

MEETING BETWEEN THE BELGIAN AND THE SPANISH BRANCHES OF IFA.

“CURRENT INTERNATIONAL HOT TOPICS WITH A BILATERAL IMPACT”.

HELD IN MADRID, 30TH AND 31ST MAY, 2014.

TOPIC:

SUMMARY OF THE SECOND PANEL DISCUSSION. “TAX RULING PRACTICE /TAX PLANNING BY ENTERPRISES”.

The members of this panel were:

1. From the Spanish side-
 - a. Mr. Domingo Carbajo Vasco, Tax Auditor. Spanish Tax Administration (AEAT), Large Taxpayers’ Office, who also acted as chairperson.
 - b. Mr. José María Cusí, Lawyer and Tax Practitioner (Barcelona and Madrid offices).
2. From the Belgian side-
 - a. Mr. Philippe Vanclooster. Tax practitioner. PWC, Brussels.
 - b. Mr. José Vilain. Head of the Belgian Tax Ruling Commission.

All members of the Panel have been previously delivered their presentations, which contents could be downloaded from the Spanish IFA Branch web page, www.aedf-ifa.org.

The two Belgian representatives supplied a shared presentation.

- A. Mr. Domingo Carbajo focussed his speech in two questions-
 - a. The lack of a consensus regarding either the legal or the actual meaning of “tax planning” activities, which difficult the application of legal and Policy tools to counteract the “tax

planning” schemes deemed illegal or abusive by the Tax Administrations.

Nevertheless, everybody- Tax practitioners, international organizations, e.g. OECD, international fiscal associations, e.g. IFA, Academic people, Tax Administrations, and so forth, recognize that confronting “tax planning” businesses is of the paramount relevance within the present economic and fiscal arena.

On the other hand, International Fiscal Law regimes are on the way to build-up several solutions to the so-called “agressive” or “abusive” tax planning schemes from more coordination amongst national Tax Administrations to the introduction of General Anti-Abuse Clauses (GAAR) within domestic Fiscal Codes, as the one proposed by the European Commission. See Commission Recommendation of 6.12.2012 on agressive tax planning.

- b. Tax ruling practices could also be considered as a mean to solve, by negotiation between Tax Administrations and taxpayers, several cases of tax planning.

Unfortunately, behind the framework of the “tax ruling” words, there is not a unique definition.

Therefore, the very first problem regarding the use and application of “tax rulings” within the International Fiscal Law framework is the lack of a clear-cut delimitation of the concept.

The speaker explained several meanings of the “tax planning” idea and emphasized its possible interaction within the so-called enhanced cooperation between Tax Administrations and taxpayers, which is recommended by the OECD.

- B. The Belgian speakers, Mrs. Vanclooster and Vilain, focussed their common presentation in the Belgian experience regarding tax rulings and the history of the implementation of a GAAR legislation within the Belgian Tax Law.

Following the history of the Belgian Income Tax Law, the speakers laid out how the impact of the EU Law and, more specifically, the jurisprudence of the European Court of Justice and its “abus de Droit” doctrine, led to the implementation of a GAAR clause by the Belgian Fiscal authorities.

This GAAR clause closely followed-up the “substance over form” idea and then, it was rejected by the Belgian Constitutional Court, which at that time supported a strict opinion on the prevalence of the so-called “legality principle” of taxation and the strict interpretation of tax regulations.

Nevertheless, the constant jurisprudence of the European Court of Justice, the increase of the aggressive tax planning operations and other considerations forced up the Belgian Parliament to implement a new and general GARR clause which strong similarities to the EU Recommendation.

In that context, the creation of an independent Tax Ruling Commission by the Belgian Government was deemed as a solution to avoid the generalization of the GAAR clause and to promote legal certainty amongst Belgian taxpayers.

The Belgian speakers broadly explained the organization of the Tax Ruling Commission, its means, functions, goals and deliverables, putting the emphasis in its possibilities concerning the avoidance of aggressive tax planning schemes and its potentiality as an example of cooperative Tax Administration.

C. Mr José María Cusí.

The Spanish speaker (an experienced practitioner on international legal tax lawyers firms) focussed its intervention in two matters-

a. The Tax Ruling practice in Spain. This practice is totally different from the Belgian legislation and application ones.

In Spain, tax rulings are issued by the Spanish General Directorate of Taxation. Tax rulings are tantamount to the official and authentic interpretation of Tax Laws and regulations.

Tax rulings in Spain are binding resolutions to tax queries asked by taxpayers concerning particular cases on the application of Tax legislation.

The author broadly developed the scope and regulations of tax rulings in Spain, their procedures and their effects.

Tax rulings in Spain are focussed in the idea of generating legal certainty concerning the application of tax rules for taxpayers and the own Tax Administration.

On the other hand, the Spanish fiscal legislation also knows other tools that could be deemed similar to “tax rulings” within the International Fiscal arena, such as Advanced Pricing Agreements.

The author laid out the Spanish APA system and strongly recommended its use by Spanish enterprises and businessmen.

b. In the area of Tax planning, the speaker explained the opportunities opened by the new Protocol of the Belgium-Spain Personal Income Tax Treaty.

The new Protocol aligned the Tax Treaty with the new OECD Exchange of information clause, removed bank secrecy and enlarged the scope of political entities encompassed by the Treaty.

The author broadly explained the use of Spanish ETVE special fiscal regime as an interesting fiscal and legal planning scheme for attracting Belgium enterprises using Spain as a route to invest in Latin America countries.

Mr. Domingo Carbajo Vasco. Economist, Lawyer, Tax Auditor.