New Challenges for Fiscal Aids

Tax Rulings are back
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Arm’s Length Principle and Transfer Pricing

- Apple
- Starbucks
- Fiat
- Amazon
- Belgian Excess Profit scheme

1995 OECD Transfer Pricing Guidelines

- **Paragraph 1.13**: It is important not to lose sight of the goal of achieving a reasonable approximation of an arm's length result on the basis of reliable information. It should also be noted that transfer pricing is not an exact science and requires judgment on the part of the tax administration and tax payer

- **Paragraph 4.1**: It is possible that tax payers and tax administrations reach different conclusions regarding the arm's length transactions between associated companies which are audited, given the complexity of some transfer pricing issues and the difficulties of interpretation and evaluation in each case

Methodological Questions

- Selectivity analysis
- Use of prudent market operator (PMO) principle
- What margin of discretion for tax authorities?

Selectivity Analysis

- Three step analysis?
- (Nearly) no analysis of applicable national legislation
- No explicit identification of reference framework
- Nearly exclusive focus on advantage

Prudent Market Operator Principle

(1)

- “In order to assess whether a method of assessment of the taxable income gives rise to (…) an advantage, it is necessary to compare that method to the ordinary tax system, based on the difference between profit and losses of an undertaking carrying out its activities under normal market conditions. Thus, where a tax ruling concerns transfer pricing arrangements between related companies in a corporate group, that arrangement should not depart from the arrangement or remuneration that a prudent independent operator acting under normal market conditions would have accepted.”

Prudent Market Operator Principle

(2)

- “The OECD guidelines are a reference document (…) and have been retained as appropriate guidance for this purpose in previous Commission decisions. The different methods explained in the OECD guidelines can result in a wide range of outcomes as regards the amount of the taxable basis. Moreover, depending on the facts and circumstances of the tax payer, not all methods approximate a market outcome in a correct way. When accepting a calculation method (…), the tax authority should compare that method to the prudent behaviour of a hypothetical market operator which would require a market conform remuneration of a subsidiary or branch, which reflect normal conditions of competition.”

Prudent Market Operator Principle
(3)

- Appropriate concept?
- *Belgian Coordination Centres* does not refer to PMO, but to undertakings in situation of free competition
- “Best” method to restrict margin of discretion?
- Problematic if arm’s length principle is not part of national legislation, but also if it has been incorporated. Commission to verify whether national rules have been correctly applied and no manifest errors made

What Margin of Discretion for Tax Authorities?

- “A general measure (may) become selective particularly where the exercise of discretionary power goes beyond the simple management of tax revenue by reference to objective criteria”

- C-6/12(2013) P Oy, para’s 26-27: “A measure (…) cannot, in principle, be considered to be selective if the competent authorities have (…) only a degree of latitude limited by objective criteria which are not unrelated to the tax system(…). A measure may only be considered selective “if the competent authorities have a broad discretion to determine the beneficiaries or the conditions under which the financial assistance is provided on the basis of criteria unrelated to the tax system such as maintaining employment”

Questions?