EFTA SURVEILLANCE AUTHORITY

Case No: 69131
Event No: 595539
Dec. No: 177/11/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 1 June 2011
on tax deductions in respect of intellectual property rights

(Liechtenstein)

The EFTA Surveillance Authority ("the Authority"),

HAVING REGARD to the Agreement on the European Economic Area ("the EEA Agreement"), in particular to Articles 61(1),

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("the Surveillance and Court Agreement"), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement ("Protocol 3"), in particular to Article 1(3) of Part I and Article 4(2) of Part II,

Whereas:

I. FACTS

1. Procedure

By letter of 23 December 2010 the Liechtenstein authorities notified certain new tax rules on intellectual property rights pursuant to Article 1(3) of Part I of Protocol 3 (Event Nos. 581810, 581812 and 581813).

On 15 February 2011 the Liechtenstein authorities sent additional information to the Authority (Event Nos. 587272, 587275, 587277, 587278, 587280 and 587283).

By letter dated 16 February 2011 (Event No. 585582) the Authority requested additional information from the Liechtenstein authorities. By letter dated 17 March 2011 (Event No. 590884) the Liechtenstein authorities replied to the information request.

The Authority considered that further information was necessary and sent another request for information by letter dated 28 April 2011 (Event No. 596016). The Liechtenstein authorities replied to the information request by letter dated 19 May 2011 (Event No. 598644).

2. Description of the proposed measures

2.1 New tax provision on intellectual property rights

According to Article 61 of a new Tax Act adopted in Liechtenstein on 23 September 2010 ("the Tax Act") income derived from intellectual property rights is subject to corporate tax at a rate of 12.5%.

On 23 December 2010, the Liechtenstein authorities notified new provisions in the Tax Act and a new tax ordinance[1] ("the Tax Ordinance") concerning income derived from intellectual property rights. The new provisions were designed for the purposes of promoting research and development.

Article 55 of the Tax Act provides that 80% of the income from intellectual property rights can be claimed as a commercially justified and deductible expense prior to the imposition of corporate tax.[2]

The Liechtenstein authorities set out further details in relation to Article 55 of the Tax Act in the Tax Ordinance. According to paragraph 1 of Article 33 of the Tax Ordinance, only patent rights, trade marks, designs and utility models are considered as intellectual property rights for the purposes of Article 55 of the Tax Act. Rights which do not qualify as intellectual property rights include copyrights, know-how and commercial designations.

Pursuant to paragraph 5 of Article 33 of the Tax Ordinance the intellectual property rights must have been created or acquired after 1 January 2011. In addition, the individuals who manage the relevant intellectual property rights must carry out an economic activity.

Paragraph 4 of Article 33 of the Tax Ordinance provides that *"if payments for the intellectual property rights are agreed which exceed the usual market compensation, then the 80% deduction shall be calculated on the basis of the usual market price."* In other words, where the licence fee paid exceeds the market rate, only the market rate will be considered as income subject to the 80% deductible. Therefore, the provision puts a ceiling on the level of deductible income by reference to the market price.[3]

In the following sections, references to Article 55 of the Tax Act include paragraphs 1, 3, 4 and 5 of Article 33 of the Tax Ordinance.

3. Comments by the Liechtenstein authorities

The Liechtenstein authorities submit that similar tax deductions have been introduced in Belgium, Luxembourg, the Netherlands and Spain. The Liechtenstein tax deductions are modelled on such existing intellectual property tax regimes. The European Commission

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[1] The Tax Ordinance was adopted on 21.12.2010.

[2] Paragraph 2 of Article 33 of the Tax Ordinance provides that prior to making the 80% deduction *"associated tax-relevant expenses, including write-downs on intellectual property rights"* can be deducted from the income from intellectual property rights. The Liechtenstein authorities have explained that such expenses include expenses normally otherwise tax deductible (under other statutory provisions in the new Tax Act) such as salaries for employees, advisor fees and depreciation. These other statutory provisions are not covered by the present notification.

[3] However, where the licence fee is lower than the market price, the actual licence fee paid, and not the market price, will be considered as income for the purposes of applying the 80% deductible.

has adopted a state aid decision in the case of Spain in which it found that the Spanish tax deduction did not involve state aid.[4]

II. ASSESSMENT

1. The presence of state aid

1.1 State aid within the meaning of Article 61(1) of the EEA Agreement

Article 61(1) of the EEA Agreement provides as follows:

"Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement."

In order for a measure to constitute aid within the meaning of Article 61(1) EEA, the following four cumulative criteria must be met: the measure must (i) confer on recipients an economic advantage which is not received in the normal course of business; (ii) be granted by the State or through State resources; (iii) be selective by favouring certain undertakings or the production of certain goods; and (iv) distort competition and affect trade between Contracting Parties.

1.2 Economic advantage

The measure must confer on an undertaking an advantage that relieves it of a charge that is normally borne from its budget.

Article 55 of the Tax Act allows for a deduction in income derived from intellectual property rights; as a result, undertakings that benefit from the provision pay less corporate tax. The beneficiaries therefore receive an economic advantage.

1.3 Presence of State resources

The measure must be granted by the State or through State resources.

Under Article 55 of the Tax Act, undertakings may claim 80% of their income from intellectual property rights as a deductible expense for corporate tax purposes. By allowing such a deduction prior to the imposition of corporate tax, the State forgoes tax revenue. A loss of tax revenue is equivalent to the consumption of State resources in the form of fiscal expenditure.[5]

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[4] Commission Decision No N 480/2007 (OJ C 80, 01.04.2008, p. 3).

[5] Section 3.3 of the State Aid Guidelines on the application of state aid rules to measures relating to business taxation.

1.4 Selectivity

The measure must be selective in that it favours "*certain undertakings or the production of certain goods*".

The tax deduction at issue is open to any undertaking subject to corporate tax in Liechtenstein, and applies without distinction to all economically active persons, irrespective of their size, legal structure or sector. The measure does not confer discretionary powers on the tax administration. The Liechtenstein authorities have explained that, to their knowledge, no particular group of undertakings is likely to benefit more from the measure than others.

On this basis, the Authority considers that Article 55 of the new Tax Act does not strengthen the position of any particular class of undertakings and, therefore, that it is not selective. This position is in line with the Authority's Guidelines on Direct Business Taxation,[6] which provides that measures that are open to all economic agents operating within an EFTA State are, in principle, general measures. The European Commission has adopted the same position in a similar case on tax deductions in respect of income derived from intellectual property rights in Spain.[7] Finally, the European Commission has also held that the fact that not every undertaking benefits from the measure merely reflects economic reality.[8]

2. Conclusion

On the basis of the above, the Authority considers that Article 55 of the Tax Act is not selective. Therefore, one of the cumulative conditions required to be met in order for state aid to be present is not met. Accordingly, Article 55 of the Tax Act does not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that Article 55 of the Tax Act together with paragraphs 1, 3, 4 and 5 of Article 33 of the Tax Ordinance, allowing for a tax deduction in respect of income derived from intellectual property rights, does not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

Article 2

This Decision is addressed to the Principality of Liechtenstein

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[6] The State Aid Guidelines on the application of state aid rules to measures relating to business taxation, section 3.1, para 1.

[7] Commission Decision No. N 480/2007, *The Reduction of tax from intangible assets* (Spain) (OJ C 80, 01.04.2008, p. 3).

[8] See in this regard Commission Decision No. N 354/2004, *Irish holding regime* (OJ C 131, 28.05.2005, p. 2).

Article 3

Only the English language version of this Decision is authentic.

Decision made in Brussels, on 1 June 2011.

For the EFTA Surveillance Authority

Per Sanderud *President*	Sabine Monauni-Tömördy *College Member*