

CHINA LEGAL BRIEFING* 216

DECEMBER 06 – 10, 2010



* CHINA LEGAL BRIEFING is a weekly collection of Chinese law related news gathered from various media and news services, edited by WENFEI ATTORNEYS-AT-LAW LTD. distributed to its clients and CHINA LEGAL BRIEFING subscribers. WENFEI ATTORNEYS-AT-LAW LTD. does not accept responsibility for accuracy of quotes or truthfulness of content. CHINA LEGAL BRIEFING is not intended to provide advice.

- 1 Notice of Issues Concerning Urban Maintenance and Construction Tax and Education Surcharges Imposed on Foreign-funded Enterprises and Citizens**
关于对外资企业征收城市维护建设税和教育费附加有关问题的通知
- 2 Particular Monitoring to Foreign Investments in Real Estate by MOFCOM**
商务部将特别监控外商投资房地产业
- 3 Circular on Issues Regarding Enterprise Income Tax for Advanced Technology Service Enterprises**
关于技术先进性服务企业有关企业所得税政策问题的通知

Notice of Issues Concerning Urban Maintenance and Construction Tax and Education Surcharges Imposed on Foreign-funded Enterprises and Citizens

关于对外资企业征收城市维护建设税和教育费附加有关问题的通知

【Issued by】 Ministry of Finance, State Administration of Taxation

【Subject】 New Levies Imposed to Foreign-funded Enterprises

【Promulgated on】 November 4, 2010

【Effective from】 November 4, 2010

【Source】 <http://www.szs.mof.gov.cn>

For the purpose of further unifying the tax system, ensuring fair taxation, and creating an external environment for equal competition, Ministry of Finance (the “MOF”) and State Administration of Taxation (the “SAT”) issued on November 4, 2010 the “Notice of Issues Concerning Urban Maintenance and Construction Tax and Education Surcharges Imposed on Foreign-funded Enterprises and Citizens” (the “Notice of Issues”). This Notice of Issues is a detailed measure in implementing the “Notice of the State Council on Extending the Urban Maintenance and Construction Tax and Educational Surcharges from Chinese to Foreign-funded Enterprises and Citizens” issued by the State Council (the “State Council Notice”) dated October 18, 2010. It clarifies that since December 1, 2010, “Provisional Regulations of the People’s Republic of China on City (Urban) Maintenance and Construction Tax” (1985) (the “UMCT Regulation”) and “Interim Provisions on the Collection of Educational Surcharges” (1986) (the “ES Provision”) and all the related regulations, rules, and policies promulgated since then shall apply to foreign-funded enterprises, foreign enterprises as well as individuals (collectively “Foreigners”).

Furthermore, it is elaborated by the Notice of Issues that urban maintenance and construction tax (the “UMCT”) and education surcharges (the “ES”) shall be imposed on Foreigners who are obliged to pay value-added tax, consuming tax, or business tax (the “Three-tax”) since December 1, 2010; otherwise Foreigners will not be taxed.

Previously, pursuant to the Circular Concerning Temporary Exemption from Urban Maintenance and Construction Tax and Additional Education Fees for Foreign-Funded and Foreign Enterprises, Foreigners did not need to pay UMCT and ES, while they now have to pay those taxes based on the same rates as domestic entities. In accordance with UMCT Regulation and ES Provision, UMCT and ES shall be calculated based on the total amount of those Three-tax actually paid by Foreigners. With regard to the taxation rates, according to Article 4 of UMCT Regulation, the rates for City Maintenance and Construction Tax are as follows:

- (1) For taxpayers located in urban areas, the rate is 7% of the total amount of Three-tax actually paid;
- (2) For taxpayers located in counties or townships, the rate is 5% of the total amount of Three-tax actually paid; and
- (3) For taxpayers located in areas other than urban area, counties and townships, the rate is 1% of the total amount of three-tax actually paid.

Pursuant to Article 3 of the ES Provision amended in 2005, the education surcharges shall be collected at the rate of 3% of the total amount of Three-tax actually paid.

In an interview on a press conference especially held for explaining the State Council Notice, the chief officers of MOF and SAT expressed that the new levies did not aim to burden Foreigners, and as the relatively low rates, they would not bring material adverse impact on foreign investment field.

Particular Monitoring to Foreign Investments in Real Estate by MOFCOM

商务部将特别监控外商投资房地产业

【Subject】 Monitoring Foreign Investments in Real Estate

【Date】 November 16, 2010

【Source】 <http://www.gov.cn>

On a routine press conference held by MOFCOM on November 16, 2010, when asked if foreign investment was one of the causes for the price raise in China, Mr. Yao Jian, the spokesman of MOFCOM, replied that MOFCOM and People's Bank would concern about unusual occurrence of phenomena and problems in foreign investment, which may possibly result in imported inflation in certain trades. He further set real estate field as an instance. According to the statistics supplied by National Bureau of Statistics, from January to September this year, 498 foreign-funded real estate enterprises have been newly established, absorbing 16 billion USD foreign funds, rising by 56% compared to the same period last year.

The spokesman expressed that the raise of the foreign investment in real estate was caused by the recovery of the whole real estate market in China this year after two years' downturn. In addition, he said that based on the current statistics, there seemed to be no clear connection between the growth of foreign investment and the fluctuation of prices. However, he still indicated that MOFCOM would double check and inspect those statistics in real estate, and further strengthen the internal management in this field, like enhancing

the double-check of the integrity of land-use right documents, ensuring the legality, validity, authenticity, and reality of the establishment of the enterprises and investment.

Additionally, just one day before the press conference, for the purpose of implementing “Notice of the State Council on Resolutely Curbing the Soaring of Housing Prices in Some Cities” (2010) and “Opinions on Regulating the Access to and Administration of Foreign Investment in the Real Estate Market” (2006) SAFE promulgated the “Notice of Further Management of Real Estate Purchasing by Foreign Entities and Individuals” (the “Notice”).

The Notice provides that any foreign individual is merely allowed to purchase one set of real estate for his own living use; any branch or representative office set up by foreign entities is only allowed to purchase real estate at the place of their registered address for its own business operation. In other words, the character of the real estate purchased by foreign entities shall not be residential. Moreover, foreign entities and individuals are also required to submit certificates and letter of acknowledgement to prove their satisfaction of the requirements listed therein.

Circular on Issues Regarding Enterprise Income Tax for Advanced Technology Service Enterprises

关于技术先进性服务企业有关企业所得税政策问题的通知

【 Issued by 】 Ministry of Finance, State Administration of Tax, Ministry Of commerce; Ministry of Science and Technology, and National Development and Reform Commission

【 Subject 】 Enterprise Income Tax for Advanced Technology Service Enterprises

【 Promulgated on 】 November 5 , 2010

【 Effective from 】 November 5 , 2010

【 Source 】 <http://www.gov.cn>

On November 5, 2010, the Ministry of Finance, State Administration of Tax, Ministry of Commerce, Ministry of Science and Technology, and National Development and Reform Commission (the “Five Ministries”) released the Circular on Issues Regarding Enterprise Income Tax for Advanced Technology Service Enterprises (the “2010 Circular”) to substitute the old Notice about the Issues Relevant to the Tax Policies on Advanced Technology Service Enterprises issued in 2009 (the “2009 Notice”). The Circular mainly clarifies the following issues:

1. Preferential taxation policies

The 2009 Notice provided three preferential taxation policies, however one of which has been abolished¹ according to the 2010 Circular, while the other two remained as follows:

- (1) A certified advanced technology service (the “ATS”) enterprise shall pay the enterprise income tax at the reduced tax rate of 15%; and
- (2) The employee education expenses incurred by a certified ATS enterprise shall be deducted in calculating the amount of taxable income to the extent that the amount thereof is not more than 8% of the total amount of the enterprise wage; and the excessive amount thereof is allowed to be carried forward and be deducted in further taxable years.

2. Unless satisfying all the following requirements, enterprises will not enjoy the preferential taxation policies provided in Section 1:

- (1) It shall engage in at least one of the services within the Business Scope for Certifying ATS (the “Scope”) (in trial) attached thereof, apply advanced technology, or have strong capacity of research and development;
- (2) It shall have its registered address located in any of the exemplary cities² (including any district, county, county-level city within certain exemplary city);
- (3) It shall be a legal person and has not violated any laws or regulations in respect of the administration of import and export businesses, financial affairs, tax, foreign exchange and customs during the recent two years;
- (4) The number of its employees with an educational background of a junior college or higher shall account for at least 50 % of the total number of its staff;

¹ The abolished policy is: “A certified advanced technology service enterprise shall be exempted from the business tax on its income from offshore outsourcing services”. (The term “income from offshore outsourcing services” refers to the income which an ATS enterprise obtains from an overseas entity, with which it concludes an authorization contract and to which it provides outsourcing services in respect of information technology, technical business procedure and technical knowledge procedure (the “Three-service”) as defined in the Annex of the 2009 Notice.)

² In accordance with the Circular, exemplary cities include: Beijing, Tianjin, Shanghai, Chongqing, Dalian, Shenzhen, Guangzhou, Wuhan, Ha’erbin, Chengdu, Nanjing, Xi’an, Ji’nan, Hangzhou, Hefei, Nanchang, Changsha, Daqing, Suzhou, Wuxi and Xiamen.

- (5) Its total income from the advanced technology services within the Scope shall account for at least 50%³ of its total income for the current year; and
- (6) Its total income from offshore outsourcing services⁴ shall account for at least 50% of its total income for the current year.

3. Application for a Certified ATS Enterprise

The application materials of a qualified ATS enterprise shall be submitted to the science and technology administrative department of certain exemplary city where the applicants located, and then those materials will be appraised and certified jointly by the science and technology, the local commerce, public finance, tax and development and reform departments (the “Five Departments”) at the city level. After that, the name list of the certified ATS enterprises shall be timely reported to the Five Ministries as well as the corresponding Five Departments of the province (municipality directly under the Central Government or city under separate state planning) for archival purposes.

4. The Five Departments in both exemplary cities and corresponding provinces shall closely trace any change to the ATS enterprises. The preferential policies shall be lifted from any of the ATS Enterprises timely, once it turns out be unqualified.

© Wenfei, Beijing, December 2010

Check the China Legal Briefing archives on: <http://www.wenfei.com/publications.html>

Obtain your personal subscription from: china@wenfei.com

³ Lower than the 70% requirement in the 2009 Notice.

⁴ The term “income from offshore outsourcing services” here refers to income obtained by an ATS enterprise from an overseas entity, with which it concludes an authorization contract and to which it provides the “Three-services” as defined in the Annex of the 2010 Notice.