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Issuance of explanatory decree regarding “the application of Beneficial Owner” under tax treaties

In order to enhance the certainty with respect to applying for tax reduction under tax treaties (i.e., Agreements for the Avoidance of Double Taxation with Respect to Taxes on Income), the Ministry of Finance released the explanatory decree no. 10800577770 on June 24, 2019 to clarify the application of the term “beneficial owner” under tax treaties. The content of the decree is made with reference to the relevant Commentaries of the OECD Model Tax Convention, the positions adopted by other countries, and its current practice. The decree, therefore, may ease the obligation of taxpayers when applying the term. The decree also specifies the situations where a taxpayer will be denied beneficial owner status.

財政部核釋所得稅協定「受益所有人之適用」

為提升適用所得稅協定減免稅之安定性，財政部參考經濟合作暨發展組織 (OECD) 稅約範本註釋、他國作法及我國實務，於 108 年 6 月 24 日發布台財際字第 10800577770 號令，核釋所得稅協定受益所有人 (beneficial owner) 之適用，一方面簡化納稅者協力義務，一方面明定非屬受益所有人之情形，以供徵納雙方遵循。

參考資料

108-06-24 財政部新聞稿：發布「核釋所得稅協定受益所有人適用」解釋令

為提升適用所得稅協定減免稅之安定性，財政部參考經濟合作暨發展組織(OECD)稅約範本註釋、他國作法及我國實務，於 108 年 6 月 24 日發布台財際字第 10800577770 號令(下稱本令)，核釋所得稅協定受益所有人(beneficial owner)之適用，簡化協力義務，明定非屬受益所有人情形，簡要說明如下：

一、簡化納稅者協力義務：

他方締約國居住者依據所得稅協定申請減免稅，應檢具受益所有人證明者，得以自我聲明作為受益所有人證明文件。以基金型態或非基金型態以信託方式投資國內有價證券取得股利及利息之外國機構投資人，該等基金或信託如為他方締約國居住者，亦得自我聲明為受益所有人，免依適用所得稅協定查核準則(下稱協定查準)第 15 條第 6 項各款規定辦理。

二、明確稅捐機關之查核：

稅捐機關受理前述案件倘經查得取得案關所得之他方締約國居住者為代理人(agent)、代名人(nominee)或財務導管實體(financial conduit entity)等依取得所得相關契約或法律義務，應將該所得移轉予他人，對該所得運用決定權或享有該所得權利受到限縮者，該他方締約國居住者非屬受益所有人。

財政部說明，我國簽署生效 32 個所得稅協定參照 OECD 或聯合國(UN)稅約範本，於股利、利息及權利金條文規範，源自一方締約國之該類所得，給付予他方締約國居住者且為受益所有人者，來源地國應提供優惠稅率。上述範本說明受益所有人規定旨在防止協定濫用，惟未予定義。我國於協定查準就適用訂有規範，另就澳大利亞法人、英國認可單位信託及英國開放型投資公司之適用訂有令(函)；實務上相關申請(報)書表載明得由所得人自我聲明為所得之受益所有人。

財政部鑑於 OECD 防止稅基侵蝕及利潤移轉(BEPS)行動計畫 6(防止租稅協定濫用)報告發布後，相關防止濫用措施已趨完備並獲國際共識；OECD 稅約範本註釋亦明文非屬受益所有人情形，並肯認符合規範之集合投資工具(如基金或信託)及退休基金得為受益所有人適用協定，經參考該等見解與荷蘭、新加坡、英國及美國等國家作法，明定所得人得自我聲明為受益所有人及非屬受益所有人情形，並適用於符合規範之基金及信託外國機構投資人；另廢止前揭澳大利亞法人、英國認可單位信託及英國開放型投資公司令(函)，依該等令(函)申請案件，於本令發布時處理程序未終結者，本令有利於申請人部分亦得適用。財政部指出，本令參考國際共識及作法發布，具有簡化納稅依從成本、明確徵納雙方適用規定、減少跨境課稅案件課稅爭議及法規鬆綁之多重效益，對於改善我國投資環境，吸引外資，具積極正面效果，有利活絡我國資本及貨幣等金融市場，提升國際競爭力。

108-06-24 財政部台財際字第 10800577770 號令：核釋「所得稅法」第 124 條、「適用所得稅協定查核準則」第 15 條規定，有關所得稅協定受益所有人之相關規定

一、他方締約國居住者取得中華民國所得稅相關法律規定應課稅之所得(以下簡稱案關所得)，依適用之所得稅協定及相關規定申請減免，應檢具受益所有人證明者，除該所得稅協定另有規定，他方締約國居住者得提出敘明其為案關所得受益所有人之自我聲明，以資證明。

二、依華僑及外國人投資證券管理辦法規定，以基金型態登記之他方締約國之外國機構投資人，或非以基金型態登記之他方締約國之外國機構投資人，與他方締約國之居住者簽訂信託契約方式投資於國內有價證券，取得中華民國來源之股利及利息，該基金或信託依適用之所得稅協定規定為他方締約國居住者，得依前點規定，提出敘明該基金或信託為案關所得受益所有人之自我聲明，以資證明，免依適用所得稅協定查核準則第 15 條第 6 項各款規定辦理。

三、稅捐機關受理前二點申請，可合理認定他方締約國居住者有下列情形之一者，非屬案關所得之受益所有人：

- (一) 代理人 (agent)，為代理之本人取得案關所得之人。
- (二) 代名人 (nominee)，以自己名義為他人利益取得案關所得，且就該所得無運用決定權之人。如借名登記之出名人，或信託關係中對案關所得無運用決定權之受託人。
- (三) 財務導管實體 (conduit financing entity)，對案關所得不具運用決定權或無權享有之法人或法律安排，其係為規避或減少該所得稅負、延緩該所得稅款繳納或退還該所得有關稅款。至依他方締約國稅法規定對取得之案關所得負有納稅義務，嗣後分配之所得來源為他方締約國，且未有依案關所得相關之契約或法律義務，應將該所得移轉予他人情形之實體，非屬財務導管實體。

(四) 其他依案關所得相關之契約或法律義務，應將該所得移轉予他人，限縮其對該所得運用決定權或享有該所得權利之人。

四、廢止本部 87 年 6 月 18 日台財稅第 870362587 號函、98 年 1 月 17 日台財稅字第 09804505010 號令及 101 年 6 月 4 日台財稅字第 10104553490 號令。

Translation of Explanatory Decree No. 10800577770

1. When a resident of the other Contracting State deriving income which is subject to tax in accordance with the relevant income tax laws of the Republic of China (hereinafter referred to as “the income in question”) applies for reduction in or exemption from tax in accordance with an Agreement for the Avoidance of Double Taxation with Respect to Taxes on Income (hereinafter referred to as “Income Tax Agreement”) as well as relevant regulations which require the submission of supporting documents identifying the said resident of the other Contracting State as the beneficial owner of the income in question, unless otherwise provided in that Income Tax Agreement, the said resident of the other Contracting State may submit a declaration identifying himself/herself/itself as the beneficial owner of the income in question in order to fulfill the aforementioned requirement.
2. When, in accordance with the stipulations of the Regulations Governing Investment in Securities by Overseas Chinese and Foreign Nationals, a foreign institutional investor of the other Contracting State investing in domestic securities with the status of a fund or not with the status of a fund but by means of holding a trust relationship with residents of the other Contracting State derives dividends or interest from sources in the Republic of China, and the aforementioned fund or trust is a resident of the other Contracting State pursuant to the provisions of the underlying Income Tax Agreement, a declaration identifying the fund or trust as the beneficial owner of the income in question may be submitted in accordance with the preceding paragraph. The requirements stipulated under each Subparagraph of Paragraph 6 of Article 15 of the Regulations Governing Application of Agreements for the Avoidance of Double Taxation with Respect to Taxes on Income, which such foreign institutional investor would otherwise be obligated to fulfill, will not apply to the case.
3. Where a tax authority, undertaking the aforementioned application, may reasonably conclude that the resident of the other Contracting State acts in one of the following capacities, that resident of the other Contracting State is not the beneficial owner of the income in question:
 - a. An agent, who derives the income in question in the name of the principal.
 - b. A nominee, who derives the income in question in his own name but for the benefit of another person, and who has no right to use or enjoy that income, e.g., a person who allows the property which is economically owned by others to be registered under his/her/its own name without the discretionary power over that property; in a trust relationship, a trustee to whom the discretionary power over the income in question is not granted.
 - c. A conduit financing entity, that is a legal person or a legal arrangement which has no right to use or enjoy the income in question, and which serves to obtain a tax exemption, reduction, deferral, or refund regarding that income. An entity will not be regarded as a conduit financing entity where: that entity is liable to tax for the receipt of the income in question in accordance with the tax laws of the other Contracting State, the subsequent distribution of income by that entity is sourced in the other Contracting State, and that entity is not obliged by any contractual or legal obligation which is dependent on the receipt of the income in question to pass on that income to another person.
 - d. A person, other than those stipulated in the preceding three paragraphs, whose right to use or enjoy the income in question is constrained by a contractual or legal obligation which is dependent on the receipt of the income in question to pass on that income to another person.
4. Decrees Nos. 870362587 (dated June 18, 1998), 09804505010 (dated January 17, 2009), and 10104553490 (dated June 4, 2012) issued by the Ministry of Finance are now abolished.

(Should discrepancy due to translation occur, the Chinese version shall prevail)