

Taxand's Take: Recent European Tax Developments

by Taxand Member Firms

Luxembourg's Advanced Tax Clearance Practice Formalized

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The LuxLeaks affair has brought Luxembourg tax rulings or Advance Tax Clearances to the center stage. However, procedures around the filing of these documents have already been under review. Taxand Luxembourg presents new modifications to the Advanced Tax Clearance (ATC) process.

In mid-October, a draft law announced a new set of measures for the future (so-called *Zukunftspak*) which evoked, among many other issues, the subject of tax rulings in Luxembourg. The draft law has now become law and a Grand-Ducal Regulation provides some further insight into these changes. From January 1, 2015, the process of filing advance tax clearances has seen some modifications.



Formal Requirements Applicable To The Filing Of ATCs

The formal requirements are more or less a formalization of the current practice. The request has to include the following information:

- Detailed description of the taxpayer requesting the ATC (name, address, tax number), of the other parties involved, together with a detailed description of their activities;
- Detailed description of the contemplated operation(s);
- Detailed and motivated analysis of the related legal issues;
- Confirmation that the information provided to analyze the request is complete and accurate.

ATC Commission

If the ATC request deals with company taxation issues, the request will first be submitted for opinion to the ATC Commission. The Commission

will be able to hear the requesting taxpayer to obtain additional information, if needed. It is up to the Commission to decide whether such a meeting is necessary or not. The ATC Commission will then provide its opinion to the tax inspector in charge, who will take the final decision. Even though the decision power remains with the tax inspector, it can be expected that the opinion of the Commission will be followed in practice, because the aim of this Commission is also to make sure that the positions taken by the tax authorities are harmonized.

While the new ATC procedure applies only to ATC requests filed as from January 1, 2015, ATC requests filed before 2015 and which are in the process of being reviewed by the tax authorities will also be subject to a review by the new ATC committee based on the new rules.

Fee For Handling Of ATCs

While no fee was due to the tax authorities in the past, a fee will apply to all ATC requests which deal with company taxation issues in future. The amount of the fee will be determined by the tax authorities upon receipt of the ATC request and will range between EUR3,000 and EUR10,000, depending on the complexity of the request and the amount of work required. The fee will be payable within one month.

Legal Force And Validity Of ATCs

The ATC is valid for a time period of maximum five tax years and will have a binding

effect on the tax authorities, except in the following situations:

- The situation/operations described are not accurate;
- The situation/operations performed differ from the ones described in the ATC request;
- It appears that the ATC is no longer in line with Luxembourg or international tax law.

While it is not specifically stated in the text of the law, the commentaries to the law make it clear that it is not possible to appeal against an ATC.

Publication

ATCs will be published in synthetic and anonymized form in the annual report of the direct tax authorities.

This is not a sweeping reform of the tax ruling system. Most of the changes introduced are simply a "formalization" of practices already applied. That said, the introduction of an ATC Commission could render the process more efficient in the long run. By acting as a filtering mechanism, the ATC Commission delivers a preliminary opinion to the tax inspector who then should be able to act more quickly. Furthermore, the taxpayer or representative/advisor may need to provide additional information to the ATC Commission so that it may provide a complete and well-informed opinion to the tax inspector. All in all, there will be increased visibility in terms of the timing of the tax ruling process.

Planned Vital Changes In The Polish Tax Ordinance Stay In Spotlight

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Newly proposed draft amendments to the existing Polish Tax Code are currently being discussed in order to pass them through within the year. Taxand Poland provides an insight into the predicted tax updates to the existing Tax Code, which although not implemented yet, once in force will have a substantial impact on taxpayers.

The draft amendments to the Polish Tax Code (still at a legislative level) assume vital changes concerning (among others):

- Anti-avoidance clause and protective opinions;
- Applications for tax rulings;
- Advance pricing agreements (APAs);
- Unification of electronic forms for accounting books and accounting evidence.

Anti-Avoidance Clause And Protective Opinions

The anti-avoidance clause seems to be the most controversial amendment planned for implementation into the Tax Code. The clause is aimed at preventing taxpayers from creating artificial structures dedicated mainly to obtain tax benefits. The clause in the proposed wording raises doubts over

the meaning of particular legal constructions, such as "artificial structures." Therefore, new protective opinions are laid out to protect multinationals. These opinions:

- Are aimed at protecting taxpayers against the application of the anti-avoidance clause;
- Will be issued by the Ministry of Finance after analysis of tax and economic aspects of the transaction in question;
- Shall be issued without undue delay and no later than within six months;
- Will be subject to fee in the amount of PLN15,000–PLN30,000 (about EUR3,600–EUR7,300);
- Will provide protection similar to that given by the individual tax interpretations (with respect to the anti-avoidance clause).

Tax Rulings

Pursuant to the planned changes, a joint application for individual tax rulings is going to be introduced in Poland. This is great news for taxpayers who act in capital groups conducting their business activity in Poland and who are subject to different tax authorities. Currently, the same business transaction may have different tax consequences for the transactional parties just because it is analyzed by different tax authorities.

Advance Pricing Agreements (APAs)

The proposed changes will cover the following:

- Extension of an APA's scope by cost sharing (cost contribution) agreements that were not allowed before;

- Implementation of an APA rollback (*i.e.*, currently an APA is in force only from the day when the APA decision is delivered to the taxpayer. After amendments, an APA could be in force from the day when the application for the APA was filed by the taxpayer);
- A taxpayer's right to renew an APA for new five-year periods (previously, the APA was prolonged for the five-year period);
- More than one transaction can be described in one APA application;
- The taxpayer will be obligated to propose an alternative transfer pricing method for the transaction if the tax authorities do not agree with the initial method proposed. The taxpayer will also have to present in the APA application more detailed information on how the transfer pricing method is applied, including the critical conditions (boundary conditions) when the transfer pricing method is applicable for the transaction.

Unification Of Electronic Form Of Accounting Books And Accounting Evidence

It is preferred for the accounting books and accounting evidence prepared in an electronic format that they are kept in a unified and widely used

standard XML. This update is compliant with the OECD's concept of Unified Control File.

All of these tax updates (when implemented) will have a great impact on the scope of protection and a taxpayer's position in Poland. In particular:

- When conducting business restructurings, multinationals should consider filing motion(s) for protective opinions which may prevent the application of the anti-avoidance clause;
- When compiling APAs, multinationals will need to prepare more complex data and more detailed information solely to be able to begin the APA process;
- Unification of the electronic form of accounting books and accounting evidence may require some adjustments to the taxpayer's electronic accounting systems. Furthermore, as the editable form gives tax authorities deeper insight into taxpayers' accounting books, the tax controls might be more detailed.

Taking into consideration the broad scope of proposed tax updates, multinationals should follow this topic closely, as many details might change through legislative works.