

The Taxation of Wealth Transfers in Thailand

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by

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ABSTRACT

This thesis examines the case for a wealth transfer tax in Thailand, against the background, *inter alia*, of the failure of Thailand's defunct tax law on estate and inheritance (the Estate and Inheritance Tax Act, 1933). Thailand has a significant problem with income and wealth distribution, with an increasing gulf between the rich and the poor—a root cause of the nation's ongoing political conflicts. Such substantial economic inequality is partly caused by imbalances and inequalities in the Thai taxation system, and it will be argued that the tax system requires restructuring through the introduction of the wealth transfer tax. This would be a significant tax policy initiative that may assist in tackling a root cause of Thailand's political and economic crises.

In addressing the above issues, this thesis examines aspects of the US federal estate and gift taxes and the UK inheritance tax systems. Comparisons between the criteria, rules and concepts in the US and UK systems reveal that Thailand should not simply import wholesale the approach of either country. Both systems have commendable features that may, when combined, help address the causes of the failure of the Thai Estate and Inheritance Tax Act of 1933. It will be argued that a wealth transfer tax should be introduced in Thailand, in the form of a transferor-based system, which incorporates selected criteria, rules, and concepts arising from both the US and UK jurisdictions. In adopting the proposed reform, it is essential to consider Thailand's political, economic, social and legal contexts, including Thailand's current legislation relating to wealth transfers, as such laws will inform and partly shape the drafting of a prospective wealth transfer tax in Thailand.

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LIST OF ABBREVIATIONS AND ACRONYMS

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|------------|--|
| ASEAN | Association of Southeast Asian Nations |
| AAEIT 1944 | Act of Abolishing the Estate and Inheritance Tax, 1944 |
| AEPAC 1999 | Act on the Establishment of and Procedure for Administrative Court, 1999 |
| AEPTC 1985 | Act on the Establishment of and Procedure for Tax Court of 1985 |
| APR | Agricultural Property Relief (UK) |
| ATECP 1934 | Act on Tax Exemption for Crown Property, 1934 |
| ATRA 2013 | American Taxpayer Relief Act of 2013 (US) |
| B.E. | Buddhist Calendar Year |
| BLT | Building and Land Tax |
| BLTA 1932 | Building and Land Tax Act of 1932 |
| BMA | Bangkok Metropolitan Administration |
| BPR | Business Property Relief (UK) |
| CATCA 2003 | Capital Acquisitions Tax Consolidation Act 2003 (Republic of Ireland) |
| CCC | Civil and Commercial Code |
| CDC | Constitutional Drafting Committee |
| CGT | Capital Gains Tax (UK) |
| CIT | Corporate Income Tax |
| CKS 1932 | Constitution of the Kingdom of Siam of 1932 |
| CKT 2007 | Constitution of the Kingdom of Thailand of 2007 |

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| CKT (Interim) 2014 | Interim Constitution of the Kingdom of Thailand of 2014 |
| CoA | Commission of Appeal |
| CPA 1936 | Crown Property Act of 1936 |
| CPI | Consumer Price Index |
| CTT | Capital Transfer Tax (UK) |
| DGRD | Director General of Revenue Department |
| EGTRRA | Economic Growth and Tax Relief Reconciliation Act of 2001 (US) |
| EIT | Estate and Inheritance Tax |
| EITA 1933 | Estate and Inheritance Tax Act of 1933 |
| ESCAP | Economic and Social Commission for Asia and the Pacific |
| FET | Federal Estate Tax (US) |
| FET/FGT | Federal Estate and Gift Taxes (US) |
| FGT | Federal Gift Tax (US) |
| FPO | Fiscal Policy Office |
| FTT | First Tier Tribunal (UK) |
| GBP | Great Britain Pound Sterling (UK) |
| GCT | Gross Chargeable Transfer (UK) |
| GDP | Gross Domestic Product |
| GST | Generation-Skipping Transfers (US) |
| GSTT | Generation-Skipping Transfer Tax (US) |
| HMRC | Her Majesty's Revenue and Customs (UK) |
| ICCPR | International Covenant on Civil and Political Rights |

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| IHT | Inheritance Tax (UK) |
| IHTA 1984 | Inheritance Tax Act of 1984 (UK) |
| IMF | International Monetary Fund |
| IRC | Inland Revenue Code (US) |
| IRS | Inland Revenue Service (US) |
| IVS | International Valuation Standards |
| IVSB | International Valuation Standards Board |
| LC | Land Code |
| LDT | Local Development Tax |
| LDTA 1965 | Local Development Tax Act of 1965 |
| MoU | Memorandum of Understanding |
| NCPO | National Council for Peace and Order |
| NLA | National Legislative Assembly |
| NRC | National Reform Council |
| OECD | Organization for Economic Co-operation and Development |
| OPV | Office of Property Valuation |
| PAOs | Provincial Administrative Organizations |
| PET | Potentially Exempt Transfer |
| PIT | Personal Income Tax |
| QSR | Quick Succession Relief (UK) |
| GSTT | Federal Generation-Skipping Transfer Tax (US) |
| RC | Revenue Code |
| RD | Revenue Department |

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| RICS | Royal Institution of Charter Surveyors (UK) |
| ROH | Regional Operating Headquarter |
| RPI | Retail Prices Index (UK) |
| SBT | Specific Business Tax |
| SCJ 2000 | Statute of the Court of Justice, 2000 |
| SD | Stamp Duty |
| SMC 1955 | Statute of the Military Court of 1955 |
| TAOs | Tambon (Village) Administrative Organizations |
| TCEA 2007 | Tribunals, Courts and Enforcement Act of 2007 (UK) |
| TTCMA 2007 | Trust for Transactions in Capital Market Act of 2007 |
| USD | United States Dollar (US) |
| UT | Upper Tribunal (UK) |
| VAT | Value Added Tax |
| WTT | Wealth Transfer Tax |

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1 Introduction

1.1 Background

The current economic and political distress in Thailand, which was once described as having one of the most unequal wealth distributions on earth,¹ is potentially perilous. Research has long shown the large income and wealth disparities—the stark inequality—existing in the country.² For four decades, Thailand has repeatedly encountered the problem of income and wealth distribution, hindering the nation's development.³ Meanwhile, the income gap between the poorest and the richest sections of Thai society has increasingly grown, leading to extreme differences in livelihood.⁴ As this gap widens, the divisions between classes have become virtually unbridgeable chasms.

The current socioeconomic structure has brought in its wake acute economic and political disruption. A Report of the Thailand Development Research Institute (TDRI) found disparities in income and wealth to be the root cause of the ongoing political conflicts pushing Thailand's democracy to the brink.⁵ Recently, the issue of disparities in income and wealth has engendered a dangerous conflict between the minority rich—the middle classes and upper classes—and the majority rural poor and urban lower working class. The result of this fundamental conflict is governmental stalemate. The aforementioned think-tank has proposed a survival strategy that offers a way out of the

¹ Jonathan Head, 'Thailand's wealthy untouchables' *BBC News* (London, 7 April 2008) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/7328054.stm>> accessed 24 June 2015.

² Hippolyte Fofack and Albert Zeufack, 'Dynamics of Income Inequality in Thailand: Evidence from Household Pseudo-Panel Data' (1999) The World Bank Research Paper (December) 2-3 <http://siteresources.worldbank.org/INTPGL/Resources/13248_Dynamics_of_income_inequality.doc> accessed 24 June 2015

³ Country Operations Division, Country Department I (East Asia and Pacific Region) 'Thailand: Growth, Poverty and Income Distribution: An Economic Report' (1996) The World Bank Report No. 15689-TH December 13/1996, 15-16 <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20204977~menuPK:435735~pagePK:148956~piPK:216618~theSitePK:430367~isCURL:Y~isCURL:Y,00.html>> accessed 24 June 2015.

⁴ Medhi Krongkaewa and Nanak Kakwanib, 'The growth–equity trade-off in modern economic Development: The case of Thailand' (2003) 14(5) *Journal of Asian Economics* 735, 749.

⁵ Nipon Poapongsakorn, 'Inequality, welfare and the politics of maintaining political control and not mentioning the obscenely wealthy royals' (Political Prisoners in Thailand, 14 September 2009) <<https://thaipoliticalprisoners.wordpress.com/tag/thailand-development-research-institute/>> accessed 24 June 2015.

current economic and political situation of distress: overcoming income disparity by creating greater opportunities for those at the lowest income and wealth levels.⁶ To end the conflict and improve conditions of extreme economic inequality, a road map to national reconciliation would include transforming the country into a welfare state while reforming the structure of the Thai tax system.

The International Monetary Fund (IMF) described the Thai tax structure as having structural weaknesses and a non-transparent and unfair tax system;⁷ therefore, restructuring the tax system is essential because the current one is not conducive to reducing asset and wealth concentration in the top brackets. The absence of balance and equality in the taxation system is a major problem for Thailand. This inequality partly results from Thailand's tax collection; the value-added tax plays a significant role,⁸ more than the personal income tax (Appendix III). Meanwhile, the personal income tax (and to a lesser extent, the corporate income tax) requires lower income earners to bear a greater fraction of the tax burden than those with higher incomes.⁹ On the other hand, Thailand's tax collection relies on income and consumption, while there is no form of taxation based on wealth and wealth transfer, contributing to greater systemic imbalance.¹⁰ The only two taxes within the wealth taxation bases categories are the building and land tax and the local development tax.

Under the era of Thai neo-feudalism in the 21st century,¹¹ any attempt to propose or introduce taxes on wealth and wealth transfer was met with confrontation from the well-off sections in society; thus, the Thai government's policy on reforming the tax structure should concentrate on increasing the tax base on wealth and wealth transfer in order to generate more general revenue for government expenditure.¹² The taxation of wealth transfer is an important form of wealth redistribution, and it is politically on the agenda in Thailand. As mentioned above, the controversy over income inequality and

⁶ Ibid.

⁷ Marco Bartolich, 'Country studies of tax systems and tax reforms in South and East Asia: Thailand' in Luigi Bernardi, and others (eds), *Tax Systems and Tax Reforms in South and East Asia* (Routledge 2013) 258.

⁸ Ibid.

⁹ Jude Ocampo, 'A Balanced Tax Policy to Sustain Thailand's Economic Development' (2014) 5 *Thai American Business Journal* 22, 22.

¹⁰ The issue regarding the imbalance tax system in Thailand will be described in more detail in Chapter 4.

¹¹ Patrick Ziegenhain, *Institutional Engineering and Political Accountability in Indonesia, Thailand and the Philippines* (PISA Publishing 2015) 237.

¹² Pasuk Phongpaichit, 'Towards an Acceptable Fair Society' in King Prajadhipok's Institute (ed), *Conflict, Legitimacy and Government Reform: Equitable Allocation of Resources in Thai Society* 53, 60 (KPI Congress XI Conference, Bangkok, 5-7 November 2009)

<http://kpi2kpiacth/wiki/images/d/da/Kpi_11_Engpdf> accessed 24 June 2015.

wealth distribution has become a contested issue in Thai society, an issue that has become even more contentious in light of the recent economic downturn in Thailand. This situation necessitates policymakers to determine the relevance of corrective tax mechanisms to reduce Thailand's inequity. Of immediate interest is the view that using the wealth transfer taxation could make a significant contribution towards solving the country's political and economic crises by narrowing the gap between rich and the poor.

Estate taxes in the modern UK wealth transfer taxation system began in 1894.¹³ By comparison, the modern US estate tax began in 1916.¹⁴ Thailand first collected a wealth transfer tax in 1933. However, it survived for only ten years, repealed in 1944 on the grounds that the low amount of revenue it generated did not compensate for its high collection costs and burdens.¹⁵ Unfortunately, Thailand currently lacks specific laws on inheritance and gift taxes. In addition, the Revenue Code (RC) codifies several limitless exemptions from personal income tax, including income derived from inheritance, from maintenance and support under moral purposes and from gifts received during a ceremony or customary or traditional occasions.¹⁶ Meanwhile, Thailand does not levy a capital gains tax. This approach benefits wealthy individuals who have received a large amount of tax-free income. Some argue that this personal income tax exemption could leave open loopholes that unfairly allow the rich taxpayer to avoid tax, increasing the disparity between the rich and the poor.¹⁷ As a result, the system fails to make the personal income tax system more equitable, and it may lead to ineffectiveness. The disparity between the rich and the poor remains unaddressed, thereby reinforcing the stark wealth inequalities characteristic of Thai society.

This thesis argues that the Thai tax system needs to be balanced and made more equitable by introducing certain forms of taxation; the wealth transfer tax will be one major component for restructuring the tax system. Wealth transfer tax can lead to a better distribution of resources and a reduction in the disparity between the rich and poor. This thesis argues that select aspects of wealth transfer taxation, particularly some rules and concepts arising from the US and UK tax systems, can be suitable for Thailand's context. These aspects can be adopted or implemented when introducing the

¹³ Steven Bank and Brain R Cheffins, 'Tax and the Separation of Ownership and Control' in Wolfgang Schön (ed), *Tax and Corporate Governance* (Springer 2010)132.

¹⁴ Casey B Mulliga, *Parental Priorities and Economic Inequality* (University of Chicago Press 1998) 154.

¹⁵ Bill of Abolishing the Estate and Inheritance Tax B.E. 2486 (A.D. 1933) Council of State No. 258/2486, (unofficial translation by author).

¹⁶ RC, s 42 (10).

¹⁷ Panthip Sawasruksa, 'Problem on the Exemption of Inheritance and Gift Income According to Revenue Code' (Master's thesis, Thammasat University 2008) 85-86.

wealth transfer tax system, helping to resolve problems arising from the Estate and Inheritance Tax Act of 1933 and its application.

The main aim of the thesis is to demonstrate that a viable wealth transfer tax system can be developed for Thailand on the basis of comparative study into two jurisdictions—the UK and the US, both of which are applicable models for framing Thailand’s tax legislation. These models will assist in understanding how conflicts between Thai legal and ethical values can be resolved when introducing wealth transfer taxation. It is therefore necessary to analyse this legal problem from a new perspective; however, such extrapolations should be adapted to Thailand’s specific conditions with its ancient Buddhist agriculturally-oriented culture and attendant sensibilities and values. Significantly, there must be no double standards—the same regulations and rules must apply to all, rich and poor alike.

1.2 Overview of the Thesis

This thesis is divided into ten chapters. Apart from this chapter, the first four chapters provide a description of the general background and context for the evolution of wealth transfer tax (WTT).¹⁸ They also provide an overview of the Thai legal and tax systems. The next four chapters continue the legislative focus in both Thailand and the selected countries. In these chapters, it is necessary to outline the current Thai laws relating to wealth transfer that may impact the drafting of legislation for the prospective WTT, including the repealed estate and inheritance tax (EIT) and its applications. The US and UK WTT legislation and their applications are compared in order to highlight desirable standards and criteria for Thailand’s context. The final two chapters provide a conclusion and thesis summary as well as recommendations for drafting the prospective Thai WTT.

Chapter 2 examines WTT evaluation, tracing the history of WTT back to its earliest origins from ancient Egypt and Rome through early modern Europe. It then moves on to particularly examine the modern histories of WTT in the selected countries, the US and the UK. However, the chapter emphasizes the origin of the WTT concept in Thailand, from *Sukothai* to the early *Rattanakosin* until the introduction of EIT in 1933. The

¹⁸ Wealth transfer taxes allegedly harm families that are surprised by death; hence, they are sometimes called a ‘tax on sudden death’ or even a ‘death tax’. See. Helmuth Cremer and Pierre Pestieau, ‘Wealth and wealth transfer taxation: a survey’ in Emilio Albi and Jorge Martinez-Vazquez (eds), *The Elgar Guide to Tax Systems* (Cheltenham 2011) 183.

outcome of this chapter is a discussion providing the background for Chapter 6, which examines the repealed EIT.

Chapter 3 briefly examines the fundamentals of Thailand's legal and tax systems. This chapter goes on to outline the system's characteristics by exploring the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (A.D. 2014) concerning the relevant sources of law, and in particular, the five new organs of state: the National Council for Peace and Order (NCPO), the Council of Ministers, the National Legislative Assembly (NLA), the National Reform Council (NRC) and the Constitutional Drafting Committee (CDC). It also examines the Thai legislative and judicial systems. This discussion covers Thai laws that will be referred to throughout the thesis. Meanwhile, the latter part of this chapter continues the focus on outlining the tax system in Thailand. It first discusses the sources of tax laws in Thailand, particularly the structure of the tax system, tax classification and administration. This chapter categorizes many different types of taxes on the grounds of tax bases in order to elucidate on how the tax system in Thailand is imbalanced. It goes on to argue that the Thai tax system needs to be balanced, and that introducing the WTT is a major component in this restructuring.

Chapter 4 primarily examines theoretical issues and domestic and international criticisms of the WTT. In Chapter 5, the thesis moves into a discussion of current legislation regarding transfers of wealth in Thailand. This chapter primarily focuses on the Thai Civil and Commercial Code's laws on succession, family, gifts and the prevention of trust creation. However, it also emphasises the Revenue Code (RC) in terms of income derived from inheritance (as transfer on death) as well as income derived from maintenance and support under moral purposes and from gifts received during a ceremony or during customary or traditional occasions (as lifetime transfers)¹⁹; these are entirely exempt from the personal income tax under s 42 (10) of the RC. This chapter concludes by highlighting the sensitive issue of whether or not the royal estate should be exempt from the new Thai WTT. This examination involves statutory interpretation of the relevant provisions of the Crown Property Act of 1936 (CPA 1936) and the Act on Tax Exemption for Crown Property, 1934 (ATECP 1934). This legislation is specifically compared to the UK criteria for royal taxation. The outcome of this chapter provides a significant foundation from which to analyse the issues discussed in Chapters 6 and 9.

¹⁹ RC, s 42 (10).

Chapter 6 deals with the repeal of the Estate and Inheritance Tax Act of 1933 (EITA 1933), a form of WTT that is part of Thailand's tax history. The chapter begins with an investigation into the reasons behind the repeal of the EITA 1933 by the Act of Abolishing the Estate and Inheritance Tax, 1944 (AAEIT 1944). It then examines the structure and provisions of the EITA 1933, arguing that the EIT failed to achieve its main goals because of its ineffectiveness, since it left several loopholes for EIT evasion and dishonest administration by tax authorities. Chapters 7 and 8 primarily focus on comparative study of aspects of the US and UK WTT legislation, including general provisions and provisions governing computation and administration. It also compares and examines both the US federal estate and gift taxes (FET/FGT) and the UK inheritance tax (IHT) system structures in detail.

Chapter 9 examines two related questions. First, should a WTT be introduced in Thailand? Secondly, are there lessons that Thailand can learn from the WTT systems in the US and UK? This chapter explores the outcomes of the preceding discussions. Through this analysis, the chapter specifically highlights the relevant aspects from Chapters 7 and 8, particularly the criteria, rules and concepts arising from both the FET/FGT and IHT. This chapter also evaluates how these selected aspects can be applied to Thailand's context and how they can help to resolve problems arising from the EITA 1933 and its application. It then argues that selected certain of from the US and UK systems could usefully be adopted into the new Thai WTT.

Chapter 10 concludes by arguing that there is a case for implementing a specific kind of WTT system in Thailand –a transferor-based system. In particular, the UK single system represents a useful model for Thailand's context. In implementing this system, however, not all IHT rules should be applied; rather, policymakers should thoroughly consider the US and UK regimes to locate appropriate measures for Thailand's political, economic, social and legal contexts. The chapter concludes by examining a proposal to introduce the new WTT by amending the RC. The provisions regarding the prospective WTT, as amended by an Act, should be inserted as a new chapter into the code. This method would be similar to the amendment of the code in Chapter 4 (ss 77 through s 91/21) regarding the value added tax (VAT).

1.3 Methodology

A doctrinal approach was adopted in this research, involving textual analyses of a range of primary and secondary material. These sources are held by several libraries in

Thailand, the USA and the UK. The libraries at Ramkhamhaeng University, Chulalongkorn University and Thammasat University are domestically the main sources of printed materials. In particular, Thai archives hold ancient manuscripts, stone inscriptions (in paper) and traditional books, mainly collected from the National Library of Thailand and Silpakorn University. In addition, Thailand's official publications were gathered from the libraries at the Office of the Council of State and the Parliament House of Thailand, the Revenue Department (RD), the Attorney General and the Supreme Court of Thailand. Meanwhile, all primary and secondary sources regarding the UK and US WTT and the international valuation standards (IVS) were obtained from several libraries in the UK, including Brunel University, the British Library, the Institute of Advanced Legal Studies and the Royal Institution of Chartered Surveyors (RICS) in London. From the USA, resources were collected from the Harvard Law School Library.

2 Evolution of Wealth Transfer Tax in Thailand

Introduction

This chapter examines the evolution of wealth transfer taxation both internationally and in Thailand. It provides a brief overview of the wealth transfer tax (WTT) in antiquity—from ancient Egypt to modern Europe. It goes on to consider the history of the WTT in the US and the UK before examining Thailand's wealth transfer taxation. The chapter then explores Thailand's tax system as it developed during each period of the country's legal history, with a focus on the context of Thai society. It will also provide an overview of Thai history in political, social and economic contexts, as this information is critical to understanding the evolution of its system of taxation. Particular attention is directed to an account of Thailand's legal history from the long period of absolute monarchy to the era of constitutional monarchy with a parliamentary system of government.

This chapter aims to provide an understanding of how Thai taxation has generally evolved in terms of the country's political, cultural, legal and social systems. This discussion seeks to inform Thailand's proposals to introduce the WTT. It is essential that the designed WTT be in harmony with Thai society as much as possible.

This chapter will reveal that no precise form of WTT has been proposed since enactment of the Estate and Inheritance Tax Act of 1933 (EITA 1933); however, the concept of a tax on wealth transfer has existed for some time in Thailand.

2.1 The Beginnings of Taxation on Wealth Transfer

Wealth transfer taxation has a long history. In the European Middle Ages, the sovereign was theoretically believed to own all real property,²⁰ and he or she bestowed property rights on select individuals.²¹ When the recipient of royally-bestowed property died, the property would revert back to direct possession of the sovereign.²² As this system

²⁰ Jean W Sedlar, *East Central Europe in the Middle Ages, 1000-1500* (University of Washington Press 1994) 260.

²¹ Wayland D Gardner, *Government Finance, National; State and Local* (Prentice-Hall 1978) 260.

²² *Ibid.*

evolved, taxation arose when property rights were transferred to a designated heir. In this system, property could be transferred so long as a duty or tax was paid to the sovereign upon the death of the property rights' holder.²³ As can be seen, there is a very long history of wealth transfer taxes and resulting controversies in western civilization,²⁴ with the earliest known examples occurring in ancient Egypt.²⁵ Ancient Greeks and Romans also maintained various taxation systems.²⁶

2.1.1. Western Civilizations

There exists a thoroughly documented history regarding the taxation of wealth transfer (sometimes called the taxation of estates and inheritances).²⁷ Known to the Egyptians, Romans and Greeks, these ancient taxes²⁸ have existed for thousands of years.²⁹ Within this history, there have been evasions and wars involving churches and kings.³⁰ There also exists a long history for taxing items. Some believe that the first systematic taxes (or tax laws) existed in Ancient Egypt, Ancient Mesopotamia and Ancient China.³¹ Others assert that this history may be longer, existing since the early Stone Ages. For example, the Australian aboriginal tribes had to give a substantial part of their hunting bounty to the senior member of the group.³² In earlier times, the straightforward requisitioning of men was a form of taxation—a payment of physical labour or payment in kind.³³ While these early forms of taxation are interesting, more relevant to this thesis is the question of when wealth transfer taxation first appeared between the times of ancient Egypt and early modern Europe.

²³ Krirkkeit Pipatseritham, 'Estate and Inheritance Tax' (1974) 3(3) *Thammasat University Journal* 86, 113.

²⁴ Jackson Spielvogel, *Western Civilization, vol A: to 1500* (9th edn, Cengage Learning Custom Publishing 2015) xxxiii.

²⁵ Randolph E Paul, *Federal Estate and Gift Taxation* (Little, Brown & Co. 1942) 3.

²⁶ William J Schultz, *The Taxation of Inheritance* (Houghton Mifflin Company 1926) 6.

²⁷ James R Hines, 'Taxing Inheritances, Taxing Estates' (2010) 63(1) *Tax Law Review* 189, 189.

²⁸ Louis Eisenstein, 'The Raise and Decline of the Estate Tax' (1956) 11 *Tax Law Review* 223, 223.

²⁹ Naveen Malhotra and Amanda Smith, 'Social and Tax Implications of Planned Giving' (2011) 27(6) *Journal of Applied Business Research* 39, 40.

³⁰ Matthew B Gaudin, 'Notes: the Federal Estate Tax and the National Debt: Why the Debt Forces a Defense of the Tax' (2011) 45(1) *Indiana Law Review* 159, 161.

³¹ Kunwar Deo Prasad, *Taxation in Ancient India: From the Earliest Times up to the Guptas* (Mittal Publications 1978) 1.

³² *Ibid.*

³³ *Ibid.*

2.1.1.1 Ancient Egypt

In 700 BC, the earliest inheritance tax appeared in Egypt during the Pharaonic Era.³⁴ The value of land transferred at death was charged a ten per cent inheritance tax.³⁵ The most effective taxation system in ancient Egypt existed under the Pharaoh at this point of time.³⁶ This Pharaoh was known to be a godlike supreme ruler who represented Egypt's soul.³⁷ He would command the *vizier*, his appointee and special advisor,³⁸ also known as the chief minister, to collect taxes using efficiently trained scribes.³⁹

Individuals were to declare the value of the wealth created through their livelihoods for taxation purposes.⁴⁰ In March and April, the crops were harvested and taxation took place.⁴¹ This activity allowed tax collectors to ascertain the precise amount that was to be collected for the throne. The Egyptian empire was known to force tax payments through its scribes.⁴² Taxes were paid in the form of agricultural produce, livestock, cooking oil, beer and land transfer. Livelihood taxation was known as the '*beku*', effectively transferring goods to the throne.⁴³ Special taxes were applied to the local officials, omitting '*apu*'. Taxes were also levied on foreign commerce and River Nile transportation methods.⁴⁴ Everyone seems to have been subjected to the tax, and there were no exemptions for tax collectors or rich nobles.⁴⁵ The Egyptian empire established a network of spies to maintain control over the local officials as well as the scribes. Officials filed taxation reports from all over the empire following a special system. Severe punishment resulted for officials or scribes who failed to report taxes in a complete and accurate manner.⁴⁶

³⁴ Sabine R Huebner, *The Family in Roman Egypt: A Comparative Approach to Intergenerational Solidarity and Conflict* (Cambridge University Press 2013)138-139.

³⁵ Max West, *The Inheritance Tax* (New York 1908) 11.

³⁶ Shona Grimby, *Encyclopaedia of the Ancient World* (Fitzroy Dearborn Publishers 2000) 231.

³⁷ Bob Brier and A. Hoyt Hobbs, *Daily Life of the Ancient Egyptians* (The Greenwood Publishing Group 2008) 69-70.

³⁸ Ana Ruiz, *The Spirit of Ancient Egypt* (Algora Publishing 2001) 84.

³⁹ Samuel Blankson, *A Brief History of Taxation* (Blankson Enterprises Limited 2007) 3.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ifueko Omoigui Okauru , *A Comprehensive Tax History of Nigeria* (Safari Books Ltd. 2012) 67.

⁴³ Blankson (n 39) 3.

⁴⁴ Ibid.

⁴⁵ Huebner (n 34) 139.

⁴⁶ Blankson (n 39) 3.

2.1.1.2 The Roman Empire

The Roman Empire (27 BEC-476 CE) was the outgrowth of the earlier Roman Republic (509-27 BCE).⁴⁷ In the early days of the Roman Republic, imports and exports were subjected to two types of indirect taxes, known as custom and harbour dues (*portoria*).⁴⁸ These taxes applied to goods carried into and out of ports during a time of increased trade in the early second century.⁴⁹ For direct taxes, several forms of real estate, chattel slaves, homes, land, monetary wealth and personal items, were subjected to 1 per cent property and wealth tax. This tax could increase to nearly 3 per cent in times of emergency, including wars.⁵⁰ In order to finance a war against Julius Caesar's assassins (42 BCE), the empire introduced a new wealth tax on properties exceeding a certain amount owned by 1,400 of the richest Roman women.⁵¹

The magistrates and local provincial officials assessed and collected the provincial taxes of each citizen. They recorded information about these individuals into a register in order to maintain accurate information about their financial resources and manpower, a practice known as the *census*.⁵² Centuries later, during the reign of the Roman emperor Caesar Augustus, Rome directly adopted the first inheritance and gift tax from Egypt as a result of conquering the Nile River.⁵³ This tax became known as *tributum*⁵⁴ and was applied to all of the deceased's beneficiaries, except for his or her close relatives.⁵⁵ The tax levied was between 0.1 and 0.3 per cent of the individual's property despite the fact that 0.1 per cent was the official rate to be levied.⁵⁶ In 167 BC, the *tributum* was

⁴⁷ Margaret A Brucia and Gregory Neil Daugherty, *To be a Roman: Topics in Roman Culture* (Bolchazy Carducci Publisher, Inc. 2007) 1.

⁴⁸ Saskia Hin, *The Demography of Roman Italy: Population Dynamics in an Ancient Conquest Society, 201 BCE-14CE* (Cambridge University Press 2013) 40.

⁴⁹ Philip Kay, *Rome's Economic Revolution* (OUP 2014) 74.

⁵⁰ Samuel Blankson (n 39) 17.

⁵¹ Pat Southern, *The Roman Army: A Social and Institutional History* (OUP 2007) 73.

⁵² In earlier time times, an extraordinary charge in kind was imposed (*indicere*) on citizens and non-soldiers in order to secure equipment and nourishment for the army. After a victorious war, the *tributum* was sometimes reimbursed to the payers if the booty and contribution taken from the enemy was large enough to cover the expenses of the war. See. E Mary Smallwood, *The Jews under Roman Rule: From Pompey to Diocletian: a Study in Political Relations* (Brill 2001) 151.

⁵³ Andrew Lymer and John Hasseldine, *The International Taxation System* (Kluwer Academic Publisher 2002) 25.

⁵⁴ Adolf Berger, *Encyclopaedic Dictionary of Roman Law*, vol 43 (The American Philosophical Society 1991) 745.

⁵⁵ Jürgen Schupp and Marc Szydlik, 'Inheritance and Gifts in Germany: The Growing Fiscal Importance of Inheritance Tax for the Federal States' (2004) 41(3) *DIW Economic Bulletin* 95, 95.

⁵⁶ Simon James and Christopher Nobes, *The Economics of Taxation Principles, Policy and Practice* (9th edn, Fiscal Publications 2009) 212.

removed, but not abolished in law.⁵⁷ Due to the spoils of war, this tax extracting large amounts from Roman citizens was no longer required. In A.D. 6, Rome applied a 5 per cent inheritance tax (*vicesima hereditarium*),⁵⁸ which included the deceased person's estates and legacies.⁵⁹ However, this tax was only applied to Roman citizens, and their citizenship was extended to the empire by Caracalla (A.D. 198-217) in order to expand the inheritance tax base.⁶⁰ In Roman society, although a wide gulf between the rich and the poor clearly existed, taxes were collected in extremely high sums every year.⁶¹ This tax was also exempt for the poor and the emperor.⁶² This inheritance tax, therefore, was a burden for the closer heirs but not for the distant beneficiaries. Contrary to expectation, there was little avoidance of this last exemption, mainly because the Romans usually left their property to their friends rather than their children.⁶³

2.1.1.3 The Middle Age and Early Modern Europe

The Middle Ages also witnessed the introduction of several taxes⁶⁴ such as a wine tax, harem taxes, sparrow and nightingale taxes, and window taxes.⁶⁵ There also was the deathbed gift transfer,⁶⁶ the first tax on death in this era. When land was passed on to heirs, vassals had to hand over a sum of money or specific goods under the feudal institution.⁶⁷ In Holland, royal power was established in the 17th century, followed by England, Spain and Portugal. In these nations, a stamp duty was adopted in the form of an inheritance tax.⁶⁸

These taxes furthered the notion that the sovereign or state owned all estate.⁶⁹ The church also periodically invoked a death tax on individuals;⁷⁰ for example, the church

⁵⁷ Claude Nicolet, *The World of the Citizen in Republican Rome* (University of California Press 1992) 150.

⁵⁸ David Noel Freedman and Allen C Myers, *Eerdmans Dictionary of the Bible* (Amsterdam University Press 2000) 1278.

⁵⁹ James and Nobes (n 56) 212.

⁶⁰ *Ibid.*

⁶¹ Prasad (n 31) 2.

⁶² James and Nobes (n 56) 212.

⁶³ *Ibid.*

⁶⁴ People use the phrase 'Middle Ages' to describe Europe between the fall of Rome in 476 CE and the beginning of the Renaissance in the 14th century.

⁶⁵ Prasad (n 31) 3.

⁶⁶ Carmen Gonzalez de Aguilar and Francisco Cabrillo, 'Distribution of Wealth and Inheritance Tax' (2001) IUDEM Documento de Trabajo 2001-1, 2 <<https://pendientedemigracion.ucm.es/info/iudem/2001-1pdf>> accessed 24 June 2015.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Gary Robbins, 'Estate Taxes: An Historical Perspective' (2004) 1719 *Backgrounder* 1, 1 <<http://www.heritage.org/research/reports/2004/01/estate-taxes-an-historical-perspective>> accessed 24 June 2015.

stipulated that ‘individuals give one-third of their possessions to the church upon death’.⁷¹ The king also introduced stamp duty through the Church Court of England to financially support the war with France.⁷² In many nations, either the monarchs established an inheritance law, or they inherited the former rights of the feudal lords. Soon, income and inheritance became subject to taxes.⁷³ As the centuries progressed, other European countries, such as Germany, the Netherlands and Denmark, began to establish taxes on inheritance, including the *erbkauf* in Germany.⁷⁴ The estate and inheritance taxes being used today have roots in the 18th century in terms of the transfer of property upon death or in some form of duties and fees.⁷⁵

2.1.2 Modern Taxation of Wealth Transfer in the UK and US

2.1.2.1 United Kingdom

The earliest form of a WTT (often called ‘death duty’) in England was a 1694 probate duty.⁷⁶ Practically speaking, however, the WTT began in the UK when Chancellor William Harcourt⁷⁷ introduced the ‘estate duty’ in 1894.⁷⁸ This estate duty lasted quite some time, from 1894 to 1974.⁷⁹ Compared to the short-lived succession and legacy duty abolished in 1949, the estate duty survived until 1974.⁸⁰ While the amount of estate tax due depended on the estate size,⁸¹ the legacy or succession duty depended on the closeness of the relationship between the testator and the beneficiary: the closer the blood tie, the lesser the duty.⁸² However, a capital transfer tax (CTT) was subsequently introduced to replace the estate tax.⁸³ Unlike the estate duty, the CTT include lifetime gifts on a cumulative basis. Both of these two taxes were voluntary.⁸⁴ Finally, in 1986,

⁷⁰ Barbara R Hauser, ‘Death Duties and Immortality: Why Civilization Needs Inheritances’ (1999) 34 *Real Property, Probate and Trust Journal* 363, 369.

⁷¹ *Ibid.*

⁷² *Ibid* 370.

⁷³ Gonzalez de Aguilar and Cabrillo (n 66) 2.

⁷⁴ Hauser (n 70) 371.

⁷⁵ Mary R Wampler, ‘Note: The Federal Estate Tax: Death to the Death Tax or Will Reform Save the Day?’ (2001) 25 *Seton Hall Legislative Journal* 525, 529.

⁷⁶ J R Edwards, *A History of Financial Accounting* (Routledge 2014) 274.

⁷⁷ Howard Glennerster, ‘Why was a wealth tax for the UK abandoned? Lessons for the policy process and tackling wealth inequality’ (2012) 41(2) *Journal of Social Policy* 233, 236.

⁷⁸ Stephen Dowell, *History of Taxation and Taxes in England*, vol 1-4 (3Rev Ed edn, Routledge 1965) xl.

⁷⁹ Graham Moffat and others, *Trusts Law: Text and Materials* (5th edn, Cambridge University Press 2009) 388.

⁸⁰ Glennys Howarth and Oliver Leaman, *Encyclopaedia of Death and Dying* (Routledge 2001) 445.

⁸¹ Joan Thirsk and Edward John T. Collins, *The Agrarian History of England and Wales*, vol 7 (Cambridge University Press 2000) 933.

⁸² William Ashworth, *An Economic History of England 1870-1939* (Routledge 2010) 234.

⁸³ Moffat and others (n 79) 388.

⁸⁴ *Ibid* 389.

the structure of the CTT changed considerably, and it became known as the inheritance tax (IHT).⁸⁵ The IHT mixes the rules of estate duty and CTT. Although its name seems to be associated with a recipient-based tax, in substance, the changes resulted in a return to a transferor-based tax⁸⁶ rather than an actual inheritance tax.

2.1.2.2 United States of America

For almost a century following the introduction of England's modern WTT system in 1694, the US considered its own WTT system. The US modern tax regime began after the constitution was ratified in 1788,⁸⁷ and the young nation enacted a number of short-lived WTTs during the eighteenth and nineteenth centuries. For example, the US enacted the death stamp tax, the nation's first, to finance the Spanish-American War. This tax was repealed in 1802.⁸⁸ Later, two other WTTs (legacy taxes) were introduced in 1862 (repealed in 1870) and again in 1898 (repealed in 1902).⁸⁹

The modern WTT has been in place since 1916, the so-called 'estate tax'.⁹⁰ This tax was introduced to raise federal government revenue during the World War I.⁹¹ After the introduction of the US federal income tax, Congress enacted the first gift tax as a supplement to combat estate tax avoidance.⁹² Repealed in 1926, it was a short-lived gift tax, but it was reintroduced in 1932.⁹³

Today, the US federal estate and gift taxes (FET/FGT) have survived for almost a century. In addition to small changes from the 1970s through the 1990s, there were two major historical revisions in 1976 and 2001. First, Congress enacted the Tax Reform Act of 1976 that introduced a unified WTT; taxes on estates and gifts were completely integrated into a single system that continues to exist in the US at the federal level.⁹⁴ The unification of the two taxes instituted a single (unified) tax rate schedule and a cumulative lifetime gift with one exemption level. It also expanded the marital

⁸⁵ Howarth and Leaman (n 80) 445.

⁸⁶ Moffat and others (n 79) 389-90.

⁸⁷ W Elliot Brownlee, *Federal Taxation in America: A Short History* (Cambridge University Press 2009) 13.

⁸⁸ Alan J Auerbach and others, *Handbook of Public Economics*, vol 5 (Elsevier 2013) 333.

⁸⁹ Brownlee (n 87) 62.

⁹⁰ Andrew Chamberlain and others, 'Death and Taxes: The Economics of the Federal Estate Tax' (2006) Tax Foundation Special Report No. 142, 4 <<http://taxfoundation.org/article/death-and-taxes-economics-federal-estate-tax>> accessed 24 June 2015.

⁹¹ Paul L Caron and James R Repetti, 'The Estate Tax Non-Gap: Why Repeal a 'Voluntary' Tax?' (2009) 20(1) *Stanford Law and Policy Review* 153, 155.

⁹² Auerbach and others (n 88) 333.

⁹³ Chamberlain and others (n 90) 4.

⁹⁴ Paul R McDaniel and Hugh J Ault, *Introduction to United States International Taxation* (Kluwer Law International 1998) 195.

deduction classifications⁹⁵ and created a single unified tax credit.⁹⁶ Moreover, a new tax was established on generation-skipping trusts (generation-skipping transfer (GST)), ‘impos[ing] an additional layer of tax liability for certain transfers to grandchildren and related transactions’.⁹⁷ Secondly, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), known as the ‘*sunset provision*’ or ‘*sun-setting tax law*’ was temporarily enacted.⁹⁸ As a result, the exclusion amount was gradually increased, while the FET/FGT rates gradually went down until 2009.⁹⁹ Interestingly, the two taxes were repealed, but only in 2010;¹⁰⁰ meanwhile, the gift tax remained in effect.¹⁰¹ In 2011, these two taxes were reinstated to reflect the legislation in effect prior to the enactment of the EGTRRA in 2001.¹⁰²

2.2 Origins of the Wealth Transfer Taxation Concept for Thailand

The taxation system of Thailand has its foundation in the early Sukhothai period from 1220-1438, the Ayutthaya period from 1351-1767 and the Rattanakosin period from 1782-1932. The modern system dates from the formation of Thailand’s constitutional monarchy democracy in 1933. This subsection aims to provide a full picture of the history of Thailand’s tax system as well as the country’s political, cultural, legal and social context. This subsection argues that these factors considerably influenced the existence of wealth transfer taxes. This evaluation will be beneficial in introducing the future WTT, which should correspond to the context of Thai society.

2.2.1 Absolute Monarchy Era

Until 1939, Thailand was known by the name of Siam,¹⁰³ which literally means ‘land of the free’.¹⁰⁴ This southeast Asian country is the only one never colonised by a European power.¹⁰⁵ In the Sukhothai, Ayutthaya, Thon Buri and early Rattanakosin periods, the regimes in Thailand (*Siam*) were uninterruptedly governed under absolute monarchy:

⁹⁵ Michael J Graetz, ‘To Praise the Estate Tax, Not to Bury It’ (1983) 93 *Yale Law Journal* 259, 260.

⁹⁶ McDaniel and Ault (n 94) 195.

⁹⁷ Auerbach and others (n 88) 334.

⁹⁸ Manoj Viswanathan, ‘Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future’ (2007) 82 *New York University Law Review* 656, 657.

⁹⁹ Gerald S Susman, *Estate Planning: Forms, Practice and Tax Analysis*, vol I (Law Journal Press 2003) 10-4.

¹⁰⁰ Viswanathan (n 98) 661.

¹⁰¹ Susan Flax Posner, *Estate & Gift Tax Handbook 2007* (CCH Incorporated 2007) 1-9.

¹⁰² Susman (n 99).

¹⁰³ Gerald W Fry and others, *Historical Dictionary of Thailand* (3rd edn, Scarecrow Press Inc 2013) 291.

¹⁰⁴ Royal Thai Embassy in London, ‘About Thailand’ <<http://www.thaiembassyuk.org.uk/?q=node/28>> accessed on 24 June 2015.

¹⁰⁵ Melvin E Page, *Colonialism: An International, Social, Cultural and Political Encyclopaedia* (ABC-CLIO Ltd 2003) 580.

the kings had supreme power and ruled over the kingdom for almost seven hundred centuries.¹⁰⁶ The kings held the power to collect taxes and grant tax exemptions. This system lasted until the People's Party (*Khana Ratsadon*) transformed the absolute monarchy into a constitutional monarchy on June 24, 1932 through a bloodless revolution.¹⁰⁷

2.2.1.1 Sukhothai Kingdom

The formative stage of Thailand's history began during the Kingdom of Sukhothai (the 'raising of happiness').¹⁰⁸ Modern Thai historians regard Sukhothai as the birthplace of the Thai nation. It was the first Thai Kingdom to achieve material prosperity and cultural blossoming.¹⁰⁹ The king during this period was King Ramkhamhaeng, also known as Rama the Great (reigned c. 1239-1289).¹¹⁰ He is recognised as the father of the Thai people.¹¹¹ A close relationship was present between the people and their king during this time period.

The citizens of Thailand carried out trade and investment in order to extract money and taxes. In 1292, King Ramkhamhaeng had these words inscribed in paragraph I of his outlined methods for ruling the kingdom's economic and fiscal systems:

In the time of King Ramkhamhaeng, this land of Sukhothai is thriving. There are fish in the water and rice in the fields. The lord of the realm does not levy tolls on his subjects for traveling the roads; they lead their cattle to trade or ride their horses to sell; those who want to trade in elephants does so; whoever wants to trade in houses does so; whoever wants to trade in silver and gold does so.¹¹²

The historic evidence shows that money and taxes held the same purpose throughout this time period: to enhance the development and growth of the nation.¹¹³ Free trade

¹⁰⁶ Roshan T Jose, *Constitutional and legal systems of ASEAN countries: Academy of ASEAN Law and Jurisprudence* (University of the Philippines Law Complex 1990) 290.

¹⁰⁷ Benjawan P Becker and Roengsak Thongkaew, *Thai Law for Foreigners* (Paiboon Publishing 2008) 1.

¹⁰⁸ Arne Kislenko, *Culture and Customs of Thailand* (Praeger Publishers 2000) 9.

¹⁰⁹ Patit Paban Mishra, *The History of Thailand* (Greenwood 2010) 36

¹¹⁰ Peter Church, *A Short History of South-East Asia* (5th edn, John Wiley & Sons (Asia) Pte Ltd 2009) 4.

¹¹¹ P N Nagara and A B Griswold, 'The Inscription of King Rāma Gāmhēñ of Sukhodaya (1292 AD)' in P M Sirindhorn (ed), *Epigraphic and Historical Studies* (The Historical Society under the Royal Patronage of HRH Princess Maha Chakri Sirindhorn, 1992) 265.

¹¹² Federico Ferrara, *Thailand Unhinged: Unraveling the Myth of a Thai-style Democracy* (Equinox Publishing (Asia) Pte Ltd 2010) 135.

¹¹³ The Revenue Department, 'Annual Report 2009' 7 <<http://www.rd.go.th/publish/24602.0.html>> accessed 24 June 2015

existed, but barter still held a significant position. Goods could be purchased through gold, money and money cowries.¹¹⁴ Merchants and treasuries helped distribute round *ticals* consisting of animal forms. When leaving or entering the city, a port tax was not collected in order to encourage free trade.¹¹⁵ ‘Sukhothai’ soon became the region’s barter economy centre. Indeed, the collection of tax and duty in Thailand dates back to the Sukhothai era. Some believe that there were taxes collected in this period called ‘*Changkob*’¹¹⁶ though the kings could grant tax exemptions. However, there is no clear evidence of such claims.¹¹⁷ Other researchers believe that there was no tax levied in the Sukhothai kingdom¹¹⁸ due to its politics, religion and economics. All prospered in the region, and many foreign traders had contact with the kingdom. Because natural resources were also plentiful during this period, the government needed no tax revenue to finance its public expenditures.

Based on this discussion, the question of wealth transfer taxation in the Sukhothai Kingdom needs to be addressed. To answer this question, it is necessary to reconsider the king’s 1292 inscription again. Paragraph II describes the law of succession:

When any commoner or man of rank dies, his estate—his elephants, wives, children, granaries, rice, retainers and groves of areca and betel—is left in its entirety to his son.¹¹⁹

Particular to the imposition of WTT, the inscription shows that when a person dies, the estate of the deceased devolved to his son regardless of his ranking status. The inscription states that there were no other statutory heirs entitled by law to inheritance. In addition, no portion of the estate was vested to the state or the king. Therefore, there is a possibility that the kings of Sukhothai collected no taxes on wealth transfer, instead promoting internal barter and trade as well as external trade with other countries.

2.2.1.2. Ayutthaya Kingdom

From 1350 to 1767, the capital of Thailand was Ayutthaya, which embodied ancient Thai agricultural and urban culture with Buddhist monasteries at the centre.¹²⁰ King

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ The Customs Department, ‘History: Organisation Arrangement, Vision, Mission and Strategy’ <<http://www.customs.go.th/wps/wcm/connect/custen/aboutus/aboutus>> accessed 24 June 2015.

¹¹⁷ The Excise Department, ‘About Us–History of Excise Department’ <http://excise.english.excise.go.th/ABOUT_US/HISTORY/index.htm> accessed 24 June 2015.

¹¹⁸ Arran Dhammano, *General Fiscal* (Thai Research and Training Publisher 2007) 9.

¹¹⁹ David K Wyatt, *Thailand: A Short History* (Silkworm Books 2004) 42.

Ramathibodi I (Uthong), regarded as the ‘founder-figure’, officially established Ayutthaya around 1351.¹²¹ The ideal of Buddhist kingship not only influenced the kings of Sukothai, but also the kings of Ayutthaya who ruled based on the ‘*dhamma*’ and the *devaraja*.¹²² The *dhamma* means all of existence (all of creation)¹²³ while the *devaraja* are the ‘god-kings’¹²⁴—kings who have a sacred power linked with the *Vishnu* and *Indra* Hindu Gods.¹²⁵ The monarch was a supreme ruler, and all property (especially land) and life in the realm belonged to him, the lord of the land and life.¹²⁶ In other words, everything in the kingdom of Ayutthaya was crown property; thus, in principle, all taxes and tolls must be recognised as royal revenue.¹²⁷

2.2.1.2.1 The Sakdina Social System

Established by the kings, the sakdina system (or power of the rice fields),¹²⁸ was an extensive administrative system aligned with a hierarchical social system.¹²⁹ From the time of King Trailok’s or Borommatrailokanat’s (1448-1488) reign, the administrative system began to evolve and eventually became modern Thai bureaucracy.¹³⁰ Titled and ranked officials were present in the hierarchy; in fact, part of the Ayutthaya bureaucracy involved the use of honour marks (*sakdina*) for such individuals.¹³¹ Thai society in the Ayutthaya period also followed a hierarchal system. Under the sakdina system, there were four classes of people: royalty (*chao*), aristocrats or nobles (*khunnang*), commoners (*phrai*) and slaves.¹³² While slaves occupied the lowest rung of the structure, the *prai* fell into the third category.¹³³ Aristocrats or nobles (*khunnang*) were

¹²⁰ Ian Harris, *Buddhism and Politics in Twentieth Century Asia* (Continuum-3PL 2001) 196.

¹²¹ Barbara Watson Andaya and Leonard Y Andaya, *A History of Early Modern Southeast Asia 1400-1830* (Cambridge University Press 2015) 117.

¹²² Neil A Englehart, *Culture and Power in Traditional Siamese Government* (Cornell Southeast Asia Publications 2001) 30.

¹²³ Donald K Swearer, *Me and Mine: Selected Essays of Bhikkhu Buddhadasa* (State University of New York Press 1989) 180.

¹²⁴ Timothy D Hoare, *Thailand: A Global Studies Handbook* (ABC-CLIO Ltd 2004) 29.

¹²⁵ Chanwit Kasetsiri and Vikran Phonpitanon, *Thai Legal History* (Thammasat University Press 2009) 49.

¹²⁶ Nicholas Grossman and Dominic Faulder, *King Bhumibol Adulyadej: A Life's Work: Thailand's Monarchy in Perspective* (Didier Millet 2012) 284.

¹²⁷ *Ibid.*

¹²⁸ Junius P Rodriguez, *The Historical Encyclopaedia of World Slavery*, vol 1 (ABC-CLIO 1997) 631.

¹²⁹ *Ibid.*

¹³⁰ Shiv Shanker Tiwary and P S Choudhary, *Encyclopaedia of Southeast Asia and Its Tribes* (Anmol Publications Pvt Ltd 2009) 7.

¹³¹ *Ibid.*

¹³² Tamara Lynn Loos, *Subject Siam: Family, Law, and Colonial Modernity in Thailand* (Cornell University Press 2006) 35.

¹³³ Keat Gin Ooi, *Southeast Asia: A Historical Encyclopedia, from Angkor Wat to East Timor*, vol1(ABC-CLIO 2004)194.

present above the commoners, and the top of the scale consisted of royalty (*chao*).¹³⁴ The Buddhist monkhood was one sector of Thai society that did not consist of any class, though it did have its own internal structure (*sangha*).¹³⁵ There was a hierarchical system, the *Thi thoranisong* and *Thi karapana*, for particular monks.¹³⁶ Thus, the social classes could also be found in the institution of monkhood.

The *sakdina* was ultimately a feudal system in the Ayutthaya period, but it differed greatly from Europe's feudalism. Each person, based on a particular criterion, was assigned a status under *sakdina*.¹³⁷ Through this system each individual had a certain level of power and responsibility. The responsibility became higher with increased rank, and these individuals could also be subjected to more severe punishment. *Rai* is a unit of land measurement used to assess the individual person's status (or *sakdina*). Each *rai* equals 1,600 square meters.¹³⁸ The provided status did not mean that the individual owned this amount of land. It only indicated the person's status using a value understood by the general population. The social ranks were classified in the following manner:¹³⁹

(1) The king was treated as a divine being as he maintained the highest rank and great power.

(2) At birth, members of the royal family were provided with their status, which could be high or low based on the Thai monarch law. The range for *rai* was nearly 15,000 *rai*, up to 100,000 *rai* of their *sakdina*.

(3) The king provided government officials and lords with the authority to deal with the common man. The *sakdina* for the lords was 400 up to 10,000 *rai*, and for government officials, it was 25 and 400 *rai*. It was not possible for government officials to become lords. As long as they lived, the lords and government officials maintained their status. Children were also not allowed to inherit this status, but based on their performance, they could be promoted or demoted.

¹³⁴ Ibid.

¹³⁵ Somboon Suksamran, *Buddhism and Politics in Thailand* (Institute of Southeast Asian Studies 1982) 17.

¹³⁶ Ibid.

¹³⁷ Rachel V Harrison and Peter A Jackson, *The Ambiguous Allure of the West: Traces of the Colonial in Thailand* (Hong Kong University Press 2010) 54.

¹³⁸ M B Hooker, *Laws of South-East Asia: The pre-modern texts* (Butterworth 1986) 172.

¹³⁹ Jit Phumisak, *Chom na Sakdina Thai – The Real Face of Thai Feudalism* (Dok-Ya Publishing House 2000) 113.

(4) The majority of society consisted of *prai* who were commoners with a rank of 25 *rai*. This status could be brought high enough to become a lord or low enough to become a slave depending on the person's performance and activities. It was the duty of the commoner to serve the nation and king. It was essential to register oneself with a lord. The commoner could register with a lord only after reaching a minimum height of two and a half *sawk* (one *sawk* is 0.5 meters). No legal protection or rights in court would be provided to a man who did not register himself with a lord. There were two kinds of commoners, '*prai-luang*' and '*prai-som*'.¹⁴⁰

(5) The lowest level of society was constituted of slaves with a rank of five *rai*. The slaves were not allowed to spend time following their own free will or to provide labour of their own accord. They were traded like merchandise in the market. If liberated, it was possible for the slave to become a commoner.

The Department of Land (*Krom Na*) was responsible for collecting a quarter of a baht from each *rai* of rice land. The retail sale of alcohol drinks, alcohol distilleries and boats were all subject to tax. If a durian tree was owned, a payment of a half baht was required annually.¹⁴¹ For a betel tree, one baht was to be paid, and for an areca-nut tree, the custom officers were to be given a certain amount of nuts. The state official charged an administrative cost if he acted on behalf of the people by giving a voucher for the land tax payment or fruit tree payment.¹⁴²

2.2.1.2.2 The 'Dharmasastra' and 'Rajsatra' Legal Systems

The Thai legal system during the Ayudhya Period (A.D. 1250-1767) followed the modified Code of Manu, the *Dharmasastra*, as well as the *Rajsatra*, which formed its basis.¹⁴³ The kings of administering justice were responsible for developing the *dharmasastra* and *rajsatra*.¹⁴⁴ The development of the Thai legal system took place during the Ayutthaya period, and it was crystallized to such a degree that it would remain applicable until the 19th century. Ancient Hindu jurisprudence helped derive the *dharmasastra*,¹⁴⁵ which then became an essential part of the Thai national heritage after becoming the code of law for the realm. This fundamental law included criminal and

¹⁴⁰ Supaluk Pinitpoovadon, *Text Book on Theory and Legal Principle of Taxation* (3rd end, Winyuchon Publisher 2005) 42.

¹⁴¹ B J Terwiel, *Thailand's political history from the 13th century to recent times* (River Books 2011) 52.

¹⁴² Ibid.

¹⁴³ Kasetsiri and Phonpitanon (n 125) 53-54.

¹⁴⁴ Ibid 56.

¹⁴⁵ Santosh N Desai, *Hinduism in Thai Life* (Popular Prakashan Private Ltd 1980) 24.

civil aspects¹⁴⁶ while also providing for private rights and individual liberty. The Ayutthaya helped carry out the royal justice concept during the Sukhothai. Limited legal development took place during the reign of King Taksin the Great (1767 and 1782) as they were occupied with endless warfare.¹⁴⁷ Revision of the laws devised from the Ayutthaya period took place at the beginning of the Chakri Dynasty in 1782. These laws were written and compiled in 1805 and were named the Law of Three Seals.¹⁴⁸

2.2.1.2.3 The 'Suaisa Arkon' System

During the Ayutthaya era, a tax system provided the main revenue for the kingdom. The so-called '*suaisa arkon*' financed public expenditures for the king, and the largest percentage of such expenditures was upkeep of the royal family;¹⁴⁹ however, the king himself was not considered taxable.¹⁵⁰ The local nobles and collectors were responsible for collecting the '*suaisa arkon*,' but they always kept large portions for themselves.¹⁵¹ From Sukhothai until the kingdom of Ayutthaya, the '*suaisa arkon*' system operated with a main tax classified into four categories, including '*arkon*' (duty), '*suai*' (corvée), '*rusha*' (charges) and '*jangkob*' (ports tax). These four tax categories of the Ayutthaya era are further described below.¹⁵²

(1) Arkon (Duty)

Arkon (duty) was charged on the earnings and benefits of individual incomes or on individual benefits gained by holding a right granted by the king to conduct specific business. For example, there were taxes on gambling, rice farming, alcoholic drinks, water fees and forestry. During the Ayutthaya era under King Prasat Thong (A.D. 1629-1656), the juridical procedures law mentioned the liquor tax, but it did not specifically discuss its collection and rate. Clearer historical evidence existed during the reign of King Narai.¹⁵³ The payment of *arkon* could be made both in cash and in kind. The tax collector was appointed based on the highest bids in the region for specific business. Such tax collectors were appointed as '*chao pasi*' or '*nai arkon*' during the early

¹⁴⁶ Swami Parmeshwaranand, *The Encyclopedic Dictionary of the Dharmasastra*, vol II (Sarup & Sons 2003) 271.

¹⁴⁷ Ooi (n 133) 194.

¹⁴⁸ David K Wyatt, *Studies in Thai History* (Silkworm Books 2008) 71.

¹⁴⁹ Grossman and Faulder (n 126) 284.

¹⁵⁰ Phra Worapakpiboon, *History of Thai Laws: Lecture on Political Science Faculty of Chulalongkorn University* (Chulalongkhon University Press 1969)12.

¹⁵¹ Grossman and Faulder (n 126) 284.

¹⁵² The Revenue Department, 'Annual Report 2013' 50-52 <<http://www.rd.go.th/publish/24602.0.html>> accessed 24 June 2015.

¹⁵³ The Excise Department, 'About Us–History of the Excise Department' (n 117).

Rattanakosin era. The *arkon* and *chao pasi nai* formed the foundation of today's Thai excise tax and excise department.

(2) Suai (Corvée)

Suai (corvée) involved two forms applicable in the Kingdom of Ayutthaya. The corvée was payment in the form of physical service labour to the king when a man was subject to tax or tribute. Every mature Thai man had to annually serve the king for 6 months, unless he chose to pay the *suai* in the form of cash or in kind. The king then used such payment to hire other persons to perform the assigned public duty. The other kind of *suai* was a tribute in which a conquered country made payment to the Kingdom of Ayutthaya.

(3) Rusha (Charges)

Rusha (charges) were court and government fees subject to charges, such as judicial process fees and issuance of land title deeds. However, *rusha* could also be granted to the judges and officials as remuneration and reward for performing their duties because there they took no salary at this time.

(4) Jangkob (Ports Tax)

Trade with foreign nations was strong, which promoted the country's economy during the reign of King Naresuan. In the Ayutthaya era, there was evidence found that the word '*jangkob*' (ports tax) and '*kha nhon*' were generally used together in Ayutthaya's laws. The *kra nhon* indicates a port where *jangkob* was imposed on the sale of goods. There were also different kinds of *kha nhon*, such as land *kha nhon*, water *kha nhon*, and market *kha nhon*. The *kra nhon* was charged at a flat rate based on the length of boat: 1 baht per *wa* (2 meters). Later, the charge changed, becoming based on the width of the boat. *Dan kha nhon* was the duty barrier in charge of levying duties upon every kind of *kra nhon*¹⁵⁴ in the Kingdom of Ayutthaya under the responsibility of the '*Pra Klang Sin Kha*' (the Royal Warehouse).¹⁵⁵ The *dan kha nhon* became the foundation of Thailand's contemporary customs department.

¹⁵⁴ The Revenue Department, 'Annual Report 2009' (n 113) 9.

¹⁵⁵ The Customs Department (n 116).

2.2.1.3 Thon Buri Kingdom and Early Rattanakosin Era

After the Burmese invasion of 1764, the Kingdom of Ayutthaya was destroyed, and much territory was lost. In order to regain this territory, warfare took place during the Thon Buri Kingdom and the Early Rattanakosin Kingdom since 1767.¹⁵⁶ Between 1767 and 1782, Siam became prosperous once again through the efforts of King Taksin—a second-generation Chinese born in Thailand.¹⁵⁷

2.2.1.3.1 The Laws of the Three Seals

The Ayutthaya legal system was still being implemented¹⁵⁸ even though most of the royal archives were destroyed during the Burmese invasion. Only about nine law codes survived the war.¹⁵⁹ King Rama I of the reigning Chakri Dynasty (1782-1806) required the Royal Commission to revise Thai law. He restored Thai laws by having legal matters and court documents analysed by a committee of 11 individuals who formed sections and carried out several discussions.¹⁶⁰ The king himself approved the resulting laws, the first code of Thailand, which became known as the Laws of the Three Seals (Kotmai Tra Sam Duang).¹⁶¹ This code has become an important source for legal scholars studying pre-19th century Thai legal texts.¹⁶²

2.2.1.3.2 Tax Collection

The basis of tax collection from the Thon Buri Kingdom until the early Rattanakosin period was similar to that in the Ayutthaya Kingdom. Rebellions were an issue during the reign of King Rama III, which caused the government to need more revenue.¹⁶³ As a result, the tax system was amended and augmented per the king's orders. There were 38 new taxes introduced along with a tax concessionaire system.¹⁶⁴ During this specific period, the Thai word for 'tax' became extremely common. The word, however, was an

¹⁵⁶ Disaphol Chansiri, *The Chinese migrations of Thailand in the Twentieth Century* (Cambria Press 2008) 46-7.

¹⁵⁷ Global Investment Centre USA, *Thailand Country Study Guide* (4th edn, International Business Publications 2008) 10.

¹⁵⁸ Becker and Thongkaew (n 107) 21.

¹⁵⁹ Yoneo Ishiii, 'Computerization of the Thammasat Version of the Kotmaitrasamduan' <http://adap.crma.ac.th/KotmaiTraSamDuang/explanation_en.html> accessed 24 June 2015.

¹⁶⁰ Kasetsiri and Phonpitanon, (n 125) 58.

¹⁶¹ Ibid.

¹⁶² Ishiii (n 159).

¹⁶³ The Revenue Department, 'Annual Report 2009' (n 113) 11.

¹⁶⁴ Ibid.

adaption of the Teochew dialect word *boosi*, which meant that a bureau collected and remitted tax to the nation.¹⁶⁵

The tax and fiscal administration revolution started during the reign of King Rama VI. The remittance of revenues was attained through *hoe ratsadakorn pipat* which was then promoted to become the Ministry of the Royal Treasury. To manage equal rates, there was a limit set on tax rates.¹⁶⁶ In terms of administrative reorganization, the ministries, departments and bureaus were established. King Rama VI established the RD under the Ministry of Finance to collect taxes as of 2 September 1915.¹⁶⁷ This reorganization aimed to create a tax system that was equal, fair and suitable to the nation's economic and political aspects.¹⁶⁸

2.2.1.3.3 The Emerging Idea of the Estate Division for the State

In order to ascertain whether or not wealth transfer taxation existed during the Thon Buri Kingdom and early Rattanakosin period, it is crucial to consider Thai succession law in addition to the tax system. The law of succession was prescribed during the Ayutthaya era during the reign of King Sanpet III (Ekathotsarot, 1605-1610).¹⁶⁹ It was used until the reign of King Rama I.¹⁷⁰ However, this law continued to be used until the early period of Ratanakosin even though King Rama V had ordered enactment of an amendment to the law of succession. This amendment was to alter estate division in 1902,¹⁷¹ especially estate division between heirs and married women.¹⁷²

The estate of commoners (*phrai*) and married women were not subject to royalty (*chao*) who occupied the highest rung of the structure of the sakdina system. The rule governing the division of noblemen's estates stated that these estates were only subject to royalty, not like the estate of ordinary men and married women. The noblemen's estates had to be divided into four portions.¹⁷³

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ The Revenue Department, 'About Us' <<http://www.rd.go.th/publish/6001.0.html>> accessed 24 June 2015.

¹⁶⁸ Ibid.

¹⁶⁹ Ellen London, *Thailand Condensed: 2,000 Years of History & Culture* (Marshall Cavendish Publisher 2008) 37.

¹⁷⁰ The law of succession which was applied from the Ayudhya period, previously called the '*Pha-eyakarn laksana morradok*'.

¹⁷¹ Fine Art Department, *Law of Three Seals, vol 1* (Fine Art Department Press 1978) 42.

¹⁷² Ibid.

¹⁷³ Ibid.

(1) Royalty portion (Paak Luang)

This portion shall be vested to the royal treasury for the sake of the state. In civil cases concerning the division of estates, the case would be furthered to officials when the court divided royalty. If the heirs divided property amongst themselves without filing the case to court, they were not subject to pay royalty. In the case of estate division according to a will, there was no royalty imposed.

(2) Parents' portion

If the testator died, but the parents were still alive, this portion of the estate would mutually belong to his or her parents. If one of the parents died, the surviving parent would receive the entire inheritance. If both parents died, this portion must be cancelled, and other portions would be divided.

(3) Wife's portion

If the testator had no formal wife and no living parents, the estate would be divided into three portions; two portions for royalty and one portion for relatives.

(4) Relative portion

The relative portion includes children, as well as sisters and brothers of half-blood and full-blood.¹⁷⁴ If there were close relatives and successors of the close relatives, the more distant relatives were disinherited.

Presumably, the imposition of the royalty portion (paak luang) marks the emergence of wealth transfer taxation in Thailand. Only noblemen's estates were subject to the royalty, which was vested to the royal treasury (or state). This rule did not apply to ordinary men or married women.

The question then arises as to when the imposition of royalty was discontinued under Thai law. The only related evidence appears in *Han v. Boonkong*.¹⁷⁵ The defendant, a nobleman, died, and his heirs had divided the estate amongst themselves. Some properties were not divided, but they still jointly possessed them more than a year later. Then, some of the joint possessors filed a case for estate division. The provincial court had divided the estate in such a way that the Supreme Court disagreed. It can be

¹⁷⁴ See CCC, s 1629.

¹⁷⁵ The Supreme Court Decision No. 269/2461 (1918) *Han v. Boonkong*.

presumed that this case was probably filed to the provincial court shortly before 1918. Until that time, there was always estate division for royalty in the provincial courts, and there was no clear evidence that the imposition of the royalty had been cancelled. However, when the regime changed from an absolute monarchy to a constitutional monarchy,¹⁷⁶ before the enactment of the EITA 1933, there was no imposition of a royalty; thus, the idea of bringing back a taxation on wealth transfer has continually developed in Thailand.

2.2.2 Constitutional Monarchy Era (1932-2015)

Later, after Thailand's regime change to constitutional monarchy in 1932,¹⁷⁷ Luang Pradit Manutham (Pridi Phanomyong) proposed the drafting of economic projects, commonly known as the 'Yellow Book.' Phanomyong's draft of economic projects presents important historic evidence relevant to Thai society. It is Thailand's first and only national economic and social development plan proposing guidelines for national socialist economics under the political framework of a democratic regime. It aimed to provide a strengthened economic foundation upon which to build tasks following the six principles of *Khana Ratsadon*. These six principles were postulated in s 11, the last section of the drafted national economic and social plan. This national economic and social plan suggested economic solutions, particularly in clause 6, which related to introducing taxes on wealth transfer.

... (3) For funds seeking to pay for labour and buy machines or materials required for running business activities that the government is unable to manage, the government should impose estate and inheritance tax, private income tax or indirect tax from people without disturbing them ...
(6) The government should make a national economic plan assigning a policy scheme concerning all inventions and circulations, including construction, to accommodate people as well as the separation of works for cooperatives, in case of revenue raising...which was essential for economic management, the government should impose taxes on wealth transfer.

¹⁷⁶ Arjun Subrahmanyam, 'Reinventing Siam: Ideas and Culture in Thailand, 1920-1944' (DPhil thesis, University of California, Berkeley 2013) 1-2.

¹⁷⁷ Somchai Preechasilpakul and David Streckfuss, 'Ramification and Re-Sacralisation of the Lese Majesty Law in Thailand' (10th International Conference on Thai Studies, Bangkok, January 2008) 4.

Clearly, the national economic and social development plan employed taxes on wealth transfer as an instrument for government fundraising. Phanomyong introduced such taxes through the Yellow Book based on the socialist principles that human beings are born to be creditors and debtors of moral debt by means of scientific method. Therefore, all human beings in society have a duty to take care of each other without discrimination based on social class, caste or financial status.

After the regime changed, there was a major economic transformation as well. Namely, the EITA 1933 was promulgated on 26 August 1934 by M.C. (the king's grandson) Naritsaranuwattiwong, who was the regent when Colonel Praya Phaholpolphayuhasena was the prime minister.¹⁷⁸ The House of Representatives approved the Act for enactment on 15 February 1933. The House of Representatives had discussed and expressed various opinions on the inheritance tax. At that time, a representative who was a proponent for the imposition of inheritance tax asserted the necessity for the EITA 1933.¹⁷⁹ He argued in favour of taxing wealth transfers because it would impose tax on the wealthy, doing no harm to their wellbeing.¹⁸⁰ After the enactment and promulgation of the Act by the House of Representatives, the law was enforced for 10 years (1933-1944). After that time, it was repealed on 18 January 1944 when Field Marshal P. Phiboolsongkram was the prime minister because Thai elites and rich sections heavily opposed the tax.¹⁸¹ Later, there were occasional efforts to reinstate the WTT.¹⁸²

No legislation on any wealth transfer taxes were enacted after the repeal of the EITA 1933. However, over the past eight decades, there have been attempts to introduce the WTT. For example, the late 1972 was a year witnessing the full growth of democracy after bloody events in October when people sought to overthrow the dictatorial military government.¹⁸³ During the period of the elected government, some sought to bring back taxes on wealth transfer. As a result, one draft of an Act for a wealth transfer tax was

¹⁷⁸ Pharkan Klinfoong, 'Estate and Inheritance Act of 1933' (1999) 11(71) *Customs Department Journal Magazine* 113, 117.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Chaisit Trachudham, 'Should We Collect the Estate and Inheritance Taxes?' (1999) *The Interest Journal* 142, 144.

¹⁸² Preecha Suwannatad, 'Inheritance Tax' (1991) 10(119) *Taxation Journal* 73, 76.

¹⁸³ Unknown author, 'The Ministry of Finance prepare for reintroducing of the new inheritance and property taxes' *Siamrath Newspaper* (Bangkok, 3 February 1974) 12.

proposed for the Parliament's consideration. However, there was a coup d'état to overthrow the democratic government, and this Act was finally rejected.¹⁸⁴

From 1997 to 2002, after the country's economic crisis, there was a decline in the tendency toward tax imposition. Onlookers anticipated that the goal as in the Yellow Book would not be achieved; thus, the government needed to increase tax revenue for state administration¹⁸⁵ by imposing direct taxes which would be the most appropriate taxes for Thailand.¹⁸⁶ For these reasons, the Cabinet had a resolution on 6 January 1998 to appoint a committee to consider legal measures to solve national economic problems. Later, the committee was ordered to appoint a subcommittee to consider the appropriateness and effects of enacting property tax and inheritance tax.¹⁸⁷ The subcommittee held a meeting and could not reach a conclusion as to whether estate tax or inheritance tax should be collected in Thailand.¹⁸⁸ However, this subcommittee was dissolved before reaching a final agreement on the imposition of inheritance tax.¹⁸⁹

Conclusion

Taxation on wealth transfers developed in western civilization, including ancient Egypt, the Roman Empire and the Middle Ages, before emerging in its current state in modern Europe. This chapter has noted that there was no wealth transfer taxation in Thailand during the absolute monarchy era, in the Sukhothai and Ayutthaya periods (1238-1767) through the Rattanakosin periods (1782-1932). However, the division of estates to royalty under the law of succession during the Ayutthaya and early Ratanakosin period, known as *paak luang*, may be regarded as an implied form of tax on transfer at death. One might assume that the concept of taxing wealth transfers in Thailand silently originated under the *sakdina* system and absolute monarchy regime. It should be noted that the royalty was progressive because only noblemen were required to pay royalty, not commoners (*phrai*) and slaves. The systematic taxation of wealth transfer never existed in Thailand until the estate and inheritance tax (EIT) was introduced in 1933. It

¹⁸⁴ Prasopsook Boondej, 'Estate Tax' *Matichon News* (Bangkok, 3 April 2000) 6.

¹⁸⁵ Khanit Chaiyanaphong, 'Thai Policy of the Estate and Inheritance Tax' (Master's thesis, Burapha University 2000) 20.

¹⁸⁶ *Ibid.*

¹⁸⁷ Polprasith Rutraksa, 'Law on the Estate and the Estate Collection' (1998) 47(1) *Revenue Journal* 23, 23.

¹⁸⁸ Polprasith Rutraksa, 'From Estate through Estate Tax' (1999) 4(3) *Government Auditing Journal* 64, 64.

¹⁸⁹ *Ibid.*

was a short-lived tax, only applicable for 10 years. Meanwhile, no serious attempts have been made to introduce the wealth transfer tax since the repeal of the EITA 1933 in 1944.

The development of the WTT in Western civilization demonstrates that it was first introduced to serve specific purposes of the state; thus the WTT tended to be a short-lived tax. For example, Rome introduced the wealth tax in order to finance a war against the assassins of Julius Caesar, while England adopted stamp duty to financially support the wars with France. The death stamp provided financial support for the US government during the Spanish-American War.

Secondly, no form of WTT was introduced between the times of ancient Egypt and early modern Europe aiming to better distribute resources and reduce the disparity between the rich and poor. This concept follows from the historical fact that the development of WTT during early modern Europe was influenced by the concept of the sovereign or state owning all property.

Finally, it can be seen that the WTT systems being used today have historical roots in continental Europe and the UK and US culture. On the one hand, the concept of the continental Europe concerning WTT would lead to the development of the recipient-based system (inheritance tax), which evolved from the *tributum* (the first ancient Roman inheritance and gift tax adopted from ancient Egypt) through the *erbkauf* in Germany. On the other hand, the concept of the UK and US concerning WTT would lead to the development of the transferor-based system (estate tax); established in the sixteenth century, the earliest form of the UK WTT was a stamp tax.

From a historical perspective, the WTT in Western civilization was used for specific purposes rather than being a basic instrument for raising revenue to finance the general expenditures of the state. In current times, the WTT is used to increase state resources for specific purposes, such as distributing of wealth and income. It does not matter if the tax must raise significant revenue to pay for the state's general public expenditures, though it does matter if the tax is able to help the state achieve specific purposes. As in Thailand, the sovereign concept significantly influenced the development of the WTT during Ayutthaya and early Rattanakosin eras. An understanding of the distinct differences between the historical roots of the European and the UK and US WTT would be helpful to further discussions regarding the analysis section in Chapter 9.

3 An Overview of the Thai Legal and Tax System

Introduction

The absence of a balanced tax system is a major problem for Thailand. The nation's tax collection relies more on the value added tax (VAT) than on the personal income tax (PIT) and corporate income tax (CIT) (Appendix III). Meanwhile, there is no current mechanism for taxation based on wealth and wealth transfer under Thailand's tax system, resulting in an even greater imbalance in the system. It can be argued that the Thai tax system needs to be balanced, and the introduction of the wealth transfer tax (WTT) would be a major component in this restructuring process.

As a foundation for the discussion on the prospects of introducing new tax legislation regarding wealth transfer into Thailand's legal and tax system, it is useful to briefly explore the fundamentals of both systems. This discussion is important because, in this thesis, there will be numerous references to Thai laws; in addition, the writer of this thesis may propose standards for WTT to lawmakers and legislators. This chapter consists of two main sections: Section A focuses on the Thai legal system, while Section B focuses on the Thai tax system. The former covers the basic structure of the Thai legal system, including relevant sources of law and organs of state under the new constitution; the latter seeks to provide an outline of the Thai tax system, focusing on classification of taxes as well as the main sources of Thai tax law and administration.

Section A

The Thai Legal System

While the legal system of the UK and US remains within the common law tradition,¹⁹⁰ the legal system of Thailand remains ambiguous. Unlike the US and UK, the Thai legal system remains within the Continental European civil law tradition; however, it cannot be regarded as a pure civil law system due to the fact that its laws differ significantly from those found in Germany, France, Italy, Spain and other countries in continental Europe¹⁹¹ in the way of using the codification alongside judge-made law. Its style and form allows Thai law to be a unique legal system that is similar to Israel¹⁹² as having a mixed legal system.¹⁹³ While it adheres strictly to civil law patterns due to the codification of effective laws, both civil law and common law have had considerable influence on the content of Thai law in terms of its detailed provisions and principles.¹⁹⁴

The democratic regime of Thailand has remained a constitutional monarchy similar to the UK even through the National Council for Peace and Order (NCPO) seized and gained control over public administration on 22 May 2014, repealing the Constitution of the Kingdom of Thailand of 2007 (CKT 2007).¹⁹⁵ Under the Interim Constitution of the Kingdom of Thailand of 2014 (CKT (Interim) 2014),¹⁹⁶ the King is regarded as the head of state and armed forces,¹⁹⁷ as well as the guardian of all religions according to the Thai charter¹⁹⁸. This change results from the provisions of Chapter 2 Monarchy of the Constitution of the Kingdom of Thailand, 2007, which remains in force by virtue of the Announcement of the NCPO No. 11/2557 dated 22 May 2014. It remains effective as part of CKT (Interim) 2014.¹⁹⁹ Thus, the King enjoys the highest privileges and status, and no person can expose him to any sort of action or allegation, per CKT 2007.²⁰⁰ The

¹⁹⁰ Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2nd edn, Routledge Cavendish Publisher 2008) 39.

¹⁹¹ John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007) 1-2.

¹⁹² Thailand and Israel have legal systems that mix civil and common law traditions. Niger is a mixture of civil and Islamic law, while Brunei is a mixture of common law and Islamic law.

¹⁹³ Sara McLaughlin Mitchell and Emilia Justyna Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge University Press 2013) 23.

¹⁹⁴ Bundit Ujjin, 'Thai Legislative Tax Jurisdiction over Physically Absent Non-Residence Sales Company' (DPhil Thesis, Brunel University 2006) 11-12.

¹⁹⁵ CKT (Interim) 2014, Preamble.

¹⁹⁶ Government Gazette: Volume 131/part 55 A/page 1/22 July 2014.

¹⁹⁷ CKT (Interim) 2014, ss 2 and 10.

¹⁹⁸ CKT 2007, s 9.

¹⁹⁹ CKT (Interim) 2014, s 2 para 2.

²⁰⁰ CKT 2007, s 8.

people of Thailand tend to regard the King as holding symbolic power, while three branches of the government exercise this power: the legislature, the executive, and the judiciary.²⁰¹

3.1 Sources of Law

The repealed CKT 2007 clearly stated that the Constitution is the supreme law of the Kingdom of Thailand,²⁰² followed by other legislation, including primary and secondary laws. Within the legislative structure, the authority of each of these levels is derived from a higher authority except for the Constitution. In the hierarchical structure, superior legislation prevails over inferior law.

3.1.1 Constitution

The highest supreme law in the country is the Constitution; as a result, primary or secondary legislation cannot run contrary to it.²⁰³ The CKT 2007 has recently been replaced by an interim constitution promulgated in 2014.²⁰⁴ This new written constitution is the 19th constitution in 82 years following the Siam revolution in 1933, which changed the regime from an absolute monarchy to a constitutional monarchy.²⁰⁵ The interim constitution is an extensive document in which the powers of the King have been explained. It not only contains duties and powers, but it also outlines the structure of the legislative, judiciary and executive bodies along with descriptions of the government and other statutory organisations.²⁰⁶ The Constitution provides the privileges, freedoms and duties of the people while protecting their rights, liberties, human dignity and equality.²⁰⁷ Unlike previous constitutions, the main purposes of the CKT (Interim) 2014 are to restore national peace and order, provide justice and public unification, solve political, social, economic and administrative problems, and to enact new, urgent legislation.²⁰⁸

²⁰¹ CKT (Interim) 2014, s 3.

²⁰² CKT 2007, s 6.

²⁰³ Ibid.

²⁰⁴ Somchai Preechasilpakul, 'Dynamics and Institutionalization of Coups in the Thai Constitution' (Institution of Developing Economies, IDE-JETRO 2013) 1

<www.ideo.go.jp/English/Publish/Download/Vrf/pdf/483pdf> accessed 24 June 2015.

²⁰⁵ Ibid.

²⁰⁶ CKT (Interim) 2014, s 3.

²⁰⁷ CKT (Interim) 2014, s 4.

²⁰⁸ CKT (Interim) 2014, Preamble.

3.1.2 Codes

Written law in Thailand can be divided into codes, Acts of Parliament and emergency decrees.²⁰⁹ A legal code in Thailand is a structure of laws that have been broadly organized and logically arranged or categorized by subject matter. Under the CKT (Interim) 2014, the National Legislative Assembly (NLA) is responsible for disseminating codes and passing Bills.²¹⁰ Currently, Thailand has four significant codes,²¹¹ often called '*Kotmai Si Mum Muang*': the Civil and Commercial Code 1925; the Civil Procedure Code 1935, as amended by the Civil Procedure Code (No. 22) 2005; the Penal Code 1956, as amended by the Penal Code (No. 17) 2003; and the Criminal Procedure Code 1934, as amended by the Criminal Procedure Code (No. 2) 2005.²¹² Codes also manage certain specific areas, including the Revenue Code (RC) and the Land Code (LC).²¹³ Generally, all codes have helped maintain stability, and a reliable legal framework has been upheld during otherwise challenging occasions.²¹⁴ This stability has reigned regardless of repeated and sometimes intense changes in Thailand's constitution and government.²¹⁵

3.1.3 Acts of Parliament

Apart from the NLA, the Council of Ministers²¹⁶ and the National Reform Council (NRC)²¹⁷ may introduce a Bill in connection with the passing of Acts. Only the Council of Ministers have the right to introduce a money Bill.²¹⁸ The CKT (Interim) 2014 does not state whether a Bill shall be presented to the NLA along with its summarized and analysed notes. It also omits whether or not people may have access to National Assembly Bills and their details.

Previously, when a Bill was considered and approved by the House of Representatives, it was submitted to the Senate.²¹⁹ Then, the Senate had the responsibility to approve the

²⁰⁹ Sirinya Dusitnanond, 'Revenue Department versus Board of Investment: The Challenges of the Tax Incentive System and FDI Promotion in Thailand' (DPhil thesis, Brunel University 2011) 29.

²¹⁰ CKT (Interim) 2014, ss 6, 14 and 15.

²¹¹ Sirinya Dusitnanond (n 209) 28.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ CKT (Interim) 2014, s 14 para 2.

²¹⁷ CKT (Interim) 2014, s 31 para 2.

²¹⁸ CKT (Interim) 2014, s 14 para 2.

²¹⁹ CKT 2007, s 146.

Bill within a period of sixty days.²²⁰ Under the CKT (Interim) 2014, however, when the NLA approves a Bill, the Prime Minister presents it to the king for approval with his signatures. The Bill comes into force as an Act after publication in the Government Gazette.²²¹ The Bill might be returned to the NLA if the king rejects it, returns it to the NLA or does not return it within ninety days. The NLA must reconsider the Bill on such an occasion. If the NLA resolves to reaffirm the Bill by ‘the votes of not less than two-thirds of the total number of existing members,’²²² then the Bill shall once again be presented to the king for signature by the Prime Minister. He arranges for the Bill to be published as an Act in the Government Gazette if the King does not sign and return the Bill within thirty days.²²³ If the King has signed it, it shall ultimately have the force of law²²⁴ and will come into effect for implementation²²⁵ because he has the power to enact an Act by consent of the NLA.²²⁶

3.1.4 Emergency and Royal Decrees

In an emergency situation, the laws disseminated by the executive branch are known as emergency decrees. In such cases of urgency, it is necessary to maintain national security, public safety, national economic security while averting public calamity; thus, the Council of Ministers is authorized to submit urgent legislation to the king who has the prerogative to issue an emergency decree with the force of an Act.²²⁷ Once the emergency decree comes into force, the Council of Ministers introduces it to the NLA without delay. If the NLA approves the emergency decree, it continues to have the force of an Act; however, the emergency decree lapses if the NLA disapproves. In this case, the lapsed emergency decree will not affect any Act occurring during the period of its enforcement. If the lapsed emergency decree has the effect of amending or repealing any provision of any Act, the provision that in force before the amendment or repeal will continue to be in force from the day the emergency decree lapsed.²²⁸

Royal decrees (*phrarachakrusadika*) represent another source of Thai law. Only the executive branch has the power to issue royal decrees. The CKT (Interim) 2014 allows

²²⁰ Ibid.

²²¹ CKT (Interim) 2014, s 15 para 1.

²²² CKT (Interim) 2014, s 15 para 2.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ CKT (Interim) 2014, s 14 para 1.

²²⁷ CKT (Interim) 2014, s 21 para 1.

²²⁸ CKT (Interim) 2014, s 21 para 2.

the issuance of a royal decree whether for the king's prerogative to grant a pardon²²⁹ or for prescribed salaries, emoluments and other benefits of the NLA president and vice-presidents, NRC chairperson and vice-chairpersons, people holding positions in the NCPO, and members of the NLA, NRC and Constitutional Drafting Committee (CDC).²³⁰

A royal decree is issued by provisions of the laws such as codes, emergency decrees or relevant Acts.²³¹ The RC is one example of a royal decree being issued to exempt certain entities from tax, including the government, state enterprises, 'Tessaban' (municipals),²³² religious bodies and other public charitable organizations.²³³ As another example, the Bank of Thailand may propose the issuance of a royal decree prescribing financial policy that affects the overall Thai economy, when there is no specific law governing such policy.²³⁴ It should be noted that royal decrees can be issued in other urgent matters so long as they do not run contrary to the law.

3.1.5 Ministerial Regulations, Department Order and Notifications

There are other sources of Thai law in secondary legislation include ministerial regulations, departmental orders and notifications. Through primary legislation, such as the constitution, codes, Acts of Parliament and emergency decrees, the executive branch is authorized to issue ministerial regulations, department orders and notifications so that the requirements of that primary legislation can be implemented and enforced. Routine conditions must be fulfilled by the administrative agencies and their officials when primary legislations specify secondary legislation.²³⁵ Firstly, the primary laws must specify the legal administrative agencies with the power to issue secondary laws.²³⁶ The primarily reason for authorizing administrative agencies to issue secondary laws²³⁷ is because they can properly utilize their experience, skills and capabilities in drafting secondary laws.²³⁸ This practice ensures optimum accomplishment of public interest as

²²⁹ CKT (Interim) 2014, s 22.

²³⁰ CKT 2007, s 128.

²³¹ Shinya Imaizumi and Kritchapol Comsatyadham, 'Legislative Process in Thailand: A Statistical Overview' in Shinya Imaizumi (ed), *Legislative Process in Thailand* (The Institute of Developing Economies, 2011) 6 <<http://www.ide.go.jp/English/Publish/Download/Jrp/157.html>> accessed 24 June 2015.

²³² The Thesaban Act of 1953, s 7.

²³³ RC, s 3 (3).

²³⁴ Financial Institution Business Act 2008, s 5.

²³⁵ Dusitnanond (n 209) 31.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

well as citizens' liberty and rights. Secondly, the primary laws must specify certain procedures for strict compliance. Finally, the Government Gazettes must contain the effective and valid date of secondary laws.

The executive branch holds the responsibility to issue emergency and royal decrees. However, the emergency decree, a primary regulation, ranks above the royal decree, a secondary legislation.²³⁹ State officials are not authorized to issue secondary legislation in scenarios where they are not granted any power by the primary legislation to be developed. On the other hand, the Legislative branch introduces primary legislation, whether the Constitution, codes or Acts of Parliament—except for the emergency decree, which falls under the prerogative of the king. Though the introduction of the prospective WTT in Thailand appears successful, it seems to be only primary legislation rather than secondary legislation.

3.2 Organs of State

In Thailand, the legislative, judicial and executive branches have seen social, budgetary, economic, political, security and legal reform. The CKT (Interim) 2014 provides for the formation of several new independent governing bodies, including the NCPO, NRC²⁴⁰ and CDC.²⁴¹ Together with these bodies, each of the three branches exercises certain powers, which is discussed in the following sections.

3.2.1 National Council for Peace and Order

The NCPO, which comprises military and police forces, seized and took control of state administration from the democratic government since the 22 of May 2014.²⁴² The NCPO exercises considerable control over the membership of constitutional bodies, such as the Council of Ministers, NLA, NRC and CDC. The king appoints the members of the NLA²⁴³ and the NRC²⁴⁴ in accordance with NCPO recommendations. The head of the NCPO countersigns royal commands appointing members of these bodies.²⁴⁵ Moreover, the NCPO exercises considerable control over the executive and legislative branches; it has the power to instruct the Council of Ministers to proceed in accordance

²³⁹ Ibid.

²⁴⁰ CKT (Interim) 2014, s 27.

²⁴¹ CKT (Interim) 2014, s 32.

²⁴² CKT (Interim) 2014, Preamble.

²⁴³ CKT (Interim) 2014, s 6.

²⁴⁴ CKT (Interim) 2014, s 28.

²⁴⁵ CKT (Interim) 2014, ss 10 para 2 and 28.

with its opinion.²⁴⁶ It is important to note that there exists non-reviewable power to make any order, or suspend or take any action that the head of the NCPO considers necessary for a very broad range of permissible reasons, including for the benefit of any aspect of the reform process.²⁴⁷

3.2.2 Council of Ministers

Under the CKT (Interim) 2014, the Council of Ministers, also known as the Cabinet, was developed by the collective involvement of the prime minister and the other ministers. The king appoints the prime minister in accordance with the resolution of the NLA and not more than thirty-five other ministers.²⁴⁸ The prime minister is the head of the executive branch.²⁴⁹ The Council of Ministers has the duty to administer state affairs, conduct reformation for all aspects and strengthen unification and harmonization of Thai people.²⁵⁰

Unfortunately, there are no provisions concerning how the Cabinet should implement its administrative goals and policies under the CKT (Interim) 2014. However, the former constitution may imply that these goals and policies are to be executed by the nominated members of the Council of Ministers. Each of the respective departments is headed by a minister. They deliver policy instruction to the permanent officials of the civil service.²⁵¹ The Council of Ministers could authorize urgent legislation to the king as one of the possible ways to pursue a proposal to introduce the WTT in Thailand. This route could be taken if such a proposal was necessary, requiring urgent and confidential deliberation. The Council of Ministers could submit such a proposal to the King as an emergency decree.²⁵² Alternatively, the Council of Ministers could also introduce such a proposal as a ‘finance Bill’ because the term ‘finance Bill’ is defined under the CKT (Interim) 2014 as ‘a Bill with provisions dealing with the imposition, repeal, reduction, alteration, modification, remission or regulation of taxes or duties.’²⁵³ If there is any doubt as to whether the Bill is a money Bill, this decision shall be made by the President of the NLA.²⁵⁴

²⁴⁶ CKT (Interim) 2014, s 42 para 3.

²⁴⁷ CKT (Interim) 2014, s 44.

²⁴⁸ CKT (Interim) 2014, s 19 para 1.

²⁴⁹ CKT 2007, s 171.

²⁵⁰ CKT (Interim) 2014, s 19 para 1.

²⁵¹ CKT 2007, s 76.

²⁵² CKT (Interim) 2014, s 21 para 1.

²⁵³ CKT (Interim) 2014, s 14 para 3.

²⁵⁴ CKT (Interim) 2014, s 14 para 4.

However, the remarkable question then becomes whether or not a WTT Bill is a finance Bill. To answer this question, it is necessary to distinguish between a ‘Bill’ and a ‘finance Bill.’ Firstly, under the CKT (Interim) 2014, although all Bills are to be approved before becoming an Act or an organic Act enacted by the NLA, they may only be introduced by three governing bodies: the NLA, the Council of Ministers and the NRC.²⁵⁵ However, before any Bill is accepted, except for a government Bill, the Council of Ministers may apply for permission to take the Bill into consideration prior to the adoption of the principle of that Bill by the NLA.²⁵⁶ Only a finance Bill may be introduced by the Council of Ministers. Nevertheless, in considering whether a Bill is a finance Bill, the name cannot be the only consideration; the context must also be analysed in accordance with s 14 para 3 of the CKT (Interim) 2014. If the context of the Act runs contrary to the provision, the Constitution deems the procedure illegal. For instance, a finance Bill must be introduced by either the NLA or NRC; otherwise, it is illegal. Therefore, the Council of Ministers is the only governing body that may introduce the WTT Bill because it is a finance Bill involving the creation of a new tax or duty.

3.2.3 National Legislative Assembly

The government is supported by another very important law-making institution with the principal responsibility of approving and disseminating new laws: the legislative branch.²⁵⁷ Previously, the National Assembly contained the House of Representatives (lower house) and the Senate (upper house).²⁵⁸ The endorsement of the Constitution came under the responsibility of the lower house. If a proposed Bill was approved by the lower house, it was forwarded to the upper house for consideration. If it was approved by the upper house and obtained approval from each house on the third reading, the prime minister received the Bill for onwards submission to the king for final approval.²⁵⁹ Under the CKT (Interim) 2014, however, the NLA acts in the place of the both house of the National Assembly.²⁶⁰

²⁵⁵ CKT (Interim) 2014, ss 14 para 2 and 15.

²⁵⁶ CKT (Interim) 2014, s 14 para 5.

²⁵⁷ CKT (Interim) 2014, s 15.

²⁵⁸ CKT 2007, s 88.

²⁵⁹ CKT 2007, s 90.

²⁶⁰ CKT (Interim) 2014, s 6 para 2.

There are 220 members in the NLA who are appointed by the king in accordance with NCPO recommendations²⁶¹ and the royal command; member appointment is countersigned by the head of the NCPO.²⁶² In order to benefit the NLA, members are appointed based on their knowledge and varied experiences in the public sector, private sector, social sector, academic sector, professional sector and other sectors.²⁶³ Although the CKT (Interim) 2014 states that its members shall be representatives of the Thai people,²⁶⁴ no effort has been made to make the NLA appear democratic and representative because NLA members are not selected through popular processes.²⁶⁵

3.2.4 National Reform Council

The NRC was established for the purpose of studying and providing recommendations for reform in politics, administration of state affairs, laws and judicial procedure, local administration, education, economics, energy, public health and environment, mass communication, and so on.²⁶⁶ Members of the NRC are appointed by the NCPO in accordance with specific rules.²⁶⁷ The NRC has the power and duty to study, analyse and propose guidelines and proposals for the reform of any field under s 27 to the NLA, the Council of Ministers, the NCPO and other related agencies. It also has the power to give advice or recommendations to the CDC for the purpose of constitution drafting as well as to deliberate and approve the draft constitution proposed by the CDC.²⁶⁸ Significantly, the NRC will approve or reject the draft of the constitution introduced by the CDC.²⁶⁹

It is crucial to note that the NRC will study and provide recommendations for reform in the country's economics with a view towards eliminating economic and social inequality for sustainable development while strengthening law enforcement.²⁷⁰ For the purpose of such reforms, the NRC holds the power to prepare and introduce a money

²⁶¹ CKT (Interim) 2014, s 6 para 1.

²⁶² CKT (Interim) 2014, s 10.

²⁶³ CKT (Interim) 2014, s 7.

²⁶⁴ CKT (Interim) 2014, s 11.

²⁶⁵ Sarah Bishop, 'Thailand's Interim Constitution: Paving the Way for a Return to Authoritarianism?' East Asia Forum: Economics, Politics and Public Policy in East Asia and the Pacific (20 August 2014) <<http://www.eastasiaforum.org/2014/08/20/thailands-interim-constitution-paving-the-way-f-or-a-return-to-authoritarianism/>> accessed 24 June 2015.

²⁶⁶ CKT (Interim) 2014, s 27.

²⁶⁷ CKT (Interim) 2014, s 30.

²⁶⁸ CKT (Interim) 2014, s 27.

²⁶⁹ CKT (Interim) 2014, s 37 para 3.

²⁷⁰ CKT (Interim) 2014, s 27 para 2.

Bill to the Council of Ministers for deliberation.²⁷¹ Thus, the NRC can start any new tax law proposal, an opportunity to propose the introduction of the WTT in Thailand.

3.2.5 Constitutional Drafting Committee

The CDC was established to prepare the draft constitution.²⁷² As such, the CDC has the duty of proposing a draft constitution to the NRC for deliberation. In preparing this draft, the CDC will consider advice and recommendations from the NLA, the Council of Ministers, the NCPO, related agencies and the public.²⁷³ Although s 35(7) does not exactly specify as to whether the CDC should focus on a proposal for introducing the WTT, this tax can be an efficient mechanism for restructuring and driving the economic and social systems for inclusive and sustainable growth while preventing populist administration that may damage the national economic system and the public in the long run.²⁷⁴

3.2.6 Judiciary

The structure of state organs has changed, and the NCPO retains significant power over such organs under the CKT (Interim) 2014; however, the composition of the judiciary remains untouched. A sole provision concerning the judiciary states that ‘judges are independent in the trial and adjudication of cases in the name of the king in accordance with the Constitution and laws.’²⁷⁵ There are only four provisions concerning the judiciary under the CKT (Interim) 2014.²⁷⁶ Therefore, it is necessary to focus mostly on other legislation concerning the establishment of and procedures for the courts recognised by the Constitution.²⁷⁷ There are four major categories of courts according to the CKT (Interim) 2014: the Constitutional Court, the Courts of Justice, the Military Court and the Administrative Court. These courts will be described in more detail in the following sections.

²⁷¹ CKT (Interim) 2014, s 14 para 2.

²⁷² CKT (Interim) 2014, s 32.

²⁷³ CKT (Interim) 2014, s 34.

²⁷⁴ CKT (Interim) 2014, s 35(7).

²⁷⁵ CKT (Interim) 2014, s 26.

²⁷⁶ CKT (Interim) 2014, ss 5, 23, 26, 45.

²⁷⁷ Statute of the Court of Justice, 2000 (SCJ 2000), Act on the Establishment of and Procedure for Tax Court of 1985 (AEPTC 1985), Act on the Establishment of and Procedure for Administrative Court 1999 (AEPAC 1999), Statute of the Military Court 1955 (SMC 1955), Act on the Establishment of and Procedure for Labour Court 1979, Act on the Establishment of the Intellectual Property and International Trade Court 1996, Act Establishing the Bankruptcy Court and Bankruptcy Procedure 1999, Civil Procedure Code 1934, and so on.

3.2.6.1 Courts of Justice

Along with cases falling outside the jurisdiction of other courts, the Courts of Justice settle cases concerning not only ordinary civil and criminal matters, but specific matters, such as labour, tax, bankruptcy, international trade and intellectual property disputes. Meanwhile, the Constitutional Court, the Administrative Court and the Military Court deal with military criminal cases, administrative cases and unconstitutional matters, respectively. There are three levels in the Courts of Justice.²⁷⁸ First is the Courts of First Instance, which includes four types of specialised courts: bankruptcy court, intellectual property and international trade court, tax court and labour court. Following the Courts of First Instance come the Courts of Appeal and the Supreme Court (*'Sarn Dika'*).

3.2.6.1.1 Courts of First Instance

The Courts of First Instance encompass juvenile and family courts, specialised courts (e.g., the Central Tax Court) and general courts. The jurisdiction of each court extends throughout the Kingdom of Thailand. The Courts consist of the general courts, the Child and Juvenile Court and the other specialised courts.

General courts are regarded as ordinary courts dealing with both criminal and civil cases, such as criminal courts, civil courts, provincial courts and *kwaeng* courts.²⁷⁹ Judgments may be petitioned to the Court of Appeal²⁸⁰ and finally to the Supreme Court.²⁸¹ On the one hand, the General Court of First Instance in Bangkok, the Bangkok South Civil Court, the Thon Buri Civil Court and the Civil Court are merely courts dealing with the civil cases in Bangkok Metropolis.²⁸² Courts dealing only with criminal cases in Bangkok Metropolis consist of the Bangkok South Criminal Court and the Thon Buri Criminal Court.²⁸³ Although the Min Buri Provincial Court and *kwaeng* courts are similar in their power to deal with both criminal and civil cases,²⁸⁴ the former has jurisdiction throughout the northern part of Bangkok.²⁸⁵ The latter deals with small matters, such as petty cases, and there is a single judge who has limited power for trial and adjudication²⁸⁶ following their own specific procedures.²⁸⁷ Unlike *kwaeng* courts

²⁷⁸ SCJ 2000, s 1.

²⁷⁹ SCJ 2000, s 2.

²⁸⁰ Civil Procedure Code of 1934, s 223.

²⁸¹ Ibid, s 247.

²⁸² SCJ 2000, s 19 para 1.

²⁸³ SCJ 2000, s 19 para 2.

²⁸⁴ SCJ 2000, s 16 para 2, 17, 24 and 25.

²⁸⁵ SCJ 2000, s 18 and 20.

²⁸⁶ SCJ 2000, s 9.

and ‘other courts of justice provided otherwise by the Act for the establishment of the courts,’²⁸⁸ there must be at least two judges forming a quorum for trial and adjudication of all civil or criminal cases brought before the General Courts of First Instance in Bangkok.²⁸⁹

Other provinces consists have expanded provincial courts and *kwaeng* courts in order to reach distant regions. Their jurisdictions cover both civil and criminal cases arising in other provinces and are not subject to the jurisdiction of other general courts.²⁹⁰ The character of the provincial courts is the same as the General Court of First Instance in Bangkok, except provincial *kwaeng* courts mirror those in Bangkok, as described above. The provincial courts have the power to transfer cases to the *kwaeng* courts, if a case falls under their territorial jurisdiction.²⁹¹

Four courts are dedicated to very specific functions: the labour court, the intellectual property and international trade court, the bankruptcy court, and tax court.²⁹² Each of these courts is headed by a judge with field-specific proficiency in order to ensure appropriate resolution of cases.²⁹³ These specialised courts have jurisdiction throughout the country, but are mainly located in Bangkok; there is only a central court in Bangkok, owned by each of the specialized courts. The labour court is the only exception with branches now located in other areas.²⁹⁴ As for the specialised courts, the Supreme Court can be directly appealed by the parties. Except in the labour court,²⁹⁵ both issues of law and issues of fact can be appealed.²⁹⁶

The Act on the Establishment of and Procedure for Tax Court of 1985 (AEPTC 1985) established the Central Tax Court presided over by the Chief Justice and Deputy Chief Justice.²⁹⁷ The law declares that the Minister of Justice is responsible for allocating the Deputy Chief Justices and a Chief Justice.²⁹⁸ The territorial jurisdiction of the Central

²⁸⁷ Criminal Procedure Code of 1934, ss 189-196.

²⁸⁸ SCJ 2000, s 26.

²⁸⁹ SCJ 2000, s 26.

²⁹⁰ SCJ 2000, s 18.

²⁹¹ SCJ 2000, s 16 para 4.

²⁹² Supreme Court, ‘The Supreme Court of Thailand’ <http://www.supremecourt.or.th/file/dika_eng.pdf> accessed 24 June 2014.

²⁹³ Ibid

²⁹⁴ Act on the Establishment of and Procedure for Labour Court 1979, ss 5 and 7.

²⁹⁵ Ibid, s 54.

²⁹⁶ AEPTC 1985, s 24, Act on the Establishment of the Intellectual Property and International Trade Court 1996, s 38, Act Establishing the Bankruptcy Court and Bankruptcy Procedure 1999, s. 24.

²⁹⁷ AEPTC 1985, s 13.

²⁹⁸ Ibid.

Tax Court extends throughout Thailand.²⁹⁹ Bangkok, Samut Sakhon, Samut Prakan, Pathumthani, Nonthaburi and Nakhon Prathom—are included in the state authority of the Central Tax Court.³⁰⁰ Currently, the Central Tax Court in Bangkok³⁰¹ holds control over all of the territory.³⁰² The Supreme Court President has the power to decide on ambiguous cases and to offer clarification, assigning cases to the appropriate court, whether tax court or another court.³⁰³ The court has the jurisdiction to try all civil cases regarding tax disputes:³⁰⁴ ‘an appeal made against a decision of an official or a committee prescribed by tax laws; a dispute involving a claim of the state on a tax debt; a dispute involving a tax refund; a dispute involving rights and duties under an obligation provided for the benefit of tax collection; a dispute concerning the matters prescribed by the law to be under the jurisdiction of the tax court’.³⁰⁵ Quorum for trial and adjudication consists of at least two judges,³⁰⁶ and such judges must be experts in tax law or have competence and knowledge regarding tax matters.³⁰⁷ An appeal against the decision or judgement of the Central Tax Court is directly submitted to the Supreme Court.³⁰⁸

3.2.6.1.2 Courts of Appeal

Courts of appeal include the Central Court of Appeal and nine regional courts.³⁰⁹ The President of the Court is the head of each Court of Appeal, assisted by vice presidents.³¹⁰ The Central Court of Appeal hears petitions against the judgments of civil and criminal courts whereas petitions against the orders or judgments of the other Courts of First Instance are heard by the nine regional courts.³¹¹ These courts also have power ‘to render judgments affirming, amending, reversing or dismissing judgments of Courts of First Instance imposing death penalty or life imprisonment if the cases are referred to the Court of Appeal and regional courts of appeal as prescribed by the law on criminal procedure; to render decisions on requests or motions submitted to the Court of

²⁹⁹ AEPTC 1985, ss 5 and 6.

³⁰⁰ AEPTC 1985, s 5.

³⁰¹ Ibid.

³⁰² Institution of Developing Economies (IDE-JETRO) ‘The Juridical System in Thailand: An Outlook for New Century, in Juridical System and Reforms in Asian Countries (Thailand)’ IDE Asian Law Series No 6 (March 2001) 35 <<http://www.widego.jp/English/Publish/Download/Als/06.html>> accessed 24 June 2015.

³⁰³ AEPTC 1985, s 10.

³⁰⁴ AEPTC 1985, s 7.

³⁰⁵ Ibid.

³⁰⁶ AEPTC 1985, s 15.

³⁰⁷ AEPTC 1985, s 14.

³⁰⁸ AEPTC 1985, s 24.

³⁰⁹ SCJ 2000, s 3.

³¹⁰ SCJ 2000, s 11.

³¹¹ SCJ 2000, s 22 para 1.

Appeal and regional courts of appeal according to the law;³¹² to render judgments to cases which the Court of Appeal and regional courts of appeal are competent to adjudicate by virtue of other laws.³¹³ There are at least three judges on the Courts of Appeal, forming a quorum for trial and adjudication.³¹⁴ Such judges are selected on the basis their experience, extensive knowledge and seniority.³¹⁵

3.2.6.1.3 Supreme Court

The Supreme Court (*Sarn Dika*) is the final court of appeal because the entire Kingdom falls under its jurisdiction; its orders and decisions are final.³¹⁶ The Supreme Court can hear petitions against orders or judgments of the Courts of First Instance, along with appeal cases from the Courts of Appeal; it may deny cases where the facts are insufficient for consideration.³¹⁷ At least three justices of the Supreme Court are required to form a quorum for trial and adjudication.³¹⁸ However, for the full court, the quorum must not be less than half of the total number of justices in the Supreme Court.³¹⁹ There are nine full justices of the Supreme Court, and they are designated on a case-by-case basis. The court reaches a verdict based on majority vote, so long as Supreme Court justices make oral statements and prepare a written opinion prior to making a decision in order to set up a quorum.³²⁰

3.2.6.2 Administrative Court

The Administrative Court was established for the first time when the 1997 constitution came into force. It has exclusive jurisdiction over administrative disputes, per the Act on the Establishment of and Procedure for Administrative Court, 1999 (AEPAC 1999). Such disputes include the following:³²¹ (1) cases of dispute between an individual or private sector organization and a state enterprise, state agency, state official, or local government organization under the supervision of the government and (2) cases of dispute among a state enterprise, state agency, state official or a local government organization under the supervision or superintendence of the authority. The CKT 2007

³¹² SCJ 2000, s 3.

³¹³ SCJ 2000, s 22 para 2.

³¹⁴ SCJ 2000, s 27.

³¹⁵ Supreme Court (n 292) 8.

³¹⁶ SCJ 2000, s 23.

³¹⁷ Civil Procedure Code of 1934, s 248.

³¹⁸ SCJ 2000, s 27.

³¹⁹ Supreme Court (n 292) 9.

³²⁰ Ibid.

³²¹ AEPAC 1999, ss 9-11.

obviously states that ‘there may also be an appellate administrative court.’³²² In fact, a two-tier system has been adopted into the administrative court system: the Courts of First Instance and the Supreme Court.³²³ It should be noted that little mention is made of the Supreme Administrative Court in the CKT (Interim) 2014. It is only mentioned that the Supreme Administrative Court can request a decision from the Constitutional Court when no constitutional provision applies to a case.³²⁴

3.2.6.3 Military Courts

Although the Military Court was not mentioned in the CKT (Interim) 2014, it has been established as an institution under the Ministry of Defence according to the Statute of the Military Court of 1955 (SMC 1955).³²⁵ Under the CKT 2007, however, there is a sole provision stating that criminal trials are to be conducted by military courts; sometimes, other cases involving military officials are also heard.³²⁶ More specifically, the following cases fall within the jurisdiction of the military court under SMC 1955: (1) ‘cases in which a person under the jurisdiction of the Military Court i.e. the military officer, has committed a crime against military law or other criminal laws; and (2) cases in which a person has committed contempt of court as defined by the civil procedure code.’³²⁷ Civilian courts have the power to try and adjudicate other cases that are not within the jurisdiction of the Military Court.³²⁸ Because they are autonomous bodies, other courts have no right to interfere with the procedures of military courts.³²⁹ Similar to the judicial system, the Military Court has three levels: the Military Court of First Instance, the Central Military Court and the Supreme Court, which is the highest court in the system.³³⁰

3.2.6.4 Constitutional Court

Unlike the CKT 2007, which provides detailed provisions concerning the Constitution Court, the court has been mentioned only in ss 5, 20, 23 and 45. These provisions focus mostly on the jurisdiction of the court and the prohibition of the Prime Minister who

³²² CKT 2007, s 223 para 3.

³²³ AEPAC 1999, s 7.

³²⁴ CKT (Interim) 2014, s 5 para 2.

³²⁵ SMC 1955, s 5.

³²⁶ CKT 2007, s 223.

³²⁷ SMC 1955, s 13.

³²⁸ SMC 1955, s 15.

³²⁹ SMC 1955, s 45.

³³⁰ SMC 1955, s 6.

must not be a judge in the Constitutional Court.³³¹ In terms of the court's the jurisdiction, it can decide whether any rule, law or regulation is unconstitutional.³³² In addition, the Constitutional Court decides when no provision under the CKT (Interim) 2014 applies to a case that does not arise in the matters of the Council of Ministers, the NLA, the NCPO, the Supreme Administrative Court and the Supreme Court.³³³ The court also has the jurisdiction to decide on 'a treaty with respect to a change of the territories of Thailand or the external territories' and on 'a treaty with wide-scale effects on the economic or social security of the country'.³³⁴ It is significant to note that the CKT (Interim) 2014 makes no provision for the formation and composition of the Constitutional Court or appointment of judges.³³⁵ Moreover, the previous constitutions gave broader jurisdiction to the Constitutional Court than its counterpart in the new constitution.

Conclusion

This discussion on the Thai legal system provides a background to some issues that will be considered further in other chapters of this thesis. It has outlined the different types and levels of Thai legislation as well as the new bodies within the constitutional structure under the CKT (Interim) 2014. This chapter has also demonstrated that efforts can be made to pursue a proposal introducing the WTT in Thailand; options seem to be limited to primary legislation, whether an Act of Parliament or emergency decree, rather than secondary legislation.

Since the NCPO seized and took control of the state's administration, it has made many changes to governing bodies functions and powers (save for the judiciary) under the CKT (Interim) 2014. The NCPO still retains significant power over such bodies. Any proposal for a new law, particularly on WTT, can be prepared and introduced to appropriate bodies for deliberation. On the positive side, apart from the Council of Ministers and NLA, there were two new governing bodies created under the CKT (Interim) 2014, including the NRC and CDC. Although a WTT Bill, being a financial Bill, may only be introduced by the Council of Ministers, both the NRC and CDC may

³³¹ CKT (Interim) 2014, s 20.

³³² CKT (Interim) 2014, s 45.

³³³ CKT (Interim) 2014, s 5.

³³⁴ CKT (Interim) 2014, s 23.

³³⁵ CKT 2007, s 204.

contribute other opportunities in pursuing the WTT proposal: the CKT (Interim) 2014 empowers the NRC to prepare and introduce a finance Bill to the Council of Minister for deliberation. Otherwise, they also have duties to study and provide recommendations for reform in Thailand's economy with a view towards eliminating economic and social inequality. The CDC, which holds duties in preparing the draft constitution, may regard the WTT as 'an effective mechanism for modifying the structures and progressing the systems of economy and society for the sake of persistent justice' under the s 35(7) of the CKT (Interim) 2014. This draft can be specifically provided in the prospective provision within the draft of the new constitution. The Thai Revenue System is outlined in the next section.

Section B

The Thai Tax System

This section explores and discusses the structure of the Thai tax system, focusing on the principal taxes and laws governing such taxes. The discussion will cover three major areas of law implemented in the tax system of Thailand: customs, revenue and excise law. It will also consider particular enforcement laws, such as the Customs Act of 1926, the RC and excise laws.

3.3 Source of Tax Law

The fundamental rules of the Thai tax system are outlined in codes or Acts of Parliament. The codes and Acts of Parliament contain all the fundamental rules, but the courts have the responsibility of interpreting these rules along with provision details for tax setup. Such codes and Acts often provide for the making of detailed regulations. The RC is the main tax law currently in force in Thailand, governing the PIT,³³⁶ CIT,³³⁷ VAT,³³⁸ specific business tax (SBT),³³⁹ and stamp duties (SD)³⁴⁰ The petroleum income tax is regulated by the Petroleum Income Tax Act of 1971, and the excise tax is governed by the Excise Act of 1984. Customs Act of 1926 regulates custom duties. Other tax laws consist of the Signboard Tax Act of 1967³⁴¹ and the Municipal Tax Act of 1965.

3.4 Types of Tax

There are many different types of taxes under the structure of the Thai tax system, most of which fall into two basic categories. Some categories depend on whether the burden falls straight away on the taxpayers or whether it is passed on to a third party on behalf of the taxpayer.³⁴² This approach divides taxes into two main types: direct tax and indirect tax. Some categories depend on the bases upon which taxes are levied, known as 'tax bases'. There are three types of tax bases that can be based on the following characteristics: the use of the base (e.g., consumption), the source of the base (e.g.,

³³⁶ RC, ss 30-64.

³³⁷ RC, ss 65-76*Ter*.

³³⁸ RC, ss 77-90/5.

³³⁹ RC, ss 91-91/21.

³⁴⁰ RC, ss 103-129.

³⁴¹ This tax was repealed from the RC (ss 94 through 102) by the Signboard Tax Act, B.E. 2510, s 3.

³⁴² Kath Nightingale, *Taxation: Theory and Practice* (4th edn, FT Prentice Hall Financial Time 2001) 5.

income) or various other characteristics (e.g., wealth and wealth transfer).³⁴³ Accordingly, these revenue bases consist of taxes on income, on consumption and expenditures, and on wealth and wealth transfer under the Thai tax system.³⁴⁴ This study considers only the way in which taxes are categorized by tax bases.

3.4.1 Taxes on Income

The PIT, CIT and petroleum income tax are the primary taxes on income paid by individuals or firms in the Thai system. These taxes are detailed below.

3.4.1.1 Personal Income Tax

The PIT in Thailand is basically a tax on a person's income.³⁴⁵ PIT is collected on revenue extracted from both outside and inside the country.³⁴⁶ Under the code, there are eight classifications of assessable income³⁴⁷ and five categories of individual taxpayers, including natural persons, deceased, undistributed estate of deceased, non-juristic body of persons and unregistered general partnership.³⁴⁸ There are certain sorts of income that are not subject to PIT.³⁴⁹ Exempt from the PIT are twenty-two categories of incomes prescribed in the code³⁵⁰ and eighty-three categories of income prescribed by ministerial regulation.³⁵¹ Personal expenses may be considered in such accountable incomes, as specified in the code³⁵² or in accordance with royal decree.³⁵³ In order to relieve the tax burden, there are two categories of allowances: personal and specific.³⁵⁴ Some types of allowance may be deducted up to a maximum of 50 000 GBP or more. When all allowances³⁵⁵ and deductions are subtracted from assessable income, an individual's

³⁴³ Herbert J Kiesling, *Taxation and Public Goods: A Welfare-economic Critique of Tax Policy Analysis* (University of Michigan Press 1992) 91.

³⁴⁴ Dhammano, (n 118) 81.

³⁴⁵ RC, s 39.

³⁴⁶ RC, s 41.

³⁴⁷ RC, s 40 provides that 'assessable income is classified into eight categories: (1) salaries and wages; (2) hire of work, office of employment or services rendered; (3) goodwill, copyright, franchise, patent, other rights, annuity, etc.; (4) interest, dividend, bonuses of investors, gain on amalgamation, acquisition or dissolution of company or partnerships, gain on transfer of shares, etc.; (5) lease of property, breach of hire-purchase contract and instalment sales contracts; (6) income from liberal professions, such as law, medicine, engineering, architecture, accountancy, and fine arts; (7) income from a contract of work whereby the contractor provides essential materials other than tools; and income from business, commerce, industry and income other than specified in (1)-(7).'

³⁴⁸ RC, ss 56 and 57*Bis*.

³⁴⁹ RC, s 42(1)-(25).

³⁵⁰ *Ibid*.

³⁵¹ Ministerial Regulation No. 126 (B.C. 2509).

³⁵² RC, ss 42*Bis*, 42*Ter*, 43, 44, 45 and 46.

³⁵³ Royal Decree No. 11 (B.C. 2502).

³⁵⁴ RC, s 47.

³⁵⁵ RC, s 47.

taxable income is then calculated.³⁵⁶ 5 to 37 percent is the ratio of tax that is charged on taxable income.³⁵⁷

Over the past two decades, tax rates have been reduced significantly, and new tax allowances and exemptions have been introduced to reduce the tax burden.³⁵⁸ There are 108 types of income exempt from the PIT, which is a high number compared to other applicable taxes.³⁵⁹ As a result, the income subject to the PIT will be narrowed, possibly contributing to a greater fall-off in tax collection; at that time, the Thai government may face a shortfall in government revenue.³⁶⁰ The PIT collected by the Revenue Department (RD) from 2012-13 accounted for 11.6 percent of government taxation revenue or 16.9 percent of the total revenue collected by the RD.³⁶¹

3.4.1.2 Corporate Income Tax

The CIT is applied to all foreign or Thai-based legal firms and corporations operating in Thailand. More precisely, the CIT is a direct tax³⁶² imposed on a legal enterprise or company involved in any kind of certified business, or on firms that do not perform any commercial operations in Thailand but generate certain kinds of revenue.³⁶³ A legal corporation or company contains a foundation or an association, a private and public company or a registered or a controlled enterprise incorporated under Thai or foreign law.³⁶⁴ The income generated by registered firms of Thailand within and outside the country is subject to the tax.³⁶⁵ Normally, tax is charged at a rate of 30 percent of net profits.³⁶⁶ Although CIT has been an important tax income source for the government, there remains a central problem for Thailand: the absence of an effective income tax system, which leads to a particular problem of CIT avoidance.³⁶⁷

³⁵⁶ RC, s 48.

³⁵⁷ RC, Tax Rates Schedule of Chapter III.

³⁵⁸ Pan Ananapibudha, 'The Tax System Reform for Social Equality in Thailand' (2012) Fiscal Policy Office Research Paper (Ministry of Finance of Thailand) 13.

³⁵⁹ Chaisit Trachudham, *A Guide to Tax Law* (10th edn, The Thai Bar 2014) 44.

³⁶⁰ Ibid.

³⁶¹ Wuttipong Jittungsakul, 'Fiscal Policy Management in Thailand: Fiscal Analysis and Forecasting Workshop' 16 – 27 June 2014, 6 <<http://www.wimf.org/external/region/tlm/rr/pdf/aug10pdf>> accessed 24 June 2015.

³⁶² Jane Frecknall-Hughes, *The Theory, Principles and Management of Taxation: An Introduction* (Routledge 2015) 74.

³⁶³ RC, s 66.

³⁶⁴ Ibid.

³⁶⁵ RC, s 66 (1).

³⁶⁶ RC, s 67 and Income Tax Schedule.

³⁶⁷ Peter Warr, 'The Changing Face of Thai Populism' (East Asia Forum, 12 June 2013) <<http://www.eastasiaforum.org/2013/06/12/the-changing-face-of-thai-populism/>> accessed 24 June 2014.

3.4.1.3 Petroleum Income Tax

Although the RC imposes taxes on corporate income, certain income relevant to petroleum businesses and manufacturers is also subject to the petroleum income tax.³⁶⁸ Under the Petroleum Income Tax Act of 1971, companies grant licenses to discover, produce, and export oil (natural gas, crude oil, etc.)³⁶⁹ Instead of the CIT, this tax is applied to companies purchasing oil for export purposes from the licensed holder organizations under the Petroleum Income Tax Act.³⁷⁰ The tax is chargeable on net profit, which is calculated in the same manner as for CIT, at a rate of 50 to 60 percent.³⁷¹

3.4.2 Taxes on Consumption

Apart from the income tax above, there are other main taxes and duties that depend on the consumption tax base under the structure of Thailand's tax system: VAT, SBT, SD, customs duties, excise tax and signboard tax. The tax base for these taxes is personal consumption and expenditures;³⁷² thus, these taxes are indirect.³⁷³ SD, SBT, VAT, signboard tax, excise and customs duties are forms of consumption tax.³⁷⁴ These taxes will be discussed in more depth in the following sections.

3.4.2.1 Value-Added Tax

On January 1, 1992, to replace the former business tax,³⁷⁵ the VAT was implemented as a kind of 'consumption tax.'³⁷⁶ VAT is regarded as an indirect tax acquired on expenditures (at each level of manufacturing), provision of services or distribution of goods.³⁷⁷ Under the RC, the 'operators' (and their representatives), whether

³⁶⁸ Petroleum Income Tax Act of 1971, s 4.

³⁶⁹ Ibid.

³⁷⁰ Petroleum Income Tax Act of 1971, ss 12 and 13.

³⁷¹ Petroleum Income Tax Act of 1971, ss 20, 21 and 22.

³⁷² Advisory Commission on the Intergovernmental Regulations, 'The Expenditure Tax: Concept, Administration and Possible Application, advisory Commission on Intergovernmental Relations' (1974) Information Report M-84, 19 <<http://www.library.unt.edu/gpo/acir/Reports/information/M-84.pdf>> accessed 24 June 2015.

³⁷³ HM Revenue and Customs, 'Indirect Taxes including VAT' <<http://www.hmrc.gov.uk/budget2012/indirect-tax.htm>> accessed 24 June 2015.

³⁷⁴ Alan Melville, *Taxation Finance Act 2008* (14th edn, Finance Times/Prentice Hall 2008) 3.

³⁷⁵ Somchai Sujjapongse, 'Tax policy and reform in Asian countries: Thailand's perspective' (2005) 16 *Journal of Asian Economics* 1012, 1015.

³⁷⁶ Ruangmalai Rattanawadee 'Value Added Tax in Thailand' (1993) 3(2) art 5 *Revenue Law Journal* 135 <<http://epublicationsbondeduaui.rlj/vol3/iss2/5>> accessed 24 June 2015.

³⁷⁷ The Revenue Department, 'VAT&SBT: Value Added Tax' <<http://www.rd.go.th/publish/6043.0.html>> accessed 24 June 2015.

manufacturers, importers, exporters, or wholesalers, may be required to register their businesses for VAT purposes.³⁷⁸

Normally, the VAT (Output Tax)³⁷⁹ is charged based on sales of goods and services or importation and exportation related to businesses and professions.³⁸⁰ For the purchase of services or goods, the VAT (Input Tax)³⁸¹ paid to other operators by the operator is then subtracted, and the RD receives the balance.³⁸² Hence, at each stage, tax accumulates only on the ‘value added’ to the services or goods³⁸³ at that particular stage.³⁸⁴ Finally, the consumer pays the tax under the VAT system. Thus, the operator is considered a tax collector for the RD.³⁸⁵ The VAT rate for most kinds of goods and services and importation of goods is set at 10 percent.³⁸⁶ However, the sale of goods or services to the government, services used by overseas parties and export sales are not subject to taxes.³⁸⁷

It is crucial to note that the VAT continually contributes the largest portion of total revenue collected, followed by income taxes. VAT tends to have a slight increase in the amount collected each year.³⁸⁸ During tax collection in fiscal year 2012-13, out of the other indirect taxes, VAT accounted for 27.2 percent of the government’s general revenue. Meanwhile, together, the PIT and CIT made up 34.6 percent.³⁸⁹ These numbers illustrate that the Thai tax system is dominated by indirect taxes, especially VAT, economically known as a regressive tax system.³⁹⁰ The poorer consumers tend to purchase services and goods more than the richer consumers, and VAT does not discriminate among consumers as obviously as do income taxes.³⁹¹ Consequently, the poorer consumers pay a higher proportion of their incomes³⁹² in indirect tax than the

³⁷⁸ RC, ss 77/1(6) and 82.

³⁷⁹ RC, s 77/1(17).

³⁸⁰ RC, ss 77/1(8)(d)(e)(f)(g), 77/1(10), 82/4 para 1 and 82/16.

³⁸¹ RC, s 77/1(18).

³⁸² RC, ss 82/4 para 4, 82/15, 83/5, 83/6, and 83/7.

³⁸³ Sriwan Puapondh and others, ‘A Summary of Thailand’s Tax Law’ (2009) Tilleke & Gibbins International Ltd., Working Paper, 17<<http://www.tilleke.com/resources/summary-thailand%E2%80%99s-tax-laws>> accessed 24 June 2015.

³⁸⁴ RC, s 82/3.

³⁸⁵ RC, ss 83 and 83/2.

³⁸⁶ RC, s 80.

³⁸⁷ RC, s 80/1.

³⁸⁸ Jittungsakul (n 361) 6-7.

³⁸⁹ Ibid.

³⁹⁰ Peter Warr, ‘Fiscal Policies and Poverty Incidence: The Case of Thailand’ (2003) 17(1) *Asian Economic Journal* 27, 29-30.

³⁹¹ Ibid.

³⁹² Ian W H Parry and Felicia Day (ed), *Issues of the Day: 100 Commentaries on Climate, Energy, the Environment, Transportation, and Public Health Policy* (Routledge 2010) 144.

richer consumers.³⁹³ In other words, such a tax system does not benefit the poor, instead increasing inequality and poverty by increasing the tax burden of the majority poor rather than the minority rich.

3.4.2.2 Specific Business Tax

SBT applies to certain business transactions, including banking businesses or similar transactions, finance, security and credit, sales of immovable properties in a commercial or profitable manner, life insurance, pawnshop brokerage, sale of securities in a securities market and any other business, as prescribed by law.³⁹⁴ There is an available exemption from the SBT, which is subject to VAT in certain cases directly related to specific business transactions.³⁹⁵ Businesses excluded from the scope of the VAT system are instead subjected to SBT. SBT is calculated at rates specified by the law and applies to the gross receipts received or receivable from operating these businesses.³⁹⁶ The rate varies between 0.1 percent and 3.0 percent.³⁹⁷ It should be noted that the SBT is considered an indirect tax similar to VAT, and its tax base is composed of gross receipts from businesses based on consumption and expenditures. However, SBT has never been an important revenue source for the Thai government. During fiscal year 2013-14, SBT only accounted for 3.07 percent of the total revenue collected by the RD.³⁹⁸

3.4.2.3 Stamp Duties

The RD imposes a SD on the execution of 28 categories of documents and instruments (contracts, insurance policies, authorisation letters, proxy letters, etc.) as set out in the SD Schedule of the RC.³⁹⁹ The categories of documents and instruments differ in the tax rates observed according to the content or nature of the instrument,⁴⁰⁰ between approximately 0.1 and 1 percent.⁴⁰¹ A person liable for SD must pay the rate specified in the schedule. If the instrument is not duty stamped,⁴⁰² whether there is no stamp

³⁹³ Economic Research and Training Centre, 'The Economic Policy and Standard for the Equality of Income Distribution' (2006) Thammasat University Economic Research Paper, 134.

³⁹⁴ RC, s 91/2.

³⁹⁵ RC, s 91/4.

³⁹⁶ RC, s 91/5.

³⁹⁷ RC, s 91/6.

³⁹⁸ The Revenue Department, 'Annual Report 2014' 94 <<http://www.rd.go.th/publish/24602.0.html>> accessed 24 June 2015.

³⁹⁹ RC, Stamp Duty Schedule.

⁴⁰⁰ RC, s 104.

⁴⁰¹ RC, Stamp Duty Schedule.

⁴⁰² RC, s 114.

affixed or the amount affixed is less than the amount of duty payable,⁴⁰³ it is not admissible by the court and other officials. Similar to the SBT, SD has never been a major revenue source since this tax contributed the smallest proportion of the total revenue collected by the RD, at 0.68 percent during fiscal year 2013-14.⁴⁰⁴

3.4.2.4 Customs Duties

Customs duties are levied on imports and a very limited number of export goods specified under the Customs Tariff Decree of 1987 and the Customs Act of 1926.⁴⁰⁵ Customs duties are levied on a specific and *ad valorem* basis⁴⁰⁶ or on a compound basis⁴⁰⁷ (whichever is the higher).⁴⁰⁸ However, most tariffs are *ad valorem*. The available duty rates are liable for most imported goods ranging between 1 percent and 80 percent. However, there are exemptions for import duties applicable to certain goods beyond those put forth in the 1987 decree.⁴⁰⁹

3.4.2.5 Excise Tax

The adjustment of the excise tax system aims to complement the VAT system. With the aim of balancing the VAT system, certain regulations have been revised in the excise tax system. While the VAT is collected by the RD, the excise tax is collected by the Excise Department⁴¹⁰ for products subject to both VAT and excise taxes.⁴¹¹ Although the Excise Department can collect both of the above-mentioned taxes, the RD is only responsible for collecting on an *ad valorem* basis.⁴¹² A percentage of the goods price is used to calculate the excise tax,⁴¹³ or it can be computed at a certain rate on the basis of weight or quantity of goods.⁴¹⁴ The excise tax is imposed on the sale of a selected range of products at specific rates on an *ad valorem* basis or compound basis, whichever is higher. The compound basis is a combination of the specific basis and *ad valorem* basis. The selected products (primarily luxury goods), whether manufactured locally or

⁴⁰³ Ibid.

⁴⁰⁴ The Revenue Department, 'Annual Report 2014' (n 398) 94.

⁴⁰⁵ The Customs Tariff Decree 1987, s 4.

⁴⁰⁶ Sujjapongse (n 375)1017.

⁴⁰⁷ The compound basis is a combination of the specific and *ad valorem* basis.

⁴⁰⁸ The Customs Tariff Decree 1987, s 5.

⁴⁰⁹ Ibid.

⁴¹⁰ Puapondh and others (n 383) 23.

⁴¹¹ Excise Tax Act 1984, s 10.

⁴¹² Dusitnanond (n 209) 53.

⁴¹³ Ibid.

⁴¹⁴ Excise Tariff Act 1984 (as amended (No. 4) 2003), s 4 and Excise Tariff Schedule.

imported, consist of crystal glassware, air conditioners (not over 72,000 BTU),⁴¹⁵ perfumes and cosmetics, fuel oil and petroleum products, motor vehicles with 10 seats or fewer, motorcycles, batteries, boats (yachts), certain non-alcoholic beverages, alcoholic beverages, cigarettes containing tobacco, ozone depleting substances, woollen carpets, playing cards, certain electrical appliances and entertaining services, turf courses and golf courses.⁴¹⁶ Tax liability arises for locally-manufactured products when the products are shipped from the factories; for imported goods, the liability arises at the time of importation.⁴¹⁷ The excise tax collected by the Excise Department during 2012-13 accounted for 16.8 percent of the government's general revenue.⁴¹⁸ This tax ranks second (after income taxes) in the total revenue collected.

3.4.3 Taxes on Wealth and Wealth Transfer

Thailand does not levy taxes on wealth and wealth transfer, except for property tax. A discussion of taxes on wealth and wealth transfer, classified by type, follows.

3.4.3.1 Property Tax

The building and land tax (BLT) and local development tax (LDT) are the only two kinds of property taxes in Thailand.⁴¹⁹ Under the Building and Land Tax Act of 1932 (BLTA 1932), the BLT is imposed annually on the owners of land, houses and building structures rented or used for commercial purposes. Taxable property under the BLTA includes houses not occupied by the owner, industrial and commercial buildings and land used in connection therewith.⁴²⁰ The BLTA also provides a tax exemption to certain kinds of properties, those used for charities, religious and certain public activities.⁴²¹ Moreover, buildings that are personally used by the owners or are unoccupied for a period of one year or more are exempt from the BLT.⁴²² The BLT rate is 12.5 percent of the actual or imputed annual rental value of the building and land.⁴²³

⁴¹⁵ Puapondh and others (n 383) 23.

⁴¹⁶ Ibid.

⁴¹⁷ Excise Tax Act 1984, ss 10, 11 and 12.

⁴¹⁸ The Revenue Department, 'Annual Report 2013' (n 152) 94.

⁴¹⁹ Pawadee Kerdthungyang, 'Study Analysis of Problem about Building and Land Tax and Local Development Tax Compare with Draft Land and Building Tax' (Master's thesis, National Institute of Development Administration 2012) 2.

⁴²⁰ BLTA 1932, s 6.

⁴²¹ BLTA 1932, s 9.

⁴²² BLTA 1932, s 10.

⁴²³ BLTA 1932, s 8.

On the other hand, under the Local Development Tax Act of 1965 (LDTA 1965), the LDT is annually imposed on a land owner at a varying tax rate according to the appraised land value, as determined by the local tax authorities.⁴²⁴ Land, mountains and water basins are included as taxable property.⁴²⁵ Similar to the BLT, religious and government land, land used for personal residence and land used for cultivation is exempt from the LDT.⁴²⁶ Idle land is subject to twice the normal rate,⁴²⁷ while cultivated land used for annual crops (in excess of the exempt area) is charged at half the normal rate; landowners who do their own farming are subject to a low maximum rate.⁴²⁸ The implicit rate typically ranges from 0.25 percent to 0.95 percent, which is regressive.⁴²⁹

These taxes are often recognised as the most obsolete taxes in the Thai system. There are not only many obvious shortcomings, but there is overlap between the tax base on the annual and rental value and PIT base on rental property with a tax rate of 12.5 percent, which is too high.⁴³⁰ Such taxes have never been a significant source of revenue. During fiscal year 2012-13, for example, these taxes contributed less than 10 percent of the total revenue collected by the local authorities throughout Thailand.⁴³¹ However, both BLT and LDT are significant revenue sources for tax authorities at the local level. The BLT accounted for 80 percent of the total local revenue collected, whereas the LDT accounted for about 9.5 percent locally during fiscal year 2012-13.⁴³² On the other hand, the regressive rates of the LDT specified depend on the average land value. The higher rate at 0.5 percent is applied to the lower land value, whereas the lower rate of 0.25 percent is conversely applied to the higher land value. Furthermore, there is a great deal of idle land in Thailand, most of which is owned by the minority rich who tend to abandon their land or not use it economically. Such individuals benefit from low LDT rates presently, though such land is subject to double the rate.⁴³³

⁴²⁴ LDTA 1965, ss 7, 9, 10, 13.

⁴²⁵ LDTA 1965, s 6.

⁴²⁶ LDTA 1965, s 8.

⁴²⁷ LDTA 1965, Excise Tax Rates Schedule.

⁴²⁸ Ibid.

⁴²⁹ Ibid.

⁴³⁰ Thammagit Kwanguer, 'Problems Related to the Proposed Act on Taxation of Land and Building: A Case Study of an Interpretation of Property Exempted from Taxes' (2010) Rajapruk University Legal Studies Research Paper, 31.

⁴³¹ Sakon Varanyuwatana, 'Property Tax in Thailand', in William McCluskey (ed), *Comparative Property Tax Systems: An International Comparative Review* (Ashgate Publishing Limited 1999) 152.

⁴³² Ibid.

⁴³³ Kwanguer (n 430) 32.

3.4.3.2 Other Taxes

Currently, Thailand does not levy estate taxes, inheritance taxes, gift taxes, net wealth taxes or capital gain taxes. However, capital gains will be taxed as ordinary income for the purposes of both PIT and CIT. For example, capital gains paid from Thailand to overseas companies and juristic partnerships are subject to the CIT.⁴³⁴ Most capital gains are taxed as ordinary income for PIT purposes⁴³⁵ unless they are gains on the sale of shares in a listed company in the Thai Stock Exchange. The separate capital gain tax has not been in place in Thailand.

3.5 Tax Administration Structure

Under the structure of tax administration in Thailand, both the central and local governments currently charge taxes. The Ministry of Finance oversees the excise, revenue and customs departments that are responsible for levying the central government's taxes, whereas the local governments are solely responsible for levying the local taxes. Thus, taxation can be divided into two levels of tax administration authority as detailed in the next sections.

3.5.1 The National Level

The Ministry of Finance has several roles and responsibilities, regulating matters regarding operations of government monopolies, taxation, public finance, government property, treasury and revenue-generating enterprises.⁴³⁶ They can be legally operated only by the government⁴³⁷ along with other organisations to which the government has prescribed commitments.⁴³⁸ For administrative reasons, the overall work is distributed among eight major agencies: the Office of the Permanent Secretary, the Office of the Secretary to the Minister, the Treasury Department, the Fiscal Policy Office, the Comptroller General's Department, the RD, the Excise Department and the Customs Department.⁴³⁹

⁴³⁴ RC, s 70.

⁴³⁵ RC, s 40(4).

⁴³⁶ Dusitnanond (n 209) 55.

⁴³⁷ Ibid.

⁴³⁸ The Ministry of Finance, 'Organisation Info' <http://www2mofgoth/government_agencieshtm> accessed 24 June 2015.

⁴³⁹ Ibid.

However, taxes are collected only from three main departments under the Ministry of Finance:⁴⁴⁰ the RD, the Excise Department and the Customs Department.⁴⁴¹ The revenue collected by these agencies continually contributes the largest portion of the government's general revenue. Together, they make up about 90 percent of the government's revenue.⁴⁴² The first and most important agency responsible for tax collection is the RD, collecting more than half of total revenue.⁴⁴³ This department was founded in 1915 by King Rama VI, succeeding in his father's quest (King Rama V's) to provide a platform for revenue collection.⁴⁴⁴ This tax agency is responsible for collecting taxes based on income and consumption.⁴⁴⁵ The PIT, CIT, VAT, SBT and SD are within the power and control of the RD.⁴⁴⁶ Apart from collecting taxes, this department makes sure that tax collection adheres to national tax policies. More importantly, it is responsible for improving and reviewing laws and regulations pertaining to the tax system⁴⁴⁷ not only for promoting investment, competition and savings,⁴⁴⁸ but also for bringing about a more equal distribution of income.⁴⁴⁹

According to the Ministerial Regulation on the RD's Organizational Structure of 2008, the director-general is the head of the RD, and the principal advisors, who are also the executives to the Director General, assist him with performance improvement, information and communication technology, and tax-base management. There are four deputy director-generals who are responsible for legal affairs, auditing operations, information technologies, finance and revenue management, human resource management, large business organisations, tax auditing standards, tax collection standards, tax policy and planning, investigations and litigation, and tax appeals.⁴⁵⁰

Second, the Excise Department was originally the 'Liquor and Opium Department' in charge of collecting opium and liquor taxes in the Ayutthaya era of King Narai (1656 to

⁴⁴⁰ Jaremsri L Mitranont and Pattama Tounprasert, 'Model-Based System Tool for Thai Tax Revenue Forecasting (MBS-TTRF)' (Eighth International Joint Conference on Computer Science and Software Engineering (JCSSE), Nakhon Pathom, 11-13 May 2011)

<http://ieeexplore.ieee.org/xpls/abs_all.jsp?arnumber=5930108&tag=1> accessed 24 June 2015.

⁴⁴¹ The Revenue Department, 'About Us' (n 167).

⁴⁴² Jittungsakul (n 361) 6.

⁴⁴³ The Revenue Department, 'About Us' (n 167).

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ RC, s 5.

⁴⁴⁷ Dusitnanond (n 209) 57.

⁴⁴⁸ Ibid.

⁴⁴⁹ The Ministry of Finance, 'Organisation Info' (n 438).

⁴⁵⁰ The Revenue Department, 'Administration and Organisation Structure of the Revenue Department' <<http://www.rd.go.th/publish/6015.0.html>> accessed 24 June 2015.

1688).⁴⁵¹ In 1933, the name Excise and Opium Department was finally changed to simply the Excise Department. It is responsible for collecting excise taxes that are levied on eleven kinds of goods and services. It also carries out suppression activities to ensure enforcement of strict laws and regulations.⁴⁵² The highest authority of the Excise Department is the director-general, followed by three consultants assisting him in the areas of excise tax strategy, excise administration and excise control development. There are also four deputy director generals responsible for assisting him in terms of technical development and audits, human resource management, collection standards and development and tax planning.⁴⁵³ During 2012-13, the revenue collected by the Excise Department accounted for 16.9 percent of the government's general revenue. Automobile taxes contributed the largest part (35.5 percent) of the total excise tax, followed by the petroleum tax (14.7 percent), beer tax (16.0 percent), tobacco tax (15.7) and liquor tax (12.2 percent).⁴⁵⁴

Third, the new era of Thai customs originated in 1874 when the Customs House was established for the first time to collect customs tariffs in the reign of King Rama IV. However, the present Customs Department finally replaced the Customs House in 1954.⁴⁵⁵ Since its establishment, the Customs Department has been responsible for collecting custom tariffs. Apart from collecting taxes and duties, it is also in charge of prevention and suppression of customs offences, promotion of exports, and facilitation of international trade.⁴⁵⁶ However, its traditional roles have been changing; as a result, the total revenue collected is no longer the primary source of the government's general revenue.⁴⁵⁷ The revenue collected by the Customs Department from 2012-13 accounted for 4.4 percent of the government's general revenue. Import duties contributed the largest part, about 98 percent of the total customs tariffs collected, followed by import duties and others.⁴⁵⁸

⁴⁵¹ The Biography of H.M. King Narai the Great, <http://www.lopburi.go.th/king_narai_e.html> accessed 24 June 2015.

⁴⁵² The Ministry of Finance, 'Organisation Info' (n 438).

⁴⁵³ The Excise Department, 'Organizational Structure' <http://excise-english.excise.go.th/ABOUT_US/ORG_CHART/index.htm> accessed 24 June 2015 .

⁴⁵⁴ Jittungsakul, (n 361) 7.

⁴⁵⁵ The Customs Department (n 116).

⁴⁵⁶ The Ministry of Finance, 'Organisation Info' (n 438).

⁴⁵⁷ The Customs Department (n 116).

⁴⁵⁸ Jittungsakul (n 361) 8.

3.5.2 Local Level

Currently, there are nearly 7,853 local governments throughout Thailand. Most regions are organized into municipalities, comprised of the Bangkok Metropolitan Administration (BMA), the City of Pattaya, 76 Provincial Administrative Organizations (PAOs), 2,440 Municipal *Tessaban* and 5,335 *Tambon* (Village) Administrative Organizations (TAOs).⁴⁵⁹ The administration and enforcement of certain tax laws and regulations take place primarily at the local level. The local authorities, namely the Municipal *Tessaban*, the BMA, the City of Pattaya, the PAOs and the TAOs are responsible for levying local revenue and property taxes in their respective areas of jurisdiction. The collection of the BLT, along with the LDT, the slaughter tax, swallow bird's net duty and the signboard tax, is the responsibility of these local authorities, while the petrol stations tax, hotel tax, and retail tobacco tax is the sole responsibility of PAOs.⁴⁶⁰

Conclusion

Section B of this chapter has examined the tax system in Thailand. It reveals that there are several shortcomings within the system. Thailand levies various categories of both direct and indirect taxes, which are the main source of the government's revenue. The country seems to have a sound tax system similar to those of other advanced countries, such as the US and UK, and it may be regarded as one of the most developed systems in the Association of Southeast Asian Nations (ASEAN) community. Nevertheless, it appears that most categories based on wealth and wealth transfers are absent from the structure of the Thai tax system, except for the property tax (either the BLT or LDT). Obviously, Thailand does not levy most principal taxes in these categories, whether it is the estate tax, inheritance tax, gift tax, capital gains tax or net wealth tax. These taxes have a greater effect on the inequality of wealth and income distribution because the current Thai tax system is defective and cannot be an effective mechanism for eradicating wealth inequality and diminishing the gap between rich and poor. It fails to promote fairness in the economy and society as a whole. This overview of the Thai tax

⁴⁵⁹ Department of Local Administration, (update on 30 September 2014)

<<http://dla.go.th/work/abt/summarizejsp>> accessed 24 June 2015.

⁴⁶⁰ Fiscal Policy Office, 'A Guide to Thai Taxation 2008' (2008) Tax Policy Bureau Information Report, 2 <<http://www.fpo.go.th/FPO/modules/Content/getfile.php?contentfileID=909>> accessed 24 June 2015.

system will lead to an important discussion in support of arguments made in chapter 4. Then in chapters 9 and 10, this matter will be discussed again.

4 Theoretical Framework and Criticisms of Wealth Transfer Taxes

Introduction

Since tax systems are affected by various political, economic, social and ethical factors, it is important to consider whether a system suits a particular context rather than simply considering whether it is 'good'. Therefore, before Chapter 5 examines how current Thai laws will influence the future of the wealth transfer tax (WTT), this chapter provides a crucial theoretical framework, briefly discussing the selected economic principles and defining the features of a desirable Thai WTT system. It is also necessary to outline the arguments in both support and against of a proposal for introducing the WTT in Thailand, particularly those developed internationally and domestically by economists, philosophers, sociologists, religious scholars and jurists. More than any other form of tax, this tax has generated controversy in multiple arenas, including economic theory, political philosophy, and social and ethical debate. Generally speaking, the WTT is today not regarded as a popular tax.⁴⁶¹ Nonetheless, people are cognisant that taxes are necessary to provide social welfare benefitting the vast majority, even if those same people are suspicious that revenue generated from taxes is at times misappropriated or abused.⁴⁶² The Economic and Social Commission for Asia and the Pacific (ESCAP) reported that, despite a largely uneven distribution of income and wealth in Thailand, the government fails to impose an estate or inheritance tax.⁴⁶³ This chapter examines whether criticisms of WTT are justified internationally and nationally.

4.1 General Principles of Taxation

Taxation, a single component of the overall scheme of fiscal management,⁴⁶⁴ is argued to be the most efficient mechanism for achieving the taxation goals of redistributing

⁴⁶¹ Luc Arrondel and Andre Masson, 'Favouring Wealth Intergenerational Mobility by Increasing the Inheritance Tax: Putting the Case for France' in John Cunliffe and Guido Erreygers (ed), *Inherited Wealth, Justice and Equality* (Routledge 2013) 119.

⁴⁶² Keith Dowding, 'Why Are Inheritance Taxes Unpopular?' (2008) 79(2) *The Political Quarterly* 179, 179.

⁴⁶³ Dhammano (n 118) 185.

⁴⁶⁴ L Hay, *Economics of Public Finance* (Pitman Publishing 1974) 104.

income and wealth.⁴⁶⁵ In taxation systems, the WTT has been considered a mechanism for achieving such objectives.⁴⁶⁶ It is necessary to examine which characteristics would be most applicable to Thailand's tax system, particularly because the lives of so many poor people could be made difficult by a new form of taxation.⁴⁶⁷ In order to construct or appraise a WTT, a basic question arises: what makes a 'good' tax system? In the following sections, the answer to this question will be investigated through the principles of taxation.⁴⁶⁸

4.1.1 Characteristics of a 'Good' Tax System

Many question whether a tax system can be more than a tool for producing government revenue and whether it can be regarded as a desirable characteristic in a tax structure. Some argue that tax systems should be designed to achieve economic efficiency,⁴⁶⁹ while others argue that tax collection should distort the economy as little as possible. Ideally, it should not only have low compliance and enforcement costs⁴⁷⁰ but it should also yield sufficient revenue to cover government expenses. Meanwhile, the notions of equity and fairness remain of paramount concern. Tax systems must uphold a number of minimum requirements as foundation stones for a 'good' tax system.

The criteria for choice have never been adequately investigated or articulated, though tax system choice should be based on sound principles at the very least.⁴⁷¹ One of the earliest attempts to identify such criteria is credited to Adam Smith⁴⁷² who, in 1776, wrote that a 'good' taxation system ought to be equitable, convenient, certain and economical. Smith created four criteria for a good tax system in 1776 which can be

⁴⁶⁵ The distribution of income and wealth are closely linked. One of the biggest causes of inequality in incomes is the inequality of wealth from which income is derived. However, in all countries, the wealth distribution is more unequal than the distribution of income, sometimes markedly so. See Graham C Hockley, *Fiscal Policy: An Introduction* (Routledge 1992) 130; Also see, C T Sandford, *Economic of Public Finance: An Economic Analysis of Government Expenditure and Revenue in the United Kingdom* (4th edn, Pergamon Press 1984) 204.

⁴⁶⁶ Yawei Zhang, 'Individual Income Tax Reform and Wealth Redistribution in China' (2014) 7(4) *Journal of Politics and Law* 112, 122.

⁴⁶⁷ Richard M Bird, *Tax Policy and Economic Development* (The John Hopkins University Press 1992) 60.

⁴⁶⁸ Adrian Shipwright and Elizabeth Keeling, *Textbook on Revenue Law* (2nd edn, Blackstone Press Limited 1997) 11.

⁴⁶⁹ Hockley, *Fiscal Policy: An Introduction* (n 465) 81.

⁴⁷⁰ Ibid.

⁴⁷¹ Robin Boadway and others, 'Taxation of Wealth and Wealth Transfers' in Stuart Adam and others (eds), *Dimensions of Tax Design: The Mirrlees Review* (OUP 2010) 739.

⁴⁷² Adam Smith (1723 -1790), author of 'The Wealth of Nations' and Professor of Moral Philosophy at Glasgow University.

found in his early statement,⁴⁷³ a so-called maxim with regard to taxes in general,⁴⁷⁴ this is the canons of taxation.⁴⁷⁵ The first canon of taxation is concerned with ‘equity’ among taxpayers. Smith believed that, ‘in a good tax system, the state subjects of every state ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities; that is in proportion to the revenue which they respectively enjoy under the protection of the state’.⁴⁷⁶ This statement indicates that people should be taxed in proportion to their income or revenue. The fourth canon is concerned with ‘efficiency: every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state’.⁴⁷⁷ Here, Smith indicates that administrative and compliance costs should not be expensive and should not distort the country’s economy. There is an important difference between the notions of these two canons: ‘equity’ is a subjective criterion whereas ‘efficiency’ is an objective one.⁴⁷⁸

The second and third canons of taxation are ‘certainty’ and ‘convenience of payment,’ respectively. The former holds that ‘the tax which each individual is bound to pay ought to be certain, and not arbitrary’.⁴⁷⁹ This point means that a taxpayer’s liabilities should be relatively simple and easy to understand—certain rather than arbitrary. The latter principle holds that ‘every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it’.⁴⁸⁰ In essence, the tax payment method should be convenient for the taxpayer. Unlike the first and fourth canons, these canons have not been broadly discussed among economists because they seem to be self-evident, and the notions of these canons are often incorporated within the rights of taxpayers.⁴⁸¹ The first and fourth canons of taxation should be examined together because they are the most widely-discussed and debated among economists.⁴⁸² These two canons shall later be considered in further detail as significant criteria in evaluating and designing the WTT.

⁴⁷³ Martin Feldstein and A J Auerbach, *Handbook of Public Economics*, vol I (Elsevier BV 2005) 16.

⁴⁷⁴ Simon R James (ed), *Taxation: Critical Perspectives on the World Economy*, vol 1, (Routledge 2002) 97.

⁴⁷⁵ Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Thomas Nelson 1843) 347.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid 348.

⁴⁷⁸ Russell S Sobel, ‘Welfare Economics and Public Finance’ in Jürgen G Backhaus and Richard E Wagner (ed.), *Handbook of Public Finance* (Kluwer Academic Publishers 2004) 20.

⁴⁷⁹ Smith (n 475) 347.

⁴⁸⁰ Ibid.

⁴⁸¹ Christopher Heady, ‘Optimal Taxation as a Guide to Tax Policy: A Survey’ (1993) 14(1) *Fiscal Studies* 15, 16.

⁴⁸² Ibid.

4.1.2 Desirable Features of a Thai WTT System

Certain criteria can be applied to evaluate potential WTT systems for Thailand. The question is how to appraise the WTT system and how to distinguish potentially worthwhile methods of introducing the new tax from inappropriate ones.⁴⁸³ Since at least the time of Adam Smith (1776) and his four canons of taxation, scholars have tried to distinguish good systems from bad systems. In addition to Smith's four criteria, economists have generated several more criteria for systems of taxation. Therefore, our attention here is drawn to certain principles of Adam Smith's canons of taxation along with alternative principles of taxation that have emerged over the last century. These principles have been selected as significant standards in evaluating and designing the WTT system for Thailand. Consideration of these principles may assist the Thai executive and legislative branches in their deliberations on introducing the WTT.

4.1.2.1 Equity

Equity or fairness in wealth transfer taxes is the first criterion to be discussed here. Political economists like Smith, Locke, Rousseau, and Mill have referred to and recognized the importance of equity.⁴⁸⁴ There are two closely-related principles that tend to be useful in considering this notion: the benefit principle and the ability to pay principle. The former suggests that taxes are apportioned to people according to the benefits they in some way gain from government expenditures,⁴⁸⁵ which includes the public provision of public goods and services,⁴⁸⁶ such as law and order, justice and defence.⁴⁸⁷ The ability-to-pay principle implies that people should be taxed according to financial capacity (or how much they can afford to pay).⁴⁸⁸ This approach remains the most fundamental principle in applying a tax system.⁴⁸⁹ Although the benefit principle often contrasts with the ability-to-pay principle,⁴⁹⁰ both must be satisfied in an equitable

⁴⁸³ James and Nobes (n 56) 16.

⁴⁸⁴ Ibid 222.

⁴⁸⁵ Hockley, *Fiscal Policy: An Introduction* (n 465) 86.

⁴⁸⁶ Aehyung Kim, 'Decentralization and the Provision of Public Services: Framework and Implementation' (2008) Policy Research Working Paper (World Bank) No. 4503, 3.

⁴⁸⁷ The benefit approach is clearly seen in action only in special cases, such as television licenses and motor taxation, 'See James and Nobes (n 56) 80.'

⁴⁸⁸ Willem Vermeend, Rick van der Ploeg and Jan Willem Timmer, *Taxes and the Economy: A Survey of the Impact of Taxes on Growth, Employment, Investment, Consumption and the Environment* (Edward Elgar Publishing Limited 2008) 59.

⁴⁸⁹ Richard Abel Musgrave, *The theory of public finance: A study in public economy* (McGraw-Hill 1959) 160.

⁴⁹⁰ Arye L Hillman, *Public Finance and Public Policy: Responsibilities and Limitations of Government* (2nd edn, Cambridge University Press 2009) 674.

tax system.⁴⁹¹ Aligned with the benefit principle, John Locke held that the rich should pay more tax than the poor because they benefit most from state protection of wealth. Other theorists, however, have downplayed this argument, suggesting that the poor actually benefit more.⁴⁹²

A good tax system must be equitable in two separate senses: horizontal equity and vertical equity.⁴⁹³ Vertical equity is concerned with fairness between people who are in unequal circumstances; they should be treated differently and receive unequal benefits.⁴⁹⁴ For the WTT, therefore, those with less wealth should pay less tax than those with large amounts of wealth.⁴⁹⁵ This view advocates for a progressive WTT system.⁴⁹⁶ A vertically equitable progressive WTT would help collect a larger portion of the gross estate as the value of the estate increases. This vertical equity can be regarded as a distributional principle, involving redistribution of wealth from people who are better off to people who are worse off.⁴⁹⁷

Unlike vertical equity, horizontal equity is concerned with fairness between people with the same amount of wealth. This sense of equity is the most widely-accepted in taxation: people in equal situations should be treated equally.⁴⁹⁸ This principle of equity is achieved if taxpayers who are equally well off bear equal tax burdens. Thus, estates of identical size should bear identical tax burdens for the purposes of WTT.⁴⁹⁹ In considering whether the redistribution between rich and poor is affected by the horizontal equity of a tax system, the ‘system must be judged by the extent to which it treats fairly and equally those members of society who are equally rich and poor’.⁵⁰⁰ These senses of equity will be reconsidered as tools of analysis in Chapter 9.

⁴⁹¹ Gardner (n 21) 49.

⁴⁹² James and Nobes (n 56) 79-80.

⁴⁹³ Anthony C Infanti, ‘Tax Equity’ in Anthony C Infanti and Bridget J Crawford (eds), *Critical Tax Theory: An Introduction* (Cambridge University Press 2009) 62.

⁴⁹⁴ Graham C Hockley, *Public Finance: An Introduction* (2nd Rev edn, Routledge and Kegan Paul Books 1979) 105.

⁴⁹⁵ C V Brown and P M Jackson, *Public Sector Economics* (4th edn, Basil Blackwell 1990) 298

⁴⁹⁶ Nightingale (n 342) 8.

⁴⁹⁷ The Institute for Fiscal Studies, *The Structure and Reform of Direct Taxation: Report of a Committee Chaired by Professor J.E. Meade* 1978 (George Allen & Unwin Publishers Ltd 1987) 14.

⁴⁹⁸ Caren Grown, ‘Taxation and Gender Equality: A Conceptual Framework’ in Caren Grown and Imraan Valodia (eds), *Taxation and Gender Equity: A Comparative Analysis of Direct and Indirect Taxes in Developing and Developed Countries* (Routledge 2010) 8.

⁴⁹⁹ Steven Maguire, ‘The Impact of the Federal Estate Tax on State Estate Taxes’ (2012) CRS Report for Congress: Prepared for Members and Committees of Congress, 12

<<https://www.fas.org/sgp/crs/misc/R42788.pdf>> accessed 24 June 2015.

⁵⁰⁰ The Institute for Fiscal Studies (n 497) 14.

4.1.2.2 Progressivity

The second principle is progressivity, which has more historic importance than contemporary value in taxation.⁵⁰¹ Some theories include this feature within the ability-to-pay principle. For clarity purposes in this thesis, it is useful to examine this principle separately. The poor should bear a tax burden at a proportionately lower rate than the rich.⁵⁰² In Thailand, the WTT should take a lower proportion of the gross estate from people with lower wealth ranges than from those with higher wealth ranges;⁵⁰³ this principle is often known as progressive taxation. Some argue that progressive taxation can produce equality in tax burdens, which is fairer than regressive or proportional taxation; in essence, each additional pound may be worth little to the rich, but it means more to the poor.⁵⁰⁴ A progressive scale thus can represent an ‘equality of sacrifice’ between the rich and poor.⁵⁰⁵ A further argument for progressive taxation suggests that the tax is based on the fact that there are only two kinds of property tax, which are unavoidably regressive taxes in the Thai system, the building and land tax (BLT) and local development tax (LDT). Thus, the Thai tax system needs to be counterbalanced by a more progressive one.⁵⁰⁶

4.1.2.3 Economic Efficiency

Efficiency is also needed in the design of a desirable tax system. Efficiency is a significant criterion in creating a good tax system that causes minimal ‘distortion to economic choice’,⁵⁰⁷ which is often known as the ‘excess burden’ of taxation. For example forgone tax revenue⁵⁰⁸ may be causing substitution effects that result in economic inefficiency.⁵⁰⁹ These distortions of economic choice directly affect the size of the economy. In line with the US federal estate tax, Steven Maguire suggests that ‘the estate tax impacts the economy more broadly as saving and capital investment become

⁵⁰¹ John E Donalson, ‘The Future of Transfer Taxation: Repeal, Restructuring and Refinement, or Replacement’ in Philip D Oliver (ed), *Reading and Materials: Tax Policy* (2nd edn, Foundation Press and Thomson & West 2004) 597.

⁵⁰² Pedro Olinto and Jaime Saavedra, ‘Inequality in Focus Series: An Overview of Global Income Inequality Trends’ (2012) 1(1) *World Bank Inequality in Focus Newsletter* 1, 2
<http://siteresources.worldbank.org/EXTPOVERTY/Resources/Inequality_in_Focus_April2012.pdf>
accessed 24 June 2015.

⁵⁰³ Commission on Taxation & Citizenship, *Paying for Progress: A New Politics of Tax for Public Spending: The Commission on Taxation and Citizenship* (Fabian Society 2000) 103.

⁵⁰⁴ Hay (n 464) 104.

⁵⁰⁵ Sandford (n 465) 113.

⁵⁰⁶ Hay (n 464) 104.

⁵⁰⁷ Vermeend and others (n 488) 59.

⁵⁰⁸ Hillman (n 490) 667.

⁵⁰⁹ Nightingale (n 342) 8.

less attractive the higher the tax. In theory, lower estate tax burdens encourage more saving and investment'.⁵¹⁰ It is significant to note that the efficiency and equity of a tax often work against each other, creating a dynamic tension.⁵¹¹ Consequently, when equity in a tax system is achieved, it comes with a cost in reduced efficiency.⁵¹²

4.1.2.4 Administrative Efficiency

The fourth feature of a desirable WTT system is administrative efficiency. For simplicity, some theories include this feature into economic efficiency; however, this thesis examines it separately for clarity purposes.⁵¹³ In order to actually run the tax system, it is unavoidable that there will be direct costs incurred as compliance or administrative costs.⁵¹⁴ However, the ratio of such administrative and compliance costs must be as low as possible; otherwise, the tax system will become inefficient as the taxes raise little more revenue than the costs of administration. It is thus essential that both the administration and compliance costs are cost effective.⁵¹⁵

Administrative costs may consist of processing tax returns, enforcing payment and providing assistance for taxpayers. Compliance costs include learning about tax legislation, keeping records, hiring costs for tax consultants and filling out forms oneself.⁵¹⁶ Thus, administrative efficiency means that these costs should remain sufficiently low in proportion to the revenue raised by tax authorities; otherwise, the tax will ultimately be abolished. For example, one of reasons for repealing the estate and inheritance tax (EIT) was that the government's administrative costs were much higher than the revenue raised.⁵¹⁷ It is vital to note that modern 'optimal tax theory' has overlooked the importance of administration and compliance costs by focusing only on

⁵¹⁰ Maguire (n 499) 14.

⁵¹¹ David Joulfaian, 'The Federal Estate Tax: History, Law, and Economics, Office of Tax Analysis' (2011) US Department of the Treasury Manuscript, 1-1 <<http://ssrncom/abstract=1579829>> accessed 24 June 2015.

⁵¹² Sobel (n 478) 20.

⁵¹³ Maroš Kravec, 'Should net wealth and property taxation be introduced in the United Kingdom?' (Master's Thesis, Lund University 2013) 10-11 <<http://lup.lub.lu.se/student-papers/record/3800434/file/3800443.pdf>> accessed 24 June 2015.

⁵¹⁴ James and Nobes (n 56) 38.

⁵¹⁵ Commission on Taxation & Citizenship (n 503) 107-108.

⁵¹⁶ Vermeend and others (n 488) 59.

⁵¹⁷ Nightingale (n 342) 7.

distortions of public behaviour, referred to as ‘distortion costs’.⁵¹⁸ All such costs are essential to actually running a tax system.⁵¹⁹

4.1.2.5 Revenue Sufficiency

The fifth feature of a desirable tax system is revenue sufficiency. It is important to consider whether or not the tax system raises enough revenue for public expenditures⁵²⁰ in order to justify the tax imposition. In addition, the yield from tax should be certain and, to some degree, resistant to business cycle fluctuations, thus allowing the government to implement a stable financial and economic policy.⁵²¹

In summary, the selected principles represent significant criteria in evaluating and designing the most desirable WTT system for Thailand. However, there are a number of conflicts within these criteria. For instance, the efficiency and equity of tax characteristics often work against each other⁵²² as achieving greater equity often comes at the cost of efficiency.⁵²³ Increasing administrative costs may lead to a fairer tax system but result in reduced efficiency. Moreover, some criteria may be difficult to define. While efficiency can be measured objectively, equity and transparency are naturally subjective.⁵²⁴ Therefore, WTT design is not a matter of value judgements on how best to make a good tax system; rather it involves value judgements on how best to balance these criteria and how to reconcile between conflicts. The most important concern is designing the most desirable and suitable tax system and harmonizing these criteria within the sociocultural context of Thailand. Chapter 9 will refer back to these principles in its analysis.

4.2 Criticisms of Wealth Transfer Taxation

Wealth transfer taxes are erroneously regarded as the most popular form of taxation because they are the most redistributive tax,⁵²⁵ but in fact, both the federal estate tax (FET) and inheritance tax (IHT) are undoubtedly the least popular taxes in the US and

⁵¹⁸ Jonathan Shaw, Joel Slemrod and John Whiting, ‘Administration and Compliance’ in Stuart Adam and others (eds), *Dimensions of Tax Design: The Mirrlees Review* (OUP 2010) 1101.

⁵¹⁹ *Ibid* 1158.

⁵²⁰ John L Mikesell, *Fiscal Administration: Analysis and Applications for the Public Sector* (8th edn, Wadsworth Cengage Learning 2011) 344.

⁵²¹ Vermeend and others (n 488) 59.

⁵²² Sobel (n 478) 20.

⁵²³ Maguire (n 499) 14.

⁵²⁴ Vermeend and others (n 488) 60.

⁵²⁵ Dowding (n 462) 179.

UK.⁵²⁶ Similarly, the introduction of a wealth transfer tax in Thailand seems to be very unpopular and has been subject to increasing criticism. Seventy years after the abolition of the Estate and Inheritance Tax Act of 1933 (EITA 1933) in 1944, the WTT has become the subject of intense debate in Thailand.

Traditionally, the primary objective of the tax system has been to collect revenue to finance government expenditures; in this sense, taxation is an instrument to achieve other objectives; for example, the government may deliver policy measures to reduce wealth inequalities using taxes on wealth transfer.⁵²⁷ The Thai government could not achieve this goal without facing numerous criticisms. In Thailand, economists, academics, politicians and attorneys have made various arguments for and against the introduction of WTT. Introducing this tax not only involve economics, but also reflects legal, political, social and ethical factors in Thailand.

This section considers the primary arguments of each side both domestically and internationally. Understanding the main arguments of both sides allows one to more rationally balance the interests of multiple stakeholders when determining which approach policy makers should adopt. Citing prominent studies from both sides, this section aims not to weigh the sides against each other, but instead to provide an overview of the conflicting perspectives.

4.2.1 Political and Public Administration Arguments

The political perspectives are crucial. Citizens and relevant authorities express a wide range of arguments in support of the WTT. The following arguments support wealth transfer taxation: promoting democracy, encouraging the government to develop a social policy for the poor, and funding public services for the poor.

4.2.1.1 Making Thai Democracy More Stable

In analysing the argument for how the WTT can help to make democracy more stable in Thailand, it is useful to examine the relationship between the degree of inequality in wealth and the stability of democracy in poor countries. This relationship is reflected in Przeworski's essay on self-enforcing democracy, where he writes, and 'democracy can

⁵²⁶ Antony Seely, 'Inheritance Tax' (2013) House of Commons Brief Papers SN93, 7
<<http://www.parliament.uk/briefing-papers/sn00093pdf>> accessed 24 June 2015.

⁵²⁷ Sandford (n 465) 111.

survive in poor countries, but only under special conditions, namely, when the distribution of income is very egalitarian or when neither the rich nor the poor have the capacity to overthrow it'.⁵²⁸ Hence, democracies should be rare in poor countries.⁵²⁹ Conversely, wealthy countries tend to have a relatively high degree of income redistribution, ensuring the survival of their democracy.⁵³⁰ Przeworski claimed that democracy in poor countries with unequal income redistribution will perish if income redistribution remains insufficient or if military forces are imbalanced.⁵³¹ In other words, democracy survives even in poor countries if income distribution is sufficiently egalitarian or if military forces are balanced. For example, democracy can survive in India where military power is more balanced even if the distribution of income is quite limited. However there is no correlation between economic equality and stability of democracy in wealthy countries. This is because democracies always survive when a society is sufficiently wealthy regardless whether or not income redistribution is sufficiently egalitarian. One should thus expect that there are countries in which democracy endures but still have huge gaps between the rich and the poor such as the USA, the UK, Germany and France. In a poor country such as Thailand, the democracy is often unstable because of highly unequal income distributions and an imbalance of military power. WTT may be one of the redistributive instruments that can be deployed in order to strive towards the goal of enhancing a more stable democracy in Thailand.

During the initial period of change in Thailand's governmental administration from a monarchy to a constitutional monarchy under a parliamentary democratic system, there were two opposing economic and political visions: the People's Party (*Khana Ratsadon*) and the Conservatives.⁵³² Conservatives—comprised of feudal classes, bureaucrats and soldiers—argued that WTT collection would promote communism. Conservatives published a white paper,⁵³³ which, in part, severely attacked WTT collection, stating that 'the WTT can be collected for more than three generations. This is like the slow seizure of private properties'.⁵³⁴ It is possible that the feudal classes

⁵²⁸ Adam Przeworski, "Self-enforcing Democracy" Department of Politics' in Barry R Weingast and Donald A Wittman (eds), *The Oxford Handbook of Political Economy* (OUP 2006) 319.

⁵²⁹ Ibid 9.

⁵³⁰ Ibid 10.

⁵³¹ Ibid 8.

⁵³² Ruthai Poolsawad, 'Estate Tax' (2001) 29(1) *Administrative Law Journal* 97, 107.

⁵³³ Prajadhipok Sakdidej, 'White Paper' 61-100

<http://www.polsci.chula.ac.th/pitch/modernthaipolitics2012/pridi76.pdf> accessed 24 June 2515.

⁵³⁴ Meeting of the Commission for Consideration of the Economic Structure B.E. 2475 (A.D. 1932), (unofficial translation by author).

viewed WTT collection as enabling state seizure of all private properties per communist precepts.

Nevertheless, Phanomyong, leader of the *Khana Ratsadon*, approached the Commission for the Consideration of the Economic Structure about government acquisition of land, labour and capital. He made the following statement:

‘My principles integrate the good parts of many concepts and have been adapted to be appropriate for the benefit of Thailand. The main thoughts come from the principles of solidarity, not communism. They include conceptual views, such as human beings being reciprocal creditors to each other. People can become poor through no fault of their own or the rich can become richer, not because of their own labour. Therefore, human beings have reciprocal moral debts to each other. They hence have to commonly ensure against harm and engage in mutual business’.⁵³⁵

Mr Pridi further explained administrative principles in relation to the government’s provision of land, labour and capital:

‘One important principle which should be taken into consideration is that the government should tenderly perform its duties by relying on cooperation between the rich and poor. The government should not hurt the rich. If the government purchases back lands, it is believed that the farmers, the owners of the lands and the mortgagees would be much pleased because the ownership of the lands or the possession of lands in security would solely lead to a deficit. The repurchase of lands differs from the communist method of seizure of properties’.⁵³⁶

Regarding the provision of capital in Chapter 1, Phanomyong, a socialist philosopher⁵³⁷ in Thailand, argued that the government should raise capital by other means, such as collecting WTT, income tax or indirect tax. Clearly, both of his concepts are significant parts of Thailand’s social structure, but the structure simultaneously has other ‘mixed’ concepts that will be examined later in this text, including Buddhist philosophy and

⁵³⁵ Ibid.

⁵³⁶ Ibid.

⁵³⁷ Heather M Campbell, *The Britannica Guide to Political and Social Movements That Changed the Modern World* (Britannica Educational Publishing 2010) 144.

humanitarianism.⁵³⁸ By contrast, a key pillar in the Communist Manifesto specified the abolition of inheritance rights.⁵³⁹

It seems that the *Khana Ratsadon* had extremely different ideas from the feudal classes. Similar to western society, people who enthusiastically support levying heavy estate taxes are regarded as wishing to destroy the capitalist system.⁵⁴⁰ The avant-garde did not regard the concept of WTT collection as a communist idea because they did not want to seize private property for the state's ownership. Conversely, they viewed WTT payment as a duty that required mutual assistance. Each person has reciprocal debts to assist others as a joint creditor and debtor. This solidarity was based more on morals than any legal enforcement.⁵⁴¹ Many principles of the *Khana Ratsadon* were consistent with socialism, but were not opposed to liberalism. Instead, solidarity rejected the boundless competition that could lead to societal trouble.⁵⁴² Therefore, WTT collection is not the transfer of private property to the state. The WTT is not communist or socialist, and it does not conflict with democratic ideals.

4.2.1.2 Encouraging the Adoption of a Social Policy for the Poor

In a democratic society, the government has a duty to determine social policy and should consider people's problems and needs in order to distribute thoroughly and justly benefits and values to the population as a whole.⁵⁴³ Thus, when creating social policy, it is necessary to consider issues like poverty, corruption, the unfair distribution of income and wealth, and unequal status.

Jens Beckert⁵⁴⁴ has introduced a principle that legitimizes the intergenerational transfer of wealth and imposition of WTT: the 'equality of opportunity principle'⁵⁴⁵ concerning

⁵³⁸ Anusorn Tamajjai, Summary of the lecture of Critics on the Economic Concepts of Mr Pridi Phanomyong and the Economic Future of Thailand and Proposals for Reform on the 81st Anniversary of the Siam Revolution B.E. 2474 (A.D. 1932) seminar held on 24th June B.E. 2556 (A.D. 2013).

⁵³⁹ Friedrich Engels and Karl Marx, *The Communist Manifesto: A Modern Edition* (Verso Books Publisher 2012) 52.

⁵⁴⁰ William G Gale and Joel B Slemrod, 'Policy Watch: Death Watch for the Estate Tax?' (2001) 15(1) *Journal of Economic Perspectives* 205, 205.

⁵⁴¹ Tamajjai (n 538).

⁵⁴² Ibid.

⁵⁴³ Poolsawad (n 532) 104.

⁵⁴⁴ Jens Beckert, 'Why Is the Estate Tax so Controversial?' (2008) 45(6) *Society* 521, 524-525 <<http://linkspringercom/article/101007%2Fs12115-008-9145-x>> accessed 24 June 2015

⁵⁴⁵ Jens Beckert distinguishes 'four different principles that legitimize the intergenerational transfer of wealth and imposition of WTT. There are four different principles used in public discourse to legitimize and contest the intergenerational transfer of wealth and the imposition of an inheritance tax: the family principle, the equality of opportunity principle, the social justice principle, and the community principle.

inheritance taxation is closely aligned with another principle, the justice principle. However, unlike the equality of opportunity principle, the justice principle concentrates on the imbalance between the successful and unsuccessful under free market conditions. From this point of view, the taxation of inheritances is justified because heirs can simply afford to pay more for the opportunities and services they receive from society. They have the capacity and obligation to enhance the life chances of those members of society who have been less successful in market competition. By taxing inheritances, society can ameliorate the unjust distribution of wealth in society. Unlike the equality of opportunity principle's concern for starting out with 'a level playing field', advocates of the justice principle are concerned with present outcomes in which unsuccessful competitors struggle in the market. Such competitors suffer from an unequal distribution of resources throughout society; therefore, revenues from the inheritance tax should be evenly redistributed among young members of society, so as to create equal starting conditions for the 'market struggle.'⁵⁴⁶ Thus, the justice principle promotes the financing of redistribution by adopting a social policy corrective of market outcomes, raising revenues by taxing inherited wealth.⁵⁴⁷

Nonetheless, WTT collection has not made much progress, encountering several problems during the policy-making steps as a result of political negotiations between conflicting sides.⁵⁴⁸ Hence, progress has depended on which group held a better position at the time. At present, the government has made decisions under pressure from various antagonistic groups. Consequently, it is difficult to imagine that WTT collection will be explicitly regulated and put into practice as a policy.⁵⁴⁹

It would appear that the Thai government lacks the political will definitively to adopt a policy of WTT collection. Almost without exception, the cabinet of any new government will proclaim a social policy of WTT collection and, most of the time, it is simply government propaganda.⁵⁵⁰ Such claims give the impression that the particular

The use of these principles in public discourse differs between countries. In Germany, which currently belongs to the inheritance-type system, the family principle and the social justice principle play a dominant role. By comparison, the equality of opportunity principle and community principle are more strongly anchored in the US', 'See n 544'.

⁵⁴⁶ Max Weber, *Economy and Society* (University of California Press 1978) 106.

⁵⁴⁷ *Ibid* 225.

⁵⁴⁸ Unknown Author, 'Is it truly fair...Thai taxation?' (2004) 10(116) *Tax & Business Law Magazine* 53, 54.

⁵⁴⁹ Thongbai Tongpao, 'Estate tax: It is not easy' (2001) 48(8) *Siamrad News Week* 40, 41.

⁵⁵⁰ Unknown Author, 'Calling for Estate Tax from the Landlord Government Cabinet' *Prachachat Business News* (Bangkok, 20 January 2002) 2.

political party in government will pay more attention to poverty issues and social inequality. In cases where the government would like to gain popularity, the WTT is used to garner favour from the poor, which comprises a larger percentage of the whole population.

The World Bank no longer classifies Thailand as a poor country⁵⁵¹ and the rural population has gained many advantages during the last three decades; however, poverty still exists, particularly in agricultural households. The increasing gap between rich and poor will continue to grow, and it will become ever more difficult to bridge.⁵⁵² WTT policy will become an important social issue consistent with the problems and needs of many poor agriculturalists in the upcountry.⁵⁵³ These people need the government to implement and specify a social policy that fairly distributes income and wealth while solving the problems of inequality between the rich and poor.⁵⁵⁴ Many poor people may not identify the WTT as a potential government approach to solve such problems. Nevertheless, it is submitted that the government has a duty to demonstrate sincerity in troubleshooting problems by regulating WTT collection as social policy.

4.2.1.3 Funding Government Functioning to Provide Public Education and Health Services the Poor

Thailand is recognized as a country with high levels of inequality in terms of access to quality education and health care.⁵⁵⁵ The Thai government attempts to mitigate such inequality through public education and health services for the poor because public education and health services have long been recognized as fundamental instruments for ensuring equality of opportunity.⁵⁵⁶ In addition, the Constitution of the Kingdom of Thailand of 2007 (CKT 2007) enshrined the right to receive free education (for at least

⁵⁵¹ Ibp USA, *Thailand Tax Guide: Strategic and Practical Information*, vol 1 (International Business Publications 2013) 230.

⁵⁵² Food and Agriculture Organization of the United Nations (FAO) Regional Office for Asia and the Pacific 'Decentralized rural development and the role of self-help organizations' A regional workshop held from 4-6 November 1998 Chiang Mai, Thailand, Food and Agriculture, RAP Publication 1999/33, 2 <<http://www.fao.org/docrep/004/ac158e/ac158e00.htm>> accessed 24 June 2015.

⁵⁵³ Peerapan Suwannarat, 'Agricultural Productivity and Poverty Reduction in Thailand' Faculty of Economics Research Paper, Thammasat University, 1-3 <http://www.bot.or.th/Thai/AboutBOT/project/Doclib_Settha_BE_2554/B_Doc_Solace2_2554.pdf> 24 June 2015.

⁵⁵⁴ Preecha Suwannatad, 'Is the Estate Tax Justified?' (1997) 14(46) *Bangkok Business* 10, 11.

⁵⁵⁵ Sirikanya Tansakun, 'Observations about Inequality in Thailand' (KEPA Seminar on Sustainable Development Goals and Inequality, Bangkok, May 2015).

⁵⁵⁶ Cecile Unternaehrer, 'Development Finance and Inequality: Good practice in Ecuador, Rwanda and Thailand' (2013) Oxfam Working Papers, 2 <<https://www.oxfam.org/sites/www.oxfam.org/files/cs-inequality-development-finance-050813-en.pdf>> accessed 24 June 2015.

twelve years)⁵⁵⁷ and the right to free health care for poor, disabled and homeless people.⁵⁵⁸ To finance such services, the Thai government requires revenue from tax collection, which mainly depends on the personal income tax (PIT), corporate income tax (CIP) and value added tax (VAT). However, WTT would specifically help to increase state resources and distribute public education and health services to the state's educational and health institutions (e.g., teachers, doctors and administrators). The state's policy regarding education and health could truly benefit the poor and/or the agriculturalists in the north and northeast of Thailand. Therefore, it is submitted that government revenue from the WTT should not be distributed to general government agencies; instead, it should be given specifically to state educational and health institutions. The services provided by these institutions directly mitigate and reduce inequality in Thailand. Meanwhile, the poor or underprivileged can see that this government revenue financing public education and health services has come from the wealthy. In essence, they will be able to realize a better standard of living through the narrowing of the social gap. Still, some continue to argue that the WTT is not useful; these arguments hold that WTT should not be collected because it will not raise a meaningful amount of revenue for government expenditures,⁵⁵⁹ and this revenue is not commensurate with the state's time and budget.⁵⁶⁰

4.2.2 Economic and Tax Policy Arguments

This subsection examines these economic and tax policy arguments through the lenses of three main issues: if the WTT constitutes double taxation, if the Thai tax system can be balanced by introducing the WTT, and if the tax can raise significant revenue to finance the government's public expenditures.

4.2.2.1 Double Economic Taxation

One argument against wealth transfer taxes is that they seem to constitute double taxation on the wealth of the deceased.⁵⁶¹ They apply to asset accumulations, which

⁵⁵⁷ CKT, s 49.

⁵⁵⁸ CKT, ss 51, 54 and 55.

⁵⁵⁹ Sarah E Waldeck, 'An appeal to charity: using philanthropy to revitalize the estate tax' (2005) 24(3) *Virginia Tax Review* 667, 731.

⁵⁶⁰ Research and Development Office, 'Death tax: The Appropriate Form of Tax Collection' (2001) 10 (3) *The Interest Journal Magazine* 80, 82.

⁵⁶¹ Karen C Burke and Grayson M P McCouch, 'Death Without Taxes?' (2001) 20(3) *Virginia Tax Review* 499, 526-527 <<http://scholarship.law.ufl.edu/facultypub/556>> accessed 24 June 2015.

already have been subject to capital gain tax (CGT) and/or income tax.⁵⁶² Opponents claim that ‘it is unfair for someone who has already paid tax on an income to then have to pay a second tax on assets that have been saved out of the already taxed income’.⁵⁶³ The contrary perspective observes that ‘large estates consist to a significant degree of “unrealized” capital gains that have never been taxed; the estate tax is the only means of taxing this income. Much of the money that wealthy heirs inherit would never face any taxation were it not for the estate tax’.⁵⁶⁴ UK proponents of the inheritance tax argue that the inheritance tax does not necessarily involve double taxation.⁵⁶⁵ Murphy and Nagle, in the *Myth of Ownership*, argue that:

‘Taxes are not like punishments, which may not be imposed twice for the same crime. Nor is an inheritance tax like a second imposition of the very same income or sales tax on the same earnings or transaction. Multiple distinct taxes often tax people’s assets ‘twice,’ as when a sales tax is imposed on the expenditure of someone’s after-tax income, or a property tax is collected on an asset that was bought with income subject to tax. Any issue of fairness in such cases would have to be about the cumulative effect of multiple taxes, not about double taxation per se.’⁵⁶⁶

Interestingly, US proponents of the FET often note that the FET serves as a backstop for the income tax⁵⁶⁷ because a taxpayer who initially escapes income tax on his or her earned income will later be taxed by the FET at death. Likewise, ‘unrealized capital gains that are bequeathed to inheritors receive basis step-up and thus never face income tax’.⁵⁶⁸ Thus, the FET plays a particularly significant role as a backstop for tax progressivity or large estates.

⁵⁶² Raj Kiani and others, ‘The Economic Consequences of Repealing the Estate Tax Law’ (2003) 1(1) *Journal of Business and Economics Research* 1, 4

<<http://www.cluteinstitute.com/ojs/index.php/JBER/article/view/2955>> accessed 24 June 2015.

⁵⁶³ Stuart White, ‘What (if Anything) is Wrong with Inheritance Tax?’ (2008) 79(2) *The Political Quarterly* 162, 163-164.

⁵⁶⁴ Chye-Ching Huang and Nathaniel Frentz, ‘Myths and Realities About the Estate Tax’ (2013) Centre on Budget and Policy Priorities (Revised August, 29) <<http://www.cbpp.org/cms/?fa=view&id=2655>> accessed 24 June 2015.

⁵⁶⁵ White (n 563) 165.

⁵⁶⁶ Liam Murphy and Thoms Nagle, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002) 143.

⁵⁶⁷ Victor Fleischer, ‘Taxing Founders’ Stock’ (2011) 59 *UCLA Law Review* 60, 107.

⁵⁶⁸ For example, in 1998 more than half of all estates with assets over \$10 million had over half of their wealth in the form of unrealized capital gains. For smaller estates, this proportion was significantly smaller. See William G Gale and Joel B Slemrod, ‘A Matter of Life and Death: Reassessing the Estate

For Thailand, arguments have also arisen that the WTT essentially serves as double taxation because it occurs on the same income or source more than once.⁵⁶⁹ Opponents often claim that property devolved on the heir already has been subject to many other forms of Thai taxes, such as the PIT, BLT and DLT.⁵⁷⁰ The WTT has to be imposed only once on the same property of the deceased. Supporters of the WTT argue that the PIT, BLT and DLT are collected from the property when the deceased is living, while the WTT is imposed on the property transfer upon death.⁵⁷¹

4.2.2.2 Counterbalance to the Thai Tax System

A system of taxation is an economic instrument capable of producing efficient distribution of income and wealth. It can also bring about a quicker outcome than public expenditure.⁵⁷² The main revenue sources for the Thai government are significantly dependent on both direct taxes (e.g., PIT, CIT, BLT and DLT) and indirect taxes, such as VAT. VAT contributes the largest part of the total general revenue collected, followed by the PIT and CIT.⁵⁷³ Together, they made up 90.51% of the total government revenue collected during fiscal year 2014.⁵⁷⁴ However, the absence of balance and equality in the taxation system is a major problem for Thailand. The Thai tax system is recognized for its imbalance and inequality in the following ways. First, the PIT (and to a lesser extent, the CIT) requires economically disadvantaged taxpayers to bear a larger fraction of the tax burden⁵⁷⁵ than high income earners. In practice, although the PIT is progressive (and the CIP is proportional),⁵⁷⁶ it has not been fully collected by the tax authority. Only a small percentage of economically advantaged taxpayers pay a high tax rate due to rampant tax evasion.⁵⁷⁷ On the other hand, although indirect taxes (e.g., VAT) are also proportional,⁵⁷⁸ the VAT is practically regressive⁵⁷⁹

and Gift Tax' (Rethinking the Estate and Gift Tax Conference, Brookings, 4 August 2000) 7-8 <<http://www.brookings.edu/Views/Articles/Gale/20000814pdf>> accessed 24 June 2015.

⁵⁶⁹ Somkit Lertpaithoon, 'Estate and Inheritance Tax' (2001) 31(2) *Law Journal* 166, 174.

⁵⁷⁰ Somchai Ruchuphan, 'Introduction to the contracts to avoid the double taxation' (1979) 26 *Revenue Journal* 123, 128.

⁵⁷¹ Ibid.

⁵⁷² Krikkiat Pipatseritham, *Public Finance in relation to the provision and distribution* (6th edn, Thammasat University Press 1998) 102.

⁵⁷³ The Revenue Department, 'Annual Report 2014' (n 398) 95.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ocampo (n 9) 22.

⁵⁷⁶ RC, Schedule (1).

⁵⁷⁷ Supreeya Cholaweewong, 'Impacts of Personal Income Tax Collection of Thailand' (Master's thesis, Thammasat University Press 1981) 115.

⁵⁷⁸ RC, Schedule (2).

⁵⁷⁹ Hyun Hwa Son, 'Is Thailand's Fiscal System Pro-Poor? Looking from Income and Expenditure Components' (The second inequality and pro-poor growth spring conference on the theme of 'how important is horizontal inequality?' World Bank Washington DC, 9th-10th June 2003) 13.

since it represents a proportionately higher financial burden on low-income consumers (taxpayers), who are the majority poor in Thailand, than on wealthier consumers. The low-income consumers pay a larger fraction of their income to the government compared to high-income consumers (taxpayers)⁵⁸⁰ because their ratio of consumption versus income is higher.⁵⁸¹ In short, the majority poor bear a greater tax burden than the minority rich, allowing well-off sections of society to be subsidized through the income of the poor via the VAT. In essence, this system makes the poor poorer and the rich richer, increasing inequity in Thai society.

Second, the Thai taxation system involves not only inequality, but also imbalances in the tax bases. While large government budgets create greater reliance on taxes levied on the basis of income (e.g., the PIT and CIT) and consumption (e.g., the VAT), Thai tax policy seems to be too lightly focused on wealth and/or wealth transfer compared to the tax bases of income and consumption. Only two taxes within the categories of wealth and wealth transfer tax bases are levied, including the BLT and LDT. However, such taxes could lead to a better distribution of resources and a reduction in the disparity between the rich and poor.⁵⁸² The DLT and BLT, however, are often recognised as the most obsolete taxes in the Thai tax system. These taxes cannot be fully collected due to the many obvious shortcomings, as discussed in Chapter 3. Moreover, the fact that the government can only collect a small amount of property tax reveals that Thailand still has a low level of development. Most people have little consciousness of tax payment.⁵⁸³ As a result, property tax has never raised a meaningful amount of revenue.⁵⁸⁴

As earlier mentioned, not only is the PIT progressive tax rate ineffectual,⁵⁸⁵ but Thailand's tax collection, similar to most low-and middle-income countries over recent decades,⁵⁸⁶ relies heavily on indirect taxes, which are not friendly to the economically

⁵⁸⁰ Ocampo (n 9).

⁵⁸¹ Thailand Development Research Institute, 'Allocation of Fiscal and Tax Burdens and Benefits of Thailand During 1986-1996' (1999) Thailand Development Research Institute (TDRI).

⁵⁸² Arunee Thanosawan, 'Structural Problems of Income Tax' (Master's thesis, Chulalongkhon University 2530) 4.

⁵⁸³ Pairoj Rojwanit, *Thai Tax Structure* (Dhansutha Press 1987) 9.

⁵⁸⁴ Somchai Ruchuphan, 'Problems and suggestions for the Reform of Thai tax system' (1981) 28 *Revenue Journal* 62, 66.

⁵⁸⁵ Thanasai Fakfaipon, 'Current Problems of Personal Income Tax Collection in Thailand' (Master's thesis, National Institute of Development Administration (NIDA) 1994) 76.

⁵⁸⁶ Kyle McNabb and Philippe LeMay-Boucher, 'Tax Structures, Economic Growth and Development' (2014) The International Centre for Tax and Development (ICTD) Working Paper 22 (September) 18 <<http://www.ictd.ac/en/publications/tax-structures-economic-growth-and-development>> 24 June 2015.

disadvantaged.⁵⁸⁷ These circumstances demonstrate the necessity of making the tax system more equitable in order to counterbalance this system.

Therefore, it is crucial to discuss how to achieve such goals. The answer is simple: Thailand needs to restructure the Thai tax system itself. Tax policymakers in Thailand should continue to seek to balance the tax system by introducing the WTT, which is not only a direct tax, but one also grounded on the wealth transfer tax base. Introducing the WTT into the Thai taxation system could offer a direct solution for restructuring the system. Direct taxes, such as the WTT, are more efficient measures for improving income distribution, while indirect taxes tend to increase inequality.⁵⁸⁸ The WTT can be used as a supplementary tax measure to effectively mitigate inequality in Thai society. It would also be useful in creating a more equitable taxation system rather than increasing the number of PIT taxpayers or reforming the VAT. Ultimately, it is a vital component in rebalancing the Thai taxation system.⁵⁸⁹

4.2.2.3 Raising Revenue for the Thai Government

Justifying the tax imposition requires taxes to be capable of generating sufficient revenue.⁵⁹⁰ Taxes have to raise significant revenue to pay for the government's public expenditures. The federal estate and gift taxes (FET/FGT) does not play a significant role in the US federal tax structure⁵⁹¹ because it has never raised a meaningful amount of revenue for federal public expenditures;⁵⁹² in the UK, the IHT is also not an important source of revenue. Critics assert that UK taxes on wealth transfers, whether IHT or CGT, have failed to raise any significant revenue;⁵⁹³ meanwhile, the US estate tax has also been a negligible source of revenue from 1916 to 2010.⁵⁹⁴ For Thailand, the

⁵⁸⁷ Thailand Development Research Institute, 'Income Distribution and Poverty: Problems and Remedial Measures' (2003) Thailand Development Research Institute (TDRI).

⁵⁸⁸ Jaejoon Woo and others, 'Distributional Consequences of Fiscal Consolidation and the Role of Fiscal Policy: What Do the Data Say?' (2013) International Monetary Fund IMF Working Paper (September) 7 <<http://www.imf.org/external/pubs/ft/wp/2013/wp13195.pdf>> accessed 24 June 2015.

⁵⁸⁹ Phongpaichit (n 12) 56.

⁵⁹⁰ Maguire (n 499) 13.

⁵⁹¹ Robert H Haveman, *The Economics of the Public Sector: Introduction to Economic* (John Wiley & Son Inc 1970) 141.

⁵⁹² Joel C Dobris, 'A Brief for the Abolition of all Transfer Taxes' (1984) 35(4) *Syracuse Law Review* 1215, 1217.

⁵⁹³ Boadway and others (n 471) 746.

⁵⁹⁴ Republican Staff, 'Cost and Consequences of the Federal Estate Tax' (2012) Joint Economic Committee, 20 <http://www.jec.senate.gov/public/_cache/files/bc9424c1-8897-4dbd-b14c-a17c9c5380a3/costs-and-consequences-of-the-federal-estate-tax-july-25-2012.pdf> accessed 24 June 2015.

EIT generated very little revenue for the government.⁵⁹⁵ Thailand has not levied an estate tax or an inheritance tax in recent times.

Inheritance tax has been used successfully since the end of WWII as a significant tool for promoting strong economic growth and an equal society in Japan.⁵⁹⁶ The opposing view has argued that the FET is also a significant source of revenue in financing US federal programmes ranging from education and medical research to law enforcement and environmental protection, despite its distortions in economic choice as it would not worsen the federal deficit.⁵⁹⁷ Studies have found that WTT does entail effects to the overall economic growth owing to the fact that WTT are not dependent on macroeconomic capital accumulation.⁵⁹⁸

The WTT has never been a significant source of revenue partly because there is widespread tax avoidance⁵⁹⁹ and partly because estates are only a small factor determining wealth distribution. Therefore, the use of the WTT as a tool for wealth redistribution is unlikely to have a significant effect.⁶⁰⁰ It is not easy to measure wealth distribution because people do not routinely report all of their wealth; however, it must be reported, at least for WTT purposes.⁶⁰¹ Some WTT opponents argue that repealing or weakening FET would have little effect on federal revenues.⁶⁰² Furthermore, some opponents have regarded the WTT as a crude instrument for raising revenue and achieving redistribution because it is easy for the wealthiest families to avoid the tax.⁶⁰³

4.2.3 Social and Ethical Arguments

Critics further assert that the WTT system is immoral and unfair, eroding Thai agrarian society while corroding customs of patrilineal inheritance in Thai society along with the hierarchical structure of the Thai family. In contrast, proponents hold that the WTT

⁵⁹⁵ Statistical Forecasting Bureau of Thailand 1935-1944, Book XVII, Book XX, Book XXI, See. Appendix I.

⁵⁹⁶ Komamiya Fumihiko, 'Japanese Inheritance Tax' (2005) 3(60) *New Law News Journal* 36, 39.

⁵⁹⁷ Huang and Frenz (n 564).

⁵⁹⁸ Tosapon Agadmeck, 'Bequest and Optimal Taxation in Overlapping-Generations General Equilibrium Model' (Master's thesis, Thammasat University 2010) 35.

⁵⁹⁹ Chamberlain and others (n 90) 2.

⁶⁰⁰ Jagadeesh Gokhale and Pamela Villarreal, 'Wealth, Inheritance and the Estate Tax' (2006) NCPA Policy Report No. 289, 14 <<http://www.ncpa.org/pdfs/st289.pdf>> accessed 24 June 2015.

⁶⁰¹ Adrian Dragulecu and Victor M Yakovenko, 'Exponential and Power-Law Probability Distributions of Wealth and Income in the United Kingdom and the United States' (2001) 299(1-2) *Physica A: Statistical Mechanics and its Applications*, 2 <<http://arxiv.org/abs/cond-mat/0103544>> accessed 24 June 2015.

⁶⁰² Gonzalez de Aguilar and Cabrillo (n 66) 6.

⁶⁰³ Cliff Pratten, 'Gordon Brown Counts Dead Children: The True Impact of Inheritance Tax' (2006) 26(3) *IEA Economic Affairs* 74, 75.

strengthens Buddhist principles in Thailand's society. This section provides an in-depth examination of these social and ethical arguments.

4.2.3.1 Immoral and Unfair Taxes

Although the WTT cannot be justified as an instrument for raising revenue, it is often justified on the grounds of fairness and morality.⁶⁰⁴ In order to justify socially the WTT on such a basis, it is useful to consider one of Beckert's sociological principles, the justice principle, which focuses on the imbalance between the successful and unsuccessful under free market conditions. From this point of view, the taxation of wealth transfer is justified because heirs can afford to pay more for the opportunities and services they receive from society. They have the capacity and obligation to enhance the life chances of those members of society who have been less successful in market competition. By taxing wealth transfers, society can ameliorate the unjust distribution of wealth in society. In a sociological sense, this principle justifies the WTT on the grounds of fairness and morality.⁶⁰⁵

With respect to virtue arguments, US opponents of FET sometimes call the tax structure a 'death tax', claiming that the taxes are unfair and immoral because death is 'an illogical time to impose taxes at best and a morally repugnant one at worst. Compounding the grief of a family with a tax, of all things, seems a bit heartless, and the mention of the tax evokes queasiness'.⁶⁰⁶

For UK opponents using the equality objection, White argues that 'IHT is an unfair tax because it leads to unequal tax burdens on people with equal amounts of wealth but who choose to use their wealth in different ways'.⁶⁰⁷ For instance, some parents may selfishly spend all of their wealth during their lifetimes and be totally free of the IHT; meanwhile, parents who endeavour virtuously to save their wealth and bequeath it to successive generations may be liable to the IHT.⁶⁰⁸ From the virtue perspective, White argues that IHT is unfair because the major role of the tax is to work as the opposite of "sin" taxes such as alcohol and tobacco taxes.⁶⁰⁹ Such taxes are designed to control "behaviour-to eliminate or at least restrict certain vices" rather than generating the

⁶⁰⁴ Boadway and others (n 471) 746.

⁶⁰⁵ Beckert (n 544) 525.

⁶⁰⁶ Gale and Slemrod, 'A Matter of Life and Death: Reassessing the Estate and Gift Tax' (n 568) 3.

⁶⁰⁷ White (n 563) 165.

⁶⁰⁸ Boadway and others (n 471) 751.

⁶⁰⁹ Edward J McCaffery, 'The Uneasy Case for Wealth Transfer Taxation' (1994) 104(2) *The Yale Law Journal* 283, 301.

government revenue.⁶¹⁰ By contrast, the FET is imposed on altruism, on thrift and on work and saving without consumption. Thus, it seems to be a virtue tax, a so-called “anti-sin tax.”⁶¹¹

By comparison, US proponents of such a tax argue that a highly progressive structure will lead to fairness⁶¹² because wealthy taxpayers will bear the tax burden rather than poor taxpayers. The estate tax structure is primarily defended by progressivity, and it may be argued that the concentration of wealth that has increased significantly ‘over the last two decades makes the case for progressivity even more compelling.’⁶¹³ Likewise, UK proponents of IHT argue that its structure must be progressive⁶¹⁴ because a progressive tax structure allows those who are poorer to escape the burden of excessive tax, which in turn levies IHT at a higher rate on those who are wealthier.⁶¹⁵ The IHT can also be justified on the basis of fairness. In fact, most people will not be much affected by WTT because only a small percentage of estates fall within IHT or FET thresholds. The current US estate tax threshold is at 2 000 000 USD; only 1 per cent of estates are liable to the tax. In the UK, only 6 per cent of estates falling within the IHT threshold of 300 000 GBP pay the tax.⁶¹⁶

Although opinions differ, the introduction of the WTT in Thailand can be defended on the grounds of fairness. The minority rich, who have been successful under the free market, should pay more taxes, including the WTT. This concept of fairness is associated with the benefit principle: the rich require more financial protection than the poor do. The WTT will not affect the majority poor in Thailand; only the minority rich would be taxed by its highly progressive structure. A heavier tax burden might appear unfair, but the tax burden the rich bear is proportional to their wealth, which is

⁶¹⁰ Edward J McCaffery, ‘The Political Liberal Case Against the Estate Tax’ (1994) 23(4) *Philosophy & Public Affairs* 281, 296.

⁶¹¹ *Ibid.*

⁶¹² Chamberlain and others (n 90) 1, 8.

⁶¹³ William G Gale and Joel B Slemrod, ‘Life and Death Questions About the Estate and Gift Tax’ (2000) 53(4)-1 *National Tax Journal* 889, 898.

⁶¹⁴ According to a 2008 report by the Organization for Economic Cooperation and Development (OECD), the US has one of the top two most progressive tax structures in the world today. In order to remain consistent with the stance of a progressive tax structure, it follows that an inheritance tax should be in place.

⁶¹⁵ Seven Pillars Institute (SPI) for Global Finance and Ethics ‘The Ethics of Taxation Trilogy: Part I – An Ethical Analysis of Inheritance Tax’ <<http://sevenpillarsinstitute.org/case-studies/taxation-trilogy/an-ethical-analysis-of-inheritance-tax>> accessed 24 June 2015.

⁶¹⁶ Martin O’Neill, ‘Commentary: “Death and Taxes” Social justice and the politics of inheritance tax’ (2007) 15(4) *Renewal* 62, 63. <[http://www-users.york.ac.uk/~mpon500/Death_and_Taxes\(Renewal,15.4\(2007\)\).pdf](http://www-users.york.ac.uk/~mpon500/Death_and_Taxes(Renewal,15.4(2007)).pdf)> accessed 24 June 2015.

compatible with the progressivity principle. Therefore, inequality is not created between the rich and the poor because the WTT equalises taxation in both groups. In addition, White's argument does not sufficiently prove that the WTT is an unfair tax because it cannot produce unequal tax burdens.⁶¹⁷ Even if parents are not eligible for the IHT because they spend all of their wealth during their lifetimes, they are still responsible for other taxes, such as consumption or income taxes.

4.2.3.2 Reducing the Unfairness of Disparate Accumulations of Wealth

The social aim of the WTT is not to make the poor richer, but to make the rich less powerful.⁶¹⁸ Wealth inequalities can lead to imbalances in political and economic power. The question may legitimately be raised of whether or not the WTT will affect the excessive concentration of wealth. While the US estate tax was previously regarded as a counterweight to an undue concentration of wealth,⁶¹⁹ the UK inheritance tax is viewed as an important mechanism to counterbalance wealth inequality in Britain.⁶²⁰ Some opponents argue that such estate taxes have not reached their goals, as they fail to affect the concentration of wealth. In fact, in a time of high estate taxes, the concentration of wealth is no lower than it was when estate taxes were low.⁶²¹ Other opponents of abolishing the FET argue that 'estate tax does more to keep the poor down than to bring down the wealthy. It does not promote equality but does impose a heavy cost on the economy and society'.⁶²² A famous American economist, Stiglitz, argues that 'because of capital accumulation effects, the estate tax may not achieve the objective to which it is presumably directed, that is, equalizing the distribution of income; if the government takes actions to offset these accumulation effects, the tax will lead to an increase in equality of income and wealth'.⁶²³ He also concludes that the FET may not lead to a reduction in inequality; rather, it may rise the degree of inequality.⁶²⁴

⁶¹⁷ White (n 563)165.

⁶¹⁸ Bird (n 467) 135.

⁶¹⁹ Gale and Slemrod, 'A Matter of Life and Death: Reassessing the Estate and Gift Tax' (n 568) 8.

⁶²⁰ Dominic Maxwell, 'A just tax on the dead' *Newstatesman* (London, 23 August 2004) 11.

⁶²¹ William G Gale and Joel B Slemrod, 'Rethinking the Estate and Gift Tax: Overview' (2001) Brookings Institution Research Paper, 8 <<http://www.brookings.edu/views/papers/gale/20010126.pdf>> accessed 24 June 2015.

⁶²² Bruce Bartlett, 'Death, Wealth, and Taxes' (2007) 141 *The Public Interest* 55, 67.

⁶²³ Joseph E Stiglitz, 'Note on Estate Taxes, Redistribution, and the Concept of Balanced Growth Path Incidence' (1978) 86(2) *Journal of Political Economy* 137.

⁶²⁴ *Ibid* 149.

He finally argues that wealth accumulation may lead to an accumulation of political power, thus affecting the nature of political processes.⁶²⁵

4.2.3.3 Eroding Thai Agrarian Society

Unlike the industrial societies of the UK and the US, Thai society remains somewhat ‘rice-growing agrarian;’⁶²⁶ the Thai government has not gone so far as to change the status of their society from agrarian to industrial.⁶²⁷ Thai agriculture is an engrained part of Thai culture and cannot be destroyed. Therefore, the primary argument against the WTT is that, if the tax is collected, many people will be affected, particularly those who possess real estates. At the time of their death, these properties will be devolved to their heir as the estate, which will then be taxable. At present, most Thais are poor and have debts, so such a tax could greatly add to their economic burdens.⁶²⁸ Furthermore, many Thai people are agriculturalists –rice farmers like their ancestors. When the parents pass away, the family farms will be devolved to the heirs; the heirs may be forced to sell them because they may not have not enough money to meet the WTT liability on the parents’ estates. Hence, the impact of WTT would not just be on the rich. Therefore, it would be detrimental for Thailand’s government to adopt the WTT.⁶²⁹

4.2.3.4 Corroding Customs of Patrilineal Inheritance in Thai Society

In his political and economic essays, Professor Alexander Tabarrok concludes that:

‘So long as men are mortal, wealth must be transferred between the generations, and so long as parents care for their children, the dominant means of doing so will be through family inheritance. The transference of wealth through the family benefits bequestor and heir, strengthens family ties, and increases long-term savings. When the state intervenes in this

⁶²⁵ Ibid.

⁶²⁶ Culver S Ladd, *Thailand Transformed: 1950-2012: Is Thailand the Test Case?* (Author House 2012) 134.

⁶²⁷ John Page, ‘The East Asian Miracle: Four Lessons for Development Policy’ in Stanley Fischer and Julio J. Rotemberg (eds), *The National Bureau of Economic Research (NBER) Macroeconomics Annual 1994*, vol 9 (Massachusetts Institute of Technology Press 1994) 219.

⁶²⁸ Krikchai Charoenratphak, ‘The estate tax is the grievance of Thais through the country’ (2001) 7(69) *Commercial World* 26, 26.

⁶²⁹ Ibid 27.

process, it increases its coffers at the expense of the smooth operation of family, society, and economy'.⁶³⁰

This statement concerns categories of rights, such as the moral obligation of the bequestor to make the wealth transfer at death to the next generation; the moral right of heirs (or surviving family members) to have the wealth transferred to them; and the right of the state to intervene in the process of wealth transfer. There are two normative questions as to whether parents should have the right to leave their estate to their heirs without suffering a WTT or whether the state should have the right to intervene in the process of wealth transfers. To a large extent, the answer to this question is subjective, relating closely to the theory of wealth transfer. There are classic wealth transfer theories that must be considered here. Firstly, in 'Two Treatises of Government', John Locke states that 'a parent must be allowed to bequeath his property to his children'. He also observed that 'God Planted in Men a strong desire also of propagating their Kind, and continuing themselves in their Parents, and a Right to Inherit their Possessions'.⁶³¹ Thomas Jefferson argued against John Locke's theory, stating that 'the earth belongs in usufruct to the living; the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when he himself ceases to be, and reverts to society'.⁶³² He thus supported the notion that the state has the right to tax the estates of wealthy descendants before they are devolved to family heirs.⁶³³

Apart from classic wealth transfer theories, however, there are fundamental sociological principles in modern (western) society that may be applied to answer this question. Beckert has postulated four value principles that 'socially legitimize the intergenerational transfer of wealth'.⁶³⁴ The most relevant to this problematic issue would be the family principle. This principle holds that 'the property of the testator is not really individual property, but property of the family as a legal entity that outlives the testator. This gives rise to a self-evident right of the family to have the wealth transferred to them'.⁶³⁵ In other words, proponents of the family principle hold that the

⁶³⁰ Alex Tabarrok, 'Death Taxes: Theory, History, and Ethics' (2005) Ludwig von Mises Institute Essays in Political Economy, 15 <<https://mises.org/library/death-taxes-theory-history-and-ethics>> accessed 24 June 2015.

⁶³¹ Peter J Kosydar, 'Death and Taxes or Death without Taxes?' (2011) 37(2) art 4 *Journal of Legislation* 224, 227 <<http://scholarship.law.nd.edu/jleg/vol37/iss2/4>> accessed 24 June 2015.

⁶³² Letter from Thomas Jefferson to James Madison (September 6, 1789) <<http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html>> accessed 24 June 2015.

⁶³³ Ibid.

⁶³⁴ Beckert (n 544) 524.

⁶³⁵ Ibid.

property being passed onto heirs only belongs to the testator in a broad sense, for such property belongs not to the testator, but to the family of the testator as a collective legal entity.⁶³⁶ This view provides a justification for those who argue that it is self-evident that the testator's wealth should be transferred to his or her surviving family members. It is said that inheritance is a kind of legal fiction—it is not a matter of individually-owned property being transferred, but a redistribution of the shares in the property owned by all members of the same family.⁶³⁷ Hegel supported this principle, noting that 'the natural dissolution of the family through the death of the parents, particularly of the husband, results in *inheritance* of the family's resources. Inheritance is essentially taking possession by the individual as his own property of what in themselves are common resources'.⁶³⁸

Appeals to the family principle have been used as justification for rejecting the WTT, asserting that inheritance tax is particularly illegitimate, an inimical intervention in the unity of the family that undermines solidarity. Moreover, on a personal level, some may feel that their personal identities are intertwined in family property; personal and familial continuity is ensured when family property is transferred to a new generation of family members. Such inheritance is a potent symbol of descent and continuity, both of which have been paramount ideals in more traditional societies, forming an essential component of what Maurice Halbwachs called the 'collective memory of the family'.⁶³⁹ However, in more liberal milieus, there are inherent tensions between the family, state, and individual; in such societies, arguments for the estate tax are much more acceptable.⁶⁴⁰

Domestically, Thais also have a tradition of saving properties for their children. The WTT would thus run contrary to Thai custom⁶⁴¹ making Thai politicians reluctant to intervene in this area. In addition, most members of the government are wealthy and

⁶³⁶ Ibid.

⁶³⁷ Ibid.

⁶³⁸ GWF Hegel, *Elements of the Philosophy of Right* (Allen W Wood (ed), Cambridge University Press 1991) 214.

⁶³⁹ Maurice Halbwachs, *On Collective Memory* (Lewis A Coser (ed), University of Chicago Press 1992) 54.

⁶⁴⁰ Beckert (n 544) 524.

⁶⁴¹ Suwan Walaisathien, 'Six Ways to Effectively Managed our Estate' (2003) 22(586) *Revenue Journal* 65, 67.

significantly influential in politics. They severely objected to the EIT proposal because it would create a burden for their own children and grandchildren.⁶⁴²

The aforementioned argument is not recent, as it has been discussed for some time. For instance, a key statement was made during the comments portion of a House of Representatives session voting on the Bill Abolishing the EITA 1933 (1943) on 29th October B.E. 2486 (A.D. 1943). A member of the House, in support of the abolition of the EIT, had this to say:

‘Thailand has the custom of patrilineal inheritance, which supports Thais with the ability to save their properties little by little for their children and grandchildren. The EIT destroys family properties. After the enactment of the EIT, it appeared that *de cujus* having many properties tried to avoid taxes that could not be fully collected’.⁶⁴³

However, a member of the House of Representatives who did not support the abolition of the EIT made this argument:

‘This Act does not affect the custom of patrilineal inheritance, which promotes Thai people to have the ability to save properties little by little for their children and grandchildren because for any person obtaining properties for their children and grandchildren, they will be much praised at the time of their death. If it is approved to abolish this Act because of the avoidance of tax payment by some persons, such an abolition would allow some persons to avoid taxes’.⁶⁴⁴

In summary, the custom of patrilineal inheritance is very important in Thai society. Introducing the WTT would not seriously distort the tradition of keeping properties for children because Thai families will maintain a strongly hierarchical structure with family members from different generations living under the same roof. However, it seems arguable that the WTT would introduce a significant financial burden on

⁶⁴² Somchai Preechasilpakul, ‘Taxes for Justice’ (2009) February *National Fiscal Journal* 67, 71.

⁶⁴³ Minutes of the Sitting of the House of Representatives No. 7/2486 (Extraordinary), Session 2, Set 3, Saturday 9th December B.E. 2486 (A.D. 1943) (unofficial translation by author).

⁶⁴⁴ Ibid 230-243.

families. The elderly certainly have authority within the Thai family. By comparison, western societies have seen a decline in the traditional family for decades.⁶⁴⁵

4.2.3.5 Strengthening Buddhist Principles in Thailand's Buddhist Society

One ethical justification for taxing wealth transfer is that people who benefit from social institutions, particularly those who are achieving much due to the use of such institutions, should pay the WTT⁶⁴⁶ or make a charitable contribution in return. The question may arise as to whether or not the WTT would affect lifetime charitable contributions. Scholars have presented a number of arguments for and against taxing wealth transfer in terms of the non-profit sector. Proponents argue that the WTT (e.g., estate taxation) creates a strong incentive⁶⁴⁷ for well-off individuals to make lifetime gifts and charitable contribution while significantly impacting behaviour.⁶⁴⁸ The tax actually increases the number of lifetime gifts and bequests to recipients in the non-profit sector.⁶⁴⁹ Therefore, taxing wealth transfers can affect lifetime charitable contributions⁶⁵⁰ and the level of charitable contributions to the non-profit sector and charities. Organisations that assist the poor would be negatively impacted by a WTT repeal.⁶⁵¹ Opponents of the WTT note that the charitable tax deduction only slightly affects charitable funds, and the absence of the WTT allows the rich to make more charitable contributions.⁶⁵²

In order to legitimize socially the introduction of the WTT in Thailand, it is crucial to take into account relevant sociological principles. Jens Beckert's fourth principle⁶⁵³ to be examined in this argument is the 'community principle'. Somewhat paradoxically, advocates of the community principle scorn both the family and the state because of their inability to redistribute wealth in a just fashion. This principle is intimately interrelated with religiously-grounded beliefs that property owners have communal

⁶⁴⁵ Gonzalez de Aguilar and Cabrillo (n 66) 8-9.

⁶⁴⁶ Curtis C Verschoor, 'Is Repealing the Estate Tax Unethical?' (2005) 86(12) *Strategic Finance* 19, 19.

⁶⁴⁷ Jon M Bakija, William G Gale and Joel B. Slemrod, 'Charitable bequests and taxes on inheritances and estates: Aggregate evidence from across States and Time,' (2003) 93(2) *The American Economic Review* 366, 369-370.

⁶⁴⁸ B Douglas Bernheim, 'Does the Estate Tax Raise Revenue?' in Lawrence H. Summers (ed), *Tax Policy and the Economy*, vol 1 (Massachusetts Institute of Technology Press 1987) 124.

⁶⁴⁹ David Joulfaian, 'The Federal Estate and Gift Tax: Description, Profile of Taxpayers, and Economic Consequences' (1998) U.S. Department of the Treasury, OTA Paper 80, 31-32
<<http://ssrn.com/abstract=1579829>> accessed 24 June 2015.

⁶⁵⁰ Joulfaian, 'The Federal Estate Tax: History, Law, and Economics, Office of Tax Analysis' (n 511) 7-5.

⁶⁵¹ Verschoor (n 646) 20.

⁶⁵² Gale and Slemrod, 'A Matter of Life and Death: Reassessing the Estate and Gift Tax' (n 568) 8.

⁶⁵³ Beckert (n 544) 525.

obligations and duties. A testator feels obliged to ensure that his or her wealth will be put to good use for the commonwealth after death.⁶⁵⁴ Often this obligation is fulfilled by setting up charitable foundations to which the wealth is transferred upon the testator's death.⁶⁵⁵ Children are effectively disinherited because they might waste unearned wealth, or use the money exclusively for dubious personal ends.

Such testators commonly leave some wealth to descendants so that they can use it to maintain themselves at a level deemed appropriate by the testator.⁶⁵⁶ In supporting this principle, the industrialist Andrew Carnegie⁶⁵⁷ argued that whatever wealth had not already been transferred to foundations prior to the death of the donor should be taxed heavily through the application of the WTT, especially the inheritance tax. According to Carnegie, "[T]he man who dies thus rich dies disgraced" because such a testator eschewed his moral obligation to improve society.⁶⁵⁸ Max Weber believed that economic behaviour is affected by religious beliefs. He argued that the greater relative participation of Protestants in certain economic functions, particularly the ownership of capital, largely depends on the possession of inherited wealth.⁶⁵⁹ This statement naturally leads to the question of whether or not Buddhist principles support the introduction of the WTT in Thailand. Buddhism remains the state religion of Thailand, and it has been a part of Thai society for more than 700 years, since the Sukothai era. Most aspects of Thai life relate to Buddhism and its principles. The Thai population stood at more than 66.2 million in 2013,⁶⁶⁰ and roughly 95 per cent⁶⁶¹ of Thais are Buddhist, adopting Buddhist practices as guidelines for living. Religion is an integral part of Thai life and traditions as well as a unique characteristic of the Thai nation.⁶⁶²

The morality and teachings of Buddhism prescribe that one's demeanour comply with religious principles; hence, the religion has been embedded into the lifestyle of virtually every Thai person. Religious beliefs are crucial to the conduct of Thai life at all societal

⁶⁵⁴ Ibid.

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid.

⁶⁵⁷ David Nasaw, *Andrew Carnegie* (Penguin Groups, 2006) 350.

⁶⁵⁸ Ibid.

⁶⁵⁹ Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Routledge 2005) 3-4.

⁶⁶⁰ Population Reference Bureau, '2013 world population data sheet' <http://www.prb.org/pdf13/2013-population-data-sheet_eng.pdf> accessed 24 June 2015.

⁶⁶¹ Buddhist Studies, Largest Buddhist Population: Top 10 Countries with Highest Population of Buddhists < <http://www.buddhanet.net/e-learning/history/bstatt10.htm>.> accessed 24 June 2015.

⁶⁶² P A Payutto, 'Thai Buddhism in the Buddhist World: A Survey of the Buddhist Situation Against a Historical Background' (2012) 14 <http://www.watnyanaves.net/uploads/File/books/pdf/thai_buddhism_in_the_buddhist_world.pdf> accessed 24 June 2015.

levels, a basic characteristic of the culture. Three main parts of Thai culture originated in Buddhism—language, arts and culture.⁶⁶³ Moral aspects of Thai culture are particularly founded on Buddhism. As a result, Thai people are known for their helpfulness, generosity, kind-heartedness and humility, traits that have become a part of the national Thai identity.⁶⁶⁴ The core of Buddhist teachings (*dharma*) lives in the hearts of Thai people, whether they realize it or not.⁶⁶⁵ However, the tenet of Buddha's teachings (*dharma*) that has gained the most importance and ascendancy in modern times is *brahmavihara*.⁶⁶⁶ This concept consists of four immeasurable minds—love, compassion, community and equanimity—the so-called four brahmavihara.⁶⁶⁷ It may be assumed that if Thai people practice the four brahmavihara, they will become happier and people in Thai society as a whole will also become happier. It can be argued that WTT collection in Thailand would help to strengthen Buddhist teachings (*dharma*), particularly *brahmavihara* in Thailand's Buddhist society.

The four '*brahmavihara*' are qualities that bind people in unity; they are principles for the helpful integration of individuals into society as a whole.⁶⁶⁸ Every person's dharma can contribute to excellent and flawless living. This dharma includes '*Metta*' (compassionate loving-kindness), '*Karuna*' (compassionate sympathy), '*Mutita*' (compassionate joy) and '*Ubeka*' (equanimity).⁶⁶⁹ In particular, benevolence and compassion support arguments for introducing the WTT in Thailand. The term '*Metta*' means genuine friendliness or loving-kindness with which someone desires to bring happiness and peace to others. The term '*Karuna*' implies a genuine desire to remove suffering from other people. Suffering is anything that brings about distress, illness, negativity or worries.⁶⁷⁰

⁶⁶³ Ibid.

⁶⁶⁴ Ibid.

⁶⁶⁵ Supaphan Na Bangchang. 'Monks and the Rural Development' in the Department of Religious Affairs, Ministry of Education (ed), *The Pursuit of the Ways for the Rural Development of Thai Monks* (Planning Division 1983) 28-30.

⁶⁶⁶ Edwina Pio, *Buddhist Psychology: A Modern Perspective* (Shakti Malik Abhinav Publication 1988) 113.

⁶⁶⁷ Thich Nhat Hanh, *The Heart Of Buddha's Teaching: Transforming Suffering into Peace Joy and Liberation* (Random House Publisher 1998) 169.

⁶⁶⁸ The 4 Brahma Vihara Dharmas, 'Buddhist Tenets for Boundless Peace, Harmony and Happiness' <<http://latzdharma.wordpress.com/2012/04/02/the-4-brahma-vihara-dharmas-buddhist-tenets-for-boundless-peace-harmony-and-happiness/>> accessed 24 June 2015.

⁶⁶⁹ U Min Swe, *Brahmavi hara Dharma: The Venerable Mahasi Syadaw of Burma* (Buddha Dharma Education Association Inc 1985) 19-20.

⁶⁷⁰ Ibid.

The '*Sangkaha Vatthu*'⁶⁷¹ is another dharma that entails doing favours for others, befriending others and being charitable and helpful to each other. This dharma has four virtues: giving, kind speech, useful conduct and equal treatment. In particular, 'giving' and 'useful conduct' support the collection of the WTT in Thailand. The term 'giving' means giving to other people or generous sharing of one's own property for the benefit of others. This dharma helps prevent greediness and selfishness, reminding people that our acquired properties are ephemeral. After death, we cannot take anything with us. The term 'useful conduct' includes all kinds of support or useful behaviour for the benefit of others. Comparing between the *Dharma* and *Zakah*⁶⁷² in Islam, the *Zakah* play a significant role in most Muslim countries as a tool for eliminating poverty and reducing inequality. While the dharma is only a principle for practising, the *Zakah* system, which is similar to a voluntary tax, is implemented alongside the tax system.⁶⁷³

The WTT should be introduced in Thailand because the tax will foster mutual generosity, eliminate the abandonment of the underprivileged and promote the desire to assist others in being happy and free of suffering. Since only a small portion of people in Thai society are rich and have opportunities for education and land ownership, this tax is important in bridging the gap between rich and poor. The Thai government can thus use income garnered from WTT collection to provide public services beneficial to the underprivileged, such as health care and education. These two groups of people will feel better about each other, which in turn, will help decrease social tension and animosity, leading to greater peace. Not only will Thai people be bound in unity indirectly, but they will also be more charitable and helpful to each other. This unity seem to comply with the core of Buddhist teachings (*dharma*), particularly brahmavihara and sangkaha vatthu, consequently strengthening Buddhist teachings (*dharma*) in Thailand's Buddhist society.

⁶⁷¹ Kalaya Chotitada, 'A Practice of Sanghavadthu and Coordinating Operation of Bureau of Printing the Secretariat of the House of Representatives' (Master's thesis, Mahachulalongkornrajavidyalaya University 2011) 11-12.

⁶⁷² *Zakah* is one of the five pillars in Islam, with the word *zakah* itself mentioned in the Quran. Unlike tax levied on income or consumption expenditures, *zakah* is built on a different and wider base, covering productive wealth and idle assets. The *zakah* payment is made on a voluntarily basis to any *zakah* institution.

⁶⁷³ Anita Md Shariff and others 'A Robust Zakah System: Towards a Progressive Socio-Economic Development in Malaysia' (2011) 7(4) *Middle-East Journal of Scientific Research* 550, 550-551.

4.2.4 Legal Arguments

Critics of the WTT argue that it violates the right of ownership, the right to inheritance and the equal protection clause. This subsection examines whether such arguments are justified.

4.2.4.1 Violating the Right of Ownership and Right to Inheritance

Two complementary legal problems are at stake: The first question relates to whether or not WTT collection violates the right of ownership, a statutory guarantee by s 1336 of the Thai Civil and Commercial Code (CCC)⁶⁷⁴; at stake is whether or not this right can be limited by tax legislation. A second question may also arise as to whether or not tax collection would violate the right of inheritance under s 1599 of the CCC.⁶⁷⁵

4.2.4.1.1 Right of Ownership

To a large extent, the answer to the first question rests in the theories of philosophers concerning the right of ownership. As the English philosopher John Locke advocated:

‘Each citizen was born with certain natural, or God-given, rights; chief of those rights was property ownership. Citizens had the right to own as much property as they could employ their labour upon, but not to own excessive amounts at the expense of the rest of society’.⁶⁷⁶

Then, there is a divergent philosophies developed by Thomas Jefferson⁶⁷⁷ from his notion of God given, natural right in the drafting the Declaration of Independent; Jefferson argued in that ‘the use of property was a natural right, but that right was limited by the needs of the rest of society’.⁶⁷⁸ He further argued that property ownership ended at death.⁶⁷⁹ While he did not call for abolishing the institution of inheritance, he

⁶⁷⁴ S1336 provides that ‘within the limits of law, the owner of property has the right to use and dispose of it and acquires its fruits; he has the right to follow and recover it from any person not entitled to detain it, and has the right to prevent unlawful interference with it’.

⁶⁷⁵ S1599 provides that ‘when a person dies, his estate devolves on the heirs. An heir may lose his right to succession only under the provisions of this Code or other laws’.

⁶⁷⁶ Barry W Johnson and Martha Britton Eller, *Federal Taxation of Inheritance and Wealth Transfers* (1998) IRS Statistics of Income Research Papers, presented at the 1997 American Statistical Association Conference Joint Statistical Meeting, 4 <<http://www.irs.gov/pub/irs-soi/inhwltrpdf>> accessed 24 June 2015.

⁶⁷⁷ In drafting the Declaration of Independence, he developed his idea of God-given or natural rights that emphasize personal and political freedoms.

⁶⁷⁸ Robert K Miller and Stephen J McNamee, *Inheritance and Wealth in America* (Springer 1993) 63.

⁶⁷⁹ Ibid.

did advocate for a strong governmental role in its regulation. As in other areas of American life, Jefferson heavily influenced later thinking about property rights, inheritance and taxation by governmental bodies.⁶⁸⁰

Domestically, to consider the argument of whether WTT runs contrary to the right of ownership, it is necessary to discuss the statutory guarantee of a person's ownership, the extent of the ownership and the limitations of property ownership. These issues are all important to WTT legitimacy. The CCC does not define the term 'ownership' in Book IV of Property within ss 1298 through 1434. It is important to note that the provisions in Book IV, drafted by French commissioners, are influenced by French Civil Code.⁶⁸¹ Legislation referring to the definition of ownership can be found within Title II of Ownership (ss 544 to 546) in the Napoleonic Civil Code of 1804. S 544 defined the term 'ownership' as the right of enjoying and disposing of choses in the most unfettered manner but so they are not used in a manner prohibited by the laws or regulation. Ownership may be acquired in two ways: by purchase or by way of gift or inheritance.⁶⁸² In French legal theory, the right of ownership is an absolute right. The term 'absolute' can be identified by two features, 'exclusivity' and 'perpetuity', which are two significant features of property ownership.⁶⁸³

Nevertheless, according to s 554, there were two rationales that counter the 'absolute' right of 'ownership', which has been eroded in modern society since the rise of collective demands. First, 'the right of ownership was never meant to be unlimited in the face of the public interest. In fact, limits to this right were already laid down in both the 1789 Declaration and Civil Code. Thus, the use of ownership contrary to law and regulation is prohibited in art 544 and in s 17 of the 1789 Declaration.'⁶⁸⁴ It also states that an owner's rights may be infringed upon when political control and public necessity demand it, such as nationalisation of private property or expropriation. Secondly, since the beginning of the 20th century, public restrictions have been imposed upon individual property through the regrouping of agricultural lands, planning laws, housing laws (in France, there is a right to be housed), and, more recently, environmental legislation.⁶⁸⁵ Therefore, this argument demonstrates the instability of ownership, a

⁶⁸⁰ Johnson and Eller (n 676) 4.

⁶⁸¹ Swang Boonchalermwiparg, *Thai Legal History* (9th edn, Winuchon Press 2009) 233.

⁶⁸² Henry Dyson, *French Property and Inheritance Law – Principles and Practice* (OUP 2003) 18.

⁶⁸³ Eva Steiner, *French Law: A Comparative Approach* (OUP 2010) 383.

⁶⁸⁴ *Ibid.*

⁶⁸⁵ *Ibid.*

modern trend. These new trends permit an organisation or person to act in such a way that other people's ownership is affected in the name of public interest. In the Thai approach, a property owner can commit any act within his or her properties,⁶⁸⁶ but the extent of any rights and the exercise of those rights over such ownership is restricted by the state, which is entitled to specify the extent of these rights. The state may also limit such rights without contradicting the principles of ownership and the statutory rights of succession, as guaranteed under the previous Constitution.

4.2.4.1.2 Right to Inheritance

In answering the second question regarding inheritance rights, one can argue from the outset that the government has the power or right to tax any inheritance. According to the English philosopher John Locke, although 'the government was established at the will of the people and was charged with protecting the natural right of inheritance, they have an even higher responsibility to ensure the benefit of all of society'.⁶⁸⁷ When societal and individual rights clash, he suggested that it was 'the civil government's duty to exercise its prerogative in order to ensure the common good'.⁶⁸⁸ Later, the utilitarian philosopher, Jeremy Bentham, rejected the idea of natural rights and stressed the higher goal of ensuring general welfare. He believed 'in the government that played an active role in moving society toward the goal', thus 'advocat[ing] strong regulation of inheritances in order to prevent too great an accumulation of wealth in the hands of an individual'.⁶⁸⁹ Moreover, Thomas Jefferson 'advocated a strong role for government in its regulation'.⁶⁹⁰ The government should have the unlimited ability to regulate any transfer of property at death or tax inheritances from the deceased to the heir.

In analysing this argument, it becomes necessary to consider philosophical theory along with legal commentary relating to the right of inheritance. John Locke also believed that the right to inheritance (or the right to transfer property at death) is a 'natural right'⁶⁹¹ that cannot be altered by law.⁶⁹² He also argued that 'the right to bequeath accumulated

⁶⁸⁶ CCC, s 1336.

⁶⁸⁷ Miller and McNamee (n 678) 62.

⁶⁸⁸ Ibid.

⁶⁸⁹ Ibid 63.

⁶⁹⁰ Ibid.

⁶⁹¹ A natural right is including life, liberty and property possessed by men which are certain inalienable rights.

⁶⁹² John Lock, *Two Treatises of Government* (Cambridge University Press 1988) 207.

property to children was divinely ensured'.⁶⁹³ Thus, individuals have unlimited rights to transfer wealth to their successors⁶⁹⁴ without government intervention.

However, English jurist William Blackstone refuted the idea of natural rights to inheritance. He took the position that the right to inheritance was only a 'civil right'⁶⁹⁵ rather than a natural right. According to Blackstone, there is no natural right to transfer property at death because the possession of property ends immediately upon death. Civil law grants rights to control the disposition of property,⁶⁹⁶ not natural law. Unlike natural rights, civil rights can be created and taken away by law; they also can be limited or modified. This is a privileged right that only the government may grant or take away from individuals.⁶⁹⁷ Consequently, the government not only has the discretion,⁶⁹⁸ but also the duty to regulate transfers of property at death from the deceased to successive generations.⁶⁹⁹ The government also has the right to tax inheritance through its tax authority.

Following this analysis of the issues surrounding the guarantee of property ownership, the extent of that ownership and its restrictions, the last but most important issue (whether or not WTT collection runs contrary to the right of ownership and the right to inheritance) will now be examined. Initially, the criteria stipulated in Books 4 and 6 of the CCC should be taken into consideration. Book 6 relates to the devolution of an estate, according to which, an estate devolves to the heirs when a person dies.⁷⁰⁰ When the heir acquires ownership over the properties devolved from the deceased, the new owner of the property has the right to use and dispose of it and to acquire its fruits; he or she has the right to follow and recover it from any person not entitled to detain it and the right to prevent unlawful interference with it.⁷⁰¹ When taking both provisions into consideration, it seems that the ownership of properties is absolute and cannot be violated by any person or organisation. Still, the provisions of the CCC can be amended if necessary in the future.

⁶⁹³ Ibid.

⁶⁹⁴ Gale and Slemrod, 'A Matter of Life and Death: Reassessing the Estate and Gift Tax' (n 568) 5.

⁶⁹⁵ Elizabeth R. Carter, 'New Life for Death Tax Debate' (2012) 90(1) *Denver University Law Review* 175, 194.

⁶⁹⁶ Johnson and Eller (n 676) 3.

⁶⁹⁷ Carter (n 695) 195.

⁶⁹⁸ Gale and Slemrod, 'A Matter of Life and Death: Reassessing the Estate and Gift Tax' (n 568) 5.

⁶⁹⁹ Ibid.

⁷⁰⁰ CCC, s 1599.

⁷⁰¹ CCC, s 1366.

4.2.4.2 Violating the Equal Protection Clause

According to the International Covenant on Civil and Political Rights (ICCPR), both the rich and poor have statutory rights and duties and should be treated equally by the state. Its general provisions guarantee that the equality of all persons shall be protected, regardless of property or social origin.⁷⁰² The ICCPR particularly emphasises that all people are equal before the law and should enjoy equal protection under it.⁷⁰³ The question first arises as to whether people should equally have the duty to pay taxes and collectively bear the expenses of the state since the WTT might have greater effects on the rich, who have more properties and estates than other social classes. This status means that they will have to pay more WTT than poor or middle-class people who have fewer properties and/or no estates. Therefore, one might assert that the WTT is contrary to the principles of equality.

The above questions provide an argument against imposing the WTT: the equal protection clause is violated when a state grants a particular class of individuals the right to engage in an activity yet denies other individuals the same right.⁷⁰⁴ In fact, equality is an important general principle within public laws, especially administrative laws. State law prohibits states from denying any person within its jurisdiction equal protection under the law. In other words, the laws of a state must treat an individual in the same manner as others in similar conditions and circumstances.⁷⁰⁵

However, not all differential treatment of people can be considered discriminatory or illegitimate. In other words, the equal protection clause is not intended to provide 'equality' among individuals or classes but only 'equal application' of the law. The result of a law, therefore, is irrelevant so long as there is no discrimination in its application.⁷⁰⁶ The principle of equality has been explicitly stated in Thai laws, as displayed in the provisions of the Constitution and in judicial decisions. The ICCPR asserts that the state has to collect taxes to support the army and the state's expenditures

⁷⁰² ICCPR, art 26.

⁷⁰³ Ibid.

⁷⁰⁴ Legal Information Institute, 'Equal Protection: An Overview'

< https://www.law.cornell.edu/wex/equal_protection > accessed 24 June 2015.

⁷⁰⁵ Ibid.

⁷⁰⁶ Ibid.

in performing its duties.⁷⁰⁷ Consequently, the tax burden of the state must be distributed fairly among every citizen by considering the capacity of each citizen to pay it.

In particular, s 30 of the Constitution⁷⁰⁸ may be interpreted as stating that the law divides equality into categories:⁷⁰⁹ equality in laws, equality in judicial affairs, equality in taking an entry examination for official positions and equality in bearing the country's burdens. From such provisions, it may be concluded that equality in bearing the country's burden entails equality regarding the payment of taxes and equality in military conscription. Consequently, Thai people have a duty to equally and collectively be responsible for the state's expenses. However, this does not mean that all people have to bear the burden of taxes equally; rather, all people have to pay taxes according to their status, income and wealth.

Hence, it can be concluded that the WTT is a type of tax based on the principle of equality. If the distribution of income or the pursuit of fairness in society is used to measure different tax payments, estates comprised of various numbers of properties or heirs acquiring different amounts of an estate will be subject to different WTT payments. This is consistent with the principle of vertical and horizontal equity in that similar circumstances shall be treated similarly, while different circumstances shall be treated differently.

4.3 Different Options for Introducing the WTT in Thailand

This section discusses two different possibilities within the category of WTT: a transferor-based system, more precisely an estate tax, and a recipient-based system, more precisely an inheritance tax.⁷¹⁰ To select a suitable option for designing the WTT in Thailand, it is proposed to commence with a discussion of the transferor-based system vs. the recipient-based system, followed by a discussion of the gift tax vs. the non-gift tax.

⁷⁰⁷ ICCPR, s 3.

⁷⁰⁸ CKT (Interim) 2014, ss 3 and 4.

⁷⁰⁹ Manit Joompar, *The Introduction to Constitutional Law of 1997* (Nitidham Press 1998) 32.

⁷¹⁰ Helmuth Cremer and Pierre Pestieau, 'The economics of wealth transfer tax' (2010) Core Discussion Paper 2010/30, 7 <https://www.uclouvain.be/cps/ucl/doc/core/documents/coredp2010_30web.pdf> 24 June 2015.

4.3.1 Estate Tax versus Inheritance Tax

The WTT can be divided into two systems. The transferor-based system collects taxes from the properties of the deceased and is called an estate tax. This tax is normally collected along with the donor's tax, which is collected from the donor. The recipient-based system collects taxes from the heirs and is referred to as an inheritance tax. It is collected along with the donee's tax. In most countries, only one of these two types of taxes is collected. The advantages and disadvantages of both types of systems can be summarised into the following four arguments: the tax incidence argument, the equality argument, the revenue argument, and the administrative argument.

4.3.1.1 Tax Incidence Argument

Tax is collected from the estate, and likewise, the tax burden falls on the estate. The estate is subject to paying taxes without considering the economic position of its heirs. For this reason, heirs should not feel uncomfortable with estate tax collection by the state.⁷¹¹ Each heir may bear no tax burden, alleviating societal resistance. On the other hand, if the state instead collected an inheritance tax, it would not be widely accepted because the inheritance tax burden would fall on each heir. Each heir might feel uncomfortable paying the tax; money would be taken out of their own pockets to pay the inheritance tax because each portion of the estate acquired by each heir. An heir who acquired a large portion of the estate would pay a great deal of tax while those acquiring a smaller portion of the estate would pay less tax.⁷¹² Thus, some heirs might not acquire any estate after paying the inheritance tax, resulting in serious societal resistance.

4.3.1.2 Equality Argument

The inheritance tax is collected based on the size of the heir's inherited estate. As the inheritance tax is collected in accordance with the estate's size, heirs with different economic positions will pay different sums of taxes depending on the acquired estate, a fair practice. However, if an estate tax were to be collected, recipients or heirs with different economic positions would bear the same tax burden, which is unfair for heirs with lower economic positions. In other words, the recipients or heirs with less means will bear a tax burden equivalent to that of people with a much higher income. The tax burden can be balanced through a progressive tax, however. For the inheritance tax,

⁷¹¹ Krikkiat Pipatseritham, *Public Finance in relation to the provision and distribution* (n 572) 327.

⁷¹² Ibid.

each recipient or heir would bear the tax burden according to the value of the estate acquired because the inheritance tax is calculated from the estate each recipient or heir acquires, not from the whole estate. This type of tax is fairer for the recipient than the estate tax, where each recipient or heir equally bears the tax burden regardless of the portion of the estate acquired.

UK proponents of the recipient-based system claim that ‘the inheritance tax accords more closely with the equality of opportunity rationale for taxing transfers, because those who have inherited more in the past pay tax at a higher rate on additional receipts’.⁷¹³ Thus, the inheritance tax can be seen as fairer than the estate tax (transferor-based system). They also observe that inherited wealth distribution is more equal because donors are encouraged by the inheritance tax (recipient-based system) to broadly spread their wealth.⁷¹⁴ Hockley remarks that the inheritance tax is better than the estate tax in ensuring equal distribution of wealth.⁷¹⁵ Opponents of the inheritance tax argue that it does not reduce inequality, observing that ‘the way estates are divided has no bearing on inequality. In a fictitious world where all wealth came from inheritance and there were no inheritance taxes, the wealth distribution would never change’.⁷¹⁶ However, WTT supporters conclude that both estate and inheritance taxes are economically efficient in improving the immoral nature of unequal income distribution.⁷¹⁷

A further argument in favour of the estate tax is that, when compared to the inheritance tax, the estate tax will lead to a fairer distribution of wealth because it helps reduce the social disparity between the rich and poor better than the inheritance tax.⁷¹⁸ The more properties a rich person has, the more revenue the government will gain at the time of that person’s death. For example, the structure of the US estate tax is relatively advantaged from the standpoint of equity because only larger transfers are taxed while smaller ones are exempted.⁷¹⁹ State income acquired by collecting the estate tax from the recipients or heirs of the rich would be used to provide public services or other

⁷¹³ Boadway and others (n 471) 739-740.

⁷¹⁴ Ibid.

⁷¹⁵ Hockley, *Public Finance: An Introduction* (n 494) 130.

⁷¹⁶ Alan S Blinder, ‘A Model of Inherited Wealth’ (1973) 87(4) *The Quarterly Journal of Economics* 608, 623.

⁷¹⁷ Ben-David Nissim, ‘Why do we ignore the best solution for improving unequal income distribution?’ (2007) 34(6) *International Journal of Social Economics* 415, 423.

⁷¹⁸ Pipatseritham, *Public Finance in relation to the provision and distribution* (n 572) 327.

⁷¹⁹ Edward N Wolff, ‘Inheritances and Wealth Inequality, 1989–1998’ (2002) 92(2) *The American Economic Review* 260, 263.

fundamental rights, such as communication infrastructure, education, public health services and transportation. The wealthy and the poor would be served with these public services, creating a better standard of living and decreasing the social gap. However, arguments against the estate tax cast doubt on estate taxation's ability to redistribute income and wealth. Many claim that the estate tax may not achieve its objective to reduce inequality in income and wealth; rather, it will increase the degree of inequality.⁷²⁰ On the other hand, 'some argue that, by encouraging the splitting of estates, a progressive inheritance tax is a more effective instrument for restraining the concentration of wealth.'⁷²¹

4.3.1.3 Revenue Argument

There are two revenue arguments emerging here: the first is that the estate tax seems to constitute double taxation the inheritance tax does not. The objection to double taxation takes various meanings if the WTT is structured by means of an inheritance tax (recipient-based tax) rather than an estate tax (transferor-based tax). There is nothing that can be characterised as 'double taxation' in the transferor (or donor) structure because the estate tax is not paid by the transferor but by the recipient.⁷²² For example, the transferor who was initially liable for the income tax on earned wealth is always a different person from the recipient who is liable to pay the inheritance tax.⁷²³

The second argument is that the estate tax raises more revenue for government public expenditures compared to the inheritance tax because it is levied on the deceased's undivided estates. However, the inheritance tax can be collected at a lower amount because it is collected from an individual recipient or heir because its base tax is the proportion of estate received by each recipient or heir rather than the gross value of the deceased's estate. The whole estate should have more value than the inheritance each heir acquires, so the government cannot produce as much revenue from the inheritance tax as from the estate tax.

Arguments against the estate tax hold that it is not possible for the government to collect an outstanding estate tax greater than the amount of the estate because the administrator does not hold any personal responsibilities for the estate tax; his or her duties are rather

⁷²⁰ Stiglitz (n 623) 137.

⁷²¹ Gale and Slemrod, 'Rethinking the Estate and Gift Tax: Overview' (n 621) 28.

⁷²² O'Neill (n 616) 64.

⁷²³ Boadway and others (n 471) 751.

similar to those of a liquidator. The government would, thus, lose revenue in outstanding tax that exceeds the amount of the estate. It may also not be worth the state's expenditures to collect. Conversely, the arguments in favour of the inheritance tax include that it is possible to collect the outstanding inheritance tax from the inheritors, although a request would have to be made upon their other properties.

4.3.1.4 Administrative Argument

With regard to tax administration, Phipatseritham provides arguments for and against both estate and inheritance taxes. He observes that the estate tax is an efficient tax collection mechanism as it is more convenient to collect than the inheritance tax.⁷²⁴ He noted that estate tax collection only requires one set of officials for tax collection and assessment each time because the officials can contact the heirs and gather the estate for the purpose of collecting and assessing taxes a single time. They do not need to make multiple contacts to each inheritor or heir. This collection and assessment procedure can save more money than the inheritance tax.⁷²⁵ The argument against the inheritance tax is that, if there is more than one heir or inheritor, officials have to assess and collect the inheritance tax from each one, keeping a record of all lifetime gifts.⁷²⁶ This process may be very difficult and involve several groups of officials. Thus, the inheritance tax system may have higher administrative costs than the estate tax system.

Phipatseritham also criticizes the practical administration and distribution of an estate.⁷²⁷ First, he argues against the estate tax because it requires appointment of an administrator for tax payment because the estate tax needs a personal representative to perform such Acts.⁷²⁸ Formerly, an administrator would be appointed by the Court only when there was a conflict of interest on the succession or transfer of the estate or when questions arose regarding the partition of the estate to the heirs.⁷²⁹ If an administrator were entitled to pay the estate tax, the overwhelming duties of the administrator would increase. The CCC may need to be amended to stipulate more duties for the administrator.

⁷²⁴ Ibid.

⁷²⁵ Ibid.

⁷²⁶ Boadway and others (n 471) 740.

⁷²⁷ Phipatseritham, *Public Finance in relation to the provision and distribution* (n 572) 327.

⁷²⁸ CCC, s 1739 (3).

⁷²⁹ CCC, ss 1711 and 1713.

Second, he argues that, when there are disputes concerning the distribution of an estate before the Court, the state's estate tax collection is delayed because the administrator is responsible for paying the estate tax without taking any personal responsibility for such payment. Therefore, when a dispute arises, it is necessary to wait until it is resolved to collect the estate tax. The argument in favour of the inheritance tax is that, upon acquiring the estate, each heir is immediately subject to inheritance tax payment, bearing the full liabilities of said payment. Despite the presence of any dispute over the properties, the heirs have the duty to handle such disputes themselves.

Against the inheritance tax, it is argued that, because inheritance tax is collected from each individual heir, it is inconvenient for tax collection officials. Collection may be delayed if there are many inheritors or heirs. Furthermore, inheritance tax collection is more expensive than estate tax collection. Because officials have to collect taxes several times according to the number of inheritors or heirs, expenses proportionally increase. As Maxwell stated, the minimal requirements for collection, administration and compliance costs require that the tax process be as simple as possible.⁷³⁰ Based on administrative criteria, he concluded that, by shifting the tax incidence to the recipient in order to replace tax on estates (inheritance tax) with a tax on inheritance (capital receipts tax), 'collection costs would increase, given the greater complexity. Compliance costs would increase, due to the demands of record-keeping'.⁷³¹ Ultimately, greater complexity results in higher collection, administration and compliance costs.

4.3.2 Gift Tax versus Non-Gift Tax

The gift tax serves as a backstop for the estate tax,⁷³² preventing wealthy taxpayers from draining their estates with tax-free lifetime transfers. In other words, it is another important tax that should be collected because when no gift tax is collected, some people may conveniently avoid paying the estate or inheritance tax by giving away their properties to others before their death, rendering the tax effectively unenforceable. This encourages them to circulate wealth during their lifetimes, thereby stimulating income

⁷³⁰ Dominic Maxwell, 'Fair Dues: Towards a More Progressive Inheritance Tax' Institute for Public Policy Research, 15 <<http://www.ippr.org/publications/fair-dues-towards-a-more-progressive-inheritance-tax>> accessed 24 June 2015.

⁷³¹ Ibid 20.

⁷³² William C Brown, 'Judicial Expansion of the Future Interest Exception to the Gift Tax Annual Exclusion—Examination of the Legislative History and Policy Basis for the Future Interest Exception' (2012) 65(3) Tax Lawyer 477, 481.

tax revenue and economic growth.⁷³³ These estate taxes are usually associated with gift taxes, which are imposed on the donor. Taxes levied after death can be avoided simply by transferring property by gift before death.⁷³⁴ Thus, the gift tax should be collected along with either the estate tax or inheritance tax.

In terms of income, the government will obtain revenue because the gift tax is paid in full within a year, whereas the estate and inheritance tax is paid at death. As for overall economic aspects, the gift tax can be collected from gifts made either before or after death. The deceased, usually seniors, would typically transfer properties to their children and grandchildren before their deaths. Hence, it is a method to promote the utilisation of properties for the benefit of the children and grandchildren by way of investment or earning a living. It benefits the individual, the family and national economic development.⁷³⁵

Conclusion

In summary, to respond to the question of whether or not the WTT should be introduced in Thailand, we should consider its objectives: does it seek to produce more government revenue or to promote fairness and justice in society? If it aims to achieve the former objective, the WTT may not be appropriate because the income acquired from such collection depends on the death of the wealthy, the size of the estate, the tax rate and the honesty/efficiency of the officials involved. However, the WTT can be imposed in Thailand to build a better and more just society, to enhance the fair distribution of taxes, to support the fair utilisation of resources, to balance the fair distribution of the tax burden and to support efficient utilisation of resources. Furthermore, the WTT would help collect taxes during the lifetime of the deceased, if its tariffs and rates are appropriate to the economic and social conditions. Most importantly, the revenue generated from the WTT must be used for state affairs, government investment or other affairs beneficial to society in order to strengthen the status and livelihood of the

⁷³³ Jeffrey S Kinsler, 'Taxation Without Explanation: The Federal Gift Tax' (2003) 2 *Appalachian Journal of Law* 15, 15.

⁷³⁴ Joulfaian, 'The Federal Estate and Gift Tax: Description, Profile of Taxpayers, and Economic Consequences' (n 649) 29.

⁷³⁵ Sawasruksa (n 17) 9.

people.⁷³⁶ These funds could also promote programmes and education for the underprivileged. To prevent any scandals about expenditures from WTT income, the government should keep this income separate from other funds. This action would help ensure that the government's objectives are to reduce social gaps in status and better the livelihoods of the people, not simply to obtain more income.

However, not all opposing arguments are weak, and not all supporting arguments are strong. Therefore, it is important to briefly discuss why arguments against the WTT should be rejected before arguing for WTT introduction in Thailand. To begin, some argue that the WTT constitutes double taxation because it occurs on the same income or source more than once.⁷³⁷ Someone has already paid income or property taxes and then has to pay a second tax on the estate, which has been saved out of the already taxed income or property. However, this argument can be addressed. Income tax and property tax are collected from the income or property when an individual is living, while the WTT is imposed on the property transfer (his estate) upon death; thus, the WTT does not constitute double taxation. Conversely, the WTT can play a significant role as a backstop for tax progressivity or large estates, particularly in Thailand where the absence of balance and equality in the taxation system is a major problem, and the PIT progressive tax rate is ineffectual and unfriendly to the poor. Instead, the WTT can be used as a supplementary tax measure to effectively mitigate inequality in Thai society.

Another argument against the WTT holds that the WTT has never been a major source of revenue for the government's public expenditures;⁷³⁸ therefore, it should be rejected because it is unable to raise sufficient revenue to make it a worthwhile exercise. However, this argument fails to recognize that it can also be used for other purposes, such as minimizing the gap between the rich and the poor, and further in strengthening the political stability, encouraging the adoption of a social policy for the poor, funding government, functioning to provide public education and health services the poor, rebalancing the Thai tax system, and strengthening relevant Buddhist principles. In reference to Thailand's case, the tax could play a significant role in this regard, even though it would be unlikely to have a significant effect on wealth distribution in larger countries like the US.

⁷³⁶ Prapaphan Udomchanya, 'Estate and Inheritance Tax: The Possible Solution' (1998) 54(4) *Bodbandit Journal* 219, 224.

⁷³⁷ Burke and McCouch (n 561) 526-527.

⁷³⁸ Boadway and others (n 471) 746.

Revenue derived from the WTT, even if relatively modest relative to the entire government revenue, could help support sustainable development. This could be of particular visible benefit to poor rural communities, which have hitherto, in a way that epitomises their desperation, been apparently hoodwinked by the lure of instant gratifications. This is visible when voting and political culture in rural Thailand are examined. Political commentators have often asserted that

‘the Thai populace, and especially the rural populace, lacks the basic characteristics essential for a modern democratic citizenry and that deficiencies need to be overcome via elite-led education. Accounts of the deficiencies of the voting population often focus on three perceived problems, which draw on well-established discourses about patronage, apolitical peasants, and the dangers of money politics. First, uneducated rural voters are parochial and have little interest in policy issues. Lacking a well-developed sense of national interest, they vote for candidates who can deliver immediate benefits. Second, given their poverty, lack of sophistication, and disinterest in policy, and they are readily swayed by the power of money. Vote buying is said to be endemic. Cash distributed by candidates, through networks of local canvassers, is said to play a major role in securing vote loyalty. And third, rural electoral mobilization is achieved via hierarchical ties of patronage whereby local influential figures can deliver blocks of rural votes to their political masters.’⁷³⁹

The apparent willingness of poor rural communities to forfeit their democratic rights so readily to possibly corrupt politicians is symptomatic of a poverty mentality fuelled by long-term deprivation. This mentality is often exploited (and perhaps even encouraged) by politicians, who actually have little (if any) to offer beyond these ‘bribes’, and whose sole agenda is to secure votes by any means.

The short-term enticements on offer bring excitement and relief for socio-economically deprived populations. But such instant gratifications are clearly not the answer to poverty and deprivation. The WTT on the other hand has much to commend it as a possibly potent instrument (via wealth distribution) for combatting poverty and for

⁷³⁹ Andrew Walker, *Thailand's Political Peasants: Power in the Modern Rural Economy* (The University of Wisconsin Press 2012) 191.

promoting long-term and sustainable benefits in such poor communities. In relation to such benefits, the Thai government should politically focus on its duty to demonstrate sincerity in ameliorating problems. The government can do so by regulating WTT collection as social policy. The revenue from the WTT should not be distributed to general government agencies, but it should instead be ring-fenced for education, health, and social welfare. For example, communities need new hospitals, new schools, free health care and education, roads, bridges, electricity and water, etc., far more than they need cash handouts that will be gone a few days. Thus, this potential advantage of WTT cannot be underestimated.

Others argue that if WTT is imposed, many people will be affected; these opponents assert that the WTT will erode not only Thai agrarian society by forcing heirs to sell their family farms because they cannot afford to bear the WTT burden on the deceased's estate,⁷⁴⁰ but also customs of patrilineal inheritance in Thai society.⁷⁴¹ These concerns can be addressed if agriculture relief and instalment relief are available in the new Thai WTT. The availability of such reliefs would be helpful to those bearing WTT burden on agricultural property (estate of deceased) by providing whole or partial elimination of the WTT that would otherwise be payable⁷⁴² as well as by allowing tax payments in instalments (by equal yearly instalments).⁷⁴³ Besides, introducing the WTT would not distort the tradition of maintaining properties for children. The Thai elder generation will still leave property to the next generation as a moral and traditional obligation.

As discussed above regarding legal arguments, the WTT does not violate the right of ownership or the right to inheritance because the state can limit such rights without contradicting the principles of ownership or the statutory rights of inheritance. For example, the Thai government may impose the WTT on all property owned by a deceased person or donor and transferred to his or her heirs or beneficiaries (or received by heirs or donees upon the death of deceased or received as a lifetime gift). In addition, the WTT does not violate the equal protection clause because the clause does not provide 'equality' among individuals or classes but only 'equal application' of the law rather than equality regarding the payment of taxes. So long as the state can distribute the tax burden fairly among the people, the principle of equality will not be violated.

⁷⁴⁰ Charoenratphak (n 628) 27.

⁷⁴¹ Minutes of the Sitting of the House of Representatives No. 7/2486 (n 643).

⁷⁴² IHTA 1984 (UK), ss 115-124.

⁷⁴³ IHTA 1984 (UK), s 227.

5 Discussion of Legislation Related to Transfers of Wealth in Thailand

Introduction

In Chapter 6, we will examine the structure and provisions of the Estate and Inheritance Tax Act of 1933 (EITA 1933) and why it was repealed. Prior to doing so, however, it is necessary to outline current Thai laws related to wealth transfers, including lifetime transfers and transfers on death, mainly the Civil and Commercial Code (CCC) and Revenue Code (RC). The CCC involves the laws on succession and family, gifts and the prevention of trust creation. Under the RC, income received for some types of inheritance and gratuitous gifts is entirely exempted from the personal income tax (PIT). Moreover, there are certain rules related to the royal estate that concern the sensitive question of whether or not the royal estate should be subject to the new Thai wealth transfer tax (WTT), set forth in provisions of the Crown Property Act of 1936 (CPA 1936) and the Act on Tax Exemption for Crown Property, 1934 (ATECP 1934).

It can be argued that these laws may affect the provision of the new Thai WTT legislation; thus, the lawmakers and legislators should take them into account in order to propose guidelines when drafting the new WTT legislation. The aim of this chapter, therefore, is to discuss the selected provisions of the CCC, particularly the RC. Understanding the rules and concepts underlying such laws provides a significant basis to analyse the issues discussed in the next chapter and beyond, as this information will be helpful in assessing the prospective Thai WTT presented in Chapter 9.

5.1 The Thai Civil and Commercial Code

This subchapter discusses the impact of a wealth transfer on the law of succession, the statutory right of inheritance in Book IV and the appointment of property controllers under the CCC.

5.1.1 Thai Civil Law of Succession

It is crucial to understand the term ‘succession’ within Thai law, particularly in terms of what triggers succession, how estates are divided amongst heirs and the applicable

family law governing jointly-held property by husband and wife.⁷⁴⁴ This discussion includes information regarding debt liability and inheritance claims by heirs, temples or the state.⁷⁴⁵ In this context, it is important to begin by exploring the causes for an estate's devolution, including death or disappearance.

5.1.1.1 Causes for Devolution of an Estate

Under the CCC, all rights and obligations of a deceased person are automatically transferred to his or her heirs at the time of death. The code states that 'when a person dies, his estate devolves to his heirs. An heir may lose his right to succession only under the provisions of this code or other laws'.⁷⁴⁶ The estate of a deceased person includes all his or her properties, rights, duties and liabilities, except those that are purely personal by law or by nature.⁷⁴⁷

The term 'death' not only refers to natural death,⁷⁴⁸ but also includes people formally adjudged as having disappeared by a court or the public prosecutor.⁷⁴⁹ The criteria for determining whether a person has disappeared and can be declared dead are that he or she has left the domicile or residence with whereabouts unknown for five years.⁷⁵⁰ However, this five-year period can be reduced to two years under two circumstances: when a person has disappeared whilst engaging in battle or when a person was involved in a car accident in which the vehicle was lost or destroyed. For veterans, the five-year period is reduced to two years dating from the time when hostilities stopped; for those involved in an accident, the two-year period dates from the day the vehicle was lost or destroyed.⁷⁵¹ Such a person is deemed to have died at the completion of the period of five or two years, as the case may be,⁷⁵² and the estate is transferred to the heirs on the fifth or second anniversary of the supposed death.⁷⁵³

When it is not clear who died first, for instance when a father and child die together in a plane crash, they will be presumed to have died simultaneously.⁷⁵⁴ In such a case, the

⁷⁴⁴ CCC, ss 1465 to s.1493 and ss1523 to 1535.

⁷⁴⁵ CCC, ss 1603, 1623, 1699 and 1753.

⁷⁴⁶ CCC, s 1599.

⁷⁴⁷ CCC, s 1600.

⁷⁴⁸ CCC, s 15.

⁷⁴⁹ CCC, ss 61-62.

⁷⁵⁰ CCC, s 61, Para.1.

⁷⁵¹ CCC, s 61, Para.2.

⁷⁵² CCC, s 62.

⁷⁵³ CCC, s 1602.

⁷⁵⁴ CCC, s 17.

child will not inherit the father's estate, and the father will not inherit the child's estate; instead, all goes to the mother and siblings of that child.

5.1.1.2 Definition of an Estate

The estate of a deceased person includes any property, rights, duties and liabilities, except those which by law or by their nature are purely personal to the deceased.⁷⁵⁵ The term 'property' not only means corporeal objects⁷⁵⁶ but also includes incorporeal objects of value that can be appropriated.⁷⁵⁷ The term also includes immovable⁷⁵⁸ and movable property,⁷⁵⁹ such as land, chattels and fixtures, or real rights connected with the land and items other than immovable property. Thus, the scope of what can be considered an estate remains very wide.

The law on succession⁷⁶⁰ regulates that all properties of the deceased wholly devolve on the heirs, including immovable property, movable property, rights, duties and liabilities, except for the specific rights, duties and liabilities of the deceased. Under Thai succession law, the estate explicitly includes corporeal properties, namely land, houses, cars, jewellery and small Buddha images. Incorporeal properties of value, such as copyrights, patents or claims, can also be part of the estate. An estate may also include properties for which their respective owners are obliged to obtain permission (e.g., a license) from official authorities (e.g., firearms). Such items can devolve to the heirs as well, but the heir has to later submit a request to lawfully occupy them with the appropriate authorities. If the request is disapproved, the heir will have to dispose of the item to a person possessing a license. Furthermore, even though a foreigner is prohibited from own land, he or she has the right to inherit the land if it devolves to him or her.⁷⁶¹

A significant question has arisen as to whether WTT collection can impact the application of Islamic law on succession in the four southern border provinces. Most people are Muslim in the four southern border provinces of Yala, Narathiwat, Pattani and Satun. Islam has many rules governing the estate differing from the provisions in Book VI of the CCC. For instance, non-Islamic heirs at the time of the *de cuius* death

⁷⁵⁵ CCC, s 1600.

⁷⁵⁶ CCC, s 137.

⁷⁵⁷ CCC, s 138.

⁷⁵⁸ CCC, s 139.

⁷⁵⁹ CCC, s 140.

⁷⁶⁰ CCC, s 1600.

⁷⁶¹ The Supreme Court Decision No. 1113/2495 (1952) *Siachiw v. Suk-u-dom*.

are prohibited from inheriting, except if there is a will. According to Islamic provisions, certain items cannot devolve to heirs but instead go to the state, including dogs, pigs and liquor. In partitioning an estate among heirs, males shall receive two portions for each single female portion, or the clauses in the will disinheriting any heirs of the *de cujus* shall be void. If the provisions in the CCC are enforced in these areas, there could be resistance. The government therefore indulges the Islamic people in these four provinces, allowing them to behave pursuant to certain rules of their religion; it specifies that any judicial dispute relating to the estate between Islamic people is subject to the enforcement of Islamic law, not to the provisions in Book VI of the CCC.⁷⁶² During the judicial trial process, one '*dato*' (a judge according to Islamic law) shall be present together with one judge. The '*dato*' has the power to adjudicate on Islamic regulations. Such adjudication is absolute and is not subject to an appeal to the Appeals Court or the Supreme Court due to the Islamic regulations.

Islamic law of succession is applied only in the Pattani, Narathiwat, Yala and Satun provinces. Any other provinces, such as Songkhla or Bangkok, are subject to the general provisions in Book VI of the CCC. Furthermore, all litigants or the *de cujus* must be Islamic when applying Islamic law in these provinces. If it appears that the *de cujus* is not Muslim, Islamic law is unenforceable. Nonetheless, the court cannot adopt the principles of Islamic law, but must mainly apply the general rules of the CCC when deciding which properties are included in the estate.⁷⁶³ For example, a deceased person might write a letter (or '*nasa*') to give land to the defendant *durante vita*. A gift by '*nasa*' is valid according to Islamic law. However, such a gift does not comply with the provisions of the CCC because the transfer of land ownership has not been recorded. As a result, the land still belongs to the deceased at the time of his death.⁷⁶⁴ Islamic law is applied only for the adjudication of the '*dato*' regarding the partition of the estate to the heirs; i.e. how much of the estate each heir will acquire.⁷⁶⁵ Such provisions should still be applied in order to decide which properties should be included in the estate of the deceased. The estates of Muslim people living anywhere in the Kingdom of Thailand are subject to the same rules as people of other religions. The only difference is the portion each heir will acquire when the *de cujus* lived in one of the four Southern border

⁷⁶² The Act on the Application of Islamic Law in the Areas of Pattani, Narathiwat, Yala and Satun Provinces of 1946, ss 3 and 4.

⁷⁶³ Ibid.

⁷⁶⁴ The Supreme Court Decision No. 1174/2518 (1975) *Benwaeyun v. Waemaming*.

⁷⁶⁵ The Supreme Court Decision No. 1203/2494 (1951) *Waesalamoe v. Bin-a-waadae*.

provinces. Therefore, WTT collection does not impact the application of Islamic law in terms of succession in the four southern border provinces.

5.1.1.3 Fundamental Principles Governing the Devolution of Estates

The CCC states that ‘when a person dies, his estate devolves on the heirs. An heir may lose his right to succession only under the provisions of this code or other laws’.⁷⁶⁶ Thailand thus recognises Roman civil law and has adopted a ‘universal [system of] succession’⁷⁶⁷ distinct from the common law system.⁷⁶⁸

In common law (tradition) countries, such as the US, the UK and much of the British Commonwealth,⁷⁶⁹ a person’s estate automatically devolves to the personal representative of the deceased upon his or her death.⁷⁷⁰ Accordingly, the personal representative is regarded as the trustee⁷⁷¹ with the statutory duty of collecting the real and personal estate of the decedent and administering it in accordance with the law.⁷⁷² So long as the personal representative remains the administrator of the estate, the estate’s beneficiaries do not own, nor are they permitted to receive, benefits from said estate.

In contrast, under the civil law system, succession could be designated by will or intestacy, and the estate devolves to the heirs at the time of death. The inheritors are either statutory heirs or legatees. Under the Roman system, therefore, the heir’s position can be found in Cicero’s topica, stating that ‘the word *hereditas* is defined in terms of the property which comes to the heir, not that belonging to the deceased at the time of his death’.⁷⁷³ The heirs (*sui heredes*) are automatically the owners of the estate⁷⁷⁴ even if they have not yet accepted it.⁷⁷⁵

⁷⁶⁶ CCC, s 1599.

⁷⁶⁷ A M Prichard, *Roman Private Law* (3rd edn, Macmillan 1967) 233-234.

⁷⁶⁸ F H Lawson, *Roman Law and Common Law: A Comparison in Outline* (2nd edn, Cambridge University Press 1965) 183.

⁷⁶⁹ Michael Adler and Sara Stendahl, ‘Administrative Law, Agencies, and Redress Mechanisms in the United Kingdom and Sweden’ in David Scott Clark (ed), *Comparative Law and Society* (Edward Elgar Publishing Limited 2012) 254.

⁷⁷⁰ Administration of Estates Act 1925 (UK), ss 1(1) and 55(1)(xi).

⁷⁷¹ Anthony R Mellows, *The Law of Succession* (Clive V. Margrave-Jones ed, 5th edn, Butterworths Law 1993) 411-412.

⁷⁷² Administration of Estates Act 1925 (UK), s .25.

⁷⁷³ Alan Watson, *Roman Private Law* (Edinburgh University Press 1971) 93.

⁷⁷⁴ H F Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, Cambridge University Press 1972) 124-125.

⁷⁷⁵ CCC, s 1600.

Unlike the common law system, under the CCC, the administrator of the estate at no point owns the estate⁷⁷⁶ because the estate devolves at the time of death,⁷⁷⁷ even when the heirs do not accept the estate. As discussed in the next section, s 1599 sets out two causes that trigger ownership based on civil law principles.

5.1.1.3.1 Types of Heirs

The CCC⁷⁷⁸ distinguishes *statutory heirs* from *legatees*. The former are entitled by law to the inheritance, while legatees are entitled by virtue of the deceased's will. In case a person dies intestate, s 1629 of the CCC divides *statutory heirs* into six classes of members entitled to inherit in the following order: descendants, parents, brothers and sisters of full-blood, brother and sisters of half-blood, grandparents, and uncles and aunts.

S 1629 (2) of the CCC further provides that a surviving spouse is a statutory heir, though only if a legally registered marriage has taken place.⁷⁷⁹ The property of the husband goes to the wife, excluding 'community property',⁷⁸⁰ which is governed by specific rules set out in ss 1465 to 1493 of the CCC, which will be discussed later. So long as there is a surviving heir who falls into one of the above categories, an heir of the lower class of statutory heirs has no entitlement to a share in the assets, except where there is a descendant and a parent, in which case they take an equal share.⁷⁸¹ Hence, so long as there is a surviving heir, an heir of the lower class of statutory heirs has no right to the estate of the deceased,⁷⁸² and if there is more than one heir in any one class, they take an equal share of the entitlement available to that class. The surviving spouse is a statutory heir, but his or her entitlement depends on what other classes of statutory heirs exist. If there are surviving children of the deceased, the estate is equally divided between the spouse and the children. For instance, if there are three children, the estate will be divided into four equal shares.

Similarly, the code divides *legatees* into two separate categories of heirs entitled to inherit by will. Firstly, legatees are entitled under a testamentary disposition to the whole of the estate or to a fraction or a residuary part thereof, which is not specifically

⁷⁷⁶ E J Cohn, *Manual of German Law*, vol 1 (Oceana Publications, Inc 1968) 257-258.

⁷⁷⁷ CCC, s 1599.

⁷⁷⁸ CCC, s 1603.

⁷⁷⁹ CCC, s 1628.

⁷⁸⁰ CCC, s 1625.

⁷⁸¹ CCC, s 1630.

⁷⁸² CCC, s 1631.

separated from the mass of the estate. They have the same rights and liabilities as statutory heirs. Secondly, people who are entitled under a testamentary disposition to specifically-identified property or to property specifically separated from the mass of the estate are legatees under a particular title; thus, they only have rights and liabilities pertaining to the particular property. In unclear cases, it is presumed that a person is a legatee under any one of these two categories.⁷⁸³

5.1.1.3.2 The Distribution of the Inheritance

Intestacy rules determine the disposition of the deceased's estate when he or she has not made a last will, testament or valid will. S 1620 specifies that

Where a person dies without having made a will, or if having made a will, his will has no effect, the whole of his estate shall be distributed among his statutory heirs according to the law. Where a person dies having made a will which disposes of or has effect for a part only of his estate, the part which has not been disposed of or is not affected by the will shall be distributed among his statutory heirs according to the law.⁷⁸⁴

This rule generally covers the following two situations: the distribution of an inheritance by virtue of the intestacy rules or the distribution of inheritance by virtue of a will or testament. The latter takes place in accordance with the civil law on succession in Thailand. A will allows a person to structure the distribution of his or her assets, rather than allowing the court to make this decision.⁷⁸⁵

5.1.1.3.3 The Partition of Estates

An estate is assumed to temporarily exist when debts, such as taxes, have to be paid. An estate administrator can be appointed by will or by court order for the purpose of collecting, selling and distributing the estate. Once the estate has paid the debts, the remaining personal property goes to the heirs, and it is presumed that the estate has been duly partitioned in accordance with the Thai civil law rules on succession. There are

⁷⁸³ CCC, s 1651.

⁷⁸⁴ CCC, s 1620.

⁷⁸⁵ CCC, s 1629.

three forms of partition: an estate partitioned by will, an estate partitioned by an administrator and an estate partitioned with the agreement of heirs.⁷⁸⁶

First, an estate can be partitioned by will, and there are two kinds of wills, specific and general. In the case of a specific will, an estate is already considered partitioned, even if it has not yet been registered or received, as it is presumed to have gone to the specific legatees. However, where there is a general legatee, the second form of partition applies.

Second, an estate can be partitioned by an estate administrator under a testamentary disposition. Such an administrator is required to take an inventory of the estate; upon completion of the partition, he or she has to submit the inventory to the court or to the heirs. This disclosure makes known the total property of the estate, including any debts owed to creditors or legatees for funeral arrangements, estate liquidation and estate management. The administrator must take inventory of the estate within 15 days of the deceased's death, from the commencement of the administratorship or upon acceptance of the administratorship, as the case may be.⁷⁸⁷

These provisions ought to remain the same even if a new WTT is adopted, as it is important to ascertain the precise amount of the estate and the amount of tax due to the Thai revenue authority.

Third, a partition can take place with the agreement of the heirs. Partition by consent of the heirs can take place expressly or implicitly; for instance, it can be agreed that the estate shall be sold in order for a partition to take place, or a compromise agreement may be entered into in order to partition the estate. However, in the event that an estate has only one heir, the estate is partitioned after being duly registered.⁷⁸⁸ If the heirs cannot agree on how to divide the estate, they have to apply to the court to judicially partition the estate. The court determines the manner in which the estate should be partitioned, which normally takes place by private auction amongst the heirs or by public auction.⁷⁸⁹ Heirs are also granted rights and duties until the partitioning is complete.⁷⁹⁰

⁷⁸⁶ Thamma M Chutinant, 'Personal Income Taxation Related to the Deceased during the Tax Year and the Undivided Estate according to the Revenue Code' (Master's thesis, Thammasat University 2006) 118-119.

⁷⁸⁷ CCC, s 1728.

⁷⁸⁸ CCC, ss 1356-1366 shall be applied in so far as they are consistent with the provisions of Book VI.

⁷⁸⁹ CCC, s 1364.

⁷⁹⁰ CCC, s 745.

When an administrator has been appointed, ss 1739-1740 applies. These provisions govern the manner in which debts owed by the estate shall be paid to estate creditors and how the property of the deceased can be appropriated to pay these creditors. Taxes and rates owed by the estate have to be paid to the Thai revenue authority, which is also a creditor of the estate, but only after all expenses have been paid for the common benefit of the estate, particularly funeral costs.⁷⁹¹ Moreover, property can only be seized to pay debts if nothing has been ‘otherwise specified by the *de cuius* or the laws’ (s 1740 (1)-(6)). The amount that the heir is required to pay depends on the laws or clauses in the will.⁷⁹² The estate of a statutory heir is divided *pro rata* in accordance with ss 1629 to 1639, but if the will provides otherwise, then the partition has to be made in accordance with the will. S 1746 also notes that some exemptions may apply in light of s 1750.

Whenever problems arise with the administration of an estate, an administrator has to be appointed.⁷⁹³ When appointed, an administrator has special status; for example, he or she can apply to the court, act as representative in court⁷⁹⁴ or sign any proprietary documents over land.⁷⁹⁵ Thus, the administrator has a similar status to that of an owner of the estate.⁷⁹⁶ In the case that there is no administrator, the heirs must jointly administer the estate, and in the event of problems, the heirs can request the court to appoint an administrator.⁷⁹⁷

If Thailand imposes a WTT, the administrator should also have to pay the WTT, and the CCC would have to be amended to impose this additional duty and to further clarify all of the administrator’s duties. In his explanatory notes about the Bill on the estate and inheritance tax of 1933, Mr. Aguillon stated the following:⁷⁹⁸

This Bill is a regulation which can only be used temporarily. Once Book V and Book VI of the Civil and Commercial Code are promulgated, a new Act will have to be enacted, because succession matters are incompletely addressed. Moreover, no extant law is fully applicable in

⁷⁹¹ CCC, s 1739.

⁷⁹² CCC, s 1746.

⁷⁹³ CCC, s 1723.

⁷⁹⁴ CCC, s 1736.

⁷⁹⁵ LC, s 81.

⁷⁹⁶ The Supreme Court Decision No. 3039/2548 (2005) *Arkhom v. Boonjan*

⁷⁹⁷ CCC, s 1713.

⁷⁹⁸ Office of the Council of State, “Bill of the Estate and Inheritance Tax B.E....” (Bangkok: Office of the Council of State, B.E. 2477 (A.D. 1934), Completed Subject No. 10/2477 (unofficial translation by author).

this instance. In particular, we find that there is no law that stipulates precisely what are the duties of administrators and just what authority they have. Moreover, there is no law specifying the conditions under which an administrator exercises authority and assumes duties whether said administrator had been appointed by the deceased or by the court. It is thus impossible to regulate the well and perfect tax on wealth transfer.

As a result, the administration of estates and the collection of taxes for wealth transfer are inefficient, rendering it difficult to collect the EIT. After Books 5 and 6 of the CCC entered into effect, no amendment was made to the Act, so the estate and inheritance tax (EIT) 1933 could not be effectively enforced.

5.1.2 Thai Civil Law on Family

The prospective Thai WTT would not only be affected by the law on succession but also by Thai family law, namely the principles that govern property held by a husband or wife (or community property) under ss 1465 through 1493 and 1532 through 1535 of the CCC. In this instance, the husband or wife of the deceased is a statutory heir.⁷⁹⁹ Because jointly-owned property is owned in equal shares by husband and wife,⁸⁰⁰ community property goes to the surviving spouse.⁸⁰¹

However, community property has to be distinguished from separate property because Thai law distinguishes between '*sin suan tua*' and '*sin somros*'—each spouse is the manager of his or her own '*sin suan tua*' under the CCC.⁸⁰² '*Sin suan tua*' means separate property and consists of property that belonged to either spouse before the marriage; this kind of property may include items for personal use, clothing or apparel, bodily decorations, tools or professional/occupational instruments. It may also include property acquired by either spouse during the marriage through a will or gratuitous gift. As another example, '*khongman*' is property given at the engagement ceremony by the man to the woman as evidence of the intention to enter into the marital relationship.⁸⁰³ '*Sin somros*' refers to community property, which consists of all property acquired by either spouse during marriage; for instance, community property would include property obtained through a will or written gift if it is expressly noted that the property should be

⁷⁹⁹ CCC, s 1629.

⁸⁰⁰ CCC, s 1625.

⁸⁰¹ CCC, s 1626.

⁸⁰² CCC, s 1470.

⁸⁰³ CCC, s 1471.

jointly owned. When it is unclear whether a property is privately separate or community property, the law presumes that the property is jointly owned as a community property.⁸⁰⁴

As '*sin somros*' does not constitute a form of concurrent ownership under the CCC, future wealth transfer taxes would have to apply to it. Upon the death of the husband or wife, the surviving spouse would have a vested half interest in all '*sin somros*'. The question then arises as to whether or not the deceased spouse's half of the '*sin somros*', should be taxed under the new WTT. Indeed one-half of the '*sin somros*', that owned by the deceased, goes to the heirs, and this one-half of the property is also included in the gross estate. When this property is transferred at death, it should be taxed through the estate tax (transferor-based system) rather than subjected to inheritance tax (recipient-based system). The other half of the '*sin somros*' would not be included in the total estate and should therefore not be taxed. Once the '*sin somros*' has been divided, the remainder becomes '*sin suan tua*',⁸⁰⁵ and the other half of the property no longer falls within the '*sin somros*' category.

If a new WTT is adopted, questions could arise about tax collection when a spouse dies and property is divided. It is therefore crucial to fully understand the applicable principles applying to the division of property between spouses; otherwise, loopholes may be left open, frustrating the introduction of a WTT. For successful WTT introduction, the laws on succession and Thai family law have to be vastly improved, and the courts must uphold these improvements. The legislature particularly must decide who should be liable for the submission of statements and in which cases these should be made. Finally, the court needs to decide how administrators and heirs will be involved as well as how the deceased's personal debts affect WTT application. It must be ensured that debts are paid to creditors before the estate is partitioned,⁸⁰⁶ and any WTT ought to be paid before the estate is partitioned. However, in practice, the payment of debts to creditors may cause problems because false creditors may assert claims in order to reduce the amount of tax owned.

Moreover, a WTT could become payable before the partition of the estate or after the receipt of the estate by the heirs. The legislature has to determine which of these alternatives is superior after careful scrutiny. At the time of death, it will be necessary to

⁸⁰⁴ CCC, s 1474.

⁸⁰⁵ CCC, s 1492.

⁸⁰⁶ CCC, ss 1734, 1736, 1740 and 1753.

assess who is entitled to what amount of the inheritance. Also, lawmakers must consider whether the WTT should be promptly collected or only once persons have actually received the inheritance. Where there is a dispute amongst the heirs, should the taxes be collected first? What procedure should be used to collect a wealth transfer tax for legatees? The answers to these questions must be clearly spelled out. It is also important to outline procedures for when there is a renunciation of the estate, disinheritance or other form of exclusion from succession. Ultimately, the WTT must be collected in a fair manner that does not impede development in Thailand.

5.1.3 Thai Trust Law

Thailand (formerly called ‘Siam’) once followed the English common law system,⁸⁰⁷ but it later converted to the civil law system. It therefore does not recognise trusts, as indicated in s 1686:

Trusts created whether directly or indirectly by will or by any juristic act producing effects during one’s lifetime or after death shall have no effect whatever, unless otherwise by virtue of the provisions of the law solely for the creation of a trust.⁸⁰⁸

The court has also found that a will is unenforceable if it gives land to all sons as a joint estate without the property being partitioned.⁸⁰⁹ The court can partition property for legatees within ten years, and heirs have to partition the estate within the same period.⁸¹⁰

Trusts that have been set up by natural persons are not generally recognised, and the Trust for Transactions in Capital Market Act of 2007 (TTCMA 2007) is the only law that deals with trusts. The TTCMA 2007 was introduced to deal with developments within trust law.⁸¹¹ Trusts have long been outlawed in Thailand, even special-purpose vehicles.⁸¹² Under s 4 of the TTCMA 2007, however, trusts can now be used for the purpose of capital market transactions. For instance, they may be used to hold an asset

⁸⁰⁷ Ibp USA, *Thailand Business Law Handbook* (5th edn, International Business Publications 2008) 239.

⁸⁰⁸ This Section has been amended by s.3 of the Civil and Commercial Code Amendment Act, (No.17) 2007.

⁸⁰⁹ The Supreme Court Decision No. 336/2502 (1959) *Thanakosed v. Phayuharad*

⁸¹⁰ CCC, s 1748.

⁸¹¹ Kaushani Pathirana, ‘Modern Use of Trusts in Commercial Transactions: Possible Reforms in the Sri Lankan Trusts Law’ (2011) <<http://www.cmb.ac.lk/wp-content/uploads/2014/02/MODERN-USE-OF-TRUSTS-IN-COMMERCIAL-TRANSACTIONS.pdf>> accessed 24 June 2015.

⁸¹² Trust Structure will help Capital Market, <http://bangkokpost.newspaperdirect.com/epaper/viewer.aspx>.

or enter into a transaction on behalf of the ultimate owner.⁸¹³ These trusts are only allowed if they have been created by juristic persons.⁸¹⁴

A minor exception to the general prohibition of trusts also applies to wills for which controllers of property have been appointed pursuant to ss 1687 to 1692 of the CCC. The testator or natural person with full capacity⁸¹⁵ can act on behalf of a minor, incompetent or quasi-incompetent person, or person admitted to the hospital on grounds of unsoundness of mind. If the testator decides to dispose the property for which he is responsible, he or she is required to appoint a controller. This controller cannot be a parent, guardian, custodian or curator of testator. The controller retains control of the property until the minor comes of age or the incompetent or quasi-incompetent person regains competence.⁸¹⁶ This exception does not mean that any natural person can set up a trust; instead, a testator or natural person can appoint a controller of a property by will.

The use of trusts in Thailand clearly differs from that of the UK. In the UK, trusts have been established for monetary purposes to obtain tax advantages and to direct cash flows to various beneficiaries. They also serve non-monetary purposes, such as protecting the interests of minors, spouses or civil partners who are unable to deal with financial matters. Trusts may also be used to prevent wasteful use of trust funds and ill-advised passing of assets to others.⁸¹⁷ In Thailand, however, the monetary reasons to permit trusts are limited to capital markets under the TTCMA 2007; they are prohibited, except in non-monetary situations seeking to protect the interests of minors and persons who are incompetent, quasi-incompetent or hospitalized due to unsoundness of mind.

Thai law does not permit trust law because civil law jurisdictions do not recognise the trust concept; this situation parallels other civil law jurisdictions in Asia where ‘the civil law trust is still in a relatively embryonic stage’.⁸¹⁸ As Thailand has adopted a civil code

⁸¹³ S 4 of the TTCMA 2007 provides that ‘a trust may be created for the benefit of transactions in the capital market as specified in the notification of the SEC in relation to the following transactions: (1) the issuance of securities under the Securities and Exchange Act; (2) the securitization under the Royal Enactment on Special Purpose Juristic Persons for Securitization; (3) other transactions which are supportive or beneficial to capital market development’.

⁸¹⁴ S.12 provides that ‘a settlor shall be any of the following Juristic Persons: (1) a company issuing securities under the Securities and Exchange Act; (2) an originator under the Royal Enactment on Special Purpose Juristic Persons for Securitization; (3) a juristic person having the qualifications specified in the notification of the SEC’.

⁸¹⁵ CCC, s 1689.

⁸¹⁶ CCC, s 1687.

⁸¹⁷ Tony Granger, *Inheritance Tax Simplified* (Management Books 2000 Ltd 2011) 71.

⁸¹⁸ Lusina Ho and Rebecca Lee, *Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis* (Cambridge University Press 2013) 277.

legal system, comparable to Germany, trusts are not codified in s 1686 of the CCC.⁸¹⁹ German law provides that an administrator can only partition property for up to 30 years,⁸²⁰ which is similar to s 1700 of the CCC, which states the following:

‘Subject to the provisions of this chapter, a person may, by an Act producing effect during lifetime or after death, dispose of any property under a stipulation that such property shall be inalienable by the beneficiary under such disposition, provided that the stipulator appoints some person, other than the beneficiary, who shall become absolutely entitled to such property in case of violation of the inalienability clause. The person appointed must be capable of exercising his rights at the same time when the Act disposing of such property takes effect. If there is no such appointment, the inalienability clause shall be deemed non-existent’.⁸²¹

At present, it is almost impossible for a legal owner of a property to create a trust in Thailand, unless such a trust has been created by a juristic person for a capital market transaction under the Capital Market Act of 2007. Hence, under Thai tax law, a trust cannot be considered a tax unit, and no income tax or other taxes can be levied. Trusts are not recognised under the RC, except for the minor exception in s 62 of the RC.⁸²² Even though Thai law does not allow the establishment of trusts to safeguard property, the prohibition can be circumvented by establishing trusts in other jurisdictions where they are permitted. This circumvention can cause problems when it comes to the administration of property.⁸²³ Thus, Thai law has slowly started to recognise trusts; for instance, the original s 1686 of the CCC provided that ‘a trust created whether directly or indirectly by will or by any juristic act producing effect during the lifetime or after death shall have no effect whatever,’ but an amended section at the end of the section adds the following: ‘...unless...by virtue of the provisions of the law solely for the creation of a trust’. This amendment to s 1686 was made by virtue of s 3 of the Civil and Commercial Code Amendment Act (No. 17) of 2007, which introduced the TTCMA 2007.

⁸¹⁹ Cohn (n 776) 270.

⁸²⁰ Ibid 269, 271.

⁸²¹ CCC, s 1700.

⁸²² RC, s 62.

⁸²³ Walaisathien (n 641) 67.

It remains unclear whether future Thai law will further broaden the scope of permissible trusts similar to the UK and the US. However, the tax regime in these countries covers different types of trusts.⁸²⁴ In the UK, a trust is dealt with as a separate legal entity, and trustees are distinct from the settlor for inheritance tax purposes.⁸²⁵ Trusts can be a very effective means to reduce or even eliminate tax liabilities, as assets are transferred out of the estate. When a gift has been made, its ownership passes from the donor or settlor to the trustees, reducing the estate and leading to less inheritance tax.⁸²⁶ While Thai tax laws do not yet apply to trusts, these laws are at present dissimilar to those of advanced nations. Although possibly requiring development to ensure effectiveness in the future, this particular issue will not be discussed any further in this thesis.

5.1.4 The Commercial Law on Gifts

In the US and UK, a tax is imposed on lifetime gifts in order to prevent people from giving away most of their property prior to death, thereby artificially reducing their estate in an effort to avoid estate tax.⁸²⁷ Although Thailand does not levy any gift tax, gifts are taxable as income, unless received during a ceremony or on occasions involving established customs.⁸²⁸ Ceremonial gifts made in accordance with established customs are also exempted from the PIT. It is therefore important to briefly examine the fundamental principles of the CCC governing gift transfers.

The Code defines the term gift as if it were a contract reflecting the donor's intention to gratuitously transfer his or her property to the donee as well as the donee's intention to accept the property.⁸²⁹ In other words, a gift is 'the voluntary transfer of property to another made without compensation.'⁸³⁰ A gift also includes the release of an obligation or duty to perform an obligation⁸³¹ and any act which decreases the quality of a material object and the quantity of the property of one person, whilst increasing the same quality

⁸²⁴ David Marsh, *A Straightforward Guide To Understanding And Controlling Inheritance Tax*, (Straightforward Publishing 2009) 62.

⁸²⁵ *Ibid*, 63.

⁸²⁶ Granger (n 817) 72.

⁸²⁷ IHTA 1984 (UK), s 2(1) and IRC (US), s 2501.

⁸²⁸ RC, s 42.

⁸²⁹ CCC, s 521.

⁸³⁰ Ruth Sarah Lee, 'A Legal Analysis of Romantic Gifts' (2002) Harvard Law School Fellows' Discussion Paper No. 43 (03/2002), 5
<http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Lee%2043.pdf> accessed 24 June 2015.

⁸³¹ CCC, s 522.

or quantity for another.⁸³² Though the RC does not specifically define the words gratuitous gift, the 1982 dictionary of the Royal Institute of Thailand makes clear that a '*gratuitous gift*' means the transfer of property to another person without compensation.⁸³³

Accordingly, a gift contract is not a reciprocal contract as benefits are solely transferred from the donor, and the donee does not have reciprocal duties. The donor gives the property gratuitously, despite not being legally obliged to do so. If a gift requires consideration or other benefits, the contract cannot be considered a gift contract. The CCC uses the principle of '*encumbered gifts*' and distinguishes these from general gifts. An encumbered gift imposes duties on the donee from the time when the property is given, releasing the encumbrance from the property. If the donee adheres to this duty, the donor can pursue a claim for undue enrichment against the donee to ensure that the encumbrance is released.⁸³⁴ The difference between the property value or the benefit received constitutes the gratuitous gift. However, certain kinds of properties, such as dowries or engagement gifts, fall outside the scope of a gift contract. Particular legal provisions govern engagement contracts, but they are nevertheless considered gratuitous gifts.

The validity of a gift depends on the type of property being gifted, and Thai law distinguishes three types of property: (1) immovable property; (2) special movable property, such as ships or vessels of six tons and over, steam launches or motor boats of five tons and over, floating houses and beasts of burden, such as elephants, horses, cows, cattle, donkeys; and (3) general movable property. Immovable and (special) movable gifts have to be made in writing and registered with competent officials to be valid.⁸³⁵ A gift of movable property is valid only upon delivery of the property.⁸³⁶ In such cases, the gift is valid without delivery.⁸³⁷ However, the donor can revoke the gift on the basis of ingratitude in the following circumstances: if the donee has committed a serious criminal offence against the donor punishable under the penal code, if the donee has seriously defamed or insulted the donor, or if the donee refused the donor the

⁸³² Wisanu Kruangarm, *Textbook on Sale, Exchange and Gift Law* (7th edn, Nitibannakarn Press 1997) 323.

⁸³³ Office of the Royal Society, *The dictionary of the Royal Institute of Thailand* (Nanmeebooks 2011) 388

⁸³⁴ CCC, s 406.

⁸³⁵ CCC, s 538.

⁸³⁶ CCC, s 525 and 456.

⁸³⁷ CCC, s 525.

necessities of life whilst he was able to supply them.⁸³⁸ In summary, when a gratuitous gift is made with regards to property, the property may be considered ‘assessable income’ during the year it was received.⁸³⁹

5.2. The Revenue Code

As discussed in Chapter 2, Thailand began to collect the estate and inheritance tax (EIT) in 1933, but repealed the law in 1944 because collection costs outweighed the revenue benefits. As a result, Thailand currently does not have specific laws that impose taxes on estate, inheritance or gifts. Income and property from an inheritance do not constitute income for the purpose of the PIT; however, if a legatee subsequently sells inherited property, an exception applies in some cases. Meanwhile, income from gifts is also exempt from tax by virtue of s 42 (10), effectively narrowing the available income tax base while the IPT system which is recognised by International Monetary Fund (IMF) as a narrow tax base due to it already constitutes several extensive exemptions.⁸⁴⁰ Such an approach certainly benefits the rich and has a similar effect as failing to make the PIT system more equitable. The disparity between rich and poor remains unaddressed, thereby reinforcing the stark wealth inequalities characteristic of Thai society.

5.2.1 Income Derived from Inheritance

Under the RC, once a partition of an estate takes place, each heir acquires a portion of the estate in the same tax year as income tax assessment for PIT purposes.⁸⁴¹ However, an inheritance is exempt from income tax; no such tax is payable irrespective of the amount of the acquired estate and regardless of whether the heir is statutory or legatee. One exception is when a registration fee is charged under the Land Code (LC), the Finance Ministerial Regulation no. 47, clause 2 (7) (a) or (d), or stamp duty (SD) under part 6, schedule 28(b) of the RC.

Generally, any income or properties received or acquired by an individual are subject to PIT, but no such tax is payable on income or properties acquired by inheritance because of s 42(10) of the RC, which states the following:

⁸³⁸ CCC, s 531.

⁸³⁹ RC, s 39.

⁸⁴⁰ Bartolich (n 7) 258.

⁸⁴¹ RC, s 48(8).

The assessable income of the following categories shall be exempt for the purpose of income tax calculation: (10) income derived from inheritance;⁸⁴²

Property acquired by inheritance is exempt when subsequently sold and when legatees sell movable properties acquired by inheritance. However, this exemption does not include the sale of ships or vessels of six tons or over, steam launches on motorboats of five tons or over, or floating houses.⁸⁴³ Furthermore, PIT becomes payable upon the sale of immovable property acquired by inheritance, which is currently set at a progressive rate of 5 to 37 per cent. However, in connection with exemptions from revenue taxes, no income tax becomes payable on immovable property outside Bangkok metropolis, municipalities, sanitation districts, Pattaya township or any local authority recognised by a specific law, provided that the amount of the sale does not exceed 4 000 GBP for the entire tax year, as per s 2(17) of Finance Ministerial Regulation no. 126 issued in the RC.

Income is only exempted from income tax under s 42(10) if it covers estate property. S 42(16) also exempts income acquired from the estate for which tax is normally payable for the purposes of income tax.⁸⁴⁴ This exemption is granted to prevent double taxation, as income tax also has to be paid by the deceased during the year of his or her death.

The transfer of property by succession to statutory heirs or third party legatees results in an absolute exemption from income tax.⁸⁴⁵ This exemption differs from transfers without consideration or gratuitous gifts. In accordance with s 39, the transferee is the taxpayer in these cases, except when maintenance or support for moral purposes is paid or a gift is received during a ceremony or on other customary or traditional occasions. Therefore, a transfer of an estate by will to either the statutory heirs or third-party legatees results in an absolute tax exemption for the heirs or beneficiaries,⁸⁴⁶ whether for movable or immovable property.

Moreover, according to s 38 of the RC, when ownership or a possessory right in an immovable property is transferred without any consideration, it is still considered a sale,

⁸⁴² RC, s 42(10).

⁸⁴³ RC, s 42(9).

⁸⁴⁴ RC, s 57*bis*.

⁸⁴⁵ RC, s 42(10).

⁸⁴⁶ *Ibid.*

and the transferor is considered a taxpayer.⁸⁴⁷ In contrast, ownership or a possessory right for an immovable property is transferred to an heir by way of inheritance; it is not a sale under s 39, and at the time of death, the property immediately is transferred to the heirs.⁸⁴⁸ Although the heir acquires more money, it is not subject to income tax. The government thus loses income from both sides. Tax payments are avoided, especially when several immovable properties are transferred. Consequently, most property is transferred by way of inheritance, as this type of transfer is free from tax burden for both the transferor and transferee.

5.2.2 Income Derived from Maintenance and Support under Moral Purposes

No income tax is payable in the following cases: maintenance income derived due to moral obligations and income or property given to children. As s 42(10) of the RC states,

The assessable income of the following categories shall be exempt for the purpose of income tax calculation: ... (10) Income derived from maintenance and support under moral purposes....⁸⁴⁹

The RC does not define the term ‘maintenance and support under moral purposes.’ The law is ambiguous because the scope of this exemption is not explained, which also has caused enforcement problems. The courts have attempted to interpret the subsection by referring to provisions of the CCC, including sections 1564, 1563 and 1462(2). They seek to clarify what constitutes maintenance and support under moral purposes. For instance, it is not maintenance and support under moral purposes for a mother to give expensive plots of lands to her married child who has work.⁸⁵⁰ As another example, a grandfather who gives a piece of land to his grandchild is not providing maintenance and support under moral purposes.⁸⁵¹ The central tax courts have interpreted the subsection by referring to the RC, taking into account the intention of the legislative body. While no interpretation should adversely affect the taxpayer, the intention behind s 42 (10) is to exempt maintenance and support under moral purposes from income tax. The government needs to reduce the tax burden of citizens in order to support the family institution. In one case, a father transferred his shares valued at 116 000 GBP to his

⁸⁴⁷ RC, s 41*Bis*.

⁸⁴⁸ CCC, s 1599.

⁸⁴⁹ RC, s 42(1).

⁸⁵⁰ The Supreme Court Decision No. 1680/2517 (1974) *Thongchom v. Chan*.

⁸⁵¹ The Supreme Court Decision No. 2043/2523 (1980) *Meesinha v. MeeMaak*.

child, and the court found that the child was exempt from income tax.⁸⁵² However, such a gift should be given to the recipient on or near the date of a ceremony or occasion for the recipient to evoke the exemption under this provision. If the gift is given a long time after an appropriate occasion, there is a risk that the property will be considered taxable income.

Nevertheless, if a father or mother, as a donor, transfers ownership or a possessory right in an immovable property to their legitimate child without any consideration, they can evoke the income tax exemption, except when the child has been adopted (Finance Ministerial Regulation no.126, clause 2(18)).

However, the RC considers a donor who gives immovable property to be a taxpayer, pursuant to s 39, which defines the word 'sale' to include gifts or transfers of ownership or possessory rights in immovable property by any means, with or without consideration. Therefore, the gift of an immovable property is considered a sale, and the donor is treated like a taxpayer under s 41*bis* of the RC, which governs exemptions from revenue taxes. This exemption also does not cover cases in which a legitimate child transfers immovable property to his or her father or mother.

As the RC does not define 'maintenance and support under moral purposes' and fails to clarify the scope of the tax exemption, an unlimited and absolute tax exemption can be claimed. Even large gifts can be considered maintenance and support under moral purposes. This issue results in the government losing a great deal of income and encourages tax avoidance, as no tax can be collected from the transferor or transferee. While the purpose of this tax exemption is to promote strong family relations and to stabilise individuals' existence, this stability often only extends to particular groups. It certainly does not result in a fairer distribution of income and wealth within Thai society as a whole.

5.2.3 Income Derived from Customary and Traditional Ceremonial Gifts

Gifts made during ceremonies or other occasions established by customs are also exempted from Thai income tax, regardless of whether or not the recipient is a relative. Established customs include New Year's, Christmas, Buddhist holy days or birthdays, celebrations of new homes or births. This legislation is made clear in s 42 (10) of the RC, which states,

⁸⁵² The Supreme Court Decision No. 4505/2533 (1990) *Chinnadhammit v. Revenue Department*.

The assessable income of the following categories shall be exempt for the purpose of income tax calculation: ... (10) Income derived from gifts received in a ceremony or on occasions in accordance with custom and tradition.

However, as can be seen, this law does not define ‘custom and traditional ceremony’, causing ambiguity in what can be considered a ceremony, including the scope of the exception. Indeed, in Thai society, there are numerous ceremonies, but which ones are considered custom and tradition is by no means clear. This lack of clarity causes enforcement problems that are further aggravated by the fact that the RC does not limit the exempted amount. Many have taken advantage of this legal loophole to avoid paying tax and to engage in corrupt business practices. However, if a donor gives a large amount of money in order to obtain political benefits or government concessions, it is not considered to be a gratuitous gift on a special occasion in accordance with ceremony or custom and tradition.⁸⁵³

As can be seen, the RC does not require the heir or the estate to pay tax. It only stipulates that if the estate has income, it is obliged to pay tax, which is a normal personal income tax principle. The RC also spells out exceptions for which tax payments are not computed, including the receipt of movable property from the estate offered for sale subsequently, such as necklaces, rings and money. In such circumstances, it is not necessary to pay tax, as stipulated in s 42(9). Nevertheless, money acquired from the sale of immovable property from the estate has to have its value computed for tax purposes. For instance, if an heir inherits land or a building and sells it, the money acquired from the sale is taxed.

Money obtained from the sale of immovable property acquired by inheritance is exempt from specific business tax (SBT). If, after the death, the heir sells the inherited properties within 5 years from the date of receipt, he or she does not have to pay SBT.⁸⁵⁴ However, this exemption comes at the expense of other taxpayers. For this reason, Thailand should adopt a tax regime for estates and gifts to close such ingenious legal loopholes. Heirs or transferees of properties currently obtain windfall incomes without having to provide any consideration, which provides them an unfair advantage over taxpayers who earn income from labour or capital. The latter have to increasingly

⁸⁵³ The Supreme Court Decision No. 1262/2520 (1977) *Thanarat v. Revenue Department*.

⁸⁵⁴ RC, s 91/2 (1) and Royal Decree, s.4(6)(b), It issued under the revenue code governing Sale of Immovable Properties as Business or Speculation (No. 342) 1998.

bear tax burdens at a progressive rate, while the ratio of advantage for the well-off increases rapidly.

Instead, income acquired as a windfall should be taxed more heavily than income from labour and investment according to the vertical equity principle of the RC. When taxpayers have different attributes, they should be treated differently in terms of tax collection. As previously mentioned, the Thai government did not gain much revenue from EIT, it therefore is essential for Thailand to start taxing wealth transfers not only to strive towards a fairer society but also to prevent huge tax losses. Such taxation is essential to maintain infrastructure, to strengthen social institutions and to promote social and economic development.

5.3 Royal Taxation under the Crown Property Act of 1936

Thailand has a history of unequal income and wealth distribution since the days of absolute monarchy and feudalism. For more than 80 years, Thailand never levied any tax on wealth transfer. The upper class has thus been able to amass a great number of properties and stupendous wealth.⁸⁵⁵ Today, however, resistance has emerged, as can be seen in numerous protests for freedom and equity in Thailand. If a tax had been imposed on wealth transfers, social inequality could have been better mitigated today.⁸⁵⁶

5.3.1 Controversial Historical Issue on Royal Taxation

In the past 100 years in Thailand, social and economic inequalities have arisen. This phenomenon was pointed out by the People's Party (*Khana Ratsadon*). In 1932, the system of government changed from an absolute monarchy and a feudal system to that of a constitutional monarchy.⁸⁵⁷ This change was brought about by a conflict between the social classes,⁸⁵⁸ and it closely related to the repeal of the EITA 1933.

As discussed in Chapter 2, Phanomyong proposed a particular economic and political view.⁸⁵⁹ The *Khana Ratsadon*, led by Phanomyong, produced a yellow paper.⁸⁶⁰

⁸⁵⁵ Udomchanya (n 736) 220.

⁸⁵⁶ Lertpaithoon (n 569) 166.

⁸⁵⁷ Nakarin Mektrairat, *Siam Revolution BE 2475 (1932)* (3rd edn, Thammasat University Press 2010) 5.

⁸⁵⁸ *Ibid* 3.

⁸⁵⁹ On 24 June 1932, the People's Party (*Khana Ratsadon*) announced six principles in an economic plan outline. Phanomyong strongly believed that if the government drew up an appropriate national economic plan, the government would be able to find employment for all and would be able to improve the well-being of the people, which was one of his major objectives in changing the government. See Pridi Phanomyong, 'Outline of an Economic Plan (1933)'

<http://www.openbase.in.th/files/pridibook049part2_4.pdf> accessed 24 June 2015.

Meanwhile, the feudal group, noblemen and military, led by Phraya Manopakorn Nititada (Kon Hutasingha), produced a white paper. These two groups always held opposing views.⁸⁶¹ The white paper was based on the royal decision of King Prajadhipok (Rama VII) and was issued to be controversially attached to the yellow paper—the contents of the white paper countered all the points made in the yellow paper, particularly in respect to the EIT.⁸⁶² On the other hand, the yellow paper proposed methods to raise capital for the government through the collection of certain taxes, including an inheritance tax. The yellow paper argued that these taxes could be collected in small daily amounts, such that the collections would not aggravate taxes. While only small amounts would be collected on a daily basis, these amounts would have generated a large sum over the course of a year.⁸⁶³ However, the white paper argued that WTT collection could not be monetary and that only immovable property should be collected.⁸⁶⁴

Although the House Representatives approved and reconsidered the EITA 1933,⁸⁶⁵ King Rama VII subsequently exercised the higher right and did not endorse the Act. The king proposed an amendment in relation to royal property. He asked that the ‘king’s private property’ be separate from the royal property because any royal property part of the royal estate passed on to people other than the subsequent monarch would be charged for the EIT. The remaining property falling outside the king’s private property category would be considered crown property and not considered for the EIT.⁸⁶⁶ Nevertheless, the House of Representatives subsequently affirmed their Bill with a resolution not to make any additional amendments, with 98 votes affirming the former Bill, 35 votes requesting an amendment and 12 abstentions.⁸⁶⁷ Subsequently, the House of Representatives, which debated the Bill, reaffirmed the former Bill and stated that s 15 of the Constitution of the Kingdom of Siam of 1932 (CKS 1932) stipulates that a person has the duty to obey the law, protect the country and assist the government by paying

⁸⁶⁰ Ibid.

⁸⁶¹ Pridi Phanomyong, *Outline Economic Plan Luang Pradist Manudharm* (Thammasat University Press 1999) IV.

⁸⁶² Bunrauam, Teamjan, *Trial and court case against King Prajadhipok: King Rama VII of Thailand (1893-1941) for defamation and disgracing the people* (Thanbundit Press 2012) 165.

⁸⁶³ Phanomyong, ‘Outline Economic Plan (1933)’ (n 859) 100.

⁸⁶⁴ Phachatipok, *White Paper: The Royal Decision of His Majesty King Phrapokkiao Chaoyuhua*, (Thammasat University Press 1933) 28.

⁸⁶⁵ CKS 1932, s 39.

⁸⁶⁶ Minutes of the Sitting of the House of Representatives No. 2/2477 (Extraordinary) Session 1, Set 1, Saturday 4th August B.E. 2477 (A.D. 1934) 43 (unofficial translation by author).

⁸⁶⁷ Ibid 53.

taxes and other means.⁸⁶⁸ As a plausible interpretation, it is arguable that all people have a legal duty to pay the EIT in order to assist the government; thus, the king is not exempt and should be considered for the EIT. Parliament supported the notion that all people are legally equal, and should not be discriminated against due to rank, nobility, appointment or any other status.⁸⁶⁹ Therefore, the king's proposal for the amendment of the Bill was rejected by the House of Representatives.⁸⁷⁰ The House finally rendered a resolution that the Bill should not be amended in order to maintain the dignity of the House of Representatives. Consequently, the properties that belong to the crown (or crown property) are still subject to the EIT.⁸⁷¹

The EITA 1933 was subsequently heavily critiqued, especially by the rich and by members of the royal family, who opposed its enactment. This resistance subsequently led to the repeal of the EITA 1933 in 1944.⁸⁷² Any further attempts to develop a WTT have been frustrated until today.

5.3.2 Royal Property of the Thai Monarchy

In the absolute monarchy era, all Thai people and property belonged to the King of Thailand. The king was recognized as the lord of the land. Today's 'constitutional monarchy exists within a vibrant globalised economy',⁸⁷³ and it is no longer true that all property belongs to him in a private capacity. Rather, the monarchy is an institution passed on from one sovereign to the next.⁸⁷⁴

Under the CPA 1936, the royal property was divided into three categories, including (1) the king's private property, (2) public property and (3) crown property. The Crown Property Bureau, as a department in the Ministry of Finance, exists to preserve and manage the property of the crown⁸⁷⁵ rather than the king's private property. The king

⁸⁶⁸ CKS 1932, s 15.

⁸⁶⁹ CKS 1932, s 12.

⁸⁷⁰ Minutes of the Sitting of the House Representatives No. 2/2477 (n 866) 43-44.

⁸⁷¹ *Ibid* 47.

⁸⁷² Act on the Repealing of the Estate and Inheritance Tax Act of B.E. 2476 (A.D. 1933) of B.C. 2486 (A.D. 1943).

⁸⁷³ Grossman and Faulder (n 126) 283.

⁸⁷⁴ *Ibid*.

⁸⁷⁵ CPA 1936, s 5 para 2.

manages his own private property⁸⁷⁶ under the Crown Property Board,⁸⁷⁷ which is made clear in s 4 of the CPA 1936,⁸⁷⁸ stating,

The '*king's private property*' means property, which belonged to the king before ascending to the throne, property conferred on the king by the state or property acquired by the king by any means and at any time other than property acquired on account of kingship, including any fruit accrued therefrom; and '*public property*' means property of the king which is used exclusively for the benefit of the State e.g. palaces; and '*crown property*' means property of the king other than the king's private property and public property.⁸⁷⁹

Before 1932, crown property was considered separate from public property used exclusively to benefit the state. Public property fell under the supervision of the Ministry of Finance and Treasury, while crown property fell under the supervision of the Department of the Privy Council.⁸⁸⁰ However, it should be noted that crown property was not absolutely separate from public property. For instance, the Building and Land Tax Act of 1932 (BLTA 1932) stipulated that certain public and crown property was tax exempt.⁸⁸¹ However, it remained unclear what constituted crown property, and the EITA 1933 did not explicitly provide an exemption for royal property. On 21 April 1935, the Cabinet approved the promulgation of the Act on Tax Exemption for Crown Property 1934, (ATECP 1934).⁸⁸² Under this Act, the king's private property was separated from crown property.⁸⁸³ S 3 of the ATECP 1934 is the most important provision of this Act, defining the king's private property as (a) properties or rental rights owned by the king at the time of his ascendancy to the throne (he has the right to sell these properties before ascending to the throne); (b) properties or rental rights devolved on him at the time of or after his ascendancy to the throne either from his parents or from any persons other than the king; and (c) properties or rental rights

⁸⁷⁶ CPA 1936, s 5 para 3.

⁸⁷⁷ CPA 1936, s 4*Ter*.

⁸⁷⁸ Crown Property Act of B.C. 2479 (A.D. 1936), Amended by Crown Property (Amendment No. 3) of B.E. 2491 (A.D. 1948), s 4.

⁸⁷⁹ CPA 1936, s 4.

⁸⁸⁰ Act on Charters of Persons Holding Official Duties in the Ministry of Finance and Treasury of 1890 (Rattanakosin Era 109).

⁸⁸¹ BLTA 1932, s 9.

⁸⁸² Government Gazette No. 52, 79-81 (Dated 21st April 1935).

⁸⁸³ ATECP 1934, s 3.

derived or acquired from his personal funds.⁸⁸⁴ Beyond the king's private property mentioned in s 3, the crown property will not be tax and duty exempt,⁸⁸⁵ and the king's private property will be considered for tax. This legislation resulted in the king's private property being distinguished from crown property.

When King Rama VII abdicated on 2 March 1935, he submitted a letter of the king's abdication statement to the Assembly, writing, 'I would like to abdicate all my rights as the king, but I reserve all my rights I held before ascending to the royal throne'.⁸⁸⁶ This statement ensured that his private property was reserved, but also caused an interpretative problem because it was unclear whether or not it also covered property set out in s 3(c) of the ATECP 1934, namely property or rights derived from or purchased with his personal money and income from these properties. However, the Third Sub-Commission of the Council of State also considered this problem and opined that s 3 (c) of the ATECP 1934 should be interpreted as dividing the king's property into three types: (1) property owned by the king before his ascendancy to the royal throne, (2) property amassed by the king during his reign, and (3) property amassed by the king after his ascendancy to the royal throne.⁸⁸⁷ As a result of there being three categories of properties, the following four categories of crown properties can be identified:⁸⁸⁸

- (1) Property that is vendible (property that will belong to the future king who has similar proprietary rights as other individuals) and is still the king's personal property at the time of ascendancy;
- (2) Property derived by the king through devolution (by inheritance or gift) from any person (whether or not a member of the royal family) who is not the previous king of the Kingdom of Siam and not derived from the previous king's personal money;
- (3) Property amassed by the king by devolution (by inheritance or gift) or acquired using money from the king's personal money; and

⁸⁸⁴ ATECP 1934, s 3.

⁸⁸⁵ ATECP 1934, s 4.

⁸⁸⁶ Prajadhipok, 'King Prajadhipok's Abdication Statement' in Benjamin A Batson (ed), *The End of the Absolute Monarchy in Siam* (Oxford University Press 1984) 317.

⁸⁸⁷ As amended by s 3 of the Crown Property Act (Amendment No. 3) 1948.

⁸⁸⁸ Memorandum of the Construction of Act on Taxation Exemption relating to the Crown Property of B.E. 2477 (A.D. 1934), Office of the Council of State of 1936, Completed Subject No. 219/1936, (unofficial translation by author).

(4) The king's personal money interpreted as a salary or type of money paid to the king in order to compensate him for assuming his royal burden as the state's chief of state. It is similar to a salary or money paid to a government official; that salary or money becomes that person's personal property.

Under the ATECP 1934, therefore, property in s 3(c) does not include fruits of the property (or profits gained from the property) in accordance with s 3(a) and (b) because property mentioned in s (3)(c) differs from that specified in s 3(a) and (b). S 3(c) clearly demonstrates that the king's personal property or funds invested to acquire specific property, such as immovable property or bonds, is still the king's personal property. As a consequence of this memorandum, the CPA 1936 was subsequently amended with the phrase including any fruit accrued therefrom in the Crown Property Act (No. 3), 1948.⁸⁸⁹

5.3.3 Thailand and UK Royal Taxation in Comparison

The first question to consider when comparing Thailand and the UK in terms of royal taxation is whether or not royal property can be taxed. If so, it is important to determine which property categories will be legally considered for taxation in Thailand. The CPA 1936, s 3 divides the royal property of the Thai monarch into three categories: the king's private property, public property and crown property, as mentioned above. In relation to royal taxation, however, the classification of such property provides a clear distinction between properties that belonged to the monarch as an institution and properties held by the king as a private individual. The royal properties and the king's private property can be subject to duty and taxation, but not the other two categories.⁸⁹⁰ S 8 specifies which royal properties fall outside legal liability in the form of a tax exemption:

Public property shall be exempted from duty and taxation; crown property shall be exempted from duty and taxation as same as public property; the king's private property shall not be within the bound of exemption as aforementioned.⁸⁹¹

⁸⁸⁹ Government Gazette, No. 54 (dated 19th July 1937).

⁸⁹⁰ Grossman and Faulder (n 126) 288

⁸⁹¹ CPA 1936, s 8.

In the UK, the status of the Queen of England, including the Prince of Wales,⁸⁹² in relation to taxation is voluntarily, but not legally, subject to capital gain tax, income tax and inheritance tax; the relevant enactments do not apply to the crown according to the Memorandum of Understanding (MoU) on Royal Taxation which took effect in 2013.⁸⁹³ For example, the Queen and Prince of Wales are held taxable and voluntarily pay all of their income tax for personal income.⁸⁹⁴ They pay a capital gain tax (CGT) on the same basis.⁸⁹⁵ They pay indirect taxes, such as the value added tax (VAT) and council tax, of their own accord.⁸⁹⁶ On the other hand, the King of Thailand only pays taxes on income derived from his private property, while public and crown properties remain tax-free.⁸⁹⁷ The crown prince is excluded from taxes because he has not yet ascended to the throne.

In terms of the inheritance tax (IHT), the royal estate belonging to the prior monarch is subject to the IHT per the MoU on Royal Taxation.⁸⁹⁸ Since 1933, the IHT has not been charged on all of the queen's royal property because some is held by her as sovereign⁸⁹⁹ and passed from her to the upcoming monarch.⁹⁰⁰ In other words, transfers that occur upon the death of one sovereign to the next are, in principle, exempt from the IHT. In the MoU on Royal Taxation, the IHT arrangements provided in A 16 state,

No inheritance tax will be payable in respect to assets which are held by the queen as sovereign, rather than as a private individual, or in respect of any other assets held in right of the crown or required for the official purposes of the crown.⁹⁰¹

⁸⁹² The Prince of Wales also corroborated that he has intentions to pay similar taxes settled on before gaining succession to the throne.

⁸⁹³ HM Government, Memorandum of Understanding on Royal Taxation: Presented to the House of Commons pursuant to section 5(4) of the Sovereign Grant Act 2011 (March 2013) 1 <<http://www.official-documents.gov.uk/>> accessed 24 June 2015.

⁸⁹⁴ After the income tax was introduced in 1842, some income tax was paid voluntarily by the sovereign, but over a long period of time, these payments were gradually phased out.

⁸⁹⁵ HM Government (n 893) 2.

⁸⁹⁶ Steven Ayres, Finances of the Monarchy, Standard Note: SN/SG/00819, 11 September 2014, Social and General Statistics, The National Audit Office (NAO) 5 <www.parliament.uk/briefing-papers/sn00819.pdf> accessed 24 June 2015.

⁸⁹⁷ CPA 1936, s 8.

⁸⁹⁸ HM Government (n 893) 2.

⁸⁹⁹ This is property that the queen is not entitled to sell to provide income or capital for her personal use.

⁹⁰⁰ The above policies shall be applicable to those gifts and bequests awarded after the date of 6 April 1993.

⁹⁰¹ HM Government (n 893) 8.

On the other hand, as a private individual, the queen's royal property, whether attained in the form of bequests or gifts to others, will be considered for the IHT, except for property passed on to the next monarch as gifts and bequests.⁹⁰²

Another question to be considered is why royal property passing from one sovereign to the next should be exempt from IHT. This question has been part of a recurrent controversy in the 19th and 20th centuries.⁹⁰³ There are significant reasons why there is no taxation of the royal estate passed on from the prior sovereign to the subsequent sovereign. It is because 'the monarch cannot produce any new wealth from this earning'.⁹⁰⁴ Such properties include the royal palaces (official residences), royal collection of paintings, and other works of art. The BLTA 1932 stipulates that certain public and crown property, such as the royal palaces, are tax exempt from BLT,⁹⁰⁵ and the CPA 1936 also specifies that the public and crown property is exempt from any duty and taxation.⁹⁰⁶

Another reason why royal properties, such as the queen's private property, should not be charged the IHT is because 'private assets, such as Sandringham and Balmorals, have official as well as private use, and the monarchy, as an institution, needs sufficient private resources to enable it to continue to perform its traditional role in national life, and to have a degree of financial independence from the government of the day'.⁹⁰⁷ Unlike the UK, the king's private property is not legally exempted from the prospective Thai WTT because, at present, there are no existing relevant enactments providing an exemption for such properties; therefore, the king's private property will be subject to any duty and taxation.⁹⁰⁸ A further question emerges of whether or not it will be possible to adopt an exemption related to the passing of the king's private property on to the next sovereign into the prospective Thai WTT. To answer this question, it would not be possible to provide the exemption provision into the legislation because 'all laws, rules and regulations in so far as they are contrary to or inconsistent with the provisions of this Act shall be repealed'. This means that the exemption provision of the new WTT will be repealed if they run contrary to or are inconsistent with s 8 of the CPA 1936.

⁹⁰² Report of the Royal Trustees (Civil List Acts 1972 and 1975), presented in pursuance of Section 5(3) of the Civil List Act 1972, Ordered by The House of Commons to be Printed 11 February 1933 (London, HMSO) 3.

⁹⁰³ Vernon Bogdanor, *The Monarchy and the Constitution* (Clarendon Press 1997) 191.

⁹⁰⁴ Ayres, (n 896) 5.

⁹⁰⁵ BLTA 1932, s 9.

⁹⁰⁶ CPA 1936, s 8.

⁹⁰⁷ Report of the Royal Trustees (n 902) 3.

⁹⁰⁸ CPA 1936, s 8.

Conclusion

In conclusion, the provisions of both codes—the CCC and the RC—and applicable Acts related to royal estate, would be affected to any drafting of the prospective WTT in Thailand. Lawmakers and legislators should therefore carefully consider certain rules and concepts within the law on succession, applicable family law provisions and gift contracts under the CCC. Significantly, as Thai tax laws do not yet apply to trusts, it is important that these laws be further developed in terms of wealth transfers. The matter of whether or not the royal estate should be taxed is controversial and remains complicated and sensitive in Thai society. This issue will therefore be further analysed in chapter 9.

Particular to the personal income tax, however, s 42 (10) of the RC provides PIT exemptions for income derived from an inheritance, from maintenance and support under moral purposes and from gifts received for a ceremony or customary and traditional, without limitations on amounts. Sawasruksa argues that such income is taxable, and that this provision should be amended. This argument is still strong so long as dealing with the income tax. He believes that it may leave open a loophole allowing wealthy taxpayers to avoid the tax, thus widening the gap between the rich and the poor.⁹⁰⁹ The exemption may fail to make the PIT system more equitable, thus causing the tax system to become more ineffective as a whole.

Undoubtedly, income derived from inheritance or gifts should be taxed because the fundamental principle of income tax is to only tax income; capital gains are not subject to this type of taxation, instead falling under the umbrella of the capital gain or capital transfer taxes, e.g., estate, inheritance or gift taxes. For example, if A inherits a block of flats, the rental income that he or she receives from his or her tenants is considered income and should be liable to income tax. If he or she sells the block of flats, the profit that he or she makes from the sale is capital and should be liable to capital gains tax. If he or she gives the block of flats to a child, he or she should be liable to capital gains or capital transfer taxes. If he or she dies, and his or her child inherits the block of flats, the inheritance should be liable to WTT. However, capital gain or capital transfer taxes are not levied in Thailand at the present time, and the exemption under s 42(10) is not justified. Sawasruksa asserts that a proper solution, in Thailand, is to repeal or amend this exemption in favour of introducing taxes on capital gains or capital transfer, such as

⁹⁰⁹ Sawasruksa (n 17) 87.

the capital gains tax and WTT.⁹¹⁰ Such legislation would make the PIT more equitable and increase the effectiveness of the Thai tax system as a whole. Ultimately, the question of whether or not Thailand should introduce a capital gains tax and an amendment to the exemption under s 42(10) falls outside the scope of this thesis; thus, it would not be appropriate to consider it further.

⁹¹⁰ Ibid

6 The Repealed Thai WTT Legislation and its Applications

Introduction

As Chapter 4 pointed out, there are various rationales for introducing a new wealth transfer tax (WTT) in Thailand. This chapter will examine the reasons behind the repeal of the Estate and Inheritance Tax Act of 1933 (EITA 1933) by the Act of Abolishing the Estate and Inheritance Tax, 1944 (AAEIT 1944). This repeal occurred only ten years after its introduction by the People's Party (*Khana Ratsadon*) following Thailand's revolution in mid-1932. This chapter will also explore whether any statutory shortcomings of the EITA 1933 caused its ultimate failure.

This chapter therefore aims to examine the structure and provisions of the EITA 1933 and to identify the types of estate and inheritance tax (EIT) that were imposed. It will also explain who was considered liable to pay EIT, what property was subject to EIT, the rate of EIT, and the administration of the EIT system. The Thai government is directly responsible for imposing the WTT, and this chapter will argue that the EIT failed to achieve its main goals because of its ineffectiveness. It left several loopholes for EIT evasion and dishonest administration within the tax authorities. This chapter analyses the ways in which the legislation and enforcement systems were ineffective. Ultimately, these systems left open EIT evasion loopholes, resulted in officials not discharging their functions and failed to sufficiently deter tax evasion due to insufficient penalties.

6.1 The Background to the Repeal of the EITA 1933

In order to introduce a wealth transfer tax in Thailand, it is very important to take account of the reasons why the EITA 1933 was repealed in 1944. By understanding this repeal, it may be possible to achieve positive objectives for the country. Generally speaking, the Act was repealed because the amount of collected EIT annually was uncertain, it was burdensome to collect small amounts, and it was considered more pragmatic for officials to perform other duties.⁹¹¹ As a result, the EITA 1933 was only

⁹¹¹ Office of the Council of State, No. 258/2486 (n 15).

in existence for 10 years. The Cabinet approved its repeal after a debate on 29 October 1943 in the House of Representatives, some favouring its repeal and others opposing it.

A member of the House of Representatives who supported its repeal explained that Thai people have traditionally adhered to the principle of being economical, maintaining their estates for their own children and grandchildren. As a result, the EIT could destroy traditional Thai family inheritance practices. It seems that the rich tried to avoid tax payments so collection could not be completely performed starting with the promulgation of the EITA 1933.⁹¹² Nonetheless, some members of the House of Representatives opposed the repeal, explaining that the EITA 1933 did not affect Thai traditional passing of land. When someone who accumulated property for his or her children and grandchildren passed away, he or she would be admired for the inheritance that would devolve to the descendants.⁹¹³

There were three main reasons why EIT collection was poor. First, World War II had resulted in increased poverty. Japan used Thailand as a military base, and consequently, large amounts of food had to be shared with the Japanese troops, leaving little for the Thai people. From 1941 to 1944, only a small amount of taxes could be collected.⁹¹⁴ In 1942, there was also a great flood, causing further hardship. The country experienced a deep economic crisis, though things began to change at the end of 1945 when Japan surrendered. World War II ended in August 1945, the same year that the EIT was abolished.⁹¹⁵

Second, the duties of the officials of the Revenue Department (RD) were significant, as they had to collect the EIT twice—the estate of the deceased was charged first, and portions of the inheritance for the heirs came second. Many different people were responsible for paying the EIT; for example, the personal representative had to submit the statement of account and had to pay the EIT, while the heirs also had to submit a statement of account to pay inheritance tax. Officials thus had to examine two different payers and payments in each case.

⁹¹² Minutes of the Sitting of the House of Representatives No. 7/2486 (n 643).

⁹¹³ Ibid.

⁹¹⁴ Polprasith Rutraksa, 'Law on the Estate and the Estate Collection' (n 187) 24.

⁹¹⁵ According to the Statistical Forecasting Bureau of Thailand 1935-1944, Book XVII, Book XX, Book XXI, the percentage of income acquired from EIT during the budgetary years 1935-1944 was 15% (Appendix I).

A comparison of the expenses involved in collecting taxes between 1942 and 1944⁹¹⁶ shows that the Excise Department (which was solely responsible for collecting cement tax, beer tax and liquor tax) had a larger budget than the RD (which had to collect income tax, EIT, business tax and sugar purchase tax). This smaller budget made it even more difficult for the RD to perform its functions.

Finally, before Thailand adopted a democratic system of government, it had an absolute monarchy, and all properties in the country belonged to the king. As the EITA 1933 was promulgated soon after this constitutional change, few properties were privately owned and capable of devolving to children and grandchildren. Therefore, the wealthy or powerful did not fear the introduction of the EIT, although after 10 years, this situation changed: wealthy individuals became particularly interested in the Act's abolition.

6.2 Application of the EITA 1933

This section is concerned with topics related to how the EITA 1933 operated. More precisely, it defines the following: the types of wealth covered, the taxable unit, and the kind of 'transfer' subject to EIT. It also considers lifetime transfer taxation: was it integrated with taxes on transfer at death? The section further delineates who was liable to pay EIT to the tax authority and whether or not there were any legislative measures to reduce or eliminate tax liability, such as deductions, exemptions, exclusions and credits (reliefs). Finally, the chapter discusses the applied rate structure (progressive or flat).

This section also takes up the issue of problems with its administration and how appeals and penalties were resolved, including valuation methods, reporting and payments. Before examining these issues, however, it is necessary to consider the roots of the problem through the statutory provisions of the EITA 1933. The explanatory notes of Mr. Aguillon, Foreign Counsel on Bills of EITA 1933, read as follows:

This Bill is a regulation for temporary use. Once Book 5 and Book 6 of the civil and commercial code are promulgated, another new Act will be enacted instead because the succession-related matters have no complete and up-to-date law to apply; in particular, there has been no good law stipulating the power and responsibilities of a personal representative

⁹¹⁶ Fine Arts Department, 'Annual budgets for the years 1942-1944' National Archives of Thailand.

appointed by the deceased or the court. It is thus impossible to regulate the well and perfect tax and inheritance tax.⁹¹⁷

After the adoption of Book 5 and Book 6 of the Civil and Commercial Code (CCC), the EITA 1933 was never amended, which resulted in it not being effectively enforced. In terms of the statutory problems of the EITA 1933, it can be argued that the absence of the CCC during its existence caused numerous problems because there was no complete and up-to-date law on succession-related matters.

However, there are the EITA 1933 provisions that can provide the statutory answers to each of the following issues, need to be examined: types of tax, taxpayer, taxing jurisdictions, exemptions, deductions, computation, reliefs, administration, tax appeal and enforcement.

6.2.1 Types of tax

In this section, the first question that arises relates to the types of wealth (transfers) to be included in the tax base. In answering this question, it is necessary to start with the basic structural characteristics of the EIT. The first tax on the wealth regime in Thailand operated under a single name,⁹¹⁸ the EITA 1933. This means that the EIT was a mixture of the estate tax, focusing on the estate of the deceased (more precisely, the right to transfer property at death) and inheritance tax, concentrating on the recipients (more precisely, the right to receive property at death). In addition, each tax was to be integrated with taxation of lifetime transfers. Most countries that decide to impose a tax on wealth tend to choose each of them rather than both of them because adopting both can result in a greater tax liability for taxpayers.⁹¹⁹

As earlier mentioned, the types of wealth transfers to be included in the tax base for EIT purposes were divided into two categories: the first was levied on the transferor's estate in what is often known as the 'transferor-based system'; the second was levied on the recipient of a gratuitous wealth transfer, often known as the 'recipient-based system'. This division follows from the fact that under the provisions of the EITA 1933, the EIT

⁹¹⁷ Office of the Council of State, No. 10/2477 (n 798).

⁹¹⁸ Robert L Williams and others, *Guide to US/UK Private Wealth Tax Planning* (Tottel Publishing Ltd 2008) 9.

⁹¹⁹ Lily L Batchelder, 'Wealth Transfer Taxes –What Is an Inheritance Tax?' Tax Policy Briefing Book (2007) I-9-3 <http://www.taxpolicycenter.org/upload/Elements/II-9KEYELEMENTS_WealthTransferTaxes.final.pdf> accessed 24 June 2015.

clearly imposed both an estate tax, called in Thai the ‘*akon-moradok*’⁹²⁰ and an inheritance tax, called in Thai the ‘*akon-kanrab-moradok*’.⁹²¹

Moreover, the gratitude gift tax was adopted as a concealed provision found in ss 7 and 34 of the EITA 1933. The gift tax was integrated with each estate and/or inheritance tax. The idea behind this tax was to prevent the deceased from avoiding both estate and inheritance taxes by simply making lifetime (*inter vivos*) gifts one year before death.⁹²² However, the estate tax paid was not credited to the inheritance tax; thus, the tax liability was the sum of the two, which could result in a greater EIT burden. This tax burden made the EIT payments unworkable because they had to be paid twice upon death: once for taxes that were imposed on the deceased’s estate and gratuitous gifts made during his lifetime, and again for tax imposed on heirs and beneficiaries as well as gratuitous gifts that the deceased made during his or her lifetime. This system differs from the WTT regime in Western countries because in these countries, the tax should only be imposed on either the estate or the heir (or beneficiary), but not both. For example, in the UK and the US, taxes on wealth transfers are only levied on the estate of the deceased,⁹²³ while in the Republic of Ireland inheritance tax is only levied on the heir (or successor).⁹²⁴

In Thailand, the EITA 1933 levied taxes on both the transferor (the estate) and the recipients (the heirs). This double taxation is mainly attributable to Mr. Aguillon, who introduced the draft Bill into the legislature and suggested that the tax should be collected from the estate first and the inheritance second. However, the Office of the Council of State noted that tax collection would be easier only if implemented on the estate before partition to the heirs.⁹²⁵ However, this system is not fair because a recipient of a small percentage of the estate must pay tax at the same rate as a recipient of a large percentage of the estate. It would be truly fair if the tax was instead collected from the heirs after partition. In some cases, there are conditions imposed so that the estate will devolve to the recipient after a set period of time; consequently, it would take a long time for the government to collect the tax from the recipient. For this reason, the Law Commission of the Royal Thai Parliament decided to adopt the drafts of Mr.

⁹²⁰ EITA 1933, s 5.

⁹²¹ EITA 1933, s 32.

⁹²² EITA 1933, ss 7 and 34.

⁹²³ IHTA 1984 (UK), s 1 and IRC (US), s 2001.

⁹²⁴ CATCA 2003 (Republic of Ireland), s 9.

⁹²⁵ The application of the EITA 1933 in the case relating to the Insurance Compensation for Study of the Estate of Mom Chao Itthithepsan Kridakorn.

Aguillon when creating the law. In other words, the tax was to be collected from the estate first and the inheritance second.⁹²⁶ It is important to note that the Law Commission of the Thai Parliament at that time considered such an approach to be warranted for two reasons: it would make collection easier, and it would promote fairness.

The EITA 1933 thus subjected the property of the deceased to estate tax, and then, after the estate had been divided, it required each heir to pay inheritance tax again on the portion of the estate acquired. This law created a very high tax burden for taxpayers, who had to pay taxes twice on one single estate. As Phaya Sivisan notes, it is much more convenient to collect estate tax than inheritance tax, as those collecting only have to collect taxes from the estate⁹²⁷ and not from the different heirs.⁹²⁸ Accordingly, whenever there were many heirs or beneficiaries, it took a long time to collect taxes, which burdened authorities.⁹²⁹ Indeed, estate tax generates quick income for the government; however, the EIT can promote wealth distribution, as was discussed in Chapter 4. The Thai government, through *Khana Ratsadon*, considered the law to be a crucial stepping stone for economic reform, redistributing wealth and decreasing the gap between the rich and poor at that time.⁹³⁰

6.2.2 The Taxpayer

Another question that emerges is what to consider a taxable unit and who should be liable for EIT purposes under the EITA 1933. The main provisions that answer this question can be found in ss 5 and 7 for estate and gift tax, and ss 32 and 34 for inheritance and gift tax. If there was a transfer of the deceased's taxable estate, the deceased was liable for the estate tax; if a beneficiary received property upon the death of the deceased, the beneficiary (heir)⁹³¹ was individually responsible for paying the inheritance tax. Clearly, the tax should be levied on the estate of the deceased and on the heirs, causing both the deceased and the heir to become taxpayers (tax units) under the EITA 1933.

⁹²⁶ Office of the Council of State, 'Note on the office of the Council of State, B.E. 2479 (A.D. 1936)' Office of the Council of State, Completed Subject No. 31/2479 (unofficial translation by author).

⁹²⁷ Note on the Committee of Khana Ratsadon on 18 August B.E. 2475 (A.D. 1932) (unofficial translation by author).

⁹²⁸ Minutes of the Sitting of the House of Representatives No. 32/2475 (Ordinary) Session 1, Friday, 18 August B.E. 2475 (A.D. 1932) (unofficial translation by author).

⁹²⁹ Chaisit Trachudham, 'Estate and Inheritance Tax' (1999) 14(8) *Thai Court of Justice Journal* 31, 33.

⁹³⁰ Somchai Ruchuphan, *Economical Opinion: Revenue in Thailand* (Thammasat Press 1982) 110.

⁹³¹ CCC, s 1603.

6.2.2.1 The Deceased

Before considering the detailed provisions, it is also helpful to answer the question of how the deceased was determined to be a taxpayer since he or she had no rights and duties as a natural person under the CCC. Under the main charging provision, the EIT was imposed on the total amount of the aggregate value of the property at the time of the death of the deceased (the deceased was termed the '*putaie*' and considered a taxpayer).⁹³² It can be argued that tax payment liabilities and EIT return filing were not possible because the deceased's duties had come to an end at death.⁹³³

This question can be answered by considering the difference between a taxpayer and a person liable to file a tax return for tax payment. These are not necessarily the same person.⁹³⁴ For example, for the purposes of determining personal income, the deceased may be a taxpayer during the tax year in which he was liable to pay tax, while an estate personal representative,⁹³⁵ his heir or the possessor of the estate, has the duty to file the tax return on the deceased's behalf pursuant to the Revenue Code (RC).⁹³⁶ By the same token, it is not necessary that the deceased be the one liable for tax payment and tax return filing. Under the EITA 1933, the personal representative or the person gaining the benefit from the property of the deceased is liable for the payment of the EIT and the administered property.⁹³⁷ In comparison to the IHTA 1984, the questions of who should report the transfer⁹³⁸ and how the tax burden is allocated, are distinct from questions of accountability (or liability) for the tax. The accountability (or liability) implies the liability to account to the tax authority for the tax due.⁹³⁹ A person who has a duty to report is not necessarily accountable for the tax or responsible for it.⁹⁴⁰

⁹³² EITA 1933, s 5.

⁹³³ CCC, s 15 para 1 provided that 'personality begins with the full completion of birth as a living child and ends with death'.

⁹³⁴ Chaisit Trachudham, *Text Book on Revenue Law* (9th edn, Thai Bar Press 2013) 56.

⁹³⁵ EITA 1933, s 3 provides that "Personal representative" means any person appointed by the deceased either by will or by the court's order in order to administer all or partial properties of the deceased which are the estate.

⁹³⁶ RC, s 57/2, para.1: 'If a taxpayer who has assessable income under paragraph 1 of s 56, dies before he has complied with the provisions of Paragraph 1 of s 56, or before his legal representative, guardian or curator has complied with the provisions of s 57, an estate personal representative, his heir or the possessor of the estate, as the case may be, shall have the duty to file the tax return on his behalf and shall include all assessable income derived by the deceased and his estate throughout the tax year in which he died as the total amount of assessable income.'

⁹³⁷ EITA 1933, ss 26 and 40.

⁹³⁸ IHTA 1984 (UK), s 216.

⁹³⁹ John Tiley, *Revenue Law: Introduction to UK Tax Law; Income Tax; Capital Gains Tax; Inheritance Tax* (7th edn, Hart Publishing 2012) 925.

⁹⁴⁰ *Ibid* 932.

Given the importance of this question, it would be reasonable to expect the EITA 1933 to provide an answer. The term ‘*putaie*’ does supply the required definition, as s 5 specifies who is personally liable for the estate tax:

When a person dies after the enactment of this Act, unless otherwise stipulated in other provisions, the tax for the value of all properties of that person is obliged to be calculated and collected at the time of investigation in accordance with the conditions mentioned hereunder. The said tax is referred to as the ‘*akon-moradok*’ which shall be collected according to the rates shown in the tariff attached to this Act.⁹⁴¹

Unfortunately, there is no single provision that defines the term ‘*putaie*’ (deceased) specifically described in s 5 of the EITA 1933. However, the term ‘*putaie*’ implies a person who dies naturally⁹⁴² or a person the court has formally adjudged as having disappeared.⁹⁴³ Such a disappeared person is deemed to have died at the time of the court’s adjudication, and his estate devolves on the heirs under the CCC.⁹⁴⁴ On the other hand, the general provisions concerning the collection and payment of EIT shall be applied to the disappeared person under the EITA 1933. As s 8 paragraph 1 stipulates,

A person who owns property of an estate, against whom an adjudication of disappearance has been made, is deemed to have died as from the day on which the order of the Court is given. The provisions concerning the collection and payment as described in this Act shall apply *mutatis mutandis*.

Subject to the above provision, a problem arises when the court has revoked the adjudication: do all obtained taxes relating to the disappeared person have to be returned to the taxpayer? S 8, paragraph 2, states the following:

If it appears at any time that that disappeared person is still alive, and the court has revoked the adjudication, and such revocation has been published in the Government Gazette, and the taxpayer has submitted a request for tax refund, all obtained taxes relating to the disappearance of that person shall be returned to the claimant.

⁹⁴¹ EITA 1933, s 5.

⁹⁴² CCC, s 15.

⁹⁴³ CCC, ss 61-62.

⁹⁴⁴ CCC, s 1602.

The statutory provision failed to state clearly how such tax refunds should be made by the authority. Furthermore, the CCC provides that ‘this does not affect the validity of acts done in good faith between the adjudication and the revocation’.⁹⁴⁵ As a result, all of the tax authority’s acts are assumed valid, so long as they have been carried out in good faith. The CCC further provides: ‘the provisions on the undue enrichment of this code shall apply, *mutatis mutandis*, to a person who has acquired property under adjudication but lost his right by its revocation’.⁹⁴⁶ However, the undue enrichment rules mandate that tax has to be refunded without interest.⁹⁴⁷ Because the property has been received in good faith, the recipient is also entitled to the interest as long as he or she has acted in good faith.⁹⁴⁸ Nevertheless, the tax authority has to duly repay the tax,⁹⁴⁹ and from thereon, interest may become payable on any amount that is not promptly repaid in the absence of any reasonable explanation for the delay.

A further problem arose when a disappeared person was deemed to have died at the time the court was dealing with the adjudication: the valuation rule in the EITA 1933 required a determination of the market value at the time of death. S 10 provided that the value of the properties specified in s 6(a), (b), and (c) should be assessed according to the market price at the time of death.⁹⁵⁰

6.2.2.2 The heirs

As stated above, the main charging provisions in the case of inheritance and gift tax can be found in ss 32 and 34 of the EITA 1933. S 32 specified those liable to pay inheritance and gift tax:

A person who becomes the owner of the deceased’s property when its value is more than 200 GBP is subject to the tax referred to as the “*akon-kanrab-moradok*” according to the rates specified in Tariff 2 attached to this Act.

⁹⁴⁵ CCC, s 63 para 1.

⁹⁴⁶ CCC, s 63 para 2.

⁹⁴⁷ CCC, s 406 para 1.

⁹⁴⁸ CCC, s 415 para 1.

⁹⁴⁹ CCC, s 415 para 2.

⁹⁵⁰ EITA 1933, s 10.

Also, s 34 of the EITA 1933 stated,

A person receiving the properties given by the deceased within one year before his death is subject to the payment of inheritance tax, except in the case of the receipt of the properties as specified in s 7.

The question of who owns the property of the deceased under s 32⁹⁵¹ is addressed in s 1599 of the CCC, which states that the estate of the deceased devolves to the heirs.⁹⁵² However, s 34 did not just apply to people who received less than 20 GBP of property, which was given as a marriage gift to the receiver.⁹⁵³

Accordingly, the *'tar-yard'* owns the property of the deceased as do other people who received property that the deceased bequeathed one year prior to his or her death.⁹⁵⁴ Thai law provides two statutory definitions for the term *'tar-yard'*. Under the EITA 1933, a *'tar-yard'* is a person who becomes the owner of all or some of the property of the deceased by virtue of a will or statutory right or through a compromise between the heirs.⁹⁵⁵ The CCC also defines the term *'tar-yard'*, as discussed in the last chapter.⁹⁵⁶ It is nevertheless important to identify the differences between the definition in the EITA 1933 and the CCC, as the term is rather technical and not an ordinary Thai word. The CCC also fails to clearly define the term, instead referring to it in relation to the rights, duties and liabilities that arise from succession⁹⁵⁷ or the different categories of *'tar-yard'*.⁹⁵⁸ One of the provisions in the CCC defines a *'tar-yard'* as follows:

'A natural person who can be an heir only when he has, at the time of *de cuius* death, personality or is capable of rights under s 15 of this Code and a child shall be deemed to have been *en ventre sa mere* at the time of such death if he is born within 310 days after such time'.⁹⁵⁹

In contrast, the EITA 1933 provided that 'the owner of all or partial properties of the deceased in the estate' can include not only the *'tar-yard'* but any person who owns

⁹⁵¹ EITA 1933, s 32.

⁹⁵² CCC, s 1599.

⁹⁵³ EITA 1933, ss 7 and 34.

⁹⁵⁴ EITA 1933, s 34.

⁹⁵⁵ EITA 1933, s 4.

⁹⁵⁶ CCC, s 1603.

⁹⁵⁷ CCC, ss 1599-1602.

⁹⁵⁸ CCC, s 1603.

⁹⁵⁹ CCC, s 1604.

some of the properties left by the estate in his will or as a result of a statutory right or compromise between heirs.

6.2.3 Taxing Jurisdictions

Although there is an acceptable basis for taxing jurisdiction under the Thai tax regime, the only jurisdictional bases applicable for EIT purposes are citizenship (or nationality) and property location. In terms of inland revenue tax, for example, income tax generally depends on the residence or domicile of the person, but citizenship (or nationality) is of no consequence.⁹⁶⁰ By comparison, the domicile and residence rules were not considered relevant under the EITA 1933.⁹⁶¹ In other words, two broad principles govern the territorial scope. Meanwhile, a single provision governing the jurisdictional bases is found in s 6 of the EITA 1933:

The property of the deceased which shall be included for the purpose of determining the ‘value of the estate’ is as follows:

(1) If the deceased is a Thai national ... all tangible immovable and immovable properties and rights or benefits from the immovable properties situated in Thailand ... all stocks, bonds ... situated in Thailand and overseas ... all pending claims ... or the money ... or any properties of the estate, existing both in Thailand and overseas. (2) If the deceased is an alien ... his property situated in Thailand, shall be included in the value of the estate.

Before considering the taxing jurisdiction under s 6 of the EITA 1933, Chapter 7 will provide a more detailed discussion of the concepts of domicile and residence within the territorial scope of the US and the UK tax regimes.

6.2.3.1 Thai Citizens (Nationality)

The EITA 1933 applied the citizenship/nationality principle.⁹⁶² The EIT is chargeable on all property owned by a citizen or national of Thailand, without regard to its location.⁹⁶³ In essence, the EIT is a worldwide tax that extends to property situated inside and outside Thailand. Assume, for example, that a Thai citizen is living in the

⁹⁶⁰ RC, ss 41 and 66.

⁹⁶¹ EITA 1933, ss 6 and 33.

⁹⁶² Lertpaithoon (n 569) 176.

⁹⁶³ EITA 1933, s 6(1).

UK in a Birmingham mansion, keeps gold in a US vault and has bonds in Thailand. The EIT applies to all of this property, as it applies regardless of where the property is situated. When the deceased is a citizen of Thailand and another country, the question inevitably arises of whether he or she should be taxed if two or more countries that regard the person as a citizen. In such situations, the deceased is certainly subject to EIT on the property regardless of its location.⁹⁶⁴ Whether or not he or she may be subject to the tax of other countries depends on whether the territorial scope of their taxation depends on citizenship/nationality, residence and domicile. In the case of the US federal estate and gift taxes (FET/FGT), for example, the territorial scope is governed by citizenship/nationality,⁹⁶⁵ residence⁹⁶⁶ and property location.⁹⁶⁷

Where the tax claims of two or more countries overlap, the situation may be affected by the double taxation treaty, which aims to limit the tax jurisdiction of the contracting states to avoid double taxation.⁹⁶⁸ However, the double taxation treaty will not be discussed further here because it falls outside the scope of this thesis.

6.2.3.2 Foreigner-Owned Property within Thailand

The EIT is chargeable on all property belonging to foreigners situated in Thailand.⁹⁶⁹ Of course, it is necessary to outline how these rules are applied to foreigner-owned property within Thailand. Residence and domicile constitute the main factors relevant to income tax and other taxes in Thailand;⁹⁷⁰ however, the EIT did not depend on the domicile or residence of the deceased or heirs since the jurisdictional bases were not accepted under the EITA 1933; the only two bases applied for EIT purposes were citizenship/nationality and property location. As a result, an individual's domicile and residence had no impact under the EITA 1933. Pursuant to the nationality rule, Thai nationals were required to pay the EIT irrespective of the location of the deceased's property and his or her domicile or residence. In contrast, the citizenship/nationality rule did not apply to foreigners, as they enjoyed immunity provided by the state.⁹⁷¹ Instead, the property location rule was applied to aliens as a result of their property being

⁹⁶⁴ EITA 1933, s 6(1).

⁹⁶⁵ IRC (US), ss 2001, 2031, 2501

⁹⁶⁶ IRC (US), ss 2001, 2501.

⁹⁶⁷ IRC (US), ss 2103, 2501.

⁹⁶⁸ Barry McCutcheon, *McCutcheon on Inheritance Tax* (Withers LLP, Marika Lemos and Aparna Nathan eds, 6th edn, Sweet & Maxwell 2013) 1166.

⁹⁶⁹ EITA 1933, s 6 (2).

⁹⁷⁰ RC, ss 41 and 66.

⁹⁷¹ Prasopsook Boondej, 'Estate Tax' (1999) 46(2) *Doonparha Journal* 116, 143.

physically situated in Thailand. Thus, the EIT was chargeable on all property situated in Thailand.⁹⁷²

6.2.4 Bases of tax

Ss 5 and 7 of the EITA 1933 stated that estate tax was chargeable on the ‘gross value of the estate’.⁹⁷³ This sum included the total value of all properties owned by the deceased at the date of death and the value of any property given away within the last year of his or her life. Ss 32 and 34 of the EITA 1933 further provided that inheritance tax had to be paid on all properties owned by the deceased that had been transferred or given away to any person during the last year of his life.

Accordingly, estate tax under the EITA 1933 was levied on all of the deceased’s assets, which required a determination of the property at death. This determination included the aggregate value at the time of death,⁹⁷⁴ whereas inheritance tax was levied on all property that had been received from the deceased, as determined by what the particular beneficiary had received.⁹⁷⁵

6.2.4.1 The Main Charging Provisions

It is also important to consider which property was subjected to EIT and provided the tax base under the EITA 1933. S 6 stated that the ‘gross value of the estate’ would be determined by including the value of the aggregate of all the deceased’s property at the time of death.⁹⁷⁶ Additionally, s 33 provided that inheritance tax had to be paid on all properties, and the provision of s 6 also applied *mutatis mutandis* to all properties that the deceased had given away during his or her lifetime.⁹⁷⁷

Before considering what was actually included in the property of the deceased, it is necessary to consider the definitions of ‘property of the deceased’ and ‘estate’.

There is, in fact, no statutory definition for ‘property of the deceased’. One way to define this phrase is to consider the concepts behind the term ‘property’ in Thai law. S

⁹⁷² IHTA 1984 (UK), s 6.

⁹⁷³ The term ‘gross value of the estate’ meant the value of all property at the time of death for the deceased, as well as certain property transferred by the deceased one year prior to death. This constituted the deceased’s gross estate according to s 6 of the EITA 1933.

⁹⁷⁴ EITA 1933, ss 5 and 7.

⁹⁷⁵ EITA 1933, ss 32 and 34.

⁹⁷⁶ EITA 1933, ss 5 and 32.

⁹⁷⁷ EITA 1933, ss 7 and 34.

138 of the CCC states that ‘property’ includes things that are corporeal.⁹⁷⁸ It also includes incorporeal objects, susceptible of having a value and of being appropriated.⁹⁷⁹ It is not entirely clear what the term “property of the deceased” means. Moreover, the EITA 1933 fails to define the term ‘property of deceased’, yet this term is referenced in the main charging provisions.

The meaning of ‘estate’ also has to be analysed as different definitions are contained in the EITA 1933 and the CCC. Under the EITA 1933, the term ‘estate’ included all immovable properties and rights or benefits from immovable properties located in Thailand as well as all tangible immovable properties located in the country.⁹⁸⁰ On the other hand, the CCC defines the term ‘estate’ by excluding money or property from the estate acquired upon death because, according to the CCC, an ‘estate’ refers only to the property, rights, duties and liabilities of the deceased. All of the aforesaid materials should already exist during the lifetime of the *de cuius*. Property received upon or after death is not considered to be property in his or her possession during the lifespan, and therefore, it is not regarded as an estate.

In the future, legislators must decide which definition is more appropriate. If the term ‘estate’ includes money or property from the estate that will be acquired upon death, the value of the taxable property and tax base will increase. On the other hand, under the CCC, the term ‘estate’ excludes money and property that will be acquired upon death, which allows for an inherited gratuity to fund funeral costs. It also allows the life insurance of the deceased to be exempted, so that those who receive the money do not have to pay tax on it. However, the removal of the exemption may prove useful since the general public may not fully understand the definition of an ‘estate’ in the CCC, and officials may also find it more difficult to collect taxes.

When a new WTT is adopted, the definition of an ‘estate’ in the CCC should not be followed in order to simplify tax collection. Any new law should levy estate tax on the gross value of the deceased’s estate and require that all properties be identified for the purpose of tax assessment, just as the EITA 1933 required.⁹⁸¹ Only after tax has been collected should the remainder devolve to the legatee or heir. Such an approach would

⁹⁷⁸ CCC, s 137.

⁹⁷⁹ CCC, s 138.

⁹⁸⁰ EITA 1933, s 6 (1).

⁹⁸¹ EITA 1933, s 9.

ensure that tax can be collected irrespective of the relationship between the legatee and the heirs.

6.2.4.2. Property and Interest Included

As for the term ‘property of the deceased’ contained in ss 6 and 33 of the EITA 1933, we must outline what exactly property of the deceased included. The term applied both to Thai and non-Thai nationals who were required to pay estate or inheritance tax under the EITA 1933.

6.2.4.2.1 Property of Thai Deceased

The following property was included in determining the gross value of the estate⁹⁸² if the deceased was a Thai national:

(A) Immoveable property in Thailand

All immovable property and rights or benefits from immovable property located in Thailand had to be included as part of the gross value of the deceased’s estate.⁹⁸³ Although the term ‘immovable properties’ was not defined by the EITA 1933, the CCC defined it as land and things fixed permanently to land or forming a body therewith.⁹⁸⁴ In Thailand, all immovable property has its own document title.⁹⁸⁵ However, the definition of immovable property under the CCC is wider than the definition adopted in the EITA 1933 as it includes all types of property. In particular, s 6(1)(a) includes ‘the rights or benefits from immovable properties’ in Thailand, but does not include immovable property located abroad.

(B) Movable property in Thailand and overseas

All tangible movable property located in Thailand was also included in the gross value of the deceased’s estate.⁹⁸⁶ However, the term ‘tangible movable property’ was not defined in s 6(1)(b), and therefore, revisions had to be made to the CCC. What exactly constitutes movable property is important because, unlike immovable property, most movable property has no title under Thai law, which causes problems when determining

⁹⁸² EITA 1933, s 6 (1).

⁹⁸³ EITA 1933, s 6 (1)(a).

⁹⁸⁴ CCC, s 139.

⁹⁸⁵ CCC, ss 1298-1299.

⁹⁸⁶ EITA 1933, s 6 (1)(b).

the gross value of the estate.⁹⁸⁷ S 140 of the CCC provides that ‘movable property denotes things other than immovable property. It includes rights connected therewith’.⁹⁸⁸ However, under common law, movable property can also denote ‘personal property’.⁹⁸⁹ Personal property is usually movable and ‘not amenable to division into multiple interests, but possessed of a value readily measurable in money and therefore easily tradable’.⁹⁹⁰

Under the CCC,⁹⁹¹ movable property is generally comprised of corporeal (or tangible) and incorporeal (or intangible) objects.⁹⁹² However, it should be noted that s 6(1)(b) of the EITA 1933 did not include ‘intangible movable property’, bringing up the question of whether ‘tangible movable property’ should be broadly and differently defined than the EITA 1933 in order to include various kinds of intellectual property rights. This question is crucial for EIT purposes because the gross value will significantly diminish if intellectual property rights are omitted. This omission would also create a legal loophole allowing EIT avoidance. Intellectual property rights are currently not considered ‘tangible movable property’ because intellectual property rights⁹⁹³ have been removed from the category of tangible movable property. Estate and inheritance rules were also applied to modern forms of intangible movable property, such as stocks, bonds and bond certificates. These rules also applied to any other securities, benefits or rights over commercial and industrial businesses, professions, partnerships or any other forms existing both in Thailand and in foreign countries.⁹⁹⁴ In addition, these gross values of the estate also include all pending claims at the time of death, money that could be obtained or any estate properties existing both in Thailand and in foreign countries.⁹⁹⁵

⁹⁸⁷ Chaisit Trachudham ‘Estate Tax: The Devious Road in Thailand’ (1985) 4(48) *The Interest Journal* 91, 93.

⁹⁸⁸ CCC, s 140.

⁹⁸⁹ It did not include ‘chattels real’, such as leasehold interests in land, which constitute real property under Thai law.

⁹⁹⁰ Sarah Worthington, *Personal Property Law: Text, Cases and Materials* (Hart Publishing 2000) 4.

⁹⁹¹ CCC, s 138.

⁹⁹² ‘Corporeal’ and ‘incorporeal’ objects are tangible and intangible properties under common law.

⁹⁹³ ‘Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce’. See World Intellectual Property Organization, ‘What is intellectual property?’ < <http://www.wipo.int/about-ip/en/index.html> > accessed 24 June 2015.

⁹⁹⁴ EITA 1933, s 6 (1)(c).

⁹⁹⁵ EITA 1933, s 6 (1)(d).

The current argument is that the EITA 1933 did state whether or not such movable property is required to have documentation.⁹⁹⁶ Therefore, it should cover movable property with and without documentation as well as any rights related to such property. However, in EIT collection, it is necessary to consider whether or not ‘a movable property without documentation but having a high price’ should be included in the estate’s value.

However, the EITA 1933 did not state whether or not such movable property was covered.⁹⁹⁷ Trachudham argues that it is important to include movable property in the deceased’s gross estate, with and without certificates, and any rights relating to such property. Such property holds a high value, whether jewellery, gold, money, ancient items or small Buddha images. However, there is no register for movable property, and there are no certificates.⁹⁹⁸

S 1299 of the CCC provides that

... no acquisition by juristic act of immovable or of real right appertaining thereto is complete unless the juristic act is made in writing and the acquisition is registered by a competent official ... Where immovable property or real right appertaining thereto is acquired otherwise than by juristic act, the acquirer’s right cannot be dealt with through the register unless it has been registered...

Also, s 1302 of the EITA 1933 stated the following:

The provisions of the three foregoing sections shall apply *mutatis mutandis* to ships or vessels of six tons and over, to steam-launches or motor-boats of five tons and over, to floating houses and to beasts of burden.

This statement means that the acquirer’s right to immovable or real property generally has to be made in writing and registered as having a certificate, unless some ‘particular movable property’ includes ships or vessels of six tons and over, steam-launches or motor-boats of five tons and over, floating houses and beasts of burden. Thus, these high price properties are not required to have a certificate under Thai law. It may be

⁹⁹⁶ Pipatseritham ‘Estate and Inheritance Tax’ (n 23) 101.

⁹⁹⁷ Ibid.

⁹⁹⁸ Trachudham ‘Estate Tax: The Devious Road in Thailand’ (n 987) 93.

more difficult to include these items when determining the ‘gross value of estate’.⁹⁹⁹ However, without rendering these properties subject to the tax regime, a legal loophole will be created allowing avoidance of EIT payment since people could accumulate movable property instead of immovable and real property with certificates.¹⁰⁰⁰ Such avoidance would indirectly promote wealth accumulation through movable property without certificates.¹⁰⁰¹ Therefore, any future wealth transfer law must ensure that no such loopholes remain.

(C) Assumed property (notional estate) owned by the deceased

Under the EITA 1933, a person had to pay estate tax on both immovable and movable property that was owned by the deceased or which bore the deceased’s name, and on movable property that the deceased had granted to any individual but that remained in his possession. It was presumed that they belonged to the deceased, unless proven otherwise.¹⁰⁰² The same rule also applied to all properties subject to payment of inheritance tax *mutatis mutandis*.¹⁰⁰³

As stated earlier, all property of the deceased was included in order to ascertain the estate’s value, and s 7 of the EITA 1933 also included all property that the deceased had directly or indirectly given away within one year of death. Marriage gifts valued at less than 20 GBP per donee or property were exempted. Also exempt were gifts given prior to the Act coming into force.¹⁰⁰⁴ Therefore, any donee who received property from the deceased within one year of the deceased’s death had to pay inheritance tax, save where he or she could prove that the exemptions in s 7 applied.¹⁰⁰⁵

The Law Commission of the Royal Thai Parliament explained that the exemptions in s 7 ensured that Thai traditions would be upheld, allowed provisions for people who had become seriously ill, and made it possible to give property as a bonus to a servant or a nurse, so long as the amount was below 20 GBP. It also noted that English law allowed for similar exceptions, though it limited the amount to 100 GBP per person.¹⁰⁰⁶

⁹⁹⁹ Boondej (n 971) 140-141.

¹⁰⁰⁰ Krikkiat Pipatseritham, ‘Estate Tax: The Principle of Equity and Equality’ (2000) *Tax & Business Law Magazine* 12, 12-13.

¹⁰⁰¹ Thailand Research Fund, ‘Estate and Inheritance Tax: What the types of Tax should be in Thailand?’ (2001) *The Interest Journal* 80, 82.

¹⁰⁰² EITA 1933, s 6 (3).

¹⁰⁰³ EITA 1933, s 33.

¹⁰⁰⁴ EITA 1933, s 7.

¹⁰⁰⁵ EITA 1933, s 34.

¹⁰⁰⁶ Office of the Council of State, No. 10/2477 (n 798).

However, ss 7 and 34 should not be followed because allowing lifetime transfers whenever a marriage takes place creates a legal loophole that enables individuals to avoid EIT payment. For example, a seriously ill person close to death might give away most of his or her property by using the available exception in order to avoid tax.

S 7 appears to provide three different exemptions related to small gifts. As such, marriage gifts and gifts made prior to the Act coming into force raise two interesting questions. The first question is whether the small gift up to 20 GBP per donee may be applied to cover part of a gift exceeding this amount. This question can be answered with this phrase: 'value not exceeding 20 GBP per person'. This phrase indicates that the small gift exemption can be applied only to those not exceeding 20 GBP to a separate donee. In other words, a small gift not exceeding 20 GBP will not be chargeable for EIT so long as the gift is made to a separate donee. If a gift exceeds this amount, it will be chargeable for EIT because this exemption cannot be used to cover part of a gift that is greater than 20 GBP.

If the marriage does not take place and there has been a gift in consideration of the marriage, is the donor entitled to recover the gift? If not, will it be chargeable for EIT? Under the CCC, a gift in consideration of marriage is considered '*sinsod*'. S 1437 para 3 provides the following:

Sinsod is property given on the part of the man to the parents, adopter or guardian of the woman, as the case may be, in return for the woman agreeing to marry. If the marriage does not take place, caused mainly by the woman or on account of any circumstances that make the woman responsible therefor and make the marriage unsuitable for the man or make the man unable to marry that woman, the man may demand the return of the *sinsod*.

If s 1437 paragraph 3 is to apply, two requirements must be satisfied. First, the marriage must not occur mainly because of the woman or any circumstances for which she is responsible. Second, the marriage must become unsuitable for the man, or circumstances must make him unable to marry the woman. This specification still leaves open the question of whether, if the man died before the return of the '*sinsod*', the claim for this return should be included in the deceased's 'gross value of estate'. Any claim arising before or contemporaneously with the death of the deceased must be

included in the 'gross value of estate'. Thus, a charge to the EIT will apply to the claim of such a return of *'sinsod'*, and there will be no exemption applied.

It might be possible to argue that the exemption under s 7 could not apply where the woman already has *'khongman'* after the betrothal has taken place. Thus, a *'khongman'* is not exempt from EIT, and it has to be included in a woman's estate for EIT purposes. To take a simple example, assume that A (the man) has given or transferred a diamond ring of 6 000 GBP to B (the woman) as evidence that the marriage will take place.¹⁰⁰⁷ One year later, if B dies, should the diamond be included in her gross estate? In the CCC, s 1437 paragraphs 1 and 2 provide that 'betrothal is not valid until the man gives or transfers the property which is *'khongman'* to the woman as evidence that the betrothal has taken place ... the *'khongman'* shall become the property of the woman after the betrothal has taken place'. Therefore, when the betrothal agreement has been made, the ownership of the *'khongman'* will be vested in the woman when the contract comes into existence. If the woman later dies, the *'khongman'* will be her property and then will be included in the gross value of her estate for EIT purposes. To revert to the earlier example, if B survives, she will have committed a breach of the betrothal agreement. The *'khongman'* will be returned to A in accordance with s 1439, which provides:

After the betrothal has taken place if either party commits a breach of the betrothal agreement, such party shall be liable to make compensation. In case the woman commits a breach of the betrothal agreement, the *'khongman'* shall also be returned to the man.

Thus, this property will not be included in the 'gross value of the estate' even though the woman has died before the return of the *'khongman'*.

6.2.4.2.2 Property of the non-Thai deceased

Under the EITA 1933, when a deceased person was not a Thai national, the 'gross value of the estate' was determined as though the deceased were a Thai national. Save for particular exempted properties,¹⁰⁰⁸ it included all immovable property and rights or benefits from immovable property located in Thailand,¹⁰⁰⁹ together with all tangible

¹⁰⁰⁷ CCC, s 1437 para 1.

¹⁰⁰⁸ EITA 1933, s 6 (2).

¹⁰⁰⁹ EITA 1933, s 6 (1)(a).

immovable property located in the country.¹⁰¹⁰ S 6(2) of the EITA 1933 prescribed that ‘all tangible immovable property in Thailand’ was included for the purpose of determining the ‘gross value of estate’. It therefore included all stocks, bonds, bond certificates and other securities. It also encompassed the benefits or rights over commercial and industrial businesses, professions, partnerships or other forms existing in Thailand, but not in foreign countries.¹⁰¹¹ Also included were pending claims at the time of death as well as money that could be obtained as a result of the death. It also included any property of the estate existing in Thailand but not in foreign countries.¹⁰¹²

Therefore, foreigners were treated just like Thai nationals when it came to determining estate value.¹⁰¹³ Nevertheless, it remained ambiguous whether properties abroad should be considered part of the ‘estate’, as the estate normally denotes property, rights and claims of the deceased along with money or property that would be acquired as a result of the death.¹⁰¹⁴ The ‘gross value of the estate’ may thus include property in Thailand and overseas.

It can be argued that a person who spends most of his or her life in Thailand, who benefits from the Thai government, who owns property in Thailand, and who earns income from the resources therein should pay taxes, even if he or she is not a Thai national but domiciled in Thailand.¹⁰¹⁵ However, when non-Thai nationals domiciled in Thailand have property outside of Thailand and their income has not been generated from resources in Thailand, no estate tax should be payable.

6.2.4.3 Valuation Methods

Generally, EIT collection first requires a valuation of all properties in order to determine the gross value of the estate. The EITA 1933 thus required a valuation of the property.¹⁰¹⁶ The valuation for EIT purposes was governed by the general valuation rules in s 10, which provided that property value should be determined as set out below.

¹⁰¹⁰ EITA 1933, s 6 (1)(b).

¹⁰¹¹ EITA 1933, s 6 (1)(c).

¹⁰¹² EITA 1933, s 6 (1)(d).

¹⁰¹³ EITA 1933, s 6 (2).

¹⁰¹⁴ CCC, s 1600.

¹⁰¹⁵ Lertpaithoon (n 569) 176.

¹⁰¹⁶ EITA 1933, s 9.

6.2.4.3.1 Property Specified in S 6(a)(b)(c)

The ‘market value’ at the time of death had to be obtained for property listed in s 6(a)(b)(c).¹⁰¹⁷ For EIT purposes, property was valued in terms of the price that was reasonably expected to be realized at the time of death. S 10 of the EITA 1933 did not precisely define the term ‘market value’, but the legal dictionary defines the term as the standard price that both a willing seller and buyer could obtain in the market, but not at an auction or through compulsion.¹⁰¹⁸

However, this provision does not specify whether any Thai statutory provisions have defined the term ‘market value’. Although there are only three provisions using the term ‘market value’ in 656,¹⁰¹⁹ 1416¹⁰²⁰ and 1598/4 of the CCC,¹⁰²¹ it does not purport to define the concept directly. Moreover, there is no single case law in Thailand that discusses the concept of market value for tax purposes.

One might expect the RC to define the term ‘market value’, but unfortunately, the RC does not precisely define it. There are, however, two terms—‘value’ and ‘market price’—defined by s 91/1 of the RC for specific business tax (SBT). These sections almost supply the required definition, as s 91/1 provides that ‘in this Chapter: ... (2) ‘value’ means market prices of a property, a business, a consideration, or any gain ... (3) ‘market price’ indicates the price of goods or services actually existing at any one moment’. Under Thai law, therefore, the meaning of ‘market value’ is the market price of property actually existing at any given moment. Nevertheless, one might also rely on international valuation practices, as determined by the International Valuation Standards (IVS). The IVS defines ‘market value’ as ‘the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s length transaction after proper marketing wherein the parties had each acted

¹⁰¹⁷ EITA 1933, s 10, para 1.

¹⁰¹⁸ Thong Withaiwat, *Law Dictionary: English-Thai* (Nititham Publishing House 2007) 461.

¹⁰¹⁹ CCC, s 656 provides that ‘if a loan is made for a sum of money, and the borrower accepts goods or other property instead of this sum, the amount of the debt due shall be considered as equal to the *market value* of the goods or property at the time and place of delivery’.

¹⁰²⁰ CCC, s 1416 provides that ‘if instead of permitting the removal of the buildings, structures or plantations, the owner of the land notifies of his intention to buy them at *market value*, the superficiesary may not refuse the offer except on reasonable ground’.

¹⁰²¹ CCC, s 1598/4 provides that ‘a guardian may dispose only of such part of the income of the ward as is necessary for the maintenance and education of the latter. The residue shall be invested only... (2) in taking sale with the right of redemption or in a mortgage of immovable property of first rank, the amount of which must not exceed half of the *market value* of such property...’.

knowledgeably, prudently, and without compulsion'.¹⁰²² This definition should be taken into account for any future WTT in Thailand, as aligning with it would allow the country to at least meet IVS requirements.

6.2.4.3.2 Property Specified in S 6(d)

The property specified in s 6(d) was assessed in accordance with the amount specified in the documents relating to each property. Where the amount was disputed, the properties were assessed by a court or in accordance with good faith between the parties. The same assessment taking place in relation to the property listed in s 7 applied to the properties listed in s 6.¹⁰²³

However, if a juristic act or document was concluded in good faith during the two years before the death of the deceased revealing the value, the personal representative and appraiser¹⁰²⁴ could mutually agree to use this figure as a value for assessing the property.¹⁰²⁵ If the administrator or representative objects to or has a different opinion on the assessment, or if the director general of the RD or the provincial governor disagrees with the assessment jointly determined by the appraiser and administrator or the representative, the provisions in the Civil Procedure Law relating to the appointment of the arbitration are applied *mutatis mutandis*.¹⁰²⁶

¹⁰²² International Valuation Standards Council, 'Proposed New International Valuation Standards' (June 2010) 20 <www.ivsc.org/sites/default/files/ivs_20100610.pdf> assessed 24 June 2015.

¹⁰²³ EITA 1933, s 10(2).

¹⁰²⁴ EITA 1933 provided that an 'appraiser' is an official appointed by the Minister of Finance who has to investigate whether or not the deceased's estate or the inheritance of such estate is liable for tax determine the estate and the inheritance.

¹⁰²⁵ EITA 1933 s 11, provided that 'if a juristic act or document made in good faith during a period of not more than two years before the death of the deceased reveals the value to be determined, the administrator or the appraiser can mutually agree to apply such value during the assessment of the properties'.

¹⁰²⁶ EITA 1933 s 12, provided that 'the determination of the value of the properties in accordance with the market price as prescribed in s 10 shall involve the appraiser and the administrator or a representative who jointly discuss and determine the price. Upon the approval of the director general of the revenue department or the provincial governor, the assessed price shall be deemed the market price.

If the appraiser makes an appointment of not less than seven days in advance, but the administrator does not join the discussion or does not appoint a representative to join the discussion, the appraiser can assess the price as deemed appropriate and send a copy of the list of assessed properties to the administrator for acknowledgement. If the administrator does not raise an objection within fifteen days and the director general of the revenue department or the provincial governor approves the price determined by the appraiser, that price is deemed to be the market price.

If an agreement in respect of any properties is objected to by the administrator or the representative or of which the administrator or the representative has a different opinion on the assessment or the price jointly assessed by the appraiser and the administrator or the representative but disapproved by the director general of the revenue department or the provincial governor cannot be reached, the provisions in the civil procedure law relating to the appointment of the arbitration are applied *mutatis mutandis*.

The fees and expenses in regard to the appointment of the arbitration are deducted from the estate'.

Prior to the adoption of the EITA 1933, the Law Commission of the Thai Parliament had noted that the valuation of property could lead to arguments and had recommended this conciliatory approach to overcome such problems. The Commission also allowed decisions to be challenged on appeal. However, the Director General of Revenue Department (DGRD) had to approve decisions in order to guarantee fairness. When no agreement could be reached, s 12 required that the dispute be resolved by way of arbitration.¹⁰²⁷

Because it is not possible to specify the precise price valuation for every property in an estate, the law empowered officials to decide on these matters. However, while some properties can be easily valued, valuation is not as straightforward for properties where no explicit criteria exist to determine the value. For instance, with antique objects, paintings and other artistic works, tax collection depends on the honesty and capability of the tax officials.¹⁰²⁸ Indeed, unskilled officials may not be able to determine the market value of such object, and leaving these decisions in the hands of officials may give rise to corruption.

6.2.5 Exemptions

The amount of the Thai EIT not only depends on the aggregate value of property, but also on the availability of any exemptions, deductions and reliefs. In this context, an exemption is a deduction that is a set amount specified by statute and claimable by every taxpayer.¹⁰²⁹ While the exemption omits certain property entirely from the EIT,¹⁰³⁰ the deduction is an amount that can be subtracted from the net value of the property to determine the taxable estate (statutorily called the net value estate)¹⁰³¹ on which the EIT is levied.

Under the EITA 1933, the taxpayer was entirely exempted for certain property. These exemptions (together with the deductions) were deducted from the net value of the property in accordance with ss 10, 11 or 12,¹⁰³² so that only the ‘taxable estate’ was used to calculate EIT. The exemptions in the EITA 1933 related to property that had

¹⁰²⁷ Office of the Council of State, No. 10/2477 (n 798).

¹⁰²⁸ Rangsan Thanapornphan, *Theory of taxation* (Phranakorn Kledthai Printing House 1973) 46.

¹⁰²⁹ John K McNulty and Grayson M P McCouch, *Federal Estate and Gift Taxation in A Nutshell* (6th edn, Thomson West Publishing 2003) 398

¹⁰³⁰ Williams and others (n 918) 59.

¹⁰³¹ EITA 1933, ss 13 and 14.

¹⁰³² *Ibid.*

devolved to the state, political parties, charities or the Red Cross. S 14 of the EITA 1933 provided the following:

If it appears the existence of any property which is vested to the state or a political party or a charity organization or the Red Cross and the value of these properties is included in order to determine the net value of the estate, the taxes of the value of such properties shall not be calculated and collected.

The exemptions could be divided into two categories: those related to death and those related to lifetime gifts. Full exemptions applied to gifts to (1) the state and Thai political parties, and (2) charities and the Red Cross.¹⁰³³ Also exempted were lifetime gifts not exceeding 20 GBP, given as a marriage gift or given prior to the entering into force of the EITA 1933.¹⁰³⁴ Hence, every individual could make a lifetime gift of 20 GBP and give away property as a wedding gift. In other words, every individual was allowed a 20 GBP lifetime exemption and a gift on consideration of marriage for estate tax purposes.¹⁰³⁵

Inheritance tax collection also included the exemptions mentioned above (1) and (2)¹⁰³⁶, but also included the lifetime gift, as provided under s 7 of the EITA 1933.¹⁰³⁷ Inheritance tax permitted the same exemptions (1) and (2)¹⁰³⁸, including those for lifetime gifts, as set out in s 7 of the EITA 1933.¹⁰³⁹

S 14 of the EITA 1933 thus created a loophole because a deceased person was able to give his property to a state agency or charity organization with which he had a personal relationship.¹⁰⁴⁰ Moreover, s 14 did not limit the amount that could be given away, and in the future, it is important to analyse what amount should be permitted. Appropriate criteria should also be set in order to avoid any arbitrary decisions. It is important to consider exemptions that are available in other jurisdictions. This thesis argues that the following types of properties should be exempted from the new model of tax on wealth transfer.

¹⁰³³ Ibid.

¹⁰³⁴ EITA 1933, s 7.

¹⁰³⁵ EITA 1933, s 14.

¹⁰³⁶ EITA 1933, ss 34 and 35.

¹⁰³⁷ Ibid.

¹⁰³⁸ Ibid.

¹⁰³⁹ Ibid.

¹⁰⁴⁰ Krikkiat Pipatseritham 'Estate and Inheritance Tax' (n 23) 115.

6.2.5.1 Royal Estate

The EITA 1933 did not exempt the monarch from EIT, but a presumption operated that the monarch never died. Aguillon noted the following:

In accordance with the legal principles of the constitution and the principles in the Royal Kingdom of Thailand (s 2 and s 6), the king would succeed in continuity and there was a legal presumption that the king never died (*Le Roi est mort, Vive Le Roi*), therefore his royal properties devolved from a king to another succeeding king should not be the estate according to the Bill on the EITA 1933.¹⁰⁴¹

Hence, the king's state as sovereign will not be subject to any tax. The Cabinet at that time also agreed that the royal estate devolved to his royal successor, but the exemption did not apply when the royal estate devolved to persons other than the royal successor.

As was discussed in Chapter 5, the Act on Tax Exemption for Crown Property, 1934 (ATECP 1934) was also promulgated in order to exempt crown property from the EIT.¹⁰⁴² The Act defines crown property as property or rights that exist or arise in any part of the kingdom, property existing before or at the time of the king's accession to the throne, property purchased with the king's personal money or property acquired after the king's accession to the throne and not granted by the former king.¹⁰⁴³

In the future, it has to be considered whether particular criteria should be adopted to determine the EIT for the king or to entirely exempt crown property from taxes, as currently provided for by the Crown Property Act of 1936 (CPA 1936). At present, property that falls within the public domain of the state constitutes crown property and is exempt from tax.¹⁰⁴⁴ In the new WTT, it is also necessary to determine which types of property belonging to the king should be exempted from EIT, a question that will be analysed in more detail in Chapter 9.

¹⁰⁴¹ Minutes of the Cabinet No. 5/2477 (ordinary) dated 17 April B.E. 2477 (A.D. 1934) (unofficial translation by author).

¹⁰⁴² ATECP 1934, s 14.

¹⁰⁴³ CPA 1936, ss 4 to 6.

¹⁰⁴⁴ CPA 1936, s 8.

6.2.5.2 Buddhist Monks' Estates

Pursuant to the CCC, a Thai Buddhist monk cannot claim an inheritance as a statutory heir unless he leaves the monkhood and enforces his claim¹⁰⁴⁵ within one year.¹⁰⁴⁶ However, any property that has been acquired by a Buddhist monk during his monkhood shall become, upon his death, the property of the temple and monastery¹⁰⁴⁷ such as temple ground¹⁰⁴⁸ or ecclesiastical property,¹⁰⁴⁹ where he is domiciled, unless he has disposed of it during his life or by will.¹⁰⁵⁰

Property transferred to the temple is not considered an estate because it forms part of the temple's ecclesiastical property or the temple ground from the moment the Buddhist monk dies. Hence, this property does not fall within the inheritance rules. Also, property that belonged to a person before he entered the Buddhist monkhood is not considered the property of the monastery, therefore devolving to the statutory heirs or being disposed of by the monk as desired.¹⁰⁵¹ Thus, it will be important to consider the appropriateness of exempting monks' property acquired during monkhood from EIT in the new WTT, an issue that will also be analysed in more detail in Chapter 9.

6.2.5.3 Ancient Monuments, Antiques and Art Objects

The EITA 1933 did not exempt ancient monuments, antiques and art objects.¹⁰⁵² However, the Ancient Monuments, Antiques and National Museums Act of 1961 provides that any person who acquires a proprietary right to an ancient monument, antique or art object by inheritance or will is obliged to notify the director general of the fine arts department.¹⁰⁵³ A natural person thus can possess ancient monuments, antiques or art objects and bequeath them to others.¹⁰⁵⁴ An issue arises as to whether or not there should be a tax exemption for ancient monuments, antiques or art objects and, if so, to what extent they should be tax exempt in the new WTT. This issue will be considered in more detail in Chapter 9.

¹⁰⁴⁵ CCC, s 1622.

¹⁰⁴⁶ CCC, s 1754 para 1.

¹⁰⁴⁷ CCC, s 1623.

¹⁰⁴⁸ See the Sangha Act of 1962, s 33(2). The term 'temple ground' is defined by s 33(2) as the land in particular belongs to one of the temples and monasteries.

¹⁰⁴⁹ Ibid, s 40(2). The meaning of 'ecclesiastical property' is defined in s 40(2) as a property in general belongs to one of the temples and monasteries.

¹⁰⁵⁰ CCC, s 1754 para 2.

¹⁰⁵¹ CCC, s 1624.

¹⁰⁵² Somchai Ruchuphan, 'Principle of the Tax Collection: Estate and Gift Tax' (1973) 23(4) *Revenue Journal* 37, 42.

¹⁰⁵³ Ancient Monuments, Antiques and National Museums Act of 1961, ss 12 para 2 and 17.

¹⁰⁵⁴ CCC, ss 1599 and 1600.

6.2.5.4 Private Cemeteries and Crematoria

The EITA 1933 did not provide a tax exemption for private cemeteries and crematoria. The Public Cemetery and Crematory Act of 1975 divides cemeteries and crematoria into two types: public and private cemeteries and crematoria.¹⁰⁵⁵ The term ‘cemetery and crematory’ refers to a place for storing, burying or cremating the remains of a clan or family or friends of a clan or family.¹⁰⁵⁶ As a result, policymakers have to decide if the new WTT should provide a tax exemption for these cases, and if so, to what extent.

The EITA 1933 only contains a few exemptions, and therefore, it will be important to consider if more exemptions should be allowed. For instance, exemptions might be made for the value of trees planted on the deceased’s land,¹⁰⁵⁷ certain allowances paid to infants, published books, manuscripts or scientific work donated to academic institutions for educational and scientific purposes,¹⁰⁵⁸ gifts between spouses or civil partners,¹⁰⁵⁹ small gifts,¹⁰⁶⁰ gifts for national purposes,¹⁰⁶¹ and donations to maintain historic buildings.¹⁰⁶² The most important exemption for the future WTT in Thailand is for agricultural land, as Thai society still heavily depends on agriculture.¹⁰⁶³ In Thailand, most of the poor population (approximately 6.6 million people) live in rural areas and work in agriculture, whether in family agricultural businesses or in labour services related to agriculture. The majority of poor households either have very little land or none at all.¹⁰⁶⁴ Thus, it is important that stringent criteria be adopted for introducing WTT legislation in Thailand– for instance, agricultural land should only be used personally by the family in order to avoid the rich being able to use this tax exemption when they do not carry out the work themselves.

6.2.6 Deductions

The taxable estate (‘net value of the estate’) was determined after all deductions had been made – for instance, for debts incurred prior to death and expenses after death.

¹⁰⁵⁵ Public Cemetery and Crematory Act 1975, s 4.

¹⁰⁵⁶ *Ibid.*

¹⁰⁵⁷ *Ibid.*

¹⁰⁵⁸ *Ibid* 42.

¹⁰⁵⁹ HITA 1984 (UK), s 18.

¹⁰⁶⁰ HITA 1984 (UK), s 20.

¹⁰⁶¹ HITA 1984 (UK), s 24A.

¹⁰⁶² HITA 1984 (UK), s 27 and Schedule 4.

¹⁰⁶³ Charoenratphak (n 628) 27.

¹⁰⁶⁴ United Nations Country Team in Thailand, ‘Thailand Common Country Assessment’ (2005) Keen Publishing (Thailand) Co. Ltd, 14 < <http://www.asiapacific.undp.org/content/dam/rbap/docs/programme-documents/cca/TH-CCA-2005.pdf>.> accessed 24 June 2015.

These deductions were regulated by ss 10, 11 or 12 for the purpose of assessing the EIT.¹⁰⁶⁵ The following amounts had to be deducted under s 13 of the EITA 1933: the debts and charges made before death and the Expenses incurred after death.¹⁰⁶⁶

6.2.6.1 Debts and Charges Made before Death

All debts incurred prior to death were considered deductions, although s 13 was very unclear and ambiguous. Debts were considered deductible, as these obligations continued to exist after the deceased's death.¹⁰⁶⁷ The CCC also makes clear that creditors are entitled to payment from the estate.¹⁰⁶⁸ They may enforce their claims in full against the estate.¹⁰⁶⁹ Therefore, such debts must be deducted from the value of the estate before it can be divided; in the event that this does not happen, creditors can pursue the heirs for any outstanding amounts.¹⁰⁷⁰ Because it is more burdensome for creditors to pursue various heirs, claims are normally pursued against the estate.

It is also necessary to consider the types of debts and claims that were not deductible¹⁰⁷¹ under s 13(1) of the EITA 1933 as well as what constituted debts incurred by the deceased before his death. The following four types of debt are not deductible:¹⁰⁷²

6.2.6.1.1 Debts Released by Will by the Deceased

Allowing debts to be released by will does not conflict with the two provisions contained in the CCC dealing with the release of obligations and providing that the

¹⁰⁶⁵ EITA 1933, ss 13 and 14.

¹⁰⁶⁶ EITA 1933, s 13 provided that 'the value of the properties which were already investigated or of which the decision was rendered and explicitly determined according to ss 10, 11 or 12 is referred to as the 'net value'. The following amounts shall be deducted from the net value:

- (1) All debts occurring before the death of the deceased;
- (2) The expenses relating to the funeral in the amount of ten per cent of the net value but not exceeding 100 GBP;
- (3) The expenses for the administration of the estate as deemed appropriate, but the following debts and claims cannot be deducted:
 - (a) The debts released by will by the deceased;
 - (b) The debts created by the deceased for the purpose of gifts, as specified in s 7;
 - (c) The debts without any other evidence except the statement of the deceased in the will;
 - (d) The debts evidenced by writing created overseas or a claim established by a final judgment in foreign countries which are not enforceable in Thailand;
 - (e) The claims in which the period of prescription lapses'.

¹⁰⁶⁷ EITA 1933, s 13(1).

¹⁰⁶⁸ CCC, s 1734.

¹⁰⁶⁹ CCC, s 1738 para 1.

¹⁰⁷⁰ CCC, s 1738 para 2.

¹⁰⁷¹ EITA 1933, s 13(3)(a)-(e).

¹⁰⁷² EITA 1933, s 13(3)(a)-(e).

donee can make a gift¹⁰⁷³ by releasing an obligation.¹⁰⁷⁴ This release may result in the obligation becoming extinguished.¹⁰⁷⁵ S 340 provides that ‘if the creditor declares to the debtor an intention to release the obligation, it is extinguished’. To the extent that the release of obligations can represent a gift to the donee, it should be taxed in the same way as a gift made by the donee during his or her lifetime. It can then be argued that the debt released by the deceased’s will is one that should not be allowed as a deduction under the EITA 1933, which also considered the release of an obligation through a will to be a gift.¹⁰⁷⁶

Under the CCC, the rule governing the juristic act holds that the release, a bilateral juristic act, may be made. The creditor may make a declaration of intention to a debtor.¹⁰⁷⁷ It may also be given in writing, or the document embodying the obligation can be surrendered to the debtor or cancelled.¹⁰⁷⁸ Clearly, the release of an obligation may be made not only by will but by other juristic acts under Thai law. The above argument demonstrates the issue as to whether or not a gift should be deductible under the EIT, particularly if it is made by releasing an obligation through a juristic act rather than by will. Under Thai law, both have been treated as gifts whether made under the CCC.¹⁰⁷⁹ However, the legal consequences differ. The former takes effect when the testator dies, whereas the latter takes effect immediately at the time of the act. In particular, a gift (as the release of obligation takes effect upon the death of the donor) is governed by the provisions of law concerning inheritance and wills under the CCC.¹⁰⁸⁰ Therefore, neither release should be taxed in the same way. A gift made by granting the donee release from an obligation through a juristic act should be deductible.

6.2.6.1.2 Debts Created by the Deceased for the Purpose of a Gift as Specified in S7

Under the CCC, an obligation arises from a gift contract whenever the donor gratuitously transfers a property of his own to the donee who has accepted the property,

¹⁰⁷³ CCC, s 521 provided that ‘a gift is a contract whereby a person, called the donor, transfers gratuitously a property of his own to another person, called the donee, and the donee accepts such property’.

¹⁰⁷⁴ CCC, s 522 provides that ‘a gift may be made by granting to the donee the release of an obligation or by performing an obligation due from the donee’.

¹⁰⁷⁵ CCC, s 340.

¹⁰⁷⁶ EITA 1933, ss 6 and 7.

¹⁰⁷⁷ CCC, s 149 provided that ‘juristic acts are voluntary lawful acts, the immediate purpose of which is to establish between persons relations, to create, modify, transfer, preserve or extinguish rights’.

¹⁰⁷⁸ CCC, s 340 para 2 provided that ‘when an obligation has been evidenced by writing, the release must also be in writing or the document embodying the obligation be surrendered to the debtor or cancelled’.

¹⁰⁷⁹ CCC, s 522.

¹⁰⁸⁰ CCC, s 536.

failing which it cannot come into existence.¹⁰⁸¹ However, the following conditions are not subject to the gift tax: if the value of the acquired property is less than 20 GBP, if it was a gift contract made at the donee's marriage such as '*sinsod*',¹⁰⁸² or if it was made before the entering into force of the EITA 1933.¹⁰⁸³ These obligations are not deductible because such gifts are already excluded from the deceased's property for EIT purposes.¹⁰⁸⁴

If a man agreed to give his property (or '*sinsod*') to the parents of the woman in return for the woman agreeing to marry, but he dies before such property (or '*sinsod*') has been given or transferred to the woman's parents, it is ambiguous as to whether there is any deduction allowed for the deceased's debt. In answering this question, it is necessary to consider the statutory provisions in s 7 together with s 13. These provisions indicate that the deceased's debt was created for the purpose of marriage, so it is not subject to s 7, exempting it from inclusion in the estate. Thus, a deduction is allowed for such debt under s 13(3) and not subject to the exemption in (b). On the contrary, if the deceased has made a gift during his or her lifetime, but dies before the obligation has been performed, this debt is subject to s 7 and will be included in the estate. This situation does not allow a deduction for such debt because it is subject to the exemption in (b).

6.2.6.1.3 Debts without any Other Evidence Except in the Case of Having a Statement in the Will

Under the CCC, it is impossible to enforce an obligation arising from a loan for a sum exceeding 40 GBP by action unless there is some written evidence of the loan signed by the borrower.¹⁰⁸⁵ The question therefore arises as to whether an exception should be allowed in respect to obligations arising from a loan that does not exceed 40 GBP and is not mentioned in the will but is an enforceable claim. For instance, a pledge is a valid contract only when the pledger delivers movable property to the pledgee as security for the performance of an obligation.¹⁰⁸⁶ The hire of services and work is a valid contract if

¹⁰⁸¹ CCC, s 521.

¹⁰⁸² CCC, s 1437 para 3.

¹⁰⁸³ EITA 1933, s 7.

¹⁰⁸⁴ EITA 1933, s 6.

¹⁰⁸⁵ CCC, s 653 para 1 provided that 'a loan of money for a sum exceeding 40 GBP in capital is not enforceable by action unless there is some written evidence of the loan signed by the borrower'.

¹⁰⁸⁶ CCC, s 747 provided that 'a pledge is a contract whereby a person, called the pledger, delivers to another person, called the pledgee, a movable property as a security for the performance of an obligation'.

both parties have orally agreed to it.¹⁰⁸⁷ However, the exemption may not be claimed in relation to these debts, and it remains undecided whether these debts should also be tax deductible. The obligation created by these contracts exists even though they are not enforceable by legal action under the CCC; therefore, it is unreasonable that these debts will not be allowed as deductions. The counterargument states that only debts enforceable against the estate at the time of death can be deducted, and these must be approved by a court judgment ruling that the debtor is bound to perform his or her obligation. However, it would be costly and time-consuming to obtain such a judgment from the court.

A further question involves why a debt involving only a statement in the will can obtain the deduction, while a debt supported by either a statement or written evidence cannot. In answering this question, particular provisions require examination. There are four forms of will prescribed under the CCC. However, at minimum, a will is required to be made in writing and signed by the testator before at least two witnesses present at the same time; they then and there must sign their names certifying the testator's signature.¹⁰⁸⁸ Other forms may be used, such as a holograph document upon which the testator must write with his own hand the whole text of the document, the date and his signature.¹⁰⁸⁹ Another form involves a public document that the testator must declare to the official before at least two other present witnesses with the dispositions he wishes to include in the will.¹⁰⁹⁰ Finally, a secret document can be used upon which the testator must sign his name and produce the closed document before the official.¹⁰⁹¹ All forms of will are required to be made in writing. Thus, if there is only a statement of debt in the will, this debt must be accompanied by evidence to qualify as a deduction under s 13(3)(c) of the EITA 1933.

6.2.6.1.4 Debts and Claims in Foreign Countries

A debt evidenced by writing created overseas or a claim established by a final judgment in a foreign country is not enforceable in Thailand. This exemption may seek to address

¹⁰⁸⁷ CCC, s 537 provides that 'a hire of property is a contract whereby a person, called the letter, agrees to let another person, called the hirer, have the use or benefit of a property for a limited period of time and the hirer agrees to pay rent therefore'.

CCC, s 575 provided that 'a hire of services is a contract whereby a person, called the employee, agrees to render services to another person, called the employer, who agrees to pay remuneration for the duration of the services'.

¹⁰⁸⁸ CCC, s 1656.

¹⁰⁸⁹ CCC, s 1657.

¹⁰⁹⁰ CCC, s 1658.

¹⁰⁹¹ CCC, s 1660.

difficulties of enforceability when the creditor demands the court for compulsory performance in foreign countries. It is obvious that the expenses of compulsory performance overseas (such as transportation costs) are greater and more time-consuming than in Thailand.

However, to be deductible, these debts and claims must be enforceable against the estate of the deceased. It can be argued that if such debts and claims overseas are not allowed as deductions on the grounds of enforceability difficulties, such debts and claims, together with their expenses of compulsory performance, are no longer to be legal obligations of the estate; rather, the decedent's heirs and beneficiaries assume responsibility for them. They shall not be liable for any obligation of the decedent or estate incurred before and after the transfer. This lack of liability follows from the fact that a 'deduction for any expenses and claims against the estate, are designed to ensure that the tax paid is computed only on the amount of property actually passing to the heirs or beneficiaries'.¹⁰⁹² Therefore, other property that does not actually pass to them should not be taxed. For the above reasons, s 13(3)(d) should allow a deduction for debts and claims in foreign countries from the estate of the decedent. It is vital to note that the provisions of s 13(3)(d) shall not apply *mutatis mutandis* to the inheritance tax under the EITA 1933.

6.2.6.1.5 Claims that have been Barred by Prescription¹⁰⁹³

Because the debtor is entitled to refuse performance after a certain time has lapsed under the CCC S, 13(3)(e) also forbids the deduction of claims that are barred by prescription from the decedent's estate.¹⁰⁹⁴ It can be argued that the provision of s 13(3)(e) is obscure and ambiguous. Although the provision specified that the deduction will not be allowed if claims have been barred by prescription, it did not explain when the claim is considered to be barred by prescription. This omission raises the question of whether claims against the estate in s 13(3)(e) should be exempted from the deduction. If so, it is necessary to determine the appropriate lapse of time for the prescription of EIT purposes.

¹⁰⁹² Stephanie J Willbanks, *Federal Estate and Gift Taxation: An Analysis and Critique* (3th edn, Thomson/West 2004) 163.

¹⁰⁹³ CCC, s 193/9.

¹⁰⁹⁴ CCC, s 193/10.

S 193/29 of the CCC states that the court cannot dismiss a claim if prescription has not been pleaded as a defence.¹⁰⁹⁵ The converse of this consequence is that if prescription has been pleaded as a defence, the case shall be dismissed as a result of the debtor's entitlement to refuse performance under s 193/10. The barring of the claim by prescription does not prevent a creditor from enforcing his or her right, and he or she does have the right to bring action to the courts. Some argue that the treatment of s 13(3)(e) in such claims was 'unfair' to the creditor, as a creditor of the estate can only enforce his or her claim within one year from the date that he learned of the deceased's death.¹⁰⁹⁶

The second question is whether s 13(3)(e) allows an estate tax deduction for the claim barred by prescription. It may be suitable for the claim to be determined at the date of death for EIT purposes. Although the EITA 1933 did not state when the claim can be determined, the date for determining the claim barred by prescription is crucial because when prescription occurs, its effect relates back to the day when it began to run.¹⁰⁹⁷ As a result, the creditor can exercise his right to the claim, which he can obtain for arrears of interest from the time when the prescription begins to run, unless prescription has not been pleaded as a defence. Both the amounts of such claims and interest accrued are deductible from the estate.

6.2.6.2 Expenses Incurred after Death

It is important to consider the types of expenses incurred after death such as funeral expenses, administration expenses and arbitration expenses, are found in ss 12, 13(2)(3) and 16 of the EITA 1933. The following three types of expenses are deductible:

6.2.6.2.1 Funeral Expenses

Expenses related to the funeral are deductible in the amount of ten per cent of the estate's net value, but not exceeding 20 GBP.¹⁰⁹⁸ The interesting problem to consider is the appropriate scope of funeral expenses. This determination should allow the deduction of actual expenses, and that deduction should be made in accordance with the deceased's status and actual amount of funeral expenses incurred.

¹⁰⁹⁵ CCC, s 193/29.

¹⁰⁹⁶ CCC, s 1754 para 2.

¹⁰⁹⁷ CCC, s 193/25.

¹⁰⁹⁸ EITA 1933, s 13(2).

The argument can be made that the financial capability and social position of each family is different and that any new legislation should revise the figures to set appropriate limitations. In Thailand, for example, if a rich family member dies, those who remain can afford to hold a luxurious crematory ceremony, whereas a poor family may not even be able to afford a coffin.

The legislation does not define the term ‘funeral expenses,’ although the CCC states that the administrator who is appointed by the deceased is responsible for arranging the funeral.¹⁰⁹⁹ The expenses incurred for the funeral are debts due by the estate in accordance with the provision of the CCC.¹¹⁰⁰ The incurred expenses are limited ‘to the amount suitable to the social station in life of the deceased’.¹¹⁰¹

The legislature therefore has to bear in mind the phrase ‘the amount suitable to the social station in life of the deceased’ when enacting new legislation. It is necessary to add a similar phrase into a statutory provision concerning funeral expenses with the exception that officials should have the power to determine and approve the funeral expenses for the deceased. In so determining, the officials may act in accordance with practice guidelines that take into account the reasonable costs for cremation or burial. These ceremonies or rites differ according to the religious beliefs and cultural practices of each family. Cremation for Buddhists¹¹⁰² involves the deceased being burned, while Christians will mostly choose to be buried or otherwise interred in a grave. The only option for Muslims is burial. Burial costs tend to be higher than cremation costs because they require a tombstone, monument, mausoleum or buried lot, as well as reasonable costs for future care and upkeep. Burial costs also include transportation to bring the deceased to the cemetery or graveyard.¹¹⁰³ Clearly, an amount that was previously considered reasonable in s 13(2) of the EITA 1933 may not now be sufficient; therefore, all funeral expenses paid by the estate during funeral rites as well as additional costs for future care and upkeep (in the case of Christians and Muslims) should be deducted in the amount actually paid, but not exceeding a specified sum. This specified sum may be generally expected to increase with reference to the inflation index.

¹⁰⁹⁹ CCC, s 1649.

¹¹⁰⁰ CCC, s 1739(2).

¹¹⁰¹ CCC, s 1650.

¹¹⁰² ‘According to the latest census, the total population of Thailand is over 60 million. Out of this number, approximately 93.4% are Buddhists. Buddhism has had a deep influence in Thai arts, traditions, learning and the character of the people’ ‘See (n 662) 14’.

¹¹⁰³ IRC (US), ss 2053 (a)(1), (b) and Treasury Regulation (US), s 20.2053-2.

6.2.6.2.2 Administration Expenses

Reasonable expenses incurred by the administrators¹¹⁰⁴ and fees for the appointments of administrators¹¹⁰⁵ were also tax deductible. However, what could be deemed 'reasonable expenses' was unclear, particularly since the wealth of deceased persons varied greatly. No other legislation defined the term, except for s 42(1) of the RC, which requires a personal representative to honestly spend only what is necessary to solely discharge his duties; any excess cannot be deducted.¹¹⁰⁶ An estate administrator is not entitled to remuneration out of the estate unless the will or the majority of heirs so permit.¹¹⁰⁷ Where the administrator has been authorized to receive remuneration, it shall be deducted as a debt from the estate.¹¹⁰⁸ Any new legislation should also permit the deduction of reasonable expenses of the administrator from the net value of the estate for EIT purposes.

6.2.6.2.3 Arbitration Expenses

Fees and expenses that are incurred to pay for arbitration must be deducted from the estate. Arbitration expenses had to be incurred whenever no agreement could be reached between the representatives or when the DGRD or the provincial governor failed to approve a jointly-agreed valuation.¹¹⁰⁹

To summarize, the provision of EITA 1933 allowed certain deductions and exemptions designed to ensure that the amount of property subject to computation for tax payment was actually passed to the heirs or beneficiaries. However, one important deduction that was absent from the provision was a deduction for casualty losses. In addition, certain debts due by the estate shall be paid in accordance with the provisions in chapter II of the CCC concerning payment of debts and estate distribution. These issues will be further analysed in Chapter 9.

6.2.7 Computation of the EIT

Under the EITA 1933, both estate and inheritance taxes shared the same rate of 1-20 per cent in the schedules and tax threshold set out below. The amount of the EIT is the

¹¹⁰⁴ EITA 1933, s 13(3).

¹¹⁰⁵ EITA 1933, s 16 para 2.

¹¹⁰⁶ RC, s 42 (1).

¹¹⁰⁷ CCC, s 1721.

¹¹⁰⁸ CCC, s 1739 (7).

¹¹⁰⁹ EITA 1933, s 12 paras 3-4.

taxable estate or taxable inheritance amount multiplied by the applicable rate. Estate and inheritance tax separately set out their process for calculating the EIT liability.

6.2.7.1 Tax Rate

In general, the EITA 1933 tax rate alters in accordance with the type of tax: estate or inheritance. In most cases, the progressive rate will apply. Pursuant to the EITA 1933, the estate tax rate according to Tariff 1¹¹¹⁰ is then applied to the ‘taxable estate’ to arrive at the estate tax; meanwhile, the inheritance tax rate according to Tariff 2¹¹¹¹ is applied to ‘taxable inheritance’ to arrive at the inheritance tax. The tariff and rate of tax can be divided as well.

Appendices 1 and 2 illustrate the separate estate and inheritance tax rate schedules: the larger the estate or inheritance, the higher the marginal tax rate. The EITA 1933 provides for a gradual increase in the highest marginal tax rates of 20 per cent. Thailand formerly applied a different progressive rate for the EIT. The rate of the estate tax does not depend on the relationship among the relatives but the estate’s net value. Conversely, the rate of the inheritance tax depends on the relationship among the relatives, the relationship between the *de cuius* and the beneficiary, and the net value of the estate. For example, if the heirs are the parents, spouse and children, only a half tax rate shall apply for the inheritance tax payment. In accordance with Tariff II, if the heirs are brothers and sisters of full blood, three quarters of the tax rate shall apply for the inheritance tax. Ultimately, the inheritance tax rate depends directly on the closeness of the relatives; closer relatives will enjoy a lower tax rate.

The tax rate is very important because it is relevant to the tax base. The determination of the tax rate is thus an issue that should be considered from the outset. The tax rate that should apply to any case—a progressive, flat or regressive rate—should be considered for the future tax on wealth transfer in Thailand.¹¹¹² Once the tax rates are determined, the next problem will be the appropriate percentage rate; if the tax rate is inappropriate for the economic and social conditions of the country, it will have an enormous effect on Thai people.

¹¹¹⁰ EITA 1933, Tariff 1.

¹¹¹¹ EITA 1933, Tariff 2.

¹¹¹² By definition, a flat rate tax is neither regressive nor progressive. Under a regressive system, the rate of tax charged falls as the size of the taxable base increases. This does not mean that the amount of tax chargeable falls as well. A progressive tax is simply the reverse of the regressive tax: one pays a higher rate of tax as the size of the taxable base rises.

The UK has implemented a (unified) flat rate of IHT imposed at a rate of 40 per cent for chargeable transfers¹¹¹³ on death and 20 per cent for chargeable lifetime transfers.¹¹¹⁴ The US has implemented a progressive rate for the FET/FGT) whereby the estate tax and gift tax share the same rate schedule¹¹¹⁵ similar to the EIT. As for Thailand, it is an open question whether future taxes on wealth transfer should be subject to a flat or progressive rate. This question will be analysed further in Chapter 9.

6.2.7.2 Tax Threshold

The EIT threshold (or ‘nil rate band’) is the amount up to which either no estate or no inheritance tax had to be paid under the EITA 1933. In other words, whenever the net value of the estate or inheritance exceeded this threshold, the progressive 1 to 20 per cent EIT was applied to the additional amount.

The EITA 1933 also introduced the tax threshold (or ‘nil rate band’) as 200 GBP, which has been fixed for the EIT. Conversely, in terms of estate tax under the EITA 1933, an estate with a net value not exceeding 200 GBP after deductions in accordance with s 13(1)(2)(3) was exempt from estate tax; by comparison, in accordance with s 13(1)(2)(3), an estate with a net value exceeding 200 GBP after deductions was subject to estate tax only on the excess portion.¹¹¹⁶ In terms of inheritance tax, an inheritance with a net value not exceeding 200 GBP after deductions was exempt from inheritance tax in accordance with s 13(1); meanwhile, an inheritance with a net value exceeding 200 GBP after deductions was subject to inheritance tax only on the excess portion in accordance with s 13(1).¹¹¹⁷

The amount actually excluded by the applicable the tax threshold (‘nil rate band’) of 200 GBP effectively reduced the amount of EIT payable, and its amount will not currently be appropriate for application in Thailand. In determining the tax threshold (‘nil rate band’) for the future WTT in Thailand, the tax authority should take into account any indexation factors. The UK/US criteria of utilizing the indexation factors will be compared and discussed in more detail in Chapter 9.

Deciding on an appropriate ‘nil rate band’ is crucial for introducing the WTT in Thailand. Indeed, the ‘nil rate band’ was widely criticized by members of the Thai

¹¹¹³ IHTA 1984 (UK), Schedule 1.

¹¹¹⁴ IHTA 1984 (UK), s 7(2).

¹¹¹⁵ IRC (US), ss 2001 and 2502.

¹¹¹⁶ EITA 1933, Tariff 1(2).

¹¹¹⁷ EITA 1933, Tariff 2(2).

parliament when the EIT Bill was considered in 1932 and 1933. For instance, during the People's Committee, Phraya Sri Visarn explained the rate collected from 2 GBP onwards was too low and should be increased. The tax rate to be collected in the future remains low and should be increased.¹¹¹⁸

Later in October 1932, Phraya Manopakorn Nititada of the House of Representatives proposed the nil rate, and the President of the People's Committee noted,

If the tax is to be collected ... [the] method is to set the tax rate; i.e. a per cent threshold of the estate should be set. In my opinion, it is not appropriate to collect taxes from a small estate because it has to be divided among the heirs. Moreover, each divided legacy is too small. Therefore, the rate is set at 50 GBP and the tax shall be collected from 3 per cent onwards *pro rata* the amount of the estate. In addition, in my point of view, the poor or the recipient of a small amount of the legacy would not be in trouble or after the partition; the legacy in a small amount will not be subject to the tax payment. These recipients shall be subject to a more *pro rata* tax payment'.¹¹¹⁹

At the same time, Mr. Pridi Phanomyong raised the issue of the specification of the tax rate in order to convince other members of the House to accept the reasons for the tax collection:

The nil rate band at 50 GBP is appropriate because the tax shall be collected from the persons having a large amount such as 20 000 GBP, for which the tax shall be paid at 30%. This is not much tax. When considering the rate, taxes shall not be collected from those having less than 50 GBP.¹¹²⁰

In the next session of the House of Representatives, it was proposed that the Bill on wealth transfer, called the Estate and Inheritance Tax Bill BE 2476, be re-considered,¹¹²¹ particularly the tax rate and s 15. One of the members of the Thai

¹¹¹⁸ Notes on the Committee of Khana Ratsadon (n 927).

¹¹¹⁹ Minutes of the Sitting of the House of Representatives No. 32/2475, Friday 28 October B.E. 2475 (A.D. 1932) (unofficial translation by author).

¹¹²⁰ *Ibid.*

¹¹²¹ Minutes of the Sitting of the House of Representatives No. 10/2476 (Ordinary), Session 2, Thursday 1 February B.E. 2476 (A.D. 1933) (unofficial translation by author).

parliament, Khun Niran Don Chai, requested that the threshold amount for the estate be reduced from 500 to 200 GBP. He argued,

In Thailand, there are not many recipients of 200 GBP, and most of them are in Bangkok. There are none in the main cities of the upcountry provinces. The tax is stipulated in the law because we will take back the paid income. However, we do not have enough income for the payment; it will become disadvantageous to us in the future.¹¹²²

This amendment was supported by another member of the Thai parliament, Khun Worasithdarunwej, who also argued,

The money obtained from the tax collection at the rate of 500 GBP is not worthwhile because persons with this amount of money can be found in this metropolis, but in the Nong Khai Province, nobody has 500 GBP.¹¹²³

When the vote was then cast, most members of the House of Representatives approved the amendment and reduced the amount to 200 GBP, resulting in an amendment of the provisions. The amendments were completed at the third session, and the Bill was then approved.¹¹²⁴ It is vital to note that most of the criticisms revolve around what members of the House of Representatives prefer in determining and using the tax threshold. This figure was not determined with reference to any indexation factors, such as the inflation index, retail price index or consumer price index; rather, it was determined using their own views which are not universally accepted. It is thus very important that any new legislation specifies the tax threshold ('nil rate band'), which should follow so-called international standards by referencing indexation factors. Chapter 9 will further investigate the tax threshold issue ('nil rate band') and the most suitable approach for Thailand's future WTT.

6.2.7.3 Computation of EIT

The EIT was calculated by multiplying the 'taxable estate' or 'taxable inheritance' with the applicable rate set out in Tariff 1 and Tariff 2. First, the total aggregate of the

¹¹²² Minutes of the Sitting of the House of Representatives No. 12/2476 (Ordinary), Session 2, Thursday 8 February B.E. 2476 (A.D. 1933) (unofficial translation by author).

¹¹²³ Ibid.

¹¹²⁴ Minutes of the Sitting of the House of Representatives No. 14/2476 (Ordinary), Session 2, Thursday 15 February B.E. 2476 (A.D. 1933) (unofficial translation by author).

deceased's properties was determined in accordance with the statutory guidelines,¹¹²⁵ which then constituted the 'net value of the estate'.¹¹²⁶ However, the 'net value of the estate' was not yet used to calculate estate or inheritance tax; instead, all deductions¹¹²⁷ had to be made and/or exemptions¹¹²⁸ had to be applied first. After the deductions had been carried out, the 'taxable estate'¹¹²⁹ or 'taxable inheritance' was established.¹¹³⁰ Finally, the EIT amount was determined in accordance with the schedules set out in Tariff 1 and 2, as further illustrated by the charts below. While the EITA 1933 exempted properties that devolved to the state or political parties, charities or the Red Cross, it nevertheless initially included them for the purpose of determining the 'net value of the estate'. However, the value of the exempted properties should not be included under s 14, and the net value of the estate should be calculated after all exemptions have been made (See Appendix II).

6.2.8 Tax Reliefs

Tax relief was only granted in three particular circumstances: conditions had to be satisfied in s 25, s 29 and Tariff 1. Tax reliefs could be sought in respect of the EIT in the situations set out below.

6.2.8.1 Quick Succession

Similar to IHT, one main type of tax relief under the EIT is a successive charges relief, internationally known as quick succession relief (QSR).¹¹³¹ This tax credit¹¹³² aims to 'alleviate a double charge to IHT which would otherwise arise as the same property being taxed twice in a short period of time'.¹¹³³ The Law Commission of the Thai Parliament discussed the Bill and made clear that the successive charges relief in s 25 aimed to prevent EIT from being paid twice.¹¹³⁴ Successive charges relief could be sought under the EITA 1933 when there was more than one chargeable occasion within a five-year period and could be claimed upon the second chargeable occasion.

¹¹²⁵ EITA 1933, ss 9-12.

¹¹²⁶ EITA 1933, s 13 para 1.

¹¹²⁷ EITA 1933, s 13 para 2(1)-(3).

¹¹²⁸ EITA 1933, s 14.

¹¹²⁹ The net value of the estate was arrived at after the deductions and exemptions; s 13 of the EITA 1933.

¹¹³⁰ The net value of the inheritance was arrived at after all exemptions had been deducted; s 14 of the EITA 1933.

¹¹³¹ HMRC Inheritance Tax: Customer Guide, 'Tell me how to calculate successive charges relief' <<http://www.hmrc.gov.uk/cto/customerguide/page13-2.htm>> accessed 24 June 2015.

¹¹³² Marsh (n 823) 52.

¹¹³³ Malcolm James Finney, *Wealth Management Planning: The UK Tax Principles* (John Wiley & Sons Ltd Publication 2008) 222.

¹¹³⁴ Office of the Council of State, No. 10/2477 (n 798).

For EIT purposes, successive charges relief operates by reducing the amount of EIT on the second occasion by a sum equal to a percentage of the amount of EIT paid on the first chargeable occasion. S 25 of the EITA 1933 set out various applicable percentages up to five years from the first chargeable occasion on death and to the second chargeable occasion on death:

If the estate tax ... is paid and then within a period of five years all or part of these properties shall be subject to the tax payment twice, the amount of tax being subject to the payment because of the death of the second person may be reduced according to the following percentage based upon the director general of the revenue department's or the provincial governor's consideration of the evidence relating thereto:

- 80% if the second death occurs within 1 year of the earlier death;
- 60% if the second death occurs within 2 years of the earlier death;
- 50% if the second death occurs within 3 years of the earlier death;
- 40% if the second death occurs within 4 years of the earlier death;
- 20% if the second death occurs within 5 years of the earlier death.

On the second chargeable occasion, relief could be sought for estate tax on immovable property, any benefits or rights accruing from commercial and industrial business or from any professions acquired as a result of being a partner; however, relief could not be sought at the time of the first deceased's death. This relief effectively reduced the amount of estate tax imposed on the second death; however, the percentage varied depending on the amount of the tax previously paid and the amount of time that had passed since the first death. This amount was determined by the DGRD or the provincial governor after considering all evidence.¹¹³⁵ Accordingly, the tax payable could be reduced by 80, 60, 50, 40 and 20 per cent if the second person died within five years of the first.¹¹³⁶ No successive charges relief were permitted if the time elapsed exceeded five years. Under the EITA 1933, when the value of the properties subject to tax for the second deceased differed from the value of the properties upon which tax was paid for the first death, the lesser amount was used for tax calculation.¹¹³⁷

¹¹³⁵ EITA 1933, s 25 para 1.

¹¹³⁶ EITA 1933, s 25 para 2.

¹¹³⁷ EITA 1933, s 25(3).

Although the successive charges relief is only applicable on death, it could be one of the most important reliefs available to mitigate the EIT charges for the future tax on wealth transfer in Thailand. It is useful in alleviating a double charge on tax as a result of two deaths arising within a short period of time. It would be a suitable relief for use in Thai society because Thailand has a custom of patrilineal inheritance whereby Thais strongly believe in holding on to their property during their lifetime for the next generation. Successive charges relief would help Thailand to reduce the effect of tax on wealth transfer for families.

6.2.8.2 Close Relatives

Although, the ‘close relative’ relief was not set out in any provisions of the EITA 1933, it can be found in Tariff 2. ‘Close relative’ relief should certainly not be overlooked even though it applied only to death and inheritance purposes. This inheritance tax relief was granted to close relatives, namely the deceased’s father, mother, husband, wife, child, and brother and sister of full blood, as set out in Tariff 1 and Tariff 2 of the EITA 1933:

- (a) If the heirs are the parents, spouse and children, only a half of the above-stated rate shall apply for the inheritance tax payment.
- (b) If the heirs are the brothers and sisters of full blood, three quarters of the above-stated rate shall apply for the inheritance tax.

The legislation thus adopted the concept of close relatives and distinguished them from distant relatives, who had to pay more tax. Pursuant to the CCC, the close relative concept is also recognized by the statutory provisions of the CCC, whereby each class of statutory heir is entitled to inherit in the following order: (1) descendants; (2) parents; (3) brothers and sisters of full blood; (4) brothers and sisters of half-blood; (5) grandparents; and (6) uncles and aunts.¹¹³⁸ Each class of statutory heir depends upon the closeness of the relationship between the *de cuius* and heirs. The closer relative the higher the class of statutory heir under Thai law. Between the classes, so long as there is an heir surviving, the heir of the lower class has no right at all to the estate of the

¹¹³⁸ CCC, s 1629.

deceased,¹¹³⁹ while between descendants of different degrees, only the children of the *de cuius* are entitled to inherit rather than descendants of lower degree.¹¹⁴⁰

Nevertheless, the close relatives who could benefit from the relief specified by Tariff II of the EITA 1933 do not match CCC provisions. The only close relatives provided in Tariff II were parents, spouse, children, and brothers and sisters of full blood, but not brothers and sisters of half-blood, grandparents, and uncles and aunts. Even though any relative who was not included in Tariff II may not be taken into account as a close relative, they share at least the same blood relation to the deceased. However, the relationship of such relatives must be in accordance with blood relations without regard to legitimacy, except in the case of the surviving spouse.

The effect of Tariff II is far from clear. To begin with, the use of the word ‘spouse’ is somewhat ambiguous as the word ‘surviving’ should be added before the word ‘spouse’. This clause ultimately begs the question of whether marriage registration shall be required under the current Thai law. The EITA 1933 was in force before the date of enforcement of Book V and Book VI of the CCC. A legitimate marriage shall be effected without regard to registration being made.¹¹⁴¹ Thus, before the enforcement of CCC Book V, if the deceased had several wives, they acquired legal status and were jointly entitled to the inheritance of the deceased whether they were the principal wife or secondary wives.¹¹⁴² In the new WTT Act, it is thus necessary to introduce the term ‘surviving spouse’ and the phrase ‘subject to the provisions of Book V of the CCC’.

6.2.8.3 Tax Instalments

Under the EITA 1933, it was also possible to pay tax in annual instalments over a period of up to eight years in particular circumstances, thus ensuring reduced tax burden. S 29 provided the option of paying tax in eight equal annual instalments or sixteen equal half-yearly instalments, although four per cent interest had to be paid for each year past the due date of the first tax payment.¹¹⁴³ The first instalment was due twelve months after the death of the deceased. Interest had to be paid together with each

¹¹³⁹ CCC, s 1630.

¹¹⁴⁰ CCC, s 1631.

¹¹⁴¹ CCC, s 1457.

¹¹⁴² CCC, s 1635.

¹¹⁴³ EITA 1933, s 25 para 1.

instalment. When a property was sold, tax had to be paid upon completion of the sale and was otherwise considered outstanding.¹¹⁴⁴

However, s 29 provided that relief in the form of instalment payments was only available for (1) immovable property and (2) when interests or rights were acquired in commercial or industrial businesses or professions through partnership.¹¹⁴⁵ A person who was liable to pay estate or inheritance tax also had to lodge a written request with the DGRD to pay in instalments.¹¹⁴⁶ While no time limit was imposed by the EITA 1993, the request was supposed to be filed prior to the tax becoming due.

The Law Commission of the Thai Parliament noted that s 29 was adopted for wealthy Thai people who owned land, not foreigners. It was also intended for those who had bank deposits or owned stocks and bonds that could easily be converted into money to pay taxes.¹¹⁴⁷ Because houses can be sold, it is also necessary to consider whether such relief should still be granted and whether officials should also have the power to sell properties if taxes remain unpaid.

6.2.9 Tax Administration

It is crucial that officials collect and administer estate tax effectively and honestly, which requires strong safeguards to prevent corruption.¹¹⁴⁸ Otherwise, the tax administration may have loopholes leading to tax evasion. The EITA 1933 provided detailed rules for the administration and collection of estate (ss 15–31) and inheritance tax (ss 36–42).

6.2.9.1 Reporting Death and Notifying of Property and Debt

Under the EITA 1933, EIT administration commenced with a notification that a person had died and that the gross value of the estate exceeded or could exceed the tax threshold (‘nil-rate band’) of 200 GBP. Certain people were required to notify the appraiser of the death, as outlined below.¹¹⁴⁹

¹¹⁴⁴ EITA 1933, s 29 para 1.

¹¹⁴⁵ EITA 1933, s 41 provided that ‘ss 27, 28, 29, 30 and 31 shall apply *mutatis mutandis* to tax collection.’

¹¹⁴⁶ EITA 1933, s 29.

¹¹⁴⁷ Office of the Council of State, No. 10/2477 (n 798).

¹¹⁴⁸ Pipatseritham, ‘Estate and Inheritance Tax’ (n 23) 117.

¹¹⁴⁹ EITA 1933, s 3.

6.2.9.1.1 Administrator

The administrator had 15 days to notify the local appraiser of the death in the area where the person died. However, when the deceased died abroad, the administrator had to notify Thai officials of the death within 15 days of becoming aware of it. A written notice thus had to be sent to the local appraiser.¹¹⁵⁰ Any person who had been appointed as an administrator had to refuse his or her administratorship or confirm his or her inability to act as administrator within thirty days of the deceased's death. The appraiser or heir then had to apply to the court to appoint an administrator if the appraiser was notified or had reasonable cause to believe that the value of the 'gross estate' exceeded the tax threshold ('nil-rate band').¹¹⁵¹

6.2.9.1.2 Person Possessing the Estate and the Debtor

Where the administrator failed to act, it became the duty of the person who was in possession of the estate to notify the appraiser of the death.¹¹⁵² Those in possession of property and debtors to the deceased had to notify the administrator and the appraiser of the value of property or debts. They also had to assist the administrator and appraiser in discharging their duties.¹¹⁵³ In turn, the administrator of the estate had to take all necessary steps to identify interested persons and to notify them of any testamentary dispositions within a reasonable period.¹¹⁵⁴

6.2.9.2 Delivery of an Account

For estate tax, the administrator or person in possession of the estate was required to deliver an account of all the deceased's properties and debts¹¹⁵⁵ to the appraiser¹¹⁵⁶ pursuant to s 20 of the EITA 1933.¹¹⁵⁷ The account did not have to go back more than

¹¹⁵⁰ EITA 1933, s 15(1).

¹¹⁵¹ EITA 1933, s 16.

¹¹⁵² EITA 1933, s 15(2).

¹¹⁵³ EITA 1933, s 18.

¹¹⁵⁴ CCC, s 1725.

¹¹⁵⁵ EITA 1933, ss 6, 7 and 18.

¹¹⁵⁶ EITA 1933, s 19.

¹¹⁵⁷ EITA 1933, s 20 provided that 'In the account which a personal representative has known whether the said property is in supervision or not, or there is an objection, or under condition precedent or not and it must inform the whereabouts and the amount of the said debt.

In the case that an executor still has property or debt that should be included in evaluating the price, an executor must record it in the personal representative of the account, but the said property or debt must not be evaluated until it is known that the said property or debt really exists and the price is certain.

When submitting an account, if a personal representative has known that the property or debt which should be included in the said price evaluation really exists, the executor must submit the additional account within three months. When the price of the additional property or debt has been specified, that amount should be calculated again by including the additional property or debt and collect the tax

six months from the date of death. If the deceased had passed away abroad, the administrator had nine months from the deceased's date of death. A request for extension could be filed with the appraiser, but this extension had a one-year maximum.¹¹⁵⁸

When the appraiser suspected that an administrator had filed a false or incomplete account, he or she could issue a summons to interrogate the administrator and any witnesses. The summons had to be issued within three years from the date of account delivery.¹¹⁵⁹ When an appraiser received and registered a completed account,¹¹⁶⁰ the value was agreed on with the administrator and then approved by the DGRD or the provincial governor.¹¹⁶¹ For this purpose, the appraiser had to send a copy of the account, an evaluation of the account and other supporting documents to the competent officials¹¹⁶² for authorization of the value for estate tax purposes.¹¹⁶³ Copies of the documents¹¹⁶⁴ also had to be delivered to the competent officials, so that they could assess the amount payable for inheritance tax purposes.¹¹⁶⁵

6.2.9.3 Assessment and Collection

6.2.9.3.1 Notice of determination

Under the EITA 1933, the appropriate official had to base EITA 1933 determination on the account and value supplied by the appraiser.¹¹⁶⁶ Under the EITA 1933, the official

according to the net included amount. Submitting an additional account is said to use the s 19, which allows a time extension'.

¹¹⁵⁸ EITA 1933, s 19.

¹¹⁵⁹ EITA 1933, ss 22 and 36(2).

¹¹⁶⁰ EITA 1933, ss 21 and 36.

¹¹⁶¹ EITA 1933, s 12.

¹¹⁶² EITA 1933, s 3 provided that a "competent official" was an official who was appointed by the Minister of Finance to assess tax.

¹¹⁶³ EITA 1933, s 23.

¹¹⁶⁴ EITA 1933, ss 36 and 37.

s 36 provided that 'the administrator shall notify the appraiser of the name and the residence of the liable heirs for the inheritance tax payment as well as the amount and the prices of the properties acquired by each heir. S 18, in addition to the obligations specified for the debtors, shall apply *mutatis mutandis* along with ss 21 and 22'.

s 37 provided that 'the prices determined at the time of assessment of the inheritance tax shall be the value of the properties for the assessment of the inheritance tax. If the heirs belatedly acquire the estate for more than one year from the previous assessment, and they believe the determined prices have changed, they can request the re-determination of the prices of the properties, and s 12 shall *apply mutatis mutandis*'.

¹¹⁶⁵ EITA 1933 s 38, provided that 'the appraiser shall send a copy of the letter of notification and a copy of the list of the assessment as specified in ss 36 and 37, together with a copy of the supporting documents, to the tax assessor and copies of such documents to the heirs liable to the tax payment'.

¹¹⁶⁶ EITA 1933, ss 24 and 39.

s 24 provided that 'the competent official shall assess the taxes mainly based on the list and the prices received from the appraiser'.

subsequently informed the person who was liable for tax how much EIT had to be paid.¹¹⁶⁷

6.2.9.3.2 Payment

The administrator had to pay EIT and could sell any properties to pay EIT or could use them as a guarantee for the taxes owed. When the administrator had no control over the properties, the person who enjoyed the benefits of these properties was responsible for paying estate tax and inheritance tax.¹¹⁶⁸ The responsible person had to pay the tax to the authority within ninety days from receiving a payment notification.¹¹⁶⁹ Any foreigner who had to pay inheritance tax¹¹⁷⁰ or who had been appointed as a representative¹¹⁷¹ also had to pay tax and could dispose of property in order to pay inheritance tax; they could also use such property as a guarantee for any outstanding tax payments.¹¹⁷²

¹¹⁶⁷ EITA 1933, ss 27 and 41.

s 27 provided that ‘the competent official shall send a letter to inform them of the monetary amount being subject to the estate tax payment’.

s 41 provided that ‘ss 27, 28, 29, 30 and 31 shall apply *mutatis mutandis* to the tax collection’.

¹¹⁶⁸ EITA 1933, ss 26 and 40.

s 26 provided that ‘the administrator shall be responsible for the payment of the estate tax of the received and administered properties. The administrator has the power to distribute any of these properties as appropriate in order to pay the estate tax or use it as a guarantee of the estate tax’.

s 40 provided that ‘s 26 shall apply *mutatis mutandis* to the liabilities in the inheritance tax payment’.

¹¹⁶⁹ EITA 1933, ss 28 and 41.

s 28 provided that ‘within ninety days of receiving notification of the tax amount from the official, the liable person shall be obliged to pay the tax to the tax collector’.

¹¹⁷⁰ EITA 1933, ss 32, 33 and 34.

s 32 provided that ‘any person who owns properties of the deceased valued at more than 200 GBP is subject to pay the tax referred to as the ‘inheritance tax’ according to the rates specified in Tariff 2 attached to this act’.

s 33 provided that ‘s 6 shall apply to all properties being subject to the payment of the inheritance tax’.

s 34 provided that ‘any person receiving the properties given by the deceased within one year before his death is subject to payment of the inheritance tax, except in the case of the receipt of the properties as specified in s 7’.

¹¹⁷¹ EITA 1933, s 33.

¹¹⁷² EITA 1933, s 42 provided that ‘an alien liable to pay the taxes according to ss 32, 33 and 34 by himself or by the appointed representative or by the administrator of the properties as specified in s 33 is liable to pay the inheritance tax.

Such person has the power to distribute these properties as deemed appropriate in order to pay the inheritance tax or guarantee the tax payment’.

6.2.10 Tax Appeal

The account was delivered to the competent official, who had to determine the EIT and issue a notice of determination.¹¹⁷³ These decisions could be appealed at the DGRD, and appeals of decisions from the DGRD could then be filed at court.

6.2.10.1 Procedure before the DGRD

All appeals had to be filed with the DGRD within fifteen days of notification.¹¹⁷⁴ The DGRD then held a hearing and reached a decision at the end of the hearing. S 43 provides,

Any person liable to pay the estate tax or inheritance tax according to this Act who is not satisfactory with the tax assessment of the competent official can appeal to the director general of the revenue department within fifteen days of the date of receipt of the oral notification of such assessment ...

For this appeal system, it is possible to argue that tax assessment appeals should rest with special commissioners rather than the DGRD, creating a much fairer and more transparent procedure; the commissioners' decision could be based on a majority rather than an individual alone.

6.2.10.2 Procedure before the Court

Where the appellant was dissatisfied with the DGRD's decision, he or she could file an appeal with the court within fifteen days of receiving the decision. Nevertheless, the person must still pay the requested taxes.¹¹⁷⁵ If the court found that there was overwhelming evidence that the appellant should not pay the entire amount, the court could permit the appellant to file the appeal, despite not having paid full/partial taxes; the court could also require a monetary guarantee.¹¹⁷⁶

¹¹⁷³ EITA 1933, ss 24 or 39.

¹¹⁷⁴ EITA 1933, s 43.

¹¹⁷⁵ EITA 1933, s 44 provided that 'any appellant who is dissatisfied with the decision of the director general of the revenue department can appeal to the court within fifteen days of receiving the decision, except in the case that this right is deprived as a result of the reason stipulated in s 43. That person would, however, be subject to the payment of the requested taxes or the due taxes'.

¹¹⁷⁶ EITA 1933, s 45 provided that 'if an appeal against the decision of the director general of the revenue department is lodged and in the court's opinion, it will be overwhelming for the appellant to pay whole or partial taxes, the court can permit the appellant to file an appeal without paying taxes or paying only some parts of taxes as deemed appropriate by the court. If the court makes such an order, the monetary guarantee for the due taxes shall be deposited'.

However, it is import to note that the DGRD or provincial governor could issue a summons¹¹⁷⁷ to interrogate the administrators or any witnesses. The DGRD could also order the representative or witnesses to provide books of accounts or other evidence within ten days of the summons delivery.¹¹⁷⁸ When there was a failure to comply with the summons or no answers were provided, the person could be barred from appealing the decisions of the DGRD¹¹⁷⁹ or the court.¹¹⁸⁰

It may be argued that the fifteen-day time limit for filing an appeal was an excessively short and unreasonable time period.¹¹⁸¹ In comparison to income tax, the appeal against the decision of the Commissioner of appeals would be submitted directly to the central tax court and the provincial tax courts, and the petition must be filed within thirty days of receiving the commissioner's decision.¹¹⁸² When an appeal goes to the Central Tax Court, the procedure is governed by the Act on the Establishment of and Procedure for Tax Court of 1985 (AEPTC 1985).¹¹⁸³ Next, the appeal against any judgment or order of the tax court will be submitted to the Supreme Court within one month of pronouncing the judgment or order.¹¹⁸⁴ It is necessary to take into account this juridical process when creating the future WTT; therefore, the Central Tax Court should have jurisdiction over taxpayer appeals based on tax deficiencies asserted by the commissioner.

6.2.11 Tax Enforcement

The EITA 1933 set up civil and criminal sanctions to ensure the effective collection of tax and to encourage prompt and accurate reporting. Ss 47–51 of the EITA 1933 set out two types of penalties: civil penalties in the form of fines and criminal penalties in the form of a fine and/or imprisonment.

¹¹⁷⁷ EITA 1933, s 46 provided that ‘a summons according to this Act can be served either by an official sender or by registered mail. If it is served by an official sender and the official sender does not meet the recipient, such letter of notification or summons can be served to any person of not lower than twenty years of age residing at the residence or office of the recipient; such delivery is deemed legally sufficient.

If the recipient cannot be found, and no one is qualified to receive the letter of notification or the summons, it shall be affixed at the house door of the recipient, which can be easily noticeable or publicized in a local newspaper’.

¹¹⁷⁸ Ibid.

¹¹⁷⁹ EITA 1933, s 43.

¹¹⁸⁰ EITA 1933, s 45.

¹¹⁸¹ EITA 1933, s 44.

¹¹⁸² RC, s 30 (2).

¹¹⁸³ Act on the Establishment of and Procedure for Tax Court of 1985, s 3.

¹¹⁸⁴ AEPTC 1985, s 24.

6.2.11.1 Civil Penalties

In the EITA 1933, civil penalties were not regarded as the principal penalty; rather, such penalties were considered an additional consequence. Fines were collected as part of the EIT payment if a deficiency procedure was being made. Civil penalties were applied differently depending on the circumstances. Firstly, a failure to report a death and a failure to notify officials of the value of the property and debts resulted in a fine of up to 40 GBP,¹¹⁸⁵ save where force majeure applied.¹¹⁸⁶ Secondly, when a personal representative prevented or obstructed an official from performing his or her duties,¹¹⁸⁷ he or she could be fined up to 20 GBP.¹¹⁸⁸ Thirdly, consciously and intentionally failing to comply with a summons could cause a person to be fined up to 10 GBP.¹¹⁸⁹ Finally, a person could be fined up to 40 GBP for failing to deliver an account, an additional account, or notice to the appraiser under s 36, or if he or she failed to specify mandatory properties or debts in the account or any additional accounts.¹¹⁹⁰

It is argued that the civil penalties for deficiency under the EITA 1933 were too light and unsuitable for the present context. The maximum fine was limited to 40 GBP, and the minimum fine was limited to 10 GBP, both of which are acknowledged as small amounts in Thailand today. There are incomparable differences between the inflation rates during the period of EITA 1933 enforcement and the present day. In fact, fines have rendered the EITA 1933 an ineffective method of tax collection.

6.2.11.2 Criminal Penalties

There is only one criminal penalty for a person who intentionally and fraudulently attempts to avoid paying the EIT. S 51 states,

- (a) A person ... [who] intentionally makes a false statement or gives a false statement or answers with a false statement or shows false evidence in order to evade taxes under this Act, or (b) A person, with faulty facts,

¹¹⁸⁵ EITA 1933, ss 15, 18 or 36.

¹¹⁸⁶ EITA 1933, s 47 provided that ‘unless it is a force majeure, any person who does not give a notice or give notification as prescribed in ss 14, 18 or 36 shall be subject to a fine not exceeding 40 GBP’.

¹¹⁸⁷ EITA 1933, ss 17, 18, 22 or 36.

¹¹⁸⁸ EITA 1933, s 48 provided that ‘any person who obstructs or prevents the administrator from performing his duties according to s 17, 18, 22 or 36 shall be subject to a fine not exceeding 20 GBP’.

¹¹⁸⁹ EITA 1933, s 49 provided that ‘any person being well aware of or intending not to perform in compliance with the summons of the official according to this Act... shall be subject to a fine of 10 GBP’.

¹¹⁹⁰ EITA 1933, s 50 provided that ‘any responsible person who does not submit the list or the additional list according to section 19 or 20, or does not send a notice to the appraiser according to section 36, or is well aware of or intends not to specify the mandatory properties or debts in the list or the additional list or a notice, shall be subject to a fine not exceeding 40 GBP’.

fraudulent, artifice or other similar nature ... [who] evades or attempts to evade tax under this Act.

That person shall be subject to imprisonment not exceeding six months or a fine not exceeding 40 GBP or both.¹¹⁹¹

The penalty provisions in the EITA 1933 should be amended, as they are currently too light; strong criminal penalties should be imposed in the future Act, particularly on those who evade or attempt to evade the payment of large amounts of tax.

Conclusion

This chapter has examined the EITA 1933 and its application. We have noted its unclear and ambiguous nature, resulting from various political, economic and social conditions that changed soon after the Thai Revolution, *Khana Ratsadon*, in mid-1932. This chapter has also discussed the background for the repeal of the Thai Estate and Inheritance Act of BE 2487 (1944).

The structure of the EITA 1933 was outlined in terms of definitions and enforcement. This chapter has demonstrated that the EITA 1933 introduced both estate and inheritance taxes operating under one system and created heavy tax burdens for taxpayers; they had to pay taxes twice from only one single estate and inheritance. This issue may partly explain the low tax yield, since taxpayers were provided (on account of the heavy tax burden) with strong incentives for evasion. Thus, a future Thai WTT system would need to pay particular attention to the tax burden issue. Moreover, there are several important concepts requiring clarification and stronger definition. Most of them differ from the definitions in other legislation, such as the terms ‘property’, ‘estate’, ‘tangible movable property’, and ‘market value’. This lack of clarity in definitions may leave open a loophole for future EIT avoidance.

In terms of jurisdictional bases, the EIT was too governed by nationality rather than by the residence or domicile status of the person. In the US and UK, taxes are governed by combined rules—the residence rule, domicile rule and nationality rule. Meanwhile, deductions and exemptions existed under the EITA 1933, but there were few cases compared to the WTT in other countries. Moreover, the progressive tax rate and

¹¹⁹¹ EITA 1933, s 51.

threshold (200 GBP) is too low and will not be appropriate for modern Thailand. There was no proper indexation factor used for indexing the EIT threshold in order to meet international standards.

Tax administration appears to have been ineffective and dishonestly administered by officials. This corruption may have allowed tax avoidance. The tax appeals system whereby appeals of tax determination went to the DGRD, and from there to the court, seems to have lacked transparency. The inefficient system contained no checks and balances between the DGRD and the courts. Meanwhile, although there were both civil and criminal penalties, they are too light and inappropriate for the present circumstances in Thailand. They require revision to render obedience, to maintain the sanctity of the EITA 1933 and to prevent EIT avoidance.

The above problems, which arose from the Act itself or from the background behind its repeal, appear to have catalysed the repeal of the EITA 1933. The discussions on the EITA 1933 presented in this Chapter provide important context for the issues considered in the other Chapters of this thesis. The tax on wealth transfer in the US and the UK will be compared to Thailand's system in Chapter 7 and 8. The discussion on the EITA 1933 in this Chapter will also resurface when the Act is further analysed in Chapter 9. This analysis will focus on selecting the most suitable elements from other tax regimes in order to create a new WTT model for Thailand.

7 Analyses of the US and UK WTT Legislations: General Provisions

Introduction

The preceding chapter showed how the Estate and Inheritance Tax Act of 1933 (EITA 1933) operated and explored why it was repealed. The government had formerly decided to employ a mixture of estate and inheritance taxes, and the wealth transfer tax (WTT) was levied not only on the decedent's estate and gifts but also on the wealth transferred to the donor's recipients or heirs.

This tax imposition resulted in taxpayers having a heavy tax burden, in essence paying taxes twice. This burden caused taxpayer failure or refusal to pay the tax as well as attempts at tax evasion. Many governments have adopted the WTT in different forms into their jurisdictions. Some tax the transfer of wealth, as in the case of estate and gift tax, while others tax the receipt of wealth as in the case of inheritance tax. Thailand, however, should choose only one form to adopt. As discussed in chapter 4, less inheritance tax can be collected than estate and gift tax; as a result, the state could not produce as much income from the inheritance tax as it could from the estate tax. Moreover, the estate and gift tax offers an efficient collection system as it is more convenient to collect the estate tax than the inheritance tax. Under the transferor-based system, the estate and gift tax is generally considered to be easier to administer because it is involved with the probate process,¹¹⁹² and the person with primary tax payment liability just files a single return.¹¹⁹³ Thus, the administrative and compliance costs are relatively low compared to inheritance tax, which requires, for example, a record of all lifetime gifts. Under the recipient-based system, however, inheritance tax is unfair because it rewards selfish 'vicious' behaviour.¹¹⁹⁴

Because nearly all of the Organization for Economic Co-operation and Development (OECD) countries levy some kind of a WTT, this thesis considers the available forms of WTT, particularly emphasising the transfer of wealth under the jurisdictions of the US and UK. Other than the US, only the UK levies 'pure' estate taxes; the others have an

¹¹⁹² Boadway and others (n 471) 794.

¹¹⁹³ Ibid.

¹¹⁹⁴ McCaffery (n 610) 296.

inheritance tax or a mixture of inheritance and estate taxes.¹¹⁹⁵ Internationally, the UK has a particularly long history of taxation in this area.¹¹⁹⁶

This chapter therefore considers the WTT system structures of the US and the UK in detail. The objective is to examine and compare, so as to find suitable aspects to adopt into the prospective Thai WTT. This adoption of suitable elements would help resolve problems causing the failure of the EITA 1933, as outlined in the preceding chapter. Thus, this chapter focuses exclusively on features of both WTT systems. It then focuses on issues concerning the main charging provisions and the jurisdictional basis for both systems. Next, the chapter examines and compares the availability of measures relieving the heavy tax burden of both taxes, such as deductions, exclusions, exemptions and credits. It argues that the outcome provides appropriate rules and concepts that will be highlighted in this chapter. This information will inform in Chapter 9, which furthers the analysis and assessment in order to propose guidelines for drafting legislation on the prospective Thai WTT.

It is, however, important to bear in mind that any provisions of the two tax jurisdictions applying to the ‘trust regime’, such as provisions applying to settled property, falls outside the scope of this thesis. It would not be appropriate to consider them in this chapter because Thailand’s legal system follows a civil law system and does not recognise trusts, as described in Chapter 5.

7.1 Classification of Tax

Globally, there are a number of different ways to tax property at death. Once Thailand decides which WTT should appropriately be imposed on death, it is necessary to choose between the transferor-based system or the recipient-based system. If emphasis is placed on the transferor, then the possible form of WTT would be an estate tax, ‘which focuses on the right to transfer property at death (estate), not the right to receive property at death.’¹¹⁹⁷ In 2010, 23 out of 30 OECD countries utilized two possible forms of WTT. For example, the US and UK levied taxes on the estate of the deceased (donor), whereas some countries taxed the recipients (donees).¹¹⁹⁸ Ireland, a country that follows common

¹¹⁹⁵ Gale and Slemrod, ‘Rethinking the Estate and Gift Tax: Overview’ (n 621) 17.

¹¹⁹⁶ Cremer and Pestieau (n 18) 184-185.

¹¹⁹⁷ Willbanks, *Federal Estate and Gift Taxation: An Analysis and Critique* (n 1092) 5.

¹¹⁹⁸ Chris Evans, ‘Wealth taxes: problems and practice around the world’ (2013) Centre on Household Assets and Savings Management Briefing Paper (CHASM)
<<http://www.birmingham.ac.uk/Documents/college-social-sciences/social-policy/CHASM/briefing-papers/2013/wealth-taxes-problems-and-practices-around-the-world.pdf>> accessed 24 June 2015.

law, has a gift tax on lifetime gifts¹¹⁹⁹ and an inheritance tax on inheritances received following a death.¹²⁰⁰ This thesis focuses on the jurisdictions of the US and the UK, using their WTT systems as possible models for Thailand.¹²⁰¹

7.1.1 Structural Characteristics of Tax Systems

It is first necessary to consider the distinct structural features of WTT systems. This structural analysis can inform the WTT system proposed by the Thai government, as will be discussed further in Chapter 9.

There are three taxes under the US WTT system. First, there are two transfer taxes – the federal estate tax (FET) and the federal gift tax (FGT). The third tax is the federal generation-skipping transfer tax (GSTT). The FET and FGT impose a tax on transfers made at death and during the deceased's lifetime. The FET imposes a tax on property owned by a decedent at death, while the FGT supplements the FET in order to ensure individuals cannot use lifetime gifts to avoid US transfer tax liability. Thus the FGT, which was introduced into the US WTT system, is a companion tax¹²⁰² and supplement¹²⁰³ to the FET.¹²⁰⁴ When a property is passed down to individuals who are two or more generations below the donor, the federal estate and gift taxes (FET/FGT) can be skipped in the intervening generation.¹²⁰⁵ Skipping generations enabled many taxpayers to dramatically reduce and even eliminate the impact of the FET/FGT.¹²⁰⁶ The GSTT is therefore imposed on generation-skipping transfers (GST) (either in trust or outright);¹²⁰⁷ otherwise, the younger generation of family members could benefit economically from the use of trusts because trust assets are not included in their gross estates.¹²⁰⁸ It has been recognised for many years that the FET/FGT can be avoided by making transfers that skip one generation or more.¹²⁰⁹ GST has been perceived by the

¹¹⁹⁹ CATCA 2003(Republic of Ireland), s 4.

¹²⁰⁰ CATCA 2003 (Republic of Ireland), s 9.

¹²⁰¹ Note that the UK inheritance tax is a single integrated tax comprising estate tax and gift tax.

¹²⁰² Adrian W Dewind, 'The Approaching Crisis in Federal Estate and Gift Taxation' (1950) 38 (1) *California Law Review* 79, 79 <<http://scholarship.law.berkeley.edu/californialawreview/vol38/iss1/5>

¹²⁰³ *Ibid* 84.

¹²⁰⁴ McNulty and McCouch (n 1029) 14.

¹²⁰⁵ Emily M Lanza, 'The Federal Estate, Gift, and Generation-Skipping Transfer Taxes'(2014) Congressional Research Service Report 7-5700, 8 <<https://www.fas.org/sgp/crs/misc/95-416.pdf>> accessed 24 June 2015.

¹²⁰⁶ *Ibid*.

¹²⁰⁷ Jay A Soled, *Estate Planning Strategies: A Lawyer's Guide to Retirement and Lifetime Planning* (4th edn, American Bar Association 2002) 140.

¹²⁰⁸ Regis W Campfield and others, *Taxation of Estates, Gift and Trusts* (23 edn, Thomson/West 2006) 726.

¹²⁰⁹ Ira Mark Bloom and others, *Federal Taxation of Estate, Trusts and Gifts* (4th edn, LexisNexis Publishing 2003) 275.

US Congress as a loophole allowing rich families to avoid the imposition of the FET on subsequent generations.¹²¹⁰ In the Tax Reform Act of 1976, the US Congress introduced a GSTT system into the US WTT system.¹²¹¹

In contrast, the UK tax on lifetime and testamentary transfers made by individuals operates under a single name – the inheritance tax (IHT).¹²¹² The tax is a transferor-based tax (or a donor-based tax) and applies to the person making the transfer of value.¹²¹³ Its effect is to impose a charge on occasions that result in a decrease in a transfer of value by actual disposition of property¹²¹⁴ or a deliberate omission diminishing the value of a person's estate.¹²¹⁵

US scholars have theoretically recognised the FET/FGT as a 'dual' WTT system,¹²¹⁶ while the IHT has been described as a 'hybrid' form of taxation within a single system.¹²¹⁷ In practice, the UK WTT system is not necessarily that different from the US WTT system. However, there are some obvious differences in the cultural contexts within which the systems currently operate.¹²¹⁸ In both tax systems, the tax is charged at death and imposed on certain lifetime transfers as a supplement; the basic rules governing taxes applicable to lifetime transfers are the same as for transfers on death.¹²¹⁹

7.1.2 Relationship between Taxation on Death and Lifetime Transfers

From the outset, it is important to compare the basic distinction between the structural characteristics of the FET/FGT and IHT in terms of how the relationship between the taxation of transfer on death and the taxation of lifetime transfers operates.

¹²¹⁰ Ibid 275-276.

¹²¹¹ Ibid 276.

¹²¹² Williams and others (n 918) 9.

¹²¹³ IHTA 1984 (UK), s 2 (1).

¹²¹⁴ IHTA 1984 (UK), s 3 (1).

¹²¹⁵ IHTA 1984 (UK), s 3 (3).

¹²¹⁶ Paul R McDaniel and others, *Federal Wealth Transfer Taxation: Cases and Materials* (6th edn, Foundation Press/Thomson Reuters 2009) 51.

¹²¹⁷ The IHT is a hybrid between estate duty and capital transfer tax, which charges more than just an inheritance on a death, and does so by reference to the total number of transfers made by the transferor and not by reference to the amount inherited; i.e. it is still a mutation and not an acquisitions tax. 'See Geoffrey Morse and David W Williams, *Davies Principles of Tax Law* (7th edn, Sweet & Maxwell 2012) 325.

¹²¹⁸ Ann Mumford, 'From Dahomey to London to DC: "Marketing" Wealth with the Proposal for a Comprehensive Inheritance Tax,' (2009) *Tax Law Review* 63, 258.

¹²¹⁹ Williams and others (n 918) 21.

Both FET and FGT were once completely separate and distinct taxes in the US, but they became one unified WTT system in 1976.¹²²⁰ By comparison, the IHT was always a single tax system from the beginning. With the Tax Reform Act of 1976, the US WTT instituted an integrated tax on death and a lifetime transfer (gift) system.¹²²¹ More precisely, both taxable gifts and taxable estates concurrently shared the same progressive rate schedule¹²²² as well as the applicable credit amount.¹²²³ Unlike the IHT, all taxable estates and adjusted taxable gifts were cumulative (individuals' cumulative gifts and bequests).¹²²⁴ Therefore, under a unified tax rule, the FET is computed by determining the tax on the aggregate amount of the taxable estate and adjusted taxable gifts. Taxable gifts include all made during individuals' lifetime since December 31st 1976 when the law took effect, and which are not otherwise included in the gross estate.¹²²⁵ The tentative tax on the total amount of any FGT paid since December 31, 1976¹²²⁶ and unified credit is then subtracted.¹²²⁷ Taxation of the lifetime transfer and the taxation on death are calculated by adjusted taxable gifts, which are 'the platform for the taxable estate, setting the starting point for the estate's run up the rate bracket schedule.'¹²²⁸ The transfers are permanently included in the FET base under a unified system. It is important to bear in mind the relationship between the two taxes as they are considered to be *in pari material*, thus being construed in the same manner.¹²²⁹

On the other hand, the UK IHT is a cumulative tax.¹²³⁰ The cumulation principle requires that the IHT in the present transfer take account of chargeable transfers already made by the transferor.¹²³¹ All chargeable transfers made during the current and prior years are cumulated and generally taxed as transfers on death. However, earlier chargeable transfers made by the transferor for more than a period of seven years cease to be cumulated.¹²³² At this point, it is important to sum up the distinction between the tax on lifetime transfer (gift) and the tax on death under the IHT system. Unlike the US

¹²²⁰ John Richard Price and Samuel A Donaldson, *Price on Contemporary Estate Planning* (CCH Incorporated 2009) 2-5.

¹²²¹ James Pratt and William Kulsrud, *Federal Taxation 2012* (6th edn, South-Western College Publishing 2011) 24-3.

¹²²² IRC (US), s 2001.

¹²²³ IRC (US), ss 2010 and 2505.

¹²²⁴ IRC (US), s 2001.

¹²²⁵ IRC (US), s 2001 (b).

¹²²⁶ IRC (US), s 2001 (b)(2).

¹²²⁷ IRC (US), ss 2010 and 2013.

¹²²⁸ McDaniel and others (n 1216) 76.

¹²²⁹ Stephanie J Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (2nd edn, Wolters Kluwer 2008) 25.

¹²³⁰ F L Memo (ed), 'Tax Memo 2005-2006' (FL Memo Ltd 2005) 849.

¹²³¹ IHTA 1984 (UK), ss 1 and 2.

¹²³² IHTA 1984 (UK), s 7(1).

WTT system, there is no integration between the two taxes under the IHT system; rather, the UK system is unusual in having no WTT on many lifetime transfers (gifts) but tax on death transfers.¹²³³ Meanwhile, the US operates a system with integrated lifetime transfers (gifts) and transfers on estate tax.

More precisely, the IHT transfer on death is cumulated with the chargeable lifetime transfers¹²³⁴ and potentially exempt transfers (PET),¹²³⁵ which becomes a chargeable transfer if the donor dies within seven years of giving the gift,¹²³⁶ while the FET/FGT gross-up rule requires that all transfers made during the three-year period ending on the date of death are included in the gross estate of the decedent. Those transfers are treated as transfers during the lifetime under testamentary circumstances.¹²³⁷ The three-year rule aims to prevent FET avoidance by providing substitutes for testamentary dispositions.¹²³⁸

It is worth noting that there are distinct differences in the rules applied to lifetime transfers and transfer on death. In particular, the set of rates, procedures and rules differ between the US and UK WTT systems. As mentioned above, the FET/FGT is a ‘dual system tax,’ although the US Congress restructured it in the Tax Reform Act of 1976,¹²³⁹ thus adopting a unified tax structure. The US WTT operates as an integrated gift and estate tax system even though the rules have retained the concept of separation under the 1976 Act. On the contrary, the IHT is treated as a ‘single tax system’; in effect, all chargeable transfers face the same tax rate schedule and procedural rules. Nevertheless, there are four basic differences between the rules applied to the chargeable lifetime transfer and chargeable transfer on death.¹²⁴⁰ First, unlike the FEG, the IHT flat rate on death is zero or 40 per cent, while half of the rate on death is applied to the chargeable lifetime transfer.¹²⁴¹ Second, IHT exemptions are divided into three categories; some are confined to the transfer on death,¹²⁴² some are confined to the

¹²³³ Boadway and others (n 471) 791.

¹²³⁴ IHTA 1984 (UK), s 3 (1).

¹²³⁵ A PET is a transfer of value made by an individual (as opposed to a ‘person,’ which has a wider meaning, including a company), which would otherwise be a chargeable transfer. A PET made seven years or more before the transferor’s death is exempt; any other PET is a chargeable transfer. A PET is treated as exempt whilst the donor is alive, and in the seven year period following the transfer, it is assumed that the PET will become exempt under s 3A(5) of the IHTA 1984 (UK).

¹²³⁶ IHTA 1984 (UK), s 3A.

¹²³⁷ McDaniel and others (n 1216) 418.

¹²³⁸ Ibid.

¹²³⁹ Price and Donaldson (n 1220) 2-5.

¹²⁴⁰ Tiley (n 939) 737.

¹²⁴¹ IHTA 1984 (UK), s 7 (2).

¹²⁴² IHTA 1984 (UK), ss 6 (1B) and 154.

lifetime transfer¹²⁴³ and some so-called ‘general exemptions’ are available during lifetime transfer and during transfer on death.¹²⁴⁴ Third, there is no need to gross-up on death for the simple reason that the benefits eventually distributed out of the estate will necessarily be net of IHT; for the same reason, there is no grossing-up of PETs should tax become payable. By comparison, the immediately chargeable lifetime transfers must be grossed-up to ascertain the loss to the transferor’s estate where the burden of IHT falls on the transferor. Fourth, if certain events that have occurred after death will affect the IHT charge on death, there will be no effect on lifetime transfers.¹²⁴⁵

To sum up, although the IHT and FET/FGT are similar, there are some differences with regard to the systems’ tax structures. While the former is operated as a ‘single system,’ the latter involves a ‘dual system. Upon close inspection of the structure of both tax systems, the IHT rules appear very complicated, while the FET/FGT rules seem more comprehensive because its structure combines the FET and FGT under one umbrella or system (it does not include the GSTT, which is theoretically not considered a tax within the dual WTT system). The dual system, however, seems to be sufficiently simple to readily allow understanding and application of the rules. Thailand’s abolished EIT system can be described as a ‘hybrid’ form of taxation within a single system like the UK: there is no WTT on many lifetime transfers but only tax on death transfers. By the same token, the EIT system may also be described as a ‘dual system’ because it involved a mixture of estate and inheritance taxes. However, the ‘dual system’ approach between Thailand and the US differ because the US counterpart operates as an integrated lifetime transfer (gift) and estate tax system.

It is vital to note that the GSTT applies only to transfers in generation-skipping arrangements, which refer to the original transfer in trust. The use of trusts could provide economic benefits for multiple generations who are members of substantial families with significant resources.¹²⁴⁶ They can be skipped to shield them from FET/FGT liability while enabling the families to control their assets. It should be acknowledged that the use of ‘generation-skipping trusts’ has become standard practice for wealthy US families accumulating resources.¹²⁴⁷ The purpose of the GSTT is to

¹²⁴³ IHTA 1984 (UK), ss 5A, 19, 20, 21 and 22.

¹²⁴⁴ IHTA 1984 (UK), ss 18, 23, 24, 24A, 25, 27, 28 and 30-35.

¹²⁴⁵ Ibid.

¹²⁴⁶ Joint Committee on Taxation, ‘Options to Improve Tax Compliance and Reform Tax Expenditures’ (2005) Report No. JCS-02-05 (January 27) 393.

¹²⁴⁷ Ray D Madoff, *Immortality and the Law: The Rising Power of the American Dead* (Mary Cady Tew Memorial Fund 2010) 79-80.

prevent such practices. Most provisions governing GST upon which the GSTT can be imposed involve the ‘trust system’, whether ‘taxable termination,’¹²⁴⁸ ‘taxable distributions’¹²⁴⁹ or ‘direct skips’.¹²⁵⁰ Therefore, the provisions in ss 2601 through 2664 concerning GSTT application will not be considered in this chapter because it extends beyond the scope of this thesis.

7.2 The Charges to WTT

This section discusses the US and UK main charging provisions, which impose the FET/FGT and IHT, respectively. It also considers the principles governing what property has been included or cumulated for the purposes of FET/FGT and IHT.

Before discussing how such provisions operate, it is helpful to discuss the definition of PET under the Inheritance Tax Act of 1984 (IHTA 1984) in the UK. Unlike the FET/FGT, the PET regime has been deemed one of the most important developments of IHT, introduced for the first time by the Finance Act of 1986. The PET benefits many UK taxpayers in terms of IHT planning.¹²⁵¹

Unfortunately, the statutory provisions do not provide the definition of PET in the IHTA 1984; nonetheless, s 3A of the Act does imply the required definition. If a lifetime transfer of value is to be a PET, it must satisfy the four basic requirements.¹²⁵²

First, the transfer of value must be made by an individual on or after 18 March 1986.

Second, the legislation must not expressly prohibit a transfer from being a PET.¹²⁵³

Third, the transfer of value made before 22 March 2006 must be made to a qualifying

¹²⁴⁸ IRC (US), s 2612 provides that ‘... the term ‘*taxable termination*’ means the termination (by death, lapse of time, release of power, or otherwise) of an interest in property held in a trust unless—(A) immediately after such termination, a non-skip person has an interest in such property, or (B) at no time after such termination may a distribution (including distributions on termination) be made from such trust to a skip person....’

¹²⁴⁹ IRC (US), s 2612 (b) also provides that ‘...the term “taxable distribution” means any distribution from a trust to a skip person (other than a taxable termination or a direct skip)...’

¹²⁵⁰ The direct skip is one of three taxable events that the federal generation-skipping transfer tax (GSTT) imposed. It is considered a generation-skipping transfer (GST) subject to the GSTT and gives an interest in the transferred property to the skipping generations. However, it would include a transfer in trust subject to the GSTT because no one has interest in the property, except a skip generation. This follows from s 2612 (c) and 2613(a)(2), which provides that ‘...the term “taxable distribution” means any distribution from a trust to a skip person (other than a taxable termination or a direct skip)...’ and also provides that ‘...a trust—(A) if all interests in such trusts are held by skip persons, or (B) if—(i) there is no person holding an interest in such trusts, and (ii) at no time after such transfers may a distribution (including distributions on termination) be made from such trusts to a non-skip person.

¹²⁵¹ McCutcheon (n 968) 162.

¹²⁵² IHTA 1984 (UK), s 3A(1)(a).

¹²⁵³ The legislation expressly prohibits certain kinds of transfers of value from being PETs. The transfers falling into this category effectively fall into two groups, those relating to close companies, and those relating to timber.

recipient, such as another individual, an accumulation and maintenance trust, or a disabled person's trust. Fourth, the transfer of value made after 22 March 2006 must constitute a 'gift' to the qualifying recipient whether another individual, a disabled person's trust or a bereaved minor's trust at the end of an 'immediate post death interest'.

It is important to address the advantages of making a PET. McCutcheon has described the main advantages of making a PET as follows:¹²⁵⁴ a PET has no IHT charge when a lifetime transfer is made by a transferor.¹²⁵⁵ If the transferor of the PET survives more than seven years after making a PET, the PET becomes a completely exempt transfer. Conversely, if the transferor of the PET fails to survive within seven years of making PET—a so-called 'failed PET', the PET becomes a chargeable transfer because it is lost retrospectively (namely, 'potentially chargeable transfers').¹²⁵⁶ IHT charged on such a 'failed PET' can be subject to a potential reduction in the availability of taper relief.¹²⁵⁷

7.2.1 Main Charging Provisions

Our examination of the main charging provisions of the FET/FGT¹²⁵⁸ and IHT¹²⁵⁹ starts by considering what constitutes a transfer of wealth and a transfer of capital, respectively, under the tax systems. Both transactions form the primary basis for the taxes. Under the US main charging provisions, a charge to the FET/FGT, an excise tax, can arise only if there have been transfers of wealth that occur at death¹²⁶⁰ or during the lifetime.¹²⁶¹ The former is measured by determining the 'gross estate' of the decedent, imposed by the FET on 'the value of all property to the extent of the interest therein owned by the decedent' at the moment of death.¹²⁶² The latter is measured by determining the 'gross gift' made during the calendar year by any resident or non-resident individual who imposed the FGT on the 'transfers of property by gift'.¹²⁶³ It is

¹²⁵⁴ McCutcheon (n 968) 162-163.

¹²⁵⁵ IHTA 1984 (UK), s 3A (5).

¹²⁵⁶ IHTA 1984 (UK), s 3A (4).

¹²⁵⁷ IHTA 1984 (UK), Sch. 2, para. 1A.

¹²⁵⁸ The ICR (US) provisions address the question of the tax base by providing the statutory answer in ss 2033 and 2501 for FET and FGT purposes, respectively.

¹²⁵⁹ The IHTA 1984 (UK) establishes two separate charging codes to achieve its designed goal, the main charging provisions and the special charging provisions. However, it will not be useful to consider the latter because dealing with 'settled property' within the trust regime is treated as matter outside the scope of this thesis.

¹²⁶⁰ IRC (US), s 2001. 'A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States'.

¹²⁶¹ IRC (US), s 2503 (a).

¹²⁶² IRC (US), ss 2001(a) and 2033.

¹²⁶³ IRC (US), s 2501.

clear that the transactions to which the two taxes apply are accumulated to determine the 'gross estate' and 'gross gift'. The term 'gross estate' and 'gross gift' are similar. While the term 'gross estate' does not appear under the Inland Revenue Code (IRC), the term 'gross gift' does. However, to determine the gross gift and gross estate, it is important to ascertain what constitutes a gift and an estate for tax purposes, as will be discussed later on.

On the other hand, the IHT is a cumulative tax on transfers of capital (value), which are only chargeable if there is a 'chargeable transfer',¹²⁶⁴ made by an 'individual',¹²⁶⁵ who is a donor during his lifetime within the seven-year period preceding death.¹²⁶⁶ This transaction is often referred to as a 'chargeable lifetime transfer' or CLT. It may also occur upon his or her death, often known as 'chargeable transfer on death'. In other words, the IHT charge on the total value transferred by a chargeable lifetime transfer is a disposition made by a person resulting in a reduction in the value of the person's estate.¹²⁶⁷ Accordingly, IHT is charged on those values which are equal to a transfer of value which has been made immediately before death.¹²⁶⁸ This IHT charge on death often is referred to as a 'deeming' provision.¹²⁶⁹ It follows from this discussion that in determining IHT on death, one should be concerned that a charge on the deceased's property (estate) depends on the aggregate of lifetime transfers, which are transfers of value that are immediately chargeable or are only potentially chargeable, 'failed PETs',¹²⁷⁰

As mentioned above, the line between PETs and the immediately chargeable lifetime transfer has been drawn. PETs do not give rise to tax straight away and do not enter the transferor's cumulative total of transfers. At that point, they became chargeable as lifetime transfers, while the immediately chargeable lifetime transfer enters the

¹²⁶⁴ A 'chargeable transfer' is any 'transfer of value' made by an individual, other than an exempt transfer in s 2 (1) of the IHTA 1984. A 'chargeable transfer' is a transfer of value by an individual, other than an exempt transfer (s 2), and a 'transfer of value' is a *disposition* by a person resulting in the value of his estate immediately after the disposition being less than it would be but for the disposition. The amount by which his estate is reduced is the measure of the transfer of value in s 3(1). This is sometimes referred to as the 'loss to the donor' principle.

¹²⁶⁵ The word '*individual*' is not defined by the Act, but of course, it is a well-known word in tax law; it does not include companies, nor trustees, nor personal representatives. 'See Morse and other (n 1217) 328.

¹²⁶⁶ From 27 July 1981 to 17 March 1986, a ten-year period applied.

¹²⁶⁷ IHTA 1984 (UK), s 3(1).

¹²⁶⁸ IHTA 1984 (UK), ss 4 (1) and 52(1).

¹²⁶⁹ Mark McLaughlin, Iris Wünschmann -Lyll and Chris Erwood (ed), *Inheritance Tax Annuals: Inheritance Tax 2014/15* (Bloomsbury Professional 2014) 52.

¹²⁷⁰ An outright lifetime gift to another individual is a PET, which therefore only becomes chargeable to IHT if the donor dies within seven years of making the gift, a so-called 'failed PET'. In addition to PETs made more than seven years before the donor's death, certain lifetime transfers are exempt from IHT.

transferor's cumulative total of transfers if its total amount goes over the nil rate band.¹²⁷¹ Unlike the charge on lifetime transfers, the charge on death is imposed on occasion of the transfer on death. There is a transfer of all the property to which the deceased was beneficially entitled immediately before death. Such transfer on death is cumulated with lifetime chargeable transfers made up to the seven years preceding death, including (1) PETs that became chargeable if the transferor died within seven years of making them, and (2) an immediately chargeable transfer that does not qualify as a PET.¹²⁷²

In summary, it is necessary at this point to draw a technical distinction between the FET/FGT and the IHT concerning the question of how the charges to tax are imposed and how taxes are charged. While the FGT is imposed on the transfer of property by donor gift rather than on the donee's receipt of the property, the FET is imposed on 'the value of property' owned by the decedent at death rather than on the value of property received by the heirs and beneficiaries.¹²⁷³ Thus, they are measured by what the donor has given away, not by what the donee has received. They are measured by the property and property interest the decedent transferred to heirs or beneficiaries, not what the heirs and beneficiaries have received. In contrast, the transfer of value is the main concept for the IHT, which is effectively defined in s 3(1) as 'a disposition made by a person (the transferor) as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the disposition'.¹²⁷⁴ This definition means that the transferor must make a disposition that diminishes his estate. Under the main charging provisions, therefore, a transfer of value cannot be made if there is no estate to diminish, and no IHT consequence (no charge) can arise. However, it still opens the question of what the term 'disposition' means precisely. The term 'disposition' is not defined by the IHTA 1984 as it is not a technical word, but an ordinary word.¹²⁷⁵ It is clearly very broad and capable of gathering almost any, if not every, lifetime transfer through which property rights pass. It is argued that the disposition also applies to the transfer on death,¹²⁷⁶ but the tax authority does not take this view, asserting that it is confined to lifetime transfers

¹²⁷¹ IHTA 1984 (UK), s 3(4).

¹²⁷² IHTA 1984 (UK), s 3A and 4(1).

¹²⁷³ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 120.

¹²⁷⁴ IHTA 1984 (UK), s 3(1).

¹²⁷⁵ *Ibid* 19.

¹²⁷⁶ John Coombes and Gordon Channon, *Inheritance Tax* (Sweet & Maxwell, 1987) 9.

only.¹²⁷⁷ Finally, it is vital to note that the value transferred is the loss in value to the transferor's estate occasioned by the disposition rather than the value of the property disposed, often known as 'the consequential loss rule'.¹²⁷⁸

What is clear here is the line between the two taxes concerning how to measure the amount of 'transfer of property by gift' and 'the value of property' for the FET/FGT or 'transfer of value' for the IHT. While the former is measured by determining the amount of the property a transferor has given away and the value of property owned at death, the loss to the transferor's estate is used to measure the latter, and thus the chargeable amounts for both tax purposes. It seems advantageous to apply the consequential loss rule rather than the one under the FET/FGT because its consequences will be fair. For example, the amount spent by the donor is used to measure the transfer of property as a gift for FGT purposes regardless of what the donee has received. Meanwhile, for the IHT, we can take the following example: if X Ltd has 100% shares, and Y owns 51% and Z owns 49% of X's shares, then Y now gives two shares to Z. Consequently, he will have less control of X Ltd. The consequential loss rule applies where the loss to the transferor's estate will be greater than the benefit received by the transferee. The difference between the non-controlling 49% holding and the controlling 51% holding is equal to the value transferred, which diminishes the value of Y's estate. The requirement of the value transferred by the transfer of value is that the diminution is arrived at by comparing the value of Y's estate before the transfer with the value of his estate after the transfer,¹²⁷⁹ not the value of the two shares themselves. Conversely, the value of the two shares gifted will be taken into account for the FET/FGT as the transfer of property by gift.

7.2.2 Principles of Inclusion (or Cumulation)

Interesting questions are raised by the fact that the legislations appear to provide two different principles governing what property has been included or cumulated as a 'gross estate' and 'gross gift' for the FET/FGT or a 'total of chargeable transfer of value,' often known as 'gross chargeable transfer' (GCT) for the IHT. The first question involves what property or interest is the subject matter providing the tax base and must be included in the 'gross estate' of the decedent and the 'gross gift'. In comparison to

¹²⁷⁷ Ibid 101.

¹²⁷⁸ McCutcheon (n 968) 5-6.

¹²⁷⁹ Ibid 183.

the IHT, further questions also arise in terms of what property or interest can be included in the GCT of the donor and deceased for IHT purposes, as will be seen below.

7.2.2.1 The Definitions

Before answering these questions, it will be useful to consider the questions of whether there is a substantive difference in the statutory language that defines the terms ‘estate’ and ‘property’ under the provisions of both tax systems. In answering this question, it is appropriate to start by considering the reason why the notion of an estate is important for the purposes of FET/FGT and IHT. The FET is imposed on the ‘taxable estate’ of the US citizen or resident (defined as the ‘gross estate’). Therefore, the notion of estate is important for the FET because the taxable estate depends on the amount of the ‘gross estate’. Likewise, there are applicable rules that demonstrate why the notion of estate is important for IHT. Ss 3(1) and 4(1) note that a disposition can give rise to IHT only if it causes a reduction in the value of the transferor’s estate, and the transferor’s death is treated as having made a transfer of value equal to the value of the deceased’s estate immediately before his death.¹²⁸⁰

On one hand, the term ‘estate’ is not precisely defined by the IHTA 1984. However, s 5(1) widely defines the meaning of a ‘person’s estate’ as the aggregate of all the property to which a person is beneficially entitled, but does not include an excluded property and certain interests in settled property.¹²⁸¹ On the other hand, there is no single provision defining the word ‘estate’ under the IRC; rather, s 2031 only defines the ‘gross estate’ as the value of all property and property transfers, either owned or not owned by the decedent at death, which are set forth by ss 2033-2044.

Similarly, the provisions defining the word ‘property’ cannot be precisely found under the IRC and the IHTA 1984. However, the word ‘property’ is widely defined as the ‘rights and interests of any description, but does not include settlement power.’¹²⁸² On the other hand, the US Senate Report on the 1932 internal revenue revisions state that the word ‘property’ should be given a broad interpretation to include ‘every species of right or interest protected by law and having an exchangeable value.’¹²⁸³

¹²⁸⁰ IHTA 1984 (UK), s 4(1).

¹²⁸¹ IHTA 1984 (UK), s 5(1).

¹²⁸² IHTA 1984 (UK), s 272.

¹²⁸³ S. Rep. No. 665, 72d Cong., 1st Sess (1931)(1939-1 CB (pt. 2) 496, 524).

For the purposes of both FET/FGT and IHT, the word ‘property’ is broadly defined beyond its ordinary meaning. FGT, for example, covers all types of property, real and personal, tangible and intangible,¹²⁸⁴ and also includes contingent interests and reversionary interest incapable of being valued.¹²⁸⁵ Similar to FGT, IHT covers rights and interests of any description, but not excluded property that was not part of the estate at death. Thus, both terms, ‘estate’ and ‘property’, should be widely defined by law to cover all types of property, rights and interest for tax purposes. This criteria would be advantageous in preventing taxpayers from avoiding tax by collecting property that falls outside the scope of the definition instead.

7.2.2.2 The Principle of Inclusion

7.2.2.2.1 Gross Estate

The beginning point for determining the FET base is the ‘gross estate’ concept, which is comprised of the value of all property owned by the decedent at death, which passes to someone else by will or intestacy.¹²⁸⁶ The amount of the gross estate has a direct effect on the ‘taxable estate’ because the FET is calculated based on the taxable estate.¹²⁸⁷ To answer the question of which of the decedent’s property interests are includable in the gross estate at death, certain statutory provisions under the IRC must be considered here. The FET general rule (or ‘principle of inclusion’) governing what property is included in a decedent’s estate is initially found in s 2031, which provides that ‘the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated’.¹²⁸⁸ In fact, s 2031 does not attempt to provide exactly what is contained in the gross estate, but it only notes the limitation of the ‘gross estate’ definition. In other words, s 2031 only defines which property interests are generally included in the gross estate, while those property interests are precisely described by s 2033 through 2044. These property interests are conceptually known as ‘actual gross estate’¹²⁸⁹

¹²⁸⁴ IRC (US), s 2511.

¹²⁸⁵ IRC (US), s 25.2511-1(a).

¹²⁸⁶ McNulty and McCouch (n 1029) 13.

¹²⁸⁷ IRC (US), ss 2001 and 2501.

¹²⁸⁸ IRC (US), s 2031.

¹²⁸⁹ Kevin Yamamoto and Samuel A Donaldson, *Federal Wealth Transfer Taxes* (Thomson/West 2006) 84.

Section s 2033 is the most commonly applicable gross estate inclusion provision in the IRC.¹²⁹⁰ It prescribes ‘gross estate’ inclusion for property interests owned by the decedent at death. It provides that ‘the value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death’.¹²⁹¹ Although there is a wide range of property interests that fall within this section, ‘not all property passing to the decedent’s heirs and his or her estate will be in the gross estate.’¹²⁹² For example, ‘wrongful death benefits paid directly to the heirs or next of kin are included in the gross estate because the decedent did not have an interest in that benefit before his death.’¹²⁹³ On the other hand, s 2034 is designed to ensure that property transferring to the surviving spouse of the decedent is subject to the FET.¹²⁹⁴ This includes property ‘to the extent of any interest therein of the surviving spouse, existing at the time of the decedent’s death as a result of dower or courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy’.¹²⁹⁵ Such property is still included even though the decedent has no power to transfer property subject to these rights.

We must also discuss whether the classification of property between the surviving spouse and the decedent impacts the basis of property for FET purposes. Under s 2033, ‘the value of the gross estate includes only the value of all property to the extent of interest of the decedent at the time of his or her death’.¹²⁹⁶ The FET is only imposed on the deceased spouse’s one-half share of the community property. The survivor spouse’s corresponding community property interest is not included in the gross estate for the purposes of FET.¹²⁹⁷ On the other hand, ‘all separate property of the deceased spouse in the community property regime is included in the gross estate.’¹²⁹⁸ This inclusion follows from the operation of state law in that the surviving spouse has acquired his or her one-half share of the community property from the deceased spouse; therefore, such property interest is not included in the gross estate.¹²⁹⁹ It is clear that s 2034 does not change any results of s 2033 that require the inclusion of a one-half share of the spouse’s community property because the community property rights were vested at

¹²⁹⁰ Bloom and others (n 1209) 61.

¹²⁹¹ IRC (US), s 2033.

¹²⁹² Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 214.

¹²⁹³ *Ibid.*

¹²⁹⁴ Bloom and others (n 1209) 65.

¹²⁹⁵ IRC (US), s 2034.

¹²⁹⁶ IRC (US), s 2033.

¹²⁹⁷ Bloom and others (n 1209) 65-66.

¹²⁹⁸ *Ibid.*

¹²⁹⁹ *Ibid.*

creation, not at death. The purpose of s 2034 is to focus on the dower-type rights that were vested at death.¹³⁰⁰

Furthermore, although the concept of the property interests owned by the decedent at death is broadly defined, there are specific provisions concerning certain property and property interest. Such property and property interest are owned by another individual or entity over which the decedent has certain powers, incidents of ownership or other rights. These are conceptually known as the ‘artificial gross estate’ under ss 2035 through 2044.¹³⁰¹ Under these provisions, the concept of the ‘gross estate’ is expanded to include three categories of gross estate property. First, the gross estate includes property over which the decedent had the general power of appointment exercisable during life and at death.¹³⁰² Second, the gross estate encompasses all substantial equivalent testamentary transfer of property over which the decedent retained an income interest or the right to designate beneficiaries,¹³⁰³ a joint tenancy property¹³⁰⁴ or a life insurance policy owned by the decedent.¹³⁰⁵ Third, a qualified terminable interest property¹³⁰⁶ is also determined as the amount includable in the gross estate for FET purposes.

At this point, it is important to bear in mind why these three categories of property are includable in the gross estate. Scholars confirm three main reasons¹³⁰⁷ when investigating inclusion of property in the gross estate. The first reason for inclusion is that at death, the deceased all of the property, regardless of location, whether real or personal, tangible or intangible.¹³⁰⁸ The second reason is the right to exercise the power to obtain the individual’s property. The decedent could have obtained this property by exercising the general power of appointment or transmitted it by will, which is includable in the gross estate.¹³⁰⁹ The third reason is because the decedent dealt with the property during his or her lifetime in a testamentary manner addressed in ss 2035 through 2044.¹³¹⁰

¹³⁰⁰ Yamamoto and Donaldson (n 1289) 88.

¹³⁰¹ Ibid 85.

¹³⁰² IRC (US), s 2041.

¹³⁰³ IRC (US), s 2036.

¹³⁰⁴ IRC (US), s 2040.

¹³⁰⁵ IRC (US), s 2042.

¹³⁰⁶ IRC (US), s 2044.

¹³⁰⁷ Bloom and others (n 1209) 31.

¹³⁰⁸ IRC (US), s 2033.

¹³⁰⁹ IRC (US), s 2041.

¹³¹⁰ Bloom and others (n 1209) 31.

7.2.2.2.2 Gross Gift

In addition to the tax on the transfer of property by gifts, the FGT applies to all gratuitous transfer of property made during life,¹³¹¹ known as a ‘gross gift’. In calculating FGT due to a transfer of property by gift for a given year, the FGT base depends on the ‘gross gifts’ for a given year. Although the IRC does not use the term ‘gross gift’, the taxable gifts depend upon the amount of the ‘gross gift’ under the basic structure for FGT provided by the IRC. For FGT purposes, before determining what constitutes a ‘gross gift,’ it is necessary to ascertain the meaning of the term ‘gift, which is not defined by the IRC. The definition of ‘gift’ is crucial and should be adequate for FGT purposes. It must be a precise definition not only because it will directly affect exclusion or inclusion of certain transactions that should be taxed as gifts, but because the taxable gifts depend on the amount of the gross gift. Unfortunately, there is no statutory definition of ‘gift,’ particularly in the IRC, though it appears to include ‘gross estate’. Under common law, a ‘gift occurs when the donor actually or constructively delivers the gift property to the donee with donative intent’.¹³¹² This donative intent test is not sufficient and is still clearly unsuitable for the purposes of the FGT.¹³¹³ S 2511 governs what property is included in the gross transfers of property by gift (or gross gifts) for FGT purposes, and goes further in providing that the tax imposed on the transfer of property by gift in s 2501 shall apply ‘whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible’.¹³¹⁴ This definition still does not provide a sufficient explanation of gifts.¹³¹⁵

Considering the provision with regard to the gift’s valuation may further assist in defining the term. S 2512(b) states that ‘...where property is transferred for less than an adequate and full consideration of money or money’s worth, and when the amount by which the value of the property exceeds the value of the consideration, it shall be deemed a gift...’.¹³¹⁶ Although it is difficult to precisely define a gift, it can be considered as occurring when the value of the property transferred exceeds the value of the consideration (if any) received.¹³¹⁷ This definition would provide a closer and more

¹³¹¹ IRC (US), ss 2501 and 2511.

¹³¹² Willbanks, *Federal Estate and Gift Taxation: An Analysis and Critique* (n 1092) 35.

¹³¹³ *Ibid.*

¹³¹⁴ IRC (US), s 2511.

¹³¹⁵ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 119.

¹³¹⁶ IRC (US), s 2512 (b).

¹³¹⁷ *Ibid.*

appropriate meaning for FGT purposes of providing a backstop for FET.¹³¹⁸ Although the IRC does not define the concept of a ‘gift’ for FGT purposes, scholars define a gift for FGT purposes as a transfer ‘(1) of a beneficial interest in property, (2) beyond the control of the transferor, (3) for less than full and adequate consideration in money or money’s worth’. Thus, it should be clear that not all gratitude transfers must be taken into account under the FGT system.

In answering the question of what transfer of property (or property interests) are included in the ‘gross gift’ for FGT purposes, it is significant to bear in mind that there are three necessary elements for imposing FGT: there must be a ‘transfer’ ‘of property’ ‘by gift’. The general principle of inclusion for defining the term ‘transfer’ can be found in s 2511, which outlines the general composition of property in the ‘gross gift’ category for FGT purposes. However, there are several other provisions in Chapter 12 of the IRC that separately prescribe what types of property transfer exist in certain circumstances where the transferor does not have an interest in the property transferred,¹³¹⁹ where Congress felt a transfer existed,¹³²⁰ or due to the relationship between the donor and donee concerning a gift in the community property made by the husband and wife to a third party.¹³²¹ These particular types of property transfers are treated as ‘transfers’ by gift which must be included in the ‘gross gift’ for FGT purposes, specifically described in s 2514 for the exercise, release, or lapse of power of appointment; s 2515 for the payment of GSTT on direct skips; s 2518 for the treatment of disclaims; and s 2519 for the disposition of certain life estate interests for which a marital deduction applies.¹³²² These sections aim to create a transfer where one may not

¹³¹⁸ Willbanks, *Federal Estate and Gift Taxation: An Analysis and Critique* (n 1092) 36.

¹³¹⁹ IRC (US), ss 2514 and 2519.

¹³²⁰ IRC (US), s 7872.

¹³²¹ IRC (US), s 2513.

¹³²² Several Code section in Chapter 12 of the IRC (US) either create a transfer where one may not exist or modify the ‘transfer’ requirement in order to determine if the gift tax is applicable on the transaction as follows:

First, s 2014 covers certain powers of appointment in the ‘gross gift’ because an exercise or release or lapse of power is treated as a transfer of property. The purpose of this section is to prevent the power holder from avoiding passing an interest in the underlying property as a result of such a holder of a broad power of appointment who could effectively exercise complete control over the property subject to the power without tax burden.

Second, s 2518 provides that any person making a ‘qualified disclaimer’ of an interest in property is treated as if the interest was never transferred to that person at all.

Third, s 2019 provides that if during the lifetime, the donee spouse disposes of all or a portion of a qualifying income interest, a constructive transfer of all the interest in property other than the income interest occurs. The spouse will be deemed to have transferred the underlying remainder interest in the property.

Fourth, s 2513 states that a gift made by a husband or wife of the community property is treated as a gift of a one-half interest by the husband, and a one-half interest by wife.

exist or modify the requirement of ‘transfer’ for determining when the FGT is applicable to a transaction.

7.2.2.3 The Cumulation Principle

For the purposes of determining the IHT rates that apply to given transfer, it is necessary to take into account the total of the values transferred since IHT is a cumulative tax.¹³²³ The question may arise as to which GCT is cumulated for the purposes of determining IHT rates. The general rule governing which property is cumulated in such a person’s estate can be found in s 5(1), which describes that such estates consist of the aggregate of all property to which the deceased was beneficially entitled, certain interests in possession in settled property¹³²⁴ and any gifts with reservation of benefit;¹³²⁵ however, it does not take into account any ‘excluded property’.¹³²⁶ Precisely what the term ‘property’ means is extremely broad, and is defined by s 272 of IHT, which states that it is the ‘rights and interests of any description’. This definition includes all types of personal and real property, including, amongst other things, money, securities, land, buildings, partnership interests and debts owed. However, it does not include rights that cannot be legally enforced.¹³²⁷

Unlike FGT, under the IHTA 1984, a chargeable lifetime transfer occurs when a donor makes a transfer that does not include a lifetime transfer qualifying as a PET or exempted transfer;¹³²⁸ this transfer is aggregated with other such transfers over a seven-year period for IHT purposes. However, McCutcheon referred to three circumstances in which tax is charged on lifetime transfers under the IHTA 1984. First, it may be charged when a transferor makes a chargeable transfer of value and then survives at least seven years. This transfer is referred to as an ‘invulnerable lifetime transfer’. Second, the tax

Fifth, s 2015 requires that any GST paid on direct skip transfers be added to the value of the transferred property for FGT purposes.

Lastly, s 7872 treats the use of money the same as the use of other property in certain circumstances that the interest-free use of money is considered a transfer of property, such as an imputed amount that is transferred from the lender to the borrower and an interest payment that is imputed passing from the borrower to the lender.

¹³²³ IHTA 1984 (UK), s 7 (1)(b).

¹³²⁴ IHTA 1984 (UK), s 49(1), provides that ‘a person who is beneficially entitled to an interest in possession is treated as being beneficially entitled to the property in which his interest subsists’.

¹³²⁵ FA 1986 (UK), s 102(3), provides that ‘a person may immediately before his death be treated as being beneficially entitled to property which would not otherwise form part of his estate if, in effect, he previously made a gift of that property and reserved a benefit in respect of it’.

¹³²⁶ The main categories of ‘excluded property’ listed in s 6 include (1) property situated outside the UK; (2) property that is excluded or exempt despite being situated in the UK; and (3) reversionary interests.

¹³²⁷ McCutcheon (n 968) 711.

¹³²⁸ Hence this includes transfers into relevant property trusts, such as a discretionary trust and transfers by close companies, which can be charged to the shareholders (ss 94-97). The transfer of those values are chargeable on the basis that they cannot be treated as PETs (are specifically prevented from being PETs).

applies when a transferor makes a chargeable transfer of value which and then does not survive at least seven years. This transfer is referred to as a ‘vulnerable lifetime transfer’.¹³²⁹ Finally, the tax is chargeable when a transferor makes a transfer of value which is a PET but fails to survive at least seven years. This transfer is referred to as a ‘failed PET’.¹³³⁰

It is interesting to note that the IHT is a cumulative tax,¹³³¹ and its rates differ according to the transfer’s cumulative total. They also differ based on whether the transfer is made during the lifetime of the transferor or upon death of the deceased. Strictly speaking, the IHT involves the principle of cumulation of all the chargeable transfers made by an individual, whereas FET/FGT involves the principle of inclusion. In s 7(1), IHT due on the existing transfer has to take account of any prior chargeable transfers made by the transferor. This IHT principle shall apply to all chargeable transfers made in the seven-year period ending with the relevant one. Previous transfers made more than seven years prior fall out of the range of cumulation.¹³³²

In summary, in the IHT, many provisions require the inclusion of various types of property or property transferred in the ‘gross estate’ for FET/FGT purposes. IHT contains only one general principle of cumulation set forth in ss 5(1), together with s 272 that describes an ‘estate’ as consisting of the aggregate of all ‘property’. Here, ‘property’ has an extremely broad definition in order to cover as many types of property and property transfer as possible. In turn, the FET principle of inclusion broadly defines the types of property or property interest covered by FET/FGT in the ‘gross estate’ or ‘gross gift’, which are found in the general provisions (s 2033 for the ‘gross estate’ and s 2511 for the ‘gross gift’). In addition, there are a number of specific provisions defining several types of special property or transfers subject to FET, and these require separate provisions for inclusion in the ‘gross estate’ specifically described by s 2033 through 2044. Similarly, several specific provisions of ss 2514 through 2519 set forth the principle of inclusion governing and defining the types of property and transfers. These properties and transfers are treated as a ‘transfer’ by gift, including the ‘gross gift’ for FGT purposes.

¹³²⁹ McCutcheon (n 968) 183.

¹³³⁰ Ibid 182.

¹³³¹ Shipwright and Keeling (n 468) 709.

¹³³² Abimbola A Olowofoyeku and others, *Revenue Law: Principles and Practice* (3rd edn, Cambridge Academic 2003) 514.

7.3 Jurisdictional Bases for WTT

The FET/FGT and IHT have territorial limits, and both the US and UK tax on different bases, whether residence (domiciliary) or location (situs) of the property. Therefore, it is important to first determine the taxing jurisdiction bases for these two taxes. The extent of FET/FGT depends upon nationality/citizenship, and the decedent or donor's residence. It also depends on the location (situs) of the assets. The UK general rules, however, differ slightly from the FGT and FET related to situs rules. While the jurisdictional bases for FET/FGT are residence or citizenship,¹³³³ the IHT depends on the domicile of the transferor or deceased.¹³³⁴ Therefore, the base is the location (situs) of the assets in the case of a non-UK domiciled person or a non-US resident foreigner. The following subsection will consider these provisions as well as the following rules: those determining where the property is treated as situated and general law rules governing nationality/citizenship, residence, domicile and location (situs) of the assets. Before considering these rules, it should be noted that the word 'location' and 'situs'¹³³⁵ are interchangeable when discussing assets.

7.3.1 Citizen, Residence and Domiciliary

The citizen, residence and domiciliary rules for FET purposes appear in s 2001, which provides that 'a tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States'.¹³³⁶ This means that a US citizen is subject to FET regardless of his residence and regardless of the location of the assets.¹³³⁷ Non-citizens who are US residents are taxed in the same manner as US citizens. This enforcement follows from the use of the phrase 'wherever situated' within s 2031 of the IRC, which makes the US a country imposing its FET worldwide.

¹³³³ IRC (US), ss 2031 and 2501.

¹³³⁴ Williams and others (n 918) 40.

¹³³⁵ The *situs* of property is governed by common law rules and depends on the type of property involved. Scholars, such as Sandra Eden, have provided various instances, such as an interest in land situated where the land is physically located; Chattels are situated at the place where they are kept at the relevant time; registered shares and securities are situated where they are registered, or, if transferable upon more than one register, where they would normally be dealt with in the ordinary course of business. Bearer shares and securities, transferable by delivery, are situated where the certificates or other documents of titles are kept. A bank account is situated at the branch that maintains the account. See Sandra Eden, 'Introduction –From Estate Duty to Inheritance Tax' in Natalie Lee (eds), *Revenue Law –Principles and Practice*, (31th edition, Bloomsbury Publishing 2013) 1004.

¹³³⁶ IRC (US), s 2001(a).

¹³³⁷ *Ibid.*

Similarly, FGT applies to all property transferred by the donor who is a citizen or resident of the US.¹³³⁸ FGT rules specifically apply to both citizens and residents of the US and appear in s 2501, providing that ‘a tax...is hereby imposed for each calendar year on the transfer of property by gift during such calendar year by any individual resident or non-resident’. For FGT purposes, s 2511 (a) imposes FGT on transfers of all property, regardless of the location of the assets. This imposition follows from the use of the phrase ‘...the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible’.¹³³⁹ For FGT purposes, therefore, the jurisdictional bases are citizenship or residence in general.

On the contrary, nationality/citizenship is of no tax consequence under UK domestic law. IHT exposure depends upon the domicile status of the transferor or deceased.¹³⁴⁰ In general, individuals domiciled in the UK are liable for IHT on lifetime gifts and the chargeable estate at death, wherever their assets may be situated.¹³⁴¹ In the UK, the location where the transferor or deceased is domiciled or deemed to be domiciled matters little,¹³⁴² as an IHT charge will arise regardless of the situs of the asset.¹³⁴³ Unlike IHT, FET/FGT reaches all property owned or transferred by the decedent or transferor who is a citizen or resident of the US without regard to its location.¹³⁴⁴

Because the UK is a unitary state, under UK general rules, every individual has a domicile and only one domicile at one time.¹³⁴⁵ Therefore, the domicile is in one territory and subject to a single system of law.¹³⁴⁶ Although the US individual is domiciled in one US state, such as California, New York, Florida and so on, an individual cannot have a domicile in the US¹³⁴⁷ as a federal state.¹³⁴⁸ Domicile connotes

¹³³⁸ IRC (US), s 2501.

¹³³⁹ IRC (US), s 2511(a).

¹³⁴⁰ Williams and others (n 918) 36.

¹³⁴¹ McCutcheon (n 968) 1131.

¹³⁴² It is important to note that in certain circumstances under UK general law, a person may be deemed to domicile in the UK even when their domicile is outside the UK. The deemed domicile rules are found in s 267 under the IHTA 1984.

¹³⁴³ Tiley (n 939) 948.

¹³⁴⁴ IRC (US), s 2031.

¹³⁴⁵ Ben Lockwood, *The Assignment of Powers in Federal and Unitary States* (June 2000) 2

<<http://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2008/twerp569.pdf>> accessed 24 June 2015.

¹³⁴⁶ McCutcheon (n 968) 1132.

¹³⁴⁷ Ibid.

¹³⁴⁸ Ram Manikkalingam, *A Unitary State, A Federal State or Two Separate States?* (Social Scientists Association 2003) 2

<http://www.dialogueadvisorygroup.org/pdf/Unitary,+Federal+or+Separate+States_.pdf> accessed 24 June 2015.

a legal relationship between an individual and a territory.¹³⁴⁹ The question arises as to how an individual can be considered as having a domicile in the UK, particularly in terms of whether or not an individual domiciled in one of the constituent jurisdictions¹³⁵⁰ can consider this location as his or her permanent home.¹³⁵¹ There are three kinds of domicile under general rule:¹³⁵² domicile of origin¹³⁵³, domicile of dependence¹³⁵⁴ and domicile of choice.¹³⁵⁵

However, for the purposes of IHT,¹³⁵⁶ there are special rules for determining where a person is domiciled, particularly the so-called ‘deemed domicile’ rule for IHT purposes.¹³⁵⁷ The rules are found in s 276, which states that longstanding residents who own a property, wherever it may be situated, are treated as domiciled in the UK. S 267 provides¹³⁵⁸ that an individual can be deemed to be domiciled in the UK¹³⁵⁹ if the ‘three year rule’ and the ‘17 out of 20 rule’ apply, even if he is domiciled in another jurisdiction under UK general law. The three-year rule applies when a person is domiciled in the UK for the three years immediately preceding the relevant time.¹³⁶⁰ The 17 out of 20 rule applies when a person is a UK resident for 17 out of the 20 years of assessment, ending with the year of assessment in which the relevant time falls.¹³⁶¹ However, these rules only apply in certain contexts depending on whether it is an excluded property or quasi-excluded property, spouse/civil partner exemption, close companies, revaluation relief or exit charges.¹³⁶² However, with regard to FET/FGT

¹³⁴⁹ Eden (n 1335) 35.

¹³⁵⁰ McCutcheon (n 968) 1132.

¹³⁵¹ McLaughlin and others (n 1269) 2.

¹³⁵² Ibid.

¹³⁵³ When an individual is born, he or she acquires a domicile of origin. Normally, this will be the father’s domicile, though if the child is illegitimate or born after his or her father’s death, he or she will take on the mother’s domicile.

¹³⁵⁴ Various kinds of people can have a domicile of independence. Of these, the most important are infants and married women.

¹³⁵⁵ An individual becomes capable of acquiring a domicile of choice when he or she is 16 or married before the age of 16. To acquire a domicile of choice, an individual must be physically present in another country and have a settled intention to reside permanently or indefinitely in the country.

¹³⁵⁶ The rules of domicile are governed by common law, as amended by the Domicile and Matrimonial Proceeding Act of 1973, which became effective on January 1, 1974.

¹³⁵⁷ McLaughlin and others (n 1269) 2.

¹³⁵⁸ IHTA 1984 (UK), s 267 provides that ‘(1) a person not domiciled in the United Kingdom at any time (in this section referred to as “the relevant time”) shall be treated for the purposes of this Act as domiciled in the United Kingdom (and not elsewhere) at the relevant time if—

(a) he was domiciled in the United Kingdom within the three years immediately preceding the relevant time, or

(b) he was resident in the United Kingdom in not less than seventeen of the twenty years of assessment ending with the year of assessment in which the relevant time falls....’

¹³⁵⁹ McLaughlin and others (n 1269) 7.

¹³⁶⁰ IHTA 1984 (UK), s 267(1)(a).

¹³⁶¹ IHTA 1984 (UK), s 267 (1)(b).

¹³⁶² McCutcheon (n 968) 1041.

general rules, a US resident is an individual who has been domiciled in the US.¹³⁶³ As per US general law, a non-US citizen is regarded as an FET/FGT resident (domiciliary) if he or she is living in the US with the purpose of making it a permanent home.¹³⁶⁴ The term 'resident' is extended by the Estate Tax Regulations, in s 20.0-2(b), which provides the following:

A 'resident' decedent is a decedent who, at the time of his death, had his domicile in the United States...A person acquires a domicile in a place by living there, for even a brief period of time, with the definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile affect such a change unless accompanied by actual removal. The question of whether the taxable estate of a decedent who is not a United States citizen is subject to the federal estate tax under section 2001 of the Code depends upon where the decedent was domiciled at the date of death.¹³⁶⁵

It is clear that if a decedent acquired a domicile in the US, he is a US resident. This issue is a factual one¹³⁶⁶ that is mainly used in determining a domicile. It includes questions concerning how long the decedent has lived in the country, whether the decedent was physically present in the US at the date of death and whether the decedent had a current intention to make the US his home, as demonstrated by home ownership, local community ties and living with one's family in the claimed domicile.¹³⁶⁷

It is important to observe that the US and UK (as per case law) assign similar meanings to domicile: both regard the place a person considers to be his or her permanent home to be the domicile.¹³⁶⁸ Moreover, when a non-citizen, who was domiciled in the US, leaves the country, he or she still holds US domicile status even if the person has no plans of returning to the US. This status changes, however, if the person obtains domicile in a different country.¹³⁶⁹ Unlike the US, upon abandonment, the UK domicile status automatically changes from the person's domicile of choice to his or her domicile of

¹³⁶³ Williams and others (n 918) 25.

¹³⁶⁴ A domicile once acquired is presumed to continue until it is shown to have changed.

¹³⁶⁵ Treasury Regulation (US), s 20.0-1(b)(1).

¹³⁶⁶ Revenue Rule (US) 80-209, 1980-2 C.B. 248, 1980-31 I.R.B. 13: Published: August 4, 1980.

<<http://www.charitableplanning.com/document/670088>> accessed 24 June 2015.

¹³⁶⁷ Farmer's Loan & Trust Co. v. United States [1932] 60 F.2d 618.

¹³⁶⁸ Williams and others (n 918) 37.

¹³⁶⁹ Mitchell v. United States [1874] 88 US (21 Wall.) 350.

origin.¹³⁷⁰ This established rule of domicile is not easy to change and, as opposed to US law, it can be changed when a domicile of choice is missing and another has been obtained.

7.3.2 Non-Resident Aliens and Non-Domiciled Individuals

When ‘non-resident aliens’¹³⁷¹ are considered for tax purposes, FET/FGT are only applicable to certain properties in the US. In other words, although property located in the US is exclusively subject to FET/FGT, not all types of property transferred can be subject to FGT. The FET/FGT should be imposed on the existence of property in the US because there is no ‘personal’ relationship between the country and the decedent with respect to citizenship/nationality, resident or domiciliary.¹³⁷² For this reason, the implementation of FET/FGT rules to the ‘non-resident alien’ is subject to certain types of assets located in the US. With regard to FET, the provisions begin by applying FET to all property, real or personal, tangible or intangible, including ‘gross estate’.¹³⁷³ The general rule provides that the value of the ‘gross estate’ of the decedent who is a non-resident alien of the US will be part of his ‘gross estate’. The property is situated in the US for FET purposes,¹³⁷⁴ making the non-resident alien’s estate with such property subject to tax; FGT is then imposed on them.¹³⁷⁵ The rule further provides that, with respect to a non-resident alien, FET only applies to the transfer of property located in the US. These provisions, read together, result in the rule that a non-resident alien is taxed only on property situated in the US.

On the other hand, FGT provisions begin by applying the general rule governing the imposition of FGT to all transfers of property by gift during the lifetime of any individual, whether resident or non-resident of the US.¹³⁷⁶ In applying the general rule, there is an exception providing that the general rule is not applied to the transfer of ‘intangible property’ by the US non-resident alien.¹³⁷⁷ This rule means that a non-resident alien’s lifetime transfer of ‘intangible property’ is not subject to FGT and differs from FET. Conversely, a non-resident alien’s gift transfer of tangible personal

¹³⁷⁰ *Gaines Cooper v. HMRC* [2008] STC 1665 (Ch D).

¹³⁷¹ The use of the phrase ‘a non-resident not a citizen’ of the United States in the provisions of the IRC is hereinafter, referred to as a ‘non-resident alien’.

¹³⁷² Randall J Gingiss, *Estate and Gift Tax* (6th edn, Thomson West) 6.

¹³⁷³ IRC (US), s 2031.

¹³⁷⁴ IRC (US), s 2103.

¹³⁷⁵ IRC (US), s 2101.

¹³⁷⁶ IRC (US), s 2501(a)(1).

¹³⁷⁷ IRC (US), s 2501(a)(2).

property is subject to FGT. Furthermore, the rule concerning the general scope of transfer for the imposition of FGT provides that when a non-resident alien makes the transfer of property, FGT only applies to the transfer of property situated within the US.¹³⁷⁸ These provisions, read together, give rise to the rule that a non-resident alien is taxed on all gift transfers of tangible personal property situated in the US, which shall be included in the total number of gifts made during the calendar year as ‘taxable gifts’¹³⁷⁹ for FGT purposes. On the contrary, even if evidence of assets, such as stock certificates are physically present in the US or the assets can be signified as an interest in US property, such as stock, these cannot be considered ‘taxable gifts’.¹³⁸⁰ It is important to note that for the purposes of FET, rules governing a non-resident alien’s property within the US involve extended boundaries of FET applicability compared to FGT rules. For instance, FET applicability also applies to shares of stock in US domestic corporations located in the US,¹³⁸¹ but cannot be extended for FGT.

In contrast, IHT is also applicable to ‘non-domiciled individuals’ in the UK, but only on chargeable UK property.¹³⁸² The territorial extent of IHT is described with regard to property. Overall, the territorial extent is regulated through a general rule that all property present in the UK is liable to be taxed. This taxation occurs irrespective of the domicile of the person owning the property. IHT is basically a worldwide tax imposed on all property, except property which is (a) located outside the UK and (b) whose owner is domiciled outside the UK.¹³⁸³ Thus, IHT is applicable if the properties are situated in the UK, even if the transferor is not domiciled or deemed to be domiciled. If properties are situated outside the UK, it must be treated as excluded property.¹³⁸⁴

A distinction needs to be drawn between the jurisdictional bases for IHT and the jurisdictional bases for FET/FGT. The IHT depends upon the situs of the property or the transferor’s domicile, while the FET/FGT depends on the nationality/citizenship, residence, or situs of the assets. The nationality/citizenship base does not exist within the IHT system and is of no IHT consequence under English law, whereas the consequence of FET/FGT depends very much on the citizenship base. In addition, IHT

¹³⁷⁸ IRC (US), s 2511(a).

¹³⁷⁹ The term ‘taxable gifts’ defined by s 2503, provides that ‘the term “taxable gifts” means the total amount of gifts made during the calendar year, less the deductions provided in subchapter C ‘See s 2522 of the IRC’.

¹³⁸⁰ Williams and others (n 918) 27.

¹³⁸¹ IRC (US), s 2104(a)

¹³⁸² IHTA 1984 (UK), s 6.

¹³⁸³ McCutcheon (n 968) 1131.

¹³⁸⁴ IHT 1984 (UK), s 6(1).

is imposed on worldwide properties for UK domiciled individuals and on UK-situated properties for ‘non-domiciled individuals’. With regard to non-resident aliens, the FET is imposed on the transfer of all property situated in the US, similar to its IHT counterpart whereby IHT is chargeable on the transfer of all property situated within the UK or if the individual is domiciled in the UK. Unlike the FET or IHT, the FGT is imposed only on the transfer of tangible property situated in the US.

Broadly speaking, IHT is chargeable on all property situated in the UK, without regard for where the individual who owns the property is domiciled and regardless of citizenship/nationality. Meanwhile, FET/FGT is imposed on all property (in the case of FET) and on the tangible property (in the case of FGT) of a non-resident alien situated in the US. In addition, IHT is chargeable on all of an individual’s property if he or she is domiciled in the UK, wherever his or her property may be situated and whatever his or her nationality. The FET/FGT is imposed on all of a person’s property who holds US citizenship/nationality and/or is a US resident, regardless of the location of the property. Clearly, there are differences and similarities between the uses of the jurisdictional base in the two tax systems. Even though the FET/FGT and IHT are similar in using the location base (*situs*) for assets, the citizen and resident bases mainly relate to the FET/FGT rather than the IHT, which only emphasises the domicile base.

7.4 The Measures for Reliving WTT Burdens

In general, the amount of FET/FGT depends not only on the value of the transfer but also on the availability of a variety of deductions, exclusions, exemptions and credits. Similarly, the amount of IHT is dependent not only on the value of the transfer made (or deemed to have been made) by the transferor or the deceased, but also on the availability of a variety of exemptions, exclusions and reliefs.¹³⁸⁵ US/UK legislations provide relief from WTT burdens in various ways that together can generally be used to reduce the amount of taxes even further. These measures can offer significant WTT planning opportunities for taxpayers by reducing and eliminating the WTT. It is important to note from the outset that unlike the US, the deduction is of no consequence to the amount of IHT.¹³⁸⁶ This subsection outlines the distinctions that need to be drawn between exemptions, deductions, exclusions and credits applicable under the US and UK WTT systems.

¹³⁸⁵ Williams and others (n 918) 59.

¹³⁸⁶ *Ibid* 59.

7.4.1 Comparative Definitions within the WTT Systems

Before considering detailed provisions, it will be helpful to have an initial look at terminology related to various tax relief measures in order to make comparisons between them.

7.4.1.1 Deductions versus Exemptions

The primary difference between a deduction and an exemption consists of the fact that the term ‘exemption’ exempts all or part of certain GST from tax, whereas the term ‘deductions’ usually involves an amount of some qualifying expense.¹³⁸⁷ The applicable deductions, which are either FET or FGT allowable deductions, are subtracted from the value of the gross estate or gross gift. These subtractions of the applicable deductions consequently yield either the taxable estate¹³⁸⁸ or taxable gift,¹³⁸⁹ respectively. The amount of the taxable estate and taxable gifts will form the tax basis for calculating FET/FGT liability.¹³⁹⁰

In addition, ‘an exemption is usually a flat amount fixed by the law for every taxpayer, whereas deductions may vary from person to person or estate to estate, according to the facts in each instance.’¹³⁹¹ With regard to FET/FGT, once the amount of the gross estate¹³⁹² and gross gift¹³⁹³ has been determined, there are various applicable tax deductions that may be taken in arriving at the taxable estate and gifts, respectively. When the taxable estate is determined, the focus shifts to four available deductions: certain expenses and debts (or other indebtedness);¹³⁹⁴ casualty losses during estate administration;¹³⁹⁵ charitable bequests¹³⁹⁶ and marital bequests.¹³⁹⁷ However, there are only two FGT deductions available in determining the gross gift: the charitable

¹³⁸⁷ Williams and others (n 918) 45.

¹³⁸⁸ IRC (US), s 2051 defines the term ‘taxable estate’ as the gross estate minus any applicable estate tax deduction allowable.

¹³⁸⁹ IRC (US), s 2503 (a) defines the term ‘taxable gift’ as the total amount of gifts made during the taxable year minus any applicable gift tax deductions allowable.

¹³⁹⁰ IRC (US), s 2001 (b) and s 2502 (a)

¹³⁹¹ McNulty and McCouch (n 1029) 398.

¹³⁹² Note that these three deductions will reduce the gross estate. A fourth deduction for qualified family-owned business interests under s 2057 became obsolete in 2004.

¹³⁹³ IRC (US), s 2503 (a).

¹³⁹⁴ IRC (US), s 2053.

¹³⁹⁵ IRC (US), s 2054.

¹³⁹⁶ IRC (US), s 2055.

¹³⁹⁷ IRC (US), s 2056.

deduction¹³⁹⁸ and the marital deduction.¹³⁹⁹ Both closely parallel the equivalent deductions in the FET system.

It is to be noted that the term ‘exemption’ appears only in the GSTT provisions of the IRC. It will not be discussed here because it is strictly outside the scope of this thesis; however, it does not appear in FET/FGT.¹⁴⁰⁰ The exemption is not available in these taxes because it operates as a deduction in calculating the taxable estate and gifts; therefore, it could involve any number in a taxable period.¹⁴⁰¹ Similarly, the term ‘exemption’ is also used in IHT as a specified monetary amount that is subtracted from the transfer of value, or exempt from the property itself in terms of whole or part of the value transferred.¹⁴⁰² Moreover, certain types of value or property transfer are exempt, and therefore, are not charged IHT. It is generally accepted that ‘a PET is not an exempt transfer, but may become one seven years after the gift is made.’¹⁴⁰³

The question has arisen as to whether the nil rate band is considered an ‘exempt transfer’ in the main type of exemption available in IHT. As Lee argued ‘the nil rate band’ is not an exempt transfer since transfers within this band are chargeable transfers, albeit taxed at 0 per cent. Accordingly, exemptions and reliefs should be exhausted first so that the taxpayer’s nil rate band remains intact as long as possible’.¹⁴⁰⁴ Some argue that the nil rate band exemption is invalid because it is an exempt transfer in the main type of exemption available in IHT.¹⁴⁰⁵ Accordingly, the ‘nil rate band’ is effectively the equivalent of the US ‘applicable credit’. Technically, taxable gifts with a cumulative value of such sums are chargeable, but the charge is at a nil rate; thus, this value should be deemed as a kind of IHT exemption.

7.4.1.2 Exemptions versus Exclusions

It is also important to bear in mind from the beginning that although the term ‘deductions’ also appears in the FET/FGT, only the term ‘exclusions’ can be used in the FGT. The taxable gift computed in any calendar year is reduced by only two significant

¹³⁹⁸ IRC (US), s 2522.

¹³⁹⁹ IRC (US), s 2523.

¹⁴⁰⁰ IRC (US), ss 2052 and 2521.

¹⁴⁰¹ Prior to the 1976 Act, each citizen or resident taxpayer was allowed an exemption of 30 000 USD over his or her lifetime in computing taxable gifts.

¹⁴⁰² Williams and others (n 918) 59.

¹⁴⁰³ McLaughlin and others (n 1269) 278.

¹⁴⁰⁴ Natalie Lee, *Revenue Law – Principles and Practice* (31th edn, Tottel Publishing 2008) 905.

¹⁴⁰⁵ Williams and others (n 918) 60.

exclusions: annual exclusion¹⁴⁰⁶ or educational/medical expenses exclusion.¹⁴⁰⁷ The annual exclusion currently rests at 14 000 USD and was indexed for inflation in 2014-15.¹⁴⁰⁸ In other words, the first 14 000 USD of a present interest in property transferred to a donee is excluded from taxable gifts during the calendar year.¹⁴⁰⁹ The educational/medical expenses exclusion also allows a tax-free gift of medical and tuition expenses.¹⁴¹⁰

On the contrary, there is no appearance of the term ‘deductions’ in the IHT; one can only find exclusion availability in the IHT, commonly referred to as ‘excluded property’. With regard to the IHT system, the ‘exclusion’ itself is a transfer of value declared to be ‘excluded property,’ thus attracting no IHT charge.¹⁴¹¹ It is important not to confuse exempt property with excluded property, as ‘excluded property’ will not form part of a person’s estate for IHT purposes. The application of exemptions depends on the recipient of any transfer of value.¹⁴¹²

A further difficulty with the terminology arises, and some of the confusion stems from the fact that there are in fact ‘exclusions’ or ‘exemptions’ that apply to FGT. The exclusion can only be used on an annual basis, currently referred to as ‘annual exclusion,’¹⁴¹³ while the exemption can be spread out over a person's entire lifetime, commonly referred to as the ‘lifetime exemption’. Prior to the 1976 Tax Reform Act, however, the term ‘exemption’ was used to allow every taxpayer a 30 000 USD lifetime exemption for FGT purposes and a 60 000 USD lifetime exemption for FET purposes.¹⁴¹⁴ It has been argued that ‘an exemption, like a deduction, benefits taxpayers in a high marginal tax bracket more than those in lower brackets.’¹⁴¹⁵ Moreover, poorer taxpayers cannot afford to take advantage of the separate FGT by making taxable gifts; thus, they did not benefit from this exemption like wealthy taxpayers.¹⁴¹⁶

¹⁴⁰⁶ IRC (US), s 2503 (b).

¹⁴⁰⁷ IRC (US), s 2503 (e).

¹⁴⁰⁸ The IRS has recently published Rev. Proc. (US) 2013-35, See The IRS has recently published Rev. Proc. (US) 2013-35, See Fiduciary Income Tax, A Source for Federal and State Information and Current Event, ‘Federal Unified Credit for 2014’
<<http://www.fiduciaryincometax.wordpress.com/2013/11/06/federal-unified-credit-for-2014/>> accessed 24 June 2015.

¹⁴⁰⁹ IRC (US), s 2503(b).

¹⁴¹⁰ Williams and others (n 918) 48.

¹⁴¹¹ Ibid 45.

¹⁴¹² McLaughlin and others (n 1269) 280.

¹⁴¹³ IRC (US), s 2503 (b).

¹⁴¹⁴ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 535.

¹⁴¹⁵ Ibid.

¹⁴¹⁶ Ibid.

The 1976 Tax Reform Act finally abolished the formerly separate FET and FGT exemptions and converted them into a unified credit,¹⁴¹⁷ often referred to as an exclusion amount or sometimes referred to as an exemption equivalent. The exclusion amount was 5 340 000 USD in 2014¹⁴¹⁸ and will most likely be 5 420 000 USD in 2015.¹⁴¹⁹ The deduction system was abandoned and a single credit concept was adopted by the US Congress to offset the FET and FGT in 1976.¹⁴²⁰ Consequently, under the new unified system, ‘taxpayers are able to make lifetime gifts that exhaust the unified credit or only use a part or none of it. The portion not used during the lifetime is available for reducing or eliminating FET.’¹⁴²¹

7.4.1.3 FET/FGT Credits and IHT Reliefs

In fact, exemptions and/or deductions and credits differ primarily in that exemptions only reduce the taxable estate and gift, which are the tax bases applied to the rate table.¹⁴²² By comparison, credits are dollar-for-dollar offsets of taxes otherwise computed on the taxable estates and gifts, which form the tax bases for calculating FET/FGT liability.¹⁴²³ In other words, the qualified credit amount actually reduces the total amount of FET/FGT liability dollar-for-dollar. Unlike exemptions and deductions, credits constitute the final step in the FET/FGT calculation process. Although the unified credit is set out in ss 2010 and 2505, no double benefit can be received by a taxpayer.¹⁴²⁴ There are six applicable credits available in the FET system: a unified FET credit,¹⁴²⁵ a unified FGT credit,¹⁴²⁶ the state WTT,¹⁴²⁷ the FGT paid on pre-1977 gifts,¹⁴²⁸ the FET paid on certain prior transfers¹⁴²⁹ and foreign WTT.¹⁴³⁰ However, on January 1, 2011, unless Congress provides otherwise, the credit provided under s 2011 was reinstated and the deduction set out in s 2058 will disappear. The credit provided

¹⁴¹⁷ Doug H Moy, *Living Trusts* (John Wiley & Sons, Inc. 2003) 193.

¹⁴¹⁸ Rev. Proc. (US) 2013-35 (n 1408).

¹⁴¹⁹ Fiduciary Income Tax, ‘Increased Estate Tax Exemption for 2015’

<<https://fiduciaryincometax.wordpress.com/2014/07/28/increased-estate-tax-exemption-for-2015/>>
accessed 24 June 2015.

¹⁴²⁰ Bloom and others (n 1209) 27.

¹⁴²¹ *Ibid.*

¹⁴²² IRC (US), s 2001.

¹⁴²³ Williams and others (n 918) 45.

¹⁴²⁴ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 536.

¹⁴²⁵ IRC (US), s 2010.

¹⁴²⁶ IRC (US), s 2505.

¹⁴²⁷ IRC (US), s 2011.

¹⁴²⁸ IRC (US), s 2012.

¹⁴²⁹ IRC (US), s 2013.

¹⁴³⁰ IRC (US), s 2014, 2515 and 2516.

under s 2012 is not necessary for gifts made after January 1, 1977, because the FGT paid is subtracted from the tentative tax under s 2001(b).¹⁴³¹

It is clear from the legislation that unified credit or other credits are to be given in order to reduce the tentative FET/FGT, provided in ss 2010 through 2015. However, only the FGT credit available is applied, which the unified credit is provided in s 2505. Although several important credits are allowed against FET/FGT burdens, as determined under s 2001 and s 2502, respectively, only two applicable credits hold special significance,¹⁴³² and the credits determine whether or not the unified credit has the effect of eliminating any tax liability for the vast majority of estates and gifts,¹⁴³³ or if a credit for tax on prior transfers is applied.¹⁴³⁴ However, if liability remains after the application of the FET credit, the other available credits may importantly reduce the actual amount of FET liability.¹⁴³⁵ The unified credit was introduced as a result of the enactment of the 1976 Tax Reform Act, which was designed to offset the tax that would otherwise be imposed on taxable transfers up to the pre-1976 specified exemption or exclusion amount.¹⁴³⁶ Such a unified credit operates within the single cumulative allowance, because to effectively provide a single credit against FET/FGT liability, the transfers have to be made during lifetime and upon death.¹⁴³⁷ According to the enactment of the current legislation, the equivalent unified credits in the FET/FGT were increased, in stages, every year to reach 2 081 800 USD in 2014.¹⁴³⁸ With regard to the other credits constituting the final step in the tax computation process, this change may significantly reduce the amount actually due. At this point, the other credits allowed against FET liability are provided in ss 2012 through 2015.

On the other hand, in IHT legislation, there are a number of ‘reliefs’ available. These reliefs can be used to reduce or eliminate the amount of tax liability where certain conditions are fulfilled, similar to the use of credits in the case of the US.¹⁴³⁹ It should be noted that from the UK perspective, there is a fundamental difference between the

¹⁴³¹ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 540-541.

¹⁴³² Yamamoto and Donaldson (n 1289) 199.

¹⁴³³ IRC (US), ss 2010 and 2505

¹⁴³⁴ IRC (US), s 2013

¹⁴³⁵ Campfield and others (n 1208) 708.

¹⁴³⁶ McNulty and McCouch (n 1029) 330.

¹⁴³⁷ IRC (US), ss 2010 and 2505.

¹⁴³⁸ The IRS has recently published Rev. Proc. (US) 2013-35. This revenue procedure is the official confirmation of the various inflation-adjusted amounts referenced in the tax code. The base exclusion amount, used for both the estate tax exemption and the gift tax exemption will be 5 340 000 USD in 2014 under IRC (US) s 2010(c)(3). This is the same amount that predicted in July of 2013 (see post here). The equivalent unified credit amount is 2 081 800 USD. ‘See (n 1408)’.

¹⁴³⁹ McLaughlin and others (n 1269) 304.

reliefs and the exemptions that apply to IHT, and one that can be operated to prevent a disposition from being a transfer of value in the first place, a difference that explains why there is no charge to IHT. On the other hand, it can be operated to prevent the transfer of value from being charged to IHT where there has been a transfer of value.¹⁴⁴⁰ In other words, in the relief case, whether or not the transfer during life or upon death is in principle chargeable, its quantum is reduced or eliminated due to the relief. In the exemption case, however, those transfers are directly exempt; therefore, it does not give rise to IHT burdens under any circumstances.¹⁴⁴¹ With regard to IHT, the legislation effectively establishes various forms of exemptions and reliefs. The value transfer and property may be declared to be exempt transfers, for example, thus exempting a specified monetary amount up to a certain limit or in full, depending on spouse domicile.¹⁴⁴² Some form of IHT relief exists on a special basis for valuation, by reducing the value transferred or by omission from the estate until some later event occurs. Other IHT relief takes the form of a reduction in the tax otherwise payable, as can be seen in quick succession relief and double taxation credit relief. Here, the value transferred must still be cumulated in full and the tax normally payable is ascertained before IHT relief can be given. Further, the relief may take different exemption forms where transfers of value are exempt from tax liability and aggregation.¹⁴⁴³ Finally, certain dispositions are not considered to be transfers of value.¹⁴⁴⁴

7.4.2 Purpose of the Measures

As mentioned above, the measures for reducing or eliminating tax liability given by WTT legislation in both systems fall into four general categories based on their grounds. The deductions, exemptions, exclusions and credits (reliefs) that fall within these categories may be justified on various grounds, such as those that are social: maintenance of the family, wedding gifts or gifts to charities. Alternatively, they might be based on administrative convenience, such as the small gift exemption. Some are also based on double-charge prevention (e.g., taper relief). In the case of IHT reliefs, property preservation grounds might be cited, such as business and agriculture property reliefs. The following grounds should be borne in mind concerning the availability of such categories.

¹⁴⁴⁰ McCutcheon (n 968) 48.

¹⁴⁴¹ Finney (1133) 199.

¹⁴⁴² IHTA 1984 (UK), s. 18.

¹⁴⁴³ Tiley (n 939) 740.

¹⁴⁴⁴ Williams and others (n 918) 59.

7.4.2.1 Cultural, Social and National Grounds

7.4.2.1.1 Marital Deduction or Spouse Exemption

Under FET and IHT legislation, marital deduction (often known as the spouse exemption under the IHT system) is a useful measure for reducing or eliminating taxpayer liability in the US and UK WTT systems. Both serve to allow limited or unlimited tax-free wealth transfers within the marital unit.¹⁴⁴⁵ In the IHT system, the most important exemption is the complete exemption of transfers between a spouse or civil partner, both of whom are, or both of whom are not, domiciled in the UK;¹⁴⁴⁶ this exemption applies to both lifetime and death transfers.¹⁴⁴⁷ Its counterpart in the FET/FGT system applies to transfers of property of any type, whether separate property or community property, subject only to two limitations. First, gifts to spouses who are not US citizens are not deductible.¹⁴⁴⁸ Second, the limitation generally parallels the estate non-deductible terminable interest rule, with similar exceptions.¹⁴⁴⁹ The legislation allows a marital deduction for FET for the value of property passing from the decedent to his or her surviving spouse,¹⁴⁵⁰ while the FGT marital deduction provides an unlimited deduction for lifetime transfers between spouses.¹⁴⁵¹

On the other hand, in the IHT system, there is a complete exemption for all transfers (i.e. lifetime and death) between UK domiciled spouses where the transferor spouse is UK domiciled but the transferee spouse is foreign domiciled.¹⁴⁵² This exemption is restricted to a cumulative total of 55 000 GBP.¹⁴⁵³ If the spouse is non-domiciled, unfortunately, any transfers to this individual are still subject to the 55 000 GBP restriction. Following the Civil Partnership Act of 2004, same-sex couples who enter into a civil relationship are given parity of tax treatment like married couples.¹⁴⁵⁴ A gift to a non-UK domiciled spouse under reservation rules may not be protected by the spouse;¹⁴⁵⁵ that relief and any eventual relief may prove to be chargeable.¹⁴⁵⁶

¹⁴⁴⁵ Robert F Klueger, *Estate Planning After the New Tax Law* (Xlibris Corporation 2011) 37.

¹⁴⁴⁶ Nigel Eastaway and John Jeffrey-Cook, *Moore Rowland's Taxation of Farmers and Farming* (Sweet & Maxwell 1989) 294.

¹⁴⁴⁷ IHTA 1984 (UK), s 18 (1)(2).

¹⁴⁴⁸ IRC (US), s 2056(d).

¹⁴⁴⁹ IRC (US), s 2056(a)-2(b).

¹⁴⁵⁰ IRC (US), s 2056(a).

¹⁴⁵¹ IRC (US), s 2523(a).

¹⁴⁵² McLaughlin and others (n 1269) 17.

¹⁴⁵³ *Ibid.*

¹⁴⁵⁴ *Ibid.*

¹⁴⁵⁵ *Ibid.*

It is important to consider the purposes of the marital deduction and/or spouse exemptions for both tax systems. According to the legislative history, when the FET/FGT was first enacted, it included no special provisions for transfers between spouses. Each individual was taxed separately as the sole owner of the property on his or her own transfers, even to each other.¹⁴⁵⁷ From 1948 through 1981, ‘the marital deduction was generally limited to one-half of the property transferred.’¹⁴⁵⁸ This policy was originally enacted in 1948, which reflects a policy judgment that spouses should be free from unnecessary tax obstacles.¹⁴⁵⁹ The marital deduction was originally designed to equalise the favourable treatment available to spouses who owned property as community property.¹⁴⁶⁰

The primary purpose of the marital deduction is to apply the same tax consequences to the transferred community property and the transferred non-community property.¹⁴⁶¹ In community property systems, each spouse is considered to own one-half of the community property; thus, the surviving spouse receives the other half, regardless of who titled the property.¹⁴⁶² At death, the propertied spouse has the right to dispose of only one-half of the community property.¹⁴⁶³ In contrast, if the propertied spouse dies first, all separate property owned at death is included in the decedent’s estate.¹⁴⁶⁴ As for the purpose of the spouse exemption in the UK, it aims to encourage people to continue to live in their community property or their own homes. There is an exemption for transfers between spouses on death, which saves widowers from needing to sell the family home to pay IHT.¹⁴⁶⁵

However, the adoption of the unlimited marital deduction in 1981 reflected a purpose entirely different from that of the 1948 enactment. In 1981, Congress fully embraced the idea that no tax should be imposed until the property leaves the spouses.¹⁴⁶⁶ Consequently, Congress completely eliminated the original 50 per cent ceiling on the amount to be deducted for gifts and estates, the result being the present-day unlimited

¹⁴⁵⁶ Ibid.

¹⁴⁵⁷ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 485.

¹⁴⁵⁸ Campfield and others (n 1208) 160.

¹⁴⁵⁹ Ibid.

¹⁴⁶⁰ Ibid.

¹⁴⁶¹ McNulty and McCouch (n 1029) 368.

¹⁴⁶² Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 485.

¹⁴⁶³ Ibid.

¹⁴⁶⁴ Ibid 488.

¹⁴⁶⁵ House of Lords (UK), Deb 28 January 1992 vol 534 cc1164-5.

¹⁴⁶⁶ Campfield and others (n 1208) 160.

marital deduction for transfers between spouses.¹⁴⁶⁷ As explained by the Senate Finance Committee (S. Rep. No. 97-144, Economic Recovery Tax Act of 1981, 97th Cong., 1st Sess. 127 (1981)),

[A] husband and wife should be treated as one economic unit for purposes of estate and gift taxes, as they generally are for income tax purposes. Accordingly, one tax should be imposed on transfers between husband and wife.¹⁴⁶⁸

The 1981 marital deduction provisions were based on the policy that inter-spousal transfers should not be subject to taxation. These contrasts with the former policy that attempted to equalise FET/FGT treatment of non-community property with community property.¹⁴⁶⁹ After amendments, the policy recognised that spouses were one economic unit, regardless of who held the title of the property or who earned the income.¹⁴⁷⁰ From 1982, however, ‘the marital deduction is unlimited in the sense that any qualified property passing to the surviving spouse can be deducted up to, and including, the entire estate of the decedent. The shift to an unlimited estate tax marital deduction signalled a shift in the rationale for the deduction. The unlimited marital deduction permits a decedent to pass the entire estate to the surviving spouses free of estate taxes. As for the tax-free portion, the marital deduction defers the payment of FET on the portion of the estate that remains until the death of the survivor.’¹⁴⁷¹

7.4.2.1.2 Charity, Housing Associations, National Purposes and Political Parties

Rules governing both charitable donations and other tax-exempt organisations, such as housing associations, national purposes and political parties, are present within both tax systems. There are many commonalities between the FET/FGT regarding tax-exempt organisation provisions, but there are also significant differences.¹⁴⁷² Under the FET system, not all interest in the property transferred to the charitable organization at death is qualified for the deduction, although an estate can deduct the majority of the value.¹⁴⁷³ It is necessary to determine the taxable estate, including the amount of all bequests, legacies, devises, or transfers to a governmental entity for exclusively public

¹⁴⁶⁷ IRC (US), s 2056.

¹⁴⁶⁸ Senate Finance Committee (US), S, Rep. No. 97-144, Economic Recovery Tax Act of 1981, 97th Cong., 1st Sess. 127 (1981).

¹⁴⁶⁹ Senate Finance Committee (n 1468).

¹⁴⁷⁰ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 487.

¹⁴⁷¹ Bloom and others (n 1209) 119

¹⁴⁷² Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 465.

¹⁴⁷³ Bloom and others (n 1209) 160.

or educational purposes, or to a veterans' organisation, or to corporations, trusts or associations organised and operated exclusively for religious, charitable or scientific.¹⁴⁷⁴ However, the FGT qualifies gift transfers for the charitable deductions depending on an amount and percentage of the qualified donor's property.¹⁴⁷⁵ Similar to the FET, 'the gift has a generous deduction for contributions to charity,'¹⁴⁷⁶ and the deductions are unlimited for gifts to a charity under the US FET/FGT.¹⁴⁷⁷

Under the IHT system, exemptions are available for gifts to UK-based charities¹⁴⁷⁸ and registered housing associations.¹⁴⁷⁹ Similar to the FET, gifts to charities are exempt without limit. In addition, s 24 states that exempt gifts to qualifying parliamentary political parties may be denied if the vesting of the gift is postponed, if it is conditional; if it is made for a limited period; or if it could be used for non-charitable purposes. Such gifts are exempt without limit from the IHT, whether or not they are gifted during life or upon death.¹⁴⁸⁰ Exemption gifts to designated bodies for national purposes, e.g., the National Gallery, National Museums and the National Trust, are available under the IHTA 1984.¹⁴⁸¹

One must also consider the purposes of charitable deductions and charitable exemptions within both tax systems. The primary purpose of FET/FGT charitable deduction is to encourage charitable contributions by providing benefits and services to people.¹⁴⁸² The charitable deduction aims to relieve the need for the government to provide certain public services and to promote social welfare without reflecting the net value of the decedent's gratuitous transfers.¹⁴⁸³ The FET/FGT are imposed only on transactions for which the donor has surrendered dominion and control over the property and received nothing in return. Transfers to political and charitable organisations are excluded from the FGT.¹⁴⁸⁴

¹⁴⁷⁴ IRC (US), s 2055.

¹⁴⁷⁵ IRC (US), s 2522(a).

¹⁴⁷⁶ Campfield and others (n 1208) 162.

¹⁴⁷⁷ IRC (US), s 2522(a).

¹⁴⁷⁸ IHTA 1984 (UK), s 23.

¹⁴⁷⁹ IHTA 1984 (UK), s 24A.

¹⁴⁸⁰ Ibid.

¹⁴⁸¹ IHTA 1984 (UK), s 25.

¹⁴⁸² McNulty and McCouch (n 1029) 356.

¹⁴⁸³ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 465.

¹⁴⁸⁴ Ibid 107-109.

7.4.2.1.3 Wedding Gifts and Family Maintenance

Under the both tax systems, there are three exemptions only available for transfers upon death. Under the FET/FGT systems, the exclusions provide direct payment of certain educational and medical expenses on behalf of an individual, such as tuition to an educational provider or training expenses; the exclusion also applies to direct payment to any person who provides medical care under s 2503(e). Such a transfer is made to the donee, who then remits the funds to the educational institution or medical care provider, and is included.¹⁴⁸⁵ However, there are significant limitations to both educational and medical expenses; only direct payment made by the donor to a medical care provider or educational institution.¹⁴⁸⁶ In the IHT system, payments for certain family maintenance purposes are not regarded as transfers of value to a spouse, or child (of either party) who is a minor or in full-time education.¹⁴⁸⁷

7.4.2.1.4 Active Service and Visiting Forces

Under the IHT system, there is an exemption that is only available on transfer upon death during active service.¹⁴⁸⁸ This exemption includes property situated in the UK belonging to members of visiting forces who are not British citizens or citizens of the dependent territories.¹⁴⁸⁹ Unlike the IHT, there are no similar measures for reducing or eliminating FET/FGT. However, it is noticeable that s 2055 allows an estate to take a charitable deduction for the amount of all transfers to veterans organisations.

7.4.2.1.5 Expenses, Debts and Claims

In general, certain expenses, debts and claims are allowed¹⁴⁹⁰ under FET to operate as deductions from the gross estate in arriving at the amount of the taxable estate. S 2053 provides a deduction for four classes of expenses, debts and claims, including reasonable funeral expenses that are actually expended,¹⁴⁹¹ administrative expenses of the estate that actually and necessarily incurred¹⁴⁹² and claims against the estate. Also deductible are the decedent's debts, which may include unpaid mortgages encumbering the property, executor commissions, attorneys, fees, appraiser fees and court costs.

¹⁴⁸⁵ Treasury Regulation (US), s 25.2503-6.

¹⁴⁸⁶ Campfield and others (n 1208) 159.

¹⁴⁸⁷ IHTA 1984 (UK), s 11.

¹⁴⁸⁸ IHTA 1984 (UK), s 154.

¹⁴⁸⁹ IHTA 1984 (UK), ss 6 (4), 155 (1).

¹⁴⁹⁰ IRC (US), ss 2053 and 2054

¹⁴⁹¹ Treasury Regulation (US), s 20.2053-2.

¹⁴⁹² Treasury Regulation (US), s 20.2053-3.

These are included in the gross estate, but only if the property is included in the gross estate at its full value, without a reduction for the mortgage.¹⁴⁹³ Furthermore, s 2054 allows a deduction for casual and theft losses that occur during the settlement of the estate. Such deductions for losses are allowed only from those arising from ‘fires, storms, shipwrecks, or other casualties, or from theft’ and only to the extent that the ‘losses are not compensated for by insurance or otherwise’.¹⁴⁹⁴

It is also necessary to consider the purposes of the deductions under ss 2053 and 2054 of the WTT systems. Broadly speaking, administration of the estate must occur. At the time of death, the decedent’s estate must pay for the services provided by the accountants and attorneys for the estate. The estate must pay for the executor and administrator and decedent debts to creditors (if any). Consequently, these costs of transferring property at death can reduce the net value of property passing from the decedent to the heirs.¹⁴⁹⁵ Therefore, the primary purpose of the deduction is to ensure that tax is not imposed on a value that is destroyed either casually or by theft prior to its distribution to the heir.¹⁴⁹⁶ Thus, it is appropriate to tax only the decedent’s net wealth, rather than the decedent’s gross assets, or more precisely, the FET. It is not a tax on the decedent’s property but rather a tax on the transfer of that property and should be imposed on net transfers rather than on gross transfers.¹⁴⁹⁷ The net (value) transfer is important for FET calculation because it helps to determine the tax amount in a system formulated on the ability-to-pay principle. Whether the FET system is more equitable, in the sense of both horizontal and vertical equity essentially depends on the correct determination of the taxable base.¹⁴⁹⁸ In arriving at the amount of the taxable estate, however, the resulting taxable estate calculated for tax purposes must be the amount actually transferred to the heirs.¹⁴⁹⁹ The deduction of amounts that are no liable to the estate of the deceased are not required in all fairness, even though fairness dictates that the taxable estate does not include assets unavailable for transfer to the heirs.¹⁵⁰⁰ Thus, ‘expenditures not essential to the proper settlement of the estate, but incurred for the

¹⁴⁹³ IRC (US), s 2053.

¹⁴⁹⁴ IRC (US), s 2054.

¹⁴⁹⁵ Bloom and others (n 1209) 103-104.

¹⁴⁹⁶ Campfield and others (n 1208) 571.

¹⁴⁹⁷ Ibid.

¹⁴⁹⁸ McNulty and McCouch (n 1029) 354.

¹⁴⁹⁹ Campfield and others (n 1208) 577.

¹⁵⁰⁰ Ibid.

individual benefit of the heirs, legatees or devisees¹⁵⁰¹ are not the administration expenditures defined under s 2503.

7.4.2.2 Administrative Convenience and Exempting Modest Tax Grounds

7.4.2.2.1 Small Gifts and Annual Exemption or Exclusion

Under the WTT systems, there is an annual exemption or exclusion available, which exempts multiple annual gifts up to a certain amount per donor. It also relieves taxpayers of the heavy tax burden of delivering an account of lifetime transfers¹⁵⁰² or reporting all gift transfers by filing tax returns for any calendar year.¹⁵⁰³ Most ordinary family or holiday transfer exemptions or exclusions only apply to transfers according to the FET/FGT and IHT.

The annual tax exclusions under the FGT system apply automatically to a limited amount of gifts made by a US citizen or domiciliary during the calendar year to an unlimited number of donees.¹⁵⁰⁴ Thus, a taxpayer is liable to pay the FGT if he or she made gift transfers in excess of the limited amount. In the IHT system, the legislation permits exemptions for two classes of gifts. The first is a small gift in any tax year up to 250 GBP per donor;¹⁵⁰⁵ the second is an annual exemption for lifetime gifts not exceeding 3 000 GBP in any tax year.¹⁵⁰⁶ There is also an exemption for lifetime gifts between 1 000 GBP and 5 000 GBP upon marriage.¹⁵⁰⁷

The purposes of the annual exemptions or exclusions for both tax systems must also be considered. The purpose of the FET/FGT annual exclusions is to keep the tax authority from setting taxes below the amount of small incidental lifetime gifts or transfers on death. It can save taxpayers from a heavy tax burden and from keeping and reporting all records of all lifetime transfers to tax authorities, such as small incidental gifts and ordinary holiday or family gifts.¹⁵⁰⁸ These changes should help to encourage lifetime giving, which has been significantly inhibited under the existing structure¹⁵⁰⁹ and administrative convenience grounds for taxpayers and officials. The exclusion was

¹⁵⁰¹ Ibid.

¹⁵⁰² IHTA 1984 (UK), s 216(7).

¹⁵⁰³ IRC (US), s 6019.

¹⁵⁰⁴ IRC (US), s 2503(b).

¹⁵⁰⁵ IHTA 1984 (UK), s 20.

¹⁵⁰⁶ IHTA 1984 (UK), s 19.

¹⁵⁰⁷ IHTA 1984 (UK), s 22.

¹⁵⁰⁸ McNulty and McCouch (n 1029) 333.

¹⁵⁰⁹ House of Commons, Deb 13 April 1981, vol 3 cc35-112, 38.

indexed for inflation,¹⁵¹⁰ and under the indexing system set forth in s 2503(b) (2), the exclusion amount rested at 1000 USD in 2015.¹⁵¹¹ The exclusion occupies an important position in gift and estate planning. Continued and careful planned use of exclusion provisions is a vehicle for transferring substantial amounts to subsequent generations without a FGT burden of any kind.¹⁵¹²

7.4.2.2.2 Unified Tax Credits

There are a number of credits available from charges to the US FET/FGT, but not for the IHT counterpart. These credits include the unified FET credit¹⁵¹³ or unified FGT credit.¹⁵¹⁴ Such credits are referred to as ‘unified’ because they are only available in single applicable amounts to each taxpayer and apply to both lifetime transfers and transfers at death. Historically, the objective of Congress in adopting a ‘unified credit’ was to exempt modest estates from FET/FGT. Congress chose a credit approach rather than a deduction approach so that ‘the economic benefit of the credit would be the same regardless of the size of the estate.’¹⁵¹⁵ In 1976, when the FET/FGT was unified, Congress claimed that ‘the change from a deduction to credit would produce greater ‘equity’ among taxpayers and that the increased exemption amount was necessary to reduce the impact of past inflation’.¹⁵¹⁶

Under the FET system, every estate is entitled to the ‘applicable credit amount’ set forth in s 2010. It is the most significant credit because it effectively exempts modest tax liability from FET. Unless the decedent has adjusted taxable gifts under s 2001(b), there can be no FET liability so long as the taxable estate does not exceed the applicable exclusion amount. Unlike the unified FET credit, the unified FGT credit is not reduced

¹⁵¹⁰ Originally, the amount was set at 5 000 USD. This figure was lowered to 4 000 USD in 1938, lowered again to 3 000 USD in 1942, and then raised to 10 000 USD in 1981. In 1997, Congress indexed the gift tax annual exclusion for inflation, but only in increments of 1 000 USD. It was not until 2002 that indexing made a difference in the amount of the exclusion, which was then raised to 11 000 USD (Rev. Proc. (US) 2001-59, 2001-2 C.B. 623. In 2006, it increased to 12 000 USD (Rev. Proc. (US) 2005-70, 2005-2 C.B. 979. Because the annual exclusion applies to each recipient, the ability to diminish gift tax liability is significant. See Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 185.

¹⁵¹¹ Inland Revenue Service, In 2015 Various Tax Benefits Increase Due to Inflation Adjustments, IR-2014-104, Oct. 30, 2014 <<http://www.irs.gov/uac/Newsroom/In-2015,-Various-Tax-Benefits-Increase-Due-to-Inflation-Adjustments>> accessed on 24 June 2015.

¹⁵¹² Campfield and others (n 1208) 114.

¹⁵¹³ IRC (US), s 2010.

¹⁵¹⁴ IRC (US), s 2505.

¹⁵¹⁵ Campfield and others (n 1208) 111.

¹⁵¹⁶ H.R. Rep. No. 1380, 94th Cong., 2d Sess. 15 (1976), reprinted in 1976 U.S.C.C.A.N. 3356, 3369; S. Rep. 94-938 Part II, 94th Cong., 2d Sess. 13 (1976), reprinted in 1976 U.S.C.C.A.N. 4030, 4039.

by any credit used to reduce the tax prior to taxable gifts made by the decedent.¹⁵¹⁷ The IRC currently states that the FET is to be repealed for deaths after 2009.¹⁵¹⁸ S 901 of the Economic Growth and Tax Reconciliation Act of 2001, however, states that on January 1, 2011, the FET provisions were to be restored to their pre-existing form prior to the 2001 Act. If this ‘sunset’ provision is not eliminated by Congress, the FET unified credit will be restored to the amount of 345 800 USD—the tax on a 1 000 000 USD taxable estate.¹⁵¹⁹

7.4.2.3 Property Preservation Grounds

In the case of the IHT system, there are two main areas of relief available to particular property. These areas of relief exist because it is desirable for the property to be preserved from the charge to IHT, not sold to pay the tax Bill.¹⁵²⁰ Two of the most important reliefs available to mitigate IHT charges are ‘business property relief’ and ‘agricultural property relief’. These reliefs are commonly referred to as BPR and APR, respectively. These two measures for the IHT, however, are not available in the FET/FGT system. Another (property) relief is the woodland relief and the heritage property relief, which are examined in more detail below. Therefore, this sub-section is only concerned with these reliefs, which are compared and discussed below.

7.4.2.3.1 Business Property and Agriculture Property Reliefs

BPR¹⁵²¹ and APR¹⁵²² are amongst the most significant reliefs from IHT charge, and they have attracted much attention from tax planners. Whether ‘business property’ or ‘agricultural property’, these reliefs are available for transfers of the value of specified assets during the lifetime and upon death. They are also available for transfers into and out of settlements. Similar to APR, BPR is given as a percentage reduction in the value transferred before grossing up and before deducting annual relief.¹⁵²³ Dependent on meeting certain criteria, the value of business property transferred is reduced by either

¹⁵¹⁷ Bloom and others (n 1209) 175.

¹⁵¹⁸ IRC (US), s 2210.

¹⁵¹⁹ The credit originated in 1977 and gradually rose to the 192 800 USD level from 1977 to 1987. The credit remained at 192 800 USD through 1977 but rose again beginning in 1998. The 2001 Act raised the unified credit for 2002 and 2003 to 345 800 USD, equal to the tax on a taxable gift or taxable estate of 1 000 000 USD. Beginning in 2004, the credit was no longer ‘unified’ and the estate tax credit rose above the gift tax credit. The gift tax credit was capped at 345 000 USD, the tax on 1 000 000 USD of taxable gifts. The estate tax credit, however, rose dramatically. ‘See (n 1208) 709’.

¹⁵²⁰ Lee (n 1404) 905.

¹⁵²¹ IHTA 1984 (UK), s 103-114.

¹⁵²² IHTA 1984 (UK), s 115-124C.

¹⁵²³ IHTA 1984 (UK), s 104 (1) (2).

50 per cent or 100 per cent when computing the tax exposure on a gift or a decedent's estate.¹⁵²⁴ The qualified agricultural property transferred is a deduction of 50 per cent or 30 per cent of its value.¹⁵²⁵ This deduction can substantially reduce or even eliminate the IHT charge where, for example, business assets are left to a chargeable beneficiary and the balance of the estate is left to a spouse.¹⁵²⁶ Although agricultural property may well qualify for business property relief, it is not possible to obtain both reliefs.¹⁵²⁷

The distinction being made between APR and BPR is that BPR applies irrespective of the location of the property, while APR only applies to property situated in the UK.¹⁵²⁸ On a transfer of property, it is possible for APR to apply to a portion of the transfer, with BRP applying where APR was inapplicable. The importance of BRP and ARP lies in the quantum of the reliefs.¹⁵²⁹ In the case of BRP, the percentage of relief is either 50 per cent or 100 per cent (depending upon the type of property) of the value of the business property transferred; in the case of ARP, the percentage of relief is 100 per cent of the value of the agricultural property transferred. If the level of relief (whether BRP or ARP) applied is 100 per cent, then the transfer is effectively not subject to IHT.¹⁵³⁰

7.4.2.3.2 Woodland Relief

As mentioned previously, woodlands can qualify for agricultural property relief.¹⁵³¹ The woodland relief applies to land upon which trees or underwood grows. This land must be in the UK, but is not agricultural property.¹⁵³² The owner must be beneficially entitled to the land for five years before the deceased's death or for a shorter period where the land was acquired other than for consideration of money or the money's worth by gift or inheritance.¹⁵³³ An election must mainly be made within two years of

¹⁵²⁴ The rate of relief is 50 per cent in the case of property consisting of a business or interest in a business (s 105 (1) (a)), or of shares which gave the transferor control, or if it is more than 25 per cent. It can include related property (s 161) unless an election has been made to value the property, which is not related as result of a sale within three years of death under ss 176 and 105 (2).

¹⁵²⁵ Eastaway and Jeffrey-Cook (n 1446) 254-255.

¹⁵²⁶ Williams and others (n 918) 62.

¹⁵²⁷ IHTA 1984 (UK), s 114 (1).

¹⁵²⁸ Finney (1133) 210.

¹⁵²⁹ Ibid.

¹⁵³⁰ Ibid.

¹⁵³¹ IHTA 1984 (UK), s 115 (2).

¹⁵³² IHTA 1984 (UK), s 125 (1) (a).

¹⁵³³ IHTA 1984 (UK), s 125 (1) (b).

the death.¹⁵³⁴ The relief is made upon death and does not extend to IHT in terms of the land upon which the trees are growing.¹⁵³⁵

7.4.2.3.3 Heritage Property Exemption

It is possible to obtain a conditional exemption from IHT for transfers of national heritage property and maintenance funds set up to fund the upkeep of such property.¹⁵³⁶ Heritage property is a ‘conditional exemption’ that may be exempt from IHT where certain conditions are satisfied.¹⁵³⁷ Under these provisions, the Board of Inland Revenue is empowered to approve the specified properties.¹⁵³⁸ It is necessary for the transferee to provide that the property will be properly maintained, and reasonable access will be given to the public; movable property must be kept permanently in the UK.¹⁵³⁹ A chargeable event occurs upon the breach of an undertaking or upon disposal of the property,¹⁵⁴⁰ which gives rise to a recalculation of the transferor’s IHT cumulative total.¹⁵⁴¹

7.4.2.4 Double Tax Prevention Grounds

In the WTT system, the credits (or reliefs) measures for eliminating tax liability may be justified on the grounds of preventing double taxes or repeated taxes. This special ground applies to various purposes and prevents a person being charged WTT twice on the same property in different circumstances. It may apply where the event or transfer occurred, or reduce the impact of taxation on separate transfers of the same property within a short period of time (taper relief). It may also prevent double taxation when a foreign WTT was taxed on the same property as IHT or FET/FGT. This sub-section is concerned with three vital credits (or reliefs): UK taper relief (or US credit for gifts made prior to 1977), quick succession relief (or credit) and foreign death credit (or double taxation relief).

¹⁵³⁴ IHTA 1984 (UK), s 125 (3).

¹⁵³⁵ IHTA 1984 (UK), ss 125-130.

¹⁵³⁶ IHTA 1984 (UK), ss 27, 30-35, 77-79, 207, Schedule 4.

¹⁵³⁷ IHTA 1984 (UK), ss 30-35A.

¹⁵³⁸ IHTA 1984 (UK), s 31 (1).

¹⁵³⁹ IHTA 1984 (UK), s 31 (2).

¹⁵⁴⁰ IHTA 1984 (UK), s 32.

¹⁵⁴¹ IHTA 1984 (UK), s 34.

7.4.2.4.1 Taper Relief

Both tax systems seek to prevent double taxes, permitting a relief (or credit) for WTT due on lifetime or gift transfers that were also included in the GCT or the decedent's gross estate. There is a gradual reduction in the amount of IHT due on all PETs and chargeable lifetime transfers made within seven years before death.¹⁵⁴² Such transfers may be subject to what is known as taper relief, thereby reducing potential IHT charges.¹⁵⁴³ Similar to UK relief, US credit for FGT is allowed in very limited circumstances because it applies only to a gift included in the decedent's gross estate,¹⁵⁴⁴ and then only to FGT paid for a gift prior to 1977.¹⁵⁴⁵ Because credits are fully provided under the 1976 unified WTT system, they are inapplicable to gifts made after 1976.¹⁵⁴⁶ Thus, the reduction of the tentative FET by the FGT payable accomplishes the same result.¹⁵⁴⁷

7.4.2.4.2 Quick Succession Relief or Credit

If the decedent has received property from a person whose estate paid FET on the transfer of the property to the decedent, the deaths of members of successive generations within a short time could have devastating tax consequences for a family. For example, if the daughter dies within three years of the father, the entirety of the FET paid by the father's estate can be credited against the tax that would otherwise be imposed upon the daughter's death. Without relief, the family's resources would be reduced dramatically within a short time.¹⁵⁴⁸ Both WTT systems have responded to such circumstances by adopting provisions of relief and credit for tax on prior transfers. The primary purpose of this relief or credit is to relieve the IHT and FET burden of the estate for successive generations or the transferor who died within a relatively short period of time.¹⁵⁴⁹ More precisely, it diminishes 'the impact of taxation on separate transfers of the same property within a short time frame.'¹⁵⁵⁰ If, for example, the decedent died within certain specified years before the prior transferor's death, or if the prior transferor died within specified years after the decedent's death, a credit or relief is

¹⁵⁴² McLaughlin and others (n 1269) 304.

¹⁵⁴³ Ibid.

¹⁵⁴⁴ IRC (US), s 2012 (a) (b).

¹⁵⁴⁵ IRC (US), s 2001 (b) (2).

¹⁵⁴⁶ Campfield and others (n 1208) 710.

¹⁵⁴⁷ IRC (US), s 2012 (e).

¹⁵⁴⁸ Campfield and others (n 1208) 711.

¹⁵⁴⁹ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 538.

¹⁵⁵⁰ Bloom and others (n 1208) 179.

allowed to relieve the tax burden. However, ‘there is no requirement of family or other relationship between the two decedents.’¹⁵⁵¹ Although the purpose of these reliefs and credits are simple, the applications are rather complicated.

This credit and relief are enacted to protect against repeated estate taxation, in quick succession, of property passing from one decedent to another. It is subject to important limitations related to both the former decedent’s estate and the latter decedent’s estate.¹⁵⁵² The amount of the FET credit and IHT relief not only relies on the length of time between the death of the transferor and the deceased but also on the amount of IHT or FET paid by transferor.¹⁵⁵³ With regards to the FET system, s 2013 allows credit for FET that was paid on a prior transfer of property to the decedent if the property was transferred by transferor who died within ten years after the decedent.¹⁵⁵⁴ With regards to the IHT system, s 141 provides relief against charges to IHT where there was more than one chargeable transfer within a five year period.¹⁵⁵⁵ This IHT relief is often called ‘quick succession relief’ and is available in two particular circumstances: (1) where the value of a person’s estate has been increased by a chargeable transfer within 5 years of his or her death or a lifetime transfer of the settled property in which the transferor had an interest in possession, and (2) where the first transfer was made with reference to the value of the same settled property, either in the making of the settlement or on a subsequent transfer. The relief is calculated as a percentage reduction in IHT payable on the first transfer to the extent that the transferor’s estate was increased by that transfer. The calculated amount is allowed as a deduction against IHT due on the later transfer.¹⁵⁵⁶

7.4.2.4.3 Foreign Death Credit or Double Taxation Relief

In both WTT systems, taxes are imposed on all property, on citizens and residents or domiciles regardless of their location; the location of the property is irrelevant for the purposes of imposing WTT in such circumstances. Hence, double taxation could occur where the transferor is liable to tax charges on the same properties in two jurisdictions. Property located outside the jurisdictions, whether in the US or the UK, will frequently

¹⁵⁵¹ Campfield and others (n 1208) 711.

¹⁵⁵² IRC (US), ss 2013(b) and (c), and fully explored in Treasury Regulation (US) ss 20.2013-2, 20.2013-3, and 20.2013-6.

¹⁵⁵³ IRC (US), s 2013(a) and IHTA 1984, ss 7 and 141.

¹⁵⁵⁴ Ibid.

¹⁵⁵⁵ IHTA 1984 (UK), s 141.

¹⁵⁵⁶ Eastaway and Jeffrey-Cook (1446) 295.

be subject to double taxation. For example, FET might be paid to a foreign country for property owned by the decedent and included in the decedent's gross estate for FET purposes,¹⁵⁵⁷ a form of double taxation. To avoid these circumstances, 'double taxation relief'¹⁵⁵⁸ or 'foreign death credit'¹⁵⁵⁹ is available in both systems. The foreign death credit allows for foreign WTT to be paid if the property located in that country is also subject to FET/FGT.¹⁵⁶⁰

The question also arises as to the purposes of 'double taxation relief' or 'foreign death credit' under the WTT systems. Ultimately, these reliefs seek to avoid the harshness of double taxation. In other words, they are designed to mitigate the effects of double taxation¹⁵⁶¹ that may also be provided for by a double tax treaty with the foreign country. It is vital to note that the estate of the decedent will be allowed either credit relief under the treaty or the s 2014 credit, but not both.¹⁵⁶² If foreign WTT was charged on the same property, it will also be chargeable to IHT, and the available relief may be allowed under the unilateral double tax relief provision in the UK legislation¹⁵⁶³ or based on the specific terms of a double tax agreement between the UK and that country.¹⁵⁶⁴

In addition, a limited FET credit was available that required the WTT to be paid in any state in the US (or territory or the District of Columbia).¹⁵⁶⁵ Such WTT was often called a 'pickup tax'¹⁵⁶⁶ because its purpose was to preserve for the state a portion of the taxes that would otherwise go to the federal government.¹⁵⁶⁷ Unlike the federation states of the US, which have separate levels of tax authority that impose WTT within their tax systems, Thailand is a unitary state that imposes its own taxes as one single system. Therefore, a credit will not benefit Thailand and is beyond the scope of this research.

In summary, Thailand's future WTT should include measures for reducing or eliminating the heavy tax burden in order to avoid certain difficulties. These measures should be cautiously selected from the two compared tax systems in order to design an

¹⁵⁵⁷ IRC (US), s 2014(b).

¹⁵⁵⁸ IHTA 1984 (UK), s 159.

¹⁵⁵⁹ IRC (US), s 2014(a).

¹⁵⁶⁰ IRC (US), s 2014(b)(1) and (2).

¹⁵⁶¹ Bloom and others (n 1209) 182.

¹⁵⁶² Ibid.

¹⁵⁶³ IHTA 1984 (UK), s 159.

¹⁵⁶⁴ IHTA 1984 (UK), s 158.

¹⁵⁶⁵ IRC (US), 2011(a).

¹⁵⁶⁶ Joseph J Cordes and others (eds), *The Encyclopaedia of Taxation & Tax Policy* (The Urban Institute Press 2005) 119.

¹⁵⁶⁷ Campfield and others (n 1208) 574.

appropriate WTT for Thailand. Of course, it will be important to determine whether or not these measures would be suitable in Thailand due to differences in political, social and economic contexts, as discussed in Chapter 4. Certainly, not all measures available in the western WTT will suit Thailand. Agriculture property reliefs tend to be the most suitable because Thai society can indeed be considered an agrarian society. A further measure may be necessary for quick succession relief or credit so long as the WTT will not destroy the custom of patrilineal inheritance of the Thai people who customarily pass on all properties to their children and grandchildren. These issues will continue to be discussed and analysed in Chapter 9.

Conclusion

As discussed in Chapter 6, the provisions of the EITA 1933 were unclear and failed to integrate factors important to the Thai context. In addition, the problematic use of the system itself caused a heavy tax burden for taxpayers. This chapter has accordingly examined the distinct differences between the FET/FGT and IHT systems in order to ascertain appropriate criteria and structural characteristics for adoption in the prospective Thai WTT. These criteria should be compatible with Thailand's culture, religions, politics and economics. Although there are some differences and similarities between the FET/FGT and IHT, both systems share the same objectives: imposing taxes on wealth transfer of deceased individuals or donors under a transferor-based system; the IHT is operated as a 'single system', while the FET/FGT is operated as a 'dual system'.

Although the charges to both the FET/FGT and the IHT are similarly imposed on transfers of (value) property, they differ in terms of the details. The FET/FGT is measured by what the decedent or donor transferred to the heirs (beneficiaries) or donees, whereas the IHT is measured by reference to the loss to the transferor's estate, the so-called 'consequential loss rule'. The use of this rule, however, seems to be advantageous in measuring transfers of (value) property because its consequence will be fairer than that under the FET/FGT.

Unlike the FET/FGT, the PET regime, which has been deemed one of the most important developments in IHT code, is used under its main charging provisions. This aspect partly causes the US WTT system to differ from its UK counterpart. The main

advantage of a PET is the assumption that it will prove to be an exempt transfer when a lifetime transfer made by a transferor results in no IHT. If the transferor of the PET survives more than seven years of making PET, the PET becomes a completely exempt transfer. Consequently, not only would it be very helpful for taxpayers in WTT planning purposes, but it would also be helpful in decreasing the overwhelming duties of tax officials. Although many types of lifetime transfers are made in a seven-year period, most of them are qualified as PETs. Conversely, non-PET will usually be immediately chargeable to IHT, and the donor must deliver an account of non-PET though Her Majesty's Revenue and Customs (HMRC). As a result, tax officials may face unnecessary administrative work.

Under the principles of inclusion (or cumulation), although the term 'estate' and 'property' are not precisely defined in either tax system, they should be broadly defined to cover all types of property, rights and interest for tax purposes. It would be advantageous to prevent taxpayers from avoiding tax by instead collecting on property that falls outside the scope of the definition. While the UK cumulation principle attempts to describe an 'estate' as consisting of the aggregate of all 'property', 'property' has an extremely broad definition in order to cover all types of property and property transfer. The US inclusion principle also broadly defines what types of property or property interest FET/FGT covers in the 'gross estate' or 'gross gift'.

With regards to the taxing jurisdictions, there are differences and similarities between the uses of jurisdictional bases. They similarly use the base of the assets location (situs). While nationality/citizenship is the focus for FET/FGT purposes, it is of no tax consequence under UK general law. The domicile is only emphasised as a jurisdictional base of IHT, whereas the resident base is a taxing jurisdiction for the US. However, it seems that most Thai tax officials are more familiar with taxing jurisdictions based on the resident rule rather than the domicile rule.

Finally, the deductions, exemptions, exclusions and credits (reliefs) for both WTT systems, which fall within different categories, may be justified on the following grounds: social, administrative convenience, double charge prevention and property preservation. However, policymakers should consider which measures should be selected for adoption into the prospective Thai WTT based on Thailand's unique political, economic, cultural and religious context.

It is important to bear in mind that all criteria for both the FET/FGT and IHT are expected to be helpful in closing the loopholes of the former Thai WTT legislation. These changes should also remove as many current difficulties as possible. The most suitable criteria for adoption into the new Thai WTT must be considered. However, this chapter is only the first part of the comparative studies for both WTT systems. This discussion will continue in the next chapter.

8 Analyses of the US and UK WTT Legislations: Provisions Governing Computation and Administration

Introduction

This chapter continues from Chapter 7 to examine the differences (if any) in the structures of the US and UK wealth transfer tax systems. Thus, this chapter addresses certain matters concerning the computation of WTT liability to wealth transfer tax (WTT). It also examines issues of tax administration, appeals and penalties. More significantly, it examines the issue of property valuation. This examination is critical because it could be a potential source of conflict between the taxpayer and tax collector.¹⁵⁶⁸ It is, however, important to bear in mind that any provisions of the two tax jurisdictions applying to the ‘trust system’, such as provisions applying to settled property, is strictly outside the scope of this thesis. No such discussion will be found in this chapter because Thailand’s legal system follows civil law and thus does not recognise trusts, as demonstrated in Chapter 5.

8.1 The Computation of Liability to WTT

This section is concerned with three vital matters concerning the computation of WTT liability in both tax systems: rates of taxes and tax thresholds (or exemption amounts) that are important in calculating taxes. The section therefore begins by considering the importance of determining both the tax rates and tax threshold (or exemption amounts), which involve a tax calculating process. Then, the tax liability will be considered in order to understand who may be liable for WTT due. Before addressing such questions, however, it will be helpful to examine the WTT rates set out in the available tax schedules, as well as the tax threshold for inheritance tax (IHT) purposes.

8.1.1 Rates of Tax

Since 1976, the rates of federal estate and gift taxes (FET/FGT) have been unified in the so-called ‘unified rate schedules’ as a result of the 1976 Act that abolished separate rates for the FET/FGT. A single rate schedule is thus used to compute taxes, and both

¹⁵⁶⁸ Office of the Council of State, No. 10/2477 (n 798).

federal estate tax (FET) and federal gift tax (FGT) share the same rate schedule as described in the following paragraphs.

The current rate schedule¹⁵⁶⁹ is set forth in s 2001 (c) for FET purposes and adopted in s 2502 for FGT purposes. The current rate specified in s 2001 (c) for FGT is based on progressive rates that increase based on the total amount of prior taxable gifts made by the donor during his or her lifetime. Different rates may actually have been used in calculating FGT liability with respect to prior taxable gifts.¹⁵⁷⁰ On the other hand, the IHT rates are governed by the cumulative total value of chargeable transfers set out in the table in Schedule 1 s 7 of the Inheritance Tax Act of 1984 (IHTA 1984).¹⁵⁷¹ Unlike the FET/FGT system, IHT rates apply at a single flat rate on any chargeable transfers in excess of the ‘nil rate band,’ whereas the FET/FGT is based on progressive rates from 18 per cent to the top rate of 40 per cent; its marginal rate only applies to cumulative chargeable transfers in excess of the applicable ‘exemption amount’.¹⁵⁷² It is important to note that two years after the capital transfer tax (CTT) was replaced by the IHTA 1984, IHT became a ‘two rate tax’ as a result of the tax threshold (or ‘nil rate band’) being introduced.¹⁵⁷³ Meanwhile, the FET/FGT system incorporated various bands of incremental rates.¹⁵⁷⁴

Under the IHT system, if such chargeable transfers are more than the tax threshold, IHT is currently imposed at a flat rate of 40 per cent, which applies only to chargeable transfers made on death or 36 per cent if the deceased’s net estate qualifies for a reduced rate as a result of charitable legacies.¹⁵⁷⁵ The 20 per cent rate is also applicable for chargeable lifetime transfers and failed potentially exempt transfer (PET).¹⁵⁷⁶ It is to be noted that chargeable lifetime transfers are charged at half the rate of chargeable

¹⁵⁶⁹ The tax years 2010 through to 2012 are based on the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act that was signed by President Obama on December 17, 2010. While this law was only supposed to be in effect for two years, on January 2, 2013, President Obama signed the American Taxpayer Relief Act (ATRA 2013), which made the rules governing FET, FGT and GSTT, as enacted by Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act, permanent for 2013 and later years with one notable exception - the top rate of taxes increased from 35% under Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act to 40% under ATRA 2013. See American Taxpayer Relief Act of 2012, ‘Permanence in the Estate Planning Landscape, Estate Planning Solutions,’ Winter 2013, 1 <http://www.llo-law.com/global_pictures/winter2013_newsletter.pdf> accessed 24 June 2015.

¹⁵⁷⁰ IRC (US), s 2505 (a).

¹⁵⁷¹ IHTA 1984 (UK), Schedule 1.

¹⁵⁷² IRC (US), ss 2010 and 2505.

¹⁵⁷³ McCutcheon (n 968) 191.

¹⁵⁷⁴ Williams and others (n 918) 92.

¹⁵⁷⁵ IHTA 1984 (UK), Sch 1A.

¹⁵⁷⁶ McCutcheon (n 968) 199.

transfers on death.¹⁵⁷⁷ Similar to FET/FGT, a unified rate structure applies to IHT on chargeable transfer during lifetime and on death; however, the lifetime transfers rate is 50 percent lower than the rate of charge applicable to transfers on death. The highest rates of FET/FGT (currently 40 per cent) are equal to those in IHT. However, when comparing how both WTT systems affect any taxpayer, it is necessary to take into account the impact of both the graduated rates of FET/FGT and the much more generous applicable exclusion credits available through tax planning.¹⁵⁷⁸ Both systems will be considered for adoption in drafting the new Thai WTT legislation; however, they will be discussed in further detail in Chapter 9.

8.1.2 Threshold Rate and Exemption Amount

In calculating IHT due on chargeable transfers, the available ‘threshold’,¹⁵⁷⁹ more commonly known as the ‘nil rate band’, must be ascertained because no IHT is payable if the chargeable transfers or failed PETs do not exceed the IHT threshold. However, for FET/FGT due on (cumulative) taxable transfers, the applicable ‘exemption amount’,¹⁵⁸⁰ can be transferred free of FET/FGT. With regard to the IHT threshold (or ‘nil rate band’), the IHT threshold (or ‘nil rate band’) for transfers made from 6 April 2009 to 5 April 2015 will be 325 000 GBP not liable for IHT.¹⁵⁸¹ With regard to the ‘exemption amount’, the progressivity of either the FET or FGT rate was more obvious than real.¹⁵⁸² The same rates structure is applied, whether during the lifetime or upon death, to cumulative taxable transfers exceeding the 5 340 000 USD applicable exemption amount in 2014.¹⁵⁸³

Both the FET/FGT and IHT systems appear to set out two different levels of exemption or tax thresholds. Thailand’s WTT should consider these levels in introducing its own WTT, particularly in terms of the factors that should be used in determining the exemption amount or nil rate threshold for future tax years.

¹⁵⁷⁷ IHTA 1984 (UK), s 7(2).

¹⁵⁷⁸ Williams and others (n 918) 92.

¹⁵⁷⁹ The IHT threshold (or ‘nil rate band’) is the amount up to which any chargeable transfers will have no IHT due.

¹⁵⁸⁰ In practice, the term ‘applicable exemption amount’ has been referred to by tax planners and tax scholars (and the code), but it is sometimes called the ‘applicable exclusion amount’ or ‘exemption equivalent.’ In fact, these terms are actually a ‘unified credit’ against FET and FGT set forth in s 2010 and s 2505, respectively. It is one of the two most special and significant credits available for reducing tax liability under the US WTT regime. However, the amount of credit against FGT used under s 2505 does not reduce the credit allowed under the FET in s 2010.

¹⁵⁸¹ S 7 states that the IHT nil rate band is set out in a table in Schedule 1, which is 325 000 GBP in the IHTA 1984.

¹⁵⁸² Willbanks, *Federal Estate and Gift Taxation: An Analysis and Critique* (n 1092) 27.

¹⁵⁸³ Since January 1, 2014, the FET exemption amount has been 5 340 000 USD.

Before answering the above question, it will be useful to identify the current tax threshold rates (or ‘nil rate band’), the exemption amount and proposed revisions for the future. The IHT threshold (or ‘nil rate band’) has increased gradually each year to its current rate of 325 000 GBP in 2014 and 2015¹⁵⁸⁴; this threshold will be frozen at 325 000 GBP until April 2018,¹⁵⁸⁵ and the 40 per cent IHT rate above the nil rate threshold has remained frozen since 1988.¹⁵⁸⁶ The FET exemption amount has increased gradually from 1997 to 2015, although its rate has significantly decreased.¹⁵⁸⁷ The FET/FGT exemption amount is equal to the American Taxpayer Relief Act of 2013 (ATRA 2013), similar to IHT. As such, the chargeable lifetime transfers and transfer on death share the same nil rate.

To answer the above question, it necessary to begin by choosing which measures should be used in determining a ‘nil rate band’ or ‘exemption amount’ for future tax years. A comparison has been made between the ways in which both the US and the UK link the level of the nil rate band or exemption amount to certain indexation factors for each country. In relation to the FET/FGT, the exemption amount for future tax years depends on the inflation index,¹⁵⁸⁸ which is calculated using the current consumer price index (CPI)¹⁵⁸⁹. Its amount would generally be expected to increase annually by reference to the US inflation index. In 2014, the inflation rate climbed by the smallest amount in three years, from 1.7 to 2.0 per cent (2012-14).¹⁵⁹⁰ For the last three years, therefore, the FET/FGT exemption amount would be indexed for inflation in 2011-14 according to the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act. The FET exemption amount will increase from 5 000 000 USD in 2011 to 5 120 000 USD for a decedent in 2013 due to the 120 000 USD increase in the 2012 FET exemption. For the decedents in 2013 and 2014, the amount was 5 250 000 USD and 5 340 000 USD

¹⁵⁸⁴ S 8(3) of the Finance Act 2010 (UK) states that the nil-rate band should be frozen at 325 000 GBP up to and including 2014-15.

¹⁵⁸⁵ In the 2010 budget, the British government announced that the IHT nil-rate band would be frozen at 325 000 GBP until April 2015; however, it would continue to be frozen until April 2018 according to the latest announcements on the level of the threshold on 11 of February 2013. See. ‘Inheritance tax: nil-rate band.’ <<http://www.hmrc.gov.uk/budget2013/tiin-1260.pdf>> accessed 24 June 2015.

¹⁵⁸⁶ Finance Act (UK) 2007 (c.11), s 7.

¹⁵⁸⁷ Exemption from Federal Estate Taxes: 1997 – 2015.

¹⁵⁸⁸ Rates of inflation are calculated using the current consumer price index published monthly by the Bureau of Labor Statistics (BLS).

¹⁵⁸⁹ The CPI can be viewed as a number used to measure change. In the United States, the Bureau of Labor Statistics gathers the average prices paid by consumers for hundreds of different items each month. The average is then compared to a reference base period. That base period is an arbitrary date set by the federal government. Currently, the US uses the average of goods and services from 1982 to 1984 and considers that the reference base period with a factor of 100.

¹⁵⁹⁰ US Inflation Calculator, Current US Inflation Rates 2004-2014

<<http://www.usinflationcalculator.com/inflation/current-inflation-rates/>> accessed 24 June 2015.

respectively, because there were increases of 130 000 USD and 90 000 USD in the FET exemption according to the ATRA 2013.

With regard to the IHT, the ‘nil rate band’ can normally be expected to increase annually by reference to an indexation factor. This factor has previously been the retail prices index (RPI). As s 8 states, ‘If in the future, the RPI for the month of September is higher than it was in the previous September, new rates will apply in line with this percentage increase as from the following April 6 unless Parliament determines otherwise; if the result is not a multiple of 1000 GBP, the amount is rounded up to the nearest such multiple’.¹⁵⁹¹ Generally speaking, this rule means that the increased RPI each September is applied to the rates of chargeable transfers made on or after 6 April the following year. However, Parliament may determine the rate in a manner other than by reference to the RPI.¹⁵⁹²

However, in the 2011 budget, the government announced that the default indexation factor to be used for the purposes of IHT would move from the PRI to the CPI. The effect of this change was subsequently included in s 208 of FA 2012, which amended s 8 (3) of the Finance Act 2010. This change applies to chargeable transfers beginning 6 April 2015. If the British Parliament, however, determines that the PRI should remain for IHT purposes, the use of the CPI in determining the nil rate band for future years would be subject to override.¹⁵⁹³

In comparing between the indexation factors, both the FET/FGT and IHT have been used in reference to the exemption amount and nil rate band, respectively. While the indexation factor for IHT has been the RPI rather than the CPI, the RPI has been replaced by the CPI from 6 April 2012,¹⁵⁹⁴ and its FET/FGT counterpart has used the CPI only. US exemptions have not been linked to the RPI because it is not the measure of consumer inflation in the US; however, these exemptions also do not seem to be linked to the CPI. However, there is a slight difference between the CPI and inflation index in that the CPI is used to calculate the inflation rate in the US. Thus, it will be helpful to consider the terms CPI and ‘inflation index’ further. According to the Bureau of Labor Statistics of the United States Department of Labor, the CPI is ‘a measure of

¹⁵⁹¹ McCutcheon (n 968) 145.

¹⁵⁹² McLaughlin and others (n 1269) 10.

¹⁵⁹³ Ibid.

¹⁵⁹⁴ HM Revenue and Customs, ‘Inheritance Tax Nil Rate Band: Switch to Consumer Prices Index’

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192092/inheritance_tax_indexation.pdf> assessed 24 June 2015.

the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services’,¹⁵⁹⁵ whereas the term ‘inflation’ is always considered as a percentage and is defined as ‘the overall general upward price movement of goods and services in an economy’.¹⁵⁹⁶ It is obvious that these terms do not thoroughly describe the nuances between the CPI and inflation index. However, the inflation rate depends significantly on CPI numbers. Moreover, the indexation factor that the US government uses for both macroeconomic and compensation purposes is the national CPI, similar to Thailand.¹⁵⁹⁷

The question often arises as to whether indexation of the nil rate band using the RPI or the CPI may be more advantageous for UK IHT purposes. The CPI and RPI are the two main measures of consumer inflation in the UK.¹⁵⁹⁸ In answering the above question, it will be useful to draw the line between the terms ‘RPI’ and ‘CPI’. In fact, the RPI usually shows a higher rate of inflation than the CPI.¹⁵⁹⁹ Between 1996 and 2011, the cumulative inflation rate shown by RPI was 53.6%, while that for CPI was 35.6%.¹⁶⁰⁰ The RPI showed a higher inflation rate primarily because these two measures differ in terms of how they are calculated.¹⁶⁰¹ This may be a problem specific to the two measures used for uprating the IHT nil rate band. Thus, British government’s proposal to move from the PRI to the CPI for determining the ‘nil rate band’ may highlight the problem of the differences between the two measures.

8.1.3 Tax Liability and Burden

This final subsection is concerned with a separate yet related matter: who is liable (or ‘accountable’) for WTT charges that arise under the main charging provisions. A person’s liability is outlined in specific provisions under the IHT and FET/FGT.

¹⁵⁹⁵ Bureau of Labor Statistics of the United States Department of Labor, ‘Consumer Price Index, What is the CPI?’ <http://stats.bls.gov/cpi/cpifaq.htm#Question_1> accessed 24 June 2015.

¹⁵⁹⁶ Bureau of Labor Statistics of the United States Department of Labor, ‘Overview of BLS Statistics on Inflation and Prices,’ <<http://www.bls.gov/bls/inflation.htm>> accessed 24 June 2015.

¹⁵⁹⁷ National Statistics Office, ‘Implications of the differences between the Consumer Prices Index and Retail Prices Index,’ 24 <<http://www.ons.gov.uk/.../consumer-price-indices/.../implications-of-the-differenced-between-the-cpi-and-rpi.pdf>> accessed 24 June 2015.

¹⁵⁹⁸ UK National Statistics, ‘Topic guide to: Price Indices and Inflation’ <<http://www.statistics.gov.uk/hub/economy/prices-output-and-productivity/price-indices-and-inflation>> accessed 24 June 2015.

¹⁵⁹⁹ Ruth Miller, ‘The long-run difference between RPI and CPI inflation’ (2011) Office for Budget Responsibility Working paper No. 2 <<http://cdn.budgetresponsibility.independent.gov.uk/Working-paper-No2-The-long-run-difference-between-RPI-and-CPI-inflation.pdf>> accessed 24 June 2015.

¹⁶⁰⁰ It should be noted that the CPI, as a measure of inflation, is lower than the retail price index (RPI). Cumulatively, from 1996-2011, CPI rose by 35.6% and RPI by 53.6%.

¹⁶⁰¹ Jill Leyland, ‘RPI versus CPI - The Definitive Account,’ (on 15 August 2011, Posted in Economics & Business, The Royal Statistical Society (RSS)) <<http://www.statslife.org.uk/significance/77-economics-business/38-rpi-versus-cpi-the-definitive-account>> accessed 24 June 2015.

8.1.3.1 Liability of WTT

Tax liability is concerned with the simple question of who is to pay the tax to the tax authority under both WTT systems. An executor or donor¹⁶⁰² can be liable to pay the FET/FGT. For the IHT, the following people may be liable for payment: the transferor, transferee, trustee, beneficiary, settlor or personal representative.¹⁶⁰³ Their liability depends on various circumstances discussed below. It is important to note from the outset that the provisions governing IHT liability are more complicated than those governing FET/FGT liability. The main provisions governing IHT liability are ss 199 to 214 of the IHTA 1984. This rule applies where more than one person is liable for the same tax, and each of them is liable for the whole tax.¹⁶⁰⁴ Provisions governing the liability for payment of taxes, whether ss 2002, 2003, 2502 (c), 6018 (a), 6324 (a) (2) or s 6324 (b), respectively apply to both FET and FGT.

8.1.3.1.1 Primary Liability

The primary liability for IHT payment on a chargeable lifetime transfer always lies with the ‘transferor’,¹⁶⁰⁵ similar to the primary liability for FGT payment imposed by s 2501, which falls upon the ‘donor’.¹⁶⁰⁶ In addition to certain circumstances, any spouse/civil partner or ex-spouse/civil partner of the transferor may personally be liable for payment of IHT. This liability is the same as for the transferor’s liability when the transferor is liable for IHT and any lifetime transfers of his/her spouse/civil partner at the time of such transfers.¹⁶⁰⁷ With regard to FET, the personal representatives of the decedent, who is the ‘executor’ and ‘administrator’ personally has primary liability for the payment of FET.¹⁶⁰⁸ The term ‘executor’ also includes the administrator and other people in possession of the decedent’s property.¹⁶⁰⁹ Thus, if there is no executor or administrator appointed, qualified, and acting, then any person in actual or constructive possession of any property of the decedent is considered the ‘executor’ for purposes of FET payment.¹⁶¹⁰ With regard to IHT on death, there are five categories of people primarily liable for tax due on chargeable transfers made at death: the deceased’s personal

¹⁶⁰² IRC (US), ss 2002 and 2502(c).

¹⁶⁰³ IHTA 1984 (UK), s 199-201.

¹⁶⁰⁴ IHTA 1984 (UK), s 205.

¹⁶⁰⁵ IHTA 1984 (UK), s 199 (1).

¹⁶⁰⁶ IRC (US), s 2502 (c).

¹⁶⁰⁷ IHTA 1984 (UK), s 230.

¹⁶⁰⁸ IRC (US), s 2002.

¹⁶⁰⁹ IRC (US), s 2203.

¹⁶¹⁰ IRC (US), s 6018 (a).

representatives, trustees, persons in whom the property is vested, persons beneficially entitled and beneficiaries.¹⁶¹¹

8.1.3.1.2 Secondary Liability

However, if the FGT is paid when it is due, then the ‘donee’ personally becomes liable for the extent of the gift as a person who has a secondary liability for payment of such tax.¹⁶¹² On the other hand, the applicable rules governing the secondary personal liabilities for payment of IHT on death, in various circumstances, applies to the ‘transferee’, who is any person whose estate is increased in value by the transfer,¹⁶¹³ any person who has an interest in possession of the property to which the IHT is attributable, or any person to whom the property becomes vested after the transfer.¹⁶¹⁴ This rule also applies to beneficiaries, whose property becomes settled, and any person who benefits from the property or income.¹⁶¹⁵ If a PET becomes chargeable as a result of a failed PET, additional tax may be due on the transfer if it was chargeable when made. Consequently, the liable persons for IHT on such chargeable transfers are those primarily liable for the payment of the lifetime transfer tax, but with the substitution of the transferor’s personal representatives for the transferor.¹⁶¹⁶ However, the beneficiaries are secondarily liable. If the estate closed before FET has been paid¹⁶¹⁷ or if the FET due is not paid, s 6324(a)(2) ‘imposes personal liability on persons who receive or are in possession of property included in the estate of the decedent to the extent of the value of the property at the time of the decedent’s death.’¹⁶¹⁸

8.2 Administration, Appeals and Penalties

This subchapter considers some of the basic rules relating to the filing of returns and the payment of transfers. It also introduces some special provisions related to instalment payments of FET/FGT. Generally, IHT is under the care and management of the Board of Inland Revenue, through one of its branches of the Capital Taxes Office. S 215 of the Act announces that inheritance tax ‘shall be under the care and management of the board’ (Her Majesty’s Commissions of Revenue and Customs). Part of the 1984 Act (ss 215 to 261) provides detailed rules concerning the administration and collection of the

¹⁶¹¹ IRC (US), s 200.

¹⁶¹² IRC (US), s 6324 (b)).

¹⁶¹³ IHTA 1984 (UK), s 199 (1) (b).

¹⁶¹⁴ IHTA 1984 (UK), s 199 (1) (c).

¹⁶¹⁵ IHTA 1984 (UK), s 199 (1) (d).

¹⁶¹⁶ IHTA 1984 (UK), s 199 (2).

¹⁶¹⁷ Yamamoto and Donaldson (n 1289) 207.

¹⁶¹⁸ McDaniel and others (n 1216) 31.

tax. Similar to the FET/FGT, it is administered under the Treasury Department by the Inland Revenue Service (IRS)¹⁶¹⁹ and headed by the Commissioner of Internal Revenue.¹⁶²⁰

8.2.1 Reporting and Payment of WTT

Applying the general rules governing the proceedings which are carried on into the administrative stage gives rise to a number of considerations. Such considerations are an important requirement for achieving the purpose of tax collection with respect to WTT reporting and payment. The following points should be borne in mind.

First of all, it is vital to note that there is a difference in the first stage of administration within both WTT systems. With regard to the IHT, subject to certain exceptions (whether excepted estates on death or exceptions for transferors and trustees), the personal representatives of a deceased person or transferee due to a failed PETs basically have a duty to deliver an account with time limits to the Revenue Department (RD) specifying, to the best of their knowledge and belief, all appropriate property and its value.¹⁶²¹ However, the US general rules require any individual making a transfer by gift in the calendar year to file an FGT return,¹⁶²² while the FET return must be filed by the executor or administrator of the estate.¹⁶²³ Both FET and FGT returns must be filed with the Internal Revenue Service at any centre¹⁶²⁴ throughout the country, but IHT accounts are to be delivered to the board.¹⁶²⁵

Second, it is important to compare payment requirements for the FET/FGT and IHT. With regard to the due date, the IHT is due six months after the end of the month in which the transfer take place,¹⁶²⁶ whereas for the FET return (Form 706), the tax is normally paid at the same time as the return regardless of when the return is filed.¹⁶²⁷ It must be filed within nine months of the decedent's death, if any return is required.¹⁶²⁸ However, IHT due on a chargeable lifetime transfer made between 6 April and 30 September is not due until the end of April the following year.¹⁶²⁹ In the case of

¹⁶¹⁹ IRC (US), s 7802.

¹⁶²⁰ IRC (US), s 7803.

¹⁶²¹ IHTA 1984 (UK), s 216.

¹⁶²² IRC (US), s 6019.

¹⁶²³ IRC (US), s 6018.

¹⁶²⁴ IRC (US), s 6091 (b).

¹⁶²⁵ IHTA 1984 (UK), s 216 (1).

¹⁶²⁶ IHTA 1984 (UK), s 226 (1).

¹⁶²⁷ IRC (US), s 6151.

¹⁶²⁸ IRC (US), s 6075.

¹⁶²⁹ IHTA 1984 (UK), s 226 (1).

additional IHT for failed PETs, the tax is due six months after the month in which the death occurred.¹⁶³⁰ For the FGT return, the tax payment is normally due at the same time as the return and must normally be filed before 15 April following the close of the calendar year for reportable gifts.¹⁶³¹

Third, where the taxpayer does not have the ability to pay taxes in full on the due date, several code sections provide possible ways to pay the tax liability in instalments or extend the deadline for payment. With regard to the IHT, in certain circumstances, it is possible to pay the tax due on a chargeable transfer with instalments, a periodic charge or an exit charge. Generally, the tax due must have been attributable to land, certain shares, a business or woodlands. The instalments on chargeable events occurring after March 14, 1983, may be paid over 10 years with equal annual instalments.¹⁶³² Similar to the UK, the US general rules provide an opportunity to defer payment of FET/FGT. The IRS must authorise the tax payment deadline for a period not in excess of six months from the date fixed for payment. This rule applies to both the FET and FGT, except the period of extension for the FET may be as long as 12 months.¹⁶³³ It sometimes extends up to 14 years if it is more than 35% of the decedent's adjusted gross estate, which consists of an interest in a closely-held business.¹⁶³⁴

It is to be noted that the provisions governing the interest on tax non-payments (or unpaid taxes), tax underpayment and tax payment under extended time arrangements (or deferred taxes) are found in both WTT systems. Like the FET/FGT, unpaid IHT carries interest on all transfers, and the current rate is applicable to deferred and underpaid taxes, adjusted for inflation. However, the interest rate on a deferred IHT will not specifically apply to certain taxable value, unlike the US system where the interest rate on deferred FET is only attributable to the taxable value of a closely-held business.¹⁶³⁵

8.2.2 The Valuation of Property

Although many properties obviously need no valuation, some are required a valuation. Some property is simple to value, such as cash or marketable securities.¹⁶³⁶ However, many other properties can be difficult to value and cause controversy, particularly when

¹⁶³⁰ IHTA 1984 (UK), s 226 (3), (3A).

¹⁶³¹ IRC (US), s 6075 (b)(1).

¹⁶³² IHTA 1984 (UK), s 227.

¹⁶³³ IRC (US), s 6161 (a) (1).

¹⁶³⁴ IRC (US), s 6166.

¹⁶³⁵ IRC (US), s 6621 (a)(2) and s 6601 (j)(1)(B).

¹⁶³⁶ Treasury Regulation (US), s 20.2031-2(b)(1).

the asset is unique or does not have regular market quotations.¹⁶³⁷ In practice, the process of such valuation is notoriously inexact and difficult.¹⁶³⁸ Moreover, the valuation being uncertain has caused disputes between the estate and the tax authority and always ‘leads to litigation and testimony from competing valuation experts.’¹⁶³⁹ In particular, the Her Majesty’s Revenue and Customs (HMRC) ‘considers valuation to be an area of ‘high risk’ in terms of the potential loss of IHT.’¹⁶⁴⁰ There is an increased risk of a successful challenge, where the valuation appears too low to the HMRC.¹⁶⁴¹ As was mentioned in the previous chapter, the valuation of property was one of the key factors causing the failure of the Estate and Inheritance Tax Act of 1933 (EITA 1933). Its provision governing the valuation of property set forth in s 10 was very unclear because the term ‘market value’ that was not precisely defined. This ambiguity resulted in a legal loophole allowing the taxpayer to escape paying EIT, and thereby, giving officials the opportunity to be corrupt.

This comparative discussion of the provisions governing the valuation of property starts by considering the meaning of the term ‘value’, which is used in s 2031(a) and 2512(a) for FET/FGT, as well as in s 160 for IHT. In applying these valuation rules, with two primary questions must be considered. First, one has to determine how a gift of property or property in the decedent’s estate is to be valued for FET/FGT and IHT purposes. The question also emerges of what methods are commonly used to determine the value of property. Because property values fluctuate due to several factors, the value of various types of property must inevitably be fixed as of a specific date;¹⁶⁴² hence, the question then emerges of when to value the gift of property or property in the decedent’s estate for FET/FGT and IHT purposes.

FET/FGT rules governing the valuation of property or interest in property transferred are contained in ss 2031 through 2032A (in the case of the FET) as well as in s 2512 (in the case of the FGT). Numerous special valuation rules are also contained in ss 2701 through 2704 in Chapter 14 of the Inland Revenue Code (IRC). Unlike the FET/FGT, IHT valuation rules are contained in a number of provisions in Part 4 (ss 160 through 189) of the IHTA 1984, which refers to different standards. There are two kinds of rules governing the valuation for FET/FGT and IHT purposes: the general valuation rule and

¹⁶³⁷ Treasury Regulation (US), s 20.2031-6(b).

¹⁶³⁸ McCutcheon (n 968) 719.

¹⁶³⁹ Bloom and others (n 1209) 252.

¹⁶⁴⁰ McLaughlin and others (n 1269) 83.

¹⁶⁴¹ Ibid.

¹⁶⁴² McDaniel and others (n 1216) 676.

the particular valuation rule. The discussion below concerning the rules governing property valuation under the two tax systems will focus on general valuation rules.

8.2.2.1 General Valuation Rules

Before answering the questions mentioned above, it would be helpful to begin this discussion by briefly considering how the term ‘value’ is to be defined for the purposes of the two taxes. If it is important for a definition to be given, one would expect the main legislations to provide one. Unfortunately, both the IRC and IHTA 1984 fail to define the term ‘value’. It is left to the regulations that define ‘value’ as ‘fair market value’, similar to the FGT definition in general. S 2031 provides that, for the decedent’s property in the gross estate, its ‘value’ at the date of death is to be considered the amount of such an estate; meanwhile, s 2512(a) states that if a gift is made in property, its ‘value’ at the date of the gift is to be considered the amount of such a gift. These provisions do not purport to define the term ‘value,’ but they fix specific dates for the purposes of the two taxes. There is no single provision of the IRC and IHTA 1984 supplying the required definition. Because the statute itself is not helpful in defining the meaning of the term ‘value’, the meaning of a word as customary as ‘value’ appears simple. However, this word has never been easy to define because many experts in various fields have different opinions on its meaning.¹⁶⁴³ Nevertheless, one can assume that ‘value’ is a self-defining term.¹⁶⁴⁴ The term ‘value’ is used in ss 2031 and 2512 for the purposes of the FET/FGT, and treasury regulations equate the term ‘value’ with ‘fair market value’. On the other hand, the term ‘value’ is used in s 160 for IHT purposes and equates it to ‘open market value’. These uses of the word make its meaning much more specific.

The value standards used in the general valuation rules for FET/FGT and IHT purposes can be found not only in the main provisions of IRC and IHTA 1984, but also in the extended regulations for the FET/FGT. While s 2031 controls the general valuation in the vast majority of estates, s 2512 controls the general valuation of a gift made in property. On the other hand, s 160 controls the general valuation of all property for the purposes of IHT.

¹⁶⁴³ Ibid 676.

¹⁶⁴⁴ Campfield and others (n 1208) 168.

8.2.2.1.1 'Fair Market Value' Standard

S 2031 or 2512 is the starting point in valuing the sum of the property and the interest in the property included in the 'gross estate' or 'gross gift', respectively. Although these provisions are very brief, the rules on valuation set forth in s 2031 or 2512 are amplified by the treasury regulations. In effect, the FET general valuation rule set forth in s 2031 requires inclusion in the gross estate of an amount equal to the 'fair market value' of the property and interest in the property from the date of the decedent's death. Ultimately, these amounts are based directly on the valuation, and its value is fixed on the decedent's death date, unless an alternate valuation under s 2032 is applied. Similar to the FET general valuation rules, FGT also employs the 'fair market value standard'. In other words, in considering the amount of the gift made in property, the property value is fixed to its 'fair market value' on the date of the gift. It should be noted that the same definition also applies by implication to the federal generation-skipping transfer tax (GSTT).¹⁶⁴⁵

As was discussed above, the 'fair market value' standard is expanded by the treasury regulations promulgated under s 2031. It provides the general standard to be used in fixing the property value for the purpose of the FET:

[T]he value of every item of property includable in a decedent's gross estate under sections 2031 through 2044 is its fair market value at the time of the decedent's death...The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion willing to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includable in the decedent's gross estate is not to be determined by a forced sale price.¹⁶⁴⁶

The relevant section for the FGT is nearly identical to that given for the FET above

[I]f a gift is made in property, its value at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a

¹⁶⁴⁵ Treasury Regulation (US), s 25.2512-1.

¹⁶⁴⁶ Treasury Regulation (US), s 20.2031-1 (b).

willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts. The value of a particular item of property is not the price that a forced sale of the property would produce.¹⁶⁴⁷

In practice, application of the above regulations governing the ‘fair market value’ standard gives rise to a number of considerations for general types of property or interest in property that fail to be valued. Therefore, the following points should also be borne in mind.

The Willing Buyer-Willing Seller Concept

The ‘fair market value’ standard is an objective test utilising hypothetical willing buyers and willing sellers in the marketplace.¹⁶⁴⁸ The ‘willing buyer, willing seller’ concept generally is employed in valuing transferred property under the standard of ‘fair market valuation’. This standard is defined as the ‘price’ a ‘willing buyer’ and a ‘willing seller’ would arrive at after arm’s length bargaining where there is no compulsion to buy or sell. The hypothetical willing buyer is assumed to have full knowledge of all relevant facts, which has the effect of increasing or decreasing the fair market value.¹⁶⁴⁹

It is vital to note that the ‘willing buyer-willing seller’ concept is important because it forms the basis for the valuation of FET/FGT.¹⁶⁵⁰ This concept is based on, what is often known as the ‘highest and best use,’ due to ‘fair market value’ and is determined with reference to its ‘highest and best use’.¹⁶⁵¹ This means that property is valued at the “highest and best use” to which such property could be put, rather than the actual use at the time of valuation.¹⁶⁵²

The Valuation Dates

However, certain rules concerning the valuation date and the property subject to tax apply separately and sometimes differently for FET/FGT purposes. Although the valuation date is a factual determination, there are certain applicable rules that must also be considered. In the case of the FGT, the valuation date is based on the date of the gift made. However, for FET, the value is fixed at the date of death unless the personal

¹⁶⁴⁷ Treasury Regulation (US), s 25.2512-1.

¹⁶⁴⁸ *United v. Cartwright*. 411 U.S. 546 (1973).

¹⁶⁴⁹ Treasury Regulation (US), s 20.2031-1(b).

¹⁶⁵⁰ *Campfield and others* (n 1208) 169

¹⁶⁵¹ H.R. Rep. No. 1380, 94th (US) Cong., 2d Sess. 3, 21 (1976).

¹⁶⁵² *Campfield and others* (n 1208) 248.

representative elects to value the property included in the gross estate within 6 months after the date of the decedent's death.¹⁶⁵³ It is the value of the property on the transfer date that is critical due to the 'taxable gift', which is valued for FGT purposes as of the date the gift is made. Thus, the issue depends on the substantive rules once a gratuitous transfer is complete.¹⁶⁵⁴ For the FET, the value is attached at the instant of death. The value of property or interest in the property included in the decedent's estate is its 'fair market value' immediately after death, not the instant before death.¹⁶⁵⁵

The Alternate Valuation Date

Although there is a general rule governing the valuation date, the asset must be valued on the date of the decedent's death. The personal representative of the estate may, under s 2031, elect to value all of the included assets exactly six months after the date of death. This exception permits the selection of an alternate valuation date and is only applicable to the FET. The purpose of the alternate valuation date is to prevent an untoward tax burden of estate assets at excessively and unrealistically high values.¹⁶⁵⁶ It is 'a relief against the estate's sudden decline in value after death and before the tax return due date'.¹⁶⁵⁷ In fact, the predecessor of this provision was enacted in 1935 following the Great Depression in which many estates declined in value and had lower values that might improve six months from the date of death.¹⁶⁵⁸ It is vital to note that the FET allows the employment of both an alternate valuation date election and a special use valuation, neither of which are allowed within the FGT system.¹⁶⁵⁹

To sum up, whether the property is included in the 'gross estate' or a gift, it must be taxed on the basic value of all items in the property. The FET/FGT is measured using the 'value' of the property transferred as a death or lifetime gift. The FGT rules governing valuing various types of property or interest in property are the same as those employed under the FET concerning actuarial valuation tables for the remainders as well as life estates and annuities.¹⁶⁶⁰

¹⁶⁵³ IRC (US), s 2031.

¹⁶⁵⁴ IRC (US), s 2512(a).

¹⁶⁵⁵ *Goodman v. Commissioner*, 234 F.2d 264 (3d Cir. 1957).

¹⁶⁵⁶ *Campfield and others* (n 1208) 172.

¹⁶⁵⁷ *Bloom and others* (n 1209) 98.

¹⁶⁵⁸ *Campfield and others* (n 1208) 172.

¹⁶⁵⁹ IRC (US), s 2512.

¹⁶⁶⁰ Treasury Regulation (US), ss 25.2512-5 and 20.2031-7.

8.2.2.1.2 ‘Open Market Value’ Standard

On the other hand, the general rule governing valuation for IHT is found in s 160, except as otherwise provided. The general valuation rule is set out in this provision:

... [T]he value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at the time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time.¹⁶⁶¹

This provision indicates that the sale referred to in s 160 is an entirely hypothetical sale. In fact, the term ‘the open market’, referred to in this provision, does not really exist. Thus, it is necessary for the court to envisage a hypothetical market with certain characteristics in terms of properties.¹⁶⁶² The value is determined with reference to its ‘price’, which means the best possible price could reasonably be obtained if it were actually sold in the open market at the relevant time, often known as the ‘open market value’. However, one cannot assume that the hypothetical vendor would go to extremes to increase the price the property might otherwise fetch, and the price must not be reduced on the grounds that the whole property is placed on the market at the same time.¹⁶⁶³ In short, the ‘open market value’ is defined as ‘the best price’ available from a hypothetical purchaser on the market, regardless of the highest prices.¹⁶⁶⁴

A distinction needs to be drawn between the standard used in the valuation of property for FET/FGT purposes and the standard used in the valuation of property for the IHT. Unlike IHT, the ‘fair market value’ is determined with reference to its ‘highest and best use for FET/FGT purposes’. The ‘open market’ value is determined with reference to its ‘best price’. But the ‘highest’ price is not necessarily brought into account, and the ‘best use’ is completely ignored.

8.2.2.2 Particular Valuation Rules

The valuation of property and interest in property depends very much upon all available facts and circumstances, particularly the nature of such property. Some properties have

¹⁶⁶¹ IHTA 1984 (UK), 160.

¹⁶⁶² *McCutcheon* (n 968) 722.

¹⁶⁶³ RICS Valuation Professional Group, *RICS Valuation - Professional Standards* January 2014 “Red Book” (Royal Institution of Chartered Surveyors (RICS) 2013) 274.

¹⁶⁶⁴ *Earl of Ellesmere v. IRC* [1918] 2 KB 735.

their own valuation rules, whereas other specific types of property are subject to particular valuation rules. There are many rules and techniques governing the valuation of specific types of property, which have been developed for application to specific types of property. There are those set forth in the regulations for FET/FGT purposes promulgated under ss 2031 and 2512 of the IRC. Others exist for IHT purposes and were only set forth in the provisions in the main legislation expressly dealing with the valuation of specific types of property. It must be borne in mind that if those special rules are not applicable, general valuation rules determining the ‘fair market value’ standard set forth in the treasury regulations¹⁶⁶⁵ or the ‘open market value’ standard set forth in s 160 of the IHTA 1984 govern the FET/FGT and IHT, as the case may be.

As mentioned previously, however, only ss 2032A of the IRC, together with certain regulations like ss 168 and 171 of the HITA 1984, will be selected for consideration at this point. These provisions were selected because they are the most relevant to the two distinct wealth statuses in Thailand: the majority poor and the minority rich. Most family farms use their lands for farming and small business purposes. In contrast, many rich families tend to be shareholders in private companies or invest in the stock exchange. Therefore, a discussion of the special valuation rules concerning these selected properties would be more beneficial to Thailand when introducing the new WTT.

8.2.2.2.1 Family Farms and Real Property Used in Closely-Held Businesses

The special provisions in s 2032A provide yet another method of valuation for when the estate contains substantial amounts of real estate used for farming or for closely-held business. This provision allows an executor and administrator to value that property based on its ‘actual use’ value as of the date of the decedent’s death instead of its ‘fair market value’ as determined by its ‘highest and best use’. This figure would probably be higher than the ‘actual use’ value, which is not the highest value the property might fetch on the market.¹⁶⁶⁶

In fact, the purpose of this provision, as enacted in 1976, was to relieve the heavy FET burden on particular taxpayers who are ‘land poor’¹⁶⁶⁷ farmers and other owners of real

¹⁶⁶⁵ Treasury Regulation (US), ss 20.3031-1 and 25.2512-1.

¹⁶⁶⁶ Campfield and others (n 1208) 249.

¹⁶⁶⁷ Their land may have very high value, but the actual income produced tends to be relatively low: they own so much unprofitable or encumbered land and lack funds to develop the land or pay the charges due on it. They own a great deal of unprofitable land but lack the money to maintain its fertility or improve it.

property used in connection with other closely-held business. Congress described the purpose of s 2032A as follows:

[T]he Congress believed that, when land is actually used for farming purposes or in other closely-held businesses (both before and after the decedent's death), it is inappropriate to value the land on the basis of its potential 'highest and best use', especially since it is desirable to encourage the continued use of property for farming and other small business purposes. Valuation on the basis of highest and best use, rather than actual use, may result in the imposition of substantially higher estate taxes. In some cases, the greater estate tax burden makes continuation of farming, or the closely-held business activities, not feasible because the income potential from these activities is insufficient to service the extended tax payment or loans obtained to pay the tax. Thus, the heir may be forced to sell the land for development purposes. Also, where the valuation of land reflects speculation to such a degree that the price of the land does not bear a reasonable relationship to its earning capacity, the Congress believed it unreasonable to require that this 'speculative value' be included in an estate with respect to land devoted to farming or closely-held business.¹⁶⁶⁸

The process of valuation is often known as 'special use valuation' for FET purposes.¹⁶⁶⁹ To be qualified for this special treatment, however, all requirements of s 2032A shall be met: (1) if the property is located in the US; (2) if the property passes to a 'qualified heir', i.e., a close family member; (3) if the property is being used for a 'qualified use', i.e., as a farm or in a non-farming trade or business; (4) if at least 50 per cent of the gross estate is real and personal property is farmed or used in a family business; and, (5) if at least 25 per cent of the gross estate is real property farmed or used in a family business by a member of the decedent's family for at least five out of the last eight years preceding the decedent's death. If all of these requirements are met, the executor and administrator are able to elect to value certain 'qualified real property' by employing the process of special-use valuation; otherwise, it is valued at its highest and best use.¹⁶⁷⁰

¹⁶⁶⁸ Joint Committee on Taxation, 94th (US) Cong., 2d Sess., General Explanation of Tax Reform Act of 1976, 537 (1976).

¹⁶⁶⁹ Yamamoto and Donaldson (n 1289) 136.

¹⁶⁷⁰ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 81.

8.2.2.2.2 Stocks and bonds or Shares and Securities

On the one hand, the treasury regulations set forth in ss 20.2031-2 and 20.2512-2 similarly provide detailed rules for valuing stocks and bonds when sold on an established market, such as a stock exchange. On the other hand, the rules for the valuation of shares and securities for IHT purposes fall into two categories that depend on the types of shares and securities: unquoted shares and securities or quoted shares and securities. The valuation is based on the price that they might reasonably be expected to fetch when sold in the 'open market'. This price is assumed by the special rule governing the valuation of unquoted shares and securities set forth in a single provision of the IHTA 1984. S 168 provides that 'in determining the price which unquoted shares or securities might reasonably be expected to fetch if sold in the open market, it shall be assumed that in that market, there is available to any prospective purchaser of the shares or securities all the information which a prudent prospective purchaser might reasonably require if he were proposing to purchase them from a willing venter by private treaty and at arm's length'.¹⁶⁷¹ However, in valuing the unquoted shares and securities, there are important factors that may be taken into account, including the size of the shareholding and the company.¹⁶⁷²

Unlike unquoted shares and securities, the values of quoted investment are ascertainable or readily available. The valuation of quoted shares and securities is based on the 'open market' rule. A specific provision for determining the market value of quoted shares and securities is not provided in the IHTA 1984. However, the capital gain tax (CGT) valuation is applied employing the 'quarter up' method set forth in s 272(3)(a) of the Taxation of Chargeable Gains Act 1992. Under this rule, the price to be brought into account is the lower limit of the shares for the day in question, plus one-quarter of the difference between the lower and higher limit of the quotation for that day, unless a price halfway between the highest and lowest bargains for that date is lower.¹⁶⁷³ This calculation differs from the FET/FGT counterpart where the 'fair market value' is the mean between the highest and the lowest quoted selling price on the valuation date. If there are no sales on the valuation date because the stock exchange is closed, then the market value refers to the previous price date, but in the case of the FET/FGT, the

¹⁶⁷¹ IHTA 1984 (UK), s 168.

¹⁶⁷² McLaughlin and others (n 1269) 97.

¹⁶⁷³ McCutcheon (n 968) 732.

weighted average is used. It should be noted that these valuation rules can be applied when valuing the decedent's estate and the lifetime gift under the two tax systems.

To summarise, a comparison has been made between the general valuation rules that both the FET/FGT and IHT use in determining the amount subject to both systems of WTT. Unlike IHT, with regard to FET/FGT, the value of every item of property included in the gross estate of the decedent is valued at its 'fair market value' at the time of the decedent's death, unless the executor elects an alternate valuation date. In contrast, with regard to IHT, the value of the property is the price that it might reasonably be expected to fetch if sold on the open market at the relevant time, the so-called 'open market value'. The result is that a distinction must be drawn between the fair market value and the 'open market value'. This distinction is considered in more detail in the following discussion, which examines the general rules governing property valuation.

First, the definition of 'fair market value' is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion, willing to buy or to sell and both having reasonable knowledge of relevant fact.¹⁶⁷⁴ Meanwhile, the definition of the 'open market value' is the best price available for a hypothetical purchase on the market and not necessarily the highest price. 'Price' means the best possible price obtainable, but does imply that the hypothetical vendor would go to extremes to increase the price the property might otherwise fetch. S 160 specifically states that the price should be one 'that could be reasonably obtained on the open market: the 'sale' is thus assumed to be on competitive, economic terms.'¹⁶⁷⁵ Thus, if there are a range of prices an expert appraisal would consider to be open market values, then the highest is no more likely than the lowest.¹⁶⁷⁶ On the other hand, the 'fair market value' involves 'the amount of money that a willing buyer would pay a willing seller. It is not the value of an item to a particular individual. An individual may place a higher value on a particular piece of property for sentimental reasons, for example, because it was the house in which she was raised. Such value is highly subjective and incapable of measurement.'¹⁶⁷⁷

¹⁶⁷⁴ Treasury Regulation (US), s 20.2031-1(b).

¹⁶⁷⁵ McCutcheon (n 968) 727.

¹⁶⁷⁶ Ibid.

¹⁶⁷⁷ Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* (n 1229) 47.

Second, the manner of valuation for FET purposes for property included in the gross estate is valued at its fair market value at the time of the decedent's death.¹⁶⁷⁸ For IHT purposes, however, when determining the property value for properties in a person's estate 'immediately before he died', one assumes that his death was imminent.¹⁶⁷⁹ For FGT purposes, however, gifts are valued 'on the date the gift is complete', that is, on the date that the donor has given up all power to change the beneficial ownership of the property.¹⁶⁸⁰

Third, s 2032A is designed to relieve the problem of many 'land poor' farm families. It allows the valuation of farmland and real property used in connection with other closely-held businesses by reference to its hypothetical farm earning for 'actual use' (or 'special use') rather than its hypothetical fair market value for the 'highest and best use'. If the requirements of s 2032A are met, the executor and administrator are allowed to value their farmland at its actual used value rather than at its fair market value for the purposes of FET. Without this option, the heirs and beneficiaries might be forced to sell whole or part of their farmland in order to pay the resulting FET. Thus, for example, if farmlands located on the outskirts of Bangkok are recognised as a potential site for industrial or commercial development, or have high development potential for residential areas, these farmlands certainly have a very substantive value. The economic return from those farmlands used for agricultural production, which is the actual income produced, may be comparatively low. Because of this phenomenon, the farm family who owns these farmlands may be considered 'land poor'. Accordingly, the FET burden is imposed on the substantive value of the farmland, while its actual income is insufficient to pay FET. It is unreasonable to value such farmland at its fair market value as determined by its 'highest and best use' because it would cause a heavy FET liability. Therefore, many farmland owners have no choice but to sell either all or part of their farmland to pay the FET. Many farmland owners have had to lower the size of their farms to a less economically sustainable level during their lifetimes; otherwise, the succeeding generations would be forced to sell the farmland, in effect depriving them of the opportunity to continue the customary family farm. This issue will be discussed more in the next chapter.

¹⁶⁷⁸ Treasury Regulation (US), s 20.2031-1(b).

¹⁶⁷⁹ McCutcheon (n 968) 740.

¹⁶⁸⁰ Treasury Regulation (US), s 25.2511-2.

8.2.3 Appeals

The following discussion describes the fundamentals of the appeals process. Both legislations provide detailed information about all of the mandatory reconsideration stages for making an appeal to resolve FET/FGT disputes.

8.2.3.1 Original Jurisdiction

The IHT juridical process begins when the account is delivered to the capital tax office, which determines the tax payable and then issues a notice of determination. The person on whom a notice of determination has been served may not only appeal against any determination specified in the notice, but appeal directly to the High Court or the Court of Session as follows.

First, such persons may appeal against any determination in writing within 30 days of being served, and they must specify the grounds of the appeal.¹⁶⁸¹ Currently, appeals from the revenue determination do not go to the special commissioners. Since 1 April, 2009, all appeals have to be made to the tax tribunal, which has replaced the special commissioners who heard previous IHT appeals. There are two tiers of such tax tribunals under the new IHT appeal system under the Tribunals, Courts and Enforcement Act of 2007 (TCEA 2007). The First Tier Tribunal¹⁶⁸² (FTT) hears appeals against decisions of the HMRC. Appeals of the First Tier Tribunal's decisions go to the Upper Tribunal¹⁶⁸³ (UT). Such appeals can only be made where leave to appeal has been granted because there are grounds to believe that an error of law has been made.¹⁶⁸⁴ In essence, the 'tribunals system' has now replaced the special commissioners.¹⁶⁸⁵ Under the new system, the tribunal is entirely independent of the HMRC because they belong to the Ministry of Justice.¹⁶⁸⁶ Particular to the appeals on the land valuation matters in the UK, however, are the appropriate tribunal or the High Court. The appeal to the tribunal may be submitted to the Upper Tribunal (where the land is in England or Wales), the Lands Tribunal for Scotland (where the land is in Scotland) or the Lands Tribunal for Northern Ireland (where the land is in Northern Ireland).¹⁶⁸⁷ The procedure before the appropriate tribunal is governed by rules of the

¹⁶⁸¹ IHTA 1984 (UK), s 222.

¹⁶⁸² TCEA 2007 (UK), s 3(1).

¹⁶⁸³ TCEA 2007 (UK), s 3(2).

¹⁶⁸⁴ TCEA 2007 (UK), s 11.

¹⁶⁸⁵ Abimbola A Olowofoyeku, *The Taxation of Income* (2nd edn, Cambridge Academic 2013) 14.

¹⁶⁸⁶ McCutcheon (n 968) 1088.

¹⁶⁸⁷ IHT 1984 (UK), s 222 (4), (4A) and (4B).

respective tribunal; each has its ‘own particular rules which should therefore be consulted as necessary.’¹⁶⁸⁸

Second, the appellant and HMRC may appeal directly to the High Court or the Court of Session (in application of the Act to Scotland).¹⁶⁸⁹ However, this process requires either an agreement between the appellant and the HMRC or an order from the High Court following an appellant’s application to have his or her case heard by the High Court rather than the FTT (or appropriate tribunal).¹⁶⁹⁰ In particular, the High Court must be satisfied that the matters to be decided are likely to be substantially confined to questions of law.¹⁶⁹¹ It is important to note that the general rules governing the procedure before the High Court falls under the Civil Procedural Rules 1998.

On the other hand, there are two courts of original jurisdiction in FET/FGT cases that have jurisdiction over taxpayer appeals: (1) the Tax Court and (2) the District Court and the Court of Federal Claims. The former has jurisdiction over the taxpayer’s appeals from FET/FGT deficiencies asserted by the commissioner, which occurs from all proceedings before the Tax Court. In contrast, the District Court has jurisdiction over the taxpayer in any FET/FGT cases against the federal government seeking a refund of tax previously paid. The Court of Federal Claims has jurisdiction over all FET/FGT claims, without regard of the amount, against the federal government.

8.2.3.2 Appellate Jurisdiction

For IHT, the appeal of a decision of the appropriate tribunal then goes to the Court of Appeal, the Court of Appeal in Northern Ireland, or the Court of Session, but the appeal can only be related to a question of law.¹⁶⁹² Likewise, under the US juridical process, further ‘appeals from the Tax Court are heard as a matter of right by the Courts of Appeals.’¹⁶⁹³ The appellant and the tax division of the Department of Justice may make all appeals whether from the district courts or from the Court of Federal Claims in FET/FGT cases, which go to the US Court of Appeals for the federal circuit.¹⁶⁹⁴ Afterwards, the appellant and the Office of the Solicitor General of the Department of

¹⁶⁸⁸ McCutcheon (n 968) 1090.

¹⁶⁸⁹ IHTA 1984 (UK), s 222 (5).

¹⁶⁹⁰ IHTA 1984 (UK), s 222 (3)(a) and (b).

¹⁶⁹¹ IHTA 1984 (UK), s 222 (3).

¹⁶⁹² IHTA 1984 (UK), s 225(2) and (3)(a)(b).

¹⁶⁹³ McDaniel and others (n 1216) 27.

¹⁶⁹⁴ Ibid.

Justice may appeal directly to the Supreme Court for review of the decisions of the Court of Appeals and in the rules under the *certiorari* procedure.¹⁶⁹⁵

8.2.4 Penalties

In order to ensure effective tax collection, the provisions under both tax systems generally impose numerous penalties to encourage prompt and accurate reporting and payment of both the FET/FGT and IHT. These legislations provide both civil and criminal penalties, the former being treated as additions to tax and collected as part of the tax through the deficiency procedure. Notably, the board has the power to remit or mitigate any penalty. It can also recover or entirely remit and further mitigate such penalties after judgment.¹⁶⁹⁶ The following discussion is divided into two parts in order to carefully discuss how penalties apply in certain circumstances.

8.2.4.1 Failure to File (Delivery)

Under the FET/FGT system, civil penalties are comprised of an accuracy-related penalty¹⁶⁹⁷ and a fraud penalty.¹⁶⁹⁸ There are penalties for failure to file FET/FGT returns. For such an unintended transgression, there is a civil penalty imposed of 5 per cent of the tax owed added for the first month of delinquency, and an additional 5 per cent for each delinquent month thereafter—but only up to a total penalty of 25 per cent.¹⁶⁹⁹ Similarly, there are provisions governing the civil penalties of failure to deliver accounts and provide information or documentation found in the IHT systems. Firstly, a person failing to deliver an account or provide information or documentation required by the board or tax tribunal is liable to a civil penalty of up to 100 GBP but not exceeding 3 000 GBP here the default continues.¹⁷⁰⁰ Secondly, a person failing to deliver an instrument of variation and pay additional tax required by s 218(A) is liable to a civil penalty of up to 100 GBP but not exceeding 3 000 GBP where the default continues.¹⁷⁰¹ Finally, a person failing to make an s 218 return (regarding the provision of information as to the making of an overseas trust); failing to comply with a s 219 notice (regarding the provision of general information to the HMRC); or failing to comply with a 219A notice (regarding the provision to produce documents or copy

¹⁶⁹⁵ Ibid.

¹⁶⁹⁶ IHTA 1984 (UK), s 253.

¹⁶⁹⁷ IRC (US), s 6662.

¹⁶⁹⁸ IRC (US), s 6663.

¹⁶⁹⁹ IRC (US), s 6651 (a)(1).

¹⁷⁰⁰ IHT 1984 (UK), s 245.

¹⁷⁰¹ IHT 1984 (UK), s 245A(1A).

documents to the HMRC) is liable for a civil penalty of up to 300 GBP plus a further penalty not exceeding 60 GBP or 30 GBP a day, respectively, where the default continues after it has been declared by a court and the tax tribunal.¹⁷⁰²

8.2.4.2 Negligence and the Wages of Fraud

It is worth noting that there are distinct differences in the way penalties apply to negligence and fraud in the provisions set out under the FET/FGT and IHT systems; they thus have different consequences. First, the criminal penalties can include both felony and the misdemeanour penalties—they are heavier penalties than any of the penalties discussed above. Felony penalties will be imposed for wilfully attempting to evade tax¹⁷⁰³ and making false returns,¹⁷⁰⁴ while misdemeanour penalties will be imposed for wilfully failing to file a return or to pay tax¹⁷⁰⁵ and making false statements.¹⁷⁰⁶ Unlike the penalties applied in the case of IHT underpayment, there are civil penalties only.¹⁷⁰⁷

Second, the differentiation between negligence and fraud under the IHT system has been removed so that there is only a single penalty. No line has been drawn between fraudulence and negligence under the FET/FGT systems, thus leading to different consequences. Accordingly, if the underpayment of FET/FGT results from negligence or disregard for the rules and regulations, a penalty of 20 per cent of the underpayment is imposed.¹⁷⁰⁸ However, no penalty is imposed when the taxpayer demonstrates that he or she acted with good faith and for reasonable cause.¹⁷⁰⁹ If the underpayment is due to fraud, the penalty jumps to 75 per cent of the underpayment.¹⁷¹⁰ Furthermore, an additional penalty is imposed where the taxpayer fails to pay the tax after notice and after the IRS has demanded payment.¹⁷¹¹ The UK system, however, make this statement on the issue:

If a person is liable for any tax on a chargeable transfer or a periodic or exit charge who fraudulently or negligently delivers, furnishes or produces to the Board any incorrect account, information or document, is

¹⁷⁰² IHT 1984 (UK), s 245A(1), (2) and (3).

¹⁷⁰³ IRC (US), s 7201.

¹⁷⁰⁴ IRC (US), s 7206.

¹⁷⁰⁵ IRC (US), s 7203.

¹⁷⁰⁶ IRC (US), s 7207.

¹⁷⁰⁷ IRC (US), s 6651 (a)(2).

¹⁷⁰⁸ IRC (US), s 6662.

¹⁷⁰⁹ IRC (US), s 6664 (c).

¹⁷¹⁰ IRC (US), s 6663 (a).

¹⁷¹¹ IRC (US), s 6651 (a)(3).

liable to a penalty not exceeding the difference between the amount of tax for which he is actually liable, and any other person is liable by virtue of the operation of s 8A, and the amount of tax for which he would be liable if the information supplied by him were correct.¹⁷¹²

A 247(3) adds that ‘a person not liable for any tax on a chargeable transfer or a periodic/exit charge that fraudulently or negligently delivers, furnishes or produces to the Board any incorrect account, information or document, is liable to a penalty not exceeding 3 000 GBP’.¹⁷¹³ The law continues:

Any person who assists in or who induces the delivery, furnishing or production of any account, information or document which he knows to be incorrect is liable to a penalty of up to 3 000 GBP.¹⁷¹⁴ Moreover, if after any account, information or document has been delivered, finished or produced by any person it comes to the notice of any other person that it contains an error whereby tax for which the latter is liability has been or might be underpaid, he must inform Her Majesty’s Revenue and Customs of the error; if he fails to do so without understandable delay, he is liable to a penalty as if he had himself delivered, furnished or produced the account, information or document and had done so negligently.¹⁷¹⁵

Third, unlike under the system of IHT, there is a line between wilful refusal and fraud or tax evasion in the FET/FGT system. Therefore, there are serious consequences for people who attempt to avoid paying FET/FGT wilfully or fraudulently. They are liable to a serious criminal penalty.¹⁷¹⁶ Accordingly, a wilful failure to file a return, supply information or pay FET/FGT is chargeable as a misdemeanour subject to imprisonment for not more than 1 year or a fine of up to 25 000 USD (100 000 USD in the case of a corporation) or both.¹⁷¹⁷ The FET/FGT evasion in any manner, such as the purposeful nondisclosure of taxable assets, is chargeable as a felony subject to imprisonment for not more than 5 years and a fine of up to 100 000 USD (500 000 USD in the case of a corporation) or both, together with the cost of prosecution.¹⁷¹⁸

¹⁷¹² IHT 1984 (UK), s 247.

¹⁷¹³ IHT 1984 (UK), s 247(3).

¹⁷¹⁴ IHT 1984 (UK), s 247(4).

¹⁷¹⁵ IHT 1984 (UK), s 248(2).

¹⁷¹⁶ IRC (US), s 7203.

¹⁷¹⁷ *Ibid.*

¹⁷¹⁸ IRC (US), s 7201.

Conclusion

The foregoing discussion reveals distinct differences between the US and UK WTT systems concerning the tax rates and thresholds. While the IHT rates apply a single flat rate on any chargeable transfers in excess of the 'nil rate band', the FET/FGT is based on progressive rates from 18 per cent to the top rate of 40 per cent; its marginal rate only applies to cumulative chargeable transfers in excess of the 'exemption amount'. On the other hand, the IHT threshold (or 'nil rate band') and the FET/FGT exemption have increased gradually each year unless frozen during certain periods. The measures used in determining the amount depends on each country's inflation index. These amounts will be calculated by reference to the current CPI which would generally be expected to increase annually. This indexation is problematic because these standards have never been used in the EIT.

With regards to the tax liability and burden, the people who are liable to pay tax to the tax authorities under both WTT systems are similar. Their liability depends on various circumstances dividing tax liability into two categories: primary and secondary. Moreover, for administration, appeals and penalties, the valuation of property seems to be regarded as a significant matter. Some uncertainties have caused disputes between the tax authorities and taxpayers, leading to litigation and testimony from competing valuation experts. The two tax systems use varying general standards in property valuation. Unlike in the IHT, the 'fair market value' is determined with reference to its 'highest and best use' for FET/FGT purposes, while the 'open market value' is determined with reference to its 'best price'. It is not necessary to use the 'highest price'. However, both general and particular valuation rules seem to have a thin line between their definitions. Whether or not one of these systems should be considered for adoption in Thailand's new WTT legislation depends on its suitability to that specific context.

The UK juridical process for the dispute settlement of IHT cases now follows a tribunal system, including the FTT and the UT. The US counterpart solely depends on the court system. The UK juridical process seems to be more flexible than the US counterpart since some appeals can be made to the High Court or the Court of Session. Appeals in the US must originate at the Court of Federal Claims, go through the Federal Circuit Court of Appeals, and end up at the Supreme Court, if necessary. Furthermore, there are differences in tax penalties in the UK and US WTT systems. While only civil penalties

are imposed under the IHT system, both civil and criminal penalties can be found in the FET/FGT system. In adopting such penalties in the Thai context, policymakers will have to decide whether heavier or lighter penalties should be applied. However, the law should significantly take into account the necessity to preserve the sanctity of the tax and to encourage obedience to tax law, thus minimizing tax avoidance.

These approaches, including those from Chapter 7, would be helpful in closing the loopholes found in the former Thai legislation. They may also help to prevent the former difficulties, employing them to design a better WTT system for Thailand. Both the FET/FGT and IHT provisions will significantly contribute to analysing and assessing the new Thai WTT in the next chapter. They need to be addressed in order to achieve the desirable objective of redistributing wealth and narrowing the gap between the rich and the poor in Thailand. It is crucial for the Thai government and legislators to find suitable approaches, and they must be selective in adopting them into the Thai tax system rather than simply copying these systems exactly. This point will be discussed in more detail in Chapter 9.

9 Analyses and Assessment of Introducing the WTT in Thailand

Introduction

There exist a number of significant issues of concern for any proposal seeking to introduce the wealth transfer tax (WTT) in Thailand. The first concerns the whole notion of introducing a WTT in Thailand, and the objective of taxes in Thailand's context. Second, if Thailand decides to introduce the WTT into its tax system, there remain concerns about jurisdiction bases, and suitable criteria for the tax. The third issue concerns appropriate measures for relieving WTT burdens. Fourth, some key issues concerning tax computation and collection administration should be considered, such as tax rates, tax thresholds, property valuations, tax appeals and tax enforcement. Fifth, necessary measures against tax avoidance need to be considered.

This chapter examines the case for introducing a WTT in Thailand, and examines the type of WTT that should be introduced. The preceding two chapters examined the differences in the structures of the US and UK WTT systems. This chapter examines whether there are aspects of either system that would be suitable for Thailand to adopt or implement when introducing its WTT system.

9.1 Should a WTT be introduced in Thailand? If so, which WTT Systems are suitable in this context?

During four decades of development, Thailand has encountered issues with income and wealth distribution. At present, there is a large gap between the richest and poorest people.¹⁷¹⁹ Narrowing this gap has been a subject of debate for decades. After ending the absolute monarchy in 1932, the People's Party (*Khana Ratsadon*) raised the issue of the economic gap to support the revolution of 1932. It then proposed to solve the problem through the enactment of the Estate and Inheritance Tax Act of 1933 (EITA 1933). Nonetheless, the idea of introducing a WTT in Thailand remains controversial. Even though some commentators have accepted the concept, they pay more attention to

¹⁷¹⁹ Pranee Tinnakrom, 'Difference of the distribution of income during the four decade period of B.E. 2504-2544 (A.D. 1961-2001)' in Five decades of Thai economic development plan, Document for an academic conference of the Faculty of Economics, Thammasat University, for 2002.

national economic equality.¹⁷²⁰ There have been many arguments against the introduction of the WTT. Thai economists and academics have noted that the WTT still faces obstacles in management and administration, including tax avoidance and potential injustice to taxpayers arising from clerical errors.¹⁷²¹ Such errors have reduced government revenue from the WTT, and opponents continue to cite this problem in debates.¹⁷²²

9.1.1 Why does Thailand need to introduce a WTT?

In order to determine whether it is desirable to introduce the WTT in Thailand, it is necessary to consider the objectives of taxes in the context of Thailand. The first question relates to the purpose of WTT collection. Chapter 4 introduced arguments in favour of WTT implementation, including two primary objectives for developing countries, including Thailand: financing government expenditures for promoting economic development and reducing wealth inequalities through taxing wealth transfers. These objectives would arguably conflict because economic equality is created through the distribution of wealth; therefore, economic growth will be delayed because the WTT may distort economic prosperity, reducing the labour supply, savings and entrepreneurship.¹⁷²³

However, the Thai military government has to decide whether the focus of a WTT should be to seek revenue, or to counterbalance wealth inequality in Thailand. A WTT may be an insufficient and uncertain revenue source because the revenue would depend on many factors, including death, the size of the estate, the tax rate, the efficiency of competent officials and so forth. Therefore, the Thai government should not expect to acquire significant amounts of revenue from the WTT. It would be more realistic to implement the WTT as a measure of wealth redistribution to narrow the gap between the rich and poor. The WTT could help to encourage the government to develop a social policy and to finance public services for the poor. The revenue acquired from the WTT could also promote programs and education for the underprivileged. These particular objectives would be best achieved if the WTT revenue was ring-fenced from other tax revenues and government funds. This would help ensure that the government's

¹⁷²⁰ Trachudham, 'Estate and Inheritance Tax' (n 929) 33.

¹⁷²¹ Pipatseritham 'Estate and Inheritance Tax' (n 23) 102.

¹⁷²² Ibid 117.

¹⁷²³ Gale and Slemrod, 'Rethinking the Estate and Gift Tax: Overview' (n 621) 40.

objectives are seen to be the reduction of social gaps rather than simply seeking to create additional revenue.

Furthermore, the recent Thai military junta promised to bring democracy to Thai society.¹⁷²⁴ Although the WTT would not directly help to promote and restore stability in a country struggling to maintain its democracy, it can be used as a redistributive instrument. The Thai military junta could implement the WTT in order to reach an adequate redistribution scheme supporting economic equality. When the junta attempts to restore the country's democracy, it should introduce the WTT in Thailand.

Next, the WTT could help to promote a fair and ethical society by strengthening Buddhist principles, particularly *Brahmavihara Dharma*. In Thai society, these qualities bind people in unity; they are principles that help integrate individuals into society as a whole. Nonetheless, as discussed in Chapter 4, some commentators assert that the WTT system is immoral and unfair; others argue that the WTT will erode Thai agrarian society and corrode customs of patrilineal inheritance and the hierarchical structure of the Thai family. The former would not cause a serious effect on Thai society because it can easily be solved through a highly progressive tax structure. The latter can be resolved because there are many tax reliefs and exemptions for agricultural land, and family farms can be provided for in the WTT system. While the custom of patrilineal inheritance is very strong in Thai society, the WTT would not seriously corrode the tradition of maintaining properties for successive generations.

Finally, as discussed in Chapter 3, the current Thai tax structure fails to create fairness¹⁷²⁵ because the rich proportionally pay lower taxes than the poor¹⁷²⁶ in terms of the tax burden due to structural imbalances. The Thai tax structure is imbalanced for two reasons: first, it depends more on indirect taxes rather than direct taxes. Second, there is an absence of taxes on wealth transfer. Instead, there are merely two property taxes within the category of a wealth tax base, the building and land tax (BLT) and local development tax (LDT). As discussed in Chapter 5, income and property from an inheritance do not constitute income for the purpose of an income tax under the Revenue Code (RC). If a legatee subsequently sells inherited property, an exception applies in some cases.¹⁷²⁷ Income from gifts is also exempt from tax.¹⁷²⁸ Such an

¹⁷²⁴ CKT (Interim) 2014, preamble.

¹⁷²⁵ Udomchanya (n 736) 224.

¹⁷²⁶ Charoonsri Chaihad, 'The Reform of Property Taxes in Thailand' (2003) 9(106) *Tax & Business Law Magazine* 42, 44.

¹⁷²⁷ RC, s 42 (9).

approach benefits the rich. Therefore, there is a need to adjust the structure of the tax system itself. The tax policy needs to focus more on direct taxes; alternatively, it could put emphasis on introducing more indirect taxes in the wealth tax base category. One possibility to reform the Thai tax structure is introducing the WTT, serving to counterbalance the whole tax system. It may be argued that it would be easier to simply broaden the tax bases for existing taxes. This approach might offer one possible solution, but not for Thailand because the Thai taxation system involves inequality and imbalances in the tax bases. The personal income tax (PIT) progressive tax rate is ineffectual (and to a lesser extent, the corporate income tax (CIT)), requiring economically disadvantaged taxpayers to bear a greater fraction of the tax burden. Meanwhile, the value added tax (VAT) proportional tax rate is practically regressive because the low-income consumers (taxpayers) pay a larger fraction of their income to the government compared to high-income consumers (taxpayers), as discussed in Chapter 4. Therefore, it would not be possible for Thailand to broaden the existing tax bases because it would cause the Thai taxation system to become more inequitable and imbalanced.

9.1.2 Which WTT System, the Estate or Inheritance Tax, Would Be Best for Thailand?

One issue to consider here is the most appropriate WTT system for Thailand. This system should cause the least impact on society. This matter requires consideration because the system has to suit the context of Thailand. The estate and inheritance tax (EIT) operated under a single name, meaning that the EIT was a mixture of the transferor-based system and the recipient-based system. Moreover, the gratitude gift tax was adopted as a concealed provision, integrating the gift tax with each estate and/or inheritance tax. The idea behind this integration was to prevent the deceased from avoiding both estate and inheritance taxes.¹⁷²⁹ These mixed systems can result in a greater tax burden for taxpayers. Meanwhile, while some form of WTT has been applied in most developed countries,¹⁷³⁰ most countries in the Organization for Economic Co-operation and Development (OECD) with a WTT only collect either an

¹⁷²⁸ RC, s 42 (10).

¹⁷²⁹ EITA 1933, ss 7 and 34.

¹⁷³⁰ Lily L Batchelder, 'What Should Society Expect from Heirs? A Proposal for a Comprehensive Inheritance Tax' (2008) 63 NYU Law and Economics Research Paper 1, 44 <<http://ssrn.com/abstract=1274466>> accessed 24 June 2015.

estate tax (transferor-based system) or an inheritance tax (recipient-based system).¹⁷³¹ Thailand should decide to choose one rather than both of these systems in order to prevent taxpayers from having a heavy tax burden, in essence paying taxes twice from only one single estate and/or inheritance.

In considering which WTT system is best suited to the structure of Thai taxes, it is necessary to consider whether such systems are in line with Thai economic policy. If the economic policy emphasises wealth distribution rather than economic development, an inheritance tax may be a better measure to implement the policy. Through this measure, each recipient or heir would bear the tax burden according to the value of the estate acquired. This system is fairer for the recipient than an estate tax, where each recipient or heir equally bears the tax burden regardless of the portion of the estate acquired. By comparison, if the policy focuses on economic development more than wealth distribution, an estate tax would be the obvious choice because it raises more revenue compared to an inheritance tax. The estate tax is levied on the deceased's undivided estates, while the inheritance tax is levied on the portion of the estate received by each individual recipient or heir.

While there remains an unfair distribution of income and wealth in Thailand, leading to wider gaps between the rich and poor, the introduction of the WTT should not focus only on solving this problem. It is essential to consider successful introduction and application in accordance to the context of Thai society. There are numerous issues of concern, such as the administrative costs, government revenue from the WTT, effects on Thai society and so forth. It is important that the administrative costs be lower than the government revenues derived through the tax; otherwise, the WTT will not align with the principle of economic efficiency.

In practice, however, neither tax has ever raised a significant amount of revenue for financing economic development. One of the main arguments for repealing the EIT is that the tax provided very little revenue for the government,¹⁷³² not enough to cover the expenses of tax administration. Thus, it is important to consider whether or not the tax system raises enough revenue for public expenditures in order to justify the tax imposition. In comparing between the estate tax and the inheritance tax, the estate tax system may generally have lower administrative and compliance costs than the

¹⁷³¹ See Appendix IV.

¹⁷³² See Appendix I.

inheritance tax system; the inheritance tax system inevitably imposes obligations on the number of heirs who are taxpayers with statutory liability for paying the tax, while estate tax system certainly imposes obligations on a single gross estate of the deceased. In the inheritance tax system, each heir is a taxpayer who generally holds remittance responsibility. Because the administrative and compliance costs depend upon the number of remitters, these costs tend to be higher when the tax official has to deal with larger remitters.¹⁷³³ Meanwhile, the number of heirs who have statutory liability for paying the inheritance tax will have some bearing on administrative and compliance costs because the greater the number of heirs (taxpayers), the greater the number of tax computations.¹⁷³⁴ This savings occurs because the number of estate taxpayers (the estate) is fewer than in the inheritance tax. The estate tax base is larger because it is charged on the whole estate, while the inheritance tax base is calculated by each proportion received by each heir. The more heirs, the lower the proportion of estate subject to inheritance tax; therefore, there may eventually be no consequences for each heir. Traditionally, in Thai society, there is a large extended family. Many different generations share a household, and Thai families tend to follow tradition in order to accumulate properties for their children. In such circumstances, the smaller the estate portion, the narrower the base for inheritance tax; successive generations may be less liable or have no liability for inheritance tax.

Thailand could decide to choose the inheritance tax rather than the estate tax. However, the tax threshold ('nil rate band') or exemption amount—an effective measure to reduce the WTT payable—may be very high. Past attempts to introduce the WTT in Thailand have always been met with resistance from the well-off sections of Thai society, and such individuals often have strong and direct influence on the government's economic policy.¹⁷³⁵ The maximum tax threshold or exemption amount directly impacts the amount of tax payable. The higher the threshold or exemption amount, the lower the WTT payable. This factor could potentially undermine an inheritance tax, making it insignificant due to its inability to more equitably distribute income and wealth between the rich and the poor.

Although the inheritance tax may encourage estate distribution more than the estate tax, tax imposition should not focus only on wealth. It must also consider other issues. The

¹⁷³³ Shaw and others (n 518) 1120-1121.

¹⁷³⁴ Ibid.

¹⁷³⁵ Michael Kelly Connors, *Democracy and National Identity in Thailand* (Nordic Institute of Asia Studies (NIAS) Press 2007) 102.

estate tax may affect wealth less than inheritance tax, but it does have some effects on wealth distribution, particularly when there is a single heir. The effects of the estate and inheritance tax are equivalent in terms of wealth distribution. The estate and gift tax (transferor-based system) places the tax burden on the descendant and donor, respectively, which means that there are fewer taxpayers than for the inheritance tax (recipient-based system). While the inheritance tax requires more tax officers to assess and collect inheritance tax from each heir, the estate tax requires fewer officers to collect and assess taxes a single time. Therefore, in introducing the WTT, officials should favour the estate tax (transferor-based system) because this approach will follow the principle of administrative efficiency. The question of liability for estate tax may arise if there are many heirs. The primary liability to pay the estate tax should lie with heirs who are the deceased's personal representatives or transferees (or donees) as the case may be.

Moreover, the estate tax (transferor-based system) can raise more revenue for government public expenditures than the inheritance tax (recipient-based system). Its base tax is the gross value of the deceased's estate rather than the proportion of the estate received by each heir. When the government gains more revenue from such taxes, it can distribute the revenue back to people in the form of agricultural support, education and public health opportunities. Through the transferor-based system, tax imposition should be justified as a desirable tax system following the principle of revenue sufficiency, allowing the Thai government to implement a stable financial and economic policy.

9.1.3 Is the US or UK transferor-based system suitable for Thailand?

Although the US and UK transferor-based systems are similar, they have some distinct differences with regard to their operation details. In considering which would be best suited for introduction into the Thai tax structure, it is necessary to recognize that the UK system is operated as a single system whereas the US system is operated as a dual system. While the IHT rules seem complicated, the federal estate and gift taxes (FET/FGT) rules are more comprehensive because its structure combines the FET and FGT. The dual system is sufficiently simple, making it readily understandable and easy to apply.

However, it is assumed that the UK single system may be more advantageous than its US counterpart because the potentially exempt transfer (PET) regime has been

introduced into the IHT system. The PET is unusual in having no tax on many lifetime transfers (gifts) but a tax on death transfers.¹⁷³⁶ This writer has selected the UK single system with the PET regime because it conceals a gift tax within the IHT system, which would help to motivate taxpayers to pay the tax. Under the PET regime, however, not all lifetime transfers will be chargeable because many lifetime transfers will be allowed without any tax consequences. It is submitted that the UK single system operating in tandem with the PET regime will align with Adam Smith's fourth canon, efficiency. Efficiency is one of the minimum requirements setting the foundation for a good tax system. Efficiency follows the criteria that 'every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state'.¹⁷³⁷ Therefore, the WTT collection approach should distort the economy of Thailand as little as possible.

While the structure of the UK single system with the PET regime could be more suitable than the US dual system, this does not imply that all rules of the UK IHT should be imported into the designed tax legislation. If appropriate, certain rules under both systems can be considered or put aside, as will be discussed later.

9.2 The Tax Base and Jurisdictional Bases

The following key issues will be considered in order to answer the question of how the tax base and jurisdictional bases should be formed when introducing the WTT in Thailand: the main charging provisions, the UK PET regime, transfer of wealth *vs.* transfer of capital, and the inclusion principle *vs.* the accumulation principle.

9.2.1 The Main Charging Provisions

While a charge to the FET/FGT can arise only if there have been transfers of wealth that occur at death¹⁷³⁸ or during the lifetime,¹⁷³⁹ a charge to the IHT can arise only if there is a chargeable transfer, chargeable lifetime transfer or chargeable transfer upon death. Under the EITA 1933, estate tax was chargeable on the 'gross value of the estate'.¹⁷⁴⁰

¹⁷³⁶ Boadway and others (n 471) 791.

¹⁷³⁷ Adam Smith, 'An Inquiry into the Nature and Causes of the Wealth of Nations' in Cannan E (ed) Methuen & Co., Ltd., 1904. Library of Economics and Liberty [Online] <<http://www.econlib.org/library/Smith/smWN20.html>> accessed 24 June 2015.

¹⁷³⁸ IRC (US), s 2001 'A tax is hereby imposed on the transfer of the taxable estate of every descendant who is a citizen or resident of the United States.'

¹⁷³⁹ IRC (US), s 2503 (a).

¹⁷⁴⁰ The term 'gross value of the estate' indicates the value of all property at the time of death of the deceased, as well as certain property, which had been transferred by the deceased one year prior to death. This constituted the deceased's gross estate: s 6 of the EITA 1933.

The gross value of the estate is the total value of all properties owned by the deceased at the date of death and the value of any property given away by the donor within the previous year. In making a comparison between the UK and US systems, the transaction of a ‘transfer of wealth’ or a ‘transfer of value’ are clearly described in US and UK legislation. However, EIT transactions were unclear because there was no single term of ‘transfer’ in the EITA 1933. The transaction is significant in distinguishing between taxes on wealth transfer (WTT) and other categories of tax, such as wealth tax, capital gains tax¹⁷⁴¹ and property tax. It is thus vital to expand the concept of transaction by including the term ‘transfer’ into the legislation provision introducing the WTT.

9.2.1.1 The UK PET Regime

As discussed above, unlike the FET/FGT system, the IHT system is advantageous because it applies the PET regime, which is one of the most significant developments in the IHT code. The PET regime is a helpful means for tax planning because it is assumed that a PET will be an exempt transfer when a transferor makes a lifetime transfer, resulting in no immediate IHT charge.¹⁷⁴² If the transferor of the PET survives more than seven years after making a PET, it becomes a completely exempt transfer.

Under the PET regime, most lifetime transfers qualify as PETs if they do not fall under the exempted transfer categories. Otherwise, IHT is charged on the value transferred by the chargeable transfer immediately – an immediately chargeable transfer. If its total amount goes over the nil rate band, these chargeable transfers will be entered into the transferor’s cumulative total of transfers, chargeable as lifetime transfers.¹⁷⁴³ Then, IHT is due on the chargeable lifetime transfer by the end of April the following year.¹⁷⁴⁴ This means that the more immediately chargeable transfers, the more tax collection and assessment will occur each year; consequently, the tax authorities may have more burdens and higher administrative costs. On the other hand, it relieves taxpayers of the heavy tax burden of reporting all gifts by filing tax returns, and it may also contribute to more costs of tax compliance. In order to design a desirable WTT system for Thailand, both the administrative and compliance costs should be effective, corresponding with the principle of economic efficiency. Therefore, the WTT legislation should implement the PET regime into the system. However, the duration of time the PET is chargeable if

¹⁷⁴¹ CGT is different from wealth transfer tax and does not belong to the same tax category with the WTT as the UK inheritance tax (IHT), formerly known as the CTT.

¹⁷⁴² IHTA 1984 (UK), s 3A (5).

¹⁷⁴³ IHTA 1984 (UK), s 3(4).

¹⁷⁴⁴ IHTA 1984 (UK), s 226 (1).

the transferor dies should be extended to up to ten years in order to persuade the taxpayers to pay taxes with a better tax planning process rather than avoiding the tax. However, IHT charged on failed PET can potentially be reduced by the availability of taper relief.¹⁷⁴⁵

9.2.1.2 Transfer of Wealth versus Transfer of Capital

The transfer of wealth and the transfer of capital (value) are the main concepts upon which US and UK legislation is built. The former concept is determined by wealth transferred at death and during the lifetime. The latter concept is determined by capital (value) transferred at death and during the lifetime. Nevertheless, there is a thin line between the two taxes in terms of how to measure the amount of wealth or capital transfer. The transfer of wealth can be measured by determining the total amount of the property given away and the total value of the property owned at death. On the other hand, the transfer of capital (value) can be measured by determining the total value transferred by a chargeable lifetime transfer, which is a disposition made by a person resulting in a reduction in the value of the person's estate according to the consequential loss rule.

Another line can be drawn between the ways in which both taxes are chargeable on wealth transferred or capital (value) transferred, as the case may be. Transfers of wealth at death and during lifetimes are treated differently, resulting in tax on both transfers being separately calculated; meanwhile, all transfers of capital (value) are treated similarly as a chargeable transfer made before death.¹⁷⁴⁶ So long as the deeming provision¹⁷⁴⁷ is applied, IHT on death is charged on the property of the deceased (estate), which depends on immediately chargeable or potentially chargeable (or failed PETs).¹⁷⁴⁸ From this point of view, the UK approach should be selected for introducing WTT legislation because it seems more comprehensive than the US approach, and its calculation seems less complicated.

¹⁷⁴⁵ IHTA 1984 (UK), Sch. 2, para. 1A.

¹⁷⁴⁶ IHTA 1984 (UK), ss 4 (1), 52(1).

¹⁷⁴⁷ McLaughlin and others (n 1269) 52.

¹⁷⁴⁸ An outright lifetime gift to another individual is a PET, which therefore only becomes chargeable to IHT if the donor dies within seven years of making the gift, a so-called 'failed PET'. In addition to PETs made more than seven years before the donor's death, certain lifetime transfers are exempt from IHT.

9.2.1.3 Inclusion Principle versus Cumulation Principle

The FET/FGT is imposed on ‘the value of property’ owned by the decedent at death¹⁷⁴⁹ and ‘the transfer of property by gift’ by the donor.¹⁷⁵⁰ These transactions are accumulated to determine the ‘gross estate’ and ‘gross gift’. The terms ‘gross estate’ and ‘gross value of the estate’ are similar, as used under the EITA 1933. On the other hand, the IHT is charged on the total value transferred not only by a chargeable lifetime transfer, which has been made immediately before death (or immediately chargeable transfers on death),¹⁷⁵¹ but those that are only potentially chargeable as failed PETs. The US and UK systems provide two different principles governing which properties are included in the ‘gross estate’ and ‘gross gift’ for the FET/FGT (‘inclusion principle’) or accumulated as a ‘total of chargeable transfer of value’ for the IHT (‘cumulation principle’). Both principles have advantages and disadvantages worth considering for the purpose of designing the Thai WTT.

S 6 and s 33 of the EITA 1933 did not attempt to define the property of the deceased in order to include all types of property when determining the gross estate value. These provisions are obsolete, leaving open a legal loophole to avoid the tax, as discussed in chapter 6. In comparing the US and UK systems, both inclusion and cumulation principles basically attempt broadly to define all types of property and property transfers; for example, ss 5(1) and s 272 describe an ‘estate’ as consisting of the aggregate of all ‘property’, which has an extremely wide definition beyond its ordinary meaning. On the other hand, ss 2033 and 2511 broadly define the ‘gross estate’ and ‘gross gift’ to cover all types of property or property interest. Therefore, it is submitted that this approach would be advantageous, as these principles should also be considered for the new WTT legislation in Thailand.

9.2.2 Jurisdictional Bases

There are differences and similarities between the uses of the jurisdictional base in the WTT systems of the US, UK and Thailand. Although the FET/FGT, IHT and EIT are similar in using the base of the location (*situs*) of assets, the citizen and resident bases primarily focus on FET/FGT rather than IHT, which only emphasises the domicile base. However, citizenship (or nationality) are the only jurisdictional bases applicable for EIT

¹⁷⁴⁹ IRC (US), ss 2001 and 2031.

¹⁷⁵⁰ IRC (US), s 2501.

¹⁷⁵¹ This IHT charge on death is often referred to as the ‘deeming’ provision.

purposes. Unfortunately, domicile and residence rules were not considered to be relevant under the EITA.¹⁷⁵²

While the jurisdictional bases for the US system are residence or citizenship, the UK system depends on the domicile of the transferor or deceased rather than citizenship/nationality. Questions can thus arise regarding the jurisdictional bases for the introduction of the WTT. Firstly, should domicile or residence rules be adopted? Under the recent Thai tax regime, for example, the PIT generally depends on the residence of the individual: ‘any person staying in Thailand for a period or periods aggregating 180 days or more in any tax year shall be deemed a resident of Thailand’,¹⁷⁵³ the so-called ‘deemed resident rule’. In correspondence with the PIT system, WTT legislation should apply the residence rule rather than the domicile rule. This means that the WTT should be chargeable on all property of an individual who is deemed to reside in Thailand for an aggregate period or periods of 180 days or more in the year at death, wherever his property may be situated and whatever his nationality.

Some Thais, particularly the wealthy, hold more than one citizenship/nationality, and they own properties situated in many countries. If their properties are situated in other countries, a second question arises: is the prospective Thai WTT chargeable on the transfer of all property situated overseas? The answer to such a question is that so long as the individual holds Thai citizenship/nationality, the tax will be imposed on the transfer of all property, regardless of where the property is situated and without regard for where the individual who owns the property resided. Thus, the new WTT legislation should continue to use the jurisdictional base of citizenship/nationality as applied in the EIT system. In determining the basis of the taxing jurisdiction (or the jurisdictional bases) for introducing the WTT in Thailand, the tax should depend upon the nationality/citizenship, the residence of the decedent or donor and the location (*situs*) of the properties (assets). However, as in the UK tax regime, the domicile rule will not be considered for use in the prospective Thai WTT because it is incompatible with the ‘deemed resident rule’ under the PIT system, as discussed above.

9.3 What Tax Relief Measures should be adopted into the New WTT?

Tax relief measures for reducing or eliminating heavy tax burdens on taxpayers is a crucial issue because the amount of WTT depends not only on the aggregate value of

¹⁷⁵² EITA 1933, ss 6 and 33.

¹⁷⁵³ RC, s 41.

property (or accumulated chargeable transfer of value), but on the availability of any exemptions, deductions and reliefs. Generally, such measures are essential to government policy whether stimulating the economy, controlling people's behaviours or relieving tax burdens. More specifically, the WTT should be reduced or eliminated in certain situations because such measures—taken on a limited and necessary basis—may prevent tax avoidance or serve other purposes.¹⁷⁵⁴ Some measures can also be justified on various other grounds, such as serving cultural, social and national necessity, preserving administrative convenience, exempting modest tax, preserving property and preventing double taxation. Nonetheless, any desirable measures for the prospective Thai WTT should be designed in accordance with other legislative enforcement in Thailand, including succession law, RC and so forth, as discussed in chapter 5.

In introducing the WTT, some of the EIT should be modified. Some suitable exemptions, deductions and reliefs should be introduced based on the context of Thai society, while others should be adopted from the selected jurisdictions, as described in the following subsection.

9.3.1 Modified EIT Measures

Measures for reducing or eliminating taxation are an important and complicated issue because if there are many exceptions, deductions and reliefs, the performance and roles of officials become more complex, and the total revenue collected decreases. Under EITA 1933, there are only a few EIT exemptions available for the taxpayer to be entirely exempt. S 14 of the EITA 1933 simply relates to property that was devolved to the state, political parties, charities or the Red Cross. It can be argued that the EITA 1933 did not provide adequate exemption, and its provision left open loopholes, failing to limit the amount allowed under the exemptions. In addition, EIT deductions had been made – for instance, for debts incurred prior to death and expenses after death under s 13 of the EITA 1933.¹⁷⁵⁵ However, many argue (Chapter 6) that s 13 was too ambiguous. Moreover, EIT relief was only granted in three particular circumstances: if the conditions in s 25, s 29 and Tariff 1 were satisfied. The reliefs consisted of quick succession, close relatives and annual instalments. It can be argued that the EIT reliefs may not be appropriate today because they are inadequate and obsolete. Therefore, it is

¹⁷⁵⁴ Pipatseritham 'Estate and Inheritance Tax' (n 23) 114.

¹⁷⁵⁵ EITA 1933, s 13.

also important to modify such measures by considering other applicable exemptions, deductions and reliefs that are available in the US and UK WTT systems.

9.3.1.1 Public Charity Exemption and Deduction

In s 14 of the EITA 1933, exemptions are applied for gifts to the state, Thai political parties, charities and the Red Cross.¹⁷⁵⁶ However, this provision was inadequate and inappropriate for the context of Thailand, and it was unable to achieve its goal of encouraging charitable contributions. Thais tend to prefer to donate their money, lands and other properties to Buddhist temples and monks. The EITA 1933 legislation failed to properly incentivize socially-desirable activity. This failure has affected the level of charitable donations to the non-profit sector and charities in Thailand as a whole. Organisations that assist the poor could possibly be negatively impacted if an appropriate public charity exemption (or deduction) does not exist in the prospective Thai WTT. Thus, the legislation should remain and be remedied after considering the criteria for the selected WTT systems.

The question then arises of which criteria would be suitable in introducing the WTT in Thailand: the US deduction or the UK exemption? Basically, the main difference between the US deduction and the UK exemption consists of the fact that the US deduction usually involves an amount of some qualifying expense, whereas the UK exemption is usually a flat (monetary) amount fixed by the law. The US deductions are subtracted from the value of the gross estate or gross gift, while the UK exemption is subtracted from the transfer of value, or exempt from the property itself. Both the US deduction and UK exemption provide for unlimited gifts to public charities.

The US deduction criteria should be adopted over the UK exemption because the US criteria arises from a policy decision to promote general welfare while relieving the government of the need to provide certain services; it is not an attempt to accurately reflect the net value of the descendant's inheritance. A strong welfare and service policy is needed for Thai people, especially the poor. Secondly, this criterion will correspond with the deduction criteria of the PIT provision under the RC. S 47 (7), providing a donation allowance to governmental entities and qualifying charitable organisations, as prescribed by the Minister and published in the Royal Gazette under the Royal

¹⁷⁵⁶ EITA 1933, s 14.

Decree.¹⁷⁵⁷ Currently, there are 747 organizations, public charitable institutions, clinics and educational institutions on the lists, according to s 3 of the Notification of the Ministry of Finance on Income Tax and Value Added Tax. In the absence of deduction limits indicated under the EITA 1933, the legislation could leave open loopholes for tax avoidance. It is important to consider whether or not the amount of the deduction should be limited. The answer is in favour of the US criteria: there are tax deduction limits for qualifying charitable organisations based on the size of the qualifying gifts or the percentage of the donor's properties. The criteria for consideration and announcement of organizations, public charitable institutions, clinics and educational institutions should also follow the US criteria. It should cover all corporations and associations organised and operated exclusively for religious, charitable, scientific or educational purposes, as well as veterans' organisations.

Meanwhile, the UK criteria will not be considered because it is unable to cover qualifying bodies compared to its US counterpart. There are only three main bodies that qualify for the UK exemption: UK-based charities¹⁷⁵⁸ (also includes the UK community amateur sport clubs which is open to the whole community), political parties, housing associations¹⁷⁵⁹ and other national bodies, such as the British Museum, National Gallery and any university.¹⁷⁶⁰ Nevertheless, it is crucial to consider the UK criteria of restrictions to prevent the abuse of such reliefs. For example, if a gift made to charity is conditional or defeasible, the relief will not be given.¹⁷⁶¹ In addition, if a donor has given a property to charity and continues to live in it, the relief will not apply.¹⁷⁶² Such restrictions are also applicable to gifts made to political parties, housing associations and certain national bodies. For active service and visiting forces, there is an IHT exemption for transfer on death during active service.¹⁷⁶³ The prospective WTT legislation should also provide an exemption to estates situated in Thailand belonging to Thai armed forces personnel who have Thai citizen/nationality and die during active

¹⁷⁵⁷ Royal Decree No.317 Notification of the Ministry of Finance on Income Tax and Value Added Tax. Re: Criteria for Consideration and Announcement of Organizations, Public Charitable Institutions, Clinics and Educational Institutions under s 47 (7) (b) of the Revenue Code and s 3 (4) (b) of the Royal Decree under the Revenue Code Regarding Value Added Tax Exemption (No.239), B.E. 2534 (A.D. 1991) as Amended by the Royal Decree Issued under the Revenue Code Regarding Value Added Tax Exemption (No.254), B.E.2535 (A.D. 1992).

¹⁷⁵⁸ IHTA 1984 (UK), s 23.

¹⁷⁵⁹ IHTA 1984 (UK), s 24.

¹⁷⁶⁰ IHTA 1984 (UK), s 25.

¹⁷⁶¹ IHTA 1984 (UK), s 23(2).

¹⁷⁶² IHTA 1984 (UK), s 23(4).

¹⁷⁶³ IHTA 1984 (UK), s 154.

service or face other conditions of a warlike nature, such as disease, accident or wounds inflicted in battle.

9.3.1.2 Small Gifts and Annual Exemption (or Exclusion)

S 7 and s 34 of the EIT appear to provide three different exemptions that are related to small gifts, gifts in consideration of marriage and gifts made prior to the Act. This first EIT exemption, the so-called ‘small gift exemption’, is similar to its IHT counterpart. The question may arise as to whether such an EIT exemption (or exclusion) should remain when introducing the WTT in Thailand. To answer this question, it is useful to considering the purpose of small gifts and annual exceptions (or exclusions). First, such an exception (or exclusion) can keep the tax authorities from setting taxes below the small incidental lifetime gifts or transfers on death, removing the need to keep records of and reports regarding such transfers. It also relieves taxpayers of the heavy tax burden of reporting all gifts by filing tax returns. On the grounds of administrative convenience, therefore, the EIT exemption should remain but be modified when introducing the WTT. This would add convenience to the tax administrative method, allowing the WTT system to correspond with the principle of administrative efficiency.

Secondly, such an exemption (or exclusion) can help to encourage lifetime giving to the non-profit sector or charities. It would also help to reduce the impact of taxing wealth transfers, which could affect lifetime charitable contributions and the level of charitable contributions to non-profit sectors or charities. This are Buddhists, contributing to temples and monks in traditional practices. In addition, such exceptions (or exclusions) would help to promote Thai custom because they correspond with the Buddhist concepts of ‘*Brahmavihara*’ and ‘*Sangkaha Vatthu*’. These ‘*dharma*’ are crucial in Thailand’s Buddhist religion.¹⁷⁶⁴

Nonetheless, in the EIT system, legislation annually permits exemptions in the amount of gifts not exceeding 20 GBP per donee. This maximum amount may be considered inappropriate and obsolete because it is too low for the present time. Thus, the proper amount and criteria for the exemption must be considered. To determine the maximum amount of gifts, it is important to consider indexation: the adjustment may use available indexation to match the maximum amount. If the indexation rates are increased over time, the maximum gift amount will accordingly increase.

¹⁷⁶⁴ Except in some parts of the south where many people are Muslim.

A further question then arises regarding which indexations are suitable for use in adjusting the maximum amount. One criterion for the exemptions is the inflation index, particularly the CPI. It should be adopted in order to adjust the maximum amount for introducing the WTT. The annual FGT exclusion will have its maximum gift amount indexed for inflation and will slowly increase over time. Under the indexing system set forth in s 2503(b) (2), the exclusion amount started at 10 000 USD in 1997 and increased to 14 000 USD in 2015.¹⁷⁶⁵

While the maximum amount of gifts for the EIT exemption is measured by using the term ‘per donee,’ both the FGT¹⁷⁶⁶ and IHT¹⁷⁶⁷ counterparts are measured with the term ‘per donor’. The question also arises as to whether there are differences in consequences between the maximum amount, as measured by the donor and donee. Ultimately, the term ‘per donee’ in the EIT exemption may leave open a loophole for avoiding tax because the donor may make gifts to many donees so long as the gift to each donee is not more than the maximum amount. Such gifts would not have any tax consequences. In introducing the WTT, therefore, the term ‘per donee’ should be replaced by the term ‘per donor’; as a result, gifts made by any donor below a set amount to an unlimited number of donees during the calendar year would be exempted from the WTT.

Furthermore, a unique approach for the IHT exemptions needs to be taken into consideration. Different from the US, UK legislation permits exemptions for two classes of gifts. Class one is a small gift in any tax year up to a total of 250 GBP per donor. The second is an annual exemption for lifetime gifts not exceeding 3 000 GBP in any tax year together with an exemption of lifetime gifts between 1 000 and 5 000 GBP for marriage. In introducing the WTT for Thailand, this approach would benefit taxpayers (donors) who would have three choices for organising their gift-giving based on varying amounts and differing circumstances. Thus, this exemption approach should be adopted into the new tax system.

9.3.1.3 Expense, Debt and Claim Deductions

In introducing the WTT for Thailand, some EIT deductions, such as certain debts and expenses, would remain and be modified. In addition, other deductions that were absent from the provisions of the EITA 1933 should be introduced into the tax system.

¹⁷⁶⁵ Inland Revenue Service (1511).

¹⁷⁶⁶ IRC (US), s 2503(b).

¹⁷⁶⁷ IHTA 1984 (UK), s 19, 20 and 22.

Deductions should be included in the Thai WTT system because the amount of tax paid should be based upon the principle of ability to pay. Correct determination of the ‘taxable base’ is essential because it can help the tax system be equitable in two senses: horizontal equity and vertical equity. The key concept is that the taxable estate must be the amount actually transferred to the heirs. Thus, the taxable estate does not include assets unavailable for transfer to heirs. For criteria suitable to Thailand, it is necessary to consider the US applicable deductions concerning certain expenses, debts and claims allowed¹⁷⁶⁸ for the purposes of the FET. These criteria of deduction should be considered when introducing the WTT because the FET/FGT is heavily focused on deductions for the amount of the taxable estate, while there is no mention of deductions in IHT.

Pursuant to the EITA, the provision of s 13 allowed certain deductions, which were analysed in Chapter 6 and will not be repeated here. Still, an important deduction that was absent from the provision was a deduction for casualty losses. S 2054 allows a deduction for casualty and theft losses that occur during the settlement of the estate. Deductions for losses include those arising from ‘fires, storms, shipwrecks, or other casualties, or from theft’ and only to the extent that the ‘losses are not compensated for by insurance or otherwise’. The question of what is or is not a ‘casualty loss’ is crucial because the term should be adopted in introducing the WTT to Thailand. The casualty losses should be listed in the statute and include theft, storm, fire and shipwreck. Moreover, deductible losses should be sudden and limited to those that occur during the period of administration and distribution of the estate. There will be no deduction allowed if the losses fail to satisfy the requirements of the new statute. However, a deduction should not be allowed when the estate receives reimbursement for the loss, whether from an insurance company or other source.

Furthermore, certain debts due by the estate shall be paid in accordance with the provisions in chapter II of the CCC concerning payment of debts and distribution of the estate. Although the creditors of the estate are entitled to be paid only out of the property in the estate, they were completely absent from s 13 of the EITA 1933. Such debts included the following: (1) expenses incurred for the common benefit of the estate; (2) taxes and rates due by the estate; (3) wages due by the deceased to any clerk, servant and worker; and (4) supplies of daily necessities made to the deceased and

¹⁷⁶⁸ IRC (US), ss 2053 and 2054.

ordinary debts of the deceased.¹⁷⁶⁹ For tax computation purpose, if such debts appear likely, a tax deduction shall also be taken.

9.3.1.4 Quick Succession Relief (or Credit)

The EIT's successive charges relief, internationally known as 'quick succession' relief, is only provided for under s 25 of the EITA 1933. S 25 set out various applicable percentages, up to five years following the first chargeable occasion on death and up to the second chargeable occasion on death. It is important that this relief remain when introducing the WTT because it constitutes a degree of fairness among the members of successive generations. It alleviates a double charge of tax as a result of two deaths arising within a short period of time. This principle also corresponds with the criteria of equity (or fairness) in the sense of vertical equality, which is concerned with fairness between those who are in unequal circumstances. For example, families may experience multiple deaths within a relatively short time span, creating a new transferor. The prior transferor and the current transferor should be regarded as being in unequal circumstances; thus, they should be treated differently. Relief will be differently applied to relieve the tax burden of the descendant in successive estates. The percentage will vary depending upon the length of time that has elapsed between the year of the prior transferor's death and transferor's death.

Moreover, quick succession should provide suitable relief for use in Thai society because Thailand has the custom of patrilineal inheritance, and Thais strongly believe in saving their property during their lifetime for the next generation. The successive charges relief would help taxpayers to reduce the impact of the WTT on family wealth. However, the relief should be remedied slightly in terms of the limited requirements of certain properties or rights and benefits.¹⁷⁷⁰ In designing the new WTT, all kinds of properties should be subjected to the relief equally; it should not be limited only to immovable property or certain rights and benefits. In addition, the maximum length of time between the death of the prior transferor and the current transferor should be extended up to ten years. This provision would be similar to US criteria with its maximum length of ten years after the prior transferor's death¹⁷⁷¹. This time span is

¹⁷⁶⁹ CCC, s 1741(1), (3), (4), (5) and (6).

¹⁷⁷⁰ EITA 1933, s 29.

¹⁷⁷¹ IRC (US), s 2013.

currently longer than what is provided in the UK and Thailand.¹⁷⁷² This time allowance would be fairer than the one currently specified under the Act.

9.3.2 Desirable Measures

In the EIT system, the category of the measures for reducing or eliminating tax liability was inadequate. There are other useful measures based on special grounds that apply to various purposes in different circumstances. These were absent in the EIT legislation. In designing the new WTT, some desirable measures should be adopted from the selected jurisdictions as being suitable for the context of Thai society.

9.3.2.1 The Royal Estate Exemption

We should first consider whether or not the royal estate should be exempt from the prospective Thai WTT. In the UK, the royal estate is taxable for the IHT, but not for the royal estate of the Thai monarch. Discussion of whether the royal estate should be subject to the WTT would be prohibited in the country, and may be regarded as promoting negative opinions about the institution of the monarchy in Thailand.

Politically, negative opinions about the Thai monarch should never be expressed; such expressions could cause the introduction of the WTT to fail as the most senior members of the royal family are protected from insult or threat by the criminal code.¹⁷⁷³ S 112 of Thai Criminal Code states that anyone who ‘defames, insults or threatens the king, the queen, the heir-apparent or the regent will be punished with up to 15 years in prison.’¹⁷⁷⁴ The question may arise as to whether ‘taxing the royal estate’ could be interpreted as defamation, insult or threat. This is a very sensitive issue, especially in the context of the current political climate in Thailand; thus it would be prudent to not comment on it.

In considering the basis of Thailand’s tradition, culture and beliefs, however, Thais respect and revere the King of Thailand, not because he is the country’s symbol of the Thai constitution, but because he serves as a unifying element for Thailand.¹⁷⁷⁵ Therefore, taxing the King’s private property would not currently be acceptable matter

¹⁷⁷² HITA 1984 (UK), s 141.

¹⁷⁷³ Thailand’s lese majesty laws explained, 1 December 2014 <<http://www.bbc.co.uk/news/world-asia-29628191>> accessed 24 June 2015.

¹⁷⁷⁴ This has remained virtually unchanged since the creation of the country’s first criminal code in 1908.

¹⁷⁷⁵ Royal Thai Embassy in London, Monarchy <<http://www.thaiembassyuk.org.uk/?q=node/29>> accessed 24 June 2015.

in Thai society. Thus, wisdom would dictate that, in order for the WTT to not be rejected, the royal estate should be completely free from the new WTT.

Legally, royal estate would be exempt from the prospective Thai WTT, as currently provided for by the Crown Property Act of 1936 (CPA 1936). Under this Act, the royal properties will be classified into two categories:¹⁷⁷⁶ (1) the ‘king’s private property’ that personally belongs to him before ascending to the throne (his personal property), which will subsequently be liable to taxation¹⁷⁷⁷ and (2) ‘public property’, which includes the king’s property used exclusively for the benefit of the state (e.g., the palace as well as ‘crown property’). These two categories of royal property will be completely exempt from taxation.¹⁷⁷⁸ Therefore, the crown estate, which is property derived by the king through devolution (by inheritance or gift) from the previous king, will fall into the category of crown property and remain untaxed.

9.3.2.2 Exemption for Buddhist Monks’ Estates

The question to consider here is whether or not the property acquired by a monk during his monkhood should be exempted when introducing the WTT. As discussed in Chapter 6, property transferred to the temple is not considered to be part of an estate since it forms part of the temple’s ecclesiastical property¹⁷⁷⁹ or the temple ground.¹⁷⁸⁰ Therefore, such property should be exempted from the prospective Thai WTT. However, a monk’s property should be subjected to the WTT if it meets the following characteristics: if it was acquired during his monkhood and disposed of during life or by will¹⁷⁸¹ or if it belonged to him before he entered the Buddhist monkhood and devolved to his statutory heirs.¹⁷⁸² Thus, his properties acquired during his monkhood which can be devolved to the temple or properties owned before become a monk but disposed by his will, are only exempted from the prospective Thai WTT.

9.3.2.3 Marital Deduction or Spouse Exemption

The EITA 1933 did not contain a variety of deductions or exemptions. It also omitted a marital deduction (often known as the ‘spouse exemption’ under the IHT system), which is a significant estate planning device and recognised as one of the most

¹⁷⁷⁶ CPA 1936, s 4.

¹⁷⁷⁷ CPA 1936, s 8 para 3.

¹⁷⁷⁸ CPA 1936, s 8 para 1 and 2.

¹⁷⁷⁹ Sangha Act of 1962, s 33(2).

¹⁷⁸⁰ Sangha Act of 1962, s 40(2).

¹⁷⁸¹ CCC, s 1754 para 2.

¹⁷⁸² CCC, s 1624.

important features of the FET.¹⁷⁸³ These WTT reliefs help to deliver generous tax savings, providing the surviving spouse more income and better financial protection. This measure can also create WTT savings that help the decedent's heirs or beneficiaries to acquire more capital.¹⁷⁸⁴

Separate property and community property have different tax consequences, with the community property jurisdiction previously serving to provide more WTT advantages than the separate property jurisdiction. To remove the discrepancy in treatment between separate property and community property, it is necessary to allow WTT relief in connection with community property through a marital deduction (or spouse exemption). This relief would assist in equalizing the WTT treatment between non-community and community property jurisdictions.¹⁷⁸⁵

In order to propose desirable measures in drafting Thailand's WTT in Thailand, one must consider whether there should be a marital reduction (or spouse exemption) relieving the tax burden on the surviving spouse who owned community property. This situation is called '*sin somros*' in Thai family law¹⁷⁸⁶ and permits the spouse who dies first (decedent) to pass his or her entire estate to the surviving spouse free of WTT. As discussed in Chapter 5 and 7, the primary purpose of such measures was to permit a deceased spouse to pass a separate property, a so-called '*sin suan tua*' in Thai family law, to his or her surviving spouse with the same tax consequences that would have been obtained if the spouses had lived and saved and transferred property in a '*sin somros*' regime. As Congress noted, 'A husband and wife should be treated as one economic unit for purposes of estate and gift taxes, as they generally are for income tax purposes. Accordingly, one tax should be imposed on transfers between husband and wife'.¹⁷⁸⁷ This married (spousal) unit, however, should not be regarded as a single taxable unit for WTT purposes,¹⁷⁸⁸ even if the marital unit was formerly recognized as a taxable unit.¹⁷⁸⁹ Similar to the US, under the Thai tax regime, a married couple (or

¹⁷⁸³ Campfield and others (n 1208) 614.

¹⁷⁸⁴ McNulty and McCouch (n 1029) 390.

¹⁷⁸⁵ Campfield and others (n 1208) 615.

¹⁷⁸⁶ Chapter 5, (5.1.2.).

¹⁷⁸⁷ Senate Finance Committee (n 1468).

¹⁷⁸⁸ The Economic Recovery Tax Act of 1981 abandoned the community property model as the determinant of the taxable unit and moved in the direction of regarding a married couple as a single taxpaying unit for transfer tax purposes. If the marital unit is the appropriate taxable unit, only transfers out of that unit should be subjected to transfer taxation. Transfers between spouses would be disregarded because they occur within the taxable unit.

¹⁷⁸⁹ Harry L Gutman, 'Reforming Federal Wealth Transfer Taxes after ERTA' (1983) 69(7) *Virginia Law Review* 1183, 1235.

spousal unit) seems to be regarded as a single taxpaying unit, at least for the purpose of IPT collection. As s 57Ter provides, 'If their marital status exists throughout the preceding tax year, the assessable income of the wife shall be treated as income of the husband, and the husband shall be liable to file a tax return and pay tax'.¹⁷⁹⁰ This statement assumes that Thailand will reach a conclusion about the married (spousal) unit, which is to be regarded as a single taxpaying unit for the purposes of the prospective Thai WTT.

Consequently, the properties accumulated during marriage are treated as '*sin somros*' in the Thai community property jurisdiction, and each spouse is considered to own one-half of the '*sin somros*'. Therefore, the surviving spouse owns the other half, regardless of how the title was held.¹⁷⁹¹ At death, the propertied spouse had the right to dispose of only one-half of the '*sin somros*.' This concept is also applied to gift transfers made by a living donor spouse at the time the transfer is made. Thus, only one-half of the '*sin somros*', which is included in the gross estate or gross chargeable transfer (GCT), qualifies for such tax reliefs, while the other half is not because it is not deemed to have been owned by decedent at death. Accordingly, both '*sin suan tua*' in the non-community property regime and separate property (one-half of '*sin somros*') of a spouse in the community property regime are treated equally for the purposes of WTT. From a logical perspective, therefore, it would seem reasonable enough to allow a marital deduction (or spouse exemption) in the prospective Thai WTT for the transfer of wealth between the deceased spouse and the surviving spouse, justifying the WTT relief in connection with community property.

9.3.2.4 Agriculture Property Relief

Agriculture is an engrained part of Thai culture and should not be destroyed by WTT collection. Most family farms will be affected, particularly rice farm owners who are poor. Thus, the WTT could greatly add to their economic burdens. Thailand must provide agricultural property relief for family farms. The most suitable criteria for introducing the WTT is the UK IHT because its IHT agricultural property relief¹⁷⁹² is amongst the most significant reliefs from the charge to IHT and has attracted much attention from tax planners.

¹⁷⁹⁰ RC, s 57Ter.

¹⁷⁹¹ CCC, s 1625.

¹⁷⁹² IHTA 1984 (UK), s 115-124C.

Another concern involves the purpose of such reliefs for IHT systems. Business property relief (BPR) and agricultural property relief (APR) were introduced in order to ensure that business was not broken up by the imposition of an IHT charge. This IHT relief could be very helpful in effectively eliminating the new Thai WTT that would otherwise be payable for farmers. It would be broadly beneficial to farmers and executors of farmers because more than half of the poor belong to the agricultural sector.

9.3.2.5 Heritage Property Exemption

There is no exemption available under the EITA 1933 concerning national heritage property, such as ancient monuments, antiques and art objects. The Ancient Monuments, Antiques and National Museums Act of 1961 permits any natural person to possess certain ancient monuments, antiques or art objects and may bequeath these to heirs and others.¹⁷⁹³ The question arises whether there should be a tax exemption for ancient monuments, antiques or art objects and, if so, to what extent these should be tax exempt when introducing the WTT. In answering this question, it is necessary to consider the aim of such exemptions. Is it to permit transfers of national heritage property in order to set up and fund the upkeep of such property? In particular, antique Buddha (or monk) statues and Buddhist sculptures must be treated with great respect, and they hold 'high value' because of their religious and traditional significance. Thus, this exemption should also be adopted when introducing the WTT; otherwise, the tax consequences may impact a basic characteristic of Buddhist society in Thailand. However, the suitable criteria for adoption will favour the IHT system with a conditional exemption; Thailand's tax authorities will approve qualified heritage properties.

9.3.2.6 Taper Relief

Because introducing WTT legislation may introduce the concept of the PET regime preventing double taxation, a taper relief should be permitted for the WTT. The tax charged on such a failed PET can be subject to a gradual reduction in the amount of the WTT due to the PETs and chargeable lifetime transfers made within the length of time before death. Consequently, whether the application of taper relief on a failed PET shall arise depends upon the length of the years the donor survives: the higher the number of

¹⁷⁹³ CCC, ss 1599 and 1600 and Ancient Monuments, Antiques and National Museums Act of 1961, ss 12 para 2 and 17.

years between gift and death, the higher the rate of relief. Although similar criteria also applies to a gift as credit, the reduction of the tentative FET by the FGT payable accomplishes the same result¹⁷⁹⁴ because gifts are fully addressed under the unified WTT system adopted in 1976. However, the duration of taper relief should be 10 years to correspond with the prospective PET regime.

9.4 How should the WTT be Computed and Administered?

There are many important issues to be selected and analysed in order to answer the question of how the WTT should be computed and administered. Here, the key matters for Thailand regarding tax computation will be analysed, including the proper tax rate and tax threshold. Meanwhile, matters concerning desirable tax collection administration should be improved after repealing the EITA 1933. In addition, desirable tax appeal and enforcement should be implemented into the new WTT legislation in Thailand.

9.4.1 Tax Computation

This subsection is only concerned with the most important matters concerning the computation of liability when introducing the WTT in Thailand: tax rates and tax thresholds (or exemption amounts).

9.4.1.1 US Unified Progressive or the UK Single Flat Rate

In designing the WTT, one of the most significant matters is determining the kind of tax rate that should be applied: a progressive rate, flat rate or regressive rate. Similar to the EIT, the FET/FGT in the US has been implemented with the same progressive (unified) rate schedule.¹⁷⁹⁵ Meanwhile, the UK has implemented a single flat rate of IHT on any chargeable transfers in excess of the nil rate band, 40 per cent for chargeable transfers¹⁷⁹⁶ on death and 20 per cent for chargeable lifetime transfers.¹⁷⁹⁷

When introducing the WTT in Thailand, one must consider which would be more appropriate: the UK single flat rate or the US progressive rate approach. In reaching a conclusion, it is more useful to consider the ability-to-pay principle than the benefit principle because the ability-to-pay principle implies that individuals should be taxed

¹⁷⁹⁴ IRC (US), s 2012 (e).

¹⁷⁹⁵ IRC (US), ss 2001 and 2502.

¹⁷⁹⁶ IHTA 1984 (UK), Schedule 1.

¹⁷⁹⁷ IHTA 1984 (UK), s 7(2).

according to their financial capacity (or how much they can afford to pay). Although the benefit principle often contrasts with the ability-to-pay principle, it is arguable that those who have a larger portion of the gross estate can afford to pay more tax than those who have a lower portion of the gross estate because they benefit most from state protection of wealth;¹⁷⁹⁸ therefore, the ability-to-pay principle is also consistent with achieving the benefit principle. In order to comply with the ability-to-pay principle, the tax rate should be based on a progressive rate rather than the flat rate that is currently applied in the IHT regime. In other words, the new WTT should implement the criteria of the US unified progressive rate on capital gain tax (CGT); therefore, those with less wealth should pay less tax than those with large amounts of wealth, a principle that advocates for a progressive WTT system.

As discussed in Chapter 4, certain economic principles have been selected to evaluate and design the WTT system for Thailand. In order to design a sound WTT system, it is necessary to recognize that a progressive rate would allow the WTT system to be more equitable in terms of vertical equity, while a flat rate would only create a horizontally equitable progressive tax. While the progressive tax is concerned with fairness between people with the same amount of wealth, leading estates of identical size to bear identical WTT burdens, the flat rate is concerned with fairness between people who have unequal resources; in essence, those who have a smaller gross estate should pay less WTT than those with large gross estates. Therefore, the suitable criteria for adoption favours the US progressive rate because vertical equity requires progressive taxation. Moreover, vertical equity is more important for redistributing wealth than horizontal equity because a vertically equitable progressive WTT would help collect a larger portion of the gross estate as the value of the estate increases. Accordingly, this sense of equity can be regarded as a distributional principle, redistributing wealth from those who are better off to those who are worse off. Such redistribution would assist the future WTT system in achieving its goal of social equality.

We must also determine the appropriate percentage rate when introducing the WTT. When comparing the lengths of progressive tax rates, the FET/FGT (18-35 per cent), the EIT (1-20 per cent) and the PIT (7-45 per cent) have been used in calculating such taxes. The future tax rate specified in the new WTT should be based on a progressive rate, from 20 per cent to a cap of 40 per cent. The marginal rate would only apply to

¹⁷⁹⁸ James and Nobes (n 56) 79-80.

GCT in excess of the applicable tax threshold ('nil rate band'). This principle would be suitable for introducing the WTT because it aligns with the RC in the PIT counterpart; however, the top PIT rate of 45 per cent is high compared to the 20 per cent EIT rate, which may lead to tax avoidance. The EIT length from 1 per cent to the top rate of 20 per cent was relatively low and narrow, causing insufficient revenue for government expenditures. The US bottom rate at 18 per cent does not begin at 1 per cent like the EIT lower rate, and its top rate of 35 per cent is also higher than the EIT counterpart. Corresponding with the progressivity principle, it is therefore reasonable to specify a progressive tax rate for introducing the WTT; a flat and regressive tax rate should not be taken into consideration. However, the top rate should not be too high because it may reduce the tax incentive or cause tax avoidance.

9.4.1.2 Threshold by Indexation Factors

We must also ascertain which tax threshold ('nil rate band') should be adopted for the new WTT. Under the EITA 1933, the amount actually excluded by the applicable tax threshold ('nil rate band') of 200 GBP¹⁷⁹⁹ effectively reduced the amount of EIT payable. This amount would not currently be appropriate in Thailand, as it was not universally acceptable. Therefore, it is important that future WTT legislation specify the tax threshold ('nil rate band') in accordance with international standards by referencing indexation factors, including the Inflation Index, retail prices index (RPI) or consumer price index (CPI).

It then becomes apparent that we must decide between the UK nil rate band and the US exemption amount. Under both the FET/FGT and IHT, the nil rate band or exemption amount has been linked to certain indexation factors for each country. Both depend on the measures of consumer prices inflation, such as the CPI and RPI. The use of consumer price inflation statistics for indexing tax thresholds would be an internationally recognised method suitable for any tax system. In fact, this method may be regarded as the international norm as most advanced countries use available price indexes for a wide variety of purposes, mainly for macroeconomic and compensation purposes, including taxation. Nations using such methods include Australia, Denmark, Finland, France, Germany, Netherlands, Norway and the USA.¹⁸⁰⁰

¹⁷⁹⁹ Appendices 1 and 2.

¹⁸⁰⁰ National Statistics Office (n 1597).

In order to meet international standards, the tax policymakers and authorities in Thailand should adopt the proper price indexes for the WTT threshold. The new WTT must meet such standards because it may become a worldwide tax with effects similar to the IHT, often known as ‘a worldwide tax,¹⁸⁰¹ which also applies to worldwide properties,¹⁸⁰² not just a domestic one.¹⁸⁰³ Therefore, it will involve the international dimension, which extends to two (or more) different taxing jurisdictions with foreign taxpayers, property situated in foreign countries, internationally mobile taxpayers, double taxation issues and so forth. Thus, the WTT must meet international standards for indexing tax thresholds because it will transcend national borders. The prospective Thai WTT should be designed to meet such international standards in order to become an internationally acceptable system.

The question then arises of which measures of consumer price inflation should be used as the basis for the WTT’s indexation of the tax threshold. In the UK, the CPI and the RPI, two main measures of consumer price inflation,¹⁸⁰⁴ have been utilised as macroeconomic indicators of inflation and for compensation purposes.¹⁸⁰⁵ While the CPI historically has been used as an indicator of inflation, the RPI was and is used for compensation purposes.¹⁸⁰⁶ Compared to the UK, only the CPI is currently used in the US¹⁸⁰⁷ and Thailand,¹⁸⁰⁸ a single price index for both purposes.¹⁸⁰⁹ The UK was, however, announced that ‘from April 2012, the default indexation assumption for direct taxes will switch from the RPI to the CPI’.¹⁸¹⁰ This change also includes the IHT. The CPI is currently used to index the IHT threshold similar to the US and Thailand, though the IHT nil rate band (threshold) would remain frozen at 325 000 GBP up to and including 2018.¹⁸¹¹ This freezing means that the normal indexation of the IHT threshold

¹⁸⁰¹ McCutcheon (n 968) 1065.

¹⁸⁰² Mark McLaughlin (ed), *Tax Planning 2013/14* (Bloomsbury Professional 2013) 404.

¹⁸⁰³ *Ibid* 1150.

¹⁸⁰⁴ National Statistics Office (n 1597).

¹⁸⁰⁵ *Ibid* 5.

¹⁸⁰⁶ National Statistics Office, History of and differences between the Consumer Prices Index and Retail Prices Index (2011) 12 <<http://www.ons.gov.uk/ons/rel/cpi/consumer-price-indices/history-of-and-differences-between-the-consumer-prices-index-and-retail-prices-index/history-of-and-differences-between-the-consumer-price-index-and-retail-price-index---article.pdf>> accessed 24 June 2015.

¹⁸⁰⁷ Indexes are available for two population groups: a CPI for All Urban Consumers (CPI-U), which covers approximately 87 per cent of the total population and a CPI for Urban Wage Earners and Clerical Workers (CPI-W), which covers 32 per cent of the population.

¹⁸⁰⁸ Bureau of Trade and Economic Indices, ‘Ministry of Commerce Thailand’ <http://www.price.moc.go.th/price_e/> accessed 24 June 2015.

¹⁸⁰⁹ National Statistics Office (1806) 22.

¹⁸¹⁰ Adam Mellows-Facer and Dominic Webb, ‘The 2011 Budget, Standard Note: SN/EP/5912’ 30 March 2011, 6 <<http://www.parliament.uk/briefing-papers/RP13-24.pdf>> accessed 24 June 2015.

¹⁸¹¹ Antony Seely, ‘Direct taxes: rates and allowances 2013/14’ (2013) House of Commons Research Paper 13/24 (April) 10 <<http://www.parliament.uk/briefing-papers/RP13-24.pdf>> accessed 24 June 2015.

will not apply until tax year 2018;¹⁸¹² therefore, the tax authority cannot continually raise the IHT threshold based on the CPI.

To sum up, the prospective Thai WTT should consider indexation factors in order to adjust the tax threshold based on the CPI. Any changes to the tax threshold will be announced in advance and will generally be expected to increase annually with reference to the consumer price inflation statistics of Thailand, which are calculated using the current CPI published monthly by the Bureau of Trade and Economic Indices, the Ministry of Commerce Thailand.¹⁸¹³ The use of the CPI for indexing the WTT threshold would be the most suitable indexation factor for macroeconomic purposes. In addition, Thai tax authorities are already more familiar with the CPI than the RPI, and they can use the CPI to uprate the WTT threshold for future tax years. Moreover, government use of the CPI is more appropriate for the purpose of raising additional revenue. The government can choose to raise more revenue for expenditures by using the CPI for indexing WTT thresholds. Conversely, indexing WTT thresholds by means of the RPI would mean raising less revenue. As noted by the government of the UK when changing the indexation of direct taxes from RPI to CPI,

‘This policy change raises 105 million GBP in 2012/13 rising to nearly 1.1 billion GBP by 2015/16. The RPI is generally higher than the CPI. Between 2011/12 and 2015/16, the OBR forecasts that the CPI will increase by 8.6% compared with 15.1% for the RPI. As a result, indexing allowances by CPI means they will generally be lower than they would have been if RPI had been used. If allowances are lower, this generally means that the government raises more revenue’.¹⁸¹⁴

9.4.2 Improving the Tax Administration

With regards to tax administration, two major problems emerged when the EIT was imposed. The first problem resulted from the absence of standard evaluation criteria and any reliable agency in Thailand. As a result, the tax authority may have had more burdens and higher administrative costs, causing corruption among tax officials. The second problem involved the administration of the tax officials; the legislation created

¹⁸¹² Previously, the government had proposed that the threshold be frozen until April 2015 at the earliest.

¹⁸¹³ Bureau of Trade and Economic Indices (n 1808).

¹⁸¹⁴ Adam Mellows-Facer and Dominic Webb (n 1810).

loopholes for tax officials to perform their administrative duties less effectively and honestly, leading to tax avoidance.

9.4.2.1 The Valuation of Property

The valuation of property was one of the key factors leading to the failure of the EITA 1933. Although general valuation rules were set out in s 10 of the EITA 1933, there was a lack of proper standards for determining the amount of property. Some properties require a simple valuation, such as cash or marketable securities. Other properties can be difficult to value and cause controversy, particularly when the property is unique or does not have regular market values, such as antique objects, Buddha statues and other artistic work.

There has long been a problem of officers valuing property at much lower than market price due to a lack of standards. In the absence of proper standards of valuation, the value of such properties heavily relies on the honesty or capability of the individual officials. If the officials are unskilled or inexperienced in valuing such properties, they might make inappropriate valuations. The lack of standards also increases the potential for corruption among officials.¹⁸¹⁵ Such corruption is unfair to taxpayers, and it runs contrary to the principle of administrative efficiency.

9.4.2.1.1 The US and the UK Standards of Valuation

There are many issues in valuing property in Thailand. The term ‘market value’ has never been used and interpreted in the valuation of property for EIT purposes.¹⁸¹⁶ However, only the Land Department has determined the value of property, which is much lower than the actual market value. Therefore, it is necessary for the Thai WTT to implement a proper standard valuation rule from abroad. The question then arises of which valuation approach and method should be adopted into the new legislation. Before answering this question, it is significant to distinguish the various value standards. There are four common standards of value,¹⁸¹⁷ including fair market

¹⁸¹⁵ Thanapornphan, *Theory of Taxation* (n 1028) 41-53.

¹⁸¹⁶ EITA 1933, s 10(1).

¹⁸¹⁷ The ‘book value’ included the remaining standard of value falling outside the four common categories. ‘Book value’ is an accounting term and refers to an asset’s historical cost reduced by any allowances for unrealized losses or depreciation, impairment, and amortization. Essentially, for a company, book value is the value of the owner’s equity on a balance sheet, that is, assets less liabilities.

value,¹⁸¹⁸ fair value,¹⁸¹⁹ investment value¹⁸²⁰ and intrinsic value.¹⁸²¹ Each of these standards involves assumptions based on the value type utilized for a specific purpose.¹⁸²² In the US, the ‘fair market value’ and the ‘fair value’ is used widely,¹⁸²³ but the latter concept is broader than the former. Although similar, ‘fair value’ does not require that buyers and sellers be as well informed as in the ‘fair market value’ for the FET/FGT.¹⁸²⁴ ‘Fair market value’ involves the standard of value used when valuing properties (or assets) in virtually all tax matters both at the federal and state level, including the FET/FGT.¹⁸²⁵ This value standard, which may be the most well-known, is applied in accordance with the meaning defined in revenue rulings, treasury regulations and tax court cases.¹⁸²⁶ Therefore, the ‘investment value’ and ‘intrinsic value’ will not be considered for the prospective Thai WTT. While ‘investment value’ is frequently used in the terminology of business valuation available to specific purchasers, such as companies, manufacturers and individuals,¹⁸²⁷ intrinsic value is not usually recognized as a legal standard of value because it has not been used for security analysis or valuation.¹⁸²⁸ Unlike these concepts, the ‘fair market value’ is simply a legal construct related to regulatory and judicial issues as well as taxation, especially the FET/FGT.¹⁸²⁹

The general valuation rules for FET/FGT and IHT purposes can be found in the main provisions of the Inland Revenue Code (IRC) and Inheritance Tax Act of 1984 (IHTA 1984). The FET/FGT employs the ‘fair market value’ standard, while the IHT is based on the ‘open market value’ standard. There is a distinct difference between the standards used in the valuation of property for the IHT and FET/FGT. The result is that a distinction must be drawn between the ‘fair market value’ and the ‘open market value’, as discussed below.

¹⁸¹⁸ The ‘fair market value’ represents a hypothetical transaction between a willing buyer and a willing seller, with knowledge of relevant information and equity to both parties. ‘See. Treasury Regulation (US), s 20.2031-1.’

¹⁸¹⁹ Based on the definitions use in the International Valuation Standards (IVS) Framework, the term ‘fair value’ means the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties, a price that reflects the respective interests of those parties.

¹⁸²⁰ The term ‘investment value’ means the value of an asset to the owner or a prospective owner for individual investment or operational objectives.

¹⁸²¹ The term ‘synergistic value’ means an additional element of value created by the combination of two or more assets or interests where the combined value is more than the sum of the separate values.

¹⁸²² Jay E Fishman and others, *Standards of Value: Theory and Applications* (John Wiley & Sons 2007) 1.

¹⁸²³ Ibid 4.

¹⁸²⁴ David Laro and Shannon P Pratt, *Business Valuation and Taxes* (John Wiley & Sons 2005) 285.

¹⁸²⁵ Shannon P Pratt, Robert Reilly and Robert Schweihs, *Valuing a Business* (4th edn, McGraw-Hill 2000) 28.

¹⁸²⁶ Fishman and others (n 1822) 13-14.

¹⁸²⁷ Ibid 24.

¹⁸²⁸ Ibid 25-26.

¹⁸²⁹ Ibid 84.

The FET Treasury Regulation s 20.2031-1 and the FGT Treasury Regulation s 25.2512-1 similarly defines the fair market value as ‘the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts’.¹⁸³⁰ On the other hand, the s 160 of the IHTA 1984 referred to the ‘open market’ value as ‘the price which the property might reasonably be expected to fetch if sold in the open market at the time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time’.¹⁸³¹

There are two interesting questions that thus arise regarding how the US fair market value differs from the UK open market value: what is the difference between fair market value and market value, and what is the difference between open market value and market value? According to Black’s Law Dictionary, the ‘fair market value’ is ‘the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s length transaction; the point at which supply and demand intersect’.¹⁸³² Noticeably, the term ‘open market’ is used to define the fair market value; the fair market value depends on the open market price. The term ‘open market’ thus has been more closely associated with the term ‘fair market value’. Meanwhile, the International Valuation Standards Board (IVSB),¹⁸³³ in the International Valuation Standards (IVS) Framework (paragraph 29),¹⁸³⁴ defines the term ‘market value’ as ‘the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion’.¹⁸³⁵ In plain language, however, ‘fair market value’ is a much narrower concept than ‘market value.’ The Oxford English Dictionary provides the most relevant meaning for the word ‘fair’ in this circumstance: ‘Of conduct, actions, argument, methods: Free from bias, fraud, or injustice: equitable, legitimate’.¹⁸³⁶ It is obvious that without the word ‘fair’, the concept of ‘market value’ changes. The term ‘fair market

¹⁸³⁰ Treasury Regulation (US), ss20.2031-1 and 25.2512-1.

¹⁸³¹ IHTA 1984 (UK), s 160.

¹⁸³² Bryan A Garner, *Black’s Law Dictionary* (9th edn, Thompson Reuters 2009) 1587.

¹⁸³³ The International Valuation Standards Board (IVSB) which is a nongovernmental organization of the United Nations, has established guideline definitions.

¹⁸³⁴ The term ‘market value’ became effective on 6 January 2014.

¹⁸³⁵ RICS Valuation Professional Group (1662) 53.

¹⁸³⁶ J A Simpson and E S C Weiner, *The Oxford English Dictionary*, vol 5 (2th edn, Clarendon Press 1989) 671.

value’ is more limiting than the term ‘market value’. Despite these dissimilar definitions, ‘fair market value’ is often used interchangeably with ‘market value’.

For the question concerning the difference between ‘market value’ and ‘open market value’, no statutes have ever defined the term; however, the Royal Institution of Chartered Surveyors (RICS)¹⁸³⁷ has offered the following reassuring commentary: ‘While the wording is very different (the market value definition is considerably shorter) there should be no difference in a valuation of a property using either definition. A client can be assured that a property valued by reference to open market value would produce the same figure if valued using the market value definition’.¹⁸³⁸ However, the RICS no longer values property on the basis of open market value: ‘In line with the RICS policy of supporting IVS, open market value has been replaced in the Red Book by the International definition of market value (VPS 4 paragraph 1.2).¹⁸³⁹ Open market value as a definition has consequently been withdrawn’.¹⁸⁴⁰

Clearly, the term ‘open market value’ is often used interchangeably with the term ‘market value’. Nonetheless, the UK ‘open market value standard’ seems preferable to the US standard. This preference follows from the fact that the ‘fair market value’ is determined with reference to its ‘highest and best use for FET/FGT purposes’;¹⁸⁴¹ meanwhile, the ‘open market value’ is determined with reference to its ‘best possible price’ regardless of whether it is the ‘highest price’ or ‘best use’.¹⁸⁴² The UK standard would be more appropriate, partly because the value of property is determined with reference to its ‘price’. This ‘price’ means the ‘best possible price’ that could reasonably be obtained if it were actually sold in the open market.¹⁸⁴³ Unlike in the UK, the US standard is defined as the ‘price’ a ‘willing buyer’ and a ‘willing seller’ would arrive at after bargaining when there is no compulsion to buy or sell. The hypothetical willing buyer is assumed to have full knowledge of all relevant facts, which has the effect of increasing or decreasing the fair market value.¹⁸⁴⁴

¹⁸³⁷ Published by the Royal Institution of Chartered Surveyors (RICS), the RICS Valuation: Professional Standards January 2014 (the Red Book) is a comprehensive set of standards covering the key aspects of a valuer’s work.

¹⁸³⁸ Anthony Banfield, *A Valuer’s Guide to the RICS Red Book 2014* (The Royal Institution of Chartered Surveyors (RICS) 2014) 121-122.

¹⁸³⁹ RICS Valuation Professional Group (1662) 53.

¹⁸⁴⁰ Banfield (n 1838) 121.

¹⁸⁴¹ Treasury Regulation (US), s 20.2031-1.

¹⁸⁴² Fishman and others (n 1822) 1.

¹⁸⁴³ IHTA 1984 (UK), s 160.

¹⁸⁴⁴ Treasury Regulation (US), s 20.2031-1(b).

Although it seems these two definitions lack significant differences, the UK price concept remains more suitable for the future WTT because it defines ‘price’ in practical applications of valuation. The UK concept of the ‘best possible price’ corresponds with the criteria for property valuation in Thailand. Only the term ‘market value’ is used in Thai statutory contexts, not the term ‘fair market value’ or ‘fair value.’ However, there is no definition of ‘fair’ in any general provisions of Thai laws. Conversely, the rules governing the ‘market value’ of goods and property, the right of superficies and the limited amount for investing on the income of the ward, as set forth in ss 656, 1416 and 1598/4(2) of the Civil and Commercial Code (CCC), contain the term ‘market value’.¹⁸⁴⁵ From time to time, these rules have been clarified by the Thai Supreme Court.

Of course, one might question the exact meaning of the term ‘market value’ for WTT purposes. The term ‘market value’ is not given a certain meaning under the CCC or the EITA 1933, nor does it appear in the decisions of the Court. Moreover, current Thai tax law does not define the term ‘market value’ in RC provision or any other general provision. Likewise, one cannot determine values implied by the Court because Thai courts have never defined the term in any case laws. Typically, there are three categories of property value in Thailand. The ‘assessed value’ is the official value of land and other immovable property, as determined by the Treasury Department using price data provided by the Department of Land.¹⁸⁴⁶ Meanwhile, the ‘registered value’ is the actual selling price of immovable property recorded on the transfer documents for a transaction. The final important value is ‘market value’, which is similar to the term used in Thai code and by the court. It is the value of a property on the ‘open market’.¹⁸⁴⁷ Therefore, ‘market value’ can be regarded as the same as the ‘open market value’ used under the UK evaluation standard, a feature that supports the researcher’s argument in favour of the UK ‘open market value standard’ for the future WTT in Thailand. There is a further question as to whether the ‘registered value’ should be used for future WTT purposes rather than ‘market value’ since ‘registered value’ is often used to determine the sale price of immovable property in the PIT. The registered value essentially involves applying the appraised value used for collecting legislation and juristic acts

¹⁸⁴⁵ CCC, ss 656, 1416 and 1598/4(2).

¹⁸⁴⁶ In principle, a property may not be transferred at a price below the assessed value except when the seller can provide an explanation. Assessed value is used to calculate the government fees to be paid upon any transaction at the Land Department.

¹⁸⁴⁷ Rene Philippe R Dubort, *How to Safely Buy Real Estate in Thailand* (2th edn, TheEbookSale Publishing 2009) 163.

fees under the Land Code (LC).¹⁸⁴⁸ ‘Registered value’ is used narrowly for cases where an immovable property transaction has been made, while the ‘market value’ is used broadly for dealing with all kinds of property.

In addition, the special use valuation in the new WTT needs to be considered due to the specific types of property subject to particular valuation rules. In Thailand, it is necessary to consider another method of valuation used when the estate contains substantial amounts of property used for farming; most Thai family farms use their land for farming and small business. It is necessary to reduce the impact of WTT on Thai agrarian society because it could add to the economic burden of the majority poor. Apart from adopting APR, the notion of s 2032A under the FET/FGT system should be adopted. It would benefit many farming families who retain their farmland and continue to use it for the purpose of farming. Such regulation would be advantageous and suitable for Thailand when introducing the new WTT because many agrarian families tend to be ‘land poor’. It is unreasonable for farms to be valued by the open market value standard, as this measure would cause heavy WTT liability. This liability could force many farm owners and their succeeding generations to sell their land or reduce its size to pay the FET. However, all requirements of s 2032A will be met in order to sustain special treatment for farmers.

9.4.2.1.2 The Desirable Valuation Agency

There are only two competent government agencies officially responsible for valuation of property for WTT purposes in Thailand: the Office of Property Valuation (OPV) and the Land Department. The Treasury Department,¹⁸⁴⁹ particularly the OPV, is responsible for determining the value of immovable property in Thailand based on the data provided by the Land Department.¹⁸⁵⁰ However, neither special movable property nor movable property has ever been assessed by the Department of Treasury.¹⁸⁵¹ Although the new 2011 criteria of land valuation uses price data based heavily on

¹⁸⁴⁸ RC, s 49 *Bis*.

¹⁸⁴⁹ The Treasury Department, which manages public lands on behalf of the government, is responsible for carrying out the valuation survey.

¹⁸⁵⁰ Land office transfer fees and taxes are collected when the real property transfer is registered. The appraised value or government assessed value (land valuation) is set by the Land Department and Treasury Department and adjusted every four years with the last valuation in 2011 for the period 2012 to 2016.

¹⁸⁵¹ The Treasury Department, ‘The Valuation of Property’
<http://www.treasury.go.th/ewt_news.php?nid=66> accessed 24 June 2015.

inflation rates and economic growth,¹⁸⁵² there is still no valuation standard for ensuring the actual value of other kinds of property. This lack of standard causes a practical problem because no valuation of other properties in the estate can be used as a baseline for future WTT purposes. To tackle this problem, the researcher submits that other than land valuation, the OPV should begin to set not only the assessed value (land valuation), but also the assessed value of other property for official use as a baseline for WTT purposes. The adjustment of government assessed value will be revised every four years on a nationwide basis, providing market price data to increase the level of public confidence and validity in government-assessed values.

9.4.2.2 Tax Instalments

Thai society remains somewhat agrarian, and many Thais are agriculturalists like their ancestors. Although Thailand is no longer classified as a poor country, poverty still exists. Therefore, the use of an instalment payment provision should be considered for both family farms and relevant small businesses not only to provide added liquidity during the transition period from the deceased to successive generations, but to produce substantial tax savings. We now analyse which instalment payment provision would be most appropriate in Thailand.

The only provision governing instalment payments for the EIT was s 29 of the EITA. This legislation permits the personal representative to defer the EIT payment up to eight years. Then, the EIT could be paid in eight equal annual instalments or 16 equal half-yearly instalments, if all requirements are fulfilled. However, the instalment payment period of eight years was too short and inappropriate as it differs from the instalment payment period allowed in the EFT/FGT and IHT. These systems allow personal representatives to defer the payment of such taxes up to 10 years (or 10 equal annual instalments). As a result, it is submitted that the instalment payment provision in the future WTT should allow the instalment payment period to extend up to 12 years. This period of time will be in accordance with Thai agrarian society, which prefers timely planning for successive generations acquiring farms and other closely-held business properties. Ultimately, it would allow deferment of WTT payment for a longer period of time.

¹⁸⁵² Land valuations set by the Treasury Department and the Land Department, *Bangkok Post* (February 10 2007)

Moreover, the qualified properties for the instalment payment option under the EIT only apply to immovable property and interests or rights acquired, whether commercial, industrial or through partnership or other ways. It is arguable that the qualified property for the instalment payment option was not in favour of family farms and small businesses, but supported commercial and industrial businesses instead. In making a comparison, the IHT ‘instalment option property’ in the estate of deceased consists of land and buildings, business or interest in a business and certain shareholdings.¹⁸⁵³ For the FET instalment option, only properties in the estate of the deceased involving closely-held farms or other closely-held businesses qualify.¹⁸⁵⁴ Thus, the future WTT instalment option should also include ‘instalment option property’, such as farms or other closely-held business properties similar to the US. It should not include commercial and industrial businesses or professions as was provided in s 29 of the EITA 1933.

It is further submitted that future WTT paid in instalments on farms and other closely-held business properties should be interest free. IHT instalments are interest-free for certain properties, the so-called ‘with interest relief’ or WIR.¹⁸⁵⁵ The WIR is allowed if the instalment is paid on the due date. The properties qualifying for the WIR include agricultural land and property that qualifies for agricultural relief, timber, certain shares and securities, and businesses or interests in a business carried out for gain.¹⁸⁵⁶ The EIT interest rate of 4 percent was charged on each annual instalment from the due date of the first tax payment,¹⁸⁵⁷ while only interest on both the unpaid portion of the FET and IHT were charged on each instalment from the due date to the payment date.¹⁸⁵⁸ Thus, EIT interest on each instalment would cause a heavy tax burden on taxpayers. Notwithstanding, the interest on the unpaid WTT should be payable on each instalment when it becomes due, and it should not be too high. For example, only 2 percent of the interest rate would be charged on the unpaid FET attributable to the first 1 120 000 USD of taxable estate involving farm or other closely-held business property. However,

¹⁸⁵³ IHTA 1984 (UK), 227.

¹⁸⁵⁴ IRC (US), 6166.

¹⁸⁵⁵ HM Revenue and Custom, ‘Inheritance Tax account: Working out the interest on inheritance tax payments’ IHT400 Help sheet <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/372015/iht400-helpsheet.pdf> accessed 24 June 2015.

¹⁸⁵⁶ IHTA 1984 (UK), s 227.

¹⁸⁵⁷ EITA 1933, s 25(1).

¹⁸⁵⁸ IHTA 1984 (UK), ss 227(1C)(3), 234 and IRC (US), s 6166.

the IHT interest rate changes from time to time and is currently at 3 percent (from 6 December 2003 onwards) regardless of estate size.¹⁸⁵⁹

9.4.2.3 Competent Authority for Tax Administration and Collection

In considering desirable WTT collection administration, the question has arisen of which competent tax authority should be responsible for administering and collecting the tax according to the new WTT legislation. In order to administer WTT collection in line with the principles of administrative and economic efficiency along with the revenue sufficiency principle as a good tax system, the WTT should be under the care and management of the Revenue Department (RD) through one of its branches of the Area Revenue Offices and Area Revenue Branch Offices. Compared to other tax authorities, the RD will be the most competent. It will be responsible for WTT collection, particularly concerning tax payments, tax return filing, tax accounting, tax refunds and tax delinquencies. It would also perform any other assigned duties.

However, it has been suggested that local authorities should be empowered to administer and collect the WTT.¹⁸⁶⁰ The establishment of a new independent agency would cause a heavy burden on government expenses, and it would be time-consuming to develop an administration system and train tax officials. Meanwhile, local authorities, such as BMAs, POAs and TAOs are too incompetent to administer and collect the WTT even though they have collected property taxes, such as BLT and LDT. Though the WTT shares the same category of tax base on wealth transfer, local tax officials lack the knowledge and skills to deal with the complicated WTT system. In addition, it would be extremely time-consuming to train local officials.

The RD is an appropriate mechanism for administering WTT collection in Thailand. However, it would be very beneficial for the RD to cooperate with other authorities rather than working independently. Firstly, the Department of Land¹⁸⁶¹ should be

¹⁸⁵⁹ Inland Revenue, Inland Revenue, Inheritance tax: The personal representatives' responsibilities, the guidance note of capital taxes HIT14 (2004) 21.

¹⁸⁶⁰ Political Economic Team, (2001) 21(1586) *Thansettakij News Journal* (26-28 April) 9.

¹⁸⁶¹ The Department of Land is the agency in charge of implementing the land legislation system in Thailand under the responsibility of the Minister of Interior. There are Land Department offices in every province and district of Thailand. Under the Land Code (LC), the Land Department's primary responsibilities are to issue land ownership and land utilization titles to people and deliver legislation services for rights and justice acts upon land and other immovable property and certain movable property. Furthermore, the Land Department is also in charge of making cadastral surveys and maps and issuing certificates for the royal title upon the public land and crown property land while controlling private cadastral surveys and land allotments. Significantly, the Land Department is responsible for providing the Department of Treasury with data needed to assess the value of immovable property and certain movable property in Thailand.

responsible for compiling a wealth of land data as the base for WTT payments. The Department of Land should provide accurate databases and annually keep up with changes supporting the valuation of properties. The databases should be considered public information; thus, they must also annually announce the prices of land throughout Thailand, which will be used by tax officials, heirs and administrators for WTT purposes. Secondly, the OPV should support both the Thai Valuation Association and the Valuation Association of Thailand, which are the only two professional valuation groups in Thailand. OPV should also support professional appraisers throughout Thailand. It is also necessary to empower such individuals to determine the values of certain valuable properties, such as land, houses, cars, jewellery, ancient objects, works of art and small Buddha images. This information could be used as the base for valuation of such properties. Thirdly, commercial banks or any authority controlling movable properties with certificates should provide information to tax officials at the RD head office, one of the area revenue offices or the area revenue branch offices. Information should be given when there is a request to obtain a monetary estate or movable properties having certificates that reach the set value for WTT collection. Finally, the Court of Justice should inform the local tax officials when receiving requests for an appointment with the administrator or when cases relate to the partition of an estate. This would further assist in collecting the estate tax. Moreover, once the court receives a report that the administrator has prepared the list of estate properties and the records regarding administration and partition of the estate,¹⁸⁶² the court should inform the local tax officials so that estate tax collection can be examined. This collaboration between the RD and others authorities will lead to more effective and efficient tax collection.

9.4.3 Improving Tax Appeals and Enforcement

Policymakers must also consider the necessary criteria for appeals and enforcement of the WTT.

9.4.3.1 Tax Appeals

Because appeals against Director General of Revenue Department (DGRD) decisions could later be filed at court, it will be necessary to standardize appeals and the relevant procedures. In order to standardize the appeals process, tax appeal orders should be

¹⁸⁶² CCC, s 1728 and 1732.

made by an appellate committee or panel. In this way, decisions will be made by a majority vote rather than an individual decision. This process can help guarantee fair dispute settlement between the taxpayer and tax authority, resulting in fewer cases of appeals to the tax court. This special commission could be comprised of officials and experts appointed by the Minister of Finance. The commission's orders should not be final and should be open to appeal at the tax courts. The committee should have power to amend, reverse, repeal and reaffirm any tax assessment. Interestingly, the criteria for tax appeal related to the WTT is already in place. In Thailand, taxpayers can appeal tax assessment through the Commission of Appeal (CoA), as provided by the RC. A taxpayer can appeal against any tax assessment (or the determination for EIT) to the CoA within 30 days of receiving the assessment.¹⁸⁶³ Therefore, all appeals for the WTT will go to the CoA, similar to appeals against revenue assessment under the RC. The CoA hearing WTT appeals would consist of the DGRD or his or her representative, a representative of the Ministry of Interior and a representative from the Office of the Attorney General.¹⁸⁶⁴

Unlike Thailand, the UK appeal system operates under two-tier tribunals; the First Tier Tribunal¹⁸⁶⁵ (FTT) hears appeals against decisions of the Her Majesty's Revenue and Customs (HMRC). Appeals against the decision of the FTT go to the Upper Tribunal¹⁸⁶⁶ (UT). However, such appeals can only be made when there are grounds to believe that an error of law has been made.¹⁸⁶⁷ Thailand should not follow the two-tier tribunals system because it would take too long to end the tax appeal procedures. On the other hand, the US appeals system only operates under a commission at the beginning of the appeals proceeding; however, an appeal against the decision of the special commission may be made to the tax court, the district court, the court of federal claims, the court of appeals and end up at the Supreme Court. It can be noted that the UK tax appeal system emphasizes the operation of tax appeals at the tribunals level rather than the court level, whereas the US counterpart focuses on the court levels rather than the commission level. Thailand should follow a middle position between the US and the UK approaches. There should be a one-tiered commission of appeal at the first appeal stage. Then, appeals would move through the court system, from the tax court to the final stage at the Supreme Court.

¹⁸⁶³ RC, ss 29 and 30 para 1.

¹⁸⁶⁴ RC, s 30(1).

¹⁸⁶⁵ TCEA 2007 (UK), s 3(1).

¹⁸⁶⁶ TCEA 2007 (UK), s 3(2).

¹⁸⁶⁷ TCEA 2007 (UK), s 11.

9.4.3.2 Tax Enforcement

As discussed in Chapter 6, the EIT provisions for penalties should be amended to be more concise and stricter, thus allowing the law to become more enforceable. For example, criminal penalties for people who avoid WTT payment should be imposed. In the US and UK tax systems, provisions generally impose numerous penalties to encourage prompt and accurate reporting and tax payment. The FET/FGT system imposes both civil and criminal penalties, including an accuracy-related penalty and a fraud penalty. Only civil penalties exist in the IHT system.

In ensuring effective enforcement of the WTT, the legislation must decide between civil and/or criminal penalties. Future WTT legislation should provide both civil and criminal penalties because under the EITA 1933, the civil penalties for deficiency were too light and unsuitable for the present circumstance. There are incomparable differences between the inflation rates during the period of enforcement of the EITA 1933 and the present.

Similar to the IHT and FET/FGT, civil penalties should be imposed for failing to deliver accounts and provide information or documentation. Under the RC, however, those who fail to file tax returns, accounts and so on, shall be subject to fines not exceeding 40 GBP.¹⁸⁶⁸ If a person attempts to evade tax, he or she should be subject to a fine not exceeding 50 GBP or imprisonment for a term not exceeding 6 months or both.¹⁸⁶⁹ In correspondence with the RC, the maximum fine in the introduction of the WTT should be up to 40 GBP, but not exceeding 50 GBP, along with the imposition of a light imprisonment. It is important to note that there are no criminal penalties imposed on those who fail to make a tax return in the IHT system; however, in Thailand, it is necessary for the criminal penalty to be imposed on those who fail to file a tax return in an attempt to evade the WTT. Compared to wilful failure to file a return, failure to supply information or pay the FET/FGT is chargeable as a misdemeanour subject to imprisonment for not more than one year or a fine of up to 25 000 USD or both.¹⁸⁷⁰ Fines of 40 or 50 GBP would be regarded as reasonable for Thailand in present.

On the other hand, the EIT penalties for negligence and fraud should be amended, as they are currently too light; hence, stronger criminal penalties should also be imposed in

¹⁸⁶⁸ RC, s 35.

¹⁸⁶⁹ RC, s 37 *Bis*.

¹⁸⁷⁰ IRC (US), s 7203.

the future WTT, particularly on those who evade or attempt to evade the payment of large amounts of WTT. When there is fraud or negligence, a strong criminal penalty should distinguish between a person liable for tax and a person not liable for tax because the liability of a person to notify authorities of false information in the WTT for tax due is distinct from the liability of a person for whom the tax burden is allocated. A lighter criminal penalty should be imposed on the former and a stronger penalty should be given to the latter. In particular, taxpayers who wilfully and fraudulently attempt to evade the WTT should be subject to imprisonment, similar to the penalty for income tax evasion.¹⁸⁷¹ A penalty of three months to seven years and 40–4 000 GBP corresponds with the RC. In comparison to the criminal penalties for the wilful refusal and fraud or tax evasion under the FET/FGT system, those who attempt to avoid paying the future WTT shall be liable to a serious criminal penalty. For example, purposeful nondisclosure of taxable assets for tax evasion purposes should be regarded as a serious criminal activity subject to imprisonment for not more than seven years and a fine of up to 4 000 GBP or both.

9.5 What measures should be taken against tax avoidance?

As discussed in Chapter 4, the gift tax is important because some taxpayers may avoid paying the WTT by giving away their properties to others before their death, rendering the tax effectively unenforceable. Thus, the gift tax should be collected along with the future WTT in order to prevent wealthy taxpayers from draining their estates with tax-free lifetime transfers, serving as a backstop for tax on the estates of deceased individuals.

A gift tax should accordingly be imposed on the donor for gift transfers during his or her lifetime;¹⁸⁷² otherwise, the tax on estates of the deceased can be avoided before death. However, tax avoidance could still occur under the new WTT. WTT avoidance may be prepared during the lifetime of the deceased by giving away properties to their heirs or other persons. As a result, there may be no tax consequences or they may pay less WTT. In the case of movable properties which need no evidence, it is easy to conceal the transfer of jewels, Buddha statues and other valuable things. By contrast, immovable and movable properties, such as land, buildings and stock certificates, require evidence for transfer. If the owner of the estate is able to estimate his life

¹⁸⁷¹ RC, s 37.

¹⁸⁷² Kraiyuth Theeratayakeenant, 'Property tax should not be an instrument to reduce the gap between the rich and the poor' (2004) 2(5) *Revenue Journal* 3, 7.

expectancy, for instance, the properties in the estate may be transferred to his heirs when he gets older or becomes sick. It is problematic to try to prove whether gift transfers made during one's lifetime are gratuitous gifts rather than transactions such as sales and purchases. For example, those who try to drain their estate with tax-free lifetime transfers may make a sale or purchase with the connivance of their heirs, thus concealing a gift transfer.

However, a gift tax can easily be imposed on an immovable property and certain movable properties because they require evidence for transfer. Taxpayers may avoid the WTT by accumulating only moveable property, such as jewels, Buddha statues, and so on. In order to address this problem, it is recommended that the OPV, a sub-division of the Treasury Department under the responsibility of the Ministry of Finance, should be in charge of controlling the registration system of certain movable property (included in the supplementary list of items). Under the new registration system, the OPV would be responsible not only for assessing the value of certain movable property (apart from its primary responsibility to assess immovable property), but for issuing certain movable property utilization titles and ownership to the people. However, this system may unduly burden Thai people and increase the workload of government officials. To avoid these problems, only certain items of movable property should be selected for inclusion in the registration system. The value threshold should be specified by referring to indexation factors, including the Inflation Index or CPI. In Thailand, some movable properties must be registered by laws with other government agencies, such as the Department of Land Transport (e.g., cars and other vehicles), the Marine Department (e.g., ships and yachts), the Department of Civil Aviation (e.g., private aeroplanes), the Fine Arts Department (e.g., Buddha statues and other antiques) and the Royal Forest Department (e.g., ivory or horns of rare wild animals). In order to alleviate the workload of government officials in this registration system, information technology needs to be used to link authorities' information with the OPV. This system would be helpful for the OPV by linking information regarding registered items of certain moveable property with the relevant government agencies. Such information can be sent online to the OPV as soon as registration is granted. The use of information technology would help the new bureaucracy to save on administration costs and to justify this registration system. This system would involve dealing with the registration of juristic acts and rights for movable property and monitoring as well as surveying and issuing certificates for such

movable property. This system would be an efficient and competent measure preventing tax avoidance, facilitating collection administration alongside the RD.

Conclusion

This chapter has argued that an estate tax (transferor-based system) should be introduced in Thailand. The tax system should follow the model of the UK single system with the PET regime, based on the UK concept of the transfer of value, determined by the value transferred at death and during the lifetime of the deceased. It should also use the jurisdictional base of citizenship/nationality, the residence of both the transferee and donor, and the location of the transferred assets. Measures have been adopted from all tax regimes to reduce and eliminate the WTT liabilities. While some should be modified, others should be adapted from the FET/FGT system for the context of Thai society.

With regard to computation and collection administration, it is further submitted that the US criteria of a unified progressive rate on gross chargeable transfer (GCT) should be implemented, together with the CPI, to calculate the threshold for Thailand. Next, the UK criteria of valuation, the ‘open market value standard,’ should be used in the future WTT, along with its price concept. The tax authority responsible for the care and management of the future WTT should be the RD; however, the department should cooperate with other authorities, such as the OPV, the Department of Land, commercial banks, the Authority Controlling the Movable Properties and the Court of Justice. Appeals from WTT determinations will be treated like appeals from tax assessment under the RC: appeals will go to the CoA for first appeal, move up to the Tax Court and then end up at the final appeal stage at the Supreme Court. In ensuring effective enforcement for the WTT, both civil and criminal penalties should be imposed; nevertheless, these penalties may be not sufficient to reach tax collection goals. Thus, a gift tax should be collected in order to prevent tax avoidance. However, the next chapter will outline the most important principles and features of this proposed tax in drafting legislation for the introduction of the WTT in Thailand.

10 Conclusions and Recommendations

10.1 Conclusions

The foregoing discussions have established that the absence of balance and equality in Thailand's taxation system presents major problems, making restructuring of the tax system essential for the nation.¹⁸⁷³ The wealth transfer tax (WTT) represents an opportunity to seek to balance the Thai tax system.¹⁸⁷⁴ Save for the Estate and Inheritance Tax Act of 1933 (EITA 1933), there has been no precise form of wealth transfer tax historically; however, the concept of a tax on wealth transfer has existed for some time in Thailand.¹⁸⁷⁵

It may be relatively easy for Thailand to introduce and enact such WTT because the National Legislation Assembly (NLA), Thailand's current unelected parliament, has succeeded in passing several new laws with relative ease. This follows from the fact that the NLA is actually functioning during period of military authoritarian regime when a majority of its members,¹⁸⁷⁶ with a military background, have predominated. The NLA has acted as rubber stamp to legitimize (when that was even considered necessary) and support, without providing a real opportunity to criticize.¹⁸⁷⁷ During one year of authoritarian rule, for example, no fewer than 130 Bills were passed, which included 105 ordinary bills introduced by the National Council for Peace and Order (NCPO).¹⁸⁷⁸ In contrast, during periods of genuinely representative government (2007- early 2014), the democratic government with more political and less military membership, engaged in more extensive debates,¹⁸⁷⁹ often paralyzing the legislation programme. Under the CKT 2007, the legislative procedure differs from somewhat according to the CKT (Interim) 2014. The former required three readings of a Bill and its passing by a majority of both houses, while only one house passing the Bill is required for the latter.

¹⁸⁷³ Chapter 1.

¹⁸⁷⁴ Chapter 3.

¹⁸⁷⁵ Chapter 2.

¹⁸⁷⁶ Out of 200 members of the non-partisan NLA, 105 were from the Army, Navy, Air Force, and the Ministry of Defense.

¹⁸⁷⁷ Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart Publishing 2011) 67-68.

¹⁸⁷⁸ The National Legislative Assembly

<<http://www.senate.go.th/w3c/senate/main.php?url=content&id=531>> accessed 24 June 2015.

¹⁸⁷⁹ Ibid.

Any Bill has to be introduced first in the House of Representatives and then reaching to the Senate to amend the Bill. However the public must have convenient access to the Bill. Under the 2007 constitutional configuration this legislative procedure hampered the efforts of the previous democratic government to pass legislation. Thus the legislative process mandated by the CKT (Interim) 2014 renders easy for the military regime to achieve what was very difficult constitutionally for the previous democratic government.

Passing legislation that will survive future attempts at repeal provides a greater challenge. In order to prevent future repeal of the new WTT legislation, it is important that this thesis not only consider crucial theoretical frameworks and criticisms of the WTT, but that it also gathers lessons from the failure of the former estate and inheritance tax (EIT). As established in the preceding chapter, the WTT has internationally and nationally generated controversy. Therefore, any proposal to introduce the WTT in Thailand should be suited to the nation's context rather than being a 'good' tax system based on theory alone. Consideration of the Thai context includes the economic, political, legal, social and ethical perspectives. However, attention to these theoretical aspects must be taken into account to justify the new WTT.¹⁸⁸⁰

The reasons behind the repeal of the EITA 1933 must also be considered. As demonstrated in the previous chapter, its structure and provisions caused the tax to fail due to ineffectiveness. The law left open several loopholes for EIT evasion and dishonest administration by tax authorities. Moreover, the EIT established a mixture of estate and inheritance taxes, and its imposition resulted in a heavy tax burden on taxpayers, in essence making them pay taxes twice. This burden caused taxpayer failure and refusal to pay taxes.¹⁸⁸¹

It is also necessary to consider current Thai laws related to wealth transfers when drafting the new WTT legislation. The previous chapter has established that these laws, particularly the Civil and Commercial Code (CCC) and Revenue Code (RC), may affect drafting provisions of the new Thai WTT legislation. Furthermore, for royal taxation, the previous chapter argued that the King of Thailand should only pay taxes on income derived from his current private property; similar to the UK, public and crown properties should remain tax-free. The king's private property would not be legally

¹⁸⁸⁰ Chapter 4.

¹⁸⁸¹ Chapter 6.

exempted from the prospective Thai WTT because there are no existing enactments providing an exemption for such properties; therefore, the king's private property will be subject to any duty and taxation. However, it will not be possible to provide the exemption provision in the new WTT legislation because such a provision would be repealed if it runs contrary to or is inconsistent with s 8 of the Crown Property Act of 1936 (CPA 1936).¹⁸⁸²

In closing the loopholes of the EIT legislation and removing these difficulties as much as possible, certain features of both the US and UK WTT systems have been highlighted, particularly in terms of appropriate rules and concepts.¹⁸⁸³ Because Thailand can choose only one form of WTT system to adopt, this thesis has focused on the transferor-based system. The discussion established in the preceding chapter shows that less inheritance tax (recipient-based system) can be collected than estate tax (transferor-based system); as a result, the government could not produce as much income from the recipient-based system as it could from the transferor-based system.¹⁸⁸⁴ On the other hand, the transferor-based system offers an efficient collection system as it is more convenient to collect the estate tax than the inheritance tax. Under the transferor-based system, the estate tax is generally considered to be easier to administer because it is involved with the probate process, and the person with primary tax payment liability files a single return. Thus, the administrative and compliance costs are relatively low compared to the inheritance tax, which requires a record of all lifetime gifts, for instance.¹⁸⁸⁵ The previous chapter also established that a gift tax can prevent tax avoidance in which taxpayers simply transfer their properties by gift before death.

It is therefore submitted that it is possible to implement a new and effective WTT system for Thailand. Such a system would not suffer the same weaknesses and insufficiencies of the repealed EIT, and it would not repeat the same mistakes. The new WTT system would be designed to avoid the root causes of the failure and ineffectiveness of the EIT, providing a fair and efficient taxation system while meeting the social objective of ameliorating the country's wealth imbalances. In this respect, Thailand has much to learn from the UK and US WTT systems, and the viability of the proposed tax would be aided by borrowing the most suitable features of these two tax systems. In choosing such features, it is important to ensure that they conform to Thai

¹⁸⁸² Ibid.

¹⁸⁸³ Chapter 8 and 9.

¹⁸⁸⁴ Chapter 4 and 6.

¹⁸⁸⁵ Chapter 4.

society in political, economic, social, ethical and legal contexts otherwise, the new system may either not survive, or may become ineffective, or may fail to achieve its main goal of wealth redistribution to narrow the gap between the rich and the poor.

A WTT through a transferor-based system is therefore and hereby proposed for Thailand. The UK single system (transferor-based system) corresponds best with the context of Thailand¹⁸⁸⁶ and will assist in narrowing the wide gulf between the rich and poor. This benefit is undeniable despite the fact that the WTT has been the subject of political, economic, social and legal debate;¹⁸⁸⁷ such debate has emerged since the repeal of the EITA 1933, which was ineffective and unable to generate a meaningful amount of revenue.¹⁸⁸⁸ Although the inheritance tax (recipient-based system) is more effective than the estate tax (transferor-based system) in terms of wealth distribution, other important factors must be considered, including economic sufficiency and efficiency. Both the US and UK WTT regimes¹⁸⁸⁹ have been considered, and based on this full analysis, this writer recommends adoption of the UK single system of WTT—though not all IHT rules or criteria should be adopted into Thailand’s WTT system.¹⁸⁹⁰ The introduction of the new WTT could currently occur through the parliamentary process, one possible solution for Thailand during the period of the high-water mark of the NLA.¹⁸⁹¹ Based on these conclusions, it is recommended that the introduction of the new WTT provisions be implemented with the following considerations in mind.

10.2 Recommendations

The following recommendations cover both legislative process and substantive process considerations.

10.2.1 Legislative Process Considerations

Attempts to introduce the WTT in Thailand seem to be limited to primary legislation at present. Therefore, this thesis makes the following recommendations regarding how the new Thai WTT system should be processed as new legislation.

¹⁸⁸⁶ Chapter 9.

¹⁸⁸⁷ Chapter 4.

¹⁸⁸⁸ Chapter 6.

¹⁸⁸⁹ Chapter 7 and 8.

¹⁸⁹⁰ Chapter 9.

¹⁸⁹¹ Harding and Leyland (n 1877) 68.

10.2.1.1 Use of Code

As mentioned above, this thesis favours the Revenue Department (RD) as the competent authority responsible for WTT collection. Therefore, WTT provisions should be set forth in the RC rather than being enacted in a new, separate Act. There are several reasons for avoiding enactment through an Act. First, many civil law countries like Thailand have codified their tax legislation, such as France, Cambodia, the Philippines, many former Soviet Union countries and several francophone African countries. Of course, exceptions exist where codes are not used, such as the excise tax, customs duty and so forth.¹⁸⁹² Even if most common law countries lack a code, codification dominates US legal systems,¹⁸⁹³ including all federal tax laws in the code.¹⁸⁹⁴ Thailand follows this approach with five main revenue taxes—the personal income tax (PIT), corporate Income Tax (CIT), value added tax (VAT), specific business tax (SBT), and stamp duty (SD)—included within a single code; however, the excise and customs taxes are not put into the same code.

This thesis argues in favour of incorporating the new WTT provisions with other revenue tax provisions into a single statute using the RC. This argument partially rests on the fact that using the RC would be helpful in eliminating potential duplicate provisions set forth in Title 1. These provisions include general definitions, the issuing of a Royal Decree to reduce or exempt tax and to appoint an assessment official by publishing it in the Royal Gazette. It would also prevent such duplication in Title 2 – Chapter I (General Provisions of Revenue Taxes), Chapter I Bis (Commission of Taxation) and Chapter 2 (Procedures Regarding Assessment Tax). Without codification, these tax administration provisions (from s 1 to 37 Bis) might repeat or differ in separate pieces of legislation.¹⁸⁹⁵ Ultimately, tax codification consolidates general tax rules in one place. Moreover, codification can make tax compliance more convenient for taxpayers because all tax information is easily and quickly searchable within one document.¹⁸⁹⁶

¹⁸⁹² Victor Thuronyi, 'Drafting Tax Legislation' in Victor Thuronyi (ed), *Tax Law Design and Drafting* (Kluwer Law International 2000) 80.

¹⁸⁹³ George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Springer International Publishing Switzerland 2015) 300.

¹⁸⁹⁴ CCH Tax Law Editors Staff, *Internal Revenue Code: Income, Estate, Gift, Employment and Excise Taxes* (CCH Incorporated 2014)

¹⁸⁹⁵ Thuronyi (n 1892) 80.

¹⁸⁹⁶ *Ibid* 81.

The RD is mainly responsible for administering and collecting six revenue taxes. On the other hand, the Customs Department and the Excise Department are responsible for collecting their taxes and administering tax collections according to specific Acts: the Customs Tariff Decree of 1987 and the Customs Act of 1926 for the Customs Department, and the Excise Tax Act of 1984 and the Excise Tariff Act of 1984 for the Excise Department. If the provisions of the new WTT are set forth in the RC, it would benefit the RD and its officials who are experienced in operating and enforcing tax laws following a single code (the RC) rather than separate Acts. Therefore, codification in the RC would allow efficient and effective revenue tax collection and administration.

10.2.1.1.1 Numbering of Sections

Related to the above argument, this thesis also argues for an amendment to the RC inserting a number of provisions when drafting new WTT legislation. There should be a new chapter in Title 2, between Chapter III of the RC regarding income tax and Chapter IV of the RC regarding value-added tax. It can be argued that insertion between chapters three and four is logical because the RC is divided into three titles: Title 1 contains all general provisions, Title 2 constitutes all provisions of the revenue tax and Title 3 includes the maintenance tax, which was repealed by the Local Maintenance Tax Act of 1965. In particular, Title 2 deals with the revenue taxes for which the RD is responsible. In addition to Chapter I (General provisions), Chapter I Bis (Commission of Taxation) and Chapter II (Procedures Regarding Assessment Tax), there are five categories of revenue tax provisions: Chapter III deals with the provision of income taxes (e.g. PIT and CIT) from s 38 through s 76Ter and includes an income rate schedule at the end. Chapter IV lays out the provisions of the value-added tax (VAT) from s 77 through s 90/5. Chapter V focuses on the provisions of the BST from s 91 through 91/21. Finally, Chapter VI deals with SD provisions from s 103 through 129 and includes the SD schedule at the end.

Starting from s 1 and continuing through s 129, Thailand has adopted the practice of sequential numbering for sections of the RC, similar to many countries, such as the US. If an amendment inserts WTT provisions into the RC as mentioned above, it would cause an issue with the sequential numbering of RC provisions, requiring renumbering, except insertions into the tax legislations that are practically used in the UK and Australia (discussed later). Unless the RC is wholly amended, such renumbering would make sections of several legal documents incorrect, including pieces of legislation,

judicial decisions, regulations, legal articles and other descriptive materials.¹⁸⁹⁷ This approach could lead to confusing designations for sections and should be avoided; otherwise, the set of WTT provisions will have to be placed at the end of s 129 of the RC. Unfortunately, this approach is also unsatisfactory because it would not place the provisions in the logical place.¹⁸⁹⁸ Logically, the reason for inserting the WTT provisions in between the existing provisions of Chapter III and Chapter IV is simply because all revenue tax provisions set forth in Chapter III governing the PIT and CIT are categorised as direct taxes; meanwhile, those set forth in the Chapter IV (including Chapter V and VI) are categorised as indirect taxes. Because the WTT is a direct tax, it should be placed together with the PIT and CIT within the same category before the VAT, SBT and SD.

The first available solution could be the Australian practice of using a hybrid numbering system to insert new sections between existing sections without renumbering. The hybrid alphanumerical designation uses ‘two numbers separated by a hyphen, the first of which designates the division of the act in which the section is found’.¹⁸⁹⁹ Indeed, Thailand has already adopted this system for sections in Chapter IV (VAT) from s 77 to s 90/5 of the RC. While Australia uses a hyphen to separate between two numbers, Thailand uses a slightly different approach; for example, s 85/7 is s 7 of division 85 in the RC. This system is advantageous because it allows insertion of additional sections to the new WTT, and section numbers can always be grouped in each division of the RC. Alternatively, the second solution could be the UK practice of using insertions into legislation using letters (e.g., “Section 114AA”), instead of using a new number (e.g., “Section 115”). This practice would not require the renumbering of the entire statute.

10.2.1.1.2 Section Headings

If the new sections of the WTT provisions are placed between the existing sections in Chapters III and IV, it will be necessary to decide if section headings should also be used. Similar to many countries in the civil law family, such as Germany, France and Spain, Thailand generally names parts of a code or statute with a title, chapter and parts, consecutively. The use of section headings should remain in the RC because it is helpful for the drafter as an organizational scheme, and it makes the code more understandable and easier to read.

¹⁸⁹⁷ Ibid 76.

¹⁸⁹⁸ Ibid.

¹⁸⁹⁹ Ibid.

The new WTT chapter in the RC should not be too difficult to understand or too lengthy even though this legislation will contain numerous tax rules and details. It must be considered which rules and details are necessary for inclusion in the new RC chapter. Following the civil law tradition, some scholars hold that ‘only the general rules of taxation should be embodied in a code, with the more specific and ephemeral rules contained in specific tax laws, which can be expected to be changed more frequently’.¹⁹⁰⁰ To aid efficiency, only general rules and some necessary details of the WTT should be provided in the code. Detailed rules that cannot be foreseen at the time of RC amendment should not be included. Details, such as administrative rules, can simply be modified and promulgated by the tax authority or other administrative branches. These rules and details can be disseminated in the form of explanatory documents. Such explanations can accompany the RC and ensure that the legislators, taxpayers and tax officials gain a greater understanding of the law’s intended operation and purpose.

10.2.2 Substantive Considerations

As discussed above, the RC has to be amended by inserting a number of provisions into the Code. Although there are numerous tax rules and details to be considered for inclusion in the new RC chapter, only general rules should be embodied in the Code. However, it will be too lengthy to provide all general rules and details of the tax; therefore, not all general rules will be selected for inclusion in this brief draft of the proposed legislation. Some necessary details of the tax and specific and ephemeral rules will not be included here. Only the most important principles and features of the new WTT legislation arising from the preceding chapters will be discussed here, including the main charging provisions, jurisdiction base provisions, tax relief provisions, Tax Rates and Thresholds, Valuation of Property Standards, Tax Instalments, Tax Authority, Tax Appeal, Tax Penalties, Measure against Tax Avoidance as follows.

10.2.2.1 The Main Charging Provisions

This thesis recommends the adoption of the UK single system; however, this recommendation does not mean that all IHT principles and features will be adopted into the tax system. Only the main IHT rules will be adopted and provided in the brief draft of the proposed WTT legislation, including the main charging provisions governing the

¹⁹⁰⁰ Ibid 81.

chargeable lifetime transfer and chargeable transfer on death. In addition, the rules governing the potentially exempt transfer (PET) regime should be implemented into the new WTT legislation with a ten-year accumulation period, but taper relief must be provided to reduce the tax consequences. As the UK approach is recommended, the consequential loss rule will also be used in determining the total value of a chargeable transfer. The rule for computing this value will follow the UK cumulation principle.

If these proposals are adopted, the proposed provisions should read as follows:

Chargeable Lifetime Transfer

‘A tax shall be charged on the value transferred by a chargeable transfer.

A chargeable transfer is a transfer of value which is made by an individual but is not an exempt transfer.

A transfer of value is a disposition made by a person (the transferor) as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the transfer’.¹⁹⁰¹

Transfer on Death

‘On the death of any person tax shall be charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death’.¹⁹⁰²

PET Regime

‘A potentially exempt transfer which is made ten years or more before the death of transferor is an exempt transfer and any other potentially exempt transfer is a chargeable transfer.

During the period beginning on the date of a potentially exempt transfer and ending immediately before (a) the ten anniversary of that date, or (b) if it is earlier, the death of the transferor, it shall be assumed for the

¹⁹⁰¹ See ss 1, 2 and 3, IHTA 1984 (UK).

¹⁹⁰² See s 4, IHTA 1984 (UK).

purposes of this Code that the transfer will prove to be an exempt transfer.

In the case where, a tax is in any circumstances to be charged as if a transfer of value had been made, that transfer shall be taken to be a transfer which is not a potentially exempt transfer'.¹⁹⁰³

Meaning of Estate

'For the purpose of this tax, a person's estate is the aggregate of all the property to which he is beneficially entitled immediately before his death, real or personal, tangible and intangible'.¹⁹⁰⁴

10.2.2.2 Jurisdictional Base Provisions

The jurisdictional bases will depend on the nationality/citizenship, the residence of the decedent or donor and the location of the assets, respectively. The proposed provisions of this proposal should read as follows:

'A resident or citizen of Thailand shall be liable to tax on all chargeable transfers without regard to the location of the assets transferred'.¹⁹⁰⁵

A non-resident alien shall be liable to tax on all chargeable transfers of assets located in Thailand.¹⁹⁰⁶

Any individual present in Thailand for a period or periods aggregating one hundred eighty days or more in any tax year shall be deemed a resident of Thailand for tax purposes'.¹⁹⁰⁷

10.2.2.3 Tax Relief Measures Provisions

Some EIT measures should remain after modification, while other measures should be adopted from the UK and US systems to reduce or eliminate WTT burdens. For instance, Thailand's WTT should adopt the US criteria for the public charity deduction, the UK small gift exemption approach, the US approach to expenses, debt and claim deductions, and the UK quick succession relief. The royal estate exemption should also

¹⁹⁰³ See s 3A, IHTA 1984 (UK).

¹⁹⁰⁴ See s 5, IHTA 1984 (UK).

¹⁹⁰⁵ See ss 2031 and 2501, IRC (US).

¹⁹⁰⁶ See ss 2103 and 2501, IRC (US).

¹⁹⁰⁷ See s 41 para 3, RC.

be adopted based on UK criteria, while the exemption for Buddhist monks' estates should remain. Finally, the WTT should include the UK spouse exemption, the UK business property relief (BPR) and agricultural property relief (APR), the UK heritage property exemption and the UK taper relief. Although the issue of taxing the royal estate should not be discussed in the current circumstances, such a discussion would eventually increase the long-term respect and love of the Thai people for the monarchy. Similar to the UK criteria, the royal estate, except for the king's private property, should not be taxed when introducing the WTT.

If these proposals are adopted, the proposed provisions should be provided to read as follows:

Public Charity Deduction

'The value of a chargeable transfer shall be determined by deducting from the value of the total of chargeable transfer of value the amount of transferred property to or for the use of the public hospitals and educational institutions; to or for the charity organizations, hospitals or educational institutions as prescribed by the Minister and published in the Royal Gazette.'¹⁹⁰⁸

The amount of the deduction under this section for any transfer shall not exceed the value of the transferred property required to be included in the total of chargeable transfer of value'.¹⁹⁰⁹

Small Gift Exemption

'Transfers of value made by a transferor in any one tax year by outright gifts to any one person are exempt if the values transferred by them (calculated as values on which no tax is chargeable) do not exceed the amount specified in accordance with a Royal Decree'.¹⁹¹⁰

¹⁹⁰⁸ See Revenue Decree No. 317, Notification of the Ministry of Finance on Income Tax and Value Added Tax. Re: Criteria for Consideration and Announcement of Organizations, Public Charitable Institutions, Clinics and Educational Institutions under s 47 (7) (b) of the Revenue Code and s 3 (4) (b) of the Royal Decree under the Revenue Code Regarding Value Added Tax Exemption (No.239), B.E. 2534 (A.D. 1991) as Amended by the Royal Decree Issued under the Revenue Code Regarding Value Added Tax Exemption (No.254), B.E.2535 (A.D. 1992).

¹⁹⁰⁹ See ss 2055 and 2522, IRC (US).

¹⁹¹⁰ Modification of the provision of the Revenue Code through Royal Decree is permitted by s 3 of the Revenue Code. S 3 provides that 'for taxes collectible under this Revenue Code, a Royal Decree may be

Expenses, Debt and Claim deductions

‘The value of the chargeable transfer shall be determined by deducting from the value of the total of chargeable transfer of value such amount for funeral expenses, for administration claims against the estate, for claims against the estate’.¹⁹¹¹

Quick Succession Relief

‘Where the value of a person’s estate was increased by a chargeable transfer (the first transfer) made not more than ten years before (a) his death, or (b) a chargeable transfer which is made by him otherwise than on his death.

The tax chargeable on the value transferred by the transfer made on his death or, as the case may be, referred to (b) above (the later transfer) shall be reduced by an amount calculated in accordance with the paragraph below.

The amount referred to in paragraph 1 above is a percentage of the tax charged on so much of the value transferred by the first transfer as is attributable to the increase mentioned in paragraph 1 at the percentages prescribed in the WTT Quick Succession Relief Schedule at the end of this Chapter’.¹⁹¹²

Quick Succession Relief Schedule

- ‘(1) 100 per cent if the period beginning with the date of the first transfer and ending with the date of the later does not exceed one year;
- (2) 80 per cent if it exceeds one year but does not exceed two years;
- (3) 60 per cent if it exceeds two years but does not exceed three years;

issued for the following purposes: (1) to reduce or exempt tax as suitable to circumstances, nature of business, or local condition; (2) to exempt tax to persons or international organizations under the commitment between Thailand and United Nations, under international laws, under Conventions, or under reciprocal basis’.

¹⁹¹¹ See s 2053, IRC (US).

¹⁹¹² See ss 141(1)(2), IHTA 1984 (UK).

- (4) 40 per cent if it exceeds three years but does not exceed four years; and
- (5) 20 per cent if it exceeds four years'.¹⁹¹³

Royal Estate Exemption

'Transfers of value of the king's private property made by the king by gifts to any one person or by transfer on death shall be in accordance with the Crown Property Act of 1936'.¹⁹¹⁴

Exemption for Buddhist Monks

'All property owned by Buddhist monks during his monkhood or owned before became a monk but disposed by his will, are exempted'.¹⁹¹⁵

Spouse Exemption

'A transfer of value is an exempt transfer to the extent that the value transferred is attributable to property which is comprised in the estate of the transferor's spouse or, so far as the value transferred is not so attributable, to the extent that that estate is increased.

If, immediately before the transfer, the transferor but not the transferor's spouse is domiciled in Thailand, the value in respect of which the transfer is exempt (calculated as a value on which no tax is chargeable) shall not exceed...less any amount previously taken into account for the purposes of the exemption conferred by this section.

The provision of the second paragraph shall not apply in relation to property if the testamentary or other disposition by which it is given:

- (a) takes effect on the termination after the transfer of value of any interest or period, or
- (b) depends on a condition which is not satisfied within twelve months after the transfer;

¹⁹¹³ See s 141(3), IHTA 1984 (UK).

¹⁹¹⁴ See s 8, CPA 1936.

¹⁹¹⁵ See ss 33(2), 40(1), Sangha Act of 1962; and ss 1754 para 2 and 1624, CCC.

But (a) above shall not have effect by reason only that the property is given to a spouse only if he survives the other spouse for a specified period'.¹⁹¹⁶

BPR and APR relief

'Where the whole or part of the value transferred by a transfer of value is attributable to the value of any relevant business property, the whole or that part of the value transferred shall be treated as reduced: (a) in the case of property falling within the categories prescribed by the ministerial regulations, or (b) in the case of other relevant business property, by the appropriate percentage prescribed by the government in the royal decree'.¹⁹¹⁷

'Where the whole or part of the value transferred by a transfer of value is attributable to the agricultural value of agricultural property, the whole or that part of the value transferred shall be treated as reduced by the appropriate percentage prescribed by the government in the royal decree'.¹⁹¹⁸

Heritage Property Exemption

'A transfer of value is an exempt transfer to the extent that the value transferred by it is attributable to: (a) any relevant object which appears to the Office of Property Valuation to be preeminent for its national, scientific, historic or artistic interest; (b) any land which in the opinion of the Office of Property Valuation is of outstanding scenic or historic or scientific interest; (c) any building for the preservation of which special steps should in the opinion of the Office of Property Valuation be taken by reason of its outstanding historic or architectural interest; or any object, building or land as prescribed by the director-general of the Office of Property Valuation with approval of the minister and published in the government gazette'.¹⁹¹⁹

¹⁹¹⁶ See s 18, IHTA 1984 (UK).

¹⁹¹⁷ See ss 105 and 104, IHTA 1984 (UK).

¹⁹¹⁸ See ss 115 and 116, IHTA 1984 (UK).

¹⁹¹⁹ See s 31, IHTA 1984 (UK).

Taper Relief

‘A chargeable transfer made within that period of ten years but more than five years before the death, the tax charged on the value transferred shall be charged at the rates prescribed in the WTT Taper Relief Schedule at the end of this chapter’.¹⁹²⁰

Taper Relief Schedule

- ‘(1) The transfer is made more than five but not more than six years before the death, ... per cent;
- (2) The transfer is made more than six but not more than seven years before the death, ... per cent;
- (3) The transfer is made more than seven but not more than eight years before the death, ... per cent;
- (4) The transfer is made more than eight but not more than nine years before the death, ... per cent’.¹⁹²¹
- (5) The transfer is made more than nine but not more than ten years before the death, ... per cent’.¹⁹²²

10.2.2.4 Tax Rates and Thresholds

The third issue concerns the most important matters in terms of tax computation: tax rates and tax thresholds (or exemption amounts). The US progressive rate approach should be implemented into the new WTT, with a specified rate from 5 per cent to a cap of 30 per cent. This specified rate should be selected in order to mitigate the effect of the taxes charged on those who are liable for the new WTT. Such mitigation would help them with capital and money for living while remaining compatible with the PIT rate under the RC. At 30 per cent, the maximum rate for chargeable transfer at death should not be too high compared to the PIT and CIT rates under the RC. This consideration will assist in alleviating any serious societal resistance and prevent a heavy tax burden for taxpayers. On the other hand, the maximum rate for chargeable lifetime transfer

¹⁹²⁰ See s 7(4), IHTA 1984 (UK).

¹⁹²¹ Ibid.

¹⁹²² Ibid.

should be lower than the maximum rate for chargeable transfers at death. It is submitted that the rate for chargeable lifetime transfers should be half the rate of chargeable at death in order to mitigate the heavy tax burden for taxpayers. In this way, it would help to increase the number of lifetime gifts and bequests to recipients in the non-profit sector as WTT can affect lifetime charitable contributions to the non-profit sector and charities. Furthermore, these rates would not encourage avoidance of the new Thai WTT because the minimum rate of 5 per cent and the maximum rate of 30 per cent are not too high compared to other countries in Asia that have a WTT (only transferor-based system) in place, such as the Philippines (5 per cent to 20 per cent).¹⁹²³ Meanwhile, the tax threshold should be based on indexation factors utilized to adjust the tax threshold, as calculated by the Consumer price index (CPI); this threshold will be expected to increase annually with reference to Thailand's inflation index.

10.2.2.5 Valuation of Property Standards

There are two major problems in improving tax administration: the absence of standard evaluation criteria and the lack of any reliable agency established in Thailand. In terms of evaluation criteria, the UK 'open market value standard' seems preferable to the US standard because the UK concept of the 'best possible price' corresponds with the criteria for property valuation in Thailand. In addition, because most Thai family farms use their land for farming and small business, the US method should be adopted for valuation of estates containing substantial amounts of property used for farming. This provision would benefit many farming families who retain their farmland and continue to use it for the purpose of farming. This regulation would also be advantageous and suitable for Thailand when introducing the new WTT because many agrarian families tend to be 'land poor'. On the other hand, the lack of standard causes a practical problem because no valuation of other properties in the estate can be used as a baseline for future WTT purposes. Nonetheless, the Office of Property Valuation (OPV) should begin to set not only the assessed value (land valuation), but also the assessed value of other property for official use as a baseline for WTT purposes. In addition, the use of an instalment payment provision should be adopted for both family farms and relevant small businesses in order to provide added liquidity during the transition period from the deceased to successive generations and to provide substantial tax savings. If these proposals are adopted, the proposed provision should be worded as follows:

¹⁹²³ Ernst & Young Global Limited, 'Worldwide Estate and Inheritance Tax Guide 2015' 234 <<http://www.ey.com/GL/en/Services/Tax/Global-tax-guide-archive>> accessed 24 June 2015.

‘If it is necessary to value assets or other benefits, the price or value receivable on the date that the asset or benefits is received shall be used’.

10.2.2.6 Tax Instalments

It is submitted that the instalment payment provision in the future WTT should allow the instalment payment period to extend up to 12 years. The future WTT instalment option should also include ‘instalment option property’, such as farms or other closely-held business properties. An interest rate of 3 per cent will be charged on each annual instalment from the due date of the first tax payment, unless the instalments on farms and other closely-held business properties are interest-free. However, the interest on unpaid WTT should be payable on each instalment when it becomes due; only 2 per cent of the interest rate would be charged on the unpaid WTT regardless of the estate size. If these proposals are adopted, the provisions should read as follows:

‘Where any of the tax payable on the value transferred by a chargeable transfer is attributable to the value of qualifying property and (a) the transfer is made on death, or (b) the tax so attributable is borne by the person benefiting from the transfer, the tax so attributable may, if the person paying it by notice in writing to the Revenue Department so elects, be paid by twelve equal yearly instalments.’¹⁹²⁴

A chargeable transfer is payable by installments as noted in the paragraph above; it shall, for the purposes of any interest to be added to each instalment, be treated as carrying interest at three per cent from the date at which the instalment is payable. This paragraph shall not apply to tax attributable to the farms and other closely-held business properties.’¹⁹²⁵

The interest under paragraph 1 above on the unpaid portion of tax shall be added to each instalment and paid accordingly’.¹⁹²⁶

10.2.2.7 Tax Authority

The WTT should be under the care and management of the RD through one of its branches in the area revenue offices and area revenue branch offices. In order to have

¹⁹²⁴ See s 227(1), IHTA 1984 (UK).

¹⁹²⁵ See s 229, IHTA 1984 (UK).

¹⁹²⁶ See s 227(1C)(3) and 233, IHTA 1984 (UK).

more effective and efficient tax collection, the RD, which would be the most competent authority, should be responsible for WTT collection with the cooperation of other authorities, such as the Department of Land, the OPV, the Court of Justice, and commercial banks or any authority controlling movable properties with certificates.

For the purposes tax of tax administration and collection, the provisions of Chapter I of the RC regarding the general provisions (from s 5 to 13) shall be applicable to power and duties of the RD. The main provisions of the RC, s 5 for example, shall apply in relation to the new WTT. S 5 provides that taxes and duties prescribed hereafter shall be within the power and control of the RD.

10.2.2.8 Tax Appeal

Tax appeal orders should follow an appellate committee or panel approach, with decisions made by majority vote rather than individual decision. However, there is no need to adopt any criteria of tax appeal operation from the selected case countries because appealing against tax assessment falls under the responsibility of the Commission of Appeal (CoA), as provided by the RC. Thailand should adopt an approach that lies somewhere in-between the US and the UK approaches. There should be a one-tiered commission of appeals at the first stage. Then, appeals should move through the court system, from the tax court to the final stage at the Supreme Court.

For the purposes of tax appeal, therefore, the provisions of Chapter II, part 2 of the RC regarding appeal procedures (s 28 to 34), shall apply *mutatis mutandis* in an appeal against the determination to the CoA through appeal against the decision of the CoA to Courts. Appeals must be made within thirty days of the date of receiving the assessment to the CoA. Then, the decision of the CoA can be appealed to the Court within thirty days of the date of receiving the appeal decision.¹⁹²⁷ However, there is a dire need to add a provision stating that the appeal procedures in Chapter II, Part 2 of the RC will apply to the new WTT *mutatis mutandis*. If these proposals are adopted, the proposed provision should read as follows:

‘Sections 28 through 34 of the RC shall apply to the WTT appeal procedures *mutatis mutandis*’.

¹⁹²⁷ RC, s 30.

10.2.2.9 Tax Penalties

To ensure effective enforcement of the WTT, the WTT legislation should include both civil and criminal penalties. The EIT civil penalties were too modest and are unsuitable for the present circumstances. There is a significant difference between the cost of goods and services made in Thailand today compared to when the EITA 1933 was enacted. In 1933, the average per capita gross domestic product (GDP) was 8 282 million USD, far lower than the average per capita GDP of 264 251 million USD in 2015.¹⁹²⁸ Today's GDP is approximately 32 times higher than the GDP at the time of the 1933 EIT enactment. Thus, the civil penalties of the new Thai WTT should be higher than the EIT civil penalties. The new civil penalties should at least be equal to the civil penalties specified under the RC. Civil and criminal penalties will depend on the seriousness of each taxpayer's offence in violating the WTT, whether the violation is a wilful attempt at avoidance, fraud or negligence.

For the purposes of tax enforcement, there are general provisions governing punishment provided in ss 35 through 37Bis of the RC. Some of these provisions will be applicable to the new WTT *mutatis mutandis*. To comply with the new WTT, however, there are key penalty rules concerning incorrect accounts or returns, failure to submit returns and failure to deliver accounts. S 35 only imposes penalties for failing to file a tax return,¹⁹²⁹ failing to issue a withholding tax certificate, or producing accounts showing or other actions aiming to withhold taxes.¹⁹³⁰ Thus, the penalty under s 35 shall apply for failing to deliver an account or failing to submit a return for WTT purposes to the RD. Unless this person has been subject to force majeure, he or she shall be subject to a fine not exceeding 40 GBP. Moreover, s 37Bis will also apply when a person intentionally fails to file tax returns in order to evade taxes. These individuals will be subject to a fine not exceeding 100 GBP or an imprisonment for a term not exceeding six months or both.

Penalties may arise if there is any wrongdoing or inaccuracies in an account or return. When information or documents are required by the new WTT legislation, the penalty rules for inaccuracies should be applied in order to be fair and effective. These penalty rules will apply when an incorrect account or return has been intentionally delivered or

¹⁹²⁸ A G Vinogradov, *National Economy: Economic Growth Around the World from Ancient Times to the Present Day: Statistical Table Part I* (Amazon Digital Services, Inc. 2015) 46.

¹⁹²⁹ RC, s 17 paragraph 1 provided that 'In relation to tax return filing, it shall be filed within the time limit specified in the Chapters regarding taxes and in accordance with the form prescribed by the Director-General'.

¹⁹³⁰ RC, ss 50Bis and 51.

submitted to the tax authority or when there has been an intentional attempt to conceal it. For example, the penalty when apply when anyone notifies or sends false evidence in order to support the incorrect information. Under the RC penalty regime, when it has been discovered that a person intentionally provided false statements or provided false evidence in order to evade taxes, such an individual will be subject to a penalty. If they give faulty facts, engage in fraudulent activity, artifice or other acts of similar nature, or attempt to evade tax, they shall be subject to imprisonment for 3 months to 7 years and a penalty of 40 to 4 000 GBP.¹⁹³¹

In sum, this thesis proposes that ss 35, 37 and 37Bis of the RC should apply *mutatis mutandis* in order to tackle issues with failing to deliver accounts, submit returns, or problems with supplying inaccurate information in an account or return. This RC penalty regime would help to avoid the root causes of the ineffectiveness of the EIT, namely the modest and unsuitable penalties that are not suited to the present circumstances.

10.2.2.10 Measure against Tax Avoidance

Finally, a gift tax should be incorporated into the prospective Thai WTT, thus serving as a measure against tax avoidance, preventing taxpayers from draining their estates with tax-free lifetime transfers and serving as a backstop for tax on the estates of deceased individuals. This proposal has already been submitted. As mentioned above (in 10.2.2.1), the prospective Thai WTT is chargeable on the value transferred by an individual's chargeable transfer during his or her lifetime, if it is not a PET or an unconditionally exempt transfer. Thus, the gift tax will not be treated as a specific tax; rather, gift and estate taxes are unified within a single system because a chargeable lifetime transfer can trigger the prospective Thai WTT charge.

¹⁹³¹ RC, s 37.

Appendix I: Statistical EIT Collection Fiscal Year 1935-1944

(Unit : GBP)

| Fiscal years | EIT | Government revenue | Tax revenue | % |
|--------------|-------|--------------------|-------------|------|
| 1935 | 814 | 1 753 027 | 979 047 | 0.08 |
| 1936 | 666 | 2 212 847 | 1 158 995 | 0.05 |
| 1937 | 1 246 | 2 026 153 | 1 919 086 | 0.12 |
| 1938 | 5 837 | 3 485 614 | 1 157 145 | 0.5 |
| 1939 | 555 | 1 103 917 | 534 252 | 0.05 |
| 1940 | 187 | 685 706 | 370 567 | 0.05 |
| 1941 | 7 487 | 2 986 265 | 1 408 893 | 0.5 |
| 1942 | 1 154 | 2 466 227 | 1 065 711 | 0.10 |
| 1943 | 2 131 | 2 446 227 | 1 852 780 | 0.11 |
| 1944 | 2 589 | 5 350 099 | 2 168 775 | 0.11 |

Source:

Statistical Forecasting Bureau of Thailand, Book XVII, Book XX, Book XXI

Appendix II: Tax Calculation under the EITA 1933

Figure 1: Calculating Estate Tax

$$\begin{array}{r} \text{Value of the Gross Estate} \\ \text{\$ Valuation} \\ \hline \text{Net Value of the Estate} \\ \text{-- Allowable Deductions} \\ \hline \text{Taxable Estate} \\ \text{\times Rate in Tariff I} \\ \hline \text{Estate Tax} \\ \text{- Certain Relief} \\ \hline \text{Estate Tax Liability} \end{array}$$

Figure 2: Calculating Inheritance Tax

$$\begin{array}{r} \text{Value of the Inheritance} \\ \text{- Debts (Before Death)} \\ \hline \text{Taxable Inheritance} \\ \text{\times Rate in Tariff II} \\ \hline \text{Inheritance Tax} \\ \text{- Certain Relief} \\ \hline \text{Inheritance Tax Liability} \end{array}$$

Source: Author

Appendix III: Tax Collection Fiscal Year 2012 -2014 in Thailand

Revenue Department of Thailand

(Unit : Millions of GBP)

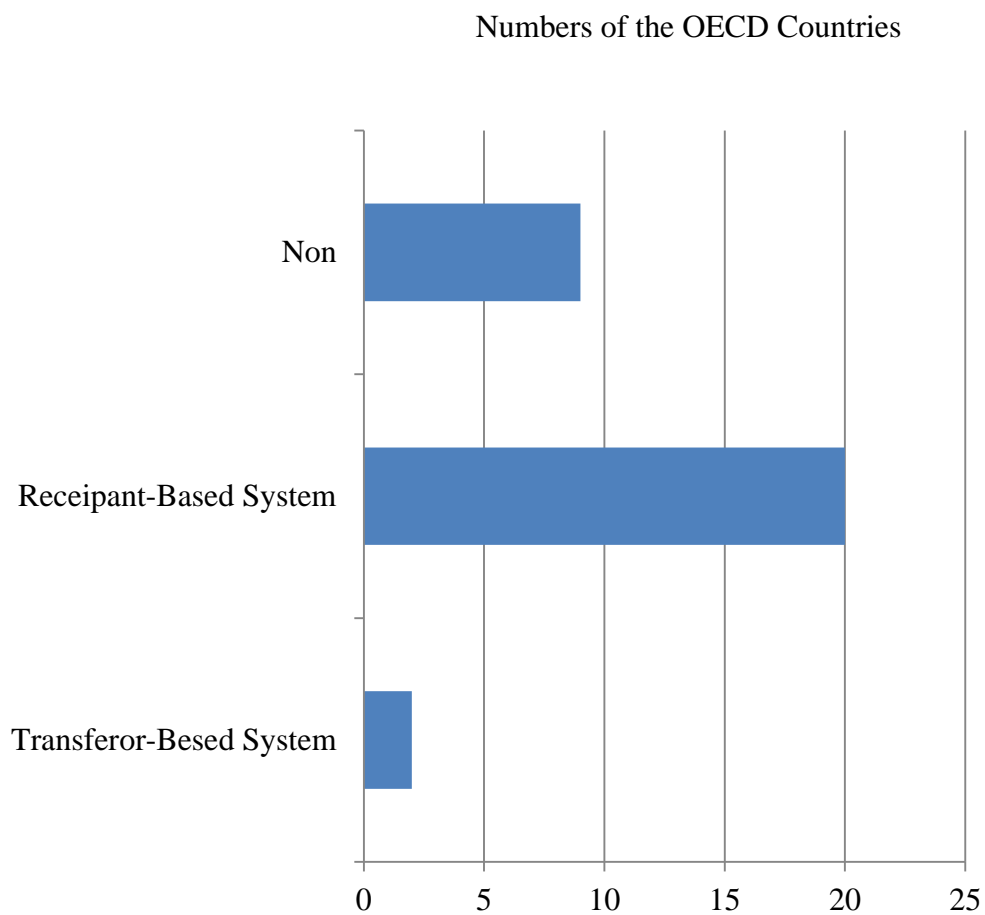
Last Updated : 24 June 2015 24:00

| Tax Type | 2012 | 2013 | 2014 |
|-------------------------|-------------|-------------|-------------|
| 1 Personal Income Tax | 4 930 | 5 538 | 5 204 |
| 2 Corporate Income Tax | 10 085 | 10 969 | 10 558 |
| 3 Petroleum Income Tax | 1 743 | 2 097 | 1 892 |
| 4 Value Added Tax | 12 219 | 12 927 | 1 3176 |
| 5 Specific Business Tax | 760 | 903 | 984 |
| 6 Stamp Duty | 207 | 236 | 217 |
| 7 Others | 7 | 5 | 6 |
| 8 Total | 29 950 | 32 677 | 32 037 |

Source:

Revenue Department of Thailand

Appendix IV: Form of Wealth Transfer Tax in OECD Countries



Source:

OECD (2014), Revenue Statistics 2014, OECD Publishing.

http://dx.doi.org/10.1787/10.1787/rev_stats-2014-en-fr

Appendix V: Estate and Inheritance Tax Act of 1933 (Only Key Substantive Provisions Relevant to this Thesis)

Section 3 An ‘appraiser’ is an official appointed by the Minister of Finance who has to investigate whether or not the deceased’s estate or the inheritance of such estate is liable for tax determine the estate and the inheritance.

Section 5 When a person dies after the enactment of this Act, unless otherwise stipulated in other provisions, the tax for the value of all properties of that person is obliged to be calculated and collected at the time of investigation in accordance with the conditions mentioned hereunder. The said tax is referred to as the ‘akon-moradok’ which shall be collected according to the rates shown in the tariff attached to this Act

Section 6 The deceased’s properties which shall be included for the purpose of determining the value of the estate are as follows:

- 1) If the deceased is a Thai national,
 - (a) All immovable properties and rights or benefits from the immovable properties located in Siam;
 - (b) All tangible immovable properties located in Siam;
 - (c) All stocks, bonds, bond certificates or any other securities or benefits or rights over the commercial and industrial businesses and professions as the partnership or any other forms existing both in Siam and foreign countries;
 - (d) All pending claims at the time of death or the money that will be obtained or any properties of the estate, existing both in Siam and foreign countries, as a result of the death, if these things have still been under some arguments or have some precedent conditions, these arguments are subject to the settlement or the conditions are fulfilled with the benefits to the heirs.
- 2) If the deceased is an alien, the value of the estate shall be determined as if the deceased is a Thai national, except there is any specific stipulation relating to the properties in Siam.

- 3) The immovable properties and movable properties owned by the deceased or indicating the deceased's name as the owner or the movable properties granted to a holder but being in the possession of the deceased, it is presumed that they belong to the deceased, unless otherwise proven.

Section 7 All properties of the deceased given, either directly or indirectly, to any person by the deceased himself within one year before the deceased's death, for the benefits of the tax they shall be deemed as one part of the estate which are obliged to be included in order for determining the value of the estate, except if the cost of the given properties acquired by a receiver is less than 20 GBP per person or the properties are given in the occasion of the receiver's marriage or are given before the effective date of this Act.

Section 8 A person who owns property of an estate, against whom an adjudication of disappearance has been made, is deemed to have died as from the day on which the order of the Court is given. The provisions concerning the collection and payment as described in this Act shall apply *mutatis mutandis*.

If it appears at any time that that disappeared person is still alive, and the court has revoked the adjudication, and such revocation has been published in the Government Gazette, and the taxpayer has submitted a request for tax refund, all obtained taxes relating to the disappearance of that person shall be returned to the claimant.

Section 9 For the determination of the value of the estate, all properties of the deceased being subject to the tax collection shall be included into one estate.

Section 10 The value of the properties shall be determined as follows:

The properties specified in section 6 (a), (b), (c) are assessed according to the market price at the time of death;

The properties specified in section 6 (d) are assessed in accordance with the amount indicated in the documents of the request, in an absence of any arguments about the request for such amount of money. If an argument takes place, the properties shall be assessed according to the amount of money specified in the judicial order or according to the agreements made between the conflicting parties in good faith. The determination of the value of the properties according to section 7 applies *mutatis mutandis* the criteria of the properties specified in section 6.

Section 11 If a juristic act or document made in good faith during a period of not more than two years before the death of the deceased reveals the value to be determined, the administrator or the appraiser can mutually agree to apply such value during the assessment of the properties.

Section 12 The determination of the value of the properties in accordance with the market price as prescribed in s 10 shall involve the appraiser and the administrator or a representative who jointly discuss and determine the price. Upon the approval of the director general of the revenue department or the provincial governor, the assessed price shall be deemed the market price.

If the appraiser makes an appointment of not less than seven days in advance, but the administrator does not join the discussion or does not appoint a representative to join the discussion, the appraiser can assess the price as deemed appropriate and send a copy of the list of assessed properties to the administrator for acknowledgement. If the administrator does not raise an objection within fifteen days and the director general of the revenue department or the provincial governor approves the price determined by the appraiser, that price is deemed to be the market price.

If an agreement in respect of any properties is objected to by the administrator or the representative or of which the administrator or the representative has a different opinion on the assessment or the price jointly assessed by the appraiser and the administrator or the representative but disapproved by the director general of the revenue department or the provincial governor cannot be reached, the provisions in the civil procedure law relating to the appointment of the arbitration are applied *mutatis mutandis*.

The fees and expenses in regard to the appointment of the arbitration are deducted from the estate.

Section 13 The value of the properties which were already investigated or of which the decision was rendered and explicitly determined according to sections 10, 11 or 12 is referred to as the 'net value'. The following amounts shall be deducted from the net value:

- (1) All debts occurring before the death of the deceased;
- (2) The expenses relating to the funeral in the amount of ten per cent of the net value but not exceeding 100 GBP;

(3) The expenses for the administration of the estate as deemed appropriate, but the following debts and claims cannot be deducted:

- (a) The debts released by will by the deceased;
- (b) The debts created by the deceased for the purpose of gifts, as specified in s 7;
- (c) The debts without any other evidence except the statement of the deceased in the will;
- (d) The debts evidenced by writing created overseas or a claim established by a final judgment in foreign countries which are not enforceable in Thailand;
- (e) The claims in which the period of prescription lapses.

Section 14 If it appears the existence of any property which is vested to the state or a political party or a charity organization or the Red Cross and the value of these properties is included in order to determine the net value of the estate, the taxes of the value of such properties shall not be calculated and collected.

Section 15 When any person dies and the total value of the estate exceeds or may exceed 200 GBP, the administrator shall notify such death to the appraiser of the local area of that person's death in accordance with the specified pattern. However, if the death happens in a foreign country, the time limit for making such notification is counted as from the time of the acknowledgement by the administrator in Siam. Such notification shall be sent to the local appraiser being in the same area of the administrator. In an absence of the administrator, a person currently possessing the estate shall perform as stated in the previous paragraph.

Section 20 In the account which a personal representative has known whether the said property is in supervision or not, or there is an objection, or under condition precedent or not and it must inform the whereabouts and the amount of the said debt.

In the case that an executor still has property or debt that should be included in evaluating the price, an executor must record it in the personal representative of the account, but the said property or debt must not be evaluated until it is known that the said property or debt really exists and the price is certain.

When submitting an account, if a personal representative has known that the property or debt which should be included in the said price evaluation really exists, the executor must submit the additional account within three months. When the price of the additional property or debt has been specified, that amount should be calculated again by including the additional property or debt and collect the tax according to the net included amount. Submitting an additional account is said to use the section 19, which allows a time extension.

Section 24 The competent official shall assess the taxes mainly based on the list and the prices received from the appraiser.

Section 25 If the estate tax of any immovable properties, any benefits or rights in the commercial and industrial businesses or any professions acquired as a result of being the partnership or any other ways (not being those acquired from the company), any benefits from such immovable properties, such benefits or rights being transferred at the time of any person's death is paid and then within a period of five years all or part of these properties shall be subject to the tax payment twice, the amount of tax being subject to the payment because of the death of the second person may be reduced according to the following percentage based upon the Director-General of the Revenue Department or the Provincial Governor's consideration of the evidence relating thereto:

80% if the second death occurs within 1 year of the earlier death;

60% if the second death occurs within 2 years of the earlier death;

50% if the second death occurs within 3 years of the earlier death;

40% if the second death occurs within 4 years of the earlier death;

20% if the second death occurs within 5 years of the earlier death.

If the value of the properties being subject to the tax payment upon the death of the second person is different from the value of the properties for which the tax was paid at the time of the first person's death, the smaller amount shall be the criteria of the tax calculation which will be reduced pursuant to this Section.

Section 26 The administrator shall be responsible for the payment of the estate tax of the received and administered properties. The administrator has the power to distribute

any of these properties as appropriate in order to pay the estate tax or use it as a guarantee of the estate tax.

In case the properties are beyond the administrator's control, a person gaining the benefits from such properties shall be liable for the estate tax payment.

Section 27 The competent official shall send a letter to inform them of the monetary amount being subject to the estate tax payment.

Section 28 Within ninety days of receiving notification of the tax amount from the official, the liable person shall be obliged to pay the tax to the tax collector.

Section 29 Concerning the immovable properties or benefits or rights over the commercial and industrial businesses and professions acquired from the partnership or any other ways being due for the estate tax payment, the liable person of the tax payment can select to make the payment either in eight annual equal installments or sixteen equal half year installments plus the four percent per year interest rate as from the due date of the first tax payment. The payment of the first installment becomes due upon the lapse of twelve months from the date of death. The interest shall be paid together with the tax of that installment. In case the property is sold, the tax shall be paid upon the completion of the sale. If such tax is not paid, it shall be deemed as the outstanding tax.

If the person liable to pay the estate tax of the immovable properties submits a request to the Director-General of the Revenue Department and the Director-General of the Revenue Department regards it is appropriate to receive the tax in the part of the immovable properties as agreed between the Director-General of the Revenue Department and the taxpayer, the tax can be wholly or partially paid.

Section 32 Any person who owns properties of the deceased valued at more than 200 GBP is subject to pay the tax referred to as the 'inheritance tax' according to the rates specified in Tariff 2 attached to this Act.

Section 33 Section 6 shall apply to all properties being subject to the payment of the inheritance tax.

Section 34 Any person receiving the properties given by the deceased within one year before his death is subject to payment of the inheritance tax, except in the case of the receipt of the properties as specified in section 7.

Section 36 The administrator shall notify the appraiser of the name and the residence of the liable heirs for the inheritance tax payment as well as the amount and the prices of the properties acquired by each heir. S 18, in addition to the obligations specified for the debtors, shall apply *mutatis mutandis* along with sections 21 and 22.

Section 37 The prices determined at the time of assessment of the inheritance tax shall be the value of the properties for the assessment of the inheritance tax. If the heirs belatedly acquire the estate for more than one year from the previous assessment, and they believe the determined prices have changed, they can request the re-determination of the prices of the properties, and section 12 shall apply *mutatis mutandis*.

Section 38 The appraiser shall send a copy of the letter of notification and a copy of the list of the assessment as specified in sections 36 and 37, together with a copy of the supporting documents, to the tax assessor and copies of such documents to the heirs liable to the tax payment.

Section 39 In the assessment, the competent official shall assess the tax by basing on the list and the prices received from the price assessor.

Section 40 Section 26 shall apply *mutatis mutandis* to the liabilities in the inheritance tax payment.

Section 41 Sections 27, 28, 29, 30 and 31 shall apply *mutatis mutandis* to the tax collection.

Section 42 An alien liable to pay the taxes according to sections 32, 33 and 34 by himself or by the appointed representative or by the administrator of the properties as specified in section 33 is liable to pay the inheritance tax.

Such person has the power to distribute these properties as deemed appropriate in order to pay the inheritance tax or guarantee the tax payment.

Section 43 Any person liable to pay the estate tax or the inheritance tax according to this Act who is not satisfactory to the tax assessment of the competent official can appeal to the Director-General of the Revenue Department within fifteen days as from the date of receipt of the oral notification of such assessment. The Director-General of the Revenue Department has the power or can authorize a provincial official to issue a summons for the appellant, issue a summons for the witnesses or order the submission of the relevant list of records and documents in order for further investigation but such

notification shall be made in not less than ten days in advance. The summons must be served in writing at least three days before the due date. Any appellants ignore to comply with the summons or do not consent to give a reply when being queried or do not submit any evidence to support his request without justifiable reasons, that person is ineligible to file an appeal against the decision of the Director-General of the Revenue Department, except in the case of legal issues relating to the deprivation or the interpretation of this Act.

The decision of the Director-General of the Revenue Department shall be served to the appellant in writing.

Section 44 provided that ‘any appellant who is dissatisfied with the decision of the director general of the revenue department can appeal to the court within fifteen days of receiving the decision, except in the case that this right is deprived as a result of the reason stipulated in section 43. That person would, however, be subject to the payment of the requested taxes or the due taxes.

Section 45 If an appeal against the decision of the director general of the revenue department is lodged and in the court’s opinion, it will be overwhelming for the appellant to pay whole or partial taxes, the court can permit the appellant to file an appeal without paying taxes or paying only some parts of taxes as deemed appropriate by the court. If the court makes such an order, the monetary guarantee for the due taxes shall be deposited.

Section 46 A summons according to this Act can be served either by an official sender or by registered mail. If it is served by an official sender and the official sender does not meet the recipient, such letter of notification or summons can be served to any person of not lower than twenty years of age residing at the residence or office of the recipient; such delivery is deemed legally sufficient.

If the recipient cannot be found, and no one is qualified to receive the letter of notification or the summons, it shall be affixed at the house door of the recipient, which can be easily noticeable or publicized in a local newspaper.

Section 47 Unless it is a force majeure, any person who does not give a notice or give notification as prescribed in sections 14, 18 or 36 shall be subject to a fine not exceeding 40 GBP.

Section 48 Any person who obstructs or prevents the administrator from performing his duties according to sections 17, 18, 22 or 36 shall be subject to a fine not exceeding 20 GBP.

Section 49 Any person being well aware of or intending not to perform in compliance with the summons of the official according to this Act shall be subject to a fine of 10 GBP.

Section 50 Any responsible person who does not submit the list or the additional list according to section 19 or 20, or does not send a notice to the appraiser according to section 36, or is well aware of or intends not to specify the mandatory properties or debts in the list or the additional list or a notice, shall be subject to a fine not exceeding 40 GBP.

Section 51 Any person

(a) Being well aware of or intending to submit false facts or give a false statement or respond to a query by speaking false statements or present evidence in order to avoid the tax payment according to this Act, or

(b) Informing false statements, intentionally neglecting, defrauding or deceptively implementing a manner to avoid or attempt to avoid the tax payment according to this Act, or

That person is subject to an imprisonment not exceeding six months or a fine not exceeding 40 GBP or both.

Tariff 1 and Tariff 2 of the EITA 1933:

1. The estate of the net value not exceeding 200 GBP after the deduction according to Section 13 (1) (2) (3) is exempt from the estate tax.

2. The estate of the net value exceeding 200 GBP after the deduction according to Section 13 (1) (2) (3) is subject to the estate tax payment only in the excessive part as follows:

Notes: (a) If the heirs are the parents, spouse and children, only a half of the above-stated rate shall apply for the inheritance tax payment.

(b) If the heirs are the brothers and sisters of full blood, three quarters of the above-stated rate shall apply for the inheritance tax.

Source: Translation by Author

*Appendix VI: Constitution of the Kingdom of Thailand of 2007 (Only Key
Substantive Provisions Relevant to This Thesis)*
(UNOFFICIAL TRANSLATION)

Section 6 The Constitution is the supreme law of the State. The provisions of any law, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable.

Section 8 The King shall be enthroned in a position of revered worship and shall not be violated.

No person shall expose the King to any sort of accusation or action.

Section 9 The King is a Buddhist and Defender of all Faiths.

Section 76 The Council of Ministers shall prepare plans for the administration of the State affairs in order to put on view measures and details embodying guidance on the discharge of official duties for each year, which must be consistent with the directive principles of fundamental State policies.

In the administration of the State affairs, the Council of Ministers shall cause to be prepared a legislative plan as necessary for the implementation of the policies and the plans for the administration of the State affairs.

Section 88 The National Assembly consists of the House of Representatives and the Senate.

Joint or separate sittings of the National Assembly shall be in accordance with the provisions of this Constitution.

No person shall be a member of the House of Representatives or a senator simultaneously.

Section 90 An organic law bill or a bill may be enacted as law only by and with the advice and consent of the National Assembly and, when signed or deemed to have been signed by the King under this Constitution, shall be published in the Royal Gazette for further entry into force as law.

Section 128 The King convokes the National Assembly, opens and prorogues its session.

The King may be present to perform the opening ceremony of the first general ordinary session under section 127 paragraph one or may command the Heir to the Throne who is *sui juris* or any person to perform the ceremony as His Representative.

When it is necessary for the interests of the State, the King may convoke an extraordinary session of the National Assembly.

Subject to section 129, the convocation, the prolongation of session and the prorogation of the National Assembly shall be made by a Royal Decree.

Section 146 Subject to section 168, when the House of Representatives has considered a bill submitted under section 142 and passed a resolution approving it, the House of Representatives shall submit such bill to the Senate. The Senate must finish the consideration of such bill within sixty days; but if it is a money bill, the consideration thereof must be finished within thirty days; provided that the Senate may, as an exceptional case, pass a resolution extending the period for not more than thirty days. The said period shall mean the period during a session and shall be counted as from the day on which such bill reaches the Senate.

The period referred to in paragraph one shall not include the period during which the bill is under the consideration of the Constitutional Court under section 149.

If the Senate has not finished the consideration of the bill within the period referred to in paragraph one, it shall be deemed that the Senate has approved it.

In the case where the House of Representatives submits a money bill to the Senate, the President of the House of Representatives shall also advise the Senate that the bill so submitted is a money bill. The advice of the President of the House of Representatives shall be deemed final.

In the case where the President of the House of Representatives does not advise the Senate that the bill is a money bill, such bill shall not be deemed a money bill.

Section 171 The King appoints the Prime Minister and not more than thirty-five other Ministers to constitute the Council of Ministers having the duties to carry out the

administration of the State affairs in accordance with the collective responsibility principle.

The Prime Minister must be a member of the House of Representatives appointed under section 172.

The President of the House of Representatives shall countersign the Royal Command appointing the Prime Minister.

The Prime Minister shall not hold office for a consecutive period of more than eight years.

Section 204 The Constitutional Court consists of the President and eight other judges of the Constitutional Court to be appointed by the King upon advice of the Senate from the following persons:

(1) three judges in the Supreme Court of Justice holding a position of not lower than Judge of the Supreme Court of Justice and elected at the general assembly of the Supreme Court of Justice by secret ballot;

(2) two judges in the Supreme Administrative Court elected at the general assembly of judges of the Supreme Administrative Court by secret ballot; (3) two qualified persons in the field of law, who really possesses knowledge and expertise in law and are elected under section 206;

(4) two qualified persons in the field of political science, public administration or other social science, who really possesses knowledge and expertise in the administration of the State affairs and are elected under section 206.

In the case where no judges in the Supreme Court of Justice or no judges in the Supreme Administrative Court are elected under (1) or (2), the general assembly of the Supreme Court of Justice or the general assembly of judges of the Supreme Administrative Court, as the case may be, shall elect other persons who have the qualifications and are not under any prohibitions under section 205 and possess such knowledge and expertise in law as are suitable for the performance of duties as judges of the Constitutional Court, as judges of the Constitutional Court under (1) or (2), as the case may be.

The elected persons under paragraph one shall hold a meeting and elect one amongst themselves to be the President of the Constitutional Court and notify the result to the President of the Senate accordingly.

The President of the Senate shall countersign the Royal Command appointing the President and judges of the Constitutional Court.

Section 223 Administrative Courts have the jurisdiction to try and adjudicate cases of dispute between a Government agency, a State agency, a State enterprise, a local government organisation, a constitutional organ, or a State official on one part and a private individual on the other part, or between a Government agency, a State agency, a State enterprise, a local government organisation, a constitutional organ or State official on one part and another such agency, enterprise, organisation, organ or official on the other part, as a consequence of the exercise of an administrative power under the law or as a consequence of a pursuit of an administrative act by a Government agency, a State agency, a State enterprise, a local government organisation, a constitutional organ or a State official, as provided by law, and also have the jurisdiction to try and adjudicate matters prescribed by the Constitution or law to be within the jurisdiction to the Administrative Courts.

The jurisdiction of the Administrative Courts under paragraph one does not include the determination by a constitutional organ, which is its direct exercise of power under the Constitution. There shall be the Supreme Administrative Court and Administrative Courts of First Instance, and there may also be the Appellate Administrative Court.

Source:

Unofficial translation by the Office of the Council of State, Thailand

Appendix VII: Interim Constitution of the Kingdom of Thailand of 2014 (Only Key Substantive Provisions Relevant to This Thesis)

(UNOFFICIAL TRANSLATION)

Preamble: Whereas the National Council for Peace and Order comprising military and police forces respectfully informed His Majesty that severe political conflict had emerged and continued within the precinct of Bangkok Metropolitan and the contiguous areas for the extended period of time and had hastily spread throughout almost all regions of the country. This situation had not only broken the unification of the people but also instituted harmful attitude amongst Thais. The use of illegal force and lethal weapons against whom having different attitudes came out several times. Public safety and living conditions of the people became hardship accordingly. National economic and State administration had then been interrupted and the exercise of the sovereign powers through the legislative, the executive and the judiciary had likewise been disrupted thereby. Law enforcement was failure. This sort of perplexity had never been found. Though the government tried to solve the problem through the existed legal mechanisms and measures, e.g. applying the laws relating to the maintenance of public peace and order, dissolving the House of Representatives and running the general election; and such third parties as private entities, the Constitutional Organizations, political parties, the armed forces and the Senate tried to figure out the conflict by means of peaceful negotiation, these tries however came to no avail. In addition, the new legal and political conflicts unveiled and made the problems more complicated. The divergence of thoughts had broadened widely and became more seriously till the portrayal of riot was foreseeable. This chaotic situation might be harmful to lives, properties and living conditions of the public at large, works and debts of farmers; especially rice farmers, national economic development, prevention of natural disasters, trust in sovereign powers and confidence of foreign investors. Further, criminals took this chance to do more crimes and ignited much unrest which inevitably undermined national security and reliance of the public to the democratic regime of government with the King as the Head of State. The National Council for Peace and Order therefore had no choice to deal with the problems other than seizing and taking control of the State administration on the 22nd Day of May B.E. 2557 (A.D. 2014). In addition to declaring the Constitution of the Kingdom of Thailand B.E. 2550 (A.D. 2007), except the

provisions of Chapter II The King, come to an end, the National Council for Peace and Order planned to restore national peace and order and the plan was divided into three phases. The first and most urgent phase was to deter the use of illegal force and lethal weapons, to cease public mistrust and to alleviate economic, social, political and administrative problems accumulated for more than six months. The second phase was to bring into force the Interim Constitution in order to establish the National Legislative Assembly to exercise the legislative power and the Council of Ministers to exercise the executive power so as to restore national peace and order, public unification and justice, to solve economic, social, political and administrative problems and to enact urgent and necessity legislations. The National Reform Council and other necessary entities shall be established to drive political and other reformations systematically. The new Constitution laying down appropriate political system, measures for prevention and suppression of corruption and efficient, effective and fair measures for examination of the exercise of State powers shall also be drafted and completed within this phase. All these missions shall be handed on to the representatives and the Council of Ministers under the new Constitution in the last and final phase. For the completion of the restoration plan as mentioned above, regard shall be had to fundamental principles rather than symbolic procedure of the democratic regime of government. In order to facilitate the restoration process, peaceful atmosphere and harmony shall be created and maintained so as to bring back public pleasure, meanwhile the unclear, inefficient and unfair rules and procedures which were the causes of conflict shall be reviewed in compliance with real public needs. Though the completion of the restoration process as planned might take a period of time, but value arising therefrom would be better than letting the crisis went along disorderly. Be it, therefore, commanded by the King that the following provisions shall be promulgated as the Interim Constitution of the Kingdom of Thailand until the new Constitution drafted under the provisions of this Constitution comes into force.

Section 2 Thailand adopts a democratic regime of government with the King as the Head of State.

The provisions of Chapter II The King of the Constitution of the Kingdom of Thailand B.E. 2550 (A.D. 2007) which still in force by the Notification of the National Council for Peace and Order No. 11/2557 dated 22nd Day of May B.E. 2557 (A.D. 2014) shall be continued in force as an integral part of this Constitution, but, subject to section 43 paragraph one, anywhere in those provisions which refer to the National Assembly or

the President of the National Assembly shall mean the National Legislative Assembly or the President of the National Legislative Assembly under this Constitution, as the case may be.

Section 3 Sovereign powers belong to Thai people. The King as the Head of State shall exercise such powers through the National Legislative Assembly, the Council of Ministers and the Judiciary under the provisions of this Constitution.

Section 4 Subject to the provisions of this Constitution, all human dignity, rights, liberties and equality of the people protected by the constitutional convention under a democratic regime of government with the King as the Head of State, and by international obligations bound by Thailand, shall be protected and upheld by this Constitution.

Section 5 Whenever no provision under this Constitution is applicable to any case, it shall be done or decided in accordance with the constitutional convention under a democratic regime of government with the King as the Head of State, but such constitutional convention shall not contrary to, or inconsistent with, this Constitution.

In the case where the question concerning the decision under paragraph one arises in the affairs of the National Legislative Assembly, it shall be decided by the National Legislative Assembly. If the question does not arise in the affairs of the National Legislative Assembly, the National Council for Peace and Order, the Council of Ministers, the Supreme Court or the Supreme Administrative Court may request the Constitutional Court to make decision thereon, but the request of the Supreme Court or the Supreme Administrative Court shall be approved by the plenary session of the Supreme Court or the Supreme Administrative Court and on the matter related to the trial and adjudication of cases.

Section 6 There shall be the National Legislative Assembly, consisting of not more than two hundred and twenty members as appointed by the King from the persons of Thai nationality by birth of not less than forty years of age in accordance with the recommendation of the National Council for Peace and Order.

The National Legislative Assembly shall act as the House of Representatives, the Senate and the National Assembly.

Section 7 In making of recommendation for the appointment of the members of the National Legislative Assembly, regard shall be had to knowledge, experience and varieties of persons from various groups in public sector, private sector, social sector, academic sector, professional sector and other sectors which may be beneficial to the performance of duties of the National Legislative Assembly.

Section 10 The King appoints, in accordance with the resolution of the National Legislative Assembly, a member of the National Legislative Assembly to be President of the National Legislative Assembly and not more than two members to be Vice-Presidents of the National Legislative Assembly.

The Head of the National Council for Peace and Order shall countersign the Royal Command appointing members, President and Vice-Presidents of the National Legislative Assembly.

Section 11 The members of the National Legislative Assembly shall be representatives of Thai people and shall devote themselves to the performance of duties in good faith for public benefit of Thai people.

Section 14 The King has the power to enact an Act by and with the advice and consent of the National Legislative Assembly.

A bill may be introduced by not less than twenty five members of the National Legislative Assembly, the Council of Ministers or the National Reform Council under section 31 paragraph two. A money bill shall be introduced only by the Council of Ministers.

A money bill under paragraph two means a bill with the provisions dealing with the imposition, repeal, reduction, alteration, modification, remission or regulation of taxes or duties, or the allocation, receipt, custody or payment of State funds, or the transfer of expenditures estimates of the State, or the raising of, or guaranteeing or redemption of, loans or any binding of State's properties, or currency.

In case of doubt as to whether any bill introduced to the National Legislative Assembly is a money bill, the President of the National Legislative Assembly shall have the power to make decision thereon.

If a bill introduced by members of the National Legislative Assembly or the National Reform Council, the Council of Ministers may, before the National Legislative Assembly adopts the principle of that bill, draw that bill for its consideration.

An enactment of the Organic Act shall be made in accordance with the provisions of this section, but an introduction thereof shall be made only by the Council of Ministers or the person having charge and control of the execution of such Organic Act.

Section 15 The Prime Minister shall present the bill or Organic Law bill approved by the National Legislative Assembly to the King for His signature within twenty days as from the date of receiving such bill from the National Legislative Assembly and the bill shall come into force as an Act or Organic Act upon its publication in the Government Gazette.

If the King refuses His assent to the bill or Organic Law bill either returns it to the National Legislative Assembly or does not return it within ninety days, the National Legislative Assembly must reconsider such bill. If the National Legislative Assembly resolves to reaffirm the bill by the votes of not less than two-thirds of the total number of existing members, the Prime Minister shall present such bill to the King for His signature once again. If the King does not sign and return the bill within thirty days, the prime Minister shall cause the bill to be promulgated as an Act or Organic Act in the Government Gazette as if the King had signed it.

Section 19 The King appoints the Prime Minister in accordance with the resolution of the National Legislative Assembly and not more than thirty-five other Ministers as recommended by the Prime Minister to constitute the Council of Ministers having the duties to carry out the administration of State affairs, to conduct reformation in all aspects and to strengthen unification and harmonization of Thai people.

Before taking office, a Minister must make a solemn declaration before the King in the following words: "I, (name of the declarer), do solemnly declare that I shall be loyal to the King and shall faithfully perform my duties in the interests of the country and of the people. I shall also uphold and observe the Constitution of the Kingdom of Thailand in every respect."

The King has the prerogative to remove the Prime Minister from office in accordance with the recommendation of the President of the National Legislative Assembly made by the resolution of the National Legislative Assembly as introduced by the National

Council for Peace and Order, and to remove the Minister in accordance with the recommendation of the Prime Minister.

The Royal Command appointing and removing the Prime Minister shall be countersigned by the President of the National Legislative Assembly.

The Prime Minister and Minister shall have the right to attend, and to give statements of fact or opinions to, the sitting of the National Legislative Assembly or the National Reform Council, but having no right to vote. In this case, the provisions on privilege under section 17 shall apply to the giving of statements of fact or opinions of the Prime Minister and Minister under this section *mutatis mutandis*.

Section 20 The Prime Minister and Minister shall have the qualifications and not being under the prohibitions as follows:

- (1) being of Thai nationality by birth;
- (2) being of not less than forty years of age;
- (3) having graduated with not lower than a Bachelor's degree or its equivalent;
- (4) not being or having been a member of a political party within three years prior to the date of appointment, and not being under the prohibitions under section 8;
- (5) not being a member of the National Legislative Assembly, the National Reform Council, the Constitution Drafting Committee or local assembly or local administrator;
- (6) not being a judge of the Constitutional Court, a judge of any Court, a State Attorney, a commissioner of the Election Commission, an Ombudsman, a commissioner of the National Counter Corruption Commission, a commissioner of the State Audit Commission, the Auditor-General or a member of the Human Rights Commission.

The Prime Ministership or the Ministership terminates upon disqualifications or being under the prohibitions under paragraph one or upon the provisions of section 9 (1) or (2).

Section 21 In case of emergency and necessary urgency in order to maintain national security, public safety, national economic security or to avert public calamity or there is

necessary to have a law on taxes, duties or currency which requires an urgent and confidential deliberation, the King has the prerogative to issue an Emergency Decree which shall have the force as an Act.

When the Emergency Decree comes into force, the Council of Ministers shall introduce such Emergency Decree to the National Legislative Assembly without delay. If the National Legislative Assembly approves such Emergency Decree, it shall continue to have the force as an Act. In case of disapproval, such Emergency Decree shall lapse. In this case, the lapsed Emergency Decree shall not affect any act done through the period of its enforcement. If the lapsed Emergency Decree has the effect of amending or repealing any provision of any Act, the provision that in force before the amendment or repeal shall continue to be in force as from the day such Emergency Decree had lapsed.

An approval or disapproval of the Emergency Decree shall be published in the Government Gazette. In case of disapproval, it shall be effective as from the date of its publication in the Government Gazette.

Section 22 The King has the prerogative to issue a Royal Decree which is not contrary to the law, the prerogative to grant a pardon and other prerogatives in accordance with the constitutional convention under a democratic regime of government with the King as the Head of State.

Section 23 The King has the prerogative to conclude a peace treaty, armistice and other treaties with other States or international organizations.

A treaty which provides for a change of the territories of Thailand or the external territories that Thailand has sovereign rights or jurisdiction thereon under any treaty or an international law, or requires an enactment of an Act for its implementation or has wide scale effects on economic or social security of the country, shall be approved by the National Legislative Assembly. In this case, the National Legislative Assembly shall complete its deliberation within sixty days as from the date of receipt of such matter.

The treaty with wide scale effects on economic or social security of the country under paragraph two means a treaty related to free trade or customs cooperation area, to the use of natural resources, to waive the rights in any natural resources of the country, wholly or partly, or other matters as prescribed by law.

If there is in doubt whether any treaty is a treaty under paragraph two or paragraph three, the Council of Ministers may request the Constitutional Court to make a decision thereon. In this case, the Constitutional Court shall have a decision within thirty days as from the date of receipt of the request.

Section 26 Judges are independent in the trial and adjudication of cases in the name of the King in accordance with the Constitution and laws.

Section 27 There shall establish the National Reform Council to study and provide recommendation for reform in the following fields:

- (1) politics;
- (2) administration of State affairs;
- (3) laws and judicial procedure;
- (4) local administration;
- (5) education;
- (6) economy;
- (7) energy;
- (8) public health and environment;
- (9) mass communication;
- (10) social;
- (11) others,

With a view to setting up of a democratic regime of government with the King as the Head of State which is suitable for Thai context, establishing the trustworthy and fair election system, establishing the efficient mechanism for prevention and suppression of corruption, eliminating economic and social inequality for sustainable development, enabling State mechanism to provide public services thoroughly, efficiently and effectively, and strengthening law enforcement rigorously and fairly.

Section 28 The National Reform Council consisting of not more than two hundred and fifty members as appointed by the King from the persons of Thai nationality by birth with not less than thirty-five years of age in accordance with the recommendation of the National Council for Peace and Order.

The King appoints, in accordance with the resolution of the National Reform Council, a member of the National Reform Council to be the Chairperson of the National Reform

Council and not more than two members of the National Reform Council to be the Vice-Chairpersons of the National Reform Council.

The Head of the National Council for Peace and Order shall countersign the Royal Command appointing members of the National Reform Council, the Chairperson and the Vice-Chairpersons of the National Reform Council.

Section 30 The National Council for Peace and Order shall select the persons to be appointed as members of the National Reform Council in accordance with the following rules:

(1) there shall establish the Selective Committee for each field of reform under section 27 to nominate the qualified persons in each field, and there shall establish the Provincial Selective Committee in each province to nominate the qualified persons whom domiciled in each province;

(2) the Selective Committee for each field of reform shall be appointed by the National Council for Peace and Order from the persons having apparent knowledge and experience and being generally accepted persons in each field;

(3) the Selective Committee shall propose the list of the nominees whom having qualifications under section 28 and not being under the prohibitions under section 29 and having apparent knowledge and experience in each field to the National Council for Peace and Order. In this case, no member of the Selective Committee shall be nominated;

(4) in the nomination under (3), regard shall be had to varieties of persons from each group of persons in public sector, private sector, social sector, academic sector, professional sector and other sectors which shall be beneficial to the performance of duties of the National Reform Council, apportion of persons from each province, gender opportunity and equality of the nominees and the conferment of the socially underprivileged persons;

(5) the Provincial Selective Committee shall consist of the members as prescribed by the Royal Decree;

(6) the Nation Council for Peace and Order shall select not more than two hundred and fifty persons to be appointed as members of the National Reform Council from the list of nominees proposed by the Selective Committees under (1). In this number, one

nominee nominated by each Provincial Selective Committee shall be selected. The number of members of each Selective Committee, the selection procedure and period of selection, the number of the nominees and other necessary matters shall be prescribed by the Royal Decree.

Section 31 The National Reform Council shall have the powers and duties as follows:

(1) to study, analyze and propose the guideline and proposal for the reform of any field under section 27 to the National Legislative Assembly, the Council of Ministers, the National Council for Peace and Order and other related agencies;

(2) to give advice or recommendation to the Constitution Drafting Committee for the purpose of Constitution drafting;

(3) to deliberate and approve the Draft Constitution proposed by the Constitution Drafting Committee.

For the purpose of (1), if the National Reform Council is of opinion that it is necessary to have an Act or Organic Act comes into force, it shall prepare and introduce that bill to the National Legislative Council for deliberation. If it is a money bill or Organic Law bill, it shall be submitted to the Council of Ministers.

The National Reform Council shall give advice or recommendation under (2) to the Constitution Drafting Committee within sixty days as from the date of its first meeting.

The provisions of section 13 and section 18 shall apply to the performance of duties of the National Reform Council *mutatis mutandis*.

Section 32 There shall establish the Constitution Drafting Committee to prepare the Draft Constitution, consisting of thirty-six members appointed by the Chairperson of the National Reform Council from the following persons:

(1) the Chairperson of the Committee as proposed by the National Council for Peace and Order;

(2) twenty persons as proposed by the National Reform Council;

(3) persons as proposed by the National Legislative Assembly, the Council of Ministers and the National Council for Peace and Order, five persons each.

An appointment of the Constitution Drafting Committee under paragraph one shall complete within fifteen days as from the date of the first meeting of the National Reform Council.

If a member of the Constitution Drafting Committee vacates office by whatever reason, the remaining members shall continue their duties. In this case, it shall be deemed that the Constitution Drafting Committee consists of the remaining members, but the Chairperson of the National Reform Council shall, in accordance with the rules as prescribed in paragraph one, appoint a new member of the Constitution Drafting Committee to fulfil the vacancy within fifteen days as from the date the member of the Constitution Drafting Committee vacates office.

The provisions of section 18 shall apply to the performance of duties of the Constitution Drafting Committee *mutatis mutandis*.

Section 34 The Constitution Drafting Committee shall propose the Draft Constitution to the National Reform Council for deliberation within one hundred and twenty days as from the date of receipt of the advice or recommendation of the National Reform Council under section 31 (2).

The Constitution Drafting Committee shall, in preparing the draft Constitution, take the advice or recommendation of the National Legislative Assembly, the Council of Ministers, the National Council for Peace and Order and comments of the public and related agencies into its deliberation.

Section 35 The draft Constitution shall cover the following matters:

- (1) the principle of being one and indivisible Kingdom;
- (2) the democratic regime of government with the King as the Head of State which is suitable for Thai context;
- (3) the efficient mechanism for prevention, examination and suppression of corruption in both public and private sectors, including mechanism to guarantee that State powers shall be exercised only for national interest and public benefit;
- (4) the efficient mechanism for prevention of a person whom ordered by a judgement or any legal order that he commits any corruption or undermines the trustworthiness or fairness of an election from holding any political position stringently;

- (5) the efficient mechanism which enabling State officials; especially a person holding political position, and political party to perform their duties or activities independently and without illegal manipulation or mastermind of any person or group of persons;
- (6) the efficient mechanism for strengthening the Rule of Law and enhancing good moral, ethics and governance in all sectors and levels;
- (7) the efficient mechanism for restructuring and driving economic and social system for inclusive and sustainable growth and preventing populism administration which may damage national economic system and the public in the long run;
- (8) the efficient mechanism for accountable spending of State fund which shall be in response of public needs and compliance with financial status of the country, and the efficient mechanism for audit and disclosure of the spending of State fund;
- (9) the efficient mechanism for prevention of the fundamental principle to be laid down by the new Constitution;
- (10) the mechanism which is necessary for further implementation for the completion of reform.

The Constitution Drafting Committee shall deliberate the necessity and worthiness of the Constitutional Organs of, and other organizations to be established by the provisions of, the new Constitution. In case of necessity, measures to ensure the efficient and effective performance of each organization shall be addressed.

Section 37 The Constitution Drafting Committee shall deliberate the proposal for amendment of the Draft Constitution within sixty days as from the expiration of the submission period under section 36 paragraph two. In this case, the Constitution Drafting Committee may make an amendment to the Draft Constitution as appropriated.

The amended Draft of the Constitution made under paragraph one shall be introduced to the National Reform Council for its approval or disapproval, and the National Reform Council shall have the aforesaid resolution within fifteen days as from the date of receipt of the Draft of the Constitution from the Constitution Drafting Committee. In this case, the National Reform Council is unable to make any amendment to the Draft of the Constitution; provided that an unnecessary mistake has been found and the Constitution Drafting Committee agrees upon or the Constitution Drafting Committee is

of opinion that it is necessary to make such amendment for the completion of the Draft of the Constitution.

If the National Reform Council approves the Draft of the Constitution under paragraph two, the Chairperson of the National Reform Council shall present the Draft of the Constitution to the King for His signature within thirty days as from the date the approval has been made. When His signature has been given, the Draft of the Constitution shall come into force as the Constitution upon its publication in the Government Gazette. The Chairperson of the National Reform Council shall countersign His Royal Command.

In the case where the King refuses His assent to the Draft of the Constitution and either returns it to the National Reform Council or does not return it within ninety days, the Draft of the Constitution shall lapse.

Section 42 The National Council for Peace and Order under the Notification of the National Council for Peace and Order No. 6/2557 dated 22nd Day of May B.E. 2557 (A.D. 2014) shall be the National Council for Peace and Order to exercise the powers and duties under this Constitution.

In case of necessity for the benefit of the performance of duties, the Head of the National Council for Peace and Order may change or add a person holding position in the National Council for Peace and Order, but the total number of members shall not exceed fifteen members. In this case, the Head of the National Council for Peace and Order may order any agency to be secretariat unit of the National Council for Peace and Order as appropriate.

If the National Council for Peace and Order is of opinion that the Council of Ministers should perform any matter under its powers and duties under section 19, the National Council for Peace and Order shall inform the Council of Ministers to proceed therewith.

If it is appropriate, the Head of the National Council for Peace and Order or the Prime Minister may ask for joint sitting between the National Council for Peace and Order and the Council of Ministers so as to consider or solve any problem related to the maintenance of peace and order or national security or to consider any other matter from time to time.

Section 44 In the case where the Head of the National Council for Peace and Order is of opinion that it is necessary for the benefit of reform in any field and to strengthen public unity and harmony, or for the prevention, disruption or suppression of any act which undermines public peace and order or national security, the Monarchy, national economics or administration of State affairs, whether that act emerges inside or outside the Kingdom, the Head of the National Council for Peace and Order shall have the powers to make any order to disrupt or suppress regardless of the legislative, executive or judicial force of that order. In this case, that order, act or any performance in accordance with that order is deemed to be legal, constitutional and conclusive, and it shall be reported to the National Legislative Assembly and the Prime Minister without delay.

Source:

Unofficial translation by the Constitution Drafting Commission, Constituent Assembly
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