

Broadening horizons

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Latest News on law, tax and business in China

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重磅：中国放宽受益所有人享受税收协定条件！

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“受益所有人”判定近年来一直是纳税人和中国税务局高度关注的问题，尤其在 2017 年新中德税收双边协定生效后，符合受益所有人条件的德国投资者可以申请 5% 的股息所得税率，很多德国投资者着手建立有效优化的股权构架。此前中国国家税务总局在 2012 年 30 号公告中就“受益所有人”的条件和判定标准进行了相关明确。此举尽管有效防止了税收协定的滥用，但是也在实践中遇到一些问题，尤其对于德投资者常用的控股公司构架。2018 年 2 月 3 日，国税总局终于公布了 9 号公告《关于税收协定中“受益所有人”有关问题的公告》（“以下简称公告”），明确允许申请人在没有滥用协定目的和结果的情况下得以享受税收协定待遇。

放宽受益所有人享受税收协定条件

公告较以往最大的变化在于放宽受益所有人享受税收协定条件。在公告发布之前，各地税务局基本明确，对于不能满足受益所有人条件也不符合安全港条件的申请，无法享受税收协定待遇。这一规定导致了在实践中申请人因为利用控股公司的商业安排而被认定为不符合受益所有人身份的案例屡见不鲜。按照以往的规定，即使控股公司的设立具有商业目的，且控股公司的母公司具有商业实质，其从中国获得的股利也无法“穿透”控股公司，从而根据上层股东所在国与中国之间的双边税收协定申请享受优惠税率。此公告给众多通过控股公司在华投资的企业新的可能

Big News: China Loosens Beneficial Ownership Conditions on Treaty Benefit Application!

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Since years, assessment of “beneficial ownership” has always been a concern of taxpayers and Chinese tax authorities. Especially, after the new Double Taxation Agreement (“DTA”) between Germany and China becoming effective from January 1, 2017, the German investors are eligible for a reduced withholding tax rate of 5 % on profit distribution, if certain preconditions and criteria of “beneficial owner” are fulfilled. Many German investors have taken measures to implement effective and optimized equity structure. The Notice No. 30 issued in 2012 by the Chinese State Administration of Taxation (“SAT”) specified the criteria of “beneficial owner”. Notice 30 indeed has effectively prevented the abuse of tax treaties, nevertheless some problems still arose in practice, especially with regard to the holding structure which are commonly used by German investors. On February 3, 2018, the SAT finally published the Announcement No. 9 on “Issues Related to Beneficial Ownership in DTAs” (“the Announcement”), which allows the applicants without treaty abuse purpose to enjoy the treaty benefit.

Loosened Beneficial Ownership Conditions on Treaty Benefit Application

The most significant change in the Announcement is loosening the beneficial ownership conditions for treaty benefit application. Before the Announcement was issued, the local tax authorities in principle do not accept the application of treaty benefit if the applicant can meet neither the criteria of beneficial owner nor the safe harbor requirement. That resulted in a situation that many applicants were not eligible for beneficial ownership due to their business arrangement of using a holding structure. According to the previous regulation, even if the holding company is established with commercial purpose and its parent company holds commercial substance, the dividends

性去申请税收协定待遇。

根据公告，即使申请人本人不符合受益所有人条件，但**同时**符合以下两个条件，也应视为申请人具有受益所有人身份：

- 直接或间接持有申请人 100% 股份的股东符合受益所有人条件；
- 直接或间接持有申请人 100% 股份的股东为申请人所在国居民（“相同国家规则”），或者虽不为申请人所在国居民，但该股东和间接持有情形下的中间层股东均为符合条件的人（“相同协定待遇规则”）。

上述“符合条件的人”是指该人从中国取得的所得为股息时，根据中国与其所属居民国/地区签署的税收协定可享受的税收协定待遇和申请人可享受的税收协定待遇相同或更为优惠。

值得注意的是，在适用“相同国家规则”情况下，并未对中间层股东所在国可享受的税收待遇进行额外规定。即如果申请人和受益所有人是同一国家的居民纳税人，则即便中间层股东所在国与中国的双边税收协定规定的股息税率更高，申请人依旧可以申请享受税收待遇。

此外，公告第 10 条规定“申请人虽具有受益所有人身份，但主管税务机关发现需要适用税收协定主要目的测试条款或国内税收法律规定的一般反避税规则的，适用一般反避税相关规定。”地方税局在实践中将如何运用该条款，目前仍不明确，有待根据后续各地的实际操作要求和公布的案例进行明确。

安全港范围扩大

根据原规定，如果申请人为在缔约对方上市的公司，或者其被同样为缔约对方居民且在缔约对方上市的公司 100% 直接或间接拥有，且该股息是来自上市公司所持有的股份的所得，可**直接认定**申请人的受益所有人身份。

在最新发布公告中，国税总局将可直接认定受益所有人

it receives from China cannot “pass through” the holding company to enjoy the preferential tax rate according to the tax treaty between the host country of the upper shareholder and China. The Announcement offers new possibilities for enterprises investing in China through holding structure to apply for tax treaty benefits.

According to the Announcement, the applicant shall be deemed to have beneficial ownership even if the applicant itself does not meet the assessment criteria as beneficial ownership, if **BOTH** of following preconditions are met:

- **Shareholders who directly or indirectly hold 100 % shares of the applicant meet the requirements of beneficial owner;**
- **Shareholders directly or indirectly holding 100 % shares of the applicant are residents of the applicant's country (“same country rule”); or although the shareholders are not residents of the applicant's country, both the shareholders and the intermediate shareholders in the case of an indirect holding are qualified persons (“same DTA benefit rule”).**

Above mentioned “qualified person” means that the treatment under the treaty between China and the country/region of its residence equals to or is more favorable compared with that under the applicable treaty of the applicant, when it receives dividends from China.

It is worth noting that in the case of application of “same country rule”, there is no additional requirement regarding the treaty treatment in the country where the intermediate shareholders are located. That means, as long as the applicant and the beneficial owner are the tax resident of the same country, the applicant can apply for treaty benefit even if the withholding tax rate on dividends is higher in the treaty between China and the country of the intermediate shareholder.

In addition, the Article 10 of the Announcement provides that “although the applicant has the beneficial ownership, the general anti-tax-avoidance rules shall be applied, if the competent tax authorities find it necessary to perform the Principal Purposes Test (“PPT”) according to the treaty or the anti-avoidance measures under domestic laws.” How the local tax bureau will use this provision in practice is to be clarified according to further practice and implementation details.

Extended Scope of the Safe Harbor

According to previous regulation, if the treaty applicant is a stock listed company in the contracting country, or a subsidiary 100 % directly or indirectly owned by a stock listed company in the same contracting country, and the dividends are derived from the shares held by the abovementioned stock listed company, the applicant will be deemed as beneficial owner **by default**.

In the Announcement, the SAT extends the Safe Harbor scope to “the government, the stock listed company or the individual resident in the contracting country”. Meanwhile, if 100 %

的范围扩大至“缔约对方政府、在缔约对方上市的公司或者缔约对方居民个人”。同时，如果申请人 100% 的股份被缔约对方政府、在缔约对方上市的公司或者缔约对方居民个人所持有，则其也可以被直接认定为受益所有人。

然而，根据中德双边税收协定，5% 的优惠税率仅适用于受益所有人是公司（合伙企业除外），且直接拥有支付股息公司 25% 资本的情况。因此，即使申请人为德国居民个人且可被认定为受益所有人，也仅能根据双边税收协定享受 10% 的优惠税率（国内法下个人股息收入的所得税税率为 20%）。对于申请人为不符合“受益所有人”判断的德国公司，而其 100% 控股股东为德国个人的情况，尽管公告确认此企业将被直接视为受益所有人，无需再进行受益人身份评估而可以享受优惠税率，然而公告并未明确其可享受的优惠税率是按公司还是按个人。我们预计这种情况很快会在实践中得以澄清。

受益所有人身份判定条件

公告对之前法规中关于申请人受益所有人身份认定的不利条件也做出了两处修改：

- 公告规定，申请人有义务在收到所得的 12 个月内将所得的 50% 以上支付给第三国居民，将不利于其受益所有人身份的认定。其中，“有义务”包括约定义务和虽未约定义务但形成支付事实的情形。
- 公告规定，申请人从事的经营活动不构成实质性经营活动将不利于其受益所有人身份的认定。实质性经营活动包括具有实质性的制造、经销、管理等活动。申请人从事的经营活动是否具有实质性，应根据其实际履行的功能及承担的风险进行判定。对于投资控股管理活动是否可被认定为构成实质性经营活动，国税总局对公告的官方解读进一步说明需根据申请人是否从事投资前期研究、评估分析、投资决策、投资实施以及投资后续管理等活动进行判断。

shares of the applicant are held by the government, the stock listed company or the individual resident in the contracting country, the applicant can also be directly recognized as beneficial owner by default.

However, according to the Sino-German DTA, the preferential tax rate of 5 % applies only to corporations (partnerships excluded) that directly hold more than 25 % shares of the enterprises distributing the profits. Thus, even if the applicant is an individual German resident and can be recognized as beneficial owner, he/she can only enjoy a preferential tax rate of 10 % under the treaty (individual income tax rate on dividend income under domestic law is 20 %). In the context that the applicant is a German corporation failing to pass the assessment of beneficial ownership and its 100 % shareholder is a German individual, the Announcement confirms the enterprise will be directly deemed as beneficial owner without further assessment. However, the Announcement does not specify which tax rates will apply (as corporation or individual) under this scenario. We expect that can be clarified in practice soon.

Assessment Criteria of Beneficial Owner

The Announcement also makes two changes to the unfavorable facts regarding the assessment of the beneficial owners of applicants:

- The Announcement stipulates that it would be detrimental to the identification of the beneficial ownership if the applicant has obligation to remit more than 50 % of received dividends to resident in third countries within 12 months upon receiving the dividends. Thereof, the term "obligation" refers to both the situation where contractual obligations for remittance exist and the situation in which the remittance is actually completed despite the absence of any contractual obligation.
- According to the Announcement, the fact that the business activities engaged by the applicant do not constitute substantive business activities will be detrimental to the identification of the beneficial ownership of the applicant. Substantive business activities include substantial manufacturing, distribution, management and other activities. Whether the business activities of the applicant are substantive should be assessed based on their actual functions performed and risks assumed. As for whether the investment holding management activities can be determined as conducting substantive business activities, the official interpretation of the SAT further explains that the assessment should be based on whether the applicant is engaged in pre-investment research, evaluation and analysis, investment decision, investment implementation and investment follow-up management.

申请材料

由于公告放宽受益所有人享受税收协定条件，因此税收协定申请的材料也较 2015 年 60 号文中的要求有了相应的变化。具体规定如下：

- 申请人除需提供其自身的税收居民身份证明外，还应提供符合“受益所有人”条件的人和符合条件的人所属居民国（地区）税务主管当局为该类人开具的税收居民身份证明；
- 税收居民身份证明均应证明取得所得的当年度或上一年度的税收居民身份。

我们的观察

在实践中，在新加坡或香港等地区设立控股公司，直接作为股东控股中国外商投资企业商业安排上是常见的模式，但以往上述模式在申请税收协定待遇时却经常因为这些控股公司没有注入足够实质遇到阻碍。公告的出台为解决这一实际问题提供了依据。但与此同时，申请享受税收协定时用以证明“受益所有人”身份的材料要求也相应增加。可以说，公告将更多没有滥用协定目的和结果情形下的申请人纳入认定条件的评判范围，却对认定条件设置了更高的要求。

Application Documents

Since the Announcement loosens the conditions of beneficial ownership during the application for treaty benefit, the requirements on application documents have also changed accordingly compared with those stipulated in Notice [2015] No. 60.

- Apart from its own tax residence certificate, the applicant should also provide the tax residence certificate issued by the competent tax authority of the country where the qualified beneficial owner and the relevant qualified persons reside;
- The tax residence certificate shall be issued to prove the tax residence identity for the year or the previous year in which the dividend is distributed.

Our Observation

In practice, establishing holding companies in Singapore or Hong Kong as the direct shareholders of a Chinese foreign-invested enterprise are very commonly seen in business arrangement. However, it has been encountered many difficulties in applying for treaty benefits due to the holding company is usually not injected with sufficient business substance. The Announcement has laid out the fundament to solve the problem. Nevertheless, the requirements on documents to identify the "beneficial ownership" are increased, when applying for treaty benefits. It can be said that more applicants that have neither intentions nor consequences of abusing treaty benefits are allowed to be included in the assessment of beneficial owner identity, while the criteria of assessment have been made even tighter.

值得注意的是，公告的生效日为 2018 年 4 月 1 日且并未提及是否可以追溯以前年度的类似事宜。公告还要求符合条件的股权架构的各层持股比例应当在取得股息前连续 12 个月以内任何时候均达到 100% 的规定比例。此外，即使是通过放宽后的条件来申请税收协定待遇，架构链上的相关各方可以取得其所在国出具的税收居民证明依旧是一个必要的先决条件。因此我们建议企业仍需谨慎判断其在新规定下是否可以享受协定待遇，恰当安排股利分配时点并对公司组织架构进行有可能的必要调整。

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It is worth to note that the Announcement will take effect from April 1, 2018, and it is not clarified whether it applies to cases happened in previous years or not. The Announcement also stipulates that every level within the qualified organizational structure shall always fulfill the requirement on shareholding percentage, which is set as 100 %. In addition, the submission of tax resident certificates of every relevant entity within the structure is still a precondition for the successful application of treaty benefit, even though the loosened conditions are applicable. Therefore, it is suggested that the companies should prudently assess their eligibility for treaty benefit in the context of the new regulation, plan the timing of dividend payment and also make the necessary adjustment on the corporate structure if possible.

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Broadening horizons

„We must be continuously on alert for new developments to be able to master challenges in the best possible way. With curiosity and an innovative approach, we are creating forward-looking solutions.“

Rödl & Partner

„The building of human towers requires each team member to again and again attempt something new. In this way, we are able to rise above the challenge together.“

Castellers de Barcelona



„Each and every person counts“ – to the Castellers and to us.

Human towers symbolise in a unique way the Rödl & Partner corporate culture. They personify our philosophy of solidarity, balance, courage and team spirit. They stand for the growth that is based on own resources, the growth which has made Rödl & Partner the company we are today. „Força, Equilibri, Valor i Seny“ (strength, equilibrium, valour and common sense) is the Catalan motto of all Castellers, describing their fundamental values very accurately. It is to our liking and also reflects our mentality. Therefore Rödl & Partner embarked on a collaborative journey with the representatives of this long-standing tradition of human towers – Castellers de Barcelona – in May 2011. The association from Barcelona stands, among many other things, for this intangible cultural heritage.

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