Luxembourg
Tax Rulings 2.0

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The Luxembourg practice of providing advance certainty in tax matters to taxpayers and investors wishing to set up operations in Luxembourg recently witnessed some interesting developments.

The intention to establish a uniform procedure and to anchor a solid framework for advance tax clearances had already been expressed by the government in its governmental program of December 2013. The government thus outlined its willingness to continue providing investors and taxpayers, whether already established in Luxembourg or not, with upfront legal security for transactions and operations intended to be realized in the Grand-Duchy. This commitment has become a reality with the law of 19 December 2014 on the implementation of the so-called ‘Package for the Future’ – the first part of which embedded the administrative practice of requesting an advance decision.

The procedure for requesting an advance decision in tax matters has been further complemented by the grand-ducal regulation of 23 December 2014. All of these new rules entered into force as of 1 January 2015.

One of the core novelties is the creation of a dedicated Tax Ruling Commission, which is given a central role in the overall assessment process. The handling and processing of requests from taxpayers have become more and more complex and intensive, and thus have obliged the tax authorities to make additional investments in technical and human resources. The additional costs triggered are to be passed on to taxpayers to a certain extent: since January 2015, requesting an advance decision has become a payable administrative service.
The adoption of a dedicated legal provision providing for the possibility to request an advance tax ruling does not entail a change from, but rather ensures continuity with, the past. The wording of the law is clear: an advance decision is a confirmation of the application of the tax law to a precise fact pattern, as was the case under the former administrative practice. In no circumstance does it create by itself a tax exemption or a tax reduction which is not foreseen by law. As is already the case for advance pricing agreements for intragroup financing transactions, advance tax decisions are valid for a period of five tax years, which also coincides with the statement of limitation period for the assessment and collection of taxes. During this period, tax authorities are in principle bound by the decision they have issued, unless one of the following triggering events causes the decision to cease to have effect:

1. it appears that the information provided for in the request was incomplete or inaccurate,
2. the effective implementation differs from what has been described in the request, or
3. the advance decision appears afterwards to be no longer compliant with domestic, European or international law (e.g. following a change in legislation).

In order to further increase transparency, the decisions rendered by the tax authorities will be published, in an anonymized summary only, in the annual activity report of the direct tax administration. Such publication will certainly constitute a useful doctrinal source for all taxpayers as regards the application of fiscal laws for specific fact patterns and should limit the need to revert to advance decisions for identical situations or operations.

Nowadays, tax transparency is however not only a domestic concern, but also plays a significant role in cross-border situations. The Ministry of Finance has thus announced, in a statement made in December 2014, its intention to further reinforce the exchange, upon request, of information on tax rulings with other countries, according to the provisions of the relevant double tax treaties or EU Directives and agreements concerning administrative cooperation and mutual assistance in tax matters. Luxembourg further supports European and international actions in this field, being mainly:

- the initiative of the European Commission to draw up a directive aiming at introducing a mandatory automatic exchange of information on tax rulings between the competent authorities of the EU Member States, and
- BEPS Action 5 on countering harmful tax practices, which looks into compulsory spontaneous exchange of information on rulings related to preferential regimes.

…but the form changes

A major innovation of the new tax ruling procedure is the creation of a Tax Ruling Commission ("Commission des décisions anticipées" or CDA), that will play an essential role in the overall tax ruling process by taking a position on all requests relating to the taxation of enterprises.

As was the case in the past, the request for a tax ruling must be made to the Chief tax inspector of the competent taxation office, respectively to the Director of the direct tax administration in case the competent taxation office is not yet known. The request has to be made in writing and must mandatorily contain information relating to, for example, the identity of the applicant and the proposed operation(s), as well as an analysis of the legal questions and an assurance that the information required for the assessment of the request is complete and reflects reality (bona fide statement).

The Chief tax inspector then submits the request to the CDA for its position each time the request relates to the taxation of enterprises. The CDA is composed of civil servants and officers of the tax directorate and of the taxation offices upon appointment by the tax director. Given the variety and the complexity of the requests filed, it is likely that the composition of the CDA may vary depending on the field of expertise required and that it may rely on sub-committees for specific matters (for example transfer pricing matters). The CDA may also invite the applicant to provide further information during a meeting. After deliberation, the CDA forwards its position for execution to the head tax inspector, so that the advance decision is taken by the latter.

This new tax ruling procedure is not a new or additional step in the overall assessment process. As a consequence, it is not possible to lodge an appeal against a negative decision. If a taxpayer decides to proceed despite a negative answer to his request, he may only claim against the tax assessment, which will presumably deviate from the tax return filed to reflect the divergent position of the tax administration.

It is also important to recall that applying for an advance tax ruling is a taxpayer’s right and not an obligation and the interpretation of the tax laws is the same for both taxpayers that seek certainty in advance about the tax consequences of their actions and those that do not.

A payable service for enterprises

The law provides for the payment of a specific fee for the processing of a tax ruling request, the amount ranging between EUR 3,000 and EUR 10,000 depending on the complexity of the request and the volume of work required. The exact amount will be fixed by the director of the direct tax administration upon receipt of the request; the fee is due and payable in full within one month following the receipt of the decision defining the amount of the fee. The request will only be processed following receipt of the payment. Furthermore, the payment is final and irreversible and cannot be refunded, even in case of withdrawal of the request, or in case of refusal or a negative answer once the request has been processed.

Conclusion

The government’s decision to anchor this important process of obtaining upfront confirmation of the application of the tax laws in a given fact pattern is highly welcomed. In particular, the setting-up of the CDA as well as the publication of summarized tax rulings, albeit on an anonymous basis, will certainly contribute to ensuring a consistent application of the tax legislation by all taxation offices and to increasing tax transparency. Now that the legal framework is set, it will depend on the practical execution to ensure that the tax ruling process continues to be an efficient process, as was the case in the past.