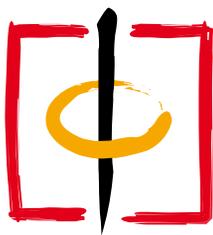


Issue 134 • May 2013



CHINA BRIEFING

From Dezan Shira & Associates



Understanding Permanent Establishments in China

- Triggering Permanent Establishment Status
- Tax Implications of a Service Permanent Establishment
- Does a Representative Office Constitute a Permanent Establishment?
- Countries with Double Taxation Avoidance Agreements with China

Introduction



Sabrina Zhang
National Tax Partner
Dezan Shira & Associates
Beijing Office

With an increasing number of foreign enterprises starting to conduct business in China, tax liabilities resulting from business activities in China are quickly becoming an issue of key concern. Many foreign enterprises that conduct business in China are unaware that their business activities here may constitute a permanent establishment ("PE"), which thus subjects them to corporate income tax.

In recent years, China's tax authorities have tightened the tax administration of expatriate secondment arrangements in China, whereby overseas parent companies may be challenged that their actions constitute provision of services to their China subsidiary and, hence, result in the creation of a Service PE in China.

This month's issue of China Briefing Magazine casts some light on this subject by discussing the circumstances that trigger the creation of a PE in China, focusing on Service PE, in the first article. In the second article, we discuss the tax implications for a non-resident enterprise where its activities constitute a Service PE in China.

At the end of the magazine, we also address the taxation of representative offices in China and list the countries and regions that have DTAs with China. We hope that a better understanding of this subject will allow foreign investors to plan their activities in China more efficiently.

Kind regards,

Sabrina Zhang



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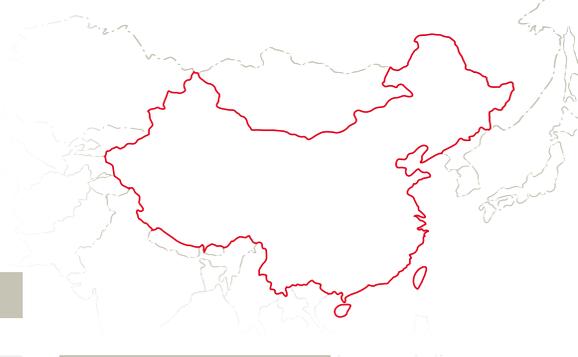


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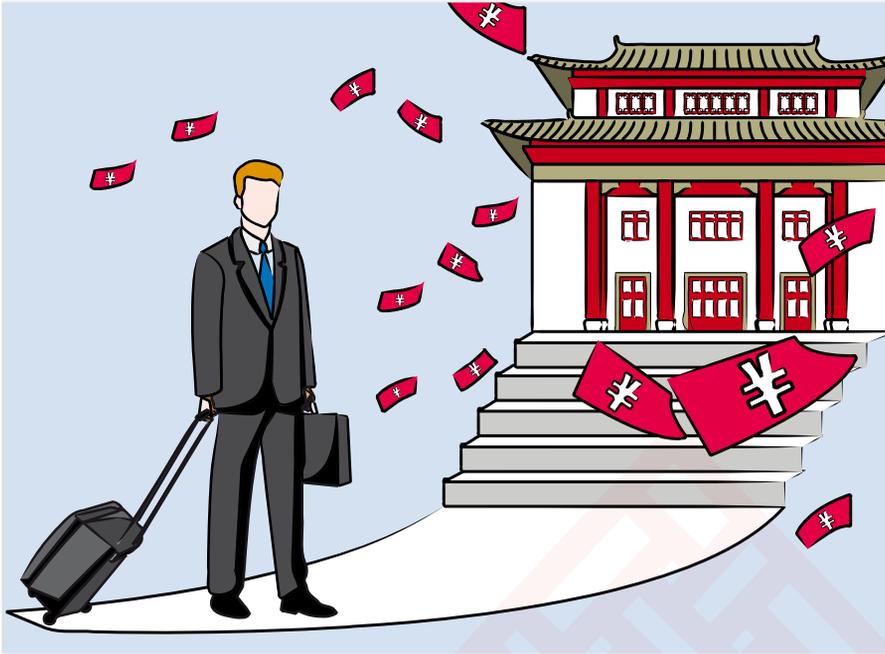
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Understanding Permanent Establishments in China



Contents



“As a foreign business or individual, income derived from China may be subject to taxes in both your home country and in China, which could substantially increase your tax burden.”

p.4

Triggering Permanent Establishment Status

p.8

Tax Implications of a Service Permanent Establishment

p.11

Countries with Double Taxation Avoidance Agreements with China

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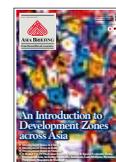
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Triggering Permanent Establishment Status

– By Eunice Ku and Shirley Zhang, Dezan Shira & Associates

For foreigners doing business in China, tax is always a key concern. As a foreign business or individual, income derived from China may be subject to taxes in both your home country and China, which could substantially increase your tax burden.

Under China's Corporate Income Tax (CIT) Law, a non-resident enterprise (i.e., an enterprise organized outside of China and whose effective management is not within China) without an establishment or venue in China is subject to CIT at a withholding rate of 10% on their China-sourced income, which includes:

- Income from property transfers;
- Income from equity investment such as dividends and bonuses;
- Income derived from interests, rentals and royalties;
- Income derived from donations; and
- Any other income.

A non-resident enterprise with an establishment or venue in China is taxable on all of its China-sourced income, as well as non-China sourced income that has an actual connection to the Chinese establishment or site, at 25% CIT. "Actual connection" means that the establishment owns equity interests or debt claims giving rise to the income, or the establishment owns, manages and controls properties giving rise to the income.

"Establishment or venue" is defined as those that are engaged in production and business operations in China, including:

- Management establishments, business operation establishments and branch offices;
- Factories, farms and venues that exploit natural resources;
- Venues that provide labor services;
- Venues that are engaged in engineering operations such as construction, installation, assembly, repair and prospecting; and
- Other establishments or venues that undertake production and business operations.

If the non-resident enterprise is a tax resident of a jurisdiction that has a double tax agreement (DTA) in place with China, it may be able to claim exemption from CIT if the establishment or venue does not constitute a permanent establishment (PE) pursuant to the PE article under the relevant DTA. DTAs aim to prevent income from being taxed by two or more states through providing tax credits (i.e., allowing the tax paid in one country to be offset against tax payable in the other country) and/or exemptions or reduced tax rates for specific income types such as interests, royalties and dividends. DTAs also provide certainty by defining the taxation right of each jurisdiction on various types of income arising from cross-border economic activities. According to Article 7 of China's tax treaties with various other countries,

“The profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Contracting State but only so much of them as is attributable to that permanent establishment.”

This means that, where a resident of a country which has a DTA with China carries on business in China through a PE, the profits derived by the PE will be subject to taxes in China. According to the various DTAs, foreign companies can be deemed to have a PE in China, if:

- It has an establishment or a place of business in China (Fixed place PE);
- It has a building site, a construction, assembly or installation project or related supervisory activities that last for a certain period of time (Construction PE);

- It appoints an agent in China to conclude contracts or accept orders in China (Agent PE); or
- It has employees working in China for a certain period of time (Service PE).

Fixed Place PE

DTAs define a PE as “a fixed place of business through which the business of an enterprise is wholly or partly carried on”, and can be a place of management, branch, office or factory.

The SAT released the “Interpretation Notes for the DTA between China and Singapore (Guoshuifa [2010] No. 75) (“Circular 75”) in September 2010, which provides a detailed interpretation of the DTA between China and Singapore and is applicable to similar provisions in other DTAs concluded by China with other countries. According to Circular 75, a fixed place PE should possess the following characteristics:

- The business venue actually exists;
- The business venue is relatively fixed and stable; and
- All or part of the enterprise’s business is carried out through the business venue.

Construction-site PE

A PE can also take the form of a building site, a construction, assembly or installation project or supervisory activities in connection therewith that last for a period of more than 6 months (in most DTAs). According to Circular 75, the start and end dates of the six-month period is determined based on the date that the signed contract is implemented (including all preparation activities) until the completion of the work (including trial operations).

Agent PE

Where a person in China acting on behalf of a non-resident enterprise has the authority to conclude contracts in the name of the enterprise and does so habitually, a PE will also be constituted with respect to any activities that the person undertakes for the enterprise. However, the use of an independent agent (e.g., broker or general commission agent) to carry on business in China does not constitute a PE. Circular 75 provides that the activities of an agent should meet the below two criteria in order to be considered an independent agent and thus not be deemed the PE of an enterprise:

- The agent is independent from the enterprise both legally and economically. The following factors will be considered when determining independence:
 - The degree of freedom of the agent’s commercial activity;
 - Who bears the risks with respect to the agent’s business activities;
 - The number of enterprises represented by the agent; and
 - The extent to which the enterprise depends on the professional knowledge of the agent.
- When the independent agent conducts activities on behalf of the enterprise, it should not engage in other activities that fall under the enterprise’s own economic activities. For example, if a sales agent sells goods on behalf of an enterprise under its own name, but at the same time acts as an agent who is authorized to sign contracts on behalf of the enterprise, the agent will be deemed as a non-independent agent and will constitute a PE of the enterprise.

PE does not include:

- Use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- Maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- Maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- Maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or collecting information, for the enterprise;
- Maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character; and
- Maintenance of a fixed place of business solely for any combination of the activities mentioned in the above subparagraphs, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

Service PE

A PE is also constituted where the provision of services, including consultancy services, by an enterprise through the dispatch of its employees or other personnel to China, continues within China for a period or periods aggregating to more than six months or 183 days within any twelve-month period, depending on the specific DTA (see “Six months vs. 183 days” section). The relevant provision in the China-U.S. tax treaty states that:

“The term ‘permanent establishment’ also includes [...] the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where such activities continue (for the same or a connected project) within the country for a period or periods aggregating more than six months within any twelve month period.”

“Employees or other personnel” and “services”

According to Circular 75, the term “employees or other personnel engaged by the enterprise” is defined as employees of the enterprise and other individuals controlled by and receiving instructions from the enterprise. Meanwhile, “services” refer to professional activities such as engineering, technology, management, design, training and consulting services.

“Connected projects”

Circular 75 also lists the factors which should be considered when assessing when “connected projects” are constituted for the purpose of determining whether a Service PE has been established:

- Are the projects covered by a single master contract?;
- Where the projects are covered by different contracts, were these contracts concluded with the same/related person; and is the execution of one project a prerequisite to another?;
- Is the nature of work the same under different projects?; and
- Are the services under different projects performed by the same group of people?

Secondment arrangements as service PEs

Since mid-2009, local tax bureaus in China have tightened the tax administration of secondment arrangements in which the HQ sends staff to work in China. Overseas parent companies might be challenged that their actions constitute the provision of services to their China subsidiary and hence the creation of a Service PE in China. If a Service PE is constituted, the service fees will be subject to CIT based on a deemed profit ratio determined by the tax authority, as well as to business tax or value-added tax and other local surcharge taxes (see next article on “Tax Implications of a Service Permanent Establishment”).

In 2009, the SAT issued the “Notice Concerning the Inspection of CIT Collection on Foreign Entities’ Provision of Services to Domestic Companies through Secondment Arrangements [Jibianhan [2009] No. 103]”, requiring tax authorities in all provinces and cities to audit companies in manufacturing and service sectors in order to assess whether their arrangements involving foreign staff sent to work in China are bona fide secondment arrangements or are in fact provision of services in a disguised manner. In the latter case, the relevant local tax authorities are required to assess whether the arrangement constitutes a PE, in which case the foreign entities will be held liable for CIT and any late tax payments and penalties.

According to Circular 75, where the parent company dispatches personnel to its Chinese subsidiary per the latter’s request, and such personnel is employed by the subsidiary with the subsidiary having the right to direct their work and bear the responsibilities for the relevant work and risks, the activities of such personnel do not constitute a PE of the parent company. Under this circumstance, the fees paid to such personnel by the subsidiaries, whether directly or via the parent company, will not be subject to CIT and other taxes. Rather, they are deemed as income distribution to the subsidiary’s internal staff. The payment can be listed as expenses by the subsidiary, and are subject to IIT in China.

Circular 75 provides the following factors to help assess whether the secondees assigned to the Chinese FIE are in fact working for the overseas parent company rather than the subsidiary:

- The overseas parent company has authority over the secondees’ work and bears the relevant responsibilities and risks;
- The number of secondees to the subsidiary company and the standard of such assignment are decided by the overseas parent company;

- The salaries and wages of the secondees are borne by the overseas parent company; or
- The overseas parent company obtains profits from the subsidiary company from the assignment of such employee.

If one of the above conditions is met, the tax authorities may determine that the seconded expatriate is working for the parent company. In this case, the PE clauses will apply in determining whether a Service PE is constituted.

Practice point:

Legislative interpretations may differ throughout China thanks to the different practices of Chinese government officials. We have come across cases where:

- The registration of a PE was hampered by local tax officers;
- No taxes were charged when the customer was a state-owned enterprise; and
- Tax officers deemed that a PE had been constituted on additional “soft” factors.

Six months vs. 183 days

Currently, China has signed DTAs with 97 different countries plus Hong Kong and Macau. Previous DTAs generally adopted the six months rule, while more recent DTAs utilize the 183 days rule. Countries that adopt the 6 months rule include Switzerland, Norway, Italy, France, the U.S., Germany, New Zealand and the UK. Countries that adopt the 183 days rule include Singapore, Hong Kong, Macau, Belgium, and Finland.

How are six months counted?

The start of the calculation period is triggered the month the expatriate first arrives for the purpose of implementing the service, until the month that the expatriate leaves upon the completion of the service. The exact number of days is disregarded. Rather, the provision of services in China for a single day in a month is considered a provision of services for that entire month. However, if no expatriate is in China to perform the relevant services for 30 consecutive days, one month will be deducted. A PE is constituted if the expatriates are in China for more than six months according to this method of calculation in any 12-month period. This method of calculation as stipulated in Circular Guoshuihan [2007] No. 403 was invalidated in January 2011. However, as of now, no new regulations have been set to replace it, and tax authorities continue to adopt this method of calculating the six-months period.

How are 183 days counted?

According to Circular 75:

- The 183 days is counted from the date on which the employee(s) of the non-resident enterprise first arrive(s) in China to provide the services, until the date on which the services are completed and delivered;
- Days spent in China by all employee(s) of the non-resident enterprise on the same project should be counted;
- If multiple employees work in China on the same day, that day should be counted as one day but not repeatedly. For example, where a Singaporean enterprise dispatches 10 personnel to work in China for 3 days for a certain project, the employees will be deemed to have worked in China for 3 days, not 30 days.
- Where a service project lasts for several years, but the 183-day threshold is met within only one 12-month period, a PE will still be constituted with regard to the entire project.

Depending on whether the six months rule or 183-days rule applies, the result of whether a PE is constituted varies, with the threshold for constituting a PE much lower under the six month rule (please see the accompanying table below).

Project X	Travel records		Total no. of months in China (6-months rule)	Total no. of days in China (183-days rule)
	In (2012)	Out (2012)		
Mr. A	Feb 3	Feb 3	1	1
Mr. B & C	Mar 4	Mar 14	1	11
Mr. D & E	May 6	May 18	1	13
Mr. A & D	Aug 1	Aug 2	1	2
Mr. B	Dec 1	Jan 26	2	57
Total			6	84
PE exposure in China?			Yes	No

Tax Implications of a Service Permanent Establishment

– By Eunice Ku and Shirley Zhang, Dezan Shira & Associates

As discussed in the previous article, if an establishment or venue of a non-resident enterprise constitutes a permanent establishment (PE) in China, it will be subject to 25% CIT on all of its China-sourced income, as well as non-China sourced income that has an actual connection to the PE.

The general principles on PE taxation are laid out in Article 7 of DTAs, which makes clear that:

- Only profits of a non-resident enterprise attributable to its PE in China are taxable in China;
- When determining the profits of a PE, transactions between the non-resident enterprise and the PE are treated as transactions between independent parties;
- Expenses incurred for the business of a PE, including general and administrative allocated from the non-resident enterprise, are deductible; and
- Amounts paid to the head office or its other offices by way of royalties or interests on money lent to the PE are not deductible.

Corporate Income Tax (CIT)

According to the “Administrative Measures for the Assessment and Collection of CIT on Non-Resident Enterprises (Guoshuifa [2010] No.19, ‘Circular 19’), non-resident enterprises are required to keep accurate and complete accounts so that the taxable income could be based on its actual profits, reflecting actual functions and risks. The CIT payable is calculated on an actual profit basis as follows:

CIT = Actual taxable income × CIT rate

For non-resident enterprises that are not able to accurately calculate its actual taxable income because of incomplete accounting books or other reasons, tax authorities are entitled to determine their taxable income using the following methods:

- *Actual revenue method:*

Taxable income = Total revenue × Deemed profit rate

Applied to situations where actual revenues, but not costs, can be deduced through accounting books or other reasonable ways;

- *Cost-plus method*

Taxable income = Costs / (1 – Deemed profit rate) × Deemed profit rate

Applied to situations where costs can be correctly calculated, but not revenues; or

- *Expenditure-plus method*

Taxable income = Expenditures / (1 – Deemed profit rate – Business tax rate) × Deemed profit rate

Applied to situations where business expenditures can be accurately computed, but not revenues and costs.

“Transaction planning is critical in order to understand tax implications and optimizing them for the greatest return. The contractual agreement for the transaction is the basis for tax assessment, which the non-resident enterprise can actively influence.”

Have additional questions about permanent establishments? Contact fabian.knopf@dezshira.com.



Fabian Knopf
Senior Associate
Business Development
Shenzhen Office

Circular 19 also provides a range of deemed profit rates that the tax authorities will apply depending on the business type of the non-resident enterprise:

Type of business	Deemed profit rate
Construction projects, design and consulting services	15% - 30%
Management service	30% - 50%
Other services or operating activities other than service	No less than 15%

In addition, if the tax authorities have evidence to believe that the actual profit rate of the non-resident enterprise significantly exceeds the prescribed ranges, they are allowed to apply a higher profit rate. No upper limit is specified. If a non-resident enterprise engages in several types of businesses, the respective taxable incomes should be calculated separately, or they will be uniformly subject to the highest profit rate applicable.

Non-resident enterprises that provide services are liable for Chinese tax to the extent of the income derived from those offered in China. Non-resident enterprises who render services both inside and outside of China should allocate profit based on the work load and cost. Chinese tax authorities may ask the non-resident enterprise to prove that the profit allocation is reasonable and genuine. If the non-resident enterprise is unable to provide the evidence, the tax authority could deem that the entire service happened in China and, therefore, the entire relevant income will be subject to Chinese tax.

For non-resident enterprises selling machinery equipment or products to Chinese enterprises and simultaneously providing services such as installation, assembling, technical training, guidance and supervision, the prices for both the equipment and the supportive services should be included in the equipment sales contracts.

If the price for the supportive services is not listed in the sales contract or if the listed price is not reasonable, the competent tax authorities could refer to the price level of identical or similar services to deem the revenues of non-resident enterprises from providing the supportive services. If no reference is available, service revenues would be deemed to be no less than 10% of the total amount of the sales contract. Therefore, non-resident enterprises are advised to create separate contracts for the equipment sales and supportive services. Note that even if the sales of equipment are not subject to Chinese tax because the transaction took place outside of China, the revenues from the supportive services provided in China will still be subject to China tax.

Also note that PE provisions in a DTA prevail over those on royalty service fees. In other words, royalty service fees that have substantial connections with a PE will be taxed as the profit of the PE, applying the 25 percent CIT rather than the reduced or exempted rates under the royalties provision.

Indirect Taxes

When a non-resident enterprise provides services to a Chinese company, the service fees are subject to a 5 percent business tax (BT), or value-added tax (VAT), and surcharges. The surcharges include the urban construction and maintenance tax (UCMT), education surcharge (ES) and local education surcharge (LES), which amount to an additional 12 percent on the total indirect tax liability.

A value-added tax (VAT) pilot reform to merge BT with VAT commenced in Shanghai and other provinces in 2012 and is expected to be implemented nationwide starting August 1, 2013 in various service sectors, including R&D and technology services, information technology services, cultural and creative services, logistics auxiliary services, and authentication and consulting services. In these sectors, a 6 percent VAT is imposed in lieu of BT.

Indirect taxes are withheld by the Chinese service recipient when it remits the payment to the foreign service provider and are paid to the tax authority. If the Chinese company is a general VAT taxpayer, it will be able to deduct the VAT paid against their output VAT incurred in its business operations. It is therefore advisable to stipulate clearly in the service contract that the contract amount is VAT-exclusive, so that the VAT does not become a cost for the foreign service provider while benefitting the Chinese company.

Individual Income Tax

Once a PE is constituted, all expatriates working for the PE are subject to individual income tax (IIT) on their China-sourced income from the first day they arrived in China for the project, and the 183-day exemption rule under the DTAs will no longer apply. Their work will be

taxed pro rata, (i.e., based on the number of days they are in China in a month). Tax filings and payments are made on a monthly basis. If it is not certain whether a project constitutes a PE, filing and payment can be postponed until the month when it is clear that the project does constitute a PE.

IIT Formula for Expatriate under PE	
Period in China	IIT calculation
Not full month	$((\text{Salary} - 4,800) * \text{Tax rate} - \text{QD}) * (\text{Days in China} / \text{Days in current month})$
Full month	$((\text{Salary} - 4,800) * \text{Tax rate} - \text{QD}) * \text{Tax rate} - \text{QD}$

IIT Rates and Quick Deductions		
Monthly taxable income (RMB)	Tax rate	Quick deduction (RMB)
1,500 or less	3%	0
1,500 < TI ≤ 4,500	10%	105
4,500 < TI ≤ 9,000	20%	555
9,000 < TI ≤ 35,000	25%	1,005
35,000 < TI ≤ 55,000	30%	2,755
55,000 < TI ≤ 80,000	35%	5,505
> 80,000	45%	13,505

Does a Representative Office Constitute a PE in China?

Representative offices (ROs) are taxed as PEs in China. The “Interim Measures for the Administration of Tax Collection against Permanent Representative Offices (ROs) of Foreign Enterprises (Guoshuifa No. 18 [2010])” issued by the SAT generally provides that ROs are required to pay corporate income tax on its profits, as well as business tax and value-added tax, which usually amounts to a liability of approximately 11-12 percent of the total expenses of the RO. ROs are required to keep proper accounting records to ascertain their actual revenues and profits and also accordingly file taxes.

Representative offices that cannot determine their profits on an actual basis must ascertain their deemed tax value by either using the expenditure-plus method or the actual revenue deemed profit method. Under either method, the deemed profit margin is no less than 15 percent. The expenditure-plus method is currently the most common method for RO tax filings and least likely to be challenged by tax authorities. Under this method, the expense of running the RO is used as the basis for tax calculation. The most common expenses faced by the RO are often rent, administrative costs and salaries.

Under very rare circumstances, i.e., where the RO is established by a foreign government or non-profit organization, a RO can apply for and enjoy tax exemption.

The Shanxi Permanent Establishment Case

In July 2012, the Shanxi Provincial State Tax Bureau international tax division conducted a routine review pertaining to an application for tax treaty benefits under the China-Hong Kong DTA, filed by a Hong Kong company that was set up by a Fortune 500 company. Based on suspicions that the Hong Kong company did not have a bona fide commercial purpose, an investigation committee was established to conduct anti-avoidance investigations on the company. The tax bureau ultimately denied the treaty benefits application.

In the process of the investigation, the investigation committee found other suspicious activities and obtained evidence indicating that the Hong Kong company’s activities in mainland China constituted a PE between October 2006 and June 2012. As a result, the tax bureau imposed a 25 percent CIT on the profits attributable to the Chinese PE and clawed back RMB240 million of income tax. This is the largest tax adjustment amount imposed in the tax bureau’s history. Non-resident enterprises should therefore be aware that applying for treaty benefits may trigger investigation into other areas such as the existence of PEs in China.



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Algeria	Estonia	Kyrgyzstan	Papua New Guinea	Thailand
Armenia	Ethiopia**	Laos	Philippines	Trinidad & Tobago
Australia	Finland	Latvia	Poland	Tunisia
Austria	France	Lithuania	Portugal	Turkey
Azerbaijan	Georgia	Luxembourg	Qatar	Turkmenistan
Bahrain	Germany	Macao	Romania	Ukraine
Bangladesh	Greece	Macedonia	Russia	United Arab Emirates
Barbados	Hong Kong	Malaysia	Saudi Arabia	United Kingdom*
Belarus	Hungary	Malta	Serbia & Montenegro	United States
Belgium*	Iceland	Mauritius	Seychelles	Uzbekistan
Bosnia-Herzegovina	India	Mexico	Singapore	Venezuela
Brazil	Indonesia	Moldova	Slovakia	Vietnam
Brunei	Iran	Mongolia	Slovenia	Zambia
Bulgaria	Ireland	Morocco	South Africa	* An additional protocol has been signed but is not yet in effect. ** Signed, but not in effect at time of writing.
Canada	Israel	Nepal	Spain	
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Cuba	Jamaica	New Zealand	Sudan	
Cyprus	Japan	Nigeria	Sweden	
Czech Republic	Kazakhstan	Norway	Switzerland	
Denmark*	Korea (R.O.K.)	Oman	Syria	



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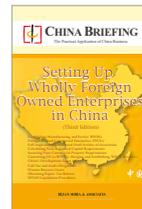
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