Baker & McKenzie

Client Alert
February 2015

Breaking News: China Issues Long Awaited Indirect Transfer Regulation Replacing Notice 698

1. Introduction

In late 2009, the PRC tax authorities issued their most influential and also most controversial anti-avoidance tool, Notice 698[1], to combat indirect transfers designed by offshore investors to avoid paying the 10% capital gains tax on the direct transfer of equity interests in Chinese resident enterprises. On February 6, 2015, the State Administration of Taxation ("**SAT**") finally released the long-awaited replacement rules for Notice 698 ("**Indirect Transfer Regulation**")[2]. While, as expected, the Indirect Transfer Regulation provides a safe harbor for intragroup reorganizations, the Indirect Transfer Regulation introduces many other significant and controversial measures, such as imposing a withholding obligation on offshore buyers potentially before the tax authorities have even determined taxability, expanding the scope to tax indirect transfers of real properties and properties owned by an "establishment or place"[3], deeming certain indirect transfers as lacking reasonable commercial purpose without going through a more full analysis and requiring sellers to pay tax while imposing penalties even before the tax authorities have determined whether the underlying transaction is taxable.

2. Transactions affected by the Indirect Transfer Regulation

Multinational corporations ("**MNCs**") engaging in cross-border M&A transactions and intragroup reorganizations involving China are expected to be significantly affected by the Indirect Transfer Regulation. Previously, Notice 698 only covered the indirect transfer of equity interests in Chinese resident enterprises. The Indirect Transfer Regulation now extends to indirect transfers of: (i) the property of an "establishment or place" situated in China; (ii) real

[1] *State Administration of Taxation's Notice on Strengthening the Administration of Enterprise income Tax on Income From Transfers of Equity Interests by Non-resident Enterprises*, Guo Shui Han [2009] No. 698, dated December 10, 2009, retroactively effective as of January 1, 2008. For a detailed discussion of Notice 698, please refer to the February 2010 issue of our Client Alert.

[2] *State Administration of Taxation's Bulletin on Several Issues of Enterprise Income Tax on Income Arising from Indirect Transfers of Property by Non-resident Enterprises*, SAT Bulletin [2015] No. 7, dated February 3, 2015, effective as of the same date.

[3] "Establishment or place" is a domestic concept which is analogous to the treaty concept of permanent establishment.

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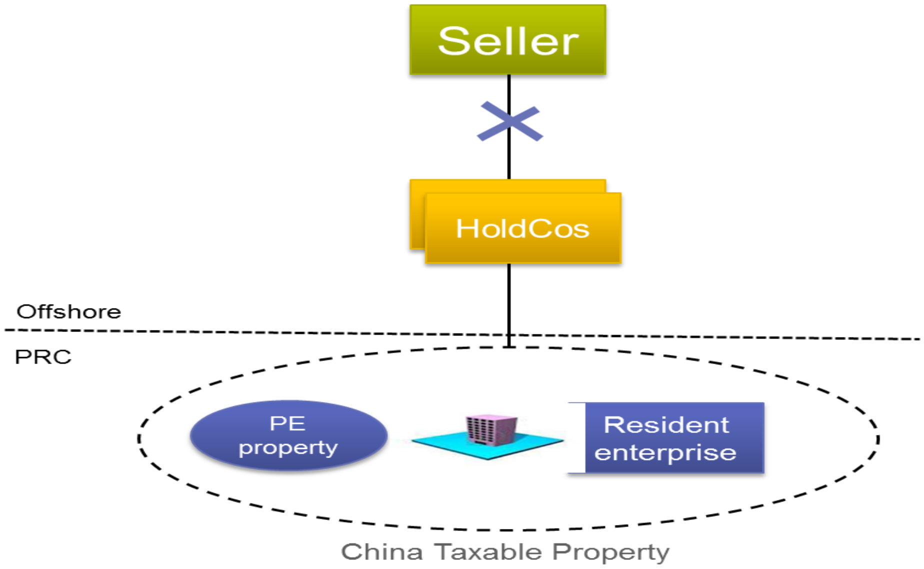
property situated in China; and (iii) equity interests in Chinese resident enterprises ("**China Taxable Property**[4]").

An indirect transfer of China Taxable Property refers to a transaction where a foreign company transfers equity interests in a foreign enterprise ***and other similar interests*** that in turn directly or indirectly holds China Taxable Property. Notably, the Indirect Transfer Regulation for the first time covers the transfer of interests other than equity interests. This may mean that under the Indirect Transfer Regulation, the transfer of partnership and other forms of interests could be subject to tax in China as the transfer of equity interests does.

A typical indirect transfer is depicted in Diagram One below.

Diagram One



The Indirect Transfer Regulation is effective from February 3, 2015, but it also applies to indirect transfers that occurred before February 3, 2015 but have not received tax assessment from the tax authorities. Since the general anti-avoidance rule ("**GAAR**") was first introduced in the Enterprise Income Tax Law ("**EIT Law**")[5] on January 1, 2008, any cross-border M&A transaction or restructuring implemented on or after January 1, 2008 but that has not received formal tax assessment from tax authorities under Notice 698 could technically be covered by the Indirect Transfer Regulation and may be subject to tax pursuant to the Indirect Transfer Regulation.

[4] China Taxable Property is defined as property directly held by a non-resident enterprise and whose transfer results in enterprise income tax liability for the non-resident enterprise in accordance with PRC tax law.

[5] *Enterprise Income Tax Law of the People's Republic of China*, adopted March 16, 2007, effective from January 1, 2008.

3. What is reasonable commercial purpose?

According to Article 1 of the Indirect Transfer Regulation, an indirect transfer shall be recharacterized as a direct transfer of China Taxable Property and subject to Chinese tax if:

- a non-resident enterprise transfers equity interests in an intermediate holding company or other similar interests that directly or indirectly holds China Taxable Property;
- the result of the transfer is in substance the same as or similar to the direct transfer of the China Taxable Property;
- the transfer is conducted by the non-resident enterprise through arrangements lacking reasonable commercial purpose; and
- the non-resident enterprise avoids enterprise income tax ("**EIT**") liability through the transfer.

Article 3 of the Indirect Transfer Regulation now provides a list of factors to determine whether the indirect transfer lacks reasonable commercial purpose. The first few factors listed still heavily focus on economic substance, such as whether all or most of the value of the offshore holding company's equity is directly or indirectly derived from Chinese property; whether all or most of the assets of the offshore holding company comprise of direct or indirect Chinese equity investments; and whether all or most of the revenue of the offshore holding company is sourced from China. However, it is welcome to see that some factors such as the functions performed and risks assumed by the offshore holding company, and the substitutability of indirect transfer and direct transfer, have taken into account commercial purposes other than economic substance. The totality test approach under Article 3 seems to allow taxpayers more room to argue for reasonable commercial purpose even when the offshore holding company does not have sufficient economic substance.

However, Article 4 of the Indirect Transfer Regulation provides that certain indirect transfers shall be ***deemed*** to lack reasonable commercial purpose without a further Article 3 type analysis if:

(1) 75% or more of the value of the offshore holding company's equity is derived from Chinese property;

(2) 90% or more of the total assets (excluding cash) of the offshore holding company are direct or indirect investments located in China, or 90% or more of the revenue of the offshore holding company is sourced from China;

(3) the offshore holding companies perform limited functions and assume limited risks that are insufficient to prove its economic substance; and

(4) the foreign income tax payable on the indirect transfer is lower than the possible China tax payable on the direct transfer.

From a technical perspective, we believe that above characteristics should only been considered factors for deciding when an indirect transfer investigation is warranted. Further review on whether a transaction ultimately has reasonable commercial purpose should be conducted to determine its taxability. Unfortunately, Article 4 is structured to deem a lack of reasonable commercial purpose without a more comprehensive analysis of all factors.

4. Safe harbors

One major criticism of Notice 698 has been that it is overly broad. Many legitimate transactions with reasonable commercial purposes, particularly intragroup reorganizations, have been held up or even caught by Notice 698. Multiple draft versions of the Indirect Transfer Regulation have addressed this criticism by including a safe harbor for intragroup reorganizations. Under the Indirect Transfer Regulation, intragroup reorganizations are exempt from EIT if:

(1) the shareholding relationship[6] between the transferor and the transferee meets any of the following:

  a. the non-resident transferor holds directly or indirectly more than 80% of the equity of the transferee,

  b. the transferee holds directly or indirectly more than 80% of the equity of the non-resident transferor, or

  c. the same party holds directly or indirectly more than 80% of the equity of the non-resident transferor and transferee;

(2) the China tax burden on any subsequent indirect transfer conducted after the indirect transfer in question would not be less than the China tax burden on the same or a similar indirect transfer if it were conducted before the indirect transfer in question; and

(3) the transferee pays all consideration in equities (exclusive of equities in listed enterprises) of the transferee itself or its controlled enterprises.

Though the safe harbor for intragroup reorganizations is welcome news for MNCs, there are still some uncertainties. For example, it is unclear whether an intragroup reorganization will qualify for the safe harbor if no consideration is paid. There are also debates on whether a spin-off will qualify for the safe harbor.

Besides the intragroup reorganization safe harbor, Article 5 provides additional safe harbors in the following two situations:

- The income from the indirect transfer would have been exempt from EIT in China in accordance with applicable tax treaties if the indirect transfer had been conducted as a direct transfer; and

- The non-resident enterprise buys and then sells, in the public securities market, the equity interests in a single foreign, listed company .

[6] The shareholding percentage shall be 100% if 50% or more of the value of the offshore holding company's equity is directly or indirectly derived from real property situated in China.

One key question that will likely be debated for years to come is whether the elements of a safe harbor, even if a taxpayer falls short of the precise standards, would still be of relevance in assessing reasonable commercial purpose under Article 3.

5. Recharacterization

Once an indirect transfer is found lacking reasonable commercial purpose and no safe harbor applies, the indirect transfer will be recharacterized and taxed as follows:

- the gain from an indirect transfer of the property of an "establishment or place" situated in China will be treated as income that is effectively connected with that "establishment or place" and subject to 25% EIT;
- the gain from an indirect transfer of real property situated in China will be treated as China-sourced income and subject to 10% withholding tax; and
- the gain from an indirect transfer of equity interests in Chinese resident enterprises will be treated as China-sourced income and subject to 10% withholding tax.

Under the EIT Law, a non-resident enterprise is subject to 25% EIT only on its income effectively connected with its "establishment or place" in China, and a non-resident enterprise without an "establishment or place" in China can be taxed only on its China-sourced income at 10%. Under the Indirect Transfer Regulation, when taxing an indirect transfer of property of an "establishment or place" situated in China, the capital gains derived by an offshore seller are included in the taxable income of the "establishment or place". Article 1 of the EIT Law provides that only enterprises who obtain revenue are taxpayers for EIT purposes. Since the "establishment or place" of a foreign company does not obtain any revenue in an indirect transfer, it is questionable whether the Indirect Transfer Regulation or even the GAAR can authorize such treatment.

A major disappointment from the final version of the Indirect Transfer Regulation is that the provisions addressing tax basis in previous draft versions were deleted. While seeming to be an area that should have been easily addressed with little to no downside for China, the deletion once again introduces uncertainty of whether the tax authorities will recognize the tax paid in prior indirect transfers when determining the tax basis in subsequent direct or indirect transfers.

6. Withholding obligation for offshore buyers

The Indirect Transfer Regulation now provides that the payors, without distinguishing between payors that are resident enterprises and payors that are non-resident enterprises, have a withholding obligation on indirect transfers of real property situated in China and equity interests in Chinese resident enterprises. Article 8 of the Indirect Transfer Regulation appears to suggest that if neither the withholding agent nor the offshore seller withholds or pays the taxes due, the PRC tax authorities may impose a penalty ranging from 50% to three times the amount of the unpaid tax on the withholding agent.

The problem is that offshore buyers in most instances are not able or in a position to determine whether the indirect transfer is taxable in China. Except in limited situations described in Articles 4 to 6, a review and analysis on whether a transaction has reasonable commercial purpose must be conducted to determine an indirect transfer's taxability.

In addition, like Notice 698, the Indirect Transfer Regulation still does not put an obligation on the tax authorities to issue a formal decision on the taxability of the transaction. Therefore, a buyer who in good faith agrees with the seller that a transaction has reasonable commercial purpose and decides to not withhold taxes must still operate under the threat that the transaction could be recharacterized at any time during the next 10 years, which is the statute of limitation for anti-avoidance cases. In the worst-case scenario, tax authorities might simply hold offshore buyers liable for the seller's unpaid taxes by imposing a penalty on the offshore buyers for indirect transfers incurred after January 1, 2008. The interest of buyers and sellers will be challenging to align, as the risk for a buyer who is ultimately "wrong" has become much higher.

7. Reporting requirements

Previously, Notice 698 required a seller to report an indirect transfer of a Chinese resident company to the Chinese tax authority. Instead, under the new Indirect Transfer Regulation, both buyers and sellers of an indirect transfer, and the underlying Chinese subsidiary, may voluntarily report the transfer by submitting a standard set of documents to the in-charge tax authority.

The documents required to voluntarily report the indirect transfer include: (i) equity transfer agreement, (ii) corporate ownership structure charts before and after the equity transfer, (iii) prior two years of financial and accounting statements for all intermediate holding companies, and (iv) a statement that the indirect transfer is not taxable. These documents are required for any voluntary report of an indirect transfer, including intragroup reorganizations that qualify for the safe harbor.

Although reporting is voluntary, the offshore buyer still has a strong incentive to report within 30 days from the date when the equity transfer contract or agreement is signed in order to secure a potential exemption from or reduction in future penalties for any failure to properly fulfill the withholding obligations on the transfer. Voluntary reporting by the offshore seller will also exempt it from the additional 5% punitive interest levy. It is unclear, however, if a single report will satisfy the voluntary reporting requirement to secure the penalty exemptions and reductions if multiple Chinese companies located in different cities or provinces have been indirectly transferred.

In addition to the voluntary reporting regime, the Indirect Transfer Regulation empowers the in-charge tax authorities to request various documents from buyers and sellers of an indirect transfer, and the underlying Chinese subsidiary. The documents subject to request have a broad and unclear coverage and include all decision-making and "implementation processes" information for the whole arrangement relating to the indirect transfer.

8. Timing of making tax payments

Under Notice 698, the offshore seller was only obligated to pay tax when the tax authorities issued an assessment notice that recharacterized the indirect transfer. The Indirect Transfer Regulation imposes an obligation on the offshore seller to file a tax return and pay tax within seven days from the date when the tax liability arises[7] if the withholding agent fails to withhold the tax.

If the offshore seller fails to pay tax in full within the prescribed time limit, the offshore seller is subject to a daily interest rate equal to the benchmark rate published by the People's Bank of China plus 5%. The additional 5% punitive interest charge will be waived if the offshore seller voluntarily reports to the tax authorities as described above.

For the indirect transfer of the property of an "establishment or place" situated in China, the "establishment or place" must include the capital gains in its tax taxable income of the tax year. It is unclear whether the "establishment or place" will be imposed a 0.05% daily late payment interest and a penalty ranging from 50% to five times the amount of the unpaid tax if the "establishment or place" fails to include the capital gains from an indirect transfer into its EIT returns.

The key problem with this approach is that in most cases the offshore seller and the "establishment or place" are not able to determine whether the indirect transfer is taxable in China within the prescribed time limit and the tax bureau has no obligation to make a determination on taxability.

9. What actions should MNCs consider?

The Indirect Transfer Regulation will significantly influence how cross-border M&A deals are negotiated and conducted in China. In response to the Indirect Transfer Regulation, MNCs should consider the following actions to safeguard their interests in China:

- Review any open tax positions on indirect transfers that occurred on or after January 1, 2008;
- Negotiate and draft contractual terms for offshore share purchase agreements in light of the Indirect Transfer Regulation;
- Weigh the costs and benefits of voluntary reporting and tax withholding for each transfer;
- Evaluate the qualifications for the safe harbors;
- Maintain detailed documentations to defend the reasonable commercial purpose and economic substance of indirect transfers;
- Look at each transaction holistically to include history of the entities, substance, functions, as well as availability of potential for treaty protection;
- Respond to investigations and informal inquiries from tax bureaus with great care and involve an experienced tax advisor at the earliest stage to increase the chance for a successful outcome;

[7] The Indirect Transfer Regulation now explicitly provides that the tax liability arises at the later of (i) the equity transfer contract/agreement taking effect or (ii) the change in equity ownership of the target company being complete.

- Communicate with the tax authorities in the MNC's home country about the availability of foreign tax credits if Chinese tax is paid; and

- Be well-prepared to challenge tax authorities' assessments and the legitimacy of the Indirect Transfer Regulation on a principled legal basis including the possibility of administrative review/litigation or competent authority procedure when necessary and commercially feasible.

Our lawyers in Greater China would be pleased to help you in assessing the impact of the Indirect Transfer Regulation on your holding structure for investments in China and your existing or past transactions involving China.

For further information, please contact any of our tax lawyers listed in this alert.

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10. Appendix 1

Unofficial Translation Prepared by Baker & McKenzie

State Administration of Taxation's Bulletin on Several Issues of Enterprise Income Tax on Income Arising from Indirect Transfers of Property by Non-resident Enterprises

(Document ref. SAT Bulletin [2015] No. 7

Dated February 3, 2015. Effective from February 3, 2015).

In accordance with the *Enterprise Income Tax Law of the People's Republic of China* (hereinafter referred to as the "**Enterprise Income Tax Law**") and its Implementing Regulations (hereinafter referred to as the "**Implementing Regulations of the Enterprise Income Tax Law**"), the *Tax Collection and Administration Law of the People's Republic of China* (hereinafter referred to as the "**Tax Collection and Administration Law**") and its Detailed Implementing Rules, in order to further regulate and strengthen the administration of enterprise income tax on income arising from the indirect transfer of equity interests in Chinese resident enterprises and other property derived by non-resident enterprises, the following is hereby announced:

1. If a non-resident enterprise indirectly transfers equity interests in Chinese resident enterprises and other property through arrangements lacking reasonable commercial purpose and avoids enterprise income tax liability, the indirect transfer shall be re-characterized as a direct transfer of equity interests in Chinese resident enterprises and other property in accordance with the provisions of Article 47 of the Enterprise Income Tax Law.

The "equity interests in Chinese resident enterprises and other property" referred to herein means property of an "establishment or place"[8] situated in China, real property situated in China, equity investment assets in Chinese resident enterprises and other property directly held by a non-resident enterprise and whose transfer results in enterprise income tax liability for the non-resident enterprise in accordance with the provisions of PRC tax law (hereinafter referred to as the "**China Taxable Property**").

"**Indirect China Taxable Property Transfer**" means a transaction where: (i) a non-resident enterprise transfers equity interests in an intermediate offshore enterprise (excluding Chinese resident enterprises registered offshore, hereinafter referred to as "**Offshore Enterprises**") and other similar interests (hereinafter referred to as the "equity interests") that directly or indirectly holds China Taxable Property; and (ii) the result of the transfer is in substance the same as or similar to the direct transfer of the China Taxable Property. Indirect Taxable Property Transfer includes transactions where a change in the Offshore Enterprise's shareholders is triggered by the reorganization of the non-resident enterprise. A non-resident enterprise that indirectly transfers China Taxable Property shall hereinafter be referred to as "**Equity Transferor**".

[8] Translator's note: the term "establishment or place" is a domestic, defined concept that is analogous to the concept of permanent establishment.

2. If Article 1 of this Bulletin is applicable and the income derived by an Equity Transferor from the transfer of equity interests in an Offshore Enterprise is attributable to China Taxable Property (hereinafter referred to as the "**Indirect China Taxable Property Transfer Income**"), the income shall be taxed as one of the following (in sequence):

(1) The income attributable to the property of an "establishment or place" that an Offshore Enterprise and its underlying affiliates that directly or indirectly hold China Taxable Property have in China (hereinafter referred to as the "**Indirect "establishment or place" Property Transfer Income**") shall be treated as income that is effectively connected with that "establishment or place" and therefore such income shall be taxed in accordance with the provisions of Article 3(2) of the Enterprise Income Tax Law;

(2) Unless the circumstance prescribed in Article 2(1) applies, the income attributable to the real property situated in China (hereinafter referred to as the "**Indirect Real Property Transfer Income**") shall be treated as China-sourced income from the transfer of real property and therefore such income shall be taxed in accordance with the provisions of Article 3(3) of the Enterprise Income Tax Law;

(3) Unless the circumstances prescribed in Article 2(1) or Article 2(2) apply, the income attributable to the equity investment assets in Chinese resident enterprises (hereinafter referred to as the "**Indirect Equity Transfer Income**") shall be treated as China-sourced income from the transfer of equity investment assets and therefore such income shall be taxed in accordance with the provisions of Article 3(3) of the Enterprise Income Tax Law.

3. To determine reasonable commercial purpose, all arrangements relating to the Indirect China Taxable Property Transfer shall be considered as a whole, and the following factors shall be comprehensively analyzed according to specific facts and circumstances:

(1) Whether the value of the Offshore Enterprise's equity is mainly directly or indirectly derived from China Taxable Property;

(2) Whether the assets of the Offshore Enterprise mainly comprise direct or indirect investments situated in China, or whether the revenue of the Offshore Enterprise is mainly sourced directly or indirectly from China;

(3) Whether the actual functions performed by or actual risks assumed by the Offshore Enterprise and its underlying affiliates that directly or indirectly hold China Taxable Property are able to prove that the enterprise structure has economic substance;

(4) The duration of the Offshore Enterprise's shareholders, business model and relevant organizational structures;

(5) The foreign taxes payable on the Indirect China Taxable Property Transfer;

(6) The substitutability of indirect investment, indirect transfer of China Taxable Property and direct investment, direct transfer of China Taxable Property;

(7) The applicable tax treaties or arrangements in China with respect to the Indirect China Taxable Property Transfer Income;

(8) Other relevant factors.

4. Unless as stated otherwise in Articles 5 and 6, the whole arrangement relating to the Indirect China Taxable Property Transfer shall be deemed to lack reasonable commercial purpose, without any further analysis or determination under Article 3, if all of the following conditions are met:

(1) more than 75% of the value of the Offshore Enterprise's equity is directly or indirectly derived from China Taxable Property;

(2) more than 90% of the total assets (excluding cash) of the Offshore Enterprise, at any time during the one year period preceding the Indirect China Taxable Property Transfer, comprise direct or indirect investments located in China, or more than 90% of the revenue earned by the Offshore Enterprise, during the one year period preceding the Indirect China Taxable Property Transfer, is directly or indirectly sourced from China;

(3) the Offshore Enterprise and its underlying affiliates that directly or indirectly hold China Taxable Property have only completed the formality of registration in their counties (or regions) and fulfilled all legal organizational requirements, but the actual functions they performed and the risks they assumed are too limited to prove that they have economic substance;

(4) the foreign income tax payable on the Indirect China Taxable Property Transfer is lower than the possible China tax payable on the direct transfer of China Taxable Property.

5. Article 1 of this Bulletin shall not apply if the whole arrangement relating to the Indirect China Taxable Property Transfer meets either of the following conditions:

(1) the non-resident enterprise derives Indirect China Taxable Property Transfer Income from buying and then selling, in the public securities market, the equity interests in a single listed Offshore Enterprise; or

(2) the income from the transfer of the China Taxable Property would have been exempt from enterprise income tax in China in accordance with provisions of applicable tax treaties or arrangements if the non-resident enterprise had directly held and transferred the China Taxable Property.

6. The Indirect China Taxable Property Transfer shall be deemed as having reasonable commercial purpose if it meets all of the following conditions:

(1) the shareholding relationship of the transaction parties meets any of the following:

   a. the non-resident transferor holds directly or indirectly more than 80% of the equity of the transferee,

   b. the transferee holds directly or indirectly more than 80% of the equity of the non-resident transferor, or

   c. the same party holds directly or indirectly more than 80% of the equity of the non-resident transferor and transferee;

The shareholding percentage for purposes of Article 6(1) shall be 100% if more than 50% (exclusive of 50%) of the value of the Offshore Enterprise's equity is directly or indirectly derived from real property situated in China.

The above indirect shareholding percentage shall be calculated by multiplying the shareholding percentages of each enterprise in the share chain.

(2) the China tax burden on any subsequent indirect transfer conducted after the indirect transfer in question would not be less than the China tax burden on the same or a similar indirect transfer if it were conducted before the indirect transfer in question; and

(3) the transferee pays all consideration in equities (exclusive of equities in listed enterprises) of the transferee itself or its controlled enterprises.

7. If Indirect "establishment or place" Property Transfer Income is subject to enterprise income tax pursuant to this Bulletin, it shall be included in the taxable income of the "establishment or place" in the tax year in which the tax liability arises, and the "establishment or place" shall file enterprise income tax returns in accordance with relevant rules.

8. If Indirect Real Property Transfer Income or Indirect Equity Transfer Income is subject to enterprise income tax pursuant to this Bulletin, the entity or individual directly obligated by law or contract to make payments to the Equity Transferor shall be the withholding agent.

If the withholding agent fails to withhold the taxes in part or in full, the Equity Transferor shall file and pay the enterprise income tax to the in-charge tax authority within 7 days from the date when the tax liability arises and submit documents relating to the calculation of the equity transfer income and the taxes payable. The in-charge tax authority shall report upwards to the State Administration of Taxation ("**SAT**") for recordal within 30 days after the taxes have been paid into the state treasury.

If neither the withholding agent nor the Equity Transferor withholds or pays the taxes payable, the in-charge tax authority may impose penalties on the withholding agentpursuant to relevant rules under the Tax Collection and Administration Law and its detailed implementing rules; however, if the withholding agent has submitted the documents listed below in Article 9 within 30 days from the date when the equity transfer contract or agreement is signed, the withholding agent may be exempted from or receive reduced penalties.

9. Parties to the Indirect China Taxable Property Transfer and the Chinese resident enterprise whose equity interests are indirectly transferred may report the equity transfer and submit the following documents to the in-charge tax authority:

(1) equity transfer contract or agreement (Chinese version is required along with the foreign language version, the same below);

(2) corporate ownership structure charts before and after the equity transfer;

(3) prior two years of financial and accounting statements for the Offshore Enterprise and its underlying affiliates that directly or indirectly hold China Taxable Property;

(4) a statement of the reason why the first paragraph of Article 1 of this Bulletin is not applicable to the Indirect China Taxable Property Transfer.

10. The parties to the Indirect China Taxable Property Transfer, the planner[9] and the Chinese resident enterprise whose equity interests are indirectly transferred and shall submit the following documents upon the request of the in-charge tax authority:

(1) documents listed in Article 9 above (unless previously submitted);

(2) decision-making and implementation processes information for the whole arrangement relating to the Indirect China Taxable Property Transfer;

(3) Information detailing the current manufacturing, operational, employment, fiscal, property, etc. conditions at the Offshore Enterprise and its underlying affiliates that directly or indirectly hold China Taxable Property, and internal and external audit information[10];

(4) asset appraisal report and other pricing information that can be used to determine the offshore equity transfer price;

(5) information on foreign taxes payable on the Indirect China Taxable Property Transfer;

(6) evidence relating to the applicability of Articles 5 and 6 of this Bulletin;

(7) other relevant materials.

[9] Translator's note: the term "planner (筹划方)" is not defined.

[10] Translator's note: the original Chinese is merging two separate items.

11. If the in-charge tax authority needs to investigate or adjust an Indirect China Taxable Property Transfer, it shall comply with the general anti-avoidance rules.

12. If the Equity Transferor's direct transfer of an equity interest in the Offshore Enterprise leads to the indirect transfer more than two China Taxable Properties subject to the authority of more than two in-charge tax authorities, and the transfer is subject to taxation according to the provisions of this Bulletin, the Equity Transferor shall separately file and pay taxes with each of the in-charge tax authority.

Each in-charge tax authority shall inform the others of their tax calculation methods, and the taxes shall only be collected once the in-charge tax authorities reach a consensus on which tax calculation method should be used; if no consensus can be reached, they shall report to their common upper-level tax authority for instruction.

13. If the Equity Transferor does not file tax returns or pay taxes in full within the prescribed time limit, and the withholding agent does not withhold any taxes, the in-charge tax authority shall, in addition to clawing back the taxes, charge the Equity Transferor a daily interest on the unpaid taxes in accordance with Article 121 and Article 122 of the Implementing Regulations of the Enterprise Income Tax Law.

If the Equity Transferor submits documents according to Article 9 of this Bulletin or files and pays taxes according to Article 7 or Article 8 of this Bulletin within 30 days from the date when the equity transfer contract or agreement is signed, the interest shall be calculated pursuant to the benchmark rate prescribed under Article 122 of the Implementing Regulations of the Enterprise Income Tax Law; otherwise, the interest shall be calculated pursuant to the prescribed benchmark rate plus five per cent.

14. This Bulletin applies to Indirect China Taxable Property Transfer Income derived by a non-resident enterprise that either does not have an "establishment or place" in China or has an "establishment or place" in China but such income is not effectively connected with the "establishment or place".

If income (including Indirect China Taxable Property Income) derived by the Equity Transferor from the transfer of equity interests in the Offshore Enterprise is effectively connected with the Equity Transferor's "establishment or place" in China, this Bulletin shall not apply to the income. Instead, the income is directly subject to taxation in accordance with Article 3(2) of the Enterprise Income Tax Law.

15. The "date on which the tax liability arises" referred to herein means the later of (i) the equity transfer contract/agreement taking effect, or (ii) the change in equity ownership of the Offshore Enterprise being complete.

16. The in-charge tax authority referred to herein means the same tax authority that would be in charge of collecting enterprise income tax payable on the transfer of the China Taxable Property, as determined by Article 2 of this Bulletin, if the non-resident enterprise directly owned and transferred the China Taxable Property.

17. Unless otherwise stated, the term "more than" as stated in this Bulletin shall include the figure or percentage it precedes.

18. Where the provisions of this Bulletin are inconsistent with tax treaties, the tax treaties shall prevail.

19. The Bulletin shall take effect upon its issuance. The Bulletin also applies to matters that occurred before the issuance of this Bulletin but have not received tax treatments[11]. Article 5 and Article 6 under the *State Administration of Taxation's Notice on Strengthening the Administration of Enterprise Income Tax on Equity Transfer Income Derived by Non-Resident Enterprises* (Guo Shui Han [2009] No. 698) and Article 6(3), Article 6(4) and Article 6(5) under the *State Administration of Taxation's Bulletin on Several Issues concerning the Administration of Income Tax on Non-Resident Enterprises* (SAT Bulletin [2011] No. 24) are repealed accordingly.

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[11] Translator's note: the term "tax treatment (税务处理)" is not defined.