

Tax Alert

European Commission investigates Gibraltar tax ruling practice

On 1 October 2014, the European Commission (“EC”) announced that it will examine the Gibraltar tax rulings practice from the perspective of the EU State aid rules. This decision comes as part of an on-going State aid investigation into the Gibraltar corporate tax system, which was opened in October 2013.

Gibraltar tax ruling practice

The Gibraltar tax system, which is currently being investigated, dates from 2010. The EU claims that the possibility for taxpayers to conclude tax rulings with the Gibraltar tax authorities was also introduced in 2010. They have reviewed 165 tax rulings granted by Gibraltar in the period between 2011 and August 2013 to a number of different companies. The EC are considering whether the Gibraltar tax authorities have granted tax rulings without an adequate evaluation of whether the companies' income has been accrued in or derived from outside Gibraltar and therefore is exempted from taxation in Gibraltar. Even if the Gibraltar tax authorities are given considerable margin of manoeuvre under the corporate tax regime of 2010, the EC notes that a misapplication of its provisions cannot be excluded at this stage.

The Gibraltar Government have, in response to the announcement, confirmed in an official press release that they will be very vigorously contesting the mistaken and unfair impression that the Commission appears to have that, ever since the Income Tax Act 2010 entered into force, the Income Tax Office grants formal tax rulings without performing an adequate evaluation

of whether the companies' income has been accrued in or derived from outside Gibraltar and therefore is exempted from taxation in Gibraltar. The practice of advanced tax rulings they argue is a well-established feature of Gibraltar's tax system dating to the years under the Income Tax Act 1952, which was adopted over 58 years before the current Act that is the subject of the EC's statement.

Furthermore, advanced tax rulings in Gibraltar are not concessionary tax arrangements. They are confirmations, issued by the Gibraltar Tax Authorities to tax payers, stating that certain income, if accrued or derived outside of Gibraltar, is non-taxable in Gibraltar. These confirmations merely reflect the treatment of non-Gibraltar derived and accrued income as stated in the Income Tax Act 2010. These rulings obtained by tax practitioners, on behalf of their clients are merely an additional assurance as obtaining these confirmations is not strictly necessary.

Possible State aid

Nevertheless, the EC estimates that potentially all assessed rulings may contain State aid, because none of them are based on sufficient information so as to ensure that the level of taxation of the activities concerned is in line with the tax paid by other companies, which generate income that is to be considered accrued in or derived from Gibraltar. This has led the EC to extend its on-going investigation into the 2010 Gibraltar regime to tax rulings.

Accrued in and derived

In its statement, the EC does not call into question the territorial system of taxation, which is the reference system of corporate taxation under the Act and which has been in operation in Gibraltar since the 1950s. This is an important issue for Gibraltar because its entire corporate tax system has been underpinned by the territorial system since inception.

Link with other State aid investigations

The expansion of the Gibraltar investigation comes shortly after the publication of the opening decisions in the high profile cases of Apple and (allegedly) Fiat on 30 September 2014. Both cases involved the use of tax rulings in the context of transfer pricing rules.

The EC is increasingly focusing on the issue of fiscal State aid. Whilst the decisions in the aforementioned cases are not directly linked to the present investigation into the Gibraltar ruling practice, they are indicative of the current climate in relation to the State aid rules.

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