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EDUCATION / 教育

New Rules Issued to Regulate Private Education Institutes 民办教育新规频出

2018年8月10日，司法部发布了《民办教育促进法实施条例（修订草案）（送审稿）》（“送审稿”），向社会公开征求意见。相对于现行有效的2004年版《民办教育促进法实施条例》（“《实施条例》”）及今年4月发布的《实施条例》征求意见稿，送审稿进一步强化了营利性和非营利性民办学校的分类管理，对民办学校的设立、运营、引入投资和上市（尤其是VIE结构的采用）均可能产生深远的影响。

2018年8月22日，国务院办公厅公布了《规范校外培训机构发展意见》（“80号文”），主要对面向中小学生的民办教育培训机构的资质要求、办学条件、分支机构的设立等进行了规定。

1. **对VIE结构的影响：**根据送审稿，在中国境内设立的外商投资企业以及外方为实际控制人的社会组织不得举办、参与举办或者实际控制实施义务教育的民办学校；实施集团化办学的社会组织不得通过兼并收购、加盟连锁、协议控制等方式控制非营利性民办学校。实务中，由于外资准入的限制，境外上市的民办教育机构普遍采用VIE结构。而送审稿中对“参与举办”、“实际控制”、“协议控制”等的限制如果是监管层的本意，可能会导致VIE结构难以在民办教育领域继续使用，也可能影响已采用VIE结构的境外教育类上市公司的合规性。

此外，送审稿对非营利性民办学校的关联交易的公允性、必要性、合法性等提出了更高的要求。此规定可能会使相关VIE协议下非营利性民办学校向外商投资企业转移利润的安排的合法性、公允性等受到质疑。

送审稿目前仅是在征求意见阶段，正式法规的出台尚需时日。送审稿中的上述规定是否会最终体现在正式规定中，以及该等规定对民办教育领域VIE结构的影响，我们将持续关注。

2. **校外民办培训机构资质要求：**我们注意到，对于面向中小学生的素质类校外民办培训机构是否需要取得办学许可，送审稿与80号文有着不同的规定。根据送审稿，素质类教育培训机构可直接办理工商（或事业单位法人、民办非企业单位法人）登记，而毋需取得办学许可。但80号文则明确规定，面向中小学生的K12所有校外培训机构（无论培训内容），必须在取得办学许可证后，方可进行登记。

目前80号文已经生效，而送审稿还在征求意见。对于上述内容，后续送审稿会否依据80号文进行修改，尚待观察。

On August 10, 2018, the PRC Ministry of Justice (“MOJ”) promulgated the *Implementing Rules of the Law on the Promotion of Private Education (Revised Draft) (Draft for Review)* (the “Draft”) to solicit public opinions. Compared with the currently effective 2004 version of the *Implementing Rules of the Law on the Promotion of Private Education* (the “Implementing Rules”) and the *Draft for Comments of the Implementing Rules* issued in April this year, the Draft further strengthened the classified regulation of the for-profit and not-for-profit private schools which may have far-reaching impact on the establishments, operations, investments and listings of private schools, especially when VIE structure is involved.

On August 22, 2018, the General Office of the PRC State Council announced the *Opinions on Regulating the Development of Off-Campus Training Institutions* (the “Opinions”). The Opinions stipulated relevant regulations for after-school training institutions (the “Institutions”) providing non-academic education training to primary and secondary school students (the “K12 Students”) such as the licenses required for establishment of the Institutions, the conditions of school operation and the establishment of branches.

1. **Impact on VIE Structure.** According to the Draft, foreign invested enterprises and social organizations controlled by foreign entities are prevented from sponsoring, participating in the sponsoring or actually controlling private schools providing compulsory education. The Draft further stipulated that education groups are not allowed to control any not-for-profit private schools by means of merger and acquisition, franchising, or contractual arrangement. In practice, due to foreign investment restrictions in education area in China, VIE structure is widely used for overseas listing purpose. If the Chinese regulators intend to set restrictions on the “participating in the sponsoring or actually controlling” or “contractual control” of the not-for-profit private schools as provided in the Draft, the VIE structure may be no longer useful in the field of private education in the future and the compliance of overseas listed education companies with VIE structures may also be adversely affected.

Additionally, the Draft imposed higher requirements on the fairness, necessity and legitimacy of the related-party transactions involving not-for-profit private schools. This may cause challenges over the legality and fairness of the arrangements for the transfer of profits from not-for-profit private schools to foreign invested enterprises under the relevant VIE agreements.

The Draft is currently seeking public opinions before it is officially promulgated and becomes effective. We will closely monitor the legislative development in this regard and the potential implications to the VIE structure in the private education field.

2. **Licenses Required for Off-Campus Training Institutions.** It is noteworthy that for the Institutions providing quality-oriented education (such as music training, dance training and swimming training) for the K12 Students, whether the Institutions should obtain a school-running license or not is differently regulated by the Draft and the Opinions. According to the Draft, the Institutions providing quality-oriented education can apply for registration with the competent registration authorities directly without obtaining a school-running license first. Meanwhile, the Opinions clearly required that all Institutions providing training activities (regardless of training content) to the K12 Students must obtain the school-running license before the registration and operation.

Note that the Opinions have already taken effect while the Draft is still seeking public comments. It therefore remains to be seen whether the Draft will be further revised to conform to the Opinions.

TAXATION / 税法

SAT Tightens up Tax Collection Policy on Individual LPs of PE Funds 国税总局收紧对私募基金个人LP的税收征管

近日，根据坊间流传的《国家税务总局稽查局关于2018年股权转让检查工作的指导意见》（“《指导意见》”）及相关信息，国税总局认为按照20%的税率对合伙制私募股权投资基金的自然人有限合伙人（“个人LP”）的投资收益（不含股息、红利所得）征税的部分地方规定和实践有违上位法的规定，个人LP的投资收益需按照《关于个人独资企业和合伙企业征收所得税问题的通知》（国发[2000]第16号）等相关规定，比照“个体工商户的生产、经营所得”项目缴纳个人所得税，适用5%-35%的超额累进税率。此外，根据相关新闻报道，对于之前已经按20%税率缴税的个人LP，可能也会被要求补缴过去多年的应纳税款差额。

我们注意到，关于个人LP的投资收益适用5%-35%税率的税收政策自2000年以来在中央层面一直存在，且未发生变化。只是各地实践中，地方政府为了招商引资等目的，降低了适用税率，而国税总局实际上对此知晓并持默认的态度。此次收紧私募基金个人LP的税收征管政策，甚至要求追缴，一方面将极大影响个人LP的投资积极性，加大私募基金在中国境内的募资难度，进而影响到私募股权投资市场的发展，另一方面也会在一定程度上损害税务机关的公信力，不符合信赖利益保护原则。此外，税款追缴也存在可操作性方面的问题，尤其对于已经到期分配完毕的私募基金而言。

According to the recent news report, the State Administration of Taxation (“SAT”) has claimed in the *Guiding Opinions of the Inspection Bureau of the State Administration of Taxation on the Inspection of Equity Transfer in 2018* (the “Guiding Opinion”, which is not publicly available) that some local regulations and practices imposing taxes on the individual LPs of the private equity funds in the form of limited partnership for their investment proceeds (excluding dividends) at a rate of 20% is in violation of relevant existing provisions of the upper-level tax regulations. The SAT believes that the investment income of individual LPs shall be levied individual income tax at the progressive tax rates ranging from 5% to 35% with reference to the income tax rules applicable to the operators of individually-owned business (including the *Circular on the Imposing of Income Taxes on Sole Proprietorship Enterprises and Partnership Enterprises (Guo Fa [2000] No. 16)* and other relevant regulations). It is also said that individual LPs who have already paid individual income tax at a rate of 20% may be subject to additional tax payment to make up the difference of the past years between the payable amounts calculated based on the aforesaid two tax rates.

It is noteworthy that the tax policy of applying 5%-35% tax rate on the investment income of individual LPs of PE funds has been effective for years without any material change at the national level. However, for purposes such as investment promotion, a few local governments have in practice effectively lowered the above-mentioned tax rates with the SAT’s acquiescence for a long time. The tightening of the tax collection policy on individual LPs of partnership type of PE funds will greatly adversely affect the investment enthusiasm of individual LPs, increase the difficulty of fundraising of PE funds in China, and thus may further affect the development of Chinese PE investment market. Further, it may to some extent also damage the credibility of the tax authorities for their deviation from the general principle of protection of reliance relationship. Practically speaking, it may also be hard to collect taxes retrospectively for the past years if the investment proceeds have already been allocated and distributed to the individual LPs by the PE funds.

China Adopts New Individual Income Tax Law 新个税法出台

2018年8月31日，《关于修改〈中华人民共和国个人所得税法〉的决定》（“《决定》”）经十三届全国人大常委会第五次会议表决通过。根据《决定》，经修订的《个人所得税法》（“《新个税法》”）将分步实施，其中大部分条款将于2019年1月1日起生效。《新个税法》提高了起征额，建立了综合所得税前扣除机制、优化了税率结构、引入了反避税机制及政府部门之间涉税信息共享及交换机制等。

1. **减税手段：**《新个税法》拟通过提高起征点、增加专项扣除附加等手段减轻个人的税负。但是，在2018年7月20日中共中央办公厅和国务院办公厅印发的《国税地税征管体制改革方案》（“《改革方案》”）（将于2019年1月1日起施行）下，由于掌握员工个人所得情况的税务机关将成为社会保险费的征收机关，企业难以再按之前实务中普遍存在的、以低于员工实际工资的数额为缴费基数给员工缴纳社保，因此，员工在扣除社保和个税后的到手收入可能反而将低于《新个税法》和《改革方案》实施

On August 31, 2018, the *Decision of the Standing Committee of the National People’s Congress on Amending the Individual Income Tax Law of the PRC* (the “Decision”) has been adopted at the Fifth Session of the Standing Committee of the 13th National People’s Congress of the People’s Republic of China. Pursuant to the Decision, the revised *PRC Individual Income Tax Law* (the “New IIT Law”) will be implemented step by step with most of the provisions taking effect since January 1, 2019. The New IIT Law has increased the tax reporting threshold, established a comprehensive income tax deduction mechanism, optimized the tax rate structure, introduced anti-tax avoidance rule and the tax-related information sharing and exchange mechanism between various government departments. Here are a few highlights of this New IIT Law:

1. **Tax Reduction Measures:** The New IIT Law intends to reduce individual tax burden by raising the threshold and introducing additional specific deductible items. However, under the *Plan for Reform of the National Tax and Local Tax Collection and Administration System* (the “Reform Plan”) issued by the General Office of the Central Committee of the Communist Party of China and the General Office of the State Council on July 20, 2018 (the “Reform Plan”, which will be implemented on January 1, 2019), given the tax authorities who will gain knowledge of the individual income status through collection of income tax will also become the collection authority of social security premiums, it will be nearly impossible for

前的所得，而企业的用工成本则会因改革方案的实施而增加。

2. **中国税务居民的判定标准：**《新个税法》收紧了对构成“中国税务居民”的判断时间标准，从原先的在中国境内居住满1年缩短为满183天。基于此，在中国境内无住所的外籍人士（包括港澳台居民；下同）在一个纳税年度内在中国境内居住满183天，即为中国税收居民，需要就其全球所得在中国缴纳个人所得税。但是，如果日后《新个税法》实施条例修订中继续保留现行实施条例中的“五年例外规则”（即，已构成中国税务居民但在中国居住5年以下的外籍人士取得的境外所得，一般可能免于在中国缴纳个税），则符合规定的外籍人员就其境外所得可免于在中国缴纳个税。
3. **个人转股工商登记的前提条件：**《新个税法》将个人所得税完税作为个人完成股权转让工商登记的前置条件。该规定吸收了国税总局曾于2009年6月12日发布的《国家税务总局关于加强股权转让所得征收个人所得税管理的通知》（国税函〔2009〕285号，于2014年底废止）的文件精神，将个人转股情形下工商登记机关的查验完税凭证的义务提高到法律层面。
4. **反避税机制：**《新个税法》首次引入反避税条款，防止个人通过不具合理商业目的的关联方交易、离岸架构及其他特殊安排逃避纳税义务。《新个税法》的反避税规定，结合CRS信息交换（中国已在今年9月1日首次与其他部分国家交换CRS信息），将有助于税务机关打击个人的境外避税行为。

总体看来，《新个税法》构建了个人所得减税和加强税收征管的基本框架，个税改革向前迈出了实质性的一步，但其具体实施效果和影响等还需等待配套实施规则的落地施行才能看清。

employers to continue to contribute social security for their employees based on a lower salary base rather than their actual salary as the past practice. Therefore, the post-tax income of employees after the deduction of social security contribution and individual income tax may become lower than the post-tax income that employees have received before the implementation of the New IIT Law and the Reform Plan. Meanwhile, the employment related costs of employers will unavoidably be increased due to the implementation of the Reform Plan.

2. **Criteria for Constitution of PRC Tax Resident:** The New IIT Law tightened up the physical presence test for determining the tax residency status of foreign individuals without a domicile in China (including Hong Kong, Macao and Taiwan residents) from one full year to 183 days spent in China. Under the new criteria, a foreign individual without domicile in China who has spent 183 days or more in China during the relevant tax year would be considered a PRC tax resident for individual income tax purpose and thus will be subject to individual income tax on his/her worldwide income. However, if the five-year exception rule as provided in the existing *Implementing Rules of the Individual Income Tax Law of the PRC* (i.e., overseas income obtained by foreign individuals who have been considered as PRC tax residents but have lived in China for less than five consecutive years may be exempt from individual income tax in China) will still be kept in the future implementing rules for the New IIT Law, the qualified foreign individuals may continue to enjoy the tax exemption treatment pursuant to such future implementing rules.
3. **Conditions for Change Registration for Equity Transfer of Individuals:** The New IIT Law provides that individual income tax clearance is a condition for an individual to complete the change registration for the proposed equity transfer. This provision, having inherited the spirit of the *Circular on Strengthening the Administration of Individual Income Tax Collection on Equity Transfer Proceeds* issued by the SAT on June 12, 2009 (*Guo Shui Han [2009] No. 285*, which has been abolished at the end of 2014), creates a clear legal obligation for the registration authority to verify the tax payment receipt in the case of individual equity transfer registration.
4. **Anti-Tax Avoidance Rule:** The New IIT Law introduced the anti-tax avoidance rule for the first time to prevent individuals from evading their tax obligations through related-party transactions, offshore structures and other special arrangements without reasonable commercial purposes. We noted that China has exchanged relevant financial account information under the Common Reporting Standards (“CRS”) with some countries for the first time on September 1 this year. With the launch of anti-tax avoidance rule in the New IIT Law and the information exchange under CRS, it will facilitate the tax authorities to crack down on the offshore tax evasion and aggressive tax avoidance of PRC individuals.

Generally speaking, the New IIT Law has established a basic regulatory framework for individual income tax reduction and strengthened the tax collection and administration system. China is taking a major step forward to reform its individual income tax system, although we will also need to wait and see how the New IIT Law’s implementing rules will be formulated and enforced.

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