

# CHINA LEGAL BRIEFING\* 213

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## **Measures on the Administration of Assessment and Collection of Non-resident Enterprise Income Tax**

非居民企业所得税核定征收管理办法

**【 Issued by 】** The State Administration of Taxation

**【 Subject 】** New Taxation

**【 Promulgated on 】** February 20th, 2010

**【 Effective from 】** February 20th, 2010

**【 Source 】** <http://www.chinatax.gov.cn>

In order to regulate the assessment and collection of non-resident enterprise income tax, the State Administration of Taxation released the “Measures on the Administration of Assessment and Collection of Non-resident Enterprise Income Tax” (hereinafter referred to as “the Measures”) on February 20, 2010. The Measures took effect on the same day.

The Measures apply to the non-resident enterprises as prescribed in paragraph 2, Article 3 of the Enterprise Income Tax Law (paragraph 2 of Article 3: For a non-resident enterprise having offices or establishments located inside China, it shall pay enterprise income tax on its incomes derived from China as well as on incomes that it earns outside China but which have actual connection with the said offices or establishments.).

These measures do not apply to non-resident enterprises, which can benefit from a double tax agreement with the P.R. China. Another regulation “Administrative Rules on Non-resident Enjoying Tax Treaty Treatment (Trial Implementation)” provide detailed guidance for non-residents seeking concessions (except for international traffic) provided in applicable tax treaties between China and other countries and regions.

For the enterprise income tax of representative offices of foreign enterprises, the “Interim Measures for Tax Administration of Representative Offices of Foreign Enterprises” were promulgated on the same day.

Where a non-resident enterprise signs a contract with a Chinese resident enterprise on the sale of its equipment or other goods and simultaneously provides equipment installment, training, management and other services to the buyer, if the sale contract does not stipulate the price of such related services or if the prices specified in the sale contract are not reasonable, the competent tax authority can determine the deemed service income refer to the general price for the identical or similar business. If there is no general price to refer to, the competent tax authority shall determine the deemed service income under the principle of no less than 10% of the total price of the sales contract.

As to the income, which a non-resident enterprise obtains from providing labor services for customers located in China, if all of the said services occur within China, the non-resident enterprise shall pay the enterprise income tax on the total income. If the service is provided both inside and outside of China, the non-resident enterprise shall pay enterprise income tax on the income derived inside China. The competent tax authority may require the non-resident enterprise to provide true and valid proof, if it has any doubt about the reasonableness and genuineness of the domestic income and overseas income divided by the non-resident enterprise. If the non-resident enterprise fails to provide the proof, the tax authority may determine the service income by regarding all of the services as services occurred within China.

According to the Measures, a non-resident enterprise shall set up account books in accordance with relevant law, record and settle their accounts on the basis of legal and valid invoices, accurately compute the taxable income under the principle of correspondence of actual functions to assumed risks and faithfully file enterprise income tax returns and pay the enterprise income tax.

If a non-resident enterprise is unable to calculate the amount of its taxable income due to poorly kept account books or for any other reason, tax authorities ought to use one of the following methods to determine the amount of taxable income:

1. Gross Income-Based Method

This method should be applied when a non-resident enterprise can correctly calculate or assess through reasonable approaches its gross income but cannot accurately compute its costs and expenses.

Taxable income = gross income x verified profit rate.

2. Cost-Based Method

This method shall apply to a non-resident enterprise of which the costs and expenses can be correctly computed, but the gross income can not be computed accurately.

Taxable income = the total of costs and expenses / (1 - verified profit rate) x verified profit rate.

3. Expenditure-Based Method

This method applies to non-resident enterprise that can correctly calculate its expenditure on operation but not its gross income or costs and expenses.

Taxable income = the total amount of expenditures / (1 - verified profit rate- business tax rate) x verified profit rate.

The tax authority can determine profit rate of non-resident enterprises according to the following standards:

- (a) For non-resident enterprises engaged in project construction, design and consulting, the verified profit rate shall be 15% to 30%;
- (b) For non-resident enterprises engaged in management services, the verified profit rate shall be 30% to 50%;
- (c) For non-resident enterprises engaged in other business activities, the verified profit rate shall be no less than 15%.

If the tax authority has good reason to consider that the actual profit rate of a non-resident enterprise is obviously higher than the aforesaid rates, it may raise the profit rate.

## **Decision of the Standing Committee of the National People's Congress on Revision of the Copyright Law of the People's Republic of China**

全国人民代表大会常务委员会关于修改《中华人民共和国著作权法》的决定

**【 Issued by 】 Standing Committee of the National People's Congress**  
**【 Subject 】 Copyright**  
**【 Promulgated on 】 February 26th, 2010**  
**【 Effective from 】 April 1st, 2010**  
**【 Source 】 <http://www.npc.gov.cn>**

The second amendment to the Copyright Law was adopted at the 13th Session of the Standing Committee of the 11th National People's Congress on February 26, 2010. Two articles of the Copyright Law have been amended. The Amendment took effect on April 1, 2010.

After revision, Article 4 reads: "In the exercise of copyrights, copyright owners shall not violate the Constitution or any other laws and shall not harm the public interest. The State shall supervise and administer the publication or dissemination of works in accordance with the law."

Former Article 4 provided: “Works that are prohibited by law from publication and dissemination shall not be protected by this Law. A copyright owner in exercising his copyright shall not violate the Constitution or the law, nor injure public interest.” It indicated that Copyright Law did not protect works for which publication or distribution is prohibited, even where their content is not against the law. Because this article brought China into a disadvantageous situation in intellectual property disputes in the WTO in 2009, it has been amended.

In addition, one article is added as Article 26, which reads: “In the case of pledge of copyright, the pledgor and pledgee shall apply for pledge registration with the State Council's copyright administrative department.”

Actually, since 1996 the copyright has been allowed to be pledged and pledge contract has been allowed to be registered (according to “Measures for the Registration of Copyright Pledge Contract”). After this provision is included into Copyright Law, the conflict between the law and relevant administrative measures is eliminated.

## **Provisions on Certain Issues Related to Excluding Illegal Evidence for Handling Criminal Cases**

关于办理刑事案件排除非法证据若干问题的规定

**【Issued by】 Supreme People’s Court; Supreme People’s Procuratorate; Ministry of Public Security; Ministry of State Security; Ministry of Justice**  
**【Subject】 Excluding Illegal Evidence**  
**【Promulgated on】 June 13th , 2010**  
**【Effective from】 July 1st , 2010**  
**【Source】 <http://www.court.gov.cn>**

On June 13, 2010, Supreme People's Court; Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security and Ministry of Justice of China jointly issued the “Provisions on Certain Issues Related to Excluding Illegal Evidence for Handling Criminal Cases” (herein after referred to as “the Provisions”). It entered into force on July 1, 2010.

The Provisions define the illegal evidence, especially the illegal verbal evidence. According to the Provisions, the statements of the criminal suspect or the defendant obtained through extortion of confessions by torture or by other illegal means, or testimonies of witnesses, statements of victims obtained through violence, threat, or other illegal means, shall be deemed illegal verbal evidence. Illegal verbal evidence shall be excluded and shall not serve as a basis for ruling a case. Furthermore, where a people's procuratorate examines and approves an arrest or examines a prosecution, it shall exclude illegal verbal

evidence in accordance with the law, and shall not use them as a basis for approving an arrest or filing a public prosecution.

The Provisions standardize the rules for eliminating illegal verbal evidence, including procedures, burden of proof, standard of proof, etc. In addition, the Provisions provide for the first time the possibility that police officials can testify as witnesses in court.

The Provisions have set higher standards and more stringent requirements on political and judicial organs in handling criminal cases, and shall improve China's system of criminal proceedings and raise the level of law enforcement and case handling.

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