



# Update China Desk

## China Law Brief

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English Version

### New Tax Regulation on Secondment Arrangement of Foreign Staff in China

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On June 1, 2013, the Chinese State Administration of Taxation's Notice concerning the Issues related to Corporate Income Tax Collection on Services provided by Non-resident Companies in China through Staff Secondments (hereinafter "SAT-Notice 19/2013") will come into effect. The new regulation represents the effort of the Chinese tax authorities to increase the legal certainty while tightening up the tax enforcement against non-resident companies, especially the multinational corporations ("MNCs"), on their taxable presence in China.

Under the Chinese Corporate Income Tax Law, a non-resident company shall pay for the income through its establishment/location in China a CIT of 25%, while for the out-of-China income but not through its establishment/location in China only a CIT of 20%. Meanwhile, the existing national bilateral treaties on double taxation, in particular the exemption or relief measures, shall be taken into account.

In a typical cross-border secondment arrangement, a secondee shall be sent by a foreign dispatching company to work at the site of the receiving company in China, while the dispatching company remains the legal employer of the secondee and continues to pay part or all of the remuneration to the secondee. However, for a long time the question, whether the payment by the Chinese receiving company to the foreign dispatching company for such secondment arrangement shall be subject to the Chinese Corporate Income Tax ("CIT"), remained not clearly answered.

The SAT-Notice 19/2013 approaches this question by clarifying whether such secondment arrangement would establish a taxable presence of the foreign non-resident company. The criteria set up by the SAT-Notice 19/2013 focus on which company assumes the responsibility for the business risk of

#### **Chinese Corporate Income Tax**

#### **Double Taxation Bilateral Treaties**

#### **A typical Cross-border Secondment**

#### **SAT-Notice 19/2013: Establishment/Location as Main Criterion**

the secondee's services and evaluates the secondee's performance. If the foreign dispatching company assumes such responsibility, wholly or partly, and normally runs the performance evaluation of the secondee, it should be assumed that this non-resident company has an establishment/location or even permanent establishment in China.

Furthermore, five factors shall be taken into account by applying these criteria and the positive identification of any one of these five factors shall be sufficient for establishing the taxable presence of the non-resident company:

1. Whether the receiving company pays management fees or service fees to the dispatching company for the secondment;
2. Whether the receiving company over-reimburses the dispatching company for the salaries, social security and other expenses of the secondee;
3. Whether the dispatching company does not pay the full amount received from the receiving company to the secondee and retains a certain amount;
4. Whether the Chinese Individual Income Tax on the salaries and wages of the secondee which shall be borne by the dispatching company has not been fully paid up in China;
5. Whether the dispatching company determines the number, qualifications, remuneration package and working location of the secondees.

However, the SAT-Notice 19/2013 explicitly exempts the secondment services relating to the exercises of shareholder's rights in China. If the dispatching company sends personnel to the receiving company merely for exercising its shareholder's rights (such as making suggestions to the receiving company on behalf of the dispatching company, or attending a shareholders meeting or a board meeting of the receiving company on behalf of the dispatching company), the dispatching company shall not be regarded as having created establishment/location in China.

With the technical and practical guidelines in the SAT-Notice 19/2013, a better compliance planning and execution could be expected in cross-border transactions, not only for taxation, but also for issues such as merger agreements and employment of post-merger integration officers.

## **Five Factors for Individual Assessment**

## **Exemption: Exercise of Shareholder's Rights**

## **Compliance at Multiple Levels in Cross-border Transactions**

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