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EU Tax Centre comment

General Court annuls Commission's decision on Belgian excess profit ruling system

State Aid – General Court - Belgium – Excess profit ruling system – Selectivity – (No) aid scheme

On February 14, 2019 the General Court of the CJEU rendered judgment on the Belgian "Excess profit" tax ruling system case (T-131/16). Belgian tax legislation provided for the possibility of advance rulings allowing a company that is a member of a multinational group to make unilateral downward adjustments to its taxable base for "excess profits". The General Court ruled that the Commission had failed to demonstrate the existence of an aid scheme and hence, the Commission's decision of January 11, 2016 was annulled in its entirety.

Background

Under EU law (Article 108 of the Treaty on the Functioning of the EU), 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 toward tax transparency and fair taxation. This led to inquiries into whether the tax ruling practices of certain Member States were compatible 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.

If the Commission finds that aid is not compatible with EU law, it is further compelled to require the Member States concerned to abolish or alter such aid within a prescribed time period, as well as demand that the latter recover the aid from the taxpayers that have benefited. Broadly speaking, aid is incompatible with EU law if it distorts competition by, for example, favoring certain undertakings and thus affecting trade between Member States.

In December 2013, the Commission launched an investigation into alleged state aid granted by Belgium to resident entities that are part of a multinational group, by way of tax rulings allowing unilateral downward adjustments of their tax base. On January 11, 2016, the Commission concluded that the excess profit tax ruling system was a tax scheme which constituted State aid.

The first observation made by the Commission was that the excess profit tax rulings system constituted an aid scheme. This was an important observation as it implied that all rulings granted under this regime would be affected if the Commission's decision was upheld. The Commission further argued that the exemption provided for under the excess profit ruling system did not apply to all undertakings subject to Belgium corporate income tax equally and expressed concern that Belgium did not apply the arm's length principle properly. The Commission also pointed to the fact that taxpayers apparently had to make substantial investments or create employment in Belgium in order to be granted a Belgian excess profit tax ruling. As a consequence, the measure should be considered as a selective advantage for which there is no justification.

The Commission indicated that aid granted may have to be recovered by Belgium over a 10-year period. This could affect all rulings granted under the regime. The Commission estimated that the recovery amounted to approx. EUR 700 million in total.

The General Court decision

The General Court joined the appeals T-131/16 by the Belgian state and T-263/16 by Magnetrol International, one of the beneficiaries of excess profit rulings. Other beneficiaries of the disputed system have also appealed the Commission's decision.

The General Court examined the arguments put forward by Belgium challenging the Commission's conclusion that the acts providing for the excess profit system did not require further implementing measures, as would be necessary pursuant to the definition of an "aid scheme" under the EU Regulation for the application of Article 108 (Regulation 2015/1589, hereinafter "the Regulation").

The Court noted that, if individual aid was awarded without further implementing measures being adopted, the essential elements of the scheme must transpire from the provisions identified as the basis for that scheme. The Court observed that the Commission itself acknowledged that the essential elements of an aid scheme did not emerge from the acts that were identified as the basis of the excess profit ruling system, but from the sample of advance rulings assessed.

According to the Court, in order for an aid scheme to exist, the national authorities applying that scheme cannot have any margin of discretion when determining the essential elements of that aid and whether it should be awarded. Any intervention by national authorities should be limited to the technical application of the provisions of the scheme. The Court noted that, when issuing advance rulings in respect of the exemption in question, the Belgian ruling authority

carried out a case-by-case qualitative and quantitative assessment and enjoyed a genuine margin of discretion in deciding whether to grant the adjustment.

The Court further noted that, under the Regulation, the alleged aid scheme must define the beneficiaries in a general and abstract manner. The Court observed that companies that actually benefited from the adjustment are a narrower group than that defined under the disputed regime, i.e. companies which are part of a multi-national group. The Court therefore found that it cannot be concluded that the beneficiaries of the alleged aid scheme are defined in a general and abstract manner.

Having regard to the above points, the Court concluded that the excess profit ruling system did require further implementing measures and therefore ruled that the Commission wrongly concluded that the regime constituted an aid scheme. In the current proceedings, the Court did not have to address the existence of aid for individual rulings and if so whether aid was unlawful.

The Court also examined the Commission's argument on the existence of a systematic approach indicating the de facto existence of a state aid scheme. The Court observed that the Commission did not adequately explain the choice of the sample tax rulings examined, or why those rulings were considered sufficiently representative and therefore concluded that the Commission had failed to demonstrate the existence of such a systematic approach.

EU Tax Centre comment

The decision of the General Court may be appealed before the CJEU on points of law (including lack of competence of the General Court, breach of procedure, or an incorrect application of EU law). Appeals must be brought within two months of the notification of the decision by the General Court. It remains to be seen whether the Commission will decide to appeal the General Court's decision.

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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