

ADVANCE DECISIONS IN BELGIUM

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1. Introduction

Belgium has a long tradition of informal tax agreements between taxpayers and local or central tax offices. Taxpayers can rely on these informal agreements for past acts but only provided no tax law has been breached. The downside of such agreements is that they can be cancelled for future tax years and that no standard proceedings are available.

In the wake of the "valid economic or financial needs" requirement introduced for certain reorganisations in 1991 and the 1993 introduction of a general anti-abuse measure, an Advance Rulings Commission was operational between 1993 and the end of 2002 with a limited working scope. A second step was taken in 1999 with the creation of an Advance Decisions Service. The scope of the available rulings was still restricted to the application of certain tax provisions only, including transfer pricing. In a third step, the Act of 24 December 2002 (promulgated on 31 December 2002) introduced the legal basis for a generalised rulings system as from 1 January 2003, allowing taxpayers and prospective investors to apply for an advance decision on the application of direct or indirect tax laws to a particular situation or transaction, provided it had not yet had any tax effects. The Commission was simultaneously abolished, and all ruling requests had to be filed with the Service. Contrary to the previous rulings systems, the scope is generalised, and those matters not covered are specifically set out in a Royal Decree.

Following an evaluation in the middle of 2004, the government decided to create a fully independent Rulings Service with sufficient dedicated staff. The Act of 21 June 2004 (promulgated on 9 July 2004) stipulates that the new Rulings Service is entitled to issue all advance tax rulings.

2. Set-up of the Rulings Service since 1 January 2005

The details of the creation and modus operandi of the Service are specified in the Royal Decree of 13 August 2004 (promulgated on 18 August 2004). The Service is directed by a board of four leading managers, including the

chairman, all recruited from the tax authority and appointed for a renewable period of five years. Decisions are taken by a majority vote. In the case of a tie, the chairman has a casting vote. The Service has legal authority to take autonomous ruling decisions that are binding on the federal tax authorities.

The Service employs more than 80 dedicated tax personnel, who are also appointed for a renewable period of five years. Although decisions are taken independently by the Service, other tax authorities may be consulted for advice during the ruling proceedings. The Service is located centrally at 1 Maria-Theresiastraat, 1000 Brussels. It can be reached by email (dvbsda@minfin.fed.be) and operates a website at www.ruling.be.

3. Proceedings applicable to advance decisions in Belgium

3.1. Scope

According to section 20 of the 2004 Act, the Federal Tax office – via the Rulings Service – grants advance decisions on any request concerning application of the tax laws under its authority or in respect of which it is responsible for collection and settlement matters. An advance ruling is defined as a legal act whereby the Rulings Service determines in accordance with the provisions in force how the law will apply to a particular situation or transaction that has not yet produced any effect from a tax point of view. An advance ruling may not result in any tax exemption or tax abatement.

Under section 21, applications for advance decisions must be sent to the Service in writing. They must be supported by reasons.

They must include:

- the identity of the taxpayer and, as the case may be, the identity of the parties and third parties involved;
- a description of the activities of the taxpayer;
- a full description of the particular situation or transaction; and
- the reference to the statutory or regulatory provisions that will constitute the basis of the decision.

Applications must include full copies of any applications that have been filed on the same subject with the tax authorities of EU Member States or third states with which Belgium has a tax treaty, together with the relevant decisions. Up until the time at which a ruling is granted, any new information relating to the situation or transaction in respect of which an application is made must be added to the application.

The advance ruling is notified to the applicant within three months of the application being made (although there is no sanction if the period is exceeded). The Service and the applicant may agree to change this deadline. The Service informs the applicant of the deadline set within 15 business days after the application is complete.

3.2. Ruling rejection

According to section 22, an advance decision may not be granted if:

- the application relates to situations or transactions identical to such as have already produced effects for the applicant from a tax point of view or it relates to an appeal or legal proceedings between the Belgian state and the applicant;
- it would be inappropriate or ineffective because of the nature of the statutory or regulatory provisions referred to in the request;
- the request concerns application of any tax law concerning collection or prosecutions.

By Royal Decree of 17 January 2003, the King has laid down the matters and provisions mentioned in the first subsection.

In addition, an advance ruling may not be granted in the area of income taxes where:

- at the time the application is filed, essential elements of the operation or transaction described are linked to a tax haven that does not cooperate with the OECD;
- the operation or transaction described lacks economic substance in Belgium.

3.3. Validity

Section 23 provides that, except in cases justified by the subject-matter of the decision, it remains valid for a maximum of five years.

An advance decision is binding on the tax office for the future, except where:

- the conditions to which the advance decision is subject are not met;
- it appears that the applicant has described the situation or the transactions incompletely or inaccurately, or essential elements of the transactions have not been carried out in the manner in which the applicant has presented them;
- any treaty, EU law or domestic law applicable to the relevant situation or transaction changes; or
- the advance decision does not comply with treaty or EU or domestic law provisions.

In addition, an advance decision ceases to be binding on the tax authorities where the main effects of the situation or transaction change owing to one or more closely-related or subsequent factors that are directly or indirectly attributable to the applicant. In such a case, withdrawal of the decision is effective as of the date on which the factors attributable to the applicant occurred.

Any application filed during the validity of an advance decision with the tax authorities of an EU Member State or third state as referred to in section 21(3)

and any decision in relation thereto must be immediately communicated to the Service for the purposes of section 23.

3.4. How the Service works

3.4.1. Pre-filing phase

Pre-filing meeting(s) can be requested, preferably by email, indicating the identity of the applicant, a brief description of the envisaged situation or transaction, and the tax sections concerned. Pre-filing meetings are optional and can be arranged with tax advisers without disclosing the identity of the applicant.

Depending on the language and the topics covered by the application, cases are allocated to one of the leading managers, and a team is constituted to deal with it. The team includes a team leader (who is in the driving seat and the main contact point with the applicant) and team members selected according to the needs of the application and based on experience and skills. At this stage, the applicant's tax inspector is not contacted by the Service.

3.4.2. Formal application

The Service has a strong preference for paperless filing (by email to dvbsda@minfin.fed.be). The application must be as complete as possible, including necessary exhibits. Exhibits in English are accepted, but the Service may request translations of relevant sections. The local tax inspector is contacted with a view to checking the advance character of the application.

3.4.3. Evaluation and negotiation

For the evaluation phase, too, the Service has a strong preference for paperless communication. The style is informal, in dialogue with the applicant, and constructive, but the facts and assumptions put forward are generally subjected to in-depth examination. Post-filing meetings are possible. The applicant has to cooperate in the process. The Service can request an opinion from the central tax administration, but the power of decision rests with the Service.

3.4.4. Formal decision

The team leader has to draw up the decision and it is validated by the leading manager responsible. When the leading manager is satisfied with the draft, the decision is presented to the board of leading managers for final approval. The board generally meets every Tuesday. The agenda for the meeting is fixed on the previous Thursday. In practice all decisions are taken by consensus of the four leading managers. The decision is signed by the Service, and notified to the applicant, with a copy to the local inspector to enable him to verify correct implementation. The applicant does not sign the

decision, and he is not obliged to implement the envisaged transaction or situation.

3.5. Publication

Under section 24, advance decisions are published on a no-name basis, in accordance with professional confidentiality rules; in general, advance decisions are published in a great amount of detail (see www.fisconet.fgov.be). Justified requests for non-publication are normally granted.

According to section 25, the Minister of Finance submits an annual report to parliament on the application of section 20. The identity of applicants and Service officials may not figure in the report. Statistics are included but the report is not made public.

3.6. Evaluation

Since starting in 2005, the Service has published more than 600 summaries of decisions, relating to various topics. The “bestsellers” include reorganisations, transfer pricing and income tax matters. The success ratio is very high.

For more information, see “*Fiscaal Zakboekje Rulings.be*”, PwC-Kluwer publication

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