

Newsalert EU Direct Tax Group

European Commission publishes decision to investigate the Belgian excess profit provision

The non-confidential version of the European Commission's opening decision announcing the formal investigation into the Belgian Excess Profit provision embodied in article 185 §2, b) of the Income Tax Code, was published in the EU's Official Journal on 5 June 2015.

Beneficiaries of excess profit rulings are requested to submit their comments at the latest one month following the publication of the non-confidential version of the Commission's letter, i.e. 6 July 2015.

Background

The Commission's investigation relates to the Belgian tax provision laid down in article 185, §2, b of the Belgian Income Tax Code which introduced the "arm's length" principle in 2004. This provision considers (cross border) intra group relations in order to assess corporate income tax on an arm's length basis. Based on this article:

- The taxable basis of a Belgian company can be increased to the extent it is lower than an at arm's length profit.
- The taxable basis can be exempt to the extent the taxable basis exceeds an arm's length profit.

The concerns of the Commission

The Commission has indicated that it has a number of concerns which require further investigation:

- There is a concern that this provision is ring-fenced, i.e. only for the benefit of a limited number of foreign multinational companies (not available to stand-alone Belgian based companies)

- Depending on the case, this provision may result in the exemption of a significant part of the income of a Belgian company.
- The provision applies subject to the requirement that an upfront ruling is obtained in Belgium. The Commission notes that these rulings have often been granted to companies that have relocated a substantial part of their activities to Belgium or that have made significant investments in Belgium.

Questions raised directly to beneficiaries

The Commission invites beneficiaries of excess profit rulings:

- to inform the Commission of further details on the transfer prices applied in their specific case; and
- to inform the Commission about how the profits exempt in Belgium have been treated from an accounting and tax point of view.

All beneficiaries of excess profit rulings are recommended to review these questions and consider how to respond to them.

Transfer pricing and EU-Law

This investigation follows the investigation by the Commission of the tax ruling practice of Member States in view of the EU State aid rules. In December 2014, the Commission issued a State aid information inquiry with regard to rulings to all 28 Member States.

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EU Direct Tax Group

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