



GSCCA/The Guernsey Bar Circular 6 8 June 2017

Rulings – BEPS Action 5

Background

Base Erosion and Profit Shifting (“BEPS”) refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no tax jurisdictions where there is little economic activity, resulting in little or no overall tax being paid.

Guernsey joined the BEPS Inclusive Framework in June 2016, and in October 2016 signed the country-by-country reporting Multilateral Competent Authorities Agreement, which provides for the automatic exchange of information (please also see Circular 5 for further information on country-by-country reporting). In June 2017, the intention is for Guernsey to sign the BEPS Multilateral Instrument (which provides a platform enabling BEPS treaty related standards to be implemented multilaterally, rather than bilaterally).

Action 5 of the BEPS initiative covers the measures intended to be put in place to counter harmful tax practices more effectively, taking into account transparency and substance. Within Action 5 is the Chapter 5 requirement to introduce a framework for compulsory spontaneous exchange of information in respect of tax rulings (where the overriding rationale is that spontaneous exchange should occur where information obtained by one jurisdiction will be of interest to another jurisdiction – i.e. the ruling has a cross-border flavour).

Rulings covered by the spontaneous exchange framework

Action 5 sets out the broad definition of a tax ruling being “any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely”¹.

¹ This is typically subject to the condition that the facts on which the ruling is based have been accurately presented and that the taxpayer abides by the terms of the ruling.

The compulsory exchange of information, however, only applies to taxpayer-specific rulings given in response to a request from a taxpayer. On this basis, the Director is of the view that any decision to adjust the tax computations during the annual review and enquiry phase of processing of returns would not meet the definition of a ruling, unless that decision affected the treatment of future profits and falls within one of the six categories detailed below.

There are six categories of taxpayer specific rulings, covered by Action 5, which are:

- Relating to preferential regimes (noting that the Director does not consider that Guernsey has any “preferential regimes”).
- Unilateral advance pricing agreements (“APAs”) or other cross border transfer pricing rulings.
- Cross border rulings providing for a downward adjustment of taxable profits (for example agreeing whether income is subject to tax at the company standard, intermediate or higher rate).
- Permanent establishment (PE) rulings (which include decisions made that explicitly determine or decide on the existence or absence of a PE, or any ruling that provides for how much profit will be attributed to the PE).
- Related party conduit rulings (this includes rulings covering arrangements involving cross-border flows of funds or income through an entity in the country giving the rulings).
- Any other rulings agreed by the OECD Forum on Harmful Tax Practices giving rise to BEPS concerns.

Timetable and format for exchange

The Director is required to exchange details of tax rulings under the framework as follows:

- Past rulings by 31 December 2017, and “past rulings”, for the purposes of Action 5, mean:
 - those rulings made between 1 January 2015 and 1 April 2017; and
 - rulings made between 1 January 2012 and 1 January 2015, if still in force at 1 January 2015.

- Future rulings, which are those issued on or after 1 April 2017, will be reported no later than 3 months after they become available (with any clarification requests dealt with within 90 days).

In order to facilitate the efficient operation of the reporting process, the Director will require any future requests for rulings, which fall within BEPS Action 5, to be submitted electronically by all customers/professional advisors. Initially it is intended that this will merely take the form of a Word template document (which will shortly be available to download from the Income Tax website at www.gov.gg/cbcr) which once completed should be submitted to EOI@gov.gg. To ensure that all relevant information is captured, broadly the following will be required:

- Name and tax reference of taxpayer (with group structure if appropriate).
- Accounting period(s) to which the ruling would relate.
- The category in Action 5 under which the ruling would fall.
- Summary of the issue to be covered by the ruling.
- Jurisdiction(s) of residence of related parties with whom the taxpayer has or will enter into a transaction – their name(s) and address(es) (with tax identification number if available) must be provided.
- Jurisdiction(s) of residence of both the immediate parent and ultimate parent of the taxpayer (or head office, for a permanent establishment) – their name(s) and address(es) (with tax identification number if available) must be provided.

In order to facilitate the ease of administration of the BEPS Tax Rulings the Director is intending to utilise a modified version of the “Template and instruction sheet for information exchange” detailed in Annex C of the OECD publication “OECD/G20 Base Erosion and Profit Shifting Project, Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, ACTION 5: 2015 Final Report” (a copy of which can be found here:

http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report_9789264241190-en#.WUuqI32bBE#page76).

Where a decision you are seeking is clearly only a Guernsey domestic matter, with no cross-border element, completion of the template is not required, but will still be accepted as a means of providing all relevant information. Please, however, mark clearly on the template that you consider it relates solely to a Guernsey domestic tax matter. If the Director is asked, in future, to give an opinion on a “no names” basis, in respect of a matter falling under one of the categories of BEPS Action 5, the opinion will not be considered as binding on the Director nor will any taxpayer be entitled to rely on it.

The income tax service will aim to deal with requests within 30 days, noting that for straightforward matters it may be possible to respond in a much shorter timeframe. For more complex matters, where it has not been possible to deal with the matter within 30 days, an update would be given along with an indication of when it is expected a full response will be issued. Please indicate any urgent timeframes within the request.

Countries with whom rulings will be spontaneously exchanged

Guernsey will spontaneously exchange rulings with any jurisdiction that is committed to implementing BEPS and with which it has an appropriate agreement to exchange information (i.e. jurisdictions which have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (“MAC”) and any other jurisdiction with which Guernsey has a Double Tax Arrangement, Tax Information Exchange Agreement, or other agreement, that allows for spontaneous exchange of information).

For further information on BEPS Action 5 please see www.oecd.org/ctp/beps-2015-final-reports.htm.

N Garland
Deputy Director of Income Tax (Compliance & International)