

Deacons Bitesize IP

Intellectual Property

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Unlocking the Patent Box: Exploring the value of your software, not just patents!

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Did you know?

Despite its name, the 'patent box' isn't just for patents. In fact, it is actually an 'innovation box'. In our earlier alert [Thinking inside the \(patent\) box](#), we highlighted the Hong Kong Government's patent box regime that seeks to encourage innovation by providing tax concessions. As we mentioned then, the regime covers not only patents and plant varieties, but also copyright subsisting in software. It is one of the most generous regimes in the world, with a 5% concessionary profits tax rate (compared to the usual 16.5%). The regime will apply to a broad range of businesses, not just high-tech sectors such as AI and life sciences.

Why does this matter to you?

Businesses that develop software or products that contain software, even if it is not the main focus of their business, should sit up and take note of the patent box. Nowadays all companies use software in their business but, of course, this alone is not enough to qualify for a tax concession – you must be an 'eligible person' deriving 'eligible IP income' from the software patents or the copyright subsisting in software.

An **'eligible person'** is simple enough: in this context, it refers to someone who is entitled to derive 'eligible IP income' from the IP. This is broad enough to cover those who do not own the IP that subsists in the software so that even if you are a licensee, you may derive eligible IP income from sub-licensing the copyright to someone else.

So, what is **'eligible IP income'**? The most straightforward example is selling the IP, but it can also include 'embedded IP income' i.e., the part of income that is attributable to the value of the IP embedded in a product or service, for example, has your business developed:

- a new software that provides novel services to customers?
- a custom fintech platform trading in financial products?
- a new game engine with improved physics or NPC/enemy AI?
- provided a software-as-a-service (SaaS) platform for your clients to subscribe?

Whilst it is early days, and it remains to be seen how the Inland Revenue Department (IRD) will apply the tests of qualifying eligible IP income, innovative companies should start thinking about whether it may be worth electing to the patent box.

Taxpayers must also show that the software patents or copyright subsisting in software are **'eligible IP'** derived from an **'R&D activity'**. Most routine software development would not qualify as an 'R&D activity'. "R&D activity" is usually referred to as an activity working to develop new products, new lines and improvements to the present production. Thus, technical developments of software for a new product, production process, tools for production of a product, or improvement may qualify.

If your software is protected by a registered Hong Kong patent, then congratulations! It is most likely 'eligible IP' under the patent box. If the remaining requirements are fulfilled, your tax bill on eligible IP income should enjoy the concession tax rate.

However, under the regime, software that does not qualify for patent protection (but is protected by copyright), could still be 'eligible IP' for the purpose of the patent box. A detailed case-by-case assessment would be needed to be conducted. The amended Inland Revenue Ordinance sets out detailed record-keeping requirements for 'eligible IP income', and Inland Revenue Department is preparing guidelines on the conditions for establishing 'eligible IP'.

Taxpayers should consider conducting an IP audit to see whether they have innovations that could benefit from the patent box incentive and seek advice on what kind of evidence is necessary to prove copyright ownership or exploitation rights. Such evidence should clearly identify the eligible software patent and copyright being applied to the products and services.

Overseas businesses and mainland Chinese entities could consider setting up a Hong Kong company to develop eligible IP (which could also be licensed to parties outside of Hong Kong) to take advantage of the considerable tax concession. Businesses may wish to consider restructuring their IP-holding arrangements and/or business operation models.

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解锁专利盒：软件价值，不仅专利！

张万怡

你知道吗？

尽管名为“专利盒”，但实际上它并不是只针对专利。事实上，它是一个“创新盒”。在我行的前一篇文章[《开启“专利盒”》](#)中，我行提到了香港政府的专利盒机制，该机制旨在通过提供税务宽减来鼓励创新。如我行之前所述，该机制不仅涵盖了专利和植物新品种，还包括软件中的版权。这是世界上最慷慨的机制之一，其特惠利得税率仅为 5%（相比于标准的 16.5%）。该机制将适用于广泛的业务范围，而不仅限于人工智能和生命科学等高科技行业。

为什么这对你来说很重要？

开发软件或包含软件的产品企业，即使不把软件作为业务的主要焦点，也应该注意专利盒。如今，所有公司都在使用软件，但仅仅使用软件本身当然并不足以使其符合税务宽减条件——你必须是“具资格人士”，并从软件中的专利或版权中获得“具资格知识产权收入”。

“具资格人士”的定义很简单：在专利盒机制下，它指的是有权从知识产权(IP)中获得“具资格知识产权收入”的人。该定义足够宽泛，可以涵盖那些不持有软件中 IP 的人，因此即使你是被许可方，你也可能从版权再许可中获得具资格知识产权收入。

那么，“具资格知识产权收入”又是什么呢？最直接的例子就是出售 IP，但它还可以包括“内含知识产权收入”，即可归因于产品或服务中嵌入的 IP 价值的一部分收入。例如，你的企业是否开发了：

- 一个向客户提供新服务的新软件？
- 一个定制的交易金融产品的金融科技平台？
- 一个新的游戏引擎，具有物理的或非玩家角色/敌人 AI 设计的改进？
- 提供了一种软件即服务（SaaS）平台，使你的客户可以订阅？

尽管现在仍是早期阶段，并且我们还需要观察香港税务局如何应用具资格知识产权收入的准则，创新公司应该从现在开始思考是否值得选用专利盒。

纳税人还必须证明软件中的专利或版权是“具资格 IP”，并且源于一项“研发活动”。大多数常规软件开发不会符合“研发活动”的标准。“研发活动”通常指的是开发新产品、新生产线和改进现有生产活动。因此，用于新产品、生产过程、生产工具或改进的软件技术改进可能符合资格。

如果你的软件已经获得香港注册专利保护，那么恭喜你！它很可能是专利盒机制下的“具资格 IP”。如果该软件也满足机制下的其他要求，你的具资格知识产权收入应该享受特惠税率。

然而，在该机制下，未能获得专利保护（但受版权保护）的软件仍然可以作为“具资格 IP”而被视为专利盒机制下的“具资格 IP”。这种情况下，需要进行详细的个案评估。修订的《税务条例》就“具资格知识产权收入”详细规定了记录保存要求，香港税务局正在准备指南，以确定建立“具资格知识产权”的条件。

纳税人应该考虑进行 IP 审计，看看其中是否有可以从专利盒激励机制中受益的创新内容，并寻求有关证明版权所有权或利用权所需的证据的建议。这些证据应清晰地明确应用于相关商品和服务的具资格软件专利和版权。

境外企业和中国大陆企业可以考虑在香港设立一家公司，以开发具资格 IP（可以向香港以外的他人授予许可），以享受显著的税务宽减。企业也可以考虑重新调整其 IP 持有安排和/或业务运营模式。

欲了解更多资讯吗？

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