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Insights & Ideas

MOFCOM Releases New Rules on Financing Leasing Enterprises (Authors: Evan ZHANG, Zhe RONG)

On September 18, 2013, the Ministry of Commerce (“**MOFCOM**”) promulgated the *Administrative Measures for the Supervision on Financing Leasing Enterprises (Shang Liu Tong Fa [2013] No. 337)* (“**Circular 337**”), making further regulations for the supervision on financing leasing enterprises’ business operations and operational risks. Circular 337 has been in effect since October 1, 2013.

Integration of Supervision on both Domestic and Foreign-invested Financing Leasing Enterprises

Before the issuance of Circular 337, there existed two regulations for the two different kinds of financing leasing enterprises. The *Administrative Measures for Foreign Investment in the Leasing Industry (Order of the Ministry of Commerce [2005] No. 5)* (“**Circular 5**”) applied to foreign-invested financing leasing enterprises, while the *Circular of the Ministry of Commerce and the State Administration of Taxation on the Relevant Issues concerning Undertaking Financing Lease Business (Shang Jian Fa [2004] No. 560)* (“**Circular 560**”) applied to domestic financing leasing enterprises. Both Circular 5 and Circular 560 focused more on the establishment conditions and procedures for financing leasing enterprises, and paid less attention to the supervision of business operations and related risks after establishment. However, the requirements of establishment conditions, business scope, supervision and administration in the two regulations differ from one another.

Article 2 of Circular 337 provides that “the financing leasing enterprises herein refer to the enterprises engaging in the financing leasing business in accordance with the relevant regulations of the Ministry of Commerce”. This means that Circular 337 applies to both domestic and Foreign-invested financing leasing Enterprises. According to Circular 337, the establishment of domestic financing leasing enterprises will change from Circular 560’s pilot scheme to being based on a more formal administrative approval process, from the joint confirmation process by MOFCOM and the State Administration of Taxation into an independent approval process by MOFCOM. Besides standardizing the establishment of financing leasing enterprises, Circular 337 focuses on the supervision of business operations and operational risks in order to comprehensively promote the healthy development of the financing leasing industry.

Establishment Conditions for Financing Leasing Enterprises

According to Article 3 and Article 4 of Circular 337, the following business and professional conditions shall be satisfied in order to establish a financing leasing enterprise: (1) having the asset

size, financial strength and risk control capability in line with the business size; (2) having foreign investors comply with the related regulations on foreign investment; (3) having employees with professional knowledge, skills and experience in finance, trade, law, accounting and other areas and with good practice records; (4) having executives, including a general manager, deputy general manager and risk control supervisor, with no less than three years of experience in the leasing business or in managing financial institutions.

Compared with the establishment conditions provided in Circular 5 and Circular 560, Circular 337 maintains the high level requirements for the profession and experience of employees and executives, but abandons the minimum registered capital requirement, which moderately extends the market access conditions for financing leasing enterprises. According to Circular 5, the registered capital of foreign-invested financing leasing enterprises should be no less than USD 10 million. Circular 560 provided that the register capital of domestic leasing enterprise should be no less than RMB 40 million (if established before August 31, 2001) or RMB 170 million (if established between September 1, 2001 and December 31, 2003).

Business Operations of Financing Leasing Enterprises

According to Article 8 and Article 9 of Circular 337, financing leasing enterprises are allowed to carry out financing leasing businesses in forms such as direct leases, subleases, sale-and-lease-backs, leveraged leases, entrusted leases and joint leases. While assuming leasing businesses such as financing leasing as the principal businesses, financing leasing enterprises may also carry out businesses in relation to the principal businesses such as the purchase of leased property, disposal and maintenance of the residual value of property for leases and leasing transaction advisory.

Supervision on Financing Leasing Enterprises

As stipulated in Circular 337, the competent provincial level commercial departments shall be in charge of the supervision and administration of financing leasing enterprises. The content of supervision includes: continuously monitoring the business operations and operational risks of enterprises, setting up risk early warning and emergency treatment mechanisms, strictly supervising and managing whether financing leasing enterprises are involved in any illegal activities such as deposit taking, loan issuing and operations beyond scope.

In addition to supervision by the competent provincial level commercial departments, MOFCOM will establish and improve the National Management Information System of Financing Leasing Enterprises, so as to dynamically understand, supervise and manage the business operations, internal controls, risk profiles, etc. of financing leasing enterprises by means of information technology. According to the *Notice on the Operation of National Management Information System of Financing Leasing Enterprises* issued by the General Office of MOFCOM on July 23, 2013, financing leasing enterprises shall use management information systems to file basic information on

records, timely update the business information (Contract Registration Form and the Receivable Situations), register the lease for public information and inquiry, fill in the financing statements, inquire about the industry information, report and inquire about lessee contract breaches. The specific requirements for using the management information system include the following: (i) prepare and report the numerical statements and brief descriptions about the business conditions of the previous quarter within 15 business days after the end of each quarter; (ii) prepare and report the numerical statements and descriptions about the business conditions of the previous year, and submit and report the financing statements of the previous fiscal year (including the footnotes) audited by an accounting firm by April 30th of each year.

Legal Updates

1. Proposed Amendments to the Administrative Measures on Foreign Investors' Strategic Investments in Listed Companies (Authors: Yang CHEN, Kaiying WU)

On September 27, 2013, the Ministry of Commerce (“MOFCOM”), with the purpose of adapting to the needs of foreign direct investment under the new situation and promoting the healthy development of China’s securities market, declared that it intended to amend the *Administrative Measures on Foreign Investors’ Strategic Investment in Listed Companies* implemented on January 31, 2006 (the “2006 Administrative Measures”), and published the *Draft of Administrative Measures on Foreign Investors’ Strategic Investments in Listed Companies (Amendment)*(the “Draft”), to solicit opinions from the public.

Compared with the 2006 Administrative Measures, the Draft proposes to make amendments to the requirements a foreign investor shall meet to be qualified to make strategic investments in A-Share listed companies (the “Investor(s)”), the approval/filing procedures of strategic investment and the applicability of some relevant rules.

Below is a brief summary of the important amendments in the Draft:

Investor Requirements

In accordance with the 2006 Administrative Measures, one of the requirements an Investor shall meet is that the total amount of both the Investor and its parent company’s actual overseas assets is not less than USD100 million or the total amount of both the Investor and its parent company’s managed actual overseas assets is not less than USD500 million. The Draft modifies this requirement by removing the word “overseas” from the above expression.

In addition, the Draft clarifies that where a listed company invests overseas by way of share swap without causing change in its actual control power, and thus makes an overseas entity become an Investor, neither the above requirement of the total amount of assets nor the requirement that the proportion of the shares obtained after the completion of the initial investment shall not be less than 10% of the shares issued by the listed company shall apply.

Strategic Investment Methods and Time Limit

In accordance with the 2006 Administrative Measures, the methods of obtaining the shares of a listed company include the transfer of shares under an agreement, purchase of new shares issued by a listed company to target subscribers, and any other means specified in the relevant laws and regulations. The Draft adds “tender offer” as a new method to the above methods.

The 2006 Administrative Measures also stipulates that an Investor may make strategic investments through any of its wholly-owned overseas subsidiaries. However, the Draft expands the scope of entities which may conduct strategic investments by saying that an Investor may make strategic investments through any of its wholly-owned overseas subsidiaries and/or its investment companies established within the territory of the PRC.

In accordance with the 2006 Administrative Measures, an Investor shall initiate its strategic investment acts within 15 days of the settlement of exchange of the funds, and shall complete the strategic investment within 180 days following the date on which the in-principle approval is granted. If an Investor fails to complete the strategic investment under the strategic investment plan within the specified time limit, the in-principle approval granted by the relevant examination and approval authority shall automatically become invalid. The Draft provides certain expansion on the time limit of completing strategic investment by stipulating that if an Investor fails to complete the strategic investment within 180 days due to rational reasons, it may submit an application for extension to MOFCOM 30 days ahead of the specified time limit.

Application Scope

The Draft clearly defines its application scope. In accordance with the Draft, besides applying to situations of obtaining shares of any listed company by an Investor through transfer of shares under an agreement, purchase of new shares issued by a listed company to target subscribers, tender offer and other means specified in the relevant laws and regulations, the rules of the Draft are also applicable in the following situations: 1) where an Investor increases its shareholding proportion in a listed company of which the Investor already holds shares through transfer under an agreement, additional directed issue of shares or tender offer; 2) where an Investor obtains actual control of a listed company through merging or acquiring the shareholders of the listed company; and 3) where an Investor obtains shares by participating in the reorganization of a listed company through foreign-invested enterprise(s) the Investor has invested in.

However, the situations not included in the application scope are as follows: 1) obtaining shares of a listed company through an Initial Public Offering of the company of which the Investor previously holds shares; and 2) obtaining the shares of a listed company as a result of bankruptcy, dissolution, mortgage or any other particular reason of foreign investment enterprises who hold the listed company's shares.

National Security Investigation, Anti-monopoly and Insider Information Confidentiality

The Draft sets forth clearer provisions on national security investigation, anti-monopoly and insider information confidentiality issues. The Draft states that if a strategic investment in listed companies falls within the scope of national security investigation, it shall follow the security investigation procedures applicable to mergers and acquisitions by foreign investors of enterprises

within the territory of China. Where a strategic investment meets the standards stipulated in the *Provisions of the State Council on the Thresholds for Notifying Concentration of Business Operators*, an antitrust notification shall be submitted to MOFCOM. Transactions are not permitted without a notification or where an antitrust clearance is not obtained. Before legal disclosure, the information of strategic investment in listed companies is insider information stipulated in the *Law of the People's Republic of China on Securities*. Those who are aware of insider information shall perform confidentiality obligations, and shall cooperate with the listed companies and relevant departments during the insider registration process.

Miscellaneous

As to the renewal of the Approval Certificate for a Foreign-Invested Enterprise (the "Approval Certificate") caused by the change of the Investor's shareholding proportion, both the 2006 Administrative Measures and the Draft stipulate that if a reduction in the number of the shares held by an Investor causes the proportion of foreign investment shares of the listed company to be less than 25%, the company shall report to MOFCOM for record-filing and go through the relevant formalities for the renewal of the Approval Certificate. On this basis, the Draft adds that when the accumulated reduction proportion of the shares held by an Investor reaches or exceeds 5% of the total share capital of the listed company, the listed company shall also report to MOFCOM to go through the Approval Certificate renewal procedure.

In addition, the 2006 Administrative Measures stipulate that where the reduction in the number of shares held by an Investor causes the proportion of foreign investment shares of a listed company to be less than 10%, and such Investor is not the single largest shareholder, the listed company shall report to the relevant examination and approval authority for record-filing and go through the relevant formalities for cancellation of the Approval Certificate. The listed company shall also complete certain change or cancellation procedures with the relevant industry and commerce, tax and foreign exchange authorities. However, the Draft stipulates that only until there are no foreign investment shares existing in a listed company, shall the listed company report to MOFCOM to go through the Approval Certificate cancellation procedure and complete certain change or cancellation procedures with the relevant industry and commerce, tax and foreign exchange authorities.

Furthermore, the Draft provides: 1) if an Investor uses offshore RMB legally obtained as funds for strategic investment, it shall comply with the relevant regulations on trans-border RMB direct investment; 2) if an Investor uses any equity interest of a company established within the territory of China as payment of strategic investment, it shall be in compliance with the relevant regulations on using equity interest as the capital contribution. Moreover, the Draft makes several adjustments, supplements and refinements of foreign exchange and tax procedures relevant to the strategic investment in listed companies by foreign investors.

2. Inheritance Tax Forecast (Author: Han CHEN)

The main functions of inheritance tax are to regulate the social discrepancies between the rich and poor, as well as to encourage the younger generation to rely on their own abilities rather than on the wealth of their ancestors. However, the inheritance tax has also been highly criticized since it is an after-tax tax, meaning that the people must pay a tax on their wealth which has already been taxed.

As early as July 1, 1940, China officially levied an inheritance tax. After the founding of the People's Republic of China, the *National Tax Implementation* was passed in 1950, with inheritance tax being one of these taxes, but due to the conditions was not collected at that time. The new tax system, as reformed in 1994, made it possible for the state to begin imposing an inheritance tax. In 1996, the National People's Congress authorized the *9th Five-Year Plan for National Economic and Social Development* and the *2010 Vision Outline*, which was an outline on "how to gradually impose an inheritance and gift tax." On February 5, 2013, the Central People's Government and State Council agreed to implement the *Several Opinions Concerning the Deepening the Reform of the Income Redistribution System*, of which the fourth part of the fifteenth provision expressly concerns "the issue of researching the appropriate time to begin levying inheritance tax." Based on this recent legislation, it can be assumed that inheritance taxes will start to be levied in the not so distant future. Therefore, it is necessary to have a basic understanding of this tax in order to properly conduct medium and long-term asset planning.

Basic Details of Inheritance Tax

The most important details of basic inheritance tax are as follows:

- a) Taxpayer. The payer of inheritance tax is typically a successor (including the legatee), and other benefactors of the inheritance.
- b) Tax threshold. The threshold for inheritance taxpayers is relatively high, because the theory for levying the tax is based on regulating the wealth imbalance between the wealthy class and the poor class, so the tax targets the inheritance of a certain class of wealthy people.
- c) Tax-rate adjustment. According to state practice, the inheritance tax rate is one that is the most adjustable. There are two reasons for this:
 - i. The tax has nothing to do with economic circulation, so adjusting the rate would have a very small impact on economic life.
 - ii. Whenever the fiscal deficits decrease, the inheritance tax rate lowers
- d) Differentiating the tax rate. The tax rate varies according to the successor's degree of kinship with the decedent, which determines the applicable tax rate.

- e) Tax Exemption (Type 1). Each country has some sort of inheritance tax exemption. Estate property exemption represents the first type of tax exemption. An example of this would be Hong Kong's exemption on property outside of Hong Kong. Italy and France exempt property in the form of equity from inheritance tax. France also exempts woodlands and agricultural lands from inheritance tax.
- f) Tax Exemption (Type2). In addition to the exemption of property, some countries also have a "special consideration" portion of taxpayers. For example, in many countries, a person with a derivative acquisition is exempt from paying an inheritance tax on their first set of housing.

It is worth mentioning that inheritance tax and gift tax are imposed at the same time, so as to cover both the legacy and cause of death given with the inheritance, so that the property transfer mode has the same legal consequences.

Inheritance Tax (Tax Saving) Planning

Compared to planning for other types of taxes, inheritance tax planning has very different characteristics: firstly, due to the unpredictability of death, you must plan ahead, and secondly, inheritance tax typically involves a combination of the management of family wealth and intergenerational inheritance.

Although every country's (or region's) rules on tax exemption are different, the focus of inheritance tax planning is not to prepare for inheritance tax exemption, but to prepare for overall family estate planning. Therefore, there are some universally adopted methods for inheritance planning in every country.

First, setting up the children or other beneficiaries with a beneficiary trust is a common method to evade paying inheritance taxes. By setting up the trust, the ownership of the property is divested, and through the beneficial rights of the trust the wealth is passed intact to the next generation. Before the inheritance tax was abolished in Hong Kong, many people chose to set up a trust fund for one or more of their family members in their estate. In such an arrangement, the ownership of the property is entrusted to the trustee, who has the responsibility to preserve and manage the trust, as well as to withdraw the property and income according to certain arrangements after the death of the principal, as agreed upon by the beneficiary. Such arrangements are carried out because, according to the relevant Hong Kong laws and regulations, a gift from a trust made more than three years after the death shall be exempt from taxation.

Second, the misinterpretation of the function of life insurance. Many lifelong life-insurance products contain a death benefit function; that is, once the insured person dies, the insurance benefit is directly attributable to the beneficiary, and thus is not part of the object levied by the estate tax. Thus, in theory, life insurance is a way to avoid inheritance tax, but it is rarely used in practice, as the use of a high number of life insurance policies introduces a high factor of instability into the family's assets. It also introduces another element of instability into the life of the insured person:

situations where the beneficiaries of the insurance policy kill the insurant to take advantage of the insurance benefit have previously occurred.

Finally, in planning for the will for an estate, family wealth and the generation transition are planned together. If the inheritance operates by law without a will, there is the possibility of missing out on certain tax benefits. By using the inter-generational inheritance of family wealth, the family will be able to move the property between the generations of the family step-by-step and thus scatter or defer the tax burden, instead of losing much of the money through inheritance.

3. Car Plate Rental Legal Risk Analysis (Authors: Ning LI, Dong WANG)

To effectively alleviate the issue of traffic congestion, the Beijing Government promulgated the *Tentative Regulations of Beijing on Adjusting and Controlling the Quantity of Cars* in 2010, and then implemented the car index allocation system (the “Index”) in the city of Beijing. The Index in 2012 was only listed at 240,000, which is far from meeting the demands of residents. In September 2013, the Beijing Government issued the *Key Task Decomposition of Beijing 2013 – 2017 Action Plan for Clean Air*, which provides that the vehicle population in the city of Beijing shall be contained within the 6 million mark by the end of 2017. Such scheme would cause the Index to be further compressed during the period from 2014 to 2017. Many companies and individuals are eager to purchase a car but continually fail to gain entry into the Index, thus encouraging more individuals to rent car plates.

Usual Practice of Car Plate Rentals

In practice, the parties involved in renting a car plate would conclude a lease agreement. In the lease agreement, it is usually agreed that the Lessee shall purchase the car, but the car shall be registered in the name of the Lessor. In addition, the Lessee shall be entitled to ownership and use rights of such car, and shall also be subject to the liabilities of any traffic accidents that might occur in the future. In return, the Lessee shall pay the Lessor a certain rental fee.

After the conclusion of such agreement, the Lessee would fund the purchase of a new car, and then the Lessor would handle the registration issues. Moreover, the Lessor would sell his original car or complete the relevant car scrapping formalities, and would then apply to use the original plate on the new car.

Potential Legal Risks for Lessees

In the lease agreement, both parties usually agree that the ownership of such car shall be entitled to the Lessee, which means that the Lessee would be entitled to the possession, use, benefit and disposal of such car. Although such agreement has clarified the ownership of the car, there are still

potential legal risks for the Lessee.

Since the registration of such car is in the name of the Lessor, for any third party, there are reasonable grounds to believe the ownership of such car belongs to the Lessor. Provided that the Lessor sold and delivered such car to a third party without authorization from the Lessee, and finished changing the name of the owner registry, the third party would obtain the ownership of such car in accordance with the *Real Rights Law of the PRC*. As a result, the Lessee would only be able to ask for liquidated damages from the Lessor to remedy such losses, but have no grounds to require the third party to return such car.

In addition, the Lessor may mortgage such car to a third party without authorization from the Lessee to guarantee his/her debts. Provided that such mortgage was registered and the Lessor failed to pay his debts in the future, then the third party would be entitled to excise his/her mortgage rights, which means that such car would be sold or auctioned off by the third party. As a result, the Lessee would lose the ownership of such car, and would only be able to seek liquidated damages from the Lessor.

Potential Legal Risks and Burdens for Lessors

a) Risk of Traffic Accident Liabilities

For any third party, the actual owner of the car is the Lessor since the registration of such car is in the name of the Lessor. As a result, if any traffic accidents occur in the future, the Lessor would be liable for damages.

In accordance with the *Tort Law of the PRC* (the "Tort Law"), provided that any traffic accident occurred in the future regarding such car, and thereby caused any injury to the third party, such liability may be covered by the insurance company, and any shortfall shall be borne by the user of such car. However, the *Tort Law* stipulates that "if the owner of the vehicle contributes to the occurrence of the damage, he/she shall bear the corresponding liability". In the judicial practice, the circumstances in which the Lessor would be recognized as the owner of such car, who contributes to the occurrence of the damage and shall bear the corresponding liability, are listed in the following:

- i. Knows or should know that such car has a defect which constitutes one of the causes for the traffic accident;
- ii. Knows or should know that the driver of such car does not meet the driving requirements or has not acquired the corresponding driving qualifications;
- iii. Knows or should know that the driver shall not drive such car when drinking, taking psychoactive drugs or narcotics controlled by the State, or having any disease that obstructs the driver's safe use of the motor vehicle; or
- iv. Has any other faults for the traffic accident.

In addition, provided that the Lessee caused any traffic accidents when driving and escaped, or the traffic accident occurred but it was too difficult for the actual driver to be identified, the Lessor is likely to be ordered to assume liability for the damages.

b) Burden of Insurance Payment

Article 2 of the *Regulations on the Compulsory Insurance for Liability for Traffic Accidents of Motor Vehicles* provides that the owners or managers of motor vehicles driving on roads within the PRC shall purchase the compulsory insurance for liability for traffic accidents of motor vehicles in accordance with the relevant provisions of the *Law of the PRC on Road Traffic Safety*. Besides, the Lessee may need to purchase other commercial insurance.

Since the registration of such car is in the name of the Lessor, the Lessor is obligated to purchase the compulsory insurance. Although the lease agreement usually provides that the Lessee shall cover the related insurance expenses, the Lessor shall still be required to provide the necessary documents when purchasing the insurance, or provide necessary assistance in claim settlements, etc., thus making it an additional burden for the Lessor.

According to Article 39 of the *Regulations on the Compulsory Insurance for Liability for Traffic Accidents of Motor Vehicles*, where the owner or manager of a motor vehicle fails to purchase the compulsory insurance for liability for traffic accidents of motor vehicles in accordance with the relevant regulations, the traffic control department of the public security organ shall carry out the following procedures: 1) detain the motor vehicle, 2) inform the owner or manager of the motor vehicle of purchasing the insurance in accordance with the relevant regulations, and 3) impose a fine of twice as much as the premium that shall be paid within the minimum limit of liability in accordance with the relevant regulations. If the Lessee refuses to pay the compulsory insurance fee and the Lessor failed to pay such fee as well, in addition to being required to pay such insurance fee, the Lessor may be fined by the related department.

c) Burden of Technical Safety Inspections

Article 16 of the *Implementing Regulations on the Law of the People's Republic of China on Road Traffic Safety* provides that a motor vehicle shall, as of the day when it is registered, be subject to technical safety inspections. Specifically, a small or mini non-operating passenger automobile shall be subject to the following inspections: one inspection every two years for the first 6 years; after 6 years, one inspection every year; and after 15 years, one inspection every 6 months. According to the above provision, the Lessor hereby shall assist the Lessee in accepting such technical safety inspections, thus the Lessor shall bear some burdens.

Risk of Invalidity of the Lease Agreement

After the lease agreement is concluded, if any dispute arises from the performance of such agreement and a suit is brought to the court, such agreement would likely to be ruled as invalid by

the court.

According to Article 53 of the *Contract Law of the PRC*, a contract shall be rendered void under any of the following circumstances: (1) The contract is concluded through the use of fraud or coercion by one party, therefore damaging the interests of the State; (2) Malicious collusion is conducted to damage the interests of the State, a collective group or a third party; (3) An illegitimate purpose is concealed under the guise of legitimate acts; (4) Public interests are damaged; or (5) The mandatory provisions of the laws and administrative regulations are violated. Since the purpose of such lease agreement is to circumvent the related provisions regarding the controls on the quantities of cars in the city of Beijing, such agreement may be recognized as a contract which damages the public interest and shall be rendered void by the court. Once such agreement is rendered invalid, both sides shall lose the related rights stipulated in the agreement.

Article 58 of the *Contract Law of the PRC* provides that the property acquired as a result of a contract shall be returned after the contract is rendered null and void or has been revoked. Where the property cannot be returned or the return is unnecessary, it shall be reimbursed at its estimated price. The party at fault shall compensate the other party for the losses incurred as a result. If both parties are at fault, each party shall bear his/her corresponding liability. According to the above provision, if the lease agreement is rendered invalid, the Lessee shall return the car plate, and the Lessor shall change the name of the owner registry. In the event that the Lessee fails to gain the Index, such car will be confirmed as property that cannot be returned, and the court may hold that such car shall be owned by the Lessor and order the Lessor to reimburse the losses of the Lessee.

Important Announcement

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