Global Tax Alert

Luxembourg establishes framework for new tax ruling practice

Executive summary

The Luxembourg Government is committed to continue providing investors with upfront legal certainty by way of private tax rulings and advance pricing agreements for transactions or operations intended to be realized in Luxembourg. This commitment is evidenced by establishing the possibility to request an advance decision in the General Tax Law (new paragraph 29a of the “Abgabenordnung”) via the Budget Law of 19 December 2014. Going a step further, the Government has forged a procedural framework for tax ruling requests (décisions anticipées) with the grand-ducal regulation of 23 December 20141 (the Regulation). One of the core novelties is the creation of a tax ruling commission (Commission des Décisions Anticipées or CDA), which will have a central role to play in the overall assessment process. A further amendment from the previous administrative practice consists in the fact that requesting an advance decision has become subject to paying an administrative service fee as of 1 January 2015.

Detailed discussion

Advance tax rulings: the key principle

In itself, the adoption of the new paragraph providing for the possibility to request an advance tax ruling does not introduce a change compared to the past. It reflects and formalizes the former administrative practice with the aim to further improve the dialogue between the taxpayer and the tax administration and to assure legal certainty in international economic operations. As was the case under the previous administrative practice, an advance tax ruling remains a confirmation of the interpretation of the tax provisions applicable to a specific fact pattern and cannot by itself create a tax exemption or a tax reduction which is not covered by the tax legislation. It allows a taxpayer to get a full view and understanding of the tax implications that the tax authorities will apply to a planned economic operation or
transaction. This also explains why the request for a tax ruling has to be introduced before an envisaged transaction actually takes place.

**Application formalities**

As was the case in the past, the request for a tax ruling, both for enterprises and individuals, has to be addressed in writing to the head tax inspector (préposé) of the competent taxation office. In case the competent tax office is not determined yet (e.g., the applying company is in the process of being incorporated and has not yet been allocated to a determined tax office), the request is addressed to the Director of the Direct Tax Administration.

The request must be reasoned and contain at least the following information:

- **Information on the parties concerned:** Exact designation (i.e., name, domicile, where applicable the tax number) not only of the applicant, but also of other parties concerned (including third parties) and the description of their respective activities.

- **Information on the transaction:** Detailed description of the proposed operation(s) which must be seriously and concretely considered and which is not yet effective. The request must be submitted in advance of the envisaged transaction. The condition that the proposed operation must “not yet be effective” might be interpreted as meaning “being implemented” in most cases, but a case-by-case assessment has to be made.

- **Detailed tax analysis:** Detailed analysis of the legal aspects, together with a detailed statement of reasons of the legal position of the applicant. Apart from the examination and interpretation of the applicable tax provisions, this section should include the underlying business reasons to perform the proposed transaction(s).

- **Bona fide statement:** Assurance that all the indications required for the assessment of the provided information are complete and factual.

**Decision process**

The Regulation introduces the ruling commission or CDA, whose members are appointed by the Tax Director and derived from the civil servants and agents of the Directorate and of the taxation offices (services d'imposition). The Tax Director also appoints a president among the members of the CDA. It is likely that the composition of the CDA will vary depending on the field of expertise required for examining a particular ruling request. The Regulation does not determine the rules of procedure and functioning of the CDA but rather empowers the CDA establish its own rules. It is anticipated that the CDA will meet on a regular basis and that it may rely on sub-commissions for determined matters (e.g., sub-commission for transfer pricing matters).

According to the Regulation, the mission of the CDA is “to assist the taxation office with the execution and the uniform and equal application of the fiscal law.” As a consequence, the tax inspector who received a ruling request must submit it for opinion to the CDA each time the request relates to the taxation of enterprises. If the CDA so decides, the applicant may provide explanations during a meeting. After deliberation, the Commission returns its opinion for execution to the head tax inspector of the competent taxation office, who takes the final decision and issues the tax ruling to the applicant.

**Binding nature of an advance decision**

The advance tax ruling is valid for a period of five tax years and is binding for the tax authorities for the aforementioned period unless (i) the situation or operations have been described incompletely or erroneously; (ii) the eventually resulting situation or operations differ from those described in the request; or (iii) the tax ruling appears to be no longer compliant with national, European or international law.

This period is in line with the validity period applicable to advance pricing agreements issued by the tax authorities for companies carrying out intragroup financing activities and also coincides with the statute of limitation period for the assessment and collection of taxes.

**Pending requests as of 1 January 2015**

The procedural rules set forth by the Regulation apply to requests introduced as from 1 January 2015. However, the Regulation clarifies that requests that have been filed
and that are in the process of being examined as of 1 January 2015 are transferred by operation of law and without any further procedure to the CDA, who has already started looking at these pending requests. The pending requests will be processed according to the conditions and rules foreseen by the Regulation but will not be subject to the payment of the administrative fee mentioned above.

**Ruling fee**
As foreseen by the new paragraph 29a of the General Tax Law, the processing of the request will trigger the payment of a specific fee for any request submitted as from 1 January 2015. The Regulation states that the amount of the fee is determined by the Tax Director upon receipt of the request, but it does not further detail how the amount of the fee will be computed. According to paragraph 29a, the fee will range between €3,000 and 10,000, depending on the complexity of the request and the volume of work required. The fee is due and payable in full within one month following the receipt of the decision determining the amount and the request will only be processed once the payment has been received. The liability of the payment of the fee rests with the applicant; this is also the case for requests introduced on behalf of several different taxpayers. The payment is final and irreversible: even in case of withdrawal of the request by the applicant, or in case of refusal or negative answer following the processing of the request, the fee will not be refunded.

**Taxation procedure**
The issuance of a tax ruling does not constitute a new or additional step in the assessment process. The consequence hereof is that no recourse is available against a negative decision. Consequently, if a taxpayer disagrees with the position taken in the advance decision, he can file a claim against the tax assessment.

**Publication of rulings**
According to the Regulation, an anonymized summary of the advance decisions will be published in the annual activity report of the tax administration. Since this summary is only published once a year, other forms of publication may possibly be considered in order to increase the frequency and the transparency of information on tax rulings issued.

**Exchange of tax rulings**
According to a statement of the Luxembourg Ministry of Finance, information on tax rulings is exchanged with other countries according to the provisions of the relevant double taxation treaties or directives and agreements on administrative cooperation in tax matters. It has been announced that these exchanges will be reinforced, be it through a possible European Directive aimed at introducing a mandatory automatic exchange of information on tax rulings between the competent authorities of the EU Member States or based on the Organisation for Economic Co-operation and Development’s Base Erosion and Profit Shifting Action 5 on countering harmful tax practices, which looks into compulsory spontaneous exchange of information on certain rulings.

**Implications**
The creation of a procedural framework for tax rulings and especially the introduction of the CDA are a positive development in order to ensure a consistent application of the tax legislation by all taxation offices. The publication of summarized tax rulings on an anonymous basis as well as the exchange of tax rulings with foreign tax authorities will increase tax transparency which is in line with the principles of the Government’s tax policy. An efficient and reliable tax ruling process is an essential element of a competitive domestic and international tax environment.

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**Endnotes**


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