

中国即将落实BEPS行动计划成果新转让定价实施办法征求意见

BEPS DELIVERABLES LANDING AT CHINA SAT RELEASES DRAFT NEW TRANSFER PRICING ADMINISTRATION MEASURES FOR PUBLIC COMMENTS

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国家税务总局在9月17日发布了新的《特别纳税调整实施办法》征求意见稿（以下简称“意见稿”），正式向社会公众征集修订意见。作为对税基侵蚀与利润转移（以下简称“BEPS”）各项行动计划成果的落实，该份意见稿是近期中国将BEPS行动计划成果转化为国内转让定价法规最为突出的成果，一旦正式落地，将对中外跨国企业的转让定价实践带来重大影响和变化。

On September 17, 2015, China's State Administration of Taxation (SAT) released the draft of "Implementation Measures of Special Tax Adjustment" (the "**Draft**") for public comments. As a response to the deliverables of the Base Erosion and Profit Shifting Action Plans (the "**BEPS Deliverables**"), the Draft absorbs many recommendations in the BEPS Deliverables and represents the most prominent development in China's transfer pricing ("**TP**") regime. Once the Draft is officially issued, it is expected to significantly impact and shape multi-national companies' ("**MNC**") transfer pricing practice in China.

该份意见稿共16个章节。在目前2号文的基础上，意见稿新增了新的第六章-无形资产、第七章-关联劳务、和第十三章利润水平监控三个章节。同时就2号文下原有的各个章节进行了更为详实的规定。其中，以下内容值得重点关注：

The Draft contains 16 chapters in total. Compared to the existing Guoshuifa [2009] No.2 ("**Circular 2**"), the Draft adds three new chapters, i.e. Chapter 6 - Intangible, Chapter 7 - Intra-group Services, and Chapter 13 - Profit Level Monitoring. Meanwhile, the original chapters under Circular 2 are expanded with more systematic and informative elaborations. Highlighted below are the salient points.

关联关系判断指引和扩大的关联交易范围。意见稿细化了关联关系的界定，并对不同关联关系的判断和确认提供了具体的指引。同时，金融资产转让、非常规无形资产（如商誉和持续经营价值）转让、融通资金（如预付款和延期收付款）被明确纳入关联交易的范围。

GUIDELINES FOR DETERMINING "RELATED PARTY" AND WIDER RANGE OF RELATED PARTY TRANSACTIONS ("RPT")

The Draft refines the definition of related party and provides a more concrete guideline for identifying related parties. Also, some additional types of transactions are specifically included in the range of RPT, for instance, transfer of financial assets, transfer of non-typical intangibles such as goodwill or going-concern value, and financing arrangements like advanced and deferred payments.

更复杂和详细的同期资料要求。意见稿参考了BEPS第13项行动计划成果的建议，构建了全新的主体文档、本地文档和特殊事项文档三位一体的转让定价同期资料结构。其中，主体文档要求披露跨国集团的整体情况，提供并综合分析集团的全球业务、价值贡献以及无形资产和融资安排。本地文档要求披露报告企业的关联交易和可比分析，同时强调对企业在集团价值链中的位置、企业对集团利润贡献的分析。在此基础上，存在关联劳务、成本分摊和关联借贷安排的企业还要就这些特殊安排提供特殊事项文档进行说明。

MORE COMPLEX AND DETAILED REQUIREMENTS OF CONTEMPORANEOUS DOCUMENTATION (TP DOCUMENTATION)

With reference to the BEPS Action 13 Deliverable, the Draft creates a new TP documentation structure composed of a Master File, a Local File and a Special Issue File. Specifically, the Master File requires disclosure of the MNC group's overall business operation, and also analysis of the group's global business, value contribution, intangible and financing arrangements coherently. The Local File requires disclosure of the local reporting company's RPT and comparable analysis, with emphasis on analysis of the company's position in the group's value chain as well as profit contribution to the group. The Special Issue File would be required to elaborate the relevant TP arrangement if the local company has intra-group services, cost sharing arrangement or related party financing arrangement.

新增转让定价方法和分析因素。意见稿新增价值贡献分配法和资产评估方法作为可选的转让定价方法，主要用于处理难以获取可比交易信息的情况和涉及复杂无形资产的关联交易。价值贡献分配法是通过分析关联企业价值创造对集团利润的贡献，采用和价值贡献相关的一个或多个要素将合并利润在不同的关联企业间进行分配的方法。资产评估方法则与通行的资产评估实践一致，包括成本法、市场法和收益法。鉴于目前中国市场可比信息的局限性和跨国集团关联交易广泛涉及无形资产，这两种方法在未来的中国实践中很可能得到广泛的使用。除此外，意见稿首次将之前广泛讨论的地域性特殊因素、营销型无形资产、集团内部的协同效应等理论概念列为运用转让定价方法时应当考虑和分析的因素。

NEW TP METHODS AND ADDITIONAL ANALYSIS FACTORS

The Draft provides two new TP methods, i.e. the Value Creation Attribution Method and the Asset Appraisal Methods. The new TP methods are likely to be used to deal with complex intangible transactions and situations where comparable transaction information is hard to locate. The Value Creation Attribution Method is a method to allocate combined profit of related parties by using one or several value contribution related allocation keys, by way of analyzing and comparing the value contribution of each related party. The Asset Appraisal Methods, on the other hand, are consistent with the general practice of asset appraisal, including the cost approach, market approach and income approach. Considering that China market comparable information is generally limited, and the RPT by and among the MNCs frequently involves intangibles, these two new methods are likely to be used widely in practice.

Besides, the Draft introduces some new concepts as the factors to be considered and analyzed for implementing the TP methods, such as special geographical factor, marketing intangibles, and intra-group synergistic effects, which have been heavily discussed in the last few years.

针对性的转让定价调查及调整指引。意见稿就转让定价调查中税务机关和纳税人的权利义务进行了详细的说明，并针对目前2号文件下尚未明确的部分问题提供了指引。例如，税务机关在一定条件下将有权要求纳税人提供其境外关联方的国别报告与有关资料，且纳税人不得拒绝；对于来料加工企业，转让定价分析中应当还原不作价来料和设备价值以及进行限额内的运营资本调整；在审查评估关联交易时，应当分析成本节约、市场溢价等特殊地域因素所带来的额外利润。

CUSTOMIZED TP INVESTIGATION AND ADJUSTMENT GUIDELINE

The Draft includes some detailed provisions and illustrations on the rights and obligations of tax authorities and taxpayers during a TP investigation, and also provides guidance on some TP investigation issues that are not addressed in Circular 2. For example, the Draft confirms the circumstances where the tax authorities should have the right to request a taxpayer to provide the by-country report and other relevant materials of its overseas related parties, and the taxpayer shall not refuse this request. For toll manufacturing services, the value of consigned materials and equipment should be added back for TP analysis, and the adjustment based on working capital different shall not exceed a prescribed limit. In an investigation, analysis of extra profit derived from special geographical factors such as cost saving and market premium is generally required.

总结性的无形资产转让定价指引。无形资产方面，意见稿第六章与BEPS第8项和第10项行动计划成果保持了一致，并充分总结和涵盖了近年来国家税务总局对无形资产转让定价管理的意见，包括国家税务总局在公告[2015]16号（以下简称“16号公告”）所提出的立场。意见稿明确了无形资产及其法律所有人和经济所有人的概念，并且给出了判定无形资产价值贡献的各项考虑因素。于此同时，第六章强调无形资产的收益分配应当与经济活动和价值贡献匹配，即仅提供资金，不履行功能和承担风险的参与方只应获得资金成本回报，而只拥有无形资产法律所有权，未对无形资产价值作出贡献的参与方，则不能参与无形资产收益分配。在分析方法方面，第六章鼓励使用新的价值贡献分配法和资产评估方法，并要求根据无形资产价值变化考虑对特许权使用费的合理调。

SUMMARIZED TP GUIDELINES FOR INTANGIBLE

The guidelines on intangibles under Chapter 6 of the Draft are generally consistent with BEPS Action 8 and Action 10, and coherently summarize the SAT's opinions on TP administration related to intangibles, including the positions set forth in the SAT Public Announcement [2016] No. 16 ("Announcement 16"). The concepts of intangibles, including legal ownership and economic ownership of intangibles, are clearly defined and distinguished, and a list of factors is provided for assessing the value contribution of intangibles. Also as a principle, Chapter 6 emphasizes that distribution of profit derived from intangibles shall be consistent with the distribution of economic activities and value contribution by different related parties. On one hand, if a participating party only contributes fund but does not perform functions or bear risks, the party shall only be entitled to a reasonable return for its funding. On the other hand, if a participating party that merely holds the legal ownership but does not contribute to the value of the intangible, they shall not share the profit derived from the intangible. Regarding the TP method, Chapter 6 encourages application of the newly introduced Value Creation Attribution Method and the Asset Appraisal Method, and also requires reasonable adjustment on royalty payment based on the change of related intangible's value.

强调关联劳务的受益性原则和报告义务。意见稿第七章重申了国家税务总局此前在16号公告下提出的关联劳务受益性原则，列举了不属于受益性劳务的情况，并要求企业在关联劳务定价和分摊安排中应保证定价和分配与相关关联企业的受益水平保持一致。此外，我们注意到第七章列举了关联劳务特殊事项文档所需要涵盖的内容范围，且第十九条规定，存在跨境关联劳务交易的企业，无论交易金额，均需准备特殊事项文档。

BENEFICIAL PRINCIPLE AND REPORTING OBLIGATION FOR INTRA-GROUP SERVICES

Chapter 7 of the Draft re-emphasizes the beneficial principle for intra-group services that have been introduced in Announcement 16, and also enumerates the cases where intra-group services should be denied as beneficial. Furthermore, Chapter 7 mandates that pricing and fee allocation in intra-group services should be consistent with the benefit enjoyed by each of the related parties. Besides, Chapter 7 lists the scope of items which shall be covered in the intra-group service Special Issue File; and according to Article 19, the Special Issue File shall be prepared by all enterprises dealing with intra-group services, regardless of the amount of the intra-group services.

动态的利润水平监控。从税收管理方面，意见稿要求税务机关构建和完善动态的关联交易利润水平监控管理指标体系。在该体系下，通过设定关联交易风险管理指标、预警值和风险模型对企业的风险等级进行动态评估，税务机关将对具有不同转让定价风险的企业采用不同的管理和监控方法。

DYNAMIC PROFIT LEVEL MONITORING

In light of tax administration, the Draft requires the tax authorities to establish and improve a dynamic administration index system for RPT profit monitoring. Under this system, dynamic assessment on enterprises' TP risk level will be conducted by using prescribed management index, warning value and risk analysis model. Accordingly, different administration and monitoring measures will be taken on enterprises with different TP risks.

除上述关键内容外，在预约定价安排、成本分摊协议、受控外国企业、资本弱化和一般反避税章节，意见稿也在2号文的基础上进行了细化和完善。

In addition to the aforementioned salient points, the Draft also refines and enhances the chapters on advanced pricing arrangement, cost share agreement, controlled foreign corporations, thin capitalization and general anti-avoidance.

中国国家税务总局就该意见稿听取公众意见的时间将截至于2015年10月16日。考虑到该意见稿与BEPS行动计划成果的一致性，以及相关变化在此前的税收法规中已有所反映和讨论，预计最终修改完成后的实施办法将在很大程度上保留该意见稿的内容和细节，并可能在2015年年底正式公布。这意味着跨国集团企业需要尽快开始研究并熟悉新的实施办法，就2016年的同期资料工作进行准备。与此同时，重新审视企业现有的关联交易安排，以及重新评估企业的转让定价风险也将成为在华跨国集团一项不可忽视的税务工作。

This Draft is meant for soliciting public opinion, and the deadline is October 16, 2015. Considering the consistency between this Draft and the BEPS Deliverables and the fact that the major changes have been more or less reflected and discussed in some previous tax circulars, it is expected that the final version of this new implementation measure will be released by the end of 2015, with limited difference from this Draft. Therefore, it would be highly advisable for MNCs to study and familiarize themselves with these changes as soon as possible, and start preparing for the work of 2015 TP documentation. At the same time, reviews of existing transfer pricing arrangements and reassessments of related TP risks will be an indispensable tax task for MNCs in China.



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