外商投资要闻简讯

JUNHE

2015 年 3 月 24 日

韩亚银行（中国）有限公司（以下简称“**韩亚银行**”）完成吸收合并外换银行（中国）有限公司（以下简称“**外换银行**”），成为首个外资银行合并案例。国家税务总局公布《国家税务总局关于非居民企业间接转让财产企业所得税若干问题的公告》（以下简称“**7 号公告**”）进一步规范和加强非居民企业间接转让中国居民企业财产的企业所得税管理。国家外汇管理局决定进一步简化和改进直接投资外汇管理。

一、 韩亚银行、外换银行完成吸收合并

2015 年 2 月 4 日，韩亚银行在其网站上宣布，韩亚银行完成吸收合并外换银行，标志着在中国银行业监督管理历史上首次两家外资银行合并的成功[1]。

（一） 背景

2014 年 8 月 20 日，中国银行业监督管理委员会（以下简称“**银监会**”）批准韩亚银行筹备吸收合并外换银行，合并筹备期为六个月。合并筹备工作完成后，韩亚银行和外换银行应当按照《中华人民共和国外资银行管理条例》和《中华人民共和国外资银行管理条例实施细则》等有关规定向银监会提交合并开业等事项的申请[2]。

2014 年 12 月 12 日，银监会批准韩亚银行吸收合并外换银行；批准韩亚银行增加注册资本，该资金由外换银行注册资本划转。变更完成后，韩亚银行的股权结构变更为：韩国韩亚银行股份有限公司出资金额为 20 亿元人民币，持股比例为 59.7%；韩国外换银行股份有限公司出资金额为 13.5 亿元人民币，持股比例为 40.3%[3]。

（二） 法律点评

2014 年 9 月 11 日起施行的《中国银监会外资银行行政许可事项实施办法》对于外资银行合并应符合的条件、审批期限、形式、流程、申请文件等作出了明确的规定。

外资银行合并可以采取吸收合并或者新设合并两种形式。外资银行的合并应经银监会审查批准。合并须经合并筹备和合并开业两个阶段。

采取吸收合并形式的，吸收合并方应按照变更的条件和材料要求向银监会提交合并筹备和合并开业的申请；被吸收方自行终止的，应向银监会提交申请；被吸收方变更为分支机构的，应当按照设立的条件和材料要求向银监会提交申请。

采取新设合并形式的，新设方应当按照设立的条件和材料要求向银监会提交合并筹备和合并开业的申请；原外资银行应当按照终止的条件和材料要求向银监会提交申请。

1 http://www.hanabank.cn/hana/cn/pub001/2015-02-04/1524h88456168.shtml

2 http://www.cbrc.gov.cn/govView_97B76171D0AC47019591BD6E56C95668.html

3 http://www.cbrc.gov.cn/govView_BA84F03AB503412F9AB571D19CFAC123.html

银监会应自收到完整申请资料之日起 3 个月内，作出批准或者不批准的决定。

（三） 关注要点

在明确的法律规定及成功案例的指引下，其他外资银行可以考虑通过合并或者分立的方式对其境内业务进行重组。

二、 国家税务总局进一步规范和加强非居民企业间接转让中国居民企业财产的企业所得税管理

国家税务总局于 2015 年 2 月 6 日在其网站上公布了 7 号公告[4]及相关解读[5]，对间接转让财产交易适用一般避税规则的范围、合理商业目的判定要素、纳税义务、法律责任等作出了明确规定。7 号公告于发布之日（即 2015 年 2 月 3 日）起施行，并追溯适用于发布前发生但未作税务处理的事项。同时，7 号公告废止了《国家税务总局关于加强非居民企业股权转让所得企业所得税管理的通知》（国税函[2009]698 号）（以下简称“**698 号文**”）及《国家税务总局关于非居民企业所得税管理若干问题的公告》（国家税务总局公告 2011 年第 24 号）（以下简称“**24 号公告**”）部分条款。

（一） 背景

按照 2008 年 1 月 1 日起施行的《中华人民共和国企业所得税法》，非居民企业直接转让中国财产需要缴纳企业所得税，但间接转让则不需要缴纳。为了规避我国的企业所得税，有的非居民企业将直接转让财产包装为间接转让。

针对非居民企业间接转让股权的企业所得税，国家税务总局在 2009 年 12 月 10 日公布的 698 号文中提出了反避税应对办法。国家税务总局随后于 2011 年 3 月 28 日公布了 24 号公告，对 698 号文部分条款作出了详细的解释。根据 698 号文，如果境外投资方通过滥用组织形式等安排间接转让中国居民企业股权，且不具有合理的商业目的，规避企业所得税纳税义务的，该交易会被主管税务机关重新定性为直接转让中国居民企业股权，从而需在中国缴纳企业所得税。

由于 698 号文并未对于合理商业目的的判断作出规定，使得主管税务机关在执法时存在较大的不确定性，而且间接转让的适用范围有限（仅适用于非居民企业间接转让中国居民企业股权）等原因，这些规定已不能满足跨境税源管理的需要。在总结 698 号文的经验和问题的基础上，国家税务总局制定了 7 号公告。

（二） 法律点评

首先，7 号公告扩大了间接转让的适用范围。7 号公告的适用范围为“中国应税财产”，包括中国境内机构、场所财产；中国境内不动产；在中国居民企业的权益性投资资产等。

其次，7 号公告提供了合理商业目的的判断指引。判断合理商业目的，应整体考虑与间接转让中国应税财产交易相关的所有安排，结合实际情况综合分析交易对象价值构成、功能风险、经济实质、交易的可替代性等因素[6]。

再次，7 号公告引入了集团内部重组安全港规则。对于同时符合法定条件的跨境集团内部重组应被认定为具有合理商业目的，从而免于在中国缴纳企业所得税。

4 http://www.chinatax.gov.cn/n810341/n810755/index.html

5 http://www.chinatax.gov.cn/n810341/n810760/c1491403/content.html

6 http://www.chinatax.gov.cn/n810219/n810724/c1491495/content.html

最后，7 号公告修改了报告制度。将 698 号文规定的强制信息报告义务修改为交易相关方自主选择报告信息。但是请注意，如果该交易需在中国缴纳企业所得税而未提交资料，会导致法律责任。

更多法律点评请浏览君合发布的法律评论《国税总局出台 7 号公告-补充完善 698 号文》。

（三） 关注要点

与 698 号文相比，7 号公告为间接转让中国应税财产是否应在中国缴纳企业所得税提供了更加明确的指引，但是仍存在一些不明确之处，例如，如何确定转让所得和成本价等。主管税务机关在实践中如何执行 7 号公告值得进一步关注。

7 号公告追溯适用于发布前发生但未作税务处理的交易。因此，即使已经完成间接转让中国应税财产，若尚未作出税务处理的，交易相关方亦应分析 7 号公告是否对该交易产生影响，并考虑是否需要采取必要的措施。

三、 进一步简化和改进直接投资外汇管理

国家外汇管理局于 2015 年 2 月 28 日在其网站上公布了《国家外汇管理局关于进一步简化和改进直接投资外汇管理政策的通知》（汇发[2015]13 号）及其附件（以下简称“**13 号通知**”）[7]，决定简化和改进境内直接投资和境外直接投资的外汇管理。

（一） 背景

2015 年 1 月 29 日，国务院决定在全国范围内推广上海自贸区可复制改革试点经验[8]，其中金融领域的改革事项包括外商投资企业外汇资本金意愿结汇、直接投资项下外汇登记及变更登记下放银行办理等。

国务院要求 2015 年 6 月 30 日前在全国范围内实行外商投资企业外汇资本金意愿结汇、直接投资项下外汇登记及变更登记下放银行办理。

（二） 法律点评

对于境内直接投资，国家外汇管理局决定取消境内直接投资项下外汇登记核准，改由银行直接审核办理投资项下外汇登记，国家外汇管理局通过银行对直接投资外汇登记实施间接监管。

国家外汇管理局决定取消境内直接投资项下外国投资者非货币出资确认登记和外国投资者收购中方股权出资确认登记。

国家外汇管理局决定将外国投资者货币出资确认登记调整为境内直接投资货币出资入账登记，外国投资者以货币形式（含跨境现汇和人民币）出资的，由开户银行在收到相关资本金款项后直接通过外汇局资本项目信息系统办理境内直接投资货币出资入账登记，办理入账登记后的资本金方可使用。

国家外汇管理局决定取消直接投资外汇年检，改为实行存量权益登记。

（三） 关注要点

13 号通知将于 2015 年 6 月 1 日起施行。在实践中，各银行如何办理直接投资外汇登记值得进一步关注。

此外，国家外汇管理局仅在 13 号通知提及外商投资企业资本金结汇管理方式改革试点地区继续按照《国家外汇管理局关于在部分地区开展外商投资企业外汇资本金结汇管理方式改革试点有关

[7] http://www.safe.gov.cn/resources/wcmpages//wps/wcm/connect/safe_web_store/safe_web/zcfg/zbxmwhgl/zjtzwhgl/node_zcfg_zbxm_kjtz_store/ecb2730047782024852fa73b4795588d/

[8] http://www.gov.cn/zhengce/content/2015-01/29/content_9437.htm

问题的通知》（汇发[2014]36 号）等有关规定实行意愿结汇政策。我们将继续关注国家外汇管理局有关外商投资企业外汇资本金意愿结汇的改革进展。

缪晴辉　合伙人　电话：86 020 2805 9066　邮箱地址：miaoqh@junhe.com
潘一鸣　律　师　电话：86 020 2805 9092　邮箱地址：panym@junhe.com
李宇明　律　师　电话：86 020 2805 9078　邮箱地址：liyuming@junhe.com

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// Foreign Investment Bulletin

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Hana Bank (China) Co., Ltd. ("**Hana Bank**") completed the merger by absorption of KEB Bank (China) Co., Ltd. ("**KEB Bank**"), the first case of merger of foreign-funded banks. The State Administration of Taxation ("**SAT**") issued the *Bulletin of the State Administration of Taxation on Several Issues Concerning Enterprise Income Tax on Income Arising from Indirect Transfers of Property by Non-resident Enterprises* ("**Bulletin 7**") to further regulate and enhance the administration of enterprise income tax on income arising from indirect transfers of property of Chinese resident enterprises by non-resident enterprises. The State Administration of Foreign Exchange ("**SAFE**") decided to further simplify and improve the foreign exchange administration for direct investment.

1. Hana Bank Completed Merger by Absorption of KEB Bank

On February 4, 2015, Hana Bank announced on its website that it completed the merger by absorption of KEB Bank, the first successful case of merger of two wholly foreign-owned banks in China's banking administration history[1].

1.1 Background

On August 20, 2014, China Banking Regulatory Commission ("**CBRC**") approved Hana's application for preparation for merger by absorption of KEB Bank, with the preparation period of six months. After the completion of the preparation, Hana Bank and KEB Bank should submit an application to the CBRC for business opening after merger in accordance with relevant provisions of the *Regulation of the People's Republic of China on the Administration of Foreign-funded Banks* and the *Implementing Rules for the Regulation of the People's Republic of China on the Administration of Foreign-funded Banks*[2].

On December 12, 2014, the CBRC approved Hana's merger by absorption of KEB Bank and the increase of Hana Bank's registered capital by converting from KEB's registered capital. After the completion of such change, the shareholding structure of Hana Bank would be: Hana Bank Co., Ltd. contributing RMB 2 billion, representing 59.7% of the equity; and Korea Exchange Bank Co., Ltd. contributing RMB 1.35 billion,

1 http://www.hanabank.cn/hana/cn/pub001/2015-02-04/1524h88456168.shtml

2 http://www.cbrc.gov.cn/govView_97B76171D0AC47019591BD6E56C95668.html

representing 40.3% of the equity[3].

1.2 Legal Review

The *Measures of China Banking Regulatory Commission for the Implementation of Administrative Licensing Items Concerning Foreign-funded Banks*, effective from September 11, 2014, provides the conditions, approval period, form, procedures, application documents and other matters concerning merger of foreign-funded banks.

A merger of foreign-funded banks may take the form of merger by absorption or merger by consolidation. A merger of foreign-funded banks must be examined and approved by the CBRC. A merger must be completed in two stages, the preparation for merger and the business opening after merger.

In the event of a merger by absorption, the merging party should submit an application to the CBRC for preparation for merger and business opening after merger according to the requirements for change application. Where the merged party, will be terminated, it should submit an application to the CBRC. Where the merged party becomes a branch office, it should submit an application to the CBRC according to the requirements for establishment application.

In the event of a merger by consolidation, the newly-established entity should submit an application to the CBRC for preparation for merger and business opening after merger according to the requirements for establishment application. The former foreign-funded banks should submit an application to the CBRC according to the requirements for termination application.

The CBRC should make a decision to approve or disapprove within 3 months after receiving the complete set of application materials.

1.3 Next Step

Other foreign-funded banks may consider reorganizing their business in China by way of merger or division under the guidance of specific legal provisions and this successful case.

2. SAT Further Regulated and Enhanced Administration of Enterprise Income Tax on Income Arising from Indirect Transfers of Property of Chinese Resident Enterprises by Non-resident Enterprises

On February 6, 2015, the SAT published Bulletin 7[4] and the relevant interpretation[5] on its website, providing with more details for the scope of application of the general anti-tax avoidance rules, factors in determining the reasonable

3 http://www.cbrc.gov.cn/govView_BA84F03AB503412F9AB571D19CFAC123.html

4 http://www.chinatax.gov.cn/n810341/n810755/index.html

5 http://www.chinatax.gov.cn/n810341/n810760/c1491403/content.html

commercial purpose, tax payment obligation, legal liabilities and other matters concerning indirect transfers of property. Bulletin 7 took effect on the date of its issuance, i.e., February 3, 2015 (the "**Effective Date**") and it also retrospectively applies to indirect transfers which took place before the Effective Date and in respect of which the PRC tax authorities have not assessed if capital gains tax must be paid. Bulletin 7 has also repealed certain provisions in the *Circular of SAT on Strengthening the Administration of Enterprise Income Tax on Income Arising from Equity Transfers by Non-resident Enterprises* (SAT Circular [2009] No. 698) ("**Circular 698**") and the *Bulletin of SAT on Several Issues Concerning the Administration of Income Tax on Non-resident Enterprise* (SAT Bulletin [2011] No. 24 ("**Bulletin 24**").

2.1 Background

According to the *Enterprise Income Law of the People's Republic of China* effective from January 1, 2008, non-resident enterprises must pay enterprise income tax on income arising from direct transfers of Chinese property, but not on income arising from indirect transfers. In order to avoid such enterprise income tax, some non-resident enterprises disguised direct transfers of property as indirect transfers.

Circular 698, issued by SAT on December 10, 2009, includes the anti-tax avoidance measures taken by the SAT concerning the enterprise income tax on income arising from indirect equity transfers by non-resident enterprises. Bulletin 24, issued by the SAT on March 28, 2011, further interprets in detail certain provisions in Circular 698. According to Circular 698, if a foreign investor indirectly transfers the equity in a Chinese resident enterprise by abuse of organizational form or other arrangements with no reasonable commercial purpose, in order to avoid the obligation to pay enterprise income tax, such transfer will be redefined by the tax authority as a direct transfer of equity in the Chinese resident enterprise, for which enterprise income tax should be paid in China.

Circular 698 failed to provide for the determination of reasonable commercial purpose, which brought great uncertainty to tax authorities in law enforcement. Also, due to the limited scope of application to indirect transfers (only applicable to indirect transfers of equity in Chinese resident enterprises by non-resident enterprises), Circular 698 cannot satisfy the requirements for administration of cross-border tax sources. Therefore, the SAT formulated and issued Bulletin 7 based on the experience of, and outstanding issues faced by, the tax authorities in implementing Circular 698.

2.2 Legal Review

First, Bulletin 7 broadens the scope of indirect transfer. Bulletin 7 applies to "China Taxable Assets", which include (i) the assets of an "establishment or place" situated in China; (ii) real

property situated in China; and (iii) equity interest in Chinese resident enterprises.

Second, Bulletin 7 provides guidance on determining the reasonable commercial purpose. In determining the reasonable commercial purpose, all arrangements relating to the indirect transfers of China Taxable Assets must be considered, in combination with a comprehensive analysis of such factors as the composition of the value of transaction targets, the function and risk, the economic substance, and the inter-exchangeability of the transaction, etc.[6]

Third, Bulletin 7 introduces a safe harbor for indirect transfers of China Taxable Assets resulting from an intra-group reorganization. An intra-group reorganization satisfying all the statutory conditions will be deemed to have a reasonable commercial purpose and therefore will be exempted from enterprise income tax in China.

Last, Bulletin 7 has changed the reporting obligations under Circular 698. It has done away with the mandatory reporting under Circular 698 and provides that the parties to an indirect transfer transaction have the option to decide whether to report the indirect transfer to tax authorities. However, where the indirect transfer is taxable in China but no reporting is made, legal consequences will arise.

Please refer to the "Hot Tax Law Topics – China Issues New Indirect Transfer Rules Superseding Circular 698" published by Jun He for more detailed comments.

2.3 Next Step

In comparison with Circular 698, Bulletin 7 provides more specific and detailed guidance on whether an indirect transfer of China Taxable Assets is subject to enterprise income tax in China; however, it still includes some uncertainties, such as how to determine the income arising from transfer and the cost price, etc. We are anxiously waiting to see how the Chinese tax authorities will implement Bulletin 7 in practice.

Bulletin 7 retrospectively applies to indirect transfers which took place before the Effective Date and in respect of which the PRC tax authorities have not assessed if capital gains tax must be paid. Therefore, even if an indirect transfer of China Taxable Assets has been completed, if the tax authority has not assessed if capital gains tax is payable, the parties to the transaction should also analyze the impact of Bulletin 7 on such transaction and consider the measures to be taken, if necessary.

3. SAFE Further Simplified and Improved the Foreign Exchange Administration for Direct Investment

On February 28, 2015, the SAFE issued the *Circular of SAFE on Further Simplifying and*

6 http://www.chinatax.gov.cn/n810219/n810724/c1491495/content.html

Improving the Foreign Exchange Administration for Domestic and Overseas Direct Investment (Hui Fa [2015] No. 13) ("**Circular 13**")[7], to simplify and improve the foreign exchange administration for domestic and overseas direct investment.

3.1 Background

On January 29, 2015, the State Council decided to promote nationwide the replicable experience accumulated from the pilot reform in Shanghai Free Trade Zone[8]. The financial reform includes allowing foreign-invested enterprises to settle foreign exchange capitals at their discretion, and delegation of foreign exchange registration and change registration under direct investment to the banks.

The State Council required the above-mentioned financial reform to be implemented nationwide by June 30, 2015.

3.2 Legal Review

The SAFE decided to cease the verification of foreign exchange registration under domestic direct investment. The banks will directly examine and handle the foreign exchange registration under direct investment in place of the SAFE, while, the SAFE will exercise indirect supervision and regulation on foreign exchange registration under direct investment.

The SAFE decided to cease the registration of confirmation of non-cash capital contribution by foreign investors under domestic direct investment and the registration of confirmation of capital contribution by foreign investors for acquisition of equity of Chinese parties.

The SAFE further decided to change the system of registration of confirmation of cash capital contribution by foreign investors to the system of registration of receipt of cash capital contribution under direct investment. Where a foreign investor makes capital contribution in cash (including cross-border foreign exchange and RMB cash), the account-opening bank will, after receiving such capitals, directly handle the registration of receipt of cash capital contribution under domestic direct investment, through the capital account information system of SAFE, and the capitals can only be used after the registration of receipt has been completed.

The SAFE also decided to replace the annual foreign exchange inspection of direct investment by a system of annual reporting of interests under domestic and overseas direct investment.

3.3 Next Step

Circular 13 will be effective from June 1, 2015. It is worthy of paying attention to how the banks will conduct foreign exchange registration for direct investment.

In addition, the SAFE only mentioned in Circular

7 http://www.safe.gov.cn/resources/wcmpages//wps/wcm/connect/safe_web_store/safe_web/zcfg/zbxmwhgl/zjtzwhgl/node_zcfg_zbxm_kjtz_store/ecb2730047782024852fa73b4795588d/

8 http://www.gov.cn/zhengce/content/2015-01/29/content_9437.htm

13 that, in the regions where pilot reform is implemented for the administration method of foreign exchange settlement for capitals of foreign-invested enterprises, foreign-invested enterprises are still allowed to settle foreign exchange capitals at their discretion according to the *Circular of SAFE on Issues Concerning Implementing Pilot Reform of the Administration Method for Foreign Exchange Settlement for the Foreign Exchange Capitals of Foreign-invested Enterprises in Certain Regions* (Hui Fa [2014] No. 36) and other relevant provisions. We will follow up the development of SAFE's reform concerning the policy of allowing foreign-invested enterprises to settle foreign exchange capitals at their discretion.

Catherine Miao	Partner	Tel: 86 20 2805 9066	Email: miaoqh@junhe.com
Vivian Pan	Associate	Tel: 86 20 2805 9092	Email: panym@junhe.com
Yuming Li	Associate	Tel: 86 20 2805 9078	Email: liyuming@junhe.com

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