



浦瑞律师事务所
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Preface

In the first eight months of this year, Shanghai seized the great business opportunities gathered in the development of an international trade center and in the Shanghai World Expo to attract foreign investment and achieved remarkable results.

Zhang Guoqing, deputy director of the Policy Research Department of Commerce, said that in the future, China would adjust industrial policy and regional policy to improve the quality of foreign capital and guide foreign capital to invest in high-end manufacturing, new energy and new materials industries, as well as labor-intensive industries in the western region.

Zhang Guoqing also stressed that China and the surrounding areas, as well as other developing countries, were carrying out an increasingly keen competition for foreign investment, and preferential policies for foreign-invested enterprises would remain.

The State Council has recently issued *the Notice of the General Office of the State Council on Fully Implementing the Plans for Assigning the Tasks to the Authorities According to the Opinions of the State Council on Further Effectively Using Foreign Investments*. The notice specified authorities' duties of using foreign investments for the purpose of encouraging foreign investors to develop environmentally friendly and labour intensive industries in Midwest China.

In August 2010, the Supreme Court published a judicial interpretation regarding application of laws in foreign-invested enterprises disputes cases, which is the first major judicial interpretation issued by the Supreme People's Court in relation to foreign-invested enterprises law, and is significant in terms of clarifying the resolution to the disputes in relation to equity transfer of foreign-invested enterprises.

The interpretation provides a uniform referee scale for legal application in foreign-invested enterprises disputes cases, and has a positive effect on equally protecting legitimate rights and interests of Chinese and foreign parties, promoting investment facilitation, creating a fair market environment and founding a good and stable legal environment in China.

Cooperation News

America

Lawyer GRAY STONE visited Cenlaw. He gave a presentation on EB5 project, and had in-depth discussion with Cenlaw partners on further cooperation between the two sides.

Israel

Partner Paul Huang was invited by the Israeli Ministry of Foreign Affairs to participate in a seven-day international forum on conflict of laws held in Jerusalem.

Hong Kong

Cooperating with Hong Kong lawyers, Cenlaw provided legal help for a Hong Kong company on stock acquisition.

America

Cooperating with an American company, Cenlaw provided legal advice and assistance for a Chinese export company on declaration of bankruptcy claims.

Turkey

Cenlaw provided legal advice for an import and export company in Shanghai on foreign trade disputes with a Turkish company.

America

Cenlaw provided initial consulting services for a U.S. company of Florida on conducting franchise business in China.

International Trade & Foreign Investment

SPC Officially Issues Judicial Interpretation on Hearing Cases Involving FIEs

Following the public consultation initiated at the end of last year, the Supreme People's Court (SPC) has finalized and officially published the "*Provisions of the Supreme People's Court on Hearing Cases Involving Foreign-Invested Enterprises (I)*" with effect from 16 August 2010. The Provisions specify the rules governing the recognition of the effect of specific contracts which are not yet approved by the competent administrative bodies, transfer of shares under specific contracts which does not have the required administrative approval, disputes over investment made by FIEs without disclosing their identifications and the duty of contributing investments owned by FIEs' shareholders. The Provisions also cover the rules on hearing cases regarding pledge agreements with FIEs, disputes of FIEs over transfer of shares induced by false information, consent of shareholders' of FIEs in the transfer of shares and disputes over pre-emptive rights in the transfer of shares.

Central Bank Approves Eligible Foreign Institutions to Enter Into Pilot Inter-Bank Bond Markets

In order to cooperate with pilot RMB settlement in cross-border trade and to broaden the recycling channels of RMB capital, the China People's Bank recently issued the Notice on Investment in Three Types of Institutions Such as RMB Settlement Banks outside Mainland China in Pilot Inter-bank Bond Markets with RMB Currency ("the Notice"), which allows relative foreign institutions to invest in pilot inter-bank bond markets, and standardizes the scope, qualifications and investment methods of foreign institutions and other related matters therein. In accordance with the Notice, the RMB capital of foreign institutions invested in inter-bank bond markets shall be the RMB capital obtained thereby, pursuant to related provisions, from currency cooperation among central banks, cross-border trade and investment in business with RMB currency.

Rules on Safety & Security of Overseas Sino Enterprises and Staff Published

In a press conference held by the Ministry of Commerce (MOFCOM) today, it was announced that in August 2010 the MOFCOM, Ministry of Foreign Affairs (MFA), National Development and Reform Commission (NDRC), Ministry of Public Security (MPS), State-Owned Assets Supervision and Administration Commission (SASAC), State Administration of Work Safety (SAWS) and All-China Federation of Industry and Commerce have jointly published the "*Provisions on the Administration of the Safety and Security of Overseas Chinese Enterprises and Staff*", which contain 30 articles in 7 chapters mainly covering the main duties and key objectives of the related authorities, embassies and consulates in connection with the safety and security of overseas Chinese enterprises as well as the emergency procedures. Higher standards will apply to investments and cooperation in unsafe countries or regions. The Provisions also stress the social responsibility of enterprises with overseas investments and cooperation which shall have the duty to offer safety training programs for their staff working overseas and to establish overseas safety management and mechanisms.

China Enhances Administration of Foreign Labor Service Cooperation

The Legislative Affairs Office of the State Council has recently issued the *"Regulations for the Administration of Foreign Labor Service Cooperation (Exposure Draft)"* to solicit public comments by 23 August 2010. The Draft clearly defines foreign labor service cooperation as "Chinese enterprises entering into labor cooperation contracts with overseas enterprises or agencies to organize and help Chinese citizens go to work abroad as agreed in contracts" (Article 2). Individual citizens of China who work or are employed abroad shall not belong to the scope of foreign labor service cooperation and not apply to these Regulations (Article 43). Following the principle of appropriately increasing the access threshold, the Draft explicitly provides the available conditions for a foreign labor service cooperation enterprise in terms of legal personality, registered capital, qualifications of management staff, internal management systems, business reputation, etc. (Article 8).

MOFCOM: Dispatching Workers through Intermediaries Strictly Prohibited

The Ministry of Commerce (MOFCOM) and Ministry of Foreign Affairs (MOFA) have jointly issued an urgent notice requiring all local authorities concerned to strictly control the dispatching of workers to engage in dangerous activities overseas. The Notice stresses that worker dispatch service through any intermediary is strictly prohibited. Contractors undertaking overseas projects must sign employment agreements with the employees who are to be sent overseas so as to ensure their payments and living conditions. In addition, communication systems are required in such projects and sub-contracting is disallowed. The Notice also provides that dispatching workers to engage in seasonal jobs overseas or dispatching workers to any countries where the minimum wages are lower than those in China shall be subject to strict control and that enterprises providing worker dispatching services are not allowed to provide their services for overseas natural persons. Overseas organizations are also disallowed to employ any staff directly in China.

Authorities' Duties of Using Foreign Investments Specified

The State Council has recently issued the *"Notice of the General Office of the State Council on Fully Implementing the Plans for Assigning the Tasks to the Authorities According to the Opinions of the State Council on Further Effectively Using Foreign Investments"*. According to the Notice, the National Development and Reform Commission (NDRC) and Ministry of Commerce (MOFCOM) are required to amend the *"Catalogue on Guiding Foreign-Invested Industries"* based on the future development of China's economy and to expand and amend the *"Catalogue on Preferred Foreign-Invested Industries in Midwest China"* in accordance with the amendments to the *"Catalogue on Guiding Foreign-Invested Industries"* for the purpose of encouraging foreign investors to develop environmentally friendly and labour intensive industries in Midwest China. In relation to diversifying the use of foreign investments, the MOFCOM, CSRC (China Securities Regulatory Commission), NDRC and MIIT (Ministry of Industry and Information Technology) shall be responsible for encouraging foreign investors to reorganize, restructure, merge and acquire Chinese enterprises by acquisitions of shares

or mergers and acquisitions. A share listed companies are encouraged to attract both local and foreign strategic investors. Regulation of foreign-investments in local securities as well as mergers and acquisitions will be provided.

Intellectual Property Right

Pledged Patent Right Registration Rules Promulgated

The "*Measures on the Registration of Pledged Patent Rights*" have been promulgated with effect from 1 October 2010. According to the Measures, where a patent right is to be pledged, the pledgor and pledgee in question must reach a written agreement on the pledge. The pledge agreement may be concluded as the entire contract or included as clauses in a master agreement. To pledge a co-owned patent right, all owners' consent is required unless all such owners have previous contractual agreements. The registration may be completed by post or in person. The State Intellectual Property Office (SIPO) shall examine applications for the registration of pledged patent rights and make conclusions within 7 working days after receiving such applications.

Interim Rules on Managing IPR in Key National Science & Technology Projects Issued

The Ministry of Science and Technology (MOST), National Development and Reform Commission (NDRC), Ministry of Finance (MOF) and State Intellectual Property Office (SIPO) have jointly issued the "*Interim Provisions on the Management of Intellectual Property Rights in the Key National Science and Technology Projects*" which effect the relevant statutory and administrative mechanisms and measures in connection with the management, ownership, protection, transfer and use of IPR in the related key national projects. The Provisions also specify the requirement of accountability, duties, obligations and rights of the related authorities in their administration. The 5-year planning, project application guidelines, application processes, assessment, execution of contracts, administration and inspection upon completion relevant to IPR shall also fall within the scope of the Provisions.

SAIC Gives More Support to Sample Cities & Enterprises for Implementing Trademark Strategy

The State Administration for Industry and Commerce recently issued the Supporting Measures for Sample Cities (Districts) for Implementing State Trademark Strategy and the Supporting Measures for Sample Enterprises for Implementing State Trademark Strategy and gave notice that all localities and departments shall carry out them in a serious manner. In accordance with the principles of these two Measures, the State Administration for Industry and Commerce will intensify efforts in the area of propaganda for the implementation by sample cities (districts) and enterprises of trademark strategy, encourage the enterprises in sample cities (districts) or the sample enterprises to conduct operating activities through trademark licenses or pledges, strengthen the international registration and overseas protection of the enterprises in sample cities (districts) or the

sample enterprises, and instruct and support the enrichment of farmers through trademarks in sample cities (districts). If the application for registration of geographic marks from sample cities (districts) meets the conditions of advanced examination and approval, the State Administration for Industry and Commerce may speed up the handling of it.

Finance & Taxation

Rules on Deducting Input VAT on Project Operators in Financing with Trusted Funds Clarified

The State Administration of Taxation (SAT) has issued an announcement regarding the deduction of input VAT in the course of financing projects with trusted funds such that: a project operator using trusted funds to finance a construction project means that a project operator cooperates with a licensed trusted company in constructing and developing a project in which the trusted company is responsible for fundraising and trust planning, the project operator is responsible for constructing and managing the project and the assets in the project will be owned by the project operator upon completion of the project. Under these circumstances, the project operator may be allowed to deduct the relevant input VAT by presenting the VAT invoices and other evidence obtained in the course of operating the project. The aforesaid arrangements will become effective from 1 October 2010. The qualifying input VAT which is not deducted by the aforesaid effective date shall be deductible, but the input VAT which is deducted by that time shall become irrelevant.

Certain Major Science and Technology Projects to Be Exempt from Tariff and Import VAT

The Ministry of Finance and four other ministries and commissions have recently published the Notice on Import Tax Policies on Major Science and Technology Projects which shall take effect as of 15 July 2010. The Notice provides that any enterprise or university or college, research institution or other public institution which undertakes any major civil-related science and technology project (subject) set forth in the Outline of the National Plan on Medium-and-long-term Development of Science and Technology (2006-2020), when importing any key equipment (including software tools and technology), component or part or raw material that is required for the project and cannot be produced in China with any appropriations from the central finance, local financial funds, self-raised funds or any funds obtained through other channels, shall be exempt from import tariff and import VAT.

Shanghai Further Supports SMEs to Finance Themselves

The Shanghai government has issued the *"Certain Opinions on Advancing the Development of the Local Financial Guarantee Industry to Further Support Small and Medium Enterprises to Finance Themselves"* expressing its intention of providing more incentives and taking more measures to encourage private investment and capital to participate in the development of financial guarantee services for small and medium enterprises (SMEs). According to the Opinions, eligible profit-making financial guarantee

organizations in Shanghai may be entitled to municipal or regional governments' subsidies amounting to 20% to 40% of the relevant amount of the guarantee given in accordance with the level of the guarantee for the target SMEs as well as the central government policy.

CIRC Announces Basic Rules on Insurers' Internal Control

The China Insurance Regulatory Commission (CIRC) has issued the *"Basic Rules on Insurance Companies' Internal Control"* which will become effective from 1 January 2011 with the intention of governing the compliance, reliability and cost-effectiveness of insurance companies. The Basic Rules mainly cover the control of sales activities, operations, fundamental management and use of the capital of insurers. According to the Basic Rules, such internal control shall be conducted in connection with insurers' business performance and their accountability systems. No person shall have any power to act outside the scope of such internal control or change internal control procedures without authority. The Basic Rules also impose a duty on insurance companies to timely and periodically modify their internal control procedures for the purpose of improving their business operations and management.

CSRC to Regulate Behavior of Senior Management Personnel of Listed Companies

It is reported that the CSRC is currently working actively to release the Rules for the Supervision and Administration of Listed Companies. The Rules shall be based on the enhancement of listed companies' transparency and the improvement in the establishment of a modern enterprise system in listed companies with a focus on regulating the behaviour of listed companies' directors, supervisors, senior management personnel, controlling shareholder and actual controller, and aim to enhance the quality of listed companies. It is reported that after the promulgation of the Rules, the CSRC will successively promulgate the Standards of Behaviour for Listed Companies' Directors, Supervisors and Senior Management Personnel, the Guidelines for Internal Control System, and other policies and regulations to comprehensively promote the establishment of China's basic systems for the supervision of listed companies.

Others

NPC Now Reviewing Draft Amendments to Criminal Law (VIII)

The Standing Committee of the National People's Congress is currently reviewing the draft eight amendments to the Criminal Law, which propose to remove the death penalty for 13 non-violent commercial crimes, 19.1% of the total number of criminal offences subject to the death penalty. According to the eight amendments, a person who organizes leads or actively participates in triad activities shall be subject to a fixed term of imprisonment from three to ten years. It is also proposed that criminals over 75 will not be sentenced to death and that criminals under 18 who are imposed a fixed-term imprisonment of less than five years may be exempted from reporting their previous criminal records. The draft amendments impose criminal liability for certain acts which are currently subject to administrative procedures or civil proceedings, such as dangerous

driving and default payment for employment services.

Rules on Hearing Maritime Cases Regarding Limitation of Damages & Liability Issued

According to the "*Certain Provisions of the Supreme People's Court on Hearing Maritime Cases Regarding Limitation of Damages and Liability*" issued by the Supreme People's Court with effect from 15 September 2010, an interested party in a maritime case who intends to apply for the Maritime Liability and Damages Fund (the Fund) shall make an application to the trial court. Where the court opens the case and the court hears the case are not the same court and the parties do not have any agreement on jurisdiction, the application must be submitted to the court which opened the case. An application for the Fund does not affect the applicant's defence in limiting his/her liability and damages.

Legal Comments

New Judicial Interpretation for Foreign Invested Enterprises Solves Disputes Involved in Entrustment Investment

By Paul Huang & Aileen Weng

On August 5, the Supreme People's Court released a new judicial interpretation which is critical to foreign invested enterprises, namely *the Regulation on Certain Issues Regarding Adjudicating Disputes of Foreign Invested Enterprises* (the Interpretation). In recent years, people's courts at various levels witnessed a growing number of disputes related to foreign invested enterprises (FIEs). During the recent two years, the number of such cases has increased to 1/5 of total foreign related civil & commercial cases. The new Interpretation aims to solve disputes in relation to establishment and alteration of FIEs.

The Interpretation has retroactive effect on cases which are not finally judged. However, the Interpretation does not apply to cases where the parties apply for rehearing,

In practice, some investment made to FIEs is entrustment investment for the sake of convenience or confidentiality. The legitimate rights of investors may not be duly protected if such entrustment investment is recognized as null and void on a wide basis. Therefore, according to the Interpretation, entrustment agreement is acknowledged as effective except for violation of laws and administrative regulations. In addition, the Interpretation prescribes various relief measures corresponding to different situations for entrustment investment.

Confirmation of shareholder's identity

The New Interpretation conditionally upholds the claim by de facto shareholder for confirmation of shareholder's identity.

Under the circumstance where disputes arise between the nominal shareholder and the de facto investor, the de facto investor usually requires the people's court to confirm his/her/its shareholder's identity and number of shares directly in the judgment. Nevertheless, pursuant to relevant laws and regulations, any alterations made to the share structure of FIEs are required to be approved by relevant authorities. Judgment of people's court should not substitute the review of approval authorities. Therefore, people's court generally will not uphold claim raised by the de facto investor to confirm the shareholder's identity.

However, the new Interpretation is more flexible in terms of this issue. In case the following requirements are met, the people's court may directly confirm the shareholder's identity of de facto investor and the number of shares he/she/it holds:

- (1) the de facto investor has actually made the investment;
- (2) the identity of de facto investor has been acknowledged by other shareholders;
- (3) the people's court or parties to the litigation has obtained the approval of authorities in charge of FIEs for confirming de facto investor as shareholder.

Performance of entrustment agreement

In accordance with the Interpretation, the people's court should uphold the petition filed by de facto investor for performance of the entrustment agreement with the nominal shareholder. The entrustment agreement should not be recognized as null and void solely for the reason of lack of approval procedures.

People's court should uphold the de facto investor's claim for paying distributed profits and other interests of FIEs by the nominal shareholder. Where the nominal shareholder breaches the agreement and causes damages to the de facto investor, the nominal shareholder shall undertake the compensation liabilities.

Consequences after Annulment of Entrustment Agreement

In the event that an entrustment agreement is recognized as void, different measures should be taken to the shares held by the nominal shareholder under different situations.

When the value of shares exceeds the investment, the court may make a judgment under which the shares remain to be held by the nominal shareholder and the actual investment amount should be paid by the nominal shareholder to de facto investor. The portion in excess of the actual investment should be divided by nominal shareholder and de facto investor reasonably.

When the value of shares is below the investment, the court may make a judgment under which the nominal shareholder should return to de facto investor the investment equaling to share value. The losses will be undertaken by the nominal shareholder and de facto investor pursuant to their respective fault.

The Interpretation provides a remedy for de facto investor when the nominal shareholder expressly waives the shares in the FIE. People's court may verdict to sell or auction the said shares and repay the consideration to de facto investor.

Avoidance of Legal Risks in Entrustment Investment

The foregoing prescriptions in the Interpretation are not meant to encourage entrustment investment, but to seek remedies under current legal framework. Entrustment investment has substantial legal risks to be considered before making a decision. For avoidance of certain legal risks in entrustment investment, the following points may be referred to:

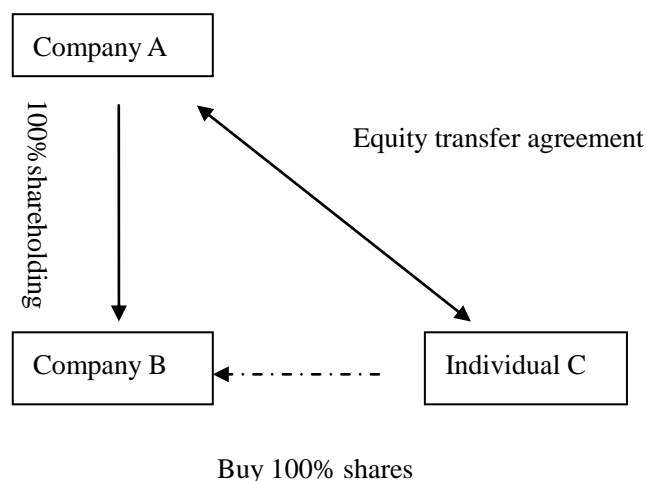
- (1) The de facto investor needs to clarify the relationship with the nominal shareholder in the entrustment agreement. The said relationship must not be defined as lending relationship, or this will cause great potential problems in the future.
- (2) The de facto investor needs to disclose the identity to other shareholders of the FIE and attend shareholders' meeting. This disclosure will reduce potential risks in profit distribution and exercise of shareholder's rights.
- (3) Where the nominal shareholder transfer the shares to a bona fide third party, it's difficult for de facto investor to protect his/her/its rights. The de facto investor may only require the nominal shareholder to undertake the liability for breach of contract and return the proceeds for transfer of shares. Nevertheless, where the de facto investor discloses the identity to other shareholders and procure the proof of the disclosure, the investor may require the shareholders passing the share transfer resolution to compensate his/her/its damages.

Tax Issues Regarding Transfer of Equities of Mainland Enterprises by Hong Kong Companies to Mainland Companies or Individuals

By Sherry Xu & Michael Pan

Brief Introduction of Case:

In 2008, Hong Kong Company A set up a WOFE B whose registered capital is 500,000 RMB in Shanghai. In 2010, Company A plans to transfer its 100% equity of Company B to a Chinese individual at the consideration of 1000,000 RMB. The following chart illustrates the proposed equity transfer:



Purpose of this Article:

The equity transfer in the case is not only related to the tax arrangements between China and Hong Kong, but also related to the tax levy jurisdiction, categories of tax and tax rate, all of which are worthy studying. Through this article, reader can get a rough understanding of the tax issues in the equity transfer.

A. Tax Levy Jurisdiction

a. According to **Article 13.4 and Article 13.5 of Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income(hereafter referred to as the “Arrangement”)**:

13.4: Gains derived from the alienation of shares in a company, the assets of which are comprised, directly or indirectly, mainly of immovable property situated in One Side may be taxed in that Side.

13.5 : Gains derived from the alienation of shares, other than the shares referred to in paragraph 4, of not less than 25% of the entire shareholding of a company which is a resident of One Side may be taxed in that Side.

b. According to **Article 3 of Notification of Several Problems in Implementing 2nd Protocol of the Arrangement** released by the State Administration of Taxation: when implementing **Article 13.5 of the Arrangement** in accordance with **Article 5 of 2nd Protocol**, mainland has the tax levy jurisdiction if a HongKong company or individual obtains gains derived from the alienation of shares or other equities in a company situated in China, and the beneficiary in the 12 months prior to the transfer, directly or indirectly owns more than 25% shareholdings of the company situated in China.

c. According to **Chapter 14 “Charge of Profits Tax” of INLAND REVENUE ORDINANCE(HK)**: Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part. (Replaced 2 of 1971 s. 9. Amended 7 of 1986 s. 12; 56 of 1993 s. 8)

In conclusion, according to the tax arrangements and respective law and regulations of mainland and Hong Kong, mainland has the tax levy jurisdiction over the case, the reasons are listed as follows:

i. The gains of equity transfer derived from mainland is offshore income according to the relevant ordinance of Hong Kong. So Hong Kong has no right to levy the tax.

ii. Since the company A owns more than 25% shareholding of company B in mainland for 12 months before the transfer, mainland has the right of tax levy according to the tax agreements.

B. The Categories of Tax

As mainland has the tax levy jurisdiction, the categories of tax shall be determined by relevant mainland law and regulations. The tax categories related to equity transfer are as follows:

a. Business Tax

According to **Article 2 of Notification about Related Issues of the Business Tax on Equity Transfer**,: The tax department does not impose business tax on equity transfer.

b. Enterprise Income Tax

According to **Paragraph 3, Article 3 of The Law of the People’s Republic of China on Enterprise Income Tax**: If non-resident enterprises have no institutions or establishments in China, or institutions or establishments are set up ,but there is no actual relationship with the income obtained by the institutions or establishments set up by such enterprises, the non-resident enterprises shall pay enterprise income tax in relation to the income originated from China.

c. Individual Income Tax

In the case, since the beneficiary is an enterprise not an individual, the individual income tax is not applicable. However, if the beneficiary is a individual, the individual income tax shall be paid. According to **Paragraph 5, Article 3 of *The Law of the People's Republic of China on Individual Income Tax***, For incomes from royalties, incomes from interest, stocks dividend and bonuses, incomes from lease of property, incomes from transfer of property, occasional incomes and other incomes, the flat tax rate is applicable and the tax rate is 20 percent.

d. Stamp Tax

According to ***Interim Regulations of the People's Republic of China on Stamp Tax and Implement Rules of Interim Regulations of the People's Republic of China on Stamp Tax***:

The equity transfer of non-listed companies which do not occur in the form of stock belongs to the act of property transfer, thus, the company should pay stamp duty according to the property transfer documents.

In conclusion, transfer of equities of mainland enterprises by Hong Kong companies to mainland companies or individuals will at most involve 3 types of tax: enterprise income tax, individual income tax and stamp tax.

C. The Tax Rates

a. Tax Rates of Enterprise Income Tax

According to **Paragraph 2, Article 4 of *The Law of the People's Republic of China on Enterprise Income Tax***: For non-resident enterprises that have obtained income in accordance with the provisions of Paragraph Three of Article 3 hereof, the applicable tax rate shall be 20%.

Paragraph 5, Article 27: The following income may be subject to exempted or reduced enterprise income tax: income prescribed by Paragraph Three of Article 3 hereof.

According to **Article 91 of *Implementation Rules of the Enterprise Income Tax Law of the People's Republic of China on Enterprise Income Tax***, Income earned by non-resident enterprises as cited in Article 27 (5) of the EIT Law shall be subject to a reduced enterprise income tax rate of 10%.

Taxable income=transfer price- actual amount of capital contribution

If the registered capital has not been paid off, then the actual amount of contribution will be calculated herein.

Enterprise income tax = Taxable income×Tax Rate

b. Tax Rates of Stamp Tax

According to ***Tax Rate Schedule of Stamp Tax in 2009***, in the equity transfer , stamp tax at the rate of 0.5 per thousand is applicalbe.

D. The Flow and Time of Tax Payment

According to the relevant laws and regulations of China, if the beneficiary is a Hong Kong enterprise, the taxpayer shall be Hong Kong enterprise and the taxes shall not be withheld by the mainland company.

The equity transfer is required to get the approval by the local commercial committee and subsequently be submitted to the AIC to alter the registration. When the formalities above have been completed, the Hong Kong company shall pay the enterprise income tax to get the tax-paid proof in order to alter the tax registration.

With the new tax registration document and the tax-paid proof, the Hong Kong company can make an application for remitting money out of mainland to the bank and get the transaction consideration. The paying bank will not remit out the transaction consideration from the mainland without the document and proof aforesaid.

There are two ways for the beneficiary to pay the taxes:

a. Hong Kong Company comes to the local tax bureau of transferee to pay the taxes.

b. Entrusting an agent to go to the local tax bureau of transferee to pay the taxes.

If the beneficiary refuses or delays to pay the taxes, the transferee has the rights to require the tax bureau to assist him to urge the beneficiary to pay the taxes.

In conclusion, according to the relevant laws and regulations of China, for a Hong Kong Company or individual to transfer a mainland company's equity to a mainland company or individual, 10% enterprise income tax (applicable to a Hong Kong company), 20% individual income tax (applicable to a Hong Kong individual) and 0.5 per thousand stamp tax (for company and individual both) will be required.

Overview of Franchising Business Division

Cenlaw & Partners was engaged in the study and application of laws and regulations governing franchising business earlier in China. We set up a professional website on HOW TO FRANCHISE IN CHINA(www.fcnlaw.com)

Thanks to the rich experience accumulated in this regard, it is positioned to offer legal & consulting services in terms of franchise system establishment and franchising-related disputes settlement. As one of the pioneering law firms specialized in providing legal service for commercial franchising, Cenlaw & Partners now takes the lead in this area after several years of continuous exploring.

The Legal services that we provide are described as following:

(I) Providing legal support for international commercial franchising activities

- Analysis of legal feasibility, investigation of legal environment, policy and system for internationally-based franchisors wishing to expand business into China.
- Formulation of the development strategy and implementation plan for commercial franchising business, legal consultation for enterprises to implement strategic program , detailed recommendation and proposals specific to individual cases.
- Translation and localization of documentation used for the franchise system, especially the contracts of franchising business.
- Recommendation and investigation of candidate franchisees, involvement in franchising negotiation, management of franchisees, settlement of disputes between both sides.
- Consultation and training course on franchising business

(II) Constructing a legal document system for franchising business

Working out and examining a complete series of legal documentation for franchising business implementation, including:

- Contract of single-outlet franchising
- Contract of regional franchising
- Contract of relevant logistics and distribution
- Contract of trade mark license
- Contract of patent license
- Contract of commercial secret protection and competition restriction
- Contract of outlet management
- Contract of technical support, marketing guidance and business training
- Contract of franchising advertisement and promotion

(III) Handling records of commercial franchising on behalf of clients

We assist franchisors to go through recording procedure based on applicable laws and regulations of the mainland of China, including the preparation and compilation of the record files.

(IV) Providing legal service for information disclosure in commercial franchising

- We assist franchisors to prepare a complete series of disclosure documents that not only comply with legal requirements of disclosure but also protect commercial secrets to the maximum extent.
- We assist franchisors to draft related security agreements.
- We assist franchisors to work out specific disclosure methods.

(V) Conducting examination of legal compliance of franchise system

- We examine the existing organizational structures of the franchisors and provide legal advice in an effort to ensure the legality and efficiency in the process of operating franchising programs and to effectively guard against potential legal risks.
- We examine relevant documents such as brochures on franchising business and bulletins of investment attraction.
- We offer specific proposals and approaches for legal compliance.

(VI) Providing protection of intellectual property in franchising business

- We assist franchisors to examine and design the framework of intellectual property.
- We assist franchisors to examine and draft the system and contract of intellectual property.
- We provide suggestions on the registration and protection measures of intellectual property including trade marks, patents, signs, private technologies and business know-how, etc.
- We assist franchisors to handle the infringement case of intellectual property.

(VII) Providing legal service for capital operation of franchisors

- We assist franchisors to attract investment in venture capital or private equity, to participate in business talk, to examine and draft contracts concerned.
- We conduct due diligence and legal feasibility analysis for financing program.
- We assist in the design of reorganizing and restructuring plans, help to establish and improve the corporate governance structure.

- We assist franchisors to conduct IPO in the capital markets both at home and abroad.

In the area of legal service for commercial franchising, our clients are active in such industries as catering, education, hotel, real estate agency and photography. Some are among the first batch of cross-provincial franchising businesses whose records have been successfully approved by the Ministry of Commerce of the People's Republic of China.

Non-litigation Cases

- ◆ Legal service for localization of franchise system was provided for certain international brand of education entering the mainland of China.
- ◆ Legal service was provided for certain catering brand in its whole process of entering the mainland of China, including investigation of legal environment, policy and system of the mainland of China, analysis of legal feasibility, design of franchising organizational structure and franchise system.
- ◆ Legal service for the protection of intellectual property was provided for certain well-known brand of photography.
- ◆ Legal service was provided for certain chain hotels that developed franchising business.
- ◆ Examination of legal compliance was provided for certain renowned real estate agency that conducted franchising business in China.

Litigation Cases

- ◆ Legal proceedings of commercial franchising contract disputes taken by certain well-known food corporation against its franchisee
- ◆ Legal proceedings of IP disputes taken by certain photography franchisor against non-franchisee
- ◆ Legal proceedings of commercial franchising contract disputes taken by certain education franchisor against its franchisee
- ◆ Legal proceedings of trade mark infringement and disputes on illegitimate competition taken by certain healthcare technology company against certain fitness service center in Shanghai
- ◆ Legal proceedings of copyright infringement taken by a person with the first name Zhao against certain catering company in Shanghai

This Periodical has been prepared for CLIENTS and COOPERATION PARTNERS of CENLAW&PARTNERS . Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this Periodical should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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