

Public release of the European Commission's State aid opening decision in McDonald's Luxembourg Tax Alert

On June 6th, the European Commission published its opening decision in connection with two Luxembourg tax rulings granted to a McDonald's Luxembourg entity (McD Europe franchising S.à.r.l (Luxembourg): "McD Europe" in March and September 2009.

This opening decision does not prejudge the final outcome of the EC's formal investigation. Tax measures for companies would be:

Facts

McD Europe acquired beneficial ownership of a number of franchise rights intangibles that were subsequently allocated to its US Franchise Branch. The US Franchise branch maintained operations within the US and was controlled by a Branch Manager.

The initial ruling of March 2009 confirmed that the US Franchise Branch constituted a permanent establishment and that on the basis on articles 7 and 25 of Luxembourg-US double tax treaty ("DTT"), the profit imputable to the branch was subject to tax in the US and tax exempt in Luxembourg. This ruling further requires that proof be submitted on a yearly basis that those profits have been declared and are subject to tax in the US.

A revised ruling was introduced explaining that the activity performed by the Branch in the US was not considered according to US domestic tax rules as US trade or business and therefore was not effectively taxed in the US and confirmed that the effective taxation in the US was not required by the Luxembourg US DTT.

Luxembourg views

Luxembourg in its response to the Commission confirms the tax treatment contained in the revised ruling is in line with Luxembourg tax law and constituted an interpretation of the relevant provisions of Luxembourg tax law and in line with the provisions of the DTT the profit derived at the level of the PE is tax exempt in Luxembourg.

Commission views

In its opening decision, the Commission considers that the revised tax ruling can be considered as State aid mainly on the grounds that:

- The revised ruling gives an interpretation that contradicts both the provisions of the Luxembourg-US DTT and the Luxembourg law which transposes that DTT into national law and which, as its guiding principle, requires worldwide taxation of profits.
- Since, the US branch does not constitute a permanent establishment for US tax purposes, the United States cannot tax any income attributed to that branch.

Your contacts

Raymond Krawczykowski

Partner - Tax Leader

Tel/Direct: +352 451 452 500

rkrawczykowski@deloitte.lu

François Guilloteau

Partner - Cross-Border Tax

Tel/Direct: +352 451 452 577

fguilloteau@deloitte.lu

Bernard David

Partner - International Tax Leader

Tel/Direct: +352 451 452 799

bdavid@deloitte.lu

Deloitte Luxembourg

560, rue de Neudorf

L-2220 Luxembourg

Tel: +352 451 451

Fax: +352 451 452 401

www.deloitte.lu

Deloitte is a multidisciplinary service organisation which is subject to certain regulatory and professional restrictions on the types of services we can provide to our clients, particularly where an audit relationship exists, as independence issues and other conflicts of interest may arise. Any services we commit to deliver to you will comply fully with applicable restrictions.

Due to the constant changes and amendments to Luxembourg legislation, Deloitte cannot assume any liability for the content of this leaflet. It shall only serve as general information and shall not replace the need to consult your Deloitte advisor.

About Deloitte Touche Tohmatsu Limited:

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/lu/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

Deloitte provides audit, tax, consulting and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries, Deloitte brings world-class capabilities and deep local expertise to help clients succeed wherever they operate. Deloitte has in the region of 200,000 professionals, all committed to becoming the standard of excellence.

© 2016 Deloitte General Services

Designed and produced by MarCom at Deloitte Luxembourg