

China Tax Weekly Update

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Reference: MOFCOM Order [2016] No. 3 / NDRC and MOFCOM Announcement [2016] No. 22 / Gong Shang Qi Zhu Zi [2016] No. 189
Issuance date: 30 September 2016, 8 October 2016
Effective date: 8 October 2016

Relevant industries: All
Relevant companies: FIEs
Relevant taxes: N/A

Potential impacts on businesses:
• Operational costs reduced

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Further implementation rules for foreign investment

As mentioned in KPMG [China Tax Weekly Update \(Issue 35, September 2016\)](#), the National People's Congress (NPC), on 3 September 2016 revised four laws regulating foreign investment, with a view to easing the rules governing foreign and Taiwanese investors establishing businesses in China. Also on 3 September, the Ministry of Commerce (MOFCOM) released *Draft Interim Measures for Filing Administration of Establishment & Change of Foreign-invested Enterprises (FIEs)* ("the Draft") and opened it to public comment.

Provisions have been added to the above-mentioned four laws, that is, for industries and sectors not included on the "Negative List" (i.e. sectors for which foreign investment is restricted/prohibited), administrative pre-approvals are replaced by recordal filing. The negative list approach, which was initially rolled out in certain pilot zones and has now been expanded to have nationwide effect, permits foreign investors investing into non-negative list industries in China simply to make a recordal with MOFCOM (rather than needing to obtain MOFCOM pre-approval) and at the same time to proceed with all of their other registrations (e.g. business registration, forex registration).

Recently, the MOFCOM, National Development and Reform Commission (NDRC), and State Administration for Industry and Commerce (SAIC) issued further rules to facilitate filing administration for FIEs.

□ [Interim Measures for Filing Administration of Establishment & Change of FIEs \(MOFCOM Order \[2016\] No. 3, "the Interim Measures"\)](#)

- On 8 October 2016, MOFCOM issued the final *Interim Measures*, which shall take effect from the date of issuance. It is noted that there is no significant change in the *Interim Measures* in comparison to the *Draft*. MOFCOM's [interpretation](#) on the *Interim Measures* was also issued on 8 October and clarified the purpose of recordal filings as follows:
 - ❖ MOFCOM recordal filings, for the establishment of FIEs and for the change of their business scope/business constitution, as provided for in the *Interim Measures*, is intended solely to ensure the supply of administration-relevant information from enterprises to MOFCOM and local departments of commerce. The recordal filing shall not be taken as an administrative pre-condition for permitting enterprises to conduct business registration or forex registration (this was the case for the previous pre-approval regime for FIE establishment/change, which has now been scrapped).



- ❖ FIEs or their investors shall provide a written promise that they assume liability for the authenticity, accuracy and integrity of the information submitted. The authorities shall only conduct pro forma examination on the information submitted at time of filing. Once the filing is completed, enterprises may choose to request an acknowledgement of the filing from the authorities at their own discretion.

□ [NDRC and MOFCOM Announcement \[2016\] No. 22 \("Announcement 22"\)](#)

- Announcement 22 clarifies that the application of the new special administration measures for foreign investment access (i.e., the “negative list” system under the Interim Measures outlined above) must have regard to the list of prohibited/restricted industries for foreign investment and the requirements of equities percentage or senior executives for foreign investment in the encouraged industries. This is specified in the [Catalogue of Industries for Guiding Foreign Investment \(Revision 2015\)](#) (the “Catalogue”).
- Accordingly, the aforesaid MOFCOM’s interpretation further clarifies that, for foreign investment which falls within the scope of the “negative list”, if the foreign investors invest in prohibited/restricted industries as specified in the Catalogue, shall continue to be subject to the administrative pre-approval. Pre-approval is required irrespective of the investment amount (large or small) or the form of the investment (newly set-up, M&A). Pre-approval equally applies for foreign investment in sectors for which the Catalogue includes requirements in relation to the prescribed percentage shareholding of Chinese JV partners (e.g. 51%, 25%) or where the Catalogue has proscriptions concerning senior executives.
- For the matters involving establishment and change of enterprises as a result of foreign M&A, the relevant regulations currently in effect shall apply. I.e., [Provisions on Foreign Investors Mergers and Acquisitions of Domestic Enterprises](#) (MOFCOM order [2009] No. 6) shall be applied to foreign investors acquiring/disposing of holdings in domestic non-FIEs through M&A transactions. If listed companies are involved, [Administrative Measures on Strategic Investment in Listed Companies by Foreign Investors](#) (MOFCOM, CSRC, SAT, SAIC and SAFE Order [2005] No. 28) shall continue to be applied. This would mean that pre-approvals continue to apply in such cases even if the target enterprise is in a non-negative list industry.
- For FIEs arising as a result of M&A of domestic non-FIEs by foreign investors, recordal filing shall also be applied if changes occur (such as change of name, business scope, registered capital, etc.) and the changes do not fall within the “negative list”.

□ [SAIC standardizes the registration of FIEs upon the implementation of recordal filing \(Gong Shang Qi Zhu Zi \[2016\] No. 189, "Circular 189"\)](#)

- On 30 September 2016, the SAIC released Circular 189, in which certain issues, such as jurisdiction and rules for FIEs’ establishment, change (filing) and de-registration have been clarified.

Reference: N/A
Issuance date: N/A
Effective date: N/A

Relevant industries: All
Relevant companies: Enterprises that have trade relations with Georgia
Relevant taxes: Import and Export Custom Duty

Potential impacts on businesses:

- Effective tax burden may be reduced
- Restrictions on import and export trade businesses may be reduced
- Development of cross-border trade businesses are facilitated

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China and Georgia substantially conclude FTA negotiations

MOFCOM has reported that, on 5 October 2016, representatives of the governments of China and Georgia signed the *Memorandum of Understanding on Substantially Concluding the China-Georgia Free Trade Agreement (FTA) Negotiations*.

- According to the news, a majority of products in cargo trade of the two sides have realized zero tariff mutually. High-quality market liberalization commitments have been made to the service sectors. Optimized trade rules have been established and the major fields to strengthen cooperation have been clarified. The agreement covers 17 chapters including trade in goods, service trade, intellectual property and rules. It also included new issues like e-commerce, competition and environment.
- In terms of trade facilitation and custom procedures, the two sides agreed to further develop their cooperation on: (i). streamlining customs clearance procedures; (ii). applying the customs advance ruling approach; (iii). using information technology in customs processes; (iv). facilitating the customs clearance for goods with low-risk; (v). accelerating the release of lawful imports; and (vi). strengthening cooperation between the border agencies, etc.

The China-Georgia FTA negotiations, which is the first set of FTA negotiations conducted between China and Europe/Asia region, was launched in December 2015. The signing of the agreement will consolidate and promote China-Georgia economic and trade relations, promote the welfare of the people of the two countries, and is also of great significant to the implementation of the "Belt and Road" initiative and China's FTA strategic influence in the Europe/Asia region.

The final China-Georgia FTA is expected to be signed in the middle of 2017, and come into force in the end of 2017.

Reference: Cai Shui [2016] No. 100
Issuance date: 18 September 2016
Effective date: 1 January 2016

Relevant industries: Securities and futures
Relevant companies: China Securities Investor Protection Fund Co., Ltd
Relevant taxes: CIT / IIT

Potential impacts on businesses:

- Compliance risks due to regulatory uncertainties reduced

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MOF and SAT clarify the income tax treatment of administrative compromise settlement

On 18 September 2016, the Ministry of Finance (MOF) and the State Administration of Taxation (SAT) jointly issued Cai Shui [2016] No. 100 ("Circular 100"). This clarifies the income tax treatment of certain administrative compromise settlement* in the securities and futures business. Circular 100 takes effect from 1 January 2016.

* Pursuant to [Provisional Measures on Administrative Compromise Settlement](#), the term "administrative compromise settlement" refers to when any citizen, legal person or other organization who is suspected of violating laws enters into an administrative compromise agreement with the China Securities Regulatory Commission (CSRC). Such party will pay an administrative compromise settlement to CSRC pursuant to the signed compromise agreement.

- The administrative compromise settlement paid by the citizen/legal person/other organization shall not be deducted in calculating income tax.
- The administrative compromise settlement received by corporate investors from China Securities Investor Protection Fund Co., Ltd. (SIPF) shall be subject to Corporate Income Tax (CIT); the administrative compromise settlement received by individual investors from SIPF shall be exempted from Individual Income Tax (IIT) temporarily.

Reference: Hui Fa [2016] No. 25

Issuance date: 28 September 2016

Effective date: 1 November 2016

Relevant industries: All

Relevant companies: All

Relevant taxes: N/A

Potential impacts on businesses:

- Operational costs reduced

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SAFE facilitates cargo trade

On 28 September 2016, the State Administration of Foreign Exchange (SAFE) issued Hui Fa [2016] No. 25 ("Circular 25"). According to Circular 25, beginning on 1 November 2016, banks are permitted to review the electronic documents (such as e-contract, e-invoice, e-declaration form etc.) when processing foreign exchange clearance for inbound and outbound payments related to cargo trade purchases and sales for eligible enterprises. Eligible enterprises do not need to supply paper documents to the banks anymore.

Guidance on Review of Electronic Documents for Foreign Exchange Income and Expenditure of Cargo Trade ("the Guidance") was also released along with the Circular. According to *the Guidance*, enterprises may handle foreign exchange clearance for inbound and outbound payments related to cargo trade purchases and sales by mean of electronic documents if they meet the following requirements at least:

- Classification result for cargo trade shall be Type A, and have obtained business license for 2 years;
- Good compliance and credit records in the banks for foreign exchange income and expenditure transaction;
- Ensure the veracity, legality and integrity of electronic documents submitted, and possess technical conditions for delivery and storage of electronic documents; and
- Others conditions required by banks for risk control

Reference: N/A

Issuance date: N/A

Effective date: N/A

Relevant industries: All

Relevant companies: All

Relevant taxes: N/A

Potential impacts on businesses:

- Forex compliance risks due to regulatory uncertainties reduced

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Q&A on forex administration on cross-border equity transfer by SAFE

Based on news from the SAFE, on 29 September 2016, the relevant officials of the SAFE clarified the forex administration issues for cross-border equity transfers in response to questions from reporters.

On 28 September 2016, Bloomberg published a report titled "Deutsche Bank's Chinese Hurdle". Late last year, the Deutsche Bank agreed to sell its 20 percent shares in Huaxia Bank to PICC Property & Casualty for as much as 25.7 billion yuan (US\$3.9 billion). But problems arose when the Deutsche Bank want to remit the money abroad. People familiar with the matter say the SAFE has taken to reviewing applications to move large sums of money offshore on a case-by-case basis to help preserve currency stability.

The SAFE official clarified that the reported position is not true. There is no policy obstacle for such transactions. According to the existing forex administration, foreign institutions may directly apply for the purchase and payment of foreign exchange for equity transfers of domestic institutions with the relevant forex bank. Upon completion of an examination of authenticity and compliance, the forex banks may deal with the application immediately without the prior examination and approval of SAFE.

Reference: N/A
 Issuance date: 22 September 2016
 Effective date: N/A

Relevant industries: All
 Relevant companies: All
 Relevant taxes: CIT

Potential impacts on businesses:

- Risks of being challenged due to non-compliance issues increased

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Case sharing: Tax authorities use big data in actual cases

On 22 September 2016, the Chongqing State Tax Bureau (STB) released on Wechat a tax avoidance case that was detected by way of using 'big data'.

Background:

- Company A, located in Chongqing, a municipality of China, was engaged in production and sale of cloud-based software. The business has the features of abstraction and complexity and Company A's production and operation status are hidden in the various big data
- The investigation team of the Chongqing STB searched through Company A's operation and tax payment information, and collected the data in relation to tax filing and payment, accounting, selling and R&D expenditures in software, by using the following platforms:
 - ❖ Golden tax system phase III
 - ❖ Comprehensive application platform of tax data
 - ❖ National enterprise credit information disclosure system
- Tax inspectors, through the logical analysis of big data, data indicator analysis, found out the following facts which support their position:
 - ❖ Proceeds of business increased tremendously, i.e., revenue in 2013 was zero while was RMB26 million in 2014
 - ❖ Company A obtained the income in the considerable amount of RMB16 million from an equity transfer

The Chongqing STB's conclusion was that:

- Company A obtained the preferential CIT policy of "exemption for two years and 50% reduction for three years", which to facilitate a tax free disposal of equity of Company A

* Pursuant to [Cai Shui \[2012\] No. 27](#), for eligible software enterprises, upon recognition, the preferential period in tax treatments shall be calculated from the profit-making year till 31 December 2017, and such enterprises will be exempted from CIT in the first and second years, and will be allowed a 50% tax reduction at a statutory rate of 25% in the third to fifth years and enjoy such tax reduction until the expiration of the preferential period. The eligible software enterprises referred to herein mean the enterprises that mainly engage in development of software products and meet 7 conditions provided in Cai Shui [2016] No. 27, one of which is that, the sales (business) income of software enterprises derived from the development of software products generally accounts for no less than 50% of their total income, and the sales (business) income from independent software product development generally accounts for no less than 40% of their total income.

The Chinese CIT Law provides that income derived from a transfer of equity shall be included in the total taxable income of the enterprise. In this case, company A obtained a large amount of equity transfer income in 2014. This means that the proportion of its qualifying income arising from the development of software relative to total sales (business) income has failed to meet the relevant requirement.



SAT issues new rate of export refund for 2016

As mentioned in KPMG [China Tax Weekly Update \(Issue 33, October 2016\)](#), on 19 August 2016, the MOF and the SAT jointly issued Cai Shui [2016] No. 92 ("Circular 92") to clarify that the export tax refund rate on VAT for products from further-processing of corn (such as corn starch, alcohol) will be resumed to 13%, effective from 1 September 2016.

* Products from further-processing of corn was subject to 0% export tax refund rate, i.e., not subject to export VAT refund, from 1 January 2016 to 31 August 2016.

Take account of the adjustment in Circular 92, consequently, the SAT issued Shui Zong Han [2016] No. 481, releasing the database for new rates of export refund (Edition C for 2016).

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Overseas tourists may enjoy tax refund upon departure policy in Shandong

Based on news published on the website of the SAT, from 1 October 2016, Shandong province shall implement tax refund upon departure policy* for overseas tourists.

* Pursuant to [Cai Shui \[2015\] No. 3](#), "tax refund upon departure" policy refers to when overseas tourists leave China through the departure ports, the VAT, on the items purchased by the overseas tourists in shops participating in the tax refund scheme, can be refunded. China has started to pilot "tax refund upon departure" policy in Hainan since 1 January 2011, and by now, the policy has been implemented in 17 provinces and cities, including Hainan, Beijing, Shanghai, Tianjin, Liaoning, Anhui, Fujian, Xiamen, Sichuan, Jiangsu, Qingdao, Shenzhen, Shaanxi, Yunnan, Guangdong, Heilongjiang and Shandong.

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Further implementation rule to facilitate processing trade business

As mentioned in KPMG [China Tax Weekly Update \(Issue 34, September 2016\)](#), on 25 August 2016, the MOFCOM and the General Administration of Customs (GAC) issued Announcement [2016] No. 45 ("Announcement 45"), which clarified that the following processing trade businesses will not be subject to approval by administration of commerce from 1 September 2016 across the country: (i) Contracts for processing trade businesses; (ii) Imported bonded materials and finished products for processing trade which are to be sold to domestic market.

In order to the smooth implementation of Announcement 45, on 9 October 2016, the GAC issued Announcement [2016] No. 56. This clarifies certain implementation issues including: (i). Establishment (change) of processing trade manuals (account book); (ii). Administration for processing trade products for domestic sales; (iii). Administration for processing trade business in Special Customs Supervision Zones, etc.

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