EU Direct Tax Newsalert

EC finds Hungarian Advertisement Tax in breach of EU State aid rules

On 4 November 2016 the European Commission (EC) announced its negative State aid decision with recovery on the Advertisement Tax in Hungary (case ref. SA.39235). Hungary is found to be granting a selective advantage to taxpayers with a low turnover and additionally, to taxpayers that made no profit in 2013.

Background

The Advertisement Tax was introduced in Hungary in August 2014. It applies to certain advertising services, including advertising made available in the media.

The base of the tax is the turnover derived from the advertising services, without deduction of any costs. Initially the tax had a highly progressive tax rate ranging from 0% and 1% (for companies with small or medium-sized advertising turnover) to 50% (for companies with high advertising turnover). With respect to only the 2014 tax year, taxpayers that had a zero or negative profit before tax in 2013 were eligible to decrease their advertisement tax base with 50% of the available tax losses carried forward (accumulated under the corporate income tax rules).

The EC's investigation

The EC opened an in-depth State aid investigation in March 2015 due to concerns about two key attributes of the Hungarian Advertisement Tax.

- The first concern of the EC was whether the steeply progressive rates could potentially favor certain media companies as the progressive tax based on turnover could place larger players at a disadvantage.
- Secondly, the utilisation of corporate tax losses was also questioned: the availability to decrease the tax base only for those taxpayers that were loss-making in 2013 may – in the view of the EC – grant a selective advantage to these companies.

In response to the EC's investigation, as of July 2015, the Hungarian Parliament amended the Advertisement Tax Act. However, only the first concern of the EC (i.e. the progressivity) was addressed by replacing the progressive rates with a 5.3% fixed rate on tax bases over HUF 100m (approx. EUR 330k), while tax bases up to HUF 100m (approx. EUR 330k) continue to be taxed at 0%. Based on the taxpayers' choice, the new tax rates could have been applied retrospectively (from August 2014).

The EC's final decision

The EC has now reached the conclusion that – although in its view the amendment took steps in the right direction – there is still no objective justification for the differential treatment (i.e. tax rate of 0% vs. 5.3%), hence, even the new progressive rates have not passed the EC's test. Moreover the limitations on deductions of past losses remained unchanged. As a consequence, Hungary is to remove the unjustified discrimination of companies under the Advertisement Tax Act and recover the selectively granted state aid from the favoured companies (unless Hungary demonstrates that the advantage received meets the criteria of *de minimis*).

The exact method of recovery is unknown yet, but is expected to be included in the non-confidential version of the decision, and likely will require retroactive taxation. In a recent press release the Hungarian Government has declined to implement retroactive taxation and voiced its concerns regarding the EC's decision to be in breach of EU law, since companies with the same revenues are subject to the same amount of tax, thus, the rules cannot be seen as selective in its view. It was also emphasized that Hungary is committed to retaining the rules of the Advertisement Tax Act, hence it is expected to appeal against the Commission's decision.

Finally, even though the detailed decision is yet to be seen, in the proceeding, the Commission previously voiced general concern over progressive rates that may have far reaching consequences, e.g. if progressive measures can only be justifiable in exceptional cases, for example if the situation that the tax is supposed to tackle also involves progressivity.

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