

# 投融资方案在法律实践中的可行性

## Feasibility of Investment and Financing Scheme in Law Practice

By Tina Shi

投融资战略的核心是优化资产结构，实现资本效用的最大化。因此资本运营不可避免地影响着产权关系，甚至还会打破原来的企业边界，实现资产的转移及股权关系的变化。而资产的转移和股权关系的变化又会影响企业的税收战略。

Optimizing asset structure, hence maximizing the capital effect is the core of investment and financing strategies; therefore, capital operation inevitably influences the relationship of property rights or even breaks existing enterprise boundaries and results in asset transfer and change in shareholding relationship, which in turn affects the tax strategies of an enterprise.

对于兼并收购等实现不同目的的投资项目，虽然投资者与被投资者之间的角度不同，但关注的却是共同的课题，例如企业发展战略、商业模式、法律结构、运营体系，财务状况、投融资的渠道，企业的管理团队等。

For investment projects involving diversified objectives such as merger and acquisition, the investor and the recipient company tend to share a common interest in enterprise development strategy, business model, legal structure, operational system, financial status, investment and financing channels and management team, although from different perspectives.

被投资项目的法律框架结构是投融资方案中的核心问题。而在中国，设定

未来投资框架结构时，必修谨慎对待的另一课题是，法律交易结构顺利获得政府批准的可行性，以及审批时间和实施成本。

The structure of the legal framework of the invested project is the core to the investment and financing scheme. In China, the other critical issue to consider prudently in designing the framework structure of the future investment is the feasibility of obtaining government approval for the legal transaction structure, as well as the time for approval and the cost of implementation.

在实践中，中伯伦一直主持或参与不同模式投融资方案的政府审批工作，除了对投融资方案影响较大的商务局、发改委、外汇管理局的意见之外，我们认为执行方案的可行性分析，还应该延伸到税务局审批环节，从税务机关对类似项目的税负认定，一直到税务发票的开具问题。

In practice, CPL has initiated or participated in government approval procedures of investment and financing schemes of various models, believing that besides the opinions of the Bureau of Commerce, NDRC and the State Administration of Foreign Exchange, the feasibility analysis of the implementation should be extended to the approval of the tax administration, where issues from determination of tax burden by tax authorities for similar projects to the establishment of tax invoice are involved.

### 股权转让中的特殊重组模式

#### Special Restructuring Plans for Share Transfer

随着中国企业IPO退出模式越来越拥堵，并购退出方式在今后将占有更大的比重。而其中的特殊重组模式，将是诸多项目选择的重要模式之一。

With increasing difficulties in IPO withdrawal model for Chinese enterprises, merger and acquisition is expected to account for a more significant proportion in the future, where the special restructuring model will be an important option for many projects.

特殊重组的概念源于2009年财政部、国家税务总局发布的《关于企业重组业务企业所得税处理若干问题的通知》（财税〔2009〕59号）以及之后国家税务总局发布的《关于发布〈企业重组业务企业所得税管理办法〉的公告》（国家税务总局公告2010年第4号），既通常所说的59号文和4号文。

The concept of special restructuring first appeared in Notice on Several Issues Concerning the Enterprise Income Tax Treatment on Enterprise Reorganization [Ministry of Finance (2009) No. 59] issued by the Ministry of Finance and the State Administration of Taxation and Public Announcement on the Issue of Measures for the Enterprise Income Tax on Enterprise Reorganization (SAT Announcement, 2010 No.4), respectively known as Document No.59 and Document No.4.





同一般重组一样，特殊重组可以适用于债务重组、股权收购、资产收购、合并、分立等形式，但特殊重组允许出让方暂不确认财产转让所得，其取得的股权的计税基础也按照所转让资产以前的计税基础确定，而不是按照实际的交易价格确认，受让方确定受让股权或资产的计税基础也可以按照相关资产原计税基础确定。这相较于一般重组可大为延缓纳税的时点。

Like conventional restructuring, special restructuring may apply to debt restructuring, equity acquisition, asset acquisition, merger or corporate division, allowing the transferor to delay the determination of revenues from property transfer with the tax base for the acquired equity determined according to the tax base before the transfer rather than the actual transfer price; while the tax base of the transferred equity or assets for the transferee may be based on the original tax base of the relevant assets, hence delaying the time point of tax payment compared to conventional restructuring.

无论是吸引更多优秀投资还是协同效应下的产业链合并，特殊重组均提供了一个很好的解决思路，但我们认为在执行时须注意区分以下几点适用情形：

Special restructuring provides an ideal solution for attracting more high-quality investment and for the merging of industrial chains with synergistic effect; however, the following situations need to be identified in implementation:

- 股权支付及比例。进行企业兼并收购时，收购企业购买的股权应不低于被收购企业全部股权的75%。同时要求，该收购股权的对价中，股权支付的金额不低于交易支付总额的85%。

- Stock equity payment and proportion. In corporate merger and acquisition, the equity acquired by the buyer shall not be lower than 75% of the total equity of the acquired enterprise. Meanwhile, it is required that

the amount of equity payment shall not be lower than 85% of the total payment of the transaction in the consideration of the acquired equity.

- 合理商业目的。对于涉及到跨境交易的特殊重组，需要得到商务部门的批准方能进行交割及相关的登记。商务部门一般较关注兼并业务的商业目的。此要求比较宽泛，也具有一定的主观性。主要要求并购不以减少、免除或推迟缴纳税款为主要目的；而对于交易对价的合理性问题，商务部门往往并不特别关注，但不要存在重大的显失公平问题。对于境外机构兼并境内股权的项目，商务部门则会关注特殊目的公司的返程投资问题，或是涉及民族企业保护的反垄断审查等问题。采用特殊重组方案还需要关注的是，取得股权支付的出让方，连续12个月都不转让所取得股权。这一点需要在制定整体方案时加以考虑。

- Reasonable business purpose. Special restructuring involving cross-border transactions shall be completed with relevant registration formalities upon approval of commercial authorities, who pays more attention to the business purpose of the merger. This regulation, general and subjective in a sense, requires that the M&A is not targeted at reduction, exemption or delay of tax payment as the major objective, with little attention shown in the reasonability of the consideration provided that no major case of unfairness is observed. For projects where overseas institution acquires domestic equity, commercial authorities pay attention to the return investment via overseas special purpose companies or anti-monopoly inspection concerning the protection of domestic enterprises. Another issue to be considered in implementing special restructuring is that the transferor acquiring equity payment shall refrain from any further transfer of the acquired equity within serial 12 months, which

should be taken into consideration in overall planning.

- 跨境交易问题。跨境的特殊重组还需满足一些额外的条件，例如税务部门要求境外股东向其100%直接控股的另一境外企业转让其拥有的中国外商投资企业股权，或向其具有100%直接控股关系的外商独资企业转让，才能被认定为特殊重组。目前，中国各省市的特殊重组项目，都需在国家税务总局进行备案。

- Cross-border transaction. Certain additional requirements shall be met for special cross-border restructuring; for instance, tax authorities stipulate that only the oversea shareholder transfer the foreign invested enterprise equity in China to its 100% direct holding overseas company or to a solely foreign-funded enterprise with a 100% direct holding relation can be recognized as special restructuring. Up to now, special restructuring projects in all provinces and cities must be registered in SAT.

- 外汇问题 Foreign exchange issue

对于兼并收购过程中外汇的进入及汇出事宜，主要考虑的问题是审批速度、文件准备等问题。例如汇款轨迹的保留，以及境外款项的支付人和股权受让人的信息匹配问题等。其中外国投资者收购中方股权，以现汇支付购买价的外资外汇登记问题。股权交易时，中方股东需要开立一个资本变现专用外汇账户，而账户的开立、使用都需要经过外汇管理部门的审批。另外，境内机构或个人收购境外股东持有的外商投资企业股权，在购付汇审批时需要先提交税务机关开具的完税证明。

For the abouchement and remit of foreign exchange in the M&A process, major concerns are centered upon the efficiency of approval and the preparation of documents, such as the retention of remittance track and information matching of overseas

payer and equity transferee, etc. For the registration of foreign fund or exchange where purchase prices is paid in cash in the acquisition of Chinese equity by foreign investor, the Chinese shareholder shall open a specific foreign exchange account for cash assets on the occasion of equity transaction; while the establishment and use of such account is subject to approval by foreign exchange authorities. Besides, a tax payment certificate issued by tax authorities shall be submitted during approval of foreign exchange purchase and payment when a domestic institution or individual acquires equity of foreign-funded enterprises held by overseas shareholders.

## 重大历史问题的处理 Treatment of Major Historical Issues

### ● 代持股的清理 Clearance of shareholding entrustment

实践中，很多公司存在一方实际认购出资，但公司的章程、股东名册或其他工商登记资料记载的投资人却是为他人的代持股现象，一般我们称之为“隐名股东”。这种情况出现的原因有很多种，有些是出于公司管理的需要，例如员工激励计划中的公司代持股，或是出于公司战略要求，显名的时间条件尚不具备。但该类隐名股东应不以规避法律的禁止性条款为目的，例如国家对于中外合资公司中的中国自然人股东的限制，以及特殊行业对公司股东的限制等。

In practice, shareholding entrustment is a common phenomenon where the investor specified in the articles of association, list of shareholders or other industrial and business registration documents is not the actual contributor known

as “dormant shareholder”. Such phenomenon may be attributable to many reasons, including the need of corporate management such as corporate shareholding entrustment in the personnel incentive plan, or the strategic requirement of the company where conditions are not mature for their names to be provided; however, such dormant shareholding shall not be targeted at circumventing from prohibiting provisions in law, including the limitation of Chinese natural persons as shareholders in Sino-foreign jointly funded companies and the limitation of corporate shareholders in special industries.

尽管中国尚缺乏完善的隐名股东的法律制度，但从保护隐名股东的权益角度，该类代持股的现象也不应在公司中持续较久，并及时清理。因为在实践中隐名、显名股东之间的协议在有善意第三方介入的情况下，是不能对抗公示下的股东状态的，如果发生了侵犯显名股东或是公司利益时，该等权益往往不能得到保护。并可能由此引发对公司上市进程的阻碍。

Despite the absence of a complete legal system of dormant shareholders in China, shareholding entrustment should not be a persisting phenomenon in corporations and should be promptly cleared from the perspective of protecting the interests of dormant shareholders because in practice, the agreement between a dormant shareholder and a named one shall not constitute a defense against the announced shareholding status with the intervention of a bona fide third party; therefore, the rights and interests of named shareholders or the corporation may fail to be protected in case of violation, which may impede the IPO

process of the company.

特别需要注意的是，代持股的转让也应关注转让对价及转让收入的纳税问题。因为零对价或1元转让等未按公允价值转让的方式，有可能会引发后续转让时的税务问题。以下将进行进一步探讨。

It should be specially noted that transfer value and taxation of revenues from the transfer should be addressed in the transfer of shareholding entrustment as failure in fair value transfer such as zero consideration or transfer at 1RMB may lead to tax problems in follow-up transfer. Further discussions will be conducted in the following part.

### ● 历史上多次股权转让未按公允价值进行 Numerous Cases of Disrespect of Fair Value in Equity Transfer in History

很多公司在成长历史过程中，往往存在多次未按公允价值进行股权转让的问题。从理论上来说，股权转让成功的标志包括内部要素和外部要素。其中内部要素是股东之间签订的股权转让协议、以及股东签订新的股东会决议、公司章程，建立新的股东名册；外部要素是股东名册需在主管工商部门完成登记备案手续。

Cases of equity transfer irrespective of fair value tend to exist in the history of many companies. Theoretically speaking, successful equity transfer includes internal and external factors, the former referring to the equity transfer agreement signed between shareholders, new resolutions of board of directors and articles of association and the establishment of new list of shareholders, while the latter referring to the completion of registration formalities of the list of shareholders at industry and commerce authorities.

只要股权转让程序完整、真实，对于日后需要上市的主体而言，股权转让未按公允价值问题往往主要是股东自身的问题，通常无涉上市主体，但要确保拟上市主体股权结构的稳定，及披露详尽。

Provided that the equity transfer procedures are complete and authentic, disrespect of fair value in equity transfer tends to be a problem among shareholders themselves from the perspective of the entity seeking IPO; however, detailed disclosure is advisable in the interest of stability of equity structure of the listed entity.

本文关注的问题，是股权转让未按公允价值但可能会涉及补缴税款，并有可能对上市主体会产生瑕疵影响。通常税务部门判定转让有失公允价值的几个关注点是：

A concern in this discussion is that disrespect of fair value in equity transfer may involve overdue tax or possible flaws in listed entities. Usually, tax authorities are focused on the following aspects in determining whether a transfer is conducted at fair value or not:

√ 股权转让价格低于初始投资成本或取得该股权所支付价款的；

√ The equity transfer price is lower than initial investment cost or the price paid for acquisition of such equity;

√ 股权转让价格低于同一被投资企业其他股东同时或大约同时、相同或类似条件下股权转让价的；

√ The equity transfer price is lower than the equity transfer price of other shareholders of the

same recipient of investment at (approximately) the same time under identical or similar conditions;

√ 股权转让收益率低于同期银行存款利率的；

√ The earnings yield of the equity transfer is lower than interest rate of bank savings in the same period;

√ 转让价格低于个人股东应享有的所投资企业所有者权益份额的；

√ The transfer price is lower than the share of proprietary interests of the investment recipient to which an individual shareholder is entitled to;

√ 有重大影响的个人股东转让企业股权，且企业的土地使用权和房屋建筑物占资产比重超过30%的；

√ Transfer of corporate equity by individual shareholder of major influence with the proportion of land use right and premises of the enterprise account for over 30% of the assets;

√ 转让收入中包含难以计价的非货币性资产或其他经济利益。

√ The revenues from the transfer include non-monetary assets or other economic benefits where pricing is difficult.

对于上述情况，有经验的税务机关往往会参考同行业转让价格，或是资产评估净值等方法核定相应的股权转让收益，并进一步要求股东缴纳税款。

For the above cases, experienced tax authorities tend to verify the corresponding equity

transfer earnings with reference to transfer prices of the same industry or the net value of asset evaluation and demand tax payment from shareholders.

#### ● 债务的清理Debt Clearance

发生兼并收购业务时，对于外商投资企业，审批部门一般要求企业提供相应的债权债务清理情况。由于公司股权兼并后，承担债务变为兼并方的法定责任，转让方与受让方一般会就此问题进行谈判，除了已披露的债权债务情况外，受让方一般可要求订立“或有债务在交割时由目标公司自行负担”以及“交割后发现未曾如实陈述的或有债务，无论是否故意过失，均由目标公司负担”等条款来保护自己，同时，还可进一步要求转让方承诺对于除列明债务外，均由转让方承诺负责清偿和解决，并且受让方有追索的权利，以保护股权转让的受让方权益。

Where an M&A case takes place in foreign-funded enterprise, authorities normally require the enterprise to provide corresponding statement of creditor's rights and debt obligations clearance. After the merger of corporate equity, such debt shall become a legal obligation of the merger party and negotiations on such issue are normally conducted between the transferor and the transferee; besides disclosed creditor's right and debt information, the transferee may protect himself by establishing the article that "contingent debt shall be the sole burden of the target company at the completion of transaction"



and “contingent debt which, after completion of transaction, is found not to have been truthfully disclosed shall be the sole burden of the target company, whether such misrepresentation is intentional or due to negligence”. Meanwhile, the transferor may be requested to pledge the clearance and solution of all debts except for those otherwise specified while granting the transferee the right of recourse to protect its interests in equity transfer.

● 对公司无形资产出资不实的处理  
Handling of Overrated Contribution of Intangible Assets

对于兼并收购前，前股东以职务技术成果当作个人成果出资公司，但时间、环境的变化，目前已造成无形资产不实的情况。我们认为，可先明确职务成果是否对企业的经营发展和竞争能力构成是否造成重要影响，通常我们不建议进行减资和出资置换。实际操作中比较安全的做法是，先明确职务成果的权属，然后补足出资，并说明该成果始终在公司的实际控制下，且此次确权对公司不构成不利影响。而未足额出资的股东需要声明因前期出资不实可能为公司带来的风险，并承诺由该等股东承担全部责任。这样处理无形资产出资不实的问题会更稳妥。

In case where the former shareholder makes a contribution with job-related technical achievement as a personal achievement yet such intangible assets have been misrepresented due to changes in time and circumstances, we suggest that first it should be decided whether such job-related achievement exerts any significant influence on the business operation and development and competitiveness of the enterprise. Usually reduction or substitution in contribution is not advisable; instead, a safer practice is to clarify the proprietorship of the job-related in the first place and make up the capital

contribution with clarification that such achievement is always under actual control of the company and that the current right confirmation will not constitute any adverse influence on the company; while shareholders who have not fully made due capital contribution shall make a declaration of possible risk generated by the precedent overrated contribution with a pledge of full assumption of responsibilities by such shareholders. This proves a more prudent measure in handling of overrated contribution of intangible assets.

● 关于合资公司中的自然人股东身份问题  
On the Issues of Identity of Natural Person as Shareholder in Joint Ventures

需要境外投资人或境外基金格外注意的是，根据《中外合资经营企业法》，原则上境内自然人不能作为中外合资企业的股东方。但有时自然人股东的个人价值较为重要，同时为了保护自然人股东投资的利益（避免代持股等问题），商务部门通常允许原境内公司中国自然人股东在公司享有股东地位一年以上的，可以经批准后保留股东地位，从而成为中外合资企业的中方股东。但暂不允许境内中国自然人以新设或收购方式与外国公司、企业成立中外合资、合作企业。

It should be noted by overseas investors or funds that according to the Law of the People’s Republic of China on Chinese-Foreign Equity Joint Ventures, in principle, natural persons within China are not eligible as shareholders of Chinese-foreign equity joint ventures. However, in certain cases, the individual value of a natural person as shareholder is more important; meanwhile, in order to protect the investment interests of natural person as shareholder (to avoid problems such as shareholding entrustment), commercial authorities usually allow Chinese natural

person shareholders of the original domestic company with over 1 year’s shareholding status to maintain such status upon approval, hence becoming Chinese shareholder of the Chinese-foreign equity joint venture; while prohibiting Chinese natural persons within China to establish Chinese-foreign joint venture or cooperation enterprises with foreign corporations or enterprises by creation or acquisition for the time being.

**总结**  
**Summary**

实践中涉及的问题往往更加错综复杂，政策法规不完善、审批机构的不同习惯，都可能会对投资方案的执行产生重大影响。我们难以全部在本文展开阐述，本期仅以几个较为常见的主题为例，对中国法律结构的实践性问题进行探讨性分析。如需深入性探讨，欢迎随时联络我们。

Issues involved in practice tend to be more complicated and sophisticated as imperfections in policies and regulations and different habits of authorities may exert major influence on the implementation of investment plans, which is impossible to be fully discussed in this article; only a few common cases are used as examples in this explorative analysis of practical issues in Chinese legal system. For further discussions, please contact us at any time.

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