

C56 Base Erosion and Profit Shifting (BEPS) – Action 5, improving transparency in relation to rulings

Background

The OECD BEPS project is set to counter harmful tax practices more effectively, taking into account transparency and substance. Action 5 includes the compulsory spontaneous exchange of information to relevant tax authorities that are also committed to BEPS Action 5 on six categories of taxpayer specific rulings which are:

- (i) rulings relating to preferential regimes (*noting that the Director does not consider that Guernsey has any “preferential regimes”*);
- (ii) unilateral advance pricing agreements (“APAs”) or other cross-border unilateral rulings in respect of transfer pricing;
- (iii) 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 where the immediate or ultimate parent entity is not resident in Guernsey);
- (iv) permanent establishment (“PE”) rulings (which includes decisions made that explicitly determine or decide on the existence or absence of a PE (either inside or outside Guernsey) or any ruling that provides for how much profit will be attributed to the PE);
- (v) 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); and
- (vi) any other type of ruling agreed by the OECD Forum on Harmful Tax Practices that in the absence of spontaneous information exchange gives rise to BEPS concerns.

Rulings

Action 5 sets out the broad definition of a tax ruling being “any advice, information or undertaking by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely”. The compulsory exchange of information, however, only applies to taxpayer-specific rulings given in response to a request from a taxpayer (where the overriding rationale is that spontaneous exchange should occur where information obtained by one jurisdiction will be of interest to the tax authority in another jurisdiction).

Rulings falling within the six categories above will be considered to be of interest to a tax authority in another jurisdiction, i.e. have a cross-border flavour, where any of the parties to the transaction are not resident in Guernsey or where the immediate or ultimate parent entity is not resident in Guernsey.

The Director is of the view that any decision to adjust the tax computations during the annual review and enquiry phase of the 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 above and is of a cross-border nature.

There is a long history of taxpayers/professional advisers making representations to the Director seeking confirmation that their/their client's particular circumstances meet the provisions of a specific Statement of Practice published. Such decisions made by the Director, which in most cases is likely to merely be affirmation of the position, would constitute a "ruling" which may be subject to the compulsory spontaneous exchange of information regime as set out in Action 5 if it falls within one of the six categories stated above.

Timing of exchange

Past rulings need to be exchanged with relevant tax authorities 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

There will be no notification to taxpayers where a past ruling has been identified for exchange.

Rulings issued on or after 1 April 2017 will need to be reported to the relevant tax authorities no later than 3 months after they have been determined.

Format of requests

To ensure the process is as simple and efficient as possible, taxpayers and their professional advisors seeking a decision from the Director must submit the details of the request on the relevant form (available at www.gov.gg/cbcr under "BEPS Action 5 – Spontaneous exchange of rulings") and should email the completed form to EOI@gov.gg. All relevant information should be provided on the form, not in a separate request/letter, however additional documents (such as a complex organogram) may be appended to the email with the form, if they cannot be inserted into the form.

Effect of a ruling

Advance tax rulings are specific to an individual taxpayer and provide a determination on the tax consequences of a proposed transaction on which the taxpayer is entitled to rely. Advance tax rulings may also provide a determination of whether or how a general ruling (such as a Statement of Practice) applies to the circumstances of a taxpayer.

A taxpayer will be entitled to rely on a ruling for the defined period time set out in the ruling, or until domestic law or published practice/interpretation of law are subsequently amended in a manner which impacts on the continuing validity of a specific ruling when the taxpayer should make contact with the Director to clarify the relevant position.

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.

Tax rulings will only be granted within the limits of, and in accordance with, relevant Guernsey law.

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