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Tax rulings – devil’s handiwork or legitimate tax planning?

Dear Ladies and Gentlemen,

During the last few weeks, the media have extensively covered the “Ammann affair”. At its core was current federal councillor Johann Schneider-Ammann’s own company; it is alleged to have invested CHF 250m in offshore tax havens. From what we have gathered via the media: not only was the chosen investment legal, it had also been agreed with the Bernese tax authorities in the form of a tax ruling. That started the argument: the left camp has vociferously asked him to resign, as the federal councillor’s position has become “untenable” because not only did he exploit all legal avenues for tax optimisation, he also ensured that he and the tax authority would be on the same legal ground. Additionally, tax rulings came under heavy fire; it would be best to completely abolish this devil’s handiwork, of the rich, their asset managers and tax lawyers. These arguments completely ignored what a tax ruling actually is, what opportunities it offers, and what its limits are. We would like to highlight these points here.

What is a tax ruling, what is its purpose?

A tax ruling is a legally binding answer by the tax authority to a question, asked in advance, about how it would treat a certain issue – usually a rather complex one without a clear-cut solution – with regard to taxation. The purpose of a tax ruling is to give the taxpayer legal security and to find consensus with the tax authority before a deal (incurring costs and risks without knowing the tax consequences) has actually been finalised.

Which issues can actually be covered with a tax ruling?

Generally everything that needs to be evaluated in a tax declaration and assessment can be subject to a ruling. Very often transfer pricing between closely related parties, e.g. different group companies, can be secured by such a ruling. Besides, tax rulings are often requested in case of the sale of a company, mergers or other forms of restructuring and also for complex real estate transactions. Very often these are high-figure deals which, once finalised, are almost impossible to revert. Thus there is a great demand for legal security. However, it is also possible to make a business sports car for representation purposes and its correct invoicing for private use subject of a tax ruling. Among the more unusual tax rulings that we had been able to negotiate on behalf of our clients was the tax treatment of a damages payment following a dispute among shareholders. A tax ruling is certainly very helpful in all cases where one enters into a major and complex commitment with unclear tax consequences. However, tax

rulings are completely over the top in cases of routine deals with either a clear tax situation or insignificant value.

How is a tax ruling obtained?

In Switzerland, tax rulings are easy to obtain at a reasonable price, generally without incurring any fees by the tax authority. In the simplest case you can already get a legally binding answer – and thus an official tax ruling – by writing to the tax authority requesting information about a specific tax question, with a detailed description of the particular issue. In professionally prepared requests for tax rulings, we include our own tax opinion of the issue at hand and explain our reasoning. This helps the tax authority save a lot of time and work; and should they agree to our fiscal deliberations, the request is returned with “approved” stamped on it.

Can I receive particular benefits with a tax ruling, which would be illegal without a ruling?

Contrary to what some of the media say: the answer is a clear “no”. When assessing tax rulings, the tax authorities are bound by the same laws, regulations and internal directives they apply to regular tax assessments. Additionally, tax rulings are, without exceptions, subject to general legal principles like the requirement for equal treatment or prohibition of arbitrary action. Of course, tax privileges as provided by law can be part of a tax ruling, such as taxation as a holding company, domiciliary company status or privileged taxation of dividends; however, these can equally be claimed without requesting a tax ruling.

To what extent can I rely on the agreement reached?

To all intents and purposes you, as a taxpayer, should be able to rely fully on the information provided. However, a few conditions have to be met to receive binding information: the request needs to list the specific issue in detail, and all actual facts that are relevant for an assessment must be fully disclosed; all questions regarding taxation need to be clearly listed as well. Additionally, all taxpayers concerned also need to be named. Anonymous requests for an unnamed third party are not binding – if the tax authorities actually bother to answer. Equally non-permissible are requests for variations asking the tax authority to choose the most tax efficient one. After the ruling has been issued, the proposed procedure has to be adhered to just as it had been described in the request. Should there be any deviations from key points, the ruling is regarded as null and void. After all, a tax ruling always refers to the legal situation as and when the request was made. Changes in legislation post-ruling take precedence over the ruling. However, the situation gets tricky if the taxpayer makes a correct request, but the tax authority, due to an error, issues incorrect information. Here the principle of protection of legitimate expectation is usually still valid, but then a few additional criteria have to be met.

Do other countries also have tax rulings?

Switzerland certainly is among the countries that most simply and cost-efficiently issue tax rulings. Just for that reason, they have become so popular here. Tax authorities in some other countries, such as Germany, are under no circumstances whatsoever willing to bindingly assess tax issues in advance. On the other hand, some countries do issue tax rulings, but you face almost insurmountable obstacles and prohibitive costs that only major corporations could afford. In one particular case, our business partners in the USA mentioned fees starting at USD 50'000 for the United States Internal Revenue Service to even look at transfer pricing between a Swiss parent company and its US subsidiary. If there are no tax rulings available, the only solution for a taxpayer is to

have, at a high price, extensive analyses and documentation prepared by his tax advisor, in order to be able to defend decisions and actions taken should it all end up in court. As far as transfer pricing between close associates is concerned, this process usually includes benchmark surveys, i.e. a research of transfer prices that other companies have applied in comparable situations. However, the costs for the extremely specific databases required in such cases are exorbitant. In place of agreements with the tax authorities, and thus in place of legal certainty, is the option to hold the tax advisor liable in case of misjudgement. The tax advisor in turn covers his back by not leaning too far out of the window and only proposing extremely cautious solutions that are bereft of any creativity whatsoever and followed by pages and pages of disclaimers of liability.

Conclusion

Tax rulings are no devil's handiwork at all, let alone an opportunity to gain illegal tax advantages at the cost of other taxpayers. However, tax rulings being easily obtainable here is a major factor in the choice of Switzerland as a business location, and significantly contributes to legal certainty and reliability and to a constructive and relaxed relationship between taxpayer and tax authorities. And even the rare case of a tax authority being in error, with the taxpayer relying on incorrect information, should neither be regarded as reprehensible nor as a reason to question tax rulings in general. Should you face fiscal uncertainties with your business plans, then tax rulings are a welcome opportunity to receive assurance at an early stage. We would be happy to be of service in such situations.

Kind regards

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