

# Advance Tax Rulings

A short overview of the current situation in Belgium since the introduction of the new advance ruling procedure

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# The need for law and order, legal comfort and certainty in tax matters - A brief historic overview

- Individual agreements with the tax administration
- Info-cap-rulings
- Written advance agreements on specific income/registration tax matters (Article 345 ITC, 1991; Article 18 and 106 RTC)
- Written advance decisions on specific income tax matters (RD May 3, 1999)
- Written advance decisions on “all” tax matters (Law of December 22, 2002, RD January 30, 2003, hereafter the “New Law”) replacing all but the individual agreements with the tax administration
- Specific: coordination center recognition based on specific legislation (RD 187, as amended)

# Individual agreements

- Legal basis: general principles of “proper governance of government”, “trust” and “legal certainty”, as e.g. reflected in Article 50 paragraph 1 relating to professional expenses
- Agreements must relate to facts (e.g. depreciation schedule of assets, amount of costs incurred on behalf the employer, etc) – cannot relate to the proper application of the tax laws (principle of “public order”) e.g. amount of tax base vs. tax exemption or reduction (requires explicit statutory base)
- All levels of the various tax administrations, at any moment (before or after a particular transaction has occurred etc), written or implicit, i.e. after a tax audit
- Binding – termination by the tax administration only for the future. Administration applies retroactivity in two cases: (i) incorrect or false data; and (ii) new circumstances
- Flexible – no uniformity – not published

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## Info-cap-rulings

- Informal contribution of goodwill/know how by parent company, as a result of which the tax administration agrees to treat part of the taxable profit as a an asset that can be depreciated over ten years (linear)
- Decided by the Council of Ministers after positive advice of the Service of Advance Tax Decisions and the Tax Group of the Foreign Investment Office
- In principle abolished by the New Law

# Written advance decisions on specific income tax/registration tax matters

- Origin: Supreme Court rules several times at the end of the 1980's that the "economic reality" is not a principle on which the tax administration can base itself to requalify the legal qualification of a particular transaction ( i..a. Cass March 22, 1990, *Au vieux St Martin*)
- Consequence: statutory changes (i) enabling the tax administration to disregard the legal qualification if this qualification does not comply with the "economic reality" even if the parties accept all legal and practical consequences of the legal qualification of a transaction (*Brepols* jurisprudence) and (ii) introducing the requirement that certain transactions must meet the "justified economic or financial needs" test
- Problem lack of definition of the statutory test "justified economic or financial needs"
- Solution: written advance decisions on specific income tax/registration tax matters

## Features of the 1991 written advance decisions system (Article 345 ITC /Article 18 and 106 RTC)

- Only a limited number of written advance decisions possible, i.e.:
  - (a) in the context of obtaining an exemption e.g. corporate reorganizations, transfer of assets to a tax exempt entity
  - (b) In the context of deduction of losses e.g. change of control
  - (c) In the context of the participation exemption (DBI - RDT)
- Binding provided all elements of the transaction were disclosed in good faith and prior to the implementation of the transaction
- More legal certainty than individual rulings - published
- Too limited – in practice many ruling requests were declined – no real possibility to appeal

# Written advance decisions on specific income tax matters (RD May 3, 1999)

- Broader application of written advance rulings but still limited in scope
- Rulings could relate to:
  - (a) Depreciation of immaterial or material fixed assets
  - (b) Existence of a permanent establishment
  - (c) Articles 26 and 54 ITC: transfer prices arm's length nature etc
  - (d) Registration duties on capital contributions;
  - (e) VAT on extra –EU deliveries of goods and services
- Evaluation: Idem as 1991 regime but broader in scope and legal basis was contested

## Written advance decisions on “all” tax matters (Law of December 22, 2002, RD January 30, 2003, hereafter the “New Law”) replacing all but the individual agreements with the tax administration

- **Scope**

“Advance written rulings can be obtained from the Federal Finance Department and can relate to **all Belgian federal taxes (income tax, VAT, registration duties, customs and excise etc)** as well a to regional taxes (inheritance tax) collected y the federal government”

- **Conditions**

- (a) Specific situation
- (b) Transaction for which ruling is requested has not yet been implemented
- (c) Transaction does not fall into the category of Exclusions:
  - (i) Identical to transaction already implemented or subject to pending litigation;
  - (ii) Statutory or regulatory exception ( see RD January 17, 2003 lists seven matters on which no rulings are granted (tax rates, tax calculation, amounts and percentages of taxes, the return, audit, etc)
  - (iii) Application of the tax collection laws
  - (iv) Only for income taxes: a tax haven is involved
  - (v) Only for income taxes: the transaction has no economic substance in Belgium

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- **Procedure**

A written request must be submitted in Dutch, French or German. enclosure can be submitted in English but the Administration can ask for translations of the relevant documents. The request must convey:

- (a) the identity of the applicant and all parties involved in the transactions;
- (b) the description of the activities of the applicant;
- (c) the full description of the special situation or transaction(s);
- (d) the reference to applicable legal provisions and regulations serving as a basis for the ruling;
- (e) a detailed argumentation that sustains the tax treatment proposed by the applicant/taxpayer;
- (f) all relevant draft documents and if appropriate, a copy of the requests relating to the same subject submitted to the tax authorities of the Member States of the European Union or other States with whom Belgium has signed a double taxation treaty and the decisions relevant to those requests;
- (g) any new element relating to the intended situation or operation.

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- The Service within the Federal Finance Department (“Service”) responsible for advance tax rulings shall acknowledge receipt of an application within 5 business days
- Once a file is deemed complete a new acknowledgment is sent to the taxpayer and a decision can be expected within 3 months ( non binding term) – Average term of response is now 148 days (!)-in May 2004 324 requests had been filed – 153 treated
- The goal is to organize the Service as an independent government service within the Federal Finance Department staffed with approx 20 high level officials (Law of June 21, 2004 and RD of August 13, 2004) – today 17 officials are present
- The taxpayer can request to be heard
- A decision of the Service is valid for five years but this period can be longer or shorter if justified. The decision is published in a neutral format on the internet ([www.fisconet.be](http://www.fisconet.be))

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- However the decision will not bind the Administration in one of the following cases:
  - (a) when the conditions for the advance decision are not met (retroactive);
  - (b) when it turns out that the description of the situation or transactions is incomplete or incorrect, or when essential elements of the transactions not carried out in the way described by the applicant (retroactive);
  - (c) in case of amendment of the provisions of the treaties, Community law or internal law applicable to the situation or operations forming the subject of the decision (ex nunc);
  - (d) when it turns out that the decision is not in conformity with the provisions of the treaties, Community law or internal law (retroactive!);
  - (e) when the principal consequences of the situation or transactions are modified by one or more related or subsequent elements directly or indirectly attributable to the applicant (ex nunc).

# Conclusions

- Legal uncertainty and unpredictability of tax audits by the Federal Finance Department as well as the legal certainty offered by competing tax jurisdictions e.g. Netherlands, Luxembourg forces Belgium to adopt this in principle “attractive” advance tax ruling regime
- The attractiveness stems from its broad scope, its binding nature, its long term application (i.e. 5 years but can be more)
- The major handicap is today the time it takes to obtain an advance ruling. It is essential that the decision period is limited to maximum three months and that the officials staffing the Service are of the “tax cooperative” type (as opposed to the “tax audit” type). A field trip should be organized to the Netherlands,; Luxembourg and Switzerland. In addition it is worth mentioning that some of the sanctions (retroactive nullity) are in certain cases exaggerated.