

## **Work Package 2015 – guidelines on the issuing of tax rulings**

### **Background**

1. As part of its 2015 Work Package the Group has agreed to develop a set of guidelines on the conditions and rules for the issuance of tax rulings, that is standard requirements for good practice by Member States based on general principles.<sup>1</sup> The development of these guidelines also forms part of the Group's work programme under the Netherlands Presidency.<sup>2</sup>
2. Significant progress has already been made in this area and the purpose of this paper is to review this work and propose a consolidated text based on it. The Commission Services are taking this approach in view of the need to find common solutions at the EU level to facilitate the effective, swift and coordinated implementation by Member States of anti-BEPS measures at the EU level.<sup>3</sup>

### **Summary of previous work**

3. The relevant documents are;
  - The Commission Services paper discussed by Working Party IV in February 2015 (see annex 2);
  - The 2015 OECD BEPS Report on Action 5;<sup>4</sup>
  - The guidance relating to rulings set out in the Group's November 2010 report to ECOFIN which considered transparency aspects of rulings (see annex 3), and;
  - The EU Joint Transfer Pricing Forum ('JTPF') advance pricing agreement ('APA') guidelines.<sup>5</sup>

#### *2015 Working Party IV Discussion Paper*

4. The discussion paper dealt with aspects of rulings which were not expected to be covered by the Commission's proposed Directive on the automatic exchange of rulings which was published in March 2015. The discussion paper began with an introduction on the purpose and

<sup>1</sup> Document 14302 FISC 159.

<sup>2</sup> Room document 1 of 2 February 2016.

<sup>3</sup> Council conclusions on corporate taxation: base erosion and profit shifting, 8 December 2015 (15150/15 FISC 185).

<sup>4</sup> *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD (October 2015), p56-58.

<sup>5</sup> 'Guidelines for advance pricing agreements in the European Union' in European Commission, *Communication on the work of the EU Joint Transfer Pricing Forum*, COM(2007) 71 final (26 January 2007).

aim of rulings. This was followed by a list of fifteen suggested standard requirements for a good rulings practice based on general principles.

#### *2015 BEPS Action 5 Report*

5. The 2015 BEPS report set out a list of best practices intended to reinforce the transparency advancements made in the OECD framework for compulsory spontaneous exchange of information on rulings. They are applicable to both general and taxpayer specific cross-border rulings. The report makes separate recommendations covering the following issues;
  - the process of granting a ruling – recommendations A(a) to (j);
  - the term of the ruling and subsequent audit procedures – recommendations B(a) to (d), and;
  - the publication and exchange of information – recommendations C(a) and (b).

#### *2010 Code Guidance*

6. The guidance consists of two paragraphs. These say that Member States should ensure that their rulings procedures are set out in a transparent legal and administrative framework of legislation or administrative guidelines. Rulings suitable for horizontal application in similar situations should be published, be reflected in updated guidance, or be made otherwise publicly available.

#### *EU APA Guidelines*

7. The guidelines were agreed in the JTPF in 2007. The JTPF examined the pros and cons of APAs in depth and concluded that they provided significant advantages for taxpayers and tax administrations, particularly the certainty over the tax treatment of the transactions in the APA. The JTPF therefore felt that it was appropriate to identify best practices for APAs in the EU.
8. The guidelines lay down procedures for an efficient APA process and detail the stages usually found in an APA and what should happen at each stage. They focus on bi- and multilateral APAs but they also include a section on unilateral APAs. The guidelines envisage a four stage APA process and describe what should happen at each stage.
9. **Comparison of EU and OECD work**
10. The conclusions in the 2015 BEPS Report were originally based on the Working Party IV proposals. Therefore, although the BEPS conclusions are more detailed, the two sets of recommendations are very similar. There are only minor differences regarding the process of granting a ruling. These include a general reference to EU law and specifically to state aid in paragraph 7 of the Working Party IV document. The document also suggests that rulings should be valid for a fixed period of time (paragraph 13), whereas paragraph B(a) of the BEPS conclusions limit this to APAs.
11. Section B of the BEPS conclusions also covers subsequent audit/checking procedures. These were not included in the Working Party IV paper but are an important element.

12. Section C of the BEPS conclusions covers the publication and exchange of rulings. It says that general rulings should be published whilst taxpayer specific rulings should remain confidential but be exchanged under the OECD framework, bilateral treaties or EU law. The 2010 Code guidance notes that general rulings need not be published individually. They can instead be reflected in published guidance.
13. The EU APA Guidelines contradict neither the BEPS conclusions nor the Working Party IV document. The Guidelines simply set out in more detail how the APA process should be organised.
14. Therefore the work carried out so far in this area has been complementary.

### **State aid**

15. The Commission is currently investigating whether certain tax rulings are in breach of EU state aid rules. The investigations are led by DG Competition and are about applying Article 107 TFEU. Tax rulings should be issued in full compliance with EU law, and should not constitute state aid pursuant Article 107 (1) TFEU
16. The draft guidelines do not consider the application of State Aid rules, which fall within the exclusive competence of the Commission. They are therefore without prejudice to any guidance on State Aid rules which may be presented by the Commission in the future.

### **Duration of a ruling**

17. Rulings can be divided into two categories. The first covers situations in which events after the ruling have been given can affect its validity. The most obvious example of this type of ruling is an advance ruling covering a number of future years, e.g. an APA, where the economic assumptions it was based on can quickly change. Such rulings should only be given for a fixed period of time. This limits the scope for taxpayers to receive benefits to which they are not entitled, e.g. where they fail (deliberately or otherwise) to notify the tax authority about changed circumstances.
18. The second type of ruling covers situations where the validity of the ruling cannot be affected by events after the transaction covered by the ruling. Examples of this type of ruling include decisions where the answer is either “yes” or “no”, e.g. whether a particular transaction was undertaken for avoidance reasons or whether certain expenditure incurred by a company is “R&D expenditure” for the purposes of national law. However, if such rulings are based on accurate information, future events cannot affect their validity so there is no reason for them to be issued for a fixed period of time.
19. The same situation can arise with rulings relating to the taxation of capital gains. In such cases the treatment of one transaction may determine the treatment of a second transaction occurring many years later.
20. The Commission Services therefore thinks that not all rulings should be given for a fixed period of time. Instead, rulings should be given for a fixed period of time if events occurring after they have been issued can affect their validity.

## **Definition of a Ruling**

21. The Working Party IV paper concerned cross-border rulings. The 2015 BEPS Report defined rulings as “any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely.” However, the best practices identified in the Report only apply to cross-border rulings.<sup>6</sup>
22. When the Code Group discussed its new Work Package in 2015 it was decided to delete the words “cross-border” from the proposed work on guidance on the issuing of rulings. This was on the basis that paragraph A of the Code of Conduct refers to measures which affect, or may affect, in a significant way the location of business activities in the EU. Rulings relating solely to domestic tax measures may have this effect, for example by the relaxation of legal provisions at an administrative level.<sup>7</sup>
23. Therefore the Commission Services believe that the conditions and rules described above should apply to domestic and cross-border rulings. This will obviously make no difference to Member States obligations to exchange rulings spontaneously or automatically under EU law as these are set out in the relevant Directive.

## **Proposed guidelines on the issuing of rulings**

24. Annex 1 contains the draft guidelines on the issuing of rulings. They reflect the BEPS conclusions with additions and deletions made in track changes to take account of work undertaken in the EU. These changes are described below.
25. The introductory paragraph sets out the definition of a ruling for the purposes of the guidelines. It is taken from the BEPS conclusions. The difference is that the draft guidelines are not restricted to cross-border rulings as is the case in the OECD framework.
26. The changes to paragraph A(c) [insert a reference to EU law and state aid].
27. In paragraph A(h) specific references to APA documentation requirements have been deleted as these are covered in the EU APA Guidelines, which are referred to in the new paragraph A(k). Other general references to APAs in the text have not been deleted.
28. Paragraph B(a) has been altered to reflect the Commission Services view that in many cases rulings should be issued for a fixed period of time.
29. Paragraph C(a) has been amended to remove the reference to the official languages of the OECD and “general rulings”. The latter is a term relevant to the OECD framework for the compulsory spontaneous exchange of information on rulings. It has been replaced with a reference to “rulings suitable for horizontal application”.
30. The 2015 BEPS Report says that general rulings should be published. This has been retained but the alternative practice of publishing the content of such rulings as updated guidance has been added, to reflect the guidance agreed by the Group in 2010.

---

<sup>6</sup> OECD, *Countering Harmful Tax Practices More Effectively*, p47 & 56.

<sup>7</sup> Room document 1 of 21 October 2015.

31. Paragraph C(b) deals with the exchange of information. It has been altered to focus on the legal obligations in the EU. Obviously, the question of whether a ruling should be exchanged will be determined by the relevant hard and soft law instrument.

## Annex 1

### Code of Conduct: guidelines on the conditions and rules for the issuance of tax rulings – standard requirements for good practice by Member States [DRAFT]

#### A. Process of granting a ruling

- a. Official rules and administrative procedures for rulings should be identified in advance and published, and they should include: (i) the conditions for the applicability of the ruling process; (ii) the grounds for denying a ruling; (iii) the fee structure, if applicable; (iv) the legal consequences of obtaining a ruling; (v) possible sanctions for incomplete or false information provided by a taxpayer; (vi) the conditions for revoking, cancelling or revising a ruling; and (vii) any other guidance that is deemed necessary in order to make the rules sufficiently comprehensive and clear to taxpayers and their advisors.
- b. Tax rulings should be issued, and any administrative discretion in granting a ruling should be exercised, only within the limits of, and in accordance with, the country's relevant domestic tax law and administrative procedures, and should be limited to determining how that law and/or any administrative procedures apply to one or more specific operations or transactions intended, planned or undertaken by the taxpayer.
- c. Tax rulings should respect applicable international obligations that are incorporated into domestic tax law, for instance, obligations under relevant bilateral treaties [REDACTED].
- d. Tax rulings should be issued in writing.
- e. Tax rulings should only be issued by the competent government office or authority in charge of this task. Where a ruling is granted by another government office, it should be subject to approval by the competent office.
- f. It is recommended that at least two officials are involved in the decision to grant a ruling or there is at least a two-level review process for the decision, in particular in cases where the applicable rules and administrative procedures explicitly refer to discretion or the exercise of judgement by one of the relevant officials.
- g. Tax rulings should be binding on the tax authority (to the extent permitted by domestic law [REDACTED]), provided that the applicable legislation and administrative procedures and the factual information on which the ruling is based do not change after the ruling has been granted.
- h. Taxpayers should apply for a ruling in writing and provide a full description of the underlying operations or transactions for which a ruling is requested. The information should be included in a file supporting the ruling application (the "ruling file"). The ruling file should also include information on the methods and facts for determining the key elements of the tax authority's view. Any additional information or relevant facts which are brought to the attention of the tax

authority (i.e. in meetings or oral presentations) should be recorded in writing and also be included in the ruling file.

- i. Information concerning the applicant (including taxpayer's name, tax residency, tax identification number, commercial register number for corporations and companies) and tax advisor/tax consultant involved should be included in the ruling file and/or the ruling itself.

■ Before taking a decision, the person/s providing the ruling should check that the description of the facts and circumstances is sufficient and justifies the envisaged outcome of the ruling. They should also check that the ruling outcome is consistent with any previous rulings concerning similar legal issues and factual circumstances.

■

*B. Term of the ruling and subsequent audit/checking procedure*

- a. APAs should only be for a fixed period of time and should be subject to review before being extended. ■  
■
- b. Taxpayers should notify the tax authority about any material changes in the facts or circumstances on which a taxpayer-specific ruling (including an APA) was based, as soon as possible so that the tax administration can assess whether to exchange this information with another country. As part of this notification process, taxpayers should notify tax administrations of any material changes to the related parties with which they transact (for transactions covered by the ruling) and any other changes which would impact on who information should be exchanged with.
- c. Effective administrative procedures should be in place to periodically verify that the factual information relied upon and assumptions made when granting taxpayer-specific rulings remain relevant throughout the period of validity of the ruling. This may be particularly necessary in the case of APAs where any underlying assumptions and decisions could be affected by changes in economic circumstances.
- d. Rulings should be subject to revision, revocation or cancellation, as the case may be, in the following circumstances:
  1. if the taxpayer makes a misrepresentation or omission in applying for the ruling that calls into question the validity of the ruling;
  2. if the relevant laws change;
  3. if there is a relevant and significant change (i) in the facts or circumstances upon which the ruling was based or (ii) in the validity of the assumptions made.

*C. Publication and exchange of information*

- a. [REDACTED]
- [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] and made easily accessible to other tax administrations and taxpayers. Ideally, [REDACTED] rulings should be published on the tax administration's website. If not published in full, the website should contain short summaries with links to where the ruling is accessible in full. Publication should take place as soon as it is practicable after the ruling is granted and where possible within six months. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- b. [REDACTED]
- [REDACTED] [REDACTED]
- [REDACTED] the OECD framework for compulsory spontaneous exchange of information on rulings, [REDACTED] or [REDACTED].



## **Annex 2**

### **Working Party IV Proposals, February 2015<sup>8</sup>**

1. Tax rulings should be issued in writing.
2. Taxpayers should apply in writing and give a full description of the underlying operations or transactions. Any additional information or relevant facts which are brought to the attention of the competent authority orally (i.e. in meetings or oral presentations) shall take the form of written minutes and be included in the file of the application for a ruling.
3. Either the application file (preferable) or the ruling decision (confirmation) itself shall include a full set of information on the applicant (taxpayer with name, residence, VAT n° or tax identification number, commercial register number for corporations and companies), the tax adviser/tax consultant involved.
4. Tax rulings should be binding on the tax authority provided that the applicable legislation and disclosed structures and facts of the case do not change ex post.
5. Changes in the economic environment that alter the relevant and significant underlying facts and circumstances of a specific case (i.e. significant changes in personnel cost or cost of raw material; in the number of staff or increases /reduction in the sales) should trigger a revision or withdrawal of a ruling, even within the period for which it was originally issued to apply.
6. Tax rulings should be issued only within the limits of the relevant national tax law, i.e. how national tax laws apply to one or more specific operations and transactions intended or planned by the taxpayer.
7. Tax rulings should be issued in full compliance with EU law, and should not constitute state aid pursuant Article 107 (1) TFEU.
8. Tax rulings should respect double taxation conventions concluded by a Member State.
9. Official rules and administrative procedures on rulings should be identified in advance and published, e.g. fee structure, legal consequences, possible sanctions for incomplete or false information provided by a taxpayer within the framework of national rules.
10. Tax rulings should only be issued by the competent government office or authority in charge of this task.
11. It should be obligatory that at least two officials (either internally or externally shown) give their approval of decisions on rulings or confirm applications for rulings.
12. Before taking a decision, the competent authority(ies) should check that the description of facts and circumstances is sufficient and justifies the envisaged outcome of the ruling.
13. Duration: tax rulings should only be valid for a certain period of time, e.g. 5 years.

---

<sup>8</sup> Commission Services, *Working Party IV Discussion Paper: possible guidelines for cross-border tax rulings* (meeting of 6 February 2015).

14. Information on the methods for determining some of the key elements (transfer prices, mark-ups, interest rates, profit margins; etc.) should be included in the file of the ruling.
15. The fact that a tax ruling has been issued to a company should be made public in a registry which should also state the key issues contained in the ruling and its duration.

## **Annex 3**

### **Code of Conduct Group – guidance on administrative practices, November 2010<sup>9</sup>**

The Group's report to ECOFIN in November 2010 notes that, with respect to improvements in the field of transparency the Group agreed the following guidance;

- a. To the extent that a MS accommodates the advance interpretation or application of a legal provision to a specific situation or transaction of an individual taxpayer, the underlying procedures should be embedded in a transparent legal and administrative framework that is public legislation or administrative guidelines.
- b. Where the advance interpretation or application of a legal provision to a specific situation or transaction of an individual taxpayer is suitable for horizontal application in similar situations, this interpretation or application should be published or be reflected in updated guidance, or be made otherwise publicly available.

---

<sup>9</sup> Document 16766/10 FISC 139.