clause 17(13) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court therefore ordered the admittance of this application for consideration.

3. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 267 paragraph four of the Securities and Exchange Act B.E. 2535 (1992) was contrary to or inconsistent with section 34 paragraph one and paragraph two of the Constitution.

The Constitutional Court found as follows. Section 34 paragraph one of the Constitution was a provision which recognised a person's freedom of travel and choice of domicile in the Kingdom; and paragraph two provided that the state could enact any law to restrict such freedom only for the purpose of state security, peace, order and welfare of the people, city planning, or for the welfare of minors. Moreover, the law restricting such freedom could only be enacted to the extent of necessity and should not affect the essence of such individual freedom of travel and choice of domicile. The law shall be also applied generally and shall not be directed at any particular case or person. These principles and conditions for the restriction of rights and liberties manifested under section 29 of the Constitution.

The spirit of the Securities and Exchange Act B.E. 2535 (1992) was to oversee and develop the capital market to function with greater efficiency. It was necessary for the law to authorize a competent official or the court to employ measures to prevent an alleged person from fleeing the Kingdom. In this regard, section 267 paragraph one prescribed that "in the case where there is evidence in which a person has committed an offence under this Act which could cause any damage to the public, and the Office has reason to believe that the offender will relocate or dispose of his or her assets, the Office by the approval of the SEC shall have the power to seize or attach such person's assets or assets with reasonable evidence to believe as belonging to him or her, but such seizure or attachment cannot exceed

one hundred and eighty days. In case of filing to court, the seizure or attachment order shall be deemed to continue in force until the court orders otherwise. In a case of necessity where a case cannot be filed to a court within one hundred and eighty days, the court having jurisdiction may order the extension of such order pursuant to the request lodged by the Office, but such extension shall not exceed one hundred and eighty days,” and paragraph four provided that “in a case under paragraph one, where there is reasonable cause for suspicion that such a person will flee from the Kingdom, upon the request by the Office, the Criminal Court has the power to provisionally prohibit such person’s travel from the Kingdom. Under an urgent circumstance, the SEC shall order a temporary prohibition of travel from the Kingdom for a period not exceeding fifteen days, until the Criminal Court orders otherwise.” The Constitutional Court found that such provision was a measure to temporarily prevent an alleged offender from leaving the Kingdom for the benefit of bringing the alleged offender into legal proceedings. If the alleged offender fled or left the Kingdom, undertaking the arrest of such person for legal proceedings would be difficult. Such measure was therefore intended to deter and suppress offenders in the capital market, which was of significance to the national economy, and to achieve the spirit of this law. These measures were in accordance with the rule of law and the principle of proportionality. Even though such provision restricted to some extent a person’s freedom of travel as recognised under section 34 paragraph one of the Constitution, the restriction of freedom was applied by virtue of a provision of law as provided under section 34 paragraph two of the Constitution only for the purpose of state security, public order or welfare, and the provision of law generally applied and not directed to any particular case or person. The provision of law also did not prejudice the essential substance of the freedom recognised under section 34 paragraph one and paragraph two of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 267 paragraph four of the Securities and Exchange Act B.E. 2535 (1992) was neither contrary to nor inconsistent with section 34 paragraph one and paragraph two of the Constitution.
