



## 马来西亚中国服务部税务月刊

### 马来西亚和中国双边税收协定（DTA） - 第二部分

#### 介绍

本期月刊主要介绍营业利润的征税、常设机构（PE）的类型以及消除双重征税方法。

#### 营业利润（双边税收协定第 7 条）

本条主要约定中国及马来西亚之间关于营业利润征税权的划分。通常，中国企业仅需在构成马来西亚常设机构的情况下就相关营业利润缴纳马来西亚所得税。当在马来西亚不构成常设机构时，相关营业利润应仅在中国征税。该原则也被税务从业人员称为“无常设机构即无税负”，其适用于双边税收协定其他条款（如上期介绍的利息、特许权使用费等）规定范畴之外的营业利润。一旦在马来西亚构成常设机构，中国企业在马来西亚应税利润应根据公平交易原则确定。

#### 常设机构（双边税收协定第 5 条）

总体而言，中国企业可能在马来西亚构成的常设机构包括四种类型。下面我们将依据经合组织（OECD）及联合国（UN）税收协定范本评论对每种常设机构的构成要素进行介绍。

##### i. 固定场所型常设机构

双边税收协定第 5（1）条将其定义为“企业进行全部或部分营业的固定营业场所。”其构成要素如下 -

##### a) 具有特定的地点

该要素要求具有中国企业用于开展营业活动的特定地点（例如建筑房产、设施、安装工程乃至街道）。相关中国企业不需要拥有

使用该地点的正式或法律权限，其可以由另一企业所拥有、租赁或在另一企业的房产内（例如一家马来西亚企业的房产）。

b) 该特定地点由该中国企业支配

该要素关注该中国企业是否实际具有使用该特定地点的自由（尽管并非无限制的自由）并确实使用了该特定地点。

c) 该特定地点在时间上具有一定的持久性

该特定地点需要在时间上具有一定的持久性且并非完全暂时性的。具体所需的时间长度应基于所从事业务活动的性质确定，通常情况下为六个月。

d) 该中国企业通过该特定地点进行营业活动

该要素要求中国企业通过该特定地点进行其营业活动。该活动应该是经常性的，但不要求具有永久性或连续性（即无任何中断）。营业活动可以由该中国企业的雇员、非独立代理人，甚或在该地点安置的自动设备进行。

双边税收协定第 5（2）条列示了常设机构应特别包括的情形：管理场所、分支机构、办事处、工厂等。尽管如此，中国企业还应根据上述固定场所常设机构的要素进行判断并确认是否构成常设机构。

ii. 建设工程型常设机构

根据双边税收协定第 5（3）（a）条之规定，常设机构包括“建筑工地，建筑，装配或安装工程，或者与其相关的监督管理活动，仅以连续六个月以上的为限。”

a) 存在建筑工地，建筑，装配或安装工程

此类现场或项目包括：

- 建设道路，桥梁，运河
- 建筑物，道路，桥梁或运河的整修（不仅仅是维护或装饰）
- 铺设管道
- 挖掘和疏浚
- 与施工项目相关的安装

b) 此类现场或项目存在时间为连续六个月以上

此类现场或项目开始于中国企业在马来西亚开展工作的日期（包括进行准备工作），结束于项目完工或终止之日。在确定现场或项目的存在期限时，应考虑因天气恶劣，物资及劳动力短缺等原因而暂停工作的时间。请注意该时间性测试是针对现场或项目的存在时间，而非中国企业员工在马来西亚的实际工作时间。此外，如果中国企业将其部分项目分包给分包商（例如马来西亚子公司或第三方马来西亚分包商），则分包商花费的时间也将计入中国企业的现场或项目时间之中。

iii. 服务型常设机构

根据双边税收协定第 5（3）（a）条之规定，常设机构同样包括“缔约国一方的企业通过雇员或者其他人员，在缔约国另一方为同一个项目或相关联的项目提供的劳务，包括咨询劳务，仅以在任何十二个月中累计超过六个月的为限。”

需注意仅当中国企业的员工或其他人员（即个人而非公司实体）在马来西亚提供服务时才满足实质性测试的要求。

#### iv. 代理型常设机构

根据双边税收协定第 5（5）条和第 5（6）条之规定：当一个人（除独立代理人以外）在缔约国一方（例如马来西亚）代表另一方（中国）的企业进行活动，有权并经常行使这种权力代表该企业签订合同，这个人为该企业（即中国企业）进行的任何活动应视为在缔约国一方（即马来西亚）构成常设机构。

##### a) 非独立代理人

代理人可以是雇员，非雇员或公司。非独立代理人的特征是：

- 委托人对代理人的活动控制程度高
- 代理人仅为唯一/少数的委托人服务
- 业务风险由委托人承担

##### b) 有权签订合同

所指合同为与中国企业业务经营相关的合同。有观点认为，当代理人不止一次为委托人签订对其具有法律约束力的合同时，即满足“有权签订合同”的要素。

#### “例外条款”【双边税收协定第 5（4）条】

即使在满足上述常设机构要素的情况下，中国企业的下列活动也不应被认为在马来西亚构成常设机构：

- i. 仅限于储存、陈列或者交付货物等特定活动；或
- ii. 具有准备性或辅助性特征。为此需确认相关活动是否构成中国企业业务活动的实质及重要部分。

#### 消除双重征税方法（双边税收协定第 23 条）

当中国企业在马来西亚构成常设机构，其归属于常设机构的营业利润将被视为来源于马来西亚而在马来西亚征税。同时，作为中国税收居民，该中国企业取得的相关营业利润同样需要在中国征税 – 进而产生了解决双重征税问题的必要。因此，双边税收协定第 23 条采用了抵免法，即已缴纳的马来西亚税收可抵免该中国企业应缴纳的税收数额，抵免额不应超过就该项所得按照中国税法和规章计算的中国税收数额。如果中国企业从马来西亚公司取得股息，且前者拥有后者股份不少于百分之十，则该抵免应考虑该马来西亚公司就该项所得缴纳的马来西亚税收，即所谓“间接抵免”。

应注意，上述中国企业可利用的马来西亚税收抵免金额仅包括已缴纳的马来西亚税收。在来源于马来西亚的所得在马来西亚获得减免税待遇的情况下（例如根据马来西亚政府提供的税收优惠而减免税），已缴纳的马来西亚税款数额将降低或减少为零，这将会导致中国企业无法利用马来西亚税收申请抵免。因此，双边税收协定采用了“税收饶让”条款来解决这一问题。借助这一条款，中国企业可以就已根据相关马来西亚税收优惠政策减免税收的所得作为未适用减免的所得申请税收抵免，换言之，即可将相关已减免的马来西亚税收视为已缴纳并用于税收抵免。最终，中国企业在中国应缴纳的税收将减少或降低为零。

#### 结论

综上，中国企业需要评估其在马来西亚的经营活动所产生的常设机构风险。实践而言，这是一个复杂的过程，对于每个常设机构的判断评估都应该充分考虑相关事实，并可能需适用不同的解释。

如果中国企业在马来西亚构成常设机构，则需要就在马来西亚税收申请适用中国境外所得税抵免之前，评估其是否符合中国税法和相关条例的规定。

您可以通过点击下列链接阅读中马双边税收协定全文。

<http://www.chinatax.gov.cn/n810341/n810770/c1153105/part/1153106.pdf>



## **Deloitte Malaysia**

### Chinese Services Group Publication

---

#### **Malaysia and China Double Taxation Agreement (DTA) - Part Two**

##### Introduction

The present publication focuses on the taxation of business profits, types of permanent establishments ("PE") and methods to eliminate double taxation.

##### Business profits (Article 7 of the DTA)

This article deals with the allocation of taxing rights on business profits between China and Malaysia. Generally, a Chinese enterprise is liable to Malaysian income tax on its business profits if it has a PE in Malaysia. In the absence of a PE in Malaysia, such business profits shall be taxable only in China. This principle is fondly referred to as 'no PE, no tax' among tax practitioners and it is applicable on business profits that do not fall within the categories of income that are specifically dealt with under other articles of the DTA (e.g., interest, royalties, etc. as discussed in the earlier publication). Once a PE is created in Malaysia, the amount of profits taxable in Malaysia is the amount of profits the PE is expected to make under arm's length conditions.

##### Permanent establishment (Article 5 of the DTA)

There are four types of PE that a Chinese enterprise could potentially create in Malaysia. Our explanations below on the key elements of each type of PE are guided by commentaries of the Organisation for Economic Co-operation and Development ("OECD") and United Nations ("UN").

v. Fixed place of business PE

This is defined by Article 5(1) of the DTA as a *fixed place of business through which the business of an enterprise is wholly or partly carried on*. Its elements are as follows:-

e) Presence of a specific geographical point

This element requires the existence of a distinct place (e.g., premises, facility, installation or even pedestrian street) used for carrying on the business of the Chinese enterprise. The Chinese enterprise is not required to possess formal or legal right to use the place. It may be owned, rented or be at premises of another enterprise (e.g., premises of a Malaysian enterprise).

f) The geographical point is at the disposal of the Chinese enterprise

This element necessitates a factual enquiry on whether the Chinese enterprise has practical (albeit not unlimited) freedom to use, and does use, the geographical point.

g) The geographical point has a certain degree of temporal permanence

This element requires the geographical point to possess a certain degree of permanency and is not purely temporary. The requisite length of time is considered in light of the nature of the business and is generally six months based on practice.

h) The Chinese enterprise carries on its business through the geographical point

This element requires the Chinese enterprise to conduct its business activity through the geographical point. The activity is required to be conducted on a regular basis but need not be permanently and continuously without any interruptions. The activity may be carried on by the Chinese enterprise's employees, dependent agents and even through automatic equipment located at that place.

Article 5(2) of the DTA contains a list of prima facie PE such as a place of management, a branch, an office, a workshop etc. Notwithstanding, the elements of a fixed place of business PE stated above should be examined to conclusively determine whether a PE has been created.

vi. Construction PE

According to Article 5(3)(a) of the DTA, a PE *likewise encompasses a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months*.

c) Existence of a building site, a construction, assembly or installation project

Such site or project includes:

- Construction of roads, bridges, canals

- Renovation (involving more than mere maintenance or redecoration) of buildings, roads, bridges or canals
- Laying of pipelines
- Excavating and dredging
- Installation related to a construction project

d) The site or project exists for more than six months

The site or project is created on the date on which the Chinese enterprise begins its work in Malaysia (including time spent to undertake any preparatory work) and ends on the date of permanent completion or abandonment of work. Temporary discontinuations of work arising from events such as bad weather, shortage of material, labour, etc. are taken into account in determining the lifespan of the site or project. Please note that the temporal test is for the site or project to exist for more than six months, instead of the number of days the Chinese enterprise's personnel are physically present in Malaysia. Lastly, where a Chinese enterprise subcontracts parts of its project to another subcontractor (e.g., Malaysian subsidiary or third party Malaysian subcontractor), the period spent by the subcontractor counts towards the time spent by the Chinese enterprise on the site or project.

vii. Service PE

*According to Article 5(3)(a) of the DTA, a PE likewise encompasses the furnishing of services, including consultancy services, by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, provided that such activities continue for the same project or a connected project for a period or periods aggregating more than six months within any twelve-month period.*

It is crucial to note the substantive test is satisfied only if the services are furnished by employees of the Chinese enterprise or other personnel (i.e., individuals instead of corporate entities) in Malaysia.

viii. Agency PE

*This is provided for under Articles 5(5) and 5(6) of the DTA: where a person, other than an agent of independent status, is acting in a Contracting State (i.e., Malaysia) on behalf of an enterprise of the Other Contracting State (i.e., China), has and habitually exercises an authority to conclude contracts in the name of enterprise, that enterprise (i.e., the Chinese enterprise) shall be deemed to have a PE in the first-mentioned Contracting State (i.e., Malaysia) ...*

c) Non-independent agent

An agent may be an employee, non-employee or a company. Indicators of non-independent agent are:

- A high degree of control exercised by the principal over the agent's activities.
- A sole / low number of principals being served by the agent.
- Entrepreneurial risk is borne by the principal.

d) Authority to conclude contracts

The contracts in question are those relating to the operations of the Chinese enterprise and constitute its business proper. Certain schools of thought suggest this element may be satisfied if the agent exercises the authority to conclude contracts that are legally binding on the principal more than once.

'Exclusion paragraph' [Article 5(4) of the DTA]

Although the elements of a PE have been fulfilled, the Chinese enterprise shall not be regarded as having a PE in Malaysia if the activities of the PE are:

- iii. Limited solely to a narrow list of activities concerning storage, display, delivery of goods, etc; or
- iv. Considered preparatory or auxiliary in character. For this purpose, one is required to examine whether the activity forms an essential and significant part of the Chinese enterprise's activities or otherwise.

Methods for elimination of double taxation (Article 23 of the DTA)

Once a Chinese enterprise creates a PE in Malaysia, its business profits attributed to the PE in Malaysia shall be subject to Malaysian tax as it is derived from Malaysia. Such business profits may also be subject to Chinese tax by virtue of the Chinese enterprise being a tax resident of China – hence the need for methods to eliminate double taxation. Article 23 of the DTA adopts the credit method for this purpose whereby Malaysian tax payable may be credited against the Chinese tax imposed on the Chinese enterprise. The amount of credit is limited to the amount of Chinese tax that would have been imposed in accordance with the taxation laws and regulations of China. In the case of dividend paid by a Malaysian resident company to the Chinese enterprise and the latter owns not less than 10 per cent of the shares of the former, the credit shall also take into account the Malaysian tax payable by the Malaysian resident company paying the dividend in respect of its income. This is also known as 'indirect credit'.

It is crucial to note that the amount of Malaysian tax credit available to the Chinese enterprise is based on its Malaysian tax payable. In the event the Malaysian sourced income is exempted from tax in Malaysia (e.g., due to tax incentive granted by Malaysian government), the Malaysian tax payable could be reduced or completely eliminated – resulting in nil Malaysian tax credit to the Chinese enterprise. Hence, tax sparing provisions have been incorporated into the DTA. As a result, Chinese enterprises are able to obtain tax credit amounting to Malaysian taxes that have been 'spared' under the relevant Malaysian incentive programme. Ultimately, the Chinese enterprise should be subject to reduced/nil taxes in China.

Conclusion

A Chinese enterprise is theoretically required to assess its PE exposure in Malaysia arising from its intended business



activities. Practically, this could be a complicated process as each of the PE elements should be examined with due consideration to the facts of each case and could be subject to differing interpretations.

If the Chinese enterprise is deemed to have a PE in Malaysia, it is then required to assess whether it fulfils the conditions imposed under the taxation laws and regulations of China as well as the practice of the relevant authority prior to claiming Malaysian tax credit against Chinese tax imposed.

You can access the full text of the DTA via the following link:  
<http://www.chinatax.gov.cn/n810341/n810770/c1153105/part/1153106.pdf>

## 联系我们

分支机构/名字	职务	邮箱	电话
<b>吉隆坡 Kuala Lumpur</b>			
<b>余永平 Yee Wing Peng</b>	董事经理	<a href="mailto:wpjee@deloitte.com">wpjee@deloitte.com</a>	(603) 7610 8800
<b>谭丽君 Tham Lih Jiun</b>	执行董事	<a href="mailto:ljtham@deloitte.com">ljtham@deloitte.com</a>	(603) 7610 8875
<b>卓鸿培 Toh Hong Peir</b>	执行董事	<a href="mailto:htoh@deloitte.com">htoh@deloitte.com</a>	(603) 7610 8808
<b>郭川永 Kok Soon Weng</b>	副总监	<a href="mailto:kekok@deloitte.com">kekok@deloitte.com</a>	(603) 7610 8157
<b>夏国辉 Ha Kok Fei</b>	副总监	<a href="mailto:kha@deloitte.com">kha@deloitte.com</a>	(603) 7610 8190
<b>颜杏蕊 Gan Sin Reei</b>	高级经理	<a href="mailto:sregan@deloitte.com">sregan@deloitte.com</a>	(603) 7610 8166
<b>刘晓劼 Liu Xiao Jie</b>	经理	<a href="mailto:roqliu@deloitte.com">roqliu@deloitte.com</a>	(603) 7610 8970
<b>郑顺民 Tey Soon Meng</b>	副经理	<a href="mailto:sotey@deloitte.com">sotey@deloitte.com</a>	(603) 7610 8197
<b>李岸莹 Li Anying</b>	高级助理	<a href="mailto:annanyli@deloitte.com">annanyli@deloitte.com</a>	(603) 7610 7843
<b>戴蔚 Vivian Dai</b>	高级助理	<a href="mailto:vdai@deloitte.com">vdai@deloitte.com</a>	(603) 7610 8646
<b>黄尹玲 Ooi Ying Ling</b>	助理	<a href="mailto:aooi@deloitte.com">aooi@deloitte.com</a>	(603) 7610 8241
<b>张艾嘉 Zhang Aijia</b>	助理	<a href="mailto:aizhang@deloitte.com">aizhang@deloitte.com</a>	(603) 7610 7872
<b>马冰青 Ma Bingqing</b>	助理	<a href="mailto:stelma@deloitte.com">stelma@deloitte.com</a>	(603) 7610 7787
<b>陈宇骄 Chen Yujiao</b>	助理	<a href="mailto:yujchen@deloitte.com">yujchen@deloitte.com</a>	(603) 7610 8271
<b>胡程 Hu Cheng</b>	助理	<a href="mailto:chhu@deloitte.com">chhu@deloitte.com</a>	(603) 7610 7614
<b>王娟 Wang Juan</b>	助理	<a href="mailto:juanwang@deloitte.com">juanwang@deloitte.com</a>	(603) 7610 8772
<b>初俊啸 Chu Junxiao</b>	助理	<a href="mailto:junxchu@deloitte.com">junxchu@deloitte.com</a>	(603) 7610 8732
<b>古晋 Kuching</b>			
<b>蔡淑萍 Chai Suk Phin</b>	高级经理	<a href="mailto:spchai@deloitte.com">spchai@deloitte.com</a>	(608) 246 3311
<b>黄俊程 Kane Bong</b>	高级经理	<a href="mailto:kbong@deloitte.com">kbong@deloitte.com</a>	(608) 246 3311
<b>新山 Johor Bahru</b>			
<b>吴玉凤 Caslin Ng</b>	副总监	<a href="mailto:caslinng@deloitte.com">caslinng@deloitte.com</a>	(607) 222 5988
<b>陈莱玲 Susie Tan</b>	高级经理	<a href="mailto:susietan@deloitte.com">susietan@deloitte.com</a>	(607) 222 5988
<b>怡保 Ipoh</b>			
<b>梅皓然 Terrence Mooi</b>	高级经理	<a href="mailto:tmooi@deloitte.com">tmooi@deloitte.com</a>	(605) 254 0288
<b>刘慧婷 Loh Wai Teng</b>	高级经理	<a href="mailto:wloh@deloitte.com">wloh@deloitte.com</a>	(605) 254 0288
<b>檳城 Penang</b>			
<b>黄兰卿 Ng Lan Kheng</b>	执行董事	<a href="mailto:lkng@deloitte.com">lkng@deloitte.com</a>	(604) 218 9888
<b>钟艾玲 Cheng Ai Ling</b>	副经理	<a href="mailto:alcheng@deloitte.com">alcheng@deloitte.com</a>	(604) 218 9888
<b>亚庇 Kota Kinabalu</b>			
<b>张济妃 Cheong Yit Hui</b>	经理	<a href="mailto:yicheong@deloitte.com">yicheong@deloitte.com</a>	(608) 823 9601

吉隆坡 Kuala Lumpur



余永平



谭丽君



卓鸿培



郭川永



夏国辉



颜杏蕊



刘晓劼



郑顺民



李岸营



戴蔚



黄尹羚



张艾嘉



马冰青



陈宇骄



胡程



王娟



初俊啸

古晋 **Kuching**



蔡淑萍



黄俊程

新山 **Johor Bahru**



吴玉凤

陈莱玲

## 怡保 Ipoh



梅皓然

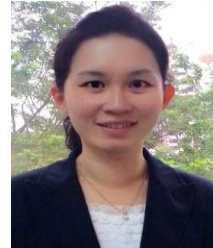


刘慧婷

## 槟城 Penang



黄兰卿



钟艾玲

## 亚庇 Kota Kinabalu



张济妃



### Deloitte

Level 16, Menara LGB  
1, Jalan Wan Kadir  
Taman Tun Dr. Ismail  
60000 Kuala Lumpur, Malaysia

英文版本与中文版本倘出现任何歧义，概以英文版本为准。上述仅供阅读参考。

If there is any inconsistency or conflict between the Chinese and English versions, the English version shall prevail for all purposes.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see [www.deloitte.com/my/about](http://www.deloitte.com/my/about) to learn more about our global network of member firms.

Deloitte provides audit, consulting, financial advisory, risk advisory, tax and related services to public and private clients spanning multiple industries. Deloitte serves four out of five Fortune Global 500® companies through a globally connected network of member firms in more than 150 countries and territories bringing world-class capabilities, insights, and high-quality service to address clients' most complex business challenges. To learn more about how Deloitte's approximately 245,000

professionals make an impact that matters, please connect with us on Facebook, LinkedIn, or Twitter.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

About Deloitte in Malaysia

In Malaysia, services are provided by Deloitte Tax Services Sdn Bhd and its affiliates.

© 2017 Deloitte Tax Services Sdn Bhd

To no longer receive emails about this topic please send a return email to the sender with the word "Unsubscribe" in the subject line.