



China Tax Alert

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New China double tax agreement administrative guidance

Regulations discussed in this issue:

- State Taxation Administration (STA) Announcement on Administrative Measures for Granting Double Tax Agreement (DTA) benefits to Non-Residents, Gonggao [2019] No. 35 ("Announcement 35"), issued on October 22, 2019.
- STA Announcement on Administrative Measures for Granting Double Tax Agreement (DTA) benefits to Non-Residents, Gonggao [2015] No. 60 ("Announcement 60"), issued on August 27, 2015.
- STA Administrative Measures for Enjoyment of Tax Treaty Treatments by Non-residents in China, Guoshuifa [2009] No. 124 ('Circular 124'), issued on 24 August 2009.

Background

On 22 October 2019 the STA released new DTA administrative guidance in Announcement 35. This will take effect from January 2020 and replaces the existing guidance in Announcement 60.

The new guidance is in line with a broader government program to reduce regulatory burdens and red tape for businesses, and moves China further in the direction of a full self-assessment based tax system. The potential tax exposures for withholding tax (WHT) agents are also reduced, and may allow for more DTA relief to be granted upfront. However, significant ambiguities remain.

Announcement 35

In 2015 the STA set out highly detailed DTA relief guidance in Announcement 60; see [China Tax Alert Issue 24 of 2015](#). This transitioned China DTA relief from the pre-approvals system under Circular 124 of 2009, to a notification system. While there were hopes at the time that Announcement 60 would facilitate greater access to DTA benefits, in practice there were a number of deficiencies. These are now partly addressed by Announcement 35.

Announcement 60 required DTA relief claimants or WHT agents, when notifying the tax authorities of a relief claim, to submit upfront extensive supporting documents. This could be highly burdensome. Announcement 35 now simply requires that supporting documents are kept by the relief claimants on their files for review. Solely a short notification form is sent to the authorities, either directly from the relief claimant or via the WHT agent.

A further change alters WHT agent tax exposures. The Announcement 60 system obliged the WHT agent to ensure that the materials (relief form and supporting documents) are complete. The WHT agent also had to ensure that the assertions made by the relief claimant in the form (as supported by the documents) corresponded to the qualifying conditions for DTA relief.

This could lead to liabilities for WHT agents for underpaid tax or penalties, where it was later determined by the authorities that relief was not merited. This naturally made many WHT agents quite cautious when it came to applying reduced DTA WHT rates upfront, and pushed relief claimants into making cumbersome refund applications instead. Announcement 35 makes clear that the WHT agent's responsibility is just to check that the claimant has fully filled out the form, and should facilitate upfront grant of relief.

Most other provisions are unchanged from Announcement 60, such as those concerning the use of contracts, board resolutions, and tax residence certificates as supporting documents, requirements on the relief claimant and WHT agent to assist the authorities with follow up review, refund procedures, etc. This being said, the multiple complex relief forms, which were different for companies and individuals, and for different income types, are now replaced with a single simple form.

KPMG observations

The efforts to limit administrative burdens and lessen WHT agent exposures are welcome, but a number of issues remain:

- A longstanding issue has been that certain local tax authorities have spun out the WHT refund process by making repeated requests for further supporting documentation and explanations, so frustrating DTA relief claims. While a 30 day refund time limit starts from the date of filing a relief application, the guidance treats no filing as having been made, as long as tax authority information requests are still outstanding. While some had hoped the new guidance would bring in a firm 'stop the clock' provision, this has not happened.
- While further clarity has been given on the extent of the relief form review required from the WHT agent, it is still not clear what lengths the WHT agent must go to in obtaining documents from the relief claimant to fulfil its obligations to assist the authorities with follow up review. Also lacking is any explicit provision requiring the WHT agent to help relief claimants with refunds. In practice, some local tax authorities will only accept refund applications from WHT agents, and these can sometimes refuse to assist. It remains to be seen whether further will be set out on these matters in the forthcoming new Tax Collection and Administration (TCA) Law.
- Relief claimants continue to face a lack of clarity on the precise documentation needed to support their DTA positions. For example, what evidence would be deemed sufficient to support a position that equity in a disposed of entity is not 'land rich', or that a foreign company does not have a fixed place 'at their disposal' in China that could constitute a PE? Lack of clear DTA interpretative guidance is compounded by varying local tax authority practices and views. The continued absence of a tax rulings system in China means that relief claimants will have to bear risks of WHT relief claw back, or PE impositions.

It remains to be seen in 2020 how effective the new treaty administrative guidance will be in practice, but it is an encouraging development.

Obtaining DTA relief remains a complex area in China tax practice; both the administrative aspects as well as interpretative issues. It is frequently necessary to confer with the in-charge local authorities as well as, in certain cases, the STA. Where the amounts involved are significant, and appropriate treatment is ambiguous, it is highly recommended conferring with your KPMG Advisor.

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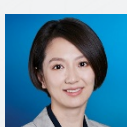
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