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Briefing note | December 2012

Luxembourg 2013 Tax Law voted

On December 13th 2012, the Luxembourg Parliament adopted the bill n°6497 on new tax measures to be implemented as from January 1st 2013. On December 21, 2012, the Luxembourg *Conseil d'Etat* formally confirmed that no second vote of the Parliament is required for the entry into force of the bill, the bill consequently entered into force at the expected date being January 1st, 2013 (hereafter "the New Law").

Even if those measures impact both individuals and companies, it is worth noticing that the impact of the newly enacted measures will be more limited than initially feared by the Luxembourg market place.

Key issues

- Amendments to the minimum flat tax
- New progressive tax
- Stock option and warrants amendments

Corporate Tax

Minimum Tax

The New Law amends the existing EUR 1.575 minimum flat tax already applicable to some Luxembourg corporations and introduces a new minimum progressive tax for all the other companies. As from 2013, two regimes of minimal income tax will then coexist. The minimum flat and progressive tax are both only applicable to companies having their statutory seat or their place of effective management in Luxembourg.

Despite the misleading drafting of the law, we are of the view that these minimum taxes would also apply to Luxembourg branches as it would otherwise be a clear discrimination between branches and companies. However some practitioners taking a strict reading of the provision claim that Luxembourg permanent establishment of foreign companies are out of the scope of the minimum tax.

Modification to the existing minimum flat tax

Since 2011, some Luxembourg companies have been subject to a minimum flat income tax of EUR 1.575 p.a. Before the entry into force of the New Law, this tax was only levied on entities (i) whose activities did not require a business license or the agreement of a supervisory authority and (ii) whose total fixed financial assets, transferable securities and cash at bank (respectively accounts 23, 50 and 51 of the standard chart of accounts) exceeded 90% of their total balance sheet. In practice, this minimum flat tax applied to holding and finance companies.

The New Law provides for an increase of the minimum flat tax from EUR 1.575 to EUR 3.210 (including the increase of the unemployment surcharge). In addition, the scope of application of this flat tax is broaden:

- As from 2013, the minimum flat tax also applies to entities which perform regulated activities (to the extent they meet the 90% requirement). SICAR, securitization companies subject to the supervision of the CSSF are now subject to the flat tax;
- For the computation of the 90% threshold, receivables due by affiliated companies have to be taken into account (being booked under Account 41 of the standard chart of accounts).

The New Law also clarifies that interest into tax transparent entities (e.g. *sociétés civiles immobilières*) are taken into account for the application of the 90% threshold (based on the commentaries to the bill, "the interest is deemed to be booked in the account 231 and 233 of the standard chart of account").

New progressive minimum tax

As from January 1st, 2013 all companies not covered by the minimum EUR 3.210 flat tax will be subject to a progressive minimum income tax. This minimum income tax ranges from EUR 535 to EUR 21.400 depending on the total balance sheet amount (e.g. EUR 21.400 for a total balance sheet exceeding EUR 20 million). In a nutshell, the EUR 21.400 minimum income tax applies as from 2013 to Luxembourg companies when (i) their total balance sheet is at least of EUR 20 million and (ii) they are not in the scope of the EUR 3.210 flat tax.

On 21 December 2012, the tax authorities formally confirmed that the assets generating income exclusively taxable in another state under a relevant double tax treaty are not taken into account for the computation of the minimum income tax (e.g. German or UK real estate and / or permanent establishment). These foreign assets are excluded for their net asset value. This formal position of the tax authorities is in line with the comments made by the *Conseil d'Etat* on the bill.

Nature of the minimum tax payment

This minimum income tax is a Corporate Income Tax advanced payment that could be offset against future corporate income tax burden. Following a strict reading of the new provisions, the potential credit should apply to the minimum flat tax and the progressive minimum tax (being both under the new article 174 alinéa 6). However, these taxes would not give rise to any refund claim. In other words, the minimum tax is a final tax if the company is in an ongoing loss position or is not realizing taxable profits (e.g. only receives exempt income).

Impact on the tax unity regime

Should a Luxembourg tax unity apply, the parent company (or parent Luxembourg branch) will be liable for the sum of the minimum taxes that each company part of the unity would have borne if the unity were not applied. However, the total minimum tax due is limited to EUR 20.000 p.a.

Potential tax credit offset

The New Law specifically denies the offset of investment tax credits, unemployed recruitment credits, lifelong learning and venture-capital credits against the minimum tax. The question whether foreign withholding tax could be credited on the minimum income tax remains open (as it is not explicitly excluded).

Interaction with Net Wealth Tax

The Net Wealth tax burden is currently reduced if the taxpayer allocates part of its profits to a specific reserve for at least 5 years (under the provision of §8a of the Net Wealth Tax law). The new Law limits the reduction of Net Wealth Tax to the amount of Corporate Income Tax excluding the minimum tax. In other words, the minimum tax is not taken into account for the reduction of Net Wealth Tax.

Solidarity Tax

The unemployment surcharge (so-called "Solidarity Tax") has been increased from 5% to 7% for corporations. The aggregated 2013 tax rate applicable to Luxembourg corporations will amount to 29,22% (vs 28,80% presently applicable to companies established in Luxembourg-city).

Investment Tax Credit

The tax credit for the additional investment will be reduced from 13 % to 12%. The tax credit for the global investment will be reduced from 3% to 2% for the investment tranche exceeding EUR 150.000.

Individual Tax

Individual Income Tax rate

A new marginal income bracket taxed at 40% for the portion of income exceeding (a) EUR 100.000 for single individuals (class 1) and (b) EUR 200.000 for couples (class 2) is introduced.

Solidarity Tax

The solidarity tax will increase from 4% to 7% for individuals (surcharge assessed on tax). A higher rate (9%) will apply on income tax assessed on income exceeding (a) EUR 150.000 for single individuals (class 1) and (b) EUR 300.000 for couples (class 2).

Taxation of stock options and warrants

On 20 December 2012, the Luxembourg tax authorities published a new Circular LIR n°104/2 on the tax treatment of stock option plans. This new circular replaces a former circular dated January 11, 2002 and modifies the valuation for tax purposes of freely transferable options : whereas the value of the options was deemed to correspond to 7.5% of the value of the underlying assets (shares), the new circular foresees that the value of the options will now be deemed to correspond to 17.5% of the value of the underlying assets. The new circular applies as from January 1st, 2013.

Tax Allowances

The lump sum allowance for travel expenses between the taxpayer's home and his place of work (i.e. 4 distance units being approx. EUR 396) is abolished. Moreover the flat deduction for a distance exceeding 30 distance units is now limited to EUR 2.574.

As from 2013, the maximum annual allowance for debit interests are reduced from EUR 672 to EUR 336 per member of the taxpayer's household.

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