Euro Tax Flash from KPMG's EU Tax Centre

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European Commission investigation into Dutch tax rulings

Fiscal State Aid – Tax Rulings – Double Non-Taxation – the Netherlands – US

On January 10, 2019 the European Commission launched an investigation to evaluate whether the tax rulings granted to two US group companies by the Netherlands constitute State aid within the meaning of EU law. (See the European Commission's press release).

Background

Under EU law, the Commission is obliged to review whether Member States give selected companies preferential treatment, incompatible with applicable State aid rules. Tax rulings have increasingly drawn public attention as their investigation became part of what the Commission refers to as a wider strategy towards tax transparency and fair taxation. This has led to inquiries into the compatibility of the tax ruling practices of certain Member States with EU law, starting in June 2013. In December 2014, the Commission extended the information inquiry into tax rulings issued by all Member States since January 1, 2010, and in June 2015 requested 15 Member States to provide detailed information on some of their rulings. Following a series of in-depth investigations, the Commission concluded that Belgium (see ETF 271), Luxembourg and the Netherlands (see ETF 262), and more recently Ireland (see ETF 300 and ETF 307) and Luxembourg (see ETF 339 and ETF 372) have granted selective tax advantages that are illegal under EU State aid rules.

Preliminary Findings

The European Commission's concerns relate to two Dutch-resident companies that are part of a US group. More specifically, the European Commission is concerned that certain elements of five tax rulings issued by the Dutch tax authorities between 2006 and 2015 may have provided an unfair advantage in comparison to other stand-alone or group companies subject to the same national taxation rules. Under the tax rulings, the two Dutch companies were able to make royalty payments in exchange for intellectual property rights relating to products in the EMEA region. According to the Commission, the level of the royalty payments may not reflect economic reality. As such, the Commission will assess whether the method used to calculate royalty payments for the use of intellectual property in the Netherlands reflects what independent companies would have agreed, i.e. whether or not the conditions are at an arm's length.

Next steps

As part of the standard procedure in State aid investigations, the European Commission will publish a non-confidential version of this preliminary decision in the Official Journal. The opening of an in-depth investigation gives interested third parties and the Member States concerned one month from the publication date to submit comments. It does not prejudge the outcome of the investigation. There is no legal deadline for completing an in-depth investigation and its actual duration depends on many factors, including the complexity of the case, the information provided and the level of cooperation from the Member State concerned. The European Commission will reach a final decision at the end of the formal investigation.

EU Tax Centre comment

Although the Commission's press release notes that the companies receiving the royalty payments from the Netherlands do not have employees and do not carry out economic activities, the Commission's investigation does not appear to challenge the structure of the group. Rather, the focus seems to be on the arm's length character of the royalty payment.

The decision to open an investigation coincides with the Netherland's comprehensive implementation of the Anti-Tax Avoidance Directives (ATAD I and ATAD II) and public commitment to enforce stricter requirements on international tax structures and increase tax transparency and consistency, which Commissioner Vestager commended.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

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