

ADVANCE TAX RULING

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Motto: The Ruler should act like a bee which collects honey without causing pain to the plant. – Mahabharata

1. INTRODUCCION

The study introduces the advance tax ruling as a special tax legal instrument in the history and now. In the main topics are the follows:

- tax assessment in the legal history,
- the aim of the introduction of the advance tax ruling,
- the application of advance tax ruling,
- the authority in the process of the advance tax ruling,
- consequences of the advance tax ruling and
- other questions related to the advance tax ruling.

Advance tax ruling is a statement of opinion issued by a tax administration or – in some countries – by other independent bodies. The application for an advance tax ruling originates with the taxpayer and is made for a particular set of facts. The taxpayer is looking for certainty on how tax provisions will be applied, in a manner that he becomes aware of the fiscal consequences of his transactions. For this purpose, the taxpayer applying for a ruling must fully disclose all relevant facts in his ruling request and will receive the official position of the tax administration on these facts. [1]

Also, the advance tax ruling is an interpretation of the authority to a future action with binding force.

2. TAX ASSESSMENT IN THE LEGAL HISTORY

Before the introducing of the domestic and international advance tax ruling, the first is to define the root of this legal instrument. The origin of the advance tax ruling is equal to taxation which is the basic element of the functioning state.

2.1. The state and the taxation

The taxation is the necessary part of the human and the communal life. The taxation – in nowadays definition – formed with the state. The ancient Mesopotamia “households had to pay taxes in kind, and they paid different taxes throughout the year. Poll taxes required each man to deliver a cow or sheep to the authorities. Merchants transporting goods from one region to another were subject to tolls, duty fees, and other taxes. To avoid as many of these as possible, they frequently resorted to smuggling. One letter from about 1900 B.C. recounts the consequences of these evasive measures, when a trader from the head office instructed his

employee: 'Irra's son sent smuggled goods to Pushuken but his smuggled goods were intercepted. The Palace then threw Pushuken in jail! The guards are strong...please don't smuggle anything else!'" [2]

2.2. Edictum of praetor in Ancient Rome

The edictum of the praetor from the Ancient Rome has a very important role in the creation of advance tax ruling. The praetor could interpret the tax rulings to the future action, and we could consider this interpretation as an Advance Tax Ruling from the Ancient.

2.2. Tax nomination by nobles

In the Middle Ages, the king has own income from the royal estate, but the wars needed more and more money so the king had to turn in the Parliament to the nobles for new taxes and soldiers. The nobles have right to nomination the taxes, but the nobles were exemption of taxation.

In Hungary the nobles forced Andrew II of Hungary to spell out their liberties (including their exemption of royal taxes) in the Golden Bull of 1222, which became the fundamental document of noble privileges. István Werbőczy's Tripartitum – a collection of customary laws compelled in 1514 – emphasized the equal status of all noblemen and identified the Hungarian nation with the community of noblemen. The law book also summarized the noblemen's privileges, including their personal freedom and their exemption of taxation. [3]

In the United Kingdom during the Tudor period, while the Crown was supposed to live of its own – that is to say, to pay its ordinary expenditure from its own ordinary and permanent revenues – it could call on the nation for additional money, by way of taxes, to meet extraordinary burdens, notably wars. By 1485, it was an established principle of the constitution, that taxation had to be granted by the representatives of the community in Parliament. [4]

2.3. Tax assessment by the tax authority

In the absolutisms, the king didn't want to rely on the nobility and the Parliament. So the king ruled a tax system in which the tax is assessed by tax authority. This is the base of tax authority which is loyal to the king.

In France absolutist states, the army invariably collected taxes; a large part of this revenue was invested in the army which got larger and more powerful; a larger army was capable of becoming even more effective at collecting taxes which were then further invested in the army. In this way, the people were trapped: they paid their taxes to a body that expanded as a result and that made it an even better collector of revenue. [5]

In Hungary, II. Habsburg Josef established the tax authority and a new tax system, in which the tax payers were the serfs, but the nobles could not introduce more tax burden than in the royal decree.

The tax authority is a tool of the king to collect taxes without the nobility and the Parliament. In this period the tax authority assess the tax, and the taxpayer have to pay it.

2.4. Self tax assessment – advance tax ruling

Nowadays, the democratic state changed the roles in the taxation. In principle, the tax authority collect, control the taxation and – only in exceptional cases – assess it. The taxpayer not only pay the tax, but also assess, return and pay it. The self tax assessment is an umbrella term, and its part:

- tax assessment,
- tax return and
- tax payment.

The Advance Tax Ruling is a tool to the tax payer to reduce the tax burden in a transaction.

3. THE AIM OF THE INTRODUCTION OF THE ADVANCE TAX RULING

3.1. Legal certainty

In this study we use the legal certainty not the legal stability. Legal stability is an important part of the Rule of Law, the legal certainty is principle for the people by the law enforcement.

The Advance Tax Ruling is a special proceeding in the tax administration, so the legal certainty is important for this legal instrument.

The application for an advance tax ruling originates with the taxpayer and is made for a particular set of facts. The taxpayer is looking for certainty on how tax provisions will be applied, in a manner that he becomes aware of the fiscal consequences of his transactions. For this purpose, the taxpayer applying for a ruling must fully disclose all relevant facts in his ruling request and will receive the official position of the tax administration on these facts. The effects of these rulings on tax authorities, taxpayers or tax courts differ from country to country.

Legal certainty is a principle in national and international law which holds that the law must provide those subject to it with the ability to regulate their conduct. Legal certainty is internationally recognised as a central requirement for the rule of law. Also, the question is that the advance tax ruling is a tool for the legal certainty, when the answer is yes, than it is very important point of contact between to the tax administration and the constitutionals principles during the advance tax ruling.

The legal certainty is the another relevant dimension of the introduction of the Advance Tax Ruling, due to frequent changes the tax regulation made by the governments in order to meet the economic global and regional and national policy challenges. Furthermore, the Advance Tax Ruling is expected to increase the efficient and effective cooperation between the taxpayers and the tax authority and prevent the dispute of the legal interpretation as early as possible through this legal instrument, in line with the practice in China. [6]

3.2. Investment promotion

The Advance Tax Ruling was introduced in Hungary at 1st January 1996, according to the Minister's reasoning the aim of this legal instrument is investment promoting. This aim appears not only Hungary but a lot of countries, some examples: Canada, Dominican Republic, India, Malaysia, Nigeria, Spain, Peru, Taiwan,

The Advance Tax Ruling could be a promoting tool for a government because the investor introduce his transaction

In other aspect, the introducing country is going to promote the investments by the possibility of the Advance Tax Ruling. [7] The OECD [8] identifies the Advance Tax Ruling as a tool which could be a significant effect on the investment in a study about the Harmful Tax Competition. However, according to my opinion, this effect will be realized if the Advance Tax Ruling is available and real tool for an investor.

The Advance Tax Ruling is not a 'hard instrument' of increasing directly the investment activity proportionally to the request. Rather, it is a 'soft instrument' which could contribute to creating favourable investment environment through predictable and calculable tax liabilities. [9] It is importance underlined by the fact that some countries publish the Advance Tax Rulings on the webpage of the issuing authorities. This practice is a relevant element to the transparent law enforcement, but, at the same time, it may trigger a negative impact on business confidentiality as it relates to future transaction.

4. THE APPLICATION OF ADVENCE TAX RULING

4.1. Only for future actions

It is an indispensable condition that the transaction – on which the advance tax ruling based – be realized in the future. In this case, the authority interprets the tax provisions about the transaction and establish on opinion before the tax control or the court. If the advance tax ruling could apply for completed transaction than the opinion of the different institutions (tax authority, court) will be compete.

For example, in Belgium, any transaction, situation or circumstance that has not yet given rise to any tax consequences may be submitted to the tax authority. [10]

In Romania, tax rulings may be obtained on every tax issue as long as it is applied for in relation to future events (i.e. no tax ruling may be obtained on a matter pertaining to a past or an on-going transaction). [11]

4.2. Only on application

The application for an advance tax ruling is initiated by the taxpayer which is based on a detailed set of facts.

The taxpayer wants to be certain of tax liabilities of his transactions based on the tax provisions. If the taxpayer decides to apply for a ruling he/she must fully disclose all relevant facts in the application and wait to receive the official position of the tax administration on the facts submitted. So, in the case of "suppose a taxpayer considers a certain transaction. There is legal ambiguity concerning the amount of

tax that has to be paid on this transaction. The law could be interpreted in a way that is favourable to the taxpayer, which means that low tax would be paid, or in an adverse way, which means that high tax would be paid. The taxpayer has to decide whether to request an advance tax ruling before carrying out the transaction, or to apply the favorable interpretation of the law and carry out the transactions without an advance tax ruling”. [12]

4.3. Assessment of the tax liabilities of a concrete transaction

According to the Richard K. Gordon, “in many jurisdiction, administrative regulations and rulings are an important instrument in interpreting tax law. Depending on the jurisdiction and its legal traditions, rulings can be of general application or can apply only to specific taxpayers, and they can apply prospectively or retrospectively. In the case of rulings of specific application, they can be issued in advance of a transaction or following the transaction.” [13]

5. THE AUTHORITY IN THE PROCESS OF THE ADVANCE TAX RULING

As a first step the paper presents the main features of the Advance Tax Ruling which appears to be a statement of opinion issued by the tax administration or – in some countries – by the ministry of finance or other independent bodies.

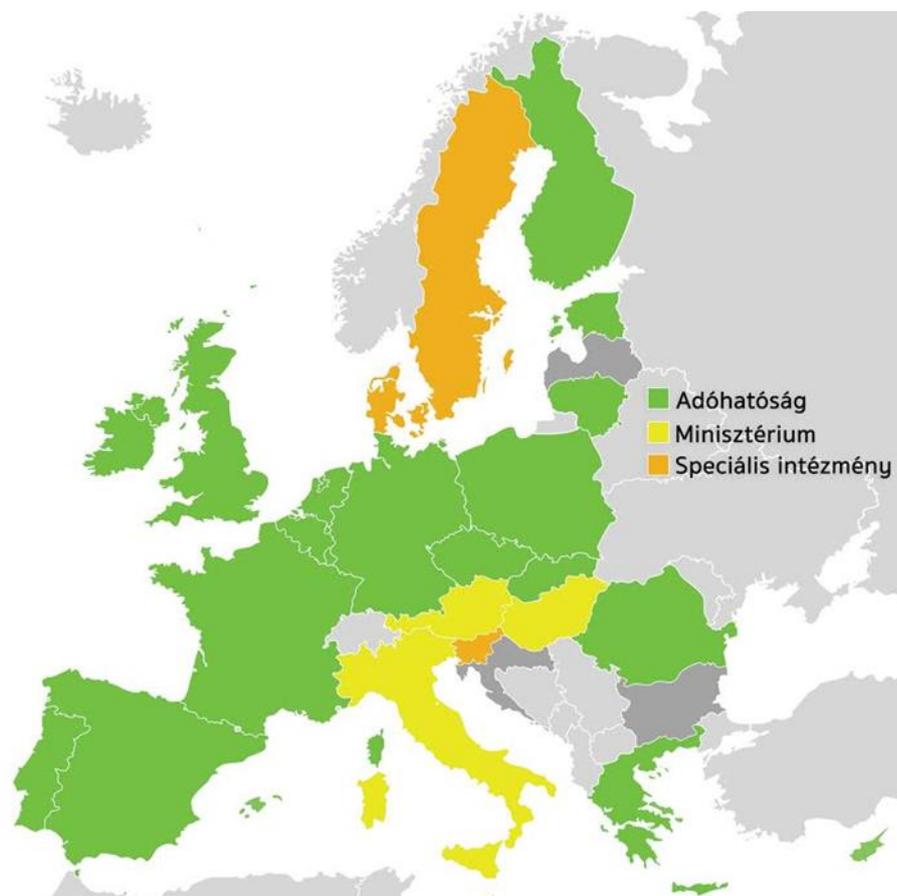


Figure 1

The decision-making authorities regarding Advance tax ruling in European Union

The regulation of the Advance Tax Ruling has a wide variety in Europe but it is unified and transparent in America – in particular United States of America. In Europe, some researcher [14] proposed the harmonization of the regulation of the Advance Tax Ruling which could mitigate the distorting effects of the procedural differences. For example, in Europe (Figure 1) and in Asia the Advance Tax Ruling appears to be issued by a tax administration or by the ministry of finance or by other independent bodies, [15] but in North- and South-America the Advance Tax Ruling always is issued by the tax administration. So, according to the experience it is easier for an individual investor if the countries would enter into force the same procedural regulation for the same or similar targets.

6. CONSEQUENCES OF THE ADVANCE TAX RULING

6.1. *Binding force*

Also, the Advance Tax Ruling binds the tax authority to follow its commitments accepted. While the binding force of the Advance Tax Ruling is used by all countries, its time appears to be different which runs from the issuing date to five years in principle. In Spain, Tax rulings duly requested are binding on the tax authorities and their criteria must be compulsory applied to taxpayers in similar cases provided the regulations existing at the time of issuance and applicable case law remains unchanged. However, in practice, the tax authorities may change from time to time their criteria on newly issued tax rulings but such changes will not have retroactive effects for taxpayers (the new criteria will supersede the previous ones for future cases). [16]

6.2. *Res judicata*

The legal concept of *res judicata* arose as a method of preventing injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of resources in the court system. *Res judicata* does not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying judgments, and confusion.

It applies for the advance tax ruling, too, which is a typical administrative decision.

6.3. *Practice*

When a tax payer applies the advance tax ruling, it is very important that

- it has binding force and
- it will be *res judicata*.

Figure 2 shows that these three conditions must be together, if the tax payer would apply the advance tax ruling with binding force and *res judicata*.

The tax payer could practice according to own opinion without Advance tax ruling. (The largest, brightest blue circle.)

The tax payer could realize the transaction on which based the application of the Advance tax ruling. After the submission of the application, the binding force related to the transaction. (The middle, blue circle.)

There are a small number of economic transactions from all ones which affected with final Advance tax ruling. (The smallest, dark blue circle.)

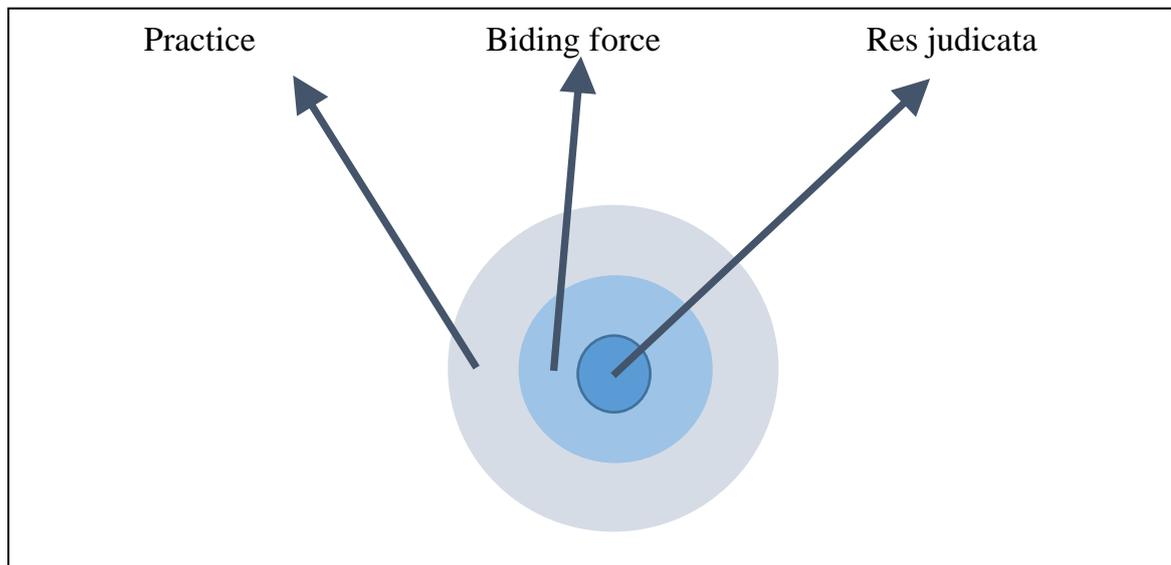


Figure 2

Advance tax ruling in practice with biding force and res judicata

7. OTHER QUESTIONS RELATED TO THE ADVANCE TAX RULING

7.1. *Rights of remedy*

The rights of remedy are a fundamental right which is entitled everyone.

The advance tax ruling is an administrative decision, so there are different solutions to enforce the fundamental right to remedies. Some countries' regulation (United Kingdom, Sweden) give to a chance to the taxpayers to present an appeal to the authority. But other countries (Netherlands, Germany, Hungary) close the administrative way, but open the judicial way for taxpayer to present their objections. Some countries (Finland, United States of America) use these solutions together. Italy, France and Luxembourg use a special process for advance tax ruling, which special name is 'tax deal'. During this process, it is possible to give more tax reduce than the regulation for example during a new significant investment.

This study showed that the right to remedies is important and indispensable in advance tax ruling process

7.2. *Fee of the application*

A processing fee must be paid when submitting applications. in Some countries have to pay fee by submitting of Advance tax ruling (India, Luxemburg, Hungary). In Hungary, since 1th January 2014, payable in the following rates:

- 5 million forints, or 8 million forints if the application is decided in the urgent procedure,
- 8 million forints in the case of applications for extended advance tax ruling or 11 million forints if the application for extended Advance tax ruling is decided in the urgent procedure.

7.3. Representation

Also in Hungary, the Advance tax ruling may submit only by tax expert or lawyer. It is a very unique regulation, because it used only in our country. The aim of this special representation is that the submitting applications will be expertly prepared.

8. CONCLUSIONS

Summing up, although the comparative study of the various legal systems may show how different legal regulations exist for the same functions and problems in practice, some rules are similar in the countries' ruling exercises which make it possible to develop a basis for the common international or regional (European) regulation.

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