

1. General introduction

1.1. Definitions

For the purposes of this report, an advance ruling is defined as “a more or less binding statement from the revenue authorities upon the voluntary request of a private person, concerning the treatment and consequences of one or a series of contemplated future actions or transactions”.

A further distinction is made between formal rulings, informal rulings and international rulings.

1.2. Historical background

The practice of informal rulings has always existed in Belgium.

The informal ruling procedure has many drawbacks however. The main drawbacks are that the tax authorities are not obliged to reply to the ruling request and that there are no time limits for processing such requests.

For the following reasons, the need arose for a stricter legal framework for obtaining advance rulings, i.e. (a) the deficiencies of the informal ruling procedure, (b) the growing complexity of the tax legislation as well as the business operations, (c) the growing need from the business community to obtain advance certainty as to how a proposed transaction should be interpreted from a tax point of view, and last but not least (d) the uncertainty resulting from the introduction in the Belgian legislation in 1991 of a general anti-abuse provision and the business purpose test. As a result, a legal framework for a formal ruling procedure was introduced in 1991 with respect to a specific number of issues in the field of income taxes and in 1994 with respect to a specific issue in the field of registration duties and inheritance taxes.

Moreover, in 1994 and 1996 a regulatory framework was introduced in order to obtain an advance ruling determining the method according to which the respective taxable income of a distribution center and a service center may be determined.

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Acknowledging the increasing need of the business community for a more flexible formal ruling practice on an increasing number of subjects, the Belgian government is in the process of preparing new initiatives which aim to meet such needs.

2. Formal rulings

2.1. Introduction

Formal rulings are defined as rulings which are issued further to specific statutory or regulatory authority. The procedure to obtain such rulings, the subjects that they may cover, the form in which they are issued, the circumstances in which they are possible and their binding effect are strictly prescribed.

A typical advance ruling procedure covered by this definition is to be found in article 345 of the Income Tax Code, article 18, §2 of the Registration Tax Code and article 106 of the Inheritance Tax Code. These articles provide that the tax administration may grant a binding advance ruling regarding specifically defined subjects relating to income taxes, registration duties and inheritance taxes respectively.

This advance ruling procedure is relatively new. Article 345 ITC was enacted by the Law of 20 July 1991. Article 18, §2 Registration Tax Code and article 106 Inheritance Tax Code were enacted by the Law of 30 March 1994.

2.2. Procedural issues

2.2.1. Who may file the ruling request?

The ruling may be requested by the taxpayer himself regardless of whether he is a resident or a non-resident, by his duly authorized representative or by his attorney.¹

If the request is filed by the taxpayer's representative who is not an attorney, it is recommended to attach a written proxy to the ruling request.

The Ruling Commission is of the opinion that the ruling must be filed by an existing taxpayer, and therefore cannot be filed by, e.g. a company in formation.² This decision has been heavily criticized. Indeed, since the ruling request must relate to a transaction not yet carried out, a company in formation should sometimes be able to submit the request.³

¹ Commissie voor voorafgaande akkoorden, "Analyse van de commissie voor fiscale akkoorden", *Bull. Bel.*, 1996, No. 758, 549; De Broe, L. and Werbrouck, J., "Belgium", in *The International Guide to Advance Rulings*, International Bureau of Fiscal Documentation, 1998, 7.

² Ci. Com./014, *Bull. Bel.*, 1994, No. 737, 839.

³ De Broe, L. and Werbrouck, J., *op. cit.*, 18; Moris, M., "Les rulings ou accords prealables: l'état de la jurisprudence (1^{re} partie)", *JDF*, 1997, 274.

If a ruling is requested on a merger or split, the application has to be filed by the target company.⁴

2.2.2. *The issuance of the ruling*

Formal rulings are granted by the Ruling Commission.

The Ruling Commission is composed of eight regular members and eight substitute members, nominated by the Minister of Finance for a renewable period of five years. Four regular members (and four substitutes) come from the Income Tax Administration and four regular members (and four substitutes) come from the Central Administration of VAT, Registration Duties and Inheritance Taxes. The Minister of Finance selects the president of the Commission from the regular members. The member of the highest rank and level acts as president when the latter is absent.⁵

At least four members of the Commission must be present for there to be a quorum, two from the Direct Income Tax Administration and two from the VAT, Registration Tax and Inheritance Tax Administration. The Commission decides by simple majority, the president having the casting vote.⁶

Decisions of the Ruling Commission must be reasoned and the applicant must be notified of the decision by registered mail.⁷

The Ruling Commission is not required by law to publish its decisions. Relevant, non-repetitive decisions are published on an anonymous basis in the *Bulletin der Belastingen/Bulletin des Contributions*. Taxpayers applying for a ruling may ask the Ruling Commission not to publish the decision. It is possible to contact the Ruling Commission in order to obtain further information on past decisions.

2.2.3. *Timing, form and content of the ruling request*

The ruling request must be submitted before the transaction takes place.⁸ Moreover, the transaction must not yet have been carried out at the moment of decision. Accordingly, if the transaction is carried out between the moment the request was submitted and the moment of decision, the administration will consider the request inadmissible.⁹ Rulings on mergers remain possible, however, until the notarial deeds are published in the State Gazette, as the merger does not exist *vis-à-vis* third parties (the Ruling Commission included) until such date of publication.¹⁰

⁴ Moris, M., *l.c.*, 274.

⁵ Art. 2, §1, Royal Decree of 9 November 1992, modified by the Royal Decree of 22 September 1993 and the Royal Decree of 4 April 1995, *BS*, 16 May 1995, 12949.

⁶ Art. 2, §2, Royal Decree of 9 November 1992, *op. cit.*, 12949.

⁷ *Ibid.*, 12950.

⁸ Ci.Com./057, not published.

⁹ Van De Woestyne, I., “De Rulingcommissie en haar interpretatie van de belastingwet”, *Waarvan Akte*, 1996, 203; Ci.Com/014, *Bull.Bel.*, 1994, No. 737, 839.

¹⁰ Art. 345, §2 ITC; Moris, M., *op. cit.*, 275.

The written request must be sent to the president of the Ruling Commission by registered mail. The request has to be reasoned, signed by the applicant and dated.¹¹

The applicant must fully disclose the nature of the proposed transaction and of the parties involved. The request should contain all legal and factual arguments justifying the request as well as all supporting documents. It is, moreover, recommended to mention specifically the articles of the Code on which an advance ruling is applied for.

The Commission will deem that it is not in a position to grant a ruling if the taxpayer does not provide all information necessary to examine the request.¹²

It is thus impossible to submit a request on an anonymous basis or for a hypothetical case. This obligation to fully disclose is an important restraint in the submitting of a request, as the applicant is obliged to provide a complete description of his intentions while there is no guarantee that a ruling will be issued.

No particular procedural costs are involved in applying for a formal ruling, as the Ruling Commission does not charge a fee for handling ruling requests.

2.2.4. The processing of the ruling request

The Ruling Commission will send the request to the competent tax administration, i.e. the Direct Income Tax Administration or the Indirect Tax Administration (VAT, Registration and Inheritance Tax). A copy of the request is also sent to the effective members and to the substitutes chosen from the administration. Within the competent administration, the technical direction examines the request and provides an advice to the Commission. The advice is most often drawn up as a draft decision.¹³

If deemed necessary in order to decide upon the request, the Ruling Commission can ask the applicant or his representative to complete the request by submitting documents or by providing additional information. The Ruling Commission can authorize one of its members to conduct these investigations. The Commission's request for documents or additional information has to be sent by registered mail. The taxpayer has to comply with the request within one month after the date of mailing. If this condition is not met, the Commission will not issue a ruling.¹⁴ Hearings may be organized at the invitation of the Commission or at the request of the applicant. The Ruling Commission is not obliged, however, to organize a hearing.¹⁵ If an applicant does not attend a hearing organized at the initiative of the Commission, or if he does not reply to the information requested at such a hearing, the Commission will not issue a ruling. Furthermore,

¹¹ Art. 3, Royal Decree of 9 November 1992, *op. cit.*, 12949–12950.

¹² Ci.Com./126, not published.

¹³ Commissie voor voorafgaande akkoorden, *op. cit.*, 544.

¹⁴ Ci.Com./066; Ci.Com./140, not published.

¹⁵ Van De Woestyne, I., “De Rulingcommissie en haar interpretatie van de belastingwet”, *Waarvan Akte*, 1996,202.

the applicant should inform the Commission on interim developments that could affect the decision of the Commission.¹⁶

All correspondence between the Commission and the applicant is to be by registered mail throughout the entire procedure.¹⁷

2.2.5. *Obligation to issue a ruling and time limits*

The Ruling Commission must take a decision on every request for a ruling filed by a taxpayer. The Commission can take a positive or a negative decision and in this way either grant or refuse a ruling.

A decision may be negative for two reasons. The first reason is that the Ruling Commission considers that it is not in a position to examine the ruling request, because, e.g.:

- the request did not contain the required data and information;
- the Commission is not competent to grant an advance ruling on the subject matter for which the ruling request is filed;
- the transaction has been completed before the request was filed;
- the legal provision invoked does not apply to the case submitted.

The second reason is that the Commission does not agree with the contents of the ruling requested.

The Ruling Commission is obliged to issue a decision within three months as from the date of receipt of the ruling by the president of the Commission. This time limit will be extended if additional information is requested or a hearing is held. The three-month period thus only commences as from:

- the date of receipt of the last documents which the Ruling Commission most recently requested; or
- the date on which the last hearing took place.

If the Commission requested additional information and held a hearing, the latter of the two dates is decisive. The time limit may never exceed six months as from the date of receipt of the request.¹⁸

The Commission is deemed to have issued a ruling in favor of the taxpayer if it does not meet the time limit. The applicant can thus be confident that a decision will be taken within six months as from the filing of the request.¹⁹

2.2.6. *Legal consequences*

Only a positive decision entails legal consequences, i.e. when the ruling is granted. A negative decision (a non-granted ruling) has no legal consequences. It does not bind the tax authorities or the taxpayer. Taxpayers who receive a negative decision remain free to carry out the transactions described in the ruling

¹⁶ Arts. 2 and 3, Royal Decree of 9 November 1992, *op. cit.*, 12949–12950.

¹⁷ Art. 3, §3, Royal Decree of 9 November 1992, *op. cit.*, 12949–12950.

¹⁸ Art. 4, Royal Decree of 9 November 1992, *op. cit.*, 12949–12950.

¹⁹ Comm.ITC, 345/25.

request. Moreover, they can lodge an appeal against tax assessments made in accordance with the negative legal decision of the ruling.²⁰

Since advance rulings are administrative acts, some legal authors are of the opinion that an appeal for an annulment of a negative decision may be brought before the Council of State.²¹ This point of view does not seem to be correct since a negative decision has no binding force.

2.2.7. Time limit and repeal of the ruling

It is generally accepted that the Ruling Commission cannot limit the time period during which a ruling remains valid. If the taxpayer, however, fixed a time period within which the transaction would be carried out and if this time schedule was not met, the tax administration could argue that the transaction was not effected as described, resulting in the expiration of the ruling.²²

2.3. The subject matter of formal rulings

A formal ruling can only be requested with respect to specific issues defined in tax law.²³ Each of those issues is examined hereafter.

A formal ruling cannot be requested on the theoretical interpretation of a condition of tax law. The ruling request must deal with a specific factual situation.²⁴

2.3.1. The business purpose test

Belgian case law has traditionally upheld the “form over substance approach” further to which a taxpayer may arrange his affairs in such a way that he pays as few taxes as possible, provided he accepts all consequences of the legal qualification given to the transactions and provided he does not violate any law.

As a reaction against such a “form over substance approach”, the legislator has made the tax treatment of some transactions subject to the requirement that they must meet “legitimate needs of a financial or economic nature”, i.e. a business purpose test.

With respect to all transactions which are subject to the business purpose test, the taxpayer may request an advance ruling as to whether the test is met in a particular situation. Those transactions are examined hereafter.

²⁰ Parl.St., Senaat, 1992–1993, 591-2, 2; Parl. St., Kamer, 1990–1991, 1641/10, 58.

²¹ Parl.St., Senaat, 1992–1993, 21 December 1992, 591/2, 59; contra Rosoux, R., “Le ruling ou accord fiscal préalable. Le point après 15 mois de procédure”, *Comptabilité et Fiscalité Pratiques*, June 1994, 350; Vanderkerken, C.H.V., “What’s going on in ...”, *European Taxation*, 1993, 213; Peeters B. and Cauwenbergh, P., “Het voorafgaand schriftelijk akkoord: fiscale (schijn)rechtszekerheid”, *TFR*, 1993, 140.

²² De Broe, L. and Werbrouck, J., *op. cit.*, 30; Commissie voor Voorafgaande Akkoorden, *op. cit.*, 546; Peeters, B. and Cauwenbergh, P., *op. cit.*, 145.

²³ Ci.Com./048 and Ci.Com./152N.

²⁴ Ci.Com./115 and Ci.Com./123, not published.

2.3.1.1. The general anti-avoidance provision

A general anti-avoidance provision applies as of 1 April 1993. Further to this provision, the Belgian tax authorities may disregard the legal qualification given by the parties to an act or series of acts that bring about a single transaction if the tax administration establishes that the purpose of the qualification is tax evasion, unless the taxpayer proves that the qualification corresponds to “legitimate financial or economic needs”.

This provision applies with respect to income taxes and registration duties as well as inheritance taxes.

The Ruling Commission is of the opinion that the obtaining of a tax advantage does not qualify as a legitimate financial or economic need.²⁵

2.3.1.2. Corporate reorganizations

Corporate reorganizations, such as contributions in kind of a branch of activity or of all assets and liabilities of a company in exchange for shares, mergers, absorptions, divisions and split-ups, may be carried out in a tax-exempt and tax neutral way, provided the reorganization meets, *inter alia*, “legitimate needs of a financial or economic nature”.

Moreover, in case of mergers, absorptions and split-ups, the losses of the merged and split companies as well as of the absorbed and absorbing companies can only be deducted as a proportion of the net tax value of the assets of each of the loss-making company against the net tax values of all assets of all companies, prior to the transaction. This proportional deduction of losses can only be carried out if the transaction meets the condition of “legitimate needs of a financial or economic nature”.

An advance ruling may be requested as to whether such condition is met.

With respect to a contribution of a branch of activity, the Ruling Commission has decided that the following motives constitute a legitimate need of a financial or economic nature:²⁶

- credit guarantee for investments;
- improvement of the financial situation of the contributed activity;
- adaptation to the Belgian federal structure;
- rationalization of activities within a group of companies;
- restructuring of a sector of activities.

The Ruling Commission is not competent to grant a ruling on the question of whether a particular division may be deemed “a branch of activity”. It will only grant a ruling on the issue of whether the contribution meets a legitimate need of a financial or economic nature on the assumption that the contributed division constitutes a branch of activity.²⁷

²⁵ Commissie voor Voorafgaande Akkoorden, *op. cit.*, 567; Ci.Com./030, *Bull.Bel.*, 1994, No. 741, 2023; Ci.Com./056, *Bull.Bel.*, No. 767, 45.

²⁶ Commissie voor Voorafgaande Akkoorden, *op. cit.*, 552.

²⁷ *Ibid.*

The following motives were accepted as legitimate financial and economic needs for mergers:

- the realization of economies of scale;
- the rationalization or restructuring of a group of companies on a Belgian and international level;
- the reinforcement of the financial structure;
- the contribution of operational real estate;
- the similar or complementary activity of the company to be merged with;
- the adaptation of the economic activity to the Belgian federal structure.

For split-ups, the following motives were deemed to be a legitimate financial or economic need:

- the acquisition of a bank guarantee;
- cost rationalization;
- the development of a real estate activity;
- the separation of independent and incompatible activities;
- the split-up of assets according to split activities;
- the possibility to attract new investors;
- the rationalization or restructuring of a group of companies on a Belgian or international level;
- the creation of a holding company.

The Commission will on a case by case basis verify whether the needs presented in the ruling request are genuine and do not disguise a transaction that is mainly inspired by tax motives.

2.3.1.3. Capital decreases

The withholding tax on dividends distributed out of capital contributed in cash as of 1 January 1994 is reduced from 25 per cent to 15 per cent provided specific conditions are met. In order to avoid companies swapping their “old” shares (issued before 1994) to new ones by means of a capital decrease, followed by a capital increase with the issue of new shares, capital increases that are preceded by a capital decrease are disregarded, unless the capital reduction meets “legitimate needs of a financial or economic nature”. The taxpayer may request an advance ruling as to whether such condition is met.

2.3.1.4. Transfers to low tax countries

Article 344, §2 ITC contains a rebuttable presumption further to which the tax administration may disregard the sale, transfer or contribution of shares, bonds, debt claims or other loan instruments, patents, trade marks, and other similar rights or cash to a taxpayer residing in a state in which the income on the transferred assets is not subject to income taxes or is subject to a much more favorable tax regime than would be the case in Belgium.

This presumption may be rebutted by the taxpayer by demonstrating that:

- the transaction meets “legitimate needs of a financial or economic nature”,
or

- the consideration received for the transfer generates effective taxable income in Belgium which is comparable to the taxable income which would have existed in the absence of the transaction.

The taxpayer may request an advance ruling as to whether in such a case the transaction meets “legitimate needs of a financial or economic nature”.

A taxpayer requested an advance ruling as to whether the contribution of funds by a Belgian company to an Irish IFSC met legitimate needs of a financial or economic nature. The Ruling Commission was of the opinion that this transaction was mainly tax motivated and refused to grant a ruling.²⁸

2.3.2. *The at arm’s length test*

Article 26 ITC provides that any “abnormal or gratuitous” advantages granted by a Belgian enterprise are included in its taxable income. If the advantages granted are, however, taken into account for determining the taxable income of the beneficiary, the taxable income of the company granting the advantages should not be adjusted.

The advantages will nevertheless be added to the taxable income of the transferor, regardless of whether the advantage is part of the taxable income of this beneficiary:

- if the recipient is a directly or indirectly related foreign taxpayer;
- if the recipient is a foreign taxpayer established in a tax haven.

Taxpayers can obtain an advance formal ruling to the effect that an advantage granted should not be deemed “abnormal or gratuitous”.

In this connection, the issue arises as to whether the tax administration is willing to pronounce itself on a transfer pricing methodology applicable to a series of transactions occurring during an unlimited or a fixed period of time. Or, in contrast, will an advance ruling under article 345 ITC only be granted with respect to a particular transfer pricing transaction?

In the first hypothesis, the advance ruling will fix in advance an appropriate set of criteria, which will determine the transfer price of future transactions. In the second hypothesis, the advance ruling will be limited to one or more particular transactions.

One could contend that the literal text of article 345, §1 suggests that a formal ruling should only apply to one or more specific transactions. Under article 345, §1 ITC, the Ruling Commission has indeed to rule on the issue of whether or not “an advantage” is abnormal or gratuitous.

From the ruling practice of the Ruling Commission, it appears that the Ruling Commission will probably take such a restrictive position. Indeed, experience shows that the Ruling Commission interprets its authority to grant rulings under article 345, §1 ITC very restrictively. Moreover, another reason why the Ruling Commission is reticent to grant a ruling on a transfer pricing methodology is that the validity of the ruling is not subject to any time limit. The Ruling Commission therefore refused to grant a ruling on the question as to whether a service fee of

²⁸ *Ibid.*, 557.

cost + 5 per cent was at arm's length in the case of warehousing and delivery services rendered by a distribution center to group members.²⁹

This means that the formal ruling procedure cannot be used to determine the transfer pricing methodology of a Belgian branch or a Belgian company in a general way on the basis of, for example, a particular cost plus method or particular resale-price method.

The Ruling Commission will not rule on the issue of whether an advantage granted by a Belgian company to another Belgian company is abnormal or gratuitous. The position of the Commission is based on the view that article 26 ITC "in principle" does not apply where the recipient of the advantage is a Belgian company, because the advantage is in that case always taken into account to determine the taxable basis of the recipient. This position conforms to the position of the Minister of Finance, expressed in answers to parliamentary questions.³⁰

The Ruling Commission will not rule on the issue of whether an advantage granted by a Belgian head office to its foreign branch is abnormal or gratuitous because, in the view of the Commission, article 26 ITC only covers advantages granted by a Belgian enterprise to another legal entity.³¹ The logical consequence of the aforementioned decision of the Ruling Commission is that it will also not rule on transactions between a Belgian head office and its foreign branch. Also in this case, there is no transaction between two different legal entities.

2.3.3. Deductibility of royalties, interest and fees paid directly or indirectly to tax havens

Interest, royalties or fees paid directly or indirectly to a non-resident who in the country of establishment is either not subject to income tax or is subject to an income tax regime which is considerably more favorable than the Belgian one, are disallowed as expenses unless the taxpayer shows that these payments correspond to real and genuine transactions and that they are at arm's length.

The Ruling Commission may grant an advance ruling as to whether such payments correspond to real and genuine transactions and as to whether they are at arm's length.

Requests have been filed with respect to the interest on loans,³² compensation for services,³³ compensation for the use of computer programs,³⁴ the payment of commissions³⁵ and the payment of royalties for the use of a brand name.³⁶

²⁹ Ci.Com./073, *Bull.Bel.*, No. 767, 50.

³⁰ Ci.Com./005, *Bull.Bel.*, 1994, No. 737, 840; Vr. en Antw., Senaat, 1992–93, 9 March 1993, 2457 (Vr. No. 302, Cooremans); Vr. en Antw., Senaat, 1995–96, 14 July 1995, 559–560 (Vr. No. 3, Nelis-Van Liedekerke); Vr. en Antw., Senaat, 1995–96, 1 April 1996, 4261–4262 (Vr. No. 373, Moriau).

³¹ Ci.Com./013, *Bull.Bel.*, 1994, No. 734, 143.

³² Ci.Com./071, not published.

³³ Ci.Com./114, not published.

³⁴ Ci.Com./116, not published.

³⁵ Ci.Com./057, not published.

³⁶ Ci.Com./028, *Bull.Bel.*, 1997, No. 767, 39–40.

2.3.4. *The participation exemption*

Under the Belgian participation exemption, 95 per cent of dividends received by a Belgian company from a Belgian or foreign company may be deducted from taxable income.

In order to qualify for the participation exemption, the company distributing the dividend must either be subject to Belgian corporate tax or to a similar foreign corporate tax.

Moreover, under specific anti-abuse provisions the following dividends are excluded from the participation exemption:

- dividends from companies established in a jurisdiction where the general tax system is significantly more favorable than in Belgium;
- dividends from financing, treasury or investment companies which are subject in the country where they are established to a tax regime which derogates from the normal tax regime;
- dividends from a company to the extent its income (other than dividends) has its source outside the state of its residence and provided this foreign source income benefits from a special tax regime in the company's state of residence;
- dividends from a company which obtains its profits through foreign permanent establishments that benefit from a significantly more favorable regime than the Belgian tax regime applicable to such profits;
- dividends paid by an intermediate holding company, out of dividend income that would not itself have qualified up to at least 90 per cent for the participation exemption.

A taxpayer may request an advance ruling as to whether dividends qualify for the participation exemption under the domestic legislation.

The tax administration has published a "black list" of countries of which the dividends from either all or some companies do not qualify for the participation exemption. The tax authorities are of the opinion that this list should be viewed as a general ruling, and that no individual advance ruling can any longer be granted with respect to those companies.³⁷

The Ruling Commission moreover deems itself not competent to issue a ruling whereby the participation exemption has to be interpreted within the framework of tax treaties.³⁸

2.4. The binding force of formal rulings

2.4.1. *Authority on which the binding force of formal rulings is based*

Article 345 ITC explicitly stipulates that the tax administration to which the ruling was submitted is bound by the ruling provided the ruling request was

³⁷ Bericht van Administratie der Directe Belastingen, *BS*, 24 August 1991, 1832–1834.

³⁸ Commissie voor Voorafgaande Akkoorden, *op. cit.*, 563.

presented in good faith and provided the ruling request was filed before the transaction was carried out.³⁹

Article 345 ITC indicates three circumstances in which the tax administration is not bound by the ruling:

- if the taxpayer has either misrepresented the transactions or has given an incomplete description of the transactions;
- when the transaction was not carried out as described by the taxpayer in the ruling request;
- if the consequences of the transactions are modified by one or more subsequent transactions in such a way that the transactions no longer fall within the scope of application.

It is up to the tax administration to examine whether the transaction was realized in conformity with the ruling request of the taxpayer.

Finally, the tax administration is of the opinion that it is no longer bound by a ruling if a decision between contracting states within the scope of a mutual agreement procedure deviates from a previous ruling of the Ruling Commission.⁴⁰

2.4.2. Extent to which the Revenue is bound

A positive decision (implying a ruling) has binding force for the tax authorities only. The taxpayer, having obtained a positive decision, is still free to decide whether or not he will complete the transaction. This also implies that, if it later turns out, e.g. that a different qualification than the one agreed with the Commission would produce a more favorable result, the taxpayer is free to apply that qualification.⁴¹

A negative decision is not binding on the tax administration or the taxpayer. The law only gives effect to positive decisions.⁴²

Changes in legislation should, in principle, have no impact on the validity of the ruling since the conditions under which the tax authorities are no longer bound by the ruling are restrictively enumerated in the law. However, a change in legislation may have as a consequence that the ruling becomes without object if the law on which the ruling was based is modified.

2.4.3. Revenue departments bound by the ruling

Tax administrations other than the administration concerned by the formal ruling are not bound by the ruling. Rulings with respect to income taxes are thus not binding upon the VAT administration.⁴³

³⁹ Comm.ITC, 345/26.

⁴⁰ Comm.ITC, 345/29.

⁴¹ Peeters, and Cauwenbergh, *op. cit.*, 142.

⁴² Vr. en Antw., Kamer, 1994-95, 16 January 1995, 14345 (Vr. No. 1160, Olivier); Commissie voor Voorafgaande Akkoorden, *op. cit.*, 545.

⁴³ Peeters, and Cauwenbergh, *op. cit.*, 142.

Local officials are normally informed about a negative decision of the Ruling Commission. The local tax authorities are, however, not bound by such a negative ruling.⁴⁴

2.4.4. *Rulings contra legem or extra legem*

Since article 345 ITC explicitly stipulates that a formal ruling is binding upon the tax administration, a ruling *extra legem* or *contra legem* should be binding upon the tax administration which has granted such ruling.

The “legality principle” contained in the Belgian Constitution, the fact that tax laws are of public order and the independence of the judiciary prevent, however, that a ruling *contra legem* could have binding force towards the courts.⁴⁵ The courts must decide independently and should, in principle, apply the law.

On the other hand, it is generally accepted that the tax administration is bound by the principles of “good governance”, which include the principles of “legal security” and “legitimate expectations”. Further to the said principles, a taxpayer is entitled to rely on a ruling which he has obtained. The issue then becomes whether the “legality principle” should take precedence over the principles of “good governance”, or vice versa. There is a growing tendency among the courts and the legal scholars to accept that the principles of “good governance” may in certain situations take precedence over the “legality principle” if the taxpayer could reasonably believe that the ruling was legal. In such a situation the taxpayer should be able to rely on a ruling *extra legem* or *contra legem*.⁴⁶

In some cases, the courts have, however, taken the position that *contra legem* rulings can never create legitimate expectations with the effect that the taxpayer is barred from invoking the *contra legem* ruling before the courts.⁴⁷

A ruling *contra legem* invokes the liability of the state for damages caused by this ruling. The taxpayer can claim compensation from the Belgian state, based on the principles of tort in civil law.⁴⁸

2.4.5. *Precedential value of issued rulings*

Since rulings concern particular transactions carried out by particular taxpayers, the binding force of these formal rulings must be restricted to the transactions for which and the taxpayers for whom the ruling was requested.⁴⁹

⁴⁴ Verschueren, C, Boone, P. and Gall, R., “Rulingpraktijk in België”, in *Fiscale Dossiers Vandewinckele*, 1997, No. 97/46, 2.6.

⁴⁵ Cass., 20 January 1941, *Arr.Verbr.*, 1941, 10; Van Crombrugge, S., *De grondregels van het Belgisch fiscaal recht*, Kalmthout, Biblo, 1992, p. 14–17 and 48–49.

⁴⁶ Cass., 27 March 1992, *R.W.*, 1991-92, 1466.

⁴⁷ Court of Appeal Antwerp, 28 December 1982, *FJF*, 1983, 115; Court of Appeal Antwerp, 23 March 1992, *FJF*, 1992, 306.

⁴⁸ Peeters, and Cauwenbergh, *op. cit.*, 146–147; Vanderkerken, C.H.V., *op. cit.*, 214; De Broe, and Werbrouck, *op. cit.*, 23.

⁴⁹ Peeters, and Cauwenbergh, *op. cit.*, 141.

Taxpayers participating in transactions on which another taxpayer requested a ruling, in principle cannot rely on this ruling. In a similar way a ruling on one transaction can not be applied to other, even similar transactions, regardless of whether or not these transactions are carried out by the same taxpayers.

The principle of equal treatment and the general principles of good governance provide formal rulings nevertheless with a limited precedential value, on condition that the factual circumstances are identical to the original case.

Legal scholars defend the point of view that third parties may ask for the annulment of an irregular decision of the Ruling Commission if they have a personal, direct, actual, material or moral and permissible interest.⁵⁰

3. Informal rulings

3.1. Introduction

An informal ruling is defined as an agreement with the revenue services that is not based on specific statutory or regulatory authority.

3.2. Procedural issues

3.2.1. Authority which may issue the ruling

No central ruling policy exists with respect to informal rulings. This means that there is no central ruling authority.

Informal rulings may be given by the Central Tax Administration or by the local tax controller. If given by the Central Tax Administration, the latter will in most cases request the prior advice of the competent local tax controller.

The tax authorities do not charge a fee for handling an informal ruling request. No other procedural costs are involved.

3.2.2. Form of the ruling request

No special procedure is provided and consequently there are no standard forms at the taxpayer's disposal.

Ruling requests are generally submitted in writing and motivated. Informal hearings are generally held, during which the taxpayer will defend his case *vis-a-vis* the tax official(s) examining the ruling request.

In certain situations a ruling may be deemed to have been granted tacitly. This is the case when a taxpayer has for many years followed a certain practice which the tax administration has – at least implicitly – accepted by not objecting to it.⁵¹

⁵⁰ *Ibid.*, 142.

⁵¹ Court of Appeal Antwerp, 4 November 1996, *AFT*, 1997, 185; *FJF*, No. 96/275.

3.2.3. *Obligation to issue a ruling and time limits*

The tax administration is not obliged to reply to an informal ruling request. The decision of the administration as to whether or not it should grant a ruling is fully subject to the discretionary power of the authorities. No specific time limits are imposed on the tax administration. Experience therefore shows that it often takes six to twelve months before a ruling is granted.

The administration's discretionary power is only limited by the constitutional principle of equal treatment. If the tax authorities decide to grant a ruling to one taxpayer, they would be obliged to grant a similar ruling to another taxpayer in comparable circumstances.⁵²

Unlike in the case of formal rulings, the absence of any reply by the tax authorities does not automatically imply that a positive ruling has been granted.

A ruling may be deemed tacitly granted if the tax authorities have accepted or not objected to a certain practice of the taxpayer over a significant period of time.⁵³

3.2.4. *Appeal*

A right to appeal does not exist for informal rulings. The taxpayer, however, is not obliged to follow a negative decision of the tax authorities further to a ruling request. If the taxpayer is subsequently assessed on the basis of the negative decision, he may file a tax protest against such assessment which is based on the negative decision.

3.2.5. *Time limit and repeal of the ruling*

An informal ruling is mostly granted for a limited time period, i.e. three or five years. A renewal may be requested, however. Such renewal is, most often, automatically granted, unless there have been changes in the law or in the factual circumstances which would no longer justify the ruling.

Rulings with respect to one taxable period are only binding for that particular period and do not bind the tax administration for subsequent tax periods.⁵⁴

If the ruling is granted for a specific period of time, the tax authorities will be bound for the time period provided for in the ruling. Rulings which are granted for an undetermined period of time can only be revoked for the future and provided the tax authorities inform the taxpayer of their intention to revoke the ruling in advance.⁵⁵

⁵² De Broe, and Werbrouck, *op. cit.*, 24; Peeters, and Cauwenbergh, *op. cit.*, 149; Vanderbruggen, E., "Kan men zich beroepen op de ruling van een ander?", *TFR*, 1993, 14.

⁵³ Court of Appeal Antwerp, 4 November 1996, *FJF*, 1996, 562; Court of Appeal Ghent, 24 September 1992, *Bull.Bel.*, 1992, No. 740, 1499; Court of Appeal Liège, 4 May 1994, *FJF*, 1995, 13.

⁵⁴ De Broe, and Werbrouck, *op. cit.*, 21–22.

⁵⁵ Peeters, B., "Rechts(on)zekerheid in het belastingrecht", *TFR*, 1994, 192, No. 31–32.

A certain tendency in case law requires, however, that revocation is only permissible if proper reasons exist, i.e. a change of circumstances or modification of the law. Retroactive revocation could only be allowed if the facts on which the ruling was based have changed substantially, in which case a retroactive revocation back to the year in which that change occurred is acceptable.⁵⁶

A ruling can be revoked implicitly or explicitly. An implicit revocation could include an amendment of the taxpayer's income tax return. The same consequence results from the fact that a taxpayer no longer applies the terms of a ruling in his income tax return.⁵⁷

3.3. The subject matter of informal rulings

3.3.1. Introduction

In the past, the Belgian tax administration has issued informal rulings on the interpretation of tax law without any direct relation to a particular taxpayer. The tax authorities seem, however, more and more reluctant to grant rulings on an anonymous basis or with respect to a hypothetical situation. They generally require that the name of the taxpayer requesting the ruling is disclosed as well as all facts and circumstances of the particular case with respect to which the ruling request is introduced.

Another issue is whether the Belgian tax authorities are still willing to grant informal rulings with respect to subject matters for which a formal ruling may be requested. Practice has shown that they are still willing to do this.

3.3.2. The cost plus rulings

A typical example of informal rulings which have been granted by the tax authorities are the cost-plus rulings whereby either an at arm's length remuneration method and/or a method fixing the taxable income of a Belgian branch or company is agreed in advance.

These cost-plus rulings are usually granted by the Central Tax Administration after consultation with the local tax controller.

3.3.2.1. Cost-plus ruling for Belgian branches of foreign companies

The Belgian tax administration has been willing to grant informal cost-plus rulings, whereby the taxable basis of the branch is fixed at a percentage of its operating expenses. The cost-plus percentage varies depending upon the scope of the activities of the branch, i.e. usually from 10 per cent to 15 per cent for service and administrative activities, and from 15 per cent to 20 per cent for other activities

⁵⁶ Court of Appeal Liège, 3 March 1983, *FJF*, 1983, 14; Court of Appeal Antwerp, 12 December 1991, *FJF*, 1992, 105; Court of Appeal Bergen, 3 January 1997, *JLMB*, 1998, 113; Court of Appeal Brussels, 10 October 1996, not published.

⁵⁷ De Broe, and Werbrouck, *op. cit.*, 25.

which are more commercial. These rulings generally provide that the following items shall be excluded from the operating expenses to which the cost-plus percentage shall be applied: the non-deductible Belgian taxes, and, if applicable, the costs borne by the branch in the name and on behalf of group companies.

Typically, the cost-plus rulings explicitly provide that the taxable income so determined must not be lower than the minimum amounts of taxable income set forth in article 182 RD/ITC for service and commercial activities which are not specifically mentioned therein, i.e. BEF 300,000 per person employed by the branch with an absolute minimum of BEF 400,000.

These rulings are based on a broad interpretation of article 342 ITC. This article provides that in the absence of proper accounts or other proper evidence, the profits of a taxpayer may be determined by comparing the profits of at least three comparable taxpayers, taking into account, among other things, invested capital, number of employees and turnover (the so-called “comparison method”). Article 182 RD/ITC sets forth the minimum taxable basis for Belgian branches of foreign companies that are taxable under the comparison method or article 342 ITC. The minima differ according to the sector in which the branch operates, and are generally based on the number of employees and turnover of the branch.

The tax administration apparently takes the view that the conditions for the application of article 342 ITC and article 182 RD/ITC are satisfied, among other instances, where the activities of the branch and its head office cannot be segregated or where the activities of the branch do not generate clearly identifiable profits.⁵⁸

In practice, the administration grants cost-plus rulings even if the branch has proper accounts or other evidence allowing a determination of its profits.⁵⁹

In a number of cases, the Belgian tax administration has granted cost-plus rulings on the basis of article 26 ITC. In those rulings, the administration has confirmed that a remuneration based on a cost-plus basis would be treated as being in conformity with article 26. The percentages are similar to those used in the informal rulings based on articles 342 ITC and 182 RD/ITC.

Under recent rulings based on article 26 ITC, the taxable income of the branch consists not only of the agreed upon percentage of the operating expenses but also of the disallowed expenses. The taxable income thus determined must be increased or decreased with the capital gains or losses resulting from the realization of branch assets (if any). It must be further increased with any income of the branch to which the transfer pricing ruling does not apply, e.g. rental income and income from the investment of branch assets (if any). The resulting total branch income may be reduced by adjustments available to companies, such as loss carry-forwards and the investment deductions.

In these recent rulings, one can discern a tendency to equalize the treatment of branches benefiting from a cost-plus regime with the treatment of branches and companies subject to a regular tax regime for matters other than the cost-plus regime itself.

⁵⁸ Com.DTT, 7/415.

⁵⁹ Com.DTT, 7/417.

3.3.2.2. Cost-plus ruling for Belgian companies

Normally, the Belgian tax administration is reticent to issue advance informal transfer pricing rulings in the case of Belgian companies. However, it has been willing to confirm in an “informal” ruling that a remuneration based on a cost-plus basis would be treated as being in conformity with article 26 ITC if the activities of the Belgian company are limited to support services for the benefit of group members.

Article 26 ITC constitutes the only legal basis for this type of cost-plus ruling. Indeed, article 182 RD/ITC only applies to foreign companies, and cannot be used as a legal basis for cost-plus rulings granted to Belgian companies.

3.3.3. *Distribution center rulings*

A distribution center is a service unit performing strictly defined activities for the benefit of companies of the group to which it belongs.

Distribution center activities are essentially focused on intra-group services involving physical handling, storage, packaging, delivery and shipment of goods. A distribution center may, moreover, carry out the following activities:

- purchase products in the name of the center or in the name; and for the account of group members and resell those products to group members;
- collect orders and prepare and send order confirmations;
- prepare and send sales invoices;
- fulfill financial, bank, administrative and fiscal formalities in connection with the above activities.

The special tax treatment of Belgian distribution centers is embodied in a “safe harbor rule”, which states that the transactions of the distribution center will be deemed at arm’s length if the gross profits of the center are at least equal to 105 per cent of its operating expenses.

Distribution center rulings are issued by the Central Tax Administration. The ruling request should mention the location of the planned distribution center, the planned activities and information regarding the group filing the application.

A distribution center ruling is granted for a period of five years and is renewable.

3.3.4. *Service center rulings*

The service center regime also provides for a safe harbor with respect to transfer prices between the service center and the related group companies. The advance pricing agreement granted will be based on either a cost-plus or a resale-minus formula, depending upon the nature of the activities to be carried out by the center.

Salary and all other personnel-related charges are excluded from the cost-plus formula as well as most charges invoiced to the center by third parties.

A service center may carry out the following activities:

- (a) Active sales operations:

- accept orders from customers in its own name, provided that the price and other conditions of sale have been previously established by the group;
 - send out order confirmations and invoices to clients, as well as carry out all other administrative, financial and fiscal formalities related to the sale;
- (b) passive sales operations: collecting orders from customers and sending out sales confirmations without negotiating or accepting orders;
- (c) provide information to clients;
- (d) preparatory or auxiliary services.

A ruling may be obtained from the Central Tax Administration for a renewable five-year period.

3.3.5. *Other rulings*

In principle, there is no limitation as to the subject matter with respect to which informal rulings may be requested.

In practice, such informal rulings are being requested with respect to a great variety of subject matters, such as, e.g. the valuation of benefits in kind granted to employees, the amount of deductible expenses which cannot be substantiated, depreciation percentages, the issue of whether or not a division constitutes a branch of activity, etc. These rulings will generally be granted by the taxpayer's local tax controller.

3.4. The binding force of informal rulings

3.4.1. *Authority on which the binding force of informal rulings is based*

Unlike in the case of formal rulings, there is no specific legal basis which makes an informal ruling binding upon the tax administration.⁶⁰

An informal ruling could be binding upon the tax administration, however, on the basis of the principles of "good governance", in particular the principles of "legal security" and "legitimate expectations", which require the tax administration to honor its word.⁶¹

In practice, the policy of the tax administration has been to honor informal rulings to the extent that the taxpayer has fully disclosed all relevant facts and that no material change of circumstances has intervened after the ruling was issued.

3.4.2. *Revenue departments bound by the ruling*

Similar to the binding force of formal rulings, tax administrations other than the administration concerned by the informal ruling are not bound by the ruling. For

⁶⁰ Flamme, M.A., *Droit Administratif*, Brussels, 1989, p. 481.

⁶¹ Parl. Question, Valkeniers of 5 May 1984, *Bull. Contr.*, 1985, No. 645, 2749.

example, a ruling in the income tax field is not binding upon the VAT administration.⁶²

3.4.3. *Informal rulings contra legem or extra legem?*

On the basis of the constitutional “legality principle” and the public order character of the tax laws, a *contra legem* ruling has, in principle, no binding force on the tax administration nor on the courts. In view of the principles of “good governance”, however, a taxpayer is entitled to rely on a ruling. As with a formal *contra legem* ruling, the issue is whether precedence should be given to the “legality principle” or to the principles of “good governance”, and in particular the principles of “legal security” and “legitimate expectations”. As explained with respect to formal rulings, there is a tendency in recent case law to treat such rulings under certain circumstances as binding.

3.4.4. *Precedential value of issued rulings*

Informal rulings in principle do not bind the administration to issue a ruling in similar circumstances, as the ruling applies only to the transactions for which the ruling was issued and to the taxpayers who requested the ruling.

Nevertheless, limited precedential value can be assigned to informal rulings, based on the constitutional principle of equal treatment and the general principles of good governance.

4. International ruling

4.1. Introduction

International rulings are defined as rulings involving tax authorities of more than one country. In recent years, there has been a growing need to conclude agreements in the field of transfer pricing, i.e. in the form of bilateral or multinational advance pricing agreements. These are agreements between two or more national tax administrations and two or more taxpayers whereby an agreement is reached among all the parties involved on a set of acceptable transfer pricing parameters for transactions in which the taxpayer intends to participate.⁶³

⁶² Court of Appeal Liège, 19 May 1990, *Bull.Bel*, 1991, No. 711, 2940.

⁶³ Lagae, J.P., *Advance Pricing Agreements*, *European Tax Conference at the Stockholm School of Economics*, 29 May 1998.

4.2. Procedural issues

4.2.1. Legal basis

The legal basis of an international agreement, including an APA, may be found in the mutual agreement procedure of article 25 of the OECD model convention.

Article 25 (2) of the USA–Belgium Tax Treaty obliges the competent authorities of the two countries

“to endeavor to resolve by mutual agreement any difficulties or doubts arising as to the application of this Convention. In particular, the competent authorities of the Contracting States may agree ... to the same allocation of income, deductions, credits, or allowances between a resident of one of the Contracting States and any related person.”

An agreement concluded on the basis of article 25, 3 OECD model tax convention is an agreement between the Belgian and foreign tax administrations. The taxpayers are, as such, not a party to the agreement. An APA may therefore be exclusively based on the mutual agreement procedure without reference to any domestic ruling procedure. In practice, such an international agreement may, however, be complemented by an agreement at the national level between the Belgian tax administration and the Belgian taxpayer involved.

The issue then is whether this separate agreement at the national level will take the form of either a formal or an informal ruling. As explained above, formal rulings may only be granted with respect to specific subject matters. One of these specific subject matters concerns at arm’s length pricing. Several reasons exist, however, why an APA concluded between the tax administrations of different countries cannot be complemented by a formal ruling.

The first issue is that the Belgian tax authorities seem to have taken the restrictive view that advance rulings under article 345 ITC apply only to single transactions and not to a transfer pricing methodology, while an APA concluded under article 25, 3 of the OECD model convention specifically applies to a transfer pricing methodology.

Second, there is a timing problem. Under the formal ruling procedure of article 345 ITC, the Belgian tax administration must reply to the ruling request within a maximum of six months. An APA under article 25, 3 OECD model convention is not subject to time limits. Moreover, in practice the negotiation of such an APA will take much longer than six months.

Accordingly, if the APA between the Belgian tax authorities and the foreign tax authorities is complemented by an agreement at the domestic level, the latter will take the form of an informal ruling.

The agreement between the Belgian taxpayer and the Belgian tax administration will restate the contents of the international agreement reached by the two

tax administrations. In this way, the taxpayer acquires legal rights and obligations of his own.⁶⁴

A specific issue that could arise is the case where a Belgian taxpayer has first obtained a formal ruling on transfer prices and where a competent authority procedure has subsequently been commenced. The question then arises as to which decision takes precedence. The Belgian tax administration has explicitly stated that in case of conflict an APA will take precedence over a prior ruling granted under article 345 ITC.⁶⁵

4.2.2. Involvement of the taxpayer

An international agreement is negotiated and entered into between and by the Belgian and foreign tax administrations directly, without the taxpayer being a party to these negotiations or to the agreement.

The taxpayer's active role may be an essential factor, however, in the successful completion of the agreement. Providing the exact information, demonstrating the validity of its analyses, the willingness to provide data and detailed explanations are critical for the Belgian tax administration when entering into an agreement with a foreign tax administration.⁶⁶

Accordingly, in practice the Belgian tax authorities accept that the Belgian taxpayer is indirectly involved in the negotiations.

4.2.3. Publication of international advance rulings

No regulations exist with respect to the publishing of decisions rendered as agreements reached further to the mutual agreement procedure. In practice such decisions and agreements are not published.

4.3. The binding force of international rulings

An international agreement concluded further to a mutual agreement procedure is binding on the tax authorities of both countries.⁶⁷

It is generally accepted, however, that an international agreement which is based on article 25, 2 of the OECD model convention is only an agreement with

⁶⁴ Kelley, P.L., "Recent Developments in Advance Pricing Agreements in Belgium", *Tax Notes International*, 27 May 1996, 1683.

⁶⁵ Administrative Circular, Ci.D.19/452.701 of 24 September 1993, *Bull.Bel.*, No. 732, 3101-3102.

⁶⁶ Kelley, P.L., "Recent Developments in Advance Pricing Agreements in Belgium", *Tax Notes International*, 27 May 1996, 1682.

⁶⁷ Commentary Tax Treaties, 25/32; Skaar, A.A., "The legal nature of mutual agreements under tax treaties", *Tax Notes International*, 21 December 1992, 1445; Lagae, J.P., "Advance Pricing Agreements en het Belgische belastingrecht", in *Liber Amirocum W. Maeckelbergh – Fiscaliteit op de vooravond van de XXIste eeuw*, Tiberghien, A. (e.), Brussels, 1993, 288.

respect to the interpretation of the tax treaties, and therefore does not bind the courts.⁶⁸

With respect to the precedential value, reference can be made to the rules as they were described for informal and formal rulings. Although there is no specific right for taxpayers to be granted a ruling for similar circumstances, the constitutional principles and the “public order” character of tax law can provide precedential value to previous rulings.

5. Recent developments

In order to improve the investment climate and legal certainty, the Council of Ministers decided on 5 December 1997 to expand the system of granting advance tax rulings.

For each investment project exceeding BEF 40 million, it would be possible to obtain an advance ruling regarding the method for fixing one or more elements of the taxable basis.

In this respect, a new organization would be established (i.e. “Staff Ruling”) which would deal with all ruling requests for which the Ruling Commission is not competent. This Staff Ruling will not itself decide on the ruling requests but will be an intermediary between the taxpayer and the competent tax authority.

Within this new ruling practice, a distinction has to be made between “standard rulings” and “custom-made rulings”.

Standard rulings are advance agreements relating to the application of a specific legislation or a specific tax regime, e.g. coordination centers, distribution centers, service centers, special tax regime for expatriates, customs warehouses. Standard rulings could also be requested with respect to advance pricing agreements, the application of the participation exemption, and reorganizations, subjects for which the Ruling Commission is presently competent.

With the exception of rulings relating to coordination centers and rulings for which the Ruling Commission is competent, the requests for standard rulings will have to be filed on a standard form. The tax administration will have to reply within one month. In the absence of a reply within one month, a positive ruling will be deemed to have been granted.

In addition to standard rulings, it would also be possible to obtain an advance custom-made ruling. The taxpayer will be able to request in advance from the tax authorities the method as to how one or more elements of the taxable base should be determined. The purpose of such ruling is to give the taxpayer legal certainty before he undertakes a specific transaction or investment. The purpose is not to grant the taxpayer a tax advantage.

⁶⁸ Lagae, J.P., “Advance Pricing Agreements in het Belgische belastingrecht”, in *Liber Amicorum W. Maeckelbergh – Fiscaliteit op de vooravond van de XXIste eeuw*, 288; Court of Appeal Liège, 24 June 1992, *FJF*, 93/3; Court of Appeal Ghent, 20 June 1996, *AFT*, 1996, 461; Contra: Peeters, B., “De interpretatie van dubbelbelastingverdragen”, *TFR 119* (July–August 1993), 185.

The time limit for replying to this ruling request is three months. This time limit may be extended by another three months.

With respect to the filing of ruling requests, two cases should be distinguished.

If the enterprise requesting the ruling is not established in Belgium and intends to make an investment exceeding BEF 200 million, it will have to contact the special service of the tax administration dealing with the taxation of foreign investors. The final decision on the ruling, however, will be taken by the competent tax authority.

If the enterprise is already established in Belgium and the intended investments exceed BEF 200 million, the ruling request must be filed with the Central Tax Administration, which will become the interface with the other tax administrations.

With respect to small investments, i.e. between BEF 40 million and BEF 200 million, the ruling will be granted by the local tax controller, provided he obtains a positive advice from the Central Tax Administration.

In June 1998, the Council of Ministers gave its approval to grant “informal capital” rulings with respect to new investments by foreign enterprises. A foreign enterprise investing in Belgium may be deemed to have contributed informal capital to a Belgian company, i.e. the potential growth of the Belgian company. This informal capital may be activated as an asset which may be depreciated over a period of 10 to 12 years. The informal capital is fixed at 5 per cent of the turnover of the newly established Belgian enterprise during the next 10 to 12 years. This turnover will have to be estimated and its amount is fixed in the ruling.

Résumé

La pratique des agréments informels existe depuis toujours en Belgique. Selon cette pratique, les autorités fiscales belges ont accepté d'accorder des agréments préalables sur une grande variété de sujets. Ces agréments sont le plus souvent limités dans le temps. Aucune disposition législative ne prévoit expressément que ces agréments lient juridiquement les autorités fiscales. Toutefois, il existe une tendance marquée de la jurisprudence selon laquelle les autorités fiscales sont tenues de respecter ces agréments pour tenir compte des principes généraux d'une "saine administration", en particulier des principes de "sécurité juridique" et d'"attentes légitimes". Un nombre important de ces agréments sont des agréments sur les marges bénéficiaires déterminant les profits des succursales belges de sociétés étrangères réalisés dans des conditions de pleine concurrence.

Les principaux inconvénients des agréments informels sont que les autorités fiscales ne sont pas tenues de répondre aux demandes d'agrément et qu'aucun délai n'est fixé pour traiter ces demandes.

Un cadre juridique pour une procédure d'agrément formel a été introduit en 1991 pour ce qui concerne les impôts sur le revenu, et en 1995 pour ce qui a trait aux droits d'enregistrement et de succession. La procédure relative à l'obtention d'un tel agrément est strictement définie. Les autorités fiscales doivent répondre à la demande d'agrément dans un délai de trois mois, qui peut être prolongé par une autre période de trois mois si les autorités fiscales demandent un supplément d'information. Faute de réponse à l'expiration de la période de six mois, un agrément favorable est censé être accordé.

Les “agrément formels” lient l’administration fiscale belge. L’administration fiscale exerce son pouvoir d’accorder des agrément formels dans un sens restrictif.

Les agrément formels ne peuvent être accordés qu’à l’égard de sujets expressément définis, par exemple la question de savoir si (a) une transaction particulière répond ou non à des besoins de “nature financière ou économique” légitimes; (b) le principe de pleine concurrence est respecté; (c) l’exemption de participation est applicable; (d) certains paiements effectués à des refuges fiscaux sont déductibles, etc.

Il ressort de la pratique que l’administration fiscale belge est disposée à conclure des accords préalables sur le prix (APA) avec des administrations fiscales étrangères. La base juridique pour la conclusion de tels APA est la procédure amiable visée à l’article 25 du modèle de convention de l’OCDE.

Zusammenfassung

Informelle Auskünfte sind in Belgien seit jeher üblich. Im Rahmen dieser Praxis sind die belgischen Steuerbehörden bereit, über eine Vielzahl von Steuerfragen im voraus Auskunft zu erteilen. Die Gültigkeit der Auskünfte ist meistens zeitlich befristet. Es gibt keine ausdrückliche Rechtsvorschrift, die die Verbindlichkeit der Auskünfte für die Steuerbehörden begründet. Aufgrund von Einzelfallentscheidungen besteht jedoch eine starke Tendenz dahin, dass die Steuerbehörden ihre Auskünfte honorieren müssen, und zwar aus Gründen des allgemeinen Prinzips der Verwaltungszuverlässigkeit, insbesondere der Rechtssicherheit und des Erwartungsanspruchs. Bei zahlreichen Auskünften handelt es sich um Kostenbestimmungen aufgrund von Gewinnen nach dem Unabhängigkeitsprinzip (*arm’s length*) belgischer Betriebsstätten ausländischer Unternehmen.

Der Hauptmangel informeller Auskünfte besteht darin, dass die Steuerbehörden nicht verpflichtet sind, einem Auskunftersuchen stattzugeben, und dass für deren Bearbeitung keine Fristen vorgesehen sind.

Für das Verfahren formalverbindlicher Auskünfte wurde ein rechtlicher Rahmen eingeführt, und zwar 1991 für die Einkommensteuer und 1995 für Anmeldegebühren und Erbschaftsteuer. Das Verfahren für die Erteilung derartiger Auskünfte ist streng geregelt. Die Steuerbehörde muss auf das Auskunftersuchen innerhalb einer Frist von drei Monaten eingehen; diese kann um weitere drei Monate verlängert werden, wenn die Steuerbehörde zusätzliche Informationen benötigt. Ergeht innerhalb von sechs Monaten kein Bescheid, kann eine positive Entscheidung angenommen werden.

Eine “formelle Auskunft” ist für die belgische Steuerverwaltung verbindlich. Diese interpretiert ihre Befugnis zur Erteilung formeller Auskünfte restriktiv.

Formelle Auskünfte können nur über genau definierte Fragen erteilt werden, zum Beispiel (a) ob ein bestimmter Geschäftsabschluss berechtigten Bedürfnissen “finanzieller oder wirtschaftlicher Natur” entspricht, (b) ob die Bedingungen der Unabhängigkeit (*arm’s length test*) erfüllt sind, (c) ob die Beteiligungsbefreiung zutrifft, (d) ob bestimmte Zahlungen an Steueroasen abzugsfähig sind usw.

Die bisherige Praxis zeigt, dass die belgische Steuerverwaltung bereit ist, Verrechnungspreisvereinbarungen mit ausländischen Steuerverwaltungen zu treffen. Rechtsgrundlage dieser APA ist das Verständigungsverfahren von Artikel 25 des OECD-Musterabkommens.

Resumen

Siempre ha existido en la práctica belga el sistema de consultas no vinculantes (CNV), según el cual las autoridades fiscales aceptan emitir dichas consultas en gran variedad de temas. Muy a menudo tales consultas se ven limitadas en el tiempo. No existe disposición legislativa que prevea expresamente que estas consultas vinculan jurídicamente a las autoridades fiscales. No obstante, existe una marcada tendencia de la jurisprudencia a precisar que las autoridades fiscales deben respetar tales consultas en base a los principios generales de una “sana administración”, en particular, los principios de “seguridad jurídica” y de “expectativas legítimas”. Un gran número de estas consultas se refieren a los márgenes de beneficio determinantes de la ganancia de las sucursales belgas de sociedades extranjeras realizada en condiciones de plena competencia.

Los principales inconvenientes de estas consultas son que las autoridades fiscales no están obligadas a responder a las peticiones de las mismas y que no existe plazo para su tratamiento.

En 1991 se introdujo un marco jurídico para el procedimiento de consultas vinculantes (CV) sobre el impuesto sobre la renta, y en 1995 para los Impuestos sobre transmisiones patrimoniales y actos jurídicos documentados y de Sucesiones. El procedimiento de obtención está estrictamente definido. Las autoridades fiscales deben responder a la CV en un plazo de tres meses, que puede prorrogarse por otro período de tres meses si solicitan información complementaria. Si no hay respuesta tras los seis meses, se considera que existe resolución favorable a la consulta.

Las “CV” vinculan a la administración fiscal belga. La administración fiscal ejerce su potestad de emitir estas consultas en sentido restrictivo.

Las CV sólo pueden referirse a temas expresamente definidos, por ejemplo a saber si (a) una transacción particular responde o no a necesidades legítimas de “naturaleza financiera o económica”; (b) se ha respetado el principio de plena competencia; (c) es aplicable la exención de participación; (d) son deducibles ciertos pagos a paraísos fiscales, etc.

La práctica revela que la administración fiscal belga está dispuesta a concluir acuerdos previos sobre precios (APA) con las administraciones fiscales extranjeras. La base jurídica para la conclusión de dichos APA es el procedimiento amistoso del artículo 25 del modelo de convenio de la OCDE.