

## Tax Issues on Non-PRC Tax Residents (Part II)

### 非中国税务居民的纳税问题（二）

#### 问题七

#### Question 7

问：第一部分中第二个问题的境内外公司重组涉及三资企业改变投资者。如果要纳税的话数额比较大，有没有其他办法节省税款？

Q: From question no. 2 in part one above, the cross-border company reorganization involves a change in the investor of the foreign investment enterprise. If the tax amount is big, are there any ways to reduce the income tax?

答：股权转让要纳税是一般规定。根据财政部及国家税务总局 2009 年第 59 号文的通知，在符合通知规定的特殊重组条件下，纳税人可以选择适用特殊性税务处理的规定：具体来说，被收购企业股权转让不低于全部股权的 75%，而且代价中股权支付金额不低于交易总额的 85%，卖方可以按其出售股权的计税基础确定从买方取得股权的计税基础，而买方可以按卖方股权原来计税基础确定从卖方取得股权的计税基础。也就是说，由于重组交易双方无须按公允价值确认所得，纳税人可以将纳税的时间推迟。

A: In general, income tax liabilities will arise in a share transfer. However, the Ministry of Finance and the State Administration of Taxation have jointly issued a notice (2009) No. 59 that, where the conditions for special reorganization are satisfied, the taxpayer can select the prescribed special tax treatment. Specifically, the transferor can adopt the tax base of the equity transferred as the tax base for the shares received from the transferee, and the transferee can adopt the original tax base of the equity acquired from the transferor, given that the equity transferred is no less than 75% of the total equity; and the equity settlement in the composition of the consideration shall be no less than 85% of the total amount of the consideration. In other words, the parties to the reorganization will not realize any gain that would have arisen from the use of fair value. The taxpayer can put off the tax liabilities to the future date.

#### 问题八

#### Question 8

问：什么是 59 号文中所规定的特殊重组条件？

Q: What are the conditions for special reorganization as provided in the notice 2009 no. 59?

答：适用特殊税务处理的条件如下。

1. 有合理的商业目的，且不以减少、免除或者推迟缴纳税款为主要目的。
2. 被收购、合并或分立部分的资产或股权比例符合本通知规定的比例；
3. 企业重组后的连续 12 个月内不改变重组资产原来的实质性经营活动；

4. 重组交易对价中涉及股权支付金额符合本通知规定比例;
5. 企业重组中取得股权支付的原主要股东, 在重组后连续 12 个月内, 不得转让所取得的股权。

A: the conditions for special reorganization are set out below:

1. The transaction has a reasonable commercial motive that is not characterized as reducing, excluding or postponing the payment of tax;
2. The transaction can meet the percentage threshold as prescribed in the notice for the parts of the assets or equity interests that are being acquired, merged or spun off;
3. There is no change in substance of business activities within a continuous period of 12 months following the reorganization;
4. The equity settlement in the composition of the consideration meet the prescribed percentage in the total amount of consideration;
5. The major shareholder who receives the shares as consideration for its equity interest in the foreign investment enterprise cannot dispose of its interest within a continuous period of 12 months following the reorganization.

问题九

Question 9

问: 一间境外公司转让境内独资企业的所有权益给另一境外公司, 出让方与受让方都属于同一境外最终控股集团而且该转让代价以股份支付的情况下, 对这样的重组有没有任何限制性的规定?

Q: A non-PRC company transfers the equity interest of a WFOE to another non-PRC company, both non-PRC companies being under ultimate control of a non-PRC holding company and the consideration of the transfer being settled by shares, are there any special restrictions imposed on this type of reorganization?

答: 有的。12 个月的转让限制只适用与发生在境内的公司重组。如果是跨境重组, 非居民转让方必须向主管税务机关作书面承诺在 3 年内不转让其拥有的非居民受让方的股权。

A: Yes. The 12-month transfer restriction only applies to company reorganization that takes place within China. If the company reorganization involves resident and non-resident companies, the non-PRC company that transfers its equity in the WFOE must give a written undertaking to the tax authority in-charge not to transfer its ownership of the non-PRC company that owns the equity in the WFOE within a period of 3 years.

问题十

Question 10

问: 三资企业向境外总公司支付劳务费 100 万, 新税法对该外币支付行为有何规定?

Q: A foreign investment enterprise pays a service fee of RMB 1 million to its head quarters outside China. What are the tax rules governing the payment of the service fee in foreign currency?

答：倘若有部分劳务在境外提供的，总公司需要按境内提供劳务所得及境外提供劳务所得的比例交纳所得税及营业税。

Q: If some portion of the services is rendered outside China, the head office is required to pay income tax and business tax with reference to the relative proportion of the services that take place inside and outside China respectively.

1. 所得税:  $1,000,000 \times 0 \times 10\% = 0$  (全部境外提供)

1. Income tax:  $100000 \times 0 \times 10\% = 0$  (services rendered outside China)

2. 所得税:  $1,000,000 \times 60\%$  (假设境内部分 60%)  $\times 20\%$  (核定利润率)  $\times 10\%$  (税率) = 12,000; 营业税:  $1,000,000 \times 60\% \times 5\% = 30,000$

2. Income tax:  $1,000,000 \times 60\%$  (assuming that 60% of the services is rendered inside China)  $\times 20\%$  (deemed profit rate)  $\times 10\%$  (tax rate) = 12,000; Business tax:  $1,000,000 \times 60\% \times 5\% = 30,000$

3. 所得税:  $1,000,000 \times 100\%$  (境内部分)  $\times 20\% \times 10\% = 20,000$ ; 营业税:  $1,000,000 \times 100\% \times 5\% = 50,000$

3. Income tax:  $100 \times 100\%$  (services rendered within China)  $\times 20\% \times 10\% = 20,000$ ; Business tax:  $1,000,000 \times 100\% \times 5\% = 50,000$

注意：外国公司派驻员工到中国工作一年内超过 183 天，在没有获得法定豁免的情况下，该外国公司可被认定在境内设立了常驻机构而产生缴纳所得税的义务。

Note: A foreign company that assigns employees to work in China for a period over 183 days in a year, in the absence of any statutory exemption, will be considered to have had a permanent establishment in China and therefore liable to PRC corporate income tax.

问题十一

Question 11

问：深圳市合资企业在上海市开发房地产项目，向境外建筑设计公司支付劳务费¥1000 万，应该在什么地方申报和纳税？

Q: A Sino-foreign equity joint venture enterprise set up in Shenzhen has a property development project in Shanghai. The JV enterprise pays a design fee of RMB10 million to a non-resident architectural design firm. Where should it declare and pay the income tax?

答：答案如下。

A: The answers are set out below.

1. 境外公司在项目所在地（上海市）办理“临时税务登记”，境内发包公司在签订合同 30 天内向机构登记所在地（深圳市）办理代扣税款登记；根据规定，境内付款方需要履行代扣代缴义务。

1. The non-resident design firm should apply for a temporary tax registration in Shanghai where the property development project is located. The domestic property development company should apply for a “tax registration as withholding agent”.

According to the PRC tax rules, the resident payer shall assume the legal obligation to withhold and pay the income tax for the non-resident recipient.

2. 如果符合双边税收协议规定，境外公司可以申请免税；如果按规定要纳税的，按年度计算、分季度预缴税款、年终汇算清缴（多除少补），合同完毕后结清税款。

2. If the conditions for tax exemption in the tax treaty are met, the non-resident design firm can apply for tax exemption. If the non-resident is liable for income tax, it shall submit a quarterly return and pay tax accordingly. It is also required to submit a yearly return to finalize its tax liabilities (top up any deficit and pay additional tax). The tax clearance is required after the completion of the construction project.

3. 根据“税务登记管理办法”的规定，非居民来华承包工程的提供劳务，不需要办理工商登记的，也应该遵从“非居民承包工程作业和提供劳务税收管理暂行办法”的规定，办理税务登记。

3. In accordance with the “The Tax Registration Administrative Rules”, non-resident companies that perform construction work or deliver services inside China are not required to apply for a business license. However, it should apply for a tax registration in accordance with the provision for “The Tentative Tax Administration Measures for Performing Construction Work and Delivering Services by Non-residents”.

## 问题十二

### Question 12

问：外国投资者出让境内房地产有什么纳税规定？

Q: What tax rules are in place for the disposal of landed properties in China by a non-resident investor?

答：答案如下。

Q: the answers are set out below.

1. 新税法规定在转让收入总额中减去投资成本，然后按照净额缴纳百分之十的所得税。境内的买方在支付购买价款前需要依照法律规定，代扣代缴预提所得税。

1. The corporate income tax law provides that the cost of the property can be deducted from the gross amount of the sales proceeds before it pays a 10% income tax on a net basis. The resident buyer has an obligation to withhold the income tax in accordance with the income tax law.

2. 其他纳税义务：营业税 5%，土地增值税(增值额 30%至 60%),印花税 0.05%。

2. Other tax obligation includes business tax (5%), land appreciation tax (30% to 60% on the appreciated portion of the property), and the stamp tax (0.05%).

3. 有关土地增值税的计算方法，请在以下网址查阅：

3. For the detailed information about the computation of land appreciation tax, please check it out at the following website: [http://www.china-tax.net/pub/China\\_Tax\\_on\\_disposal\\_landed\\_properties.pdf](http://www.china-tax.net/pub/China_Tax_on_disposal_landed_properties.pdf)

### 问题十三

#### Question 13

问：某外国投资者将其上海市外资房地产企业 40%股份出让给广州市国有企业，它应该在上海还是在广州纳税？

Q: A foreign investor wants to sell its 40% equity interest in a JV company situated in Shanghai to a state owned enterprise located in Guangzhou. At which city should the foreign investor to pay the income tax? How is the tax amount computed?

答：答案如下。

Q: the answers are set out below.

1. 该外商投资者属于在中国没有常驻机构的非居民企业；该外商应该就来源于中国境内所得纳税，实行源泉扣缴，即以支付人（广州国有企业）为义务扣缴人；应纳税所得额 = 股权转让价减除股权成本，应纳税额 = 应纳税所得额 x 10%。

1. The foreign investor is a non-resident enterprise without a permanent establishment in China. The foreign investor shall be liable to tax on PRC-source income, which is withheld at source. That is, the payer (the State Owned Enterprise in Guangzhou) shall withhold the income tax. The amount of taxable income shall be computed as follows: the gross amount of sales proceeds after deducting the cost of equity investment. The amount of tax payable shall be: taxable income x 10%.

2. 其他纳税义务：营业税（无），印花税 0.05%。

2. Other tax obligations: business tax (nil) and stamp tax at 0.05% on the gross amount.

### 问题十四

#### Question 14

问：因股改成为流通 A 股，外国投资者在上海证券交易所出让广州市公司的股份，如何计算税款？它应该在什么地点纳税（上海市还是广州市税务局征税）？

Q: The foreign investor acquired the shares in the reform for non-tradable stock. If the foreign investor sold the shares of the Guangzhou Company at the Shanghai Stock Exchange, how should the tax be computed? At which city should it pay the income tax (Shanghai or Guangzhou)?

答：因股权分置改革方案而取得的股份，属于原始股。该外国投资者应该在广州市交税。税款计算应根据企业所得税法规定按总额征税，税率为百分之十（有协定税率的适用协定税率），不得扣除任何成本或费用。

A: The foreign investor acquired the shares during the reform for non-tradable stock. It shall pay the income tax in Guangzhou where the company's place of registration is located. The amount of taxable income shall be the gross sum received. The income tax rate is 10% (where there is a treaty, the treat rate shall apply). No deduction for costs or expenses are allowed.