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China Insights

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China's New Enterprise Income Tax Law

China's new Enterprise Income Tax Law (the "New Tax Law") was adopted earlier this year and will take effect on January 1, 2008 (the "Effective Date"). Many articles have been published to introduce and explain the changes made by the New Tax Law. Though this article summarizes fundamental changes made by the New Tax Law, it also focuses on the impact the New Tax Law will have on foreign invested enterprises (FIEs), points out some uncertainties resulting from unanswered questions presented by the New Tax Law and concludes by advising FIEs to revisit their current corporate structure in light of the New Tax Law.

1. Reasons for the New Tax Law

Preferential tax treatment, including lower tax rates and tax holidays, for FIEs, has been one of the primary tools China has used to attract foreign investment. It has helped fuel a capital influx that reached $60.3 billion in 2006, resulting in China surpassing the U.S. as the world's top destination for foreign direct investment. The core of the preferential tax treatment has been a 100% tax holiday on enterprise income taxes for two years, beginning with the first year in which an FIE generates a profit, and a 50% holiday for each of the next three years.

Why then has China adopted the New Tax Law, which diminishes or eliminates the preferential tax treatment to FIEs that has been such an effective magnet for attracting foreign investment? There are several reasons.

"False FIE's." Domestic Chinese enterprises and individual investors, seeking to take advantage of the preferential tax treatment afforded only to FIEs, increasingly found or created loopholes through which they engaged in "round-trip" investments by moving funds out of the mainland – often without complying with Chinese tax and currency transfer laws – to Hong Kong or other foreign destinations. They then used these funds to invest back into China, thereby enjoying preferential tax treatment intended to benefit only foreign investors – not round-trip Chinese investors.

Other Attractions. Increasingly, foreign investors have found other good reasons to invest in China, such as reaching its exploding domestic market for goods provided by FIEs, an increasingly skilled workforce and an improving infrastructure. As a result, across-the-board preferential tax treatment is no longer as necessary as it once was to attract foreign investment.

More Targeted Tax Preferences. Across-the-board preferential tax preferences to manufacturing FIEs did not discriminate among relatively more and less attractive industries and companies. China is now using more targeted tax and other incentives to attract greener, higher tech and other especially desirable industries and companies.

Remaining Tax-rate Competitive Worldwide While Leveling the Playing Field. China's Ministry of Finance reported that the average tax rate in the world is 28.6%; and the tax rate in 18 countries adjacent to China is 26.7%. Based on this data, China adopted 25% as its new tax rate, with the hope that the tax rate will still be regarded as being favorable compared with those in most countries and regions. The new tax rate will increase the tax rate on FIEs from the present 15% or 24% to 25% and will eliminate tax holidays while decreasing the tax rate on domestic enterprises from 30% to 25%. Thus the playing field for both FIEs and domestic Chinese companies will be level.

2. Grandfathering of Current Preferential Tax Treatment

In order to provide transitional relief to adversely affected FIEs as the result of elimination of tax holidays, the New Tax Law provides a "grandfather rule" for FIEs established before the Effective Date. Current reduced tax rates for existing FIEs will be gradually increased to the new tax rate within 5 years of the Effective Date

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(although the specifics of how this gradual increase will work have not yet been announced). Any unused tax holiday for existing FIEs will be grandfathered until it expires by its terms; however for those FIEs whose tax holiday has not started because they have not yet been profitable, the tax holiday will be deemed to have commenced on the Effective Date.

3. Selected Noteworthy Provisions

Residence Rule. The New Tax Law taxes "residential enterprises" and "non-residential enterprises" on a different basis. A residential enterprise will be taxed on its worldwide income, while a non-residential enterprise will be taxed only on its China-sourced income. China takes the position that if a foreign company is either registered in China or its effective management is exercised in China, then the company will be a "residential enterprise" in China. The New Tax Law, however, does not define what constitutes "effective management."

This residence rule makes it advisable for certain Chinese enterprises and foreign companies to revisit their current structure. Chinese enterprises which currently accumulate Chinese-sourced income offshore will be taxed on their portion of undistributed profits as retained in certain low-tax jurisdictions. Likewise, if foreign-based multinationals place their Asia/Pacific regional management in China, they may well be deemed "residential enterprises" by application of the "effective management" standard.

Transfer Pricing Enforcement. In the past, tax holidays have been abused by some FIEs. For example, an FIE may generate a large profit margin during the period of the tax holiday, but afterward generate a small profit or even a loss because the FIE's foreign parent company artificially allocates excessive cost to the FIE. As a result, the FIE generates only a small taxable profit, or even a loss, in China, and a large profit offshore – often in a low or no tax jurisdiction. Recently such transfer pricing has come under closer scrutiny by Chinese tax authorities, and FIEs have been required to disclose their affiliate transactions in detail either in their FIEs' formation application package or in their annual tax filings. Under the New Tax Law, Chinese tax authorities are authorized to apply reasonable methods to adjust an FIE's income if the FIE and its affiliates do not comply with the "arm's length" principle. In addition, Chinese tax authorities are increasingly requesting information from companies in order to identify potential transfer pricing audit targets.

"Recently…transfer pricing has come under closer scrutiny by Chinese tax authorities…"

Anti-tax Avoidance. The New Tax Law contains a general anti-avoidance rule and a specific anti-avoidance rule. The general rule prevents tax avoidance through the use of tax haven companies by taking into account the portion of the undistributed profits attributable to the resident enterprise when computing the taxable income of the resident enterprise in China. As for the specific rule, the New Tax Law will not allow an interest expense deduction if it relates to a debt that exceeds a specified related party debt-to-equity ratio. The New Tax Law does not, however, specify the debt-to-equity ratio. Currently, an FIE's capital structure must comply with the statutory debt-to-equity ratio. Payment of interest on debt in excess of this ratio is not allowed. However, there is no similar requirement imposed on domestic enterprises. Therefore, this specific anti-tax avoidance rule may have more impact on domestic enterprises than FIEs if the to-be-issued new debt-to-equity ratio is no more stringent than the current debt-to-equity ratio applicable to an FIE's capital structure.

Withholding Tax and Tax Treaties. Like many other laws promulgated in China, the New Tax Law aims to provide a general framework. Certain definitions of new terms and specific application of various provisions are left to the detailed implementing regulations and supplementary tax circulars that are expected to follow. An example of a still-outstanding question is taxation on dividends. Under current law, dividends paid by an FIE to its foreign shareholder are exempted from withholding income tax. However, unlike the current law, the New Tax Law does not specifically exempt withholding tax on dividends payable to foreign investors. Many foreign investors, relying on the present dividend tax exemption, have set up their holding companies in lower or zero tax rate tax havens such as the British Virgin Islands and the Cayman Islands. If China imposes withholding tax on dividends, then such structures may not be tax efficient. To set up a tax-efficient structure, China's anti-double taxation treaty should be considered. China currently has a tax treaty or similar arrangement with 86 countries and regions including the U.S., Hong Kong and Macau, but China does not have a tax treaty or similar arrangement with tax-free jurisdictions such as the British Virgin Islands and the Cayman Islands. Accordingly, the tax-efficiency concern

of holding companies set up in these regions may need to be revisited.

Also, under current law, withholding tax is 20%, but the tax rate applicable to interest, royalty and other passive income is 10%. The New Tax Law does not specify whether such reduced withholding tax rate applicable to interest, royalty and other passive income will remain the same after the Effective Date.

Tax-efficient Structure and Tax Treaties. Under current law, foreign companies are often able to restructure their China operations on an income tax-free basis. For example, a foreign company may transfer an interest in an FIE at cost to another group company (with 100% common control) as long as there is no ownership change. This tax-free restructuring safe harbor may no longer be available after 2007 when the New Tax Law comes into force. Therefore, a foreign company with multiple FIEs in China may need to consider whether to reorganize its Chinese business before the New Tax Law becomes effective.

4. Conclusion

The New Tax Law aims to provide a unified platform for domestic enterprises to compete with FIEs. As a result, except for grandfathered FIEs, the relative tax burden on FIEs will be increased. However, given the other factors that are more important to most foreign investors, the increased tax burden is not likely to slow down foreign investment in China. The change of tax law on issues such as transfer pricing, withholding tax and tax on dividends may cause FIEs to revisit their current structure to make sure it is still tax efficient when the New Tax Law comes into effect on January 1, 2008.

It is important to note that many important aspects of the New Tax Law will remain unclear until detailed implementing regulations provide a number of important definitions and clarify how the New Tax Law will be applied in certain situations. Although drafts of some of these detailed implementing regulations are now being circulated by various governmental authorities, final versions are not expected to be approved by China's State Council until later this year. We will report on the finalized detailed implementing regulations in a future issue of *China Insights*.

For more information on this topic, please contact either Yanping Wang at (216) 363-4664 in the U.S., (011-86-21) 3222-0388 in China, or ywang@bfca.com; or Allan Goldner at (216) 363-4623 or agoldner@bfca.com.

China's New Labor Contract Law

Introduction

On June 29, 2007, the National People's Congress passed the long-anticipated Employment Contract Law of the People's Republic of China. The new law (sometimes referred to in this article as the "Labor Contract Law") will come into effect on January 1, 2008. While existing contracts that are valid under China's current labor law will still be considered binding, all new rules and regulations concerning the performance of employment contracts, worker termination and benefits will be applicable.

Written Contracts

The Labor Contract Law requires written contracts for all full-time workers. Part-time laborers, defined as persons working no more than 24 hours per week (previously 30), can still be employed without a written agreement. Under the new law, if an employer fails to conclude a contract within one month of the commencement date, the employee will be paid double the standard rate until a contract is signed. If a contract has not been signed by the first anniversary of employment, the employer and employee will be considered to be in an open-ended contract at twice the standard rate of pay. Moreover, if a contract cannot be agreed upon, the terms of the collective contract, if one exists, will apply.

Open-ended Contracts

A major change under the new law is that employers are required to enter into open-ended employment contracts (i.e., contracts without a fixed term) with all employees who have worked for the business for more than 10 years. In addition, employers are prohibited from entering into more than two fixed-term contracts with any employee. This

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change makes it more difficult and costly for an employer to end a contract with an employee. The intent behind the Labor Contract Law is to discourage employers from entering into short, fixed-term contracts and then renewing them if continued employment is desired. The Labor Contract Law provides that if an employer does not enter into an open-ended contract following the employee's second fixed-term contract, the employee must be paid at twice the contract rate.

"…reduction of the maximum duration for a non-compete period from three years to two."

Termination

The Labor Contract Law provides that employment can be terminated upon 30 days' notice if the conditions for which an employee was hired change such that his or her job is no longer necessary and a new contract cannot be concluded, or in the event of a non-work related injury. The Labor Contract Law also regulates circumstances in which more than 20 persons (or 10% of an employer's workforce) are terminated. Now an employer may only substantially reduce its workforce if it gives 30 days' notice and the reduction is due to bankruptcy or a major change in business circumstances. If there is to be a substantial workforce reduction, employees with open-ended contracts, lengthy fixed-term contracts, and those who are sole providers for their family or who have dependents are to be given job retention priority. Significantly, the new law requires that employees terminated as a result of a substantial workforce reduction are required to be given severance pay. Indeed, if an employee is dismissed in violation of the Labor Contract Law, he or she generally has the right to be reinstated or receive severance at twice the rate stipulated by the terminated contract.

Non-compete Provisions and Training Costs

A significant change provided by the Labor Contract Law is the reduction of the maximum duration for a non-compete period from three years to two. Another change is that the new law appears to mandate that compensation for a non-compete agreement must be paid during the restricted period (although the amount of compensation required will vary by location). Accordingly, employers may not be able to designate a portion of an employee's monthly salary as compensation for the non-competition covenant. Employers can, however, seek compensation for lost training costs. If an employer pays for an employee's job training, it can include in the contract a minimum "term of service" and liquidated damages for failure to complete that term. The liquidated damages must be limited to the employer's costs for the job training and proportionate to the amount of the term of service completed.

Severance Pay

Under the Labor Contract Law, an additional month of salary is required for each year of employment. Employees eligible for severance pay will receive monthly payments equal to their contractual wages. An amount equal to one-half of a month's salary is payable if the employment period was less than six months. However, if an employee's wages exceed three times the average monthly wage in the region (a "highly compensated employee"), then his or her severance pay will be capped at three times the average monthly wage for a maximum period of 12 months.

Conclusions

There appear to be several motivating factors behind the Labor Contract Law. First of all, it significantly closes loopholes left open in the 1994 Labor Law that allowed employers to avoid intended labor regulations. In addition, it facilitates the Chinese government's objective of increasing the use of open-ended contracts. In general, the provisions of the Labor Contract Law are expected to result in higher costs and less flexibility for employers.

This article addresses only a limited number of the changes mandated by the Labor Contract Law, and this summary is not intended to constitute legal advice. All employers in China are encouraged to review their labor contracts and employee handbooks in light of the relevant changes.

Jonathan Strassfeld, a Princeton University student who interned with Benesch during the summer of 2007, co-authored and was a significant contributor to this article. Please contact Peter Shelton at pshelton@bfca.com or (216) 363-4169, or Leo Pan at lpan@bfca.com or (011-86) 139-1754-4172 with any questions or comments.

U.S. Bankruptcy Representation for China-based Suppliers

There is much publicity, at least once a quarter, concerning the negative U.S. trade balance with the People's Republic of China. A natural result of the consistent growth in volume of China-produced products for U.S. distribution is the unintentional increased instances where China-based companies are appearing in the lists of the top 20 largest unsecured creditors in U.S. Bankruptcy proceedings. In many industries, the potential Official Unsecured Creditors' Committee is almost entirely composed of foreign manufacturers.

For example, almost all domestically sold bicycles are manufactured in China or its Southeast Asian neighbors. Traditional manufacturer names such as Huffy, Schwinn and Raleigh, names most Baby Boomers rode in the '50s and '60s, have their bicycles manufactured in Asia. A case in point – Huffy Corporation, an Ohio corporation, filed its reorganization proceedings in the Dayton, Ohio Bankruptcy Court in 2004. The list of creditors holding the 20 Largest Unsecured Claims included six headquartered in China (five of the top seven!) holding amalgamated claims of $33.8 million of the total claims of the top 20 of $55 million, or 62%!

In another manufacturing sector, the Anchor Hocking proceeding filed earlier this year in Delaware had seven Chinese-based companies on its list of the 20 largest unsecured creditors, with two Chinese companies topping the list.

If the current business slowdown, which is most evident in the auto industry and home sales, pours over into the textile and related industries, the representation of China-based companies will grow significantly.

It is important that law firms with an active business reorganization practice and a committed China presence work with China-based manufacturers to prepare internal tracking systems and serve as U.S. agents to enable these manufacturers to obtain timely notice of the commencement of customer bankruptcy proceedings. The filing of a bankruptcy proceeding triggers short time frames for enforcing rights to reclamation of delivered products and terminating credit terms under pending purchase orders, issues that generally affect the ability of the supplier to receive payment. Further, knowledge of the benefit of serving on Official Creditors' Committees, obtaining appropriate payment terms for post-filing transactions and having the document base to support timely filing of Proofs of Claim and, perhaps every bit as important, defending preference litigation should improve the financial recoveries of Chinese manufacturers faced with receiving a Notice of Bankruptcy Filing from a U.S. Court by a key customer.

For more information on this topic, please contact Will Kohn at (216) 363-4182 or wkohn@bfca.com

China's New Bankruptcy Law

The standing Committee of the National People's Congress passed into law the statute known as the "new" Enterprise Bankruptcy Law on August 27, 2006. The law became effective on June 1, 2007, replacing the 1986 Enterprise Bankruptcy Law.

The new Enterprise Bankruptcy Law comprises 12 chapters with 136 subchapters. The scope of the law is to encompass all types of Chinese legal entities, whether privately owned, state owned or foreign invested companies, and is intended to provide new alternative procedures for insolvent companies to either restructure or liquidate.

Under the new Enterprise Bankruptcy Law, bankruptcy administration commences when a financially troubled company files a bankruptcy application in the People's Court. Creditors may also make such an application if the debtor is unable to pay its debts as they fall due and has insufficient assets to pay off all debts or clearly lacks the ability to do so. For proceedings involving commercial banks, securities firms and insurance companies, an application for bankruptcy can be made to the People's Court by the governmental financial supervisory institutions.

Within 15 days of filing an application, the People's Court must issue its order accepting or rejecting the application. If accepted, the People's Court will notify the debtor, the applicant (if a party other than the debtor) and all known creditors of the determination accepting the application. Upon acceptance of the application, the People's Court appoints an administrator who takes over control of the bankrupt company's affairs and oversees the administration of the assets,

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similar to a trustee under the United States Bankruptcy Code.

The order accepting the bankruptcy case is made public by published notice, which also specifies the period of time in which creditors can submit their claims. Creditors must submit their claims to the court-appointed administrator prior to the deadline in order to participate in the bankruptcy process, including participation at the first creditors' meeting. The law specifies that the period to be set for filing of claims should not be less than 30 days or more than three months from the date following the public announcement of the acceptance of the bankruptcy filing.

Within 15 days after the filing deadline, the People's Court is to convene the first creditors' meeting at which the debtor, the court-appointed administrator and attending creditors will determine which claims should be accepted, leading to the filing of an agreed list of claims with the People's Court. Upon the People's Court confirming the list of claims, that list will determine the parties entitled to share in subsequent distributions.

While some details of the new Enterprise Bankruptcy Law are not generally available in English, the statute is viewed as providing significant benefits over the current bankruptcy law in China. Perhaps the most significant change is the creation of an independent administrator who has the duties to manage the debtor's affairs. The administrator has ultimate responsibility for controlling the assets of the debtor and determining how best to dispose of the assets while managing the daily business affairs of the debtor, reviewing claims and ultimately making distributions. The administrator will also work with the creditors to determine a final list of accepted claims to be submitted to the People's Court and, where deemed appropriate, investigate the prior activities of the debtor. It is anticipated that independent private organizations such as accounting firms will develop an expertise to be appointed as administrators. The current practice in China is to have the People's Court appoint a liquidation committee composed of representatives of various government agencies.

"Another anticipated benefit of the new law is the broader powers granted to creditors."

Another anticipated benefit of the new law is the broader powers granted to creditors. In addition to being authorized to commence a bankruptcy proceeding, the creditors are to be actively involved in determining the approved creditor list and, once a creditor's claim has been approved, that party will then be able to fully participate in the first creditors' meeting, including: voting for a replacement administrator, determining if a creditors' committee would be appropriate and providing input on how the debtor's assets are to be liquidated and the proceeds distributed.

The new law also recognizes the priority of secured creditors with regard to pledged assets. Article 109 of the new Enterprise Bankruptcy Law states that secured creditors shall have first priority over the pledged assets over not only other creditors, but also claims of employees. There is a transition rule, however, in Article 132 stating that after the new law became effective (June 1, 2007), any claims of employees that pre-date the effective date shall maintain their priority to pledged assets even over secured creditors, but that any employee claims accruing on or after June 1, 2007, will be subordinated with regard to pledged assets to the claims of the secured creditor.

In addition to the formal procedures with regard to bankruptcy proceedings, the new Enterprise Bankruptcy Law also provides statutory alternatives to the bankruptcy process. A "restructuring" procedure is available that permits the debtor, with the approval of its creditors, to have time to submit a plan for the reorganization of its business, but this alternative requires an agreement between the debtor and its creditors by the end of the first meeting of creditors. Another alternative process is "conciliation," whereby the debtor can propose a compromise and payment program of its debts with its creditors, which also must be agreed to by the creditors by the end of the first meeting of creditors.

While it is clear that China has been in need of a more modern approach to bankruptcy for its financially troubled companies, it remains to be seen how efficient the new process will be. Certainly, many of the provisions of the new Enterprise Bankruptcy Law (e.g., independence of case administrators, contractual liens given their appropriate priority and some degree of flexibility to avoid a liquidation process) are significant enhancements over the existing law.

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Benesch Grows in China

Lianzhong ("Leo") Pan Joins Benesch China Group

Benesch is pleased to announce that Lianzhong ("Leo") Pan has joined the Shanghai Law Office and China Group as Of Counsel. Leo focuses his practice on international trade and investment, mergers, acquisitions, joint ventures and strategic alliances, as well as counseling clients on employment, real estate and other day-to-day business matters.

Leo practiced law in China for seven years before earning his U.S. LLM law degree from the University of Texas Law School and being admitted as a member of the New York Bar. He has assisted U.S. companies in entering the China market through mergers, acquisitions and joint ventures involving Chinese companies, as well as through direct investment. Leo has also assisted import and export companies with contract matters, business financing projects and other business negotiation, litigation and arbitration matters. He is fluent in English and Mandarin.

Benesch Shanghai Office Has New Location

In October, Benesch moved from our existing Shanghai location at One Corporate Avenue to the Shanghai Kerry Centre. Our Kerry Centre office will provide us with the additional space needed to accommodate our recent and expected growth.

Yanping Wang, who became a partner of the firm earlier this year, is now resident in Shanghai where she heads our Shanghai Office. Prior to receiving her U.S. JD law degree and practicing in the U.S., Yanping earned an advanced law degree and practiced in China, where she also published several books and articles regarding Chinese commercial law, contracts and property law. She assists clients in establishing a broad range of business relationships in China, and in mergers, acquisitions, joint ventures, strategic alliances and direct investments. She also counsels clients on employment, real estate and other day-to-day business matters.

Joanna Liao continues as a member of our Shanghai Office team as a Legal Assistant and Office Manager. Joanna's engineering and business background permits her to assist clients in many ways.

Allan Goldner and Peter Shelton continue to Co-Chair Benesch's China Group and frequently travel to China. The other members of Benesch's China Group work out of our Cleveland and Columbus offices (with support from our Wilmington and Philadelphia offices as needed).

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Joanna's direct China mobile phone number is (011-86)138-1604-8570, and her e-mail address is jliao@bfca.com.

Events

Ten Questions You Should Ask About Doing Business in China... and the Answers!

Peter Shelton will be a panelist at the Charter One/Bank of China Forum about conducting business in China.

October 31, 2007 | The Ritz-Carlton; Cleveland, Ohio

For more information, please contact Liz Highley at ehighley@bfca.com or (216) 363-4538.

How We Work With Clients

We help U.S. companies as they: (1) establish China-related strategic alliances and joint ventures for manufacturing and distribution; (2) establish wholly owned manufacturing or other business operations in China; (3) acquire the shares or assets of China-based companies; (4) deal with governmental and operationally related legal issues in China; (5) source components or products from China and deal with related logistics issues; and (6) develop U.S.-based solutions to competition from China.

We also help Chinese companies with respect to U.S. legal and business considerations as they: (1) establish U.S.-related strategic alliances and joint ventures for manufacturing and distribution; (2) establish subsidiaries and other business operations in the U.S.; and (3) acquire the shares or assets of U.S. companies.

We help clients as they structure, negotiate and document China-related transactions; and consult with clients with respect to capital structure, operating control, governance, due diligence and other issues.

In the area of intellectual property, we are experienced in working with our China-based colleagues and government officials to maximize the protection of our clients' valuable patents, trademarks, know-how, trade secrets and other intellectual property rights.

Our established network of highly competent, experienced and reliable U.S. and China-based service providers (including Chinese licensed lawyers with whom we work when our clients' needs require) enables us to help produce complete China business/legal solutions. Together we provide U.S., China and other international legal, tax, governmental relations, import/export, construction, operational and other solutions for our clients in a cost-effective manner.

Pass this copy of *China Insights* on to a colleague, or e-mail ehighley@bfca.com to add someone to the mailing list.

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