

China New Rules on the Entitlement to Treaty Benefits for Non-resident Taxpayers



ASIA

On October 14, 2019, the State Administration of Taxation announced a new regulation relating to the entitlement to tax treaty benefits for non-resident taxpayers ("Bulletin 35"), which has come into effect from January 1, 2020, and replaced the previous Bulletin related to this topic (i.e. "Bulletin 60"). Bulletin 35 stipulates the administration of the entitlement to tax treaty benefits for non-resident taxpayers and especially simplifies the procedure.

Major Changes

The most important change made by Bulletin 35 is the simplification of the procedure for claiming tax treaty benefits applicable to non-resident taxpayers, which is changed from «filing documents for record» stipulated by Bulletin 60 to the system called «keeping documents for subsequent inspection». In the meantime, Bulletin 35 specifies the procedure to be followed by the tax authorities for the subsequent inspection and defines the responsibilities of non-resident taxpayers and withholding agents.

I. SIMPLIFIED PROCEDURES

The following table summarizes the differences between the old and new procedures.

Bulletin 60 – "Filing Documents for Record"	Bulletin 35 – "Keeping Documents for Subsequent Inspection"
<p>The following documents shall be submitted to the in-charge tax bureau:</p> <p>1) Reporting Forms</p> <ul style="list-style-type: none"> - <Information Reporting Form on Tax Resident Identity of Non-resident Taxpayers> - <Information Reporting Form on the Treaty Benefits to be enjoyed by Non-resident Taxpayers> <p>2) Documents for Record-Filing</p> <ul style="list-style-type: none"> - Tax resident certificate - Contracts, agreements, resolutions of the board of directors or shareholders' meeting, payment certificates and other documents justifying the relevant incomes to be obtained by non-resident taxpayers; - Other documents evidencing a non-resident taxpayer's entitlement to treaty benefits as may be required by the tax authorities. 	<p>Only a <Reporting Form for the Entitlement to Treaty Benefits for Non-resident Taxpayers> (hereinafter the "Reporting Form") needs to be submitted to the in-charge tax bureau.</p> <p>The taxpayer should keep the following documents for the potential subsequent inspection by tax authorities:</p> <ul style="list-style-type: none"> - Tax resident certificate - Contracts, agreements, resolutions of the board of directors or shareholders' meeting, payment certificates and other documents justifying the relevant incomes to be obtained by non-resident taxpayers; - Relevant information proving the status of «beneficial ownership» in the case of payment of dividends, interest and royalty. - Other documents evidencing a non-resident taxpayer's entitlement to treaty benefits.

From the table, we can note the following key differences between two Bulletins:

- Under the old regime, when claiming tax treaty benefits, in addition to a number of supporting documents, two «reporting forms» containing the detailed information should be submitted to the in-charge tax bureau, which allowed the latter to assess whether non-resident taxpayers can enjoy the treaty benefits or not. Therefore, in practice, some non-residents could not enjoy the treaty benefit until they got the approval from the in-charge tax bureau.

- However, under the new regime, a non-resident taxpayer only needs to submit an «Reporting Form» which is less detailed than before as it only contains non-resident taxpayers' basic information, plus a statement on the following points:

- i. Tax resident certificate has been obtained;
- ii. The principal purpose of the relevant arrangement and transaction is not to obtain the treaty benefits;



- iii. A self-assessment of eligibility for enjoying the treaty benefits;
- iv. Commitment of taking the legal responsibilities;
- v. Commitment of collecting and keeping relevant documents for the subsequent inspection by tax authorities.

In practice, under the old regime, a French non-resident taxpayer, when applying for the tax treaty benefits upon distribution of dividends by its Chinese subsidiary, namely the application of 5% treaty withholding tax rate instead of 10% as provided for under Chinese domestic law, had to wait several months for the approval of tax bureau, which might delay the actual remittance of dividends.

With the new regime, the taxpayer can receive the dividends immediately after submission of the Reporting Form to tax bureau.

II. CLEARING THE RIGHTS AND RESPONSIBILITIES OF NON-RESIDENT TAXPAYERS AND WITHHOLDING AGENTS

In most cases, it is the Chinese entity paying the income in question that, as the "withholding agent", files and/or pays the withholding taxes on behalf of non-resident taxpayers. Bulletin 35 has stipulated the rights and responsibilities of non-resident taxpayers and withholding agents as follows:

Non-residents taxpayers	Withholding agents
1) If a non-resident taxpayer judges by itself that it meets the conditions to enjoying the treaty benefits and wishes to enjoy such benefits, it shall fill out the Reporting Form, and hand over it to its withholding agent actively;	1) The withholding agents should confirm whether the information filled by non-resident taxpayers in the «Reporting Form» is complete, and perform the withholding obligation according to the non-resident taxpayers' request for enjoying treaty benefits.
2) If a non-resident taxpayer has improperly enjoyed tax treaty benefits and as a result has paid no tax or less tax, it shall be deemed as failing to fulfill its tax obligation and the in-charge tax bureau can ask the non-resident taxpayer to make up the unpaid taxes and assume the late payment liability (i.e. late-payment interests plus a potential fine ¹). The non-resident taxpayer can however be waived of said late-payment liability if the failure is due to the misconduct of its withholding agent.	2) If a non-resident taxpayer has improperly enjoyed the tax benefits and as a result has paid no tax or less tax, due to the failure of its withholding agent to perform the withholding obligation and provide relevant documents in accordance to Bulletin 35, the in-charge tax bureau can require the non-resident taxpayer to settle the unpaid taxes, and ask the withholding agent to pay a fine ² .
3) Non-resident taxpayers shall collect, gather and keep relevant supporting documents for the potential future inspection by the tax authorities. In case of inspection, non-resident taxpayers shall provide the relevant documents to tax bureau within the time limit required by the latter.	3) Under specific circumstances during an inspection, the tax authorities may require the withholding agent to provide relevant documents within a specified time limit and cooperate in the course of investigation.

Our Suggestions

Although the procedure of «keeping documents for subsequent inspection» seems to be simpler and faster than the old procedure of «filing documents for record», it does not lower the substance requirements imposed by the tax authorities as regards the conditions to qualify for tax treaty benefits, since the tax authorities reserve the right to ask non-resident taxpayers to provide, subsequently, the relevant documents in case of an inspection. For this reason, we strongly suggest the non-resident taxpayers to continue to prepare the relevant documents serving to justify their entitlement to tax treaty benefits, as it was done until now, in order to be able to submit them to the in-charge tax bureau when necessary upon tax audit.

¹Based on Tax Administration Law, the tax bureau can require the taxpayers to pay the taxes due, late-payment interest equal to 0.05% per day and fines from 50% up to 5 times the amount of tax which should have been paid.

²Based on Tax Administration Law, the tax authority can ask the withholding agent to pay fines ranging from 50% up to 3 times the amount of tax which should have been paid.



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By the way, as the non-resident taxpayer shall now self-assess whether it can enjoy the treaty benefits or not, it requires having a better understanding of the relevant tax regulations. If the non-resident taxpayer makes mistake, it might be penalized later on by the tax bureau who can claim not only the payment of unpaid or underpaid taxes, but also the late-payment interests and fines. Therefore, non-resident taxpayers are suggested to give special attention to said self-assessment work, to well coordinate with the withholding agent and, in case of doubt, seek the advice from professionals.

Please do not hesitate to contact us:

He Shunshan - Senior Tax Advisor

heshunshan@dsavocats.com

Liu Yijun - Senior Tax Advisor

liuyijun@dsavocats.com



*For any additional information
please contact:*

asie@dsavocats.com

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