

CHINA TAX ALERT

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Tax clearance procedure for certain outbound remittances overhauled

Regulations discussed in this issue:

- The 2013 Notice of State Administration of Foreign Exchange and State Administration of Taxation on Issues relating to Tax Recordal Filing for Payments to Foreign Parties under Service Trade, etc. (Announcement 40)
- The 2008 Notice of State Administration of Foreign Exchange and State Administration of Taxation on Issues relating to Provision of Tax Certificate for Payments to Foreign Parties under Service Trade, etc. (Circular 64)

On 9 July 2013, the State Administration of Taxation (SAT) and the State Administration of Foreign Exchange (SAFE) jointly issued Announcement 40 to prescribe a new tax registration requirement for Chinese residents making certain payments overseas, effective from 1 September 2013. The scope of the new circular covers cross-border service fees as well as other current account and capital account items under China's foreign exchange regulations.

Announcement 40 is a welcome development for multinational companies (MNCs) doing business in China. It eliminates the existing requirement that tax clearance must be secured before outbound remittance can be carried out; it will also significantly expedite cash transfers from China to overseas for items covered by the circular. However, with the new tax recordal filing system, taxpayers may face greater penalty risks if they are unable to demonstrate that Chinese taxes in connection with the remittance have been adequately settled.

Background

China has maintained a strict foreign exchange control system that regulates funds flowing in and out of China. Historically, a Chinese payor needs to obtain various tax clearance documents before a remittance application can be accepted by a bank in China. In 2008, the SAFE and the SAT jointly issued Circular 64 to streamline the process of obtaining tax certificates for remitting abroad service fees, earnings, current transfers and some capital account items. The tax certificate requirement is waived for a payment that does not exceed USD 30,000 on per remittance basis. In addition, Circular 64 stipulates several instances of outbound remittance where the Chinese payor does not need to obtain tax clearance in advance (the carve-out).

The tax clearance system formalised by Circular 64 has played an important role in ensuring the collection of Chinese taxes on international transactions that are accompanied by cross-border movement of foreign currency. However, the system also creates inefficiency in commercial arrangements and slows down legitimate business transactions, especially in the cross-border service sector. In the past, due to various reasons, the application process to obtain tax certificate on transactions such as service fee payment and expense reimbursement may have taken months or even years to complete. Until the tax certificate was issued, a taxpayer was unable to remit the associated cross-border payment.

Many MNCs have voiced concerns over the negative implications of the tax clearance system on business operations, especially its effect on impeding the development of cross-border provision of services.

Announcement 40

Announcement 40 comes as a government response to address these concerns and to promote international service flows. The circular is consistent with the general trend to gradually relax China's foreign exchange system over recent years. In essence, Announcement 40 prescribes a new tax recordal filing system to replace the existing advance tax certificate system. For each covered remittance that exceeds USD 50,000, the Chinese payor needs to perform a tax recordal filing with its in-charge state tax bureau (ISTB), unless the remittance falls into an exemption list. The reporting package submitted by the Chinese payor for the initial remittance includes the executed contract or other legal documents evidencing the relevant transaction, and the 'tax recordal filing form', which contains basic information on the initial outbound remittance. For any subsequent remittance related to the same transaction, the taxpayer only needs to provide an updated tax recordal filing form reflecting that particular remittance.

The Chinese payor can obtain the tax recordal filing form from the ISTB office or its government homepage. Three copies of the form need to be filled out and submitted to the ISTB. During the recordal filing, the ISTB will assign a serial number to the forms for tracking purposes and will stamp them with the official chop. The ISTB will return one copy to the Chinese payor, retain one copy for their own record, and will send one copy to the local tax bureau in charge. The Chinese payor will bring the stamped tax recordal filing form to a designated bank in China to carry out the remittance.

According to Announcement 40, the ISTB will not review the tax position associated with the remittance during the recordal filing. The purpose of the filing is not to report the Chinese tax position on the remittance, but to notify the ISTB regarding the underlying transaction. As a result, the form does not include any tax information on the remittance. However, this will not diminish the taxpayer's obligation to settle Chinese taxes in compliance with the laws. Within 15 days ensuing the issuance of the stamped tax recordal filing form, the ISTB will examine the reporting package submitted by the Chinese payor as part of the recordal filing and may request additional supporting documents. The focus of this subsequent examination is to check:

- i. Whether the information reported on the form is consistent with the actual transaction
- ii. Whether all Chinese taxes have been fully paid according to the relevant regulations
- iii. Whether the transaction is really entitled to preferential tax treatment under a Chinese income tax treaty where such a treaty claim has been made.

In the post-filing examination, if the ISTB discovers that the Chinese taxes have not been properly paid, it will issue a notice of tax deficiency to the taxpayer or the withholding agent, and may impose a penalty as well as late payment surcharges according to Chinese tax law.

The types of remittances that fall within the scope of Announcement 40 are fairly broad. They include: income derived by non-residents from services (e.g., transportation, tourism, telecommunications, construction, installation, insurance, finance, information technology, and entertainment), intangible licensing, finance lease, real estate transfer, equity transfer, equity investment (e.g., dividend), foreign loan (e.g., interest), guarantee, and various current transfer items, among other things. China-sourced salary income earned by foreign individuals is included. Reinvestment of China-sourced earnings by a foreign investor within China is subject to the provisions in Announcement 40 as well.

The tax recordal filing requirement of Announcement 40 applies to the aforementioned payments only if the amount of a single remittance exceeds USD 50,000. In addition, Announcement 40 prescribes a number of instances where no tax recordal filing is necessary to affect a remittance from China to overseas. The list of exemptions in Announcement 40 is similar to the carve-out in Circular 64 in nature, but it is more comprehensive in scope.

KPMG observations

Announcement 40 represents a measure by the Chinese tax authorities to improve taxpayer services for non-residents, and delivers generally positive news for MNCs seeking to make remittance out of China. The conversion from the advance tax clearance system to the tax recordal filing system could significantly accelerate the outbound remittance process. Under the existing system, it is imperative that the designated Chinese bank sees a tax certificate in order to approve a remittance request. Meanwhile, tax officials reviewing the Chinese tax positions of the transactional parties are pressured to request that all taxes should be collected and all tax controversies are resolved before the tax clearance can be issued. This often causes delay in the remittance process, especially if the tax authorities and the taxpayer are locked in a tax dispute. Under the new system, remittance is de-linked from tax clearance. Tax officials do not need to determine whether adequate taxes have been settled at the time of registering the remittance transaction, and the remittance can take place right after the Chinese payor obtains the stamped tax recordal filing form. The ISTB will examine the transaction after the remittance and assess the MNC's tax positions, but this examination will not hold up the remittance process.

However, the new system in Announcement 40 places higher tax administration standards on the ISTB and creates greater urgency for taxpayers on document preparation. Announcement 40 suggests that the ITSB should proactively examine MNCs' tax positions in cross-border transactions rather than relying on foreign exchange control as an automatic check-point, given that advance tax clearance requirement is no longer a prerequisite for remittance in the future. MNCs should ensure that their tax positions have strong technical merits and are well supported by relevant documentation. If MNCs are imposed with additional tax assessments during the post-remittance examination, they could face penalty and late payment surcharges.

Announcement 40 is scheduled to take effect on 1 September 2013. The SAT has informally indicated that if a taxpayer has obtained a tax certificate, but has not completed remittance before the effective date of Announcement 40, the unutilised tax certificate will cease to be effective on 1 September 2013 and the tax recordal filing system will kick in. With a month to go before the implementation of Announcement 40, MNCs are encouraged to plan the timing of their impending remittances, proactively communicate with their ISTBs to understand any local practices, prepare tax computations according to the facts and the law, and gather documents to support their tax positions.

Khoonming Ho

Partner in Charge, Tax
China and Hong Kong SAR
Tel. +86 (10) 8508 7082
khoonming.ho@kpmg.com

Beijing/Shenyang

David Ling
Partner in Charge, Tax
Northern China
Tel. +86 (10) 8508 7083
david.ling@kpmg.com

Qingdao

Vincent Pang
Tel. +86 (532) 8907 1728
vincent.pang@kpmg.com

Shanghai/Nanjing

Lewis Lu
Partner in Charge, Tax
Central China
Tel. +86 (21) 2212 3421
lewis.lu@kpmg.com

Hangzhou

Martin Ng
Tel. +86 (571) 2803 8081
martin.ng@kpmg.com

Chengdu

Anthony Chau
Tel. +86 (28) 8673 3916
anthony.chau@kpmg.com

Guangzhou

Lilly Li
Tel. +86 (20) 3813 8999
lilly.li@kpmg.com

Fuzhou/Xiamen

Maria Mei
Tel. +86 (592) 2150 807
maria.mei@kpmg.com

Shenzhen

Eileen Sun
Partner in Charge, Tax
Southern China
Tel. +86 (755) 2547 1188
eileen.gh.sun@kpmg.com

Hong Kong

Karmen Yeung
Tel. +852 2143 8753
karmen.yeung@kpmg.com

Northern China

David Ling
Partner in Charge, Tax
Northern China
Tel. +86 (10) 8508 7083
david.ling@kpmg.com

Vaughn Barber

Tel. +86 (10) 8508 7071
vaughn.barber@kpmg.com

Roger Di

Tel. +86 (10) 8508 7512
roger.di@kpmg.com

John Gu

Tel. +86 (10) 8508 7095
john.gu@kpmg.com

Kevin Lee

Tel. +86 (10) 8508 7536
kevin.lee@kpmg.com

Paul Ma

Tel. +86 (10) 8508 7076
paul.ma@kpmg.com

Vincent Pang

Tel. +86 (10) 8508 7516
+86 (532) 8907 1728
vincent.pang@kpmg.com

Michael Wong

Tel. +86 (10) 8508 7085
michael.wong@kpmg.com

Jessica Xie

Tel. +86 (10) 8508 7540
jessica.xie@kpmg.com

Irene Yan

Tel. +86 (10) 8508 7508
irene.yan@kpmg.com

Leonard Zhang

Tel. +86 (10) 8508 7511
leonard.zhang@kpmg.com

Tracy Zhang

Tel. +86 (10) 8508 7509
tracy.h.zhang@kpmg.com

Abe Zhao

Tel. +86 (10) 8508 7096
abe.zhao@kpmg.com

Catherine Zhao

Tel. +86 (10) 8508 7515
catherine.zhao@kpmg.com

Eric Zhou

Tel. +86 (10) 8508 7610
ec.zhou@kpmg.com

David Chamberlain

Tel. +86 (10) 8508 7056
david.chamberlain@kpmg.com

Tony Feng

Tel. +86 (10) 8508 7531
tony.feng@kpmg.com

Tiansheng Zhang

Tel. +86 (10) 8508 7526
tiansheng.zhang@kpmg.com

Central China

Lewis Lu
Partner in Charge, Tax
Central China
Tel. +86 (21) 2212 3421
lewis.lu@kpmg.com

Anthony Chau

Tel. +86 (21) 2212 3206
+86 (28) 8673 3916
anthony.chau@kpmg.com

Cheng Chi

Tel. +86 (21) 2212 3433
cheng.chi@kpmg.com

Chris Ho

Tel. +86 (21) 2212 3406
chris.ho@kpmg.com

Lily Kang

Tel. +86 (21) 2212 3359
lily.kang@kpmg.com

Sunny Leung

Tel. +86 (21) 2212 3488
sunny.leung@kpmg.com

Christopher Mak

Tel. +86 (21) 2212 3409
christopher.mak@kpmg.com

Martin Ng

Tel. +86 (21) 2212 2881
+86 (571) 2803 8081
martin.ng@kpmg.com

Yasuhiko Otani

Tel. +86 (21) 2212 3360
yasuhiko.otani@kpmg.com

John Wang

Tel. +86 (21) 2212 3438
john.wang@kpmg.com

Jennifer Weng

Tel. +86 (21) 2212 3431
jennifer.weng@kpmg.com

Grace Xie

Tel. +86 (21) 2212 3422
grace.xie@kpmg.com

Bruce Xu

Tel. +86 (21) 2212 3396
bruce.xu@kpmg.com

Zichong Xu

Tel. +86 (21) 2212 3404
zichong.xu@kpmg.com

William Zhang

Tel. +86 (21) 2212 3415
william.zhang@kpmg.com

Michelle Zhou

Tel. +86 (21) 2212 3458
michelle.b.zhou@kpmg.com

Cheng Dong

Tel. +86 (21) 2212 3410
cheng.dong@kpmg.com

David Huang

Tel. +86 (21) 2212 3605
david.huang@kpmg.com

Dylan Jeng

Tel. +86 (21) 2212 3080
dylan.jeng@kpmg.com

Ho Yin Leung

Tel. +86 (21) 2212 3358
hoyin.leung@kpmg.com

Henry Ngai

Tel. +86 (21) 2212 3411
henry.ngai@kpmg.com

Amy Rao

Tel. +86 (21) 2212 3208
amy.rao@kpmg.com

Southern China

Eileen Sun
Partner in Charge, Tax
Southern China
Tel. +86 (755) 2547 1188
eileen.gh.sun@kpmg.com

Sam Fan

Tel. +86 (755) 2547 1071
sam.kh.fan@kpmg.com

Angie Ho

Tel. +86 (755) 2547 1276
angie.ho@kpmg.com

Jean Jin Li

Tel. +86 (755) 2547 1128
Tel. +86 (592) 2150 888
jean.j.li@kpmg.com

Jean Ngan Li

Tel. +86 (755) 2547 1198
jean.li@kpmg.com

Lilly Li

Tel. +86 (20) 3813 8999
lilly.li@kpmg.com

Kelly Liao

Tel. +86 (20) 3813 8668
kelly.liao@kpmg.com

Maria Mei

Tel. +86 (592) 2150 807
maria.mei@kpmg.com

Michelle Sun

Tel. +86 (20) 3813 8615
michelle.sun@kpmg.com

Bin Yang

Tel. +86 (20) 3813 8605
bin.yang@kpmg.com

Hong Kong

Ayesha M. Lau
Partner in Charge, Tax
Hong Kong SAR
Tel. +852 2826 7165
ayasha.lau@kpmg.com

Chris Abbiss

Tel. +852 2826 7226
chris.abbiss@kpmg.com

Darren Bowdern

Tel. +852 2826 7166
darren.bowdern@kpmg.com

Barbara Forrest

Tel. +852 2978 8941
barbara.forrest@kpmg.com

Daniel Hui

Tel. +852 2685 7815
daniel.hui@kpmg.com

Charles Kinsley

Tel. +852 2826 8070
charles.kinsley@kpmg.com

John Kondos

Tel. +852 2685 7457
john.kondos@kpmg.com

Alice Leung

Tel. +852 2143 8711
alice.leung@kpmg.com

Curtis Ng

Tel. +852 2143 8709
curtis.ng@kpmg.com

Kari Pahlman

Tel. +852 2143 8777
kari.pahlman@kpmg.com

John Timpany

Tel. +852 2143 8790
john.timpany@kpmg.com

Wade Wagatsuma

Tel. +852 2685 7806
wade.wagatsuma@kpmg.com

Lachlan Wolfers

Tel. +852 2685 7791
lachlan.wolfers@kpmg.com

Jennifer Wong

Tel. +852 2978 8288
jennifer.wong@kpmg.com

Christopher Xing

Tel. +852 2978 8965
christopher.xing@kpmg.com

Karmen Yeung

Tel. +852 2143 8753
karmen.yeung@kpmg.com

Rebecca Chin

Tel. +852 2978 8987
rebecca.chin@kpmg.com

Kate Lai

Tel. +852 2978 8942
kate.lai@kpmg.com

Alex Lau

Tel. +852 2143 8597
alex.lau@kpmg.com

Benjamin Pong

Tel. +852 2143 8525
benjamin.pong@kpmg.com