

The Constitutional Court
The Kingdom of Thailand

Constitutional Court Ruling

No. 8/2564 (2021)

Dated 2nd June B.E. 2564 (2021)

Between { Civil Court
- Applicant
Respondent

Re: Whether or not section 37 ter of the Revenue Code was contrary to or inconsistent with section 26, section 27 paragraph one and paragraph three, section 29 paragraph one and paragraph two and section 37 paragraph one and paragraph two of the Constitution.

The Civil Court referred an objection of objectors (Mr. Surapong Pipatpallop and others, the 1st to 9th objectors, and 13th to 25th objectors, a total of 22 persons) in Civil Case No. (Black) For. 84/2561 and For. 158/2561 to the Constitutional Court for a ruling under section 212 of the Constitution. The facts in the letter of referral of objection of objectors and supporting documents could be summarised as follows.

The public prosecutor of the Department of Special Litigation 3, Office of the Attorney General, submitted a motion to the Civil Court requesting for the forfeiture of assets related to the commission of an offence of Mr. Thongchai Rojrungrangsri and others to the state. The Anti-Money Laundering Office (AMLO) received a report from the Revenue Department that Mr. Thongchai Rojrungrangsri and others were involved in the commission of an offence under section 37 of the Revenue Code by operating a sales of goods business without registering for payment of value added taxes and submitting personal income tax returns which were incomplete in regard to actual incomes in the tax years B.E. 2554 (2011) to B.E. 2559 (2016). The action had the elements of fraudulent misrepresentation or deception, or by other similar means, to evade or attempt to evade the payment of taxes under Category 2, constituting a criminal offence under section 37(2) of the Revenue Code. The officer of the Revenue Department assessed evaded or defrauded taxes in the amount of ten million baht or more per tax year, and the actions were committed in conspiracy or a network by creating false transactions or concealing assessable incomes or

incomes to evade or commit tax fraud by spreading incomes derived from operating the sales of goods businesses to other self-created tax units but falsely using other persons' names. The accused also acted meticulously to avoid tax liabilities from incomes received from the sale of goods, including the conduct of concealing or hiding assets related to the commission of offence by transferring funds from the account of shops to other persons to prevent tracing by the Revenue Department. Those actions were deemed as a concealment and hiding of assessable incomes to prevent such funds from being including in the tax calculation process. The actions had the elements of an offence under section 37 ter in conjunction with section 37 of the Revenue Code, which provided wrongdoing as a predicate offence under the law on anti-money laundering. The Transaction Committee under the Anti-Money Laundering Act, B.E. 2542 (1999) examined transactions and assets of Mr. Thongchai Rojrungrangsi and others and adopted a resolution to provisionally freeze assets as well as yields accruing therefrom. Thereafter, upon finding that such assets subject to a provisional freezing order were assets related to the commission of an offence under section 37 ter in conjunction with section 37 of the Revenue Code, the Transaction Committee adopted a resolution which directed the Secretary-General of the Anti-Money Laundering Committee (AMLC Secretary-General) to refer the matter to the public prosecutor to consider filing a motion in the Civil Court for an order to forfeit the assets to the state under section 49 paragraph one of the Anti-Money Laundering Act, B.E. 2542 (1999). After consideration, the public prosecutor filed a motion in the Civil Court for an order to forfeit the assets relating to the commission of offences, totalling 129 items, to the state pursuant to section 51 of the Anti-Money Laundering Act, B.E. 2542 (1999).

The 1st to 9th objectors and 13th to 25th objectors in such civil case objected that section 3 of the Anti-Money Laundering Act, B.E. 2542 (1999) did not specify the types of offences under the Revenue Code which constituted predicate offences. On the contrary, the provision was stipulated in section 37 ter of the Revenue Code, providing that an offence under section 37 ter of the Revenue Code was deemed as a predicate offence under the law on anti-money laundering. Such provision prejudiced an honest person in paying taxes since it could lead to criminal measures, such as asset freezing, granting greater discretionary powers to an official for suppression and was contrary to the principles of criminal law. There was merely a finding of evidence for a probable cause of a wrongdoing without the need to prove intent, which constituted external and internal elements of a wrongdoing. Such provision of law was contrary to or inconsistent with section 26 of the Constitution since it was an enactment of law to restrict a right or liberty of a person, contrary to the rule of law, increased a burden or disproportionately restricted a right or liberty

of a person and prejudiced human dignity. The provision of law granted powers to an officer of the Revenue Department to determine the objectors as having committed predicate offences and consequentially being subject to the law on anti-money laundering. The provision unfairly discriminated a person due to personal, economic or social status, which was contrary to human dignity and contrary to or inconsistent with section 27 of the Constitution. Furthermore, such provision of law was a legal presumption. A public prosecutor did not have to prove an actual act or intent of the objectors. The objectors were estopped, despite the cases bearing criminal liabilities. The prosecution had the burden of proving all external and internal elements of the act since a forfeiture of assets to the state was a confiscation, being a criminal penalty under section 18 of the Penal Code, and therefore subject to section 29 of the Constitution. In addition, the commission of a predicate offence disputed in this case which the Civil Court was requested to forfeit assets to the state occurred prior to the coming into force of the Act Amendment the Revenue Code (No. 45), B.E. 2560 (2017). Therefore, the application of section 37 ter of the Revenue Code, which carried a criminal penalty, to penalise a person retroactively in this case was therefore contrary to or inconsistent with section 29 of the Constitution. Also, the exercise of legal powers to seize or freeze juristic acts as well as other rights of the objectors without proof, hindered the enjoyment of rights and liberties of a person, thus there had to be a limited and reasonable timeframe as necessary for the case. The provision therefore prejudiced the rights and liberties to use assets of the objectors as recognised under section 37 of the Constitution.

The Civil Court found that the objectors raised objections that section 37 ter of the Revenue Code was contrary to or inconsistent with section 26, section 27, section 29 and section 37 of the Constitution. As the Civil Court was going to apply such provision of law to a case and there had not yet been a ruling of the Constitutional Court in relation to such provision, the objectors' objections were referred to the Constitutional Court for a ruling under section 212 paragraph one of the Constitution.

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the competence to accept the letter referring the objection for a ruling under section 212 paragraph one of the Constitution. The Constitutional Court found as follows. The Civil Court referred the objections of the 1st to 9th objectors and 13th to 25th objectors, a total of 22 persons, for a Constitutional Court ruling that section 37 ter of the Revenue Code was contrary to or inconsistent with section 26, section 27, section 29 and section 37 of the Constitution. Such provision of law was a provision which the Civil Court was going to apply to a case. Upon an objection together with reasons that such provision of

law was contrary to or inconsistent with the Constitution and that there had not yet been a ruling of the Constitutional Court in relation to such provision, the case was in accordance with section 212 paragraph one of the Constitution. Hence, an order was given to accept the matter for consideration. In the interest of these proceedings, the Constitutional Court issued letters summoning the relevant agencies to submit information, opinions and documents or evidence to the Constitutional Court.

1. The Director-General of the Revenue Department was of the opinion that prior to the provision of section 37 ter of the Revenue Code, the Revenue Department had measures relating to an offender under section 37 of the Revenue Code, i.e. upon finding a wrongdoing, a complaint would be filed with an inquiry officer or a special case inquiry official, as the case may be, to take criminal action against such offender. As for civil liabilities, upon an assessment of taxes by an assessment official and serving notice of assessment to a person liable to tax, if the person liable to tax failed to completely pay taxes within thirty days of receiving such notice of assessment under section 18 ter of the Revenue Code, it shall be deemed as tax arrears. The Director-General of the Revenue Department would then have the power to order the seizure or freezing and auction of assets of the person with tax arrears liability, the proceeds of which would be used to satisfy the tax debts pursuant to section 12.

2. The Office of the Council of State explained that Thailand, as a founding member of the Asia Pacific Group on Money Laundering (APG) had an obligation under regulation prescribing member countries to comply with recommendations of the Financial Action Task Force (FATF) in prescribing serious tax related crimes as predicate offences under the law on anti-money laundering. The Ministry of Finance introduced the Bill Amending the Revenue Code (No. ..), B.E. prescribing an offence relating to tax evasion or tax fraud as a predicate offence under the law on anti-money laundering by amending the Revenue Code (adding section 37 ter). The reason for section 37 ter providing a predicate offence under the law on anti-money laundering without amending the Anti-Money Laundering Act, B.E. 2542 (1999) was that the Council of State was of the opinion that the principle of such bill was the prescription of an offence relating to tax evasion or attempted tax evasion or tax fraud under the Revenue Code as a predicate offence under the law on anti-money laundering, and that such tax related offence required a particular knowledge and expertise, thus the Revenue Department, as the agency responsible for tax collections, should consider and submit the relevant information to AMLO, and that such act shall be deemed as a predicate offence under the law on anti-money laundering.

3. AMLO was of the opinion that the law on anti-money laundering was a specialised law enacted by the state to disrupt the cycle of a crime. The rationale for the law was derived from the principle of protection of social and public interests as well as tracing and retrieving assets derived from the commission of an offence. Therefore, two legal measures were stipulated, namely criminal measures used for taking actions against a person who had committed an offence of money laundering, including aiders and abettors, accessories, attempts and conspirators for money laundering, and civil measures for taking actions on assets derived from the commission of an offence through a motion to forfeit such assets to the state. As regards proceedings on assets relating to a predicate offence under other laws, upon AMLO receiving a report of a transaction and relevant information on the commission of a predicate offence, if investigations reveal that there was an actual commission of a predicate offence, the matter would be processed and submitted to the Transaction Committee for review of the transaction and assets relating to the commission of offence pursuant to section 34, including related persons pursuant to section 38. In the event of a cause for suspicion and there was reasonable evidence of a transaction relating to or possibly relating to the commission of a predicate offence or money laundering offence, if there was reasonable cause to believe that there could be a transfer, disposal, relocation, concealment or hiding of assets, the Transaction Committee or Secretary-General of AMLC, as the case may be, had the power to restrain the transaction, as well as to provisionally seize or freeze such assets. In this connection, the person executing the transaction or person having an interest in the seized or frozen asset could file a motion that the monies or assets in such transaction was not an asset related to the commission of an offence in order to request a revocation of the seizure or freezing of such assets under section 48. If there was credible evidence that the asset was related to the commission of an offence, the Transaction Committee could adopt a resolution for the Secretary-General of AMLC to refer the matter to the public prosecutor to consider filing a motion in the Civil Court for an order to forfeit assets to the state pursuant to section 49. As for a motion for forfeiture of assets to the state, a person with interest in the asset could file an objection against the motion of the public prosecutor, with a burden of proof under section 50 to show the Civil Court that he or she was the true owner of such assets, which were not assets related to the commission of an offence, or that he or she was a recipient of transfer in good faith and for consideration, or recipient in good faith and reasonable pursuant to good morals and public charity. In addition, after the Civil Court ordered the forfeiture of assets to the state, the law opened an opportunity for the asset owner, transfer recipient or beneficiary of asset who had not filed an objection to intervene in the case to file a

motion for the Civil Court to return assets or protect his or her rights. Upon an inquiry and decision by the Civil Court that there was cause for a finding under section 50, an order could be given to return the asset or prescribe conditions for protection of such assets, or prescribe other conditions for the protection of rights of beneficiaries. If the assets could not be returned or rights could not be protected, price or damages should be paid under section 53, as the case may be.

4. The Secretariat of the Senate submitted copies of documents relating to the deliberations of the Bill Amending the Revenue Code (No. ..), B.E. of the National Legislative Assembly which could be summarized as follows. The sitting of the National Legislative Assembly no. 72/2559 on Thursday, 17th November B.E. 2559 (2016), adopted a resolution to approve in principle the Bill Amending the Revenue Code (No. ..), B.E., introduced by the Council of Ministers, for consideration and appointed an ad hoc committee to deliberate. The Ad Hoc Committee to Deliberate the Bill Amending the Revenue Code (No. ..), B.E., after prudent deliberations, prescribed a predicate offence in the Revenue Code by this Bill. The sitting of the National Legislative Assembly considered the amendment and approved its promulgation into law.

The Constitutional Court considered the objection of the objectors, opinions and information of relevant agencies and supporting documents and found that there was sufficient facts in this case for a decision. The inquisitorial proceedings were therefore concluded under section 58 paragraph one of the Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018). The issue which had to be decided was whether or not section 37 ter of the Revenue Code was contrary to or inconsistent with section 26, section 27 paragraph one and paragraph three, section 29 paragraph one and paragraph two, and section 37 paragraph one and paragraph two of the Constitution.

After deliberations, the Constitutional Court found as follows. Section 26, section 27 paragraph one and paragraph three, section 29 paragraph one and paragraph two and section 37 paragraph one and paragraph two of the Constitution were provisions in Chapter 3, Rights and Liberties of the Thai People. Section 26 paragraph one provided that “the enactment of a law which results in the restriction of a right or liberty of a person must be in accordance with conditions prescribed by the Constitution. In the case where the Constitution does not provide a condition, such law must not be contrary to the rule of law, not increase a burden or disproportionately restrict a right or liberty of a person, and must not prejudice a person’s human dignity, as well as must specify the reason of necessity for restriction of right and liberty.” Paragraph two provided that “a law under paragraph one must be generally applicable, not directed to a particular case or person.” Section 27

paragraph one provided that “persons are equal under the law, have rights and liberties and receive equal protection under the law.” Paragraph three provided that “unfair discrimination against a person whether due to a difference in birthplace, race, language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious faith, education and training or political views that is not contrary to the provisions of the Constitution or other cause is prohibited.” Section 29 paragraph one provided that “a person shall not be liable to a criminal penalty unless an act committed is provided by a law in force at the time of commission as an offence and a penalty is provided, and the penalty imposed on such person cannot be heavier than the penalty provided by the law in force at the time of commission of offence.” Paragraph two provided that “in a criminal case, it shall be presumed that a suspect or defendant has not committed an offence and prior to a final judgment convicting a person for an offence, such person cannot be treated as an offender.” Finally section 37 paragraph one provided that “a person has rights in property and succession.” Paragraph two provided that “the extent of rights and restriction of such rights shall be as provided by law.”

Section 37 ter of the Revenue Code was amended by the Act Amending the Revenue Code (No. 45), B.E. 2560 (2017). The reasons in the endnote to the Act stated that “since Thailand, in its capacity as a founding member of the Asia Pacific Group on Money Laundering (APG), has reasons of necessity to comply with the Terms of References prescribing that a member country has to comply with recommendations of the Financial Action Task Force (FATF) by stipulating serious taxation crimes as predicate offences under the law on anti-money laundering. For those reasons, as well as to increase efficiency in the suppression of tax evasion and fraud, it is expedient to stipulate an offence relating to evasion or attempted evasion of tax and tax fraud which have the characters of a serious crime are predicate offences under the law on anti-money laundering...” Section 37 ter paragraph one provided that “an offence under section 37, section 37 bis or section 90/4 where the offender is a person having the duty to pay tax or remit tax, and is an offence involving an amount of tax evaded or defrauded in the amount of ten million baht or more per tax year, or the amount of tax refund requested through misrepresentation, fraud or deceit, or by other similar means, in the amount of two million baht or more per tax year, and such person having a duty to pay taxes or remit taxes acted in a conspiracy or network by creating false transactions or concealing assessable incomes or revenues in order to evade or commit tax fraud, and there is conduct of concealing or hiding assets related to the commission of offence to prevent tracing of such assets, such offence shall be deemed to be a predicate offence under the law on anti-money laundering. Upon the Director-

General, by approval of the Tax Offences Qualifying as Predicate Offences Screening Committee, submitting the relevant information to the Anti-Money Laundering Office, proceedings shall be taken under the law on anti-money laundering.” Paragraph two provided that “a committee under paragraph one shall consist of the Director-General, Deputy Director-Generals and all Advisors of the Revenue Department.”

The Revenue Code was a law relating to the collection of taxes from persons having a duty to pay taxes as provided by law. Taxes were collected from all types of incomes obtained from work by the persons having the duty to pay taxes in the preceding tax year. In the case where taxes were not paid correctly, the Revenue Code provided for legal measures for actions in an event of an offence relating to tax evasion or tax debtor. Several measures were provided to prescribe duties and powers to competent officials to take the appropriate actions in each case. The characteristics of the offences and civil and criminal penalties were provided. For example, in the case where there was reasonable cause to believe that there was a tax evasion, the law empowered the Director-General to enter or issue a written order to authorise a revenue officer to enter a premise or vehicle to conduct a search, seize or freeze accounts, documents or other evidence related to or presumed to be involved with tax arrears throughout the Kingdom pursuant to section 3 quinquies, or the case of section 3 novem which prescribed a fine and imprisonment penalty for a person who was already aware and did not facilitate or obstruct an officer exercising duties under section 3 quinquies, or only a fine in the case where an officer found that a suspect did not deserve an imprisonment penalty or a legal action under section 3 bis, or the case of the power of the Director-General to seize or freeze and conduct an auction of assets of a person liable to pay taxes or to remit taxes throughout the Kingdom without the need to request a court warrant of seizure or order under section 12, or the case of the power to issue a summons to a person liable to pay tax arrears and any person with reasonable cause to believe that would be beneficial for the collection of tax arrears to give a statement, or the issuance of an order to direct a revenue officer to conduct a search or seizure of accounts, documents or other evidence of a person under section 12 ter, or the case of the commission of an offence under section 37, where a person acting with intent to make a false representation or false statement or give a false reply or adduce false evidence to avoid payment of taxes or to apply for a tax refund, or by relying on a false statement, fraud or deceit or other similar means to avoid or attempt to avoid the payment of taxes or request a tax refund, was liable to a term of imprisonment from three months to seven years and a fine from two thousand baht to two hundred thousand baht. In the case of an offence under section 37 bis, a person with intent to not file an item which had to be filed in order to avoid

payment of taxes was liable to a term of imprisonment not exceeding one year or a fine not exceeding two hundred thousand baht, or both. In the case of an offence under section 90/4, a business operator who registered a representative of the operator, issuer of tax receipt acting as provided in section 90/4 with intent to evade or attempted evasion of value added tax, issue a tax receipt, increased debt bill or debt discount bill without the right to do so, failure to record an item or recording a false item, committing any act by false representation, fraud or deceit or by any other similar means, or having an intent to use a false tax receipt or unlawfully issued tax receipt to credit taxes, would be liable to a term of imprisonment from three months to seven years and a fine from two thousand baht to two hundred thousand baht. If it was found that an offender under section 37, section 37 bis or section 90/4 of the Revenue Code, who was a person under a duty to pay taxes or remit taxes, failed to pay such tax arrears to a competent tax assessment official, legal proceedings could be initiated in a court of specific competent jurisdiction and provision measures or procedures could similarly be requested from the court pursuant to the Revenue Code.

As regards section 37 ter of the Revenue Code, which provided that an offence under section 37, section 37 bis and section 90/4, being all types of tax offences, whether evasion, non-filing or false filing of tax returns, with an amount of ten million baht or more per tax year, including tax refund requests from two million baht per tax year, done in a conspiracy or network, and having circumstances of concealing assets related to the commission of the offence, should be deemed as a predicate offence under the law on anti-money laundering after consideration by the Director-General by the approval of the screening committee, the Constitutional Court found as follows. A predicate offence under the law on anti-money laundering was a predicate offence provided under section 3 of the Anti-Money Laundering Act, B.E. 2542 (1999). This law was a law which contained provisions restricting the rights and liberties of a person with the intent to prevent a criminal offender to use funds or assets related to the commission of offence in order to continue committing those crimes, thus causing difficulties in the suppression of those wrongdoings. The crime cycle was therefore broken and incentive eliminated by barring the use of assets obtained from the commission of a wrongdoing done as a network or conspiracy, which would normally be difficult for the justice process to take actions on those wrongdoers. Therefore, the law on anti-money laundering authorised a state official to take actions to restrict the rights and liberties of a person. Apart from shifting the burden of proof to the suspect as well as other related third parties, the state official also had the power to take intrusive actions which affected rights and liberties relating to a person's assets, being fundamental rights recognised by the

Constitution. Such intrusive actions taken by a state official affecting the rights and liberties of a person had to be done only to the extent of necessity insofar as the state official's inability to employ regular actions under the justice process on the offender. Such restriction of rights and liberties had to essentially take into account the commission of offence provided as a predicate offence, since the measures taken under the law on anti-money laundering prejudiced fundamental rights recognised by the Constitution, so as to ensure consistency with the principle of proportionality. At the time, section 3 of the Anti-Money Laundering Act, B.E. 2542 (1999) provided 21 predicate offences. Those offences were serious in nature. The provision did not include offences provided in other laws. This showed that the law had the intent of excluding other laws from prescribing a predicate offence in order to exercise powers under the law on anti-money laundering. Upon consideration of various aforementioned measures provided by the Revenue Code, containing both civil and criminal penalties, it was discernible that such measures were appropriate to the seriousness of the offences relating to tax payments in each case. In the case of offenders under section 37, section 37 bis or section 90/4 of the Revenue Code, a competent official had the authority to initiate legal proceedings in a court having exclusive jurisdiction over tax law cases, namely the Tax Court, and could request provisional measures or procedures from the court pursuant to the Revenue Code. As a result of section 37 ter of the Revenue Code providing for an offence under section 37, section 37 bis or section 90/4 to be a predicate offence under the law on anti-money laundering, a competent official was able to use measures under the Anti-Money Laundering Act, B.E. 2542 (1999), consisting of both civil and criminal penalties, and as a consequence, a person having a duty to pay taxes or remit taxes was subject to severe measures, such as a restraint of transaction, seizure or freezing of assets, as well as arrest and motions to the Civil Court to forfeit assets to the state. Furthermore, the Revenue Code already provided for efficient and appropriate measures. Hence, there was no necessity to also use measures under the law on anti-money laundering. Moreover, section 37 ter of the Revenue Code was a provision which gave discretionary powers to an official in collecting assets to satisfy the outstanding amount as provided by the Revenue Code, including other related parties acting in good faith who would also be subject to severe measures under the law on anti-money laundering until proven otherwise in court. Therefore, section 37 ter was a provision which increased a burden and disproportionately restricted rights and liberties of a person, inconsistent with the principle of proportionality and contrary to the rule of law. Hence, the provision was contrary to or inconsistent with section 26 and section 37 paragraph one and paragraph two of the Constitution.

As for the objection on whether or not section 37 ter of the Revenue Code was contrary to or inconsistent with section 27 paragraph one and paragraph three, and section 29 paragraph one and paragraph two of the Constitution, the Constitutional Court found as follows. If there was a question on the unlawful exercise of discretion by an officer, the person affected by such exercise of discretion could seek judicial redress. This was not a matter of discrimination against a person or the principle of equality. Therefore, the provision was neither contrary to nor inconsistent with section 27 paragraph one and paragraph three. According to the application in this case, the Civil Court was considering an order relating to the forfeiture of assets to the state, which were proceedings on assets related to the commission of a predicate offence under the law on anti-money laundering. The Anti-Money Laundering Act, B.E. 2542 (1999) prescribed two legal measures, namely criminal measures for proceedings against a person who had committed a money laundering offence and civil measures in the form of proceedings against assets derived from the commission of an offence by filing a motion for forfeiture of such assets to the state. Those two proceedings were distinct from one another. Forfeiture of assets to the state was a civil measure, not a criminal penalty under section 18 of the Penal Code. There was also an opportunity to rebut the presumption before the Civil Court issued an order to forfeit assets related to the commission of an offence to the state. This provision was not relevant to the legal principle that a criminal penalty should not have retroactive effect on a person and was not a presumption of a criminal offence which would be subject to the provisions of section 29 of the Constitution. Therefore, the provision was neither contrary to nor inconsistent with section 29 paragraph one and paragraph two of the Constitution.

Nevertheless, if the state had a necessity pursuant to an obligation to comply with the recommendations of FATF in prescribing serious tax crimes as predicate offences under the law on anti-money laundering, such offences should be provided as a “predicate offence” in section 3 of the Anti-Money Laundering Act, B.E. 2542 (1999), being the principal law for proceedings relating to anti-money laundering, providing special and specific legal measures acted upon by specialised officers. The law also provide for checks and balances between each authority to ensure clear and systematic law enforcement that was not overlapping. These principles were consistent with the fundamental principle for the enactment of laws and the principle of necessity for enactment of laws.

By virtue of the aforesaid reasons, it is held that section 37 ter of the Revenue Code is contrary to or inconsistent with section 26 and section 37 paragraph one and paragraph two of the Constitution.
