

股权投资基金的税务管理与筹划 ——关于投资架构

Tax Management and Planning of Equity Investment Fund ——On Investment Structure

By Queena Ye

随着在中国的被投资公司上市或并购退出规模的增大，站在投资者的角度来看，税收成本对股权投资基金回报率的影响将愈发凸显。同时，我们也注意到，对股权基金管理费的定义问题、合伙制基金的纳税方式问题，以及境外基金涉及的常设机构等问题的处理方式，中国税务机关也还处于完善阶段。

With the growing trend of IPO or exit of investee companies due to merger & acquisition in China, from the investor's perspective, the influence of tax cost on the return on equity investment fund is expected to be increasingly visible. Meanwhile, we have taken note that taxation authorities in China are still in the process of improvement in addressing such issues as definition of administration fees of equity fund, tax payment method of partnership funds and standing institutions involved in overseas funds.

良好的税务筹划方案，往往依附于主营业务的交易模式。针对投融资业务，基金公司在投资退出环节涉及的整体税务成本，有可能涉及到第一步的融资环节。实际上我们认为，对于基金公司自身而言，完善的税务筹划体系除了涵盖融、投、管、退这四个环节以外，首先应该考虑的是股权基金自身的组织架构与税收成本的关系。

A sound tax plan is usually based on the transaction model of the main business. In terms of investment and funding business, the overall tax cost involved in the exit strategy of fund companies may involve funding at the first step. In fact, we believe that for fund companies themselves, a well-structured tax planning system should, besides covering the four steps, namely funding, investment, management and exit, primarily take the relationship between the organizational structure of the equity fund itself and tax cost into consideration.

我们计划分两期来共同探讨股权基金税收筹划这一课题，本期将重点关注股权基金自身的组织架构模式对税收的影响，而下一期我们将重点围绕被投资的目标公司展开税务分析。

We shall discuss tax planning for equity fund in two phases. In this phase, we shall mainly focus on the influence on tax of the organizational structure of the equity fund; while in the next phase we shall provide a tax analysis with the target investee company as the key.

股权基金的税收问题涉及基金投资人、基金管理人、基金管理团队等主体角色。我们可以从股权基金不同类型的收入，在各个主体角色间的税负高低以及纳税的方式作为出发点，对股权基金的组织架构和收入比重进行合理安排，以实现合理降低整体税负的目的。

Roles such as fund investor, fund manager and fund management team are involved in tax issues of equity fund. It is therefore possible to proceed from the different types of revenues of equity fund, degree of tax burden among each subject role and the method of tax payment and rationally arrange the organizational structure and income proportion of the equity fund so as to reduce the overall tax burden in a reasonable way.

目前在中国的投资基金及其管理人、投资人的业务收入类型及应税情况总结如下：

Types of business revenues and payable tax of investment funds and their managers and investors currently in China are summarized as follow

纳税主体 Taxpayer	收入类型 Type of Revenue	收入内容 Content of Revenue	公司制 Corporate System	有限合伙制 Limited Partnership	离岸基金 Offshore Fund
投资主体本身 (投资公司或 合伙制基金) Investment subject (investment company or partnership fund)	投资收益 Investment income	股息、红利 Stock dividend and bonus	境内企业税后利润分 配免税 Tax free for after-tax profit sharing for domestic companies	按照“先分后税”的原 则由其合伙人分别缴 纳(形成“透明纳税主 体管道”) Paid respectively by partners following the principle of “sharing before taxation” (hence constituting “transparent taxpayer channel”)	缴纳 10%或 5% (如香港)预提 所得税; 10% or 5% (e.g. in Hong Kong) withholding income tax payable)
		利息、股权转让所得 Interest and income from equity transfer	缴纳 25%的企业所 得税 25% business income tax (BIT) payable		
投资主体中的 管理人(分公 司、合伙企业、 个人三种情形) Manager of investment subject (categorized into corporation, partnership business and individual)	服务费 Service fee	管理费收入、向被投企 业收取的顾问费、服务 费等 Income from management fees and consulting & service fees charged from investee enterprises	公司: 缴纳 5%的营业税; 形成利润的部分缴纳 25%的企业所得税; Corporation: 5% business tax and 25% BIT for profits generated; 合伙企业: 缴纳 5%的营业税; 形成利润的部分, 各合伙人分别缴 纳所得税; Partnership: 5% BT and IIT payable by each partner for profits generated; 个人: 暂无 Individual: N/A		
		投资分成 Investment sharing	股息、红利 Stock dividend and bonus	公司: 境内企业利润分配免税; Corporate: tax free for profit sharing among domestic enterprises; 合伙企业: 各合伙人分别缴纳所得税; Partnership: IIT payable by each partner respectively; 个人: 暂无; Individual: N/A	
	利息、股权转让所得 Interest and income from equity transfer		公司: 缴纳 25%的企业所得税; Corporation: 25% BIT payable; 合伙企业: 各合伙人分别缴纳所得税; Partnership: IIT payable by each partner respectively; 个人: 暂无; Individual: N/A		
	投资主体中的 投资人(分公 司、合伙企业、 个人三种情形) Investor of investment subject (categorized into corporation, partnership and individual)	投资收益 Investment income	股息、红利 Stock dividend and bonus	公司: 境内企业利润 分配免税; Corporate: tax free for profit sharing among domestic enterprises; 合伙企业: 各合伙人 分别缴纳所得税; Partnership enterprise: IIT payable by each partner respectively; 个人: 20%个人所得 税; Individual: 20% IIT	公司: 境内企业利润分 配免税; Corporate: tax free for profit sharing among domestic enterprises; 合伙企业: 各合伙人分 别缴纳所得税; Partnership: income tax payable by each partner respectively; 个人: 5-35%个人所得 税; Individual: 5-35% IIT
利息、股权转让所得 Interest and income from equity transfer			公司: 缴纳 25%的企 业所得税; Corporation: 25% BIT payable; 合伙企业: 各合伙人 分别缴纳所得税; Partnership enterprise: IIT payable by each partner respectively; 个人: 20%个人所得 税; Individual: 20% IIT	公司: 缴纳 25%的企 业所得税; Corporation: 25% BIT payable; 合伙企业: 各合伙人分 别缴纳所得税; Partnership: IIT payable by each partner respectively; 个人: 5-35%个人所得 税; Individual: 5-35% IIT	

需要注明的是, 对于合伙制基金, 尽管国家税务总局已经在2008年出台了159号文件, 用以规范合伙制企业的纳税原则。但目前普遍认为还有些问题需要进一步明确, 诸如: 其从被投资企业取得的股息收益经由合伙企业分配给境内法人合伙人是否适用“符合条件的居民企业之间的股息红利收益免税”、合伙企业自身的亏损如何弥补等。

It should be noted that, for partnership funds, despite Document No.159 issued by the State Administration of Taxation in 2008 to standardize the tax payment principles

of partnership enterprises, it is generally believed that certain issues require further definition, such as whether that dividend yield generated from investee enterprise divides among domestic legal person partners via partnership enterprise is applicable to “tax exemption for dividend and bonus which is eligible between resident enterprises”, the compensation for losses of partnership enterprise itself, etc.

股权基金内的角色安排 Roles in Equity Fund

- 基金投资人
Fund Investor

无论是境内基金投资人还是境外投资者，从基金收入的类型来看，主要是从被投资企业取得的股息、红利等权益性投资收益，以及转让被投资企业股权取得的收益。由于不同法律形式的投资人会适用不同的纳税方式和税率，因此基金公司在成立前需要考虑的主要问题，就是应以哪一个主体作为基金投资人，特别是离岸基金更需关注该问题。

Be it domestic or overseas fund investor, the types of fund revenues mainly include dividends, bonuses and other return on equity investment received from the investee company as well as revenues from equity transfer of the investee company. Due to different tax payment methods and tax rates would apply for investors of different legal forms, a major problem to consider before the establishment of a fund company is the subject as fund investor, which is especially critical for offshore funds.

- 基金管理人
Fund manager

基金管理人一般采取公司制或合伙制的法律形式。基于税收筹划的考虑，基金管理人亦通常设立为有限合伙的形式。

Most common legal forms for fund managers are corporation and partnership. With tax planning taken into consideration, limited partnership is the usual form of fund managers.

无论基金本身采取何种形式，其基金管理人的收入类型主要是基金的管理费(通常为基金募资总额的1-2%)和收益分成(即carried interest, 通常为基金增值部分的20%)。但基金管理人无论是公司形式还是有限合伙形式，均须就其取得的管理费缴纳营业税。

Regardless of the form of the fund itself, revenues of its manager mainly include management fees (normally 1-2% of the total fundraising) and carried interest (normally 20% of the added value). However, business tax is payable on the basis of the management fees obtained regardless whether the fund manager is corporation or limited partnership.

但实践中对于收益分成的法律性质是属于“服务收入”还是“投资收益”存在不同的理解和做法。为避免收益分成在基金管理人的账目上与管理费一视同仁被课以营业税，基金管理人在账目处理上必须十分清晰。我们认为更为保守的做法是设立两家管理企业，其中一家担任基金的普通合伙人，另一家担任基金的管理人，由管理人收取管理费，而普通合伙人收取收益分成。

However, interpretations and practices of the legal nature of the carried interest—whether it is categorized as service revenue or investment income—vary in practice. To avoid business tax levied on carried interest which is understood as an equivalent of management fee in the account of fund manager, the accounts must be handled by the fund manager in a clear and unambiguous way. We think a more conservative practice is to establish two enterprises as managers, one of which is GP while the other is manager of the fund, the latter charging management fees while the former receiving carried interest.

投资组织架构的税务分析 Tax Analysis of Investment Organizational Structure

由于中国公司法规定，公司制的基金必须符合注册资本和认缴资金的要求，从而容易锁定资本，导致所投入的资金流动性较弱。并且，公司制的基金进行利润分配仍需要遵循公司法的规定，需要留存一定比例的公积金，这也不利于基金投资人的资金利用率。

It is stipulated in the Company Law of China that funds of corporation must meet all requirements of registered capital and subscribed capital; therefore capital is easily locked with weak liquidity of invested capital. Besides, profit distribution of funds of corporation must comply with the provisions of the Company Law, with a certain proportion of public accumulation fund required to be retained, which may go against the capital utilization rate of investors.

而离岸基金则设置在中国境外，一般会通过境外中间持股公司间接投资于境内企业。在退出时可以转让中间持股公司的股权。由于该转让行为发生在中国境外，导致中国资本利得税负担的可能性较小。但近期中国的税务机关开始关注上述境外股权转让行为，认为在某些情况下，境外母公司转让境外中间持股公司获得的资本利得也将属于来源于中国的所得，需要缴纳中国预提所得税。

In contrast, offshore funds are established outside China and normally invest in domestic enterprises in an indirect way via overseas shareholding intermediary companies, whose equity can be transferred in the case of exit. Because such transfer takes place outside China, there is less possibility of capital gains tax. However, recently tax authorities in China have started to show concern over such overseas equity transfer, holding that in certain cases, capital gains obtained from the transfer from an overseas parent company to overseas shareholding intermediary shall also be deemed as revenues obtained in China on which withholding income tax is payable.

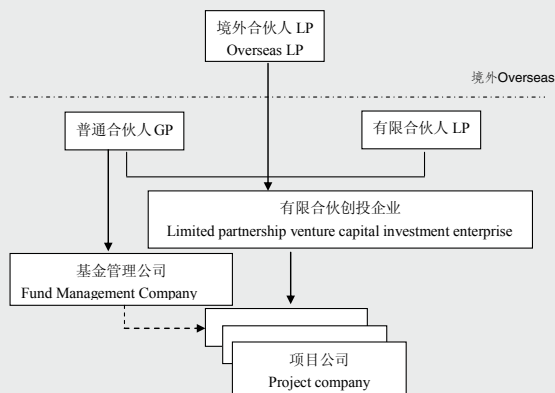
并且，还需要重视离岸基金对中国境内被投资项目的长期管理，易触发中国税务机关对常设机构的判定标准。而一旦被认定为在中国境内设立了机构，则该机构、场所取得的来源于中国境内的所得，以及发生在中国境外但与其机构、场所存在实际联系的所得，都需要缴纳25%的中国企业所得税。

Besides, we shall be aware that the long-term management of investee projects in China by offshore funds which may influence the criteria of standing institution as defined by tax authorities in China. Once it is determined that an institution is established in China, 25% corporate income tax shall be payable for revenues obtained by such institution or premises from China as well as revenues from overseas yet are materially related to such institution or premises.

本文以有限合伙制基金为重点，进行深入性的讨论。有限合伙制基金包括普通合伙人(General Partner)和有限合伙人(Limited Partner)。一般情况下，有限合伙人作为基金投资者，出资比例一般为基金总规模的99%，并获得80%左右的利润分成。普通合伙人负责基金企业的经营管理，对合伙债务承担无限连带责任，出资比例一般是基金总规模的1%，并获得20%左右的利润分成。如下图：

This article is an in-depth discussion focusing on limited partnership. A limited partnership fund includes general partner

and limited partner; where, generally speaking, the latter, as fund investor, shall contribute 99% of the total fund and receive approximately 80% of carried interest; while the former is responsible for the business operation and management of fund corporation and assumes unlimited joint and several liability of the debt of partnership, normally contributing 1% of the total fund and receiving approximately 20% of carried interest. Such relationship is illustrated as follows:



以及股权转让收益。未来被投资企业上市将会成为合伙制基金主要的退出渠道，因此取得股权转让收益将成为合伙制基金未来主要收益来源。根据159号文“先分后税”的税收政策，合伙制基金本身毋须缴纳企业所得税，由各合伙人在合伙人层面缴纳相应的企业所得税或个人所得税。由此可见有限合伙制基金在基金层面不需缴纳企业所得税，而是由基金的合伙人在取得分成收益时分别纳税，避免了公司制基金的“双重课税”问题。

Investment income received by partnership fund from Investee Company mainly consists of dividends, bonuses and revenues from equity transfer. In the future, IPO of Investee Company shall be a major exit channel of partnership funds; hence revenues from equity transfer are expected to be the major source of revenues of partnership funds. On the basis of the “distribution before taxation” policy in Document No.159, rather than corporate income tax payable by partnership fund, corresponding corporate or personal income tax is payable by each partner on the partner level. Therefore it is concluded that tax is payable by partners at the reception of carried interest respectively instead of paying corporate income tax on the fund level of LP fund, hence eliminating the problem of “double taxation” on corporate fund.

我们认为有限合伙制的基金组织架构，可以作为投融资业务税务筹划的一个着重点。但中国的合伙人体制真正大规模应用的时间并不长。目前仍有一些问题有待主管机关进一步明确。例如合伙人从合伙企业分配中取得收入的定性：是投资收入还是经营所得？

We believe that the organizational structure of LP fund may be a focus in investment and funding tax planning. However, with a relatively short history of partnership system in China, there are certain issues to be clarified by relevant authorities, for instance, whether revenues received by partners in the distribution of Partnership Corporation should be regarded as investment income or business revenues?

值得注意的是，境外合伙人作为非居民企业纳税人，常设

机构的判定将成为其纳税义务判定的关键所在。但鉴于各地税务机关对政策把握的尺度不同，我们在实践中看到该问题也带有一定的伸缩性。另外还需要关注地方性政策的可持续性，以及国家的外汇管制问题，这导致合伙制基金的税务问题更加复杂化。

It is worth noting that since overseas partner is a non-resident taxpayer, the determination of standing institution shall be the critical point of the determination of its tax obligations. Yet such determination can be flexible to a certain degree in practice as local tax authorities may have different understandings in the policy implementation. Besides, the sustainability of local policies and the national policy of foreign exchange control are also worth attention, which makes tax issues of partnership fund even more complicated.

总结 Summary

在全球经济一体化格局下，投资者在中国的跨境交易日趋频繁，降低交易过程的税务成本和纳税风险，是提高企业竞争优势的关键。

Against the background of global economic integration, there have been a growing number of cross-border transactions by investors in China, and reducing the tax cost and tax payment risk in the transaction process has become the key in sharpening the competitive edge of enterprises.

我们相信，深入的税务分析方案，能够在投资活动中对不同的涉税环节进行权衡，以改变股权投资基金在纳税环节中的涉税性质，得以寻求税赋最优。这需要综合考虑跨境投资业务中的各种税收政策，特别是基层税务机关的执行因素，并事先制定灵活及可操作的解决方案。

We believe that in-depth tax analysis plan allows for assessment of various tax-related issues in investment activities, hence changing the tax-related nature of equity investment fund in tax payment and optimizing scot. This requires comprehensive consideration of various tax policies in cross-border investment, especially the implementation by local level tax authorities, as well as design of flexible and operable solutions beforehand.

特别是在股权投资基金的筹建阶段，我们建议要从投资身份的选择、基金组建的形式、基金内部收入结构、对投资的管理模式、利益分配及退出方式等角度进行权衡分析，以安排适合长远利益的投资框架与纳税体系。

In particular, in the preparatory stage of equity investment fund, it is advised to conduct assessment and analysis from the perspectives of choice of investment identity, form of fund initiation, internal income structure of fund, investment management model, profit sharing and exit strategy, etc. so as to arrange an investment framework and a tax payment system for long-term interests.

中伯伦咨询有限公司
2012年3月