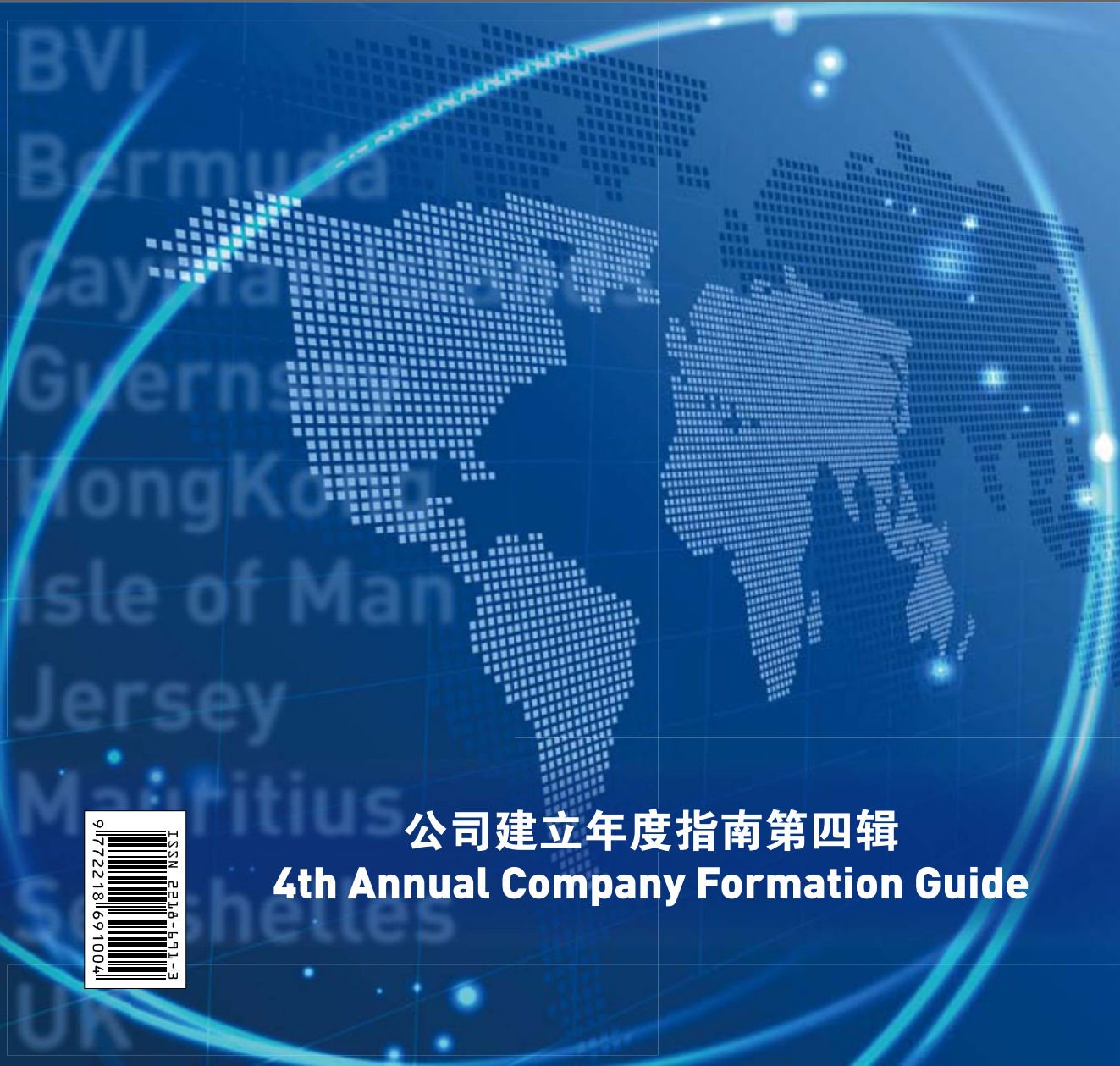


4TH ANNUAL COMPANY FORMATION GUIDE

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公司建立年度指南第四辑
4th Annual Company Formation Guide



美国联邦机构：中国投资者须知 海外账户纳税法案（FATCA） 对中国的影响力

What Chinese Citizens and Businesses Should Know About the IRS



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很多中国人和中国企业在美国做生意，在美国投资，或有家人在美国。由于美国政府和美国政府近来的关系越来越密切，将来中国投资客或公司需要面对美国联邦机构税法的情况也会越来越多。

有些中国人也是美国公民或绿卡持有者。但是由于不是长期住在美国，常忽略了向美国国税局报税。美国政府也正在加强税务收缴。

美国预扣税义务

如果不是美国公民，美国政府只能通过境外汇款扣税来收集税务。美国每年汇给外国人的金额高达 1400 亿美元。这些扣税义务很复杂也很难择要，不过大概规则是：美国政府向给外国人的汇款扣 30% 的税，但是有些税收协议允许减少税率。

美国要求私人企业和公司在汇款前扣押预扣税，然后转缴给美国国税局。事实上，如果美国公司没有按规定扣押预扣税，则该公司必须自付补齐这部分税款。因此国外个人和公司常常会发现美国公司宁可多扣押预扣税，因为美国国税局不会对过多的预扣进行惩罚。

Many Chinese individuals and companies conduct business with the U.S., have U.S. investments, or U.S. relatives. Some encounter the Internal Revenue Service (IRS) because of U.S. withholding tax rules. Others find themselves answering IRS questions because of the increasing cooperation between the U.S. and foreign governments—including China.

However, many individuals and families in China are either U.S. citizens or permanent residents, even if they do not spend significant time in the U.S. That means their U.S. tax compliance may languish. This is a dangerous tendency, particularly at a time when the U.S. is enforcing its tax laws more firmly than ever.

U.S. Withholding Tax

For non-U.S. taxpayers that have no requirement to file U.S. tax returns, the only way the U.S. can get any tax money is via withholding on payments sent from the U.S. to those persons. U.S. source income paid to foreign individuals amounts to \$140 billion

美国要求私人公司在汇款前扣税，事后缴给美国国税局（IRS）。如果美国公司没有扣税，公司必须付 IRS 税金。美国公司小心为上，通常会多扣押，因为 IRS 不会惩罚过多的预扣。

可并不是每样向外国的汇款都必须扣税。实际上有很多不同的汇款定义。一般来说，只有在美国境内的所得收入才可以预扣所得税。并且还必须被归类为固定的、可确定的，每年都有或是定期的收入（简称 FDAP 收入），该词汇可以被理解为包括个人服务所得报酬、股息、利息、租金、稿酬以及很多其他类型的收入。

如果中国公民或公司在美国有收入，最好预先计划。美国公司为了保证他们符合美国税法，通常会比较保守。但是如果您有充裕的时间，就可以预先解决税赋的问题。

美国公民和绿卡持有者

对于美国居民和绿卡持有者来说，税务的问题会更复杂。全球有 700 万美国公民和绿卡持有者不居住在美国。在美国税法看来，美国绿卡持有者只要在美国呆一天就视为永久居民。美国公民和绿卡持有者必须申报他们在国内和国外的所有收入，包括填报 TD F90-22.1 表“国外银行和金融账户申报”（Report of Foreign Bank and Financial Accounts 简称 FBAR）。您的国外银行或投资账户也必须一一列清。

如果美国公民和绿卡持有者在任何外国公司有 10% 以上的股份，那会引发更多的美国缴税义务。有 50% 以上股份的美国公民将面对最严格的赋税责任。此外，由于“等同所有权”规则可将个人财产在其家庭成员之间



each year. The tax withholding rules are complex and difficult to summarize. However, most types of U.S. source income paid to a foreign person are subject to a withholding tax of 30%, although a reduced rate or exemption may apply in the case of some tax treaties.

The U.S. relies on private parties and companies to collect this withholding tax and remit it to the IRS. In fact, if withholding is required and a payer fails to withhold the required tax, the withholding agent (the payer) is liable for it. That is one reason non-U.S. individuals and companies often find that U.S. payers err on the side of withholding tax. The IRS does not criticize over-withholding. However, not every payment is subject to withholding, and much of the terminology is hard to decipher. In general, the payment must be from sources within the U.S. to be subject to withholding. Moreover, it also must generally be classified as fixed or determinable annual or periodical income. This phrase has been interpreted as covering compensation for personal

services, dividends, interest, rents, royalties, and many other types of payments. Gains from selling intangibles such as patents or copyrights are also subject to withholding.

For any individual or company receiving payments from the U.S., planning ahead is best. Payers in the U.S. want to be certain they are complying with U.S. law so they are not liable for the tax themselves. But there is often a way to address the issue provided that there is adequate time.

U.S. Citizens and Residents

In some ways, withholding tax problems are nothing compared to the tax issues facing U.S. citizens and residents. U.S. citizens and green card holders face a far more serious interaction with the IRS. There are more than 7 million U.S. citizens living outside the U.S. and many green card holders too. A green card holder is classified as a permanent U.S. resident for tax purposes regardless of how little time he spends in the U.S. U.S. citizens and green card holders must report their worldwide income

进行推定归属，因此，国外投资者和家庭通过一到多个公司来掌控其生意或者房产的做法常会在缴税方面让他们伤够脑筋。

有些美国公民和绿卡持有者因为这些苛刻的税率，会选择放弃他们的公民身份。所以现在放弃美国国籍的情况是创历史新高。即便如此，这些人离开美国也负有纳税义务。

最近几年来，由于美国国税局的传讯和起诉，许多美国银行开始将有外国账户的美国公民和永久居民列入名单内。美国政府也开始从举报人、证人和银行收集了很多资料。另外，美国政府通过「海外账户纳税法案（FATCA）」，要求海外银行公开美国公民和永久居民的海外账户资讯。

因为 FATCA，很多国家（英国、加拿大等等）已经跟美国签订协议。虽然中国还没跟美国签协议，但是中国表示支持美国执行 FATCA。美国和香港特区的协议应该在 2014 年签约。

美国公民和绿卡持有者必须申报他们全球的收入。如果您有海外银行账户，请在 Schedule B 上选“是”。

美国公民和绿卡持有者的海外资产超过 5 万美元，就须向美国国税局如实申报 Form 8938。如果您的海外账户金额超过 1 万美元，您也必须申报 FBAR。FBAR 申报必须在每年 6 月 30 日以前完成。如果您不申报海外收入，您就可能面临罚款甚至牢狱之灾。刑事犯罪的诉讼时效为 6 年。但民事的税收欺诈罪则不受诉讼时效的限制，故美国国税局可在 10 年甚至 20 年后查账并要求您补缴漏缴的税款，还可能罚您 20% 的罚款或 75% 的民事欺诈罪罚款。



to the IRS, and make annual FBAR financial disclosures.

In addition, if U.S. citizens or green card holders own more than 10% of the stock of any foreign company, additional U.S. tax and disclosure obligations arise. The biggest problem occurs for those who have invested more than 50% in a foreign company that holds their business, investments or even their residence. Under U.S. controlled foreign corporation rules, additional U.S. tax and disclosure obligations are triggered.

Moreover, there are deemed ownership rules that can attribute constructive ownership between family members. As a result, the propensity of foreign investors and families to have one or more companies in which they hold businesses or real estate can cause tax headaches.

Some U.S. citizens and green card holders choose to give up their U.S. citizenship or residency in view of what they may see as high U.S. compliance burdens. The number of expatriations from the U.S. is at a record high. But in some cases,

the act of expatriating itself can involve compliance and disclosure.

Over the last few years, IRS subpoenas and prosecutions have caused banks to identify U.S. citizens and residents with foreign accounts. In addition, the U.S. has gathered stockpiles of information from whistleblowers, banks under investigation and cooperative witnesses. But the biggest sea change is the Foreign Account Tax Compliance Act (FATCA), the U.S. law that compels banks worldwide to turn over the details of American account holders.

As a result of FATCA, many nations are entering agreements with the U.S., including the UK, Canada, and numerous other nations. Despite delays in negotiations between China and the U.S., the two countries have expressed a desire to work together to implement a FATCA agreement. Hong Kong SAR has already embraced FATCA and an official agreement is expected to be signed in 2014. For all of these reasons, U.S. tax compliance is in the spotlight.

如果您并不是故意违犯，每次漏报 FBAR 会面临 1 万美元的罚款。如果您是故意违犯，则罚款就是 10 万美元或是高达 50% 海外账户金额。假报招致最高达五年监禁的刑事重罪及高达 25 万美元的罚款。不申报 FBAR 也可能招致最高达十年监禁的刑事重罪及高达 50 万美元的罚款。

为了避免严重的罚款，很多纳税人应该考虑海外主动申报计划（Offshore Voluntary Disclosure Program，简称 OVDP）。该计划允许纳税人更正过去八年内的错误资讯或漏报的咨询和 FBAR。纳税人必须缴纳漏报的税款、利息、以及 20% 的漏缴税。该计划同时要求纳税人缴纳过去八年内海外账户最高余额的 27.5%。

这 27.5% 是最严重的罚款。但是对于长年居住在海外的美国纳税义务人，美国给他们提供有简单且对他们更有利的「简易型揭露计划」(Streamlined Filing Compliance Procedures)。该计划只要求过去 3 年内的纳税申报，6 年 FBARs，而且没有罚款。

如果不参加 OVDP，也不参加「简易型揭露计划」，有些纳税人会选择以安静方式 (quiet disclosures) 申报海外账户，这样的申报比没有申报好些，但是美国国税局警告大家，如果抓到您，您会面临严重的罚款。

一些纳税人尽管有不恰当的报税，但如果该不恰当报税有幸并不影响其所欠税务（比如，由于其境外缴税相抵免），美国国税局表示该种情况不需要该纳税人修改纳税申报表。

申报过去的 FBAR 不算是安静方式申报。虽然纳税申报和 FBAR 都很重要，不报 FBAR 有更严重的后果，所以纠

U.S. citizens and green card holders must report their worldwide income on their U.S. taxes, even if they claim foreign tax credits or an exclusion of income earned abroad. There are also disclosure obligations. If you have a foreign account, check “yes” (on Schedule B).

As part of your tax return, you must file Form 8938 if your foreign assets (generally) exceed \$50,000 in value. You also must file a Foreign Bank Account Report (FBAR) annually if the aggregate of your foreign accounts exceeds \$10,000 at any time during the year. FBARs are separate filings due by June 30 each year. If you fail to report your worldwide income on your tax return or fail to check the foreign account box, it can be considered tax evasion or fraud.

The criminal statute of limitations is six years. The statute of limitations never expires on civil tax fraud, so the IRS can pursue you 10 or 20 years later. Tax bills can include a 20% penalty or a 75% civil fraud penalty. Failing to file an FBAR carries a civil penalty of \$10,000 for each non-willful violation. If willful, the penalty is the greater of \$100,000 or 50 percent of the account balance for each year you failed to file. Filing a false tax return is a felony that can mean up to five years in jail and a fine of up to \$250,000. Failing to file FBARs can even be considered criminal, carrying fines up to \$500,000 and up to ten years in prison.

For many, participation in the IRS offshore amnesty program is the best way to solve a failure to

comply in the past without facing potential prosecution or civil penalties that can be severe. The IRS amnesty program involves submitting up to 8 amended tax returns and 8 FBARs. It involves paying taxes, interest and a 20% penalty on any unreported income. Finally, the IRS program calls for a penalty equal to 27.5% of the highest balance in your foreign accounts over the 8 years.

For many participants, the most painful part of the IRS program is the 27.5% penalty paid at the very end of the case. For some U.S. citizens living outside the U.S., though, there is a more favorable IRS program referred to as the “Streamlined” program. For those who qualify, it only involves 3 tax returns, 6 FBARs, and no penalties.

For those who do not enter either amnesty program, the choices are narrowing. Some opt for a “quiet” disclosure. That means amending tax returns and filing FBARs outside the IRS amnesty programs. Although a quiet disclosure is better than doing nothing, the IRS warns that it will treat you harshly if it catches you. For fortunate taxpayers who do not owe any U.S. taxes despite improper reporting (because of foreign tax credits, for example), the IRS has said that amended tax returns are not necessary.

Moreover, in such a case, filing past due FBARs is not considered a quiet disclosure. And while both tax returns and FBARs are important, FBARs are arguably more sensitive than tax returns. Civil and criminal penalties for



正 FBAR 比纠正纳税申报还重要。您可以避免 FBAR 的罚款如果您有“合理事由” (reasonable cause), 可是这些事由没有明确的制定。

有些人不纠正以前的错报或漏报, 而只对将来的纳税申报和 FBAR 进行修改。可是美国国税局仍可能会调查以前漏报的纳税申报和 FBAR。而且取消账户不会解决您以前的错误。如果您的这种行为被视为隐瞒以前的错误, 您可能会面临更严重的罚款。

公司问题

拥有国外公司 10% 的股票就必须另填申报。如果您和其他美国公民总共持有 50% 以上的股票, 这个公司就是受控外国企业 (CFC)。

这就带来重要的申报责任。首先您必须申报 5471 表格和您每年的纳税申报。另外, 虽然您没有收到实际配额, 您必须按照您在公司所持有的股份比

ailing to file FBARs are worse than tax penalties. That is one reason filing FBARs can help ameliorate liability even if minor errors on your tax returns are not corrected. You can avoid FBAR penalties if you had “reasonable cause,” but the grounds for waiving penalties are not clearly enumerated.

Some people do not attempt to correct the past and instead commence filing accurate tax returns and FBARs prospectively. However, the risks can be high. The IRS may ask about the lack of prior FBARs and tax returns disclosing a foreign account. Moreover, simply closing foreign accounts is not an answer to compliance failures in the past. Tying off the problem prospectively can make sense, but ironically, it can exacerbate a lack of past compliance if the actions are viewed as efforts to conceal previous offshore activities.

Company Issues

As discussed, owning as little as 10% of the stock of a foreign company can trigger additional IRS filing obligations. The obligations are most onerous when you and other U.S. persons own more than 50% of the foreign company. Even if you own less than 50% yourself, the U.S. shareholders owning more than 50% means the company is a controlled foreign corporation for U.S. tax purposes.

That entails very unfavorable tax treatment. First, you generally must file a special form (5471) with your annual tax return. Moreover, you are generally taxed on your portion of the company's income even if it was never distributed to you. In effect, your pro rata share of the corporate income is attributed and taxable to you because you are a U.S. person.

例来缴税。如果您没有申报这表格，美国国税局可以无限期查账和要求您补缴漏缴的税。此时，美国国税局的3年或6年的查税时效便不存在了。换句话说，如果美国国税局发现您在CFC拥有股票且没有申报5471表格，美国国税局可以进行无限期查账，甚至要求您补交10年或20年前的漏税！

离境的外籍人士

美国的税务责任很严重。有人因为高税，打起了退堂鼓。可是退“美”鼓也有缴税规定。您必须证明您已经正确缴纳了5年的税。另外，如果您的资产超过2,000,000美元，或者您最近5年来平均每年付了155,000美元以上的税，您必须缴纳出口税。

出口税的理论很实用。这是美国当局向您讨税的最后机会。出口税假定您在离开时变卖了资产，那么您资产增加的价值就需要缴税。比如您当初资产3,000,000美元，事后增值到6,000,000美元，您增值的3,000,000美元需要缴税，免税额为668,000美元。不仅美国公民需要缴纳出口税。永久居民和绿卡持有者也必须缴纳出口税。所以放弃国籍的决定不能轻率，需要慎思。未雨绸缪便可能减少出口税的责任。

结论

如何报税，何时提出，何时回应美国国税局都有很重要的后果。所以您在投资之前，必须谨慎考虑美国税务申报。还有在报税前，也要小心考虑美国报税问题。律师根据您的特别的税务，给您特殊的忠告，巧妙谨慎履行付税。

You might assume that you are safe from the past if you did not know about this rule and have not been filing the required IRS Form 5471. But if you fail to file the Form 5471 with your tax return where required, the IRS statute of limitations never runs on your tax return. The normal 3 year or 6 year periods that cut off the IRS ability to audit you do not apply. As a result, if the IRS discovers that you owned shares in a controlled foreign corporation and that you failed to file a Form 5471, the IRS can audit you for an unlimited period, even ten or 20 years back!

Expatriation Formalities and Exit Tax

The U.S. tax rules can be onerous. For some, these tax rules can motivate expatriation. Yet even leaving America can have a special tax cost. To exit, you generally must prove 5 years of tax compliance in the U.S. In addition, if you have a net worth that is greater than \$2 million or have average annual net income tax for the 5 previous years of \$155,000 or more (tax, not income), you face an exit tax. The theory of the exit tax is practical. It is the last chance the U.S. has of taxing a person who is giving

up U.S. citizenship or permanent residency. The exit tax treats you as having sold your property upon your departure. Only gain is taxed, so if you have a basis of \$3M in your assets and on expatriation, they are worth \$6M, the \$3M gain is taxed, but there is an exemption of \$668,000.

U.S. citizens are not the only ones to face the exit tax. Long-term residents giving up a Green Card can also be required to pay it. A decision to expatriate should never be taken lightly, and careful thought is needed. Fortunately, advance planning can often reduce or eliminate the exit tax.

Conclusion

How and when you file, respond, or react to the IRS can have important legal and financial consequences, in whatever context you come into contact with U.S. taxes. For that reason, consider U.S. tax exposure before implementing legal or investment structures. Consider U.S. tax issues before filing, reporting or responding to the IRS. Implement your strategy carefully after obtaining tax advice tailored to your facts. ☺

