

Announcement on Several Issues Concerning Enterprise Income Tax on Indirect Transfers of Property by Non-Resident Enterprises of the PRC

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Chapter I — General Provisions

Article 1 — This Announcement is formulated in accordance with the Enterprise Income Tax Law of the People's Republic of China and its Implementing Regulations and the Administrative Measures on the General Anti-Avoidance Rule (Trial), for the purpose of further clarifying the administration of enterprise income tax on income derived from indirect transfers of taxable property in China by non-resident enterprises.

Article 2 — Where a non-resident enterprise indirectly transfers taxable property in China, including equity interests in a Chinese resident enterprise or immovable property situated in China, by transferring equity interests in an overseas holding company or other similar arrangement, and such indirect transfer is not driven by a reasonable commercial purpose but is designed to avoid payment of enterprise income tax, the indirect transfer shall be re-characterized as a direct transfer of the taxable property in China in accordance with the Enterprise Income Tax Law and the provisions of this Announcement.

Article 3 — For the purposes of this Announcement, "indirect transfer of taxable property in China" means a non-resident enterprise transferring equity interests or other similar rights and interests in an overseas enterprise (other than a Chinese resident enterprise) that directly or indirectly holds taxable property in China, where the overseas enterprise whose equity is transferred and any intermediate overseas enterprise through which the taxable property in China is held do not have reasonable commercial substance for their existence, and the arrangement is designed to circumvent the enterprise income tax liability that would arise from a direct transfer of the taxable property in China.

Article 4 — The terms "taxable property in China" as used in this Announcement include:

- (1) equity interests in a Chinese resident enterprise;
- (2) immovable property situated in China;
- (3) assets of an establishment or place of business situated in China.

Article 5 — Where an indirect transfer of taxable property in China is re-characterized as a direct transfer, the enterprise income tax payable shall be calculated based on the capital gains derived from the deemed direct transfer. The tax base shall be the total consideration received from the transfer minus the net asset value of the taxable property in China. The applicable tax rate shall be 10%, unless otherwise provided under an applicable tax treaty.

Chapter II — Reporting and Withholding Obligations

Article 6 — The transferor of an indirect transfer transaction shall, within 30 days from the date of the transfer agreement, voluntarily report the transaction to the competent tax authority. The reporting shall include the following information:

- (1) the equity structure of the transferor and the transferee, including all intermediate holding companies and their respective jurisdictions;
- (2) the transfer price and the method of payment;
- (3) the assets and liabilities of the overseas enterprise whose equity is transferred;
- (4) the value of the taxable property in China and the manner of its determination;
- (5) the purpose, structure, and commercial rationale of the transaction.

Article 7 — Where the transferee is a Chinese resident enterprise or a non-resident enterprise with an establishment or place of business in China, the transferee shall be the withholding agent and shall withhold the enterprise income tax payable on the indirect transfer. The withholding agent shall, within seven days from the date of the transfer payment, file the withholding tax return and remit the tax to the competent tax authority.

Article 8 — Where the transferee does not withhold the tax as required, the transferor shall, within seven days from the date of receipt of the transfer consideration, voluntarily file a tax return and pay the enterprise income tax to the competent tax authority of the Chinese resident enterprise whose equity is indirectly transferred.

Article 9 — Where both the transferor and the transferee are non-resident enterprises without an establishment or place of business in China, the transferor shall self-report and pay the tax. Where the transferor fails to pay the tax, the competent tax authority may pursue collection through the exchange of information mechanisms under applicable tax treaties.

Article 10 — Where an indirect transfer has been completed and no tax has been reported or paid, the tax authority may initiate an investigation and require the relevant parties to provide transaction information, group structure charts, financial statements, and transfer pricing documentation within a specified period.

Failure to cooperate may result in the tax authority making a deemed assessment of the taxable income.

Chapter III — Assessment of Reasonable Commercial Purpose

Article 11 — In assessing whether an indirect transfer of taxable property in China has a reasonable commercial purpose, the tax authority shall conduct a comprehensive analysis based on the specific facts and circumstances of each case, taking into account all relevant factors, including but not limited to:

- (1) the proportion of the value of the taxable property in China to the total value of the overseas enterprise's assets;
- (2) the proportion of the income or profits derived from the taxable property in China to the total income or profits of the overseas enterprise;
- (3) the actual functions performed and risks assumed by the overseas enterprise and its intermediate holding companies;
- (4) the duration of existence of the overseas enterprise and its intermediate holding companies;
- (5) the tax consequences of the indirect transfer arrangement in the relevant foreign jurisdictions;
- (6) the substitutability of the indirect transfer by a direct transfer of the taxable property in China;
- (7) the applicability of any tax treaty to the indirect transfer and the eligibility of the transferor for treaty benefits.

Article 12 — The following factors, alone or in combination with others, shall indicate a lack of reasonable commercial purpose:

- (1) 75% or more of the total asset value of the overseas enterprise whose equity is transferred consists, directly or indirectly, of taxable property in China;
- (2) 75% or more of the total income of the overseas enterprise whose equity is transferred is derived, directly or indirectly, from taxable property in China;
- (3) the overseas enterprise and any intermediate overseas enterprise have few or no actual functions and bear little or no risk, and their existence serves primarily to hold the taxable property in China;
- (4) the overseas enterprise was established shortly before the indirect transfer and has no substantial business operations;
- (5) the tax payable on the indirect transfer in the foreign jurisdiction where the transferor is located is significantly lower than the enterprise income tax that would have been payable on a direct transfer of the taxable property in China;
- (6) the indirect transfer transaction constitutes a circular arrangement, a self-dealing transaction, or an arrangement entered into for no genuine business purpose.

Article 13 — In considering whether an indirect transfer has a reasonable commercial purpose, the tax authority shall adopt a substance-over-form approach and may disregard the form of the arrangement or re-characterize the transaction in accordance with the economic substance thereof.

Chapter IV — Safe Harbor Rules

Article 14 — An indirect transfer of taxable property in China shall not be subject to re-characterization under this Announcement if any of the following safe harbor conditions is met:

- (1) the equity interest in the overseas enterprise being transferred is acquired and sold through a public securities market;

(2) the indirect transfer would not have been subject to enterprise income tax in China had the transferor been a Chinese tax resident enterprise under the same or similar circumstances under applicable tax treaty provisions;

(3) the proportion of the value of the taxable property in China to the total assets of the overseas enterprise whose equity is transferred is less than 25%, based on the financial statements prepared in accordance with generally accepted accounting principles at the time of the transaction.

Article 15 — Where an indirect transfer qualifies for the safe harbor under Article 14 of this Announcement, the transferor may, within 30 days of completion of the transaction, file a report with the competent tax authority providing relevant documentary evidence. The tax authority shall, upon verification, confirm the safe harbor treatment.

Chapter V — Supplementary Provisions

Article 16 — Where a non-resident enterprise indirectly transfers taxable property in China and the transaction involves a tax treaty, the tax authority shall, in determining whether to apply the provisions of this Announcement, consider whether the transferor is entitled to treaty benefits. Where the transferor or the arrangement does not qualify for treaty benefits under the applicable anti-treaty-abuse rules, the domestic law provisions including this Announcement shall apply.

Article 17 — Where an indirect transfer of taxable property in China is re-characterized as a direct transfer under this Announcement, interest and late payment surcharges may be imposed in accordance with the Tax Collection and Administration Law on any tax that should have been paid but was not paid.

Article 18 — This Announcement applies to indirect transfers of taxable property in China occurring on or after February 3, 2015. For transactions occurring before this date, the Notice of the State Administration of Taxation on Strengthening the Administration of Enterprise Income Tax on Income Derived from Equity Transfers by Non-Resident Enterprises (Guoshuihan [2009] No. 698) shall continue to apply, provided that the tax authority has not conducted an investigation or made a determination prior to the effective date of this Announcement.

Article 19 — This Announcement shall take effect as of February 3, 2015. Guoshuihan [2009] No. 698 is repealed simultaneously. Any matters not addressed in this Announcement shall be governed by the relevant provisions of the Enterprise Income Tax Law and its Implementing Regulations and the Administrative Measures on the General Anti-Avoidance Rule (Trial).

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