CHINA
REGULATORY UPDATES

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TAXATION / 税收

SAT Released New Rules Governing EIT on Indirect Transfers of China Related Assets by Non-Resident Enterprises

国税总局发布非居民企业间接转让财产企业所得税新规

With a view to further strengthening the tax administration on cross-border transactions and cracking down the cross-border tax evasion and avoidance, the PRC State Administration of Taxation ("SAT") issued on February 3, 2015 the *Announcement on Several Issues concerning the Enterprise Income Tax ("EIT") on the Indirect Transfers of Assets by Non-Resident Enterprises* ("Circular #7") to replace the previous guidance on indirect transfers of equity interests in PRC entities (i.e., the *Notice of the State Administration of Taxation on Strengthening the Administration of Enterprise Income Tax on Non-Resident Enterprises' Equity Transfer Income* or Circular #698). Highlights of Circular #7 include, among others:

(a) Expansion of taxation scope. According to Circular #7, the income obtained from indirect transfers of taxable Chinese assets by non-resident enterprises without reasonable business purposes shall be taxed by Chinese government, while Circular #698 is only applied to indirect transfers of equity interests in Chinese resident enterprises. The concept of "*taxable Chinese assets*" introduced by Circular #7 for the first time under the PRC legal system would include: (i) assets owned by any organization or place of business situated within China; (ii) real properties situated within China; and (iii) equity investments in Chinese resident enterprises (collectively, the "Taxable Chinese Assets"). Notably, pursuant to Circular #7, indirect transfers of the Taxable Chinese Assets not only include the transfer of equity interests in offshore enterprises but also include other similar interests of offshore entities holding the Taxable Chinese Assets.

(b) Determination of reasonable business purposes. Circular #7 lists 7 factors that need to be considered when determining reasonable business purposes of a given transaction, such as the composition of the value of the transferred assets, economic substance of the offshore target company, substitutability of the transaction and potential tax benefits involved. Circular #7 further clarifies that under some specified conditions, a transaction could be deemed as being lack of reasonable business purpose directly with no need to further analyze the aforesaid factors.

(c) Safe harbor rules. Circular #7 exempts intergroup restructuring transactions from taxation if such transactions meet the requirements in terms of ownership threshold and the form of consideration with the exception that the aforesaid tax exemption will not apply to any transaction resulting in lesser Chinese EIT burden for the group. In addition, buying and selling equity interest in the same listed company by a non-resident enterprise through offshore public securities markets will be deemed to have reasonable business purpose and thus will not be subject to Chinese tax under Circular #7. This means that the safe harbor rule may not apply to a private equity investment made before the listing of the offshore enterprise holding Taxable Chinese Assets, even if the offshore investor exits through offshore securities market later on.

(d) Encouragement of voluntary tax filing. Previously, Circular #698 required the transferor of any indirect transfer of a PRC entity to report the transaction to the competent Chinese tax authority for its determining whether the transaction is a taxable one, while under Circular #7, the transferee, transferor and the underlying Chinese entity in an indirect transfer of the Taxable Chinese Assets may voluntarily (but not obliged to) report the underlying transaction to the competent Chinese tax authority if the reporter does not think the transaction is taxable. To encourage voluntary reporting, Circular #7 has adopted lighter punishment against the transferee and the transferor who have voluntarily reported the transfer which is later on determined by the competent tax authority to be a taxable one. It is noteworthy that, since Circular #7 imposes a withholding obligation on the party having the direct payment obligation to the transferor, such party (in most cases, the transferee), which was not subject to any reporting and withholding obligation under Circular #698, will very likely choose to voluntarily report to competent tax authority in order to mitigate its risk of being punished if it is not sure about the tax nature of the transaction under this Circular #7.

为进一步加强跨境交易中的税收监管，打击海外逃税和非法避税行为，2015年2月3日，国家税务总局发布《关于非居民企业间接转让财产企业所得税若干问题的公告》（"7号文"）以取代《国家税务总局关于加强非居民企业股权转让所得企业所得税管理的通知》（"698号文"）的有关规定。7号文的亮点主要体现在：

(a) 扩大税收征管范围。7号文规定非居民企业不具有合理商业目的间接转让中国应税财产的，应就该等间接转让所得缴纳企业所得税。不同于689号文仅适用于中国居民企业股权的间接转让，7号文首次提出"中国应税财产"概念，包括(i)中国境内机构、场所财产；(ii)中国境内不动产；(iii)在中国居民企业的权益性投资资产等，且间接转让不限于转让持有中国应税财产的境外企业的股权，还包括其他类似利益；

(b) 明确合理商业目的判断因素。7号文列举了境外企业的股权和资产价值来源，境外企业的经济实质，间接转让交易的可替代性，间接转让交易是否使交易方获得税收利益等7个因素判断间接转让交易是否具有合理商业目的，并规定同时符合若干条件的间接转让交易可直接认定为不具有合理商业目的；

(c) 确立"安全港"规则。7号文豁免了集团内部重组的有关纳税义务，但是对内部重组交易双方的股权关系以及交易对价的支付均有限制，如果集团利用内部重组导致中国所得税负担减少的，将被排除在安全港之外。此外，非居民企业在公开市场买入并卖出同一上市境外企业股权取得间接转让中国应税财产所得将被直接认定具有合理商业目的，但买入和卖出必须在公开市场进行，因此，在境外企业上市前以私募方式取得其股权，在上市后从公开市场退出的情形将不能适用本条规定；

(d) 鼓励自愿申报。7号文废止了698号文中要求任何间接转让中的境外转让方必须向主管税务机关报告相关

转让，并由税务机关决定该等转让是否需要交税的义务。在7号文下，对于一项间接转让中国应税财产的交易，如果转让方、受让方或相关中国企业认为该交易不构成应税交易，则前述各方均可以自愿（但无义务）向主管税务机关报告相关交易。为鼓励自愿报告，7号文规定如相关交易日后被税务机关认定为需要纳税，且在相应税款未及时扣缴或缴纳的情况下，对于已经根据7号文主动报告的扣缴义务人和股权转让方可以减轻/免除责任或适用较低的处罚。值得注意的是，由于7号文明确规定对股权转让方直接负有相关付款义务的单位或者个人（通常为股权受让方，无论是居民企业还是非居民企业）为扣缴义务人，为降低受处罚的风险，在698号文下原本没有报告和代扣代缴义务的股权受让方在对相关交易的性质不确定的情况下可能多会选择向主管税务机关主动报告。

FOREIGN EXCHANGE / 外汇

SAFE Streamlined Forex Administration for Direct Investments
外管局简化直接投资外汇管理

In order to further deepen the reform of foreign exchange administration of capital accounts and to promote and facilitate cross-border investments, on February 28, 2015, the State Administration of Foreign Exchange ("SAFE") issued the *Notice of the State Administration of Foreign Exchange on Further Simplifying and Improving Foreign Exchange Administration Policies of Direct Investment* (the "Notice") and the *Operational Guidelines on Foreign Exchange Administration of Direct Investment*, which will take effect on June 1, 2015.

According to the Notice, foreign exchange registration for foreign direct investments (or FDI) and outbound direct investments (or ODI, including those in connection with round-trip investments; together with FDI, the "Direct Investments") will be exempted from approval by the competent SAFE office in most cases. Instead, cross-border investors could go through the foreign exchange registration for the Direct Investments with the qualified banks directly. Meanwhile, the Notice abolished two FDI related registration items: the registration for confirmation of non-monetary capital contribution by foreign investors and the registration for confirmation of capital contribution regarding the acquisition of equity interest held by Chinese parties by foreign investors. The registration for confirmation of capital contribution in cash by foreign investors is changed to the registration for receipt of the contribution, which shall be done through relevant banks via a SAFE system, and the funds contributed by the foreign investors should not be used unless and until such registration is completed. The Notice also cancelled the filing requirement for overseas reinvestments, which means that offshore equity investments made by offshore enterprises that are directly established or controlled by domestic PRC entities will no longer be subject to any filing obligation. Furthermore, the annual foreign exchange inspection requirement for Direct Investments is replaced by an annual reporting system, through which the relevant domestic entities are required to submit data and information related to the Direct Investments to competent foreign exchange authorities annually.

2月28日，国家外汇管理局（"外管局"）发布《国家外汇管理局关于进一步简化和改进直接投资外汇管理政策的通知》（"《通知》"）及《直接投资外汇业务操作指引》（"新《操作指引》"），并将于2015年6月1日起实施。外管局前述新规的发布旨在进一步深化直接投资外汇管理改革，促进和便利企业跨境投资资金运作。

根据《通知》，境内外商投资企业、境外投资企业的境内投资主体可以直接通过符合相关资质的银行办理境内直接投资和境外直接投资（统称"直接投资"）项下的外汇登记，无需再经过外管局办理外汇登记核准。同时《通知》删除了境内直接投资项下的外国投资者非货币出资确认登记和外国投资者收购中方股权出资确认登记两个登记事项，并将外国投资者货币出资确认登记调整为境内直接投资货币出资入账登记，由开户银行在收到相关资本金款项后通过外汇局相关系统办理，登记完成后资本金方可使用。《通知》还取消了境外再投资外汇备案，境内投资主体设立或控制的境外企业在境外再投资设立或控制新的境外企业毋需办理外汇备案手续。此外，直接投资外汇年检将被改为存量权益登记，由相关境内主体每年自行向外汇局报送相关数据信息。

PE&VC / 私募股权及创业投资

AMAC Strengthened Regulation on PE/VC Funds
中国证券投资基金业协会加强私募基金管理

Recently, the Asset Management Association of China ("AMAC") publicized on its website the first annual implementation review of the *Measures for the Registration and Archival Filing Regarding Private Equity Fund Managers (Trial Implementation)* (the "Measures"). The review shows that by February 7, 2015, some 7,358 fund managers (including the largest and most influential ones), managing some 9,156 private equity funds with up to RMB2.38 trillion committed capital, have been registered with AMAC.

It is reported that AMAC has taken various disciplinary actions against 10 fund managers for their illegal activities by far. One of them was investigated by the public security authority for suspected misappropriation of funds and AMAC finally determined to revoke its registration and blacklisted its actual controller and legal representative for filing false or misleading information and failure to report the required matters. Such fund manager together with its actual controller and legal representative are consequently no longer allowed to conduct any PE/VC business. AMAC made public denouncement against and blacklisted another four fund managers as well as their legal representatives after conducting investigations based on the complaints reported by relevant investors. AMAC also cancelled the registrations of five dormant fund managers. Obviously, the competent government authority is taking more active measures to deal with non-compliances by PE/VC funds.

近日，中国证券投资基金业协会（"协会"）在其网站上发布了《私募投资基金管理人登记和基金备案办法（试行）》（"《办法》"）施行一周年的

报告，全面总结了《办法》的实施情况。根据该报告，截至2015年2月7日，已在协会登记的私募基金管理人有7,358家，其所管理的私募基金共计9,156家，管理总规模达2.38万亿元。我国境内主要的私募证券、股权、创投基金管理人已基本完成登记。

此外，报告披露目前共有10家存在违法违规行为的私募基金管理人被纪律处分。其中一家因涉嫌资金挪用已被公安机关调查，协会经检查认定其存在未按规定如实填报登记信息、未按规定报告重大事项等违规情形，决定撤销其管理人登记并将其实际控制人和法定代表人加入黑名单；该基金管理人被撤销登记后不得再从事私募投资基金业务，同时其实际控制人和法定代表人不得在协会登记的私募基金管理人从业。另有四家机构被投资者投诉，协会经检查决定对上述机构及其法定代表人公开谴责并加入黑名单。还有五家机构在登记后未开展私募投资基金管理业务被责令注销登记。由此可见，监管部门正在加强对私募投资基金的违法违规行为的监管力度。

FTZ MAJOR DEVELOPMENTS / 自贸区要闻

Shanghai FTZ Allows Overseas Financings
上海自贸区放开本、外币境外融资

On February 12, 2015, the Shanghai Head Office of the People's Bank of China has circulated the *Implementing Rules of the China (Shanghai) Pilot Free Trade Zone for the Prudent Macro Management of Overseas Financing and Cross-Border Cash Flows in Separate Accounting Business (Trial Implementation)* (the "Rules"), allowing more institutions (including enterprises, non-bank financial institutions and other qualified financial institutions in Shanghai Pilot Free Trade Zone ("Shanghai FTZ")) to engage in overseas financing activities in both Chinese and foreign currencies with an attempt to pave the way for capital account liberalization inside Shanghai FTZ.

The Rules clarified that enterprises, non-bank financial institutions and financial institutions providing separate accounting business within Shanghai FTZ may engage in overseas financings when risks are controllable (the "Separate Accounting Overseas Financing"). The Rules further provided the formula for calculating the financing scale, applicable businesses and the borrowing cap of the Separate Accounting Overseas Financing, and double the leverage ratio for the enterprises within Shanghai FTZ engaged in the Separate Accounting Overseas Financing activities. Furthermore, the Rules cancelled the pre-approval process and adopted such in-process and post-process supervision systems as: (i) enterprises and non-bank financial institutions within Shanghai FTZ shall report to PBOC Shanghai Head Office through the settlement banks after they enter into overseas financing contracts and in no event later than three days before the drawdown of the funds; (ii) relevant financial statements of the borrowers shall be disclosed in the Shanghai FTZ annual report publication system; and (iii) PBOC Shanghai Head Office will conduct offsite investigations on a regular or irregular basis and may impose penalties against the borrowers who have violated the Rules.

2月12日，中国人民银行上海总部（"央行总部"）发布了《中国（上海）自由贸易试验区分账核算业务境外融资与跨境资金流动宏观审慎管理实施细则（试行）》（"《细则》"）。《细则》根据2013年发布的《中国人民银行关于金融支持中国（上海）自由贸易试验区建设的意见》（相关内容请参见我所2013年12月刊China Regulatory Updates）而制定，全面放开上海自贸区内企业和金融机构的本、外币境外融资，为资本账户可兑换改革进一步铺平道路。

根据《细则》，区内企业、非银行金融机构及提供试验区分账核算业务的金融机构可以在风险可控的原则下，自主从境外融入资金（"分账核算境外融资"），并允许融资双方在合理范围内自主确定利率。《细则》明确了分账核算境外融资的规模计算公式、覆盖的业务类型以及融资上限，同时将区内企业分账核算境外融资的杠杆率从其资本的1倍扩大到2倍。此外，《细则》取消了境外融资的事前审批，确立了事中事后监管机制，规定区内企业和非银行金融机构应当在境外融资合同签订后但不晚于提款前三个工作日，通过其结算银行向央行总部办理分账核算境外融资业务申报，并应通过试验区企业年报公示平台披露相关财务报表。央行总部将定期或不定期对金融机构和区内企业的分账核算境外融资情况进行非现场核查，对未及时或虚假报送有关信息以及超规模融资的主体进行相应处罚。

CAPITAL MARKETS / 资本市场

SSE and SZSE Revised Supporting Rules for Delisting
上交所、深交所修订退市相关配套规则

With an effort to implement *Several Opinions on Reform, Improvement and Strict Implementation of the Delisting System for Listed Companies* promulgated by CSRC in October, 2014 (*see our October and November, 2014 Issue of China Regulatory Updates for more information*), the Shanghai Stock Exchange ("SSE") and the Shenzhen Stock Exchange ("SZSE") have recently revised a series of supporting rules for delisting of the PRC listed companies (including, among others, *SSE Measures on Re-listing of Delisted Companies*, *SSE Detailed Rules on Business in Delisting Arrangement Period*, *SZSE Measures on Re-listing of Delisted Companies*, *SZSE Detailed Rules on Business in Delisting Arrangement Period* (collectively, the "New Delisting Rules"). The New Delisting Rules set out the detailed conditions and procedures for a delisted company that is in the process of major asset reorganization to decide at its own discretion whether to end such reorganization and enter into the delisting transitional period. In terms of the re-listing applications by delisted companies, differentiated arrangements have been adopted according to the different delisting situations: voluntarily delisted companies may enjoy preferential treatments on application interval period, application document requirements and review procedures, while delisted companies that have committed major violations will be subject to stricter prerequisites.

为落实证监会于2014年10月发布的《关于改革完善并严格实施上市公司退市制度的若干意见》（相关内容请参见我所2014年10月11月合刊China

Regulatory Updates），上交所与深交所在其已经修订的上市规则的基础上，于近日分别修订了《上海证券交易所退市整理期业务实施细则》、《上海证券交易所退市公司重新上市办法》 、《深圳证券交易所退市整理期业务规定》、《深圳证券交易所退市公司重新上市办法》等退市配套规则（“退市新规”）。退市新规细化了有关处于重大资产重组进程中的退市公司自主决定是否进入退市整理期的条件和决策程序；对于退市公司重新上市，将根据不同的退市情形区别对待：主动退市的公司在申请间隔期、申请文件和审核程序方面更加便利，而重大违法退市公司则需要符合严格的前置条件。

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