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合伙企业与合伙所得的税收协定
适用问题研究

Study of the Application of Bilateral Tax Conventions to
Partnerships and the Income of Partnerships

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内 容 摘 要

各国国内税法给予合伙企业的税收待遇不尽相同，有的将其视为纳税虚体，有的将其视为纳税实体，在适用双边税收协定时，缔约方对合伙企业的协定资格以及所得定性会产生冲突，导致双重征税或者不征税，从而使协定目的落空。本文就双边税收协定对合伙企业的适用进行了研究，对 1999 年 OECD 关于合伙企业报告中提出的解决方法进行分析，提出一些粗浅的看法，并对中外双边税收协定对合伙企业的适用提出了建议。除了引言和结论以外，本文共包括五章：

第一章以德国、美国、日本、西班牙等国为代表，对各国国内税法给予合伙企业的不同规定和待遇作了简介，并探讨了双边税收协定上关于合伙企业定性冲突的概念、类型及其产生的原因。

第二章着重研究了合伙企业的协定资格。先探讨了 OECD 税收协定范本第一条意义上“人”和“居民”的含义，合伙企业可以成为协定意义上的“人”，但不必然是缔约国居民；然后分别从缔约国对合伙企业进行相同或者不同定性的双边以及三边情形中的合伙企业的协定资格进行了分析。

第三章对《报告》所提出的有关合伙企业协定资格定性冲突的解决方法，区分为两国和三国情况，从来源国和居住国的角度进行了分析检讨，论证了其合理与否。

第四章探讨了合伙人与合伙企业之间因不同关系所致的所得课税问题。主要涉及到合伙人从合伙企业获得的营业利润以及合伙人与合伙企业内部之间因交易关系而产生的特别报酬。

第五章分析了中外双边税收协定对合伙企业的适用。先介绍了我国对合伙企业的税收待遇；然后对我国 90 个双边税收协定对合伙企业的规定进行了归类；接着讨论了中外双边税收协定对合伙企业的适用，并分析了适用中的问题以及解决问题的建议。

关键词：合伙企业协定资格； 双边税收协定； 定性冲突

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ABSTRACT

Every state has different tax rules about partnerships, some regard partnerships as tax entities, some as transparent entities, which leads to some conflicts about the entitlement of partnerships to treaty benefits and the characterization of the income, resulting in double or no taxation when people apply to the bilateral tax conventions and the purpose of the conventions is failure. The thesis has studied the application of the tax convention to partnerships and the income of partnerships, and discussed the solution to “The Application of the OECD Model Tax Convention to Partnerships” in 1999, as well as made some suggestions to the application of the Chinese bilateral tax conventions to partnerships. Except for the introduction and the conclusion, the thesis includes five chapters:

Chapter one, taking Germany, US, Japan, Spain as references, has introduced different stipulations and treatments to partnerships in various countries’ domestic tax law, and discussed the concepts, types and causes of the characterization conflicts to partnerships in the bilateral tax conventions.

Chapter two has studied the entitlement of partnerships to treaty benefits. Firstly, it has discussed the meaning of “person” and “resident” of the OECD tax convention model. Partnerships may become the “person” in the conventional significance, but they are not inevitably the residents of the contracting state. Secondly, it has discussed the same or different characterization of the entitlement of partnerships to treaty benefits in the bilateral as well as the trilateral situations.

Chapter three, from the aspect of the state of source and the state of residence respectively, has analyzed and reviewed the solution to characterization conflicts to partnerships which the OECD-Report has put forward.

Chapter four has discussed the problems of income tax as result of the different relationship between the partners and the partnership, which mainly about the partners’ business profits, and the special incomes which come from the trade between the partners and the partnership.

Chapter five has discussed the application of China tax conventions to partnerships. It firstly has introduced the tax treatment of the partnership in China. Secondly it has studied the classification of partnerships in the 90 bilateral tax conventions of China. Finally, it has discussed the application of the Chinese tax conventions to partnerships and proposed the solutions to the problems.

Key words: The Entitlement of Partnerships to Treaty Benefits; Bilateral Tax Convention; Characterization Conflicts

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缩略语表

一、英语

a.: and (和)

BTR: British Tax Review (英国税收评论)

CDFI: Cahiers de Droit Fiscal International (国际财政手册)

DTC: Double Tax Convention (双边税收协定)

ET: European Taxation (欧盟税收)

IBFD: International Bureau of Fiscal Documentation (国际财政文献)

IFA: International Fiscal Association (国际财政协会)

Intro.: introduction (引言)

IRC: Internal Revenue Code (国内税收法典)

IRS: Internal Revenue Service (国家税务局)

LLC: Limited Liability Company (有限责任公司)

OECD: Organization for Economic Cooperation and Development (经济合作与发展组织)

OECD-MC: OECD. Commentaries on the Articles of the Model Convention (协定范本条款注释)

OECD-MTC: OECD. Model Tax Convention on Income and on Capital. 2003. (OECD 对所得和财产的税收协定范本)

Para.: paragraph (段)

OECD-Report: OECD. The Application of the OECD Model Tax Convention to Partnerships. 1999. (税收协定范本对合伙企业的适用)

p.: page (页码)

Rev.: Review (评论)

TC: Tax Convention (税收协定)

二、德语

AG: Aktiengesellschaft (股份公司)

- AO: Abgabenordnung (税收政管规则)
- BB: Der Betriebsberater (企业顾问)
- BFH: Bundesfinanzhof (联邦财政法院)
- BGBI : Bürgerliches Gesetzbuch Teil I (民法典 I)
- BMF: Bundesministerium der Finanzen (联邦财政部)
- BNB: Beslissingen in Belastingzaken, Nederlands Belastingrechtspraak (税收裁决, 荷兰税收法)
- BverfG: Bunderverfassungsgericht (联邦宪法法院)
- BStBl I(II III): Bundessteuerblatt Teil I (Teil II Teil III) (联邦税收活页 I)
- BT-Drs.: Bundestags-Drucksachen (联邦议会出版物)
- DB: Der Betrieb (企业)
- DBA: Doblebesteuerungsabkommen (双边税收协定)
- DSWR: Datenverarbeitung Steuer Wirtschaft Recht (税收经济法数据整理)
- DStJG: Deutsche Steuerjuristische Gesellschaft (德国税收法律协会)
- DStR: Deutsches Steuerrecht (德国税法)
- EStR: Einkommensteuergesetz (所得税法)
- Einl.: Einleitung (引言)
- F.: Fach (专业)
- FG: Finanzgericht (财政法院)
- Fn.: Fußnote (脚注)
- FR: Finanzrundschau (财经新闻)
- GbR: Gesellschaft bürgerlichen Rechts (民法协会)
- GewSTG: Gewerbesteuerengesetz (营业税法)
- GmbH: Gesellschaft mit beschränkter Haftung (有限责任公司)
- Gr.: Gruppe (群体)
- IStR: Internationale Steuerrecht (国际税法)
- IWB: Internationale Wirtschaftsbriefe (国际经济学书信)
- JbFfSt: Jahrbuch der Fachanwälte für Steuerrecht (税务律师年刊)
- KG: Kommanditgesellschaft (两合公司)

MA: Musterabkommen der OECD zur Vermeidung der Doppelbesteuerung auf dem Gebiete der Steuern vom Einkommen und vom Vermögen mit weiteren Nachweisen (关于避免对所得和财产双重征税的税收协定范本)

ÖstZB: Beilage zur ÖstZ, Die finanzgerichtlichen Erkenntnisse des Verwaltungsgerichtshofs und des Verfassungsgerichtshofs (行政法院和宪法法院对财政法院裁决的补编)

OHG: Offene Handesgesellschaft (公开贸易合伙)

RStBI II: Reichssteuerblatt Teil I (Teil II) (帝国税收汇编)

RFH: Reichsfinanzhof (帝国财政法院)

RIW: Recht der Internationalen Wirtschaft (国际经济法)

Rz.: Randziffer (段)

S.: Seite (页)

s.o.: sehen oben (同上)

Stbg: Die Steuerberatung (税收顾问)

StbJb: Steuerberater-Jahrbuch (税收顾问年刊)

StuW: Steuer und Wirtschaft (税收与经济)

SWI: Steuer und Wirtschaft International (国际税收经济)

u.: und (和)

Wpg: Die Wirtschaftsprüfung (经济审查)

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