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INVESTMENT AND TAXATION
投资与税务
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外债登记新政

国家外汇管理局（以下简称“外汇局”）于 2013 年 4 月 28 日发布《外债登记管理办法》的通知（“19 号文”）。此项通知简化了外债登记管理环节，取消了部分外债管理审批事项，除外债签约登记外，外债账户开立、资金结汇和还本付息等均由外汇指定银行（以下简称“银行”）直接审核办理。于 2013 年 5 月 13 日起开始实施。

主要政策调整

1. 根据外商投资企业外债资金流入、使用的实际需求，19 号文就以下操作层面的规定予以完善细化：

1.1 针对外商投资企业资本金到位情况，明确外商投资企业首次借用外债之前，其外方股东至少已经完成第一期资本金的缴付；外商投资企业实际可借用外债额度等于外方股东资本金到位比例乘以“投注差”。

1.2 对借入的外债资金，企业除可以将其用于自身范围内的货物与服务贸易支出外，还可用于符合规定的金融资产交易，包括：

- 通过借新还旧等方式进行债务重组；
- 在其经营范围内，将借入的外债资金通过新建企业、购买境内外企业股份等方式进行股权投资。

1.3 鉴于境内企业凭境外机构或个人提供的担保向境内银行申请贷款（“外保内贷”）情况较为普遍，19 号文对境内债务人提出如下要求：

- 属于国家鼓励行业；
- 过去三年内连续盈利；
- 具有完善的财务管理制度和内控制度；
- 企业的净资产与总资产的比例不得低于 15%；
- 对外借款与对外担保余额之和不得超过其净资产的 50%。

1.4 考虑实务操作中出现境外债权人豁免债务的情况，19 号文明确了不同情形的备案材料要求：

- 减免债务本金和利息的，应提供债权人出具的豁免通知或其他相关证明文件；
- 债权转股权等债务重组，应提供境外债权人确认书，商务主管部门批复文件；

- 境内、外担保人代债务人履行债务偿还责任的，应提供担保人已经履约的证明文件；
- 通过债务人境外账户偿还债务和利息的，应提供境外支付证明材料。

2. 取消外债资金结汇审批

19 号文取消了外债资金结汇的审批事项，将审核权限下放给银行，规定债务人结汇以根据实际需要，持相关文件直接到银行办理。同时，将结汇所得人民币资金划转给收款人的期限由之前的 2 个工作日延长至 5 个工作日。结汇后的人民币资金不能用于偿还境内金融机构发放的人民币贷款。

跨境特许权使用费和租金应以不含增值税收入计算预提所得税

2013 年 2 月 19 日，中华人民共和国国家税务总局颁布了 9 号公告。在 9 号公告中，国家税务总局明确了非居民企业取得来源于中国的某些被动所得如果属于营业税改征增值税试点（以下简称营改增）范围，由此应缴纳的增值税应从计算预提所得税的计税基础中扣除。

9 号公告影响的所得类型主要为企业所得税法第 3 条第 3 款中定义的，同时又属于营改增范围内应缴纳增值税的被动所得项目。这些所得项目主要为特许权使用费和租金。

假设该特许权使用费属于营改增范围。跨境支付特许权使用费的情形下，中方应以 10%的法定税率（或更低的税收协定税率，如适用）代扣代缴非居民企业预提所得税。企业所得税法及其实施条例对预提所得税的计税基础作出了相关规定。企业所得税法第 19 条规定非居民企业取得特许权使用费所得，以“收入全额”为应纳税所得额。企业所得税法实施条例第 103 条进一步说明，“收入全额”是指非居民企业向支付人收取的“全部价款和价外费用”。因此，间接税是否应当包含在预提所得税计税基础中，取决于其是否属于“全部价款和价外费用”的一部分。

2012 年起实施的营改增试点开始对来源于试点地区的跨境特许权使用费由原来的营业税改征增值税，由此出现了一个问题，即：代扣代缴的企业所得税计税基础是否应包含增值税。9 号公告明确，在规定范围内，应以不含增值税的收入全额计算缴纳应代扣代缴的企业所得税。该公告为营改增试点范围内各地区企业所得税的代扣代缴提供了统一的执行口径、有效地终止了围绕这一问题的争议。

New foreign debt registration rules to shorten timeline for processing foreign currency settlement

On 28 April 2013, the State Administration of Foreign Exchange (SAFE) announced the release of Circular 19. Circular 19 seeks to simplify foreign debt registration procedures, which remove certain approval requirements. With the exception of registering foreign debt contracts, other actions such as opening foreign debt accounts and foreign currency settlements and repayments can now be handled directly by designated foreign exchange banks (collectively referred to as the 'banks'). It will be effective on 13 May 2013.

Main policy changes

In an effort to simplify regulations on the foreign debt that is so crucial to the operations of many FIEs in China, Circular 19 has clarified and refined the following rules:

Circular 19 requires that the first round of capital investment be paid before FIEs are permitted to borrow foreign debts. Foreign debts obtained by FIEs are capped at the percentage of foreign capital injected multiplied by the difference between total investments and registered capital.

In addition to the purchase of goods and services allowable under their permitted business scopes, enterprises can also use foreign debts to fund the following transactions:
- When replacing old loans with new loans in debt restructuring
- When using foreign debts to fund equity investments through the establishment of a new enterprise, provided that this is an allowable activity based on its business scope.

Enterprises in China (including FIEs) commonly apply for loans with domestic banks using guarantees from foreign organizations or individuals ('foreign-guaranteed domestic loans'). In this respect, Circular 19 requires that domestic debtors should satisfy the following in order to qualify for these loans:
- The borrower belongs to an 'encouraged' industry of the PRC
- The borrower has been in a profitable position for the past three years
- The borrower has sound financial management and internal control systems
- The borrower's net equity should be no less than 15 percent of its total capital
- The borrower's total overseas borrowings plus remaining overseas guarantees should not exceed 50 percent of its net capital.

Circular 19 has also clarified the documentation requirements with respect to the claiming of debt forgiveness or debt reduction for the following scenarios:
- Claiming debt reduction or full debt forgiveness: Debt forgiveness notice from the creditor or other related supporting materials
- Debt restructuring transactions, such as converting debt to equity: Confirmation letter from the creditor and an approval from the competent authority of commerce
- Domestic/overseas guarantor honoring the guarantee: Relevant supporting material showing fulfillment of the guarantor's duty
- Repaying debt and interest through debtor's overseas account: Materials supporting the repayment transaction.

Removal of the application procedure with the SAFE for foreign currency settlements for foreign debt

Circular 19 has removed the application procedure for foreign currency settlements for foreign debts. Instead, banks are now authorized to examine such settlements, and debtors can now directly apply for foreign currency settlements with banks by submitting the relevant supporting documentation. In addition, Circular 19 has also extended the time limit allowed for transferring the Renminbi received from the settlement to the recipient from two days to five days.

VAT to be excluded from calculation of income withholding tax on cross-border royalties and rents

On 19 February 2013, the State Administration of Taxation (SAT) of the People's Republic of China (PRC) issued Announcement 9. The new announcement clarifies that if a non-resident enterprise derives certain China-sourced passive income that falls within the scope of the value added tax (VAT) reform pilot program, the VAT arising on such passive income is not to be included in the taxable base for calculating the corporate income tax (CIT) that should be withheld for the non-resident recipient (CIT WHT).

The types of income affected by Announcement 9 are those passive income items defined in Paragraph 3 of Article 3 of the CIT Law, to the extent that they are subject to VAT under the VAT reform pilot program. Such income items mainly consist of royalties and rents.

Assuming that the royalty payment falls within the scope of the VAT reform pilot program. A cross-border royalty payment from China to a non-resident enterprise is subject to CIT withholding at a 10 percent statutory rate, subject to tax treaty relief when relevant. The basis for calculating the CIT WHT is set out in the CIT Law and the Detailed Implementation Rules ('DIR'). Specifically, Article 19 of the CIT Law provides that CIT WHT will be calculated on the 'total income', and Article 103 of the DIR clarifies that the latter means the 'total consideration and extra charges paid to a non-resident enterprise". Whether indirect taxes should be included in the taxable base for calculating the CIT WHT thus depends on whether they are considered to form part of this 'total consideration and extra charges'.

As the VAT reform pilot program in 2012 replaced BT with VAT for cross-border royalties originating from the VAT pilot regions, a question arose as to whether the taxable base for CIT WHT should similarly include VAT. Announcement 9 confirms that VAT may be excluded from the computation of CIT WHT. It prescribes uniform CIT WHT treatment among regions under the VAT reform pilot program and effectively ends controversy on this subject.

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