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## Preface

On March 28, 2010, Chinese automaker Geely Group purchased 100% shares of Volvo, a brand under Ford Automobile at a price of USD1.8billion. Volvo, a high-end automobile brand with eighty years' history, was purchased by a Chinese enterprise with merely 13 years' experience in auto making. While the transaction is by no means large in the global merge and acquisition market of auto industry, it constitutes, however, the largest cross-border takeover made by a Chinese automaker. We focus on the case not because of its transaction volume, but its implication that Chinese enterprises are steadily going out.

*The Administrative Measures on Registration of Foreign Invested Partnership Enterprises* came into effect in this month, under which background the Shanghai Administration of Industry and Commerce in China issued the business license to Carlyle Fosun (Shanghai) Equity Investment Firm on March 3, 2010.

In this issue of LEGAL EXPRESS, the first article is the information on jointly release of a notice by four departments of China's central government to encourage foreign investments In R&D centres In China.

Actively attracting investment and steadily going out will be the two major directions in the economic development of China in the future.

We advocate cross-border cooperation with a hope to become a promoter in the wake of going out by Chinese enterprises rather than a spectator or witness. With cooperation with overseas law firms, we hope to offer support where necessary to numerous Chinese enterprises like Geely to go out and also assist more foreign investors in finding investment opportunities in China and offer them our professional legal services.

Our monthly publication, as well as its content, is being updated. We not merely hope to produce a newsletter, but a publication which is more professional, profound and commercially valuable. This is the reason why you hereby receive a PERIODICAL OF CENLAW rather than a NEWSLETTER OF CENLAW.

The World Expo, a large event which is approaching, is an opportunity for China to present itself to the world and for the world to better understand China. We welcome you, our cross-border cooperation lawyers, to Shanghai and to World Expo. And we may also enhance our mutual understanding through this opportunity.

## Cooperation News

### **Poland**

In March of 2010, a Poland company appointed CENLAW to solve its trade disputes with an import & export company based in Nanjing. According to the Poland company, the Nanjing company failed to provide the goods before the deadline as prescribed in the purchase contract.

### **NY, US**

Recently, CENLAW was appointed by a wholly foreign owned enterprise established by a US company to provide legal services in the whole process of its dissolution and liquidation. Our services cover a wide range from labor issues to financial issues.

### **France**

In March of 2010, CENLAW & PARTNERS issued legal opinions for a French client involved in dispute concerning investment-linked insurance products with a worldwide renowned insurance company.

### **Singapore**

In March, CENLAW witnessed the execution of the will of a Singapore client. The execution process was attended by CENLAW lawyers and assistants. The client was very satisfied with the service offered by CENLAW.

### **Italy**

Paolo Corinaldesi, partner of our Italian cooperation law firm DOTTORI COMMERCIALISTI & AVVOCATI, visited CENLAW on March 16 and March 17. During the visit, Mr. Paolo Corinaldesi discussed business matters in details with CENLAW.

DOTTORI COMMERCIALISTI & AVVOCATI is one of top Italian law firms with expertise in cross-border merge and acquisition.

### **IL, US**

Gary J. Stern, principal of CENLAW's US cooperation partner, visited CENLAW on March 15, 2010. Accompanied by lawyers of CENLAW, Mr. Stern also paid a visit to Shanghai Federation of Industry and Commerce. Mr. Stern stayed in Shanghai for a week for business matters and was grateful to the reception offered by CENLAW.

### **NC, US**

On March 3, the senior lawyer Stephen M. Hader from the U.S. law firm Moore & Van Allen from Southeast America, visited CENLAW & PARTNERS.

Mr. Hader is a senior lawyer specialized in international legal services. He was invited by CENLAW and had an in-depth discussion with partners responsible for international legal services of our firm. The two parties also had communication on some specific cross-border cases.

## International Trade & Foreign Investment

### **Four Departments Issue Measures To Encourage Foreign Investments In R&D Centres In China**

MOFCOM, MOF, GAC and SAT have recently published jointly the Notice on Measures for the Examination and Approval of Qualifications for Tax Exemption/Refund in the Purchase of Equipment by Foreign-invested R&D Centres. The Notice provides that the examination and approval department shall publish the list of the foreign-invested R&D centres which meet the conditions for tax exemption/refund in the form of an announcement. With regard to the foreign-invested R&D centres which fail to meet the relevant provisions, the department in charge of commerce shall issue a written examination and approval opinion according to the decision by the joint session and specify the relevant reasons. For a new foreign-invested R&D centre that has been established for less than two years and is a non-independent legal-person, the total input to research and development means the assets invested by the foreign-invested enterprise to which it is affiliated for the establishment and construction of such R&D centre, including the assets to be invested for the execution of purchase contracts. The annual disbursement of R&D funds means the annual average amount of the R&D funds that is disbursed in the latest two years. Where an R&D centre has been established for less than two full accounting years, the annual disbursement of R&D funds may be computed in accordance with the amount of R&D funds that is actually disbursed during any 12 successive months since such R&D centre is established. The input of cash and physical assets shall be no less than 60% of the total input.

### **MOFCOM Expresses Its Support For Overseas Investment And Cooperation**

The Ministry of Commerce (MOFCOM) has issued the "*Opinions of the Ministry of Commerce on Guiding Overseas Investment and Cooperation in China for 2010*" providing the key objects as well as policies and measures in connection with overseas investment and cooperation in 2010. Enterprises are encouraged to better use China-Africa Development, China-ASEAN Investment Cooperation Fund and other credit funds and make overseas investment. The Opinions remind traders that full use of the preferential policies and measures under the currently effective bilateral free trade agreements may assist them in expanding their overseas investment.

## Intellectual Property Right

### **NPC Passes Second Amendments To Copyright Law**

The National People's Congress (NPC) has passed the second amendments to the Copyright Law and published the full text of the amended Copyright Law, which will come into force on 1 April 2010. Article 4 has been amended such that "Copyright owners must not act in breach of the Constitutional Law and other laws or in conflict with the public interests in exercising their copyrights. This Country shall lawfully supervise publications and circulations of works". A new article has been inserted to become Article 26, which provides that "To pledge a copyright, the pledgor and pledgee concerned shall complete the pledge registration with the copyright authority under the State Council.

### **State Council Releases Amended Intellectual Property Rights Customs Protection Regulations**

The State Council has amended and released the "*Regulations of the People's Republic of China on the Customs Protection of Intellectual Property Rights*" with effect from 1 April 2010:

1. Article 11 has been revised as “In case of any change to the registration of an intellectual property right, the right holder shall go through a registration alteration or cancellation process at the General Administration of Customs.”
2. Paragraph 1 under Article 23 has been revised as “After applying to the Customs for protection, the right holder may, in accordance with the provisions in the Trademark Law, the Copyright Law, the Patent Law or other relevant laws, apply to the people’s court for the stopping of the infringement act or taking property preservation measures with respect to the goods being detained for alleged infringement.”
3. An item under Article 24 has been inserted as Item 5: Where, before Customs confirms that the alleged infringement goods being detained are infringement goods, the right holder withdraws the application for detaining the alleged infringement goods.

## Finance & Taxation

### **Seven Departments Jointly Release Financing Guarantee Company Administration Measures**

The China Banking Regulatory Commission has released the *“Interim Measures on the Administration of Financing Guarantee Companies”* (the “Measures”) jointly with the National Development and Reform Commission, the Ministry of Industry and Information Technology, the Ministry of Finance, the Ministry of Commerce, the People’s Bank of China and the State Administration for Industry and Commerce. The Measures aim to regulate financing guarantee institutions in the corporate system, namely the limited liability companies and stock limited companies established in accordance with the law and engaged in financing guarantee business. Under the Measures, the establishment of any financing guarantee company and its subsidiary body shall be subject to the prior examination and approval of the competent regulatory department that shall then grant a business permit. The applicant shall apply for registration at the industry and commerce administrative department by presenting the business permit (Article 8). In addition, the minimum limit for registered capital of a financing guarantee company may be no less than RMB5 million (Article 10). No financing guarantee company may involve itself in “deposit taking, granting of loans solely or on commission, investment on commission and so on” (Article 21).

### **CSRC Further Improves GEM Sponsor Work**

The China Securities Regulatory Commission (CSRC) has recently issued the *Guidelines on Further Improving the Growth Enterprise Market Sponsor Work* (the *Guidelines*) in a move to improve the sponsor work, and support and promote the development of emerging strategic industries of the State. The Guidelines require that sponsors, when selecting or recommending companies for the growth enterprise market, shall pay close attention to the innovative capacity of the recommended enterprise, perform an in-depth examination of whether the enterprise possesses core technology, outstanding research and development advantages, innovative business modes and strong market expansion capacity, and explain the same in the special advices on growth.

### **CIRC Issues Insurance Group Company Administrative Rules**

The China Insurance Regulatory Commission (CIRC) has recently issued the *Administrative Rules on Insurance Group Companies* (trial), which provides detailed provisions on insurance group company’s admittance conditions, business scope, capital management and information disclosure. According to the Rules, insurance group companies should focus their core business on equity investment and

management and carry out external equity investment and establishment of the relevant business with self-owned funds, and, insurance group companies and their subsidiaries' total investment in non-insurance financial companies shall not exceed 30 percent of the group's consolidated net assets, and their total investment in insurance-related non-financial companies shall not exceed 10 percent of the group's consolidated net assets.

### **SAT Releases Taxation Administrative Reconsideration Regulations**

The State Administration of Taxation (SAT) has released the *"Regulations on Taxation Administrative Reconsideration"* (Order [2010] No.21 of the SAT). The Regulations apply where any individual, legal person or other organization (the "applicant") believes that the specific administrative act of the taxation authority has violated his legitimate rights and applies for an administrative reconsideration to the taxation administrative reconsideration authority which shall deal with the administrative reconsideration issues. The Regulations consist of 12 chapters including the general provisions, authority and personnel, scope, jurisdiction, applicant and respondent, application, handling, evidence, review and decision, reconciliation and mediation, direction and supervision of taxation administrative reconsideration and supplementary provisions, setting out specific rules in every aspect of the taxation administrative reconsideration.

### **VAT General Taxpayers Qualification Recognition Measures Released**

The State Administration of Taxation (SAT) has released the *"Administrative Measures on the Qualification Recognition of Value-added Tax (VAT) General Taxpayers"*, setting out specific provisions relating to the recognition of qualifications of VAT general taxpayers. Under the Measures, if the annual taxable sales<sup>[1]</sup> of VAT taxpayers (the "taxpayers") exceed the standard for small-scale taxpayers as provided by the Ministry of Finance and the SAT, the taxpayers shall apply to the competent taxation authority for the recognition of qualifications of general taxpayers, except that the taxpayers are one of the following kinds: 1. Other individuals other than individual business households; 2. Non-enterprise entities that choose to pay taxes as small-scale taxpayers; 3. Enterprises that choose to pay taxes as small-scale taxpayers and seldom have VAT taxable items.

### **CICPA Regulates Annual Inspection Of Foreign Exchange**

The Chinese Institute of Certified Public Accountants (CICPA) has recently issued a circular on forwarding the "Notice of the Comprehensive Department of the State Administration of Foreign Exchange on Further Improving the 2010 Annual Inspection of the Foreign Exchange of Foreign-funded Enterprises". Pursuant to the "Notice", to accept a foreign-invested enterprise's entrustment to complete and submit the electronic data of foreign exchange information to the foreign exchange administration for annual inspection, an accounting firm should enter into a separate engagement letter with the foreign-funded enterprise referring to the relevant provisions, specifying the entrustment's purpose, nature, scope, time as well as the respective rights, obligations and responsibilities, etc. of the two parties in order to avoid a different understanding of the entrusted business.

### **MHRSS Tightens Its Supervision Of Human Resources Market**

The Ministry of Human Resources and Social Security (MHRSS) has issued the "*Notice on Further Improving the Supervision of the Human Resources Market*" requiring that organizations providing human resources services for business purposes shall be subject to the centralized supervision and licensing procedures. By 1 May 2010, the provincial authorities of human resources and social security shall replace the licences for those organizations which pass the annual inspection. The authorities concerned are expected to take action against illegal employment agency services as well as overcharging.

## **Others**

### **NPC Passes Amended Election Law Amendment**

The National People's Congress (NPC) has overwhelmingly passed the Amendment to the Election Law which has explicitly abolished the urban and rural difference and realized the election of a deputy to the NPC under the same proportion of population in both city and countryside. Under the Amendment, the quota of deputies to the NPC shall be allocated by the Standing Committee of the NPC in accordance with the population of each province, autonomous region and municipality and the principle of each deputy representing the same urban and rural population as well as the requirements that there must be a proper number of deputies representing all areas, minorities and aspects. The Amendment has also provided relevant provisions with respect to the proportion of electing deputies to the local people's congress. New provisions being inserted are that "the secret voting place shall be set up in the election to prevent from corruption" and that "deputy candidates shall meet with electors" to prevent "blind election". With respect to the reduced number of frontline deputies, the Amendment has provided that "there should be a proper number of basic deputies, especially deputies representing workers, farmers and intellectuals."

### **The Supreme People's Court Clarifies Property Penalty Execution Issues**

The Supreme People's Court has recently issued the *Several Provisions of the Supreme People's Court on Issues concerning Enforcement of Property Penalties* (the Provisions), which, to be effective as of 1 June 2010, consist of 13 articles and mainly specify the following content: 1. the property penalties shall be enforced by the first instance of the people's courts, the enforcement of the property penalties shall be the responsibility of the executive board of the people's courts; the first instance of the people's court may appoint the people's court of the same level at the locality of the property to enforce the same on its behalf; 2. the enforcement of property penalties shall be following the performance of the civil liability collateral to criminal proceedings and repayment of proper debts; 3. providing the circumstances for suspending the execution of property penalties, as well as the resumption of the execution after elimination of the cause of the suspension; 4. providing the conditions for terminating the execution of the property penalties, stipulating that if the people's court discovers any person subject to the penalties in any circumstance of hiding or transferring the property after closure of the execution, such hidden or transferred property shall be recovered.



**“Measures For Administration Of Catering Service Licences” To Take Effect On 1 May**

The “Measures for the Administration of Catering Service Licences” have been officially issued and will come into force as of 1 May 2010. The “Measures” apply to enterprises and individuals engaging in catering services other than food vendors as well as enterprises or individuals providing catering service providers self-finished foods. Pursuant to the “Measures”, catering service providers shall obtain the “Catering Service Licence”, and bear the responsibility for food safety of catering service in accordance with the law. The State Food & Drug Administration shall take charge of the administrative work of catering service licences throughout the country, and local food & drug administrative authorities at each level shall govern the administrative work of catering service licences in their administrative regions. In addition, it provides that the executive personnel in direct charge of enterprises with revocation of catering service licences may not, from the date on which the decision on punishment is made, engage in food service management within 5 years.

## Legal Comments

### Illegality and Remedies for the Investment-linked Insurance Business in Mainland of Hong Kong Insurance Companies

*By Paul Huang and Susan Zheng*

#### A. Background

##### a. What is investment-linked insurance?

Investment-linked insurance is an emerging insurance product in China. It is basically a life insurance that combines investment functions. The premiums constitute not only a life insurance cover, but also investment in specific investment funds of policy holders' choice. The clients may gain high profit with the assistance of financial expert. However, high risk is also undertaken by them at meantime.

##### b. The entry of Hong Kong insurance companies to the mainland insurance market

With the closer economic and commercial relationship between mainland and Hong Kong, the huge potential market of mainland catches the eye of Hong Kong insurance companies. On the other hand, attracted by specific superiority of purchasing Hong Kong insurance products, more and more local or foreign inhabitants in mainland prefer to deal with Hong Kong companies. Nonetheless, the entirely different legal systems implemented in the two regions lead to numerous legal problems to the entry of Hong Kong insurance companies.

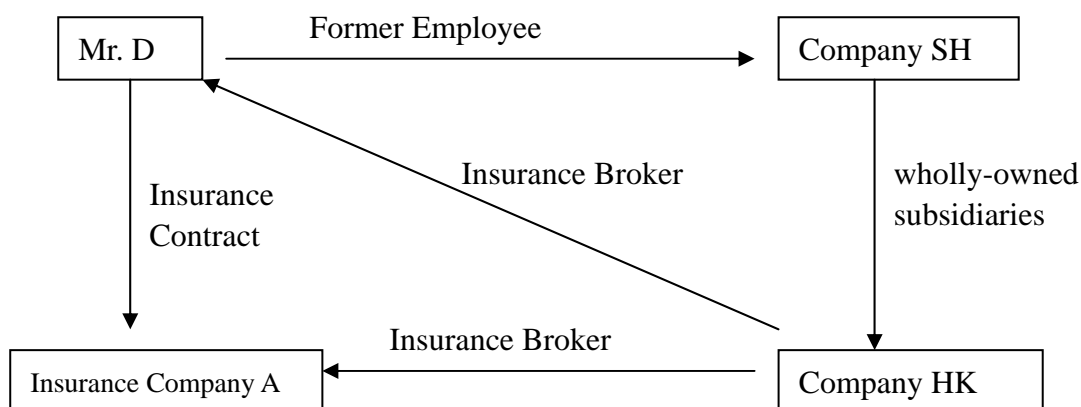
This article focuses on the illegality and remedies for the investment-linked insurance business in mainland of Hong Kong insurance companies. Linked with a real case, some practical tips are provided for investors when purchasing investment-linked insurance products.

#### B. A Real Case

##### a. Preliminary Facts

Mr. D used to be an employee of a Shanghai investment consultant company (Company SH), which is the wholly-owned subsidiary of a Hong Kong investment consultant company (Company HK). During the employment period, Mr. D purchased the investment-linked insurance product offered by a Hong Kong insurance company (Company A) at the introduction of the staff of Company HK. Some time later, Mr. D was notified of the illegality in insurance product's operation and the fraudulent misrepresentation of the product. Soon after, Mr. D resigned from Company SH, and claimed his insurance premium to Company A. After the refusal of Company A, Mr. D also claimed his rights to Company HK, and the reply of which was also negative.

The relationship chart is provided below:



## b. The Analysis on the Illegality of Insurance Company A

The practice of Insurance Company A in mainland violates the compulsory regulations of China PRC and Hong Kong SAR.

i. Insurance Company A did not receive the permission from China Insurance Regulatory Commission.

In accordance with Article 5 of *Investment-linked Insurance Management Interim Measures* of PRC, no insurance companies are allowed to sell investment-linked insurance products in mainland without the authorization of China Insurance Regulatory Commission.

ii. The insurance broker, Company HK did not register to the relevant department of PRC.

Referring to Article 2 of *Investment-linked Insurance Management Interim Measures* of PRC, insurance broker companies shall apply for the permission of China Insurance Regulatory Commission.

iii. Disqualification of Company HK's Employees as Insurance Salespeople

Advanced requirements are put forward to investment-linked insurance salespeople. According to Article 1 and Article 4 of the *Notice of Further Strengthening of Investment-linked Insurance Sales Management*, the training for the investment-linked insurance salespeople shall not be less than 40 hours, and the insurance companies also have the obligation to ensure the qualification of their stuff.

In the case, the disqualification of Company HK's insurance salespeople in accordance with Chinese compulsory regulations may lead to the company's legal responsibility for violation of the law.

iv. Company A's Default on Its Obligation to Disclose in Concluding an Insurance Contract

As stipulated by Article 17 of the *Insurance Law of PRC*, if standard terms are implemented in the insurance contracts, the standard terms shall be attached to the insurance slip and the insurer also has the obligation to explain the contents of the contract. The exclusion clauses shall be pointed out by the insurer clearly in the insurance slip, insurance policy, or other insurance certificates orally or in written to cause the attention of the policy holders.

Our client, Mr. D was not informed of any of the standard terms nor the exclusion clauses in the insurance contract when concluding the contract with the insurer: Company A, which directly results in his misunderstanding in the risk of the investment. Therefore, Company A shall be responsible for Mr. D's financial loss.

**v. The Violation of Due Diligence Duty in Concluding the Contract of Company A**

Based on the *Notice of Further Strengthening of Investment-linked Insurance Sales Management* of PRC, the insurance company is obliged to establish a system of risk assessment for the investment-linked insurance products. The sales people of investment-linked insurance products shall investigate and analyze their clients' financial status, investment experience, purpose to purchase insurance products, and the potential risk tolerance ability, to evaluate whether the evaluated clients has the capacity to purchase the specific investment-linked insurance product, and the evaluation opinions are to be delivered to the client with both parties' signatures for confirmation on it.

Company A in our case, did not comply with its due diligence duty when concluding the contract. With no awareness of the real risk of the company which the insurance fund was devoted to, Company A paid no attention to their clients' interests. And no system of risk assessment was established in accordance with Chinese compulsory regulations. The violation of its due diligence duty is another illegality of Company A.

**c. Remedies for the Policy Holder**

There are three optional remedies for Mr. D in this case.

- i. Negotiate with the insurer and the broker. This is what shall be done first when we are involved in insurance contract disputes. During the process, records of the negotiation must be carefully retained as crucial evidences for our further steps.
- ii. Seek for assistance from local departments like Hong Kong CIB and China Insurance Regulatory Commission. There are some insurance regulators or supervisors, whose responsibility is to ensure the legality of the insurer and insurance brokers in the whole process of performing the insurance contracts. The involvement of them may cause the attention of the insurance companies to deal with the dispute, and a lot of evidences would also turn up therefore.
- iii. File a lawsuit to the court. The most efficient and effective method to solve the problem is litigation. However, the problem of jurisdiction and applicable law is what we should consider first. Under this circumstance, the assistance from professional legal team is definitely necessary for an ordinary victim.

**Tips for Investors**

**a. Pay Attention to the Place of Signing the Contract**

Since the place of signing the contract is a significant element in deciding the jurisdiction and applicable law, attention shall be paid to it by policy holders. On the condition of disqualification as insurer or insurance broker in mainland, the common practice of Hong Kong companies is to ask the policy

holders to sign the contract in mainland, and then the contract will be taken to Hong Kong for the completion of the signing process. According to the regulations of Contract Law, the place of signing the contract is defined as where the latter signature was written. Therefore, by completion of the signing process in Hong Kong, the insurers or the insurance brokers evaded the regulation of Chinese compulsory laws, which leads to the infringement of the policy holders' rights when they are faced with jurisdiction from foreign courts and foreign laws.

**b. Check with the Qualification of the Insurance Companies and Insurance Brokers**

Before signing the contract, it is necessary for the policy holders to check with the qualification of the insurance companies and insurance brokers. Not only whether they are qualified insurer or brokers under the local regulations, but also whether they are permitted to deal with specific insurance products we shall focus on. The disqualification of the insurance companies may leave the contract invalid.

**c. Review Terms in the Contract**

Policy holders must review all the terms in the contract when concluding the contract, especially for the exclusion terms for the insurance companies. According to the Insurance Law of PRC, insurers have the obligation to disclose as required by the policy holders in concluding an insurance contract. Moreover, the standard terms shall be attached to the insurance slip and the insurer also has the obligation to explain the contents of the contract. The exclusion clauses shall be pointed out by the insurer clearly in the insurance slip, insurance policy, or other insurance certificates orally or in written to cause the attention of the policy holders.

**d. Retain the Relevant Evidence**

In the whole process of performance of the contract, policy holders ought to pay attention to the reservation of relevant evidence, including the promotional materials, the communication email correspondences, and other legal documents. Since when the dispute occurs, policy holders are usually at vulnerable status learning from our previous experience, to retain the relevant evidence in advance is the key point for them to win their cases.

## China Further Regulates the Registration and Taxation of Representative Offices

*By Kingward Gan and Aileen Weng*

The State Administration of Industry and Commerce (the “AIC”) and the Ministry of Public Security (the “MPS”) jointly issued on 4 January 2010 the Notice Concerning Strengthening Administration on the Registration of Representative Offices of Foreign Enterprises (the “Notice”). And further to the Notice, the State Administration of Taxation (the “SAT”) released on 20 February, 2010 the Interim Measures on Taxation of Representative Offices of Foreign Companies (the “Measure”), which shall come into effect as of January 1, 2010. Both the two regulations further clarify certain issues concerning the representative offices of foreign companies that operate in China.

### 1. Background

Representative offices are the economic choice for foreign companies that have the intension to conduct business in China but want to avoid certain risks brought by operating a formal business entity. Under current laws and regulations, a representative office can not be engaged in direct profit making activities. However, during the recent years, some representative offices are illegally engaged in business activities and submit fake certificates for registration purpose, which greatly damages administration on representative offices. The Notice and the Measures are promulgated with the aim of strengthening management on representative offices and promoting the healthy development of the market.

### 2. Highlights of the Notice

#### **Two Years’ Presence of the Foreign Company**

While establishing or altering registration of a representative office, the foreign company is required to submit a certificate of business operation for over two years and a credit worthiness certificate issued by a financial institution. The above two certificates are required to be certified by a notary public of the country where the company incorporates and be authenticated by the Chinese embassy or consulate in the said country. The Notice imposes the requirement of a presence of at least two years on foreign companies.

Nevertheless, for a foreign enterprise with less than two years’ presence, it may wish to acquire another qualified shell company overseas to set up the RO in China.

#### **New Registration Certificate Valid for Only One Year**

Compared with previous practice, the new registration certificate will only be valid for one year, indicating that representative offices need to renew their registration certificates every year. Any registration certificate valid for over one year should be replaced when going through alteration or extension procedures.

#### **Maximum Four Representatives in a Representative Office**

The Notice also restricts the number of representatives dispatched to a RO. The maximum number of

representatives should not exceed four, which includes the chief representative. The ROs with over four representatives are principally prohibited from adding new representatives, whilst only de-registration of representatives is allowed.

In fact, certain local AICs have already adopted such requirement prior to the promulgation of the Notice.

#### **On-site Inspection Required**

Under the Notice, local AICs are required to carry out on-site inspection on the premises and other issues of newly established ROs within three months following their registration. Any ROs submitting fake documents should be punished timely. Where any ROs are found engaged in profitable business activities, local AICs may impose punishment on such ROs under the name of unlicensed business activities.

#### **Cooperation between AIC and MPS**

The Notice states that local AIC and branches of MPS should strengthen cooperation and coordination in administration of ROs. AICs should notify local branches of MPS of the information on registration and illegal operation of ROs. And if the MPS branches find that a representative office is registered at a false business address or operates at an address other than its official registered address, or that a representative office or its representative(s) fail to participate in the annual assessment exercise, the same should be notified to the AIC authorities for further action.

### **3. Highlights of the Measures**

The Measures make a significant change to the existing tax rules on ROs and shall be effective retrospectively from 1 January 2010.

#### **Revised Tax Declaration Requirements**

In accordance with Article 6 of the Measures, ROs should declare to tax authorities the corporate income tax ("CIT") and business tax ("BT") within 15 days following the end of the preceding quarter and declare the value-added tax ("VAT") in accordance with relevant laws and regulations.

The Measures abolish the previous rule of tax declaration within one month following the end of each year for ROs exempted from taxation. All ROs, even enjoy preferential treatment under relevant tax treaties, should declare the taxes according to Article 6 of the Measures.

#### **Abolishment of Tax Exemptions**

The Measures have abolished previous tax exemption treatment for ROs. Nevertheless, ROs eligible for preferential tax treatment under relevant tax treaties may still enjoy such treatment after going through the procedures prescribed in a notice issued by State Administration of Taxation in 2009 (GuoShuiFa [2009] No. 124) and making declaration under the Measures.

#### **Two Deeming Methods**

ROs are required to keep book accounts and calculate the taxable incomes and revenues, or their expenses. However, in case a RO fails to act accordingly, tax authorities are entitled to adopt the following two deeming methods:

(1) Cost-plus method

This method is applicable to ROs that may ascertain expenses but may not ascertain revenues.

Deemed gross revenue = expenses for the period / (1 – deemed profit rate - applicable BT rate)

CIT = Deemed gross revenue x deemed profit rate x CIT rate

The deemed profit rate should not be below 15% according to Article 8 of the Measures.

(2) Profits Deemed by Income Method

This method is applicable to ROs that may ascertain incomes but may not ascertain costs and expenses.

CIT = Actual gross revenue x deemed profit rate x CIT rate

Also, the deemed profit rate should not be below 15% according to Article 8 of the Measures.

The new Measures have greatly changed the existing taxation regime of ROs in China. Further communications between ROs and their head offices or local tax authorities are highly recommended.



## Anti-Dumping Against China and Chinese Enterprises' Response Strategy

*By Paul Huang and Susan Zheng*

### News Background

On February 22, 2010, pursuant to paragraph 41(1)(a) of the *Special Import Measures Act*, the President of the Canada Border Services Agency made final determinations of dumping and subsidizing respecting the alleged injurious dumping and subsidizing of oil country tubular goods originating in or exported from the People's Republic of China.

On February 23, 2010, the Canada Border Services Agency (CBSA) concluded its re-investigation of the normal values and export prices of certain waterproof footwear and bottoms made of plastic or rubber from the People's Republic of China, pursuant to the *Special Import Measures Act* (SIMA).

After the entrance to the WTO, China is faced with severe anti-dumping problems from all over the world in current years. The first anti-dumping case against China made its debut in 1979, and thereafter China turns out to be the biggest victimized country worldwide gradually. Actually, nowadays antidumping already severely effected the healthy development of the export trade of China, and much attention is paid to this issue by Chinese government.

### The Characteristics of Chinese Anti-dumping Cases

When we have a closer look at the current status of anti-dumping cases against China, 7 main categorizes of Chinese victimized products including base metals, chemicals, mechanical and electrical products, fabrics, rubber plastic products, ceramic and glass products and other miscellaneous products can be found. The Chart A provided below illustrates the proportion of 7 categorizes in the total number of Chinese products involved in anti-dumping from January 1995 to July 2008.

We can be clearly informed from the fact that most of Chinese anti-dumping products can be classified as labor intensive and low added value products. On the other hand, the countries, which have taken anti-dumping measures against China is not limited to developed countries, such as US and European Union, but some developing countries like Brazil, Turkey and India as well. In 2002, America and India are the two countries which filed most anti-dumping cases against China.

Chart A

Name of the Product	The Number of Cases Against China	The proportion of the Cases Against China (%)	The Number of Cases Worldwide	The proportion of the Cases Worldwide
Base Metals	146	22.8	905	27.5
Chemicals	134	20.9	666	20.2
Mechanical and Electrical Products	76	11.9	305	9.2
Fabrics	54	8.4	252	7.6
Rubber Plastic Products	46	7.2	427	12.9
Other Miscellaneous Products	44	6.9	81	2.5
Ceramic and Glass Products	36	5.6	110	3.3
Total	536	83.8	2746	83.1

The relevant statistics are from [www.wto.com](http://www.wto.com)

### Relevant Legislations in China

Ministry of Foreign Trade and Economic Cooperation (MOFTEC) promulgated *Regulations on Responding Anti-dumping Cases Related to Export Products* (Regulations) in August 2006, providing new legal foundation for Chinese enterprises to response anti-dumping cases. The Regulations, in contrast to the version of 2001, emphasize more on the function of enterprises as respondents and enlarge the scope of the unit organizing action responding such as industry association and temporary coalitions.

In reference to Article 3 of the Regulations, the enterprises, which export the products concerned to the country (region) raising the anti-dumping investigation shall response to the lawsuits actively. In addition, Article 8 of the Regulations also establishes the enterprises' obligation to collect and clarify relevant information of anti-dumping cases and to report to the industrial organization.

### Current Situation of Chinese Enterprises to Respond to Anti-dumping Cases

The current situation of Chinese enterprises to respond to anti-dumping cases is not optimistic, and many foreign-trade enterprises are not willing to invest resources to respond to anti-dumping cases. The reasons for the negative attitudes of them can be concluded as:

#### 1. Limited Volume of Export

Some small or middle sized companies, subjected to their limited volume of export, the influence of anti-dumping from oversea is also insignificant to them.

#### 2. High Expense and Cost to Involve in Anti-dumping Case

A lot of enterprises are afraid of the cost in both time and money for the anti-dumping cases, and therefore, they always prefer to disregard the fact that their negative attitude may direct lead to their large

financial losses in the end.

### **3. Lacking of Professional Knowledge and Experience**

Another barrier for Chinese enterprises to respond to the anti-dumping cases is the requirement for professional knowledge and experience. In China, anti-dumping cases are still emerging business for many law firms, and we believe that the market for anti-dumping business is quite large in China.

### **The Strategy for Chinese Enterprises in Faced of Anti-dumping Cases**

We highly recommend positive attitude for our enterprises in faced of anti-dumping cases. In recent years, many cases can illustrate that in the situation of responding to the lawsuit actively, the final anti-dumping rate would be substantially reduced. We hereby list some advice for Chinese enterprises to respond anti-dumping cases.

#### **1. Awareness of Relevant Legislation and Notice**

As for foreign trade enterprises, the awareness of relevant legislation and system overseas is crucial. The short period for the enterprises involved to respond to the investigation requires our enterprises to react quickly as soon as the investigation is initiated.

#### **2. Collection of Relevant Information**

The improvement in our enterprises' management system is also fairly significant in dealing with anti-dumping cases. The documents such as various agreements, business letters, and invoices, shall be carefully reserved. The key point to win the anti-dumping cases is the proof that the export price is not lower than the normal value, and the evidence collection of which is supposed to catch our attention.

#### **3. Acquisition the Support from Local Industrial Association**

For some small-sized enterprises, it's not reasonable for them to respond to the anti-dumping lawsuits individually owing to the high cost in both money and time. Local Industrial Association therefore turns out to be whom we may ask for help. Abundant successful cases, for instance, the anti-dumping case of Wenzhou Lighter Association in Europe and Concentrate Apple Juice case in 1996, can be evidence for the vital role of industrial association in anti-dumping cases.

Another character of industrial association is to communicate with relevant government departments. By alliance with local industrial association, enterprises may also gain the favor of our government.

In conclusion, for their own benefit, enterprises should be preparing right now in face of anti-dumping cases overseas.

*This Newsletter 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 Newsletter 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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