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China Mergers, Acquisitions and Reorganisation Tax Guide.
中国企业并购及重组税务指南.

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Introduction

On 26 July 2010, the State Administration of Taxation (SAT) finally issued further guidance (Bulletin No. 4, "Administrative Measures on the Enterprise Income Tax Treatment of Enterprise Reorganisation" (Implementation Rules)) to clarify certain aspects of the Rules on the Income Tax Treatment of Enterprise Reorganisation" (M&A Tax Rules) that were jointly issued by the Chinese Ministry of Finance (MOF) and the SAT on 30 April 2009. The two documents provide investors with a tax framework for structuring acquisitions and divestments or for undergoing internal reorganisations under the Enterprise Income Tax Law (EIT Law) and the filing and documentation requirements[1]. The M&A Tax Rules are effective retroactively as from 1 January 2008, which aligns with the effective date of the EIT Law.

The M&A Tax Rules introduce the concept of an "Ordinary Reorganisation" and a "Special Reorganisation" and contemplate the following types of company reorganisations:

- Equity acquisition: A company acquires the shares of another company in exchange for shares of the acquiring company and/or non-equity consideration to obtain control over that other company.
- Asset acquisition: A company acquires all or part of the business assets of another company in exchange for shares of the acquiring company and/or non-equity consideration.
- Merger: One or more companies transfer(s) all of its/their assets and liabilities to another existing or newly established company in exchange for shares of the surviving company and/or non-equity consideration.
- Split: A company transfers all or part of its assets and liabilities to two or more existing or newly established companies ("split-off companies") in exchange for shares of the split-off companies and/or non-equity consideration.
- Change in legal form: A company changes its registered name, address or entity type.
- Debt restructuring: An arrangement between a debtor and its creditors relating to debts arising as a result of financial difficulties of the debtor.

Although the Implementation rules are effective as from 1 January 2010, taxpayers that have elected Special Reorganisation treatment since 1 January 2008 must comply with the filing and documentation requirements in the Implementation Rules.

The M&A Tax Rules and the Implementation Rules introduce new concepts into Chinese law. In light of the retroactive effect of the M&A Tax Rules, potential investors should be aware of the basic concepts and the types of acquisition, divestiture and reorganisation structures that are available, and how the rules intersect with other guidance issued by the Chinese authorities and the impact on future reorganisations.

This M&A Tax Guide is not intended to be a comprehensive discussion of all issues that could arise in the course of a reorganisation. A tax advisor should be consulted before making any decision.

1 The M&A Tax Rules only address the EIT treatment of reorganisations. The impact of other taxes, such as Business Tax, Value Added Tax, etc., on a reorganisation also must be considered in any enterprise restructuring exercise.

Chapter 1: Ordinary Reorganisation vs. Special Reorganisation

The M&A Tax Rules classify a transaction (except for a transaction involving a change in legal form) as an Ordinary Reorganisation or a Special Reorganisation. The major differences between the two types of reorganisation are summarised below.

1. Timing of recognition of taxable gain or loss

Ordinary Reorganisation

Taxable gain or loss on the transfer of assets/equity must be recognised at the time the transaction is completed.

Special Reorganisation

In general, the transferor can elect to defer the recognition of taxable gain or loss, except for the portion relating to any non-equity consideration ("boot"), which must be recognised at the time of the transaction.

2. Tax basis of acquired assets/equity

The tax basis represents the tax value of assets/equity that is used to calculate gain or loss when the assets/equity are sold. The tax basis of assets/equity may differ from the book value for financial reporting purposes.

The M&A Tax Rules set out the tax basis for both the transferor and the transferee in an Ordinary Reorganisation and a Special Reorganisation.

Ordinary Reorganisation

The acquirer's tax basis in assets/equity received is stepped up to the post-transaction fair market value (FMV). Thus, the computation of tax depreciation, amortisation and impairment of the exchanged assets/equity will be based on the newly stepped up tax basis. Similarly, gain or loss on the future sale of such assets/equity will be computed using the stepped up tax basis.

Special Reorganisation

The transferee's tax basis of the assets/equity received will be the same as that of the transferor immediately before the transfer, i.e. the basis carries over except with respect to any adjustment for boot. Accordingly, the computation of tax depreciation, amortisation, impairment, and gain or loss will be calculated based on the historical tax basis.

As compared with an Ordinary Reorganisation, the tax deduction for depreciation, amortisation and impairment under a Special Reorganisation will be less where the FMV of the relevant assets/equity is higher than the original tax basis. Furthermore, any gain recognised from the future sale of the acquired assets/equity under a Special Reorganisation likely will be greater than that under an Ordinary Reorganisation (in the case of appreciating assets/equity).

3. Determination of taxable gain or loss

Ordinary Reorganisation

An enterprise must recognise gain or loss of the relevant assets/equity at the time the transaction is executed. The amount recognised will be the difference between the FMV and the original tax basis of assets/equity transferred.

Special Reorganisation

No current tax liability will arise in the case of a Special Reorganisation because the gain or loss is deferred. However, to the extent any non-equity consideration is involved in the transaction, the corresponding gain or loss relating to the non-equity consideration will be recognised immediately. The formula to calculate the gain or loss with respect to the non-equity consideration is:

> (FMV of assets disposed – Original tax basis of assets disposed) x (Non-equity consideration ÷ FMV of assets disposed)

Comment: Although the formula seems to suggest that it only applies to asset acquisitions, the term "assets" in this context may also include shares, and, if so, the formula could be applicable to other forms of reorganisation, such as equity acquisitions, mergers, etc. (the examples below assume that the formula does apply to other forms of reorganisation).

The new tax basis of the relevant assets/equity assumed by the transferor should be adjusted accordingly.

Neither the M&A Tax Rules nor the Implementation Rules provide details of how the new tax basis of the equity acquired by the transferor should be adjusted. In theory, the new basis should be adjusted downward or upward with a value equal to the following formula:

> Transferor's historical tax basis of assets/equity – Boot + Taxable gain recognised or loss recognised

4. Tax loss carryover under a merger and split

The carryover of historical tax net operating losses (NOLs) in the case of a merger or split depends on whether the transaction qualifies as an Ordinary Reorganisation or a Special Reorganisation.

Ordinary Reorganisation

In general, NOLs may not be carried over or utilised in a merger or split.

Special Reorganisation

NOLs may be carried over to the merging enterprise/split-off enterprise with some limitations.

5. Conditions to qualify as a Special Reorganisation

In general, taxpayers may choose to treat a transaction as an Ordinary Reorganisation or a Special Reorganisation. There are five general conditions that must be satisfied for a transaction to qualify as a Special Reorganisation:

1. **Bona fide business purpose**

   The reorganisation must have a *bona fide* business purpose and the primary purpose of the transaction must not be to reduce, avoid or defer the payment of tax.

Although the Implementation Rules do not provide any definition or guidance on what constitutes a bona fide business purpose, taxpayers are required to provide the following information to demonstrate the existence of a bona fide business purpose:

- Information on the structure of the reorganisation, including the transaction model, background, date, pre- and post-reorganisation operations and related common business practices;
- Form and substance of the transaction, from both legal and business perspectives;
- Potential changes and impact on the tax position of each party;
- Changes in the financial situation of each party;
- Whether the transaction will result in unusual economic benefits and/or responsibilities for each party involved; and
- Relevant information on the involvement of a nonresident enterprise in the reorganisation.

2. **Amount of assets/equity transferred**
   At least 75 percent of the transferring enterprise's assets must be acquired in an asset acquisition and at least 75 percent of the equity interest in the acquired enterprise must be acquired in an equity acquisition. All assets and liabilities are transferred in a merger.

3. **Continuity of business operations**
   There must be no change in the original operating activities of the transferred entity or its assets for 12 months after the reorganisation.

   The Implementation Rules clarify that the starting date for the 12-month period depends on the type of reorganisation:

   - For an equity acquisition, the date the equity transfer agreement is effective and all statutorily required equity transfer procedures have been completed.
   - For an asset acquisition, the date the transfer agreement is effective and the assets are actually transferred.
   - In a merger, the date legal title to the assets of the enterprise being merged is transferred to the merging enterprise and the registration with the State Administration of Industry and Commerce (SAIC) is amended.
   - In a split, the date legal title to the assets of the enterprise being split is transferred to the split-off enterprise and the registration with SAIC is amended.
   - In a debt restructuring, the date the debt restructuring contract or agreement becomes effective.

   Comment: There is no exception to the continuity of business requirement, so some enterprises may face a tax exposure if an unanticipated commercial need to change the business operations arises within 12 months of the reorganisation (e.g. a change in the business environment or market conditions). Therefore, further interpretation from the tax authorities on this condition is needed.

4. **Amount of equity consideration**
   At least 85 percent of the total consideration received must be in the form of shares; in other words, the maximum non-equity consideration is 15 percent of the total consideration. Additionally, in a split, the equity received should be based pro rata on the original holding in the enterprise being split.

The M&A Tax Rules define the term "equity consideration" as the shares of the acquiring enterprise or the shares of its controlled enterprise. A "controlled entity" is defined under the Implementation Rules as a company whose shares are owned *directly* by the acquiring enterprise. The M&A Tax Rules are silent as to the percentage of equity (or the degree of management control) that must be owned by the acquiring enterprise to be qualified as "controlled."

The M&A Tax Rules define "non-equity" as items such as cash, bank deposits, accounts receivable, marketable securities, inventory, fixed assets, other assets and the assumption of liabilities.

Comment: In reality, many enterprises have liabilities on their books and the amount could be in excess of 15 percent of the FMV of the enterprise. If these liabilities are considered as the assumption of liabilities for purposes of the 15 percent rule, it would not be possible to elect Special Reorganisation treatment. The Implementation Rules do not provide any guidance on whether the liabilities assumed in an asset acquisition will be counted as non-equity consideration. Further clarification from the tax authorities on this condition is needed.

5. **Continuity of ownership**
   The M&A Tax Rules provide that the main original shareholders receiving equity payments cannot transfer the equity received within 12 months after a Special Reorganisation. The term "main shareholders" is defined under the Implementation Rules as the original shareholders that own more than 20 percent of the shares in the enterprise being transferred or acquired.

Documentation requirements for Special Reorganisation

The Implementation Rule set out detailed documentation requirements for equity and asset acquisitions, mergers, splits and debt restructuring under both Ordinary Reorganisations and Special Reorganisations (the specific rules for each type of transaction is discussed in the following chapters). To elect Special Reorganisation treatment, both the transferor and the transferee are required to submit supporting documents to the Chinese tax authorities; failure to comply will result in the disallowance of deferred gain or loss.

The general requirements are as follows:

1. **Application for Special Reorganisation**
   Under the Implementation Rules, the parties to the reorganisation should submit relevant documents with the tax authorities before electing Special Reorganisation treatment. If formal confirmation is requested from the tax authorities, the "lead party" is responsible for submitting the application to the relevant tax authorities which, in turn, submit the application to the provincial tax authorities.

   The "lead party" is defined as the seller in an equity or asset acquisition, the enterprise which is planned to survive post-merger in a merger by absorption or the enterprise with more assets in terms of value before the merger in a merger by the creation of a new enterprise, the enterprise being split or the surviving enterprise in a split and the debtor in a debt restructuring.

   Comment: In principle, the provincial tax authorities should presumably complete a review and confirmation of Special Reorganisation treatment before the deadline for the annual tax return in the year in which the reorganisation takes place so that the taxpayers can elect Special Reorganisation treatment in appropriate cases.

2. **Post-restructuring compliance requirements**
   Each party to a Special Reorganisation must include information in its first annual tax return for the period after the reorganisation demonstrating that the conditions are still fulfilled within the 12-month post-reorganisation period.

   If conditions have changed for a party, it must notify the other parties to the reorganisation within 30 days after the change. The lead party should inform the relevant tax authorities within 30 days after receiving notice of a change in conditions. All parties should adjust the tax treatment of the reorganisation within 60 days after the change.

3. **Valuation of equity/assets**
   The Implementation Rules require that a valuation, if needed, be made by a legally qualified valuation firm in China.

Treatment of step transactions

The M&A Tax Rules provide that a restructuring that consists of a series of asset or equity transfers within a consecutive 12-month period should collectively be treated as a single transaction according to the substance-over-form principle.

The Implementation Rules further specify that if the 12-month period is spread across two tax years and each party expects that the reorganisation meets the requirements for a Special Reorganisation, Special Reorganisation treatment can be applied in the first tax year. However, if the parties to the restructuring are uncertain whether the reorganisation meets the requirements for a Special Reorganisation, the transaction should be treated as an Ordinary Reorganisation. If the transaction qualifies for Special Reorganisation treatment in the following year, the enterprise can amend its tax return to elect the treatment and apply for a tax refund or a credit against the current year tax payable.

简介

国家税务总局于2010年7月26日发布了第4号公告《企业重组业务企业所得税管理办法》（以下简称“管理办法”），进一步澄清了财政部和国家税务总局于2009年4月30日 联合下发的《关于企业重组业务企业所得税处理若干问题的通知》（以下简称“通知”）的若干问题。通知及管理办法为实施新的企业所得税法后投资者进行并购、分立及内部重组 提供了框架式指导，并对申报和资料准备做出了规定[1]。通知追溯自2008年1月1日起生效，与企业所得税法的生效日期一致。

该通知介绍了一般性重组和特殊性重组的概念，并提出了以下几种企业重组形式：

- 股权收购：一家企业购买另一家企业的股权，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；
- 资产收购：一家企业以股权支付、非股权支付或两者的组合购买另一家企业全部或部分经营性资产的交易；
- 合并：一家或多家企业将其全部资产和负债转让给另一家现存或新设企业，被合并企业股东换取合并企业的股权及/或非股权支付；
- 分立：一家企业将全部或部分资产分离转让给两家或以上的现存或新设的企业，被分离企业的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；
- 企业法律形式改变：企业名称、注册地址或企业形式的变更；
- 债务重组：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法院裁定书，就其债务人的债务作出让步的事项。

虽然管理办法自2010年1月1日起生效，但2008年1月1日（即通知生效之日）后选择特殊性税务处理的纳税人也应按照管理办法的规定准备和递交相关资料。

该通知和管理办法向中国税法注入了新的概念。考虑到通知的追溯效力，投资者需掌握重组的基本概念，认识并购、剥离和重组架构的基本类型，并了解在通知和管理办法与其他相关税收法律法规的交互作用下，相关规则将对未来的重组交易产生甚么具体影响。

本税务指南旨在协助投资者了解新规定下的一些基本概念，向投资者介绍几种可能的交易架构，但并未涵盖企业重组的全部内容，因此建议您在决策前咨询税务顾问的专业意见。

1 请注意通知仅适用于企业重组业务中的企业所得税处理。企业重组业务中产生的其它税项，如营业税，增值税等，也应在企业重组架构中予以考虑。

第一章：一般性重组与特殊性重组

按照通知的规定，重组交易（企业法律形式改变除外）可划分为一般性重组或特殊性重组。

一般性重组和特殊性重组的主要区别如下：

1. 确认转让应税所得/损失的时间

一般性重组
应税所得或损失应在交易完成的当期确认。

特殊性重组
一般来说，除了非股权支付对应的转让所得和损失外，重组的应税所得和损失可以递延确认。而该非股权支付对应的转让所得或损失则应在交易完成的当期确认。

2. 购入资产/股权的计税基础

计税基础是指未来转让资产/股权时用于计算转让所得或损失的计税价值。资产和股权的计税基础或会不同于其在财务报表上的账面价值。

通知中列出了在一般性重组和特殊性重组中转让方和接受方确认的计税基础：

一般性重组
在一般性重组中，收购方所取得的资产/股权的计税基础“提升”至交易后的公允价值。因此，上述资产的折旧、摊销和减值等计算都应基于该提升后的计税基础。同样地，未来转让该资产/股权的所得和损失也将基于该计税基础计算。

特殊性重组
在特殊性重组中，收购方取得资产/股权后的计税基础和转让前转让方的原计税基础相同。被转让资产的折旧、摊销和减值都基于该历史计税基础计算。

在一般性重组下，相关资产/股权的公允价值高于原计税基础，因此，与一般性重组相比，在特殊性重组下折旧、摊销和减值的可抵扣税额可能较小，继而导致未来转让该资产/股权时确认的所得在特殊性重组下可能将高于一般性重组（在资产/股权升值的情况下）。

3. 应税所得/损失的确定

一般性重组
企业应在交易执行时确认相关的股权和资产所得或损失，其金额为被转让股权和资产的公允价值和原计税基础的差额。

特殊性重组
在特殊性重组下，由于应税所得/损失被递延确认，当期无需确认应纳所得税。但交易支付对价中如包括非股权支付部分，则仍应在当期确认非股权支付所对应的所得或损失。非股权支付对应的资产转让所得或损失按以下公式计算：

（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）

评论：虽然上述公式似乎仅适用于资产收购，但公式中的“资产”可能还包括股权。如果这一假设成立，那么该公式同样适用于股权收购、合并等其它形式的重组。在下文的例子中，我们假设上述公式也适用于其它形式的重组，例如股权收购和合并等。

交易中所涉及的资产和股权转让方取得的股权的计税基础也应相应调整。

通知和管理办法目前均未清楚说明如何调整转让方取得的股权的计税基础。理论上，该股权计税基础应按如下公式分别调增或调减：

> 转让方股权/资产的历史计税基础 －非股权支付 + 已确认的应税所得 或者 已确认的可扣除损失

4. 合并和分立中亏损的结转

在合并或分立交易中，过去年度经营净亏损能否结转弥补，取决于交易被认定为一般性重组还是被认定为特殊性重组。

一般性重组

一般而言，被合并企业或被分立企业的经营净亏损不能由合并或分立企业结转弥补。

特殊性重组

被合并企业或被分立企业的经营净亏损可由合并或分立企业在不同的情况下按照不同的限额结转弥补。

5. 适用特殊性重组的条件

一般来说，纳税人可以选择把一项交易视为一般性重组或者特殊性重组。一般性重组没有特定条件的要求，而特殊性重组则必须满足以下五项条件：

1. **合理的商业目的**

   重组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。

   虽然管理办法并没有就合理的商业目的给出定义或指引，但其要求纳税人在备案或提交确认申请时，从以下方面说明企业重组具有合理的商业目的：

   - 重组活动的相关信息，包括重组活动采取的具体形式、交易背景、交易时间、在交易之前和之后的运作方式和有关的商业常规；
   - 从法律和商业的角度分析交易的形式及实质；
   - 重组活动给交易各方的税务状况所带来的可能变化；
   - 重组交易各方的财务状况变化；
   - 重组活动会否给交易各方带来在市场原则下不会产生的异常经济利益或者潜在义务；
   - 非居民企业参与重组活动的情况。

2. **转让资产或股权的金额**

   资产收购下被收购资产应不低于被收购企业全部资产的百分之七十五，或者股权收购下被转让股权应不低于被收购企业全部股权的百分之七十五。合并中所有资产和负债整体转让。

3. **经营的连续性**
企业重组后的12个月内不改变被转让企业/资产原来的实质性经营活动。

管理办法明确，该期限是指自重组日起计算的连续12个月内。管理办法将“重组日”定义如下：

- 股权收购：以转让协议生效且完成股权变更手续日为重组日。
- 资产收购：以转让协议生效且完成资产实际交割日为重组日。
- 企业合并：以合并企业取得被合并企业资产所有权并完成工商登记变更日期为重组日。
- 企业分立：以分立企业取得被分立企业资产所有权并完成工商登记变更日期为重组日。
- 债务重组：以债务重组合同或协议生效日为重组日。

评论：通知和管理办法都未提供关于经营连续性条件的例外情况。在没有例外的情况下，若因不可预计的市场环境变化导致企业出于商业目的需要在重组后12个月内改变经营活动，则某些企业可能面临一定的税务风险。税务机关需就此问题提供进一步的解释。

4. **股权支付金额**
为符合特殊性重组的条件，收购方用自己股权或其控股企业股权支付的对价不得低于交易支付总额的百分之八十五。换句话说，低于百分之十五的交易支付对价可以是非股权形式。此外，在分立中，获得股权的比例应该基于被分立企业原持股比例确定。

根据通知，“股权支付”是指以收购方或其控股企业的股权、股份作为支付的形式。管理办法明确，“控股企业”是指由收购企业直接持有股份的企业。但对于收购企业的持股比例（或管理经营的实际影响程度）是否有要求以符合“控股”的界定，管理办法并未提供更详细的规定。

根据通知，“非股权支付”是指现金、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。

评论：就承担债务而言，实务中许多企业账面确认的负债可能超过其公允价值的百分之十五。因此，如果这些债务的承担被认为是非股权支付，那么许多企业有可能无法符合特殊性重组的条件。对于债务的承担是否被认为是非股权支付的问题，管理办法未提出任何指引，这一点有待税务机关提供进一步解释。

5. **权益的连续性**
通知规定，企业重组中取得股权支付的原主要股东在特殊重组后12个月内不得转让所取得的股权。管理办法中明确了“原主要股东”的定义，即指原持有转让企业或被收购企业百分之二十以上股权的股东。

特殊性重组申请资料要求

管理办法针对股权收购、资产收购、合并、分立及债务重组选择一般性税务处理或特殊性税务处理时需要进行的相关资料准备要求分别做出了具体规定。对于各种交易类型在一般性重组和特殊性重组情况下需要具体提交的资料将在以后各章节中详细列明。未能遵从相关资料准备要求者将不获允许递延所得/损失。

管理办法规定了适用特殊性重组需要遵从的一般性程序，具体如下：

1. **特殊性重组申请**

   管理办法规定，企业重组业务，符合通知规定条件并选择特殊性重组处理的应该备案，如企业重组各方需要税务机关确认，可以选择由重组主导方向主管税务机关提出申请，层报省级税务机关予以确认。

   管理办法对"重组主导方"确认方法明确如下：主导方为股权收购的股权转让方，资产收购的资产转让方，吸收合并后的拟存续企业，新设合并中合并前资产较大的企业，分立中被分立的企业或存续企业，债务重组的债务人。

   评论：原则上，省级税务机关理应在企业重组发生当年的年度企业所得税申报限期前，检阅及确认特殊性税务处理，以便纳税人在适当情况下可选择特殊性税务处理。

2. **后续要求**

   当事各方在完成重组业务后的下一年度的企业所得税年度申报时，须向主管税务机关证明企业在重组后的连续12个月内仍然符合特殊重组的条件。

   当事方的其中一方的情况发生了变化（致使不再符合特殊性重组条件），其应在发生变化的30日内通知其他所有当事方。主导方在接到通知后的30日内须将有关变化通知主管税务机关。交易各方应在情况发生变化后的60日内调整重组业务的税务处理。

3. **股权／资产的评估**

   管理办法规定，如果需要对资产/股权进行评估，需要由具有合法资质的中国资产评估机构出具评估报告。

分步交易的处理

通知要求，企业在重组发生前后连续12个月内分步对其资产、股权进行交易的，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。

管理办法进一步明确，若同一项重组业务涉及在连续12个月内分步交易，且跨两个纳税年度，当事各方在第一步交易完成时预计整个交易可以符合特殊性重组条件，可在第一年适用特殊性重组处理。若当事方不能预计整个交易是否符合特殊性重组，应适用一般性重组。若下一年度完成全部交易后符合特殊性重组条件，企业可以调整上一年度的所得税申报表，涉及多缴税款可以申请退税或抵缴应纳税款。

Caveat

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