

# China Tax Alert

Issue 28, November 2017

## New China withholding tax administrative guidance

### Regulations discussed in this issue:

- Announcement of the State Administration of Taxation on Issues Relating to the Withholding at Source of Non-resident Enterprises Income Tax issued on 17 October 2017 (SAT Announcement Gonggao [2017] No. 37), effective from 1 December 2017
- Official interpretation of Announcement of the State Administration of Taxation on Issues Relating to the Withholding at Source of Non-resident Enterprises Income Tax (Announcement 37 official interpretation)
- Notice of the State Administration of Taxation on the Issuance of the Interim Administrative Measures for Source Withholding and Remittance of Non-Resident Enterprise Income Tax (SAT Circular Guo Shui Fa [2009] No. 3)

On 17 October 2017, the State Administration of Taxation ('SAT') issued new guidance on withholding tax ('WHT') administration in SAT Announcement [2017] No. 37 ('Announcement 37'), as well as official interpretative guidance. The new guidance abolishes some of the WHT document registration requirements, clarifies WHT calculations for disposal gains, introduces more reasonable timeframes for WHT payment, and clarifies the respective obligations of WHT agents and overseas payment recipients.

While the clarifications in Announcement 37 have been welcomed by industry, areas of uncertainty remain concerning the precise obligations of WHT agents and overseas payment recipients, as well as the operation of the amended WHT compliance timeframes. Particular challenges arise in reconciling Announcement 37 to the indirect offshore disposal rules in SAT Announcement [2015] No. 7 ('Announcement 7').

### Announcement 37 WHT administration changes

Announcement 37 replaces, with effect from 1 December 2017, the principal existing WHT administrative guidance in Circular [2009] No. 3 ('Circular 3'). It also replaces the remaining provisions of Circular [2009] No. 698 ('Circular 698') on the calculation of disposal gains, so abolishing the circular. The indirect transfer rules in Circular 698 had already been replaced by Announcement 7 back in 2015. The new guidance made eleven key changes, listed below:

#### *Reduced tax compliance burden for WHT agents*

1. Announcement 37 abolishes the Circular 3 requirement for WHT agents to register business contracts, involving non-resident payees, with the tax authorities, within 30 days of contract conclusion. The WHT agent must still, however, maintain WHT account books and contract information on file. This is in line with the broader SAT Circular [2017] No. 101 policy of simplifying China tax administration;

## Regulations discussed in this issue:

- Notice of the State Administration of Taxation on Strengthening the Administration of Corporate Income Tax on Gains derived by Non-resident Enterprises from Equity Transfers (SAT Circular Guo Shui Han [2009] No. 698)
- Announcement of the State Administration of Taxation on Several Issues Relating to Corporate Income Tax on Gains from Indirect Transfer of Assets by Non-resident Enterprises (SAT Announcement Gong Gao [2015] No. 7)
- Announcement of the State Administration of Taxation on Corporate Income Tax Administration of Non-resident Enterprises (SAT Announcement Gong Gao [2011] No. 24)
- Notice of the State Administration of Taxation on Implementation of Several Taxation Issues Concerning Enterprise Income Tax Law (Circular Guo Shui Han [2010] No.79)
- Interim Measures for the Administration of Taxation on Undertaking Contracted Projects and Providing Labor Services by Non-residents (SAT Order Ling No.19)
- Corporate Income Tax Law (Presidential Decree No. 64)
- Implementation Regulations of the Corporate Income Tax Law (State Council Order No. 512)
- Tax Collection and Administration Law (TCA Law) (2015)
- Notice of the SAT on Simplifying China Tax Administration and Providing Better Taxation Environment (Circular Shui Zong Fa [2017] No. 101)

2. Announcement 37 abolishes the Circular 3 requirement for WHT agents to conduct final clearance and settlement procedures for contracts with multiple installment payments. Tax authority clearance was previously required at least 15 days before the final installment payment was due to be paid.
3. Announcement 37 continues the Circular 3 provision permitting a non-resident enterprise, which obtains income from several locations within China, to select a tax authority in one of the locations for tax filing. Clarifications are provided for the coordination of this rule with the reporting provisions of Announcement 7.

### *Tax calculation clarified*

4. Announcement 37 continues and refines the guidance on calculation of equity transfer gains, previously set out in Circular 698. The new guidance addresses cases where the non-resident enterprise made several investments in the same target, at different times, explaining how the tax basis is to be apportioned to the transferred part of equity. The guidance also observes that the base cost of equity, referred to as its 'net value', must be adjusted for any asset value write downs/increments previously recognized for tax purposes. Detailed calculation examples are provided in the official interpretative guidance to Announcement 37;
5. Announcement 37 revises the guidance, previously provided under Circular 698, regarding how foreign exchange (forex) changes are factored into equity transfer gain calculations.

### *Timing of WHT payment obligations*

6. Announcement 37 clarifies that a WHT obligation arises on the date of actual payment of dividends out of China. Circular 3 previously set this at the date on which the decision is made (by the board) to allocate profits to dividends;
7. Announcement 37 clarifies that where asset transfer consideration is to be paid in installments, the tax law will treat the investment cost as first being recovered, followed by the crystallization of disposal gains. This will consequently defer the time that a WHT obligation arises, relative to the Circular 3 guidance.

### *More reasonable tax settlement timeframes for foreign payees*

8. Announcement 37 abolishes the Circular 3 requirement for the foreign payee to settle WHT within a predefined period, where the WHT agent fails to pay (a WHT agent has a 7 day period to file and pay). Circular 3 required the foreign payee to file and pay the underpaid tax within 7 days of the original WHT obligation arising (e.g. within 7 days of an equity disposal in the case of capital gains WHT). The new guidance provides that the foreign payee can wait until instructed by the tax authorities to pay. So long as the foreign payee pays within the time limit set by the tax authorities within that instruction, it will be deemed that the WHT had been settled on time for penalty/levy calculation purposes.

### *Clarified responsibilities for WHT agents and foreign payees*

9. Announcement 37 clarifies that where a WHT agent fails to withhold tax, then the in-charge tax authorities of the WHT agents may pursue them for the unpaid tax. The approach in Circular 3 was to pursue the foreign payee for underpaid tax, rather than the WHT agent.

10. Announcement 37 newly draws a distinction between (i) situations in which tax can be regarded as having been withheld by the WHT agent but not remitted to the tax authorities, and (ii) situations in which tax was not withheld at all. It appears that in the former case the WHT agent is to be pursued for recovery of tax, while in the latter case either the WHT agent or the foreign payee can be pursued.

#### *Clarification of tax authorities responsible for tax filing handling and follow up*

11. Announcement 37 provides more specific detail on how to determine which local tax authorities are responsible for tax filing handling and follow up. In the first instance the local tax authority of the WHT agent is responsible for receiving the WHT filing and follows up with the WHT agent to recover tax withheld but not paid over, and to pursue tax and penalties in case of failure to withhold. For the case where filing and payment by the foreign payee is called for, and they must then liaise with the authority in the location where the income is sourced, then Announcement 37 clarifies how the 'sourcing' location authority is to be determined. For immovable asset transfer this is the authority where the assets are located, for equity transfer the authority where the investee is located, for dividends the authority of the distributing enterprise, and for interest, rents, and royalties the authority of the payer/bearer of the payment.

### **KPMG observations**

Announcement 37 brings some relief to WHT agents and foreign payees in relation to compliance burdens and timeframes. However, it leaves some areas of ambiguity unaddressed and may also introduce new uncertainties, as outlined below.

#### *When is a 'payment in instalments' in point?*

Under the new Announcement 37 guidance, WHT will only start to be imposed on transfer consideration in installment payments once the cost base has been recovered. Later instalment payments which, partly or wholly, constitute gains will be subject to WHT, with the tax becoming due at the time those later instalments are paid. This should ease associated liquidity pressures. However, it is not clear from Announcement 37 how broadly this treatment can be drawn.

If a transfer agreement includes contingent payments or allows for subsequent price adjustments, would these constitute 'instalments' for the purposes of Announcement 37, such that tax only becomes due and payable when these amounts are paid? Under existing guidance in SAT Circular [2010] No.79, tax on these payments would be retroactively due from the time that the equity was transferred, with potential for late payment levies and penalties to apply. There is potential for tax authority and taxpayer disagreement on the application of the new provisions.

#### *When do interest or levies apply to offshore direct/indirect transfers?*

The CIT Law provides that where a WHT agent fails to withhold tax then the non-resident payee has an obligation to account for tax and may be pursued by the authorities. Circular 3 required filing and payment within 7 days of the WHT obligation arising (e.g. equity transfer effective date).

Announcement 37 now replaces the 7 day payment timeframe with a requirement that the seller/payee, if directed by the authorities to account for tax not paid by the WHT agent, will need to do so within the time frame set by the authorities – payment within this time frame will be treated as ‘on time settlement’.

This seems to indicate that if the WHT agent does not withhold the tax, the non-resident payee can wait until receiving notice from the tax authorities, and will not suffer any late payment levies (calculated on a ‘days’ basis) or penalties (a multiple of tax outstanding, ranging up to 500%) for doing so (the WHT agent may still be subject to penalties, and indeed for tax recovery, in such cases). It might be asked whether the SAT had intended for Announcement 37 to be quite so ‘generous’ to the non-resident payee, particularly in offshore transfer cases. Further clarity may be needed from the SAT on this point.

Assuming that the above treatment is the intended outcome of the new guidance, a further complication arises in the case of Announcement 7 indirect transfers. Announcement 7 provides that where an indirect transfer of Chinese equity is determined to be taxable, and yet the WHT agent fails to pay the tax, then the seller will be liable for tax. The CIT Law Detailed Implementation Rules (DIR) further add that interest will start to accrue from 1 June of the year following the year in which the transaction is completed, assuming the taxes are still unpaid by that time (this is ‘interest’ applied for ‘special tax adjustments’, as opposed to ‘late payment levies’, imposed under the TCA Law). With the removal of the 7 day payment timeframe for sellers in case of WHT agent failure, there is a degree of uncertainty surrounding the circumstances in which interest would be imposed on a seller.

The uncertainty arises due to the lack of any reconciliation in the tax rules between ‘interest’ and ‘late payment levies’ and their appropriate ‘trigger’ events. If the non-resident seller pays tax within the prescribed timeframe set by the authorities under Announcement 37, but after the June due date provided for in the CIT DIR, will interest still arise? If the seller does not pay tax within the prescribed timeframe but the period of non-payment is before the June due date, would levies be imposed in this case? Or would interest just start to be imposed from 1 June? Further clarity on these matters is required.

#### *Tax filing in one location for the “same item of income”*

Announcement 37 continues the Circular 3 provision permitting a non-resident enterprise, which obtains streams of income from several locations within China, to select a tax authority in one of the locations for tax filing (this applies to cases where there has been no WHT agent tax payment). However, Announcement 37 supplements this with a further requirement that streams must relate to the “same item of income”. The meaning of this requirement for Announcement 7 indirect transfers is clarified in the SAT official interpretation of Announcement 37.

In an indirect transfer case, a directly transferred overseas company may hold equity interests in numerous Chinese enterprises in different tax districts. Consequently, when Announcement 7 is applied, the re-characterization of the offshore transfer may result in the recognition of numerous onshore direct transfers. These will have separately determined gains for each transferred China equity interest. The official interpretation of Announcement 37 is clear that these gains will not be viewed as relating to the “same item of income” for the purposes of selecting a Chinese filing authority, despite the fact that the gains arise from a single (offshore) transaction. Consequently, separate filings will need to be made with all the relevant authorities in which the transferred Chinese entities are located.



Announcement 7, on its introduction back in 2015, had abolished a special treatment under SAT Announcement [2011] No. 24 ('Announcement 24'), which had simplified Circular 698 indirect transfer compliance. Announcement 24 provided that where an indirect transfer resulted in multiple transfers of China equity interests, the taxpayer could select one tax authority location for tax filing and payment. While taxpayers and practitioners have since been calling for the restoration of this administrative simplification, it is still yet to be reconstituted.

For other types of income other than gains, no clear guidance is provided as to when income streams arising from several locations in China, and involving multiple tax authorities, might be regarded as the "same item of income", and eligible for this filing simplification.

#### *Filing of contract information*

Announcement 37 has abolished the Circular 3 requirement for WHT agents to make a tax authority registration of business contracts, with non-resident payees, within 30 days of contract conclusion. However, where non-residents conduct contracted projects for, or provide labor services to, Chinese recipients, then tax authority contract registration requirements will still be required under SAT Order [2009] No.19. Both the foreign enterprise, and the domestic customer, are required to register these contracts. Monitoring and fulfilment of these obligations could become complex where, for example, an initial technology licensing agreement does not require contract registration under Announcement 37 but then later expansion of the service to include on-site training/assistance triggers an Order 19 registration requirement. The registration requirements would need to be discussed with the local tax authorities on a case-by-case basis.

It might also be noted that requirements continue to exist for outbound payments exceeding USD50,000 to be recorded with the tax authorities. The tax authorities also receive further information on outbound payments through WHT filings by WHT agents (incl. tax treaty relief filings), transfer pricing related party payment reports, and from information pooling arrangements with the forex authorities. As such, while the abolition of the Circular 3 contract registration requirement moderately decreases WHT agent burdens, it in no way lessens the information available for scrutiny of outbound payments.

#### *Tax withheld, but not remitted to authorities*

Announcement 37 describes certain specific circumstances in which a WHT agent may be regarded as having withheld tax, without having remitted it to the authorities. They describe cases in which the WHT agent has informed the recipient that the tax has been withheld, or it has separately presented WHT in the financial accounts or tax returns, or other evidence points to tax having been withheld.

The TCA Law states that where a WHT agent has withheld tax but fails to remit it to the tax authorities, then the WHT agent maybe pursued for tax as well as for late payment levies and penalties. What is more, the CIT Law defines the circumstances in which the foreign payee may be pursued for underpaid tax as being the case where the WHT agent has failed to withhold tax, but not the case where the WHT agent has withheld tax and failed to remit. As such, the clarifications in Announcement 37 may have the effect of shielding the non-resident payee from being chased for tax where the WHT agent can be shown to have withheld. Where the criteria for treating tax as having been withheld are not met, then either the WHT agent or the non-resident (or both) may be pursued for tax recovery (and levies/penalties), as the authorities decide. The precise implications of these new clarifications in practice remain to be seen.

### *Recourse to WHT agent for underpaid tax*

Announcement 37 clarifies that where a WHT agent fails to withhold tax, then the tax authorities may pursue them for the unpaid tax. This is a shift from the Circular 3 approach. The Circular 3 procedures had focused on recovery of tax, which the WHT agent failed to withhold, from the non-resident payee. This was even to the point of seizing the foreign enterprise's other China assets. While heavy penalties could be imposed on the WHT agent for failure to withhold, the approach in Circular 3 was not to pursue for them for the underpaid tax.

However, there is no clear guidance in Announcement 37 on whether the tax authorities are, in the first instance, to pursue the recovery of non-withheld tax from the WHT agent or from the non-resident payee. Disputes could readily arise between tax authorities, given that the tax authority pursuing the WHT agent will be his place of registration, while the tax authority pursuing the non-resident will be the tax authority in the place the income 'arose', which may be different.

The Announcement 37 changes may alter the dynamic in sales and purchase agreement (SPA) negotiations between buyers and sellers, particularly in Announcement 7 cases. It will make it even more imperative for the buyer to negotiate and agree with the seller on their respective reporting responsibilities, given the protections offered to reporting buyers in Announcement 7, and seek necessary protections and escrow from the seller during the SPA negotiation process.

### *Withholding obligations of offshore payers*

There has long been debate concerning whether offshore payers (including overseas purchasers of equity in direct and indirect disposal transactions) are to be held liable for tax withholding and remittance to the Chinese authorities. The authorities have certainly asserted that they are so liable, and this position underpins the WHT mechanism in Announcement 7 indirect transfer cases. Announcement 37 has not provided any further clarity on this matter leaving it open to the authorities to continue to push this position.

A new development with Announcement 37 is that a Circular 3 provision, which protected offshore purchasers in direct disposal cases, has been scrapped. Circular 3 had said that in a direct offshore transfer of Chinese equity in which both the seller and buyer are non-residents, the offshore seller must pay the taxes arising on their gains. With this provision being scrapped, with ambiguity surrounding whether offshore payers can constitute WHT agents, and with Announcement 37 clarifying that WHT agents may be pursued for tax where they fail to withhold, there is now tax exposure for offshore purchasers in direct disposal cases.

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