

Tax Minimization and Profit Repatriation 减低税负与跨境收回利润

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Main Points - Repatriation of Profit 大纲

1. Legal Structure 法律架构
2. How tax rules work in host country and home country 母国与东道国的税法规定
3. Problem for foreign investor 利润汇回母国面对的问题
4. Withholding income tax 预提所得税
5. Foreign exchange compliance issues 外汇管理规定

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Offshore Company as Tax Effective Vehicles for PRC investment

境外投资控股公司 - 高税收效益工具

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Legal Structure - I

Ownership
所有权

Holding Co.
控股公司

Exchange of
Legal Rights and
Obligations
权利和义务转移

FIE
Legal Person
外商独资企业

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Legal Structure - II

Ownership
所有权

Foreign Co
外国公司

Exchange of
Legal Rights and
Obligations
权利和义务转移

Resident P.E.
Non-legal person
常驻机构

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Legal Structure - III

Exchange of Legal
Rights and
Obligations
权利和义务转移

Foreign Co.
外国公司

FIE and Non-FIE
境内机构

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Co Structure vs. income tax computation 法律架构与征税方式

- FIE/FICE – Tax on net income 所得净额
- FE with PE – Tax on net income, or gross income 常驻机构按所得净额/总额征税
- FE with no PE – Tax on gross income 外国企业中国境内所得按总额征税

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Legal Structure vs. Scope of Tax Liability 法律结构与纳税义务

FIE/FICE	F.E. with a P.E.
Tax on worldwide income 境内境外收入征税	Tax on PRC-sourced income 境内收入征税
Tax on dividend <exempt> 股息免税	Not applicable 不适用

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FE without P.E. in the PRC 没有设立常驻机构的外国企业

May suffer withholding taxes on: 预提税

Interest, Royalty, and Service income arising from:

- Indirect investment 间接对华投资
- Right to use IP in the PRC 在境内使用无形资产
- Cross-border provision of services 提供跨境劳务

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Taxation on P.E. 常驻机构

- Duration - physical presence 停留时间
- Scope of tax – taxable activities 应税活动
- Domestic rules and treaty provision 国内法与租税协定
- Computation methods 计税方式

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FDI 直接投资方

Comparing: 比较

1. BVI Co. 维京群岛
2. HK Co. 香港
3. Mauritius Co. 毛里求斯
4. Singapore Co. 新加坡
5. Canadian Co. 加拿大

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Domestic tax rules in host country

- Distribution of dividend by FIE / FICE
- Host - Dividend is exempt from Chinese IT 外商投资企业股息免税

Note: Distribution of dividend by non-FIE Co
Host - Dividend is liable to income tax 内资企业股息纳税

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Domestic tax rules in home country (I) **投资国(地区)税法规定**

- Distribution of dividend by FIE / FICE
- Possible tax treatment in home country
 - (a) No liability for tax 不征税
 - (b) Tax exemption 免税
 - (c) Tax on receipt basis 母国收到利润时征税
 - (d) Tax on as-earned basis 在东道国取得时征税

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Domestic tax rules in home country – (II) **投资国(地区)税法规定**

- No tax – BVI Co 维京群岛
- Tax exempt – HK / Singapore Co 香港/新加坡
- Tax on receipt basis – Singapore / Canada Co
- Tax on as-earned basis – Canadian Co. 加拿大

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Singapore

- Income tax-exempted if not received in Singapore 所得未汇入新加坡不征税
- Income taxed if received in Singapore; tax credit, including credit for tax paid on profit at company level if equity in FIE >25%
汇入新加坡时征税, 有抵免, 如果控股>25%, 抵免额包括FIE已缴纳的所得税

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Canada (I)

- Dividend distributed by treaty country Co (FIE) is exempted from tax, if Canadian tax residents own more than 10% equity in FIE. Indirect credit also available
如果在协定国公司(FIE)控股超过10%, 股息在加拿大免税, 也有间接抵免。

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Canada (II)

- Dividend distributed by Non-treaty country Co.
非协定国公司派发股息
- 1. Taxed on receipt basis if the Co earns active income 生产经营所得在汇回加拿大时纳税
- 2. Taxed on as-earned basis if it earns passive income 投资收益在获得时纳税

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Hong Kong

- Exemption from profit tax: (i) Dividend distributed by HK and non-HK Co; (ii) Profit derived from outside HK 境内境外投资收益免税, 境外利润免税
- HK tax system does not adopt resident principle;
- Exception: taxation on shipping and air service income 香港税制不实施属人管辖, 海运空运业务所得除外

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BVI 维京群岛

- BVI law imposes no tax on income received outside BVI 维京群岛法律不对境外收入征税
- BVI Co. has no power to carry on business with BVI residents, and own any property situated in BVI
- BVI Co. can hold a leased property for use as an office in BVI

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Classification of options

I.	Tax heaven Co. 避税港公司	Cannot sign DTA 不能签租税协定	(BVI) 维京群岛
II.	Semi-tax heaven Co. 半避税港公司	Can sign DTA (in part) 能签有限度租税协定	(HK) 香港
III.	Non-tax heaven Co. 非避税港公司	Can sign DTA 能签租税协定	(Singapore 新加坡/ Canada 加拿大/ Mauritius 毛里求斯)

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Comparison: tax heaven Co and non-tax heaven Co

	Tax heaven Co. 避税港公司	Semi-tax heaven Co. 半避税港公司	Non-tax heaven Co. 非避税港公司
Residence jurisdiction 属人管辖	No	No (with exception)	Yes
Source jurisdiction 属地管辖	Yes (Some impose no tax)	Yes	Yes
Comprehensive DTA 全方位租税协定	No	Yes (in part)	Yes

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Comparison: tax heaven Co and non-tax heaven Co

Tax heaven Co: 避税港公司

- Adopt common law 普通法
- Legal and beneficiary ownership co-exist over shares in the Co 一物两权: 法定和受益所有人
- Most are incorporated in the Commonwealth Nations 主要在英联邦国家注册

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Criteria for tax effective vehicle?

有效的税收载体标准

- Any unilateral credit; direct and indirect credit in domestic tax rules of investing country?
投资税法是否有单边抵免, 包括直接间接抵免
- Whether Holding Co. can benefit under DTA / tax treaty? 投资者是否能受惠于租税协定

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Benefit of DTA 租税协议的好处

- Eliminate double taxation through bilateral credits (Direct credit and indirect credit)
双边抵免(直接和间接)避免双重征税
- P.E. protection 常驻机构条文保护
- Lower withholding tax rate 低预提税率
- Possible tax sparing credit provision
<with exception> 税收饶让(有例外)

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Basic concepts 一些基本概念

- Juridical double taxation vs. economic double taxation 不同法域双重征税和经济活动双重征税
- Direct and indirect credit 直接与间接抵免
- Reason for Tax sparing credit provision <with exception> 税收饶让(有例外)

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Scope of DTA 适用范围

- DTA shall apply to persons who are residents of one or both of the contracting states. 租税协定适用于缔约国一方或同时为双方居民的人

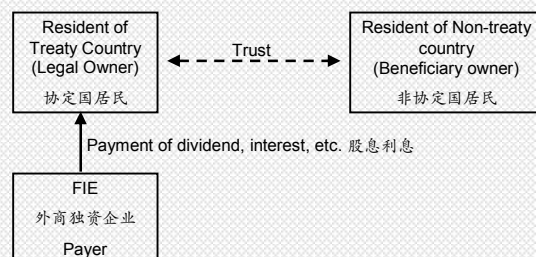
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Treaty shopping 规避协定义务

- Why does it arise? 发生原因
- What form it takes? 形式
- Limitation of benefit? 受益所有人限制条款

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Legal structure - IA



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DTA between PRC and Singapore

Paragraph 2(a) of Article 10: ... "Dividends paid by a company which is a resident of China to a resident of Singapore may also be taxed in China, and according to the laws of China, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed 12 per cent of the gross amount of the dividends."

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中新租税协定

第十条 股息

二、(一) ...，中国居民公司支付给新加坡居民的股息，按照中国的法律也可以在中国征税。但是，如果收款人是股息受益所有人，则所征税收不应超过股息总额的百分之十二。

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Profit repatriation 当在华投资汇出利润

- How it arises? 问题的发生
- Case study 案例

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Balance Sheet 资产负债表

Year 1	Fixed asset 固定资产	100	Capital 资本	100
Year 10	Cash 现金	100	Profit 利润	100
Year 10	Cum. Depr'n 折旧	-100	Profit 利润	-100

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Balance Sheet 资产负债表

10 Years ago 之前	Fixed Asset 固定资产	100	Capital 资本	100
Now 之后	Cash 现金	100	Capital 资本	100

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Possible Solutions 可能的方案

1. Winding up the FIE or capital reduction 清算或减资
2. Capital equipment acquired under finance lease 进口租赁融资设备
3. FIE acquiring ownership of IPR / transfer of technology to the FIE 向境外购买包括转让所有权的专有技术
4. Foreign investor's right to get back investment from before-tax profit in CJV; Condition: Transfer ownership of contributed assets upon the expiry of CJV agreement 合作企业外国投资可税前先行收回投资. 条件: 经营期满设备归中方拥有. <Article 21, CJV Law>

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Tax concession

进口设备税务优惠政策

- Importation of capital equipment is exempt from duty and VAT
免征进口环节增值税关税
- Conditions: own funds; FIE belonging to five types of enterprises <Shu Shui 791 (1999), PRC General Administration of Customs>
条件: 自有资金, 五类企业

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Withholding income tax (WIT) 预提所得税

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How does WIT arise? 如何发生?

Cross border movement / exchange:

跨境流动 / 转移

- (a) Money 资金
- (b) Goods 货物
- (c) People 人员
- (d) Legal rights/obligations 权利和义务

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Withholding obligations (Non-trade items)

Scope 范围

1. Payment of rent, interest, royalties

Exemptions from BT: 免征营业税:

- Payment of rent (finance lease) 融资租赁利息
- Interest 利息
- Guarantee fee 担保费

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Withholding obligations (non-trade items)

2. Payment to non-residents for the provision of services within PRC in connection with the following activities: 向境外公司支付劳务费

(IT and BT) Construction, installation, supervision, repairing, design, testing, consulting, accounting, training, agency, engineering work, etc
预提所得税及营业税

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Withholding obligations Non-trade Items

3. Payment to non-resident owner for the acquisition of immovable property situated in the PRC (IT and BT) 向境内居民转让境内物业, 境内居民支付外币(所得税及营业税)
4. Payment to non-resident who disposes of share in FIE (exempted from BT) 向境外居民收购FIE境内公司股权(免征营业税)

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Withholding obligations Non-trade Items

5. Payment for international shipping and air service in China territory, 支付国际海运空运服务费

➢ Resident of non-PRC treaty country:
The income is taxable if ship or aircraft departs from Chinese territories, wherever it is received
非协定国居民公司: 无论在何处收款, 在中国申报纳税

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Withholding obligations Non-trade Items

➢ Resident of a PRC treaty country:
The shipping and air service income derived by residents of a PRC treaty country will be exempted from Chinese tax, even if received in China
协定国居民公司取得国际海运空运服务收入: 免税, 尽管在中国境内收款

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Special rules for assigning taxing rights

- Article 8 of the Sino-Singapore tax treaty is read as follows:

Income from the operation of a ship or aircraft in international traffic carried on by an enterprise which is a resident of a contracting state shall be exempt from tax in the other contracting state

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划分税收管辖

中国政府和新加坡政府关于对所得避免双重征税的协定第8条规定:

缔约国一方居民企业以船舶或飞机从事国际运输业务取得的所得应在缔约国另一方免税, 但仅在缔约国另一方各地之间以船舶或飞机从事运输的除外。

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Document required for outward remittances (1) 对外付汇文件

1. Tax payment certificate or tax exemption certificate 完税证或免税证
- 1.1. Type of taxes: Income tax and business tax 所得税及营业税
- 1.2. Issuing body: national income tax office and local income tax office 国税及地税

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Document required for outward remittances (2) 对外付汇文件

2. Non-tax documents: contracts, invoices 合同、发票
- 2.1. Additional non-tax documents 其他:
 - Technology import licensing certificate 技术进口合同登记证
 - Trade mark licensing registration acknowledgment 商标使用许可合同备案通知书
 - Patent licensing registration acknowledgment 专利实施许可合同备案通知书

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Payment for non-trade items (1A)

案例: 经常帐非贸易项目

Distribution & Repatriation of dividends 派发股息

1. Foreign exchange registration certificate 外汇登记证
2. Resolution passed by board of directors 董事会决议
3. Tax payment (exemption) certificates 完税(或免税)证

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Payment for non-trade items (1B)

案例: 经常帐非贸易项目

4. Auditor's report certifying appropriation of the after-tax profits
会计师事务所审计报告, 包括利润分配资料

5. Capital examination report 验资报告

What if the registered capital has not been paid up? 注册资金未全部到位怎么办?

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Trade items

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Trade items (1)

The mechanism of forex control on the export and import of tangible goods:

Legal rules: Import payment verification rules; export collection verification rules

Objective:

Verifying export collection and import payments to ensure that (i) transactions are genuine, and (ii) no unlawful diversion of forex away from the PRC

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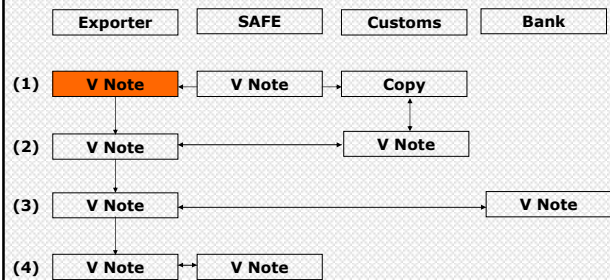
Trade items (2)

How the forex verification system works for exports:

- (1) Application for verification notes
- (2) Advance notification
- (3) Cross checking
- (4) post-transaction reconciliation

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Diagram



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Trade items (3)

1. V note used to apply for VAT export rebate
2. Non-compliance, fines ranging from RMB 50,000 to RMB 300,000
3. Recognition of sales: accounting vs tax rules

The forex verification system is also adopted in
(1) export processing trade settlement
(2) Payments for imports

Exceptions: FTZs and EPZs

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Capital Structure

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Capital receipts & payment 资本帐往来

- Types: FDI, and Indirect Investment (II)
直接、间接投资
Form of II: loans 间接投资: 外债
- MOFCOM approval: All FDI, II for EJV and CJV
合资合作企业外债需审批
- Registration: loans
登记范围: 所有外债

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Foreign currency loan: inception 外债登记

Registration:

- Statutory time: within 15 days of concluding loan agreement 合同订立15天内登记

Administrative Body: SAFE

- 管理机构: 外管局

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Foreign currency loans: redemption (1) 偿还外债 (1)

Repayment of principle:

1. Approval by SAFE 审批
2. Loan agreement 贷款协议
3. FDRC 外债登记证
4. Repayment notice 还款通知
5. May either use own forex, or use RMB to buy forex

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Foreign currency loan: Interest payment (2) 支付利息 (2)

Interest payments: Loan agreement, FDRC,
Evidence of withholding income tax
支付利息文件: 贷款协议、外债登记证、完
税证明

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Consequences of non-registration? 未有登记外债后果?

- Creditors face enforcement problems
欠缺生效文件, 无追诉权
- Creditors face conversion problems
还款时, 结汇问题

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