

THE PRESUMPTION OF MONEY LAUNDERING OFFENSE: A CASE STUDY ON HAWALA

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Introduction

At present, the current emphasis on the prevention of illegal remittance systems also varies by area such as “Hui Kuan” (Hong Kong), “Hundi” (India) and Thailand we call “Phei Kwan”, but many countries called “Hawala” that referred to in the Middle East and South Asia, this word mean trust. The Hawala remittance systems are a fast, safe and cost-effective way to transfer funds both domestic and international without using formal financial institutions. Hawala works by transferring money without actually moving it. In a Hawala transaction, no physical movement of cash is there. Hawala system works with a network of operators called Hawala Dealers (clearing agent). A person willing to transfer money, contacts a Hawala operator at the source location. The Hawala operator at that end collects the money from that person who wishes to make a transfer. He then calls upon his counterpart or the other Hawala operator at the destination place was the transfer has to be made. Now the Hawala operator at the transferee's end hands over the cash to the intended recipient after deducting a certain amount of commission. Is something that all people and many other organizations in the public sector were featured. Especially, the problem at the borders provinces of Thailand. This problem is interest for international organizations

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such as Financial Action Taskforce (FATF), which is the international organization with 36 member countries and has attended more than 180 countries to served a policy was intended, then created the international standard with the development and promotion of policies to against the remittance characteristic Hawala because this problem is a serious threat and affected the economy in many countries.

Moreover, the important of FATF as the basis of international standard model laws to apply and considered in Thailand. Therefore the government's policy and government officials must use the law enforcement for situation is calm as much as possible to perform quickly and efficiently by using legal procedure contemplated between the importance in the protection of right and liberty of the people with the aim to balance the crime, that is law enforcement can further right and liberty necessary to efficiently, so that people have suffered at least. Especially the money laundering with the problems of payment regarding Hawala (illegal remittance) and reporting requirement according to Anti-Money Laundering laws. Which already know this crime of payment regarding Hawala (illegal remittance) threatened the stability and economy of the country. In case study conducting transactions with Hawala methods of Entity and professions under Section 16 (10) of Anti-Money Laundering Act B.E. 2542.

Furthermore, this case study was interviewed by Mr. Piya Srivika, Investigator senior professional level division 3 department of AMLO "The AMLO has made investigation expand information by AMLO electronic reporting system concerning about Mr. J and Mr. S (confidential), who have suspicious transaction since the year 2004-2014 include 10 years that found the relevant deposit more than 34 accounts total of transaction value of deposit amount 1,962,973,660 bath. This suspicious transaction may conflict with profession. There are a lot of revenue and transaction with a person who has a circumstance in offense related to drugs. Then the investigation gathers witness, an important document following the Anti-Money Laundering Act B.E.2542.

However, the fact of suspicious transaction found Mr. J and Mr. S they are offenses that resemble the transnational crimes. Importantly, this case starting from the

capitalist owner of the drugs, which are outside the kingdom has drug trafficking. Those things are distributed in Thailand come to a group of drug dealers, then the dealers pay for drugs by money transfer of the various parties, who opened an account paid most of them are the workers. When the illegal remittance of drug dealer transfer to the workers, then the workers shall transfer money or Hawala to the group of Mr. J and Mr. S. Later, Mr. J and Mr. S will continue to transfer money to drug dealers. The illegal remittance shall be in various methods. Firstly, they will be moved the money in cash or a classic Hawala system that trust matches transfer between people who want to get money into the country with those who need to get it out, minimizing the need to transfer across borders Secondly formally, they will send money to company business export goods including fresh fruit, crops, cars, construction equipment and oil. Finally, they will export the products to a capitalist owner of the drugs”, Mr. Piya Srivika said¹. Although the Anti-Money Laundering Act B.E.2542 section 16 (10) as follows:

“ Professions stated below shall have the duty to report to the Office any transaction when it is carried out in cash of a value exceeding the amount prescribed in the Ministerial Regulation or is a suspicious transaction. The professions conducting a financial business under the law on exchange control which is not a financial institution and poses a risk, according to risk assessment, of being abused for money laundering or terrorism financing, as prescribed by the Ministerial Regulation”².

It's important to keep in mind that on this fact of the Professions conducting a financial business under the law on exchange control which is not a financial institution who want to avoid the law they did not report any transaction to the Office because the Entity and Professions were conducting a financial business they have benefited from avoiding the duty to report the Office.

¹ Interview with Piya srivika, Investigator senior professional level, Department of Litigation 3, Anti-Money Laundering Office (AMLO), 18 January 2016.

² section 16 (10) Anti-Money Laundering Act, B.E. 2542.

It must be accepted in this current situation of the presumption of money laundering offense with transactions of professions under section 16 (9) (10) of Anti-Money Laundering Act B.E. 2542 (AML). The problems of money laundering on HAWALA process which the criminals commonly used this method for money laundering. In short, It should be presumed that the persons who have no license always related to money laundering. Even if the process by HAWALA method, it should be presumed that Money laundering offenses under the laws of Thailand without taking into consideration on the predicate. The fact is legal professions must report transactions under section 16 (9) (10) of AML. On the other hand the illegal professions there will not be reported transactions, and it also caused by transnational money laundering by HAWALA methods such as significant drug traffickers, Politicians, Gambler, etc. Then all these methods are used for money laundering, transnational HAWALA to make their assets are difficult to be investigated.

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Anti-Money Laundering law cannot enforce and control reporting of transactions. Therefore, we can presume that the professions of money services business on the HAWALA financial system are predicates offense on Anti-Money Laundering Act B.E. 2542.

Summary

To my knowledge, this part needs to mention about comparable of Anti-money laws include definition and meaning relate to persons and entities which is conducting a financial business. Furthermore, in this part will describe the appearances of persons or entities that each country has different measures to control group of money service business. Especially, Anti-Money Laundering laws in foreign nations compare with Thai Anti-Money Laundering laws relate to the profession under section 16 (10) of Anti-Money Laundering Act B.E. 2542.

Comparable of Anti-Money Laundering laws³

Countries	Appearance of persons or entity	Transaction Report	Definition/Meaning	AML laws
1. Australia (AUSTRAC)	registered	Report	The persons and entity of financial services in the capacity of non-financier carrying on a business with formal banking system as Hawala	AML/CTF Act A.D.2006
	Unregistered	Invite to registered and Enforce to report		
2.Malaysia	registered	Report	The persons and	AML Act

³ Interview with Piya srivika, Investigator senior professional level, Department of Litigation 3, Anti-Money Laundering Office (AMLO), 11 June 2017

(BNM)	unregistered	Enforce to registered and report	entity which is bank or non-bank with licensees carry on money services business (MSB) or remittance services (Hawala)	A.D.2001 And MSB Act A.D.2011
	unregistered	Not report		
3. Canada (FINTRAC)	registered	Report	The persons and entity engaged in the business of foreign exchange	
	unregistered	Invite to registered and Enforce to report		

Comparable of Anti-Money Laundering laws (Continue)

Countries	Appearance of persons or entity	Transaction Report	Definition/Meaning	AML laws
Countries	Appearance of persons or entity	Transaction Report	Definition/Meaning	AML laws
			dealing, of the cashing or selling money orders and money transferring (Hawala)	PCMLTF Act A.D.2001
4. Thailand (AMLO and BOT)	registered	Report	The persons who conducting a financial business under the law on exchange control	AML/CTF Act B.E.2542

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It's important to remember that, regarding the legal findings in Thailand concern section 16 (10) of Anti Money Laundering Act BE 2542. Anti Money Laundering law specific aware of individuals registered as the main criteria. Therefore, on the case studies of a real situation that interviewed by Mr. Piya Srivika has changed many points of view in this field. For example, from the case studies both of Mr. A and Mr. B operating the same business such as conducting financial business, whether it is the Hawala transactions or not. Mr. A not registered by Bank of Thailand (BOT) when conducting business on money exchange and remittance service provider, but later Mr. A was registered with Bank of Thailand because of pressure from state agencies to requiring registration and reporting transaction following section 16(10) of Anti Money Laundering Act BE 2542. On the other hand, Mr. B conducting on the same business as Mr. A, but Mr. B not registered with Bank of Thailand. The important point is that information from Mr. Piya Srivika, which BOT commented on Mr. B not registered with Bank of Thailand (BOT). So, Mr. B was not under the supervision of the Bank of Thailand (BOT) in the money service business (MSB). In the situation of Mr. B, when not registered that mean Mr. B was not listed as the money service business (MSB) or they called independent remittance. So, Mr. B does not belong to professions under section 16(10) of AML Act B.E. 2542. Then Mr. B does not require to reports transactions to the Anti-Money Laundering Office (AMLO)⁴.

Summing it up, the difference of Mr. A and Mr. B both are the same conducting financial business that Mr. A who registered with Bank of Thailand (BOT) must report

⁴ Interview with Piya srivika, Investigator senior professional level, Department of Litigation 3, Anti-Money Laundering Office (AMLO), 13 June 2017.

transactions to the AMLO under section 16(10) of AML Act B.E. 2542 but, Mr. B not to require to report transactions to the Anti-Money Laundering Office (AMLO). Meanwhile, the foreign laws relating to money service business (MSB) are extensively and forcefully than Thai law. The problem becomes more important, because the Anti-money laundering office investigate and found that, most money service business never register with the BOT. So, they do not need to report anything. Anti-Money Laundering Office (AMLO) can get information on suspicious transactions by reporting from the financial institution under section 13. That means the loophole in the Anti Money Laundering act be 2542. The provision needs to be improved to protect criminals in the future. Primarily, the provision relates to reporting duty, property in rem, customers due diligence and power of enforcement, to make the law contemporary, stable and be accepted by the international.

Conclusion

To the best of our knowledge, we can conclude that about the analysis of the legal problems on Anti-Money Laundering Act B.E. 2542 section 16 (10) relate to the case study on HAWALA. The critical point is that to revise and prescribe the definition of Money Service Business in the law related to the financial field and Sign the Memorandum of Understanding (MOU) with the foreign countries are follow;

1. To revise and prescribe the definition of Money Service Business in the law related to the financial field. Thai laws define the meaning of Money Service Business specific to the financial institution. Nonfinancial institution (nonbank) which is under section 16 mostly specific to a company which is register to the minister of commerce, such as, credit provider, money exchange or money transfer. However, the money service business providers whose avoid the register or not ever be recognized

by the government remain. The HAWALA method is one of that; the money smuggles carrier into the country and the money exchange on the border that is illegal.

From the information above, I would like to suggest that expanding the scope of law under section 16 of Anti Money Laundering Act BE 2542 to cover the nonregistered money service business. The law shall be defined the definition and extensively the provision. That will force these MSB entities to have duties to report under section 16 (10) of Anti-Money Laundering Act B.E 2542.

To my way of thinking, we have to Amend on section 16 (10) from “Professions conducting a financial business under the law on exchange control which is not a financial institution and poses a risk, according to risk assessment, of being abused for money laundering or terrorism financing, as prescribed by the Ministerial Regulation” be “Professions conducting a financial business under the law on exchange control including persons who carry on the business of a remittance agent (Hawala) which is not a financial institution, as prescribed by the Ministerial Regulation” relate to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act A.D. 2001 (PCMLTFA) of Canada. The important point is that definition should be covered by the professions who are conducting financial business which is money transferring by HAWALA method must report transactions and;

2. Sign the memorandum of understanding (MOU) with the foreign countries which have a territory connected with our country. To prescribe the definition of the Money service provider, which is related to the parties. That will decrease the avoiding of tax by transfer pricing, illegal money exchange, and stability report system. If the MOU is signed, the cooperation between both countries will make the real persons who take benefit from illegal business appear.

3. The presumption of money laundering offenses to amend “the professions conducting a financial business who carry on the business of a remittance agent (HAWALA)” this act shall be unconditionally assumed as the money laundering activities with no countable on the predicate offense.

