DE'AN
NEWSLETTER
INVESTMENT AND TAXATION
投资与税务
· 德安通讯 · 2013年2月 <总第139期>

税收协定

2012 年 12 月 31 日，国家税务总局发布了 [2012]59 号公告《国家税务总局关于税收协定中财产收益条款有关问题的公告》（以下简称“59 号公告”），明确了关于税收协定财产收益条款的有关问题。59 号公告于公布之日起执行。

当非居民纳税人转让其中国境内公司股权并获得资本利得时，59 号公告对判定中国政府是否拥有征税权，给予了更加详尽的解释。该公告描述了如何确定中国公司的股份价值 50%以上是否直接或间接由位于中国的不动产组成，以及处置中国公司股权的非居民是否持有该公司至少 25%资本的条件。

转让“中国不动产企业”的股权

59 号公告对中新税收协定中有关中国公司如何被认定为“中国不动产企业”进行了定义。即“中国不动产企业”是指被转让公司的股份价值 50%以上直接或间接来自位于中国的不动产。自 2010 年中国修订与巴巴多斯税收协定起，中国政府在所有签订的税收协定中都保留了对非居民直接转让“中国不动产企业”的征税权。

59 号公告规定，在判定中国公司股份价值是否主要由不动产组成时，不考虑负债，不使用净资产，而是根据该公司的总资产价值进行计算和判定（“总资产法”）。59 号公告所选择的总资产法与经合组织在相关领域的规定基本一致。

59 号公告指出，判定由中国不动产直接或间接构成公司价值的比率是否超出了 50%的标准，应基于按照中国会计制度确定的有关资产价值。但是考虑到中国的土地和土地使用权通常发生了较大幅度的增值，59 号文要求土地或土地使用权的价值不得低于按照当时可比相邻或同类地段的市场价格计算的数额。因此，一般可以理解为，在判定被转让的中国企业是否是房地产企业时，土地或土地使用权 应使用市场公允价值，其他资产应采用账面价值来进行计算。

转让“非中国不动产企业”的股权

59 号公告明确的是中新税收协定第十三条中如何判定非居民转让方对中国被转让企业拥有至少25%股权的规定。比方说，当一个新加坡居民转让一家非不动产企业的中国公司，如果该新加坡居民对此中国公司在过去 12 个月中的任一时间直接或间接持有至少 25%的股权，则应就该股权转让所得缴纳 10%的中国企业所得税。

针对直接持有中国公司的股权，该公告规定若非居民通过名义持有人参与中国公司的股权，则在判定非居民持股是否超过了 25%实际控股的标准时，该名义持有人的持股情况将被考虑在内。另外，59 号公告规定在涵盖间接持股的影响时，仅限于非居民通过其持有至少 10%股权的中间控股公司间接持有中国公司股权的情形。最后，59 号公告指出，判定间接持有中国公司股权中所用的10%的最低持股标准，同样适用于计算非居民转让方通过“具有显著利益关系”的个人和法人实体股东对中国被转让公司视同持有的股权比例。

增值税

2012 年 12 月 13 日，国家税务总局发布了 2012 年第 55 号公告（“55 号公告”），处理资产重组中增值税留抵税额的结转问题，55 号公告于 2013 年 1 月 1 日起生效。国家税务总局明确了在资产重组中，所有与被转让资产相关的尚未抵扣的进项税额可被结转至受让方。55 号公告允许资产受让方在资产重组后实现增值税留抵税额的内在价值，而使纳税人从中获利良多。

55 号公告要点

根据 55 号公告的规定，资产重组中涉及货物转让的不属于增值税征税范围，但仅适用于以下情况：

- 纳税人（“原纳税人”）在资产重组过程中，采取合并、分立、出售、置换等方式；
- 原纳税人将全部或者部分实物资产以及与其相关联的债权、负债和劳动力一并转让给其他单位和个人（“新纳税人”）。

国家税务总局确认原纳税人的增值税留抵税额可以结转至新纳税人。55 号公告附有表格《增值税一般纳税人资产重组进项留抵税额转移单》，该表格需由原纳税人税务机关填写, 纳税人主管税务机关留存一份，交纳税人一份，传递新纳税人主管税务机关一份，以实现留抵税额的转移。作为结转程序的一部分，新纳税人主管税务机关应对尚未抵扣的进项税额进行核实。

增值税

财政部和国家税务总局于 2012 年 12 月 31 日联合发布了财税[2012]84 号文关于“总分支机构试点纳税人增值税计算缴纳暂行办法”（“84 号文”），明确了总分支机构汇总缴纳增值税的实质性框架政策。

适用范围

84 号文仅适用于增值税改革试点行业的纳税人，即目前适用于总机构位于试点地区并从事交通运输业与现代服务业的企业。因此，相关汇总纳税方法适用于所有分支机构，即包括在试点地区内缴纳增值税和在非试点地区缴纳营业税的分支机构。

需要注意的是，84 号文并不适用于销售或进口货物、提供加工、修理修配劳务的增值税纳税人。

总机构申报缴纳增值税的义务

84 号文规定，由总机构汇总计算总机构以及其分支机构应缴纳的增值税额，并由总机构向其所在地（省、市）主管税务机关缴纳。这意味着总机构承担起汇总申报并缴纳增值税的义务。

总机构应纳增值税额的计算方法

84 号文规定总机构的汇总应征增值税销售额由以下两部分组成：

- 总机构及其试点地区分支机构提供增值税改革试点方案所列应税服务的应征增值税销售额，即汇总纳税涵盖了所有试点地区的总机构及其分支机构从事交通运输业与现代服务业的应纳增值税额。
- 非试点地区分支机构提供增值税改革试点方案所列应税服务的销售额，即汇总纳税涵盖了所有非试点地区分支机构从事交通运输业与现代服务业的应纳营业税额。非试点地区分支机构销售额的计算方法有稍许变化，应当根据以下公式进行计算：

  销售额=应税服务的营业额÷（1+增值税适用税率）

分支机构按预征率计算应纳增值税额

尽管增值税汇总纳税意味着总机构承担起对其分支机构的增值税申报缴纳义务，但 84 号文并没有完全免除分支机构的纳税义务。84 号文规定分支机构仍然要按照一个相对简单的计算方法缴纳增值税，计算公式如下：

应缴纳的增值税＝应征增值税销售额×预征率

预征率由财政部和国家税务总局规定，并适时予以调整。

分支机构应纳营业税额的计算方法

非试点地区的分支机构仍然需要按照营业税的相关规定继续向其地税局申报并缴纳营业税。这意味着非试点地区的分支机构不能直接从增值税汇总纳税中获得任何实质性利益。

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Double tax agreements

On 31 December 2012 the State Administration of Taxation (SAT) of the People's Republic of China (PRC) issued Announcement on Issues Concerning the Clauses on Capital Gains in Tax Agreements, SAT Announcement [2012] No. 59 (Announcement 59), which clarifies the manner in which the capital gains tax articles of China's double tax agreements (DTAs) are to be applied. Announcement 59 becomes effective from the date published.

Announcement 59 offers more detailed guidance on the determination of whether China retains the right to subject gains, arising on the disposal of equity in a Chinese enterprise by a non-resident, to WHT at 10 percent. It elaborates on the circumstances in which a Chinese enterprise is considered to derive more than 50 percent of its value from immovable property, and the circumstances in which a non-resident disposer of equity in a Chinese enterprise is considered to hold at least 25 percent of that enterprise.

Transferring a "land rich" Chinese company

Announcement 59 is the determination of whether a Chinese company is "land rich" in the context of a DTA. Since the 2010 revisions to the Barbados-China DTA, all of China's DTAs have reserved taxing rights to China on disposals of equity in a land-rich Chinese enterprise. Chinese DTAs typically define a "land rich" Chinese company as a Chinese enterprise that directly or indirectly derives more than 50 percent of its value from Chinese immovable property.

Announcement 59 clarifies that, in determining whether a Chinese enterprise derives its value largely from immovable property, liabilities of the enterprise are to be disregarded, and regard solely had to the enterprise assets ("gross asset approach"). This gross asset approach is generally consistent with the OECD Commentary.

Announcement 59 states that the determination of whether the 50 percent threshold is crossed should be made using the values of the enterprise assets as recorded in the financial statements prepared in accordance with PRC GAAP. However, the value attributed to land and land use rights should not be lower than the fair market value of comparable adjacent or similar land and land use rights. Essentially,

fair market value should be used for land and land usage rights, which has a high potential to appreciate in China; the book value approach should be applied for the rest of the assets.

Transferring a Chinese company that is not "land rich"

Announcement 59 is the determination of the 25 percent shareholding in Article 13 of the PRC-Singapore DTA. For example, when a Singaporean company transfers an equity interest in a Chinese company that is not "land rich," and has owned directly or indirectly at least 25 percent of the capital in the Chinese investee company at any time during the preceding 12-month period, gains from the equity transfer are subject to Chinese corporate income tax.

With respect to direct ownership in the Chinese enterprise, the Announcement notes that where nominees are used by a non-resident to hold equity in the Chinese enterprise, then the nominee holdings will be considered in determining whether the 25 percent threshold is met. Announcement 59 also clarifies how indirect holdings in the Chinese enterprise are to be taken into account in determining whether the 25 percent threshold is met. Such indirect holdings need only be included in the calculation where the holding in the intermediate holding company, through which equity in the Chinese enterprise is held, is at least 10 percent of the total share capital of that company. The Announcement also defines more clearly, for both non-resident individual and corporate disposers of Chinese equity, who is to be considered to be related persons with 'significant interest relationships'. The 10 percent threshold for including indirect holdings in the Chinese enterprise is equally relevant in determining the holdings of such related persons.

Value added tax ("VAT")

On 13 December 2012 the State Administration of Taxation (SAT) issued Announcement 55 [2012] ("Announcement 55") dealing with the transferability of input VAT credit balances on asset restructuring transactions, the Announcement 55 becomes effective from 1 January 2013. The SAT has confirmed that when an asset restructuring occurs, any VAT credit balance associated with those assets may be transferred to the purchaser. This Announcement is beneficial to taxpayers because it allows the inherent value of accrued VAT credit balances to be realized by a purchaser after an asset restructuring occurs.

Key points

Refer to Announcement 55 that the SAT concluded that certain corporate restructures involving the transfer of tangible goods fall outside the scope of VAT. The circumstances where this applied was limited to situations where:

A taxpayer transfers tangible goods ("the original taxpayer") in a corporate restructuring that takes the form of a merger, de-merger, sale or swap; and

The original taxpayer transfers all or part of the tangible assets together with related debt claims, liabilities and workforce to other units or individuals ("the new taxpayer").

The SAT confirms that the accrued input VAT credit balance of the original taxpayer may be transferred to the new taxpayer. Included in the detail of Announcement 55 is a form which must be filled in by the original taxpayer and lodged with both their in-charge tax official, and that of the new taxpayer, for the purposes of facilitating the transfer. As part of that process, the tax authorities will need to verify the amount of the input VAT credit balance being transferred.

Value added tax ("VAT")

On 31 December 2012, the Ministry of Finance (MOF) and the State Administration of Taxation (SAT) jointly issued Circular Caishui [2012] 84 about "Provisional Measures on Head Offices and Branches Eligible for Grouping for Value Added Tax Purposes" ("Circular 84") setting out the substantive framework under which head offices and branches may be eligible to group for Value Added Tax (VAT) purposes.

Scope of application

Circular 84 only effectively applies to taxpayers in industries subject to the VAT pilot program. At present, this means that Circular 84 applies to businesses in the transportation and modern services industry where their head office is located in a pilot location. The grouping rules then apply to all of their branches – that is, those branches paying VAT (in a pilot location) and those paying Business Tax (BT) (in a non-pilot location).

Attention, Circular 84 does not apply to VAT taxpayers in respect of the sale or importation of goods, processing, repair and replacement services.

Filing and payment obligations of head office

Circular 84 provides that the head office of a taxpayer calculates the VAT payable both in respect of itself, and its branches, on a grouped basis. The VAT on a grouped basis is paid by the head office to the SAT at the location (i.e., the city or province) where the head office is located. This means that the head office effectively discharges both the filing and payment obligations on a grouped basis.

Calculation of VAT payable by HQ

In undertaking this calculation on a grouped basis, Circular 84 provides that the grouped sales revenue of a head office is the sum of:

The sales revenue of the head office and its branches located in the pilot areas from business activities which are subject to the VAT pilot program. In other words, all the VAT payable in respect of transportation and modern services in pilot locations of the head office and its branches is grouped.

The sales revenue of branches which are located in non-pilot areas derived from business activities which are in the scope of the VAT pilot program. In other words, all the BT payable in

respect of transportation and modern services carried out by branches in non-pilot locations is grouped. There is a slight variation in the calculation of the sales revenue of branches in non-pilot areas, such that the following formula applies:

Sales revenue = turnover of taxable services ÷ (1 + applicable VAT rate)

Calculation of VAT payable by branches using the advance tax rate

While grouping for VAT purposes means that the head office discharges the filing and payment obligations of its branches, Circular 84 does not completely absolve the branches of their obligations. In particular, Circular 84 provides that the branches are still required to pay VAT in accordance with a relatively simple calculation methodology. That is, they must pay VAT as follows:

VAT payable = sales revenue x advance tax rate

Where: Advance tax rate is a rate which is prescribed and adjusted from time to time by the MOF and the SAT.

Calculation of BT payable by branches

Those branches which are located in non-pilot locations are still required to continue to file BT returns and pay BT to their local tax bureau in accordance with the BT rules. This means that branches in non-pilot locations do not really gain any administrative benefit from grouping.

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