

INCOME TAXATION ON NONPROFIT ORGANIZATIONS STUDY ON ASSOCIATIONS AND FOUNDATIONS¹

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Abstract

Foundations and associations (“FFAs”), as nonprofit organizations, are incorporated for the purpose of public charitable works. FAAs should be supported by the government sector and make them as government representative to help communities in need such as public works, accidents, fires or disasters. The government should encourage citizens to participate in charitable activities by volunteering or donating money. FAAs work as a center for citizens to operate charitable activities and to benefit the countries and reduce economic inequality.

From the study, however, there are some disadvantages found in the Thai Revenue Code and the relevant provisions that provide inadequate income tax measures for FAAs, for example, income tax computation is based on gross income tax charge before deduction expenses, and very limit tax deductible contributions and carryover computation tax rule.

These findings suggest that Thai Revenue Code of income tax on FAAs and the Notification of the Ministry of Finance on Income Tax and Value Added Tax (No.531) which exempt income tax on public charitable FAAs should be amended to encourage a better performance of charitable works of FAAs.

Keyword: Income taxation on nonprofit organizations, foundations, associations, charitable contributions.

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บทคัดย่อ

มูลนิธิและสมาคมในฐานะที่เป็นองค์กรที่ไม่แสวงหากำไรจัดตั้งขึ้นเพื่อดำเนินการเพื่อประโยชน์ต่อการกุศลสาธารณะ พวกเขาจึงควรได้รับการสนับสนุนโดยภาครัฐและเป็นส่วนหนึ่งในการเป็นตัวแทนของภาครัฐเพื่อที่จะช่วยเหลือชุมชนในทางจำเป็น เช่น งานสาธารณะ อุบัติเหตุ อักคิภัย หรือภัยพิบัติ รัฐบาลควรจะสนับสนุนพลเมืองเพื่อเข้าไปมีส่วนร่วมในกิจกรรมการกุศลโดยในสมัคร หรือการบริจาคเงิน มูลนิธิหรือสมาคมจึงเป็นศูนย์กลางของพลเมืองเพื่อที่จะดำเนินกิจกรรมการกุศลและสร้างผลดีต่อประเทศและลดความเหลื่อมล้ำทางเศรษฐกิจ

อย่างไรก็ตามจากการศึกษา ยังมีข้อเสียบางประการในประมวลรัษฎากรและบทบัญญัติที่เกี่ยวข้องซึ่งเกี่ยวข้องกับมาตรการทางภาษีเงินได้ต่อมูลนิธิและสมาคม ตัวอย่างเช่น การคำนวณภาษีบนฐานรายได้ก่อนหักรายจ่ายและข้อจำกัดด้านการหักลดหย่อนเงินบริจาคและการนำเงินบริจาคส่วนเกินในปีปัจจุบันไปลดหย่อนในปีถัดไป (carryover)

จากผลการศึกษาที่กล่าวมาข้างต้นจึงขอเสนอแนะว่าบทบัญญัติบางประการในประมวลรัษฎากรการจัดเก็บภาษีเงินได้ ของมูลนิธิและสมาคมและประกาศกระทรวงการคลังว่าด้วยภาษีเงินได้และภาษีมูลค่าเพิ่ม (ฉบับที่ 531) ควรได้รับการแก้ไขเพื่อที่จะสนับสนุนการดำเนินงานการกุศลสาธารณะของมูลนิธิและสมาคม

Introduction

Currently, there is a major increase in population and an increase in the citizens who are facing the social issues such as poverty, homelessness, disabilities, unemployed etc. As a result, there is an increase in social problems and violence such as criminal problems, drug addiction problems, family problems, deterioration in morality. The government alone cannot provide enough social welfare coverage for all these social problems. One of the ways to reduce the social problems and improve society is to work together both public sector and private sector and support nonprofit organizations which become very powerful and resourceful because the nonprofit organizations are composed of knowledge, skill, selflessness, and a precisely charitable goal; they also have a lot of resources and equipment to carry out the tasks. Therefore, nonprofit

organizations have a lot of essential roles in helping the people in need, protecting people, resolving social issues which are increasing and getting worse in the different areas.³

Foundations and associations (“FAAs”) are regarded as “nonprofit organizations” established by the virtue of the Thai Civil and Commercial Code under section 110 (foundations) and section 78 (associations). When they are registered, they will have the status of legal entities. FAAs are established for charitable, religious, art, science, literature, education, or for other public purposes.⁴

In supervising a foundation, section 128 of the Thai Civil and Commercial Code gives the power to the registrar to examine a foundation to ensure that it is operating in accordance with section 135, which allows ordinary citizens to examine documents regarding the foundation that is kept by the registrar. In addition, section 131 allows the registrar to revoke the license of foundation if the aim of it is against public order or if it has stopped operating for more than two years above, because there is a fear that an anonymous person may use the name of the nonprofit organization in a negative way.

For income tax purposes, in the past, FAAs did not have any duty to pay income tax until the year 1982 (2525 B.E.)⁵ when income tax law on FAAs was introduced and to be effective in 1983 (2526 B.E.) This was stem from the views that tax exemption on FAAs could be abused for the aims of tax evasion as a result FAAs’ moral images.

Because FAAs operate for public and charitable purposes and do not have any objectives of distributing any profits among members, the provisions related to income tax on FAAs should not

³ Thai Junior Encyclopedia Project,
<http://kanchanapisek.or.th/kp6/sub/book/book.php?book=12&chap=3&page=t12-3-infodetail09.html>.

⁴ Amara Pongsapich. **Thailand Nonprofit and Social Development**. Bangkok: Chulalongkorn University. 70 (1997).

⁵ สุเมธ สิริคุนโชติ. “ภาษีเงินได้กับมูลนิธิและข้อคิดเห็นบางประการ.” *สรรพากรสาส์น*. เล่มที่ 4: 2528, น. 81

(Sumet Sirikunchoat. “*Taxable income of foundations and some suggestions*.” *Sanpakornsarn*. No. 4: 2528, at 81.)

only contribute to equity but also support nonprofit organizations. Furthermore, nonprofit organizations like FAAs are legally prohibited to distribute the profits among their members.

Definition of Nonprofit Organization

A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors or trustees. It should be noted that a nonprofit organization is not barred from making profits. It is only the distribution of the profit that is prohibited among members.⁶

Actually, it is very difficult to define exactly the meaning of “nonprofit organization”. There are many scales, scopes and forms. It operates to cover public activities such as education, religions, museums, hospitals etc. Many researchers have provided definitions of nonprofit organizations in relation to various aspects.

Rules on income taxation on nonprofit organizations study on foundations and associations compared to foreign law

Thai law

The historical background of income tax on FAAs did not started from income taxation but it started from the tax deduction from charitable contributions. It means that the Thai Revenue Code allowed taxpayers who donate money to FAAs registered with the Minister of Finance as public charitable FAAs to receive the tax deduction from charitable contributions at the maximum amount of 10 percent of the contributions after the deduction of other tax expenses and allowances. This regulation seemed like a good starting point to implement tax measures in order to foster charitable organizations in form of associations and foundations.

Tax deduction from charitable contributions has restricted to FAAs as prescribed by the Ministry of Finance because the

⁶ James J. Fishman. **Taxation on Nonprofit Organizations Cases and Materials**. Fourth Edition. New York : Foundation Press, 2015, at 3-4.

authorities may consider that these kinds of them are examined by law. The law consists of many conditions and they must operate activities for public. Therefore, individuals who donate money to public charitable FAAs can trust that their money would be spent on charitable works. In addition, this policy indirectly fosters FAAs' activities because instead of direct payment from government, they can obtain contributions from individuals and reduce to depend on government. Accordingly, FAAs have to adapt and operate well to make individuals trust them. Currently, the maximum amount of the tax deductible contributions is 10 percent after deduction of expenses and allowances for individuals and the maximum amount of the tax deductible contributions is 2 percent of net profit for companies.

While, for income tax purposes, in the past, FAAs were exempt from income tax (both personal income tax and corporate income tax) because they were not under any tax unit in Thai Revenue Code. Until 1982 (2525 B.E.), FAAs must be taxable on income tax which was effective in the accounting period of 1983 (2526 B.E.) except the FAAs prescribed by Minister of Finance under section 47 (7) (b) of the Revenue Code that is still exempt income tax⁷.

FAAs must be taxable on gross income, the amount of money person earns before other deduction, at the tax rate of 5 percent, while, income derived from trade or business activities taxed at 1 percent. Afterwards, the tax rate has been increased from 5 and 1 percent to 10 and 2 percent respectively.⁸ Incomes from registration fees or maintenance fees from members, cash or assets received as donations, cash or assets received as gifts and income from private school registered on behalf of associations or foundations except tutorial schools are out of scope of income taxation.⁹ FAAs

⁷ Sumet Sirikunchoat, *supra note 5*.

⁸ สุเมธ ศิริคุณโชติ. ภาษีอากรตามประมวลรัษฎากร 2558. กรุงเทพฯ : เรือนแก้วการพิมพ์, 2558. หน้าปก (Sumet Sirikunchoat. **Taxation under Thai Revenue Code 2558**. Bangkok : Ruenkaew Printing, 2558, cover page.)

⁹ The Thai Revenue Code, section 65 Bis (13)

prescribed by Minister of Finance as charitable organization are exempt from income taxation.

From what has been mentioned above, at present, the Thai Revenue Code classifies two types of associations and foundations: (1) General FAAs which they are taxable on gross income and (2) FAAs prescribed by the Minister of Finance in accordance with Section 47 (7) (b) under the Thai Revenue Code which are exempt on income tax.¹⁰

The United States Law

In the United States, nonprofit organizations fall under Internal Revenue Code.¹¹ They are probably tax-exempt organizations if they qualify and apply it. Although nonprofit organizations have tax-exempt status, they may be required to be taxable on unrelated business income which is not exempt's purposes. Passive investment income such as dividends, interest, rents and royalties are excluded from unrelated business income.¹² Charitable contributions to qualified organizations under section 501 (c)(3) organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes are also tax deductible expenses. The limits of tax deductible contribution are 50 percent maximum of adjust gross income for individuals and 10 percent maximum of taxable income for companies. Moreover, if the deduction from contribution exceeds the limit in the present year, it can be carried over for the next five years.

The Japanese law

Nonprofit organizations can be established in a variety of ways, such as associations and foundations, public interest associations and foundations, special nonprofit organizations,

¹⁰ จิระภา สุชีประเสริฐ, “ภาระหน้าที่การเสียภาษีของมูลนิธิหรือสมาคม.” *สรรพากรสาส์น*, เล่มที่ 02 : 47, น.50.

(Jirapar Sukipraseard. “*Tax burdens of Foundations and Associations.*”

Sanpakornsarn.No. 02 : 47, at 50.)

¹¹ The Internal Revenue Code, section 501 (c)

¹² The Internal Revenue Code, section 512 (b)(1)-(5)

organizations established under special law etc. Also, the main objectives of their activities are to serve public charities. Commonly, nonprofit organizations are exempt from the corporate tax, but any incomes they receive from profit-making activities are taxable on corporate tax which is subjected to the same tax rate as a company. In addition, the accounting for nonprofit organizations is subject to the business accounting practice as fair and appropriate. For tax benefit, Japanese nonprofit organizations consist of various categories. Therefore, income taxation of nonprofit organizations may be complex. The limit of tax deductible donation is 40 percent maximum of individuals and 3.125 percent maximum of companies.¹³

Problems on income taxation on foundations and associations under Thai law

Currently, there are several problems related to income taxation on foundations and associations. The problems can be classified the two major issues: (1) problems related to income tax computation and organizational features and (2) problems related to charitable contributions. They will be explained through the following:

1. Problems related to income tax computation and organizational features

1.1) Tax base and tax rate of income taxation on foundations and associations

At present, income taxation on FAAs shall be taxable on gross income at 10 percent while income derived from business, commerce, agriculture, transmission of real estate and others ways which fall under section 40(8) of the Thai Revenue Code are taxable on gross income at 2 percent.¹⁴ There are some problems of income taxation facing as follows:

¹³ Council of foundations. "*Foundation Basics*." <http://www.cof.org/content/japan>.

¹⁴ The Thai Revenue Code, section 39 and income tax rate schedule.

Firstly, income taxation on FAAs is inappropriate for the current situation because income taxation on them has been at this rate since the accounting period of 2529 B.E. even though the tax rate of companies as profitable organizations which are taxable on net profit was decreased from 30 percent to 23 percent in the accounting period of 2555 B.E. and has been further decreased to 20 percent in 2556-2558 B.E. It shows that the tax rate imposed for FAAs has never been decreased even though they have roles in developing the society and community and do not have any profit-making agendas.

Secondly, although income taxation on gross income of FAAs is actually taxable on lower tax rate compared to companies and they are disallowed to deduct any expenses.¹⁵ They, therefore, are not concerned about the items which shall not be allowed as expenses in the calculation of net profits. However, it is the disadvantages when FAAs operate its business and lose money but they still have to pay income tax on gross income, unlike companies that do not need to pay tax if they are going through the loss and, furthermore, it can bring the loss to carry forward in the next five accounting period. For this reason, it seems as if the FAAs bear the tax burden too much or not although their aims do not to make profit to distribute among members. Moreover, keep in mind that tax policy related to them should be imposed to examine FAAs rather than a channel of earning for the government.¹⁶

In United States, nonprofit organizations can apply to obtain tax exempt status under section 501(c) of the Internal Revenue Code. Nonprofit organizations are divided in two types: (1) nonprofit organization that allows people who donated money to deduct as charitable contributions and (2) nonprofit organization that disallows to deduct charitable contributions. Donors can be deductible contributions, if it is charitable organization in accordance with section 501(c) (3) of Internal Revenue Code such as educational, religious organizations etc.

¹⁵ The Thai Revenue Code, section 65 Ter.

¹⁶ Sumet Sirikunchoat, *supra* note 5, at 85.

1.2) No measures to examine financial receipts of foundations and associations

Commonly, general FAAs have to submit annual income tax return (PND 55) in each accounting period but they do not need to submit a balance sheet, accounting sheet, or any financial statement. In this case, it leads to an absence in examining of the real financial status of FAAs.¹⁷

On the other hand, public charitable FAAs as tax-exempt status are not required to submit annual income tax return (PND 55) but they need to submit a balance sheet, and accounting sheet to the Revenue Department for examining on whether it is operating in the conditions that the Revenue Department imposed or not.

1.3) Problems of Notification of the Ministry of Finance on Income Tax and Value Added Tax (No. 531)

There are three problems related to Notification of the Ministry of Finance (No. 531) which specifies the qualifications of public charitable organizations, foundations and associations in order to obtain tax-exempt status:

Firstly, FAAs which expect to apply for public charitable organizations established at least than one year is inappropriate because it is difficult to ensure whether or not those are registered for the purpose of public charitable works. Accordingly, to be easier to ensure, the qualified FAAs should be registered more than one year. In the past, FAAs that expected to apply for the public charitable organizations would have to be set up for at least three years which made it ensure to prove that the organizations had the history in helping the societies. Yet, the regulation was changed in 2555 B.E. from three years to one year. The problem is that the period of one year is released in the situation in examining and supervising the

¹⁷ Jirapar Sukipraseard, *supra* note 10, at 50.

donated money for tax deductible contributions which increase the risk for the Revenue Department.¹⁸

Secondly, public charitable FAAs are barred from deriving revenue from a purchase or sale or provision of service in ordinary course. The clause disallows the public charitable FAAs to derive revenue from sales or services in ordinary course except if the sales are related to religion, education, clinic and social work. It is understandable that the government wishes for public charitable FAAs that is truly beneficial, transparent, and does not engage in business activities that produces profits from businesses and commercial purposes. In addition, these FAAs are more likely to receive subsidy from donors because they also receive tax deductible contributions.

However, although FAAs will receive the subsidy from donors, it may not enough to administer them and work for the society. The government, therefore, should allow the general FAAs including the public charitable FAAs to operate for profits from income and spend to charitable activities. The government does not have to concern that the public charitable FAAs will behave to obtain more profits because they must be imposed to spend at least 60 percent of expenses for charitable purposes.

Thirdly, the regulation provides the authority to Minister of Finance to deem any FAAs properly qualified as public charitable FAAs even if they disqualify because certain FAAs may reasonably encourage the governmental policy to resolve the problems of society so they should gain more sponsorship directly from the citizens and the citizens are further able to enjoy tax deductible contributions. On the other hand, this seems impartial because it could be seen as abusive authority of the Minister of Finance¹⁹ because it possibly equips to a political tool for the founders who have political connections to establish public charitable FAAs to obtain tax-exempt

¹⁸ Thai Plubica. *“Revenue Department collects information related to donations to Foundations and Associations backward 20 years.”*
<http://thaipublica.org/2013/04/personal-income-tax-structure-18/>

¹⁹ Sumet Sirikunchoat, *supra* note 5, at 86.

status and spend the money in a negative way. In order that after they registered as a public charitable FAAs, they are incentive to people to donate money and enjoys tax deductible contributions. As a result, if it is not established for public purposes, then it possibly leads to the government losing revenues.

1.4) Profits received from passive investment income should be exempt from income taxation

Passive Investment Income is income that receives without doing anything such as royalties, dividends, interest, and rents. In the United States, these kinds of income are excluded from unrelated business income which would be taxable because they do not cause unfair competitive problem. These kinds of income are recognized as proper source of income of nonprofit organizations.²⁰

Under Thai Tax Law, FAAs must be taxable on gross income which is all categories of income they receive.²¹ Royalties, dividends, interest shall be taxable at 10 percent of all income except dividends under conditions according to section 65 Bis (10) of Thai Revenue Code.

2. Problems related to charitable contributions

2.1) The limit of deductible contributions is too small.

Currently, the limit of deductible contributions is rather small limit. The amount of contributions has been 10 percent maximum of income after deduction of expenses and allowances for individuals²² and 2 percent maximum of net profit for companies.²³

It is true that tax deductible contributions become highly criticized because there are both sides that agree and disagree with tax deductible contribution policy which can lead to the wealthy gaining more benefits because donors are able to donate their own

²⁰ Fishman, *supra* note 3, at 370.

²¹ Thai Revenue's ruling No. 0702/4315

²² The Thai Revenue Code, section 47 (7)(b).

²³ The Thai Revenue Code, section 65 Ter (3)

money and enjoy tax deductible contributions. On the other side, donors who voluntarily donate money should not receive benefits return. This policy may cause an “upside-down effect” which wealthier people will receive more benefits than poorer people under the progressive tax rate.²⁴

Nevertheless, the dissents argue that supporting contribution policy lead to help people in the rural areas and reduce the gap between the rich and the poor in society because the rich is willing to donate the money and enjoys tax deductible contributions. In fact, the benefits donors receive are not much higher than the money they donate depending on the tax rate they reach. Additionally, FAAs can help people faster and more efficient.

2.2) Disallowance to carryover of the excess amount of contributions

Under the Thai Revenue Code, if individuals contribute a large amount of money for donations over 10 percent of their income in the current year, they cannot carry over and deduct in the excess amount of contributions to the next year. Therefore, adding the clause which allows such excess amounts to be carried over can be useful for donors because they will receive a full amount of tax deductible contributions. In the United States, if individuals donate money over a limit to allow deductible by law, they can carry it over to the next five years. This encourages individuals and companies to donate to public interest.

Recommendations for income taxations on foundations and associations

1. Recommendations related to income tax computation and organizational features

1.1) Abolish income taxation on gross receipt on FAAs

²⁴ วิริยะ นามศิริพงศ์พันธุ์. “ปฏิรูปภาษี การคลังและงบประมาณ เพื่อลดความเหลื่อมล้ำและสร้างความเป็นธรรมในสังคม.” วารสารนิติศาสตร์. เล่มที่ 1: 2555. (Wiriya Narmsiripongpan. “*Tax reformation, public finance and budget for a reduction of inequity and contributing fairness to societies.*” **Faculty of Law’s Journal**. No.1: 2555).

Currently in Thailand, FAAs are taxable on gross income. Basing on gross income is not the most favorable measure to encourage FAAs. Therefore, Thai tax law should be amended by abolishing the Income Tax Rates Schedule related to tax on gross income before deduction of any expenses of FAAs which is not income under Section 65 Bis (13) at 10 and 2 percent on gross receipt and add Tax Rates Schedule to tax on net profit of unrelated trade or business income at 20 percent. Also, section 65 Bis (13) should be amended to exempt income tax on FAAs except income from net profit derived from unrelated trade or business income.

1.2) Impose the policy to examine financial statement of FAAs

As general FAAs in Thailand pay tax on gross receipts, they have to submit annual income tax return for FAAs (PND55) but they are not required to submit financial statement (except public charitable organizations prescribed by the Minister of Finance) so the Revenue Department cannot prove income they receive. As a result, to be tax-exempt, they should be required to submit income tax returns with financial statement to the Revenue Department. If they fail to do this, their tax-exempt status will be revoked.

1.3) Amend the Notification of the Ministry of Finance on Income Tax and Value Added Tax (No. 531)

The Notification of the Ministry of Finance on Income Tax and Valued Added Tax (No. 531) should be amended as follows:

Firstly, the period of time established of at least only one year is too short to prove that foundations are charitable organizations. Therefore, this clause should be amended to make foundations be established for at least three years.

Secondly, it should allow the foundations prescribed by the Minister of Finance or public charitable organizations to conduct activities such as purchase or sale or provision of services.

Thirdly, Notification of the Ministry of Finance on Income Tax and Value Added Tax (No. 531) should be used only for FAAs

which qualify to receive tax exempt status. It should not provide the power to Ministry of Finance to deem any FAAs properly because the donors can obtain deductible contributions if they donate to foundations which mostly work for charitable purposes.

1.4) Exclude income taxation on passive investment income

Passive investment income such as income from royalties (40(3)), interest or dividends (40(4)) and income from rent (40(5)) are types of income that have no impact on competition. Therefore, fees for royalties, interests, dividends and rent should be exempt from taxation.

2. Recommendations related to charitable contribution deduction

2.1) Increase the limit of tax deductible contributions

To foster charitable activities, the limit of tax deductible contributions should be increased from 10 percent of individual income and 2 percent of companies' net profits.

2.2) Allow excess donations to be carried over to the next year

Add a provision to allow the excess of donations in the current year to be carried over to the next year so that tax payers are able to fully deduct contributions (within the limit that is set for each year).

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