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Two Paths for Developing Anti-Avoidance Rules

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The author discusses the administration of anti-avoidance rules in China, and puts forth the argument that anti-avoidance rules are being applied in China not only in the absence of the rule of law, but also parallel to the rule of law. He suggests that Chinese taxpayers and tax administrators collectively have the choice of pursuing discussions about the boundary between legitimate and illegitimate tax planning along two alternative paths. In one of these paths the rule of law figures as an important norm, while in the other it does not, and he discusses how each works in China.

1. Introduction

In 2007, when China adopted the new Enterprise Income Tax Law, [1] the "general anti-avoidance rule" (GAAR) set out in Art. 47 of the law was all but unfathomable – neither the couple of paragraphs explicating the provision that were found on government websites and quasi-official publications nor the small set of scholarly articles gave much of an inkling as to how the "Chinese GAAR" would be applied, substantively or procedurally. Only three years later, after a handful of circulars issued by the State Administration of Taxation (SAT) [2] and the profuse attention afforded them by advisors on Chinese taxation, has China been catapulted into the centre of international anti-avoidance efforts. On the topic of anti-avoidance, China has found common language with the international tax community, or so it would seem.

The subject of anti-tax-avoidance is of course also being extensively discussed in Europe, the United States, Canada, Australia, and many other jurisdictions around the world. It may be an important scholarly exercise to study all of these simultaneous developments, identify similarities and differences, and both include China in this comparison and to use the comparison to shed light on Chinese developments. But instead of attempting to accurately characterize the uses of anti-avoidance (or anti-abuse) rules in other tax systems, this article aims to capture what may be an important background in China as to the administration of anti-avoidance rules, a background that has not been much discussed.

The hypothesis advanced is that anti-avoidance rules are being applied in China, and may continue to be applied, not in the absence of the rule of law, but in parallel to the rule of law. That is, Chinese taxpayers and tax administrators collectively have the choice of pursuing discussions about the boundary between legitimate and illegitimate tax planning along two alternative paths. In one of these paths the rule of law figures as an important norm, while in the other it does not. And the outcome of applying anti-avoidance rules may differ depending on which path taxpayers and the government pursue. The choice of which path to go down – or, since it's likely that both paths will be followed, to what extent each will be followed – is up to both sides. Very importantly, the choice will reflect the preferences of taxpayers and not just of the government. Pursuing the anti-avoidance discussion within the framework of the rule of law is possible in China. There are existing institutions for doing so, and a set of impressive efforts that the government, and especially the SAT, has made recently to promote the rule of law in tax administration must be highlighted. Especially in light of these efforts, it will become harder and harder to maintain that the practice of anti-tax-avoidance in China occurs *in the absence* of the rule of law, as though the weakness of legal institutions is a given. Rather, these institutions may be weak because taxpayers consciously, freely, collectively, and perhaps by habit, opt out of these institutions. This article aims to describe how traditionally taxpayers have made this choice in daily tax compliance, and posit that it is this choice that will determine how Chinese anti-tax-avoidance practice will evolve in the future.

2. A Western Allegory and How To Transpose It to China

Before substantiating my claims about the behaviour of Chinese taxpayers and tax administrators, let me first explain further the idea of two alternative paths for dealing with tax avoidance, by reference to a stylized narrative about the emergence of anti-avoidance rules in advanced tax systems. In a recent speech made in Beijing, the prominent US tax lawyer Peter Blessing addressed the very topic of anti-avoidance. In his speech, [3] Mr Blessing offered an allegory that starts with a scene of "the Wild West" in tax planning. In this setting (which probably corresponded to US tax practice up until the early 1990s), taxpayers took advantage of inconsistent judicial precedents within a jurisdiction (involving some court decisions that were arguably biased against the tax authorities), as well as differences among the tax systems of different countries, and structured transactions that strayed from the spirit of the law. Moreover, in exchange for lucrative fees, tax advisors offered assistance in

executing transactions that approach the borderline of lawfulness. Into this scene “entered the Sheriff”, which is the tax authority wielding the weapons of anti-abuse rules. These weapons come in different varieties, some of which are detailed, while others more generally state that transactions carried out that are inconsistent with the purpose of either detailed rules or tax law as a whole will be subject to adjustment. Sometimes the anti-abuse tools deployed by tax authorities may cause even greater alarm, at least from a legal perspective, than the actions of taxpayers. This is when the Sheriff begins to throw grenades. An important example of this that Mr Blessing pointed to is the heavy penalties that the US Internal Revenue Service now intends to impose on transactions that are found to lack “economic substance”, [4] even when the interpretation of “economic substance” is still unclear and a matter on which the government has not offered sufficient guidance. [5] Penalizing people for violating unclear standards would of course raise fundamental concerns about fairness, concerns that are widely shared in countries with long traditions of the rule of law.

But even as the legal debate over the use of anti-abuse rules goes on, Mr Blessing’s allegory had an intriguing end, i.e. “the outlaws lay down their arms”. That is, a movement has emerged in a number of countries where the tax authorities and some taxpayers – especially large corporations and financial institutions – are beginning to collaborate on tax matters, instead of engaging in confrontations. Although some of these collaborations involve only taxpayers disclosing their tax planning to tax authorities – so that they are not just playing the “audit lottery” and hoping that problematic positions will not be reviewed – others, for example those in the United Kingdom, require taxpayers to forego taking positions that the government may disagree with. [6] It is yet to be seen whether taxpayers are truly willing to “surrender” this way, but that is a possibility. [7]

So, how does this allegory help us interpret the situation in China? To begin, we could probably agree that there has not been a “Wild West” of tax planning here. Sure, there was a period of generous tax preferences offered especially to foreign investors before 2008. But there were no judicial precedents stacked against tax authorities and not much else that one can point to by way of legal mechanisms that could be said to have threatened tax administration. There was perhaps lax enforcement of legal rules (e.g. tax agencies failed to ensure that true market value was reported in connection with asset transfers), and occasionally the SAT adopted rules that manifestedly lent themselves to abuse. An example of the latter is the now-obsolete “Circular 207”, which allowed cross-border, purportedly intra-group equity transfers, to be carried out at cost instead of market value. [8] But these were arguably self-inflicted wounds, which could all be remedied by normal, competent tax policymaking and tax administration, with no need for the introduction of anti-abuse rules. The repeal of Circular 207 upon the enactment of the Enterprise Income Tax Law, and the adoption of stringent conditions for cross-border reorganizations in the widely discussed Circular 59, [9] are examples of such normal policymaking. The conditions imposed by the new reorganization regime may be viewed as too inflexible by some tax advisors, but they do not raise the types of issues that the GAAR does.

Instead, it may be suggested that China’s starting point, insofar as the anti-avoidance discourse is concerned, is more likely where Mr Blessing’s allegory ends. That is, there is an alternative mode of interaction between taxpayers and the government that does not rely on interpretation of legal rules or legal argumentation, let alone heavy use of litigation. In this mode of interaction, taxpayers are given, or find, incentives to seek out the government’s preferred view about how transactions should be taxed. On the basis of such communication, bargains regarding permissible behaviour are reached informally, in the sense of being unconstrained by legal rules. It seems that it is this type of interaction that the United Kingdom’s tax authority, among other tax authorities, now think could be useful in reducing tax-avoidance. Whereas in China, taxpayers have been more accustomed to this mode of interaction in tax compliance than to legal argumentation, and are likely to continue to choose this mode of interaction over legal institutions.

3. Some Features of Traditional Tax Compliance Practice in China

While the following has to be verified, it is probably the case that most business taxpayers in China do not assemble information about tax law themselves. This is not only because, like many other countries, small and medium-sized businesses in China do not have staff resources for doing so, but the firms to whom they outsource accounting and tax compliance work may also not have access or choose not to consult primary legal material. Instead, taxpayers and their tax accountants obtain knowledge of tax law mainly from dealings with tax agencies in everyday compliance. They treat the local tax bureaus in charge of collection as their main source of information about tax law. Indeed, they may demand a large amount of time from employees of tax agencies in providing them with fairly basic information, and tax agencies cannot presume that taxpayers know the tax law.

Now, taxpayers who do not access primary legal information are probably the predominant type relative to the overall taxpayer population in every country. This is why many tax authorities issue a multitude of official publications assisting tax compliance. [10] These publications are not legal documents and do not interpret law. They do not refer to specific legal provisions or describe the sources of the rules they state (i.e. whether they are from statutes, regulations, and agency interpretations). Instead, they simply tell taxpayers what to do in computing their tax liability and report their computation to the government. [11] Local tax authorities across China are

gradually beginning to offer such publications (including online) to taxpayers. Even so, many taxpayers may still rely heavily on oral guidance, since looking up any written instruction simply isn't what the persons handling tax compliance are trained to do. Moreover, this description applies not just to small and medium-sized businesses but also to large enterprises, whether they are state owned, privately and domestically owned, or sometimes even foreign owned.

It is a good question as to why this is the case. The decentralization of tax administration, and therefore the simple *availability* of government employees to answer mundane questions, may be one factor. However, there is evidence that this type of reliance on the government's hand-holding in compliance is putting more of a strain on government resources nowadays. Instead of making policy, dealing with difficult tax issues, and performing audits, government employees spend a significant amount of time explaining the most basic rules to taxpayers. Very often, in fact, they can earn some extra money offering training sessions to both taxpayers and tax practitioners, which is likely done out of the genuine belief that they can improve compliance this way. The point is that all these actions happen *at the taxpayers' demand*. Taxpayers and tax practitioners appear to value access to even fairly low-ranking government employees highly.

One consequence of this is that there is relatively little by way of independent interpretation of tax law by taxpayers themselves. From a lawyer's perspective, there is a variety of tools for interpreting unclear rules or applying rules to unfamiliar situations, e.g. documents from legislative history showing legislative intent, official publications that do not have the force and effect of law, scholarly writing, as well as professional publications in trade journals and trade associations. And just as fundamentally, there is the conceptual analytical framework that comes with mature taxes such as the income tax and value added tax, which one would expect to permeate all sorts of writing. In other countries, of course, judicial decisions form a dominant source of law and assist in legal interpretation. In China, not only are judicial decisions very rare in the tax area, but there is not much evidence of engagement in independent legal interpretation by taxpayers and tax professionals. There is little professional writing that goes beyond the regurgitation of written rules, and there is not much that one can find that can be called a consensus or prevalent opinion of the profession about a problem unresolved by official announcements. In fact, most occasions for professional discussions (i.e. discussions across businesses, not by way of client service and not engaged in purely because of personal acquaintance or friendship) have been motivated by the objective of inviting officials. It is as though that in the absence of a government employee, there is no point discussing tax law.

It would be interesting to examine other related phenomena (such as the infrequency with which tax opinions are given, contrasted with the frequency with which offers to arrange in-person meetings with government employees are made). Nonetheless, enough has been said to support the claim that very extensive interaction with the government is the norm in ordinary tax compliance in China, and taxpayers pursue such interactions as an alternative to, i.e. without presupposing, independent knowledge and interpretation of the law. There is no obvious way in which such practice is imposed on taxpayers by the government. Quite the opposite, some tax officials may feel uncomfortable about such practice because it is somewhat inconsistent with the roles they are supposed be playing, which is to focus on the enforcement of law. But few are motivated to *resist* taxpayers' demands in this regard.

The implication of all this on the subject of anti-avoidance is that if one's starting point is tax compliance by government hand-holding, and to routinely seek out the tax authorities' preferred interpretation of law, then the notion that taxpayers may develop their own understandings and interpretations of tax law which may be different from that of tax agencies, and that they may be *correct* in arriving at such different conclusions, will seem alien to most. These ideas are not new to a majority of educated Chinese tax officials, who conceptually understand that legal rules are written for everyone to obey and are distinct from individual dictates, and that even *the spirit of the law* (let alone the letter) is different from agency preferences. It is just that it is not clear that Chinese taxpayers are interested in operating according to these ideas. If they did, i.e. if they really tried to independently understand and comply with the law, as many large multinational companies operating in China probably do, the tax officials' work will be easier, not harder.

Given this general mode of operation, it is natural for any tax authority, including the SAT, to combat perceived tax avoidance by requiring taxpayers to follow the government's preferred interpretation of law even when the taxpayers are not legally obligated to. Prevention of avoidance activities becomes not a matter of law enforcement but of negotiation, where the tax authorities may publicly impose requirements that go beyond what is un-controversially implied by law, and engage in simultaneous negotiations with many, including the largest, taxpayers for a collective "sign-on". One would imagine the dynamics of this kind of interaction could become quite subtle, but of course the dynamics of legal battles could be equally so.

4. The SAT's Promotion of the Rule of Law

Given this background, where Chinese taxpayers seem to prefer modes of interaction with tax agencies that sidestep the law (which may support a mode of anti-avoidance on the government's part that also sidesteps the law), it may come as a surprise that the Chinese government has recently demonstrated a strong drive to promote

the rule of law in tax administration. For the purposes of this article, the SAT will be used as an example, although many local tax authorities have undertaken equally impressive initiatives. [12] The point of mentioning some of these exciting developments, again, is to show that there is no lack of legal apparatus available to resolve disagreements between taxpayers and tax authorities, some of which may be advanced even by international standards. Such apparatus makes it inaccurate to claim that the debate about tax avoidance is carried out in China *in the absence of* the rule of law.

Although other examples may be given, the focus below will be on two new SAT ministerial regulations, i.e. (i) the regulation on tax rule-making, and (ii) the regulation on administrative review (AR) procedures. The first example refers to the SAT ministerial regulation "Administrative Measures for Formulating Normative Documents in Taxation" (hereinafter "New Rulemaking Measures"), [13] which took effect on 1 July 2010, and which not only significantly clarified the question of which SAT-issued rules have the force of law but also imposed important new procedures on the making of such rules. [14] The New Rulemaking Measures govern all "tax normative documents" (including those issued by the SAT), which are defined to exclude SAT ministerial regulations but capture all informal rules issued by tax agencies that "prescribe the rights and obligations of taxpayers" generally. The regulation requires all such documents to be issued in Public Announcements ("*gonggao*") format, [15] which makes it possible to tell whether an informal rule is intended to have legal effect simply by its format. Sure enough, during the first four months after the regulation took effect, the SAT issued 18 Public Announcements – more than twice the number of Public Announcements issued during the 15 years between 1995 and 2009. [16]

The New Rulemaking Measures impose three other requirements that are just as significant. Firstly, tax normative documents cannot apply retroactively, except for provisions adopted "for the purpose of better protecting the rights and interests of" taxpayers. [17] In general, there needs to be a 30-day period between a tax normative document's date of promulgation and its date of initial implementation. [18] Secondly, the adoption of any tax normative document must be preceded by a review procedure that specifically focuses on the legal basis of the proposed rule and its consistency with existing law. [19] Each draft document has to be submitted for review by the rulemaking agency's legal department, along with specific statements of the legal ground of such proposed document. [20] No normative document may be issued without the sign-off of the legal department. [21] Finally, if taxpayers believe that a normative document is inconsistent with higher law, regulations, or normative documents, they may apply for the review of such document with the issuing agency or the tax agency at the next higher level. [22] Since this rule applies to SAT normative documents, if a taxpayer is inclined to challenge an SAT circular, he no longer has to wait for an enforcement action to occur.

What the New Rulemaking Measures accomplish is to extend, to informal tax rulemaking, some fundamental norms and concepts – in particular, non-retroactivity and the possibility of applying for non-judicial, pre-enforcement review of a rule – that generally apply only to formal legal rules recognized by the Legislation Law. [23] Numerous other provisions of the New Rulemaking Measures [24] also promise to introduce substantially more clarity and transparency to tax agencies', especially the SAT's, rulemaking activities. Simply by eschewing the worst forms of retroactivity and by being unambiguous as to its intended legal effect, each "*gonggao*" now issued by the SAT and local tax agencies across China testifies to a desire to bring more rule of law into taxation.

The second example is the SAT's revised regulation on administrative reconsideration proceedings (hereinafter the "New AR Regulation"), [25] which was adopted and published roughly at the same time as the New Rulemaking Measures. This revision of a previous regulation was partially in response to the State Council's promulgation of Implementation Regulations for the Administrative Reconsideration Law in 2007, [26] but it also introduced certain provisions that demonstrated the SAT's initiative. It is important to note that even before this new SAT regulation and in fact before the State Council's regulation in 2007, administrative reconsideration (AR) procedures had proven to be effective, by some measures, in providing taxpayers with remedies. According to the SAT's own report, [27] between 1994 and 2005, among AR cases across China, agency actions were sustained in roughly an equal number of cases as cases where agency actions were overturned. And between 1994 and 2006, in the AR proceedings that the SAT itself processed , agency actions were sustained in 55% of the cases, whereas in the rest, the SAT either overturned agency actions itself or required provincial tax agencies to do so. [28]

The SAT's New AR Regulation was a major overhaul of its predecessor regulation as issued in 2004. It clarified a large number of procedural issues, making the logistics of an AR proceeding much more transparent. Regarding who can be made a respondent in an AR proceeding, for example, it states that where a tax agency takes an action that can be taken only upon the approval of a superior tax agency, then that superior, approving agency can be made the respondent. [29] In the case where a taxpayer disagrees with the actions of a withholding agent, the tax agency with jurisdiction over the withholding agent may be made the respondent. [30] The regulation also incorporates a number of measures aimed at protecting the petitioners. For example, the reviewing body in an AR proceeding cannot make, with respect to any matter for which the petitioner has sought review, any decisions that are more unfavourable than the original administrative actions reviewed. [31] Additionally, while in general if a petitioner withdraws an AR application it cannot submit an AR application again based on the same facts and arguments, the petitioner may pursue such re-submission if it can "demonstrate that the withdrawal was made

against the petitioner's true will". [32]

Perhaps most notably, the New AR Regulation introduced two sets of procedures previously unavailable. First, for cases that are significant and complex, AR may be conducted through an actual hearing if either the petitioner so requests or if the review body determines that a hearing is necessary. Unless there are national secrets, commercial secrets or personal privacy concerns, a hearing should be open to the public. The content of the hearing will be recorded and made part of the basis of the decision of the reviewing body. [33] Compared to the previous protocol where ARs were conducted by government officials simply through written submissions, hearing procedures make it much more likely that the substantive discussion of the merits of a case can take place in a non-confrontational (i.e. relative to litigation) AR context. Secondly, the New AR Regulation laid out certain measures for mediation and reaching a settlement during AR. [34] Of course, such settlements mean that the government would not be sued in court, and one can see why litigation-averse tax authorities might find it useful. Nonetheless, we know that informal settlements between taxpayers and tax authorities occur all the time. From a legal perspective, it is good for such settlements to be governed by procedures in order to ensure fairness and prevent abuse, and now at least such procedures exist for settlements reached in an AR proceeding, if not for settlements that may happen before the taxpayer reaches an AR proceeding.

There are many other aspects of the New AR Regulation that one cannot discuss here for the sake of brevity. [35] Indeed, there are other interesting recently adopted regulations as well as draft guidance, for example regarding procedures in tax audits and examinations [36] and the exercise of discretion in tax administration, that one cannot go into. The overall point, however, is simple; from a lawyer's perspective, very significant progress is being made in introducing greater rule of law in tax administration, making tax procedures presently one of the most dynamic areas of Chinese taxation overall. The fact that this is happening can be explained both by an ideology of rule of law that is gradually taking hold across the Chinese government and by the tax administration's own internal, managerial needs. Given the propensity of taxpayers to sidestep such legal mechanisms however, such government efforts may ironically appear to be unilateral, uncalled for and a subject of indifference.

5. Conclusion

Many of us think that the rule of law in tax administration is a good thing, and that more of it is needed in China. Of course, using courts and legalistic arguments to resolve disputes is not an end in itself. Any legal system will have its defects, and it is completely understandable if taxpayers who have access to the system sometimes choose not to use it. But the existence of legal systems is also not arbitrary. Such systems embody the results of millennia of human search for justice and fairness in social interactions. To achieve a decent and acceptable outcome in such interactions, using the legal system is sometimes a necessity. If we recognize this, we need to recognize further that the government cannot force taxpayers to make use of legal mechanisms to protect their own rights and interests. They can only make such mechanisms available. And by many standards, these mechanisms in China are favourable to potential users. It is a mistake to imagine that the rule of law is simply something that the government can *give* to its citizens. In some countries which have recently gone through severe political turmoil, such as South Africa and Russia, tax litigation is not uncommon. It is hard to believe that in these two places, benign governments emerged that simply gave their citizens adequate enticements for using legal institutions and mechanisms. It seems more plausible that the citizens in these countries either *chose* to use such mechanisms, or that they had no other alternative. In China, taxpayers seem to be choosing the alternative, non-legal mode of tax compliance that requires extensive interactions with tax officials. And tax officials very often are in the role of responding to, instead of initiating, such interactions.

In this environment, it is not just the SAT or the local tax authorities that have trouble delineating the scope of their anti-avoidance efforts. Taxpayers themselves do not seem to grasp certain intuitive standards of fairness, e.g. there is evidence that many taxpayers and tax advisors have not intuited the idea that they cannot disregard the forms of transaction they themselves have adopted based on "substance over form" arguments. Interestingly, in the United States, this doctrine that taxpayers cannot generally disregard transactional forms they themselves chose – the so-called "Danielson rule" – was developed judicially. [37] How anti-avoidance rules will be interpreted by both Chinese taxpayers and tax administrators outside the framework of law is an intriguing question indeed.

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1. Passed by the 10th National People's Congress on 16 March 2007 taking effect on 1 January 2008.

2. These primarily include *Guoshuihan* [2008] No. 1076 issued by the SAT on 30 December 2008 – *A Case of the Appropriate Handling of Tax Treaty Abuse by the Xinjiang Uygur Autonomous Region State Tax Bureau*; *Guoshuifa* [2009] No. 2 issued by the SAT on 10 January 2009 taking effect on 1 January 2009 – *(Trial) Measures for the Implementation of the Special Tax Adjustment*; *Guoshuihan* [2009] No. 601 issued by the SAT on 27 October 2009 – *Notice on How to Interpret and Determine "Beneficial Owners" in Tax Treaties*; and *Guoshuihan* [2009] No. 698 issued by the SAT on 10 December 2009 taking retroactive effect on 1 January 2008 – *Notice on Strengthening the Management of Enterprise Income Tax Collection on Proceeds from Equity Transfers by Non-resident Enterprises*.

3. A Chinese version of Mr Blessing's paper on which his talk is based, "Abuse and Anti-Abuse: The Role of a Tax Professional in a Changing World", is scheduled to be published in Xiong, W. (Ed.), Vol. 2 *Tax Law And Case Review* (Law Press, 2011).

4. See Secs. 7701(o), 6662(b)(6) and 6664(c)(2) of the US Internal Revenue Code.

5. In his talk, Mr Blessing explained that US tax practitioners are interpreting the "economic substance" requirement in light of the heavy penalties, i.e. anything that intuitively does not deserve heavy penalties should not be viewed as failing to satisfy the requirement.

6. Her Majesty's Revenue and Customs (HMRC), Tax Compliance Risk Management Process (May 2009). See also, Freedman, J., Loomer, G., and Vella, J., "Analyzing the Enhanced Relationship Between Corporate Taxpayers and Revenue Authorities: A U.K. Case Study (2010)", *The IRS Research Bulletin Proceedings of the 2009 IRS Research Conference* (Internal Revenue Service: Washington DC, 2010), pp. 103-148.

7. According to BBC News, only four of 15 major banks had signed on the HMRC's Code of Practice on Taxation for Banks, and Chancellor George Osborne wanted to force the remaining 11 to do so. BBC News, Business, 17 October 2010, http://www.bbc.co.uk/news/business/.

8. *Guoshuihan* [1997] No. 207 issued by the SAT on 17 April 1997 – *Notice Regarding the Income Tax Treatment of the Transfer of Company Share by Foreign-Invested Enterprises and Foreign* Enterprises.

9. *Caishui* [2009] No. 59 issued by the Ministry of Finance and SAT on 30 April 2009 – *Notice Regarding Several Issues in the Enterprise Income Tax Treatment of Enterprise Restructuring*.

10. For such practice in the United States, see, e.g. http://www.irs.gov/publications/index.html.

11. These instructions are of course consistent with legal rules, and there are many situations that they do not address, in which case an examination of the underlying law becomes necessary.

12. See, e.g. Liaoning Provincial State Tax Bureau Public Announcement [2010] 2 issued on 25 September 2010 taking effect on 1 November 2010 – *(Trial) Measures for Processing Disputes Regarding Normative Documents* – setting out procedures for non-judicial, pre-enforcement review of normative documents that may be inconsistent with higher law.

13. SAT Decree No. 20 issued on 10 February 2010 taking effect on 1 July 2010, replacing *Guoshuifa* [2005] No. 201 which was issued by the SAT on 16 December 2005 taking effect on 1 March 2006 and repealed on 1 July 2010 – *Administrative Measures for Formulating Normative Documents in Taxation (for Trial Implementation)*.

14. For a full discussion of the state of national-level tax rulemaking in China, see Cui, W., "What Is Law in Chinese Taxation?" scheduled to be published in the *Asia Pacific Law Review* (2011). Also available at http://papers.ssrn.com.ezproxy.lib.monash.edu.au/sol3/papers.cfm?abstract_id=1687781.

15. Art. 27 of the New Rulemaking Measures.

16. Circulars for purposes of internal management continue to be issued without adopting the Public Announcement format. See, e.g. *Guoshuihan* [2010] No. 323 issued by the SAT on 12 July 2010 – *Notice Regarding Initiating Examinations of Contemporary Documentation*.

17. Art. 13 of the New Rulemaking Measures.

18. Id., Art. 14.

19. Id., Arts. 16, 19, 20 and 22.

20. Id., Arts. 19 and 20.

21. Id., Art. 16.

22. Id., Art. 35.

23. Law on Legislation passed by the 9th National People's Congress on 15 March 2000 taking effect on 1 July 2000.

24. Art. 6 of the New Rulemaking Measures, for example, makes it clear that no internal division of a tax agency may issue normative documents.

25. SAT Decree No. 21 issued on 10 February 2010 taking effect on 1 April 2010 – *Measures for Tax Administrative Review* – replacing *(Trial) Measures for Tax Administrative Review* which was issued on 24 February 2004 taking effect 1 May 2004.

26. See Administrative Reconsideration Law passed by the 9th National People's Congress on 29 April 1999 taking effect on 1 October 1999; Administrative Reconsideration Law Implementation Regulations issued by the State Council via Decree No. 499 dated 29 May 2007 taking effect on 1 August 2007 (hereinafter "ARLIR").

27. See Hong, L., "Tax Administrative Cases a Growing Trend", *China Taxation News* (5 February 2007), p. 1.

28. Over 30% of AR proceedings involved disputes regarding the legal basis of agency actions. Applications that requested the review of normative documents "showed a notable increase after the Administrative Reconsideration Law took effect in 2000". Id.

29. Art. 29 of the New AR Regulation. This is based on Art. 13 of the ARLIR.

30. Art. 27 of the New AR Regulation. Other procedural clarifications include how to compute the period within which an AR proceeding must commence (Arts. 35-36), and what an application for AR must contain and what evidence must be submitted by the petitioner (Arts. 39 and 41).

31. Art. 5 of the New AR Regulation. This is based on Art. 51 of the ARLIR. Further, the SAT's New AR Regulation provides that if a reviewing body decides that the respondent agency has erred and a new action needs to be taken, the latter agency cannot take (i) substantially the same action unless the original action was deemed invalid on procedural grounds alone, or (ii) a more adverse action against the petitioner unless the original action has been rejected on the grounds that the factual, evidential or legal basis of the action was inadequate. Art. 76 of the New AR Regulation.

32. Art. 71 of the New AR Regulation. This is based on Art. 38 of the ARLIR.

33. Id., Arts. 65-69.

34. Id., Arts. 86-92.

35. Other notable provisions include, (i) the head of each tax agency is the primary person responsible for matters relating to administrative review (Art. 8), (ii) each agency is urged to make physical investments in AR work, by furnishing necessary office equipment, information systems, as well as specific venues and other necessary means for petitioners and third parties to review relevant material, pursue mediation or conduct hearings (Arts. 9-10), and (iii) each agency may also form an administrative review committee to collectively examine "major and difficult" cases selected by the reviewing body, and invite specialists outside the agency to participate in the discussion of the committee (Art. 12).

36. See *Guoshuifa* [2009] No. 157 issued by the SAT on 24 December 2009 – *Work Protocol for Tax Audits*.

37. See *Commissioner v. Danielson*, 378 F.2d 771 (3d Cir. 1967), cert. denied, 389 U.S. 858.