



中國稅務及投資顧問有限公司
China Tax & Investment Consultants Ltd

International Taxation in China (II)

Legal concepts - DTA texts


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Agenda

- Conflicts of laws
- DTA objectives and concepts
- Structure of legal texts

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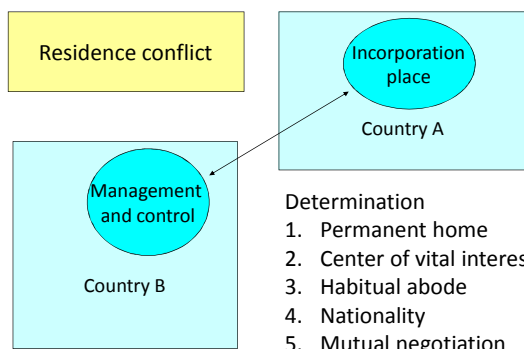
Part I

Conflicts of laws

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Residence conflict


Incorporation place
Country A

Management and control
Country B

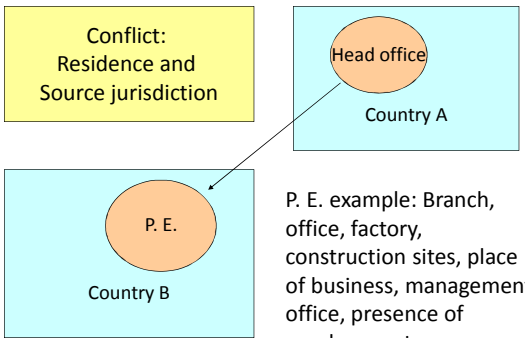
Determination

1. Permanent home
2. Center of vital interest
3. Habitual abode
4. Nationality
5. Mutual negotiation

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Conflict:
Residence and
Source jurisdiction

Head office
Country A

P. E.
Country B

P. E. example: Branch,
office, factory,
construction sites, place
of business, management
office, presence of
employee, etc.

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DTA exceptions

	Constituting P. E.	Not constituting PE
1)	Have a fixed business place on other side	Use of facilities for storage, display, delivery of goods belonging to the enterprise
		Maintenance of stock of goods belonging to enterprise for storage, display & delivery purposes

Ref: China-Singapore DTA

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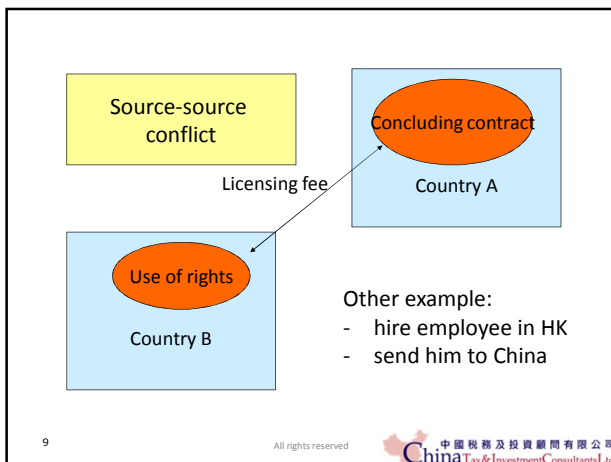
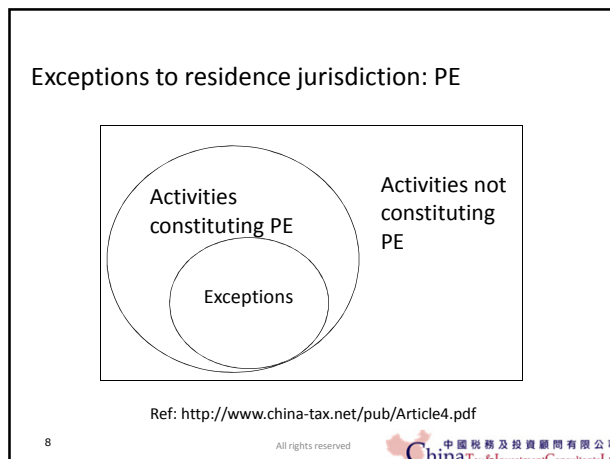


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DTA exceptions

	Constituting P. E.	Not constituting PE
1)	Have a fixed business place on other side (Continued)	Sourcing of goods, collecting information, from China
2)	Having an agent conclude contracts on other side	Having agent conclude contracts for activities relating to (1) above

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Case – International assignment

- A Hong Kong company wants to assign an employee to work as the general manager in its PRC subsidiary under a 3-year contract. The employee is a US national. He owns a house in Canada. His wife and children are all working and living in Canada. The employee and the Hong Kong Company have to find out the following tax implication before signing the contract for the assignment:
- (I) What taxing rights the following jurisdictions should exercise: Hong Kong, Mainland China, US and Canada?
- (II) Where he should pay the taxes?
- (III) What should the HK Company do?

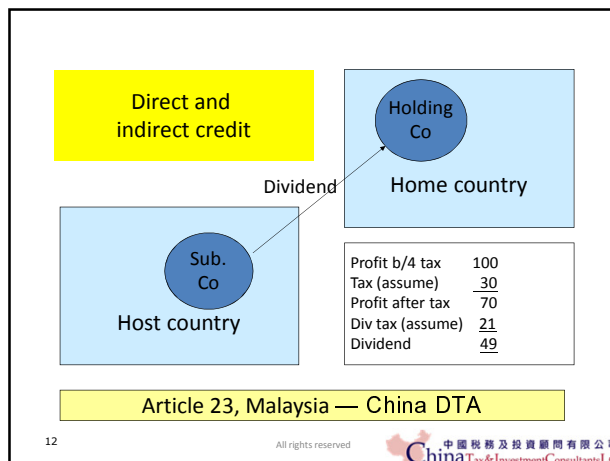
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Analysis – International Assignment

Tips:

- (i) According to US-Canadian DTA, family tie takes precedence over nationality;
- (ii) Tax resident can enjoy tax credit at home for foreign tax on foreign income.

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Tax sparing credit

1. Tax Credit to host tax Concession ?
2. Who benefits ?

Dividend

Sub. Co
Host country

Holding Co
Home country

Profit b/4 tax	100
Tax (30%)	0
Profit after tax	100
Div tax (30%)	0
Dividend	100

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Part II

DTA Objectives and Concepts

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Objective of concluding DTA - I

- Avoidance of double taxation
- Allocation of tax jurisdiction
- Avoiding discriminatory taxation
- Mutual agreement procedure
- Exchange of tax information

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Objective of concluding DTA - 2

- Enhancing certainty in taxation for doing international business and cross-border investment

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Scope of DTA

- This DTA shall apply to persons who are residents of one or both of the contracting states.

Personal scope: natural and legal persons

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Benefit of DTA to tax residents

- Eliminate double taxation through bilateral credits (Direct credit and indirect credit)
- P.E. protection
- Lower withholding tax rate
- Possible tax sparing credit provision <with exception for the US>
- Preventing discriminatory taxation

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Concepts and technical terms in DTA

- Juridical double taxation vs. economic double taxation
- Residence and source jurisdiction
- Direct credit and indirect credit
- Unilateral credit and bilateral credit
- Tax sparing credit
- Permanent establishment

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Concepts of residence and source jurisdiction

Residence jurisdiction:

- ❑ tax imposed because of a nexus between the country and the person earning the income, irrespective where he earns it.

Source jurisdiction:

- ❑ tax imposed because of a nexus between the country and the activities that generate the income, irrespective of the taxpayer's residence.

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Article 8, China-Singapore DTA

Shipping and Air Transport

1. Profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.

Article 7, China-Singapore DTA

Business Profits

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

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Article 17 Artistes and Sportsmen, China-Singapore DTA

1. ... income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may..., be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised.

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Article 22 Elimination of Double Taxation

Direct and indirect credit

In Singapore, double taxation shall be avoided as follows:

Where a resident of Singapore derives income from China which, in accordance with the provisions of this Agreement, may be taxed in China, Singapore shall, subject to its laws regarding the allowance as a credit against Singapore tax of tax payable in any country other than Singapore, allow the Chinese tax paid, whether directly or by deduction, as a credit against the Singapore tax payable on the income of that resident. Where such income is a dividend paid by a company which is a resident of China to a resident of Singapore which is a company owning directly or indirectly not less than 10 per cent of the share capital of the first-mentioned company, the credit shall take into account the Chinese tax paid by that company on the portion of its profits out of which the dividend is paid.

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Article 22 Elimination of Double Taxation

Sparing credit

Paragraph 3: For the purposes of the credit referred to in paragraph 2 of this Article, Chinese tax payable shall be deemed to include the amount of Chinese tax which would have been paid if the Chinese tax had not been exempted, reduced or refunded in accordance with the Enterprise Income Tax Law of the People's Republic of China and the Detailed Rules and Regulations for the Implementation of such Law.

<http://www.chinatax.gov.cn/n8136506/n8136593/n8137537/n8687294/n8687467.files/n8687477.pdf>

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Part III

Structure of Legal text

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Structure of Legal Texts

- Except-for provision
- Catch-all provision
- Specified provision
- Deeming provision

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Legal texts : Except-for provision

- Paragraph 4, Article 5, China-Singapore DTA

Notwithstanding the preceding paragraph, the term “permanent establishment” shall be deemed not to include the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise

- Article 18, China-Singapore DTA

Subject to the provision of paragraph 2 of Article 19 (Government Service), pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.

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Legal texts - Catch-all provision

- Other Income: Article 21, China-Singapore DTA
- Dividend income: Article 10, China-Singapore DTA

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

- (a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;
- (b) 10 per cent of the gross amount of the dividends in all other cases.

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Legal texts - Catch-all provision

- Item 11, Article 2, PRC Individual Income Tax Law
Individual incomes set forth below shall be subject to payment of individual income tax:
 1. incomes from wages and salaries;
 2. incomes of private industrial and commercial households from their productions and business operations;
 3. incomes from contracting or leasing enterprises and institutions;
 4. incomes from remuneration for labor services;
 5. incomes from authors' remuneration;
 6. incomes from royalties;
 7. incomes from interest, stocks dividends and bonuses;
 8. incomes from lease of property;
 9. incomes from transfer of property;
 10. occasional incomes; and
 11. **other incomes** specified as taxable by the department of the State Council for finance.

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Legal texts - Catch-all provision

Paragraph 3, ARTICLE 22, OTHER INCOME China-Malaysia DTA

- Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Agreement and arising in the other Contracting State may be taxed in that other State.

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Legal texts - Specified provision

■ Paragraph 2, Article 5, China-Singapore DTA

The term "permanent establishment" includes especially:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop; and
- (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

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Legal texts - Specified provision

■ Paragraph 3, Article 5, China-Singapore DTA

The term "permanent establishment" likewise encompasses:

- (a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than 6 months;
- (b) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if such activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 183 days within any twelve-month period.

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Legal texts - Deeming provision

- Paragraph 3, Article 22, China-Singapore DTA
- Elimination of Double Taxation

For the purposes of the credit referred to in paragraph 2 of this Article, Chinese tax payable shall be deemed to include the amount of Chinese tax which would have been paid if the Chinese tax had not been exempted, reduced or refunded in accordance with the Enterprise Income Tax Law of the People's Republic of China and the Detailed Rules and Regulations for the Implementation of such Law.

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Legal texts - Deeming provision

■ Article 4, The Implementation Rules of the PRC VAT Tentative Regulations

单位或者个体工商户的下列行为，视同销售货物：

- (一) 将货物交付其他单位或者个人代销；
 - (二) 销售代销货物；
 - (三) 设有两个以上机构并实行统一核算的纳税人，将货物从一个机构移送其他机构用于销售，但相关机构设在同一县（市）的除外；
- {略}

The following transactions conducted by units or individual trader are deemed to be sale transactions:

- (1) Transferring goods to other units or individuals for re-selling to others;
- (2) Selling the consigned goods for the principal;
- (3) A taxpayer who has two or more place of business ships the goods from one business place to another, except that the taxpayer's places of business are situated in the same city (or county).
- (4) (Skipped)

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Legal texts - Deeming provision

■ Article 3, The Implementation Rules, PRC IITs

税法第一条第一款所说的在境内居住满一年，是指在一个纳税年度中在中国境内居住365日。临时离境的，不扣减日数。

前款所说的临时离境，是指在一个纳税年度中一次不超过30日或者多次累计不超过90日的离境。

Individuals who stay in China for a full year mentioned in Section 1 of Article 1 of the Tax Law mean individuals who have stayed in China for 365 days in a tax year. Days for temporary absence from Chinese territory shall be included in the calculation of the total days.

The temporary absence from the territory of China mentioned in the above paragraph means one time absence of not exceeding 30 days or multiple absences of not exceeding of a total of 90 days from the territory of China within a tax year.

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