

# CHINA LEGAL BRIEFING\* 228

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# Announcement on the Identification of “Beneficiary Owner” in a Tax Agreement

关于认定税收协定中“受益所有人”的公告

【Issued by】 The State Administration of Taxation of People’s Republic of China

【Subject】 Tax

【Promulgated on】 June 29, 2012

【Effective from】 June 29, 2012

【Source】 <http://www.chinatax.gov.cn/n8136506/index.html>

On June 29 2012, the State Administration of Taxation of P.R.C. (“SAT”) issued an Announcement regarding the identification of the “Beneficial Owner” (“Announcement”) to clarify various issues related to the identification of an applicant as a “beneficiary owner”.

## 1. Definition and the factors in determining the beneficial ownership concepts

The beneficial ownership concept was introduced by the SAT in the Notice of the SAT Regarding Understanding and Recognition of “Beneficial Owner” under Tax Treaties (“Notice”), on October 27, 2009. However, the provisions of the Notice are too general and lead to different interpretations. According to the Announcement, the principle of “Substance over Form” should be applied and various factors should be analyzed and judged comprehensively according to the Notice in determining the “Beneficial Owner”. No negative or positive determination shall be made solely on the basis of a single adverse factor or because of the absence of “the purposes of evasion or reduction of tax, or transfer or accumulation of profits” as stated in the Notice. But the Announcement still does not give a clean-cut answer as whether the application should be denied due to multi-adverse factors.

The Announcement lists some common documents required when assessing the “Beneficial Owner” status of the applicant as follows: articles of association, financial statements, records of cash movements, board meeting minutes, board resolutions, staffing and materials situations, relevant expenditures, functions and risk assumption, loan contracts, royalty contracts or license contracts, patent registration certificates, certificates of ownership of copyright, agency contracts or designated fee-collection contracts and other information.

## 2. Safe harbor only for dividend income

The Announcement provides a safe harbor with stringent application conditions for dividend income. It stipulates that, for dividend income, if the treaty benefit applicant is a public company or is 100% directly or indirectly owned by a public company which is a tax resident of the contracting country, then the applicant shall be qualified as the “Beneficial Owner” automatically without further verification by the P.R.C. tax authorities. However, indirect ownership through a third country enterprise which is not a tax resident in China or in the contracting country does not qualify.

### **3. Agent rule for the non-resident partnership and trust**

If an applicant collects such passive income as dividend, interest and royalties through an agent or designated payment recipients, the tax residency of the agent shall not affect the identification of the "Beneficial Owner". However, at the same time the agent shall file a declaration to the tax authority to disclaim its beneficial ownership.

Whereas, by doing information exchange with the foreign jurisdiction of the agent, if the P.R.C. tax authorities discover that the agent is the substantial "Beneficial Owner", they change the original decision, make a re-assessment, levy the under-paid tax and surcharge to the original "Beneficial Owner".

Contrarily, during the process of examination, if the tax authority is unable to make a decision due to the difficulty in identification of the "Beneficial Owner", it may decide that no tax treaty benefits will be granted at that time in accordance with the Notice of the SAT on Printing and Distribution of the Measures for the Administration of Tax Treaty Benefits for Non-resident Enterprises (Trial). But if after further examination, the tax authority decides to grant treaty benefits, the taxes previously paid will be refunded to the applicant.

### **4. Administrative procedures**

If the competent tax authority, in the process of its examination, decides to deny the application, such case shall be reported to the tax authority at provincial level for approval before the denial is implemented. The tax authority at provincial level shall report the decision on such case to the SAT for record.

While applying with various tax authorities for similar cases concerning the "Beneficial Owner" status in regard with treaty benefits, the applicant can give an explanation to the relevant tax authorities, who shall subsequently consult each other to make a unanimous decision. If those tax authorities fail to reach a consensus, the case should be reported to the competent tax authority at superior level for further decision.

# Announcement of the General Administration of Customs No. 45/2012 on “Several Measures Concerning Promoting the Steady Growth of Foreign Trade”

海关总署关于促进外贸稳定增长的若干措施

- 【Issued by】 General Administrations of Customs
- 【Subject】 Customs of Foreign Trade
- 【Promulgated on】 September 27, 2012
- 【Effective from】 September 27, 2012
- 【Source】 <http://www.customs.gov.cn/publish/>

For the purpose of effectively deal with the difficult economic situation in China and abroad, the General Administration of Customs (“GAC”) announced some measures to promote the steady growth of foreign trade on 24 July 2012.

## 1. Improve customs supervision and services

GAC promised to provide a fast and accurate statistical information system to support the national macro-control, production and operation. GAC will strengthen the cooperation and coordination with other administrative departments. In order to accelerate the export tax rebate and the RMB settlement of cross-border trade GAC will facilitate the automatic import licensing application system and improve the process of adjustment of local regulations due to amendments of national laws in regard with the import and export of goods. GAC will pay close attention to the completion of the certificate of origin and the establishment of an import and export enterprise credit management system, improve the export tax rebate online verification system. Furthermore, GAC will implement several measures in order to improve the performance of services for enterprises.

## 2. Speed up the pace of business reform

The National Customs will fully implement classified clearance before the 1st October 2012; accelerate the reform of paperless customs clearance; extend the scope of application of “territorial declaration, port clearance”, which means that customs clearance by way of declaring the goods with the customs office at the location of the enterprise and going through the customs clearance procedures at other customs ports. GAC will further adjust the enterprise classification criteria and implement a more convenient customs clearance treatment for the Class A production-oriented enterprises.

### **3. Reduce customs clearance costs**

Since the 1st October 2012, the National Customs have stopped collecting fees for printing the certification page of import or export declaration forms (for foreign exchange payment and collections for import and export) and the tax refund page of export declaration forms, as well as bar code fees for declaration forms and Customs supervision handling fees, and will speed up the process for cancelling the fees for ATA document adjustment and storage of goods and luggage. The National Customs will optimize the way of tax collection by promotion of electronic payment systems and improve the efficiency of case handling.

### **4. Simplify the Bonded supervision procedures**

In order to increase domestic sales of products produced in tax privileged districts and in order to encourage enterprises to produce such products for the domestic market, GAC will simplify the formalities in regard with domestic sales and maintenance services for products originated from these privileged districts.

### **5. Maintain fair trade order to create a healthy environment for the development**

The GAC will strengthen the actual supervision, improve the quality of regulations, and comprehensively fight against smuggling in order to create a standardized, fair and orderly environment for the development.

## **“Twelfth Five-Year” Plan for Financial Industry Development & Reform of the Financial Industry Issued**

金融业发展和改革“十二五”规划发布

**【Issued by】** People’s Bank of China; China Banking Regulatory Commission; China Securities Regulatory Commission; China Insurance Regulatory Commission; State Administration of Foreign Exchange

**【Subject】** Development and Reform of the Financial Industry

**【Promulgated on】** September 17, 2012

**【Effective Date】** September 17, 2012

**【Source】** [http://www.csrc.gov.cn/pub/newsite/bgt/xwdd/201209/t20120917\\_214954.htm](http://www.csrc.gov.cn/pub/newsite/bgt/xwdd/201209/t20120917_214954.htm)

On September 17, 2012, the State Council approved and released the “Twelfth Five-Year” Plan for Financial Industry Development & Reform of the Financial Industry jointly compiled by the People’s Bank of China, the China Banking Regulatory Commission, the China Securities Regulatory Commission, the China Insurance Regulatory Commission and the State Administration of Foreign Exchange. The Plan is comprised by nine chapters. It provides the guidelines, main objective and policy direction of the reform

and development of the financial industry during the period of the “Twelfth Five-Year”,  
i.e. 2011-2015.

According to the drafters, the Plan is formulated in accordance with the “Twelfth Five-year” Plan for National Economic and Social Development of the P.R.C. and relevant documents of the National Financial Work Conference in 2012. It reviews the main achievements in financial sector development and reform during the Eleventh Five-year Period, analyses the opportunities and challenges facing the financial industry, expounds on the guiding principles, main objectives and policy measures for financial sector development and reform in the Twelfth Five-Year Period.

### **The guiding principles of the Plan**

- Implement the scientific outlook on development
- Drive forward the financial reform, the opening up and development on all fronts
- Enhance the overall power, international competitiveness and risk resilience of China’s financial industry
- Strengthen the financial industry’s role in serving the real economy
- Strengthen financial macro control and regulation systems
- Create a secure and sound modern financial system with a full array of efficient services with reasonable structure.

### **The main objectives**

- Maintain the steady and rapid growth of the size of the financial industry. During the 12<sup>th</sup> Five-year Plan period, the value added created by the financial service industry is expected to account for around 5% of GDP, with the size of the overall funding provided to the real economy increasing at a proper rate.
- Accomplish significant progress in the financial structure. By the end of the 12<sup>th</sup> Five-year Plan period, the direct funding raised by non-financial institutions shall make up over 15% of the overall funding provided to the real economy. The structure and organization of major financial sectors such as banking, securities and insurance shall become more reasonable.
- The market shall play a more important role in financial resources allocation. The market-based reform of interest rate and the RMB exchange rate formation mechanism is expected to improve. RMB shall be more extensively used in cross border transactions.
- Deepen reform in financial institutions. Major financial institutions shall gradually modernize their corporate systems and improve their risk management.
- Full coverage of financial services shall be achieved.
- Financial risks shall be maintained under control in general. The prevention and warning, assessment and resolution mechanism designed to address systemic financial risks shall further develop, while financial safety nets including the deposit insurance system shall be established.

## Policy focuses

- Improve the financial macro control ability.
- Propel the economic restructuring. Facilitate and finance technological innovation. Promote the green development. A market for emission trading shall be gradually built and foster the low carbon financial development.
- The balance of payments shall be led to general equilibrium. Support the expansion of domestic demand to increase domestic consumption in order to create a new round of economic growth by consumption, investment and export in a balanced way. Facilitate overseas investment by enterprises and individuals.
- Further reform shall be conducted in key areas of the financial industry. Gradually resolve the relevant rules and procedures causing profound hurdles to financial development.
- Give great emphasis to financial innovation. Adjust the role of regulators' functions, promote the institutional investors and build a multi-layered financial market.
- Enhance the role of financial markets in investment and financing. Promote the development of financial derivatives markets, and create more investment channels.
- Enhance the overall risk management capabilities of financial institutions and the effectiveness of financial supervision and regulation. The "firewall" between the banking system and capital market shall be built and improved to prevent risks from spreading.
- The protection of financial consumers' interests shall be strengthened.

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