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Administrative Rules on Non-resident Enjoying Tax Treaty Treatment (Trial Implementation)

非居民享受税收协定待遇管理办法（试行）

Issued By	**The Administration of Taxation**
Subject	**Tax Treaty Treatment**
Promulgated on	**August 24th, 2009**
Effective from	**October 1st, 2009**
Source	**http://www.chinatax.gov.cn**

On August 24, 2009, the State Administration of Taxation issued Administrative Rules on Non-resident Enjoying Tax Treaty Treatment (Trial Implementation) (Guo Shui Fa [2009] No.124, hereinafter referred to as "the Rules"). The Rules provide detailed guidance for non-residents seeking concessions (except for international traffic) provided in applicable tax treaties between China and other countries and regions (including similar tax arrangements with Hong Kong and Macau Special Administrative Regions). The Rules have taken effect on October 1, 2009 and they apply to the tax liabilities incurred on or after October 1, 2009. They also apply to a tax liability incurred prior to October 1, 2009, for which the claim for treaty benefits is made on or after October 1, 2009.

Non-resident refers to a taxpayer who is not a Chinese tax resident in accordance with China's laws and tax treaties (including non-resident individual and non-resident enterprise). The tax benefit applies to four types of incomes including: dividends, interests, royalties and capital gains.

A non-resident must submit the following supporting documents pursuant to the Rules to the Chinese tax authorities to obtain a treaty tax reduction or exemption:

(i) Required application forms;

(ii) A resident certificate issued by the competent authority of the treaty country or region. The resident certificate must be dated on or after January 1 of the year immediately prior to the year of application;

(iii) Documents that evidence its right to the payment, such as property ownership certificate, agreement, payment voucher, or certificate issued by an intermediary or notary agent.

The Rules allow non-resident taxpayers to retroactively enjoy treaty benefits. A nonresident who should enjoy the tax treaty treatment can apply to the tax authorities within three years for tax refund if it has overpaid.

If a Chinese representative office is used only for the purchase of goods and merchandise for its foreign home office, the representative office will be able to file for tax-free protection. In this case, the Chinese representative office does not get profits from the procurement according to China's tax treaties.

According to the Rules, the tax authorities will approve or deny the application and notify the applicant in writing within 20 - 40 working days from the date of acceptance of the application, depending on the level of the authority. The date may be extended by 10 working days with notice in writing to the applicant. Failure to inform the applicant in writing within the stipulated period will result in automatic approval of the application.

Moreover, the Rules exclude duplicate application within three calendar years (i.e., the remaining period of the current year plus the following two calendar years) from the initial approval of the treaty benefits for income from the same item subject to the same treaty treatment. Incomes from the same items include dividends derived from the same equity investment in the same enterprise, interest earned from the same creditor's right from the same debtor, and royalties gained from the same licensed right from the same license. "The same tax treaty treatment" refers to the treaty benefits provided under the same conditions in the same tax treaty.

In addition to the Rules, several other tax circulars concerning non-residents were issued recently. On one hand, according to the Rules a large number of individuals and enterprises can get tax concessions. On the other hand, China has strengthened administration of non-resident tax collections. To receive tax treaty benefits, multinational companies should not only make accurate and complete initial applications or filings but should also ensure proper information filings during the implementation of an approved treaty benefit claim.

Notice on the Issues concerning the Application of Royalty Clauses in Tax Treaties

关于执行税收协定特许权使用费条款有关问题的通知

Issued By	**The State Administration of Taxation**
Subject	**Royalty Clauses**
Promulgated on	**September 14th, 2009**
Effective from	**October 1st, 2009**
Source	**http://www.chinatax.gov.cn**

On September 14, 2009, China's State Administration of Taxation issued a Notice on the Issues concerning the Application of Royalty Clauses in Tax Treaties (Circular No.507, hereinafter referred to as "the Circular"). The Circular clarifies the definition and scope of royalty clauses in tax treaties to avoid double taxation and to prevent fiscal evasion with respect to taxes on income. It has taken effect on October 1, 2009.

The Circular is applicable to mainland China's tax arrangements with foreign countries and regions as well as Hong Kong and Macau Special Administrative Regions. If the definition of "royalty" in a tax arrangement covers payments for the use of industrial, commercial and scientific equipment, a lower tax rate specified by the tax arrangement will be applied to income originated from such payments. However, immovable properties will be regulated separately in line with immovable property clauses.

The Circular makes clear that information procured by industrial, commercial or scientific experience will be recognized as technical know-how. In a service contract, if the service provider uses certain technical know-how without transferring or licensing it, service fees will be excluded from the scope of royalties. In contrast, the service fees for technical know-how will be regarded as royalties, if the following conditions are satisfied:

(i) The work results fall within the scope of royalties provided in a tax treaty;
(ii) The service provider is the owner of the work provided;
(iii) The service recipient only has the usage rights to the work results.

In addition, the Circular enumerates four categories of payments which will not fall in the scope of royalties:

(i) Income derived from post-sale services with respect to sales of goods;
(ii) Remuneration earned from services provided by sellers to buyers during the product warranty period;
(iii) Payments arising from an entity or individual who specializes in engineering, management, consultant services and so on;
(iv) Other similar payments as decided by the SAT.

Moreover, the Circular confirms that royalty clauses shall only apply if the beneficial owner is a resident of the contracting state: For a permanent establishment by a third party jurisdiction in the contracting state, the tax treaty signed between the third jurisdiction and China shall apply to royalties generated from China. A permanent establishment in the contracting state which belongs to a China registered company, shall not be treated as a resident of the contracting state to apply royalty provisions of the tax treaty. Payments from entities, places and permanent establishments set up by foreign companies in China to residents of countries or districts with tax arrangements with China will be considered as royalties.

The Circular is of great importance for foreign companies, since they can make us of it for better tax planning. In addition, the Circular can be regards as guidance in the course of negotiating licensing or transfer contracts.

Administrative Measures for the Establishment of Partnership Enterprises in China by Foreign Enterprises or Individuals (Draft)
外国企业或者个人在中国境内设立合伙企业管理办法（草案）

Issued By	**The State Council**
Subject	**Foreign Investment**
Promulgated on	**August 19th , 2009**
Source	**http://www.gov.cn**

On August 19, 2009, China's State Council executive meeting examined and approved in principle the Administrative Measures for the Establishment of Partnership Enterprises in China by Foreign Enterprises or Individuals (Draft) (hereinafter referred to as "the Draft"). The Draft has been returned to the Ministry of Commerce for further refinement.

Article 108 of the PRC Partnership Enterprises Law taking effect in June 2007 indicates: "Administrative measures for the establishment of partnership enterprises by foreign enterprises or individuals shall be formulated by the State Council." This provision indicates that China has allowed foreign companies and individuals to establish partnership enterprises. However, foreign-invested enterprises are different from the general partnership enterprises, so the Partnership Enterprises Law applies only to partnership among PRC legal persons. The Draft is an important signal of unified supervision for foreign-invested partnerships by the PRC.

According to the current Draft, foreign investors can directly establish a Limited Liability Partnership as a General Partner, or directly invest in a PRC Limited Liability Partnership as a Limited Partner. The draft doesn't stipulate the minimum capital of foreign partners. They can set up a partnership with foreign investors, Chinese individuals or enterprises. If foreign partners make his capital contribution in cash, they must use convertible foreign currency.

It is worth noticing that the Draft doesn't relieve industrial policies of the state on foreign-invested partnerships. Foreign-invested partnerships should refer to the Foreign Investment Guidance Catalog. If national policy allow foreign investment in an industry only in the form of "Sino-foreign equity", "cooperative joint venture", or "joint venture

where the Chinese party would retain control", foreign investors can not direct access to the field only by investing through a foreign-invested partnership.

The Draft clarified the procedure and method for foreign investors to establish partnership enterprises. Foreign investors, who make their future invest plan, are advised to refer to the Draft.

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