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Case Study on Control and Distribution of Dividends during Financing

Note: The following article is the second article of the series discussion regarding “Listing and Financing of FIEs in China”

1. Financing and control

Some foreign enterprises are concerned that their equity in the foreign invested enterprises established by them in China (“FIEs”), will be continuously diluted in the course of financing, potentially resulting in losing the control over the FIEs or even be sidelined from management. While these concerns may have some merit, they don't always hold true.

Firstly, from the perspective of the legislation, the *Foreign Investment Law* replaced the three previous laws related to foreign investment enterprises, namely, *Sino-foreign Joint Venture Law*, *Wholly Foreign-owned Enterprise Law* and *Sino-foreign Cooperative Enterprise Law*. Upon the implementation of *Foreign Investment Law*, especially upon the expiry of the five-year transition period, all types of foreign investment enterprises in China are now governed by a unified legal basis. Specifically, such legislation implies that domestic and foreign enterprises are no longer treated differently in terms of corporate governance mechanism in China and the provisions of the *Company Law*, *Partnership Law* and other laws now uniformly applies to both of domestic and foreign enterprises. In accordance with the *Company Law*, for a resolution on matters such as (1) amendment to the articles of association of the

company; (2) increase or reduction of registered capital; (3) company merger, division, dissolution or (4) change of company structure, it must be passed (i) for a limited liability company, at a shareholders' meeting by shareholders representing more than two-thirds of the voting rights; or (ii) for a company limited by shares, at a shareholders' general meeting by two-thirds or more of votes cast by shareholders present. Accordingly, in a limited liability company or a company limited by shares, the shareholders who hold more than two-thirds of the shares of the enterprise can be assumed to enjoy absolute control over the enterprise.

Secondly, it could be noticed that the ownership structures of many onshore or offshore listed companies are relatively fragmented, and many founding shareholders have no control over the company purely from the perspective of the ownership structure. In practice, many investors are less interested in the management of the company and believe that respecting and retaining the decision-making power and control of the founding team would be more beneficial to the long-term development of the company. As a result, the founding shareholders could retain actual control of the company through concerted action agreements or voting rights proxy agreements with the investors.

2. Case study

Let us take the auto parts industry as an example. There are now about 200 automobile enterprises listed on the Main Board, with a median P/E ratio of 30. Suppose that a foreign enterprise (“F”) establishes a new

wholly-owned subsidiary company (“C”) in China, with a registered capital of 100,000 euros (about 750,000 RMB). In the case that C maintains a certain profit rate and continues to raise funds for expansion, the evolution of F’s shareholding ratio and dividends is as follows (assuming a P/E ratio of 30):

Assume that the sales revenue of C is 5 million RMB and the profit margin is 15% in the first year of operation. In the series A financing, series A investors acquire 10% of the shares by subscribing new shares of C, if the estimated P/E ratio after the financing is 10, then the valuation of C after the financing is 7.5 million RMB. Series A investors then purchase 10% of the shares from F. At this point, F holds 80% of the shares in C, obtains an equity transfer price of 750,000 RMB, and F has recovered its investment costs. F will also receive a dividend of 750,000 RMB within the same year.

Assume that the sales revenue of C is 10 million RMB and the profit margin is 15% in the second year of operation. In the series B financing, series B investors acquire 10% of the shares by subscribing new shares of C, the estimated P/E ratio after the financing is 20, and the valuation of C after the financing is 30 million RMB. Series B investors then purchase 10% of the shares from F. If the series A investors decide not to subscribe to the increased shares and meanwhile do not sell their shares to F, then F’s shares will be diluted to 62% and F will obtain an equity transfer price of 3 million RMB. F will also receive a dividend of 1.2 million RMB within the same year.

Assume that the sales revenue of C is 20 million RMB and the profit margin is 15% in the third year of operation. In the series C financing, series C investors acquire 10% of the shares by subscribing new shares of C, if the estimated P/E ratio after the financing is 25, then the valuation of C after the financing is 75 million RMB. Series C investors then purchase 10% of the shares from F. If the series A and B investors decide

not to subscribe to the increased shares and meanwhile do not sell their shares to F, then F’s shares will be diluted to 45.8% and F will obtain an equity transfer price of 7.5 million RMB. F will also receive a dividend of 1.86 million RMB within the same year.

Assume that the sales revenue of C is 40 million RMB and the profit margin is 15% in the fourth year. In the series D financing, series D investors acquire 10% of the shares by subscribing new shares of C, if the estimated P/E ratio after the financing is 30, then the valuation of C after the financing is 180 million RMB. Series D investors then purchase 10% of the shares from F. If the series A, B and C investors decide not to subscribe to the increased shares and meanwhile do not sell their shares to F, then F’s shares will be diluted to 31.2% and F will obtain an equity transfer price of 18 million RMB. F will receive a dividend of 2.748 million RMB within the same year.

After four rounds of financing, the foreign company F is expected to receive a return on investment of nearly 36 million RMB, while remaining the largest shareholder of its subsidiary C. Considering that in practice, many institutional investors would sign the concerted action agreement or voting rights proxy agreement with controlling shareholders in order not to hamper the original management team’s business philosophy and ideas during the investment process, therefore, although F holds less than 50% of the total shares, it may still enjoy actual control over C. It should be noted that only when C continuously increases capital, issues share, and attracts new investors, could C keep improving its production capacity and expanding its scale, through which C can maintain sound development and profitability, and consequently its shareholders can also get more revenue by selling their shares and receive dividend in return. If F insists on being the sole shareholder of C, it will be difficult for C to obtain external financial support and make greater profits.

Foreign Shareholder (F)’ Shareholding, Equity Transfer Price and Dividends in the Financing Process

Series	Sales Revenue	Profit Margin	P/E after Financing	C’s Value after Financing	New Investor’s Capital Increase	New Investor’s Share Purchase from F	F’s Equity Transfer Price	F’s Shareholding	F’s Dividends
Start				<u>0.75m</u>				100	
A	5m	15%	10	7.5m	10%	10%	0.75m	80%	0.75
B	10m	15%	20	30m	10%	10%	3.00m	62%	1.2m
C	20m	15%	25	75m	10%	10%	7.50m	45.8%	1.86m
D	40m	15%	30	180m	10%	10%	18.00m	31.2%	2.75m
Total						68.8%	<u>29.25m</u>	<u>31.2%</u>	<u>6.558m</u>

3. Enterprise Income Tax imposed on the Equity Transfer and Dividend Withholding Tax to be paid by Foreign Shareholders

Specifically, if the abovementioned foreign enterprise is a German enterprise, in accordance with *the Agreement between the People's Republic of China and the German Federal Republic for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income and Property* (“**Sino-German Tax Agreement**”), gains derived by a resident of a Contracting State from the alienation of shares of a company which is a resident of the other Contracting State may be taxed in that other Contracting State if the first-mentioned resident, at any time during the 12 month period preceding the alienation has owned, directly or indirectly, at least 25 percent of the shares of that company. Additionally, according to the *Enterprise Income Tax Law* and the *Implementation Regulations for the Enterprise Income Tax Law* of China, non-resident enterprises shall pay enterprise income tax at a rate of 10%. In the above case, F obtains a total equity transfer revenue of 29.25 million RMB and shall pay the enterprise income tax of 2.886 million RMB after deduction of the capital contribution cost.

According to the *Sino-German Tax Agreement*, where an enterprise (except the partnership) is the beneficiary of dividends and directly holds at least 25% of shares of the entity that distribute the dividends, then the dividend withholding tax rate shall not exceed 5%. In the above case, F received dividends of 6.558 million RMB in total and shall pay the withholding tax of 327,900 RMB in China.

According to relevant Chinese tax regulations, if a non-resident enterprise acquired equity investment income such as equity transfer income, dividends, bonuses, etc. within China, the enterprise may remit the dividends to the overseas parent company's account after completing the tax obligation and obtaining the tax payment certificate from the tax authorities. There is no pre-approval procedure by the government or restriction on distributing dividends to overseas shareholders.

4. Summary

According to the case analysis as presented above, for FIEs with listing or financing needs within China, there is no need to worry about corporate governance and control issues. On the contrary, the introduction of professional investors is conducive to optimizing the standardized operation of the company. Although the gradual transfer of equity and different rounds of financing might lead to a certain degree of equity dilution for overseas investors, however, it is crucial for the further growth and development of enterprises which will be a win-win

situation for both the founders and the investors. In addition, overseas investors can plan their exit strategy step by step through dividend distribution and share transfer to realize timely returns on their investment, which is beneficial to their global layout and capital chain turnover.

公司融资过程中的控制权与分红问题案例研究

编者注：本文系“外资企业中国上市和融资”系列文章第二篇

1. 融资与控制权

部分外国企业担心其在中国设立的外商投资企业（“外资企业”）在境内融资过程中，其持有的股权持续被稀释，最终导致对外资企业的控制权丧失甚至被排挤出管理层。这种担忧有一定的合理性，但也并不完全如此。

首先，从法律层面看，《外商投资法》取代了原有的三资企业法（即《中外合资经营企业法》、《外资企业法》、《中外合作经营企业法》），该法实施后（尤其是五年过渡期后），外商投资企业拥有了统一的法律基础，也标志着内外资企业在公司治理机制不再区分处理，而是统一适用《公司法》、《合伙企业法》等法律的规定。根据《公司法》的规定，股东会会议（对于有限责任公司）或股东大会（对于股份有限公司）作出修改公司章程、增加或者减少注册资本的决议，以及公司合并、分立、解散或者变更公司形式的决议，必须经代表三分之二以上表决权的股东（对于有限责任公司）或经出席会议的股东所持表决权的三分之二以上（对于股份有限公司）通过。因此在有限责任公司或股份有限公司中，股东持有三分之二以上股份的，将对企业享有绝对控制权。

其次，我们看到境内外许多上市公司的股权结构相对分散，单纯从股权结构上看很多创始股东对公司并无控制权。实践中，许多投资者对公司的管理并不感兴趣，且认为尊重和保留创始团队对于企

业的决策权和控制力，有利于企业长远发展。因此，创始股东通过与投资者签订一致行动人协议或投票权委托协议的方式，依然保留对企业享有实际控制权。

2. 案例分析

以汽车零部件行业为例，目前在主板上市的汽车板块企业约两百家。如以市盈率高低进行排序，中位数企业的市盈率约30倍。以该市盈率作为参考，我们假设一家外国企业F在中国新设全资子公司C，注册资本为10万欧元（约为75万人民币），在C公司保持一定利润率，并持续融资扩大规模的情况下，F公司持股比例和分红的情况展示如下：

假设C公司第一年销售额500万元，利润率15%。在A轮融资中，A轮投资者对C公司先增资获得10%的股权，如C公司投后市盈率估值为10倍，则C公司投后估值为750万元。A轮投资者再从F购买10%股权，合计持有20%的股权。此时，F持有80%股权，获得75万元的股权转让价款，F这时已收回投资成本。F公司于同年获得75万元分红。

假设C公司第二年销售额1000万元，利润率15%。在B轮融资中，B轮投资者对C公司先增资获得10%的股权，如C公司投后市盈率估值为20倍，则C公司投后估值为3000万元。B轮投资者再从F购买10%股权的方式获得20%的股权。如A轮投资者决定不跟投，也未将股权出售给F，则F的持股比例稀释至62%，获得300万元的股权转让价款。F公司于同年获得120万元分红。

假设C公司第三年销售额2000万元，利润率为15%。在C轮融资中，C轮投资者对C公司先增资获

得10%的股权，如C公司投后市盈率估值为25倍，则C公司投后估值为7500万元。C轮投资者再从F购买10%股权的方式获得20%股权。假设A轮、B轮投资者决定不跟投，也未将股权出售给F，则F的持股比例稀释至45.8%，获得750万元的股权转让价款。F公司于同年获得186万元分红。

假设C公司第四年销售额4000万元，利润率为15%。在D轮融资中，D轮投资者对C公司先增资获得10%的股权，如C公司投后市盈率估值为30倍，则C公司投后估值为1.8亿元。D轮投资者再从F购买10%股权的方式获得20%股权，假设A轮、B轮、C轮投资者决定不跟投，也未将股权出售给F，则F的持股比例稀释至31.2%，获得1800万元的股权转让价款。F公司于同年获得274.8万元分红。

经过四轮融资，外国企业F公司已获得接近3600万元人民币的投资回报，同时仍为C公司第一大股东。考虑到许多机构投资者在投资过程中，为不影响原管理团队的经营理念 and 思路，与大股东签订一致行动人协议或投票权委托协议。因此尽管F公司的持股比例不足50%，仍可能对C公司享有实际控制权。应当注意的是，C公司只有不断地增资扩

3. 境外股东应支付的股转所得税和股息预提税

特别地，如果上述外国企业是德国企业，那么根据《中华人民共和国和德意志联邦共和国对所得和财产避免双重征税和防止偷漏税的协定》（以下简称“《中德税收协定》”），缔约国一方居民转让其在缔约国另一方居民公司的股份取得的收益，如果该居民在转让行为前的12个月内，曾经直接或间接拥有该公司至少25%的股份，可以在该缔约国另一方征税。按照《企业所得税法》和《企业所得税法实施条例》的规定，非居民企业应当按照10%的税率缴纳企业所得税。在上述案例中，F公司总计获得2925万元的股权转让收入，扣除出资成本，应当缴纳约288.6万元的企业所得税。

根据《中德税收协定》，如果股息的受益所有人是公司（合伙企业除外），并直接拥有支付股息的公司至少25%的资本，则股息预提税税率不应超过5%。在上述案例中，F公司总计获得分红655.8万元，应在中国缴纳32.79万元的股息预提税。

根据相关税法规定，非居民企业取得股权转让收入、股息、红利等权益性投资收益的，在办理完

融资过程中外方股东F公司的持股比例、股权转让价款和分红情况

轮次	销售额	利润率	投后估值 P/E	C公司估值	投资人增资比例	投资人买老股比例	F股权转让价款	F持股比例	F分红
初始				75万				100	
A轮	500万	15%	10倍	750万	10%	10%	75万	80%	75万
B轮	1000万	15%	20倍	3000万	10%	10%	300万	62%	120万
C轮	2000万	15%	25倍	7500万	10%	10%	750万	45.8%	186万
D轮	4000万	15%	30倍	1.8亿	10%	10%	1800万	31.2%	274.8万
合计					68.8%		2925万	31.2%	655.8万

股、吸引新投资人，才能不断地提高企业产能，扩大企业规模，企业因此才能持续良好发展，不断盈利，股东也才能得以获得股权转让收入和分红回报。如果F公司坚持作为C公司的单一股东，那么，C公司也很难获得外部的资金支持，企业本身也很难盈利。

成税务扣缴并取得完税证明后，即可将股利汇向境外母公司账户，不存在政府审批的前置程序或禁止向境外股东分配股利的限制。

4. 结论

根据如上案例分析，对于有在境内上市或融资需求的外商投资企业而言，无需担心公司治理和控

制问题，相反，引入专业的投资人也有利于优化公司规范化运作。逐步让渡股权和多轮融资虽然会对境外投资人造成一定的股权稀释效果，但作为企业做大做强的重要路径，这有利于企业的进一步壮大和发展，实现创始方与投资人双赢的局面。此外，境外投资人可以通过分红和股转等路径分步退出，及时实现投资回报，这对其全球化布局、资金链周转都是大有裨益的。

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