

CUATRECASAS, GONÇALVES PEREIRA



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**STATE COUNCIL'S DRAFT AMENDMENT TO THE PATENT LAW OF THE PEOPLE'S REPUBLIC OF CHINA
(DRAFT FOR DELIBERATION)**

The Chinese patent law is undergoing its fourth amendment to better protect and enforce patents, thus encouraging their use and quality. A third draft amendment ("the Draft") was released on December 2, 2015, for public comment. The solicitation period ends January 1, 2016.

Key proposed changes:

Design-related provisions

To keep pace with international standards, the Draft proposes extending the design protection from 10 years to 15 years. It also recognizes partial product designs for the first time (currently only complete product designs are protected).

Broader scope of patent infringement

The Draft introduces three new types of patent infringement, in line with criteria already adopted by Chinese courts:

1. Contribution: if a person is clearly aware that certain raw materials, intermediates, parts and components, or equipment, are used exclusively to exercise a patent, and provides these to others for production and operation purposes, that person will be jointly and severally liable.
2. Inducement: if a person is clearly aware that certain products or methods are patented and induces others to infringe the patent rights for production and operation purposes, that person will be jointly and severally liable.
3. Infringements by network service provider: if a network service provider knows (or should have known) a user is infringing patents through its network and fails to stop the infringement, it will be jointly and severally liable. The patent holder, the patent administrative department or any interested party can provide the network service provider with proof of the infringement.

Calculation of damages

The Draft increases the maximum statutory damages from RMB 1,000,000 to RMB 5,000,000 and introduces the concept of treble or increased damages, but it does not define the willful patent infringement that would cause these damages.

Standard essential patents and service invention

If a patent holder participates in enacting a national standard without disclosing its patents that are essential to it, this will imply that the patent holder allows the user of the national standard to use patent-related technologies. However, compensation must be agreed.

If an entity that provides material and technical resources does not reach an agreement with the inventor on the right to apply for or own the resulting invention, the inventor will own the patent right.

Date of issue: December 2, 2015. Deadline for public comments: January 1, 2016

NOTICE ON ADJUSTING CATALOGS AND RULES ON IMPORT TAX POLICIES FOR MAJOR TECHNICAL EQUIPMENT (CAIGUANSHUI [2015] NO.51) (财政部 国家发展改革委 工业和信息化部 海关总署 国家税务总局 国家能源局关于调整重大技术装备进口税收政策有关目录及规定的通知)

On December 1, 2015, the Ministry of Finance, the National Development and Reform Commission, the Ministry of Industry and Information Technology, the General Administration of Customs, the State Administration of Taxation (“the SAT”) and the National Energy Administration jointly released the 2015 versions of the Catalog of Major Technical Equipment and Products under State Support (“Catalog 1”) and the Catalog of Key Components and Raw Materials Imported for Major Technical Equipment and Products (“Catalog 2”). Customs duty and import value-added tax (“VAT”) exemptions apply to qualified domestic enterprises importing goods under Catalog 2 to manufacture equipment and products under Catalog 1.

They also released the 2015 version of the Catalog of Major Technical Equipment and Products not Eligible for Tax Exemption (“Catalog 3”). Under the existing policies,¹ the import for

¹ The policies refer to Guo Fa [1997] No. 37 and Announcement of the Ministry of Finance, the General Administration of Customs and the SAT [2008] No. 43.

qualified projects of self-use equipment not listed in Catalog 3 can be exempt from customs duty.

The three catalogs are updated yearly to reflect the needs of the developing domestic industry. The 2015 versions became effective January 1, 2016.

Date of issue: December 1, 2015. Effective date: January 1, 2016

STATE ADMINISTRATION OF TAXATION'S SUPPLEMENTARY ANNOUNCEMENT ON TAX REFUND AND EXEMPTION FOR TAXABLE SERVICES ELIGIBLE FOR ZERO-RATED VALUE-ADDED TAX (ANNOUNCEMENT [2015] NO. 88) (国家税务总局关于《适用增值税零税率应税服务退（免）税管理办法》的补充公告)

Following the release of Caishui [2015] No. 118 on expanding the scope of the zero-rated VAT policy effective December 1, 2015 (see our November 2015 Legal Flash), the SAT issued Announcement [2015] No. 88 to supplement and amend the administrative measures on VAT tax refund and exemption for zero-rated services provided originally under Announcement [2014] No. 11.

The highlights:

1. The scope of the newly added zero-rated export services is found in the annexes to Circular Caishui [2013] No. 106, which provides the main implementing rules on the pilot VAT reform. These services are not zero-rated when they are provided to enterprises located in the domestic custom's special zones.
2. Taxpayers providing the newly added zero-rated export services must apply for refund and exemption when submitting the VAT declaration. After collecting all the relevant documents, taxpayers can declare VAT refund and exemption with the relevant tax authorities within each declaration period, from the month after the income from the service is received until April 30 of the following year.
3. Announcement 88 lists the documents required for the VAT refund and exemption declaration on the export of research and development ("R&D") and design services (zero-rated under the original scope) and the newly added zero-rated export services:
 - Invoices issued;

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- Service contracts signed with the overseas service recipient, registered and verified by the Ministry of Commerce through its information management system for service outsourcing and software export or its information management system for trade in culture.
- Relevant certificates (i.e., radio, film and television production licenses for radio, film and television production services; radio, film and television distribution copyright and licenses for radio, film and television distribution services; and registration certificate for technology export contract for R&D, design and technology transfer services).
- Receipt voucher showing service income from the overseas service recipient.

Announcement 88 became effective December 1, 2015. Its application is based on the date the export services are provided and the date the income from the service is identified from an accounting perspective.

Date of issue: December 14, 2015. Effective date: December 1, 2015

CHINA ADVANCE PRICING AGREEMENT ANNUAL REPORT (2014) (《中国预约定价安排年度报告(2014)》)

On December 21, 2015, SAT issued the China Advance Pricing Agreement Annual Report (2014) ("the Report"), which covers the statistics on China's advance pricing agreements ("APA") for January 1, 2005, to December 31, 2014. This is the sixth year that SAT has issued the Report to introduce the China APA system, procedures and implementation.

According to the Report, China signed three unilateral APAs and six bilateral APAs in 2014. In total, China had signed 70 unilateral and 43 bilateral APAs by December 31, 2014. China has yet to sign a multilateral APA. Also, based on the statistics of pending applications, 129 APAs are in various stages of application and 7 APAs are agreed but not yet signed.

Although the number of signed APAs in 2014 dropped compared to 2013, statistics confirm the trend that companies are more interested in signing bilateral APAs to gain future certainty and to reduce the risk of international double taxation.

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The statistics also show the following China APAs' characteristics as of December 31, 2014:

- main related-party transactions covered are purchases and sales of tangible assets, with an increase in applications to deal with the transfer and licensing of intangible assets and provision of services;
- bilateral APAs are mainly signed with Asian countries;
- 94% of unilateral APAs were signed within two years from the date of application, while 72% of bilateral APA were signed within two years;
- the transactional net margin method (TNMM) is the preferred transfer pricing method, using full cost plus rate and operational profit rate;
- 81% of APAs are with manufacturing companies.

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