

税务快讯

2014年4月30日

国税总局发布委托投资情况下认定受益所有人问题公告



2014年4月21日，国家税务总局发布2014年第24号公告，在《国家税务总局关于印发〈非居民享受税收协定待遇管理办法（试行）〉的通知》（国税发[2009]124号）、《国家税务总局关于如何理解和认定税收协定中“受益所有人”的通知》（国税函[2009]601号）和《国家税务总局关于认定税收协定中“受益所有人”的公告》（国家税务总局公告2012年第30号）的基础上，对于委托投资情况下受益所有人身份的认定问题作出具体规定。

24号公告自2014年6月1日起施行，公告施行前已发生但税务处理未完结的事项，仍按该公告规定执行。

公告要点

- 公告适用范围为“委托投资”的情形。根据公告的规定，对于非居民投资者在委托投资情形下取得的符合条件的所得，该非居民投资者可认定为受益所有人从而享受有关协定待遇。

公告中所称的“委托投资”是指“非居民将自有资金直接委托给境外专业机构用于对居民企业的股权、债权投资”，其中“境外专业机构”是指“经其所在地国家或地区政府许可从事证券经纪、资产管理、资金以及证券托管等业务的金融机构”；并且境外专业机构“将受托资金独立于其自有资金进行专项管理”，“根据相应的委托或代理协议收取服务费或佣金。受托资金的投资收益和风险应由该非居民取得和承担”。

在通常情况下，我们理解在现行政策中的一些合格境外机构投资者（即 **Qualified Foreign Institutional Investors**，简称“**QFII**”）安排可符合上述有关“委托投资”的规定，然而由于在投资决策，风险报酬等方面的不同，一些通过其他金融机构进行的资产管理和投资安排（例如私募基金，集合投资工具，信托等）很可能被排除在公告的适用范围之外。此外，**QFII** 的形式多样，仅有满足上述条件的 **QFII** 安排才可纳入本公告的适用范围。

- 在中国签订的大多数税收协定下，股息条款中较低的预提所得税率一般只有在受益所有人直接拥有支付股息公司至少 **25%** 资本时才能享受。因此当相关境外专业机构被视为代理人并由此被“穿透”时，投资者即使被认定为受益所有人，通常仍需满足至少 **25%** 的持股要求，才可能申请协定优惠税率。由于现行政策对 **QFII** 在国内公司的持股比例存在限制，因此有关投资者在 **QFII** 安排下享受协定低税率的资格仍会因持股比例要求受到影响。除此以外，拟申请享受协定待遇的投资者可能还需满足其他有关受益所有人的条件。
- 国税总局在公告中对于委托投资情形的认定提出了较为严格的资料要求。出于保密性的原因，这些资料要求对于某些非居民投资者而言可能较难满足。非居民投资者需要提交的资料包括：
 - 投资链条各方（包括该非居民、投资管理人或投资经理、各级托管人、证券公司等）签署的与投资相关的合同或协议，以及能够说明投资业务的其他资料，资料内容应包括委托投资本金来源和组成情况以及各方收取费用或取得所得的约定；
 - 投资收益和其他所得逐级返回至该非居民的信息和凭据，以及对所得类型认定与划分的说明资料；如果非居民与投资链条上一方或多方形成关联关系的，还应向税务机关提供关联交易定价原则、方法及相关资料，以证明相关交易符合独立交易原则；
 - 税务机关为认定受益所有人所需要的其他资料。
- 税务机关在审核非居民所提交资料时，将区分所得类型进行处理。在所得为股息或利息的情形下，“该所得在逐级返回至该非居民的过程中所得性质未发生改变，且有凭据证明该所得实际返回至该非居民，则可以认定该非居民为该笔所得的受益所有人，能够享受税收协定相应条款规定的待遇”。该审核条件强调了股权或债权投资性质在整个投资链条中保持不变的重要性。

- 公告规定“如果投资链条上除该非居民以外的各方收取的费用或取得的报酬与股息、利息有关，则该非居民不是该部分费用或报酬的受益所有人，该部分费用或报酬不得享受税收协定股息和利息条款规定的待遇”，我们理解这是针对基于股权/债券投资收益的一定比例收取费用的情形，而不包括固定收费或者仅基于投资数额的一定比例收取的费用报酬。
- 值得注意的是，公告中适用“受益所有人”规定的收入类型仅限于股息、利息，公告特意指出“如果投资收益的所得类型为财产收益，或其他不适用受益所有人规则的所得类型，则应按税收协定相应条款的规定处理”。

在近年来多种境外资金来华投资形式不断涌现的背景下，国税总局希望通过 24 号公告的发布对目前一些常见的投资模式中受益所有人认定的有关事项予以明确。从这一角度而言，24 号公告的颁布具有较为积极的意义。然而，对于希望将该公告的应用延伸至更广范围的纳税人而言，该公告的作用可能显得相对有限。

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中文

Tax Newsflash

April 30, 2014

SAT issued Bulletin concerning Determination of the "Beneficial Owners" under "Entrusted Investment" Structures



On 21 April 2014, the Chinese State Administration of Taxation ("SAT") issued Bulletin of the SAT [2014] No. 24 ("Bulletin 24", "the Bulletin"), which stipulates the additional rules on determining beneficial owner status under "entrusted investment" structures based on the *"Notice of the SAT on Publishing 'Administrative Measures (Provisional) for Non-residents Enjoying Tax Treaty Treatment'"* (Guishuifa [2009] No. 124), *"Notice of the SAT on How to Understand and Determine 'Beneficial Owners' under Double Taxation Agreements ('DTAs')"* (Guoshuihan [2009] No. 601) and *"Bulletin of the SAT on the Determination of 'Beneficial Owners' under DTAs"* (Bulletin of the SAT [2012] No. 30).

Bulletin 24 will take effect on 1 June 2014, and will apply to any cases occurred before its promulgation but yet to be settled.

Highlights

- The Bulletin is applicable to "entrusted investment" structures. The Bulletin provides that a non-resident investor may apply for treaty benefits (i.e., "beneficial owner") on

income derived from an "Entrusted Investment."

Entrusted investment structures are those in which "... *non-PRC residents entrust their own funds to an "offshore professional institution" for making equity or debt investments in Chinese resident enterprises.*" Such "offshore professional institutions" refer to financial institutions that are permitted by their jurisdictions to engage in the business of securities brokerage, asset management, and custody of funds or securities, etc. Further, it is stipulated that under such structures, that "... *the entrusted funds will be managed separately from the funds of the professional institution which will charge service fees or commissions to the non-residents based on relevant entrustment or agency agreement, while the investment benefits and risks of the entrusted funds are obtained by and born by the non-residents.*"

In general, we understand that the rule would cover certain investment arrangements that non-residents make with Qualified Foreign Institutional Investors ("QFII") under the current Chinese regulations, whereas investments through other financial institutions engaged in assets management and investment, such as private equity fund, collective investment vehicles ("CIVs"), trust etc. would likely be excluded from the scope due to the differences in investment decision making process, risk and benefits, etc. Moreover, despite the numerous types of QFII investment structures, only the ones meeting aforementioned definition/requirements would qualify as the entrusted investments for the purpose of Bulletin 24.

- Under most of the tax treaties China entered into, the preferential dividend withholding tax rate is generally granted where the beneficial owner directly owns at least 25% of the capital of the company which pays the dividends. Therefore, when the offshore professional institution is regarded as nominee/agent for the beneficial ownership requirement purposes under relevant treaties, the investor can only enjoy the reduced tax rate if "25% shareholding" condition is met. This requirement may restrict the application of Bulletin 24 as the current regulations may not allow QFIIs to invest in a Chinese company over certain ownership percentage. In addition, the investor must satisfy other conditions for beneficial owner status as set forth in other relevant circulars.
- The SAT sets forth a high documentation requirement on non-resident investors to prove the existence of a qualifying entrusted investment structure, which some investors may find difficult to satisfy due to confidentiality concerns. The

documentation to be submitted to the Chinese tax authorities include:

- all the agreements or contracts in relation to the investment entered into between relevant parties (including the non-resident, investment manager, custodians, securities firms, etc.) and any other materials that can demonstrate the investment arrangement which should include source of entrusted funds and its components, as well as fees charged by each party;
 - documents relating to the remittance flow of investment income and other income through each level/person to the non-resident; and explanation on the characterization and allocation for each type of income. Where the non-resident is a related party to one or more parties in the investment chain, it shall also present the pricing principle and methodology to demonstrate the arm's length transaction; and
 - Other documents requested by the tax authorities.
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- The tax authorities will handle each case based on the income type. Where the type of investment income are interests or dividends, *"the non-resident shall be recognized as the 'beneficial owner' of the income and hence can enjoy tax treaty benefit, provided that the nature of such income remains unchanged through each step of remittance to such non-resident, and the actual remittance to such non-resident can be backed up by supporting documents."* This verification emphasizes the importance of the unchanged nature of equity/debt investment throughout the investment chain.
 - The Bulletin stipulates that *"if the fees or remuneration received by any parties other than the non-resident investor in the investment chain are linked to the interests or dividends, the non-resident shall not be recognized as the beneficial owner with respect to such fees or remuneration and thus shall be denied the tax treaty benefit on such fees or remuneration."* Based on our understanding, the fees or remuneration being denied preferential treaty rates may relate to those calculated based on certain percentage of the equity/debt investment income, while any fixed fee or fee based on certain percentage of the invested amount would be excluded from it.
 - It is worth noting that the applicable income is limited to dividends and interest. The Bulletin explicitly points out that *"for capital gain or any other type of income which are not subject to the 'beneficial owner' rules, the relevant articles in the tax treaty shall apply."*

With the emergence of various forms for offshore funds investing into China, the SAT

hopes to clarify the determination of "beneficial owners" for certain currently commonly seen investments, and the Bulletin thus plays a positive role. However, taxpayers who hope to extend the application to a broader range of investment structures than merely the qualifying entrusted investment structures, as defined, may find the narrow application of Bulletin 24 disappointing.

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