Gibraltar Tax Alert – European Commission state aid investigation of tax rulings extended

The European Commission announced on 7 October 2016 that it is extending the scope of its ongoing state aid investigation of rulings issued by the Gibraltar tax authorities, which began with a review of the tax ruling procedure, to include a formal investigation of whether the tax ruling system and/or the specific rulings reviewed violate the EU state aid rules (for prior coverage, see the World Tax Advisor article dated 10 October 2014). Interested parties are invited to submit comments within one month of the date of the announcement's publication, i.e. by no later than 7 November 2016.

Background

In October 2013, the Commission initiated a formal investigation regarding whether the Gibraltar Income Tax Act 2010 (ITA 2010) selectively favors certain categories of companies, in breach of the EU state aid rules. The investigation focused on the exemption for certain passive income available under the ITA 2010 at the time.

The ITA 2010 came into effect on 1 January 2011, when the previous tax act was repealed. At that time, intercompany interest income and royalty income were not within the scope of taxation. The Gibraltar Government subsequently amended its tax legislation to bring both of these sources of income within the scope of corporate tax in July 2013 and January 2014, respectively.

The European Commission's preliminary investigation of Gibraltar's tax system, which dates back to 2012 (in parallel with the formal investigation), also included a review of the tax rulings procedure. As a result, a sample of 165 tax rulings out of a total of 340 rulings granted were selected by the Commission for a review covering the years 2011 to 2013. This sample is summarized in the Commission's published letter dated 1 October 2014, which is reproduced in the announcement published on its website on 7 October 2016.

European Commission announcement

The review of the selected rulings has resulted in the European Commission extending its formal state aid investigation to include an assessment of whether the tax rulings system and the 165 rulings reviewed result in a breach of the EU state aid rules. The preliminary comments made by the Commission are as follows:

- There does not seem to be any designated procedure for the request of information by the Gibraltar tax authorities;
- The Gibraltar tax authorities do not conduct any substantive analysis or provide reasoning in the tax rulings; and
- There may be misapplications of the provisions of the ITA 2010 in the tax ruling practice.

Government response

The Gibraltar Government is confident that the tax rulings issued do not constitute EU state aid, since they merely confirm the application of legislation to the particular set of facts and circumstances provided by the parties requesting the ruling, and the rulings are caveated as being dependent on the facts and circumstances provided and on current legislation; any deviations would result in the ruling becoming invalid. The Income Tax Office reportedly has reviewed the 165 rulings that were issued and listed in the European Commission letter and is confident that none of the rulings is incorrect based on the ITA 2010, in light of the background provided when the ruling was requested.

The Government also claims that the rulings have been applied across the board and not to a particular industry, category or group of taxpayers and, therefore, they do not indicate any type of selectivity.

Comments

Companies included in the list of 165 rulings selected by the Commission should review the facts and circumstances applicable to the ruling they received and consider submitting detailed comments to the Commission in respect of its investigation before the deadline date.

Other companies (including those not in the 165) that have obtained rulings under the ITA 2010 should review their own rulings to assess their position and monitor the progress of this matter closely.

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