European Commission explains State aid investigation in the Netherlands

November 17, 2014

In brief

The European Commission (EC) has published its opening decision in the formal investigation into transfer pricing agreements between Starbucks and the Dutch tax authorities. The Commission had already communicated this investigation through a press release issued on June 11, 2014. The current decision, issued November 14, 2014, explains the reason for this investigation, and specifies the additional information which the EC has requested from the Netherlands.

This decision does not yet provide the outcome of the Commission's ongoing, formal investigation in this matter.

In detail

Background

The formal investigation pertains to a tax ruling concluded in 2001 on the application of transfer pricing rules to a Dutch Starbucks entity, Starbucks Manufacturing BV (SMBV). Under Article 8b of the Dutch Corporate Income Tax Act of 1969, such agreements need to be 'at arm's length'.

The EC believes that this agreement between Starbucks and the Dutch tax authorities may not reflect a price which corresponds with the 'at arm's length' standard. The EC refers to the standards set by the OECD's Transfer Pricing Guidelines.

Key reasons

The EC expresses three key areas of concern.

First, the EC has concerns about the qualification of SMBV as a "low risk toll manufacturer". The EC cites a number of factual arguments for this position, e.g., reasons why the inventories of SMBV cannot be regarded as being on consignment.

Second, the EC questions two adjustments which were made to the SMBV agreement in 2002 and 2004. The EC believes that specific elements of these adjustments are not in line with the OECD Guidelines and could also not be observed on the market.

Third, the EC has concerns about the manner in which the amount of royalties paid by SMBV is calculated, on the grounds that this amount may be exaggerated in light of the IP in question.

Transfer pricing and EU law

The EC asserts that "if the method of taxation for intra-group transfers does not comply with the arm's length principle, and leads to a taxable base inferior to the one which would result from the correct implementation of that principle, it provides a selective advantage to the company concerned."

While this is not the first time that the EC has targeted transfer pricing arrangements, the EC's current view is likely to prove controversial. If this position is confirmed in the final decisions in these cases, further litigation before the European Courts is likely.

The takeaway

The EC continues to focus on the issue of fiscal State aid. The investigation into these agreements in the Netherlands follows other recent EC action. Multinational companies should therefore continue to monitor these developments.

Let's talk

For a deeper discussion of how this might affect your business, please contact:

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