

(Unofficial Translation provided by Deloitte)

Notice of the Ministry of Finance and the State Administration of Taxation on Enterprise Income Tax Treatment of Enterprise Reorganisation Caishui [2009] No.59

In accordance with Article 20 of the “Enterprise Income Tax Law of the People’s Republic of China” and Article 75 of its Implementation Rules, the Income Tax treatments with respect to enterprise reorganisation are hereby stipulated as follows:

Article 1. The term “enterprise reorganisation” as used herein shall refer to transactions dealing with significant changes (excluding changes in daily business operations) in the legal or the economic structure of an enterprise, including a change in the enterprise’s legal form, debt restructuring, equity acquisition, asset acquisition, merger, and split.

- (1) “Change in legal form” shall refer to changes in the enterprise’s registered name, address, and type of entity, etc., but excluding the other types of reorganisations as stipulated in this Notice.
- (2) “Debt restructuring” shall refer to a concessionary agreement entered into between creditor and debtor or a ruling by the Court in view of financial difficulty.
- (3) “Equity acquisition” shall refer to a transaction where an enterprise (hereinafter referred to as the “acquiring enterprise”) acquires equity interest in another enterprise (hereinafter referred to as the “acquired enterprise”) so as to achieve control over the acquired enterprise. The consideration to be paid by the acquiring enterprise may include equity consideration, non-equity consideration, or a combination of both.
- (4) “Asset acquisition” shall refer to a transaction where an enterprise (hereinafter referred to as the “receiving enterprise”) acquires operating assets of another enterprise (hereinafter referred to as the “transferring enterprise”). The consideration to be paid by the receiving enterprise may include equity consideration, non-equity consideration, or a combination of both.
- (5) “Merger” shall refer to a transaction where one or several enterprises (hereinafter referred to as the “merged enterprises”) transfer all of their assets and liabilities to another existing or newly established enterprise (hereinafter referred to as the “merging enterprise”). The shareholders of the merged enterprises will receive an equity interest in the merging enterprise or non-equity consideration so as to achieve a legal merger of two or more enterprises.
- (6) “Split” shall refer to a transaction where an enterprise (hereinafter referred to as the “enterprise being split”) transfers part or all of its assets to an existing or newly established enterprise (hereinafter referred to as the “split enterprise”). The shareholders of the enterprise being split will receive the equity interest in the split enterprise or non-equity consideration so as to achieve a legal split.

关于企业重组业务企业所得税处理若干问题的通知 财税[2009]59号

根据《中华人民共和国企业所得税法》第二十条和《中华人民共和国企业所得税法实施条例》（国务院令512号）第七十五条规定，现就企业重组所涉及的企业所得税具体处理问题通知如下：

第一条. 本通知所称企业重组，是指企业在日常经营活动以外发生的法律结构或经济结构重大改变的交易，包括企业法律形式改变、债务重组、股权收购、资产收购、合并、分立等。

- (一) 企业法律形式改变，是指企业注册名称、住所以及企业组织形式等的简单改变，但符合本通知规定其他重组的类型除外。
- (二) 债务重组，是指在债务人发生财务困难的情况下，债权人按照其与债务人达成的书面协议或者法院裁定书，就其债务人的债务作出让步的事项。
- (三) 股权收购，是指一家企业（以下称为收购企业）购买另一家企业（以下称为被收购企业）的股权，以实现对被收购企业控制的交易。收购企业支付对价的形式包括股权支付、非股权支付或两者的组合。
- (四) 资产收购，是指一家企业（以下称为受让企业）购买另一家企业（以下称为转让企业）实质经营性资产的交易。受让企业支付对价的形式包括股权支付、非股权支付或两者的组合。
- (五) 合并，是指一家或多家企业（以下称为被合并企业）将其全部资产和负债转让给另一家现存或新设企业（以下称为合并企业），被合并企业股东换取合并企业的股权或非股权支付，实现两个或两个以上企业的依法合并。
- (六) 分立，是指一家企业（以下称为被分立企业）将部分或全部资产分离转让给现存或新设的企业（以下称为分立企业），被分立企业股东换取分立企业的股权或非股权支付，实现企业的依法分立。

Article 2. “Equity consideration”, as stated hereinafter, shall refer to consideration paid by the acquiring enterprise in the form of an equity interest or shares of the acquiring enterprise or its controlled entity (控股企业) to purchase or exchange for the assets of another enterprise during the enterprise reorganisation. “Non-equity consideration” shall refer to consideration other than the equity interest or shares of the acquiring enterprise or its controlled entity, including cash on hand, cash in bank, accounts receivable, marketable securities, inventory, fixed assets, other assets, assumed debt, etc.

Article 3. The applicable tax treatment of enterprise reorganisation may be classified as either an “Ordinary Reorganisation” or a “Special Reorganisation” based on various criteria.

Article 4. Ordinary Reorganisation

The tax treatment of the enterprise reorganisation, except where Special Reorganisation treatment is applicable as stipulated under this Notice, shall generally be as follows:

(1) Change in Legal Form – An enterprise altering its legal status from legal person status to a sole proprietorship enterprise, partnership enterprise, or other non-legal person status; or changing its registered address to outside of the People’s Republic of China (including the Hong Kong Special Administrative Region, the Macau Special Administrative Region and Taiwan) shall be deemed as the enterprise distributing its assets to its shareholders in liquidation followed by its shareholders investing in a new enterprise. The tax basis of the enterprise’s assets and the shareholders’ investment in the new enterprise shall be equal to the fair market value of the enterprise’s assets.

Unless otherwise stipulated, an enterprise making other simple changes to its legal form can amend its tax registration directly and the enterprise income tax attributes (including carryover of tax loss, continuity of preferential tax treatment, tax entitlement, and tax obligation) shall remain with the enterprise after the change with the exception of ineligibility of preferential tax treatment due to change of registered address.

(2) Debt Restructuring – In the event of debt restructuring, the relevant tax treatment shall be as follows:

1. The repayment of debt with non-monetary assets shall be regarded as two separate transactions: 1) the sale of such non-monetary assets; and 2) the repayment of debt at fair market value with the non-monetary assets. Gains or losses arising from the sale of such assets shall be recognised accordingly.
2. The conversion of debt into equity shall be regarded as two separate transactions: 1) the repayment of debt; and 2) an equity investment. Gain or loss arising from the repayment of debt shall be recognised accordingly.
3. In a debt restructuring, where the amount of debt settlement is lower than the tax basis of the debt, the debtor shall recognise gain on such difference, while the creditor shall recognise a loss on the excess amount of tax basis of the debt over the debt settlement amount.
4. The debtor’s tax attributes shall, in principle, remain unchanged.

第二条. 本通知所称股权支付，是指企业重组中购买、换取资产的一方支付的对价中，以本企业或其控股企业的股权、股份作为支付的形式；所称非股权支付，是指以本企业的现金、银行存款、应收款项、本企业或其控股企业股权和股份以外的有价证券、存货、固定资产、其他资产以及承担债务等作为支付的形式。

第三条. 企业重组的税务处理区分不同条件分别适用一般性税务处理规定和特殊性税务处理规定。

第四条. 企业重组，除符合本通知规定适用特殊性税务处理规定的外，按以下规定进行税务处理：

(一) 企业由法人转变为企业非法人组织，或将登记注册地转移至中华人民共和国境外（包括港澳台地区），应视同企业进行清算、分配，股东重新投资成立新企业。企业的全部资产以及股东投资的计税基础均应以公允价值为基础确定。

企业发生其他法律形式简单改变的，可直接变更税务登记，除另有规定外，有关企业所得税纳税事项（包括亏损结转、税收优惠等权益和义务）由变更后企业承继，但因住所发生变化而不符合税收优惠条件的除外。

(二) 企业债务重组，相关交易应按以下规定处理：

1. 以非货币资产清偿债务，应当分解为转让相关非货币性资产、按非货币性资产公允价值清偿债务两项业务，确认相关资产的所得或损失。
2. 发生债权转股权的，应当分解为债务清偿和股权投资两项业务，确认有关债务清偿所得或损失。
3. 债务人应当按照支付的债务清偿额低于债务计税基础的差额，确认债务重组所得；债权人应当按照收到的债务清偿额低于债权计税基础的差额，确认债务重组损失。
4. 债务人的相关所得税纳税事项原则上保持不变。

- (3) Equity and Asset Acquisition – In the event of an equity acquisition and an asset acquisition, the relevant tax treatment shall be as follows:
1. The transferor shall recognise gain or loss arising from the transfer of the equity or assets.
 2. The acquiring party shall determine the tax basis of the acquired equity or assets, respectively, in accordance with fair market value.
 3. The acquired enterprise's tax attributes shall, in principle, remain unchanged.
- (4) Merger – In the event of a merger, the relevant tax treatment shall be as follows:
1. The merging enterprise shall determine the tax basis of assets and liabilities received from the merged enterprise(s) in accordance with the fair market value.
 2. The merged enterprise and its shareholders shall follow the enterprise income tax treatment of a liquidation.
 3. The tax losses of the merged enterprise shall not be carried over to or be utilised by the merging enterprise.
- (5) Split – In the event of a split, the relevant tax treatment shall be as follows:
1. The enterprise being split shall recognise gain or loss based on the fair market value of the assets being split.
 2. The split enterprise shall determine the tax basis of the split assets received in accordance with the fair market value.
 3. When the enterprise being split survives, the consideration received by its shareholders shall be deemed as a distribution from the enterprise being split.
 4. When the enterprise being split does not survive, the enterprise being split and its shareholders shall follow the enterprise income tax treatment of a liquidation.
 5. Any tax loss carried forward by each party in the split shall not be utilised among themselves.

Article 5. Conditions for Special Reorganisation

Special Reorganisation treatment may be applicable if all of the following conditions are satisfied:

- (1) The reorganisation has a bona fide commercial purpose and the primary purpose is not to reduce, exempt, or defer any tax payments.
- (2) The assets or equity transferred in an acquisition, merger, or split should meet the prescribed thresholds as set forth in this Notice.
- (3) The original business operations of the transferred enterprise or assets shall remain unchanged within a consecutive 12-month period after the reorganisation.
- (4) The equity consideration shall comply with the prescribed ratio as set forth in this Notice.
- (5) The main shareholder receiving equity consideration cannot transfer the equity consideration acquired within 12 months after the reorganisation.

(三) 企业股权收购、资产收购重组交易，相关交易应按以下规定处理：

1. 被收购方应确认股权、资产转让所得或损失。
2. 收购方取得股权或资产的计税基础应以公允价值为基础确定。
3. 被收购企业的相关所得税事项原则上保持不变。

(四) 企业合并，当事各方应按下列规定处理：

1. 合并企业应按公允价值确定接受被合并企业各项资产和负债的计税基础。
2. 被合并企业及其股东都应按清算进行所得税处理。
3. 被合并企业的亏损不得在合并企业结转弥补。

(五) 企业分立，当事各方应按下列规定处理：

1. 被分立企业对分立出去资产应按公允价值确认资产转让所得或损失。
2. 分立企业应按公允价值确认接受资产的计税基础。
3. 被分立企业继续存在时，其股东取得的对价应视同被分立企业分配进行处理。
4. 被分立企业不再继续存在时，被分立企业及其股东都应按清算进行所得税处理。
5. 企业分立相关企业的亏损不得相互结转弥补。

第五条. 企业重组同时符合下列条件的，适用特殊性税务处理规定：

- (一) 具有合理的商业目的，且不以减少、免除或者推迟缴纳税款为主要目的。
- (二) 被收购、合并或分立部分的资产或股权比例符合本通知规定的比例。
- (三) 企业重组后的连续12个月内不改变重组资产原来的实质性经营活动。
- (四) 重组交易对价中涉及股权支付金额符合本通知规定比例。
- (五) 企业重组中取得股权支付的原主要股东，在重组后连续12个月内，不得转让所取得的股权。

Article 6. Special Reorganisation

If the enterprise reorganisation meets all of the conditions in Article 5 of this Notice, each party involved may elect for Special Reorganisation treatment in respect of the equity consideration of this transaction, which is generally as follows:

- (1) Debt Restructuring – Any gain recognised in a debt restructuring may be recognised evenly over a period of five years when such gain accounts for more than 50% of the debtor's current year's taxable income.

In the event there is a conversion of debt into equity and the relevant gain or loss arising from the debt repayment and equity investment is not recognised temporarily, the tax basis of the equity investment shall equal the tax basis of the debt. The debtor's other tax attributes shall remain unchanged.

- (2) Equity Acquisition – In the event of an equity acquisition, where at least 75% of the equity interest in the acquired enterprise is acquired and the equity consideration received is at least 85% of the total consideration, the following treatment may be elected:

1. The acquired enterprise shareholders' tax basis of the acquiring enterprise shares received shall equal the transferor's original tax basis of the equity interest in the acquired enterprise;
2. The acquiring enterprise's tax basis of the equity interest in the acquired enterprise obtained shall equal the transferor's original tax basis of the equity interest in the acquired enterprise;
3. The EIT attributes and the tax bases of the assets and liabilities of the acquiring and acquired enterprise shall remain unchanged.

- (3) Asset Acquisition – In the event of asset acquisition where at least 75% of the transferring enterprise's assets are acquired by the receiving enterprise and the equity consideration is at least 85% of the total consideration, the following treatment may be selected:

1. The transferring enterprise's tax basis of the receiving enterprise shares obtained shall equal the transferring enterprise's original tax basis of the assets transferred.
2. The receiving enterprise's tax basis of the transferring enterprise's assets obtained shall equal the transferring enterprise's original tax basis of the assets transferred.

- (4) Merger – In the event of a merger where the equity consideration received by the shareholders of the merged enterprise is at least 85% of the total consideration, or no consideration is received for merger of enterprises under common control, the following treatment may be selected:

1. The merging enterprise's tax basis of the merged enterprise assets and liabilities received shall equal the merged enterprise's original tax basis of the assets and liabilities transferred.
2. All of the income tax attributes of the merged enterprise prior to the merger shall carry over to the merging enterprise.
3. The maximum net operating loss ("NOL") of the merged enterprise, which may be utilised by the merging enterprise, equals the fair market value of the net assets of the merged enterprise times the bond yield of the government bond with the longest maturity term as of the end of the year in which the merger occurred.

第六条. 企业重组符合本通知第五条规定条件的，交易各方对其交易中的股权支付部分，可以按以下规定进行特殊性税务处理：

- (一) 企业债务重组确认的应纳税所得额占该企业当年应纳税所得额50%以上，可以在5个纳税年度的期间内，均匀计入各年度的应纳税所得额。

企业发生债权转股权业务，对债务清偿和股权投资两项业务暂不确认有关债务清偿所得或损失，股权投资的计税基础以原债权的计税基础确定。企业的其他相关所得税事项保持不变。

- (二) 股权收购，收购企业购买的股权不低于被收购企业全部股权的75%，且收购企业在该股权收购发生时的股权支付金额不低于其交易支付总额的85%，可以选择按以下规定处理：

1. 被收购企业的股东取得收购企业股权的计税基础，以被收购股权的原有计税基础确定。
2. 收购企业取得被收购企业股权的计税基础，以被收购股权的原有计税基础确定。
3. 收购企业、被收购企业的原有各项资产和负债的计税基础和其他相关所得税事项保持不变。

- (三) 资产收购，受让企业收购的资产不低于转让企业全部资产的75%，且受让企业在该资产收购发生时的股权支付金额不低于其交易支付总额的85%，可以选择按以下规定处理：

1. 转让企业取得受让企业股权的计税基础，以被转让资产的原有计税基础确定。
2. 受让企业取得转让企业资产的计税基础，以被转让资产的原有计税基础确定。

- (四) 企业合并，企业股东在该企业合并发生时取得的股权支付金额不低于其交易支付总额的85%，以及同一控制下且不需要支付对价的企业合并，可以选择按以下规定处理：

1. 合并企业接受被合并企业资产和负债的计税基础，以被合并企业的原有计税基础确定。
2. 被合并企业合并前的相关所得税事项由合并企业承继。
3. 可由合并企业弥补的被合并企业亏损的限额=被合并企业净资产公允价值×截至合并业务发生当年年末国家发行的最长期限的国债利率。

4. The merged entity shareholders' tax basis of the merging enterprise shares obtained shall equal the original tax basis of the merged enterprise shares surrendered.
- (5) Split – In the event of a spin-off, all shareholders of the enterprise being spun-off receive an equity interest in the spin-off enterprise based on original shareholding of the enterprise being spun-off, and the business operations of both the enterprise being spun-off and the spin-off enterprise remain unchanged, provided that the equity consideration received by the shareholder of the enterprise being spun-off is not less than 85% of the total consideration, the following treatment may be selected:
1. The spin-off enterprise's tax basis of the assets and liabilities received shall equal the original tax basis of the enterprise being spun-off;
 2. The income tax attributes attributable to the spin-off assets shall carry over to the spin-off enterprise;
 3. The amount of unutilised NOL of the enterprise being spun-off attributable to the spin-off assets shall be apportioned based on the ratio of spin-off assets to total assets and shall carry over to the spin-off enterprise;
 4. If the shareholders of the enterprise being spun-off surrender part or all of their equity interest in the enterprise being spun-off (hereinafter referred to as "old shares") in exchange for an equity interest in the spin-off enterprise (hereinafter referred to as "new shares"), the tax basis of the new shares shall equal the original tax basis of the old shares surrendered. If the shareholders of the enterprise being spun-off do not surrender old shares, there are two other options available to determine the tax basis of the new shares: (1) the tax basis of the new shares is set at zero, or (2) reduce the tax basis in the old shares of transferor enterprise by the proportion of net assets spun off to the total net assets of the transferor enterprise and allocate the remaining tax basis evenly to the new shares in the spun-off enterprise.
- (6) Non-Equity Consideration – If the enterprise reorganisation meets the criteria under paragraph (1) to (5) of this Article and the party involved elects Special Reorganisation treatment to defer the recognition of gain or loss, any gain or loss corresponding to non-equity consideration received shall be recognised in the current period of the transaction and the tax basis of the transferred assets shall be adjusted accordingly.

The gain or loss corresponding to non-equity consideration = (Fair Market Value of the transferred assets – Tax basis of the transferred assets) x (Non-equity consideration ÷ Fair Market Value of the transferred assets)

Article 7. Cross Border Transactions Eligible for Special Reorganisation Treatment

Certain types of cross-border equity and asset acquisitions (including the Hong Kong Special Administrative Region, the Macau Special Administrative Region and Taiwan), if meeting the conditions stipulated in Article 5, are eligible to elect for Special Reorganisation treatment. The types of transactions are listed as follows:

- (1) A non-resident enterprise transfers the shares of a resident enterprise to its 100% directly owned non-resident enterprise. In addition, such transfer may not lead to a change in the capital gain withholding tax burden arising from the subsequent transfer of the enterprise shares, and the transferring non-resident enterprise issues a written undertaking to the in-charge PRC tax bureau

4. 被合并企业股东取得合并企业股权的计税基础，以其原持有的被合并企业股权的计税基础确定。

(五) 企业分立，被分立企业所有股东按原持股比例取得分立企业的股权，分立企业和被分立企业均不改变原来的实质经营活动，且被分立企业股东在该企业分立发生时取得的股权支付金额不低于其交易支付总额的85%，可以选择按以下规定处理：

1. 分立企业接受被分立企业资产和负债的计税基础，以被分立企业的原有计税基础确定。
2. 被分立企业已分立出去资产相应的所得税事项由分立企业承继。
3. 被分立企业未超过法定弥补期限的亏损额可按分立资产占全部资产的比例进行分配，由分立企业继续弥补。
4. 被分立企业的股东取得分立企业的股权（以下简称“新股”），如需部分或全部放弃原持有的被分立企业的股权（以下简称“旧股”），“新股”的计税基础应以放弃“旧股”的计税基础确定。如不需放弃“旧股”，则其取得“新股”的计税基础可从以下两种方法中选择确定：直接将“新股”的计税基础确定为零；或者以被分立企业分立出去的净资产占被分立企业全部净资产的比例先调减原持有的“旧股”的计税基础，再将调减的计税基础平均分配到“新股”上。

(六) 重组交易各方按本条（一）至（五）项规定对交易中股权支付暂不确认有关资产的转让所得或损失的，其非股权支付仍应在交易当期确认相应的资产转让所得或损失，并调整相应资产的计税基础。

非股权支付对应的资产转让所得或损失 = (被转让资产的公允价值 - 被转让资产的计税基础) × (非股权支付金额 ÷ 被转让资产的公允价值)

第七条. 企业发生涉及中国境内与境外之间（包括港澳台地区）的股权和资产收购交易，除应符合本通知第五条规定的条件外，还应同时符合下列条件，才可选择适用特殊性税务处理规定：

- (一) 非居民企业向其100%直接控股的另一非居民企业转让其拥有的居民企业股权，没有因此造成以后该项股权转让所得预提税负担变化，且转让方非居民企业向主管税务机关书面承诺在3年（含3年）内不转让其拥有受让方非居民企业的股权；

providing that it will not transfer the shares of the acquiring non-resident enterprise shares within three years.

- (2) A non-resident enterprise transfers the shares of a resident enterprise to its 100% directly owned resident enterprise.
- (3) A resident enterprise invests in its 100% directly owned non-resident enterprise in the form of assets or equity interests.
- (4) Other cross-border reorganisation approved by the Ministry of Finance and the State Administration of Taxation.

Article 8. If a resident enterprise elects Special Reorganisation treatment in connection with the transaction as stated under Article 7(3), any gain realised from the transfer of assets (including equity interests) may be recognised equally and subject to tax over a 10-year period (instead of the gain deferral for other Special Reorganisations).

Article 9. In the case of a merger by absorption, where the eligibility and conditions of tax incentive entitlement of the surviving corporation have not changed; such entity's pre-merger unused tax incentive may be carried over after the merger is completed. The amount of the tax incentive is determined based on the taxable income (zero if taxable loss) of the surviving entity in the year preceding the merger.

In the case of a split where the enterprise being split has a tax holiday, if the business operations and the eligibility for the tax holiday remain unchanged for the enterprise being split and the split enterprise post-split, the remaining tax holiday will carry over to both enterprises (the enterprise being split and the split enterprise). The amount eligible for the tax holiday is determined based on the taxable income of the enterprise being split in the year preceding the split (zero if taxable loss) multiplied by the ratio of split assets to total assets of the enterprise being split.

Article 10. A series of asset or equity acquisitions within a consecutive 12-month period should collectively be treated as one transaction according to the substance over form principle.

Article 11. If Special Reorganisation treatment is elected, each party to the reorganisation shall include written information evidencing that the conditions in Article 6 (and Article 7, if applicable) have been satisfied with its annual tax return for the year in which the reorganisation occurs. Special Reorganisation treatment cannot be used if such written documentation is not submitted for record.

Article 12. Any other special enterprise income tax treatment with respect to enterprise reorganisations will be separately addressed by the finance and taxation departments in charge under the State Council.

Article 13. This Notice is effective from 1 January 2008.

- (二) 非居民企业向与其具有100%直接控股关系的居民企业转让其拥有的另一居民企业股权；
- (三) 居民企业以其拥有的资产或股权向其100%直接控股的非居民企业进行投资；
- (四) 财政部、国家税务总局核准的其他情形。

第八条. 本通知第七条第(三)项所指的居民企业以其拥有的资产或股权向其100%直接控股关系的非居民企业进行投资,其资产或股权转让收益如选择特殊性税务处理,可以在10个纳税年度内均匀计入各年度应纳税所得额。

第九条. 在企业吸收合并中,合并后的存续企业性质及适用税收优惠的条件未发生改变的,可以继续享受合并前该企业剩余期限的税收优惠,其优惠金额按存续企业合并前一年的应纳税所得额(亏损计为零)计算。

在企业存续分立中,分立后的存续企业性质及适用税收优惠的条件未发生改变的,可以继续享受分立前该企业剩余期限的税收优惠,其优惠金额按该企业分立前一年的应纳税所得额(亏损计为零)乘以分立后存续企业资产占分立前该企业全部资产的比例计算。

第十条. 企业在重组发生前后连续12个月内分步对其资产、股权进行交易,应根据实质重于形式原则将上述交易作为一项企业重组交易进行处理。

第十一条. 企业发生符合本通知规定的特殊性重组条件并选择特殊性税务处理的,当事各方应在该重组业务完成当年企业所得税年度申报时,向主管税务机关提交书面备案资料,证明其符合各类特殊性重组规定的条件。企业未按规定书面备案的,一律不得按特殊重组业务进行税务处理。

第十二条. 对企业在重组过程中涉及的需要特别处理的企业所得税事项,由国务院财政、税务主管部门另行规定。

第十三条. 本通知自2008年1月1日起执行。