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TAXATION / 税收

Tightened Tax Regulations May Affect Future Investment Structures 税收监管收紧或将影响投资结构

On December 9, 2014, the State Council issued a *Notice on Clearing up and Regulating Preferential Tax Policies* (the "Notice"), which expressly forbids local authorities from making preferential tax policies beyond their authorities and requires all such illegal policies formulated for enterprises and their investors (or management) to be fully abolished. In response and as a follow-up, the Ministry of Finance released on December 24 the *Notice on Implementing State Council's Notice on Clearing up and Regulating Preferential Tax Policies*, ordering to cease the implementation of all illegal preferential tax policies from December 1, 2014.

On December 12, the State Administration of Taxation ("SAT") issued the *Administrative Measures on the General Anti-Avoidance Rule (Trial Implementation)* (the "Measures"), which clarify various issues concerning tax authorities' implementation of special tax adjustments on tax avoidance schemes that are adopted in cross-border transactions or payments and intend to obtain a tax benefit without reasonable commercial purposes. Those issues include related adjustment methods, working

procedures and dispute resolutions, etc. According to the Measures, taxpayers may file evidence with competent tax authorities to prove that their arrangements are not tax avoidance schemes within 60 days upon receiving investigation notices and apply for legal remedies against adjustment decisions.

SAT further clarified in a press conference that the Measures are also applicable to indirect offshore equity transfers.

With the issuance of the Notice and the Measures, investors may expect stricter regulation by tax authorities in the future and need to will apparently need to take more prudent actions when choosing investment locations and transaction structures.

2014年12月9日，国务院发布《关于清理规范税收等优惠政策的通知》（“《通知》”），明确各地区、各部门一律不得在权限外自行制定税收优惠政策，已违法制定的与企业及其投资者（或管理者）有关的税收优惠政策应坚决予以取消。财政部随后于12月24日发布《关于贯彻落实国务院清理规范税收等优惠政策决策部署若干事项的通知》，责令该等违法违规的优惠政策于2014年12月1日起一律停止执行。

12月12日，国家税务总局发布《一般反避税管理办法（试行）》（“《办法》”），进一步规范和明确了税务机关针对跨境交易或者支付中不具有合理商业目的而获取税收利益的避税安排实施特别纳税调整的调整方法、工作程序、争议处理等相关问题。被调查企业可在立案后60日内向税务机关提供资料证明其不属于避税安排，并可对调整决定申请相关法律救济。

此外，国税总局有关负责人在答记者问时明确表示，本《办法》也适用于境外间接股权转让。

随着《通知》和《办法》的出台，税务机关在税收监管时势必将更加严格规范，投资人在选择投资地点和交易结构时也更需更加谨慎。

SAT Specified IIT Rules on Share Transfer Income

国税总局规范股权转让所得个税管理

On December 7, 2014, SAT issued the *Administrative Measures on Individual Income Tax on Income Gained from Share Transfers (Trial Implementation)* (the "Measures"), which will take effect on January 1, 2015. The Measures further clarify various controversial issues related to tax practice, which include scope of levy, calculation of share transfer income and original share value, time of tax payment, and obligations of transferors, transferees and investee enterprises.

The share transfer referred in the Measures includes, among others, a sale of shares, a share buyback by a company and payment of debts by shares, while a share transfer in secondary market is not included. A tax declaration shall be made within 15 days of the month subsequent to that in which the share transfer consideration has been paid or the share transfer agreement has taken effect. The tax authorities have the

power to reassess any income derived from share transfer if they find such income is significant low without a justifiable reason.

It is noteworthy that, pursuant to the Measures, once the value of transferred shares has been reassessed and adjusted by tax authorities and relevant income tax has been paid based on such adjustment, the adjusted value (rather than the actual transfer price) shall serve as the original value of the transferred shares for taxation purposes when the taxpayer who purchased those shares resells them in future share transfer. This clarification solves the confusion caused by contradictory stipulations in previous regulations.

国税总局于2014年12月7日发布了《股权转让所得个人所得税管理办法（试行）》（“《办法》”），《办法》将于2015年1月1日起正式施行。《办法》对以往纳税实践中争议较大的征税

范围、转让收入和股权原值的确定、纳税时点、股权转让双方和被投资企业的责任义务等问题进行了进一步明确。

本《办法》所指的股权转让包括出售股权、公司回购股权、以股权抵偿债务等七种情形，不包括二级市场上的股权转让。纳税申报时间为转股价格已支付或转让协议已签订生效的次月15日内。税务机关认为转让收入明显偏低且无正当理由的，可以依据一定方法核定转让收入。

特别需要注意的是，《办法》明确了纳税人再次转让所受让的股权时，若其受让的股权已被税务机关核定价格并据此纳税，再次转让时的股权原值以该核定价格为准，避免了以往股权原值以转股价格为准所造成的矛盾。

FOREIGN INVESTMENT / 外商投资

Guangdong Will Be First to Generally Realize Service Trade Liberalization with Hong Kong and Macau 广东将率先与港澳基本实现服务贸易自由化

On December 18, 2014, the Ministry of Commerce ("MOFCOM") signed the *CEPA Agreement between Mainland China and Hong Kong/Macau to Generally Achieve Liberalization of Trade in Services in Guangdong* (the "Agreements") with Hong Kong and Macau, respectively, which Agreements will be officially implemented from March 1, 2015. Upon execution of the Agreements, Guangdong will take the lead in generally achieving liberalization of trade in services with Hong Kong and Macau, which will further promote the economic integration between mainland China and Hong Kong/Macau.

Compared with previous CEPA agreements, the Agreements are mainly based on the form of a "negative list" and pre-existing national treatments to set out the liberalization measures. Moreover, the Agreements further confirm the most-favored

treatments to Hong Kong and Macau, under which any CEPA-plus preferential treatment offered by the mainland to other countries will be extended to Hong Kong and Macau.

It is noteworthy that the liberalization measures in telecom sector are set out in the form of a "positive list". Areas in this sector further opened up under the Agreements include permission of Hong Kong/Macau service providers to establish WFOEs or JVs (without shareholding restrictions) in Guangdong to provide multi-party communications services (within mainland China), store and forward services, call center services, internet access services (within Guangdong only) and content services (app stores).

2014年12月18日, 商务部与香港和澳门分别签署了《内地与香港/澳门CEPA关于内地在广东与香港/澳门基本实现服务贸易自由化的协议》(“《协议》”), 《协议》将于2015年3月1

日起正式实施。《协议》签署后, 内地将在广东率先与香港和澳门基本实现服务贸易自由化, 有利于全面推动内地与香港、澳门经济的融合。

与以往CEPA协议相比, 新签署的《协议》以负面清单为主, 绝大多数部门以准入前国民待遇加负面清单的开放方式予以推进。此外, 《协议》将给予香港和澳门最惠待遇用协议的方式进一步加以明确, 即今后内地与其他国家和地区签署的自由贸易协定中, 优于CEPA的开放措施均将适用于香港和澳门。

需要注意的是, 对电信领域的开放措施仍然采用正面清单的形式列举, 此次《协议》的新增开放内容为: 允许香港和澳门服务提供者在广东省内设立合资或独资企业(其所占股权比例不设限制), 提供内地境内多方通信、存储转发类、呼叫中心、因特网接入服务和信息服务(应用商店)的业务。

PE&VC / 私募股权及创业投资

CIRC Allows Insurance Capital to Be Invested in VC Funds 保险资金将可投资创业投资基金

In 2010, China Insurance Regulatory Commission ("CIRC") issued *Interim Measures for Equity Investment with Insurance Capital* to allow insurance capital to be invested directly or indirectly into enterprises at growth stage or mature stage. Following such measures, CIRC issued the *Circular on Matters Relevant to Investment of Insurance Capital in Venture Capital ("VC") Funds* (the "Circular") on December 12, 2014, which expands the investment scope of insurance capital to include indirect investment in start-ups through VC funds. The Circular further encourages insurance institutions to provide additional funding to micro-sized enterprises and thus promote their development.

In the Circular, VC fund is defined as a private equity fund that invests in common stocks, preferred stocks, convertible bonds and other interests of start-ups. The Circular also specifies the rules that should be followed by insurance institutions when investing in VC funds, such as basic requirements, investment restrictions, risk control and supervision of investment. In addition, the Circular allows indirect investment of insurance capital in VC funds through other private equity funds and fund of funds (FOF).

2014年12月12日, 保监会发布了《关于保险资金投资创业投资基金有关事项的通知》(“《通知》”), 继《保险资金投资股权暂行办法》准予险资直接

或间接投资处于成长期、成熟期的企业后, 将险资可投资范围扩大至通过投资创业投资基金间接投资于初创期企业。《通知》的发布将促使保险机构进一步为小微企业提供增量融资资金, 从而促进小微企业的发展。

《通知》将创业投资基金界定为投资企业普通股、优先股、可转换债券等权益的股权投资基金, 并对投资创业投资基金的基本要求、行为规范、风险管控和监督管理方面等进行了具体规定。此外, 《通知》允许保险资金通过投资其他股权基金以及通过母基金投资创业投资基金的方式展开投资。

SAC Released the Draft Administrative Measures for Private Equity Crowdfunding 证券业协会发布《私募股权众筹融资管理办法(试行)(征求意见稿)》

On December 18, 2014, the Securities Association of China ("SAC") released the *Draft Administrative Measures for Private Equity Crowdfunding (Trial Implementation)* (the "Measures") to solicit public comments. The

Measures set out preliminary requirements on various issues regarding private equity crowdfunding, such as issuing methods, investors, issuers, filing requirements, etc. The Measures clarify that private

equity crowdfunding shall be issued to specific investors through private placements. Under the Measures, the threshold for "qualified investors" is set up mainly by reference to relevant requirements in the *Interim Measures*

for Supervision and Administration of Private Investment Funds, and the investor group is further expanded to include individuals whose financial assets are no less than RMB3 millions or whose average annual incomes for the recent three years are no less than RMB500,000. Moreover, the Measures limit the issuers to medium, small, or micro-sized enterprises, and require that the total number of an issuer's shareholders upon the completion of crowdfunding shall not exceed 200. The Measures, however, does not set restriction on the amount an issuer could raise through crowdfunding. In addition, the Measures prohibit crowdfunding platform from concurrently engaging in online individual lending (i.e. P2P) or online microfinance business.

Drafted and published in 2014, a booming year for China's crowdfunding sector, the Measures

ANTI-MONOPOLY / 反垄断

MOFCOM Publicized Penalty Decisions on Illegal Concentration of Undertakings for the First Time 保险商务部首次公布经营者集中处罚决定书

On December 8, 2014, MOFCOM publicized on its website three penalty decisions against questionable concentrations of undertakings. Since MOFCOM decided to publicize cases of illegal concentrations of undertakings investigated from May 1, 2014 and the corresponding administrative penalties imposed thereon (see April 2014 issue of our *China Regulatory Updates for a brief introduction*), it is the first time that MOFCOM released such decisions.

Among the three administrative penalties, one was made against an enterprise responsible for filing of a concentration that has reached the anti-monopoly filing threshold but failed to file it with MOFCOM. After assessment, MOFCOM imposed a RMB300,000 fine on such enterprise even if it decided that this concentration would not eliminate or restrict competition. The other two

aim at promoting the development of innovative entrepreneurship and internet financing. However, in light of the private placement nature of crowdfunding as defined by the Measures, relatively high investment thresholds and other restrictions, the actual effects of the Measures remain to be seen. We will further follow up with subsequent developments related to the Measures.

中国证券业协会于2014年12月18日发布了《私募股权众筹融资管理办法（试行）（征求意见稿）》（“《办法》”），对股权众筹融资的发行方式、投资者、融资者、备案要求等作出了初步规定。

《办法》明确了股权众筹应当采取非公开发行方式，投资者必须为特定对象。

《办法》对合格投资者的具体标准设定主要参照了《私募投资基金监督管理暂行办法》相关要求，同时投资者范围增加了“金融资产不低于300万元人民币

或最近三年个人年均收入不低于50万元人民币的个人”。《办法》要求融资者为中小微企业，融资完成后，融资者的股东人数累计不得超过200人，但未对融资额度作出限制。此外，《办法》禁止众筹平台“兼营个体网络借贷（即P2P网络借贷）或网络小额贷款业务”。

《办法》在众筹融资迅速发展的2014年起草并发布，旨在促进创新创业和互联网金融的发展。但是，鉴于本《办法》规定的众筹融资的私募属性及较高的投资门槛和限制条件，其实际意义仍有待证实。我们将继续关注《办法》的后续进展。

penalties were made against an enterprise that violated MOFCOM's restrictive conditions for two times when implementing a conditionally approved concentration. MOFCOM imposed on such enterprise a RMB300,000 fine for each of its violations and ordered it to rectify its illegal actions.

As the fines against illegal concentrations of undertakings are capped at RMB500,000, the deterring effect of monetary penalties may be limited. In spite of that, enterprises should also be cautious of MOFCOM's non-monetary penalties, such as orders to cease concentrations or restore the status *quo ante*, when implementing concentrations.

2014年12月8日，商务部在其网站上同时公布了3份关于经营者集中的行政处罚决定书，这是自商务部决定公布2014年5月1日后立案调查的未依法申报的经

营者集中的案件及相关行政处罚决定（相关介绍可参见本所2014年4月刊 *China Regulatory Updates*）以来首次正式公布该等决定书。

此3份行政处罚决定书中，1份针对一项已达到申报标准但未依法申报的经营者集中，在评估确认此次集中不会产生排除、限制竞争的影响后，对申报义务人处以人民币30万元的罚款，另2份针对相关经营者在实施附条件批准的经营者集中时违反限制性条件的行为，各处以人民币30万元的罚款并责令其改正违法行为。

鉴于违反经营者集中相关规定的罚款上限为人民币50万元，该等财产性处罚威慑力有限，但实施集中的经营者仍需警惕商务部责令停止集中、恢复原状的行为性处罚。

FTZ UPDATES / 自贸区近期动态

New FTZs to Be Launched in Guangdong, Tianjin and Fujian 国务院确定在广东、天津、福建新设自贸区

On December 12, 2014, the State Council decided in an executive meeting that three new free trade zones ("FTZs") would be established in Guangdong, Tianjin and Fujian. The meeting also decided to expand Shanghai FTZ to include Lujiazui

Financial District, Jinqiao Development Zone and Zhangjiang Hi-Tech Park. While those new FTZ areas will mainly adopt existing pilot policies implemented in Shanghai FTZ, new reform trials will also be explored based on local characteristics.

On December 28, 2014, the Standing Committee of the National People's Congress passed a decision, authorizing the State Council to temporarily adjust the implementation of relevant laws in all FTZs. According to such decision, except for foreign

investment subject to *Special Access Administrative Measures*, as a temporary adjustment all establishment and change procedures involving FIEs in all FZTs will only be subject to a simplified filing procedure instead of any administrative approvals. Such adjustment will begin to be implemented on a trial basis for three years since March 1, 2015.

2014年12月12日，国务院召开常务会议，确定在广东、天津、福建特定区域再设三个自由贸易园区，并扩展上海自贸区范围至陆家嘴金融片区、金桥开发片区和张江高科技片区。新设区域将以现有上海自贸区试点内容为主体，并结合地方特点探索新的试点内容。

2014年12月28日，全国人大常委会发文授权国务院在全部试点区内调整实

施相关法律规定，对于国家规定实施准入特别管理措施之外的外商投资，暂时停止实施企业设立、变更等行政审批，改为备案管理。该等调整试行期为3年，自2015年3月1日开始。

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