

Tax Issues on Non-PRC Tax Residents (Part I)

非中国税务居民的纳税问题（一）

问题一：

Question 1

问：我们用英属处女（维京群）岛（BVI）公司作为外商独资企业的投资者。新税法对这公司架构有什么影响？

Q: We have used a BVI company to invest in a wholly foreign owned enterprise in China. What impact of the new PRC corporate income tax law will have on this company structure?

答：BVI不是主权国，没可能和中国签订双边税收协定。从2008年1月1日起，中国税务机关在外商独资企业派发股息的时候会向BVI公司征收10%的所得税，法律规定由独资企业代扣代缴。

A: BVI is not a sovereign state, and therefore it cannot sign tax treaty with China. As from 1st January 2008, the PRC tax authority will impose a 10% income tax on the dividends that is payable by the WFOE to the BVI company. The WFOE has the legal obligation to withhold the income tax.

问题二

Question 2

问：情况同上，听说收款人是香港公司的，税款可以由10%降低到5%。如何办理？

Q: The above-mentioned facts remain unchanged. They say if the recipient is a Hong Kong Company, the income tax rate can be reduced from 10% to 5%. How can it be done?

答：答案如下。

Q: The answers are set out below:

1. 如果外商独资企业将投资方变更为香港公司，在股权变更一年后，香港公司可以享受中国与香港双方税收安排的低税率待遇，股息的税率可减低到5%。

1. If the investor of the WFOE is changed from a BVI company to a Hong Kong company, the HK Company is eligible for the tax reduction as per Hong Kong-China Double Tax Arrangement. The income tax rate on the dividend can be reduced from 10% to 5%. The rate reduction shall take effect one year after the change of investor.

2. 具体操作如下：香港公司从BVI公司取得外商独资企业股本权益，同时香港公司发行等值股份给BVI公司作为对价。这就是说，该转让是一宗不涉及现金的换股重组交易。交易后，BVI公司成为香港公司的控股公司，而香港公司成为外商独资企业的控股公司。

2. The detailed implementation steps are as follows: the Hong Kong Company acquires the equity interest in the WFOE. As the consideration, the HK Company issues to the BVI Company shares with a value equal to the amount of the acquired investment in the WFOE. In other words, it is a non-cash transaction involving an equity swap in company reorganization. After the share swap, the BVI Company owns the HK Company, which in turn owns the WFOE.

3. 要注意的问题是上述的重组交易，在大陆会产生纳税问题。按中国 2008 年生效的企业所得税法规定，BVI 公司因出售境内公司股份所得而需要纳税。在香港，上述换股或重组交易不涉及香港公司股份转让，无须缴纳印花税。

3. Note that the above reorganization transaction will give rise to PRC tax liability. In accordance with the PRC income tax law effective on 1st January 2008, the BVI Company is required to pay income tax on the gain from the disposal of equity interest in the WFOE. In Hong Kong, there is no share transfer of any HK companies involved in the above reorganization. Therefore no HK stamp duty liabilities will arise.

问题三

Question 3

问：为什么香港公司不是立刻可以获得减税，而是需要在一年后才能享受税收协定的待遇？

Q: Why is it that the HK Company cannot get the tax reduction immediately and has to wait one year to become eligible for the tax preference under the HK-China double tax arrangement?

答：针对这个问题，国家税务总局在国税函(2009)81 号文件中已经有明确规定。要享受协定税率，香港公司必须符合或同时满足下列条件：

- (一) 取得股息的该对方税收居民根据税收协定规定应限于公司；
- (二) 在该中国居民公司的全部所有者权益和有表决权股份中，该对方税收居民直接拥有的比例均符合规定比例（25% 或以上）；
- (三) 该对方税收居民直接拥有该中国居民公司的资本比例，在取得股息前连续 12 个月以内任何时候均符合税收协定规定的比例。

A: With reference to this requirement, the State Administration of Taxation already issued a notice (2009) No. 81 to elaborate on this. To get the tax preferential treatment, the Hong Kong Company must satisfy the following conditions:

1. The recipient of the dividend who is a tax resident of the other party to the double tax arrangement must be a company;
2. The direct legal ownership of the recipient in the equity or voting shares of the PRC resident Company must reach a prescribed percentage (25% or more); and
3. The prescribed percentage of direct legal ownership in the PRC resident company should be maintained at any time during the 12-month period preceding the receipt of the dividends.

问题四

Question 4

问：集团内公司重组是否要有股权转让协议书？

Q: It is necessary to draft a share (equity) transfer agreement for the company reorganization within a group?

答：根据中华人民共和国公证法有关规定，双方需要到公证处将协议书公证以及缴交公证费。转让中国境内房地产的协议书也有相同要求。

A: Yes, according to the PRC Notarization Law, parties to the share agreement must have it attested or notarized, and pay the notarization fees accordingly. This notarization requirement also applies to the transfer of properties situated in China.

问题五

Question 5

问：除了公证协议书以外，还有什么其他要求？

Q: What are the other requirements in addition to the notarization?

答：股权转让协议书（合同）必须经过审计机关批准，才能生效。

A: The share (equity) transfer agreement must be submitted to the approval authority for approval. The share transfer agreement will not become valid before it is approved.

问题六

Question 6

问：除了改变股权外，有没有其他方案？

Q: Is there any alternative other than a change in the investor of the WFOE as you mention above?

答：如果符合下列条件的，BVI 公司也可以将股息税率有 10%降低到 5%：在香港经营业务而有办理商业登记的，及向香港税务局申请取得“香港特区居民身份证明书”。要注意，香港税务局要收到被投资方所在地税务机关出具的《关于请香港特别行政区政府税务主管当局出具居民证明的函》，才会发出有关证明。

Q. Where the conditions below are satisfied, the BVI company can enjoy the reduction in the tax rate: it carries on business in Hong Kong with a business registration certificate; and it has obtained from the Hong Kong tax authority a “Certificate of Tax Resident Status in the Hong Kong Special Administrative Region”. To be noted is that the Hong Kong tax authority will not proceed with the issue of certification before it has received a “request for the issue of certification for tax resident status” from the tax authority in the city or district where the WFOE is located.