瀚一律師事務所
HAN YI LAW OFFICES

www.hanyilaw.com

Shanghai Office
Suite 4103, II Grand Gateway
3 Hongqiao Road
Shanghai 200030, China
Tel: (86-21) 6448-5600
Fax: (86-21) 6448-5611

Beijing Office
Suite C203-5A
Lufthansa Centre Office Building
Beijing 100125, China
Tel: (86-10) 6410-5322
Fax: (86-10) 6410-5322

May 12, 2010

Memorandum to: Our Clients and Friends

Brief Analysis of Certain Foreign-Related Tax Law Issues under China's New EIT Law

Since the promulgation of the new *PRC Enterprise Income Tax Law* (the "EIT Law") on January 1, 2008, the PRC State Administration of Taxation ("SAT") has issued a series of supporting regulations and rules to facilitate the implementation of the EIT Law and further incorporate the anti-avoidance principle under the EIT Law into the philosophy and practice of the tax collection of China.[1] According to these supporting rules and based on the principle of "substance over form", the Chinese tax authorities are now empowered to initiate anti-avoidance investigation against any suspicious deals and make adjustment against any arrangement that fails the tests of "reasonable business purpose" and "commercial substance".

Amid the rapidly changing PRC tax regulatory environment, foreign investors and their China operations are faced with increasingly stringent compliance requirements, especially in areas of corporate restructuring, transfer pricing, EIT withholding at source for non-resident enterprises (the "NREs"), and treaty benefit claims of NREs.[2] Hence, it has become imperative for foreign investors to revisit their current tax planning strategies and tax compliance issues and adjust existing investment structures accordingly. As a matter of current practice, tax authorities have geared up efforts in scrutinizing and cracking down tax-avoidance driven arrangements. Based on the foregoing and with a focus on the anti-avoidance feature embedded in the ancillary rules of the EIT Law, we have prepared this memorandum to offer preliminary analyses and suggestions on tax issues of special importance to foreign investors.

The supporting regulations and rules mainly include the following (together with the EIT Law and its implementing regulations, the "New EIT Laws"):

- ✓ Circular on Several Issues with respect to Enterprise Income Tax Treatment for Corporate Restructuring

---

[1] Solely for the purpose of this memo, "China" or the "PRC" means the People's Republic of China, excluding Hong Kong SAR, Macao SAR and Taiwan.

[2] Under the PRC tax law, a NRE refers to an enterprise (i) incorporated under the laws of a foreign country or region with de facto management body located outside of China; and (ii) having any institution or establishment (e.g., rep. offices established by foreign companies) within China or having China-sourced income.

- ✓ Trial Implementation Measures on Special Tax Adjustment
- ✓ Interim Measures on Administration of Enterprise Income Tax Withholding at Source of Non-Resident Enterprises
- ✓ Trial Measures on Administration of Tax Treaty Treatments Enjoyed by Non-Resident Enterprises
- ✓ Circular on Several Issues on Implementation of Dividend Provisions under Tax Treaties
- ✓ Circular on How to Interpret and Identify "Beneficial Owner" under Tax Treaties
- ✓ Notice on Strengthening the Management of Enterprise Income Tax Collection of Proceeds from Equity Transfers by Non-Resident Enterprises[3]

I. Issues on EIT Treatment for Corporate Restructuring

Corporate restructuring refers to transactions that occur outside the ordinary course of business and result in substantive change in the legal or economic structure of companies. The New EIT Laws contemplate six forms of corporate restructuring, including equity acquisition, asset acquisition, merger, split-up, debt restructuring or change of legal form.

1. General Tax Treatment vs. Special Tax Treatment

   The New Tax Laws categorize EIT treatment of corporate restructuring as general tax treatment (the "GTT") and special tax treatment (the "STT"). The former is the generally applied method, while the latter is the exception rule subject to the election of relevant parties. The major distinctions between GTT and STT are as follows:

   (a) Timing of Gains and Losses Recognition. Under the GTT, any gain or loss should be recognized at the time of the transaction, whereas under the STT, any gain or loss attributable to the equity-based consideration will, instead of being recognized in the current period, be deferred to the time when the underlying assets/equities are disposed again; and

   (b) Determination of Tax Basis.[4] Under the GTT, the acquirer's tax basis of the underlying assets/equities is the fair value[5] post-transaction, whereas

[3] Please note that, this circular, the *Circular on Several Issues with respect to Enterprise Income Tax Treatment for Corporate Restructuring*, and the *Trial Implementation Measures on Special Tax Adjustment*, although issued in 2009, have taken effect retroactively as of January 1, 2008.

[4] The *PRC Enterprise Accounting Standards* (2006) introduce the concept of "tax basis". Assets tax basis, as opposed to debt tax basis, refers to the statutory deductible amount out of the taxable economic profits for the purpose of calculation of taxable income, when the relevant enterprise recovers its book value.

[5] The New EIT Laws define the term "fair value" as the value determined based on the market price, without specifying how the market price is measured, i.e., by appraisal price or transaction price. According to our knowledge, the PRC Ministry of Finance, who promulgates the *PRC Enterprise Accounting Standards*, favors a case-by-case analysis according to the nature of various transactions, while experts believe that appraisal price is a

under the STT, the historic tax basis of such assets/equities will be carried over.

Please note that, the STT is in nature a deferral of recognition of taxable gains or losses arising from restructuring rather than tax reduction or exemption. Further, since the tax payment so deferred is only limited to the EIT, the amount of turnover taxes (such as value added tax) payable by the parties should still be calculated based on the total purchase price under both GTT and STT. With respect to asset/equity acquisition, the adoption of STT is conditioned on the satisfaction of the following requirements:

(i) Bona Fide Business Purpose. The transaction should be structured with a bona fide business purpose other than for the purposes of reducing, avoiding or deferring tax payment. There is no such definition as bona fide business purpose under the New EIT Laws, so it is believed by some people that the Chinese tax authorities may wish to have certain degree of discretion in this connection;

(ii) Prescribed Ratio on Acquired Asserts/Equities. At least 75% of the target company's assets/equities should be acquired;

(iii) Continuity of Business Operation. The business activities in connection with the assets/equities under restructuring may not undergo any substantive changes within 12 consecutive months after close of the transaction. It is still unclear however whether the change of business operation due to the target company's operation need or market demand (e.g., product improvement, scientific innovation or changes in customer requirements) should be deemed substantive change of business operation;

(iv) Prescribed Ratio on Equity Payment. The equity payment portion should account for at least 85% of the total purchase price. Any gain or loss attributable to non-equity payment must however be recognized at the time of the transaction without any deferral. As suggested by many tax experts, the parties may enjoy more EIT deferral treatment by way of minimizing non-equity payment; and

(v) Continuity of Shareholding. The original shareholders of the target company should commit not to transfer, within 12 consecutive months after close of the transaction, equities received from the acquirer as part of the consideration for assets/equities so acquired.

In addition, procedurally, parties electing the STT should submit relevant written documents to the competent tax authorities when filing their annual tax returns in the completion year of the transaction, failing which will subject the parties to the GTT.

2. Tax Treatment of Cross-Border Equity Acquisitions

Under the old EIT regime, EIT exemption treatment was available to certain cross-border equity acquisitions with a reasonable business purpose. Foreign shareholders were allowed to transfer its equity in a foreign invested enterprise (the "FIE") to an affiliate at the cost price, provided that such affiliate controlled, or was controlled by, or was under the common control of an actual controller with, the transferor, in each case subject to a 100% equity ownership and without regard to shareholding layers in between. The New EIT Laws however,

---

better option.

replace the virtually EIT-exempt treatment with the less favorable STT (or the EIT deferral treatment), and impose much more restrictive criteria on cross-border equity transactions. The following requirements should be met before adoption of the STT in a cross-border context: (i) satisfaction of the abovementioned 5 general conditions; (ii) satisfaction of additional category-specific conditions below; and (ii) prior approval by competent provincial tax authorities.

(a) A NRE —Transfer of Equity in A Resident Enterprise→ Another NRE

(i) The transferee should be an immediate subsidiary wholly owned by the transferor;

(ii) The PRC withholding tax rate for the transferor parent is the same as that of the transferee subsidiary pre-transaction; and

(iii) The transferor should make written undertaking not to transfer its equity in the transferee within 3 years.

(b) A NRE —Transfer of Equity in A Resident Enterprise→ A Resident Enterprise

The transferee should be an immediate subsidiary wholly owned by the transferor.

In cross-border equity acquisitions, foreign investors have to weigh the pros and cons between GTT and STT. Although the GTT does not allow deferral of tax payment, the transferee could use higher tax basis when effecting any future sales of the acquired assts/equities. Under the STT, the transferee however receives the transferor's equity on a tax deferral basis at its own expense. The reason is that, if the transferee disposes of the acquired assets/equities subsequently, its taxable gain on such disposition will be measured by the excess of the proceeds it received over the historic tax basis so carried over, rather than the fair value otherwise applicable under the GTT. Moreover, in the case of cross-border equity acquisitions involving a resident enterprise transferee, the adoption of STT will incur higher tax burden for the resident enterprise transferee, as it has to pay the EIT at the rate of 25% (instead of the10% withholding tax) for its gains realized from its future sales of assets/equities so acquired.

3. Suggestions

In equity or asset transactions, especially cross-border equity transactions, the parties still need to elect a more favorable tax treatment based on specific conditions (e.g., the purpose of restructuring and the expectation of the buyer to dispose of the assets or equity so acquired), even if the conditions for STT have been satisfied. Parties electing to adopt the STT in cross-border equity transactions need to pay special attention to the following aspects: (i) appropriate tax warranties and indemnities should be contained in relevant transaction documents, to address the failure on the part of any party to fulfill their respective obligations under the STT subsequent to the transaction, such as continuity of business operation and lock-up requirement; and (ii) an agreement may be reached by the parties on how to allocate economic interests and potential tax exposure arising from STT. The potential commercial implication as a result of such agreement should be fully assessed and duly reflected via adjustment to the purchase price.

II. Issues Related to Transfer Pricing

As the PRC anti-avoidance system becomes increasingly sophisticated, the Chinese transfer pricing regime has also further moved in the direction of integration with prevailing international practices. The tax authorities also step up law enforcement effort, enhance the reporting obligation, and broaden the sweep of transfer pricing audit. Enterprises that will be key targets for transfer pricing audit include those that (i) have large amounts of related party transactions or have multiple types of related party transactions; (ii) have transactions with related parties registered in tax havens; (iii) fail to make a declaration of their related party transactions or prepare contemporaneous transfer pricing documentation; and (iv) act obviously in violation of the arm's length principle, among others.

1. Relevant Compliance Requirements for Transfer Pricing

(a) Reporting of Related Party Transactions (the "RPTs")

Chinese enterprises and NREs with institution or establishment in China and taxable income derived therefrom are required to report their RPTs when filing their annual tax returns. The information so disclosed will serve as an important basis for tax authorities to locate potential targets of transfer pricing audit. Any misstep in the RPT reporting may possibly lead to transfer pricing audit against the reporting enterprises.

The New EIT Laws stipulate three criteria in determining related party relationship, i.e., the "shareholding" criterion and the "ratio of controlling people" criterion (measured by the ratio of the number of directors or managers having control over another company), and the "de facto control" criterion, which effectively expands the scope of related party transactions within the meaning of the PRC tax law. It is noteworthy that the tax authorities introduce for the first time the 25% "looking through" principle in assessing the shareholding threshold. For example, given that party A holds, through party B, equity interest in party C, party A's shareholding ratio in party C will be considered the same as that of party B in Party C so long as party A holds 25% or more equity interest in party B. Moreover, enterprises without equity-based relationship may also be deemed related parties if the "de facto control" criterion is triggered, whereby common connection in production, supply and sales, or alignment of interest can be considered as de facto control.

(b) Contemporaneous Documentation

The New EIT Laws for the first time incorporate the contemporaneous documentation preparation requirement into its transfer pricing system and make it a mandatory obligation of taxpayers engaged in RPTs (except for those specifically exempted by the New EIT Laws). Reporting enterprises should put in contemporaneous documentations their organizational structure, operation status, related party transactions, election of transfer price method and etc. Relevant enterprises are required to submit the contemporaneous documentations prior to May 31 of the next year and furnish to the tax authorities within 20 days upon request. Moreover, contemporaneous documentations should be prepared by individual taxpayers separately rather than on a consolidated basis even if in the case of multi-national companies (the "MNCs") with various China operations. This creates extra burden on MNCs as they may possibly face multiple rounds of transfer pricing audits in China.

(c) Legal Liabilities

Where taxpayers fail to prepare and submit the contemporaneous documentation, tax authorities are empowered to (i) assess the taxable income using the transfer

pricing method they deem "reasonable"; (ii) levy additional taxes and interest accrued thereon as well as penalty interest charges, and (iii) reject the application for advance pricing arrangement.

2. Suggestions

MNCs and offshore entities with Chinese portfolio companies need to review the reasonableness of their transfer pricing arrangements and re-assess the tax exposure of transfer pricing adjustment. Proactive measures should be taken to identify in a timely manner portfolio companies subject to contemporaneous documentation obligation and to facilitate the preparation work. Specifically, foreign shareholders of Sino-foreign joint ventures may need to ensure effective and timely communication and cooperation with their Chinese partners in respect of preparation of contemporaneous documentations.

III. EIT Withholding at Source

Generally, NREs having China-sourced passive income (e.g., dividends, interest, rentals, royalties and capital gains) are obliged to pay the PRC withholding taxes, which should be duly withheld by relevant Chinese payers or self-declared. With the view to intensifying tax collection and administration efforts against NREs, the New Tax Laws stipulate additional compliance requirements in respect of EIT withholding at source, and put under stricter scrutiny offshore equity transfer among NREs in particular (but excluding the purchase and sale of the stocks of Chinese resident enterprises on public securities markets).

1. Compliance Requirements

(a) Transactions with Withholding Agents

The New Tax Laws for the first time impose filing obligation on statutory or contractual withholding agents (e.g., domestic payers of dividends, royalties and interests, or domestic buyers in equity transfer deals). The withholding agents should register and file the underlying business contracts and other relevant documents with competent tax authorities within prescribed time period.

Please note that if the NREs refuse to let the withholding agent to withhold their income taxes, the withholding agent may suspend payment of any amount equal to their taxes payable and report to the competent tax authorities on the same day. However, in the event of any failure on the part of the withholding agent to discharge their withholding obligation, the relevant NREs should, no later than 7 days after receipt of payment, declare their PRC withholding taxes to competent tax authorities, otherwise the tax authorities may deduct the amount of taxes payable by such NREs against their other China-sourced income (if any).

Please further note that if it is provided in the relevant transaction documents that the withholding agent should be responsible for the taxes payable by the NREs, the after-tax income specified therein should be converted to pre-tax income for tax collection purposes.

(b) Transactions with No Withholding Agent

(i) Direct Equity Transfer. In a direct equity transfer where a NRE transfers its equity interest in a Chinese investee enterprise to another NRE outside of China, the foreign transferor is obliged to declare directly or through its agent the withholding taxes to the competent local tax authority where the target company is located, otherwise the tax authorities may deduct the amount of

taxes payable by such NREs against their other China-sourced income (if any). The timeline is within 7 days after the closing date set forth in the underlying contracts (or within 7 days after the date when the proceeds are actually obtained, provided that such date is earlier than the aforementioned closing date). The foreign transferee should note that if the transferor fails to pay taxes as required, the target company so acquired by it may be subject to censure or even penalties by the competent tax authorities in the future, so it is necessary that the tax payment obligations of the transferor in China be expressly provided in the relevant transaction documents.

(ii) Indirect Equity Transfer. In an indirect equity transfer where an offshore intermediate holding company (the "Holdco") transfers its equity interest in a Chinese investee enterprise to a NRE outside of China, the foreign actual controller of the Holdco should be subject to the reporting obligation, if the Holdco is located in a tax jurisdiction that (i) has an effective tax rate of lower than 12.5%, or (ii) does not tax foreign-sourced income of its resident enterprises. The foreign actual controller should, within 30 days after the execution of the underlying equity transfer agreement, submit to the competent local tax authority, supporting documents regarding the Holdco's status and its relationship with the foreign actual controller. The relevant tax authorities will carefully review the documents so submitted based on the substance-over-form principle, and report any suspicious deals to SAT for its final review and decision. If the underlying equity transfer is deemed as having no reasonable business purpose but for avoidance of PRC tax burden, the tax authority may disregard the existence of the Holdco (as well as any other pass-through SPVs between the foreign actual controller and the Holdco). As a result, the foreign actual controller will have to pay the 10% PRC withholding tax for transfer gains obtained by the Holdco.

Arguably, the New EIT Laws challenge the commonly seen holding company structure adopted by foreign investors, through granting the controversial extra-terrestrial taxing right to the PRC tax authorities. Given the complexity of the issue and the lack of explanatory stipulations, it would still take time to observe how far and broadly this rule may be applied by the Chinese tax authorities.

2. Suggestions

In order to avoid indirect equity transfer being questioned or challenged by the PRC tax authority, foreign investors need to put more commercial substance into their intermediate holding company to duly justify the presence of a reasonable business purpose. For example, maintaining business and financial books and records, recruiting reasonable number of employees, holding board meetings regularly with well-kept minutes, and preparing contemporaneous documentations of related party transactions at the onshore level.[6]

In offshore equity transfers involving equities in PRC resident enterprises, it is generally in the interests of foreign investors (especially foreign buyers) to spell out in the equity transfer agreement the respective tax compliance obligations of each party (e.g., tax payment, withholding, assistance, and reporting, as the case may be) as well as relevant indemnification provisions.

IV. Entitlement to Treaty Benefits

[6] Please note that the related party transactions between the holding company and the onshore company shall be at arm's length and the related party filing and contemporaneous documentations shall be prepared.

Under the New EIT Laws, the PRC tax authorities have also tightened their control over treaty benefit to offshore companies. More substantively and procedurally stringent rules have been put into place to rigorously combat treaty shopping.

1. Procedural Requirements

Procedurally, treaty benefits entitlements should be approved by or file with tax authorities. Prior approval from competent tax authority should be secured for treaty benefits on dividends, interest, royalties and capital gains sourced from China. For entitlements to the other types of treaty benefits, NREs should file requisite materials with the competent tax authorities according to relevant regulations. Failure to effectuate the required approval or filing procedures will result in the denial of treaty benefits and trigger the application of relevant PRC tax laws and regulations.

2. Substantive Criteria

(a) General Conditions to Treaty Benefits

As a pre-requisite to enjoying the reduced withholding tax on China-sourced dividends, interest, royalties or capital gains under a tax treaty, NREs are required to submit various documents, evidencing its status as a beneficial owner thereof. The New EIT Laws define a beneficial owner as an individual or any organization that has ownership and control over the income or the assets or rights generating the income, which generally engages in the manufacturing, distribution, management and other substantive business activities. Note that, no agent or conduit company[7] may be recognized as a beneficial owner for this purpose. According to the New EIT Laws, NREs will be less likely to be identified as a beneficial owner if, among others, (i) the taxpayer is obligated to pay or distribute all or a substantial part of its income to a third country resident within a prescribed time (e.g., within 12 months after the receipt date thereof); (ii) the taxpayer has few business activities other than holding the assets or rights from which it obtains income; or (iii) the taxpayer's home country does not levy tax or levy tax at a rate of a fairly low level over such income.

(b) Additional Conditions to Dividend-Related Treaty Benefits

In addition to being a beneficial owner and holding the required percentage of equity as stipulated in relevant tax treaties (e.g., 25% under the Mainland-HK double taxation avoidance agreement), NREs claiming for tax treaty treatment on dividends should also satisfy the following prescribed requirements: (i) the applicant has to be a corporate entity; and (ii) the proportion directly held by the applicant in terms of equity holding and voting right should have reached the standard percentage as required by the relevant tax treaty at any time during the 12 months immediately before the receipt of dividends. It is generally considered that the PRC tax authorities have unilaterally imposed extra conditions on dividend-related treaty benefit, representing a departure from relevant tax treaties. This indicates an increasing level of difficulty for offshore companies to secure lower withholding tax rate on dividends received from their onshore portfolio companies.

3. Information Disclosure

[7] Conduit companies refer to companies established in a tax efficient jurisdiction for the purpose of avoidance or reduction of taxes or the transfer or accumulation of profits, without conducting any substantive business activities.

Previously, NREs simply needed to file an application form for the purpose of claiming treaty benefit, subject to limited information disclosure obligation. The New EIT Laws however introduce much more demanding information provision and disclosure requirements as part of the effort to combat treaty shopping. NREs applicants are required to disclose information in respect of, among others, corporate particular, their shareholders, operation status, offshore tax payment, and related-party transactions, which imposes a heavy compliance burden on NREs, even heavier than that of many developed countries (e.g., U.S.A and Britain).

4. Suggestions

(a) Focus of Anti-Avoidance Review

We understand that, the PRC tax authorities will likely focus their scrutiny on (i) the adequacy of commercial substance of the underlying transactions; and (ii) the degree to which the holding of Chinese investments by offshore holding companies established by non-residents in a tax-efficient jurisdiction is justifiable commercially or otherwise. Therefore, foreign investors are advised to adopt proactive measures to ensure that there is sufficient commercial substance in their holding companies and that they can provide reasonable evidences (*please refer to Section 3.3 above for more details*).

(b) Preparation of Application Materials

For approval and/or filing purposes, NREs are required to submit the certificate of tax resident issued after the beginning of the previous calendar year by the competent authorities of the state where the applicant is resident. The procedures to obtain such tax resident certificate vary depending on how the home country requires and what the relevant tax treaty provides for. Take Hong Kong for example. Based on our knowledge, for companies incorporated in Hong Kong, the submission of the duplicate of the Certificate of Incorporation will suffice. For companies incorporated elsewhere but constituting tax residents under Hong Kong tax law, the procedures are much more complicated. They should first obtain from the competent mainland tax authority the Letter of Request on Issuance of the Tax Resident Certificate by the Tax Authority of Hong Kong Special Administration, and then apply to the Hong Kong Inland Revenue Bureau for the Certificate of Hong Kong Tax Resident with presentation of the aforesaid letter. Hence, when it comes to obtaining the requisite tax resident certificate, NREs need to be aware of relevant procedures and get prepared in advance.

(c) Timeline for Application Submission

NREs may apply for treaty benefit when they have their withholding taxes settled, the timelines of which are 20 to 40 working days depending on the level of the authorities responsible for processing the application. Given the uncertainty in application outcome, NREs may encounter obstacles if they are in a hurry to repatriate the China-sourced income back home. Alternatively, NREs may consider fully paying up the withholding taxes first, and then claiming for refund of the overpaid taxes within 3 years thereafter. As no specific application procedures are provided under the New EIT Laws, NREs are advised to consult the local tax authorities before using this option.

* * *

The above is a brief introduction of the relevant PRC rules and regulations on several foreign related tax issues based on currently effective PRC laws and regulations and

our practice experience. Please note that we primarily address relevant tax issues and tax exposures from the legal compliance perspective. If you intend to seek professional tax advice for your specific case, please further consult tax experts. This memo is for your general reference purpose only and shall not be relied on as any formal PRC legal opinion in any respect. If there is any discrepancy between our discussions herein and any rule or official interpretation to be issued by the relevant PRC government authorities, such new rule or interpretation shall prevail.

If you have any questions about this memo, please do not hesitate to contact us.

©Han Yi Law Offices
Email: inquiry@hanyilaw.com

简析新企业所得税法下若干涉外税收法律问题

自新的《企业所得税法》于2008年1月1日实施以来，中国[1]国家税务总局陆续出台了一系列配套文件，在对新《企业所得税法》生效后的若干税务问题作了进一步完善和细化规定的同时，将新《企业所得税法》的反避税原则和精神进一步融入中国税收征管的理念和实践。根据这些配套规定，中国税务机关有权基于“实质高于形式”、“是否具有合理商业目的”等判断标准，对当事人具有避税动机的交易安排发起反避税调查，并对违规交易重新定性和征税。

在新《企业所得税法》及其配套规定的反避税特征日益凸显、中国税务机关的税收征管亦日趋严格的背景下，我们理解，外国投资者可能需要对其自身及其在华投资企业的税收筹划及税务合规性事项等进行进一步评估并作出相应调整。为此，我们选取了与企业兼并重组、关联企业间转让定价、非居民企业[2]所得税源泉扣缴及非居民企业享受税收协定优惠待遇等问题相关、也较为重要的税务事项，结合新《企业所得税法》及其配套文件的相关规定（尤其是其中涉外税收部分的规定）准备了本备忘录，以期能为外国投资者提供一些比较有针对性的初步分析和建议。

本备忘录谈及的新《企业所得税法》配套规定主要如下（为简便起见，我们在本备忘录中将该等配套规定与新《企业所得税法》及其实施条例一起，统称为“新企业所得税法”）:

- ✓ 《关于企业重组业务企业所得税处理若干问题的通知》
- ✓ 《特别纳税调整实施办法（试行）》
- ✓ 《非居民企业所得税源泉扣缴管理暂行办法》
- ✓ 《非居民享受税收协定待遇管理办法(试行)》
- ✓ 《关于执行税收协定股息条款有关问题的通知》
- ✓ 《关于如何理解和认定税收协定中“受益所有人”的通知》
- ✓ 《国家税务总局关于非居民企业转股所得征收企业所得税管理的通知》[3]

I. 有关企业重组所得税处理的几个问题

根据新企业所得税法，企业重组是指企业在日常经营活动以外发生的法律结构或经济结构重大改变的交易，主要包括股权并购、资产并购、合并、分立、债

[1] 仅为本备忘录之目的，除特别注明外，“中国”一词不包括香港特别行政区、澳门特别行政区以及台湾地区。

[2] 根据新《企业所得税法》，“非居民企业”是指依照外国（地区）法律成立且实际管理机构不在中国境内，但在中国境内设立机构、场所（如外国企业在中国境内设立的代表处）的企业，或者在中国境内未设立机构、场所，但有来源于中国境内所得的企业。

[3] 请注意，本通知、《关于企业重组业务企业所得税处理若干问题的通知》以及《特别纳税调整实施办法（试行）》这三个文件虽然于 2009 年颁布，但均被追溯为自 2008 年 1 月 1 日起生效。

务重组以及企业法律形式变更等六种形式。

1. 一般性税务处理和特殊性税务处理

在新企业所得税法下，企业重组的所得税处理分为一般性税务处理和特殊性税务处理两类。前者为一般性原则，后者则为可由重组当事方选择适用的例外情形。两者的主要区别在于：(i)确认损益的时间点不同——对资产或股权的处置方/转让方而言，一般性税务处理是在重组交易的当期即确认其资产或股权处置的所得或损失，而特殊性税务处理则是在重组交易的当期暂不确认股权支付部分（即受让方以股权作为对价进行支付的部分）所对应的被处置资产或股权的所得或损失，待相关资产或股权由受让方再行处置的时候再予确认；以及(ii)计税基础[4]不同——一般性税务处理的计税基础为重组所涉及资产或股权的“公允价值”，[5]而特殊性税务处理的计税基础则为被处置资产或股权在重组前的原有计税基础。需要注意的是，特殊性税务处理的实质是递延确认重组产生的应税所得或损失，但非直接的减免税优惠。此外，特殊性税务处理下的“递延纳税”仅适用于企业所得税部分，企业在重组过程中产生的营业税、增值税等流转税项并不据此作任何递延处理。

对于股权或资产收购而言，适用特殊性税务处理的条件主要包括:

(a) 不以避税为目的。即相关交易必须具有“合理的商业目的”，且不以减少、免除或推迟缴纳税款为条件。但何谓“合理的商业目的”，新企业所得税法并没有给出明确界定，对此，不少人认为，中国税务机关可能希望以此为自己留出自由裁量的空间;

(b) 符合重大性标准。即收购方购买的股权或资产不应低于被收购企业全部股权/资产的 75%;

(c) 保持经营连续性。即企业完成重组后的连续 12 个月内不应改变重组资产原来的实质性经营活动。但对于企业在重组完成后因经营需要或市场需求（如产品提升、科技更新或客户需求变更等）而发生的经营活动变化是否构成实质性经营活动变更，目前尚无明确规定可以遵循;

(d) 股权支付比例达到标准。即重组交易对价中涉及的股权支付金额应不低于交易支付总额的 85%。但需注意的是，对于达到前述标准的重组交易而言，可以适用递延纳税的也只有股权支付部分，非股权支付部分仍应在交易当期确认所得或损失。对此，很多税务专家建议，企业

[4] “计税基础”是在 2006 年中国新的《企业会计准则》中出现的概念，分为资产的计税基础和负债的计税基础。就资产（包括股权）的计税基础而言，它指的是企业收回资产账面价值过程中，计算应纳税所得额时按照税法规定可以自应税经济利益中抵扣的金额。

[5] 关于“公允价值”，新企业所得税法将其解释为“按市场价格确定的价值”。至于“市场价格”是以评估价格为准还是以交易价格为准，新企业所得税法并没有作进一步解释。据我们了解，作为中国企业会计准则制订部门的财政部倾向于认为应根据不同交易行为本身的性质进行判断和选择，但专业人士则认为评估价格应更为合理。

在兼并重组活动中最好不要“变现”，而应即尽可能地多地以股权作为支付手段，以最大程度地享受递延纳税；以及

(e) 符合持股期限要求。即在重组活动中取得股权支付的资产/股权转让方/处置方，在重组完成后的连续 12 个月内，不得转让其取得的股权。

此外，在程序上，选择适用特殊性税务处理的相关当事方应在重组完成当年进行企业所得税年度申报时按主管税务机关的要求提交相关书面备案材料，否则只能适用一般性税务处理。

2. **跨境股权重组的税务处理**

在原来的企业所得税法体系下，只要转股安排具有合理的商业目的，外国投资者可以按成本价将其持有的中国居民企业（即外商投资企业）的股权转让给与其具有100%股权关联关系的企业，从而享受所得税减免优惠。但新企业所得税法只是允许符合规定条件的跨境重组选择适用特殊性税务处理（其实质，正如前面提到的，只是递延纳税，而非直接的减免税优惠）。在适用上，除需要满足前面提到的适用特殊性税务处理的五项基本条件外，还需根据重组不同类型，分别满足下列附加条件，并按规定将相关备案材料报省级税务主管机关核准:

(a) 类型一：非居民企业 —转让居民企业股权→ 另一家非居民企业

(i) 受让居民企业股权的另一家非居民企业须是转让方 100%直接控股的子公司;
(ii) 交易后受让方适用的预提所得税税率与交易前转让方适用的税率相同；以及
(iii) 转让方须书面承诺 3 年内不转让其拥有的受让方股权。

(b) 类型二：非居民企业 —转让居民企业股权→ 另一家居民企业

(i) 受让居民企业股权的另一家居民企业须是转让方 100%直接控股的子公司。

需要注意的是，在跨境重组中，选择适用一般性税务处理和特殊性税务处理（当然，前提是满足可以适用特殊性税务处理的条件）对买卖双方而言都各有利弊。适用一般性税务处理，转让方无法实现递延纳税，但受让方今后再行转股时，可适用较高的计税基础（即受让股权的公允价值），从而减少应税所得额；而如果适用特殊性税务处理，则转让方应在一般性税务处理下缴纳的所得税可能将转嫁给受让方，原因是受让方如果再次转让目标公司股权，其相应的处置收益将根据该等股权的原始计税基础确定（由此，该等股权公允价值与原始计税基础之间的差额将成为受让方的应税所得）。此外，在类型二下，受让方作为中国居民企业，再行转股时需按 25%税率缴纳企业所得税，而不是 10%的预提所得税。

3. 几点建议

在股权或资产重组活动中，尤其在跨境股权重组背景下，即使满足相关交易符合适用特殊性税务处理的条件，交易当事方仍需根据个案的具体情况（如重组的目的、受让方再行处置重组资产或股权的预期等）来选择适用更优的税务处理方式。如果选择适用特殊性税务处理，应注意就适用特殊性税务处理所可能产生的经济利益或潜在税务代价进行评估，并在交易文件中就当事方如何分配或承继该等经济利益或潜在税务代价，如何承担相应的税务保证责任和补偿责任等问题作出明确约定（例如，在选择适用特殊性税务处理的情况下，应要求取得重组资产的当事方就其持有重组资产的期限和重组资产经营的连续性等事项，根据新企业所得税法的规定作出保证）。

II. 涉及关联企业间“转让定价”的几个问题

随着中国反避税法规的完善和手段的升级，中国的转让定价制度也逐渐与国际惯例接轨，“转让定价”问题进入全面规范阶段。税务机关针对转让定价加强了执法力度，提高了对关联方信息披露的要求，并扩大了对转让定价行为进行监控的范围。根据规定，税务机关重点监控的几类企业主要包括关联业务往来数额较大或类型较多的企业、与避税港关联方发生业务往来的企业、未按照规定进行关联申报或准备同期资料的企业以及存在其他明显违背独立交易原则的交易行为的企业。

1. 有关“转让定价”的合规性要求

(a) 关联申报

作为企业年度所得税申报的重要内容，关联申报适用于需依法申报缴纳企业所得税的中国居民企业和在中国境内设立机构、场所的非居民企业。请注意，相关申报表格中的信息是税务机关选取转让定价调查对象的重要依据，如果填报不当，申报企业很可能会因此成为税务机关进行转让定价调查的重点对象。

关于关联关系的界定，新企业所得税法主要采用了“持股比例标准”、“董事会成员或经理人员中对其他企业具有控制力的人数比例标准”以及“实际控制标准”。值得注意的是，在“持股比例标准”下，中国税务机关首次引入了“25%透视原则”，即，如果甲方通过乙方间接持有丙方的股权，那么只要甲方持有的乙方股权达到 25%或以上，则甲方持有的丙方股权的比例将按乙方对丙方的持股比例计算，这实际上扩大了企业关联机构的范围。另外，根据实际控制标准，不存在股权关系的企业之间如果在产、供、销等方面存在控制关系或在利益上存在共同性，也可能会被认定为存在关联关系。

(b) 同期资料

围绕转让定价安排的同期资料准备要求被新企业所得税法首次纳入中国的反避税体系，成为发生关联交易的纳税人的法定义务（但属于法定可以免于提交同期资料的情况除外）。根据新企业所得税法，同期资料应当包括组织结构、生产经营情况、关联交易情况、可比性分析、以及转让定价方法的选择和使用等内容。相关企业应在关联交易发生年度的次年 5 月 31 日之前准备完毕该年度同期资料，并自税务机关要求之日起 20 日内提供。此外，同期资料的准备应以单个独立纳税人为单位，即使同属一个集团公司的多个关联企业也不能合并起来共同准备，这意味着跨国集团公司因下属关联企业众多而可能面临多重转让定价调查。

(c) 法律责任

对于未按新企业所得税法的要求准备同期资料的企业，税务机关有权直接采用其认为合理的转让定价方法核定征税，并加收利息、罚息，同时，也可以拒绝受理该企业的预约定价申请。

2. 几点建议

跨国集团公司和外商投资企业的境外母公司一方面应注意积极采取措施，尽早确定有义务准备同期资料的关联企业的范围并督促该等企业及时开展同期资料的准备及归档工作，另一方面也可以利用准备同期资料这一契机，评估其关联企业是否存在潜在的纳税调整风险，确保其税收筹划尤其是关联企业间转让定价安排的合理性。对于中外合资企业的外方股东而言，其还应注意与中方合作伙伴保持及时有效的沟通，以确保其所设合资企业的关联申报及同期材料准备工作得以顺利进行。

III. 非居民企业所得税源泉扣缴

非居民企业取得的来源于中国境内的股息、红利等权益性投资收益和利息、租金、特许权使用费所得以及转让财产所得等依法向中国政府缴纳所得税，且原则上适用源泉扣缴制度。在新企业所得税法下，税务机关加强了对非居民企业所得税的征管力度及合规性要求，非居民企业因转让中国居民企业股权而取得的收入尤其成为其监管的重点（但非居民企业在公开证券市场上买卖中国居民企业股票取得收入除外）。

1. 几点合规性要求

(a) 存在扣缴义务人的情形

对于法律规定或合同约定有扣缴义务人（例如，支付利息、租金、特许权使用费、分派股息或直接受让外商投资企业股权的境内居民企业）的交易，新企业所得税法在程序上首次引入了备案要求。根据该要求，扣缴纳义务人应在规定期限内向主管税务机关报备交易文件及相关材料。

需提醒非居民企业纳税义务人注意的是，如果其拒绝扣缴义务人为其代扣代缴所得税，则扣缴义务人有义务暂停向其支付与其应缴税款相当的款项，并于同日向主管税务机关报告。但如果扣缴义务人未履行扣缴义务，则非居民企业纳税义务人自己有义务于取得相关所得之日起的 7 日内，主动到主管税务机关申报纳税，否则，税务机关有权从其来源于中国境内的其他收入中予以追缴（如有）。

另需非居民企业纳税义务人注意的是，根据新企业所得税法，如果其在相关交易文件中约定由扣缴义务人来负担其应缴纳的税款，则其约定的不含税所得额须换算成含税所得额后计算征税。

(b) 不存在扣缴义务人的情形

(i) 非居民企业之间直接转让居民企业的股权（直接转股）

即外国投资者（作为外商投资企业的股东/母公司）在境外将其直接持有的中国居民企业（外商投资企业）的股权转让给其他外国投资者。对中国居民企业（外商投资企业）而言，即发生了股东或股权变更。在此情形下，因不存在境内扣缴义务人而不适用源泉扣缴制度。但作为股权转让方的外国投资者应注意，其有义务于转股交易文件约定的股权转让之日起（如果其提前取得转股收入的，应自实际取得该等收入之日起）的 7 日内，自行或委托代理人向目标公司（即发生股东/股权变更的外商投资企业）所在地的中国主管税务机关申报纳税，否则，税务机关将有权从其来源于中国境内的其他收入中予以追缴(如有)。作为股权受让方的外国投资者也应注意，如果转股方未按规定纳税，则其受让的境内目标公司在日后办理涉税事项时可能会受到主管税务机关的责难甚至处罚，因此，其有必要考虑在相关交易文件中就转股方在中国的纳税义务和责任作出明确约定。

(ii) 非居民企业通过境外特殊目的公司间接转让居民企业的股权（间接转股）

即中国居民企业的境外实际控制人通过转让其持有的境外中间控股公司（通常为特殊目的公司）股权的方式，达到将中国居民企业的股权转让给第三方的目的。从形式上看，此类交易完全发生在境外，故严格而言中国政府并无征税权。但在中国政府看来，此类交易的实质是使中国居民企业的股权归属发生变化，所以如果发生股东或股权变动的境外中间控股公司（该等境外中间控股公司可能只有一层，也可能有多层）被境外实际控制人设立在低税率国家或地区而没有合理的商业目的，且除持有中国居民企业的股权外并无实质性的经营活动，则相关交易安排就很可能存在逃避中国税收征管的嫌疑，因而中国税务机关有权予以纠正。基于此，新企业所得税法规定，如果被转让的境外中间控股公司所在国或地区的实际负税低于 12.5%或者根本不对其居民的境外所得征税,那么有关境外实际控制人有义务自其股权转让合同签订之日起的 30 日内，向股东或股权实际上已发生变化的中国居民企业所在地的主管税务机关提交其境外转股合同及有关境外中间控股公司经营情况的说明等。主管税务机关在对相关材料进行审查

后，如果认为境外实际控制人存在通过滥用组织形式等安排避税的情况，可以发起一般反避税调查，经层报国家税务总局审核后，有权从税收征管的角度否定境外中间控股公司的存在，并就境外实际控制人的境外转股收益按 10%征收所得税。

由于上述反避税措施在一定程度上赋予了中国税务机关域外征税权，因此对外国投资者而言，其经常采用的离岸控股公司投资模式将受到挑战，相关境外股权交易也将受到一定的影响。但考虑到上述政策出台不久，故目前尚难预测中国税务机关将如何在实践中具体实施。

2. 几点建议

为应对中国税务机关可能发起的一般反避税调查，外国投资者应注意采取适当的措施，赋予其用于持有中国居民企业股权的境外特殊目的公司/中间控股公司以合理的商业目的和恰当的商业实质，并准备充分的证明材料（例如，该等特殊目的公司/中间控股公司的业务和财务记录、人员配置情况、合理次数的董事会会议记录及其与中国境内居民企业在资金及业务往来等方面的文件、资料等[6]）。

此外，外国投资者（尤其是作为股权受让方）参与涉及中国居民企业股权转让的交易时，应注意在交易文件中就各方（特别是转股方）涉及该次交易的纳税、代扣代缴、报告和信息披露等义务以及相应的违约和补偿责任作出明确约定，以更好地保障自己的权益。

IV. 非居民企业享受税收协定待遇

在新企业所得税法下，为了加强对非居民企业的纳税管理，打击滥用税收协定的行为，中国税务机关进一步统一和细化了非居民企业享受税收协定待遇的实体条件和程序性要求，从而增加了持有中国境内投资的离岸控股公司享受税收协定待遇的难度。

1. 程序性要求

在程序上，新企业所得税法将非居民企业享受税收协定待遇分为审批和备案两类予以管理——非居民企业就来源于中国的股息、利息、特许权使用费、财产收益（如转让股权、资产的收益）享受税收协定待遇的，应取得主管税务机关的事先批准；享受其他税收协定待遇的，则需按规定向主管税务机关备案。未按规定办理审批或备案手续的，不得享受有关税收协定待遇，而只能按中国税法的规定纳税。

2. 实体条件 —— 税务机关的主要审查标准

(a) 享受税收协定待遇的基本条件

[6] 这里还需注意的一点是，境外中间控股公司与其下属中国居民企业之间的关联交易，如前面介绍的，应符合独立交易原则，并按规定进行关联申报和准备同期资料。

在适用审批制的情形，非居民企业向税务机关提交的申请材料须能证明其为适用税收协定待遇的相关所得的“受益所有人”。所谓“受益所有人”，是指对所得或所得据以产生的权利、财产具有所有权和支配权的人，他们通常从事制造、经销、管理等实质性的经营活动。根据新企业所得税法，非居民企业如果存在下列情形，就不利于其被税务机关认定为“受益所有人”，从而很可能无法享受相关税收定待遇：该非居民企业有义务在一定时间内（比如在取得相关所得的 12 个月内）将其所得的全部或绝大部分支付或派发给第三国或地区的居民；该非居民企业除持有其所得据以产生的财产或权益外，没有或几乎没有其他实质性经营活动；或者该非居民企业所在的国家或地区对有关所得不征税、免税，或虽然征税但实际税率极低等。据此，代理人、导管公司[7]（或壳公司）被新企业所得税法明确排除在“受益所有人”的范围之外。

(b) 非居民企业就所得股息享受优惠待遇的附加条件

如果相关税收协定规定，非居民企业享受股息优惠税率应以其直接拥有支付股息的中国居民公司一定比例的股权为条件（如大陆-香港税收协定下的 25%），则申请享受股息税收优惠待遇的非居民企业除须能证明其为“受益所有人”并符合相关税收协定规定的其他条件外，还需以公司形式存续，并在其取得有关股息前的连续 12 个月内的任何时候，均符合相关税收协定规定的持股比例标准。请注意，上述条件被普遍视为是中国税务机关在双边税收协定之外，单方面课加了额外的适用条件，从而增加了非居民企业享受税收协定股息条款优惠待遇的难度。

3. 增强的信息披露要求

另外值得注意的是，在原来的所得税法体系下，非居民企业申请享受税收协定待遇一般只需填写一张简单的申请表，程序简单，需要披露的信息也相对较少。新企业所得税法则围绕反避税这一理念，针对非居民企业享受税收协定优惠提出了更为广泛的信息披露和资料提供要求，内容涉及非居民企业所在税收协定国的居民身份信息、股东信息、经营情况、境外纳税情况、关联交易信息等，信息披露量被不少专业机构认为甚至超过英美等发达国家，这无疑将在一定程度上加重非居民企业的管理及合规性负担。

4. 几点建议

(a) 关于税务机关的审查重点

据我们了解，中国税务机关的审查重点应该会放在了解和判定非居民企业在相关税收协定国或地区设立控股公司以持有中国投资是否具有合理的商业目的，以及该等控股公司是否具备充分的经济实质。因此，外国投资者有必

[7] “导管公司”通常指那些以逃避或减少税收、转移或累积利润等为目的而设立的，不从事实质性经营活动的公司。

要考虑采取适当的措施，确保其设立的控股公司具有足够的商业实质，并能够提供合理的证明材料（具体措施可参见上文第三条第 3 项的有关介绍）。

(b) 关于申请材料的准备

根据新企业所得税法，非居民企业为享受税收协定优惠而履行报批或报备手续时，需提交“税收协定缔约对方主管当局在上一公历年度开始以后出具的税收居民身份证明”。取得该等境外税收居民身份证明的程序主要应视税收协定的具体规定和缔约对方政府的要求而定。以香港为例，据我们了解，按照现行的程序，非居民企业如在香港注册设立，只需提交《公司注册证书》副本即可；如在香港以外注册设立但构成香港税收居民，需先取得中国主管税务机关《关于请香港特别行政区税务主管当局出具居民证明的函》，再据此向香港税务局申请《香港居民身份证明书》。因此，非居民企业有必要了解其所在国或地区为其出具税收居民身份证明的程序，并提早着手准备，确保及时取得相关证明。

(c) 关于提交申请和享受减免的时间问题

对于经批准方可享受税收协定待遇的收入或所得，非居民企业提交申请的具体时间税务机关明确。考虑到主管税务机关届时审查批准相关申请可能需要花费较长的时间（根据主管税务机关级别的不同，一般为 20 天到 40 天），而且相关申请最终能否获得批准也存在一定的不确定性，因此，非居民企业如急于将其源于中国境内的收入汇出，亦可考虑先行全额缴付税款，然后在缴付之日起三年内，向主管税务机关申请退还多缴纳的税金，但办理退税手续的具体程序和所需时间需以各主管税务机关的操作和要求为准。

* * *

以上为我们根据中国现行法律法规以及本所律师的实务经验，对新企业所得税法下若干税收（特别是涉外税收）法律问题所作的简要介绍和分析。请注意，我们仅从法律的角度介绍了相关涉税事项的合规性要求及法律后果，至于税务处理方面的具体问题，还请向专业税务人士和主管税务机关进一步咨询和确认。本备忘录提供的介绍和分析仅供阁下一般性参考，并不能视为我们就相关事项出具的任何正式法律意见。如果本备忘录的内容与有权机关之后颁布的法律法规或提出的要求有不一致之处，应以该等法律法规或要求为准。

如阁下对于本备忘录述及之内容有任何疑问，敬请随时与敝所联系。

©瀚一律师事务所
Email: inquiry@hanyilaw.com
2010 年 5 月 12 日