

中外合作办学中的法律问题 (下)

Sino-foreign cooperation in education (part 3)



王娅瑾
Sally Wang
胡光律师事务所
Associate
Martin Hu & Partners

在上一期中，笔者论述了中外合作办学者在合作办学运作和管理中遇到的相关问题。在此篇关于中外合作办学的最后一部分中，我们将分析中外合作办学营利和合理回报的相关问题，以及中国政府出台的与中外合作办学相关的最新政策和动态。

营利和合理回报

根据《中外合作办学条例》规定，中外合作办学是中国教育事业的组成部分，属于公益性事业，因此中外合作办学的性质是非营利性的。但是为了促进中外合作办学的发展和鼓励中外办学积极开展合作办学，中国政府允许中外办学取得一定的合理回报。

但是，该种回报并不属于投资性回报，并且合理回报的取得需要满足一定的条件，主要包括：

- 中外合作办学机构的中外办学可以要求合理回报，而中外合作办学项目的外中办学是不能取得任何回报的；
- 中外合作办学机构的章程中必须写明中外合作办学者要求取得合理回报，否则推定为中外合作办学者没有取得合理回报的要求；
- 中外合作办学者只有在中外合作办学机构当年度办学有结余的情况下才可以取得回报，办学没有结余则不能取得任何回报；
- 合理回报的取得需要符合法定的程序。

中外合作办学机构在确定中外合作办学者取得合理回报的比例之前，应当向社会公布其办学情况、教学质量和财务状

况。然后，由中外合作办学机构的决策机构对中外合作办学者取得合理回报比例作出决定。在此之后，中外合作办学者应将决定以及合作办学机构的办学情况、财务状况等材料向教育部门进行备案。

实践中，中外合作办学者在确定从办学结余中取得合理回报的比例时，应综合考虑中外合作办学机构的办学水平、教育质量、收费标准、用于教学活动和改善办学条件的支出等各项因素来确定。对于收费高、用于教学的经费比例低、教学质量和办学水平都比较低的中外合作办学机构，中外合作办学者的回报比例不能超过其他同级同类的中外合作办学机构。

学费分配

与营利和合理回报相关联的一个问题，就是中外合作办学者是否能够直接对收取的学费进行分配。答案是否定的。中外合作办学者不能将取得合理回报等同于分配学费。

中外合作办学机构收取的学费应该用于教育教学活动，提高办学水平和质量，而合理回报是在办学结余之中按一定比例进行提取，提取完合理回报后剩余的办学结余仍应继续用于中外合作办学机构的教育教学活动。直接分配学费是混淆了成本和盈余的界限。

税收缴纳

与合理回报相关联的另一个问题就是取得合理回报是否需要缴税的问题。就所得税而言，在中国，公立学校的经费是由财政拨款，其收入也是纳入国家

财政的，因此公立学校在中国基本是不需要纳税的。民办学校则与公立学校不同，具体可分为两种情况：根据《民办教育促进法实施条例》的规定，不要求取得合理回报的民办学校可以享受与公立学校一样的税收待遇，即不需要纳税；对于中外合作办学者要求取得合理回报的，由相关部门制定税收政策，但至今一直未有明确的规定出台。实践中，地方税务部门已开始加强对中外合作办学者从中外合作办学机构中取得回报的税收管理，尤其是通过加强与外汇管理部门的沟通和协作，从外汇渠道来监管外国教育机构取得合理回报的情况。

最新动态

今年初，教育部决定恢复中断了四年之久的中外合作办学审批工作。此番恢复之后，中外合作办学机构和项目将必然增多，外国教育机构将会有更多机会在中国开展教育活动。

同时在近期，教育部在其网站上公布了400多家实施本科及以上教育的中外合作办学机构和项目的名单。这是自2003年《中外合作办学条例》颁布和实施以来，教育部首次全面公布中外合作办学机构和项目的信息，并且教育部还对学生和家长如何选择这些机构和项目进行了重要提醒。

针对现实中仍存在的未经审批进行中外合作办学的现象，教育部强调，未经中国政府教育行政部门批准的中外合作办学机构或项目所颁发的国（境）外学历、学位证书或高等教育文凭是不能获得中国政府的认证的。■

mhp
MARTIN HU & PARTNERS
胡光律师事务所
上海市龙阳路2277号永达国际大厦19楼
19/F Yongda International Tower
2277 Longyang Road
Shanghai, China
邮编 Postal code: 201204
传真 Fax: +86 21 5010 1222
www.mhplawyer.com

胡光 Martin Hu
电话 Tel: +86 21 5010 1666*966
电子信箱 E-mail: martin.hu@mhplawyer.com

王娅瑾 Sally Wang
电话 Tel: +86 21 5010 1666*933
电子信箱 E-mail: sally.wang@mhplawyer.com

Last month, in part 2 of this article, we discussed issues that parties can encounter in the establishment, operation and management of Sino-foreign cooperative schools. This month, in the final part of the article, we will analyse issues relating to the profits and reasonable returns from such schools, as well as the most recent policies issued by the PRC government relating to, and the most recent trends with respect to, such schools.

Profits and reasonable returns

Pursuant to the *PRC Sino-foreign Cooperation in Education Regulations*, schools constitute an integral part of the PRC's education system and are considered institutions for the public good. Accordingly, schools are of a non-profit nature.

However, to promote the development of schools and encourage Sino-foreign parties actively to cooperate in the establishment and operation of such schools, the PRC government permits such parties to derive reasonable returns.

Nonetheless, such returns are not considered returns on investment and certain conditions must be satisfied in order to obtain them:

- parties to schools may derive reasonable returns, but parties to Sino-foreign cooperative education projects are not permitted to do so;
- the articles of association of a school must expressly state that the Sino-foreign parties actively request reasonable returns, failing which it will be inferred that the parties have not made such a request;
- the Sino-foreign parties may obtain returns only in years when the school has an operational surplus. When there is no operational surplus, they may not obtain any returns;
- the obtaining of reasonable returns is required to comply with statutory procedures.

Before determining what is a "reasonable" return for Sino-foreign parties, a school is required to make public details of its operations, the quality of its teaching and its financial position. Then, the decision-making organization of the school will make its decision on the size of the reasonable returns that

the Sino-foreign parties will obtain. Once this decision has been made, the Sino-foreign parties are required to submit details of the decision, together with various materials including the details of the operation of the school and its financial position, to the education authority for the record.

In determining the level of the reasonable returns which they are to obtain from the operational surplus, the Sino-foreign parties should comprehensively consider such factors as the educational level of the school, the quality of its education, tuition rates, and expenditure on teaching activities and improving its operating conditions. If a school charges high tuition fees but spends little on teaching, and its teaching quality and the level of education provided are relatively low, the rate of reasonable return that the Sino-foreign parties may make may not exceed the rate of other schools of the same grade and type.

Distribution of tuition fees

A closely related issue is that of whether Sino-foreign parties can directly distribute the revenue from tuition fees charged. The answer is no. Sino-foreign parties may not equate the obtaining of reasonable returns to the distribution of tuition fees.

The tuition fees charged by a school should be used for educational and teaching activities and enhancing school operations and quality. This is distinct from "reasonable" returns which are to be allocated at a certain percentage from the operational surplus. The balance of the operational surplus remaining after allocation of the reasonable returns should also be used for the educational and teaching activities of the School.

Payment of taxes

Another issue relating to reasonable returns is the question of whether taxes are payable on the reasonable returns obtained. With respect to income tax, the funds for state schools in China are allocated from public finances and their profits are counted in state finances. Accordingly, state schools essentially are not required to pay taxes. However, private schools differ from state schools, and one of two circumstances apply to them: pursuant to the *PRC Promotion*

of Private Education Law Implementing Regulations, private schools that do not request reasonable returns are eligible for the same tax treatment as state schools, i.e. they are not required to pay taxes; in the case of schools where Sino-foreign parties request reasonable returns, the relevant authorities are supposed to formulate tax policies accordingly but, to date, no such policies have been issued.

However, in practice, local tax authorities are becoming stricter in their treatment of returns from schools derived by Sino-foreign parties, particularly by the monitoring of foreign exchange channels.

Recent trends

At the beginning of this year, the Ministry of Education decided to resume the examination and approval of Sino-foreign cooperative schools or education projects which it had halted for four years due to concerns over quality. The opportunity for foreign education institutions to run educational activities in the PRC therefore exists once more.

Additionally, the Ministry of Education recently published on its website a list of more than 400 Sino-foreign cooperative schools or projects that provide education at the undergraduate level and above. This is the first time that the Ministry of Education has published such comprehensive information since the issue and implementation of the *PRC Sino-foreign Cooperation in Education Regulations* in 2003. Furthermore, the Ministry of Education has provided important advice to potential students and their parents on how to select such schools or projects.

With respect to Sino-foreign educational activities being without official approval, the Ministry of Education has stressed that the foreign educational attainments, degrees and higher education diplomas granted by Sino-foreign cooperative schools or projects that have not been approved by the relevant educational authorities of the PRC government will not be recognized by the government. ■

王娅瑾是胡光律师事务所律师
Sally Wang is an associate at Martin Hu & Partners (MHP Law Firm)