



税务快讯

境外投资者以分得利润再投资递延纳税新规

2017年12月28日，财政部、国家税务总局、国家发展和改革委员会、商务部四部委联合发布了《关于境外投资者以分配利润直接投资暂不征收预提所得税政策问题的通知》（财税[2017]88号，以下简称“88号文”）；2018年1月8日国家税务总局又出台了88号文的操作性指导文件《关于境外投资者以分配利润直接投资暂不征收预提所得税政策有关执行问题的公告》（国家税务总局公告2018年第3号，以下简称“3号公告”）。88号文和3号公告落实了国务院于2017年8月16日发布的《国务院关于促进外资增长若干措施的通知》（国发[2017]39号，以下简称“39号文”）。39号文提出“鼓励境外投资者持续扩大在华投资。对境外投资者从中国境内居民企业分配的利润直接投资于鼓励类投资项目，凡符合条件条件的，实行递延纳税政策，暂不征收预提所得税”，以期营造更好的税收营商环境，鼓励外商持续和扩大在华投资。自39号文发布以来，各界均对这一鼓励政策的落地实施翘首企盼。88号文和3号公告正是39号文政策的落地文件，对享受递延纳税的条件、程序、后续管理和执行时间等作了具体规定。其要点如下：

1. 优惠政策的具体内容是什么？

对境外投资者从中国境内居民企业分配的利润，直接投资于鼓励类投资项目，凡符合条件条件的，实行递延纳税政策，暂不征收预提所得税。

2. 符合哪些条件才能享受上述优惠？

需要同时满足以下四方面的条件：

2.1 投资方式

境外投资者以分得的利润进行直接权益性投资，具体是指：

- 新增或转增中国境内居民企业实收资本或者资本公积
- 在中国境内投资新建居民企业
- 从非关联方收购中国境内居民企业股权
- 财政部、税务总局规定的其他方式

上述投资不包括新增、转增、收购上市公司股份（符合《外国投资者对上市公司战略投资管理办法》（商务部 2005 年第 28 号令）规定的战略投资除外）。

2.2 资金来源

境外投资者分得的利润属于中国境内居民企业向其实际分配已经实现的留存收益而形成的股息、红利等权益性投资收益，包括以前年度留存尚未分配的收益。

2.3 资金路径

用于投资的资金（或非现金资产）须从利润分配企业直接划转到被投资企业或股权转让方。

需要注意的是，88 号文对于资金路径的要求非常严格，资金不得经过其他账户周转，非现金资产在直接投资前不得由其他方代持，这会导致一些经过第三方暂管账户进行的股权转让交易无法享受递延纳税的优惠。因此，建议纳税人在进行这类交易时，考虑使用符合规定的资金划转路径，以便享受递延纳税的优惠。

2.4 投资范围

直接投资鼓励类投资项目，即被投资企业在境外投资者投资期限内从事属于《外商投资产业指导目录（2017 年修订）》（中华人民共和国国家发展和改革委员会 中华人民共和国商务部令 第 4 号）中所列的鼓励外商投资产业目录或《中西部地区外商投资优势产业目录（2017 年修订）》（中华人民共和国国家发展和改革委员会 中华人民共和国商务部令 第 46 号）的一项或多项（即至少开展一项）经营活动（其中经营活动包括生产产品或提供服务、研发活动、投资建设工程或购置机器设备、其他经营活动，且日后目录的修订不影响该优惠的享受）。

3. 新政何时生效？是否可以追补享受？

新政自 2017 年 1 月 1 日起执行，境外投资者在 2017 年 1 月 1 日（含当日）以后取得的股息、红利等权益性投资收益可以适用。

境外投资者可以享受暂不征收预提所得税政策而未实际享受的，可在实际缴纳税款之日起三年内申请追补享受该政策，退还税款。

4. 享受优惠需要履行哪些程序？

为了享受递延纳税的优惠，境外投资者、利润分配企业及其主管税务机关应当分别履行以下程序：

4.1 境外投资者

- 填写《非居民企业递延缴纳预提所得税信息报告表》（以下简称《递延纳税报告表》）中应由境外投资者填报的信息，并提交给利润分配企业；

- 关于是否符合上述 2.4 项中要求的投资范围的证明资料，境外投资者应在收回享受暂不征税待遇的投资前或申报补缴税款时（参见后文 5.1 部分），向利润分配企业主管税务机关提供被投资企业在境外投资者投资期限内从事鼓励类投资项目的交易证据、财务会计核算数据等资料；
- 追补享受时，应向利润分配企业主管税务机关提交《递延纳税报告表》以及相关合同、支付凭证、与鼓励类投资项目活动相关的资料以及省税务机关规定要求报送的其他资料。

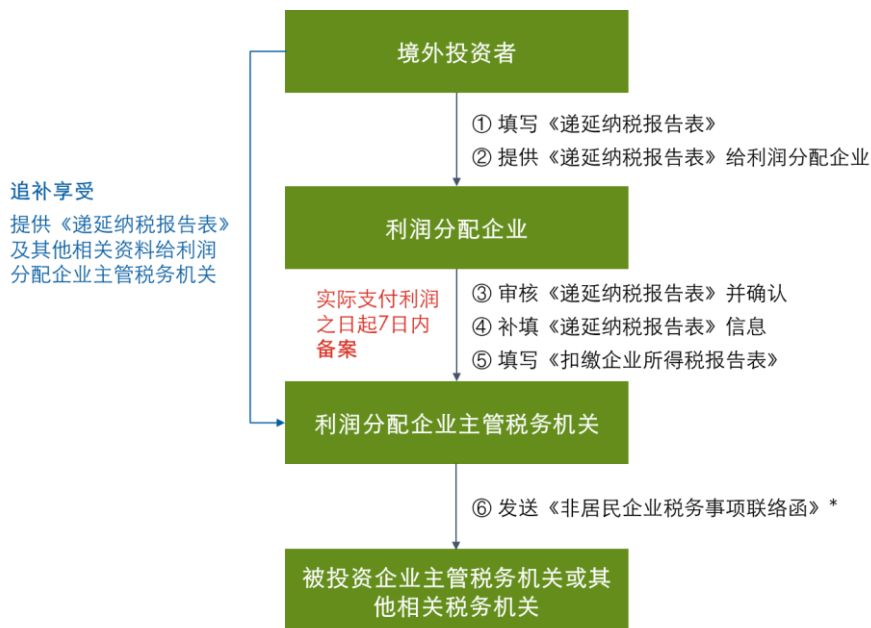
4.2 利润分配企业

- 审核境外投资者提交的资料信息，并确认以下结果：
 - 境外投资者填报的信息完整，没有缺项；
 - 利润实际支付过程与境外投资者填报信息吻合；
 - 境外投资者填报信息涉及利润分配企业的内容真实、准确。
- 填写《递延纳税报告表》中应由利润分配企业填报的信息，如股息的支付方式等。
- 在实际支付利润之日起 7 日内，向主管税务机关提交以下资料备案：
 - 由利润分配企业填写的《中华人民共和国扣缴企业所得税报告表》（以下简称《扣缴企业所得税报告表》）；
 - 由境外投资者提交并经利润分配企业补填信息后的《递延纳税报告表》。

4.3 利润分配企业主管税务机关

应在收到《递延纳税报告表》后 10 个工作日内，向被投资企业主管税务机关或其他相关税务机关发送《非居民企业税务事项联络函》，转发相关信息。

申请享受优惠具体流程图：



*利润分配企业与被投资企业可能为同一企业

5. 何时需要补缴递延的预提所得税？

5.1 实际收回投资

- 境外投资者通过股权转让、回购、清算等方式实际收回享受暂不征收预提所得税政策待遇的直接投资，应在实际收取相应款项后 7 日内申报补缴税款；
- 被投资企业重组，进行特殊性税务处理的，境外投资者可以继续享受递延纳税优惠；
- 境外投资者部分处置一项同时包含已享受和未享受暂不征税政策的投资，视为先行处置已享受暂不征税政策的投资。

5.2 已享受优惠，经税务部门后续核实不符合规定条件的-

- 由利润分配企业的原因（未按规定确认境外投资者提交的资料信息）导致：追究利润分配企业应扣未扣税款的责任，并向境外投资者追缴税款；
- 由境外投资者的原因（如填报信息有误）导致：视为境外投资者未按照规定申报缴纳企业所得税，税款延迟缴纳期限自相关利润支付之日起计算。

境外投资者补缴递延的预提所得税时可以适用税收协定，并且应适用相关利润支付时有效的税收协定，除非后续税收协定另有规定。

我们的评论

88 号文和 3 号公告对于境外投资者享受递延纳税政策的条件制定得较为宽松，释放出中国对于吸引和留住外资的积极信号。有意愿用从中国分得的利润在华进行再投资的境外投资者，应积极了解上述两则文件，注意投资范围的选择以及交易形式和支付方式的合理安排，以充分享受这一利好。

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Tax Newsflash

New Rules Issued on Deferral of Withholding Tax on Dividends Paid to Foreign Investors and Reinvested in China

On 28 December 2017, four Chinese ministries (Ministry of Finance, State Administration of Taxation (SAT), National Development and Reform Commission and Ministry of Commerce) jointly issued a notice, *Circular on Policies on Temporary Exemption of Withholding Tax (WHT) for Direct Investment with Distributed Profits by Foreign Investors (Caishui [2017] No. 88, hereinafter referred to as "Circular 88")*, which defers the imposition of withholding tax on profits distributed by Chinese enterprises to foreign investors. On 8 January 2018, the SAT issued a bulletin, *Bulletin on the Implementation of Policies on Temporary Exemption of WHT for Direct Investment with Distributed Profits by Foreign Investors (Bulletin of the State Administration of Taxation [2018] No. 3, hereinafter referred to as "Bulletin 3")*, which contains the implementation guidance for Circular 88.

Taken together, Circular 88 and Bulletin 3 put into practice the policy announced by the State Council (Circular 39) on 16 August 2017 to roll out new policies to promote foreign investment in China. Circular 39 provides that no withholding tax will be imposed on a distribution of profits by a PRC resident enterprise in China to a foreign investor where the profits are used to invest in domestic projects encouraged by China. The government's policy articulated in Circular 39 aims to create a better tax environment for businesses and encourage foreign investors to maintain and expand their investments in China. Implementation of this new policy has been eagerly anticipated.

Circular 88 and Bulletin 3, which apply retroactively as from 1 January 2017, set out the conditions and procedures for obtaining deferral and the effective date, as well as measures outlining how the tax authorities will administer the incentive.

The key points of Circular 88 and Bulletin 3 are as follows:

1. Overview of the incentive

Profit distributions received by foreign investors from PRC resident enterprises in China that are directly reinvested in encouraged investment projects in China will be eligible for a deferral of the 10% withholding tax on the distributed profits, provided four conditions are fulfilled. Such conditions relate to the form of the reinvestment, the source of the profits, route of the reinvestment, and the scope of the reinvestment.

1.1 Form of the reinvestment: The distributed profits must be used in a "direct equity investment," such as:

- Increasing the paid-in capital or capital reserves of an existing PRC resident enterprise in China by a new capital injection or by transferring retained earnings to capital;
- Setting up a new PRC resident enterprise in China;
- Acquiring an equity interest in an existing PRC resident enterprise in China from an unrelated party; and
- Other forms of investment as specified by the Ministry of Finance or the SAT.

However, the following investments will not qualify:

- investments in newly issued shares of listed companies;
- investments in shares converted from capital surplus or retained earnings of listed companies; and
- acquisition of shares in listed companies

unless the investment is considered a strategic investment under the *Administrative Measures for Strategic Investments in Listed Companies by Foreign Investors (Order of the Ministry of Commerce [2005] No. 28)*.

1.2 Source of profits: The distributed profits (cash or non-cash assets) derived by the foreign investor must be dividends or other equity investment income arising from the actual distribution of the retained earnings realized by PRC resident enterprise in China, including undistributed earnings from previous years.

1.3 Route of reinvestment: The funds or non-cash assets used for the reinvestment must be transferred directly from the profit-distributing enterprise to the invested enterprise or equity transferor. Foreign investors should take note of this strict requirement because failure to comply may result in the foreign investor's being ineligible for tax deferral (e.g. where the payments are routed through a bank account or escrow account that does not belong to the profit-distributing enterprise, the invested enterprise or the equity transferor).

1.4 Scope of reinvestment: The reinvestment must be a direct investment in encouraged investment projects, i.e. during the term of the reinvestment, the invested enterprise must be engaged in business activities that fall within the scope of at least one of the encouraged foreign investment industries listed in (i) the *Catalogue for the Guidance of Foreign Investment Industries 2017 Edition (Order of the National Development and Reform Commission and the Ministry of Commerce No. 4)*; or activities in (ii) the *Catalogue of Priority Industries for Foreign Investment in Central and Western China 2017 Edition (Order of the National Development and Reform Commission and the Ministry of Commerce No. 46)*. (Business activities for these purposes include the manufacturing of goods, the provision of services, research and development activities, investment in construction projects, the purchase and installation of machinery and equipment, etc. Future changes to the catalogues will not affect the enjoyment of benefits that already were granted).

2. Effective date

The tax deferral rules apply retroactively as from 1 January 2017 and can be applied to dividends and other equity investment income derived by foreign investors on or after that date.

Foreign investors that qualify for the deferral, but that already have paid withholding tax on distributed profits may apply for the deferral and request a refund of the tax paid within three years from the date the tax was paid.

3. Procedures for application of tax deferral

To benefit from the tax deferral, the foreign investor, the Chinese profit-distributing enterprise and the tax authorities in charge of the profit-distributing enterprise must follow certain procedures:

3.1 Foreign investor

- The foreign investor must complete its part of the form, "Information Reporting Form for Non-resident Enterprises Deferring Withholding Tax" (hereinafter referred to as the "WHT deferral form") and submit the form to the profit-distributing enterprise.
- In terms of the evidence showing that the reinvestment falls within the scope of the above catalogues during the term of the reinvestment, the foreign investor must submit the evidence to the tax authorities in charge of the profit-distributing entity either before it exits the reinvestment or when it actually pays the deferred tax. Such evidence can be in the form of transaction documentation, financial accounting data, etc.
- A foreign investor applying for a retroactive application of the withholding tax deferral must submit to the tax authorities in charge of the profit-distributing enterprise the WHT deferral form, the relevant contract, the payment certificate, information related to the encouraged investment project activities, and any other information required by the provincial tax authorities.

3.2 Profit-distributing enterprise

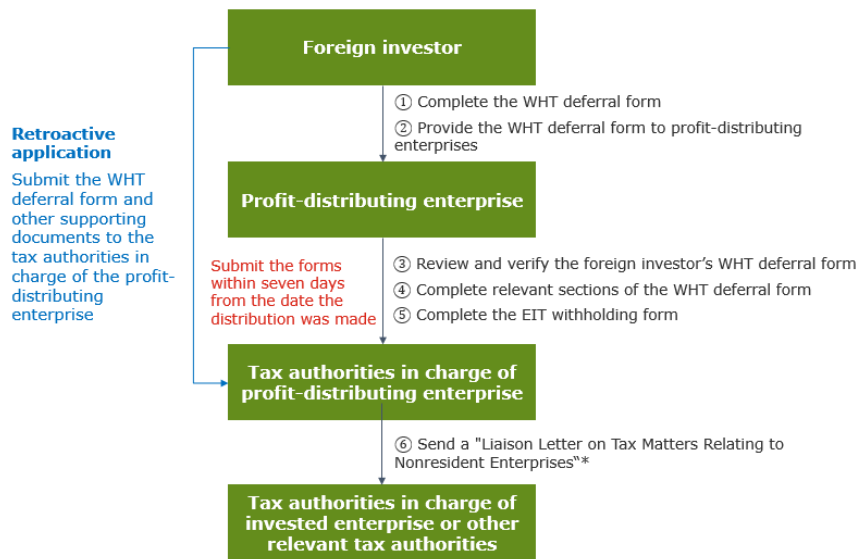
- The profit-distributing enterprise must review the WHT deferral form provided by the foreign investor and verify the following information:
 - That the information provided by the foreign investor in the WHT deferral form is accurate and complete;
 - That the actual payment process relating to the profits is in line with the information provided by the foreign investor; and
 - That the information about the profit-distributing enterprise as described by the foreign investor is accurate.
- The profit-distributing enterprise must complete the relevant sections in the WHT deferral form that apply to it (e.g. whether the dividends were distributed in cash or in kind).
- Within seven days from the date the profits were distributed, the profit-distributing enterprise must submit the WHT deferral form, as well as a completed enterprise income tax withholding form (hereinafter referred to as the "EIT withholding form") to the tax authorities.

3.3 Tax authorities in charge of profit-distributing enterprise

Within 10 business days of receiving the WHT deferral form from the profit-distributing enterprise, the tax authorities must send a "Liaison Letter on Tax Matters Relating to Nonresident

Enterprises" to the tax authorities in charge of the invested enterprise or other relevant tax authorities to notify them of the relevant information.

The following chart demonstrates the procedure:



4. When must the deferred tax be paid?

4.1 The foreign investor exits from the reinvestment

- If a foreign investor exits from a reinvestment that has benefited from the deferral of withholding tax, either by an equity transfer, share repurchase, liquidation or otherwise, it will be required to pay the deferred withholding tax within seven days from the date it receives the relevant payment.
- If the invested enterprise undergoes a special reorganization that qualifies for tax deferral, the foreign investor can continue to enjoy the deferral benefit.
- If the foreign investor disposes of an investment that has partially enjoyed the withholding tax deferral benefit, the foreign investor will be deemed to dispose of the investment that has enjoyed the tax deferral benefit first.

4.2 The tax authorities determine that a foreign investor that enjoyed tax deferral has not satisfied all the relevant conditions in follow-up inspections

- If the situation is caused by the profit-distributing enterprise (e.g. failure to verify the information provided by the foreign investor in the WHT deferral form), the tax authorities will hold that enterprise liable for failure to withhold tax and then demand recovery of the withholding tax from the foreign investor.
- If the situation is caused by the foreign investor (e.g. providing incorrect information), the foreign investor will be deemed not to have filed and paid tax due, and an overdue period for tax payment will be counted as from the date of the profit distribution

A foreign investor paying the deferred withholding tax may apply for tax treaty benefits. The applicable tax treaty in such cases will be the treaty in effect at the time the relevant dividends were paid unless provided otherwise in a subsequently concluded treaty.

Comments

Circular 88 and Bulletin 3 provide a relatively lenient policy for foreign investors to enjoy tax deferral benefit on their dividends, sending a strong signal that the Chinese government is committed to attracting and retaining foreign investment in the country. Foreign investors wishing to benefit from the tax deferral opportunity should consider reviewing their investment plans and continue to monitor future developments in this area.

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