

Report No. 785/2558 on the request to submit the fact attached with the consideration about human rights violation to the Constitutional Court: the case of Section 84 paragraph three of the Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services B.E. 2553 (2010) affecting human rights and against Constitution of the Kingdom of Thailand B.E. 2550 (2007)

- **Issues of Complaint:**

The complainant asked the NHRCT to examine Section 84 paragraph three of the Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services B.E. 2553 [2010] which affects human rights and contradicts Constitution of the Kingdom of Thailand B.E. 2550 [2007]. Such provision causes TOT Public Company Limited to transfer its income to the NBTC, affects the company's status of financial and investment, and reduces the amount of salaries, wages and welfares of the company's employees. This creates impacts to the permission or the concession agreement which has made before the date Constitution of the Kingdom of Thailand B.E. 2550 [2007] was in effect. And the prescription of powers and duties of the NBTC are beyond the constraint as prescribed in Section 47 paragraph two of Constitution of the Kingdom of Thailand B.E. 2550 (2007) which specifies an public independent entity with the duty of allocating radio frequency under paragraph one and regulating the broadcasting and telecommunications services.

Decisions of NHRCT

NHRCT examined and deemed that there is no settlement in the criteria of expense which the Ministry of Finance has prescribed a state enterprise to deduct its expense before the delivery of income. Also, CAT Telecom Public Company Limited and TOT Public Company Limited has not registered in the Stock Exchange and opened for selling their shares to people. Thus, the NHRCT deemed that there has been no action affecting the financial status and status of employees in a concrete way. And Section 84 paragraph three of the Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services B.E. 2553 [2010] is not against Constitution of the Kingdom of Thailand B.E. 2550 [2007]. Because Section 84 paragraph three however is prescribed to change the delivery method of income which comes from the concession of the state enterprise operating telecommunication services during the transition period, from the concession agreement system to the license system which created no impact to the permission for concession or the lawful contract made before the announcement date of Constitution of the Kingdom of Thailand B.E. 2550 [2007] Section 305 (1). Due to the status of both state enterprise which is the receiver of allocated radio frequency and the licensee to operate telecommunications services with the same status as other concessionaires, the supervision of

NBTC on the delivery of income from the concession among state enterprises operating telecommunications services under the transition period is also not against Constitution of the Kingdom of Thailand B.E. 2550 [2007]. However, this complaint has a point relating to a complaint which was earlier considered by the NHRCT. Thus, the NHRCT deems appropriate to submit policy suggestions or proposals for improving laws to the Cabinet as follows:

Policy recommendations or Recommendations on the revision of laws

(1) In case where both state enterprises, CAT Telecom Public Company Limited and TOT Public Company Limited will registered in the Stock Exchange of Thailand (SET) to accumulate capital for financial circulation in business, there should be the amendment of laws involving the delivery of income from the concession agreement on radio frequency allocated for telecommunications services which are considered national resources with the aim of gaining public interest and income of the country and avoiding negative effects to private investors.

(2) When the method of the income delivery according to Section 84 paragraph three of the Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services B.E. 2553 [2010] may affect the financial status and liquidity of both state enterprises for telecommunications services. Also, the provision of Section 116 of the Public Company Limited Act B.E.2535 [1992] determines that a public company limited shall allocate a part of annual net profit to be the reserve capital at the rate of 5 percent or over of the net profit deducted by the accumulate loss (if any) until the reserve capital will reach 10 percent or over of registered capital in order to secure the financial status of the company. The Cabinet and related agencies should find the solution to adapt the business structure for earning income and consider the budget allocated for investment of TOT Public Company Limited and CAT Telecom Public Company Limited in the future for supporting the business performance after the termination of concession agreement and the case of no income from the concession. There should also be a measure for benefits, salaries and the security of employment of state enterprise employees when the income from business operated by state enterprises is not enough after the change of the method of income delivery according to Section 84 paragraph three of the Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services B.E. 2553 [2010].

(3) To consider expenses which state enterprises can deduct before delivering net income to the NBTC for becoming a part of the national revenue according to Section 84 paragraph three of the Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services B.E. 2553 [2010] and the consideration of criteria for expenses which CAT Telecom Public Company Limited and TOT Public Company

Limited can deduct before delivering net income to NBTC for becoming a part of the national revenue under the Ministry of Finance, the Ministry of Finance should ensure the coverage of the real expense caused by the concession agreement or contract, such as the expense caused by the execution of judgment or the final verdict of court or award of arbitration. For this, the financial status of both state enterprises will not be affected.

(4) The National Broadcasting and Telecommunications Commission (NBTC) as the supervising agency should protect rights and liberties of people not to be disadvantaged from the licensee of telecommunication services together with right to privacy and freedom of communication of individual by telecommunication and promote rights, liberties and equality of people in the accession to and utilization of radio frequency for telecommunications services, especially the right of customer, as prescribed in the Telecommunications Business Act B.E. 2544 [2001], e.g. precise and fair rates of fees and service fees applied to licensees and customers. Licensees must be supervised on the collection of fees or service fees which are extra or above the maximum rate as prescribed by the supervising agency or ensured that they will not violate the law, the obligation of permission and the contract of service.

Performance outcomes of the Cabinet and related government agencies

On 22nd September 2015, the Cabinet adopted the resolution on acknowledging the outcome of the NHRCT consideration for policy recommendations and Recommendations on the revision of laws and assigned the Ministry of Information and Communication Technology to consider together with the Ministry of Finance, Bureau of the Budget and the Office of the National Broadcasting and Telecommunications Commission the consideration of studying the guideline or the appropriateness of such proposals and summarizing the outcome of consideration or the outcome of performance about such issues.

Later, on 8th March 2016, the Cabinet adopted the resolution on acknowledging the outcome of the NHRCT consideration for policy recommendations and Recommendations on the revision of laws of the Ministry of Information and Communication Technology. The key conclusion is that the government hasn't planned to register these 2 state enterprises in the Stock Exchange. If, in the near future, the government has such related policy, it should consider related laws and make them under the same direction as the case of the Mass Communication Organization of Thailand (MCOT). The deduction of expense as prescribed in Section 84 paragraph three follows the criteria of the Ministry of Finance under the law. Furthermore, both state enterprises were informed to accelerate the exercise of rights as prescribed by laws before the termination of contract. Now, the Ministry of Information and Communication Technology is opening for comments and suggestions from stakeholders in the guideline for the development of Thailand's Digital Economy in order to set the vision and

make a draft of the Digital Economy and Society Development Plan. And the NBTC notified that it has regulated the fees and supervised licensees to ensure that they will do business under the prescribed laws. NHRCT's comments will be taken into the consideration for the protection of rights and liberties of people.